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14
15 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
16 SAN JOSE DIVISION

17 ANTHONY PADILLA, et al.,)
Plaintiffs,)

Civil No. C-98 20309 RMW EAI
CLASS ACTION

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MEMORANDUM OF AMICUS CURIAE
UNITED STATES IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION

TIMOTHY RYAN, Chief of)
Corrections of the Santa Clara)
Dept. of Corrections, et al.,)
22 Defendants.)

Date: July 31, 1998
Time: 9:00 A.M.
Dept.: 6
Judge: Ronald M. Whyte

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I. INTRODUCTION

Plaintiffs, who are deaf and rely on sign language for effective communication, are past and present inmates of facilities of the Santa Clara County Department of Corrections, and visitors to such facilities. On behalf of themselves and all those similarly situated, plaintiffs have filed this class action against various officials (in their official capacities) of the County of Santa Clara and the Santa Clara Department of Corrections (collectively, the "DOC"). Plaintiffs allege that the DOC has engaged in ongoing violations of title II of the Americans with Disabilities Act ("title II" or "the ADA"), 42 U.S.C. §§ 12131-34, and section 504 of the Rehabilitation Act of 1973 ("section 504" or "the Rehabilitation Act"), 29 U.S.C. § 794, by excluding deaf and hard of hearing inmates in Santa Clara County jails from a wide range of correctional programs and services on the basis of those inmates' disabilities. Specifically, the plaintiffs allege that the DOC has discriminated against deaf and hard of hearing inmates by failing to provide appropriate auxiliary aids and services where necessary for effective communication, 28 C.F.R. §§ 35.160(a), 42.503(b), (e), (f); by failing to provide notice to deaf and hard of hearing inmates of their rights under the ADA, 28 C.F.R. § 35.106; and by failing to make available, to deaf and hard of hearing inmates, information about the existence and location of accessible services, 28 C.F.R. § 35.163(a). The plaintiffs seek preliminary and permanent injunctive relief.

II. STATEMENT OF THE CASE

A. Background

The DOC is charged with administering Santa Clara County's correctional system, which includes five correctional facilities. When arrested and brought to one of these facilities, all inmates are entitled to certain forms of communication with the outside world, and are required to communicate with various jail officials, in a series of interviews, for booking, for orientation, and to determine their eligibility for various recreational and rehabilitative programs.

Initially, when brought in for booking, inmates have a statutory right to three free phone calls. Cal. Penal Code § 851(b). Inmates are entitled to use these phone calls to contact their attorneys, bail bondsmen, family members, and others. Cal. Code of Regulations, Title 15 (Crime Prevention and Corrections), Rule 1067 (Access to Telephones), Rule 1068 (Access to Courts and

Counsel).¹ In addition, once housed in the jail, inmates generally have regular and ready access to telephones.² See Declaration of James Vandivere ("Vandivere Dec.") at ¶ 5; Declaration of Joseph Garcia ("Garcia Dec.") at ¶ 7-8.³

In addition to communicating with individuals outside the jail, inmates go through a series of important interviews. For instance, medical staff or other intake personnel interview inmates at booking to ascertain their current medical and mental health status, including any necessary treatment or medications, as well as exposure to HIV or other communicable diseases. See Title 15, Rule 1207 (Medical Receiving Screening) ("a screening shall be completed on all inmates at the time of intake"), and Rule 1051 (Segregation) (requiring segregation of individuals with communicable diseases).⁴ In addition to the medical interview, inmates also undergo a

¹Title 15 of the Cal. Code of Regulations is hereafter cited as "Title 15." A copy is attached as Exhibit G to the Declaration of Amanda K. Wilson (hereafter "Wilson Dec."), which plaintiffs have submitted to the Court. The importance of access to telephones is recognized by the state's own guidelines to Title 15, which note that "inmates have a constitutional right to unimpeded access to attorneys and legal representation." Guidelines to California Code of Regulations, Title 15, Programs and Procedures Standards (May 1998), at 64 (hereafter, "the Guidelines"). A copy of the Guidelines is attached as Exhibit H to Wilson Dec.

²The Guidelines make clear the importance of ready access to telephones, explaining that [t]he telephone is an effective tool for reducing tension and anxiety in a detention facility. An adequate number of phones and a generally open phone use policy allow inmates to maintain contact with family and the community thereby avoiding many incarceration and reentry problems.

Guidelines at 63.

³A copy of the Vandivere and Garcia declarations, and other declarations referred to herein, have been submitted to the Court by plaintiffs.

⁴The Guidelines for the Medical and Mental Health standards imposed by Title 15 underscore the importance of these interviews. "[T]he jail must find out at the earliest possible point who is carrying a contagious disease, who is in need of medical attention, and/or who should not be admitted to the jail for medical/mental health reasons," and "[t]he more information gathered through the screening, the better the likelihood that important issues will surface." Guidelines to California Code of Regulations, Title 15, Medical and Mental Health, Sanitation and Nutrition Standards (May 1998), at 31. (The Guidelines for medical, mental health, sanitation, and nutrition standards are published separately from the Guidelines for program and procedures standards; a copy of the Guidelines for the medical and mental health standards is attached as Exhibit I to Wilson Dec.) The Guidelines further advise that the medical interview be conducted in an environment that will "increase the chances of the inmate discussing any potential problems." *Id.*

1 classification interview to determine appropriate housing and activities. See Title 15, Rule 1050
2 (Classification Plan).⁵ See also Vandivere Dec. at ¶ 3-4; Garcia Dec. at ¶ 3-4. Inmates also
3 interview with Pretrial Release Services, the office which is responsible for notifying the court in
4 the event an inmate needs interpreter services.⁶

5 In addition to this series of interviews, inmates are also put through an orientation to the jail
6 consisting of video and written materials. The Guidelines make clear the importance of the non-
7 written communication in this process, explaining that "written material should be accompanied by
8 discussion of the material; simply giving an inmate a written document does not guarantee that he
9 or she will read or understand it." Guidelines at 65. The Guidelines emphasize that people newly
10 received in jails are often "in crisis," that they may be frightened or disoriented, and encourage staff
11 to "tak[e] time to listen and respond to individual needs." Id. at 66.

12 Once admitted to the jail, inmates have access to a large variety of programs ranging from
13 recreation as simple as television viewing, Vandivere Dec. at ¶ 6, or access to literature, to
14 vocational and educational courses, to counseling and rehabilitative courses such as Alcoholics
15 Anonymous, and drug rehabilitation. See Title 15, Rule 1070 (Inmate/Family Service Programs);
16 Rule 1061 (Inmate Education Plan); Rule 1064 (Library Service); Rule 1066 (Books, Newspapers,
17 Periodicals); and Rule 1065 (Exercise and Recreation). Finally, when necessary, inmates are also
18 expected to participate in disciplinary hearings. See Title 15, Article 7 (Discipline).

19 In 1995, in response to several complaints regarding the treatment of deaf inmates at DOC
20 facilities, the DOC agreed to adopt a policy ensuring that deaf and hard of hearing inmates would
21

22 ⁵The Guidelines explain that this interview is necessary for the jail to maintain a
23 "classification system," which

24 should separate the sophisticated from the uninitiated, the violent from the nonviolent, the
25 passive from the aggressive. In addition, the classification system should assist in
26 identifying security risks, . . . those requiring protective custody. . . [and] those eligible for
27 facility programs.

28 Guidelines at 36.

⁶ Wilson Dec at ¶ 11; Garcia Dec. at ¶ 5.

1 have equal access to these communications and services.⁷ The following written notice of rights
2 was to be posted or provided to all inmates with hearing impairments at booking:

- 3 1. If you want a qualified sign language interpreter during booking, one will be
provided to you.
- 4 2. You have the right to know the charges against you.
- 5 3. Immediately upon being booked, you have the right to make and complete three (3)
6 free telephone calls free within the local dialing area.
 - 7 A. A call can be made to an attorney of your choice or the Public Defender at
299-770.
 - 8 B. A call can be made to a bail bond agency.
 - C. A call can be made to a relative or other person.

9 A TDD/TTY Telecommunication or a telephone with an amplification device is available if
10 you desire one to make your telephone calls.⁸

- 11 4. Upon being booked, you have the right to post bail or you may qualify for an O.R.
12 Release (a release on your own recognizance). This will depend on the type of ties
you have to the community, such as a family or a job.
- 13 5. You have the right to a qualified sign language certified interpreter during any
interrogation or interview.

14 Wilson Dec., Ex. D. In 1996, it became apparent that the policies agreed to by the DOC were not
15 being implemented or enforced. Wilson Dec. at ¶ 8. Inmates reported that they did not receive
16 notice of their rights, and that TDDs were broken or otherwise unavailable. *Id.* If inmates did
17 receive TDDs, it was after a wait of several days or weeks. *Id.* Inmates also reported a lack of
18 qualified interpreters for the interviews conducted at booking and while receiving medical care. *Id.*

20 ⁷These policies resulted from negotiations with plaintiffs' counsel and technical assistance
21 from the NorCal Center on Deafness. Wilson Dec. at ¶ 7.

22 ⁸ A TDD, or telecommunication device for the deaf, also called a TTY, makes it possible for
23 persons who are deaf, hard of hearing, or who have speech impairments to communicate by
telephone. Conversing with a TDD is very similar to a spoken conversation, except that it is typed
24 and read, instead of spoken and heard. A TDD user places the telephone handset into a cradle on
the TDD, and then types his or her conversation; the TDD converts the typed letters and symbols
25 into sounds which are transmitted over the phone lines. The TDD at the other end of the line then
translates the sounds (a series of high-pitched beeps) back into letters and symbols, which are
26 shown on a small display screen on the TDD. Some TDDs also have a paper tape and the capacity
to make a printed copy of the conversation. See Declaration of Michael Strong, Ph.D. (hereafter
"Strong Dec.") at 11-12.

B. Experiences of Class Members

Plaintiff Criss Brown

Plaintiff Criss Brown is a 42 year-old deaf man who relies on American Sign Language (ASL) for primary, face-to-face communication. Declaration of Criss Brown at ¶ 3. He has only limited skills in speech, lipreading, and reading and writing in English. *Id.*⁹ Late in the evening on Sunday, May 12, 1996, Mr. Brown was arrested by San Jose Police. *Id.* at ¶ 4. Once taken to the San Jose Main Jail, Mr. Brown wrote a note requesting a sign language interpreter, and officers just laughed. *Id.* Brown was very confused about what was happening: he had never been arrested before, and he did not see and was not shown any notice of his legal rights under the ADA. *Id.*

At the jail, an officer handed Mr. Brown some forms. Mr. Brown again wrote on the forms that he needed an ASL interpreter and a TDD. *Id.* at ¶ 5. When another officer wrote a note to him pertaining to bail, Mr. Brown attempted to ask questions, as he was interested in getting out of jail. *Id.* Mr. Brown tried to communicate by gesturing and writing but was very confused, and he again requested an interpreter. *Id.* On being refused, he became frustrated and gave up, but did mime a request for a TDD hoping to call about bail. *Id.* Eventually, he was told he would have a TDD in four hours, and was taken to a room to change into jail clothing, where he experienced communication difficulties with an officer who refused even to write notes to him. *Id.* Every day at meal times and breaks, Brown asked officers for a TDD. *Id.* at ¶ 6. The officers typically just shrugged their shoulders. Mr. Brown asked officers to assist him in making phone calls, but they refused. *Id.*

On Wednesday morning, Mr. Brown was taken to court, where there was no interpreter. *Id.* at ¶ 7. When he arrived, he saw a number of inmates who were being addressed by a sheriff. *Id.* Mr. Brown tried to follow what was going on, with no luck, but the sheriff did at least try to write notes back and forth with him. The sheriff wrote, "tomorrow, one thirty." Mr. Brown was under the impression that he would meet with the public defender the following day. *Id.*

⁹American Sign Language is not based on English; the languages differ vastly in syntax and structure. See Tom Humphries, A Basic Course in American Sign Language 1 (1980). See also U.S. Department of Justice, The Americans with Disabilities Act Title II Technical Assistance Manual (November 1993 and Supp. 1994) § II-7.1200 at 40 (discussing qualified interpreters and different forms of communication by sign) (hereafter "TA Manual"). A copy of the TA Manual is attached to this memorandum as Exhibit A. See also Strong Dec., Ex. 8.

1 When Mr. Brown was returned to the jail, he requested a TDD, and was told "no." *Id.* at ¶ 8.
2 The next morning, when he asked again, he got a hostile reception. *Id.* He became distraught,
3 having had no contact with his wife or baby, and no idea "when or if [he'd] see them again." *Id.* He
4 was also afraid that he would be fired from his job, because he had not reported to work since
5 Monday, and had no way of contacting his boss. *Id.* Finally, an inmate who saw that he was upset
6 offered to assist him in calling his boss and a bail bondsman. *Id.* at ¶ 9. In the afternoon, Mr.
7 Brown was taken from his cell to what he believed was the meeting with the public defender. To
8 his surprise, this was his scheduled hearing, and the interpreter was late, so he did not get to meet
9 with the public defender at all. *Id.* at ¶¶ 7, 9. On the day of his release, Mr. Brown was finally
provided a TDD. *Id.* at ¶ 10.

10 Mr. Brown was extremely upset and traumatized by his experience at the jail. *Id.* at ¶ 11. If
11 he had been a hearing person, he might have been released as early as Monday, May 13. Instead, he
12 missed an entire week's work. Moreover, as the days dragged on, he grew more confused,
13 frustrated, anxious, and upset. *Id.* When he ultimately asked why he could not be placed with other
14 inmates, he was told, "some are gay," which only added to his confusion. *Id.* He was cut off from
15 communicating with his family and friends, and was unable to have anything more than
16 rudimentary, gesturing communication with anyone while incarcerated. *Id.*

17 Plaintiff Jill Brown

18 Jill Brown is the deaf wife of Criss Brown; she is 42 years old, her English is also very
19 limited, and she communicates in ASL. Declaration of Jill Brown at ¶ 1, 2. On Sunday evening,
20 May 12, 1998, she called a crisis service to inquire about staying at a safe house because she was
21 afraid that her husband might physically abuse her. *Id.* at ¶ 3. The crisis service advised her to
22 contact the police, who would take her to a shelter. *Id.* She did so, but the police arrived without a
23 sign language interpreter, and, to her surprise, did not take her to a shelter. Instead, they wrote a
note informing her that her husband would be arrested and taken to jail. *Id.*

24 The next day, Ms. Brown received a call through the relay¹⁰ from a jail employee, who she

25
26 ¹⁰As required by title IV of the ADA, each state has a relay service that permits deaf people
to call people or organizations that do not have TDDs. A relay call is made through an operator

1 had assumed was assisting Mr. Brown in calling her. Id. at ¶ 4. She attempted to return the call,
2 and was confused at getting no response, but eventually guessed that it was probably an answering
3 machine-type message. Id. When she finally reached the jail, she spoke with a woman from the
4 Own Recognizance program, who asked her a number of questions, which she had some difficulty
5 understanding. Id. She did understand that her husband would be at the Main Jail, and that he
6 might be there for up to three days if he did not post bail. She also received more phone numbers to
7 call for information about her husband. Id.

8 When Ms. Brown called those numbers using the relay, she experienced considerable
9 difficulty. Id. at ¶ 4. One number seemed to have an answering machine with no message. She
10 tried another number five times before it answered, and then was confused by a long outgoing
11 message that left several more phone numbers. Id. When she called what she thought was the
12 correct number, she only got a series of beeps and the phone hung up. Later, she again made several
13 vain attempts to call the jail. Id. The next day, Ms. Brown went to the jail in person to check on her
14 husband. Id. at ¶ 7. She had called some of her husband's friends and realized that no one had
15 heard from him, and was very worried. Id. When she arrived at the visiting desk, the officer told
16 her that she could not see him until after his hearing on Thursday. She left feeling confused and
17 upset that he had to stay in jail even longer than she had been told. Id.

18 When by Wednesday evening, three days after his arrest, nobody had heard from Mr.
19 Brown, Ms. Brown was becoming extremely anxious. Id. at ¶ 8. On Thursday, she again tried to
20 call the main jail, but received the same confusing message. Id. at ¶ 9. After four such calls, she
21 finally understood enough of the taped message to get through to a person on the other end of the
22 line, who told her that her husband would be released late that night or early the next day. Id. She
23 was relieved, but also concerned as to how he would arrange for a ride without use of a TDD. She
24 was told that Chris Brown had access to a TDD any time he wanted to use one. Id. at ¶ 10.

25 Plaintiff Anthony Padilla

26 Plaintiff Anthony Padilla is a 26 year-old deaf man who cannot speak and communicates

27 with a TDD, who types the spoken words of one party into the TDD, and then speaks the response
28 from the TDD user.

1 using ASL. He has only limited skills in lipreading and English. Declaration of Anthony Padilla at
2 ¶ 2-3. Mr. Padilla was booked into the San Jose Main Jail on or about December 23, 1997, for
3 allegedly violating conditions of his parole; he remained incarcerated there until April 1998. *Id.* at
4 ¶ 4.

5 At booking, the DOC placed Mr. Padilla with an officer who apparently knew some sign
6 language. Mr. Padilla struggled to understand the officer through lipreading. *Id.* at ¶ 5. What little
7 he gathered did not match the officer's signs, which made no sense in the context of the situation.
8 *Id.* He was able, at best, to attain limited, ineffective communication with the officer. *Id.* He was
9 never provided a qualified interpreter. *Id.*

10 While he was in the custody of the Main Jail, Mr. Padilla served as a "Trustee" at the South
11 Facility. *Id.* at ¶ 5. As a result of the policy requiring him to live where he worked, rather than
12 permitting him to live with other deaf inmates, he was isolated. He was unable to participate in any
13 social activities. *Id.* at ¶ 6. He could not watch television, because of the lack of captioning, nor
14 could he even reliably communicate with friends or family, because the DOC did not provide him
15 with TDDs for several days or weeks following a request. *Id.* at ¶ 6-7. Mr. Padilla was also pre-
16 vented from participating in substance abuse and other courses, which would have served important
17 rehabilitative functions for him.¹¹ *Id.* at ¶ 10. The DOC refused his requests for qualified sign
18 language interpreters. *Id.* at ¶ 9. Mr. Padilla was never provided with notice of his rights. *Id.* His
19 time in DOC's facilities was emotionally traumatizing because it was impossible for him to com-
20 municate with anyone — within the jail, through sign language, or outside, by phone. *Id.* at ¶ 10.

21 Plaintiff Bruce Lambert

22 Plaintiff Bruce Lambert is a 33 year old deaf man whose primary method of communication
23 is ASL. He has only very limited skills in speaking, and reading and writing in English.

24 Declaration of Bruce Lambert at ¶ 2-3. Mr. Lambert was first in the custody of a DOC facility in
25 May of 1993. During a second arrest, for parole violations, he was booked into the San Jose Main
26 Jail on December 23, 1996, where he remained in custody for several days. He was also at the San

27 ¹¹In addition to their innate importance, participation in these programs can also have an
28 effect on sentencing, often leading to a more lenient sentence.

1 Jose Main Jail for approximately one month, in February and March of 1997, and for some period
2 during February and March 1998, as a result of transfers within the prison system. Id. at ¶ 4.

3 When he was taken to the San Jose Main Jail in December of 1996, Mr. Lambert was
4 mistreated by state patrol agents, who pushed him against a glass door with enough force to knock
5 him unconscious. Id. at ¶ 6. As a result of this and other injuries he sustained, Mr. Lambert spent
6 his first three days in jail receiving medical attention. Id. Although he needed a qualified
7 interpreter to communicate with medical staff, one was not provided. Id. During booking, Mr.
8 Lambert was also forced to undergo the interviews and screening without the assistance of a sign
9 language interpreter. Id. at ¶ 7.

10 During his 1993 stay at the jail, Mr. Lambert was abused by officers of the DOC. An officer
11 physically assaulted him — pushing him to the floor, and placing him in a confinement cell —
12 because Mr. Lambert failed to respond to remarks made by the officer. Id. at ¶ 5. Mr. Lambert
13 failed to respond because the officer made the remarks while Mr. Lambert was bent over picking up
14 a pencil, and wholly unable to see that someone was addressing him. Id.

15 During his 1997 custody, the DOC provided Mr. Lambert with a defective TDD that contin-
16 ually garbled incoming and outgoing text. He was told that it would be replaced with a functioning
17 TDD, but it was not. Id. at ¶ 8. As a result, he was unable to contact his friends, family members,
18 or counsel. He never received a replacement TDD. Id. At no time while he was in custody did the
19 DOC provide a captioning device so that he could watch television with the other inmates. Id. at ¶
20 11. He was cut off and isolated from communicating in any meaningful way with other inmates,
21 and, like the other plaintiffs, also experienced considerable emotional turmoil. Id. at ¶ 13.

22 III. ARGUMENT

23 A. The ADA and The Rehabilitation Act Prohibit Discrimination on the Basis of 24 Disability.

25 The Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., is Congress' most extensive
26 piece of civil rights legislation since the Civil Rights Act of 1964. Its purpose is to provide "a clear
27 and comprehensive national mandate for the elimination of discrimination against individuals with
28 disabilities." 42 U.S.C. § 12101(b)(1). The ADA's coverage is accordingly broad -- prohibiting

1 discrimination on the basis of disability in employment, state and local government programs and
2 services, transportation systems, telecommunications, commercial facilities, and the provision of
3 goods and services offered to the public by private businesses. This action involves title II of the
4 ADA, which prohibits disability discrimination by state and local governments.

5 In enacting the ADA, Congress extended the protections of section 504 of the Rehabilitation
6 Act of 1973, 29 U.S.C. § 794, the first federal statute to provide broad prohibitions against
7 discrimination on the basis of disability. Although section 504 applies only to entities (including
8 state and local governments) which receive federal financial assistance, the substantive provisions
9 of section 504 and title II of the ADA are very similar. Section 504 provides that

10 [n]o otherwise qualified individual with a disability in the United States . . . shall,
11 solely by reason of his or her disability, be excluded from the participation in, be
12 denied the benefits of, or be subjected to discrimination under any program or
activity receiving Federal financial assistance

13 29 U.S.C. § 794(a). Similarly, title II of the ADA provides that

14 no qualified individual with a disability shall, by reason of such disability, be
15 excluded from participation in or be denied the benefits of the services, programs, or
activities of a public entity, or be subjected to discrimination by any such entity.

16 42 U.S.C. § 12132. Not surprisingly, the same standards apply to both laws except to the extent the
17 ADA has adopted a different standard. 28 C.F.R. pt. 35, App. A at 466. See Armstrong v. Wilson,
18 124 F.3d 1019, 1025 (9th Cir. 1997) ("Congress has directed that the ADA and [section 504] be
19 construed consistently").

20 Although some federal courts had held otherwise, the Supreme Court has recently held that
21 title II of the ADA "unmistakably" applies to prisons. See Pennsylvania Dept. of Corrections v.
22 Yeskey, ___ U.S. ___, 1998 WL 309065, *2 (June 15, 1998). The Ninth Circuit has also held that
23 both section 504 and the ADA apply to correctional facilities. See Duffy v. Riveland, 98 F.3d 447
24

1 (9th Cir. 1996); Bonner v. Lewis, 857 F.2d 559, 562 (9th Cir. 1988).¹²

2 **B. Standards for Granting Preliminary Injunctive Relief.**

3 In another case arising under the ADA, this Court stated the current standard for grant of a
4 preliminary injunction. Cupolo v. Bay Area Rapid Transit, 1997 WL 901909 (N.D. Cal. Sept. 29,
5 1997). A party is entitled to a preliminary injunction if it establishes either:

- 6 (1) a combination of probable success on the merits and the possibility of irreparable
7 harm, or
8 (2) that there exist serious questions regarding the merits and the balance of hardships
tips sharply in its favor.

9 Id. at *3. See also Philippines v. Marcos, 818 F.2d 1473, 1477 (9th Cir. 1987); Rodeo Collection v.
10 West Seventh, 812 F. 2d 1215, 1217 (9th Cir. 1987). The requirements for granting a preliminary
11 injunction exist along a continuum: the necessity of showing irreparable harm diminishes as
12 success on the merits becomes more likely, and vice-versa. See Diamontiney v. Borg, 918 F.2d
13 793, 795-96 (9th Cir. 1990); Benda v. Grand Lodge of the Int'l Ass'n of Machinists, 584 F.2d 308,
315 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979).

14 **C. The Plaintiffs are Very Likely to Succeed on the Merits.**

15 For their ADA and section 504 claims, plaintiffs must establish (1) that they are individuals
16 with disabilities; (2) that they are qualified; and (3) that the defendants either excluded their
17 participation or denied them the benefits of a service, program, or activity, or otherwise subjected
18 them to discrimination on the basis of disability. Duffy, 98 F.3d at 455.

19 1. The Plaintiffs are Qualified Individuals with Disabilities.

20 The plaintiffs meet the ADA's definition of disability because each has a hearing impairment
21 that substantially limits him or her in the major life activity of hearing. 42 U.S.C. § 12102(2)(A);
22

23
24 ¹²A number of district courts have specifically applied the statutes to county and municipal
25 correctional facilities. Hanson v. Sangamon Co. Sheriff's Dep't, 991 F. Supp. 1059, 1062 (C.D. Ill.
26 1998) (upholding claim where deaf man was processed at a county jail). Fennell v. Simmons, 951
27 F. Supp. 706, 713 (N.D. Ohio 1997) (squarely holding ADA applies to county jail); Outlaw v. City
of Dothan, 1993 WL 735802, at *3 (M.D. Ala. April 27, 1993) ("terms [service, program, or activity
include] the jail and all of its facilities").

28 C.F.R. § 35.104. See Duffy, 98 F.3d at 454, 455; Clarkson v. Coughlin, 898 F. Supp. 1019, 1032, 1036-37 (S.D.N.Y. 1995); Randolf v. Rogers, 980 F. Supp 1051, 1061 (E.D. Mo. 1997). Moreover, all such plaintiffs who are, were, or will be incarcerated at DOC facilities are "qualified" individuals with disabilities, because they are "eligible" to be in prison, and to participate in various prison programs and services.¹³ See Yeskey, 1988 WL 309065 at *3; Armstrong, 124 F.3d at 1024; Duffy, 98 F.3d at 454-55.

Plaintiffs like Jill Brown — the deaf wife of a deaf inmate — are also individuals with disabilities being denied the benefits of the prison programs and services. To the extent the DOC holds some part of its facilities open to the public for phone calls or limited visits, callers or visitors such as Jill Brown meet the essential eligibility requirements, and are qualified. 28 C.F.R. pt. 35, App. A. at 472 (if entity provides information to the public upon request, essential eligibility requirement is simply to request the information).¹⁴ In addition, plaintiffs like Jill Brown are also persons associated with a person with a disability — typically, their deaf or hard of hearing friends or family members — and thus are separately protected under the ADA provision prohibiting discrimination on the basis of association with disabled persons: the DOC may not

exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is

¹³A "qualified individual with a disability" is an individual who -- with or without accommodations such as "the provision of auxiliary aids and services," or "reasonable modifications to rules, policies, or practices" — meets the essential eligibility requirements for the receipt of services or participation in programs or activities provided by the public entity. 42 U.S.C. § 12115(2); 28 C.F.R. § 35.104.

¹⁴As the Department's commentary to its regulation makes clear, "[t]he 'essential eligibility requirements for participation in some activities covered under this part may be minimal.'" 28 C.F.R. pt. 35, App. A. at 472. See Rothschild v. Grottenthaler, 907 F.2d 286, 290 (2d Cir. 1990) (deaf parents are qualified to have interpreters in activities at hearing child's school); Raines v. Florida, 983 F. Supp. 1362, 1372 (N.D. Fla. 1997); Niece v. Fitzner, 922 F. Supp. 1208, 1218 (E.D. Mich. 1996) (cause of action under ADA for deaf fiancé of prison inmate); Aikins v. Mt. Helena Hosp., 843 F. Supp. 1329, 1337 (N.D. Cal. 1994) (supporting a claim against the hospital on behalf of the deaf wife of a patient at the hospital). Cf. TA Manual § II-7.1000 (Supp. 1994) (the obligation to ensure effective communication is not limited to those who have a "direct interest" in the program at issue; example is courtroom spectators).

known to have a relationship or association.

28 C.F.R. § 35.130(g).

2. The DOC Has Discriminated Against the Plaintiffs.

The Department of Justice has issued regulations implementing the general mandate of non-discrimination, which provide the affirmative steps an entity must take in order to ensure that it does not exclude individuals with disabilities from enjoying opportunities to participate or benefit that are equal to those provided to others.¹⁵

Among other things, the regulation requires public entities to make reasonable modifications to its policies and procedures, when such modifications are necessary to avoid discrimination on the basis of disability. 28 C.F.R. § 35.130(b)(7). The primary manner in which the DOC has discriminated against the plaintiffs, however, lies in its failure to effectively communicate with deaf inmates and deaf members of the public. Title II requires entities to take affirmative steps to ensure that "communications with applicants, participants, and members of the public with disabilities are as effective as communications with others." 28 C.F.R. § 35.160(a) (emphasis added). Hanson, 991 F. Supp. at 1063; see Randolf, 980 F. Supp. at 1060; Clarkson, 898 F. Supp. at 1038. To meet this requirement, the law provides that a public entity

shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service,

¹⁵Congress expressly authorized the Attorney General to issue regulations implementing both section 504 and title II of the ADA, and to provide technical assistance to entities covered by the ADA. See 29 U.S.C. § 794(a); 42 U.S.C. §§ 12134(a), 12206. In view of Congress' express delegation of authority to the Attorney General, the Department's regulations and interpretations should be accorded controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Bragdon v. Abbott, __U.S.__, 1998 WL 332958 at *14 (June 25, 1998); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). The same is true of the preamble or commentary accompanying the regulations since both are part of the Department's official interpretation of the legislation and its regulations. See Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (agency's interpretation of its own regulation is entitled to deference). The Department of Justice's Technical Assistance Manual is also entitled to deference. See Innovative Health Sys. v. City of White Plains, 931 F. Supp. 222, 233 n.4 (S.D.N.Y. 1996), aff'd, 117 F.3d 37 (2d Cir. 1997); Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35, 36-37 n.4 (D.D.C. 1994).

program, or activity conducted by a public entity.

28 C.F.R. § 35.160(b)(1).

Examples of auxiliary aids and services for individuals who are deaf or hard of hearing include qualified interpreters, assistive listening systems, closed caption decoders, open and closed captioning, telecommunication devices for the deaf (TDDs), telephones compatible with hearing aids, written materials, and the exchange of written notes. See 42 U.S.C. § 12102(1)(A); 28 C.F.R. § 35.104. The list of examples is large because people have different needs. A hard of hearing individual may require a telephone that is compatible with hearing aids, but that telephone will be of no use to someone who is deaf and needs to use a TDD. The type of auxiliary aid or service that is required may also vary depending on the kind of communication at issue. For extremely simple communications, such as if a deaf inmate is requesting a permit to go to the library, an exchange of written notes is likely to suffice for most deaf people, assuming minimal literacy in English.

For the variety of interviews conducted at or around "booking," medical care, courses, or hearings, however, a qualified interpreter is likely to be required for effective communication with deaf inmates. See TA Manual § II-7.1000, ILLUSTRATION 2, at 5 (Supp. 1994) (the example provided to illustrate when an interpreter is necessary is that of interviews or interrogations by municipal police officers).¹⁶ The Justice Department formulated the definition of a "qualified interpreter" specifically in response to concerns that public entities might not understand the difference between a qualified interpreter, and an individual who knows some sign or who can finger spell. 28 C.F.R. pt. 35, App. A, at 473. A qualified interpreter must be able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary. 28 C.F.R. § 35.104. TA Manual § II-7.1200 ("a staff member who signs 'pretty well'" can not be used as an interpreter).¹⁷

¹⁶In general, a qualified interpreter is likely to be required for someone who is deaf and uses sign language when the communication involved is comparatively important, lengthy, or complex and, thus, more conducive to confusion on the part of the deaf individual. TA Manual § II-7.1000 at 38; 28 C.F.R. pt. 35, App. A at 437.

¹⁷The Department chose a functional definition not in order to lower the qualifications required of interpreters, but to make the point that interpreting in certain contexts may require specialized terminology, or skills, over and above certification. 28 C.F.R. pt 35, App. A at 473.

1 The ADA provides specific, practical guidance to public entities regarding which type of
2 auxiliary aid or service is needed in a given situation. The ADA requires that a public entity give
3 primary consideration to the requests of the individual. 28 C.F.R. § 35.160(b)(2) (emphasis added).
4 Primary consideration means that the public entity must generally honor the expressed choice of the
5 individual with the disability. Id. The only exception to this mandate is if the entity can
6 demonstrate that an alternative is available that is an "equally effective means of communication."
7 Id. See Duffy, 98 F. Supp. at 455; TA Manual § II-7.1100 at 39.¹⁸

8 As the experience of the named plaintiffs amply demonstrates, the DOC has discriminated
9 by failing to consider plaintiffs' requests and denying class members equally effective
10 communication. Indeed, defendants' practices foreclose virtually all available avenues of
11 communication. Plaintiff Criss Brown made continual and exhaustive requests for a TDD and a
12 qualified sign language interpreter. Far from ensuring "primary consideration," defendants' officers
13 paid so little heed to his request that they just laughed. Meanwhile Mr. Brown had neither an
14 interpreter nor access to a TDD from the moment he was taken from his home until his second court
15 date, at the end of the week. As a result, Mr. Brown was unable to post bail, to exercise his
16 statutory right to three phone calls, to contact his boss to explain his week of absence, or to contact
17 his family, friends, or counsel. Not only was he denied a TDD, but several officers also refused to
18 assist him in making phone calls. Finally, Plaintiff Brown was forced to spend an entire week in
19 custody; had he been a hearing person, he would have had a chance to make bail, perhaps as early
20 as Monday.

21 In addition to the outright abuse Mr. Lambert suffered,¹⁹ he was also denied effective

22 See TA Manual § II-7.1200. See also Declaration of Nancy Fishberg.

23 ¹⁸An entity should give the disabled person an opportunity to elect an appropriate aid or
24 service, and the entity should give deference to that choice unless the entity can demonstrate that
25 some other effective aid or service exists or that the means chosen would not be required under the
26 title II regulation. Deference to the person's choice is desirable because of the range of disabilities.
27 The public entity is responsible to provide the appropriate auxiliary aids and services. See 28
28 C.F.R. § 35.160; 28 C.F.R. Pt. 35, App. A at 473.

29 ¹⁹Defendant's treatment of Mr. Lambert — in which they misconstrued his failure to respond
30 as impertinence or resistance — is a scenario many police offices are trying to address. Many deaf

1 communication. He was forced to spend his first three days in jail under medical care, partially as a
2 result of police misconduct, without a qualified interpreter. Despite his requests, he too was denied
3 qualified interpreters or any means of effective communication for the booking interviews, and was
4 provided only defective TDDs. He was also denied captioning equipment, so that he was unable to
5 join other inmates in watching television.²⁰ As a result of the DOC's practices, Mr. Lambert was
6 forced to spend his entire time, some six or more weeks, in isolation — unable to communicate with
7 individuals within the jail, or in the outside community.

8 Similarly, defendants discriminated against Mr. Padilla. If he received access to a TDD at
9 all, it was after days or weeks of waiting. Moreover, defendants' refusal to provide qualified
10 interpreters to Padilla prevented him from participating in rehabilitative courses and counseling,
11 from which he would have benefitted greatly. The officer who made some attempt at signing with
12 Padilla during booking was not a qualified interpreter, primarily because he was unable to
13 communicate effectively with Padilla. To the extent Mr. Padilla was able to understand the booking
14 officer at all, it was through lipreading. Due to defendants' failures to ensure effective
15 communication with Mr. Padilla, he was completely isolated for more than four months. He was
16 not housed with deaf inmates, and had no means of communicating with hearing inmates.²¹ He
17 could not even watch television, or participate in any recreational or social activities along with
18 other inmates. Without ready access to TDDs, he could not call friends or family members.

19 Finally, the DOC's pattern of failing to ensure effective communication is also evidenced by
20 the experience of Jill Brown, and the plaintiff class of visitors or callers. Ms. Brown's efforts to
21 discover information about her husband's well-being and release date — despite a personal visit and

22 people are killed because an officer misinterprets a deaf arrestee's failure to stop, or otherwise
23 respond to a spoken order. On the street, this can be a difficult problem to address adequately, but
24 in an institutional setting like this one, it can be avoided with adequate training.

25 ²⁰Captioning can either be open, where it is fully visible to everyone, or closed, where only
26 those who have a captioning decoder see the captions. Many television programs have closed
27 captioning, which can be viewed with the use of a closed captioning decoder.

28 ²¹Deaf inmates should be housed with deaf inmates, where possible, even if it means
returning them to a different housing arrangement at the end of the day's job or course work.
Defendants' current practices are a likely violation of the requirement to make reasonable
modifications to policies, practices, or procedures. See 28 C.F.R. § 35.130(b)(7).

dozens of attempts to call the jail — were unavailing. The one person she did speak with from the jail lead her to believe that her husband would be released earlier than he was actually released. This inconsistency simply added to her confusion. The DOC's failure to provide effective communication to those deaf persons who contact the jail could be remedied by establishing a separate TDD line, or by re-working the recorded messages to be user friendly to someone who calls through the relay.²²

3. The DOC Has Violated the Rehabilitation Act.

Defendants' treatment of individuals with hearing impairments similarly violates the Rehabilitation Act. As noted, the first two requirements for stating a claim under the Rehabilitation Act, that plaintiffs have disabilities and are "otherwise qualified" to receive services, are identical to those under the ADA. Duffy, 98 F.3d at 455 (deaf inmate satisfies first two elements of claim). The DOC receives federal assistance, in part because they house federal prisoners.

Finally, the relevant anti-discrimination provision under the Rehabilitation Act is also essentially the same as that under the ADA.²³ The Rehabilitation Act requires recipients of federal funding to "insure that communications . . . are effectively conveyed to those having impaired . . . hearing." 28 C.F.R. § 42.503(b)(6)(e). Specifically, the Rehabilitation Act requires that recipients of federal funding.

provide appropriate auxiliary aids to qualified handicapped persons with impaired sensory, manual, or speaking skills where a refusal to make such provision would discriminatorily impair or exclude participation of such persons. . . .

28 C.F.R. § 42.503(b)(6)(f). As it does under the ADA, the DOC's recurring practice of refusing to

²²In addition to the general requirement regarding effective communication, defendants are also covered by 28 U.S.C. § 35.161 ("Where a public entity communicates by telephone, . . . TDDs or equally effective telecommunication systems shall be used to communicate with individuals with impaired hearing or speech."). Entities that have extensive phone contact with the public are encouraged to use a TDD to comply with this section of the regulation. For entities that, nevertheless, chose to use the relay to comply with this part, they must be prepared to effectively accept and handle relayed calls in the normal course of business. See TA Manual § II-7.2000 at 41.

²³Accommodation must provide "meaningful access" to persons with disabilities. Alexander v. Choate, 469 U.S. 287, 301 (1985).

1 provide qualified interpreters,²⁴ TDDs, captioning, and other auxiliary aids and services plainly
2 impairs the ability of deaf inmates to participate in or benefit from prison services or programs.

3 4. The DOC Has Also Violated the ADA by Failing to Notify Class Members of Their
4 Rights Under the Act and to Ensure That They Can Obtain Information Regarding
5 Accessible Services.

6 The ADA requires public entities to notify individuals with disabilities of their rights as
7 provided by the Act. 28 C.F.R. § 35.106. Specifically, each public entity must

8 make available to applicants, participants, beneficiaries, and other interested persons
9 information regarding the provisions of this part and its applicability to the services,
10 programs, or activities of the public entity.

11 Id.²⁵ Methods of providing this information may include "the publication of information in
12 handbooks, manuals or pamphlets," or "the display of informative posters in service centers." 28
13 C.F.R. pt 35, App. A at 474. None of the named plaintiffs saw or received from the DOC notice of
14 their rights in any form; the DOC's failure to provide that notice contravenes the ADA. See
15 Clarkson v. Coughlin, 898 F. Supp. at 1038. Providing written notice is not burdensome; the notice
16 proposed by plaintiffs in earlier meetings with the county is a simple, one-page, typewritten sheet.

17 The ADA contains a related requirement that specifically deals with accommodations
18 affecting communication.²⁶ Entities must ensure that they effectively communicate the availability
19 of accessible services, and the means by which individuals may obtain those services. Id. The
20 DOC failed to provide any such information to all of the named plaintiffs, despite the plaintiffs'
21 repeated requests for accessible services. Criss Brown was sometimes forced to mime requests,
22 when defendants could have provided him with an accessible format for requesting auxiliary aids
23

24 ²⁴"Qualified interpreters" are also required by the Rehabilitation Act. 28 C.F.R.
25 § 42.503(b)(6)(f).

26 ²⁵ Although the Act allows department heads discretion regarding the manner of providing
27 such notifications, an entity cannot simply choose to disregard the requirement. Id.

28 ²⁶The regulation provides:

A public entity shall ensure that interested persons, including persons with impaired vision
or hearing, can obtain information as to the existence and location of accessible services,
activities, and facilities.

28 C.F.R. §35.163 (a).

1 simply by having available a pad and pen. Similarly Jill Brown had no idea where to turn for
2 accessible services. Because of the DOC's non-compliance, the Browns were confused and unable
3 to communicate about Mr. Brown's incarceration, plans for his release, or any other important
4 family or employment issues.

5 There are some indications that defendants may have had a process for requesting the use of
6 a TDD after a deaf inmate is assigned to a housing unit. Nevertheless, when the named plaintiffs
7 attempted to follow such procedures, they were made to wait several days or weeks to obtain
8 equipment that was frequently defective. In contrast, hearing inmates have regular and daily access
9 to telephones. If defendants' procedure is not implemented or is not effective, it does not comply
10 with the ADA. In Aikins v. St. Helena Hospital, 843 F. Supp. 1329, 1335 (N.D. Ca. 1994), the
11 defendant had clear and posted policies regarding how deaf individuals could obtain access to sign
12 language interpreters, TDDs, and other services, and argued, on that basis, that it was in compliance
13 with the Act. Where such policies were not effective for plaintiff, however, the court disagreed, and
14 denied defendants' motion. Id. at 1336. The ADA's requirements for procedures and notice are
15 intended to assist in effectuating the mandate of equal participation and equal benefit; they are not
16 shields that defendants can raise to insulate themselves from the law's requirements. See 28 C.F.R.
17 § 35.101.

18 **D. Many Federal Courts Have Granted Preliminary Injunctive Relief Under Both**
19 **the ADA and the Rehabilitation Act In Similar Circumstances.**

20 Several courts have liberally granted preliminary injunctive relief under the Americans with
21 Disabilities Act and the Rehabilitation Act to plaintiffs seeking qualified sign language interpreters,
22 TDDs, and other appropriate auxiliary aids and services.²⁷ The case most nearly on point, because
23 it addresses issues virtually identical to those presented in this case, is Clarkson v. Coughlin, 898 F.
24 Supp. 1019, 1032 (S.D.N.Y. 1995), where the court held with respect to a Department of

25 ²⁷See, e.g., Tugg v. Towey, 864 F. Supp. 1201 (S.D. Fla. 1994) (grant of preliminary
26 injunction requiring defendant to provide mental health counselors who were fluent in American
27 Sign Language where even qualified interpreters did not ensure effective communication during
28 therapy); Crawford v. University of California, 440 F. Supp. 1047 (M.D.N.C. 1977) (granting
preliminary injunction compelling provision of qualified sign language interpreter because of
balance of hardships even where no clear private right of action had been found).

1 Correction's treatment of a class of deaf and hearing impaired inmates:

2 In their failure to provide notice of rights to accommodations and available assistance, to
3 consult with disabled inmates as to the most effective form of accommodation, . . .
4 defendants have violated the ADA. By failing to provide interpretive services during
reception and classification, through the absence or inadequacy of assistive communications
devices for telephone and television, . . . defendants have violated both § 504 of the
Rehabilitation Act and the ADA.

5 Accordingly, the court granted preliminary injunctive relief. *Id.* at 1035. Similarly, in this case,
6 plaintiffs' affidavits show that defendants have engaged in ongoing discrimination by failing to
7 provide class members with notice of their rights; by failing to consult and instead rejecting outright
8 plaintiffs' requests for accessible services; by failing to provide qualified interpreters for reception
9 or intake, and classification interviews, and by failing to provide equivalent access to telephones
10 and televisions. Each successive plaintiff's statement of experiences is the mirror image of a prior
11 one; together, they provide a stark illustration of the forced isolation and inferior treatment Congress
12 sought to arrest in the passage of the ADA. *See* 42 U.S.C. §§ 12101(2), (5), (6). In another parallel
13 case, *Randolf v. Rogers*, 980 F. Supp 1051, 1062 (E.D. Mo. 1997), the court found that defendants
14 violated the ADA as a matter of law, where a deaf inmate was denied qualified interpreters for non-
15 emergency medical care and classification-type interviews, even where the facts demonstrated that
16 he could communicate in writing and there was no evidence of problems with his medical care. The
17 court found that because he had not had a "full" opportunity to communicate, he was not thereby
provided with "full" benefits. *Id.* at 1061.

18 Moreover, the Ninth Circuit Court of Appeals and other courts have faced the precise factual
19 situation presented in this case — namely, the denial by correctional officials of auxiliary aids and
20 services such as qualified interpreters, TDDs, or captioning, among others, to deaf inmates, and
21 have found that the pattern of behavior engaged in by defendants, if evidenced, constitutes a
22 violation of the ADA or the Rehabilitation Act, or both. *See Duffy*, 98 F.3d at 456, 458 (where deaf
23 inmate was denied qualified interpreter, summary judgment in favor of officials was improper);
24 *Bonner*, 857 F.2d at 564 (same under Rehabilitation Act); *Hanson*, 991 F. Supp. at 1063
25 (defendants' failure to provide a qualified interpreter and TDD while plaintiff was being processed
at the jail, and had no opportunity to arrange for bail, states a prima facie case). *Cf. Rewolinski v.*
26 *Morgan*, 896 F. Supp. 879 (E.D. Wis. 1995) (plaintiffs' allegation of defendants' failure to provide

1 interpreters, and closed captioning for television, state sufficient claim to proceed in forma
2 pauperis).²⁸

3 **E. The Required Actions Do Not Constitute An Undue Burden or Fundamental**
4 **Alteration, or Pose Unreasonable Safety Risks.**

5 The prohibitions of discrimination regarding accessible communication do not require an
6 entity to "take any action that it can demonstrate would result in a fundamental alteration in the
7 nature of a service, program, or activity or undue financial or administrative burdens." 28 C.F.R.
8 § 35.164. See 28 C.F.R. pt. 35, App. A, at 483. Defendants here would bear the burden of proof
9 should they allege that providing a sign language interpreter or other auxiliary aid presents a
10 fundamental alteration in the nature of the prison's program or undue financial or administrative
11 burdens. *Id.* Notwithstanding any such claims by defendants, it is unlikely that actions required by
12 the ADA or the Rehabilitation Act would fundamentally alter the jail setting, or otherwise impose
13 an undue burden on the DOC. The DOC itself negotiated and agreed to these policies; it would be
14 surprising if they now found them burdensome or altering of the prison environment.²⁹ Secondly, as
15 noted *supra*, several courts have required the provision of appropriate auxiliary aids or services in
16 jail and prison settings. TDDs and captioning devices typically cost less than \$300 each. If an act is
17 an undue burden, the public entity must still provide effective communication to the "maximum
18 extent feasible" — in Santa Clara County jails, however, some officers would not even assist deaf
19 inmates by writing notes, or in making phone calls. *Id.*

20 Finally, because this case involves jail administration, it is important to consider legitimate
21 safety concerns. Although the plaintiffs' rights should be "considered in light of effective prison
22 administration," *Bullock v. Gomez*, 929 F. Supp. 1299, 1302-03 (C.D. Cal. 1996), the Department

23 ²⁸For cases involving court-sanctioned injunctive relief in settlements which require the
24 provision of qualified sign language interpreters and other appropriate auxiliary aids and services to
25 deaf inmates, see *Armstrong v. Wilson*, 124 F.3d at 1025; *Pyles v. Kamka*, 491 F. Supp. 204 (D.
26 Md. 1980).

27 ²⁹With respect to administrative burdens, it should be noted that the County has a contract
28 with a sign language interpreter service already in place. (A copy of a July 1997 letter, from John
Longabaugh, Coordinator of Programs for the Disabled, stating that the County had entered into a
contract for the provision of sign language interpreting services, is attached as Exhibit E to the
Wilson Dec.)

1 does not believe that the standards originally articulated in Turner v. Safley, 482 U.S. 78 (1987), for
2 constitutional cases should be added, as a judicially-created inquiry, to ADA and Rehabilitation Act
3 statutory claims.³⁰ As discussed above, the ADA and the Rehabilitation Act each provide statutory
4 protections and mechanisms for covered entities that allow them to evaluate requests for an
5 interpreter or other auxiliary aid or service and decide whether or not responding to the request
6 would present serious safety concerns or otherwise damage serious penal interests. Security
7 concerns are best addressed within the statutory scheme, using the tools that Congress created.³¹
8 See Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997) (Posner, J.,
9 explaining that statutory "[t]erms like 'reasonable' and 'undue' are relative to circumstances, and the
10 circumstances of a prison are different than those of a school, an office, or a factory."); Onishea v.
11 Hopper, 126 F.3d 1323, 1336 (11th Cir. 1997), vacated, 133 F.3d 1377 (11th Cir. 1998) (rejecting
12 the application of the Turner test to the Rehabilitation Act, reasoning that the Turner test is
13 "duplicative of the inquiry under the Act.").³² Although the Ninth Circuit applied the Turner
14 analysis in Gates v. Rowland, 39 F.3d 1439, 1447-48 (9th Cir. 1994), to claims under the
15 Rehabilitation Act,³³ it is questionable whether this standard applies to the ADA, especially
16 following Yeskey. 1998 WL 309065. There, the Supreme Court held unanimously, and without the
17 hint of a limiting principle, that the ADA applies to prisons.

Turner establishes a four prong test for assessing the reasonableness of prison policies that

18 ³⁰ At least one court has questioned the applicability of this kind of inquiry when a jail as
19 opposed to a prison system is concerned, reasoning that such a facility is designed primarily to
20 house individuals charged with, but not convicted of, criminal offenses (often not at the felony
21 level). Fennell v. Simmons, 951 F. Supp. 706 (N.D. Ohio 1997).

22 ³¹ In Turner, 482 U.S. at 78, the Supreme Court was concerned with judicial restraint in
23 legislative and administrative matters: the ADA and the Rehabilitation Act are legislative
24 enactments that are enforced by the Department of Justice. In fact, "constitutionalizing" these
25 statutes robs Congress of its powers to enact statutes with specific requirements and remedies.

26 ³² Although the 11th Circuit has vacated the panel opinion in Onishea pending rehearing en
27 banc, the panel opinion's reasoning remains persuasive.

28 ³³ In Duffy v. Riveland, 98 F.3d at 455, the Court of Appeals applied the test only to the
29 plaintiff's Rehabilitation Act Claim, not to his ADA claim. But in Bullock v. Gomez, 929 F. Supp.
30 at 1306, the district court applied Turner to both Acts. In Bullock, the court did not, however,
31 simply defer to the warden's testimony that the policy was necessary for security reasons. Instead,
32 the court found flaws in the prison's rationale, and denied summary judgment for the prison.

1 the Court adopted to balance its vital role in protecting prisoners' constitutional rights with its
2 concern that a court not inject itself into decisions about prison administration and legitimate
3 security issues. See Gates, 39 F.3d at 1447. We are not dealing in this action with a prison policy
4 designed to insure inmate safety, but with meeting the communication needs of deaf and hard of
5 hearing inmates, guaranteed by the ADA, a statute that the Supreme Court has recently reaffirmed
6 protects prisoners. Providing interpreters and other auxiliary aids is, moreover, likely to enhance
7 the ability of the DOC to deal with safety concerns. Jail administrators will be able to effectively
8 screen individuals with hearing impairments at booking, and gather the necessary information from
9 them. Id. Individuals with hearing impairments will be able to participate in rehabilitative
10 programs; and have access to their friends and families, which serves rehabilitative ends. Id.

11 In Gates v. Rowland, 39 F.3d at 1447-48, the Ninth Circuit adopted the Turner test and
12 upheld a policy denying HIV+ inmates from working in food service, with the rationale that "the
13 full programming opportunities available to the general population" are still provided to such
14 inmates "except that they are not given food service assignments." Id. Citing Turner, the Ninth
15 Circuit found that legitimate penological concerns for safety of other prisoners weighed against
16 permitting HIV+ prisoners from having the right to work in the food service. Id. This case is
17 different. Here, the full programming opportunities are not available to the plaintiffs, and DOC's
18 failure to ensure effective communication makes it more difficult for DOC to address legitimate
19 security issues (such as finding out, at booking, whether deaf inmates have any contagious disease).
20 Moreover, by denying deaf prisoners a sign language interpreter for those communications which
21 are important, the DOC is effectively isolating them, and preventing them from exercising their
22 rights in virtually all circumstances within and outside of the jail.³⁴

23 Prison is not a free environment, but it should not be worse for deaf inmates than it is for

24 ³⁴Moreover, in Gates v. Rowland, the court emphasized the fact that prisoners live in a
25 closed environment and thus can not chose where to eat. Id. In society, deaf individuals are able to
26 make the arrangements necessary to communicate with people who are not deaf, whether by owning
27 TDDs, by using interpreters, or by communicating in American Sign Language with people who use
28 that method of communication. In jail, the possibility of addressing those necessities is removed;
the defendants' practices effectively place deaf individuals in something like solitary confinement
for no reason other than their deafness.

1 anyone else. That is the point of the ADA, the Rehabilitation Act, and even Turner itself. See
2 Armstrong, 124 F.3d at 1025 (citing Turner for the proposition that "rights against discrimination
3 are among the few rights that prisoners do not park at the prison gates.").

4 **F. The DOC's Discrimination Causes Ongoing, Actual Injury, and Contravenes
5 the Public Interest In Preventing Discrimination.**

6 Finally, the plaintiffs can demonstrate irreparable harm.³⁵ In Cupolo v. Bay Area Rapid
7 Transit, 1997 WL 901909 at *5, this Court opined that "[i]njuries to individual dignity and
8 deprivations of civil rights constitute irreparable injury," citing Chalk v. United States Dist. Court,
9 840 F.2d 701, 710 (9th Cir. 1988), and Sullivan v. Vallejo City Unified School Dist., 731 F. Supp.
10 947, 961 (E.D. Cal. 1990). The Cupolo Court underscored the ADA's goals of "equality of
11 opportunity" and "full participation" and the fact that the behavior of the defendant interfered with
12 the ADA's accomplishment of those goals. Id. See also 42 U.S.C. § 12101 (stating goals).

13 The same considerations are present in this case. According to the statements of the
14 plaintiffs, the DOC continually refused to provide plaintiffs with qualified interpreters, TDDs, and
15 captioning decoders, even after plaintiffs' counsel had spent time and energy negotiating a specific
16 policy of non-discrimination. Defendants apparently made no effort whatsoever to put these
17 policies into practice; they did not even undertake the simple step of posting a notice of plaintiffs'
18 rights. Plaintiffs have no reason to believe that class members will not continue to suffer
19 humiliation and irreparable injury.

20 These injuries are serious. Class members have been forced to endure delays of several days
21 in release from custody — prior to being convicted of any crime. There are few constraints on
22 freedom more profound than custody. More to the point, while in custody, Plaintiffs have been
23 forced into profound isolation, prevented from participating in programs or services, from vital
24 medical treatment and rehabilitation,³⁶ to recreation as basic as watching television.³⁷ Almost every

25 ³⁵See generally Doe v. Judicial Nominating Comm'n, 906 F. Supp. 1534, 1545 (S.D. Fla.
26 1995) (discrimination on the basis of disability is the type of harm that warrants injunctive relief).

27 ³⁶Exclusion from therapeutic programs constitutes irreparable harm. See Innovative Health
28 Sys., Inc. v. City of White Plains, 931 F. Supp. at 241 (clients of a substance abuse program would
be irreparably harmed by interference with treatment); Tugg, 864 F. Supp at 1207 (ineffective
communication in counseling of deaf individuals is irreparable injury); Oxford House-Evergreen v.

avenue of communication has been closed to them: they are prevented from communicating with family, friends, and the courts over the phone, and are unable to communicate at anything more than a gestural level with officers and other inmates. Not surprisingly, these circumstances caused and continue to cause indignity, forced dependence, and emotional turmoil.³⁸

Finally, in Innovative Health Systems, Inc. v. City of White Plains, 931 F. Supp. 222, 244 (S.D.N.Y. 1996), the court applied reasoning similar to that in Cupolo to find that the balance of hardships weighed in the favor of a preliminary injunction for violations of the ADA and the Rehabilitation Act. Specifically, the court stated that discrimination on the basis of disability converted the case into one warranting relief, especially where the Acts provide courts with the express power to change the discriminatory practices.

City of Plainfield, 769 F. Supp. 1329 (D.N.J. 1991) (plaintiffs would be irreparably harmed if removed from a home for recovering alcoholics and drug addicts). For discussion of medical treatment see cases cited supra.

³⁷In Concerned Parents to Save Dreher Park Center v. West Palm Beach, 846 F. Supp. 986, 992 (S.D. Fla. 1994), the court found irreparable harm to plaintiffs with disabilities when the city eliminated social, athletic, and other leisure programs for people with disabilities. See also Rewolinski v. Morgan, 896 F. Supp. 879 (E.D. Wis. 1995).

³⁸Cupolo, 1997 WL 901909, at *2, *6 ("substantial indignity and inconvenience" constitutes irreparable harm); Sullivan, 731 F. Supp. at 961 (injuries to a disabled person's dignity, self-respect, and ability to function as an independent person constitutes irreparable harm). Cf. Chalk, 840 F.2d at 709-10 (loss of emotional satisfaction from job in disability claim constitutes irreparable harm).

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CONCLUSION

For the foregoing reasons, the United States respectfully urges the Court to grant the plaintiffs' application for a preliminary injunction.

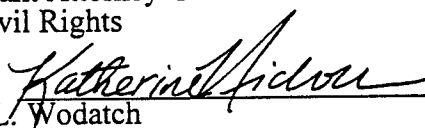
Respectfully submitted this 26th day of June 1998.

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