EXHIBIT A

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AUDLEY BARRINGTON LYON, JR., et. al.,

Plaintiffs,

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, et. al.,

Defendants.

Case No. 13-cv-05878 EMC

PLAINTIFFS' [PROPOSED] MOTION FOR RECONSIDERATION

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Plaintiffs file this motion for reconsideration related to the application of *Turner v. Safley*, 482 U.S. 78 (1987), to Plaintiffs' procedural due process claims. This motion is proper because "a material difference in . . . law exists from that which was presented to the Court before entry" of the Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment; and Denying Plaintiffs' Motion for Summary Judgment, ECF No. 167 ("Order on Motions for Summary Judgment"). Local Civil Rule 7-9(b).

In its Order on Motions for Summary Judgment, the Court adopted a view that was not considered or briefed by the parties, namely that *Turner v. Safley* must be applied to Plaintiffs' procedural due process claims in addition to consideration of those claims under *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See* Order on Motions for Summary Judgment at 33 ("The Court must therefore first apply the *Mathews* balancing test in order to determine if Plaintiffs' due process rights have been impinged by the telephone restrictions at issue. If the Court finds that Plaintiffs' constitutional rights have been impinged, the Court will then apply the *Turner* four-factor test"). In doing so, the Court referenced cases that were not cited by either party in the cross motions for summary judgment and which do not apply *Turner* to procedural due process claims. *See id.*

Notwithstanding the sweeping language in certain Ninth Circuit decisions, not every constitutional right in prison or jail must be subjected to a *Turner* analysis. *Johnson v. California*, 543 U.S. 499, 510 (2005) ("[W]e have applied *Turner*'s reasonable-relationship test *only* to rights that are 'inconsistent with proper incarceration'") (emphasis in original). Indeed, as the U.S. Supreme Court noted in *Johnson*, one of the most common types of constitutional claims in prison—deliberate indifference under the Eighth Amendment—is not subject to *Turner* "because the integrity of the criminal justice system depends on full compliance with the Eighth Amendment." *Id.* at 511. In this case, it is highly unusual and incorrect to apply both *Mathews* and *Turner* seriatim to Plaintiffs' procedural due process claims; as set forth below, this would strip the *Mathews* test of its meaning and lead to unjust results.

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I. Applying *Turner* After *Mathews* Would Strip the *Mathews* Test of Its Meaning

The Order on Motions for Summary Judgment sets forth a two-step analysis in which the *Mathews* test would be applied to determine whether Defendants' policies and practices impinge on Plaintiffs' due process rights, and only then reach the *Turner* question of whether these policies and practices are reasonably related to legitimate penological interests. Order on Motions for Summary Judgment at 32. But this two-step analysis creates the bizarre result that Plaintiffs—civil detainees who seek outside communication for the purpose of ensuring a full and fair hearing in their immigration proceedings—would face higher barriers to relief than a sentenced prisoner who seeks outside communication for general information or entertainment purposes.[1]

By its nature, the *Turner* test considers the governmental interests at stake but not the relative importance of the individual's interest. Of the four *Turner* factors, none of them addresses the nature or importance of the interest at stake for the individual.[2] That is why, in applying *Turner* to First Amendment rights (such as the right to receive certain publications or attend religious services), courts do not examine the value of the particular First Amendment exercise at issue. They do not consider whether commercial speech or sexually explicit materials are entitled to greater or lesser First Amendment protection than political speech, for example. *See, e.g.*, *Prison Legal News v. Lehman*, 397 F.3d 692, 698-701 (9th Cir. 2005) (analyzing bulk mail ban under *Turner*); *Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir. 1999) (reviewing prohibition on sexually explicit material under *Turner*). The content of the speech is relevant only insofar as

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[1] Telephone access restrictions can be challenged under the First Amendment by sentenced prisoners and pretrial criminal detainees alike, without regard for the purpose of the communication, and such challenges are reviewed under *Turner* even without any relationship to a procedural due process violation. *See, e.g., Valdez v. Rosenbaum*, 302 F.3d 1039 (9th Cir. 2002) (applying *Turner* analysis to First Amendment challenge to telephone restrictions on calls to persons other than defense counsel); *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986) (applying *Bell* analysis to First Amendment challenge to jail's refusal to quickly provide telephone access).

[2] These factors are (1) whether there is a "valid, rational connection" between the prison 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 prisoners, (3) whether accommodation of the asserted constitutional right will have significant impacts on guards, other prisoners, and the allocation of prison resources generally, and (4) whether ready alternatives are absent (or whether obvious, easy alternatives exist). *Turner*, 482 U.S. at 89-90.

it impacts the government's penological interests. *See Mauro*, 188 F.3d at 1060 (ban on frontal nudity justified by concerns about jail security and sexual harassment of prison guards).

By contrast, procedural due process analysis begins with a consideration of the individual's liberty interests: here, access to counsel and the right to present evidence with the ultimate consequence being removal from the United States. But if *Turner* is applied outside the context of *Mathews*, it eliminates this critical factor and renders the *Mathews* analysis at best surplusage and at worst a further barrier to relief that does not exist in other applications of *Turner*. This would be a serious departure from procedural due process jurisprudence, which recognizes that the process due depends on the interests at stake. *Cf.*, *e.g.*, *Goss v. Lopez*, 419 U.S. 565 (1975) (notice and right to be heard prior to suspension from public school satisfied by an informal interview in which student is permitted to respond to charges of misconduct); *Morrissey v. Brewer*, 408 U.S. 71 (1972) (process due prior to parole revocation includes advance written notice of claimed parole violations, disclosure of evidence against parolee, opportunity to cross-examine adverse witnesses, neutral and detached hearing body, and written factual findings and basis for revocation).

II. The Place for Consideration of Governmental Interests Is Within the *Mathews* Test, Not Outside of It

The *Mathews* test already incorporates consideration of government interests. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Accordingly, if heightened deference to governmental interests is appropriate in this case, the proper place for such deference is *within* the *Mathews* balancing test, in evaluating the government's interest in maintaining the challenged policies and practices.

Washington v. Harper, 494 U.S. 210 (1990) is not to the contrary. In *Harper*, while the U.S. Supreme Court relied on *Turner* to analyze the plaintiff's substantive due process challenge to forced administration of psychotropic drugs, 494 U.S. at 221-25, the Court used *Mathews* to analyze the plaintiff's procedural due process challenge. *Harper*, 494 U.S. at 228-36. And while the *Mathews* analysis gave significant deference to the judgments of prison medical staff, that

deference took place entirely within the context of the *Mathews* analysis rather than being part of a separate *Turner* analysis. *See id.* Similarly, in *United States v. Loughner*, 672 F.3d 731 (9th Cir. 2012), the Ninth Circuit applied *Turner* for its substantive due process analysis, but applied *Mathews* for its procedural due process analysis. *Loughner*, 672 F.3d at 748-52 (substantive due process), 756 (procedural due process).

In neither case did the court engage in a separate *Turner* analysis of the procedural due process issues. The procedural due process analysis started and ended, as it should, with the *Mathews* balancing of the individual interest against the government's interests. By incorporating *Jones*, *Bell*, or *Turner* into the *Mathews* government interest analysis, the Court could consider the specific needs of governmental authorities without creating strange inconsistencies in the case law or completely discounting the individual interests at stake. *See Mathews*, 424 U.S. at 335 (third prong of balancing test is "the Government's interest, including the *function* involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail") (emphasis added).

III. *Turner* Has Never Been, and Should Not Be, Applied to a Class of Civil Detainees in the Ninth Circuit

There remains the issue of which standard to incorporate into the *Mathews* government interest analysis. *Turner v. Safley*, *Bell v. Wolfish*, and *Jones v. Blanas* all require similar (but not identical) tests regarding the interests of government officials who are responsible for incarcerating or detaining people. *Turner* requires that prison regulations satisfy the four-factor test described above. 482 U.S. at 89-90. *Bell* requires that officials not punish pretrial criminal detainees, whether through an express intent to punish or through conditions or restrictions that are not "reasonably related to a legitimate governmental objective" or are "excessive in relation" to that purpose. *Bell v. Wolfish*, 441 U.S. 520, 538 (1979). And *Jones* applies a version of the *Bell* test, directing that civil detainees cannot be subjected to "restrictions [that] serve an alternative, non-punitive purpose but are nonetheless 'excessive in relation to the alternative purpose,'" and further directing that civil detainees be given "more considerate treatment" than pretrial criminal

detainees. *Jones*, 393 F.3d at 932 (citing *Bell*). All three tests rely on the same operative facts; the only difference is the degree of deference to the government.

Despite the Ninth Circuit's inconsistent rulings on the appropriate analysis for pretrial criminal detainees,[3] it has never departed from its holding in *Jones v. Blanas* on the analysis for civil detainees. The facts of the instant case make it particularly ill-suited to repudiate *Jones*. While three of the facilities are county jails, Mesa Verde houses exclusively civil detainees and was renovated before activation to fit this new purpose. If the specialized civil detention standard in *Jones* is to apply anywhere, it must apply to a facility that houses a population consisting entirely of civil detainees.

Moreover, *Jones* makes clear that its protections are based on the civil status of civil detainees, not the location of their confinement or even the detainee's prior criminal history. *See Jones*, 393 F.3d at 933 ("Civil status means civil status, with all the Fourteenth Amendment rights that accompany it."). Indeed, the basis of the plaintiff's claim in *Jones* was his shoddy treatment while held as a civil detainee at the Sacramento County Jail. *Jones*, 393 F.3d at 923. *See also Lynch v. Baxley*, 744 F.2d 1452, 1463 (11th Cir. 1984) (prohibiting Alabama emergency civil detainees from being held in jails altogether because conditions of confinement were unacceptable).

For all of these reasons, and particularly in light of the Ninth Circuit's consistent application of *Jones* to civil detainees, applying *Turner* to this class of civil detainees would represent an unprecedented contraction of *Jones* with serious implications for future cases

[3] *Demery* has not been implicitly overruled. Rather, Plaintiffs' further research indicates that the Ninth Circuit has two parallel lines of mutually-inconsistent case law on how to analyze the rights of pretrial criminal detainees, one of which applies *Bell* and one of which applies *Turner*, and neither of which cites the other. *Compare Byrd v. Maricopa Cty. Sheriff's Dep't*, 629 F.3d 1135 (9th Cir. 2011) (en banc) (applying *Bell* instead of *Turner*) *with Bull & City & Cnty. of S.F.*, 595 F.3d 964 (9th Cir. 2010) (en banc) (applying *Turner* instead of *Bell*). While the Ninth Circuit's lack of consistent guidance is troubling, the U.S. Supreme Court's 2015 decision in *Kingsley v. Hendrickson* is instructive. In *Kingsley*, the Supreme Court reiterated the differing positions of pretrial detainees from sentenced prisoners by adopting an objective test for use of force against pretrial detainees rather than the "malicious and sadistic" subjective test that governs use of force against sentenced prisoners. In adopting this standard, the Court relied heavily on *Bell* to distinguish pretrial criminal detainees from sentenced prisoners. *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015). (This week, the en banc Ninth Circuit is hearing oral arguments in *Castro v. County of Los Angeles*, No. 12-56829, to address the potential application of *Kingsley* outside the excessive force context.)

involving the rights of civil detainees. For these reasons, Plaintiffs argue that *Jones*, and not *Turner*, would be the most appropriate form of government deference to be incorporated into government interest step of the *Mathews* analysis.

For the foregoing reasons, Plaintiffs request that the Court reconsider that aspect of its Order on Motions for Summary Judgment that sets forth the unprecedented test of applying *Turner v. Safley* to the telephone restrictions that are the basis of Plaintiffs' procedural due process claims. To the extent a heightened deference to governmental interests is appropriate, that should be through incorporating *Jones* into the third prong of the Court's *Mathews* analysis of the Plaintiffs' and governments' relative interests.

Dated: March 22, 2016

Respectfully submitted,

By: */s/ Carl Takei* .
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