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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

GABRIELA SOLANO, on behalf of herself and those similarly situated,

Plaintiff,

v.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; et al.

Defendants.

Case No. 2:21-cv-01576-AB (KSx)

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Hearing Date: July 23, 2021
Hearing Time: 10:00 a.m.
Ctrm: 7B
Hon. Andre Birotte Jr.

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT

PLEASE TAKE NOTICE that, on July 23, 2021 at 10:00 a.m., or as soon thereafter as they may be heard, Defendants will, and hereby do, move this Court for an order dismissing Plaintiffs' Complaint. This motion will be made in the First Street Federal Courthouse before the Honorable Andre Birotte Jr., United States District Judge, located at 350 W. 1st Street, Los Angeles, CA 90012.

Defendants bring this motion to dismiss Plaintiff's Complaint on the ground that the Court lacks subject matter jurisdiction. There is no ongoing case or controversy so Plaintiff's claims are moot. Plaintiff lacks standing as her injury, which has not occurred, is merely speculative. Further, the Court lacks subject matter jurisdiction to review Plaintiff's claims under 8 U.S.C. § 1252(a)(5) and (b)(9) and under 8 U.S.C. § 1252(g). Additionally, Plaintiff may not obtain review of her claims under the Administrative Procedures Act because (1) Plaintiff does not challenge a final agency action and (2) Plaintiff has adequate alternatives to seek relief.

This motion is made upon this Notice, the attached Memorandum of Points and Authorities, the Declaration of Frances Jackson and other attached Exhibits, and all pleadings, records, and other documents on file with the Court in this action, and upon such oral argument as may be presented at the hearing of this motion.

This motion is made following the conference of counsel pursuant to Local Rule 7-3 which was held on May 27, 2021 and supplemented via email on June 1 and 2, 2021.

Dated: June 3, 2021

Respectfully submitted,

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I. INTRODUCTION

On February 12, 2021, Plaintiff Gabriela Solano filed a Complaint challenging Defendant U.S. Immigration and Customs Enforcement's (ICE) alleged use of private contractors to arrest individuals at jails and prisons in California without ICE officers or other immigration officers present at the time of arrest, which she refers to as ICE's alleged "Private Contractor Arrest Policy."[1] ECF No. 1. Plaintiff alleges that such arrests by private contractors violate the Immigration and Nationality Act (INA) and relevant implementing regulations and thus violate the Administrative Procedure Act (APA) and *Accardi* Doctrine.[2] *Id.* Plaintiff brings these claims on behalf of herself and a putative class of: "All individuals who are currently, or will be in the future, in custody at CDCR [California Department of Corrections] facilities or county jails within the Areas of Responsibility of the ICE San Francisco Field Office and Los Angeles Field Office, who are the subject of an ICE detainer request." ECF No. 1 ¶ 99. Plaintiff seeks an order declaring the alleged "Private Contractor Arrest Policy" unlawful and enjoining it from continuing. ECF No. 1 at 30-31.

The Court should dismiss Plaintiff's Complaint under Federal Rule of Civil Procedure 12(b). First and foremost, the case is moot. Plaintiff has been taken into custody by ICE and this arrest was conducted by a legally-authorized immigration officer and not a private contractor. Further, as reaffirmed as recently as March 24, 2021, ICE policy clearly prohibits anyone other than a lawfully appointed immigration officer from arresting individuals for immigration enforcement purposes. Whatever might have occurred in years previous to this policy announcement, current ICE policy–

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[1] "The term 'immigration officer' means any employee or class of employees of the [former INS, now Department of Homeland Security] or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this chapter or any section of this title." 8 U.S.C. § 1101(a)(18).

[2] *United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

which it has comprehensively disseminated to its officers–clearly proscribes any arrests by private contractors, and thus forecloses any assertion that the alleged "Private Contractor Arrest Policy" challenged in this suit continues to operate, even assuming *arguendo* it existed previously. Because there is no longer a live dispute as to this alleged policy, the Court must dismiss the case as moot.

Even if the case was not moot, Plaintiff–and, consequently, the putative class she seeks to represent–lacks standing to challenge the alleged policy. Plaintiff is not now and has never been arrested by a contractor and can only speculate through a chain of improbably contingencies that she might be arrested by a private contractor in the future. That is especially so given ICE's March 24, 2021 policy and her own arrest by an immigration officer, not a contractor. Further, the Court lacks subject matter jurisdiction under 8 U.S.C. §§ 1252(a)(5) and (b)(9), which channel "[j]udicial review of all questions of law and fact … arising from any action taken or proceeding brought to remove an alien from the United States" into a petition for review from removal proceedings, 8 U.S.C. § 1252(b)(9), and thus require Plaintiff to challenge her anticipated arrest in her immigration proceedings and not before this Court. Likewise, 8 U.S.C. § 1252(g) bars judicial review of any cause or claim "arising from the decision or action … to commence proceedings, adjudicate cases, or execute removal orders" and therefore precludes Plaintiff's challenge to her arrest because that is directly connected to and part of ICE's decision to commence removal proceedings against her. Finally, even if justiciable, Plaintiff's claims arise solely under the APA. But APA review is not available where, as here, a plaintiff does not challenge a final agency action, but instead seeks pre-enforcement review of an alleged policy that has not in fact been applied to them, or where there is an alternative remedy available, as there is here through removal proceedings under 8 U.S.C. § 1229a, followed by a petition for review in the relevant court of appeals or a habeas petition under 28 U.S.C. § 2241.

II. FACTUAL BACKGROUND

A. ICE Policy Regarding Transfer of Custody Arrests

"On a warrant issued by the [Secretary of DHS], [a noncitizen] may be arrested and detained pending a decision on whether the [noncitizen] is to be removed from the United States." 8 U.S.C. § 1226(a). Even without a warrant, "[a]ny officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power" to make a broad array of immigration arrests, including "to arrest any [noncitizen] in the United States, if he has reason to believe that the [noncitizen] so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest …." 8 U.S.C. § 1357(a)(2); *see* 8 C.F.R. § 287.5(c)(1) (listing the categories of "immigration officers" who are "authorized and designated to exercise the arrest power conferred by" section 1357(a)(2)). Further, the Government may enter into a written agreement with a state or locality under which "an officer or employee of the State or subdivision" may "perform a function of an immigration officer in relation to the investigation, apprehension, or detention of noncitizens in the United States[.]" 8 U.S.C. § 1357(g)(1).[3]

Regarding noncitizens removable on the basis of criminal offenses who are leaving state or local criminal detention, the INA provides that the Government "shall take into custody any [noncitizen] who" is removable on the basis of qualifying criminal offenses "when the [noncitizen] is released" from state or local custody. 8 U.S.C. § 1226(c)(1). Pursuant to regulation, ICE issues immigration detainers to federal, state, or local law enforcement agencies (LEAs) holding individuals suspected for immigration offenses. *Gonzalez v. United States Immigr. & Customs Enf't*, 975 F.3d 788, 798 (9th Cir. 2020). "Any authorized immigration officer may at any time issue a Form I–247, Immigration Detainer–Notice of Action, to any other Federal, State, or local law enforcement agency." 8 C.F.R. § 287.7(a). "A detainer serves to advise another law

[3] However, ICE currently has no section 1357(g) agreements with any localities in California.

enforcement agency that the Department [of Homeland Security] seeks custody of [a noncitizen] presently in the custody of that agency, for the purpose of arresting and removing the [noncitizen]." *Id.* "The detainer is a request that such agency advise the Department, prior to release of the [noncitizen], in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible." *Id.*

On April 6, 2018, ICE Enforcement and Removal Operations (ERO) leadership broadcasted a notice to its workforce clearly setting out the established procedures for the safe transfer of custody of noncitizens detained by state or local LEAs into ICE custody. Declaration of Frances Jackson ¶ 6 & Declaration Ex. A (attached hereto as Exhibit 1). The notice was sent on behalf of ERO's Assistant Director for Enforcement, with the concurrence of the Assistant Director for Field Operations, to all Field Office Directors (FODs), Deputy FODs, and Assistant FODs across the United States. *Id.* ¶ 7. The notice explicitly set forth the established procedure, which included, among other things, that an "immigration officer," such as an ERO officer, or a state or local officer carrying out the functions of an immigration officer under the supervision of the Secretary, must arrest the noncitizen before any custody transfer can occur. *Id.* ¶ 8.

On February 12, 2021, Plaintiff filed her Complaint, alleging that private contractors were making arrests on ICE's behalf. ECF No. 1. On March 24, 2021, ERO leadership broadcasted a subsequent notice to its workforce reaffirming the established procedures laid out in the April 6, 2018 notice. Jackson Decl. ¶ 9 & Decl. Ex. B. The broadcast states: "For such custody transfer to occur, an immigration officer, such as an ERO Deportation Officer or designated immigration officer (DIO) under section 287(g) of the INA, must arrest the noncitizen." Decl. Ex. B. Further, the broadcast provides: "If an immigration officer is not able to arrest the noncitizen contemporaneously with his or her release from state or local [law enforcement agency] custody, ICE may request that the state or local LEA honor an Immigration Detainer Notice of Action, Form I-247A for up to 48 hours until an immigration officer can arrive to arrest the noncitizen.

Otherwise, the noncitizen must be released from state or local LEA custody." *Id.* (emphasis added).

This broadcast notice was sent on behalf of ERO's Assistant Director for Enforcement to all FODs and Deputy FODs, with instructions to further distribute to all Assistant FODs. Jackson Decl. ¶ 10. ERO leadership has made clear to its workforce that the procedures set forth in the broadcast issued on March 24, 2021, must be followed, and any deviation therefrom is prohibited and will not be tolerated. *Id.* ¶ 11.

B. Plaintiff's Allegations

Plaintiff is a 48-year-old lawful permanent resident. ECF No. 1 ¶ 83. She was convicted of felony murder after participating in a botched robbery in 1988 where a pedestrian was shot and killed, and sentenced to life in prison without the possibility of parole. *Id.* ¶ 88. Felony murder is an aggravated felony rendering even lawful-permanent resident noncitizens removable. 8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii). However, on December 30, 2020, Plaintiff was found suitable for release at a hearing by members of the California parole board. ECF No. 1 ¶ 95. Her tentative release date was March 15, 2021. *Id.* ¶ 96. Plaintiff alleged that ICE notified her that it intended to detain her for removal proceedings upon her release from state custody based on her murder conviction. *Id.* ¶ 8.

Plaintiff alleges that since 2016, ICE has directed and retained employees of G4S Secure Solutions, Inc., to arrest individuals at jails and prisons in California for immigration enforcement purposes "without any ICE immigration officer present." *Id.* ¶ 28. Plaintiff claims ICE has a contract for detention and transportation services with G4S and that, since at least 2016, has included making immigration arrests of individuals in state and county criminal custody, without an ICE officer present.[4] *Id.* ¶ 29. Plaintiff offers anecdotal allegations regarding 14 noncitizens in California who were allegedly

[4] The contract is for secure transportation assistance and detention services but Plaintiffs do not allege an actual term of the contract tasks G4S with conducting arrests on behalf of ICE without an immigration officer present. *See generally* ECF No. 1.

arrested by G4S contractors without an immigration officer present. *Id.* ¶¶ 68-81. The last of these alleged arrests by G4S contractors occurred on January 15, 2021, during the last Administration. *Id.* ¶ 81. Plaintiff alleges that she will move to certify a putative class of "[a]ll individuals who are currently, or will be in the future, in custody at CDCR facilities or county jails within the Areas of Responsibility of the ICE San Francisco Field Office and Los Angeles Field Office, who are the subject of an ICE detainer request." *Id.* ¶ 99.

C. Plaintiff's Arrest by ICE

On March 29, 2021, an I-200 Warrant for Arrest of Noncitizen, was issued for Martha Gabriela Solano-Urias, also known as Gabriela Martha Solano, and signed by an ICE supervisory deportation officer. Warrant for Arrest (attached as Exhibit 2) at 1. The warrant was served on Plaintiff in Fresno, California, on March 30, 2021, by an ICE deportation officer, who signed the warrant upon service on and arrest of Ms. Solano. *Id.* "Deportation officers" are "immigration officers" who, once they "have successfully completed basic immigration law enforcement training[,] are hereby authorized and designated to exercise the arrest power conferred by" 8 U.S.C. § 1357(a)(2). 8 C.F.R. § 287.5(c)(1)(iv).

That same day, March 30, 2021, ICE served Plaintiff with a Notice to Appear in Removal Proceedings under Section 240 of the Immigration and Nationality Act, 8 U.S.C. § 1229a, charging her with being removable under 8 U.S.C. §1227(a)(2)(A)(iii) on the basis of three criminal convictions for first degree murder, carjacking, and second-degree robbery on August 11, 1999. Notice to Appear (attached as Exhibit 3) at 1, 4. Plaintiff signed and fingerprinted the Notice to Appear, acknowledging its service and requesting a prompt hearing. *Id.* at 3.

On March 29, 2021, ICE also completed a Notice of Custody Determination form for Plaintiff, determining that she must remain detained pending a final administrative determination in her removal proceedings. Notice of Custody Determination (attached as Exhibit 4) at 1. This form was read to Plaintiff in English and signed on March 30,

2021, by the ICE deportation officer who had executed her arrest warrant that day. *Id.* Plaintiff also signed and fingerprinted the Notice of Custody Determination form that day, acknowledging receipt of it and requesting review of her custody determination by an immigration judge. *Id.*

III. ARGUMENT

The Court must dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) for lack of jurisdiction and failure to state a claim. As explained below, the case is moot and Plaintiff lacks Article III standing in any event; the Court lacks subject matter jurisdiction under 8 U.S.C. §§ 1252(a)(5), (b)(9) and 1252(g); and Plaintiff may not obtain review pursuant to the APA because she does not challenge a final agency action and has adequate alternative avenues for relief.

A. There is No Article III Case or Controversy.

1. Plaintiff's Claims Are Moot.

Plaintiff has been arrested by an immigration officer, not a private contractor. Despite whatever might have occurred previously, ICE has recently and unequivocally reaffirmed that agency policy prohibits using private contractors to make immigration enforcement arrests and requires that immigration officers conduct such arrests, and no deviations from this policy will be tolerated. Because this is the very result Plaintiff seeks, ECF No. 1 at 30(d), there is no longer a live controversy, because the Court cannot order any relief that would remedy alleged harms no longer occurring, and therefore the case is moot.

"Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies," *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990), which "must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quotation marks omitted). "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike,*

Inc., 568 U.S. 85, 91 (2013) (quotation marks omitted); *see also Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005) (en banc) (internal citations omitted) (explaining that the central question when analyzing mootness "is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief"). A textbook case of mootness is where, as here, "the requisite personal interest that must exist at the commencement of the litigation" is no longer present because the court can no longer order any relief that would benefit Plaintiff. *Arizona*, 520 U.S. at 68 & n. 22.

Moreover, although the government must show "that the challenged conduct cannot reasonably be expected to start up again" when it assert mootness, the Court must "presume[] that a government entity is acting in good faith when it changes its policy." *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014). Accordingly, where a governmental policy is at issue, "mootness is more likely if (1) the policy change is evidenced by language that is "broad in scope and unequivocal in tone, (2) the policy change fully addresses all of the objectionable measures that the Government officials took against the plaintiffs in the case," (3) "the case in question was the catalyst for the agency's adoption of the new policy"; (4) the policy has been in place for a long time when we consider mootness; and (5) "since the policy's implementation the agency's officials have not engaged in conduct similar to that challenged by the plaintiff." *Id.* at 972 (quoting *White v. Lee*, 227 F.3d 1214, 1243–44 (9th Cir. 2000) (internal citations, quotation marks and additions from original omitted).

Under a straightforward application of these principles, the case is moot and must be dismissed for two separate reasons. First, Plaintiff has been transferred to and is in ICE custody. Exs. 2, 4. That transfer was conducted by an authorized immigration officer, specifically an ICE deportation officer, as reflected on the executed Certificate of Service dated March 30, 2021, on the I-200 Warrant of Arrest for Ms. Solano. Ex. 2; *see* 8 C.F.R. § 287.5(c)(1)(iv) (including "Deportation officers" in the list of "immigration officers who" once they "have successfully completed basic immigration law

enforcement training are hereby authorized and designated to exercise the arrest power conferred by" 8 U.S.C. § 1357(a)(2)). Because her transfer of custody has occurred and it was conducted by an authorized immigration officer, not a private contractor, there is no longer any basis for the Complaint's prospective request that the Court intervene, and declare unlawful and prevent, her arrest by a private contractor. *See* ECF No. 1 at 30-31. Thus, "changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief" from the Court and there is no longer a live controversy to satisfy Article III. *See Arizona*, 520 U.S. at 68 & n. 22.

Second, the alleged Private Contractor Arrest Policy that Plaintiff challenges does not exist any longer, if it ever did. Whatever might have occurred in the past, ICE's current policy prohibits arrests by private contractors. The Court cannot grant the relief Plaintiff seeks, enjoining the Government from pursuing a "Private Contractor Arrest Policy," ECF No. 1 at 30, because, as made clear on March 24, 2021, no such policy exists. *See* Jackson Decl. ¶¶ 6-11 & Exs. A & B. ICE permits only immigration officers to perform transfer-of-custody arrests and will not tolerate deviations from this rule. Jackson Decl. ¶ 11. Plaintiff's own arrest by an immigration officer and not a contractor confirms this. Ex. 2. The situation that gave rise to Plaintiff's Complaint no longer exists. That is, "changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief" available from the Court, and therefore the case is moot. *See Gator.com Corp.*, 398 F.3d at 1129.

All of the additional factors applied by the Ninth Circuit in *Rosebrock* also point to mootness. 745 F.3d at 971. First, ICE's reaffirmation that only immigration officers may conduct transfer-of-custody arrests is "broad in scope and unequivocal in tone," pertaining to all transfers of noncitizens into ICE custody and requiring an immigration officer to perform the arrest in all cases, full stop. See Decl. Ex. B ("In order to transfer the noncitizen into ICE custody: 1. an immigration officer **must** arrest the noncitizen at the time of release from state or local LEA custody[.]") (emphasis in original); *id.* (if ICE cannot arrive when the noncitizen is released to effect the arrest, and the locality

cannot hold the noncitizen until ICE arrives, "the noncitizen must be released from state or local LEA custody") Jackson Decl. ¶ 11 ("ERO leadership has made clear to its workforce that the procedures set forth in the broadcast issued on March 24, 2021, must be followed, that and any deviation therefrom is prohibited and will not be tolerated[.]").[5]

Second, the policy reaffirmation here fully "addresses all of the objectionable measures that [the Government] officials took against the plaintiffs in the case." *See Rosebrock,* 745 F.3d at 972. Plaintiff's Complaint solely challenges the legality of and seeks the end to ICE's alleged Private Contractor Arrest Policy. *See, e.g.*, ECF No. 1 at 30-31. While no such policy exists, ICE's March 24, 2021 reaffirmation speaks directly and fully to the action Plaintiff challenges as objectionable, which is the use of persons other than immigration officers to make transfer-of-custody arrests. ICE's policy reaffirmation unequivocally states: "an immigration officer **must** arrest the noncitizen at the time of release from state or local LEA custody." Decl. Ex. B. (emphasis in original). This policy prohibits any arrest by private contractors, and thus the entire basis for Plaintiffs' claims.

Third, it appears that Plaintiff's suit was at least part of the catalyst for the reaffirmation of ICE policy. The March 24, 2021 broadcast was issued only slightly more than a month after the suit was filed and speaks directly and solely to the issue raised by Plaintiff's claims, arrests by persons other than immigration officers. Thus, the "record strongly suggests" that this case was one of or *the* impetus for ICE to reaffirm the arrest policy for its field offices. *See Rosebrock*, 745 F.3d at 974.

Further, ICE's reaffirmation of its requirement that only immigration officers may

[5] That the policy at issue here, concerning transfers of custody of noncitizens from state and local authorities to ICE, was previously existing and ICE's recent action reaffirmed and re-educated its employees about it, as opposed to creating it from scratch, does not change the analysis. *See Rosebrock*, 745 F.3d at 972 (holding that, even though agency action was "more aptly described as reemphasizing, or recommitting to, an existing policy," than changing it, "[a]ll of the factors that suggest mootness in 'policy change' cases are present here").

perform transfer of custody arrests, and communication that this policy must be strictly enforced and if it cannot be, the noncitizen must be released, will have occurred more than three months ago once this motion is heard, and Plaintiff has not identified any cases of contractor arrests that occurred after the broadcast went out on March 24, 2021. *See Rosebrook*, 745 F.3d at 974. Indeed, the Complaint does not allege that any have occurred after January 15, 2021. ECF No 1 ¶ 81. Plaintiff's own arrest by an immigration officer and not a contractor on March 30, 2021, is further confirmation that contractor arrests are not occurring since the March 24, 2021 broadcast. *See* Exs. 2, 4.

And finally, "in light of the presumption that the Government acts in good faith," the Ninth Circuit has "found the heavy burden of demonstrating mootness to be satisfied in 'policy change' cases without even discussing procedural safeguards or the ease of changing course." *Rosebrock*, 745 F.3d at 974 (citing *Am. Cargo Transp.*, 625 F.3d at 1179-80). Even so, the fact that this ICE policy has been longstanding, existing since at least it was broadly communicated on April 6, 2018, suggests that it is unlikely to and could not be easily abandoned. *See id.* at 972.

Thus, "[a]ll of the factors that suggest mootness in 'policy change' cases are present here" as well. *Id.* at 973. In light of ICE's direct and unequivocal reaffirmation of the prohibition on arrests by contractors or any other non-immigration officers, the comprehensive way this reaffirmation was communicated to field offices, and the admonition that the policy will be strictly enforced going forward and "any deviation therefrom … will not be tolerated," Jackson Decl. ¶¶ 8-11, and the remaining circumstances surrounding the timing of the reaffirmation, Defendants have met their burden of showing that the challenged conduct, i.e., an alleged policy permitting arrests by private contractors, to the extent they occurred in the past, cannot reasonably be expected to start up again. *Rosebrock*, 745 F.3d at 971. Therefore, the case is moot.

2. Plaintiff Lacks Standing for a Pre-enforcement Challenge.

Even if not moot, the case is still non justiciable under Article III due to lack of standing: when Plaintiff filed her Complaint, it was no more than speculative that she

would be arrested by a contractor, as her subsequent arrest by an immigration officer only underscores. To have Article III standing, a plaintiff must demonstrate that: (1) she has suffered an "injury in fact" that is concrete, particularized, and actual or imminent, (2) the injury is "fairly traceable" to the defendant's conduct, and (3) the injury can be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted). Where, as here, a plaintiff challenges an action that has not yet occurred, a past injury does not provide standing to seek prospective injunctive relief "[a]bsent a sufficient likelihood that [the plaintiff] will again be wronged in a similar way." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

Plaintiff cannot make this showing. Plaintiff alleges that she is subject to an immigration detainer but has not yet been arrested by ICE.[6] ECF No 1 ¶ 8. Her claim thus depends on her speculation that she could be arrested by ICE in the future, and that the person who arrests her could be a contractor. In light of ICE's unequivocal reaffirmation and communication prohibiting contractor arrests and admonition of strict enforcement thereof, it is entirely improbable speculation that, if and when Plaintiff is taken into custody pursuant to that detainer by ICE, that she would be arrested by a contractor instead of an immigration officer. *See* Jackson Decl. ¶ 11 & Decl. Ex. B.

While the Complaint alleges that such arrests have happened in the past, any such occurrences are insufficient to establish a non-speculative likelihood that she will be arrested by a contractor, given ICE's intervening broad and unequivocal reaffirmation that only immigration officers may perform transfer-of-custody arrests. *See id.*; *Lyons*, 461 U.S. at 111. The ICE policy reaffirmation broadcast renders it highly unlikely, to the point of speculative, that any such contractor arrests would occur going forward, in

[6] "'[S]ubject-matter jurisdiction depends on the state of things at the time of the action brought,' i.e., at the time the plaintiff commenced suit[.]" *Gonzalez v. United States Immigr. & Customs Enf't*, 975 F.3d 788, 803 (9th Cir. 2020) (quoting *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473 (2007)). Although her arrest by an immigration officer and not a contractor occurred subsequent to filing of the Complaint, the ICE policy prohibiting contractor arrests had already been in place for over two years, and it still was mere speculation that Plaintiff could be arrested by a contractor.

Plaintiff's case or any other. *See Lyons*, 461 U.S. at 111. This is especially true given that any such speculation ignores the presumption of regularity that attaches to agency action, *see San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014), and assumes that government officers would knowingly violate ICE policy. *See Spencer v. Kemna*, 523 U.S. 1, 15-16 (1998) (rejecting as speculative suggestions of future injury that would require a court to assume that respondents would violate the law; presumption is that parties follow the law). And while it occurred subsequently to the Complaint, Plaintiff's arrest by an immigration officer and not a contractor, Ex. B, nevertheless underscores how speculative her arrest by a contractor was at that time.

Accordingly, Plaintiff lacks standing to bring her suit, and the putative class lacks standing as well. *See B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999) (noting that "[a] class of plaintiffs does not have standing to sue if the named plaintiff does not have standing").[7]

B. The Court Lacks Jurisdiction Under 8 U.S.C. 1252(g).

The Complaint must be dismissed for lack of jurisdiction under section 1252(g) because Plaintiff challenges action taken by Defendants to "commence proceedings": Plaintiff alleges that, while still in state criminal detention, she is subject to an immigration detainer under which ICE will (and has) taken her into detention pending a determination whether she is removable on the basis of her criminal offenses. ECF No. 1 ¶¶ 8, 13, 89. Because she challenges an action that "aris[es] from" a decision to

[7] To be clear, Defendants are not arguing that it was speculative that Plaintiff would be arrested pursuant to the alleged ICE detainer, *see Gonzalez*, 975 F.3d at 804, but only that it was speculative that it would be a private contractor and not an immigration officer doing so, in light of ICE's policy. Further, unlike in *Gonzalez*, Plaintiff is not challenging her detention or ICE's authority to place a detainer on or arrest her, but merely who would perform that transfer of custody arrest. 975 F.3d at 804 (holding that Gonzalez had an already ongoing injury by virtue of being detained in LAPD custody pursuant to an ICE detainer). Rather, she would only be injured under the theory of her Complaint if that arrest was carried out by a contractor; because she had not yet been arrested at that time, her possible injury cannot be ongoing. Finally, it is far too speculative to find standing on the basis that Plaintiff might again be in criminal custody and subject to an ICE detainer and arrested by a contractor in the future, given both ICE's policy and because this chain of events requires the Court to impermissibly assume she would commit another crime. *See Spencer*, 523 U.S. at 15-16.

commence immigration proceedings against her, Plaintiff's claims are jurisdictionally barred by 8 U.S.C. § 1252(g).

Recognizing the discretion inherent in the decision to and action of bringing immigration enforcement actions and executing removal orders, Congress deprived the courts of jurisdiction to second guess the Executive's use of this discretion. Section 1252(g) provides:

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), … no court shall have jurisdiction to hear any cause or claim by or on behalf of any noncitizen arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any noncitizen under this chapter.

8 U.S.C. § 1252(g). Congress "focus[ed] special attention upon, and ma[d]e special provision for, judicial review of the Attorney General's discrete acts of 'commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders'—which represent the initiation or prosecution of various stages in the deportation process." *Reno v. Am. Arab Anti-Discrimination Comm.* ("*AADC*"), 525 U.S. 471, 483 (1999). While section 1252(g)'s jurisdictional bar does not apply to the entire universe of activity related to noncitizen removal, section 1252(g) does "perform[] the function of categorically excluding from non-final-order judicial review … certain specified decisions and actions of the INS" namely the government's "'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders.'" *Id.* (quoting 8 U.S.C. § 1252(g)). The statute covers future as well as past actions or decisions to commence proceedings, adjudicate cases, or execute removal orders. *See, e.g.*, *Balogun v. Sessions*, 330 F. Supp. 3d 1211, 1215 (C.D. Cal. 2018) (collecting cases where courts held that section 1252(g) applied to claims to prevent future removals).

The Ninth Circuit held that section 1252(g) bars jurisdiction over a noncitizen's claim that he was unlawfully arrested for expedited removal when he was not an "arriving" noncitizen subject to that summary procedure. *Sissoko v. Rocha*, 509 F.3d 947, 950 (9th Cir. 2007). The Ninth Circuit "conclude[d] that Sissoko's detention arose

from Rocha's decision to commence expedited removal proceedings." *Id.* at 949. It cited a statute that mandated detention for noncitizens subject to expedited removal credible fear screenings. *Id.* (citing 8 U.S.C. § 1225(b)(1)(B)(iii)(IV)). Despite the fact that Sissoko never actually had a credible fear interview or was subject to expedited removal (as he was ineligible for this and was placed into regular removal proceedings), the Ninth Circuit nevertheless held that section 1252(g) applied, reasoning that "Sissoko's detention," however invalid given Sissoko's ineligibility for expedited removal, "arose from Rocha's decision to commence expedited removal proceedings." *Id.* at 949.

Similarly, Plaintiff's arrest by ICE arises from a decision to commence proceedings against her. Just as with the expedited removal provision in *Sissoko*, statute mandates that noncitizens with significant criminal convictions such as Ms. Solano be subject to mandatory detention pending removal proceedings. *See* 8 U.S.C. § 1226(c)(1)(B). Plaintiff's claims "directly challenges [ICE]'s decision to" commence removal proceedings against Plaintiff, *see* ECF No. 1 ¶ 8, and ICE's taking her into custody to ensure her presence at those proceedings, 8 U.S.C. § 1226(c)(1). *See Sissoko*, 509 F.3d at 950. That is, ICE may detain a noncitizen under § 1226—under either subsection (a) or subsection (c)—only "pending a decision" on removal. *See* 8 U.S.C. § 1226(a) ("On a warrant issued by the Attorney General, [a noncitizen] may be arrested and detained pending a decision on whether the [noncitizen] is to be removed from the United States."). Detention authority is thus contingent on ICE's discretionary decision to commence removal proceedings in the first instance, by issuing a notice to appear. *See id.* § 1229(a); *see also Niz-Chavez v. Garland*, 141 S. Ct. 1474, 182 (2021) ("A notice to appear serves as the basis for commencing a grave legal proceeding" and "is like an indictment in a criminal case"). Here, ICE has served Plaintiff with a notice to appear in removal proceedings on the basis that she is removable due to her murder conviction, and thus has placed her in detention pending those proceedings. Exs. 3, 4. ICE's taking Plaintiff into immigration custody under

section 1226–mandatory detention under subsection (c) due to her felony murder offense, *see* 8 U.S.C. § 1226(c)(1)(B)– flowed necessarily from and is part and parcel of the decision to serve her with that notice to appear in removal proceedings. *See Gupta v. McGahey*, 709 F.3d 1062, 1065 (11th Cir. 2013) ("Securing a [noncitizen] while awaiting a removal determination constitutes an action taken to commence proceedings."). Accordingly, the Ninth Circuit's holding in *Sissoko* logically extends to ICE's arrest of Plaintiff because that was part of the Government's decision to "commence proceedings" against her.

Courts recognize that certain ancillary claims would be subsumed by the jurisdiction-stripping provisions of section 1252(g) as they relate to the commencement of proceedings, adjudication of cases, and execution of removal orders. *See Humphries v. Various Fed. USINS Emps.*, 164 F.3d 936, 944 (5th Cir. 1999). Thus, in *Humphries*, section 1252(g) barred a First Amendment claim that a noncitizen's exclusion was undertaken with retaliatory animus because "in addition to being a significant and important event in the chain of causation leading to Humphries' alleged unconstitutional exclusion, the Attorney General's decision to place [him] in exclusion proceedings appears to provide the most direct, immediate, and recognizable cause of [his] injury"). 164 F.3d at 945. As *Humphries* explained, section 1252(g) claims fall on a spectrum:

> At one end of that spectrum we find claims clearly not included within the definition of "arising from," i.e., those claims with no more than a weak, remote, or tenuous connection to a "decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders." *** At the other end of the spectrum we find claims that clearly are included within the definition of "arising from," i.e., those claims connected directly and immediately with a "decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders."

Id. at 943 (internal citations omitted). Here, Plaintiff challenges her arrest by ICE for

purposes of detention pending removal proceedings, *see* 8 U.S.C. § 1226(a), (c)(1)(B), an action that, just as closely intertwined with–and directly and immediately connected to–commencement of proceeding as Sissoko's detention pending proceedings was to commencement of his expedited removal proceedings. *See* 509 F.3d at 950; *accord Gupta*, 709 F.3d at 1069 (holding that noncitizen's claims of invalid procurement of an arrest warrant, unlawful arrest and detention, invalid search of his apartment and car, and unlawful seizure of his personal items all fell under section 1252(g) because they all represented "an action taken to secure him and prevent the perceived threat he posed to Disney World while he awaited a deportation hearing"); *Kareva v. United States*, 9 F. Supp. 3d 838, 845 (S.D. Ohio 2014) (explaining that because "Plaintiff was detained for removal … [she] was subject to an order of removal and Plaintiff's motion to reopen was denied," her "claims that she was wrongfully arrested and detained arise from the Government's decision or action to execute the September 23, 2009 removal order"). Thus, under controlling Ninth Circuit precedent in *Sissoko*, Plaintiff's claim concerning her arrest for immigration detention and removal purposes arises from ICE's decision to "commence proceedings" against her and should be dismissed by the straightforward application of section 1252(g).

C. The Court Lacks Jurisdiction Under 8 U.S.C. § 1252(a)(5), (b)(9).

Plaintiff's claims arise from removal-related activity and thus, no matter how phrased, they fall within the jurisdiction channeling provisions of 8 U.S.C. §§ 1252(a)(5) and (b)(9). The only federal court with jurisdiction to hear such claims is a circuit court of appeals on petition for review from an administratively final removal order. Accordingly, this Court lacks jurisdiction over Plaintiff's claims.

Congress has clearly provided that all claims, whether statutory or constitutional, that "aris[e] from" immigration removal proceedings can only be brought through the petition for review process in the federal courts of appeals after exhaustion of administrative remedies. 8 U.S.C. §§ 1252(a)(5), (b)(9); *see J.E.F.M. v. Lynch*, 837 F.3d 1026, 1038 (9th Cir. 2016) (holding that statutory and due process right-to-counsel

claims "arise from" their removal proceedings). "Judicial 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 a [noncitizen] from the United States ... shall be available only in judicial review of a final order ...." 8 U.S.C. §1252(b)(9); 8 U.S.C. § 1252(a)(5) (providing that "a petition for review ... shall be the sole and exclusive means for judicial review of an order of removal").

Section 1252(b)(9) "is 'breathtaking' in scope and 'vise-like' in grip and therefore swallows up virtually all claims that are tied to removal proceedings." *J.E.F.M.*, 837 F.3d at 1031 (quoting *Aguilar v. ICE*, 510 F.3d 1, 9 (1st Cir. 2007)). "Taken together, § 1252(a)(5) and § 1252(b)(9) mean that any issue—whether legal or factual—arising from any removal-related activity can be reviewed only through the [petition for review] process." *Id.* (citing *Viloria v. Lynch*, 808 F.3d 764, 767 (9th Cir. 2015)). Only "claims that are independent of or collateral to the removal process" fall outside the scope of these jurisdictional-channeling provisions. *Id.* at 1032.

Here, Plaintiff's claims arise from an "action taken … to remove a noncitizen from the United States," 8 U.S.C. § 1252(b)(9), i.e., the arrest of Plaintiff by ICE (and other similarly situated noncitizens) in state or local law enforcement custody in order to initiate her removal proceedings. Plaintiff's claims address and challenge the government's action of taking Plaintiff into custody to seek her removal on the basis of her felony murder conviction in removal proceedings, Exs. 2-4; 8 U.S.C. § 1226(c), and inarguably thus concern "removal-related activity" and fall within the scope of *J.E.F.M.*

The Supreme Court recently reaffirmed this view by explaining that claims "asking for review of an order of removal; … challenging the decision to detain them in the first place or to seek removal; and … challenging any part of the process by which their removability will be determined" falls squarely within the scope of section 1252(b)(9). *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018); *accord Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907 (2020) (holding that section 1252(b)(9) did not apply to the decision to revoke DACA, which,

unlike here, was unrelated to a "decision … to seek removal" or any aspect of removal proceedings). These cases confirm that Plaintiff's claim falls within section 1252(b)(9)'s scope. Ms. Solano's arrest (and that of similarly situated putative class members) occurred as a direct result of a decision to seek her removal in the first place and to ensure her presence in removal proceedings. *See Jennings*, 138 S. Ct. at 841 (explaining that plaintiffs there were challenging the prolongation of detention and were "not challenging the decision to detain them in the first place or to seek removal"). It has not–and cannot–be alleged that ICE was engaged in anything other than "removal-related activity" when it took Plaintiff into custody for purposes of detaining her for removal proceedings upon her release from state criminal incarceration. *See J.E.F.M.*, 837 F.3d at 1031.

J.E.F.M. recognized that "claims that are independent of or collateral to the removal process do not fall within the scope of § 1252(b)(9)." 837 F.3d at 1032. The Supreme Court also eschewed interpreting "arising from" in section 1252(b)(9) in an "extreme way would also make claims … effectively unreviewable. *Jennings*, 138 S. Ct. at 840. However, Plaintiff's claim challenges her arrest to seek her removal, and thus is not independent or collateral to the removal process. *See id.* at 841. And unlike the claims of prolonged detention at issue in *Jennings*, 138 S. Ct. at 840, claims challenging allegedly unlawful or unconstitutional immigration arrests are both reviewable and remediable in removal proceedings and petitions from review therefrom. *See, e.g., Sanchez v. Sessions*, 904 F.3d 643, 649 (9th Cir. 2018) (holding that the exclusionary rule applies in immigration proceedings "when the agency violates a regulation promulgated for the benefit of petitioners and that violation prejudices the petitioner's protected interests" and "when the agency egregiously violates a petitioner's Fourth Amendment rights"); *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018 (9th Cir. 2008) (holding that Fourth Amendment required immigration court to suppress statements obtained by noncitizens "in the custody immediately following the unconstitutional entry of their residence"). If any prejudice accrued to Plaintiff from the manner of her arrest,

she may raise that issue in her removal proceedings. *See Sanchez*, 904 F.3d at 649.

Indeed, a district court within this Circuit, applying these precedents, recently reached a similar conclusion vis-à-vis the applicability of sections 1252(a)(5) and (b)(9) to claims that the manner of ICE's taking noncitizens into immigration custody was unconstitutional because it occurred "without prompt judicial determination of whether probable cause justifies their detention." *Cancino-Castellar v. Nielsen*, 338 F. Supp. 3d 1107, 1115 (S.D. Cal. 2018). The court reasoned that requiring a probable cause determination for the immigration arrests challenged both the government's decisions to detain plaintiffs initially and to seek removal, circumstances *Jennings* distinguished from the noncitizens challenging prolonged detention in that case. *Id.* (citing *Jennings*, 138 S. Ct. at 841). The court rejected the Plaintiffs' argument that the mere fact that the challenged action involved taking them into detention meant that *Jennings* applied, noting that this custody was only an ancillary part of the action to seek Plaintiffs' removal, the activity they were fundamentally challenging. *See id.* Under *Jennings*, "a court must decide whether the legal or factual question a plaintiff raises arises from an action taken to remove or the removal process," the court stated, concluding that "[a]t its core, Plaintiffs' … probable cause claim does so." *Id.* at 1116.

This Court should be guided by this reasoning. At bottom, Plaintiff here is also challenging "an action taken to remove" her–the act of "tak[ing her] into ICE custody because immigration officers suspect [her] of being [a noncitizen] removable from the United States," and not the length or condition of detention under the ICE detainer or in potential federal custody. *Id.*; *see* ECF No. 1 ¶ 8 ("ICE has notified Ms. Solano that it intends to detain her for removal proceedings upon her release from state custody."); *id.* ¶ 103 ("Defendants' policy of routinely and systemically directing and retaining G4S employees to arrest individuals at jails and prisons in California for immigration enforcement purposes").

In sum, sections 1252(a)(5) and (b)(9) prevent this Court's review of this case.

D. Plaintiff Cannot Obtain APA Review of Her Claims.[8]

1. Plaintiff Does Not Challenge a Final Agency Action.

Plaintiff's claims also fail on the merits. Plaintiff does not challenge a final agency action, but alleged actions by individual ICE officers that would, if they had occurred (but did not), directly violate the clear policy statement that the agency has issued concerning transfer-of-custody arrests. Thus, Plaintiff cannot obtain APA review.

The APA allows challenges only to "final agency action." 5 U.S.C. § 704. Agency action is "final" under the APA only if it both is "the consummation of the agency's decisionmaking process" and also determines "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). To represent the consummation of a decision-making process, the decision "must not be of a merely tentative or interlocutory nature." *Id.* Further, a plaintiff must be "adversely affect or aggrieved" by that final agency action to have a cause of action under the APA. 5 U.S.C. § 702. Here, the consummation of the agency's decision-making process was, if anything, the March 24, 2021 reaffirmation that ICE policy strictly prohibits the conduct Plaintiff challenges—supporting Plaintiff's contention and preventing the injury she postulates, not aggrieving her. Plaintiff's challenge is to an alleged "Private Contractor Arrest Policy" which, to the extent it ever even existed, was interlocutory and has been superseded by the March 24, 2021 pronouncement. "The interest in postponing review is powerful when the agency position is tentative. Judicial review at that stage improperly intrudes into the agency's decisionmaking process." *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 732 (D.C. Cir. 2003) (internal quotation omitted).

[8] The lack of APA reviewability forecloses both Plaintiff's arbitrary and capricious claim under 5 U.S.C. § 706(2)(A), (C) and her *Accardi* claim. An *Accardi* argument that Defendants are not following regulations, and hence law, is just one species of an APA claim. *See* 5 U.S.C. § 706(2)(A) (permitting Court to "hold unlawful and set aside agency action, findings, and conclusions found to be … not in accordance with law"); *see, e.g.*, *Alcaraz v. I.N.S.*, 384 F.3d 1150, 1161-62 (9th Cir. 2004) (addressing Accardi claim under APA review); *Emami v. Nielsen*, 365 F. Supp. 3d 1009, 1020 (N.D. Cal. 2019) (examining whether plaintiffs "state a plausible APA claim under *Accardi*" and collecting cases holding that an agency's alleged failure to follow its own policy can be challenged under *Accardi* via the APA).

Further, the alleged prior unwritten policy of using contractor to make arrests would not have even been a general statement of policy, had it existed, much less a substantive rule, and so categorically would not be final agency action. "A substantive rule constitutes a binding final agency action and is reviewable. … A general statement of policy, on the other hand, … is not a "final agency action," rendering it unreviewable." *Cohen v. United States*, 578 F.3d 1, 6 (D.C. Cir. 2009), *reh'g en banc granted in part, opinion vacated in part,* 599 F.3d 652 (D.C. Cir. 2010), *and on reh'g en banc in part,* 650 F.3d 717 (D.C. Cir. 2011). It is textbook law that a "statement of policy" is not "final agency action" unless and until it is applied "in a particular situation" to a regulated entity. *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) (Kavanaugh, J.); *accord Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 395 (D.C. Cir. 2013) ("The APA only provides for judicial review of 'final agency action.' ... [S]tatements of policy generally do not qualify because they are not finally determinative of the issues or rights to which [they are] addressed"). The alleged Private Contractor Arrest Policy, if it even existed, is at most a statement of policy and would not be a final agency action until it had been applied to Plaintiff, which the Complaint indicates has not occurred.

While Plaintiff may argue that contractor arrests will persist despite the agency's unequivocal policy communication prohibiting such, this still does not establish a final agency action. Even where a plaintiff "alleges that violation of the law is rampant within [a certain agency] program … she cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990); *see id.* at 893 (holding that "the flaws in the entire "program"—consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA"). "A plaintiff may not simply attach a policy label to disparate agency practices or conduct" to thereby obtain APA review. *Al*

Otro Lado, Inc. v. McAleenan, 394 F. Supp. 3d 1168, 1207 (S.D. Cal. 2019) (citing *Lujan*, 497 U.S. at 891); *accord Bark v. United States Forest Serv.*, 37 F. Supp. 3d 41, 50 (D.D.C. 2014) ("Plaintiffs point to no written rules, orders, or even guidance documents of the Forest Service that set forth the supposed policies challenged here. Instead, Plaintiffs appear to have attached a 'policy' label to their own amorphous description of the Forest Service's practices. But a final agency action requires more."). Plaintiff points to no written rules or guidance establishing the challenged Private Contractor Arrest Policy; indeed, the written guidance prohibits such a policy from existing. Alleged individual, previously occurring deviations from such a policy do to not represent the consummation of agency-level decision-making and cannot be pasted together to create for APA review a policy that does not exist and contravenes the agency's stated policy. *See Lujan*, 497 U.S. at 891; *Al Otro Lado*, 394 F. Supp. 3d at 1207.

Ultimately, there is no final agency action to permit review here.

2. Plaintiff Has an Adequate Alternative to APA Review.

Plaintiff's APA claim fails for a second reason: she has an adequate alternative remedy and thus cannot obtain APA review.

"Even if final, an agency action is reviewable under the APA only if there are no adequate alternatives to APA review in court." *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016); 5 U.S.C. § 704. "[W]here Congress has provided special and adequate review procedures," the APA "does not provide additional judicial remedies…." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988).

First, to the extent that Plaintiff alleges suffering adverse effect from the status of the individual who would arrest her, as explained, the exclusionary rule is brought to bear in removal proceedings "when the agency violates a regulation promulgated for the benefit of petitioners and that violation prejudices the petitioner's protected interests." *Sanchez*, 904 F.3d at 649 (citing *Chuyon Yon Hong v. Mukasey*, 518 F.3d 1030, 1034 (9th Cir. 2008)). Plaintiff claims that her arrest, were it to be by a private contractor

(which it in fact was not), would violate 8 C.F.R. § 287.5(c)(1) and other federal regulations. ECF No. 1 ¶ 116. Such a claim would thus be cognizable in a petition for review from removal proceedings, and Plaintiff could challenge any prejudice accruing to her immigration interests therein. *See Sanchez*, 904 F.3d at 649.

Second, Plaintiff may file a habeas petition in federal court pursuant to 28 U.S.C. 2241 to challenge her detention pending removal proceedings under section 1226(c). *See, e.g.*, *Demore v. Kim*, 538 U.S. 510, 514 (2003). Further, she can and already has requested to have her initial custody determination appealed to and reviewed by an immigration judge. Ex. 4

Finally, to the extent that any adverse effect on Plaintiff would flow not from an agency policy–which expressly precludes contractor arrests—but from the speculated actions of rogue employees defying ICE policy, her most appropriate remedy (which is no longer necessary because she was arrested by an authorized immigration officer), is a claim for compensation for false arrest under tort law. *See, e.g.*, *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1380 (9th Cir. 1998).

Because Plaintiff and members of the putative class have adequate alternatives available to challenge the various aspects of their alleged arrests by contractors, there is no APA review.

IV. CONCLUSION

For the foregoing reasons, the Court must dismiss the Complaint.

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Respectfully submitted,

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