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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

LAS AMERICAS IMMIGRANT ADVOCACY CENTER, et al., Plaintiffs, v. DONALD TRUMP, et al., Defendants.	CASE NO. 3:19-cv-02051-IM **DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION

The Court should dismiss this case. Plaintiffs raise a range of general grievances with the immigration court system, but the only actual agency practices they challenge are immigration judge performance metrics and other case-completion goals that the Executive Office for Immigration Review (EOIR) has instituted to ensure that cases are resolved on a reasonable timeline. Plaintiffs challenge these goals under the Take Care Clause, the Immigration and Nationality Act (INA), and the Administrative Procedure Act (APA). Each of these claims fails.

First, Plaintiffs lack standing. *See* ECF No. 24, Motion to Dismiss (Mot.), at 7-14. They have identified no concrete injury that is fairly traceable to these goals or redressable by a favorable decision from this Court. *Id. Second*, Plaintiffs are outside the zone of interests of the INA provisions they cite, which address the rights of individual aliens in removal proceedings. Nothing in these provisions extends rights to or protects interests of organizations. *Id*. at 16. *Third*, in 8 U.S.C. § 1252 and § 1329, Congress created a comprehensive scheme for claims arising from removal proceedings that eliminated district court jurisdiction. *Id*. at 16-22. The statutory bars to judicial review extend to policy-and-practice claims, as well as claims brought by organizations, and, as the Ninth Circuit recently ruled, also prohibit granting injunctive relief related to the INA provisions governing removal proceedings when sought by organizational plaintiffs. *Id*. *Fourth*, Plaintiffs fail to state a claim upon which relief can be granted. *Id*. 22-32. Their Take Care Clause claim is nonjusticiable, their INA claim is not based on any plausible allegations that case-completion goals are biasing the outcome of proceedings in immigration court, and their APA claims challenge future decisions that cannot be considered final agency action or ripe for review, and for which an APA claim cannot be raised because Congress has set out an alternative, and exclusive, avenue for review. *Id*. *Finally*, Plaintiffs' claims do not relate to any government action or activities by the Plaintiffs in this District, and so venue is improper here. *Id*. at 32-35.

ARGUMENT

I. Plaintiffs lack Article III standing.

Plaintiffs cannot establish standing for any of their claims. Mot. 7-9. Here, Plaintiffs—which are all organizations—raise only speculative injuries of aliens who are not parties to this case. *Id.* As the government has explained, Plaintiffs allege no concrete or particularized injury to their own interests sufficient to establish Article III standing. *Id*. at 9-14.

None of Plaintiffs' arguments in response solve this fundamental problem with their claims. *See* ECF No. 57, Plaintiffs' Opposition (Pls.' Opp.), at 6-11. They argue that they have "a legally protected interest in using their organizational resources to achieve their missions," and standing because "defendants impaired their missions to serve asylum-seeking clients and caused organizational resources to be diverted." Pls.' Opp. 7. But they cannot meet the standard from any of the cases they cite in support of this diversion-of-resources theory of standing. Plaintiffs rely on *East Bay Sanctuary Covenant v. Trump (East Bay III)*, 950 F.3d 1242, 1265 (9th Cir. 2020), which held that diversion of resources can establish standing in some circumstances. Pls.' Opp. 7. There, however, the court found that the challenged rule had "caused the Organizations to divert" "significant resources" to activities that were "not part of [their] core mission," and that they otherwise "would have suffered some other injury," because "[e]ach organization would have lost clients … had it not diverted resources toward counteracting the effect of the Rule." *Id*. at 1266. As explained below, Plaintiffs have not identified any resources that they have diverted outside their core mission, let alone significant resources, nor do they allege that they risk losing clients or any other injury absent some diversion of resources. An organization "cannot manufacture the injury" by choosing to expend resources "fixing a problem that otherwise would not affect the organization." *East Bay III*, 950 F.3d at 1265-66; *see* Mot. 11.

Plaintiffs next cite *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which held that an organization whose mission was to achieve equal access to housing had organizational standing to bring suit under the Fair Housing Act. Pls.' Opp. 7. But *Havens* involved an organization that had diverted "significant resources to identify and counteract" the challenged practices. 455 U.S. at 379; *see* Mot. 12-13. *Havens* also involved the Fair Housing Act, which includes a private right of action and extends certain legal rights to "associations" in addition to individuals. *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1100 (D.C. Cir. 2015) (Millett, J., dubitante); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Congress may 'elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.'"). There is no similar legally protected organizational interest at issue here. In *El Rescate Legal Servs. v. EOIR*, 959 F.2d 742, 748 (9th Cir. 1991), on which Plaintiffs also rely, *see* Pls.' Opp. 7, the court held that organizations have standing to challenge a practice that "requires the organizations to expend resources in representing clients they otherwise would spend in other ways." Plaintiffs do not identify any resources that they are similarly expending in a different way as a result of EOIR's case-completion goals or any concrete injury or diversion of resources sufficient to satisfy Article III.

Plaintiffs also argue that they have alleged "concrete, particular, and actual harms to the[ ] organizations," "separate from any potential injuries to respondents in immigration court." Pls.' Opp. 8. But nowhere in their arguments on standing, *id*. at 6-11, or in their complaint, *see e.g.*, ¶¶ 155-92, do they identify these concrete injuries. Plaintiffs merely assert "that they are unable to fulfill their missions of providing meaningful legal assistance to asylum seekers because Defendants have denied them a fair court system in which to practice," and that they have thus "been forced to divert organizational resources to redesign programs and systems; retrain staff and

volunteers; rewrite guides and materials; and engage in increasing education, monitoring, and advocacy work to address underlying systemic problems with the immigration courts." *Id*. at 9 (citing Compl. ¶¶ 160, 166, 170, 181-85). The cited paragraphs of their complaint offer no concrete examples of how they have been forced to divert resources in these ways and do not identify any programs that they have changed since the case-completion goals took effect. Moreover, Plaintiffs offer no plausible theory of why setting reasonable case-completion goals for immigration courts would require any diversion of resources whatsoever. Rather, the cited allegations show that Plaintiffs are continuing to carry out their missions of representing asylum seekers in removal proceedings. Compl. ¶¶ 166, 170. Plaintiffs' allegations related to recruiting pro bono attorneys, *id*. ¶¶ 181-85, relate not to the case-completion goals but rather to the "backlog" and scheduling "delays," *id*. ¶¶ 182-85—issues the case-completion goals should help remedy.

Plaintiffs mainly argue that their efforts and resources are "wasted" where immigration courts fail to adjudicate claims on a case-by-case basis, and cite portions of their complaint alleging that their efforts to represent asylum seekers in immigration court are nullified where immigration judges deny relief to their clients. Pls.' Opp. 9. But this is an argument about the outcome of the proceedings in immigration court, not about Plaintiffs' ability to carry out their missions of representing aliens in immigration court. There is no allegation that Plaintiffs are prevented from representing their clients or that case-completion goals have "impaired the organization's ability to provide services" or "carry out" its "core activities," as they must show to establish standing under the theory they advance. Mot. 11-12. And Plaintiffs put forth no concrete allegations or examples of any immigration judge making decisions based on case-completion goals rather than the facts of a particular case. Plaintiffs' standing argument is based on an alleged failure of immigration judges to adjudicate claims on a case-by-case basis but their allegations do not show

that this is happening. Moreover, the denial of a claim in immigration court could at most be an injury to the individual alien bringing the claim. Plaintiffs cannot establish standing based on injuries to these non-parties, *see* Mot. 7-9, and they disavow any such theory of standing anyway by claiming their "injuries [are] separate from any potential injuries to respondents in immigration court," Pls.' Opp. 8. If Plaintiffs' argument is that the United States should grant asylum to more individuals, this is precisely the type of abstract and generalized grievance that the Supreme Court has repeatedly said cannot establish standing under Article III. Mot. 8, 13-14.

Having failed to identify any actual diversion of resources, Plaintiffs attempt to lower the standard for establishing standing. They argue that even an insignificant "loss of resources" that they would "otherwise would spend in other ways" should be enough to support standing. Pls.' Opp. 9 & n.1 (quoting *El Rescate*, 959 F.2d at 748). But what resources have Plaintiffs diverted that they would have spent in other ways absent EOIR's case-completion goals? Plaintiffs' complaint and response to the motion to dismiss provide no answer to this question. *See* Mot. 12-13. Rather, Plaintiffs attack the government's argument that they must show some actual diversion of resources from their missions by saying that this argument "misses the point entirely" because, in their view, they do not have to show any such diversion of resources if their mission is to provide "legal assistance to asylum-seeking individuals" in immigration court, Pls.' Opp. 9. The Supreme Court says otherwise. *See* Mot. 11-13.

Plaintiffs' causation and redressability arguments fail for the same reasons. On causation, Plaintiffs argue, circularly, that their injuries are "fairly traceable" to the agency's case-completion goals because they "allege that their injuries result from" these goals. Pls.' Opp. 11. But the burden is on Plaintiffs to identify a particular, concrete injury and explain how it is caused by the challenged action, *see Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), and Plaintiffs do not

even attempt to trace a connection here. *See generally* Pls.' Opp. 6-11. Plaintiffs' redressability arguments fare no better. Plaintiffs argue only that courts have power to award declaratory or injunctive relief and make no attempt to explain how it is "likely, as opposed to merely speculative," that their claimed injuries would "be redressed by a favorable decision" granting them the declaratory or injunctive relief they seek in the complaint. *Lujan*, 504 U.S. at 561. In addition, their argument that the Court "has broad equitable powers to afford remedies in the form of injunctive relief," Pls.' Opp. 11, is incorrect as to organizational plaintiffs seeking injunctive relief related to the operation of removal proceedings in immigration court. *See infra*, 22-24. And Plaintiffs provide no explanation for how the declaratory relief they seek will redress any injury or have any effect whatsoever. *See* Complaint, Prayer for Relief (a)(1)-(3).

The Court should dismiss Plaintiffs' claims for lack of standing.

II. Plaintiffs are outside of the zone of interests.

Plaintiffs' claims based on the INA also fail because they cannot show that organizations fall within the zone of interests of the INA provisions on which they base these claims. Mot. 14-16. Under the APA, a plaintiff must show that they have some protected interest under the relevant statute, and the INA provisions Plaintiffs cite provide rights only to individual aliens in removal proceedings, not to organizations. *Id*. Plaintiffs' arguments, *see* Pls.' Opp. 11-24, do not explain how they fall within the zone of interests of the statutory provisions identified in the complaint.

Plaintiffs concede that a "statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law involved." Pls.' Opp. 11-12 (citing *Lexmark Int'l v. Static Control Components*, 572 U.S. 118 (2014)). They focus their arguments instead on distinguishing *INS v. Legalization Assistance Project of L.A. Cty. (LAP)*, 510 U.S. 1301, 1305 (1993) (O'Connor, J., in chambers), in which Justice O'Connor concluded that "immigration advocacy organizations are outside the immigration statutes' zone of interests," and rely heavily

on *East Bay Sanctuary Covenant v. Trump (East Bay I)*, 932 F.3d 742, 769 (9th Cir. 2018). Pls.' Opp. 12. *East Bay I* distinguished *LAP* on the grounds that the organizational interests asserted in that case were "markedly different from the interest" asserted in *LAP*. 932 F.3d at 769, n.10. *East Bay I* represents an incorrect and overly generous application of the zone-of-interests test, but even if it were correct, *East Bay I* involved interests that are materially different from the interests Plaintiffs assert here.

East Bay I dealt with the asylum statute, 8 U.S.C. § 1158, and noted that, "[w]ithin the asylum statute, Congress took steps to ensure that pro bono legal services of the type that the Organizations provide are available to asylum seekers." *East Bay*, 932 F.3d at 768 (discussing the provisions at 8 U.S.C. § 1158(d)(4)(A)-(B)). Plaintiffs' claims here are instead based on 8 U.S.C. § 1229a, which addresses the rights of individual aliens in removal proceedings in immigration court, *see* Mot. 18; Plaintiffs' claims are not based on § 1158, *see* Complaint ¶¶ 193-242. Plaintiffs also cite *Al Otro Lado v. Nielsen*, 327 F. Supp. 3d 1284, 1300 (S.D. Cal. 2018), but *Al Otro Lado* similarly dealt with 8 U.S.C. § 1158. *See* 327 F. Supp. 3d at 1290, 1301. Plaintiffs next note that the Ninth Circuit held that "organizational plaintiffs, including Plaintiff Innovation Law Lab … fell within the INA's zone of interests" in *East Bay III*. Pls.' Opp. 13 (citing *East Bay III*, 950 F.3d at 1270). That case also dealt with the asylum statute, § 1158, and "[m]igrants in the country who file affirmatively for asylum," whose claims are "collateral to the process of removal," and who "never encounter the statutory provisions governing removal" under 8 U.S.C. § 1229a. *Id*. at 1269-70. Plaintiffs argue that this Court should follow *East Bay* and *Al Otro Lado* and distinguish *LAP* because it addresses "the zone of interests of an entirely different statute," Pls.' Opp. 12, but Plaintiffs' claims are not based on the statute at issue in *East Bay* and *Al Otro Lado*. Plaintiffs must

at a minimum show that 8 U.S.C. § 1229a was intended to provide rights to organizations—as the courts in *East Bay* and *Al Otro Lado* held § 1158 does—but Plaintiffs make no attempt to do so.

Plaintiffs advance no argument that they fall within the zone of interests of 8 U.S.C. § 1229a and, in fact, do not address § 1229a at all in their arguments on the zone of interests, *see* Pls.' Opp. 11-14. This is not surprising: there is nothing in § 1229a that even arguably regulates or protects the interests of legal services organizations. Mot. 15. Plaintiffs base their claim that EOIR is violating "the INA's case-by-case adjudication standards" on "8 U.S.C. §§ 1229a(b)(4)(A)-(B), (c)(1)(A), (c)(4)(B)." Complaint ¶¶ 195, 197; *see also id.* ¶¶ 202, 210, 228, 239. These statutory provisions say nothing about organizations. Section 1229a(b)(4), titled "Alien's rights in proceedings," addresses the "privilege[s]" and "rights" "*the alien* shall have" in these proceedings. 8 U.S.C. § 1229a(b)(4)(A)-(B) (emphasis added). Section 1229a(c)(1)(A) addresses determinations immigration judges must make related to "an alien," and § 1229a(c)(4)(A) addresses "[a]n alien applying for relief" and the burden of proof on "the alien."

Section 1229a does not regulate organizational interests at all, and provides even less basis for an organizational claim than the statute at issue in *LAP*. The opinion in *LAP* concludes that organizations failed to satisfy the zone-of-interests test even though that statute specifically addressed "qualified designated entities" who were to assist aliens seeking legalization under the statute. 510 U.S. at 1305. There is no similar language in § 1229a aimed at organizations, and even if there were it would not be enough given the *LAP* opinion's conclusion that a statute's reference to "organizations … [who] play[ed] a role in the [ ] scheme" "[f]or purposes of assisting in the program of legalization provided under" the statute is not enough to find that the statute "[i]s in any way addressed to their interests." 510 U.S. at 1305. For a statute that is "clearly meant to protect the interests of undocumented aliens, not the interests of organizations," even if the statute

or an agency's actions implementing the statute "may affect the way an organization allocates is resources," this "does not give standing to an entity which is not within the zone of interests the statute meant to protect." *Id*. Whatever the merits of *East Bay* and *Al Otro Lado* are, Plaintiffs' claims fall squarely within the rule applied in *LAP* rather than those cases because the statutory provisions they rely on address the rights only of individual aliens, not organizations.

Plaintiffs argue that the zone-of-interests test is not "especially demanding" and that "there need be no indication of congressional purpose to benefit the would-be plaintiff" so long as suit by organizations would not be "inconsistent with the purposes implicit in the statute" and it can "reasonably be assumed that Congress authorized the plaintiff to sue." Pls.' Opp. 13-14 (quoting *East Bay I*, 932 F.3d at 768). But here there are clear indications that Congress did not intend to authorize organizations to bring suit to challenge how removal proceedings are conducted. Section 1229a governs the rights of individual aliens in removal proceedings, the "sole and exclusive procedure for determining" whether an alien is removable. 8 U.S.C. § 1229a. And Congress has specified that "the sole and exclusive means of judicial review" of a determination in removal proceedings is "a petition for review" filed by an individual alien in the "appropriate court of appeals," 8 U.S.C. § 1252(a)(5)—a limitation on who can sue to enforce the provisions of § 1229a that extends to "[j]udicial review of all questions of law and fact" "arising from any action taken or proceedings brought to remove an alien," *id*. § 1252(b)(9). As a result, "it cannot reasonably be assumed that Congress intended to permit suit" by organizations challenging how § 1229a is implemented in immigration court. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012); *see also* Mot. 19-20.

Finally, Plaintiffs attempt to distinguish *Fed'n for Am. Immigration Reform (FAIR), Inc. v. Reno*, 93 F.3d 897 (D.C. Cir. 1996). Pls.' Opp. 12 n.5. *FAIR* held that an organization with an

interest in a particular level of immigration does not fall within the INA's zone of interests. *Id*. at 901-04. Plaintiffs argue that *FAIR* is "unhelpful" because it addressed an organization that sought lower rates of immigration and Plaintiffs here alternatively want more aliens to have an avenue to obtain legal status within the United States. Pls.' Opp. 12 n.5. But they point to nothing in the statutory text indicating that Congress intended suits by organizations that want aliens to have easier access to legal status in United States but not organizations that want less immigration. "The question under the zone-of-interests test … is simply whether the language of the statutes invoked by the plaintiff or the supporting legislative history suggests a congressional intent to permit the plaintiff's suit." *FAIR*, 93 F.3d at 902. Nothing in § 1229a shows any such intent.

The Court should dismiss the statutory claims because Plaintiffs are outside the zone of interests.

III. Plaintiffs' claims should be dismissed for lack of jurisdiction.

Plaintiffs' claims are also barred by jurisdictional provisions in the INA that foreclose challenges in district courts to the conduct of removal proceedings, including policy-and practices challenges and claims brought by organizations, 8 U.S.C. § 1252(a)(5), (b)(9), challenges to how cases are adjudicated, *id*. § 1252(g), and requests from organizational plaintiffs for injunctive relief related to 8 U.S.C. § 1229a or other provisions governing removal proceedings, *id*. § 1252(f). Plaintiffs' arguments to the contrary, *see* Pls.' Opp. 14-25, are inconsistent with the text of § 1252 and Ninth Circuit cases interpreting its jurisdictional limitations, *see* Mot. 16-22.

A. Section 1252(a)(5) and (b)(9)

The INA contains a carefully constructed scheme for review of legal or factual challenges arising from any action in removal proceedings. For any such challenge, Congress sharply limited federal court jurisdiction, providing that "a petition for review filed with an appropriate court of appeals" "shall be the sole and exclusive means for judicial review." 8 U.S.C. § 1252(a)(5);

see also id. § 1252(b)(9). Plaintiffs' claims thus must be dismissed for lack of jurisdiction. *See* Mot. 16-20.

Plaintiffs resist this conclusion by arguing that § 1252(a)(5) bars review only of removal orders and that they "do not seek review of any removal orders" or any issues "inextricably linked" to removal orders. Pls.' Opp. 14-15. Their complaint says otherwise. *See, e.g.* Complaint ¶ 5 (alleging case-completion goals lead to "rapid removals"), ¶ 62 (alleging "increase in removal orders"), ¶ 79 (challenging practices they allege lead EOIR to "issue removal orders"), ¶ 138 (case-completion goals lead "immigration judges to order removal instead of granting asylum"), ¶ 166 (alleging challenged practices lead to "inevitable appeal of the immigration judge's decision" to issue removal order). The entire theory of their case is that case-completion goals will somehow lead immigration judges to deny asylum and instead order removal, "nullifying" their efforts to assist aliens in obtaining asylum in immigration court. *See, e.g.*, Complaint ¶ 159; *see also* Mot. 7, 18. There is no way to separate Plaintiffs' claims from the removal orders issued to aliens whose claims are denied. The denial of an asylum claim is reviewed as part of the appeal of a removal order, *see* 8 U.S.C. § 1252(b)(1), (b)(4)(D), which can be judicially reviewed "sole[ly] and exclusive[ly] in the appropriate "court of appeals," *id.* § 1252(a)(5). Even where there is not yet a removal order, whenever a claim, "however it is framed, challenges the procedure and substance of an agency determination that is 'inextricably linked' to the order of removal, it is prohibited by section 1252(a)(5)." *J.E.F.M.*, 837 at 1032 (quoting *Martinez v. Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012)).[1]

[1] Plaintiffs argue that their "claims stem not from case outcomes or removal orders but from the frustration of Plaintiffs' missions and diversion of their resources resulting from Defendants' unlawful policies and practices." Pls.' Opp. 20. But if Plaintiffs are not challenging case outcomes, this further demonstrates their lack of standing. There is no injury to an alien who is *granted*

Plaintiffs next argue that § 1252(b)(9) does not bar review because their claims are "independent of or collateral to the removal process." Pls.' Opp. 15-21. This argument fails for many of the same reasons. Section 1252(b)(9) provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States … shall be available only in judicial review of a final order under this section" and that, with the exception of judicial review in the court of appeals authorized by § 1252(a)(5), "no court shall have jurisdiction … to review … such questions of law or fact." 8 U.S.C. § 1252(b)(9). As the Ninth Circuit has recognized, § 1252(b)(9) channels to the courts of appeals *all* claims related to "*any* removal-related activity," *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016), and the Supreme Court has held that § 1252(b)(9) covers all "decisions and actions leading up to or consequent upon final orders of deportation," *Reno v. Am.-Arab Anti-Discrimination Comm. (AADC)*, 525 U.S. 471, 483-85 (1999); *see also* Mot.16-20.

Plaintiffs make two main arguments to evade § 1252(b)(9) and *J.E.F.M.* Each fails. First, Plaintiffs argue that *J.E.F.M.* is "no longer controlling" because it "pre-dates *Jennings*." Pls.' Opp. 19 (citing *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018)). *Jennings*, however, was a habeas case that held that § 1252(b)(9) should not be read so broadly as to limit habeas "claims of prolonged detention" that would be "effectively unreviewable" in a petition for review (PFR) to the court of appeals under § 1252(b)(9). 138 S. Ct. at 840. In doing so, the Supreme Court distinguished cases like this one challenging "any part of the process by which [an alien's] removability will be determined." *Id.*; *see also id.* at 841 n.3 (plurality opinion) ("the question is … whether *the legal*

asylum—case-completion goals may merely have helped the alien obtain asylum sooner—and any diversion of resources would be purely self-inflicted if undertaken to respond to practices that lead to asylum grants rather than removal orders.

questions in this case arise from" "*an action taken to remove an alien*" (emphasis in original)). Plaintiffs cite language in *Jennings* addressing claims that, unlike the claims here, *are* completely collateral to proceedings in immigration court, which the Supreme Court identified as "detention" claims, claims based on "conditions of confinement," and state-law claims based on criminal or tort law. *Id*. at 840; *see* Pls' Opp. 21. Justice Alito's opinion explained that "cramming judicial review of those questions into the review of final removal orders would be absurd" because these claims do not arise from actions in the removal proceedings. *Jennings*, 138 S. Ct. at 840. Nothing in *Jennings* narrows § 1252(b)(9)'s application to challenges to things that do occur in immigration court or overturns *J.E.F.M. See, e.g., Alvarez v. Sessions*, 338 F. Supp. 3d 1042, 1048-49 (N.D. Cal. 2018) (noting that it does not require "an expansive interpretation of § 1252(b)(9)'s 'arising from' language to find that" "issues related to legal representation during removal proceedings" "fall squarely within the purview of the provision," and that *J.E.F.M.'s* holding remains good law post-*Jennings*); *Rueda Vidal v. DHS*, No. 18-cv-9276, 2019 WL 7899948, at *11, n.17 (C.D. Cal. Aug. 28, 2019) (*J.E.F.M.* remains "binding circuit precedent" following *Jennings*).

Second, Plaintiffs attempt to argue that, although their challenges relate to things that take place in immigration court, their challenges are nonetheless collateral to removal proceedings and thus escape § 1252(b)(9)'s channeling provisions. Pls.' Opp.16. They maintain that they do not "challenge any part of the process through which an individual's removability is determined," but instead challenge the "manner in which Defendants administer the removal process." *Id*. This is not a meaningful distinction under the plain statutory text, as their claims, even as they describe them, do not evade the Ninth Circuit's holding that "*any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the PFR process." *J.E.F.M.*, 837 F.3d at 1031; *see* Mot. 16-19.

Plaintiffs argue that § 1259(b)(9) cannot be read to bar claims that cannot be raised in a PFR, *see* Pls.' Opp. 16-18, but fail to show that their claims fall into this category. They acknowledge that "petitioners in removal proceedings may raise claims of bias in a petition for review" and that for the case-processing goals for family-unit cases and other case-completion goals they challenge, "[t]he practical effect of both policies on the individuals who Plaintiffs serve would likely take the form of biased decision making or the denial of a continuance, which could form the basis of a petition for review." *Id*. at 19 nn.9-10 (citing cases raising bias and scheduling challenges in PFRs). They also concede that claims challenging the "asylum grant rate" at immigration courts have been raised through PFRs, and that "courts have granted individual petitions for review based in part on immigration court backlogs." *Id*. at 18 (citing PFR decisions from different appellate courts). They quarrel with the outcome of those cases, but that does not mean that these types of claims are not reviewable through a PFR. There is no exception to § 1252(b)(9) that permits Plaintiffs to seek review in district court of an appellate decision they disagree with from another part of the country addressing the immigration court in that circuit—an immigration court from which that court of appeals will have regularly heard PFRs and with which it will be most familiar.

Plaintiffs attempt several other versions of this same argument. They argue that their claims escape § 1252(b)(9) because they raise "broader systemic challenges to immigration court policies and practices" that are not reviewable through a PFR that is limited to claims raised by an individual alien. Pls.' Opp. 18-19. But Congress's decision to limit the *manner* in which claims related to removal proceedings are reviewed to individual claims does not mean that Plaintiffs' claims are unreviewable. Also, Plaintiffs cannot reasonably dispute that Congress intended to foreclose claims in district courts raising systemic challenges to proceedings in immigration court

when it enacted § 1252(b)(9). Congress specifically "crafted language to channel challenges to agency policies through the PFR process," "including policies-and-practices challenges." *J.E.F.M.*, 837 F.3d at 1034-35; *see also* Mot. 19-20. Reading § 1252(b)(9) to bar jurisdiction for district court review or systemic claims relating to practices in immigration court does not involve the "uncritical literalism" the Supreme Court warned against in *Jennings* that would read this provision in a way that "no sensible person could have intended." 138 S. Ct. at 840. Congress intended precisely this result: "When it enacted § 1252(b)(9) in 1996, Congress was legislating against the backdrop of recent Supreme Court law" that "offered a blueprint for how Congress could draft a jurisdiction-channeling statute that would cover not only individual challenges to agency decisions, but also broader challenges to agency policies and practices." *J.E.F.M.*, 837 F.3d at 1034. "[Section] 1252(b)(9) neatly tracks the policy and practice jurisdiction-channeling language suggested" by the Supreme Court and "[t]hus, the legislative history and chronology of amendments to § 1252(b)(9) confirm" that § 1252(b)(9) channels "review of all claims, including policies-and-practices challenges, through the PFR process." *J.E.F.M.*, 837 F.3d at 1035.

Plaintiffs also argue that organizational claims should escape § 1252(b)(9) because organizations cannot file PFRs so their claims "would otherwise be unreviewable." Pls.' Opp. 20; *see* Mot. 20. Here again, Plaintiffs incorrectly try to cast claims that they concede are reviewable in a PFR as unreviewable solely because the INA requires that an alien, rather than an organization, bring the claim. Plaintiffs argue that the government's reliance on cases to the contrary is "misplaced" and that these cases are "unpersuasive," Pls.' Opp. 20-21, but they identify no meaningful basis to distinguish cases holding that § 1252(b)(9) prevents organizations from raising challenges that arise from removal proceedings. Plaintiffs attempt to distinguish *ASAP v. Barr*, 409 F. Supp. 3d 221 (S.D.N.Y. 2019), because *ASAP* held that the organizations were challenging

removal orders "in substance if not form," and here "Plaintiffs' claims stem not from case outcomes or removal orders." Pls.' Opp. 20. The assertion that Plaintiffs are not challenging case outcomes or removal orders is incorrect for the reasons set out above, but it also misses the point. Plaintiffs do not respond to *ASAP*'s holding that § 1252(b)(9) bars claims by organizations. If Plaintiffs' argument were correct, *ASAP* would have held that § 1252(b)(9) was irrelevant because Plaintiffs were "a group of organizations dedicated to helping immigrant families," *ASAP*, 409 F. Supp. 3d at 222, that could not alternatively file a PFR raising their claims.

Plaintiffs also attempt to distinguish *P.L. v. ICE*, No. 1:19-cv-1336, 2019 WL 2568648 (S.D.N.Y. June 21, 2019), which similarly dismissed organizational claims as barred by § 1252(b)(9). Plaintiffs note that *P.L.* addressed a challenge to conducting removal proceedings by video teleconference (VTC), which, they maintain, is different from their claims because VTC is explicitly authorized by the INA. Pls.' Opp. 21. Plaintiffs do not acknowledge that the INA also provides, as part of the "procedures" for "consideration of asylum applications," that immigration judges should complete "adjudication of the asylum application" within six months where circumstances allow, and that "the Attorney General shall establish a procedure for the consideration of asylum applications." 8 U.S.C. § 1158(d)(1), (d)(5)(A)(iii). More importantly, however, Plaintiffs once again do not respond to the court's conclusion that organizational claims are foreclosed by § 1252(b)(9). The court in *P.L.* did not just dismiss the claims of individual plaintiffs under § 1252(b)(9). It also dismissed the claims of the organizations, who argued that VTC causes "scheduling challenges" and delays and "increases the time and cost associated with providing legal services to detained immigrants and their ability to effectively represent their clients." *P.L.*, 2019 WL 2568648, at *2. Plaintiffs acknowledge that in *P.L.*, "the organizational plaintiffs raised a claim on their own behalf," Pls.' Opp. 21, that was dismissed under § 1252(b)(9).

Plaintiffs identify no basis on which this Court can reach a different conclusion than the multiple courts that have held that § 1252(b)(9) bars organizational claims.

Ultimately, even if Plaintiffs were correct that the limits on PFRs to claims brought by individual aliens makes their claims "effectively unreviewable," there is no "effectively unreviewable" exception to § 1252(b)(9). Pls.' Opp. 17, 21. Section 1252(b)(9) bars review of all claims "arising from any action taken or proceeding brought to remove an alien" except for claims that can be brought through a PFR under § 1252(a)(5). Section 1252(b)(9) does not say that it bars district-court review of only those claims that can otherwise be brought in a PFR. It says that if a claim cannot be brought "as otherwise provided in" § 1252—*i.e.*, through a PFR—then "*no court* shall have jurisdiction." 8 U.S.C. § 1252(b)(9) (emphasis added).

A statutory review scheme may lawfully require a plaintiff to wait until the agency initiates proceedings and issues a decision before challenging the relevant statute or rule. *AFL-CIO v. Trump*, 929 F.3d 748, 755-56 (D.C. Cir. 2019). This is true even where the statute "ma[kes] it *impossible* to obtain particular forms of review or relief"—a "Statute can preclude a claim from being brought in a district court even if it *forecloses* the claim from administrative review and provides no other way to bring the claim." *Id.* at 756. Where the "statutory scheme provide[s] no way to assert" a "nationwide' attack," that does not mean that Plaintiffs can "resort to the courts"; it means that Plaintiffs "may not raise the claim at all." *Id*. A statute that provides for a "comprehensive review process" for agency decisions thus forecloses "pre-enforcement claims" where the review scheme "does not distinguish between preenforcement and postenforcement challenges" and instead "applies to all" legal and factual challenges arising from the agency proceedings. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208-09 (1994). That is what § 1252 does by limiting "challenges to INS procedures and practices" to the PFR process. *J.E.F.M.*, 837

F.3d at 1036. This is no different from other contexts where facial challenges are routinely channeled through administrative proceedings *before* federal-court review. *See Am. Fed'n of Gov't Employees v. Sec'y of Air Force*, 716 F.3d 633, 639 (D.C. Cir. 2013) (statute providing for an exclusive review mechanism "applies to a 'systemwide challenge' to an agency policy … just as it does to the implementation of such a policy in a particular case"); *Jarkesy v. S.E.C.*, 803 F.3d 9, 12, 28-29 (D.C. Cir. 2015).

Jennings did not create an exception to § 1252(b)(9) for claims "arising from" removal proceedings if those claims cannot be raised in a PFR. Rather, *Jennings* concluded that detention claims do not fall under § 1252(b)(9), not because they cannot be reviewed in a PFR, but because § 1252(b)(9) applies where "*the legal questions*" "arise from" "an action taken to remove an alien," and detention questions do not arise from and "are too remote from" actions or proceedings in immigration court. *Jennings*, 138 S. Ct. at 841, n.3. While claims that do not arise in immigration court may be unreviewable in a PFR as a result, it is the "arising from" analysis and not the ultimate reviewability of the claim that drives the determination of whether § 1252(b)(9) applies. *See Cancino-Castellar v. Nielsen*, 338 F. Supp. 3d 1107, 1116 (S.D. Cal. 2018) (*Jennings* "should not be read to fashion a free-standing exception to Section 1252(b)(9) based on the mere assertion that a claim is effectively unreviewable … . As Justice Alito himself confirmed, a court must decide whether the legal or factual *question* a plaintiff raises arises from an action taken to remove or the removal process."); *Nat'l Immigration Project of Nat'l Lawyers Guild v. EOIR*, No. 1:20-cv-852, 2020 WL 2026971, at *8-9 (D.D.C. Apr. 28, 2020) (rejecting similar argument).

The cases Plaintiffs cite are not to the contrary. *See* Pls.' Opp. 15, 17. In *E.O.H.C. v. Sec'y United States Dep't of Homeland Sec.*, the court acknowledged that the relevant inquiry "start[s] with the statutory text" and asks whether the claims arise from an action taken to remove

individuals from the United States. 950 F.3d 177, 184 (3d Cir. 2020). The court concluded that the challenged action was reviewable because it "was not part of the process of removal," and § 1252(b)(9) "does not reach claims that are independent of, or wholly collateral to, the removal process." *Id*. at 184, 186. Plaintiffs' reliance on *Singh v. Gonzales*, 499 F.3d 969, 979 (9th Cir. 2007), is similarly misplaced. They argue that *Singh* held that a "district court had jurisdiction over [an] ineffective assistance of counsel claim where [the] asylum seeker otherwise would have had no legal avenue to obtain judicial review." Pls.' Opp. 15. This is not what *Singh* held. *Singh* held that claims that "occurred *after* the issuance of the final order of removal" were not barred because they could not have arisen in the removal proceedings, but distinguished claims that arose during the proceedings, which were barred because the alien "should have raised" them "before the IJ or the BIA on direct review." 499 F.3d at 974, 979; *see also Cancino-Castellar*, 338 F. Supp. 3d at 1111-12. Plaintiffs' assertion that *Singh* was based on a finding that there would otherwise be "no legal avenue to obtain judicial review," Pls.' Opp. 15, is also incorrect—the court noted that there was "an alternative avenue for relief" that could lead to judicial review through a "petition for review." *Singh*, 499 F.3d at 979.

This Court should dismiss Plaintiffs' claims for lack of jurisdiction as required by § 1252(a)(5) and (b)(9).

B. Section 1252(g)

Plaintiffs' claims are separately barred by 8 U.S.C. § 1252(g). *See* Mot. 21-22. That provision, titled "Exclusive Jurisdiction," provides that, outside of a PFR, "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. § 1252(g). This bar to judicial review squarely encompasses Plaintiffs' claims, which they describe as challenges to how cases are "adjudicated" in immigration court. *See, e.g.*,

Pls.' Opp. 9 (describing basis of their challenge as practices that effect how "each case is individually adjudicated"); 16 (arguing that "Plaintiffs' claims 'arise from' [ ] policies and practices" related to "adjudication" of cases "across the immigration court system").

Plaintiffs contend that § 1252(g) must be read narrowly to apply only to the "decisions or actions listed in the statute—i.e., to commence removal proceedings, to adjudicate a case, or to execute a removal order." Pls.' Opp. 22. As noted above, however, Plaintiffs' claims arise from decisions and actions "to adjudicate a case." They argue that § 1252(g) and the "adjudicate a case" language applies only to decisions or actions antecedent to the "formal adjudicat[ion]" of claims in immigration court. Pls.' Opp. 22-23. This is not correct: § 1252(g) applies to decisions or actions to "execute removal orders" that necessarily take place after the immigration-court proceedings and, as the Supreme Court noted, Congress stated in the legislation enacting § 1252(g) that this provision "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings." *Reno*, 525 U.S. at 479-80 (quoting Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 110 Stat. 3009–546, § 306(c)(1) (1996)). It would be inconsistent with Congress's statement that § 1252(g) "shall apply without limitation to claims arising from all [ ] pending, or future … removal proceedings," to hold that § 1252(g) does not apply to any decision or action arising in pending removal proceedings.

Plaintiffs maintain that § 1252(g) is limited to protecting the Attorney General's discretionary decisions rather than decisions made by immigration judges, citing *Barahona-Gomez v. Reno*, 236 F.3d 1115 (9th Cir. 2001). Pls.' Opp. 22. Plaintiffs here, however, are challenging the Attorney General's oversight of how claims are adjudicated in immigration courts. *See, e.g.*, Complaint ¶¶ 195, 197 (alleging their challenge is to the "Attorney General's" oversight of "immigration court proceedings" and his decisions related to "adjudication of removal

proceedings"). The Ninth Circuit in *Barahona-Gomez* distinguished actions by immigration judges from the "actions that the Attorney General may take" because "actions by the Executive are sharply different from the quasi-judicial, as opposed to quasi-prosecutorial, role of immigration judges." *Barahona-Gomez*, 236 F.3d at 1119 (quoting *AADC*, 525 U.S. at 482). The Attorney General or his delegates' decisions on what cases to prioritize and how many cases an immigration judge should aim to complete in a year are entirely discretionary. Mot. 21. Plaintiffs dispute the discretionary nature of these decisions, Pls.' Opp. 23 n.13, but they point to no statute or regulation that governs these particular decisions or cabins the Attorney General's discretion in this area.

As the Supreme Court explained, § 1252(g) covers discretionary decisions relating to "'commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders'—which represent the initiation or prosecution of [the] various stages in the deportation process." *AADC*, 525 U.S. at 482. The manner in which the stages of the removal process are prosecuted is what Plaintiffs challenge here. And as the Ninth Circuit held, "deconstruction, fragmentation, and hence prolongation of removal proceedings" are "the evils meant to be remedied by the statute." *Barahona-Gomez*, 236 F.3d at 1119. There, the court held that "there [was] no rational way to find that" plaintiffs' claims would lead to such fragmentation. *Id.* at 1119. This case presents the opposite situation, where Plaintiffs challenge case-scheduling issues that can also be raised in individual PFRs, leading to fragmented litigation arising from the same proceedings, and seek to strike down goals for completing removal proceeding on a reasonable timeline, potentially causing unnecessary prolongation of the proceedings.

Plaintiffs argue that § 1252(g)'s goals of preventing deconstruction and fragmentation must be assessed in the context of the statutory scheme as a whole. Pls.' Opp. 22 (citing *AADC*, 525 U.S. at 487). But doing that just further confirms that this Court is not the proper place for

these claims. Section 1252(g), like other provisions of § 1252, bars judicial review outside of a properly filed PFR. Bringing whatever claims are not barred by § 1252(g) as part of a PFR prevents multiple lawsuits addressing the same issues and avoids the type of fragmentation that the Supreme Court and the Ninth Circuit have held that § 1252(g) is designed to prevent. *See also Aguilar v. ICE*, 510 F.3d 1, 13 (1st Cir. 2007) (permitting parties "to ignore the channeling provisions of section 1252(b)(9)" and instead raise "claims directly in the district court would result in precisely the type of fragmented litigation that Congress sought to forbid"). Dismissing challenges to the Attorney General's discretionary decisions is also consistent with the overall statutory scheme of § 1252, "*many* provisions of [which] are aimed at protecting the Executive's discretion from the courts—indeed, that can fairly be said to be the theme of the legislation." *AADC*, 525 U.S. at 486.

C. Section 1252(f)

Plaintiffs' requested relief is also barred by 8 U.S.C. § 1252(f)(1), which prevents district courts from granting organizations injunctive relief that would restrain the operation of the statutes governing the removal process. Section 1252(f)(1) provides that: "[r]egardless of the nature of the action or claim or of the identity of the party or parties bringing the action, 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). Section 1229a, the provision governing the conduct of removal proceedings on which Plaintiffs base their claims, falls within the statutory range covered by § 1252(f)(1).

Plaintiffs primarily seek "injunctive relief prohibiting Defendants from continuing to implement" the case-completion goals. Complaint, Prayer for Relief, (b)-(c). They ask this Court to "[i]ssue injunctive relief requiring Defendants to take specific corrective action" to change the operation of the "immigration court system." *Id.* (d). As the Ninth Circuit just held, however,

"Congress intended [§ 1252(f)] to prohibit injunctive relief with respect to organizational plaintiffs." *Padilla v. ICE*, 953 F.3d 1134, 1150 (9th Cir. 2020). "The statute's legislative history supports [this] reading," as "Congress adopted § 1252(f)(1) after a period in which organizations and classes of persons, many of whom were not themselves in [removal] proceedings, brought preemptive challenges to the enforcement of certain immigration statutes." *Id.* Congress enacted § 1252(f)(1) to end "suits brought by organizational plaintiffs and noncitizens not yet facing proceedings under 8 U.S.C. §§ 1221-1232." *Id*.

Plaintiffs argue that "[t]his Court has broad equitable powers to afford remedies in the form of injunctive relief," Pls.' Opp. 11, but *Padilla* dooms their request for injunctive relief that would alter the statutory provisions that apply to proceedings in immigration court. For example, § 1229a requires that "[a]n immigration judge shall conduct proceedings for deciding" whether an alien is removable and rule on claims for relief from removal, including asylum applications. 8 U.S.C. § 1229a(a)(1), (c)(4). And § 1229 requires "Prompt Initiation of Removal" for aliens who are removable for having committed certain offenses, stating that "the Attorney General shall begin any removal proceedings as expeditiously as possible," and, as to the scheduling of the initial hearing for aliens in removal proceeding "under section 1229a," requires only that "the hearing date shall not be scheduled earlier than 10 days" after the start of the proceedings. 8 U.S.C. § 1229(b), (d)(1). Plaintiffs seek to enjoin how EOIR currently implements these provisions, but nothing in § 1229 or § 1229a requires the specific actions they ask this Court to order.

Section 1252(f) forecloses Plaintiffs' attempt to rewrite these statutory provisions to place additional limitations on the government's authority based on "requirement[s]" or "standards" "that [do] not exist in the statute." *Hamama v. Adducci*, 912 F.3d 869, 879-80 (6th Cir. 2018). Section 1252(f)(1) provides that no court other than the Supreme Court has "jurisdiction or

authority to enjoin or restrain the operation" of these provisions. If placing "limitations on what the government can and cannot do under the removal … provisions are not 'restraints,' it is not at all clear what would qualify as a restraint." *Id.* at 880. This includes attempts to place limitations on the scheduling of hearings in immigration court. *See Vazquez Perez v. Decker*, No. 18-cv-10683, 2019 WL 4784950, at *1, 6 (S.D.N.Y. Sept. 30, 2019). In *Vazquez* the court held that granting relief related to case scheduling "would enjoin or restrain, at a minimum, the operation of [§ 1229]" because, beyond the initial 10 days after removal proceedings begin, the statue does not state when hearings should be scheduled. *Id*. at *6. "Because Congress, in its judgment, chose not to mandate" that hearings be scheduled on a particular schedule, "an injunction imposing one where the statute is *silent* would displace that judgment in a way that would enjoin or restrain the method or manner of Section 1229(b)'s functioning." *Id.*

Plaintiffs must separately establish jurisdiction for each of their claims *and* "for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 185 (2000). This Court cannot grant injunctive relief to organizations or relief that would alter or add to the requirements of § 1229, § 1229a, or the other INA provisions governing the removal process, and thus should dismiss Plaintiffs' claims for injunctive relief. *See, e.g.*, *Byam v. Cain*, No. 2:18-CV-1030-SI, 2019 WL 3779508, at *1 n.1 (D. Or. Aug. 12, 2019) (dismissing claims for injunctive relief where injunctive relief barred by statute); *Anoushiravani v. Fishel*, No. 04-cv-212-MO, 2004 WL 1630240, at *3 (D. Or. July 19, 2004).

D. Section 1329

Amendments to 8 U.S.C. § 1329 further support the conclusion that § 1252 bars jurisdiction over all of Plaintiffs' claims. Mot. 20-21. Plaintiffs argue that § 1329 does not itself bar their claims. Pls.' Opp. 23-25. This is correct, but misses the point. By removing provisions in § 1329 that had previously allowed organizational claims related to immigration court proceedings

at the same time that Congress enacted § 1252 and limited such claims to individual PFRs brought by aliens, Congress established a comprehensive and exclusive scheme for review. Plaintiffs and their claims fall outside of this scheme.

"When a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 344-51 (1984). Here, the Court need not resort to any implication—Congress expressly precluded review of organizational claims such as Plaintiffs' in § 1252. A statutory provision that "establishes that the [agency] and the courts of appeals have exclusive jurisdiction over challenges to agency [ ] proceedings" and provides a "comprehensive review process" "applies to all" challenges, even to claims on which the statute is "facially silent." *Thunder Basis Coal Co.*, 510 U.S. at 208-09; *see also supra*, 17-18.

Plaintiffs argue that there is a "presumption in favor of judicial review" and urge this Court to find jurisdiction under the general federal-question statute, 28 U.S.C. § 1331, but they acknowledge that § 1331 does not provide jurisdiction "where review is precluded by statute." Pls.' Opp. 25. That is the case here, where § 1252 precludes jurisdiction over the types of claims Plaintiffs seek to raise and eliminates jurisdiction "[n]otwithstanding any other provision of law." 8 U.S.C. § 1252(a)(5); *see also id.* § 1252(b)(9) ("no court shall have jurisdiction" under "any other provision of law"); *id*. § 1252(f) ("Regardless of the nature of the action or claim or the identity of the party or parties bringing the action, no court … shall have jurisdiction"); *id.* § 1252(g) ("notwithstanding any other provision of law (statutory or nonstatutory) … no court shall have jurisdiction"); *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (use of "notwithstanding" in a statute "clearly signals the drafter's intention that the provisions of the

'notwithstanding' section override conflicting provisions of any other section"). "When two statutes come into conflict, courts assume Congress intended specific provisions to prevail over more general ones." *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1075 (9th Cir. 2016); *see also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (noting that rule "of statutory construction that the specific governs the general" "is particularly true where … Congress has enacted a comprehensive scheme").

Because Congress enacted a comprehensive review scheme in the INA eliminating judicial review of all claims not specifically authorized, Plaintiffs' claims are doomed by their concession that "[t]he statutes that apply to removal proceedings do not authorize an organizational challenge to Defendants' broad, programmatic policies." Pls.' Opp. 17 n.8. By also removing jurisdiction for organizational claims from § 1329, *see* Mot. 20, Congress further "ma[de] clear that district court jurisdiction founded on the immigration statute is confined to actions brought by the government." *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999); *see also* Mot. 20.

IV. Plaintiffs fail to state a claim upon which relief can be granted.

Plaintiffs' claims under the Take Care Clause, the INA and Due Process Clause, and the APA must also be dismissed under Rule 12(b)(6). *See* Mot. 22-32.

A. Plaintiffs fail to state a claim under the Take Care Clause (claim I).

The Take Care Clause places no justiciable restraints on executive action and cannot be a basis for a claim by private parties. Mot. 22-23. Plaintiffs argue that they state a claim under the Clause, but acknowledge that "the contours of the Take Care Clause" have never "been defined." Pls.' Opp. 36-37. They insist that they have a plausible claim for relief under the Clause, *id*. at 38, but cite no cases setting out what is required to state a claim or grant relief under the Clause, because no such cases exist.

Plaintiffs describe their claim as seeking to enforce the Attorney General's "obligation to oversee the immigration court system in accordance with the case-by-case adjudication standards of the INA," which they base on 8 U.S.C. § 1229a(b)(4)(A)-(B), (c)(1)(A), and (c)(4)(B). Pls.' Opp. 42. They argue that the Attorney General has "suspended" these standards "through the abuse of authority and mismanagement of the immigration courts." *Id*. But they offer no plausible theory or allegations of how, in their view, the Attorney General has done so. The statutory provisions they cite address the alien's rights to retain counsel at no cost to the government, to examine and present evidence, to cross-examine witnesses, and to get a decision from the immigration judge based on the evidence in the record. They do not explain how reasonable case-completion goals "suspend" any of these provisions or give even one concrete example of an individual case where this has happened. They thus fail to plead "factual content" sufficient to state a plausible claim that the government "is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Ultimately Plaintiffs challenge discretionary decisions related to case scheduling that cannot form the basis of any claim, let alone a claim under the Take Care Clause. *See* Mot. 22.

The Court should dismiss this claim under Rule 12(b)(6).

B. Plaintiffs fail to state a claim under the Due Process Clause or INA (claim II).

Plaintiffs cannot state a bias claim under the INA or the Due Process Clause. Mot. 23. Plaintiffs have not identified a waiver of sovereign immunity for this claim, have not put forth any plausible allegations of bias, and have not linked their theory of bias to the case-completion goals they challenge. *Id*. at 24-30. Plaintiffs' responses do not save this claim. Pls.' Opp. 29-36.

Plaintiffs first argue that the APA's waiver of sovereign immunity applies to "all actions 'seeking relief other than money damages' against federal officials." Pls.' Opp. 29 (quoting 5 U.S.C. § 702). But "the APA's waiver of immunity comes with an important carve-out: The waiver does not apply 'if any other statute that grants consent to suit expressly or impliedly forbids

the relief which is sought' by the plaintiff." *Patchak*, 567 U.S. at 215 (quoting 5 U.S.C. § 702); *see also* 5 U.S.C. § 702(a)(1) (providing that "This chapter," which includes the APA's waiver of sovereign immunity "applies … except to the extent that" "statutes preclude judicial review"). These provisions "prevent[ ] plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes," *Patchak*, 567 U.S. at 215, and as explained, Congress has enacted statutes clearly limiting this suit from proceeding. *See also Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998) ("APA's waiver of sovereign immunity contains several limitations," and applies only to agency action "made reviewable by statute" or "final agency action for which there is no other adequate remedy").

Plaintiffs next argue that a bias claim does "not require proof of actual bias" if there is an "intolerable probability of actual bias." Pls' Op. 30. As explained, however, stating a claim based on probability requires allegations that show an extraordinarily high probability that bias infected a particular decision, Mot. 30-31, such as "a direct, personal, substantial, pecuniary interest" in the outcome of a particular case, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876-77 (2009). For example, in *Caperton*, a company contributed millions of dollars to elect a judge to a court that was about to hear the company's appeal of a $50 million adverse judgment. *Id*. at 882-84. The Supreme Court emphasized that its finding of a "probability of actual bias [that rose] to an unconstitutional level" was based on the "extreme facts" presented by that case. *Id*. at 877-88. Plaintiffs rely heavily on *Caperton*, but that case sets a standard that Plaintiffs' allegations come nowhere close to meeting, and dealt with the standard for recusal, not anything related to the INA.

The other cases that Plaintiffs cite, Pls.' Opp. 30, similarly dealt with extreme factual scenarios, nothing like what is presented here, showing a clear connection between the decision-maker and a particular case, and a personal interest by the decision-maker that created a high risk

of bias, *see* Mot. 29-30. These cases further support the argument that bias claims must be adjudicated based on a specific record and on a case-by-case basis, as is the case when these claims are raised in individual PFRs. Mot. 29. Plaintiffs respond to cases treating bias claims as a backwards-looking inquiry requiring a showing that a particular decision could have been affected by bias and turned out differently, *id.*, only by saying that "[t]hose cases do not apply here because Plaintiffs do not challenge any decision in any individual case." Pls' Opp. 30-31. They point to no cases that hold that a party can state a bias claim that is disconnected from the actual decision or decisions that are claimed to be biased.

Plaintiffs' allegations do not come close to stating a plausible bias claim. Their argument reduces to asking this Court to infer wrongdoing (even in the absence of any specific allegations plausibly showing it) on the theory that the Court can "reasonably infer that mandating the pace of adjudication, through [case-completion goals,] leads to biased decision-making." Pls.' Opp. 32. This is incorrect. Plaintiffs must put forth allegations that contain "sufficient factual matter" to state a plausible claim for relief, *Iqbal*, 556 U.S. at 678, and that "raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs' allegations on this claim, *see* Compl. ¶¶ 117-54, 201-07, and the arguments they make to try to save it, *see* Pls.' Opp. 31-32, are nothing but speculation that case-completion goals might affect the outcome of decisions without pointing to a single example or case of this allegedly widespread effect.

Plaintiffs argue that the case-completion goals "require judges to prioritize speed regardless of the specific facts and circumstances of each case." Pls.' Opp. 31. The performance metrics, however, simply set a target for the number of cases that an immigration judge should aim to complete in a year. Mot. 26-27. These metrics do not say that every pending case must be completed within a year—*i.e.*, a case that is completed in a particular year may have been pending

for multiple years if necessary—and the performance metrics "preserv[e] immigration judge discretion" to determine an appropriate schedule for a particular case. *Id*. Plaintiffs argue that the goals for completing family-unit cases within a year "stigmatizes family-unit asylum cases from the beginning" as cases that should be "hastened through the system with little regard for individual facts or circumstances." Pls.' Opp. 31-32. They provide no explanation for why that is so—EOIR has simply provided that these "cases should be completed expeditiously and without undue delay consistent with due process." *Tracking and Expedition of Family Unit Cases* (Nov. 16, 2018), https://www.justice.gov/eoir/page/file/1112036/download. Plaintiffs also maintain that performance metrics setting case-completion goals give "immigration judges a pecuniary interest in the pace and outcome of the cases before them." Pls.' Opp. 32. But the performance metrics merely provide benchmarks for case completion—an immigration judge receives no pecuniary benefit from reaching a particular outcome. Mot. 26-27. They contend that it is faster to deny than grant asylum because a decision denying asylum potentially can address fewer "factual and legal issues." Pls.' Opp. 33. Plaintiffs point to nothing showing this is actually true, but even if it were, this could affect only the length of the judge's decision, and would do nothing to shorten the overall time of the case or the length of hearings or testimony.

Plaintiffs argue that immigration judges face "negative employment consequences, including termination" for "granting a continuance, postponing a hearing when a witness is unavailable, or taking a matter under advisement to consider evidence," Pls.' Opp. 32, but the performance metrics say nothing even remotely like this and, unsurprisingly, Plaintiffs do not allege or point to any immigration judge who has actually faced negative consequences for these actions. The performance metrics also assess the rate at which an immigration judge's decisions are overturned on appeal, so there is no incentive or advantage to quickly reaching an incorrect

decision. Mot. 27. Plaintiffs argue that the remand-rate metric gives immigration judges an incentive to reach decisions that will be upheld on appeal, and argue that this is improper because they also allege that the Board of Immigration Appeals is not "fair or functioning." *Id*. 33-34. They acknowledge that these decisions are also reviewed by the federal courts of appeals, but this is insufficient in Plaintiffs' view because appeals are sometimes subject to deferential standards of review. *Id*. at 34. If, however, "Defendants have manipulated the immigration court system to serve an anti-immigrant agenda," as Plaintiffs allege, *see* Compl. ¶ 5, and have done so since January 2017, *id.* ¶¶ 58-59, surely there would be at least some increase in the rate at which the appellate courts overturn agency decisions. Yet the statistics tell a very different story, showing a lower remand rate in recent years and an overall downward trend. *See* EOIR, Circuit Court Remands Filed, https://www.justice.gov/eoir/page/file/1199211/download.

As explained in Defendants' motion, there are additional problems with Plaintiffs' allegations of causation that further undermine the plausibility of their claims. There are many factors that might affect whether an alien is granted asylum, including that certain immigration courts hear claims from particular groups of aliens that are less likely to be eligible for asylum, Mot. 25, and rules unrelated to the issues raised in this case bar certain categories of aliens from applying, *id*. at 25-26. As the government further explained, Plaintiffs allege in their complaint that the Attorney General suspended case-by-case adjudication of asylum claims, but they did not explain why, if this were true, it only affects certain immigration courts and not all, or address the fact that the family-unit case-processing goals apply in only 10 cities and do not align with the immigration courts whose decisions they challenge. *Id.* at 28-29. Plaintiffs also rely on statistics that go back to 2014, long before the case-completion goals were in place. *Id.* at 29.

Plaintiffs do not respond to any of these problems that make implausible their allegations that the case-completion goals have had the negative effects they allege. They respond only that "the statistics Plaintiffs allege speak for themselves," that they "are entitled to all reasonable inferences in their favor," and as to the government's argument that they have not pleaded sufficient factual content to state a plausible claim of "judicial bias," they argue that "this Court need not reach it at this stage." Pls.' Opp. 35. This ignores the standard at the motion-to-dismiss stage, which requires that Plaintiffs' allegations permit a reasonable inference that Defendants are liable of the alleged misconduct to avoid dismissal. *Iqbal*, 556 U.S. at 678; *see also Sangers v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007) ("Conclusory allegations and unreasonable inferences [ ] are insufficient to defeat a motion to dismiss."); *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (A "court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit," or "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.").

Plaintiffs' allegations do not meet this threshold standard and their claim must be dismissed as a result.

C. Plaintiffs fail to state an APA claim (claims III-VI).

Plaintiffs' maintain that the case-completion goals are arbitrary and capricious because they prevent impartial adjudication. But Plaintiffs cannot state an APA claim because they do not identify a final agency action subject to APA review and APA claims are not available where Congress has provided an alternative mechanism for review. Mot. 30-31.

Plaintiffs argue that the case-completion goals in the immigration judge performance metrics and the family-unit case-processing goals are each final agency actions. Pls.' Opp. 26-27. Plaintiffs do not dispute that to be final, an agency decision must mark the consummation of the agency's decision-making process (as opposed to tentative or interlocutory decisions), and must

determine rights or obligations or have legal consequences. *Id*. They argue that these practices are final because they have "an actual or immediate threatened effect" in that they "have negatively affected Plaintiffs since they were implemented in late 2018." *Id*. at 27. But Plaintiffs elide an important step in their theory of the case. Plaintiffs do not allege that the case-completion goals in and of themselves have some negative impact on Plaintiffs. Certainly they could not contend that they are negatively affected where an alien is granted asylum and the asylum grant occurs more quickly as a result of the case-completion goals. Rather, they argue that the case-completion goals affect the outcome of some, but not all, decisions by immigration judges.

It is only in these decisions by immigration judges ruling on asylum claims in individual cases that the case-completion goals could theoretically have any effect. Plaintiffs have not shown that any such effect exists, but for purposes of whether they have stated an APA claim, the relevant inquiry looks to when the agency consummates its decision making. Even the ultimate decision by the immigration judge is not the final agency action where there is an appeal and the Board of Immigration Appeals (BIA) makes the agency's final decision. EOIR's recommended goals for how immigration judges should schedule cases, which may not even play any role at all in a particular case and which Plaintiffs have not shown have any particular effect on the outcome of any, let alone all, decisions in immigration court, are the type of action that courts have characterized as non-final. *See* Mot. 31; *see also Dalton v. Specter*, 511 U.S. 462, 470 (1994) ("The core question for determining finality [is] whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."); *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939) (holding that agency action is non-final and unreviewable under the APA if it "does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action").

Plaintiffs also argue that "legal consequences flow" from the case-completion goals because they "force immigration judges to rely on impermissible factors." Pls' Opp. 28. Again, the case-completion goals neither mention nor require consideration of any impermissible factors and they have no legal consequences that "directly affect" the Plaintiff organizations in this case. *Dalton*, 511 U.S. at 470.

Finally, Plaintiffs argue that a PFR is not an adequate alternative remedy because neither the immigration judge nor the BIA can review "the challenged agency action." Pls' Opp. 29. Here Plaintiffs rehash their argument that an organization, rather than affected alien, must have an opportunity to bring a claim on behalf of an affected alien. There is no merit to this argument or to the argument that immigrations judges and the BIA cannot consider arguments that case scheduling may have an impact on a particular case. Even if Plaintiffs could point to any distinction between the review available in an APA claim brought by an organization and a claim raised by an alien in immigration court, the APA "requires only an *adequate* alternative," meaning that "the alternative remedy need not provide relief identical to relief under the APA in order to have preclusive effect." *CREW v. DOJ*, 846 F.3d 1235, 1244-46 (D.C. Cir. 2017).

The Court should dismiss Plaintiffs' APA claims under Rule 12(b)(6).

V. The complaint should be dismissed for improper venue.

Finally, Plaintiffs' claims should be dismissed for improper venue. Mot. 32-35. Plaintiffs respond that Innovation Law Lab's principal place of business is Oregon, Pls.' Opp. 44, though this is not something they allege in their complaint. Plaintiffs point to this fact to dispute that they are forum shopping, but never explain why they chose to bring their suit here when all other Plaintiffs and all of their alleged harms are in other parts of the country. They raise no allegations and make no arguments about the immigration court in Oregon.

Despite this, Plaintiffs argue that all Plaintiffs and all of their claims are properly joined because they challenge "policies that apply across the immigration court system." Pls.' Opp. 44-45. This is not true. The family-unit case-processing goals apply in only 10 immigration courts in other parts of the country, and Plaintiffs' allegations related to the case-completion goals similarly relate only to immigration courts in other parts of the country. Mot. 32-34. Courts have broad discretion to sever claims and parties, particularly where the claims involve distinct legal and factual issues related to things that Plaintiffs allege happen in some immigration courts in other parts of the country, but not in others, and not in the immigration court here. *Id*. Congress has created a review scheme for claims related to proceedings in immigration court that channel such claims exclusively to PFRs in the court of appeals for the circuit where the immigration court is located. That is more than enough reason to sever Plaintiffs' claims that ask this Court to hear claims arising in other circuits, usurping the role of the courts of appeals for those circuits and challenging those courts' decisions on similar claims.

Plaintiffs argue that this Court cannot dismiss based on *forum non conveniens* because Defendants have not identified "an adequate alternative forum." Pls.' Opp. 45. It is true that Defendants do not believe that there is an alternative forum that can hear Plaintiffs' claims because they lack standing; they are outside the zone of interests of the statutes they seek to enforce; § 1252 bars jurisdiction for any district court to hear their claims; and, they fail to state any claim upon which relief can be granted. If, however, the Court holds that any claims survive, they should be severed and transferred to the circuit where they arise so that the "appropriate court of appeals" for a particular immigration court can ultimately resolve any resulting appeals relating to proceedings in that immigration court, as Congress intended. *See* 8 U.S.C. § 1252(a)(2)(D), (a)(5).

CONCLUSION

Defendants respectfully request that the Court dismiss this case.

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Respectfully submitted,

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