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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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| AUDLEY BARRINGTON LYON, JR., *et al.*,<br><br>Plaintiffs,<br><br>vs.<br><br>U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *et al.*,<br><br>Defendants. | No. 3:13-cv-05878-EMC<br><br>**DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**<br><br>Date: February 11, 2016<br>Time: 1:30 p.m.<br>Courtroom: 5<br>Judge: Hon. Edward M. Chen |

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## I. Introduction

Defendants have already demonstrated their entitlement to summary judgment on all of Plaintiffs' claims for relief, because the undisputed facts regarding telephone access do not demonstrate actual interference with Plaintiffs' statutory or due process rights to be represented by counsel at no expense to the government, to present evidence in support of their immigration cases, or to petition the government. *See generally* Defendants' Cross-Motion for Summary Judgment ("Defs.' Mot.") (ECF No. 139). Relatedly, the facts do not demonstrate actual injury in terms of impact on Plaintiffs' removal proceedings or related immigration proceedings. *Id.* at 28-29. As detailed below, Plaintiffs' Opposition and Reply ("Pls.' Opp.") (ECF No. 141) does not adequately refute Defendants' showing on legal or factual grounds. Plaintiffs' proposed legal theories are inapplicable to the Court's analysis—either because they are cited in support of claims not pleaded in the Complaint, or because there is simply no basis to apply them to the claims that *were* pleaded. Even under Plaintiffs' legal theories, however, Defendants have adequately justified any limitations on phone usage, and have shown that those limitations are not overly restrictive, particularly in light of the variety of telephone and communications options available to detainees.

## II. Argument

### A. The Facts Do Not Demonstrate an Actual Interference with Detainees' Right To Obtain Representation or to Present their Case in Immigration Proceedings.

Plaintiffs do not claim that they have absolute rights to telephone access in detention *per se*. Instead, they assert certain statutory and due process rights relating to their removal proceedings, and claim that telephone access conditions in ICE detention violate those rights. Accordingly, the Court cannot focus solely on the telephone access conditions themselves, as Plaintiffs would desire, but must examine whether those conditions have an actual impact on detainees' rights. Although Plaintiffs claim that the telephone access conditions "*necessarily* interfere with Plaintiffs' abilities to access counsel and gather evidence and documentation" (Pls.' Opp. at 3:4-5), this ignores that: (1) the named Plaintiffs themselves have not demonstrated that the allegedly inadequate telephone access prevented them from obtaining counsel, communicating with counsel, or presenting their immigration cases; and (2) detainees are afforded *other* means of communicating with counsel privately as well. The only way to assess

the overall impact of telephone access conditions is to look at causation and injury—that is, the effect of telephone access conditions on Plaintiffs' efforts to obtain representation and present defenses to, or claims for protection or relief from, removal.

1. Plaintiffs Must Show More than a Speculative Risk of Harm.

As an initial matter, Plaintiffs bear the burden of proving an actual or an imminent threat of irreparable harm to justify prospective injunctive relief. *Stevens v. Harper*, 213 F.R.D. 358 (E.D. Cal. 2002) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983); *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999)). Further, to establish liability here, Plaintiffs must show actual or imminent interference with the rights they assert on behalf of the class, which in this context requires a showing of actual injury.

Plaintiffs' contentions that they must only show a "risk of harm" to demonstrate liability are misguided. *See* Pls.' Opp. at 2-3. The main case they cite in support of that proposition is *Parsons v. Ryan*, which analyzed whether prisoners' Eighth Amendment claims were appropriate for class treatment. 754 F.3d 657 (9th Cir. 2014). An Eighth Amendment deliberative indifference analysis, unlike a claim of due process violations regarding access to counsel or the courts, specifically considers as an element of the claim whether a prison policy creates a "substantial risk of serious harm," and focuses on future prevention of health and safety issues in prison, *see id.* at 676-678, thus rendering it "possible to enjoin a policy before the actual harm manifests," *Amador v. Baca*, No. CV-10-1649, 2014 WL 10044904, at *4 (C.D. Cal. Dec. 18, 2014).[1]

Here, by contrast, "substantial risk of harm" is not an element of Plaintiffs' claims. Instead, they must show "actual injury" to demonstrate interference with rights to counsel and to prepare a defense, even when seeking prospective injunctive relief on behalf of a class. *See Lewis v. Casey*, 518 U.S. 343, 350-51 (1996).[2] Defendants have already explained why the

[1] Further, several Judges of the Ninth Circuit questioned whether *Parsons* contradicts controlling Supreme Court principles set forth in *Lewis v. Casey* and *Wal-Mart v. Dukes*. *See Parsons v. Ryan*, 784 F.3d 571 (9th Cir. 2015) (Ikuta, J., dissenting from denial of rehearing en banc).

[2] Defendants are not arguing that "actual injury" will always require an adverse result in removal proceedings, but it does require a showing that telephone access conditions actually hindered detainees' ability to set forth their defenses and claims. That said, success in immigration

actual injury requirement should be applied to Plaintiffs' claims. *See* Defs.' Mot. at 26-28, 39-40. To dictate that particular telephone accommodations must be made, absent a showing that the current conditions actually deprive Plaintiffs and class members of the ability to be represented by counsel, present evidence, or petition for redress of grievances would be contrary to the judiciary's role. *See Casey*, 518 U.S. at 349-50, 352-53, 358. Contrary to Plaintiffs' suggestion, the Supreme Court's analysis in *Casey* does not focus on the status of the claimants as sentenced prisoners, nor on the fact that the prisoners were affirmatively seeking post-conviction relief or challenging conditions of confinement. Rather, it focuses on the fact that denial of certain rights cannot be evaluated by examining confinement conditions alone, but must be proven by a real impediment to the exercise of that right. Accordingly, it is appropriate to apply the "actual injury" analysis in the context of Plaintiffs' claims regarding telephone access as it affects their ability to effectively communicate with lawyers and present evidence. *Cf. Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1509-10 (C.D. Cal. 1988) (evaluating immigration detainees' "access to counsel" claims under an "access to the courts" analysis).

The non-controlling cases cited by Plaintiffs in opposition (at 27-28) do not persuade otherwise. For example, in *Benjamin v. Fraser*, 264 F.3d 175 (2d Cir. 2001), the Second Circuit held that the *Casey* "actual injury" requirement should not apply to claims that delays in attorney visits violated criminal pretrial detainees' Sixth Amendment right to counsel.[3] In so doing, the Second Circuit stated that "*Lewis [v. Casey]'s* reasoning is premised on the distinction between the standing required to assert direct constitutional rights versus the standing required to assert claims that are derivative of those rights." *Id.* at 185. While Plaintiffs will argue they are asserting a direct due process right to counsel or a fair hearing, their claims, like the claims in *Casey*, are in fact derivative of any due process rights: they are seeking enhanced telephone

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proceedings does tend to refute allegations that Plaintiffs and class members are unable to communicate with their counsel or present their case.

[3] Plaintiffs repeatedly attempt to equate the right to obtain representation in immigration cases with the Sixth Amendment's *guarantee* of counsel to criminal defendants. As shown below and in Defendants' Motion, this comparison is inapt. *See infra* Part II.A.3; Defs.' Mot. at 19 n.9. Further, only one of Plaintiffs' claims deals with access to counsel. The two remaining claims, which concern effects of telephone access on presenting evidence and applying for discretionary benefits, are even more factually similar to the *Casey* plaintiffs' claims.

access as a "means to ensure" adequate representation by counsel or the ability to present evidence for their claims. *See id.*[4]

Even if Plaintiffs only needed to show a "risk of harm" to justify prospective injunctive relief, they cannot prove that the risk is more than speculative because they have not demonstrated more than isolated incidences of past or current interference with the asserted rights. *See* Defs.' Mot. at 39-40. In fact, as explained in Defendants' Motion and below, the named Plaintiffs have not even shown interference with such rights in their own cases.

2. The Facts Plaintiffs Cite Do Not Demonstrate Actual Interference with the Asserted Rights.

In both their Motion and their Opposition/Reply, Plaintiffs commit the same offense they accuse Defendants of committing—they cherry-pick certain facts regarding telephone access and certain instances where class members were frustrated, but refuse to examine the overall conditions (including all available means of telephone access and communication) and the overall impact of the conditions on each Plaintiff and class member's removal proceedings.[5]

It is true that justified limitations on telephone usage exist to varying degrees in each of the four facilities. Yet these limitations have not been shown to adversely impact Plaintiffs' or class members' rights. The fact that Plaintiff Lyon claimed *no* difficulty communicating with his immigration attorney while he was detained at WCDF is significant, and trumps evidence that Mr. Lyon was unable to call that attorney from the Pro Bono Platform. Defs.' Mot. at 17:13-24; Pls.' Opp. at 4:2-5 & n.7. The fact that Plaintiff Neria-Garcia made numerous semi-private and private calls to her attorney, received between seven and ten visits, and wrote to her attorney

[4] Defendants acknowledge that the out-of-circuit, district court decision in *Turkmen v. Ashcroft* facially supports Plaintiffs' argument with respect to their access to counsel claims. 2006 WL 1662663, at *48 (E.D.N.Y. June 14, 2006). But the *Turkmen* court did not directly consider whether it should *import* the "actual injury" requirement to the claim regarding detainees' rights to representation for their removal proceedings.

[5] In its consideration of the facts, the Court should strike untimely filed exhibits to Plaintiffs' Opposition, including the Declaration of Ilyce Shugall (ECF. No. 142), and Exhibits 51 and 59, to the Declaration of Alexis Yee-Garcia (ECF. No. 144-1). *See Bookhamer v. Sunbeam Prods., Inc.*, 913 F. Supp. 2d 809, 814 n.4 (N.D. Cal. 2012) (striking improper late submission of declaration that should have been attached to opposition where plaintiff failed to articulate any explanation for the late filing).

multiple times, is also significant, and trumps her claims that she was unable to have private conversations with her attorney such that it interfered with her due process rights. Defs.' Mot. at 16:21-17:12; Pls.' Opp. at 4 n.9, 28. The fact that Plaintiff Astorga retained a lawyer shortly after being detained and obtained release on bond is also significant (Defs.' Mot. at 16:4-12); Plaintiffs presented no evidence that Mr. Astorga complained about difficulties communicating with his lawyer for the short period he was detained.[6] The fact that all but one of the class member witnesses were able to obtain counsel is significant. Defs.' Mot. at 22:5-7.

The facts cited by Plaintiffs in their Motion and in their Opposition/Reply are insufficient to overcome this showing of non-interference with rights. Plaintiffs assert that, although all but one witness obtained counsel, it often took them a long time to do so. Pls.' Opp. at 4 n.9. Yet the evidence of causation is absent. For the most part, if detainees had difficulties in obtaining counsel, it has nothing to do with the telephone access, and everything to do with other reasons, such as the detainees' limited defenses and avenues for relief, or an organization's inability to accept a particular case. *See, e.g.*, Defs. Mot. at 6-7; Declaration of Brian Ward ("Ward Decl.") (attached hereto), Ex. 3, V.V. Dep. at 55:18-25–56:1 (when asked why she had difficulty retaining an attorney at the beginning of her case, V.V. explained that "[n]obody wants to pick up my case, period," because she understood her case to be difficult); Declaration of Katherine Shinners In Support of Defs.' Mot., ("Shinners Decl.") (ECF No. 139-2), Ex. 24, Lyon Dep. at 38:3-20 (Plaintiff Lyon had difficulty obtaining counsel due to his criminal charges); Declaration of Jose Astorga Cervantes in Support of Pls.' Mot. for Class Certification ¶ 12 (ECF No. 14-3) (explaining that organizations he called seeking an attorney were "not accepting cases").[7] Nor have Plaintiffs actually demonstrated "real obstacles" to communicating with counsel that affected the representation. *See* Pls.' Opp. at 4 & nn 4, 9. Although Plaintiffs assert that class

[6] Notably, Plaintiffs did not submit any declaration from Plaintiff Astorga in support of their Motion for Summary Adjudication.

[7] Plaintiffs' reliance on the Declaration of Edgar Cornelio (at nn.3, 9) is inappropriate, because Plaintiffs never indicated their intent to rely on Mr. Cornelio as a witness after his withdrawal as a named Plaintiff in this case. Further, Mr. Cornelio's difficulties in finding an attorney apparently had nothing to do with telephone access conditions: he could not afford the private attorney he retained, and the pro bono organizations that he contacted after his attorney withdrew were not accepting new cases. Declaration of Edgar Cornelio ¶¶ 6-7 (ECF No. 14-4).

member V.V. had to communicate through her husband and "critical information was lost in the process," she testified during her deposition that she could not count how many times she met with her attorney in person during her immigration case, because it was "too many times." Ward Decl. Ex. 3, V.V. Dep. at 41:8-25–42:1-20; *see also id.* at 43:7-25; 50:7-25–51:1-9 (citing various in-person and telephone conversations with attorneys). Nor did this prevent V.V. from presenting her case, as she testified that there was no evidence that she or her attorney wanted to submit that was not submitted in her various applications for relief, even if some of it was difficult to obtain because it was located overseas. *Id.* at 59:1–62:5.[8] Similarly, Plaintiffs' claims that lack of formal, written notice of certain available options has impacted their rights are yet again belied by the evidence that they were in fact able to avail themselves of these options. Shinners Decl. Ex. 36, Neria-Garcia Dep. at 80:22-81:20, 84:13-85:22, 86:2-14, 92:18-21, 93:9-94:9, 96:10-98:3,144:24-145:20 (use of Yuba and WCDF phones); Shinners Decl. Ex. 24, Lyon Dep. at 97:16-98:14 (use of WCDF phones).[9]

Plaintiffs' characterization of the facts also suffers from several other problems. First, Plaintiffs for the most part ignore what detainees are able to do, and instead focus on what they term "restrictions." Plaintiffs address these "restrictions" without considering the overall communications and telephone options available to detainees. Further, these restrictions have no demonstrated impact on constitutional or statutory rights. For example, not a single Plaintiff or class member witness complained about not being able to access toll free numbers from housing unit phones at Mesa Verde (see Pls.' Opp. at p. 6). *E.g.*, Ward Decl. Ex. 1, Neria-Garcia Dep. at 141:20-142:5 (failing to cite non-access to toll free numbers as a complaint with the phones or

[8] Plaintiffs' other evidence (at n.4), is similarly discounted, or has already been addressed in Defendants' Motion. *See* Defs.' Mot. at. 22-27. The cited portion of the declaration of F.L. demonstrates only that F.L. had difficulty calling his first attorney from the housing unit telephones, but does not demonstrate that F.L. asked ICE or Yuba to make a free or confidential call to attorneys until October 28, 2014. *See* Declaration of F.L. ¶¶ 30-31, 34 (ECF No. 120-14). Nor do F.L. or M.G. assert any harm to their representation from using family members to communicate with their lawyers. *See generally id.*; Declaration of M.G. (ECF No. 120-8).

[9] Even if the Court determines that the lack of formal notice impedes detainees' ability to use the available telephone options, then the proper remedy would be to order Defendants to provide formal notice in order to ensure that detainees are knowledgeable about these options, not to find that the communication options themselves are constitutionally insufficient.

phone access at Mesa Verde). And the cost of housing unit phone calls, the privacy afforded by those phones, or other technical features of those phones are not independently material to Plaintiffs' claims in light of other telephone options available to ICE detainees. Further, Plaintiffs' claims related to the cost of calls from housing unit telephones at Mesa Verde, WCDF, Yuba, and RCCC will be resolved through Federal Communications Commission ("FCC") regulation of inmate and detainee calling.[10]

Plaintiffs' characterization of the facts also ignores that it is *their* burden on summary judgment to point to sufficient facts to support the elements of their claims. If, as here, the facts of record—disputed or undisputed—do not rise to the level of a constitutional or statutory violation, then summary judgment for Defendants is required. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). Plaintiffs' argument that *Defendants* have not presented evidence that WCDF's messaging system is "effective" misunderstands this burden.[11] Similarly, it is Plaintiffs' burden to present facts that could give rise to a finding that any delay in the use of the facility phone rooms actually interferes with Plaintiffs' rights to be represented by counsel or hinders that representation. Yet Plaintiffs have not done so.

Plaintiffs also argue that Defendants have not disputed certain facts. But these facts are not material to a ruling on Plaintiffs' claims because the facts still do not evidence actual

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[10] The FCC has already imposed caps on rates for interstate calling, and will soon extend rate caps to intrastate calls. *See* Defs.' Mot. at 13:10-25. Plaintiffs argue that the FCC rate caps have not yet been fully implemented and that it is unclear whether they will be, citing a motion that was filed to stay the implementation. Pls.' Opp. at 3:16-4:1 & n.6. But Plaintiffs' arguments are wholly speculative. The remaining FCC rules regarding rates will go into effect on June 20, 2016. *See Wireline Competition Bureau Announces the Comment Cycle and Effective Dates for the Inmate Calling Second Report and Order and Third FNPRM*, WC Docket No. 12-375, Public Notice, DA 15-1484 (WCB 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-15-1484A1.pdf. And the FCC has denied all motions to stay its implementation, including the motion Plaintiffs cite. *In the Matter of Rates for Interstate Inmate Calling Servs.*, DA16-83, 2016 WL 279250, at *1 (OHMSV Jan. 22, 2016).

[11] Plaintiffs' contention that the messaging system at WCDF is ineffective (Pls.' Opp. at 7) is simply not supported by the paltry evidence. *See* Defs.' Mot. at 24 n.19.

interference with claimed rights or actual injury. Moreover, many of these facts *are* and *have* been disputed by Defendants: Mesa Verde does offer the ability to call non-attorneys from the private room (*see* Defs.' Mot. at 9:6-12); Mesa Verde staff typically schedules such private-room calls within a day (*see* Ward Decl. Ex. 4, Harvey Dep. at 106:13-20); Contra Costa allows calls to non-attorneys for case-related purposes and outside of free time (*see* Defs.' Mot. at 10:8-9); and RCCC permits use of the law library phone, which affords privacy under the detention standards (*see* Defs.' Mot. at 12; Shinners Decl. Ex. 34, Hackett Report ¶ 27). The evidence cited by Defendants—statements from facility staff as to facility practices or call logs[12]—is competent to dispute statements by detainees. For these and other reasons, Defendants certainly dispute Plaintiffs' sweeping contention that "none of the Facilities comply with the detention standards specified in their contracts with ICE." *See* Pls.' Opp. at 5:6-7; *see also* Shinners Decl. Ex. 34, Hackett Report ¶¶ 26-29.[13]

3. Class Members' Rights Are Not Violated.

Considering all of the above, Plaintiffs simply have not pointed to facts demonstrating actual interference with statutory or due process rights to be represented by counsel at no expense to the government or to present evidence in their immigration proceedings, regardless of how broadly those rights are interpreted. *See* Pls.' Opp. at 23-25. In any event, Defendants have already explained why Plaintiffs' attempt to stretch these rights beyond the INA's plain language is not supported by legal authority. Defs.' Mot. at 18-25. Plaintiffs analogize detainees' right to

[12] Plaintiffs object to the use of Exhibit 37 to the Shinners Declaration, which includes logs of telephone calls from the private rooms in the VTC area at WCDF. *See* Pls.' Opp. at n.24. Although evidence need not necessarily be presented in admissible form on summary judgment so long as it would be admissible at trial, *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010), Defendants are re-submitting this exhibit along with an authenticating declaration establishing that the document meets the hearsay exception for records of regularly conducted activity, Fed. R. Evid. 803(6). *See* Declaration of John M. Trinidad (attached hereto).

[13] As Ms. Dozoretz acknowledged, for example, the availability of alternate calling options—such as private rooms—will negate other concerns with the privacy or features of housing unit phones under the detention standards. *See* Pls.' Mot. at n.93. Further, non-compliance with ICE's detention standards would not violate constitutional rights, as the standards represent goals for detention above and beyond the constitutional minimum. *See* Shinners Decl. Ex. 34, Hackett Report at ¶ 32; Ward Decl. Ex. 5, Brooks Dep. 121:10-122:16; *Hopper v. Melendez*, No. C05-5680, 2007 WL 4111366, at *5 (W.D. Wash. Nov. 16, 2007) (a telephone system in compliance with ICE policy "would more than meet constitutional minimum").

counsel to the Sixth Amendment's guarantee of counsel, but this comparison is inapt. *See* Defs.' Mot. at 19 n.9. The Constitution expressly guarantees counsel for criminal defendants. U.S. Const. Amend. VI. Immigration respondents, by contrast, are afforded the "privilege" of representation in their removal proceedings by statute, at no cost to the government, and any recognized "due process" rights to representation emanate from that statute. *See* 8 U.S.C. § 1229a(b)(4); *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312-13 (9th Cir. 1987). Thus, Sixth Amendment jurisprudence—including Ninth Circuit case law regarding the right to represent oneself—is generally inapplicable to the class members' situation. This is true not only because immigration proceedings are civil, but also because immigration respondents do not receive the same absolute guarantee of counsel.[14] Accordingly, although the Ninth Circuit has drawn on Sixth Amendment law in limited contexts involving denial of counsel (Pls.' Opp. at 25), Plaintiffs have not presented a persuasive reason to apply Sixth Amendment law to their claims that telephone access conditions impede their access to counsel or their ability gather evidence.

4. The Facts Do Not Demonstrate That The Named Plaintiffs Suffered Any "Actual Injury."

The facts do not show that Plaintiffs suffered any "actual injury" from telephone access conditions. That is, the named Plaintiffs have not shown that telephone access conditions actually hindered their ability to set forth their defenses and claims, through counsel or on their own. Not only were Plaintiffs able to retain and communicate confidentially with counsel, but they were able to present the evidence they needed in their cases. *See* Defs.' Mot. at 28-29. Plaintiffs now point to Mr. Astorga's and Mr. Lyon's claimed difficulties in obtaining evidence before they retained counsel. Yet Mr. Astorga was able to gather evidence using the phones, and Mr. Lyon does not claim to have attempted to use other available means of communication to obtain that evidence, nor did they ask to use an alternate phone to obtain that evidence. *See* Ward Decl. Ex. 2, Lyon Dep. at 77:24-82:19 (Lyon made only two requests to use a private

[14] Further, Ninth Circuit law regarding *pro se* criminal defendants is similarly deferential to detention facilities in affording alternative means of preparing a defense, although "the state may not unreasonably hinder the defendant's efforts to prepare his own defense." *Milton v. Morris*, 767 F.2d 1443, 1446-47 (9th Cir. 1985).

phone, and those requests were to call his wife and his attorney for purposes unrelated to gathering evidence); *id.* Ex. 9, Astorga Dep. at 67:18-68:18. Similarly, Ms. Neria-Garcia claimed difficulty reaching potential witnesses, but these witnesses were simply busy and would have been difficult to contact anyway. Ward Decl. Ex. 1, Neria-Garcia Dep. at 52:16-53:2. Further, Ms. Neria-Garcia had a lawyer who was able to contact those witnesses. Shinners Decl. Ex. 36, Neria-Garcia Dep. at 50:6-12, 53:8-11, 53:20-54:2, 67:24-68:13.

**B. *Mathews v. Eldridge* Is Inapplicable to Plaintiffs' Due Process Claims.**

Plaintiffs' Opposition does not refute Defendants' arguments that no Court has applied the *Mathews* balancing test to claims regarding access to counsel in a detention environment, and that the test was designed to determine whether additional *administrative procedures* were required prior to the deprivation of a liberty or property interest. Indeed, Plaintiffs merely rehash their discussion of the same two district court cases cited in their Motion, without even addressing Defendants' discussion demonstrating why this authority is inapposite (*see* Defs.' Mot. at 33 & n.23). Moreover, Defendants have pointed to ample reasons why, even under the *Mathews* test, Defendants are entitled to summary judgment, or at the very least have demonstrated the existence of disputed issues of fact material to that test. Plaintiffs' arguments in response are without merit.

First, contrary to Plaintiffs' assertion (Pls.' Opp. at 19), the Court has not considered or rejected Defendants' argument that the *Mathews* analysis cannot be applied uniformly across this broadly-defined class. Generally, whether there is commonality to sustain a 23(b)(2) class will hinge on the legal theory presented. *See, e.g.*, *Parsons*, 754 F.3d at 676 (9th Cir. 2014); *Amador*, 2014 WL 10044904, at *2. And Plaintiffs never presented this legal theory in prior briefing on their motions for class certification and to expand the class definition. *See generally* ECF Nos. 14, 28, 86, 93. Further, the Court may revisit the propriety of class certification at any time. *See* Fed. R. Civ. P. 23(c)(1)(C).

Second, Plaintiffs are incorrect when they state that Defendants do not dispute a violation of ICE's detention standards. *See* Pls.' Opp. at 20:5-6. Defendants have disputed this assertion through all of the facts presented in their Motion. Defendants argue, however, that the proper

focus of the inquiry is not a narrow focus on a governmental interest in compliance with the ICE detention standards, but on the government's asserted interests in ensuring safe and secure detention space in light of administrative burdens and concerns. Defs.' Mot. at 34-35. And third, as discussed in detail below, Defendants' and their contractors' security concerns are far from illusory or arbitrary, but are inherent in the management of any detention facility. *See infra* Part D.2 (discussing legitimate governmental justifications for limitations on telephone usage).

**C. Defendants Are Entitled to Summary Judgment on Plaintiffs' First Amendment Claim (Third Claim for Relief) as A Matter of Law.**

Contrary to Plaintiffs' arguments, the Court cannot consider Plaintiffs' newly asserted claims regarding the right to file court cases, habeas petitions, or their non-specific "right" to consult with an attorney outside the context of removal proceedings. *See* Pls.' Mot. at 46:10-47:22; Pls.' Opp. at 23:18-25:25. Plaintiffs never specifically pleaded this legal theory or any facts to support it. In their opposition, Plaintiffs point to several allegations in their complaint and cite *Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004), for the proposition that a complaint that alleges facts consistent with a First Amendment claim is sufficient under Fed. R. Civ. P. 8, even if the complaint does not specifically refer to the First Amendment claim. Pls.' Opp. at 8 n.32 (citing Compl. ¶¶ 61-70). But the portions of the complaint Plaintiffs cite, which raise allegations related to the right to legal representation, right to gather evidence, and to the length of detention, are all limited to the context of removal proceedings, as are their allegations related to the right to petition the government for redress of grievances. Compl. ¶¶ 110-113 ("Third Claim for Relief"). Plaintiffs raised no allegations related to habeas petitions, post-conviction relief, or a general right to consult with a lawyer outside the context of removal proceedings. The complaint did not give fair notice of these claims, and the Court should not consider them. *See infra* Part D, at pp. 13-14.

As to Plaintiffs' claims related to applications for non-immigrant or immigrant status, applications for discretionary immigration benefits are not petitions for redress of grievances protected by the First Amendment's Petition Clause. *See* Defs.' Mot. at 37 (citing *Friedl v. City of New York*, 210 F.3d 79, 86 (2d Cir. 2000); *Hill v. Walker*, 2015 WL 1486531, at *3-6 (S.D.

Miss. Mar. 31, 2015)).[15] Plaintiffs did not meaningfully respond to this line of cases cited in Defendants' motion, other than to note that these courts are outside the Ninth Circuit. Pls.' Opp. at 25:1-3. But Plaintiffs cite only one case within the Ninth Circuit, *Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583 (9th Cir. 1992), and provide a misleading description of this case. Pls.' Opp. at 25:3-6. The Ninth Circuit specifically noted Supreme Court cases holding that the First Amendment protects "meaningful access *to the courts*," and cited approvingly Supreme Court precedent questioning whether those cases apply to claimants before an administrative agency. *Id*. at 594-95 (emphasis added). The court also stated that legal aid might not be required to give meaningful access to an administrative agency, and denied the First Amendment claim. *Id.* at 595. In *Friedl v. City of New York*, the only other case Plaintiffs cite, the Second Circuit, in the context of a Section 1983 retaliation claim, distinguished between the statutory right to *apply* for public welfare benefits, and the right to *appeal* the denial of public benefits, the latter of which is protected by the First Amendment right to petition for redress of grievances. 210 F.3d at 86.

Even if the Petition Clause applied to applications for discretionary benefits, Plaintiffs have not demonstrated any actual interference with this right. Defs.' Mot. at 37:22-38:2. Plaintiffs certainly have not established that Defendants actively interfere with their ability to seek benefits. *See Silva v. Di Vittorio*, 658 F.3d 1090, 1103 (9th Cir. 2011) (access claims based on First Amendment right to petition require "active interference" with that right). Although Defendants clearly briefed this issue, *see* Defs.' Mot. at 37:11-38:2, Plaintiffs provided no response in their Opposition.

**D. Although the Court Should Not Consider Plaintiffs' Substantive Due Process Claim, Defendants Are Entitled to Summary Judgment on this Claim.**

Almost one-third of Plaintiffs' Opposition focuses on yet another claim that was never raised in the Complaint: a substantive due process claim, asserting that ICE detention conditions are punitive, and that the class's detention is unconstitutionally prolonged. *See* Pls.' Opp. at 8-

[15] Plaintiffs have apparently abandoned the First Amendment Free Speech claims, which again were raised for the first time in their Motion for Summary Adjudication. *See* Pls.' Mot. at 46:28-47:22.

17. As already shown, this claim should not be considered on summary judgment. *See* Defs.' Mot. at 30:2-4 (citing argument at n.13). Plaintiffs never amended their complaint to assert this claim, despite the fact that they moved to supplement their complaint on June 11, 2015 (*see* ECF No. 86), nor did they otherwise put Defendants on notice of this claim. To consider a substantive due process claim would be fundamentally unfair when Defendants were deprived of the opportunity to develop specific factual defenses to the claim in discovery, and were afforded less than three weeks to respond to that and the multitude of other arguments raised by Plaintiffs in their Motion for Summary Adjudication.

Plaintiffs argue that their substantive due process claim is proper because they "explicitly identified the Fifth Amendment's due process clause as a source of relief in the Complaint." Pls.' Opp. at 8 n.32. Yet Plaintiffs expressly alleged that they were deprived of particular *procedural* rights emanating from the Due Process Clause—they never pleaded a violation of substantive due process based on either punitive conditions or prolonged detention. *See* Compl. at pp. 25-26. Asserting a substantive due process claim now is much more than presenting an alternate legal theory or legal standard to apply to the same set of facts because the substantive element of the Due Process Clause presents a brand new claim for relief. The substantive component of the clause "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided." *Reno v. Flores*, 507 U.S. 292, 302 (1993).

As the cases cited by Defendants demonstrate, invoking a constitutional amendment or even alleging facts that may be consistent with multiple legal theories is insufficient to put the opposing party on notice of claims such that consideration of those claims on summary judgment would be fair. *See* Defs.' Mot. at n.13 (citing, *inter alia*, *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292-93 (9th Cir. 2000) ("After having focused on intentional discrimination in their complaint and during discovery, the employees cannot turn around and surprise the company at the summary judgment stage on the theory that an allegation of disparate treatment in the complaint is sufficient to encompass a disparate impact theory of liability"); *Ins. Co. of N. Am. v. Moore*, 783 F.2d 1326, 1328 (9th Cir. 1986) ("The district court did not err in refusing to award relief on this unpleaded cause of action even if summary judgment against Moore on the basis of

fraud necessarily implied that Moore had also breached its duty of good faith.")). The cases Plaintiffs cite, by contrast, do not address whether represented Plaintiffs are permitted to assert new claims for relief on summary judgment without fair notice to the opposing party. *See* Pls.' Opp. at 8 n.32.[16] Defendants nonetheless address the merits of Plaintiffs' newly-asserted claim, to further show why Defendants are entitled to summary judgment.

1. The *Jones* Presumption Does Not Apply to this Case.

Plaintiffs argued for a decision in their favor on their newly-asserted substantive due process claim of "punitive" conditions, based solely on their contention they are entitled to a presumption of punitiveness under *Jones v. Blanas*, 393 F.3d 918, 934 (9th Cir. 2004). Pls.' Mot. at 43-44. In response, Defendants argued that immigration detainees are not entitled to that presumption, and that, at most, the government need only show that a particular condition or restriction of detention "is reasonably related to a legitimate governmental objective" to demonstrate that the condition is not punitive. *Bell v. Wolfish*, 441 U.S. 520, 539 (1979); Defs.' Mot. at 30-31. Thus, contrary to Plaintiffs' assertions, Defendants never argued that ICE detainees have *no* protections under the Fifth Amendment's Due Process Clause.[17] Defendants merely argued that the law and facts do not support application of the *Jones v. Blanas* presumption to ICE detainees.

First, as a matter of law, there is considerable authority demonstrating that the *Jones* presumption—which was narrowly applied to an individual confined while awaiting a determination on civil commitment—should not be extended to apply to this diverse class of ICE detainees. Defendants have already explained that, although immigration proceedings are civil in nature, the legality of immigration detention pending removal proceedings is not evaluated

[16] In *Austin v. Terhune*, 367 F.3d 1167, 1170-71 (9th Cir. 2004), the *pro se* prisoner plaintiff, unlike the Plaintiffs here, had not pleaded *any* particular legal theory in support of certain allegations in his complaint. The court held that the plaintiff had pleaded facts supporting a First Amendment retaliation claim, rather than a due process claim as construed by the district court. And *Alvarez v. Hill*, 518 F.3d 1152, 1155, 1157 (9th Cir. 2008), is also inapposite. In that case, unlike here, the *pro se* plaintiff expressly put the defendants on notice of his claim under a particular statute by citing the statute in filings purporting to supplement the complaint.

[17] To the contrary, Defendants explicitly acknowledged throughout their motion that aliens are afforded certain due process protections. *See, e.g.*, Defs.' Mot. at 32:1-3.

under the same standards as other types of detention. Defs.' Mot. at 31 (citing *Demore v. Kim*, 538 U.S. 510, 521-22 (2003)). Further, the Supreme Court in *Fiallo v. Bell* established a deferential, rational basis standard to evaluate substantive due process and equal protection challenges to immigration policies. *Padilla-Padilla v. Gonzales*, 463 F.3d 972, 979 (9th Cir. 2006) (if immigration legislation is supported by "a 'facially legitimate and bona fide reason' the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification....") (quoting *Fiallo v. Bell*, 430 U.S. 787, 794-95 (1977)). The Supreme Court's distinct treatment of due process considerations in the immigration and immigration detention contexts demonstrates that immigration detainees cannot be grouped automatically with other types of civil detainees in considering substantive due process claims. Accordingly, there is no legal justification to hold that, as a matter of constitutional law, immigration detainees are entitled by default to *better* conditions than those afforded criminal pretrial detainees. Further, the Supreme Court "has cautioned that we 'must … exercise the utmost care whenever we are asked to break new ground in this field [of substantive due process]." *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

As the *Jones* presumption does not apply to this case as a matter of law, Defendants need not show that the telephone access conditions for ICE detainees are better than the conditions for criminal pretrial detainees or other county inmates. However, contrary to Plaintiffs' assertions, Defendants have made such a showing. ICE Detainees at Yuba, WCDF, and RCCC are afforded various telephone privileges that county inmates are not: free telephone calls on the Pro Bono Platform; access to private telephone rooms at WCDF and Yuba from which to make free calls to attorneys other than public defenders and, at WCDF and RCCC, to other case-related contacts; the ability to make private telephone calls from ICE VTC rooms at WCDF or from ICE field offices, to all types of call recipients; and the opportunity to request VTC meetings or in-person meetings with *pro bono* attorneys at ICE offices. Defs.' Mot. at 9-13.[18]

Finally, even if the *Jones* presumption were to apply, that presumption has been rebutted

[18] Further, a comparison to particular privileges afforded by court order to certain *pro se* criminal defendants is not instructive, given that no court order exists in this case.

by Defendants' evidence of legitimate justifications for limitations on telephone usage, as discussed just below. *See Jones*, 393 F.3d at 934 (explaining that presumption is rebuttable by showing of legitimate, non-punitive purpose).

2. Defendants Have Demonstrated a Reasonable Relationship Between Telephone Access and Interests in Order and Security—Which Entitle Defendants to Summary Judgment, or at Least Present a Factual Dispute.

Defendants have already shown that the telephone access conditions in each of the facilities are far from "arbitrary," but are justified by a rational connection to various legitimate security concerns. *See* Defs.' Mot. at 13-15. "A reasonable relationship between the governmental interest and the challenged restriction does not require an 'exact fit,' nor does it require showing a 'least restrictive alternative.'" *Valdez v. Rosenbaum*, 302 F.3d 1039, 1046 (9th Cir. 2002) (internal citations to *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999) and *Thornburgh v. Abbott*, 490 U.S. 401, 410-12 (1989) omitted). Nor does it matter "whether the policy in fact advances the jail's legitimate interests." *Id.* (quoting *Mauro*, 188 F.3d at 1060).

In their attempt to pick apart the legitimate security and institutional interests presented by Defendants, Plaintiffs again misrepresent the appropriate legal standard. Plaintiffs argue that Defendants' stated security concerns are not legitimate because they are unsupported by specific factual examples of "unacceptable security risk" or "telephone misconduct," and are not sufficiently "individualized" or tailored to the ICE detainee population. *E.g.*, Pls.' Opp. at 11, 15, 16. But to establish a rational relationship, Defendants are not required to demonstrate that each and every ICE detainee represents a risk to security and order; to prove specific telephone misuse such as rule violations,[19] victim harassment, bullying and shotcalling; nor even to prove that the telephone access conditions ameliorate those concerns. *See Valdez*, 302 F.3d at 1046 ("exact fit" not required); *Arney v. Simmons*, 26 F. Supp. 2d 1288, 1293-94 (D. Kan. 1998) (applying similar *Turner v. Safley* "rational connection" test to prison regulations restricting

[19] However, examples of telephone misuse do exist in the record. For example, class member V.V. admitted to using the private phone room at WCDF for calls unrelated to her immigration case—which could increase demand and cause others with case-related calls to wait longer for use the phone room. Ward Decl. Ex. 3, V.V. Dep. at 95:12-21.

telephone usage of inmates, and holding that (i) it is common sense to assume that telephone restrictions serve legitimate prison management purpose; and (ii) defendants need not prove incidents of telephone misuse to show a "rational connection" to that purpose).[20]

Further, it is without question that the "need to manage the facility in which the individual is detained" is a "legitimate operational concern" and "valid objective" that "may require administrative measures that go beyond" the bare justifications for detention. *Bell*, 441 U.S. at 540 ("[T]he effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions … ."). That is, there are basic detention objectives that apply generally to detention facilities, and there will always be an administrative need to control phone usage in detention. *See generally* Defs.' Mot. at 14:9-15:11; *Beaulieu v. Ludeman*, 690 F.3d 1017, 1039-40 (8th Cir. 2012) (limits on detainee phone access justified by legitimate interests in detecting and preventing crimes, maintaining safe environment, and providing equal access to phones); *Bull v. City & Cty. of San Francisco*, 595 F.3d 964, 974 n.10 (9th Cir. 2010) (interests in punishment or rehabilitation may not apply outside of prison setting, but interests in security and safety apply in all correctional facilities, including those housing pretrial detainees).[21] Thus, Plaintiffs' focus on whether the

[20] The proof required by the Ninth Circuit in the similar context of evaluating prison regulations for a reasonable relationship with legitimate penological interests is instructive. *Frost v. Symington*, 197 F.3d 348, 355, 357 (9th Cir. 1999) (government need only identify a common-sense connection between a legitimate objective and the prison regulation, and need not present "institution-specific or general social science evidence, as long as it is plausible that prison officials believed the policy would further a legitimate objective"); *Mauro*, 188 F.3d at 1060 (prison officials need not provide proof of actual problems in the past or likely problems in the future); *Barrett v. Premo*, 101 F. Supp. 3d 980, 993-94 (D. Or. 2015) (in the absence of evidence refuting a common-sense connection, "[t]he only question is whether prison administrators reasonably could have thought the regulation would advance legitimate penological interests."); *see also Pope v. Hightower*, 101 F.3d 1382, 1385-86 (11th Cir. 1996) (telephone restriction limiting calls had rational connection to government interest in reducing criminal activity and harassment because the connection was not so remote as to render it arbitrary or irrational).

Plaintiffs also argue that detainees are placed in administrative segregation without a security justification. Pls.' Opp. at 14. But, regardless of the truth of that statement, that does not mean that administrative segregation is never appropriate, nor does it mean that segregation—and the accompanying, necessary limitations on telephone usage—does not serve a valid purpose when appropriate. *See, e.g.*, Ward Decl. Exs. 6-8, Exhibits 89, 92, and 96 to Deposition of Kevin McDaniel (describing detainees as being in special management units due to gang affiliations).

[21] Accordingly, some rules that apply to the housing unit phones in the detention environment

ICE detainee population presents *particular* security risks cannot support a ruling that the limitations on phone usage are "punitive," particularly where ICE detainees receive more telephone accommodations than county inmates.[22]

Indeed, Plaintiffs imply throughout their briefing that detention security concerns do not apply to ICE detainees, but they have not demonstrated why this would be the case. Their generalizations about the "low risk" nature of the ICE detainee population (*see, e.g.*, Pls.' Opp. at 11:12) are unsupported by fact. The risk classification data presented by Defendants demonstrates that over half of the ICE detainee population from 2013-2014 received a medium-high or high security rating and only about 10.5% of the detainees received a "low" rating. Shinners Decl. Ex. 32.[23] Plaintiffs have not presented any other evidence in this regard.

3. Plaintiffs Are Prohibited From Asserting a Prolonged Detention Claim.

Before their Motion for Summary Adjudication, Plaintiffs never claimed that their detention violates substantive due process because it is prolonged.[24] Even if Plaintiffs had properly raised a claim challenging the legality of their detention, they have not shown that each class member has exhausted administrative remedies by seeking a bond hearing before an immigration court, and appealing any adverse decision. *Leonardo v. Crawford*, 646 F.3d 1157,

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may be relaxed when detainees have specifically requested to make calls to attorneys, family members, or case-related contacts from the facility phone rooms or ICE field offices.

[22] Plaintiffs suggest that the opinions of expert witness Michael Hackett, an experienced jail administrator, are not based on facts. Pls.' Opp. at 10-11. This is unfounded. Defendants do not dispute that Mr. Hackett, like Plaintiffs' expert Michael Berg, is offered as an expert witness, and, like Mr. Berg, lacks personal knowledge about the administration of the facilities at issue. Like Mr. Berg, he relied on his decades of experience in jail administration as well as case-specific facts from deposition transcripts of facility administrators and ICE officials. Although Mr. Hackett did not participate in visual inspections of the telephones in the facilities as did Mr. Berg, Mr. Hackett relied on Mr. Berg's descriptions. Mr. Hackett's report serves to rebut Mr. Berg's conclusion that all restrictions are "arbitrary" by pointing to the legitimate governmental interests of a detention administrator.

[23] Plaintiffs' statement that "two-thirds of the detainees were assigned a 'low' or 'medium' risk score" is intentionally misleading. Pls.' Opp. at 16. There is no "medium" risk classification. Instead, there are four different classifications: low, medium-low, medium-high; and high. Shinners Decl. Ex. 32. Plaintiffs' "two-thirds" calculation accounts for all but the highest security classification.

[24] Plaintiffs previously argued only that detainees are injured by claimed statutory and due process violations relating to access to counsel or evidence, in that their detention may last longer as a result. They have never before argued that their detention is unconstitutionally prolonged as a matter of substantive due process.

1161 (9th Cir. 2011) (exhaustion of administrative bond remedies required before challenging prolonged detention in district court). Further, even if Plaintiffs were permitted to raise such a claim, it could not possibly be adjudicated in Plaintiffs' favor on the current record, which contains no area-specific evidence of classwide prolonged detention, or of any direct correlation between length of detention and telephone access conditions. And, as Plaintiffs themselves implicitly acknowledge, this correlation could not be proven classwide, because whether continued detention is justified depends on the *individual* circumstances pertaining to each detainee. *E.g.*, *Rodriguez v. Robbins*, 715 F.3d 1127, 1139 (9th Cir. 2013).

**E. The Named Plaintiffs Do Not Have Standing to Assert Claims of Injury on Behalf of Class Members Who Speak Minority Languages or Who Are Indigent.**

Plaintiffs lack standing and representative capacity to assert unrelated claims on behalf of other individuals for conditions that do not affect them—such as any lack of special accommodations for minority language speakers and indigent detainees. *See Casey*, 518 U.S. at 358 (named plaintiffs cannot seek relief related to conditions that did not cause them any injury). The named Plaintiffs concede that they speak Spanish and English, and argue only that all detainees struggle to learn what communications options are available. Pls.' Opp. at 29:4-8. While Plaintiffs cite evidence showing that Plaintiff Astorga sought additional help to use the phone (Pls.' Opp. at 29 n.92), this evidence does not establish an injury based on failure to provide accommodations for minority languages. Nor are the claimed injuries of minority-language speaking class members redressable by enhancing telephone instructions or notice. Different types of notice, interpreter services, or other accommodations may be sought by minority language speakers.[25]

The named Plaintiffs also lack standing to raise claims on behalf of indigent detainees. Plaintiffs now cite evidence that: (1) some of Plaintiffs' family members could not afford to

[25] Plaintiffs also cite a declaration from a French-speaking class member whose calls to Togo did not initially go through but who was nonetheless able to contact his wife and obtain the documents he needed. Pls.' Opp. at 29 n.92. This evidence does not show injury, but more importantly, does not show that the *named Plaintiffs* have standing to seek accommodations on behalf of a French speaker. Further, it shows particular issues faced by a French speaker not faced by the named Plaintiffs.

accept collect calls, and (2) when Plaintiff Astorga-Cervantes was initially detained he did not have enough money in his account to make calls to his family, though he was able to make a free call to his brother and free calls to immigration attorneys. *Id*. at 29 n.90; Astorga Decl. (ECF No. 14-3) ¶¶ 6, 12. Mr. Astorga also testified, however, that his family put money in his phone account shortly after he arrived at RCCC, and that he was able to make calls to attorneys and his family both before and after he received this money. *See* Ward Decl. Ex. 9, Astorga Dep. at 67:18-68:18. Plaintiffs have submitted no evidence demonstrating that any of the three named Plaintiffs were indigent throughout their detention, nor that the named Plaintiffs sought accommodations from ICE or the facilities for purposes of retaining counsel or preparing their immigration cases. *See* Defs.' Mot. at 38:23-39:5. Since redress of the injuries allegedly suffered by the named Plaintiffs would not redress injuries, if any, of unnamed class members who are indigent or speak only minority languages—and who would thus potentially raise a significantly different set of concerns—Plaintiffs lack standing to raise these claims. *See Melendres v. Arpaio*, 784 F.3d 1254, 1263-64 (9th Cir. 2015).

**F. Defendants' Evidentiary Objections Were Properly Lodged.**

Plaintiffs challenge Defendants' evidentiary objections under L.R. 7-3, which requires objections to be contained in the brief opposing a motion. *See* Pls.' Opp. at 2 n.2. Defendants properly lodged objections in their 42-page brief (Def.'s Mot. at 40-42), and merely attached a chart listing the objectionable text for the Court's convenience and ease of reference. *Id*. Ex. A. Defendants also complied with the spirit of the rule, which aims to prevent parties from circumventing the page limits. *See, e.g., Gonzales v. City of San Jose*, No. 13-CV-00695-BLF, 2015 WL 2398407, at *5 n.2 (N.D. Cal. May 19, 2015) (excusing strict compliance with L.R. 7-3 because brief and separate evidentiary objections combined did not exceed the page limit). Even if the chart had been included directly in the brief, the brief would have remained well under the 60-page limit. *See* ECF No. 117 (setting page limits).

## III. Conclusion

For the foregoing reasons, the Court should grant summary judgment for the Defendants on all claims asserted in the Complaint, and deny Plaintiffs' Motion for Summary Adjudication.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of January, 2016, a copy of **DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT** was served with the Clerk of Court by using the CM/ECF system, which provided an electronic notice and electronic link of the same to all attorneys of record through the Court's CM/ECF system.

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