November 23, 2020

VIA ECF

Honorable Andrew L. Carter, Jr.
United States District Court
Southern District of New York
40 Foley Square, Room 2102
New York, NY 10007
ALCarterNYSDChambers@nysd.uscourts.gov

Re: *P.L. et al. v. ICE et al.*, No. 1:19-cv-01336 (ALC)

Dear Judge Carter,

We write on behalf of the Plaintiffs to address the Supreme Court's decision in *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020), and its applicability to Plaintiffs' remaining Administrative Procedures Act ("APA") claim challenging the government's refusal to produce detained noncitizens from custody to participate in their removal proceedings in person (the "Refusal to Produce Policy"). (*See* ECF No. 127). Because *Regents* reiterated that 8 U.S.C. § 1252(b)(9) does not apply to claims such as the APA claim at issue here, Plaintiffs respectfully ask the Court to grant the Rule 59(e) motion (ECF No. 105) and reinstate Count VI of Plaintiffs' Complaint (the "APA claim").

The putative Plaintiff Class and the Organizational Plaintiffs assert that Defendants' Refusal to Produce Policy is arbitrary and capricious in violation of the APA. *See* Compl., Count VI, ¶¶ 233-39 (ECF No. 2). As described further in Plaintiffs' Rule 59(e) motion and reply brief (ECF No. 114), Plaintiffs' APA claim targets the decision-making process that Defendants employed in adopting the Policy and the factors that Defendants improperly relied upon and those they improperly ignored to inform their process. *See* ECF Nos. 106 at 5-8; 114 at 3-6. Through the APA claim, Plaintiffs do not seek review of any removal proceedings or relief that otherwise could be achieved through removal proceedings. Instead they challenge a decision-making process that is entirely collateral to removal proceedings. As the Supreme Court reiterated this past June, such claims do not fall within the narrow reach of the § 1252 jurisdictional bars, and nothing in that section prevents this Court from exercising jurisdiction over Plaintiffs' APA claim. *See Regents*, 140 S. Ct. at 1907; *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (rejecting an "expansive interpretation of § 1252(b)(9)").

In *Regents*, the Supreme Court considered whether the government acted arbitrarily and capriciously during an immigration policy decision-making process—specifically, ending the Deferred Action for Childhood Arrivals ("DACA") program. *See* 140 S. Ct. at 1905. Rejecting the government's argument that § 1252(b)(9) and (g) barred judicial review of the government's action, the *Regents* Court adopted a narrow reading of those jurisdictional bars consistent with the reading that Plaintiffs advocate in this case. *Id.* at 1907. In so doing, the Court affirmed that § 1252 does not bar APA claims challenging the decision-making process a government agency

employed when implementing a policy, the exact issue before the Court here. The Court found that § 1252(b)(9) "is not aimed at this sort of case . . . where those bringing suit are not asking for review of an order of removal, the decision to seek removal, or the process by which removability will be determined." *Id.* (internal citations and alterations omitted).

The government's argument that § 1252 (b)(9) bars Plaintiffs' APA claim is no more persuasive here.[1] Plaintiffs assert that Defendants acted arbitrarily and capriciously in adopting the Refusal to Produce Policy, including by relying on impermissible factors and failing to consider important realities during the decision-making process. Compl. ¶¶ 233-39 (ECF No. 2); *cf. Regents*, 140 S. Ct. at 1905, 1910-16 (analyzing APA claim as a dispute regarding the procedure used by the Department of Homeland Security in deciding to shift its policy on DACA). Section 1252(b)(9) is simply "not aimed at this sort of case." *Id.* at 1907.

Further, as raised in Plaintiffs' Rule 59(e) motion, § 1252(b)(9) is particularly inapplicable to the Organizational Plaintiffs' challenge to Defendants' decision-making process and resulting policy, which significantly and directly impacts the Organizational Plaintiffs' practice and cannot be addressed through immigration court proceedings or the Petition For Review process. *Regents* supports this conclusion. In *Regents*, the Court explained that the organizational plaintiffs' claims were justiciable because they challenged a decision-making process that could not be adjudicated through removal proceedings (or a Petition For Review). *See* 140 S. Ct. at 1907; *see also, e.g.*, *Capital Area Immigrants' Rights Coal v. Trump*, No. 19-cv-2117 (TJK), 2020 WL 3542481, at *8 (D.D.C. June 30, 2020) (quoting *Regents*'s holding that § 1252(b)(9) "is certainly not a bar where, as here, the parties are not challenging any removal proceedings" in finding that organizational plaintiffs were not precluded from "challeng[ing] under the APA immigration-related regulations that harm their own interests"). The same is true in this case.

In the past five months, courts have applied *Regents*'s holding to find that district courts can properly exercise jurisdiction over APA claims challenging arbitrary and capricious action by immigration agencies, including in cases challenging policies and practices that may impact removal proceedings. *See, e.g.*, *Canal A Media Holding, LLC v. United States Citizenship & Immigration Servs.*, 964 F.3d 1250, 1257 (11th Cir. 2020) (citing *Regents* when reiterating the "narrow" scope of § 1252(b)(9), explaining that it "is not intended to cut off claims that have a tangential relationship with removal proceedings," and finding that it did not bar jurisdiction over APA claims challenging an agency's decision to deny an immigration benefit despite the individual plaintiff being in removal proceedings); *Elizeo Velazquez-Hernandez, et al., v. U.S. Immigration and Customs Enf't, et al.*, No. 3:20-CV-2060 (DMS)(KSC), 2020 WL 6712223, at *3 (S.D. Cal. Nov. 16, 2020) (quoting *Regents* in rejecting Immigration and Customs Enforcement's ("ICE") argument that the plaintiffs' APA challenge to an immigration enforcement courthouse arrest policy was barred by § 1252(b)(9) because the plaintiffs were "not challeng[ing] their immigration proceedings, removal orders, or [the Department of Homeland

[1] Likewise, the Supreme Court's reasoning that § 1252(g), which it characterized as "similarly narrow" to § 1252(b)(9), did not bar the APA claims at issue in *Regents* is equally applicable here. Because Defendants have never argued § 1252(g) applies, and *Regents* reaffirms that § 1252(g) is inapposite to the present litigation, Plaintiffs do not fully address that provision here. To the extent that the Court seeks argument on the applicability of § 1252(g), Plaintiffs request the opportunity to provide additional briefing on that issue.

Security's] authority to remove them" but were challenging policies and practices "collateral to their removal"); *NWDC Resistance v. Immigration & Customs Enf't*, No. C18-5860 (JLR), 2020 WL 5981998, at *7 (W.D. Wash. Oct. 8, 2020) (citing *Regents* in rejecting ICE's argument that § 1252(b)(9) barred jurisdiction over an APA challenge to ICE's selective enforcement policy of targeting immigrant activists, noting that the plaintiffs did "not seek to enjoin any specific removal proceeding, even if the injunction might ultimately have an impact on some removals" because "[t]he substance of the relief they seek demonstrates that their claims are independent of challenges to removal orders"); *Las Americas Immigrant Advocacy Ctr. v. Trump*, No. 3:19-CV-02051 (IM), 2020 WL 4431682, at *6-7 (D. Or. July 31, 2020) (quoting *Regents* in finding that § 1252(b)(9) did not bar jurisdiction over, *inter alia*, organizational plaintiffs' APA challenge to the "immigration *process*," and noting that "[a]llowing organizational plaintiffs to bring claims alleging systemic problems, independent of any removal orders . . . does not thwart the purpose of 1252(b)(9)" (emphasis in original)); *Capital Area Immigrants' Rights Coal.*, 2020 WL 3542481, at *8 (citing *Regents* in rejecting defendants claim that § 1252(b)(9) barred jurisdiction over organizational plaintiffs' APA challenge to an immigration regulation that would restrict the availability of asylum, including in removal proceedings); *see also Gonzalez v. United States Immigration & Customs Enf't*, 975 F.3d 788, 810-11 (9th Cir. 2020) (relying on *Regents* to find that § 1252(b)(9) did not bar jurisdiction over class claims challenging ICE policies).[2]

In *Regents*, the outcome of the policy decision at issue—the agency's rescission of DACA—and the Supreme Court's injunction, which was based on the holding that a decision-making process violated the APA, impacted the initiation and disposition of removal proceedings as well as the issuance and execution of removal orders. *See Regents*, 140 S. Ct. at 1901-02 (explaining that under DACA, ICE was directed to defer action in order to "prevent [certain] low priority individuals from being removed from the United States"). Indeed, "the heart of DACA" was a "forbearance policy," under which the government would, *inter alia*, not "institute proceedings" to remove certain individuals or decline to remove them. *Id.* at 1907, 1911-12. Nonetheless, this did not alter the *Regents* Court's holding that § 1252(b)(9) did not bar the APA claims because the challenge did not seek "review of an order of removal, the decision to seek removal, . . . the process by which removability will be determined[, . . . or] any removal proceedings." *Id.* at 1907 (internal alterations, punctuation, and citations omitted); *see also id.* (noting that § 1252(b)(9) "is certainly not a bar where, as here, the parties are not challenging any removal proceedings").

Other district courts have reached similar conclusions when applying *Regents* to claims challenging immigration agencies' policies, practices, and decision-making processes at the policy level. *See, e.g., NWDC Resistance*, 2020 WL 5981998, at *6-7 (relying on *Regents* in

[2] Only one unpublished opinion from a different circuit, *Conteh v. Wolf*, No. 20-CV-10736 (ADB), 2020 WL 6363910 (D. Mass. Oct. 29, 2020), cited *Regents* when denying jurisdiction under § 1252(b)(9), and that decision is inapposite. Unlike the claims at issue here, *Conteh* concerned neither a policy nor a decision-making process, nor claims brought by organizational plaintiffs, but rather a challenge to the execution of an individual's removal order. There, a noncitizen who was removed from the United States pursuant to a removal order asked the court to order ICE to facilitate his return to the United States so he could pursue relief in his reopened removal proceedings. Unlike here, the plaintiff was specifically challenging his removal in his individual immigration proceeding, rather than any systemic and widespread agency policy that is collateral to the proceedings. *Conteh* is neither binding nor persuasive on this Court.

declining to apply the "inextricably linked" test in *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011) and *Singh v. Gonzalez*, 499 F.3d 969, 978 (9th Cir. 2007) in the context of an APA challenge to an immigration policy because the organizational plaintiffs did "not seek to enjoin any specific removal proceeding, even if the injunction might ultimately have an impact on some removals"); *Las Americas Immigrant Advocacy Ctr*, 2020 WL 4431682, at *6-8 (applying *Regents* to organizational plaintiffs' claims challenging "the immigration *process*" where the claims did "not plainly challenge any decision to detain . . . [or] any removal order, nor would granting a remedy require any removal order to be overturned," while concluding that jurisdiction was precluded where granting relief would necessarily require the court to order immigration judges to reach different outcomes in some asylum cases) (emphasis in original).

* * *

Consistent with the Supreme Court's narrow reading of § 1252(b)(9) in *Regents* and a growing body of case law that recognizes that district courts may properly exercise jurisdiction over APA challenges to arbitrary and capricious immigration policy decisions, we respectfully ask that the Court grant Plaintiffs' Rule 59(e) motion and reinstate the APA claim.

Respectfully,

/s/ Brooke Menschel

Julie Dona
Aadhithi Padmanabhan
THE LEGAL AID SOCIETY
199 Water Street, 3rd Floor
New York, NY 10038
Tel: (646) 988-1425

Susan Reagan Gittes
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY
Tel: (212) 909-6000
Fax: (212) 909-6836

Brooke Menschel
Sonia Marquez
Jessica Nitsche
BROOKLYN DEFENDER SERVICES
177 Livingston Street, 7th Floor
Brooklyn, NY 11201
Tel: (718) 254-0700

Robert J. Gunther, Jr.
Christopher Bouchoux
Jeffrey A. Dennhardt
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
Tel: (212) 230-8800

Thomas Scott-Railton*
Jenn Rolnick Borchetta
THE BRONX DEFENDERS
360 E. 161st Street
Bronx, NY 10451
Tel: (718) 838-7878
**Not admitted in SDNY, practicing under supervision*

Counsel for Plaintiffs