IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

AUSTIN LAWYERS GUILD, CARL GOSSETT, DAVID GRASSBAUGH, MARK SAMPSON, FRANCIS WILLIAMS, AND THE PRISON JUSTICE LEAGUE, PLAINTIFFS,	§	
V.	§	CAUSE NO. 1:14-CV-366-LY
SECURUS TECHNOLOGIES, INC., TRAVIS COUNTY SHERIFF'S OFFICE, SHERIFF GREG HAMILTON (IN HIS OFFICIAL CAPACITY), TRAVIS COUNTY DISTRICT ATTORNEY'S OFFICE, DISTRICT ATTORNEY ROSEMARY LEHMBERG (IN HER OFFICIAL CAPACITY), TRAVIS COUNTY ATTORNEY'S OFFICE, AND COUNTY ATTORNEY DAVID ESCAMILLA (IN HIS OFFICIAL CAPACITY), DEFENDANTS.	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE

Before the Court are Defendants Hamilton, Lehmberg and Escamilla's Motion to Dismiss Pursuant to Rule 12(b)(1), Rule 12(b)(6), filed August 6, 2014 (Clerk's Dkt. No. 27); Defendants Travis County Sheriff's Office, Travis County District Attorney's Office, and Travis County Attorney's Office's Motion to Dismiss Pursuant to Rule 12(b)(1), 12(b)(6), filed August 6, 2014 (Clerk's Dkt. No. 28); Defendant Securus Technologies, Inc.'s Renewed Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), filed August 6, 2014 (Clerk's Dkt. No. 29); Plaintiffs'

Response to Defendants' Renewed Motions to Dismiss, filed September 5, 2014 (Clerk's Dkt. No. 34); Reply Brief in Support of Defendant Securus Technologies, Inc.'s Renewed Motion to Dismiss Pursuant to Fed. R. Civ. P 12(b)(1) and 12(b)(6), filed September 26, 2014 (Clerk's Dkt. No. 36); and Travis County Defendants' Reply to Plaintiffs' Response to Defendants' Renewed Motions to Dismiss, filed September 26, 2014 (Clerk's Dkt. No. 38).

The motions were referred by United States District Judge Lee Yeakel to the undersigned for a Report and Recommendation as to the merits pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. After reviewing the parties' pleadings, relevant case law, as well as the entire case file, the undersigned issues the following Report and Recommendation to the District Court.

I. BACKGROUND

Plaintiffs the Austin Lawyers Guild ("ALG"); Carl Gossett, David Grassbaugh, Mark Sampson, Francis Williams (collectively, "Individual Plaintiffs"); and the Prison Justice League ("PJL") (collectively, "Plaintiffs") filed this action on April 29, 2014, naming as defendants (collectively, "Defendants") Securus Technologies, Inc. ("Securus"); as well as Greg Hamilton ("Hamilton") in his official capacity as Travis County Sheriff, Rosemary Lehmberg ("Lehmberg") in her official capacity as Travis County District Attorney, and David Escamilla ("Escamilla") in his official capacity as Travis County Attorney (collectively, "Officials"); and the Travis County Sheriff's Office, the Travis County District Attorney's Office, and the Travis County Attorney's Office (collectively, "Travis County Offices"), (Officials and Travis County Offices collectively, "Travis County Defendants").

The ALG is a membership-based, incorporated non-profit organization, which includes as members a number of Austin, Texas criminal defense attorneys. (First Am. Compl. ¶ 4). The PJL is also a membership-based, incorporated non-profit organization, which includes as members people detained in the Travis County Correctional Complex ("TCCC") in Del Valle, Texas. (*Id.* ¶ 5). The Individual Plaintiffs are defense attorneys who routinely represent detainees housed in the Travis County Jail ("TCJ") in downtown Austin and the TCCC. (*Id.* ¶ 3).

Plaintiffs filed an amended class action complaint on July 23, 2014. By way of the first amended complaint, Plaintiffs allege Securus is working in concert with the other Defendants to violate Plaintiffs' and TCJ and TCCC detainees' rights. Securus allegedly entered into a contractual agreement with Travis County, which requires Securus to record, store, and grant the other Defendants access to detainees' telephone calls. (*Id.* ¶ 14). According to Plaintiffs, Defendants lead attorneys and detainees to believe calls to each other are confidential and not recorded. (*Id.* ¶¶ 10, 15). Securus and the Travis County Sheriff's Office, which operates TCJ and TCCC, purportedly also advertise to the public that confidential telephone calls are not recorded. (*Id.* ¶¶ 6, 15). However, Plaintiffs allege Securus intentionally and unlawfully intercepts and records confidential attorney–client telephone calls and stores the recordings in a database for six months. (*Id.* ¶ 14)

Plaintiffs further contend Securus provides 24-hour online access to the confidential recordings to Travis County staff, including the Travis County Sheriff's Office and the Travis District and County Attorneys' Offices. (*Id.* ¶¶ 12, 13, 16, 19). In support of this contention, Plaintiffs allege prosecutors have disclosed copies of the confidential recordings to defense attorneys among other discovery materials, and other prosecutors have used the knowledge gained from the recordings to their tactical advantage without disclosing that they obtained or listened to the

confidential recordings. (*Id.* ¶ 17). Plaintiffs finally allege that, although Defendants have been notified on multiple occasions of the allegedly unlawful conduct, they refuse to take any action to remedy the issue. (*Id.* ¶¶ 18–23).

Accordingly, Plaintiffs assert causes of action against Defendants for violations of the Federal Wiretap Act and Texas Wiretap Act (jointly, "Wiretap Acts"); unreasonable search and seizure in violation of the Fourth Amendment to the United States Constitution; denial of effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution; and denial of access to the courts in violation of First, Fourth, and Fifth Amendments to the United States Constitution. Plaintiffs seek declaratory and injunctive relief regarding the purported violations. Defendants now move to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. STANDARDS OF REVIEW

A. Rule 12(b)(1)

"Federal courts are courts of limited jurisdiction; without jurisdiction conferred by statute, they lack the power to adjudicate claims." *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 286 (5th Cir. 2012) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). A claim is properly dismissed for lack of subject-matter jurisdiction under Rule 12(b)(1) "when the court lacks the statutory or constitutional power to adjudicate the claim." *Id.* (citation and internal quotation marks omitted).

"Lack of subject-matter jurisdiction may be found in the complaint alone, the complaint supplemented by the undisputed facts as evidenced in the record, or the complaint supplemented by the undisputed facts plus the court's resolution of the disputed facts." *Id.* at 287 (citing *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001)). A motion brought under Rule 12(b)(1) should

be granted only "if it appears certain that the plaintiff cannot prove any set of facts in support of his claims entitling him to relief." *Id.* (citing *Wagstaff v. U.S. Dep't of Educ.*, 509 F.3d 661, 663 (5th Cir. 2007)).

B. Rule 12(b)(6)

Rule 8 of the Federal Rules of Civil Procedure mandates only that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). This standard demands more than "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement." *Bell Atl. v. Twombly*, 550 U.S. 544, 555–57 (2007). Rather, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* at 570.

The Supreme Court has made clear that this plausibility standard is not a "probability requirement," but does impose a standard higher than "a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Although "a court must accept as true all of the allegations contained in a complaint," that tenet is "inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* When evaluating a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court assumes the veracity of the well-pleaded factual allegations and construes the facts alleged "in the light most favorable to the nonmoving party." *Doe v. Robertson*, 751 F.3d 383, 386–87 (5th Cir. 2014) (citations and internal quotation marks omitted).

"Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. Thus, in considering a motion to dismiss, the court must initially identify

pleadings that are no more than legal conclusions not entitled to the assumption of truth, then assume the veracity of well-pleaded factual allegations and determine whether those allegations "plausibly give rise to an entitlement to relief." *Id.* If not, "the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id*. (quoting FED. R. CIV. P. 8(a)(2)).

III. ANALYSIS

By way of their motions, Defendants argue: (1) Plaintiffs lack standing to bring their claims; (2) the Travis County Offices and Officials are immune from suit; (3) Plaintiffs fail to state claims for violations of the Wiretap Acts; (4) Plaintiffs fail to state claims for violations of the United States Constitution; and (5) Securus is not acting under color of state law.[1] Because standing is a jurisdictional matter, the undersigned will address that issue first.

A. Standing

Defendants contend none of the Plaintiffs named in the complaint have suffered injury as a result of the alleged conduct forming the basis of the complaint. Specifically, Defendants argue Plaintiffs have not suffered a violation of their constitutional rights as a result of any purported breach of attorney–client communications because attorney–client privilege is held by the client, not the attorney. Defendants further argue Plaintiffs do not have associational standing or third-party standing to bring claims on behalf of TCJ and TCCC detainees.

Article III of the Constitution limits the jurisdiction of federal courts to cases and controversies. *Susan B. Anthony List v. Driehaus*, __U.S.__, 134 S. Ct. 2334, 2341 (2014); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 395 (1980). "One element of the case-or-controversy requirement is that [plaintiffs], based on their complaint, must establish that they have standing to

[1] The undersigned will not address arguments regarding class certification at this preliminary stage.

sue." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). This requirement, like other jurisdictional requirements, is not subject to waiver and demands strict compliance. *Id.* at 819; *Lewis v. Casey*, 518 U.S. 343, 349 n.1 (1996). To meet the standing requirement a plaintiff must show: (1) she has suffered an injury-in-fact that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Susan B. Anthony List*, 134 S. Ct. at 2341; *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Consol. Cos., Inc. v. Union Pacific R.R. Co.*, 499 F.3d 382, 385 (5th Cir. 2007); *Fla. Dep't of Ins. v. Chase Bank of Tex. Nat'l Ass'n*, 274 F.3d 924, 929 (5th Cir. 2001) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). To survive, injury that has not yet occurred must be "certainly impending" or must pose a "substantial risk" that the harm will occur. *Clapper v. Amnesty Int'l USA*, 568 U.S.__, __ n.5 133 S. Ct. 1138, 1146 n.5 (2013). The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

The United States Supreme Court has "adhered to the rule that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). However, courts allow exceptions to the general standing rules in limited situations, such as where an association has associational standing, or a litigant is eligible for third-party standing. *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (third-party standing); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 191 (5th Cir. 2012) (associational standing).

1. Associational Standing

An association has associational standing to sue on behalf of its members if: (1) its members would otherwise have standing individually; (2) the interests the association seeks to protect are germane to the association's purpose; and (3) the claim asserted and relief sought do not require the individual members' participation in the lawsuit. *Nat'l Rifle Ass'n of Am., Inc.*, 700 F.3d at 191. *See Ass'n of Am. Physicians and Surgeons v. Tex. Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010) ("The first two elements [of the associational standing analysis] address constitutional requirements; the third is solely prudential."). However, it is unnecessary to demonstrate every member of an association has suffered an injury-in-fact; if any member has suffered an injury-in-fact it may be imputed to the association. *Warth*, 422 U.S. at 511.

a. The ALG

The ALG asserts it has associational standing to sue on behalf of its members. According to the complaint, many individual members of the ALG are Austin criminal defense attorneys who regularly represent criminal defendants detained in the TCCC or TCJ.

i. Individual Members' Standing

The ALG argues its members have suffered injury-in-fact because Defendants' alleged conduct interferes with the business relationship between attorneys and their clients. Specifically, "attorneys' incomes are reduced" by being unable to consult with their detained clients via telephone. (First Am. Compl. ¶ 31). Instead, to avoid prejudicing their clients' cases, attorneys are forced to travel to the jail and engage in the rigorous and time-consuming security and visitation processes. The ALG further alleges the injury is directly caused by Defendants' conduct of recording confidential telephone calls. Finally, the ALG alleges an injunction enjoining Defendants from

recording or sharing confidential attorney–client telephone calls will redress its members' injuries because they will be able to engage in telephone calls with their clients.

The undersigned agrees that being forced to conduct in-person visits, rather than quick and inexpensive telephone calls demonstrates concrete injury. *See, e.g., Ctr. Hill Def. Fund v. U.S. Army Corps of Eng., Nashville Dist.*, 886 F. Supp. 1389, 1397 n.5 (M.D. Tenn 1995) (being forced to drive longer distance to launch boat is concrete injury for standing purposes). As the ALG points out, what previously could be accomplished in a ten-minute phone call necessitates a potentially hours-long journey. *See Ass'n of Cmty. Org. for Reform Now v. Fowler*, 178 F.3d 350, 358 (5th Cir. 1999) (citing *Lujan*, 504 U.S. at 560–61) (injury must be concrete and particularized, but "need not measure more than an 'identifiable trifle"); *Conserv. Council of N. Carolina v. Costanzo*, 505 F.2d 498, 501 (4th Cir. 1974) (same). Even if injury has not already occurred, it appears imminent from the face of the complaint because Defendants continue to indirectly prevent telephone communications between attorneys and their detained clients. *See Clapper* 133 S. Ct. at 1146 n.5 (quoting *Lujan*, 504 U.S. at 560–61) (imminence is a somewhat elastic concept, but the injury must be "*certainly* impending").

Further, the injury alleged is traceable to Defendants' purportedly unlawful conduct—that is, attorneys must travel to visit their clients to avoid the disclosure of potentially prejudicial information to Defendants. *See Prison Legal News v. Livingston*, 683 F.3d 201, 213–12 (5th Cir. 2012) (publisher suffered injury by "denial of opportunity to communicate [via distribution of its books] with certain inmates—that resulted directly from the government action it challenges as illegal"). Therefore, an injunction enjoining Defendants from recording confidential telephone calls will redress the injury alleged. The undersigned accordingly finds the ALG's members have

individual standing.

ii. Germaneness and Participation

The next inquiry in determining whether the ALG has associational standing is whether the interests the ALG seeks to protect in this lawsuit are germane to the ALG's purpose. The ALG's stated purpose, set out in its bylaws, is to "promote the public interest, civil rights, and social justice." (First Am. Compl. ¶ 4). Broadly construed, the purpose of this lawsuit is to protect the legal and constitutional rights of detainees and attorneys. Therefore, ALG's interests in this suit are germane to its civil rights and social justice purposes. *See Ass'n of Am. Physicians*, 627 F.3d at 551 n.2 ("The germaneness requirement is 'undemanding' and requires 'mere pertinence' between the litigation at issue and the organization's purpose."). *See also Lopez Torres v. New York State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006), *rev'd on other grounds*, 552 U.S. 196 (2008) (lawsuit regarding state judicial nomination process was germane to voter organization's organizational purpose of making government more open and responsive to citizens).

The last inquiry is whether the ALG can proceed with the lawsuit without individual members' participation. The Fifth Circuit has made clear this element rests on whether the claims in a particular case required minimal factual development, such as allegations of administrative illegality, or were of a more fact-sensitive nature. *See Ass'n of Am. Physicians*, 627 F.3d at 552–53 (concluding individual participation not necessary in suit for declaratory and injunctive relief for alleged constitutional violations including medical board's use of anonymous complaints and retaliatory actions against physicians). "[A]s long as resolution of the claims benefits the association's members and the claims can be proven by evidence from representative injured members, without a fact-intensive-individual inquiry, the participation of those individual members

will not thwart associational standing." *Id.*

Here, the claims are similar and relatively uniform among the members of the ALG: recording, sharing, and listening to confidential attorney–client telephone calls between attorneys and their detained clients is unlawful and should cease. *See Defenders of Wildlife*, 420 F.3d at 958, *rev'd on other grounds*, 551 U.S. 644 (2007) (participation of members not required because "the relief sought will run equally to all of them"); *Familias Unidas v. Briscoe*, 619 F.2d 391, 398 n.2 (5th Cir. 1980) ("[T]he declaratory relief sought, inuring as it would to the benefit of all members, is ideally suited to allowing 'associational standing.'"). Accordingly, individual inquiries are unnecessary and the case only requires minimal factual development. The ALG thus has associational standing to pursue claims on behalf of its members and the motions to dismiss should be denied on this ground.

b. The PJL

The PJL also contends it has associational standing to sue on behalf of its members. Plaintiffs allege that members of the PJL include people detained in the TCCC.

i. Individual Members' Standing

The PJL alleges its detained members could easily and unknowingly divulge compromising confidential information while attempting to seek legal advice. The PJL further alleges detainees face a substantial risk of having their confidential calls used by prosecutors to prejudice detainees' cases.

PJL's members detained in the TCCC have a personal stake in the outcome of this litigation because they are allegedly unable to contact their attorneys without the possibility of prejudicing their cases. *See Warth*, 422 U.S. at 511 (association shows injury-in-fact when any one of its

members suffer immediate or threatened injury); *In re Global Indus. Tech., Inc.*, 645 F.3d 201, 210 (3d Cir. 2011) (citing *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686–90, 690 n.14 (1973)) (the injury-in-fact requirement is very generous, and is met when the party alleges personal stake in the outcome). *But see Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 482 (1982) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13 (1974)) ("Art. III requirements of standing are not satisfied by 'the abstract injury in nonobservance of the Constitution asserted by . . . citizens.'"). The undersigned finds Plaintiffs' allegation that prosecutors have already disclosed copies of confidential records to defense attorneys during discovery sufficient to allege injury. Although the PJL's contentions regarding injury are somewhat conclusory, they are satisfactory at this preliminary stage. *See Lujan*, 504 U.S. at 561 (quoting *Nat. Wildlife Fed.*, 497 U.S. at 889) (at the motion to dismiss stage, courts presume that the complaint's general factual allegations regarding injury are supported by "specific facts that are necessary to support the claim"); *Buchanan v. Fed. Election Com'n*, 112 F. Supp. 2d 58 (D.D.C. 2000) (fact that plaintiff might not be successful in claim does not affect standing if injury is alleged).

In addition, for reasons similar to those discussed regarding the ALG's standing, the undersigned finds the injury is traceable to Defendants' alleged conduct and that the injunctive and declaratory relief sought will properly redress the injuries alleged. Accordingly, the PJL's individual members who are incarcerated in the TCCC have individual standing.

ii. Germaneness and Participation

PJL's alleged mission is to "improve conditions of incarceration through 'litigation, advocacy, and empowering [its] members.'" (First Am. Compl. ¶ 5). The undersigned finds the

litigation's goal of protecting detainees' privacy during attorney–client communications is germane to PJL's mission. *See PA Prison Soc'y. v. Cortes*, 622 F.3d 215, 277–30 (3d Cir. 2010) (challenging revision of pardon system regarding life or death in prison was germane to organizational purpose of advocating for humane, just, restorative correctional system). Again, as discussed above, the instant litigation will not require participation of the individual members of the PJL. *See Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 532–33 (8th Cir. 2005) (boarding school could assert claim on behalf of students because suit for injunctive and declaratory relief did not require students' participation); *Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272 (5th Cir. 1981) (civil rights claim did not require individual participation where claim and relief requested affected membership as a whole). Accepting the PJL's allegations as true, its members face concrete prejudice to their cases if confidential information is utilized by prosecutors, which is likely to be redressed by declaratory and injunctive relief. The PJL therefore has standing to sue on behalf of its members, including those members detained in the TCCC. Accordingly, the motions to dismiss should be denied on this ground.

2. Individual Standing

The Individual Plaintiffs assert they have standing to sue on their own behalf. Where one plaintiff has standing, the Court is not required to consider the standing of similarly situated plaintiffs. *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbot*, 748 F.3d 583, 589 (5th Cir. 2014). Like the ALG members, the Individual Plaintiffs are Austin criminal defense attorneys who represent clients detained in the TCJ or TCCC. The Individual Plaintiffs are therefore similarly situated to the members of the ALG. Because the ALG members have standing in their own right, the undersigned

finds the Individual Plaintiffs also have standing. *See Fla. ex rel. Atty Gen. v. U.S. Dep't Health and Human Servs.*, 648 F.3d 1235, 1243 (11th Cir. 2011), *aff'd in part and rev'd in part on other grounds*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, __U.S.__, 132 S. Ct. 2566 (2012), (citing *Watt*, 454 U.S. at 160; and *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977)) ("The law is abundantly clear that so long as at least one plaintiff has standing to raise each claim . . . we need not address whether the remaining plaintiffs have standing."). The Individual Plaintiffs thus have standing and the motion to dismiss on this basis should be denied.

3. Third-Party Standing

The ALG and the Individual Plaintiffs additionally argue they have third-party standing to assert claims on behalf of their detained clients. A litigant has third-party standing to sue on behalf of another individual if: (1) the litigant has suffered an injury-in-fact giving the litigant a sufficiently concrete interest in the outcome of the issue; (2) the litigant has a close relationship with the third party on whose behalf the right is asserted; and (3) there is a genuine obstacle to the third party's ability to protect his own interests. *Powers*, 499 U.S. at 411. The Supreme Court "[has] not looked favorably upon third-party standing." *Kowalski*, 543 U.S. at 130 (denying third-party standing to attorney seeking to litigate right of client); *Conn v. Gabbert*, 526 U.S. 286, 292–93 (1999) (same); *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1341 (5th Cir.1988) (alumni, football players, and cheerleaders lacked third-party standing to assert claims of university).

As noted above, the ALG and Individual Plaintiffs properly alleged they have suffered injury-in-fact. The ALG and Individual Plaintiffs also allege there is a close relationship between attorneys and clients, and the Supreme Court has agreed in certain circumstances. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (attorney–client relationship satisfies third-

party standing closeness requirement); *cf. Kowalski*, 543 U.S. at 129 (attorney–client relationship does not satisfy closeness requirement where clients are prospective, unascertained criminal defendants).

However, most challenging for the undersigned is the contention that the detainees face obstacles to asserting their own rights because there is a short window of time between arrest and the opportunity to consult with an attorney. In support of this contention, the ALG points out that many harms potentially suffered by detainees due to the denial of the right to freely consult with counsel cannot be remedied on appeal. For example, a person who was recently arrested and attempting to seek attorney advice on being released on a personal recognizance bond could easily share compromising information. Another example offered is an arrestee's immigration status. "[I]nitial pleas—even for low-level charges—could have significant legal ramifications" for legal permanent residents and visa-holders' immigration statuses. Similarly, Plaintiffs argue, undocumented immigrants eligible for relief from deportation could suffer irreparable legal harm without an attorney's advice.

Plaintiffs' contention that detainees cannot assert rights on their own behalf is unconvincing. *See Barrows v. Jackson*, 346 U.S. 249, 257 (1953) (hindrance must be "difficult if not impossible for the persons whose rights are asserted to present their grievance before any court"). Detainees' rights are routinely asserted and remedied on appeal, even after legal damage has been done at the trial level. *See Kowalski*, 543 U.S. at 131–32 (denying counsel to indigent criminal defendants is not "hindrance" to defendants' ability to bring suit or remedy violations on appeal); *Miller v. Albright*, 523 U.S. 420, 448 (1998) (noting petitioner had not shown "substantial hindrance" or "genuine obstacle" to third party's ability to assert own claim). The alleged hindrances are too

speculative to rise to the level of a "genuine obstacle." *Suciu v. Washington*, 2012 WL 4839924, at *4 (E.D. Mich. Oct. 11, 2012) (attorneys could not bring claims on behalf of prisoner clients because clients were not hindered as clients could pursue relief through the courts and claim arising from violation was not factually or legally complex); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 31–32 (D.C. Cir 2010) (third party in Yemen on a "kill list" who would possibly be detained in the United States if he brought suit here was not hindered from bringing suit on his own behalf within the meaning of the *Powers* hindrance requirement). Moreover, the fact that the PJL, a party to this suit, includes individuals detained in the TCCC demonstrates that detainees are not hindered from bringing suit. *See e.g., Pharmacy Buying Ass'n, Inc. v. Sebelius*, 906 F. Supp. 2d 604, 616–17 (W.D. Tex. 2012) ("A claim of hindrance is rebutted in this case, as in others, by the participation of [the third-party a plaintiff seeks to represent]."). Accordingly, the ALG and Individual Plaintiffs have not shown they have third-party standing to assert rights on behalf of their detainee clients. *See Singleton v. Wulff*, 428 U.S. 106, 116 (1976) ("Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply . . . . [unless] there is some genuine obstacle to such assertion.").

In sum, ALG and PJL have associational standing to bring suit on behalf of their members. The Individual Plaintiffs have standing to bring claims on behalf of themselves. However, no plaintiff has third-party standing to bring claims on behalf of non-member detainee clients. As each plaintiff has standing to assert at least one cause of action, the motions to dismiss should not be granted for lack of standing.

B. Travis County Immunity

The Travis County Offices and Officials argue they are not capable of being sued or are

immune from suit. The Officials further maintain Plaintiffs have failed to state an official capacity claim against them.

1. Travis County Offices

The Travis County Sheriff's Office, Travis County District Attorney's Office, and Travis County Attorney's Office correctly assert, and Plaintiffs do not contest, the Travis County Offices are not legal entities capable of being sued. *See Murray v. Earle*, 334 F. App'x 602, 606 n.2 (5th Cir. 2009) (Travis County District Attorney's Office is not a separate entity; the district attorney is the properly named party when alleging a constitutional violation by a district attorney's office); *Darby v. Pasadena Police Dep't*, 939 F.2d 311 (5th Cir. 1991) (police and sheriff's departments are governmental subdivisions without capacity for independent legal action); *Parker v. Whoolery*, 2009 WL 3247583, at *2 (W.D. Tex. Oct. 2, 2009) (Travis County Sheriff's Department is not legal entity capable of being sued); *Jacobs v. Port Neches Police Dep't*, 915 F. Supp. 842, 844 (E.D. Tex. 1996) (county sheriff's office and county district attorney's office are not legal entities capable of being sued). The undersigned generally construes claims such as Plaintiffs' as if they were brought against Travis County. However, Plaintiffs have named Hamilton, Lehmberg, and Escamilla in their official capacities. Hamilton is the duly elected Travis County Sheriff, Lehmberg is the duly elected Travis County District Attorney, and Escamilla is the duly elected Travis County Attorney. Plaintiffs' claims against Hamilton, Lehmberg, and Escamilla in their official capacities are the same as if they were brought against Travis County. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (suit against state official in official capacity is against official's office, which is no different that suit against state itself); *Overlin v. Boyd*, 598 F.2d 423, 424–25 (5th Cir. 1979) (construing official capacity claims against county commissioners as against the county); *see also Washington v. Med.*

Staff T.C.S.O., 2006 WL 2052848, at *2 (W.D. Tex. Jul. 21, 2006) (construing official capacity claim against Travis County medical director as against Travis County). Accordingly, the Travis County Sheriff's Office, Travis County District Attorney's Office, and Travis County Attorney's Office should be dismissed from this suit.

2. Travis County Officials

Lehmberg and Escamilla assert they are entitled to absolute prosecutorial immunity from the instant suit. Lehmberg, Escamilla, and Hamilton further argue Plaintiffs have failed to state an official capacity claim against the Officials.

a. Absolute Prosecutorial Immunity

Prosecutors are generally entitled to absolute immunity in civil rights damages lawsuits for actions taken pursuant to their prosecutorial role. *Kalina v. Fletcher*, 522 U.S. 118 (1997); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Esteves v. Brock*, 106 F.3d 674 (5th Cir. 1997); *Boyd v. Biggers*, 31 F.3d 279, 284 (5th Cir. 1994). However, as noted previously, Plaintiffs filed suit against Lehmberg and Escamilla in their official capacities. Therefore, absolute immunity is inapplicable here because the suit is construed as being brought against Travis County. *See Burge v. Parish of St. Tammany*, 187 F.3d 452, 466–67 (5th Cir. 1999) (citing *Monell v. New York City Dep't Of Soc. Servs.*, 436 U.S. 658, 690–91 n.55 (1978)) (district court erred in granting summary judgment for district attorney in official capacity based on absolute immunity, because "[u]nlike government officials sued in their individual capacities, municipal entities and local governing bodies do not enjoy immunity from suit, either absolute or qualified . . . ."). *See also Hill v. City of Seven Points*, 31 F. App'x 835, 845 (5th Cir. 2002) (citing *Burge*, 187 F.3d at 466–67) (prosecutor entitled to absolute immunity in her individual capacity for conduct occurring within the scope of duties as

prosecutor but not immune in her official capacity).

Moreover, absolute prosecutorial immunity is inapplicable to suits for prospective, i.e., injunctive and declaratory, relief. *Johnson v. Kegansi*, 870 F.2d 992, 998–99 (5th Cir. 1989) (citing *Pulliam v. Allen*, 466 U.S. 522, 541 (1984). Lehmberg and Escamilla therefore should not be dismissed from the suit.

b. Official Capacity

In order to state an official capacity claim against a municipality under 42 U.S.C. § 1983, a plaintiff must allege a constitutional violation resulting from a municipal custom or policy. *Monell*, 436 U.S. at 690–94 (1978); *Collins v. City of Harker Heights, Tex.*, 916 F.2d 284, 286 (5th Cir. 1990), *aff'd*, 503 U.S. 115 (1992). Counties are not liable for constitutional violations committed by county employees unless the violations were the result of a county policy or custom that caused the injury. *Parm v. Shumate*, 513 F.3d 135, 142 (5th Cir. 2007); *Conner v. Travis County*, 209 F.3d 794, 796 (5th Cir. 2000). To establish an official policy, plaintiff must allege either an officially adopted policy, or a:

> [P]ersistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.

Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984) (en banc). *See Bishop v. Arcuri*, 674 F.3d 456, 467 (5th Cir 2012) (applying *Bennett*'s policy test).

Plaintiffs allege Travis County's policymakers have adopted a widespread practice and policy of recording confidential attorney–client telephone calls, that the Travis County Defendants have

access to the confidential recordings, and that the Travis County Defendants have been engaged in this conduct for years. Accepting these allegations as true, the undersigned finds Plaintiffs have properly alleged that the Travis County Defendants have engaged in a persistent, widespread practice that is purportedly unconstitutional. *See Bishop*, 674 F.3d at 469 (unwritten police policy of conducting no-knock entries promulgated by chief of police was sufficient to establish widespread police department policy).

Further, Plaintiffs specifically allege that the Travis County Defendants had actual, and, at a minimum, constructive knowledge of the custom. In support of this allegation, Plaintiffs maintain that members of the Austin criminal defense bar contacted Travis County's policymakers personally and in writing on three separate occasions, including the Sheriff, County Attorney, District Attorney, Travis County and District Judges, and the Travis County Commissioners Court. *See Bennett*, 728 F.2d at 768 (actual knowledge may be shown by discussion at council meetings, written notification; constructive knowledge may be shown if governing body would have known of violations if properly exercised responsibilities). Accordingly, Plaintiffs properly state an official capacity claim against the Officials and the complaint should not be dismissed on this ground.

C. Wiretap Acts

The Federal Wiretap Act and Texas Wiretap Act generally prohibit intentional interception, use, or disclosure of telephone communications without at least one communicating party's consent. 18 U.S.C. § 2511; TEX. CIV. PRAC. & REM. CODE § 123.002. *See Stephens v. Dolcefino*, 126 S.W.3d 120, 133 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (clarifying that Texas Wiretap Act is not violated if at least one party to the communication consents to interception). Defendants contend they are not liable under the Wiretap Acts because various statutory exceptions apply.

Defendants argue the ordinary course of business exception and law enforcement exception to the Federal Wiretap Act and the common carrier defense to the Texas Wiretap Act apply here.[2] The ordinary course of business exception exempts a wire or electronic communication service provider's use of a "telephone or telegraph instrument, equipment or facility, or any component thereof" in the ordinary course of business. 18 U.S.C. § 2510(5)(a)(ii). Similarly, the law enforcement exception exempts investigative or law enforcement officers who intercept telephone conversations in the ordinary course of their duties. 18 U.S.C. § 2510(5)(a)(ii). The common carrier defense grants "communication common carriers" the right to conduct "an activity that is necessary to service for the protection of the carrier's rights or property." TEX. CIV. PRAC. & REM. CODE § 123.003(a). Therefore, the crux of these exceptions is whether the calls at issue are recorded in the ordinary or necessary course of the Securus' business and the Travis County Defendants' duties.

As a preliminary matter, it is undisputed that Securus is a common carrier that intentionally intercepts detainees' telephone conversations while they are in custody and that the Travis County Defendants are given access to the recordings. Recording detainees' calls is routinely accepted as a practice within the ordinary course of business and within the ordinary course of law enforcement officers' duties. *Riviera v. United States*, 546 U.S. 1023 (2005); *Lanza v. State of New York*, 370 U.S. 139, 143 (1962).[3] However, the issue here differs because it specifically involves allegations

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[2] The Officials also argue the Texas Wiretap Act claims are barred by sovereign immunity, citing *City of Oak Ridge North v. Mendes*, 339 S.W.3d 222, 232–34 (Tex. App.—Beaumont 2011, no pet.). Specifically, they argue the claims are construed against Travis County, and the Texas Wiretap Act only applies to "persons." However, the Texas Government Code specifically defines "persons" to include a "government or governmental subdivision or agency." TEX. GOV'T CODE ANN. § 311.005. *See also Garza v. Bexar Metro. Water Dist.*, 639 F. Supp. 2d 770, 773 (W.D. Tex. 2009) (Texas and Federal Wiretap Acts apply to governmental entities).

[3] Plaintiffs also argue that the equipment used by Securus to record the confidential conversations falls outside of the ordinary course of business exception. However, equipment "furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business . . ." falls within the exception. *Adams v. City of Battle Creek*, 250 F.3d 980,

that confidential attorney–client telephone communications were recorded and intentionally disclosed to law enforcement officers and prosecutors.[4]

In the complaint, Plaintiffs allege that Defendants' policies bar recording of confidential attorney–client telephone conversations.[5] Specifically, Plaintiffs allege the Travis County Sheriff's Office and Securus both publicly state on their webpages that attorney–client telephone conversations are not recorded. Plaintiffs further allege Major Darren Long, the Travis County Sheriff's Office's jail administrator told defense attorneys attorney–client telephone calls are not recorded or listened to by his staff. (First Am. Compl. ¶ 15). Moreover, Plaintiffs allege that the recordings are conducted covertly, without notice to any party that is being monitored. *See Crooker v. U.S. Dep't Of Justice*, 497 F. Supp. 500, 502–03 (D. Conn. 1980) ("[T]he Court of Appeals for the First Circuit held that the mere fact that the plaintiff was in restrictive custody and knew or should have known that his telephone call would probably be monitored was not sufficient to establish consent."). Plaintiffs have thus alleged recording confidential attorney–client telephone conversations is not within Defendants' ordinary course of business, necessary to Securus' service,

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983–84 (6th Cir. 2001) (citing 18 U.S.C. § 2510(5)(a)(I)) (pager provided by electronic communications service was used in ordinary course of business). All recording equipment allegedly used by Securus to purportedly violate detainees' rights is also equipment used to record inmate telephone calls that are not confidential. Therefore, because the equipment is also used in the ordinary course of business, the equipment itself falls within the ordinary course of business exception.

[4] The Officials argue in their motion to dismiss that "courts have consistently held that inadvertent recording of attorney-inmate calls by correctional officers or officials . . . is insufficient to constitute a violation of constitutional rights . . . . Accordingly, [the recording] falls within the Federal Wiretap Act's law enforcement exemption." (Offiials Mot. at 18). Notably, the Officials fail to cite a single case specifically holding intentional recordings of confidential attorney-inmate calls and sharing them with prosecutors fell within the law enforcement exception.

[5] On multiple occasions in the motions to dismiss, Defendants assert that Defendants provide an alternate mechanism whereby detainees and their attorneys may engage in private telephone calls. However, at this stage, the undersigned will only consider the complaint and accept the allegations therein as true. *See Bell Atl.*550 U.S. at 555 (complaint's factual allegations must be accepted as true).

or within the Travis County Defendants' law enforcement duties. *See, e.g., id.* at 503–04 (routine monitoring of inmate-attorney calls was unwarranted). *See also, e.g., Garza v. Bexar Metro. Water Dist.*, 639 F. Supp. 2d 770, 772–75 (W.D. Tex. 2009) (defendants' handbook reserving right to monitor and access phone and email messages did not give defendants right to maliciously listen to personal calls within the ordinary course of business); *Lonegan v. Hasty*, 436 F. Supp. 2d 419, 432 (E.D.N.Y. 2006) ("[I]n the prison setting, attorney–client communications generally are distinguished from other kinds of communications and exempted from routine monitoring.").

Accordingly, Defendants have not shown the ordinary course of business exception, law enforcement exception, and common carrier defense apply at this preliminary stage. The motion to dismiss the Federal and Texas Wiretap At claims should therefore be denied.

D. Constitutional Claims

Defendants contend Plaintiffs fail to state a claim under the Fourth Amendment for unreasonable search and seizure, the Sixth Amendment for ineffective assistance of counsel, and the First, Fifth, and Fourteenth Amendments for denial of access to the courts. Securus further argues it is not liable for any alleged constitutional violations because it is a private entity not acting under color of state law.

1. Unreasonable Searches and Seizures

The Fourth Amendment protects individuals from unreasonable searches and seizures by the government. A "search" extends to the recording of oral statements and conversations. *Katz v. United States*, 389 U.S. 347, 353 (1967); *Berger v. New York*, 388 U.S. 41, 51 (1967). The government cannot monitor or record a call without violating the Fourth Amendment if the parties have a reasonable expectation of privacy in their conversation. *Katz*, 389 U.S. at 351–52. *See also*

United States v. Jones, 132 S. Ct. 945, 950–51 (2012) (indirectly reaffirming *Katz*). To establish a Fourth Amendment privacy claim, a plaintiff must demonstrate he had an actual, subjective expectation of privacy, and that his expectation of privacy is objectively reasonable. *Zaffuto v. City of Hammond*, 308 F.3d 485, 488 (5th Cir. 2002) (citing *Katz*, 389 U.S. at 351–52).

Pretrial detainees and prisoners do not enjoy the same constitutional protections as unincarcerated individuals. *See Hudson v. Palmer*, 468 U.S. 517, 527 (1984) (inmate has no reasonable expectation of privacy in prison cell); *Bell v. Wolfish*, 441 U.S. 520, 556 (1979) (constitutional rights of inmates are "limited by the legitimate goals and policies of penal institution"). Again, it is generally acceptable to record and listen to inmate telephone calls. *Riviera*, 546 U.S. 1023; *Lanza*, 370 U.S. at 143. However, the question here is whether recording, listening to, and sharing detainees' confidential attorney–client telephone calls is a violation of the Fourth Amendment.

Defendants argue Plaintiffs' Fourth Amendment claim fails because attorneys cannot assert the attorney–client privilege, as that privilege is properly held and asserted by the client. *See In re Grand Jury Subpoena*, 220 F.3d 406, 408 (5th Cir. 2000) (attorney–client privilege is held by client). While the attorney–client privilege is held by the client, the Fourth Amendment reasonable expectation of privacy standard is distinguishable from the pure attorney–client privilege. All parties who have a reasonable expectation of privacy in a conversation are protected by the Fourth Amendment. *See Gennusa v. Shoar*, 879 F. Supp. 2d 1337, 1348 (M.D. Fla. 2012), *aff'd* 748 F.3d 1103 (11th Cir. 2014) (local criminal defense attorney and client had reasonable expectation of privacy when communicating with pretrial detainee client in interrogation room when officials led attorney to believe conversations would not be monitored); *Lonegan v. Hasty*, 436 F. Supp. 2d 419,

435 (E.D.N.Y. 2006) ("Although the privilege afforded to attorney–client communications generally belongs to the client, not to the attorney, *see United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504 (2d Cir. 1991), the existence of robust protections for attorney–client communications makes [attorney-plaintiffs'] expectation of privacy in their conversations with Detainees reasonable.").

Both attorneys and clients have an objectively reasonable expectation of privacy in confidential communications between an attorney and client. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981) (attorney–client privilege is the "oldest of the privileges for confidential communications known to the common law"). Fourth Amendment protection thus extends to attorneys engaged in confidential communications with their clients and the expectation of privacy in those communications is objectively reasonable. Therefore, it must be determined whether the attorneys and clients had an actual, subjective expectation of privacy.

Defendants assert Plaintiffs have not alleged a subjective expectation of privacy because Plaintiffs have not alleged the recordings were made without notice. Defendants attempt to analogize the case here to *United States v. Novak*, 531 F.3d 99 (1st Cir. 2008), wherein the First Circuit held detainees had no reasonable expectation of privacy because they were notified that all calls were being recorded and attorney–client telephone calls were mistakenly recorded. *Id.* at 101. Plaintiffs allege three facts which distinguish this case from *Novak* and support their contention that attorneys and detainee clients had an actual, subjective expectation of privacy. First, Plaintiffs allege the Travis County Sheriff's Office and Securus tell the public attorney–client telephone calls are not recorded. Second, Plaintiffs allege Major Long stated that attorney–client telephone calls are not recorded or listened to by his staff. (First Am. Compl. ¶ 15). Third, Plaintiffs allege "Defendants

similarly lead detainees to believe" their attorney–client telephone calls are confidential. Moreover, nowhere in the complaint did Plaintiffs allege detainees or attorneys were notified that their calls were being recorded. Plaintiffs have therefore properly alleged that attorneys and detainee clients have a reasonable expectation of privacy in their confidential communications. Accordingly, this claim should not be dismissed.

2. Effective Assistance of Counsel

The Sixth Amendment right to effective assistance of counsel is implicated when there are concerns regarding interference with the attorney–client privilege. *Taylor*, 532 F.2d at 472. However, this Sixth Amendment right is solely applicable to "pre-trial detainees or to a convicted prisoner being tried on additional charges or contesting the legality of a previous conviction." *Id.* Generally, a cause of action for a Sixth Amendment violation for ineffective assistance of counsel requires a showing of actual prejudice to the defendant, e.g., a conviction or longer sentence that would not have occurred but for the attorney's deficient performance. *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977); *United States v. Davis*, 226 F.3d 346, 353 (5th Cir. 2000).

Defendants argue Plaintiffs fail to state a claim for denial of effective assistance of counsel because they lack standing and have alleged no facts showing a denial of effective assistance of counsel or resulting prejudice.

The undersigned first notes that the Sixth Amendment right to effective assistance of counsel is one held by individual criminal defendant clients, not attorneys. *Strickland v. Washington*, 466 U.S. 668, 680, 686 (1984) (constitution affords criminal defendants effective assistance of counsel). The ALG's members and Individual Plaintiffs are attorneys rather than clients, they do not have standing to assert an ineffective assistance of counsel claim. However, the PJL alleges its members

include people detained in TCCC and that its members have been denied effective assistance of counsel. (First Am. Compl. ¶ 5). Accordingly, this cause of action should not be dismissed based on a lack of standing.

The undersigned next notes that the issue of prejudice is central to a Sixth Amendment claim's survival. *Davis*, 226 F.3d at 353. Defendants argue a showing of actual prejudice is required, and that Plaintiffs have failed to allege the TCCC detainees have been actually harmed regarding the legal proceedings against them. Plaintiffs respond by arguing Defendants' conduct creates an unreasonable risk of prejudicing detainees' cases.

While a Sixth Amendment cause of action for denial of the right to effective counsel requires actual prejudice, several courts, including the Fifth Circuit, have presumed prejudice in situations wherein the government intentionally interferes with the attorney–client relationship. The Fifth Circuit held in *United States v. Zarzour*, "It is well settled that an intrusion by the government upon the confidential relationship between a criminal defendant and his attorney, either through surreptitious electronic means or through an informant, is a violation of the Sixth Amendment right to counsel." 432 F.2d 1, 2 (5th Cir. 1970) (citing *Hoffa v. United States*, 385 U.S. 293 (1966); and *Black v. United States*, 385 U.S. 26 (1966)). More recently, the United States Supreme Court denied certiorari and refused to disturb the Connecticut Supreme Court's ruling that a prosecutor's intrusion into the attorney–client privilege presumptively prejudiced a defendant's case. *State v. Lenarz*, 301 Conn. 417 (2011). In that case, police officers lawfully seized the defendant's laptop. *Id.* at 421. Defense counsel advised the court at a hearing that the laptop contained materials subject to the attorney–client privilege. *Id.* The court ordered the privileged materials to remain unaccessed. *Id.* at 421–22. Nevertheless, the prosecutor in that case read the materials. *Id.* The court consequently

presumed prejudice to the defendant's case, finding that even on retrial, the defendant would be prejudiced because a new prosecutor could access the transcript from the original trial. *Id.* at 450–52. The Third Circuit has similarly held where there is "a knowing invasion of the attorney–client relationship and where confidential information is disclosed to the government," the Sixth Amendment's prejudice requirement may be called into question. *United States v. Levy*, 577 F.2d 200, 208 (3d Cir. 1978).

The undersigned finds the PJL's allegation that its TCCC detainee-members will be prejudiced by the recording and sharing of confidential telephone calls is sufficient to support a presumption of prejudice at this preliminary stage. See *United States v. Collins*, 927 F.2d 605, 618 (6th Cir. 1991) (quoting *Levy*, 577 F.2d at 209) ("The *Levy* court held that prejudice is presumed 'at the point where attorney–client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case,' the defendant need not show the information was actually used by the prosecutors or of benefit to them.") (internal citations omitted); *see also Tucker v. Randall*, 948 F.2d 388, 390–91 (7th Cir.1991) ("Denying a pre-trial detainee access to a telephone for four days would violate the Constitution in certain circumstances. The Sixth Amendment right to counsel would be implicated if plaintiff was not allowed to talk to his lawyer for the entire four-day period. In addition, unreasonable restrictions on prisoner's telephone access may also violate the First and Fourteenth Amendments."). *See United States v. Ryans*, 903 F.2d 731, 741 n.11 (10th Cir. 1990) (informant knowingly placed in "defense camp" of indicted defendant which allowed prosecution to access confidential defense planning taints the entire prosecution and is a violation of the Sixth Amendment). Plaintiffs' cause of action for denial of effective assistance of counsel under the Sixth Amendment therefore should survive.

3. Access to Courts

Detainees have a constitutionally protected right of access to the courts.[6] *Bounds v. Smith*, 430 U.S. 817, 821 (1977); *Terry v. Hubert*, 609 F.3d 757, 761 (5th Cir. 2010). Claims of denial of access to courts fall into two categories: (1) "claims that systematic official action frustrates a plaintiff or plaintiff class in preparing and filing suits at the present time," e.g., access to a law library or a lawyer; or (2) "specific cases that cannot now be tried (or tried with all material evidence), no matter what official action may be in the future," e.g., the loss of the opportunity to seek relief because there was a police coverup extending until the statute of limitations had run. *Christopher v. Harbury*, 536 U.S. 403, 413 (2002). This right generally includes a reasonable opportunity to receive the assistance of attorneys. *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) *overruled in part on other grounds by Thornburgh v. Abbot*, 490 U.S. 401 (1989).

However, the right of access for detainees is not unlimited. *Johnson v. Rodriguez*, 110 F.3d 299, 310 (5th Cir. 1997). Rather, it encompasses only a reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement. *Lewis*, 518 U.S. at 351; *Mann v. Smith*, 796 F.2d 79, 84 (5th Cir. 1986); *Morrow*, 768 F.2d at 623 (direct legal assistance need not be by trained lawyers).[7] Thus, to prevail on a denial of access to the courts claim under section 1983, a plaintiff must show actual injury in connection with an identifiable legal

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[6] Plaintiffs correctly point out that pretrial detainees and post-conviction prisoners' rights of access to the courts differ somewhat. However, the undersigned notes that Plaintiffs do not specify in the complaint whether the PJL member–detainees are pretrial detainees or post-conviction prisoners. However, the undersigned's analysis includes cases regarding both pretrial detainees and post-conviction prisoners; therefore the discrepancy is immaterial.

[7] Defendants, citing *Brewer v. Wilkinson*, argue the right to access the courts merely protects a detainee's right to prepare and transmit legal documents. 3 F.3d 816, 821 (5th Cir. 1993). This undersigned rejects this literal and narrow reading of *Brewer* and notes that *Brewer* also mentions that prison officials should not unreasonably limit a detainee's access to legal personnel. *Id.* at 821 (citing *Procunier*, 416 U.S. at 419–22).

proceeding.[8] *Lewis*, 518 U.S. at 349–53. "[An inmate] might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known." *Id.* at 351. *See Harbury*, 536 U.S. at 415 n.12 (the underlying legal proceeding can be "upcoming or lost," but the claimant must describe it in the complaint). *See also Lewis*, 518 U.S. at 354 ("Finally, we must observe that the injury requirement is not satisfied by just any type of frustrated legal claim. Nearly all of the access-to-courts cases in the *Bounds* line involved attempts by inmates to pursue direct appeals from the convictions for which they were incarcerated.").

Although the Fifth Circuit has been somewhat forgiving regarding the prejudice requirement for Sixth Amendment claims, it appears much less flexible regarding actual injury requirement in the "access to courts" context. *See Gross v. Normand*, 576 F. App'x 318, 320 (5th Cir. 2014) (former pretrial detainee alleging prison officials confiscated his legal documents failed to state a claim absent an allegation of actual injury in his state criminal case); *Mendoza v. Strickland*, 414 F. App'x 616, 619 (5th Cir. 2011) (assuming federal pretrial detainee alleged officials interfered with pursuit of state post-conviction challenge, detainee failed to plead actual injury as required by the Supreme Court in *Harbury*); *Terry v. Hubert*, 609 F.3d 757, 761–62 (5th Cir. 2010) (pretrial detainee was not denied access to courts because he had the ability to file a legally sufficient claim when he had writing materials, contact information, and could request help from inmate counsel); *Walker v. Navarro Cnty. Jail*,4 F.3d 410 (5th Cir. 1993) (pretrial detainee was required to but failed to allege his position as a litigant was prejudiced); *Jones v. Diamond*, 594 F.2d 997, 1024 (5th Cir. 1979)

[8] The right of access to courts is therefore one held by detainee–clients, rather than their attorneys. Accordingly, the ALG and Individual Plaintiffs do not have standing to assert this claim and the undersigned only considers the sufficiency of the claim in relation to the PJL.

(pretrial detainees were not prevented from seeking redress in court because they could meet their attorneys in private rooms at jail facility).

As noted above, the PJL contends that its members will prejudiced by the Defendants' recording and use of confidential telephone calls.[9] (First Am. Compl. ¶ 44). Although the PJL has properly alleged its members detained in the TCCC face a substantial risk their rights will be violated for standing purposes and Sixth Amendment purposes, the PJL has not identified a specific underlying legal proceeding of a PJL member that has been actually injured, as required to satisfy an access-to-courts cause of action. *See Stamper v. Campbell Cnty.*, 415 F. App'x 678 (6th Cir. 2011) (declining to presume actual injury when pretrial detainee was denied telephone access to counsel for days prior to plea hearing); *Carter v. Lowndes Cnty.*, 89 F. App'x 439, 442 (5th Cir. 2004) (pretrial detainee who, without providing detail, alleged that he was prejudiced because he was prevented from filing motion to dismiss failed to show actual injury). This allegation fails to "identify a 'nonfrivolous,' 'arguable' underlying claim" that a detainee was unable to pursue. *Harbury*, 536 U.S. at 415 (quoting *Lewis*, 518 U.S. at 353 & n.3). Because the PJL has not identified a specific underlying claim wherein the denial of access to an attorney prejudiced its detained members, the PJL has not established actual prejudice. *Lewis*, 518 U.S. at 351–52; *Ruiz v. United States*, 160 F.3d 273, 275 (5th Cir. 1998). Accordingly, the claim for denial of access to the courts should be dismissed.

[9] Plaintiffs allege a violation of the right to access the courts under the First, Fifth, and Fourteenth Amendments. As the Fifth Amendment only applies to actions of the federal government, and not to the actions of a local government, the undersigned considers the alleged violation in the context of the First and Fourteenth Amendments. *See Morin v. Caire*, 77 F.3d 116, 120 (5th Cir. 1996) (Fifth Amendment only applies to actions of the federal government).

4. Color of State Law

Securus, a private company, argues Plaintiffs fail to allege facts showing Securus was acting under color of state law when recording detainees' telephone calls. To state a claim under section1983 against a private entity such as Securus, a plaintiff must: (1) allege a violation of rights secured by the Constitution or laws of the United States, and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law. *Randolph v. Cervantes*, 130 F.3d 727, 730 (5th Cir. 1997).

The Supreme Court has utilized a number of tests to determine whether a private entity is acting under color of state law. *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549–50 (5th Cir. 2005). Under the "public function test," the court examines whether the private entity performs a function that is traditionally reserved solely to the State. *Id.* at 549. The "state compulsion test" asks whether the private entity's actions are attributable to the State because the State exerts coercive power over the private entity or provides significant encouragement. *Id.* at 549–50. The "nexus" or "state action test" looks at whether the State has insinuated itself into the affairs of the entity such that it was effectively a joint participant in the wrong. *Id.* at 550. Finally, under the "joint action test" the private entity will be considered a state actor if it willfully participated in joint action with the State. *Id.*

The analysis of whether a private entity acted under color of state law always begins by identifying the specific unconstitutional conduct attributed to the private entity. *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982). As discussed above, Plaintiffs have properly alleged Securus' recording of and granting access to confidential attorney–client telephone calls violates the Fourth and Sixth Amendment to the United States Constitution. Having identified the specific allegations of

unconstitutional acts committed, the undersigned thus turns to the various state action tests.

The facts alleged in the complaint are sufficient to meet the joint action test at this stage. Plaintiffs allege Securus and the Travis County Defendants were notified multiple times that Securus records confidential attorney–client telephone calls and granting prosecutors access to the recordings. Plaintiffs further allege Securus and the Travis County Sheriff's Office "have acted (and continue to act) in concert to intercept confidential communications between plaintiff attorneys and detainees . . . . " (First Am. Compl. ¶ 34); *see Hobbs v. Hawkins*, 968 F.2d 471, 480 (5th Cir. 1992) (alleging conspiracy between private and public actors satisfies joint action test). On the face of the complaint, it appears Securus and the Travis County Defendants willfully participated in the decision to monitor confidential attorney–client telephone calls. *See Cornish*, 402 F.3d at 549–51 (joint action test requires complaint contain factual allegations that county and private entity were willful or joint participants in unconstitutional act).

The allegations in the complaint are also sufficient to meet the state compulsion test. Generally, a public contract is insufficient to establish a private actor is acting under color of state law. *See Rendell-Bake v. Kohn*, 457 U.S. 830, 841 (1982) (public contract alone does not turn private actor into state actor); *Harris v. Rhodes*, 94 F.3d 196, 197 (5th Cir. 1996) (jail maintenance worker was not acting under color of state law when he punched prisoner during horseplay because punch involved purely private aim and no misuse of state authority). However, courts have found a violation by a private actor at the direction of the State to be sufficient "state compulsion" at the motion to dismiss stage. *See Nelson v. Cauley*, 2005 WL 415144, at *3 (N.D. Tex. Feb. 22, 2005) (at motion to dismiss stage, state prisoner's assertion that private doctors violated his rights at the direction of state officer was sufficient to show conduct was fairly attributable to the state). Securus'

contract requires Securus to record and share detainee telephone calls with the Officials. The state compulsion test is therefore met at the motion to dismiss stage.

Plaintiffs have thus properly pled that Securus was acting under color of state law when it committed the allegedly unconstitutional acts and the motion to dismiss on this ground should be denied.[10]

E. Declaratory Judgment and Injunctive Relief

Finally, Defendants assert that Plaintiffs' declaratory judgment action and request for injunctive relief should be denied for the reasons set forth in their motions to dismiss. As an initial matter, the undersigned notes this inquiry would require resolution of disputed facts. Accordingly, this inquiry is properly addressed in a motion for summary judgment, not in a motion to dismiss.

In addition, the success of Plaintiffs' requests for declaratory judgment and injunctive relief rest on the success of their claims. As Defendants note, this is because a request for declaratory and injunctive relief are simply remedies and not free-standing claims. *See Volvo Trucks N. Am., Inc. v. Crescent Ford Truck Sales, Inc.*, 666 F.3d 932, 938 (5th Cir. 2012) (operation of federal Declaratory Judgment Act is procedural only); *Sid Richardson Carbon & Gas. Co. v. Interenergy Res., Ltd.*, 99 F.3d 746, 752 n.3 (5th Cir. 1996) (Texas Uniform Declaratory Judgments Act is merely procedural device which does not create any substantive rights or causes of action); *Spady v.*

[10] The undersigned agrees with Securus' contention that Plaintiff has not alleged that telephone and video conferencing services are traditionally reserved solely for the State, as required to meet the public function test. *See Cornish*, 402 F.3d at 549–50 (public function test examines whether private entity's function is exclusively reserved to the state). Nor do the allegations in the complaint meet the nexus/state action test. *See Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345, 352 (5th Cir. 2003) (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357–58 (1974)) (interdependence between State and private actor is required); *Goss v. Memorial Hosp. Sys.*, 789 F.2d 353, 356 (5th Cir. 1986) (existence of state statute alone does not automatically result in state action). *Cf. West v. Atkins*, 487 U.S. 42, 49 (1988) (where private entity is given its authority by state law, and a deprivation of a right is caused by the exercise of that authority, the private actor is said to be acting under color of state law). However, as discussed above, the allegations in the complaint meet the state compulsion and joint action tests at this preliminary stage.

America's Servicing Co., 2012 WL 1884115, at *5 (S.D. Tex. May 21, 2012) (request for injunctive relief absent cause of action supporting entry of judgment is fatally defective and does not state claim). *See also Smith v. JPMorgan Chase Bank, N.A.*, 519 F. App'x 861, 864 n.5 (5th Cir. 2013) (because district court properly rejected all of plaintiffs' claims, it also correctly rejected request for declaratory judgment). *See also Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) (temporary injunction requires pleading cause of action against defendant); *Brown v. Ke–Ping Xie*, 260 S.W.3d 118, 122 (Tex. App.—Houston [1st Dist.] 2008, no pet.) ("injunction is an equitable remedy, not a cause of action"). Consequently, the motions to dismiss Plaintiffs' claims for declaratory and injunctive relief should be denied.

IV. RECOMMENDATION

The undersigned **RECOMMENDS** that the District Court **GRANT** Defendants Travis County Sheriff's Office, Travis County District Attorney's Office, and Travis County Attorney's Office's Motion to Dismiss (Clerk's Dkt. No. 28). The undersigned **FURTHER RECOMMENDS** that the District Court **GRANT** in part and **DENY** in part Defendants Hamilton, Lehmberg and Escamilla's Motion to Dismiss (Clerk's Dkt. No. 27); and **GRANT** in part and **DENY** in part Defendant Securus Technologies, Inc.'s Renewed Motion to Dismiss (Clerk's Dkt. No. 29).

In sum, the Travis County Sheriff's Office, Travis County District Attorney's Office, and Travis County Attorney's Office should be dismissed as defendants from this action. Further, Plaintiffs' claim for violation of the right to access the courts under the First, Fifth and Fourteenth Amendment should be dismissed. All other relief sought by the motions to dismiss should be denied.

V. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150–53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

To the extent that a party has not been served by the Clerk with this Report and Recommendation electronically, pursuant to the CM/ECF procedures of this District, the Clerk is ORDERED to mail such party a copy of this Report and Recommendation by certified mail, return receipt requested.

SIGNED on February 4, 2015.

MARK LANE
UNITED STATES MAGISTRATE JUDGE