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IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GABRIELA SOLANO, *et al.*,

Plaintiffs,

v.

U.S. IMMIGRATION & AND CUSTOMS ENFORCEMENT, *et al.*,

Defendants.

Case No. 2:21-cv-01576-AB-KS

IMMIGRATION REFORM LAW INSTITUTE'S AMICUS CURIAE MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Hearing on Preliminary Injunction

Judge:	**Hon. Andre Birotte, Jr.**
Date:	**July 23, 2021**
Time:	**10:00 am**
Crtrm	**7B, First St. Courthouse**

***Amicus Curiae* Immigration Reform Law Institute's Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss**

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MEMORANDUM OF POINTS AND AUTHORITIES

Amicus Curiae the Immigration Reform Law Institute ("IRLI") files this memorandum of points and authorities in support of the federal defendants' motion to dismiss.

INTEREST OF *AMICUS CURIAE*

Amicus curiae Immigration Reform Law Institute ("IRLI") seeks the Court's leave to file this brief for the reasons set forth in the accompanying motion. IRLI is a nonprofit 501(c)(3) public-interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of and in the interests of, United States citizens and lawful permanent residents, and to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus* briefs in many important immigration cases. For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's affiliate, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has direct interests in the issues here.

SUMMARY OF ARGUMENT

Plaintiffs' claims should be dismissed for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), or for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The Administrative Procedure Act ("APA")

provides not only to procedure but also the waiver of sovereign immunity for challenging the actions of federal executive agencies.. As relevant here, challenged agency action must either be made reviewable by statute or be final. 5 U.S.C. § 704. For an agency action to be final it must reflect "the consummation of the agency's decisionmaking process" in a way that impacts "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 178 (1997).

Here, Plaintiffs invent a name for what they allege is a policy that violates the APA. Yet they point to no evidence of any decisionmaking process or determination of rights and obligations. Furthermore, even if they could show that such policy exists, Plaintiffs cannot challenge such policy based on the illegality of actions that have not yet and may not occur. Finally, the use of third-party providers for transfer and detention services is common and not prohibited by the Immigration and Nationality Act ("INA").

ARGUMENT

Defendants' motion to dismiss should be granted because Plaintiffs cannot establish that the agency acted in violation of either the APA or the INA. Plaintiffs' claims must fail because they do not challenge a final agency action, or even an agency-wide practice. Rather, Plaintiffs take issue with ICE's contracting with

trained security officers in certain state and local jurisdictions that refuse to comply with detainer requests from immigration officers.

Furthermore, even were the alleged policy amenable to review, Plaintiffs cannot show that Defendants' use of third-party contractors to perform arrests violates federal law. ICE regularly and permissibly contracts with third parties to provide detention services, and thus is also permitted to enter into contracts to perform custody transfer services. Such contracts are necessary in states such as California that increasingly pass laws barring compliance with the INA.

I. PLAINTIFFS' SUIT MUST BE DISMISSED FOR FAILURE TO CHALLENGE FINAL AGENCY ACTION.

At issue is whether ICE violates the INA by employing a third-party contractor in certain situations to transfer criminal aliens who have been issued valid detainers from state or local detention facilities to ICE facilities. Plaintiffs allege that ICE has a Private Contractor Arrest Policy that is a final agency action subject to APA review. *See* ECF No. 1, ¶ 111. ("ICE's Private Contractor Arrest Policy is final agency action that is contrary to the law, including, but not necessarily limited to, 8 U.S.C. § 1357(a), and in excess of the statutory authority conferred by 8 U.S.C. § 1357(a)."); ECF No. 1, ¶ 112 ("To the extent that Defendants have interpreted the INA, including 8 U.S.C. § 1357(a) to authorize its Private Contractor Arrest Policy and to authorize G4S employees to perform

immigration arrests of individuals at jails and prisons, that interpretation is final agency action that is arbitrary and capricious."). Plaintiffs, however, provide no evidence of agency decisionmaking at all, much less of a policy representing the "consummation" of such a process.

Before the court can consider whether an agency has taken an action that is arbitrary and capricious, it must consider whether the challenged action is a final agency action. *See Gill v. United States DOJ*, 913 F.3d 1179, 1184 (9th Cir. 2019) (citing 5 U.S.C. § 704) ("The APA allows judicial review only of final agency actions."); *L1 Techs., Inc. v. United States Customs & Border Prot.*, No. 19-cv-2338-MMA (LL), 2020 U.S. Dist. LEXIS 61910, at *23 (S.D. Cal. Apr. 8, 2020) ("Although neither party addresses this point, the Court must assess as a threshold matter: whether there is a final agency action subject to review under the APA."); *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 800 (9th Cir. 2020) (internal citation omitted) ("To maintain a cause of action under the APA, a plaintiff must challenge agency action that is final."). Only upon finding that an action is final can a court consider whether such final action was made in violation of the APA. *See Mt. St. Helens Mining & Recovery Ltd. P'ship v. United States*, 384 F.3d 721, 727 (9th Cir. 2004) ("It is well established that once an agency has taken final

agency action under the APA, a reviewing court analyzes that decision under the arbitrary and capricious standard of review.").

As the Supreme Court explained, there are two elements to establish a final action: "[f]irst, the action must mark the consummation of the agency's decisionmaking process, it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-78 (internal citations omitted). *See also Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970) (internal citations omitted) ("[T]he relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action."). Final agency action can also include agency nonaction. 5 U.S.C. § 551(13) (defining agency action as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.").

An action represents the result of agency decisionmaking where "the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review." *Abbott Labs. v. Gardner*, 387 U.S.

136, 152 (1967). Therefore, where "regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business," they are considered final agency action. *Id*. *See also Ciba-Geigy Corp. v. United States EPA*, 801 F.2d 430, 435-36 (D.C. Cir. 1986) (internal quotations omitted) (explaining that the court "look[s] primarily to whether the agency's position is definitive and whether it has a direct and immediate . . . effect on the . . . parties challenging the action."). An action is also considered final when it is "not subject to further agency review." *Sackett v. EPA*, 566 U.S. 120, 127 (2012). *See also United States Army Corps of Eng'rs v. Hawkes Co.*, 136 S.Ct. 1807, 1814 (2016) (explaining that the decision was final because it "[wa]s issued after extensive factfinding . . . and [wa]s typically not revisited if the permitting process moves forward."). Furthermore, "[t]he mere possibility that an agency might reconsider in light of informal discussion . . . does not suffice to make an otherwise final agency action nonfinal." *Sackett,* 566 U.S. at 127. The second factor, that the decision must result in legal consequences, is not satisfied if the action is not binding. *Bennett*, 520 U.S. at 178 (finding of "no[] final agency action followed from the fact that the recommendations were in no way binding[.]").

Plaintiffs cannot create their own policy-term for government operations and then deem that policy a final agency action that violates federal law. The Supreme

Court has previously rejected challenges to policies that are "not derived from any authoritative text." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 (1990). The Court rejected an attempt to challenge what the petitioners deemed the Bureau of Land Management's "land withdrawal review program" because it "d[id] not refer to a single BLM order or regulation . . . It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM." *Id*. The same is true in this case.

Furthermore, ICE's decision to use private contractors in limited circumstances was "tentative or interlocutory [in] nature." *Bennett*, 520 U.S. at 178. Plaintiff provides no evidence of an agency-wide policy other than a contract between ICE and G4S for three cities – Los Angeles, San Francisco, and Phoenix. ECF No. 1, ¶¶ 28-31. The alleged policy is a contract entered into for limited services in a small number of jurisdictions out of necessity, likely due to the lack of assistance from state and local officials. ECF No. 1, ¶ 31 (describing a purchase agreement entered into in 2012 for "detention and transportation services in . . . its San Francisco . . . Los Angeles . . . and its Phoenix Field Office[s]."). Furthermore, the alleged policy does not reflect a binding agency action with legal effects. *See, e.g., Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 57 (2004) (holding that a Bureau of Land Management decision effecting a legal mandate "was not subject

to review . . . because [that mandate] left the BLM a great deal of discretion in deciding how to achieve it."). There is no indication that ICE does not have, under the law, discretion to enter (or not to enter) the agreement in order to achieve statutory objectives.

Plaintiffs cannot show any "direct and immediate" consequences as a result of ICE's use of private contractors because Plaintiffs do not allege that they were improperly taken into custody by private security. *Gill v. United States DOJ*, 913 F.3d 1179, 1184 (9th Cir. 2019) (internal citation omitted) ("Regardless of the agency's characterization, we consider the actual effects of the action to determine whether it is final."). Speculation about a potentially problematic arrest does not provide a viable APA claim. *See, e.g., Cal. Wilderness Coal. v. United States DOE*, 631 F.3d 1072, 1099 (9th Cir. 2011) ("the agency's decision must be a final agency action and the plaintiffs must establish that they have suffered a legal wrong, or will be adversely affected or aggrieved within the meaning of the relevant statute.").

Furthermore, a potential issue with arrest procedure is not sufficient to overcome a valid final order of removal. *See United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 158 (1923) ("Irregularities on the part of the Government official prior to, or in connection with, the arrest would not necessarily invalidate

later proceedings"); *In re Bulos*, 15 I. & N. Dec. 645 (B.I.A. 1976) (citations omitted) ("However, assuming, *arguendo*, that there was a defect in the arrest procedure, it is cured if a resulting deportation order is adequately supported."); *Avila-Gallegos v. Immigration & Naturalization Serv.*, 525 F.2d 666, 667 (2d Cir. 1975) ("Assuming, *arguendo*, that petitioner's arrest was technically defective, it does not follow that the deportation proceedings were thereby rendered null and void."); *Westover v. Reno*, 202 F.3d 475, 480 (1st Cir. 2000) (explaining that "Fourth Amendment violations do not constitute grounds for invalidating removal proceedings"); *United States v. Abdi*, 463 F.3d 547, 557 (6th Cir. 2006) ("it is clear that nothing in the text of 8 U.S.C. § 1357 provides an independent statutory remedy of suppression for failing to obtain an administrative warrant.").

The fact is, Plaintiffs can point to no "actual effect" that supports characterizing the limited use of private contractors as a final agency decision. Nor do Plaintiffs provide any indication of being "adversely affect[ed] or aggrieved" by the alleged policy. 5 U.S.C. § 702. Therefore, the use of private contractors to transfer custody of properly detained aliens cannot be considered a final action and is thus not challengeable under the APA.

II. ICE IS PERMITTED TO CONTRACT WITH THIRD PARTIES FOR TRANSFER AND DETENTION SERVICES.

Even if the policy represented final agency action, it would still be permissible. The INA establishes the powers of immigration officers, including the right, in certain situations, to act without warrant. 8 U.S.C. § 1357. It does not, as Plaintiffs allege, preclude ICE from entering into contracts with properly trained third-party service providers. As the Ninth Circuit has explained, "because the Attorney General may delegate her authority, the list of powers granted in section 1357(a) cannot be read as exhaustive." *United States v. Chen*, 2 F. 3d 330, 334 (9th Cir. 1993). Plaintiff points to no authority that precludes ICE from entering into agreements with private contractors for transportation and detention services.

The INA provides certain requirements regarding the apprehension and detention of aliens. 8 U.S.C. § 1226. It includes the authority to detain aliens while they await removal and also requires that removable aliens be taken into custody "when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense." 8 U.S.C. § 1226(c)(1). It also endows immigration officers with certain powers, including the authority to carry out arrests, and act without a warrant in certain situations. *See generally* 8 U.S.C. § 1357. The lack of the express provision for use of private security services

does not preclude the agency from deciding that their use is necessary in certain situations. *See Comm. for Immigrant Rights v. Cty. of Sonoma*, 644 F. Supp. 1177, 1198 (N.D. Cal. 2009) ("The fact that § 1357 does not expressly authorize ICE to issue detainers for violations of laws other than laws relating to controlled substances hardly amounts to the kind of unambiguous expression of congressional intent that would remove the agency's discretion[.]"). The INA reflects that Congress provided "broad authority . . . to establish such regulations as [DHS] deems necessary for carrying out [its] authority to administer and enforce" immigration law. *Id.*; *see also De Bilbao-Bastida v. Immigration & Naturalization Serv.*, 409 F.2d 820, 822 (9th Cir. 1969) (explaining that Congress "g[ave] the Attorney General broad authority to establish regulations to carry out his authority under the Immigration and Nationality Act").

In fact, ICE regularly uses private detention facilities due to the unpredictability of detention needs. *See, e.g., Geo Grp. v. Newsom*, 493 F. Supp. 3d 905, 923 (S.D. Cal. 2020) (explaining that "ICE neither constructs nor operates its own detention facilities because significant fluctuations in the alien population require ICE to maintain flexibility."). As envisioned in the INA, ICE is able to cooperate with state and local officials to find available private facilities in order to fulfill its statutory duties regarding detention. *See, e.g. Det. Watch Network v.*

United States Immigration & Customs Enf't, 215 F.Supp. 3d 256, 259 (S.D.N.Y. 2016) (addressing what information from government contracts with private facilities is available under the Freedom of Information Act); *Katlong v. Barr*, No. C20-0846-RSL-MAT, 2020 U.S. Dist. LEXIS 224820, at *10 (W.D. Wash. Oct. 30, 2020) (explaining that the facility at issue "is a private detention facility run by . . . an independent contractor with ICE . . . for the 24-hour supervision of the detainees in ICE custody."). Even if the defendants' actions were reviewable final agency action, therefore, this Court would nonetheless need to dismiss this action for failure to state a claim.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be granted.

Date: June 30, 2021

Respectfully submitted

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