IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICANS FOR IMMIGRANT JUSTICE, et al., *Plaintiffs*, v. U.S. DEPARTMENT OF HOMELAND SECURITY, et al., *Defendants*.	No. 1:22-cv-03118 (CKK)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Rules

Other Authorities

INTRODUCTION

In this action, Plaintiffs seek to ensure that immigrants held in civil detention facilities may exercise their foundational right to retain and communicate with legal counsel. Plaintiffs are four non-profit organizations that provide free legal services to detained immigrants. They challenge Defendants' restrictions on communication with and access to their clients, which have rendered reliable and confidential attorney-client communication functionally impossible. Defendants, including the Department of Homeland Security ("DHS") and U.S. Immigration and Customs Enforcement ("ICE"), have moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. That motion should be denied.

This Court has already concluded that it has subject matter jurisdiction in this case.[1] Plaintiffs have made factual allegations necessary to demonstrate both organizational standing and third-party standing to survive a motion to dismiss.

There is also no question that Plaintiffs have stated claims for relief. This Court has already granted preliminary relief in part, concluding that by restricting attorney access, Defendants have subjected detained immigrants to punitive conditions of confinement. Defendants' arguments also misunderstand the Federal Rules of Civil Procedure. Disregarding the well-pleaded allegations of the complaint, Defendants repeatedly argue for dismissal on the basis that Plaintiffs did not attach declarations to their complaint. Such evidence is not required at the pleading stage.[2] Drawing all

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[1] Memorandum Opinion, ECF No. 79, *Ams. for Immigrant Just. v. U.S. Dep't of Homeland Sec.*, No. 22-cv-3118 (CKK) (D.D.C. Feb. 1, 2023) (slip op.) (the "PI Op."), at 14.

[2] As previously indicated to the Court, Plaintiffs intend to file a motion for leave to amend their complaint, which will include individualized allegations regarding the experience of specific Detained Clients, and allegations intended to cure any standing defects in the case. Pls.' Mot. to Hold Proceedings in Abeyance, ECF No. 84; *see Scahill v. District of Columbia*, 909 F.3d 1177, 1184 (D.C. Cir. 2018) (holding that a "plaintiff may cure a standing defect under Article III through an amended pleading alleging facts that arose after filing the original complaint.").

reasonable inferences in the Plaintiffs' favor, Plaintiffs have stated valid claims that attorney access conditions in the Four Detention Facilities constitute unlawful punishment, and that restrictions on attorney-client communication deny Detained Clients the right to a full and fair custodial hearing. Plaintiffs have sufficiently pled that Defendants' restrictions violate both Plaintiffs' and Detained Clients' First Amendment rights. Plaintiffs have also stated valid claims under the Administrative Procedure Act ("APA") that Defendants have unlawfully withheld or unreasonably delayed agency action, and that Defendants' noncompliance with their own Detention Standards is arbitrary and capricious or otherwise not in accordance with the law and contrary to the U.S. Constitution. Finally, FIRRP and AIJ have pled that Defendants' restrictions negatively impact Detained Clients with Disabilities in violation of the Rehabilitation Act. Because this Court has jurisdiction over this case, and Plaintiffs state valid claims for relief, this Court should deny Defendants' motion to dismiss.

STATEMENT OF FACTS

I. PLAINTIFFS' DETAINED CLIENTS FACE URGENT CHALLENGES REQUIRING ADEQUATE LEGAL REPRESENTATION

Plaintiffs[3] are non-profit legal organizations that provide free legal services to people in immigration detention. First Amended Complaint, ECF No. 53 ("FAC")[4] ¶¶ 18–19, 21–22. Plaintiffs' Detained Clients at the Four Detention Facilities face pressing and complicated legal challenges that will have profound impacts on their lives. *Id.* ¶ 29. Plaintiffs have represented or

[3] Plaintiffs are Americans for Immigrant Justice ("AIJ"), the Florence Immigrant and Refugee Rights Project ("FIRRP"), Immigration Services and Legal Advocacy ("ISLA"), and the Refugee and Immigrant Center for Education and Legal Services ("RAICES") (collectively, "Plaintiffs"). Plaintiff Immigration Justice Campaign ("IJC") has been dismissed as a party for lack of standing. Order and Preliminary Injunction, ECF No. 78, *Ams. for Immigrant Just. v. U.S. Dep't of Homeland Sec.*, No. 22-cv-3118 (CKK) (D.D.C. Feb. 1, 2023) ("PI Order").

[4] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the FAC.

currently represent Detained Clients in proceedings seeking release from detention through bond or parole and/or challenging conditions of confinement. *Id.* ¶¶ 30, 33. Given the procedural requirements, legal complexities, burdens of proof, and short timelines in these proceedings, Plaintiffs and Detained Clients require, and are entitled to, reliable means of timely and confidential communication. *Id.* ¶¶ 13, 31–34, 36–37. Yet Defendants restrict Plaintiffs' ability to reliability and confidentially communicate with Detained Clients in the most basic ways. *Id.* ¶¶ 6, 45–56, 66–68.

II. DEFENDANTS ARE RESPONSIBLE FOR ENSURING ATTORNEY ACCESS AT ICE DETENTION FACILITIES

As the federal agencies and officials responsible for managing the immigration detention system, Defendants are responsible for ensuring that detained immigrants' access to counsel comports with constitutional and federal law requirements. *Id.* ¶¶ 39, 160–61. Where Defendants contract with local jurisdictions and private prison companies to operate detention facilities, they are not absolved from that duty. *Id.* ¶¶ 39, 160. To the contrary, Defendants must monitor detention facilities to evaluate compliance with constitutional requirements and remedy deficiencies. *Id.*

In light of this responsibility, Defendants have developed standards governing conditions in immigration detention, including conditions at the Four Detention Facilities (collectively, the "Detention Standards"). *Id.* ¶¶ 8, 40.[5] These Detention Standards provide rules and requirements for conditions including confidential attorney-client meetings, legal visitation, interpretation services, confidential attorney-client telephone conversations, direct or free calls to legal representatives, delivery of messages to detainees, duration of legal calls, and confidentiality of

[5] Notably, the Detention Standards are not in line with, and in many respects fall short of, constitutional requirements. *Id.* ¶ 43. Thus, although the Detention Standards, if followed, would ensure some minimal degree of access to counsel for detained immigrants, compliance with Detention Standards is not synonymous with constitutional compliance. *Id.* Accordingly, Plaintiffs seek compliance with both the Detention Standards and the relevant constitutional standards. *Id.*

legal mail (collectively, "Attorney Access Provisions"). *Id.* ¶¶ 165–66. Defendants incorporate these binding standards into contracts with facility operators, and purport to conduct reviews and inspections of all detention facilities to ensure compliance. *Id.* ¶¶ 40 n.23, 165. However, Defendants have consistently failed to enforce compliance with the Detention Standards. *Id.* ¶¶ 9, 43, 167, 168, 170, 175. While ICE conducts inspections and monitors detention facilities, including the Four Detention Facilities, *id.* ¶¶ 171–74,[6] the DHS Office of Inspector General ("DHS-OIG") has concluded that "neither the inspections nor the onsite monitoring ensure consistent compliance with detention standards, nor do they promote comprehensive deficiency corrections." *Id.* ¶ 167.[7]

These failures extend to Detention Standards regarding attorney access. ICE admitted to Congress earlier this year that, despite regular inspections of facilities, it "does not track . . . the number of facilities that do not meet ICE standards for attorney/client communications." *Id.* ¶ 168. On November 3, 2022, twenty-eight members of Congress wrote to DHS and ICE, noting that "ICE has failed as an agency to exercise even the most basic oversight or data collection regarding immigrants' access to counsel in detention." *Id.* ¶ 169. As the agency's most recent facility inspection reports indicate, ICE has failed to investigate or enforce violations of Detention Standards related to attorney access at the Four Detention Facilities. *Id.* ¶¶ 170–74.

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[6] *See, e.g.*, DHS, ICE, Off. of Det. Oversight, *Compliance Inspection of the Laredo Processing Center* 5 (2022) ("Laredo Inspection"), http://bit.ly/3OcQ18b ("ODO conducts oversight inspections of ICE detention facilities with an average daily population greater than 10, and where detainees are housed for over 72 hours, to assess compliance with ICE national detention standards."); DHS, ICE Off. of Det. Oversight, *Follow-Up Compliance Inspection of the River Correctional Center* 5 (2022) ("River Inspection"), http://bit.ly/3UYRhy1 (same); DHS, ICE, Off. of Det. Oversight, *Follow-Up Compliance Inspection of the Krome North Service Processing Center* 5 (2022) ("Krome Inspection"), https://bit.ly/3eZ2Vtc (same); DHS, ICE, Off. of Det. Oversight, *Follow-Up Compliance Inspection of the CCA Florence Correction Center* 5 (2022) ("Florence Inspection"), https://bit.ly/3MTv29U (same).

[7] DHS Off. of Inspector Gen., *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements* at DHS-OIG Highlights (June 2018), https://bit.ly/2Mwp2Ug.

III. DEFENDANTS RESTRICT ATTORNEY-CLIENT COMMUNICATIONS AT THE FOUR DETENTION FACILITIES

A. Defendants Restrict Reliable Access to Free, Confidential Telephone Calls.

Lack of Private, Confidential Phone Calls. At each of the Four Detention Facilities, Defendants fail to provide access to private spaces for Detained Clients to conduct legal phone calls with their attorneys. *Id.* ¶¶ 85–91. Phones are often placed in public spaces, such as in the housing units, where conversations can be easily overheard by others, or where there is distracting background noise that makes it difficult for Detained Clients and their attorneys to hear each other properly. *Id.* ¶¶ 86–89.

Lack of Scheduling Procedures for Phone Calls. Plaintiffs also face significant barriers to scheduling phone calls with Detained Clients—attorneys cannot reliably speak with clients at a designated time, leaving the ability to talk with clients largely to chance. *Id.* ¶¶ 70–71, 74, 76–80. The inability to schedule phone calls also prevents the use of interpreters, who are necessary for communication with non-English speaking clients; many interpretation services, particularly for rarer languages, require advance notice to ensure availability. *Id.* ¶¶ 73, 76. There is no way to schedule legal phone calls at all at Florence or Krome, and there is no reliable scheduling system in place at Laredo. FAC ¶¶ 71, 74, 77. At River, information regarding the scheduling system for legal phone calls is not publicly available, nor does the system function. *Id.* ¶ 76.

Phone Calls are Not Free. Detained Clients must generally pay to call counsel, which limits attorney-client communication. *Id.* ¶ 92. While pro bono platforms that allow Detained Clients to contact certain non-profit legal organizations free of charge exist at some of the facilities, the current pro bono platforms at Krome and Florence are functionally impossible to use, forcing Detained Clients to use paid platforms. *Id.* ¶¶ 93–94.

Unreasonable Time Limits. In addition, Defendants unreasonably limit calls on RAICES's free hotline at Laredo to 15 minutes, which prevents RAICES and Detained Clients from effectively communicating with each other. *Id.* ¶ 98.

B. Defendants Restrict Access to Reliable, Confidential In-Person Attorney-Client Visits at the Four Detention Facilities.

Lack of Private Spaces for In-Person Meetings. Each of the Four Detention Facilities lacks sufficient private areas to conduct confidential in-person visits between Detained Clients and Plaintiffs. *Id.* ¶ 47. For example, ISLA attorneys are unable to conduct confidential in-person visits at River. *Id.* ¶ 48. Although Laredo, Florence, and Krome have some attorney visitation rooms, they are inadequate. *Id.* ¶¶ 49–54. Florence has only three or four private attorney visitation rooms, while ICE maintains capacity for approximately 450 to 1,000 people at the facility. *Id.* ¶ 51. Similarly, Laredo has only two attorney visitation rooms for a facility with a maximum capacity of over 400 people. *Id.* ¶ 49. The walls of the two rooms are so thin that sound freely passes between them and the adjacent waiting area. *Id.* Krome has only six private in-person contact visitation rooms for a facility with capacity to hold 682 people. *Id.* ¶ 52. While Krome also offers other visiting spaces, conversations in these spaces are monitored, are not private, and have poor acoustic and room design, which often prevents AIJ attorneys from being able to communicate effectively. *Id.* ¶¶ 53–54.

Restricted Access to Interpreters. Defendants also obstruct access to interpreters during in-person legal visits. *Id.* ¶ 57. Although interpreters are necessary when an attorney and client do not speak the same language, access to interpreters is effectively foreclosed during in-person attorney-client meetings at Florence, Laredo, and Krome. *Id.* ¶¶ 57–61. Given the lack of access to telephonic interpretation, attorneys must arrange for interpreters to travel in person to the Four Detention Facilities, which presents its own set of difficulties. *Id.* ¶ 58.

Lack of In-Person Access to Technology. Plaintiffs' attorneys are barred from using technology such as laptops, printers, and/or cell phones during in-person legal visits. *Id.* ¶ 63. Plaintiffs' attorneys are thus generally unable to draft or edit documents during their in-person visits. *Id.* Instead, Plaintiffs' attorneys must make several lengthy trips to the detention facilities with prepared documents in hand to refine drafts or obtain client signatures. *Id.*

C. Defendants Restrict Access to Free, Confidential Video Teleconference ("VTC") Attorney-Client Visits at the Four Detention Facilities.

Defendants also fail to provide free, confidential VTC access to Detained Clients at Florence, Krome, and Laredo. *Id.* ¶¶ 114, 116–19.

D. Defendants Restrict Plaintiffs and Detained Clients at the Four Detention Facilities from Sending and Receiving Legal Documents.

Attorneys must be able to send documents for detained clients to review and sign, including declarations, forms, and other legal filings. *Id.* ¶ 102. Defendants, however, do not permit the use of widely available methods to timely exchange legal documents, such as fax and email, at any of the Four Detention Facilities. *Id.* ¶¶ 102–03. These policies are more restrictive than those at other ICE detention facilities. *Id.* ¶ 112. Plaintiffs and Detained Clients must rely on mail or courier delivery to exchange legal documents and obtain signatures, which can often take several days, because of both the U.S. postal system *and* Defendants' failures to timely deliver mail to Detained Clients once received at the facility. *Id.* ¶¶ 104–08. This is particularly problematic in fast-paced proceedings and time-sensitive matters. *Id.* ¶¶ 102, 105–08, 110.

E. Defendants Fail to Make Reasonable Accommodations for FIRRP's and AIJ's Detained Clients with Disabilities at Florence and Krome.

At Florence and Krome, FIRRP and AIJ attorneys represent individuals with serious mental health conditions who, as a result, are unable to effectively access counsel without accommodations. *Id.* ¶ 121. These individuals ("Detained Clients with Disabilities") include

people who have been determined by a qualified mental health provider to have a serious mental disorder or condition. *Id.* FIRRP's and AIJ's Detained Clients with Disabilities experience greater obstacles to attorney access than other Detained Clients because they face unique barriers due to their disabilities and experience more significant challenges resulting from the attorney access restrictions detailed above. *Id.* ¶ 124.

FIRRP represents Detained Clients with Disabilities at Florence, including those who qualify for the National Qualified Representative Program ("NQRP"). *Id.* ¶ 125. At Florence, Detained Clients with Disabilities face distinct challenges with the message relay and call-back system for telephonic communication. *Id.* ¶¶ 132–33. A significant number of Detained Clients with Disabilities are placed into medical or mental health observation/segregation in conditions akin to solitary confinement, where telephone access is either sharply limited or non-existent, often resulting in a total loss of access to counsel for weeks. *Id.* ¶¶ 129–31. Florence lacks clearly established procedures to allow in-person access to counsel for individuals who are in medical/mental health observation or segregation. *Id.* ¶¶ 130–31. Defendants fail to consistently provide accommodations at Florence, despite requests from FIRRP. *Id.* ¶¶ 130–31, 135.

At Krome, AIJ regularly represents Detained Clients with Disabilities who are held in the Krome Behavioral Health Unit, a unit specifically designated by ICE for the detention of people with severe mental illness, as well as in other areas of the facility, including the Medical Housing Unit, solitary confinement, and general population units. *Id.* ¶ 126. Detained Clients with Disabilities at Krome face even greater challenges to attorney access than AIJ's other Detained Clients. *Id.* ¶¶ 136–40. AIJ's Detained Clients with Disabilities require additional support to communicate and relay information as a result of their disabilities. *Id.* ¶ 138. The lack of VTC access and confidential legal calls particularly hampers attorney access for Detained Clients with

Disabilities. *Id.* ¶¶ 137–39. Detained Clients with Disabilities who are placed in solitary confinement at Krome are also cut off from access to telephone and paid messaging communications. *Id.* ¶ 141.

STANDARD OF REVIEW

Defendants seek to dismiss Plaintiffs' First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and, in the alternative, Rule 12(b)(6). When considering a facial challenge to the legal sufficiency of a complaint's jurisdictional allegations, the Court must accept as true all factual allegations in the complaint. *Am. Oversight v. U.S. Dep't of Veterans Affs*., 498 F. Supp. 3d 145, 152 (D.D.C. 2020). When considering a factual challenge to the Court's jurisdiction, the Court may also look to the "complaint, any undisputed facts, and the '[C]ourt's resolution of disputed facts'" to resolve the jurisdictional issue. *Id.* at 153 (alteration in original) (quoting *Erby v. United States*, 424 F. Supp. 2d 180, 183 (D.D.C. 2006)). However, if there are disputed jurisdictional facts, the court should "defer its jurisdictional decision until the merits are heard." *Id.* (quoting *Herbert v. Nat'l Acad. Of Scis.*, 974 F.2d 192, 198 (D.C. Cir. 1992)).

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff's complaint "does not need detailed factual allegations," but must allege facts sufficient "to raise a right to relief above the speculative level . . . on the assumption that all of the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although the court "is limited to considering facts alleged in the complaint, any documents attached to or incorporated in the complaint, matters of which the court may take judicial notice, and matters of public record," *Covad Commc'ns Co. v. Revonet, Inc.*, 250 F.R.D. 14, 18 (D.D.C. 2008), there is no requirement in the Federal Rules of Civil Procedure that a plaintiff attach declarations to the complaint. "In evaluating a motion to dismiss, the Court must accept the factual allegations in the complaint as true and draw all reasonable inferences in favor of plaintiff." *Moghaddam v. Pompeo*, 424 F. Supp.

3d 104, 112 (D.D.C. 2020) (quoting *Nat'l Postal Pro. Nurses v. U.S. Postal Serv.*, 461 F. Supp. 2d 24, 27 (D.D.C. 2006)).

Importantly, plaintiffs are permitted to plead facts alleged upon "information and belief" where the information is in defendants' possession to which plaintiffs would not have access prior to discovery, *Kelleher v. Dream Catcher, LLC,* 263 F. Supp. 3d 322, 325–26 (D.D.C. 2017), or where plaintiffs' belief is based on factual information that renders the allegation plausible. *United States ex rel. Scollick v. Narula*, No. 14-cv-1339, 2017 WL 3268857, at *10 (D.D.C. July 31, 2017).

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS

This Court has already determined that it has subject matter jurisdiction over Plaintiffs' procedural due process claim, which arises out of representation in bond and custody proceedings, not removal. PI Op. at 13–14. There is no reason to revisit that conclusion, or other established precedent on the issue. *S. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec. (SPLC II)*, 605 F. Supp. 3d 157, 168 (D.D.C. 2022); *Nat'l Immigr. Project of Nat'l Laws. Guild v. Exec. Off. of Immigr. Rev.*, 456 F. Supp. 3d 16, 30 (D.D.C. 2020).

As this Court has already noted, 8 U.S.C. § 1252(b)(9)'s channeling provision applies to only three categories of challenges that "arise from" removal proceedings: "(1) 'review of an order of removal,' (2) a challenge to 'the decision to detain them in the first place or to seek removal,' and (3) a challenge to 'any part of the process by which their removability will be determined.'" *SPLC II*, 605 F. Supp. 3d at 164 (quoting *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018)). Defendants entirely ignore *Jennings*, which held that constitutional claims involving bond do not "arise from" removal proceedings, and which counseled against subjecting the phrase "arising

from" to "'uncritical literalism' leading to results that 'no sensible person could have intended.'" *Id.* at 168 (quoting *Jennings*, 138 S. Ct. at 840).

J.E.F.M. v. Lynch and *P.L. v. U.S. Immigration & Customs Enforcement* are inapposite. In both cases, the court considered due process claims arising from removal, not bond proceedings, and dismissed for lack of jurisdiction under Section 1252(b)(9). *J.E.F.M.* addressed whether indigent minor immigrants have a right to government-appointed counsel in removal proceedings. *J.E.F.M.*, 837 F.3d 1026, 1029 (9th Cir. 2016). *P.L.* considered a challenge to ICE's use of video conferences, instead of in-person hearings, to conduct removal hearings. *P.L.,* No. 19-cv-1336, 2019 WL 2568648, at *3 (S.D.N.Y. June 21, 2019).

Like the procedural due process claim over which this Court found jurisdiction in *SPLC II*, Plaintiffs' procedural due process claim is based on the right to a full and fair hearing in bond and custody proceedings—not, as Defendants erroneously state, on either an access-to-counsel or access-to-courts theory. *SPLC II*, 605 F. Supp. 3d at 169 (finding subject matter jurisdiction for "a Fifth Amendment full-and-fair-hearing claim" "as to bond proceedings"); *see infra* pp. 26–31 (detailing basis for right to representation in bond and custodial proceedings).

Defendants argue that Plaintiffs' failure to include client declarations with their complaint should lead this Court to conclude that it lacks subject matter jurisdiction. *See* Defendants' Motion to Dismiss, ECF No. 81-1 ("Defs.' MTD") at 26.[8] But Defendants do not actually dispute factual allegations that Plaintiffs provide representation to Detained Clients in bond and custody proceedings, FAC ¶¶ 18–19, 21–22, or explain why a lack of such declarations should, as a facial matter, preclude subject matter jurisdiction. For that reason, this Court "must accept the allegations of the complaint as true." *Am. Oversight*, 498 F. Supp. 3d at 152–53. To the extent that Defendants

[8] All page numbers of documents filed in this case refer to ECF page numbers.

pose a factual jurisdictional challenge, the court "should defer its jurisdictional decision until the merits are heard." *Id.* at 155 (quoting *Herbert*, 974 F.2d at 198).

Citing to no authority, Defendants argue that the court lacks subject matter jurisdiction because relief granted could not be cabined solely to detained clients in custody proceedings. Defs.' MTD at 26. But as discussed above, whether 8 U.S.C. § 1252(b)(9) strips the court's jurisdiction turns on whether the Plaintiffs' claim is "*arising from* any action taken or proceeding brought to remove an alien from the United States," *SPLC II*, 605 F. Supp. 3d at 164 (emphasis in original) (quoting 8 U.S.C. § 1252(b)(9)), not on the remedy that would resolve the claim. For these reasons, the Court has subject matter jurisdiction in this case.

II. PLAINTIFFS HAVE ORGANIZATIONAL AND THIRD-PARTY STANDING

Plaintiffs satisfy the requirements of organizational and third-party standing. To demonstrate Article III standing, Plaintiffs must show (1) "injury in fact"; (2) "a causal connection between the injury and the conduct complained of"; and (3) that it is "likely" that the harm can be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotes and citations omitted). Organizations have Article III standing to sue on their own behalf. *See Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 132 (D.C. Cir. 2006). Although a litigant "generally must assert his own legal rights and interests," "courts have recognized that there are circumstances in which it is 'necessary to grant a third party standing to assert the rights of another.'" *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, 485 F. Supp. 3d 1, 34 (D.D.C. 2020) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975) and *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004)).

At each stage of the litigation, a plaintiff "must establish the predicates for standing 'with the manner and degree of evidence required at' that stage of trial." *Abigail All.*, 469 F.3d at 132 (quoting *Lujan*, 504 U.S. at 561). Unlike subsequent stages of the litigation where a plaintiff's

showing on standing may be more demanding, to withstand a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan*, 504 U.S. at 561; *see also NB ex rel. Peacock v. District of Columbia*, 682 F.3d 77, 82 (D.C. Cir. 2012) (plaintiffs' burden to establish standing at the pleading stage "is not onerous") (citation omitted). As explained below, Defendants' challenges to Plaintiffs' organizational standing and third-party standing are unavailing.

A. Plaintiffs Have Organizational Standing to Pursue the APA and First Amendment Claims.

As this Court has already held, Plaintiffs have organizational standing to pursue their APA and First Amendment claims on their own behalf. PI Op. at 15. Organizational standing requires an organization, "like an individual plaintiff, to show 'actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision.'" *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (citation omitted). Courts apply a "two-part inquiry" to determine whether organizational plaintiffs have suffered injury: "first, whether the agency's action or omission to act injured the [organization's] interest and, second, whether the organization used its resources to counteract that harm." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (internal quotation marks and citation omitted) (alteration in original).

Plaintiffs satisfy both prongs. To show that a defendant's conduct injured an organization, an organization must allege that the defendant's conduct "perceptibly impaired" its ability to provide services. *Turlock Irr. Dist. v. F.E.R.C.*, 786 F.3d 18, 24 (D.C. Cir. 2015) (internal quotation marks and citation omitted).

Plaintiffs describe a myriad of ways in which attorney access restrictions at the Four Detention Facilities inhibit their daily operations and restrict them from providing effective legal

representation to Detained Clients. *See supra* pp. 5–9; FAC ¶¶ 146–52. For example, Plaintiffs experience difficulties in gathering sensitive information and evidence necessary to adequately prepare Detained Clients' cases due to the lack of confidential communication options. *See id.* ¶¶ 147–48; PI Op. at 43 (ordering relief at Florence). Restrictions on scheduling phone calls prevent Plaintiffs from promptly speaking to Detained Clients at a time when both parties are available, leading to inefficiencies and delays in communication. FAC ¶¶ 97, 149–51, 157–58.

These allegations show that Defendants' actions have harmed Plaintiffs' organizational interests. *See* PI Op. at 15. As in *Ukrainian-American Bar Association, Inc. v. Baker*, it is "apparent" that the access to counsel deficiencies caused by Defendants interfere with Plaintiffs' activities in providing legal services to individuals in immigration detention, which "distinguishes [Plaintiffs'] injury from the sort of 'abstract social interest' insufficient to confer standing." 893 F.2d 1374, 1378 (D.C. Cir. 1990) (citation omitted). As this Court previously recognized, *Ukrainian-American Bar Association, Inc.* held that "a legal organization whose access to potential clients has been hindered by government action has organizational standing to challenge such action." PI Op. at 15 (citing *Ukr.-Am. Bar Ass'n*, 893 F.2d at 1378).

Defendants' attempt to distinguish *Ukrainian-American Bar Association, Inc.* risks creating unjustified precedent that would heighten the requirements for organizations to establish injury. Defs.' MTD at 21. Contrary to what Defendants urge, a total bar on Plaintiffs' ability to communicate with their clients is not needed to show organizational injury. Conduct that makes it more difficult for Plaintiffs to communicate with and access Detained Clients is sufficient. *See Cap. Area Immigrants' Rts. Coal. v. Trump*, 471 F. Supp. 3d 25, 40 (D.D.C. 2020) (recognizing standing where plaintiff organization alleged that the challenged rule caused injury "by making it harder for them to conduct their own basic activities"); *S. Poverty L. Ctr. v. U.S. Dep't of*

Homeland Sec. (SPLC I), No. 18-cv-0760, 2020 WL 3265533, at *13 (D.D.C. June 17, 2020) (finding injury where immigration detention policies made it "*more difficult* for Plaintiff to effectively represent its clients (which involves, among other things, meeting with them and exchanging confidential information and documents)") (emphasis added).

Defendants argue that Plaintiffs have not demonstrated harm to their organizations but point only to factors relevant to Plaintiffs' diversion of resources, a separate inquiry under organizational injury's second prong. Defs.' MTD at 19–21. Defendants fail to engage with Plaintiffs' allegations that Defendants have impaired Plaintiffs' ability to effectively advocate for Detained Clients. *Compare* Defs.' MTD at 19–21 (citing FAC ¶¶ 153–58) *with* FAC ¶¶ 146–52. Despite Defendants' attempt to minimize Plaintiffs' harm, Plaintiffs show that "the challenged action itself—rather than the organization's response to it—makes the organization's task more difficult," and thus satisfy the first prong of organizational injury. *Ctr. for Responsible Science v. Gottlieb*, 346 F. Supp. 3d 29, 41 (D.D.C. 2018).

As a *result* of that impairment, Plaintiffs must divert additional resources to try and combat that harm, FAC ¶¶ 154–58, which satisfies the second prong for organizational injury. An organizational plaintiff "must show that it expended resources—beyond those normally carried out to advance [its] mission and excluding 'self-inflicted' expenditures—to address th[e] impairment." *Citizens for Resp. & Ethics in Wash. v. U.S. Off. of Special Counsel*, 480 F. Supp. 3d 118, 128 (D.D.C. 2020). Plaintiffs make such a showing. As this Court recently explained, "where government action makes it more difficult for an attorney to communicate with a potential client, the attorney must expend more resources (financial, logistical, etc.) to reach that potential client." PI Op. at 15 (citation omitted); *see also SPLC I*, 2020 WL 3265533, at *13. Plaintiffs have been forced to spend more resources, both in time and money, to communicate with Detained

Clients. As a result, Plaintiffs must incur expenses and spend extra time traveling to and from and waiting at the detention facilities, even for simple or brief matters that otherwise could and should be addressed remotely. FAC ¶ 154. FIRRP must spend hours driving to and from Florence "for even the most minor aspects of case preparation" that would otherwise take a matter of minutes absent Defendants' prohibitive conduct. *Id.* ¶ 157. Despite Defendants' insistence that AIJ does not explain from where the time, resources, and money spent by traveling to Krome are diverted, AIJ specifically states that these additional expenses "further reduc[e] the number of cases AIJ can accept." *Compare* Defs.' MTD at 21 *with* FAC ¶ 158. The same is true for ISLA and for RAICES. *Id.* ¶¶ 155–56; Supp. Decl. of Javier Hidalgo, ECF No. 69-4 ("Supp. Hidalgo Decl.") ¶ 8. In sum, Plaintiffs show that the harm caused by Defendants results in a "consequent drain on the organization's resources—constitut[ing] . . . more than simply a setback to the organization's abstract social interests." *Nat'l Ass'n of Home Builders v. E.P.A.*, 667 F.3d 6, 11 (D.D.C. 2011) (internal quotation marks and citation omitted). Plaintiffs therefore demonstrate organizational injury.

B. Plaintiffs Have Third-Party Standing to Pursue Claims on Behalf of Detained Clients.

Plaintiffs also have third-party standing to pursue their claims on behalf of Detained Clients. To establish third-party standing, Plaintiffs must demonstrate (1) "an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute," (2) "a close relation to the third party," and (3) "some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (citation omitted). Contrary to Defendants' arguments that no Plaintiffs meet the first and third requirements and that RAICES does not demonstrate the second requirement, Plaintiffs satisfy all three elements.

1. Plaintiffs Have Demonstrated Injury in Fact, and Hindrance to Detained Clients to Protect Their Own Rights.

As an initial matter, Plaintiffs have demonstrated an injury in fact. Defendants misconstrue the injury required for organizations to assert third-party standing. Defendants suggest that injury in fact requires identifying a detained client and a proceeding in which they have been injured. Defs.' MTD at 22. But in the organizational context, the injury element of third-party standing involves the same inquiry as the injury element required for organizational standing: harm to the *organization*. *See* PI Op. at 18; *see also Whitman-Walker Clinic, Inc.*, 485 F. Supp. 3d at 35 (holding that healthcare-provider plaintiff organizations asserting third-party standing on behalf of patients established injury in fact where they suffered "financial and operational harm").

Plaintiffs have also demonstrated that Detained Clients are hindered in their ability to protect their own rights. The hindrance prong "does not require an absolute bar from suit, but some hindrance to the third party's ability to protect his or her own interests." *SPLC I*, 2020 WL 3265533, at *14 (internal quotation marks and citation omitted). Courts have recognized the following as hindrances justifying third-party standing: "(1) deterrence from filing suit due to privacy concerns, (2) systemic practical challenges to pursuing one's rights, or (3) the 'imminent mootness' of a case." *United States v. TDC Mgmt. Corp.*, 263 F. Supp. 3d 257, 274 (D.D.C. 2017) (citing *Singleton v. Wulff*, 428 U.S. 106, 117 (1976)). Each one of these hindrances apply here.

Detained Clients face inherent difficulties in bringing lawsuits as first party litigants. An absolute bar from suit is not required. *SPLC I*, 2020 WL 3265533, at *14. Defendants' restrictions on access to counsel hinder Detained Clients from asserting claims as first party litigants. *See* FAC ¶ 38 (alleging that "the attorney access issues discussed here" in addition to other "significant barriers" "hinder[] [Detained Clients] from protecting their own interests as first parties in this case."). For Detained Clients to bring their own lawsuits effectively, they would need to have access to consistent and effective attorney-client communication for attorneys to conduct an

assessment of legal claims, engage in fact gathering, advise Detained Clients as to legal options and case developments, obtain signatures on release forms, and prepare testimony. FAC ¶ 146. But attorney access barriers at the Four Detention Facilities make this essentially impossible. *Id*.

Even if it were somehow possible for Detained Clients to bring their own suit, such a suit would swallow the already limited time Detained Clients have to communicate with counsel for other proceedings also deserving careful attention. Systemic practical challenges hinder Detained Clients' ability to bring this lawsuit as named parties. These challenges are exacerbated by Detained Clients' lack of English proficiency, a limited understanding of the U.S. legal system, and diminished access to legal resources. FAC ¶ 38; *see also SPLC I*, 2020 WL 3265533, at *14 (finding these same obstacles contributed to the requisite hindrance). Fear of retaliation also deters Detained Clients from bringing suit. FAC ¶ 38; *see also Whitman-Walker Clinic, Inc.*, 485 F. Supp. 3d at 36 (concluding that patients' fear of stigmatization is a powerful deterrent to bringing a lawsuit and satisfies the hindrance element). Detained Clients are hindered in their ability to bring this lawsuit given that their "fast-paced and time-sensitive" proceedings make it likely that they may not remain in detention throughout the course of this litigation, FAC ¶ 13, and their claims are subject to mootness due to release or deportation before adjudication of their claims. *See SPLC I*, 2020 WL 3265533, at *14.

Defendants argue that AIJ's and FIRRP's Detained Clients are not hindered in bringing *this* suit because they have brought *other* suits challenging conditions of confinement in the past, including those related to COVID-19 issues. Defs.' MTD at 23. This argument is flawed. Even if Plaintiffs represent Detained Clients at any of the Four Detention Facilities in other conditions of confinement proceedings, this does not prevent Plaintiffs from showing that Detained Clients are hindered in bringing *this* lawsuit. *See Whitman-Walker Clinic, Inc.*, 485 F. Supp. 3d at 36 (rejecting

defendants' argument that plaintiffs could not meet the "hindrance" element where LGBTQ patients themselves sued as plaintiffs in another jurisdiction). Notably, other conditions of confinement lawsuits do not present the unique obstacle presented by an access to counsel suit, where Detained Clients would face the very same deficiencies in litigation that they seek to remedy. Moreover, Defendants do not cite any cases in support of their suggestion that there is a quasi-exhaustion requirement necessitating Plaintiffs to first approach their clients about this lawsuit.[9] Plaintiffs emphasize that FIRRP could not represent Detained Clients at Florence in a COVID-19 conditions lawsuit because of the attorney access barriers at Florence. *See* FAC ¶ 36; Decl. of Laura St. John ¶ 15, ECF No. 55-9.

2. RAICES Has a Close Relationship with Detained Clients at Laredo.

Defendants incorrectly argue that because RAICES has no existing attorney-client relationships with individuals at Laredo, RAICES does not possess the "close relationship" required for third-party standing.[10] Defs.' MTD. at 24–25. Although courts have generally found

[9] To the extent this Court cannot decide whether Detained Clients are hindered in their ability to bring this lawsuit because of a lack of individual detainee declarations, Plaintiffs intend to file leave to amend to add in those supporting allegations to their complaint. *See supra* note 2.

[10] Although access to counsel barriers at RAICES have not improved since Plaintiffs filed the FAC, RAICES has resumed taking new cases at Laredo and recently represented two detained clients at Laredo. Plaintiffs intend to file a motion for leave to amend, among other things, to add in these new allegations. *See supra* note 2. The D.C. Circuit has held that "a plaintiff may cure a standing defect under Article III through an amended pleading alleging facts that arose after filing the original complaint." *Scahill*, 909 F.3d at 1184; *see also G&E Real Estate, Inc. v. Avison Young-Wash., D.C., LLC*, 168 F. Supp. 3d 147, 160 (D.D.C. 2016) ("[S]tanding may be assessed by the timing of the filing of the operative complaint in an action – whether the original complaint or a supplemental or amended complaint."). Therefore, to the extent this Court determines based on the FAC that RAICES has no attorney-client relationships with individuals at Laredo, and otherwise declines to find RAICES still maintains a "close relationship" with individuals detained at Laredo, Plaintiffs intend to amend the FAC to reflect RAICES's current circumstance. *See Scahill*, 909 F.3d at 1184. In the event this Court denies Plaintiffs' forthcoming motion for leave to amend, Plaintiffs would request that, before deciding Defendants' Motion to Dismiss, this Court grant leave to submit additional evidence in support of standing.

third-party standing in limited circumstances, including attorney-client relationships, that list is not exclusive. *See Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 361 (D.D.C. 2020), *appeal dismissed*, No. 20-5374, 2021 WL 2201669 (D.C. Cir. May 17, 2021) ("Though confidential or contractual relationships, for example, those between doctors and patients, attorneys and clients, and vendors and vendees, have most often been found to support third-party standing . . . neither the Supreme Court nor the D.C. Circuit has ever 'required' such a relationship."). All that is required to demonstrate a "close relationship" is that there is "an identity of interests between the parties such that the plaintiff will act as an effective advocate of the third party's interests." *Lepelletier v. F.D.I.C.*, 164 F.3d 37, 44 (D.C. Cir. 1999).

RAICES continues to operate a hotline at Laredo through which detained individuals may initiate calls to seek assistance. FAC ¶¶ 77, 156. Indeed, RAICES has worked with "new clients from Laredo in limited circumstances, notwithstanding these obstacles." Supp. Hidalgo Decl. ¶ 8. RAICES is a "motivated, effective advocate" for Detained Clients in this lawsuit, as RAICES and Detained Clients share the same interest of improving access to counsel measures to facilitate effective legal representation. *Powers*, 499 U.S. at 414.

Defendants cite *Kowalski*, 543 U.S. at 131, for the proposition that third-party standing can exist between an attorney and existing client, but not based on a hypothetical attorney-client relationship. Defs.' MTD at 24. However, this District recently noted that in *Kowalski*—which involved attorneys asserting claims on behalf of future, criminal defendant clients—"the class of potential third parties could have been literally any person" which is different from a situation where "a far more limited universe of third parties" is involved. *Whitman-Walker Clinic, Inc.*, 485 F. Supp. 3d at 36. In making this distinction, the court held that healthcare-provider plaintiffs had a close relationship with their *potential* future LGBTQ patients. *Id.* Like in *Kowalski*, RAICES's

potential clients form a sufficiently limited group of third parties: individuals detained at Laredo seeking legal representation by RAICES for bond and parole proceedings or conditions of confinement complaints. *See* FAC ¶¶ 22, 49. For these reasons, this Court should not dismiss Plaintiffs' claims for lack of third-party standing.

III. PLAINTIFFS STATE VALID CLAIMS FOR RELIEF

A. Plaintiffs State a Substantive Due Process Claim.

Plaintiffs have stated a valid claim that Defendants' restrictions on access to counsel impermissibly punish Detained Clients in violation of their Fifth Amendment right to substantive due process. Immigration detention "is undisputedly civil—*i.e.,* non-punitive in nature." *SPLC I*, 2020 WL 3265533, at *18 (quoting *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 187 (D.D.C. 2015)) (internal quotation marks omitted). Detained immigrants can establish unconstitutional punishment by showing that there is "an expressed intent to punish," or that the challenged conditions are either "not rationally related to a legitimate governmental objective" or "excessive in relation to that purpose." *Kingsley v. Hendrickson*, 576 U.S. 389, 398 (2015) (quoting *Bell v. Wolfish*, 441 U.S. 520, 538 (1979)); *see also SPLC I*, 2020 WL 3265533, at *18. To determine whether a challenged condition is not rationally related to a legitimate governmental objective, the court considers "whether the conditions are 'employed to achieve objectives that could be accomplished in so many alternative and less harsh methods.'" *SPLC I*, at *18 (quoting *Bell*, 441 U.S. at 539 n.20); *see also* PI Op. at 23.[11]

[11] Defendants' citation to, and reliance on, the test outlined in *Turner v. Safley* is incorrect. Defs.' MTD at 30. *Turner* examines whether a restriction is reasonably related to a "legitimate *penological* objective" in the context of a correctional prison setting, not a "legitimate governmental objective" in a civil detention setting. *Compare Turner v. Safley*, 482 U.S. 78, 89 (1987) (emphasis added) *with Bell*, 441 U.S. at 538; *see also Banks v. Booth*, 468 F. Supp. 3d 101, 110 (D.D.C. 2020) (applying *Bell's* "legitimate governmental objective" standard to punitive condition-of-confinement claim for pre-trial criminal detainees). To the extent *Turner* applies, see

Where conditions at a detention facility are "not more considerate than those at pretrial and prison facilities," they "may be punitive in nature." *SPLC I*, 2020 WL 3265533, at *19 (quoting *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004)); *cf.* PI Op. at 25 (stating that detained immigrants establish a "'presumption' of punitive detention" where conditions are "equal to or worse than conditions experienced by inmates convicted of a criminal offense" (citing *Jones*, 393 F.3d at 932)).[12] Plaintiffs have adequately pled that attorney access conditions in the Four Detention Facilities are more restrictive than those in which prisoners serving criminal sentences are held. FAC ¶¶ 47–54, 56 (private legal meeting rooms); ¶¶ 63–64 (laptops in legal visits); ¶¶ 66–68 (wait times and visiting hours); ¶¶ 70–83 (scheduled legal calls); ¶¶ 97–112 (fax and email for document exchange); ¶¶ 113–20 (legal VTC calls). Notably, the correctional facilities identified by Plaintiffs as having more considerate conditions for attorney access hold prisoners serving criminal sentences, as well as pre-trial detainees.[13]

Attorney access conditions at the Four Detention Facilities are worse than those widely available to prisoners serving criminal sentences. For example, state departments of corrections

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infra pp. 31–35 (analyzing attorney access conditions at Four Detention Facilities under *Turner*, for purposes of First Amendment analysis).

[12] In *Jones*, the Ninth Circuit compared civil detainees with criminal pre-trial detainees and concluded that conditions are presumptively punitive where conditions of civil confinement are "identical to, similar to, or more restrictive than, those in which [a detainee's] criminal counterparts are held." This presumption is rebuttable upon demonstration of "legitimate nonpunitive interests" or that the restrictions are not "excessive." 393 F.3d at 935.

[13] *See, e.g.* Iberia Parish Sheriff's Office, *Jail Information*, https://www.iberiaso.org/jailInfo (last visited Mar. 5, 2023) (Iberia Parish Jail holds "State Prisoners, Federal Prisoners, as well as prisoners for other local agencies"); Prison Rape Elimination Act (PREA) Audit Report, Karnes County Correctional Center 10 (2019), https://bit.ly/3mrEQih (noting that facility holds inmates for the Idaho Dep't of Corr.); PREA Audit Report, Miami-Dade Corr. and Rehab. Dep't 3, 7, 15 (2022) https://bit.ly/3JeHUHj (noting that Metro West, Miami-Dade Pre-Trial, and Turner Guilford Knight (TGK) correctional facilities all hold Bureau of Prison (BOP) inmates; PREA Audit Report, Central Arizona Florence Correctional Complex 3 (2021), https://bit.ly/3ZZNxir (noting that the facility holds BOP inmates).

nationwide require prisons to permit attorneys to bring laptops and electronic devices to legal visits.[14] State prisons are also required to provide scheduled, confidential legal phone calls,[15]

[14] *See, e.g.* Ark. Dep't Corr., Sec. Dir. 2022-15 (2022), https://bit.ly/3Y2jxRg (electronic devices such as cell phones, tablets, or laptops permitted if authorized in writing); Colo. Dep't Corr. Admin. Reg. 750-03 (2022), https://bit.ly/3IsNgNO ("laptop computers may be used by an attorney/agent during a visit/proceeding"); Conn. Dep't Corr. Admin. Dir. 10.6 (2018), https://bit.ly/3IPOAeX (attorneys "permitted to bring in a tablet or laptop for official legal purposes"); Haw. Dep't Pub. Safety, Corr. Admin. Pol'y and Proc. COR 12.02 (2019), https://bit.ly/3IPOtQz (allowing "equipment that the attorney believes is required during the inmate visit" if cleared in advance); Neb. Dep't Corr. Serv., Pol'y 205.02 (2022), https://bit.ly/3ks0CSh ("Attorneys are authorized to bring in the following items: digital camera, and laptop or tablet"); Ohio Dep't of Rehab. and Corr., Information for Attorneys (2022), https://bit.ly/3Zg4iG9 (attorneys must provide advance notice to bring items "including . . . electronic devices" to legal visits); Okla. Dep't Corr. OP-030118 (2022), https://bit.ly/3Z1CJQr ("Facility heads may approve an attorney. . . to bring a computer or tablet to the visit"); Or. Admin. R. 291-127-0450, bit.ly/3YuUSW0 ("Computers, tape recorders, and other electronic devices may be permitted" upon approval); 240-20 R.I. Code R. § 00-3, Access to Institutional Facilities by Attorneys and Their Agents, bit.ly/3F6OUUe ("recording devices/cameras/lap top computers/computer tablets are permitted"); Tex. Dep't Crim. Just. Board Pol'y No. BP-03.81 (2021), https://bit.ly/3yamuFf ("Attorneys and designated representatives may bring . . . computer laptops, and personal digital assistants into the visiting area"); Vt. Dep't Corr., Inmate Visits—Attorney Information (2019), https://bit.ly/3KEjYOY (allowing "laptop, tablet, or e-reader"); Va. Dep't Corr., Legal Visit Request (2020), https://bit.ly/3KTGkfx (allowing requests for approval of "laptop computer" and "computer data storage device"); Wyo. Dep't Corr., Pol'y and Proc. 5.403 (2021), https://bit.ly/3m7hleg (permitting "portable computerized equipment, *i.e.*, laptop or tablet computer" with pre-approval).

[15] Conn. Dep't Corr. Admin. Dir. 10.7 (2022), https://bit.ly/3IQkyI2, (requiring facilities statewide to honor "requests by attorneys . . . for privileged calls. . . at the time specified by the attorney"); Fla. Admin. Code Ann. Rev. 33-602.205, bit.ly/3Zy9cy3 ("an attorney shall be permitted to request prior arrangements be made with the warden or warden's designee to have an inmate receive a private telephone call from the attorney on an unmonitored telephone"); Idaho Dep't Corr., Stand. Op. Proc. 402.02.01.001 (2019), https://bit.ly/3ISMbjB ("An attorney or attorney's staff member may contact the facility paralegal to arrange a time for the inmate to call the attorney"); Iowa Admin. Code 201-20.4(3)(x), bit.ly/3YyxhUn (detailing protocol for attorneys to schedule confidential incoming legal calls); Minn. Dep't Corr., Pol'y 302.210 (2020), https://bit.ly/3xOpl6m ("Attorneys must contact the designated facility staff to schedule a call at a mutually agreeable date and time."); N.C. Dep't Pub. Safety Prisons, Pol'y and Proc. G.0200 (2022), https://bit.ly/3xPbAEH (allowing attorneys to "make a formal written request to communicate with the offender via telephone"); Or. Dep't Corr., Professional Visits, https://bit.ly/3kkkqqU (last checked Feb. 25, 2023) ("Legal telephone calls may be scheduled when a professional visit is not possible."); Penn. Dep't Corr., Pol. No. DC-ADM 818 (2022), https://bit.ly/3Zlltpi ("[E]ach facility has established phone booths that can be utilized by inmates under certain pre-arranged circumstances . . . at the request of . . . inmates' attorneys."); Tex. Dep't

provide for the exchange of legal documents through fax and email,[16] and provide scheduled, confidential legal VTC calls.[17] These attorney access policies—many of which include provisions for facility screening, preclearance, and advance notice—demonstrate that even in prisons,

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Crim. Just. Board Pol'y No. BP-03.81 (2021), https://bit.ly/3yamuFf (calls requested by attorneys "can be scheduled on the same day as the request or on a day that is convenient for all parties"); Utah Dep't Corr., Attorney Information, https://bit.ly/3Z1755Q (last visited Feb. 25, 2023) ("[A]n attorney of record for an inmate may be able to set up a telephone call with a client," and an "appropriate case manager" will "arrange a call."); Wash. Dep't Corr., Attorney Communication with Individuals Incarcerated at DOC (2021), https://bit.ly/3lTNlCj (attorneys may "schedule phone meetings . . . by sending written notice"); *c.f.* Neb. Dep't Corr. Serv., Pol'y 205.03 (2022), https://bit.ly/3YXRJyQ ("As each individual has a tablet there is no scheduling need to make phone calls.").

[16] Alaska Dep't Corr., Pol'y and Proc. 810.01, (2020), https://bit.ly/3YmGVZV ("The Department shall implement a system by which attorneys may leave messages for prisoners via facsimile or via e-mail."); Iowa Dep't Corr., Attorney Contact with Incarcerated Clients (Sept. 9, 2021), bit.ly/3YyxhUn (describing "O-mail" electronic mail system); N.J. Inmate Handbook (2014), https://bit.ly/3ZgeuOV (describing guidelines for confidential transmission of faxes between attorneys and clients); Tex. Dep't Crim. Just. Board Pol'y No. BP-03.81 (2021), https://bit.ly/3yamuFf (attorneys permitted to send incarcerated clients emails through the "official inmate correspondence process").

[17] Del. Dep't Corr. *COVID-19 Frequently Asked Question* (2020), https://bit.ly/3m09fnz ("The DOC is working to accommodate video meetings for attorneys."); Indiana Court Times, *State Public Defender Uses Videoconferencing to Reduce Costs and Improve Services*, Aug. 16, 2011, https://bit.ly/3lTRGp5 (describing installation of confidential VTC for attorney-client communication); Ky. Corr., Pol'y and Proc. 16.5 (2022), https://bit.ly/3m09gYF ("Attorneys of record may use the video visitation system . . . video visits shall not be recorded" and describing scheduling process.); Maine Dep't Corr., Pol. No. (AF) 21.04.01, (2022), https://bit.ly/3SJ0OcN (describing protocols for scheduled, privileged video visits); Mass. Dep't Corr., Std. Operating Proc. (SOP) Attorney Video Visits, https://bit.ly/3ECsPNa (last visited Feb. 25, 2022) (establishing guidelines for confidential, scheduled, free attorney video calls); Mich. Dep't Corr., Video Visiting Standards (2021), https://bit.ly/3YZBnWF (describing guidelines for scheduling attorney video calls); N.J. Inmate Handbook (2014), https://bit.ly/3ZgeuOV (describing guidelines for scheduled, confidential attorney videoconference calls); North Dakota Dep't Corr. and Rehab., Access to Courts, https://bit.ly/3XYxmQY (last visited Feb. 25, 2023) ("After an attorney and resident complete the required application process, they may communicate through remote video visitation that is not audio-monitored or recorded."); Ohio Dep't of Rehabilitation and Corr., Information for Attorneys (2022), https://bit.ly/3Zg4iG9 (describing availability of confidential attorney video visits); Penn. Dep't Corr., Policy No. DC-ADM 812 (2022), https://bit.ly/3klBnRL (attorney video visits "are not recorded" and "scheduled in advance"); Tenn. Dep't Corr., Index No. 109.09, (2020), https://bit.ly/41D050P ("[A]ttorneys of record requesting videoconferencing with their client shall be provided with the facilities VC contact information.").

attorney access can be provided through "many alternative and less harsh methods," while ensuring order and security. *SPLC I*, 2020 WL 3265533, at *18 (internal quotation marks and citation omitted).

Attorney access conditions at the Four Detention Facilities fall short of requirements outlined in ICE's Detention Standards, which "offer an example of less restrictive alternative means." *Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1065 (C.D. Cal. 2019).[18] Plaintiffs have also shown that numerous ICE detention centers have successfully employed these alternative and less harsh methods to ensure access to counsel.[19] Indeed, facility staff at Florence attempted to set up a system to schedule phone calls in coordination with FIRRP, which was canceled after ICE learned of the proposed plan. FAC ¶ 84. Even under the more stringent test identified in *Turner,* where a prisoner "can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may count that as evidence that the regulation does not satisfy the reasonable relationship standard." 482 U.S. at 90. Defendants have done little more than claim a general interest in facility order and security, but even *Turner* requires that prison authorities "show more than a formalistic logical connection between a regulation and a penological objective." *Beard v. Banks*, 548 U.S. 521, 535 (2006).

[18] FAC ¶ 55 (requiring confidential attorney meetings and private consultation rooms); ¶ 65 (requiring that facilities provide for exchange of documents in legal visits); ¶ 71 (prompt delivery of messages); ¶ 82 (effective communication via phone and prompt delivery of messages); ¶ 90 (requiring private phone calls); ¶ 101 (phone time limits no shorter than 20 minutes); ¶ 109 (legal mail); ¶ 101 (VTC).

[19] FAC ¶ 62 (37 ICE detention facilities allow cellphones in legal visits); ¶ 64 (98 ICE detention facilities allow laptops in legal visits); ¶ 83 (at least 37 ICE facilities allow scheduled legal calls; 7 allow immediate connection); ¶ 91 (provision of private and unmonitored legal calls, and installation of phone booths); ¶ 96 (provision of free, unmonitored legal calls); ¶ 101 (elimination of automatic phone cut-off); ¶ 112 (availability of fax and email).

Defendants' argument that their restrictions on attorney access are rationally related to "protecting the public and enforcing the immigration laws" bears no weight. Defs.' MTD at 24–25. Plaintiffs do not seek release from detention; ensuring access to counsel to detained immigrants has no impact on the government's ability to provide for public safety or ensure immigration enforcement. Defendants also argue that there is "no right to counsel" in civil proceedings, and on that basis, argue that Plaintiffs have no substantive due process claim. *Id.* at 21. Defendants, however, misinterpret the test for a substantive due process violation: that detained immigrants cannot be subject to punitive conditions of confinement. *See Youngberg v. Romeo*, 457 U.S. 307, 322 (1982). Importantly, prisons must provide the *same* terms for attorney access regardless of whether the legal representation is civil or criminal in nature. *See e.g., Taylor v. Sterrett*, 532 F.2d 462, 474 (5th Cir. 1976); *Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1208 (9th Cir. 2017). For these reasons, Plaintiffs state a valid substantive due process claim.

B. Plaintiffs State a Procedural Due Process Claim.

Plaintiffs' procedural due process claim satisfies the requirements for a well-pleaded complaint under *Iqbal* and *Twombly*. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Twombly*, 550 U.S at 55. Plaintiffs establish, through detailed allegations, that: (a) custodial proceedings are complex, high-stakes proceedings, so it is essential for Detained Clients to be able to access their counsel to effectively seek release, FAC ¶¶ 29–34; (b) that Defendants systemically deny Detained Clients adequate access to their counsel across all four facilities, FAC ¶¶ 44–145; and (c) that these restrictions have significantly impeded, and in some cases entirely prevented, specific Detained Clients from seeking release through custodial proceedings.

The harm suffered by Detained Clients due to these restrictions is significant. ISLA attorneys could not confidentially communicate with a client at River and instead had to wait to receive necessary medical information through a records request, delaying the submission of a

bond request and likely lengthening his detention. *Id.* ¶ 150. Delays in scheduling private calls at Laredo slowed RAICES attorneys' ability to gather important sensitive medical information from a client, which in turn delayed the submission of the client's release request and unnecessarily prolonged her detention. *Id.* ¶ 151. Mail delays at Florence forced attorneys to seek continuances in bond hearings, prolonging detention. *Id.* ¶ 105. Mail delays at Laredo have interfered with attorneys' ability "to make release requests for their clients." *Id.* ¶ 106. Mail delays at Krome slowed the exchange of documents necessary for an attorney to submit a bond motion, *Id.* ¶ 108. Plaintiffs' allegations of systemic failure and concrete harms far exceed a "mere possibility of misconduct," *Iqbal*, 556 U.S. at 679—they show that Defendants have deprived, are depriving, and will deprive, Detained Clients of their procedural due process right to adequate access to counsel in custody proceedings. *See Torres*, 411 F. Supp. 3d at 1063.

Defendants misstate the standard for establishing a violation of procedural due process. Plaintiffs need not show "effective denial of counsel and forced self-representation" in a specific hearing, Defs.' MTD at 33 n.11, to make out a violation of the right to a full and fair custody proceeding under *Mathews v. Eldridge*, 424 U.S. 319 (1974). The cases cited by Defendants are inapposite: they all engage in an entirely distinct analysis of whether denial of the statutory right to counsel in a specific removal proceeding resulted in a legally defective removal order.[20] Here,

[20] These cases include *Montes-Lopez v. Holder*, 694 F.3d 1085, 1086 (9th Cir. 2012) (petitioner's statutory "right to be represented" violated when IJ held merits hearing resulting in removal order, despite his counsel's recent suspension); *Biwot v. Gonzales*, 403 F.3d 1094, 1096 (9th Cir. 2005) (petitioner denied statutory right to counsel when IJ denied continuance to retain counsel and ordered removal); *Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004) (assessing whether noncitizens were denied "effective assistance" where attorney's advice resulted in placement in removal proceedings and denying reopening where none of attorney's "deficiencies pertain[ed] to the actual substance of the hearing"). *Gonzalez v. INS*, relied on by Defendants as support for the same inapplicable standard, does not include the language quoted in Defendants' memorandum or discuss access to counsel at all. *Compare* 82 F.3d 903 (9th Cir. 1996), *with* Defs.' MTD at 26 n.11.

plaintiffs do not challenge adverse removal decisions. They allege that their clients are denied their protected interest in full and fair bond or parole proceedings because they cannot effectively and timely consult with their counsel. In analogous cases, courts have not required a showing of prejudice in a particular hearing because plaintiffs do "not seek to reverse any decision by an IJ or the BIA." *Torres*, 411 F. Supp. 3d at 1045, 1063–64 (holding that even if required, the plaintiffs sufficiently alleged prejudice where allegations established access restrictions had "effect of disrupting [] representation—with lasting consequences" for custodial proceedings); *accord Arroyo v. U.S. Dep't of Homeland Sec.,* No. SACV 19-815, 2019 WL 2912848, at *17 (C.D. Cal. June 20, 2019) ("[A] significant burden on the attorney-client relationship, without a showing of underlying prejudice to the removal proceedings, may be sufficient to establish a legal injury sufficient to justify injunctive relief." (citing *Comm. Cent. Am. Refugees v. INS*, 795 F.2d 1434, 1439 (9th Cir. 1986)). Here, the "significant burden" created by conditions at the facilities on attorney-client relationships is "a legal harm" that violates due process. *Arroyo*, 2019 WL 2912848, at *18.

Moreover, Plaintiffs have shown harm in the form of unnecessarily lengthened detention resulting from the unreasonable burdens on accessing their attorneys. *See supra* pp. 26–27. "Detention of any length implicates a liberty interest," regardless of the basis for confinement. *Reid v. Donelan*, 17 F.4th 1, 16 (1st Cir. 2021) (Lipez, J., dissenting). The liberty deprivations alleged by Plaintiffs—additional time in detention that could have been avoided but for Defendants' restrictions—constitute cognizable prejudice.

Defendants acknowledge that Plaintiffs' clients are entitled to specific proceedings to contest their release from detention. Defs.' MTD at 34. That entitlement provides Detained Clients with a procedural due process right to full and fair release proceedings. *See Roberts v. United*

States, 741 F.3d 152, 161 (D.C. Cir. 2014). Under *Mathews*, the attorney access barriers at issue create a significant risk of the erroneous deprivation of liberty in those release proceedings that outweighs any minimal burden on Defendants to facilitate access, and harms the public. As Defendants concede, "[f]reedom from detention is an important private interest." Defs.' MTD at 34.

Mathews also requires consideration of the "risk of erroneous deprivation" of liberty. 424 U.S. at 335. Defendants' unsupported conjecture that lack of access to counsel does not reduce the likelihood that Detained Clients will be released because the factors relevant to bond determinations are "personal information known by the detainee," Defs.' MTD at 34, is untethered to the reality of how bond hearings proceed in Immigration Court and ignores the significance of counsel to a successful release application, *see* FAC ¶¶ 3, 29, 31–34 (noting, *inter alia*, that detained immigrants are approximately seven times more likely to be released when represented). Bond determinations are complex, include evaluation of the consequences of any criminal history and the merits of underlying claims for relief, and require coordination with potential sponsors. *See id*. The burden is on noncitizens to prove they merit release, 8 C.F.R. § 1236.1(c)(8)—a burden often met through evidence not easily accessible from detention and only obtainable by counsel. *See* FAC ¶¶ 31–34; *Velasco Lopez v. Decker*, 978 F.3d 842, 847 (2d Cir. 2020) (describing immigration judge's demand for arrest records).[21]

The third *Mathews* factor—the fiscal and administrative burden on the government—also favors Plaintiffs. *Mathews*, 424 U.S. at 335. The government already provides the procedures

[21] Defendants argue that DHS bears the burden of proof in bond proceedings in certain circuits — but as Defendants fail to acknowledge, Detained Clients at Krome (Florida), Florence (Arizona), Laredo (Texas) and River (Louisiana) do not benefit from rulings of the First, Second and Third Circuit Courts of Appeal. Defs.' MTD at 27 n.12.

Plaintiffs request at other immigration detention facilities, jails, and prisons, *see* FAC ¶¶ 83, 91, 96, 101, 112, 114–15, which belies Defendants' argument that Plaintiffs' requested relief would harm the "safety, security, and orderly management of the detention facilities," Defs.' MTD at 35. In addition, the government frequently asserts that access to counsel promotes more efficient immigration proceedings.[22] Finally, attorney access restrictions delay the submission of bond and parole requests, leading to additional time in detention, at a cost to taxpayers. *See* FAC ¶¶ 72, 76, 85, 105, 106, 108, 150–51; *see also Velasco Lopez*, 978 F.3d at 854 n.11 ("Detention costs taxpayers approximately $134 per person, per day, according to ICE's estimates." (citation omitted)). On balance, Plaintiffs have plausibly stated a claim that the *Mathews* factors tip in their favor.

Defendants incorrectly focus on the constitutional and statutory rights to counsel in custodial proceedings. Defs.' MTD at 34. Plaintiffs' claim arises from the Fifth Amendment: the right to a full and fair hearing includes a noncitizen's ability to access their counsel, with the attendant ability to gather and present evidence and argument. *Cf. Torres*, 411 F. Supp. 3d at 1063. It is a procedural right long recognized by agency regulations and protocol. *See, e.g.*, 8 C.F.R. § 1003.17(a) (addressing procedural requirements for attorneys appearing in a "custody or bond proceeding" before an immigration court).[23] It is similarly immaterial that Detained Clients' custody is "lawful" in the sense that it is authorized by statute. *See Zadvydas v. Davis*, 533 U.S.

[22] *See* Dep't of Justice, Fact Sheet: EOIR's Office of Legal Access Programs (Aug. 2016), https://bit.ly/3Yx83ps (Immigrants who receive legal orientations "make better informed and more timely decisions and are more likely to obtain representation; and cases are completed faster, resulting in fewer court hearings, less time spent in detention, and cost savings.").

[23] *See also* 8 C.F.R. § 1003.16(b) (authorizing respondents in "proceedings before an Immigration Judge" to representation of their choice); Imm. Ct. Practice Manual, § 9.3(e)(2) (Nov. 14, 2022), https://bit.ly/3J2iKdN ("In a bond hearing, the respondent may be represented by a practitioner of record at no expense to the government.").

678, 693 (2001); *R.I.L-R*, 80 F. Supp. 3d at 190 (finding likely due process violation for detention authorized under 8 U.S.C. § 1226(a)). In the context of immigration detention, courts have frequently found that procedural due process requires additional protections beyond those set out by statute. *See, e.g.*, *Gayle v. Warden Monmouth Cnty. Corr. Inst.*, 12 F.4th 321, 334-36 (3d Cir. 2021); *Velasco Lopez*, 978 F.3d at 850–55 (requiring burden shift and heightened standard of proof for continued detention under § 1226(a)).

C. Plaintiffs State a Claim on Their Own Behalf under the First Amendment.

The First Amendment protects a lawyer's ability to advise people of their legal rights and solicit prospective litigants. *NAACP v. Button*, 371 U.S. 415, 428–29 (1963). For legal service organizations like Plaintiffs, "litigation is not a technique of resolving private differences; it is a form of political expression and political association." *In re Primus*, 436 U.S. 412, 427–28 (1978) (citation and quotation marks omitted). Communication with Detained Clients lies at the core of this right: "if *Button* and *Primus* mean anything they permit legal counsel to inform [detained immigrants] of their legal rights when counsel does so as an exercise of political speech unaccompanied by expectation of remuneration." *Jean v. Nelson*, 711 F.2d 1455, 1508–09 (11th Cir. 1983).

In the context of the First Amendment, courts examine challenges involving a prison's restrictions on communication, using the test set out in *Turner v. Safley*. *See* 482 U.S. at 78; *see also Thornburgh v. Abbott*, 490 U.S. 401, 404 (1989). Under *Turner*, courts examine whether the challenged regulation is "reasonably related to legitimate penological interests" using four factors: (1) whether there exists "a valid, rational connection between the [detention] regulation and the legitimate governmental interest put forward to justify it," (2) "whether there are alternative means of exercising the right that remain open to [detained immigrants]," (3) "the impact accommodation of the asserted constitutional right will have on guards and other [detained immigrants], and on the

allocation of [detention] resources generally," and (4) "the absence of ready alternatives" to the detention regulation. *Turner*, 482 U.S. at 89–91. All four *Turner* factors weigh in Plaintiffs' favor, so Plaintiffs adequately pled First Amendment violations.

First, there exists no "valid, rational connection between the [restrictions] and the legitimate governmental interest put forward to justify [them]." *Id.* at 89. Defendants claim two interests justify the restrictions placed on Plaintiffs' communications with their Detained Clients: "ensuring the safety and security of the facility" and "allocating fair amounts of time any single individual may use the limited number of phones." Defs.' MTD at 40. Neither justification supports the restrictions. Defendants' Detention Standards require that the Four Detention Facilities provide detained immigrants with the ability to access and communicate with counsel. *See supra* p. 3; *see also, e.g.*, FAC ¶¶ 55, 82, 90 (requiring confidential meeting rooms, phone procedures that foster legal access, and private legal calls). Defendants' vague reference to the "general need" for safety cannot justify their departure from their own policies. *Anderson-Bey v. District of Columbia*, 466 F. Supp. 2d 51, 66 (D.D.C. 2006); Defs.' MTD at 40. Other nearby correctional facilities provide the access measures Plaintiffs request without security issues. *See, e.g.*, FAC ¶¶ 56, 83, 112, 115 (referring to facilities that provide private attorney-client meeting rooms, scheduled legal calls, fax or email, and VTC). Defendants' concern about fairly allocating their "limited number of phones" further fails because—as the Court already recognized in issuing its preliminary injunction—the solution to limited numbers of telephones is not to curtail Plaintiffs' First Amendment rights but instead to simply add more telephones. PI Order at 1 (ordering Defendants to install visiting rooms or telephones necessary to remedy constitutional violations at Florence). The first *Turner* factor favors Plaintiffs.

Second, no "alternative means of exercising the right . . . remain open" to Plaintiffs under the Four Detention Facilities' restrictions. *Turner*, 482 U.S. at 90. Defendants attempt to point to alternative methods of communication that would permit Plaintiffs to exercise their First Amendment rights, but they cannot identify any workable alternative because ***all*** methods of communication are flawed. Defendants accept that Plaintiffs have alleged flaws in the mail system. Defs.' MTD at 37; *see also* FAC ¶¶ 102–12. Defendants counter that "in-person" exchange of documents serves as an alternative to mail. Defs.' MTD at 37. They accept that Plaintiffs have alleged that in-person visitation, too, is flawed because it may not be confidential and because interpretation for in-person visits is functionally impossible. *Id.* at 38 & n.13; *see also* FAC ¶¶ 46–56, 58.[24] Defendants then argue that Plaintiffs need not rely on in-person visitation but should "use multiple methods of communication" instead.[25] Defs.' MTD at 38. But these other "methods of communication" are likewise seriously flawed. One such method is VTC. Defendants admit Plaintiffs have alleged VTC is unavailable. *Id.* at 38–39; *see also* FAC ¶¶ 113–20. They argue that Plaintiffs should rely on other modes of communication instead. Defs.' MTD at 38–39. But Defendants' telephone policies provide no means to schedule calls, making telephone communications also effectively unavailable in many circumstances. *See* FAC ¶¶ 69–101. Defendants then argue that, when telephone calls are not a workable option, Plaintiffs "are not prohibited from visiting their clients when necessary." Defs.' MTD at 39. Defendants thus return

[24] Defendants argue that, under *Roshan v. Smith*, 615 F. Supp. 901, 907 (D.D.C. 1985), the government is under no obligation to provide VTC access. Defs.' MTD at 39. But that opinion involved the separate question of whether legal services organizations could bar the government from transferring detained clients to far-flung facilities, which has no bearing on the inquiry of whether legitimate penological concerns justify Defendants' refusal to provide VTC access under *Turner*.

[25] Defendants also argue that Plaintiffs should simply "wait" in line for a private room to become available. But, as Plaintiffs alleged, these private rooms are used by other agencies and are often entirely unavailable, meaning "wait[ing]" is not an option. FAC ¶¶ 51–52.

to their starting point of in-person visitation, without having identified any communication means that actually serves as a workable alternative. This complete absence of any viable alternative causes the second *Turner* factor to favor Plaintiffs. *See Torres*, 411 F. Supp. 3d at 1067–68 (finding that the second *Turner* factor favored Plaintiffs when Defendants' restrictions on detained immigrants' access to telephones, email, mail, and in-person legal visits infringed on detained immigrants' ability to "communicate with the outside world").

Third, the "impact [of] accommodation of the asserted constitutional right [] on guards and other [detained immigrants], and on the allocation of [detention center] resources generally," if any, will be minimal. *Turner*, 482 U.S. at 90. Defendants fail to explain why allowing Plaintiffs to exercise their First Amendment rights would affect guards or other detained immigrants, or the "the allocation of [detention facility] resources." *Id.* To the contrary, Plaintiffs' allegations show that Defendants can readily accommodate the modifications necessary to remedy the violations. For instance, other ICE detention facilities provide scheduled legal calls, *see* FAC ¶ 83, private and unmonitored legal calls, *see id.* at ¶ 91, legal correspondence by fax or email, *see id*. ¶ 112, and free, confidential VTC, *see id.* ¶ 114. That Defendants provide these measures elsewhere implies that they can provide these measures at the Four Detention Facilities. This is particularly true because the Detention Standards, which the Four Detention Facilities are already contractually obligated to follow, require them to allocate whatever resources are necessary to provide these measures. *See supra* p. 32. The third *Turner* factor therefore favors Plaintiffs.

Fourth, "obvious, easy alternatives" to Defendants' restrictions exist, showing "that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Turner*, 482 U.S. at 90. "[I]f [a detained immigrant] can point to an alternative that fully accommodates the [detained immigrant's] rights at *de minimis* cost to valid penological interests, a court may consider

that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91. Here, as Plaintiffs detailed in their complaint, "obvious, easy alternatives" are readily available to Defendants that would sufficiently protect detainees' First Amendment rights. The measures set out in Defendants' Detention Standards are reasonable alternatives to the unnecessary restrictions imposed in the Four Detention Facilities. *See Torres*, 411 F. Supp. 3d at 1068. Moreover, as noted above in Plaintiffs' analysis of the third *Turner* factor, viable alternatives to Defendants' restrictions at the Four Detention Facilities exist, as evidenced by other ICE detention facility policies on attorney-client communication. *See* FAC ¶¶ 83, 91, 101, 112, 114. Additionally, Defendants publicly tout the availability of VTC legal visits across their detention network. *See id.* ¶ 115. This admission demonstrates that VTC is an obvious and straightforward measure to improve access. The fourth *Turner* factor thus also favors Plaintiffs.

Defendants further claim that the *Turner* analysis is not enough and that Plaintiffs must additionally satisfy the requirement set out in *Lewis v. Casey*: that a person asserting the right to access courts while in criminal custody (an issue not raised at all in this case) must show an "actual injury" to a non-frivolous legal claim that this person could otherwise have brought. 518 U.S. 343, 351–53 (1992); *see* Defs.' MTD at 35–36. Defendants' misconception that the *Lewis* requirement applies stems from two misunderstandings of the law. First, Defendants appear to misread *Ukrainian-American Bar Association, Inc.*, 893 F.2d at 1378, to limit lawyers' First Amendment rights so they can be asserted only when their clients can also prove a violation of their Sixth Amendment right to counsel. *See* Defs.' MTD at 35. In *Ukrainian-American Bar Association, Inc.*, the plaintiff organization argued that lawyers hold special First Amendment rights, requiring different treatment than other non-legal organizations, and that the government was required to notify all people seeking asylum from a Soviet country of the plaintiff organization's offer of

representation. 893 F.2d at 1381. The court rejected that argument, explaining that "lawyers have no special first amendment status," and thus that there is no "first amendment right of access" specific to lawyers "that is independent of the [potential client]'s right to counsel." *Id.* at 1382. Because the organization in that case did not bring claims related to a right to counsel, the court simply held that the plaintiff organization should receive the same type of access as any other, non-legal organization. *Id.* Plaintiffs in this case similarly bring no claim under the Sixth Amendment; here *Ukrainian-American Bar Association, Inc.* stands for the unremarkable proposition that Plaintiffs' First Amendment claim is evaluated under the same *Turner* test that would apply if a non-lawyer were to make the same claim.

Second, Defendants make an unsupported logical leap, stating: "it follows, therefore" that the *Lewis* requirement applies to Plaintiffs' First Amendment claims. Defs.' MTD at 35–36. This assumption suffers from an additional error: *Lewis* does not apply to the claims Plaintiffs raise under the First Amendment's protection of freedom of "expression and association." FAC ¶ 196. While a claim for "denial of access" to courts while in criminal custody—an entirely separate type of claim not raised here—implicates *Lewis* and thus "requires an allegation that the defendant's actions resulted in actual injury to the plaintiff such as the dismissal of an otherwise meritorious legal claim, a free speech claim does not." *Banks v. York*, 515 F. Supp. 2d 89, 108 (D.D.C. 2007) (quotation marks and citation omitted); *see also Al-Amin v. Smith*, 511 F.3d 1317, 1334 (11th Cir. 2008) (holding that "the actual injury requirement [of *Lewis v. Casey*] applies to access-to-courts claims but not to free speech claims," even when those free speech claims involve communications between lawyers and detained clients); *Jones v. Brown*, 461 F.3d 353, 359–60 (3d Cir. 2006) (same); *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003). Defendants are therefore wrong that the Court should apply any legal requirement beyond the *Turner* test.

D. Plaintiffs State a First Amendment Claim on Behalf of Their Detained Clients.

Plaintiffs likewise state a claim that Defendants' attorney access restrictions violate their Detained Clients' freedom of speech and freedom of association under the First Amendment.[26] Plaintiffs' First Amendment claims on behalf of their Detained Clients are also governed by the same *Turner* test, *Thornburgh*, 490 U.S. at 401, and all four elements favor Plaintiffs.

First, in arguing for the dismissal of Count Four, Defendants fail to identify any "legitimate governmental interest." *Turner*, 482 U.S. at 89. Defendants therefore fail at the outset on this element. Assuming, however, that Defendants would assert the same governmental interests they claimed for Count Three, this element tips in Plaintiffs' favor for the same reasons Plaintiffs explained for Count Three.

Second, Defendants fail to cite any "alternative means" available to Plaintiffs' Detained Clients to exercise their First Amendment rights. *Turner*, 482 U.S. at 90. Defendants merely contend that "Plaintiffs' clients are able to 'hire, consult, and communicate with Plaintiffs'" in some limited capacity despite the communication challenges they face. Defs.' MTD at 41. Defendants' argument fails to account for Plaintiffs' allegations explained above, showing that there exist no adequate, alternative means. *See supra* pp. 33–34. The second *Turner* factor thus also favors Plaintiffs. The third and fourth *Turner* factors favor Plaintiffs for the reasons described above for Count Three. *See supra* pp. 34–35.

Defendants again argue that the *Lewis* requirement limits Detained Clients' First Amendment claims. Defs.' MTD at 40. However, Plaintiffs solely pursue claims for freedom of speech and freedom of association on behalf of their Detained Clients, *see supra* note 26, and so

[26] Plaintiffs' FAC brings claims under several of the First Amendment's protections, including freedom of speech, freedom of association, and the right to petition the government for redress of grievances. FAC ¶¶ 201–05. Plaintiffs will no longer pursue their claim on behalf of Detained Clients under the Petition Clause.

this requirement does not apply. *See supra* p. 36. Defendants also argue that "Plaintiffs do not identify a client who alleges [a First Amendment] deprivation," suggesting—with no legal support—that this is a pleading requirement. Defs.' MTD at 40. Defendants' assertion of such a pleading requirement is unsupported and fails. *See supra* p. 1.

E. Plaintiffs State a Claim for Relief Under the APA.

Plaintiffs bring a claim for relief under the APA on two grounds. First, Plaintiffs seek to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Second, Plaintiffs ask the Court to "hold unlawful . . . agency action [that is] arbitrary, capricious, . . . or otherwise not in accordance with the law" and "contrary to constitutional right[s]." 5 U.S.C. § 706(2). Each of these bases for relief arises from Defendants' failure to comply with their own Detention Standards pursuant to the *Accardi* doctrine. In moving to dismiss these claims, Defendants argue that Plaintiffs have failed to establish final agency action. *See* Defs.' MTD at 42–43. Defendants overlook that agency action need not be "final" under Section 706(1), and, in any event, Plaintiffs adequately allege that Defendants' failure to comply with the Detention Standards constitutes "final" agency action. Defendants also argue that there "is no record of non-compliance" and that the existence of ICE compliance inspections, which Defendant DHS has itself criticized as inadequate,[27] undermines the merits of the APA claim. Defs.' MTD at 42. Both arguments are unavailing.

1. "Final" Agency Action is Not Necessary for a Section 706(1) Claim.

Under this Circuit's law, the agency action necessary to support a Section 706(1) claim need not be "final." *See Stone v. United States Dep't of State*, No. 21-cv-3244, 2022 WL 4534732,

[27] *See* FAC ¶ 167 (citing DHS Off. Inspector Gen. ("DHS-OIG"), *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance of Systemic Improvements* 1, 3 (June 2018), https://bit.ly/2Mwp2Ug ("2018 DHS-OIG Report")).

*5 (D.D.C. Sept. 28, 2022) ("[A]n exception to [the] requirement of final agency action [is] 'where plaintiffs claim that a governmental action was unlawfully withheld or unreasonably delayed.'" (quoting *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001)).[28] Accordingly, Plaintiffs must simply allege "agency action" that was "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1); *see also id.* § 551(13) (agency action includes "failure to act"). Plaintiffs have made that showing given that their complaint adequately alleges that, by failing to comply with the Detention Standards, Defendants have not taken action that is "legally required"[29] and "discrete." *Norton v. S. Utah W. All.* (*SUWA*), 542 U.S. 55, 62–64 (2004) (defining agency action as "failure to act").

[28] Even though satisfaction of the "final agency action" requirement under 5 U.S.C. § 704 is not necessary to sustain an agency action unlawfully withheld claim, final action is present here, as discussed *infra*.

[29] In moving to dismiss Plaintiffs' APA claim, Defendants do not challenge that the Detention Standards are legally binding. Plaintiffs recognize that the Court noted in the PI Op. when addressing the Procedural Due Process claim that the Detention Standards are "technically optional." PI Op. at 29. Plaintiffs do not understand the Court's statement to apply to an *Accardi* analysis, but, for the avoidance of doubt, address the binding nature of the standards. Under *Accardi*, agency rules and regulations are legally binding, regardless of whether they are "formal regulations," "if so intended" by the agency, and when they are "promulgated for the protection of individuals." *Damus v. Nielsen*, 313 F. Supp. 3d 317, 336 (D.D.C. 2018) (citations omitted). Defendants' intention to be legally bound is evidenced by, among other things, the incorporation of the Detention Standards into facility contracts. *See* FAC ¶¶ 40 n.23 ("ICE describes the Detention Standards as requirements, and ICE's contracts reflect that immigration detention facilities are contractually obligated to adhere to the standards."), 165 (the Detention Standards are "incorporated through contracts and are binding on the Four Detention facilities"); *Torres*, 411 F. Supp. 3d at 1069 (finding an allegation of an *Accardi* violation where the 2011 PBNDS were binding via contract). The standards are also facially mandatory by their language, which further reflects Defendants' intent to be bound. *See* FAC ¶ 40 n.23 (describing the Detention Standards' use of the word "shall"); *Moghaddam*, 424 F. Supp. 3d at 120-21 (determining agency intent under *Accardi* requires an examination of "mandatory language"). Defendants essentially concede that the Detention Standards are binding in their brief. *See* Defs.' MTD at 10 ("ICE detention facilities must comply with one of several detention standards . . . facilities are bound by specific standards that are set forth in contracts for detention services"). The Detention Standards also confer "individual protections" by establishing standards for attorney access. *See* FAC ¶ 8. Accordingly, pursuant to *Accardi*, the detention standards are binding.

Defendants do not challenge that the Detention Standards create "discrete" responsibilities. Nor could they in light of the clearly delineated mandates in the Detention Standards. *See* FAC ¶ 166 (introducing examples of the Detention Standards' "*specific* requirements for attorney-client access") (emphasis added).[30] These provisions under the Detention Standards are ones that a court can "competently compel and supervise." *Ctr. for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 20 (D.D.C. 2017) (citing *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 891 (D.C. Cir. 2014)); *see also Gayle v. Meade*, No. 20-cv-21553, 2020 WL 2086482, at *6 (S.D. Fla. Apr. 30, 2020) (even where agency guidelines contain "some flexibility," the *Accardi* doctrine "does not absolve ICE of its responsibility with respect to the mandatory provisions"), *order clarified*, 2020 WL 2203576 (S.D. Fla. May 2, 2020).[31]

2. Plaintiffs Adequately Allege Final Agency Action under Section 706(2).

Plaintiffs sufficiently allege that Defendants' noncompliance with the Detention Standards constitutes final agency action that is "arbitrary, capricious, . . . or otherwise not in accordance with law" and "contrary to constitutional right[s]." 5 U.S.C.§ 706(2); *see Aracely R. v. Nielsen*, 319 F. Supp. 3d 110, 150 (D.D.C. 2018) ("Agency actions may be arbitrary and capricious when they do not comply with binding internal policies governing the rights of individuals.").

Finality is a "flexible" standard that is to be applied in a "pragmatic" way. *See Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149, 150 (1967), *abrogated on other grounds* by *Califano v.*

[30] *See* FAC ¶¶ 46–56, 57–62, 63–65, 69–84, 85–91, 92–96, 97–101, 102–12. For example, the Detention Standards require that time limits on phone calls be no shorter than 20 minutes. *See* 2008 PBNDS at 5.31(V)(F)(1); 2011 PBNDS at 5.6(V)(F)(1); 2019 NDS at 5.4(II)(F).

[31] Indeed, this Court directed Defendants either to install in Florence either six private, confidential attorney-client visitation rooms that allow for interpreters and the physical exchange of documents or to ensure that there is one telephone per 25 detainees that allows for confidential legal calls. PI Op. at 43. This Court noted that it was granting relief in accordance with "what Defendants have promulgated" in the Detention Standards. *Id.* at 42.

Sanders, 430 U.S. 99 (1977); *see also Friedman v. Fed. Aviation Admin.*, 841 F.3d 537, 543 (D.C. Cir. 2016) ("Nothing in our case law suggests the law of final agency action is confined to the specific facts of prior circuit cases.").

The FAC alleges facts demonstrating (1) that Defendants' noncompliance marks the "consummation" of a decision-making process, as opposed to being "tentative or interlocutory," and (2) that such noncompliance determines rights or obligations. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Taken together, the allegations regarding ICE's policies and practices for conducting inspections demonstrate ICE's decision to eschew compliance with the Detention Standards. For example, the complaint reports ICE's admission that it "does not track . . . the number of facilities that do not meet ICE standards for attorney/client communications." FAC ¶ 168.[32] ODO only inspects for fifteen to sixteen "core standards" in the 2008 PBNDS and 2011 PBNDS and those standards do not include any attorney access provisions other than telephone access; as a result ODO does not inspect for compliance with visitation and mail and correspondence standards unless ICE leadership requests it or specific conditions warrant it. FAC ¶ 167.[33] Moreover, despite being informed that ODO inspections are "too infrequent to ensure compliance" with Detention Standards, and despite ICE's confirmation that it would "ensure that inspection procedures are adequate and appropriately resourced to *fully evaluate* detention conditions at facilities" by July 2019,[34] ODO has since *decreased* the scope of its inspections. Beginning in Fiscal Year 2022, ODO instituted a process "of rotating all standards on a 3-year

[32] Citing ICE, *Access to Due Process: Fiscal Year 2021 Report to Congress*, at 2 (Feb. 14, 2022), https://bit.ly/3F1TMek.
[33] 2018 DHS-OIG Report, *supra* note 27, at 6, n.11, 26. DHS-OIG also criticized ODO's focus on such a small percentage of the Detention Standards, commenting that "ODO is scrutinizing compliance with fewer than half of the NDS or PBNDS standards." *Id.* at 6.
[34] FAC ¶ 167, 2018 DHS-OIG Report, *supra* note 27, at 5, 16 (emphasis added).

basis,"[35] meaning that certain standards will be assessed only every six years. These facts are sufficient to infer final agency action regarding noncompliance at this pre-discovery phase of the litigation when all reasonable inferences must be drawn in favor of Plaintiffs. *See Ramirez v. U.S. Immigr. & Customs Enf't*, 471 F. Supp. 3d 88, 93 (D.D.C. 2020), *judgment entered*, 568 F. Supp. 3d 10 (D.D.C. 2021) (ICE's failure to act in accordance with statute violated § 706(1) and § 706(2) where it "[did] not train officers on proper decisionmaking" and "[did] not require any number of practices that could facilitate compliance with the statute"); *Torres*, 411 F. Supp. 3d at 1069 (inferring a final agency decision of noncompliance based on allegation of "numerous agency decision-making processes" where DHS-OIG identified deficiencies in compliance at Adelanto detention facility and ICE had committed to assess that facility's noncompliance by a specified date).[36]

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[35] *See* FAC ¶ 172 n.69, DHS, ICE Off. Det. Oversight, *Follow-Up Compliance Inspection of the River Correctional Center* 6 (2022), https://bit.ly/3Sm9LH8 ("2022 River Inspection"). As the FAC highlights, in inspections conducted at the Four Detention Facilities last year, Defendants failed to systematically assess for compliance with Attorney Access Provisions. *See* FAC ¶ 171 (at Laredo, ICE did not investigate standards associated with telephone access or visitation) (citing DHS, ICE Off. Det. Oversight, *Compliance Inspection of the Laredo Processing Center* (2022), https://bit.ly/3MRA1I1); ¶ 172 (same for River) (citing 2022 River Inspection); ¶ 173 (at Krome, ICE did not investigate standards associated with visitation) (citing DHS, ICE Off. Det. Oversight, *Follow-Up Compliance Inspection of the Krome North Service Processing Center* (2022), https://bit.ly/3eZ2Vtc); ¶ 174 (at Florence, ICE did not investigate standards associated with correspondence and other mail or visitation) (citing DHS, ICE Off. Det. Oversight, *Follow-Up Compliance Inspection of the CCA Florence Correction Center* (2022), https://bit.ly/3MTv29U).

[36] In the PI Op., the Court distinguished between *Torres* and this case as to "final agency action." *See* PI Op. at 36. However, with respect to this analysis, there are clear parallels between both cases. First, as the Court noted, the defendants' decision to forego compliance with the Detention Standards in *Torres* was "specific" and operated as "a *rule.*" *Id.* (emphasis in original). Importantly, the *Torres* court concluded that Defendants took "final agency action" because inspections had put the defendants on notice of facility deficiencies; ICE had replied that it would remedy the deficiencies; and Plaintiffs alleged the existence of "past or ongoing noncompliance." *Torres*, 411 F. Supp. 3d at 1069. In the same vein, Defendants in this case have been made aware of their noncompliance with the Detention Standards and noncompliance persists. Second, although the Court noted that Plaintiffs challenged "*each* instance of noncompliance as collectively actionable," PI Op. at 36, that was the same in *Torres*. *See Torres*, 411 F. Supp. at

For this reason, the fact that ICE allegedly "monitors compliance with the detention standards" cannot save Defendants when the inspections do not actually routinely assess for compliance with Attorney Access Provisions. Defs.' MTD at 42; *see Gayle*, 2020 WL 2086482, at *6 (stating that even "purported 'substantial compliance' does not pass muster under the *Accardi* doctrine"). The facilities' "superior" rating and Defendants' bald assertion that "there is no record of non-compliance with the attorney-client access detention standards," Defs.' MTD at 42–43, means little where even Defendant DHS's own oversight body has explicitly criticized the quality of those inspections, and where Plaintiffs have proffered extensive evidence of restrictions on attorney access in practice. *See* FAC ¶ 167 ("ICE's inspections, follow-up processes, and onsite monitoring of facilities . . . do not ensure adequate oversight or systemic improvements in detention conditions, with some deficiencies remaining unaddressed for years.") (quoting 2018 DHS-OIG Report); *supra* pp. 5–9 (describing how ICE limits access to counsel). In sum, Plaintiffs have stated a claim under 5 U.S.C. § 706(2).

F. Plaintiffs FIRRP and AIJ State a Claim Under the Rehabilitation Act.

Defendants make three arguments against FIRRP's and AIJ's Rehabilitation Act claim: (1) they seek reconsideration of the Court's ruling that FIRRP and AIJ fall within the Rehabilitation Act's zone of interest, (2) they argue that an organization asserting a Rehabilitation Act claim may proceed past the Rule 12 stage only if its complaint identifies by name a specific person with a disability, and (3) they seek dismissal under Rule 12(b)(6) based on disagreements with the facts Plaintiffs pled and a lack of "evidence" attached to the complaint. All arguments fail.

First, the Court should reject Defendants' improper attempt to seek reconsideration of the Court's ruling as a matter of law that FIRRP and AIJ fall within the Rehabilitation Act's zone of

1044–45 (detailing allegations of "numerous respects" in which ICE failed to comply with the 2011 PBNDS).

interest. Defendants already raised this same argument in their opposition to Plaintiffs' motion for a preliminary injunction. *Compare* Defs.' Opp. to Pls.' Mot. for Preliminary Injunction, ECF No. 66, at 43–44 *with* Defs.' MTD at 44–45. The Court rejected Defendants' argument in a thoroughly reasoned analysis, citing several opinions holding that the statutory language extending a cause of action under the Rehabilitation Act to "any person aggrieved" by discrimination permits organizations such as FIRRP and AIJ to sue based on discrimination against those they serve. PI Op. at 38 (citing 29 U.S.C. § 794(a)(2)). "[T]he same issue presented a second time in the same case in the same court should lead to the same result." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc) (emphasis removed), *cert. denied*, 520 U.S. 1264 (1997).

Second, Defendants improperly assume there is a requirement at the pleading stage that Plaintiffs name a particular Detained Client with a Disability. Plaintiffs recognize that the Court found AIJ had not made the proof necessary to support its motion for a preliminary injunction because its evidence did not detail "the specific identity of any clients' disabilities." PI Op. at 39. But Defendants are wrong that this evidentiary requirement applies at the pleading stage. Plaintiffs plead allegations sufficient to set out a Rehabilitation Act claim. They identify the specific set of medical conditions for which they seek relief, based on the set of conditions used by another court addressing a right to counsel in immigration proceedings. *See* FAC ¶¶ 121–23; *see also Franco-Gonzalez v. Holder*, No. 10-cv-2211, 2014 WL 5475097, at *2–3 (C.D. Cal. Oct. 29, 2014). Plaintiffs plead specific examples of the access barriers that specific Detained Clients with Disabilities have faced. *See* FAC ¶¶ 135, 138, 141, 142. Plaintiffs will provide the evidence to support these allegations according to the rules of discovery—identifying particular clients with disabilities in their initial disclosures and identifying their expert's opinions with expert

disclosures—but there is no requirement that they make these identifications in their initial pleading. *See supra* p. 1.

Third, Defendants' disagreements with Plaintiffs' allegations and complaints about a lack of "evidence" attached to the complaint cannot support a motion under Rule 12(b)(6). Defendants quibble with various of Plaintiffs' allegations. They argue that Plaintiffs' allegations about phone access barriers at Florence are "erroneous[]" because the facilities' flawed call-back systems provide sufficient access. Defs.' MTD at 45. They argue that Plaintiffs have alleged that the disproportionate placement of Detained Clients with Disabilities in isolated housing results in "limited" access rather than a "ban" on access. *Id.* at 45.[37] This Rule 12(b)(6) motion is not the appropriate vehicle for Defendants to raise these disagreements with Plaintiffs' allegations. Defendants similarly fault Plaintiffs for not providing "evidence" to support their factual allegations. *See* Defs.' MTD at 46; *see also id.* (misapprehending the Court's Preliminary Injunction order as requiring "'declarations'" at the pleading stage). These arguments fail because a complaint need not attach evidence to survive a Rule 12(b)(6) motion.

CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss should be denied.

[37] Defendants are also wrong that the Rehabilitation Act applies only in the cases of complete bans on access. Instead, the Rehabilitation Act requires Defendants to allow Detained Clients with Disabilities to "communicate as effectively" as those without disabilities. *Rogers v. Colo. Dep't of Corr.*, No. 16-cv-2733, 2019 WL 4464036, at *15 (D. Colo. Sept. 18, 2019).

Respectfully submitted this 8th day of March, 2023.

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