IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO PARTIALLY DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(h)(3) FOR LACK OF SUBJECT MATTER JURISDICTION

TABLE OF CONTENTS

INTRODUCTION

SPLC's Response to Defendants' Renewed Motion to Partially Dismiss the Second Amended Complaint ("SPLC Response") relies upon its own misconception of the Court's June 17, 2020 Order. There, the Court granted in part and denied in part SPLC's Temporary Restraining Order. ECF No. 105. The Court decided in favor of SPLC's standing and jurisdictional arguments "on the basis of Plaintiff's substantive due process claim" in the context of conditions of confinement related to ICE's COVID-19 response. *See* Mem. Op., ECF No. 124 at 31. The Court explicitly "d[id] not address" SPLC's "separate arguments focusing on its clients' access-to-counsel claims pursuant to the Fifth Amendment." *Id*. at 22, 31-32. That same day, the Court denied, *without prejudice*, Defendants' Motion to Partially Dismiss the SAC "because it appeared to raise some of the same issues as the [pending] TRO." *See* Minute Order of June 17, 2020. *Contra* SPLC Resp. at 2 ("[T]his Court rejected the primary arguments supporting Defendants' 'renewed' motion."). By SPLC's own admission, the Court explicitly did not venture an opinion about whether it has subject matter jurisdiction over Plaintiff's access-to-counsel claims, observing that the "authorities are in equipoise." *Id.* at 32 n.4, 36; *see also* SPLC Resp. at 6.

Defendants' Renewed Motion to Partially Dismiss The Second Amended Complaint ("Renewed Motion") explicitly does not challenge the district court's determination that it has jurisdiction, in context of the now entered preliminary injunction, to consider "whether the conditions imposed as a result of the limitations and restrictions adopted due to COVID-19 are punitive, in part because they result in limited access to counsel." Renewed Mot. at 23 n. 5; ECF No. 124 at 36–37. SPLC miscalculates the court's TRO ruling and Defendants' separate Renewed Motion arguments.

Further, adherence to the statutory j

ARGUMENT

I. BY DISTORTING THE RULING IN *JENNINGS V. RODRIGUEZ*, SPLC REDESIGNS ITS LAWSUIT AS THAT OF "CONDITIONS OF CONFINEMENT" TO CREATE SUBJECT MATTER JURISDICTION

Defendants' argument that 8 U.S.C § 1252(b)(9) jurisdictionally bars SPLC's client-detainees access-to-counsel claims, says SPLC, ignores *Jennings*, "which expressly carves out

Jennings, 138 S. Ct. at 840. Read in full, the cited passage establishes that Justice Alito was

be determined. *See* Renewed Motion at 22–23; *e.g.*, SAC ¶ 331 (alleging Defendants' "conduct creates a substantial likelihood that Plaintiff's clients' rights to a full and fair hearing will be violated, because Defendants' policies and practices severely restrict the ability of Plaintiff to communicate with its clients and to conduct necessary legal work on their behalf in connection with their removal proceedings."); SAC n. 1, ¶ 96 (discussing the impact access to counsel has on release on bond and ultimate success in removal proceedings); SAC ¶ 318 (arguing "Plaintiff's clients require meaningful access to Plaintiff in order to seek release on both bond and parole and to defend themselves against removal from the United States—the very reason that they are detained at these immigration prisons."); SAC ¶ 333 (asserting "All of the obstacles to accessing and communicating with counsel described herein create a substantial risk that errors will occur in bond and removal proceedings. . . ."). SPLC engages in work for clients seeking representation in removal proceedings, bond, habeas, and parole, and all facility detainees are in removal proceedings, and SPLC *only* renders immigration services to these individuals. *See* SAC ¶¶ 14, 16, 98, 100, 102, 318; SPLC Resp. at 15. Thus, SPLC is alleging access to counsel claims "challenging any part of the process by which their removability will be determined." *Jennings*, 138 S. Ct. at 841. *Jennings* establishes these claims continue to be barred. *Id.* A challenge to fairness of removal proceedings due to barriers to access to counsel is—without a doubt—a challenge to the "process" by which removability will be determined. *See Jennings*, 138 S. Ct. at 841. Congress has clearly determined that such challenges must be funneled to the court of appeals via the administrative process. *See Aguilar*, 510 F.3d at 13 ("subject to the channeling effect of section 1252(b)(9), petitioners' right-to-counsel claims must be administratively exhausted.").

Further, SPLC relies upon its buzzword usage of

cv-815, 2019 WL 2912848, at *12 (C.D. Cal. June 20, 2019). SPLC Resp. at 9. As argued in Defendants' Renewed Motion, these four cases that SPLC relies upon, are distinguishable from the SAC for a myriad of reasons. *See* Renewed Mot. at 18 (*E.O.H.C.*, where appellants' claims arose from the Migrant Protection Protocol ("MPP") and interim removal to Mexico, not their *final* removal to Guatemala); *id.* at 24 (*Torres*, where the court determined that putative class plaintiffs' claims affected more than just removal proceedings and bond matters but included

this point is that it also challenges barriers that impede access to counsel for other purposes, in addition to removability, such as release on bond, parole, habeas, and conditions advocacy. SPLC Resp. at 15. This distinction is of no moment, however, given the clear discretion provided to the Attorney General under section 8 U.S.C. §§ 1226(e) and 1231 (*see infra* section III). Further, because all of these matters arise from a "part of the process by which [ ] removability will be determined," review is barred. *Jennings*, 138 S. Ct. at 841. Although SPLC conveniently asserts it represents detainees in "conditions advocacy," it is telling that the SAC unequivocally states that SIFI was formed in 2017 for the stated purpose of "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." SAC at ¶ 97. Nowhere does the SAC allege SIFI represents Facility detainees in "conditions advocacy" *or for any other purpose* not arising directly from the removal process. *See* SAC ¶ 102 ("Through SIFI, Plaintiff endeavors to provide effective and ethical removal defense to all their detained clients."). Accordingly, the Court lacks subject matter jurisdiction.

Further, while SPLC makes much that the *NIPNLG* plaintiffs sought injunctive relief against EOIR and "expressly sought to enjoin certain practices in removal hearings themselves," SPLC ignores that ICE was also a defendant in the case. SPLC Resp. at 15. Specifically, plaintiffs in *NIPNLG* sought to "require ICE to provide VTC and teleconference capabilities and to take a number of detailed and specific steps relating to counsel communications, the installation of telecommunications and VTC facilities, and the provision of PPE." *NIPNLG*, 2020 WL 2026971, at *4; *see NIPNLG*, 2020 WL 2026971, *1 ("[Plaintiffs] challenge immigration court and detention facility policies that the government has implemented in response to the

COVID-19 pandemic.”). The court denied relief as to claims related to ICE and EOIR based on the same lack of subject matter jurisdiction. *Id.* at *12.

proceedings and which SPLC claims directly affect the fairness of removal proceedings. *See* SAC n. 1, ¶ 96 (discussing the impact access to counsel has on release on bond and ultimate success in removal proceedings); SAC ¶ 331 (alleging Defendants' "conduct creates a substantial likelihood that Plaintiff's clients' rights to a full and fair hearing will be violated, because Defendants' policies and practices severely restrict the ability of Plaintiff to communicate with its clients and to conduct necessary legal work on their behalf in connection with their removal proceedings."); SAC ¶ 333 (asserting "All of the obstacles to accessing and communicating with counsel described herein create a substantial risk that errors will occur in bond and removal proceedings. . . .").

Finally, the Ninth Circuit's pre-*Jennings* decision in *J.E.F.M.* and the First Circuit's pre-*Jennings* decision in *Aguilar*, where both courts held that § 1252(b)(9) jurisdictionally bars access-to-

action lawsuit where plaintiffs sought certain injunctive and declaratory relief from various practices and procedures of the former Immigration & Nationality Service relating to the detention of El Salvadoran and Guatemalan citizens in Los Fresnos, Texas. *Nunez v. Boldin*, 537 F. Supp. 578, 578-80 (S.D. Tex. 1982). SPLC's reliance upon *Nunez* is similar to its misplaced reliance upon *Torres*, which is distinguishable to the present matter because SPLC does not represent a class of detained individuals. *See* Renewed Mot. at 24-25 (distinguishing *Torres*). Furthermore, *Benjamin* involved the denial of the New York City Department of Corrections' motion to terminate consent decrees pursuant to

T2 (e)4pos( )]T Ti0 3-10 (D)2 cT 0 3 r 1 . t i 0

access to counsel." ECF No. 124 at 36–37. In fact, the Court explicitly declined to address whether it had jurisdiction over SPLC's access-to-counsel claims in the SAC and did not broadly hold it has jurisdiction over conditions of confinement claims unrelated to Defendants' COVID-19 response. *See id.* at 22, 31-32. The distinction is meaningful because conditions of confinement claims about access-to-counsel that are not related to the COVID-19 public health crisis do not present the sort of "now or never" emergency requiring immediate intervention that would render review via the administrative process or PFR insufficient. *See E.O.H.C.*, 950 F.3d at 185-86 (noting that due to the MPP, the administrative process was insufficient and the court had subject matter jurisdiction). Finally, *Banks* is not an immigration case and cannot stand for the proposition that Defendants' congressionally authorized detention processes, practices, or procedures are not covered by § 1252(b)(9).

III. THE COURT LACKS JURISDICTION TO REVIEW DISCRETIONARY DETERMINATIONSeceha-4 (NSe)-2 (c)-6 (e)-6 ()-11 (V-10 (c)]TJ E4 8126 391.44 >>BDC001

determinations on whether to detain or to grant bond or parole." SPLC Resp. at 13. SPLC is mistaken. Not only is the ultimate discretionary decision on bond or parole unreviewable, so is the process by which the agency arrives at the discretionary determination. Section 1226(a) explicitly provides that the Attorney General "may" detain an alien or "may" release on bond or conditional release. 8 U.S.C. § 1226(a). It is well established that "[n]o court may set aside any action or decision by the [government] under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." 8 U.S.C. § 1226(e); *see Demore v. Kim*, 538 U.S. 510, 518-22 (2003) (noting 8 U.S.C. § 1226(e) strips jurisdiction to consider challenges to discretionary determinations). Therefore, the bond and parole decision is discretionary and unreviewable by statute.

Likewise, the process by which the discretionary decision is reached is also unreviewable. *See Privett v. Sec'y Dept of Homeland Sec*, 865 F.3d 375, 381 (6th Cir. 2017) (holding the court lacked jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(B)(ii) to review a constitutional claim that would necessarily require review of a discretionary decision). It is impossible to separate the outcome of the process from the process itself, and the court would unavoidably be required to review the process by which the bond or parole decision is reached. *Bourdon v. United States Dep't of Homeland Sec. (DHS)*, 940 F.3d 537, 545 (11th Cir. Oct. 3, 2019) ("If a court can dictate which arguments the Secretary must entertain or how the Secretary weighs the evidence, then the Secretary can hardly be said to have 'sole and unreviewable discretion'…").

F-2 (on')3c2]TJ ( )Tj 7Ln

removal proceedings. *See* SAC ¶ 100 ("…assist clients in obtaining release on bond and parole"); *id.* ¶ 318 ("Plaintiff's clients require meaningful access to Plaintiff to seek release on both bond and parole and to defend themselves against removal…"). They are not tangential to removal proceedings and are barred. *NIPNLG*, 2020 WL 2026971, *4-8 (citing *Jennings*, 138 S. Ct. at 841).

IV. THE CONSTITUTIONAL AVOIDANCE DOCTRINE IS INAPPLICABLE

SPLC's argument that the constitutional avoidance doctrine dictates that § 1252 not be construed to deprive this court of jurisdiction to adjudicate SPLC's claims is not only confusing, but inapplicable. *See* SPLC Resp. at 16. "[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988). "The canon of constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one [plausible] construction." *Jennings*, 138 S. Ct. at 836 (citing *Clark v. Martinez*, 543 U.S. 371, 385 (2005)). In the absence of more than one plausible construction, the canon simply "has no application." *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) (quoting *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494 (2001)). When relying upon this doctrine, the court "still must *interpret* the statute, not rewrite it." *Jennings*, 138 S. Ct. at 836. (emphasis in original). Here, section 1252(b)(9) explicitly provides that "judicial review of all questions of law and fact….*arising from any action taken or any proceeding* brought to remove an alien from the United States….shall be available only in judicial review of a final order." § 1252(b)(9) (emphasis added). No recourse to the cannon of constitutional avoidance is necessary. Through § 1252, "Congress has clearly provided that all claims—whether statutory or constitutional—that 'aris[e] from' immigration removal proceedings can only be brought through the petition for

review process in federal courts of appeals." *J.E.F.M.*, 837 F.3d at 1029. "Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the PFR process." *Id.* at 1031 (emphasis in original).

Section 1252(b)(9)'s channeling provisions are "'breathtaking" in scope and "vise

jurisdiction is not precluded by another statute." *Dhakal v. Sessions*, 895 F. 3d 532, 538 (7th Cir. 2018).[3] Congress intended the provisions of the Immigration and Nationality Act of 1952 (INA) to supplant the APA in immigration proceedings, *Ardestani v. INS*, 502 U.S. 129, 133 (1991), and 8 U.S.C. § 1252(a)(5) is the "sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter." § 1252(a)(5).

SPLC argues that the jurisdiction-channeling provision under 1252(b)(9) does not apply to SPLC's claims, and therefore this court is not precluded from reviewing SPLC's APA claim. SPLC Resp. at 22. As Defendants argue in the Renewed Motion, the APA does not provide a mechanism for review of claims barred by statute. Renewed Mot. at 36; *see* 5 U.S.C. § 704 ("The APA provides a cause of action only ucaonm(a)-4 nm(a)-4 nm(a)doe6/iP <</MCID 0(ju)2 e 0.5w [(s)-5 (ee)]T

agent, brought action against Director of Secret Service, challenging the Secret Service's revocation of her top secret security clearance. *Oryszak*, 576 F. 3d at 522. There, the court found that the APA provided no cause of action to review the decision of the Secret Service to revoke plaintiff's security clearance because that decision is an "agency action…committed to agency discretion by law" and therefore plaintiff failed to state a claim upon which relief can be granted. *Id.* at 526. Neither *Sygenta* nor *Oryszak* involve the strict INA funneling provision at issue here. *Aguilar*, 510 F.3d at 1, 9 (describing § 1252(b)(9)'s jurisdiction-stripping provisions as "vise-like in grip"). Accordingly, SPLC's reliance on these cases is misplaced.

SPLC badgers Defendants' timing to file its motion "over two years after litigation began" and that Defendants "impermissibly attach[ed] evidence outside of the pleadings." SPLC Resp. at 17-18. But, because subject matter jurisdiction is a fundamental requisite of the federal court's 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). Further, a court may consider material outside of the pleadings in ruling on a "motion to dismiss for lack of venue, personal jurisdiction, or subject matter-jurisdiction." *Artis v. Greenspan*, 223 F. Supp. 2d 149, 152 (D.D.C. 2002). Defendants' Exhibit A to its Renewed Motion merely illustrates how expansive SPLC views its allegations in the SAC, unbridled by section 1252(b)(9)'s jurisdictional bars, and may be considered by the Court. *See, e.g.*, SPLC Resp. at 5 ("[T]he Government is refusing to produce discovery on many of these topics because it disputes the basic premises of Plaintiff's First and Fifth Amendment claims."). However inconvenient it may be to SPLC, Defendants unequivocally did not file their motion pursuant to Federal Rules 12(b)(1), (b)(6), or Rule 56. ECF No. 133. Rather, Defendants correctly filed a motion to dismiss pursuant to Rule 12(h)(3), and the Court may consider whatever information it deems necessary to decide its own subject matter jurisdiction.

B. SPLC fails to identify a final agency action for which relief can be sought under the APA.

To avoid dismissal, SPLC argues that the SAC unambiguously identifies a discrete and "final" agency action that is subject to APA review and alleges sufficient facts that raise a right to relief "above the speculative level." SPLC Resp. at 18; *see* 5 U.S.C. § 704. Specifically, says SPLC, the SAC alleges that Defendants' failure to follow their own rules in the Performance Based National Detention Standards ("PBNDS") constitutes "arbitrary and capricious" conduct in violation of the APA. SPLC Resp. at 18 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) (the "*Accardi*" doctrine).

The *Accardi* doctrine "stan[d]s for the proposition that agencies may not violate their own rules and regulations to the prejudice of others." *Battle v. FAA*, 393 F. 3d 1330, 1336 (D.C. Cir. 2005); SPLC Resp. at 18. In the recent *D.A.M. v. Barr* decision, petitioners similarly argued that, under the *Accardi* doctrine, ICE's failure to follow CDC guidance and its own policies in responding to the COVID-19 pandemic is arbitrary and capricious in violation of the APA. *D.A.M. v. Barr*, No. 20-cv-1321, 2020 WL 4218003, at *13 (D.D.C. Jul. 23, 2020) (Cooper, J.); *see Accardi* 347 U.S. at 260. Agency regulations, however, "do not create *substantive* due process rights" but rather are rooted in the notions of procedural due process. *Id.* at *13 (citing *C.G.B. v. Wolf*, No. 20-CV-1072 (CRC), 2020 WL 2935111, at *34 (D.D.C. June 2, 2020) (emphasis in original)); *e.g.*, *Damus v. Neilson*, 313 F. Supp. 3d 317, 324, 337 (D.D.C. 2018) (finding that plaintiffs could challenge ICE's failure to comply with its own Parole Director, imposing "a number of *procedural* requirements for assessing asylum-seekers' eligibility for relief") (emphasis added)). The Court found that the CDC guidelines at issue in *D.A.M.* set out substantive standards for how to handle the COVID-19 crisis. *Id.*

Thus, "flaws in the entire 'program' cannot be laid before the courts for wholesale correction under the APA . . . ." *Id.* at 873. Although SPLC does not style the SAC as an attack on an agency "program," its identification of the agency actions at issue is no less vague and impermissible under the APA. *Osage Producers Ass'n v. Jewell*, 191 F. Supp. 3d 1243, 1249-50 (N.D. Okla. 2016).

SPLC's interpretation of the court's ruling in *C.G.B. v. Wolf* confuses this very distinction. SPLC Resp. at 21; *see C.G.B., et al. v. Wolf, et al.*, 2020 WL 293511 (D.D.C. June 2, 2020). SPLC argues that, unlike in *C.G.B* where plaintiff alleged "general deficiencies in ICE's compliance with the PRR," in contrast, SPLC has provided extensive factual allegations detailing ICE's failure to enforce specific provisions of the PBNDS. SPLC Resp. at 21 (citing *C.G.B*, 2020 WL 293511, at *33). It is not a question of whether the allegations are general or specific, but rather if SPLC's allegations constitute a *final* agency action under the APA—or merely the aggregation of incidents, each of which constituting its own "final action." *Lujan*, 497 U.S. at 882-83. SPLC's argument that the PRR in *C.G.B.* is "dynamic" and the PBNDS is part of the Defendants' contracts with the Facilities, has no bearing on this question.

SPLC unpersuasively attempts to show the applicability of the APA by distinguishing *NIPNLG*.

CONCLUSION

For the foregoing reasons, Defendants request the Court to grant its Partial Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Dated: August 4, 2020

Respectfully submitted,

ETHAN P. DAVIS
Acting Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director, Office of Immigration Litigation
District Court Section

YAMILETH G. DAVILA
Assistant Director

/s/Ruth Ann Mueller
RUTH ANN MUELLER
(D.C. Bar No. 1617339)
Trial Attorney
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Washington D.C. 20044

DAVID BYERLEY
(D.C. Bar No. 1618599)
Trial Attorney
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Washington D.C. 20044

JAMES J. WALKER
(D.C. Bar No. 1032636)
Trial Attorney
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Washington D.C. 20044

CHRISTOPHER LYERLA
(TX Bar No. 24070189)
Trial Attorney
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Washington D.C. 20044

CERTIFICATE OF SERVICE

I certify that I served a copy of this motion 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: August 4, 2020

/s/ Ruth Ann Mueller
Attorney for Defendants