

1 MICHAEL KAUFMAN (CA Bar No. 254575)
2 EVA BITRAN (CA Bar No. 302081)
3 ZOË MCKINNEY (CA Bar No. 312877)
4 ACLU OF SOUTHERN CALIFORNIA
5 1313 West 8th Street
6 Los Angeles, CA 90017
7 Telephone: (213) 977-5232
8 Facsimile: (213) 977-5297
9 MKaufman@aclusocal.org
10 EBitran@aclusocal.org
11 ZMcKinney@aclusocal.org

12 *Attorneys for Plaintiffs*

13 *(Additional counsel listed on following page)*

14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA

16 ERNESTO TORRES, DESMOND
17 TENGHE, JASON NSINANO, on behalf
18 of themselves and all others similarly
19 situated, AMERICAN IMMIGRATION
20 LAWYERS ASSOCIATION,
21 IMMIGRANT DEFENDERS LAW
22 CENTER,

23 Plaintiffs,

24 v.

25 UNITED STATES DEPARTMENT OF
26 HOMELAND SECURITY; KIRSTJEN
27 M. NIELSEN, Secretary of Homeland
28 Security; UNITED STATES
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' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF THEIR
APPLICATION FOR A
TEMPORARY RESTRAINING
ORDER**

1 *Additional Plaintiffs' counsel*

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

12 SEAN A. COMMONS (CA Bar No. 217603)
13 CHRISTOPHER M. GRIFFIN (CA Bar No. 317140)
14 NICHOLAS S. WILLINGHAM (CA Bar No. 317952)
15 SIDLEY AUSTIN LLP
16 555 West Fifth Street, Suite 4000
17 Los Angeles, CA 90013
18 Telephone: (213) 896-6000
19 Facsimile: (213) 896-6600
20 scommons@sidley.com
21 cgriffin@sidley.com
22 nwillingham@sidley.com

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

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1 *Holder v. Humanitarian Law Project*,
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15 U.S. Const. amend. V 12

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1 **I. INTRODUCTION**

2 Plaintiffs seek temporary emergency relief to ensure that immigration detainees
3 at the Adelanto ICE Processing Center have basic access to counsel during the
4 COVID-19 pandemic. At present, the federal government is proceeding with Adelanto
5 detainees’ immigration cases, including bond hearings at which their liberty is at stake
6 and final merits hearings at which they may be ordered deported. Defendants have
7 nonetheless instituted policies related to COVID-19 that effectively prevent any in-
8 person visitation. These policies compound the serious pre-existing barriers that
9 unlawfully restrict Adelanto detainees’ access to the outside world—including
10 Defendants’ limits on access to outgoing telephone calls, prohibition on incoming
11 legal calls, prohibitively expensive phone rates, and denial of confidential calls—that
12 have made it effectively impossible for legal counsel and detainees to prepare for
13 these critical hearings. Plaintiffs, having learned of these policies on March 21 and
14 March 24, 2020, now therefore seek emergency relief from this Court.

15 Plaintiffs emphasize at the outset that they do **not** seek any modifications to the
16 public health measures at Adelanto related to COVID-19, and do **not** seek to
17 reinstitute in-person visitation at the facility. Rather, Plaintiffs seek only modest
18 accommodations to facilitate phone and video calls in light of the pandemic and the
19 extraordinary restrictions on visitation instituted by Defendants. And Plaintiffs only
20 request that the Court order these accommodations temporarily until the crisis abates
21 and full visitation is restored.

22 In the past several days, Defendants have virtually shut down in-person
23 visitation to Adelanto. Defendants have barred all contact visitation at Adelanto, and
24 only permit non-contact visitation if “legal visitors to provide and wear personal
25 protective equipment (PPE) (disposable vinyl gloves, N-95 or surgical masks, and eye
26 protection) while visiting any detention facility.”¹ As has been widely reported, there

27 ¹ Decl. of Zoë McKinney (“McKinney Decl.”) Ex. B; *accord* ICE Guidance on
28 COVID-19, *available at*: <https://www.ice.gov/covid19> (last visited 25 March 2020, 2:00 p.m. PDT).

1 is a global shortage of PPE,² and medical professionals, the surgeon general, and the
2 Vice President are urging members of the public to stop purchasing PPE and donate
3 available supplies to protect frontline hospital workers.³ Because of these policies,
4 attorneys are effectively barred from any visitation at Adelanto. And because of the
5 pre-existing and ongoing lack of confidential or free legal calls to detainees at the
6 facility, many detainees are effectively shut off from any legal assistance.

7 To prevent further constitutional harm, Plaintiffs Ernesto Torres, Jason
8 Nsinano, American Immigration Lawyers Association (“AILA”) and Immigrant
9 Defenders Law Center (“ImmDef”) seek a temporary restraining order requiring
10 Defendants to provide detained immigrants the means to communicate with counsel
11 outside the facility. Plaintiffs are likely to demonstrate that Defendants’ policies and
12 practices violate their constitutional and statutory right to counsel. The Ninth Circuit
13 has long recognized that the Due Process Clause and the Immigration and
14 Nationality Act (INA) protect immigrants’ fundamental right to retain and receive
15 effective assistance from counsel. *See, e.g., Orantes-Hernandez v. Thornburgh*, 919
16 F.2d 549, 566 (9th Cir. 1990). For represented immigrants, this right protects
17 against “interfere[nce] with established attorney-client relationships.” *Comm. of*
18 *Cent. Am. Refugees v. INS*, 795 F.2d 1434, 1437-39 (9th Cir. 1986). As to
19 unrepresented immigrants, the right safeguards against policies that are “tantamount
20 to denial of counsel.” *Biwot v. Gonzales*, 403 F.3d 1094, 1100 (9th Cir. 2005).

21 Plaintiffs are also likely to show that Defendants’ practices violate Attorney

22 ² *See, e.g.,* News Release, “*Shortage of personal protective equipment endangering*
23 *health workers worldwide*,” World Health Organization, 3 March 2020, available
24 at: <https://www.who.int/news-room/detail/03-03-2020-shortage-of-personal-protective-equipment-endangering-health-workers-worldwide>; Amelia Nierenberg,
“*Where Are All the Masks?*” *The New York Times*, March 22, 2020, available at:
25 <https://www.nytimes.com/article/face-masks-coronavirus.html>.

26 ³ Mariel Padilla, “*‘It Feels Like a War Zone’: Doctors and Nurses Plead for Masks*
27 *on Social Media*,” *The New York Times*, March 19 2020, available at:
28 <https://www.nytimes.com/2020/03/19/us/hospitals-coronavirus-ppe-shortage.html>
 (“As hospital supplies have dwindled, the vice president has called on construction
companies to donate masks, the surgeon general has urged the public to stop buying
them, and experts have warned that, the more doctors and nurses who get sick, the
greater strain on a system already stretched thin.”)

1 Plaintiffs’ First Amendment right to communicate with those who may need their
2 legal assistance or have retained their legal services. *See* Dkt. 101, Order Denying in
3 Part Defs.’ Mot. to Dismiss, at 25 (citing, *inter alia*, *NAACP v. Button*, 371 U.S.
4 415, 428-29 (1963)).

5 Finally, this case satisfies the remaining criteria for issuing a temporary
6 restraining order. Plaintiffs face irreparable harm: the continued denial of their
7 constitutional rights, *see Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012),
8 and the risk that they may be denied release or deported—to face persecution,
9 torture, or death—because they have been denied critical legal assistance, *see*
10 *Innovation Law Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1081 (D. Or. 2018). The
11 balance of interest tips in favor of the Plaintiffs, because the public has an interest in
12 government compliance with the Constitution. *Preminger v. Principi*, 422 F.3d 815,
13 826 (9th Cir. 2005), and the relief Plaintiffs seek is exactly what ICE’s own policy
14 suggests: that facilities protect attorney, guard, and detainee safety by offering
15 Skype or teleconference visitation first.⁴ Plaintiffs’ requested relief also complies
16 with the Center for Disease Control’s recommendations for institutional facilities
17 during the coronavirus pandemic⁵ and ICE’s own Performance Based National
18 Detention Standards,⁶ and it is available in other, similar detention facilities. To stop
19 the ongoing violation of detained immigrants’ constitutional and statutory rights,
20 Plaintiffs respectfully request that this Court issue a temporary restraining order.

21 II. FACTS

22 Defendants Department of Homeland Security (“DHS”) and Immigration and
23 Customs Enforcement (“ICE”) (collectively “Federal Defendants”) and the GEO

24 ⁴ *See* ICE Guidance on COVID-19, available at: <https://www.ice.gov/covid19> (last
25 visited 25 March 2020, 2:00 p.m. PDT).

26 ⁵ Center for Disease Control, “Interim Guidance on Management of Coronavirus
27 Disease 2019 (COVID-19) in Correctional and Detention Facilities,” 23 March
28 2020, available at: [https://www.cdc.gov/coronavirus/2019-
ncov/community/correction-detention/guidance-correctional-detention.html](https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html).

⁶ 2011 Operations Manual ICE Performance-Based National Detention Standards,
available at: <https://www.ice.gov/detention-standards/2011>.

1 Group (collectively “Defendants”) imprison up to 1,940 individuals at the Adelanto
2 ICE Processing Center in San Bernardino County under color of immigration law.
3 The individuals detained at the facility are foreign nationals awaiting the conclusion
4 of their removal proceedings.⁷ Many are asylum seekers who presented at a port of
5 entry to seek refuge from persecution or torture; many others are long term
6 permanent residents of the United States.⁸ Defendants control the conditions of the
7 detained immigrants’ confinement including whether, how often, and under what
8 conditions detainees are permitted to communicate beyond the prison walls.

9 To effectively represent a detained immigrant in removal proceedings,
10 immigrants must be able to spend at least 10-15 hours (and in many cases more)
11 speaking confidentially and openly with their attorneys. *See* Declaration of Chelsea
12 Bell (“Bell Decl.”) ¶¶ 27-29; Declaration of Munmeeth Kaur Soni (“Soni Decl.”) ¶
13 36; Declaration of Katrina Bleckley (“Bleckley Decl.”) ¶¶ 15-17, 23-24. Attorneys
14 must develop trust and build rapport, ensure their clients understand the details of
15 our complex immigration system, receive their clients’ input on strategic decisions,
16 elicit truthful and honest accounts of the often traumatic experiences in their clients’
17 past, draft declarations and prepare evidentiary submissions to be filed in court, and
18 prepare clients to undergo direct examination and withstand cross. *See* Bell Decl. ¶¶
19 27-32; Soni Decl ¶ 31-37; Bleckley Decl. ¶¶ 15-17, 23-24. Attorneys and their
20 detained clients typically rely on in-person visitation and, where necessary,
21 telephone conversations to advance the representation. Defendants have put into
22 place policies and practices that greatly restrict the ability of Adelanto detainees to
23 find and retain counsel and to communicate with the lawyers they have hired.

24 **A. Restrictions on In-Person Visitation in Light of COVID-19**

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26 ⁷ Facility Detail, Adelanto ICE Processing Center,
<https://www.geogroup.com/FacilityDetail/FacilityID/24>.

27 ⁸ Paloma Esquivel, *‘We don’t feel OK here’: Detainee deaths, suicide attempts and*
28 *hunger strikes plague California immigration facility*, Los Angeles Times, Aug. 8,
2017, [https://www.latimes.com/local/lanow/la-me-ln-adelanto-detention-20170808-](https://www.latimes.com/local/lanow/la-me-ln-adelanto-detention-20170808-story.html)
[story.html](https://www.latimes.com/local/lanow/la-me-ln-adelanto-detention-20170808-story.html).

1 As the Ninth Circuit recently recognized, the coronavirus pandemic is a
2 “rapidly escalating public health crisis, which public health authorities predict will
3 especially impact immigration detention centers” *Xochihua-Jaimes v. Barr*,
4 No. 18-71460, Dkt. 53 at 1 (9th Cir. March 23, 2020) (per curiam) (sua sponte
5 releasing petitioner from immigration custody). The Centers for Disease Control’s
6 guidance for detained populations, which expressly includes immigration detention,
7 urges facilities to limit contact visitation *and* in exchange increase access to free or
8 low-cost telephone calls and virtual visitation. *See* Center for Disease Control,
9 “Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in
10 Correctional and Detention Facilities,” 23 March 2020, *available at*:
11 [https://www.cdc.gov/coronavirus/2019-ncov/community/correction-](https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html)
12 [detention/guidance-correctional-detention.html](https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html). But Defendants’ policies fall far
13 short: they functionally eliminate *any* visitation to the detention center without *any*
14 increase telephone or virtual visitation. This puts attorneys in the impossible
15 position of weighing their health and safety and that of their clients and families
16 against their ethical duty to effectively represent their detained clients. *See* Soni
17 Decl. ¶¶ 13-15 & Ex. A (instructing staff not to visit Adelanto during the pandemic
18 because of a lack of PPE and California’s shelter-in-place order).

19 Defendants have issued restrictive rules for facility access in light of COVID-
20 19. First, on March 15, 2020 ICE barred all contact visits at its facilities, relegating
21 in-person legal visits to a limited set of non-confidential phone booths. McKinney
22 Decl. ¶ 2 & Ex. A; Bleckley Decl. ¶ 6. Next, on March 21, 2020, ICE updated its
23 attorney visitation guidelines: “ICE/ERO now requires all legal visitors . . . to
24 provide and wear personal protective equipment (PPE) (disposable vinyl gloves, N-
25 95 or surgical masks, and eye protection) while visiting any detention facility.” *Id.*
26 Finally, on March 24, 2020, ICE updated its policy once more, urging that “[n]on-
27 contact legal visitation (e.g. Skype or teleconference) should be offered first” but
28 permitting in-person, contact visitation if the attorney undergoes screening “using

1 the same procedures as staff” and wears PPE. McKinney Decl. ¶ 6 & Ex. B. The
2 most recent policy states both that ultimate authority to approve legal visits remains
3 with the warden, and that “ICE will require all legal visitors to provide and wear
4 personal protective equipment (PPE) (disposable vinyl gloves, N-95 or surgical
5 masks, and eye protection) while visiting any detention facility.” McKinney Decl.
6 Ex. B. GEO staff have confirmed that the facility is not currently allowing contact
7 visits under any circumstances, and non-contact visitors must wear PPE. McKinney
8 Decl. ¶¶ 6-9; *accord* Bleckley Decl. ¶¶ 6, 14, 22.

9 Defendants’ policy requiring legal visitors to Adelanto to wear PPE in light of
10 COVID-19 renders in-person visitation all but impossible. Given the global shortage
11 of PPE,⁹ the region’s immigration attorneys—like Plaintiffs—are not able to get the
12 equipment they would need to comply with Defendants’ policies. *See* Bleckley
13 Decl. ¶¶ 14; Soni Decl. ¶ 12-13; Declaration of Karlyn Kurichety (“Kurichety
14 Decl.”) ¶ 3. In light of the risks of visiting the facility with incomplete PPE and
15 California’s shelter-in-place order, Plaintiff ImmDef’s Executive Director has
16 instructed attorneys not to conduct in-person visitation during the pandemic. Soni
17 Decl. ¶¶ 13-14 & Ex. A.

18 Even if attorneys had access to PPE and were able to meet Defendants’
19 criteria for entering the facility, they would only be permitted non-contact visits
20 with their clients. *See* McKinney Decl. ¶¶ 6-9; *accord* Bleckley Decl. ¶¶ 6, 14, 22;
21 Bell Decl. ¶ 6. But non-contact visits at Adelanto are inadequate because there is not
22 sufficient space to accommodate legal visits and the spaces are not confidential. *See*
23 Bell Decl. ¶ 10; Bleckley Decl. ¶ 6. The non-contact visitation space at Adelanto
24 comprises a row of several stools on one side of a plexiglass barrier, with matching
25

26 ⁹ *See, e.g.*, News Release, “*Shortage of personal protective equipment endangering*
27 *health workers worldwide*,” World Health Organization, 3 March 2020, available
28 at: <https://www.who.int/news-room/detail/03-03-2020-shortage-of-personal-protective-equipment-endangering-health-workers-worldwide>; Amelia Nierenberg,
“*Where Are All the Masks?*” The New York Times, March 22, 2020, available at:
<https://www.nytimes.com/article/face-masks-coronavirus.html>.

1 stools for the detainee behind the glass. Bleckley Decl. ¶ 6; Bell Decl. ¶ 10.
2 Attorneys and their clients each speak into a telephone receiver. *Id.* Although there
3 are short barriers separating one stool from the next, they are not walls: attorneys
4 and their clients can easily hear other non-contact visits taking place, and the GEO
5 guard who stands at the door of the non-contact visit room can also overhear these
6 conversations. Bleckley Decl. ¶ 6; Bell Decl. ¶ 10.

7 This lack of confidentiality harms attorney-client relationships. For example,
8 in April 2019 Plaintiff ImmDef Attorney Chelsea Bell went to Adelanto to prepare a
9 gay, HIV-positive client for a merits hearing. Bell Decl. ¶ 10. She intended to
10 discuss sensitive facts at the heart of his asylum claim, including the violence he
11 suffered in his home country on account of his sexual identity and would likely
12 suffer on account of his HIV-positive status. *Id.* She and her client sat in an open
13 booth, separated by plexiglass. *Id.* Because Ms. Bell and her client were separated
14 by plexiglass, she could not get his signature on any documents. *Id.* Their
15 conversation was not confidential: Ms. Bell heard everything those next to her said,
16 and she could hear GEO guards talking in the corner of the room. *Id.* As a result,
17 Ms. Bell and her client could not review his testimony because the client feared for
18 his safety if others learned of his sexuality and HIV-positive status. *Id.*

19 In sum, ICE's COVID-19 guidance all but bars attorneys from in-person
20 visitation with their clients and forces anyone who is actually able to enter the
21 facility to jeopardize attorney-client confidentiality.

22 **B. Restrictions on Telephone Access**

23 In light of ICE's COVID-19 visitation rules, attorneys have little choice but to
24 rely on the telephone to communicate with their clients. But Defendants have made
25 no allowances for these extraordinary circumstances: their telephone policies remain
26 as restrictive as ever. Barriers to telephone access at Adelanto render attorneys
27 virtually unable to advance their clients' representation over the phone. *See, e.g.,*
28

1 Bell Decl. ¶ 12 (“I cannot reach my Adelanto clients by phone, and when they call
2 me it is not possible to speak confidentially.”); Bleckley Decl. ¶¶ 19-20 (“Because it
3 is not possible for me to speak with clients on an unmonitored line, I cannot have
4 private conversation with my clients over the telephone. Instead, to ensure
5 confidentiality, I am forced to do all of my substantive case preparation through in-
6 person attorney visits at the Adelanto Detention Facility.”). Although Defendants
7 theoretically offer to deliver messages requesting detainees call their attorneys, in
8 practice this system is inoperable. One attorney tried “on at least two dozen
9 occasions over the past year to call Adelanto and leave a message” for her client,
10 and before the pandemic none of her clients had ever received a message she left for
11 them. Bell Decl. ¶ 13; *accord* Soni Decl. ¶ 19 (“For at least the past two years, I
12 have instructed attorneys under my supervision that they should not rely on
13 telephone messages to reach their clients because the system is so unreliable, and
14 they cannot expect to receive a call back when they leave a message for a client.”).

15 Even more troubling, detained immigrants are unable to leave voicemail for
16 their attorneys. Declaration of Ernesto Torres (“Torres Decl.”) ¶ 8; Bell Decl. ¶ 14;
17 Soni Decl. ¶ 20. This is because Defendants impose a “positive acceptance
18 requirement,” *i.e.*, a live person (and not a phone tree or voice mailbox) must
19 answer the phone and press a number on the keypad in order for a call to connect.
20 Bell Decl. ¶ 14; Soni Decl. ¶ 20. If a lawyer happens to miss a call, they have no
21 ability to know which of their clients or prospective clients wanted to get in touch,
22 let alone what the immigrant detainee wanted to say. Bell Decl. ¶ 15.

23 The inability to leave messages is harmful because it is uncertain that
24 detainees will have access to a working phone during business hours. *See, e.g.*, Bell
25 Decl. ¶ 22; Declaration of Jason Nsinano (“Nsinano Decl.”) ¶¶ 10, 14; Torres Decl.
26 ¶ 11. Telephones are available in the dayroom at Adelanto, the place where the
27 approximately 80 immigrants who share a dorm may spend time when they are not
28 confined to their cells for count (occurring at least once during the workday for 60-

1 90 minutes, Bell Decl. ¶ 15) or otherwise locked down. *See* Nsinano Decl. ¶ 9.
2 Detainees use dayroom hours to take showers, buy and prepare food from
3 commissary, and make phone calls, among other things. Torres Decl. ¶ 19; Bell
4 Decl. ¶ 16. There are approximately 7 phones for the 80 detainees per dayroom.
5 Nsinano Decl. ¶ 9-10. One or more of these phones is commonly out of order, and
6 there are long stretches when the phones are simply shut off without explanation. *Id.*
7 For detainees in administrative, medical, or disciplinary segregation, the situation is
8 much worse: they are given only one dayroom hour per day and must share at most
9 4 working phones with 12 other detainees. *See* Nsinano Decl. ¶¶ 11-14.

10 During unit- or facility-wide lockdowns—such as the one currently affecting
11 a portion of Adelanto, Bell Decl. ¶ 16; Soni Decl. ¶ 16—immigrants have at most
12 one dayroom hour during which all 80 detainees in a dorm must share showers,
13 microwaves, and telephones. *See* Bell Decl. ¶ 16; Nsinano Decl. ¶ 11. The
14 predictable result is that immigrants are unable to communicate with counsel. Bell
15 Decl. ¶ 16 (“During a recent lockdown in January 2020, for example, all five of my
16 clients at the time were allowed out of their cells for a maximum of a half hour each
17 day for a period of almost three weeks. Some clients later told me that they spent the
18 half hour they had waiting in line for the phone, but because the other detainees in
19 the dorm were also trying to use the phone during that time, my clients were not
20 able to get access to the phone to call me in time before they were required to go
21 back into their cells. Some clients later told me that they were not able to wait to use
22 the phone because they only had a half hour to shower or buy items from the
23 commissary. I received no calls or missed calls from my five clients that were
24 detained at Adelanto during the duration of the lockdown.”). Even without the
25 constraints of a lockdown, attorneys and their clients cannot guarantee that they will
26 be able to speak on the phone during business hours. For example, Ms. Bell often
27 receives missed calls as early as 6:00 a.m. and as late as 8:30 p.m. Bell Decl. ¶ 15.
28

1 When detained immigrants and their attorneys are able to connect, call quality
2 and confidentiality prevent meaningful communication. Problems include static,
3 distortion, and background noise. *See, e.g.*, Bell Decl. ¶ 17; Soni Decl. ¶ 21;
4 Declaration of Elizabeth Hercules-Paez (“Hercules-Paez Decl.”) ¶ 8. Attorneys and
5 their clients waste time repeating themselves and waiting for phones to become
6 available if a call is dropped or is so poor that the parties decide to try again. Bell
7 Decl. ¶ 17. Even when the call quality is tolerable, conditions at the facility prevent
8 confidentiality. Calls from dayroom phones may be recorded and monitored.
9 Bleckley Decl. ¶¶ 17-18; Bell Decl. ¶ 18; Hercules-Paez Decl. ¶ 8. And the phones
10 are in public spaces: attorneys can hear the voices of other people in the background
11 of their clients’ calls. *See* Bell Decl. ¶ 17-18; Nsinano Decl. ¶ 18-20.

12 Attorneys have been told it is not possible to schedule a confidential call with
13 their clients. Bleckley Decl. ¶ 19 (“When I began representing detainees at Adelanto
14 in 2018, I asked a GEO employee if it is possible to schedule a confidential call
15 between an attorney and client and they confirmed that it is not.”); Soni Decl. ¶ 21
16 (“I do not have the ability to have a confidential call with a client detained at
17 Adelanto.”); Kurichety Decl. ¶¶ 5-6 (reporting GEO staff’s comments that the
18 facility “does not do legal calls”); Hercules-Paez Decl. ¶ 4 (“There is no clearly
19 established procedure for requesting a confidential call at Adelanto.”). Although
20 some attorneys have been told their clients may request confidential legal calls in
21 writing from their Deportation Officers, in practice these calls rarely if ever take
22 place. *See* Bell Decl. ¶¶ 20-21 (one of three requested calls took place more than a
23 week after the request; two others have yet to happen). Some attorneys have been
24 told that a confidential legal call can only happen if *both* the client submits a written
25 request *and* the attorney calls the client’s Deportation Officer with the same
26 request—an impossibility for a prospective client without a signed G-28 Notice of
27 Entry of Appearance of Attorney on file (no longer possible given the COVID-19
28

1 visitation restrictions), or a client who does not know about this process and is not in
2 contact with their attorney. *See* Kurichety Decl. ¶¶ 5-15; Hercules-Paez Decl. ¶ 4-7.

3 The lack of telephone confidentiality is a meaningful barrier to effective
4 representation: many detained immigrants' cases depend on details and information
5 they must keep secret from guards and other detainees for their own safety, such as
6 their sexuality or HIV status. *See* Bell Decl. ¶ 22; Nsinano Decl. ¶¶ 18-20; *accord*
7 Bleckley Decl. ¶¶ 19-21. As a result of this inability to have confidential phone
8 calls, many legal service providers (including Plaintiff ImmDef) have a policy of
9 not discussing substantive case-related matters over the phone. Soni Decl. ¶ 25
10 ("Because of the challenges with telephone communication with detainees at
11 Adelanto, in the last two years I have told attorneys working under my supervision
12 that, whenever possible, they should not communicate sensitive information to
13 clients detained at Adelanto."); *accord* Bell Decl. ¶ 18; Bleckley Decl. ¶¶ 19-20.

14 C. Restrictions on Access to Detainees' Deportation Officers

15 Finally, Defendants' policies and practices meaningfully restrict Attorney
16 Plaintiffs' access to their clients' Deportation Officers. Deportation Officers are ICE
17 employees who are responsible for clearing non-attorneys (including doctors) to
18 access the facility, giving access to the possessions (including medicine and
19 identifying documents like driver's licenses or passports) that were in an
20 immigrant's possession when they were arrested, maintaining DHS's internal file on
21 an immigrant, receiving and processing emergency requests for parole, and
22 coordinating detained immigrants' deportations. Bell Decl. ¶ 24; Soni Decl. ¶ 38;
23 Bleckley Decl. ¶ 26. In light of the COVID-19 pandemic, Deportation Officers have
24 become critical gatekeepers to requests for emergency medical parole and for
25 accommodations for those with preexisting medical conditions. Soni Decl. ¶¶ 38,
26 41; Declaration of Kate Voigt ("Voigt Decl.") ¶ 4. Crucially, attorneys must
27 communicate with clients' Deportation Officers to tell them when an immigrant's
28

1 deportation has been stayed. *Id.* & 42. However, due to Defendants’ policies and
2 practices, attorneys are unable to reliably communicate with Plaintiffs’ Deportation
3 Officers at Adelanto, whether by phone or in person. *See* Bell Decl. ¶¶ 34-42
4 (describing inability to contact Deportation Officers despite calling weekly or
5 multiple times per day, including since outbreak of COVID-19 pandemic; inability
6 to reach Deportation Officers via mail; month-long delays in contacting deportation
7 officers); Bleckley Decl. ¶¶ 26-30; Soni Decl. ¶ 39.

8 **III. ARGUMENT**

9 Plaintiffs meet the standard for emergency relief. A motion for temporary
10 restraining order should be issued if “immediate and irreparable injury, loss, or
11 irreversible damage will result” to the applicant if the order does not issue. Fed. R.
12 Civ. P. 65(b). The standard for issuing a temporary restraining order is the same as
13 the standard for issuing a preliminary injunction. *See Stuhlbarg Int’l Sales Co. v.*
14 *John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). To obtain a
15 preliminary injunction, Plaintiffs must demonstrate that (1) they are likely to
16 succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of
17 preliminary relief, (3) the balance of equities tips in their favor, and (4) an
18 injunction is in the public interest. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127
19 (9th Cir. 2009) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22
20 (2008)). “A preliminary injunction is appropriate when a plaintiff demonstrates . . .
21 that serious questions going to the merits were raised and the balance of hardships
22 tips sharply in the plaintiff’s favor.” *Alliance for Wild Rockies v. Cottrell*, 632 F.3d
23 1127, 1134-35 (9th Cir. 2011) (quoting *Lands Council v. McNair*, 537 F.3d 981, 97
24 (9th Cir. 2008) (en banc)). As set forth below, Defendants’ denial of attorney
25 access at Adelanto violates clearly established constitutional and statutory law.
26 Plaintiffs will suffer serious irreparable harm absent emergency relief.

27 **A. Plaintiffs Are Likely to Prevail on their Statutory and** 28 **Constitutional Claims.**

1 **1. Defendants’ Policies and Practices Violate Immigrants’**
2 **Constitutional and Statutory Right to Counsel.**

3 As this Court recently confirmed, Dkt. 101, the Constitution and the INA
4 require that imprisoned immigrants have adequate opportunities to visit and
5 communicate with counsel. *Id.* at 19-24, 26-28. The Due Process Clause of the Fifth
6 Amendment and the INA guarantee immigrants the right to be represented by
7 counsel of their choice. *See, e.g., Baltazar-Alcazar v. INS*, 386 F.3d 940, 944 (9th
8 Cir. 2004); 8 U.S.C. 1229a(b)(4)(A), 1362. This due process right includes the right
9 to effective assistance of counsel, *see Ahmed v. Mukasey*, 548 F.3d 768, 771 (9th
10 Cir. 2008); *see also Ardestani v. INS*, 502 U.S. 129, 138 (1991) (“We are mindful
11 that the complexity of immigration procedures, and the enormity of the interests at
12 stake, make legal representation in deportation proceedings especially important.”),
13 which necessarily entails the “right to consult with counsel.” *Orantes-Hernandez v.*
14 *Thornburgh*, 919 F.2d 549, 564 (9th Cir. 1990); *see also County of Nevada v.*
15 *Superior Court*, 236 Cal. App. 4th 1001, 1007 (2015) (“The right to effective
16 assistance of counsel includes the right to confer in absolute privacy.”); *id.* (detained
17 individuals have a “constitutional right to . . . have contact visits with counsel as
18 part of their right to meaningful access to the courts”).

19 **a. Defendants’ Policies and Practices Interfere with**
20 **Represented Detainees’ Attorney-Client Relationship**

21 Plaintiffs are likely to demonstrate that Defendants’ policies and practices
22 interfere with represented detainees’ attorney-client relationships and thus violate
23 their constitutional rights. The Ninth Circuit has made clear that a “constitutional
24 deprivation” of the “[F]ifth [A]mendment right to receive due process in deportation
25 proceedings” occurs when the government interferes with “an established, on-going
26 attorney-client relationship.” *Comm. of Cent. Am. Refugees v. INS*, 795 F.2d 1434,
27 1439 (9th Cir. 1986). This is true regardless of whether detained immigrants’
28 removal proceedings continue. As this Court stressed, “Even if an IJ granted infinite

1 continuances, the statutory right[] would never be realized if an immigrant’s
2 custodians could effectively block access to counsel. The right to counsel would be
3 meaningless if indefinite continuances were the remedy.” Dkt. 101 at 20.

4 As detailed extensively in Part II, *supra*, Defendants’ telephone and visitation
5 policies interfere with represented detainees’ attorney-client relationships because
6 they severely restrict detained immigrants’ access to consistent, confidential,
7 effective communication with their counsel. Immigrants must spend at least 10-15
8 hours—commonly up to 40—in detailed, confidential conversation with their
9 attorneys to successfully pursue their claims. *See* Bell Decl. ¶ 29; Bleckley Decl. ¶¶
10 16-18, 20-22; Soni Decl. ¶¶ 31-37. They must have the ability to check in frequently
11 with their attorneys to make strategic decisions, provide signatures, and confirm
12 facts. *See id.* But because neither detained immigrants nor their counsel can send or
13 receive voicemail, they cannot reliably contact one another. *See* Bell Decl. ¶ 13;
14 Soni Decl. ¶¶ 19-20. Nor can they count on having access to a telephone during
15 business hours because of count, disciplinary lockdown, quarantine, and lines to use
16 the phone, *see, e.g.*, Bell Decl. ¶ 15, especially (though not only) if they are in
17 segregation, *see* Nsinano Decl. ¶¶ 11-14. When calls do connect, they are often of
18 poor quality, straining communication. *See* Bell Decl. ¶¶ 18-19; Soni Decl. ¶ 21;
19 Nsinano Decl. ¶¶ 11-14. Worse, they are not confidential: dayroom phones are
20 monitored and in places where conversations may be overheard by guards and other
21 detainees, even when discussing deeply sensitive matters. *See* Bell Decl. ¶¶ 18-19.
22 This causes Plaintiffs to withhold critical information from their attorneys to
23 preserve their own safety. *See* Bell Decl. ¶¶ 20-22; Nsinano Decl. ¶¶ 18-20.

24 Because of these obstacles to telephone communication, attorneys typically
25 resort to in-person visitation. *See* Bell Decl. ¶ 22; Bleckley Decl. ¶¶ 19-20; Soni
26 Decl. ¶ 25. But this has become impossible: Defendants’ new policy mandates that
27 attorneys may not visit their clients unless they don COVID-19 PPE, McKinney
28 Decl. ¶ 9, which is presently globally unavailable to the public. *See supra* n.2. Even

1 if attorneys managed to acquire COVID-19 PPE, they could at most see their clients
2 via non-contact visitations, which, as described in Part II, *supra*, are not confidential
3 and do not permit represented detainees to exchange documents with their counsel.
4 *See* Bell Decl. ¶ 10; Bleckley Decl. ¶ 6.

5 Finally, Defendants’ policies and practices prevent attorneys from
6 communicating with detainees’ Deportation Officers even though this
7 communication is necessary to the representation. Deportation Officers are
8 responsible for providing detainees’ medicine, documentation, and identification, to
9 seek emergency humanitarian parole of their clients are ill, and to inform
10 Defendants at the facility when a detainee has received a stay of deportation. *See*
11 Soni Decl. ¶ 39; Bell Decl. ¶¶ 34-35; Bleckley Decl. ¶ 26. In light of Defendant
12 ICE’s announcement that it “will focus enforcement on public safety risks and
13 individuals subject to mandatory detention based on criminal grounds” and
14 “exercise discretion to delay enforcement actions until after the crisis or utilize
15 alternatives to detention, as appropriate,” for those not in that category, ICE
16 Guidance on COVID-19, Immigration Enforcement and Check-Ins, *available at*:
17 <https://www.ice.gov/covid19>, the agency may see an increase in requests for parole
18 or bond. However, Defendants’ policies and practices make it extremely difficult to
19 contact an immigrant’s Deportation Officer, even in the most urgent of
20 circumstances. *See* Bell Decl. ¶ 41; Soni Decl. ¶¶ 38-42.

21 As described above, these policies have the cumulative effect of interfering
22 with represented detainees’ established, ongoing attorney-client relationships. Ms.
23 Bell’s client, Frank, provides a striking example: Ms. Bell learned one Monday her
24 client was scheduled for a Friday bond hearing. Bell Decl. ¶ 23. Though she had
25 written materials ready to go, she had not yet prepared the client to testify. *Id.* She
26 called Adelanto Monday and requested they give Frank a message to call her back
27 (which he never received). *Id.* She asked a colleague going to Adelanto on Tuesday
28 to inform Frank of his court date and ask him to call Ms. Bell between 3:00 p.m. and

1 5:00 p.m. *Id.* Though the colleague relayed a message, Frank was unable to call
2 during that window (instead leaving missed calls at other times). *Id.* Because of the
3 positive acceptance requirement, Frank could not leave Ms. Bell a message, and
4 because detainees cannot receive incoming calls, she could not call him back. *Id.* On
5 Thursday, she tried to make an appointment for Friday morning, but she was unable
6 to reach the scheduler. *Id.* On Friday, Ms. Bell arrived at Adelanto at 7:00 a.m. in
7 hopes of spending at least the hour before Frank’s 8:30 a.m. hearing preparing his
8 testimony, which included difficult questions about his criminal history. *Id.* ¶ 25.
9 She waited over an hour, only getting access to her client at 8:10 and therefore only
10 being able to speak with him for 15 minutes before the hearing. *Id.* The Immigration
11 Judge asked questions about Frank’s criminal history that he was not able to answer
12 in sufficient detail because he had not had an opportunity to prepare for examination
13 with his attorney. *Id.* Ultimately, the judge stated Frank’s uncertainty about details
14 in his criminal history indicated he was dishonest and a flight risk. *Id.* He set a
15 \$20,000 bond, in spite of Ms. Bell’s submission of evidence that the family could at
16 most pay \$2,200. *Id.* In Ms. Bell’s words, “Because of barriers to speaking by phone
17 and to scheduling an in-person meeting, we had only very limited time to practice
18 before the hearing, and the immigration judge set a bond Frank could not pay.” *Id.*
19 Defendants’ COVID-19 restrictions heighten these same barriers. *See id.* ¶ 42.

20 In sum, Plaintiffs are likely to demonstrate that Defendants’ policies and
21 practices interfere with detainees’ statutory and constitutional right to counsel.

22 **b. Defendants’ Policies and Practices Effectively Deny**
23 **Unrepresented Detainees Access to Counsel**

24 Plaintiffs are likely to succeed in showing that Defendants’ policies and
25 practices produce “conditions that are ‘tantamount to denial of counsel,’” Dkt. 101
26 (quoting *Biwot*, 403 F.3d at 1099-1100). Defendants’ restrictions on telephone
27 access, the cost of calls, the positive acceptance requirement, the lack of
28 confidentiality on phone calls and in person, and barriers to visitation combine to

1 drastically limit detained immigrants’ access to attorneys who might represent them.
2 *See* Part II; *accord* Kurichety Decl. ¶¶ 16-18 (“Where attorneys cannot initiate
3 confidential calls, these individuals remain unaware either that there is an attorney
4 able and willing to assist[.]”).

5 For example, Plaintiff Nsinano never obtained counsel while detained at
6 Adelanto and only obtained pro bono representation after 39 months in detention,
7 while held by ICE at the Theo Lacy facility in Orange County (since closed).
8 Nsinano Decl. ¶¶ 5-6. Defendants’ positive acceptance requirement, coupled with
9 restrictions on the hours during which Mr. Nsinano could access telephones,
10 constrained Mr. Nsinano’s ability to find a lawyer. For the first ten months of his
11 detention, while at Adelanto, Mr. Nsinano was held in a dorm with approximately
12 80 other detainees. *Id.* ¶ 9. There were 7 telephones in the dorm, and frequently one
13 or more was inoperable. *Id.* Because the ratio of detainees to phones was at best
14 approximately 11-to-1, there was very frequently a line to use the phone. *Id.* ¶ 10.
15 After experiencing harassment because of his sexual orientation, Mr. Nsinano was
16 moved to protective custody at Adelanto. *Id.* ¶ 11. He was in a cell alone for 22
17 hours per day, with only one hour of “day room” during which he was permitted to
18 use the shower and make calls on the four available phones. *Id.* ¶ 12. Because
19 approximately 12 detainees shared dayroom time, there frequently was not a phone
20 available to him within that hour. *Id.* ¶ 13. Mr. Nsinano’s dayroom time often fell
21 outside standard business hours; when, for example, he was given phone access at
22 7:00 a.m. or 5:00 p.m. it was even more difficult to reach an attorney. *Id.* ¶ 14.

23 Defendants’ policies barring detainees like Mr. Nsinano from receiving
24 incoming calls or messages further denied him access to counsel. Mr. Nsinano tried
25 to reach attorneys through the free call platform, a list of approximately 40
26 telephone numbers (primarily for government agencies and foreign embassies) that
27 he could dial at no cost. *Id.* ¶ 14. This free call platform was unreliable. *Id.* ¶ 15. He
28 made approximately 20 free calls per month to about 18 legal service organizations

1 on the platform. *Id.* ¶ 14. Though Mr. Nsinano reached approximately nine private
2 attorneys through the platform, many as a rule did not serve Adelanto detainees;
3 others were outside the state; and others yet did not provide pro- or low-bono
4 representation. *Id.* ¶ 16. Named Plaintiff Torres reports a similar experience: he tried
5 approximately eight times to contact pro bono attorneys but was stymied by the
6 positive acceptance requirement: “Each time, however, the phone would ring for a
7 long time, and then I would receive a message that my call could not be completed
8 or the recipient won’t accept collect calls. I was never able to leave a message
9 because I never reached anybody’s voicemail.” Torres Decl. ¶ 8.

10 Lack of confidentiality also contributed to Mr. Nsinano’s inability to find
11 counsel. Neither the dorm phones nor the dayroom in segregation allowed for
12 confidential or private communications. ¶ 18. The phones are in close proximity to
13 one another and to other detainees. *Id.* Mr. Nsinano found it easy to overhear
14 telephone conversations happening near him. *Id.* The dayroom phones are next to
15 each other in a row, and the phone bank is only about 15 feet from the tables for
16 indoor recreation in the dayroom. *Id.* Because Mr. Nsinano’s case, like many
17 others’, *see* Bell Decl. ¶ 10, involves sensitive, traumatic subjects that might
18 endanger him if discussed openly, Mr. Nsinano was not able to fully describe his
19 case to prospective lawyers on the phone. Nsinano Decl. ¶ 20 (“I do not believe I
20 was ever able to explain the full extent of my case to an attorney on the phone
21 because I was never able to speak to an attorney in private. I believe this contributed
22 to some of the attorneys I reached being unwilling to represent me in my asylum
23 case.”). On approximately ten occasions, Mr. Nsinano tried to request a private
24 phone call while in segregation, but his accounts were ignored or denied. *Id.* On the
25 rare occasion Mr. Nsinano could make private calls from his isolation cell, his
26 conversations were cut off—and even these calls were not entirely private. *Id.*
27 Defendants similarly denied Mr. Torres access to telephones while in medical
28 isolation, reporting phones in the ward were broken. *See* Torres Decl. ¶ 11. Despite

1 his due diligence, Mr. Nsinano was never able to secure representation while at
2 Adelanto, Nsinano Decl. ¶¶ 5-7, and Mr. Torres only retained counsel after four
3 months with assistance from the attorneys in this lawsuit, *see* Torres Decl. ¶ 12.

4 Plaintiffs are likely to show that Defendants’ policies restricting telephone
5 access, barring detainees from leaving or receiving voicemail, and preventing
6 confidentiality—especially paired with lawyers’ inability to visit the—produce
7 “conditions that are ‘tantamount to denial of counsel,’” Dkt. 101 at 19 (quoting
8 *Biwot*, 403 F.3d at 1099-1100), and so violate the INA and the Constitution.

9 **2. Defendants’ Policies and Practices Violate the First**
10 **Amendment.**

11 The First Amendment protects Attorney Plaintiffs’ right to speak with those
12 who may need their legal assistance or have retained their legal services. *See*
13 *Button*, 371 U.S. at 428-29 (affording First Amendment protection to NAACP
14 members wanting to “assist[] persons who seek legal redress for infringements of
15 their constitutionally guaranteed and other rights” as “modes of expression and
16 association protected” by First Amendment); *In re Primus*, 436 U.S. 412, 423-24
17 (1978) (addressing solicitation and concluding even unsolicited legal advice can
18 implicate First Amendment); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27-
19 28, 38 (2010) (statute prohibiting attorneys from providing legal advice implicated
20 First Amendment); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547-48 (2001)
21 (restrictions that “prohibit [attorney] advice or argumentation” in a way that
22 “confine[s] litigants and their attorneys” violate First Amendment); *see also*
23 *Procunier v. Martinez*, 416 U.S. 396, 408-409 (1974) (recognizing First
24 Amendment interests of both parties to correspondence with prisoners). As this
25 Court recently made clear, Defendants may only impose time, place, and manner
26 restrictions on Attorney Plaintiffs’ First Amendment right if the restrictions are
27 “reasonable,” *i.e.*, “justified without reference to [content,] . . . [are] narrowly
28 tailored to serve a significant governmental interest, and . . . [leave] open ample

1 alternative channels for communication of the information.” Dkt. 101 at 25 (quoting
2 *Mothershed v. Justices of the Supreme Court*, 410 F.3d 602, 610 (9th Cir. 2005)).

3 Attorney Plaintiffs are likely to demonstrate that Defendants’ policies and
4 practices unlawfully infringe their First Amendment rights. As declarations from
5 attorneys at Plaintiffs ImmDef and AILA show, Defendants’ positive acceptance
6 requirement for phone calls, policies barring lawyers and their clients from leaving
7 one another messages, bars to confidential legal calls, and the cost of calls prevent
8 attorneys from providing their clients with legal advice over the phone. *See*
9 *generally* Bell Decl.; Soni Decl.; Voigt Decl. And because of Defendants’ new
10 requirement that attorneys don full COVID-19 PPE before they can visit their
11 clients, in-person visitation provides no alternative. These policies bar attorneys
12 from carrying out their mission: “assisting persons who seek legal redress for
13 infringements of their constitutionally guaranteed and other rights.” *Button*, 371
14 U.S. at 428-29. As a result, Attorney Plaintiffs are able to represent fewer
15 immigrants than if they had reliable access to their detained clients. Soni Decl. ¶ 30.

16 Defendants will be unable to show that their restrictions on telephone access
17 are narrowly tailored because *their own policies and practices*, both on paper and in
18 other facilities, provide a less restrictive alternative. *See Mothershed*, 410 F.3d at
19 609 (“A time, place, and manner regulation is narrowly tailored as long as the
20 substantial governmental interest it serves would be achieved less effectively absent
21 the regulation and the regulation achieves its ends without . . . significantly
22 restricting a substantial quantity of speech that does not create the same evils.”)
23 (internal quotation marks omitted) (second ellipsis in original). ICE’s COVID-19
24 guidance urges detention centers to prioritize Skype and videoconference
25 alternatives to visitation. *See ICE Guidance on COVID-19, available at:*
26 <https://www.ice.gov/covid19>. ICE’s Performance Based National Detention
27 Standards provide for free calls for indigent detainees, 2011 PBNDS 5.6, V, E,
28 “reasonable and equitable access to reasonably priced telephone services,” 2011

1 PBNDS Part 5.6, II.1, visiting space sufficient to preserve the attorney-client
2 privilege, 2011 PBNDS Part 5.7, II.2 & V.J.9, and the prompt delivery of telephone
3 messages to detainees, 2011 PBNDS Part 5.6, II.1.

4 Further, pursuant to a settlement agreement in a similar case in the Northern
5 District of California, Defendants GEO and ICE provide a system for scheduled,
6 confidential legal calls between detainees and their attorneys. *Lyon v. ICE*, No.
7 3:13-cv-05878, Dkt. 280 at 6 (N.D. Cal. Nov. 18, 2016). Under that settlement,
8 Defendants GEO and ICE agreed to eliminate the “positive acceptance” requirement
9 for phone calls made from detention facilities. *See id.* A number of immigration
10 detention centers also provide opportunities for videocalls, including currently at
11 Adelanto. *See Hercules-Paez Decl.* ¶ 14. Deportation Officers have the capability to
12 exchange email messages with attorneys. *Soni Decl.* ¶ 38; *Voigt Decl.* ¶ 4.

13 Finally, Defendants cannot credibly claim that their telephone restrictions
14 leave open “ample alternative channels” for communication, *Mothershed*, 410 F.3d
15 at 609, because they have all but cancelled in-person visitation.

16 In sum, Attorney Plaintiffs are likely to demonstrate that Defendants’ policies
17 and practices violate their First Amendment rights.

18 **B. Plaintiffs Satisfy the Remaining Factors for Emergency Relief.**

19 Plaintiffs can easily demonstrate that they will likely suffer irreparable harm
20 absent an injunction and that the balance of equities tips in their favor. *See*
21 *Stormans, Inc.*, 586 F.3d at 1127. “It is well established that the deprivation of
22 constitutional rights ‘unquestionably constitutes irreparable injury.’” *Melendres .*
23 *Arpaio*, 695 F.3d at 1002 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). In the
24 case of detained immigrants facing deportation, the risk of irreparable harm is
25 especially high. *See Hernandez v. Sessions*, 872 F.3d 976, 994-95 (9th Cir. 2017);
26 *Innovation Law Lab*, 342 F. Supp. 3d at 1081 (“The harms likely to arise from the
27 denial of access to legal representation in the context of asylum applications are
28 particularly concrete and irreparable.”) Absent intervention from this court,

1 Defendants’ “denial of access to legal assistance is likely to lead to the denial of
2 asylum and ultimately to the deportation of detainees with meritorious asylum
3 claims.” *Innovation Law Lab*, 342 F. Supp. 3d at 1081.

4 The balance of equities and the public interest also favor Plaintiffs. First, any
5 administrative cost to the government is “far outweighed by the considerable harm
6 to Plaintiffs’ constitutional rights” in the absence of an injunction. *See Hernandez*,
7 972 F.3d at 996; *Innovation Law Lab*, 342 F. Supp. 3d at 1082 (“[A]ny such burden
8 on Defendants is more than justified by the need to ensure the fulfillment of
9 Plaintiffs’ constitutional rights and to prevent the improper denial of meritorious
10 asylum applications.”). In this case, the administrative burden is especially low
11 because ICE regulations require that Defendants implement policies more protective
12 of Plaintiffs’ rights than those currently in operation. *See Part III.A.2, supra*.

13 Further, Defendants have already instituted videocalls between detainees and those
14 outside the facility, *see Hercules-Paez Decl.* ¶ 14, as well as the now-vacant attorney
15 visitation rooms in which detainees can make confidential videocalls. GEO staff are
16 accustomed to scheduling appointments for visits and could shift those resources to
17 coordinating calls—as they do in other facilities. *See Lyon v. ICE*, No. 3:13-cv-
18 05878, Dkt. 280 at 6 (N.D. Cal. Nov. 18, 2016). Finally, Defendants provide others
19 of Plaintiff AILA’s regional chapters with contact information for detainees’
20 deportation officers, which AILA may share with its membership. *Voigt Decl.* ¶ 4.

21 Second, in cases where the remedy Plaintiffs seek is compliance with the
22 Constitution, the public interest favors granting an injunction. *See Preminger*, 422
23 F.3d at 826 (constitutional violations implicate public interest “because all citizens
24 have a stake in upholding the Constitution.”). For these reasons, Plaintiffs satisfy the
25 remaining criteria for emergency relief.

26 **C. The Relief Plaintiffs Request is Necessary to Vindicate Their Rights.**

27 Plaintiffs seek relief that is narrowly tailored to the discrete harms they have
28 identified. In particular, Plaintiffs seek the following temporary relief for the

1 duration of the COVID-19 pandemic in light of the fact that Defendants have
2 effectively barred all in-person visitation at Adelanto: an order (1) requiring that
3 Defendants remove the positive acceptance requirement for all legal telephone calls
4 from immigrants detained at Adelanto; (2) requiring that Defendants make all legal
5 telephone calls from immigrants detained at Adelanto free of charge; (3) requiring
6 Defendants to create, implement, and advertise a process by which attorneys and
7 detained immigrants may schedule confidential telephone calls and videocalls
8 within 24 hours of the request, to take place between 8:00 am and 8:00 pm.; (4)
9 requiring Defendants to create, implement, and advertise a process by which
10 attorneys and detained immigrants may exchange confidential documents
11 electronically (whether via email or fax); (5) requiring that all of the above relief be
12 made available to detained immigrants who are quarantined; and (6) requiring that
13 the Federal Defendants have a system for making available the contact information
14 for detained immigrants' Deportation Officers to their legal counsel.

15 This requested relief is consistent with *ICE's own COVID-19 guidance*,
16 which states that "Non-contact legal visitation (e.g., Skype or teleconference)
17 should be offered first." McKinney Decl. Ex. B It is also consistent with the CDC's
18 guidance on protecting detainees during the COVID-19 pandemic. *See* Center for
19 Disease Control, "Interim Guidance on Management of Coronavirus Disease 2019
20 (COVID-19) in Correctional and Detention Facilities," 23 March 2020, *available at*:
21 [https://www.cdc.gov/coronavirus/2019-ncov/community/correction-](https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html)
22 [detention/guidance-correctional-detention.html](https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html) (instructing agencies, *inter alia*, to
23 "Consider reducing or temporarily eliminating the cost of phone calls for
24 incarcerated/detained persons," "Consider increasing incarcerated/detained persons'
25 telephone privileges to promote mental health," "[P]rovide access to virtual
26 visitation options where available," and "If suspending contact visits, provide
27 alternate means (e.g., phone or video visitation) for incarcerated/detained
28 individuals to engage with legal representatives").

1 Plaintiffs' requested relief is also tailored to prevent their specific ongoing
2 harm: as described in Part II, *supra*, the positive acceptance requirement and the
3 cost of telephone calls prevent detained immigrants from having initial consultations
4 and finding representation, effectively denying them the right to counsel. Once
5 Plaintiffs are able to retain counsel, these barriers so restrict the utility of telephone
6 calls that attorneys often give up on phone calls, relying instead on in-person
7 visitation to effect the representation. But because in-person visitation is no longer
8 an option, Plaintiffs and their attorneys must rely on other means of
9 communications. As described above, in recent months Defendant GEO introduced
10 tablets for videocalling into Adelanto for communication with friends and family.
11 *See* Minutes of Adelanto Planning Commission Meeting, February 26, 2020,
12 1:50:40-1:51:30, *available at*: [https://adelanto.granicus.com/MediaPlayer.php?](https://adelanto.granicus.com/MediaPlayer.php?view_id=1&clip_id=260)
13 [view_id=1&clip_id=260](https://adelanto.granicus.com/MediaPlayer.php?view_id=1&clip_id=260); Hercules-Paez Decl. ¶ 14. This technology, already
14 available at the facility, is the best possible alternative to in-person visitation during
15 this pandemic. *See, e.g.*, Voigt Decl. ¶ 9 & Ex. C. As Plaintiffs Nsinano's and
16 Torres's accounts make clear, detainees in administrative, disciplinary, and medical
17 segregation face even higher barriers to communication beyond the facility—yet
18 their rights are the same. Plaintiffs' request for a process to schedule timely,
19 confidential videocalls for every detainee at Adelanto will protect their rights under
20 the INA and the Constitution.

21 Similarly, attorneys often need to get their clients' signatures on applications
22 for relief, fee waivers, and other documents. Because in-person visitation is
23 unavailable, Plaintiffs' request for a confidential means to exchange documents
24 electronically is the safest and least burdensome solution, and one already in place
25 at other ICE facilities. Given the fast pace of immigration proceedings, the mail
26 system is insufficient to exchange documents, particularly because it often takes a
27 week or more for mail to reach detainees at Adelanto. *See* Soni Decl. ¶ 28. Finally,
28 access to deportation officers' contact information is necessary for attorneys to

1 effectively represent their clients. As set forth in Part III.A, *supra*, attorneys need
2 reliable access to detained immigrants’ deportation officers to clear medical
3 evaluators, submit emergency requests for humanitarian parole for immigrants who
4 may be sick or vulnerable, inform ICE of developments in immigrants’ cases, and
5 communicate critical information about detainees’ health and well-being.

6 Because of the emergency nature of this request, Plaintiffs have not sought
7 class certification concurrent with this motion. It is well-established that a district
8 court has broad power to remedy constitutional wrongs, and the nature and scope of
9 a remedy must be “determined by the violation.” *Milliken v. Bradley*, 433 U.S. 267,
10 281-82 (1977); *Toussaint v. McCarthy*, 801 F.2d 1080, 1087 (9th Cir. 1986).
11 Plaintiffs have demonstrated that the violation of their constitutional and statutory
12 rights stem from policies and practices Defendants apply throughout Adelanto;
13 therefore, this Court may enter an injunction in the absence of a certified class. *See*
14 *Clement v. Cal. Dep’t of Corr.*, 364 F.3d 1148, 1152 (9th Cir. 2004) (affirming a
15 statewide permanent injunction against a prison policy where plaintiff demonstrated
16 the policy was contrary to the First Amendment); *Sharp v. Weston*, 233 F.3d 1166,
17 1173 (9th Cir. 2000) (affirming court’s decision declining to lift a facility-wide
18 injunction in action brought by one resident); *see also, e.g., Bresgal v. Brock*, 843
19 F.2d 1163, 1169 (9th Cir. 1987) (“There is no general requirement that an injunction
20 affect only the parties in the suit.”); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92
21 F.3d 1486, 1501-02 (9th Cir. 1996) (noting that, even without class certification,
22 injunctive relief may be extended beyond the named plaintiffs “if such breadth is
23 necessary to give prevailing parties the relief to which they are entitled”); *Brantley*
24 *v. Maxwell-Jolly*, 656 F. Supp. 2d 1161, 1178, n. 14 (N.D. Cal. 2009) (noting that
25 district courts “are empowered to grant [class-wide] preliminary injunctions
26 regardless of whether the class has been certified”) (internal quotations omitted).
27 Nevertheless, Plaintiffs are prepared—if the Court believes it necessary—to file a
28 motion for preliminary certification, which could be heard on an expedited basis in

1 conjunction with an order to show cause regarding converting a TRO into a
2 preliminary injunction.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Plaintiffs respectfully request that the Court grant
5 this temporary restraining order.

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Respectfully submitted,

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ACLU FOUNDATION OF
SOUTHERN CALIFORNIA

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Dated: March 26, 2020

/s/ Eva L. Bitran
EVA L. BITRAN
Counsel for Plaintiffs

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