MICHAEL KAUFMAN (CA Bar No. 254575)
EVA BITRAN (CA Bar No. 302081)
ZOË MCKINNEY (CA Bar No. 312877)
ACLU OF SOUTHERN CALIFORNIA
1313 West 8th Street
Los Angeles, CA 90017
Telephone: (213) 977-5232
Facsimile: (213) 977-5297
MKaufman@aclusocal.org
EBitran@aclusocal.org
ZMcKinney@aclusocal.org

Attorneys for Plaintiffs

(Additional counsel listed on following page)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ERNESTO TORRES, DESMOND TENGHE, JASON NSINANO, on behalf of themselves and all others similarly situated, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, IMMIGRANT DEFENDERS LAW CENTER,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN, Secretary of Homeland Security; UNITED STASTES IMMIGRATION AND CUSTOMS ENFORCEMENT; RONALD D. VITIELLO, Acting Director, Immigration and Customs Enforcement; DAVID MARIN, Field Office Director, Los Angeles Field Office of ICE; ORANGE COUNTY SHERIFF'S DEPARTMENT; GEO GROUP, INC., a Florida corporation,

Defendants.

Case No. 5:18-cv-02604-JGB-SHK

PLAINTIFFS' OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO DISMISS [ECF NO.79]

[Plaintiffs' opposition to Defendant GEO's motion to dismiss filed concurrently]

Hearing Date: Sept. 30, 2019, 9:00 a.m.
Hearing Location: Riverside Ctrm. 1
Judge: Hon. Jesus G. Bernal

Additional Plaintiffs' counsel

JAYASHRI SRIKANTIAH (CA Bar No. 189556)
LISA WEISSMAN WARD (CA Bar No. 298362)
IMMIGRANTS' RIGHTS CLINIC
Mills Legal Clinic at Stanford Law School
Crown Quadrangle, 559 Nathan Abbott Way
Stanford, California 94305-8610
Telephone: (650) 724-2442
Facsimile: (650) 723-4426
jsrikantiah@law.stanford.edu
lweissmanward@law.stanford.edu

SEAN A. COMMONS (CA Bar No. 217603)
CHRISTOPHER M. GRIFFIN (CA Bar No. 317140)
SIDLEY AUSTIN LLP
555 West Fifth Street, Suite 4000
Los Angeles, CA 90013
Telephone: (213) 896-6000
Facsimile: (213) 896-6600
scommons@sidley.com
cgriffin@sidley.com

THEODORE R. SCARBOROUGH (*Pro Hac Vice*)
CHRISTOPHER M. ASSISE (*Pro Hac Vice*)
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
Telephone: (312) 853-7000
Facsimile: (312) 853-7036
tscarborough@sidley.com
cassise@sidley.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

Defendants detain thousands of immigrants in Southern California, without appointed counsel, and deprive them of meaningful access to legal assistance for their immigration cases, pending criminal matters and other critical legal issues they face while incarcerated. The Department of Homeland Security and Immigration and Customs Enforcement are responsible for the conditions of these individuals' confinement and determine when and how they can communicate with people outside the facilities. They have standards that purport to safeguard immigrants' access to legal assistance, but utterly fail to meet these minimal standards. They restrict access to outgoing telephone calls, deny incoming legal calls, charge prohibitively expensive phone rates, and monitor the few legal calls that occur. In-person visitation is scarcely better, with extremely long waits and arbitrary barriers to entry by attorneys. Mail and email provide no alternatives either, as jailed immigrants have no access to the Internet and mail (including legal mail) arrives extremely late and, at times, open.

The consequences are devastating. Defendants' policies and procedures disrupt established attorney-client relationships, prevent immigrants from finding counsel or gathering evidence, isolate immigrants from the outside world, chill immigrants' right to confer with lawyers, and improperly punish immigrants in civil detention. They also prevent attorneys from speaking with clients and providing legal advice. These barriers violate the First and Fifth Amendments to the Constitution, the Immigration and Nationality Act, and the Administrative Procedure Act.

This Court has jurisdiction to remedy these wrongs. Attorney Plaintiffs, suing on their own behalf, and individual Immigrant Plaintiffs, who challenge the conditions of their confinement, unquestionably have standing to prevent ongoing violations of their rights. Although Immigrant Plaintiffs and all putative class members are in removal proceedings, the harms Plaintiffs allege accrue before, and are independent of, any action by the government to remove them. This is most clear because Defendants' policies and practices deny Immigrant Plaintiffs' access to *all*

legal assistance, regardless of whether it relates to immigration proceedings.

Because this Court has jurisdiction and Plaintiffs have stated valid claims to vindicate constitutional and statutory rights, this Court should deny Federal Defendants' motion to dismiss.

STATEMENT OF FACTS

Individual Plaintiffs Ernesto Torres, Desmond Tenghe, and Jason Nsinano ("Immigrant Plaintiffs"), immigrants currently and formerly detained in this District under color of immigration law, bring this putative class action on their own behalf and on behalf of all others similarly situated.[1] Dkt. 62 (First Amended Complaint ("FAC")) ¶¶ 18-56. American Immigration Lawyers Association ("AILA") and Immigrant Defenders Law Service ("ImmDef") (collectively "Attorney Plaintiffs") are legal services organizations whose members advise, represent, and advocate for detained immigrants. *Id.* ¶¶ 73-75. Defendants Department of Homeland Security ("DHS") and Immigration and Customs Enforcement ("ICE") (collectively "Federal Defendants") detain immigrants in removal proceedings under color of immigration law. In Southern California, they do so pursuant to an agreement with defendant GEO Group, which manages the day-to-day operations of the Adelanto ICE Processing Center ("Adelanto"). *Id.* ¶ 85.[2] Adelanto is a jail-like facility in San Bernardino County that has capacity to hold nearly 1,900 detainees. *Id.* ¶¶ 85, 88-90.

Defendants control the conditions of Immigrant Plaintiffs' confinement: they restrict access to telephone calls, in-person attorney visitation, and legal mail inside Adelanto. ICE has promulgated the National Detention Standards, to which GEO is contractually obligated to comply, but in practice Adelanto fails to live up to these standards in numerous respects. *Id.* ¶ 92 (citing, *inter alia*, DHS Off. Inspector

[1] The FAC names as an individual Plaintiff Yakubu Raji, who has since been voluntarily dismissed. Dkt. 89 (Notice of Voluntary Dismissal).

[2] The FAC also names the Orange County Sheriff's Department ("OCSD") as a defendant, Dkt. 62 ¶ 80. Because OCSD will no longer house immigration detainees as of August 1, 2019, Plaintiffs voluntarily dismissed OCSD from this suit after OCSD agreed to make certain accommodations for the putative Class members that remain at the facilities. Dkt. 88 (Stipulation to Dismiss Defendant OCSD).

General, *Management Alert—Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, CA*, OIG-18-86 (Sept. 27, 2018)). Defendants prevent detained immigrants from making free legal calls (even if they are indigent), *id.* ¶¶ 94-98, restrict the availability and hours during which immigrants can make paid or collect calls, *id.* ¶¶ 104-06, charge expensive rates for calls, *id.* ¶ 101, impose onerous requirements (such as the "positive acceptance requirement" that a live person answer the phone, preventing immigrants from leaving voicemail), *id.* ¶ 103, prevent detained immigrants from receiving incoming calls and messages, *id.* ¶¶ 107-10, deny detained immigrants confidentiality during their legal calls, *id.* ¶¶ 111-16, and fail to maintain phones in good working order, *id.* ¶¶ 116-19. For in-person legal visits, attorneys with appointments are at times forced to wait up to four-and-a-half hours to see their clients; those without appointments can wait even longer. *Id.* ¶¶ 129-31. Legal mail often arrives late and at times opened, so it is not a reliable alternative. *Id.* ¶¶ 133, 135.

The communication failures caused by Defendants' policies and practices have the effect of disrupting Immigrant Plaintiffs' representation—with lasting consequences not only for bond and removal proceedings, *id.* ¶¶ 152-56, but also for legal matters outside immigration court. Immigrants detained at Adelanto may have pending habeas petitions, custody matters, criminal appeals, civil rights actions, family-court actions, and petitions for benefits, among other legal matters. *See, e.g.*, *id.* ¶¶ 165-66. For unrepresented immigrants, contact with the outside world is even more critical: they rely on the limited access Defendants provide to find representation and, when that fails, contact family members and friends to gather evidence in support of their cases (both in immigration court and in ancillary proceedings). *See id.* ¶¶ 143-51, 157-64.

Defendants' policies and procedures are so needlessly restrictive as to be punitive. Conditions at Adelanto—including for attorney visitation rooms and phone bays—are virtually indistinguishable from those imposed on pretrial detainees and convicted prisoners. *See id.* ¶¶ 167-70. ICE's National Detention Standards require a

less restrictive model that Defendants could, but do not, adopt. *See id.* ¶ 170.

ARGUMENT

Contrary to Defendants' arguments, this Court has subject matter jurisdiction. Both Individual Plaintiffs (who bring a putative class action) and Attorney Plaintiffs (suing on their own behalf) have standing. The Immigration and Nationality Act ("INA") does not prevent this Court from entering class-wide relief on any of the six claims, and Plaintiffs have alleged sufficient facts to state claims for relief.

I. The Court Has Subject Matter Jurisdiction.

A. Plaintiffs Have Standing.

The Federal Defendants contend that because Plaintiffs Tenghe and Nsinano were released from ICE custody after they filed this action, they "do not have an injury" and thus lack standing to bring this action. Dkt. 79 (Defs' Mot. to Dismiss) at 10-11. Defendants' argument confuses mootness and standing. *See Hernandez v. Lynch*, No. EDCV1600620-JGB-KKX, 2016 WL 7116611, at *12 (C.D. Cal. Nov. 10, 2016) (Bernal, J.) (recognizing that defendants' argument concerning plaintiffs' release from detention "are more properly raised under the mootness doctrine"), *aff'd sub nom. Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017). "A plaintiff's standing is assessed as of the time an action was initiated and is unaffected by subsequent developments." *Id.* at *12; *see also Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) (standing exists if plaintiffs' injuries "w[ere] at [the moment of filing the complaint] capable of being redressed through injunctive relief"). Plaintiffs Tenghe and Nsinano were detained at the time of filing the complaint and therefore their injuries were "capable of being redressed through injunctive relief." *See* Dkt. 1 ¶ 28 (Plaintiff Tenghe was detained at Adelanto); Dkt. 1 ¶¶ 37-43 (Plaintiff Nsinano was detained at Theo Lacy and had spent approximately two years at Adelanto between 2015 and 2017).[3]

[3] Likewise, Plaintiff Torres, whose standing Defendants do not contest, Dkt. 79 at 10, was detained at Adelanto as of the filing of the complaint. Dkt. 1 ¶ 18.

While their release may moot individual claims for relief, Plaintiffs nonetheless may maintain their claims for injunctive relief for two reasons. First, "the Ninth Circuit has held that plaintiffs with mooted individual claims can maintain claims for injunctive relief where they 'are challenging an ongoing government policy.'" *Hernandez*, 2016 WL 7116611, at *12 (citing *United States v. Howard*, 480 F.3d 1005, 1010 (9th Cir. 2007)). Second, there is an exception to the mootness doctrine for "inherently transitory" claims. *McLaughlin*, 500 U.S. at 52; *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1087, 1091 (9th Cir. 2011) ("the [Supreme] Court has applied the [mootness] doctrine flexibly, particularly where the issues remain alive, even if the plaintiff's personal stake in the outcome has become moot.") (internal citations omitted); *see also* 1 Newberg on Class Actions 2:13-15 (5th ed. Supp. 2013) (discussing this exception to mootness). Courts have recognized that claims by immigration detainees are paradigmatic examples of inherently transitory claims. *See, e.g.*, *Preap v. Johnson*, 831 F.3d 1193, 1197 (9th Cir. 2016), *rev'd and remanded on other grounds sub nom. Nielsen v. Preap*, 139 S. Ct. 954 (2019); *Hernandez*, 2016 WL 7116611, at *13; *Lyon v. ICE*, 300 F.R.D. 628, 639 (N.D. Cal. 2014).

Finally, Defendants observe that the Theo Lacy and James A. Musick facilities have terminated their contracts with ICE. Dkt. 79 at 12-13. For this reason, Plaintiffs recently stipulated to the dismissal of Defendant Orange County Sheriff's Department, which operates those facilities. *See* Dkt. 89. However, Defendants are wrong that the termination of the Orange County contracts renders Plaintiffs' claims moot, Dkt. 79 at 12-13, because none of Plaintiffs' claims for relief is specific to those facilities. *See generally* Dkt. 62 ¶¶ 183-215. Plaintiffs maintain live claims against Federal Defendants to challenge the conditions at Adelanto, and Plaintiffs' allegations concerning the OC facilities are relevant to establishing Federal Defendants' practices and procedures in this District.

B. Sections 1252(a)(5) and 1252(b)(9) Do Not Bar Plaintiffs' Claims.

Defendants claim that Sections 1252(a)(5) and 1252(b)(9) deprive this Court of

jurisdiction to hear Immigrant Plaintiffs' claims challenging the conditions of their confinement. But Defendants' reading of these provisions is insupportably overbroad, and ignores—indeed, fails to cite—the controlling Supreme Court decision on the scope of these provisions. *See Jennings v. Rodriguez*, 138 S.Ct. 830, 840 (2018) (Alito, J.).[4] Properly construed and taking into account the Supreme Court's mandate that the statute not be read to deprive immigrants "of any meaningful chance for judicial review," *id.* at 840, Section 1252 does not bar this Court's jurisdiction.

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). Section 1252 therefore, 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). *Jennings* expressly observed that a conditions-of-confinement claim is 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.

This Court recently addressed the scope of Sections 1252(a)(5) and 1252(b)(9) in *Arroyo v. U.S. Dep't of Homeland Security*, No. SACV 19-815 JGB (SHKx), 2019 WL 2912848 (C.D. Cal. June 20, 2019) [hereinafter *Arroyo*]. As this Court's analysis

[4] In *Jennings*, the three dissenting Justices also found that Sections 1252(a)(5) and 1252(b)(9) did not apply to the petitioners' claims. *See* 138 S.Ct. at 876 (Breyer, J., dissenting). Because Justice Alito's plurality opinion is narrower, it is the Court's controlling opinion on this issue.

makes clear, the application of these provisions depends on the identity of the plaintiff and the nature of the claim. *See Arroyo* at *13 ("[T]he nature of the right violated guides the jurisdictional inquiry."). Following this Court's approach, Plaintiffs here review each of Immigrant Plaintiffs' and Attorney Plaintiffs' claims, and explain why Sections 1252(a)(5) and 1252(b)(9) do not bar them.

First, Sections 1252(a)(5) and 1252(b)(9) do not apply to **Attorney Plaintiffs' First Amendment claims** (Count 4). As in *Arroyo*, "Attorney Plaintiffs' rights are not connected to removal orders entered against their clients." *Arroyo* at *17 n.7. Defendants apparently do not contest this point, as they argue Sections 1252(a)(5) and 1252(b)(9) only bar Immigrant Plaintiffs' claims. *See* Dkt. 79 at 4-9.

Second, Sections 1252(a)(5) and 1252(b)(9) do not apply to **represented Immigrant Plaintiffs' INA and procedural due process claims** (Counts 1 and 2). As this Court found in *Arroyo*, represented Immigrant Plaintiffs' right-to-counsel claims (arising under the INA and the Due Process Clause) rest on the premise that "an immigrant who has already retained counsel enjoys the right not to have that relationship unduly burdened or interfered with," *Arroyo* at *13. *See* Dkt. 62 ¶¶ 152-56, 186. These claims fall outside Section 1252 because they assert "harm that accrues by conduct imposing a significant burden on the attorney-client relationship without looking to the effect of that burden on the underlying removal proceedings." *Arroyo* at 13.[5]

Third, **unrepresented Immigrant Plaintiffs' INA and procedural due process claims** may likewise proceed. Plaintiffs recognize that this Court concluded that it lacked jurisdiction over unrepresented detainees' right-to-counsel and full-and-fair-hearing claims in *Arroyo* at *14. However, this Court also recognized that many

[5] Defendants observe that right to counsel claims are often raised in petitions for review of a removal order, but those claims typically concern whether the *immigration judge*, not the immigrants' custodians, acted contrary to law by, for example, unlawfully denying a continuance. Dkt. 79 at 6 (citing, *inter alia*, *Ram v. Mukasey*, 529 F.3d 1238, 1242 (9th Cir. 2008), and *Biwot v. Gonzales*, 403 F.3d 1094, 1100 (9th Cir. 2005)). Because Plaintiffs do not challenge any immigration judge's decision or the conduct of removal proceedings, these cases are distinguishable.

detained immigrants "face proceedings that are likely not included within this jurisdictional bar and related zipper clause," such as individuals with final orders of removal or collateral proceedings such as upcoming bond hearings or habeas actions. *Arroyo* at *16 (granting Plaintiffs' leave to amend to address deficiencies in unrepresented plaintiffs' claims). Here, Plaintiffs have alleged that putative class members have ongoing legal matters unrelated to removal: post-conviction relief, criminal appeals, family court cases, civil rights actions, and habeas petitions, to name a few.[6] *See* Dkt. 62 ¶¶ 156-66; Dkt. 62 at ¶¶ 12-13.[7]

Further, *all* represented and unrepresented immigrants are eligible for some form of custody review within a short period after detention for which they may need the assistance of counsel. *See* 8 C.F.R. 1003.19 (providing for bond hearings for individuals detained under color of Section 1226(a)); 8 C.F.R. 212.5 (providing for parole determinations for individuals detained under color of Section 1225); 8 C.F.R. 241.4 (providing for post-order custody review for individuals detained under color of Section 1231); *Matter of Joseph*, 22 I&N Dec. 3387 (BIA 1999) (providing for custody review of individuals detained under color of Section 1226(c)). They may invoke this Court's jurisdiction. *See Jennings*, 138 S.Ct. at 840 (finding jurisdiction over challenges to prolonged detention); *Ramos v. Sessions,* 293 F. Supp. 3d 1021, 1028 (N.D. Cal. 2018) ("a district court retains jurisdiction . . . to review legal and constitutional challenges to bond hearings"); *Cancino-Castellar v. Nielsen,* 338 F. Supp. 3d 1107, 1117 (S.D. Cal. 2018) (in light of *Jennings*, "treating Plaintiffs' Fifth Amendment claim regarding alleged prolonged detention, resulting from delays in

[6] *See e.g. Novoa v. GEO Grp., Inc.*, No. EDCV172514-JGB-SHKX, 2018 WL 3343494, at *15 (C.D. Cal. June 21, 2018) (Bernal, J.) (denying in part motion to dismiss wage-and-hour suit on behalf of putative class of Adelanto detainees); Complaint, *Rivera Martinez v. GEO Grp., Inc.*, No. 5:18-cv-01125-R-GJS (C.D. Cal. filed July 23, 2018) (lawsuit on behalf of hunger strikers detained at Adelanto).

[7] Defendants are right that Immigrant Plaintiffs are not entitled to counsel appointed under the Sixth Amendment, but this is irrelevant: as discussed in Part II.B , *infra*, the Constitution protects against government interference with a person's right to hire or consult with counsel regardless of whether the attorney is retained or appointed. *See, e.g.*, *Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 611 (2005), *as amended on denial of reh'g* (9th Cir. July 21, 2005).

presentment, as 'arising from' an action taken to remove an alien would make Plaintiffs' claim 'effectively unreviewable'").

Moreover, an immigration judge has no authority to order Defendants to change the conditions at a detention facility; therefore, Plaintiffs can win no redress by raising this challenge in removal proceedings. Unrepresented detainees can only obtain "meaningful judicial review" of these claims by presenting them to an Article III court. *See Rodriguez-Castillo v. Nielsen*, No. 5:18-cv-1317-ODW-MAA, 2018 WL 6131172 (C.D. Cal. June 21, 2018) (granting TRO requiring telephone access for jailed immigrants); *Innovation Law Lab (ILL) v. Nielsen*, 342 F. Supp. 3d 1067 (D. Or. 2018). While this Court found this consideration insufficient to avoid the application of Sections 1252(a)(5) and 1252(b)(9) in *Arroyo*, Plaintiffs submit that the inability of immigration courts to order relief to redress constitutional and statutory injuries—including injuries suffered separate and apart from removal proceedings—removes claims from the ambit of Sections 1252(a)(5) and 1252(b)(9).

Fourth, **Immigrant Plaintiffs' First Amendment claims** likewise fall outside the scope of Sections 1252(a)(5) and 1252(b)(9) (Count 5). As the Supreme Court clarified in *Jennings*, Section 1252 limits jurisdiction to consider immigrants' challenges to 1) a removal order, 2) the decision to detain them, or 3) "any part of the process by which their removability will be determined." 138 S.Ct. at 841. But here, Immigrant Plaintiffs challenge infringement of their First Amendment rights: to communicate with the outside world, a right they possess regardless of the nature of their detention or the status of their removal case; to communicate and consult with retained counsel, including for matters unrelated to removal proceedings; and to receive sealed legal mail without government interference. Dkt. 62 ¶¶ 205-09. None of these challenges goes to the issuance of a removal order, the decision to detain Plaintiffs, or the removal process. *Cf. Jennings*, 138 S.Ct at 841. And in each case the harm to Plaintiffs accrues at the moment of the First Amendment violation and without reference to the removal proceeding. *See, e.g.*, *Hayes v. Idaho Corr. Ctr.*, 849

F.3d 1204, 1209 (9th Cir. 2017) (plaintiffs must only show their "right to privately confer with counsel has been chilled")[8]; *cf. Arroyo* at *13 (finding jurisdiction where plaintiffs' harm "accrues at the moment of geographic separation, rather than in reference to the fairness of their underlying removal proceedings").

Fifth, Sections 1252(a)(5) and 1252(b)(9) cannot bar **Immigrant Plaintiffs' substantive due process claim** because the conditions of immigrants' confinement are plainly separate and apart from their removal proceedings (Count 3). Indeed, the Supreme Court called it "absurd" to "cram[] judicial review" of a conditions of confinement claim into the review of a final order of removal. *Jennings*, 138 S.Ct at 840. The Due Process Clause bars Defendants from subjecting civil immigration detainees to conditions comparable to criminal detention. *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004). The legal inquiry at the heart of this claim is wholly independent from any question at issue in a removal case. Further, Immigrants' conditions-of-confinement claims cannot practicably be raised in removal proceedings: Immigration Judges do not hold evidentiary hearings to compare conditions in criminal and civil detention, nor could they issue an order to remedy the conditions. The Supreme Court's reasoning in *Jennings* is instructive here. "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 a particular case, depriving that detainee of any meaningful chance for judicial review." *Jennings*, 138 S.Ct at 840.

Sixth, this Court has jurisdiction to hear **Immigrant Plaintiffs' APA claim**

[8] *See also Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [actions] that fall short of a direct prohibition against the exercise of First Amendment rights," where "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging.").

that the Federal Defendants fail to adhere to the ICE Performance-Based National Detention Standards (Count 6). As this Court ruled in *Arroyo*, "any violation [of the APA] is not inextricably linked to the outcome of removal proceedings," at *17 n.7, and therefore falls outside the scope of Section 1252. *Accord J.L. v. Cissna,* 374 F. Supp. 3d 855, 860 (N.D. Cal. 2019) (denying defendants' motion to dismiss APA challenge to USCIS policy of preventing Plaintiffs from obtaining Special Immigrant Juvenile status). In sum, each of Plaintiffs' claims may proceed.

C. The Court Has the Authority to Enter Class-Wide Injunctive Relief.

Defendants assert that 8 U.S.C. 1252(f)(1) bars this court from entering class-wide injunctive relief. Dkt. 79 at 13-14. This is incorrect. Section 1252(f)(1) provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operations of [8 U.S.C. 1221-1232], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." 8 U.S.C. 1252(f)(1). As this Court correctly ruled in *Arroyo* at *7, this provision does not bar relief where all members of a putative class are already in immigration proceedings. *See Rodriguez v. Marin*, 909 F.3d 252, 256-57 (9th Cir. 2018) (cited in *Arroyo* at *7). As in *Arroyo*, all immigrant plaintiffs in this case are detained by ICE under color of immigration law and are by definition in immigration proceedings. *See Arroyo* at *7; Dkt. 62 ¶ 172. As a result, Section 1252(f)(1) does not bar class-wide relief. [9]

II. Plaintiffs State Valid Claims for Relief.

Contrary to Defendants' assertion, each of Plaintiffs' six causes of action states a valid claim for relief. Defendants alternately impose too heavy a burden on Plaintiffs to demonstrate harm and ignore facts in the FAC that, taken as true, demonstrate Plaintiffs are entitled to relief. Specifically, Immigrant Plaintiffs state valid claims

[9] Defendants do not contend that Section 1252(f)(1) bars this Court's ability to enter a declaratory judgment, nor could they: the statute applies only to injunctions. See *Rodriguez*, 909 F.3d at 256 (Section 1252(f)(1) "does not affect classwide declaratory relief"). This Court may grant Plaintiffs' requested declaratory relief.

under the INA, the procedural Due Process Clause, the substantive Due Process Clause, and the First Amendment; and Attorney Plaintiffs state a valid claim for relief under the First Amendment.

A. Immigrant Plaintiffs State a Claim for Relief Under the INA.

Plaintiffs have alleged sufficient facts to support their claim that Federal Defendants' policies and procedures violate the INA.

The INA guarantees noncitizens the right to retain counsel to assist them in removal proceedings. 8 U.S.C. 1229a(b)(4)(A), 1362; *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005); *see also Ardestani v. INS*, 502 U.S. 129, 138 (1991) ("We are mindful that the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important."). As this Court recently stressed in *Arroyo*, this right necessarily entails the "right to consult with counsel." *Arroyo* at *17 (citing *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 554 (9th Cir. 1990)); *see also County of Nevada v. Superior Court*, 236 Cal. App. 4th 1001, 1007 (2015) ("The right to effective assistance of counsel includes the right to confer in absolute privacy."). As Plaintiffs have alleged, Defendants' policies and procedures restricting detained immigrants' access to telephones, attorney visits, and mail prevent represented immigrants from communicating with counsel, Dkt. 62 ¶¶ 152-56, and pro se immigrants from finding lawyers, Dkt. 62 at ¶¶ 105, 144. Such practices give rise to a right for relief under the INA. *See Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1509 (C.D. Cal. 1988) (government practices "that unjustifiably obstruct" immigrants' "statutory and due process rights to retain counsel of their choice" "must be invalidated"), *aff'd Orantes-Hernandez*, 919 F.2d at 549.

Defendants contend Immigrant Plaintiffs have not alleged sufficient harm, Dkt. 79 at 15, but misapprehend the showing required at this stage. First, as to represented detainees, Plaintiffs need only allege Defendants' policies and procedures interfere with "established, on-going attorney-client relationship[s]" to state a claim under the

INA. *Comm. of Cent. Am. Refugees v. INS (CCAR)*, 795 F.2d 1434, 1439 (9th Cir. 1986); *accord Arroyo* at *17; *Orantes-Hernandez*, 685 F. Supp. at 1509 (finding breach of detained immigrants' right to counsel without reference to prejudice); *Orantes-Hernandez*, 919 F.2d at 566 (affirming injunction on actions that "interfere[d] with established attorney-client relationships"). The FAC alleges this harm in detail. Dkt. 62 ¶ 54 (describing effects of Federal Defendants' policies on Plaintiff Nsinano); *id.* ¶¶ 152-56 (describing effects of Defendants' policies on attorney-client relationships); *id.* ¶ 186. Because the harm accrues at the moment a detained immigrant is denied right to access counsel, the Court has all the information it needs to adjudicate this Immigrant Plaintiffs' right-to-counsel claim without waiting for the conclusion of removal proceedings.

Second, detained immigrants who are denied the statutory right to assistance of counsel are "not required to demonstrate actual prejudice in order to obtain relief." *Montes-Lopez v. Holder*, 694 F.3d 1085, 1086 (9th Cir. 2012); *id.* at 1093-94 ("an alien who shows that he has been denied the statutory right to be represented by counsel in an immigration proceeding need not also show that he was prejudiced by the absence of the attorney"); *see also C.J.L.G. v. Barr*, 923 F.3d 622, 631 (9th Cir. 2019) ("A violation of the right to retained counsel is uniquely important, and thus we do not require a showing of prejudice to grant relief."). Contrary to Defendants' assertion, Dkt. 79 at 15-16, the FAC alleges in painstaking detail how Defendants' restrictions impede detained immigrants' ability to find, retain, and consult with attorneys, harms tantamount to outright denial of counsel. *See, e.g.*, Dkt. 62 ¶¶ 32-39 (describing how Defendants' policies and procedures barred Plaintiff Tenghe from ever retaining counsel while detained); *id.* ¶ 44-45 (same, with respect to Plaintiff Nsinano); *id.* ¶ 105 ("[Defendants'] restrictions on telephone access make it difficult *or impossible* for detained noncitizens to contact individuals for legal purposes.") (emphasis added); *id.* ¶ 144 ("Defendants' numerous restrictions on communication . . . effectively delay[] *or prevent* detained noncitizens from . . . obtaining counsel.")

(emphasis added). *Compare ILL*, 310 F. Supp. 3d at 1163 (ICE and Bureau of Prisons' "attorney visitation policies and practices," including limited visitation hours and lack of free legal calls, "have the 'cumulative effect' of denying detainees constitutionally sufficient access to legal assistance"). Permitting claims over denial of access to counsel without proof of actual prejudice makes particular sense here where putative class members challenge policies applied to them uniformly and before the conclusion of removal proceedings. *See CCAR*, 795 F.2d at 1439; *Arroyo* at *18; *ILL*, 310 F. Supp. 3d at 1163; *Orantes-Hernandez*, 685 F. Supp. at 1509.[10]

The INA also guarantees immigrants the right to present evidence on their own behalf. 8 U.S.C. 1229a(b)(4)(B) ("[T]he alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government . . . ."). Inherent in this right is the ability to gather that evidence. Though Defendants observe most reported cases concern an IJ's obligations to permit access to counsel, *see* Dkt. 79 at 15, the cases support the common-sense inference that undue restrictions on an immigrant's ability to gather evidence necessarily infringe on the right to present it. In *Agyeman*, for example, the court held that where a petitioner is pro se, the IJ must "fully develop the record." *Agyeman v. INS*, 296 F.3d 871, 884 (9th Cir. 2002) (citing protections under the Fifth Amendment due process right to a full and fair hearing and 8 U.S.C. 1229a(b)(4)(B)); *accord Jacinto v. INS*, 208 F.3d 725, 733 (9th Cir. 2000). The obligation to develop the record is critical when the petitioner is in custody: "In such cases, the alien may have limited access to relevant documents and will, therefore, depend even more on heavily the IJ for assistance in identifying appropriate sources of evidence to support his claim." *Agyeman*, 296 F.3d at 884.

It would be meaningless for courts to require IJs to identify appropriate sources of evidence if immigrants did not have a right to collect such evidence. *See Angov v.*

[10] While the court in *Lyon* granted summary judgment finding no evidence the restrictions in that case were "tantamount to a denial of counsel," *Lyon v. ICE.,* 171 F. Supp. 3d 961, 975-6 (N.D. Cal 2016), it did so after discovery.

Lynch, 788 F.3d 893, 899 (9th Cir. 2015) (petitioner's statutory right to examine evidence was not violated where "[h]e was allowed to examine [evidence] and given ample time to produce substantial evidence to rebut it"); *Cinapian v. Holder*, 567 F.3d 1067, 1075 (9th Cir. 2009) (finding violation of section 1229a(b)(4)(B) where government did not produce evidence against petitioners until the hearing because "[i]f they had been given notice, Petitioners might very well have been prepared to produce other [necessary] evidence"). Although *Lyon* declined to find a right to gather and present evidence in the INA (as opposed to under the Due Process Clause), 171 F. Supp. 3d at 976-77 (N.D. Cal 2016), it did not consider these Ninth Circuit cases in evaluating plaintiffs' statutory claim. For all of these reasons, Immigrant Plaintiffs adequately state a claim under the INA that Defendants' policies and procedures prevent them from collecting evidence. *See* Dkt. 62 at ¶¶ 27-28 (describing Plaintiff Torres' inability to obtain necessary evidence, like police records); *id.* ¶¶ 35-39 (alleging Plaintiff Tenghe was unable to obtain critical documents); *id.* ¶ 46 (alleging Plaintiff Nsinano's asylum application and BIA appeal denied in part because he could not collect necessary evidence); *id.* ¶¶ 157-64 (describing general effect of Defendants' policies and practices on unrepresented immigrants' ability to collect evidence).

B. Immigrant Plaintiffs State a Procedural Due Process Claim.

Like the INA, the Due Process Clause safeguards Immigrant Plaintiffs' right to retain and consult with counsel. *See Orantes-Hernandez*, 919 F.2d at 554, 565 (recognizing "aliens have a due process right to obtain counsel of their choice at their own expense" and affirming injunction against government practices "the cumulative effect of which was to prevent aliens from contacting counsel and receiving any legal advice," including denying visits with counsel); *Biwot*, 403 F.3d at 1098 ("The right to counsel in immigration proceedings is rooted in the Due Process Clause[.]"). In this regard, Plaintiffs' arguments about the right to counsel under the INA apply equally to their due process claims. Part II.A *supra*; *see also, e.g.*, *CCAR*, 795 F.2d at

1439-40 ("The key factor . . . showing a constitutional deprivation is the existence of an established, on-going attorney-client relationship.").[11]

Contrary to Defendants' assertion, Dkt. 79 at 8, a criminal prisoner's constitutional entitlement to appointed counsel is a question separate and distinct from whether the government may interfere with a person's right to hire an attorney or with an ongoing attorney-client relationship. "[A]t least as a general matter, the right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition." *Mothershed*, 410 F.3d at 611; *see also DeLoach v. Bevers,* 922 F.2d 618, 620 (10th Cir. 1990) ("The right to retain and consult an attorney . . . implicates . . . clearly established First Amendment rights of association and free speech."). Never has the Supreme Court implied that a prisoner's right to communicate with counsel hinges on the source or subject of the attorney-client relationship—and for good reason: such a rule would not only lead to absurd results, it would be a content-based restriction on speech subject to strict scrutiny.

The seminal cases protecting communication with counsel for those incarcerated make no distinction based on the nature of the prisoner's proceeding. The class in *Procunier v. Martinez*, for example, contained inmates who may have been seeking post-conviction relief, appeals outside the scope of the Sixth Amendment, or indeed any other form of legal relief with the assistance of retained counsel. 416 U.S. 396 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989). If anything, pretrial criminal detainees, detainees pending civil commitment proceedings, immigrants seeking custody determinations, and immigrants in removal proceedings have a *greater* liberty interest in access to counsel than convicted prisoners: they are fighting for physical freedom.

In this case, immigrants detained at Adelanto may have counsel retained

[11] The Ninth Circuit has not yet extended *Montes-Lopez*'s holding that an immigrant need not show prejudice if denied the statutory right to counsel to claims arising under the Due Process Clause. *See* 694 F.3d at 1093-94. But this Court need not reach the constitutional question if it finds Plaintiffs have adequately alleged a claim under the INA. *See Baires v. INS*, 856 F.2d 89, 91 (9th Cir. 1988).

privately or appointed pursuant to the Rehabilitation Act, the Ninth Circuit's pro bono representation project, or the Criminal Justice Act's provision for appointment of counsel in habeas proceedings (22 U.S.C. 2255), to name a few. Courts have extended due process protections that may not arise directly under the INA to such counsel relationships beyond removal proceedings. *See, e.g.*, *Arroyo* at *17-*19 (protecting right to counsel for, *inter alia*, immigrants with final orders of removal); *Orantes*, 685 F. Supp. at 1499, 1509 (protecting right to counsel in cases where immigrants are not yet in removal proceedings); *ILL,* 342 F. Supp. 3d at 1162 (same); *Rodriguez-Castillo*, No. 18-cv-1317-ODW (Order, C.D. Cal. June 21, 2018) (same). Defendants offer no authority for the proposition that this Court can enjoin unconstitutional restrictions as to some of these attorney-client relationships but not others. The Constitution protects them all.

Further, Plaintiffs have sufficiently pled that Defendants' policies and practices so restrict unrepresented detained immigrants' ability to collect evidence and speak with witnesses experts that they deprive Immigrant Plaintiffs of their right to a full and fair hearing under the Due Process Clause. Dkt. 62 ¶ 193; *id.* ¶¶ 157-66 (describing effect of Defendants' restrictions on detained immigrants' ability to prevail, *inter alia*, in removal proceedings, at a bond redetermination hearing, on appeal, in habeas corpus actions, and when seeking post-conviction relief). "It is well established that the Fifth Amendment guarantees non-citizens due process in removal proceedings. Therefore, every individual in removal proceedings is entitled to a full and fair hearing. A vital hallmark of a full and fair hearing is the opportunity to present evidence and testimony on one's behalf." *Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2013) (citations omitted); *accord Lyon*, 171 F. Supp. 3d at 982, 987-88.

Here, too, Defendants wrongly suggest that an onerous prejudice standard controls. Dkt. 79 at 19 (urging dismissal because some Named Plaintiffs' proceedings have not concluded and so they cannot show injury). Particularly at this stage, the law requires only that Plaintiffs allege the outcome of their proceedings "*may* have been

affected by the alleged violation." *See Lyon*, 171 F. Supp. 3d at 982 (citing *Colmenar*, 210 F.3d at 971, *Zolotukhin v. Gonzales*, 417 F.3d 1073, 1076 (9th Cir. 2005), and *Walters v. Reno*, 145 F.3d 1032, 1036 (9th Cir. 1998)). In *Lyon*, the court explained that evidence of restrictions on the plaintiffs' ability to gather evidence by phone, "along with the nature and breadth of the systemic phone restrictions and their potential impact upon detainees' ability to communicate with counsel, relatives, government agencies, etc., are sufficient to establish a real risk for class members that the restriction 'may' or 'potentially' affect the outcome of removal proceedings . . . ." 171 F. Supp. 3d at 983; *see also id.* at 988 ("There is also evidence that limiting the private phones to attorney calls only . . . can impede individuals from gathering evidence, particularly individuals who have no attorney or when the private phone is the only available phone option without a positive acceptance requirement."). Immigrant Plaintiffs make similar allegations here, *e.g.* Dkt. 62 ¶¶ 157-66, 193, and so state a claim for relief under the Due Process Clause.

C. Immigrant Plaintiffs State a Substantive Due Process Claim.

Immigrant Plaintiffs have adequately pled that Defendants' policies violate their right to substantive due process. *See* Dkt. 62 at ¶¶ 167-70, 195-98. In the Ninth Circuit, "an individual detained under civil process—like an individual accused but not convicted of a crime—cannot be subjected to conditions that 'amount to punishment.'" *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004) (quoting *Bell v. Wolfish*, 441 U.S. 520, 536 (1979)). "With respect to an individual confined awaiting adjudication under civil process, a presumption of punitive conditions arises where the individual is detained under conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held, or where the individual is detained under conditions more restrictive than those he or she would face upon commitment." *Id.* at 933-34.

Plaintiffs need not allege or demonstrate that Defendants' policies are "intended to be punitive," Dkt. 79 at 22. Once Plaintiffs establish a presumption of

punitive conditions, the burden shifts to Defendants to explain what legitimate, non-punitive purpose justifies immigrants' detention in these conditions. *Jones*, 393 F.3d at 934. Plaintiffs have credibly alleged that restrictions on telephone and visitation access at the facilities are "similar, if not identical, to restrictions imposed on pre-trial detainees and convicted prisoners" in this judicial district, *see* Dkt. 62 ¶ 167; that Defendants' restrictions are unnecessarily restrictive and punitive, *id.* at 53; and that "ICE's own Detention Standards represent just one example of less restrictive legal communication policies and practices that Defendants could implement," *id.* ¶ 170.[12]

D. Immigrant Plaintiffs State a First Amendment Claim.

Defendants do not dispute that Immigrant Plaintiffs have a First Amendment right to communicate with the outside world. *See* Dkt. 79 at 24-25.[13] Nor could they in light of Ninth Circuit precedent, which has "sensibly and expansively define[d] the First Amendment right at issue in this case as the right to communicate with persons outside prison walls." *See Valdez v. Rosenbaum*, 302 F.3d 1039, 1048 (9th Cir. 2002) (internal quotation marks omitted); *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986) ("Courts have recognized detainees' and prisoners' first amendment right to telephone access."). To state a First Amendment claim, Plaintiffs must allege that Defendants' restrictions are excessive and leave insufficient means for Plaintiffs to communicate, and that there are "obvious, easy alternatives to the restriction[s] showing that [they are] an exaggerated response to prison concerns." *Valdez*, 302 F.3d at 1049; *Pell v. Procunier*, 417 U.S. 817, 822 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."); *Dillard v.*

[12] Defendants observe that a DHS OIG report cited in the FAC focuses on substandard conditions other than those relating to visitation and communication policies, Dkt. 79 at 22-23, as if that somehow could undermine Plaintiffs' allegations. Regardless, the FAC cites a separate report published this year which squarely addresses those policies. *See* Dkt. 62 at 26 n.4 (citing California Department of Justice, *Immigration Detention in California* (February 2019)).

[13] Plaintiffs' FAC alleged four theories of First Amendment liability on behalf of Immigrant Plaintiffs. Dkt. 62 ¶¶ 205-209. Plaintiff are no longer pursuing their theory under the petition clause. *See* Dkt. 79 at 24-25.

Pitchess, 399 F. Supp. 1225, 1240 (C.D. Cal. 1975) ("Nothing in the need to detain a prisoner pending trial requires that he be substantially restricted in his ability to be in telephone communication with the outside world.").

Contrary to Defendants' arguments, Dkt. 79 at 24, the allegations in the FAC easily satisfy the standards under existing precedent. The same policies that obstruct communications with counsel prevent immigrants from contacting the outside world. *See, e.g.*, Dkt. 62 ¶¶ 93-119 (alleging Defendants' telephone policies prevent immigrants from communicating with family and counsel); *id.* ¶¶ 120-124, 128-30 (describing excessive restrictions on in-person visitation); *id.* ¶¶ 130-35 (showing why legal mail is not an alternative to telephone and in-person communication); *id.* ¶ 170 ("ICE's own Detention Standards represent just one example of less restrictive legal communication policies and practices that Defendants could implement.").

Defendants' restrictions, of course, infringe on Immigrant Plaintiffs' First Amendment right to hire and consult with an attorney. *See Mothershed*, 410 F.3d at 611; *DeLoach,* 922 F.2d at 620. Regulations that restrict this right are subject to intermediate scrutiny.

> Time, place, and manner regulations are reasonable provided that the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. . . .
>
> A time, place, and manner regulation is narrowly tailored as long as the substantial governmental interest it serves would be achieved less effectively absent the regulation and the regulation achieves its ends without . . . significantly restricting a substantial quantity of speech that does not create the same evils.

Mothershed, 410 F.3d at 609 (internal quotation marks omitted) (second ellipsis in original). As above, Immigrant Plaintiffs have plausibly alleged Defendants' own regulations provide reasonable alternatives (among others) that would restrict a far smaller quantity of speech. Dkt. 62 ¶ 170.

Finally, Defendants do not appear to contest that Immigrant Plaintiffs have stated a First Amendment claim, grounded in the speech clause, to receive sealed

legal mail without government interference. *See* Dkt. 79 at 24-25. Plaintiffs' allegations that Defendants open and inspect legal mail outside detained immigrants' presence, Dkt. 62 ¶¶ 52, 135, 208, suffice to state a claim under *Hayes*, 849 F.3d at 1208, 1212 (First Amendment protects prisoners' right to have legal mail opened and inspected in prisoner's presence; plaintiffs need only allege their "right to privately confer with counsel has been chilled") and *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (per curiam) (First Amendment protects prisoners' right to send and receive legal mail).

E. Attorney Plaintiffs State a First Amendment Claim.

The First Amendment protects Attorney Plaintiffs' right to speak with those who may need their legal assistance or have retained their legal services. *See NAACP v. Button*, 371 U.S. 415, 428-29 (1963) (affording First Amendment protection to NAACP members wanting to "assist[] persons who seek legal redress for infringements of their constitutionally guaranteed and other rights" as "modes of expression and association protected" by First Amendment); *In re Primus*, 436 U.S. 412, 423-24 (1978) (addressing solicitation and concluding even unsolicited legal advice can implicate First Amendment); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27-28, 38 (2010) (statute that prohibited attorneys from providing legal advice implicated First Amendment); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547-48 (2001) (restrictions that "prohibit [attorney] advice or argumentation" in a way that "confine[s] litigants and their attorneys" violated First Amendment); *see also Procunier*, 416 U.S. at 408-09 (recognizing First Amendment interests of both parties to correspondence between prisoners and those outside the prison).

Relying on an opinion from the Western District of Missouri, Defendants argue their restrictions on First Amendment rights are subject to what amounts to rational-basis review. Dkt. 79 at 23. This is incorrect. Even content-neutral speech restrictions are subject to intermediate scrutiny. *See Mothershed*, 410 F.3d at 610; *Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1043 (9th Cir. 2002). Unlike in *Arroyo*, where

this Court found attorney plaintiffs were not likely to succeed on a First Amendment claim for purposes of a preliminary injunction, here Defendants' policies impose "express restrictions on attorney speech or expressive conduct," *Arroyo* at *20 —they precisely regulate when, how, and through what means attorneys can speak with clients. *See* Dkt. 62 at ¶¶ 107-116, 120, 128-32, 135 (describing policies that bar Attorney Plaintiffs from making incoming calls or leaving messages for clients; prevent Attorney Plaintiffs from having confidential, unmonitored, unrecorded calls with clients; impose unreasonable wait times to meet with clients; and open detainees' incoming legal mail, including from counsel).

Because these regulations "expressly restrict expressive conduct" without reference to content, *Arroyo* at *20, they are permissible only if "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information," *Mothershed*, 410 F.3d at 611 (internal quotation marks omitted). For the same reasons identified in Part II.D, *supra*, Defendants' restrictions fail intermediate scrutiny.

F. Immigrant Plaintiffs State a Claim for Relief Under the APA.

Defendants contend the FAC fails to state an APA claim because it purportedly does not "support an inference that any action, or inaction, of the Federal Defendants was a final agency action." Dkt. 79 at 25. But under *United States ex. rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), an agency's failure to comply with its own procedures is "arbitrary, capricious" conduct actionable under the APA, and in the Ninth Circuit, this is true even if the policy was never formally established. *See Cal. Trout v. Fed. Energy Regulatory Comm'n*, 572 F.3d 1003, 1022-23 (9th Cir. 2009); *Nw. Envtl Def. Center v. Bonneville Power Admin.*, 477 F.3d 668, 690 (9th Cir. 2007); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (an agency may not "simply disregard rules that are still on the books") (quoting). Nor can the Defendants credibly argue that the APA's "good reason" requirement is "limited to officially promulgated regulations." *Robbins v. Reagan,* 780 F.2d 37, 45-49 (D.C. Cir. 1985); *see*

also, *W. States Petroleum Ass'n v. EPA*, 87 F.3d 280, 284 (9th Cir. 1996) (holding when an agency departs from its prior policies and/or practices, it must "clearly set forth the ground for its departure from prior norms.").

The FAC explains that Defendants fail to comply with their own published procedures without explanation. *See* Dkt. 62 ¶¶ 93-136 (alleging ICE violates its Detention Standards regarding the availability of free calls (2011 PBNDS 5.6, V, E; 2008 PBNDS Part 5, 31, V.E), "reasonable and equitable access to reasonably priced telephone services," (2011 PBNDS Part 5.6, II.1; 2008 PBNDS Part 5, 31, V.A.2), space sufficient to preserve the attorney-client privilege (2011 PBNDS Part 5.7, II.2 & V.J.9), the prompt delivery of telephone messages to detainees (2011 PBNDS Part 5.6, II.1; 2008 PBNDS Part 5, 31, V.A.2), and the practice of opening legal mail outside of a detained noncitizen's presence (2011 PBNDS 5.1.V.F.2)). This is sufficient, regardless of whether the violated procedure was a formal agency rule, or an informal and/or internal agency policy. *See Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004) (observing that "courts have recognized that the so-called *Accardi* doctrine extends beyond formal regulations" and collecting cases).

Finally, as argued *supra*, Federal Defendants' policies and procedures also violate the APA because they are not "in accordance with the law," specifically, 8 U.S.C. 1229a(b)(4)(A)-(C) and the Constitution. *See* 5 U.S.C. 706(2)(A). Accordingly, Plaintiffs have more than adequately stated a claim under the APA.

Respectfully submitted,

DATED: July 26, 2019

ACLU FOUNDATOIN OF SOUTHERN CALIFORNIA

By: */s/ Eva Bitran*

EVA BITRAN
Attorney for Plaintiffs Desmond Tenghe, Jason Nsinano, American Immigration Lawyers Association, and Immigrant Defenders Law Center