

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES	:	
UNION OF PENNSYLVANIA,	:	
	:	No.
Plaintiff,	:	
	:	
v.	:	
	:	
MONTGOMERY COUNTY;	:	
MONTGOMERY COUNTY	:	
CORRECTIONAL FACILITY;	:	
SEAN P. McGEE, Warden;	:	
GARY CHESNEY, Director; and	:	
BRIAN KNIEZEWSKI, Assistant Director,	:	
	:	
Defendants.	:	

COMPLAINT

INTRODUCTION

1. Since the 1950s, the American Civil Liberties Union of Pennsylvania (“ACLU-PA”) has worked to defend and protect the constitutional rights of individuals across the Commonwealth. One critical aspect of the organization’s work involves defending and protecting the fundamental constitutional rights

guaranteed to individuals deprived by the government of their liberty while they await resolution of criminal charges or serve criminal sentences. Among other things, the ACLU-PA works with and for detained individuals to ensure that conditions of confinement are constitutional and consistent with health, safety, and human dignity, and that the criminal legal system that has placed them behind bars abides by applicable constitutional requirements. The ACLU-PA's commitment to working for detained individuals is among the most critical aspects of its mission because this is a population largely without resources, access to halls of power, or wherewithal to defend against constitutional and human rights violations, many of which take place in spaces shielded from public scrutiny.

2. The ACLU-PA's work would not be possible without access to individuals detained in state, county and local detention facilities. The organization receives thousands of communications each year from detained individuals alleging constitutional rights violations. To investigate and evaluate potential claims, ACLU-PA attorneys must communicate in confidence with the detained individuals who are prospective clients, as well as other incarcerated people who may have relevant information and could be witnesses to the violations. Under Pennsylvania's Rules of Professional Conduct, ACLU-PA's attorneys do not and cannot enter into a formal attorney-client relationship prior to having confidential discussions with the prospective client to determine, *inter alia*, whether the organization is competent to

handle the matter, the prospective client's factual allegations can be substantiated, there is no conflict, and the ACLU-PA agrees with the prospective client on the scope and terms of representation. Only after this vetting period does, and ethically can, the ACLU-PA enter into a formal attorney-client relationship. These communications—before the ACLU-PA establishes a formal attorney-client relationship with any individual, including an incarcerated person—are ethically required and essential to the organization's effectiveness. The First Amendment to the U.S. Constitution has long been held to apply to attorneys seeking to interview prospective clients for the purpose of furthering the civil-rights objectives of an organization. *See, e.g., In re Primus*, 436 U.S. 412, 423-26, 431 (1978); *NAACP v. Button*, 371 U.S. 415, 428-30 (1963).

3. Pro bono assistance from the ACLU-PA is often the only means an incarcerated person has to effectively address constitutional violations. Court-appointed criminal-defense counsel and public defenders typically lack the resources or expertise, or otherwise are unable to address, the civil rights issues the ACLU-PA handles. The ACLU-PA and only a few other non-profits (like the Pennsylvania Institutional Law Project, the Abolitionist Law Center, and Amistad Law Project) regularly provide *pro bono* legal services to address civil rights violations experienced by incarcerated people in Pennsylvania.

4. The Montgomery County Correctional Facility (“MCCF”) is one of the many detention facilities across Pennsylvania where these critical communications about potential civil rights violations occur. MCCF is one of the largest jails in Pennsylvania, housing 878 individuals as of April 2021, including those awaiting trial and hearings for alleged supervision violations and others who have been convicted and sentenced to prison terms under 24 months. *See* Montgomery County Correctional Facility, Board of Prison Inspectors, Meeting Minutes (Apr. 8, 2021), https://www.montcopa.org/AgendaCenter/ViewFile/Minutes/_04082021-1241.

5. Over the past several years, the ACLU-PA’s investigations into the administration of justice in Montgomery County have resulted in a string of lawsuits and administrative proceedings against the county and MCCF, some of which are ongoing. In January 2021, for example, the ACLU-PA filed a class-action lawsuit challenging Montgomery County’s longstanding policy of unlawfully collecting duplicative court costs from criminal defendants. *See McFalls v. 38th Judicial Dist.*, No. 4 M.D. 2021 (Pa. Commw. Ct. filed Jan. 5, 2021). In addition, MCCF is currently appealing the ACLU-PA’s successful petition under the state open records law for access to MCCF’s jail admissions logs, which provides information about individuals detained at MCCF. *See Montgomery Cty. v. Li*, No. 2021-02499 (Pa. Ct. Com. Pl. filed Feb. 26, 2021).

6. In recent months, the ACLU-PA, the American Civil Liberties Union Foundation (collectively with ACLU-PA, “ACLU”), and its affiliated pro bono co-counsel (collectively, “ACLU-affiliated attorneys”) have been investigating numerous complaints concerning constitutional violations within Montgomery County’s probation and parole system and detention at MCCF. ACLU-affiliated attorneys have gathered information through a variety of means, including articles and reports in the public domain. *See, e.g.,* Samantha Melamed & Dylan Purcell, *The Probation Trap*, Phila. Inquirer, Oct. 24, 2019, <https://www.inquirer.com/news/inq/probation-parole-pennsylvania-philadelphia-criminal-justice-system-20191024.html>; Human Rights Watch & ACLU, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States* (July 31, 2020), <https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states>. Chief among these sources of information are confidential interviews with people detained at MCCF. Between October 2020 and March 2021, ACLU-affiliated attorneys conducted several dozen remote-access legal visits with detained individuals. During this time, due to COVID-19 restrictions, MCCF did not permit any in-person visits. MCCF never expressed any concerns about security or logistical issues caused by ACLU-affiliated attorney visits.

7. Nonetheless, on or about March 15, 2021, MCCF adopted a new policy of preventing known ACLU-affiliated attorneys from conducting virtual visits with detained persons unless the attorneys first demonstrate a pre-existing attorney-client relationship with those persons. The policy requires that the attorney-client relationship be memorialized in “court documentation or a letter of representation.” MCCF still limits and discourages in-person attorney visits due to COVID-19 and telephone calls are not confidential. Accordingly, Defendants’ actions block Plaintiff’s confidential attorney communications with prospective clients and witnesses.

8. Under this policy, Defendants unilaterally cancelled numerous visits scheduled by attorneys known to be ACLU-affiliated. Defendants refused to allow these ACLU-affiliated attorneys to conduct any professional visits with individuals detained at MCCF, including individuals with whom they had previously met and who had written letters seeking the ACLU’s legal assistance. In some instances, the ACLU and the incarcerated individuals were moving towards formal representation by the ACLU to address possible constitutional violations. Defendants’ de facto ban on ACLU-affiliated attorneys’ ability to meet and confer with prospective clients and witnesses effectively blocks the ACLU’s ability to provide legal representation to address ongoing constitutional rights violations, and simultaneously insulates Defendants from legal accountability.

9. Defendants have not demanded proof of client representation from non-ACLU-affiliated attorneys, allowing them to conduct attorney visits with individuals detained at MCCF without imposing the same preconditions. In other words, the policy appears to directly target only attorneys known to be affiliated with the ACLU.

10. Plaintiff brings this civil rights action for declaratory and injunctive relief to enjoin Defendants' unconstitutional attorney-visitation policy, which singles out the ACLU and lawyers working with it, and only these lawyers, for unreasonable, unnecessary and retaliatory attorney-visitation restrictions and interferes with the rights of persons detained in MCCF to access the courts.

11. The First Amendment to the U.S. Constitution protects the rights of free speech and association, and has long been held to apply to attorneys seeking to interview prospective clients or pursue litigation for the purpose of furthering the civil-rights objectives of an organization. *See In re Primus*, 436 U.S. at 423-26, 431; *Button*, 371 U.S. 428-30. Defendants' visitation policy violates the First Amendment in three distinct ways. First, the policy unreasonably burdens the ACLU's ability to even investigate prospective clients' claims, let alone gather the information necessary to file lawsuits to vindicate ongoing constitutional violations. Second, the policy appears to apply *only* to attorneys known by Defendants to be affiliated with the ACLU and thus reflects impermissible content and viewpoint

discrimination. Third, the policy amounts to unconstitutional retaliation against the ACLU for engaging in First Amendment-protected activity—namely, pursuing civil rights litigation against Defendants Montgomery County and MCCF.

12. Defendants' policy violates the constitutional rights of incarcerated individuals as well. The Due Process Clause and the First Amendment protect the rights of detained persons to access courts and legal assistance to present allegations concerning violations of fundamental constitutional rights. *Bounds v. Smith*, 430 U.S. 817, 821-28 (1977); *Wolff v. McDonnell*, 418 U.S. 539, 578-80 (1974). Several individuals incarcerated at MCCF have sought the ACLU's help in pursuing civil rights claims, but Defendants' denial of access to counsel significantly impedes their ability to seek legal redress for ongoing civil rights violations.

13. The ACLU and its prospective clients have suffered and will continue to suffer irreparable harm, for which there is no adequate remedy at law, because of Defendants' substantial interference with their First Amendment rights and their right of access to the courts. Plaintiffs therefore seek preliminary, and thereafter permanent, injunctive relief.

JURISDICTION AND VENUE

14. This action to vindicate the First Amendment and Due Process rights of ACLU-PA, and their prospective clients, is brought under 42 U.S.C. § 1983. This Court has jurisdiction over this action under 28 U.S.C. § 1331.

15. Venue is proper in the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1391(b) because the events that gave rise to this action occurred within the Eastern District of Pennsylvania, and Defendants are subject to personal jurisdiction within the Eastern District of Pennsylvania. The Court has personal jurisdiction over each Defendant, and has the authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202.

PARTIES

16. The American Civil Liberties Union of Pennsylvania (ACLU-PA) is a state affiliate of the national American Civil Liberties Union Foundation, both of which are non-profit, non-partisan, public-interest organizations dedicated to defending and protecting civil rights and civil liberties for all. The ACLU-PA has three offices across the Commonwealth, including one in Philadelphia. The ACLU-PA's mission is to protect and defend the constitutional rights and civil liberties of individuals across the Commonwealth, and includes providing legal advice to vulnerable populations, including incarcerated persons. The organization has a long history of litigating prisoners' rights cases.

17. The ACLU-PA routinely represents criminal defendants and people detained in jails and prisons in lawsuits seeking to vindicate their rights under the U.S. Constitution and federal law. For instance, the ACLU-PA recently brought

federal class-action lawsuits challenging unconstitutional conditions of confinement in both Philadelphia and Allegheny County jails following the COVID-19 pandemic. *See Remick v. City of Philadelphia*, No. 2:20-cv-01959-BMS (E.D. Pa. filed Apr. 20, 2020); *Graham v. Allegheny Cty.*, No. 2:20-cv-00496-CB-CRE (W.D. Pa. filed Apr. 8, 2020). The ACLU-PA has been class counsel in numerous other prisoners' rights cases, including an Eighth and Fourteenth Amendment challenge to the Commonwealth's use of perpetual solitary confinement brought on behalf of death-sentenced individuals, *see Reid v. Wetzel*, No. 1:18-cv-00176-JEJ (M.D. Pa. filed Jan. 25, 2018); a lawsuit challenging on First Amendment grounds the Department of Corrections' 2018 policy restricting attorneys' ability to communicate confidentially by mail with imprisoned clients, *see Pa. Institutional Law Project v. Wetzel*, 18-cv-02100-JEJ-EBC (M.D. Pa. filed Oct. 30, 2018); an Eighth Amendment challenge to the conditions at Pennsylvania's oldest county jail, *see Arison v. Fayette Cty.*, No. 2:18-cv-00845-MPK (W.D. Pa. filed June 26, 2018); an Eighth and Fourteenth Amendment challenge to Allegheny County Jail's use of punitive solitary confinement on pregnant detainees, *see Seitz v. Allegheny Cty.*, No. 2:16-cv-1879-CRE (W.D. Pa. filed Dec. 19, 2016); a Fourteenth Amendment and Americans with Disabilities Act lawsuit on behalf of seriously mentally ill jail detainees challenging illegal delays in transferring them to mental-health facilities for treatment, *see J.H. v. Dallas*, No. 1:15-cv-02057-SHR (M.D. Pa. filed Oct. 22,

2015); and an Eighth and Fourteenth Amendment challenge to the Pennsylvania Department of Corrections' treatment of seriously mentally ill prisoners, *see Disability Rights Network of Pa. v. Wetzel*, No. 1:13-cv-00635-JEJ (M.D. Pa. filed Mar. 11, 2013).

18. A current focus of the ACLU-PA's work is to ensure that county criminal-legal systems, which decide who is detained, for how long, and under what conditions, comply rigorously with state and federal constitutional strictures.

19. The ACLU-PA brings these claims on behalf of itself, its employees, and its prospective clients.

20. Defendant Montgomery County is a municipal corporation organized under the laws of the Commonwealth of Pennsylvania.

21. Defendant Montgomery County Correctional Facility is a correctional facility, or jail, that houses individuals awaiting trial on new criminal charges, hearings on alleged violations of supervision conditions, and already-convicted people serving sentences of incarceration under 24 months.

22. Defendant Sean McGee is the warden and custodian of Montgomery County Correctional Facility. Defendant McGee is Montgomery County's final policymaker concerning the MCCF's policies and practices. Plaintiff is suing Defendant McGee in his official capacity.

23. Defendant Gary Chesney is the Director of Inmate Services of Montgomery County Correctional Facility. In this capacity, he oversees legal visits between detained persons and attorneys. Plaintiff is suing Defendant Chesney in his official capacity.

24. Defendant Brian Kniezewski is the Assistant Director of Inmate Services of Montgomery County Correctional Facility. In this capacity, he oversees legal visits between detained persons and attorneys. Defendant Kniezewski communicated the policy barring known ACLU-affiliated attorneys from conducting legal visits without documentary evidence of a pre-existing attorney-client relationship. Plaintiff is suing Defendant Kniezewski in his official capacity.

25. The three aforementioned individual defendants were, at all relevant times, and still are, acting under color of state law.

FACTS

History of ACLU-PA Litigation against Montgomery County and MCCF

26. The ACLU-PA is a civil rights organization whose mission is to protect and defend the constitutional rights and civil liberties of individuals across the Commonwealth, including often society's most disadvantaged and vulnerable members. The ACLU-PA works in courts, legislatures, and communities to advocate for civil rights and civil liberties for all.

27. The ACLU-PA routinely undertakes cases that seek to vindicate the rights of criminal defendants and individuals detained in jails and prisons. Fulfillment of this work requires that ACLU-PA attorneys regularly communicate with and represent those people most directly impacted by the criminal legal system, namely, detained individuals.

28. Several recent ACLU-PA cases involve the administration of justice in Montgomery County. In January 2021, for example, the ACLU-PA filed a class action lawsuit challenging Montgomery County's policy of unlawfully collecting duplicative court costs from criminal defendants. *See McFalls v. 38th Judicial Dist.*, No. 4 M.D. 2021 (Pa. Commw. Ct. filed Jan. 5, 2021). This case generated substantial negative press coverage for Montgomery County. *See, e.g.*, Samantha Melamed, *Montgomery County Illegal Double-Bills Defendants for Court Costs*, Phila. Inquirer, Jan. 5, 2021, <https://www.inquirer.com/news/aclu-montgomery-county-pa-lawsuit-court-costs-fees-20210105.html>; Kenny Cooper, *ACLU, Civil Rights Attorneys Accuse Montco Court of Overcharging Defendants*, WHYY (Jan. 5, 2021), <https://whyy.org/articles/aclu-civil-rights-attorneys-accuse-montco-court-of-overcharging-defendants>.

29. Notably, in two of the ACLU-PA's ongoing cases, Montgomery County and MCCF suffered litigation setbacks around the time Defendants adopted the policy at issue, which limits ACLU-PA attorney visits.

30. In 2019, the ACLU-PA filed a lawsuit directly in the Pennsylvania Supreme Court challenging cash bail practices across the Commonwealth. Although the litigation named only the Philadelphia Criminal Court system, the Montgomery County Public Defender and Deputy Public Defender at the time, Dean Beer and Keisha Hudson, supported the ACLU-PA's lawsuit as *amici curiae*. Visibly and publicly displeased, the Montgomery County Board of Commissioners responded by directing the Public Defender to withdraw its *amicus* brief and summarily terminated both officials' employment. That prompted the ACLU-PA to file suit against the Commissioners, alleging that the termination of the public defenders violated Pennsylvania's Sunshine Act. The former public defenders separately sued Montgomery County, raising retaliation, whistleblower, and First Amendment claims. In December 2020, Montgomery County agreed to pay \$110,000 to settle Ms. Hudson's claims. *See* Max Mitchell, *Montgomery County to Pay \$310K to Settle Claims from Former Public Defender in Row Over Bail Policies*, The Legal Intelligencer, Mar. 19, 2021, <https://www.law.com/thelegalintelligencer/2021/03/19/montgomery-county-to-pay-310k-to-settle-claims-from-former-public-defenders-in-row-over-bail-policies/>. And in February 2021—one month before MCCF's adoption of the new visitation policy—Montgomery County settled Mr. Beer's lawsuit for another \$200,000. *See id.* This dispute and these settlements also generated negative publicity for Montgomery County.

31. MCCF likewise suffered a loss before the Pennsylvania Office of Open Records shortly before changing the visitation policy challenged here. In October 2020, the ACLU-PA submitted open records requests to five counties, including Montgomery County, seeking jail admissions reports. These reports provide information about whom the jails, including MCCF, are detaining and the reasons for detention. Every other county, either initially or following subsequent negotiations, complied with the ACLU-PA's requests. Montgomery County categorically refused to provide the reasons for detention; Montgomery County was the lone county that remained steadfast in its refusal of this request. Following MCCF's refusal, the ACLU-PA appealed. On January 29, 2021, the Office of Open Records ordered MCCF to disclose the requested reports. Montgomery County filed an appeal on March 2, 2021—just days before the adoption of the new visitation policy.

32. Due to the ACLU-PA's mission, history, and recent litigation, the ACLU-PA is widely known as an organization that vigorously defends and protects the rights of individuals detained by the Commonwealth and its sixty-seven counties, often in an adversarial capacity against the government actors operating the detention facility.

Pre-March 15, 2021 ACLU Virtual Visitation to MCCF

33. In March 2020, due to the COVID-19 pandemic, MCCF “temporarily restrict[ed] professional visitors,” including attorneys, from in-person visitation with people detained in MCCF. MCCF announced it was instead “offering free video visitation for attorneys/professional visitors due to the concerns over the Coronavirus,” through a system operated by GTL. MCCF instructed attorneys to register for a GTL account, which they could use to schedule visits with people detained in MCCF. MCCF did not limit professional video visits to people with pre-existing attorney-client relationships with individuals detained at MCCF or request documentation of attorney-client relationships in advance of such visits.

34. MCCF’s publicly available data indicate that since the beginning of the pandemic, there have been several hundred professional video visits with persons detained in MCCF each month. ACLU-affiliated attorneys participated in only a small fraction of these visits.

35. In relation to its recently-instituted and planned future litigation challenging constitutional violations in Montgomery County, ACLU-affiliated attorneys obtained GTL accounts and conducted confidential video visits with people incarcerated at MCCF. Between October 2020 and March 2021, ACLU-affiliated attorneys completed several dozen video interviews with persons detained

in MCCF. MCCF never expressed any concerns about security or logistical issues created by these visits.

March 15 Change in MCCF Policies Related to Video Visitation

36. Between February 19, 2021 and March 4, 2021, three attorneys from WilmerHale LLP working as cooperating attorneys with ACLU-PA registered with Defendants for access to GTL accounts.

37. On March 5, 2021, MCCF notified one of the WilmerHale ACLU-affiliated attorneys that a previously scheduled interview was being canceled. The notification did not provide any explanation. Defendants did not allow WilmerHale attorneys to conduct any video interviews after this date.

38. On March 11, 2021, another WilmerHale ACLU-affiliated attorney was advised that his GTL account was deactivated. When the attorney contacted Defendant Knieszewski, he responded on March 15, 2021 that the attorney would be able to schedule a visit with a person detained in MCCF but “court documentation or a letter of representation will be needed prior to the start of the visit.”

39. On March 15, 2021, an ACLU attorney was able to conduct an interview with a person detained at MCCF. Later that day, Defendant Knieszewski sent an email to the attorney stating:

[S]tarting today, court documentation or a letter of representation will be needed for any inmate you schedule a visit with prior to the

start of the visit. Failure to do so may result in the visit being cancelled.

40. Defendant Kniezeweki sent a similar email to a WilmerHale ACLU-affiliated attorney on March 15, 2021. Since March 15, 2021, MCCF has summarily cancelled all visits scheduled by attorneys known to be affiliated with the ACLU.

41. On March 23, 2021, the ACLU-PA sent a demand letter to Defendants McGee and Kniezewski. The ACLU-PA explained that Defendants' newly adopted visitation policy violates the constitutional rights of the ACLU-PA and the individuals detained at MCCF.

42. Defendants failed to respond to the ACLU-PA's letter and instead continued to deny all known ACLU-affiliated attorneys access to individuals incarcerated at MCCF.

43. ACLU-affiliated attorneys had interviews cancelled by Defendants on at least six separate occasions between mid-March and the end of April. Defendants provided no explanation for these cancellations.

44. Defendants have enforced this policy even where ACLU-affiliated attorneys have a prior relationship with the person scheduled to be interviewed. Two of the cancelled interviews were with two separate prospective clients, with whom ACLU attorneys had previously spoken and who asked to continue the discussions. A third cancelled interview was with a potential client whose family member had written a letter to the ACLU expressly seeking the ACLU's legal assistance on the

detained individual's behalf. Defendants' cancellation of these interviews thus interfered with both the ACLU's right to communicate with prospective clients and witnesses, and those individuals' right of access to the courts.

Post-March 15 Instances in which MCCF Did Not Cancel Attorney Visits

45. To the best of Plaintiff's knowledge, Defendants' policy applies *only* to visits conducted by attorneys known by Defendants to be affiliated with the ACLU. On multiple occasions in March and April 2021, three attorneys who are not affiliated with the ACLU were able to conduct interviews with persons detained at MCCF. Defendants allowed these interviews to take place without asking the attorney to provide documentation of a pre-existing attorney-client relationship.

46. On April 2, 2021, MCCF announced that it was changing its policy to begin permitting in-person visits but "professional video visitation or a non-contact secured visit is still the preferred method of meeting with the inmate population." The email reiterated that "space for in-person" visits was limited so "video" remained the "preferred option." The announcement did not mention any requirement for attorneys to provide written documentation of an attorney-client relationship in order to be able to visit persons detained in MCCF.

The Impact of the Visitation Policy on Plaintiffs and Persons Detained in MCCF

47. Defendants' interference with Plaintiff and its prospective clients and witnesses' right to communicate and right to pursue legal redress is causing them irreparable harm for which there is no adequate remedy at law.

48. The MCCF policy has directly impeded the work of the ACLU-PA. In particular, MCCF's policy and practice of denying ACLU-affiliated attorneys access to individuals incarcerated at MCCF has brought the investigation of unconstitutional probation and parole practices to a standstill, by blocking the ACLU's ongoing interviews of prospective clients and witnesses. MCCF's policy has prevented ACLU-affiliated attorneys from investigating or pursuing civil rights advocacy on behalf of persons detained at MCCF.

COUNT I

VIOLATION OF THE FIRST AMENDMENT RIGHT TO FREE SPEECH

49. Plaintiff incorporates by reference paragraphs 1 through 48 of this Complaint as though set forth fully herein.

50. The First Amendment, as applied to state and local government agencies and officials by the Fourteenth Amendment, prohibits governmental entities from "abridging the freedom of speech." U.S. Const. Amend. I.

51. Plaintiff has a right to free speech under the First Amendment, which includes the right to speak to prospective clients and witnesses to inform them of

their legal rights, investigate civil rights violations, and discuss the possibility of legal representation in a confidential setting. *See In re Primus*, 436 U.S. 412, 431 (1978) (“[T]he efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants.”); *NAACP v. Button*, 371 U.S. 415, 430 (1963) (First Amendment protects civil rights organization’s right to “engage in association for the advancement of beliefs and ideas” (quoting *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 460 (1958))).

52. Plaintiff’s First Amendment right to free speech extends to communications with prospective clients who are in custody. *See Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989) (those who wish to communicate with prisoners “have a legitimate First Amendment interest in access to prisoners”); *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974) (both incarcerated people and those with whom they correspond have First Amendment rights that can be infringed by unjustified government interference), *overruled in part on other grounds by Thornburgh*.

53. Plaintiff’s prospective clients also have rights under the First Amendment to communicate with persons outside MCCF.

54. Defendants have a policy, practice, and/or custom of prohibiting ACLU-affiliated attorneys from speaking to people incarcerated at MCCF unless the

attorneys first provide documentation of a formal, pre-existing attorney-client relationship with those individuals.

55. That policy severely impedes the ACLU-PA's ability to conduct ongoing investigations into potential violations of the rights of people incarcerated at MCCF. The ACLU-PA does not formalize an attorney-client relationship with every person interviewed about a potential claim. The ACLU-PA engages in privileged, confidential discussions with hundreds of prospective incarcerated clients each year, often in response to requests for assistance. Given its limited resources, however, the ACLU-PA cannot agree to represent all of those individuals. Ethically, it certainly cannot obtain a letter of representation from a prospective client before preliminary discussions have even taken place. ACLU lawyers must first determine whether they are competent to handle the matter, verify the factual allegations, check for existing conflicts, and discuss with the putative client the scope and terms of potential representation. Only after this vetting process is completed can Plaintiff ethically enter into a formal attorney-client relationship. Thus, by denying ACLU-affiliated attorneys access to people incarcerated at MCCF prior to establishment of a formal attorney-client relationship, Defendants have interfered with Plaintiff's ability to carry out a core aspect of its mission—protecting and defending the constitutional rights of individuals in custody.

56. Defendants’ policy also amounts to content and viewpoint discrimination. The policy appears to target just ACLU-affiliated attorneys. To the best of the ACLU’s knowledge, it has not been applied to other attorneys conducting legal visits. On information and belief, the targeted nature of the policy reflects Defendants’ disagreement with the content and viewpoints that Defendants presume will be expressed during ACLU legal visits.

57. Viewpoint discrimination is “an egregious form of content discrimination,” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)), and accordingly is *per se* prohibited. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring in part and concurring in the judgment); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). Accordingly, Defendants’ policy of denying ACLU-affiliated attorneys access to people incarcerated at MCCF is *per se* unconstitutional.

58. Even if, *arguendo*, the policy is not *per se* invalid based on viewpoint discrimination, it must withstand strict scrutiny. *See, e.g., Sturm v. Clark*, 835 F.2d 1009, 1013-16 (3d Cir. 1987) (traditional First Amendment analysis applied where a prison’s restrictions on visiting rights involved “latent content bias”). It cannot. No compelling interest justifies restricting ACLU-affiliated attorneys’ communications with incarcerated individuals; nor is Defendants’ practice

“narrowly drawn” to achieve the least possible intrusion on First Amendment rights. *See id.* at 1016 (quoting *Widmar v. Vincent*, 454 U.S. 263, 270 (1981)).

59. As a result of their conduct, Defendants are violating the ACLU’s First Amendment rights. Defendants have already denied ACLU-affiliated attorneys access to several people incarcerated at MCCF, and Plaintiff has a substantial, well-founded fear that Defendants will continue to deny access in the future.

60. As a result, the Court should declare that Defendants’ policy violates the First Amendment. The Court should enter a preliminary and permanent injunction prohibiting Defendants from requiring proof of an existing attorney-client relationship before attorneys may conduct legal visits with people incarcerated at MCCF.

COUNT II

RETALIATION IN VIOLATION OF THE FIRST AMENDMENT

61. Plaintiff incorporates by reference paragraphs 1 through 48 of this Complaint as though set forth fully herein.

62. A First Amendment retaliation claim requires proof that the plaintiff engaged in constitutionally protected activity and that the protected activity was a substantial or motivating factor in an adverse action taken against the plaintiff by the defendants.

63. Plaintiff and its attorneys have unquestionably engaged in First Amendment-protected activity. Plaintiff's attorneys have communicated with incarcerated people about alleged civil rights violations and about the possibility of seeking redress for those violations in court. Their "expressive and associational conduct" is "at the core of the First Amendment's protective ambit." *In re Primus*, 436 U.S. 412, 424 (1978); *NAACP v. Button*, 371 U.S. 415, 430 (1963) (First Amendment protects civil rights organization's right to "engage in association for the advancement of beliefs and ideas"); *see also ACLU Fund of Mich. v. Livingston County*, 796 F.3d 636 (6th Cir. 2015).

64. Plaintiff's attorneys have also filed multiple civil rights lawsuits and open record requests against Montgomery County and MCCF. Civil rights litigation is likewise constitutionally protected activity under the First Amendment's petition clause. *See Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387-88 (2011).

65. Defendants are, or should be, aware of the ACLU-PA's lawsuits against Montgomery County and MCCF. Defendant Montgomery County has been a named defendant in those proceedings, and their employees and agents have knowledge of the ongoing litigation. ACLU-PA's litigation against Montgomery County generated negative publicity for the county in local and regional press.

66. Defendants are also aware that between October 2020 and March 2021, ACLU-affiliated attorneys regularly communicated remotely with people

incarcerated at MCCF. Because the ACLU is an organization dedicated to defending people's civil rights and civil liberties, presumably Defendants deduced that these communications were about potential civil rights lawsuits.

67. Defendants have taken adverse actions against the ACLU-PA by canceling ACLU-affiliated attorneys' visits with persons detained in MCCF. By depriving the ACLU-PA of access to prospective clients and sources of information, Defendants directly impair their ability to bring civil rights lawsuits at the core of the ACLU-PA's mission.

68. There is a causal connection between the ACLU-PA's protected activity and Defendants' adverse actions. Defendants adopted their policy of denying ACLU-affiliated attorneys' access to people incarcerated at MCCF within weeks of the ACLU-PA engaging in protected activity. Two months earlier, the ACLU-PA had filed a new class-action lawsuit challenging Montgomery County's practice of double-billing criminal defendants for court costs—a practice that affects the people housed at MCCF. In addition, just weeks before Defendants announced the new policy, Defendants had experienced significant setbacks in ongoing litigation involving access to MCCF records and retaliation against former public defenders for supporting an ACLU-PA lawsuit. That temporal proximity strongly supports an inference of causation. *See Watson v. Rozum*, 834 F.3d 417, 422 (3d Cir. 2016).

69. As a result, the Court should declare that Defendants’ policy also constitutes retaliation, a distinct and independent First Amendment violation. The Court should enter a preliminary and permanent injunction prohibiting Defendants from requiring proof of an existing attorney-client relationship before attorneys may conduct legal visits with people incarcerated at MCCF.

COUNT III

VIOLATION OF FUNDAMENTAL RIGHT OF ACCESS TO THE COURTS

70. Plaintiffs incorporate by reference paragraphs 1 through 48 of this Complaint as though set forth fully herein.

71. The Constitution guarantees incarcerated people the right to access the courts in order to “present claimed violations of fundamental constitutional rights.” *Bounds v. Smith*, 430 U.S. 817, 825 (1977); *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (“[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.”).

72. This right of access includes the right to communicate with lawyers about potential civil rights claims. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) (recognizing that prisoners’ fundamental rights “would be diluted” if incarcerated individuals were prohibited from “seek[ing] help” in bringing civil rights actions as well as challenges to criminal convictions); *Allah v. Seiverling*, 229 F.3d 220, 224 (3d Cir. 2000) (noting it is “well settled” that the right to access the

courts requires “access to . . . adequate assistance from persons trained in the law” to file civil rights actions (quotation mark omitted)).

73. The ACLU-PA is in active investigation of systemic civil rights and civil liberties violations in Montgomery County’s probation and parole system, which result in the unconstitutional confinement of many people at MCCF, and is preparing a class-action lawsuit seeking redress for these harms. Individuals detained at MCCF have expressed an interest in pursuing civil rights litigation to vindicate their constitutional rights. These incarcerated individuals, however, are not trained lawyers; they require the assistance of counsel experienced in litigating civil rights claims to bring a successful civil rights lawsuit. Defendants’ policy prevents them from meeting with the ACLU-affiliated attorneys who have spent months investigating and developing their legal claims. Defendants’ policy therefore unquestionably hinders the incarcerated individuals’ efforts to pursue an important and meritorious lawsuit that would vindicate their civil rights. *See Lewis v. Casey*, 518 U.S. 343, 351 (1996).

74. The ACLU-PA has third-party standing to assert an access to courts claim on behalf of their prospective clients at MCCF. The ACLU-PA has a “close relationship” with the individuals at MCCF who seek to pursue a civil rights challenge; ACLU-affiliated attorneys have interviewed them and developed their legal claims over the past several months. *See Kowalski v. Tesmer*, 543 U.S. 125,

130-31 (2004) (attorney-client relationship with ascertained individuals can support third-party standing). These individuals' ability to protect their own rights is plainly hindered by Defendants' policy of suspending legal visits from attorneys absent an existing, formal attorney-client relationship. *See Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 288-89 (3d Cir. 2002).

75. As a result, the Court should declare that Defendants' policy violates the fundamental right of access to the courts. The Court should enter a preliminary and permanent injunction prohibiting Defendants from requiring proof of an existing attorney-client relationship before attorneys may conduct legal visits with persons detained in MCCF.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of itself, its employees, and its current and prospective clients, seeks judgment in its favor and against Defendants, and in particular seeks:

- A. A declaration that Defendants' actions violate its rights under the First and Fourteenth Amendments to the United States Constitution;
- B. An injunction—preliminary and permanent thereafter—enjoining Defendants' policy of requiring proof of an attorney-client relationship before allowing attorney visits;
- C. Costs, interest and attorney's fees; and
- D. Any other relief deemed just and appropriate.

Dated: May 20, 2021

Respectfully submitted,

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