

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ENTERGY SERVICES, INC., ET AL.

CIVIL ACTION

v.

NO. 14-1524
c/w 14-1644

U.S. DEPARTMENT OF LABOR, ET AL.

SECTION "F"

ORDER AND REASONS

Before the Court is the government defendants' motion to dismiss. For the reasons that follow, the motion is GRANTED in part and DENIED in part.

Background

These consolidated cases involve a dispute between the Office of Federal Contract Compliance Programs and various federal government contractors -- the Entergy entities, which are utility companies and gas and electricity providers. The OFCCP is tasked with ensuring that federal contractors comply with certain workplace nondiscrimination and affirmative action obligations. In the course of enforcing compliance with these obligations, the OFCCP initiated compliance reviews of 12 Entergy entities. Characterizing as anomalous the sheer number and other aspects of the initiated reviews of 12 of its entities, Entergy refused to provide requested documents and advised the OFCCP of its concerns with the audit selection process. Entergy challenges the particular features of the OFCCP's compliance reviews as infringing on the

Fourth Amendment prohibition against unreasonable searches and seizures. When the OFCCP refused to meet with Entergy, Entergy filed an administrative complaint, which was dismissed by the ALJ for lack of subject matter jurisdiction.¹ Entergy sues for judicial review of that administrative ruling and, alternatively, declaratory relief. The government sues for enforcement of its power and policy. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the relevant statutory and administrative framework pertinent to the present controversy.

Statutory and Regulatory Framework

Executive Order 11246,² the Vietnam Era Veterans Readjustment

¹At the administrative tribunals, the plaintiffs sought declaratory relief on the basis that the OFCCP violated the plaintiffs' Fourth Amendment constitutional right to be free from unreasonable searches and seizures by selecting 12 of the plaintiffs' establishments for potential audit in May 2012, without reference to a neutral administrative plan and without evidence of a current violation of any of the laws or regulations for which the OFCCP has enforcement responsibility.

²Executive Order 11246, as amended, requires covered federal contractors and subcontractors to undertake affirmative action for "minorities and women", and makes it unlawful to discriminate against applicants for employment and employees based on their race, sex, religion, color, and/or national origin. Pursuant to this Executive Order, eligible federal contractors must agree that they "will furnish all information and reports required by [the executive order] and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to [the contractor's] books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders." EO No. 11246, § 202. These terms must be included in every government contract that is not expressly exempted. § 204.

Assistance Act of 1874 (VEVRAA),³ and Section 503 of The Rehabilitation Act of 1973,⁴ through their implementing regulations, forbid federal government contractors, whose contracts meet certain dollar thresholds, from engaging in discriminatory employment practices. 41 C.F.R. §§ 60-1.4, 60-300.5, 60-741.5. Federal contracts must include provisions prohibiting discrimination against employees or applicants based on certain protected characteristics such as race, color, religion, sex, national origin, disability, and veteran status. 41 C.F.R. §§ 60-1.4(e), 60-300.5(e), 60-741.5(e). Contractors are also required to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to" such characteristics. Id.

The Department of Labor has the responsibility for implementing Executive Order 11246, VEVRAA, and Section 503. See EO 11246 § 201. DOL-promulgated regulations implementing EO 11246 authorize the OFCCP to enforce compliance with these laws. See 41 C.F.R. § 60. The regulations require government contractors and subcontractors with 50 or more employees and a contract over a

³The portion of VEVRAA, as amended, enforced by OFCCP requires covered federal contractors and subcontractors to undertake affirmative action for "Protected Veterans".

⁴Section 503 of The Rehabilitation Act of 1973, as amended, requires covered federal contractors to undertake affirmative action and makes it unlawful to discriminate against applicants for employment and employees based on a covered disability.

specific monetary amount to develop and maintain written affirmative action programs ("AAPs") for each of their facilities. See 41 C.F.R. §§ 60-2.1(b), (c), 60-300.40(b), (c), 60-741.40(c), (d). EO 11246 requires AAPs to be updated annually, and they must be provided to the OFCCP upon request. See 41 C.F.R. §§ 60-2.1(c), (d), 60-300.40(c), (d), 60-741.40(c), (d).

To determine whether covered contractors have been complying with their nondiscrimination and affirmative action employment obligations, the OFCCP conducts compliance evaluations. See 41 C.F.R. §§ 60-1.20(a), 60-300.60(a), 60-741.60(a). The OFCCP Active Case Enforcement Procedures Transmittal 295 governs the process for conducting compliance reviews. See U.S. Dept. of Labor, Office of Federal Compliance Programs Transmittal 295 (Dec. 16, 2010). The directive requires that, among other things, the OFCCP employ the Federal Contractor Scheduling System to select contractors for reviews, which uses administratively neutral selection criteria to identify supply and service providers, such as utility companies, for compliance evaluations. Id. The resulting list of identified contractors is distributed to the pertinent OFCCP office based on the physical address of the facility. Id. The OFCCP field office schedules a given establishment for an evaluation by issuing a scheduling letter. Id.

A compliance evaluation typically takes the form of a compliance review, consisting of three stages of investigation. See

41 C.F.R. §§ 60-1.20(a)(1)(i)-(iii), 60-300.60(a)(1)(i)-(iii), 60-741.60(a)(1)(i)-(iii). The agency first conducts a desk audit of the written AAPs and supporting documentation. See 41 C.F.R. §§ 60-1.20(a)(1)(i), 60-300.60(a)(1)(i), 60-741.60(a)(1)(i). A desk audit is an audit ordinarily conducted at the office of the OFCCP official conducting the audit, and not on the premises of the establishment being reviewed. Id. The OFCCP may conduct an on-site review after the desk audit, normally involving an examination of the contractor's personnel and employment policies, inspection and copying of relevant documents, and interviews with personnel. See 41 C.F.R. §§ 60-1.20(a)(1)(ii), 60-300.60(a)(1)(ii), 60-741.60(a)(1)(ii). Additionally, the OFCCP may request data from the contractor to analyze off-site. See 41 C.F.R. §§ 60-1.20(a)(1)(iii), 60-300.60(a)(1)(iii), 60-741.60(a)(1)(iii).

If the OFCCP has reasonable cause to believe that a contractor violated Executive Order 11246, VEVRAA, or Section 503, it may issue a notice to show cause why monitoring, enforcement proceedings, or other actions to ensure compliance should not be instituted. See 41 C.F.R. §§ 60-1.28, 60-300.64, 60-741.64. After reasonable efforts at conciliation, see 41 C.F.R. §§ 60-1.26(b)(1), 60-300.65(a)(1), 60-741.65(a)(1), the OFCCP may refer the matter to the Solicitor of Labor, who may choose to institute enforcement proceedings by filing a complaint with the OALJ. See 41 C.F.R. § 60-30.5; see also 41 C.F.R. § 1.26(b) ("OFCCP may refer matters to

the Solicitor of Labor with a recommendation for the institution of administrative enforcement proceedings."); 41 C.F.R. § 60-1.27 (identifying administrative sanctions the Solicitor of Labor may seek, including debarment).⁵ Or, the matter may be referred to the Department of Justice with a recommendation for the institution of judicial enforcement proceedings without any "procedural prerequisites." 41 C.F.R. § 60-1.26(c)(1).

Background and Initiation of Entergy Compliance Reviews

The Entergy plaintiffs are separate corporate entities that are each related to a common corporate parent, Entergy Corporation. Plaintiff Entergy Services, Inc. provides administrative services for Entergy Corporation and some of the Entergy plaintiffs. The other Entergy plaintiffs⁶ include rate-regulated utilities and rate-regulated producers that supply electricity and gas to

⁵After discovery, an administrative law judge holds a hearing and recommends findings, conclusions, and a decision to the Administrative Review Board of the Department of Labor, which may, after considering the recommendation and any exceptions advanced by the parties, issue a final administrative order. Id. § 60-30.35; Id. § 60-30.37 (if the Board does not issue a final administrative order within 30 days of the ALJ's recommended decision, that recommendation becomes the final administrative order.). A federal contractor's failure to comply with a final order exposes it to the cancellation of its current government contracts and debarment from future contracts. Id. § 60-30.30.

⁶The other Entergy plaintiffs are Entergy Mississippi, Inc., Entergy Texas, Inc., and Entergy Gulf States, Louisiana, LLC, as well as Entergy Nuclear Operations, Inc., Entergy Operations, Inc., both of which operate and hold licenses for certain nuclear power plants owned in whole or in part by one or more of Entergy Corporation's subsidiaries.

customers in Louisiana, Mississippi, Texas, and Arkansas.

Entergy is a covered government contractor within the meaning of these federal laws and regulations. OFCCP compliance reviews, or audits, are burdensome and expensive to regulated parties like Entergy. In 2004 Entergy Corporation received an Exemplary Voluntary Efforts Award -- the DOL's highest award given to the single company in the nation undertaking exemplary affirmative action practices worthy of publicity and emulation by other federal contractors. As a result, Entergy Corporation received a three-year exemption from OFCCP audits.

During OFCCP's 2012 Fiscal Year, between May 2 and August 12, 2012 OFCCP issued a Corporate Scheduling Announcement Letter in which Entergy was alerted that OFCCP would potentially audit 12 Entergy establishments. Entergy noticed and took issue with several anomalies in the sites selected for potential audit: (1) contrary to longstanding OFCCP practice, OFCCP had selected for potential audit four establishments with fewer than 50 employees; (2) contrary to longstanding OFCCP practice, the scheduling letter lists Entergy headquarters, which OFCCP had administratively closed an audit just two years previously;⁷ and (3) this many OFCCP audits in one 12-month period was unprecedented in Entergy's history with OFCCP; the Entergy companies rarely collectively received more than

⁷Entergy's headquarters at 639 Loyola Avenue had received an audit closure letter as recently as March 28, 2011, with a finding of full compliance.

one or two audits per year. These perceived anomalies concerned Entergy. Being audited is expensive and burdensome. Moreover, given that a major portion of Entergy's business consists of regulated utilities, Entergy has a responsibility to its rate-paying residential and corporate customers to ensure the propriety of the selection process; those customers will ultimately bear the cost burden of OFCCP's audits.

Thereafter, Entergy received audit scheduling letters for 10 of the 12 sites identified in the announcement letters.⁸ OFCCP has scheduled its North Boulevard establishment in Baton Rouge for what is colloquially known as a Glass Ceiling audit, uniquely reserved for national or regional headquarter establishments, which most likely means an onsite search. In light of the fact that all 11 of the Entergy establishments declined to provide compensation data to OFCCP in response to the agency's request, OFCCP typical practice would be to conduct an onsite audit at all 11 of the Entergy establishments pursuant to its practice of going onsite in every instance in which a covered federal contractor declines to provide compensation data to OFCCP in response to the agency's request.

The Entergy plaintiffs objected to each of OFCCP's audit scheduling letters and requested that OFCCP administratively close the audits. On July 10 and 25, 2012 the Entergy plaintiffs

⁸Although the Beaumont, Texas facility did not receive a scheduling letter, Entergy nevertheless received a notice to show cause for that facility.

requested a meeting with OFCCP to express their concerns. But OFCCP refused to meet with Entergy about the selection process and, to date, the audits have not been closed. In refusing to submit the affirmative action programs and documents demanded by OFCCP, Entergy took the position that OFCCP's requests for submission of affirmative action programs and other documents violate the prohibition against unreasonable searches and seizures contained in the Fourth Amendment to the U.S. Constitution. On August 29, 2012 OFCCP advised Entergy that its requests for affirmative action programs and other documents in the scheduling letters are consistent with the Fourth Amendment's requirements because the requests are limited in scope, relevant in purpose, and specific in directive.

On September 27, 2012 OFCCP issued a notice to show cause for the five Mississippi establishments listed for compliance review. On December 18, 2012 OFCCP issued a notice to show cause for the remaining six establishments noticed for compliance review. These notices to show cause demand to know why the OFCCP should not file an administrative complaint within 30 days that seeks to compel an audit.

Administrative Procedural History

Meanwhile, on October 26, 2012 the Entergy plaintiffs filed an Administrative Complaint for Declaratory Relief with the United States Department of Labor, Office of Administrative Law Judges

(OALJ); the plaintiffs administratively sought declaratory relief from compliance review searches scheduled by the OFCCP. After considering briefs addressing the OALJ's authority to conduct a hearing on a contractor's request for declaratory relief in the absence of an administrative complaint filed by OFCCP under 41 C.F.R. § 60-30.5, the Chief Administrative Law Judge dismissed the plaintiffs' complaint for lack of subject matter jurisdiction on November 27, 2012.

In doing so, first, the ALJ noted that Section 554 of the APA applies to "adjudications required by statute to be determined on the record after opportunity for an agency hearing," and that "Executive Order 11426 is not a statute," and neither Section 503 nor VEVRAA provide for on-the-record hearings. Therefore, the ALJ held that Section 554 of the APA is not applicable "because OALJ's jurisdiction over the OFCCP administrative complaints is afforded by Executive Order and regulations rather than by statute."⁹ Second, the ALJ held that, even if Section 554(e) applies when the agency adjudication is conducted by virtue of a regulation or Executive Order, the OALJ's subject matter jurisdiction derives from 41 C.F.R. § 60-30.5, 41 C.F.R. § 60-250.65(b)(3), and 41 C.F.R. § 60-741.65(b)(3), not the APA, and each of these regulations provides authority for the OALJ to adjudicate

⁹Notwithstanding that Order 11246 derives its provenance by statute.

administrative complaints only when the Office of Solicitor files a complaint on behalf of OFCCP as a plaintiff.¹⁰ Therefore, the ALJ concluded that OFCCP's regulations do not authorize contractors to initiate a hearing before the OALJ by the filing of an administrative complaint for declaratory relief. Third, the ALJ held that the DOL's Rules of Procedure (29 C.F.R. § 18.1) are not used in OFCCP administrative complaint cases and, therefore, the cross-reference to the Federal Rules of Civil Procedure found in the OALJ's ROP does not apply to the plaintiffs' complaint. Fourth, the ALJ stated that, regardless of whether the OFCCP's or the DOL's ROP apply, a mere cross-reference in the OFCCP's and DOL's ROP to

¹⁰The OALJ determined that it obtains the regulatory authority to adjudicate an OFCCP dispute only upon the filing of an administrative complaint by OFCCP through the Office of the Solicitor under 41 C.F.R. § 60-30.5, which governs commencement of administrative complaints:

41 C.F.R. § 60-30.5. Administrative complaint.

(a) Filing. The Solicitor of Labor, Associate Solicitor for Labor Relations and Civil Rights Regional Solicitors and Regional Attorney upon referral from the Office of Federal Contract Compliance Programs, are authorized to institute enforcement proceedings by filing a complaint and serving the complaint upon the contractor which shall be designated as the defendant. The Department of Labor, OFCCP, [] shall be designated [as] plaintiff.

Because this section expressly grants only the OFCCP (and not the target of an OFCCP compliance review) the authority to file a complaint, the ALJ determined that it lacks subject matter jurisdiction to entertain an administrative complaint filed by the target of an OFCCP compliance review seeking declaratory relief from that compliance review.

incorporate the Federal Rules of Civil Procedure to "fill procedural gaps" cannot confer jurisdiction to OALJ on matters reserved to Article III courts (despite, the Entergy plaintiffs submit, the APA allows declaratory relief before administrative agencies by private parties).

Entergy appealed to the Administrative Review Board but on May 19, 2014 the ARB issued its Final Decision and Order affirming the ALJ and dismissed Entergy's complaint. The ARB affirmed the ALJ decision without addressing Entergy's Exceptions advancing its APA arguments.

Entergy's Lawsuit and the DOJ's Judicial Enforcement Proceeding

To date, Entergy submits that the OFCCP has refused to advise the Entergy plaintiffs of the neutral administrative plan prompting OFCCP to select 12 Entergy establishments for potential audit. Likewise, OFCCP has failed to advise of the evidence OFCCP had, if any, that any of the plaintiffs had violated one or more of the laws or regulations enforced by OFCCP. On June 17, 2014 the Department of Justice, by letter, notified counsel for Entergy that OFCCP referred to the DOJ for consideration of judicial enforcement of Entergy's failure to submit the requested affirmative action program documentation absent indication of acquiescence to a consent decree on specified terms by July 16, 2014.

Having no intention of agreeing to a consent decree, on July 1, 2014 six Entergy entities -- Entergy Services, Inc., Entergy

Mississippi, Inc., Entergy Texas, Inc., Entergy Nuclear Operations, Inc., Entergy Operations, Inc., and Entergy Gulf States, Louisiana, LLC -- sued the United States Department of Labor; Thomas E. Perez, in his official capacity as Secretary of the Department of Labor; the Office of Federal Contract Compliance Programs; and Patricia A. Shiu, in her official capacity as the Director of the OFCCP. Seeking judicial review of the Final Administrative Decision and Order dismissing their administrative complaint for declaratory relief, the Entergy plaintiffs allege that the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 702. The Entergy plaintiffs ask the Court to vacate the final administrative decision and remand to the administrative agency for a hearing and consideration of the merits of the plaintiffs' claims for declaratory relief. Alternatively, if the Court determines that remand is not warranted, the Entergy plaintiffs request that the Court consider the merits of the plaintiffs' request for declaratory relief pursuant to 28 U.S.C. § 2201; in particular, they seek a declaration that the OFCCP violated the plaintiffs' Fourth Amendment rights against unreasonable searches and seizures as to each of the 11 locations which OFCCP scheduled for audit and to which the plaintiffs properly objected by refusing to respond to those OFCCP audit scheduling letters. In connection with their

request for declaratory relief,¹¹ the Entergy plaintiffs seek a permanent injunction ordering OFCCP to cease and desist from further investigating the 12 establishments that are the subject of the complaint and order OFCCP to select the Entergy plaintiffs for compliance reviews only upon a proper finding of "probable cause" consistent with the Fourth Amendment.¹²

Sixteen days after the Entergy entities filed their lawsuit in this Court, on July 17, the United States filed suit to enforce its contractual obligations imposed by Executive Order No. 11246, 29 U.S.C. § 793, and 38 U.S.C. § 4212, all as amended; named as defendants are Entergy Corporation, Entergy Services, Inc., Entergy Mississippi, Inc., Entergy Operations, Inc., Entergy Enterprises, Inc., Entergy Louisiana, LLC, Entergy Gulf States Louisiana, LLC, and Entergy Nuclear Generation Co. The United States seeks an order permanently enjoining Entergy from refusing to produce affirmative action programs and other documents as requested by

¹¹Plaintiffs contend that "an actual controversy exists under the United States Constitution and the laws of the United States, as to which this Court can provide declaratory relief under 28 U.S.C. § 2201."

¹²In support of its request for declaratory relief, the plaintiffs allege that OFCCP has the burden to demonstrate that it had probable cause to select up to 12 of plaintiffs' establishments for audit and that it initiated its search in a proper manner as to each of the 11 at-issue establishments OFCCP already noticed for audit; the plaintiffs allege that OFCCP has not satisfied its burden to establish probable cause to select any of the 12 establishments at issue for potential cause.

OFCCP as part of the pending compliance evaluations for the 11 establishments; and the United States seeks an order compelling Entergy's compliance with the terms, conditions, and obligations imposed by Executive Order 11246, Section 503, VEVRAA, and the implementing regulations. Initially assigned to another Section of Court, the enforcement suit was promptly transferred to this Section of Court; on July 21, 2014, the APA and enforcement suits were consolidated. The United States now seeks dismissal of the Entergy plaintiffs' lawsuit.

I.
A.

The subject matter jurisdiction of federal courts is limited. Kokkonen v. Guardina Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). Indeed, "[i]t is to be presumed that a cause lies outside this limited jurisdiction," the Supreme Court has observed, "and the burden of establishing the contrary rests upon the party asserting jurisdiction." Id. (citations omitted). Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the Court's subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1). In challenging this Court's subject matter jurisdiction, the government defendants contend that the Entergy plaintiffs lack constitutional standing to pursue their APA claim and their alternative declaratory judgment claim. See Harold H. Huggins Realty, Inc. v. FNC, Inc., 634 F.3d 787, 795 n.2 (5th Cir. 2011)("a dismissal for lack of constitutional standing" is properly

granted under Rule 12(b)(1)).¹³

The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. King v. U.S. Dep't of Veterans Affairs, 728 F.3d 410, 416 (5th Cir. 2013); Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001). The Court may find a plausible set of facts to support subject matter jurisdiction by considering any of the following: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Barrera-Montenegro v. United States, 74 F.3d 657, 659 (5th Cir. 1996).

B.

In the alternative to their jurisdictional challenge, the defendants also seek dismissal of the plaintiffs' APA claim for failure to state a claim under Rule 12(b)(6). The standard of review applicable to motions to dismiss under Rule 12(b)(1) is similar to that applicable to motions to dismiss under Rule 12(b)(6). See Williams v. Wynne, 533 F.3d 360, 364-65 n.2 (5th Cir. 2008)(observing that the Rule 12(b)(1) and Rule 12(b)(6) standards are similar, but noting that applying the Rule 12(b)(1) standard permits the Court to consider a broader range of materials in

¹³Additionally, as to the plaintiffs' alternative claim for declaratory relief, the defendants advance another jurisdictional infirmity by invoking the doctrine of sovereign immunity.

resolving the motion). Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a party to move for dismissal of a complaint for failure to state a claim upon which relief can be granted. Such a motion is rarely granted because it is viewed with disfavor. See Lowrey v. Tex. A & M Univ. Sys., 117 F.3d 242, 247 (5th Cir. 1997) (quoting Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982)).

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009)(citing Fed.R.Civ.P. 8). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Id. at 678 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

In considering a Rule 12(b)(6) motion, the Court "accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" See Martin K. Eby Constr. Co. v. Dall. Area Rapid Transit, 369 F.3d 464 (5th Cir. 2004) (quoting Jones v. Greninger, 188 F.3d 322, 324 (5th Cir. 1999)). But, in deciding whether dismissal is warranted, the Court will not accept conclusory allegations in the complaint as true. Kaiser, 677 F.2d at 1050.

"To survive a motion to dismiss, a complaint must contain

sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" Gonzalez v. Kay, 577 F.3d 600, 603 (5th Cir. 2009)(quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009))(internal quotation marks omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations and footnote omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."). This is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679. "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." Id. at 678 (internal quotations omitted) (citing Twombly, 550 U.S. at 557). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief'", thus, "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (alteration in

original) (citation omitted).¹⁴

II.

The government defendants first seek dismissal of the plaintiffs' APA claim for lack of standing or alternatively -- if the Court finds standing -- for failure to state a claim.

A.

First and foremost, the Court turns to consider the threshold issue of standing.¹⁵ The government defendants challenge the plaintiffs' standing to seek judicial review of the administrative ruling denying the Entergy plaintiffs an administrative forum to resolve their Fourth Amendment challenge to the OFCCP's compliance reviews. To resolve this issue, the Court must be satisfied that the plaintiffs have standing to pursue their APA claim. The Court finds that they do.

"Article III of the Constitution limits federal courts'

¹⁴Finally, "[w]hen reviewing a motion to dismiss, a district court 'must consider the complaint in its entirety, as well as other sources ordinarily examined when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.'" Funk v. Stryker Corp., 631 F.3d 777, 783 (5th Cir. 2011)(quoting Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)).

¹⁵The defendants also challenge the plaintiffs' standing with respect to plaintiffs' alternative claim for declaratory relief. Because the defendants' second standing challenge is framed in the alternative to the defendants' argument that sovereign immunity has not been waived with respect to the declaratory judgment claim, the Court defers consideration of the second standing analysis to such time as it addresses the defendants' arguments advanced to dismiss the plaintiffs' alternative claim.

jurisdiction to certain 'Cases' and 'Controversies.'" Clapper v. Amnesty Int'l USA, --- U.S. ---, 133 S.Ct. 1138, 1146 (2013). "One element of the case-or-controversy requirement" commands that a litigant must have standing to invoke the power of a federal court. See id. (citation omitted); see also National Federation of the Blind of Texas, Inc. v. Abbott, 647 F.3d 202, 208 (5th Cir. 2011). The plaintiffs bear the burden of establishing standing under Article III, independently, as to each claim alleged. See DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006); Miss. State Democratic Party v. Barbour, 529 F.3d 538, 545 (5th Cir. 2008).

The doctrine of standing requires that the Court satisfy itself that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." See Summers v. Earth Island Institute, 555 U.S. 488, 493 (2009); see also Doe v. Beaumont Independent School Dist., 240 F.3d 462, 466 (5th Cir. 2001)(citing Warth v. Seldin, 422 U.S. 490, 498 (1975)). "Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." Doe v. Tangipahoa Parish School Bd., 494 F.3d 494, 499 (5th Cir. 2007).

The plaintiffs must demonstrate the "irreducible constitutional minimum of standing", which is informed by three

essential elements: (1) that they personally suffered some actual or threatened "injury in fact" (2) that is "fairly traceable" to the challenged action of the defendants; (3) that likely "would be redressed" by a favorable decision in Court. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). "An injury must be 'concrete, particularized, and actual or imminent.'" Clapper, 133 S. Ct. at 1147 (quoting Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139 (2010)).¹⁶ In challenging the plaintiffs' standing to contest the administrative tribunal's ruling dismissing the administrative complaint for lack of subject matter jurisdiction, the defendants stress that plaintiffs have failed to establish an actual or imminent injury.¹⁷ The Court disagrees.

That the plaintiffs have not suffered an actual or imminent injury, the government defendants submit, is illuminated by this undisputed procedural history: Upon initiating compliance reviews, the OFCCP requested from Entergy AAPs and other supporting documents. Plaintiffs chose not to comply with the document requests and, instead demanded that the OFCCP suspend their efforts to obtain the materials. In response to Entergy's refusal to

¹⁶The actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

¹⁷The defendants do not challenge whether the injury is fairly traceable to their critical habitat designation; nor do they challenge whether the injury is likely to be redressed by a favorable ruling.

adhere to the requests for information, the OFCCP field offices issued notices to show cause why enforcement proceedings should not be commenced. The plaintiffs then filed an administrative complaint, arguing that they need not abide by the OFCCP's document demands. When the plaintiffs filed suit against the government defendants in this Court, the DOL directed the plaintiffs to comply with its document demands, but had not compelled Entergy to provide it with the information the government seeks. Nor had the United States filed its judicial enforcement lawsuit in which it now seeks an order compelling Entergy to produce the requested information. The government defendants underscore that, in the context of the affirmative enforcement action, Entergy will have the opportunity to raise (and, in fact, have so raised) whatever defenses it considers appropriate, including its Fourth Amendment claim. Based on these undisputed facts, the government defendants submit, the Entergy plaintiffs were not, and have not been, forced to submit the requested documents or otherwise comply with the administrative evaluation and, thus, no "actual" injury resulted.

For the same reason, the government insists, the plaintiffs have not shown that initiation of the compliance reviews amounted to an "imminent" injury. That the plaintiffs suggest that they will endure a future injury in the form of an unconstitutional search and seizure if they are ultimately compelled to adhere to the government's requests for information falls short of even

articulating a speculative injury, the government submits. In fact, the alleged future injury is illusory because under no scenario will the plaintiffs be subjected to the constitutional violation: if the United States prevails in its affirmative lawsuit, then the Court will have rejected the plaintiffs' charge that the document requests infringe their constitutional rights; on the other hand, the Entergy plaintiffs could succeed in defending the government's enforcement action. Either way, the plaintiffs have not and will not suffer any injury, constitutional or otherwise, and have therefore failed to demonstrate Article III standing.¹⁸

The plaintiffs counter that the government misconstrues their APA claim and, thus, their injury for standing purposes. Whereas the government characterizes Entergy's APA claim as a challenge to OFCCP audit requests, the Entergy plaintiffs point out that their APA claim instead clearly seeks judicial review of the ARB

¹⁸In support of its standing argument, the government invokes Trinity Industries, Inc. v. Martin, 963 F.2d 795 (5th Cir. 1992). There, an employer had asked the court to declare that it had the right to have company representatives present during employee interviews conducted by the Occupational Safety and Health Administration. Id. at 796-97. Without company representatives present, the employer asserted that employees would be confused during the interviews, causing them to give incorrect answers, which would lead to invalid citations. Id. at 798. The Fifth Circuit concluded that the employer lacked standing, reasoning that its alleged injury "rests upon a series of speculative, not 'concrete' assumptions." Id. at 798-99 (noting that the "possibility, that maybe, in the future, if a series of events occur," the employer might suffer some injury "is clearly too impalpable to satisfy the [standing] requirements"). This case is distinguishable on its facts.

determination denying them an administrative forum. The plaintiffs submit they suffered an actual *procedural* injury (namely, their interest in access to a neutral tribunal for asserting Fourth Amendment rights) when the ARB denied them an administrative forum to vindicate their Fourth Amendment rights. In support, the Entergy plaintiffs invoke Int'l Primate Prot. League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 77 (1991). There, one of the defendants, National Institutes of Health, removed to federal court the animal rights plaintiffs' lawsuit, which was originally filed in Louisiana state court. Id. at 74-76. By removing the case, NIH acted to deprive the plaintiffs of the opportunity to bring their suit in state court, and the Supreme Court held that petitioners suffered a cognizable injury in losing their right to sue in state court, the forum of their choice; thus, plaintiffs had standing to challenge the case's removal to federal court. Id. at 77. Likewise, the Entergy plaintiffs submit that their injury-in-fact is the loss of the forum of their choice.

The government defendants distinguish International Primate, noting that the defendants took no affirmative action to deprive Entergy of its ability to file an administrative complaint. But the plaintiffs argue that the ARB decision indisputably denied the plaintiffs access to the administrative forum to adjudicate their constitutional rights; as formal parties to an adverse ARB decision, plaintiffs challenge the governing statute providing

discretionary access to the administrative forum -- access not afforded due to what is charged as an erroneous interpretation by the agency adjudicator. The Court finds that the plaintiffs suffered a procedural injury-in-fact.

The Court of Appeals for the District of Columbia explains:

In procedural-injury cases, the claimed injury arises from an alleged failure on the part of the injury-causing party to adhere to a prescribed process in adjudicating the petitioner's substantive rights, rather than from the substantive decision itself. Accordingly, the petitioner has standing "if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed" the petitioner.

Spectrum Five LLC v. FCC, 758 F.3d 254, 264 n.10 (D.C. Cir. 2014)(internal citations omitted). Of course, "deprivation of a procedural right without some concrete interest that is affected by the deprivation--a procedural right *in vacuo*--is insufficient to create Article III standing." Summers v. Earth Island Institute, 555 U.S. 488, 496 (2009). When a "person ... has been accorded a procedural right to protect his concrete interests [he] can assert that right without meeting all the normal standards for redressability and immediacy." Id. at 496-97. In challenging their denial of an administrative forum to vindicate their constitutional claims, the Entergy plaintiffs essentially argue that the tribunal would have provided a process in which their concrete Fourth Amendment claims could be determined one way or the other; that this is not simply a lawsuit "to vindicate [a] public[]

nonconcrete interest in the proper administration of the laws." Id. (citation omitted). The plaintiffs have sufficiently alleged that they have suffered a procedural injury as a result of the administrative tribunals' failure to provide a forum to consider their Fourth Amendment challenge to the OFCCP's conduct in initiating allegedly anomalous (and, thereby, overly burdensome) compliance reviews. Cf. Sabine River Authority v. U.S. Dep't of Interior, 951 F.2d 669, 674 (5th Cir. 1992). The plaintiffs have satisfied the constitutional dimension of standing to pursue their APA claim.

Plaintiffs have a personal stake in this controversy and have identified a concrete, procedural, injury that is actual, not hypothetical. The defendants unsuccessfully minimize the procedural harm as a "novel" application of standing based on conjecture, but the Court finds that the plaintiffs have demonstrated an actual, concrete injury. That their injury is procedural does not remove it from the reach of constitutional standing where, as here, they allege a constitutional right that is affected by the deprivation of process.¹⁹ And the government cannot

¹⁹The Court observes more generally that regulated parties regularly demonstrate that they suffer some economic harm or other coercive effect by virtue of direct regulation of their activities. Notably, in a somewhat analogous context, when the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action" has caused him injury. Lujan, 504 U.S. at 561-62. In fact, when the plaintiff challenging agency action is a regulated party or an organization representing regulated parties, courts have found that the standing inquiry is "self-evident." See South Coast Air Quality Management Dist. v.

hide behind its enforcement action.

B.

Satisfied that the plaintiffs have procedural standing to pursue their APA claim, the defendants alternatively urge the Court to dismiss the plaintiffs' APA claim for failure to state a claim upon which relief may be granted in light of the agency's allegedly correct ruling that it lacked the authority to entertain the plaintiffs' administrative complaint.

The APA is the appropriate vehicle for this Court's review of the agency's dismissal of Entergy's administrative complaint. A reviewing court must "set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2). This standard is deferential, and the agency's decision is afforded a strong presumption of validity. See

EPA, 472 F.3d 882, 895-96 (D.C.Cir. 2006) (an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect ... even a single" member of the association); see also Am. Petroleum Institute v. Johnson, 541 F. Supp. 2d 165, 176 (D.D.C. 2008) ("Regulatory influences on a firm's business decisions may confer standing when, as here, they give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries.") (citing Clinton v. City of New York, 524 U.S. 417, 432-33 (1998) and Sabre, Inc. v. Dept. of Transp., 429 F.3d 1113, 1119 (D.C.Cir. 2005) (firm established standing to challenge regulation where it was "reasonably certain that [the firm's] business decisions [would] be affected" by the regulation)).

Memorial Hermann Hosp. v. Sebelius, 728 F.3d 400, 405 (5th Cir. 2013); Hayward v. U.S. Dep't of Labor, 536 F.3d 376, 379 (5th Cir. 2008).

The plaintiffs suggest several errors in the ARB's ruling dismissing their administrative complaint for lack of subject matter jurisdiction. The Court considers each in turn.

1. Whether the Agency Erred in Applying 41 C.F.R. § 60-30.5(a).

The government submits that the agency correctly held that it lacked the authority to entertain the plaintiffs' administrative complaint. Moreover, the government urges the Court to apply Auer deference where, as here, the plaintiffs challenge an agency's interpretation of its own regulation, 41 C.F.R. § 60-30.5(a); under the circumstances, the agency's reading controls unless it is "plainly erroneous or inconsistent with the regulation." Luminant Generation Co. v. U.S. E.P.A., 714 F.3d 841, 851 (5th Cir. 2013)(citing Auer v. Robbins, 519 U.S. 452, 461 (1997)). The plaintiffs counter that the ARB's interpretation is not entitled to deference under the constitutional avoidance doctrine where, as here, it raises serious constitutional questions (Fourth Amendment and due process problems).²⁰ Even assuming the plaintiffs are not

²⁰The Entergy plaintiffs urge the Court to reject the ARB's interpretation of the regulations on the ground that its construction raises serious constitutional problems. Expounding on the constitutional problems raised, the plaintiffs first contend that neutral review is part and parcel fo the Fourth Amendment right and the ARB's denying the plaintiffs access to the

overstating the seriousness of the constitutional questions they allege will flow from the OALJ's interpretation,²¹ the Court declines to indulge the plaintiffs' invocation of the canon of constitutional avoidance where, as here, the Court does not face two "competing plausible interpretations of statutory text," one of which arguably violates the Constitution. See Clark v. Martinez, 543 U.S. 371, 381 (2005). The government defendants point out that the regulation at issue here provides that the Solicitor of Labor may file an administrative complaint, not the contractor.

When reviewing an agency's interpretation of its own regulation the "only tools ... are the plain words of the

administrative courts presents a constitutional concern. Elaborating, the plaintiffs explain that the OFCCP concedes that "the weight of judicial authority supports a presumption that [federal contractors] contractually consented 'only to searches that comport with constitutional standards of reasonableness.'" United Space Alliance, LLC v. Solis, 824 F. Supp. 2d 68, 91 n.8 (D. D.C. 2011)(citations omitted).

As a second, but related, constitutional construct, the plaintiffs contend that due process requires a forum for vindicating Fourth Amendment rights other than through violation of federal law. In support, the plaintiffs point to Mathews v. Eldridge, 424 U.S. 319, 333 (1976), which articulates the "fundamental requirement of due process[:] the opportunity to be heard at a meaningful time and in a meaningful manner." Noting that the plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures is a protected interest under the due process clause, the plaintiffs submit that due process does not require that a regulated entity first break the law as the sole means of resolving or preserving its rights.

²¹The Supreme Court has observed that "before suffering any penalties for refusing to comply with" an administrative order, the federal contractor "can question [its] reasonableness ... by raising objections in an action in district court." See Donovan v. Lone Steer, 464 U.S. 408, 415 (1984).

regulation and any relevant interpretations of the [agency]." Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945). The plaintiffs have failed to show that the OALJ and ARB erred in applying 41 C.F.R. § 60-30.5(a) in support of dismissing the administrative complaint.²² The plain language of the applicable regulation supports the OALJ's conclusion that, construing 41 C.F.R. Part 60-30, on this ground, it lacked subject matter jurisdiction. 41 C.F.R. § 60-30.5, which governs commencement of administrative complaints provides:

41 C.F.R. § 60-30.5. Administrative complaint.

(a) Filing. The Solicitor of Labor, Associate Solicitor for Labor Relations and Civil Rights Regional Solicitors and Regional Attorney upon referral from the Office of Federal Contract Compliance Programs, are authorized to institute enforcement proceedings by filing a complaint and serving the complaint upon the contractor which shall be designated as the defendant. The Department of Labor, OFCCP, [] shall be designated [as] plaintiff.

Because this regulation expressly grants only the OFCCP the authority to file a complaint, the ALJ did not under the regulation at issue here err in determining that it lacks subject matter jurisdiction to entertain an administrative complaint filed by the target of an OFCCP compliance review seeking declaratory relief from that compliance review. The plain language of the regulation supports the agency's dismissal of Entergy's administrative action

²²The defendants submit that no parallel authority specifically permits a federal contractor to institute administrative proceedings by submitting a complaint.

on that ground.²³ The Entergy plaintiffs fail to persuade otherwise with respect to § 60-30.5(a).

2. Whether Agency Erred in Failing to Consider EO 11246

The Entergy plaintiffs contend that § 208(a) of Executive Order 11246, in providing the OALJ, through the Secretary of Labor, discretion to hold a hearing "for purposes of 'compliance,'" plainly allows for an administrative hearing to adjudicate their Fourth Amendment rights. Thus, the plaintiffs insist that the ARB wrongly concluded that its authority to permit the Entergy plaintiffs an administrative forum was restricted by the affirmative grant of authority in the OFCCP regulations.²⁴ The plaintiffs additionally contend that, absent other applicable regulations, the DOL's general Rules of Practice apply by default. 29 C.F.R. § 18.1(a) ("These rules of practice are generally applicable to adjudicatory proceedings before the Office of

²³The defendants point out that the OALJ has previously held that it lacks subject matter jurisdiction to entertain preemptive administrative complaints filed by the target of a compliance review. Matter of U.S. Security Assocs., Inc. v. OFCCP, 2012 WL 5106048 (Sept. 17, 2012) (relying on 41 C.F.R. § 60-30.5(a), ALJ dismissed for lack of subject matter jurisdiction a contractor's complaint seeking a judgment excusing it from searches it faced in 21 compliance reviews scheduled by the OFCCP).

²⁴Plaintiffs concede that the regulations provide positive authority to adjudicate administrative complaints in enforcement proceedings only initiated by the OFCCP, but the plaintiffs insist the regulations do not address whether administrative hearings under EO 11246 could be initiated for other purposes and, in any event, they submit that the regulations do not negatively preclude such authority.

Administrative law Judges, United States Department of Labor."). Although the ROPs do not expressly address declaratory relief actions, they incorporate the Federal Rules of Civil Procedure, which in turn provide for declaratory relief actions under Rule 57. The plaintiffs submit that the ARB incorrectly ruled that Rule 67 applies only to actions brought pursuant to the Declaratory Judgment Act in "Courts of the United States" and not to administrative actions.

The government defendants urge the Court not to consider this argument, which the plaintiffs raise for the first time in their opposition (and not before the administrative tribunal). The government defendants also argue that the plaintiffs' argument is defeated because section 208 does not grant the OALJ subject matter jurisdiction to consider administrative complaints filed by federal contractors. Furthermore, the government contends that the ROPs do not provide a basis to allow the OALJ to issue declaratory judgments in the absence of subject matter jurisdiction. This is so, it is submitted, because the ROPs do not expressly apply when they run counter to another regulation, such as the OFCCP rules; nothing in the OFCCP rules grants a contractor the right to institute an administrative proceeding to seek declaratory relief, even though the regulations authorize the application of the Federal Rules of Civil Procedure in some circumstances; the references to Rule 57 relates simply to a form of relief, but

neither the Rule nor the statute is an independent basis for jurisdiction. Thus, even if deemed applicable, Rule 57 would not grant the OALJ jurisdiction where none exists.

To the extent that this argument was raised in the administrative tribunal, the Court finds that the plaintiffs have failed to show that the ARB's decision was contrary to law. As the defendants point out, the plaintiffs offer no authority for their reading of section 208. Furthermore, both "compliance" and "enforcement" appear to refer to hearings instigated by the agency at different stages of the administrative process. See EO 11246, Section 204 ("The Secretary of Labor shall be responsible for securing compliance by all Government contractors[.]"). Finally, even if the ROPs applied and Rule 57 applied, the Court is persuaded that Rule 57 cannot supply a basis for subject matter jurisdiction. See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950)(the Declaratory Judgment Act "provides an additional remedy where jurisdiction already exists").

3. Whether the APA Authorizes the Entergy Plaintiffs' Administrative Adjudication

The plaintiffs argue that the APA authorizes "private persons" to be "moving parties" that may initiate administrative adjudication. See 5 U.S.C. § 554(b). APA authorization extends to "every case of adjudication required by statute...." Id. at § 554(a). Because EO 11246 authorizes adjudication for both enforcement and compliance purposes, the plaintiffs submit that APA

authorization applies here.

Because this argument was advanced by the Entergy plaintiffs in their Exceptions brief filed with the ARB, but the ARB did not address these arguments, the plaintiffs insist that remand to the agency to consider their APA authorization argument is required. The defendants reject this argument in light of the fact that APA authorization cannot apply because EO 11246 is not technically a "statute" as expressly required.²⁵ The plaintiffs are more persuasive. This argument clearly needs to be more thoroughly considered by the ARB, which did not do so in the first instance. Remand, as plaintiffs argue, is required as to this issue.

III.

Alternative to their APA claim, the plaintiffs seek a *judicial* declaration that the OFCCP's compliance reviews and their attendant requests for information violate the Fourth Amendment. The defendants submit that the plaintiffs have not and cannot demonstrate that the Court possesses jurisdiction over the declaratory judgment claim, independent from the Declaratory Judgment Act, to entertain their alternative claim.²⁶ The

²⁵5 U.S.C. § 554(a) provides: "This section applies ... in every case of adjudication *required by statute* to be determined on the record after opportunity for an agency hearing...." (emphasis added).

²⁶The Declaratory Judgment Act does not serve as an independent ground for subject matter jurisdiction over an independent claim; it merely provides an additional remedy where jurisdiction already exists. Skelly Oil Co. v. Phillips Petroleum

defendants advance two separate grounds that jurisdiction is lacking: sovereign immunity and, again, Article III standing. The Court considers each sovereign immunity argument and then, finally, if sovereign immunity has been waived, constitutional standing.

A.
Sovereign Immunity

"Sovereign immunity is the privilege of the sovereign not to be sued without its consent." Va. Office for Prot. & Advocacy v. Stewart, --- U.S. ---, 131 S.Ct. 1632, 1637 (2011). Contesting the government defendants' invocation of sovereign immunity, the plaintiffs insist that it has been waived, either through the APA or by virtue of the defendants' invocation of the Court's jurisdiction by filing the enforcement proceeding.²⁷

1. APA Waiver

The United States, as sovereign, is immune from suit unless it unequivocally consents to being sued. United States v. Mitchell,

Co., 339 U.S. 667, 671-72 (1950).

²⁷The Entergy plaintiffs correctly assert that the government does not (and cannot) assert immunity on behalf of its officers. See Alabama Rural Fire Ins. Co. v. Naylor, 530 F.2d 1221, 1225 (5th Cir. 1971)("Thus, a suit is not violative of the doctrine of sovereign immunity if ... the officer acts in an unconstitutional manner or pursuant to an unconstitutional grant of authority."); see also Smith v. Booth, 823 F.2d 94, 98 (5th Cir. 1987)("Sovereign immunity does not bar suit ... where the statutory powers exercised, or the manner in which they are exercised, by the federal officers are unconstitutional."). The government fails to respond to this point but the implication is nevertheless clear: even if the Court determined that the government agencies did not waive sovereign immunity, the plaintiffs could still proceed against the government officers.

445 U.S. 535, 538 (1980). Section 702 of the Administrative Procedure Act generally waives sovereign immunity for suits against the United States that, like this one, seek "relief other than monetary damages." See 5 U.S.C. § 702;²⁸ King v. U.S. Dep't of Veterans Affairs, 728 F.3d 410, 416 (5th Cir. 2013). But the parties dispute the contours of the Section 702 waiver.

The plaintiffs submit that the Court has subject matter jurisdiction pursuant to the federal question statute, 28 U.S.C. § 1331, and sovereign immunity has been waived through Section 702 of the APA. The government defendants do not dispute that an express waiver of sovereign immunity exists in the APA at § 702, but they contend that, in the Fifth Circuit, absent final agency action, the APA's waiver of sovereign immunity does not apply to a constitutional claim.

The plaintiffs submit that the federal appellate courts, including the Fifth Circuit, appear to have unanimously embraced the rule that Section 702's waiver of sovereign immunity extends to all non-monetary claims against federal agencies and their officers sued in their official capacity, regardless of whether plaintiff seeks review of final agency action.²⁹ Indeed, the Fifth Circuit

²⁸The APA creates a "strong presumption that Congress intends judicial review of agency action." Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986).

²⁹The plaintiffs cite: Muniz-Muniz v. U.S. Border Patrol, 741 F.3d 668, 673 (6th Cir. 2013) ("Other circuits are unanimous in their conclusion that a plaintiff who seeks non-monetary relief against the United States need not also satisfy the requirements of

recently reaffirmed this view, noting in Alabama-Coushatta Tribe of Tex. v. United States, 757 F.3d 484, 488 (5th Cir. 2014) that "[t]here is no requirement of 'finality' for this waiver to apply." The court in Alabama-Coushatta Tribe articulated a bifurcated analysis to determine whether the waiver attaches: The court noted that the APA provides a waiver for two types of claims: (1) claims seeking judicial review pursuant to the general APA provisions; and (2) claims seeking review under a separate statutory or non-

§ 704 of the APA before there is a waiver of sovereign immunity."); see also Dep't of Army v. Blue Fox, Inc., 525 U.S. 255, 260-61 (1999) (finding that § 702 "waives the Government's immunity from actions seeking relief 'other than money damages'"); Rico v. United States, 490 F.3d 50, 57-58 (1st Cir. 2007) (holding that § 702 waives immunity for all actions for specific relief against federal agencies; Muniz-Muniz, 741 F.3d at 672 ("However, we now join all of our sister circuits who have done so in holding that § 702's waiver of sovereign immunity extends to all non-monetary claims against federal agencies and their officers sued in their official capacity, regardless of whether plaintiff seeks review of 'agency action' or 'final agency action' as set forth in § 704."); Michigan v. Army Corps of Engineers, 667 F.3d 765, 775 (7th Cir. 2001) ("[T]he conditions of § 704 ... do not limit the waiver of immunity in § 702's second sentence."); Red Lake Band of Chippewa Indians v. Barlow, 846 F.2d 474, 476 (8th Cir. 1988) ("[S]ection 702 is not dependent on application of the procedures and review standards of APA."); Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518 (9th Cir. 1989) (noting that § 702 provides an "unqualified waiver of sovereign immunity" and nothing "in the language of the amendment suggests that the waiver ... is limited to claims challenging conduct falling in the narrow definition of 'agency action'"); Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225, 1233 (10th Cir. 2005) ("[§ 702 waiver] is not limited to suits under the Administrative Procedure Act."); Delano Farms Co. v. California Table Grape Com'n, 655 F.3d 1337, 1344 (Fed. Cir. 2011) ("We hold that section 702 of the APA waives sovereign immunity for non-monetary claims made against federal agencies.... It is not limited to 'agency action' or 'final agency action.'"); Trudeau v. Federal Trade Commission, 456 F.3d 178, 187 (D.C. Cir. 2006) (finding that § 702's waiver applies "regardless of whether the elements of an APA cause of action are satisfied").

statutory cause of action. 757 F.3d at 489. The former require "final agency action" under Section 704, while the latter claims only require "agency action" as defined by Section 551(13). See id.

However, to add to its doctrinal confusion, more recently, a different panel of the Fifth Circuit distinguished (indeed, questioned) Alabama-Coushatta Tribe. See Belle Company, L.L.C. v. U.S. Army Corps of Engineers, 761 F.3d 383 (5th Cir. 2014). Belle instructs that the Section 702 waiver does not apply to a constitutional claim absent a final agency decision. Belle, 761 F.3d at 395-96. The government of course invokes Belle, insisting that because the agency here did not reach a final decision regarding the constitutionality of the compliance reviews or attendant document requests, the APA waiver is inapplicable and the Court lacks jurisdiction over the plaintiffs' claim for declaratory relief.

The plaintiffs urge the Court not to apply Belle. But, even if Belle applies, the plaintiffs characterize the OFCCP Notices to Show Cause as final agency action.³⁰ In Belle, the Fifth Circuit

³⁰With respect to the features of "finality", the Supreme Court observes:

As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decision-making process - it must not be of merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations

found that a jurisdictional wetlands determination (JD) from the Corps was not final agency action under Section 704 of the APA. Belle, 761 F.3d at 395-96. In so finding, the court distinguished the JD from the EPA compliance order at issue before the Supreme Court in Sackett v. EPA. Id. at 388 (citing Sackett v. EPA, 132 S. Ct. 1367 (2012)). That is, reasoning that the JD was not an agency decision from which legal consequences flowed, the court concluded that it was not final action under Section 704; rather, the JD merely provided notification of the wetlands determination by the Corps, while the EPA compliance order demanded that the Sacketts promptly restore their property in accordance with an EPA-approved plan and to give the EPA site access and documents related to the site. Id. (citing Sackett, 132 S. Ct. at 1371-72). Notably, in Sackett, the compliance order determined that the Sacketts were in violation of the CWA. Id. at 393. "By contrast," the Fifth Circuit observed in Belle, "the JD does not state that Belle is in violation of the CWA, much less issue an order to Belle to comply with any terms in the JD or take any steps to alter its property." Id.

Just like the EPA compliance orders in Sackett, the plaintiffs submit that the OFCCP Notices to Show Cause were the consummation

have been determined," or from which "legal consequences will flow."

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (internal citations omitted).

of the OFCCP's decision-making process from which legal consequences flowed. The Notices "directed" Entergy entities to submit to audits by giving the OFCCP access to corporate records and documents; when the entities refused, according to the government, those entities violated the laws and regulations enforced by the OFCCP.

The government counters that the plaintiffs' effort to distinguish Belle is unavailing and, regardless, condemned by another Fifth Circuit case, Luminant Generation Co. v. U.S. Eenvtl. Prot. Agency, 757 F.3d 439, 442 (5th Cir. 2014), which held that the EPA's issuance of a notice of violation was not a final agency action. Similarly, the defendants argue, the preliminary notifications sent by the local district office actually signify the beginning, not the consummation, of the administrative process. See id. Driving the point home, the defendants direct the Court to the language used by the notices: they merely asked Entergy to explain why enforcement proceedings "should not be *initiated*." And, no legal consequences flowed from the Notices, which advised that a hearing would be held "*before* any sanctions [were] imposed." Point-counterpoint notwithstanding, the Court need not reconcile the confusing Fifth Circuit case literature.

2. Same Transaction or Occurrence Waiver

Even if the Court were to hold that Belle controls, that the OFCCP's Notices to Show Cause were not final agency action as in

Luminant (such that the APA waiver of sovereign immunity is inapplicable on these facts), the Entergy plaintiffs present a persuasive alternative argument of sovereign immunity waiver.³¹

³¹Even if the Court held that Belle's final action rule applied and that the OFCCP Notices fail to satisfy the finality requirement, the plaintiffs urge the Court to acknowledge that the Supreme Court has found that contractors have a right to object to administrative subpoenas in federal district court. See Donovan v. Lone Steer, 464 U.S. 408, 415 (1984) (holding that subject to a subpoena has right to "question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court"). The government originally failed to respond to this argument; however, by way of Notice of Additional Authority, the government defendants concede that part of the Supreme Court's decision might be viewed as authority contrary to positions taken by the government, although they submit such a reading of Lone Steer would be mistaken. The government then explains: In Lone Steer, the Supreme Court reaffirmed its holding in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) that "when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." 464 U.S. at 415. The Supreme Court also observed that its cases "provide protection for a subpoenaed employer by allowing him to question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court." Id. Read out of context, this might support the Entergy plaintiffs' position. However, the defendants insist their approach has ensured that the plaintiffs will have an opportunity in this Court to litigate their objections to the DOL's request for documents at issue in this case before facing any penalties for refusing compliance, and without any need for the Court to adjudicate the plaintiffs' affirmative claims as presented in their complaint. By Answer to the government's enforcement action, Entergy argues that the compliance reviews initiated against its facilities by the Department of Labor violate the Fourth Amendment. Because the enforcement action is also before this Court, the Court will be able to fully consider Entergy's constitutional challenges in the context of the government's affirmative lawsuit before the plaintiffs suffer "any penalties."

Furthermore, even if the OFCCP audit decisions did not constitute final agency action, the plaintiffs contend that the government's claim that the Fifth Circuit requires finality for a waiver of immunity under the APA would pose serious constitutional problems by effectively denying the plaintiffs a forum to vindicate

That is, even if the APA did not provide a waiver of sovereign immunity, the Entergy plaintiffs contend that the government's lawsuit against the Entergy plaintiffs constitutes a waiver with regard to an action based on the same transactions at issue in the government's enforcement action. The Court agrees. It is undisputed that, by filing an enforcement action, merely strategically or straightforward to vindicate the government's rights, the government waived its sovereign immunity related to claims based on the same transactions. See United States v. Irby, 618 F.2d 352, 356 (5th Cir. 1980)(quoting Frederick v. United States, 386 F.2d 481, 488 (1967): "[W]hen the sovereign sues it waives immunity as to claims of the defendant ... arising out of the same transaction or occurrence which is the subject matter of the government's suit, and to the extent of defeating the government's claim but not to the extent of a judgment against the (United States) which is affirmative in the sense of involving relief different in kind or nature to that sought by the government....").

The government contends that the plaintiffs have failed to identify any authority for their novel assertion that Irby should

their Fourth Amendment rights. See Webster v. Doe, 486 U.S. 592, 603 (1988)(holding that § 701(a)(2) does not preclude constitutional claims); see also Wong v. Warden, FCI Raybrook, 171 F.3d 148, 149 (2d Cir. 1999)(ruling that constitutional claims against discretionary agency acts are reviewable, even though discretionary acts are not generally subject to review under the APA). Notably, the government fails to respond to these arguments.

be extended such that the government waives sovereign immunity when a court *sua sponte* consolidates a lawsuit initiated by a private party with an enforcement action filed by the government. However, the government does not credibly dispute that the declaratory judgment claim the Entergy plaintiffs affirmatively advance is part of the same transaction as those defenses it has raised in response to the government's enforcement action. The Court is persuaded that under the circumstances the government has waived its sovereign immunity.

B.
Standing (Declaratory Judgment Act Claim)

Finally, the Court turns to consider the government defendants' challenge to the plaintiffs' standing to pursue their alternative claim for declaratory relief. The same constitutional standing principles announced earlier apply equally here. However, the nature of the injury for the purposes of the request for declaratory relief differs from the procedural injury alleged with respect to the APA claim.³²

The plaintiffs contend that the government's repeated threats to immediately file suit if the plaintiffs failed to comply with its demands created prospective injury sufficient to establish Article III standing. That the defendants had not yet

³²Defendants again submit that the plaintiffs will not suffer an injury if the Court orders them to submit to the reviews, as it will have decided in the government's affirmative case that OFCCP's actions pass constitutional muster.

affirmatively taken enforcement action does not defeat a finding of injury in fact. Invoking MedImmune, Inc. v. Genetech, Inc., 549 U.S. 118, 128-29 (2007) ("where threatened action by the government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat"), the plaintiffs insist that actual enforcement is not required to confer Article III standing.

The defendants dispute that MedImmune has any bearing on this Court's standing analysis; MedImmune, defendants submit, embraces the proposition that a party should not have to expose itself to liability to challenge the validity of a law. An unremarkable principle in the context of the plaintiffs' claim for declaratory relief on its constitutional claims. The Court disagrees; the Court finds that the plaintiffs sufficiently allege an injury-in-fact and, therefore, their declaratory judgment claim need not be dismissed for lack of subject matter jurisdiction.

The plaintiffs adequately allege injury-in-fact: the course of conduct in which they engaged -- faced with threats of enforcement action,³³ the Entergy plaintiffs refused to comply with the audit review demands on the ground that the compliance would violate and waive their Fourth Amendment rights -- suffices as injury-in-fact.

³³Not only did the OFCCP repeatedly threaten to take enforcement action, the fact that the DOJ validated that threat by filing suit undermines the government's argument that the plaintiffs' injuries were merely conjectural or illusory.

See Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2324 (2014) ("When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law"); see also Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979) (holding that injury-in-fact is satisfied upon an allegation of "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and there exists a credible threat of prosecution thereunder."), *overruled on other grounds by* 442 U.S. 936 (1979).³⁴

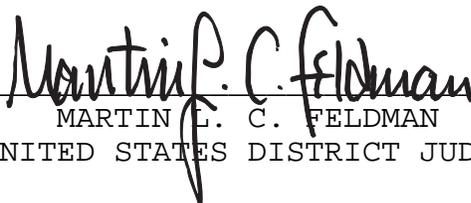
If the Court determines that it has the authority to enter a declaratory judgment, the government urges the Court to decline to exercise its discretion to do so, considering that the plaintiffs filed their lawsuit in anticipation of the government's enforcement suit. See The Sherwin-Williams Co. v. Holmes County, 343 F.3d 383, 388 (5th Cir. 2003). By merely alluding to the Court's discretion to entertain the declaratory judgment claim, the government defendants have failed to persuade the Court to decline to hear it.

Accordingly, IT IS ORDERED: that the defendants' motion to dismiss is DENIED in part: 1) The plaintiffs have standing to

³⁴Moreover, although no parties address the other two essential components of constitutional standing, the Court finds that they are met as well. The plaintiffs' injury is "fairly traceable" to the challenged action of the defendants; and their injury would likely "would be redressed" by a favorable decision in Court.

pursue both their APA claim and their declaratory relief claim, 2) sovereign immunity has been waived with respect to the declaratory relief claim, and, 3) DENIED without prejudice with respect to the APA authorization aspect of the APA claim; and GRANTED in part: 1) The plaintiffs have failed to state an APA claim, in part, insofar as the ARB did not act contrary to law in applying 41 C.F.R. § 60-30.5(a); 2) nor did the ARB err in failing to consider EO 11246. As to the component of the plaintiffs' APA claim in which the plaintiffs advance the APA authorization argument, because the ARB failed to consider that argument, remand is required.³⁵

New Orleans, Louisiana, December 15, 2014


MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

³⁵Plaintiffs shall submit within 7 days a proposed order sending this issue to the ARB for resolution. These consolidated cases are administratively closed pending final resolution of the authorization issue.