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May 21, 2019

VIA ECF and Email
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,

Plaintiffs write to oppose Defendants' motion to dismiss this challenge to the government's refusal to produce the Plaintiff Class for immigration hearings ("Policy") because Plaintiffs' Complaint (ECF No. 2) contains allegations sufficient to support subject matter jurisdiction[1] and state plausible claims for relief.[2]

Motions to dismiss are "decided under the same standards" whether brought under Federal Rules of Civil Procedure 12(b)(1) or 12(b)(6). *De Dandrade v. U.S. Dep't of Homeland Sec.*, 367 F. Supp. 3d 174, 181 (S.D.N.Y. 2019). Under either standard, the Court "must accept as true all allegations of fact in the complaint and draw all reasonable inferences in favor of Plaintiffs." *Amadei v. Nielsen*, 348 F. Supp. 3d 145, 155 (E.D.N.Y. 2018) (citation omitted); *see also L.V.M. v. Lloyd*, 318 F. Supp 3d 601, 611-12 (S.D.N.Y. 2018) (Rule 12(b)(6) standard).

I. Organizational Plaintiffs Have Standing to Assert an APA Claim

To adequately plead a claim, the Organizational Plaintiffs need only allege that they have suffered a plausible injury-in-fact traceable to Defendants' Policy that will be redressed by a favorable judicial decision. *See De Dandrade*, 367 F. Supp. 3d at 181. Here, they meet that standard.[3] Defendants challenge the veracity of the allegations, disputing whether the Policy *truly* harms the Organizational Plaintiffs. Those arguments are beside the point on a motion to dismiss, where the Court must "'accept as true all material factual allegations of the complaint

[1] Here, 8 U.S.C. § 1252 does not disturb the Court's subject matter jurisdiction. Because Plaintiffs do not seek to enjoin the statute or video teleconferencing ("VTC"), § 1252(f)(1) does not present a jurisdictional hurdle. Neither does § 1252(b)(9), which only precludes review of removal orders and further does not apply to claims related to custody or brought by the Organizational Plaintiffs. ECF No. 80 at 2-6.

[2] Plaintiffs' prior filings (ECF Nos. 18, 37, 80) set forth additional arguments in opposition to Defendants' motion.

[3] Motions to dismiss for lack of standing are evaluated under Rule 12(b)(1). *Amadei*, 348 F. Supp. 3d at 154.

and draw all reasonable inferences in favor of' Plaintiffs." *Amadei*, 348 F. Supp. 3d at 154 (quoting *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 57 (2d Cir. 2016)) (alteration and citation omitted).

"'[O]nly a perceptible impairment of an organization's activities is necessary'" to meet the injury-in-fact standard in the Second Circuit. *De Dandrade*, 367 F. Supp. 3d at 181 (quoting *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017)); *see also Nnebe v. Daus*, 644 F.3d 147, 156-57 (2d Cir. 2011) (injury sufficient for standing where organizational plaintiff provided "scant" evidence of "some perceptible opportunity cost expended"). Here, the Organizational Plaintiffs "'alleg[e] facts that affirmatively and plausibly suggest'" that they suffer far more than a perceptible impairment of their activities as a result of Defendants' Policy. *See Amadei*, 348 F. Supp. 3d at 154 (quoting *Carter*, 822 F.3d at 56).[4]

Defendants' Policy interferes with the Organizational Plaintiffs' ability to fully meet their responsibility to represent detained immigrants. Compl. ¶¶ 8, 24-26, 177-79, 181, 182-84; *see also Centro*, 868 F.3d at 110 (injury where a "policy has impeded, and will continue to impede, the organization's ability to carry out its responsibilities") (internal citation and alterations omitted). While that injury is sufficient to establish standing, the Organizational Plaintiffs also face financial burdens and resource drains attributable to the Policy, in the form of "unnecessary and growing costs" caused by the need to spend significantly more time and money to screen, advise, and fully represent clients in immigration proceedings. Compl. ¶¶ 8, 129-30, 132, 179-81, 183-84 (barriers to confidential communications over VTC during hearings); ¶¶ 8, 119, 121, 177-81 (same at initial appearances); ¶ 128 (same at jails due to the Policy).

Defendants' claim that these allegations do not amount to a "perceptible impairment" is contradicted by the very cases they cite. *See Centro*, 868 F.3d at 110-11 (injury where organization "inevitably face[d] increased difficulty in meeting" constituents and "devote[d] attention, time, and personnel" to respond to challenged law); *De Dandrade*, 367 F. Supp. 3d at 181-82 ("real world injury" where staff spent "twice as much time" on immigration cases because of challenged practice). Defendants' arguments about traceability are similarly contradicted by the Complaint: Plaintiffs alleged, "[a]s a direct result of the Policy, the Organizational Plaintiffs can no longer screen [detained immigrants], conduct initial interviews, or obtain the necessary documents." Compl. ¶ 177; *id.* ¶ 183 ("Defendants' Policy also interferes with the Organizational Plaintiffs' ability to represent their clients during hearings.").

Moreover, the Organizational Plaintiffs' injuries would be redressed by a favorable decision. Relief would mitigate impediments to client representation and reduce the drain on organizational resources.

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[4] Organizational Plaintiffs have alleged facts sufficient to support standing so the Court need not look beyond the pleadings. Nonetheless, "[w]here subject matter jurisdiction is contested, a district court is permitted to consider evidence outside the pleadings, such as affidavits and exhibits." *Ahmed v. Cissna*, 327 F. Supp. 3d 650, 661 (S.D.N.Y. 2018) (citation omitted). Here, the Organizational Plaintiffs have filed declarations providing further detail of their injuries. *See, e.g.*, Declarations of Organizational Plaintiffs, ECF Nos. 45 (¶¶ 5, 8-10, 15-16, 24-27, 29-33); 46 (¶¶ 5, 7-10); 47 (¶¶ 12-18, 20-22, 40); 83 (¶¶ 3, 5, 9); 84 (¶¶ 5-6); 85 (¶¶ 3, 5-7, 11-12).

II. Plaintiffs Properly Pled the Rehabilitation Act Claim

A. Plaintiffs Properly Alleged a Cause of Action for the Rehabilitation Act Claim

Plaintiffs bring their Rehabilitation Act claim directly under the Rehabilitation Act as well as under the Administrative Procedure Act ("APA"). *See* Compl. ¶¶ 224-39, Counts V-VI. Thus, regardless of whether the Rehabilitation Act implies a private right of action—which it does—the claim survives because the APA provides a cause of action. ECF No. 80 at 6.

Courts regularly recognize an implied cause of action for injunctive relief under the Rehabilitation Act. *See McRaniels v. U.S. Dep't of Veterans Affairs*, No. 15-cv-802, 2017 WL 2259622, at *4 (W.D. Wis. May 19, 2017); *Davis v. Astrue*, No. 06-cv-6108, 2011 WL 3651064, at *2-5 (N.D. Cal. Aug. 18, 2011); *Am. Council of Blind v. Astrue*, No. 05-cv-4696, 2008 WL 1858928, at *7 (N.D. Cal. Apr. 23, 2008); *Howard v. Bureau of Prisons*, No. 3:05-cv-1372, 2008 WL 318387, at *9 (M.D. Pa. Feb. 4, 2008); *Am. Council of Blind v. Paulson*, 463 F. Supp. 2d 51, 57-58 (D.D.C. 2006); *see also Palamaryuk v. Duke*, 306 F. Supp. 3d 1294 (W.D. Wash. 2018) and *Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034 (C.D. Cal. 2010) (allowing Rehabilitation Act challenge to immigration policies that would not be possible absent a cause of action).

The cases Defendants rely on declined to find a private right of action in different contexts that are distinguishable from this case. *Lane v. Pena* assumed an implied cause of action for injunctive relief but held that none existed in an action for monetary damages. 518 U.S. 187, 190, 195-96 (1996).[5] And *De Dandrade* emphasized a "fundamental[]" distinction between administrative immigration proceedings initiated by applicants and cases like this one: "A naturalization proceeding is also fundamentally different from a removal proceeding. If a naturalization application is denied [based on an N-648], LPRs are not threatened with removal." 367 F. Supp. 3d at 185. The remaining cases that Defendants rely on in this District base their holdings on the fact the government is acting as a regulator. *See Doe v. U.S. Sec. Transp.*, No. 17-cv-7868, 2018 WL 6411277, at *14 (S.D.N.Y. Dec. 4, 2018) (no private right of action "when [the United States] acts in its capacity as a regulator"); *Pereira v. USDOJ*, No. 16-cv-2599, 2016 WL 2745850, at *19 (S.D.N.Y. May 11, 2016) (same); *Kinneary v. City of New York*, 358 F. Supp. 2d 356, 360 (S.D.N.Y. 2005) (same).[6] Unlike those cases, the government here is initiating proceedings to prosecute, detain, and deport the Plaintiff Class and is being sued for § 504 violations in its *own* programs, not just those it licenses, funds or regulates.

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[5] *See also Cooke v. U.S. Bureau of Prisons*, 926 F. Supp. 2d 720, 731 (E.D.N.C. 2013) (describing *Lane*); *Am. Council of Blind*, 463 F. Supp. 2d at 57-58 (injunctive relief awarded by the district court in *Lane* was not challenged by the government or disturbed by the Supreme Court).

[6] In finding a private right of action, *McRaniels* distinguished cases holding no implied private right of action for cases involving government responding to administrative complaints or serving as regulator. 2017 WL 2259622, at *4. The cases outside this District that Defendants rely on are likewise distinguishable. *See Cousins v. Sec. of U.S. Dep't. of Transp.*, 880 F.2d 603, 605 (1st Cir. 1989) ("[T]he Act is silent about whether and how a person injured by the government *as regulator* is to enforce the Act against the government") (emphasis in original); *Clark v. Skinner*, 937 F.2d 123, 126 (4th Cir. 1991). Further, *Cousins* analyses APA claims where the government acts as a regulator to hold that, "in light of the existence of the APA," there is "no *need*" for an implied private right of action. 880 F.2d at 605-06 (emphasis in original); *see also Clark*, 937 F.2d at 126; *Pereira*, 2016 WL 2745850, at *19.

Moreover, the text and legislative history of § 504 as amended in 1978 demonstrates that a private right of action is available. Congress was aware that § 504 provided an implied right of action, and rather than eliminate the remedy, it bolstered it through § 505(b), permitting attorney's fees. *See Davis*, 2011 WL 3651064, at *2-5; *Lane*, 518 U.S. at 194 (finding that § 505(b) was an explicit waiver of sovereign immunity as to attorney's fees).[7] *De Dandrade*'s conclusion that § 505(a)(2) limits § 504(a), 367 F. Supp. 3d at 191, ignores not only this textual and legislative analysis, but also the limit of *Lane*'s holding and *Lane*'s analysis of injunctive relief and attorney's fees. *See Lane*, 518 U.S. at 190, 194-96.

B. Plaintiffs Need Not Exhaust Administrative Remedies Under Rehabilitation Act

There is no exhaustion requirement under the Rehabilitation Act. The plain language of 6 C.F.R. § 15.70 does not require administrative exhaustion, rather it provides only that a person who believes they faced discrimination "may" seek administrative relief before the DHS Officer for Civil Rights and Civil Liberties ("CRCL") (not that they "must" or "shall" do so).[8] 6 C.F.R. § 15.70(c); *see also Franco-Gonzales*, 767 F. Supp. 2d at 1046 n.5 (finding exhaustion was not required before a Rehabilitation Act challenge to an immigration process under a substantively identical regulation, 28 C.F.R. § 39.170(d)(1)(i)); *see also id.* at 1047-48; *McRaniels*, 2017 WL 2259622, at *4; *Payne v. Fed. Gov't*, No. 15-cv-5970, 2016 WL 3356281, at *2 (N.D. Ill. June 17, 2016).

Even where a court has required exhaustion, it did so not because it was mandatory, but rather based on an individualized weighing of whether (1) the administrative process would cause indefinite or unreasonable delay; (2) an agency can grant effective relief, and (3) the administrative process was adequate, considering agency expertise or bias. *See Cooke*, 926 F. Supp. 2d at 733; *Pereira*, 2016 WL 2745850, at *19 n.17. Here, these factors weigh against exhaustion and highlight that it would be futile. Not only would an administrative process cause unreasonable delay, but it also fails to provide effective relief for Plaintiffs' challenge to a blanket Policy.[9] *See* ECF No. 80 at 5-6; Compl. ¶ 231. The Subclass's claims arise from a range of disabilities, including mental illness, and "requiring [these] Plaintiffs to exhaust" would not "be fruitful in any respect in light of the severe mental illnesses from which [these] Plaintiffs suffer." *Franco-Gonzales*, 767 F. Supp. 2d at 1047-48 (holding that requiring Rehabilitation Act exhaustion in similar circumstances "would be futile").

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[7] *See also Am. Council of Blind*, 463 F. Supp. 2d at 58; *McRaniels*, 2017 WL 2259622, at *4.

[8] Nor did Congress mandate exhaustion of administrative remedies when it mandated that executive agencies promulgate regulations "to carry out" the 1978 Rehabilitation Act amendment. *See Cooke*, 926 F. Supp. 2d at 732.

[9] DHS's Office for Civil Rights and Civil Liberties ("CRCL") is responsible for implementing the process described in 6 C.F.R. § 170. CRCL is not empowered to grant effective relief. *See, e.g.,* DHS Directive Nos. 3500 and 19001, *available at* https://www.dhs.gov/publication/crcl-directives-and-delegations (allowing CRCL Officer to issue findings and recommendations, and describe potential remedies for a violation, but not provide relief).

Because Plaintiffs have established subject matter jurisdiction and pled facts sufficient to state claims on which relief may be granted, Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss. Thank you for your consideration.

Respectfully,

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