IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOUTHERN POVERTY LAW CENTER,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants.

Civil Action No. 18-0760 (CKK-RMM)

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

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INTRODUCTION

This is a case about the federal government's deliberate decisions to detain noncitizens

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

These policies and practices prejudice SPLC's clients at the Facilities and prevent them from (c)4e Q q Bd7( )]TJ Ee 72 460.4-1.9(e)4(e)4.7(i)-2.84(l)-79.2(F)-4.5T /F21-2

While the lives and liberty of SPLC's clients are at stake, *see id.* ¶ 54 & n.13, Defendants'

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

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

ARGUMENT

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

The Fifth Amendment ensures no "person" is "deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Grounded in the Fifth Amendment's guarantee of procedural due process is the long-recognized right of "adequate, effective, and meaningful" access to the courts. *Broudy v. Mather*, 460 F.3d 106, 117 (D.C. Cir. 2006) (quoting *Harbury v. Deutsch*, 233 F.3d 596, 607 (D.C. Cir. 2000)) a*ff'd in part, rev'd in part, and remanded*, 536 U.S. 403 (2002), *vacated*, No. 99-5307, 2002 WL 1905342 (D.D.C. Aug. 19, 2002); *Bounds v. Smith*, 430 U.S. 817, 822 (1977), *overruled on other grounds by Lewis v. Casey*, 518 U.S. 343 (1996). This right applies to "any person,39 ry U.S Cife, liunds by

also Broudy, 460 F.3d at 118. The plaintiffs in *Harbury* and *Broudy* were seeking to bring affirmative litigation against the government—litigation which, they alleged, the government effectively prevented or undermined through its own actions. *See Harbury*, 536 U.S. at 405-08 (the plaintiff alleged her right of access to the courts was violated by a CIA cover-up that prevented her from filing a suit to prevent her husband's death); *Broudy*, 460 F.3d at 108 (D.C. Cir. 2006)

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

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

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

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

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

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[6] Defendants misconstrue Plaintiff's claim: SPLC is not attempting to vindicate its clients' liberty interests by seeking "release on both bond and parole from the district courts." Dkt. 218 at 19-20. Rather, Defendants' detention of SPLC's clients in a remote facility, with an inadequate

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

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

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

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

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

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

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

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

Defendants' final argument on this element appears to be that SPLC must fully plead its underlying claim "in accordance with Federal Rule of Civil Procedure 8(a)." Dkt. 218. at 20 (quoting *Harbury*

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

2. The "complete foreclosure" requirement does not apply to civil

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

In *Torres*, the court declined to impose a higher injury standard on detained noncitizens' procedural due process claims. 411 F. Supp. 3d 1036. The court evaluated the procedural due process claims of a class of noncitizens in an immigration detention center where their access to

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

Torres, *Lyon*, and *Benjamin* apply a modified standard to access-to-counsel related procedural due process claims outside the post-conviction context for two reasons. First, *Lewis* involved more attenuated constitutional claims. Because there is no "freestanding right to a law library or legal assistance program," an access to courts claim founded on denial of such access must "demonstrate that the alleged shortcomings in the library or legal assistance program hindered [the plaintiffs'] efforts to pursue a legal claim." 518 U.S. at 350-51. *Torres*, *Lyon*, and *Benjamin*, by contrast, involved claims that the access barriers *themselves* were constitutional violations. *Torres*, 411 F. Supp. 3d at 1063-64; *Lyon*, 171 F. Supp. 3d. at 980; *Benjamin*, 264 F.3d

prosecution or continued detention.[12] *Benjamin*, 264 F.3d at 186 (quoting *Murray v. Giarratano*, 492 U.S. 1, 7 (1989));

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. SPLC Adequately Pleaded Particularized Agency Action.

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

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

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

both "the equivalent" of official decisionmaking and "failure[s] to act." 5 U.S.C. §§ 551(13), 701(b)(2) ("agency action" for judicial review provisions of the APA carries same meaning given by § 551). Agency action must be "particularized," and not a "generalized complaint about agency behavior."[17] *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015) (quoting *Bark v. United States Forest Service*, 37 F. Supp. 3d 41, 51 (D.D.C. 2014)). A claim is sufficiently particularized

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

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

compliance with the PBNDS and indicate that ICE will conduct periodic inspections to enforce such compliance. *Id.*

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

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

B. SPLC Adequately Pleaded Final Agency Action.

In addition to adequately pleading particularized agency action, SPLC also adequately pleaded *final* agency action in its SAC. *See* 5 U.S.C. § 704. Agency action is "final" when (1) it "mark[s] the 'consummation' of the agency's decisionmaking process" and (2) as a result of the action, "'rights or obligations have be 9.1(de)35(of)-7.9((h)-9.2(e)3.1( )d0)4.9(i)-2(ne3.1(t)-1.9(t)-2(i)-2(

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

Taking a "'pragmatic' approach . . . to finality,"

deterrence into account when considering bond requests "has profound and immediate consequences" for asylum seekers detained as a result); *see also Venetian Casino Resort*, 530 F.3d

R., 319 F. Supp. 3d at 149-50 (citing *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (regulations), and

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

Rather, D.C. Circuit caselaw establishes that agency polices are "binding" "if so intended by the agency," examining "the statement's language, the context, and any available extrinsic evidence." *Id.* Polici1.9(e)(i)-2(c)8(P)-3..-1.ssc(P)-3.T Q q BT 1[Id.

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

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

[22] Defendants quote *Damus* to open their argument that the PBNDS cannot be the basis of an *Accardi* claim because they are not "procedural"—specifically, they argue that "[t]he provisions of PBNDS . . . do not 'fall within the ambit of those agency actions to which the *Accardi* doctrine may attach.'" *See* Dkt. 218 at 32 (quoting 313 F. Supp. 3d at 338). But that quote from *Damus* is from the opinion's discussion of whether ICE's Parole Directive is "binding" on the agency—not

https://www.ice.gov/detention-management). The renamed PBNDS were adopted in 2008 "to 'more clearly delineate the results or outcomes to be accomplished by adherence to their *requirements*' and improve, *inter alia*, the 'conditions of confinement'

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

"[C]onstru[ing] the complaint liberally in [SPLC's] favor and grant[ing] plaintiff the benefit of all reasonable inferences deriving from the complaint," *Sellers*, 376 F. Supp. 3d at 91, SPLC has clearly stated a claim to relief on its § 706(2)(A) *Accardi* claim that Defendants' decision

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

A First Amendment inquiry typically proceeds by "first, determining whether the First

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

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

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

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

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

Similarly, with respect to Pine Prairie, the SAC alleges that "Defendants and their agents are targeting SPLC and its volunteers based on hostility to SPLC's mission. The longer SIFI is operational at Pine Prairie, the more Defendants and their agents at Pine Prairie interfere with SPLC's efforts to meet with clients and prospective clients." SAC ¶ 254. Specific examples of this

instances provide no basis for inferring that Defendants have "a policy or custom of enforcing [legal visitation policies] based on the content of the speech or viewpoint of the speaker." Dkt. 218 at 39-40 (citing

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

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

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

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

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

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

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

CONCLUSION

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

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

[Signature block on subsequent page]

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CERTIFICATE OF SERVICE

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

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