IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOUTHERN POVERTY LAW CENTER, *Plaintiff*, v. U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*, *Defendants*.	Civil Action No. 18-0760 (CKK)

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR A TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Never in the history of this country's modern immigration detention system have detained immigrants more urgently needed access to their lawyers. Nearly 1,000 detained immigrants are known to be infected with COVID-19—nearly 50 percent of those tested—and that number is indisputably much higher given that Defendants have tested a mere 7% of people in its custody. *See* ICE Guidance on COVID-19, http://ice.gov/coronavirus (last visited May 17, 2020 7:36pm EST). To avoid the perils of this deadly disease, detained immigrants need adequate and reliable access to their lawyers in order to obtain release on bond, parole and habeas, to advocate for better conditions, and to defend them at the merits stage of their ongoing removal proceedings.

Defendants do not contest that access to counsel is necessary during these dangerous circumstances nor do Defendants follow this Court's clear instruction[1] to identify which measures it agrees should reasonably be implemented to facilitate access. Instead, Defendants invoke—over two years after this case was filed—unsupportable standing and jurisdictional arguments in an effort to forever close the courthouse doors to SPLC and its clients. As set forth below, these procedural arguments ignore controlling Supreme Court precedents and, if accepted, would deprive detained immigrants of any forum whatsoever to remediate unconstitutional conditions of confinement that impede access to counsel. Defendants' arguments on the merits fare no better. Defendants fundamentally mischaracterize the nature of Plaintiff's access-to-counsel claim and, in so doing, respond to a different claim altogether. And Defendants not only fail to respond to respond to Plaintiff's substantive due process claim (conceding the claim for purposes of the TRO) but also submit evidence that further supports that claim. Plaintiff's motion for temporary restraining order therefore should be granted.

[1] *See* Transcript of May 12, 2020 Hearing ("Transcript") at 22:1-5.

ARGUMENT

I. SPLC Has Third-Party Standing to Assert Its Clients' Constitutional Rights.

SPLC has third-party standing to assert violations of its clients' Fifth Amendment rights, as it satisfies the three requirements: (1) "injury in fact,"; (2) "a close relation to the third party"; and (3) "some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *Eisenstadt v. Baird*, 405 U.S. 438, 444-46 (1972).

First, SPLC has suffered an injury because Defendants' conduct has frustrated its organizational mission and forced it to divert its resources. Legal services organizations suffer an "injury in fact" where defendants' conduct has "thwarted" their "organizational purpose." *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 799 (D.C. Cir. 1987) (holding legal services organization had suffered injury sufficient for standing where it alleged that its mission to provide legal representation to refugees had been thwarted); *Ukrainian-Am. Bar Ass'n v. Baker*, 893 F.2d 1374, 1378 (D.C. Cir. 1990). Likewise, where a defendant's conduct has impaired an organization's ability to provide services and thereby caused a drain on its resources, "there can be no question that the organization has suffered the requisite injury in fact." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

Here, Defendants' obstructive conduct has injured SPLC by thwarting its institutional purpose of "provid[ing] desperately needed legal representation to indigent immigrants detained in remote locations in the Southeast," "seeking clients' release from ICE custody," and pursuing "advocacy regarding the conditions of confinement" in immigration detention. Second Am. Compl. ("SAC"), ECF No. 70, at ¶ 15, 97; Rivera Decl. ¶ 2, ECF No. 105-7; Williams Decl. ¶ 1, ECF No. 105-8. With the onset of the pandemic, SPLC is especially focused on release of its clients from custody, as continued detention in the Facilities greatly magnifies its clients' risk of exposure to COVID-19. Venters Decl. ¶¶ 7, 9-13, ECF No. 105-5. SPLC represents clients

desperately seeking release through bond, parole, or petitions for habeas, in addition to representing clients at their merits hearings and conducting conditions advocacy. Rivera Decl. ¶¶ 2, 4, 13; Williams Decl. ¶ 4-7. Defendants' failure to ensure that SPLC and its clients can reliably, timely, and effectively conduct remote legal visits and can timely exchange confidential documents, particularly during the pandemic, has frustrated SPLC's ability to fulfill its mission by limiting its ability to represent clients and secure their release. For these reasons alone, SPLC has suffered an "injury in fact." *Haitian Refugee Ctr. v. Baker*, 789 F. Supp. 1552, 1558-60 (S.D. Fla. 1991) (holding that legal services organization had suffered injury due to Defendants' "denial of access to [a] particular group of [ ] refugees" and the organization's "corresponding inability to fulfill its organizational mandate").

Defendants' obstructive conduct has also injured SPLC by forcing it to divert institutional resources from its core mission. Even before COVID-19, chronic delays and limitations on in-person visits, VTC and phone calls, and mail at the Facilities frustrated SPLC's ability to zealously represent its clients. Rivera Decl. ¶ 6. The pandemic has only exacerbated these injuries. Rivera Decl. ¶ 60. SPLC staff must spend unnecessary and inordinate time scheduling and rescheduling remote legal visits at the Facilities because of delays, *id*. ¶ 27, 38-41, arbitrary cancellations, *id*. ¶ 25, and poor connectivity, *id*. ¶ 43. *See also* Williams Decl. ¶¶ 18-21 (documenting delays in scheduling, failure to set up remote legal calls, and an active attempt to frustrate legal calls). Time wasted on scheduling and visits where SPLC attorneys cannot effectively communicate with clients is time that the attorneys cannot do other necessary legal work. *See* Rivera Second Supp. Dec at ¶ 14. Had SPLC not had to endure these delays and cancellations and conduct follow-up visits to compensate, it could have represented additional people in detention and engaged in other advocacy. *Id*.; Williams Decl. ¶ 19 (noting SPLC's inability to represent retained client at Irwin as

plaintiff in habeas case because of Defendants' failure to ensure scheduling of remote legal visits). Under these circumstances, the injury requirement for standing is easily met. *See PETA v. USDA*, 797 F.3d 1087, 1093-96 (D.C. Cir. 2015) (holding that organization had suffered injury sufficient to satisfy standing where it had diverted resources in response to challenged conduct); *Guild v. Securus Techs., Inc.*, No. 1:14-CV-366-LY, 2015 WL 10818584, *4-5 (W.D. Tex. Feb. 4, 2015) (holding that plaintiffs alleged sufficient injury where defendants' conduct of recording attorney-client jail calls compelled attorneys to travel to jail and conduct in-person visits to protect the confidentiality of communications with their clients).

Second, SPLC's interests are sufficiently aligned with those of its detained clients to satisfy the "close relationship" requirement for third-party standing. Such a relationship must "allow the third-party plaintiff to operate fully, or very nearly, as effective a proponent of the potential plaintiff's rights as would the plaintiff himself." *Nasir v. Morgan*, 350 F.3d 366, 376 (3d Cir. 2003) (internal quotations and citations omitted); *see also Reese Bros., Inc. v. U.S. Postal Serv.*, 531 F. Supp. 2d 64, 67 (D.D.C. 2008) (quoting *Powers*, 499 U.S. at 411). The attorney-client relationship is sufficient to confer third-party standing. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (granting third-party standing to attorney seeking to assert rights of existing clients).

There can be no serious dispute that SPLC shares a "close relationship" with its clients detained in the Facilities. Contrary to Defendants' characterization, Defs.' Opp'n at 30-31, SPLC asserts third-party standing on behalf of its current clients. As such SPLC's relationship with its clients is not "hypothetical," *see Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004),[2] but instead

[2] Defendants' invocation of *Kowalski* is misplaced, as that case involved two individual attorneys arguing for third-party standing on behalf of all indigent defendants across the state who might seek counsel on appeal. 543 U.S. at 130-31. Here, by contrast, SPLC seeks to represent only its

indisputably close and of "special consequence," *see Caplin*, 491 U.S. at 623 n.3. Nor is there, as Defendants erroneously suggest, Defs.' Opp. at 30, any bar to third-party standing on behalf of detained immigrants, who have a "well established" due process right to counsel.[3] *Dakane v. U.S. Attorney General*, 399 F.3d 1269, 1273 (11th Cir. 2005). SPLC's very mission is to protect the constitutional rights of its existing clients by providing them with ethical and effective representation and to secure their release. Rivera Decl. ¶ 2; *see Exodus Refugee Immigration, Inc. v. Pence*, 165 F. Supp. 3d 718, 732 (S.D. Ind. 2016) (refugee resettlement organization had sufficiently close relationship with its refugee clients because "its entire purpose and mission is to resettle refugees escaping dire circumstances"). Accordingly, SPLC and its clients share an "identity of interests" in ensuring that people imprisoned in the Facilities obtain meaningful access to counsel, such that SPLC will act as "an effective advocate of [its clients'] interests." *Lepelletier v. FDIC*, 164 F.3d 37, 44 (D.C. Cir. 1999).

Third, SPLC's detained clients are "hindered" from protecting the interests that SPLC seeks to vindicate on their behalf. Although Defendants observe that some SPLC clients have filed

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own clients. And even if SPLC did seek to represent the interests of potential clients at the Facilities, SPLC has a much closer relationship than the attorneys in *Kowalski*, insofar as SPLC is dedicated to working with detained immigrants at the four Facilities in this litigation by setting up offices near the detention centers to provide legal services; is on the EOIR referral list for the Facilities; is frequently the only legal organization with a daily presence at the Facilities; and gives limited legal assistance to individuals whom it screens but does not take on as clients.

[3] Although Defendants selectively quote *AILA v. Reno*, 199 F.3d 1352 (D.C. Cir. 2000) to suggest this, the case does not support their suggestion. *AILA* involved organizational plaintiffs seeking to file suit on behalf all immigrants who would be subject to expedited removal provisions. The court concluded that AILA, which—unlike SPLC—did not represent individual immigrants at particular facilities and did not raise access to counsel claims, did not have third party standing "on behalf of aliens subjected to expedited removal system" to represent all immigrants who have tried or will try to enter the country. 199 F.3d at 1359, 1364. Moreover, *AILA* affirmatively supports SPLC's standing on behalf of its clients, as it observes that the Supreme Court has recognized third party standing where "the right being asserted . . . was a right protecting the [third party's] access to [the litigant]." *Id.* at 1361 (in the context of doctors asserting *Roe v. Wade* right on behalf of patients). That is precisely the situation here, as SPLC asserts its clients' due process rights of access to their attorneys.

petitions for habeas relief, Defs.' Opp'n at 31, the hindrance requirement "does not require an absolute bar" or "insurmountable barriers," but only "'*some* hindrance to the third party's ability to protect his or her own interests.'" *Penn. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 290 (3d Cir. 2002) (quoting *Powers*, 499 U.S. at 411 (emphasis added)); *accord Singleton v. Wulff*, 428 U.S. 106, 117-18 (1976). The hindrance requirement "presents a relatively low threshold." *Exodus Refugee Immigration, Inc.*, 165 F. Supp. 3d at 732. Various obstacles may warrant third-party standing, such as "imminent mootness," or where the nature of the constitutional right at stake presents inherent obstacles for the right holder to assert the right. *See, e.g., Singleton*, 428 U.S. at 117; *Aid for Women v. Foulston*, 441 F.3d 1101, 1114 (10th Cir. 2006).

Here, the barriers preventing SPLC's clients from protecting their own rights are legion. First, as in *Singleton*, where women were hindered from protecting their rights to privacy because filing suit would vitiate that very privacy, 428 U.S. at 117, SPLC's clients are substantially hindered from protecting their interests because filing suit on their own behalf would have the perverse effect of impairing those very interests. Specifically, SPLC's clients need to have their rights to access counsel vindicated so that they can have meaningful access to and communication with their lawyers to secure release from detention and in their removal proceedings. But if SPLC clients filed a civil lawsuit to vindicate those rights, the necessary attorney-client communications necessary would hinder them from preparing for bond proceedings, parole requests, potential habeas claims, and removal proceedings. Every hour of a remote legal visit using the Facilities' limited phone and VTC stations to discuss the access to counsel suit would be an hour the clients could not spend speaking with their attorneys about release options or their removal cases. In this way, the very nature of the constitutional injury at stake—deprivation of access to counsel—

hinders the ability of SPLC's clients to vindicate their rights. *See Aid for Women*, 441 F.3d at 1114.

Moreover, most of SPLC's clients do not speak fluent English, have limited knowledge of the U.S. legal system, and have no access to legal resources but for those provided by SPLC, *see* SAC ¶ 19. SPLC's clients therefore would be severely—if not entirely—hampered from protecting their own constitutional interests. *See Al Odah v. United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004) (Kollar-Kotelly, J.) (recognizing "it is simply impossible to expect [Guantanamo detainees] to grapple with the complexities of a foreign legal system and present their claims to this Court without legal representation"). The imminent mootness of SPLC's clients' claims likewise constitutes a substantial hindrance. By the time SPLC's clients could go through the lengthy process of litigating their constitutional claims in federal court, their removal cases would almost certainly be complete.

For these reasons, there can be no serious dispute that SPLC maintains third-party standing to assert its clients' rights in this litigation.[4]

II. This Court Maintains Subject-Matter Jurisdiction to Adjudicate and Remediate Plaintiff's Claims that Conditions in the Facilities Violate the Constitution.

More than two years after this case was filed, Defendants now erroneously argue that 8 U.S.C. § 1252 divests federal district courts of any jurisdiction to adjudicate and remediate Plaintiff's constitutional claims regarding conditions of confinement inside ICE prisons. Defendants' argument not only ignores Supreme Court precedent to the contrary but also—if

[4] Defendants' restrictions on remote and in-person legal visitation, mail, and the exchange of confidential documents also constitute a sufficient injury to SPLC to assert organizational standing in its own right as to the denial of Fifth Amendment rights and infringement on attorney-client communications. *See PETA*, 797 F. 3d at 1094 (requiring "a concrete and demonstrable injury to an organization's activities—with the consequent drain on the organization's resources") (citing *Havens*, 455 U.S. at 379). The Court, however, need not decide whether SPLC has organizational standing because SPLC clearly has third-party standing for the reasons set forth above.

accepted—would deprive people in ICE prisons of any forum whatsoever in which to seek injunctive relief to remediate unconstitutional detention conditions.

A. The Supreme Court Has Made Clear that Section 1252 Does Not Apply to Claims Alleging Unconstitutional Conditions of Confinement.

Defendants' argument that Sections 1252(a)(5), (b)(9), and (f)(1) divest this Court of jurisdiction over Plaintiff's constitutional conditions claim is insupportably overbroad and ignores—and fails to cite—dispositive language from *Jennings v. Rodriguez*, 138 S.Ct. 830, 840 (2018) that expressly carves out detention conditions claims, such as those here, from the jurisdictional bar.

Section 1252 channels review of claims arising from an immigrant's removal proceedings through an administrative process. "[A] petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, . . . ," 8 U.S.C. 1252(a)(5), and "judicial review of all questions of law and fact . . . arising from any action taken or any proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order," *id*. 1252(b)(9). But Section 1252 does not apply to "claims that are independent of or collateral to the removal process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016); *accord Jennings*, 138 S.Ct. at 841 (Section 1252 covers only challenges to a removal order, the decision to detain an immigrant, or the process by which an immigrant's removability will be decided). Defendants' brief altogether ignores Justice Alito's conclusion in *Jennings* that detained noncitizens' claims challenging "conditions of confinement" are not subject to Section 1252 because it would be "absurd" to "cram[] judicial review" of such claims into review of a final order of removal. 138 S. Ct. at 840. As Justice Alito observed, such an expansive reading of Section 1252 would render detained immigrants' conditions-of-confinement claims "effectively

unreviewable," because immigration judges have no authority to issue injunctions ordering ICE to remediate unconstitutional conditions. *Id*. at 840.

Following *Jennings*, courts have recognized that Section 1252 does not divest district courts of jurisdiction to adjudicate and remediate claims of unconstitutional conditions of confinement in ICE facilities, including access-to-counsel and substantive due process claims. *See, e.g.*, *Torres v. DHS*, 411 F. Supp.3d 1036, 1047-50 (C.D. Cal. 2019) (holding Section 1252 did not bar court from issuing an injunction to remediate conditions in ICE facility that impeded access to counsel and that were unconstitutionally excessive and punitive); *Innovation Law Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1075-78 (D. Or. 2018) (holding Section 1252 did not bar access-to-counsel claim by people in ICE custody where conditions of confinement impeded access to counsel); *accord Arroyo v. DHS*, No. SACV 19-815 JGB (SHKx), 2019 WL 2912848 (C.D. Cal. June 20, 2019) (Section 1252 did not bar jurisdiction over claims that ICE's decision to transfer represented people unconstitutionally interfered with existing attorney-client relationships in violation of due process). *Jennings* compels the same result in this case.

Section 1252 does not bar Plaintiff's claim that conditions in Defendants' facilities impede access to counsel in violation of due process because unlike Plaintiff's claims, the access-to-counsel claims in both *J.E.F.M.* and *P.L.* were not "collateral to" but rather "bound up in and an inextricable part" of the actual removal proceedings, meaning their claims could meaningfully be reviewed and remediated through the removal process itself. *J.E.F.M.*, 837 F.3d at 1033. Plaintiff's claims, in contrast, focus exclusively on conditions and practices within ICE facilities that impede access to counsel. Plaintiff is not challenging processes occurring within removal hearings, which is the focus of Section 1252. In *J.E.F.M.*, for example, plaintiffs affirmatively sought the appointment of counsel at removal proceedings; it was not a conditions case. *Id*. at

1029. Similarly, in *P.L. v. ICE*, the plaintiffs challenged barriers to in-person communications with counsel *during the removal proceeding itself*; they did not challenge conditions inside detention facilities impeding communications with counsel during detention. *P.L. v. ICE*, 1:19-cv-01336, 2019 WL 2568648, *1 (S.D.N.Y. June 21, 2019). Here, in sharp contrast, immigration judges cannot issue an injunction to remediate conditions in the Facilities that impede Plaintiff's clients' access to counsel. Applying Section 1252 therefore would deprive people in detention any "meaningful chance for judicial review" of their access-to-counsel claims.

Nor does Section 1252 bar Plaintiff's substantive due process claim. The Fifth Amendment prohibits Defendants from subjecting people in immigration detention to conditions and restrictions that are so excessive and restrictive as to constitute punishment. *See Torres*, 411 F. Supp at 1064; *accord Banks v. Booth*, No. 1:20-CV-849, 2020 WL 1914896, *6 (D.D.C. Apr. 19, 2020). The legal inquiry at the heart of this claim is wholly independent from any question at issue in a removal case, and this claim could not be meaningfully remediated in a removal proceeding because immigration judges cannot issue an order to remedy punitive conditions. *See e.g.*, *Torres*, 411 F. Supp at 1049 ("the Court has little difficulty determining that it also has jurisdiction over the . . . substantive Due Process claim regarding lack of telephone access, barriers to legal visits, and interference with legal mail").

Finally, as to SPLC's claims on behalf of itself, it would be especially "absurd" to apply Section 1252 because SPLC is not a party to removal proceedings and therefore cannot seek a remedy for its injuries through the removal process. *See Jennings*, 138 S. Ct. at 840.

B. The District Court's Decision in *NIPNLG* is Distinguishable and Non-Binding.

Defendants contend that *National Immigration Project of the National Lawyers Guild v. EOIR*, No. 1:20-cv-00852, 2020 WL 2026971 (D.D.C. Apr. 28, 2020) ("*NIPNLG*") supports their

argument that Section 1252 divests this Court of jurisdiction over Plaintiff's conditions claims. Defendants, however, ignore crucial distinctions between this case and *NIPNLG*, which are fatal to Defendants' jurisdictional arguments.

First, in *NIPNLG*, plaintiffs also sought injunctive relief against EOIR (the administrator of immigration courts) and expressly sought to enjoin certain practices in removal hearings themselves.[5] Thus, unlike the exclusive conditions claims at issue here, the *NIPNLG* plaintiffs sought relief that was "bound up in" removal hearings. *See J.E.F.M.*, 837 F.3d at 1033.

Second, although the *NIPNLG* plaintiffs brought access-to-counsel claims, they styled their claims as procedural due process claims impacting the merits of hearings rather than claims that conditions impeded access to counsel generally. The *NIPNLG* plaintiffs also did not assert substantive due process claims, which pivot on whether or not conditions and restrictions in detention are so excessive as to constitute punishment.

Third, the *NIPNLG* plaintiffs' access claims focused on barriers that impacted plaintiffs' access to counsel only as they related to the "merits" removal hearing. *See, e.g.*, *NIPNLG*, 2020 WL 2026971, at *8. In addition to challenging barriers that impede access to attorneys for assistance with clients' merits cases, SPLC also challenges barriers that impede access to counsel for other purposes, such as release on bond, parole, habeas, and conditions advocacy. On this point, the Court's decision in *Jennings* is particularly instructive: "Interpreting 'arising from' in this extreme way would make claims [by detained immigrants] effectively unreviewable. By the time a final order of removal was eventually entered, the allegedly [unlawful] detention would have already taken place. And of course, it is possible that no such order would ever be entered in

[5] For example, in sharp contrast to Plaintiff's claims, the *NIPNLG* plaintiffs sought to require EOIR to postpone in-person detained hearings and to provide for the automatic adjournment of any scheduled removal hearings or court deadlines. *See NIPNLG*, 2020 WL 2026971, at *4.

a particular case, depriving that detainee of any meaningful chance for judicial review." *Jennings*, 138 S.Ct at 840. So too here. By the time SPLC's clients were able to seek review of their barriers to communicating with counsel for purposes of release on bond, parole, or unconstitutional conditions, the unlawful "detention would have already taken place."[6]

C. The Constitutional Avoidance Doctrine Dictates that Section 1252 Not Be Construed to Deprive this Court of Jurisdiction to Adjudicate Plaintiff's Claims.

Although *Jennings* itself makes clear that Section 1252 does not apply to Plaintiff's constitutional conditions claims, well-established rules of statutory construction and constitutional avoidance further demonstrate why this Court retains jurisdiction.

"[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (requiring a "heightened showing" of Congressional intent to divest courts of jurisdiction to hear constitutional claims); *ANA Int'l, Inc. v. Way*, 393 F.3d 886, 894 (9th Cir. 2004) ("the general rule to resolve any ambiguities in a jurisdiction-stripping statute [is] in favor of the narrower interpretation"). The Supreme Court has repeatedly applied this principle to limit the reach of Section 1252. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 314 (2001); *Calcano-Martinez v. INS*, 533 U.S. 348, 351-52 (2001). The Supreme Court has made clear that adopting the broad construction of Section 1252 that Defendants propose here "would raise serious constitutional concerns" by depriving immigrants of any meaningful forum to have their constitutional claims adjudicated and remediated. *Id*. Such a construction would likewise raise serious "separation of powers" concerns. *See Ramos v. Nielsen*, 321 F. Supp.3d

[6] Finally, in addition to being distinguishable, the decision in *NIPNLG* is not precedent and this court is not bound to follow it. *Camreta v. Greene*, 563 U.S. 692, 709, n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case."); *Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Sessions*, 344 F. Supp. 3d 1, 15 (D.D.C. 2018) (same).

1083, 1102 (N.D. Cal. 2018). For all these reasons, Defendants cannot satisfy their "heightened" burden to demonstrate that, through Section 1252, Congress intended to deprive district courts of their longstanding power to adjudicate constitutional conditions claims—particularly where such a construction would deprive detained immigrants of any ability whatsoever to obtain an injunction to remediate those conditions. *See Webster*, 486 U.S. at 603.

III. SPLC Is Likely to Succeed on the Merits of Its Access-To-Counsel Claim

Defendants erroneously contend that SPLC cannot prevail on its access-to-counsel claim because SPLC has not shown that access barriers resulted in an adverse outcome or "forced self-representation" at a client's immigration hearing, Defs.' Opp'n at 36–37, and because each access barrier, considered in isolation, does "not rise to the level of a constitutional violation," Defs.' Opp'n at 43. These arguments are premised on fundamental misunderstandings of the nature of Plaintiff's claims. Applying the proper framework, the evidence shows that, whether or not Defendants' standards are adequate as written, Defendants are failing to conduct oversight to ensure consistent implementation. As a result, the totality of barriers deprive SPLC's clients of adequate and reliable access to counsel.

A. Defendants Mischaracterize the Nature of Plaintiff's Access-to-Counsel Claim and Misapply the Standard for Reviewing a Constitutional Violation.

First, by arguing that Plaintiff must prove prejudice in SPLC's clients' cases to obtain an injunction to remediate barriers to accessing counsel, Defendants altogether mischaracterize Plaintiff's access-to-counsel claims. *See* Defs.' Opp'n 36–37 (denial of counsel "may not violate due process absent a showing of prejudice"). Unlike those cases on which Defendants rely, SPLC is not alleging that an immigration judge denied its clients due process, and SPLC is not seeking to set aside its clients' removal orders as a result of barriers to being represented by an attorney at a removal proceeding, or as result of counsel's ineffectiveness. *See, e.g., Biwot v. Gonzales*, 403

F.3d 1094, 1098 (9th Cir. 2005) (immigrant sought to set aside removal order as a result of immigration judge's refusal to grant continuance to find legal representation); *Lara-Torres v. Ashcroft*, 383 F.3d 968 (9th Cir. 2004) (immigrant sought to set aside removal order as a result of ineffective assistance of counsel in removal proceedings). Indeed, in contrast to the cases that Defendants cite, this case does not concern IJ rulings, EOIR hearing procedures, or BIA appeals. Rather, SPLC challenges *conditions* of confinement that, in their totality, impede meaningful and reliable access to attorneys, and the only remedy Plaintiff seeks is an injunction to remediate those restrictive conditions. SPLC need not prove prejudice in such a case. *Cf. Benjamin v. Fraser*, 264 F.3d 175, 186 (2d Cir. 2001) (holding that pre-trial detainees did not need to prove prejudice to enjoin barriers to accessing counsel). In fact, if such a showing were required, then a detained immigrant could never obtain *prospective relief* to remediate unlawful conditions that impede access to counsel because the detained immigrant would need to complete her removal proceeding without adequate (or possibly any) assistance of counsel before having proof of actual prejudice to obtain prospective relief. By then, such prospective relief would be hollow. *Accord Jennings*, 138 S. Ct. at 840 ("By the time a final order of removal was eventually entered, the allegedly [unconstitutional] detention would have already taken place.").

Moreover, Defendants' "backward-looking inquiry into the actual substance of the hearing" wholly ignores that detained immigrants require access to counsel for purposes other than removal proceedings, such as seeking release (e.g., via bond, parole, or habeas) or advocating for improved conditions. Indeed, SPLC represents many clients at the facilities exclusively for purposes other than the merits phase of removal hearings. *See, e.g.*, Rivera Decl. ¶¶ 2, 4, ECF No. 105-7; *see also* SAC ¶ 97.

Defendants also erroneously describe the controlling standard for showing a violation of

the right to counsel. Specifically, Defendants focus on whether each challenged access barrier, viewed in isolation, is so severe to be tantamount to the denial of counsel. *See, e.g.*, Defs.' Opp'n at 47 (inquiring whether barriers to communicating via mail during COVID-19 alone constitute a constitutional violation). The proper inquiry is whether the totality of circumstances has the "cumulative effect" of denying a detained persons adequate and meaningful access to counsel. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 565 (9th Cir. 1990); *see also Nunez v. Boldin*, 537 F. Supp. 578, 582 (S.D. Tex. 1982) (examining combination of access barriers in considering whether restrictions impeded access to counsel); *Louis v. Meissner*, 530 F. Supp. 924, 927 (S.D. Fla. 1981) (finding that combination of facility's lack of legal services information, lack of telephones, and remote location denied immigrants access to counsel).

B. The Evidence Shows that the Totality of Conditions in the Facilities Unreasonably Impedes Adequate and Reliable Access to Counsel.

Applying the proper standard, SPLC has shown that the totality of conditions "unjustifiably obstruct" adequate and reliable access to counsel at the Facilities during the COVID-19 pandemic. *See Procunier v. Martinez*, 416 U.S. 396, 419 (1974). The evidence shows the Facilities fail to ensure that there are sufficient means of conducting confidential attorney-client communications (whether by VTC or legal call) (Pl.'s Mem. of P. & A. 12, 15, 21); that VTC and legal calls can be promptly scheduled (*Id*. at 10–11, 13–14); that such calls can be scheduled for a sufficient period of time to cover necessary topics (*Id*. at 11–12, 14); that such remote communications are confidential (*Id*. at 21); and that calls are not undermined by sound-quality and connectivity issues (*Id*. at 14); amongst other necessary measures. The evidence further shows that these issues are ongoing since Plaintiff initially filed this TRO. *See generally* Rivera Second Supp. Dec.

Defendants do not rebut SPLC's evidence of what is actually occurring *in practice* at the Facilities. Nor do Defendants apparently disagree that detention standards concerning access to

counsel should be followed. And in any event, Defendants concede (and SPLC agrees) that "the PBNDS does not form the constitutional floor."[7] Defs.' Opp'n at 41. Instead, and contrary to the Court's express direction, Defendants devote the majority of their opposition and evidentiary submissions to arguing that the Facilities already have policies in place concerning access to counsel. But that is not the question before the Court. Rather, the key questions are (1) whether those policies and practices are constitutionally adequate and (2) if so, whether they are actually being followed in practice. The evidence firmly establishes that the answer to both of these question is *no*.

For example, with respect to VTCs, Defendants assert that the Facilities have extended VTC hours, but the evidence shows that Defendants' VTC restrictions are themselves unreasonably restrictive. Pine Prairie limits VTCs to 30 minutes and Stewart mechanically imposes a 1-hour limitation notwithstanding a significant number of available VTCs. Rivera Decl. ¶¶ 8, 30-31; Defs.' Opp'n at 13. These arbitrary time restrictions prevent SPLC from meaningfully engaging with its clients. *See* Rivera Decl. ¶ 25 (describing a SIFI attorney's inability to adequately prepare their client the day before their final asylum hearing because of this limitation). And even assuming those VTC hours are sufficient (and they are not), the evidence nevertheless shows that—in practice—access to VTCs remains unreasonably restricted, unreliable, and that quality issues impede meaningful communications. *See, e.g.*, Rivera Second Supp. Dec. at ¶¶ 5-6, 10-12.[8] To provide but one example, at Irwin, Defendants agreed to extend VTC hours one month

[7] And thus, to the extent Defendants contend that any remedies sought by Plaintiff go beyond the PBNDS, that is because those remedies are necessary to cure the ongoing constitutional violations during the pandemic.

[8] Defendants argue that, at LaSalle, Defendants have made one of the three VTC consoles available for SPLC's exclusive use for two hours a day. Defs.' Opp'n 46. Defendants neglect to mention that this *ad hoc* remedy was offered only six days ago in response to a non-compliance notice sent by SPLC, and in fact provides *no* additional access beyond what the parties already

ago due to the pandemic, *see* Rivera Decl. ¶ 38 Ex. B. (April 3rd letter extending hours from 8:00 a.m to 7:00 p.m, Tuesday through Friday), yet SIFI legal staff at Irwin have continued to experience delays and cancellations. Rivera Decl. ¶ 27; Rivera Second Supp. Decl. ¶¶ 5-6.

Likewise, Defendants emphasize that reductions in the detained populations have increased phone ratios in the Facilities to "optimal levels," but Defendants wholly ignore the fact that, in reality, these telephones are not confidential and therefore not a proper mechanism for SPLC to engage with its clients about highly confidential legal matters. *See, e.g.*, Second Paulk Decl., Warden of Irwin, ¶ 39, ECF No. 110-12 ("Attorneys wishing to speak to a detainee [at Irwin] via telephone are advised that phone calls are recorded and monitored, and attorneys are recommended to schedule a VTC appointment to speak to detainees for full confidentiality"); *see also* Rivera Decl. ¶ 38 ("One SIFI attorney who has been working with people detained at [Pine Prairie] since October 2018 states that no client of hers has ever been able to successfully request a facility legal call."). And even for those meager opportunities for confidential legal calls at the Facilities, SIFI staff continues to have confidentiality issues. *See* Rivera Second Supp. Dec. ¶ 7 (describing instances wherein guards remain in the room). Evidence shows that these breaches are commonplace: for example, Defendants concede that Irwin staff enter and exit the room during VTC appointments; *see also* Defs.' Opp'n at 14, 18.

Critically, these barriers to adequate and reliable access in the Facilities flow directly and foreseeably from Defendants' longstanding and ongoing failures to ensure that Facilities comply with ICE's own standards and constitutional dictates. Tellingly, Defendants do not submit a single declaration that adequately describes how Defendants are ensuring that the Facilities comply with

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negotiated in a prior settlement agreement at that facility. *See* Agarwal Supp. Decl. Ex. D, ECF No. 108-1. Nor does this offer provide any kind of systemic "fix" for the ongoing connectivity issues that have made VTCs wholly unreliable at LaSalle. Rivera Decl. at ¶ 24.

standards and minimal constitutional requirements for accessing counsel. The closest Defendants come is a general and conclusory affidavit by Russell Hott (that was originally filed in a wholly different case and that Defendants submitted in this case two days after their deadline), which fails to address the Facilities altogether and does not discuss uniform mandates to ensure access to counsel. *See* Hott Decl. at ¶ 24.[9] Mr. Hott's declaration further makes clear that, far from conducting adequate monitoring of Facilities' compliance with standards, Defendants are reflexively relying upon ICE's already broken oversight system that DHS's own Inspector General has repeatedly criticized. *See*, e.g., Office of Inspector Gen., U.S. Dep't of Homeland Sec., *OIG-19-18: ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards*, at 7 (Jan. 29, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf; Office of Inspector Gen., U.S. Dep't of Homeland Sec., *OIG-18-47: ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, at 14-15 (Jun. 26, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf. Critically, Defendants' not only fail to adequately address how they are conducting meaningful oversight of the Facilities but Defendants also dangerously resist oversight altogether. Defendants cavalierly characterize this Court's well-established power to remediate constitutional violations as "micromanagement," as though conditions in detention are immune from judicial scrutiny. And rather than ensuring that Facilities comply with constitutional dictates, Defendants' opposition

[9] Defendants failed to disclose eight of the ten declarants they rely on in their initial disclosures, submitted October 7, 2019. Indeed, Defendants' initial disclosures do not even identify the positions held by five of the eight undisclosed declarants. Since the declarants are providing information that goes to the merits of SPLC's claims and possible defenses, Defendants appear to have violated their ongoing duty to disclose these persons' identities to SPLC under Rule 26(a)(1)(A)
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reflects an alarming willingness to permit *contractors* to tell Defendants what conditions should be implemented. *See, e.g.*, Rice Decl. ¶ 47, ECF No. 110-14 (describing that it would be "ill-advised" to install confidential legal phones); Staiger Decl. ¶45, ECF No. 110-15 (same). Contrary to Defendants' dangerous approach, "having stripped [detained immigrants] of virtually every means of self-protection . . . [Defendants] are not free to let the state of nature take its course" in its Facilities. *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994). Yet, the evidence shows that is exactly what Defendants are permitting the Facilities to do with respect to detained immigrants constitutional rights to access to counsel.

C. Defendants' Other Arguments Are Meritless.

In addition to failing to rebut SPLC's evidence of access barriers, Defendants also make numerous frivolous arguments. Defendants, for example, argue that SPLC has not shown that Defendants' PPE requirement "somehow violates a third party's constitutional rights." Defs.' Opp. at 40. But as SPLC has repeatedly explained, Plaintiff is "in no way" challenging the PPE requirement. *See* Transcript of May 12, 2020 Hearing at 13:25-14:1.

Defendants also claim that the mere fact that SPLC has engaged new clients at the Facilities "is, in and of itself, evidence that SPLC has had access to detainees during the pandemic." Defs.' Opp'n at 42. This argument is a non-sequitur. The PBNDS do not measure access to counsel by the existence or non-existence of a retainer. They measure it by phone ratios, confidentiality, frequency of communication, and timeliness of scheduling—they very things SPLC has shown in detail are seriously deficient at the Facilities. The fact that SPLC is able to engage a client says nothing about whether it can meaningfully and reliably communicate with that client.

Finally, Defendants' objections to the "double hearsay" in SPLC's sworn declarations fail to address the actual content of those allegations while also ignoring that evidence need not be

admissible to be considered in a TRO application. *See Holiday CVS, L.L.C. v. Holder*, 839 F. Supp. 2d 145, 155 (D.D.C. 2012)).

IV. SPLC Is Likely to Succeed on the Merits of the Substantive Due Process Claim.

As an initial matter, Defendants' opposition focuses exclusively on Plaintiff's access-to-counsel claims and nowhere meaningfully addresses Plaintiff's substantive due process claim. Defendants therefore have "conceded" the merits of Plaintiff's claim that conditions in the facility restricting legal communications are excessive and therefore punitive in violation of the Fifth Amendment's substantive due process protections. *See Meixing Ren v. Phoenix Satellite Television, Inc.*, No. 13-cv-1110, 2014 WL 12792707, *2 (D.D.C. 2014); *see also Schneider v. Kissinger*, 412 F.3d 190, 200 (D.C. Cir. 2005) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.").

Nor could Defendants seriously dispute that the challenged conditions are unnecessarily restrictive and therefore unconstitutionally punitive in light of SPLC's evidence and Defendants' own admissions. For example, even assuming that Defendants' standards were themselves constitutionally adequate—Defendants have failed to ensure that those standards are consistently implemented at the facilities, as described above. *See* ECF 105-1 at 29-32. The evidence further establishes that conditions at the facilities both fail to comply with CDC guidance on legal communications and are more restrictive than conditions in prisons. ECF 105-1 at 31-32. This evidence shows that the challenged restrictions are excessive. *See Torres*, 411 F. Supp.3d at 1065. But there is more.

Far from rebutting Plaintiff's substantive due process claims, Defendants' evidence further supports a finding that conditions impeding legal communications at the facilities are "excessive" in relation to any proffered justification. *See Banks*, 2020 WL 1914896, at *5. For example,

although all the facilities utilize fax for exchange of medical records, only Irwin allows detained individuals to send faxes to their attorneys. Rivera Decl. ¶ 12. Defs.' Opp'n at 19. There is also a designated legal fax number for attorneys to send faxes to their clients. "[I]ncoming faxes from attorneys are treated like legal mail and delivered to the detainees daily upon request." *Id*. at 20. Irwin also allows detained individuals to request that legal or case sensitive documents be e-mailed. Second Musante Decl. ¶35 ECF No. 110-10.[10] Stewart states that, while it does not accept faxes or emails for detained individuals, they may "communicate with attorneys via email" by using the 27 kiosks at the facility. Moten Decl. ¶39 ECF No. 110-8. But Defendants fail to provide evidence that these kiosks are unmonitored and that their use is free of charge. *Id*. The PBNDS explicitly contemplates use of fax or email, and Courts have found this may be warranted for documents that require prompt signature or delivery. *Torres v. U.S. Dep't of Homeland Sec*., No. 5:18-CV-2604 (C.D. Cal. Apr. 11, 2010), ECF No. 144 *citing* PBNDS 5.1 (V)(O).

V. SPLC's Requests for Relief are Appropriate and Narrowly Tailored

SPLC's requested relief is narrowly and reasonably tailored to facilitate access to counsel during the pendency of the pandemic; is consistent with many of Defendants' pre-existing policies; and builds logically upon some of its pre-existing practices in specific ICE facilities. *Torres*, No. 5:18-CV-2604, ECF No. 144 (granting TRO to expand remote attorney communications during COVID-19). Plaintiffs' requests are also not unduly intrusive, even if they impose a set of conditions. *Banks*, 2020 WL 1914896, at *12.

Plaintiffs' requests seeking to expand access to remote legal visitation are crucial during this period when in-person visitation can threaten the lives of attorneys, their clients, and Facility

[10] Defendants present a false dichotomy wherein the only option for facilitating fax or email system is to violate confidentiality. This cannot be true, unless Defendants are providing an admission that staff at Irwin are currently violating confidentiality.

staff; indeed, the CDC itself recommends limiting in-person attorney visits and expanding access to remote communications. Yet, as detailed above, the evidence shows that Defendants allow Facilities to impose unnecessary restrictions on remote legal communications (e.g., by placing strict limits on the number of calls that can take place and by placing unreasonable limits on when calls can occur) and also fail to ensure that phones and VTCs are confidential and in proper working order. For example, while Pine Prairie does not refrain from limiting the number of legal phone calls or VTC at Pine Prairie, Defs.' Opp'n at 23, Stewart mechanically limits the number of calls—despite evidence that the facility often has 30% unreserved appointments on any given week, *id*. at 13. Moreover, given the evidence that Defendants fail to ensure confidential phones and VTC are in working order, it is reasonable for the Facilities to designate points of contact for SPLC and SPLC's clients to be able to relay technical issues that impede remote legal communications. For these reasons, Plaintiff's request to expand reliable access to confidential legal communications and for Defendants to provide points of contact for technical issues are narrowly and reasonably tailored to remediate the ongoing violations during the pandemic.

Defendants also contest Plaintiff's request that Defendants implement a process for confirming receipt of parole requests and providing timely parole determinations. Defs.' Opp'n. at 49. But contrary to Defendants' argument, Plaintiff's Second Amended Complaint expressly addresses the importance of access to counsel for purposes of obtaining release on parole, which is entirely within ICE's discretion (and not an aspect of the removal proceeding itself). SAC, ECF 70 at ¶¶ 40, 47, 96, 100, 116, 318. Plaintiff's TRO includes specific evidence detailing how Defendants have failed to ensure that SPLC and its clients have reliable access to Deportation

Officers who are responsible for facilitating parole determinations. ECF 105-1 at 23.[11] Further, when Deportation Officers do not confirm receipt of a parole request, it delays an attorneys' ability to remediate any errors that relate to postal mail. *Id*.

Finally, Defendants have failed to rebut the reasonableness and necessity of SPLC's requests that Defendants permit the confidential exchange of documents electronically, that Defendants ensure phones and VTC equipment are disinfected, and that clients are provided with necessary PPE during visits where they may be at risk of exposure. For example, Defendants do not provide any evidence undermining the crucial need for the exchange of documents electronically besides conclusory allegations that ensuring confidentiality may be difficult to achieve. Staiger Decl. at ¶ 46. But Defendants admit they *already* provide this precise kind of quick inspection of legal mail (Defs. Opp. at 15, 19) and, in any event, confidentiality could be ensured by fax cover sheets and clear email subjects, as is presumably already done at Irwin (where attorneys can send faxes). Defendants' evidence further shows that Facility *staff* wear masks and gloves when facilitating in-person legal visits, thus supporting the reasonableness of Plaintiff's request that its clients be provided PPE during legal calls and visitation. *See* Defs.' Opp'n at 16. Similarly, Defendants' evidence showing that detained people are "encouraged to sanitize" telephones and kiosks likewise demonstrates the reasonableness of Plaintiff's request that Defendants *ensure* these areas are disinfected between use to reduce transmission of this deadly disease. *Id*. at 14.

[11] Defendants misleadingly refer to custody redetermination *hearings*, as though they are conducted before an immigration judge. Defs.' Opp'n at 49. They are not. As detailed herein, Plaintiff's request for relief does not relate to removal hearings. Rather, parole requests and *Fraihat* custody redetermination requests are submitted directly to the AFOD and the Deportation Officer. These ICE officials are also tasked with granting or denying such requests. *See, e.g.*, Rivera Decl. ¶¶55-56. *See also*, Chamberlain Decl. ¶ 6 (describing the AFOD's duty to supervise Deportation Officers). Denials of these requests cannot be challenged in the removal hearing.

CONCLUSION

For these reasons, and all those assigned in its moving brief and argument, SPLC's motion for temporary restraining should be granted.

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Respectfully submitted,

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