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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 DEFENDANT GEO'S MOTION TO DISMISS [ECF NO. 80]

[Plaintiffs' opposition to Federal Defendants' motion to dismiss filed concurrently]

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

INTRODUCTION

Much like the motion to dismiss filed by the Federal Defendants, Defendant GEO disregards earlier decisions by this and other courts upholding jurisdiction to grant individual and classwide injunctive relief for statutory and constitutional violations. Indeed, like the Federal Defendants, most of GEO's jurisdictional arguments conflate standing and mootness. Plaintiffs have more than adequately alleged injuries for standing, and controlling precedent permits them to pursue inherently transitory claims on behalf of a putative class irrespective of subsequent developments that might moot their individual claims.

GEO's merits arguments fare no better. GEO performs a quintessential government function, namely detaining immigrants. Under settled precedent, it is subject to liability. Otherwise, constitutional and statutory violations could go unremedied through the simple expedient of hiring GEO to perform government functions. For obvious reasons, that is not the law and should not become the law.

The balance of GEO's arguments disregards the detailed and specific allegations in the Complaint. In effect, GEO asks the Court to weigh evidence to find that its conduct is not so offensive, oppressive, and punitive as to violate applicable statutes and constitutional norms. But that is the proper use of a motion to dismiss. For each of these reasons, the Court should deny GEO's motion.

STATEMENT OF FACTS

Plaintiffs have summarized the key facts in their concurrently-filed opposition to Federal Defendants' motion to dismiss. Opp. to Fed. Defs.' Mot. to Dismiss at 2-4. In light of this Court's guidance to avoid unnecessary repetition, Plaintiffs do not repeat those facts here and will not repeat arguments from that opposition that apply equally to both motions. [1] *See Arroyo v. United States Dep't of Homeland Sec.*, No. SACV 19-815 JGB, 2019 WL 2912848, at *6 n. 4 (C.D. Cal. June 20, 2019).

[1] This brief would remain under the page limit if Plaintiffs reproduced applicable sections from their opposition to the Federal Defendants' motion to dismiss.

ARGUMENT

I. The Court Has Subject Matter Jurisdiction.

A. Plaintiffs Have Standing and Their Claims Are Not Moot.

Defendant GEO asserts that the individual named Plaintiffs lack standing because they either were released from ICE custody or obtained counsel after filing this action. *Compare* Dkt. 80 (GEO's Mot. to Dismiss) at 11-13 *with* Dkt. 79 (Fed.'s Mot. to Dismiss) at 10-11 . For the reasons Plaintiffs set forth in the opposition to the Federal Defendants' motion, Defendant GEO's arguments fail because standing is determined as of the filing of the complaint, and the mootness doctrine does not prevent plaintiffs from challenging an ongoing government policy on behalf of a putative class. Opp. to Fed. Defs.' Mot. at 4-5; *Hernandez v. Lynch*, 2016 WL 7116611, at *12 (C.D. Cal. Nov. 10, 2016) (Bernal, J.) (citing *United States v. Howard*, 480 F.3d 1005, 1010 (9th Cir. 2007)).

GEO also suggests that Plaintiffs lack standing because they cannot demonstrate prejudice. Dkt. 80 at 11-13. But this argument confuses a merits issue—that is, whether Plaintiffs must allege prejudice to state their claims (addressed in Part II.B, *infra*)—with a jurisdictional defect. Standing merely requires injury, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), and Plaintiffs unquestionably have alleged multiple injuries, including interference with their ability to communicate with retained counsel and access legal assistance, among others. Dkt. 62 (First Amended Complaint ("FAC")) ¶¶ 22-27, 32-39, 44-56.

GEO next argues that Plaintiffs lack a sufficient connection to Adelanto.[2] But individual Plaintiffs Torres, Tenghe and Nsinano were detained at Adelanto, and have alleged harm as result of policies and practices at the facility. Dkt. 62 ¶¶ 2-27, 32-39,

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

44-56. These allegations are more than sufficient for this Court to exercise jurisdiction over class claims. *See Stearns v. Ticketmaster Corp.,* 655 F.3d 1013, 1021 (9th Cir. 2011).

Finally, GEO challenges the standing of Attorney Plaintiffs American Immigration Lawyers Association ("AILA") and Immigrant Defenders Law Center ("ImmDef"). An organization can establish standing on two independent grounds: (1) direct organizational standing; or (2) associational standing. *See Olagues v. Russoniello*, 770 F.2d 791, 797-98 (9th Cir. 1985). GEO does not contest that both AILA and ImmDef have adequately alleged direct organizational standing. *Compare Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (holding organization has standing when unlawful conduct diverts its resources and frustrates its mission), *with* Dkt. 62 ¶¶ 73-74 (alleging AILA's mission includes to advocate for "improved attorney access at immigration detention centers" and that it has used resources to document instances in detention facilities where counsel's ability to represent their clients has been restricted), *and id.* ¶¶ 75, 133, 148-49 (alleging ImmDef's mission is to represent detained immigrants, and Defendants' violations cost time and resources and make certain representations "almost impossible").

Therefore, Attorney Plaintiffs have established direct organizational standing, and this Court need not consider whether they also have associational standing. Plaintiffs' allegations, however, are likewise sufficient for associational standing. Defendant GEO contends that Attorney Plaintiffs lack associational standing because they have not identified by name individual members impacted by the unlawful practices, citing *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. California Dep't of Transp*., 713 F.3d 1187, 1194 (9th Cir. 2013). Dkt. 80 at 14. But there, the Ninth Circuit held that at *summary judgment* a party must provide evidence of an identified member subject to the challenged practices. *Id*. ("[O]n summary judgment, AGC was required to submit competent evidence, not mere allegations, to demonstrate that at least one of its members had standing."). Here, the FAC alleges

that both AILA and ImmDef members visit Adelanto, Dkt. 62 ¶¶ 73-75, and that Defendants' unlawful policies and procedures harm individual attorneys who visit the facility, *e.g.* Dkt. 62 ¶¶ 52-56. Nothing further is needed at this stage.

B. Section 1252 Does Not Bar Plaintiffs' Individual or Class Claims.

Defendant GEO raises the same jurisdictional arguments under Section 1252 as the Federal Defendants. GEO argues that Section 1252 prevents this Court from reviewing its unlawful and unconstitutional conduct or, alternatively, that the Court cannot entertain a request for classwide injunctive relief. Dkt. 80 at 15-18.[3] This Court recently rejected most of these arguments, and its reasoning is well supported. *Arroyo* at *13. For the reasons set forth in Plaintiffs' opposition to the Federal Defendants' motion, Section 1252 does not bar Plaintiffs' claims or request for relief. Opp. to Fed. Defs.' Mot. at 5-11.

II. Plaintiffs State Claims for Relief Sufficient to Survive a Motion to Dismiss.

Defendant GEO raises two sets of challenges to the merits of Plaintiffs' complaint, both of which fail. First, GEO objects that it cannot be sued for federal constitutional violations because there is no cause of action under the Constitution and because it is a federal contractor. Under well-established law, Plaintiffs may sue GEO directly under the Constitution for its unlawful conduct in the course of performing a quintessentially federal function. Second, GEO claims that the FAC fails to allege sufficient facts. But the FAC lays out in painstaking detail how GEO's policies and practices violate Plaintiffs' statutory and constitutional rights.

A. GEO Is Subject to Liability for Federal Constitutional Violations.

1. Plaintiffs Have Adequately Pled Claims Under the Constitution.

GEO argues Plaintiffs have not identified a basis for asserting constitutional claims. *See* Dkt. 80 at 19-20. "The court's power to enjoin unconstitutional acts by the government, however, is inherent in the Constitution itself . . . ." *Mitchum v. Hurt*, 73

[3] GEO concedes the INA's jurisdiction-channeling provision does not apply to Attorney Plaintiffs' claim. *See* Dkt. 80 at 17-18.

F.3d 30, 35 (3d Cir. 1995) (quoting *Hubbard v. US EPA*, 809 F.2d 1, 11 n.15 (D.C. Cir.1986)); *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1231 (10th Cir. 2005). *See generally* Hart and Wechsler's The Federal Courts and the Federal System 892 (7th ed. 2015) ("The principle that the Constitution creates a cause of action against governmental officials for injunctive relief ... appl[ies] in suits challenging federal official action."). "[T]ime and again this court has affirmed the right of [individuals] to seek equitable relief against . . . the agency itself, in vindication of their constitutional rights." *Am. Fed'n of Gov't Employees Local 1 v. Stone*, 502 F.3d 1027, 1039 (9th Cir. 2007) (quoting *Mitchum*, 73 F.3d at 38-39).

The Supreme Court has long recognized claims under the Constitution for equitable relief. *See Armstrong v. Exceptional Child Ctr. Inc.*, 135 S. Ct. 1378, 1384 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity[.]"); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (recognizing "as a general matter" "an implied private right of action directly under the Constitution to challenge governmental action") (citation omitted); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"); *Davis v. Passman*, 442 U.S. 228, 242 (1979) ("this Court has already settled that a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right") (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)). The Court recently reaffirmed that "unlike the *Bivens* remedy, which we have never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

GEO has it exactly backwards when it argues private rights of action to enforce the Constitution "generally must be created by Congress." Dkt. 80 at 19-20. As then-

Judge Alito explained, "there is a 'presumed availability of federal equitable relief against threatened invasions of constitutional interests.'" *Mitchum*, 73 F.3d at 35 (quoting *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring in the judgment)). "While Congress may restrict the availability of injunctive relief . . . we should be very hesitant before concluding that Congress has impliedly imposed such a restriction on the authority to award injunctive relief to vindicate constitutional rights." *Id*. GEO fails to identify any Congressional statute sufficient to overcome the strong presumption in favor of the federal courts' power to enjoin constitutional violations.

GEO relies heavily on a Magistrate Judge's Report and Recommendation in *Flores v. ICE*, No. 3:18-cv-05139-BHS-DWC, ECF No. 83 (W.D. Wash. Oct. 10, 2018) [hereinafter *Flores* R&R], but the District Court declined to adopt the Magistrate Judge's R&R on other grounds. *See* Order Granting Pls.' Mot. for Leave to Supplement the Record at 2, *Flores*, No. 3:18-cv-05139-BHS-DWC (Jan. 18, 2019), ECF No. 155. The *Flores* R&R is flawed in several respects. First, the Magistrate Judge reasoned that implied claims are disfavored, relying on case law applicable to damages actions under *Bivens*. *See Flores* R&R at 6 (citing *Bivens*, *Davis*, 442 U.S. at 242, and *Carlson v. Green*, 446 U.S. 14 (1980)). Federal courts have long distinguished between damages actions under *Bivens* and claims for equitable relief under the Constitution, which are presumptively available. *Simmat*, 413 F.3d at 1231; *Am. Fed'n of Gov't Employees Local 1*, 502 F.3d at 1039. Second, the Magistrate Judge relied on cases involving municipal or state defendants, which must be brought pursuant to Section 1983. *See Flores* R&R at 6-8 (citing, *inter alia*, *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992)). That rule has no application to constitutional claims for equitable relief against federal officials, which are cognizable under the Constitution and federal courts' equitable powers. Third, the Magistrate Judge observed that Section 1331 does not give rise to a cause of action. *See Flores* R&R at 5. Plaintiffs invoke Section 1331 for subject matter jurisdiction,

not as a freestanding claim. Section 1331 creates jurisdiction for the federal courts to hear claims "*arising under the Constitution*, laws, or treaties of the United States." 28 U.S.C. 1331 (emphasis added).

GEO's other authority is inapposite. For example, GEO cites to *Tavake v. Allied Ins. Co*'s statement that "there is no cause of action directly under the United States Constitution." No. 11-3259-KJM, 2012 WL 1143787, *6 (E.D. Cal. Apr. 4, 2012). But that case involved claims for damages against municipal officials, which must be brought under 42 U.S.C. 1983. Likewise, GEO cites several cases recognizing that a litigant may not bring a free-standing claim for injunctive or declaratory relief, absent some other cause of action. Dkt. 62 at 20. But unlike here, the plaintiffs in those cases did not allege violations of the Constitution. *See Ramos v. Chase Home Fin.,* 810 F. Supp. 2d 1125, 1132 (D. Hawaii 2011) (no constitutional claims at issue); *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951) (same); *Harris Cnty. Tex. v. Merscorp Inc.*, 791 F.3d 545, 552 (5th Cir. 2015) (same).

Because Plaintiffs have brought claims under the Constitution, "a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (internal quotation marks omitted). The FAC does so here.

2. GEO Is a Government Actor for Constitutional Purposes

Although GEO is a private for-profit corporation, it contracts with the government to perform a federal function—housing immigrants pending a determination of their immigration status pursuant to ICE specifications—and therefore may be enjoined from engaging in conduct that violates the Constitution. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982) (private actors can be held liable for violations of individual federal rights where they "caus[e] the deprivation of a federal right . . . fairly attributable to the State").

Private entities are engaged in government action where they "exercise[]

powers traditionally exclusively reserved to the State." *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1338 n.17 (9th Cir. 1987) (internal quotations omitted). The public function test was articulated in the context of a Section 1983 claim, but the same state action principles apply to federal contractors. *See Mathis v. Pac. Gas. & Elec. Co.*, 891 F.2d 1429, 1432 n.3 (9th Cir. 1989) ("The standards for determining whether an action is governmental are the same whether the purported nexus is to the state or to the federal government.").

GEO argues it is not a governmental actor, ignoring that the Ninth Circuit reached a contrary decision **in a case against GEO**. *See Pollard v. Geo Group, Inc.*, 629 F.3d 843, 854 (9th Cir. 2010) ("[T]he threshold question presented here is whether the GEO employees can be considered federal agents acting under color of federal law in their professional capacities. We conclude that they can."), *rev'd on other grounds sub nom*, *Minneci v. Pollard*, 565 U.S. 118 (2012). GEO's arguments rely on district court decisions out of the Fourth Circuit, which has held private prison companies are not federal actors because operating prisons has not always been "exclusively" a public function, *Holly v. Scott*, 434 F.3d 287, 293 (4th Cir. 2006). Dkt. 80. at 21-22. GEO's remaining cases are inapposite. In *Davis v. GEO Grp. Corr., Inc.*, the plaintiff did not object to the dismissal of his constitutional claims against GEO. No. 5:16-cv-00462-HE, 2018 WL 814210, at *1 (W.D. Okla. Feb. 9, 2018). In *Harris v. Corr. Corp. of American Leavenworth Det. Ctr.*, the district court dismissed a *Bivens* action against a private prison company, which had been foreclosed by *Malesko*. No. 16-3068-SAC-DJW, 2016 WL 6164208, at *3 (D. Kan. Oct. 24, 2016).

While the Supreme Court reversed *Pollard* on other grounds, the Ninth Circuit's reasoning remains sound. As the Ninth Circuit found, "imprisonment is a fundamentally public function, regardless of the entity managing the prison." *Pollard*, 629 F.3d at 857. Recently, the Fifth Circuit reached a similar conclusion, holding that a private prison company running an immigration detention center engaged in federal action because "detaining aliens pending a determination of their immigration status

pursuant to ICE specifications . . . is fundamentally a federal function." *Doe v. United States*, 831 F.3d 309, 316 (5th Cir. 2016) (quotation omitted) (holding private prison could not be liable under Section 1983 because it engaged in federal, not state, action).

The Supreme Court's recent decision in *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019) provides further support for the Ninth Circuit's reasoning in *Pollard*. There, the Court applied the public-function test to a private operator of a public-access TV station. The Court sought guidance from its prior decision in *West v. Atkins*, in which the Court held that "a private entity may, under certain circumstances, be deemed a state actor when the government has outsourced one of its constitutional obligations to a private entity." *Manhattan Cmty.*, 139 S. Ct. at 1929 n.1 (citing *West v. Atkins*, 487 U.S. 42, 56 (1988)). Here, the government has "outsourced one of its constitutional obligations" to Defendant GEO, namely to ensure access to counsel to detained immigrants. *See Manhattan Cmty.*, 139 S.Ct at 1929 n.1. As such, Defendant GEO falls squarely under *West* and may "be deemed a state actor." *Id.*

Defendant's position cannot be the law for the additional reason that it would deprive incarcerated individuals of any means of vindicating constitutional rights. If GEO were right, individuals incarcerated by a private prison company could not obtain an injunction to prevent the company from retaliating against them for exercising First Amendment rights and could subject them to cruel, unusual, and arbitrary punishment. *See generally* Third Amended Complaint, *Flores*, No. 3:18-cv-05139-BHS-DWC (Dec. 31, 2018), ECF No. 120. It would also mean that individuals who happen to be assigned to a privately operated facility would have lesser ability to protect constitutional rights than those assigned to facilities operated by the federal government. Because GEO performs a fundamentally federal function—incarcerating immigrants—this Court should find that it engages in state action and is subject to

liability for constitutional violations. [4]

B. Immigrant Plaintiffs Adequately Allege Prejudice to State Claims for Relief under the INA and the Procedural Due Process Clause.

GEO does not dispute that Immigrant Plaintiffs are entitled to counsel and to a full and fair hearing under the INA and the Due Process Clause. *See* Dkt. 80 at 15. Rather, its core argument regarding Counts 1 and 2 is that Plaintiffs have not alleged sufficient injury. Dkt. 80 at 11-14.[5] But GEO applies the wrong standard. *Lewis v. Casey*'s requirement that prisoners show "actual injury" applies only to claims raising a "constitutional right of access to the courts." 518 U.S. 343, 353-54 (1996). Plaintiffs' INA and Due Process claims do not require a showing of actual prejudice.

The FAC easily satisfies the standards applicable here. First, with respect to Plaintiff's right-to-counsel claims, the Ninth Circuit has expressly held that immigrants who are denied their statutory right to 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. Sessions*, 880 F.3d 1122, 1133 (9th Cir. 2018) ("A petitioner need not show prejudice where he was denied his statutory right to privately-retained counsel."). Plaintiffs need only show that conditions are so restrictive that they are "tantamount to denial of counsel." *Biwot v. Gonzales*, 403 F.3d 1094, 1099-1100 (9th Cir. 2005). The FAC devotes nearly 100 paragraphs to

[4] Notably, in other litigation pending before this Court, Defendant GEO argued that its "detention of immigrants is exclusively a federal function" in seeking to avoid liability for forced labor violations. *See* Memorandum of Points and Authorities in Support of Defendant GEO Group's Motion to Dismiss at 22, *Novoa v. GEO Group*, No. 5:17-cv-02514-JGB (C.D. Cal. Feb. 16, 2018), ECF No. 20-1). Defendant's position here cannot be reconciled with its position in *Novoa*.

[5] Though Defendant raises these arguments to attack Plaintiffs' standing, Plaintiffs address them as an attack on the merits in an abundance of caution and because, as described in Part I.A, *supra*, Defendant conflates the injury required to establish standing with that required to win relief.

describe in detail policies and practices that on their face impede detained immigrants' ability to find and retain counsel. *See, e.g.*, Dkt. 62 ¶¶ 32-39 (describing how GEO's policies and procedures barred Plaintiff Tenghe from retaining counsel while detained); *id.* ¶¶ 44-45 (alleging Plaintiff Nsinano was never able to obtain counsel while at Adelanto); *id.* ¶ 105 (GEO's "restrictions on telephone access make it difficult or impossible for detained noncitizens to contact individuals for legal purposes."); *id.* ¶ 144 ("Defendants' numerous restrictions on communications . . . effectively delay[] *or prevent* detained noncitizens from . . . obtaining counsel."); *cf. Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1163 (D. Or. 2018) (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").[6]

As to represented detainees, Plaintiffs need only allege GEO's policies and procedures interfere with their "established, on-going attorney-client relationship." *Comm. of Cent. Am. Refugees v. INS (CCAR)*, 795 F.2d 1434, 1439 (9th Cir. 1986); *accord Arroyo* at *17; *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1509 (C.D. Cal. 1988) (finding breach of detained immigrants' right to counsel without reference to prejudice where officers denied access to phones via, *inter alia*, time restrictions, low number of functioning phones, obstacles to collect calling, and unreliable notifications of calls and messages from attorneys), *aff'd sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 549 (9th Cir. 1990) (affirming injunction on actions that "interfere[d] with established attorney-client relationships"). The FAC alleges such harms. Dkt. 62 ¶ 54 (describing effect of policies on Plaintiff Nsinano); *id.* ¶¶ 152-56 (describing impact of policies on detained immigrants' attorney-client relationships); *id.* ¶ 186.

[6] *Lyon v. ICE*, 171 F. Supp. 3d 961, 976 (N.D. Cal. 2016), is not to the contrary. Though in that case the court granted summary judgment finding no evidence the restrictions were "tantamount to a denial of counsel," *id.* at 974, it did so only after discovery.

Second, with respect to Immigrant Plaintiffs' INA and due process right to a full and fair hearing, the law requires only that Plaintiffs allege that the outcome of their proceedings "*may* have been affected by the alleged violation." *See Lyon v. ICE*, 171 F. Supp. 3d 961, 982 (N.D. Cal. 2016) (considering and rejecting applying *Lewis*'s actual-injury requirement). In *Lyon*—in which the court considered evidence of restrictions on phone access similar to that alleged here—the court found that "the nature and breadth of the systemic phone restrictions . . . , are sufficient to establish a real risk for class members that the restrictions 'may' or 'potentially' affect the outcome of removal proceedings . . . ." 171 F. Supp. 3d at 983 (denying Defendant's motion for summary judgment on Plaintiffs' due process claim); *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 allege that GEO's 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.* ¶¶ 32-39 (alleging GEO's policies and procedures prevented Plaintiff Tenghe from ever obtaining critical documents needed for his case); *id.* ¶ 46 (alleging Plaintiff Nsinano's application for asylum and BIA appeal were denied because he could not collect necessary evidence); *id.* ¶¶ 157-64 (describing general effect of GEO's policies and practices on unrepresented immigrants' ability to collect evidence). These allegations state a claim for relief under the INA and the Due Process Clause.

C. Immigrant Plaintiffs State a Claim for Relief Under the Substantive Due Process Clause.

Immigrant Plaintiffs have adequately pled that GEO's policies and practices violate their right to substantive due process (Count 3). *See* Dkt. 62 at ¶¶ 167-70, 195-98. As Plaintiffs have explained in opposition to the Federal Defendants' motion

to dismiss, at 18, Plaintiffs have credibly alleged GEO's 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 ¶ 67; that Defendants' restrictions are unnecessarily restrictive and punitive; 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.

GEO nonetheless contends the FAC's allegations are too conclusory to survive review under *Iqbal* and *Twobly* . Dkt. 80 at 24. The FAC devotes eight paragraphs to lay out facts specific to this claim—with evidentiary citations—and dozens more describe in detail the restrictions jailed immigrants face. *See, e.g.*, Dkt. 62 at ¶¶ 167-70, 195-98. Among other things, the FAC bolsters its factual allegations with references to corroborating public reports. *See* Dkt. 62 at 26 n.4 (citing California Department of Justice, *Immigration Detention in California* (February 2019), at 122-28. For instance, Exhibit E to the FAC provides a comparator between the conditions at issue and those in criminal detention facilities in this judicial district. Dkt. 62-5.

Collectively, the factual allegations in the FAC "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 663, 678 (2009). GEO can readily discern the nature and the basis for the claims against it, which more than satisfies Rule 8.

D. Attorney Plaintiffs State a Claim for Relief Under the First Amendment

GEO challenges Attorney Plaintiffs' First Amendment claim (Count 4), asserting the First Amendment does not protect their right to speak with persons who seek their legal assistance. Dkt. 80 at 22-23. For the reasons discussed in Plaintiffs' Opposition to the Federal Defendants' Motion to Dismiss, 21-23, GEO is wrong, and the FAC adequately alleges a basis for this claim. Attorney Plaintiffs assert their own rights, not their clients', which is why GEO's arguments about third-party standing miss the mark. *See* Dkt. 80 at 23. And this Court has jurisdiction to hear

these claims. *See supra* Part I.

E. Immigrant Plaintiffs State a Claim for Relief Under the First Amendment

Beyond challenging this Court's jurisdiction to hear Immigrant Plaintiffs' First Amendment claims (discussed in Part I.B, *supra*), GEO devotes only one paragraph to the merits of those claims (Count 5). It contends that they have not alleged an actionable harm based on a misreading of both governing case law and the FAC.

First, contrary to GEO's suggestion, Dkt. 80 at 25, Immigrant Plaintiffs need not show actual injury to demonstrate a violation of their First Amendment rights. Restrictions that interfere with prisoners' First Amendment right to communicate with the outside world are "subject to rational limitations in the face of legitimate security interests of the penal institution." *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986). Under the test established by the Supreme Court, this Court must evaluate:

> (1) whether there is a valid, rational connection between the restriction and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right; (3) whether accommodating the asserted constitutional right will have a significant negative impact on prison guards and other inmates, and on the allocation of prison resources generally; and (4) whether there are obvious, easy alternatives to the restriction showing that it is an exaggerated response to prison concerns.

Valdez v. Rosenbaum, 302 F.3d 1039, 1049 (9th Cir. 2002) (citing *Turner v. Safley*, 482 U.S. 78, 89-90 (1987)). Here, Immigrant Plaintiffs have plausibly alleged, *inter alia*, that GEO's 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.[7] *See, e.g.*, Dkt. 62 ¶¶ 93-119 (alleging telephone policies prevent communications with family and counsel); *id.* ¶¶ 120-124 (describing excessive restrictions on in-person visitation); *id.* ¶¶ 130-35 (showing why legal mail is not a

[7] *See also*, *e.g.*, *Dillard v. 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.").

viable alternative); *id.* ¶ 170 ("ICE's own Detention Standards represent just one example of less restrictive legal communication policies").

Second, Immigrant Plaintiffs need not allege actual injury to maintain a claim that GEO interferes with their right to confidential legal mail. Immigrant Plaintiffs have a First Amendment right, grounded in the speech clause, to receive sealed legal mail without government interference. *Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1208 (9th Cir. 2017). This protection includes the right to "send and receive" legal mail, *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995), and the right to have legal mail inspected and opened in their presence, *Hayes*, 849 F.3d at 1208. To state a claim, Plaintiffs need only allege their "right to privately confer with counsel has been chilled." *Id.* at 1209. The harms occur at the moment of the violation and without reference to the outcome of removal proceeding. Plaintiffs' allegations that GEO returns properly addressed legal mail without explanation, imposes screening and sorting procedures that delay delivery by weeks, and thereby prevents detained immigrants from receiving legal advice or preparing for court hearings without in-person visits are sufficient to allege a First Amendment violation. *See* Dkt. 62 ¶¶ 52, 135, 208.

F. Immigrant Plaintiffs May Seek Relief Under the INA Against GEO.

Finally, GEO wrongly contends that there is no private right of action to enforce Sections 1229a(b)(4)(A)-(B) and 1362. Dkt. 80 at 18-19. In determining whether a private right of action is implicit in a statute, courts "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Courts use "ordinary tools of statutory interpretation," looking to the "language and structure" of a statute in "evaluat[ing] whether an implied private cause of action exists." *Segalman v. Southwest Airlines Co.*, 895 F.3d 1219, 1222-24 (9th Cir. 2018). Among other things, courts consider whether statutory language confers "rights" on the plaintiffs. *See Armstrong*, 135 S. Ct. at 1387 ("Section 30(A) [of the

Medicaid Act] lacks the sort of rights-creating language needed to imply a private right of action."); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n. 13 (1979) ("[T]his Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case . . . .").

Here, both the language and structure of the INA support that Congress intended to create a private cause of action. The right-to-counsel provisions expressly create "rights" for the plaintiff class, focusing on individuals instead of being "phrased as a directive to federal agencies." *See Alexander*, 532 at 289 (quoting *Universities Research Assn, Ind. v. Coutu,* 450 U.S. 754, 772 (1981)). Section 1229a(b)(4) is titled "alien's rights in proceeding," and Section 1362 is titled "right to counsel." The provisions protect Immigrant Plaintiffs' interests by, *inter alia*, ensuring that they can retain counsel of their choice, have a "reasonable opportunity" to examine the Government's evidence, present evidence on their behalf, and cross-examine witnesses. *See* 8 U.S.C. 1229a(b)(4)(A)-(B) and 1362. In enacting these sections, Congress recognized these rights "stem[] from the Fifth Amendment guarantee of due process that adhere to individuals that are the subject of removal proceedings." *Biwot*, 403 F.3d at 1098 (citing *Baltazar-Alcazar v. INS*, 386 F.3d 940, 944 (9th Cir. 2004).[8]

The structure of the INA also supports finding an implied cause of action under Sections 1229a(b)(4)(A)-(B) and 1362. *See Segalman*, 895 F.3d at 1224 ("[w]e ... look to see whether Congress designated a method of enforcement other than through private lawsuits, because [t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others") (internal quotations omitted). For the reasons set forth *supra*, Congress did not intend to preclude a district court action to enforce the INA's right to counsel provisions. *See also* Opp to Fed. Defs.' Mot. at 5-11. The administrative scheme is therefore entirely

[8] *See also* Congr. Research Service, Doc. R43613, at Summary (May 2016), *available at* https://fas.org/sgp/crs/homesec/R43613.pdf ("[T]he [right to counsel] provisions have generally been construed as conferring a legally enforceable right.").

consistent with the existence of a private cause of action under Sections 1229a(b)(4)(A)-(B) and 1362.

While Plaintiffs are not aware of any decision that has directly addressed whether the right to counsel provisions confer a private right of action, courts have found that other provisions of the INA do. *See, e.g.*, *Vega v. Nourse Farms Inc.*, 62 F. Supp. 2d 334, 340-41 (D. Mass. 1999) (finding implied right of action under statute designed to protect domestic workers); *Int'l Union of Bricklayers v. Meese,* 616 F. Supp. 1387, 1397 n. 8. (N.D. Cal. 1985) (same). Like in those cases, Congress has "evidenced a continuing concern for the protection of" individuals in removal proceedings by enacting the right to counsel provisions, *Int'l Union of Bricklayers*, 616 F. Supp. at 1401. Consistent with this understanding, numerous courts have entertained claims arising from violations of the INA. *See, e.g.*, *Orantes-Hernandez*, 919 F.2d at 567-68; *Lyon*, 171 F. Supp. 3d. at 994 (INA claims failed on factual basis, not as a matter of law); *Rodriguez-Castillo v. Nielsen*, No. 5:18-cv-01317-ODW-MAA, Dkt. 1 ¶¶ 57-59 (asserting claims under 1229a(b)(4)(A); *Rodriguez-Castillo v. Nielsen*, 2018 WL 6131172, at *1 (C.D. Cal. June 21, 2018) (granting temporary restraining order).

GEO cites to several cases in which courts have declined to find an implied cause of action under the INA, *see* Dkt. 80 at 19. However, those cases involve INA provisions that lack rights-creating language. *See Singh v. Cissna*, No. 1:18-cv-00782-SKO 2018 WL 4770737, *7 (E.D. Cal. Oct. 1, 2018) (no cause of action under INA provisions that define which noncitizens are subject to quotas and establish penalties for marriage fraud); *North Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp. 2d 288, 303-304 (D.N.J. 2002), *rev'd on other grounds*, 308 F.3d 198 (3d Cir. 2002) (no cause of action under INA provisions that establish protocols for removal proceedings because they lack language providing "the public a *right* of access"); *Huiwu Lai v. United States*, No. C17-1704-JCC, 2018 WL 1610189, at *4 (W.D. Wash. Apr. 3, 2018) (plaintiff conceded there was no cause of action under the INA provisions at

issue). These cases support finding a cause of action under INA provisions that do contain rights-creating language, like those at issue here.

Accordingly, Sections 1229a(b)(4)(A)-(B) and 1362 are designed to benefit individuals like Plaintiffs, and they may sue to enforce these provisions.

Respectfully submitted,

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