IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02733-STV

BIONCA CHARMAINE ROGERS,
CATHY BEGANO,
KANDYCE VESSEY, and
JENNIFER SAUGAUSE,

Plaintiffs,

v.

COLORADO DEPARTMENT OF CORRECTIONS,
RICK RAEMISCH, in his official capacity as Executive Director of the Colorado Department of Corrections,
RYAN LONG, in his official capacity as Warden of the Denver Women's Correctional Facility, and
JOHN/JANE DOE(S) responsible for the decision(s) not to provide videophones at the Denver Women's Correctional Facility, in their official capacities,

Defendants.

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

Plaintiffs Bionca Charmaine Rogers, Cathy Begano, Kandyce Vessey, and Jennifer Saugause, by and through counsel, hereby file this brief in opposition to Defendants' Motion to Dismiss, ECF 37 ("Motion").

Because Plaintiff Rogers has alleged both that Defendants discriminated against her on the basis of her relationship with her deaf parents, and because she was harmed by Defendants' discrimination against her parents, she has standing to sue under Title II of the Americans with Disabilities Act ("ADA" or "Title II"), 42 U.S.C. § 12131 *et seq*. and section 504 of the Rehabilitation Act ("Rehab Act"), 29 U.S.C. § 794. Because all Plaintiffs have alleged that

Defendants do not provide the auxiliary aids and services necessary to permit them an equal opportunity to participate in, and enjoy the benefits of, Defendants' services, programs, and activities, they have stated claims under Title II and the Rehab Act. And because Plaintiffs have properly alleged that deaf prisoners have a right under the First Amendment to the United States Constitution to communicate by videophone, they have stated a claim for violation of that Amendment. For these reasons, Defendants' Motion has no merit and should be denied.

FACTS

Plaintiffs are all prisoners in the custody of the Colorado Department of Corrections ("CDOC") housed at the Denver Women's Correctional Facility ("DWCF"). Plaintiff Rogers is able to hear (often described by the adjective "hearing") but both of her parents are deaf. Plaintiffs Begano, Vessey, and Saugause are all deaf. Ms. Rogers's parents and Ms. Begano, Ms. Vessey, and Ms. Saugause all use American Sign Language ("ASL") as their primary language; Ms. Rogers knows ASL and uses that language to communicate with her parents. Third Amended Complaint ("TAC"), ECF 34, ¶¶ 1, 9-13.

Plaintiffs have all requested access to a videophone to be able to communicate with their family and friends in a manner equivalent to the way inmates who are not deaf or do not have deaf family members are able to communicate. Defendant CDOC has denied these requests. TAC ¶¶ 2-5, 36-53, 64. Plaintiffs have filed the present lawsuit alleging that, by denying access to a videophone, CDOC is in violation of Title II, the Rehab Act, and the First Amendment. TAC ¶¶ 72-102.

I. Standard of Review

For purposes of this Motion and Opposition, Plaintiffs accept the standards of review set forth by Defendants. *See* Motion at 2-3. Plaintiffs understand Defendants to be challenging Plaintiff Rogers's standing as a matter of law, requiring the Court to accept the factual allegations in the Third Amended Complaint as true and determine whether they are sufficient to establish jurisdiction.

II. Plaintiff Rogers Has Standing to Bring Claims Under the ADA and Rehab Act.

Plaintiff Rogers bases her standing to sue under the ADA and the Rehab Act on two distinct grounds: (1) that she herself was discriminated against as a person who has a relationship or association that is known to the CDOC with individuals whose disabilities are known to the CDOC, 28 C.F.R. § 35.130(g); and (2) that she has been harmed and aggrieved by the CDOC's discrimination against her parents, 42 U.S.C. § 12133; 29 U.S.C. § 794a(a)(2).

A. CDOC Discriminated Against Plaintiff Rogers Based on Her Association with her Deaf Parents.

Title II's implementing regulations[1] provide that "[a] public entity shall 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 known to have a relationship or association." 28 C.F.R. § 35.130(g). Defendant asserts that Plaintiff Rogers "does not allege that she has been discriminated against as a result of her known association with

[1] Title II's statutory language mandates that the Department of Justice promulgate implementing regulations consistent with those implementing the Rehabilitation Act. 42 U.S.C. § 12134(a), (b). "[B]ecause Congress mandated that the ADA [Title II] regulations be patterned after the section 504 coordination regulations [of the Rehabilitation Act], the former regulations have the force of law." *Marcus v. Kansas Dep't of Revenue*, 170 F.3d 1305, 1306 n.1 (10th Cir. 1999) (quoting *Helen L. v. DiDario*, 46 F.3d 325, 332 (3d Cir. 1995)).

her parents, both of whom are alleged to be deaf." Motion at 5. This is incorrect. Plaintiff alleges that she is "an individual who has a known relationship or association with persons with known disabilities," TAC ¶ 9; *see also id.* ¶ 82, and further alleges:

> Defendant CDOC excluded Plaintiffs and Ms. Rogers's parents from participation in and/or denied them the benefits of it services, programs, and/or activities and/or subjected them to discrimination on the basis of disability and, in the case of Ms. Rogers, on the basis of her relationship or association with her deaf parents, in violation of Title II and its implementing regulations as more fully described in this Third Amended Complaint.

TAC ¶ 84; *see also id.* ¶ 96 (same allegation under Rehab Act).

Ms. Rogers's detailed allegations provide further support. She alleges that, on August 28, 2015, she requested a videophone to communicate with her "deaf family." TAC ¶ 38. After the CDOC requested additional evidence to support this, Ms. Rogers provided contact information for an individual at Sorenson Video Phone who would be able to confirm that her parents are deaf and have videophones. As the TAC explains, because "Sorenson Communications provides videophones and software exclusively to deaf individuals who require Video Relay Service (VRS) to place and receive calls," https://apply.sorensonvrs.com/secured_ntouch_apply_form (last visited 6/11/2017), Ms. Rogers was . . . substantiating the fact that her parents were deaf." TAC ¶¶ 47-51. Defendant CDOC has thus known, from very soon after Ms. Rogers entered its custody, that her parents were deaf, that is, that individuals with whom she had a known relationship had known disabilities. She has standing, pursuant to 28 C.F.R. § 35.130(g), because the CDOC has discriminated against her based on that association by not permitting her to communicate with her parents as effectively as prisoners who are not related to or associated with deaf friends or family. *See, e.g., Prakel v. Indiana*, 100 F. Supp. 3d 661, 672-73 (S.D. Ind. 2015) (holding that hearing mother/criminal

defendant had standing under 28 C.F.R. § 35.130(g), to challenge failure of court system to provide an interpreter for her deaf son, who wanted to attend her court hearing as a spectator); *S.K. v. N. Allegheny Sch. Dist.*, 146 F. Supp. 3d 700, 712 (W.D. Pa. 2015) (holding that, under 28 C.F.R. § 35.130(g), "[a] parent may . . . assert an associational discrimination claim against a school district if the school district discriminates against him or her because of his or her association with a disabled child.").

> The *S.K.* case recited a four-prong test for standing under § 35.130(g): the plaintiff must plausibly allege: "(1) a logical and significant association with an individual with disabilities; (2) that a public entity knew of that association; (3) that the public entity discriminated against them because of that association; and (4) they suffered a direct injury as a result of the discrimination."

Id. (quoting *Schneider v. Cnty. of Will*, 190 F. Supp. 2d 1082, 1091 (N.D. Ill. 2002)). Ms. Rogers meets each of those prongs: she alleges that she has a parent/child relationship with two people who are deaf; she alleges that the CDOC knew of the association; she alleges that the CDOC discriminated against her by not providing communication as effective as that provided prisoners with nondisabled parents; and she alleges that she suffered a direct injury -- inability to communicate with her parents -- as a result. Ms. Rogers thus has standing to bring a claim under Title II pursuant to 28 C.F.R. § 35.130(g).

B. Ms. Rogers Was Harmed by the CDOC's Discrimination Against Her Parents.

"[A]ny person aggrieved by any act or failure to act by any recipient of Federal assistance" under the Rehab Act may bring suit. 29 U.S.C. § 794a(a)(2). Title II of the ADA grants a right of action to "any person alleging discrimination on the basis of disability." 42 U.S.C. § 12133. As Defendants agree, "[t]he enforcement provisions of Title II of the ADA do not limit relief to "qualified individuals with disabilities.'" Motion at 4 (citing *MX Group, Inc. v.*

City of Covington, 293 F.3d 326, 335 (6th Cir. 2002) and *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 47 (2nd Cir. 1997), *superseded on other grounds by Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 171 (2nd Cir. 2001)).

Indeed, "the use of such broad language in the enforcement provisions of the statutes 'evinces a congressional intention to define standing to bring a private action under 504 [and Title II] as broadly as is permitted by Article III of the Constitution.'" *Innovative Health*, 117 F.3d at 47 (citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972)); *cf. Tandy v. City of Wichita*, 380 F.3d 1277, 1287 (10th Cir. 2004) (holding, in a different context, that enforcement provisions of both Title II and the Rehab Act evince a congressional intent to confer standing to the full limits of Article III). Where "Congress intended standing [under a statute] to extend to the full limits of Art. III, the normal prudential rules do not apply; as long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 103 n.9 (1979).

Thus the right of action under the Rehab Act "includes the non-disabled," provided they can "establish[] an injury causally related to, but separate and distinct from, a disabled person's injury under the statute." *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 280 (2d Cir. 2009). The same is true of Title II because, as Defendant agrees, the two statutes are "materially identical," Motion at 5; because the Tenth Circuit has recognized that standing under both Title II and the Rehab Act extends "to the full limits of Article III," *Tandy*, 380 F.3d at 1287; and because the enforcement provision of Title II incorporates by reference the enforcement provision of the Rehab Act, 42 U.S.C. § 12133.

Ms. Rogers has alleged that CDOC discriminated against her parents on the basis of disability. TAC ¶¶ 84, 96. Because Ms. Rogers has alleged that she was injured -- by being prevented from communicating with her family -- by the CDOC's discrimination against her deaf parents, *id.* ¶¶ 89, 101, she has standing to sue under Title II and the Rehab Act.

III. Plaintiffs Have Stated Claims Under Title II and Rehab Act.

Plaintiffs allege that the CDOC discriminates against them by failing to provide videophones that would permit them to communicate with family members as effectively as hearing prisoners (in the case of Plaintiffs Begano, Vessey, and Saugause) or as effectively as prisoners with hearing family members (in the case of Plaintiff Rogers) are able to communicate. Plaintiffs agree with Defendants that "'[t]he Rehabilitation Act is materially identical to and the model for the ADA…' *Crawford v. Indiana Department of Corrections*, 115 F.3d 481, 483 (7th Cir. 1997)," and that, as such, "the discussion of the elements required under the ADA is equally applicable to consideration of the Rehabilitation Act." Motion at 5.

The DOJ's Title II implementing regulations -- which have the force of law, *see supra* note 1 -- require that the CDOC ensure that communications with people with disabilities "are as effective as communications with others." 28 C.F.R. § 35.160(a)(1). The CDOC is required to

> furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity.

Id. § 35.160(b)(1). "The type of auxiliary aid or service . . . will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place." *Id.* § 35.160(b)(2).

Crucially, for the purposes of this case, "[i]n determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities." *Id.* The Department of Justice Title II Technical Assistance Manual explains, "'Primary consideration' means that the public entity must honor the choice, unless it can demonstrate that another equally effective means of communication is available, or that use of the means chosen would result in a fundamental alteration in the service, program, or activity or in undue financial and administrative burdens." The Americans with Disabilities Act Title II Technical Assistance Manual, § II-7.1100 "Primary consideration."[2] If an entity proposes an alternative form of communication, it has the "burden under the statute to demonstrate the proffered aid's effectiveness." *Hayden v. Redwoods Cmty. Coll. Dist.*, No. C-05-01785NJV, 2007 WL 61886, at *9 (N.D. Cal. Jan. 8, 2007).

Plaintiffs explained in detail in the TAC how the CDOC is not providing them communications that "are as effective as communications with others." Prisoners are generally permitted to make phone calls to individuals on their phone list any time between 6:00 a.m. an midnight. TAC ¶¶ 32-35. In contrast, prisoners with hearing disabilities must (in theory) use a teletypewriter or TTY. *Id.* ¶ 35 (quoting CDOC Administrative Regulation 850-12, ¶ IV(A)(4)). A TTY requires both parties to have specialized equipment, and requires both parties to type back and forth. TAC ¶¶ 21-22. Even when it works precisely as intended, it is far more cumbersome than a videophone conversation. *Id.* ¶ 23. Forcing deaf prisoners or prisoners with deaf family members to use a TTY is equivalent to withdrawing phone service from all prisoners

[2] https://www.ada.gov/taman2.html#II-7.1100 (last visited July 3, 2017). The interpretations in the Title II Technical Assistance Manual are "entitled to deference." *Kirola v. City & Cty. of San Francisco*, No. 14-17521, 2017 WL 2676768, at *12 (9th Cir. June 22, 2017).

and requiring them to communicate with their friends and family entirely by text or letter. As the Fourth Circuit recently explained, "TTY does not permit real-time conversations, and each conversation over a TTY device takes significantly longer than signed or spoken conversations." *Heyer v. United States Bureau of Prisons*, 849 F.3d 202, 207 (4th Cir. 2017).

As Ms. Rogers explained to the CDOC in her August 28, 2015 request:

> due to sign language being a visual language where I, and my family are able to effectively communicate through expressions, demeanor, and facials as sign language uses such to understand one another. [A videophone] is equal to a telephone that a hearing family uses because the ability to determine moods etc. is easily heard through vocal language and having a deaf family, I am at a disadvantage because I cannot vocally commune with my parents.

TAC ¶ 38. This situation is exacerbated here because Ms. Rogers's parents do not own TTY equipment, making such calls essentially useless to her. *Id.* ¶ 41. "As technology has evolved, fewer and fewer deaf people own or use TTYs." *Id.* ¶ 25; *see also Heyer*, 849 F.3d at 207 ("TTY is old technology that is fast becoming obsolete. Over the last decade, many deaf people have migrated from TTY devices to videophones. Because a TTY device is required on both ends of the call, the abandonment of TTY technology means there are fewer and fewer people with whom [the plaintiff] can communicate.").

Although it was not the solution she requested or preferred, after the CDOC informed Ms. Rogers on several occasions that she would have to use the TTY, *id.* ¶¶ 40, 44, she tried to do so only to find it broken, *id.* ¶ 42. She later received a notice from the CDOC stating "TTY Access Denied," and requiring her to provide -- over a year after she had first provided it, *see id.* ¶ 51 -- proof that both of her parents were deaf and that they had a TTY, as well as the model of the TTY, *id.* ¶ 56. The memo concluded, "[y]ou are not an ADA offender and you are not deaf so you have been denied access to the TTY." *Id.*

Starting in April, 2017, Plaintiff Rogers has been able to reach her mother using "Video Relay Service," or VRS. VRS is an indirect method of communication between a deaf person and a hearing person who does not sign. Using VRS, Ms. Rogers uses a conventional telephone to call her mother's videophone number. The call is answered by a sign language interpreter/operator equipped with a headset (to talk with Ms. Rogers) and a videophone (to sign with her mother). With Ms. Rogers holding on the phone line, the operator calls her mother's videophone. As Ms. Rogers speaks, the interpreter interprets for her mother; as her mother signs in response, the interpreter interprets into back into spoken English for Ms. Rogers. *See id.* ¶¶ 59-60.

For Ms. Rogers, VRS does not constitute communication that is in any way equivalent to a phone call between a hearing prisoner and her hearing family members, as the entire conversation is mediated by the interpreter. Participants in a VRS call do not speak with each other directly, and still cannot perceive emotion, tone, and other "non-spoken" features of a conversation between family members. Thus although VRS is a convenient solution for conversations between deaf people and non-signing hearing people, it is by definition indirect. As such, it is an inferior way for a deaf and hearing person to communicate when both know ASL. TAC ¶ 61.

Plaintiffs Begano, Vessey, and Saugause -- all of whom are deaf prisoners at DWCF -- have each attempted to use a TTY at that facility on a number of occasions. The family members with whom they communicate are largely hearing, rather than deaf. Plaintiffs Begano, Vessey, and Saugause have thus used TTY relay, a more primitive system than Video Relay, in which they type their half of the conversation into the TTY, while an operator reads the text to

the hearing person at the other end. When the hearing person responds, the operator types the response back to the deaf prisoner's TTY. TAC ¶ 66. Even when it works properly, this process is far more cumbersome and time consuming than a phone call, videophone call, or video relay call. *Id.* ¶ 67.

In addition, when Plaintiffs Begano, Vessey, and Saugause have attempted to use the TTY, it has not worked properly. The TTY often skips words and when there is background noise or interference, the words are garbled. On many occasions when one of them wanted to use the TTY, it was broken and they were asked to wait until it was fixed to place their call. This is in stark contrast to hearing inmates, who are able to use the phone at any time between 6:00 a.m. and midnight. TAC ¶ 68.

In contrast to the TTY, a videophone permits two deaf people, or a deaf person and a hearing person who signs, such as Ms. Rogers, to communicate directly in their native language, the way two hearing individuals communicate on the phone. *See* TAC ¶ 27. It would permit Plaintiffs Begano, Vessey, and Saugause to communicate directly with any deaf friends or family, and at the very least to progress from TTY relay to Video Relay to communicate with hearing friends and family.

Ultimately, the question whether a covered entity has provided effective communication requires a "fact-intensive inquiry . . . precluding summary judgment." *Silva v. Baptist Health S. Florida, Inc.*, 856 F.3d 824, 836 (11th Cir. 2017) (Ebel, J., sitting by designation). This makes the question unsuitable for resolution on a motion to dismiss.

Defendants' cases are not to the contrary. Three of the cases on which Defendants rely were brought under Title I of the ADA, which prohibits discrimination on the basis of disability

in employment, 42 U.S.C. § 12111 *et seq*., rather than Title II and the Rehab Act, at issue here. *See Hall v. Claussen*, 6 Fed.Appx. 655, 662 (10th Cir. 2001) (plaintiff alleges employer failed to accommodate medical condition); *Gile v. United Airlines, Inc*., 95 F.3d 492, 493 (7th Cir. 1996) (plaintiff challenges failure to reassign as accommodation); *Crumpton v. St. Vincent's Hospital*, 963 F.Supp. 1104, 1108 (N.D. Ala. 1997) (plaintiff challenges employer's failure to accommodate following surgery), *cited in* Motion at 6. While Title I requires reasonable accommodations, 42 U.S.C. § 12112(b)(5)(A), it does not have Title II's explicit requirements of effective communication, auxiliary aids and services, and deference to the requests of disabled person. *See* 28 C.F.R. § 35.160(a), (b). These cases are thus not apposite here.

Defendants cite *Dean v. University at Buffalo School of Medicine and Biomedical Sciences*, 804 F.3d 178, 187 (2d Cir. 2015), for the proposition that a public entity is not required to "provide a disabled individual with every accommodation he requests or the accommodation of his choice." Motion at 7. Although *Dean* involved a claim under Title II, it addressed an accommodation requested by an individual with mental illness, not a request for effective communication. *Dean*, 804 F.3d at 182. Thus, as with the Title I cases above, the defendants in *Dean* were not constrained -- as the CDOC is here -- by the requirement that they defer to the request of the plaintiff. Furthermore, despite the fact that it was undisputed that the defendants had provided an alternative accommodation, *id.* at 188, the Second Circuit reversed summary judgment in favor of the defendants, holding that the question whether an accommodation is reasonable is "fact-specific," *id.* at 189.

The final two cases on which Defendants rely both address effective communication in the context of an arrest. In *Gevarzes v. City of Port Orange, Florida*, No. 6:12-cv-1126-Orl-

37DAB, 2013 WL 6231269, at *2 (M.D. Fla. Dec. 2, 2013), the court granted summary judgment in favor of the defendant based on a fully developed record concerning the plaintiff's communications skills and on the fact that "there were . . . exigent circumstances present that . . . weighed against stopping the investigation to bring an interpreter to the scene." *Id.* at *3-4. In *Valanzuolo v. City of New Haven*, 972 F. Supp. 2d 263, 274 (D. Conn. 2013), the court decided in favor of the defendant following a bench trial that also addressed the plaintiff's communications skills, as well as the credibility of various witnesses. *Id.* at 276-80. Neither of those cases are apposite here, given the factual and procedural differences.

Plaintiffs have all stated claims for violation of the effective communication requirements of Title II and the Rehab Act.

IV. Plaintiffs Have Stated Claims Under the First Amendment.

The Fourth Circuit recently addressed the precise question raised by Plaintiffs' First Amendment claim: whether deaf prisoners have a First Amendment right to communicate by videophone when the prison makes a TTY available. That court held that such a right existed, that a TTY was not a reasonable alternative, and that issues of fact existed precluding summary judgment for the Bureau of Prisons. *Heyer*, 849 F.3d at 213-18.

"[T]he First Amendment rights retained by convicted prisoners include the right to communicate with others beyond the prison walls." *Id*. at 213 (citing cases). Defendants concede as much in their Motion, *id.* at 8, but argue that Plaintiffs "have not asserted any facts tending to show that the choice between TTY, VRS, or the use of TTY Relay over videophones are not related to legitimate penological interests," *id.* at 8-9. Defendants do not articulate, much less support, the penological interests they believe served by a refusal to provide videophones at

DWCF; rather, they quote from an email from the CDOC's custodian of records in response to the undersigned's request for documents pursuant to the Colorado Open Records Act, stating her understanding that videophones "did not work from a security standpoint." TAC ¶ 63, *quoted in* Motion at 9.

While a full analysis of the factors set forth in *Turner v. Safley*, 482 U.S. 78, 89-91 (1987), is not required at the motion to dismiss stage, Plaintiffs are required to plead -- and have pleaded -- "'facts from which a plausible inference can be drawn that the action was not reasonably related to a legitimate penological interest.'" *See Al-Owhali v. Holder*, 687 F.3d 1236, 1240 (10th Cir. 2012) (internal citation omitted). "'This is not to say that [Plaintiffs] must identify every potential legitimate interest and plead against it.'" *Id.* (internal citation omitted). Plaintiffs have provided sufficient facts to satisfy their burden on the *Turner* factors at the motion to dismiss stage with respect to "security," the only concern identified, without further elaboration, in Defendants' Motion.

Plaintiffs assert, in their TAC, that "Defendants' refusal to provide Plaintiffs with access to a videophone serves no legitimate or compelling need and is not rationally related or narrowly tailored to any identified penological or rehabilitative need," and that "[p]rovision of appropriate telecommunication equipment to Plaintiffs would have negligible effects, if any, on other prisoners and prison employees at DWCF." TAC ¶¶ 74-75. They further plead that Plaintiffs Rogers, Begano, and Vessey were provided access to a videophone while detained at the El Paso County Jail, *id.* ¶¶ 30, 65, "facts from which a plausible inference can be drawn," *see Al-Owhali*, 687 F.3d at 1240, that provision of videophones in detention facilities do not present security challenges.

The Fourth Circuit's decision in *Heyer* and settlements from around the country substantiate that videophones may be installed and use in prisons and jails consistent with facility security. Again, the *Heyer* decision addressed the precise question raised here: whether a deaf prisoner has a First Amendment right to communicate with others outside the prison via videophone. That decision reversed summary judgment in favor of the Bureau of Prisons and in so doing, conducted a detailed analysis, under the *Turner* factors, of the Bureau's refusal to provide videophones. *Heyer*, 849 F.3d at 214-18. The Fourth Circuit concluded that, in light of the plaintiff's

> evidence of the minimal cost of a videophone and the ease with which security concerns could be mitigated, we believe that a factfinder could reasonably conclude that BOP's refusal to provide a videophone is an exaggerated response to the perceived security concerns. The district court therefore erred by granting summary judgment to BOP on Heyer's First Amendment videophone claim.

Id. at 218.

In addition, this Court can take judicial notice of settlements from around the country in which state departments of corrections and county sheriffs have agreed to provide videophones in their facilities.[3] *See, e.g.*, Settlement Agreement, ¶ X(D)(3), *Minnis v. Johnson*, No. 10-cv-96 (E.D. Va. 2010) (Virginia Department of Corrections),[4] Settlement Agreement, ¶ IX(D)(3), *Jarboe v. Maryland Dep't of Public Safety and Correctional Servs.*, No. 1:12-cv-00572-ELH (D. Md. 2015),[5] Settlement Agreement Between Defendants The Commonwealth of Kentucky *et al*. and Plaintiffs Oscar Adams

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[3] If this Court should hold that Plaintiffs should have included a recitation of these cases in their Third Amended Complaint, to pre-emptively address the question of legitimate penological interest, Plaintiffs respectfully request leave to amend to include this information.

[4] Decl. of Elliot Mincberg In Support of Pls.' Opp'n to Mot. to Dismiss, Ex. 2.

[5] *Id.* Ex. 1.

and Michael Knights, ¶ IX(D)(3), *Adams v. Commonwealth of Kentucky*, No. 3:14-cv-00001 (E.D. Ky. 2015);[6] Settlement Agreement and General Release, ¶ 4.2, *Siaki v. Darr*, 11-cv-03074-JLK (D. Colo. Sept. 27, 2012) (Adams County, Colorado).[7] The DOJ, tasked with enforcing Title II, has entered settlements with a large number of jurisdictions requiring sheriffs and jails to make videophones available to prisoners: Columbia, SC;[8] Arlington, VA;[9] Milwaukee, WI;[10] Humboldt County, CA;[11] Yakima County, WA;[12] Pennington, SD;[13] Robeson County, NC;[14] Washington County, MO;[15] San Juan County, NM;[16] and Cedar Rapids, IA.[17]

For the reasons set forth above, and explained in detail in the *Heyer* case, Plaintiffs have stated a claim under the First Amendment.

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6 Decl. of Amy F. Robertson In Support of Pls.' Opp'n to Mot. to Dismiss, Ex. 1.
7 *Id.* Ex. 2.
8 https://www.ada.gov/columbia_pd/columbia_pd_sa.html (last visited July 17, 2017).
9 https://www.ada.gov/arlington_co_sheriff_sa.html (last visited July 17, 2017).
10 https://www.ada.gov/milwaukee_pca/milwaukee_sa.html (last visited July 17, 2017).
11 https://www.ada.gov/humboldt_pca/humboldt_ca_cd.html (last visited July 17, 2017).
12 https://www.ada.gov/yakima_co_pca/yakima_sa.html (last visited July 17, 2017).
13 https://www.ada.gov/pennington_co/pennington_sa.html (last visited July 17, 2017).
14 https://www.ada.gov/robeson_co_pca/robeson_sa.html (last visited July 17, 2017).
15 https://www.ada.gov/washington_county_pca/washington_county_sa.html (last visited July 17, 2017).
16 https://www.ada.gov/san_juan_co_pca/san_juan_sa.html (last visited July 17, 2017).
17 https://www.ada.gov/cedar_rapids_pca/cedar_rapids_sa.html (last visited July 17, 2017).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss.

Respectfully submitted,

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Dated: July 21, 2017

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2017 I electronically filed the foregoing document, along with the Declarations of Amy F. Robertson and Elliot Mincberg, with the Clerk of Court using the CM/ECF system, which will provide electronic service to the following:

Chris Alber
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Counsel for Defendant

/s/ Jean Peterson
Jean Peterson, Paralegal
Civil Rights Education and Enforcement Center