IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

EARNEST KEVIN TRIVETTE, et al., Plaintiffs, v. TENNESSEE DEPARTMENT OF CORRECTION, Defendant.	Civil No. 3:20-cv-00276 Judge Trauger

MEMORANDUM IN SUPPORT OF PLAINTIFF DISABILITY RIGHTS TENNESSEE'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Disability Rights Tennessee ("DRT"), on behalf of DRT constituents and proposed plaintiffs Alex Gordon Stinnett and Jason Andrew Collins, by and through counsel, file this Memorandum in support of their Motion for Preliminary Injunction. DRT files this motion pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, respectfully requesting that this Court order Defendant Tennessee Department of Correction ("TDOC") to provide Mr. Stinnett and Mr. Collins, both deaf inmates in TDOC's custody, access to videophone service in order to prevent the irreparable harm caused by their inability to communicate with their families – including minor children – in American Sign Language ("ASL"), their native language.

TDOC refuses to provide Mr. Stinnett and Mr. Collins with videophones ("VPs") as they have each requested, providing instead only ineffective and obsolete teletypewriter ("TTY") service. TTYs – technology developed in the 1960s – require Mr. Stinnett and Mr. Collins to type messages back and forth, and thus deny them telecommunications in their native language. Communicating in written English is awkward, time-consuming, and incomplete for both men.

VPs, on the other hand, would permit them to make phone calls in their native language, as hearing inmates are able to do through conventional telephones, and thus to maintain contact with deaf and hearing friends and family.

Because TDOC is required to provide Mr. Stinnett and Mr. Collins with communication "as effective as" that provided others, and to give "primary consideration" to their requested form of communication, 28 C.F.R. § 35.160(a)(1) & (b)(2), it is likely they will prevail on the merits, as did the deaf prisoners in *Rogers v. Colorado Department of Corrections*, No. 16-CV-02733-STV, 2019 WL 4464036, at *16 (D. Colo. Sept. 18, 2019), and *McBride v. Michigan Department of Corrections*, 294 F. Supp. 3d 695, 710 (E.D. Mich. 2018), two cases granting the plaintiffs' summary judgment motions and ordering VPs in prison.

Without access to VPs, Mr. Stinnett and Mr. Collins will suffer irreparable harm, as they are deprived of effective communication with friends and family; in Mr. Collins's case, a total deprivation of any communication whatsoever with his young children who are also deaf.

TDOC has never provided a substantive reason for denying access to VPs; in rejecting requests by Mr. Stinnett and Mr. Collins for VPs, the only reason TDOC gave was that its policy only provided for TTYs. There is thus no evidence that it will suffer any – much less irreparable – harm. In any event, prisons around the country provide VPs to deaf inmates, making it unlikely that the technology will harm TDOC in particular. Finally, the public interest tilts sharply in favor of enforcing the Americans with Disabilities Act ("ADA").

For these reasons, Plaintiff DRT – as associational plaintiff representing the interests of Mr. Stinnett and Mr. Collins[1] – satisfies the standard for issuance of a preliminary injunction requiring TDOC to provide VP service to these two inmates.

PROCEDURAL HISTORY

On March 31, 2020, Plaintiffs Ernest Kevin Trivette, a former TDOC prisoner currently on parole, and DRT filed their Complaint alleging that TDOC's past and ongoing failure to provide effective communication to Mr. Trivette (during his incarceration) and other deaf and hard of hearing inmates currently in the custody of TDOC violated Title II of the ADA, 42 U.S.C. § 12131 *et seq*., and Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794. TDOC's failure to provide effective communication includes failure to provide VPs, thus denying deaf and hard of hearing inmates equal access to its phone program. Compl. ¶ 5, ECF 1.

The present motion addresses only that portion of Plaintiffs' ADA and Section 504 effective communication claims that request access to VPs.

On July 13, 2020, Plaintiffs filed a Motion for Leave to File First Amended Complaint, requesting to add Mr. Stinnett and Mr. Collins – deaf men currently incarcerated in the custody of TDOC – as plaintiffs. ECF 18. Briefing on that motion is complete. ECF 19, 20, 21. Also pending is Defendant's Motion to Dismiss, which has also been fully briefed. ECF 10, 13, 14.

FACTS

Mr. Stinnett and Mr. Collins are both deaf and their primary language is ASL. Both are currently incarcerated in the custody of TDOC. Decl. of Alex Stinnett ("Stinnett Decl.") ¶¶ 2, 3;[2] Decl. of Jason Collins ("Collins Decl.") ¶¶ 2, 3.

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[1] Should this Court grant Plaintiffs' Motion to Amend, ECF 18, and add Mr. Stinnett and Mr. Collins as Plaintiffs, they will join this motion in that capacity.

[2] Decl. of Martha M. Lafferty, Ex. 5.

ASL is a visual language that uses hand movements and facial expressions to communicate. Stinnett Decl. ¶ 4; Collins Decl. ¶ 4. It is not based on English, but rather "is a visual manual language with its own unique structure, syntax, and grammar. It is based on the movement of the signs, other body movements, and non-manual grammatical markers, which are known as 'facial grammar.'" Expert Report of Richard Lorenzo Ray ("Ray Report") at 8.[3]

Because they are deaf, Mr. Stinnett and Mr. Collins are unable to use a conventional telephone. Stinnett Decl. ¶ 5; Collins Decl. ¶ 5. For both Mr. Stinnett and Mr. Collins, English is not their native language and communicating in written English is awkward, time-consuming, and incomplete for them. They are not able to fully express themselves in written English, show emotions, or converse about the range of subjects they can in ASL. Stinnett Decl. ¶ 12; Collins Decl. ¶ 9.

By written policy and in practice, the only communication devices that TDOC provides deaf inmates are TTY's.[4] TDOC Administrative Policy and Procedure ("AP&P") Index #503.08, "Telephone Privileges," ¶ VI(D)(3).[5] The TTY is a 60-year-old technology that enables remote communications between deaf individuals and between deaf and hearing individuals. In a conversation between two deaf individuals, both parties type and read responses using the teletypewriter device, and their typed conversation is transmitted back and forth across the standard telephone network. In a conversation between a deaf individual and a hearing individual, the deaf party uses the TTY while the hearing party uses a standard telephone. An

[3] Decl. of Martha M. Lafferty ("Lafferty Decl."), Ex 1.
[4] Although it is DRT's understanding that there is a videophone at North East Correctional Complex, DRT also understands that it does not work properly, *see* [Proposed] First Amended Complaint, ¶ 190, ECF 18-1. In any event, TDOC does not provide Mr. Stinnett access to it. *See* Stinnett Decl. ¶¶ 6, 9.
[5] Lafferty Decl., Ex. 2.

operator then dictates the deaf person's typed messages to the hearing person and types the hearing person's spoken messages to the deaf person. This is known as TTY relay. Ray Report at 10. As such, the TTY is a more cumbersome form of communication than a telephone conversation between hearing people. *See generally id.* at 11-12 (discussing technological limitations of TTYs).

Because Mr. Stinnett and Mr. Collins are not fluent in written English, the TTY is not an effective telecommunications method for them: both often cannot understand what people say to them on the TTY, and thus experience misunderstandings, miscommunication, and confusion when they communicate via TTY. Stinnett Decl. ¶ 12; Collins Decl. ¶ 9; *see also* Decl. of Tammy Wishoun ("Wishoun Decl.") ¶¶ 14-15 (Mr. Collins's mother explaining the difficulty communicating with him by TTY relay).

In contrast, VPs permit deaf people to communicate directly in their native language of ASL. Videophones are telephones with a high-definition video display, capable of simultaneous two-way interactive video and audio for communication between people in real-time. Ray Report at 14. Videophones are widely used by deaf people, as they permit them to communicate in sign language, which has its own structure, syntax, and grammar, as well as body language and facial expressions to indicate the intensity of emotion. *Id.* at 15. Videophones allow point-to-point calls between deaf people using ASL as well as "video relay service" ("VRS") calls between a deaf person and a hearing person. *Id.* With VRS, the deaf caller signs to an intermediary sign language interpreter via video monitor. The interpreter, in turn, relays the deaf person's message to the hearing person in spoken English; when the hearing person speaks his response, the interpreter translates back into ASL for the deaf person. *Id.* at 15.

Because VPs permit direct, simultaneous, native-language communication, while TTYs permit only asynchronous, written conversations, most deaf people use VPs to communicate telephonically. *See* Ray Report at 10.

Mr. Stinnett and Mr. Collins both require VPs because that technology permits them to converse in their native language and to show emotion they cannot show through typed TTY conversations. Stinnett Decl. ¶ 5; Collins Decl. ¶ 5.

Mr. Collins has three deaf children, ages five, seven, and 11, with whom he communicates in ASL, not written English. Collins Decl. ¶¶ 10-11. They cannot communicate using the TTY, only by VP. *Id.* ¶ 16. Mr. Collins has not been able to communicate with his children nor has he seen them since December, 2019, causing emotional distress for both Mr. Collins and his children. *Id.* ¶¶ 11, 16. Mr. Collins's children live with his mother, Tammy Wishoun, who is hearing but fluent in ASL. Wishoun Decl. ¶¶ 2-4, 6. She reports that Mr. Collins has a close relationship with his children and is a good father, but that his inability to communicate with them is having a detrimental effect on them. *Id.* ¶ 18. Given how cumbersome it is to communicate by TTY, Mr. Collins communicates with his family far less than he would if he had access to VP. Collins Decl. ¶ 13. Ms. Wishoun, too, feels like she is losing her connection to her son because she cannot communicate directly with him. Wishoun Decl. ¶ 17.

Mr. Stinnett has deaf family members including his mother; they do not have TTYs. Stinnett Decl. ¶¶ 13, 15. His attempts to communicate by TTY – through a double-relay process – have been frustrating, causing him and his family (including his child) emotional distress. He communicates far less frequently with family and friends than he would if he had access to a VP. *Id.* ¶ 15.

Not having access to VPs is causing both men emotional distress, as they feel isolated and alone and lack the same connection and access to family and friends that hearing inmates do. They can never get back the time they are missing with friends and family, including their minor children. Stinnett Decl. ¶ 18; Collins Decl. ¶ 16. Ultimately, "[v]ideophones are necessary for deaf inmates to be able to communicate effectively with individuals outside TDOC and to have equal access to TDOC's phone program." Ray Report at 6.

Since their entry into custody, both Mr. Stinnett and Mr. Collins have repeatedly requested access to a VP to communicate with family and friends. TDOC has denied these requests. Stinnett Decl. ¶¶ 6, 10-11; Collins Decl. ¶¶ 6-7; Lafferty Decl. Exs. 3 & 4.

TDOC has never provided a substantive reason for denying Mr. Stinnett and Mr. Collins access to VPs; rather, they rely on the fact that TDOC policy provides only for TTYs. Lafferty Decl. Exs. 3 & 4. There are solid grounds to conclude that installing and providing VP service would not harm TDOC. For example, there is no cost to use the service – it is paid for by the FCC's Telecommunications Relay Services Fund – and the equipment is often available at reasonable cost or even for free. *See* Ray Report at 15-16. Technology is available to permit video calls to be monitored just as prisons monitor voice calls. *Id*. at 20.

In addition, prison systems around the country have provided or agreed to provide VP service in their facilities, demonstrating that TDOC would not be harmed by the relief requested herein. *See, e.g.*, Ray Report at 22-24 and Ex. J (listing departments and facilities); Settlement Agreement ¶ X(D)(3), *Minnis v. Johnson*, No. 1:10-cv-00096-TSE-MSN (E.D. Va. Nov. 16, 2010) (Virginia Department of Corrections);[6] Settlement Agreement ¶ IX(D)(3), *Jarboe v. Md.*

[6] Decl. of Amy F. Robertson, Ex. 1.

Dep't of Public Safety and Corr. Servs., No. 1:12-cv-00572-ELH (D. Md. Feb. 20, 2015);[7] Settlement Agreement Between Defs. The Commonwealth of Kentucky *et al*. and Pls. Oscar Adams and Michael Knights ¶ IX(D)(3), *Adams v. Kentucky*, No. 3:14-cv-00001-GFVT-EBA (E.D. Ky. June 24, 2015), ECF 79-1;[8] Settlement Agreement and General Release ¶ 4.8, *Siaki v. Darr*, 11-cv-03074-JLK (D. Colo. Sept. 27, 2012) (Adams County, Colorado);[9] Stipulation of Settlement ¶ XII(70)(c), *Holmes v. Godinez*, No. 1:11-cv-02961 (N.D. Ill. July 12, 2018), ECF 446-2.[10] The United States Department of Justice ("DOJ"), tasked with enforcing Title II, 42 U.S.C. § 12134(a), has entered settlements in the following jurisdictions requiring sheriffs and jails to make VPs available to prisoners: Columbia, SC;[11] Arlington, VA;[12] Milwaukee, WI;[13] Humboldt County, CA;[14] Yakima County, WA;[15] Pennington, SD;[16] Robeson County, NC;[17] Washington County, MO;[18] San Juan County, NM;[19] Cedar Rapids, IA;[20] Central Virginia

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7 *Id.* Ex. 2.
8 *Id.* Ex. 3.
9 *Id.* Ex. 4.
10 *Id.* Ex. 5.
11 https://www.ada.gov/columbia_pd/columbia_pd_sa.html (last visited Oct. 13, 2020).
12 https://www.ada.gov/arlington_co_sheriff_sa.html (last visited Oct. 13, 2020).
13 https://www.ada.gov/milwaukee_pca/milwaukee_sa.html (last visited Oct. 13, 2020).
14 https://www.ada.gov/humboldt_pca/humboldt_ca_cd.html (last visited Oct. 13, 2020).
15 https://www.ada.gov/yakima_co_pca/yakima_sa.html (last visited Oct. 13, 2020).
16 https://www.ada.gov/pennington_co/pennington_sa.html (last visited Oct. 13, 2020).
17 https://www.ada.gov/robeson_co_pca/robeson_sa.html (last visited Oct. 13, 2020).
18 https://www.ada.gov/washington_county_pca/washington_county_sa.html (last visited Oct. 13, 2020).
19 https://www.ada.gov/san_juan_co_pca/san_juan_sa.html (last visited Oct. 13, 2020).
20 https://www.ada.gov/cedar_rapids_pca/cedar_rapids_sa.html (last visited Oct. 13, 2020).

Regional Jail Authority;[21] Utah Department of Corrections;[22] Philadelphia Police Department;[23] South Carolina Department of Corrections;[24] and Larimer County, CO.[25]

ARGUMENT

I. Legal Standard.

"In determining whether to issue a preliminary injunction, a district court weighs four factors: '(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction.'" *Hall v. Edgewood Partners Ins. Ctr., Inc.*, 878 F.3d 524, 526-27 (6th Cir. 2017) (internal citations omitted); *Adams & Boyle, P.C. v. Slatery*, 455 F.Supp.3d 619, 626 (M.D. Tenn. 2020) (same).

"The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits." *United Food & Com. Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998) (internal citations omitted). This may often require affirmative relief in the form of a mandatory injunction. *See id.* As a result, the Sixth Circuit applies the same standard – quoted above – to both mandatory and prohibitory preliminary injunctive relief. *Id.*; *see also Robinson v. Purkey*, No. 3:17-CV-1263, 2017 WL 4418134, at *6 (M.D. Tenn. Oct. 5, 2017) (same).

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21 https://www.ada.gov/central_va_jail_sa.html (last visited Oct. 13, 2020).
22 https://www.ada.gov/udoc_sa.html (last visited Oct. 13, 2020).
23 https://www.ada.gov/ppd_sa.html (last visited Oct. 13, 2020).
24 https://www.ada.gov/south_carolina_doc_sa.html (last visited Oct. 13, 2020).
25 https://www.ada.gov/larimer_cty_sheriff_sa.html (last visited Oct. 13, 2020).

As discussed in detail below, Plaintiff DRT satisfies all four factors for entry of preliminary injunctive relief ordering that Mr. Stinnett and Mr. Collins be provided access to VPs.

II. DRT Is Likely to Succeed on the Merits of Its Claim for Videophones for Mr. Stinnett and Mr. Collins.

Based on the clear language of the applicable regulations and on the reasoning of the cases cited in the Introduction – *Rogers*, 2019 WL 4464036, and *McBride*, 294 F. Supp. 3d 695, both of which granted summary judgment to deaf prisoners holding that the ADA required provision of videophones – Plaintiff DRT is likely to succeed on the merits of its claim that TDOC must provide such technology to Mr. Stinnett and Mr. Collins.

Title II of the ADA prohibits discrimination on the basis of disability by public entities such as TDOC. 42 U.S.C. § 12131 *et seq*. Section 504 prohibits such discrimination by recipients of federal financial assistance. 29 U.S.C. § 794. To state a claim under Title II of the ADA, the plaintiff must allege that (1) he has a disability; (2) he is otherwise qualified; and (3) he was being excluded from participation in, denied the benefits of, or subjected to discrimination under the program because of his disability. *Anderson v. City of Blue Ash*, 798 F.3d 338, 357 (6th Cir. 2015). "Title II prohibits public entities from denying, even unintentionally, qualified disabled individuals meaningful access to the services or benefits they provide." *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 909 (6th Cir. 2004).

A. Mr. Stinnett and Mr. Collins Are Qualified Individuals with Disabilities.

Mr. Stinnett and Mr. Collins are both deaf, Stinnett Decl. ¶ 3; Collins Decl. ¶ 3, that is, substantially impaired in the major life activity of hearing. As such, they are individuals with disabilities as that term is defined in the ADA and Section 504. 42 U.S.C. § 12102(1)(A); 29 U.S.C. § 705(9).

Furthermore, both men are "otherwise qualified" to participate in TDOC's inmate phone program, which permits inmates to communicate telephonically with individuals outside of their facilities. *See, e.g., Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210-12 (1998) (holding disabled prisoners are "qualified" to receive the benefits and services of state prisons if they meet eligibility requirements, despite the fact that prisoners may not always participate voluntarily in services or programs).

B. DRT has Standing to Request Videophones on Behalf of Mr. Stinnett and Mr. Collins.

As explained in greater detail in Plaintiffs' Opposition to Defendant's Motion to Dismiss, ECF 13, Plaintiff DRT – the Protection and Advocacy System for the state of Tennessee – has standing to bring ADA and Section 504 claims on behalf of its constituents: individuals with disabilities in Tennessee, including Mr. Stinnett and Mr. Collins. *See id.* at 11-14, 17-22.[26] The Sixth Circuit has held that an association may have standing to seek preliminary injunctive relief on behalf of its members. *See Speech First, Inc. v. Schlissel*, 939 F.3d 756, 762-63 (6th Cir. 2019).

C. TDOC's Refusal to Provide Videophones to Deaf Inmates Discriminates Against Mr. Stinnett and Mr. Collins Because of Their Disabilities.

Regulations enforcing Title II of the ADA[27] explicitly require TDOC to ensure that communications with people with disabilities "are as effective as communications with others," 28 C.F.R. § 35.160(a)(1), and to "furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the

[26] DRT incorporates by reference pages 11 through 14 and 17 through 22 of ECF 13.
[27] "[B]ecause Congress mandated that the ADA regulations be patterned after the section 504 coordination regulations, the former regulations have the force of law." *Helen L. v. DiDario*, 46 F.3d 325, 332 (3d Cir. 1995); *see also Marcus v. Kan. Dep't of Revenue*, 170 F.3d 1305, 1306 n.1 (10th Cir. 1999) (holding that DOJ Title II regulations have the force of law).

benefits of, a service, program, or activity," *id*. § 35.160(b)(1). Crucially, "[i]n determining what types of auxiliary aids and services are necessary," TDOC is required to "give primary consideration to the requests of individuals with disabilities." *Id*. § 35.160(b)(2).

> "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.

U.S. Dep't of Justice, "The Americans with Disabilities Act Title II Technical Assistance Manual," § II-7.1100 ("TAM-II") (emphasis added).[28] 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); *see also Taylor v. City of Mason*, 970 F. Supp. 2d 776, 783 (S.D. Ohio 2013) (same); *Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 396–97 (D. Md. 2011) (same); *Pierce v. City of Salem*, No. CIV. 06-1715-ST, 2008 WL 4415407, at *19 (D. Or. Sept. 19, 2008) (same).

TDOC's inmate phone program permits inmates to speak with individuals outside the facility by telephone, *see, e.g.,* AP&P Index #503.08, ¶ V, a technology that permits hearing inmates to communicate directly with hearing friends and family, to understand all of their words and grammar, to express themselves fully in their native language, and to hear tone of voice, affect, and emotion without barriers. In contrast, Mr. Stinnett and Mr. Collins are forced to use the TTY, obsolete technology that requires them to communicate in a language in which they are not fluent, that denies them access to the visual grammar and emotional tone of a direct VP conversation, and that makes communication with deaf people outside the facility especially

[28] https://www.ada.gov/taman2.html (last visited Oct. 13, 2020).

complex. Stinnett Decl. ¶¶ 8-9, 12-15; Collins Decl. ¶¶ 8-13. This is not meaningful access; it is discrimination and exclusion on the basis of disability.

As noted above, the courts in *McBride v. Michigan Department of Corrections* and *Rogers v. Colorado Department of Corrections* granted summary judgment to deaf prisoners and ordered the defendant departments of corrections to provide VP service based on facts materially identical to those here. The defendants in those cases – like TDOC here – denied deaf prisoners access to VPs and provided, instead, only access to TTYs. Here, as in *McBride* and *Rogers*, Mr. Stinnett, Mr. Collins, and Plaintiffs' expert Richard Ray have demonstrated that VPs are the only means of telecommunications that provide deaf prisoners equal or even meaningful access to TDOC's inmate phone program and communications as effective as those provided hearing inmates. Because Mr. Stinnett and Mr. Collins requested to use a VP to call friends and family outside the facility, TDOC must honor that request unless it can show that TTYs are equally effective. *See* TAM-II § II-7.1100; *see also supra* at 12 (citing cases). It has not sustained and cannot sustain this burden.

The *McBride* court analyzed substantially similar evidence and concluded that "merely providing deaf and hard of hearing inmates with TTYs does not satisfy the [Michigan Department of Corrections's] obligations under the ADA . . . ." 294 F. Supp. 3d at 712–13. Similarly, the Fourth Circuit has held, in a case brought by a deaf prisoner, that "TTY does not permit real-time conversations, and each conversation over a TTY device takes significantly longer than signed or spoken conversations" and that

> 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.

Heyer v. U.S. Bureau of Prisons, 849 F.3d 202, 207 (4th Cir. 2017); *see also Rogers*, 2019 WL 4464036, at *15 ("Plaintiffs have established that TTY technology does not ensure that they are able to communicate as effectively as inmates with access to conventional telephones [and that] TTY is 60 years old and becoming obsolete."). As in *Rogers* and *McBride*, Mr. Stinnett and Mr. Collins have demonstrated that "'TTYs do not enable them to communicate effectively with persons outside of prison, much less provide them with telecommunications access equal to that provided to hearing prisoners,' and that videophones are necessary for deaf inmates to have meaningful access to [prison] telephone services." *Rogers*, 2019 WL 4464036, at *16 (quoting *McBride*, 294 F. Supp. 3d at 713).

For these reasons, Plaintiff DRT is likely to succeed on the merits of its Title II and Section 504 claims on behalf of Mr. Stinnett and Mr. Collins for provision of videophones.

III. Mr. Stinnett and Mr. Collins will Suffer Irreparable Injury in the Absence of a Preliminary Injunction.

Not having access to VPs has caused Mr. Stinnett and Mr. Collins to suffer harm including but not limited to emotional distress and isolation because they do not have the same connection and access to family and friends as hearing inmates. Both Mr. Stinnett and Mr. Collins have minor children with whom they cannot directly communicate. Mr. Collins' children are deaf and cannot communicate through written English. Neither Mr. Collins nor Mr. Stinnett can ever get back this time they are missing with friends, family, and especially their minor children, whom they have not directly communicated with in almost a year. Stinnett Decl. ¶¶ 2, 15, 18; Collins Decl. ¶¶ 2, 11, 16.

Courts often find irreparable injury sufficient to support preliminary injunctive relief where deaf people are denied access to communication. For example, the court in *Hernandez v. County of Monterey* held that deaf prisoners would suffer irreparable injury through lack of sign

language interpreters. 110 F. Supp. 3d 929, 956 (N.D. Cal. 2015). Courts in two recent cases granted preliminary injunctions requiring government spokespeople to provide sign language interpretation for televised updates relating to the COVID-19 pandemic, holding irreparable harm existed in denial of information in ASL. *Nat'l Ass'n of the Deaf v. Trump*, No. CV 20-2107 (JEB), 2020 WL 5411171, at *10 (D.D.C. Sept. 9, 2020); *Martinez v. Cuomo*, No. 20-CV-3338 (VEC), 2020 WL 2393285, at *6 (S.D.N.Y. May 12, 2020); *see also Nieves-Márquez v. Puerto Rico*, 353 F.3d 108, 121–22 (1st Cir. 2003) (holding deaf student would suffer irreparable harm from denial of sign language interpreters); *Tugg v. Towey*, 864 F. Supp. 1201, 1208-09 (S.D. Fla. 1994) (holding irreparable harm existed where deaf plaintiffs denied access to mental health services in ASL).

Indeed, another judge in this Court held that denial of a disabled athlete's access to high school sports, in violation of the ADA, constituted irreparable harm for purposes of a preliminary injunction. *Crocker v. Tenn. Secondary School Athletic Ass'n*, 735 F.Supp. 753, 759 (M.D. Tenn. 1990); *see also Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ*., 208 F. Supp. 3d 850, 878 (S.D. Ohio 2016) ("there is … a presumption of an irreparable injury when a plaintiff has shown a 'violat[ion] [of] a civil rights statute.'" (Internal citations omitted)). Many courts have held, in other contexts, that denial of communications access and/or loss of contact with friends or family constitutes irreparable harm. *See, e.g., Keirnan v. Utah Transit Auth*., 339 F.3d 1217, 1220 (10th Cir. 2003) (disabled plaintiff challenging curtailment of paratransit service demonstrated irreparable harm because she would "lose contact with friends and family"); *U.S. WeChat Users All. v. Trump*, No. 20-CV-05910-LB, 2020 WL 5592848, at *11 (N.D. Cal. Sept. 19, 2020) (Plaintiffs challenging limits on communications app established irreparable harm from "elimination of their platform for communication"); *Dupuy v. Samuels*,

462 F. Supp. 2d 859, 896 (N.D. Ill. 2005), *aff'd*, 465 F.3d 757 (7th Cir. 2006) (Plaintiffs challenging family services' "safety plans" that prohibited contact with family members showed irreparable harm).

IV. The Requested Injunction Will Not Cause Any – Much Less Substantial – Harm to TDOC or Others.

TDOC has never provided a substantive reason for refusing Mr. Stinnett's and Mr. Collins's access to VP service. It would thus be precluded from raising the defenses set forth in the regulations to requests for auxiliary aids and services necessary for effective communication, as any decision to invoke these defenses "must be made by the head of [TDOC] or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion." 28 C.F.R. § 35.164. In response to grievances filed by Mr. Collins and Mr. Stinnett, TDOC refused to provide VPs and cited only AP&P Index #503.08 – the TDOC policy providing only TTYs – as the reason for its refusal. Lafferty Decl. Exs. 3 & 4. TDOC also indicated that these decisions were not appealable. Stinnett Decl. ¶¶ 10-11; Collins Decl. ¶ 7.

In any event, as explained by Plaintiffs' expert Richard Ray, there is no cost to use VP service, and many VP providers offer the equipment at no charge or reasonable cost. Ray Report at 14-15 & n.24. Options are available to monitor VP calls as necessary for security. *Id.* at 20. And as set forth above, carceral systems around the country have adopted and installed VP service. *See supra* at 8-9 and sources cited therein.

V. The Public Interest Would Be Served by the Issuance of an Injunction.

Finally, the public interest will be served by a preliminary injunction requiring TDOC to provide equal and effective telephone communications services – in the form of VP – to Mr. Stinnett and Mr. Collins, as required by Title II of the ADA. "The public interest is served by the

enforcement of the ADA . . . ." *Wilborn ex rel. Wilborn v. Martin*, 965 F. Supp. 2d 834, 848 (M.D. Tenn. 2013), *vacated on other grounds*, No. 3:13-CV-00574, 2014 WL 7893050 (M.D. Tenn. June 13, 2014). "In enacting the ADA, Congress demonstrated its view that the public has an interest in ensuring the eradication of discrimination on the basis of disabilities." *Featherstone v. Pac. Nw. Univ. of Health Scis.*, No. 1:CV-14-3084-SMJ, 2014 WL 3640803, at *7 (E.D. Wash. July 22, 2014) (holding deaf medical student entitled to preliminary injunction requiring sign language interpreters for classes); *see also Jordan v. Greater Dayton Premier Mgmt.*, 9 F. Supp. 3d 847, 863 (S.D. Ohio 2014) (issuing preliminary injunction requiring landlord to provide blind tenant with audio materials, holding "[i]t is clearly in the public interest for the Court to enforce compliance with federal law prohibiting discrimination on the basis of disability.").

In addition, there is a public and penological interest in TDOC providing VP for its inmates who are deaf and hard of hearing. This will ensure that these individuals are maintaining and strengthening family and other supportive community ties so that, upon their eventual return to the community – whether through expedited release relative due to the COVID-19 pandemic or after fulfilling all requirements of their sentence – they will have the connections necessary to succeed and not reoffend, which would cause additional burdens and costs upon the State and TDOC itself. *Cf. Glob. Tel*Link v. Fed. Commc'ns Comm'n*, 866 F.3d 397, 405 (D.C. Cir. 2017) (Quoting FCC brief establishing that "[b]arriers to communication from high inmate calling rates . . . impede family contact that can "make[ ] prisons and jails safer spaces," and foster recidivism." (Internal citations omitted)).

VI. No Bond Should Be Required for Issuance of the Requested Preliminary Injunction.

Rule 65(c) of the Federal Rules of Civil Procedure states that this Court may issue a preliminary injunction only if the movant provides a bond. As this Court has noted, the rule in the Sixth Circuit "has long been that the district court possesses discretion over whether to

require the posting of security." *Winnett v. Caterpillar, Inc*., 579 F. Supp. 2d 1008, 1043 (M.D. Tenn. 2008) (internal citation omitted), *rev'd on other grounds*, 609 F.3d 404 (6th Cir. 2010); *see also Adams & Boyle*, 455 F. Supp. 3d at 629 (same, quoting *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995)). In *Winnett*, this Court considered the age and financial means of the plaintiffs and the strength of their case in declining to require a bond. 579 F. Supp. 2d at 1043; *see also Adams & Boyle*, 455 F. Supp. 3d at 629 (declining to impose a bond where the plaintiffs' case and the public interest were both strong).

Here, Plaintiff asks the Court to follow two recent, on-point cases ordering departments of corrections to provide VP service to deaf prisoners, and there is a strong public interest in enforcing the ADA. Plaintiff respectfully requests that this Court issue this injunction without requiring a bond.

CONCLUSION

For the reasons set forth above, Plaintiff DRT respectfully requests that this Court issue a preliminary injunction requiring Defendant TDOC to provide VP service to Mr. Stinnett and Mr. Collins and to take all steps necessary to ensure that Mr. Stinnett and Mr. Collins have access to VP on an equal basis with that of hearing inmates' access to telephones.

Respectfully submitted,

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Dated: October 14, 2020

CERTIFICATE OF SERVICE

I certify that, on October 14, 2020, I served the foregoing document upon all parties herein by e-filing with the CM/ECF system maintained by the court which will provide notice to the following:

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