UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BRANDON COBB, MARY HILL, and JOSEPH NETTLES, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

GEORGIA DEPARTMENT OF COMMUNITY SUPERVISION, and MICHAEL NAIL, in his official capacity as Commissioner of the Georgia Department of Community Supervision,

Defendants.

Civil Action No.
1:19-cv-03285-WMR

CLASS ACTION

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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U.S. Constitution Fourteenth Amendment 1

INTRODUCTION

Defendants' Motion for Summary Judgment ("MSJ" or "Motion"), ECF 200, should be denied in its entirety. Plaintiffs have standing to pursue their claims, and Defendants have not mooted these claims. Ultimately, genuine disputes of material fact remain that preclude summary judgment.

Plaintiffs seek injunctive and declaratory relief, on behalf of themselves and a putative class, to remedy ongoing violations of the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act ("Section 504"), and the Fourteenth Amendment to the U.S. Constitution by defendant Georgia Department of Community Supervision ("DCS"). Plaintiffs allege that DCS has denied deaf and hard of hearing people subject to its supervision the auxiliary aids and services and reasonable modifications they need to communicate effectively and participate fully in DCS's programs, services, and activities.

The majority of Defendants' Motion is an attempt to mischaracterize Plaintiffs' claims and complicate the issues before the Court. Defendants repeatedly assert that the Plaintiffs' alleged harms will *only* arise if a Plaintiff's probation or parole is revoked. Yet the risk of revocation is only one type of harm suffered by Plaintiffs, and is by no means the linchpin of their claims. Rather, ample evidence demonstrates that Plaintiffs are being injured *right now* by DCS's failure to provide

effective communication during supervision. Each instance of ineffective communication is *itself* disability discrimination and is *itself* an injury sufficient for standing and injunctive relief—independent of any follow on injuries that may flow from the lack of effective communication. That Defendants' discriminatory conduct increases the likelihood of revocation, while true, is not necessary for standing. This principle alone rebuts most of the arguments asserted in Defendants' motion.

SUMMARY OF DISPUTED FACTS AND RECORD EVIDENCE

Defendants have caused injury to deaf and hard of hearing supervisees by repeatedly and continuously denying them auxiliary aids and services, reasonable modifications, and effective communication, in violation of federal law. Defendants appear to disagree with these material facts. These disputes are genuine and preclude summary judgment for Defendants.

Plaintiffs intend to introduce evidence at trial in support of the following:

Communication between supervisees and DCS is an essential, core function of supervision.

It is undisputed that DCS communicates with supervisees and considers "[e]ffective communication [] vital to ensuring compliance during supervision."[1] Community Supervision Officers ("CSO") communicate terms and conditions of

[1] *See* MSJ Ex. B, Declaration of ADA Coordinator Darrell Smith (the "Smith Decl.") Attachment 1 (the "ADA Policy") at IV.E.

supervision to supervisees during their initial intake, and also discuss how to be successful at supervision, and the process for violations and sanctions if conditions are not met.[2] Even though supervisees may have received information about the general terms of supervision in court or in prison, CSOs also communicate these terms and have discretion to change them during the course of supervision.[3]

DCS fails to train or monitor its officers to ensure they provide effective communication and equal access to deaf and hard of hearing supervisees.

DCS does not provide training or guidance to CSOs on how to identify, understand, and provide appropriate auxiliary aids and services for deaf and hard of hearing supervisees.[4] Defendants rely on CSOs to make that determination based on a handful of questions and the CSOs' subjective impressions of what "appears to be working."[5] Given the complete discretion and lack of training that CSOs have in determining how to communicate effectively with supervisees, their assessments are often erroneous. The record includes numerous instances when CSOs have

[2] Ex. A, Driver Dep. at 18:16-25, 24:21-26:16.
[3] *E.g.*, Ex. B, Branch Day 1 Dep. at 79:3-81:18 (CSOs can add special conditions of probation); Ex. C, Mays Dep. at 41:7-44:2 (same), 209:7-24 (CSOs can waive community service requirement); Ex. D, Worley Dep. at 67:21-68:20 (CSOs can change curfew). *See also* Pls.' Local Rule 56.1 Statement of Additional Material Facts (the "Statement") ¶ 34.
[4] Ex. E, Smith 2020 Dep. at 110:21-111:9; Ex. F, Smith 2021 Dep. at 179:20-180:9, 181:17-24; Ex. G, Hilliard Dep. at 30:11-15. *See also* Statement ¶¶ 15-16.
[5] Ex. A, Driver Dep. at 40:19-41:11; Statement ¶ 27.

mistakenly believed lip-reading and written notes are effective and failed to provide interpreters and other auxiliary aids necessary for meaningful communication.[6]

Notably, in May and June of 2020, DCS ADA Coordinator Darrell Smith emailed CSOs who supervise deaf or hard of hearing individuals asking "[w]hat form of communication are you using to communicate"?[7] Mr. Smith received multiple responses from CSOs reporting ineffective means of communication, including: (i) failure to use the video remote interpreting ("VRI") app;[8] (ii) use of text messages;[9] (iii) use of written notes and lip-reading;[10] (v) reliance on family members to assist with communication;[11] and (vi) technical issues with VRI during visits.[12] Despite CSOs reporting the use of these ineffective methods, DCS did not offer training or correction. Instead, Mr. Smith simply replied "thank you for your update."[13]

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[6] *Compare* Szotkowski Decl. Ex. K (CSO stating Barnett reads lips well and uses written notes to communicate with class member) *with* Ex. I, Expert Report of Dr. Erin Moriarty Harrelson at 17 (Nov. 2, 2020) (the "Harrelson Rep.") (Plaintiffs' expert determined that Barnett primarily communicates using ASL). *See also* Statement ¶ 32.

[7] Ex. U to the Decl. of Stephanna Szotkowski in Supp. of Pls.' Mot. for Class Cert. (the "Szotkowski Decl."); *See also* Statement ¶¶ 45.

[8] Szotkowski Decl. Ex. U at 1.

[9] *Id.* at 2, 12, 30, 33, 47, 51, 68, 76.

[10] *Id.* at 2, 12, 13, 18, 24, 28, 32, 41, 47, 51, 78, 76.

[11] *Id.* at 39, 68, 76.

[12] *Id.* at 55, 68, 103.

[13] *E.g., id.* at 4, 9, 13.

DCS instructs its officers to rely almost exclusively on VRI instead of in-person interpreters, despite its frequent failures to provide for the possibility of effective communication.

While VRI can be a useful tool in some circumstances, it is not always appropriate or effective, as explained by Plaintiffs' unrebutted expert report,[14] and DCS does not have policies, practices, or guidance to ensure that CSOs' use of VRI is appropriate. Instead, DCS relies on individual CSOs to assess, without direction or training, whether they perceive VRI to be effective, including when it is and is not appropriate to use VRI, how to deal with situations when VRI is not working in the field, and how to choose the right device screen size when using VRI.[15] DCS instructs its officers to use VRI for all sign language users in all instances unless the supervisee specifically requests an in-person interpreter; however, neither DCS nor the CSOs inform supervisees that they may make this request.[16] Furthermore, the process for requesting in-person sign language interpreters is unnecessarily complex and time consuming,[17] DCS does not provide Deaf interpreters—including when

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[14] Ex. J, Expert Report of Drs. Judy A. Shepard-Kegl & Amy June Rowley at 48-49 (Aug. 9, 2020) (the "Kegl-Rowley Report").
[15] Ex. A, Driver Dep. at 51:15-52:2, 131:14-24, 133:22-134:15.
[16] *Id.* at 49:15-23, 117:7-21; Ex. F, Smith 2021 Dep. at 87:22-88:14; Szotkowski Decl. Ex. I.
[17] ADA Policy at IV.G.9; Ex. A, Driver Dep. at 117:7-21; Ex. E, Smith 2020 Dep. at 266:21-267:9.

supervisees require them to communicate effectively,[18] and DCS has a blanket policy that it will *never* provide in-person interpreters for any field visit.[19]

Because of DCS's heavy reliance on VRI, and its instruction to use VRI unless a supervisee expressly requests another form of communication (and the CSO is able to understand this request), the record is replete with instances of ineffective or failed attempts at communication through VRI, none of which resulted in CSOs procuring in-person interpreters or taking any appropriate steps to remedy the communication failures or re-communicate the information.[20]

<u>Plaintiffs have suffered harms and injuries as a result of DCS's actions and inactions</u>.

Defendants' ongoing violation of the law alone is sufficient to establish standing. But the evidence shows that Plaintiffs suffer additional harms as a result of Defendants' failures to provide effective communication. Plaintiffs do not fully understand the terms of their supervision and suffer ongoing fear and anxiety that they will inadvertently break a rule that they never understood.[21] Even where communication does not concern the details of terms and conditions of supervision,

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[18] Ex. L, Cobb Day 2 Dep. at 56:5-7; Ex. M, Hill Day 1 Dep. at 22:6-23:19; Ex. N, Hill Day 2 Dep. at 118:13-23; Ex. J, Kegl-Rowley Report at 145. *See also* Statement ¶ 55.

[19] *Id.* at 55:25-56:5; Ex. A, Driver Dep. at 119:13-25; Statement ¶¶ 48-49.

[20] *Supra* at 3-4; Statement ¶¶ 44-46.

[21] See ECF 2-2, Cobb Decl. ¶ 17; Statement ¶¶ 63, 65, 71, 95, 123.

Plaintiffs and class members lose the benefits of conversations on a number of topics that CSOs are expected to discuss with their supervisees, such as referrals for services addressing housing, employment, counseling, and other needs.[22]

Additionally, Plaintiff Hill was reincarcerated on a probation revocation that was a direct result of Defendants' failure to communicate effectively with her. Defendants concede that communication failures occurred, but incorrectly characterize them as mistakes or "technical" problems. MSJ at 4, 23-24. In fact, CSO Roper did not effectively communicate with Plaintiff Hill when he had her sign first the admission form, and then the consent order agreeing to 60 days in jail.[23] CSO Roper did not explain to Plaintiff Hill that she was waiving the right to go before the judge with a lawyer and evidence to contest and explain the circumstances underlying the positive test result for THC.[24] This was contrary to CSO Roper's usual practice, which he used with other, hearing supervisees, of explaining each piece of a consent order.[25] Contrary to Defendants' assertions, this was not a

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[22] Statement ¶¶ 23-25, 34-36.
[23] Ex. O, Roper Dep. 115:7-118:22, 194:12-201:14, 208:4-210:23, , 222:4-226:13, 259:11-264:15, 270:11-271:16; Szotkowski Decl. Ex DD, Consent Order dated November 3, 2020; Statement ¶¶ 101-103.
[24] *Id.*; Ex. P, BodyCam video of Mary Hill dated Nov. 3, 2020.
[25] Ex. O, Roper Dep. at 224:14-226:13.

"technical" oversight; in reality, it deprived Ms. Hill of her constitutional due process rights and the opportunity to contest her violation and the ultimate penalty.[26]

THE SMITH AND NAIL DECLARATIONS

While Plaintiffs extensively cite to the record evidence that has been developed throughout discovery, Defendants rely on what amounts to a self-serving declaration from Mr. Smith and a declaration of new financial analysis from Commissioner Nail. Many of the opinions in these declarations were first disclosed to Plaintiffs upon the filing of Defendants' Motion, months after the close of discovery. Under Rule 26(e), a party who has made a disclosure under Rule 26(a) must supplement or correct its disclosure or response in a timely manner if the additional information has not otherwise been made known to the other parties during the discovery process or in writing. If a party fails to provide information as required by Rule 26(e), the party is not allowed to use that information to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. Fed. R. Civ. P. 37(c)(1); *Cooley v. Great Southern Wood Preserving*, No. 04-15912, 138 F. App'x 149, 162 (11th Cir. May 18, 2005) (excluding information produced after the discovery deadline) (unpublished).

[26] *See generally* Statement at 84-107.

Even if it could be considered at summary judgment, Mr. Smith's declaration is full of conclusory statements about DCS's policies and practices that are at odds with the evidence Defendants produced in discovery. Mr. Smith claims in his declaration, for the first time, that DCS has a process in place whereby it "cause[s] an offender who identifies as deaf to be assessed by an outside assessor to determine his or her communication skills." MSJ Ex. B, Smith Decl. ¶ 12. Mr. Smith goes on to claim that "[t]his assessment culminates in a written recommendation for auxiliary aids and services, if any, which DCS should provide to ensure effective communication." *Id.* ¶ 13.

While Plaintiffs' counsel would support the introduction of this kind of process, if fully and properly implemented, Defendants have never previously disclosed that they have done so, and no Plaintiff has ever encountered this purported process. Further, this process does not appear in the ADA Policy,[27] is directly contradicted by DCS deposition testimony describing the intake process,[28] and is unsupported by any documentary evidence showing that such an arrangement exists or has ever been used.[29] To the extent any such process or evidence actually exists,

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[27] ADA Policy § IV.C.1 (no discussion of assessment in initial interview).

[28] Ex. E, Smith 2020 Dep. at 291:7-292:14; Ex. F, Smith 2021 Dep. at 228:7-230:19; Pls.' Resp. to Defs.' Local Rule 56.1 Statement of Facts ("Responses") ¶ 17.

[29] For example, Defendants have not provided documents related to an outside assessment, such as an agreement with an outside assessor, policies or procedures

Defendants have failed to disclose it despite Plaintiffs' discovery requests that clearly called for the production of such documents.[30]

Similarly, Mr. Smith claims that "DCS is *looking into* preparing a pre-recorded video to show the supervisee regarding communication accommodations and option." MSJ Ex. B, Smith Decl. ¶ 11 (emphasis added). Again, while such a video might be beneficial, something that Defendants are *considering* doing, as opposed to what they are *actually* doing, has no bearing on whether they are complying with the ADA. Accordingly, the Court should disregard paragraphs 11-13 of the Smith Declaration which claim, without supporting evidence, that Defendants are engaged in practices which have never been disclosed.[31]

Commissioner Nail's declaration also purports to introduce new information, that was not previously disclosed, regarding the associated costs of additional CSOs and body armor necessary to allow for in-person interpreters on DCS field visits. These statements are inconsistent with deposition testimony which established that DCS had not discussed whether this was an appropriate or necessary policy or

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relating to that assessor, training for CSOs on how to initiate such an assessment, or written recommendations provided by that assessor.

[30] Ex. Q, Defs.' Resp. to Pls.' First Req. for Produc. at 11-12.

[31] *E.g.*, *DS Waters of Am., Inc. v. Fontis Water, Inc.*, No. 1:10-cv-0335-SCJ, 2012 WL 12873771, at *15 (N.D. Ga. Sept. 13, 2012) (excluding evidence introduced for the first time in a declaration to summary judgment briefing, reasoning that the party "may not now seek to rely on that which it withheld during discovery.").

whether it could be modified, and did not disclose financial justifications for the policy.[32] Accordingly, Defendants' failures to comply with discovery and disclosure obligations do not permit them to assert a fact as "undisputed" when Plaintiffs have had no opportunity to dispute or challenge such "facts."

LEGAL STANDARD

Summary judgment is only appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of proving an absence of genuine issue of material fact; only if the moving party meets that burden does the burden shift to the non-moving party to establish "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The moving party is only entitled to summary judgment if "the nonmoving party [fails] to make sufficient showing on an essential element of its case with respect to which it has the burden of proof." *Id.* at 323. The Court must "review the evidence and all factual inferences drawn therefrom, in the light most favorable to the nonmoving party." *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993) (citation omitted). Furthermore, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate

[32] Ex. A, Driver Dep. at 121:24-122:6, 127:24-129:6, 129:23-130:7.

inferences from the facts are jury functions," not those of a judge. *Bennett Coll. v. S. Ass'n of Colls. & Sch. Comm'n on Colls., Inc.*, 474 F. Supp. 3d 1297, 1305 (N.D. Ga. 2020) (quoting *Anderson*, 477 U.S. at 255).

ARGUMENT

I. Plaintiffs Have Standing to Seek Injunctive and Declaratory Relief.

Plaintiffs have alleged and introduced evidence demonstrating injuries in fact, including current, ongoing injuries. These injuries are directly traceable to Defendants and are redressable by the requested relief.

A. Defendants' Failure to Communicate Effectively with Plaintiffs is an Ongoing, Cognizable Injury.

Defendants argue that Plaintiffs' injuries turn on revocation of supervision and incarceration, claiming that this is the "primary future harm alleged by Plaintiffs." MSJ at 27, 29. This is incorrect. The central question in this case is whether DCS is, in violation of the ADA and Section 504, denying deaf and hard of hearing supervisees the auxiliary aids and services and reasonable modifications they need to effectively communicate, and to equally participate in DCS programs, services, and activities. Thus, the primary harm which Plaintiffs have suffered, and will continue to suffer absent the relief requested in this action, is Defendants' failure to provide effective communication *in the first place.*

Title II of the ADA prohibits disability discrimination in any of the programs of any state or local governmental entity. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a).[33] The regulations implementing Title II require "[a] public entity [to] take appropriate steps to ensure that communications with . . . members of the public . . . with disabilities are *as effective as communications with others*." 28 C.F.R. § 35.160(a)(1) (emphasis added). The regulations also impose an affirmative duty on a public entity to "furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity." 28 C.F.R. § 35.160(b)(1). "In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities." 28 C.F.R. § 35.160(b)(2).

While the denial of effective communication does increase the risk that Plaintiffs will face revocation—and *has* immediately preceded at least one Plaintiff's reincarceration—Plaintiffs' injuries do not turn on revocation. With or without the threat of reincarceration, Plaintiffs continue to experience ongoing, present denials

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[33] "Discrimination claims under the ADA and Rehabilitation Act are governed by the same standards, and the two claims are generally discussed together." *J.S., III by & through J.S., Jr. v. Houston Cty. Bd. of Educ.*, 877 F.3d 979, 985 (11th Cir. 2017).

of effective communication. The Eleventh Circuit has made clear that these denials are *themselves* a violation of federal law:

> [W]hat matters is whether the handicapped patient was afforded auxiliary aids sufficient to ensure a *level of communication* about medically relevant information substantially equal to that afforded to non-disabled patients. In other words, the ADA and RA focus on the communication itself, **not on the downstream consequences of communication difficulties** . . .

Silva, 856 F.3d at 834 (emphasis in original; bold emphasis added); *accord Crane v. Lifemark Hospitals, Inc.*, 898 F.3d 1130, 1135 ("[T]he focus of the Court's inquiry . . . is on Crane's equal opportunity to communicate medically relevant information to hospital staff."). Here, it is undisputed that effective communication between supervisees and DCS officers is a necessary part of supervision.[34] Plaintiffs and class members suffer harm each and every time they are denied effective communication by Defendants, regardless of the "downstream consequences of communication difficulties." *Silva*, 856 F.3d at 834.[35]

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[34] *See, e.g.*, Ex. F, Smith 2021 Dep. at 151:6-152:18, 156:11-157:21; Ex. A, Driver Dep. at 18:16-25, 24:21-25:11; *see also* Department of Community Supervision, Standard Conditions of Supervision, https://dcs.georgia.gov/offender-supervision-0/parole-supervision/standard-conditionssupervision.

[35] *See also*, *Redding v. Nova Southeastern University, Inc.*, 165 F.Supp.3d 1274, 1294 (S.D. Fla. 2016) ("Disability discrimination includes more than just adverse actions . . . . failure to provide reasonable accommodation is a distinct, actional theory of discrimination under the ADA and Rehabilitation Act.").

This case shares similar facts with *Silva*, where the Eleventh Circuit found that deaf plaintiffs had standing to pursue injunctive relief against a hospital for failing to provide effective communication. *Id.* at 832 (noting that plaintiffs attended defendants' facilities "dozens of times in the years preceding this lawsuit" and "routinely experienced problems with VRI devices . . ."). Indeed, the facts here are even stronger because Plaintiffs have no choice but to encounter Defendants. They are *required* to participate in recurring meetings with CSOs as a condition of their supervision. Even more than in *Silva*, Plaintiffs' risk of future injury—the lack of effective communication in interactions with DCS—is a virtual certainty.

The case law Defendants rely on in their attempt to defeat standing is unavailing. Unlike in *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983), *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974), and other cases Defendants cite, Plaintiffs are not alleging "abstract," "conjectural," or "hypothetical" injuries, and there is no speculation or factual predicate to Plaintiffs' present and future injuries; interactions with DCS *will* occur. Unlike in *Rizzo v. Goode*, 423 U.S. 362, 607-09 (1976), these encounters do not depend on the possibility of a future arrest, charge, traffic stop, or unlawful seizure. Plaintiffs are subject to Defendants' control and will remain so for months and years to come; in fact, they are guaranteed to continue to interact with DCS in the future where the record shows that Plaintiffs and class

members face ongoing, routine denials of auxiliary aids and services. *Cf. Lewis v. Casey*, 518 U.S. 343, 347 (1999) (noting only "two instances of actual injury").

B. The Injuries Plaintiffs Experience are Traceable To, and Are Redressable By, Defendants.

Defendants' challenges to the traceability and redressability elements of standing are unavailing. Traceability asks whether the defendant caused the alleged injury, while redressability assesses whether "it is likely that a favorable decision will redress that injury." *Massachusetts v. E.P.A.*, 549 U.S. 497, 517 (2007) (citation omitted). Defendants' arguments in their Motion rely on the same mischaracterization of Plaintiffs' alleged harm—namely, that it is based solely on the risk of revocation. When one properly considers that Plaintiffs are harmed by each instance of ineffective communication, there is no meaningful dispute that their harms are traceable to, and are redressable by, Defendants. Plaintiffs seek equally effective communication, including reasonable modifications and auxiliary aids and services, in their interactions with Defendants' officers and staff. The harm they suffer occurs when DCS fails to comply with its legal obligations in interactions with Plaintiffs. And this harm is caused by, and can *only* be redressed by, Defendants.

Defendants point to other state entities that *also* have obligations, sometimes overlapping, to communicate with plaintiffs and class members about the terms of their supervision. MSJ at 25-30. But any such obligations are irrelevant to

Defendants' obligations and Plaintiffs' standing in this case. It is undisputed that CSOs communicate with supervisees, including conveying the terms and conditions of supervision to them during initial intake. Ex. A, Driver Dep. at 18:16-25, 24:21-26:17. The fact that other entities may also provide this information—often years or decades before supervision actually begins[36]—does not mean that DCS is free to deny deaf and hard of hearing supervisees equal access to *DCS's* communication.

Defendants' attempt to shirk responsibility for communicating with supervisees is further undermined by the fact that CSOs are permitted to change supervision requirements. *Supra* 3. Even if all other entities in Georgia communicated the general rules of supervision to a class member, DCS is the only entity that could possibly communicate *new* terms that come up *within* supervision —such as changed curfews, a scheduled meeting, or required drug testing.[37] More broadly, it is undisputed that DCS considers communication an important part of its supervision and that it may not decline communication access to deaf and hard of hearing supervisees. Defendants' redressability arguments fail for the same reason.

[36] *See* Ex. R, Nettles Day 1 Dep. at 10:8-11:10, 34:16-35:17 (Nettles pled guilty in court in 2001 but did not begin supervision until 2011); ECF 2-2, Cobb Decl. at ¶ 6 (Cobb was imprisoned in 2014 and did not begin supervision until 2019).

[37] *Supra* 3; *see also* Statement ¶ 34.

II. Defendants' Actions Have Not Mooted Plaintiffs' Claims.

Defendants are incorrect that their frequently evolving, inadequate, and unenforced ADA Policy moots Plaintiffs' claims. MSJ at 15-16. "It has long been the rule that 'voluntary cessation of allegedly illegal conduct . . . does not make the case moot.'" *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1333 (11th Cir. 2005) (citations omitted). Since Defendants are "free to return to [their] old ways," *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), "[they] bear[] a heavy burden of demonstrating that [their] cessation of the challenged conduct renders the controversy moot," *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 531 (11th Cir. 2013); *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 189 (2000) ("A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.").

For government actors, the court considers "whether the termination of the offending conduct was unambiguous," *Rich*, 716 F.3d at 531, and if, based on "the entirety of the relevant circumstances [. . .] there is no reasonable expectation that the government entity" will resume the challenged action. *Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs*, 868 F.3d 1248, 1257 (11th Cir. 2017) (en banc), *abrogated on other grounds by Uzuegbunam v. Preczewski*, 141 S. Ct. 792,

800-02 (2021). Courts consider three factors in determining whether a case has been mooted based on voluntary cessation: (1) "whether the change in conduct resulted from substantial deliberation or is merely an attempt to manipulate our jurisdiction"; (2) "whether the government's decision to terminate the challenged conduct was 'unambiguous'"; and (3) "whether the government has consistently maintained its commitment to the new policy or legislative scheme." *Id.* at 1257; *see also Rich*, 716 F.3d at 531-32.[38] Each of these factors weighs against a finding of mootness.

A. The Policy Post-Dates Plaintiffs' Case and Was Not the Result of Substantial Deliberation.

When voluntary cessation was "not made before litigation was threatened," this change is "'late in the game'" and, therefore, suspect. *Rich*, 716 F.3d at 352 (citation omitted); *see also Harrell v. The Florida Bar*, 608 F.3d 1241, 1266 (11th Cir. 2010). Here, all of the alleged changes were made after this lawsuit was filed in July 2019. In September 2019, DCS made VRI available to CSOs through a state contract, ECF 200-1 ¶ 23, appointed Darrell Smith to the new position of ADA

[38] Defendants argue that government entities are given more leeway than private parties in determining whether they are likely to resume illegal conduct. MSJ at 16. However, any presumption that may be appropriate in favor of government entities attaches *only after* a government entity shows that its conduct has been unambiguously terminated. *Doe v. Wooten*, 747 F.3d 1317, 1322 (11th Cir. 2014). As discussed below, no such unambiguous termination can be shown here.

Coordinator, and promptly provided him with documents related to the lawsuit. Statement at 1-2. On November 29, 2019, DCS adopted its ADA policy.[39]

Courts also consider changes made in response to litigation and without clear justification or deliberation, as well as changes made behind closed doors or apart from standard practice, with skepticism. *See Harrell*, 608 F. 3d at 1267 (holding that termination was not unambiguous where agency took up the matter only at the urging of counsel after litigation was filed, made its decision in secrecy behind closed doors, and may have deviated from standard processes); *Doe*, 747 F.3d at 1325. Here, the ADA Policy appears to have been established solely in an attempt to thwart litigation. Defendants admitted that the ADA Policy was implemented "so that it no longer invites the criticisms lodged by Plaintiffs" and in response to "Plaintiffs' quarrels with the previous written policy." ECF 76 at 18. This context further directs against a finding of mootness. Finally, courts are "more likely to find a reasonable expectation of recurrence when the challenged behavior constituted a

[39] Ex. E, Smith 2020 Dep. at 72:13-22. Defendants argue that DCS was a "new agency" in 2019. MSJ at 16. Even if this were legally relevant (and it is not), DCS was established in 2015 and had previously been a unit within the Georgia Department of Corrections for decades. Ex. A, Driver Dep. at 15:13-25. For over four years before the filing of the Complaint, DCS had been subject to the effective communication requirement in Title II of the ADA, yet did not have an ADA coordinator as required by law, 28 C.F.R. § 35.107(a), until Smith was appointed. Ex. E, Smith 2020 Dep. at 42:2-8, 48:20-49:3.

continuing practice or was otherwise deliberate." *Doe*, 747 F.3d at 1323. Here, Defendants' rush of activity in response to the lawsuit stands in sharp contrast to DCS's long, documented history of failing to meet communication needs.[40]

B. Defendants Have Not Unambiguously Terminated the Challenged Conduct.

The requirement that prior conduct must have been unambiguously terminated is a cornerstone of the voluntary cessation doctrine. *Wooten*, 747 F.3d at 1322. Here, the ADA Policy has not terminated the conduct that Plaintiffs are challenging in this suit, unambiguously or otherwise, nor have Defendants *actually* ceased committing the violations alleged in the Complaint since implementation. *Supra* 2-8.

1. The Policy is Inadequate as Written.

A subsequent policy can only moot a claim if, as a preliminary matter, it actually addresses the concerns raised by Plaintiffs. "[A] superseding statute or regulation moots a case only to the extent that it removes challenged features of the prior law. To the extent that those features remain in place, and changes in the law have not so fundamentally altered the statutory framework as to render the original controversy a mere abstraction, the case is not moot." *Naturist Society v. Fillyaw*,

[40] *See, e.g.*, *supra* at 2-8; Ex. I, Harrelson Report at 17, 33-34 (describing miscommunications dating back to 2011 and instances where supervisee could not meet conditions of sentence due to lack of interpreters dating back to 2015); Statement ¶ 125.

958 F.2d 1515, 1520 (11th Cir. 1992). *Layton v. Elder*, 143 F.3d 469, 471-72 (8th Cir. 1998) (holding that plaintiffs' claims were not mooted by county's adoption of a policy indicating its intent to comply with the ADA and initiating the process of barrier removal, since these steps, "while commendable, have not addressed the problem"). On its face, the ADA Policy is insufficient to meet DCS's affirmative burden to provide effective communication and equal access to Plaintiffs.

a. The Policy Does Not Require DCS To Meet its Affirmative Burdens to Provide Effective Communication.

The policy does not affirmatively guarantee access to auxiliary aids and services or effective communication. Instead, it states that DCS "will *generally*, *upon request*, provide appropriate auxiliary aids and services leading to effective communication for qualified persons with disabilities." ADA Policy § IV.E (emphasis added). Courts have repeatedly held that this passive approach to providing auxiliary aids and services is inadequate under the ADA and Section 504.

The Fifth Circuit observed in *Delano-Pyle v. Victoria Cty., Tex.*, 302 F.3d 567 (5th Cir. 2002) that:

> The ADA expressly provides that a disabled person is discriminated against when an entity fails to *take such steps as may be necessary* to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services. . . . Congress intended to impose an affirmative duty on public entities to create policies or procedures to prevent discrimination based on disability.

Id. at 575 (citation and quotations marks omitted, emphasis in original); *accord* 28 C.F.R. §§ 35.160(a)(1), (b)(1). In *Pierce v. D.C.*, 128 F. Supp. 3d 250, 266, 269 (D.D.C. 2015), then Judge Ketanji Brown Jackson similarly rejected the argument that defendants only need to provide accommodations when they are explicitly requested, holding that covered entities do not "have the option of being passive in their approach to disabled individuals as far as the provision of accommodations is concerned."

b. The Policy Does Not Ensure Appropriate Auxiliary Aids and Services Needed for Effective Communication.

The current ADA policy gives CSOs virtually complete discretion to decide what auxiliary aids and services, if any, to provide at intake, and it provides no guidance in how to exercise that discretion or assess the accuracy of chosen services. At the initial interview, the policy directs that "[t]he CSO will use auxiliary aids and services (AAS) *as necessar*y in order to have effective communication." ADA Policy § IV.C.1 (emphasis added). But there is no explanation of how the CSO should determine what services are "necessary," and there is no evidence to suggest that CSOs receive any training on how to make this determination. *Cf.* Statement ¶¶ 6-8. Further, it is at the initial meeting that a supervisee should learn how to request accommodations or services. ADA Policy, § IV.C.1. But when untrained CSOs

inevitably fail to guess what auxiliary aids a supervisee requires, that supervisee will not learn how to request auxiliary aids that *are*, in fact, effective. This problem could be addressed with a combination of training, communication assessments, video, and plain language information about accommodation request processes. However, neither the ADA Policy nor DCS's practices include any of these elements.

The policy further provides no guidance to CSOs to determine whether VRI is effective or permissible. It notes in the definitions section that "[t]he new regulations give covered entities the choice of using VRI or on-site interpreters in situations where either would be effective," but neglects to lay out the specific regulatory prerequisites to using VRI: adequate internet speeds, screen size, and quality. 28 C.F.R. § 35.160(d). Finally, Defendants effectively concede that the ADA Policy as written is insufficient. As discussed, *supra* 8-11, Mr. Smith claims that DCS has implemented or is looking into additional processes for assessing supervisees needs during the intake process, but it is undisputed that these processes are not documented in the current ADA Policy. MSJ Ex. B, Smith Decl. ¶¶ 11-14.

2. **The Policy Has Not Been Implemented.**

Even a perfect policy could only moot Plaintiffs' claims if it was actually enforced and implemented. And while Defendants state they are not forbidden from having a defective policy so long as they are, in fact, following the law, MSJ at 21,

the evidence shows that DCS is not, in fact, following the law. Plaintiffs in this case allege ongoing actions and inactions that violate their rights. While Defendants' policies—or lack thereof—are an important part of this theory, this is not a case solely about policies. And Defendants' have not stopped harming Plaintiffs through their conduct, whether through "implementation" of the policy or otherwise.

Despite Defendants' claims that CSOs are "trained to comply with ADA," MSJ at 3, and Mr. Smith's acknowledgment of the importance of training, DCS has provided no formal training to CSOs on how to provide effective communication. Statement at ¶¶ 14-20. In particular, CSOs do not receive training on:

- How to identify communication needs and adequately assess the appropriate auxiliary aids and services individuals need (Ex. F, Smith 2021 Dep. at 179:20-180:9, 181:17-24);
- When VRI should be used (Ex. F, Smith 2021 Dep. at 78:9-79:4);
- How to determine whether the device screen size is appropriate for VRI (Ex. F, Smith 2021 Dep. at 40:19-42:15, 45:3-14; Ex. A, Driver Dep. at 134:3-6);
- How to appropriately use VRI during field interactions (Ex. A, Driver Dep. at 133:9-21);
- How to communicate with supervisees in the field when VRI is not working (Ex. A, Driver Dep. at 139:17-21);
- How to obtain in-person interpreters under the policy (Ex. F, Smith 2021 Dep. at 66:21-67:13); or
- How to use the "Offender Interpreter and Disability Service Refusal Form" discussed in the policy (Ex. F, Smith 2021 Dep. at 102:6-23, 105:2-14).

Even though Mr. Smith agreed that such training might be helpful, and even though training on determining communication needs was being "considered" by DCS at least by February 2020, Mr. Smith testified that no such training had been implemented as of January 2021.[41] And while Defendants tout that CSOs can now use VRI when interacting with supervisees, nothing in the ADA Policy requires that they do so, and VRI is often ineffective and inappropriate given issues of technology and logistics. Indeed, the record shows that CSOs continue to deny supervisees access to effective communication despite the written policy. *Supra* 2-8.

Defendants' reliance on the cases cited in support of their mootness claims is misplaced. In those cases, the defendants made changes that meaningfully addressed the challenged conduct (which the ADA Policy here does not) *and* implemented those policy changes consistently over time (which DCS has not). For example, in *Jews for Jesus, Inc. v. Hillsborough County Aviation Auth.*, 162 F.3d 627, 629 (11th Cir. 1998), the plaintiff challenged a specific county policy that prohibited organizations like the plaintiff from distributing literature at an airport. In finding the case moot, the Circuit considered that the policy had been changed and no longer

[41] Ex. E, Smith 2020 Dep. at 62:18-63:15; Ex. F, Smith 2021 Dep. at 181:6-182:20. Of further concern is the fact that Mr. Smith, who has been heavily involved in the changes that have occurred, is still the only staff member in the DCS ADA unit. Ex. E, Smith 2020 Dep. at 158:3-17; Ex. F, Smith 2021 Dep. at 236:22-237:16. As a result, implementation of the ADA Policy remains largely dependent on one person.

banned plaintiff's conduct, that the policy change was the result of substantial deliberation, and that the policy had been consistently applied for three years. *Id.*[42] Similarly, in *Troiano v. Supervisor of Elections*, 382 F.3d 1276 (11th Cir. 2004), the defendant had already changed a policy to provide devices to assist individuals with disabilities vote and fully implemented the new practices for several elections. *Id*. at 1280-1281.

C. Defendants Have Not Maintained a Commitment to Their Changed Policy.

Defendants' actions over the past two years suggest that the policy is not finalized nor successfully implemented; thus, DCS cannot show it has "maintained its commitment to the new . . . scheme." *Flanigan's Enterprises*, 868 F.3d at 1262. Defendants have changed the ADA Policy at least twice since it was adopted in 2019,

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[42] *See also Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1332 (11th Cir. 2005) (holding case challenging specific language in a specific ordinance was moot when the ordinance was replaced and substantially revised, changing and clarifying the challenged provisions); *Tanner Advertising Group v. Fayette County*, 451 F.3d 777, 789-90 (11th Cir. 2006) (en banc) (holding replacement of ordinance mooted most challenges to specific provisions, except where new ordinance still prohibited challenged conduct; *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (holding case challenging a specific regulation moot after the university changed that regulation); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 474 (1990) (holding case was rendered moot by amendments to the statute). *See also Davis v. New York*, 316 F.3d 93, 99 (2d Cir. 2002) (holding a prisoner's claim was not moot where he continued to experience the harm and policy was not being implemented or enforced). Also, these decisions reviewed factual findings on appeal, rather than evaluating evidence at the summary judgment stage.

and Mr. Smith now suggests that even more changes are being considered.[43] To the extent further revisions are being considered, they are evidence of a late-formed, and still evolving, process rather than a settled policy. This ongoing evolution reveals that Defendants could revert any improvements that have been made over the course of litigation, further undermining a claim of unambiguous termination. *Walker v. City of Calhoun*, 901 F.3d 1245, 1270-71 (11th Cir. 2018) (observing that a claim was not mooted when the policy was changed through the order of a single judge rather than a public deliberative process, so that lacked transparency and could be reverted).[44] Finally, Defendants' continued defense of their prior conduct also weighs against a finding of mootness. *See, e.g.*, *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (noting that defendant "continues to defend the legality" of their conduct, and, therefore, "it is not clear why [defendant] would necessarily refrain . . . in the future.").

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[43] MSJ Ex. B, Smith Decl. ¶ 6, 11-14; Ex. F, Smith 2021 Dep. at 205:8-207:13; *supra* 8-11.

[44] In addition, DCS never informed its CSOs that it had replaced or rescinded its prior interpreters policy, even though the ADA Policy addressed many of the same topics and purported to supplant some of its procedures. Ex. F, Smith 2021 Dep. at 54:14-21, 63:21-64:12. Again, this suggests that DCS's embrace of the new policy was not wholehearted and that old practices would continue.

III. <u>Plaintiffs Have Presented Evidence That They Are Entitled to Injunctive and Declaratory Relief.</u>

In order for a court to grant a permanent injunction, a plaintiff must demonstrate: "(1) that [plaintiff] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.'" *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)). "When a civil rights statute is violated, 'irreparable injury should be presumed from the very fact that the statute has been violated,'" *EEOC v Cosmair*, 821 F. 2d 1085, 1090 (5th Cir. 1987) and "when the state is a party, the third and fourth considerations are largely the same." *Scott v. Roberts*, 612 F.3d 1279, 1289 (11th Cir. 2010). Defendants address only irreparable injury and balance of hardships in their motion papers. *See generally*, ECF 200. At the very least, there remain genuine disputes of material fact that preclude granting summary judgment at this stage, and Defendants' challenges to the scope of the requested injunction, including their references to federalism principles, are unavailing.

A. The Evidence Supports Plaintiffs' Claims.

As discussed in full detail in the Statement, Plaintiffs have presented evidence sufficient to support their claims for injunctive and declaratory relief. This includes evidence supporting each element of their legal theory and satisfying each prerequisite to granting permanent injunctive relief. This evidence of present and ongoing harms precludes summary judgment.

Plaintiffs' injuries include the denial of communication access itself, *supra* § I.A., and Plaintiffs have amassed extensive record evidence of such denials which dispute Defendants' claim that there has been "[a]t most . . . one past technical ADA violation," MSJ at 23. While Mr. Smith also claims he is aware of only one instance of ineffective communication since he started in his role, MSJ Ex. B, Smith Decl. ¶ 21, contrary evidence abounds, including numerous instances of ineffective communication in the years since this litigation was filed.[45] Rather than establishing that there are no questions of material fact, Mr. Smith's claim that he is only aware of one instance of ineffective communication serves as further evidence of disputed

[45] *See, e.g.*, Ex. O, Roper Dep. at 194:12-201:18, 208:4-210:23 (in October 2020 CSO Roper had Hill sign an acknowledgment form admitting to using THC without the use of a sign language interpreter—even through a laptop with access to VRI was available on the table), 259:11-262:7 (Roper having Hill sign a consent order requiring 60-day incarceration without reviewing with an interpreter, despite his regular practice of reviewing those elements with hearing supervisees). *See also supra* 2-8.

facts. It also indicates that Defendants will continue to refuse to provide auxiliary aids and services to members of the class.

Many of the facts that Defendants emphasize in their Motion are not undisputed, and some are not supported by the evidence at all. For instance, while it is undisputed that DCS has adopted an ADA Policy, whether such policy is "robust," as Defendants claim, MSJ at 3, and whether it is followed, is disputed extensively in the record. *Supra* § II. Defendants assert that DCS provides services "in order to communicate effectively" with deaf supervisees at intake. MSJ at 3. But this assertion is also disputed and contradicted by extensive record evidence that DCS officers do not, in fact, communicate effectively during meetings. *Supra* 2-8. Indeed, the declaration that Defendants rely upon for this contention does not even assert that DCS actually provides effective communication at intake; rather, it explains what "usually" happens and describes an aspirational project that DCS is "looking into" to provide further information. *Supra* 8-11. This is not an undisputed statement of fact. As another example, Defendants assert that DCS officers "are trained to comply with [the] ADA," MSJ at 3, but the evidence contradicts DCS's claim that CSOs receive training related to supervision of deaf and hard of hearing individuals. *Supra* 25. These genuine disputes of material fact preclude summary judgment.

B. Defendants Cannot Demonstrate Fundamental Alteration or Undue Burden as a Matter of Law to Defeat Either Liability or Balance of Equities.

Defendants assert that providing the relief Plaintiffs request would result in a fundamental alteration of DCS's programs and/or impose an undue financial or administrative burden on the agency. MSJ at 33. These assertions cannot support summary judgment for three reasons. *First*, Defendants' arguments are based on a mischaracterization of Plaintiffs' requested relief. Plaintiffs have never asked for, and do not seek, an injunction that would require Deaf interpreters at all supervision meetings for all class members, or in-person interpreters during all field interactions. *Second*, these claims are based on improperly introduced opinions that were not previously disclosed or put to the test during discovery. *Supra* 8-11. To the extent Defendants suggest these claims are "undisputed," this is only because Plaintiffs have had no opportunity to examine, let alone dispute, them.

Finally, even if this new evidence is accurate and properly considered, the Defendants cannot demonstrate either fundamental alteration or undue burden, and certainly cannot do so as a matter of law.

1. Undue Burden and Fundamental Alteration as Affirmative Defenses to Liability

Whether a proposed modification would impose an undue burden or require a fundamental alteration is generally a question of fact, *Redding*, 165 F. Supp. 3d at

1298, and therefore inappropriate for summary judgment. Nevertheless, compliance with Title II obligations "would in most cases not result in undue financial and administrative burdens on a public entity." 28 C.F.R. Part 35 App. B (analyzing Sections 35.150 and 35.164). Defendants' focus solely on the cost of providing services, but courts frequently reject public entities' claims of undue burden based on cost alone. *See Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1264 (D.C. Cir. 2008) (affirming district court finding that Treasury could not show as a matter of law that redesigning U.S. currency to make it accessible to individuals with disabilities would cause an undue burden under section 504 despite millions in initial and annual costs); *Reyazuddin v. Montgomery County*, 789 F.3d 407, 417 (4th Cir. 2015) (reversing grant of summary judgment on county's claim that making software accessible for county employee at a cost of $648,000 would be an undue hardship because district court focused on cost alone).

DCS's cost estimates also impermissibly compare the projected costs of compliance (and costs of a remedy Plaintiffs do not, in fact, seek), with the agency's line-item budget allocated to reasonable accommodations. Yet public entities may not rely on the budget allocated to providing auxiliary aids and services to demonstrate an undue burden. Instead, DCS must evaluate the burden based on all of the agency's resources. *See Searls v. Johns Hopkins Hosp.*, 158 F. Supp. 3d 427,

438 (D. Md. 2016) ("The [Defendant's] budget for reasonable accommodations is 'an irrelevant factor in assessing undue hardship'"); *Reyazuddin*, 789 F.3d at 418 (holding that the county could not rely on its budgeting decisions to support its undue burden defense); *U.S. v. Bd. of Trustees for Univ. of Alabama*, 908 F.2d 740, 751 (11th Cir. 1990) (holding that the costs of providing accessible transportation were not an undue burden under section 504 when viewed in relation to the university's entire transportation budget).

Even taking the self-serving declarations of Nail and Smith as accurate and admissible, just as in *Searls*, *supra*, Defendants have not established how providing auxiliary aids and services for all putative class members costing at most $807,326—.0048% of DCS's $169,420,352 budget—could constitute an undue burden. *Searls*, 158 F. Supp. 3d at 438. At a minimum, these are factual issues that cannot be decided on summary judgment.[46]

[46] To the extent Defendants argue that safety concerns about providing in-person interpreters for field interactions support a finding of undue burden or fundamental alteration, such arguments are undermined by DCS's failure to determine whether there is any basis for these safety concerns or to analyze their impact on people with disabilities. Ex. A, Driver Dep. 121:24-122:6, 127:24-129:6. DCS also conducts a ride along program permitting community members to ride with CSOs in the field, further undermining the credibility of such safety concerns. *Id.* at 121:9-23.

2. The Balance of the Equities Tips in Favor of Plaintiffs

The public interest in equal access and full participation is best served where individuals with disabilities are permitted to use the aids, services, and assistive technology they choose to maximize personal independence. *Enyart v. Nat'l Conf. of Bar Exam., Inc.*, 630 F.3d 1153, 1167 (9th Cir. 2011) (holding that "the public clearly has an interest in the enforcement of its statutes" and "[i]n enacting the ADA, Congress demonstrated its view that the public has an interest in ensuring the eradication of discrimination on the basis of disabilities").

Since public entities are required to adhere to federal nondiscrimination statutes, they can rarely succeed in defeating injunctive relief due to financial concerns which are interpreted by courts to be a "necessary consequence" of compliance.[47] District courts have often found that public entities cannot succeed in a balance of equities analysis if the sole injury they face is the financial hardship of providing services to the non-public party.[48] Additionally, DCS' purported concern

[47] *Tugg v. Towey,* 864 F.Supp. 1201, 1209 (S.D. Fla. 1994) (holding state officials cannot refuse to offer counselors with sign language ability and sufficient understanding of the deaf community merely because it would require significant budget reallocation.); *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013) (finding the balance of equities tips in favor of plaintiffs because the plaintiffs' medical needs outweigh the financial hardship imposed upon the state.)

[48] *See V.L. v. Wagner*, 669 F. Supp. 2d 1106 (N.D. Cal. 2009) (issuing preliminary injunction enjoining the enforcement of a state reduction of personal services when the sole injury to the State is financial hardship of continuing to provide access to

regarding the spread of COVID-19 is purely speculative and at the very most creates a factual issue that must be decided at trial, again precluding summary judgment.[49]

IV. The Scope of Plaintiffs' Requested Relief is Not Properly Before the Court, is Permissible, and is Not Barred by Federalism Principles.

A. It is Premature to Consider the Scope of the Plaintiffs' Requested Injunction.

"Injunctive relief should be narrowly tailored to fit the specific legal violations adjudged." *Keener v. Convergys Corp.*, 342 F.3d 1264, 1269 (11th Cir. 2003) (quoting *Soc'y for Good Will v. Cuomo*, 737 F.2d 1239, 1251 (2d Cir. 1984)). Since Defendants' liability has not yet been determined, it is premature for the Court to determine or even consider the scope of any potential injunction.

Courts regularly decline to consider challenges to the scope of requested injunctive relief at the summary judgment stage, and the Court should do so here. *See, e.g.*, *United States v. Colonial Pipeline Co.*, 242 F. Supp. 2d 1365, 1372 (N.D. Ga. 2002) (holding at summary judgment that "[t]he scope of appropriate injunctive relief cannot be determined until and if liability is established"); *Cameron v. Peach County, GA*, No. 5:02–CV–41–1 (CAR), 2004 WL 5520003, at *31 (M.D. Ga. June

services); *see also O.B. v. Norwood*, 170 F. Supp. 3d 1186 (N.D. Ill. 2016) (finding loss of funds is not an unjust harm when such treatment is required to be provided to plaintiffs by statute).

[49] Responses ¶ 50.

28, 2004) (holding "that there remain a number of factual issues yet to be decided in this case" that render it "premature for this Court to now rule upon the scope of any injunctive relief"). Here, too, genuine issues of material fact preclude a ruling on the scope of an injunction.

B. The Injunction Plaintiffs Seek Is Proper.

In any event, Plaintiffs' requested injunction is well within the scope of relief available under the ADA. Plaintiffs are not, as Defendants claim, seeking to require DCS to automatically provide whatever aids or services each Plaintiff or class member requests. Rather, Plaintiffs are requesting that Defendants be ordered to: (i) develop a process to determine, on an individualized basis, the aids and services each individual needs to receive effective communication, (ii) use a process that properly considers each individual's personal communication abilities and the type of information being communicated, and then (iii) provide those aids and services. 28 C.F.R. § 35.160(a)(1); ECF 181, Complaint ¶¶ 5, 31-34, 37.

Plaintiffs' requested relief is squarely within the bounds of injunctive relief granted by courts within this Circuit and across the country. *See, e.g.*, *Tugg v. Towey*, 864 F. Supp. 1201 (S.D. Fla. 1994) (granting preliminary injunction to require state department of health to provide mental health counseling services through counselors who knew sign language); *Armstrong v. Davis*, 275 F.3d 849, 873 (9th

Cir. 2001) (affirming in relevant part injunction requiring defendants to remedy violations related to ineffective communications and failure to give primary consideration to the preferences of deaf people in prison and on parole), *abrogation on other grounds recognized by Gonzalez v. U.S. Immigration & Customs Enforcement*, 975 F.3d 788 (9th Cir. 2020).[50]

Defendants' claim that Plaintiffs seek an injunction that does no more than require Defendants to "obey the law" is without merit. Courts in this District have repeatedly rejected such arguments in disability discrimination cases, and this Court should do likewise. *See, e.g.*, *United States v. Georgia*, 461 F. Supp. 3d 1315, 1326 (N.D. Ga. 2020) (denying defendant's motion to dismiss claiming that the judgment would be an "obey the law" order, and noting that plaintiff "specifically request[ed] that the Court mandate modification of Defendant's" programs and services and that "Plaintiff unambiguously list[ed] the methods by which such modifications can be

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[50] Defendants are also routinely ordered in injunctions to make necessary and reasonable modifications in policies, practices, or procedures to avoid discrimination. *See, e.g.*, *Alejandro v. Palm Beach State Coll.*, 843 F. Supp. 2d 1263 (S.D. Fla. 2011) (granting preliminary injunction to allow plaintiff to bring service animal onto campus); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 271, 276-77 (2d Cir. 2003) (affirming injunction requiring defendant to modify practices and "enact a number of procedural reforms" to enable plaintiffs to access public assistance programs); *Smith v. Aroostook Cty.*, 376 F. Supp. 3d 146, 162 (D. Me. 2019), *aff'd*, 922 F.3d 41 (1st Cir. 2019) (granting preliminary injunction compelling jail to provide incarcerated plaintiff with necessary medication).

made."); *Georgia Advocacy Office v. Georgia*, 447 F.Supp.3d 1311, 1327 (N.D. Ga. 2020) (noting, in denying motion to dismiss, that despite defendants' framing of "[p]laintiffs' injunction as 'stop discrimination,'" the injunction sought "the services necessary to ensure" that plaintiffs could access defendants' programming via the requested "types of services . . . laid out in the complaint"). Like the permissible, specific requested relief in these cases, Plaintiffs identify the specific relief needed to enable class members to participate equally and avoid disability discrimination, including reasonable modifications to policies, practices, and procedures, as well as the provision of auxiliary aids and services for effective communication. ECF 181, Complaint ¶¶ 32-35, 41, 56. The specific obligations Defendant will have to meet under any injunction can be established once the Court makes findings on liability.

C. Federalism Concerns Do Not Limit the Court's Authority to Order Relief in This Case.

Defendants assert that precedent cautions federal courts against issuing injunctions against any state entities that administer criminal laws. *See* MSJ at 6-7. None of the cases Defendants cite stand for this proposition. Rather, these cases rest on the general principle that plaintiffs must show a likelihood of future harm to establish both standing and entitlement to injunctive relief. *See supra* § I.A. As discussed above, Plaintiffs' case is distinguishable from *Lyons* and similar cases because the putative class members are experiencing present and ongoing injuries.

To adopt Defendants' novel theory would undermine the very foundation of Title II of the ADA, which was enacted specifically—and solely—to address discrimination by government entities, which includes law enforcement agencies. 42 U.S.C. § 12131; *see, e.g.*, *Pa. Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998); *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1083 (11th Cir. 2007). More fundamentally, Defendants' claims ignore the responsibility of federal courts to remedy legal violations. *See Brown v. Plata*, 563 U.S. 493, 511 (2011) (holding that, while courts must be sensitive to state interest in law enforcement, they have a responsibility to address legal violations and cannot allow them "to continue simply because a remedy would involve intrusion into the realm of prison administration;" in which the Court affirmed a fairly intrusive remedy ordered by the three-judge panel—albeit the least intrusive method available—that required a reduction in prison overcrowding); *R.C. v. Nachman*, 969 F. Supp. 682, 704 (M.D. Ala. 1997), *aff'd*, 145 F.3d 363 (11th Cir. 1998) (holding that, despite federalism concerns about court oversight of prison system, "when a state refuses to adopt and maintain minimal constitutional, federal statutory[,] and common-law standards in its public institutions the state forces federal involvement.").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motion for summary judgment.

Respectfully submitted this 4th day of April 2022.

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CERTIFICATION OF COMPLIANCE

I hereby certify that the typeface used herein is 14-point Times New Roman and that the memorandum is compliant with L.R. 5.1 and 7.1.

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2022, I caused the foregoing Memorandum in Opposition to Defendants' Motion for Summary Judgment to be electronically filed with the Clerk of Court using the CM/ECF system.

Respectfully submitted this 4th day of April 2022.

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