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INTRODUCTION

The U.S. Department of Homeland Security, *et al.*, ("Defendants") respectfully submit this Reply to Plaintiff, Southern Poverty Law Center's ("SPLC") Response to Defendants' Partial Motion for Judgment on the Pleadings. *See* ECF No. 221 ("Opp.").

ARGUMENT

I. THE THIRD PARTY ACCESS-TO-COURTS CLAIM FAILS (COUNT I).

In Defendants' motion, Defendants explained that the SAC fails to state a third-party access-to-courts claim under *Broudy v. Mather*, 460 F.3d 106, 120-21 (D.C. Cir. 2006), the *Harbury* cases, *Christopher v. Harbury*, 536 U.S. 403, 417 (2002) ("*Harbury III*"); *Harbury v. Deutch*, 244 F.3d 95000, 536s7resHarburbury

Access-to-courts claims may be forward looking or backward looking. Each have clear standards. Mot. 6-7 (quoting *Harbury III*, 536 U.S. at 413; *Broudy v. Mather*, 460 F.3d 106, 120-21 (D.C. Cir. 2006)). In opposition, SPLC first disclaims that it asserts a backwards looking access-to-courts claim. Opp. 7-8. Although plaintiffs are the masters of their complaints, an adequately pled denial-of-access claim is not so slippery that it may be recast to suit the exigencies of the moment. *Broudy*, 460 F.3d at 118; *Harbury v. Hayden*, 444 F. Supp. 2d 19, 45 (D.D.C. 2006) (Kollar-Kotelly, J.) ("[T]he Supreme Court itself emphasized its displeasure with the opportunity taken by Plaintiff on appeal and at that late stage in the proceedings to 'supply the missing allegations'" in access-to-courts claim). But accepting SPLC's new gloss on the SAC, "forward-looking claims [have] at least two necessary elements: an arguable underlying claim and present foreclosure of a meaningful opportunity to pursue that claim." *Broudy*, 460 F.3d at 120-21. SPLC asks to be excused from both. Opp. 14-15. Indeed, the central tenant of SPLC's opposition is that the SAC should be held only to standards that SPLC has made up.

A. SPLC Fails to Allege an Arguable Underlying Claim.

Far from hyperbole, SPLC claims that "a modified version of the *Harbury* test applies[,]" which—unrecognized by any court—is a standard SPLC has cobbled together from odds and ends of inapposite out-of-circuit cases to excuse its pleading failures. Opp. 9.[1] The first standard SPLC excuses itself from is the requirement to plead an arguable underlying claim to Rule 8(a) standards. According to SPLC, "that requirement applies

roadblocks to future litigation, the named plaintiff must identify a 'nonfrivolous,' 'arguable' underlying claim, [*Lewis v. Casey*, 518 U.S. 343, 401 n.3 (1996)], and we have been given no reason to treat backward-looking access claims any differently in this respect." *Harbury III*, 536 U.S. at 415. "It follows that 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.* In requesting excusal, SPLC tacitly admits its failure.

Undeterred, SPLC asks the Court to ignore binding precedent on constitutional access-to-courts claims in favor of *Torres v. U.S. Dep't of Homeland Security*, 411 F. Supp. 3d 1036, 1062 (C.D. Cal. 2019), a decision in a class-action brought by activist groups and detainees alleging a violation of detainees' statutory rights (8 U.S.C. §§ 1229a, 1362) to access counsel during removal proceedings. Opp. 9. *Torres* does not save SPLC. First, *Torres* involved a first-party statutory access-to-*counsel* claim analyzed under Ninth Circuit interpretations of 8 U.S.C. §§ 1229a and 1362, not a third-party constitutional access-to-*courts* claim. Second, even if *Torres* were useful, the *Torres* court *still* required a particularity in asserting a first-party statutory access-to-counsel claim that SPLC fails to match in its third-party access-to-courts claim. Specifically, *Torres* ruled,

> To state a claim under § 1229 involving access to counsel, ….. Represented plaintiffs… must allege Defendants' conduct interfered with "established, on-going attorney-client relationship[s]." Plaintiffs assert that when they retained counsel for certain proceedings, Defendants would 'impede [] vital attorney-client exchanges by limiting the means by which detained noncitizens and attorneys… can communicate confidentially.' (FAC ¶ 154). This allegation is not specific to any particular Plaintiff, except Nsinano. He alleges interference with an established attorney-client relationship while he was held at an OCSD facility, (*id.* ¶ 54), but has standing only with respect to ICE. Tenghe and Torres do not sufficiently allege interference with an established attorney-client relationship.

Torres, 411 F. Supp. 3d at 1061. Even if *Torres* spoke to constitutional access-to-courts claims—which it does not—allegations "not specific to any particular [detainee]" that "Defendants would 'impede [] vital attorney-client exchanges by limiting the means by which detained noncitizens

and attorneys . . . can communicate confidentially'" do "not sufficiently allege interference with an established attorney-client relationship" to state a statutory access-to-counsel claim. *Id*.

Ignoring that pleading sufficiency is the central issue, SPLC instead blithely argues that "noncitizens are entitled to due process, including in immigration proceedings." Opp. 10. But SPLC's general legal opinions have nothing to do with the defect in the claim, which is that SPLC did not identify at least one third-party client at each facility and detail their specific "non-frivolous, arguable underlying claim" to Rule 8(a) standards. *Broudy*, 460 F.3d at 121. Instead, SPLC argues holdings cases from other districts (Opp. 10), and then asks the Court to conclude therefrom that "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." Opp. 10. This is a non-sequitur. Other courts' conclusions of law do not support the conclusion that the SAC alleges a third-party's arguable, non-frivolous underlying claim to satisfy Rule 8(a), as required.

As a last resort, SPLC tasks the Court with covering for its failures by *presuming* that its third-party clients at each facility have non-frivolous legal claims for release, though none are detailed. Opp. 10-11. Indeed, SPLC's opposition on this point consists largely of its legal opinion that its clients all have a "fundamental interest in physical liberty" and therefore, "Plaintiff has sufficiently alleged its clients' interest in their physical freedom to state its access to courts claim." Opp. 11-12. The Court may accept as true that SPLC has at least one client at each Facility for the purposes of this motion, but SPLC is not entitled to have its labels and legal conclusions—that its third-party clients at the Facilities have "non-frivolous, arguable underlying claims" to unspecified "bond or parole"—taken as true. *Harbury III*, 536 U.S. at 416 ("…the predicate claim [must] be described well enough to apply the 'nonfrivolous' test and to show that the 'arguable' nature of

the underlying claim is more than hope."); *Hernandez v. Gipson*, No. 5:18-cv-167, 2020 U.S. Dist. LEXIS 143879, at *7 (N.D. Fla. July 13, 2020) ("Plaintiff's assertion that his claims were 'non-frivolous' is a legal conclusion for which he states no facts in support."); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). In *Harbury III*, the Court reversed *Harbury II*'s acceptance of "protean allegation[s]" defendants "foreclosed Plaintiff from effectively seeking adequate legal redress" as sufficient to state an access-to-courts claim. *Harbury III*, 536 U.S. at 418, *rev'g Harbury II*, 244 F.3d at 957. SPLC fares no better, and dismissal follows when "it is impossible to ascertain from Plaintiff's… complaint the precise nature of Plaintiff's claims, much less that these claims are non-frivolous." *Gipson*, 2020 U.S. Dist. LEXIS 143879, at *8.

Dismissal requires no constitutional ruling on access-to-courts, nor would it be a ruling that no detainee has or will ever have an arguable, non-frivolous claim. Rather, after three iterations of the complaint, SPLC has failed to allege a non-frivolous, underlying claim held by at least one third party client at each facility to a degree sufficient for the Court to apply the non-frivolous test. *Broudy*, 460 F.3d at 119 ("The 'underlying claim,' the Court concluded [in *Harbury III*, 536 U.S. at 418-19], is essential to a well-pled complaint; otherwise the plaintiff's claim for denial of access must fail."). The SAC does not provide sufficient allegations to apply that test, so Count I fails.

B. The "Foreclosure" Requirement Applies, and SPLC Failed to Meet It.

As with the first required element for forward-looking access-to-courts claims, SPLC also requests to be excused from the second—a "present[] den[ial of] an opportunity to litigate" *Harbury III*, 536 U.S. at 413—by claiming that it "does not apply to civil immigration detainees[.]" Opp. 15. Binding precedent, however, applies the same pleading stringencies to differing classes of civil litigants. *Harbury III*, 536 U.S. at 413 (applying *Lewis v. Casey*, 518 U.S. 343 (1996) in non-prisoner context); *accord Pinson v. U.S. Dep't of Justice*, 964 F.3d 65, 75 (D.C.

counsel case requiring no showing of prejudice)). Count I is Fifth Amendment third-party access-to-courts claim, not a Sixth Amendment access-to-counsel claim. Still, SPLC claims *Benjamin* applies because civil ICE detainees seek to use courts "as a shield" rather than asserting affirmative claims. Opp. 17-18. However, bond and parole are affirmative claims seeking favorable exercises of discretion as against statutory authorizations—or indeed *mandates*

"the conditions' *effects* on Fifth Amendment rights *as to removal proceedings*" are "barred [by § 1252(b)(9)] because they arise from the removal proceedings themselves." Opinion (ECF No. 201) at 13-14. This leaves requests for bond and parole, which *Lyon* did not address, and which are affirmative—not defensive—requests for exercises of discretion. Third, although *Lyon* mentioned "access to courts" in its attempt to distinguish *Lewis v. Casey*, *Lyon* did not address the access-to-courts claim independently, it did not mention *Harbury III*, nor even any Ninth Circuit authority applying *Harbury III*. Instead, it relied on Ninth Circuit petition-for-review cases to discard the foreclosure requirement, and did so without addressing the "arguable, non-frivolous underlying claim" requirement. *Lyon*, 171 F. Supp. 3d at 981 (citing *Oshodi v. Holder*, 729 F.3d 883 (9th Cir. 2013); *Zolotukhin v. Gonzales*, 417 F.3d 1073 (9th Cir. 2005); *Colmenar v. INS*, 210 F.3d 967 (9th Cir. 2000); *Rios-Berrios v.INS*, 776 F.2d 859 (9th Cir. 1985)). Finally, even if *Lyon* had discussed access-to-courts claims, it is an outlier in its substitution of the actual injury requirement with a potential injury requirement. More persuasive authorities have rejected that position. *E.g.*, *Ortiz v. Downey*, 561 F.3d 664, 671 n.4 (7th Cir. 2009) (holding, in access-to-court case by pre-trial detainee, "[t]he Supreme Court in *Lewis*, however, specifically… explained that waiver of the actual-injury requirement was inappropriate even in cases involving substantial, systemic deprivation of legal materials."). *Lyon*, thus, presents no basis to depart from binding precedent, which does not suggest that pleading access-to-courts claims requires special leniency for SPLC.

Indeed, prisoners and civil detainees alike are held to *Harbury III*'s pleading requirements in access-to-courts claims. *E.g.*, *Shehee v. Ahlin*, 678 F. App'x 601, 601 (9th Cir. 2017) (applying *Harbury III*'s requirements to civil detainee); *Edney v. Haliburton*, 658 F. App'x 164, 166 (3d Cir. 2016) (same as to pre-trial detainee); *Mendoza v. Strickland*, 414 F. App'x 616, 618 (5th Cir. 2011) (same); *Ortiz*, 561 F.3d at 671 (same); *Kollins v. S.C. Dep't of Mental Health*, No. 8:04-1599-

CMC-BHH, 2007 U.S. Dist. LEXIS 18900, at *3 (D.S.C. Mar. 14, 2007) ("Plaintiff's circumstance [as a civil detainee] is analogous enough to that of a criminal defendant to warrant parallel treatment regarding his right of access to the courts."). Like everyone else, SPLC "must show that a meaningful opportunity to pursue [third parties'] underlying claims was 'completely foreclosed[]'" to the third party, *Broudy*, 460 F.3d at 121, and SPLC clearly has failed to do so.

For this reason, SPLC does not argue the SAC meets the bar set by *Harbury III* and *Broudy*, reaffirmed by *Pinson*, but instead argues "SPLC has adequately pleaded this claim to satisfy this modified harm standard" that SPLC has made up. Opp. 18-20. Failing that, SPLC argues the Court should assume the existence of an unspecified third party's arguable, non-frivolous underlying claim and that this theoretical third party has been foreclosed from meaningful litigation of the undisclosed underlying claim on a Rule 12(c) motion. However, the existence of a "non-frivolous" claim and "meaningful" access are legal questions. *E.g.*, *Jones v. Van Lanen*, 27 F.4th 1280, 1288 (7th Cir. 2022); *Dixon v. von Blanckensee*, 994 F.3d 95, 107 (2d Cir. 2021); *Broudy*, 460 F.3d at 123. The Court does not accept as true formulaic recitations of merit or unilateral legal conclusions that unspecified third-party clients possess some undescribed "non-frivolous, arguable underlying claim" and that "a meaningful opportunity to pursue [the undescribed] underlying claims [is] 'completely foreclosed.'" *Broudy*, 460 F.3d at 121.

Indisputably, the SAC is vague by design. An attorney—or here, a well-funded group of them—is in the best position to know their clients' claims, and SPLC would have pled an access-to-courts claim to *Harbury III* and *Broudy*'s satisfaction if SPLC were able. Instead, the SAC makes generalized allegations specific to no one, and SPLC asks the Court to task Defendants with the burden of showing that, *e.g.*, *no third-party client* will have any arguable, non-frivolous claim in the future and that impediment to that unspecified claim is impossible under the allegations.

Opp. 20. However, SPLC's failure to plead with requisite specificity does not shift the burden to Defendants to show impossibility. The Supreme Court rejected the view that "any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561 (2007) (rejecting the view that "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery.") (citing favorably *O'Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976) (finding no "duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional official action into a substantial one.")). To the contrary, SPLC's failure to identify a *single* client—out of the 83 they claimed to represent (SAC ¶ 99)—who is impeded from bringing a specific, non-frivolous underlying claim should *undermine* the SAC, not support it. "[W]hen a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist." *DiGrazia*, 544 F.2d at 546 n.3.

Finally, SPLC does not respond to the argument that the barriers, taken as alleged, are insufficient to establish inaccessibility to courts, even if SPLC had identified a third party's underlying, non-frivolous claim to Rule 8(a) standards. Mot. 13; Opp. 20. As noted, the D.C. Circuit's recent opinion in *Muthana v. Pompeo*, 985 F.3d 893, 901 (D.C. Cir. 2021) very strongly suggests that the barriers—here, a mix of inconveniences and facets inherent to a secure setting—are not sufficient to show that the courts

wrong that "unadorned, the-defendants-[may potentially]unlawfully-harm[]-[an unspecified third-party in an unspecified way as to bond or parole]" states a third-party claim. *See id*.

First, SPLC counters that "SPLC's clients are seeking to vindicate their liberty interest in being free from confinement." Opp. 21; *id.* 2 ("The individuals whom Defendants detain have a fundamental liberty interest in release from those facilities"), 10-12, 21.

Ass'n v. E.P.A., 372 F.3d 420, 427 (D.C. Cir. 2004) (citation omitted). SPLC now recasts its single APA claim[4] as a challenge to an alleged policy of not enforcing compliance with PBNDS, *see* Opp. 24, and allege in the SAC that "Defendants' wholly fail to enforce the PBNDS." SAC ¶ 303.

SPLC's new gloss is untenable. Once again, SPLC flocks to *Torres* to support their claim that such a characterization can be considered a particularized action. *See* Opp. 25. There, however, the complaint's allegations sufficiently showed that "any past or ongoing non-compliance at [the facility] [wa]s allegedly the result of an agency decision not to enforce the terms of its contract." *Torres*, 411 F. Supp. 3d at 1069. Here, SPLC instead relies on disjointed incidents of alleged noncompliance and then claims the incidents, when mashed together, amount to a single, identifiable agency action. *See* SAC ¶¶ 352–357. *Torres* is further distinguishable because *Torres*

SPLC's spin here is a thinly-veiled attempt to avoid *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 879 (1990). In *Lujan*, plaintiffs challenged the Bureau of Land Managements' withdrawal review program on the grounds it was an unlawful agency action that should be set aside under § 706(2). *Id.* at 879. The plaintiff "allege[d] that violation of the law [was] rampant within this program" and, rather than challenging individual determinations, claimed that the whole program was unlawful. *Id.* at 891. SPLC similarly tries to challenge multiple alleged incidents of noncompliance to make a blanket challenge to the enforcement of the PBNDS. *See* SAC ¶ 357 ("Defendants' final agency *actions* are the direct cause of the injuries to Plaintiff's detained clients.") (emphasis added). The Supreme Court in *Lujan* rejected such a scattershot programmatic challenge, and this Court should do the same. *Lujan*, 497 U.S. at 873 (holding "flaws in the entire 'program' cannot be laid before the courts for wholesale correction under the APA . . . .").

1. Alleged "Non Enforcement" of PBNDS as a "Particularized Agency Action" is Insufficiently Pled and SPLC's Claim is Undercut by the SAC.

Even if the Court were to agree that Defendants' alleged decision not to enforce the PBNDS

series of discrete and identical actions to support the existence of a policy requiring those same actions. *Id.* ("If anything, review of the Service's alleged policy is much more akin to a permissible review of a 'specific order or regulation, applying some particular measure across the board'—in this case, the alleged policy of mooting pending suits meant to challenge the Service's undue processing delays."). By contrast, SPLC generally alleges "Defendants wholly fail to enforce the PBNDS" (SAC ¶ 303) on a programmatic level, pointing to differences between facilities and an assortment of anecdotal incidents to conclude there is a failure to enforce the PBNDS. *See* SAC at 15, 18, 20. Ignoring, of course, that the PBNDS contemplates flexibility, with different factors taken into account for different facilities, *see, e.g.*, 2011 PBNDS Preface, and so PBNDS-compliant operations would take different forms across facilities.

The facts supporting the APA claims in *R.I.L-R v. Johnson* and *Aracely R. v. Nielsen* similarly demonstrate SPLC's failure to sufficiently plead facts proving the existence of a particularized policy. *See* Opp. 24. In *Aracely R.*, the claim regarding the existence of an unlawful parole policy aimed at deterring immigration was supported by government policy statements and orders; public statements by high level government officials; prior statements by defendants in other; and claims and declarations from other immigration lawyers, nongovernmental organizations, and other experts; and data all tending to suggest the existence of such a policy, *in addition* to plaintiffs own anecdotal experience with the alleged policy. *See Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 145–48 (D.D.C. 2018). Here, SPLC's allegation is only supported by its anecdotal evidence of different conditions at different facilities.

In *R.I.L-R v. Johnson*, the plaintiffs alleged defendants had a policy of "consider[ing] deterrence of mass migration as a factor in their custody determinations." 80 F. Supp. 3d 164, 174 (D.D.C. 2015). However, SPLC's claim that Defendants have an alleged policy of "not enforcing

of single and final decision by Defendants to not enforce the PBNDS at the facilities in question, merely because "Defendants "direct, manage and control the U.S. immigrant detention system and the conditions of confinement therein." *Id.* at 28; *supra* § III.A.

An examination of the case's SPLC cites to in its Opposition demonstrate the point that its APA claim does not challenge a final agency action. In *Nat. Res. Def. Council v. Wheeler* (cited Opp. 28), plaintiffs challenged a 2018 rule of the EPA, which was "[i]ssued under the authority of the Administrator himself, was published in the Federal Register, and was the culmination of EPA's consideration of the issue of how to treat the 2015 Rule's HFC listings pending any further formal rulemaking." 955 F.3d 68, 78 (D.C. Cir. 2020). More notably, in *Soundboard Ass'n v. Fed. Trade Comm'n* (cited Opp. 28), the D.C. Circuit noted "[t]he decisionmaking processes set out in an agency's governing statutes and regulations are key to determining whether an action is properly attributable to the agency itself and represents the culmination of that agency's consideration of an issue. 888 F.3d 1261, 1267 (D.C. Cir. 2018). In the case at hand, the SAC is bereft of any such facts that might support SPLC's claim that Defendants' decision not to enforce the PBNDS is "the consummation of Defendants' decisionmaking." SPLC has accordingly failed to challenge a final agency action and failed to state a claim for relief under the APA. *Bennett*, 520 U.S. at 177–78.

SPLC's challenged agency action is also not one from which "rights or obligations have been determined, or from which legal consequences will flow." *Id.* Plaintiff's only response to Defendants' argument is that other courts have found DHS actions in the context of immigration detention to be ones from which legal consequences flow. Opp. 29-30. This ignores the fact, however, that any alleged decision by Defendants to not enforce PBNDS does not directly result in further detention. This is definitionally nonfinal action. *See DRG Funding Corp. v. HUD*, 76

F.3d 1212, 1214 (D.C. Cir. 1996) ("[C]ourts have defined a nonfinal agency order as one, for instance, that does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action") (internal quotations omitted). This is clear from the cases SPLC cites as examples. In *Aracely*, plaintiffs challenged the rejection of parole requests, allegedly upon consideration of an improper factor, which would "have actual or immediately threatened effects." *Aracely*, 319 F. Supp. 3d at 139. Similarly in *R.I.L-R*, the plaintiffs also challenged the alleged policy of considering deterrence in custody determination, which had "immediate consequences for Central American asylum seekers detained as a result." *R.I.L-R*, 80 F. Supp. 3d at 184. In *Ramirez*, the plaintiff challenged the decision to place them in adult immigration detention, which "had immediate and significant legal consequences for Plaintiffs, who must bear detention in more restrictive settings . . . ." *Ramirez v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 7, 23 (D.D.C. 2018). No such immediate or imminent risk of detention results from an alleged policy of nonenforcement of PBNDS. Because the SAC does not show that legal consequences will flow therefrom, it fails to plead a final agency action under the APA.

C. The PBNDS Are Outside the Scope of the *Accardi* Doctrine.

SPLC's expansion of the *Accardi* doctrine to include substantive rights ignores the doctrine's history and traditional application by the Supreme Court and the D.C. Circuit. Pl.'s Opp. 30–33. As noted in *D.A.M. v. Barr*, 474 F. Supp. 3d 45 (D.D.C. 2020) and *C.G.B. v. Wolf*, 464 F. Supp. 3d 174 (D.D.C. 2020), the *Accardi* doctrine is "rooted instead in notions of *procedural* due process." *D.A.M.*, 474 F. Supp. 3d at 66 (quoting *C.G.B.*, 464 F. Supp. 3d at 226). "All subsequent decisions of the Supreme Court that reference the *Accardi* principle were also to involve procedural as opposed to substantive regulations." Thomas W. Merrill, The Accardi Principle, 74 Geo. Wash. L. Rev. 569, 577 (2006). The doctrine has generally been applied narrowly in this Circuit. *See, e.g.*, *Battle v. F.A.A.*, 393 F.3d 1330, 1335 (D.C. Cir. 2005) (examining *Accardi* claim in the

context of alleged violation of procedural rules during the EEO process); *Doe v. U.S. Dep't of Just.*, 753 F.2d 1092, 1098 (D.C. Cir. 1985) ("Courts, of course, have long required agencies to abide by internal, *procedural regulations* concerning the dismissal of employees even when those regulations provide more protection than the Constitution or relevant civil service laws.") (citing *Vitarelli v. Seaton*, 359 U.S. 535 (1959)) (emphasis added); *Mazaleski v. Treusdell*, 562 F.2d 701, 717 n.38 (D.C. Cir. 1977) ("*Procedural rules*, such as those promulgated by PHS to govern its personnel actions, are binding upon the agency issuing them.") (citing *Accardi*) (emphasis added). The history of the *Accardi* doctrine in the Supreme Court and D.C. Circuit clearly indicates that it is only meant to be applied to procedural rights, which the PBNDS are not. *See* Mot. 23.

The D.C. Circuit cases SPLC cites to in its opposition do not change this conclusion, with most only citing the broad proposition that an agency must abide by its own rules without specifying whether these rules are substantive or procedural. SPLC cites to *Mass. Fair Share v. L. Enf't Assist. Admin.*, 758 F.2d 708 (D.C. Cir. 1985) for the general proposition that the *Accardi* doctrine is "rooted in the concept of fair play and in abhorrence of unjust discrimination[.]" Opp. 32. The next sentence in the decision, however, addresses this view in the context of procedural, not substantive, regulations. *Mass. Fair Share*, 758 F.2d at 711 ("The Supreme Court has declared that "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own *procedures*, ...") (citation omitted; emphasis added). This fits, as the case addressed a challenge to procedures for "applications for grants under the Urban Crime Prevention Program." *Id.* at 711–12. While *Padula v. Webster* broadly stated agencies "must adhere to voluntarily adopted, binding policies that limit its discretion," it did not apply *Accardi*, ruling that the public statements did not constrain the agency's "traditional hiring discretion in the way [plaintiff suggested]." 822 F.2d 97, 101 (D.C. Cir. 1987). *Padula* also cited *Vitarelli* and *Wilkinson*; both

arose in challenges to violations of procedural regulations in discharges from federal service. *Service v. Dulles*, 354 U.S. 363, 373 (1957) (asking "(1) Were the [] Regulations here involved applicable to discharges effected under the McCarran Rider? and (2) Were those Regulations violated in this instance?"); *Vitarelli v. Seaton*, 359 U.S. 535 (1959) (the agency "was obligated to conform to the procedural standards… for the dismissal of employees on security grounds.").

Because SPLC fails to challenge or plead a particularized and final agency action and because the *Accardi* doctrine traditionally does not apply to substantive regulations, which the PBNDS are, the Court should grant judgment in favor of Defendants as to SPLC's APA claim.

IV. SPLC FAILS TO STATE A FIRST AMENDMENT CLAIM (COUNT IV).

A. The SAC's Allegations Do Not State a Plausible Viewpoint Discrimination Claim

SPLC misses the crux of Defendants' argument as to why its First Amendment claim is a failure. To state a viewpoint discrimination claim, SPLC must show "a pattern of unlawful favoritism," *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 325 (2002), that they were "prevented from speaking while someone *espousing another viewpoint* was permitted to do so." *McCullen v. Coakley*, 573 U.S. 464, 485 n.4 (2014) (emphasis added); *see also Zukerman v. U.S. Postal Serv.*, 961 F.3d 431, 446 (D.C. Cir. 2020) (the "most basic ... test for viewpoint discrimination," is "whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed."). While the SAC vaguely articulates a viewpoint, it contains no showing that its viewpoint differs from that of any other *pro bono* group serving ICE detainees at the Facilities, nor do the allegations plausibly suggest SPLC was targeted because of its indistinguishable viewpoint. The SAC thus failed to plead a First Amendment Claim.

SPLC attempts to correct its failing by describing its viewpoint as advocating for "lawful means of vindicating legal rights," Opp. 39, and points to SAC ¶ 15, "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." SPLC's First Amendment claim, however, is that Defendants target "SPLC alone—and not at other immigration lawyers who practice at LaSalle, Stewart, or Irwin—due to SPLC's underlying *mission*." SAC ¶ 340 (emphasis added); *see also id.* ¶¶ 162, 164, 229, 254, 255 (each alleging Defendants target SPLC and its volunteers because of "hostility" to its "mission"). The SAC depicts this mission as providing "desperately needed legal representation to indigent immigrants detained in remote locations in the Southeast… by providing direct representation to detained immigrants in bond proceedings, training *pro bono* attorneys to provide effective representation to indigent detainees in their bond proceedings, and facilitating representation in merits hearings for people who would otherwise have no legal recourse," *Id.* at ¶ 97, and "to provide quality representation to its clients." *Id.* at ¶ 141. Thus, the only "viewpoint" that SPLC has as the basis for its First Amendment Claim, is its "mission[,]" which is completely indistinguishable from that of any other *pro bono* group serving ICE detainees at the Facilities. Mot. 27-28. SPLC has failed to show it was "prevented from speaking while someone espousing *another viewpoint* was permitted to do so.'" *McCullen*, 573 U.S. at 485 n.4 (emphasis added).

This fault is highlighted by SPLC's Opposition. SPLC points to *Hightower v. City and Cty. of S.F.*

> …Plaintiffs' complaint provides three different control groups…: Critical Mass, The World Naked Bike Ride, and the Naked Sword film-shoot. SAC ¶¶ 73–78. Plaintiffs allege that at all three… events, groups of people engaged in publicly nude conduct, in violation of § 154. *Id*. Plaintiffs further allege that none of these events sought to express an "anti-§ 154" message and that at all three of these events, the SFPD were present but did not enforce the Ordinance. *Id.* By contrast, each time the Plaintiffs engaged in nude conduct that expressed an "anti-§ 154" message, the SFPD enforced § 154, issuing citations and detaining the Plaintiffs.

Id. at 884. The complaint in *Hightower* specifically plead how a *unique* viewpoint, an "anti-§ 154" message, resulted in plaintiffs alone being targeted out of other groups engaging in similar actions but without the "anti-§ 154" message. The SAC does not contain any like showing distinguishing SPLC's mission from other groups' missions who provide *pro bono* services to ICE detainees. Given these viewpoints are substantively indistinguishable from one another (Mot. 28), it is implausible that SPLC received discriminatory treatment for sharing the same exact view as every other *pro bono* group there. *See generally* SAC. SPLC has failed to state a First Amendment claim.

B. The SAC Does Not Show a Pattern Of Unlawful Favoritism.

SPLC fails to show a "pattern of unlawful favoritism." *Frederick Douglass Found., Inc. v. D.C.*

SPLC's only allegation of unfair treatment at LaSalle consists of a one day in 2018, with no pled reoccurrences, where a facility employee mistakenly denied access to SPLC's volunteers on the basis they had not filed appearances in relevant cases. SAC ¶¶ 162–164. Other allegations of targeting are similarly weak, such as the alleged interaction between one of SPLC's volunteers at Stewart and an ICE officer who pulled the volunteer over and recorded her information. Opp. 40. SPLC points to this as proof of discrimination "directed specifically and deliberately at SIFI staff and volunteers—not at other attorneys who visit the facility." Opp. 40. However, in SPLC's retelling, the ICE officer pulled her over and informed her that he needed to record her information *before* the volunteer identified herself as SPLC. *Id.* 40–41. Other targeting allegations are comingled with conditions SPLC alleges are uniform: "[a]ny lawyers… would encounter the same obstacles to access that SIFI staff and volunteers regularly encounter," SAC ¶ 18; *see, e.g.*, *id.* ¶¶

Dated: September 9, 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 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: September 9, 2022

/s/ David J, Byerley
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