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 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR A TEMPORARY RESTRAINING ORDER

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I. Introduction

The COVID-19 pandemic has changed nearly every aspect of life in the United States, and that includes forcing unprecedented changes on the legal system. Instead of meeting in person, attorneys now consult with clients over the phone or via video-teleconference ("VTC"). Deposition and trial testimony are taken by VTC, and judges conduct trials in courtrooms empty except for the judge and a video monitor. These actions preserve access to courts and counsel as COVID-19 has made it too dangerous for client consultations, attorney meetings, and judicial proceedings to occur in person. Defendants' immigration detention facilities, however, have refused to make accommodations to ensure safe, constitutionally sufficient, and reliable access to counsel during this pandemic. Plaintiff the Southern Poverty Law Center ("SPLC") therefore seeks a temporary restraining order requiring Defendants to remove barriers that unreasonably limit access to counsel during the COVID-19 pandemic at four detention facilities.

Defendants, the Department of Homeland Security ("DHS"), Immigrations and Customs Enforcements ("ICE"), and various DHS and ICE officials, are responsible for the approximately 30,000 immigrants detained in the United States on any given day, including those served by SPLC's Southeast Immigrant Freedom Initiative ("SIFI") at four detention facilities in the rural Southeastern United States.[1] SPLC initiated this litigation over two years ago to challenge the constitutionality of Defendants' failure to provide access to counsel and courts to detained immigrants. SPLC alleged that Defendants failed to ensure constitutionally sufficient access to confidential legal calls and VTC, citing deficiencies in confidentiality, time limitations, access, and reliability.

[1] While some of the facilities are run by private groups such as "CoreCivic" and "GEO Group," ICE is the ultimate custodial entity with a nondelegable legal responsibility for ensuring that it and its vendors/contractors comply with the Constitution and applicable regulations.

COVID-19 has foreseeably exacerbated these failures even as detained immigrants' need to consult with counsel via telephone or VTC has exponentially increased. While non-detained immigration courts have halted proceedings, detained courts have not, and the current administration's aggressive removal policy has continued. Detained immigrants, facing continued removal proceedings and the terror of being trapped in prisons as COVID-19 sweeps through, are desperate to speak with counsel about their cases, the need to litigate to improve conditions inside, and the possibility of release through bond, parole, habeas proceedings or other means.

Yet, as the acute need for access to counsel has grown, already inadequate access has further diminished. Defendants limit in-person access to counsel, require attorneys to provide their own personal protective equipment ("PPE") despite the near impossibility of procuring PPE in the rural South, fail to provide PPE to detained individuals, and fail to adequately clean and disinfect visitation rooms between visits or telephone and VTC equipment between calls. At the same time, Defendants have failed to implement necessary procedures to expand capacity for remote legal visitation through telephone and video calls or to facilitate the exchange of documents remotely. A federal court has already recognized that Defendants' failures to accommodate legal communications during the COVID-19 pandemic are more than likely unconstitutional and entered a temporary restraining order requiring Defendants to implement accommodations to ensure sufficient access to counsel at a detention facility in California. *See* Min. Order, *Torres v. U.S. Dep't of Homeland Sec*., No. 5:18-CV-2604 (C.D. Cal. Apr. 11, 2010), ECF No. 144. But Defendants continue to refuse to make necessary—and life-saving—accommodations for legal communications throughout the country, including those SIFI serves.

SPLC seeks narrow relief. It does ***not*** seek any modifications to the public health measures at the facilities related to COVID-19, the release of any detained person, or the reinstitution of unprotected in-person visitation at the facility. Rather, SPLC requests common-sense accommodations to ensure constitutionally sufficient access to counsel, including increasing the number of VTC consoles, facilitating the scheduling of VTC calls, enjoining limitations on the number and duration of VTC calls, requiring Defendants to make all legal telephone calls from detained persons free of charge, ensuring that detained immigrants can exchange confidential documents with counsel electronically, and mandating that Defendants disinfect the shared telephone and VTC rooms and provide detained persons with personal protective equipment to ensure that they can communicate with counsel without risking exposure to the virus.

As detailed below, SPLC is likely to succeed on the merits of its claims that Defendants are violating its clients' Fifth Amendment rights to access counsel and to substantive due process. These constitutional violations constitute irreparable harm—never more so than now in the face of COVID-19, as clients without access to counsel can neither adequately fight their removal cases from detention nor seek release from detention to avoid COVID-19 infection. The balance of equities and the public interest tip sharply in favor of SPLC's clients because it is in both the government's and the public's interest to ensure protection of the constitutional rights of people in Defendants' custody.

Accordingly, and for all the reasons set forth below, this Court should grant Plaintiff's motion and enter a temporary restraining order enjoining Defendants from unreasonably limiting access to counsel during the COVID-19 pandemic and failing to ensure the safety of detained persons during legal communications.

II. Statement of Facts

A. SPLC continues to provide representation for detained persons at the Facilities during the COVID-19 pandemic, and Defendants are failing to adequately accommodate necessary remote legal communications.

The Southern Poverty Law Center established SIFI in April 2017 to provide pro bono representation to individuals in ICE custody at facilities with some of the lowest representation rates in the country: LaSalle ICE Processing Center ("LaSalle") in Jena, Louisiana; the Pine Prairie ICE Processing Center ("Pine Prairie") in Pine Prairie, Louisiana; the Irwin County Detention Center ("ICDC" or "Irwin") in Ocilla, Georgia; and the Stewart Detention Center ("Stewart") in Lumpkin, Georgia (hereinafter referenced collectively as "the Facilities"). Since SIFI's launch, SIFI attorneys and their detained clients have experienced repeated and substantial barriers to meaningfully and reliably communicating with one another. After efforts to resolve the problems without court intervention failed, SPLC filed the underlying litigation over two years ago in April 2018.

Shortly thereafter, SPLC filed a request for preliminary injunction to resolve urgent access issues at LaSalle and reached a mediated agreement ("LaSalle Agreement") with Defendants in August 2018. After this Court adjudicated Defendants' motion to sever and transfer, Plaintiff amended its complaint and the parties commenced discovery. Defendants made some changes at LaSalle as a result of the LaSalle Agreement, which focused on the need for additional legal visitation meeting space and remote interpretation services for in-person meetings at LaSalle. Agarwal Decl. ¶ 3. Defendants' noncompliance with the agreement is an ongoing issue, and has contributed to the present threat of irreparable harm to SPLC's clients. *See* Agarwal Decl. ¶¶ 5–10; Notices of Noncompliance, Exs. A, C, E, and G to Agarwal Decl. Further, the LaSalle Agreement is limited in scope and does not address crucial and emergent issues that have detrimentally impacted SIFI's clients during the COVID-19 pandemic, such as

the failure to provide a method to facilitate remote confidential document exchange (e.g., via e-mail or fax) and ICE's failure to ensure that spaces and technologies used for remote legal communications are properly disinfected.[2] These issues are described in greater detail below.

SPLC now seeks emergency relief because, although the circumstances for individuals detained at the Facilities and their attorneys have deteriorated significantly in light of the COVID-19 pandemic, Defendants continue to refuse to remediate barriers to legal communications during the pandemic. As of the date of filing, 3.5 million individuals have been infected worldwide, including 1.15 million people in the United States, of whom 61,000 have died. World Health Org., *Situation Report 106* (May 5, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200505covid-19-sitrep-106.pdf?sfvrsn=47090f63_2. There are significant outbreaks in Louisiana and Georgia (the states where the Facilities are located) and within detention centers themselves. Ctrs. for Disease Control & Prevention, *Cases in the U.S.*, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited May 6, 2020); Rivera Decl. ¶ 14. The Centers for Disease Control published an Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities ("CDC Interim Guidance") on March 23, 2020. *See* Ctrs. for Disease Control & Prevention, *Interim Guidance on Management of Coronavirus Disease 2019*

[2] On May 4, 2020, SPLC sent a Notice of Non-Compliance to Defendants regarding violations of certain provisions of the LaSalle Agreement concerning VTC scheduling. SPLC is currently working with Defendant to resolve phone and VTC issues at LaSalle. This motion includes facts about these issues at LaSalle only to illustrate Defendants' systemic pattern of failing to ensure adequate remote legal communications during the pandemic. SPLC does not currently seek an order to remediate VTC or phone issues at LaSalle. SPLC only seeks relief to remediate other issues at LaSalle, including Defendants' failure to provide a method to facilitate remote confidential document exchange (e.g., via e-mail or fax) and to ensure that spaces and technologies used for remote legal communications are properly disinfected. SPLC reserves the right to seek additional remedies concerning VTC and phones at LaSalle if negotiations between the parties are unsuccessful, as contemplated by the LaSalle Agreement.

(COVID-19) in Correctional and Detention Facilities, https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf (last visited May 6, 2020). A federal judge has already found ICE noncompliant with the CDC Interim Guidance with regard to the protection and provision of adequate care to medically vulnerable individuals in detention. *Fraihat v. U.S. Immigration & Customs Enf't*, No. 5:19-CV-1546, 2020 WL 1932570 (C.D. Cal. Apr. 20, 2020). Judges across the country have ordered correctional and detention facilities to take various measures to remediate the risk of COVID-19 and/or to release individuals to diminish the risk, including this Court in *Banks v. Booth*, No. 1:20-CV-849, 2020 WL 1914896 (D.D.C. Apr. 19, 2020). These facts demonstrate the crucial need for detained persons to be able to communicate with their attorneys to seek release from detention and protect themselves from the lethal risks of COVID-19.

Not surprisingly, the pandemic has fundamentally altered the way detained individuals access and communicate with counsel, as most of the legal profession has transitioned to remote communications (e.g., phone and video-teleconference) in order to protect not only themselves but also their clients and detention center staff from the prospect of transmitting the virus. This alteration is consistent with the CDC Interim Guidance, which encourages facilities to place limitations on contact visitation while expanding access to telephonic and video-conferencing legal communications as well as providing free phone calls to detained persons and cleaning surfaces used for remote communications. *See* CDC Interim Guidance at 13–14.

Yet Defendants have failed to accommodate these necessary and foreseeable changes to legal communications, placing SIFI attorneys in the untenable position of having to choose between engaging in-person visitation at high risk to their clients, detention center staff and themselves, or relying on remote access that was already insufficient and unreliable prior to the

pandemic and is now even worse. As Dora Schriro, a national expert on detention management and the founding director of ICE's Office of Detention Policy and Planning, explains, at a time when detained immigrants need their lawyers most, Defendants "are currently failing to ensure that the individuals in its custody have crucially needed access to lawyers during the COVID-19 pandemic." Schriro Decl. ¶ 17. SIFI has brought these failures to the attention of Defendants, most recently with a letter on March 25, 2020 demanding a number of remote legal visitation provisions in light of the pandemic. Agarwal Decl. ¶ 6; Demand Letter, Ex. E to Agarwal Decl; LaSalle Notices of Noncompliance, Exs. A, C, and G to Agarwal Decl. Nevertheless, Defendants have failed to ensure that SIFI's clients can adequately and reliably access their attorneys despite the growing and acute need. *See* Demand Letter, Ex. E to Agarwal Decl.; Rivera Decl. ¶ 20.

As explained by SIFI's Director Laura Rivera, both pre-and post-COVID-19, SIFI's representation of clients at the Facilities typically begins the same way: detained individuals contact SIFI's free and unmonitored hotline through the shared telephones mounted in their units. Rivera Decl. ¶¶ 10, 36. SIFI's hotline operators conduct an intake, ranging from thirty minutes to an hour. *Id.* Before COVID-19, SIFI staff would then conduct a screening interview of the prospective client, typically in person. These initial screenings may take sixty to ninety minutes, depending on whether a SIFI-provided interpreter is necessary. If SIFI determines it can take the case, it must meet with the individual again to explain and execute the retainer, to discuss next steps, and to answer any questions the client may have. *Id* at ¶ 11. It is common for SIFI staff to speak with the client two or three more times to prepare the client's bond motion or parole request even before necessary interviews related to the removal merits case. *Id.* Eliciting relevant facts usually requires several conversations, as clients typically must describe in detail personal and traumatic events and revisit them repeatedly. *Id.* Because exchanging documents

with detained clients and getting their signatures by mail is often unreliable at the Facilities, *id.* at ¶ 9, SIFI staff have historically done this in person, *id. at* ¶ 12.

Although in-person visits at the Facilities have always been deeply constrained by long wait times, limited hours, and time limits, *id.* at ¶ 6, SIFI still found in-person visits to be more effective and more reliable than the Defendants' processes and capabilities for video teleconferences and legal phone calls at the Facilities. *Id.* at ¶¶ 7–8. Before the pandemic, SIFI staff visited Facilities two or three days a week and conducted in-person legal visits with two dozen people or more on average. *Id.* As set forth in detail below, during the COVID-19 pandemic, in-person visits have become functionally impossible, thus increasing the need for remote access, which has simultaneously become more limited—leaving clients and their attorneys in an untenable position that necessitates this Court's immediate intervention.

B. ICE has restricted in-person legal visitation in response to COVID-19.

The exponential rate of the spread of COVID-19 inside ICE facilities is evident by ICE's own information. More than 48% of immigrants in ICE custody who have been screened for COVID-19 have tested positive. ICE Guidance on Coronavirus, https://www.ice.gov/coronavirus (last visited May 6, 2020). As of the date of this application**,** ICE has confirmed the following positive cases of COVID-19 at the Facilities: ten detained people at LaSalle;[3] twenty-six detained people at Pine Prairie; two detained people at Irwin; eleven detained people at Stewart and more than forty staff. Rivera Decl. ¶ 14; *see also* Schriro Decl. ¶ 30 ("ICE does not report the status of detention staff employed by the facilities"). At the same time, Executive Office of Immigration Review ("EOIR") courts where SIFI lawyers practice continue to press forward in their detained dockets "as speedily as they had before the pandemic." Rivera Decl. ¶ 15.

[3] On April 27, ICE reported *twenty* cases at LaSalle. *See* Rivera Decl. ¶ 14 Ex. C.

Although Defendants are ultimately responsible for ensuring that conditions inside detention centers comply with constitutional, statutory and regulatory dictates, Defendants have done little more to address COVID-19 than publish inadequate guidance documents. Schriro Decl. at ¶¶ 37–40. Yet, ICE's guidance has been exactly that: *guidance*—without any meaningful mandate or monitoring mechanisms to ensure compliance. ICE still has not provided concrete mandates to ensure that detention facilities—including the Facilities at issue here—implement necessary modifications to legal communication procedures during the pandemic. *Id.* at ¶ 35. On March 23, ICE posted a statement allowing only non-contact legal visitation and requiring all legal visitors to wear, "gloves, N-95 masks, and eye protection." Rivera Decl. ¶ 18, Ex. A. Because there was and continues to be a national shortage of N-95 masks, this requirement effectively prohibited in-person legal visits. Rivera Decl. ¶ 20; López Decl. ¶ 11; *see also* Strategies to Optimize the Supply of PPE and Equipment, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/index.html (last visited May 5, 2020) ("PPE shortages are currently posing a tremendous challenge to the US healthcare system because of the COVID-19 pandemic").

For a short time, SIFI was able to acquire a limited amount of the necessary PPE. But because Defendants' remote visitation policies continued to create intolerable delays, SIFI's Director was forced to make tough calls, "deciding between waiting days for remote legal visits to complete time-sensitive client communications, or authorizing in-person visits by SIFI staff who could unknowingly expose clients to the virus or contract the virus themselves." Rivera Decl. ¶ 19. It has been over a month since ICE published its PPE requirement, which effectively blocked in-person attorney-client communication at a critical time. Defendants have not provided

any remedy. To the contrary, Defendants have imposed additional restrictions on remote legal visitation that further impede detained clients' access to crucially needed legal counsel.

C. ICE has imposed additional restrictions on remote legal visitation.

The combination of ICE's PPE requirements, the shelter-in-place orders across the states, and the recorded COVID-19 outbreaks at the Facilities has effectively blocked SPLC's ability to conduct in-person legal visitation. Rivera Decl. ¶ 20; Williams Decl. ¶ 10. As the number of positive cases has risen exponentially, and clients' vulnerabilities and immediate need for legal assistance inside of these Facilities has become even more urgent, SPLC has been forced to rely on Defendants' increasingly restrictive, inconsistent, and unreliable policies for video-teleconferences and legal phone calls (hereinafter referenced together as "remote legal visitation"). Out of necessity, SPLC has also had to rely on communicating through non-confidential, collect calls with clients at these Facilities.

1. Video-teleconference access restrictions.

Defendants' pre-existing barriers to VTC access—the more effective means of attorney-client communication compared to telephones— have worsened as the pandemic has progressed. Over the past month, SIFI has experienced scheduling delays at all Facilities at every step of the process: delays in receiving a response to a VTC request, delays between the date requested and the date made available, delays on the day of the appointment, as well as outright cancellations. Rivera Decl. ¶ 22–29; Williams Decl. ¶ 11 –12. These delays can be attributed to factors that Defendants have conceded are within their control.

In an April 3 letter to SPLC, Defendants stated that, because of the public health crisis, they would provide extended VTC days and hours of operation for the Facilities. Rivera Decl. ¶ 21, Ex. B. Nearly two months into the pandemic, however, SIFI has seen no evidence of these extensions. For example, SIFI staff at Stewart reported on April 24 and April 27 that they were

offered the same hours for VTC slots as before—9am-3pm. *Id.* at ¶ 22. Defendants' failures to ensure adequate access to VTC has resulted in devastating consequences for detained individuals. For example, due to inadequate access to VTC at Irwin, detained persons were unable to be retained and be Petitioners in a habeas action filed by SPLC and SIFI, thereby defeating their chances for release during this dangerous pandemic. Williams Decl. ¶ 19.

In addition to scheduling delays, Defendants have restricted VTC access through sudden and seemingly arbitrary restrictions at the Facilities over the past month. For instance, Stewart set a weekly cap on the number of VTC calls a SIFI attorney could have with the same client, refusing counsel's request for a two-hour session the day before the client's final asylum hearing. Rivera Decl. ¶ 25. Pine Prairie rescheduled a VTC appointment because the officer was on transport duty and could not bring the client. *Id*. at ¶ 26. Irwin and Stewart cancelled VTC calls without notice. *Id.* at ¶¶ 27-28. Irwin scheduled VTC calls with extremely short notice. Williams Decl. ¶¶ 12, 20. LaSalle's VTC quality is so poor that one SIFI attorney now schedules only legal phone calls. Rivera Decl. ¶ 24; López Decl. ¶ 9. And on at least two separate occasions, Irwin failed to notify the client of the scheduled call, Rivera Decl. ¶ 33; Williams Decl. ¶ 21, and sometimes fails to notify attorneys that it has scheduled a call. Osorio Decl. ¶ 7. These barriers have a direct impact on SIFI's ability to expeditiously prepare urgent filings, and adequately prepare their clients for hearings. Rivera Decl. ¶ 25; *see also*, López Decl. ¶ 10; Osorio Decl. ¶7 ("The failure to provide notice to immigration attorneys of when VTC appointments are scheduled makes it difficult to effectively communicate with my client and properly meet my ethical obligations to my client if I cannot have access to her.")

When SIFI is finally able to schedule VTC calls, the attorneys experience further barriers because of Defendants' unreasonable time restrictions. At Pine Prairie, VTCs are limited to thirty

minutes, and are sometimes even shorter than that due to the time it takes to move quarantined and non-quarantined individuals separately. Rivera Decl. ¶ 8.; López Decl. ¶ 8. At Stewart and Irwin, VTCs are limited to one hour. Williams Decl. ¶ 11. These limitations exist even when an interpreter is needed, which effectively doubles the time it takes to communicate. *See id.* at ¶16; Rivera Decl. ¶ 10 ("While a typical screening without interpretation may take one to one-and-a-half hours, a screening through an interpreter may take twice as long."). SIFI has no choice under these strict time limits but to request additional VTC calls and go through the same scheduling delays once or twice more.

Although confidentiality is "a bedrock principle" of attorney-client communication, confidentiality is severely compromised in the VTC rooms at the Facilities. Rivera Decl. ¶ 30. At Irwin, for example, when VTC calls are conducted in the library, detention center staff frequently interrupt the call by entering and answering separate calls on a phone close to the detained individual. Williams Decl. ¶15; Osorio Decl. ¶¶ 5–6. Likewise, at Pine Prairie, VTCs occur in adjacent cubicles with thin walls, and attorney-client conversations are clearly audible. Rivera Decl. ¶31.

Finally, Defendants' inadequate safeguards to protect detained individuals from the virus during VTC calls have forced SIFI attorneys to think twice about proceeding with remote legal visits to avoid health risks to their clients. Williams Decl. ¶¶ 8-9. One SIFI attorney has never seen any of his clients at Irwin wearing gloves during their VTC call. Rivera Decl. ¶ 32. At Stewart, a client was never provided gloves but found a pair of gloves that an officer had discarded and put them on for his own safety. Sanchez-Martinez Decl. ¶ 14. Because of Defendants' documented failure to provide detained individuals in these Facilities with sufficient hygiene products and protection, every time clients leave their cells for a VTC appointment, they

risk exposure to the virus. Venters Decl. ¶ 11; *see* Joe Penney, Inside an ICE facility in Louisiana, detainees say ICE is depriving them of masks, under-testing for COVID-19, and moving migrants around the country, BUSINESSINSIDER (May 1, 2020) https://www.businessinsider.com/detainees-say-ice-undertesting-for-covid19-not-giving-them-supplies-2020-5; *see also* Debbie Nathan, Women in ICE Detention Face Reprisals For Speaking Up About Fears of Covid-19, THE INTERCEPT (April 28, 2020) https://theintercept.com/2020/04/28/ice-detention-coronavirus-videos/(Women detained at Irwin describe conditions of overcrowding and deficient sanitation).Likewise, the VTC equipment itself can transmit the virus, which necessitates disinfecting it and providing detained persons with proper PPE, but this is not happening. *see, e.g.,* López Decl. ¶ 16 (describing failure to disinfect VTC terminals and seats after a detained individual from a quarantined unit was at the VTC). Defendants' ongoing failure to implement these precautionary measures puts attorneys in the untenable position choosing between preparing their clients for their legal cases and putting them at risk of transmission due to Defendants' inadequate precautions. Rivera Decl. ¶ 47; López Decl. ¶ 18.

2. Phone access restrictions.

Due to Defendants' worsening restrictions for VTC access, SIFI has tried to utilize "facility legal calls," which are confidential phone calls coordinated by the facility, to reach current and potential clients. Rivera Decl. ¶ 37. But the process for setting up such legal calls is still unclear to clients and attorneys at the Facilities and, until recently, was impossible at Stewart or Pine Prairie. *Id.* at ¶ 38. Defendants' April 3 letter stated that they would "extend" the hours for facility legal calls at the Facilities. *Id.* Ex. B. When SIFI staff at Stewart brought this information to CoreCivic employees' attention, the employees said they were not aware of any

mechanism for facility legal calls. *Id.* at ¶ 39. Only on April 24, after several weeks and multiple email exchanges, was a new process set up at Stewart, requiring the SIFI attorney to email the warden to request the call, and the warden to confirm the time and date and then provide the attorney with a phone number. *Id.* at ¶¶ 40–41. Pine Prairie officials state that facility legal calls may be requested by detained individuals through their case managers. However, most clients at Pine Prairie do not know who their case managers are. *Id.* at ¶ 38. A SIFI attorney who has been representing clients at Pine Prairie since October 2018 has never had a client successfully request a facility legal call. *Id.*

Even where there is a process for requesting facility legal calls, there are still delays in scheduling, as with VTC calls, and detained individuals have been limited from accessing such calls due to lockdowns in their units. Rivera Decl. ¶¶ 40–42. At LaSalle, there have been significant connectivity issues when dialing in essential third parties, such as other attorneys and interpreters. *Id.* at ¶ 43. Defendants' solution has been for the client to take the call while on speaker phone. This solution raises similar confidentiality concerns to the VTC calls because conversations can be overheard by individuals in the next room *Id.* at ¶ 31.

Because the mechanism for requesting facility legal calls is not clear, uniform, or reliable, SIFI has identified alternatives to Defendants' restrictions to communicate with their clients during this pandemic. Although detained individuals are entitled to free access to legal calls (Schriro Decl. ¶ 58; Rivera Decl. ¶ 48), because access to such calls is so difficult to obtain, SIFI staff have arranged with clients for them to make paid calls at designated times from one of the telephones in their unit. Williams Decl. ¶ 13; Sanchez-Martinez Decl. ¶ 5. To alleviate the financial burden of this communication on their clients, SIFI set up an internal method to allow SIFI to pay for these collect calls from clients at the Facilities. Rivera Decl. ¶ 44.

SIFI has asked Defendants to place SIFI staff's phone numbers on a do-not-monitor list, but Defendants have refused to provide written confirmation and verbally confirmed that they were able to do this at only three of the facilities: Stewart, LaSalle, and Pine Prairie. Rivera Decl. ¶ 44–45; Williams Decl. ¶¶ 13–14. At Irwin, Defendants told SIFI that they cannot place them on a do-not-monitor list because Defendants do not have a contract with that facility's phone vendor. Rather, SIFI would have to reach out to Irwin's warden and make this request. SIFI made this request via email but, as of May 5th, still have not received a response. Rivera Decl. ¶ 45.

Although SIFI staff should be placed on the do-not-monitor list, it is important to note that these collect calls do not guarantee confidential attorney-client communications. Clients at the Facilities make these calls from the same telephones that they use to call the SIFI hotline as well as their loved ones. They are made in the open space, in close proximity to the individuals from their unit and are shared by many other individuals. Williams Decl. ¶ 13; Rivera Decl. ¶ 46.

Furthermore, calls made from these shared telephones raise similar safety concerns to calls made from the VTC rooms. Individuals are already unable to socially distance in their units, and using the shared phones puts them at a higher risk for contracting the virus. Venters Decl.¶ 11, 36. When detained clients are waiting in line to use the shared telephones, they are often extremely close to one another and, because they also lack protective equipment, they are exposing themselves to the virus. Venters Decl. ¶ 36. Additionally, clients indicate that the facilities still fail to provide them with adequate hygienic products. They have not seen anyone wipe down the telephones— neither detained individuals who clean the units, nor the detention staff. Sanchez-Martinez Decl. ¶¶ 7, 12. At Stewart, a SIFI client is in a unit with ninety-two people in total with only seven working telephones. At Irwin, another SIFI client has been in a

unit when it was at capacity and had 32 people in two-person cells with a total of three shared telephones. At LaSalle, a client is currently detained in a unit that has had 88 people sharing eight telephones. At Pine Prairie, one client is in a unit that has had 56 or 57 people and eight shared telephones. Rivera Decl. ¶ 47; Sanchez-Martinez ¶¶ 10-11; Venters Decl. ¶ 36 ("Cleaning and disinfecting is a crucial aspect of infection control as there are numerous frequently used locations within facilities that may facilitate infection spread").

SIFI's partial solution of paying for these collect calls does not excuse Defendants' failure to follow its own ERO COVID-19 Pandemic Response Requirements, which call on facilities "to ensure *all* detainees receive some number of free calls per week," (Rivera Decl. ¶ 48; Schriro Decl. ¶ 58), as well as the Center for Disease Control's guidance for detained populations, which calls on detention facilities, including those that confine immigrants, to increase access to free or low-cost telephones and virtual visitation. CDC Interim Guidance 13–14.

D. Restrictions on legal mail and document exchange.

Defendants' COVID-19 policies on document exchange are unreasonably restrictive and make SPLC's ability to maintain necessary contact and move expeditiously on its clients' cases extremely and needlessly difficult. Defendants state that they will not retrieve fax documents or download electronic documents for detained individuals at the Facilities. Rivera Decl. ¶ 53, Ex. B. This is unreasonable since Irwin already allows detained individuals to send faxes to their attorneys and, for a few weeks prior to the pandemic, it had allowed attorneys to send faxes for their clients that the facility officer would retrieve for them before a VTC appointment. *Id.*; Williams Decl. ¶¶ 23–24; *see also* Rivera Decl. ¶ 12 (listing the multitude of documents typically exchanged for case preparation). All Facilities utilize fax machines to send attorneys their

clients' medical records. Rivera Decl. ¶ 12. Allowing attorneys to use the fax machines to transmit documents to clients for their signature would greatly improve access, especially with the restrictions on in-person visitation and delays in mail. For example, in trying to obtain a client's medical records at LaSalle, a SIFI attorney was told by the deportation officer that the client's verbal authorization over the phone to release their medical records was insufficient and would instead require a wet signature, delaying SIFI's ability to timely procure the files and represent the client. Rivera Decl. ¶¶ 54*; see also* López Decl. ¶ 13. Providing a mechanism for electronic or facsimile document exchange would alleviate at least one of the many compounding barriers SPLC now faces amid COVID-19.

Defendants have also stated that they "may permit" metered and preaddressed envelopes. Rivera Decl. Ex. B. At Stewart, SIFI staff has had mixed success with sending pre-stamped envelopes. At LaSalle, SIFI has been successful. Rivera Decl. ¶ 50. Defendants also refuse to permit stamps into the Facilities. Since in-person legal visitation is prohibited, Defendants' stamp prohibition forces SPLC to deposit funds into their clients' accounts or break stay-at-home orders to obtain prepaid envelopes that they *may* have success sending to facility. Williams Decl. ¶ 23.

Because of these restrictions, SPLC must send postal mail to the Facilities, which even before the pandemic, has been unreliable. Rivera Decl. ¶ 9 (explaining that delays in sending and receiving mail are commonplace; Stewart's sole post office box number is shared by multiple actors in the system; Pine Prairie has reports of detained individuals' legal mail being improperly searched); *Id.* ¶ 50 ("Mailings appear to be periodically rejected regardless of the delivery service or the type of postage"). Reliance on postal mail results in undue delay. Ms. Rivera explains that, "to even start working on an individual's case, SIFI legal workers may need to wait

at least one week after their first client meeting to receive any documents from the client. A one-week delay amid this pandemic has grave consequences for individuals medically vulnerable to COVID-19." *Id.* at ¶ 51. Delays also harm clients' chances of winning release. *Id.* at ¶ 52. Judges consider the applicant's flight risk in deciding on release motions. "The closer a person's final individual or merits hearing is, the more of a flight risk she is considered to be." *Id*.

Finally, Defendants have restricted SPLC's access to the ICE official who oversees their clients' parole requests and *Fraihat* custody redeterminations. There have been weeks-long delays by ICE in responding to humanitarian parole requests. Rivera Decl. ¶ 56. For example, on or about April 15, a SIFI attorney submitted a humanitarian parole request on behalf of their medically vulnerable client. ICE had instructed her not email, but to mail the request. On April 28, she emailed an ICE agent involved in her client's case to ask about the status of the request, only to learn that ICE had never received it. She was subsequently instructed to email the request. The ICE agent responded within one hour denying her request. *Id.* at ¶ 55.

III. Legal Standard

Motions for temporary restraining orders and preliminary injunctions are analyzed under the same four-factor standard. *Council on Am.-Islamic Relations v. Gaubatz,* 667 F. Supp. 2d 67, 74 (D.D.C. 2009). An applicant must clearly show: "(1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction." *Id.* Historically, courts have applied these four factors along a "sliding scale" in which "a particularly strong showing in one area can compensate for weakness in another." *Id.* Lately, however, "the continued viability of that approach has been called into some doubt, as the United States Court of Appeals for the District of Columbia

Circuit has suggested, without holding, that a likelihood of success on the merits is an independent, free-standing requirement." *Kingman Park Civic Ass'n v. Gray*, 956 F. Supp. 2d 230, 241 (D.D.C. 2013). Additionally, some Circuit judges have observed that all four factors may need to be independently shown. *See, e.g.*, *Davis v. Pension Benefit Guar. Corp*., 571 F.3d 1288, 1296 (D.C. Cir. 2009) ("It appears that a party moving for a preliminary injunction must meet four independent requirements.") (Kavanaugh, J. concurring). Regardless of the status of the sliding scale approach in this Circuit, the evidence clearly shows that SPLC satisfies each of these factors, thereby warranting a temporary restraining order.

IV. Argument

A. SPLC has a substantial likelihood of succeeding on the merits of its clients' Fifth Amendment access claims.

Defendants' unreasonable restrictions and conditions on legal communications during the COVID-19 pandemic deprive SPLC's clients of their fundamental right to access crucially needed counsel during this dangerous period.

"It is well established that the Fifth Amendment entitles [non-citizens] to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993). This includes the right to meaningful access to counsel and the courts. *Ozoanya v. Reno*, 968 F. Supp. 1, 8 (D.D.C. 1997); *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1273 (11th Cir. 2005) (non-citizens have "the constitutional right under the Fifth Amendment Due Process Clause right to a fundamentally fair hearing to effective assistance of counsel where counsel has been obtained"); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1510 (C.D. Cal. 1988) (holding that immigration officials "have a constitutional duty not to obstruct [detained immigrants'] access to courts"). "Regulations and practices that unjustifiably obstruct the availability of professional [legal] representation or other aspects of the right of access to the courts are invalid." *See Procunier v.*

Martinez, 416 U.S. 396, 419 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989). Accordingly, when Defendants impose unreasonable restrictions or conditions on legal communications between SPLC and its clients, Defendants' conduct violates the Fifth Amendment. *See, e.g., Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1162 (D. Or. 2018) ("Government practices that effectively deny access to counsel include the detention of aliens far from where potential or existing counsel was located, limited attorney visitation hours, and the processing of aliens at locations where telephones were not available to them."); *Arroyo v. U.S. Dep't of Homeland Sec.*, No. 8:19-CV-815, 2019 WL 2912848, *17–18 (C.D. Cal. June 20, 2019) (granting preliminary injunctive relief because plaintiffs were likely to succeed on merits of Fifth Amendment claim regarding Defendants' interference with detained immigrants' attorney-client relationships); *Torres*, 411 F. Supp. 3d at 1063–64 (unreasonable burdens on attorney-client relationship violate Fifth Amendment rights of detained immigrants). The Central District of California has recently held that Defendants violate the Fifth Amendment by failing to accommodate access to crucially needed legal counsel during the COVID-19 pandemic. *See* Min. Order, *Torres*, No. 5:18-CV-2604 (ECF No. 144).

Here, the evidence plainly shows that Defendants' policies, practices, and omissions concerning legal communications during the COVID-19 pandemic impose unreasonable restrictions on SPLC's clients' access to their attorneys and therefore violate the Fifth Amendment. As detailed above, the evidence shows that in-person legal visits are functionally impossible during the COVID-19 pandemic due to a variety of factors, including the high-risk of infection and the national shortage of PPE. Rivera Decl. ¶ 20; Williams Decl. ¶ 10. Consequently, SIFI and its clients must rely on remote communications, such as VTC and legal calls, in order to prepare SIFI's clients for their removal cases and assist SIFI clients in their

efforts to be released from detention during this deadly pandemic. Rivera Decl. ¶¶ 17-48. Yet, Defendants have altogether failed to modify their policies and procedures to expand access to crucially needed remote legal communications, implement necessary precautions during remote visits (e.g., by disinfecting phones/VTC rooms and providing detained persons with necessary PPE), and provide mechanisms for exchange of legal documents remotely. To the contrary, Defendants have increased barriers to access. Rivera Decl. ¶ 20. In some cases, these barriers have altogether barred individuals from obtaining SPLC's services, including to obtain release. Williams Decl. ¶ 19. These access barriers are unreasonable as evidenced by Defendants' own detention standards, expert opinion, and legions of legal precedent. Schriro Decl. ¶¶ 50–100.

For example, the lack of confidentiality in communication between SPLC's clients and their legal teams violate DHS's Performance Based National Detention Standards ("PBNDS"). The PBNDS mandate that "each facility shall ensure privacy by providing a reasonable number of telephones on which detainees can make such calls without being overheard by staff or other detainees." PBNDS 5.6(V)(F)(2). Facility "staff may not monitor phone calls made in reference to legal matters." *Id.* According to Dora Schriro, a detention operations expert, the current conditions at the facilities exhibit a failure to comply with ICE Detention Standards for confidentiality. *See* Schriro ¶¶ 92–100. The evidence further shows that these violations of the PBNDS are merely the tip of the iceberg in terms of ICE's violation of its own standards concerning attorney access. *See* Schriro ¶¶ 110-15. "[R]estrictions which are not reasonably related to orderly administration cannot stand." *Nunez v. Boldin*, 537 F. Supp. 578, 582 (S.D. Tex. 1982)

Defendants' conduct is not only unreasonable, it is also dangerous—even deadly. Defendants' refusal to expand access to remote legal communications contradicts CDC guidance.

See CDC Interim Guidance at 13–14 (detailing the need to expand virtual communications and clean electronic surfaces regularly). And even where VTC and phone use is successful, Defendants' failure to disinfect these areas and provide detained persons with PPE forces SPLC's clients to choose between speaking to their attorneys and risking infection with COVID-19 *or* foregoing a legal call (and any hope of release) to avoid transmission. Rivera Decl. ¶¶ 36, 47; Venters Decl. ¶¶ 14, 32–36.

Numerous courts have held that similar combinations of access barriers as those described herein deny timely and confidential remote legal communications in violation of a detained person's right to access counsel and the courts. *See, e.g.*, *Castillo v. Nielsen*, No. 5:18-CV-01317, 2018 WL 6131172 (C.D. Cal. June 21, 2018) (granting TRO enjoining DHS from limiting phone calls and in-person visits to detained immigrants housed at a medium security prison); *Innovation Law Lab*, 310 F. Supp. 3d at 1162 (granting TRO requiring detention facility to, *inter alia*, expand access to remote legal communications and requiring those communications to be confidential); *Orantes-Hernandez*, 685 F. Supp. at 1511 ("Defendants have violated detained plaintiff class members' rights to effective representation of counsel by unduly restricting attorney and paralegal visitation, failing to provide private telephone and visitation facilities, and in some cases failing to provide adequate telephone access."); *Louis v. Meissner*, 530 F. Supp. 924, 927 (S.D. Fla. 1981) (granting injunctive relief when there was a "general unavailability of telephones" in detention facilities thereby restricting detained persons' access to counsel); *Johnson ex rel. Johnson v. Brelje*, 701 F.2d 1201, 1207 (7th Cir. 1983) (finding two ten-minute calls a week to criminal defendants detained was unreasonable barrier to access courts).

Most recently, a federal district court entered a temporary restraining order requiring Defendants to expand remote legal communications during the COVID-19 pandemic, holding that Defendants' failures to accommodate necessary remote legal communications at a detention facility in California during the pandemic most likely violated the Fifth Amendment. *See* Min. Order, *Torres*, No. 5:18-CV-2604 (ECF No. 144). In *Torres*, the court found that pre-existing access barriers almost identical to those complained of in this case—lack of confidential phone calls, unreliable and inconsistent procedures, strict time limitations—were exacerbated by the virtual elimination of in-person visits due to Defendants' COVID-19 restrictions. The court held that this combination of limitations on in-person legal visits and restrictions on phone and other remote communications warranted emergency relief. According to the court: "Although the harm to attorneys and clients has been magnified by the pandemic, it is still fair to say Defendants' own policies caused the harm, not the virus or the shortage in PPE." *Id*. at 10.

As in *Torres*, the evidence here establishes that Defendants' myriad—and mutually reinforcing— failures to accommodate legal communications during the COVID-19 pandemic unreasonably impedes SPLC's clients' rights to access crucially needed legal counsel. Sealed inside of Defendants' remote detention centers, SPLC's clients are unable to reliably, adequately, and confidentially communicate with attorneys who can assist them in their removal cases, in obtaining release, or in advocating for improved conditions and medical care during the pandemic. For these reasons, SPLC's clients are likely to succeed on their merits of their due process claim.

B. SPLC has a substantial likelihood of succeeding on the merits of its clients' substantive due process claims.

Defendants' policies, practices and omissions concerning legal communications during the COVID-19 pandemic are unnecessarily restrictive and excessive and, therefore, constitute punishment in violation of the Fifth Amendment's substantive due process protections.

Immigration detention is "undisputedly civil" in nature, *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 187 (D.D.C. 2015), and therefore people in immigration detention are entitled to "more considerate treatment" than individuals confined pursuant to criminal process, *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982). For that reason, Defendants may not impose conditions or restrictions on people in immigration detention that are "punitive" in nature. *See Torres*, 411 F. Supp. 3d at 1064–65. Conditions or restrictions in civil detention are unconstitutionally "punitive" where there is either a "subjective intent to punish" *or* where the condition or restriction "is objectively unreasonable or excessive relative to the Government's proffered justification." *Banks*, 2020 WL 1914896, at *6 (citing *United States v. Moore*, No. 1:18-CR-198, 2019 WL 2569659, at *2 (D.D.C. June 21, 2019)); *accord Bell v. Wolfish*, 441 U.S. 520, 538–39 (1979); *Torres*, 411 F. Supp. 3d at 1064–65. A presumption of punitiveness arises (1) where those conditions "are employed to achieve objectives that could be accomplished in so many alternative and less harsh methods" or (2) where there conditions are "identical to, similar to, or more restrictive than" those under which individuals detained pursuant to criminal process are held. *Jones v. Blanas*, 393 F.3d 918, 932–34 (9th Cir. 2004).

Because SPLC can establish both presumptions, it is likely to prevail on its claims that Defendants' conditions and restrictions concerning legal communications are unconstitutionally punitive. First, the evidence plainly establishes that Defendants' conditions and restrictions concerning legal communications at the Facilities are objectively unreasonable and excessive

relative to any justification that Defendants could conceivably proffer. As detention expert Dora Schriro explains, Defendants have failed to ensure that policies and practices concerning legal communications at the Facilities comply with ICE's very own standards and requirements. For example, ICE is failing to ensure that the Facilities comply with its own standards on confidential legal communications. Schriro Decl. ¶¶ 92–100. Likewise, ICE has failed to ensure that the Facilities provide expedient and reliable access to legal calls and video-conferencing services, as well as reliable facilitation of legal document exchange, in violation of its own standards. Schriro Decl. ¶¶ 57–59; ¶¶ 80–90. As the evidence lays bare, these examples are just a few of many of ICE's outright failures to ensure that the Facilities comply with ICE's own standards concerning legal communications. This evidence is sufficient for SPLC to establish that Defendants' practices concerning legal communications are excessive and therefore constitute punishment. *See Torres*, 411 F. Supp. 3d at 1065 (plaintiffs' allegations that ICE failed to follow regulations in the PBNDS at an ICE facility were sufficient to show punitive conditions and state a substantive due process claim). But there is more.

ICE's failure to implement necessary precautions at the Facilities to ensure that spaces and devices used for legal communications are properly disinfected and that detained persons have adequate access to gloves or other protective equipment is also objectively unreasonable. Schriro Decl. ¶¶ 109–11; Venters Decl. ¶¶ 29, 36; Sanchez-Martinez Decl. ¶¶ 12–14; Rivera Decl. ¶¶ 32, 36, 47; López Decl. ¶¶ 16, 20; Report & Recommendation, *Dada v. Witte*, No. 1:20-CV-458 (W.D. La. Apr. 30, 2020), ECF No. 17 (outlining lack of hygienic conditions at LaSalle and Pine Prairie that rendered all petitioners housed at the facilities "all at moderate to high risk of exposure" to the virus). This evidence further supports a finding of punitive conditions. *Fraihat*, 2020 WL 1932570, at *25 ("During a pandemic such as this, it is likely punitive for a

civil detention administrator to fail to mandate compliance with widely accepted hygiene, protective equipment, and distancing measures until the peak of the pandemic, and to fail to take similar systemwide actions as jails and prisons.").

Defendants' policies requiring attorneys to rely on post mail to exchange legal documents and submit parole requests is also excessive relative to any justification that may be proffered. Rivera Decl. ¶¶ 50–56. Post mail has proven unreliable to SIFI staff (*id.* at ¶ 9) and Defendants have themselves made exceptions to this requirement. *Id.* ¶ 55 (ICE agents directed a SIFI attorney to email the humanitarian parole request after the attorney stated she had mailed to them weeks earlier, per their instructions). Defendants similarly have refused to retrieve fax or download electronic copies of legal documents for detained individuals. (Rivera Decl. ¶ 53; ex. B). This refusal is also excessive when viewed in light of the fact that all the Facilities already rely on fax to retrieve privacy waivers from, and send medical records to, attorneys. *Id.* at ¶ 12; *cf.* López Decl. ¶ 13.

Second, the evidence establishes that Defendants' conditions and restrictions on legal communications are unconstitutionally "punitive" because they "are similar to[] or more restrictive than" policies on legal communications for individuals in criminal custody. *See Jones*, 393 F.3d at 932. For example, the Federal Bureau of Prisons COVID-19 Action Plan provides clear instructions for attorneys seeking confidential calls with their clients via a chart listing consolidated legal centers and phone numbers. Fed. Bureau of Prisons, *Federal Bureau of Prisons COVID-19 Action Plan*, https://www.bop.gov/resources/news/20200313_covid-19.jsp (last visited May 6, 2020). The CDC has also issued guidance to ensure that individuals in correctional settings have adequate methods to communicate via telephone or videoconference with their lawyers. *See* CDC Interim Guidance.

In sharp contrast, Defendants have failed to ensure that detained persons have adequate and reliable access to confidential legal communications during the COVID-19 pandemic, supporting a finding of punitive conditions. Defendants have failed to issue a single mandate to ensure access to legal communications during the pandemic. Schriro Decl. ¶¶ 35–46. As a direct consequence of Defendants' failure to provide adequate guidance and oversight concerning legal communications, SIFI attorneys at the Facilities have been substantially impeded in obtaining securing confidential legal communications with their clients. Rivera Decl. ¶¶ 21–44. Because conditions for detained individuals are worse than those for individuals with criminal convictions, a Fifth Amendment substantive due process violation has occurred. *See, e.g.*, *Torres*, 411 F. Supp. 3d at 1064–65 (allegations that there were less restrictive legal communication policies and practices in jails as compared to ICE facility was sufficient to create presumption of punitive conditions); *Fraihat*, 2020 WL 1932570, at *25 (comparing BOP memorandum commanding BOP director to "immediately maximize" transfers to home confinement with ICE guidelines to FODs to "please" make individualized determinations as to release).

In sum, the evidence firmly establishes that Defendants have altogether failed to provide SPLC's clients with the "more considerate" treatment to which they are entitled during the COVID-19 pandemic. Instead, Defendants' policies and practices concerning legal communications during the pandemic are excessive, violate their own standards, and are even more restrictive than those of certain prisons. SPLC is therefore more than likely to succeed on the merits of its Fifth Amendment substantive due process claim.

C. Defendants' violation of SPLC's clients' constitutional rights causes irreparable harm.

"It has long been established that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (internal citation and quotation marks omitted); *see also Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (prospective due process violation constitutes threat of irreparable harm). The mere allegation of a constitutional violation may be sufficient to show irreparable harm when the three other factors for a TRO are satisfied. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 304 (D.C. Cir. 2006). More palpably, because of the heightened risk of contracting COVID-19 in the Facilities, especially among vulnerable people in detention, Venters Decl. ¶ 25, adequate and reliable access to counsel to seek release on bond, parole, or habeas is a matter of life and death for SPLC's clients. In this context, restrictions on SPLCs' clients' Fifth Amendment rights indisputably cause irreparable harm.

The facilities' delays and nonresponses in scheduling remote legal visits with SIFI staff have narrowed the prospects for release for Plaintiff's clients, increasing their risk of exposure to the coronavirus. At Irwin, for example, because a SIFI attorney's repeated requests to schedule a VTC with a client were ignored, the call never happened. As a result, the client could not be a plaintiff in habeas litigation seeking release of medically vulnerable people. Williams Decl. ¶ 19; *see also* Rivera Decl. ¶¶ 23–24 (noting delays in humanitarian parole applications at LaSalle because SIFI cannot conduct interviews). Erratic scheduling practices have damaged SPLC's clients' ability to prepare for their immigration hearings with their attorneys, jeopardizing their prospects for immigration relief. Rivera Decl. ¶¶ 24, 52, 56. Further, Defendants' failure to ensure the availability of remote legal visits has meant that SPLC's clients must resort to

conducting legal calls without privacy in the communal day room to more timely consult with their attorneys. Rivera Decl. ¶¶ 36, 46–47; Williams Decl. ¶ 13. And in some cases, this has even led to detained persons being unable to obtain SPLC's services to seek release from detention. Williams Decl. ¶ 19.

"[T]he irreparable harm here, the denial of access to legal counsel, is apparent on its face." *Fed. Defs of New York, Inc. v. Fed. Bureau of Prisons,* 416 F. Supp. 3d 249, 251 (E.D.N.Y. 2019) (prison banned legal visitation outright). Denial of access to counsel and the courts that creates a risk of missed filing deadlines, ineffective relief applications or other motions, and hastily prepared oral presentations at hearings, also creates the threat of irreparable harm warranting emergency relief. Compounding this harm is the risk to SPLC's clients of contracting COVID-19 and sustaining severe illness, organ failure and even death. This risk increases with the duration of their detention, notwithstanding viable claims for release that they cannot file because of access barriers in Defendants' control, and this injury is irreparable. The stakes of immigration proceedings are simply too high to deny a respondent access to counsel. *See Innovation Law Lab*, 342 F. Supp. 3d at 1081 ("The harms likely to arise from the denial of access to legal representation in the context of asylum applications are particularly concrete and irreparable."); *Valentine v. Beyer*, 850 F.2d 951, 957 (3d Cir. 1988) ("Clearly no greater harm than the inability to meet filing deadlines, potentially precluding litigation forever, is possible when the question of access to the courts is at issue."); *Doe v. McAleenan,* 415 F. Supp. 3d 971, 979 (S.D. Cal. 2019) ("Petitioners allege that without access to counsel, they risk the irreparable harm of a non-reviewable erroneous decision that forces them to return to Mexico to face persecution. Petitioners emphasize the complexity of non-refoulement interviews that they—as unsophisticated migrants in stressful and foreign circumstances—do not understand; and that

without access to their counsel, their ability to answer questions and meaningfully participate in the interview is significantly impaired. Given the high stakes of the interview, the Court finds Petitioners have shown likelihood of irreparable harm.").

The injury caused by the loss of access to counsel and the courts is not only irreparable, but for SPLC's clients concrete and ongoing. To obstruct someone's access to counsel as she tries to challenge her detention in a facility with confirmed COVID-19 cases where "ICE will be unable to stop the spread of the virus through the facility," (Venters Decl. ¶ 9), and to defend against her removal, is to deny her the right to counsel when she needs it most. In the last month, while SIFI attorneys have struggled to schedule phone calls and set up VTC appointments to communicate with their clients, EOIR courts have operated as if it were business as usual. Rivera Decl. ¶ 15. SPLC's clients have had to prepare various filings and prepare for hearings with reduced assistance from their legal teams. Rivera Decl. ¶ 25; Williams Dec. ¶¶ 7, 19, 11. Immigration law is second only to the tax code in complexity; it is "a labyrinth that only a lawyer could navigate." *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005). Without adequate and reliable access to their counsel, SPLC's clients suffer real harm as they try to navigate this labyrinth during this deadly pandemic.

D. The balance of equities and the public interest weigh in favor of restraining Defendants from violating SPLC's clients' constitutional rights.

The balance of equities and the public interest favor issuing a temporary restraining order to remove the access barriers between SPLC and its clients at Defendants' facilities. When the government is the non-movant, these final considerations for a grant of injunctive relief merge into one "because the government's interest *is* the public interest." *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016) (emphasis in original). A movant may satisfy this factor by demonstrating a violation of her constitutional rights. *Simms v. District of Columbia*,

872 F. Supp. 2d 90, 105 (D.D.C. 2012) ("It is always in the public interest to prevent the violation of a party's constitutional rights."); *see also Upshaw v. Alameda Cty.*, 377 F. Supp. 3d 1027, 1033 (N.D. Cal. 2019) (finding public interest in enjoining punitive conditions of confinement in violation of due process); *Doe v. McAleenan*, 415 F. Supp. 3d 971, 979 (S.D. Cal. 2019) ("[T]he public interest is served by allowing Petitioners' access to retained counsel prior to and during their non-refoulement interviews."). In addition to the public interest in the vindication of constitutional rights, the attorney-client relationship is "an institutionally significant . . . relationship" in the American legal system, and as such, a court order protecting that relationship "advances broader public interests in the observance of law and administration of justice." *Council on Am.-Islamic Relations*, 667 F. Supp. 2d at 79 (internal quotation marks and citation omitted).

A TRO would serve the public interest by ensuring the protection of SPLC's clients' constitutional rights and upholding the integrity of removal proceedings during the COVID-19 pandemic. It also would place a minimal administrative burden on Defendants given the limited scope of relief requested. SPLC seeks an order which largely mirrors policies envisioned by Defendants' own regulations and guidance. *See* Min. Order at 11, *Torres*, No. 5:18-CV-2604 (ECF No. 144) ("Although a grant of relief requires Defendants to take steps to ensure access to counsel, any administrative burden will be minor based on the limited scope of that relief, which can mirror policies already envisioned by Defendants' own regulations and guidance."). An order enforcing Defendants' own access standards requires Defendants to enforce what they already have the authority and means to do. All Facilities were always supposed to have, for example, "at least one operable telephone for every 25 detainees," legal calls unlimited in number or duration, and confidential phone lines, but simply never have. PBNDS 5.6(V)(A)(1);

id. (V)(F)(1)–(2). Defendants have the ultimate and non-delegable constitutional obligation to ensure that conditions in the facilities comply with constitutional, statutory, and regulatory mandates. Defendants also have the contractual authority to require this from their operators, and an extensive monitoring and compliance bureaucracy to ensure that it happens.[4] All this motion asks is that they finally, and immediately, fulfill those obligations and use their authority, which they have historically refused to do. Schriro Decl. ¶¶ 17–24.

E. The Court should waive a security bond for this application.

SPLC also requests that the Court exercise its broad discretion to waive any security bond for issuance of the TRO. Federal Rule of Civil Procedure 65(c) provides that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." However, it is well settled that, "[t]he amount of security required is a matter for the discretion of the trial court; it may elect to require no security at all." *Citizen's Alert Regarding Env't v. U.S. Dep't of Justice*, No. 95-CV-1702, 1995 WL 748246, at *12 n.10 (D.D.C. Dec. 8, 1995) (citation omitted). "Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right." *Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F. Supp. 2d 1326, 1335 (M.D. Fla. 2009). To impose a financial condition on the vindication of a movant's constitutional right may "impact negatively on the exercise of" those rights. *Smith v. Bd. of Election Comm'rs for City of Chicago*, 591 F. Supp. 70, 72 (N.D. Ill. 1984).

[4] *See* Nat'l Immigrant Justice Ctr, *ICE Offices Involved in Detention Center Inspections*, https://immigrantjustice.org/sites/immigrantjustice.org/files/images/T%26HR%20DHS%20flow%20chart%20linked%20version2.pdf.

SPLC is a non-profit organization seeking to vindicate the constitutional rights of its indigent clients who are civilly detained. The possible loss that Defendants would suffer from a TRO requiring they comply with the Constitution and enforce their own detention standards is minimal. SPLC merely asks that Defendants comply with their constitutional obligations—in part, by enforcing various parts of the PBNDS requiring free legal phone calls, prohibiting limitations on legal communications, requiring competent scheduling, and requiring a sufficient ratio of phone or VTC equipment to detained persons. The relief SPLC seeks that is beyond the mere enforcement of the PBNDS also imposes a minimal administrative burden. Providing detained persons with documents through fax or email, for instance, at facilities where attorneys already communicate with staff through fax or email does not entail purchasing or designing any new communication systems. When the possible monetary loss caused by an injunction is minimal, waiver or a minimal bond is appropriate. *See, e.g.*, *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 107 (D.D.C. 2012) ("[T]he costs or damages sustained by the District would be modest…").

F. The relief sought is tailored to the access barriers created by Defendants' COVID-19 access restrictions

This Circuit has "long held that an injunction must be narrowly tailored to remedy the specific harm shown." *Nebraska Dep't of Health & Human Servs. v. Dep't of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006). SPLC seeks relief that is particularly tailored to the specific access barriers and substantive due process violations at Defendants' Facilities. SPLC has demonstrated that unreliable scheduling, delays, restrictive time limits, poor connectivity, lack of confidentiality in remote legal communications, and restrictions on legal document exchange obstruct its clients' access to counsel and the courts. As a remedy, SPLC seeks more robust scheduling systems and staffing, the removal of time limits on communications,

maintenance of phones and VTC systems, the provision of private settings for confidential legal communications, and an ability to exchange necessary legal documents with clients through a reliable and effective method (e.g., fax or e-mail).

These remedies fit the violations narrowly. *See, e.g.*, Min. Order at 12–14, *Torres*, No. 5:18-CV-2604 (ECF No. 144) (finding free legal phone calls, 24-hour scheduling system, and document drop box appropriately tailored remedies to similar access barriers); *Innovation Law Lab*, 310 F. Supp. 3d at 1165 (issuing TRO requiring new phone lines be installed, that detained immigrants have expanded access to legal calls, and that staff resources be dedicated to accommodate increase in attorney visits); *McClendon v. City of Albuquerque*, 272 F. Supp. 2d 1250, 1260 (D.N.M. 2003) (enjoining jail from limiting the length of legal calls).

SPLC has also demonstrated that Defendants are violating its clients' substantive due process rights to be free from punitive conditions by confining them in conditions that are worse than those in facilities where individuals with criminal convictions are held. The remedies SPLC seeks for this constitutional violation are also narrowly tailored. *See Basank v. Decker*, No. 20-CV-2518, 2020 WL 1481503, at *7 (S.D.N.Y. Mar. 26, 2020) (TRO releasing medically vulnerable persons from ICE detention); *Fraihat*, 2020 WL 1932570, at *25 (preliminary injunction ordering nationwide custody reviews of medically vulnerable persons in ICE detention); Mem. Op. at 33–37, *Mays v. Dart*, No. 1:20-CV-2134 (N.D. Ill. Apr. 9, 2020), ECF No. 47 (issuing TRO ordering various sanitation measures but declining to release detained persons in Cook County Jail during coronavirus pandemic); Mem. Op. at 27–29, *Banks v. Booth*, No. 1:20-CV-849 (D.D.C. Apr. 20, 2020), ECF No. 51 (issuing TRO ordering D.C. DOC provide various sanitation measures and adhere to social distancing protocols).

V. Conclusion

For the reasons set forth above, SPLC respectfully requests this Court enter a Temporary Restraining Order requiring Defendants to immediately implement the requested remedies.

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Respectfully submitted,

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