UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOUTHERN POVERTY LAW CENTER,
Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, ,
Defendants.

Civil Action No. 18-760 (CKK)

MEMORANDUM OPINION
(June 2, 2022)

This case concerns detained immigrants' access to legal counsel and conditions of confinement at to four Immigration and Customs Enforcement ("ICE") detention facilities: LaSalle ICE Processing Center in Jena, Louisiana ("LaSalle"); Pine Prairie ICE Processing Center in Pine Prairie, Louisiana ("Pine Prairie); Irwin County Detention Center in Ocilla, Georgia ("Irwin");[1] and Stewart Detention Center in Lumpkin, Georgia ("Stewart") (collectively, "the Facilities"). Pl.'s Second Am. Compl., ECF No. 70, ¶ 13. Plaintiff Southern Poverty Law Center ("SPLC") is

[1] Because, as the parties agree, Irwin has since been closed, all legal and factual issues related to Irwin are now moot. Although the Court finds this part of Plaintiff's operative complaint moot, it does not any portion of the complaint as a result. There appears to be some disagreement among the federal courts as to whether Federal Rule of Civil Procedure 12 permits a district court to dismiss a portion of a claim (i.e., a theory of liability) or rather whether Rule 12 permits only dismissal of a claim . A number of district courts have taken the former position. , , 430 F. Supp. 3d 1230, 1246 n.121 (D. Utah 2019); , 21 F. Supp. 3d 620, 629 (W.D. Va. 2014). One judge of this court recently concurred. , --- F. Supp. 3d ---, 2022 WL 103308, at *17 (D.D.C. Jan. 11, 2022) (JEB). On the other hand, the United States Court of Appeals for the District of Columbia Circuit has appeared to endorse, but not hold, that a court may partially dismiss a claim for relief. , 398 F.3d 666 (2005) (concluding that certain theories of liability should be dismissed for failure to state a claim). In an abundance of caution, the Court shall follow the more conservative approach here.

an organization that provides representation for detained persons at these four Facilities. Plaintiff's operative complaint alleges that Plaintiff

consideration of the briefing,[2] the relevant authorities, and the entire record, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' [133] Renewed Motion to Partially Dismiss the Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(h)(3) for Lack of Subject Matter Jurisdiction.

I. BACKGROUND

Among other things, Plaintiff Southern Poverty Law Center provides free legal services to immigrants, including those civilly detained by ICE. , 2020 WL 3265533, at *8. This action concerns the work of its constituent organization, the Southeast Immigrant Freedom Initiative ("SIFI"), and the legal services it provides to detainees at the Facilities. SIFI, whether through attorneys employed through SPLC or through volunteer attorneys, "travel to the [Facilities] for week-long rotations in order to meet with potential clients, gather evidence, draft legal documents, and assist clients in obtaining release on bond or parole." Compl. ¶ 100. Additionally, SIFI provides "effective and ethical defense to all detained clients." ¶ 101 (emphasis added). Broadly, Plaintiff alleges that ICE maintains conditions of confinement

[2] The Court's consideration has focused on the following:

- Plaintiff's Second Amended Complaint, ECF No. 70 ("Compl.");
- Defendants' Renewed Motion to Partially Dismiss the Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(h)(3) for Lack of Subject-Matter Jurisdiction, ECF No. 133 ("Mot.");
- Plaintiff's Response to Defendants' Renewed Motion to Partially Dismiss the Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(h)(3), ECF No. 136 ("Opp.");
- Defendants' Reply in Support of their Motion to Partially Dismiss the Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(h)(3) for Lack of Subject Matter Jurisdiction, ECF No. 138 ("Repl.");
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across all Facilities that unconstitutionally impede SIFI and SPLC clients from accessing their SIFI and/or SPLC counsel. ¶ 118. Based on these factual allegations, Plaintiff advances six claims for relief: (1) denial of access to courts in violation of the Due Process Clause of the Fifth Amendment; (2) denial of the right to counsel in violation of the Due Process Clause of the Fifth Amendment; (3) denial of the right to a full and fair hearing in violation of the Due Process Clause of the Fifth Amendment; (4) punitive conditions of confinement in violation of the Due Process Clause of the Fifth Amendment; (5) on behalf of Plaintiff itself, breach of the Free Speech Clause of the First Amendment; and (6) arbitrary and capricious conduct in violation of the APA.

On May 7, 2020, Plaintiff filed a Motion for a Temporary Restraining Order, asking that the Court (1) preliminarily grant the relief sought in the operative complaint and (2) order Defendants to implement certain hygienic protocols in light of the COVID-19 pandemic. The Court granted that motion in part on June 17, 2020, and entered a preliminary injunction ordering Defendants, among other things, to provide more and better means for detainees to communicate with counsel. , 2020 WL 3265533, at *1. In so doing, the Court found that Plaintiffs were

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Monitor's work remains ongoing as of the date of this Memorandum Opinion.

With this procedural background in mind, the Court now turns to the resolution of Defendants' [133] Renewed Motion to Partially Dismiss the Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(h)(3) for Lack of Subject Matter Jurisdiction.

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(h)(3), if the Court "determines at any time that it lacks subject matter jurisdiction," it "must dismiss the action." A Rule 12(h)(3) motion is subject to the same standards as a Rule 12(b)(1) motion to dismiss for lack of jurisdiction. , 206 F. Supp. 3d 202, 207 (D.D.C. 2016). To survive a motion to dismiss pursuant to Rule 12(b)(1), plaintiff bears the burden of establishing that the court has subject matter jurisdiction over its claim. , 483 F.3d 824, 828 (D.C. Cir. 2007). In determining whether there is jurisdiction, the Court may "consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." , 333 F.3d 193, 198 (D.C. Cir. 2003) (citations omitted). "Although a court must accept as true all factual allegations contained in the complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1)," the factual allegations in the complaint "will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." ., 503 F. Supp. 2d 163, 170 (D.D.C. 2007) (citations omitted). Although the Court must construe the complaint liberally, it may not "draw argumentative inferences in favor" of Plaintiff. , 779 F. Supp. 610, 611 (D.D.C. 1991) (citing , 266 U.S. 511 (1925)).

IV. DISCUSSION

Defendants move to dismiss all but Plaintiff's First Amendment claim on two limited bases: (1) the Court lacks jurisdiction to hear Plaintiff's Fifth Amendment claims because Congress has statutorily provided that only the federal Courts of Appeals may hear such claims after administrative review, and (2) the Court lacks jurisdiction to hear Plaintiff's APA claim because there is no final agency action to review. For example, Defendants do not argue that Plaintiff fails to state a claim or Plaintiff lacks standing. As such, before the Court are two tailored questions: (1) whether, as a matter of pleading and statutory interpretation, Plaintiff's claims qualify as claims "arising from" removal proceedings that the federal district courts lack jurisdiction to hear, and (2) whether Plaintiff's purported failure to plead a final agency action strips the Court of jurisdiction over Plaintiff's APA claim.

As to the former, the Court repeats its prior holding thoou (i)6 (d( )-10 (Tc 0 Tw 23.3 0(pl /26d( )Tj( )Tj

A. Fifth Amendment Claims

As the Court previously explained in its Memorandum Opinion granting preliminary relief on Plaintiff's punitive-conditions claim, the Immigration and Nationality Act ("INA") provides that "a petition for review filed with an appropriate court of appeals" is "the sole and exclusive means for judicial review of an order of removal." 8 U.S.C. § 1252(a)(5). It also channels "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, any action taken or proceeding brought to remove an alien from the United States" into "judicial review of a final order" of removal. § 1252(b)(9) (emphasis added). Section 1252(b)(9) is an "unmistakable 'zipper' clause,"

the powers of immigration judges are limited, the Court concluded that Plaintiff's claim that "conditions imposed as a result of the limitations and restrictions adopted due to COVID-19 are punitive" is not a claim arising from removal proceedings. , 2020 WL 3265533, at *17.

The level and quality of relief an immigration judge may fashion to address a particular claim, however, is not of whether such a claim arises from removal proceedings. As the Court explained, the key reason why a punitive-conditions claim—which the Court then

counsel relationship that is independent of and collateral to their removal proceedings."); , 342 F. Supp. 3d 1067, 1078 (D. Or. 2018) ("As with the legal question regarding an alien's indefinite detention in , the legal questions regarding detainees' access to their retained counsel in this case are 'too remote' from removal proceedings to fall within the scope of § 1252(b)(9) or (g).").

Other courts have found that such claims are barred on the general theory that the right to counsel is too closely bound up in the removal proceeding and related processes. , , 510 F.3d at 13 (finding barred plaintiffs' "claim that their detention and subsequent transfer by the government infringed their rights to counsel by barring their access to lawyers, interfering with preexisting attorney–client relationships, and making it difficult to secure counsel of their choosing");

, 456 F. Supp. 3d 16 (D.D.C. 2020) (finding barred plaintiffs' "access-to-counsel and due process claims" because they arose "from the course of removal hearings"); , No. 19-CV-08296-CRB, 2020 WL 570987, at *2 (N.D. Cal. Feb. 5, 2020) (finding barred claim that plaintiff's "transfer to [another facility] violate[d] her Fifth Amendment right to counsel");

, 338 F. Supp. 3d 1042, 1048 (N.D. Cal. 2018) (finding barred claims alleging "disruption to an established representation relationship").

A close reading of the plurality and the statutory language at issue shows that the key question is the proceedings at issue. The plurality explained that, for jurisdictional purposes, there is an important difference between bond proceedings and removal proceedings. At issue in was whether the INA provides for periodic bond hearings as a matter of statutory construction. 138 S. Ct. at 836. In order to reach that question, the Court first had to determine whether legal questions posed by bond proceedings "arose from" removal proceedings

for the purposes of section 1252(b)(9). at 839-40. As previously explained, the plurality concluded that a legal question regarding the legal sufficiency of bond proceedings did not "arise from" removal proceedings because, in posing such a question, the detainee respondents did not ask for judicial review of any part of their removal proceedings. at 840. The Court distills from the plurality decision a simple principle in this case: on the one hand, where a Fifth Amendment claim centers on the process due in removal proceedings, it is barred; where a Fifth Amendment claim centers on the process due in any other proceedings, on the other hand, it is not barred.

A number of other courts have taken a similar approach. is particularly instructive. There, several detainees and legal services organizations challenged the same kinds of conditions of confinement as raised in this case, alleging that those conditions of confinement violated, among other things, the Fifth Amendment's guarantee of access to counsel as to removal proceedings. 456 F. Supp. 3d at 24. As the court there explained, even though the plaintiffs characterized their access-to-counsel claim as centering on conditions of confinement, "[w]hether there has been a violation of any immigration petitioner's right to counsel will depend on the specific facts that arise from [their] removal proceedings." at 29 (citing , 867 F.3d at 1035)). In other words, to determine whether Defendants violated Plaintiff's client's right to access to counsel for the purposes of removal proceedings by setting certain conditions of confinement, the Court must look to the effects on the representation in the removal proceedings themselves. Although PTj0.04 Tw 0.29 0hTti/(e)4 (hw -0.61 -2]p3 (e)4 (ca3 (e)4 (. (t)-2 (i)ouns)-1 T

barred because they arise from the removal proceedings themselves.

Plaintiff protests such a finding as illogical because, as the Court has previously noted, immigration judges are powerless to remedy conditions of confinement at detention centers. Opp. at 10. As an initial matter, whether an immigration judge can fashion an effective remedy has nothing to do with the statutory text, the lodestar of the Court's analysis. , 510 F.3d at 10. Even if true, immigration judges have the power to fashion other effective relief. For example, "immigration judges can and do control removal proceedings by allowing parties additional time to discuss matters with counsel and evidence." , 2021 WL 1840418, at *5. Although immigration judges lack the power to provide the relief Plaintiff seeks here, it is incorrect to suggest that they lack

without a bond hearing did not fall within section 1252(b)(9). 138 S. Ct. at 841 & n.3.

Defendants' argument that the Court should read 1252(b)(9) to sweep even broader—swallowing up all Fifth Amendment claims by immigrant detainees—is unavailing. As the First Circuit explained, had Congress intended the "zipper clause" to sweep as broadly as Defendants would prefer, Congress could have easily used different language, e.g. "related to" or "because of." , 510 F.3d at 10; , 498 U.S. 479, 496 (1991) (implying Congress could have used broader language had it wanted to set a broader jurisdictional bar). Congress did not do so. Defendants' position also stands in stark contrast to the broader plurality's supposition that challenges to non-removal proceedings are not included within the "zipper clause."

Defendants' reading of 8 U.S.C. § 1252(a)(2)(B)(ii) fails for similar reasons. Pursuant to that provision, "no court shall have the jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security" including, pursuant to 8 U.S.C. § 1226(a), discretionary bond determinations. Yet, as the plurality explains, Fifth Amendment claims such as Plaintiff's do not challenge a detention decision itself. 138 S. Ct. at 841. If Plaintiff is not challenging individual bond proceedings as unconstitutional under the Fifth Amendment (i.e., as applied), it is making a facial challenge to the statutory scheme permitting detention to the extent that the statutory scheme permits Defendants' alleged conduct, which would not be barred. As a general matter, the Court is unconvinced that Fifth Amendment claims predicated on conditions of confinement that unconstitutionally affect bond proceedings are statutorily barred in light of the precedent examined. , 2019 WL 2912848, at *16; , 456 F. Supp. 3d at 30 (implying that right-to-counsel claim would not be barred if it was connected to bond proceedings).

any provision of this chapter." Repl. at 18. Yet Plaintiff's APA claim does not challenge any removal order; it only alleges that Defendant has failed to implement an agency policy and that failure to implement that policy is a violation of the APA.

Perhaps cognizant of what Plaintiff actually pleads, Defendants devote the vast majority of argument in support of dismissal on whether Plaintiffs have alleged a final agency action within the meaning of the APA. Mot. 30-37; Repl. 20-23. Such an argument, however, has nothing to do with subject matter jurisdiction. The APA itself does not contain any jurisdictional grant. , 430 U.S. 99, 107 (1977); , 576 F.3d 522, 524-25 (D.C. Cir. 2009). Therefore, any argument about the deficiency of an APA claim—particularly an argument that a plaintiff has failed to identify a final agency action—is made on a motion to dismiss for failure to state a claim, not a motion to dismiss for lack of jurisdiction.

, 456 F.3d 178, 187-88 (D.C. Cir. 2006). The present motion, of course, is solely to dismiss for lack of jurisdiction, and Defendants cannot now move to dismiss the operative complaint

Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(h)(3) for Lack of Subject Matter Jurisdiction is **GRANTED IN PART AND DENIED IN PART**. An appropriate Order accompanies this Memorandum Opinion.

Date: June 2, 2022

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge