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' COURT ORDERED SUPPLEMENTAL BRIEFING CONCERNING DEFENDANTS' PARTIAL MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to the Court's March 15, 2023, Order Granting in Part Defendants' Partial Federal Rule of Civil Procedure 12(c) Motion for Judgment on the Pleadings, *see* Order, ECF No. 226, Defendants, by and through their undersigned counsel, hereby submit supplemental briefing as to Count III of the Second Amended Complaint ("SAC"). The Court ordered briefing on two issues: "(1) the circumstances providing a right to counsel in bond proceedings under *Mathews v. Eldridge*, and (2) whether the Court in *Harbury* effectively foreclosed a procedural due process claim in similar circumstances where relief is available via another constitutional claim." Mem. Op. 8, ECF No. 225 (citing *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (quotation omitted)).

I. No Circumstances Support a Right to Counsel for Bond Proceedings Under *Mathews.*

As a threshold matter, no court has found an unqualified right to counsel in immigration bond proceedings under *Mathews*. Rather, the cases addressed by Plaintiff and the Court are patently distinguishable in their focus on the right to counsel—if any—in immigration proceedings, not bond proceedings. The void in case law follows from Congress's broad

discretionary, unreviewable bond scheme. Specifically, under 8 U.S.C. § 1226(e), the Attorney General's decision regarding detention, bond, or parole is not reviewable by the courts because the statute precludes "challeng[ing] a 'discretionary judgment' by the Attorney General or a 'decision' that the Attorney General has made regarding his detention or release." *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (quoting *Demore v. Kim*, 538 U.S. 510, 516 (2003)). Here, instead of challenging Defendants' statutory authority to set bond, Plaintiff seeks to augment existing policies and practices in a manner that would require additional considerations addressing access to counsel for bond proceedings. *See* SAC Prayer for Relief, ECF No. 70 ("SAC"). Section 1226(e), however, directly "deals with challenges to operational decisions, rather than to the legislation establishing the framework for those decisions." *Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999). The Supreme Court solidified the importance of this distinction in *Nielsen v. Preap*, 139 S. Ct. 954, 961 (2019), a case addressing mandatory detention without bond. The Supreme Court articulated that the jurisdictional bar at § 1226(e) *would apply* if respondents challenged "that the Government exercised its statutory authority in an unreasonable fashion." *Id.* That is precisely what Plaintiff contests here. Plaintiff's claim—directed at operational choices they assert unconstitutionally limit access to counsel in bond proceedings—is subject to the jurisdictional bar at 8 U.S.C. § 1226(e). This is precisely the type of assault on Defendants' discretionary bond authority expressly prohibited by 8 U.S.C. § 1226(e) and 8 U.S.C. § 1252 (a)(2)(b)(ii). Consequently, consistent with the statutory scheme and in the utter absence of any contrary authority in the context of immigration bond proceedings, the Court should grant judgment to Defendants on Count III because Plaintiff cannot establish that its clients' right to a full and fair hearing has or will be violated.

A. Plaintiff Has Not Adequately Pled that a Liberty Interest of its Clients Has Been Violated by Defendants' Conduct.

Courts analyze procedural due process claims in two steps. First, a court considers "whether there exists a liberty or property interest which has been interfered with by the State."

Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460 (1989); *see also Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 117 (D.C. Cir. 2010) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'liberty' or 'property.'") (citation omitted). "Only after finding the deprivation of a protected interest do we look to see if the [government's] procedures comport with due process." *Id.* at 117 (quotation omitted). While the Court has directed the parties to address "the circumstances providing a right to counsel in bond proceedings under *Mathews v. Eldridge*," Mem. Op. 8, ECF No. 225, such analysis is premature because Plaintiff has not yet established that a liberty interest has been interfered with by Defendants. The Court should accordingly grant judgment in favor of Defendants as to Plaintiff's Denial of Full and Fair Hearing Claim (Count III).

The Court is correct that "each individual in the United States has a generalized right to be free from unlawful detention, *see Zadvydas v. Davis*, 533 U.S. 678, 698 (2001), and that each alien held in civil detention has a liberty interest in their release if the detention is unlawful, *see Hernandez v. Sessions*, 872 F.3d 976, 992-93 (9th Cir. 2017)," Mem. Op. 7, ECF No. 225. However, the SAC lacks any specific, individualized claim that the Government's alleged actions interfered with a liberty interest of Plaintiff's clients. *See, e.g.*, *Americans for Immigrant Just. v. U.S. Dep't of Homeland Sec.*, No. CV 22-3118 (CKK), 2023 WL 1438376, at *17 (D.D.C. Feb. 1, 2023) ("Because Plaintiffs do not make a facial challenge to some statutory provision of one of ICE's many detention authorities, Plaintiffs must identify some *particular* proceeding in which a *particular* client faces the deprivation of a liberty interest that the Constitution guarantees *that* client.") (emphasis original); *see also Dent v. Holder*, 627 F.3d 365, 373–74 (9th Cir. 2010) (holding that to prevail on a full and fair hearing claim a noncitizen must "demonstrate that the challenged proceeding was so fundamentally unfair that the alien was

prevented from reasonably presenting his case" and "that the outcome of the proceeding may have been affected by the alleged violation").

Just as in *Americans for Immigrant Just.*, here Plaintiff's Procedural Due Process Full and Fair Hearing claim does not make a facial challenge to one of ICE's detention statutory authorities and is "prospective," *id.*, alleging "Defendants' conduct creates a substantial likelihood that Plaintiff's clients' rights to a full and fair hearing *will be* violated" and "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; eliminating these barriers creates a greater likelihood of *preventing* an erroneous deprivation of Plaintiff's clients' rights." SAC ¶¶ 331, 333 (emphasis added). However, Plaintiff's SAC identifies "no particular client and no particular proceeding." *See generally*, SAC. Indeed, the SAC only pleads one retrospective instance where conditions at a facility allegedly impacted attorney communications prior to a bond hearing. *See id.* at ¶ 200 (alleging an instance where SPLC could not meet with a "potential client" because of delay at a facility prior to a bond hearing which was subsequently denied).[1] This individual, however, was only a "potential client" of Plaintiff, *id.*, and as the Court noted in its decision granting judgment to Defendants on Count I, "Plaintiff lacks third-party standing to advance claims for hypothetical clients, *AIJ*, 2023 WL 1438376, at *10, and the Court cannot credibly infer that an adverse disposition was the consequence of conditions of confinement, as opposed to late client-intake or the lack of meritorious argument." Mem. Op. 6, ECF No. 225.

[1] The SAC makes one other retrospective allegation where conditions impacted the outcome of a bond hearing, *see* SAC ¶ 232, but this allegation revolves around access to mail and not conditions impacting access to counsel. Indeed, the detainee in question was represented by counsel at the bond hearing. *Id.*

Indeed, it is unclear from the SAC whether any of Plaintiff's clients even have a liberty interest at stake in this matter. *See Americans for Immigrant Just.*, 2023 WL 1438376, at *17 n.12 ("Nor can the Court determine whether any particular client even has a liberty interest at stake. Of ICE's many detention authorities, the Supreme Court has found only statutory detention authority permitting 'detention that is indefinite and potential permanent' *per se* offensive to the Fifth Amendment.") (citing *Zadvydas*, 533 U.S. at 698). Plaintiff's clients are lawfully detained, and there is no constitutional right to counsel in civil proceedings. *Koller By and Through Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1052 (D.C. Cir. 1984), *vacated on other grounds sub nom. Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985); *INS v. Lopez- Mendoza*, 468 U.S. 1032, 1038 (1984). Congress has only provided a statutory right to counsel in removal proceedings, 8 U.S.C. § 1362.Therefore, the absence of counsel in a custody proceeding does not violate the right to a full and fair hearing because it exceeds the minimum due-process requirement that an alien receive "some form of meaningful or fair hearing." *Maldonado-Perez v. INS*, 865 F.2d 328, 32 (D.C. Cir. 1989); *Dia v. Ashcroft*, 353 F.3d 228, 243 (3d Cir. 2003) (en banc) ("[a]liens only have those statutory rights granted by Congress"). The SAC is bereft of any allegation or claim which would support the conclusion that its clients are unlawfully detained or in contravention to the due process clause of the Fifth Amendment.

In the absence of any such claims, Plaintiff has failed to meet the requisite showing for standing, *cf. Franklin v. District of Columbia*, 163 F.3d 625, 633 (D.C. Cir. 1998) (requiring showing for standing purposes), let alone the necessary step of establishing "there exists a liberty or property interest which has been interfered with by the State" required before applying the balancing test in *Mathews v. Eldridge*. The Court should accordingly grant judgment in favor of Defendants at to Count III.

B. Plaintiff's Clients Do Not Have a Procedural Due Process Right to Counsel in Immigration Bond Proceedings.

Even if the Court concludes that it can proceed with determining whether "the procedures attendant upon that deprivation were constitutionally sufficient," *Thompson,* 490 U.S. at 460, judgment should still be granted to Defendants because there are no circumstances providing a right to counsel for Plaintiff's clients in bond proceedings under *Mathews v. Eldridge*. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 205 (D.C. Cir. 2001) (quoting *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)). In *Mathews v. Eldridge,* the United States Supreme Court established a three-factor balancing test to determine the "specific dictates of due process," *Ralls Corp. v. Committee on Foreign Inv. In U.S.*, 758 F.3d 296, 318 (D.C. Cir. 2014), including:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. At base, due process requires that procedures provide notice of the proposed official action and "the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 333. A weighing of these three factors does not support a conclusion that Plaintiff's clients are entitled to an attorney in bond hearings.

As to the first prong, freedom from detention is an important private interest, but Plaintiff has failed to establish that any of its clients in the facilities at questions are detained unlawfully or prolonged in a manner that would amount to a violation of due process. *Supra* section I.A; *Americans for Immigrant Just.*, 2023 WL 1438376, at *17 n.12 ("Of ICE's many detention authorities, the Supreme Court has found only statutory detention authority permitting 'detention

that is indefinite and potential permanent' *per se* offensive to the Fifth Amendment."). Even if it can be determined that Plaintiff's clients do have a liberty interest that the Government has deprived them of, it is necessarily a lesser one than the liberty interest of plaintiffs in cases concluding that there does exist a right to counsel in *deportation* hearings. *See, e.g.*, *C.J.L.G. v. Barr*, 923 F.3d 622 630 (9th Cir. 2019) (en banc) (Paez, J., concurring); *Aguilera-Enriques v. INS*, 516 F.2d 565, 568 (6th Cir. 1975). Both cases examined right to counsel in removal proceedings, not bond hearings, and "deportation is a penalty—at times a most serious one." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *see also id.* at 164 (Murphy, J., concurring) ("The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence."). Instead of deportation, Plaintiff's clients in the case at hand only face the denial of bond and continued legal detention pending the outcome of their removal proceedings.

The second prong considered in *Mathews* is the risk of error and adequacy of the challenged procedures. *Mathews*, 424 U.S. at 335. Detainees receive due process with respect to their liberty interest through ICE's initial custody determination and mechanisms to challenge that determination, such as a bond hearing. At a bond hearing, the court evaluates whether the individual poses a flight risk or a danger to the community. *Nielsen v. Preap*, 139 S. Ct. 954, 960 (2019) (citing 8 C.F.R. §§ 1003.19(a), 1236.1(d)). The factors include: "(1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's

history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States." *In Re Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006). "The burden is low, comparatively; it is more akin to a preponderance of the evidence standard than a clear and convincing standard. Indeed, the Immigration Judge can consider "any information that is available . . . or that is presented to him or her" by the alien or DHS." *Lopez v. Barr*, 458 F. Supp. 3d 171, 178 (W.D.N.Y. 2020) (citing 8 C.F.R. § 1003.19(d)). Notably, these factors are generally personal information known by the detainee, undermining any assertion that without counsel there is a risk of error in a custody determination. Additionally, there are additional safeguards in place that are available to a detainee to challenge a bond determination, including the ability to request a subsequent bond determination upon a showing of changed circumstances, *see* 8 C.F.R. § 1003.19(e); appeal of an IJ bond determination to the Board of Immigration Appeals, *see* 8 C.F.R. § 1003.1(b)(7); or, if they believe their continued detention is unconstitutional, a habeas petition in U.S. District Court. *Demore v. Kim*, 538 U.S. 510, 517-18 (2003) (holding federal courts have jurisdiction to review challenges to pre-removal detention). The existence of various opportunities for independent review by a neutral adjudicator is further evidence that adequate procedures presently exist to ensure due process and minimize risk of error. *See, e.g.*, *Statewide Bonding, Inc. v. United States Dep't of Homeland Sec.*, 980 F.3d 109, 119 (D.C. Cir. 2020) (citing the existence of multiple avenues for review as sufficient to "satisfy the requirements of the Due Process Clause"); *see also Lopez*, 458 F. Supp. 3d (citing the multiple levels of review available for immigration bond determinations as a sufficient procedural due process safeguard).

The risk of error in bond hearings without attorney representation is also sufficiently different from the cases where courts have found a right to counsel in removal proceedings. For

example, the cases cited for the proposition that noncitizens are entitled to representation in removal proceedings in *C.J.L.G.* were in the unique and special context of noncitizen children in removal proceedings, which the courts concluded increased the risk posed by an erroneous result and necessitated increased procedural protections. *C.J.L.G.*, 923 F.3d at 634–38. *C.J.L.G.* and *Aguilera-Enriques* are further distinguishable because they both deal with a right to counsel in removal proceedings, not bond. As noted in *C.J.L.G.*, "immigration law is exceedingly complex" and "[a]sylum and withholding claims that involve proving persecution on account of a particular social group are complicated for lawyers and courts." *Id.* at 635 (Paez, J., concurring). The added complexity of the types of cases in removal proceedings can be directly contrasted with the straightforward nature of bond determinations at issue in this case.

Finally, in the third prong, the Court must consider the interest of the Government in using the current procedures versus different procedures. *Mathews*, 424 U.S. at 335. Essentially, as the Court noted in its decision partially granting Defendants Partial Motion for Judgment on the Pleadings, "the ultimate balancing question of whether all instrumentalities and agents of the federal government must forgo any actions that severely impact a pre-existing attorney-client relationship in a bond proceeding." Mem. Op. 7, ECF No. 225. While Plaintiff alleges that "[t]he government's interest in maintaining the current obstacles is de minimis, especially in light of the countervailing interests of Plaintiff's clients," SAC ¶ 334, ECF No. 70, this completely ignores the impact Plaintiff's requested modifications to existing visitation procedures may have on the safety, security, and orderly management of the detention facilities. It also ignores the Supreme Court's caution to "defer to the informed discretion of prison administrators because the realities of running a corrections institution are complex and difficult, [and that] courts are ill equipped to deal with these problems." *Bell v. Wolfish*, 441 U.S. 520, 547 n.29 (1979) (noting

"courts should defer to the informed discretion of prison administrators because the realities of running a corrections institution are complex and difficult, courts are ill equipped to deal with these problems, and the management of these facilities is confided to the Executive and Legislative Branches, not to the Judicial Branch.").

Given the Government's interest in maintaining the orderly management of detention facilities, and the sufficient procedures in place to ensure a full and fair hearing and prevent erroneous custody determinations in bond hearings, it cannot be said that procedural due process requires all instrumentalities and agents of the federal government to forgo any actions that severely impact a pre-existing attorney-client relationship in a bond proceeding under *Mathews v. Eldridge*. The Court should accordingly grant judgment in favor of Defendants as to Count III.

II. Count III is Effectively Foreclosed by *Harbury* Because Relief is Available Via Another Constitutional Claim.

The Court should also grant judgment to Defendants on Count III because the Supreme Court's decision in *Christopher v. Harbury,* 536 U.S. 403 (2002) ("*Harbury III*") effectively forecloses Plaintiff's duplicative procedural due process claim because of the existence of a viable alternative to relief for Plaintiff's clients in the form of its Substantive Due Process claim in Count V, which this Court has already determined may move forward. *See* Mem. Op. Granting Prelim. Injunction 40, ECF No. 124. In *Harbury III*, the Supreme Court delineated the two types of access to court claims, "forward" and "backward" looking, and their respective requirements. *Harbury III*, 536 U.S. at 413. Under *Harbury III*, and applicable D.C. Circuit precedent, both types of access to court claims require complete foreclosure of an ability to achieve the relief underlying the basis of their access to court claim. *Broudy v. Mather*, 460 F.3d 106, 120–21 (D.C. Cir. 2006) (citing *Harbury v. Deutch*, 233 F.3d 596, 609 (D.C. Cir. 2000) ("*Harbury I*"); *Harbury v. Deutch*, 244 F.3d 956, 957 (D.C. Cir. 2001) (*per curiam*) ("*Harbury*

II")).[2] In a forward-looking access claim, a plaintiff must be "presently den [ied] an opportunity to litigate" and "must show that a meaningful opportunity to pursue their underlying claims was "completely foreclosed." *Broudy*, 460 F.3d at 120 (quotations omitted). If a plaintiff "can still meaningfully press his underlying claims . . . the plaintiff is not being 'presently den [ied] an opportunity' to meaningfully litigate . . . ." *Id*. (quoting *Harbury III*, 536 U.S. at 415). Similarly, in a backward looking claim, a plaintiff "must identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought" because "[t]here is, after all, no point in spending time and money to establish the facts constituting denial of access when a plaintiff would end up just as well off after litigating a simpler case without the denial-of-access element." *Harbury III*, 536 U.S. at 415. Accordingly, any access to court claim must fail if the requested relief underlying the access to court claim is not completely foreclosed. *See Broudy*, 460 F.3d at 120 (citing *Harbury III,* 536 U.S. at 413).

The Court granted judgment in favor of Defendants on Plaintiff's access to court claim in Count I because the Second Amendment Complaint failed to plead facts for the Court to determine whether Plaintiff's clients had a "nonfrivolous claim" underlying it, *see* Mem. Op 5–6, ECF No. 225, as required in *Harbury III*. It should similarly grant judgment in favor of Defendants as to Plaintiff's Denial of Full and Fair Hearing Claim (Count III) because it is effectively another access to court claim, and Plaintiff may achieve the requested relief via the substantive due process/conditions of confinement claim in Count V.

A. *Harbury* Applies to Plaintiff's Procedural Due Process Claim Because Its Basis and Rationale are the Same as Plaintiff's Access to Court Claim.

[2] While *Harbury III* only address this issue in the context of a backward-looking access to court claim, the D.C. Circuit applied the requirement to a forward-looking access to court claim, noting that "nothing in these cases or *Harbury III,* suggests that a forward-looking claim can proceed if a plaintiff can still meaningfully pursue the underlying claim." *Broudy*, 460 F.3d at 120 n.9.

Application of *Harbury III* to Plaintiff's full and fair hearing claim is appropriate here because it is duplicative to Plaintiff's access to courts claim in Count I; requesting the same relief on near-identical grounds, *i.e.,* Defendants' policies and practices severely restrict the ability of Plaintiff's clients to access counsel and represent them in bond proceedings. *Compare* SAC ¶ 319 (Count I) ("The regulations and practices of the Defendants unjustifiably obstruct the availability of meaningful legal professional representation for SPLC's clients and impede upon other aspects of their right of access to the courts at facilities across the Southeast.") *with id.* ¶ 333 (Count III) ("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."). Both claims seek to solve the same alleged problem of attorney access for detainees with bond hearings and seek various injunctive relief to address the alleged conditions of confinement. *See* SAC, Prayer for Relief No. 3, ECF No. 70. To allow Count III to proceed when it essentially seeks the same relief on the same ground as the improperly plead Count I would circumvent the clear holding of *Harbury III* that the relief underlying an access to court claim must be completely foreclosed.

Application of *Harbury III* to a full and fair hearing claim that requests the same relief on the same grounds as an access to courts claim is appropriate given the overlap of constitutional basis and rationale for both. The constitutional basis for a full and fair hearing claim is found in the due process clause of the Fifth Amendment. *See Miller v. French*, 530 U.S. 327, 350 (2000) (noting the Fifth Amendment due process clause "principally serves to protect the personal rights of litigants to a full and fair hearing"). While the Supreme Court has yet to identify the Constitutional basis for an access to court claim, *see Harbury III*, 536 U.S. at 414 n.12, it has

been found to have a basis in the Fifth Amendment's due process clause. *See, e.g.*, *Murray v. Giarratano,* 492 U.S. 1, 11, n. 6 (1989) (plurality opinion); *Walters v. National Assn. of Radiation Survivors,* 473 U.S. 305, 335 (1985). Indeed, Plaintiff pleads both Count I and Count III as procedural due process claims. *Compare* SAC ¶ 317 ("The Due Process Clause of the Fifth Amendment guarantees noncitizen detainees the right of access to courts and prohibits the government and its agents from unjustifiably obstructing that access.") *with id.* ¶ 330 ("The Due Process Clause of the Fifth Amendment guarantees Plaintiff's clients the right to a full and fair hearing in their removal cases."). Additionally, other courts have applied the standard for an access to court claim to a general procedural due process claim. *See, e.g.*, *Vetcher v. Barr*, 953 F.3d 361, 370 (5th Cir. 2020) (applying *Harbury III*'s predecessor, *Lewis v. Casey*, 518 U.S. 314 (1996) to a procedural due process challenge to conditions of confinement allegedly impacting deportation proceedings). At base, both an access to court claim and full and fair hearing claim serve to protect due process in the same way: by ensuring an opportunity to be heard and should be analyzed under similar standards when they seek the same relief. *See, e.g.*, *Walters v. National Assn. of Radiation Survivors,* 473 U.S. 305, 335 (1985).

In *Walters*, plaintiffs challenged a fee provision for attorneys representing veterans seeking benefits from the Veterans' Administration. *Id.* at 305. Plaintiffs alleged that the fee requirement violated due process under the Fifth Amendment and denied them "meaningful access to courts." *Id.* at 320, 334. Both claims were premised on the argument that the fee structure denied plaintiffs legal representation at hearings. *Id.* While the Supreme Court ultimately concluded that the fee requirement did not violate procedural due process after an application of the balancing test in *Matthews v. Eldridge*, *see id.* 334, it similarly dispensed with plaintiffs' access to court claim. *Id.* The Court concluded that the "analysis of appellees' due

process claim focused on substantially the same question [as plaintiffs' access to court claim]—whether the process allows a claimant to make a meaningful presentation—and we concluded that appellees had such an opportunity under the present claims process, and that significant Government interests favored the limitation on "speech" that appellees attack. Under those circumstances appellees' First Amendment [access to court] claim has no independent significance." *Id.* at 335. Notably, the Court also concluded that plaintiffs' access to court claim, "would attach only in the absence of a 'meaningful' alternative," and because the analysis for the procedural due process claim clearly demonstrated that a claimant could still make a "meaningful presentation" to the Veterans Administration, the access to court claim must also necessarily fail. *Id.*

Similar to *Walters*, Plaintiff here brough an access to court claim in Court I and a procedural due process claim in Count III, both of which are predicated on an alleged inability of their clients to access bond hearings because of alleged conditions at the facilities restricting attorney communications. *See* SAC ¶¶ 317–19, 330–31. The questions they ask, and the analysis they require, are "inseparable," and should be treated the same, just as in *Walters*. *Id.* The Court should accordingly apply the holding in *Harbury III* that an access to court claim "must identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought," *see Harbury III*, 536 U.S. at 415, to Plaintiff's full and fair hearing claim and grant judgment in favor of Defendants on Count III.

B. The Court Should Also Apply *Harbury III* to Count III to Avoid Deciding Constitutional Issues Needlessly When Relief Via Another Constitutional Claim is Available.

The Court should also apply *Harbury III*'s holding that relief sought in an access to court claim must be completely foreclosed to Plaintiff's full and fair hearing claim because of *Harbury*

III's other holding that courts "avoid deciding constitutional issues needlessly." *Id.* at 417. This holding ought to be read in conjunction with the Supreme Court's rationale for requiring complete foreclosure that "there is, after all, no point in spending time and money to establish the facts constituting denial of access when a plaintiff would end up just as well off after litigating a simpler case without the denial-of-access element." *Harbury III*, 536 U.S. at 415. Because Plaintiff's clients can seek the relief underlying their Procedural Due Process Claim via another constitutional claim, *Harbury III* requires that the Court abstain from needlessly deciding it.

In the case at hand, the requested relief all turns on conditions of confinement at the facilities themselves and is the basis for Count I, Count III, and Count V. Because Plaintiff may achieve its requested relief, *see* SAC Prayer for Relief, via Count V, it has a viable Constitutional claim to achieve its relief. *See* Mem. Op. Granting Prelim. Injunction 40, ECF No. 124; *cf. Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 122 (D.D.C. 2011), *rev'd*, 683 F.3d 390 (D.C. Cir. 2012) (holding "allegations of a denial of access to enjoin the conditions of his detention ultimately fail, as Doe's requested relief under this claim merely duplicates the relief sought under his substantive due process claim."). The Court should accordingly give full effect to the holdings in *Harbury III* that claims underlying access to court claims be completely foreclosed and avoid needlessly deciding constitutional issues where a viable alternative exists.

CONCLUSION

The Court should grant judgment to Defendants as to Count III of the Second Amended Complaint.[3]

Dated: April 5, 2023 Respectfully submitted,

[3] Defendants request the Court schedule a Rule 16 Conference upon resolution of this motion to resolve the Parties' pending Motion to Compel and Motion for Protective Order and set a timeline for the completion of outstanding fact discovery.

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CERTIFICATE OF SERVICE

I served a copy of the foregoing 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: April 5, 2023

/s/ *Richard G. Ingebretsen*
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