

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

SOUTHERN POVERTY LAW CENTER,

*Plaintiff,*

v.

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

*Defendants.*

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

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

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## **I. INTRODUCTION**

This case challenges conditions that obstruct access to counsel at immigration prisons where people in civil detention are fighting for the ability to stay in this country and avoid deportation or even death. This case has been pending for over two years. Defendants first sought to sever and transfer the case, characterizing the claims as



person or remote, with their clients at the Facilities. *Id.* ¶¶ 149-52; 179; 220. When they do manage to get visits, the attorneys encounter significant delays at the Facilities, causing them to cut client meetings short or cancel the meetings altogether. *Id.* ¶¶ 122; 141-45; 167; 196-200; 225-26. Phones and video-teleconference consoles at the Facilities have poor connectivity and regularly cut out. *Id.* ¶¶ 126; 177-78; 203. Moreover, some phone systems at the Facilities cannot accommodate necessary third parties like interpreters or medical experts. *Id.* ¶¶ 147; 204. Several effectively meet with its clients. *Id.* ¶¶ 128; 195; 201; 236. Several of the Facilities also prohibit contact visitation, further hindering communication and impeding the building of trust and rapport. *Id.* ¶¶ 139-40; 173. Taken in their totality, these conditions of confinement at the

properly oversee and monitor the facilities. *Id.* ¶¶ 179; 220. When they do manage to get visits, the attorneys encounter significant delays at the Facilities, causing them to cut client meetings short or cancel the meetings altogether. *Id.* ¶¶ 122; 141-45; 167; 196-200; 225-26. Phones and video-teleconference consoles at the Facilities have poor connectivity and regularly cut out. *Id.* ¶¶ 126; 177-78; 203. Moreover, some phone systems at the Facilities cannot accommodate necessary third parties like interpreters or medical experts. *Id.* ¶¶ 147; 204. Several effectively meet with its clients. *Id.* ¶¶ 128; 195; 201; 236. Several of the Facilities also prohibit contact visitation, further hindering communication and impeding the building of trust and rapport. *Id.* ¶¶ 139-40; 173. Taken in their totality, these conditions of confinement at the

case. Instead they sought to sever the claims into three separate cases and transfer them to district courts in Louisiana and Georgia. This Court denied that attempt, reasoning that the D.C.-based Defendants were responsible for the local detention conditions claimed to be unconstitutional by SPLC. Mem. Op. 1-

This case concerns immigrants' access to counsel in three separate detention facilities. Immigrants' difficulties accessing counsel at all three facilities allegedly stem from Defendants' administration of national standards

discovery in October 2019, with discovery set to close on June 5, 2020. Scheduling & Procedures Order, ECF No. 69. SPLC propounded its first written discovery requests in November 2019 and served requests for inspections in December 2019 and January 2020.

discovery requests. During their months-long delay, Defendants asserted that they were withholding discovery, in part, on the grounds that SPLC did not have standing, that it had not properly pled a First Amendment claim (though Defendants never filed a motion to dismiss for failure to state a claim), and that the Court lacked subject-matter jurisdiction pursuant to 8 U.S.C. § 1252(b)(9). *See* Decl. of S. Agarwal, Ex. M, ECF No. 116-

Government is refusing to produce discovery on many of these topics because it disputes the

Restraining Order, occasioned by additional barriers to [redacted] with its clients in light of the COVID-19 pandemic. *See* [redacted] -

35, ECF No. 112. Defendants separately raised these arguments again in a Motion to Partially Dismiss the SAC that is nearly identical to the instant motion. ECF No. 117. The Court denied

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

In its TRO Order, the Court granted injunctive relief in part and held that it has subject-

y to the

Were it to conclude that § 1252(b)(9) stripped it of jurisdiction, the Court cautioned, there would effectively be no avenue for judicial review of this conditions of confinement claim, as

*Id.* at 35 (citing *Torres*

*v. DHS*, 411 F. Supp.3d 1036, 1049 (C.D. Cal. 2019)). A

about whether it has subject-

observing t

*Id.* at 32 n.4, 36.

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

### III. LEGAL STANDARD

Jurisdiction is a threshold issue which ordinarily must be addressed before the merits of the case are reached *William Penn Apartments v. D.C. Court of Appeals*, 39 F. Supp. 3d 11, 15 (D.D.C. 2014). Because subject

power to hear a case, the lack of it may be raised at any time. *Arbaugh v. Y&H Corp.*, 546 U.S.

500, 506 (2006)

iction

*Harbury v. Hayden*, 444 F. Supp. 2d 19, 26 (D.D.C. 2006) When faced with what a party characterizes as a Rule 12(h)(3) motion, a court should treat the motion as a traditional Rule 12(b)(1) motion for lack of subject matter jurisdiction. *Id.* In general, a motion to dismiss under Federal Rule of Civil Procedure 12(b) should not prevail unless plaintiffs can

*Id.* (internal

At the stage in litigation when dismissal is sought, the plaintiff's complaint must be construed liberally, and the plaintiff should receive the benefit of all favorable inferences that can be drawn from the alleged facts. *Id.* These facts include those alleged in the complaint, as well as any undisputed facts in the record or disputed facts resolved by the court. *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003).

#### **IV. ARGUMENT**

##### **A. This Court Maintains Subject Matter Jurisdiction to Adjudicate and**

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

court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this c § 1252(a)(5), and



*DHS*, 950 F.3d 177, 187-



with counsel *during the removal proceeding itself* was barred).<sup>2</sup>

focus exclusively on conditions and practices within ICE facilities that impede access to counsel.

Plaintiff does not challenge any process within removal hearings, the focus of § 1252

jurisdictional bar.

Likewise, in *Aguilar*, the plaintiffs t  
impeded access to counsel but instead exclusively sought transfer relief which can be obtained  
via a change of venue in the removal proceeding itself. *See Aguilar v. ICE*, 510 F.3d 1, 14 (1st  
Cir. 2007). In sharp contrast, immigration judges cannot issue an injunction to remediate  
. Thus, applying  
§ 1252 would deprive people in detention of remedy for  
their access-to-counsel claims removal proceedings have a singular focus  
removability and are not structured to provide declaratory and injunctive relief aimed at  
system-wide reforms. *Nava v. DHS*, No. 18 C 3757, 2020 WL 405634, at \*7-



could not be meaningfully resolved in a removal proceeding because Immigration Judges are

No. 124 at 35 (citing *Torres*

detention conditions, not release decisions. 8 U.S.C. § 1226(e) is therefore inapposite and inoperative.<sup>3</sup>

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

Defendants contend that *National Immigration Project of the National Lawyers Guild v. EOIR*, No. 1:20-cv-*NIPNLG*  
their argument that §

Third, the *NIPNLG*

*See, e.g., NIPNLG, 2020*

WL 2026971, at \*8. In addition to challenging barriers that impede access to attorneys for

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

Although *Jennings* itself makes clear that § constitutional conditions claims, well-established rules of statutory construction and constitutional avoidance further demonstrate that this Court retains jurisdiction.

*Webster v. Doe*

*ANA Int'l, Inc. v. Way*

ambiguities in a jurisdiction-

Supreme Court has repeatedly applied this principle to limit the reach of § 1252. *See INS v. St. Cyr*, 533 U.S. 289, 314 (2001); *Calcano-Martinez v. INS*, 533 U.S. 348, 351-52 (2001). The Supreme Court has made clear that adopting the broad construction of § 1252 that Defendants

meaningful forum to have their constitutional claims adjudicated and remediated. *Id.* Such a

*See Ramos v.*

*Nielsen*, 321 F. Supp. 3d 1083, 1102 (N.D. Cal. 2018). For all these reasons, Defendants cannot

rate that, through § 1252, Congress intended to

deprive district courts of their longstanding power to adjudicate constitutional conditions

claims particularly where such a construction would deprive detained immigrants of any ability



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

APA

claim brought under 5 U.S.C. § 702. However, it is well settled in this circuit that the APA does not confer subject matter jurisdiction. Rather, actions arising under the APA confer federal question jurisdiction; the proper question here

outside of the pleadings,<sup>6</sup> and that they purport to file this motion under 12(h)(3) while asserting a 12(b)(6) defense, this Court should reject \_\_\_\_\_ as untimely.

Should the Court \_\_\_\_\_, SPLC has properly asserted an APA claim. The SAC unambiguously identifies a d

*See* 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Specifically, follow their own rules in the PBNDS







Finally, as argued *supra*  
1252(b)(9) does not apply to  
instead focus

§ 1252(b)(9) does not properly apply.

## V. Conclusion

For the foregoing reasons, SPLC r  
Dismiss be denied.

Dated: July 28, 2020

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n-channeling provision under 8 U.S.C. §  
do not arise from the removal process but

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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

/s/ William E. Dorris  
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