IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SOUTHERN POVERTY LAW CENTER,

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INTRODUCTION

Never in the modern immigration detention system have detained immigrants more urgently needed access to their lawyers. Nearly 1,000 detained immigrants are known to be infected with COVID-19 nearly 50 percent of those tested and that number is indisputably much higher given that Defendants have tested a mere 7% of people in its custody. *See* ICE Guidance on COVID-19,

ARGUMENT

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

SPLC has third- Amendment rights,

Powers v.

Ohio, 499 U.S. 400, 411 (1991); *Eisenstadt v. Baird*, 405 U.S. 438, 444-46 (1972).

organizational mission and forced it to divert its resources. Legal services organizations suffer an

See

Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 799 (D.C. Cir. 1987) (holding legal services organization had suffered injury sufficient for standing where it alleged that its mission to provide legal representation to refugees had been thwarted); *Ukrainian-* , 893 F.2d

ability to provide services and thereby caused a drai

Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982).

, and pursuing

ion detention. Second Am. 15, 97; Rivera Decl. ¶ 2, ECF No. 105-7; Williams Decl. ¶ 1, ECF No. 105-8. With the onset of the pandemic, SPLC is especially focused on release of its clients from custody, as continued detention exposure to COVID-19. Venters Decl. ¶¶ 7, 9-13, ECF No. 105-5. SPLC represents clients

desperately seeking release through bond, parole, or petitions for habeas, in addition to representing clients at their merits hearings and conducting conditions advocacy. Rivera Decl. ¶¶ 2, 4, 13; Williams Decl. ¶ 4-

timely, and effectively conduct remote legal visits and can timely exchange confidential

limiting its ability to represent clients and secure their release. For these reasons alone, SPLC has

Haitian Refugee Ctr. v. Baker, 789 F. Supp. 1552, 1558-60 (S.D. Fla. 1991)

Under these circumstances, the injury requirement for standing is easily met. *See PETA v. USDA*, 797 F.3d 1087, 1093-96 (D.C. Cir. 2015) (holding that organization had suffered injury sufficient to satisfy standing where it had diverted resources in response to challenged conduct); *Guild v. Securus Techs.*,

petitions for habeas relief, Defs. Opp

some

h Servs., Inc., 280 F.3d 278, 290 (3d Cir. 2002) (quoting *Powers*, 499 U.S. at 411 (emphasis added)); *accord* *Singleton v. Wulff*, 428 U.S. 106, 117-

Exodus Refugee Immigration, Inc., 165 F. Supp. 3d at 732. Various obstacles may warrant third-

constitutional right at stake presents inherent obstacles for the right holder to assert the right. *See, e.g., Singleton*, 428 U.S. at 117; *Aid for Women v. Foulston*, 441 F.3d 1101, 1114 (10th Cir. 2006).

First, as in *Singleton*, where women were hindered from protecting their rights to privacy because filing suit would vitiate that very privacy, 428 U.S. at 117,

hindered from protecting their interests because filing suit on their own behalf would have the perverse effect of impairing those very interests. S

rights to access counsel vindicated so that they can have meaningful access to and communication with their lawyers to secure release from detention and in their removal proceedings. But if SPLC clients filed a civil lawsuit to vindicate those rights, the necessary attorney-client communications necessary would hinder them from preparing for bond proceedings, parole requests, potential habeas claims, and removal proceedings. Every hour of a remote legal visit using the limited phone and VTC stations to discuss the access to counsel suit would be an hour the clients could not spend speaking with their attorneys about release options or their removal cases. In this way, the very nature of the constitutional injury at stake deprivation of access to counsel

See Aid for Women, 441 F.3d at 1114.

ave limited knowledge of the U.S. legal system, and have no access to legal resources but for those provided by SPLC, *see* SAC ¶ 19 therefore would be severely if not entirely hampered from protecting their own constitutional interests. *See Al Odah v. United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004) (Kollar-Kotelly, J.) to grapple with the complexities of a foreign legal system and present their claims to this Court witho T process of litigating their constitutional claims in federal court, their removal cases would almost certainly be complete.

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

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

More than two years after this case was filed, Defendants now erroneously argue that 8 U.S.C. § 1252 divests federal district courts of any jurisdiction to adjudicate and remediate constitutional claims regarding conditions of confinement inside ICE prisons. if

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

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

Following *Jennings*, courts have recognized that Section 1252 does not divest district courts of jurisdiction to adjudicate and remediate claims of unconstitutional conditions of confinement in ICE facilities, including access-to-counsel and substantive due process claims. *See, e.g.*, *Torres v. DHS*, 411 F. Supp.3d 1036, 1047-50 (C.D. Cal. 2019) (holding Section 1252 did not bar court from issuing an injunction to remediate conditions in ICE facility that impeded access to counsel and that were unconstitutionally excessive and punitive); *Innovation Law Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1075-78 (D. Or. 2018)

Jennings,

to communicating with counsel for purposes of release on bond, parole, or unconstitutional

[6]

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

Although *Jennings*

constitutional conditions claims, well-established rules of statutory construction and constitutional avoidance further demonstrate why this Court retains jurisdiction.

Webster v. Doe, 486 U.S. 592, 603 (1988)

of Congressional intent to divest courts of jurisdiction to hear constitutional claims); *ANA Int l, Inc. v. Way*, 393 F.3d 886, 894 (9th Cir. 2004)

jurisdiction- The Supreme Court has repeatedly applied this principle to limit the reach of Section 1252. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 314 (2001); *Calcano-Martinez v. INS*, 533 U.S. 348, 351-52 (2001). The Supreme Court has made clear that adopting the broad construction of Section 1252 that Defendants propose here

y meaningful forum to have their constitutional claims adjudicated and remediated. *Id*. Such a construction would

. *See Ramos v. Nielsen*, 321 F. Supp.3d

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

1083, 1102 (N.D. Cal. 2018).

burden to demonstrate that, through Section 1252, Congress intended to deprive district courts of their longstanding power to adjudicate constitutional conditions claims particularly where such a construction would deprive detained immigrants of any ability whatsoever to obtain an injunction to remediate those conditions. *See Webster*, 486 U.S. at 603.

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

Defendants erroneously contend that SPLC cannot prevail on its access-to-counsel claim because SPLC has not shown that access barriers -

a 36 37, and because each access

F.3d 1094, 1098 (9th Cir. 2005) (immigrant sought to set aside removal order as a result of

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

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wholly ignores that detained immigrants require access to counsel for purposes other than removal

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

counsel should be followed. And i

PBNDS does not form the constitutional floor. [7] n at 41. Instead, and contrary to the

Defendants devote the majority of their opposition and evidentiary submissions to arguing that the Facilities already have policies in place concerning access to counsel. But that is not the question before the Court. Rather, the key questions are (1) whether those policies and practices are constitutionally adequate and (2) if so, whether they are actually being followed in practice. The evidence firmly establishes that the answer to both of these question is *no*.

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

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

[8] Defendants argue that, at LaSalle, Defendants have made one of the three VTC consoles

mention that this *ad hoc* remedy was offered only six days ago in response to a non-compliance notice sent by SPLC, and in fact provides *no* additional access beyond what the parties already

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

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

Critically, these barriers to adequate and reliable access in the Facilities flow directly and foreseeably ly Tellingly, Defendants do not submit a single declaration that adequately describes how Defendants are ensuring that the Facilities comply with

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negotiated in a prior settlement agreement at that facility. *See* Agarwal Supp. Decl. Ex. D, ECF No. 108-
issues that have made VTCs wholly unreliable at LaSalle. Rivera Decl. at ¶ 24.

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

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

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ntive due process claim.

Defendants therefore have conceded

restricting legal communications are excessive and therefore punitive in violation of the Fifth

s protections. *See Meixing Ren v. Phoenix Satellite Television, Inc.*, No. 13-cv-1110, 2014 WL 12792707, *2 (D.D.C. 2014); *see also Schneider v. Kissinger*

argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for

Nor could Defendants seriously dispute that the challenged conditions are unnecessarily restrictive and therefore unconstitutionally punitive in light of

own admissions.

constitutionally adequate Defendants have failed to ensure that those standards are consistently implemented at the facilities, as described above. *See* ECF 105-1 at 29-32. The evidence further establishes that conditions at the facilities both fail to comply with CDC guidance on legal communications and are more restrictive than conditions in prisons. ECF 105-1 at 31-32. This

although all the facilities utilize fax for exchange of medical records, only Irwin allows detained individuals to send faxes to their attorneys. River

designated legal fax number

Id. at 20.

Irwin also allows detained individuals to request that legal or case sensitive documents be e-mailed. Second Musante Decl. ¶35 ECF No. 110-10.[10] Stewart states that, while it does not accept

using the 27 kiosks at the facility. Moten Decl. ¶39 ECF No. 110-8. But Defendants fail to provide evidence that these kiosks are unmonitored and that their use is free of charge. *Id*. The PBNDS explicitly contemplates use of fax or email, and Courts have found this may be warranted for documents that require prompt signature or delivery. ., No. 5:18-CV-2604 (C.D. Cal. Apr. 11, 2010), ECF No. 144 *citing* PBNDS 5.1 (V)(O).

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

ably tailored to facilitate access to counsel during the pendency of the pandemic; -existing policies; and builds logically upon some of its pre-existing practices in specific ICE facilities. *Torres*, No. 5:18-CV-2604, ECF No. 144 (granting TRO to expand remote attorney communications during COVID-19).

conditions. *Banks*, 2020 WL 1914896, at *12.

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

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

staff; indeed, the CDC itself recommends limiting in-person attorney visits and expanding access to remote communications. Yet, as detailed above, the evidence shows that Defendants allow Facilities to impose unnecessary restrictions on remote legal communications (e.g., by placing

CONCLUSION

for temporary restraining should be granted.

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Respectfully submitted,

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