Stephen Manning, OSB No. 013373
smanning@ilgrp.com
Nadia Dahab, OSB No. 125630
nadia@innovationlawlab.org
Jordan Cunnings, OSB No. 182928
jordan@innovationlawlab.org
Tess Hellgren, OSB No. 191622
tess@innovationlawlab.org
INNOVATION LAW LAB
The Oregon Trail Bldg
333 SW 5th Ave Ste 200
Portland OR 97204
Telephone: 503.241.0035

Melissa Crow *(admitted pro hac vice)*
Melissa.Crow@splcenter.org
SOUTHERN POVERTY LAW CENTER
1101 17th Street, NW, Suite 705
Washington, DC 20036
Telephone: 202.355.4471

Thomas R. Johnson, OSB No. 010645
TRJohnson@perkinscoie.com
Bryan D. Beel, OSB No. 073408
BBeel@perkinscoie.com
Heidee Stoller, OSB No. 072835
HStoller@perkinscoie.com
Nathan R. Morales, OSB No. 145763
NMorales@perkinscoie.com
PERKINS COIE LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Telephone: 503.727.2000

Rebecca Cassler *(admitted pro hac vice)*
Rebecca.Cassler@splcenter.org
Gracie Willis *(admitted pro hac vice)*
Gracie.Willis@splcenter.org
SOUTHERN POVERTY LAW CENTER
150 E. Ponce de Leon Avenue, Suite 150
Decatur, GA 30030
Telephone: 404.221.6700

Attorneys for Plaintiffs
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

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' SUPPLEMENTAL SURREPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Pursuant to this Court's Scheduling Order, ECF 70, Plaintiffs submit this Supplemental Surreply addressing Defendants' arguments with respect to 8 U.S.C. § 1252(f)(1) and the Ninth Circuit's decision in *Padilla v. Immigration & Customs Enforcement*, 953 F.3d 1134 (9th Cir. 2020).

I. INTRODUCTION

Section 1252(f)(1) does not apply in this case because Plaintiffs do not seek to enjoin or restrain the operation of 8 U.S.C. §§ 1221–32 or any other provision of the INA. *Padilla* is therefore irrelevant. In *Padilla*, the Ninth Circuit construed the "exception clause" of § 1252(f)(1) to permit injunctive relief to enjoin or restrain the operation of the removal statutes when the relief is sought by a class of noncitizens against whom proceedings have been initiated. 953 F.3d at 1151. But § 1252(f)(1) limits the court's authority only with respect to enjoining or restraining the operation of the removal statutes. Here, Plaintiffs do not seek to enjoin or restrain the operation of the removal statutes; rather, they seek to enforce their provisions. Section 1252(f)(1) is therefore not a bar to relief, and there is no need to invoke its exception clause.

II. ARGUMENT

Section 1252(f)(1) provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [8 U.S.C. §§ 1221–1232], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. § 1252(f)(1). The provision is "nothing more or less than a limit on injunctive relief . . . against the operation of [the removal statutes]." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999). Thus, it does not preclude a district court from exercising jurisdiction over a plaintiff's claims; rather, it reflects Congress's intent, at the time that it overhauled the INA in 1996, to limit a court's ability to enjoin the INA's removal procedures to challenges brought "by, and only by, [noncitizens] against whom the new procedures had been applied." *Am. Immigration Lawyers Ass'n v. Reno*,

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

199 F.3d 1352, 1359–60 (D.C. Cir. 2000); *Arroyo v. U.S. Dep't of Homeland Sec.*, 2019 WL 2912848, at *7 (C.D. Cal. 2019) (same).

The scope of § 1252(f)(1) is limited in at least three important respects. First, the provision limits the relief a court may afford *only* with respect to claims seeking to enjoin or restrain "the operation of" the removal statutes; it does not limit this Court's authority to enjoin or restrain alleged violations of those statutes, as requested here. *Rodriguez v. Hayes*, 591 F.3d 1105, 1120 (9th Cir. 2010) (holding that § 1252(f)(1) "prohibits only injunction of 'the operation of' the [immigration statutes], not injunction of a violation of the statutes"); *Ali v. Ashcroft*, 346 F.3d 873, 886 (9th Cir. 2003), *vacated on other grounds sub nom. Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005) (holding that where a claim "seeks to enjoin conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of part IV of subchapter II, and § 1252(f)(1) therefore is not implicated"); *Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1050 (C.D. Cal. 2019) (holding that § 1252(f)(1) does not apply where the relief, "rather than preventing the operation of the INA, seeks to enforce its provisions"); *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015) (§ 1252(f)(1) poses no bar to relief where claims seek to enjoin conduct that violates the removal statutes).

Second, the provision does not limit a court's authority in any respect when the request for relief is on constitutional grounds. *See Ali*, 346 F.3d at 886 (§ 1252(f)(1) does "not bar injunctive relief for a class because the class members sought not to enjoin the statute but constitutional violations and INS policies and practices" (internal quotation marks omitted)); *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1205 n.19 (N.D. Cal. 2017), *aff'd* 905 F.3d 1137 (9th Cir. 2018) (§ 1252(f)(1) does not bar an injunction that "neither enjoins nor restrains *the proper* [*i.e.*, constitutional] operation of any part of Part IV of the immigration statutes." (emphasis added)); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (leaving open the possibility that § 1252(f)(1) does not apply to constitutional claims). Thus, even if § 1252(f)(1) applied in

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

this case—and for the reasons explained below, it does not—it would not apply to Plaintiffs' claim under the Take Care Clause, which seeks an order requiring Defendants to take specific corrective actions to ameliorate and mitigate the dysfunctionality of the immigration court system that has resulted in asylum-free zones, immigration court backlogs, and the lack of impartial adjudication. Compl. at 62, ¶ (d).

Third, by its terms, § 1252(f)(1) applies only to requests for injunctive relief; thus, it does not limit a court's authority when the request for relief is declaratory.[1] Those three limitations plainly eliminate § 1252(f)(1) as a jurisdictional bar in this case.

Section 1252(f)(1) "poses no bar" here because Plaintiffs do not challenge the operation of the removal statutes; instead, they seek to enjoin or restrain Executive or agency actions that *violate* those statutes. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 143 (D.D.C. 2018); *see also Jennings*, 138 S. Ct. at 851 (court may enjoin or restrain "conduct . . . not authorized by the statutes"); *Rodriguez*, 591 F.3d at 1120 (court may enjoin a violation of the INA). As Plaintiffs allege in their complaint, the INA's case-by-case adjudication standards apply in all U.S. immigration courts, Compl. ¶¶ 34–39 (citing, *e.g.*, 8 U.S.C. § 1229a(b)–(c)), and those standards necessarily incorporate the impartial adjudicator guarantee under the Fifth Amendment, *id.* ¶ 202. Plaintiffs further allege that Defendants have engaged in conduct, including final agency actions implementing the Enforcement Metrics Policy and the FAMU Directive, in violation of those statutory commands. *Id.* ¶¶ 197 (alleging that the Attorney General has suspended the INA's statutory standards); 204 (alleging that Defendants have violated the INA and the impartial adjudicator guarantee by implementing policies that are inconsistent with the INA's case-by-case adjudication standards and that prevent immigration judges from serving as

---

[1] Defendants do not and cannot argue otherwise. In their reply, Defendants do not take issue with Plaintiffs' requests for declaratory relief. *See* Defendants' Reply in Support of Motion to Dismiss ("Reply") at 22; *see also Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018) (Section 1252(f)(1) "does not affect classwide declaratory relief").

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

impartial adjudicators); 212 (alleging that the Enforcement Metrics Policy violates the INA, and therefore the APA); 222 (same); 230 (alleging that the FAMU Directive violates the INA, and therefore the APA); 239 (same).[2] In their prayer for relief, Plaintiffs seek to enjoin or restrain Defendants' continuing violations of the INA's statutory scheme. *Id.* at 62, ¶¶ (b)–(d). In other words, Plaintiffs' claims in this case do not seek to enjoin or restrain the operation of the removal statutes—rather, they seek to enforce them. Accordingly, § 1252(f)(1) does not limit the Court's authority to grant the relief that Plaintiffs seek. *See Rodriguez*, 591 F.3d at 1120.

Defendants mischaracterize the nature of Plaintiffs' claims and prayer for relief. They contend, incorrectly, that Plaintiffs' prayer for relief seeks to "change the operation of the immigration court system" by "alter[ing] the statutory provisions that apply to proceedings in immigration court." Reply at 22–23. But that is simply wrong—as explained above, Plaintiffs' claims seek not to change, but to *protect* the immigration court system that Congress created and the adjudicatory standards that govern it. Defendants further contend, incorrectly, that Plaintiffs seek to "rewrite [the INA's] statutory provisions to place additional limitations on the government's authority" that are not required by Congress. Reply at 23. But again, Plaintiffs do not seek to change or "rewrite" the INA; they seek to prevent and correct Defendants' ongoing and systemic violations of the INA, and to enjoin policies that the INA does not permit. And, recognizing that § 1252(f)(1) requires a statutory hook, Defendants unpersuasively seek to tie their argument to §§ 1229 or 1229a. *See* Reply at 23. But that argument does not change the fact that Plaintiffs do not seek to enjoin either of those statutory provisions. The Court should reject Defendants' mischaracterizations—because Plaintiffs seek to enjoin conduct that is not

---

[2] Indeed, Plaintiffs' APA claims seek to enjoin final agency action, and not the operation of any statute. Section 1252(f)(1) does not limit the Court's authority to vacate that agency action pursuant to Plaintiffs' requests. *See Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018) (vacatur and remand is the presumptively appropriate remedy under the APA).

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

authorized by statute in the first place, "§ 1252(f)(1) . . . is not implicated." *Ali*, 346 F.3d at 886.[3]

The Ninth Circuit's decision in *Padilla* does not compel a contrary result. *Padilla* was a class action that challenged a government policy relating to bond hearings for asylum seekers detained pursuant to 8 U.S.C. § 1225(b)(1)(B)(ii). 953 F.3d at 1139–40. The district court held that certain procedures during those hearings were required and issued an injunction to that effect. *Id.* at 1140 (also describing those procedures). The Ninth Circuit assumed, without deciding, that the district court had issued an order "enjoin[ing] or restrain[ing] the operation of" the removal statutes, and the parties assumed that § 1252(f)(1) applied. *Id.* at 1153 n.1 (Bade, J., dissenting) ("Plaintiffs do not argue that [they seek] to prevent conduct not authorized by § 1225(b)(1)(B)(ii); they directly challenge the 'operation of' that statute."). The only question for the court, then, was whether the class claims fell within the scope of § 1252(f)(1)'s "exception clause"—the clause permitting a court to "enjoin or restrain the operation of" the removal statutes "with respect to the application of such provisions to an individual alien against whom proceedings . . . have been initiated." *Id.* at 1149. The Ninth Circuit held that they did and upheld the district court's order. *Id.* at 1151.

Padilla, even if it is correct, does not apply here. In *Padilla*, the district court had issued an order "enjoin[ing] or restrain[ing] the operation of" § 1225(b)(1)(B)(ii); thus, § 1252(f)(1) clearly applied. *Padilla*, 952 F.3d at 1153 n.1 (Bade, J., dissenting). The issue in *Padilla* was whether the class members' claims for injunctive relief fell within § 1252(f)(1)'s exception

---

[3] The cases Defendants cite, each of which involves plaintiffs seeking classwide injunctive relief related to the operation of §§ 1221–1232, are distinguishable and do not help Defendants. The district court in *Hamama v. Adducci*, 912 F.3d 869, 879–80 (6th Cir. 2018), as in *Padilla*, sought to impose additional requirements for bond hearings that did not exist in statute. Thus, that court, like the *Padilla* court, held that § 1252(f)(1) precluded relief. *Id.* And in *Vazquez Perez v. Decker*, 2019 WL 4784950, at *8 (S.D.N.Y. 2019), the court agreed with Plaintiffs here that "Section 1252(f)(1) may not strip it of jurisdiction to enjoin explicit violations of Sections 1221–1232 as written, because such an injunction cannot be said to 'enjoin or restrain' the operation of those provisions."

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

clause. Here, by contrast, § 1252(f)(1) does not apply in the first instance: Plaintiffs do not seek to enjoin or restrain the operation of any statutes—rather, all of Plaintiffs' prayed-for relief seeks to remedy alleged violations of the statute or the Constitution. *Cf. id.*; *see also Rodriguez*, 591 F.3d at 1120; *Ali*, 346 F.3d at 886; *Torres*, 411 F. Supp. 3d at 1050; *R.I.L-R*, 80 F. Supp. 3d at 184. Because § 1252(f)(1) does not apply in the first place, Plaintiffs need not invoke its exception clause.[4] *Padilla*'s holding with respect to the exception clause is therefore irrelevant.

III. CONCLUSION

Section 1252(f)(1) does not limit the Court's authority to issue injunctive relief in this case. None of Plaintiffs' requests for relief seek "to enjoin or restrain the operation of" any immigration statutes; rather, each seeks to enforce those statutes and prevent or correct Defendants' ongoing and systemic violations of those statutes. In these circumstances—where Plaintiffs seek to enjoin conduct that is not authorized by statute *in the first place*, "§ 1252(f)(1) . . . is not implicated." *Ali*, 346 F.3d at 886 (so holding).

[4] Likewise, *Padilla*'s discussion of Congress's intent to prohibit organizational plaintiffs from seeking to enjoin or restrain the operation of the removal statutes, *see* 953 F.3d at 1150, is irrelevant because, as explained above, Plaintiffs here do not seek to enjoin or restrain the operation of the removal statutes.

Perkins Coie LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

DATED: June 25, 2020

PERKINS COIE LLP

By: *Thomas R. Johnson*

Thomas R. Johnson, OSB 010645
TRJohnson@perkinscoie.com
Bryan D. Beel, OSB No. 073408
BBeel@perkinscoie.com
Heidee Stoller, OSB No. 072835
HStoller@perkinscoie.com
Nathan R. Morales, OSB No. 145763
NMorales@perkinscoie.com
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Telephone: 503.727.2000

Stephen Manning, OSB No. 013373
smanning@ilgrp.com
Nadia Dahab, OSB No. 125630
nadia@innovationlawlab.org
Jordan Cunnings, OSB No. 182928
jordan@innovationlawlab.org
Tess Hellgren, OSB No. 191622
tess@innovationlawlab.org
INNOVATION LAW LAB
The Oregon Trail Bldg
333 SW 5th Ave Ste 200
Portland OR 97204
Telephone: 503.241.0035

Melissa Crow *(admitted pro hac vice)*
Melissa.Crow@splcenter.org
SOUTHERN POVERTY LAW CENTER
1101 17th Street, NW, Suite 705
Washington, DC 20036
Telephone: 202.355.4471

Rebecca Cassler *(admitted pro hac vice)*
Rebecca.Cassler@splcenter.org
Gracie Willis *(admitted pro hac vice)*
Gracie.Willis@splcenter.org
SOUTHERN POVERTY LAW CENTER
150 E. Ponce de Leon Avenue, Suite 150
Decatur, GA 30030
Telephone: 404.221.6700

Attorneys for Plaintiffs 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