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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' [CORRECTED] OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION

Date: February 11, 2016
Time: 1:30 p.m.
Courtroom: 5
Judge: Hon. Edward M. Chen

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I. INTRODUCTION

Defendants do not dispute the obstacles to telephone access identified in Plaintiffs' Motion for Summary Adjudication. Defendants do not even respond to Plaintiffs' evidence that many of the protections sought are required by Defendants' own detention standards. Defendants' only justifications for these restrictions are post-hoc speculations unsupported by evidence. In other words, Defendants utterly fail to justify their severe restrictions on Plaintiffs' ability to access counsel and gather evidence and other documentation necessary to defend against the removal charges that place them in Defendants' custody.

Instead of disputing the facts, Defendants claim that Plaintiffs may be detained and deported without the full protections of due process, solely because they are not citizens. But the Due Process Clause of the Fifth Amendment protects *all persons* and recognizes Plaintiffs' liberty interests in avoiding unjust deportation and prolonged detention as among the most weighty. Defendants also propose that the Court import the "actual injury" requirement from *Lewis v. Casey*, which involved sentenced prisoners who sought better law libraries to litigate *pro se* claims. *See* 518 U.S. 343, 352-53 (1996). But *Lewis* is inapplicable here, because Plaintiffs are not sentenced prisoners who may choose whether to file particular claims. Plaintiffs are immigration detainees who must submit legal arguments and evidence to immigration judges and other decision-makers or face certain removal. Plaintiffs' constitutional and statutory rights to access counsel and present evidence and arguments to seek release from detention and relief from deportation are critically important, and Defendants' ongoing restriction and denial of the telephone access Plaintiffs require to effectuate those rights must be enjoined.

II. ARGUMENT[1]

A. Defendants' Systemic Denial of Telephone Access Necessarily Interferes with Plaintiffs' Vindication of their Legal Rights.

Defendants misunderstand the nature of Plaintiffs' claims and the proof required to seek

[1] Numbered references to "Ex. __" refer to Exhibits attached to the Declaration of Alexis Yee-Garcia unless otherwise specified. References to "____ Decl. ECF No. 120-X" refer to Declarations filed in support of Plaintiffs' Motion for Summary Adjudication ("Motion" or "Mot."), filed on December 18, 2015. Lettered references to "Ex. _" refer to Exhibits attached to the Declaration of Melanie Phillips filed in support of Plaintiff's Motion, ECF No. 120-26 filed on December 18, 2015.

prospective relief. And while they paint a rosy picture of telephone access for Plaintiffs in detention, Defendants do not actually dispute most of Plaintiffs' evidence of obstacles to needed telephone access. To achieve this illusion, Defendants "cherry-pick" the most favorable facts and imply that they apply class-wide. To the extent Defendants do dispute facts presented by Plaintiffs' Motion, they rely on the statements of high-level policy makers regarding what *should* be possible, but ignore—and fail to rebut—evidence from Plaintiffs that such options are not actually available.[2] The record establishes that Defendants' policies and practices interfere with Plaintiffs' rights and create a class-wide risk of harm that can only be redressed through prospective relief.

1. Defendants' Ongoing Interference with Plaintiffs' Efforts to Vindicate their Legal Rights Creates a Class-Wide Risk of Harm that Must Be Redressed Through Prospective Relief.

Plaintiffs seek prospective relief to enjoin Defendants' ongoing restriction and denial of Plaintiffs' telephone access to counsel and others necessary to their ability to defend against removal charges. For this reason, liability does not depend on a showing of prejudice suffered by individual class members, but rather on whether Plaintiffs have proven that Defendants' telephone access policies and practices create a substantial risk of denying Plaintiff class members access to counsel and the ability to gather documents and evidence necessary to seek relief from removal. *See e.g., Parsons v. Ryan*, 754 F.3d 657, 677-680 (9th Cir. 2014) (claim of deprivation of food "will not stand or fall based on variations in how hungry each member of the putative sub-class is, or on each individual's dietary needs . . . but whether defendant "regularly provides a level of nutrition so inadequate that it exposes *any* inmate . . . to substantial risk of serious harm"); *Abadia Peixoto v. U.S. Dept. of Homeland Security*, 277 F.R.D. 572, 575 (N.D. Cal. 2011) (rejecting argument that showing of prejudice is required for prospective relief under the Due Process Clause against blanket use of restraints in immigration court). Just as relief from

[2] Defendants make a number of evidentiary objections in an Exhibit to their Opposition (Exhibit A ECF No. 139-1). Plaintiffs maintain that these objections are without merit, but in any event they are out of order. Per Civil L.R. 7-3(a), when opposing a motion "Any evidentiary and procedural objections to the motion must be contained within the brief or memorandum." Defendants' six-page Exhibit violates this rule. Moreover, the vast majority of the evidence objected to supports propositions for which there is additional, unobjectionable evidence.

inadequate medical care in prison is not contingent upon a plaintiff first falling ill, Defendants' assertions that some Plaintiffs made certain telephone calls and that many of Plaintiffs' witnesses were ultimately represented by counsel do not defeat Plaintiffs' claims. *See Parsons v. Ryan*, 754 F.3d at 676-77.[3] This is because the undisputed restrictions on telephone access *necessarily* interfere with Plaintiffs' abilities to access counsel and gather evidence and documentation needed to pursue release from detention and relief from removal.[4] The fact that some of Plaintiffs' witnesses have overcome some of these obstacles in some situations does not erase this widespread injury.

2. The Undisputed Facts Establish that Defendants Systematically Restrict Telephone Access.

Although Defendants recharacterize some facts, they do not dispute most of Plaintiffs' evidence regarding the telephone systems available in the Facilities. For example, it is undisputed that in all Facilities, Housing Unit Phones do not offer privacy from other detainees and facility staff, paid calls are generally recorded or monitored, three-way calling is prohibited, and the positive-acceptance requirement blocks Plaintiffs from leaving voicemails and penetrating automated answering systems.[5] It is also undisputed that current telephone rates at RCCC, Yuba, and Contra Costa are prohibitively expensive. The fact that the FCC has ordered caps on these rates does not make these costs "irrelevant" to Plaintiffs, since the FCC Order has

[3] As a practical matter, Plaintiffs have great difficulty providing evidence from witnesses who have not remained in custody well past the average detention times, obtained release on bond, or prevailed in their immigration cases. *See* Mot. n. 107. *See also* Opp. at 5:7-27 (describing expedited "detained docket" in immigration court). For example, although Edgar Cornelio was able to present one declaration describing how Defendants' restriction and denial of telephone access required him to seek multiple continuances as he sought counsel, he ultimately had to represent himself, lost his case, was deported, and was unable to stay in contact with Plaintiffs' counsel. *See* Declaration of Edgar Cornelio ISO Plaintiffs' Motion for Class Certification ¶¶ 8-10, ECF No. 14-4; Plaintiffs' Motion for Permission to Withdraw as Counsel for Edgar Cornelio, ECF No. 70.

[4] *See generally* Mot. at 31-33; *See also* Ex. 45 V.V. Dep. 148:8-22; 149:7-150:11; V.V. Decl. ECF No. 120-3 ¶¶ 19-21 (had to communicate through husband and critical information was lost in the process); M.G. Decl. ECF No. 120-8 ¶ 26 (communicates with attorney through sister); F.L. Decl. ECF No. 120-14 ¶¶ 30-31; Vincent Decl. ECF No. 120-20 ¶ 4 (only takes detained clients if family members are available to assist with communication).

[5] Mot. at 12:7-10; 7:9-8:5; 9:2-10. Defendants' claim that calls from Housing Unit Phones are "rarely" monitored at Mesa Verde and Yuba is of no benefit to Plaintiffs, whose interest in private legal calls requires a guarantee of privacy, rather than a random chance of it. Opp. at 8:20 (Mesa Verde); 11:5 (Yuba), *see* O.A. Decl. ECF No. 120-6 ¶ 15 (uncomfortable talking to attorney because message on telephone says it is recorded or monitored).

not yet been implemented and it is unclear when or whether it will be.[6]

Defendants do not dispute that many class members have been unable retain counsel through the Talton Free Call Platform, that the Talton Free Call Platform is limited as set forth in Plaintiffs' Motion, or that this limited platform is the only accommodation for indigent detainees seeking to use Housing Unit Phones.[7] Defendants instead suggest that difficulty in obtaining and communicating with counsel is attributable to causes other than Defendants' actions.[8] While there are many reasons lawyers may decline representation, Defendants have failed to rebut Plaintiffs' extensive evidence that telephone restrictions pose a real obstacle to Plaintiffs' efforts to retain counsel and to effective attorney-client communication needed to share critical information, prepare applications for relief and supporting documentation, and prepare for hearings.[9] Nor have Defendants rebutted Plaintiffs' evidence that immigration attorneys limit their representation of detained immigrants precisely because communication with such clients requires greater

[6] Opp. at 13. On December 22, GTL, the telephone service provider for two of the Facilities in this case, filed a motion with the FCC stating its intention to challenge the new FCC order in federal court and requesting a stay of implementation. Petition of Global Tel*Link for Stay Pending Judicial Review, In the Matter of Rates for Interstate Inmate Calling Services, WC Docket No. 12-375 (Fed. Communications Commission, Dec. 22, 2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001389692.

[7] Mot. 11:1-2, n. 42. Although Defendants cite Plaintiff Astorga's deposition for the proposition that he was able to contact legal services organizations through the Talton Free Call Platform, they fail to mention that Mr. Astorga required assistance from another detainee to navigate the system, a fact consistent with Plaintiffs' evidence that Defendants' telephone systems are extremely difficult to use and Defendants fail to provide assistance. Opp. at 8:4; Ex. 46 Astorga Dep. 16:14-17:25; Mot. at 17:11-18:1. *See also* Mot. at 10:6-11:8 (describing limited usefulness of Talton Free Call Platform) and 40:11-12 (no other accommodation for indigent Plaintiffs).

[8] Opp at 6, 22-23.

[9] Many of Plaintiffs' witnesses found counsel only after months of searching and with assistance from friends or family. *See* H.S. Decl. ECF No. 120-13 ¶¶ 6-13; Y.A. Decl. ECF No. 120-2 ¶¶ 17-23; I.P. Decl. ECF No. 120-12 ¶¶ 28-35; F.L. Decl. ECF No. 120-14 ¶ 29; M.G. Decl. ECF No. 120-8 ¶¶ 14-16; R.K. Decl. ECF No. 120-5 ¶¶ 21-25. In addition, Edgar Cornelio, formerly a named plaintiff, sought three continuances in order to retain counsel. He was thwarted in his attempt to reach counsel through Defendants' telephone system and ultimately had to represent himself. Cornelio Decl. ISO Class Certification ¶¶ 7-9, ECF No. 14-4. Plaintiffs who were represented by counsel felt uncomfortable discussing their cases in non-private settings and many were unable to speak to their attorneys at all. *See* Ex. 47 Neria-Garcia Dep. 49:14-20 (testifying that she felt uncomfortable because the calls were monitored); Ex. 45 V.V. Dep. 61:20-63:1 (unable to secure evidence from overseas due to difficulties with phone); V.V. Decl. ECF No. 120-3 ¶¶22, 31; H.S. Decl. ECF No. 120-13 ¶¶ 15-16; I.P. Decl. ECF No. 120-12 ¶¶ 36-37; B.M. Decl. ECF No. 120-16 ¶¶ 10-17, F.L. Decl. ECF No. 120-14 ¶ 36. *See also* Ex. 48 Garzon Dep. 76:14-77:12 (delays in communication impacted preparation of application for relief); Prasad Decl. ECF No. 120-22 ¶ 11 (automatic cut-off impedes preparation of declarations).

resources.[10]

Defendants make the general claim that "compliance issues are identified and corrected in various ways."[11] But this is belied by Plaintiffs' specific evidence of ICE failing to correct telephone access deficiencies its own inspectors identified during the course of litigation and the lack of familiarity ICE oversight personnel have with the detention standards' requirements for telephone access.[12] Moreover, Defendants do not dispute Plaintiffs' evidence that none of the Facilities comply with the detention standards specified in their contracts with ICE.[13]

Defendants suggest that the option of requesting to make a call at an ICE Field Office is a meaningful accommodation.[14] However, this option requires that Plaintiffs be shackled in leg irons, handcuffs, and a belly chain and transported in a van.[15] Moreover, it is undisputed that posted policies and handbooks do not inform Plaintiffs of this option, the Phone Rooms at Contra Costa and Yuba, or the library phone at RCCC.[16] It is also undisputed that written notice of telephone access policies and instructions are provided only in English and Spanish and no oral

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[10] Vincent Supp. Decl. ECF No. 120-17 ¶ 13; Lee Decl. ISO Class Certification ECF No. 120-21 ¶ 8; Lee Supp. Decl. ECF No. 18 ¶ 12. Defendants' cited cases are inapposite. In *Johannes v. County of Los Angeles*, 2011 WL 6149253 (C.D. Cal. April 8, 2011), a civil detainee who was held, post-conviction, under the California Sexually Violent Predator Act did not seek telephone access for the purpose of retaining or communicating with counsel or representing himself against civil or criminal charges. In *Hopper v. John Doe Meyers Recreational Coach*, 2006 WL 3337388 (W.D. Wash. Nov. 9, 2006) the plaintiff did not argue and the court did not consider whether the challenged law library and telephone access restrictions prevented plaintiff from defending himself from removal proceedings. Plaintiff's goal in *Hopper* was to file lawsuits in state and federal court, and he had filed *eight* such suits. In the only holding relevant to this case, the court denied the defendant's motion for summary judgment on a *Lewis v. Casey* access to court analysis, because defendant's allegation "that requests for access to [non-monitored] administrative phones are processed within eight hours does not adequately address this issue." 2006 WL 3337388 at *9.

[11] Opp. at 7.

[12] *See* Mot. at 42:1-11; *see also* Ex. 49 Meyer Dep. at 27:13-28:7; 70:4-21; 159:15-160:2 (ICE Assistant Field Office Director (AFOD) unaware what steps would be taken to address telephone access problems in the Facilities for which he had supervisory responsibility).

[13] Mot. at 19:4-5.

[14] Opp. at 12:24-26.

[15] Ex. 51 Vaughn Dep. 65:19-66:7; Ex. 49 Meyer Dep. 131:10-133:17; H.S. Decl. ECF No. 120-13 ¶¶ 17-18; M.G. Decl. ECF No. 120-8 ¶ 28. Defendants' witness Nina Dozoretz testified this option would not satisfy ICE detention standards, which set requirements for telephone access *inside* each detention facility. Ex. 50 Dozoretz Dep. 123:16-126:1.

[16] Ex. 49 Meyer Dep. 135:3-24; Ex. 52 Bonthron Dep. 213:22-214:14 (stating he had not heard of ICE detainees being transported to San Francisco in order to make telephone calls); Mot. at 18:2-10.

instructions are provided to Plaintiffs who do not read either of those languages.[17]

Mesa Verde. Defendants begin their discussion of the Facilities with the Mesa Verde Detention Facility ("Mesa Verde"), which provides the most telephone access to Plaintiff class members. But Defendants cannot dispute that Mesa Verde does not meet the detention standard requiring that legal calls be scheduled within eight facility waking hours.[18] Defendants also neither dispute nor justify the Mesa Verde rule against calling toll free numbers.[19] It is undisputed both that the posted instructions for Phone Room calls specify that they are for attorney calls only and that Plaintiffs have been thwarted in their efforts to contact non-attorneys for legal support.[20] Neither evidence of occasional non-attorney phone calls nor the absence of written requests for calls not permitted by the posted policy is sufficient to rebut Plaintiffs' evidence that Phone Room calls are generally limited to attorney calls and that even attorney calls are not granted consistently.[21]

Contra Costa. Defendants do not dispute that calls from Housing Unit Phones at the West County Detention Facility ("Contra Costa") can only be made on a collect-call basis to recipients with a credit card or that these phones are accessible only during a few hours of daily out-of-cell time.[22] In response to Plaintiffs' evidence of particular detainees' being denied access to the Phone Room to make non-attorney calls and being told they could not use the Phone Room

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[17] *See* Opp. at 14, n. 7; *cf.* Mot. at 18:2-10. Defendants cite special accommodations for pro bono attorney visits or videoconference ("VTC") meetings. Opp. at 13:2-9. These options are limited and insufficient to overcome the Defendants' restrictions. *See* Defendants' Answer to the First Supplemental Complaint ECF No. 100 ¶ 60 (admitting that ICE does not typically transport detainees from the Mesa Verde Facility to meet with counsel in San Francisco); Declaration of Ilyce Shugall ISO Plaintiffs' Reply to Defendants' Motion for Summary Judgment ("Shugall Decl.") ¶ 10 (VTC "meetings" have technical problems, are limited to when client has court appearance), ¶ 9 (burden of transport for pro bono attorney meetings), ¶ 4-7 (limits of know-your-rights program in Facilities). Moreover, accommodations for pro bono representatives do not benefit the vast majority of Plaintiffs and their counsel. *See* Ex. 53 Shugall Dep.73:16-24 (visits accommodated only for pro bono clients); Eagly, I. and Shafer, S., *A National Study of Access to Counsel in Immigration Court*, 164 U.Penn.L.Rev 1, 27 (Dec. 2015) (90% of represented detainees are represented by private counsel in small firms), *cited by* Berg Report at 16-17.

[18] *See* Neria-Garcia Decl. ECF No. 120-7 ¶ 26 (response to requests for Phone Room varied, including four day wait and denial of request).

[19] Mot at 40:2-4.

[20] Mot at 16:2-17, *see also* Ex. 54 Harvey Dep. 74:15-75:20 (has not set up calls with witnesses or government agencies and does not know policy for doing so).

[21] *Id.*

[22] *See* Mot. 8:6-9:1; 12:1-3.

outside of "free time," Defendants did not provide contrary declarations.[23] Instead, they merely cited call logs showing some calls outside of free time and to non-attorneys and cited the experiences of Plaintiffs Lyon and V.V., who obtained special module-worker privileges that enabled them to access telephones when most other Plaintiffs at Contra Costa were required remain in their cells.[24] None of this rebuts Plaintiffs' evidence that such access is not consistently provided. Indeed, Defendants' expert report acknowledges the contradiction between stated policy and practice on this point.[25] As to messaging, Defendants note that Contra Costa has a messaging system but cannot show it is effective and do not rebut evidence that V.V. received a message from her attorney four days after it was sent, late the night before her deposition.[26]

Yuba. Defendants' description of the telephone options at the Yuba County Jail ("Yuba") is similarly misleading. While detainees "can put in a request at any time to use the phone in the booking area," and the phones in the Yuba Phone Room "are available every day typically between 8 in the morning and 4 in the afternoon," it is undisputed that Plaintiffs must wait a week or more to actually use those telephones, Plaintiffs are limited to one 20 minute call from the Phone Room per week, the Phone Room at Yuba does not provide privacy, Plaintiffs have no ability to schedule calls, the Phone Room is limited to calls with attorneys, and phones in Yuba's

[23] Mot at 15:6-10; *see also* Ex. 55 Nancy Neria-Garcia Response to Interrogatory No. 1 at 7:7-8:14; Berg Decl. Ex. A ECF No. 120-23 ("Berg Report") at p. 12 (during October 2015 inspection of Contra Costa, deputy stated that Phone Rooms were limited to attorney calls).

[24] *See* Ex. 56 Lyon Dep 107:18-108:7, 113:25-115:20; Ex. 45 V.V. Dep. 100:3-7; Ex. 52 Bonthron Dep. 84:19-85:24. In addition, Contra Costa's Lt. Bonthron testified that when the jail realized detainees were using the Phone Room to call loved ones, it instituted a system to "quell that whole abuse." Ex. 52 Bonthron Dep. 141:12-142:6. Exhibit 37 of the Shinners Declaration, ECF No. 139-40, described as a copy of "Contra Costa County VTC Room Call Logs," is inadmissible and should be excluded from evidence. The Call Logs are out-of-court statements introduced to establish the truth of the matter asserted (that certain telephone calls were made at certain times) and are therefore inadmissible hearsay under F.R.E. 801. The business records exception is not satisfied because its conditions have not been established by the testimony of the custodian or other qualified witness under F.R.E. 803(6)(D), and in fact no declaration or testimony has been submitted from any individual who has personal knowledge regarding the creation, review or maintenance of this. Finally, Exhibit 37 was produced to Plaintiffs on November 23, 2015 (*see* Yee-Garcia Decl. ¶ 21), after the fact discovery cutoff date of November 19, 2015 (*see* Second Amended Case Management and Pretrial Order for Bench Trial ECF No. 96) despite the fact that the documents appear to have been created months earlier.

[25] Hackett Decl. ECF No. 139-37 ("Hackett Report") ¶ 26.

[26] *See* Mot. n. 80, citing V.V. Dep. 10:12-11:4. Defendants claim this evidence is irrelevant because the attorney was not V.V.'s attorney for her immigration proceedings, but do not claim Contra Costa's messaging system operates any differently for different types of attorneys. The distinction is therefore meaningless in this context.

Phone Room require positive acceptance by the call recipient and therefore cannot penetrate automated answering systems.[27]

Rio Cosumnes Correctional Center. Defendants make much of Lieutenant Butler's opinion that the telephone in the law library at Rio Cosumnes Correctional Center ("RCCC") is "absolutely private."[28] But Lt. Butler is not an expert witness and no reasonable fact-finder could rely on his conclusory opinion given the location of the library phone and Butler's own testimony that library calls are made "in observation of a deputy" and that due to the lack of privacy for telephones "[he] would assume" ICE had waived its standards on privacy for legal calls for detainees at RCCC.[29] Further, Defendants do not dispute Plaintiffs' evidence that requests to use the library telephone have been regularly delayed and denied.[30] Defendants' statement that Plaintiffs have access to Housing Unit Phones "at any time" is misleading; Defendants do not dispute Plaintiffs' evidence of extremely restrictive conditions that allowed access to Housing Unit Phones for at most a few hours a day.[31]

B. The Due Process Clause of the Fifth Amendment Protects Non-Citizens' Substantive and Due Process Rights. [32]

1. Defendants' Telephone Policies and Practices Deny Plaintiffs Substantive Due Process.

a. Non-Citizens Are "Persons" Under the Due Process Clause.

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[27] Opp. at 11:5-13; Mot. at 13:18-14:10. There is no dispute that the "booking phone" option is not made known to Plaintiffs through detainee handbooks or other means and does not provide privacy for Plaintiffs' calls.

[28] Opp. at 12: 16-18.

[29] Ex. 57 Butler Dep. 85:20-24; 86:5-87-11; Takei Decl. ECF No. 120-28 ¶ 38 (photo of library phone). *See also* Mot. at n. 56.

[30] Mot. at 13:11-13.

[31] Opp. at 12:9; Mot. at 11:13-14.

[32] Defendants claim that several of Plaintiffs' arguments "are not properly before the Court" because they were not specifically pleaded in Plaintiffs' Complaint. *See* Opp. at 21, n. 3, 30:3-4; 32: 9-10. However, Plaintiffs explicitly identified the Fifth Amendment's due process clause as a source of relief in the Complaint, independent of their statutory causes of action, Supp. Compl. ECF No. 99 ¶¶ 101, 106, and provided detailed factual allegations in support of these claims. *See id.* ¶¶ 61-70. Under the notice pleading system, plaintiffs must merely plead sufficient factual allegations to put defendants on notice of their claims. *Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004) (complaint that "did not expressly refer to the First Amendment" but merely alleged facts consistent with a First Amendment claim was sufficient under Fed. R. Civ. P. 8); *Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008) (plaintiff required to set forth "claims for relief, not causes of action, statutes or legal theories").

Defendants' only argument for avoiding the substantive due process standard for civil detainees set forth in *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004) is that "Congress may make rules as to aliens that would be unacceptable if applied to citizens." Opp. at 31:10-14, *quoting Demore v. Kim*, 538 U.S. 510, 521-22 (2003).[33] But this blithe assertion ignores the fact that non-citizens are *persons* protected by the Due Process Clause and their liberty interests in avoiding unnecessarily prolonged detention are as weighty as any. "The Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments").[34] To justify federal discrimination based on alienage, Defendants must establish that treating non-citizen civil detainees worse than citizen civil detainees serves an actual, legitimate government interest. *See Hampton v. Wong*, 426 U.S. 88, 104 (1976). Defendants have identified no such interest.[35] Accordingly, the Court should apply *Jones* to Plaintiffs just as it would to a class of U.S. citizen civil detainees. *See Jones*, 393 F.3d at 933.[36]

b. Defendants' Treatment of Plaintiffs Is "Punitive" Under Jones.

Under *Jones*, civil detention "under conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held" is presumptively punitive and thus

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[33] Defendants wrongly characterize Plaintiffs as endorsing the *Bell v. Wolfish* test, which governs pretrial criminal detainees. *See* 441 U.S. 520, 535- 39 (1979). In fact, Plaintiffs' brief clearly argued for the application of *Jones v. Blanas*, which holds that a civil detainee is "entitled to more considerate treatment than his criminally detained counterparts" (internal quotation omitted). 393 F.3d 918, 932 (9th Cir. 2004).

[34] *See also Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law").

[35] Defendant's reliance on *Demore v. Kim* is misplaced. Opp. at 31:10-14, *citing* 538 U.S. at 522 ("Congress may make rules as to aliens that would be unacceptable if applied to citizens"). First, ICE is not Congress. As an executive agency, ICE cannot arrogate Congress's plenary powers to itself. *See Hampton*, 426 U.S. at 116. Second, not even Congress has the power to impose punishment on non-citizens without due process of law. *See Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896).

[36] Defendants waived their chance to rebut the *Jones* presumption in their opposition brief and are precluded from introducing a new rebuttal argument in their reply brief. *Banga v. First USA, NA*, 29 F.Supp. 3d 1270, 1276 (N.D. Cal. 2014) ("if a party raises a new argument . . . in a reply brief, a court may consider these matters only if the adverse party is given an opportunity to respond").

violates the civil detainee's substantive due process rights. *Jones*, 393 F.3d at 934. Defendants make no effort to rebut the presumption of punitiveness that Plaintiffs supported with evidence in their opening brief.[37] And they do not adequately justify the challenged practices under either *Jones v. Blanas* or *Bell v. Wolfish*. Instead, they simply make a series of speculative statements about possible security interests, unmoored from the Facilities in this case, without defending the severity of the restrictions in relation to the purported interests and without disputing the existence of "alternative and less harsh methods" to serve those purported interests. *See Bell*, 441 U.S. at 539 ("[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees"); *Jones*, 393 F.3d at 932 (restrictions are punitive where they serve a non-punitive purpose but are excessive in relation to that purpose, or where the purpose could be served by "alternative and less harsh methods").

Even under *Bell*'s deferential standard, this Court need not defer to security justifications that lack factual support. *See Lock v. Jenkins*, 641 F.2d 488, 498 (7th Cir. 1981) ("We do not read anything in *Wolfish* as requiring this court to grant automatic deference to ritual incantations by prison officials that their actions foster the goals of order and discipline"); *Demery v. Arpaio*, 378 F.3d 1020, 1032 (9th Cir. 2004) (rejecting sheriff's claim that jail webcam served county's interest in transparency). Here, the "factual" support for Defendants' purported security interests consists almost entirely of speculative, post-hoc rationalizations fabricated by Michael Hackett, a rebuttal expert witness who lacks personal knowledge of the facts in this case.[38] "In the context of a motion for summary judgment, an expert must back up [his] opinion with specific facts."

[37] *See* Mot. 44- 45. Defendants do not dispute or otherwise address Plaintiffs' evidence that pretrial criminal defendants at Yuba, RCCC, and Contra Costa all have greater access to counsel and evidence than Plaintiffs, whether represented by public defenders or proceeding *pro se*. Moreover, as articulated by Plaintiffs' expert Berg, the denial of telephone access necessary to provide Plaintiffs a realistic chance of defending against removal charges instills in them hopelessness and despair, and is in this way "punitive" indeed. Ex. 58 Berg Dep. 169:22-176:13. *See also* Mot. at 45, n. 161, citing *United States v. Salerno*, 481 U.S. 739, 746 (1987).

[38] According to his report, Mr. Hackett never visited the Facilities, never familiarized himself with their layouts, never interviewed detainees or staff, and did not even review all of the depositions and other documentary evidence relied upon by Plaintiffs' experts Berg and Wood. *See* Hackett Report at 1-2.

United States v. Various Slot Machs. on Guam, 658 F.2d 697, 700 (9th Cir. 1981). Here, Defendants' expert not only fails to provide a factual basis for his opinions, but some of his assertions are flatly contradicted by undisputed evidence of how the phone systems in this case actually operate.[39]

Defendants' near-exclusive reliance on Hackett's speculative statements reveals a basic truth about the facts underlying this case: Rather than developing policies grounded in security considerations that apply to Plaintiffs, ICE and their contractors have unthinkingly applied generic and highly restrictive policies, while failing to take into account Plaintiffs' particular needs relative to sentenced prisoners or pretrial detainees who have appointed counsel for their criminal proceedings. Nothing in the record shows that Defendants evaluated technological solutions that could provide more individualized security protections or otherwise expand telephone access to the generally low-risk population at issue. As Plaintiffs' expert Michael Berg concluded based on his site inspections, interviews, and review of documents, the restrictions on Plaintiffs' telephone access "are maintained because of institutional inertia rather than based on any determination that they serve specific legitimate, nonpunitive purposes."[40] Plaintiffs address each of Defendants' stated security concerns in turn:

Three-Way Calling. The security justifications for prohibiting three-way calling identified in the Hackett Report—Defendants' sole source for this alleged concern—are mere speculations, cut-and-pasted from other contexts that make no sense when applied to ICE detainees. Defendants have produced no evidence, for example, that the stated interest in preventing a detainee from making calls to "embarrass or harass his victim" applies to civil immigration

[39] For example, Mr. Hackett claims that prohibiting detainees from leaving voicemails and navigating voicemail trees is necessary because "it is essentially impossible for a telephone provider at the corrections facility to be paid for the call" unless the phone system requires the recipient to positively accept the call. *See* Hackett Report at ¶ 10. However, it is undisputed that Yuba, Mesa Verde, and RCCC permit detainees to make calls that they pay for themselves using calling cards or commissary-funded accounts—which, contrary to Hackett's conclusory assertion, would make it possible for a telephone provider at the corrections facility to be paid for the call even if the facilities chose to remove the positive-acceptance requirement.

[40] Berg Report at 24. Indeed, the restrictions far exceed what is commonly applied to sentenced prisoners in low-security environments such as work release centers. Ex. 58 Berg Dep. 59:6-13 (work release centers commonly provide prisoners access to unrestricted, direct-dial telephones to call potential employers) and 71:11-13 (some work release centers even allow prisoners to use personal cell phones for this purpose).

detainees or that this or related issues have ever come up with immigration detainees at any of the Facilities.[41] Additionally, Defendants' practices are internally inconsistent and as a result merely interfere with detainees who seek to set up three-way calls for legitimate purposes, without serving the purported security interest in blocking all three-way calls.[42]

Positive Acceptance. Relying on the Hackett Report and some statements from Plaintiffs' expert Berg, Defendants assert a security interest in requiring recipients to positively accept all calls from Housing Unit Phones because it enables call recipients to reject "unwanted and harassing calls" from detainees.[43] While jail administrators admittedly have an interest in stopping people in their custody from making harassing phone calls, imposing a positive-acceptance requirement on all Housing Unit Phones is an excessive response because it leads to the automated rejection of vast numbers of non-harassing calls. It is undisputed that current technology permits the telephone contractor to configure Housing Unit Phones to block particular detainees from calling specific phone numbers in response to reports of phone misuse by those detainees[44] and toggle the positive-acceptance requirement on and off for particular phone numbers.[45] Additionally, the fact that detainees may make unrestricted calls from ICE field offices without positive acceptance undermines the credibility of Defendants' purported concern

[41] *See* Hackett Report ¶ 11.

[42] For example, Mesa Verde's phone system instructions state that "THREE (3) WAY CALLS ARE NOT PERMITTED AND WILL BE BLOCKED," Ex. 59 Exhibit 254 to the Deposition of Julius Talton, but Mesa Verde's phone contractor monitors three-way calls from Housing Unit Phones and blocks them only if the contractor determines the call "wasn't [to] an attorney or could be potentially for illegal activity." Ex. 60 Talton dep. 68:2-20. Defendants also concede that the phones in the Contra Costa and Mesa Verde Phone Rooms, as well as the library phone at RCCC, are capable of connecting three-way calls, *See* Def. MSJ and Opp. at 14 & n. 7, even though detainee handbooks indicate that three-way calls are prohibited. *See e.g.* Ex. K at 11 (RCCC Inmate and Detainee Handbook, noting that detainees who "attempt to . . . make three way phone calls" may have their "telephone privileges . . . revoked"); Ex. E (Contra Costa calling instructions).

[43] *See* Def. MSJ and Opp. at 14. Defendants also reference a security interest in "being able to verify who the detainee is calling from the private phone rooms." However, it is unclear what this refers to, and Defendants' cites to the record all relate to the positive-acceptance requirement.

[44] Ex. 58 Berg Dep. 48:12-49:3, 49:16-17; Ex. 60 Talton Dep. 44:6-45:18; Hackett Report at ¶ 13. *See also* Pl. Mot at 38 n. 133.

[45] Wood Decl. ECF No. 120-24 Ex. A ("Wood Report") at ¶ 52-53. *See also* Ex. 57 Butler Dep. 130:9-132:22 (explaining options for blocking calls to particular number from particular detainees). Although Hackett makes a conclusory statement that it would be "essentially impossible" to protect recipients from harassing calls without the positive-acceptance requirement, he later admits that blocking individual phone numbers is an alternative that offers greater flexibility. *See* Hackett Report at ¶¶ 10, 13.

to protect the public from unwanted detainee calls.[46]

Recording and Monitoring. Relying solely on the Hackett Report, Defendants assert a security interest in recording all telephone calls and monitoring some calls because a detainee may "call an associate to destroy evidence, to commit further crimes on his behalf, or for him to make statements against his own interests. This ability has proven particularly valuable in organized crime, narcotics, and gang investigations." Hackett Report ¶ 15. Again, these justifications are entirely speculative. Defendants have not identified any circumstances where Plaintiffs have made telephone calls for *any* illegal purposes, much less to destroy evidence or manage narcotics enterprises from detention. Even if there had been an example of wrongdoing, Defendants have not explained why alternative policies that do not involve mass, suspicionless recording of Plaintiffs' calls (for example, targeted recording based on individualized suspicion of wrongdoing) would be insufficient to serve their interests.[47]

Automatic Time Limits. Relying on the Hackett Report and the testimony of ICE AFOD Vaughn, Defendants assert that limiting call duration to 20 minutes at Yuba and RCCC serves a general interest in "reducing the possibility of fights" for telephone access.[48] Defendants provide no evidence that any fight regarding the sharing of telephone time has ever occurred within the Plaintiff class. Moreover, ICE's own detention standards prohibit facilities from imposing automatic limits on the duration of legal calls "unless *necessary* for security purposes or to maintain orderly and fair access to telephones,"[49] and ICE Deputy Division Director Dozoretz testified, "I can't think of any security issue that would require an automatic [cut-off]. It would be episodic. So it wouldn't be something that would be routine."[50] The fact that Mesa Verde imposes a 180-minute cutoff instead of a 20-minute cutoff undermines the credibility of this speculative

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[46] Mot. at 38. Also, given the ubiquity of Caller ID-equipped phones, many call recipients can decline to answer based on the originating phone number—rendering a blanket positive-acceptance requirement noticeably outdated.

[47] The fact that detainees may make unmonitored, unrestricted calls from ICE field offices undermines the credibility of Defendants' purported interest in mass recording of calls. Mot. at 38.

[48] *See* Opp. at 15.

[49] Ha Decl. Ex. 3 ECF No. 120, NDS Telephone Access Standards § F, at 3 (emphasis added); Ha Decl. Ex. 2 ECF No. 120, 2011 PBNDS Telephone Access Standards § F(1) at 364.

[50] Ex. 50 Dozoretz Dep. 158:1-6.

risk—particularly since the only reason cited for even having a 180-minute cutoff is to prevent detainees from accidentally leaving the phone off the hook when they walk away.[51] Accordingly, Defendants have failed to produce any evidence that automatically cutting calls off after 20 minutes is a non-excessive response to a real security interest.

Liberty Restrictions within the Facilities. Relying on the testimony of ICE officials Vaughn and Trinidad, as well as Yuba official Gil, Defendants assert that severely limiting the times of "housing unit dayroom (and thus telephone access)" may help ensure that violent or unruly individuals are segregated, or to segregate individuals from others who may harm them. But Defendants provide no concrete facts that any Plaintiffs have been held in administrative segregation units based on such specific evidence of violent behavior or needs for self-protection. Indeed, at least two witnesses, M.G. and Nancy Neria-Garcia, were inexplicably held in extremely limited conditions for some periods of time and then housed in dormitories or tanks where they were in contact with many fellow detainees.[52] This illustrates that Defendants do not actually reserve segregation for those who are a serious danger to themselves or others.[53] In fact, the entire detainee population at Contra Costa is subjected to severe limits on dayroom access even though Defendants concede that Contra Costa "does not house any ICE detainees who are classified as high risk."[54] Meanwhile, RCCC and Mesa Verde both offer portable telephone units that a detainee may use from a segregation cell without entering the hallway or dayroom.[55] Defendants have offered no reason why each Facility cannot provide portable telephone units to detainees in segregation at all hours.[56]

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[51] *See* Ex. 60 Talton Dep. 155:1-19.
[52] Mot. at 41:7-17.
[53] Opp. at 15 (citing Vaughn Dep. 201:2-22, Trinidad Dep. 66:6-8, Gil Dep. 76:20-78:25) (testimony focused on administrative segregation in response to specific threats or safety determinations based on individual histories of violence).
[54] *See* Mot. at 12; Opp. at 9.
[55] *See* Takei Decl. ECF No. 120-28 ¶¶ 33 (portable telephone at RCCC), ¶ 55 (portable telephone at Mesa Verde); Ha Decl. Ex. 22 ECF No. 130-4 Defendant's Responses to Plaintiffs' Requests for Admissions No. 144, 176 (admitting the use of portable telephones for detainees in total separation at RCCC and Mesa Verde, respectively).
[56] Indeed, ICE detention standards call for such accommodations: detainees in administrative segregation should generally "receive the same privileges available to detainees in the general population, subject to any existing safety and security considerations," facilities that impose special telephone access restrictions on segregated detainees must "clearly document why such restrictions are necessary to preserve the safety, security and good order of the facility," and

Locating Phones Immediately Adjacent to Each Other. Relying solely on the warden of Mesa Verde, Defendants assert that locating telephones immediately adjacent to each other in large banks enables facility staff to "visually monitor the use of housing unit phones."[57] However, this justification is both speculative and not credible; the warden has no personal knowledge of the reasons why the telephones were set up in this manner, and conceded that in each unit, one of the banks of phones is actually not in the line of sight from the podium where the housing unit officer typically stands.[58] Plaintiffs' expert Berg, who has extensive experience with correctional design and planning, testified that the way in which the Mesa Verde phones were "right on top of each other" is atypical and problematic.[59]

Calling Cards and Debit Accounts. Relying solely on the Hackett Report and on statements elicited from Plaintiffs' expert Berg, Defendants claim that providing detainees with calling cards that enable them to pay for their own telephone calls poses a security risk because such cards can be used as currency. However, as Mr. Berg pointed out, anything that can be bartered may be used as currency in a detention facility, including food, favored bunk locations, and items that detainees purchase from the jail commissary.[60] Defendants have not produced any evidence that calling cards pose a greater risk of being used for barter than any other item that exists in a detention setting. In fact, Yuba already provides calling cards, which undermines the speculative claim that these cards pose an unacceptable security risk. And this security concern can be avoided by allowing Plaintiffs to use commissary-funded debit telephone accounts.[61] Given all of this, Defendants' claimed security interest is not credible.

"[d]etainees and their legal counsel shall nevertheless be accommodated in order for them to be able to communicate effectively with each other." Ha Decl. Ex. 3 ECF No. 120, NDS Telephone Access Standards § H at 7 and Ha Decl. Ex. 2 ECF No. 120, 2011 PBNDS Telephone Access Standards § H(1), at 365.

[57] *See* Opp. at 15.

[58] Ex. 62 Murray Dep. 76:5-77:15.

[59] Ex. 58 Berg Dep. 130:1-18.

[60] Ex. 58 Berg Dep. at 193:7-18.

[61] Wood Report ¶ 18. The only reason why Contra Costa does not offer calling cards is that their computerized jail management system is, in the words of one Contra Costa official, "quite antiquated," based on "very old technology," "doesn't perform to the level that most systems do," and the vendor that provided the system no longer offers support for it. Contra Costa is working to update this system to make debit calling available to all of its detainees and prisoners. Ex. 61 Grant Dep. 56:23-57:20, 58:5-11. Reluctance to replace a system that is concededly antiquated and fails to meet common standards is not a cognizable security interest.

Security Classifications. The only non-speculative evidence that Defendants cite to support the supposed security risks posed by the Plaintiff class is a table, dated December 2012 to August 2014, of classification scores assigned by the ICE Risk Classification Assessment ("RCA") for detainees at Contra Costa, RCCC, Yuba, and Sacramento County Jail (which held ICE detainees at the time). However, this table actually shows that the vast majority—two-thirds—of the detainees were assigned a "low" or "medium" risk score.[62] Under established principles of correctional management, this low risk of misconduct, along with the important purposes for which Plaintiffs need telephone access, should increase the range and quantity of telephone access that Plaintiffs receive.[63] Hackett himself concedes that detainees "may also need access to unrestricted private telephone calls to select counsel," and "[i]t is quite likely that a detainee representing himself will also require greater access to private telephone communications than most detainees."[64] Defendants have offered no explanation for severely limiting telephone access for the entire Plaintiff class in order to respond to security concerns that are not supported by any concrete evidence of telephone misconduct and where their own risk assessment tool—which they impliedly concede overpredicts the risk of misconduct—classifies two-thirds of the class as "low" or "medium" risk.

c. All Persons Have a Liberty Interest in Freedom from Detention.

Defendants also argue that non-citizens have no liberty interest in reducing the length of time they spend detained because the average detention stay is shorter than the six-month

[62] *See* Opp. at 14 (citing RCA table) & Def. MSJ and Opp. Ex. 32 (RCA table). Defendants misleadingly group together the "medium-high" category with the "high" category. Even a "high" RCA risk score does not carry the significance that Defendants imply in their brief, because this score is not used for the facility classification decisions that determine whether a detainee is placed in a more or less restrictive housing unit. Ex. 51 Vaughn Dep. 199:24-200:22. Thus, the RCA assigned 17% of Contra Costa detainees a "high" risk score, even though Contra Costa's population is limited to detainees with no gang affiliations, no enemy situations, no significant histories of disciplinary incident reports, and no histories of in-custody violence. Ex. 52 Bonthron depo. 45:15-46:14 (describing who may be housed at Contra Costa). *See also* Opp. at 9:22-24 (Defendants concede Contra Costa does not house high risk detainees).

[63] *See* Ex. 58 Berg Dep. 59:18-21 ("[F]or a jail administrator, it's their responsibility to make the determination of how the phone application fits the function of that particular unit, and that particular population."); 71:3-13 ("We, as jail and prison administrators, develop the amenities for the inmate populations according to the security levels that they are at . . .").

[64] Hackett Report ¶¶ 21, 23. Hackett follows these admissions with a conclusory statement, apparently repeating hearsay from an unidentified declarant, that "each facility reportedly can meet the needs described." This statement lacks a foundation and should be disregarded. *See id.*

benchmark of "prolonged" detention identified in *Zadvydas v. Davis* and *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015).[65] But, as this Court has already acknowledged, this liberty interest is not a switch that suddenly flicks on after six months of detention; rather, the liberty interest in being released from detention is an ongoing interest that grows steadily stronger as time in detention increases.[66] *See Zadvydas*, 533 U.S. at 699-701; *Rodriguez*, 804 F.3d at 1078. *See also Diouf v. Napolitano*, 634 F.3d 1081, 1091 (9th Cir. 2011) (detention between 90 and 180 days "certainly affects aliens' interests in freedom from confinement," and detention beyond 180 days implicates "profound" liberty interests and therefore requires greater procedural safeguards.) "The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny. There must be a 'sufficiently compelling' government interest to justify such action." *Reno v. Flores*, 507 U.S. 292, 315 (1993) (O'Connor, J., concurring). Defendants have identified no compelling interest in delaying Plaintiffs' proceedings and thereby prolonging their detention.

2. Defendants' Restriction and Denial of Telephone Access Violates Plaintiffs' Procedural Due Process Rights.

a. *Mathews v. Eldridge* Allows for a Flexible Application of Due Process to Plaintiffs' Claims.

Defendants argue that the due process balancing test from *Mathews v. Eldridge* should not apply to Plaintiffs' claims because its use is limited to analyzing the *procedures* the government applies before depriving individuals of their liberty interests. But Defendants also concede that "[t]he precise procedural protections of due process vary, depending on the circumstances, because due process is a flexible concept unrestricted by any bright-line rules." Opp. at 33, *quoting Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1222 (10th Cir. 2006). In *Perez-Funez v. Dist. Dir., INS*, 619 F.Supp. 656 (1985) and *Orantes-Hernandez v. Meese*, 685 F.Supp. 1468 (C.D.Cal. 1988) the district court for the Central District of California applied the *Mathews* balancing test to "voluntary departure procedures" of Defendants' predecessor agency ("INS"), but it is clear from the courts' discussions and the injunctions issued in those cases that the

[65] *See* Opp. at 31.

[66] *See* Order Granting Class Certification ECF No. 31 at 15 ("That a plaintiff may or may not be released on bonds does not negate the fact that, whatever the length of their detention, the need for continuances prolongs or did prolong the detention. As to those detainees denied bond in particular, the deficient process in the facilities prolongs their detention.")

"procedures" that violated the plaintiffs' due process rights included the agency's denial of access to counsel and other support through restricted visitation and telephone access.

The courts in both *Orantes-Hernandez* and *Perez-Funez* considered whether the INS's voluntary departure "procedures" created the risk of depriving class members of yet another procedural protection—the removal hearing itself. *Orantes-Hernandez*, 685 F.Supp. at 1496, ¶ 57 (the "procedures used by the INS in implementing the administrative voluntary departure procedure . . . are highly likely to result and have resulted in class members being deprived of their rights to a deportation hearing"); *Perez-Funez*, 619 F.Supp. at 656 ("the right to a deportation hearing and the various rights associated therewith constitute a substantial liberty interest"). Those "procedures" included the means of communication class members were permitted with family, consulates or attorneys. *See Orantes-Hernandez*, 685 F.Supp. at 1497-1503 (finding denial of telephone access, incomplete legal services referral lists, transfer to remote locations "where there are few attorneys and pro bono attorneys cannot travel to meet with clients," lack of privacy for telephone conversations, time restrictions on telephone access, difficulty reaching attorneys and relatives using "collect only" telephone, messaging system "not always reliable"); *Perez-Funez*, 619 F.Supp. at 658 (certain minor class members permitted to consult with adult friend or relative). The courts in both cases held the conditions under which INS sought voluntary departure agreements from class members violated due process and ordered, *inter alia*, procedures that included increased telephone access. *Orantes-Hernandez*, 685 F.Supp. at 1511-13 (defendants violated "rights to effective representation of counsel by unduly restricting attorney and paralegal visitation, failing to provide private telephone and visitation facilities, and in some cases failing to provide adequate telephone access;" and must "provide class members with access to telephones during processing" and "ensure the privacy of attorney-client communications"); *Perez-Funez*, 619 F.Supp. at 667, 670.

The analogies between these cases and the Plaintiffs' claims in this case are striking. All challenge the circumstances under which non-citizens seek to realize their rights to a removal hearing. While the *Perez-Funez* and *Orantes-Hernandez* plaintiffs sought to protect against the involuntary waiver of this important right, Plaintiffs seek here to fully effectuate it. For all three

sets of plaintiffs, the conditions of confinement that impact the class members' ability to contact family, friends, and legal counsel are critical to protecting their liberty interest in a meaningful removal hearing. Having failed to cite any cases that *decline* to apply the *Mathews* test to an analogous situation, Defendants argument against its application here fails.[67]

b. Application of the *Mathews* Test Warrants Summary Adjudication for Plaintiffs.

Plaintiffs provided detailed argument in their opening brief, setting forth evidence for each prong of the *Mathews* test, and do not repeat those arguments here, except as necessary to respond to Defendants' limited counterarguments.

First, Defendants claim that, due to differences between individual class members and individual detention facilities, "it is impossible to find a past or ongoing procedural due process violation on a classwide basis." Opp. at 34. The Court has already rejected this argument—twice—in both of its orders granting class certification.[68] To accommodate differences between the Facilities, the Court can set a constitutional floor for telephone access and allow Defendants to propose measures to address the deficiencies on a facility-by-facility basis. *See Lewis v. Casey*, 518 U.S. at 362-63 (approving of injunction that ordered defendant to design a plan). Defendants have not offered any reasons why the federal government would be unable to craft a plan for four facilities that hold a class of fewer than 1,000 people.[69] Indeed, the solutions required are, as

[67] Defendants claim that *Orantes-Hernandez* was an "access to courts" case and supports Defendants' argument that an "actual injury" requirement should apply. Opp. at 33. But, *Orantes-Hernandez* was decided before *Lewis v. Casey* and applied no such requirement.

[68] *See* Order Granting Class Certification, ECF No. 31 at 18-10 ("The fact that precise practices among the three facilities may vary does not negate the application of a constitutional floor equally applicable to all facilities") *and* Order Granting Plaintiffs' Motion to Modify Class Certification, ECF No. 98 at 9, *citing Williams v. City of Philadelphia*, 270 F.R.D. 208, 215 (E.D. Penn 2010).

[69] This type of process has worked in numerous, substantially more complex prison reform cases. *Cf., e.g., Brown v. Plata*, 563 U.S. 493 (2011) (ordering entire California state prison system to reduce prison population from 156,000 prisoners to approximately 110,000 prisoners within two years); *Parsons v. Ryan*, No. CV-12-0601-PHX-DKD (D. Az. Feb. 25, 2015) (order approving consent decree governing provision of health care in all Arizona prisons, for class of 33,000 prisoners); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995) (entering injunction governing health care, use of force, and other constitutional issues at Pelican Bay Prison for class of 3,900 prisoners in both segregation and general population).

Plaintiffs' expert Berg put it, "simple and obtainable."[70]

Second, although Defendants claim that Plaintiffs have not appropriately "framed" the governmental interests at stake, Plaintiffs presented extended argument regarding government interests, including an analysis of how most of the additional safeguards needed are contemplated by Defendants' own agency guidelines.[71] Defendants do not dispute that they violate their own standards or provide any justification for doing so.

In their *Mathews* analysis, Defendants refer to the same ill-supported speculations about security interests as those discussed *supra* for the *Jones* analysis, as well as two additional interests: (1) the governmental interest in fulfilling Congress's detention mandate under 8 U.S.C. §§ 1226(c) and 1231(a)(2); and (2) the "administrative burdens of both cost and ensuring detention space." As to the detention mandate, the fact that the Government may constitutionally detain certain classes of immigrants "during the limited period necessary for their removal proceedings," *Demore v. Kim*, 538 U.S. 510, 526 (2003), does not create a governmental interest in unnecessarily extending that "limited period" of detention, nor does it generate a governmental interest in slow or unfair adjudication.[72] As to the purported administrative burdens of cost and ensuring detention space, Defendants have not explained how enforcing their own detention standards would impose an improper administrative burden, and the only cost they identify is the slightly higher personnel cost calculation provided in the Hackett Report. "Financial cost alone is not a controlling weight" under *Mathews.* 424 U.S. at 348. Moreover, Mr. Hackett concedes that this funding would probably be made available.[73]

Third, Defendants barely dispute Plaintiffs' weighty liberty interests or the high risk of their deprivation absent increased telephone or other access to the outside world, claiming only

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[70] Berg Report at 24. *See generally* Mot. at 36-41. To take two examples, RCCC could increase privacy by installing the plexiglass privacy shields for Housing Unit Phones described by Lt. Butler. Ex. 57 Butler Dep. 112:3-113:23, and RCCC, Yuba, and Contra Costa can each expand the availability of free, direct legal calls by adding legal services organizations and private immigration attorneys to their local free call platforms. *See* Ex. 48 Garzon Dep. 157:20-159:14 (indicating willingness for his firm to be added to a free call platform).

[71] Mot. at 34-44.

[72] *See* Mot. at 34.

[73] Hackett Report at ¶ 35 ("When presented with issues such as contained in the present matter, it has been my experience that funds will often be made available").

that Plaintiffs have not pointed to evidence that of individuals are detained longer than they otherwise would be due to continuances as they try to obtain counsel or evidence.[74] This assertion is both inaccurate and insufficient to rebut Plaintiffs' showing of widespread injury to their ability to obtain and consult with counsel, obtain documents and reach witnesses necessary for their cases, and prolongation of detention due in part to obstacles created by Defendants' restriction and denial of telephone access.[75]

C. Reasonable Telephone Access Is Necessary to Ensure Plaintiffs' Rights Under the INA Are Not an "Empty Formality."

As explained in Plaintiffs' opening brief, the Ninth Circuit has refused to allow immigration court respondents' rights to a full and fair hearing and to access to counsel to become an "empty formality." *Biwot v. Gonzalez*, 403 F.3d 1094 (9th Cir. 2005) *quoting Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). Yet Defendants argue that these rights do not extend outside the four walls of the courtroom and assert that because many of Plaintiffs' witnesses retained counsel, Plaintiffs have not proven a violation of the statutory right to access counsel. *See* Opp. at 22:2-4 ("Aliens who are represented by counsel during their immigration hearings are not denied the statutory right to counsel") *citing Boone v. Ashcroft*, 113 F.App'x 749, 750 (9th Cir. 2004). First, the fact that some class members managed to obtain counsel does not negate the fact that Defendants' restriction and denial of telephone access interferes with many Plaintiffs' ability to retain counsel.[76]

Second, the right to counsel clearly implicates aspects of representation outside the removal hearing. For example, ineffective assistance of counsel claims may be based on an attorney's failure to interview the client and fully investigate the claims for relief before the hearing. *See Jie Lin v. Ashcroft*, 377 F.3d 1014, 1024 (9th Cir. 2004); *Chernykh v. Holder*, 552 F. App'x 695, 697-98 (9th Cir. 2014). Similarly, an attorney's ability to consult with and properly advise a client outside of the hearing is directly related to the respondent's due process right to

[74] Opp. at 36:2-5.
[75] *See supra* Section A(1) and (2). *See also* Y.A. Dec. ECF No. 120-2 ¶¶ 9-12, 17-25, M.G. Decl. ECF No. 120-8 ¶¶ 14-16 (sought four continuances over the course of four months while seeking counsel); Cornelio Decl. ISO Class Certification ECF No. 14-4 ¶¶ 7-9.
[76] *See* Mot 31-32 and *supra* n. 9. Also, *Boone* is an unpublished case from prior to 2007; Defendants' reliance on it is improper under 9th Cir. R. 36-3.

counsel. *See Salazar-Gonzalez v. Lynch*, 798 F.3d 917 (9th Cir. 2015) (attorney's bad advice to voluntarily depart and apply for a visa from abroad denied respondent due process right to counsel).[77]

Regarding the right to present evidence, *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010), is particularly instructive. Contrary to Defendants' suggestion that the right to a full and fair hearing depends only on the conduct of the immigration judge, the court in *Dent* held that the plaintiff had been denied a full and fair hearing because ICE withheld information from both the plaintiff and the court. Opp. at 19:5-12, 629 F.3d at 374. The immigration judge gave Mr. Dent several continuances in order to gain the evidence he needed to prove his citizenship claim, but Mr. Dent was unable to obtain that evidence, and the immigration judge ordered his removal. Later, Mr. Dent discovered that ICE had possessed documents relevant to Mr. Dent's claim. The court held that Mr. Dent's due process right to present evidence had been violated through ICE's failure to provide him these documents—not based on any error by the immigration judge.[78]

In the same code section that grants Plaintiffs access to counsel and "a reasonable opportunity to . . . present evidence" on their own behalf, Congress set forth the immigration respondent's burdens to establish entitlement to admission, lawful presence, or satisfaction of the eligibility requirements for relief or protection from removal. 8 U.S.C. § 1229a(b)(4) (procedural rights) and (c)(4) (burdens of proof). To sustain their burden of proving eligibility for relief from removal, Plaintiffs "must comply with the applicable requirements to submit information or documentation in support of the . . . application for relief or protection," and "[w]here the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided" unless it cannot reasonably be obtained. 8 U.S.C. § 1229a(c)(4)(B). Mr. Dent was unable to produce evidence of his adopted

[77] That access to counsel is not limited to the courtroom is well established in the criminal context. *See e.g. Avery v. State of Alabama*, 308 U.S. 444, 446 (1940) ("denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham"); *Adams v. Illinois*, 405 U.S. 278, 282 (1972) (noting that functions of counsel aside from its role at trial bear on the factfinding process).

[78] The court in *Dent* held that ICE violated a subsection of 8 U.S.C. § 1229a, which requires that a non-citizen be given access to entry records where the non-citizen has the burden of proving lawful presence. *Id.*

mother's citizenship and was ordered deported. Plaintiffs—without meaningful access to government agencies here in and in their home countries, private entities such as hospitals, churches, and employers, and the friends and family members who can act as runners or serve as witnesses—are also unable to present evidence in support of their applications for relief.[79]

Defendants' limited rebuttal to Plaintiffs' argument that Sixth Amendment jurisprudence should guide the Court's interpretation of analogous rights under the INA is similarly unpersuasive. Defendants simply cite a series of cases declining to apply analysis from Sixth Amendment jurisprudence or distinguishing immigration as civil—as opposed to criminal—proceedings in a variety of circumstances. While there are many distinctions between civil immigration proceedings and criminal proceedings, Defendants completely fail to respond to Plaintiffs' argument—and supporting precedent—that as to the statutory rights to access counsel and to present evidence specifically, the Ninth Circuit has drawn on case law interpreting *corollary* rights from the Sixth Amendment. *See* Mot. at 25, *citing Montes-Lopez v. Holder*, 694 F.3d 1085, 1092-93 (9th Cir. 2012) (following Sixth Amendment rule that denial of counsel warrants reversal even without a showing of prejudice); *Torres-Chavez v. Holder* 567 F.3d 1096, 1100 (9th Cir. 2009) (statutory ineffective assistance claim begins "within the Sixth Amendment framework").[80]

D. Both Due Process and the Right to Petition Protect Plaintiffs' Rights to Communicate with Counsel and Others As Necessary to Seek Relief from Removal Outside the Context of Immigration Court Proceedings.

In addition to individuals with proceedings in immigration court, the Plaintiff class includes individuals who—like Nancy Neria-Garcia and Edgar Cornelio—are held pursuant to 8 U.S.C. §§ 1225 or 1231 and may or may not ultimately appear before an immigration judge. Many class members are eligible for relief through U-visas or other immigration benefits

[79] *Hopper v. Melendez*, 2007 WL 4111366 (W.D. Wash. Nov. 16, 2007), cited by Defendants for the proposition that due process does not require "unfettered or unlimited right to use the telephone," does not even consider whether telephone access was required by the plaintiffs' statutory right to counsel and is factually distinguishable.

[80] Defendants vainly assert that "the Sixth Amendment rights to present a defense and to access counsel while in detention are not so expansive as Plaintiffs would ascribe," but provide no support for that conclusion, nor any competing interpretation of the cases cited by Plaintiffs, and are therefore precluded from doing so on reply. *See supra* n. 36.

adjudicated by the U.S. Citizenship and Immigration Services ("USCIS") rather than immigration judges.[81] Still others may remain in custody even after their appeals are exhausted, pending the issuance of travel documents from their countries of citizenship. *Zadvydas*, 533 U.S. at 699-701. All of these class members have potential legal claims for release from custody or relief from removal, and Plaintiffs' need for telephone access exists as to each of these potential claims, whether they seek to present claims and defenses to ICE itself (*e.g.* in administrative removal proceedings), to immigration court, to USCIS, or to federal courts. Such access is required, if not by 8 U.S.C. § 1229a(b)(4), then by the Due Process Clause of the Fifth Amendment and the Petition Clause of the First Amendment.[82]

Defendants characterize Plaintiffs' applications for immigration benefits as "outside the context of removal proceedings," as if Plaintiffs were applying for general assistance or health insurance. *See* Opp. at 36-37. But Plaintiffs' applications for immigration benefits may provide collateral relief from removal and support a request for release on bond, well within "the context of removal proceedings."[83] In *U.S. v. Cisneros-Rodriguez*, -- F.3d. ---, 2015 WL 9309958, No. 13-10645 (9th Cir. 2015), an undocumented individual was placed in administrative removal proceedings under 8 U.S.C. § 1228(b)(4) due to her criminal history. The ICE agent who oversaw her proceedings told her that an attorney could not help her, even though she was facially eligible for a U-visa, which—if granted—would have terminated her removal proceedings. The Ninth Circuit held that this conduct violated her due process right to counsel in *administrative* removal proceedings, illustrating that due process applies to all Plaintiff class members, regardless of the decision-maker who is the source of their potential relief. 2015 WL 9309958 at *12.

[81] Prasad Decl. ECF No. 120-22 ¶¶ 16-17; Lyon Decl. in Support of Plaintiffs' Motion for Class Certification ("Lyon Decl.") ECF No. 120-9 ¶ 6.

[82] Defendants complain that they did not have notice of Plaintiffs' claims on behalf of class members in administrative removal or reasonable fear proceedings. Opp. p. 21, n.13. The Court has already rejected Defendants' proposal to exclude such individuals from the class, noting "there is no real dispute that the reason why Plaintiffs and other ICE detainees are in the facilities in the first place is because of the potential for removal." Order Granting Class Certification, ECF No. 31 at 9.

[83] *See* Ex. 63 Memorandum from John Morton, Director, U.S. Immigration & Customs Enforcement (June 17, 2011) (directing ICE to administratively close cases involving individuals who are eligible for a U-visa). *See also Matter of Ellis*, 20 I&N Dec. 641, 643 (BIA 1993) (respondent's eligibility for relief from removal informs flight risk determination and eligibility for bond).

In addition, Defendants' proposition that affirmative applications for benefits are not considered petitions under the First Amendment is not supported by any controlling authority. *See* Opp. at 37. The Ninth Circuit has held that the First Amendment right to petition the government required that plaintiffs seeking compensation for radiation exposure from the Veterans' Administration be afforded "meaningful access" to that agency's benefits process. *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 594-95 (9th Cir. 1992). Similarly, the Second Circuit has recognized the right of a sentenced prisoner on work release to apply for public assistance under the Petition Clause of the First Amendment. *Friedl v. City of New York*, 210 F.3d 79, 86 (2d Cir. 2000) ("[T]he administrative adjudication of Friedl's asserted right to receive public assistance benefits while on work release was constitutionally protected").

Finally, Plaintiffs' due process and First Amendment rights apply to more than applications for "immigration benefits." Plaintiffs may also need to consult with an attorney or gather evidence in support of a petition for a writ of habeas corpus challenging their prolonged immigration detention.[84] They may seek post-conviction relief in state court to challenge an unlawful conviction that forms the basis of their underlying removal order and detention. *See Diouf v. Napolitano*, 634 F.3d 1081, 1087 (9th Cir. 2011) (motions to reopen final orders are an "important safeguard" to the fairness of the removal hearing, including motions to set aside removal orders when the underlying criminal conviction has been vacated); 8 U.S.C. § 1226(c) (establishing mandatory detention for immigrants with certain criminal convictions).[85] The ability to challenge one's confinement and seek post-conviction relief enjoys "strong constitutional protection." *Johnson v. Avery*, 393 U.S. 483, 485 (1969). There is no question that Plaintiffs' legal rights to seek release from detention and relief from removal—whether adjudicated by immigration judges, ICE agents, USCIS, or the state or federal courts—are protected by the Due Process Clause of the Fifth Amendment, the Petition Clause of the First Amendment to the Constitution, or both.

[84] *See* Ex. 45 V.V. Dep. 67:2-68:3.
[85] *See* J.H. Decl. ECF No. 120-11 ¶¶ 8, 12; Prasad Decl. ECF No. 120-22 ¶ 19.

E. *Lewis v. Casey* Does Not Apply.

Defendants assert that *Lewis v. Casey* and its "actual injury" requirement for class representatives should apply to all of Plaintiffs' claims, including those arising under the INA, purely because Plaintiffs are in a detention environment. *See* Def. Mot. at 26-28 (citing *Lewis v. Casey*, 518 U.S. 343 (1996). Not so. The restrictive approach to access to courts claims in *Lewis* cannot apply here, where Plaintiffs are detained pending resolution of removal charges and must defend themselves from those charges while in custody. Courts have declined to extend *Lewis* to constitutional claims beyond its particular context—where sentenced prisoners sought assistance with filing *pro se* claims distinct from the criminal proceedings that resulted in the sentences that put them in custody. *See Lewis*, 518 U.S. at 355.[86]

In *Lewis*, a group of already-sentenced prisoners filed a class action alleging that prison officials deprived them of their rights of access to the courts under *Bounds v. Smith*, 430 U.S. 817 (1977), by providing inadequate law library materials and legal assistance. *Lewis*, 518 U.S. at 346. The Court held that the district court's broad injunction went beyond what was necessary to remedy "isolated instances" of actual injuries to class members under *Bounds—i.e.* prejudice shown by particular prisoner-litigants to their capability to present and prevail on non-frivolous claims challenging their sentences or conditions of confinement. 518 U.S. at 349, 352-56.

The critical distinction between Plaintiffs and the litigants in *Lewis* is that Plaintiffs are not sentenced prisoners, but detainees facing removal proceedings in which they have no choice but to participate, or face certain deportation. While the Court in *Lewis* noted that obstructing a prisoner-litigant from pursuing a frivolous lawsuit "would deprive him of nothing at all, except perhaps the punishment of Federal Rule of Civil Procedure 11 sanctions," the stakes are entirely different for Plaintiffs. *Id.* at n. 3. Indeed, for detainees forced into legal proceedings that have life-changing consequences, no claim or defense can be deemed too frivolous to explore. In this

[86] Defendants assert that *Lewis v. Casey*'s "actual injury" requirement has been applied outside this context, but none of the cases they cite support this assertion. *See* Opp. at 26-27. *Bell v. Wolfish*, 441 U.S. 520 (1979) and *Turner v. Safley*, 482 U.S. 78 (1987), and *Strandberg v. City of Helena*, 791 F.2d 744 (9th Cir. 1986), all pre-date *Lewis*. Meanwhile, *Nelson v. City of Los Angeles*, 2015 WL 1931714, No. CV 11-5407 (C.D. Cal. Apr. 28, 2015), neither cites *Lewis* nor applies *Lewis*'s actual injury requirement.

way, Plaintiffs are in a position analogous to pre-trial criminal detainees.

Understanding this distinction between defending against charges and bringing affirmative litigation, courts have declined to shoehorn *Lewis*'s actual injury requirement into the Sixth Amendment analysis governing the rights of pre-trial criminal detainees: "It is not clear to us what 'actual injury' would even mean as applied to a pretrial detainee's right to counsel . . . . The reason pretrial detainees need access to the courts and counsel is not to present claims to the courts, but to defend against the charges brought against them." *Benjamin v. Fraser*, 264 F.3d 175, 186 (2d Cir. 2001). Indeed, this Court has already considered and rejected Defendants' argument, understanding that the rights to counsel and a fair hearing cannot depend on whether a detained respondent could ultimately prevail. Order Granting Class Certification, ECF No. 31 (Defendants' argument that detainees who are ineligible to seek relief from removal cannot evidence "actual injury," "misses the point" because "even those who are ineligible for relief from removal may still wish to get the advice of counsel as there may be other avenues for relief"). *See also Jones v. City and County of San Francisco*, 976 F. Supp. 896, 913-14 & n. 17 (N.D. Cal. 1997) (pretrial detainees could pursue Sixth Amendment claim alleging inadequate privacy for attorney consultation without showing actual injury under *Lewis*, because "their Sixth Amendment right to effective assistance of counsel suffers direct assault with the absence of confidentiality").[87]

For the same reasons, *Lewis v. Casey* does not apply to Plaintiffs' statutory and constitutional rights to defend themselves against removal charges. *See Turkmen v. Ashcroft*, 2006 WL 1662663, No. 02 CV 2307(JG), at *47 (E.D.N.Y. June 14, 2006) *aff'd in part, vacated in part (on other grounds), remanded*, 589 F.3d 542 (2d Cir. 2009) (citing 8 U.S.C. § 1229a(b)(4) and denying motion to dismiss claim that holding immigration detainees incommunicado and without telephone access to their attorneys violated their right to counsel in removal proceedings,

[87] While the term "access to courts" has long been used loosely to describe the due process rights of incarcerated individuals, including access to counsel, it is only post *Lewis v. Casey* that the case law has drawn tighter distinctions between access to courts within the meaning of *Lewis* and the First and Sixth Amendment rights of pretrial detainees. *See, e.g.*, *Jones v. Brown*, 461 F.3d 352 (3d Cir. 2006) (First Amendment right to confidential legal mail does not depend on "actual injury," unlike right to law libraries or legal services under access to courts claim).

"a right they enjoyed independently [of the right of access to courts] under the Constitution and laws of the United States"); *Perez-Funez v. Dist. Dir., INS*, 619 F.Supp. 656, 660 (C.D. Cal. 1985) (although not all class members are eligible for relief from deportation, the right to a deportation hearing and various rights associated therewith constitute a substantial liberty interest).

F. Plaintiffs Lyon, Astorga, and Neria-Garcia Have Standing to Remedy the Injuries of All Class Members.

Defendants argue that Plaintiffs Lyon, Astorga, and Neria-Garcia do not have standing to seek relief for the injuries of the class for two reasons: 1) because they have not "been actually hindered by the telephone access in asserting claims for relief in their immigration proceedings," and 2) some of the conditions they seek to remedy do not apply to them, namely restrictions that impact Plaintiffs who do not read English or Spanish and restrictions that impact indigent Plaintiffs. Opp. at 28 and 38. Both of these arguments fail.

First, although each of the named Plaintiffs ultimately overcame obstacles to communication and gained release from custody, each has already presented evidence—in their declarations in support of class certification—detailing the ways that Defendants' restriction and denial of telephone access impacted them.[88] Given low rates of representation for detained immigrants, Mr. Lyon and Mr. Astorga were extremely fortunate to retain pro bono counsel who obtained the evidence Plaintiffs were unable to obtain for themselves while detained.[89] Ms. Neria-Garcia spent 15 months in custody, unable to communicate confidentially with her attorney or contact witnesses to support of her application for bond. But the named Plaintiffs' ultimate good fortune does not negate the fact that each of them was hindered in seeking the evidence and legal support needed to avoid removal. As certified representatives, the fact that they are no longer in custody does not affect their standing to pursue the claims of the class because all of

[88] *See* Lyon Decl. ECF No. 120-9; Astorga Decl. in Support of Plaintiffs' Motion for Class Certification ("Astorga Decl.") ECF No. 14-3, Neria-Garcia Decl. ECF No. 120-7.

[89] Northern California Collaborative for Immigrant Justice, Access to Justice for Immigrant Families and Communities: Study of Legal Representation of Detained Immigrants in Northern California (October 2014) (roughly 2/3 of detained immigrants in removal proceedings before the San Francisco Immigration Court had no legal representation at any point; represented detainees were at least three times more likely to prevail than unrepresented detainees), *cited by* Berg Report at 16-17.

Plaintiffs' claims are inherently transitory. *See* Order Granting Class Certification, ECF No. 31 at 11 (rejecting Defendants' argument that former named Plaintiff Edgar Cornelio could not serve as a class representative based on mootness of his claims).

Second, the fact that each of the named Plaintiffs is literate in English or Spanish does not prevent them from representing the interests of class members who lack those abilities.[90] Plaintiffs have cited Defendants' failure to notify *all* class members of available options as one of the obstacles to communication, specifically noting that "Plaintiffs who do not speak or read English or Spanish struggle even more to learn what communication options are available."[91] Under the Ninth Circuit's recent holding in *Melendres v. Arpaio*, Defendants' failure to advise and instruct Plaintiffs on the telephone system—requiring Mr. Astorga to seek help from a fellow detainee to access the Free Call Platform, among other harms—does not "raise a significantly different set of concerns" from the injuries to class members who speak minority languages.[92] *Melendres v. Arpaio*, 784 F.3d 1254, 1262, 1264 (9th Cir. 2015) (*Lewis v. Casey* did not apply to preclude named plaintiff from representing class members with respect to systemwide discriminatory practices despite minor differences in circumstances).

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motion for summary judgment grant Plaintiffs' motion for summary adjudication.

[90] Defendants' contention that none of the named Plaintiffs suffered injuries from the lack of accommodation for indigent detainees is obviously without basis, given Mr. Astorga's inability to buy telephone credit in the first month of his detention and Mr. Lyon's inability to communicate his wife. *See* Astorga Decl. ECF No. 14-3 ¶¶ 7-8, Lyon Decl. ECF No. 120-9 ¶ 9.

[91] Mot. at 17-18.

[92] Ex. 46 Astorga Dep. 16:14-17:25; *cf.* Mot. 33:11-17 (describing struggles of French-speaking Plaintiff).

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Respectfully submitted,

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CERTIFICATION OF CONCURRENCE FROM OTHER PARTIES

I, Robert P. Varian, am the ECF user whose ID and password are being used to file this Opposition to Defendants' Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Adjudication. In compliance with General Order 45, X.B., I hereby certify that the other signatories have concurred in the filing of this document and have authorized the use of their electronic signatures.

Dated: January 25, 2016

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