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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(San Diego)

AL OTRO LADO, INC., *et al.*,

Plaintiffs,

v.

Kirstjen NIELSEN, Secretary, U.S. Department of Homeland Security, in her official capacity, *et al.*,

Defendants.

Case No. 3:17-cv-02366-BAS-KSC
Hon. Cynthia A. Bashant

Defendants' Reply in Support of their Motion to Dismiss

Hearing Date: February 12, 2018

No Oral Argument Unless Requested by the Court

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Plaintiffs' Opposition to Defendants' Motion to Dismiss (ECF No. 143) fails to explain how this case could possibly entail a live, justiciable controversy. Plaintiffs acknowledge that they have not brought a claim under section 706(2) of the Administrative Procedure Act ("APA") to challenge an official agency policy. Pls.' Opp'n 19:16–18 ("The review of 'final agency action' for APA claims brought under 5 U.S.C. § 706(2) is distinct from the analysis for APA claims to compel agency action under § 706(1), and Plaintiffs brought the latter APA claim."), 21:9–12 ("Plaintiffs need not show a formal, written policy; Plaintiffs have pled sufficient facts to show a widespread pattern or practice of denial of access to the asylum process to support a reasonable inference of liability.").

Instead, despite having already received all of the relief they are entitled to receive under section 706(1) of the APA, Plaintiffs again ask the Court to manufacture a new waiver of sovereign immunity entirely unauthorized by Congress that encompasses "pattern or practice" allegations made by several unnamed sources in various news articles and non-governmental organizations' reports. But not even these articles and reports can resurrect Plaintiffs' moot claims, because they cannot replace an individual plaintiff with a live injury—something this suit has lacked since several days after it was filed in July 2017. Plaintiffs also fail to explain why the Court should create its own waiver of sovereign immunity when an appropriate remedy for Plaintiffs' only well-pleaded (but now moot) claims—APA relief under section 706(1)—already exists. For these and various other reasons, the Court should dismiss the Complaint in its entirety.

I. All the Doe Plaintiffs' Claims are Moot.

All of the Doe Plaintiffs' claims are moot because each has received all the relief the Court would be capable of providing. *See* Defs.' Mot. to Dismiss 4–9. A case becomes moot "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663,

669 (2016). The INA states that an otherwise inadmissible alien who "indicates either an intention to apply for asylum . . . or a fear of persecution . . . shall [be] refer[red] . . . for an interview by an asylum officer," or alternatively placed into removal proceedings where a claim of fear or persecution can be presented to an immigration judge. 8 U.S.C. §§ 1225(b)(1)(A)(ii), (b)(2)(A); 8 U.S.C. § 1229a(c)(4). If CBP "unlawfully withh[olds] or unreasonably delay[s]" this relief, the APA empowers—requires—the Court to "compel" the agency to provide it. 5 U.S.C. § 706(1). Assuming for the purposes of this Motion that the Doe Plaintiffs' were in fact "denied access" to the asylum process, they are entitled to nothing more than an order compelling CBP to refer them to an asylum interview or place them into removal proceedings. *Id.* (Defendants note that Plaintiffs' attack on Defendants for "not disput[ing]" the allegations that CBP "refused to allow" putative class members to seek protection in the United States is misdirected, since a denial of Plaintiffs' allegations would be inappropriate in this procedural posture. Pls.' Opp'n 1:23–25; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).)

Since the Complaint was filed, however, Defendants have done exactly what the Court could order them to do under section 706(1). Abigail, Carolina, Dinora, Ingrid, and Jose Doe have all been properly processed as applicants for admission. Declaration of Karen Ah Nee ¶ 4 (ECF No. 135-2); Declaration of Ruben Coe ¶ 4 (ECF No. 135-3); Declaration of James H. Moon ¶¶ 3, 5, 6, 7, 8 (ECF No. 91). Beatrice Doe remains outside the United States, Pls.' Opp'n 11:11–13, but should she return to a port of entry and indicate an intention to apply for asylum or fear of persecution in her home country, Defendants fully expect that "she would be processed as an applicant for admission, in accordance with applicable statutes and regulations." Ah Nee Decl. ¶ 4. Until the day Beatrice actively seeks such processing and CBP "unlawfully withh[olds]" it from her, there is nothing the Court can compel the agency to do. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63–65 (2004). CBP cannot force Beatrice to initiate a process she does

not wish to initiate, and the APA does not empower the Court to compel the agency to do what it is not presently failing to do. *Id.* It "is impossible for a court to grant any effectual relief whatever" to Plaintiffs, and their claims are therefore moot. *Campbell-Ewald Co.*, 136 S. Ct. at 669.

Plaintiffs argue that the Doe Plaintiffs' claims are still justiciable under the "inherently transitory" exception to the mootness doctrine. Pls.' Opp'n 10–15. The problem is that they misstate when this exception applies:[1] the exception does not apply "when the named plaintiff's individual interests become moot before a court order granting a timely filed motion for class certification." *Id.* at 12:4–6. It applies "only in exceptional situations" when "the challenged action is in its duration too short to be fully litigated prior to cessation or expiration." *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (internal punctuation omitted). Plaintiffs *assume* that their claims of alleged denials of access are too transient to litigate, *see* Pls.' Opp'n 10–15, but they do not explain how or why those claims are "in [their] duration too short to be fully litigated," *Kingdomware Techs.*, 136 S. Ct. at 1976, like the types of claims Defendants identified in their Motion. *See* Defs.' Mot. to Dismiss 8:21–9:10. The Doe Plaintiffs' claims are

[1] Plaintiffs also misstate the applicable law: under Supreme Court and Ninth Circuit precedent, the "inherently transitory" test is one of two prongs of the "capable of repetition, yet evading review" exception, not a separate exception to the mootness doctrine. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016); *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1174 (9th Cir. 2002); Pls.' Opp'n 11:22–23. Under the proper test, a plaintiff seeking injunctive relief bears the burden of establishing that the exception applies. *See Lyons v. City of Los Angeles*, 461 U.S. 95, 109 (1983). Plaintiffs' failure to address the second prong—the reasonable likelihood of repetition—means they have not carried their burden. *Luman v. Theismann*, 647 Fed. App'x 804, 807 (9th Cir. 2016).

moot because each has actually received all the relief the Court could have provided, *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1138 (9th Cir. 2016), not because their claims are inherently transitory by the operation of time or because of Defendants' litigation strategy. The Court should reject Plaintiffs' conclusory statements and dismiss their claims for mootness.

The cases Plaintiffs cite illustrate the difference between the APA claims to compel agency action in this lawsuit and claims that warrant an exception to the mootness doctrine. Plaintiffs cite *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011), a case involving an unaccepted Rule 68 offer of judgment on claims for money damages under the Fair Labor Standards Act, Nevada labor law, and contract law, and *Chen v. Allstate Ins. Co.*, 819 F.3d 1136 (9th Cir. 2016), a case involving an unaccepted Rule 68 offer of judgment on claims for money damages and injunctive relief under the Telephone Consumer Protection Act. *See generally* Pls.' Opp'n. An exception to the mootness doctrine was warranted in those cases because, in *Chen*, the plaintiffs had not actually received the relief they sought, and because, in both *Pitts* and *Chen*, invoking the exception would further the efficiency purposes of Rule 23 and prevent the defendant from avoiding liability by "buy[ing] off" the named plaintiffs prior to class certification. *Pitts*, 653 F.3d at 1091; *Chen*, 819 F.3d at 1144, 1147.

Contrast *Pitts* and *Chen* with this case: here, Defendants have not offered judgment or settlement or a "buy-off," but only to provide the Doe Plaintiffs with what they are entitled by law to receive—"access [to] the credible fear, withholding-only, or asylum process *as appropriate under the Immigration and Nationality Act*." Email from Danielle Schuessler to James Moon at 2, July 14, 2017 ("Schuessler Email") (ECF No. 67-3) (emphasis added). This distinction is important: unlike in *Pitts* and *Chen*, Plaintiffs' available relief exists independently of what they try to construe as an offer of settlement or judgment or a "buy-off," which means that, unlike in *Pitts* and *Chen*, there is nothing more the Court can

provide Plaintiffs even if Beatrice "refuses" to apply for admission to the United States. Schuessler Email at 2; 5 U.S.C. § 706(1); *Campbell-Ewald Co.*, 136 S. Ct. at 669; *Norton*, 542 U.S. at 62. Until CBP "unlawfully withh[olds] or unreasonably delay[s]" Beatrice's or any putative class member's access to the asylum process, it is "impossible for a court to grant any effectual relief whatever," and Plaintiffs are without Article III standing. *Campbell-Ewald Co.*, 136 S. Ct. at 669; 5 U.S.C. § 706(1).

Plaintiffs also cite *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980), *Sosna v. Iowa*, 419 U.S. 393 (1975), and *Haro v. Sebelius*, 729 F.3d 993 (9th Cir. 2014). But those cases involved challenges to a government entity's legally binding or openly acknowledged policy, not a case where, as here, there is no reasonable inference that such a policy exists, *see* Defs.' Mot. to Dismiss 13:13–15:3, and where Plaintiffs have eschewed any challenge to a final agency action, Pls.' Opp'n 19:14–18. *See McLaughlin*, 500 U.S. at 48 (evaluating the policy "the County represent[ed]" to the Court); *Geraghty*, 445 U.S. at 396 (evaluating "the validity of the Parole Release Guidelines"); *Sosna*, 419 U.S. at 397 (evaluating "Sections 598.6 and 598.9 of the Code of Iowa"); *Haro v. Sebelius*, 789 F. Supp. 2d 1179, 1182 (D. Ariz. 2011) (reviewing the Secretary's determination that "her procedures" complied with the Medicare statute). Moreover, the facts of those cases supported an exception to the mootness doctrine because where the parties dispute the legality of a binding policy, a court can be assured, first, that the putative class members will continue to experience the same injurious conduct caused by that policy, even after any one plaintiff's claim becomes moot; and second, that the dispute over the policy's lawfulness creates the requisite Article III case or controversy that allows a federal court to adjudicate the issue. *See, e.g.*, *Geraghty*, 445 U.S. at 396 (explaining that the controversy was live because "prisoners currently affected by the guidelines have moved to be substituted" based on their being subjected to the

same guidelines as the named plaintiff). Contrast that with this case, where Plaintiffs have not adequately alleged the existence of any policy, where they emphasize that they do not wish to litigate their claims under section 706(2), and where their own allegations show that the practice they allege is inconsistent with the statements of government officials and evidence that CBP properly processes the overwhelming majority of individuals who express a fear of return. Pls.' Opp'n 21:9–12, 19:14–18; Defs.' Mot. to Dismiss 13:13–17:15.

Plaintiffs also cite *Wade v. Kirkland*, 118 F.3d 667 (9th Cir. 1997), and *Unknown Parties v. Johnson*, 163 F. Supp. 3d 630 (D. Ariz. Jan. 11, 2016). Both those cases are distinguishable from this case because they involve claims that would have been mooted (but for an exception to the mootness doctrine) by something *other* than the defendants' providing complete relief. See *Wade*, 118 F.3d at 669 (challenge to working conditions would have been mooted by named plaintiff's "transfer[] from the jail"); *Johnson*, 163 F. Supp. 3d at 641–42 (challenge to detention conditions would have been mooted by issuance of nonimmigrant visa). In other words, *Wade* and *Johnson* are proper examples of when a claim is inherently transitory and may justify an exception to the mootness doctrine.

Plaintiffs finally argue that their claims are not moot because Defendants have provided only partial relief. Pls.' Opp'n 15:6–22. Not so. There is no dispute between the parties that "Defendants are legally required to take . . . specific, discrete agency actions" under the INA, *see* Pls.' Opp'n 20:20–25, which means there is no legal controversy that is redressable by declaratory relief. *See Biodiversity Legal Found.*, 309 F.3d at 1173 (court had jurisdiction to grant declaratory relief because the plaintiff "sought [a declaration] that the Service's interpretation of [a statute] is erroneous"); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (reiterating that declaratory relief is only appropriate when there is a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment").

Nor does Plaintiffs' bare assertion that Defendants "could attempt" to use Plaintiffs' withdrawal statements "to prejudice [them] in the future" save their Complaint.[2] Pls.' Opp'n 15:16–17. First, that claim is wholly speculative—there is no indication that any Doe Plaintiff who withdrew her initial application has yet suffered adverse consequences in administrative proceedings. *See* Moon. Decl. ¶¶ 3, 5. Second, Plaintiffs never requested any relief relating to this speculative injury in their Complaint, *see* Compl. ¶ 186, which means it does not comply with Rule 8 and must be ignored. *See* Fed. R. Civ. P. 8(a)(3) ("A pleading that states a claim for relief must contain a demand for the relief sought . . . ."). Third, even if

[2] Withdrawal of an application for admission is a form of relief available to all applicants for admission, and it is the only form of discretionary relief available in expedited removal proceedings. 8 U.S.C. § 1225(a)(4); 8 C.F.R. § 235.4; *United States v. Garcia-Gonzalez*, 791 F.3d 1175, 1177 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 862, 193 L. Ed. 2d 759 (2016). Individuals who withdraw their applications for admission are not subject to the negative consequences of a removal order, including, for an expedited removal order, a five-year entry bar. *See, e.g., United States v. Bayardo-Garcia*, 590 Fed. App'x 660, 662 (9th Cir. 2014) (unpublished). In addition, an individual who withdraws his application for admission may return at any time and be subject to processing as an applicant for admission. During such processing, he may assert an intention to apply for asylum or fear of return and be referred for additional consideration of that claim like all other applicants for admission. If, however, he returns after being ordered removed or departing "voluntarily, under an order of removal," and his removal order is reinstated, he is "not eligible and may not apply for any relief under this chapter," including asylum. 8 U.S.C. § 1231(a)(5); *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1082 (9th Cir. 2016) (alien "is not eligible to apply for asylum under § 1158 as long as he is subject to a reinstated removal order").

the harm Plaintiffs allege is not speculative, and even if it does not violate Rule 8, the Court does not have jurisdiction to review that claim: the APA allows review of agency action "for which there is no other adequate remedy," 5 U.S.C. § 704, and the future adverse credibility determinations Plaintiffs speculate about can and must be remedied by an immigration judge or the appropriate federal court of appeals through a petition for review. *See Espinoza v. I.N.S.*, 45 F.3d 308, 310 (9th Cir. 1995) (alien in administrative proceedings can "establish[] a basis for exclusion of evidence from a government record"); *Shrestha v. Holder*, 590 F.3d 1034, 1039 (9th Cir. 2010) ("[W]e review adverse credibility determinations under the substantial evidence standard.").

Plaintiffs fail to show why their claims are not moot. Each Doe Plaintiff has received all the relief the Court is capable of granting, and no exceptions to the mootness doctrine apply to their claims. The Court should dismiss the Complaint.

II. Al Otro Lado Does Not Have Statutory Standing under the INA.

While Defendants have not yet disputed Al Otro Lado's Article III standing, Plaintiffs have failed to plead sufficient facts to demonstrate that Al Otro Lado has statutory standing as a legal advocacy group to pursue a claim under 8 U.S.C. §§ 1158 or 1225, which provide relief only to "alien[s]" "who [are] physically present in the United States," "arriv[ing] in the United States," or "applicants for admission" to the United States. The cases Plaintiffs rely on to support their assertion that Al Otro Lado has statutory standing do not help them. *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1992), does not address the issue of statutory standing. *See* Pls.' Opp'n 18:21–23. And *Doe v. Trump*, No. 17-0178, 2017 WL 6551491, at *11 (W.D. Wash. Dec. 23, 2017), *appeal filed*, No. 18-35015 (9th Cir. Jan. 11, 2018)—a non-binding case currently being appealed—grants only a preliminary injunction request rather than final relief on the merits. *See* Pls.' Opp'n 18:18–21. *Doe* is also distinguishable from this case because the organizational plaintiff's core mission in *Doe* was

to make "provisions for the resettlement and absorption of refugees into the United States," and the organization sought standing under specific INA provisions enacted to provide "uniform provisions for the effective resettlement and absorption of those refugees admitted." *Doe*, 2017 WL 6551491, at *12.

That is not the case here. Al Otro Lado is an advocacy group that provides legal advice and assistance to individuals seeking legal redress under certain provisions of the INA, such as sections 1158 and 1225. *See* Compl. ¶¶ 12–13. While those provisions confer legal rights on aliens who have a fear of returning to their home countries, they were not even arguably designed to confer new rights on legal advocates. *See* Order Transferring Venue 3 (ECF No. 113) (referring to Al Otro Lado's "questionable standing"); Order Staying Disc. 4:17–18 (ECF No. 144) ("[I]t appears that plaintiff, Al Otro Lado's, standing is inadequate."). Plaintiffs have pointed to no language in the statute to suggest otherwise.

III. Plaintiffs Fail to Show How They Have Otherwise Presented a Live Claim.

Plaintiffs emphasize that they bring only one claim under section 706(1) of the APA to compel agency action wrongfully withheld, and no claims under section 706(2) for review of a final agency action. Pls.' Opp'n 19:14–18. Defendants have already acknowledged when the Complaint was filed, Plaintiffs had properly pleaded a section 706(1) claim. *See* Defs.' Mot. to Dismiss 4:4–5. However, that claim became moot once CBP did everything the Court could order it to do under section 706(1), and the Complaint no longer presented an "invasion of a legally protected interest" which is "concrete and particularized [and] actual or imminent." Schuessler Email at 2; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

Plaintiffs also assert that they have not brought a "pattern or practice" claim against CBP, but rather a "policy or practice" claim analogous to the claims brought under *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978). Pls.' Opp'n 21 n.7. But that argument fails for two reasons: First, 42

U.S.C. § 1983 and *Monell* apply only to state and municipal actors. *See id.*; 42 U.S.C. § 1983. They do not waive sovereign immunity for the federal government or its officers, and so Plaintiffs cannot possibly have stated a claim against Defendants. Second, despite citing *Perez v. United States*, No. 13-1417, 2014 WL 4385473 (S.D. Cal. Sept. 3, 2014), for the proposition that they have stated a "pattern or practice" claim, Plaintiffs do not present a claim under *Bivens v. Six Unknown Named Agents of the Bureau of Narcotics*, 403 U.S. 388 (1971), as the *Perez* plaintiff did, nor do they seek damages in tort. In sum, Plaintiffs fail to identify any provision of law that would allow them to litigate a purported "pattern and practice" claim against a federal agency—including section 706(2) of the APA, which Plaintiffs concede does not form the basis of their suit.

Even if Plaintiffs had identified a proper "pattern or practice" (or "policy or practice") cause of action, their allegations—comprised largely of assertions by unnamed sources and other non-parties to this action—would still be too speculative to state a live claim. *See* Defs.' Mot. to Dismiss 22:11–24:24. And while Plaintiffs fault Defendants for making "evidentiary arguments that are inappropriate at this [procedural] stage," Pls.' Opp'n 23 n.8, they forget that Defendants' "factual contention[s]" are based exclusively on the facts Plaintiffs themselves alleged or referenced in their Complaint, some of which seriously undermine their claims. *See* Defs.' Mot to Dismiss 13:13–17:15.

Finally, Plaintiffs acknowledge that "there is no dispute that Defendants are legally required" to follow 8 U.S.C. §§ 1158 and 1225, Pls.' Opp'n 20:20–21, which means there is no legal controversy that could be remedied by declaratory relief. *Biodiversity Legal Found.*, 309 F.3d at 1173. Plaintiffs also fail to identify a new plaintiff in this case, or even a single putative class member with a live claim. With neither a live legal controversy nor a concrete, particularized injury before it, the Court lacks jurisdiction to grant Plaintiffs' requests for declaratory and prospective injunctive relief and must dismiss this case in its entirety.

Dated: February 5, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case No. 3:17-cv-02366-BAS-KSC

I certify that on February 5, 2018, I served a copy of the foregoing Reply in Support of Defendants' Motion to Dismiss by filing this document with the Clerk of Court through the CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record.

/s/ Alexander J. Halaska
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