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United States District Court, District of Columbia.

Wilmer GARCIA RAMIREZ, et al., Plaintiffs,
v.
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, et al., Defendants.

Civil Action No. 18-508 (RC)
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Signed 11/07/2019

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ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

RUDOLPH CONTRERAS, United States District Judge

***1** This case concerns alleged violations of the Administrative Procedures Act ("APA") by the U.S. Immigration and Customs Enforcement ("ICE" or "the Agency"). The government has moved for Summary Judgment on Count One but not Count Two of the Amended Complaint. Defs.' Mot. for Partial Summ. J. ("MSJ"), ECF No. 209. The Government concedes that there is a genuine dispute of fact on Count Two that will have to be litigated at trial. The Government has evidently overlooked the reality that this factual dispute is equally crucial to adjudication of Count One because the two claims rely on the same set of facts and challenge the same conduct by ICE. As a result, summary judgment on either count is equally inappropriate at this stage, and the motion is denied.

In their Amended Complaint, plaintiffs allege two counts of violations of the APA. Count One alleges a violation of § 706(2), which says that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be" among other things "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). Count Two is similar. It alleges a violation of § 706(1) which says that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1). In both Counts, Plaintiffs allege that ICE is failing to fulfill its statutory obligation under 8 U.S.C. § 1232(c)(2)(B) to "consider placement in the least restrictive setting available" when

processing HHS age-outs. Both counts allege that the failure to consider the least restrictive placement violates the APA. In Count One, the Plaintiffs argue that it is arbitrary, capricious, or an abuse of discretion for ICE not to consider placement in the least restrictive setting. In Count Two they argue that ICE is unlawfully withholding consideration of placement in the least restrictive setting and they ask the Court to compel the Agency to undertake such consideration. Both Counts are about what ICE is actually doing with each age-out it encounters. Neither is about what official policy ICE might have written down. In both Counts, the Plaintiffs are alleging that ICE is not fulfilling its obligation to actually consider placement in the least restrictive setting for each age-out that comes into its custody.

The Government has moved for summary judgment, which the Court can only grant if the Government "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In footnote three to its memorandum in support of its motion for summary judgment, the Government identifies a disputed issue of fact that it says precludes summary judgment on Count Two. MSJ at 8 n.3. The government says it is not seeking summary judgment on Count Two because there is genuine dispute over "whether ICE Officers in the field are indeed considering the least restrictive setting available, as 8 U.S.C. § 1232(c)(2)(B) and ICE policy require." *Id.* The Government says it needs to go to trial to present testimony to show the Court that ICE Officers in the field are *actually considering* the least restrictive setting. *See id.* This means the Court cannot decide right now as a matter of law that the agency is unlawfully withholding the action—considering placement in the least restrictive setting—that it is obligated to take. The problem for the Government is that the same logic applies for Count One, because Count One is challenging the same exact conduct. The Government concedes in this footnote that it is genuinely disputed right now whether ICE Officers in the field are *actually considering* the least restrictive setting. *Id.* This also means that the Court cannot determine—for Count Two—whether the agency is abusing its discretion or acting not in accordance with law, or exceeding its statutory authority by not considering the least restrictive placement.

***2** The Government argues that it is entitled to summary judgment because ICE requires officers to complete Age-Out Review Worksheets and to undergo certain training. *See* MSJ at 11–20. But this would not defeat the Plaintiffs' claims because the Plaintiffs are not claiming that ICE is obligated to have a policy in place for considering the least restrictive setting. Rather, they are claiming that ICE is obligated to *actually consider* the least restrictive setting and that ICE has failed, and continues to fail, to do so. The Government has conceded that this is unproven at this stage. Later in its briefing the Government says that "[t]he material facts show that Defendants are considering alternatives to detention which are available." MSJ at 21. This could be a basis for summary judgment if the Court agreed, but there is no way to square this statement with the Government's earlier concession that there is a genuine dispute regarding what ICE Officers are actually doing out in the field. At summary judgment, the Court must draw factual inferences in favor of the nonmoving party so, where the moving party's briefing is internally inconsistent, the Court accepts the version of the facts on which the Plaintiffs' claim survives. On this issue that means the Court accepts the Government's concession that there is a genuine dispute here.

Finally, the Government makes an argument focused on the class nature of the claim in an attempt to distinguish Count One and Count Two. Defs.' Reply Br. in Supp. of Mot. for Partial Summ. J. at 8–10, ECF No. 236. The Government says that "Plaintiffs cannot prevail at trial unless they prove that there are sufficiently numerous (to maintain a class) specifically discernable age-out class members who are in ICE detention without ICE having *considered* the least restrictive setting available for them." *Id.* at 8. The Government seems to suggest that there will not be enough class members for the claim to succeed as Plaintiffs have framed it but, again, this assumes the very issue that the Government has conceded is a matter of genuine dispute. If ICE Officers in the field are not actually considering the least restrictive setting, then there might well be plenty of discernable age-out class members. *See Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 196 (D.D.C. 2013) ("In this district, courts have found that numerosity is satisfied when a proposed class has at least forty members....").

For these reasons, the Government's Motion for Summary Judgment is **DENIED**.

SO ORDERED.

All Citations

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