IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BRANDON COBB, et al., etc., Plaintiffs, v. GEORGIA DEPARTMENT OF COMMUNITY SUPERVISION, et al., etc., Defendants.	CIVIL ACTION NO. 1:19-cv-03285-WMR

MOTION BY DEFENDANTS FOR SUMMARY JUDGMENT, SUPPORTING BRIEF, STATEMENT OF MATERIAL FACTS NOT GENUINELY IN ISSUE, AND EXHIBITS

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MOTION BY DEFENDANTS FOR SUMMARY JUDGMENT

Defendants move the Court under Fed. R. Civ. P. 56 to grant summary judgment against Plaintiffs' claims on the grounds that Plaintiffs lack standing, cannot meet the requirements for permanent injunctive relief, and seek an injunction outside the proper scope of such relief. Moreover, important federalism principles stand against their request for an injunction.

This motion is based upon the attached supporting brief, statement of material facts, exhibits, and the record.

Respectfully Submitted,

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BRIEF IN SUPPORT OF MOTION BY DEFENDANTS FOR SUMMARY JUDGMENT

I. Introduction

The claims for injunctive and declarative relief presented by Plaintiffs in their second amended complaint (Doc. 181) against Defendants Georgia Department of Community Supervision (DCS) and its Commissioner, Michael Nail, are subject to dismissal or adverse summary judgment.[1] The relief requested by Plaintiffs would

[1]If a court finds lack of standing, it is required to dismiss without prejudice instead of on the merits. DiMaio v. Democratic Nat. Comm., 555 F.3d 1343, 1345 (11th Cir. 2009) ("the dismissal for lack of standing was necessarily without prejudice"). Should the Court rule only on this basis and find that it lacks subject matter jurisdiction, Defendants ask that this motion be construed as brought under Fed. R. Civ. P. 12(b)(1). Against Plaintiffs' claim for injunctive relief, Defendants argue both lack of standing and failure to satisfy the prerequisites for equitable relief, in particular the absence of a threat of irreparable harm. These arguments share the basis that our record shows no realistic threat of future harm to Plaintiffs. A decision on the failure to satisfy the prerequisites for equitable relief would be on the merits.

infringe important federalism principles. Moreover, Plaintiffs lack standing to seek permanent injunctive relief. Relatedly, Plaintiffs cannot show a substantial threat of future irreparable harm, as required for permanent injunctive relief. And the relief sought by Plaintiffs is beyond the proper scope of an injunction.

A. Standard for Summary Judgment

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), the Supreme Court held that to defeat a defendant's properly supported motion for summary judgment, a plaintiff must produce "evidence on which the jury could reasonably find for the plaintiff." Id. at 251. The Court also held: " 'The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient....' " Id. at 266.[2] See also id. at 247-48 ("the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact") (emphasis original); Celotex v. Catrett, 477 U.S. 317, 323-24 (1986) (after defendant carries initial burden of demonstrating no genuine issue of material fact, the burden

[2]Due to space limitations, all internal citations and quotation marks are omitted from this brief unless otherwise indicated. Also, unless otherwise indicated, this brief refers to documents by ECF instead of internal pagination.

shifts to plaintiff "to go beyond the pleadings" and present competent evidence designating "specific facts showing that there is a genuine issue for trial").

B. Statement of Facts

Due to space limitations, Defendants incorporate their separately filed statement of material facts. In the body of this brief, Defendants discuss numerous facts with citations to the record.

Defendants emphasize here several significant facts. DCS has adopted and follows a robust Americans with Disabilities (ADA" Title II policy. (MSJ Exhibit B (Darrell Smith Decl. 3) ¶¶ 4, 6 (Attachment 1, Policy 6.340)). At the intake of a deaf offender into DCS supervision, DCS deploys Video Remote Interpreting (VRI) and other accommodations in order to communicate effectively with the offender. (MSJ Exhibit B (Smith Decl. 3) ¶ 11). Over the course of supervision, DCS officers, who are trained to comply with ADA, are able to engage VRI, a live ASL interpreter, or any other needed accommodation without prior administrative approval. (MSJ Exhibit B (Smith Decl. 3) ¶¶ 15-19).

There have been approximately 1,800 home and office visits by Community Supervision Officers (CSO) with deaf offenders over the past two years. (MSJ Exhibit C (Nail Decl.) ¶ 6). After Plaintiff Hill admitted violating a condition of probation by using marijuana, confirmed by a drug screen, CSO Adam Roper read

to Hill a proposed consent revocation order on November 3, 2020 through an ASL interpreter. Roper mistakenly failed to read two critical paragraphs. (MSJ Exhibit D (Roper Decl.) ¶¶ 8-12; Roper Dep. at 157:6-158:9, 247:8-248:16, 249:21-252:11, 255:20-263:12, 265:21-266:3; Dep. Exhibits 115-117). But Hill would have been revoked and sentenced to serve 60 days even if the communication had been perfect, since she admitted the drug violation. (Exhibit D (Roper Decl.) ¶ 13; Roper Dep. at 63:4-64:9, 267:22-268:9).

Other than the incident with Hill and Roper, ADA Coordinator Darrell Smith is aware of no other instance of ineffective communication with a deaf offender in all of the home and office visits between CSOs and deaf offenders over the past two years. (MSJ Exhibit B (Smith Decl. 3) ¶¶ 21-22).

C. Plaintiffs' Claims

Plaintiffs have sued Defendants under Title II of the ADA, as amended, 42 U.S. Code § 12131, et seq., Section 504 of the Rehabilitation Act of 1973 (RA), as amended, 29 U.S.C. §§794, et seq., and the Due Process Clause of the Fourteenth Amendment. (Doc. 181).

The ADA and Rehabilitation Act impose the same standards on state actors providing public services. In the Eleventh Circuit's words, "Discrimination claims under the ADA and the 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).

To establish a claim under Title II of the ADA and Section 504 of the RA, each Plaintiff must: (1) be a ''qualified individual with a disability"; (2) who was "excluded from participation in or denied the benefits of the services, programs, or activities of a public entity" or otherwise "discriminated [against] by [] such entity"; (3) "by reason of such disability." 42 U.S.C. § 12132; Bircoll v. Miami-Dade Cty., 480 F.3d 1072, 1083 (11th Cir. 2007); Shotz v. Cates, 256 F.3d 1077, 1079 (11th Cir. 2001). DCS is of course a "public entity."

The U.S. Department of Justice has promulgated implementing regulations, which provide in relevant part: "A public entity shall 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).

Having abandoned their request for a preliminary injunction, Plaintiffs now seek only permanent injunctive relief. Plaintiffs itemize the elements of the permanent injunction they seek:

> an order permanently enjoining Defendants from engaging in the unlawful discrimination complained of herein; [and] an order granting such other injunctive relief...directing Defendants to immediately provide qualified ASL interpreters, auxiliary aids and services, and reasonable modifications, as determined by each individual's preferred method of communication, to Plaintiffs and to all other deaf and hard of hearing individuals subject to

> GDCS supervision, including: (i) at every meeting and encounter with a GDCS officer and (ii) to facilitate effective communication of the contents of any written documents related to the terms of these individuals' supervision….

(Doc. 181 at 40).

Defendants discuss below Plaintiffs' Due Process claim under the Fourteenth Amendment. This throwaway claim presents no serious issues since DCS does not adjudicate, sentence, or revoke criminal charges. Georgia courts, which are not parties to this case, are required to provide due process to probationers and parolees.

II. Federalism Principles Count Against the Permanent Injunctive Relief Sought by Plaintiffs.

A permanent injunction against DCS would violate important federalism principles. Implicit in Plaintiffs' demand for a permanent injunction, is takeover of the policymaking apparatus of DCS along with long-term monitoring of the agency. The record does not support such drastic interference in a state criminal justice agency.

The Supreme Court has repeatedly warned and ruled against federal court interference in the operations of state criminal justice agencies. In Los Angeles v. Lyons, 461 U.S. 95 (1983), the Court admonished: "Recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the State's

criminal laws in the absence of irreparable injury which is both great and immediate." Id. at 112; O'Shea v. Littleton, 414 U.S. 488, 499 (1974); Rizzo v. Goode, 423 U.S. 362, 607-609 (1976); Lewis v. Casey, 518 U.S. 343, 347 (1996) (rejecting concept that federal courts may intervene in a state criminal justice agency in the absence of "actual or imminent harm" merely because the "institution [is] not organized or managed properly").

This federalism concern distinguishes ADA Title II cases, such as ours, from ADA Title III ones. Title II regulates "public entit[ies]," which includes "any department, agency...of a State or States or local government." 42 U.S.C.A. § 12131(1)(A, B). Title III regulates places providing "public accommodation[]." 42 U.S.C. § 12182. Thus, in Title III cases, federalism plays no role. See Silva v. Baptist Health South Florida, 856 F.3d 824 (11th Cir. 2017).

III. All Plaintiffs, Including Those Seeking to Represent Classes, Must Have Standing to Present Claims in Federal Court.

A. General Principles

In order to maintain a legal claim in federal court, the plaintiff must have standing. Standing serves to "identify those disputes which are appropriately resolved through the judicial process." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). In the same case, the Supreme Court held:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly...trace[able] to the challenged action of the defendant, and not...th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. See also Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009).

Moreover, "[t]he party invoking federal jurisdiction bears the burden of establishing these elements." Lujan, 504 U.S. at 561. The Eleventh Circuit has explained a plaintiff's duty to support standing at the summary judgment stage:

> "Since [standing elements] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." At the pleading stage "general factual allegations of injury...may suffice." But in response to a summary judgment motion, "the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts.' "

Georgia Republican Party v. Sec. & Exch. Comm'n, 888 F.3d 1198, 1201 (11th Cir. 2018) (quoting Lujan, 504 U.S. at 561).

B. Standing to Seek Injunctive or Declaratory Relief Requires Plaintiffs to Show a Substantial Likelihood of Future Injury.

To establish standing to pursue injunctive or declaratory relief, a plaintiff must show a substantial likelihood of future injury from Defendants' conduct that she

seeks to enjoin. "In order to demonstrate that a case or controversy exists to meet the Article III standing requirement when a plaintiff is seeking injunctive or declaratory relief, a plaintiff must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future." AA Suncoast Chiropractic Clinic, P.A. v. Progressive Am. Ins. Co., 938 F.3d 1170, 1179 (11th Cir. 2019).

Indeed, the risk of future injury from the threatened misconduct must be immediate and approach a certainty. The Supreme Court has strongly emphasized that a plaintiff seeking federal injunctive relief must show a realistic threat of imminent future injury. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401 (2013) ("respondents' theory of future injury is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending' ").

In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the Court held that Lyons lacked standing to seek an injunction against the future use by Los Angeles police officers of chokeholds, although he had been injured by one. Id. at 101-02. The Court emphasized that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief...if unaccompanied by any continuing, present adverse effects." Lyons, 461 U.S. at 102 (quoting O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974)). The Court held that Lyons' past experience

with the chokehold did "nothing" to establish standing to seek injunctive relief against the use of such holds. The Court elaborated that to have standing Lyons would have to show far more than that he and others had been victimized by the chokeholds in the past. Lyons, 461 U.S. at 105-06. The Court recognized that Lyons would have to allege and prove "that ***strangleholds are applied by the Los Angeles police to every citizen who is stopped or arrested*** regardless of the conduct of the person stopped." Id. at 108 (emphasis added).

Abundant additional case law underscores that a plaintiff asserting standing must demonstrate a substantial threat of future harm. In the words of the Eleventh Circuit, " 'When a plaintiff cannot show that an injury is likely to occur immediately, the plaintiff does not have standing to seek prospective relief even if he has suffered a past injury.' " Corbett v. Transp. Sec. Admin., 930 F.3d 1225, 1233 (11th Cir. 2019) (quoting 31 Foster Children v. Bush, 329 F.3d 1255, 1265 (11th Cir. 2003)). See also Kerr v. City of West Palm Beach, 875 F.2d 1546, 1548, 1551, 1554-56 (11th Cir. 1989) (applying Lyons to a claim for injunctive relief against the use of police dogs by a city police department and holding that, despite "high ratios of bites to apprehensions" and "no specialized internal procedures for monitoring the performance of the canine unit," the plaintiffs lacked standing to seek injunctive relief); Elend v. Basham, 471 F.3d 1199, 1207-08 (11th Cir. 2006) ("The binding

precedent in this circuit is clear that for an injury to suffice for prospective relief, it must be imminent."); 31 Foster Children v. Bush, 329 F.3d 1255, 1266-67 (11th Cir. 2003) (standing for declaratory or injunctive relief requires that future injury "proceed with a high degree of immediacy") (quoting Lujan, 504 U.S. at 559, 564 n.2); Bowen v. First Family Fin. Servs., 233 F.3d 1331, 1340 (11th Cir. 2000) (a "perhaps or maybe chance" of an injury occurring is not enough for standing).

These principles have been applied in ADA cases. Numerous federal courts have ruled that a plaintiff seeking injunctive relief under the ADA must allege a threat of future injury from the alleged violation. In Silva, a case presenting alleged ADA Title III violations involving hospital services to deaf plaintiffs, the Eleventh Circuit held: "To establish such a threat, each patient must show that (1) there is a "real and immediate" likelihood that he or she will return to the facility and (2) he or she "will likely experience a denial of benefits or discrimination" upon their return." 856 F.3d at 832. The court ultimately concluded that plaintiffs "offered evidence sufficient to support a finding that (1) they will return to Defendants' facilities; and (2) they will likely experience a denial of benefits or discrimination upon their return." Id. See also Shotz, 256 F.3d at 1081-82 ("In ADA cases, courts have held that a plaintiff lacks standing to seek injunctive relief unless he alleges

facts giving rise to an inference that he will suffer future discrimination by the defendant.").

C. Named Plaintiffs Seeking Class Action Certification Must First Have Individual Standing.

Standing is necessary for a named plaintiff to pursue a class action suit. Defendants will discuss this principle further in response to Plaintiffs' anticipated renewed motion for class certification.

Regarding the necessity for individual standing before qualification to represent a class, the Supreme Court has held:

> [I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.... Abstract injury is not enough. It must be alleged that the plaintiff has sustained or is immediately in danger of sustaining some direct injury.... The injury or threat of injury must be both real and immediate, not conjectural or hypothetical.

O'Shea v. Littleton, 414 U.S. 488, 494 (1974). See also Wooden v. Board of Regents of Univ. Sys. of Georgia, 247 F.3d 1262, 1287 (11th Cir. 2001) ("it must be established that the proposed class representatives have standing to pursue the claims as to which class wide relief is sought.").

Generally, a class action cannot be maintained unless there is a named plaintiff with a live controversy both when the complaint is filed and when the class is certified. See Tucker v. Phyfer, 819 F.2d 1030, 1033 (11th Cir. 1987) ("In a class

action, the claim of the named plaintiff, who seeks to represent the class, must be live both at the time he brings suit and when the district court determines whether to certify the putative class. If the plaintiff's claim is not live, the court lacks a justiciable controversy and must dismiss the claim as moot.") (overruled in part on other grounds, United States v. White, 723 Fed. Appx. 844 (11th Cir. 2018)).

And standing to seek injunctive relief should be decided before class certification. Prado-Steiman v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000) ("prior to the certification of a class, and technically speaking before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim"). Griffin v. Dugger, 823 F.2d 1476, 1482 (11th Cir. 1987) ("Only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others."); Howard v. City of Greenwood, 783 F.2d 1311, 1312 n.2 (5th Cir. 1986) ("An action under [Rule] 23(b)(2) was inappropriate because the plaintiffs had no standing to seek injunctive relief.... [P]ast exposure to illegal conduct would not in itself show a present case or controversy for injunctive relief...if unaccompanied by any present adverse effects.") (citing Lyons, 461 U.S. at 102).

The post-certification exception to the mootness doctrine does not apply here since the Court has not ruled on Plaintiffs' motion for class certification. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980) (citing Sosna v. Iowa, 419 U.S. 393 (1975)) ("a named plaintiff whose claim on the merits expires after class certification may still adequately represent the class"). See also Cameron-Grant v. Maxim Healthcare Servs., Inc., 347 F.3d 1240, 1244-45 (11th Cir. 2003).

D. A Plaintiff Must Maintain Standing Throughout the Life of the Case.

A plaintiff seeking injunctive or declaratory relief must maintain standing and avoid mootness throughout the life of the case. The Supreme Court has recognized that "a change in the legal framework" could moot a dispute that previously presented an adjudicable case or controversy. Lewis v. Cont'l Bank Corp., 494 U.S. 472, 482 (1990). In the Court's words,

> This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed.... The parties must continue to have a " 'personal stake in the outcome' " of the lawsuit.

Id. at 477-78 (quoting Lyons, 461 U.S. at 101; Baker v. Carr, 369 U.S. 186, 204 (1962)).

Accordingly, the Eleventh Circuit has held that "a challenge to governmental action has been mooted when the alleged wrongdoers have ceased the allegedly

illegal behavior and the court can discern no reasonable chance that they will resume it upon termination of the suit." Troiano v. Supervisor of Elections, 382 F.3d 1276, 1284 (11th Cir. 2004). See also Jews for Jesus, Inc. v. Hillsborough County Aviation Auth., 162 F.3d 627, 629 (11th Cir. 1998) (holding that where a prior policy had changed "there [was] no meaningful relief left for the court to give" and "[t]he only remaining issue [was] whether the [defendant's] policy ***was*** constitutional—which, ...is a purely academic point") (emphasis original).

Underscoring that a change in regulations may moot a legal challenge, the Supreme Court held in Princeton Univ. v. Schmid, 455 U.S. 100, 103 (1982), that because Princeton University "substantially amended its regulations governing solicitation, distribution of literature, and similar activities on University property by those not affiliated with the University....the validity of the old regulation is moot." As a result, the Court ruled, "[T]his case has 'lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law.' " Id. at 103.

In like manner, "the repeal or amendment of an allegedly unconstitutional statute moots legal challenges to the legitimacy of the repealed legislation." Nat'l Adver. Co. v. City of Miami, 402 F.3d 1329, 1332 (11th Cir. 2005), cert. denied, 546 U.S. 1170 (2006). See also Tanner Adver. Group v. Fayette County, 451 F.3d

777, 785 (11th Cir. 2006); Naturist Soc., Inc. v. Fillyaw, 958 F.2d 1515, 1520 (11th Cir. 1992).

Moreover, although courts are reluctant to dismiss for mootness claims against private entities that have changed their policies so as to comply with the law, "governmental entities and officials [are] given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities." Nat'l Adver. Co. v. City of Miami, 402 F.3d at 1333-1334 (quoting Coral Springs St. Sys. v. City of Sunrise, 371 F.3d 1320, 1328-29 (11th Cir. 2004)).

In our case, as discussed below, any alleged violations by Defendants of the legal rights of deaf offenders or that may have existed when this suit was filed have been corrected. In July 2019, DCS, as a new agency, had no written ADA Title II policy. DCS now allows a CSO to engage VRI, Communication Access Realtime Translation (CART), and other accommodations without administrative approval in order to facilitate communications with deaf offenders. DCS also has a comprehensive written ADA Title II policy, which explicitly requires full compliance with the ADA, allows an offender to request an accommodation, and provides a grievance mechanism. (MSJ Exhibit B (Smith Decl. 3) ¶¶ 4, 6 (Attachment 1, Policy 6.340)). This deprives Plaintiffs of standing.

IV. Prerequisites for Permanent Injunctive Relief

To obtain permanent injunctive relief, Plaintiffs must also satisfy other requirements that overlap the elements of standing. The Supreme Court has held:

> "[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it 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, 561 U.S. 139, 156-57 (2010). A plaintiff seeking equitable relief must make "a clear showing of immediate irreparable injury," or a "presently existing actual threat; [an injunction] may not be used simply to eliminate a possibility of a remote future injury...." Acierno v. New Castle County, 40 F.3d 645, 655 (3d Cir. 1994) (bracket original).

As discussed below, Plaintiffs in our case cannot show irreparable injury or that hardships and public interest balance in their favor.

V. Plaintiffs Lack Standing to Seek Injunctive Relief and Cannot Satisfy Requirements for a Permanent Injunction.

Plaintiffs do not have standing to seek injunctive relief against DCS and Commissioner Nail. Indeed, they cannot meet any of the three Lujan requirements for standing. For similar reasons, Plaintiffs also cannot satisfy the requirements for equitable relief.

As to standing, named Plaintiffs lack standing for their individual claims and consequently also lack standing to seek class certification for unnamed potential plaintiffs. They fail all elements of the conjunctive Lujan test of standing: (1) "an injury in fact...which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," (2) caused by the defendant, which means it is "fairly...trace[able] to the challenged action of the defendant," ***and*** (3) "likely, as opposed to merely speculative that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 560-61.

First, Plaintiffs cannot show an "injury in fact" that is "actual or imminent." As discussed above, " '[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief...if unaccompanied by any continuing, present adverse effects.' " Lyons, 461 U.S. at 102 (quoting O'Shea, 414 U.S. at 495-96). As discussed above, the Supreme Court held in Lyons that Los Angeles police officers' use of a chokehold on a motorist "rendering him unconscious and causing damage to his larynx" did "nothing" to establish standing to seek injunctive relief against the use of such holds. Lyons, 461 U.S. at 97-98, 105-06.

Another instructive case is Rizzo v. Goode, 423 U.S. 362 (1976). There, the Supreme Court reversed an injunction against the Philadelphia Police Department

comprehensively "overhauling police disciplinary procedures." Id. at 373. The Court held that some 16 constitutional violations by 7,500 policemen in Philadelphia—a city of three million inhabitants—over a period of one year did not support injunctive relief. Id. at 374-75. The Court noted that plaintiffs "lacked the requisite personal stake in the outcome" necessary for standing inasmuch as their claims depended "upon what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures." Id. at 372-73. Because the district court had certified the class and granted injunctive relief, the Supreme Court reached and reversed on the merits, not resting its holding on lack of standing.

In Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008), the Supreme Court reviewed a preliminary injunction against the U.S. Navy limiting sonar training exercises based on potential harm to marine mammals. The Court held that the "possibility" of harm is not sufficient to support a preliminary injunction: "We agree with the Navy that the Ninth Circuit's 'possibility' standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction." Id. at 22. The Court reversed the lower courts although the record showed some possibility of harm: "564 physical injuries to marine mammals, as well as 170,000

disturbances of marine mammals' behavior." Id. at 19-20. The Court emphasized that its ruling on the preliminary injunction would also control the outcome of the request for permanent injunctive relief. Id. at 33 ("our analysis of the propriety of preliminary relief is applicable to any permanent injunction as well").

An additional case that speaks to this issue is Lewis v. Casey, 518 U.S. 343 (1996), in which the Supreme Court reversed an injunction imposing systemwide relief against the Arizona prison system regarding access by inmates to prison law libraries. The district court had identified only "two instances of actual injury." The Court held: "The constitutional violation has not been shown to be systemwide, and granting a remedy beyond what was necessary to provide relief to [inmates] Harris and Bartholic was therefore improper." Id. at, 356, 360.

One might have expected instant Plaintiffs to marshal evidence that Defendants are responsible for defective policies that have caused ADA violations or other violations of law. Indeed, Plaintiffs allege in their complaint that Defendants maintain "unlawful policies, practices, and procedures" that have harmed Plaintiffs. (Doc. 181 ¶¶ 27, 31, 33, 58, 68). Without genuine issue of material fact, these allegations fail.

The current ADA Title II policy of DCS was last modified June 1, 2021. A copy is attached to the summary judgment declaration of DCS ADA Coordinator

Darrell Smith. When this suit was filed, DCS was a new agency (four-years-old). It had a written policy on interpreters but no written ADA Title II policy. (MSJ Exhibit B (Smith Decl. 3) ¶¶ 4,6 (Attachment 1, Policy 6.340)).

As Defendants have previously argued, even assuming that the previous DCS interpreters policy was insufficient and/or defective, the law does not forbid an entity from having a defective policy so long as the policy does not cause a violation of law. Rather, an entity is required simply not to violate the law.

The Eleventh Circuit addressed the question of an allegedly defective government policy in Kerr v. City of W. Palm Beach, 875 F.2d 1546 (11th Cir. 1989), which involved the use of police dogs. The Court recognized that the city had "promulgated a general policy that may permit unconstitutional seizures in some circumstances, [although] the Department's policy does not require its officers to act unconstitutionally." The Court ruled that "such general policies are not unconstitutional on their face [and] appellants therefore have no standing to seek injunctive or declaratory relief against the policy's continued usage." Id. at 1554. See also City of L.A. v. Heller, 475 U.S. 796, 799 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point."); Temkin v. Frederick Cty. Comm'rs, 945 F.2d 716,

723–24 (4th Cir. 1991) (rejecting claim that county commissioners "failed to adopt adequate policies governing the training and supervision of officers engaged in high-speed pursuits...absent a finding of a constitutional violation").

Due to the adoption by DCS of its new ADA policy and its implementation of new practices regarding VRI and CART (MSJ Exhibit B (Smith Decl. 3) ¶¶ 4, 6 (Attachment 1, Policy 6.340), Plaintiffs attacks on the previous, superseded policy and practices are moot.

Most importantly, with the goal of effective communications, the current ADA Title II policy of DCS provides for the use of VRI 24/7 and also a variety of other accommodations for hearing-impaired offenders. Neither VRI nor other accommodations, including CART, require administrative approval. (MSJ Exhibit B (Smith Decl. 3) ¶¶ 4, 6, 15-19 (Attachment 1, Policy 6.340)).

Beginning September 11, 2019, DCS has provided VRI for same location communications with hearing-impaired offenders. And DCS is able to provide CART for those hearing-impaired offenders who do not know ASL. DCS provides these services through statewide contracts and/or purchase orders with various vendors. (MSJ Exhibit B (Smith Decl. 3) ¶¶ 4, 15-17 (Attachment 2); Doc. 67-1 (Smith Decl. 1) ¶¶ 5, 9-11 (Attachments 1, 2)).

At most, Plaintiffs in the present case can show one past technical ADA violation, which is completely insufficient to establish the "actual injury" necessary for standing to seek a permanent injunction. The primary future harm alleged by Plaintiffs is that they do not know the conditions of supervision and as a result are subject to the "constant risk" or "constant threat of incarceration" in the form of revocation—absent preliminary and permanent injunctions. (Doc. 181, ¶¶ 1, 2, 7, 8, 30, 46, 76-78). But no revocation proceedings have been initiated against Cobb or Nettles. (Doc. 34-1, Exhibit A (Mitchell Decl., re Brandon Cobb), ¶ 16; Doc. 34-4, Exhibit D (Worley Decl., re Nettles) ¶ 15).

Only Hill has been the subject of revocation, but she would have been revoked even had there been perfect communication since she admitted a drug violation. Hill was arrested on a probation revocation warrant for failing a drug screen, and she admitted the drug usage. Using a laptop computer, CSO Adam Roper engaged an ASL interpreter over VRI on November 3, 2020 at the Forsyth County, Georgia Jail to review with Hill a proposed consent order admitting the drug violation and a community service violation. The Forsyth County Sheriff's policies during the Covid pandemic required Roper and Hill to communicate through a glass window in the visitation area and did not allow Roper and Hill to be in the same room. Roper read the proposed consent order to Hill through the ASL interpreter, but mistakenly

failed to read two critical paragraphs. (MSJ Exhibit D (Roper Decl.) ¶¶ 6-13; Roper Dep. at 157:6-158:9, 247:8-248:16, 249:21-252:11, 255:20-263:12, 265:21-266:3; Dep. Exhibits 115-117).

Defendants concede that in the November 3, 2020 event, communication between Roper and Hill did not satisfy the DCS ADA Title II policy, which requires auxiliary aids and services sufficient to establish "effective communication." The failure of Hill's CSO to read through the ASL interpreter two critical paragraphs of the consent order was technically ineffective and Hill should not have been cited for failing to perform community service during the pandemic. But this single failure is not evidence that Hill or any other offenders under DCS supervision face an immediate and substantial threat of future harm from violations by DCS of the ADA or other laws. It is undisputed that Hill would have been revoked even if the communication had been perfect, inasmuch as she admitted the drug violation. (MSJ Exhibit D ¶ 13; Dep. Exhibits 115-117).

Across some 1,800 home and office visits by CSOs with deaf offenders over the past two years, DCS management is aware of only the technical violation involving Hill and Roper on November 3, 2020. ADA Coordinator Darrell Smith is aware of no other instance of ineffective communication with a deaf offender in all

of the home and office visits between CSOs and deaf offenders over this period. ((MSJ Exhibit C (Nail Decl.) ¶¶ 5-6; MSJ Exhibit B (Smith Decl. 3) ¶ 21).

Plaintiffs also cannot meet the *second* and *third* standing requirements of Lujan and progeny, i.e., traceability and redressability. Traceability requires Plaintiffs to show that alleged violations of law are "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Lujan, 504 U.S. at 560-61.

Again, the primary future harm Plaintiffs allege is that they face revocation because they do not know the conditions of probation and parole. The yawning gap in this argument is that other Georgia agencies which are not Defendants have independent legal responsibilities to communicate to probationers and parolees conditions of supervision. These include sentencing courts, the Georgia Department of Corrections (DOC), the Georgia Board of Pardons and Paroles (BPP), and Georgia sheriffs.

State criminal courts in Georgia, not DCS, are responsible for communication with defendants in court proceedings. Ga. Uniform Superior Ct. Rule 73; Ga. Supreme Ct. Rules, Use of Interpreters for Non-English Speaking and Hearing Impaired Persons. (Roper Dep. at 268:10-19).

Importantly, all Plaintiffs were provided with the terms of their criminal sentences and probation/parole conditions at sentencing. (Doc. 34-1 (Brandon Cobb) ¶¶ 9, 15 (Attachment 1, at 9-16); Doc. 34-4 (Joseph Nettles) ¶¶ 9, 14 (Attachment 1, at 8-22); MSJ Exhibit D (Roper Decl.) (Mary Hill) ¶¶ 4, 5 (Attachment 1)).

Under state law, DOC, DCS, Georgia sheriffs, Georgia Bureau of Investigation, and other state agencies have various responsibilities regarding sex offender registration. DCS is the "appropriate official" responsible for communications to such offenders ***only*** with respect to those "sentenced to probation without any sentence of incarceration in the state prison system or who [are] sentenced [as] first offenders." O.C.G.A. § 42-1-12(a)(2). DOC, not DCS, is the "appropriate official" responsible for communicating registration requirements and conditions of supervision to sex offender who are sentenced to incarceration before probation. DOC is required to communicate this information before a sex offender is released from prison or placed on probation or parole. § 42-1-12(b). And BPP is the "appropriate official" responsible for communicating registration requirements and conditions of supervision to sex offender who are placed on parole. § 42-1-12(a)(2), -12(b).

Nettles, who is a sex offender, served time in prison before entering probation. (Doc. 181 ¶ 24; Nettles Dep. II (05/25/2021) at 124:7-11). Thus, DOC and local sheriffs have had the responsibility of communicating the terms of sex offender registration to him, not DCS. If Nettles or other sex offenders under supervision contend they have not been adequately informed of the conditions of their registration, they should have sued DOC and the sheriffs of the counties in which they have resided. DCS has had no responsibility to communicate to them the terms of their sex offender registration.

Moreover, the claim that Plaintiffs are threatened with probation revocation without due process in violation of the Fourteenth Amendment is confused and fallacious. (Doc. 181 ¶¶ 14, 71-78). Under O.C.G.A. § 42-8-34.1, probation cannot be revoked unless the full panoply of due process requirements is provided by the court—not DCS. These include written notice, hearing, and proof by preponderance of evidence. See Lewis v. Sims, 277 Ga. 240, 241 (2003). Moreover, Georgia court rules require interpreters for hearings and trials. Ga. Uniform Superior Ct. Rule 73; Ga. Supreme Ct. Rules, Use of Interpreters for Non-English Speaking and Hearing Impaired Persons. Indeed, former Plaintiff Carlos Herrera was provided with two ASL interpreters at criminal sentencing—one in the courtroom and the other to assist

communications with his attorney. (Doc. 69-1 (Strauss Dep.), at 166-172; Dep. Exhibit 18).

Although parole revocation proceedings, unlike probation revocations, are administrative in nature, "The same minimum constitutional due process requirements apply in both probation and parole revocation hearings." Williams v. Lawrence, 273 Ga. 295, 298 (2001). Due process requirements for parole revocation are secured by O.C.G.A. §§ 42-9-48, et seq.

Further, Defendants contend that the state would be required to prove in a revocation hearing by a preponderance of the evidence that a probationer or parolee intentionally violated a condition of probation or parole. See Klicka v. State, 315 Ga.App. 635, 637-38 (2012). Thus, a deaf offender could not be revoked if he truly did not understand, due to poor communications or deafness, the terms of probation or parole.

As to the redressability element of standing, Plaintiffs are required to show that the alleged harm a Court order restraining Defendants would provide the relief they seek. They must show that it is "likely, as opposed to merely speculative that the injury will be redressed by a favorable decision." Lujan, 504 U.S. at 560-61. For the same reasons discussed above, Plaintiffs' failure to name as Defendants the

other state actors involved in probation and parole defeats the redressability requirement for standing.

Our Plaintiffs and other criminal offenders have been provided with the conditions of their probation/parole by state actors other than DCS and these other actors are not parties to this lawsuit. Those on probation were informed by the trial courts at sentencing of the conditions of probation. The only Plaintiff on parole, Brandon Cobb, was informed of the conditions of parole by BPP. (Doc. 34-1 (Brandon Cobb) ¶¶ 9, 15 (Attachment 1, at 9-16); Doc. 34-4 (Joseph Nettles) ¶¶ 9, 14 (Attachment 1, at 8-22); MSJ Exhibit D (Roper Decl.) (Mary Hill) ¶¶ 4, 5 (Attachment 1)).

As noted, Georgia court rules require interpreters for hearings and trials. Ga. Uniform Superior Ct. Rule 73; Ga. Supreme Ct. Rules, Use of Interpreters for Non-English Speaking and Hearing Impaired Persons. DCS is not involved in, and has no control over, these court proceedings.

And probation/parole revocation proceedings, over which DCS also has no authority, are accompanied by all required due process rights, including the right to interpreters outlined above. O.C.G.A. §§ 42-8-34.1, 42-9-48, et seq.; Lewis v. Sims, 277 Ga. 240, 241 (2003); Williams v. Lawrence, 273 Ga. 295, 298 (2001). (Doc. 76 at 18-19). Therefore, at revocation proceedings, hearing-impaired offenders are

guaranteed due process from state courts. This includes accommodations for their hearing issues.

As a result, if criminal offenders in Georgia are not provided hearing accommodations adequate for communicating terms and conditions of probation/parole or are not provided accommodations at revocation proceedings, those matters are outside the purview and responsibility of DCS. The same is true for communicating the conditions of sex offender registration, unless a sex offender is sentenced to probation without prior incarceration.

For reasons similar to those that deprive them of standing, Plaintiffs cannot meet the requirements for permanent injunctive relief. They cannot show they have "suffered an irreparable injury," "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted," and "the public interest would not be disserved by a permanent injunction." Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 156-57 (2010).

As discussed above, no deaf offenders have been harmed by the policies of DCS. Moreover, an injunction would necessarily harm the administration of services by DCS. It would disrupt the processes currently in place and inevitably divert resources from security and other important mandates of the agency. For example, if DCS must allow each Plaintiff to choose his own preferred

accommodation (in some instances two interpreters for every encounter) and is required to take live ASL interpreters on every field visit, DCS will be required to reallocate resources from its other priorities. (MSJ Exhibit C (Nail Decl.) ¶¶ 5-19). On the facts before the Court, an injunction would harm and disserve the public interest.

VI. The Relief Requested by Plaintiffs is Not Within the Proper Scope of Injunctive Relief.

Plaintiffs seek an injunction "enjoining Defendants from engaging in…unlawful discrimination" and requiring Defendants to provide "qualified ASL interpreters, auxiliary aids and services, and reasonable modifications, as determined by each individual's preferred method of communication, to Plaintiffs and to all other deaf and hard of hearing individuals subject to GDCS supervision, including…at every meeting and encounter with a GDCS officer." (Doc. 181 at 40). In their second amended complaint, all three Plaintiffs allege they are entitled to both a live ASL interpreter and a CDI for all meetings with DCS staff. (Doc. 181 ¶¶ 4, 21, 37, 43).

First, to the extent Plaintiffs seek an injunction merely requiring that Defendants not engage in "discrimination," it would be invalid. (Doc. 181, at 40). Courts do not favor injunctions that merely require government actors to comply

with the law or a statute. State agencies are already required to comply with law. In N.L.R.B. v. Express Pub. Co., 312 U.S. 426, 435-36 (1941), the Supreme Court held:

> [T]he mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.

Id. at 435-36. See also Burton v. City of Belle Glade, 178 F.3d 1175, 1200-1201 (11th Cir. 1999) (rejecting an "injunction [that] does no more than instruct a defendant to 'obey the law' " and recognizing "an injunction must 'contain "an operative command capable of enforcement." ' " (quoting International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n, 389 U.S. 64, 73-74 (1967)); S.E.C. v. Goble, 682 F.3d 934, 949-952 (11th Cir. 2012).

Second, unlike Plaintiffs' premise and requested injunction, DCS is not required automatically to provide whatever accommodation a disabled person may request. The DOJ regulation codified at 28 C.F.R. § 35.160(b)(2) says that "a public entity shall give primary consideration to the requests of individuals with disabilities." But this does not mean that the entity is required automatically to provide the requested accommodation(s). Tennessee v. Lane, 541 U.S. 509, 531-32 (2004) ("Title II does not require States to employ any and all means" to provide accessibility and there often are "a number of ways" to satisfy the requirements of

the law.); McCullum v. Orlando Reg'l Healthcare Sys., Inc., 768 F.3d 1135, 1147 (11th Cir. 2014) ("The regulations do not require healthcare providers to supply any and all auxiliary aids even if they are desired and demanded."); Silva v. Baptist Health South Florida, 856 F.3d 824, 840 n.14 (11th Cir. 2017) ("[A] patient is not entitled to an in-person interpreter in every situation, even if he or she asks for it. The hospital ultimately gets to decide, after consulting with the patient, what auxiliary aid to provide.") (citing McCullum).

Third, the injunction requested by Plaintiffs that DCS provide all accommodations requested by deaf offenders, including both live hearing ASL interpreters and CDIs (certified deaf ASL interpreters) "at every meeting and encounter with a GDCS officer" (Doc. 181 at 40) is not viable due to adverse effects on DCS operations. Under 28 CFR § 35.164, DCS is not required to "to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."

The attached declaration of DCS Commissioner Michael Nail demonstrates that the injunction requested by Plaintiffs would cause fundamental alterations in the services, programs, and activities of DCS and impose undue financial and administrative burdens. As Nail shows: "[I]f DCS is required to hire a live ASL interpreter or both a hearing interpreter and…CDI[] for all meetings between CSOs

and deaf or hearing-impaired offenders, approximately $788,126 in additional funds would be needed by DCS." (MSJ Exhibit C (Nail Decl.) ¶¶ 5-8).

Moreover, home visits with probationers and parolees often involve security issues, such as arrests and uses of force. ASL interpreters generally do not have law enforcement training. Commissioner Nail shows that for ASL to provide the additional security needed for home visits with offenders by ASL interpreters would require that DCS "hire 38 additional CSOs" requiring approximately $2,368,082 in additional funds" beyond the agency's current budget, and DCS would be required to provide body armor to the interpreters. (MSJ Exhibit C (Nail Decl.) ¶¶ 5, 10-15).

Further, Plaintiffs' proposed injunction would severely interfere in the ability of DCS to manage its activities so as to limit the spread of Covid-19. During the pandemic starting in March 2020, DCS has at times restricted home visits with offenders to execution of arrest or search warrants and other emergencies. During these times, DCS has generally communicated with deaf offenders by VRI. (MSJ Exhibit C (Nail Decl.) ¶¶ 5, 16-19; MSJ Exhibit B (Smith Decl. 3) ¶¶ 24-26).

VII. Conclusion

For these reasons, the Court should grant complete summary judgment against Plaintiffs' claims. Plaintiffs' requested injunction would trample important federalism principles. Moreover, due the absence of evidence of a realistic threat of

substantial future harm, Plaintiffs lack standing to seek permanent injunctive relief and fail the irreparable harm requirement for equitable relief. And the relief requested here exceeds the proper scope of an injunction.[3]

Respectfully Submitted,

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[3]This document has been prepared in Times New Roman (14 pt.) font, which has been approved by the Local Rules of this Court.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BRANDON COBB, et al., etc., Plaintiffs, v. GEORGIA DEPARTMENT OF COMMUNITY SUPERVISION, et al., etc., Defendants.	CIVIL ACTION NO. 1:19-cv-03285-WMR

CERTIFICATE OF SERVICE

I hereby certify that I have this date electronically filed a copy of the foregoing MOTION BY DEFENDANTS FOR SUMMARY JUDGMENT, SUPPORTING BRIEF, STATEMENT OF MATERIAL FACTS NOT GENUINELY IN ISSUE, AND EXHIBITS with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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