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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

LAS AMERICAS IMMIGRANT ADVOCACY CENTER et al.,

Plaintiffs,

v.

JOSEPH R. BIDEN et al.,

Defendants.

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

PLAINTIFFS' SUPPLEMENTAL BRIEF PURSUANT TO COURT ORDER OF AUGUST 11, 2021 (ECF NO. 112)

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I. ARGUMENT

A. The Attorney General's Suspension of the INA's Case-by-Case Adjudication Standards Is Justiciable Under the Take Care Clause

Plaintiffs' claim against the Attorney General under the Take Care Clause, U.S. Const. art. II, § 3, *see* Compl. ¶¶ 193–200—unlike the claims in many cases cited by Defendants—does not challenge the discretionary performance of executive duties. Rather, the claim challenges the Attorney General's persistent and egregious failure to uphold the case-by-case adjudication standards *mandated* by Congress in the INA. Plaintiffs' first claim merely asks this Court to play its proper judicial role by redressing the Executive's constitutional violations, which it may do using its traditional equitable powers. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326–27 (2015); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.,* 561 U.S. 477, 491 (2010).

In the alternative, the claim is appropriate as an implied private cause of action under the Take Care Clause, "a separation-of-powers limitation that [plaintiffs] can invoke to challenge actions that cause justiciable injuries." *See Sierra Club v. Trump*, 977 F.3d 853, 878 (9th Cir. 2020) (internal quotations and citation omitted).

1. Plaintiffs' Take Care Clause Claim Is Justiciable Under This Court's Traditional Equitable Powers

"The ability to sue 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*, 575 U.S. at 326–27; *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) ("[I]njunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally."); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[.]"). In this context, an implied right of action is not necessary to grant equitable relief for specific constitutional violations. For example, in *Free Enterprise Fund*, the Supreme Court concluded that equitable claims under the Appointments

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Clause and separation-of-powers principles were "properly presented for … review," acknowledging "a right to relief as a general matter" in constitutional cases, even without "an implied private right of action directly under the Constitution." 561 U.S. at 491 & n.2.[1]

Armstrong underscores that this Court may grant equitable relief on Plaintiffs' Take Care Clause claim. In *Armstrong*, recognizing the "equitable relief that is traditionally available to enforce federal law," the Supreme Court analyzed plaintiffs' constitutional claims "in equity," *separate* from any implied constitutional cause of action. 575 U.S. at 327–29. While this equitable power may be subject to express or implied statutory limitations, *see id.*, the statutory limitations that concerned the Court in *Armstrong* are absent.[2] *Contra* Defs. Supp. Br., ECF 116, at 7 n.5. First, the INA does not establish any alternative specific remedy for systemic violations of the case-by-case adjudication standards. *See* 8 U.S.C. § 1229a. And second, the text of such statutory standards is not judicially unadministrable: the case-by-case adjudication standards state basic procedural rights that courts understand and apply daily.[3] *See, e.g.*, 8 U.S.C. § 1362; 8 C.F.R. § 1003.16(b); 8 C.F.R. § 1292.1; 8 C.F.R. § 1001.1(f) (right to be represented by counsel at no cost to the government); 8 U.S.C. §§ 1229(a)(1), (b)(2), 1158(d)(4)(A)–(B); 8 C.F.R. § 1003.61 (right to access list of local pro bono legal service providers and receive notice of the right to be

[1] *See also Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring) (affirming "the presumed availability of federal equitable relief against threatened invasions of constitutional interests"); *Hubbard v. U.S. E.P.A. Adm'r* , 809 F.2d 1, 11 (D.C. Cir. 1986), *on reh'g sub nom. Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (upholding availability of equitable relief to remedy First Amendment violation); *Turner v. U.S. Agency for Global Media*, 502 F. Supp. 3d 333, 372–73 (D.D.C. 2020), *appeal dismissed*, No. 20-5374, 2021 WL 2201669 (D.C. Cir. May 17, 2021) (citing *Armstrong* and holding that plaintiff may "advance her claim for equitable relief directly under the First Amendment").

[2] In *Armstrong*, the Court found that the plaintiffs' claims under the Supremacy Clause could not proceed because Congress had precluded private enforcement of Medicaid Act § 30(A), the statutory provision at issue. 575 U.S. at 327–29. The Court found Congress intended to foreclose equitable relief for violations of § 30(a) because (1) the Act established its own specific remedy for such violations and (2) the Act contained "judicially unadministrable" text requiring payments "consistent with efficiency, economy, and quality of care." *Id.*

[3] Defendants' argument that the Take Care Clause is itself "judicially unadministrable" (*see* Defs. Supp. Br. 7 n.5) misconstrues the standard from *Armstrong*, which considers whether the *statutory* – not constitutional – provisions at issue are so judicially unadministrable as to preclude private enforcement in the courts. *See Armstrong*, 575 U.S. at 328–29.

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represented by counsel); 8 U.S.C. § 1229a(b)(2); 8 C.F.R. § 1003.25(c) (right for respondent's attorney of choice to appear by teleconference). The INA's case-by-case adjudication standards thus do not restrict this Court's equitable power to enjoin unlawful executive action, as Plaintiffs' Take Care Clause claim requests. *See Armstrong*, 575 U.S. at 327; *see also Webster v. Doe*, 486 U.S. 592, 603 (1988) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear . . . to avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.").

2. Plaintiffs' Take Care Clause Claim Is Justiciable as an Implied Private Cause of Action

Claims under the Take Care Clause are justiciable not only under the Court's traditional powers—the Clause *also* provides an implied private cause of action. The Ninth Circuit recognized as much when it considered the merits of a constitutional claim alleging a violation of the Take Care Clause. *See Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 561 (9th Cir. 2019); *see also* Order and Opinion on the Motion to Dismiss (ECF 79) ("MTD Order") 24–25 (stating that the Ninth Circuit does not "appear to have doubted that the Take Care Clause could give rise to a justiciable cause of action"). As here, the *Bernhardt* defendants argued that plaintiffs did not state a claim under the Take Care Clause because the President's duty is "not an appropriate subject for judicial intervention." Br. for Appellees David Bernhardt & the U.S. Dep't of the Interior, *Ctr. for Biological Diversity v. Bernhardt*, No. 18-35629, ECF No. 38, at 17–18. The Ninth Circuit plainly disagreed; its resolution of the Take Care Clause claim on its merits necessarily reflected its determination that the claim was justiciable. *See Bernhardt*, 946 F.3d at 562.

Bernhardt also reflects the well-established principles that private parties "are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies." *Bond v. United States*, 564 U.S. 211, 223 (2011); *see also Sierra Club*, 977 F.3d at 878 (litigants may sue to enforce

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separation-of-powers constraints in the Constitution when "government acts in excess of its lawful powers").[4] It is of no moment that the Take Care Clause claim at issue in *Bernhardt* was directed at legislative rather than executive action, *see* 946 F.3d at 561, for "[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 v. Fitzgerald*, 457 U.S. 731, 754 (1982).

Although the Supreme Court has never explicitly addressed whether the Take Care Clause creates a private cause of action,[5] private causes of action may be brought directly under the Constitution where separation-of-powers principles are at stake.[6] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Bond*, 564 U.S. at 223 (citing cases involving justiciable injuries where private parties relied on separation-of-powers principles). The Constitution's core

[4] Given the presumption that "justiciable constitutional rights are to be enforced through the courts," a constitutional cause of action must exist for "those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights." *Davis v. Passman*, 442 U.S. 228, 242 (1979); *see also id.* at 239 n. 18 (distinguishing "cause of action" from standing, jurisdiction, and relief).

[5] In *United States v. Texas*, 577 U.S. 1101 (2016) (Mem.), the Supreme Court ordered briefing on whether the challenged executive policy "violates the Take Care Clause," at minimum "suggest[ing] that the Clause's justiciability is an open question," *see Citizens for Responsibility & Ethics in Wash. v. Trump*, 302 F. Supp. 3d 127, 139 (D.D.C. 2018) (*CREW*).

[6] Defendants argue that recognizing a cause of action under the Take Care Clause would break with "the Supreme Court's repeated caution" against new constitutional causes of action. Defs. Supp. Br. 1, 7. But Defendants rely entirely on cases requesting *damages* against the federal government through extensions of or additions to the *Bivens* doctrine. *See Hernandez v. Mesa*, 140 S. Ct. 735, 750 (2020) (denying *Bivens* damages); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1848–50 (2017) (same); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734–38 (2004) (denying damages action which would "supplan[t]" *Bivens*); *Moore v. Glickman*, 113 F.3d 988, 994 (9th Cir. 1997) (finding *Bivens* claim precluded by availability of judicial review under APA). Here, "unlike the *Bivens* remedy . . . injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Corr. Servs. Corp.*, 534 U.S. at 74. The Supreme Court has repeatedly implied private causes of action for equitable claims brought under constitutional provisions. *See, e.g., Trump v. Hawai'i*, 138 S. Ct. 2392, 2416 (2018) (Establishment Clause); *Nat'l Lab. Relations Bd. v. Noel Canning*, 573 U.S. 513, 556–57 (2014) (Recess Appointments Clause); *Boumediene v. Bush,* 553 U.S. 723, 771 (2008) (Suspension Clause); *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998) (Presentment Clause); *INS v. Chadha*, 462 U.S. 919, 956–58 (1983) (Bicameralism and Presentment Clauses); *see also Sierra Club v. Trump*, 977 F.3d at 878 (Appropriations Clause); *United States v. McIntosh*, 833 F.3d 1163, 1174–75 (9th Cir. 2016) (same).

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separation-of-powers principles animate the "constitutional obligation to ensure the faithful execution of the laws" expressed in the Take Care Clause.[7] *Free Enter. Fund*, 561 U.S. at 484 (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.").

In short, the Take Care Clause articulates a "separation-of-powers limitation that [litigants] can invoke to challenge actions that cause justiciable injuries." *See Sierra Club*, 977 F.3d at 878 (internal quotation marks, citations omitted). Plaintiffs here seek to compel the Attorney General to comply with adjudication standards mandated by Congress through the INA.

3. Plaintiffs' Take Care Clause Claim Neither Infringes Upon the Lawful Exercise of Executive Discretion nor Poses Serious Concerns About Judicial Overreach

To Defendants, finding an implied cause of action would infringe on executive discretion, and constitute judicial overreach. *See* Defs. Supp. Br. at 2–7. Not so. The Executive's obligation to "faithfully execute[]" the laws means that it has no 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); *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 604 (D.C. Cir. 1974) (the Take Care Clause "does not permit the [Executive] to refrain from executing laws duly enacted by the Congress"); *E. Bay Sanctuary Covenant v. Trump* ("*EBSC I*"), 932 F.3d 742, 774 (9th Cir. 2018) (same); *see*

[7] In reaching the merits of the Take Care Clause claim in *Bernhardt*, the Ninth Circuit explained that "a court's understanding of 'the reach and purpose' of the constitutional provision at issue . . . must be informed by '[t]he separation-of-powers doctrine, and the history that influenced its design.'" *Bernhardt*, 946 F.3d at 561. By requiring the Executive to "take Care" that the laws be "faithfully" executed, the Take Care Clause empowers the executive branch, and by referencing "Laws" duly enacted by Congress limits the exercise of that power. *See* U.S. Const. art. II, § 3. The Supreme Court has invoked the Clause as the textual source of the Executive's duty to abide by and enforce the laws enacted by Congress. *See* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause,* 164 U. Pa. L. Rev. 1835, 1848–51 (2016) (describing the Take Care Clause as "the instantiation of the President's duty to respect legislative supremacy and not to act *contra legem*").

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also Util. Air Regul. Grp. v. E.P.A., 573 U.S. 302, 327 (2014) (power to execute the laws does not "include a power to revise clear statutory terms that turn out not to work in practice").[8] Congress obligated the Attorney General to oversee the immigration court system in accordance with the INA. The Attorney General must ensure operation of the INA's case-by-case adjudication standards, *see* Compl. ¶¶ 194–95, and has no discretion to suspend or limit them. *See Util. Air Reg. Grp.*, 573 U.S. at 327–28; *Youngstown*, 343 U.S. at 587.

Recent district court decisions cited by Defendants do not direct otherwise. In *City of Columbus v. Trump,* 453 F. Supp. 3d 770 (D. Md. 2020), the district court denied plaintiffs' Take Care Clause claim "because judicial intervention [] would impinge on the *discretion* that Congress has afforded to the President and entrust to the courts the 'executive and political' duties of determining how to 'faithfully execute' the [Affordable Care Act]."[9] *Id.* at 803 (emphasis in original); *see also CREW*, 302 F. Supp. 3d at 140 (denying Take Care Clause claim challenging the President's discretionary decision to act through executive order). Similarly, in *In re Border Infrastructure Env't Litig.*, 284 F. Supp. 3d 1092, 1139 (S.D. Cal. 2018), *aff'd*, 915 F.3d 1213 (9th Cir. 2019), the district court denied a Take Care Clause claim against the Executive's use of "discretionary authority" that was "plausibly called for by an act of Congress." Here, by contrast, Plaintiffs do not challenge *how* the Attorney General "faithfully executes" the INA's case-by-case adjudication standards, but instead assert that the Attorney General's disregard for these standards constitutes a *failure* to faithfully execute them.[10] *See* Compl. ¶¶ 193–200; Pl. Resp. Opp. Mot. to

[8] Indeed, as this Court noted in its Order on Defendants' motion to dismiss, "it appears that even the U.S. Department of Justice understands the Take Care Clause to create some actionable limits on the executive." MTD Order 24 (citing *NAACP v. Trump*, 298 F. Supp. 3d 209, 239–40 (D.D.C. 2018) (referencing arguments under the Take Care Clause in the "Sessions Letter")).

[9] In *City of Columbus*, the district court relied on *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866) and limited judicial review over "the degree of discretion left to the *President*." *See* 453 F. Supp. 3d at 802 (emphasis added). It did not consider, as here, a case in which *another* executive official violated the terms of his congressionally mandated powers.

[10] Similarly, Defendants' reliance on *Dalton v. Specter*, 511 U.S. 462 (1994), is misplaced, as its holding relates to the Executive's exercise of lawfully delegated discretion rather than, as here, to its widespread, persistent, and egregious violation of a congressional command. *See id.* at 476.

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Dismiss (ECF 57) 5, 37–38. Whether Plaintiffs ultimately prove that the Attorney General's disregard of the INA's standards is sufficiently widespread, persistent, and egregious to constitute a violation of the Take Care Clause is the ultimate merits question; it suffices now that Plaintiffs' allegations state a facially plausible claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Defendants suggest that *Johnson* held that the Take Care Clause is nonjusticiable. *See* Defs. Supp. Br. 4–5. But there are "no case[s] adopting that understanding of *Johnson*." *CREW*, 302 F. Supp. 3d at 139. The *Johnson* Court, "limit[ing its] inquiry to the question presented," concluded that *the President* may not be named as a Defendant or personally enjoined from *enforcing federal law* that was arguably unconstitutional. *Johnson*, 71 U.S. at 498–99. *Johnson*, by its terms, is limited to its facts and does not foreclose other claims, "particularly against executive branch officials other than the President."[11] *See CREW*, 302 F. Supp. 3d at 139. *Johnson* thus has no bearing on the claims here, against the Attorney General. *See United States v. Navarro-Vargas*, 408 F.3d 1184, 1205 (9th Cir. 2005) (en banc) (recognizing that the Executive's duty under the Take Care Clause "can be delegated to subordinates, including the attorney general"); *In re Border Infrastructure Env't Litig.*, 284 F. Supp. 3d at 1138 (same).

Defendants' complaint about judicial interference is also overblown, conflating challenges to discrete agency actions or inactions with the allegations here: utter disregard of congressional mandate. The former fall within the purview of the Administrative Procedure Act.[12] *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review."); *see also Match-E-Be-Nash-She-Wish*

[11] *Johnson* is widely viewed as a political question case, rather than a statement on the Take Care Clause and its justiciability. *See, e.g.*, *CREW*, 302 F. Supp. 3d at 139.
[12] Defendants misrepresent *Norton v. Southern Utah Wilderness Alliance*, an APA case that does not address the Take Care Clause or any constitutional cause of action. *See* 542 U.S. 55, 67 (2004). Plaintiffs' first claim is not and could not be brought under the APA. And because it not a mandamus claim, the denial of mandamus in *Nat'l Treasury Employees Union* is unavailing. *See* Defs. Supp. Br. 3–5.

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Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 225 (2012) (noting Congress's "evident intent" in enacting the APA to make all agency action presumptively reviewable).

Plaintiffs' allegations under the Take Care Clause, however, are targeted to a persistent and egregious course of conduct that disregards a congressional mandate.[13] Pl. Resp. Opp. Mot. to Dismiss (ECF 57) 37–38; Compl. ¶¶ 193–200. Plaintiffs allege that the Attorney General has disregarded the adjudicatory standards of the INA to such an extent that he has effectively suspended the statutory scheme that he has a duty to oversee, violating separation-of-powers and the Take Care Clause. *Id.* That is a question for the courts. *See Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982); *Nat'l Treasury Emps. Union*, 492 F.2d at 604. Plaintiffs' claim is thus not only justiciable, but sufficiently rare (persistent and egregious disregard of a congressional mandate) that it should not open the floodgates to litigation.

B. Plaintiffs Are Entitled to Seek Equitable Relief for the Government's Conduct Flouting 8 U.S.C. § 1229a's Impartial Adjudicator Requirement

The second question this Court directed the parties to brief is whether the impartial adjudicator requirement in 8 U.S.C. § 1229a provides "a private cause of action." ECF 112. Notably, Plaintiffs do not seek review of discrete violations of § 1229a—*i.e.*, those that may be addressed on a case-by-case basis through petitions for review, and need not look to the statute as the source of a private cause of action. Plaintiffs instead seek to invoke the Court's equitable power to enjoin executive conduct that is unconstitutional or *ultra vires*. This avenue to equitable relief—the doctrine of "nonstatutory review"—has been recognized for more than a century. *See generally*

[13] Defendants also miscite *Lujan* for the proposition that a cause of action under the Take Care Clause would result in impermissible judicial interference. *See* Defs. Supp. Br. 6; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992). 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 grievances 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. *Lujan* is fundamentally a standing case; it is not a Take Care Clause case, and it certainly cannot be turned on its head to hold that the Clause is unenforceable.

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33 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 8307 (2d ed. 2021). Regardless, § 1229a provides an implied right of action. Thus, this Court may review Plaintiffs' impartial adjudicator claim regardless of whether § 1229a provides a private right of enforcement.

1. The Doctrine of Nonstatutory Review Provides a Well-Established Mechanism to Seek Review of *Ultra Vires* Conduct by the Executive Branch

The doctrine of nonstatutory review derives from courts' traditional, inherent authority to review and prospectively enjoin or declare unlawful *ultra vires* or unconstitutional action by the Executive. *See, e.g.*, *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 111 (1902); *accord Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 681 (1986). Nonstatutory review is based on the well-established presumption in favor of judicial review of executive action in the absence of "clear and convincing evidence of a contrary legislative intent." *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)). Courts have jurisdiction to hear nonstatutory review suits under their general federal question jurisdiction, 28 U.S.C. § 1331.[14] *See* 33 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 8307 (2d ed. 2021); *see also, e.g.*, *Leedom v. Kyne*, 358 U.S. 184, 188 (1958) (district court had authority to review and "strike down an order . . . made in excess of its delegated powers and contrary to a specific prohibition in the Act," even where statute contained no express enforcement remedy).

Even without naming it as such, courts conduct "nonstatutory review" in cases challenging unconstitutional or unauthorized executive conduct. *See, e.g.*, *Hawai'i v. Trump*, 878 F.3d 662, 682 (9th Cir. 2017), *rev'd and remanded* (on other grounds), 138 S. Ct. 2392 (2018); *R.I. Dep't of Env't Mgmt. v. United States*, 304 F.3d 31, 41–42 (1st Cir. 2002); *Chamber of Com. v. Reich,* 74

[14] In 1976, Congress explicitly waived sovereign immunity for *all* claims for nonmonetary relief against a federal "agency or an officer or employee thereof." *See* 5 U.S.C. § 702; *see also Presbyterian Church (USA) v. United States*, 870 F.2d 518, 523–26 (9th Cir. 1989) ("Congress' plain intent in amending § 702 was to waive sovereign immunity for all [equitable actions to redress government misconduct] . . . ."); *Sierra Club v. Trump*, 929 F.3d 670, 699–700 (9th Cir. 2019) (waiver of sovereign immunity in § 702 permitted equitable claim for prospective relief against Executive).

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F.3d 1322, 1328 (D.C. Cir. 1996). Nonstatutory review is particularly appropriate where, as here, constitutional concerns are at stake. *See, e.g.*, *Sierra Club v. Trump,* 929 F.3d at 698–99 (non-APA claim seeking to enjoin agency's unconstitutional or *ultra vires* actions).[15]

Plaintiffs' second cause of action is readily amenable to nonstatutory review. Plaintiffs allege a course of conduct to subvert the impartiality of immigration court judges. *See* Compl. ¶¶ 201–07. This course of conduct exceeds Defendants' statutory authority, which requires that removal orders be "based only on the evidence produced at the hearing," 8 U.S.C. § 1229a(c)(1)(A). This impartial adjudicator requirement, which incorporates the impartial adjudicator guarantees embodied in the Fifth Amendment Due Process Clause, is both statutory and constitutional. *See, e.g.*, *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950), *overruled on other grounds*, *Marcello v. Bonds*, 349 U.S. 302 (1955) ("When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality."); *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882–87 (2009) (describing "constitutionally intolerable probability of actual bias"); *Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975) (same).

By usurping Congress's role, Defendants have also violated separation of powers, which also renders their conduct subject to judicial review. *See Stark v. Wickard*, 321 U.S. 288, 309–10 (1944) ("The responsibility of determining the limits of statutory grants of authority . . . is a judicial function . . .); *Leedom*, 358 U.S. at 190 ("This Court cannot lightly infer that Congress does not

[15] Ninth Circuit law "clearly contemplate[s] that claims challenging agency actions—particularly constitutional claims—may exist wholly apart from the APA." *Sierra Club v. Trump*, 929 F.3d at 698; *see also California v. Trump*, 963 F.3d 926, 941 n.12 (9th Cir. 2020) (equitable *ultra vires* cause of action and APA cause of action can proceed separately); *Olivas v. Whitford*, No. 14-1434, 2015 WL 867350, at *4–6 (S.D. Cal. Mar. 2, 2015); *R.I. Dep't of Env't Mgmt.*, 304 F.3d 31; *Clinton v. Babbitt*, 180 F.3d 1081, 1086 (9th Cir. 1999). Although the Supreme Court stayed the Ninth Circuit's 2019 order in *Sierra Club*, *see Trump v. Sierra Club*, 140 S. Ct. 1 (2019), the order remains good law. *See Washington v. U.S. Dep't of Homeland Sec.*, No. 19-5210, 2020 WL 4667543, at *6 (E.D. Wash. Apr. 17, 2020) (Ninth Circuit panel opinion in *Sierra Club* was binding notwithstanding stay); *California v. Trump*, 407 F. Supp. 3d 869, 885 (N.D. Cal. 2019) (same).

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intend judicial protection of rights it confers against agency action taken in excess of delegated powers.").

Nonstatutory review is available when plaintiffs have no other "meaningful and adequate means of vindicating [their] . . . rights," and Congress did not clearly intend to preclude review. *Cf. Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43–44 (1991). Unlike a final agency action, which would be reviewable under the APA, *see* 5 U.S.C. § 706(2), Plaintiffs here challenge a long-term course of *ultra vires* conduct. They have no other way to assert their claims regarding systemic failure of impartial adjudication.

And Congress did not manifest an intent to preclude such review, much less a "clear" intent.[16] The APA also does not bar such review. *See Sierra Club*, 929 F.3d at 699 (although "the APA is the general mechanism by which to challenge final agency action . . . this does not mean that the APA forecloses other causes of action," including equitable causes of action). Nor does 8 U.S.C. § 1252(a)(5), which limits jurisdiction over an "order of removal"; because Plaintiffs do not challenge any such order, this Court properly concluded that their claims fall "outside the bounds of the narrow language of the statute." MTD Order 13. And this Court already correctly found that neither § 1252(a)(5) nor § 1252(b)(9) "preclude[s] judicial review for all questions of law that may be somehow related to removal proceedings," and that "[a]llowing organizational plaintiffs to bring claims alleging systemic problems, independent of any removal orders" does not thwart the purpose of the statute. MTD Order 14, 17. Because there is no clear congressional intent to preclude review of Plaintiffs' impartial adjudicator claim, *see R.I. Dep't of Env't Mgmt.*,

[16] For claims amenable to nonstatutory review, the Court is not asked to divine whether Congress affirmatively intended to *create* a cause of action, but rather to determine whether there is "clear and convincing evidence of a contrary legislative intent," i.e., intent to *eliminate* one, in the context of a presumption of reviewability under the Court's equitable powers. *Traynor*, 485 U.S. at 542.

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304 F.3d at 44, this Court may rely on the "residuum of power" that it retains "even after passage of the APA" to review and enjoin *ultra vires* or unconstitutional agency action, *id.* at 42.[17]

Finally, Defendants' reliance on *California v. Sierra Club*, 451 U.S. 287 (1981), *Alexander v. Sandoval*, 532 U.S. 275 (2001), and *Cort v. Ash*, 422 U.S. 66 (1975), is misplaced, as each addresses the wrong question—*i.e.*, whether a statute creates a private right of action. *See* Defs. Supp. Br. 10–15). Because the doctrine of nonstatutory review provides a well-established mechanism for judicial review of the conduct alleged here, the Court need not look for a cause of action in the statute itself, nor try to derive one from the drafters' intent.

2. Even If the Doctrine of Nonstatutory Review Did Not Apply, Case Law Supports an Implied Private Right of Action Under § 1229a

At least one court in this Circuit has found that § 1229a contains an implied private right of action to enforce its terms. *See Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1058–59 (C.D. Cal. 2019). If the Court reaches this question, it should reach the same conclusion.

In *Torres*, a group of detained noncitizens alleged that conditions of confinement at the Adelanto detention facility interfered with their legal rights in immigration proceedings under, *inter alia*, 8 U.S.C. § 1229a. Citing *Alexander v. Sandoval*, 532 U.S. at 285, the district court found an implied private right of action based on the statutory text and the INA's structure, which revealed Congress's intent to allow private enforcement of the rights guaranteed by § 1229a. 411 F. Supp. 3d at 1058–60.

Defendants provide no persuasive argument against *Torres*. And properly applied, the three-part test from *Cort v. Ash*, 422 U.S. at 78, supports Plaintiffs. The first part of the test asks whether the plaintiff is "one of the class for whose especial benefit the statute was enacted." *Id.*

[17] Defendants also argue that 8 U.S.C. § 1329 manifests Congress's intent to exclude a private right of action to enforce the INA. *See* Defs. Supp. Br. 12 n.7. This Court has also rejected that claim, noting that § 1329 only deprives private parties of a cause of action to pursue "otherwise unreviewable" claims. MTD Order 17–18, citing *Sulit v. Schiltgen*, 213 F.3d 449, 453 n.2 (9th Cir. 2000); *Allen v. Miles*, 896 F.3d 1094, 1106–07 (9th Cir. 2018). Plaintiffs' claims here, unlike consular decisions, are not "otherwise unreviewable."

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There is no dispute that immigration court respondents are individuals accorded rights under § 1229a, *see* Defs. Supp. Br. 11. Likewise, the statute recognizes the integral role of legal service providers in § 1229a removal proceedings. *See, e.g.*, 8 U.S.C. §§ 1158(d)(4), 1229(a)(1)(E), (b) (setting out the right to counsel in removal proceedings, and requiring Executive Office for Immigration Review ("EOIR") to provide a list of pro bono legal service providers to respondents); 70 Fed. Reg. 55662, 55662 (Sept. 17, 2013) (explaining that the list "is central to EOIR's efforts to improve the amount and quality of representation before it's [sic] adjudicators, and it is an essential tool to inform [noncitizens] in proceedings before EOIR of available pro bono legal services"); Compl. at ¶¶ 40–46 (explaining Plaintiffs' role in proceedings under § 1229a, including, *inter alia*, participation in the statutorily-required pro bono legal service providers list).[18]

The second part of the *Ash* test considers whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one," *Ash*, 422 U.S. at 78. Here, the intent is implicit. Congress created an adjudication system knowing, and clearly intending, that noncitizens in removal proceedings could sue to enforce their rights under § 1229a, *see Torres*, 411 F. Supp. 3d at 1058–60, including the right to impartial adjudication. It follows that this right extends to organizations like Plaintiffs who fall within the INA's zone of interests and who rely on impartial adjudication to pursue their mission of providing meaningful representation in the immigration courts. *See* MTD Order 10–12; *EBSC I*, 932 F.3d at 768–69. Moreover, the statute evinces no legislative intent to deny a remedy here. *See supra*, part B.1; *see also Trump v. Hawai'i*, 138 S. Ct. at 2407 (assuming without deciding that plaintiffs' statutory

[18] *See also Torres*, 411 F. Supp. 3d at 1060 ("The right [to counsel] appears to be integral to the INA's foundation, because Congress mentions the right in two disparate sections of the 1952 immigration code and has declined to substantially modify it since. [] A private right of action is therefore consistent with this legislative scheme, and directly advances the main purpose of the INA." (citing Pub. L. No. 82-414, §§ 242, 292, 66 Stat. 209, 235 (June 27, 1952))).

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claims under the INA were reviewable in the absence of any provision that "expressly strips the Court of jurisdiction over plaintiffs' claims").[19]

Finally, the third part of the *Ash* test favors Plaintiffs: an implied remedy to permit judicial review to address the organizational harms alleged in the Complaint is wholly "consistent with the underlying purposes of the legislative scheme." *Ash*, 422 U.S. at 78. Allowing legal service providers to bring direct claims challenging systemic violations of the INA's broad statutory scheme not only helps protect the integrity of the immigration courts, but also permits redress of these broader issues in a way that avoids the type of piecemeal litigation that Congress sought generally to avoid. *See* H.R. Rep. No. 109-72, at 174–76 (describing history of related INA provisions and Congress's desire to promote efficiency); *see also EBSC I*, 932 F.3d at 769 (concluding that direct reliance of INA's statutory provisions "on institutions like [Plaintiffs] to aid immigrants" is sufficient to support "an inference that Congress would have intended [their] eligibility to bring suit.").[20]

II. CONCLUSION

The federal courts' role in providing a check on the Executive is central to the separation-of-powers scheme of the Constitution. Plaintiffs respectfully request that this Court reaffirm its previous ruling on Defendants' motion to dismiss that Plaintiffs' Take Care Clause and impartial adjudicator claims state cognizable claims for relief.

[19] While Defendants suggest that the INA's petition-for-review provisions preclude a private right of action for Plaintiffs, this Court has already rejected that argument. MTD Order 13, 17.

[20] Citing three unpublished cases, Defendants make the sweeping assertion that the "majority of courts have found . . . that the INA does not create a stand-alone cause of action." Defs. Supp. Br. 14–15. But, as the government itself acknowledges, none of these cases even deals with § 1229a. *Id.* In two of them, the court found that the plaintiffs' claims could have been raised under the APA. *See Singh v. Cissna*, No. 18-782, 2018 WL 4770737, at *7 (E.D. Cal. Oct. 1, 2018); *Huiwu Lai v. United States*, No. C17-1704, 2018 WL 1610189, at *4 (W.D. Wash. Apr. 3, 2018). In the third, the relevant INA provision explicitly barred the plaintiff's claim. *See Jaskiewicz v. DHS*, No. 06-3770, 2006 WL 3431191, at *4 n.2 (S.D.N.Y. Nov. 29, 2006).

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