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-RMM)

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' PARTIAL FRCP 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

This is a case about the federal government's deliberate decisions to detain noncitizens whom it is trying to deport in remote, isolated, prison-like detention facilities without sufficient infrastructure and far from legal resources, to fail to enforce its own binding rules on access to legal representation, and to discriminate against a well-known organization providing *pro bono* legal services to people detained in those facilities. Plaintiff Southern Poverty Law Center ("SPLC") brought this lawsuit in 2018 seeking to vindicate it and its clients' constitutional rights. Despite the fundamental rights at issue for the noncitizens in its custody, Defendants have sought to delay this case time and again. In their latest delay attempt, Defendants have moved for judgment on the pleadings on four of five of SPLC's remaining claims: its access to courts claim, full and fair hearing claim, Administrative Procedure Act ("APA") claim, and First Amendment claim. Dkt. 218. For the reasons discussed below, SPLC has adequately pleaded all its challenged claims, and the Court should deny Defendants' Partial FRCP 12(c) Motion for Judgment on the Pleadings, Dkt. 218, and allow this case to move forward with depositions and inspections.

BACKGROUND

SPLC provides free representation to people detained in multiple facilities in the Southeast, including Stewart Detention Center in Lumpkin, Georgia ("Stewart"), Pine Prairie ICE Processing Center in Pine Prairie, Louisiana ("Pine Prairie"), and LaSalle ICE Processing Center in Jena Louisiana ("LaSalle") (collectively, the "Facilities"). In its efforts to represent detained noncitizens at the Facilities, SPLC encounters significant challenges due to Defendants' policies, practices, and omissions. Defendants also interfere with SPLC's work informing and representing clients by discriminating against SPLC because of its viewpoint.

Immigration detention is civil, not criminal, in nature, and most individuals who are detained have a right to release on bond or parole except in specific and rare circumstances. The individuals whom Defendants detain have a fundamental liberty interest in release from those facilities, release that allows them to be with friends and family, to prepare their substantive immigration cases, secure and communicate with legal representatives, and to live freely outside government custody. Detained noncitizens who have legal representation are almost seven times more likely to secure release on bond than those without counsel. Dkt. 70 ("SAC") ¶ 2. But Defendants' policies, practices, and decisions not to enforce binding administrative rules ensure that most people they detain will not secure counsel. Those who do secure counsel then face obstacles meeting and communicating with them, either in person or remotely.

SPLC brought this case in 2018 on behalf of itself and the noncitizens it represents whom Defendants detain at the Facilities.[1] Dkt. 1. The operative Second Amended Complaint ("SAC") details myriad conditions at Defendants' Facilities that unlawfully obstruct SPLC's clients from access to their attorneys and prospective clients from access to legal counsel—which in turn hinders their ability to access the courts and have full and fair hearings to seek release via bond or parole. For example, the Facilities do not have an adequate number of or adequately designed attorney-client visitation rooms. SAC ¶¶ 121, 134-37, 189-90, 216-19. The two "rooms" at Pine Prairie are, in fact, cubicles whose thin walls do not reach the ceiling, failing to provide any semblance of confidentiality. *Id.* ¶ 227. SPLC attorneys cannot reliably schedule legal visits, either in-person or remote, with their clients at the Facilities. *Id.* ¶¶ 149-52, 220. When they do manage to schedule visits, the attorneys encounter significant delays at the Facilities, causing them to cut

[1] SPLC added Pine Prairie to the case in its First Amended Complaint. Dkt. 57. Defendants stopped detaining noncitizens at Irwin County Detention Center, so that portion of SPLC's claims is now moot. Dkt. 201 at 1, n.1.

client meetings short or cancel the meetings altogether. *Id.* ¶¶ 122, 141-45, 196-200, 225-26. Phones and video-teleconference consoles ("VTC") at the Facilities have poor connectivity, technical difficulties, and regularly cut out. *Id.* ¶¶ 126, 203. Moreover, some phone systems at the Facilities cannot accommodate necessary third parties like interpreters or medical experts. *Id.* ¶¶ 147, 204. Several of the Facilities maintain a strict prohibition on electronic devices, which impairs SPLC's ability to effectively meet with its clients. *Id.* ¶¶ 128, 195, 201, 236. Several of the Facilities also prohibit contact visitation, further hindering communication and impeding the building of trust and rapport between attorney and client. *Id.* ¶¶ 139-40.

These policies and practices prejudice SPLC's clients at the Facilities and prevent them from accessing the courts and having full and fair hearings to seek bond and parole. *Id.* ¶¶ 318-19. Taken in their totality, these policies and practices are the unconstitutional result of Defendants' wholesale failure to properly oversee and monitor their operators and their decision not to enforce the Performance Based National Detention Standards ("PBNDS"). *Id.* ¶¶ 302-15. Defendants' duty to ensure detained immigrants' constitutional rights is non-delegable. *Id.* ¶ 288.

Defendants also interfere with SPLC's work informing and representing clients by discriminating against SPLC because of its viewpoint. *Id.* ¶¶ 337-40. SPLC alleges that Defendants' agents engage in conduct aimed at interfering with the work of Southeast Immigrant Freedom Initiative ("SIFI") staff and volunteers. *Id.* ¶ 254. Guards at the Facilities have singled out a volunteer interpreter for an obtrusive security inspection and forced SPLC staff and volunteers to wait even when attorney-visitation rooms were available. *Id.* ¶ 209. When an ICE officer learned that the woman he had pulled over was an SPLC volunteer who had spent the day observing immigration court, he asked her if she was helping to "support illegal immigration." *Id.* ¶ 214.

While the lives and liberty of SPLC's clients are at stake, *see id.* ¶ 54 & n.13, Defendants' approach to this case has been to delay, and then delay again. SPLC initially filed this suit in 2018. Shortly thereafter, Defendants moved to sever and transfer venue of this case, which the Court denied in May 2019. Dkts. 47, 62. SPLC then filed the operative complaint in August 2019. Dkt. 70. In May 2020, SPLC moved for a temporary restraining order seeking removal of Defendants' barriers to access to counsel for SPLC's clients and to remedy the dangerous and punitive conditions at the Facilities during the COVID-19 pandemic. Dkt. 105. In June 2020, the Court granted that motion in part, finding that the conditions at the Facilities violated SPLC's clients' substantive due process rights. Dkt. 123. In the interim, Defendants moved to partially dismiss SPLC's SAC for lack of subject matter jurisdiction. Dkt. 117. In July 2020, Defendants renewed their motion to partially dismiss SPLC's SAC for lack of subject matter jurisdiction—once again not challenging the sufficiency of SPLC's complaint. Dkt. 133. Following the dismissal of only one of SPLC's claims, Dkt. 201, Defendants sought reconsideration of the Court's 2019 order denying their motion to sever and transfer venue. Dkt. 216. Defendants' instant motion is their most recent effort to drag out and delay resolution of Plaintiff's claims. Like Defendants' prior motions, it should be denied.

LEGAL STANDARD

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). To prevail on a Rule 12(c) motion, the movant must "demonstrate[] that no material fact is in dispute and that it is entitled to judgment as a matter of law." *Ronaldson v. Nat'l Ass'n of Home Builders*, 502 F. Supp. 3d 290, 296 (D.D.C. 2020) (quoting *Jimenez v. McAleenan*, 395 F. Supp. 3d 22, 30 (D.D.C. 2019)), *amended on reconsideration*, No. CV 19-1034 (CKK), 2021 WL 7210781 (D.D.C. June 3, 2021).

"[T]he standard of review is 'functionally equivalent' to that for a Rule 12(b)(6) motion" for failure to state a claim upon which relief can be granted. *Jimenez*, 395 F. Supp. 3d at 30 (quoting *Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 130 (D.C. Cir. 2012)). "[The] Court must first 'tak[e] note of the elements a plaintiff must plead to state [the] claim' to relief, and then determine whether the plaintiff has pleaded those elements with adequate factual support to state a claim to relief that is plausible on its face." *Blue v. District of Columbia*, 811 F.3d 14, 20 (D.C. Cir. 2015) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)) (internal quotation marks and alterations omitted). In evaluating the complaint, a court may consider "the facts alleged in the complaint, any documents attached to or incorporated in the complaint, matters of which a court may take judicial notice, and matters of public record." *Ronaldson*, 502 F. Supp. 3d at 296.

"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." *Ramirez v. Blinken*, No. 21-CV-1099 (CRC), 2022 WL 1795080, at *4 (D.D.C. Mar. 22, 2022) (quoting *Iqbal*, 556 U.S. at 678). To survive a 12(b)(6) or 12(c) motion, a complaint need not contain "detailed factual allegations." *Sellers*, 376 F. Supp. 3d at 91. Indeed, a complaint is sufficient if it contains enough facts "to raise a right to relief above the speculative level," even if "recovery is very remote and unlikely." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

The reviewing court must "construe the complaint in a light most favorable to the plaintiff and . . . accept as true all reasonable factual inferences drawn from well-pled factual allegations." *Ronaldson*, 502 F. Supp. 3d at 296. "The Court must construe the complaint liberally in plaintiff's favor and grant plaintiff the benefit of all reasonable inferences deriving from the complaint," but may ignore unsupported inferences and the plaintiff's own legal conclusions. *Sellers v. Nielsen*, 376 F. Supp. 3d 84, 91 (D.D.C. 2019).

Applying this standard, SPLC sufficiently pleaded its claims in its SAC. Defendants' motion should be denied.

ARGUMENT

I. SPLC Sufficiently Stated a Third-Party Access-to-Courts Claim (Count I).

The Fifth Amendment ensures no "person" is "deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Grounded in the Fifth Amendment's guarantee of procedural due process is the long-recognized right of "adequate, effective, and meaningful" access to the courts. *Broudy v. Mather*, 460 F.3d 106, 117 (D.C. Cir. 2006) (quoting *Harbury v. Deutsch*, 233 F.3d 596, 607 (D.C. Cir. 2000)) a*ff'd in part, rev'd in part, and remanded*, 536 U.S. 403 (2002), *vacated*, No. 99-5307, 2002 WL 1905342 (D.D.C. Aug. 19, 2002); *Bounds v. Smith*, 430 U.S. 817, 822 (1977), *overruled on other grounds by Lewis v. Casey*, 518 U.S. 343 (1996). This right applies to "any person," U.S. CONST. amend. V, including detained noncitizens. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (recognizing that "the Due Process Clause applies to all 'persons' within the United States"); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1510 (C.D. Cal. 1988) (recognizing that detained noncitizens are entitled to the right of access to courts), *aff'd sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990); *Nunez v. Boldin*, 537 F. Supp. 578, 582 (S.D. Tex. 1982) (same).

In *Christopher v. Harbury*, the Supreme Court identified two categories of access to court cases. 536 U.S. 403, 413 (2002). The first, "forward-looking cases," are cases where the plaintiff seeks to "open the courthouse door for desired litigation." *Id.* These cases include attempts by individuals in prison to obtain access the law library, access to counsel, or a waiver of filing fees that they cannot afford to pay. *Id.* The second category, "backward-looking cases," are cases "that cannot now be tried (or tried with all material evidence), no matter what official action may be in

the future." *Id.* at 413-14. In these cases, the plaintiffs allege that "[t]he official acts claimed to have denied access may allegedly have caused the loss or inadequate settlement of a meritorious case." *Id.* at 414 (footnotes omitted). This category has commonly consisted of cases where the plaintiff alleges a cover-up caused them to lose the opportunity to bring their case. *Id.*; *see also Broudy*, 460 F.3d at 118.

SPLC alleges that its clients—individuals in civil detention for the sole purpose of the government effectuating their removal from the United States—need to communicate with their legal representatives in order to have constitutionally sufficient access to the courts to seek release on bond or parole. *See, e.g.*, SAC ¶¶ 47, 93 ("Detained noncitizens are approximately seven times more likely to be released on bond when represented." (footnote omitted)). SPLC further alleges that Defendants' "policies, practices, and omissions" obstructing access to counsel unjustifiably impede its clients' ability to access the courts in violation of the Fifth Amendment. *Id.* ¶¶ 318-22. SPLC has adequately pleaded a forward-looking access to courts claim on behalf of its third-party clients, and Defendants' motion on this claim should be denied.

A. SPLC Is Not Asserting a "Backwards-Looking" Claim.

As an initial matter, SPLC is not alleging a "backwards-looking" claim, and Defendants' arguments on that point are irrelevant.[2] Unlike in *Harbury* or *Broudy*, SPLC does not allege that a cover-up or other "official acts" led to "the loss or inadequate settlement of a meritorious case" that "cannot now be tried (or tried with all material evidence)." *Harbury*, 536 U.S. at 413-14; *see*

[2] Because SPLC has not alleged a backwards-looking access to courts claim, the third element—causation—does not apply, and Defendants' arguments as to causation should be discarded as irrelevant. *See* Dkt. 218 at 23. Nevertheless, SPLC has amply described the barriers Defendants have erected that have interfered with SPLC's clients' access to the courts. *See, e.g.*, SAC ¶ 155 (limiting attorney phone calls to 20 minutes per client per day), ¶ 202 (cutting off calls after an hour "regardless of need or availability"), ¶ 222 (prohibiting SIFI's volunteer attorneys from meeting with clients).

also Broudy, 460 F.3d at 118. The plaintiffs in *Harbury* and *Broudy* were seeking to bring affirmative litigation against the government—litigation which, they alleged, the government effectively prevented or undermined through its own actions. *See Harbury*, 536 U.S. at 405-08 (the plaintiff alleged her right of access to the courts was violated by a CIA cover-up that prevented her from filing a suit to prevent her husband's death); *Broudy*, 460 F.3d at 108 (D.C. Cir. 2006) (WWII veterans alleged their right of access to the courts was violated by a government cover-up of harm caused by exposure to radiation). Those plaintiffs' procedural due process claims turned on allegations that they were forever robbed of their day in court by government cover-ups that prevented them from seeking relief in time or failed to provide evidence key to their underlying claims in separate, affirmative litigation. *Harbury*, 536 U.S. at 409-10; *Broudy*, 460 F.3d at 109-10.

Here, by contrast, SPLC's clients do not allege that Defendants covered up evidence crucial to some separate affirmative lawsuit against the government that they can now never bring. Rather, SPLC's clients are in a defensive position vis-à-vis the government, seeking to vindicate their liberty interests against Defendants who detain them. *See id.* ¶¶ 318-22; *see also* INA § 236(a) (providing for bond or conditional parole for noncitizens detained "pending a decision on whether the [noncitizen] is to be removed from the United States"). Their allegations of procedural due process violations turn on the obstacles Defendants put in their way when they try to access their legal representatives to prepare for bond or parole proceedings. *See, e.g.*, SAC ¶¶ 189-200 (discussing delays at Stewart impeding attorney-client meetings), ¶¶ 237-39 (discussing inaccessibility of confidential legal calls at Pine Prairie).

B. SPLC Adequately Pleaded a "Forward-Looking" Access to Courts Claim.

SPLC has brought a forward-looking access to courts claim: it is seeking to remove the "systemic official action" that "frustrates" its clients' access to the courts. *Harbury*, 536 U.S. at 413. In the post-conviction imprisonment context or the non-detained civil litigation context, a forward-looking access to courts claim under *Harbury* requires (1) "an arguable underlying claim," and (2) the "present foreclosure of a meaningful opportunity to pursue that claim." *Pinson v. U.S. Dep't of Justice*, 964 F.3d 65, 75 (D.C. Cir. 2020) (citing *Broudy*, 460 F.3d at 120-21) (applying the *Harbury* test to claim brought by individuals serving prison sentences seeking to proceed *in forma pauperis* in their appeal of civil lawsuits).

However, because SPLC's clients are in *civil* immigration detention—not prison—and are seeking to vindicate essential liberty interests against Defendants who detain them, a modified version of the *Harbury* test applies. *See Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1062-63 (C.D. Cal. 2019); *Lyon v. U.S. Immigr. & Customs Enf't*, 171 F. Supp. 3d 961, 980 (N.D. Cal. 2016); *Benjamin v. Fraser*, 264 F.3d 175, 190 (2d Cir. 2001). Specifically, SPLC's clients need not allege actual injury in the form of complete foreclosure to establish the second element of the test. As the SAC alleges the necessary harm, SPLC states a due process claim for access to courts.

1. SPLC has alleged an arguable underlying claim.

The first element of a *Harbury* access to court claim is an "arguable underlying claim." *Broudy*, 460 F.3d at 120-21. SPLC has adequately alleged the facts necessary to state a claim on this element because its clients have arguable underlying claims to bond and parole.

Defendants first argue that SPLC's claim does not concern the right of access to courts because release on both bond and parole is sought from an administrative agency. Dkt. 218 at 19.[3] But noncitizens are entitled to due process, including in immigration proceedings. *See Reno v. Flores*, 507 U.S. 292, 306 (1993). The Fifth Amendment forbids the Government from "depriv[ing]" any "person" of liberty "without due process of law." U.S. CONST. amend. V. Courts have consistently recognized that proceedings before immigration judges implicate the right to access the courts. *See, e.g.*, *Orantes-Hernandez*, 685 F. Supp. at 1510 (recognizing noncitizens' right to access the courts); *Nunez*, 537 F. Supp. at 582 (same). Bond and conditional parole hearings, which also take place before an immigration judge,[4] similarly implicate the right of access to courts.

Defendants next argue that bond and parole proceedings do not vindicate "fundamental" rights. Dkt. 218 at 19. But SPLC's clients' attempts to vindicate their *liberty* interests through bond or parole are constitutional claims regarding the fundamental right to liberty.[5] SPLC's clients

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[3] Defendants' reference to *Broudy*, Dkt. 218. at 19, is misleading: the *Broudy* Court recognized that the plaintiffs in that case "*argue[d]* that the constitutional right of access to the courts extends to administrative proceedings," but ultimately did not resolve the issue. 460 F.3d at 117 n.6 (emphasis added). *Broudy* certainly did not establish that the "right of 'access to courts' has not extended to administrative proceedings." Dkt. 218 at 19. Judicial restraint in the face of an issue the court need not decide is not the equivalent of a holding and establishes no precedent.

[4] *See* 8 U.S.C. § 1229a(a)(1) (authority for bond and conditional parole); 8 U.S.C. § 1231 (authority for detention); 8 C.F.R. § 1003.19(a) (regulation governing custody/bond determinations).

[5] Throughout their motion, Defendants focus on one type of parole for noncitizens: 8 U.S.C. § 1182(d)(5), which allows the "Secretary of Homeland Security, under whom ICE operates, to temporarily parole non-citizens applying for asylum who are 'neither a security risk nor a risk of absconding,'" in the service of such 'urgent humanitarian reasons or significant public benefit.'" *Heredia Mons v. Wolf*, No. CV 19-1593 (JEB), 2020 WL 4201596, at *1 (D.D.C. July 22, 2020) (quoting 8 U.S.C. § 1182(d)(5)(A)). Significantly, they overlook the parole provision in 8 U.S.C. § 1226(a), which "gives the Attorney General—and, by extension of DOJ's internal organizational structure, the immigration judges—discretion on whether such an individual may continue to be detained during the proceedings or released on bond or conditional parole." *Texas v. United States*, 524 F. Supp. 3d 598, 613 (S.D. Tex. 2021).

require "meaningful" access to courts—which involves access to counsel—in order to seek freedom from detention.[6] *See Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Orantes-Hernandez*, 685 F. Supp. at 1510. And courts around the country have repeatedly found that procedural (or substantive) due process requires access to immigration bond proceedings given the liberty interest at stake in prolonged immigration detention. *See, e.g.*, *Joseph v. Decker*, No. 18-CV-2640 (RA), 2018 WL 6075067, at *12 (S.D.N.Y. Nov. 21, 2018); *J.G. v. Warden, Irwin Cty. Det. Ctr.*, 501 F. Supp. 3d 1331 (M.D. Ga. 2020), *appeal dismissed sub nom. Jinxu Gao v. Paulk*, No. 21-10158-JJ, 2021 WL 3089259 (11th Cir. May 18, 2021).

SPLC has sufficiently alleged that its detained clients at the Facilities have an underlying claim relating to their fundamental right to liberty—seeking bond or parole from the immigration court in order to secure their physical liberty from government detention. *See* SAC ¶¶ 89-95. Indeed, it is axiomatic that a person seeking to secure their physical liberty from detention is seeking to vindicate a fundamental right. *See Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty [the Fifth Amendment Due Process] Clause protects."). This case concerns SPLC's clients' fundamental interest in physical liberty. "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *see also Parham v. J. R.*, 442

[6] Defendants misconstrue Plaintiff's claim: SPLC is not attempting to vindicate its clients' liberty interests by seeking "release on both bond and parole from the district courts." Dkt. 218 at 19-20. Rather, Defendants' detention of SPLC's clients in a remote facility, with an inadequate number of visitation rooms, restrictions on visitation hours, delays in attorney access, lack of confidentiality in visitation rooms, lack of meaningful access to interpretation services, and barriers to remote[] and confidential[] communicat[ions]" unjustifiably obstruct SPLC's clients' access to the courts that can grant their release—immigration courts. SAC ¶¶ 319, 322.

U.S. 584, 600 (1979) (observing the "substantial liberty interest in not being confined unnecessarily"); *Harris v. Bowser*, No. CV 18-768 (CKK), 2021 WL 4502069, at *7 (D.D.C. Oct. 1, 2021). The "loss of personal liberty through imprisonment" is a recognized private interest, and the Supreme Court has "made clear that its threatened loss through legal proceedings demands 'due process protection.'" *Turner v. Rogers*, 564 U.S. 431, 445 (2011) (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)). SPLC's clients' fundamental interest in their physical liberty is not lessened by the fact that they are being detained for the purposes of adjudicating their removal. *See, e.g.*, *Clerveaux v. Searls*, 397 F. Supp. 3d 299, 309 (W.D.N.Y. 2019) ("Clerveaux's interest in his freedom pending the conclusion of his removal proceedings deserves great weight and gravity."). Plaintiff has sufficiently alleged its clients' interest in their physical freedom to state its access to courts claim. *See* SAC ¶¶ 82, 116, 318.

The cases Defendants rely on are inapposite. The court in *Pinson* took no position on the plaintiff's underlying constitutional claim, and instead found that she had failed to meet the second element of an access-to-courts claim. 964 F.3d at 67, 75. In *Asemani v. U.S. Citizenship and Immigration Services*, the court narrowly considered the impact of the Prison Litigation Reform Act's "three strikes rule" in preventing an individual in *criminal* detention from proceeding *in forma pauperis* in a subsequent mandamus action. 797 F.3d 1069 (D.C. Cir. 2015). The *Asemani* Court concluded that the plaintiff's collateral mandamus action did not fall into the narrow line of cases wherein courts recognized a "constitutional requirement to waive court fees in civil cases." *Id.* at 1077-78. SPLC has alleged that Defendants' regulations and practices—rather than a statutory bar—are impeding its *civilly*-detained clients' right of access to courts so that they can

defend themselves *against* the government's efforts to detain them and vindicate their fundamental liberty interest. *See, e.g.*, SAC ¶ 319.[7]

Franklin v. District of Columbia, 163 F.3d 625, 631 (D.C. Cir. 1998),[8] and *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 11 (1979), are similarly inapposite as they refer to parole for post-conviction incarcerated individuals. *See* Dkt. 218 at 19. Individuals in immigration detention are in civil detention, where parole and bond are the principal mechanisms for freedom from detention while a noncitizen is in removal proceedings. *See Mons v. McAleenan*, No. CV 19-1593 (JEB), 2019 WL 4225322, at *1-2 (D.D.C. Sept. 5, 2019) (explaining the circumstances under which an asylum-seeker should be paroled).

Moreover, unlike *Franklin* and *Greenholtz*, this case does not involve a challenge to the procedures by which bond or parole are adjudicated. *Compare* SAC ¶¶ 317-22 (challenging Defendants' policies and practices which obstruct SPLC's clients' access to courts), *with Greenholtz*, 442 U.S. at 3-4 (challenging Nebraska parole statutes and procedures), *and Franklin*, 163 F.3d at 631 (challenging the District of Columbia's failure to provide official interpreters in parole and other hearings). Rather, SPLC—on behalf of its clients—is seeking relief from Defendants' policies, practices, and omissions that obstruct its clients' access to bond and parole proceedings in the first place. *See Procunier*, 416 U.S. at 419. Ultimately, "immigration detention is an extraordinary liberty deprivation that must be 'carefully limited.'" *J.G.*, 501 F. Supp. 3d at

[7] In addition, SPLC's clients' efforts to seek release on bond or parole involve the fundamental right to liberty, which is distinct from "the mine run of [civil] cases" and involve a right of "basic importance to our society." *Asemani*, 797 F.3d at 1077 (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996). The right to physical liberty in this respect stands in contrast to those cases where the Court has found lesser constitutional protections, such as securing bankruptcy discharge or challenging the termination of welfare benefits. *Id.* (citations omitted).

[8] In *Franklin*, the court did "not take issue with the proposition that when liberty interests are at stake, the Due Process Clause gives prisoners certain procedural rights, including the right to obtain an understanding of the proceedings." 163 F.3d at 634 (citations omitted).

1336 (quoting *United States v. Salerno*, 481 U.S. 739, 750 (1987)). The Supreme Court has "always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty," *Foucha*, 504 U.S. at 80 (quoting *Salerno*, 481 U.S. at 750), and this Court should refuse the government's attempts to do so here, *Hamdi v. Rumsfeld*, 542 U.S. 507, 529-30 (2004).

Defendants' final argument on this element appears to be that SPLC must fully plead its underlying claim "in accordance with Federal Rule of Civil Procedure 8(a)." Dkt. 218. at 20 (quoting *Harbury*, 536 U.S. at 417-18). However, that requirement applies only to "a backward-looking access suit." *Harbury*, 536 U.S. at 417. Moreover, even if that standard were to apply, SPLC has adequately alleged that its clients have been "den[ied] the opportunity to litigate" their underlying claims for physical liberty through bond or parole. *See* SAC ¶¶ 89, 92, 318. The SAC alleges specific instances where Defendants' official acts denied access and caused the loss of meritorious bond cases. SAC ¶ 200 (describing a SIFI volunteer's attempt to meet with a detained individual before his bond hearing but was prevented from meeting with the client and the client's bond was ultimately denied), ¶ 232 (describing how Pine Prairie's inadequate process for mailing documents caused one individual to lose critical exhibits for their bond hearing, and whose bond request was ultimately denied). The underlying causes of action—freedom from detention by way of bond or parole—are "described in the complaint," as are Defendants' "official acts frustrating the litigation." SAC ¶ 322. Defendants' failure to provide an adequate number of visitation rooms, restriction on visitation hours, failure to provide confidential attorney-client meeting spaces, failure to provide meaningful access to interpretation services, and barriers that prevent clients from remotely and confidentially communicating with their attorneys have frustrated SPLC's clients' ability to access courts to secure their liberty from immigration detention. *Id.*

Thus, SPLC has sufficiently alleged that its clients have arguable underlying claims to bond and parole, and has satisfied that element of the *Harbury* test at the 12(c) stage.

2. The "complete foreclosure" requirement does not apply to civil immigration detainees, and SPLC adequately alleged the necessary harm.

No court has applied the "complete foreclosure" requirement in the context of forward-looking immigration detention cases.[9] The Court in *Harbury* built on its prior decision in *Lewis v. Casey*, a class action lawsuit brought by prisoners seeking to improve access to law libraries and legal assistance programs. 518 U.S. at 349. In *Lewis*, the Supreme Court imposed an "actual injury" standard, which requires identification of a specific "past or imminent official interference with individual inmates' presentation of claims to the courts." *Id. Harbury* incorporated *Lewis*'s "actual injury" requirement into its forward-looking access to courts test by requiring a plaintiff to show their underlying claim was "completely foreclosed," *i.e.* they were "presently den[ied] an opportunity to litigate." *Broudy*, 460 F.3d at 121 (quoting *Harbury*, 536 U.S. at 413, and *Harbury v. Deutsch*, 233 F.3d 596) (describing the second element of the *Harbury* test).

The foreclosure requirement in *Harbury* has been applied to post-conviction incarcerated plaintiffs and to civil litigants who are not detained. *See, e.g.*, *Isaac v. Samuels*, 132 F. Supp. 3d 56 (D.D.C. 2015) (individual imprisoned post-conviction); *William v. Savage*, 538 F. Supp. 2d 34, 42 (D.D.C. 2008) (non-detained civil litigants). The Court should follow the approach of *Lyon*, 171 F. Supp. 3d 961, *Torres*, 411 F. Supp. 3d 1036, and *Benjamin*, 264 F.3d 175, where a modified

[9] The D.C. Circuit in *Broudy* explained the binding *Harbury* test as stemming from the Supreme Court's decision "and the portions of our decisions in [prior D.C. Circuit *Harbury* opinions] which have not been disturbed." 460 F.3d at 120 (footnote omitted).

harm standard was applied to claims alleging obstruction of access to counsel brought by individuals in immigrant detention (*Lyon* and *Torres*) and pretrial detention (*Benjamin*).[10]

In *Torres*, the court declined to impose a higher injury standard on detained noncitizens' procedural due process claims. 411 F. Supp. 3d 1036. The court evaluated the procedural due process claims of a class of noncitizens in an immigration detention center where their access to counsel was obstructed by DHS practices, which included limiting the duration of phone calls, providing insufficient confidential meeting rooms, and forcing attorneys to wait for long periods of time to meet with their clients. *Id.* at 1045. The court determined that the "cumulative nature of the hindrances alleged . . . were tantamount to the denial of counsel," *id.* at 1060, and sufficiently pleaded a procedural due process violation, *id.* at 1063. The court did not "review the fundamental fairness of any particular hearing," finding it sufficient at the pleading stage that the plaintiffs were in immigration detention and they had "allege[d the] Defendants' actions or inaction impeded their ability" to properly present their case and the alleged restrictions put them "at risk of procedural defaults." *Id.*

In *Lyon*—like *Torres*, decided more than a decade after *Harbury* and *Lewis*—the court explicitly rejected application of the *Lewis* "actual injury" requirement and instead required the detained noncitizen plaintiffs only "to establish a real risk . . . that the restrictions 'may' or 'potentially' affect the outcome of [the underlying legal proceedings]; [that] there are 'plausible scenarios' in which outcomes are affected."[11] 171 F. Supp. 3d at 980, 983 (quoting *Colmenar v.*

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[10] *Kelly v. Farquharson*, 256 F. Supp. 3d 93, 100-01 (D. Mass. 2003), included a backward-looking access to court claim based on access to the law library and a missing file while the noncitizen was detained at a correctional facility, and is therefore distinguishable.

[11] Although the courts in *Torres* and *Lyon* grounded their analysis of the access-to-counsel claim in the Fifth Amendment right to a full and fair hearing, the reasoning is equally applicable to SPLC's access to courts claim. *Torres*, 411 F. Supp. 3d at 1063; *Lyon* 171 F. Supp. 3d at 977.

I.N.S., 210 F.3d 967, 971 (9th Cir. 2000)). The *Lyon* Court relied primarily on the Second Circuit's reasoning in *Benjamin v. Fraser*, 264 F.3d at 190. *Benjamin* was a challenge by individuals in pretrial criminal detention against regulations which obstructed their ability to meet with their attorneys and violated their right of access to the courts and counsel. *See generally* 264 F.3d 175.

Torres, *Lyon*, and *Benjamin* apply a modified standard to access-to-counsel related procedural due process claims outside the post-conviction context for two reasons. First, *Lewis* involved more attenuated constitutional claims. Because there is no "freestanding right to a law library or legal assistance program," an access to courts claim founded on denial of such access must "demonstrate that the alleged shortcomings in the library or legal assistance program hindered [the plaintiffs'] efforts to pursue a legal claim." 518 U.S. at 350-51. *Torres*, *Lyon*, and *Benjamin*, by contrast, involved claims that the access barriers *themselves* were constitutional violations. *Torres*, 411 F. Supp. 3d at 1063-64; *Lyon*, 171 F. Supp. 3d. at 980; *Benjamin*, 264 F.3d at 185 ("While a prisoner complaining of poor law libraries does not have standing unless he can demonstrate that a direct right—namely his right of access to the courts—has been impaired, in the context of the right to counsel, unreasonable interference with the accused person's ability to consult counsel is itself an impairment of the right.").

Second, the interest of people imprisoned following a criminal conviction in using due process access rights "as a sword to upset the prior determination of guilt" is quite different from the interest of pretrial or civil immigration detainees who seek to use it "as a shield" from

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The right of noncitizens in immigration detention to access the courts, like the right to a full and fair hearing, stems from the Fifth Amendment and implicates the ability to meaningfully access counsel and requires detention officials to "refrain from placing obstacles in the way of communication between detainees and their attorneys." *Orantes-Hernandez*, 685 F. Supp. at 1510.

prosecution or continued detention.[12] *Benjamin*, 264 F.3d at 186 (quoting *Murray v. Giarratano*, 492 U.S. 1, 7 (1989)); *see also The Right to Be Heard from Immigration Prisons: Locating a Right of Access to Counsel for Immigration Detainees in the Right of Access to Courts*, 132 Harv. L. Rev. 726, 742 (2018) ("[W]here standing in the postconviction context protects against frivolous claims raised by prisoners who have exhausted their appeals, pretrial criminal and immigration detainees are often facing the first stage of their proceeding, in the front line of defense.").

For the same reasons explained by the courts in *Benjamin*, *Lyon*, and *Torres*, the *Harbury* standard requiring actual injury in the form of complete foreclosure does not apply to this case. Instead, all that is required is that access to a "meaningful opportunity to pursue [a] claim," *Broudy*, 460 F.3d at 121, may have been affected or impeded, *Lyon*, 171 F. Supp. 3d at 923; *Torres*, 411 F. Supp. 3d at 1063. As in *Torres*, *Lyon*, and *Benjamin*, SPLC makes a direct claim on behalf of its clients that the access barriers at the Facilities are constitutional due process violations. *See* SAC ¶¶ 317-22. Moreover, SPLC's clients seek to use their due process access rights to consult with their attorneys "as a shield" to protect them from continued detention and to vindicate their fundamental liberty interests. *Id.* ¶¶ 89, 318. The policy concerns that motivated *Lewis* also are not present in the pretrial or civil immigration detention context: the right of noncitizens in immigration detention to access the courts, like the right to a full and fair hearing, implicates the

[12] Courts have repeatedly found individuals in immigration detention to be entitled to the same protections and standards as those in pretrial detention. *See e.g.*, *Adekoya v. Chertoff*, 431 Fed. App'x 85, 88 (3d Cir. 2011) ("Because [the plaintiff] was an immigration detainee at the time of the alleged constitutional violations, he was entitled to the same protections as pretrial detainee." (citations omitted)); *E. D. v. Sharkey*, 928 F.3d 299, 306–07 (3d Cir. 2019) (collecting cases where courts expressly held that "immigration detainees are entitled to the same due process protections" as pretrial detainees); *In re Kumar*, 402 F. Supp. 3d 377, 383 (W.D. Tex. 2019) (declining to apply an "unnecessarily restrictive" prison conditions standard in the case of a detained noncitizen, noting that "[w]ords matter—a detainee is not a prisoner. These words have different definitions. This difference is not merely semantic nor are the words interchangeable. An individual seeking asylum is not akin to a criminal prisoner").

ability to meaningfully access counsel and requires detention officials to "refrain from placing obstacles in the way of communication between detainees and their attorneys." *Orantes-Hernandez*, 685 F. Supp. at 1510; *see generally The Right to be Heard*, 132 Harv. L. Rev. (discussing the policy implications of the narrowed holding in *Lewis*).

SPLC has adequately pleaded this claim to satisfy this modified harm standard. Like this case, *Torres* and *Lyon* involved due process claims based on numerous phone restrictions at ICE detention centers that created significant barriers to detained noncitizens being able to speak with their attorneys and prepare their cases. *Torres*, 411 F. Supp. 3d at 1044-45; *Lyon*, 171 F. Supp. 3d at 982-83. Both sets of plaintiffs alleged, among other things, that unconstitutional restrictions on phone access affected their ability to seek release. *Torres*, 411 F. Supp. 3d at 1045; *Lyon*, 171 F. Supp. 3d at 964-65. The *Lyon* Court found that the plaintiffs met the modified harm standard because—at the summary judgment phase—the plaintiffs had submitted examples of detained noncitizens who were unable to communicate with their attorneys due to, *inter alia*, the restrictions on phone calls, and their inability to contact counsel or family members to assist in the collection of documents needed for bond. *See id.* at 982-83. At the motion to dismiss phase, the *Torres* Court concluded that the plaintiffs had stated a procedural due process claim by alleging "restrictions on telephone access as well as difficulty with legal mail, in-person meetings, and numerous other obstacles," which prevented them from communicating with their legal representatives and "put them at risk of procedural defaults." 411 F. Supp. 3d at 1060, 1063-64.

As in *Torres* and *Lyon*, SPLC has alleged sufficient obstructions to state a claim. *See, e.g.*, SAC ¶ 200 (explaining that an attorney's inability to meet with a client for over an hour led to the noncitizen's bond being denied), *id.* ¶ 203 (describing how technical issues on a VTC and the client's being taken away for "count" prevented the attorney from reviewing the client's

declaration), *id*. ¶ 235 (noting that due to Pine Prairie's remote location, SIFI was unable to access an interpreter in the client's indigenous language, which prevented SIFI from meeting with the client for more than four months, thereby prolonging their detention).[13] These allegations, "along with the nature and breadth of the [access] restrictions and their potential impact upon detainees' ability to communicate with counsel, relatives, government agencies, etc. are sufficient to establish a real risk" for SPLC's clients "that the restrictions 'may' or 'potentially' affect the outcome" of their bond and parole proceedings, especially at the 12(c) stage where the Court must construe the pleadings in the light most favorable to SPLC and grant SPLC all favorable inferences stemming from its well-pleaded allegations. *See Lyon*, 171 F. Supp. 3d at 983.

Under the modified *Harbury* standard, SPLC has sufficiently alleged that its clients have arguable underlying claims, and that Defendants' actions obstructing SPLC's clients' access to counsel have impeded "meaningful opportunity[ies] to pursue [] claim[s]" for relief from physical restraint via bond or parole. *Broudy*, 460 F.3d at 121; *Lyon*, 171 F. Supp. 3d at 923; *Torres*, 411 F. Supp. 3d at 1063. Defendants' motion for judgment on SPLC's first claim should be denied.

II. SPLC Sufficiently Stated a Procedural Due Process Claim for Violation of the Right to a Full and Fair Hearing (Count III).

In its third claim for relief, SPLC alleged that Defendants' conduct violated its clients' right to a full and fair proceeding. The right to a "full and fair hearing" is largely focused on the ability to present evidence—including the ability to reach out to witnesses, obtain declarations, and obtain evidence from a variety of sources—all of which are necessary in a bond or parole proceeding. *See, e.g.*, *Lyon*, 171 F. Supp. 3d at 981. The right to access to counsel is subsumed within the right

[13] Moreover, these barriers to SPLC's clients' ability to access their counsel to assist in bond or parole proceedings are recognized violations of noncitizens' access to courts. *Orantes-Hernandez*, 685 F. Supp. at 1510 (citing *Procunier*, 416 U.S. at 419).

to a full and fair hearing. *See, e.g.*, *Colindres-Aguilar v. I.N.S.*, 819 F.2d 259, 261 n.1 (9th Cir. 1987) ("Petitioner's right to counsel . . . is a right protected by the Fifth Amendment due process requirement of a full and fair hearing." (internal citations omitted)).

Defendants' argument against SPLC's full and fair hearing claim appears to turn on two points, neither of which applies in the context of civil immigration detention. First, Defendants again argue that there is no liberty interest in bond or parole. Dkt. 218 at 24-25. As previously explained, SPLC's clients are seeking to vindicate their liberty interest in being free from confinement. *See Zadvydas*, 533 U.S. at 690. Given that SPLC's clients are held in civil detention, *Sandin v. Conner*, 515 U.S. 472, 484 (1995) (as applied in *Franklin v. District of Columbia*) is inapplicable. Dkt. 218 at 24 (citing *Franklin*, 163 F.3d at 631). SPLC's clients are not "prisoners" subject to a "restraint" that "'imposes atypical and significant hardship' as compared with 'the ordinary incidents of prison life.'" *Franklin*, 163 F.3d at 631 (quoting *Sandin*, 515 U.S. at 484). Nor are they serving a sentence where, if they are denied bond or parole, they will not suffer a loss of liberty because they will simply "continue to serve [their] sentence under the same conditions as [their] fellow inmates." *Ellis v. D.C.*, 84 F.3d 1413, 1418 (D.C. Cir. 1996). Instead, SPLC's clients seek access to a full and fair hearing on bond and parole so that they may be free from confinement during the pendency of the civil removal proceedings the government has brought against them. *See* Sec. I.B.1., *supra*; *see also Morrow v. U.S. Parole Com'n*, No. CV 12-700 DSF, 2012 WL 2877602, at *3 (C.D. Cal. Mar. 20, 2012) (noting the "value of providing a full and fair hearing" to individuals in their parole hearing). As such, SPLC's clients have a liberty interest that is subject to due process protections. *See Hernandez v. Sessions*, 872 F.3d 976, 992-93 (9th Cir. 2017) (recognizing the private interest of "freedom from imprisonment" as "fundamental" as applied to immigration detention); *Linares Martinez v. Decker*, No. 18-CV-6527 (JMF), 2018 WL

5023946, at *3 (S.D.N.Y. Oct. 17, 2018) ("[W]here, as here, the Government seeks to detain an alien pending removal proceedings," due process required the government to "prov[e] that such detention is justified").

Second, Defendants confusingly cite caselaw from the class action context to argue that SPLC needs to meet an imaginary "*de facto* class-wide" standard that exists nowhere in the law. Dkt. 218 at 25. As the Court well knows, this is not a class action. SPLC does not need to show that every single one of its clients has standing to bring a procedural due process claim. Instead, SPLC has adequately alleged that Defendants' policies and practices restricting the ability of SPLC to communicate with its clients violate the three-pronged procedural due process framework articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976): (1) the interest at stake for the individuals; (2) the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards; and (3) the interest of the government in using the current procedures rather than additional or different procedures. *Id*. at 324; *see Lyon*, 171 F. Supp. 3d at 987-88 (applying the *Mathews* framework to the noncitizen plaintiffs' violation of the right to a full and fair hearing claim). The SAC identifies (1) the interests at stake for SPLC's clients, *see, e.g.*, SAC ¶ 333 (interest in avoiding prolonged detention); (2) the risks of erroneous deprivation, *id.* ¶ 200 (inability to consult with an attorney led to SPLC's client's bond being denied); and (3) that the government's interest is *de minimis*, *id.* ¶¶ 40, 43, 334.

SPLC stated a claim to relief on its full and fair hearing claim. Defendant's motion should be denied.

III. SPLC Sufficiently Stated an APA § 706(2) Claim for Defendants' Decision Not to Enforce the PBNDS (Count VI).

Section 706(2)(A) of the APA allows a court to "hold unlawful [or] set aside agency action, findings, and conclusions found to be, . . . arbitrary, capricious, . . . or otherwise not in accordance

with law." 5 U.S.C. § 706(2)(A).[14] SPLC's SAC contains one APA claim, alleging that Defendants' failure to ensure compliance with the PBNDS is "arbitrary and capricious" and that Defendants' violations of Fifth Amendment guarantees of attorney access and of SPLC's First Amendment rights are "not in accordance with law."[15] *See* SAC ¶¶ 352-54. Defendants seek judgment on the pleadings solely on SPLC's "arbitrary and capricious" claim involving the PBNDS.[16] *See generally* Dkt. 218 at 26-36 (discussing only PBNDS and not constitutional basis for APA claim). As SPLC adequately pleaded particularized, final agency action by Defendants not to enforce compliance with the binding PBNDS, Defendants' motion fails.

A. SPLC Adequately Pleaded Particularized Agency Action.

"[T]he term 'agency action' undoubtedly has a broad sweep." *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004). The APA defines "agency action" broadly to include

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[14] Section 706(2)(B) is also a source for the standard of review for claims challenging an agency's constitutional violations. *See* 5 U.S.C. § 706(2)(B) (allowing courts to hold unlawful and set aside agency action found to be "contrary to constitutional right, power, privilege, or immunity"). To the extent the Court concludes that the constitutional aspect of SPLC's APA claim should have been brought under § 706(2)(B), SPLC respectfully requests that the Court apply that standard *sua sponte*, as SPLC is alleging that Defendants' actions are *ultra vires* and the § 706(2) standards generally seek to require agencies to act within the bounds of their legal authority. *See, e.g.*, *Collins v. Yellen*, 141 S. Ct. 1761, 1795 (2021) (Gorsuch, J., concurring in part) (describing § 706(2)(B) violation as *ultra vires*); *Adamski v. McHugh*, 304 F. Supp. 3d 227, 236 (D.D.C. 2015) (discussing how courts often describe § 706(2)(A) and § 706(2)(C) claims as *ultra vires* claims).

[15] Defendants include in their Motion a misplaced argument about the requirements of an APA § 706(1) claim. Dkt. 218 at 28. SPLC has not alleged a § 706(1) violation. *See* SAC ¶¶ 353-54 (citing only § 706(2)(A) for basis of APA claim). A § 706(1) claim requires that an agency have a "discrete and mandatory" duty to take a specific action. *Connecticut v. U. S. Dep't of the Interior*, 344 F. Supp. 3d 279, 293-95 (D.D.C. 2018). A § 706(2)(A) "not in accordance with law" claim, by contrast, analyzes the broader question of whether an agency's actions are *ultra vires*. *See City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013). As SPLC did not plead any § 706(1) violations by Defendants, their arguments on that point are irrelevant and should be set aside by the Court.

[16] Defendants thereby waive any argument that the Court should grant judgment on the pleadings on the portion of SPLC's APA claim grounded in alleged constitutional violations, i.e. First and Fifth Amendment violations.

both "the equivalent" of official decisionmaking and "failure[s] to act." 5 U.S.C. §§ 551(13), 701(b)(2) ("agency action" for judicial review provisions of the APA carries same meaning given by § 551). Agency action must be "particularized," and not a "generalized complaint about agency behavior."[17] *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015) (quoting *Bark v. United States Forest Service*, 37 F. Supp. 3d 41, 51 (D.D.C. 2014)). A claim is sufficiently particularized if it challenges, for example, an agency's "alleged practice of acting on permit applications only after a lawsuit was threatened or filed," *Phoenix Herpetological Soc'y, Inc. v. U.S. Fish & Wildlife Serv.*, No. 19-CV-00788 (APM), 2021 WL 620193, at *2 (D.D.C. Feb. 17, 2021), an agency's "routine[] and systematic[] fail[ures] to abide by a binding, official agency directive," *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 120 (D.D.C. 2018), or an agency's policy of "consider[ing] . . . an allegedly impermissible factor in making custody determinations," *R.I.L-R*, 80 F. Supp. 3d at 184.

SPLC clearly pleaded the "particularized" element of its APA claim "with adequate factual support to state a claim to relief that is plausible on its face." *Blue*, 811 F.3d at 20 (quotation omitted). Far from alleging a grab-bag of "anecdotal actions" or disparate "categories" of "agency practices" as Defendants argue, Dkt. 218 at 26, SPLC alleges that Defendants decided not to enforce compliance with the PBNDS, and challenges that agency action insofar as it affects

[17] Defendants twice cite *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), to argue that SPLC did not meet the standard for "particularized" agency action. Dkt. 218 at 27, 28. But *Norton*, where the Court rejected "pervasive" judicial oversight of "broad statutory mandate[s]" to "manage" federal programs under § 706(1), is inapposite to SPLC's § 706(2) claim alleging particularized agency action violating clear constitutional and regulatory requirements. *See All. To Save Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1, 10 (D.D.C. 2007) (*Norton* does not control § 706(2) claims); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 482 F. Supp. 2d 1248, 1264 (W.D. Wash. 2007) (same).

Stewart, Pine Prairie, and LaSalle.[18] *See Torres*, 411 F. Supp. 3d at 1069 ("Because Plaintiffs allege that the PBNDS are contractually binding, the Court determines that any past or ongoing non-compliance at Adelanto [immigration detention facility] is allegedly the result of an agency decision not to enforce the terms of its contract."). In the SAC, SPLC clearly alleges that "Defendants wholly fail to enforce the PBNDS." SAC ¶ 303. SPLC describes at length Defendants' adoption of the PBNDS, along with its purpose and relevant content, citing numerous specific sections related to visitation and attorney access. *Id.* ¶¶ 288-301. Defendants entered into contracts regarding the operation of Stewart, Pine Prairie, and LaSalle, all of which require

[18] Part of SPLC's *Accardi* claim and its Fifth Amendment claims, which also fall under its APA "contrary to law" claim, is that Defendants' decision to contract with the remote, isolated facilities at Stewart, Pine Prairie, and LaSalle was part of its policy or practice of systematically violating the constitutional rights of detained individuals. Defendants argue in a conclusory footnote that two sections of the INA render unreviewable "decisions to contract for or construct facilities." Dkt. 218 at 27 n.6 (citing 8 U.S.C. §§ 1231(g), 1252(a)(2)(B)(ii)). Not so. Section 1231(g) addresses "the government's brick and mortar obligations for obtaining facilities in which to detain [noncitizens]." *Reyna as next friend of J.F.G. v. Hott*, 921 F.3d 204, 209 (4th Cir. 2019). Courts have interpreted 1231(g) to give DHS discretion to house a detainee in any available facility. *See, e.g.*, *Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999); *Hassoun v. Searls*, 453 F. Supp. 3d 612, 620 (W.D.N.Y. 2020) (citing *Wood v. United States*, 175 F. App'x 419, 420 (2d Cir. 2006)). Section 1252(a)(2)(B)(ii) strips courts of jurisdiction to review the decision of where to house a particular detainee within the system—as the unpublished, nonbinding case Defendants cite clearly states. *Sinclair v. Att'y Gen. of U.S.*, 198 F. App'x 218, 222 n.3 (3d Cir. 2006). But neither statute, nor both statutes read together, renders unreviewable the initial decision to contract with the remote, isolated, prison-like facilities at Stewart, LaSalle, or Pine Prairie, given that their layout guarantees inadequate space for in-person visitation and their location erects barriers to access to courts and full and fair hearings. SAC ¶¶ 263–87. Finally, § 1231(g) requires the government to "arrange for *appropriate* places of detention." 8 U.S.C. § 1231(g)(1) (emphasis added). While the agency may be granted some deference to interpret the word "appropriate," *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), it is self-evident that the agency cannot interpret it in a way that would violate detainees' constitutional rights. *Cf. J.J. Cassone Bakery, Inc. v. N.L.R.B.*, 554 F.3d 1041, 1044 (D.C. Cir. 2009) ("[A] reviewing court owes no deference to the agency's pronouncement on a constitutional question.") (quoting *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1173–74 (D.C. Cir. 1980)). Nor can the government simply invoke "discretion" to avoid liability for its decisions. *Palamaryuk by & through Palamaryuk v. Duke*, 306 F. Supp. 3d 1294, 1303 (W.D. Wash. 2018) ("Decisions that violate the Constitution cannot be 'discretionary[.]'" (quoting *Wong v. United States*, 373 F.3d 952, 963 (9th Cir. 2004)) (alterations omitted)).

compliance with the PBNDS and indicate that ICE will conduct periodic inspections to enforce such compliance. *Id.* ¶¶ 265-70 (LaSalle), 277-80 (Stewart), 281-85 (Pine Prairie). Defendants have numerous components ostensibly dedicated to detention oversight. *Id.* ¶¶ 304-08. Incorporating by reference DHS's Office of Inspector General ("OIG") and NGO reports, SPLC alleges that Defendants systematically fail to enforce the PBNDS through inadequate inspections, failure to address identified deficiencies, disregard for visitation rights and telephone standards, and "a 'checklist culture'" of "pre-planned, perfunctory reviews of detention centers that are designed to result in passing ratings." *Id.* ¶¶ 309-12. SPLC also includes extensive allegations of the inadequacies at LaSalle, Pine Prairie, and Stewart, which, read in concert with SPLC's explanation of what the PBNDS require, clearly detail how Defendants' decision not to enforce the PBNDS is applied at these three facilities. *Id.* ¶¶ 134-64 (LaSalle), 189-214 (Stewart), 215-56 (Pine Prairie); 293-300 (PBNDS requirements).

Defendants' reliance on *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), is misplaced.[19] In *Lujan*, the Supreme Court barred, at the summary judgment stage, an APA

[19] Other cases Defendants rely upon are similarly unavailing on this point. Although Defendants cite them in sections on finality and the elements of an *Accardi* claim, they cite them to argue that SPLC failed to allege a discrete or particularized agency action, and as such SPLC responds to them here. Both *C.B.G. v. Wolf*, 464 F. Supp. 3d 174 (D.D.C. 2020) and *National Immigration Project of National Lawyers Guild v. Executive Office of Immigration Review*, 456 F. Supp. 3d 16 (D.D.C. 2020) ("*NIPNLG*") address claims related to ICE's approach to the COVID-19 pandemic in immigration detention facilities. Plaintiffs in *NIPNLG* filed their complaint prior to ICE's release of its Pandemic Response Requirements ("PRR"), and made a § 706(1) claim that ICE's failure to issue uniform guidance on COVID-19 was agency action "unlawfully withheld or unreasonably delayed," which is not relevant to SPLC's § 706(2) claim. 456 F. Supp. 3d at 31-32. *C.B.G.* is distinguishable because the plaintiffs "d[id] not identify any discrete final agency decision not to implement the PRR," they simply alleged that ICE was not following it in various ways at different detention centers. 464 F. Supp. 3d at 225. Similarly, the plaintiffs in *Citizens for Responsibility & Ethics in Washington v. DHS*, 387 F. Supp. 3d 33, 54 (D.D.C. 2019) ("*CREW*"), challenged only a general failure to maintain a records management program without referencing the specific guidelines and directives they found inadequate—let alone a decision not to enforce binding agency norms, as SPLC does here.

challenge to "the continuing (and thus constantly changing) operations" of the Bureau of Land Management with respect to some "1250 or so individual classification terminations and withdrawal revocations." *Id.* at 890. The *Lujan* plaintiff's claims were not yet ripe, the Supreme Court found, because it was challenging "rules of general applicability" and not "concrete actions." *Id.* at 891. But "[t]he Supreme Court stressed in [*Lujan*] that, in contrast to the broad programmatic takeover advanced there, an agency's action in 'applying some particular measure across the board . . . [could] of course [still] be challenged under the APA.'" *Hisp. Affs. Project v. Acosta*, 901 F.3d 378, 388 (D.C. Cir. 2018) (quoting *Lujan*, 497 U.S. at 890 n.2).

That is exactly what SPLC has alleged here—that Defendants decided not to enforce the PBNDS, and applied that decision across the board at Stewart, Pine Prairie, and LaSalle. SAC ¶¶ 134-64 (LaSalle), 189-214 (Stewart), 215-56 (Pine Prairie), 293-300 (PBNDS requirements), 302-15 (non-enforcement and consequences thereof). Construing the SAC liberally in SPLC's favor and granting SPLC all reasonable inferences deriving therefrom, as this Court must, this is clearly sufficiently particularized for APA purposes "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555-56.

B. SPLC Adequately Pleaded Final Agency Action.

In addition to adequately pleading particularized agency action, SPLC also adequately pleaded *final* agency action in its SAC. *See* 5 U.S.C. § 704. Agency action is "final" when (1) it "mark[s] the 'consummation' of the agency's decisionmaking process" and (2) as a result of the action, "'rights or obligations have been determined,' or . . . 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). Each *Bennett* prong "must be satisfied independently[.]" *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018). An agency's "decision . . . to adopt a policy" is final agency action, *Venetian Casino Resort, LLC v.*

EEOC, 530 F.3d 925, 931 (D.C. Cir. 2008), as is "discretionary agency 'inaction,' such as [an agency's] failure to veto [a] permit," where "the agency 'did' nothing." *All. To Save Mattaponi*, 515 F. Supp. 2d at 9-10.

Taking a "'pragmatic' approach . . . to finality," *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599 (2016), and examining "the concrete consequences an agency action has or does not have," *California Commts. Against Toxics v. Env't Prot. Agency*, 934 F.3d 627, 637 (D.C. Cir. 2019), it is clear that Defendants' decision not to enforce the PBNDS satisfies both *Bennett* prongs and is final agency action.

Consummation of agency decisionmaking: The SAC pleaded that Defendants decided not to enforce the PBNDS terms of the contracts they signed with private contractors running the Facilities. *See* SAC ¶¶ 265-70 (LaSalle), 276-80 (Stewart), 281-85 (Pine Prairie), 288-312 (detailing Defendants' adoption of and failure to enforce PBNDS). Given that Defendants "direct, manage and control the U.S. immigrant detention system and the conditions of confinement therein," *id.* ¶ 257, that decision "represents the culmination of that agency's consideration of [the] issue." *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020) (quoting *Soundboard Ass'n*, 888 F.3d at 1267, 1269). "[F]rom the agency's perspective," *Soundboard Ass'n*, 888 F.3d at 1271, the decision not to require their contractors to comply with the PBNDS was final and "is properly attributable to the agency itself." *Wheeler*, 955 F.3d at 78 (quoting *Soundboard Ass'n*, 888 F.3d at 1267); *see also Torres*, 411 F. Supp. 3d at 1069 (holding that DHS's "alleged . . . noncompliance with the PBNDS" was the consummation of its decisionmaking).

Contrary to Defendants' assertions, Dkt. 218 at 35, the 2018 DHS OIG Report further establishes that Defendants' decision not to enforce the PBNDS was the consummation of the agency's decisionmaking. SAC ¶ 309. As in *Torres*, when an agency concurs with an OIG report

that documents compliance deficiencies at detention centers and promises to implement the OIG's recommendations, it demonstrates that the agency "was and is engaged in numerous agency decision-making processes regarding PBNDS enforcement and compliance." 411 F. Supp. 3d at 1069 (concluding from an OIG report that "ICE regularly initiates and concludes PBNDS-compliance reviews" and thus "any past or ongoing non-compliance at [the facility in question] is allegedly the result of an agency decision not to enforce the terms of its contract"). Defendants point to the fact that ICE "proposed steps to improve oversight" after the OIG Report found systemic failures of monitoring and oversight in detention centers. Dkt. 218 at 35. But granting SPLC "the benefit of all reasonable inferences deriving from the complaint," ICE's statements that it would implement changes do not establish that such changes ever were implemented. *Sellers*, 376 F. Supp. 3d at 9. And even if ICE undertook to implement OIG's recommendations, that does not undermine SPLC's allegation that Defendants decided not to enforce the PBNDS.

Rights, obligations, or legal consequences: Defendants' decision was also final under this *Bennett* prong, which "look[s] at finality . . . from the regulated parties' perspective." *Soundboard*, 888 F.3d at 1271. Clearly, a decision by Defendants not to enforce the PBNDS would determine the "obligations" of both Defendants and the private contractors who run the Facilities. *See Torres*, 411 F. Supp. 3d at 1069. In addition, a decision not to enforce the PBNDS determines the rights of detained individuals to retain and communicate confidentially with legal counsel. *See id.* Courts have found this *Bennett* prong satisfied in numerous cases challenging DHS actions in the context of immigration detention. *See Aracely, R.*, 319 F. Supp. 3d at 139 (defendants' rejection of plaintiffs' parole requests had "actual or immediately threatened effects"); *Ramirez*, 310 F. Supp. 3d at 21 (defendants' decision to detain plaintiffs in more restrictive setting "had immediate and significant legal consequences"); *R.I.L-R*, 80 F. Supp. 3d at 184 (defendants' policy of taking

deterrence into account when considering bond requests "has profound and immediate consequences" for asylum seekers detained as a result); *see also Venetian Casino Resort*, 530 F.3d at 931 (holding in a non-detention context that challenged agency policy "surely" met this *Bennett* prong without discussion).

As Defendants fail to understand the "final agency action" that SPLC pleaded, their arguments that no "legal consequences" flow therefrom are not well-founded. Dkt. 218 at 29, 31. In addition, Defendants' myopic focus on removal proceedings is misleading. *Id.* This Court has already narrowed SPLC's procedural due process claims to the non-removal context. *See* Dkt. 201 at 16-17. And detained individuals have rights and suffer legal consequences beyond the narrow context of a decision of an immigration judge in an individual case. *See, e.g.*, *Aracely, R.*, 319 F. Supp. 3d at 139 (detention itself is a consequence); *Ramirez*, 310 F. Supp. 3d at 23 (detention in more restrictive setting); *R.I.L-R*, 80 F. Supp. 3d at 184 (detention itself); *see also supra* at Section I.B.1 (discussing SPLC's clients' liberty interests in being free from detention). This very case contains allegations of constitutional violations, and to the extent Defendants' decision caused those violations, it is clear that "legal consequences" flow from that decision.

C. SPLC Adequately Pleaded an *Accardi* Violation.

As discussed above, SPLC pleaded extensive factual allegations in its SAC that Defendants decided not to enforce compliance with their own PBNDS—a clear APA violation.[20] SAC ¶¶ 288-315, 351-53. Agencies are bound to follow their own regulations and internal policies. *See Aracely*,

[20] Defendants express confusion about whether SPLC is challenging their failure to follow the PBNDS or the "PBNDS itself." Dkt. 218 at 35. SPLC's *Accardi* claim is clearly based on the former. The SAC simply acknowledges that the PBNDS is not co-terminous with the protections of the Constitution, and seeks to hold Defendants to their obligations under both. SAC ¶ 313; *see also id.* ¶ 288 ("The standards exist in addition to, and do not limit, Defendants' nondelegable constitutional duties.").

R., 319 F. Supp. 3d at 149-50 (citing *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (regulations), and *Morton v. Ruiz*, 415 U.S. 199 (1974) (internal policies)). "[A]gency actions may be arbitrary and capricious when they do not comply with binding internal policies governing the rights of individuals." *Id.* at 150. This is a well-settled principle of federal law and D.C. Circuit caselaw, commonly known as the *Accardi* doctrine. *See Damus v. Nielsen*, 313 F. Supp. 3d 317, 335-38 (D.D.C. 2018).

Defendants' sole argument regarding SPLC's *Accardi* claim is that *Accardi* does not apply to "substantive" rights.[21] Dkt. 218 at 32-33. Although Defendants point to two decisions by Judge Cooper applying *Accardi* only where purportedly procedural rights are at issue—*D.A.M. v. Barr*, 474 F. Supp. 3d 45 (D.D.C. 2020), and *C.G.B., et al., v. Wolf, et al.*, 464 F. Supp. 3d 174 (D.D.C. 2020)—this Court is not bound by that analysis. *Comm. on Oversight & Gov't Reform, U. S. House of Representatives v. Sessions*, 344 F. Supp. 3d 1, 15 (D.D.C. 2018) (citing cases); *see also Kalka v. Hawk*, 215 F.3d 90, 100 (D.C. Cir. 2000) (Tatel, J., concurring in part) ("District court decisions have no precedential effect."). The *D.A.M.-C.B.G.* holding has not been adopted by other courts. *See Biron v. Carvajal*, No. 20-CV-2110 (WMW/ECW), 2021 WL 3047250, at *30 (D. Minn. July 20, 2021) (noting but not discussing *C.B.G.* holding), *report and recommendation adopted*, 2021 WL 4206302 (D. Minn. Sept. 16, 2021), *aff'd*, No. 21-3615, 2022 WL 2288534 (8th Cir. June 24, 2022); *Jane v. Rodriguez*, No. CV 20-5922 (ES), 2020 WL 6867169, at *14 (D.N.J. Nov. 23, 2020) (requiring supplemental briefing on whether *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370 (1932) controls and thus negates *C.B.G.* holding). Moreover, it undermines the purpose of *Accardi* and contradicts D.C. Circuit precedent and persuasive District Court caselaw.

[21] The latter half of Defendants' discussion of SPLC's *Accardi* claim is actually a discussion of particularity and finality, *see* Dkt. 218 at 34-35, which SPLC addresses *supra* in Sections III.A and III.B of its Argument.

The *Accardi* doctrine, like the APA in general, protects individuals from abuse and mistreatment by administrative agencies. By requiring agencies to follow their own rules and binding norms, *Accardi* aims to prevent the inconsistent or even malicious application of agency power where that power has already been constrained by standards the agency itself adopted. *Massachusetts Fair Share v. L. Enf't Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985) (*Accardi* doctrine "is rooted in the concept of fair play and in abhorrence of unjust discrimination[.]"). "It is well settled that an agency, even one that enjoys broad discretion, must adhere to voluntarily adopted, binding policies that limit its discretion." *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (first citing *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959), and then citing *Service v. Dulles*, 345 U.S. 363, 372 (1957)). The *D.A.M.-C.B.G.* holding, by contrast, would allow agencies to ignore any policies they have adopted that affect supposedly "substantive" rights. Were this view to prevail, an agency could adopt rules to bind its own conduct as it affects vulnerable individuals the agency itself is detaining, incorporate those rules into contracts with private prison companies, and then allow those rules to be violated systematically with no mechanism for detained individuals or other plaintiffs to hold the agency to its own standards. This cannot be. *See Wilkinson v. Legal Servs. Corp.*, 27 F. Supp. 2d 32, 60 (D.D.C. 1998) ("[T]he *Accardi* doctrine['s] requirement that agencies follow their own rules reflects a founding, constitutional principle that the Government is bound by law.").

Rather, D.C. Circuit caselaw establishes that agency polices are "binding" "if so intended by the agency," examining "the statement's language, the context, and any available extrinsic evidence." *Id.* Policies are *not* binding when they "impos[e] no rights or obligations on the respective parties," "leave the agency free to exercise its discretion," or "impose no significant restraints on the agency's discretion." *Id.* Policies that exist solely to "guide" an agency's "exercise

of its discretion," and that do not "confer *substantive or* procedural benefits" on individuals, are not binding. *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1153 (D.C. Cir. 2006) (emphasis added) (finding that DOJ guidelines on issuing subpoenas were not binding); *see also Wilkinson*, 27 F. Supp. 2d at 50 & n.28 ("[A] right to judicial review extends to those adversely affected by an agency's violation of" "a self-imposed binding *substantive or* procedural rule that limits an agency's discretion[.]" (emphasis added)). There is no distinction between supposedly "procedural" and "substantive" policies in any precedential holding on *Accardi*—if the agency intended a policy to be binding and it affects individuals outside the agency, then it is binding.[22] *Padula* itself examined whether the FBI had "renounced homosexuality as a basis for reaching employment decisions"—clearly a "substantive" policy that the Circuit acknowledged could have been the basis for an *Accardi* challenge if the agency had made it binding. *Id.* at 101.

Here, the SAC alleges that the PBNDS are "binding" upon Defendants because they impose obligations on Defendants and limit their discretion, for the benefit of detained individuals. In particular, the SAC explains that Defendants promulgated the PBNDS (originally the National Detention Standards) "to establish 'consistent conditions of confinement, access to legal representation, and safe and secure operations across the detention system.'" SAC ¶ 288 (quoting *Detention Management*, U.S. Immigration & Customs Enforcement,

[22] Defendants quote *Damus* to open their argument that the PBNDS cannot be the basis of an *Accardi* claim because they are not "procedural"—specifically, they argue that "[t]he provisions of PBNDS . . . do not 'fall within the ambit of those agency actions to which the *Accardi* doctrine may attach.'" *See* Dkt. 218 at 32 (quoting 313 F. Supp. 3d at 338). But that quote from *Damus* is from the opinion's discussion of whether ICE's Parole Directive is "binding" on the agency—not whether the Directive was procedural or substantive in nature. 313 F. Supp. 3d at 338. Nothing in *Damus* creates a distinction between procedural and substantive policies or applies *Accardi* only to supposedly "procedural" policies. In fact, the *Damus* Court found ICE's Parole Directive to be binding on the agency despite a disclaimer that the Parole Directive "did not confer any substantive rights" because it "was intended—at least in part—to benefit asylum-seekers navigating the parole process" and not just to guide the agency in the exercise of its discretion. *Id.*

https://www.ice.gov/detention-management). The renamed PBNDS were adopted in 2008 "to 'more clearly delineate the results or outcomes to be accomplished by adherence to their *requirements*' and improve, *inter alia*, the 'conditions of confinement' *for detained immigrants*." *Id.* ¶ 289 (emphases added) (quoting https://www.ice.gov/detain/detention-management/2008). The 2011 PBNDS, which apply to the Facilities, Dkt. 218 at 12, were adopted "to improve several specific aspects of conditions of confinement, including 'access to legal services . . . improve[ment of] communication with detainees with limited English proficiency' and access to visitation," all of which confer substantive benefits on detained individuals. *Id.* ¶ 290 (quoting Preface to 2011 PBNDS). The PBNDS limit Defendants' discretion in numerous ways by setting mandatory standards for legal visitation. *Id.* ¶¶ 293-300. The SAC also pleaded that the PBNDS "govern" the facilities where Defendants detain noncitizens, *id.* ¶ 291, and "are the primary mechanism through which [Defendants] execute their duty to ensure constitutional access to counsel *for the thousands of detained immigrants across the United States*." *Id.* ¶ 292 (emphasis added).

SPLC clearly pleaded in the SAC that the PBNDS are binding on the agency and confer benefits on detained individuals, and thus adequately pleaded an *Accardi* claim.

D. There is No Other Adequate Remedy in a Court for Defendants' Violations.

Defendants argue unconvincingly and in passing that the SAC does not satisfy the requirements of section 704 of the APA that there be "no other adequate remedy in a court" for the alleged violation. Dkt. 218 at 31-32. Defendants are wrong.

"The Supreme Court has long construed the 'adequate remedy' limitation on APA review narrowly, emphasizing that it 'should not be construed to defeat the central purpose of providing a broad spectrum of judicial review of agency action.'" *R.I.L-R*, 80 F. Supp. 3d at 185 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988)). "Rather, 'Congress intended by that provision

simply to avoid duplicating previously established special statutory procedures for review of agency actions.'" *Id.* (quoting *Darby v. Cisneros*, 509 U.S. 137, 146 (1993)); *see also CREW*, 846 F.3d at 1244. Defendants point to no other "special statutory procedures" that would substitute for APA review of their action. Rather, they point the Court to a website—a website that detained individuals, of course, cannot access—by which one can provide "feedback" to DHS on a variety of subjects and file administrative complaints with DHS components. *See* Dkt. 218 at 31 n.7. An administrative complaint to the agency itself does not displace APA review of the agency's *Accardi* violations. Defendants then claim that the Court's ability to issue injunctive relief based on SPLC's substantive due process claim allows them to escape APA review. These arguments are unavailing. Neither administrative complaints nor a substantive due process claim are "special statutory procedures" that displace APA review.

"[C]onstru[ing] the complaint liberally in [SPLC's] favor and grant[ing] plaintiff the benefit of all reasonable inferences deriving from the complaint," *Sellers*, 376 F. Supp. 3d at 91, SPLC has clearly stated a claim to relief on its § 706(2)(A) *Accardi* claim that Defendants' decision not to enforce the binding PBNDS was arbitrary and capricious. Defendants' motion for judgment on the pleadings of SPLC's APA claim should be denied.

IV. SPLC Sufficiently Stated a First Amendment Claim (Count IV).

The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. In particular, "when the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is […] blatant. Viewpoint discrimination is thus an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (internal citations omitted). The First Amendment requires the government to "abstain from regulating speech when

the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* SPLC alleges that Defendants interfered with SPLC's protected speech, as "many of the obstacles described [in the SAC] have been targeted at the SPLC alone—and not at other immigration lawyers who practice at [the Facilities]—due to SPLC's underlying mission."[23] *See* SAC ¶¶ 336-40. SPLC adequately pleaded a claim of First Amendment viewpoint discrimination, and this Court can reasonably infer from the SAC that Defendants discriminated against SPLC because of its viewpoint and violated its First Amendment rights. The Court should therefore deny Defendants' motion on this claim.

A First Amendment inquiry typically proceeds by "first, determining whether the First Amendment protects the speech at issue, then identifying the nature of the forum, and finally assessing whether the [government's] justifications for restricting . . . speech 'satisfy the requisite standard.'" *Mahoney v. Doe*, 642 F.3d 1112, 1116 (D.C. Cir. 2011) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)). Defendants do not challenge, Dkt. 218 at 36-41, that the First Amendment "protects SPLC's activities as a legal organization in informing and representing its clients because those activities are modes of expression and association." SAC ¶ 337.[24] As to the nature of the forum, "viewpoint discrimination is prohibited in all forums . . . so the justiciability of [a] viewpoint discrimination claim does not depend on any specific assumption about the nature of the [] forum." *Zukerman v. U.S. Postal Serv.*, 961 F. 3d 431, 444 (D.C. Cir.

[23] The First Amendment claim specifically lists LaSalle, Stewart, and Irwin. SAC ¶ 340. Defendants stopped detaining noncitizens at Irwin County Detention Center, so that portion of SPLC's claim is now moot. Dkt. 201 at 1 n.1. SPLC's viewpoint discrimination claim also reaches Pine Prairie, as SPLC incorporated previous paragraphs of the complaint into this claim for relief. SAC ¶ 336.

[24] SPLC sufficiently alleged that it engages in speech protected by the First Amendment. Advocacy and litigation are a type of political expression and association. *See NAACP v. Button*, 371 U.S. 415, 429-31 (1963); *In re Primus*, 436 U.S. 412, 431 (1978); *Haitian Ctrs. Council v. Sale*, F. Supp. 1028, 1040 (E.D.N.Y. 1993).

2020) (citing *Rosenberger*, 515 U.S. at 828-30). "The state may reserve the forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).[25]

To state a claim of viewpoint discrimination, a plaintiff "must show that he was prevented from speaking while someone espousing another viewpoint was permitted to do so." *McCullen v. Coakley*, 573 U.S. 464, 485 n.4 (2014). Under D.C. Circuit precedent, "allegations pass the 'most basic . . . test for viewpoint discrimination'" when "'within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.'" *See Zukerman*, 961 F. 3d at 446 (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring in part and concurring in the judgment)). Because "the government rarely flatly admits it is engaging in viewpoint discrimination," other circumstantial evidence, including comparisons to other relevant examples, is considered. *See Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.*, 901 F.3d 356, 365-66 (D.C. Cir. 2018) (quoting *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004)). Here, the relevant subject category is legal service providers informing and representing detained individuals in the Facilities, and SPLC sufficiently alleged that Defendants discriminated against SPLC because of its viewpoint.

A. Defendants' Widespread Obstacles to Attorney-Client Communications Do Not Preclude SPLC's Claim of Viewpoint Discrimination.

Defendants argue that Paragraph 18 of the SAC, alleging that "[a]ny lawyers who tried to represent Plaintiff's clients in civil litigation would encounter the same obstacles to access that

[25] Defendants do not make any forum argument regarding SPLC's First Amendment claim, and thus waive the issue. *See* Dkt. 218 at 36-41. As viewpoint discrimination is disallowed in all fora, the immigration detention center forum would not change the analysis in this case.

SIFI staff and volunteers regularly encounter," SAC ¶ 18, shows that SPLC cannot establish a claim of viewpoint discrimination. Dkt. 218 at 39. Not so. Throughout the SAC, SPLC alleges numerous obstacles to attorney-client communication that would impact any legal service provider. But in addition to those widely applicable obstacles, and as detailed below, SPLC specifically alleges discriminatory treatment based on its unique viewpoint. Defendants cannot escape SPLC's claim of viewpoint discrimination by pointing to allegations that all legal service providers face certain similar obstacles at the Facilities and ignoring SPLC's assertions that Defendants singled out and imposed additional specific obstacles on SPLC based on its viewpoint.

B. SPLC Sufficiently Pleaded that Defendants Target SPLC Based on Its Viewpoint.

Defendants erroneously assert that SPLC's viewpoint is the same as "every other legal organization providing legal services to detainees at the facilities." Dkt. 218 at 38. Defendants confuse the content of SPLC's communications with its detained clients—which may be similar to the content other legal services providers express—with SPLC's viewpoint.[26] *See Rosenberger*, 515 U.S. at 829. The Supreme Court has made clear that its "cases use the term 'viewpoint' discrimination in a broad sense," such that "disparagement" and "[g]iving offense" count as viewpoints. *Matal*, 137 S. Ct. at 1763. "The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses." *Id.* at 1766 (Kennedy, J., concurring in part and concurring in the judgment).

[26] Defendants miss the point entirely in arguing that most of Defendants' practices that limit SPLC's speech at the Facilities are not time, place, and manner restrictions. *See* Dkt. 218 at 37. Time, place, and manner restrictions, if content-neutral, are generally permissible regulations on speech as long as they meet the appropriate, forum-dependent level of scrutiny. *See Perry*, 460 U.S. at 45-46. Defendants' speech restrictions can be classified as time, place, and manner restrictions. SPLC is not making a facial challenge to these policies, but arguing that Defendants apply them to SPLC in a discriminatory way based on SPLC's viewpoint.

SPLC possesses a distinct viewpoint. Similar to the NAACP in *NAACP v. Button*, SPLC "advocate[s] lawful means of vindicating legal rights" and its litigation and advocacy are tools to advance particular expressive goals. *See Button*, 371 U.S. at 437, 419-22 (describing the NAACP's history and legal operations). SPLC "engages in litigation and advocacy to make equal justice and equal opportunity a reality for all, including the most vulnerable members of our society." SAC ¶ 15. SPLC's expressive activity includes fighting against institutional racism and white supremacy and fighting for immigrants and other detained individuals. *Id.* SPLC created SIFI to "provide high-quality *pro bono* legal representation and to safeguard due process rights for the thousands of people held in civil prisons across the Southeast." *Id.* ¶ 16. SPLC recognized the scarcity of immigration attorneys for individuals detained in remote Southeastern immigration detention centers. *Id.* ¶ 97. Believing that detained immigrants—among the most vulnerable members of our society—deserve high quality, free legal representation and should not be detained in the first place, and engaging in litigation and advocacy to those ends, is a viewpoint.

The SAC includes specific factual allegations of viewpoint discrimination that "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 545. The SAC alleges direct animosity towards SPLC's viewpoint as evidenced by a pattern of Defendants' failure to enforce its own requirements and procedures where SPLC is concerned. Despite Defendants' contentions to the contrary, the SAC contains allegations sufficient to plead "a pattern of unlawful favoritism." *See* Dkt. 218 at 38 (quoting *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002)).[27] The SAC

[27] Courts have only inconsistently required a "pattern of unlawful favoritism." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002); *compare Frederick Douglass Found. v. District of Columbia*, 531 F. Supp. 3d 316, 331 (D.D.C. 2021) (requiring a pattern of unlawful favoritism), *with Zukerman*, 961 F. 3d at 446 (describing the standard for a viewpoint discrimination claim without mentioning the need for a pattern). Regardless, SPLC has sufficiently alleged a "pattern of unlawful favoritism."

details how SPLC is targeted and treated differently, to its detriment, at each relevant facility. *See* SAC ¶¶ 162-64 (LaSalle), ¶¶ 205-14 (Stewart), ¶¶ 229-30, 254-55 (Pine Prairie). At LaSalle, the SAC states: "Defendants and their agents are targeting SPLC and its volunteers based on hostility to SPLC's mission. The longer SIFI is operational at LaSalle, the more Defendants and their agents at LaSalle interfere with SPLC's efforts to meet with clients and prospective clients." *Id.* ¶ 162. Examples of disparate treatment of SPLC accompany this allegation. *Id.* ¶¶ 162-64. At LaSalle, Defendants' agents stopped SPLC staff and volunteers from meeting with detained individuals without notices of appearances, despite Defendants' written policy not requiring notices of appearance for visits. *Id.* ¶ 162. Defendants' agents also prevented SPLC attorney visits with detained individuals when notices of appearance were filed. *Id.* ¶ 163. Defendants' agents at LaSalle ended a meeting between SPLC legal volunteers and detained individuals halfway through the scheduled time, even though the volunteers possessed the mandated letter of authorization from a supervising attorney. *Id.* As alleged in the SAC, "Defendants and their agents have exclusively targeted SPLC in enforcing this purported policy out of hostility toward the presence and mission of the organization and its volunteers." *Id.* ¶ 164.

The SAC also includes numerous examples from Stewart, alleging that Defendants' discriminatory "conduct is directed specifically and deliberately at SIFI staff and volunteers—not at other attorneys who visit the facility." *Id.* ¶¶ 205-14. A volunteer attorney with SPLC stopped on the side of the road after leaving Stewart to take photos. *See id.* ¶ 213. As she continued driving, "an ICE patrol car passed her, drove about halfway toward the detention center and turned around," and pulled her over. *Id.* ¶ 214. Even after the ICE officer acknowledged that the attorney was doing nothing wrong, the officer "said he still had to take her information." *Id.* The ICE officer

> asked for her name and phone number, which he transcribed with a pen on the palm of his hand. When he asked who she was with, she

> said "SPLC." He asked if she was helping to "*support illegal immigration*" and asked what she was doing. She said she was court watching. When he again asked for the name of her organization, she said "the Southeast Immigrant Freedom Initiative, with the Southern Poverty Law Center," and he wrote that information on the palm of his hand. The officer then said he had to write down her license plate information.

Id. (emphasis added). Another SPLC volunteer attorney completed legal visits one morning after submitting the required faxed letter with the legal visit request, but Defendants' agents prevented her from completing legal visits in the afternoon after she returned to the facility. *Id.* ¶ 205. They demanded a second letter be faxed to Stewart for those afternoon visits, despite the fact that SPLC faxed a letter with the legal visit request the previous day. *Id.* The SAC also alleges that Defendants prevented SPLC volunteers from entering Stewart with extra business cards for prospective clients. *Id.* ¶ 206. A Stewart guard pressured an SPLC attorney to shorten visits. *Id.* ¶ 207. SPLC staff and volunteers are targeted by guards at Stewart who "forced SIFI staff and volunteers to wait even when there are available attorney-visitation rooms." *Id.* ¶ 209. A volunteer interpreter with SPLC was forced to take off her bra in the public waiting area at Stewart and leave Stewart to change clothes after a guard refused to use a metal detection wand and instead required the volunteer to walk through the metal detector. *Id.* This was after the guard used the wand on a different visitor who set off the metal detector. *Id.*

These factual allegations of overt hostility to SPLC's supposed viewpoint—"support[ing] illegal immigration"—and disparate treatment of SPLC employees and volunteers demonstrate the clear connection between SPLC's viewpoint and Defendants' discriminatory actions. *See, e.g.*, *Center for Bio-Ethical Reform, Inc. v. Black*, 234 F. Supp. 3d 423, 435-36 (W.D.N.Y. 2017) (holding that the First Amendment viewpoint discrimination and retaliation claim could proceed where plaintiffs alleged hostility to the anti-abortion content and viewpoint of their photo-murals).

Similarly, with respect to Pine Prairie, the SAC alleges that "Defendants and their agents are targeting SPLC and its volunteers based on hostility to SPLC's mission. The longer SIFI is operational at Pine Prairie, the more Defendants and their agents at Pine Prairie interfere with SPLC's efforts to meet with clients and prospective clients." SAC ¶ 254. Specific examples of this discriminatory conduct at Pine Prairie accompany this allegation. *Id.* ¶¶ 229-30, 254-55. The SAC alleges that Pine Prairie staff "have engaged in other obstructionist behavior during visits, including demanding to review and take pictures of confidential client files, barging in and asking for client identification, refusing to provide a table or chairs for attorney visitation, and refusing to allow detainees to use the bathroom during legal visits," and that this behavior is directed towards SPLC because of its viewpoint. *Id.* ¶ 229. Non-SPLC attorneys were allowed to use briefcases or large files for legal paperwork, but SPLC employees and volunteers were not allowed to use accordion files or large folders. *Id.* ¶ 230. Defendants' agents also started to require in-person supervision of legal volunteers at Pine Prairie, directed towards SPLC because of its viewpoint. *Id.* ¶¶ 254-55.

C. SPLC Alleged that Defendants Engaged in Numerous Discriminatory Incidents, Differential Treatment, and Deviation from Policy.

SPLC does not have to prove viewpoint discrimination at this stage of the case. A complaint is sufficient at the 12(b)(6) or 12(c) stage if it contains enough facts "to raise a right to relief above the speculative level," even if "recovery is very remote and unlikely." *Twombly*, 550 U.S. at 555-56. SPLC has met that standard. Defendants analogize to inapposite cases and make unconvincing comparisons that ignore the factual allegations in the SAC.

Defendants argue that SPLC's numerous pleaded allegations of viewpoint discrimination are insufficient to establish a "pattern of enforcement activity evincing a governmental policy or custom of intentional discrimination on the basis of viewpoint or content" because the numerous

instances provide no basis for inferring that Defendants have "a policy or custom of enforcing [legal visitation policies] based on the content of the speech or viewpoint of the speaker." Dkt. 218 at 39-40 (citing *Brown v. City of Pittsburgh*, 586 F.3d 263, 294-96 (3d Cir. 2009)).[28] On the contrary, Defendants' agent expressed on at least one occasion the belief that SPLC's viewpoint is "support[ing] illegal immigration" while interacting with a SPLC volunteer. SAC ¶ 214. In the numerous other instances of viewpoint discrimination in the SAC, SPLC pleaded that other legal service providers were not treated in the same hostile manner as SPLC and were, in fact, treated better.[29] "[P]laintiffs lack insight into the reasoning behind the Government's behavior. They rely, accordingly, on evidence of how the Government treats comparators in order to establish a pattern of enforcement from which a viewpoint-discriminatory rationale may be inferred." *Phillips v. D.C.*, No. CV 22-277 (JEB), 2022 WL 1302818, at *5 (D.D.C. May 2, 2022). SPLC has pleaded numerous instances of other legal service providers being allowed to conduct themselves one way while SPLC is not similarly permitted to do so, and of others not receiving the same level of

[28] Defendants try to place a municipal liability standard on the SAC, arguing that "the SAC does not provide any basis for inferring that Defendants have 'a policy or custom of enforcing [legal visitation policies] based on the content of the speech or the viewpoint of the speaker." Dkt. 218 at 40 (quoting *Brown*, 586 F.3d at 296). Yet this language regarding a policy or custom is directly linked to *Brown*'s municipal liability allegation under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), which is not at issue here. *See Brown*, 586 F.3d at 292. The *Brown* Court was also at a different procedural posture from this case's—the plaintiff appealed from the district court's denial of a motion for a preliminary injunction and the court affirmed that there was not a likelihood of success for the selective enforcement claim. *Id.* at 266, 297.

[29] Defendants' attempt to compare this case to *McCullen v. Coakley* is unavailing. *See* Dkt. 218 at 38. Contrary to Defendants' assertion that "SPLC has not identified any other legal group that was permitted to 'inform and represent its clients' in a manner different from SPLC," *see* Dkt. 218 at 38, SPLC has pleaded extensive factual allegations of differing treatment of other parties, including "other immigration lawyers," thereby identifying other legal groups who were treated differently. SAC ¶ 340.

scrutiny as SPLC when attempting to access the Facilities.[30] This is sufficient to infer viewpoint discrimination and to survive Defendants' early challenge. *See Twombly*, 550 U.S. at 555-56.

The pattern of discriminatory conduct alleged in the SAC supports an inference of viewpoint-discriminatory rationale and is more than "'a handful of instances of allegedly inconsistent enforcement.'" Dkt. 218 at 40 (quoting *Frederick Douglass Found.*, 531 F. Supp. 3d at 335).[31] SPLC alleges numerous relevant discriminatory incidents at each facility from which an inference of viewpoint discrimination can be made. *See* Sec. IV.B, *supra*. Furthermore, at the 12(c) stage here, there is no need to resolve whether the "contrasting response turned on factors other than the content or viewpoint of the speech at issue." Dkt. 218 at 40-41 (quoting *Frederick Douglass Found.*, 531 F. Supp. 3d at 334).

Defendants fail to cite to a single case that applies the as-applied viewpoint discrimination standard at the at the 12(b)(6) or 12(c) stage. *See* Dkt. 218 at 36-41. However, *Hightower v. City*

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[30] Defendants try to rely on *ACLU Foundation v. Spartanburg County* to counteract SPLC's allegations of discriminatory enforcement. No. 7:17-cv-01145-TMC, 2017 WL 5589576, at *3-4 (D.S.C. Nov. 21, 2017), Dkt. 218 at 41. In addition to being a facial challenge decided on a preliminary injunction standard, this case is inapposite because the court analyzed the motion first based on the *Turner v. Safely*, 482 U.S. 78 (1987), standard for the constitutionality of prison regulations. *ACLU Found*, 2017 WL 5589576, at *4. *Turner* does not apply because individuals held in civil immigration detention facilities are legally distinct from individuals convicted of crimes and detained in prisons. *See In re Kumar*, 402 F. Supp. 3d at 383. Further, Defendants' quotes from *ACLU Foundation*, Dkt. 218 at 41, are from a part of the opinion discussing how the "policy is rationally related to a legitimate and neutral government objective" under *Turner*, which is irrelevant to this case. *ACLU Found.*, 2017 WL 5589576, at *7-8. Thereafter, the court in *ACLU Foundation* did use a First Amendment analysis, but held that "the regulation [on its face] does not seek to prohibit a certain viewpoint of speech" without addressing claims of as-applied viewpoint discrimination under a First Amendment framework. *Id.* at 9-10. SPLC's as-applied viewpoint claim is not comparable to this case.

[31] In *Frederick Douglass Foundation v. District of Columbia*, the court denied the plaintiffs' motion for a preliminary injunction because the plaintiffs did not establish a likelihood of success on the merits for any of the claims, including for the as-applied First Amendment challenge. 531 F. Supp. 3d at 322, 328, 338. The court found plaintiffs' examples of discriminatory treatment to demonstrate viewpoint discrimination unconvincing because they consisted of governmental speech or irrelevant examples from more chaotic protests. *Id.* at 331-34.

and County of San Francisco, an apposite 12(b)(6) decision on an as-applied viewpoint discrimination claim, holds that such a claim survives a motion to dismiss where plaintiffs allege differential enforcement and deviation from protocol to their detriment. 77 F. Supp. 3d 867, 875 (N.D. Cal. 2014). The *Hightower* plaintiffs alleged that a public nudity ordinance was not enforced against other groups who also violated it but did not hold the anti-ordinance viewpoint held by Plaintiffs. *Id.* at 884. Plaintiffs also asserted that defendants deviated from proper protocol in denying parade permits for an unauthorized rationale. *Id.* These allegations were sufficient to support a plausible inference of viewpoint discrimination. *Id.* The SAC in this case similarly contains allegations of differential enforcement and deviation from Defendants' usual practices to SPLC's detriment. *See, e.g.*, SAC ¶ 163 (claiming that SPLC staff and volunteers could not meet with clients and prospective clients without notices of appearances, despite Defendants' written policies to the contrary).

SPLC sufficiently alleged a claim of First Amendment viewpoint discrimination through allegations of hostility to SPLC's viewpoint and numerous pleaded allegations of viewpoint discrimination. The Court should therefore deny Defendants' motion on this claim.

CONCLUSION

For the foregoing reasons, SPLC respectfully requests that the Court deny Defendants' Partial Fed. R. Civ. P. 12(c) Motion for Judgment on the Pleadings.

Respectfully submitted, this 26th day of August, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2022, I electronically filed the foregoing Plaintiff's Response in Opposition to Defendants' Partial Fed. R. Civ. P. 12(c) Motion for Judgment on the Pleadings with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered CM/ECF users.

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