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 RESPONSE TO DEFENDANTS' RENEWED MOTION TO PARTIALLY DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(h)(3)

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I. INTRODUCTION

This case challenges conditions that obstruct access to counsel at immigration prisons where people in civil detention are fighting for the ability to stay in this country and avoid deportation or even death. Because of Defendants' delay tactics, it has been pending for over two years. Defendants first sought to sever and transfer the case, characterizing the claims as "primarily, if not exclusively, aris[ing] from conditions and policies" at the facilities at issue. Mem. in Supp. of Defs.' Mot. to Sever & Transfer 28, ECF No. 47-1. In a complete about-face, Defendants' "renewed" motion to dismiss asserts that SPLC seeks to "dress a challenge to immigration proceedings as a conditions claim to fashion subject matter jurisdiction." Defs.' Mem. in Supp. of Renewed Mot. to Partially Dismiss 22, ECF No. 133 ("Defs.' MTD"). But Defendants' claim that this case challenges removal proceedings deliberately misconstrues Plaintiff's claims. As this Court has already recognized, this case is about detention conditions that are "ancillary to the removal process," and that immigration judges are "powerless to remedy." Mem. Op. 35, 37, ECF No. 124. This Court should once again deny Defendants' motion so that the case may move forward with discovery, and SPLC may finally obtain long delayed relief on the merits.

When it denied Defendants' first motion to dismiss, this Court rejected the primary arguments supporting Defendants' "renewed" motion. Specifically, this Court has already concluded that it does have subject-matter jurisdiction over SPLC's substantive due process claim. Because the two additional jurisdictional arguments Defendants raise in their Renewed Motion to Dismiss intentionally mischaracterize Plaintiff's claims as arising from removal proceedings, those arguments likewise fail. Defendants' argument that § 1252 strips federal courts of jurisdiction to remedy unlawful barriers to detained immigrants' access to counsel

would effectively make these conditions of confinement unreviewable by any tribunal. Defendants additionally submit untimely 12(b)(6) arguments in response to Plaintiff's APA claim and ignore that their issuance of and failure to enforce detention standards is reviewable final agency action.

The Court should reject Defendants' too-little, too-late efforts and allow this case to proceed.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. This Case Challenges Detention Conditions.

Defendants' suggestion that SPLC makes allegations arising from removal proceedings that masquerade as allegations about conditions of confinement in order to "circumvent explicit jurisdictional bars," Defs.' MTD 1, 21, is simply false. Rather, Plaintiff's Second Amended Complaint ("SAC") alleges what it says, that "[t]he conditions of confinement for Plaintiff's clients at LaSalle, Irwin, Pine Prairie, and Stewart, violate the Due Process Clause," SAC ¶ 344, ECF No. 70, and other constitutional and statutory provisions. *See also id.* ¶¶ 317-19 (access to courts); 325, 327 (effective assistance of counsel); 330-32 (full and fair hearing); 337-40 (First Amendment); 353-55 (APA).

Over 90 pages, the SAC details myriad conditions at Defendants' four immigration prisons at issue in this case ("the Facilities") that unlawfully obstruct SPLC's clients from access to their attorneys—conditions that are completely independent from removal proceedings. For example, the Facilities do not have an adequate number of or adequately designed attorney-client visitation rooms. *Id.* ¶¶ 121; 134-37; 166; 170; 190; 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; 179; 220. When they do manage to get visits, the attorneys encounter significant delays at the Facilities, causing them to cut client meetings short or cancel the meetings altogether. *Id.* ¶¶ 122; 141-45; 167; 196-200; 225-26. Phones and video-teleconference consoles at the Facilities have poor connectivity and regularly cut out. *Id.* ¶¶ 126; 177-78; 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 electronics, 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. *Id.* ¶¶ 139-40; 173. Taken in their totality, these conditions of confinement at the Facilities, the SAC alleges, are the unconstitutional result of Defendants' wholesale failure to properly oversee and monitor their operators. *Id.* ¶¶ 302-15. This duty to provide constitutional conditions of confinement is non-delegable. *Id.* ¶ 288.

The only factual allegations in the SAC about EOIR proceedings reinforce that this case challenges detention conditions that are distinct from those proceedings and irremediable by immigration courts. *See id.* ¶¶ 184-88 (describing how Irwin has a Facility policy—not an EOIR policy—prohibiting attorneys from appearing alongside their clients during remote EOIR proceedings and stating that "[i]mmigration judges say they have no authority over the prisons where Defendants choose to house civil detainees").

B. Defendants' Baseless Motion Continues Their Consistent Pattern of Delay.

Defendants' Motion is their most recent effort to drag out and delay resolution of Plaintiff's claims. SPLC filed this case more than two years ago. Initially, Defendants took no issue with the claims pled, SPLC's standing to assert them, or the Court's jurisdiction over the

case. Instead they sought to sever the claims into three separate cases and transfer them to district courts in Louisiana and Georgia. This Court denied that attempt, reasoning that the D.C.-based Defendants were responsible for the local detention conditions claimed to be unconstitutional by SPLC. Mem. Op. 1-2, ECF No. 62 ("This case concerns immigrants' access to counsel in three separate detention facilities…Immigrants' difficulties accessing counsel at all three facilities allegedly stem from Defendants' administration of national standards[.]"). The case moved into discovery in October 2019, with discovery set to close on June 5, 2020. Scheduling & Procedures Order, ECF No. 69. SPLC propounded its first written discovery requests in November 2019 and served requests for inspections in December 2019 and January 2020.

There, in effect, the case has remained. Defendants objected broadly to all of SPLC's discovery requests. During their months-long delay, Defendants asserted that they were withholding discovery, in part, on the grounds that SPLC did not have standing, that it had not properly pled a First Amendment claim (though Defendants never filed a motion to dismiss for failure to state a claim), and that the Court lacked subject-matter jurisdiction pursuant to 8 U.S.C. § 1252(b)(9). *See* Decl. of S. Agarwal, Ex. M, ECF No. 116-2 ("We understand that the Government is refusing to produce discovery on many of these topics because it disputes the basic premises of Plaintiff's First and Fifth Amendment claims. In Plaintiff's view, the proper forum for resolving such disputes is through motions practice before the court."). Defendants finally raised these arguments to the Court in opposition to SPLC's Motion for a Temporary Restraining Order, occasioned by additional barriers to SPLC's ability to communicate with its clients in light of the COVID-19 pandemic. *See* Defs.' Corrected Opp. to Pl.'s Mot. for TRO 28-35, ECF No. 112. Defendants separately raised these arguments again in a Motion to Partially Dismiss the SAC that is nearly identical to the instant motion. ECF No. 117. The Court denied

that motion to dismiss without prejudice as it raised some of the same issues that the Court addressed in its order on the TRO.

In its TRO Order, the Court granted injunctive relief in part and held that it has subject-matter jurisdiction over Plaintiff's substantive due process claim that conditions in the Facilities are punitive. The Court noted that such conditions of confinement claims are "ancillary to the removal process," especially as SPLC represents detained clients "in proceedings other than removal proceedings, such as bond and release proceedings." Mem. Op. 35, 37, ECF No. 124. Were it to conclude that § 1252(b)(9) stripped it of jurisdiction, the Court cautioned, there would effectively be no avenue for judicial review of this conditions of confinement claim, as "Immigration Judges are 'powerless to remedy the conditions alleged.'" *Id.* at 35 (citing *Torres v. DHS*, 411 F. Supp.3d 1036, 1049 (C.D. Cal. 2019)). Although Plaintiff's substantive due process claim "raises issues addressing access to counsel," the Court did not venture an opinion about whether it has subject-matter jurisdiction over Plaintiff's access to counsel claims, observing that "the authorities are in equipoise." *Id.* at 32 n.4, 36.

Defendants seek to dismiss this case for lack of subject-matter jurisdiction again, hoping that the third time will be the charm. Because their arguments continue to lack merit, the Court should deny Defendants' motion.

III. LEGAL STANDARD

"Jurisdiction is a threshold issue which ordinarily must be addressed before the merits of the case are reached." *William Penn Apartments v. D.C. Court of Appeals*, 39 F. Supp. 3d 11, 15 (D.D.C. 2014). Because subject matter jurisdiction is a fundamental requisite of a federal court's power to hear a case, the lack of it may be raised at any time. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). Federal Rule 12(h)(3) "merely clarifies" that lack of subject matter jurisdiction

"is never waived." *Harbury v. Hayden*, 444 F. Supp. 2d 19, 26 (D.D.C. 2006). "When faced with what a party characterizes as a Rule 12(h)(3) motion, a court should treat the motion as a traditional Rule 12(b)(1) motion for lack of subject matter jurisdiction." *Id*. "In general, a motion to dismiss under Federal Rule of Civil Procedure 12(b) should not prevail unless plaintiffs can prove no set of facts in support of their claim that would entitle them to relief." *Id.* (internal quotation marks and citation omitted). "At the stage in litigation when dismissal is sought, the plaintiff's complaint must be construed liberally, and the plaintiff should receive the benefit of all favorable inferences that can be drawn from the alleged facts." *Id*. These facts include those alleged in the complaint, as well as any undisputed facts in the record or disputed facts resolved by the court. *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003).

IV. ARGUMENT

A. This Court Maintains Subject Matter Jurisdiction to Adjudicate and Remediate Plaintiff's Claims That Conditions in the Facilities Violate the Constitution.

Defendants recycle the same flawed argument—already rejected by this Court—that § 1252 divests federal courts of jurisdiction to remediate conditions of confinement that impede detained immigrants' ability to access lawyers. Defendants' argument not only again ignores Supreme Court precedent to the contrary but also—if accepted—would deprive people in ICE prisons of any forum whatsoever in which to seek injunctive relief to cure unconstitutional detention conditions.

1. The Supreme Court Has Made Clear That § 1252 Does Not Apply to Claims Alleging Unconstitutional Conditions of Confinement.

Defendants' argument that sections 1252(a)(5), (b)(9), and (f)(1) divest this Court of jurisdiction over Plaintiff's constitutional conditions claims is insupportably overbroad and

ignores *Jennings v. Rodriguez*, 138 S.Ct. 830, 840 (2018), which expressly carves out detention conditions claims from the jurisdictional bar.

Section 1252 channels review of claims arising from an immigrant's removal proceedings through an administrative process. "[A] petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, . . . ," 8 U.S.C. § 1252(a)(5), and "judicial review of all questions of law and fact . . . arising from any action taken or any proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order," *id.* § 1252(b)(9). But § 1252 does not apply to "claims that are independent of or collateral to the removal process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016); *accord Jennings*, 138 S.Ct. at 841 (clarifying that § 1252 covers only challenges to a removal order, the decision to detain an immigrant, or the process by which an immigrant's removability will be decided). Defendants' brief relies on cases, including *J.E.F.M.* and *Aguilar*, that pre-date *Jennings* and altogether ignores Justice Alito's conclusion in *Jennings* that detained noncitizens' claims challenging "conditions of confinement" are not subject to § 1252 because it would be "absurd" to "cram[] judicial review" of such claims into review of a final order of removal. 138 S.Ct. at 840. As Justice Alito observed, such an expansive reading of § 1252 would render detained immigrants' conditions-of-confinement claims "effectively unreviewable," because immigration judges have no authority to issue injunctions ordering ICE to remediate unconstitutional conditions. *Id.*.

Following *Jennings*, courts have recognized that § 1252 does not divest district courts of jurisdiction to adjudicate claims of unconstitutional conditions of confinement in ICE facilities, including access-to-counsel and substantive due process claims. *See, e.g., E.O.H.C. v. Sec'y*

DHS, 950 F.3d 177, 187-88 (3d Cir. 2020) (holding § 1252 did not bar review of constitutional access-to-counsel claims, as the harm could not be remedied after a final order of removal); *Torres*, 411 F. Supp.3d at 1047-50 (holding § 1252 did not bar court from issuing an injunction addressing conditions in ICE facility that impeded access to counsel and that were unconstitutionally excessive and punitive); *Innovation Law Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1075-78 (D. Or. 2018) (holding § 1252 did not bar access-to-counsel claim by people in ICE custody where conditions of confinement impeded access to counsel); *accord Arroyo v. DHS*, No. SACV 19-815 JGB (SHKx), 2019 WL 2912848 (C.D. Cal. June 20, 2019) (holding § 1252 did not bar jurisdiction over claims that ICE's decision to transfer represented people unconstitutionally interfered with existing attorney-client relationships in violation of due process). *Jennings* compels the same result in this case.

As detailed in the Second Amended Complaint, all of SPLC's legal claims challenge conditions of confinement that impede detained immigrants' ability to access and communicate with legal counsel, and the remedies SPLC seeks are squarely aimed at addressing these conditions. SPLC does not seek to overturn a removal decision, does not challenge processes and procedures within the removal hearing itself, and does not attack either the performance of counsel or the inability to appoint counsel in removal proceedings. Rather, consistent with a long line of precedent from both the immigration and criminal contexts, SPLC seeks a systemic injunction to remediate conditions of confinement that impede the ability of its detained clients to access and communicate with lawyers. *See, e.g.*, *Nunez v. Boldin*, 537 F. Supp. 578, 582 (S.D. Tex. 1982); *Benjamin v. Fraser*, 264 F.3d 175, 186 (2d Cir. 2001).

Defendants take great pains to try and persuade the Court that SPLC's claims are not, in fact, conditions of confinement claims—likely because they understand that otherwise their

jurisdictional argument is meritless. But Defendants offer no explanation why SPLC's claims, which seek to remediate conditions of confinement in ICE facilities – rather than seeking any changes to immigration court proceedings themselves – do not constitute conditions-of-confinement claims. Nor do Defendants dispute that immigration judges cannot issue an injunction addressing these conditions of confinement and, as a result, detained immigrants would "never" have the opportunity to bring their claims for injunction relief if § 1252 barred this suit. *See E.O.H.C.*, 950 F.3d 187-88. Because all of SPLC's claims are conditions claims seeking injunctive relief, § 1252 does not bar SPLC's suit.

a. Plaintiff's Access to Counsel Claims Are Not Barred.

Section 1252 does not bar Plaintiff's claims that conditions in Defendants' facilities impede access to counsel in violation of due process. The access-to-counsel cases Defendants cite involve claims that are not "collateral to" but rather "bound up in and an inextricable part" of the actual removal proceedings, meaning their claims could meaningfully be reviewed and resolved through the removal process itself. *J.E.F.M.*, 837 F.3d at 1033. In *J.E.F.M.*, for example, the alleged access-to-counsel violations were not due to any condition of plaintiffs' confinement, but rather to the lack of appointment of an attorney to represent plaintiffs at the removal hearing itself. *Id*. at 1029.[1] *Accord P.L. v. ICE*, 1:19-cv-01336, 2019 WL 2568648, *1 (S.D.N.Y. June 21, 2019) (concluding that challenge to barriers to in-person communications

[1] Defendants repeatedly cite to language from *J.E.F.M.* and *Aguilar* describing the "breathtaking" and "vise-like" scope of § 1252. Yet both of these decisions preceded the Supreme Court's decision in *Jennings* expressly limiting the reach of § 1252, including over claims concerning conditions of confinement. *See Jennings*, 138 S.Ct. at 840. Thus, the expansive characterizations of § 1252 by the courts in *J.E.F.M.* and *Aguilar* are no longer good law.

with counsel *during the removal proceeding itself* was barred).[2] Plaintiff's claims, in contrast, focus exclusively on conditions and practices within ICE facilities that impede access to counsel. Plaintiff does not challenge any process within removal hearings, the focus of § 1252's jurisdictional bar.

Likewise, in *Aguilar*, the plaintiffs did not seek to remediate a facility's conditions that impeded access to counsel but instead exclusively sought transfer—relief which can be obtained via a change of venue in the removal proceeding itself. *See Aguilar v. ICE*, 510 F.3d 1, 14 (1st Cir. 2007). In sharp contrast, immigration judges cannot issue an injunction to remediate conditions in the Facilities that impede Plaintiff's clients' access to counsel. Thus, applying § 1252 to SPLC's claims would deprive people in detention of any "meaningful" remedy for their access-to-counsel claims since "removal proceedings have a singular focus—removability—and are not structured to provide declaratory and injunctive relief aimed at system-wide reforms." *Nava v. DHS*, No. 18 C 3757, 2020 WL 405634, at *7-8 (N.D. Ill. Jan. 24, 2020)

Defendants take the erroneous position that, because access-to-counsel claims ultimately impact detained persons' ability to prepare for removal proceedings, § 1252 bars any access-to-counsel claim without regard for the actual content of the claim, the underlying allegations relevant to the claim, or the particular remedies sought. But there are many types of access-to-counsel claims. Some, like those in *J.E.F.M.*, challenge problems with access to attorneys that *could* be addressed through the removal process—for example, a Circuit Court could feasibly

[2] Unlike in *P.L.*, Plaintiff does not challenge an EOIR policy impacting in-person communications during removal proceedings; rather, Plaintiff's allegations concerning attorneys' inability to attend proceedings with clients at Irwin stem directly from a Facility policy that prohibits attorneys inside the facility during court proceedings and thus is distinguishable from *P.L.*

overturn a deportation order if an immigrant were denied the opportunity to retain counsel at his removal proceeding. But for an access-to-counsel claim based on conditions that impede attorney-client communications, such as the claims here, the Petition for Review process could never result in a systemic injunction to remediate those conditions that impede access to counsel.

Defendants' categorical approach has no basis in law and would lead to the "staggering results" warned against in *Jennings*. 138 S.Ct. at 840. Indeed, if Defendants' argument were accepted, detained immigrants could *never* obtain injunctive relief to address conditions inside detention facilities that impede their ability to access counsel. For that very reason, the Third Circuit recently characterized constitutional access-to-counsel claims, such as those asserted here, as "now-or-never" claims that are not barred by § 1252. *E.O.H.C.*, 950 F.3d at 187-88. Similarly, while Defendants concede that that the Performance-Based National Detention Standards ("PBNDS") prescribe certain conditions relating to attorney access, Defs.' MTD 4-5, if Defendants' argument were accepted, detained immigrants would "never" have any forum whatsoever to seek enforcement of those standards. Section 1252 therefore does not divest this Court of jurisdiction to adjudicate SPLC's access-to-counsel claims that challenge conditions of confinement.

b. Plaintiff's Substantive Due Process Claim Is Not Barred.

Nor does § 1252 bar Plaintiff's substantive due process claim, as this Court has already held. *See* ECF No. 124 at 31-37. The Fifth Amendment prohibits Defendants from subjecting people in immigration detention to conditions and restrictions that are so excessive and restrictive as to constitute punishment. *See Torres*, 411 F. Supp at 1064; *accord Banks v. Booth*, No. 1:20-CV-849, 2020 WL 1914896, *6 (D.D.C. Apr. 19, 2020). The legal inquiry at the heart of this claim is wholly independent from any question at issue in a removal case, and this claim

could not be meaningfully resolved in a removal proceeding "because Immigration Judges are 'powerless to remedy the conditions alleged.'" ECF No. 124 at 35 (citing *Torres* 411 F. Supp. 3d at 1049); *see also, e.g.*, *Torres*, 411 F. Supp. at 1049 ("the Court has little difficulty determining that it also has jurisdiction over the . . . substantive Due Process claim regarding lack of telephone access, barriers to legal visits, and interference with legal mail"). Defendants make the confusing and inapposite argument that SPLC and its clients instead should have filed a habeas case or *Bivens* damages suit. Defs.' MTD 21. Once again, Defendants ignore the nature of SPLC's claims and requested relief. SPLC does not seek release or damages. SPLC seeks a systemic injunction to remediate unconstitutional conditions of confinement—neither a habeas nor a *Bivens* suit could accomplish this. This Court has already rejected the same argument. *Vetcher v. Sessions*, 316 F. Supp. 3d 70, 78 (D.D.C. 2018) ("The Government . . . contends that Vetcher may bring a cause of action under *Bivens*, but the only relief available there would be monetary damages, which is not an "adequate remedy" for the equitable relief Vetcher seeks.").

c. SPLC's Claims Do Not Challenge Discretionary Determinations Made as Part of Individual Removal Cases.

Finally, as to SPLC's claims on behalf of itself, it would be especially "absurd" to apply § 1252 because SPLC is not a party to removal proceedings and therefore cannot seek a remedy for its injuries through the removal process. *See Jennings*, 138 S.Ct. at 840. Defendants' assertion that, because 8 U.S.C. § 1226(e) precludes judicial review of the Government's bond and parole determinations in immigration proceedings, SPLC's claims on its own behalf cannot be heard, Defs.' MTD 22-23, is based on this faulty premise. SPLC does not challenge any of its clients' bond or parole determinations in this litigation. Nor can Defendants credibly argue that SPLC's claims about barriers to access to counsel are inseparable from the Attorney General's determinations on whether to detain or to grant bond or parole. This case clearly challenges

detention conditions, not release decisions. 8 U.S.C. § 1226(e) is therefore inapposite and inoperative.[3]

2. *NIPNLG* is Distinguishable and Non-Binding.

Defendants contend that *National Immigration Project of the National Lawyers Guild v. EOIR*, No. 1:20-cv-00852, 2020 WL 2026971 (D.D.C. Apr. 28, 2020) ("*NIPNLG*") supports their argument that § 1252 divests this Court of jurisdiction over Plaintiff's conditions claims. Defendants, however, ignore crucial distinctions between this case and *NIPNLG*, which are fatal to Defendants' jurisdictional arguments.

First, in *NIPNLG*, plaintiffs also sought injunctive relief against EOIR (the administrator of immigration courts) and expressly sought to enjoin certain practices in removal hearings themselves.[4] Thus, unlike the exclusive conditions claims at issue here, the *NIPNLG* plaintiffs sought relief that was "bound up in" removal hearings. *See J.E.F.M.*, 837 F.3d at 1033.

Second, although the *NIPNLG* plaintiffs brought access-to-counsel claims, they styled their claims as procedural due process claims impacting the merits of hearings, rather than claims that conditions impeded access to counsel generally. The *NIPNLG* plaintiffs also did not assert substantive due process claims, which pivot on whether or not conditions and restrictions in detention are so excessive as to constitute punishment.

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[3] Moreover, although Defendants admit that § 1226(e)'s jurisdictional bar applies only to the discretionary actions described "in this section," Defs.' MTD 28, they go ahead and apply the bar to other sections of the INA as well. Specifically, Defendants export § 1226's jurisdictional bar to § 1231, which grants the Attorney General authority—though, importantly and contrary to Defendants' reading, not discretion—to "arrange for appropriate places of detention for aliens detained pending removal." Defendants' attempt to stretch the jurisdictional bar beyond recognition and should be rejected.

[4] For example, unlike Plaintiff, the *NIPNLG* plaintiffs sought to require EOIR to postpone in-person detained hearings and to provide for the automatic adjournment of any scheduled removal hearings or court deadlines. *See NIPNLG*, 2020 WL 2026971, at *4.

Third, the *NIPNLG* plaintiffs' access claims focused on barriers that impacted plaintiffs' access to counsel only as they related to the "merits" removal hearing. *See, e.g.*, *NIPNLG*, 2020 WL 2026971, at *8. In addition to challenging barriers that impede access to attorneys for assistance with clients' merits cases, SPLC also challenges barriers that impede access to counsel for other purposes, such as release on bond, parole, habeas, and conditions advocacy. *See, e.g.*, SAC ¶ 100 (describing SPLC's work to support bond motions and parole applications); ¶ 15 (noting SPLC's "history of advocacy" as to "conditions of confinement for those in . . . immigration imprisonment"). On this point, the Court's decision in *Jennings* is particularly instructive: "Interpreting 'arising from' in this extreme way would make claims [by detained immigrants] effectively unreviewable. By the time a final order of removal was eventually entered, the allegedly [unlawful] detention would have already taken place. And of course, it is possible that no such order would ever be entered in a particular case, depriving that detainee of any meaningful chance for judicial review." *Jennings*, 138 S.Ct. at 840. So too here. By the time SPLC's clients could seek review of their barriers to communicating with counsel for purposes of release on bond, parole, or unconstitutional conditions, the unlawful "detention would have already taken place."[5]

[5] Finally, in addition to being distinguishable, the decision in *NIPNLG* is not precedent, and this court need not follow it. *Camreta v. Greene*, 563 U.S. 692, 709, n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."); *Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Sessions*, 344 F. Supp. 3d 1, 15 (D.D.C. 2018) (same).

3. The Constitutional Avoidance Doctrine Dictates That § 1252 Not Be Construed to Deprive This Court of Jurisdiction to Adjudicate Plaintiff's Claims.

Although *Jennings* itself makes clear that § 1252 does not apply to Plaintiff's constitutional conditions claims, well-established rules of statutory construction and constitutional avoidance further demonstrate that this Court retains jurisdiction.

"[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (requiring a "heightened showing" of Congressional intent to divest courts of jurisdiction to hear constitutional claims); *ANA Int'l, Inc. v. Way*, 393 F.3d 886, 894 (9th Cir. 2004) ("the general rule to resolve any ambiguities in a jurisdiction-stripping statute [is] in favor of the narrower interpretation"). The Supreme Court has repeatedly applied this principle to limit the reach of § 1252. *See INS v. St. Cyr*, 533 U.S. 289, 314 (2001); *Calcano-Martinez v. INS*, 533 U.S. 348, 351-52 (2001). The Supreme Court has made clear that adopting the broad construction of § 1252 that Defendants propose "would raise serious constitutional concerns" by depriving immigrants of any meaningful forum to have their constitutional claims adjudicated and remediated. *Id*. Such a construction would likewise raise serious "separation of powers" concerns. *See Ramos v. Nielsen*, 321 F. Supp. 3d 1083, 1102 (N.D. Cal. 2018). For all these reasons, Defendants cannot satisfy their "heightened" burden to demonstrate that, through § 1252, Congress intended to deprive district courts of their longstanding power to adjudicate constitutional conditions claims—particularly where such a construction would deprive detained immigrants of any ability whatsoever to obtain an injunction to remediate those conditions. *See Webster*, 486 U.S. at 603.

B. This Court Maintains Subject Matter Jurisdiction over Plaintiff's Claim for Relief under the APA.

Defendants claim that this Court lacks subject matter jurisdiction over SPLC's APA claim brought under 5 U.S.C. § 702. However, it is well settled in this circuit that the APA does not confer subject matter jurisdiction. Rather, actions arising under the APA confer federal question jurisdiction; the proper question here is "whether the complaint states a claim under the APA, which grants judicial review to a party adversely affected or aggrieved by agency action." *Syngenta Crop Prot., Inc. v. Drexel Chem. Co.*, 655 F. Supp. 2d 54, 61 (D.D.C. 2009) (citing 5 U.S.C. § 702); *Oryszak v. Sullivan*, 576 F.3d 522, 524-25 (D.C. Cir. 2009) (holding that district court's dismissal of APA claims should have been for failure to state a claim under 12(b)(6) rather than for lack of subject matter jurisdiction (12)(b)(1)).

Defendant's motion to dismiss SPLC's APA claim is therefore an untimely 12(b)(6) failure to state a claim defense. As a threshold matter, Defendants are not entitled to relief under 12(b)(6) because they have already filed their answer to the Second Amended Complaint. ECF No. 80. *See* Fed. R. Civ. P. 12(b); *Alemayehu v. Abere*, 298 F. Supp. 3d 157, 163 (D.D.C. 2018). Although courts have, at times, treated a motion to dismiss that is filed after a responsive pleading as a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c), courts also decline to consider untimely 12(b)(6) motions. *See, e.g.*, *Murphy v. Dep't of Air Force*, 326 F.R.D. 47, 48-50 (D.D.C. 2018) (discussing substantive difference that 12(b) motions focus solely on sufficiency of complaint allegations while 12(c) motions relate to the merits and require a showing that no material fact is in dispute and the movant is entitled to judgment as a matter of law); *Lewis v. Schafer*, 571 F. Supp. 2d 54, 57 (D.D.C. 2008). Given that Defendants filed this motion over two years after litigation began, that they impermissibly attach evidence

outside of the pleadings,[6] and that they purport to file this motion under 12(h)(3) while asserting a 12(b)(6) defense, this Court should reject Defendants' argument as to SPLC's APA claim as untimely.

Should the Court consider Defendants' motion, SPLC has properly asserted an APA claim. The SAC unambiguously identifies a discrete and "final" agency action that is subject to APA review and alleges sufficient facts that raise a right to relief "above the speculative level." *See* 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Specifically, SPLC alleges that Defendants' failure to follow their own rules in the PBNDS constitutes "arbitrary and capricious" conduct in violation of the APA. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954); *Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005) ("*Accardi* has come to stand for the proposition that agencies may not violate their own rules and regulations to the prejudice of others."). In the D.C. Circuit, this principle applies not only to claims that an agency has violated formal regulations, but also to claims that an agency violated its own binding procedures, especially where those procedures are "promulgated for the protection of individuals." *Vanover v. Hantman*, 77 F. Supp. 2d 91, 103 (D.D.C. 1999), *aff'd*, 38 Fed. App'x 4 (D.C. Cir. 2002). Indeed, the *Accardi* doctrine extends even to internal agency guidance. *See, e.g., Damus v. Nielsen*, 313 F. Supp. 3d 317, 336 (D.D.C. 2018) (collecting cases and finding ICE's noncompliance with its Parole Directive, which requires individualized parole determinations for asylum seekers, likely violated the

[6] When a party presents matters outside the pleadings in a 12(b)(6) or 12(c) motion, Rule 12(d) requires summary judgment analysis unless the evidence is excluded by the court. Fed. R. Civ. P. 12(d); *Linder v. Exec. Office for U.S. Attys.*, 315 F. Supp. 3d 596, 598 (D.D.C. 2018). Here, Defendants attach excerpts of SPLC's Discovery Requests 4, 11, 14, and 15 to their motion. ECF No. 133, Ex. A. Thus, this Court must either convert Defendants' motion to a summary judgment under Fed. R. Civ. P. 56 or strike Defendants' Exhibit A. *See Langley v. Napolitano*, 677 F. Supp. 2d 261, 263-64 (D.D.C. 2010).

APA); *Moghaddam v. Pompeo*, 424 F. Supp. 3d 104, 120-21 (D.D.C. 2020) (citing *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987)) ("[A]n agency pronouncement is transformed into a binding norm if so intended by the agency, and to determine agency intent, a court must examine the statement's language, the context, and any available extrinsic evidence.").[7]

The SAC explains that Defendants promulgated the PBNDS to govern conditions of confinement in immigration prisons for the protection of detained individuals. SAC ¶¶ 288-92. Furthermore, Defendants' contracts with each of the Facilities require compliance with the PBNDS and indicate that ICE will conduct periodic inspections to enforce such compliance. SAC ¶¶ 265-68 (LaSalle); 271-74 (Irwin); 277-79 (Stewart); 281-84 (Pine Prairie). Hence, any non-compliance at the four Facilities is the result of an agency decision not to enforce the terms of its contracts. *See Torres*, 411 F. Supp. 3d at 1069.

Despite Defendants' claims that SPLC's identification of agency action is vague, Defs.' MTD 31, the SAC specifically identifies Defendants' failure to comply with its PBNDS requirements at the four Facilities and provides enumerated sections of the PBNDS relating to access to counsel. *See* SAC ¶¶ 351-52; 292-315 (identifying 2011 PBNDS at 5.7(V)(J)(2), (4), (7)-(10); 2011 PBNDS at 5.7(V)(K)(7); 2011 PBNDS at 5.7(V)(I)(4)); ¶ 104 n.39 (2011 PBNDS at 2.4(II)(9)). Defendants' noncompliance with the PBNDS is evident from the factual allegations about each facility as well as the various reports by Defendant DHS's own Office of

[7] *See* SAC ¶ 289, which makes clear Defendants' intent to be bound by the PBNDS. ("In 2008, ICE renamed the standards as the Performance Based National Detention Standards ('PBNDS'), and revised them 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.").

the Inspector General and by advocacy groups, which are incorporated by reference in the SAC.[8] Defendants' reliance on cases dismissing APA claims where the plaintiff wholly fails to identify a discrete agency action is misplaced. *See, e.g.*, *Osage Producers Ass'n v. Jewell*, 191 F. Supp. 3d 1243, 1249 (N.D. Okla. 2016) (dismissing complaint that only generically described arbitrary agency practices such as "unreasonably delaying issuance of drilling permits"); *Citizens for Responsibility & Ethics in Washington v. DHS*, 387 F. Supp. 3d 33, 54 (D.D.C. 2019) (dismissing APA claim where complaint challenging general failure to maintain a records management program did not reference DHS' inadequate recordkeeping guidelines and directives as the basis of the claim).

Furthermore, unlike in *NILPNLG*, where a district court found that ICE's policies on the COVID-19 pandemic were being "implemented on a facility-by-facility and individual-by-individual basis," ICE's PBNDS is just that – national detention standards with which Defendants must comply. 2020 WL 2026971, at *5.[9] SPLC's APA claim is also easily

[8] Courts may ordinarily examine documents incorporated in the complaint by reference. *See Proctor v. D.C.*, 74 F. Supp. 3d 436, 447 (D.D.C. 2014). SAC ¶¶ 309-12 (citing DHS Office of Inspector General, *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements* (OIG-18-67) 4 (June 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf.; Nat'l Immigration Law Ctr., *A Broken System: Confidential Reports Reveal Failures in U.S. Immigration Detention Centers* ix (July 2009), https://www.nilc.org/news/special-reports/a-broken-system-failures-in-detention-centers/; Nat'l Immigrant Justice Ctr., *Lives in Peril: How Ineffective Inspections Make ICE Complicit in Immigration Detention Abuse* 2 (October 2015), https://immigrantjustice.org/lives-peril-how-ineffective-inspections-make-ice-complicit-detention-center-abuse).

[9] Notably, Plaintiffs in *NIPLNLG* filed their complaint prior to ICE's release of its Pandemic Response Requirements ("PRR") and did not characterize their APA claim as a failure to enforce compliance of the PRR. Rather, they argued that ICE's failure to issue uniform guidance for immigration court proceedings and attorney-client visits in detention amid COVID-19 constituted agency action "unlawfully withheld or unreasonably denied" under 5 U.S.C. § 701(1).

distinguishable from *C.G.B v. Wolf*, in which plaintiffs failed to identify a discrete final agency action by ICE *not* to implement their Pandemic Response Requirements ("PRR") and instead alleged "general deficiencies in ICE's compliance with the PRR." 2020 WL 2935111, at *33 (D.D.C. June 2, 2020). In contrast, SPLC has provided extensive factual allegations detailing ICE's failure to enforce specific provisions of the PBNDS. In *C.G.B.*, the court acknowledged that PRR's provisions were mandatory for ICE facilities but nevertheless "dynamic" and indicated that the PRR would be updated "as additional/revised information and best practices become available." *Id.* at *4. Any attempt by Defendants to conflate the PRR with the PBNDS, which predate them, have long been part of Defendants' contracts with the Facilities, and were not created amid an ever-evolving pandemic, is misplaced.

As in *Torres*, it is fair to assume that the rights of detained individuals and obligations of the Facilities here would flow from agency action regarding detention standards compliance and enforcement. 411 F. Supp. 3d at 1069. Defendants acknowledge that the court in *Torres* found ICE's alleged failure to enforce its PBNDS requirements at Adelanto, a contracted detention facility, to be a "final agency action." Defs.' MTD 34. Likewise, ICE's failure to enforce the PBNDS requirements enumerated in the SAC at the four contracted Facilities is a final agency action. SPLC has adequately pled facts that Defendants' failure to follow their own rules is arbitrary and capricious in violation of the APA.[10] Consequently, this Court should deny Defendants' motion for judgment on the pleadings.

[10] In addition to Defendants' failure to follow their own rules in the PBNDS, Defendants also violate the APA under a separate provision of the statute—by failing to act "in accordance with law," insofar as their actions violate SPLC's clients' Fifth Amendment rights to attorney access and SPLC's First Amendment rights. SAC ¶ 354 (citing 5 U.S.C. § 706(2)(A)). Defendants do not address this argument and thereby waive any defense they may have against it.

Finally, as argued *supra*, Defendants' jurisdiction-channeling provision under 8 U.S.C. § 1252(b)(9) does not apply to SPLC's claims, which do not arise from the removal process but instead focus on conditions of confinement that frustrate SPLC's detained clients' access to counsel at the Facilities. This Court is not precluded from reviewing SPLC's APA claim, as § 1252(b)(9) does not properly apply.

V. Conclusion

For the foregoing reasons, SPLC requests that Defendants' Renewed Motion to Partially Dismiss be denied.

Dated: July 28, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July, 2020, I electronically filed the forgoing PLAINTIFF'S RESPONSE TO DEFENDANTS' RENEWED MOTION TO PARTIALLY DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(h)(3) with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered CM/ECF users.

/s/ William E. Dorris
William E. Dorris