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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

LAS AMERICAS IMMIGRANT ADVOCACY CENTER; ASYLUM SEEKER ADVOCACY PROJECT; CATHOLIC LEGAL IMMIGRATION NETWORK, INC.; INNOVATION LAW LAB; SANTA FE DREAMERS PROJECT; AND SOUTHERN POVERTY LAW CENTER,

Plaintiffs,

Case No. 3:19-cv-02051-IM

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Oral Argument Requested

v.

DONALD J. TRUMP, in his official capacity as President of the United States; WILLIAM BARR, in his official capacity as Attorney General of the United States; U.S. DEPARTMENT OF JUSTICE; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; AND JAMES MCHENRY, in his official capacity as EOIR Director of the United States,

Defendants.

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I. INTRODUCTION

This lawsuit seeks to protect the full and fair administration of justice in our Nation's immigration courts. Immigration judges make decisions every day in which the stakes are extraordinarily high. Individuals seeking protection from persecution under United States asylum laws depend on a functioning immigration court system that is transparent, predictable, and impartial in adjudicating their claims for relief. To that end, Congress has established clear statutory standards that reflect these fundamental values of our legal system and ensure case-by-case decision-making by immigration judges.

Plaintiffs are legal advocacy organizations that aim to fulfill their missions to provide meaningful legal assistance to individuals in removal proceedings. Plaintiffs allege that Defendants have impaired their work by manipulating the immigration courts in violation of statutory and constitutional commands, implementing policies that have pushed immigration judges to prejudge cases, and fostering an adjudicatory system that is permeated with bias against immigrants. Plaintiffs have standing to assert their claims for relief, and this Court has jurisdiction to remedy them. Plaintiffs have also stated claims for relief under the Administrative Procedure Act (APA), the Immigration and Nationality Act (INA), and the Take Care Clause of the United States Constitution. The Court should deny Defendants' motion to dismiss.

II. FACTUAL BACKGROUND

Plaintiffs are six legal advocacy organizations whose missions focus on providing meaningful legal assistance to individuals in the immigration court system. ECF 1 ("Compl.") ¶¶ 17–22. Plaintiffs accomplish their missions through several types of programming, including offering direct representation; supporting unrepresented individuals through limited legal services; screening, placing, and supporting cases with vetted pro bono attorneys; and providing technical and case support to attorneys and volunteers who assist asylum seekers. *See, e.g.*, *id.*

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¶¶ 17–22, 158. Plaintiffs employ attorneys, accredited representatives, paralegals, coordinators, and other staff, and in some cases rely on a network of volunteers. *See id.* ¶¶ 17–22, 157.

Defendants are President Donald J. Trump, U.S. Attorney General William Barr, the U.S. Department of Justice, the Executive Office for Immigration Review (EOIR), and Director of EOIR James McHenry. Compl. ¶¶ 23–27. Defendants have consistently and publicly vilified individuals seeking asylum, attacked the attorneys and organizations who represent them, and undermined the integrity of the immigration court system. *Id.* ¶ 56. President Trump, for instance, repeatedly has characterized people seeking asylum as frauds whose "bogus" claims deserve no judicial process. *See, e.g.*, *id.* ¶¶ 60, 70, 75. The successive Attorneys General under the President have shared his anti-immigrant animus. *Id.* ¶¶ 61, 63.

To further their anti-immigrant agenda, Defendants have implemented policies and practices that undermine the legitimacy of the immigration court system and effectively suspend the asylum laws in immigration courts nationwide. Compl. ¶ 117. In doing so, Defendants have forced Plaintiffs to redesign programs and systems, retrain staff and volunteers, rewrite guides and materials, and engage in increasing education, monitoring, and advocacy work to address underlying systemic problems with the immigration courts. *Id.* ¶ 160. Defendants' policies have frustrated Plaintiffs' missions by nullifying the impact of their programming and causing their resources and efforts to be wasted. *Id.* ¶ 159; *see also id.* ¶¶ 155–92.

A. The INA requires that certain case-by-case adjudication standards apply in all U.S. immigration courts.

Under the INA, noncitizens seeking humanitarian protection, either upon arriving in the United States or after their entry, are entitled to apply for asylum or withholding of removal. Noncitizens placed in removal proceedings (known as "respondents" in immigration court) are entitled to a full and fair opportunity to present their asylum claims before an impartial adjudicator. Compl. ¶¶ 34, 80. To that end, Congress, through the INA, has established a clear

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and cohesive statutory scheme codifying case-by-case adjudicatory standards that must be upheld in all U.S. immigration courts. *Id.* ¶¶ 34–39.

First, respondents have the right to legal representation at no cost to the government. U.S. Const. Amend. V; 8 U.S.C. §§ 1229a(b)(4)(A) & 1362; Compl. ¶ 35. Second, respondents have the right to a reasonable opportunity to submit evidence—including through telephonic hearings where appropriate—to cross-examine witnesses, and to examine evidence. 8 U.S.C. § 1229a(b)(2), (b)(4)(B); Compl. ¶ 36. Third, respondents have the right to a full record of the proceedings, including transcripts, exhibits, the judge's decision, written orders, motions, briefs, and other papers. 8 U.S.C. § 1229a(b)(4)(C); 8 C.F.R. §1240.9; Compl. ¶ 37. Fourth, and critically, respondents have the right to a decision based solely on the record created in the proceedings. 8 U.S.C. § 1229a(c)(1)(A); Compl. ¶ 38. That right necessarily requires that the decision must be made by an impartial adjudicator. Compl. ¶ 38.

B. Defendants have weaponized the immigration court system against asylum seekers in violation of the INA's case-by-case adjudication standards.

Defendants have taken actions that undermine or eliminate the INA's case-by-case adjudication standards. These actions further Defendants' anti-immigrant agenda and improperly convert the immigration court system into a tool to achieve Defendants' enforcement priorities. For example, in some immigration courts where Plaintiffs work, Defendants have allowed judges to categorically deny asylum claims regardless of their merits. Compl. ¶ 86. In 2019, 23 immigration courts—nearly 40 percent of the immigration court system—denied more than 85 percent of the asylum claims that came before them. *Id.* ¶ 95 (identifying "asylum-free zones"). These extraordinarily high denial rates cannot be explained by any legitimate case-related variable; the only explanation for the rates is that those courts failed to comply with the INA's standards for case-by-case adjudication. *Id.* ¶ 96.

Defendants have taken no meaningful action to correct skyrocketing asylum denial rates and preserve the operation of federal law. Compl. ¶¶ 82, 84–101. Instead, they have perpetuated

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the environment that allows asylum-free zones to exist. Defendants have reorganized the Board of Immigration Appeals (BIA) to reduce its independence, encouraged Defendant McHenry himself to decide individual appeals, and rewarded judges in asylum-free zones with appointments to the appellate bench. *Id.* ¶ 103. Defendants effectively nullify asylum law in asylum-free zones, creating courts in which the rule of law simply does not apply. *Id.* ¶ 99.

Defendants have further advanced their anti-immigrant agenda by mismanaging the immigration court system in a manner that has nearly doubled the backlog of cases. Compl. ¶¶ 104–05. They direct immigration judges to postpone long-scheduled hearings to respond to politically motivated priorities at border facilities. *Id.* ¶¶ 113–16. They have eliminated docket management practices that aim to manage caseloads and preserve already limited court resources. *Id.* ¶ 112. Those actions have increased the backlog, causing cases to remain unresolved for years. *Id.* ¶¶ 104–110. As a result, in courts where Plaintiffs work, respondents are forced to wait years for hearings. *Id.* ¶¶ 106–10. Such unreasonably long delays undermine the INA's case-by-case adjudication standards by compromising the right to access counsel and to a reasonable opportunity to present witnesses and evidence. *Id.* ¶ 111.

C. Defendants have implemented policies that create an intolerable risk of bias in immigration proceedings and violate the INA.

Defendants have also implemented policies that violate the INA, create a constitutionally intolerable risk of bias in immigration proceedings, and undermine Plaintiffs' ability to carry out their organizational missions. Compl. ¶¶ 8-11, 117.

The Enforcement Metrics Policy requires immigration judges to comply with certain performance benchmarks to receive a satisfactory performance rating. *Id.* ¶¶ 9, 130. Under the policy, immigration judges must complete 700 cases a year, or about three cases per day, and must have less than 15 percent of their decisions reversed on appeal. *Id.* ¶¶ 123–24. The policy limits the time an immigration judge may spend on any given case, imposing categorical timeframes without regard to whether a case is ready for adjudication. *Id.* ¶¶ 125–26. If a judge

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fails to comply with the policy, Defendants may subject the judge to discipline, reassignment, or termination. *Id.* ¶ 130. Thus, an immigration judge could lose her job if she grants a continuance for additional testimony, postpones a hearing because a witness is unavailable, takes a matter under advisement to consider evidence, or takes other action falling short of case completion. *Id.* ¶ 133. The policy also requires judges to prioritize speed in a manner wholly disconnected from the facts and circumstances of each case. *Id.* ¶ 134–36.

Under the FAMU Directive, Defendant EOIR created a prioritized docket in ten pilot courts. Compl. ¶ 147. FAMU cases, which generally involve Central American families seeking asylum, are heard not only in those ten courts but also on a case-by-case basis in immigration courts across the country. *Id.* ¶¶ 119, 148, 153. In FAMU cases, immigration judges must schedule an initial hearing within 30 days, schedule an evidentiary (or "merits") hearing within six months, and complete the case within 365 days of the filing of the notice to appear. *Id.* ¶¶ 151, 53. Like the Enforcement Metrics Policy, the time limits apply without regard to the facts or circumstances of an individual case. *Id.* ¶ 152. As of October 2019, over 95,000 cases were on the FAMU docket. *Id.* ¶ 147.

D. Defendants' conduct violates the U.S. Constitution, the INA, and the APA.

In their Complaint, Plaintiffs allege three types of claims. First, Plaintiffs allege that Defendants have engaged in widespread, persistent, and egregious mismanagement of the immigration court system in violation of the Take Care Clause of the U.S. Constitution. Compl. ¶¶ 193–200. Second, Plaintiffs allege that by fostering an asylum system that is biased against immigrants, including by implementing the Enforcement Metrics Policy and the FAMU Directive, Defendants have acted in violation of the INA. *Id.* ¶¶ 201–07. Third, Plaintiffs allege that the Enforcement Metrics Policy and the FAMU Directive violate the APA because they are arbitrary and capricious, not in accordance with the law, and implemented in excess of Defendants' statutory authority. *Id.* ¶¶ 208–42.

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III. LEGAL STANDARD

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain sufficient factual matter only to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has facial "plausibility" if its factual allegations allow the court to reasonably infer the defendant's liability for the alleged conduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In deciding a motion to dismiss, a court must accept factual allegations as true and construe those facts in the light most favorable to the non-moving party. *N. Cty. Cmty. All., Inc. v. Salazar*, 573 F.3d 738, 741–42 (9th Cir. 2009). In the face of a challenge to Article III standing, the plaintiff bears the burden to establish standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Where, as here, such a challenge occurs at the motion to dismiss stage, courts look to the factual allegations contained in the complaint to determine whether that burden is met. *See id*.

IV. ARGUMENT

Plaintiffs have standing to bring their claims, and Plaintiffs fall within the zone of interests of the INA. *See infra* Sections IV(A)–(B). This Court also has jurisdiction to hear their claims. *See infra* Section IV(C). Plaintiffs have stated a claim under the APA, the INA, and the Take Care Clause, *see infra* Section IV(D), and Oregon is the proper venue in which to adjudicate those claims, *see infra* Section IV(E).

A. Plaintiffs have Article III standing.

To establish standing, a "plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted). An organization establishes an injury in fact where it demonstrates "frustration of its organizational mission" and "diversion of its resources to combat the particular [conduct] in

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question." *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004). In this case, Plaintiffs have Article III standing because (1) they have suffered an injury in fact and (2) their injury is "fairly traceable" to Defendants' alleged misconduct and is "likely to be redressed by the requested relief." *Lujan*, 504 U.S. at 590.

1. Plaintiffs have suffered a cognizable injury to a legally protected interest.

a. Plaintiffs have a legally protected interest in fulfilling their organizational missions and protecting their resources.

Plaintiffs have a legally protected interest in using their organizational resources to achieve their missions. "[A]n interest can support standing . . . so long as it is the sort of interest that courts think to be of sufficient moment to justify judicial intervention." Courts have repeatedly recognized that organizations' interests in their own missions and resources are judicially cognizable. *See E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1265 (9th Cir. 2020) ("*EBSC II*") ("[A]n organization has direct standing to sue where it establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose."); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.20 (1982) (injury related to "organization's noneconomic interest in encouraging open housing" suffices under Article III).

Organizational plaintiffs have standing where they allege that defendants impaired their missions to serve asylum-seeking clients and caused organizational resources to be diverted. *See, e.g., El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1991) (organizations' interest in their mission of "assist[ing] Central American refugee clients . . . in their efforts to obtain asylum and withholding of deportation in immigration court proceedings" sufficient to support standing); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 766 (9th Cir. 2018) ("*EBSC I*") (organizations' "mission of providing legal aid" to asylum seekers sufficient to support standing).

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Plaintiffs are legal advocacy organizations that seek to provide meaningful legal assistance to noncitizens fleeing persecution. Compl. ¶¶ 13, 17–22. Plaintiffs have a legally protected interest in protecting their organizational missions and resources. Defendants have implemented policies and practices that undermine the INA's adjudication standards, perpetuate asylum-free zones and an impenetrable backlog, and impose enforcement-oriented metrics and discriminatory docketing initiatives. *Id.* ¶¶ 13, 155–92. Those practices have frustrated Plaintiffs' missions and diverted their resources to non-case-related efforts. *Id.*

Defendants incorrectly assert that Plaintiffs cannot establish standing unless Plaintiffs' legally protected interest is the same as the rights they seek to uphold under the INA. *See* Motion at 10-11. That position "misunderstands the injury-in-fact inquiry and conflates organizational standing with third-party standing," which Plaintiffs do not assert in this case. *EBSC II*, 950 F.3d at 1267; *see also Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 950 (9th Cir. 2013) (legally protected interest "need not be a statutorily created interest"). Indeed, the U.S. Supreme Court has found that plaintiffs have Article III standing where their legally protected interests are different from the rights they seek to vindicate through their claims on the merits. *See Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103 n.9 (1979) (for standing purposes the question is "not who possesses the legal rights protected by [the statute], but whether respondents were genuinely injured by conduct that violates *someone's* [statutory] rights, and thus are entitled to seek redress of that harm under [the statute]").

b. Plaintiffs have alleged concrete, particular, and actual harms to their organizations.

Defendants mischaracterize Plaintiffs' injuries as speculative harms to unidentified, non-party asylum seekers. *See* Motion at 7, 9. In doing so, Defendants ignore Plaintiffs' allegations of specific injuries separate from any potential injuries to respondents in immigration court.

Plaintiffs allege concrete, particular, and actual harms to their organizations. For instance, they allege that they are unable to fulfill their missions of providing meaningful legal

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assistance to asylum seekers because Defendants have denied them a fair court system in which to practice. Compl. ¶¶ 13, 155–92. Without a fair court system, Plaintiffs have been forced to divert organizational resources to redesign programs and systems; retrain staff and volunteers; rewrite guides and materials; and engage in increasing education, monitoring, and advocacy work to address underlying systemic problems with the immigration courts. *See, e.g.*, *id.* ¶¶ 160; 166, 170, 181–85. Plaintiffs' resources are also wasted when immigration courts that fail to comply with the INA's case-by-case adjudication standards undermine Plaintiffs' direct representation, pro se support, pro bono volunteer coordination, and technical assistance programs. *Id.* ¶¶ 161, 168, 175, 177, 188, 191–92.[1]

Defendants further mischaracterize Plaintiffs' injuries as mere "incidental effects" of Defendants' actions. *See* Motion at 9, 13. In fact, Defendants have caused Plaintiffs clear organizational harms that establish an Article III "injury in fact." *See, e.g.*, *El Rescate Legal Servs.*, 959 F.2d at 748 ("The allegation that the EOIR's policy frustrates [organizational plaintiffs'] goals and requires the organizations to expend resources in representing clients they otherwise would spend in other ways is enough to establish standing."); *EBSC II*, 950 F.3d at 1265-66 (same). Defendants also argue that Plaintiffs' harms are "part of their existing missions," Motion at 12–13, but that critique either misses the point entirely or wrongly suggests that it is incumbent on Plaintiffs to ensure that Defendants provide them with a lawful forum in which to advocate for their clients. Plaintiffs were established to provide meaningful legal assistance to asylum-seeking individuals in an immigration court system that complies with federal law. Plaintiffs' missions are undermined by Defendants' creation of a court system that fails to ensure that each case is individually adjudicated on its merits. Compl. ¶¶12–13.

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[1] To the extent that Defendants suggest that Plaintiffs' loss of resources is not sufficiently "significant" to support standing, *see* Motion at 12, they are mistaken. "The comparative magnitude of the harms alleged by the parties . . . is not relevant for standing purposes; a loss of even a small amount of money is ordinarily an 'injury.'" *EBSC II*, 950 F.3d at 1267 n.5 (internal quotation marks omitted).

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Defendants go on to launch a misplaced critique of Plaintiffs' lack of allegations relating to particular asylum decisions, suggesting that Plaintiffs' claims are unripe because they challenge "hypothetical" future decisions in individual cases. Motion at 8. That mischaracterization of Plaintiffs' claims apparently supports Defendants' argument that Plaintiffs assert generalized grievances.[2] Motion at 8, 13–14. As explained above, Plaintiffs do not challenge specific outcomes—past or future—of any individual asylum case.[3] Instead, Plaintiffs allege that Defendants' unlawful actions have caused harm to their organizations by undermining the fairness of immigration proceedings and thereby frustrating Plaintiffs' ability to provide meaningful legal assistance. As a result, Plaintiffs must divert valuable resources from supporting individual cases on their merits to fighting Defendants' unlawful immigration court practices. Plaintiffs' allegations describe concrete and specific injury to Plaintiffs themselves.

2. Plaintiffs' injuries are "fairly traceable" to Defendants' unlawful actions and redressable by this Court.

Defendants do not dispute that Plaintiffs meet the causation and redressability prongs of the standing analysis. *See Lujan*, 504 U.S. at 560–61. But because Article III standing is jurisdictional, Plaintiffs briefly address both prongs.

Plaintiffs' injuries are "fairly traceable" to Defendants' unlawful actions. *See id.* at 590. As Plaintiffs allege, those actions "have directly frustrated Plaintiffs' missions by substantially or

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[2] A case may be dismissed as a generalized grievance where a plaintiff's alleged interest is so abstract that it "deprives the case of the concrete specificity" necessary to characterize a judicial controversy, *see Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998), or "is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974). Here, Plaintiffs allege concrete and specific harms to their organizational missions and resources that are neither abstract nor shared by the public at large. Nor does the scope of Plaintiffs' allegations make their interest a generalized grievance; harms that are widespread may be justiciable so long as the plaintiff's interest is "sufficiently concrete and specific." *See Akins*, 524 U.S. at 24–25.

[3] To be sure, Defendants' actions have serious impacts on the individuals whom Plaintiffs serve and on countless other respondents in the immigration court system. Those injuries are not, however, the basis of Plaintiffs' Complaint.

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totally nullifying the impact of their programming and causing their resources to be squandered" and diverted to other types of work. Compl. ¶¶ 159–60. Plaintiffs further allege that their injuries result from Defendants' failure to ensure that the immigration courts function impartially and in accordance with the INA and from Defendants' implementation of the Enforcement Metrics Policy and the FAMU Directive. *See* Compl. ¶¶ 161–63, 166–68, 170–72, 175–78, 180–89, 191–92. Plaintiffs have therefore met the causation requirement for Article III standing.

This Court can redress Plaintiffs' injuries. To establish redressability, Plaintiffs must seek remedies that are (1) "substantially likely to redress" their injuries and (2) within the district court's power to award. *See M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018). Plaintiffs' requests for injunctive and declaratory relief meet this standard. *See* Compl. at 62–63.

This Court has broad equitable powers to afford remedies in the form of injunctive relief, such as the relief requested by Plaintiffs. *See Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15, 31 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."). Plaintiffs' requested relief is also tailored and proportionate to the alleged violations of law. *See Milliken v. Bradley*, 418 U.S. 717, 744 (1974) ("the scope of [an equitable] remedy is determined by the nature and extent of the constitutional violation"). The Court also has an obligation to rule on requests for declaratory relief regardless of whether it finds injunctive relief appropriate, further supporting redressability here. *See Zwickler v. Koota*, 389 U.S. 241, 254 (1967) (so holding).

B. Plaintiffs are within the zone of interests of the INA.

Plaintiffs fall squarely within the zone of interests of the INA.[4] "[A] statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the

[4] Defendants do not argue that Plaintiffs fail a zone-of-interests test for their constitutional claim. In *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), the Supreme Court explained that the zone-of-interest test "applies to all *statutorily created*

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law invoked." *Lexmark Int'l*, 572 U.S. at 129 (internal quotations omitted). The zone-of-interests test "is a 'prudential' inquiry that asks 'whether the statute grants the plaintiff the cause of action that he asserts.'" *See EBSC I*, 932 F.3d at 767–69 (quoting *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302 (2017)).

Defendants argue, incorrectly, that "[c]ourts have . . . held that immigrant advocacy organizations are outside the immigration statutes' zone of interests." Motion at 15. For support, they cite *INS v. Legalization Assistance Project of L.A. County*, 510 U.S. 1301, 1305 (1993) (O'Connor, J., in chambers). But, as the Ninth Circuit stated in *EBSC I*, "[n]ot only is Justice O'Connor's opinion [in *Legalization Assistance Project*] non-binding and concededly 'speculative,' . . . but the interest asserted by the organization in that case—conserving organizational resources to better serve *non*immigrants—is markedly different from the interest in aiding immigrants" alleged here. *EBSC I*, 932 F.3d at 769 n.10. Thus, *Legalization Assistance Project* cannot and does not apply. *Legalization Assistance Project* also addresses the zone of interests of an entirely different statute. *See Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1300 (S.D. Cal. 2018).[5]

causes of action" and that "Congress is presumed to legislate against the background of" this limitation. *Id.* at 129 (emphasis added; internal quotations and alterations omitted). Following *Lexmark*, the Ninth Circuit has expressed doubt that the test applies to equitable causes of action under the Constitution. *See Sierra Club v. Trump*, 929 F.3d 670, 702 (9th Cir. 2019) ("Because the Constitution was not created by any act of Congress, it is hard to see how the zone of interests test would even apply.").

[5] Defendants' citation to *Federation for American Immigration Reform, Inc. (FAIR) v. Reno*, 93 F.3d 897, 900–01 (D.C. Cir. 1996) is unhelpful. *See* Motion at 15. There, the D.C. Circuit rejected arguments made by FAIR—an *anti*-immigrant advocacy group—that their members' interests in reducing immigration fell within the INA's zone of interests. Defendants' characterization of FAIR as an "immigrant advocacy organization" is disingenuous. Motion at 15. FAIR's interests, which lie in "redu[cing] overall immigration" to the United States," are markedly different from those of Plaintiffs, which are pro bono legal service providers seeking to uphold fair immigration adjudication in accordance with the INA's requirements. *See* https://www.fairus.org/about-fair (accessed Apr. 22, 2020); FAIR 93 F.3d at 899–901.

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The Ninth Circuit has repeatedly held that the interests of nonprofit legal organizations fall squarely within the INA's zone of interests. In *EBSC I*, the Ninth Circuit held that nonprofit organizations representing asylum applicants and potential applicants fell within the INA's zone of interests, particularly in light of the organizations' "interest in aiding immigrants seeking asylum," their provision of "pro bono legal services" as envisioned by the INA, and their statutorily recognized "role in helping immigrants navigate the immigration process." *See* 932 F.3d at 768–69. Just this year, the Ninth Circuit again held that four organizational plaintiffs, including Plaintiff Innovation Law Lab ("Law Lab"), fell within the INA's zone of interests where their "purpose is to help individuals apply for and obtain asylum." *EBSC II*, 950 F.3d at 1270.

Plaintiffs fall within the INA's zone of interests. They are nonprofit legal advocacy organizations that work to provide meaningful legal assistance to noncitizens fleeing persecution. *See* Compl. ¶¶ 13, 17–22, 40. Plaintiffs' claims seek to preserve their organizational missions and resources by ensuring the fair and impartial adjudication of immigration proceedings consistent with the INA. Compl. ¶¶ 12–14. The Ninth Circuit has explained that, "[w]ithin the asylum statute, Congress took steps to ensure that pro bono legal services . . . are available to asylum seekers" and that other provisions of the INA also give organizations like Plaintiffs "a role in helping immigrants navigate the immigration process." *EBSC I*, 932 F.3d at 768–69. That the INA's statutory provisions "directly rely on institutions like [Plaintiffs] to aid immigrants" is sufficient to support "an inference that Congress would have intended eligibility to bring suit." *Id.* at 769 (internal quotations omitted).

By meeting the zone-of-interests test for the INA, Plaintiffs also meet the test for their APA claims.[6] Under the APA's "generous review provisions," the zone-of-interests test "'is not

[6] The INA is the relevant statute for all of Plaintiffs' claims, including their claims brought under the APA. When the APA is the basis of a cause of action, the relevant zone of interests is "the zone of interests to be protected or regulated by the statute that [the plaintiff] says was

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meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.'" *EBSC I*, 932 F.3d at 768 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 & n.16 (1987)); *see also Lexmark*, 572 U.S. at 130. Thus, when applying the zone-of-interests test, "the benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). Indeed, the test "forcloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Lexmark*, 572 U.S. at 130 (internal quotations omitted). Plaintiffs' interests easily meet the APA's "lenient" zone-of-interests test because they are, at the very least, "'marginally related to' and 'arguably within' the scope of the" INA. *See EBSC II*, 950 F.3d at 1270 (quoting *Patchak*, 567 U.S. at 224, 225).

C. This Court has jurisdiction over Plaintiffs' claims.

Defendants claim that various provisions of 8 U.S.C. § 1252 foreclose this Court's jurisdiction because, in Defendants' view, this lawsuit seeks to challenge removal orders in individual cases. Defendants further contend that 8 U.S.C. § 1329 precludes jurisdiction over *any* claim related to the INA unless the claim is brought by Defendants themselves. Neither argument is correct. Indeed, "[t]he presumption favoring interpretations of statutes to allow judicial review of administrative action is well-settled[.]" *Kucana v. Holder*, 558 U.S. 233, 251–52 (2010) (internal quotation marks omitted). This presumption can be overcome only if Defendants offer "clear and convincing evidence" to the contrary. *Id.* at 252 (internal quotation marks omitted).

1. Section 1252(a)(5) does not preclude jurisdiction.

Section 1252(a)(5), which bars "judicial review of an order of removal" except through a petition for review, applies only to individuals in removal proceedings. *Singh v. Gonzales*, 499

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violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (internal quotations omitted).

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F.3d 969, 978 (9th Cir. 2007) ("By [its] explicit language, § 1252(a)(5) [applies] only to those claims seeking judicial review of orders of removal."). Plaintiffs are not subject to the removal process and do not seek review of any removal orders. Nor do their claims constitute an indirect challenge to or raise issues that are "inextricably linked" to a removal order. *Cf. Martinez v. Napolitano*, 704 F.3d 620, 622–23 (9th Cir. 2012). Section 1252(a)(5) does not apply to this case.

2. Section 1252(b)(9) does not preclude jurisdiction.

Section 1252(b)(9), which bars district court review of "questions of law and fact . . . arising from any action taken or proceedings brought to remove an alien from the United States," also does not apply to this case. The Ninth Circuit has construed § 1252(b)(9) to encompass only the review of final removal orders and those issues that "are bound up in and an inextricable part of" the removal process. *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032–33 (9th Cir. 2016).[7] "[C]laims that are independent of or collateral to the removal process" fall outside the scope of § 1252(b)(9). *Id.* at 1032; *see also Martinez*, 704 F.3d at 622 ("distinction between an independent claim and indirect challenge [to a removal order] 'will turn on the substance of the relief that a plaintiff is seeking'" (quoting *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011))); *Singh*, 499 F.3d at 979 (district court had jurisdiction over ineffective assistance of counsel claim where asylum seeker otherwise would have had no legal avenue to obtain judicial review).

In *Jennings v. Rodriguez*, a plurality of the Supreme Court warned of the "staggering results" of broadly interpreting § 1252(b)(9). 138 S. Ct. 830, 840 (2018). Although it did not offer a "comprehensive interpretation" of the provision, the *Jennings* plurality explained that § 1252(b)(9) precludes district court review of challenges by individual respondents to removal

[7] The plain wording of § 1252(b) provides that the section applies "[w]ith respect to review of an order of removal under subsection (a)(1)," which refers to judicial review of a "final order of removal."

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orders, decisions to detain or seek removal, or "any part of the process by which their removability will be determined." *Id.*; *see also Nielsen v. Preap*, 139 S. Ct. 954, 962 (2019) (same). The *Jennings* plurality held that § 1252(b)(9) did *not* preclude review of the petitioners' challenge to prolonged detention because their challenge fell outside of those categories. 138 S. Ct. at 840. Indeed, the plurality observed that, if § 1252(b)(9) had foreclosed jurisdiction, the petitioners' claims would be "effectively unreviewable." *Id.*

As in *Jennings*, the claims in this case fall outside the scope of § 1252(b)(9). Plaintiffs are not individual respondents subject to detention, removal, or the removal process. Plaintiffs do not challenge removal orders in any individual case or challenge any part of the process through which any individual's removability is determined. Rather, Plaintiffs challenge the unlawful manner in which Defendants administer the removal process across the immigration court system—i.e., through policies and practices that perpetuate vast asylum-free zones, preclude impartial adjudication, and effectively suspend the INA's case-by-case adjudication requirements. Plaintiffs' claims "arise from" those policies and practices, not from any proceeding associated with any individual's case.

Defendants suggest that challenges to EOIR policies or practices must always be channeled through the petition-for-review process. Yet, as Defendants concede, the Ninth Circuit has held that this is true only when the challenges in question "arise from removal proceedings" involving an individual respondent. *See J.E.F.M.*, 837 F.3d at 1032. Moreover, courts in the Ninth Circuit have repeatedly affirmed that § 1252(b)(9) does not preclude jurisdiction "where a claim could not have been litigated in removal proceedings and the noncitizen would otherwise 'have had no legal avenue to obtain judicial review of [the] claim.'" *Inland Empire–Immigration Youth Collective v. Nielsen*, 2018 WL 4998230, at *14 (C.D. Cal. Apr. 19, 2018) (quoting *J.E.F.M.*, 837 F.3d at 1032); *see also Cancino-Castellar v. Nielsen*, 338 F. Supp. 3d 1107, 1114 (S.D. Cal. 2018) (in assessing jurisdiction, "a court must ask whether the

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claims otherwise challenge issues that are cognizable in the [petition-for-review] process"). Here, Plaintiffs' challenges to Defendants' unlawful policies and practices cannot be raised through the petition-for-review process because Plaintiffs are organizations, not individual respondents, and their removability is not at issue.[8]

Drawing on the principles raised by the Supreme Court in *Jennings*, the Third Circuit recently proposed the following approach for applying § 1252(b)(9):

> We must ask: If not now, when? If the answer would otherwise be never, then § 1252(b)(9) poses no jurisdictional bar. . . . [T]he point of the provision is to channel claims into a single petition for review, not to bar claims that do not fit within that process.

E.O.H.C. v. Dep't of Homeland Sec., 950 F.3d 177, 185–86 (3d Cir. 2020) (internal citation omitted); *see also INS v. St. Cyr*, 533 U.S. 289, 299 (2001) ("A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions."). Plaintiffs' claims are precisely the type of "now or never" claims that must proceed in district court, because they challenge Defendants' unlawful policies and practices and not their impact in particular respondents' cases, and because they are based on organizational harms that cannot be asserted or remedied through the petition-for-review process.

Plaintiffs' Take Care Clause claim alleges that the Attorney General has abused his authority by mismanaging the immigration courts and thereby suspended the INA's case-by-case adjudication standards, resulting in the persistence and proliferation of asylum-free zones and the

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[8] The statutes that apply to removal proceedings do not authorize an organizational challenge to Defendants' broad, programmatic policies. Under § 1229a(c)(1)(A), at the conclusion of a removal proceeding, the immigration judge determines only "whether an alien is removable from the United States." To determine whether an "alien" is "removable," the judge may look only to whether that specific "alien" is "inadmissible" or "deportable." § 1229a(e)(2). The judge must consider certain statutory factors in making that determination. *See* § 1182 (enumerating factors to consider when determining "inadmissibility"); *see also* § 1227(a) (same for "deportability"). Those factors pertain to the individual, not to her legal representative.

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immigration court backlog. Compl. ¶ 197. The petition-for-review process gives courts of appeals jurisdiction to address only those constitutional violations that are based on the record in an individual case with respect to an individual petitioner. The process does not allow courts of appeal to consider broader systemic challenges to immigration court policies and practices. Those challenges must be made by filing suit in district court.

Cases brought by individual asylum-seeking petitioners reveal the limits of the petition-for-review process. In *Diaz-Rivas v. Attorney General*, for instance, the Eleventh Circuit rejected an equal protection claim similar in some respects to Plaintiffs' claims alleging the perpetuation of "asylum-free zones." 769 F. App'x 748, 758 (11th Cir. 2019). The petitioner had argued that the Atlanta immigration court's "shockingly low asylum grant rate of only 2% compared to the average grant rate of 43% in other Immigration Courts" showed an intent to discriminate against asylum applicants in Atlanta as compared with similarly situated asylum seekers whose cases were pending in other immigration courts. *Id*. The court conceded that the numbers "betray a troubling approach to asylum adjudication in Atlanta generally" but denied the petition for review because it had to limit its analysis to whether the petitioner had demonstrated any discriminatory intent "*in this case*." *Id*. Similarly, although courts have granted individual petitions for review based in part on immigration court backlogs, the backlog itself remains intact. *See Kouropova v. Gonzales*, 200 F. App'x 692, 694–95 (9th Cir. 2006) (granting petition for review based in part on delay caused by BIA backlog); *Salazar-Paucar v. INS*, 281 F.3d 1069, 1077 (9th Cir. 2002), *opinion amended on denial of rehearing by* 290 F.3d 964 (9th Cir. 2002) (granting petition for review because of prejudicial effect of BIA backlog).

Nor could Plaintiffs' INA claim be asserted or remedied through the petition-for-review process. In that claim, Plaintiffs allege that Defendants' have pushed immigration judges to prejudge cases by implementing the Enforcement Metrics Policy and the FAMU Directive, and by fostering adjudicatory system that is infected with bias against immigrants. Compl. ¶ 204.

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Challenges to such system-wide policies and practices cannot be raised or remedied in an individual case.[9]

Plaintiffs' APA claims are no different. In their APA claims, Plaintiffs challenge the legality of the policies themselves on the basis that they are arbitrary and capricious, not in accordance with law, or implemented in excess of Defendants' statutory authority. They do not challenge the impact of the policies on individual respondents. Thus, with respect to the Enforcement Metrics Policy, Plaintiffs allege that the policy, *as a whole*, requires immigration judges to consider factors other than the facts and merits of cases they decide and gives them a pecuniary interest in the adjudication of those cases. Compl. ¶ 213. Similarly, Plaintiffs allege that the FAMU Directive, *as a whole*, stigmatizes cases of recently arrived families and imposes rigid timelines that curtail procedural protections guaranteed under federal law. *Id.* ¶ 231. Even if those policies were challenged in an individual case,[10] their deleterious effects would continue to taint the immigration court system. In other words, only a lawsuit filed in district court can provide systemwide relief.

Defendants' reliance on *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016) is misplaced for two reasons. First, because *J.E.F.M.* pre-dates *Jennings*, its focus on the sweeping text of §§ 1252(a)(5) and (b)(9) no longer is controlling. *Compare J.E.F.M.*, 837 F.3d at 1031 (relying on "breathtaking . . . scope" of text) (internal quotation marks omitted), *with Jennings*, 138 S. Ct.

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[9] Although individual petitioners in removal proceedings may raise claims of bias in a petition for review, any decision on that petition for review will affect only that individual's case. *See, e.g.*, *Reyes-Melendez v. INS*, 342 F.3d 1001, 1007-09 (9th Cir. 2003) (granting petition for review on the basis that immigration judge had violated individual's due process rights by abandoning her role as a neutral adjudicator); *Wang v. Att'y Gen.*, 423 F.3d 260 (3d Cir. 2005) (same).

[10] The practical effect of both policies on the individuals who Plaintiffs serve would likely take the form of biased decision making or the denial of a continuance, which could form the basis of a petition for review. *See, e.g.*, *Raffin v. Gonzales*, 143 F. App'x 26 (9th Cir. 2005) (denying petition for review because denial of motion for continuance did not violate petitioner's right to counsel). But any relief that a court of appeals might provide would be limited to that individual's case.

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at 840 (rejecting broad reading of text as "uncritical literalism") (internal quotation marks omitted); *see Cancino-Castellar*, 338 F. Supp. 3d at 1114 (so stating). Second, the *J.E.F.M.* petitioners were individual, unrepresented children who alleged that the lack of government-appointed counsel in removal proceedings violated their constitutional and statutory rights. 837 F.3d at 1029. The individual petitioners' claims were deemed "part and parcel of the removal proceeding itself" and could thus be raised through the petition-for-review process. *Id.* at 1033 (internal quotation marks omitted). Plaintiffs here, by contrast, are organizations raising systemic challenges that would otherwise be unreviewable. Because Plaintiffs' claims are "collateral to" the removal process, *J.E.F.M.* does not preclude this Court from hearing them. *Id.* at 1032 (citing cases).[11]

Defendants' comparison of Plaintiffs' claims to the claims alleged in *Asylum Seeker Advocacy Project (ASAP) v. Barr* is also unpersuasive. 409 F. Supp. 3d 221 (S.D.N.Y. 2019). In *ASAP*, several organizational plaintiffs challenged the defendants' unlawful issuance of *in absentia* removal orders without notice and sought declaratory and injunctive relief. *Id.* at 222-23. The court dismissed the complaint under § 1252(a)(5) and (b)(9), finding that "while Plaintiffs may *presently seek* only an order entitling unrepresented immigrants to a hearing, . . . their ultimate goal is to challenge the lawfulness of the removal orders themselves." *Id.* at 225 (internal quotation marks omitted). The court found that it lacked jurisdiction because the plaintiffs were challenging the underlying removal orders "in substance if not form." *Id.* at 226. Here, by contrast, Plaintiffs' claims stem not from case outcomes or removal orders but from the frustration of Plaintiffs' missions and diversion of their resources resulting from Defendants' unlawful policies and practices.

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[11] *Alvarez v. Sessions*, 338 F. Supp. 3d 1042 (N.D. Cal. 2018), and *Aguilar v. ICE*, 510 F.3d 1 (1st Cir. 2007), in which individual respondents also alleged violations of their right to counsel in removal proceedings, similarly have no bearing on jurisdiction in this case.

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Defendants' reliance on *P.L. v. Immigration & Customs Enforcement* is similarly misplaced. 2019 WL 2568648 (S.D.N.Y. June 21, 2019). There, individual respondents and their legal representatives challenged the government's use of video teleconferencing (VTC) in removal proceedings. *Id.* at *1-2. The court held that the plaintiffs were required to pursue their claims before the BIA or through a petition for review, reasoning that "[h]ow immigrants appear for removal proceedings constitutes part of the process of these proceedings." *Id.* at *3. While acknowledging that the organizational plaintiffs raised a claim on their own behalf, the court merged its consideration of that claim with the claims the individual plaintiffs raised. *See Id.* (noting that plaintiffs "challenge Defendants' VTC policy, not *their* detention" (emphasis added)). Moreover, VTC is a mechanism for conducting removal proceedings explicitly provided in the INA. *See* § 1229a(b)(2)(A)(iii). Plaintiffs here challenge policies that *violate* the INA by preventing the full and fair adjudication of cases. "[C]ramming judicial review" of such unlawful policies "into the review of final removal orders would be absurd." *Jennings*, 138 S. Ct. at 840.

Defendants' overly expansive reading of § 1252(b)(9) ignores the plain language of the statute and Congress's carefully constructed statutory scheme, which was intended to channel claims "arising from" removal proceedings through the petition-for-review process. Allowing Plaintiffs' collateral claims to proceed would "not undermine Congress's desire to limit all [noncitizens] to one bite of the apple with regarding to challenging their removal orders." *EBSC II*, 950 F.3d at 1269 (internal quotation marks omitted); *see also E.O.H.C.*, 950 F.3d at 185–86. Instead, district court jurisdiction here would ensure that Plaintiffs' claims are not "effectively unreviewable." *Jennings*, 138 S. Ct. at 840.

3. Section 1252(g) does not preclude jurisdiction.

Defendants also assert that jurisdiction is barred by § 1252(g), which restricts federal courts' ability to hear claims arising from discretionary decisions or actions by the Attorney

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General "to commence proceedings, adjudicate cases, or execute removal orders." Motion at 21. Specifically, Defendants contend that Plaintiffs' claims challenge discretionary "actions" to "adjudicate cases" and therefore cannot be considered by this Court. The Supreme Court has rejected that argument.

In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), the Court held that § 1252(g) applies only to the discrete decisions or actions listed in the statute—i.e., to commence removal proceedings, to adjudicate a case, or to execute a removal order. *Id.* at 482. According to the Court, that construction is consistent with Congress's intent, which was to protect the Attorney General's exercise of prosecutorial discretion, e.g., by deciding *not* to pursue the removal of certain noncitizens.[12] *Id.* at 483–86. Since *Reno*, the federal courts of appeal have construed § 1252(g) narrowly. *See Arce v. United States*, 899 F.3d 796, 800 (9th Cir. 2018) (§ 1252(g) does not preclude jurisdiction over all claims challenging decisions or actions related to deportation process; claims relating to government's violation of mandatory duties required by statute or court order fall outside its scope); *Selgeka v. Carroll*, 184 F.3d 337, 342 (4th Cir. 1999) (§ 1252(g) does not preclude petition for review of impartial adjudicator claim).

Moreover, the Ninth Circuit has already rejected the reading of § 1252(g) that Defendants urge this Court to adopt here. In *Barahona-Gomez v. Reno*, 236 F.3d 1115 (9th Cir. 2001), the Ninth Circuit considered whether § 1252(g) bars claims arising from policy directives halting immigration judges' ability to consider applications to suspend deportation. *Id.* at 1117–18. In that context, the court held that the term "adjudicate" in § 1252(g) refers only to "the

[12] Defendants cite *Reno* for the proposition that § 1252(g) was intended "to prevent deconstruction, fragmentation, and hence prolongation of removal proceedings," suggesting it should be read broadly to bar any claim relating to the adjudication of any case. Motion at 22. Defendants take this statement out of context. The *Reno* Court made that statement in the context of discussing the relationship between the various jurisdiction-stripping provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, concluding that "[o]ur narrow reading of § 1252(g) makes sense of the statutory scheme as a whole." 525 U.S. at 487.

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discretionary, quasi-prosecutorial decisions of asylum officers and INS district directors to adjudicate cases or to refer them to IJs for hearing" and not to the administration of such proceedings by an immigration judge once a referral has occurred. *Id.* at 1120–21. Thus, according to the Ninth Circuit, § 1252(g) does not preclude review of all "decisions or actions that occur during the formal adjudicatory process," *see id.* at 1121.

Consistent with that result, federal courts have found challenges to programmatic policy decisions outside the scope of § 1252(g), even if they relate to the adjudication of removal proceedings. *See, e.g., Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, 908 F.3d 476, 504 (9th Cir. 2018), *cert. granted sub nom. Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2019); *Catholic Soc. Servs., Inc. v. Reno*, 232 F.3d 1139, 1150 (9th Cir. 2000) (en banc); *Inland Empire*, 2018 WL 4998230, at *12. In short, Defendants' assertion that any claim challenging the lawfulness of EOIR's programmatic policy decisions and management of the immigration court system generally is barred by § 1252(g) is squarely at odds with binding precedent from the Supreme Court and the Ninth Circuit.[13]

4. Section 1329 does not preclude jurisdiction.

Finally, Defendants cite to § 1329, a jurisdiction-*granting* provision in the INA, contending that because that provision grants district court jurisdiction over claims arising under

[13] As a fallback position, Defendants appear to argue that even if § 1252(g) does not bar Plaintiffs' claims, the claims are not justiciable because no law or statute governs "how the agency dockets cases or manages its backlog." Motion at 21. That assertion is wrong—immigration courts are subject to the case-by-case adjudication standards set forth in the INA. And the cases that Defendants cite relating to the justiciability of decisions committed to an agency's discretion do not apply to the agency actions challenged in this case. *See Heckler v. Chaney*, 470 U.S. 821, 823, 830–31 (1985) (prisoners' challenge to FDA enforcement action to prevent the alleged misuse of lethal injection drugs); *Diaz-Covarrubias v. Mukasey*, 551 F.3d 1114, 1116-17 (9th Cir. 2009) (challenge to BIA refusal to reopen immigration case *sua sponte*); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002) (same).

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the INA brought by the *government*, no other federal court jurisdiction exists.[14] In other words, by negative implication only, Defendants would strip federal courts of jurisdiction over any case arising under any aspect of the INA, except those brought by Defendants themselves. That reading of § 1329 is overbroad and implausible and has been rejected by the Ninth Circuit. *See Sulit v. Schiltgen*, 213 F.3d 449, 453 n.2 (9th Cir. 2000) ("nothing in the language of § 1329 forecloses the operation of other jurisdictional mechanisms").

Defendants cite only two inapposite cases. In *Bains v. Schiltgen*, 1998 WL 204977, (N.D. Cal. Apr. 21, 1998), the Northern District of California considered only whether § 1329 *conferred* jurisdiction over an APA claim, not whether the provision *eliminated* federal jurisdiction otherwise provided by law. *See id.* at *2–3. The court recognized that, under 28 U.S.C. § 1331 and the APA, federal courts generally have jurisdiction to review agency actions unless Congress explicitly has said otherwise. *Id.* at *2. And in *Saavedra Bruno v. Albright*, the D.C. Circuit affirmed the district court's dismissal of the plaintiff's challenge to a visa denial based on the doctrine of consular non-reviewability. 197 F.3d 1153, 1160 (D.C. Cir. 1999). The court went on to note, in dicta, that § 1329 recently had been narrowed to apply only to actions brought by the United States. *Id.* at 1162-63 (citing *Reno*, 525 U.S. at 476 n.4). The court did not hold that the narrowing of § 1329 served to eliminate federal question jurisdiction generally. Without further explanation or analysis, *Saavedra Bruno* can only be read to eliminate § 1329 as an end-run around the doctrine of consular non-reviewability. Defendants' interpretation, which would mean that § 1329 is an end-run around 28 U.S.C. § 1331's grant of federal question jurisdiction entirely, is not correct. The Ninth Circuit expressly has rejected the interpretation of *Saavedra Bruno* that Defendants urge this Court to adopt. *See Sulit*, 213 F.3d at 453 n.2 (so stating) (citing *Sabhari v. Reno*, 197 F.3d 938, 941–42 (8th Cir. 1999) (same)).

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[14] Section 1329 reads, in part, "The district courts of the United States shall have jurisdiction of all causes, civil and criminal, brought by the United States that arise under the provisions of this subchapter."

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Section 1331 provides district courts with original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States," and, except where review is precluded by statute, "confer[s] jurisdiction on federal courts to review agency action." *Califano v. Sanders*, 430 U.S. 99, 105 (1977). That general grant of jurisdiction remains over claims that are not barred by the INA's judicial review provisions. *See Ortiz v. Meissner*, 179 F.3d 718, 721–22 (9th Cir. 1999) (so holding). If § 1329 were as broad as Defendants argue, none of the INA's judicial review provisions, *see* § 1252, would be necessary, and the Supreme Court's presumption in favor of judicial review would be meaningless. *See Kungys v. United States*, 485 U.S. 759, 778 (1988) (noting the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant"); *St. Cyr*, 533 U.S. at 298 (noting "strong presumption in favor of judicial review of administrative action" in immigration context).

D. This Court should deny Defendants' Rule 12(b)(6) motions.

Defendants also move against all of Plaintiffs' claims on their merits. The Court should deny Defendants' motion because Plaintiffs state a plausible claim for relief as to each cause of action they allege.

Plaintiffs begin with their APA claims, against which Defendants make only cursory arguments that are easily resolved. Plaintiffs' APA claims challenge the Enforcement Metrics Policy and the FAMU Directive as discrete agency actions subject to judicial review. All four claims satisfy the *Twombly*/*Iqbal* standard because Plaintiffs identify final agency actions subject to judicial review.

Plaintiffs turn next to their claim under the INA, which challenges Defendants' actions that have undermined the impartiality of immigration court proceedings, including the Enforcement Metrics Policy and the FAMU Directive. Those actions contravene the case-by-case adjudication standards that the INA requires.

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Finally, Plaintiffs address their claim for relief under the Take Care Clause. The Take Care Clause may properly be invoked to stop widespread, persistent, and egregious Executive conduct that effectively suspends the laws that Congress has enacted. Plaintiffs' claim under the Take Care Clause raises core separation-of-powers concerns, the proper balance of which it is this Court's duty to maintain. *See Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982).

1. Plaintiffs state a claim under the APA.

Plaintiffs state plausible claims for relief under the APA. Again, Defendants distort the nature of Plaintiffs' claims by attempting to frame the claims as attacks on individual removal decisions. But Plaintiffs do not challenge any decision in any specific immigration case; they challenge policies that Defendants have implemented across all immigration courts. Through their APA claims, Plaintiffs seek to remedy only the injuries that those policies have caused to Plaintiffs as organizations. Plaintiffs thus properly bring their claims under the APA.

In support of their motion, Defendants contend, incorrectly, that Plaintiffs cannot state a claim under the APA because they have not identified a "final agency action," and that the claims fail in any event because § 1252(b)(9) provides an "other adequate remedy in a court." Motion at 30–32. But Plaintiffs have alleged facts challenging *two* final agency actions. Both the Enforcement Metrics Policy and the FAMU Directive are final agency actions because they are neither tentative nor interlocutory and because legal consequences flow from both. And, as explained above, § 1252(b)(9) does not apply to any of Plaintiffs' claims, and therefore cannot constitute an "other adequate remedy" in court. *See supra* Section IV(C)(2).

a. Plaintiffs have alleged two final agency actions.

Under the APA, agency actions are reviewable only if they are "final agency actions." 5 U.S.C. § 704. A "final agency action" must (1) "mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature" and (2) "be one by which rights or obligations have been determined, or from which legal

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consequences will flow." *Bennett*, 520 U.S. at 177–78 (internal citations and quotation marks omitted). Here, Plaintiffs sufficiently allege that the Enforcement Metrics Policy and FAMU Directive are final agency actions.

Both policies easily meet the first element. An agency action is "final" for purposes of the APA when it has "an actual or immediate threatened effect." *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 139 (D.D.C. 2018). In *Aracely*, the plaintiffs brought an APA claim challenging a policy directing local officials to heavily weigh immigration deterrence when making parole decisions. *Id.* at 123–24. The district court held that, because parole decisions based on improper factors have "actual or immediately threatened effects," the policy was a "final agency action" under the APA. *Id.* at 139.

Here, as in *Aracely*, Plaintiffs have alleged that two policies have negatively affected Plaintiffs since they were implemented in late 2018. Compl. ¶ 117. The Enforcement Metrics Policy sets mandatory timelines and remand limits for immigration judges. *Id.* ¶¶ 118, 121–46. The financial incentives embedded in the policy introduce systemic bias into the immigration court system and undermine Plaintiffs' ability to offer meaningful legal assistance to respondents. *Id.* ¶¶ 118, 121–46. Similarly, the FAMU Directive creates a specialized accelerated docket, primarily for Central American families seeking asylum. *Id.* ¶¶ 119, 147–54. By stigmatizing family-unit cases, the policy reflects Defendants' intent to deport certain asylum seekers as quickly as possible, regardless of the merits of their claims. *Id.* ¶¶ 119–20.

Both policies have actual, immediate, lasting, and negative effects, not only on Plaintiffs' clients but also on Plaintiffs themselves. Plaintiffs' Complaint alleges several of those effects. *See* Compl. ¶¶ 155–92. For example, the Enforcement Metrics Policy has squandered Plaintiffs' financial resources, impaired Plaintiffs' abilities to provide meaningful legal assistance to respondents, nullified the effect of Plaintiffs' pro se support, and impaired of Plaintiffs' abilities to provide useful technical assistance and mentorship to other removal defense attorneys.

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Id. ¶¶ 163, 172, 177, 188, 192. Similarly, the FAMU Directive has impaired Plaintiffs' ability to provide meaningful legal assistance, *id.* ¶ 178, substantially weakening their pro bono programs, *id.* ¶ 189, and harming their abilities to assist and mentor other attorneys, *id.* ¶¶ 178, 189, 192. Plaintiffs have sufficiently alleged specific agency actions that have actual or immediately threatened effects. The policies mark the consummation of Defendants' decision-making process, and thus are final agency actions under the APA. *Bennett*, 520 U.S. at 177–78.

The policies are also actions "by which rights or obligations have been determined, or from which legal consequences will flow," and therefore meet the second element. *Id.* In *R.I.L.-R v. Johnson*, the plaintiffs challenged a Department of Homeland Security policy directing ICE officers to consider deterrence of mass migration as a factor in their custody determinations. 80 F. Supp. 3d 164, 174 (D.D.C. 2015). The court held that ICE's reliance on an impermissible factor in making custody determinations had profound and immediate consequences for asylum seekers and, therefore, was an agency action "by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 184.

Here, as in *R.I.L.-R*, Plaintiffs challenge two policies that force immigration judges to rely on impermissible factors in making removal decisions. *See* Compl. ¶¶ 172, 192 (alleging that the policies require immigration judges to consider "extra-legal" and "extra-record" factors). As discussed above, these policies have immediate and lasting effects on Plaintiffs. *See State v. Immigration & Customs Enf't*, 2019 WL 6906274 (S.D.N.Y. Dec. 19, 2019) (holding that a policy was a "final agency action," by looking at the direct consequences to noncitizens, not the plaintiff). Therefore, they constitute "final agency actions" under the APA.

b. Section 1252(b)(9) is not an "other adequate remedy in court."

Defendants raise § 1252(b)(9) as a jurisdictional bar to all claims, and then again as a bar to Plaintiffs' APA claims. Plaintiffs have addressed this issue extensively in Section IV(C)(2), and incorporate by reference those same arguments here.

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In addition to those arguments, § 1252(b)(9) does not provide an adequate alternative remedy to the APA because Plaintiffs could not raise their APA claims through the petition-for-review process. Under the APA, an "other adequate remedy in court" does not exist in the immigration context if "neither the immigration judge nor the Board of Immigration Appeals can review" the challenged agency action. *O.A. v. Trump*, 404 F. Supp. 3d 109, 137 (D.D.C. 2019) (quotations omitted). Here, because immigration judges and members of the BIA have no authority to review a challenge by legal service providers to the Enforcement Metrics Policy or FAMU Directive, *see supra* Section IV(C)(2) n.9 (citing provisions of the INA), § 1252(b)(9) does not provide an "other adequate remedy."

2. Plaintiffs state a claim under the INA.

Plaintiffs state a plausible claim that Defendants' weaponization of the immigration courts violates the INA's requirement that immigration judges be impartial. Compl. ¶¶ 201–07.

As a threshold matter, Defendants' assertion of sovereign immunity, *see* Motion at 24, disregards the APA's waiver of sovereign immunity in all actions "seeking relief other than money damages" against federal officials "in an official capacity or under color of legal authority." 5 U.S.C. § 702. This waiver is not limited to actions brought under the APA's judicial review provisions. *Presbyterian Church v. United States*, 870 F.2d 518, 523–26 (9th Cir. 1989). Plaintiffs' claim under the INA thus properly falls under the APA's waiver.[15]

a. Plaintiffs allege that Defendants have created a constitutionally intolerable probability of bias in immigration courts.

The statutory scheme governing removal proceedings requires that immigration judges be impartial, and it necessarily incorporates the Fifth Amendment guarantee of an impartial adjudicator. *See* Compl. ¶¶ 34–39; 8 U.S.C. § 1229a(c)(1)(A) (decisions in removal proceedings "shall be based only on the evidence produced at the hearing," not on extra-record factors or

[15] Because Plaintiffs request injunctive and declaratory relief, Defendants' citations to cases discussing claims for money damages are irrelevant.

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biases); *see also Wong Yang Sung v. McGrath*, 339 U.S. 33, 49–50 (1950) ("When the Constitution requires a hearing," as in the removal context, "it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality."), *superseded by statute on other grounds as stated in Ardestani v. I.N.S.*, 502 U.S. 129, 133 (1991).

To decide whether there is an "intolerable probability of actual bias," courts look to "objective standards that do not require proof of actual bias." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882-83 (2009). A due process violation—and by extension, a violation of § 1229a(c)(1)(A)—arises when there is a "serious risk of actual bias or prejudgment" based on "a realistic appraisal of psychological tendencies and human weakness." *Id.* at 883–84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). This test "does not require a showing of actual judicial bias," but rather, "only a showing of an undue risk of bias, based on the psychological temptations affecting an 'average judge.'" *Echavarria v. Filson*, 896 F.3d 1118, 1128 (9th Cir. 2018) (quoting *Caperton*, 556 U.S. at 881, 883), *cert. denied sub nom Gittere v. Echavarria*, 2019 WL 2166437 (May 20, 2019).

Defendants do not explain why that standard does not apply to the structural features of the immigration courts that Plaintiffs challenge in this case. Instead, they incorrectly assert that Plaintiffs must demonstrate "actual" bias in individual decisions, citing several cases in which plaintiffs challenged the denial of individual claims for relief from removal on grounds of bias and political interference. Motion at 24, 28–29 (citing *Yang v. Reno*, 925 F. Supp. 320, 330–32 (M.D. Pa. 1996); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954); *Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 280, 282 (1955); *Marcello v. Bonds*, 349 U.S. 302, 311 (1955)). They also cite ineffective-assistance-of-counsel cases, which apply a different legal test altogether. *See* Motion at 28–29 (citing *Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (applying *Strickland v. Washington* to ineffective-assistance-of-counsel claim); *United States v. Decoster*, 624 F.2d 196, 336 (D.C. Cir. 1976) (MacKinnon, J., dissenting) (similar)).

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Those cases do not apply here because Plaintiffs do not challenge any decision in any individual case.[16] Instead, Plaintiffs challenge the ways in which Defendants have created a constitutionally intolerable probability of actual bias throughout the immigration court system. Compl. ¶¶ 201–07; *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909–10 (2016) (finding harm where "the *objective risk* of actual bias on the part of a judge rises to an unconstitutional level").

b. Plaintiffs state a plausible claim that Defendants violated the INA's impartial adjudicator requirement.

Plaintiffs state a plausible claim that Defendants have violated the INA. Specifically, Plaintiffs allege that the Enforcement Metrics Policy, the FAMU Directive, Defendants' pervasive hostility toward asylum seekers, and Defendants' perpetuation of asylum-free zones, "*either individually or collectively*, create a constitutionally and statutorily intolerable probability of actual bias in immigration court adjudication." Compl. ¶¶ 202, 204 (emphasis added).

To start, the Enforcement Metrics Policy and the FAMU Directive create an unlawful, intolerable structural risk of bias by requiring judges to consider factors unrelated to the facts and merits of the cases they decide. *Id*. ¶ 204. This risk affects all immigration judges in FAMU-designated cases pending in all immigration courts. *Id.* ¶¶ 118–19, 121–46, 147–54.

Contrary to Defendants' argument, *see* Motion at 26–27, Plaintiffs sufficiently allege that as a result of the case quotas and time limits imposed through these policies immigration judges do not act as impartial adjudicators. Compl. ¶¶ 118, 128–40, 151–54, 204. The policies require judges to prioritize speed regardless of the specific facts and circumstances of each case. *Id.* ¶¶ 125–26, 134, 154. The FAMU designation further stigmatizes family-unit asylum cases from the beginning, indicating to judges that the case should be "hastened through the system with

[16] Defendants' argument that "the decisions of immigration judges are entitled to a presumption of regularity," *see* Motion at 24, likewise does not apply to Plaintiffs' claims, which do not challenge the individual decisions of any immigration judge. Moreover, the presumption of regularity does not create an elevated pleading standard and does "not . . . shield [agency] action from a thorough, probing, in-depth review." *Citizens to Preserve Overton Parkin, Inc. v. Volpe*, 401 U.S. 402, 413 (1971).

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little regard for individualized facts or circumstances." *Id.* ¶¶ 10, 119, 154, 231. And the Enforcement Metrics Policy poses a risk of negative professional repercussions if a case is not moved quickly enough. Compl. ¶¶ 130–33. Defendants remind immigration judges of the pressure to comply with the Enforcement Metrics Policy by placing a dashboard on their computers, with stoplight indicators showing how the judge is performing under the policy. *Id.* ¶ 127. Both policies violate the INA and its implementing regulations, which require immigration judges to protect due process and make impartial decisions based solely on the facts of the cases before them. 8 U.S.C. § 1229a; 8 C.F.R. §§ 1003.10(b).

Plaintiffs have also alleged that the Enforcement Metrics Policy gives immigration judges a pecuniary interest in the pace and outcome of the cases before them, regardless of each case's individual facts. *See, e.g.*, Compl. ¶¶ 131, 133–37, 204. When an "adjudicator has a pecuniary interest in the outcome" of a case, "the probability of actual bias . . . is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47; *see also Williams*, 136 S. Ct. at 1905–06 (a judge cannot try cases "where he has an interest in the outcome." (citing *In re Murchison*, 349 U.S. 133, 136 (1955))); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (judges "with substantial pecuniary interest in legal proceedings should not adjudicate these disputes"). Here, Plaintiffs allege that the Enforcement Metrics Policy imposes potential negative employment consequences, including termination, on immigration judges who take actions that delay adjudication—actions such as granting a continuance, postponing a hearing when a witness is unavailable, or taking a matter under advisement to consider evidence—even if the actions are necessary to protect rights under the INA. Compl. ¶¶ 130–33. The policy thus gives judges a personal pecuniary interest in the pace of adjudication of pending cases that undermines their impartiality in every case. *Id.* ¶¶ 131, 204.

The court may also reasonably infer that mandating the pace of adjudication, through both the Enforcement Metrics Policy and the FAMU Directive, leads to biased decision-making.

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Immigration judges who deny asylum more often tend to do so early in a case, making it more likely that they will satisfy the speed-related requirements. *See* David Hausman, *The Failure of Immigration Appeals*, 164 U. Penn. L. Rev. 1177, 1197–98, 1203, 1216–17 (2016) (explaining that judges who tend to deny relief more often "partly reach their results by preventing an individual relief hearing with a lawyer, rather than by denying relief to immigrants who make it that far"). But having time to prepare a case works in a respondent's favor because "the facts underlying an application for relief from removal may continue to develop up to the time of, and even during, the final individual hearing on the merits." *Matter of E-F-H-L-*, 26 I&N Dec. 319, 322 (BIA 2014), *vacated on other grounds*, 27 I. & N. Dec. 226 (A.G. 2018). The factual and legal complexity of asylum proceedings also means it will be faster for a judge to deny rather than grant relief. To grant asylum, a judge must analyze several factual and legal predicates to demonstrate eligibility.[17] To deny asylum, however, a judge need only find an applicant not credible or ineligible on a single legal ground.

The Remand Rate, which is an Enforcement Metric that punishes immigration judges when their decisions are reversed on appeal, gives judges a pecuniary interest in the outcome, as well as the pace, of adjudications. Compl. ¶ 130. The Remand Rate conditions satisfactory performance reviews on whether the BIA or a federal court of appeals affirms an immigration judge's decision, thus directly tying judges' jobs to case outcomes. *Id.* And contrary to Defendants' assertions, the Remand Rate will not necessarily encourage the "right outcome" and therefore negate the psychological temptations caused by the other benchmarks. *See* Motion at 27. As Plaintiffs allege, the BIA is not a "fair and functioning administrative appellate system."

[17] These factual and legal predicates include positive credibility, 8 U.S.C. § 1158(b)(1)(B)(ii)-(iii), the definition of a refugee, *see* § 1158(b)(1)(B)(i), 8 C.F.R. § 208.13(a)-(b), and any other contested eligibility criteria, § 1158(a)(2), (b)(2), 8 C.F.R. § 208.13(c).

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Compl. ¶ 102.[18] And at the circuit court level, immigration judge decisions are often subject to highly deferential judicial review; thus, an affirmance is often based on the standard of review rather than whether the judge's decision was correct. *See, e.g.*, Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 Wm. & Mary L. Rev. 581, 584–85, (2013) (noting that agency factual and credibility determinations often drive asylum cases outcomes, yet these decisions are subject to very circumscribed judicial review).

Defendants would have this Court believe that the Enforcement Metrics Policy and the FAMU Directive are merely immigration court corollaries to 28 U.S.C. § 476. *See* Motion at 26 n.3. The differences between the two, however, highlight the ways in which the policies that Plaintiffs challenge are likely to have an oversized effect on the decision making of immigration judges. For federal judges, who are appointed for life, the only consequence of failing to meet a case completion goal is public disclosure. *See* 28 U.S.C. § 476(a). Immigration judges, by contrast, are non-supervisory career attorneys subject to disciplinary measures by Defendants. Compl. ¶ 50; 8 U.S.C. § 1101(b)(4) (immigration judges "shall be subject to such supervision . . . as the Attorney General shall prescribe"). And the consequences of failing to comply with the Enforcement Metrics Policy include not only disciplinary actions, but also threats to job security.

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[18] BIA members are appointed by the Attorney General, who has politicized hiring at the BIA by elevating judges with some of the highest asylum denial rates to the appellate bench. Compl. ¶ 103. The Remand Rate, rather than providing a meaningful marker of the legal correctness of immigration judge decisions, thus encourages ideologically motivated results. *See generally Baez-Sanchez v. Barr*, 947 F.3d 1033 (7th Cir. 2020) (vacating BIA decision after the BIA "defi[ed] a [prior] remand order;" refusing to remand for further proceedings because doing so "would do little beside give the [BIA] a free pass for its effrontery;" and threatening BIA members with contempt); *Guzman Orellana v. Att'y Gen.*, 2020 WL 1898251, at *7 (3d Cir. Apr. 17, 2020) (reversing BIA decision and noting that "we are troubled by the BIA's apparent distortion of evidence favorable to [the respondent] in this case"); Hausman, *Failure of Immigration Appeals*, 164 U. Penn. L. Rev., at 1179–81, 1203-04 (whether an immigration judge's denial of relief is appealed depends in part on whether the respondent has counsel, which in turn depends on how much time the judge provides to retain counsel); *id.* at 1192–94 (removal orders of "harsher" judges tend to evade scrutiny through review, while the BIA more often reverses the grants of relief by "generous" judges when the government appeals).

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Compl. ¶ 130. Plaintiffs know of no other federal adjudication system that conditions performance evaluations on speed of decision or rate of affirmance.[19]

Beyond the policies themselves, Plaintiffs further allege that Defendants have violated the INA by perpetuating asylum-free zones that create an "intolerable probability of actual bias." *Caperton*, 556 U.S. at 882. With respect to those allegations, the statistics Plaintiffs allege speak for themselves—in many immigration courts, asylum claims are almost always denied. Compl. ¶ 95; *see generally id.* ¶¶ 87–94, 96; *see also, e.g.*, *Diaz-Rivas*, 769 F. App'x at 768 (Jordan, J., dissenting) (observing that the two percent asylum grant rate in Atlanta is "a telltale sign of purposeful discrimination" (internal quotation marks omitted)). Although Defendants claim that asylum-free zones do not relate to judicial bias and attack the truth of Plaintiffs' allegations, Motion at 25–29, that claim is inaccurate, and, in any event, this Court need not reach it at this stage.[20] Plaintiffs' allegations suffice to create a plausible inference that Defendants have

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[19] The statutory and regulatory framework governing federal Administrative Law Judges (ALJs) is illuminating on this point. In stark contrast to immigration judges, ALJs are hired based on merit by the Office of Personnel Management. 5 U.S.C. §§ 1104, 3304, 5372. The Merit Systems Protection Board is the only entity that can determine whether an ALJ should be removed or disciplined. § 7521. And the agencies that employ ALJs are prohibited from rating an ALJ's job performance or influencing their pay. § 5732; 5 C.F.R. § 930.206

[20] Defendants request that this Court infer that asylum-free zones are not based on legitimate differences between immigration courts. Motion at 25–26. But at the motion to dismiss stage, Plaintiffs, rather than Defendants, are entitled to all reasonable inferences in their favor. Plaintiffs' allegations demonstrate that the fact of detention does not account for asylum-free zones. *See, e.g.*, Compl. ¶¶ 87–90 (discussing high denial rates in Atlanta, El Paso, and Houston, which all have both detained and non-detained dockets); *id.* ¶ 95 (list of asylum-free zones including detained and non-detained courts). Even if all individuals at a detained court were subject to mandatory detention—which is not necessarily the case—the criminal grounds for mandatory detention under § 1226(c) are also considerably broader than the criminal bars to asylum under § 1158(b)(2). Nor does the existence of a 2019 regulation regarding asylum eligibility explain the systemic trends that Plaintiffs allege. *See* Motion at 25–26.

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undermined the impartiality of the immigration court system by failing to address the intolerable risk of bias posed by asylum-free zones. *See* Compl. ¶¶ 84–103, 204, 206.[21]

Finally, Plaintiffs allege that Defendants violated the INA's impartial adjudicator guarantee by "fostering an adjudicatory system that is permeated by bias against immigrants." Compl. ¶ 204. The Complaint contains allegations that Defendants are hostile toward asylum seekers, their legal representatives, and the immigration court system. *Id.* ¶¶ 55–79. The Enforcement Metrics Policy and the FAMU Directive exist in the context of Defendants' rhetorical war against immigrants; Plaintiffs allege that the combination pushes immigration judges to use both policies as a shortcut or excuse to deny relief. *Id.* ¶¶ 55–79, 138–40, 154. Plaintiffs have thus alleged a plausible claim that Defendants' weaponization of the immigration court system—through their policies, their perpetuation of asylum-free zones, and their pervasive hostility toward asylum seekers—creates a constitutionally intolerable probability of actual bias in immigration courts that violates the INA. *See* § 1229a; *Caperton*, 556 U.S. at 882–84.

3. Plaintiffs state a claim under the Take Care Clause.

The Take Care Clause is a cornerstone of our constitutional design, operating not only to empower the Executive branch, but also to constrain Executive actions by reference to duly enacted laws passed by Congress. By its text, the Take Care Clause requires the Executive not simply to "execute" the laws, but to "take Care" that the laws be "faithfully" executed.[22] U.S. Const. art. II, § 3. "Faithfully execute" was understood at the Founding to mean "strict adherence to duty . . . [w]ithout failure of performance . . . [s]incerely . . . [h]onestly." Andrew

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[21] Defendants muddle the concept of causation in a way that ignores Plaintiffs' allegations. *See* Motion at 27–28. Plaintiffs' allegations are based on the most recent EOIR data available and are entitled to all reasonable inferences in their favor. *See* Compl. ¶¶ 84–96. It is reasonable to infer that asylum-free zones persist to the present. Plaintiffs properly allege that they result from Defendants' unlawful actions. *Id* ¶ 204.

[22] The Executive's duty under the Take Care Clause "can be delegated to subordinates, including the attorney general." *United States v. Navarro-Vargas*, 408 F.3d 1184, 1205 (9th Cir. 2005) (en banc). The Take Care Clause thus applies equally to Executive officials, including the Attorney General, whose power derives from the President.

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Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2132 (June 2019). "Execute" meant "to carry out or put into effect or force, to enforce, to administer," like it means today. *Id.* at 2133. The phrase "take Care" was understood to be "a directive from a superior to an agent, directing that special attention be paid to ensure that a command or duty was carried out." *Id.* at 2134.

Although the contours of the Take Care Clause have not yet been defined by the federal courts, the Executive's "constitutional obligation to ensure the faithful execution of the laws" stands as a bulwark of our Constitution's separation-of-powers principles. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010) (quotations omitted); *see also Chadha*, 462 U.S. at 951 (The Constitution "divide[s] the delegated powers of the . . . federal government into three defined categories . . . to assure, as nearly as possible, that each Branch of government . . . confine[s] itself to its assigned responsibility."). Thus, under our constitutional system, "Congress makes laws and the President, acting at times through agencies . . . , 'faithfully execute[s]' them." *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 327 (2014). By imposing on the Executive the obligation to take care that the laws be faithfully executed, the Take Care Clause affords due respect to Congress and limits the Executive's authority to act against the laws that Congress has enacted. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("[T]he Constitution is neither silent nor equivocal about who shall make laws which the President is to execute."); *id.* at 633 ("[T]he power to execute the laws starts and ends with the laws Congress has enacted.") (Douglas, J., concurring).

The Take Care Clause may properly be invoked to prevent widespread, persistent, and egregious Executive misconduct in flagrant disregard of congressional command.[23] Here, Plaintiffs challenge that very sort of misconduct, alleging that the Attorney General persistently

[23] The Clause need not be invoked against isolated agency action or inaction. Such challenges fall within the purview of the APA. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

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and egregiously has mismanaged the immigration court system in flagrant disregard of the adjudicatory standards of the INA, and to such an extent that he effectively has suspended the statutory scheme that Congress created. Compl. ¶¶ 193–200. Plaintiffs' Take Care Clause claim not only is justiciable but also states a plausible claim for relief.

a. Plaintiffs' Take Care Clause claim is justiciable.

Defendants contend that the Take Care Clause is nonjusticiable because it starts and ends with the Executive and is judicially unenforceable. *See* Motion at 22–23. That argument is contrary to the plain mandate of the Take Care Clause itself and the separation-of-powers principles inherent in our constitutional design.[24]

Defendants rely primarily on an overly broad reading of the Supreme Court's 1866 decision in *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), without acknowledging that *Johnson*'s ruling was limited to claims brought against the President, rather than executive officials. Defendants contend that *Johnson* held that the Take Care Clause is nonjusticiable. Motion at 22. But there are "no case[s] adopting that understanding of *Johnson*." *Citizens for Responsibility & Ethics in Wash. v. Trump (CREW)*, 302 F. Supp. 3d 127, 139 (D.D.C. 2018). In *Johnson*, the State sued, in part on federalism grounds, to enjoin President Andrew Johnson from carrying out duly enacted provisions of the Reconstruction Acts, which would have delayed the reintegration of the Southern states into the Union. 71 U.S. (4 Wall.) at 492; *see id.* at 477. The

[24] It also runs afoul of a relatively recent order from the Supreme Court, in which it directed the parties in *United States v. Texas* to address the question whether the Obama administration's Deferred Action for Parents of Americans policy "violates the Take Care Clause of the Constitution, Art. II, § 3." 136 S. Ct. 906 (2016) (Mem.); *see also Citizens for Responsibility & Ethics in Wash. v. Trump (CREW)*, 302 F. Supp. 3d 127, 139 (D.D.C. 2018) (noting the order in *United States v. Texas* "suggest[s] that the Clause's justiciability is an open question"); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. Pa. L. Rev. 1835, 1848 (2016) ("The Supreme Court has also invoked the Take Care Clause as the textual source of the President's duty to abide by and enforce the laws enacted by Congress—that is, as the instantiation of the President's duty to respect legislative supremacy and not to act *contra legem*.").

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Court "limit[ed its] inquiry to the question presented," which was whether *the President* may be named as a Defendant and personally enjoined from enforcing federal law on the basis that the law is arguably unconstitutional. *Id.* at 498. The Court held that he could not. *Id.* at 499 (emphasis added). *Johnson*, by its terms is limited to its facts and does not foreclose Plaintiffs' claim, "particularly against executive branch officials other than the President." *CREW*, 302 F. Supp. 3d at 139; *see also Johnson*, 71 US at 490 (citing statements by the prevailing party that, "[i]n the case of a mere subordinate officer the court may very well enforce its authority . . . because, taking a secretary from the head of his department, or an Attorney General from his office . . . does not stop the government, does not interfere with any great branch or department of the government. The President is there to make another Attorney General . . . .").[25]

Defendants' argument that the Take Care Clause falls under general principles forbidding judicial interference is also unavailing. *See* Motion at 22. A suit "to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 326 (2015); *see also Free Enter. Fund*, 561 U.S. at 491 n.2 ("[E]quitable relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." (internal quotation marks omitted)); *Franklin v. Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring in part and concurring in the judgment) ("Review of the legality of [Executive] action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the [Executive's] directive . . . ."). Thus, the Supreme Court has

[25] Defendants' reliance on *Lujan* is also misplaced. *See* Motion at 22. In *Lujan*, the Supreme Court addressed Article III's limitations as they relate to generalized grievances challenging Executive action—i.e., cases in which the plaintiff claims "only harm to his and every citizen's interest in proper application of the Constitution and laws." 504 U.S. at 573. By analogy only, the *Lujan* Court likened jurisdiction over generalized grievance challenges to a "transfer from the President to the courts [of] the Chief Executive's most important constitutional duty," to "take Care that the Laws be faithfully executed." *Id.* at 577 (quoting U.S. Const. art. II, § 3). *Lujan* is a standing case, pure and simple—it is not a Take Care Clause case, and it certainly does not hold that the clause is unenforceable.

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held that "[w]hen judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance . . . —the exercise of jurisdiction has been held warranted," even as a check on the Executive. *Nixon*, 457 U.S. at 754(citations omitted); *see also EBSC I*, 932 F.3d at 774 ("[I]f there is a separation of powers concern . . . it is between the President and Congress, a boundary that we are sometimes called upon to enforce.").

At bottom, "[t]he courts, when a case or controversy arises, can always ascertain whether the will of Congress has been obeyed." *Chadha*, 462 U.S. at 953 n.16 (internal quotation marks omitted). That authority is a core judicial function—indeed, it remains "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). It is therefore well within the authority of this Court to adjudicate Plaintiffs' constitutional claim.

b. Plaintiffs do not challenge an exercise of Executive discretion.

Under the Take Care Clause, the Executive's obligation to "faithfully execute" the laws means that it lacks any discretion to suspend them. U.S. Const. art. II, § 3. "The Constitution does not confer upon [the Executive] any power to . . . suspend or repeal such [laws] as the Congress enacts." *United States v. Midwest Oil Co.*, 236 U.S. 459, 505 (1915). Nor does the clause confer a "dispensing power"—in *Kendall v. United States*, the Supreme Court rejected the contention that "the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution." 37 U.S. (12 Pet.) 524, 612–13 (1838).

Defendants attempt to mischaracterize Plaintiffs' Take Care Clause claim as a challenge to Executive discretion and contend that, as such, it is nonjusticiable. *See* Motion at 22–23. To support their position, Defendants cite *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), and *United States v. Navarro-Vargas*, 408 F.3d 1184 (9th Cir. 2005). Both cases involve the Executive's exercise of prosecutorial discretion—a distinct form of discretion long deemed unreviewable.

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See Heckler, 470 U.S. at 832. In *Heckler*, an APA case, the Court analogized an agency's decision not to take an enforcement action to "the decision of a prosecutor in the Executive branch not to indict." *Id.* Likewise, in *Navarro-Vargas*, a criminal case, the Ninth Circuit held that the same is true with respect to discretion exercised by a grand jury in deciding to issue an indictment. 408 F.3d at 1205.

Neither *Heckler* nor *Navarro-Varg*as applies here, as Plaintiffs do not challenge any exercise of Executive discretion, let alone an exercise of prosecutorial discretion in an individual case. Instead, Plaintiffs challenge Defendants' widespread, persistent, and egregious violations of standards established by Congress and set forth in the INA—conduct in which no government official has discretion to engage.[26]

To be sure, "[t]he power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration." *Util. Air Reg. Grp.*, 573 U.S. at 327. But if "it does not include a power to revise clear statutory terms that turn out not to work in practice," *see id.*, it "does not permit the [Executive] to refrain from executing laws duly enacted by the Congress," *Nat'l Treasury Emps. Union*, 492 F.2d at 604; *EBSC I*, 932 F.3d at 774 (same). Under the Take Care Clause, the Executive has no discretion to persistently and egregiously disregard the case-by-case adjudication standards of the INA.

c. Plaintiffs plead a plausible claim for relief.

Through the INA, Congress has delegated to the Attorney General the obligation to oversee the immigration court system in accordance with the case-by-case adjudication standards

[26] Defendants claim that under *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950), the nonjusticiability of Executive discretion is "especially true for immigration." Motion at 23. *Knauff* addressed the Attorney General's authority to decide, in an individual case and during a national emergency, that a person's admission into the country is not in the national interest. 338 U.S. at 540–42, 544–45. It is limited to the Attorney General's discretion to enforce immigration laws in individual cases; it does not hold that the Executive has "discretion at a vast scale" to act in violation of their statutory mandates or constitutional obligations.

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of the INA. *See* Compl. ¶¶ 194–95; 8 U.S.C. §§ 1101(b)(4), 1103(g). That obligation requires the Attorney General to ensure that the INA's case-by-case adjudication standards are upheld. Compl. ¶ 195; § 1229a(b)(4)(A)–(B), (c)(1)(A), (c)(4)(B). Given that clear command, the Attorney General has no discretion to suspend or limit their operation. *See Util. Air Reg. Grp.*, 573 U.S. at 327–28; *Youngstown*, 343 U.S. at 587; *Kendall*, 37 U.S. (12 Pet.) at 612–13.

Plaintiffs' Complaint states a plausible claim for relief under the Take Care Clause based on allegations that the Attorney General has persistently and egregiously disregarded the adjudicatory standards in the INA. Plaintiffs allege that the Attorney General has "suspended the INA's case-by-case adjudication standards through the abuse of authority and mismanagement of the immigration courts." Compl. ¶ 197. As explained above, Section II(B), (C), Plaintiffs allege that he has abused his authority to control the immigration court system by allowing courts to categorically deny asylum claims regardless of their merits. *Id.* ¶ 86. Those rates of denials have been increasing for years, but the Attorney General has taken no meaningful action to correct such persistent and egregious violations of law. *Id.* ¶¶ 82, 84–101. Instead, he has taken affirmative actions to exacerbate them, including reorganizing the administrative appellate system in a manner that removes the independence of its members, permits Defendant McHenry himself to decide individual appeals, and rewards judges in asylum-free zones with appointments to the appellate bench. *Id.* ¶ 103. He has nullified asylum law in Plaintiffs' asylum-free zones—creating courts in which the INA effectively is suspended. *Id.* ¶ 99.

Plaintiffs also allege that the Attorney General has mismanaged the immigration court docket in a manner that has increased the backlog by nearly 300 percent. Compl. ¶¶ 104–05. He has directed immigration judges to postpone long-scheduled hearings to respond to politically motivated priorities at the border. *Id.* ¶¶ 113–15. Through his refer-and-review authority, he has eliminated docket management practices that aim to manage caseloads and preserve already

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limited immigration court resources. *Id.* ¶ 112.[27] Those actions have caused the immigration court backlog to increase, causing cases to remain unresolved for years. *Id.* ¶¶ 104, 106–110. The Attorney General's actions have the effect of undermining the case-by-case adjudication standards that Congress commanded must apply in all immigration courts. *Id.* ¶ 111.

Plaintiffs allege that the Attorney General effectively has suspended the INA's case-by-case adjudication standards by taking persistent and egregious actions that disregard the operation of those standards throughout the immigration court system. His actions have the effect of "dispensing" with laws enacted by Congress, *see Kendall*, 37 U.S. (12 Pet.) at 612–13, and violate the Executive's obligation to "Take Care" that those laws be faithfully executed. *Nat'l Treasury Emps. Union*, 492 F.2d at 604. Plaintiffs plead sufficient facts to state a plausible claim for relief under the Take Care Clause.

E. Venue is proper in the District of Oregon.

Venue is proper in this Court under 28 U.S.C. § 1391(e)(1). In cases against United States officers or employees, venue is proper in judicial districts where "(A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred," or "(C) the plaintiff resides." 28 U.S.C. § 1391(e)(1). A plaintiff organization's residence, for venue purposes, is where the organization "maintains its principal place of business." 28 U.S.C. § 1391(c)(2). A corporation's principal place of business is "the place where corporation's officers direct, control, and coordinate the corporation's activities" or the corporation's "nerve center." *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010); *see also RAJMP, Inc. v. United States*, 2019 WL 2613304, at * 2 (D. Colo. May 9, 2019) (applying *Hertz* to § 1391(e)(1)).[28]

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[27] *See, e.g.*, *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018).

[28] Plaintiffs assume for the purposes of argument that a party's "residence" within the meaning of § 1391(e)(1) is the same as its "residence" for the purposes of § 1391(c)(2). *See RAJMP*, 2019 WL 2613304, at *2 n.4 (citing *Hammonds v. Stamps.com, Inc.*, 844 F.3d 909, 911–12 (10th Cir. 2016) (applying a presumption of consistent usage in jurisdictional statutes)).

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Defendants suggest that no Plaintiff maintains its principal place of business in Oregon. Motion at 32. This is incorrect. Law Lab was founded and incorporated in Oregon and directs and controls its operations out of its Portland, Oregon, office. Compl. ¶ 20. In Portland, Law Lab manages Equity Corps of Oregon and other nationwide programs, including in Atlanta, Georgia; Kansas City, Missouri; San Diego, California; Charlotte, North Carolina; and El Paso, Texas. Compl. ¶ 20. Law Lab's nerve center is in Oregon; thus, for the purposes of § 1391, Law Lab's principal place of business is in Oregon. *See Hertz*, 669 U.S. at 92-93.

Defendants accuse Plaintiffs of forum shopping, suggesting that the venue statute was not designed to allow one judicial district to decide claims that apply nationwide. Motion at 32–33. But that position is contrary to established case law. Under § 1391(e)(1), the phrase "the plaintiff" means "any plaintiff," and only one "plaintiff" need reside in a judicial district for venue to be proper. *See, e.g.*, *Exxon v. Fed. Trade Comm'n*, 588 F.2d 895, 898–99 (3d Cir. 1978) ("[R]equiring every plaintiff in an action against the federal government . . . to independently meet section 1391(e)'s standards would result in an unnecessary multiplicity of litigation. . . . There is no requirement that all plaintiffs reside in the forum district.").[29] Because Plaintiff Law Lab resides in Oregon, venue is proper in this district.

This Court should also reject Defendants' request to sever Plaintiffs' claims. Multiple plaintiffs may properly join an action if they assert any right to relief jointly with respect to the same "transaction, occurrence, or series of transactions or occurrences" and "any question of law or fact common to all plaintiffs will arise in the action." Fed. R. Civ. P. (a)(1). In this action, Plaintiffs challenge Executive-level immigration policies that apply across the immigration court

[29] The cases that Defendants cite are not to the contrary. In *Natural Resources Defense Council, Inc. v. Tennessee Valley Authority*, 459 F.2d 255, 257 (1972), the Second Circuit considered whether a suit against the Tennessee Valley Authority fell within the exceptions clause of § 1391(a). And *National Distillers & Chemical Corp. v. Department of Energy*, 487 F. Supp. 34, 36–37 (1980), dealt with an issue of fraudulent joinder, which Defendants do not and cannot allege here.

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system. *See* Compl. ¶¶ 37–44 (explaining the creation and enforcement of the Enforcement Metrics Policy and FAMU Directive). They do not, as Defendants contend, challenge the adjudication of individual asylum claims or require particularized factual analysis. *See* Motion at 34. Because Plaintiffs assert systemic challenges to broad, programmatic policies, severance is unnecessary and nonsensical. It would only result in unnecessarily repetitive litigation—the very problem that Rule 20(a)(1) seeks to avoid. *See League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977) (permissive joinder rule should "be construed liberally in order to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits.").

Finally, Defendants' cursory request to dismiss Plaintiffs' claims based on the doctrine of *forum non conveniens* should be rejected out of hand. *Forum non conveniens* provides for dismissal when no adequate alternative forum exists and the balance of private and public interest factors favors dismissal. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981). Defendants bear the burden to identify an adequate alternative forum. *Cheng v. Boeing Co.*, 708 F.2d 1406, 1411 (9th Cir. 1983). Defendants have not met this burden, as they identify no specific court better suited to adjudicate this case. *See* Motion at 35. In all events, *forum non conveniens* dismissal is generally more appropriate when the alternative court sits in a foreign country. *See, e.g.*, *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1145 (9th Cir. 2001). Moreover, courts are reluctant to dismiss on *forum non conveniens* grounds if the plaintiff resides in the forum. *See id.* Here, there is no "transferee" court in another judicial system or foreign country, and Plaintiff Law Lab resides in Oregon. Plaintiffs' claims were properly brought in Oregon and should be adjudicated here.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss.

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