IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CRISTHIAN HERRERA CARDENAS *et al.*, on behalf of themselves and all others similarly situated, *Plaintiffs*, v. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT *et al.*, *Defendants*.	No. 1:22-cv-00801-TWP-DML Chief Judge Tanya Walton Pratt Magistrate Judge Debra McVicker Lynch **CLASS ACTION**

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Plaintiffs—current and former detainees at an Immigration and Customs Enforcement ("ICE") contracted facility—bring this Administrative Procedure Act suit to remedy allegedly substandard conditions at that facility, the Clay County Jail ("Jail"). *See* Compl., ECF No. 1. Plaintiffs assert that ICE should have found the Jail to fail its most recent inspection and should have thereafter ceased funding the Jail as a result. Plaintiffs further assert that ICE should have ceased funding the Jail for the separate reason that Clay County is allegedly using federal funds for purposes not permitted by applicable law.

The Court need not wade into the merits of any of these contentions, however, because Plaintiffs' APA claims founder on the shoals of core jurisdictional and justiciability doctrines constraining such lawsuits against federal agencies. Put simply, Plaintiffs cannot state APA claims where, as here, they are premised on broad programmatic allegations and day-to-day agency operations. Nor may Plaintiffs seek judicial relief to challenge an agency's exercise of enforcement discretion. And in any event, it is no more than speculative that the relief Plaintiffs can properly seek would redress the harms they have alleged. Therefore, whether under Rule 12(b)(1) or Rule 12(b)(6), Plaintiffs' claims against the Federal Defendants should be dismissed.

BACKGROUND

I. IMMIGRATION DETENTION AT CLAY COUNTY JAIL

The Department of Homeland Security, including through its component ICE, has broad statutory authority under the Immigration and Nationality Act ("INA") to enforce the immigration laws of the United States. *See, e.g.*, 8 U.S.C. § 1103(a)(1) (establishing that the Secretary of Homeland Security "shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens" except where such

authorities are specifically related to functions or duties of various other specified officers). Among those powers is the authority to detain various categories of aliens within the United States pursuant to 8 U.S.C. §§ 1225, 1226, and 1231.

DHS and in some instances the Department of Justice are provided broad authorities to determine the manner in which these detention powers are exercised. A few provisions of law governing immigration detention by the United States are relevant to this litigation. First, the Attorney General is authorized to make payments to and enter into cooperative agreements with state and local authorities "in support of persons in administrative detention in non-Federal institutions." 8 U.S.C. § 1103(a)(11) (providing that this authority encompasses various specified uses of federal funds). Second, the Secretary of Homeland Security has broad discretionary authority to "perform such other acts as he deems necessary for carrying out his authority" under the INA. *Id.* § 1103(a)(3). And third, judicial review of DHS actions pursuant to its immigration authorities is substantially circumscribed. As relevant here, 8 U.S.C. § 1252(f)(1) establishes a bar on any court except the Supreme Court from "enjoin[ing] or restrain[ing] the operation of the provisions of part IV of this subchapter" of the INA, *i.e.* 8 U.S.C. §§ 1221–1231, except "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). As discussed further below, this provision establishes a broad prohibition on the entry of class-wide injunctive relief in cases challenging DHS's exercise of its detention authorities under the INA. *See Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2065 (2022).

The crux of this litigation is ICE's exercise of its detention authority at one particular facility, the Clay County Jail in Brazil, Indiana. Consistent with 8 U.S.C. §§ 1103(a)(3) and (a)(11), ICE detains individuals at this facility pursuant to a contract between DOJ's U.S. Marshals

Service and the Jail. *See* ECF Nos. 1-1, 1-2. The Marshals Service is entitled to terminate the contract in writing at any time. *See* ECF No. 1-1, Art. V. The Jail is obligated to comply with six minimum conditions of confinement and agrees to permit inspections of the facility by Marshals Service inspectors. *Id.* at Art. XIII. The Jail further agrees to receive a negotiated amount of money per prisoner, per day housed at the facility on behalf of the United States, an amount that is based on "actual and allowable costs associated with the operations of the facility." *Id.* Art. VI. The Jail is "responsible for the management and fiscal control of all funds" provided by the United States and for complying with various provisions of federal law governing accounting and financial management. *Id.* Arts. VIII, IX. Separately from any Marshals Service inspections pursuant to contract, ICE conducts its own periodic inspections at the Jail as a matter of policy to judge compliance with ICE detention standards.

II. PLAINTIFFS' CLAIMS AND ALLEGED INJURIES

Plaintiffs are four individuals that were detained by ICE at the Jail as of the date of the Complaint. Three of those individuals—Cristhian Herrera Cardenas, Javier Jaimes Jaimes, and Baijebo Toe—have since been transferred to other facilities or removed from the country. *See* Joint Mot. on Scheduling ¶ 9, ECF No. 46. One of the named plaintiffs, Maribel Xirum, remains in ICE custody at the Jail. Plaintiffs also seek to proceed on behalf of a putative class of "[a]ll persons who are currently or will be detained by ICE at the Jail." Pls.' Mot. for Class Certification ¶ 13, ECF No. 3; *see also* Compl. ¶¶ 239–44. Plaintiffs claim injury based on various allegedly substandard conditions at the Jail. *See generally* Compl. ¶¶ 30–40, 97–175.

Plaintiffs bring three claims in the Complaint—the first two against the Federal Defendants and the third against Clay County and affiliated defendants. Count I alleges that ICE has violated the Administrative Procedure Act through its "certification of the jail as compliant with the 2008 [Performance Based National Detention Standards] in December 2021." Compl. ¶¶ 248, 253–62.

The Complaint identifies three inspections at the Jail in 2021 of potential relevance to this lawsuit. The first was conducted by ICE contractor The Nakamoto Group, Inc. ("Nakamoto") from May 18–20, 2021. Compl. ¶¶ 199–203. That inspection resulted in an overall rating of "Does Not Meet Standards." Compl. ¶ 203. The second was conducted by ICE's Office of Detention Oversight from November 15–18, 2021. Compl. ¶¶ 212–14. That inspection resulted in a rating of "superior." Compl. ¶ 214. The third was conducted by Nakamoto from December 7–9, 2021. Compl. ¶¶ 219, 221–35. That inspection resulted in a rating of "Meets Standards." Compl. ¶ 235.

In Count I, Plaintiffs challenge the third of these inspections, contending that it was arbitrary and capricious and contrary to law for ICE to deem the Jail had met the applicable detention standards pursuant to Nakamoto's December 2021 inspection. Compl. ¶¶ 248–61 (repeatedly referring to the December 2021 Nakamoto inspection as the basis for relief). Plaintiffs contend that ICE should have discontinued funding the Jail pursuant to an appropriations provision stating that no appropriated funds "may be used to continue any contract for the provision of detention services if the two most recent overall performance evaluations received by the contracted facility are less than 'adequate' or the equivalent median score in any subsequent performance evaluation system." Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, Div. F, Tit. II, §215(a) (Dec. 27, 2020), 134 Stat. 1457; Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, Div. F, Tit. II, §215(a) (Mar. 15, 2022), 134 Stat. 322.

Count II is also based on the APA and challenges the purported "decision to continue making payments under the Agreement [between the United States and the Jail], despite knowing that the County is misusing funds to pay for County expenses and discretionary expenditures." Compl. ¶¶ 266–75. Plaintiffs make various factual allegations that they contend show the

misappropriation of federal funds by the County for purposes not permitted under contract and applicable law. Compl. ¶¶ 70–88 .

Plaintiffs seek declaratory and injunctive relief against the United States for the apparent purpose of either improving conditions at the Jail or ending ICE detention there. *See* Compl. at 69–70 (seeking injunctive relief to either end ICE detention at the Jail or forbid ICE from making payments to the Jail "without complying with ICE's federal statutory and regulatory duties related to the proper use of federal funds").

ARGUMENT

I. PLAINTIFFS LACK STANDING TO BRING THEIR CLAIMS AGAINST THE UNITED STATES.

As the parties invoking federal jurisdiction, Plaintiffs bear the burden of establishing the three elements that constitute the "irreducible constitutional minimum of standing," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)—namely, that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citation omitted). Standing is necessary for Plaintiffs to establish the existence of an Article III case or controversy and, thus, to invoke the jurisdiction of the federal courts. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103–04 (1998). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element [of standing]." *Spokeo*, 578 U.S. at 338 (alteration in original) (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

Plaintiffs have failed to meet their burden at least as to the third element of the standing inquiry: redressability. That prong of standing doctrine requires a plaintiff to show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision" from

the court. *Lujan*, 504 U.S. at 561, 590 (citation omitted). Here, Plaintiffs allege various injuries rooted in conditions at the Clay County Jail. Thus, in order to show redressability, Plaintiffs must show that it is likely that the relief they seek in this litigation would remedy those allegedly unlawful conditions or cause their release or transfer from those conditions. Plaintiffs fail to do so.

1. To begin, Plaintiffs' request for various forms of specific equitable relief is inconsistent with the APA's provision that a reviewing court may only "hold unlawful and set aside agency action" found to be in violation of law pursuant to the APA. *See* 5 U.S.C. § 706(2). Plaintiffs ask the Court to take various actions to require the end of funding at the Jail and to declare that the Jail failed its December 2021 inspection. But those forms of specific relief are inconsistent with the above provision for APA relief. "[U]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the correct legal standards." *PPG Indus., Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995). Thus, at most this Court has authority pursuant to the APA to vacate the allegedly unlawful agency actions and remand the matter to ICE for further action consistent with the correct legal standards. *See Palisades General Hosp. Inc. v. Leavitt*, 426 F.3d 400, 403 (D.C. Cir. 2005) (holding the district court's jurisdiction extended only to vacatur of agency action applying incorrect wage data to a determination; the court lacked "jurisdiction to order either reclassification based upon those adjusted wage data or an adjusted reimbursement payment that would reflect such a reclassification").

This principle of administrative law defeats Plaintiffs' claim to redressability because they can do no more than speculate as to whether vacatur of the alleged agency actions would result in

either an end to ICE detention at the Jail or an improvement of conditions at the Jail to the level Plaintiffs deem appropriate.

Regarding an end to ICE detention at the Jail, Plaintiffs' theory of the case in Count I appears to be that the December 2021 inspection was inconsistent with applicable laws. But vacatur of that inspection would not result in a finding that the December 2021 inspection failed. It would simply prompt a further inspection by ICE. And it is impermissibly speculative to suppose that any subsequent inspection would result in a failing grade; it is unknowable what conditions will be like at the Jail when that future inspection is conducted. *Lujan*, 504 U.S. at 561 (redressability requires that it be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision").

Moreover, vacatur of the December 2021 inspection would only later prompt cancellation of ICE's contract with the Jail upon *two* failing inspections in a row. *See* Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, Div. F, Tit. II, §215(a) (Mar. 15, 2022), 134 Stat. 322 (restricting the use of federal funds based on the "two most recent overall performance evaluations"). That is because ICE found the Jail to be "superior" in the November 2021 inspection described above, Compl. ¶ 214, a finding that Plaintiffs do not challenge anywhere in the Complaint. Thus, Plaintiffs' claims are even more attenuated from their requested relief where the appropriations provision they invoke requires two consecutive failing inspections to trigger a funding restriction.

Similar principles apply to Plaintiffs' claims in Count II regarding alleged misuse of federal funds. Although that claim is non-justiciable under the APA for at least two other reasons described below, at most the Court could remand that matter to the agency for further proceedings. Even if the Court had declared, *e.g.*, that the County has misused federal funds, it would remain

only speculative whether ICE would subsequently use its enforcement discretion to take some adverse action against the County on that basis. *See Forest Stewardship Council-U.S. v. Office of U.S. Trade Rep.*, 405 F. App'x 144, 146 (9th Cir. 2010) (unpublished op.) (declaratory judgment that money should have been deposited into the Treasury would not redress plaintiff's injury where, *inter alia*, the decision to seek recovery of such funds was subject to "prosecutorial discretion"); *cf. Cabral v. City of Evansville, Ill.*, 759 F.3d 639, 642–43 (7th Cir. 2014) (finding no redressability where vacatur of injunction against third-party city would not require city to grant permit that would redress church's injury; the city "might also deny the permit for any number of reasons"). It would be more speculative still to say that discontinuation of the contract would be the remedial action chosen by ICE. *See infra* at p.17 (citing 2 C.F.R. § 200.339).

Plaintiffs may contend that the relief they seek could redress their injuries by improving conditions at the Jail. But those conditions are controlled by Clay County, not ICE. Although ICE has the ability to exert fiscal leverage, such as by threatening to cease sending detainees and federal funds to the Jail, it has no supervisory control over the Jail. Put simply, ICE cannot order Clay County to take any particular action regarding conditions at the Jail beyond incentivizing the County to do so. *Cf. Printz v. United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer a federal regulatory program.").

Accordingly, APA relief against ICE regarding conditions at the Jail would not likely redress Plaintiffs' grievances where ICE lacks supervisory control over Clay County's operations at the Jail beyond the possibility that it would simply stop sending detainees there. "Where, as here, the asserted injury 'arises from the government's allegedly unlawful regulation (or lack of

regulation) of *someone else*," here ICE's purported failure to adequately police the conditions at the Jail, "causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." *DH2, Inc. v. U.S. S.E.C.*, 422 F.3d 591, 596 (7th Cir. 2005) (quoting *Lujan*, 504 U.S. at 562). In this context, where a third party is the primary cause of an alleged injury, the Seventh Circuit holds that "much more is needed" to establish standing, namely a "showing that those choices [of third parties] have been or will be made in such a manner as to produce causation and permit redressability of injury." *Id.* Plaintiffs cannot establish this sort of likelihood where Clay County is a separate government over which ICE has little authority beyond the ability to terminate its relationship. *Cf. Cabral*, 759 F.3d at 642–43.

The fact that Clay County is a defendant in this litigation, rather than an absent third party, does not relieve Plaintiffs of the burden to "demonstrate standing for each claim [they] seek[] to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (citation omitted). That fundamental requirement means that Plaintiffs must show "that each defendant caused [the] injury and that an order of the court against each defendant could redress the injury." *Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017) (citing *Lujan*, 504 U.S. at 560–61). Plaintiffs have not shown that the requested APA relief against the Federal Defendants, standing alone, is likely to effect a change in conditions at the jail redressing their alleged injuries.

2. Plaintiffs may argue that their requests for injunctive relief overcome the foregoing redressability problems. Plaintiffs seek to enjoin ICE's expenditure of federal funds for detention at the Jail and to enjoin ICE from detaining Plaintiffs and other putative Class members at the Jail. Compl. at 70 ¶¶ K–M.

To begin, the requested injunctive relief is impermissible as a matter of APA law because it represents specific relief not contemplated by section 706(2). *See PPG Indus.*, 52 F.3d at 365; *Palisades General Hosp.*, 426 F.3d at 403. But even setting that aside, injunctive relief is categorically unavailable in this putative class action as a result of 8 U.S.C. § 1252(f)(1), which provides that federal district courts lack "jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter" of the INA, other than with respect to proceedings against individual aliens. The Supreme Court has long stated that section 1252(f)(1) "prohibits federal courts from granting classwide injunctive relief against the operation of [8 U.S.C.] §§ 1221–1231." *See Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 481 (1999). And the Court recently clarified the expansiveness of this prohibition, holding that section 1252(f)(1) "generally prohibits lower courts from entering injunctions that order federal officials to take or refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions" and that it does so to prohibit the entry of class-wide injunctive relief. *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2065 (2022). In *Aleman Gonzalez*, the challenged injunction entered by the district court "require[d] the Government to provide bond hearings" for all class members, which came within section 1252(f)(1) because it "require[d] officials to take actions that (in the Government's view) are not required by" a provision of the INA authorizing detention of removable aliens. *See id.* (citing 8 U.S.C. § 1231(a)(6)).

Plaintiffs' requested injunctive relief falls squarely within section 1252(f)(1) as interpreted by *Aleman Gonzalez*. Section 1252(f)(1) prohibits class-wide injunctive relief including with respect to the INA provisions authorizing the detention of individuals unlawfully present in the United States and those who have been ordered removed. *See* 8 U.S.C. §§ 1226, 1231. And here, Plaintiffs seek injunctive relief that would require the Government to "take actions that (in the

Government's view) are not required by" these authorizing statutes, *see Aleman Gonzalez*, 142 S. Ct. at 2065, namely the cessation of detention at a particular facility and the forced transfer of detainees elsewhere. Just as the district court could not order class-wide relief regarding detention of aliens in *Aleman Gonzalez*, so too this Court cannot order class-wide relief regarding the detention of the putative class here. *See id.*; *see also Hamama v. Adducci*, 912 F.3d 869, 877 (6th Cir. 2018) ("[W]e find that 8 U.S.C. § 1252 (f)(1) bars the district court from entering class-wide injunctive relief for the detention-based claims.").

In summary, Plaintiffs ask the Court for injunctive relief it is powerless to enter and declaratory relief that would be ineffectual in redressing the injury they allege. Plaintiffs thus fail to meet their burden to show standing and the Court lacks jurisdiction accordingly.[1]

II. PLAINTIFFS' CLAIMS DO NOT CHALLENGE FINAL AGENCY ACTION.

Judicial review is available under the APA only with respect to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The failure to establish final agency action warrants dismissal under Rule 12(b)(6). *Matushkina v. Nielsen*, 877 F.3d 289, 292 n.1 (7th Cir. 2017). A two-element test must be satisfied to show that an agency action is final. "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which

[1] Federal Defendants note that the claims of the three individual Plaintiffs that are no longer in custody at the Jail are moot. *See Olson v. Brown*, 594 F.3d 577, 580 (7th Cir. 2010) (observing that "[i]t is without question" that a claim seeking injunctive relief regarding conditions of confinement is moot where the individual is no longer subject to those conditions). Although mootness deprives a court of jurisdiction, Plaintiffs seek to invoke an exception to mootness doctrine applicable to class action litigation involving "inherently transitory" classes. *See id.* at 580–84. If the remaining named Plaintiff is transferred out of the Jail, mootness would be another basis on which this litigation should be dismissed insofar as the Court ultimately denies Plaintiffs' motion for class certification or otherwise concludes that the "inherently transitory" class exception to mootness doctrine does not apply.

rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016).

Moreover, a plaintiff must show that the action in question is in fact "agency action" as defined by the APA, whether final or not. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004). The APA defines agency action by reference to "five categories of decisions made or outcomes implemented by an agency," *id.*, providing that agency action "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13)). The Supreme Court has stressed that consistent with these example categories, agency action subject to challenge under the APA is limited to "circumscribed [and] discrete" actions that cause harm, precluding "broad programmatic attack[s]" on the manner in which an agency is operating. *Norton*, 542 U.S. at 62, 64. And given the finality requirement discussed above—which asks whether an agency action is one "by which rights or obligations have been determined," *Hawkes*, 578 U.S. at 597—numerous courts have explained that the "term 'action' as used in the APA is a term of art that does not include all conduct such as, for example, constructing a building, operating a program, or performing a contract." *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186, 193 (4th Cir. 2013); *Louisiana v. United States*, 948 F.3d 317, 321 (5th Cir. 2020) (same); *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19 (D.C. Cir. 2006) (stating that agency action is "not so all-encompassing as to authorize us to exercise judicial review over everything done by an administrative agency," and citing examples such as "conduct[ing] studies" and otherwise engaging in the "common business of managing government programs").

Applying these principles, Counts I and II both should be dismissed because they fail to allege final agency actions cognizable under the APA.

First, Count I should be dismissed because ICE inspections of the Jail do not constitute final agency actions under the APA. As noted above, the APA provision for review of final agency actions does not encompass every kind of action that an agency may undertake in its day-to-day operations, such as "operating a program, or performing a contract." *See Vill. of Bald Head Island*, 714 F.3d at 193. Here, ICE's inspections of its contracted detention facilities represent just such an ordinary, day-to-day activity pursuant to program operations and contract performance. It is not akin to an "agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). And in any event, ICE inspections of the Jail do not meet the finality test because they cannot be said to determine rights or obligations where, for example, they are no more than antecedent to decisions by ICE regarding which facilities it may fund. *Jama v. Dep't of Homeland Sec.*, 760 F.3d 490, 496 (6th Cir. 2014) (quoting *Rochester Tel. Corp. v. United States,* 307 U.S. 125, 130 (1939) (agency action is not final where it "does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action.")); *Peoples Nat'l Bank v. Office of Comptroller of Currency of U.S.*, 362 F.3d 333, 337 (5th Cir. 2004) (same). In sum, Plaintiffs challenge an interim inspection rating made in the context of an ongoing programmatic monitoring scheme, not a final action appropriate for judicial review.

Second, Count II should also be dismissed because the alleged decision to continue issuing funds to the jail does not constitute any discrete and circumscribed agency action at all, let alone a final agency action. Claims that agency action may be based on a purported "decision" to continue implementing a program or issuing payments are foreclosed by precedent. For example, in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), the Supreme Court considered claims that "violation of the law [was] rampant within" a challenged Bureau of Land Management program, with the agency allegedly "fail[ing] to revise land use plans in proper fashion" and

"fail[ing to provide required public notice . . . [and] adequate environmental impact statements." *Id.* at 891. The Court concluded that the plaintiff could not seek the requested "*wholesale* improvement of this program by court decree," in light of the APA's limitation of review to discrete agency actions. *Id.*; *see also Norton*, 542 U.S. at 64 ("The limitation to discrete agency action precludes the kind of broad programmatic attack we rejected in *Lujan* . . . .").

The Seventh Circuit has been similarly skeptical of attempts to shoehorn such programmatic challenges into an APA claim. In *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765 (7th Cir. 2011), the court stated in dicta that purported agency actions such as "operation of [the program] in a manner" that would be allegedly unlawful and "reliance on ineffective" measures in operating the program were variously "not discrete at all" and not "the final outcome of any decisionmaking process by" the agency. *See id.* at 787; *see also Louisiana v. United States*, 948 F.3d at 322 ("allegations focus[ing] on decades of inaction by [the Government] in failing to" adhere to congressional mandate failed under the APA because, *inter alia*, it did not concern any discrete agency action).

Plaintiffs raise a similar programmatic challenge, rather than one appropriately limited to a discrete agency action. An alleged "decision to continue making payments under the Agreement"—particularly where untethered to any particular rule, order, license etc.—is indistinguishable from the sort of programmatic challenge that the Supreme Court rejected in *Lujan*, where the agency was allegedly engaged in all manner of ongoing actions contrary to law. 497 U.S. at 891; *see also Louisiana v. United States*, 948 F.3d at 322. Nor can one see how, in any event, the "decision to continue making payments" could constitute *final* agency action where it is manifestly not the "consummation of the agency's decisionmaking process." *Hawkes*, 578

U.S. at 597. APA claims must challenge the legality of some discrete and identifiable agency action; attempts to challenge an ongoing state of affairs are inapt.

III. COUNT II CHALLENGES MATTERS COMMITTED TO AGENCY DISCRETION BY LAW.

Count II fails for the additional reason that it challenges matters committed to agency discretion by law, which are precluded from APA review under section 701(a)(2).

"[B]efore any review at all may be had" under section 706 of the APA, "a party must first clear the hurdle of § 701(a)." *Heckler v. Chaney*, 470 U.S. 821, 828 (1985). As relevant here, section 701(a) provides that review is unavailable if "agency action is committed to agency discretion by law," *id.* § 701(a)(2). A failure to hurdle the bar of section 701(a)(2) requires dismissal pursuant to Rule 12(b)(6). *Builders Bank v. FDIC*, 846 F.3d 272, 274 (7th Cir. 2017).

The Supreme Court has explained that section 701(a)(2) forecloses APA review in two general circumstances relevant here. First, review is unavailable if the challenged agency action is of a kind "traditionally regarded as committed to agency discretion," including various categories of discretionary judgments that "require[] 'a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise.'" *Lincoln v. Vigil*, 508 U.S. 182, 192–93 (1993) (quoting *Heckler*, 470 U.S. at 831). Most significantly for this case, the Court has held that section 701(a)(2) generally bars review of agency enforcement decisions. *See Heckler*, 470 U.S. at 831–32 (explaining that an agency "is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities"). Second, section 701(a)(2) also applies if the "relevant statute" underlying the plaintiff's APA challenge "'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln*, 508 U.S. at 191 (quoting *Heckler*, 470 U.S. at 830). Courts in this Circuit examine the applicable statutes and regulations to determine whether they "contain judicially

manageable standards for judging how and when an agency should exercise its discretion." *Menominee Indian Tribe of Wisc. v. EPA*, 947 F.3d 1065, 1072 (7th Cir. 2020) (citation and ellipsis omitted).

Count II's request for relief regarding ICE's continued funding of detention at the Jail is barred as committed to agency discretion by law. Plaintiffs here directly challenge ICE's exercise of enforcement discretion, baldly stating that Plaintiffs are entitled to relief because ICE "has failed to take any corrective action or otherwise ensure compliance with federal law." Compl. ¶ 274. But Plaintiffs run aground on the bedrock rule that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is . . . generally committed to an agency's absolute discretion" and is therefore "presumed immune from judicial review under § 701(a)(2)." *Heckler*, 470 U.S. at 831–32. As the *Heckler* Court explained, an agency's decision whether or not to enforce is similar in significant ways to a prosecutor's decision whether or not to indict—"a decision which has long been regarded as the special province of the Executive Branch." *Id.* at 832; *see also United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[T]he decision whether or not to prosecute . . . generally rests entirely in [the prosecutor's] discretion."). Plaintiffs ask the Court nonetheless to intercede, even though the decision whether to pursue some kind of enforcement action involves "a complicated balancing of a number of factors which are peculiarly within [an agency's] expertise" and with which the agency is "far better equipped than the courts" to deal. *Heckler*, 470 U.S. 831–32. The APA forecloses Plaintiffs' request.

Plaintiffs nonetheless point to two provisions of law as cabining the agency's enforcement discretion. Neither suffice to overcome the presumption against reviewability of enforcement decisions. First, Plaintiffs point to a provision of the INA authorizing the United States to "make payments" "in support of persons in administrative detention in non-Federal institutions" for

certain specified purposes, such as the provision of clothing and medical care. 8 U.S.C. § 1103(a)(11)(A). Plaintiffs contend that the Jail is using federal funds in a manner inconsistent with these purposes. But this statute does not help Plaintiffs because it does nothing to guide or cabin the agency's enforcement discretion. Plaintiffs cannot prevail simply by showing a violation of a substantive legal provision; they must show that some legal provision speaks to the subsidiary question of whether ICE must take corrective action in response to a violation. *See Heckler*, 470 U.S. at 835–36 (rejecting argument that a statute's "substantive prohibitions" supplied law to apply).

Plaintiffs also point to the regulations titled Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Part 200. Compl. ¶ 268. Reliance on those regulations has the same fatal flaw, as shown by 2 C.F.R. § 200.339, which establishes the "[r]emedies for noncompliance" by a grantee with "the U.S. Constitution, Federal statutes, regulations or the terms and conditions of a federal award." That provision establishes various remedial options for an agency but, crucially, it gives discretion to the Government about which remedy to adopt or *whether to pursue any remedy at all*. *See* 2 C.F.R. § 200.339 (stating that the awarding agency "may" pursue various actions "as appropriate in the circumstances"). Count II is accordingly barred by section 701(a)(2) of the APA.

CONCLUSION

Plaintiffs' claims against the Federal Defendants should be dismissed.

Dated: July 22, 2022

Respectfully submitted,

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