IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' PARTIAL FEDERAL RULE OF CIVIL PROCEDURE 12(c) MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Federal Rule of Civil Procedure 12(c), Defendants, by and through their undersigned counsel, hereby move the Court to enter judgment on the pleadings as to Counts I, III, IV, and VI in Plaintiff's Second Amended Complaint, ECF No. 70. Defendants' motion is based on the accompanying Memorandum of Points and Authorities in Support of the Motion.

A proposed Order consistent with this Motion is attached.

DATED:

CERTIFICATE OF SERVICE

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

DATED: July 29, 2022

/s/ Richard G. Ingebretsen
RICHARD G. INGEBRETSEN
Attorney for Defendants

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)

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INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 12(c), this Court should grant judgment in favor of Defendants, U.S. Department of Homeland Security, et al. ("Defendants") on Counts I, III, IV, and VI of Plaintiff, Southern Poverty Law Center's ("SPLC") Second Amended Complaint ("SAC"). Counts I and III are Fifth Amendment due process right claims brought as a third-party claim on behalf of SPLC's detainee-clients; Count IV is a First Amendment Viewpoint Discrimination claim brought in first-party on behalf of itself; and Count VI is an Administrative Procedure Act ("APA") claim on behalf of itself and its detainee-clients. *See* 2d Am. Compl. ¶¶ 316–59, ECF No. 70 ("SAC"). Plaintiff has, for each of Counts I, III, IV and VI, failed to state a *prima facie* claim. Accordingly, with the pleadings now closed and a discovery and trial date not yet set, *see* Order 1, ECF No. 215, the Court should grant judgment in favor of Defendants on each of the above four Claims.

58, 65, 72; Ans. ¶¶ 49, 58, 65, 72. Detainees at each are subject to removal proceedings. *See* SAC ¶¶ 51, 59, 66, 75; Ans. ¶¶ 51, 59, 66, 75.

The operative SAC was filed on August 28, 2019 (ECF No. 70), which claims six causes of action: four third-party claims on behalf of its detainee-clients' Fifth Amendment due process rights (Counts I, II, III, and V), one claim on behalf of its own First Amendment rights (Count IV), and one claim on behalf of itself and its detainee-clients pursuant to the APA (Count VI).

substantive due process claim[,]" in the context of the allegedly "punitive" conditions of confinement related to ICE's COVID-19 response. *See* Mem. Op., ECF No. 124 at 31. The Court explicitly "d[id] not address" SPLC's "separate arguments focusing on its clients' access to counsel claims pursuant to the Fifth Amendment." *Id.* at 22, 31-32. That same day, the Court denied, without prejudice, Defendants' Partial 12(h)(3) Motion to Dismiss, ECF No. 117, "because it appeared to raise some of the same issues as the [pending TRO]." *See* Minute Order (June 17, 2020). A month later, Defendants renewed their Partial 12(h)(3) Motion to Dismiss. ECF No. 133.

On June 2, 2022, the Court partially granted Defendants' renewed 12(h)(3) motion, dismissing SPLC's third-party Fifth Amendment right-to-counsel claim (Count II), for lack of subject matter jurisdiction. Order 1, ECF No. 200. The Court also narrowed SPLC's third-party Fifth Amendment access to courts and full-and-fa7.008 T0.001lgrtsmeeprB2 (a)-2 ( ]TJct)-2 (pa)a-38.745el c(c

for judgment on the pleadings. *See* Order 1, ECF No. 215. Pursuant to the Court's briefing schedule, Defendants filed their Motion for Reconsideration of the Court's Order Denying Defendants' Motion to Sever and Transfer Venue on July 14, 2022. ECF No. 216.

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). Motions under Fed. R. Civ. P. 12(c), when filed by defendants, are "functionally equivalent to a Rule 12(b)(6) motion." *Rollins v. Wackenhut Servs.*, 703 F.3d 122, 130 (D.C. Cir. 2012). As such, the pleading requirements in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), apply when evaluating Rule 12(c) motions just as they do on a motion under Rule 12(b)(6). *Rollins*, 703 F.3d at 130. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Such arguments are not untimely, even if a motion to dismiss was not filed, because "[f]ailure to state a claim upon which relief can be granted . . . may be raised . . . by a motion under 12(c)." Fed. R. Civ. P. 12(h)(2)(B).

As with motions under Rule 12(b)(6), "[b]ecause Rule 12(c) provides judicial resolution at an early stage of a case, the party seeking judgment on the pleadings shoulders a heavy burden of justification." *Dist. No. 1, Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n, AFL-CIO v. Liberty Mar. Corp.*, 933 F.3d 751, 760 (D.C. Cir. 2019). "The moving party must demonstrate its entitlement to judgment in its favor, even though the 'court evaluating the 12(c) motion will accept as true the allegations in the opponent's pleadings, and as false all controverted assertions of the movant.'" *Id.* (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1249 n.11 (D.C. Cir. 1987)). Nonetheless,

further consideration, or are otherwise insufficient to state a *prima facie* claim. *El v. Oparaugo*, No. 19-3804 (CKK), 2022 U.S. Dist. LEXIS 103701, at *8 (D.D.C. June 10, 2022) ("In conclusory fashion, Plaintiff states that she and her family members were 'traumatized' and believed 'their lives were threatened.' Such assertions are far too vague to survive [a Rule 12(c)] motion."). As it relates to constitutional claims, "early dismissal of a hopelessly incomplete claim for relief coincides… with the obligation of the Judicial Branch to avoid deciding constitutional issues needlessly." *Christopher v. Harbury*, 536 U.S. 403, 417 (2002) ("*Harbury III*").

ARGUMENT

I.

'presently den[ied] an opportunity to litigate.' Such plaintiffs must show that a meaningful opportunity to pursue their underlying claims was 'completely foreclosed.'" *Id.* (quoting *Harbury III*, 536 U.S. at 413; *Harbury v. Deutch*, 233 F.3d 596, 609 (D.C. Cir. 2000) ("*Harbury I*"), and *Harbury v. Deutch*, 244 F.3d 956, 957 (D.C. Cir. 2001) (*per curiam*) ("*Harbury II*")). Prisoners/detainees (or those standing in for them as third party) "bringing a forward-looking claim must show an 'actual injury to [the detainee's] litigation.'" *Broudy*, 460 F.3d at 121 (D.C. Cir. 2006). "No such injury exists if a [third-party detainee-client] can still meaningfully press his underlying claims because the [third-party detainee-client] is not being 'presently den[ied] an opportunity' to meaningfully litigate, even in 'the short term.'" *Broudy*, 460 F.3d at 121 (quoting *Harbury III*, 536 U.S. at 413); *accord Pinson v. U.S. Dep't of Justice*, 964 F.3d 65, 75 (D.C. Cir. 2020).

As compared to forward-looking claims, there are "at least three elements necessary to prove a backward-looking denial-of-access claim: an arguable underlying claim, complete foreclosure, and causation." *Broudy*, 460 F.3d at 120. Per *Broudy*,

> First, to state a denial-of-access claim, plaintiffs must identify "in the complaint" a "non-friF5.0. (cl)4 tatm,d d [(")-a (e)4 (r)-gua (e)bl(or)-2 (e)- [(")-1 ( )]Tw 0.15 Tw 82.945 0 Td [(un4)-
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Id. at 120. SPLC fails to state a third party claim on either of the first two elements, common to both forward and backward looking claims, and the third element of backward-looking denial-of-

concerned; (3) SPLC has not alleged the third party detainee-clients possess a non-frivolous claim, much less describe it to Federal Rule of Civil Procedure 8 standards.

First, because "release on both bond and parole" is sought from administrative agencies—DHS-ICE and/or EOIR—the right of "access to courts" is not implicated because there are no "courts" involved. The right of "access to courts" has not been extended to administrative proceedings. *Broudy*, 460 F.3d at 117 n.6 ("The plaintiffs argue that the constitutional right of access to the courts extends to administrative proceedings . . . . Because we conclude that the plaintiffs fail to state a denial-of-access claim for other reasons, we need not address this issue.").

Second, even assuming "access-to-courts" also means "access-to-ICE" and "access-to-EOIR," the requests for exercises of bond or parole discretion under 8 U.S.C. §§ 1182(d)(5), 1226(a), or 1231, are not "constitutional" claims regarding "fundamental rights" with which "access-to-courts" claims are concerned. *Pinson*, 964 F.3d at 75; *Asemani v. U.S. Citizenship & Immigration Servs.*, 797 F.3d 1069, 1077 (D.C. Cir. 2015) (barrier to litigation "might raise constitutional concerns when a prisoner seeks access to the courts to vindicate certain fundamental rights . . . ."). Release on bond or parole under the INA is entirely discretionary, and thus the third-party detainee-clients have no fundamental legal interest in parole or bond. *Franklin v. District of Columbia*, 163 F.3d 625, 631 (D.C. Cir. 1998) ("a liberty interest in parole cannot be derived from the Constitution itself."); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 11 (1979) ("That the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained . . . a hope which is not protected by due process.").

To the extent SPLC alleges that third-party detainee-clients "seek release on both bond and parole" from the district courts, the legal claims would be futile because bond/parole determinations are committed to the Executive Branch, not to the district courts, under the

Immigration & Nationality Act ("INA"). 8 U.S.C. §§ 1182(d)(5), 1226(a), 1231. Furthermore, Congress has also made those bond and parole determinations unreviewable in the district courts. 8 U.S.C. §§ 1226(e), 1252(a)(2)(B)(ii); *see also C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 219 (D.D.C. 2020) ("[T]he INA expressly commits such parole determinations to the 'discretion' of the agency.").

The jurisdictional bars to review of parole and bond decisions aside, SPLC has not adequately alleged that at least one of their clients at each facility possesses a non-frivolous underlying claim which either will be filed, or would have been filed, in court but for Defendants' official actions. *See Harbury III*, 536 U.S. at 413. "Whether an access claim turns on a litigating opportunity yet to be gained or an opportunity already lost, the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." *Id*. Pertinently, "the underlying cause of action, whether anticipated or lost, *is an element that must be described in the complaint*, just as much as allegations must describe the official acts frustrating the litigation." *Id.* at 415 (emphasis added). The SAC does not "state the underlying claim in accordance with Federal Rule of Civil Procedure 8(a), just as if it were being independently pursued, and a like plain statement should describe any remedy available under the access claim and presently unique to it." *Id.* at 417-18. The access-to-courts claim (Count I) therefore fails on the pleadings on the first element for either type of denial-of-access claims.

B. The SAC Does Not Show that at Least One Third Party Detainee Client is Experiencing or has Experienced a Complete Foreclosure of Meaningful Opportunities to Pursue an Underlying Claim in Court.

As applied to a third-party claim, the second element requires that SPLC must "show that a meaningful opportunity to pursue the[third-party detainee-client's] underlying claim[] was completely foreclosed [to the third-party detainee-client]." *Pinson*, 964 F.3d at 75. Although SPLC

describes various aspects of the Facilities as "barriers," the SAC falls far short of adequately alleging a "complete foreclosure" to the pursuit of a specific, underlying non-frivolous claim possessed by at least one detainee-client at each Facility. Hurdles, burdens, and limits are simply not the equivalent of "completely foreclos[ure,]" a "total[] bar[,]" or "'den[ial] [of] . . . any and all access' to the courts" under binding Circuit precedent. *Id.* at 75 (quoting *Broudy v. Mather*, 460 F.3d 106, 117, 120-21 (D.C. Cir. 2006); *In re Green*, 669 F.2d 779, 785-86 (D.C. Cir. 1981) (*per curiam*)).

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claims or to allow us to decide if these claims are 'nonfrivolous.'" *Broudy*, 460 F.3d at 123 (quoting *Harbury III*, 536 U.S. at 416).

Without specific underlying claims, SPLC has also failed to sufficiently allege that the claimed "barriers" (Compl. ¶ 322) have caused foreclosure or a specific impediment to a third-party detainee-client's non-frivolous litigation. Specificity as to the nature of both the impediment and the injury are required to establish causation. *E.g.*, *Jones v. Van Lanen*, 27 F.4th 1280, 1288 (7th Cir. 2022) ("Right to it, we see nothing that would allow a jury to conclude the confiscation and destruction of [Jones's

C. The Alleged Barriers Described in the SAC Do Not Establish SPLC's Third Party Detainee Clients Suffered a Complete Lack of Access to Courts.

To the extent it does not dismiss SPLC's access-to-courts claim for failing to state a claim, the Court should find that the access-to-court claim fails because the barriers, as alleged, are not sufficient to establish a lack of access to courts. In this, the D.C. Circuit's recent opinion in *Muthana v. Pompeo*, 985 F.3d 893, 901 (D.C. Cir. 2021) is instructive. In *Muthana*, the D.C. Circuit noted "a serious question of whether Muthana can sustain next friend standing on behalf of his adult daughter Hoda[,]" an ISIS bride trapped in a Kurdish camp in Syria, because "Hoda does not fit within any of the established exceptions" under *Whitmore v. Arkansas*, 495 U.S. 149 (1990). Notably, one "established exceptions" is when the real party in interest is unable to litigate due to a "lack of access to court[.]" *Whitmore*, 495 U.S. at 165 (explaining the "ancient tradition" of next friend standing requires that "the real party in interest is unable to litigate his own cause due to mental incapacity, *lack of access to court*, or other similar disability") (emphasis added). Indeed, the SAC at most conflates a lack of a desired result (bond or parole) with a lack of access to courts. *See* SAC ¶ 2. This is insufficient to establish that SPLC's clients lack access to courts. *See, e.g.*, *Pinson*, 964 F.3d at 75 (requiring a "prisoner to 'show that a meaningful opportunity to

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because “the obstacles to accessing and communicating with counsel described herein create a substantial risk that errors will occur in bond … proceedings.” Compl. ¶¶ 329, 331. The SAC is insufficient to state a third-party procedural due process claim under governing law.

in *all* three facilities possess a present constitutional interest in a bond or parole hearing in order to obtain class-wide relief on their behalf. *Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) ("…the Court of Appeals has already acknowledged that some members of the certified class may not be entitled to bond hearings as a constitutional matter . . . . Assuming that is correct, then it may no longer be true that the complained-of 'conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" (quoting *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338 (2011)). Because SPLC has not alleged that all of its third-party detainee-clients have a current, constitutionally-protected substantive interest in bond or parole hearings, SPLC has not alleged facts sufficient to show that the real parties in interest (the third-party detainee-clients) have the standing to support a *de facto* class-wide procedural due process claim that their bond hearings or parole requests[5] are, have been, or will be prejudiced. *See Franklin*, 163 F.3d at 633 ("In order for plaintiffs to have constitutional standing to challenge how those [parole] hearings are conducted, there must be proof that a named member of the class: (1) was imprisoned for a misdemeanor; (2) could not speak or understand English; (3) appeared before the Board of Parole seeking early release on parole; and (4) suffered harm because of the Board's failure to provide an interpreter."). Because SPLC does not allege that all third-party detainee-clients have a protected substantive due process interest, the procedural due process claim necessarily fails. *Jennings*, 138 S. Ct. at 852; *Lewis v. Casey*, 518 U.S. 343, 359 (1996); *Franklin*, 163 F.3d at 635 ("It is worth repeating that broad decrees rendered in the name of the Due Process Clause, decrees mandating what m

of judicial legislating we have rejected in the past."). Judgment should be entered for Defendants on Count III.

III. PLAINTIFF FAILS TO STATE AN APA CLAIM (COUNT VI).

A. The SAC fails to state a claim for relief under the APA because it does not challenge a specific agency action.

SPLC's vague claims concerning anecdotal actions affecting immigration proceedings of detainees does not state a claim under the APA. The APA provides both a cause of action and a waiver of sovereign immunity for claims in which a plaintiff has "suffered a legal wrong because of agency action," or been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. To obtain judicial review under this provision, a plaintiff must: (1) identify some discrete final "agency action" to be reviewed; and (2) show that it has suffered a "legal wrong" or been "adversely affected or aggrieved" by the action at issue within the meaning of a relevant statute. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990). The Court cannot, as SPLC proposes, simply lump together multiple allegations—none of which have been specifically identified as discrete "final agency action"—and provide meaningful relief. This sort of programmatic challenge falls outside of § 702's limited waiver of sovereign immunity. *See Lujan*, 497 U.S. at 891 ("Respondent alleges that violation of the law is rampant within this program . . . . Perhaps so. But respondent cannot seek *wholesale* improvement of this program by court decree . . . . Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm.").

Here, the SAC generically describes categories of purportedly arbitrary or unlawful agency practices—such as processes for requesting or conducting in-person ohC(us)-1 .ondu ine ain thulli wepast (la)1 (

detained clients.") (emphasis added).[6] Such programmatic challenges are prohibited under the APA per *Lujan*, 497 U.S. at 882–83. In *Lujan*, the Supreme Court held that absent an explicit congressional authorization to correct the administrative process on a systemic level, agency action is not ordinarily considered "ripe" for judicial review under the APA "until the scope of the controversy has been reduced to manageable proportions, and its factual components fleshed out, by concrete action that harms or threatens to harm the complainant." *Id.* at 873. Thus, "flaws in the entire 'program' cannot be laid before the courts for wholesale correction under the APA . . . ." *Id.* As in *Lujan*, here the Court faces a generic challenge to an amorphous group of potentially several hundred administrative "decisions" or "actions." *Lujan*, 497 U.S. at 873; *see Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("The limitation to discrete agency action precludes the kind of broad programmatic attack we rejected in *Lujan*…").

This is in part because of the role of ICE's PBNDS. While the SAC is partly correct that the PBNDS "govern the . . . facilities used by ERO . . . to hold detainees for more than 72 hours," *see* SAC ¶ 291, the implementation of PBNDS is done on a facility-by-facility basis, with different factors taken into account for different facilities. *See, e.g.*, 2011 PBNDS Preface ("The PBNDS 2011 are also drafted to include a range of compliance, from minimal to optimal. As such, these standards can be implemented widely . . . ."). Here, SPLC's client-detainees are housed at three different facilities with differing characteristics, meaning that PBNDS compliance may facially appear non-uniform. *See* SAC at 15, 18, and 20. In sum, an aggregation of conduct concerning how the Facilities apply the PBNDS is not a discrete "final agency action." *Lujan*, 497 U.S. at 882-83.

[6] The only arguable exception being the locations of the Facilities themselves, but decisions to contract for or construct facilities are not reviewable. *See* 8 U.S.C. §§ 1231(g), 1252(a)(2)(B)(ii); *Sinclair v. AG of the United States*, 198 F. App'x 218, 222 n.3 (3d Cir. 2006)

Further, to raise a claim under §

B. The SAC fails to state a claim for relief under the APA because it does not challenge a final agency action.

implement all CDC and World Health Organization protocols designed to combat COVID-19, and sought immediate release. *Id.*

The comparison of *NIPNLG* to the present matter is particularly apt because both involve policies that are implemented on a "facility-by-facility" basis. *Compare NIPNLG*, 456 F. Supp. 3d at 31 (discussing how ICE's Pandemic Response Requirements are implemented on a "facility-by-facility" basis "based on the particularized circumstances present at detention centers") *with* 2011 PBNDS Preface ("The PBNDS 2011 are also drafted to include a range of compliance, from minimal to optimal. As such, these standards can be implemented widely, while also forecasting our new direction and laying the groundwork for future changes."). Like *NIPNLG*, it is impossible to tell whether any particular attorney-client visitation meeting or the VTC meeting scheduled by SPLC at a particular facility will have any effect on the outcome of its client-detainees' removal proceedings or any legal consequences before an immigration judge renders a decision. *See NIPNLG*, 456 F. Supp. 3d at 31 (finding that EOIR's policies do not constitute final agency action because they do not determine any rights or obligations, nor do legal consequences flow from those policies). Rather, legal consequences flow, and rights and obligations are determined, only from the particular decision of an immigration judge implementing EOIR's policies in a specific case. *Id.* Accordingly, SPLC's abstract allegations of harm do not amount to reviewable agency action under the APA.

Furthermore, "[t]he APA's judicial review provision also requires that the person seeking APA review of final agency action have 'no other adequate remedy in a court,' 5 U. S. C. § 704." *Sackett v. EPA*, 566 U.S. 120, 127 (2012). Here, there are multiple other routes to challenge the conditions of confinement at ICE facilities.[7] But notably, in this case, the Court already issued a

[7] ICE has multiple mechanisms for individual detainees and their family and representatives to raise grievances and issues with their confinement. *See, e.g.*, U.S. Dept. Homeland Security, *Provide Feedback or Make Complaints to DHS*, https://www.dhs.gov/provide-feedback-or-

TRO that, "[in] broad strokes, . . . orders that Defendants shall comply with the optimal-level requirements of the Performance-Based National Detention Standards [among other things,]" without mentioning the APA once in the entire 77-page opinion. ECF No. 124 at 4. As such, there can be no serious argument that there is "no other adequate remedy in a court" to remedy the allegedly deficient conditions at the Facilities. Accordingly, this Court should grant judgment in favor of Defendants with respect to Count VI.

C. Even if the SAC's allegations regarding PBNDS adequately alleges a discrete and final agency action, PBNDS does not qualify for review under the *Accardi* doctrine.

In lieu of identifying a discrete and final agency action, SPLC has sought to construe its APA action as a challenge to Defendants' alleged failure to follow their own rules in the PBNDS as it relates to attorney access, under *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) (the "*Accardi*" doctrine). *See* SAC ¶ 353; *see also* Pl.'s Resp. to Defs.' 12(h)(3) Motion 18, ECF No. 136. The provisions of PBNDS, however, do not "fall within the ambit of those agency actions to which the *Accardi* doctrine may attach." *See Damus v. Neilson*, 313 F. Supp. 3d 317, 324, 338 (D.D.C. 2018)

The *Accardi* doctrine "stan[d]s for the proposition that agencies may not violate their own rules and regulations to the prejudice of others." *Battle v. FAA*, 393 F. 3d 1330, 1336 (D.C. Cir. 2005). In *D.A.M. v. Barr*, petitioners similarly argued that under the *Accardi* doctrine, ICE's failure to follow CDC guidance and its own policies in responding to the COVID-19 pandemic is in violation of the APA. *D.A.M v. Barr*, 474 F. Supp. 3d 45, 66 (D.D.C. 2020) (Cooper, J.); *see Accardi* 347 U.S. at 260. Agency regulations, however, "do not create *substantive* due process

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Information Line, https://www.ice.gov/sites/default/files/documents/Document/2015/DRIL_helpline_flyer_community.pdf (last visited July 29, 2022).

rights" but rather are rooted in the notions of procedural due process. *D.A.M*, 474 F. Supp. 3d at 66 (citing *C.G.B.*, 464 F. Supp. 3d at 226 (emphasis in original)); *e.g.*, *Damus*, 313 F. Supp. 3d at

Nor does any reliance on *Torres v. U.S. Dep't of Homeland Security*, 411 F. Supp. 3d 1036 (C.D. Cal. 2019) alter this outcome. *See* Pl.'s Resp. to Defs.' 12(h)(3) Mot. 21, ECF No. 136; The *Torres* court, relying upon an Office of Inspector General Report that examined conditions at Adelanto ICE Processing Center, held that ICE's alleged failure to enforce its PBNDS standards at a contracted detention facility was final agency action for the purposes of surviving a Rule 12(b)(6) motion because the complaint's factual allegations sufficiently established that "any past or ongoing non-compliance at [Adelanto] [wa]s allegedly the result of an agency decision not to enforce the terms of its contract." *Torres*, 411 F. Supp. 3d

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Because SPLC raises no challenge to a final and discrete agency action, the Court should grant judgment in favor of Defendants as to SPLC's APA claim. *See, e.g.*, *NIPNLG*,

speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Instead, similar to its APA claim, SPLC broadly alleges an "inadequate number of attorney-visitation rooms, lack of contact visits, shackling, unavailability of interpreters, lack of access to video-teleconferencing ('VTC') and telephones, lack of confidentiality,

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directly contradict such a view, alleging "[a]ny lawyers who tried to represent Plaintiff's clients in civil litigation would encounter the same obstacles to access that SIFI staff and volunteers regularly encounter—including the inadequate number of attorney-visitation rooms, lack of contact visits, shackling, unavailability of interpreters, lack of access to video-teleconferencing ('VTC') and telephones, lack of confidentiality, prohibition on electronic devices, and arbitrary changes in rules regarding attorney visitation." SAC ¶ 18. If "any lawyer" would face the "same obstacles" in representing clients at the facility, then it is impossible for SPLC to establish that Defendants' policies "prevented [SPLC] from speaking while someone espousing another viewpoint was permitted to do so." *McCullen*, 573 U.S. at 485 n.4.

SPLC attempts to obfuscate the above by identifying certain instances where it asserts "upon information and belief" that it was "exclusively targeted" because of its "mission." *See, e.g.*, SAC ¶¶ 162–164, 208, 254 – 255. These alleged instances of disparate treatment, however, still do not establish a First Amendment violation for viewpoint discrimination because the alleged instances do not "evinc[e] a governmental policy or custom of intentional discrimination on the basis of viewpoint or content." *Frederick Douglass Found.*, 531 F. Supp. 3d at 331 (quoting *Brown v. City of Pittsburgh*, 586 F.3d 263, 294 (3d Cir. 2009)). And Plaintiff makes no allegation that any of the "obstacles" are anything other than content-neutral. As such, "in order to establish municipal liability for selective enforcement of a facially viewpoint- and content-neutral regulation, a plaintiff whose evidence consists solely of the incidents of enforcement themselves must establish a pattern of enforcement activity evincing a governmental policy or custom of intentional discrimination on the basis of viewpoint or content." *Brown v. City of Pittsburgh*, 586 F.3d 263, 294 (3d Cir. 2009). In *Brown*, the Third Circuit concluded that a plaintiff could not establish that a defendant's enforcement of a buffer zone law outside of abortion clinics was

ordinance and concluding “given distinct differences between the circumstances surrounding the mural's creation and the incident involving Plaintiffs nearly two months later, it seems far more likely that the District's contrasting response turneossyTw 6. -2.33w

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CONCLUSION

For the foregoing reasons, Defendants request that the Court grant judgment on the pleadings in favor of Defendants as to Counts I, III, IV, and VI of Plaintiff's Second Amended Complaint.

Dated: July 29, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy of this motion and the accompanying memorandum of law