IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOUTHERN POVERTY LAW CENTER, *Plaintiff,* v. U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*, *Defendants*.	Civil Action No. 18-0760 (CKK)

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO PARTIALLY DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(h)(3) FOR LACK OF SUBJECT MATTER JURISDICTION

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INTRODUCTION

SPLC's Response to Defendants' Renewed Motion to Partially Dismiss the Second Amended Complaint ("SPLC Response") relies upon its own misconception of the Court's June 17, 2020 Order. There, the Court granted in part and denied in part SPLC's Temporary Restraining Order. ECF No. 105. The Court decided in favor of SPLC's standing and jurisdictional arguments "on the basis of Plaintiff's substantive due process claim" in the context of conditions of confinement related to ICE's COVID-19 response. *See* Mem. Op., ECF No. 124 at 31. The Court explicitly "d[id] not address" SPLC's "separate arguments focusing on its clients' access-to-counsel claims pursuant to the Fifth Amendment." *Id*. at 22, 31-32. That same day, the Court denied, *without prejudice*, Defendants' Motion to Partially Dismiss the SAC "because it appeared to raise some of the same issues as the [pending] TRO." *See* Minute Order of June 17, 2020. *Contra* SPLC Resp. at 2 ("[T]his Court rejected the primary arguments supporting Defendants' 'renewed' motion."). By SPLC's own admission, the Court explicitly did not venture an opinion about whether it has subject matter jurisdiction over Plaintiff's access-to-counsel claims, observing that the "authorities are in equipoise." *Id.* at 32 n.4, 36; *see also* SPLC Resp. at 6.

Defendants' Renewed Motion to Partially Dismiss The Second Amended Complaint ("Renewed Motion") explicitly does not challenge the district court's determination that it has jurisdiction, in context of the now entered preliminary injunction, to consider "whether the conditions imposed as a result of the limitations and restrictions adopted due to COVID-19 are punitive, in part because they result in limited access to counsel." Renewed Mot. at 23 n. 5; ECF No. 124 at 36–37. SPLC miscalculates the court's TRO ruling and Defendants' separate Renewed Motion arguments.

Further, adherence to the statutory jurisdictional bars will not render SPLC's or their clients' claims "'effectively'" unreviewable. SPLC Resp. at 8 (citations omitted). That is because detainees have traditionally raised claims related to access and quality of counsel in the context of administrative proceedings and via PFR before the court of appeals. *J.E.F.M. v. Lynch*, 837 F.3d 1031 (9th Cir. 2016) (quoting *Aguilar v. U.S. Immigration and Customs Enf't Div. of Dep't of Homeland Sec*., 510 F. 3d 1, 9 (1st Cir. 2007)). Consequently, the clear availability of options for seeking redress do not produce the "absurd" results cautioned by Justice Alito in *Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018), and the jurisdictional bars apply.

Finally, SPLC's characterization that Defendants' Renewed Motion is a "too little, too late effort" neglects the legal standard SPLC recites. SPLC Resp. at 6. Because subject matter jurisdiction is a fundamental requisite of a federal court's power to hear a case, the lack of it may be raised at any time. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006); *see* SPLC Resp. at 6–7. Federal Rule 12(h)(3), says SPLC, "merely clarifies" that the lack of subject matter jurisdiction "*is never waived*." *Harbury v. Hayden*, 444 F. Supp. 2d 19, 26 (D.D.C. 2006) (emphasis added); *see* SPLC Resp. at 7. SPLC may disagree with Defendants' timing on filing the Renewed Motion, but that bears no weight on the issue of whether subject matter jurisdiction is ripe for the Court's consideration.[1]

[1] SPLC further accuses Defendants' Renewed Motion as a "consistent pattern of delay" and recites the procedural history of this matter as it relates to the parties' discovery disputes that remain pending before the Court. SPLC Resp. at 4–5. The Parties have already briefed these arguments in the Parties' discovery briefing. ECF Nos. 116, 121, 130. 135. Plaintiff's decision to use its Response to rehash these issues distracts from the legal question squarely presented: whether the Court has subject matter jurisdiction to hear SPLC's access to counsel claims.

ARGUMENT

I. BY DISTORTING THE RULING IN *JENNINGS V. RODRIGUEZ*, SPLC REDESIGNS ITS LAWSUIT AS THAT OF "CONDITIONS OF CONFINEMENT" TO CREATE SUBJECT MATTER JURISDICTION

Defendants' argument that 8 U.S.C § 1252(b)(9) jurisdictionally bars SPLC's client-detainees access-to-counsel claims, says SPLC, ignores *Jennings*, "which expressly carves out detention conditions claims from the jurisdictional bar." SPLC Resp. at 8; *see Jennings*, 138 S. Ct. at 840. SPLC's view of *Jennings'* applicability here is detached from its actual claims pled in the Second Amended Complaint ("SAC"), and SPLC's flawed interpretation of *Jennings* further renders both an inaccurate and expansive reading of pre- and post- *Jennings* case law.

As an initial matter, SPLC reads Justice Alito's determination—speaking for a majority of the Court—on the possible limits of § 1252(b)(9), out of context. Justice Alito merely noted that the phrase "any cause or claim by or on behalf of any alien *arising from* the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter," should not be read hyper technically. *Jennings*, 138 S. Ct. at 841 (citing 8 U.S.C. § 1252(g) (emphasis in original). Contrary to SPLC's assertion, *nowhere* does the opinion state that conditions of confinement claims fall outside of the jurisdictional bar. *Id.* Rather, Justice Alito merely illustrated that *Bivens* claims based on conditions of confinement and tort claims based on state law would not be encompassed. Specifically, Justice Alito postured:

> Suppose, for example, that a detained alien *wishes to assert a claim under Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), based on allegedly inhumane conditions of confinement. *See, e.g., Ziglar v. Abbasi*, 582 U.S. ——, —— – ——, 137 S.Ct. 1843, 1863–1867, 198 L.Ed.2d 290 (2017). Or suppose that a detained alien brings a state-law claim for assault against a guard or fellow detainee. Or suppose that an alien is injured when a truck hits the bus transporting aliens to a detention facility, and the alien sues the driver or owner of the truck.

Jennings, 138 S. Ct. at 840. Read in full, the cited passage establishes that Justice Alito was specifically referring to "inhumane conditions" claims arising in *Bivens* litigation. *Id.* Further, Justice Alito made clear that the parties in *Jennings* "ha[d] not addressed the scope of § 1252(b)(9), and it [wa]s not necessary for [the Court] to attempt to provide a comprehensive interpretation." *Id.* at 841. Accordingly, the Court did not offer any new limitation abrogating well-established precedent that claims "asking for review of an order of removal; . . . challenging the decision to detain [] in the first place or to seek removal; and . . . challenging any part of the process by which their removability will be determined" continue to be barred. *Jennings*, 138 S. Ct. at 841.

In *Jennings*, Justice Alito articulated that the touchstone for determining whether section 1252(b)(9) applies to a claim turns on whether the legal questions presented "aris[e] from [the] actions taken to remove these aliens." *Jennings*, 138 S. Ct. at 840. Read in full, the majority opinion merely noted that courts should take care not to adopt such an expansive interpretation of § 1252(b)(9) that a detained alien's claim under *Bivens*, based on allegedly inhumane conditions of confinement, or a tort claim under state law for assault or a car accident while being transported, would be barred. *Id*; *see also Aguilar*, 510 F.3d at 10 ("Courts consistently have recognized that the term 'arising from' requires more than a weak or tenuous connection to a triggering event."); SPLC Resp. at 8 ("[I]t would be "absurd" to "cram[] judicial review" of such claims into review of a final order of removal") (citing *Jennings*)). None of these situations are presented in this case. Here, the SAC does not plead allegations that fall into the vast expanse of claims, unconnected to the removal proceeding itself like a *Bivens* or state tort claim. In fact, it is beyond dispute that SPLC does not even allege any conditions of confinement claims that *are not* focused on its clients' access to counsel connected to the process by which removability will

be determined. *See* Renewed Motion at 22–23; *e.g.*, SAC ¶ 331 (alleging Defendants' "conduct creates a substantial likelihood that Plaintiff's clients' rights to a full and fair hearing will be violated, because Defendants' policies and practices severely restrict the ability of Plaintiff to communicate with its clients and to conduct necessary legal work on their behalf in connection with their removal proceedings."); SAC n. 1, ¶ 96 (discussing the impact access to counsel has on release on bond and ultimate success in removal proceedings); SAC ¶ 318 (arguing "Plaintiff's clients require meaningful access to Plaintiff in order to seek release on both bond and parole and to defend themselves against removal from the United States—the very reason that they are detained at these immigration prisons."); SAC ¶ 333 (asserting "All of the obstacles to accessing and communicating with counsel described herein create a substantial risk that errors will occur in bond and removal proceedings. . . ."). SPLC engages in work for clients seeking representation in removal proceedings, bond, habeas, and parole, and all facility detainees are in removal proceedings, and SPLC *only* renders immigration services to these individuals. *See* SAC ¶¶ 14, 16, 98, 100, 102, 318; SPLC Resp. at 15. Thus, SPLC is alleging access to counsel claims "challenging any part of the process by which their removability will be determined." *Jennings*, 138 S. Ct. at 841. *Jennings* establishes these claims continue to be barred. *Id.* A challenge to fairness of removal proceedings due to barriers to access to counsel is—without a doubt—a challenge to the "process" by which removability will be determined. *See Jennings*, 138 S. Ct. at 841. Congress has clearly determined that such challenges must be funneled to the court of appeals via the administrative process. *See Aguilar*, 510 F.3d at 13 ("subject to the channeling effect of section 1252(b)(9), petitioners' right-to-counsel claims must be administratively exhausted.").

Further, SPLC relies upon its buzzword usage of the term "conditions" in the SAC, although the SAC does not allege any condition of confinement affecting any right unrelated to access to counsel in immigration proceedings. *See* SAC ¶¶ 55, 62, 68, 74 ("Defendants' policies, procedures, and practices govern the selection of [facility] as an immigration prison and the terms of the contracts pursuant to which it operates; the placement of ICE detainees at that prison and which detainees are selected for placement there; the conditions of confinement that they endure . . . ."; *e.g.*, *id.* ¶ 257 ("Defendants direct, manage, and control the U.S. immigrant detention system and the conditions of confinement therein, including at LaSalle, Irwin, Pine Prairie, and Stewart."); *id.* ¶ 288 ("The purpose of ICE's detention standards was to establish consistent conditions of confinement, access to legal representation, and safe and secure operations across the detention system."). Deployment of the term "conditions" is insufficient to transform SPLC's core access to counsel claim into a general "conditions of confinement" case and circumvent the clear jurisdictional bar. Finally, nothing in *Jennings* supports limitation of the jurisdictional bar on this flimsy basis. *Jennings*, 138 S. Ct. at 840 (specifically noting § 1252(b)(9) would not apply to a *Bivens* claim alleging inhumane conditions of confinement, or a tort claim, under state law for assault or a car accident).

II. SPLC'S DISTORTION OF CASE LAW DOES NOT ESTABLISH JURISDICTION

Further, SPLC relies upon "conditions of confinement" cases that are inapposite or not applicable to its access-to-counsel allegations.

First, SPLC argues that *Jennings* "compels the same result" for SPLC's client-detainees as those plaintiffs in post-*Jennings* cases such as *E.O.H.C. v. DHS*, 950 F. 3d 177 (3rd Cir. 2020), *Torres v. U.S. Dep't of Homeland Security*, 411 F. Supp. 3d 1036 (C.D. Cal 2019), *Innovation Law Lab v. Nielson*, 310 F. Supp. 3d 1150 (D. Or. 2018), and *Arroyo v. DHS*, No. 19-

cv-815, 2019 WL 2912848, at *12 (C.D. Cal. June 20, 2019). SPLC Resp. at 9. As argued in Defendants' Renewed Motion, these four cases that SPLC relies upon, are distinguishable from the SAC for a myriad of reasons. *See* Renewed Mot. at 18 (*E.O.H.C.*, where appellants' claims arose from the Migrant Protection Protocol ("MPP") and interim removal to Mexico, not their *final* removal to Guatemala); *id.* at 24 (*Torres*, where the court determined that putative class plaintiffs' claims affected more than just removal proceedings and bond matters but included representation in family court and criminal proceedings); *id.* at 19 (*Innovation Law Lab*, where the detainees were not in removal proceedings); *id.* at 20 (*Arroyo*, where plaintiff claimed that a detainee *transfer* interferes with an existing attorney-client relationship, and further is inconsistent with the Ninth Circuit's ruling in *J.E.F.M.*, 837 F.3d 1026). Here, SPLC only represents detainees in the Facilities in immigration related proceedings (not family matters or criminal proceedings), is not alleging an inability to represent detainees due to the MPP, and makes no allegations in the SAC regarding detainee transfers from the Facilities. *See* SAC. Thus, as established, *Torres*, *E.O.H.C.*, *Innovation Law Lab*, and *Arroyo* are factually distinguishable, non-binding, and not persuasive.

Next, SPLC's attempt to distinguish *National Immigrant Project of the National Lawyers Guild v. EOIR*, No. 1:20-cv-00852, 2020 WL 2026971 (D.D.C. Apr. 28, 2020) ("*NIPNLG*") lacks merit. SPLC's analysis rests solely on its flawed argument that SPLC pled an "exclusive" conditions of confinement case, not an access-to-counsel case. SPLC Resp. at 14-15; *see* Renewed Mot. at 18 (discussing the *NIPNLG* decision). Citing *Jennings*, Judge Nichols found that the *NIPNLG* plaintiffs' access-to-counsel claims arise as a "part of the process by which…removability will be determined…and this Court thus lacks jurisdiction over them." *NIPNLG*, 2020 WL 2026971, *4-9 (citing *Jennings*, 138 S. Ct. at 841). SPLC's distinction on

this point is that it also challenges barriers that impede access to counsel for other purposes, in addition to removability, such as release on bond, parole, habeas, and conditions advocacy. SPLC Resp. at 15. This distinction is of no moment, however, given the clear discretion provided to the Attorney General under section 8 U.S.C. §§ 1226(e) and 1231 (*see infra* section III). Further, because all of these matters arise from a "part of the process by which [ ] removability will be determined," review is barred. *Jennings*, 138 S. Ct. at 841. Although SPLC conveniently asserts it represents detainees in "conditions advocacy," it is telling that the SAC unequivocally states that SIFI was formed in 2017 for the stated purpose of "providing direct representation to detained immigrants in bond proceedings, training *pro bono* attorneys to provide effective representation to indigent detainees in their bond proceedings, and facilitating representation in merits hearings for people who would otherwise have no legal recourse." SAC at ¶ 97. Nowhere does the SAC allege SIFI represents Facility detainees in "conditions advocacy" *or for any other purpose* not arising directly from the removal process. *See* SAC ¶ 102 ("Through SIFI, Plaintiff endeavors to provide effective and ethical removal defense to all their detained clients."). Accordingly, the Court lacks subject matter jurisdiction.

Further, while SPLC makes much that the *NIPNLG* plaintiffs sought injunctive relief against EOIR and "expressly sought to enjoin certain practices in removal hearings themselves," SPLC ignores that ICE was also a defendant in the case. SPLC Resp. at 15. Specifically, plaintiffs in *NIPNLG* sought to "require ICE to provide VTC and teleconference capabilities and to take a number of detailed and specific steps relating to counsel communications, the installation of telecommunications and VTC facilities, and the provision of PPE." *NIPNLG*, 2020 WL 2026971, at *4; *see NIPNLG*, 2020 WL 2026971, *1 ("[Plaintiffs] challenge immigration court and detention facility policies that the government has implemented in response to the

COVID-19 pandemic."). The court denied relief as to claims related to ICE and EOIR based on the same lack of subject matter jurisdiction. *Id.* at *12. Nor has SPLC styled its claims in the SAC that conditions "impeded access to counsel generally" to distinguish itself from the *NIPNLG* plaintiffs. SPLC Resp. at 14. Instead, SPLC's SAC alleges various barriers to its ability to meet with its clients detained at the Facilities, such as a lack of confidentiality in attorney access rooms, inadequate numbers of attorney visitation rooms, phone banks, video-teleconference ("VTC") modules, and lack of interpretation services, *See* SAC ¶ 322; Renewed Mot. at 6-7 (discussing the SPLC's specific access-to-counsel allegations).

Similarly distinguishable is SPLC's reliance upon *Nava v. DHS*, 435 F. Supp. 3d 880 (ND. IL 2020). SPLC Resp. at 11. In *Nava*, five named putative class members and two organizational immigration advocacy groups filed suit against ICE to ensure "compli[ance] with statutory obligations under 8 U.S.C. § 1357(a)(2) when conducting warrantless arrests'" and to ensure ICE "complies with the Fourth Amendment when making traffic stops." *Nava*, 435 F. Supp. 3d at 884-885. Defendants filed a motion to dismiss for lack of jurisdiction, arguing plaintiffs' claims were jurisdictionally barred under § 1252(b)(9). The court found that illegal stops of individuals conducted before the government has any legitimate reason to believe that the individual is removable occurs *before* the removal process begins and thus is not "action taken…to remove an alien…under" the INA. *Id.* at 888-89. Even if the illegal stops were actions taken to remove plaintiffs under the INA, the court viewed the illegal stops—occurring before the commencement of any removal proceedings—as "'collateral' to the removal process." *Id.* at 891. The *Nava* plaintiffs' Fourth Amendment illegal stop allegations to ensure compliance with 8 U.S.C. § 1357(a)(2) are a far cry from SPLC's Fifth Amendment access-to-counsel claims, such as an attorney-client visitation meeting in the midst of a detainee's removal

proceedings and which SPLC claims directly affect the fairness of removal proceedings. *See* SAC n. 1, ¶ 96 (discussing the impact access to counsel has on release on bond and ultimate success in removal proceedings); SAC ¶ 331 (alleging Defendants' "conduct creates a substantial likelihood that Plaintiff's clients' rights to a full and fair hearing will be violated, because Defendants' policies and practices severely restrict the ability of Plaintiff to communicate with its clients and to conduct necessary legal work on their behalf in connection with their removal proceedings."); SAC ¶ 333 (asserting "All of the obstacles to accessing and communicating with counsel described herein create a substantial risk that errors will occur in bond and removal proceedings. . . .").

Finally, the Ninth Circuit's pre-*Jennings* decision in *J.E.F.M.* and the First Circuit's pre-*Jennings* decision in *Aguilar*, where both courts held that § 1252(b)(9) jurisdictionally bars access-to-counsel claims in district court, were not overturned by *Jennings. Jennings*, 138 S. Ct. 830 at 840; SPLC Resp. at 10 n.1 (describing *J.E.F.M.* and *Aguilar* as "bad law")[2]. *Jennings* does not categorically exempt "conditions of confinement" litigation from the jurisdictional bar or provide SPLC the ability to seek relief for claims precluded by § 1252. Further, Justice Alito specifically stated that the limits of § 1252(b)(9) were not briefed by the parties in *Jennings* and not decided by the Court. *Jennings*, 138 S. Ct. at 841. SPLC's assertion that *Aguilar* and *J.E.F.M.* are somehow "bad law" is wholly unsupported by *Jennings*.

SPLC's reliance upon *Nunez v. Boldin* and *Benjamin v. Fraser* is not applicable to SPLC's access-to-counsel allegations in the SAC. *See* SPLC Resp. at 9. *Nunez* was a class

[2] Despite SPLC's characterization that *J.E.F.M.* is "bad law," SPLC relies upon *J.E.F.M.* in support of its argument that § 1252 does not apply to "claims that are independent of or collateral to the removal process." SPLC Resp. at 8. SPLC also cites to *J.E.F.M.* in its attempt to distinguish *NIPNLG*. SPLC Resp. at 14. Further, this Court relies on *J.E.F.M.* throughout its opinion granting preliminary injunction. ECF No. 124.

action lawsuit where plaintiffs sought certain injunctive and declaratory relief from various practices and procedures of the former Immigration & Nationality Service relating to the detention of El Salvadoran and Guatemalan citizens in Los Fresnos, Texas. *Nunez v. Boldin*, 537 F. Supp. 578, 578-80 (S.D. Tex. 1982). SPLC's reliance upon *Nunez* is similar to its misplaced reliance upon *Torres*, which is distinguishable to the present matter because SPLC does not represent a class of detained individuals. *See* Renewed Mot. at 24-25 (distinguishing *Torres*). Furthermore, *Benjamin* involved the denial of the New York City Department of Corrections' motion to terminate consent decrees pursuant to 18 U.S.C. § 3626 (Prison Litigation Reform Act), a statute that bears no resemblance to 8 U.S.C. § 1252. *Benjamin v. Fraser*, 264 F. 3d 175, 178-79 (2nd Cir. 2001). Similarly, the *Benjamin* detainees' access-to-counsel allegations implicated only the Sixth Amendment, not the Fifth Amendment. *Id.* at 184-85. Therefore, *Benjamin* is not persuasive here.

SPLC's attempt to rely upon *Banks v. Boothe*, where the court granted specific relief on a putative class's TRO in light of the COVID-19 pandemic, demonstrates its flawed interpretation of conditions of confinement lawsuits. *See* SPLC Resp. at 12-13. In *Banks*, the court ruled on behalf of criminal detainees' Fifth Amendment due process rights for pre-trial detainees and Eighth Amendment due process rights for post-conviction detainees relating to the conditions of their confinement during the COVID-19 pandemic. *Banks v. Boothe*, No. CV 20-849(CKK) 2020 WL 1914896, *1-2 (D.D.C. April 19, 2020) (Kollar-Kotelly, J.) (for publication); *see id.* at *14; *cf.* Order on SPLC's Motion for Temporary Restraining Order, ECF No. 123 (granting specific relief to SPLC with respect to access-to-counsel *in light of the COVID-19 pandemic*). Here, the TRO was limited to the issue of "whether the conditions imposed as a result of the limitations and restrictions adopted due to COVID-19 are punitive, in part because they result in limited

access to counsel." ECF No. 124 at 36–37. In fact, the Court explicitly declined to address whether it had jurisdiction over SPLC's access-to-counsel claims in the SAC and did not broadly hold it has jurisdiction over conditions of confinement claims unrelated to Defendants' COVID-19 response. *See id.* at 22, 31-32. The distinction is meaningful because conditions of confinement claims about access-to-counsel that are not related to the COVID-19 public health crisis do not present the sort of "now or never" emergency requiring immediate intervention that would render review via the administrative process or PFR insufficient. *See E.O.H.C.*, 950 F.3d at 185-86 (noting that due to the MPP, the administrative process was insufficient and the court had subject matter jurisdiction). Finally, *Banks* is not an immigration case and cannot stand for the proposition that Defendants' congressionally authorized detention processes, practices, or procedures are not covered by § 1252(b)(9).

III. THE COURT LACKS JURISDICTION TO REVIEW DISCRETIONARY DETERMINATIONS

SPLC also mischaracterizes Defendants' "attempt to stretch the jurisdictional bar beyond recognition" with respect to 8 U.S.C. § 1231. Section 1231(g)(1) provides that "[t]he Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." 8 U.S.C. § 1231(g)(1). A plain reading of the statute imports the exercise of discretion. *See* Renewed Motion at 29 (citing *Aguilar v. U.S. Immigration & Customs Enf't Div. of the Dep't of Homeland Sec.*, 490 F. Supp. 2d 42, 45 (D. Mass. 2007), *aff'd sub nom*, *Aguilar*, 510 F.3d 1. Notably, SPLC's Response fails to address or distinguish the case law provided in Defendants' Renewed Motion on this point, or provide additional case law for the Court's consideration. *See* SPLC Resp. at 13-14; *see generally* Renewed Mot. at 26-30.

In its Response, SPLC argues that "Defendants [cannot] credibly argue that SPLC's claims about barriers to access to counsel are inseparable from the Attorney General's

determinations on whether to detain or to grant bond or parole." SPLC Resp. at 13. SPLC is mistaken. Not only is the ultimate discretionary decision on bond or parole unreviewable, so is the process by which the agency arrives at the discretionary determination. Section 1226(a) explicitly provides that the Attorney General "may" detain an alien or "may" release on bond or conditional release. 8 U.S.C. § 1226(a). It is well established that "[n]o court may set aside any action or decision by the [government] under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." 8 U.S.C. § 1226(e); *see Demore v. Kim*, 538 U.S. 510, 518-22 (2003) (noting 8 U.S.C. § 1226(e) strips jurisdiction to consider challenges to discretionary determinations). Therefore, the bond and parole decision is discretionary and unreviewable by statute.

Likewise, the process by which the discretionary decision is reached is also unreviewable. *See Privett v. Sec'y Dept of Homeland Sec*, 865 F.3d 375, 381 (6th Cir. 2017) (holding the court lacked jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(B)(ii) to review a constitutional claim that would necessarily require review of a discretionary decision). It is impossible to separate the outcome of the process from the process itself, and the court would unavoidably be required to review the process by which the bond or parole decision is reached. *Bourdon v. United States Dep't of Homeland Sec. (DHS)*, 940 F.3d 537, 545 (11th Cir. Oct. 3, 2019) ("If a court can dictate which arguments the Secretary must entertain or how the Secretary weighs the evidence, then the Secretary can hardly be said to have 'sole and unreviewable discretion'…").

Further, challenges to the way in which bond and parole determinations are made is undoubtedly a challenge to a part of the "process" by which removability will be determined. These decisions are—as SPLC specifically recognizes—key to and affect the very outcome of

removal proceedings. *See* SAC ¶ 100 ("…assist clients in obtaining release on bond and parole"); *id.* ¶ 318 ("Plaintiff's clients require meaningful access to Plaintiff to seek release on both bond and parole and to defend themselves against removal…"). They are not tangential to removal proceedings and are barred. *NIPNLG*, 2020 WL 2026971, *4-8 (citing *Jennings*, 138 S. Ct. at 841).

IV. THE CONSTITUTIONAL AVOIDANCE DOCTRINE IS INAPPLICABLE

SPLC's argument that the constitutional avoidance doctrine dictates that § 1252 not be construed to deprive this court of jurisdiction to adjudicate SPLC's claims is not only confusing, but inapplicable. *See* SPLC Resp. at 16. "[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988). "The canon of constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one [plausible] construction." *Jennings*, 138 S. Ct. at 836 (citing *Clark v. Martinez*, 543 U.S. 371, 385 (2005)). In the absence of more than one plausible construction, the canon simply "has no application." *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (quoting *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 (2001)). When relying upon this doctrine, the court "still must *interpret* the statute, not rewrite it." *Jennings*, 138 S. Ct. at 836. (emphasis in original). Here, section 1252(b)(9) explicitly provides that "judicial review of all questions of law and fact….*arising from any action taken or any proceeding* brought to remove an alien from the United States….shall be available only in judicial review of a final order." § 1252(b)(9) (emphasis added). No recourse to the cannon of constitutional avoidance is necessary. Through § 1252, "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 federal courts of appeals." *J.E.F.M.*, 837 F.3d at 1029. "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 PFR process." *Id.* at 1031 (emphasis in original).

Section 1252(b)(9)'s channeling provisions are "'breathtaking" in scope and "vise-like" in grip'", swallowing up "virtually all claims that are tied to removal proceedings." *J.E.F.M.*, 837 F.3d at 1031 (quoting *Aguilar*, 510 F.3d at 1, 9). These channeling provisions include "right-to-counsel claims" and "challenges to agency policies." *Id.* at 1035. So viewed, SPLC's claims are directly linked to, and are intertwined with, the administrative process that Congress so painstakingly fashioned. *Aguilar*, 510 F.3d at 13 ("subject to the channeling effect of section 1252(b)(9), petitioners' right-to-counsel claims must be administratively exhausted.").

SPLC relies upon the Supreme Court's decisions in *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Calcano-Martinez v. INS*, 533 U.S. 348 (2001), to support its argument. In *St. Cyr*, Justice Stevens found that the jurisdiction-stripping provisions of the Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") did not deprive a district court's jurisdiction to review a detainees' habeas corpus challenging the decision of the Board of Immigration Appeals that he was ineligible to apply for discretionary relief from deportation. *St. Cyr*, 533 U.S. 289 at 289-90. Specifically, plaintiffs argued that § 1252(b)(9)'s jurisdictional bar does not apply to actions brought pursuant to the general habeas statute. 28 U.S.C. § 2241; *St. Cyr*, 533 U.S. at 313-314. The Court reasoned that if it were clear that the question of law [availability of habeas] could be answered in another forum, it "might be permissible" to construe § 1252(b)(9) of precluding such claims. *Id.* at 314. "But, in the absence of such a forum, coupled with the lack of clear, unambiguous, and express statement of congressional intent to preclude judicial

consideration on habeas," the court concluded that § 1252(b)(9) did not preclude the availability of relief under the general habeas statue in a district court. *Id.* In *Calcano-Martinez*, again Justice Stevens found that the IIRIRA precluded lawful permanent resident petitioners, who had already been found removable based on their prior aggravated felony convictions, from filing habeas petitions in district court. *Calcano-Martinez*, 533 U.S. at 348-49 ("Congress has not spoken with sufficient clarity to strip the district courts of jurisdiction to hear habeas petitions raising identical claims.").

In both cases, the Supreme Court interpreted the availability of habeas relief under 28 U.S.C. § 2241 with respect to the jurisdictional bar under 8 U.S.C. § 1252(b)(9). It is unclear how statutory interpretation with respect to SPLC's client-detainees' abilities to file habeas petitions on behalf of themselves correlates to any question of statutory interpretation with respect to section 1252(b)(9) and SPLC's access-to-counsel allegations on behalf of its client-detainees. Nor do these cases support SPLC's contention that Defendants' assertion of section 1252(b)(9)'s jurisdictional bar "depriv[e]s detained immigrants of any ability whatsoever to obtain an injunction to remediate those conditions." SPLC Resp. at 16 (citing *Webster*, 486 U.S. at 603). Unlike *St. Cyr* and *Calcano-Martinez*, where plaintiffs lacked reviewability of their claims in an additional forum, SPLC's allegations on behalf of their client-detainees may be reviewed under "a petition for review filed with an appropriate court of appeals." 8 U.S.C. § 1252(a)(5).

Given that section 1252(b)(9) "is [not] found to be susceptible of more than one construction," *Jennings*, 138 S. Ct. at 836, Defendants do not need to satisfy any "heightened" burden to demonstrate section 1252's applicability to the present case. *See Webster v. Doe*, 486 U.S. 592, 603 (1988). Nor does this interpretation of section 1252(b)(9) raise any serious

"separation of powers" concerns. SPLC Resp. at 16; *e.g.*, *Ramos v. Nelson*, 321 F. Supp. 3d 1083, 1102 (N.D. Cal. 2018) (finding that the jurisdiction-stripping provision of the Temporary Protected Status statute, 8 U.S.C. § 1254(b)(5)(A), does not bar judicial review of DHS' general TPS procedures and criteria, but does bar judicial review of individual determinations). At bottom, accepting and applying SPLC's statutory construction argument here would otherwise render all other case law on this issue—which is voluminous—irrelevant and inapplicable.

V. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLAIMS FOR RELIEF UNDER THE APA

A. Defendants' 12(h)(3) motion is a proper vehicle to dismiss SPLC's APA claims.

SPLC argues that Defendants' Renewed 12(h)(3) Motion to Dismiss SPLC's APA claims is an untimely 12(b)(6) failure to state a claim defense. SPLC Resp. at 17. Further, SPLC contends that "actions arising under the APA confer federal question jurisdiction," not subject matter jurisdiction, and therefore it is a question of whether SPLC has failed to state a claim upon which relief can be granted. SPLC Resp. at 17. SPLC neglects that its allegations of impediments to access-to-counsel need not rely upon the APA conferring a "limit[ed] cause of action for parties adversely affected by agency action" when a petition for review remains the sole and exclusive vehicle for review of the SAC's allegations. § 1252(a)(5); *Trudeau v. Federal Trade Com'n*, 456 F. 3d 178, 185 (D.C. Cir. 2006).

It is well-settled that the APA itself does not confer subject matter jurisdiction. *Califano v. Sanders*, 430 U.S. 99, 107 (1977) (The "APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action"). Accordingly, "[b]ecause the APA does not provide an independent grant of subject matter jurisdiction, the Court has jurisdiction under the APA only insofar as it has jurisdiction under [28 U.S.C. § 1331]." *Am. Chiropractic Ass'n v. Shalala*, 108 F. Supp. 2d 1, 8 (D.D.C 2000). That is, unless, "federal

jurisdiction is not precluded by another statute." *Dhakal v. Sessions*, 895 F. 3d 532, 538 (7th Cir. 2018).[3] Congress intended the provisions of the Immigration and Nationality Act of 1952 (INA) to supplant the APA in immigration proceedings, *Ardestani v. INS*, 502 U.S. 129, 133 (1991), and 8 U.S.C. § 1252(a)(5) is the "sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter." § 1252(a)(5).

SPLC argues that the jurisdiction-channeling provision under 1252(b)(9) does not apply to SPLC's claims, and therefore this court is not precluded from reviewing SPLC's APA claim. SPLC Resp. at 22. As Defendants argue in the Renewed Motion, the APA does not provide a mechanism for review of claims barred by statute. Renewed Mot. at 36; *see* 5 U.S.C. § 704 ("The APA provides a cause of action only for claims challenging "final agency action for which there is no other adequate remedy in a court."). Besides relying upon its incorrect interpretation of the 1252(b)(9) jurisdictional bar, SPLC neither distinguishes nor addresses Defendants' argument with respect to § 704 preclusion.

To support its 12(b)(6) argument, SPLC relies upon case law distinguishable from SPLC's claims that fall under the purview of a jurisdictional-stripping statute such as § 1252. In *Sygenta Crop. Prot., Inc v. Drezel Chem. Co.*, 655 F. Supp. 2d 54, 61 (D.D.C. 2009), the parties were engaged in a binding arbitration proceeding initiated under the data-sharing provisions of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq*. In *Oryszak v. Sullivan*, 576 F. 3d 522, 524-25 (D.C. Cir. 2009), plaintiff, a secret service special

[3] In *Dhakal*, petitioner challenged the denial of his asylum application under the APA and Declaratory Judgment Act. The Seventh Circuit reasoned that since petitioner was not subject to a final order of removal, he "cannot avail himself of the ordinary process for obtaining federal court review set forth in [8 U.S.C. 1252(a)(5)]" and therefore "attempts to proceed under the APA." *Dhakal*, 895 F. 3d at 538. Here, SPLC does not allege—nor could it—that its detained clients at the Facilities are not in removal proceedings or subject to final removal orders. *See* SAC.

agent, brought action against Director of Secret Service, challenging the Secret Service's revocation of her top secret security clearance. *Oryszak*, 576 F. 3d at 522. There, the court found that the APA provided no cause of action to review the decision of the Secret Service to revoke plaintiff's security clearance because that decision is an "agency action…committed to agency discretion by law" and therefore plaintiff failed to state a claim upon which relief can be granted. *Id.* at 526. Neither *Sygenta* nor *Oryszak* involve the strict INA funneling provision at issue here. *Aguilar*, 510 F.3d at 1, 9 (describing § 1252(b)(9)'s jurisdiction-stripping provisions as "vise-like in grip"). Accordingly, SPLC's reliance on these cases is misplaced.

SPLC badgers Defendants' timing to file its motion "over two years after litigation began" and that Defendants "impermissibly attach[ed] evidence outside of the pleadings." SPLC Resp. at 17-18. But, because subject matter jurisdiction is a fundamental requisite of the federal court's power to hear a case, the lack of it may be raised at any time. *Arbaugh v. Y&H Corp*. 546 U.S. 500, 506 (2006). Further, a court may consider material outside of the pleadings in ruling on a "motion to dismiss for lack of venue, personal jurisdiction, or subject matter-jurisdiction." *Artis v. Greenspan*, 223 F. Supp. 2d 149, 152 (D.D.C. 2002). Defendants' Exhibit A to its Renewed Motion merely illustrates how expansive SPLC views its allegations in the SAC, unbridled by section 1252(b)(9)'s jurisdictional bars, and may be considered by the Court. *See, e.g.*, SPLC Resp. at 5 ("[T]he Government is refusing to produce discovery on many of these topics because it disputes the basic premises of Plaintiff's First and Fifth Amendment claims."). However inconvenient it may be to SPLC, Defendants unequivocally did not file their motion pursuant to Federal Rules 12(b)(1), (b)(6), or Rule 56. ECF No. 133. Rather, Defendants correctly filed a motion to dismiss pursuant to Rule 12(h)(3), and the Court may consider whatever information it deems necessary to decide its own subject matter jurisdiction.

B. SPLC fails to identify a final agency action for which relief can be sought under the APA.

To avoid dismissal, SPLC argues that the SAC unambiguously identifies a discrete and "final" agency action that is subject to APA review and alleges sufficient facts that raise a right to relief "above the speculative level." SPLC Resp. at 18; *see* 5 U.S.C. § 704. Specifically, says SPLC, the SAC alleges that Defendants' failure to follow their own rules in the Performance Based National Detention Standards ("PBNDS") constitutes "arbitrary and capricious" conduct in violation of the APA. SPLC Resp. at 18 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) (the "*Accardi*" doctrine).

The *Accardi* doctrine "stan[d]s for the proposition that agencies may not violate their own rules and regulations to the prejudice of others." *Battle v. FAA*, 393 F. 3d 1330, 1336 (D.C. Cir. 2005); SPLC Resp. at 18. In the recent *D.A.M. v. Barr* decision, petitioners similarly argued that, under the *Accardi* doctrine, ICE's failure to follow CDC guidance and its own policies in responding to the COVID-19 pandemic is arbitrary and capricious in violation of the APA. *D.A.M. v. Barr*, No. 20-cv-1321, 2020 WL 4218003, at *13 (D.D.C. Jul. 23, 2020) (Cooper, J.); *see Accardi* 347 U.S. at 260. Agency regulations, however, "do not create *substantive* due process rights" but rather are rooted in the notions of procedural due process. *Id.* at *13 (citing *C.G.B. v. Wolf*, No. 20-CV-1072 (CRC), 2020 WL 2935111, at *34 (D.D.C. June 2, 2020) (emphasis in original)); *e.g.*, *Damus v. Neilson*, 313 F. Supp. 3d 317, 324, 337 (D.D.C. 2018) (finding that plaintiffs could challenge ICE's failure to comply with its own Parole Director, imposing "a number of *procedural* requirements for assessing asylum-seekers' eligibility for relief") (emphasis added)). The Court found that the CDC guidelines at issue in *D.A.M.* set out substantive standards for how to handle the COVID-19 crisis. *Id.*

Because *Accardi* does not create substantive rights, the *D.A.M.* petitioners could not rely upon the APA to enforce the government's adherence to CDC guidance or its own internal guidance during removals. *Id.* at 13. Similarly, the PBNDS sets out measured standards for overall visitation within detention centers, and provides guidance to facilities on topics such as maintaining confidentiality during legal visits, scheduling legal visitations, and attorney documentation guidelines. Renewed Mot. at 5-6. Indeed, in its order granting a temporary restraining order related to COVID-19, this Court acknowledged that each facility may meet threshold condition requirements in different ways and declined to issue granular directives. *See* Order on SPLC's Motion for Temporary Restraining Order, ECF No. 123. Therefore, SPLC cannot merely rely upon its allegation that Defendants have failed to follow the PBNDS as a maneuver to create substantive rights to seek relief under the APA.

SPLC's Response further cites various provisions of the SAC with respect to the Defendants' contracts with the Facilities that require compliance with the PBNDS, and various enumerated sections of the PBNDS relating to access-to-counsel. SPLC Resp. at 19. Defendants do not contest that SPLC's SAC incorporates PBNDS provisions in its access-to-counsel allegations. What is "vague" is SPLC's inability to identify discrete, final agency action for purposes of relief under the APA. *Cf.* SPLC Resp. at 19. Nor does SPLC cite case law to help square this distinction. *Compare Torres*, 41 F. Supp. 3d at 1069 (where ICE's alleged *decision* not to enforce its PBNDS standards at a contracted detention facility was "final agency action" for purposes of surviving a Rule 12(b)(6) motion) *with* SAC (where SPLC fails to identify a discrete agency action). Here, SPLC merely aggregates purported incidents of misconduct in an attempt to fashion dozens of reviewable, "final" agency actions. But, the APA is not a vehicle for such "system-wide" challenges. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990).

Thus, "flaws in the entire 'program' cannot be laid before the courts for wholesale correction under the APA . . . ." *Id.* at 873. Although SPLC does not style the SAC as an attack on an agency "program," its identification of the agency actions at issue is no less vague and impermissible under the APA. *Osage Producers Ass'n v. Jewell*, 191 F. Supp. 3d 1243, 1249-50 (N.D. Okla. 2016).

SPLC's interpretation of the court's ruling in *C.G.B. v. Wolf* confuses this very distinction. SPLC Resp. at 21; *see C.G.B., et al. v. Wolf, et al.*, 2020 WL 293511 (D.D.C. June 2, 2020). SPLC argues that, unlike in *C.G.B* where plaintiff alleged "general deficiencies in ICE's compliance with the PRR," in contrast, SPLC has provided extensive factual allegations detailing ICE's failure to enforce specific provisions of the PBNDS. SPLC Resp. at 21 (citing *C.G.B*, 2020 WL 293511, at *33). It is not a question of whether the allegations are general or specific, but rather if SPLC's allegations constitute a *final* agency action under the APA—or merely the aggregation of incidents, each of which constituting its own "final action." *Lujan*, 497 U.S. at 882-83. SPLC's argument that the PRR in *C.G.B.* is "dynamic" and the PBNDS is part of the Defendants' contracts with the Facilities, has no bearing on this question.

SPLC unpersuasively attempts to show the applicability of the APA by distinguishing *NIPNLG*. "Unlike in *NIPNLG*," argues SPLC, "where the district court found that ICE's policies on the COVID-19 pandemic were being 'implemented on a facility-by-facility and individual-by-individual basis,' ICE's PBNDS is just that – national detention standards with which Defendants must comply." SPLC Resp. at 20 (citing *NIPNLG*, 2020 WL 2026971, at *5). SPLC obviates that the PBNDS provides overall, national standards for visitation within the detention centers, but the application between those detention centers are implemented on a "facility-by-facility…basis." *NIPNLG*, 2020 WL 2026971, at *10. Here, SPLC's client-detainees are housed

at four detention facilities. *See* SAC at 15, 17, 18, and 20. The PBNDS is incorporated into contracts that post-date the PBNDS, and applies to Service Processing Centers, Contract Detention Facilities, and state and local government facilities. Renewed Mot. at 5; *cf.* SPLC Resp. at 19 ("Defendants' contract with each of the Facilities require compliance with the PBNDS and indicate that ICE will conduct periodic inspections to enforce such compliance."). Each Facility complies with the PBNDS guidance differently. In sum, an aggregation of conduct concerning how the Facilities apply the PBNDS is not a discrete "final agency action." *Lujan*, 497 U.S. at 882-83.

Finally, SPLC asserts that Defendants do not address SPLC's argument under 5 U.S.C. § 706(2)(A). SPLC Resp. at 21 n.10. This is incorrect. In its Renewed Motion, Defendants specifically state that "SPLC cites that Defendants' failure to enforce the PBNDS attorney access requirements are "not in accordance with law." Renewed Mot. at 35 (citing 5 U.S.C. § 706(2)(A)). But, as argued in the Renewed Motion, the PBNDS legal visitation standards that SPLC relies upon are not an "action [where] by which rights or obligations have been determined, or from which legal consequences will flow" but rather management expectations and guidelines for Facilities within ICE's detention system. Renewed Mot. at 35 (citing the 2008 and 2011 PBNDS at Preface); *see., e.g.*, *NIPNLG*, 2020 WL 2026971, at *10 ("[A]s to their access-to-counsel claims, Plaintiffs have failed to point to any statute or other source that requires Defendants to have taken specific and particular steps during the pandemic."). Accordingly, SPLC's APA claims should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants request the Court to grant its Partial Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Dated: August 4, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy of this motion on the Court and all parties of record by filing them with the Clerk of the Court through the CM/ECF system, which will provide electronic notice and an electronic link to these documents to all counsel of record.

Dated: August 4, 2020

/s/ Ruth Ann Mueller
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