IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FRANKLIN GOMEZ CARRANZA and
RUBEN TORRES JAUREGUI,

Plaintiffs,

v. No. 20-cv-00424 KG/KRS

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; MATTHEW T. ALBENCE, ACTING DIRECTOR OF ICE; DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, ACTING SECRETARY OF THE DEPARTMENT OF HOMELAND SECURITY; COREY A. PRICE, FIELD OFFICE DIRECTOR FOR THE EL PASO FIELD OFFICE,

Defendants.

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION (DOC. 29) TO MOTION TO DISMISS (DOC. 23)

The only injuries that Named Plaintiffs have suffered arise from their alleged difficulty communicating with their counsel via telephone to prepare for their removal proceedings. *See* Doc. 1 ¶¶ 72-75, 79-82. Yet Named Plaintiffs also allege a laundry list of miscellaneous problems with the telephone systems at El Paso Service Processing Center and Otero County Processing Center that have absolutely nothing to do with them or their removal proceedings. *See id.* ¶ 7. Because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), Named Plaintiffs have standing only to bring claims relating to the deficiencies in telephone service that they allege affected their removal proceedings.

These claims, however, are precluded from this Court's review by 8 U.S.C. § 1252(b)(9), which channels claims relating to access to counsel and due process in removal proceedings into judicial review of a final order of removal. Named Plaintiffs now seek to evade Section 1252(b)(9)

by recasting their claims as challenging "conditions of confinement" collateral to their removal proceedings. *See* Doc. 29 at 21.[1] However, they did not allege any collateral conditions of confinement claims in the Complaint—all three claims assert alleged violations of procedural rights *in immigration proceedings*. Doc. 1 ¶¶ 95-99, 103-04, 109. Consequently, their claims fall within the ambit of Section 1252(b)(9). Named Plaintiffs also argue that application of Section 1252(b)(9) would deprive them of a remedy, but the immigration court can provide relief such as continuances or venue changes, and the Court of Appeals can—and routinely does—review properly exhausted access-to-counsel and due process claims on a petition for review. To the extent Named Plaintiffs seek to remedy conditions of their confinement that are independent of, and collateral to, their assertions of procedural rights in removal proceedings, they are free to raise such a claim in the district court and seek relief. They have not done so.

Even if the Court determines it has jurisdiction, Named Plaintiffs have failed to state a claim for relief. All of the claims asserted sound in due process because they allege the right to counsel, the right to a full and fair hearing, and the right to meaningful access to the administrative process. To prevail on a due process theory in the Tenth Circuit, an alien "must demonstrate prejudice which implicates the fundamental fairness of the proceeding." *Michelson v. I.N.S.*, 897 F.2d 465, 467 (10th Cir. 1990). Here, Named Plaintiffs have failed to identify any prejudice implicating the fundamental fairness of a proceeding and have therefore failed to state a claim for which this Court can grant relief.

The Court should therefore grant Defendants' Motion to Dismiss (Doc. 23) and deny Plaintiffs' Motion for Class Certification (Doc. 4) as moot.

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[1] Citations to Named Plaintiffs' filings are to the page number stamped at the top by the Court rather than the number at the bottom of the page.

ARGUMENT

I. Named Plaintiffs Lack Standing to Raise Claims Based on Government Actions That Did Not Injure Them.

Defendants do not dispute that Named Plaintiffs have standing to assert claims based on the difficulties they allegedly experienced in communicating with their counsel to prepare for their removal-related hearings. *See* Doc. 23 at 2. However, "a litigant cannot 'by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him.'" *Donelson v. United States Through Dep't of the Interior*, 730 F. App'x 597, 602 (10th Cir. 2018) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 n.5 (2006)). "Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982). This is true because "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). Hence, the Court should dismiss the claims to the extent they allege injuries that Named Plaintiffs did not personally suffer, such as inability to access phone service due to disabilities or lack of translations into rare languages.

Named Plaintiffs argue that they should be allowed to bring their hodge-podge of telephone-related claims because the breadth of their claims implicates class certification issues rather than standing. However, the Supreme Court has made clear that courts may limit the breadth of class action claims under the standing doctrine rather than Rule 23. For example, in *Lewis v. Casey*, the Supreme Court noted that its determination that "respondents lacked standing to complain of injuries to non-English speakers and lockdown prisoners does not amount to a conclusion that the class was improper." 518 U.S. at 358 n.6. Named Plaintiffs also analogize to nationwide Americans with Disabilities Act class actions where the named plaintiff has not

personally visited every location of a chain yet still has standing to bring a claim for nationwide injunctive relief. Doc. 29 at 13 (citing *Colo. Cross Disability Coal. v. Abercrombie & Fitch Co*., 765 F.3d 1205 (10th Cir. 2014)). The issue in *Abercrombie & Fitch* was a raised porch design common to store locations across the country, which the named plaintiff indisputably encountered when visiting one store in a wheelchair. *See* 765 F.3d at 1209-10. The Tenth Circuit evaluated the proper geographic scope of relief under the rubric of Rule 23. Here, the issue is myriad of telephone issues, only certain of which the Named Plaintiffs personally experienced. Under *Lewis v. Casey*, they lack standing to raise claims based on other issues that they have not experienced, either on their own behalf or on behalf of a class.[2] 518 U.S. at 358 n.6 (noting that standing "to complain of *one* administrative deficiency" does not "automatically confer[] the right to complain of *all* administrative deficiencies" (emphasis in original)).

Although Named Plaintiffs contend that *Lewis v. Casey* is inapposite, they do so only to argue that they do not need to allege "actual injury" beyond a due process violation to have standing to bring their claims. Doc. 29 at 15. Again, Defendants do not argue that Named Plaintiffs lack standing to raise claims based on their own alleged difficulties with communicating with their counsel. In any event, Named Plaintiffs are incorrect to claim that no actual injury is required. They cite a Second Circuit case, *Benjamin v. Fraser,* 264 F.3d 175 (2d Cir. 2001), for this proposition. However, the Tenth Circuit, which governs this case, does require actual injury. *See,*

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[2] Named Plaintiffs misconstrue Defendants' argument regarding Named Plaintiff Gomez Carranza's access to counsel claims at El Paso. Doc. 29 at 13 n.4. Because Named Plaintiff Gomez Carranza concedes that his counsel visited him in person, Doc. 6 ¶ 7, he cannot plausibly contend that he was denied access to counsel. The right to access to counsel does not require any particular means of access. *See, e.g.*, *Lobato v. Gonzales*, No. CV 14-753 WJ/GBW, 2015 WL 13651121, at *7 (D.N.M. Dec. 16, 2015), *report and recommendation adopted*, No. CV 14-753 WJ/GBW, 2016 WL 10591982 (D.N.M. Jan. 19, 2016) (holding that "a prisoner cannot demonstrate an injury on the basis of denial of attorney phone calls when the prison provides alternative methods of contacting a lawyer").

e.g., *Abiodun v. Gonzales*, 217 F. App'x 738, 742–43 (10th Cir. 2007) (finding that the petitioner, who alleged a due process violation based on inadequate legal materials, at his detention facility, "failed to demonstrate any actual injury that 'hindered his efforts to pursue a legal claim' and thus "fail[ed] to satisfy the actual injury component of constitutional standing to bring this claim" (quoting *Lewis*, 518 U.S. at 351)); *accord Peoples v. CCA Det. Centers*, 422 F.3d 1090, 1107 (10th Cir. 2005), *opinion vacated in part on reh'g en banc*, 449 F.3d 1097 (10th Cir. 2006) (in part of panel decision left intact by the *en banc* decision, requiring pretrial detainee alleging deprivation of access to courts to allege "actual injury, not mere deprivation, as a 'constitutional prerequisite' to bringing a claim" (quoting *Lewis*, 518 U.S. at 351)).

II. Named Plaintiffs' Alleged Injuries Arise out Their Removal Proceedings and Cannot Be Brought in District Court Under 8 U.S.C. § 1252(b)(9).

A. Named Plaintiffs' Claims Are Inextricably Intertwined with the Removal Process.

In the Complaint, Named Plaintiffs state that they "challenge policies and practices that deny and severely restrict their abilities to make telephone calls necessary to consult with or obtain counsel, to gather information and evidence necessary for their cases, and to obtain fair hearings while in civil, immigration custody." Doc. 1 ¶ 2. All three of their claims seek to vindicate procedural rights that arise out of immigration proceedings, *id.* ¶¶ 95-99, 103-04, 109, and more specifically, their removal proceedings, *id.* ¶¶ 70, 77.

As the First Circuit explained in *Aguilar*, "claims that are based upon an alleged deprivation of an alien's right to counsel in connection with a removal proceeding, whether pending or imminent, arise from the removal proceeding. By any realistic measure, the alien's right to counsel is part and parcel of the removal proceeding itself. *See* 8 U.S.C. § 1362." *Aguilar v. ICE*, 510 F.3d 1, 13 (1st Cir. 2007); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1033 (9th Cir. 2016) (holding that right-to-counsel claims "'arise from' removal proceedings and "are bound up in and an inextricable part

of the administrative process"); *E.O.H.C. v. Sec'y United States Dep't of Homeland Sec.*, 950 F.3d 177, 187-88 (3d Cir. 2020) (holding that the statutory right to counsel under Section 1362 "is tied to the removal proceedings themselves").

The same reasoning applies to Plaintiffs' other claims because they also arise out of their removal proceedings. *See, e.g.*, *Aguilar*, 510 F.3d at 18 (holding that procedural due process claims alleging "difficulties in calling witnesses and in presenting evidence at the removal proceedings" fall within Section 1252(b)(9)); *Nat'l Immigration Project of Nat'l Lawyers Guild v. Exec. Office of Immigration Review*, No. 1:20-CV-00852 (CJN), — F.3d —, 2020 WL 2026971, at *8-9 (D.D.C. Apr. 28, 2020) ("Plaintiffs' access-to-counsel and due process claims arise from the course of removal hearings, placing them within § 1252(b)(9)'s broad jurisdictional bar.").

Because Named Plaintiffs' claims are intertwined with their removal proceedings, they are challenging "part of the process by which their removability will be determined." *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (plurality op.). Section 1252(b)(9) therefore channels their claims in to the petition for review process in the Court of Appeals. *J.E.F.M.*, 837 F.3d at 1033.

B. The Exception for Collateral Claims Does Not Apply.

"Claims that are independent of or collateral to the removal process do not fall within the scope of § 1252(b)(9)." *J.E.F.M.*, 837 F.3d 1026, 1032 (9th Cir. 2016). For example, Justice Alito's plurality opinion in *Jennings* referenced a hypothetical *Bivens* action "based on allegedly inhumane conditions of confinement" as the type of claim collateral to the removal process. 138 S. Ct. at 840. Named Plaintiffs seek to avail themselves of this exception by recharacterizing their claims as challenging the conditions of their confinement rather than the fairness of their immigration proceedings. This shift in focus is likely attributable to the *Southern Poverty Law Center* ("*SPLC*") decision, which came out six weeks after Named Plaintiffs filed their Complaint. *S. Poverty Law Ctr. v. U.S. Dep't of Homeland Sec.,* No. CV 18-760 (CKK), 2020 WL 3265533

(D.D.C. June 17, 2020). In *SPLC*, the organizational plaintiff claimed that "conditions at . . . four detention centers are so restrictive that they are punitive in violation of the Fifth Amendment's substantive due process clause." *Id*. at *16. The *SPLC* court held that a "substantive due process claim alleging punitive conditions of confinement is not barred by section 1252(b)(9)" and avoided deciding whether Section 1252(b)(9) would bar the organizational plaintiff's Fifth Amendment access-to-counsel claim.[3] *Id*. *14, *16.

Here, the Complaint does not raise any causes of actions alleging that the conditions of confinement at Otero and El Paso, by themselves, are punitive or inhumane. Indeed, the Complaint does not even mention the term "conditions of confinement" except to describe ICE's detention standards. Doc. 1 ¶ 28. Soon after filing their Complaint, Named Plaintiffs filed a motion for class certification that also failed to mention "conditions of confinement" but instead argued that detainees "must access free, confidential legal calls in order to speak to their attorneys and to *be able to effectuate their constitutional, statutory, and regulatory rights in their immigration proceedings*." Doc. 5 at 5 (emphasis added). Post-*SPLC*, Named Plaintiffs seek to focus solely on conditions of confinement: "Here, Plaintiffs' [*sic*] *do not seek any procedural protections in removal proceedings*—rather they seek injunctive relief to remedy conditions of their confinement." Doc. 29 at 21 (emphasis added). Yet the procedural rights they are seeking to vindicate arise from their removal proceedings. *See* Doc. 29 at 15 (noting that "Plaintiffs do not

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[3] The court acknowledged that the "conditions of confinement claim raises issues addressing access to counsel"; however, because the organizational plaintiff defended immigrants in proceedings other than removal proceedings, the court found that the substantive due process claim did not "directly invoke[] the detained immigrants' right to counsel in removal proceedings." *Id*. at *17. Here, by contrast, the Named Plaintiffs are individuals in removal proceedings, and their allegations regarding the conditions of their confinement directly invoke their right to counsel in removal proceedings.

assert that they have a standalone right to telephone access"). Accordingly, Named Plaintiffs are in fact seeking procedural protections for their removal proceedings.

In any event, to the extent Named Plaintiffs now allege that their conditions of confinement are punitive independent of any impact on their removal proceedings, Named Plaintiffs may not avoid dismissal by raising new claims in response to a motion to dismiss. *See, e.g.*, *Wroten v. Walmart*, No. 19-CIV-1125 MV/JHR, 2020 WL 2364570, at *2 (D.N.M. Apr. 20, 2020), *report and recommendation adopted*, 2020 WL 2330018 (D.N.M. May 11, 2020); *see also Boyer v. Bd. of Cty. Comm'rs of Johnson Cty.*, 922 F. Supp. 476, 482 (D. Kan. 1996) ("It is inappropriate to use a response to a motion to dismiss to essentially raise a new claim for the first time."). In deciding this motion to dismiss, the Court should consider the procedural claims raised in the Complaint, and not the substantive claims Named Plaintiffs neglected to assert.

C. Named Plaintiffs Are Not Left Without a Remedy If Required to Exhaust Their Claims and File a Petition for Review in the Court of Appeals.

According to Named Plaintiffs, their claims must be allowed to proceed notwithstanding Section 1252(b)(9) because otherwise, they would have no remedy. Doc. 29 at 17-18. These concerns are overstated. As Named Plaintiffs concede, "Section 1252(b)(9) is a jurisdiction channeling provision, and not a jurisdiction stripping provision." Hence, Section 1252(b)(9) does not "foreclose *all* judicial review of agency actions. Instead, [it] channel[s] judicial review over final orders of removal to the courts of appeals." *J.E.F.M.*, 837 F.3d at 1031 (emphasis in original). In other words, Named Plaintiffs "can have their day in court, but just not in this Court." *Vetcher v. Sessions*, 316 F. Supp. 3d 70, 77 (D.D.C. 2018) (internal quotation marks and citation omitted).

Furthermore, "[t]he remedies left open by section 1252(b)(9) are neither inadequate nor ineffective to protect the petitioners' rights. Each petitioner's right to counsel can be adequately addressed and effectively vindicated before an immigration judge (who can grant a continuance,

order a change of venue, or take other pragmatic steps to ensure that the right is not sullied)." *Aguilar*, 510 F.3d at 18 (citation omitted). Here, for example, Named Plaintiffs each obtained a continuance when they felt unprepared for their hearings. Doc. 1 ¶¶ 75, 81. To the extent the immigration judge denies such a request, Named Plaintiffs can exhaust the issue before the Board of Immigration Appeals and raise it during the petition for review process. *See J.E.F.M.*, 837 F.3d at 1033 (noting that "[r]ight-to-counsel claims are routinely raised in petitions for review filed with a federal court of appeals"); *see also Vaccaro v. Holder*, 465 F. App'x 744, 745 (10th Cir. 2011) (addressing the immigration judge's denial of a continuance on a petition for review but finding the claim unexhausted); *Abiodun*, 217 F. App'x at 742 & n.6 (noting that the petitioner could have raised claims relating to the right to counsel and lack of opportunity to review evidence in removal proceedings in a previous petition for review, provided they had been properly exhausted).

Although the immigration judge lacks jurisdiction over conditions in a detention facility, Doc. 29 at 24, Named Plaintiffs can still seek relief from the district court if they allege claims that are truly collateral to their removal proceedings, such as claims "based on allegedly inhuman conditions of confinement," *Jennings*, 138 S. Ct. at 840; *see also E.O.H.C.*, 950 F.3d at 186 (describing claims to which Section 1252(b)(9) would not apply, including denial of halal or kosher food or withholding of medication). Moreover, the fact that conditions of confinement can affect procedural rights does not bar applicability of Section 1252(b)(9) when the procedural rights arise from removal proceedings and any injury can be remedied in that context. For example, in *National Immigration Project*, the plaintiffs alleged that conditions at ICE detention facilities—including restrictions on in-person visits and telephone calls, scheduling difficulties, lack of confidentiality, and charges for calls—deprived them of the right to counsel. 2020 WL 2026971, at *6, *8. The court held that because the detainees were in removal proceedings, their access-to-

counsel and due process claims "arise as a 'part of the process by which . . . removability will be determined.'" *Id*. at *9 (quoting *Jennings*, 138 S. Ct. at 841 (ellipsis in original)). Similarly, in *Vetcher*, the plaintiff alleged that deficiencies in the ICE detention facility's law library impaired his ability to meaningfully contest his removal charges and thus violated his right to due process. 316 F. Supp. 3d at 75. Even though the due process claim stemmed from facility issues, the court found that Section 1252(b)(9) required it be exhausted and channeled to the court of appeals on a petition for review.

Named Plaintiffs further argue that they will obtain no relief if required to wait until a removal order to bring their claims, since their decision to seek continuances has prolonged their detention. Doc. 19 at 24. The problem with this argument is that Named Plaintiffs do not bring a challenge to their prolonged detention, a cause of action that the *Jennings* plurality determined was not subject to Section 1252(b)(9). 138 S. Ct. at 840. Named Plaintiffs cannot manufacture an escape hatch from Section 1252(b)(9) by failing to assert a claim and then lamenting that they are left with no remedy for that unasserted claim. Named Plaintiffs chose to frame their complaint as seeking remedies for violations of procedural rights, and Named Plaintiffs can adequately vindicate those rights as Congress intended—by exhausting their claims and consolidating them with all other removal-related claims in a petition for review to the Tenth Circuit.

III. Even If the District Court Has Jurisdiction, Named Plaintiffs Fail to State a Claim Absent Any Allegation of Prejudice.

Immigrant detainees lack the right to counsel under the Sixth Amendment, and "due process is not equated automatically with a right to counsel." *Michelson v. I.N.S.*, 897 F.2d 465, 468 (10th Cir. 1990). "[B]efore [the court] may intervene based upon a lack of representation, petitioner must demonstrate prejudice which implicates the fundamental fairness of the proceeding." *Id.*; *Alzainati v. Holder*, 568 F.3d 844, 851 (10th Cir. 2009) ("To prevail on a due

process claim, an alien must establish not only error, but prejudice."); *see also Hernandez Lara v. Barr*, 962 F.3d 45, 56 & n.14 (1st Cir. 2020) (noting circuit split on whether prejudice is required to show a due process violation in immigration proceedings and citing *Michelson* as a Tenth Circuit decision requiring prejudice).

Contrary to binding Tenth Circuit precedent, Plaintiffs contend that they are exempt from the prejudice requirement or that prolonged detention is sufficient to show prejudice for purposes of the Fifth Amendment.[4] Doc. 29 at 26-27. The cases make clear, however, that not only must there be prejudice, but the prejudice must "implicat[e] the fundamental fairness of a *proceeding*." *Michelson*, 897 F.2d (emphasis added). Tellingly, Plaintiffs do not argue that the alleged telephone issues caused them prejudice at any immigration proceeding and thus have failed to state a cognizable claim that their right to due process was violated. *See Van Dinh v. Reno*, 197 F.3d 427, 435 (10th Cir. 1999) (concluding that a class complaint alleging "a totally speculative future violation of due process" from detainees' lack of access to counsel did "not allege that an actual or continuing constitutional violation had occurred that could be remedied by judicial action").

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim (Doc. 23) and deny as moot Named Plaintiffs' Motion for Class Certification and Appointment of Class Counsel (Doc. 4).

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[4] Because the First Amendment claim is based on meaningful access to the administrative process, it should be analyzed in the same way as the due process claims. *See Nat'l Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 595 (9th Cir. 1992), *as amended on denial of reh'g* (June 18, 1993).

Respectfully submitted.

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/s/ Christine H. Lyman 8/3/2020
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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2020, Defendants filed through the United States District Court CM/ECF System the foregoing document, causing it to be served by electronic means on all counsel of record.

/s/ Christine H. Lyman 8/3/2020
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