IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

#LETUSBREATHE COLLECTIVE et al. Plaintiffs,	)	Case No. 2020CH04654
v.	)	
CITY OF CHICAGO, Defendant.	)	Hon. Judge Neil H. Cohen

PLAINTIFFS' RESPONSE IN OPPOSITION TO THE CITY'S MOTION TO DISMISS

INTRODUCTION

Plaintiffs #LETUSBREATHE COLLECTIVE, LAW OFFICE OF THE COOK COUNTY PUBLIC DEFENDER ("the Public Defender"), BLACK LIVES MATTER CHICAGO ("BLM"), STOP CHICAGO, UMEDICS, NATIONAL LAWYERS GUILD CHICAGO ("NLG"), and GOODKIDS MADCITY ("GKMC") allege systemic violations of 725 ILCS 5/103-3 and 725 ILCS 5/103-4, governing access to counsel and telephones for detainees in police custody. Plaintiffs' Compl. ¶¶ 1–3. Plaintiffs seek a writ of mandamus (on behalf of all Plaintiffs) to enforce both statutory provisions, and injunctive relief to enforce 5/103-3 (on behalf of the Organizational Plaintiffs).[1] The City has moved to dismiss under 735 ILCS 5/2-619.1, pursuant to Sections 2-615 and 2-619 (a)(3) and (a)(9) ("Mot."). The motion has no merit.

The well-pled allegations document the City's historical and on-going failure to follow black letter law governing the rights of arrestees, set forth in the Illinois Criminal Code and its regulations, 20 Ill. Adm. Code § 720.20. The Chicago Police Department ("CPD") systematically fails to

[1] The Organizational Plaintiffs constitute #LetUsBreathe, STOP CHICAGO, BLM, UMEDICS and GKMC. In its Reply Brief in Support of the Petition for a Preliminary Injunction, Plaintiffs affirmed that they were bringing a claim for an implied right of action under Section 103-3 only on behalf of Organizational Plaintiffs, while the lawyer entities, the Public Defender and NLG, and Organizational Plaintiffs all sought a writ of mandamus. Pls' Reply Br. at 19 n. 29 and 22 n. 31. In addition, Plaintiffs inadvertently omitted a claim for an implied right under Section 103-4 in Count II. Plaintiffs will seek to amend the complaint should the Court deny the City's motion on that Count, as is unwarranted.

provide *any* phone call to a significant number of people in its custody. As a matter of policy and practice, it delays telephone access to the remaining subset of detainees, often until after detainees are interrogated, jeopardizing their rights against compelled self-incrimination. CPD is similarly obstructive in denying people in custody physical access to their attorneys.

The City complains that Plaintiffs are trying to "rewrite the law." Mot. at 9. It is the City that is rewriting the law, injecting into plain statutory language a chimera of discretion that does not exist. *Id.* at 2, 9. CPD policy does not track the relevant statutes, *id*. at 4 (under General Orders, phones are only to be provided "as soon as practicable"), and omits reference to the regulations' "one-hour" phone requirement. CPD has adopted exceptions to the access requirements untethered from law (*e.g.*, delaying calls when a case is "serious[]"). *Id*. at 5. CPD lacks both "the infrastructure" and the will to provide phone calls, in private, to arrestees. *Id*. at 6.

That Plaintiffs have supported remedies in different "fora," *id*. at 2, 9–15, does not warrant dismissal.[2] It underscores the urgency of this suit. Because of the City's intransigence, members of the public, including the Public Defender, have had to raise their voices before City Council and the legislature, pursuing every possible avenue to obtain CPD's compliance with the law.

[2] It is irrelevant that the state legislature previously considered amending 725 ILCS 5/103-3 to include a reference to the "one hour" requirement but did not do so. Mot. at 9–11. It is similarly irrelevant that City Council is "considering" an amendment to the municipal code to include that language. *Id*. at 14–15. The City does not offer any legal argument as why these facts are pertinent to its motion. They clearly are not. The Illinois Supreme Court has counseled courts against taking into account legislative action that does not result in actual law in judicial decision-making. See *City of Chicago v. FOP*, 2020 IL 124831, ¶ 49, 2020 WL 3273050 (2020) ("the introduction of a bill that is never passed or signed into law has no legal effect whatsoever, as the legislature cannot express its will or intent by a failure to legislate") (citation omitted). The reason "is simple: there are several equally tenable inferences that may be drawn from such inaction." *Id*. ¶ 49 (citation omitted). The legislature may well have failed to pass the proposed bill because legislators understood that the right to calls within one hour was *already* enshrined in state law.

Plaintiffs meet the legal requirements for the requested relief so that Section 2-615 dismissal is unfounded.[3] Mandamus lies to compel the City's compliance with its non-discretionary duties under Sections 103-3 and 103-4. The writ would rectify the plight of the thousands held incommunicado, and would do so without requiring Court oversight of CPD's general course of conduct. Compl. ¶ 51. Given the City's history of trampling on arrestee rights, there is also a need to effectuate 103-3 by recognition of an implied right of action under the statute. Such a cause accords with the law's plain language and is essential to uphold the public policy of the State.

Neither does the City's motion under Section 2-619 defeat Plaintiffs' claims. The case is not moot where the violations continue, and no other matter precludes the requested relief. That includes the consent decree over CPD, negotiated by the Illinois Attorney General and City to address CPD's pattern of excessive force, in a case where no enforcement actions are pending.

On the interpretation of Illinois statutory law, it is for this court, and not the federal judiciary, to compel the City to abide by its precepts. The City's motion should be denied entirely.

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[3] The City attaches extrinsic evidence, including an affidavit from CPD Deputy Chief Randall Darlin (Mot., Ex. A), ostensibly in support of its 2-619 motion. Mot. at 3 n. 1. But this evidence is irrelevant to those arguments, which concern only the applicability of the federal Consent Decree over CPD. Instead, the City improperly uses it to contest the veracity of Plaintiffs' allegations. See, *e.g.*, Darlin Aff. ¶ 12 ("If at any time an arrestee asks to speak to an attorney, all questioning is stopped and the arrestee is . . . provided access to a phone . . . ."); ¶ 24 ("Despite the challenges posed by the civil unrest, the Districts remained open . . . so if an attorney showed up looking for a specific arrestee, they would be provided access to the arrestee . . . ."). Extrinsic material controverting well-pled facts should not be considered. *Green v. Trinity Int'l Univ.*, 344 Ill. App. 3d 1079, 1086 (2003) ("when presenting a hybrid motion to dismiss it is improper to submit evidentiary material going to the truth of the allegations contained in the complaint because a motion pursuant to either section 2-615 or 2-619 concedes the truth of all well-pleaded allegations").

SUMMARY OF ALLEGATIONS SUPPORTING DENIAL OF MOTION TO DISMISS

Plaintiffs Have a Statutory Right to Prompt Access to Phones and Counsel in Stationhouses

The provisions at issue fall under Article 103 of the Criminal Code—"Rights of the Accused." They guarantee that a person in police custody "shall have the right to communicate" with an attorney and a member of their family by "making a reasonable number of telephone calls or in any other reasonable manner." Compl. ¶ 9 (citing 725 ILCS 5/103-3 (1963)). What is "reasonable" is defined by regulation, 20 Ill. Adm. Code § 720.20, as "generally within the first hour after arrival at the first place of custody." *Id*. ¶ 10 (alterations omitted). They also ensure that every individual restrained of liberty has a right to consult with an attorney "alone and in private" at the place of custody. *Id*. ¶ 11 (citing 725 ILCS 5/103-4 (1963)); see also *id.* ¶ 12.

The City has a Documented History of Statutory Violations, Which Are Ongoing

CPD has historically ensured that people cannot obtain legal counsel in the stationhouse at all, or until after they have been investigated and questioned. Compl. ¶¶ 1–2, n. 1, 22, n. 3, 23. CPD interrogation rooms have been sites of uncounseled and coercive interrogations for decades, leading to scores of wrongful convictions. Compl. ¶ 1 n. 1. The Chicago Police Accountability Task Force (PATF) issued a 2016 report finding systemic instances of delayed and denied access to lawyers in CPD stations. *Id*. ¶ 22 n. 3.[4]

Nothing has changed since then. CPD routinely fails to comply with its statutory duties under Sections 103-3 and 103-4 by denying arrestees access to counsel and to phones. Compl.

[4] Citing Police Accountability Task Force Report: Recommendations for Reform 56–57 (April 2016), https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf (". . . CPD generally provides phone access only at the end of processing, after interrogation and charging, while arrestees wait in lockup to be released or transferred to county custody."); *id*. at 57 ("When individuals in custody attempt to invoke their legal rights to counsel, they report facing hostility from police.").

¶¶ 23-50; Amy Campanelli Aff. (Ex. A to Complaint) ¶ 8. The violations have only escalated, as CPD used the pandemic and protests as cover for its misconduct. Compl. ¶ 29.

Continuing Violations of Section 5/103-3

The Public Defender is appointed as defense counsel at the time of a person's arrest by judicial administrative order. Campanelli Aff. (Compl. Ex. A) ¶ 6. Pursuant to that order, the Public Defender created the Police Station Representation Unit ("PSRU"), which represents detainees in CPD custody. *Id.* ¶¶ 4–7. In March, the Public Defender asked CPD General Counsel O'Malley to provide her clients a private place to consult with PSRU attorneys remotely, in light of the outbreak. Compl. ¶¶ 30–31. Counsel O'Malley rejected the request, stating CPD lacked "infrastructure" for private calls and demanding attorneys counsel clients in person. *Id.* ¶ 32; Campanelli Aff. (Compl. Ex. A), App. 1.[5]

CPD ultimately insisted that arrestees who wished to speak to counsel remotely sign an "Attorney/711 Visitation Notification Limited Waiver." Compl. ¶ 36; Campanelli Aff (Compl. Ex. A) ¶ 15. The waiver forces an arrestee to both acknowledge that CPD cannot provide private calls and agree not to "use any inadvertent overhear [by CPD or anyone else] as a basis to defeat criminal charges or in civil litigation . . . ." Campanelli Aff. (Compl. Ex. A), App. 2. The City can thus use "overhear" information against detainees in legal proceedings, yet attorneys must advise their clients to waive their constitutional rights so that they can access counsel. Compl. ¶ 38.

The waiver is a new development in an old tale. It accords with CPD's policy of denying private (and timely) phone calls to detainees in violation of 103-3. Telephones are available to detainees only in non-private lock-up areas, and only after CPD's investigation has concluded.

[5] The State's Attorney's Office was given remote access to detainees. Compl. ¶ 35.

Compl. ¶ 34.[6] The City admits to this policy. Mot. at 4 ("CPD district stations are equipped with phones only near the lock-up areas for use by arrestees"); *id*. at 5 ("[T]here is no expectation of privacy for calls made by arrestees . . . ."); Darlin Aff. (Mot., Ex. A) ¶¶ 6, 8 (only CPD facilities with lock-ups have phones and it is CPD policy to prohibit arrestees from making private calls).

And despite the waiver, CPD continues to bar many detainees from telephoning counsel *at all*. Compl. ¶¶ 25, 33–34 (describing bond court surveys concerning station phone access and CPD admissions about the denial of phone calls).[7] Indeed, the Organizational Plaintiffs' members were denied access to phones after being arrested for protesting. Williams Aff. (Compl. Ex. D) ¶ 3; Malcolm London Aff. (Compl. Ex. E) ¶ 3; Brown Aff. (Compl. Ex. F) ¶ 3.

Continuing Violations of Section 5/103-4

The City also blocks physical access to attorneys, in violation of 103-4. Members of the Organizational Plaintiffs who were arrested during recent uprisings were prohibited from seeing their counsel entirely, or forced to wait hours to see a lawyer; several were forced to sign waivers of their right to confidential communication in order to speak to an attorney, and the visits that did proceed were not private. Compl. ¶¶ 40–41.[8] Lawyers also experienced these violations. *Id*. ¶¶

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[6] See also Cristina Law Merriman Aff. (Compl. Ex. P) ¶ 6 ("Sergeant continued to yell and tell me that my client could not call me until after being processed and that this was the procedure.").

[7] The surveys are not "anecdotal," Mot. at 13, but admissible business records under Ill. S.Ct. R. 236, where Ms. Laudermilk is the Public Defender's custodian and she maintains the surveys in the regular course of the Public Defender's business. See Laudermilk Aff. (Compl. Ex. M) ¶ 2; see also *Gulino v. Econ. Fire & Cas. Co*., 2012 IL App (1st) 102429, ¶ 27 (foundation for business records can be established by "testimony of one who is familiar with the business and its mode of operation. . . ."). Also, the admissions of CPD officers to attorneys constitute statements of party opponents. ILL. R. EVID. 801(d)(2).

[8] See, *e.g.*, Kristiana Rae Colón Aff. (Compl. Ex. C) ¶¶ 3–6 ("Between 6:30–7:30pm, I witnessed Malcolm London, Damon A. Williams, Christopher Isaiah Brown, and Jennifer Pagán be placed under arrest by Chicago police officers, while experiencing significant brutality. . . . It took me approximately 3 hours to locate [them]. . . . Once counsel was obtained, counsel was denied access to the detained for an additional 4.5 hours."); Williams Aff. (Compl. Ex. D) ¶¶ 4–7 ("I was in custody for at least four hours before I was allowed to speak to an attorney. I later learned that I had two attorneys attempting to see me for nearly four hours before they were allowed to see me. . . . I was asked to sign a waiver prior to being able to speak with

42–48. CPD has prohibited Public Defender and NLG attorneys from accessing clients in custody and withheld information as to their whereabouts. *Id.*[9] As a result, detainee clients were (and are) vulnerable to interrogation without counsel. *Id.* ¶¶ 43–44.

As the social justice protests eased, the City's violations continued. From June 1 to June 5, 2020, the Public Defender surveyed 481 people in bond court. One in four were *never* offered a phone call while in CPD custody. Compl. ¶ 27; Laudermilk Aff. (Compl. Ex. M) ¶ 8. The City's misconduct is not the result of exigency, Mot. at 9, but of CPD's policies and procedures, which violate the statutes and regulations. Compl. ¶¶ 36–37, 49; Mot. at 4. CPD's leadership has stated that CPD is not complying with the law, and it has no intention of doing so in the future.[10]

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counsel. The officer told me that I would have to sign the paper to see my lawyer. . . . I was allowed to speak with counsel in person for approximately 5–7 minutes, in a non-private location."); London Aff. (Compl. Ex. E) ¶ 5 ("At some point in the morning, I was transferred to 51st and Wentworth police station. After arriving at the police station, an[ ] officer who was a family friend came to talk to me. After that officer came to talk to me, I was allowed to make a phone call. I had been in custody for more than 12 hours when I was allowed to make that call."); Chris Brown Aff. (Compl. Ex. F) ¶¶ 3–4 ("I was taken to the 2nd District, at 51st and Wentworth in Chicago and was never asked if I would like a phone call to call my family or my attorney. . . . During the entire time that I was in custody I was never allowed to speak to an attorney or make a phone call.").

[9] See Molly Armour Aff. (Compl. Ex. H) ¶¶ 3–6 (NLG attorney, describing her attempt over seven-hour period to access a client in custody at the 18th District); Lillian McCartin Aff. (Compl. Ex. I) ¶¶ 1, 5, 6 (NLG attorney was denied access to a client at the 1st District for over 10 hours, until the client was released after being charged); Harold Hall Aff. (Compl. Ex. T) ¶¶ 3, 5, 6 (PSRU attorney, who was told by 7th District officers that he could not call his client, and who received delayed physical access to his client); Aaron Goldstein Aff. (Compl. Exhibit Q) ¶¶ 10–25 (attorney and head of the PSRU, describing difficulty locating clients at police stations throughout the city and being denied physical access to clients at the 1st District in particular); Stephanie Ciupka Aff. (Compl. Exhibit R) ¶¶ 3–4 (PSRU attorney who called Central Booking repeatedly in order to locate 80 arrested clients, and Central Booking's failure to locate all but two clients); see also Renee Hatcher Aff. (Compl. Ex. U) ¶ 3 ("Upon arrival at the station [at 51st and Wentworth on May 31]. . . I presented my credentials [] to the officers and asked about the three individuals [I intended to represent]. One officer . . . told me that he would not confirm if the individuals were at the police station and I would not be admitted to inquire inside the police station.").

[10] Deputy Chief Randall Darlin testified at the August 24, 2020 City Council Public Safety Committee Hearing (Mot. at 14) that CPD would not commit to providing detainees access to an attorney within one hour of an arrest, but only "as soon as practicable." Hr'g Tr., Aug. 24, 2020 (Ex. 1) at 3:14–17. Darlin testified that providing counsel within one hour "is not always practicable[,]" *id.* at 3:18–21, and if CPD was forced to follow the one-hour rule, it would find it "very difficult to comply." *Id.* at 16:9–13. The hearing transcript, official proceedings from City Council, are properly subject to judicial notice. *City of Centralia*

The City of Chicago Has the Authority—and Capacity—to Comply With the Law

Plaintiffs have pled that the City has the authority and ability to comply with the law.[11] CPD can promulgate policies that revoke the waiver and require its members to provide detainees access to a phone within an hour of arrival at a station and facilitate private, in-person attorney visits. Compl. ¶ 51(a–c)(g). An agency with a $1.8 billion budget can afford telephones in its stations.[12] Each station is already equipped with private rooms for attorney consultations. Mot. at 5. These can be used to facilitate conversations between arrestees and counsel, by authorized cell phones, video technology, or hardwired phones. Compl. ¶ 51(e), (f); Campanelli Aff. (Compl. Ex. A), App. 2 (O'Malley acknowledging that stations have landlines). The City already has a method by which attorneys can present their credentials remotely to ensure security protocols for client-counsel calls. Mot. Ex. B, App. 1. A remedy is feasible here.

The CPD Consent Decree Does Not Supersede This Action

In the wake of the police killing of Laquan McDonald and the subsequent cover-up by CPD, the United States Department of Justice ("DOJ") initiated an investigation into CPD's uses of force and the City's failures to hold its officers accountable. The resulting 2017 report ("DOJ Report") determined that CPD officers engage in a pattern and practice of using force, including deadly force, that is unreasonable. DOJ Civil Rights Division, "Investigation of the Chicago Police Department"

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v. Garland, 2019 IL App (5th) 180439, ¶ 10 (holding that court could take judicial notice of a report of the proceedings of the Centralia City Council from 1893) (citing *People v. Mata*, 227 Ill. 2d 535, 539–40 (2005) (holding judicial notice of public documents that are "readily verifiable" is appropriate.)).

[11] Thus the City's argument that Plaintiffs do not "allege that such relief is feasible" is inaccurate. Mot. at 1. Further, Darlin's statement decrying the "expenditures" involved in reconfiguring stations to comply with the law, Mot. Ex. A ¶ 8, is another factual contention not properly considered here. See n. 3, *supra*.

[12] See Dan Hinkel, *While Others Pledge Funding Cuts to Police Forces, Chicago More Hesitant*, Chicago Tribune (Jun. 9, 2020), https://www.chicagotribune.com/news/breaking/ct-chicago-police-defunding-20200609-ugem6o353fhc7hch36uhs6mhqq-story.html.

5 (Jan. 13, 2017), https://www.justice.gov/opa/file/925846/download. The Report does not address the rights of CPD arrestees to phone calls and counsel.

In June 2017, community organizations including BLM filed a lawsuit, *Campbell v. City of Chicago*, No. 17 CV 04467 (N.D. Ill.), challenging CPD's pattern of excessive force and discrimination against Black and Latinx people. Futterman Aff. (Ex. 2) ¶ 1. On August 29, 2017, the Illinois Attorney General filed its own lawsuit against the City to enjoin CPD's "pattern of using excessive force, including deadly force[.]" *State of Illinois v. City of Chicago* Compl., No. 17 CV 04467 (N.D. Ill.) (Ex. 2, App. A) ¶ 2. That suit relied heavily on the DOJ findings.[13] *State of Illinois* Compl. (Ex. 2, App. A) ¶ 9. It did not mention access to counsel or telephones.

The day that case was filed, the Attorney General and the City entered into settlement negotiations aimed at a consent decree. Ex. 2 ¶ 3. Nearly 1,700 comments and suggestions were received from the public on the draft decree. Mem. Op. and Order (Ex. 2, App. C) at 7. The federal court also convened a fairness hearing, during which community members could submit comments regarding the proposed decree. *Id.* There were 96 speakers at the hearing, and more than 500 groups or individuals, including the Public Defender and BLM, submitted written comments. *Id.*; Ex. 2 ¶ 7. On January 31, 2019, Judge Robert Dow approved the Decree, retaining jurisdiction until the City is in compliance. Ex. 2 ¶ 8; Consent Decree (Ex. 2, App. B) ¶ 693.

Plaintiffs were not parties to the Attorney General's lawsuit. Ex. 2 ¶¶ 2–3. A "Coalition" consisting of the *Campbell* Plaintiffs (including BLM) and another set of organizations with a separate civil rights suit against the City agreed to stay their own litigation in exchange for the ability to enforce the Decree. The *Campbell* Plaintiffs did submit suggestions to the *State of Illinois* parties

[13] The *State of Illinois* Complaint relies on the PATF Report findings, but not in reference to the rights of arrestees to counsel and phones in custody. *State of Illinois* Compl. (Ex. 2, App. A) ¶ 7; see also n. 4, *supra*.

for access to counsel provisions, but the versions later adopted by the parties do not contain the language the *Campbell* Plaintiffs proposed. *Id.* ¶¶ 4–6. The Public Defender also submitted proposed changes to the access to counsel paragraphs that were not included in the final Decree. See 10/12/2018 Comments of Public Defender Amy Campanelli (Ex. 3) at 1.[14] The *Campbell* Plaintiffs eventually dismissed their case, while expressly reserving rights "to file any future claim against the City for any violations of federal or state law, including any civil rights violations by the Chicago Police Department[.]" Ex. 2 ¶ 9; Release and Settlement (Ex. 2, App. D) ¶ 7. In approving the Decree, the federal court made clear that it does not supplant Illinois law or the obligations or rights of third parties. Mem. Op. and Order (Ex. 2, App. C) at 12.

The Consent Decree, like the Complaint filed by the Attorney General, is largely focused on CPD's practices of excessive force and lack of accountability. It addresses: community policing; impartial policing; crisis intervention; use of force; recruitment, hiring, and promotion; training; supervision; officer wellness; accountability and transparency; and data collection. Consent Decree (Ex. 2, App. B). Out of 721 substantive provisions, the City identifies two as relevant to the instant case. Mot. at 11 (outlining paragraphs 30 and 31 of the Decree).

Following the George Floyd and Breonna Taylor murders and the ensuing uprisings, the Coalition sent a demand letter to the City raising concerns over CPD's repressive tactics against protesters, including holding them without counsel or access to phones. See O'Malley Aff. (Mot., Ex. B), App. 9. Over 540 concerned residents sought to provide oral comments to the Independent Monitor; approximately 100 individuals, among them the Public Defender, did so. 8/20/2020 Hr'g Tr. (Mot., Ex. E) at 91:24–25; 92:22–24. The Public Defender implored the Monitor to recognize

[14] The Public Defender's comments were filed publicly in *State of Illinois v. City of Chicago*, 17-CV-06260 (D.E. 163), and so the Court may take judicial notice of them. See *May Dept. Stores Co. v. Teamsters Union Local No. 743*, 64 Ill.2d 153, 159 (1976); accord City Mot. at 7 n. 2.

CPD's ongoing refusals to provide arrestees access to counsel and phones. 8/19/2020 Hr'g Tr. (Mot., Ex. D) at 83:23–86:12. The Court closed the listening session by indicating that the Monitor would issue a report on CPD's response to the uprisings. Mot., Ex. E at 189:5–6. To date, no enforcement action has been filed—by any party or by the Coalition. Ex. 2 ¶ 11.

LEGAL STANDARDS

The City brings its motion to dismiss pursuant to 735 ILCS 5/2-615 and 5/2-619(a)(3) and (a)(9). A section 2-615 motion "tests the legal sufficiency of the plaintiff's claim," while one under section 2-619(a) "admits the legal sufficiency of the plaintiff's claim, but asserts certain defects or defenses outside the pleading which defeat the claim." *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002). Subsection (a)(3) of section 2-619 allows for dismissal where there is "another action pending between the same parties for the same cause." Subsection (a)(9) provides for dismissal if a claim "is barred by other affirmative matter avoiding the legal effect of or defeating the claim." In responding to a section 2-619(a) motion, a plaintiff may present "affidavits or other proof" to show the defendant's affirmative defense is "unfounded." *Epstein v. Chicago Bd. of Educ.*, 178 Ill. 2d 370, 383 (1997) (citing, *inter alia*, 735 ILCS 5/2-619(c)).

In evaluating a motion under either 2-615 or 2-619, the Court construes the pleadings and all reasonable inferences therefrom in the light most favorable to the plaintiff. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004); *Mayfield v. ACME Barrel Co.*, 258 Ill. App. 3d 32, 34 (1994). The inquiry presented by a 2-615 motion is "whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 382 (2004). A 2-619 motion should only be granted "where there are no material facts in dispute and the defendant is entitled to be dismissed as a matter of law." *Mayfield*, 258 Ill. App. 3d at 34.

ARGUMENT

I. WELL-PLED ALLEGATIONS SHOW THE CITY SYSTEMATICALLY VIOLATES SECTIONS 103-3 AND 103-4, SO DISMISSAL UNDER 2-615 IS UNWARRANTED.

A. Mandamus is Appropriate to Force the City to Comply with Its Non-Discretionary Duties to Provide a Timely Phone Call and Attorney Access to Detainees.

Mandamus is appropriate when officials fail to follow the law. *Noyola v. Bd. of Educ. of the City of Chicago*, 179 Ill. 2d 121, 132–33 (1997) ("Where . . . public officials have failed or refused to comply with requirements imposed by statute, the courts may compel them to do so by means of a writ of mandamus."). The Complaint underscores that Organizational Plaintiffs have "a clear and affirmative right to relief," *i.e.*, to the enforcement of existing law protecting the accused; (2) the City has "a clear duty to act"; and (3) the City has clear authority to comply. *Gassman v. Clerk of the Cir. Ct. of Cook Cty.*, 2017 IL App (1st) 151738, ¶ 13.[15]

The City states that the mandamus claim fails as a matter of law because (1) CPD has discretion in implementing the statutes, and (2) entry of the writ would require the Court to monitor CPD's "general conduct." Mot. at 15–20. These arguments have no merit.

1. The City's Enumerated Duties under Sections 103-3 and 103-4, and their Implementing Regulations, Are Not Discretionary.

The City does not have discretion as to when, or whether, it provides phone and attorney access. This conclusion is compelled by analysis of the relevant statutes and regulations, for the best indicator of legislative intent is the law's plain language, given its ordinary meaning. *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 226 Ill. 2d 559, 567 (2007). Under 103-3(a) and 20 Ill. Adm.

[15] The City does not contest that it has the authority to comply with the writ, but suggests that it would be onerous and expensive to implement the law governing private phone access. Mot. at 16–17. Plaintiffs' allegations say otherwise. Given its budget, CPD has both the financial and physical ability to offer phones to arrestees, in private, within an hour. *Cf. Grant v. Dimas*, 2019 IL App (1st) 180799, ¶ 70 (holding defendant agencies had authority to comply with mandamus to implement a statutorily mandated wage increase by virtue of their positions and where the General Assembly had appropriated the necessary funds).

Code § 720.20(b), municipal law enforcement "*shall*" provide a phone to arrestees at the first place of custody, "generally within an hour," so that detainees can communicate "with an attorney of their choice and a member of their family by making a reasonable number of phone calls. . . ." (emphasis added). Section 103-4 mandates that any person "restrained of his liberty," whether or not charged, "*shall*. . . be allowed to consult with any licensed attorney. . . alone and in private at the place of custody, as many times and for such period each time as is reasonable." (emphasis added). The word "shall," particularly when "used with reference to a right or benefit," is a "mandatory directive." *Ryan v. Retirement Bd. of Firemen's Annuity and Ben. Fund of Chicago*, 136 Ill. App. 3d 818, 820–21 (1985).

The City acknowledges that pursuant to 103-3 and 103-4, it must provide arrestees access to counsel and to telephones. City. Mot. at 16 ("The City does not dispute that it must offer arrestees reasonable access to phones and the ability to see or consult with an attorney."). That is, it admits that the provision of calls and attorneys are *non*-discretionary duties. Yet, the pleadings show that CPD fails to provide any call to a significant number of people in its custody, and that it similarly obstructs physical access to counsel at the stationhouse door. The City does not address the allegations concerning the wholesale denial of access. On these facts, Plaintiffs have "a clear, affirmative right to relief[]," under both statutes. *Gassman*, 2017 IL App (1st) 151738, ¶ 13.

The City is also required to provide the statutorily-mandated rights in a specified period of time. Here, the City argues it carries no such burden, because the Criminal Code "imparts to CPD discretion as to the timing" in which it provides phones and counsel. Mot. at 2. The City brazenly states that CPD is not "able to provide every arrestee (or even most arrestees) with a phone, in private, within an hour of being taken into custody[.]" Mot. at 16–17. Acting under an intentional misinterpretation of its duties, CPD has crafted policy dictating that phone access be provided not

"within an hour" but only "as soon as practicable." *Id*. at 4 (citing CPD General Orders G06-01 and G06-01-04). CPD policy permits delays in the provision of phone and attorney access depending on "the seriousness, complexity, or ongoing nature of the crime at issue, as well as in mass arrest situations." *Id*. at 9 (citing Darlin Aff., Mot. Ex. A, ¶¶ 11–16). It allows officers to postpone access to counsel in order to "perserv[e] the integrity of any ongoing criminal investigation." *Id*. at 17. And as a matter of practice, CPD refuses to allow a phone call until after it has completed "processing" the person in custody, including after any interrogation, line-up, polygraph, or other pre-charging investigation. Compl. ¶ 22, n. 3. In short, the City has devised its own rulebook governing the rights of arrestees.[16]

CPD is not the adjudicator of rights for people in custody. It is for the legislature to draft the law and the judiciary to interpret it. *Millineum Maintenance Management, Inc. v. County of Lake*, 384 Ill. App. 3d 638, 649 (2008). The state legislative body, via the Joint Administrative Committee on Administrative Rules (JCAR), has explicitly spoken as to the rights conferred upon a person arrested within the State of Illinois. *Cf. Osorio v. The Tile Shop, LLC,* 939 F.3d 847, 851 (7th Cir. 2019) (statutory scheme analyzed by reference to implementing regulations). Arrestees are entitled to a phone call, for the purpose of contacting family and seeking representation, "generally within an hour" of arrival at the first place of custody. 20 Ill. Adm. Code § 720.20(b).

[16] Incredibly, CPD does not believe it is bound by state regulations. During testimony given at a recent City Council meeting, Deputy Chief Darlin, the City's affiant, explicitly stated that he did not think that 20 Ill. Adm. Code § 720.20 *was* the law. See Ex. 1 at 15–16 (CHIEF DARLIN: " . . . The terminology of 'within one hour' is an administrative recommendation that the legislature made through the process, so we are, our directive itself, a policy, written policy for the department. ALDERMAN IRVING: Hold on. Hold on. You said, [JCAR] (phonetic) is not a recommendation, [JCAR] is law. It's not a recommendation. That's law. If that's the rule, that's the rule. That's the law. Am I mistaken about it? CHIEF DARLIN: So, under the law, Alderman, the department is allowed discretion through that recommendation . . . .").

This Court has the authority to interpret "generally," using principles of construction where the word is given its "ordinary meaning." *Rosewood Care Center*, 226 Ill. 2d at 567. Thus, generally means "as a rule; usually." *Generally*, Merriam-Webster, https://www.merriam-webster.com/dictionary/generally. Exceptions are to be *unusual*, and not the norm. The U.S. and Illinois Supreme Courts, interpreting "generally" in the analogous context of probable cause hearings, have held that where the right to such a hearing is "generally" to be conferred within a specific time (48 hours), the defendant has the burden to justify any deviation from that obligation by reference to an "extraordinary" circumstance. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991) (interpreting *Gerstein v. Pugh* to hold that "as a general matter," a determination of probable cause within 48 hours of arrest will "comply with the promptness requirement of *Gerstein*," but "[w]here an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. . . . [and] the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance."); *People v. Williams*, 230 Ill. App. 3d 761, 778 (1992) ("Providing [a] determination of probable cause within 48 hours generally satisfies [the] constitutional requirement. Beyond 48 hours, the burden shifts to the State to show extraordinary circumstances justifying the delay.").

The same holds true here. "As a rule," the City is to provide calls "within an hour" of their being brought into custody, except in an "extraordinary" circumstance warranting delay. "Extraordinary" circumstances are not "as soon as practicable," when CPD is done "processing" a person, or where the charges are serious.[17] *Cf. County of Riverside*, 500 U.S. at 577 ("The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance."). Accepting the City's claim of unfettered discretion

[17] Cases where the charges are serious are those in which the need for a phone and lawyer are most acute.

would undercut the General Assembly's obligatory mandate. CPD, warden of the accused, would become the arbiter of rights for those in its custody and could eviscerate such rights with impunity (as it attempts to do here). That is an untenable reading of the law. *Cf. In re Madison H.*, 215 Ill. 2d 364, 372 (2005) (Statutory construction presumes "the legislature did not intend to create absurd, inconvenient or unjust results."). The correct interpretation abides by its written letter, upholding the intent of the legislature to ensure objective protections for those in custody.[18]

2. The City Cannot Force Arrestees to Sacrifice Privilege in Exercising Their Rights.

While conceding that Section 103-4 requires that attorney consultations be "alone and in private at the place of custody," Mot. at 17, the City argues that it is a valid exercise of its discretion under 103-3 to require a Limited Waiver of the attorney-client privilege for detainee legal phone calls, because "there is no law requiring arrestees to have access to private phone consultations with their attorneys." *Id.* It similarly argues that it is appropriate to require that detainees make these calls to attorneys in crowded lock-up areas, since "there is no expectation of privacy" for such communications. *Id*. at 5. These are spurious contentions, ignoring both the purpose of Section 103-3, which is to "ensure access to counsel," *People v. Williams*, 2017 IL App (1st) 142733, ¶ 35, and over a century of Illinois precedent sanctifying the privilege of attorney-client communications.[19] See, *e.g.*, *Dickerson v. Dickerson*, 322 Ill. 492, 498-99 (1926) ("It is essential

[18] This is why *Holly v. Montes*, 231 Ill. 2d 153 (2008), Mot. at 16, 18, misses the mark. That court denied mandamus to a parolee seeking to compel the Prisoner Review Board to remove electronic monitoring during his supervised release, finding that a plain reading of the relevant statute gave the PRB "wide discretion in the setting of MSR conditions." *Id*. at 160 ("[C]onditions of parole or mandatory supervised release shall be such as the [PRB] deems necessary to assist the subject in leading a law-abiding life.") (quoting statute). The law here has the opposite effect of the PRB statute, *requiring* law enforcement to provide specific protections rather than referring all decision-making to law enforcement agencies.

[19] Illinois has adopted the Wigmore rule of privilege: "'(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself

to the ends of justice that clients should be safe in confiding to their counsel the most secret facts and to receive advice in the light thereof, without peril of publicity.").[20]

The two sets of rights—attorney access and attorney-client privilege—are symbiotic and must be interpreted in tandem, including for detainees in custody. Illinois courts have recognized as much. See *People v. McRae*, 2011 IL App (2d) 090798, ¶¶ 28–30, 39 (ruling that unless there was waiver, letter written by pretrial detainee to his attorney "for the purpose of legal advice," subsequently confiscated by a guard and disclosed to the prosecution, was privileged, and noting that the Criminal Code "ensure[s] that prisoners' and inmates' privileged communications with their attorneys. . . will not be subject to monitoring by the State."); *id*. ¶ 29 ("Communications made in confidence by a defendant to his or her attorney are protected from disclosure by the attorney-client privilege.") (citing *People v. Childs*, 305 Ill. App. 3d 128, 136 (1999)).

The City's interpretation of the law would turn the privilege on its head. A person in detention cannot seek the advice of an attorney in order to obtain effective legal counsel while simultaneously omitting from that communication any matter that might be sensitive and not for public consumption. Such a procedure undermines the purpose of the privilege. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) ("The [attorney-client] privilege is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'") (quoting *Upjohn Co. v. United States*, 499 U.S. 383, 389 (1981)).[21]

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or by the legal adviser, (8) except the protection be waived.'" *People v. Knippenberg*, 66 Ill. 2d 276, 282–83 (1977) (citing 8 John H. Wigmore, Evidence § 2292).

[20] The right of a detained person to confidential and privileged communications with their attorney was thus well established in 1963, when the Illinois legislature passed Sections 103-3 and 103-4.

[21] It is also implausible that detainees, generally unaware of the City's position on privilege, would refrain from disclosing a confidential matter on the phone when talking to a lawyer who represented them.

The City's willingness to concede detainees' right to privileged in-person attorney communication while disavowing a commitment to privacy for phone calls is in tension with the holistic nature of the privilege, which applies to all communications.[22] See n. 19, *supra*. Recognition of a telephonic privilege is particularly important now. The City says it recognizes the "serious limitations and concerns presented by COVID," yet argues that only in-person communications are privileged. Mot. at 17. The City's position is both unfounded and callous.

3. The Writ Will Require the City's Compliance with the Law, Not Court Monitoring of CPD's "General Course of Conduct."

Plaintiffs' mandamus claim is limited in scope. The City claims the requested relief is "insufficiently specific," requiring court oversight of CPD's general course of conduct including an assessment of "each arrest" that it makes. Mot. at 19. This is a boogeyman defense.

Plaintiffs seek a writ to force the City to comply with the statutes and regulations, as written, and subject to their plain interpretation. They do not prescribe a general set of procedures, and thus are dissimilar to petitioners in the City's cited cases. Mot. at 18–20. The Court in *Metro. Chi. Nursing Home Ass'n v. Walker*, 31 Ill. App. 3d 38 (1975) rejected the petitioners' request that an agency's acting director be made to negotiate the rate of reimbursement for services provided to the public, emphasizing that "negotiate" could "be used in many senses," and thus petitioners were not asking for performance of a "specific act as distinguished from a general course of conduct." *Id*. at 41–42. In *Ryan*, 136 Ill. App. 3d 818, the court reversed the lower court's issuance of mandamus, because it "prescrib[ed] the exact steps that the [defendant] must take to execute" its duty. *Id*. at 821. Both cases hold no sway here.

[22] An arrestee does not have to renounce their right to a timely call under Section 103-3 in order to pursue a private in-person consultation under Section 103-4, as the City would have it. Mot. at 18. The City cites no authority for the claim that the statutory provisions are interchangeable; they are not.

A Court order will require that CPD provide arrestees access to a phone within an hour of being taken into custody, other than in extraordinary circumstances, as well as physical access to counsel, in private. That is what the law requires.[23] See *Greene v. Dep't of Public Work*s, 234 Ill. App. 111, 119 (1924) ("[W]hen the purpose of the law is plainly stated, and the facts . . . show that public officials are arbitrarily and illegally disregarding the plain purpose and intent of the statute . . . the writ of mandamus will issue."). The writ will implicate judicial enforcement of that specific conduct, and extend no further.[24] The City retains discretion in *how* it effectuates the law (*e.g.*, the types of phones to provide arrestees, who is to be in charge of ensuring calls, etc.). But the City has no discretion as to *whether* it must follow the law.

B. Plaintiffs Have Pled a Cognizable Right to Injunctive Relief via an Implied Right of Action on Behalf of the Organizational Plaintiffs' Members Under 725 ILCS 5/103-3

Per Count II of the Complaint, Organizational Plaintiffs maintain an implied right of action to enforce Section 5/103-3. Their members are the intended beneficiaries of the statute and seek to remedy the very harm it was designed to prevent (incommunicado detention); the legislative purpose aligns with such an action, and recognition of an implied right is essential to provide an adequate remedy under the statute and end the City's violations of Illinois law. See *Rodgers v. St. Mary's Hospital*, 149 Ill. 2d 302, 308 (1992).[25]

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[23] Plaintiffs are not asking that CPD be compelled to exercise its discretion—a different type of mandamus petition. See *People ex rel. Chesapeake & O. Ry. Co. v. Donovan*, 30 Ill. 2d 178, 180 (1964) (mandamus can be available "to compel the exercise of discretion."). As a result, the City's cite to *Chicago Association of Commerce & Industry v. Regional Transportation Authority*, 86 Ill. 2d 179, 187 (1981), in which the plaintiff sought that very relief, is not pertinent. *Id*. at 187 ("Although under some circumstances mandamus may lie to compel a public officer to proceed with the exercise of discretion [citations], it will not lie to compel him to act in a certain manner while exercising that discretion.").

[24] The Court would of course retain its "inherent authority" to enforce its own orders. *Dir. of Ins. ex rel. State v. A & A Midwest Rebuilders, Inc.*, 383 Ill. App. 3d 721, 723 (2008).

[25] Illinois courts have repeatedly recognized a private right of action, under varied laws, including the Illinois Constitution, where plaintiffs meet these prongs. See, *e.g.*, *Sherman v. Field Clinic*, 74 Ill. App. 3d 21, 29 (1979) (affirming that courts found an implied right under Article I, Section 17 of the 1970 Illinois

In analyzing the propriety of an implied right, courts consider the "totality of the circumstances." *Moore v. Lumpkin*, 258 Ill. App. 3d 980, 989 (1994). The circumstances here—including the rights-bearing language of the statute, the harm suffered by the Organizational Plaintiffs' members, and the City's outright defiance of its obligations—counsel in favor of a private action. See *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 89 Ill. 2d 379, 389 (1982) (Illinois courts "have continually demonstrated a willingness to imply a private remedy, where there exists a clear need to effectuate the purpose of an act."); *Cannon v. University of Chicago*, 441 U.S. 677, 690 n. 13 (1979) ("the right- or duty-creating language of [a] statute has generally been the most accurate indicator of the propriety of implication of a cause of action."); *Moore*, 258 Ill. App. 3d at 999–1000 ("[I[n determining whether a private right of action should be implied, it is proper to ask whether the statute is remedial, *i.e.*, does the statute seek to redress wrongs against individuals who are harmed because the statute is violated.") (citation omitted).[26] The City's arguments to the contrary are unavailing.

1. Organizational Plaintiffs are representing their members, intended beneficiaries of Section 103-3, and seek to remedy the harm the statute was designed to prevent.

The City concedes, as it must, that "[a]rrestees are within the class of persons protected by Section 103-3." Mot. at 21. The class includes the Organizational Plaintiffs' members, who were recently arrested. Compl. ¶¶ 15–20 and supporting affidavits. Equally evident is that the statute was intended to prevent harm to this class by preventing incommunicado detention. The City admits

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Constitution prohibiting sex discrimination, the Election Code, the Workman's Compensation Act, the Federal Safety Appliance Act, the Retail Installment Sales Act, and the Consumer Fraud Act).

[26] A judicial finding of an implied action pursuant to an article of rights in a state criminal code is not revolutionary. Courts in other jurisdictions have recognized such an action where, as here, plaintiffs were within the class of persons covered by the statute (and even where the law was not within an article of rights). See, *e.g.*, *Oja v. Grand Chapter of Theta Chi Fraternity Inc.*, 684 N.Y.S.2d 344, 346 (N.Y. App. Div. 1999) (conferring a private right of action to plaintiff decedent, a victim of hazing, because doing so clearly "further[ed] the legislative purpose of deterring potentially dangerous hazing activities").

this point. Mot. at 21 ("Section 103-3 was enacted to prevent injuries to arrestees . . . ."). Organizational Plaintiffs' members suffered the contemplated harm at the hands of CPD officers when they were recently arrested. Compl. ¶¶ 15–20. They are likely to face similar injury in the future, because of their commitment to protest and CPD's commitment to arresting protesters. *Id*. The members should be able to seek relief under Section 103-3 via an implied action to put an end to the continuing violations of their rights. *Cf. Sawyer Realty Group, Inc*., 89 Ill. 2d at 391 ("The plaintiffs were members of the class for whose benefit the statute was enacted. . . . The plaintiffs' injury is one the statute was designed to prevent.").

Yet the City attempts to muddy clear waters, arguing that though arrestees are beneficiaries of the statute, the Organizational Plaintiff groups, comprised of arrestees and those at future risk of arrest, are not. Mot. at 21.[27] It similarly asserts that Section 103-3 was not intended to remedy harm to community groups. *Id*. The City misconstrues this litigation.

Organizational Plaintiffs seek to enforce Section 103-3 on behalf of their harmed members, under the well-established doctrine of associational standing. See *Winnebago Cty. Citizens for Controlled Growth v. Cty. of Winnebago*, 383 Ill. App. 3d 735 (2008) (under associational standing doctrine, "an organization may assert the legal rights of its members[.]"); see also *International Union of Operating Engineers, Local 148, AFL-CIO v. Illinois Dep't of Emp't Security*, 215 Ill. 2d 37, 50 (2005) (adopting federal associational standing test in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).[28] Associational standing is "an effective tool for

[27] The City also states that the Public Defender and NLG are not intended beneficiaries of Section 103-3. Mot. at 21. As previously noted, Plaintiffs do not dispute this. See n. 1, *supra*.

[28] Under *Hunt*, "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343.

vindicating interests [members of an organization] share in common." *Guns Save Life, Inc. v. Raoul*, 2019 IL App (4th) 190334, ¶ 15. The City does not challenge the Organizational Plaintiffs' standing to bring suit, so the well-pled allegations on this point, Compl. ¶¶ 15–20, are taken as true. *Cf. Senese v. Climatemp, Inc.*, 222 Ill. App. 3d 302, 317 (1991) (affirming that the defendant bears the burden of pleading and proving lack of standing).

Courts have long recognized that organizations may enforce a statute via an implied right of action in the interest of members whom the legislature intended to protect. See *Organization of Minority Vendors, Inc. v. Illinois Central Gulf R.R.*, 579 F. Supp. 574, 592–93 (N.D. Ill. 1983) (holding that an organization representing minority business owners had associational standing and an implied right of action under the Railroad Revitalization and Regulatory Reform Act where the members were intended beneficiaries); see also *Kappa Alpha Theta Fraternity, Inc. v. Harvard University*, 397 F. Supp. 3d 97, 108 (D. Mass. 2019) (finding that fraternity had associational standing and stated discrimination claim under Title IX on behalf of its members); *Pele Defense Fund v. Paty*, 73 Haw. 578, 606 (1992) ("[W]e hold that PDF, whose members are beneficiaries of the trust, may bring suit for the limited purpose of enjoining state officials' breach of trust. . . in violation of the Hawaii constitutional and statutory provisions. . . .").[29]

Because the Organizational Plaintiffs bring a representative action on behalf of the direct beneficiaries of the statute, the City's cases brought by individuals who were *not* intended beneficiaries are off point. Mot. at 21. In *Metzger v. DaRosa*, 209 Ill. 2d 30 (2004), the Court held that the Illinois Personnel Code, enacted "to benefit the state and the people of Illinois by providing

[29] *Cf. Helping Others Maintain Envtl. Standards v. Bos*, 406 Ill. App. 3d 669, 686 (2010) (affirming that plaintiffs, including non-profit organization representing individuals opposed to construction of a livestock facility, were members of the class for whose benefit the Livestock Act was intended but ultimately finding no implied right based on other prongs of implied action test).

efficient government administration," did not inure to the benefit of the aggrieved employee plaintiff, who was not "a member of the primary class for whose benefit the statute was enacted[,]" and whose injury was not one the statute was designed to prevent. *Id*. at 38–39. In *Fisher v. Lexington Health Care, Inc*., 188 Ill. 2d 455 (1999), the Court affirmed dismissal of an implied right suit brought by nursing home employees for retaliatory conduct under the Nursing Home Care Act, which covered nursing home residents and so was "not designed to protect nursing home employees such as the plaintiffs." *Id*. at 462.[30] In contrast, Organizational Plaintiffs seek to "vindicate" the rights of their members, the intended beneficiaries of the statute, and "prevent the type of injuries the General Assembly intended the [law] to prevent." *Id.*

2. An implied right of action is necessary to provide an adequate remedy here.

An implied right is also required to provide an adequate remedy for the City's ongoing violations of Section 103-3, and thus to "effectuate" the law's purpose.[31] *Sawyer*, 89 Ill. 2d at 389. The City has engaged in long-standing violations of the statute. Compl. ¶¶ 1, 22 and n. 3.[32] CPD continues to take the explicit position that it is neither physically possible nor advisable to ensure private phone calls for detainees. Darlin Aff. (Mot., Ex. A) ¶ 8; Compl. Ex. A, App. 1. Deputy

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[30] *Midwest Med. Records Ass'n, Inc. v. Brown*, 2018 IL App (1st) 163230, Mot. at 21, is inapposite for the same reason. There, the Court declined to find an implied right of action for plaintiffs who challenged court filing fees under the Clerk of Courts Act, as the Act was meant to compensate the Clerk's office for operating costs and not intended to benefit individual litigants, like the plaintiffs. *Id.* ¶ 47. Using this same statutory analysis, it is incontestable that Section 103-3 is intended to benefit Plaintiffs' members.

[31] The City does not contest that a private right of action is consistent with the underlying purpose of the relevant law. Regardless, Plaintiffs meet this prong of the test, which is generally considered in conjunction with the "adequate remedy" prong. See *Pilotto v. Urban Outfitters West, LLC*, 2017 IL App (1st) 160844, ¶ 26 ("[O]ther courts do not necessarily discuss [the legislative purpose] factor in detail, instead discussing it together with the fourth element."). The rights-granting language in 735 ILCS 5/103-1 *et seq*., of which 103-3 is part, is unique within the code. It confers benefits upon a subclass of the public—arrestees—whom the legislature intended to protect, and are otherwise unenforceable absent a private right of action.

[32] See n. 4, *supra*, describing the 2016 PATF findings regarding the denial of phone access to counsel.

Chief Darlin informed city council that CPD does not intend to provide detainees a phone call within an hour. See n. 16, *supra*. The City's motion backs this up. Mot. at 16–17.

Plaintiffs' allegations, and the City's response, evince a "clear need" for prospective relief via an implied right of action to uphold the rights of Plaintiffs' members and this state's public policy. See *Sherman*, 74 Ill. App. 3d at 29 (finding implied right of action under Collection Agency Act against debt collectors where "the acts of collection harassment alleged contravene the public policy of this State[.]"); *Sawyer Realty Group, Inc*., 89 Ill. 2d at 389, 391 (finding implied right of civil action under the Brokers Licensing Act where it was "necessary to provide an adequate remedy for self-serving, deceptive and fraudulent practices of brokers and salesmen that the Act seeks to prevent."); *Kelsay v. Motorola*, 74 Ill. 2d 172, 184-85 (1978) (finding implied right of action under Workmen's Compensation Act because "[r]etaliatory discharge is offensive to the public policy of this State. . . ."). See also *Montague v. George J. London Memorial Hospital*, 78 Ill. App. 3d 298, 302 (1979) (finding implied right of action under Mental Health Code and noting that "public policy considerations are material when analyzing statutory provisions with respect to ascertaining whether they may support civil actions such as that pursued by plaintiff in the present case.").

The City argues an implied right is unnecessary as Plaintiffs have alternative remedies. Mot. at 22–23. Such "recourse" is unavailable, limited in scope, and will not remedy systemic ills.

The City wrongly claims that the exclusionary rule provides a proper remedy for those held without access to telephones. Mot. at 22. Violations of Section 103-3 do not, on their own, trigger application of the exclusionary rule within the criminal legal process. See *People v. Martin*, 121 Ill. App. 3d 196, 210 (1984) (holding that police violations of 720 ILCS 5/103-3 do not result in vacation of conviction or suppression of evidence, absent a due process violation); see also *People v. Williams*, 2017 IL App (1st) 142733 ¶ 29 (noting that Section 103-3 fails to contain any remedy

in criminal proceedings). Moreover, the exclusionary rule comes into play only if an arrestee provides a custodial statement and is subsequently charged, prosecuted, and subjected to proceedings in which that statement is used. See *People v. Winsett*, 153 Ill. 2d 335, 350 (1992) (describing exclusionary rule). It provides no palliative for those who have been held incommunicado and released without charge, prosecuted without providing a statement, or denied a call to a family member. Thus, the City's cite to *People v. Barton*, 122 Ill. App. 3d 1079 (1984), Mot. at 22, in which the lower court suppressed the defendant's confession obtained in derogation of his constitutional right to counsel, is not pertinent to this analysis. The criminal process does not provide an avenue for relief here.[33]

Plaintiffs cannot bring a damages lawsuit for violations of Section 103-3, which provides broader protections than those under the Constitution and so will not support section 1983 litigation. See *Moore v. Marketplace*, 754 F.2d 1336, 1349 (7th Cir. 1985) ("[A]n alleged violation of a state statute does not give rise to a corresponding § 1983 violation, unless the right encompassed in the state statute is guaranteed under the United States Constitution.").[34] The only appropriate remedy for violations of 103-3 is a private right of action to ensure that law's specific protections. *Cf. Abbasi v. Paraskevoulakos*, 187 Ill. 2d 386, 393 (1999) (implied right of action is proper where necessary to "uphold and implement the public policy behind the Act.").

While an individual CPD officer could theoretically be subject to criminal penalties for violating Section 103-3, Mot. at 22, that is not a cure for an epidemic. It would not compel the rest

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[33] This is particularly true as even admitted constitutional violations do not require exclusion, *e.g.*, confessions taken in violation of an arrestee's constitutional rights can still be admitted as evidence of guilt. See *People v. Willis*, 215 Ill. 2d 517, 540 (2005) (holding that a delay in presenting defendant before a judge for probable cause determination did not require exclusion of his custodial confession).

[34] The City admits that the Fourteenth Amendment, which does not guarantee a timely phone call, and certainly not one within an hour, is less protective than Illinois law. Mot. at 4.

of CPD to comply with its statutory obligations, particularly given the anemic nature of the sanctions. No officer, anywhere, has ever been convicted under the statute; the penalties are not a deterrent.[35] *Cf. Kelsay*, 74 Ill. 2d at 185 (finding implied right of action even where criminal sanctions were available, for it "some employers would risk the threat of criminal sanction in order to escape their responsibility under the Act").[36] The existence of a penal remedy does not bar civil relief, particularly where an implied cause of action is essential to uphold the law and promote the rights of the class of intended beneficiaries. *Id.* at 185 (The State's "policy can only be effectively implemented and enforced by allowing a civil remedy for damages, distinct from any criminal sanctions which may be imposed on employers for violating the Act. . . .") (citing *Heimgaertner v. Benjamin Elec. Mfg. Co.*, 6 Ill. 2d 152, 155 (1955)); see also *Corgan v. Muehling*, 143 Ill. 2d 296, 313 (1991) (finding implied right of action under Psychologist Registration Act) ("When a statute is enacted for the protection of a particular class of individuals, a violation of its terms may result in civil as well as criminal liability, even though the former remedy is not specifically mentioned therein.") (citations and alterations omitted).[37]

Given the flagrant nature of the City's rights violations, individuals at risk of future harm from CPD's conduct have only one remedy: an implied action for prospective injunctive relief under

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[35] This contention is based on an exhaustive search conducted by Plaintiffs' counsel of every case available on Lexis and Westlaw citing 720 ILCS 5/103-8, which provides for criminal penalties for officers who intentionally violate the criminal code. It is also doubtful anyone has ever been charged under this provision.

[36] Thus, the City's reliance on *Doe 1 ex rel. Tanya S. v. N. Cent. Behavioral Health Sys., Inc.*, 352 Ill. App. 3d 284 (2004), Mot. at 23, is inapposite, since there, the Court held that the plaintiffs had failed to explain why the criminal sanctions under the Abused and Neglected Child Reporting Act were "insufficient to assure compliance with the provisions of the statute." *Id.* at 288.

[37] *Davis v. Kewanee Hosp.*, 2014 IL App (2d) 130304, ¶¶ 35, 39, Mot. at 23, is not on point, where the plaintiff was not an intended beneficiary of the law and failed to meet any of the implied action test prongs.

103-3. *Cf. Nickels v. Burnette*, 343 Ill. App. 3d 654, 663 (2003) ("It is well settled that a plaintiff may seek to enjoin an activity that may lead to substantial future harm.").

II. THE CITY HAS NO AFFIRMATIVE GROUNDS FOR 2-619 DISMISSAL.

A. Illinois State Courts Should Continue to Enforce Illinois Law While CPD Is Under Oversight of a Federal Monitor.

The City contends that the Consent Decree is "another action pending between the same parties for the same cause," and that the court must dismiss this matter. Mot. at 24 (citing Section 2-619(a)(3)). The City's position is untenable on several levels.

First, there is no risk of duplicative court proceedings from the Consent Decree. The Consent Decree is a court-ordered contractual agreement, the implementation of which is overseen by a court-appointed monitor. See *Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO v. City of Cleveland*, 478 U.S. 501, 522 (1986) ("it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree"); *United States v. Alshabkhoun*, 277 F.3d 930, 934 (7th Cir. 2002) (consent decrees "embod[y] the terms agreed upon by the parties as a compromise to litigation"). The federal court's adoption of the Consent Decree creates only "the *availability* of judicial enforcement" against CPD if it violates the Decree's terms. *Local No. 93*, 478 U.S. at 523 (emphasis added).

The City spills much ink to create the false impression that litigation is pending in the federal court regarding access to phones and counsel. Mot. at 12–13, 26. It is not. The case that gave rise to the Decree was brought by the Illinois Attorney General, based on DOJ Report findings concerning the City's pattern and practice of excessive and discriminatory force and lack of accountability. The Attorney General's Complaint did not mention phone or counsel access. That

case closed with entry of the Consent Decree, and there are no attendant proceedings.[38] A demand letter certainly does not constitute a motion to enforce. As neither the Attorney General nor the Coalition has moved to enforce any aspect of the Consent Decree, the concern about duplicative litigation is purely speculative.[39] See *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 447 (1986) ("Section 2-619(a)(3) is designed to avoid duplicative litigation and is to be applied to carry out that purpose.").

Second, in entering the Consent Decree, Judge Dow made clear that the Decree could not and *did not* eliminate state law rights—especially of third parties.[40] Ex. 2 (App. C) at 12; see also *id.* at 11 (citing *State of Illinois v. City of Chicago*, 912 F.3d 979, 988 (7th Cir. 2019)) (consent decrees alter state law rights of third parties "only where the change is necessary to remedy a

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[38] The City's alternative argument that the final judgment in the federal proceeding already operates as a res judicata bar is without merit. Mot. at 24 n. 12. There has been no adjudication on the merits of the Attorney General's suit in the federal proceeding. See *Goodman v. Hanson*, 408 Ill. App. 3d 285, 300 (2011) (holding that settlement agreement did not operate as a final judgment on the merits for purposes of res judicata, because "'an agreed order is not a judicial determination of the parties' rights, but rather is a recordation of the agreement between the parties.'") (citing *Kandalepas v. Economou*, 269 Ill. App. 3d 245, 252 (1994)). Additionally, the facts alleged in this case are of recent vintage and regard CPD abuses in response to protest activity, whereas the Attorney General suit was about CPD excessive force pre-dating the August 2017 filing of that case. See *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 311 (1998) (operative facts are determinative of res judicata effect).

[39] The City's reliance on *Kapoor v. Fujisawa Pharm. Co.*, 298 Ill. App. 3d 780, 785 (1998) is misplaced. Mot. at 26. *Kapoor* emphasizes that the purpose of section 2-619 is to "avoid[ ] duplicative litigation," which is not a concern here given the status of the Consent Decree proceedings.

[40] This case does not involve the "same parties" as *State of Illinois v. Chicago*. Plaintiffs are not parties to that suit. No plaintiff negotiated or is a party to the contract between the State and City that arose from that separate litigation. Moreover, the Illinois Attorney General, "the chief law enforcement officer of the State," *Hoffman v. Madigan*, 2017 IL App (4th) 160392, ¶ 22, cannot be said to represent the same interests as Plaintiffs here, such that they are in privity with one another. The State is on the other side of the "v" as the Public Defender's and National Lawyer's Guild's opponent in every criminal case involving the organizations. Similarly, members of the Organizational Plaintiffs who are arrested and denied access to phones by CPD and then prosecuted by the State of Illinois hardly share the same interests as the State in those proceedings. The lack of privity between the Plaintiffs here and the Attorney General is especially evident when considering that the Attorney General agreed to a version of the Consent Decree that did not track the access to counsel and phones language sought by the Public Defender and BLM. See *Jackson v. Callan Publ'g, Inc.*, 356 Ill. App. 3d 326, 342 (2005) (record was incomplete on question of whether Attorney General fully and adequately represented interests of plaintiffs in agreeing to prior settlement).

violation of federal law" and noting that "no finding of necessity" was made in the federal case). Yet that is precisely what the City proposes by insisting that the only enforceable law as to the rights of arrestees to phones and counsel is the federal decree that it negotiated.[41]

Indeed, adopting the City's capacious argument as to the Consent Decree would bar Illinois state courts from deciding a wide range of issues in which they have both an interest and a responsibility to adjudicate. If the Court were to accept the City's arguments, Illinois courts could not adjudicate an equal protection claim against CPD under the Illinois Constitution because the Consent Decree includes a provision requiring CPD officers to provide services in a manner that "ensures equal protection of the law."[42] Ex. 2 (App. B) ¶ 51. The Consent Decree should not be misused to close the gates of Illinois courthouses to civil rights claims against the police, especially claims involving CPD's non-discretionary duties to uphold state law. See *Hapag-Lloyd (Am.), Inc. v. Home Ins. Co.*, 312 Ill. App. 3d 1087, 1096–97 (2000) ("[W]e feel that comity demands that deference should be given to the Illinois action, as section 2–619(a)(3) relief should not be used to fend off the public policy of the State of Illinois."). As a matter of comity, this Court's interpretation of the law has precedence. *Cf. People v. McCauley*, 163 Ill. 2d 414, 439 (1994) ("State courts possess ultimate authority to interpret State law.").

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[41] This would be a particularly inequitable result, as it does not go both ways. The Consent Decree states that there are no third party beneficiaries. Ex. 2 (App. B) ¶ 707. According to the City, Chicagoans cannot avail themselves of their statutory rights under the Illinois Criminal Code *or* the Decree.

[42] This is just one example of many. The Consent Decree provides that CPD will clarify in written policy the right of the public to photograph and record CPD officers in the performance of official duties. Ex. 2 (App. B) ¶ 58. Does the City contend that the Consent Decree precludes all other courts from adjudicating the rights of protesters to film police? The Consent Decree provides that CPD will review and if necessary revise its policies regarding transgender, intersex, and gender non-conforming individuals. *Id.* ¶ 61. Does the City contend that the Consent Decree bars Illinois courts from hearing cases about the rights of transgender arrestees in CPD custody? The Consent Decree also provides that CPD will review and if necessary revise policies for persons with limited English proficiency. *Id.* ¶ 64. Does the City contend that the Consent Decree precludes state court lawsuits alleging CPD does not provide interpretation services to individuals in detention?

Third, should an enforcement action ever be initiated in the future, the likelihood of obtaining complete relief via Consent Decree proceedings is uncertain, at best. See *Hapag-Lloyd*, 312 Ill. App. 3d at 1097 (reversing section 2-619(a)(3) dismissal where court "should have . . . taken into account . . . whether the Federal Action could provide complete relief"). The language of the Consent Decree does not track state law, employing the "as soon as practicable" language that is not found in Section 103-3. Mot. at 26. The City and Attorney General refused to incorporate Illinois' one-hour requirement into the language of the Decree. Ex. 2 ¶¶ 5–6. Even if the provisions were synonymous, the City would be unlikely to conform its conduct to the Decree's requirements. The City has not put forward evidence that it is moving towards compliance with the Decree's phone access provision.[43] See *Epstein*, 178 Ill. 2d. at 383 ("'affirmative matter' asserted by the defendant must be apparent on the face of the complaint or supported by affidavits or certain other evidentiary materials"). Plaintiffs' evidence shows the City is woefully out of compliance with almost all Decree provisions. See Ex. 2 ¶ 10 (according to Independent Monitoring Report,[44] City missed 52 out of 74 deadlines); First Independent Monitoring Report (Ex. 2, App. E) at 3, Fig. 2; Second Independent Monitoring Report (Ex. 2, App. F) at 8, Fig. 2.[45]

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[43] Indeed, the City is pointedly vague on this question, offering no specifics, and stating only that the Independent Monitor is "immersed in . . . evaluating many of the day-to-day operations of CPD, including the development of policies and trainings consistent with the Consent Decree requirements *like* Paragraph 31." Mot. at 26 (emphasis added). The City does *not* say that it is working to enforce or draft policy regarding Paragraph 31.

[44] This Court may take judicial notice of the Independent Monitor's reports, as they are filed publicly on the federal docket. See n. 14, *supra*.

[45] The situation is in stark contrast to *Katherine M. v. Ryder*, 254 Ill. App. 3d 479 (1993), where there was evidence before the state court that much of what the plaintiffs sought had already been achieved. 254 Ill. App. 3d at 485; see § II.B, *infra*. Indeed, the court deemed dismissal appropriate because the "federal court ha[d] already addressed and continue[d] to address the very issues presented[.]" *Id.* at 488. *In re M.K.*, 284 Ill. App. 3d 449 (1996), cited by the City, Mot. at 27, is distinguishable for the same reasons. *Id.* at 459 (deferring to federal consent decree proceedings that had already resulted in 94% success rate regarding reduction in psychiatric hospital overstays).

Fourth, in the speculative event of a future federal enforcement action related to phone access, there is no "'danger of inconsistent results[.]'"[46] Mot. at 27 (quoting *Schnitzer v. O'Connor*, 274 Ill. App. 3d 314, 323 (1995)). This is not a case where legal proceedings in different jurisdictions could result in competing verdicts as to disputed property rights, or leave a party uncertain as to its obligations. Rather, the City would have to conform its conduct to the rule that is most protective of the rights of those it arrests and detains. The Consent Decree itself makes clear that "[n]othing in this Agreement will in any way prevent or limit the City's right to adopt future measures that exceed or surpass the obligations contained herein, as long as the terms of this Agreement are satisfied." Ex. 2 (App. B) ¶ 705. See also *A.E. Staley Mfg. Co. v. Swift & Co.*, 84 Ill. 2d 245, 252–53 (1980) ("[M]ultiple actions in different jurisdictions, but arising out of the same operative facts, may be maintained where the circuit court, in a sound exercise of its discretion, determines that both actions should proceed."). It is not exceptional for state rights to be more protective than federal rights in a particular area, and vice versa. See, *e.g.*, *McCauley*, 163 Ill. 2d at 439–441 (holding that Illinois constitution is more protective than the federal constitution with regards to the right to counsel).

C. The Federal Consent Decree Does Not Moot the Ongoing and Serious Violations of Illinois State Law Alleged.

Finally, this case is in no way moot because of the Consent Decree. "[A] matter is considered moot when no controversy remains or the issues involved cease to exist, thereby rendering it impossible for the court to grant effective relief to the complaining party." *Katherine M. v. Ryder*,

[46] If an enforcement action related to phone access were ever brought, the federal court would decide whether it should defer to the ongoing proceedings here on the basis of comity. Indeed, Judge Dow already made plain that if there were any conflict, Illinois law would supersede the language of the Consent Decree between the State and City. Ex. 2 (App. C) at 12.

254 Ill. App. 3d 479, 485 (1993). CPD continues to deny Plaintiffs' rights under the Criminal Code, and the Court has the power and duty to order CPD to stop.

The City's reliance on *Katherine M.* for its mootness argument is misplaced. There, the plaintiff sought changes to the Illinois child welfare system under the Juvenile Court Act and the Children and Family Services Act—"improved methods of determining appropriate placements, better supervision at their placements, the creation of specialized placements, and better training of caseworkers and caretakers"—for a subset of child sexual abuse perpetrators and victims in the welfare system. 254 Ill. App. 3d at 486. However, a parallel federal court consent decree was already underway to bring about sweeping changes to the Illinois child welfare system. Pursuant to the decree and remedial implementation plan, the Department of Children and Family Services had largely done what the state-court plaintiff demanded: established a new facility for the targeted population, developed specialized workshops for staff, and trained over 1,000 professionals in assessment and service delivery to juvenile sex offenders. *Id.* at 485–86 (finding state case moot because "the [federal decree and remedial implementation] plan does make the systemic changes that plaintiffs request").

Illinois law has long required that CPD provide detainees a phone call upon arrest, generally within the first hour. The Public Defender's recent comments exhorting Judge Dow to add express language to the Consent Decree alerting CPD officers that they must let her clients make a phone call within an hour of entering custody does not suggest that federal court is an adequate forum for redress. See Mot. 13–14. The Public Defender is not party to the Decree and has no ability to modify it. Instead, her comments are yet more evidence of CPD's persisting lawlessness and that the controversy is not moot.

CONCLUSION

WHEREFORE, this Court should deny the City's motion to dismiss and allow the case to proceed on the merits.

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Respectfully submitted,

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