Stephen Manning, OSB No. 013373
smanning@ilgrp.com
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

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

Thomas R. Johnson, OSB No. 010645
TRJohnson@perkinscoie.com
Heidee Stoller, OSB No. 072835
HStoller@perkinscoie.com
Bryan D. Beel, OSB No. 073408
BBeel@perkinscoie.com
Alletta Brenner, OSB No. 142844
ABrenner@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: 404.521.6700

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;,

Plaintiff,

v.

JOSEPH R. BIDEN, JR., et. al.;,

Defendants.

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

PLAINTIFFS' MOTION TO COMPEL DISCOVERY BEYOND THE ADMINISTRATIVE RECORD

Pursuant to FRCP 37(a)

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page(s)

Perkins Coie LLP
AuthorOfficeAddress
Phone: AuthorOfficeGeneralNo1
Fax: AuthorOfficeFaxNo1

TABLE OF AUTHORITIES

Page(s)

CASES

Perkins Coie LLP
AuthorOfficeAddress
Phone: AuthorOfficeGeneralNo1
Fax: AuthorOfficeFaxNo1

TABLE OF AUTHORITIES (continued)

Page(s)

STATUTES

OTHER AUTHORITIES

Perkins Coie LLP
AuthorOfficeAddress
Phone: AuthorOfficeGeneralNo1
Fax: AuthorOfficeFaxNo1

LR 7-1 CERTIFICATION

Pursuant to Local Rule 7-1, Plaintiffs' counsel certify that the parties have conferred in good faith on the issues presented in this motion regarding the scope of discovery to be allowed for Plaintiffs' first two claims. Following the parties' Rule 16 conference on December 8, 2020, Plaintiffs noted some of the issues raised in this motion in their objections to the administrative records, which they provided to Defendants on January 18, 2021. The parties then conferred telephonically on the discovery issues in this motion on February 1, 2021, and on April 9, 2021. The parties further conferred by telephone on April 12, 2021, at which time Defendants consented to Plaintiffs' filing of this motion. Notwithstanding these multiple conferrals, the parties have been unable to resolve their dispute as to these issues.

MOTION

Plaintiffs respectfully move for an order compelling discovery on their first two claims brought under the Take Care Clause of the U.S. Constitution and the impartial adjudicator requirement of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1229a, beyond the administrative records relevant to Plaintiffs' other claims, which are brought under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. This Motion is supported by the memorandum of law below.

MEMORANDUM OF LAW

I. RELEVANT BACKGROUND

Plaintiffs assert claims against Defendants on several, independent grounds. First, Plaintiffs allege that Defendants have abused their authority and grossly mismanaged the immigration courts in violation of the Take Care Clause of the U.S. Constitution (Claim 1). Complaint, ECF 1 (hereafter "Compl.") ¶¶ 193–200. Second, Plaintiffs allege that by engaging in a pattern of conduct that has fostered an adjudicatory system that is biased against immigrants, Defendants have created and perpetuated a "deportation machine" that violates the impartial

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

adjudicator and case-by-case adjudication requirements set forth in the INA (Claim 2). *Id.* ¶¶ 79, 84–103, 117, 201–07. Third, Plaintiffs allege that two specific policies enacted in recent years—the Enforcement Metrics Policy[1] and the FAMU Directive[2]—violate the APA because they are arbitrary and capricious, not in accordance with the law, and exceed Defendants' statutory authority (Claims 3-6). *Id.* ¶¶ 208–42.

All of Plaintiffs' claims pertain to aspects of dysfunction within the immigration court system. However, their first two claims—both of which allege systemic patterns of unlawful conduct that go beyond the legality of any single policy or action—are based on numerous facts occurring both before and *after* the Enforcement Metrics Policy and FAMU Directive were promulgated. *Compare id.* ¶¶ 80–116, 193–207 (describing long-standing EOIR dysfunction and alleging that Defendants perpetuated and aggravated these problems in violation of the Take Care Clause and INA by failing to take corrective action and weaponizing EOIR through multiple structural changes and policies) *with* ¶¶ 117–154, 208–242 (describing creation and implementation of Enforcement Metrics Policy and FAMU Directive policies in 2018 in violation of the APA). Likewise, while Plaintiffs have alleged that the Enforcement Metrics Policy and FAMU Directive violate the INA's case-by-case adjudication requirements, these are but two of the many ways Defendants have acted unlawfully in violation of their constitutional and statutory obligations. *See* Compl. ¶ 197 (alleging that "[t]he Attorney General has violated the Take Care Clause because he has suspended the INA's case-by-case adjudication standards through the abuse of authority and mismanagement of the immigration courts" and that this "has resulted in the persistence and proliferation of asylum-free zones and the immigration court backlog."); *id.* ¶ 206

[1] The "Enforcement Metrics" policy refers to Defendants' requirements that immigration judges meet certain performance benchmarks, including a Case Completion Quota, Remand Rate, and Speed-Related Adjudication Benchmarks. *See* Complaint (ECF 1) ¶¶ 8–9, 121–126. These requirements, which Defendants have referred to as the "IJ Performance Metrics," were adopted on October 4, 2018, through the Memorandum of Understanding Regarding the Implementation of New Performance Measures for Immigration Judges.

[2] The "FAMU Directive" refers to Defendants' family-unit policy, first laid out in PM 19-04, that establishes a rapid-removal family docketing directive. *See* Complaint (ECF 1) ¶¶ 8, 10, 147–153.

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

(alleging "[d]efendants have violated the INA by implementing the Enforcement Metrics Policy and the FAMU Directive, *by perpetuating asylum-free zones, and by otherwise driving judges to prejudge asylum claims*.") (emphasis added). Consequently, although related to their claims under the APA, Plaintiffs' claims under the Take Care Clause and the INA arise from broader facts giving rise to distinct harms.

II. APPLICABLE LEGAL STANDARD

It is well-established that the Federal Rules of Civil Procedure permit broad discovery and that generally, a plaintiff is entitled to inquire as to "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Harrison v. Hershman*, No. 6:19-CV-00315-AA, 2021 WL 719896, at *2 (D. Or. Feb. 24, 2021) (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)); *see also* FRCP 26(b) (providing that "[u]nless otherwise limited . . . [p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case"). There are some narrow exceptions, however. For example, when a plaintiff challenges an agency policy or decision under the APA, discovery is typically limited to the administrative record before the agency at the time of its action. 5 U.S.C. § 706; *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000).

Given this exception, some courts have declined to permit full discovery even for claims alleged on other grounds when those claims are extremely similar and reliant on the same underlying factual allegations as a parallel claim being alleged under the APA. *See, e.g.*, *Jiahao Kuang v. U.S. Dep't of Def.*, No. 18-CV-03698-JST, 2019 WL 293379, at *2 (N.D. Cal. Jan. 23, 2019) (denying extra-record discovery in case where plaintiffs' constitutional claims required a "fundamentally similar" analysis to that required for plaintiffs' APA claims relating to same agency policy); *J.L. v. Cissna*, No. 18-CV-04914-NC, 2019 WL 2224851 (N.D. Cal. Mar. 8, 2019) (same); *Carlsson v. U.S. Citizenship & Immigration Servs.*, No. 2:12-CV-07893-CAS, 2015 WL

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

1467174, at *13 (C.D. Cal. Mar. 23, 2015) (declining to permit discovery for due process claim that appeared to overlap completely with arguments advanced for APA claim).

However, recently, in *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019), the Ninth Circuit clarified that even when plaintiffs assert one or more claims under the APA, the presence of those APA claims does not preclude plaintiffs from *independently* litigating other causes of action arising from the same basic facts, as "claims challenging agency actions—particularly constitutional claims—may exist wholly apart from the APA." *Sierra Club*, 929 F.3d at 699; *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d 1168, 1216–17 (S.D. Cal. 2019) (*applying Sierra Club* and concluding it was proper for judicial review of a constitutional challenge to agency activities to proceed "independently of the APA's strictures"); *see also Navajo Nation v. Dep't of the Interior,* 876 F.3d 1144, 1170 (9th Cir. 2017) (explaining that APA restrictions do not limit constitutional claims "not grounded in the APA").

Since *Sierra Club*, courts in this Circuit have recognized that if a plaintiff raises a claim independent of the APA, then "the APA's administrative record requirement does not govern the availability of discovery" for that claim. *State v. U.S. Dep't of Homeland Sec.*, No. 4:19-cv-04975-PJH, 2020 WL 1557424, at *13, 14–15 (N.D. Cal. Apr. 1, 2020). *See also, e.g., Washington v. U.S. Dep't of Homeland Sec.*, No. 4:19-CV-5210-RMP, 2020 WL 4667543, at *6 (E.D. Wash. Apr. 17, 2020) (allowing discovery for equal protection claim alleging discriminatory intent, despite claim challenging same rule under APA). And, even before *Sierra Club,* some courts in this Circuit had reached the same conclusion based on earlier Ninth Circuit caselaw. *See*, *e.g.*, *Bolton v. Pritzker*, No. 15-cv-1607MJP, 2016 WL 4555467, at *4 (W.D. Wash. Sept. 1, 2016) (concluding that because "[a] direct constitutional challenge is reviewed independent of the APA" extra-record discovery should be permitted for such a claim) (internal citation omitted); *Grill v. Quinn*, No. CIV S-10-0757 GEB, 2012 WL 174873, at *2–5 (E.D. Cal. Jan. 20, 2012) (permitting full discovery for constitutional claim on ground that such challenges may be litigated independently of APA).

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

Considering this precedent, it is now clear that at least in the Ninth Circuit, asserting one or more claims under the APA alongside other claims based on statutory or constitutional grounds does not deprive a plaintiff of the full discovery that would otherwise be afforded under FRCP 26 for those claims. Rather, so long as a plaintiff's other claims can exist separately from the APA as standalone causes of action, those claims should be treated as such and litigated independently of any restrictions that would otherwise apply under the APA.

III. ARGUMENT

Plaintiffs' first two claims, brought under the Take Care Clause of the U.S. Constitution and the INA, "allege a systemic 'gross mismanagement' of the immigration system by Defendants." MTD Order, ECF 79, at 23. Under *Sierra Club* and its recent progeny, full discovery under FRCP 26 is appropriate for these claims because they are based on constitutional and statutory grounds that are independent of the APA. But even under the "fundamental overlap" test applied by courts in other circuits, extra-record discovery remains appropriate, because Plaintiffs' first two claims arise from facts *beyond those* underlying their APA claims challenging the Enforcement Metrics Policy and FAMU Directive. In any case, full discovery is necessary for the Court to adjudicate the merits of Plaintiffs' first two claims.

A. Discovery Is Required Because Plaintiffs' Non-APA Claims Are Based on Independent Statutory and Constitutional Grounds

Under recent Ninth Circuit case law, Plaintiffs' first two claims should be treated as distinct and afforded complete discovery under FRCP 26 because plaintiffs may independently litigate claims challenging agency action on grounds separate from the APA. *See, e.g.*, *State*, 2020 WL 1557424 at *13 (applying recent precedent and holding that APA's administrative record requirement did not govern availability of discovery for claim seeking equitable relief under the Due Process Clause); *Washington*, 2020 WL 4667543 at *6 (reaching same conclusion in case involving APA claims and separate claim under Equal Protection Clause).

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

Plaintiffs allege distinct claims for equitable relief under both the Constitution's Take Care Clause and the INA's impartial adjudicator requirement. *See* Compl. ¶¶ 193–207 (Claims 1-2). Plaintiffs also challenge specific policies under the APA, *see id.* ¶¶ 208–242, but those policies are just two examples of many ways Plaintiffs allege Defendants to have mismanaged the immigration courts for years, resulting in a dysfunctional system that is systemically and unlawfully biased against immigrants. *See id.* ¶¶ 80–116 (describing history and effect of Defendants' systemic mismanagement). For example, many allegations in the Complaint relate to systemic problems in EOIR stemming from mismanagement going back many years. *See* Compl. ¶¶ 86–96, 101–02 (describing existence and persistence of "asylum-free zones" since at least 2014 and extreme variation in case outcomes among immigration courts in different jurisdictions since at least 2004); *id.* ¶¶ 104–05 (describing growth of EOIR backlog since 2010). Other allegations relate to actions taken by Defendants well *after* the Enforcement Metrics and FAMU Directive policies were enacted. *See id.* ¶¶ 71–78 (describing Defendants' expressions of discriminatory animus and rhetoric undermining the legitimacy of the immigration courts and pressuring judges to prioritize deportations since 2019); *id.* ¶ 103 (describing Defendants' "reorganization" of the BIA in 2019); *id.* ¶ 113 (describing Defendants' mismanagement of backlogged immigration court dockets, including reassignment of judges to "tent courts" in 2019).

As these allegations make clear, Plaintiffs' Take Care Clause and impartial adjudicator claims stand on their own, apart from whatever conclusions this Court might draw regarding the lawfulness of those policies under the APA.[3] Therefore, because Plaintiffs' first two claims are based on grounds that "exist wholly apart from the APA," discovery for those claims should

[3] That Defendants' sovereign immunity for these claims also is waived pursuant to the APA is immaterial. *See* MTD Ord., ECF 79, 25–26 ("[T]he APA contains a waiver of immunity that applies to all actions brought against agencies and federal officials, even when those actions do not seek review under the APA."). *See also* Plf's' Resp. to MTD, ECF 57 at 41 (citing 5 U.S.C. § 702, *Presbyterian Church v. U.S.*, 870 F.2d 518, 523–26 (9th Cir. 1989)).

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

proceed independently of whatever limitations may apply to Plaintiffs' APA claims. *Sierra Club*, 929 F.3d at 699.

B. Discovery Is Also Required Under the Stricter Fact-Specific Inquiry Used by Courts in Other Circuits

Lacking binding precedent, district courts in other circuits have reached varying conclusions about whether the APA restricts discovery on claims challenging agency action on other grounds. *See State*, 2020 WL 1557424, at *14 (noting that district courts outside the Ninth Circuit, lacking precedential guidance, "have struggled to coalesce around a categorical rule" and have instead tended to apply a fact-specific inquiry resulting in varying outcomes). When faced with this issue, however, most courts apply a similar analytical framework, looking to the underlying facts to determine whether the claims "fundamentally overlap" such that they should be treated as functionally identical. *Id.* at *14–15; *see also, e.g., Kuang*, 2019 WL 293379 at *2 (pre-*Sierra Club* decision by district court in this Circuit declining to allow discovery because plaintiffs' APA and constitutional claims were "fundamentally similar").

Applying this fact-based approach, courts have distinguished between cases where, as here, the claims are directed at distinct conduct and harms, and cases where the underlying allegations and issues are so similar as to be practically identical. *Compare Manker v. Spencer*, No. 3:18-cv-372, 2019 WL 5846828, at *19 (D. Conn. Nov. 7, 2019) (concluding that extra-record discovery was warranted in case involving both APA and constitutional claims "[w]here a plaintiff challenges an agency's general course of conduct rather than a discrete adjudication") *and Vidal v. Duke*, No. 16-cv-4756, 2017 WL 8773110 *2 (E.D.N.Y. Oct. 17, 2017) (permitting extra-record discovery for constitutional claims challenging additional "collateral" decisions by agency that went beyond specific agency decision at issue in APA claim) *with Kuang*, 2019 WL 293379 at *2 (declining extra-record discovery where plaintiffs' constitutional claim was directed at the same, specific agency action as their APA claim and would require analysis of the same evidence) *and Bellion Spirits, LLC v. U.S.*, 335 F. Supp. 3d 32, 43 (D.D.C. 2018) (same).

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

Here, there is no question that Plaintiffs' first two claims arise from additional facts distinct from those underlying the agency actions challenged through Plaintiffs' APA claims. Plaintiffs' first claim under the Take Care Clause alleges that Defendants' abuse of authority and mismanagement of the immigration courts has resulted in the persistence and proliferation of asylum-free zones and the immigration court backlog. Compl. ¶ 197. And Plaintiffs' second claim under the INA alleges that Defendants have created a constitutionally intolerable probability of actual bias in immigration court adjudication by, among other actions, "fostering an adjudicatory system that is permeated by bias against immigrants, including by perpetuating asylum-free zones." *Id.* ¶ 204. Although Plaintiffs' impartial adjudicator claim *mentions* the policies at issue in Plaintiffs' APA claims, it is far broader in that it alleges "systemic judicial bias" "*driven both by policies and also by a general hostility toward immigrants*." MTD Order, ECF 79 at 25 (emphasis added); *see also id.* at 26–27 (expanding on Plaintiffs' broad basis for claim "alleging bias throughout a judicial system").

In arguing that discovery beyond the administrative record is not appropriate, Defendants have previously cited a variety of cases, each of which is either inapplicable, *see* Joint Rule 26(f) Report, ECF 90, at 4 (citing cases limiting discovery in the context of APA claims, or in the context of the Bankruptcy Code),[4] or involve claims that, unlike in this case, are virtually indistinguishable. *Id.* at 4–5 (*citing Bellion*, 335 F. Supp. 3d at 43, case evaluating non-APA claim contesting substance of agency decision that would have required analysis of same administrative record, and *Jiahao*, 2019 WL 293379 at *2, case reaching same conclusion where claims were functionally identical). Plaintiffs' constitutional and statutory claims in this case, however, are not merely repackaged APA claims challenging specific agency actions.

Neither Plaintiffs' Take Care Clause claim nor their impartial adjudicator claim challenges a final agency action that can be assessed on an administrative record; instead, both challenge

[4] For example, *Hall v. Norton*, 266 F.3d 969, 975 (9th Cir. 2001), concerns an APA challenge to final agency action, and *Ramos v. Wolf*, 975 F.3d 872, 900 (9th Cir. 2020), addresses the "APA's record-review requirement" as a condition for the government's waiver of sovereign immunity.

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

Defendants' overarching course of action (and inaction) on the ground that Defendants' conduct violates distinct constitutional and statutory obligations. Both claims necessarily depend on allegations of systemic conduct and collateral questions of law and fact that go far beyond the two discrete policies that Plaintiffs challenge under the APA. *See Manker*, 2019 WL 5846828, at *19 (allowing discovery for claim challenging "agency's general course of conduct rather than a discrete adjudication"); *Vidal*, 2017 WL 8773110 *2 (allowing discovery for claims challenging additional "collateral" decisions beyond that at issue in APA claim). Accordingly, because neither of these claims "fundamentally overlaps" with Plaintiffs' APA claims, those limitations on discovery for claims brought under the APA are inapplicable.

C. Absent Further Discovery on Plaintiffs' First Two Claims, This Court Would Be Left Without the Evidence Necessary to Adjudicate Those Claims

Finally, full discovery under FRCP 26 is necessary to ensure that the parties and the Court have the evidence needed to evaluate the broader questions of law and fact underlying Plaintiffs' first two claims. *See, e.g., Vidal*, 2017 WL 8773110 *2 (holding that extra-record discovery was appropriate for due process claims seeking relief on collateral grounds, noting "[d]efendants have provided no reason why the court's review of these claims . . . should be limited to an administrative record that . . . sheds no light on why the Government allegedly made these collateral decisions"); *see also, e.g., Washington*, 2020 WL 4667543 at *7 (concluding that full discovery consistent with FRCP 26 was reasonable and appropriate where parallel constitutional claim required inquiry into "whether the relevant decisionmakers manifested a discriminatory purpose," which could not be determined based on the administrative record); *Grill*, 2012 WL 174873, at *2–5 (allowing full discovery and noting that plaintiff's due process claim required evidence of bias not found in the administrative record).

An administrative record for an APA claim is typically limited to those materials that were before and considered by the agency *at the time it enacted* the challenged policy. *See Dombeck*, 222 F.3d at 560. However, as noted, many of the factual allegations underlying Plaintiffs' first two

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

claims relate to issues beyond the scope of what Defendants would have considered before enacting the Enforcement Metrics Policy and FAMU Directive policies in 2018. *See, e.g., supra* page 6. Indeed, that several of those allegations pertain to actions Defendants took *after* those policies were enacted weighs heavily towards allowing full discovery. *Id.*; *see also Ctr. for Biological Diversity v. U.S. E.P.A.*, 90 F. Supp. 3d 1177, 1198 (W.D. Wash. 2015) (explaining rule that post-decision facts may not be considered in an APA claim).

That the administrative records for those two policies would necessarily be inadequate to assess Plaintiffs' broader Take Care Clause and impartial adjudicator claims is especially evident when one considers the broader mismatch between the substance of those allegations and the information found within the administrative records provided by Defendants.[5] For example, whereas the existence and exacerbation of the EOIR case backlog figures prominently in the Complaint, the administrative records, though replete with references to the *existence* of the backlog, contain almost nothing regarding the specific conduct on Defendants' part that Plaintiffs' allege has exacerbated the backlog. *See, e.g.,* Compl. ¶¶ 104–116 (describing exacerbation of backlog due to Defendants' mismanagement, including repeatedly shuffling case priorities to further law enforcement priorities and reassigning judges to hearings on the border, causing thousands of already-scheduled cases to revert to the backlog); Decl. of Alletta Brenner in Support of Plf's Mot. to Compel ("Brenner Decl."), ECF109, Exs. A, G (certified indexes for administrative records), Ex. B (IJ0027) (Memorandum for Executive Office of Immigration Review dated December 5, 2017 noting existence of backlog), Ex. C (IJ0136–41) (Letter from National Association of Immigration Judges describing backlog and need for increased resources to address it); Ex. D (IJ0630) (excerpt from 2013 NAIJ Blueprint report noting problem of "surging

[5] Whether Plaintiffs may obtain additional discovery beyond the administrative record in support of their APA claims, or likewise supplement the records for those policies, is not currently before the court. Accordingly, Plaintiffs preserve their right to separately challenge the adequacy and completeness of those administrative records, if necessary, once the stay is lifted. But even if Plaintiffs succeeded in such a challenge, discovery on Plaintiffs' first two claims would still be warranted because the allegations underlying those claims are distinct from and broader than the policies challenged in the APA claims.

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

case backlogs"), Ex. H (FAMU0635) (House Appropriations Committee Report noting backlog).[6] Moreover, other key factual issues alleged in the Complaint are entirely absent from those records, such as:

- Defendants' exacerbation of unlawful bias within the immigration courts by, among other things, promoting a culture that vilifies non-citizens as "invaders" and "criminals" unworthy of judicial process, contributing to the creation and proliferation of "asylum-free zones." Compl. ¶¶ 4, 55–79;

- Defendants' creation and proliferation of "asylum-free zones" through conduct including deficient hiring, training and oversight of immigration judges.[7] *Id.* ¶¶ 67, 145;

- Defendants' reorganization and politicization of the Board of Immigration Appeals (BIA) through a series of so-called reforms in 2019. *Id.* ¶ 103;

- Defendants' tolerance of immigration courts' unlawful local operating procedures that, among other things, restrict access to case files, prevent expert testimony by categorically denying motions for telephonic appearances, and deny adequate time to gather requisite evidence. *Id.* ¶ 167; and

- Other particular facts underlying the existence and proliferation of "asylum-free zones," including the detailed statistical information by court that would be probative of the relationship between Defendants' above-mentioned conduct and the abnormally high rates of asylum denials in those jurisdictions. *Id.* ¶¶ 84–102; *see also* MTD Order, ECF 79, at 23 n.7 (noting that "the high rates of asylum denials may not be a viable stand-alone claim for relief but does appear to be admissible of Plaintiffs' other, broader claims alleging systemic irregularities in the immigration system").

Given the lack of alignment between the contents of the administrative records Defendants have provided and the factual issues underlying Plaintiffs' non-APA claims, limiting discovery to

[6] To aid the Court in its consideration of the issues presented in this Motion, Plaintiffs requested Defendants to lodge the administrative records for both the Enforcement Metrics and FAMU Directive policies in their entirety. At the time of this filing, Defendants had not responded to this request.

[7] For example, although the administrative records contain information indicating that EOIR was directed to rapidly hire new immigration judges and report on their training, they contain no information on how that was accomplished or on the content, requirements, or frequency of any training that was developed or provided. *See* Brenner Decl., ECF 109, Ex. E (IJ1179) (Senate Appropriations Committee Report noting directive to hire and train judges), Ex. F (IJ1473) (regulations at 5 U.S.C. § 4302 directing hiring of immigration judges), Ex. H (FAMU0634–36) (House Appropriations Committee Report noting requirement to hire and train judges to speed pace of adjudications).

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

those record materials would deprive the Court of crucial evidence. It would also leave the Court, and the parties, with no basis to assess the link between these facts and the concrete harms Plaintiffs allege. To avoid that result, the Court should order discovery on Plaintiffs' first two claims, as provided by FRCP 26.

IV. CONCLUSION

For these reasons, Plaintiffs respectfully request an order directing Defendants to provide complete discovery as provided by FRCP 26 for Plaintiffs' first two claims under the Take Care Clause and INA, beyond the scope of the materials provided in the administrative records for the Enforcement Metrics and FAMU Directive policies. Plaintiffs further request that upon ordering complete discovery for those claims, the Court update the timelines set in its Case Management Order, ECF 97, to account for the time that has elapsed as a result of Defendants' recent motions for extension and for a temporary stay of proceedings and ensure an adequate amount of time for the completion of discovery on those claims.

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

DATED: May 7, 2021

PERKINS COIE LLP

By: */s/ Alletta Sue Brenner*
Thomas R. Johnson, OSB No. 010645
TRJohnson@perkinscoie.com
Heidee Stoller, OSB No. 072835
HStoller@perkinscoie.com
Bryan D. Beel, OSB No. 073408
BBeel@perkinscoie.com
Alletta Brenner, OSB No. 142844
ABrenner@perkinscoie.com
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128
Telephone: 503.727.2000

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

Stephen Manning, OSB No. 013373
smanning@ilgrp.com
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: 404.521.6700