COMMENTS

REHABILITATING OUR IMMIGRATION SYSTEM WITH THE REHABILITATION ACT: REJECTING VIDEO TELECONFERENCING AND PRESUMPTIVELY REQUIRING IN-PERSON COURT APPEARANCES AS A REASONABLE ACCOMMODATION FOR MENTALLY INCOMPETENT DETAINEES

CASSANDRA H. CHEE*

In recent years, the Executive Office for Immigration Review (EOIR), the office of the U.S. Department of Justice (DOJ) responsible for adjudicating immigration cases, has increasingly relied on the use of video teleconferencing (VTC) in immigration court proceedings, as opposed to in-person court appearances. Citing VTC as an efficient and effective way to conduct hearings and manage its large docket backlog, EOIR has installed VTC units at its headquarters and at nearly all immigration courts, and the agency's use of VTC has risen exponentially under the Trump Administration. Yet, VTC has been proven to harm immigration

* Note & Comment Editor, *American University Law Review*, Volume 70; J.D. Candidate, May 2021, *American University Washington College of Law*; B.A., Political Science and Spanish, 2015, *Furman University*. I would like to thank Professor Robert Dinerstein for his invaluable feedback as my faculty advisor and the *Law Review* staff for their efforts in the publication of this piece. I would also like to thank the Capital Area Immigrants' Rights Coalition, in particular Edith Hinson, for encouraging my growth as a future attorney, and to extend a special thank you to CDP, whose perseverance and unwavering positivity inspired this Comment. I am also endlessly grateful to my CARECEN/Immigrant Justice Corps family and to my friends for their infinite encouragement and support. Finally, my biggest thank you goes to my parents, who have been along for the journey every step of the way.

judges' abilities to assess respondents' credibility, body language, demeanor, and nonverbal communication cues. These issues are compounded for detainees suffering from serious mental conditions, such as major depression, schizophrenia, bipolar disorder, obsessive-compulsive disorder, panic disorder, post-traumatic stress disorder, and borderline personality disorder, among others. Not only do respondents with these conditions have difficulty testifying and understanding the nature of their proceedings, but it is also more difficult for judges to recognize respondents' mental disabilities over video than it is to recognize them in person. The potential consequences of these failures are extreme, as studies have shown that many mentally impaired detainees are often unfairly deported, a mistake that can lead to a possible death sentence for those deported back to countries with rampant violence or without adequate legal and medical safeguards to aid in treating and managing their mental conditions.

This Comment examines the legality of the use of VTC in removal proceedings for detainees whom immigration judges, following a competency hearing called a Matter of M-A-M- *proceeding, declare mentally incompetent by reason of their mental impairments. Since the 2013 landmark decision in Franco-Gonzalez v. Holder, immigrants in removal proceedings found to be incompetent due to mental disabilities have been entitled to a qualified representative, or an appointed attorney, as a reasonable accommodation under section 504 of the Rehabilitation Act. This Comment extends the rationale in Franco-Gonzalez to argue that in-person court appearances be presumptively mandated as a reasonable accommodation under section 504 of the Rehabilitation Act for mentally incompetent detainees.*

Per the requirements of a prima facie case under section 504, this Comment shows that (1) mentally incompetent detainees appearing via VTC qualify as persons with disabilities within the meaning of the Rehabilitation Act; (2) they are otherwise qualified for the benefit or services they seek from the government agency; (3) they are denied full participation in their proceedings and meaningful access to the benefit or services sought because of their disabilities when forced to appear via VTC as opposed to in person; and (4) EOIR, the agency providing the benefit, is a federal executive agency under the umbrella of the DOJ and to which section 504 applies. Given that all four elements of a section 504 prima facie case are met when mentally incompetent detainees are required to appear via VTC for their hearings, in-person court appearances should be presumptively mandated as a reasonable accommodation. This accommodation will therefore give mentally incompetent detainees the chance to effectively argue their cases and meaningfully participate in their removal proceedings unhindered by the inherent difficulties of appearing through a screen.

TABLE OF CONTENTS

INTRODUCTION

Client X[1] is a thirty-five-year-old man from El Salvador with a tumultuous history of mental health conditions. His story began in the 1980s as a young child in El Salvador, where he was regularly subjected to sexual abuse but lacked a parental figure to turn to for help. At the same time, he was also living through the gruesome Salvadoran Civil War, during which it became normal for him to encounter dead bodies on the streets of his neighborhood. As much as he tried to escape the war, the violence directly confronted him on one occasion, forcing him to make an impossible choice: commit a violent act against others or die at the hands of the military soldiers. He chose survival, but it was a choice that has haunted him for the remainder of his life, manifesting in nightmares, panic attacks, and hallucinations as an adult. Although Client X came to the United States as a teenager, learned English, and assimilated as much as he possibly could into American culture over the years, he could never escape the trauma he endured as a child in El Salvador. He developed alcohol and substance abuse problems, and as a result, he came into contact with the criminal justice system several times throughout his adult life. Eventually, a severe mental episode landed Client X in an immigration detention facility, fighting for his life against deportation back to the country that almost destroyed him as a child.

After being detained, Client X was put on suicide watch and transferred between multiple detention facilities. Throughout his

1. For confidentiality reasons, this Comment uses "Client X" in place of this individual's real name. I represented Client X in his removal proceedings during my 2019 legal internship with the Capital Area Immigrants' Rights Coalition. My experience representing Client X provided me with the details of his story that this Introduction highlights. His journey through the immigration system—including his struggles, frustrations, and ultimately, his triumphs—inspired this Comment.

detention, he had several hearings before an immigration judge (IJ). Despite suffering from bipolar disorder, post-traumatic stress disorder (PTSD), hallucinations, panic attacks, anxiety, and depression, current immigration laws allowed the IJ to force Client X to appear for these hearings via video teleconferencing (VTC), rather than in person, to tell the judge about his extensive life trauma that culminated in his detention.[2] He expressed frustration and fear about this process—frustration because he did not feel that he could adequately communicate his story to the judge without appearing in person, and fear because he had seen the guards at his facility listening to other detainees give testimony during their hearings, and he did not feel comfortable knowing that they could be listening to him as well.

Unfortunately, Client X's story is not unusual, representing just one example of the detrimental consequences that VTC can have on the experiences of detainees with mental conditions during their removal proceedings in immigration court. Yet, the Executive Office for Immigration Review (EOIR), the office of the U.S. Department of Justice (DOJ) responsible for adjudicating immigration cases, has increasingly relied on VTC in recent years, citing it as an efficient and effective way to conduct hearings and manage the large docket backlog.[3] According to EOIR, it has installed VTC units at its headquarters and at nearly all immigration courts.[4] As of 2015, nearly one-third of detained immigrants in the United States appeared via VTC for their hearings, and by 2017, there had been a 185% increase in the use of VTC since 2007.[5] As VTC has become more entrenched in the immigration detention process, it has become clear to

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2. *See infra* note 19 and accompanying text. The immigration laws explored in this Comment allowing for the use of VTC as opposed to in-person immigration court hearings long preceded the COVID-19 pandemic. While I wrote this Comment before the start of the pandemic and argue for mandating in-person court appearances for mentally incompetent detainees, I recognize that it will be difficult to require such in-person appearances until it is safe for all parties to be in courtrooms together. Nevertheless, the increased use of VTC both in immigration court and in other contexts underscores the relevance of this Comment's analysis and recommendations.

3. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, EOIR'S VIDEO TELECONFERENCING INITIATIVE (Mar. 13, 2009), https://www.justice.gov/eoir/video conferencingfactsheetmarch2009 [https://perma.cc/L67X-6ZGE] [hereinafter EOIR'S VIDEO TELECONFERENCING INITIATIVE].

4. *Id.*

5. Lauren Markham, *How Trial by Skype Became the Norm in Immigration Court*, MOTHER JONES (May/June 2018), https://www.motherjones.com/crime-justice/2018/05/how-trial-by-skype-became-the-norm-in-immigration-court [https://perma.cc/WEB9-FUVK].

immigrants and advocates across the country that the system has chosen to prioritize efficiency and expediency over the pressures that VTC places on those seeking to find their voices and tell their stories unhindered by massive barriers.

This Comment examines the legality of the use of VTC in immigration court proceedings, particularly in deportation hearings for detainees whom IJs declare mentally incompetent by reason of their mental impairments in a separate competency hearing called a *Matter of M-A-M-* proceeding. Since 2013, when a federal judge decided the landmark class action lawsuit *Franco-Gonzalez v. Holder*,[6] immigrants in removal proceedings found to be incompetent due to mental disabilities have been entitled to a qualified representative (QR), or an appointed attorney, as a reasonable accommodation under section 504 of the Rehabilitation Act of 1973.[7] This Comment extends the rationale in *Franco-Gonzalez* to argue that in-person court appearances must be presumptively mandated as a reasonable accommodation under section 504 of the Rehabilitation Act for detainees whom IJs declare mentally incompetent. This Comment argues that such a presumption is necessary to afford mentally impaired immigrants the opportunity to effectively argue their cases unhindered by the inherent difficulties of appearing through a screen. This Comment further demonstrates that a prima facie case under section 504 can be established for this particular group, such that immigrants simultaneously battling mental health conditions and deportation proceedings should receive access to in-person hearings as an appropriate accommodation and safeguard of their rights.

Part I of this Comment examines the rise of VTC in immigration court proceedings, the current statutory and regulatory schemes that allow for VTC's use, and various studies about VTC's impact on immigration case outcomes. Part I also includes background on the legal framework and procedural safeguards that have emerged since

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6. No. CV 10-02211 DMG (DTBx), 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013). The ACLU filed the original case, on behalf of Jose Antonio Franco-Gonzales, as a petition for writ of habeas corpus in California federal district court. *See infra* note 74 and accompanying text. As the petitioner in this original case, his name was spelled "Franco-Gonzales," but in the class action it is spelled "Franco-Gonzalez." *See infra* note 79 and accompanying text.

7. 29 U.S.C. § 794 (2018); *see Franco-Gonzalez*, 2013 WL 3674492, at *3–9; Leslie Wolf, *After* Franco-Gonzalez v. Holder*: The Implications of Locating a Right to Counsel Under the Rehabilitation Act*, 23 S. CAL. REV. L. & SOC. JUST. 329, 329 (2014).

the *Franco-Gonzalez* decision for immigrants with mental conditions. Next, Part II of this Comment reviews existing challenges to the use of VTC in immigration court, in particular focusing on allegations that VTC violates due process. This Section also analyzes one of the most recent challenges to VTC, a 2019 New York class action lawsuit, *P.L. v. United States Immigration & Customs Enforcement*[8] ("*P.L. v. ICE*"), filed in response to Immigration and Customs Enforcement's (ICE) New York Field Office's novel 2018 blanket policy that it would no longer produce detained immigrants in immigration court to attend their hearings in person.[9] Part III then sets forth the prima facie basis for arguing that section 504 of the Rehabilitation Act should be utilized to create a legal framework for presumptively mandating in-person court appearances as a reasonable accommodation for mentally incompetent immigrants who cannot otherwise meaningfully participate in their removal proceedings through VTC. Finally, Part IV offers policy recommendations for implementing in-person court appearances as a reasonable accommodation, followed by concluding comments.

I. THE RISE OF VTC IN IMMIGRATION COURT PROCEEDINGS AND THE EXISTING LEGAL FRAMEWORK FOR IMMIGRANTS WITH MENTAL DISABILITIES

To address the necessary context regarding the use of VTC in removal proceedings for immigrants with mental health conditions, the background Section of this Comment is divided into two subparts. First, this Section examines the history of VTC and its rise to dominance, including an overview of the statutory and regulatory schemes that were implemented over time to allow for its widespread use in immigration courts across the country. Second, this Section addresses the moderately recent developments, beginning in 2011, in the creation of a legal framework for immigrants with mental disabilities, the enactment of procedural safeguards to protect their rights, and the effects of conducting a hearing through VTC for mentally incompetent detainees.

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8. No. 1:19-CV-01336 (ALC), 2019 WL 2568648 (S.D.N.Y. June 21, 2019). The original complaint was filed on February 12, 2019. Class Action Complaint, P.L. v. ICE, No. 1:19-CV-01336 (ALC), 2019 WL 2568648 (S.D.N.Y. June 21, 2019) [hereinafter P.L. v. ICE Class Action Complaint].

9. P.L. v. ICE Class Action Complaint, *supra* note 8, at 1.

A. The History of VTC, the Current Statutory and Regulatory Schemes that Provide for its Use, and its Rise to Dominance

Courts have assigned the utmost importance to observations of one's demeanor and manner of speaking during the factfinding process, observations that have traditionally occurred in person.[10] As far back as 1879, the Supreme Court has observed that the manner of an individual "while testifying is oftentimes more indicative of the real character of his [or her] opinion than his [or her] words."[11] Likewise, in *Anderson v. City of Bessemer City*,[12] the Supreme Court wrote that when factfinding is "based on determinations regarding the credibility of witnesses," a reviewing court should defer to the trial court's findings, "for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."[13] For immigration cases, the Board of Immigration Appeals (BIA), the appellate body housed within EOIR, similarly accords deference to the IJ's findings concerning credibility, for the IJ has the unique "advantage of observing the alien as the alien testifies."[14]

Despite this emphasis on IJs' in-person court observations, Congress amended the Immigration and Nationality Act[15] (INA) by passing section 240(b)(2)(A) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[16] to give judges full discretion to conduct removal proceedings via VTC—a method that research suggests inhibits

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10. *Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1182 (2009) [hereinafter *Developments in the Law*].

11. Reynolds v. United States, 98 U.S. 145, 156–57 (1879); *Developments in the Law*, *supra* note 10, at 1182.

12. 470 U.S. 564 (1985).

13. *Id.* at 575; *Developments in the Law*, *supra* note 10, at 1182.

14. *In re* A-S-, 21 I&N Dec. 1106, 1109 (B.I.A. 1998); *see also* Sarvia-Quintanilla v. U.S. Immigration & Naturalization Serv., 767 F.2d 1387, 1395 (9th Cir. 1985) (finding that "[a]n immigration judge alone is in a position to observe an alien's tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial evidence" and that the judge is "uniquely qualified to decide whether an alien's testimony has about it the ring of truth").

15. Pub. L. No. 82–414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

16. Pub. L. No. 104–208, § 240(b)(2)(A), 110 Stat. 3009-546 (1996).

the factfinder's ability to assess credibility[17]—without the respondent's[18] consent.[19] Since 1996, EOIR has implemented this change through 8 C.F.R. § 1003.25(c), which states that an IJ "may conduct hearings through video conference to the same extent as he or she may conduct hearings in person."[20] The adoption of VTC as a replacement mechanism for in-person appearances in immigration proceedings sharply diverges from the limited adoption of VTC in the federal court system.[21] In the same year that Congress granted IJs full discretion to use VTC, in contrast, it amended the Federal Rules of Civil Procedure to allow for the use of "contemporaneous transmission from a different location" only upon a finding of "good cause in compelling circumstances and with appropriate safeguards."[22] Similarly, in 2002, Congress amended the Federal Rules of Criminal Procedure to allow for VTC in criminal proceedings but limited its use to a defendant's initial appearance and arraignment.[23] Therefore, the use of VTC in immigration courts, at any stage of the hearing process (including final merits hearings) and without any limits or particularized requirements such as those that exist in the Federal Rules of Civil and Criminal

17. *See infra* notes 49–64 (explaining the difficulty that VTC poses for credibility assessments).

18. "Respondent" is a term given to non-citizens placed in removal proceedings. *See* 8 C.F.R. § 1001.1(r) (2020) ("The term respondent means a person named in a Notice to Appear issued in accordance with section 239(a) of the [Immigration and Nationality] Act, or in an Order to Show Cause issued in accordance with § 242.1 of 8 CFR chapter I as it existed prior to April 1, 1997." (emphasis omitted)).

19. This amendment is codified at 8 U.S.C. § 1229a (2018), in particular § 1229a(b)(2)(A), stating that "[t]he proceeding may take place—(i) in person [or] . . . (iii) through video conference." *See* Cormac T. Connor, *Human Rights Violations in the Information Age*, 16 GEO. IMMIGR. L.J. 207, 208 (2001) (elaborating on the passage of section 240(b)(2)(A)); *Developments in the Law*, *supra* note 10, at 1183–84 ("The 1996 amendments to the [INA] introduced videoconferencing as an alternate and undifferentiated means of conducting previously in-person removal hearings, without requiring the respondent's consent." (footnote omitted)).

20. 8 C.F.R. § 1003.25(c) (2020).

21. *Developments in the Law*, *supra* note 10, at 1182–83.

22. *See* FED. R. CIV. P. 43(a) and accompanying Notes of Advisory Committee on Rules–1996 Amendment.

23. *See* FED. R. CRIM. P. 5 and accompanying Committee Notes on Rules–2002 Amendment; FED. R. CRIM. P. 10 and accompanying Committee Notes on Rules–2002 Amendment; *Developments in the Law*, *supra* note 10, at 1182–83.

Procedure, represents EOIR's wholesale embrace of VTC as a substitute for in-person court appearances in removal proceedings.[24]

To date, VTC units have been installed at EOIR headquarters, nearly all immigration courts, and at other sites, such as detention centers and correctional facilities, where immigration hearings occur.[25] According to its website, EOIR defines VTC as "an electronic form of communication that permits two or more people in different locations to engage in audio and visual exchanges," thus allowing court proceedings "to be conducted efficiently and effectively, even though participants are not together at one site."[26] Although IJs retain the authority to compel in-person production of immigrants to the courthouse for their proceedings from the jails where they are confined,[27] this rarely occurs, with "trial by Skype" becoming the norm in immigration court over time.[28] In fact, EOIR has even gone so far as to create two immigration adjudication centers in Falls Church, Virginia, and Fort Worth, Texas, where a total of fifteen judges sit and hear cases exclusively via VTC.[29] For some hearings, then, the immigrant detainees, their lawyers, and the trial attorneys are all located in different places, resulting in judges' use of VTC creating a scenario that some lawyers have dubbed "double VTC."[30]

Current statistics indicating VTC's use in removal proceedings are staggering. Whereas in its early years, VTC was predominantly only used to conduct hearings for immigrants being held in remote detention centers hours away from the nearest immigration court, as of 2015, nearly one-third of detained immigrants in the United States appeared via VTC for their hearings, and 2017 marked a 185%

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24. *See Developments in the Law*, *supra* note 10, at 1184 (referencing EOIR's embrace of VTC despite never formally studying the effectiveness of it and noting that, in comparison to VTC's use in other contexts, "the blanket adoption of videoconferencing in immigration appears to be an anomalous development").

25. EOIR'S VIDEO TELECONFERENCING INITIATIVE, *supra* note 3.

26. *Id.*

27. 8 C.F.R. §§ 1003.35(b)(1), 1240.1(c) (2020).

28. Markham, *supra* note 5.

29. Katie Shepherd, *Immigration Courts' Growing Reliance on Videoconference Hearings Is Being Challenged*, IMMIGR. IMPACT (Feb. 25, 2019), https://immigrationimpact.com/2019/02/25/immigration-courts-videoconference-hearing-challenged [https://perma.cc/Y78Z-N54R].

30. *Id.*; *see also* THE LEGAL ASSISTANCE FOUND. OF METRO. CHI. & CHI. APPLESEED FUND FOR JUSTICE, VIDEOCONFERENCING IN REMOVAL HEARINGS: A CASE STUDY OF THE CHICAGO IMMIGRATION COURT 55 (2005), http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf [https://perma.cc/RLR4-QDQZ].

increase in VTC's usage since 2007.[31] Immigration courts' reliance on VTC has most significantly increased under the Trump Administration.[32] Beginning in 2017, a national shift within EOIR started when the DOJ and the U.S. Department of Homeland Security (DHS) sought to implement a plan to reduce the massive backlog of cases pending in immigration courts across the country.[33] In March 2017, this plan culminated in then-Attorney General Jeff Sessions releasing a memo detailing efforts to "increase each facility's VTC capabilities and update existing infrastructure to aid in the ability to conduct removal proceedings."[34] Since the release of Sessions's memo, the number of cases completed per month has shot up by sixty eight-percent, with 22,963 cases completed per month in 2019, compared with 13,598 cases completed per month in 2017.[35] According to EOIR's 2019 data through October, a total of 115,372 cases used VTC for hearings.[36] However, despite touting VTC's efficiency and effectiveness based on its numbers, EOIR has a historical tendency to shroud its statistical data on VTC and its impacts, as data on the number of hearings occurring via VTC before 2019 is not currently available.[37]

The push in favor of VTC reached a new apex on June 27, 2018, when ICE's New York Field Office announced without warning that it would no longer produce detained immigrants in immigration court but that these detainees would appear by video feed from behind bars at the county jails where they are detained.[38] This so-called "Refusal to Produce Policy" upended the New York Field Office's long-standing practice of transporting immigrants from their detention facilities to the Varick Street Immigration Court in New York City to appear for

31. Markham, *supra* note 5.
32. Shepherd, *supra* note 29.
33. *Id.*
34. Press Release, U.S. Dep't of Justice, Attorney General Sessions Announces Expansion and Modernization of Program to Deport Criminal Aliens Housed in Federal Correctional Facilities (Mar. 30, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-expansion-and-modernization-program-deport-criminal [https://perma.cc/DLA6-3DU2].
35. Darcy Reddan, *Immigration Courts' Video Evolution Stirs Due Process Fears*, LAW 360 (Nov. 17, 2019, 8:02 PM), https://www.law360.com/articles/1219854/immigration-courts-video-evolution-stirs-due-process-fears.
36. *Id.*
37. *Id.*
38. P.L. v. ICE Class Action Complaint, *supra* note 8, at 1; Shepherd, *supra* note 29.

their hearings in person.[39] Such a radical policy change was the first time that any ICE Field Office had engaged in a blanket refusal to produce detainees for in-person hearings.[40]

These policy shifts indicating EOIR's heightened use of VTC are alarming because, although EOIR has stated that "[t]here is no indication of a statistically significant difference in outcomes between VTC cases and in-person cases,"[41] research suggests that VTC can in fact negatively impact case outcomes.[42] One such study published in 2015 compared the outcomes of hearings conducted via VTC as opposed to in-person and paradoxically found that while detained VTC respondents are more likely than detained in-person respondents to be deported, judges did not necessarily deny VTC respondents' claims at higher rates.[43] Rather, these higher deportation results were associated with the fact that detained litigants forced to appear via VTC expressed diminished engagement with the adversarial process and were less likely to retain counsel, apply to lawfully remain in the United States, or seek the right to voluntarily return to their countries of origin (an immigration benefit known as voluntary departure).[44] Even after controlling for significant factors that could influence case outcomes, such as prosecutorial charge type, proceeding type, judge assignment, representation by counsel, nationality of the respondent, and fiscal year of decision, the differences between VTC and in-person proceeding outcomes remained statistically significant.[45] Remarkably, when compared to similarly situated VTC respondents, detained individuals appearing in person for their court appearances were ninety percent more likely to apply for immigration relief and thirty-

39. P.L. v. ICE Class Action Complaint, *supra* note 8, at 1.

40. *Id.*

41. *See* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, MYTHS VS FACTS ABOUT IMMIGRATION PROCEEDINGS (May 2019), https://www.justice.gov/eoir/page/file/1161001/download [https://perma.cc/Z8NL-NEJL] [hereinafter MYTHS VS FACTS ABOUT IMMIGRATION PROCEEDINGS] (claiming that "[l]ess than one-tenth of one percent (.0052%) of EOIR VTC hearings, 310 out of nearly 60,000, are continued due to a VTC malfunction").

42. *See Developments in the Law*, *supra* note 10, at 1184–85 (writing that "[r]esearch on mediated communication generally, and videoconference hearings specifically," suggests that videoconferencing can impact both adjudicative quality and case outcomes).

43. Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 937–38 (2015).

44. *Id.*

45. *Id.* at 938.

five percent more likely to obtain legal counsel.[46] A similar study comparing asylum grant rates from 2005 to 2006 between respondents appearing in person and those appearing via VTC found that VTC roughly doubles the likelihood that an applicant will be denied asylum,[47] in effect refuting EOIR's contention that VTC "does not change the adjudicative quality or decisional outcomes."[48]

Substantively, these changes in "adjudicative quality or decisional outcomes" take a variety of forms. Most important are the effects of VTC on a respondent's communication, in particular VTC's failure to capture the vital nonverbal components of oral testimony.[49] Many studies have confirmed the overwhelming weight that courts place on nonverbal communication, including body language, facial expressions, and eye contact, in completing their factfinding function.[50] Eye contact, for example, "is consistently ranked as the most important element of nonverbal communication [in court], . . . because in American culture, failure to make eye contact triggers feelings of distrust in an observer."[51] In VTC hearings, however, it is physically impossible for a respondent to simultaneously look at the camera and at the video feed of the judge on the display monitor.[52] Therefore, to maintain eye contact, respondents must look into the camera while speaking, but by doing so, they are unable to see the judge's reactions to their testimony.[53]

In addition, VTC often skews respondents' affect and tone of voice, impairing judges' abilities to determine the veracity of their stories and

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46. *Id.*

47. Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259, 271 (2008).

48. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, EOIR HEADQUARTERS IMMIGRATION COURT (July 21, 2004), https://www.justice.gov/sites/default/files/eoir/legacy/2004/08/27/HQICFactSheet.pdf [https://perma.cc/7J9S-PG9P].

49. Connor, *supra* note 19, at 216; *Developments in the Law*, *supra* note 10, at 1185; Walsh & Walsh, *supra* note 47, at 268.

50. *See* Connor, *supra* note 19, at 216–17 (finding that at least fifty percent of any message is carried by nonverbal communication); *see also* Walsh & Walsh, *supra* note 47, at 268 (citing a study which found that "[w]ords account for seven percent of meaning, tone of voice for thirty-eight percent, and body language for fifty-five percent").

51. Connor, *supra* note 19, at 217 (citing ROBERTO ARON ET AL., TRIAL COMMUNICATION SKILLS 28 (1986)).

52. Walsh & Walsh, *supra* note 47, at 269.

53. *Id.*

to form a positive emotional connection with them as speakers.[54] A study on the use of VTC in Chicago's immigration courts found that "emotions were less clearly communicated" and "judges were likely to feel more emotionally distant from and apathetic to an immigrant on a television screen."[55] This dehumanizing effect of VTC that artificially distances respondents is worsened by split-second delays in the video transmission that, although only lasting between two hundred and four hundred milliseconds, can adversely affect the listener's perception of the speaker and make the respondent appear less truthful.[56] In fact, a 2017 report that EOIR itself commissioned found that judges have difficulty analyzing eye contact, body language, and other forms of nonverbal communication over VTC.[57] The same report found that "[f]aulty VTC equipment, especially issues associated with poor video and sound quality, can disrupt cases to the point that due process issues may arise."[58]

Although EOIR has continually argued in favor of VTC's ability to foster efficient case adjudication and decrease travel times for both judges and detained respondents to an in-person forum,[59] many immigrants have had their hearings canceled due to technical problems with video or sound, forcing them to be detained even longer.[60] According to EOIR, from January to October 2019, 891 hearings were adjourned due to some kind of video malfunction.[61] Another ongoing technical issue pertaining to VTC hearings relates to the use of interpreters, which are required in ninety-two percent of all immigration

54. *See id.* at 269–70 (writing that VTC undermines a respondent's ability to make an emotional connection with the IJ, as "the applicant appears to be more of a character on a television set than an actual person telling his or her story of persecution and escape").

55. THE LEGAL ASSISTANCE FOUND. OF METRO. CHI. & CHI. APPLESEED FUND FOR JUSTICE, *supra* note 30, at 45–46.

56. *See id.* (noting one observer's alarm at the indifference that the judge displayed while a respondent was sobbing onscreen); Walsh & Walsh, *supra* note 47, at 269–70.

57. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, LEGAL CASE STUDY: SUMMARY REPORT 23 (2017), https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/immigration_judge_performance_metrics_foia_request_booz_allen_hamilton_case_study.pdf [https://perma.cc/5K2S-28GE].

58. *Id.*

59. EOIR'S VIDEO TELECONFERENCING INITIATIVE, *supra* note 3.

60. Shepherd, *supra* note 29.

61. Reddan, *supra* note 35.

hearings.[62] Interpreters have noted that during VTC hearings, they often miss a respondent's gestures or facial expressions, that VTC makes motioning for a detainee to slow down or stop speaking extremely difficult, and that simultaneous interpretation is almost impossible while using VTC.[63] In particular, interpreters' jobs are made even more challenging when they must convey information to respondents who have limited education or are illiterate.[64] Given all of these substantive challenges inherent in the use of VTC in a courtroom supposedly bound by the basic tenets of due process, it is remarkable that EOIR stands by its position that there is no statistically significant difference in outcomes between VTC cases and in-person cases.[65]

B. Current Legal Framework and Procedural Safeguards in Place for Immigrants with Mental Disabilities

VTC is widely used in hearings for all immigrants, including for those who suffer from mental disabilities that might impair their ability to meaningfully participate in their removal proceedings.[66] Until fairly recently, no legal framework existed to protect mentally impaired detainees, who were previously expected to proceed pro se in defending themselves against deportation,[67] a particularly onerous task especially for those with the diminished capacity to provide coherent and credible information when it comes to claims and defenses.[68] Although ICE has acknowledged that between two and five percent of immigrants in its custody suffer from serious and persistent mental

62. Phoebe Taylor Vuolo et al., *Immigration Court Interpreters Say Video Teleconferencing Makes It Difficult to Do Their Jobs*, GOTHAMIST (July 22, 2019, 4:00 PM), https://gothamist.com/news/immigration-court-interpreters-say-video-teleconferencing-makes-it-difficult-to-do-their-jobs [https://perma.cc/K2RP-KWYY].

63. *Id.*

64. *Id.*

65. MYTHS VS FACTS ABOUT IMMIGRATION PROCEEDINGS, *supra* note 41.

66. HRW & ACLU, DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE US IMMIGRATION SYSTEM 35 (2010).

67. *See infra* note 83 and accompanying text (explaining that the court in *Franco-Gonzalez v. Holder* imposed a new requirement for the government to provide legal representation to immigrants who could not competently represent themselves due to mental impairments).

68. HRW & ACLU, *supra* note 66, at 3, 5.

illness,[69] other sources indicate that the true number is much higher.[70] While no exact official figures exist, according to a study published by the American Civil Liberties Union (ACLU) and Human Rights Watch ("HRW"), "the percentage of non-citizens in immigration proceedings with a mental disability is estimated to be at least 15 percent of the total immigrant population in detention," a number HRW estimated to amount to roughly 57,000 individuals in 2008.[71] Suicide is cited as one of the most common causes of death among detained immigrants,[72] a statistic further exacerbated by the tendency of ICE and its private prison contractors to fail to provide adequate medical care to detainees.[73]

In 2010, the case that changed the legal landscape for immigrants with mental conditions began when the ACLU filed a petition for a writ of habeas corpus on behalf of Jose Antonio Franco-Gonzales, a Mexican citizen and the son of lawful permanent residents, who suffered from mental disabilities so severe that he did not know his age

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69. *See id.* at 16 (reporting ICE's select responses to questions regarding mentally impaired detainees in its custody and detainee medical care).

70. *See* Dana Priest & Amy Goldstein, *Suicides Point to Gaps in Treatment: Errors in Psychiatric Diagnoses and Drugs Plague Strained Immigration System*, WASH. POST, May 13, 2008, at A1 ("No one in the Division of Immigration Health Services (DIHS), the agency responsible for detainee medical care, has a firm grip on the number of mentally ill among the 33,000 detainees held on any given day, records show. But in confidential memos, officials estimate that about 15 percent . . . are mentally ill, a number that is much higher than the public ICE estimate. The numbers are rising fast, memos reveal, as state mental institutions and prisons transfer more people into immigration detention."); *see also* P.L. v. ICE Class Action Complaint, *supra* note 8, at 47 (writing that "sources suggest that the true number [of mentally ill detainees] is much higher" than ICE's two-to-five percent estimate).

71. HRW & ACLU, *supra* note 66, at 3.

72. *See* Priest & Goldstein, *supra* note 70 (noting that suicide accounted for fifteen of eighty-three deaths since 2003); *see also* Megan Granski et al., *Death Rates Among Detained Immigrants in the United States*, 12 INT'L J. ENVTL. RES. & PUB. HEALTH 14414, 14416 (2015) (finding suicide to be one of the top three causes of deaths occurring in ICE facilities).

73. For a complete examination of ICE's selection of its private prison contractors, the particulars of the failures of these contractors in providing adequate care to detainees, and ICE's failure to monitor and oversee its detention facilities, see Complaint for Declaratory and Injunctive Relief for Violations of the Due Process Clause of the Fifth Amendment and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 at 53, Fraihat v. ICE, 445 F. Supp. 3d 709 (C.D. Cal. 2020) (No. 19-cv-01546), citing to an ICE memo revealing that officials fail to review reports of detainees with severe mental health disabilities, causing detainees to encounter preventable harm and death.

or birthday.[74] During his court proceedings, Franco-Gonzales's IJ felt that he was unable to continue with his proceeding due to both his mental incompetence and lack of counsel, and the judge therefore administratively closed his case.[75] Afterwards, however, the government did not release Franco-Gonzales from detention.[76] Instead, he languished for five years in various detention centers throughout Southern California before the ACLU filed its habeas corpus petition on his behalf, alleging violations of the INA, the Due Process Clause of the Fifth Amendment, and section 504 of the Rehabilitation Act.[77] Franco-Gonzales was finally released on March 31, 2010, pursuant to section 236 of the INA, which authorizes the release of detained immigrants on bail.[78]

Franco-Gonzales's story did not end there, however. Over time, the lawsuit added more plaintiffs, and in August 2010, the ACLU filed an amended complaint seeking class certification for plaintiffs similarly situated to Franco-Gonzales—other mentally disabled immigrant detainees who were held in custody without counsel.[79] In addition to

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74. First Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus at 11–12, Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034 (C.D. Cal. 2010) (No. 10-CV-02211) [hereinafter Franco-Gonzales First Amended Class-Action Complaint]. This citation refers to an amended complaint. The original complaint involving the petition for habeas corpus on behalf of Gonzales was filed in March 2010 but was amended in August 2010 "to add new plaintiffs and new causes of action and sought certification on behalf of a class of plaintiffs whose situations [were] similar to Franco's former situation." *See* Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034, 1037–38 (C.D. Cal. 2010) (examining the entire procedural posture of the case from inception through December 2010); *see also infra* note 79 and accompanying text.

75. Franco-Gonzales First Amended Class-Action Complaint, *supra* note 74, at 4; Wolf, *supra* note 7, at 331.

76. Wolf, *supra* note 7, at 331–32.

77. *Franco-Gonzales*, 767 F. Supp. 2d at 1037; Franco-Gonzales First Amended Class-Action Complaint, *supra* note 74, at 29–31; Wolf, *supra* note 7, at 331–32.

78. *Franco-Gonzales*, 767 F. Supp. 2d at 1037; Wolf, *supra* note 7, at 332.

79. *Franco-Gonzales*, 767 F. Supp. 2d at 1037–38; *see also supra* note 74. For a complete account of the class definition the ACLU sought to certify, see Franco v. Holder*: Case Developments*, AM. C.L. UNION S. CAL., https://www.aclusocal.org/en/cases/franco-v-holder [https://perma.cc/RQ9M-HG2U] ("[U]nrepresented immigration detainees are members of the Class certified in this case . . . if the criteria of subparagraph (i), (ii) or (iii) of this paragraph are met: (i) a qualified mental health provider determines the detainee meets one or both of the following criteria: (1) has a mental disorder that is causing serious limitations in communication, memory or general mental and/or intellectual functioning (e.g., communicating, reasoning, conducting activities of daily living, social skills); or a severe medical condition(s) (e.g., traumatic

the violations alleged in Franco-Gonzales's petition for writ of habeas corpus, this amended class action complaint alleged a right to competency evaluations for detainees with mental disabilities under the INA and Due Process Clause, as well as a right to appointed counsel under the Due Process Clause and section 504 of the Rehabilitation Act for detainees found mentally incompetent.[80] In November 2010, these additional named plaintiffs then filed a motion for a preliminary injunction.[81] On December 27, 2010, the court granted this preliminary injunction,[82] and for the first time in the history of U.S. immigration proceedings, ordered the government to provide legal representation to several plaintiffs with serious mental disabilities who were unable to competently represent themselves.[83] Another victory came almost a year later, when on November 21, 2011, the court granted the motion for class certification, certifying the following class:

> All individuals . . . in DHS custody . . . who have been identified by or to medical personnel, DHS, or an Immigration Judge, as having a serious mental disorder or defect that may render them incompetent to represent themselves in detention or removal proceedings, and who presently lack counsel . . . .[84]

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brain injury or dementia) that is significantly impairing mental function; or (2) is exhibiting one or more of the following active psychiatric symptoms or behavior: severe disorganization, active hallucinations or delusions, mania, catatonia, severe depressive symptoms, suicidal ideation and/or behavior, marked anxiety or impulsivity[;] (ii) a qualified mental health provider otherwise diagnoses the detainee as demonstrating significant symptoms of one of the following: (1) Psychosis or Psychotic Disorder; (2) Bipolar Disorder; (3) Schizophrenia or Schizoaffective Disorder; (4) Major Depressive Disorder with Psychotic Features; (5) Dementia and/or a Neurocognitive Disorder; or (6) Intellectual Development Disorder (moderate, severe or profound)[; or] (iii) an Immigration Judge finds that the evidence of record results in a bona fide doubt about the detainee's competency to represent him- or herself." (footnotes omitted)).

80. *Franco-Gonzalez*, 767 F. Supp. 2d at 1038; Wolf, *supra* note 7, at 332.

81. *Franco-Gonzales*, 767 F. Supp. 2d at 1038.

82. *Id.* at 1061.

83. *See* Franco v. Holder*: Case Developments*, *supra* note 79 ("This was the first published opinion ever requiring the government to provide legal representation to a non-citizen in immigration proceedings.").

84. Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *2 (C.D. Cal. Apr. 23, 2013) (including two sub-classes, "Sub-Class 1: Individuals in the above-named Plaintiff Class who have a serious mental disorder or defect that renders them incompetent to represent themselves in detention or removal proceedings," and "Sub-Class 2: Individuals in the above-named Plaintiff Class who have been detained for more than six months").

Meanwhile, in May 2011, the BIA decided *Matter of M-A-M-*,[85] its first case directly addressing the needs of immigrants with mental disabilities, in which it sought to provide a framework for IJs "to determine whether a respondent is sufficiently competent to proceed and whether the application of safeguards is warranted" in his or her proceeding.[86] This framework builds upon the statutory and regulatory provisions that already impose certain requirements and safeguards for accommodating immigrants with competency issues.[87] First, statutorily, 8 U.S.C. § 1229a(b)(3) acknowledges that immigrants in proceedings may be mentally incompetent[88] and delegates power to the Attorney General to prescribe safeguards "to protect the rights and privileges" of the immigrant.[89] Examples of regulatory safeguards enacted over time include: requiring the serving of an incompetent immigrant with a Notice to Appear (NTA) in person,[90] or whenever possible serving the NTA on a "near relative, guardian, . . . or friend";[91] permitting an "attorney, legal representative, legal guardian, near relative, or friend" who was served with the NTA to appear on behalf of the mentally incompetent respondent when it is impracticable for him or her to be present;[92] prescribing discretion to IJs to not accept an admission of removability from an unrepresented respondent who is incompetent and unaccompanied;[93] and enabling the IJ to "prescribe safeguards to protect the rights and privileges" of the respondent when the judge determines that he or she lacks sufficient competency to proceed with the hearing.[94]

In creating the process for assessing competency, the BIA wrote that as a threshold matter, respondents are presumed competent to

85. 25 I&N Dec. 474 (B.I.A. 2011).

86. *Id.* at 474–75.

87. *See id.* at 477 (examining "the governing statutory and regulatory authority[] as interpreted by case law" and stating that the INA and its implementing regulations "contemplate circumstances in which competency concerns trigger the application of appropriate safeguards").

88. *Id.*

89. *See* 8 U.S.C. § 1229a(b)(3) (2018) ("If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.").

90. *Matter of M-A-M-*, 25 I&N Dec. at 478; 8 C.F.R. § 103.8(c)(2)(i) (2020).

91. *Matter of M-A-M-*, 25 I&N Dec. at 478; § 103.8(c)(2)(ii).

92. §§ 1240.4, 1240.43; *see Matter of M-A-M-*, 25 I&N Dec. at 478.

93. *Matter of M-A-M-*, 25 I&N Dec. at 478; § 1240.10(c).

94. *Matter of M-A-M-*, 25 I&N Dec. at 478; § 1003.10(b).

participate in removal proceedings, and that without any indicia of incompetency, IJs have no obligation to analyze respondents' competency.[95] The BIA set out the test for determining competency as whether a respondent "has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses."[96] In applying this test, IJs must undertake individualized measures to assess whether a respondent is competent to participate in proceedings, taking care to note that each case will vary based on the particular circumstances.[97] For instance, the IJ may modify questions to the respondent to make them simple and direct or could request that the respondent receive a psychiatric evaluation to determine the respondent's competency.[98]

If the IJ makes a finding of incompetency, then the IJ must not proceed without first applying appropriate safeguards, given the particularities of the case.[99] *Matter of M-A-M-* provides a non-exhaustive list of safeguards, including but not limited to those that the EOIR regulations enumerate, that IJs can implement for respondents with mental disabilities, such as the IJ's refusal to accept admission of removability from an unrepresented respondent; identification and appearance of a family member or friend who can assist in court; docketing the case to facilitate the respondent's ability to obtain legal representation or medical treatment; granting a continuance for good cause; and actively aiding in the development of the record, including the examination and cross-examination of witnesses.[100] As a result of this binding precedent, today IJs must conduct *Matter of M-A-M-* competency hearings for detainees exhibiting indicia of incompetency before their removal proceedings may go forward.[101]

Returning again to the *Franco-Gonzalez* class action, in an unprecedented decision on April 23, 2013, Judge Dolly Gee of the United States District Court for the Central District of California issued a permanent injunction enjoining the government from removing any

95. *Matter of M-A-M-*, 25 I&N Dec. at 477.
96. *Id.* at 479.
97. *Id.* at 480.
98. *Id.* at 480–81.
99. *Id.* at 481–82.
100. *Id.* at 483.
101. *Id.* at 484.

immigrants found incompetent due to mental disabilities and not represented by counsel.[102] This order, while not addressing any of the due process allegations in the complaint, held that section 504 of the Rehabilitation Act requires the government to provide all immigrants declared mentally incompetent by reason of a serious mental disorder or defect with appointed counsel, or a Qualified Representative (QR),[103] during all phases of their removal and detention proceedings.[104] Given that courts have always held that the Sixth Amendment's provision of counsel is inapplicable to immigration proceedings, this opinion became the very first to recognize a right to appointed counsel for a group of immigrants fighting their removal.[105]

Not only was this decision substantively unprecedented, but the legal theory Judge Gee used to implement the QR framework and requirement was novel and groundbreaking.[106] Instead of finding a right to appointed counsel based on the Due Process Clause of the Fifth Amendment, where advocates had focused their previous litigation, Judge Gee became the first to rule that the Rehabilitation Act, the predecessor to the Americans with Disabilities Act (ADA), mandates appointing counsel for immigrants with severe mental disabilities.[107] Judge Gee found that under the Rehabilitation Act—which prohibits the federal government from discriminating against any individual, including non-citizens, on the basis of disability[108]—the

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102. Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *20 (C.D. Cal. Apr. 23, 2013); Wolf, *supra* note 7, at 332.

103. *See Franco-Gonzalez*, 2013 WL 3674492, at *5 (adopting the definition of a Qualified Representative that the court defined in Franco-Gonzales v. Holder, 828 F. Supp. 2d 1133, 1147 (C.D. Cal. 2011), thus stating that a Qualified Representative for a mentally incompetent detainee may be "(1) an attorney, (2) a law student or law graduate directly supervised by a retained attorney, or (3) an accredited representative, all as defined in 8 C.F.R. § 1292.1").

104. *Id.* at *6, *9; Franco v. Holder*: Case Developments*, *supra* note 79.

105. Franco v. Holder*: Case Developments*, *supra* note 79.

106. Wolf, *supra* note 7, at 329, 333.

107. *Id.* at 333 ("No prior court had ruled that the Rehabilitation Act or the Americans with Disabilities Act (ADA) requires courts to appoint counsel for litigants with mental disabilities.").

108. *See* 29 U.S.C. § 794(a) (2018) ("No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.").

plaintiffs had successfully established a prima facie case: (1) the class members qualified as persons with disabilities within the meaning of the Rehabilitation Act[109] and that such disabilities rendered them incompetent to represent themselves; (2) the exercise of rights to present evidence, cross-examine witnesses, and make legal arguments against the government's charges under 8 U.S.C. § 1229a(b)(4)(B) constitute a "benefit[] or service[]" to which all immigrants in proceedings are entitled; (3) the class members were "denied the benefit or services" sought—in other words, denied full and meaningful participation in their removal and detention proceedings—because of their disability; and (4) that the defendants were all federal agencies receiving federal funding.[110] Because providing a QR as a "reasonable accommodation" would not constitute a fundamental alteration of the immigration court system, Judge Gee held that the government must appoint QRs for the plaintiffs.[111]

Combining *Matter of M-A-M-* and *Franco-Gonzalez*, immigrant detainees exhibiting indicia of incompetency are entitled to a competency hearing, and if the IJ finds an individual incompetent, then he or she is entitled to an appointed QR.[112] In conjunction with Judge Gee's decision in *Franco-Gonzalez*, on December 31, 2013, EOIR released additional guidance—entitled "Phase I of Plan to Provide Enhanced Procedural Protections to Unrepresented Detained Respondents with Mental Disorders"—to the nation's IJs in order to "provide enhanced procedural protections" for unrepresented detained immigrants with

109. The Rehabilitation Act's definition of "disability" is codified at 29 U.S.C. § 705(9), which defines a disability as "a physical or mental impairment that constitutes or results in a substantial impediment to employment."

110. Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *4 (C.D. Cal. Apr. 23, 2013); *see* Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1266 (D.C. Cir. 2008) (summarizing the requirements for Rehabilitation Act claims that the plaintiff(s) be (1) disabled within the meaning of the Act; (2) otherwise qualified for the benefit or services sought; and (3) excluded from, denied the benefit of, or subject to discrimination under a program or activity, and (4) that the program or activity at issue be carried out by federal funds); *see also infra* text accompanying note 191.

111. *Franco-Gonzalez*, 2013 WL 3674492, at *5, *9; *see infra* notes 192–97 and accompanying text (exemplifying this component of analysis of Rehabilitation Act claims).

112. *Franco-Gonzalez*, 2013 WL 3674492, at *6, *20; Matter of M-A-M-, 25 I&N Dec. 474, 474–75, 484 (B.I.A. 2011).

mental disabilities.[113] This EOIR guidance also builds upon the BIA's conclusions in *Matter of M-A-M-*, outlining the standard for competency to be used in the assessment process, the procedures that IJs should employ (including the discretionary ability to procure an independent mental health evaluation), and the process for implementing safeguards, including the appointment of a QR, throughout the proceeding.[114] Over time, these 2013 procedural protections have been implemented in various locations across the country under the National Qualified Representative Program, or "NQRP," in which contracts between EOIR, the Vera Institute of Justice, and local subcontracting legal service organizations enable the provision of pro bono QRs to respondents wherever they are needed.[115]

Despite these major successes, mentally incompetent detainees are often still required to appear via VTC during their removal proceedings.[116] This requirement remains even for respondents who may be suffering from serious mental conditions such as major depression, schizophrenia, bipolar disorder, obsessive-compulsive disorder, panic disorder, PTSD, borderline personality disorder, and many others.[117] With research already suggesting the limitations of VTC in capturing nonverbal cues and its negative impact on factfinding and credibility assessments, it is no wonder that these issues

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113. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, PHASE I OF PLAN TO PROVIDE ENHANCED PROCEDURAL PROTECTIONS TO UNREPRESENTED DETAINED RESPONDENTS WITH MENTAL DISORDERS 1 & n.1 (2013), https://immigrationreports.files.wordpress.com/2014/01/eoir-phase-i-guidance.pdf [https://perma.cc/ST7P-Q7XL] [hereinafter EOIR PHASE I GUIDANCE].

114. *Id.* at 1 & n.2; Wolf, *supra* note 7, at 334–35.

115. Amelia Wilson et al., *Addressing All Heads of the Hydra: Reframing Safeguards for Mentally Impaired Detainees in Immigration Removal Proceedings*, 39 N.Y.U. REV. L. & SOC. CHANGE 313, 317 n.10 (2015); *see also National Qualified Representative Program (NQRP)*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/national-qualified-representative-program-nqrp [https://perma.cc/G2YF-9NFJ] (providing a brief synopsis on the creation of the NQRP program).

116. *See generally* P.L. v. ICE Class Action Complaint, *supra* note 8, at 40–44 (examining the impact of VTC on detained immigrants with disabilities, in particular on the named plaintiffs in the class action).

117. *See* Aliza B. Kaplan, *Disabled and Disserved: The Right to Counsel for Mentally Disabled Aliens in Removal Proceedings*, 26 GEO. IMMIGR. L.J. 523, 532–33 (2012) (writing that according to the National Alliance on Mental Illness (NAMI), "[m]ental illnesses are medical conditions that disrupt a person's thinking, feeling, mood, ability to relate to others and daily functioning," before examining NAMI's list of illnesses that qualify as serious mental illnesses under its definition).

are amplified for a respondent with mental incompetency.[118] In fact, studies have found that VTC makes it more difficult for judges to recognize the mental conditions of detainees over video and for respondents with cognitive disabilities to comprehend the nature of the proceedings against them.[119]

Additionally, the study by the ACLU and HRW revealed that stigma surrounding mental disability and fear of punitive consequences often prevent individuals from revealing their mental impairments to the immigration court and even their legal representatives.[120] As a result, even though deportation lends itself to a possible death sentence, many mentally impaired detainees are often unfairly deported without the court's consideration of their impairments—a risk that is only augmented for this particularly vulnerable population when deportation hearings occur via VTC.[121] In an era of increasing dependence on technology and the Trump Administration's deepened commitment to deporting immigrants without affording them their statutory and constitutional rights,[122] addressing the use of VTC in the hearings of

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118. *See* Molly Bowen, *Avoiding an "Unavoidably Imperfect Situation": Searching for Strategies to Divert Mentally Ill People out of Immigration Removal Proceedings*, 90 WASH. U. L. REV. 473, 487 (2012) (addressing and emphasizing "heightened" concerns regarding IJs' use of VTC to assess competency).

119. HRW & ACLU, *supra* note 66, at 35.

120. *Id.* at 36–37; *see also* Jasmine E. Harris, *Processing Disability*, 64 AM. U. L. REV. 457, 460, 463–64 (2015) (arguing for public access to adjudicative proceedings to combat social stigma surrounding disability, for new frameworks within existing laws to address disability discrimination, and for the dissemination of counter narratives in public adjudicative spaces).

121. Christine Herman, *A Young Immigrant Has Mental Illness, and that's Raising His Risk of Being Deported*, NAT'L PUB. RADIO (Nov. 17, 2019), https://www.npr.org/sections/health-shots/2019/11/17/766112083/a-young-immigrant-has-mental-illness-and-thats-raising-his-risk-of-being-deporte [https://perma.cc/A9AZ-QYG7]; *see also* Esha Bhandari, *Yes, the U.S. Wrongfully Deports Its Own Citizens*, AM. CIV. LIBERTIES UNION (Apr. 25, 2013, 11:45 AM), https://www.aclu.org/blog/speakeasy/yes-us-wrongfully-deports-its-own-citizens [https://perma.cc/LK5N-PBCF] (narrating the story of a U.S. citizen with mental disabilities who was wrongfully deported to Mexico and noting that such a story is not unique when the deportation system fails to protect mentally impaired individuals).

122. *See* Franklin Foer, *How Trump Radicalized ICE*, THE ATLANTIC (Sept. 2018), https://www.theatlantic.com/magazine/archive/2018/09/trump-ice/565772 [https://perma.cc/64EQ-LT7J] (noting views that President Donald J. Trump's election "[took] the handcuffs off" ICE, no longer subjecting it to a multitude of formal constraints, and that his Administration has implemented a "zero-tolerance" immigration regime, which the "family-separation debacle" exemplifies).

mentally incompetent immigrants is imperative to ensuring that they can meaningfully participate in their own removal proceedings.

II. ANALYZING PRIOR CHALLENGES TO THE USE OF VTC IN IMMIGRATION COURT PROCEEDINGS

Before addressing this Comment's argument that the use of VTC in removal proceedings for mentally incompetent detainees violates section 504 of the Rehabilitation Act, it is first useful to survey prior challenges to the use of VTC in immigration court, the majority of which argued that VTC amounts to a violation of detainees' due process rights. As a starting point, it is well-established that the law must afford immigrants "all opportunit[ies] to be heard upon questions involving [their] right[s] to be and remain in the United States" and that "[d]eportation and asylum hearings . . . are subject to the requirements of procedural due process."[123]

In assessing whether an immigrant has been subjected to a proceeding conforming with the Fifth Amendment's demands of fairness and due process, courts apply the test derived from *Mathews v. Eldridge*,[124] requiring them to balance three factors: (1) the nature and degree of the immigrant's private interest as "affected by the official action;" (2) the risk of "erroneous deprivation of [that] interest through the procedures used," together with the "probable value, if any, of [alternative] procedural safeguards;" and (3) the government's interest, including the fiscal and administrative burdens, "that the [alternative] procedural requirement would entail."[125] In his student note, Cormac T. Connor applied the *Eldridge* standard to argue that INA section 240, codifying VTC, violates procedural due process and an immigrant's right to a fair trial.[126] Under the first prong, he argued that the respondent's interest at stake in fighting deportation is "undeniably strong because the [immigrant] could be deported to his [or her] native country even if [he or she] has no ties in that country, does not speak the language, [and] is unfamiliar with the culture."[127]

123. Rusu v. U.S. Immigration & Naturalization Serv., 296 F.3d 316, 320–21 (4th Cir. 2002); *see* Landon v. Plasencia, 459 U.S. 21, 36 (1982).

124. 424 U.S. 319 (1976).

125. *Id.* at 334–35; Connor, *supra* note 19, at 220.

126. Connor, *supra* note 19, at 223–24.

127. *Id.* at 221.

For asylum seekers in particular, this "interest" is life or death.[128] Under the second prong, which balances "the risk of erroneous deprivation" of rights inherent in the regulatory scheme against available alternatives,[129] Connor argued that VTC substantially raises the risk of erroneously depriving immigrants of their rights when it has been shown to impair the judge's factfinding function.[130] This analysis, combined with the fact that in-person hearings can serve as an available, viable alternative to VTC, weighs in favor of finding that VTC violates procedural due process.[131] Finally, in assessing the government's costs in utilizing VTC as opposed to the proposed alternatives, Connor argues that the burden imposed on the immigrant's rights by erroneous deportation is "immeasurable" and outweighs the government's potential financial burden.[132]

All challenges to VTC that have reached federal circuit courts to date have been brought by individual plaintiffs alleging that VTC hearings violate the fundamental due process requirement of having an opportunity to be heard at a meaningful time and in a meaningful manner.[133] Yet, while some courts have acknowledged that VTC has the

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128. *See* Alison Parker, *The U.S. Deported Them, Ignoring Their Pleas. Then They Were Killed.*, WASH. POST (Feb. 10, 2020, 2:23 PM), https://www.washingtonpost.com/opinions/2020/02/10/us-deported-them-ignoring-their-pleas-then-they-were-killed (citing to a HRW report released on February 5, 2020 "that identified 138 cases of Salvadorans who had been killed since 2013 after being [denied asylum and] deported from the United States," but noting that these numbers likely represent a significant undercount of reality since no government entity tracks what happens to deportees); *see also Human Rights Watch: 200 Salvadoran Asylum Seekers Killed, Raped or Tortured After U.S. Deportation*, DEMOCRACY NOW! (Feb 7. 2020), https://www.democracynow.org/2020/2/7/hrw_report_el_salvador_deportations [https://perma.cc/S78U-YUES] (noting that some of the "138 people deported [back] to El Salvador were murdered by gang members, police, soldiers, death squads or ex-partners between 2013 and 2019" and that "most of the victims were killed within two years after being deported" by the same perpetrators from whom they had fled as asylum seekers).

129. Connor, *supra* note 19, at 221.

130. *Id.* at 222; *see also Developments in the Law*, *supra* note 10, at 1188–89 (explaining that the use of VTC as a factfinding method is a violation of immigrants' due process rights since it impedes or distorts the presentation of evidence or credibility determinations and noting that research suggests such an impact).

131. Connor, *supra* note 19, at 222; Walsh & Walsh, *supra* note 47, at 277–78.

132. Connor, *supra* note 19, at 223–24.

133. Jessica Zhang & Andrew Patterson, *New York Lawsuit Challenges Replacement of Immigration Court Hearings with Video Technology*, LAWFARE (Mar. 5, 2019, 9:00 AM), https://www.lawfareblog.com/new-york-lawsuit-challenges-replacement-immigration-court-hearings-video-technology [https://perma.cc/PJV5-B4TW].

potential to lead to due process violations in particular instances,[134] they have consistently rejected the argument that VTC and its codification in the INA violate due process.[135] For instance, in *Rusu v. U.S. Immigration & Naturalization Service*,[136] the United States Court of Appeals for the Fourth Circuit held that although an asylum hearing was plagued by VTC communication and technical problems that "created additional barriers" to the presentation of the case, these VTC issues did not in fact prejudice the outcome of the hearing.[137] The Fourth Circuit admitted that VTC "has the potential of creating certain problems in adjudicative proceedings," is "rarely a substitute for actual presence," and can diminish the effectiveness of a respondent's lawyer.[138] It further conceded that VTC can make it difficult for the fact-finder to make credibility determinations and gauge demeanor, a highly relevant issue in asylum proceedings, in which credibility is central to the resolution.[139] Nevertheless, the Fourth Circuit concluded that it need not reach Rusu's due process claim regarding the use of VTC in his proceeding because he had failed to establish his eligibility for asylum in the first place, an outcome that the court said the use of VTC did not prejudice.[140]

The outcome was similar in two cases before the United States Courts of Appeals for the Third and Fourth Circuits—*Miller v. Attorney General of the United States*[141] and *Aslam v. Mukasey*,[142] respectively. In

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134. *See infra* notes 149–54 and accompanying text.

135. Zhang & Patterson, *supra* note 133; *see also infra* notes 136–48 and accompanying text.

136. 296 F.3d 316 (4th Cir. 2002).

137. *See id.* at 319, 323–24 ("[A]lthough the circumstances of the asylum hearing were problematic, and they should not have been countenanced by the [Immigration & Naturalization Service [(]INS[)], Rusu nevertheless seems to have had an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976))).

138. *Id.* at 322–23.

139. *Id.* at 322.

140. *Id.* at 325 ("[E]ven if Rusu's asylum hearing had not been conducted in such a haphazard manner, and even if his testimony had been fully credited, he could not have prevailed on his claim for asylum[] [b]ecause he suffered no prejudice from the manner in which his asylum hearing was conducted . . . ."). *But see Developments in the Law*, *supra* note 10, at 1190 ("While the *Rusu* court may have reached the correct disposition, a proper application of the *Mathews* test would have illustrated that in some instances the potential constitutional infirmities it acknowledged can result in a violation of due process.").

141. No. 10-1762, 2010 WL 4027837 (3d Cir. Oct. 15, 2010) (per curiam).

142. 537 F.3d 110 (2d Cir. 2008) (per curiam).

Miller, the petitioner argued that the government violated his right to a fair hearing when it conducted his hearing via VTC.[143] The Third Circuit rejected his argument, finding that no precedent supports the assertion that VTC violates due process.[144] The court did, however, note *Rusu*'s acknowledgement that VTC "might result in prejudice where it impedes" the respondent's ability to present his or her case and an IJ's ability to assess credibility.[145] Likewise, in *Aslam*, while the Second Circuit acknowledged the same concerns as the *Rusu* court regarding the use of VTC in asylum proceedings, it nonetheless held that the petitioner's due process rights were not violated by the admission of videoconference testimony of a witness at his immigration hearing.[146] According to the Second Circuit, the petitioner received a full opportunity to confront and cross-examine the witness, his ex-wife, and to draw attention to any credibility issues or inconsistencies in her testimony.[147] The IJ furthermore offered to transfer the case to another court where the witness could appear in person to testify, but the petitioner declined this opportunity, solidifying the court's conclusion that his due process rights were not violated by the use of VTC during his hearing.[148]

One case that brings a glimmer of hope to the due process realm of VTC challenges is a United States Court of Appeals for the Seventh Circuit case, *Rapheal v. Mukasey*,[149] in which the respondent argued that holding her hearing via VTC violated her due process and statutory rights and that 8 C.F.R. § 1003.25(c) is facially unconstitutional.[150] The Seventh Circuit wrote that "[n]o court has ever held that Congress has violated the due process clause by authorizing removal hearings to proceed via video conference" and that the respondent's facial challenge to the regulation fails "because Congress authorized such proceedings."[151] Nonetheless, it held that the use of VTC in this particular case may have prejudiced the outcome because the respondent was unable to adequately view through VTC a material piece of evidence that the IJ

143. *Miller*, 2010 WL 4027837, at *1.
144. *Id.* at *2.
145. *Id.*
146. *Aslam*, 537 F.3d at 114–15.
147. *Id.* at 115.
148. *Id.*
149. 533 F.3d 521 (7th Cir. 2008).
150. *Id.* at 530; *see supra* note 20 and accompanying text.
151. *Rapheal*, 533 F.3d at 531.

used to deem her not credible.[152] The Seventh Circuit thus ordered that the respondent receive a new hearing as a result of being denied "her [statutory] right[] under 8 U.S.C. § 1229a(b)(4)(B)[153] to a reasonable opportunity to examine evidence used against her."[154]

In addition to the due process arena, courts have occasionally entertained the question of whether a respondent is considered "present" at a proceeding while appearing via the VTC screen.[155] This issue of "presence" has most commonly arisen in the criminal context, which involves considerations surrounding Federal Rule of Criminal Procedure 43[156] and the Sixth Amendment's Confrontation Clause.[157] According to the Fourth, Fifth, Ninth, and Tenth Circuits, presence in criminal court means physical presence, and "a defendant's actual presence [is] not satisfied by a projection of the defendant on a television screen."[158] Although the issue of "presence" takes on a different form in regard to immigration hearings, the analogous argument goes that if a VTC appearance does not constitute presence in criminal court, then neither should it constitute presence in immigration court.[159] Other potential due process claims against VTC

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152. *Id.* at 533–34.

153. 8 U.S.C. § 1229a(b)(4)(B) (2018) ("[T]he alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government.").

154. *Rapheal*, 533 F.3d at 533.

155. Walsh & Walsh, *supra* note 47, at 278.

156. FED. R. CRIM. P. 43 (requiring that, unless otherwise provided for, "the defendant must be present at: (1) the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury impanelment and the return of the verdict; and (3) sentencing").

157. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

158. Walsh & Walsh, *supra* note 47, at 278 & n.127 (citing United States v. Torres-Palma, 290 F.3d 1244, 1245 (10th Cir. 2002); United States v. Lawrence, 248 F.3d 300, 301–02, 304 (4th Cir. 2001); United States v. Navarro, 169 F.3d 228, 235–36, 239 (5th Cir. 1999); Valenzuela-Gonzalez v. U.S. Dist. Ct. for Dist. of Ariz., 915 F.2d 1276, 1280 (9th Cir. 1990)).

159. *Id.* Several scholarly articles have examined the use of VTC in the federal criminal context and have made similar findings to its impact on criminal defendants. *See, e.g.*, Anthony Garofano, *Avoiding Virtual Justice: Video-Teleconference Testimony in Federal Criminal Trials*, 56 CATH. U. L. REV. 683, 683–84, 683 n.1 (2007) (extensively examining the use of VTC testimony in federal criminal trials and its effect on the Confrontation Clause and arguing that VTC should only be allowed upon a specific finding that it is necessary to further public policy or upon the defendant's consent); Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote*

could include the arguments that VTC's negative impact on credibility determinations in asylum proceedings leads to a violation of the obligation of non-refoulement under international law,[160] that VTC violates the Equal Protection Clause,[161] and that VTC denies the respondent access to effective assistance of counsel, in particular counsel's inability to communicate both effectively and confidentially with his or her client appearing on the screen.[162] However, none of these potential arguments has been fully litigated, let alone found by a court to demand an end to EOIR's reliance on VTC in removal proceedings.

The most recent challenge to the use of VTC in removal proceedings emerged in response to ICE's New York Field Office announcing its first ever "Refusal to Produce Policy," ending its practice of transporting detained immigrants to appear for their hearings in person.[163] In response, on February 12, 2019, the Brooklyn Defender Services, Bronx Defenders, and Legal Aid Society filed a class action lawsuit, *P.L. v. ICE*, in the United States District Court for the Southern District of New York seeking an injunction against the Refusal to Produce Policy.[164] Seven detained or formerly detained individuals who were previously denied the opportunity to appear in person served as named plaintiffs and class representatives in this suit.[165]

The complaint in *P.L. v. ICE* laid out the numerous harms that the representative plaintiffs and members of the putative class suffered, particularly as the harms related to the violation of due process, access

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Defendant, 78 TUL. L. REV. 1089, 1089, 1093, 1100 (2004) (analyzing scholarship suggesting that VTC has a negative impact on the way the defendant is perceived in court as well as the way the defendant experiences the criminal justice system, and raising concerns that VTC trials are unable to capture nonverbal cues).

160. *See generally* Shirley Llain Arenilla, *Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States*, 15 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 283, 315–18 (2015) (noting that the principle of non-refoulement "prohibits nations from returning refugees or asylum seekers to countries where their lives or freedom may be threatened").

161. *See* Connor, *supra* note 19, at 225 ("Even [an] intermediate level of scrutiny of INA Section 240 should find that [VTC] inhibits a[] [respondent's] ability to present his [or her] case.").

162. *Id.* at 225–26. Cormac T. Connor advanced these arguments in his student note, but no party has successfully litigated them.

163. P.L. v. ICE Class Action Complaint, *supra* note 8, at 1; Shepherd, *supra* note 29.

164. P.L. v. ICE Class Action Complaint, *supra* note 8, at 1, 4–5; Zhang & Patterson, *supra* note 133.

165. Zhang & Patterson, *supra* note 133.

to courts and counsel, and associated statutory rights.[166] First, the complaint alleged that the defendants' policy causes repeated adjournments, thus delaying the resolution of immigration cases and needlessly prolonging detention by months.[167] Second, it elaborated on the ways the policy prevents detained immigrants from participating in their proceedings, citing reasons such as insufficient VTC capacity to meet the demands of the docket, unreliable technology that interrupts the video or audio feed, and an image that only offers a narrow slice of the courtroom.[168] Third, the complaint alleged that the policy prevents detained immigrants from retaining and receiving assistance of counsel—given that attorneys must either travel to remote jails to visit clients or use the limited VTC lines in courtrooms when they are not in use—and inhibits the ability of detainees to obtain and review evidence prior to appearing in court.[169]

The complaint further details how the policy prevents confidential communications with counsel, thwarts effective foreign language services by interpreters, and impacts credibility assessments by judges.[170] Lastly, the complaint devotes a separate section to addressing how the policy particularly harms detained immigrants with disabilities, writing that "[p]oor video and audio quality on VTC lines often causes severe cognitive and intellectual disabilities to go unnoticed," causing in-person signs of impairment to "be overlooked by attorneys and judges with only a narrow view of the person's head."[171] Further, even when a detainee's disability is identified, the complaint states that the "Defendants' Policy prevents them from receiving necessary accommodations that would allow them to adequately participate in their removal proceedings."[172]

Taking into account all of these potential harms, the complaint made several novel legal arguments for why the use of VTC violates the rights of its defined class members.[173] Constitutionally, the suit alleged a violation of the right of access to courts without government obstruction

166. P.L. v. ICE Class Action Complaint, *supra* note 8, at 27.
167. *Id.*
168. *Id.* at 29–30.
169. *Id.* at 31–33.
170. *Id.* at 33–40.
171. *Id.* at 40.
172. *Id.* at 41.
173. *See id.* at 45–46 (defining the proposed class of plaintiffs as "[a]ll individuals who are now, or will in the future be, detained by the ICE NY Field Office for removal proceedings and who ICE and/or EOIR has not produced or will not produce in person for those proceedings pursuant to Defendants' Refusal to Produce Policy").

under both the Petition Clause of the First Amendment and the Due Process Clause of the Fifth Amendment, as well as a violation of the right to procedural due process under the Fifth Amendment's Due Process Clause.[174] It also alleged violations of provisions of the INA and the Administrative Procedure Act (APA), which state that immigrants must receive full and fair hearings; that they must have access to counsel of their choosing, the opportunity to examine evidence against them, and the ability to present evidence and cross examine government witnesses; and that arbitrary and capricious action by ICE must be overturned.[175] Finally, the lawsuit was the first of its kind to allege that the Refusal to Produce Policy violated section 504 of the Rehabilitation Act, requiring the government (including DHS and ICE), to make reasonable accommodations for disabled detainees to ensure that they can access government benefits as equally as other detainees.[176] The complaint further identified a proposed sub-class for detained immigrants with disabilities bringing these claims under the Rehabilitation Act.[177]

This lawsuit was pioneering in the sphere of challenges to VTC for several reasons. First, none of the previous VTC challenges was a class

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174. *Id.* at 49, 52; *see also id.* at 5 ("Plaintiffs seek a declaration that the Policy as implemented violates protections guaranteed by the First Amendment [and] the Fifth Amendment."); *id.* at 52 ("The Petition Clause of the First Amendment and the Due Process Clause of the Fifth Amendment guarantee the Representative Plaintiffs, Plaintiff Class, and Rehabilitation Act Subclass the right of access to courts and prohibits the government and its agents from unjustifiably obstructing that access.").

175. *Id.* at 50–51, 54–55; *see also id.* at 5 ("Plaintiffs seek a declaration that the Policy as implemented violates protections guaranteed by . . . the Immigration and Nationality Act ("INA") [and] the Administrative Procedure Act ("APA").."); *id.* at 50 ("The Immigration and Nationality Act guarantees the Representative Plaintiffs, Plaintiff Class, and Rehabilitation Act Subclass the privilege of being represented . . . by counsel of their choosing in their removal proceedings." (internal quotation marks omitted)); *id.* ("Under the Administrative Procedure Act, courts must hold unlawful and set aside agency action that is [1] not in accordance with law, [2] contrary to constitutional right, [3] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, [4] or that is without observance of procedure required by law." (internal quotation marks omitted)).

176. *Id.* at 40–41.

177. *See id.* at 46 (defining the proposed subclass of persons with disabilities bringing claims under the Rehabilitation Act as "[a]ll individuals who are now or will in the future be detained by the ICE NY Field Office for removal proceedings who have a disability, as defined by the Rehabilitation Act, and who ICE has not produced or will not produce in person for those proceedings because of Defendants' Refusal to Produce Policy").

action, but rather were actions solely by individual respondents challenging the use of VTC in their particular proceedings.[178] Second, prior challenges concentrated mostly on challenging the INA statute authorizing the use of VTC as a procedural due process violation, whereas *P.L. v. ICE* challenged "a blanket governmental policy of refusing to produce *any* detainees for in-person hearings."[179] This strategy enabled the plaintiffs to bring claims under the APA and the Rehabilitation Act that had not been previously litigated.[180] As such, to date, this lawsuit is one of a kind in applying a section 504 Rehabilitation Act argument to the use of VTC for detainees with mental conditions. Although it was dismissed on June 21, 2019, due to jurisdictional issues,[181] this class action suit perhaps will help lay future groundwork for a judge to find that the use of VTC in the hearings of mentally incompetent detainees violates the Rehabilitation Act and presumptively mandate in-person court appearances as a reasonable accommodation, just as Judge Gee did in *Franco-Gonzalez* in requiring the appointment of QRs as a reasonable accommodation for this vulnerable population.[182]

III. ESTABLISHING A PRIMA FACIE CASE UNDER SECTION 504 OF THE REHABILITATION ACT AND CREATING A LEGAL FRAMEWORK FOR PRESUMPTIVELY REQUIRING IN-PERSON COURT APPEARANCES AS A REASONABLE ACCOMMODATION FOR MENTALLY INCOMPETENT DETAINEES

The Rehabilitation Act of 1973—in particular Title V, which prohibits the federal government from discriminating against any individual, including non-citizens, on the basis of a disability—was the

178. Zhang & Patterson, *supra* note 133.

179. *Id.*

180. *Id.*

181. *See* P.L. v. ICE, No. 1:19-CV-01336 (ALC), 2019 WL 2568648, at *3–4 (S.D.N.Y. June 21, 2019) (granting the defendants' motion to dismiss on subject matter jurisdiction grounds). On July 22, 2019, the plaintiffs filed a Rule 59(e) motion to alter or amend that judgment in regard to their APA claim, reasserting that they were challenging the decision-making process leading to the VTC policy as being arbitrary and capricious. P.L. v. ICE, No. 1:19-CV-01336, 2020 WL 1233761, at *1, *3 (S.D.N.Y. Mar. 13, 2020). On March 13, 2020, the court stayed the plaintiffs' motion as to the APA claim pending a decision from the Supreme Court in a related case involving the Deferred Action for Childhood Arrivals (DACA) program. *Id.* at *3.

182. *See supra* notes 102–04 and accompanying text.

first broad-reaching federal disability law.[183] Although the originally passed Rehabilitation Act did not cover programs and agencies of the federal government, Congress amended section 504 in 1978 to prohibit discrimination by reason of disability "under any program or activity conducted by any Executive agency,"[184] such that today, DHS, DOJ, and the State Department are all included.[185] Courts have consistently applied section 504's federal government disability discrimination provision to invalidate federal agency actions that effectively discriminate against persons with disabilities, including disparate impact discrimination and intentional discrimination (though proof of discriminatory intent is not required).[186] This occurred in *Franco-Gonzalez*, when Judge Gee held that the government violated section 504 in failing to provide mentally incompetent immigrants with counsel and entered a permanent injunction mandating QRs as a reasonable accommodation.[187] As such, although Congress did not create an explicit exception for immigrants with disabilities in the INA, the accepted construction and interpretation of section 504 prohibits DHS, ICE, and EOIR from ignoring its statutory mandates.[188]

In order to establish a successful case under section 504 of the Rehabilitation Act, the plaintiff(s) must show that they were discriminated against under a "program or activity . . . carried out by a federal executive agency."[189] To successfully demonstrate such a prima facie claim, plaintiffs must prove four elements:

> (1) they are disabled within the meaning of the Rehabilitation Act[;][190] (2) they are otherwise qualified [for the benefit or services sought;] (3) they were excluded from, denied the benefit of, or subject to discrimination under a program or activity[;] and (4) the

183. *See* Rehabilitation Act of 1973, 29 U.S.C. § 794 (2018); Mark C. Weber, *Of Immigration, Public Charges, Disability Discrimination, and of All Things,* Hobby Lobby, 52 ARIZ. ST. L.J. 245, 264 (2020); Wolf, *supra* note 7, at 352–53.

184. Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, § 119, 92 Stat. 2955, 2982 (1978).

185. Weber, *supra* note 183, at 265.

186. *Id.* at 266.

187. Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *16 (C.D. Cal. Apr. 23, 2013); Wolf, *supra* note 7, at 332–33.

188. Weber, *supra* note 183, at 269–70.

189. Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1266 (D.C. Cir. 2008).

190. *See supra* note 109 (explaining the statutory definition of "disability"); *infra* notes 202–05 and accompanying text (regulatory definition).

> program or activity is carried out by a federal executive agency or with federal funds.[191]

To combat a section 504 claim, defendants may assert an affirmative defense that accommodating the plaintiffs' disabilities would constitute an undue burden or would fundamentally alter the government's operations.[192] For example, in *American Council of the Blind v. Paulson*,[193] a case that laid out section 504's required elements, the District of Columbia Circuit held that the Treasury Department's practice of issuing paper money that lacked tactile or other features readily distinguishable to individuals with visual impairments violated section 504 of the Rehabilitation Act.[194] In applying the elements, the court held that (1) visually impaired people are disabled within the meaning of the Act;[195] (2) they are qualified to engage in commerce using U.S. currency; (3) they are excluded from meaningful access to currency and denied the benefit of maximizing their employment, economic self-sufficiency, independence, and inclusion in society when required to depend "on the kindness of strangers" to complete monetary transactions; and (4) the production and design of currency is a "program or activity" carried out by an Executive agency within section 504.[196] Further, the Treasury Department failed to show that accommodating visually impaired people with currency adapted to their needs would cause an undue burden, especially when other currency systems around the world already do so and when the plaintiffs did not seek to modify one dollar bills, the number of which in circulation might have created an undue burden.[197]

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191. *Am. Council of the Blind*, 525 F.3d at 1266.

192. *Id.*

193. 525 F.3d 1256 (D.C. Cir. 2008).

194. *Id.* at 1274.

195. *See infra* Section III.A (discussing the definition of a disability under the Rehabilitation Act).

196. *Am. Council of the Blind*, 525 F.3d at 1266–71.

197. *Id.* at 1271–73. As mentioned, defendants can also argue that the accommodation would fundamentally alter its programs. *See, e.g.*, PGA Tour, Inc. v. Martin, 532 U.S. 661, 682–83 (2001) (describing two types of potential fundamental alterations to a golf tournament—one that would change a major aspect of the game and affect all players and one that would change a minor aspect of the game for one person and give that person a competitive advantage—and finding that allowing a golfer with severe mental disabilities to use a golf cart in competitions was neither type of change and thus was not a fundamental alteration); Kohl v. Woodhaven Learning Ctr., 865 F.2d 930, 940 (8th Cir. 1989) (agreeing with the defendant that separating a disabled student from other students would constitute a fundamental alteration of the

Applying section 504's framework here, this Comment argues that the use of VTC in removal proceedings for immigrants declared mentally incompetent by immigration courts is a violation of section 504 of the Rehabilitation Act because (1) mentally incompetent detainees qualify as disabled persons under the Act; (2) they are entitled to the right to examine evidence against them, to present evidence on their own behalf, and to cross-examine the government's witnesses, and thus are "otherwise qualified for the benefit or services sought;" and (3) they are denied full participation in their proceedings and meaningful access to these benefits by reason of their disability when VTC is used as opposed to in-person appearances.[198] Given that (4) EOIR is an executive agency, satisfying the final element, all the elements required to establish a prima facie case under the Rehabilitation Act are met.[199] As such, section 504 of the Rehabilitation Act requires that in-person court appearances be presumptively required as a reasonable accommodation for all mentally incompetent detainees whose full and meaningful participation in their removal proceedings might be hindered by the use of VTC.

The following sections of this Comment's analysis will address each of the above-referenced elements and establish that all four are met, demonstrating that EOIR's use of VTC in removal proceedings violates section 504 of the Rehabilitation Act. Next, this Comment will argue that given this violation of the Rehabilitation Act, the mandated solution is a presumptive requirement that all immigrants declared mentally incompetent in a *Matter of M-A-M-* proceeding be entitled to appear in-person for their hearings as a reasonable accommodation. The contours surrounding the implementation of this reasonable accommodation as a

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school's programming that focused on social interaction and would therefore not be a reasonable accommodation).

198. Lovell v. Chandler, 303 F.3d 1039, 1052 (9th Cir. 2002). Note that the actual language of the statute states that the individual must "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination" *solely* by reason of his or her disability. 29 U.S.C. § 794(a) (2018).

199. *See Lovell*, 303 F.3d at 1052 (articulating these four required elements of a section 504 claim); *see also* Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034, 1051–52 (C.D. Cal. 2010) ("To state a *prima facie* case under Section 504, Plaintiffs must demonstrate that: (1) they are qualified individuals with a disability, as defined under the Americans with Disabilities Act ("ADA"), (2) they are otherwise qualified for the benefit or services sought; (3) that they were denied the benefit or services solely by reason of their handicap; and (4) the program providing the benefit or services receives federal financial assistance.").

presumption that can be rebutted, limited, or refused based upon the particular circumstances of the individual will be delineated here and furthermore addressed in this Comment's policy section. Finally, this analysis Section will identify and dispose of possible anticipated challenges to a section 504 claim and will further discuss other arguments that plaintiffs have made in the immigration context using section 504, including in *P.L. v. ICE*.

A. Element One: Mentally Incompetent Detainees Appearing via VTC Qualify as Persons with Disabilities within the Meaning of the Rehabilitation Act

First and foremost, detainees declared mentally incompetent by an IJ under the procedures set forth in *Matter of M-A-M-*[200] and the 2013 implementing EOIR guidelines[201] qualify as persons with disabilities within the meaning contemplated by the Rehabilitation Act. The implementing regulations of the Rehabilitation Act define "[h]andicapped persons" as "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[202] In addition to including physiological disorders that constitute physical impairments, the regulations define mental impairments as including "any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities."[203] Beyond this, the regulations do not enumerate a specific list of conditions that would constitute "physical or mental impairments," such that the deciding factor is whether the impairment "substantially limits one or more major life activities."[204] The regulations define major life activities as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[205]

Relatedly, in 2008, Congress amended the ADA to incorporate these definitions of "major life activities" into the statute, and the amended

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200. *See* 25 I&N Dec. 474, 477–78 (B.I.A. 2011); *supra* note 85.

201. *See* EOIR PHASE I GUIDANCE, *supra* note 113, at 1–2.

202. 34 C.F.R. § 104.3(j) (2019). "Handicapped persons" is now an outdated term, but it continues to be utilized in the implementing regulations of the Rehabilitation Act, although section 504 itself uses "persons with disabilities" language. *See supra* notes 108–10 and accompanying text.

203. *Id.*

204. *Id.*

205. *Id.* Section 504 of the Rehabilitation Act itself does not include these definitions of "major life activities," but rather the implementing regulations put the definitions in force.

act also added several new categories of such qualifying activities.[206] These amendments emphasized that the definition of disability "shall be construed in favor of broad coverage . . . to the maximum extent permitted by the terms of th[e] [ADA]."[207] The regulations implementing the 2008 amendments to the ADA went even a step further, adding a few more categories of qualifying "major life activities"[208] and providing nine rules of construction to apply when determining whether an impairment substantially limits an individual in a major life activity.[209] In applying these nine principles, the regulations explain that the individualized assessment of some impairments will, in virtually all cases, result in the determination of a disability and lists some qualifying examples, including major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia that substantially limits brain function.[210] As such, the ADA has continually built upon the foundation that the Rehabilitation Act created and offers a useful framework for also analyzing the needs of disabled individuals whom the Rehabilitation Act seeks to protect.

As applied to the class of immigrants at bar, detainees deemed mentally incompetent during a *Matter of M-A-M-* proceeding qualify as "disabled" or "handicapped persons" under the definition contained in the Rehabilitation Act and its implementing regulations. The basis for this conclusion is the fact that a *Matter of M-A-M-* proceeding is an individualized inquiry that "var[ies] based on the circumstances of the

206. *Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (May 3, 2011), https://www.eeoc.gov/laws/guidance/fact-sheet-eeocs-final-regulations-implementing-adaaa [https://perma.cc/4SCX-JMUD]. *See* 42 U.S.C. § 42 USC 12102(2)(A) (2012) (adding the following activities to the accepted list of "major life activities": eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating).

207. 42 U.S.C. § 12102(4). This broad net includes an impairment that substantially limits *at least* one major life activity, an impairment that is episodic or in remission that would substantially limit a major life activity if active, and a determination that an impairment can substantially limit a major life activity without regard to the ameliorative effects of mitigating measures such as medication, assistive technology, or other reasonable accommodations. *Id.*; *Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA, supra* note 206.

208. *See* 29 C.F.R. § 1630.2(i)(1) (2019) (adding "sitting," "reaching," and "interacting with others" to the accepted categories of "major life activities").

209. *Id.* § 1630.2(j)(1).

210. *Id.* § 1630.2(j)(3).

case,"[211] just as the Rehabilitation Act and its regulations require an individualized assessment regarding an impairment's impact on an individual's life.[212] Here, the IJ's determination of mental incompetency falls within the Rehabilitation Act's first definitional prong that the detainee have "a physical or mental impairment which substantially limits one or more major life activities."[213] An example of this would be a scenario in which an IJ assesses all of the particular facts and determines during the *Matter of M-A-M-* proceeding that the respondent suffers from a severe form of schizophrenia impacting his or her ability to carry out the major life activity of thinking. Having thus made the threshold determination of whether a disability exists, under the Act the IJ's next task in the *Matter of M-A-M-*hearing is to determine whether the impairment (schizophrenia in this proposed hypothetical) compromises the detainee's ability to actively participate in the government activity, here being the removal proceeding.[214] If this impact exists, then the person must have exhibited sufficient indicia of incompetency such that the IJ could conclude that as a result of the impairment(s), the immigrant would not have a rational and factual understanding of the proceedings, would be unable to adequately consult with an attorney, and would lack a "reasonable opportunity to examine and present evidence and cross-examine witnesses."[215] Therefore, after the IJ's incompetency determination based on the respondent's disability, if the government does not seek to ensure that the impaired individual can meaningfully participate in his or her proceeding, that could amount to discrimination in violation of the Rehabilitation Act.

In sum, an IJ's finding of incompetency clearly satisfies the definition of disability for immigrants appearing via VTC because the detainee's physical or mental impairment(s) will substantially limit one or more major life activities that are necessary to his or her ability to meaningfully participate in the VTC proceedings.[216] Judge Gee also found this to be the case in *Franco-Gonzalez*, as she wrote that immigrants

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211. *See* Matter of M-A-M-, 25 I&N Dec. 474, 480–81 (B.I.A. 2011) (articulating the test for competency).

212. 34 C.F.R. § 104.3(j) (2019).

213. *Id.* § 104.3(j)(1).

214. *Matter of M-A-M-*, 25 I&N Dec. at 480–81.

215. *Id.* at 479.

216. Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *15–16 (C.D. Cal. Apr. 23, 2013).

with a "serious mental disorder or defect that renders them incompetent to represent themselves" are classified as "disabled" under the Act.[217]

B. Element Two: Mentally Incompetent Detainees Appearing via VTC Are Otherwise Qualified for the Benefit or Services Sought

Second, detainees declared mentally incompetent and forced to appear for their hearings through VTC are otherwise qualified, with or without a reasonable accommodation, for the benefit or services they are seeking despite their disability. Under the Rehabilitation Act, an "otherwise qualified" person is one who is able to meet all of a program's requirements in spite of his or her handicap.[218] As the Supreme Court found in *Southeastern Community College v. Davis*,[219] a "person who suffers from a limiting physical or mental impairment still may possess other abilities that permit him [or her] to meet the requirements of various programs" and "individual[s] who could be 'otherwise qualified' [are] . . . included among the class of 'handicapped' persons covered by [section] 504."[220]

In the immigration context, the INA mandates that all immigrants in removal proceedings, including those with mental disabilities, be accorded "rights and privileges."[221] These include not only the privilege of being represented by counsel but also the statutory right to a reasonable opportunity to examine evidence against the immigrant, to present evidence on the immigrant's own behalf, and to cross-examine witnesses presented by the government.[222] As the *Franco-Gonzalez* court demonstrated, these "rights and privileges" under the INA constitute the "benefit or services" sought under the second element required to

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217. *Id.* at *4 & n.2.

218. Se. Cmty. Coll. v. Davis, 442 U.S. 397, 406 (1979).

219. 442 U.S. 397 (1979).

220. *Id.* at 405–06 n.6.; *see also* Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 135 (2d Cir. 1995) (finding that the phrase "otherwise qualified" is "hardly unambiguous on its face," and as applied in the employment discrimination context, "an individual is otherwise qualified for a job if [he or] she is able to perform the essential functions of that job, either with or without a reasonable accommodation").

221. 8 U.S.C. § 1229a(b)(3) (2018).

222. § 1229a(b)(4)(B); *see also* Katherine Conway, Comment, *Fundamentally Unfair: Databases, Deportation, and the Crimmigrant Gang Member*, 67 AM. U. L. REV. 269, 276–77 (2017) (arguing that admitting unsubstantiated gang membership data in removal proceedings without allowing respondents to examine or respond to such evidence violates due process).

establish a section 504 prima facie case.[223] The plaintiffs in *Franco-Gonzalez* argued that the Rehabilitation Act "take[s] an extremely expansive view of what constitutes a 'benefit or service'" given that section 504 "'applies to *all* programs or activities conducted' by the DOJ" and given the fact that another division of DHS had already interpreted this wording to require accommodations for people seeking naturalization.[224] Judge Gee agreed with the plaintiffs' argument, finding that "the exercise of rights to present evidence, cross-examine witnesses, and make legal arguments against the Government's charges constitute a 'benefit or services' to which all individuals in immigration proceedings . . . are entitled."[225]

Mentally incompetent immigrants appearing via VTC are similarly "otherwise qualified" individuals (irrespective of their entitlement to any reasonable accommodation) seeking the "rights and privileges" to which they are entitled during their proceedings, satisfying element two of a section 504 claim.[226] It is thus indisputable that mentally disabled detainees "meet all of [the] program's requirements in spite of [their] handicap," as the "rights and privileges" are guarantees under the INA.[227] They are therefore not required to prove their eligibility for the particular form of relief they are seeking, such as asylum or withholding of removal, in a section 504 claim, but rather they meet the second element by virtue of being statutorily "qualified" to examine the evidence against them, to present evidence during their cases, and to cross-examine the government's witnesses.[228] As such, EOIR cannot use VTC to negate immigrants' statutory "rights and privileges," and, as will be discussed in an analysis of the third element of a section 504 claim below, these rights and privileges are significantly hindered and abridged when VTC is utilized to conduct their hearings.

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223. Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *4 n.2 (C.D. Cal. Apr. 23, 2013).

224. Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment at 10, Franco-Gonzalez v. Holder, No. 10-CV-2211 (C.D. Cal. Sept. 7, 2012).

225. *Franco-Gonzalez*, 2013 WL 3674492, at *4 n.2.

226. *Id.*

227. Se. Cmty. Coll. v. Davis, 442 U.S. 397, 406 (1979).

228. 8 U.S.C. § 1229a(b)(4)(B) (2018).

C. Element Three: Mentally Incompetent Detainees Are Denied Full Participation in Their Proceedings and Meaningful Access to the Benefit or Services Sought Because of Their Disability When Appearing via VTC as Opposed to in Person

The Supreme Court has held that section 504 of the Rehabilitation Act "requires that an otherwise qualified handicapped individual . . . be provided with meaningful access to the benefit that the grantee offers."[229] However, element three—that mentally incompetent detainees appearing via VTC are denied meaningful access to their statutory "rights and privileges" under the INA "solely by reason of" their disability[230]—is likely to be the most challenged aspect of this legal argument. This was the element that the *Franco-Gonzalez* court spent the most time analyzing, as the government argued that the plaintiffs were not denied access to their rights "solely by reason" of their disability because the government did not intend to prevent them from full participation in their removal proceedings.[231] The *Franco-Gonzalez* court wrote, however, that in an action "for injunctive relief," it is "sufficient that Plaintiffs are unable to meaningfully access the benefit offered—in this case, full participation in their removal and detention proceedings—*because of* their disability," rather than requiring the higher standard of "solely by reason" of their disability.[232]

An analysis of precedential case law on both the Rehabilitation Act and the ADA demonstrates that the majority view of Circuit Courts of Appeals is that the Rehabilitation Act does not require a "sole-cause" standard but rather a "but-for" causation standard.[233] This has particularly been the case in employment discrimination claims made under the Rehabilitation Act, in which the Second, Fourth, Sixth and Seventh Circuits have all adopted a "but-for" causation standard for these claims.[234] In a recent Second Circuit decision, *Natofsky v. City of*

229. Alexander v. Choate, 469 U.S. 287, 301 (1985).

230. 29 U.S.C. § 794 (2018).

231. *Franco-Gonzalez*, 2013 WL 3674492, at *4.

232. *Id.* (emphasis added).

233. Blaze Knott & Lisa Griffith, *Second Circuit Adopts Heightened "But-For" Standard but Rejects "Sole-Factor" Test for Disability Discrimination Claims*, LITTLER (Apr. 25, 2019), https://www.littler.com/publication-press/publication/second-circuit-adopts-heightened-standard-rejects-sole-factor-test [https://perma.cc/EB7X-MYKM].

234. Natofsky v. City of New York, 921 F.3d 337, 349–50 (2d Cir. 2019); Gentry v. E.W. Partners Club Mgmt. Co., 816 F.3d 228, 235–36 (4th Cir. 2016); Lewis v. Humboldt Acquisition Corp., 681 F.3d 312, 315, 317, 321 (6th Cir. 2012); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 963–64 (7th Cir. 2010), *superseded by statute*,

New York,[235] the court highlighted the differing causation language between the Rehabilitation Act and the ADA.[236] The court noted that the Rehabilitation Act provides that no individual shall be discriminated against "solely by reason of his or her disability," while the ADA makes discrimination unlawful against an individual "on the basis of disability."[237] Nevertheless, the Second Circuit ultimately decided that the Rehabilitation Act now incorporates the same causation standard as the one that is applied for complaints alleging employment discrimination under the ADA, meaning that instead of requiring proof that the disability was the *sole* cause of the discrimination, it is now acceptable in this context to show the adverse action occurred *because of* the disability.[238]

Over the years, the Supreme Court has additionally incorporated a "but-for" causation standard into age discrimination and Title VII retaliation claims, demonstrating a trend among courts in favor of the less stringent standard.[239] While this precedent does not directly address the Rehabilitation Act's language as it relates to the immigration context, it squares perfectly with the court's analysis in *Franco-Gonzalez*, which utilized a "but-for" causation standard (i.e. "because of their disability") rather than adhering to a "sole-cause standard" in enabling the plaintiffs to satisfy the third element of a section 504 claim.[240]

Per this precedent, in assessing whether mentally impaired detainees are denied the benefit or services sought under element three, courts need only consider whether VTC denies them meaningful access to the immigration court process *because of* their disability, not "solely by reason" of it. This analysis entails demonstrating that, because of their

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42 U.S.C. § 12112(a) (2012), *as recognized in* Gulliford v. Schilli Transp. Servs., Inc., No. CV 4:15-CV-19-PRC, 2017 WL 1547301 (N.D. Ind. Apr. 27, 2017).

235. 921 F.3d 337 (2d Cir. 2019).

236. *Id.* at 344–45.

237. *See id.* (emphasis omitted) (noting that this Rehabilitation Act language is codified at 29 U.S.C. § 794(a), while the ADA language is codified at 42 U.S.C. § 12112(a)).

238. *Id.*

239. *See* Knott & Griffith, *supra* note 232 (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175–77 (2009) (holding that the Age Discrimination in Employment Act's "because of" age language incorporated a "but-for" causation standard) and Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350–52 (2013) (adopting the analysis of *Gross* and finding that the "because of" language in Title VII's anti-retaliation provision demonstrated Congress's intent to adopt a "but-for" causation standard for such claims)).

240. Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *4 (C.D. Cal. Apr. 23, 2013).

impairments, mentally incompetent detainees appearing via VTC have an inability to understand and participate in their hearings that goes beyond the general level of confusion that most other immigrants experience in deportation proceedings.[241] As discussed, studies have demonstrated VTC's ability to inhibit the adjudicatory process, undermine the respondent's ability to build an emotional connection with the judge, and impede the full capturing of nonverbal cues.[242] As the Fourth Circuit held in *Rusu v. U.S. Immigration & Naturalization Service*, VTC has the potential to create additional barriers, such as sound quality and technological problems in the presentation of one's case,[243] an issue that led the court in *Raphael v. Mukasey* to order a new hearing for the respondent because her right to examine evidence against her had been violated.[244] These issues are only exacerbated for mentally impaired detainees appearing via VTC, as VTC coupled with cognitive or physical disabilities makes it all the more difficult for these individuals to collect and confront evidence, to serve as persuasive witnesses,[245] and to have judges effectively recognize their impairments through the screen.[246]

The complaint in *P.L. v. ICE* illustrates these additional hurdles that mentally incompetent detainees appearing through VTC must overcome to attain the full exercise of their "rights and privileges" in their proceedings because of their disabilities. First, the complaint highlighted the risk that immigrants with disabilities will not be properly identified during their VTC hearings given the difficulty of observing signs of cognitive impairment with "only a narrow view of the person's head."[247] It cited a 2017 U.S. Government Accountability Office (GAO) study that criticized EOIR for failing to comprehensively evaluate the effects of VTC on case outcomes and for neglecting to adopt best practices to ensure that the use of VTC ends up being

241. Wolf, *supra* note 7, at 339–40.
242. Connor, *supra* note 19, at 216, 218; Walsh & Walsh, *supra* note 47, at 269–70.
243. *See supra* notes 136–40 and accompanying text (examining Rusu v. U.S. Immigration & Naturalization Serv., 296 F.3d 316 (4th Cir. 2002)).
244. *See supra* notes 149–54 and accompanying text (examining Rapheal v. Mukasey, 533 F.3d 521 (7th Cir. 2008)).
245. P.L. v. ICE Class Action Complaint, *supra* note 8, at 40–44.
246. HRW & ACLU, *supra* note 66, at 35.
247. P.L. v. ICE Class Action Complaint, *supra* note 8, at 40.

outcome-neutral.[248] In regard to mentally impaired respondents, the GAO study mentioned an example of an IJ who reported being unable to identify a respondent's cognitive disability over VTC but found that the disability was "clearly evident when the respondent appeared in person at a subsequent hearing, which affected the judge's interpretation of the respondent's credibility."[249]

Next, the *P.L. v. ICE* complaint stated that because mentally impaired detainees often suffer from disorders that affect their cognitive and behavioral functioning, they tend to have difficulty focusing, remembering details, and testifying credibly, even more so than the typical trauma victim.[250] This issue is further exacerbated when respondents can only see the judge while speaking and not the interpreter or their attorney simultaneously.[251] Given that VTC renders such in-person observations impossible,[252] the allegations in the complaint make it all the more clear that mentally incompetent detainees appearing via VTC are inevitably deprived of their full statutory "rights and privileges" because of their disability, satisfying element three of a section 504 prima facie case.

The *P.L. v. ICE* complaint best illustrates this conclusion by examining the cases of several of its representative plaintiffs, whose experiences exemplify the ways that VTC denied them meaningful participation in their proceedings because of their disabilities. For instance, Representative Plaintiff P.L., who had been diagnosed with unspecified schizophrenia and suffers from cognitive defects impacting his attention, memory, and visual and spatial abilities, experienced significant difficulty concentrating during his VTC hearings, even though his disabilities are not immediately apparent.[253] Similarly, Representative Plaintiff B.M.B. had been diagnosed with PTSD, major depressive disorder, and a major neurocognitive disorder due to a traumatic brain injury.[254] As a result, he has difficulty remembering and understanding events and exhibits an erratic speech pattern.[255]

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248. U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 52 (June 2017), https://www.gao.gov/assets/690/685022.pdf [https://perma.cc/VSK2-NATB].

249. *Id.* at 55.

250. P.L. v. ICE Class Action Complaint, *supra* note 8, at 41–43.

251. *Id.* at 41–42.

252. *Id.* at 40.

253. *Id.* at 41.

254. *Id.* at 42.

255. *Id.*

During his hearing, the interpreter had difficulty following his speech pattern, and at multiple points during this testimony, B.M.B. "sobbed uncontrollably for several minutes [at a] time."[256] Because of the length of time it took to complete B.M.B.'s testimony due to his speech difficulties, his hearing was continued until four months later, where subsequently the IJ found him not credible and denied him relief.[257] Ultimately, each of these experiences typifies the harm suffered by mentally incompetent detainees forced to appear through VTC as opposed to in person, who as a result are denied meaningful and comprehensive access to their constitutional and statutory rights because of their disabilities.

D. Element Four: EOIR, the Agency Providing the Benefit or Services Sought, is an Executive Agency with Federal Funding

Finally, and indisputably, EOIR, the entity responsible for providing the benefit sought by mentally impaired immigrants fighting their removal proceedings, is a federal executive agency. Under the Rehabilitation Act, section 504 applies to all programs or activities conducted by executive agencies,[258] and given that EOIR falls under the umbrella of the DOJ, it is a federal executive agency, the function of which is to administer the nation's immigration court system.[259]

EOIR's 2020 budget requests demonstrate its continued use of VTC and prioritization of what it deems to be time-saving measures. For Fiscal Year 2020, EOIR requested a budget total of $673 million, a 33.4% increase over its 2019 Continuing Resolution.[260] According to EOIR, this increase is to account for an additional 963 positions over the Fiscal Year 2019 Continuing Resolution of 2,798 direct positions.[261] This bump in positions and finances is in line with EOIR's "2020 strategic focus [on] . . . increas[ing] adjudicatory and case processing capacity . . . to decrease the pending caseload and reduce the amount

256. *Id.*
257. *Id.* at 42–43.
258. 29 C.F.R. § 33.6(a) (2019) (applying section 504 to Department of Labor programs and activities).
259. *See* U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW (EOIR): FY 2020 BUDGET REQUEST AT A GLANCE (2020), https://www.justice.gov/jmd/page/file/1142486/download [https://perma.cc/YYU6-BR6H] [hereinafter EOIR FY 2020 BUDGET].
260. *Id.*
261. *Id.*

of time respondents must wait until their case is heard."[262] Making greater use of its VTC systems has been among the strategies EOIR has selected to achieve this goal, and as such, part of EOIR's 2020 Fiscal Year budget is in fact directly allocated towards the continued use of VTC.[263]

E. In-Person Court Appearances Should Be Presumptively Required as a Reasonable Accommodation for Detainees Declared Mentally Incompetent

Given that all four elements of a prima facie case can be established for showing that VTC's use in the hearings of mentally incompetent detainees violates section 504 of the Rehabilitation Act, the Act requires presumptively providing this population with a reasonable accommodation, or modification of current immigration hearing practices, so that they can meaningfully participate without being deprived of their "rights and privileges." The implementing regulations of section 504 demonstrate that "reasonable adjustments in the nature of the benefit offered must at times be made to ensure meaningful access."[264] The regulations state, "[a] recipient shall make [a] reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity."[265] It does not suffice for the agency to proffer just any accommodation; instead, it "must consider the particular individual's need[s] when conducting its investigation into what accommodations are reasonable."[266] The reasonableness of an accommodation "depends on the individual circumstances of each case and requires a fact-specific, individualized analysis of the [disabled] individual's circumstances and the accommodations that [would] enable meaningful access to the federal program."[267] An accommodation is further considered reasonable if it is "reasonable on its face,"[268] and "[m]ere speculation that a suggested accommodation is

262. *Id.*
263. *Id.*
264. Alexander v. Choate, 469 U.S. 287, 301 n.21 (1985); 45 C.F.R. § 84.12(a) (2019).
265. 45 C.F.R. § 84.12(a).
266. Lovell v. Chandler, 303 F.3d 1039, 1056 (9th Cir. 2002).
267. Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *5 (C.D. Cal. Apr. 23, 2013) (quoting Mark H. v. Hamamoto, 620 F.3d 1090, 1098 (9th Cir. 2010)).
268. *Hamamoto*, 620 F.3d at 1098 (quoting U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 402 (2002)).

not feasible falls short of the reasonable accommodation requirement."[269] The Rehabilitation Act instead "create[s] a duty to gather sufficient information from the disabled individual and qualified experts as needed to determine what accommodations are necessary."[270] Reasonable accommodations, however, do not require an agency to make fundamental alterations to its programs.[271]

In *Franco-Gonzalez*, Judge Gee held that court intervention was necessary to establish QRs as a mandatory reasonable accommodation for detainees found to be mentally incompetent under the *Matter of M-A-M-* procedure.[272] In doing so, Judge Gee concluded that this appointment of QRs as a reasonable accommodation did not amount to a "fundamental alteration" of the immigration court system because the plaintiffs were not seeking automatic relief from removal or termination of their proceedings but rather "only the ability to meaningfully participate . . . including the rights to 'examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government.'"[273] Further, she believed that the "[p]laintiffs' ability to exercise these rights [was] hindered by their mental incompetency, and [that] the provision of competent representation able to navigate the proceedings [was] the only means by which they [could] invoke those rights."[274]

Applied to mentally impaired respondents appearing via VTC, a presumption of mandated in-person court appearances upon an individualized finding of incompetency is a reasonable accommodation that would not constitute a "fundamental alteration" to the immigration court system. Just as the *Franco-Gonzalez* court determined, this accommodation would not give this population automatic relief from deportation, but for many individuals, it would provide them with the only meaningful way to participate fully in their hearings.[275] This presumed accommodation thus becomes mandatory for the government unless it would be unduly burdensome, financially or administratively, or

269. *Id.* at 1098 (quoting Duvall v. Cty. of Kitsap, 260 F.3d 1124, 1136 (9th Cir. 2001)).
270. *Id.* (quoting *Duvall*, 260 F.3d at 1136).
271. *Id.*
272. *Franco-Gonzalez*, 2013 WL 3674492, at *5, *8–9.
273. *Id.* at *5.
274. *Id.*
275. *Id.*

would fundamentally alter the immigration court system.[276] Each of these anticipated challenges, among others, is addressed below.[277]

As for the parameters regarding in-person court appearances as a reasonable accommodation, this Comment proposes implementing this accommodation as a presumption, such that all immigrants deemed mentally incompetent during a *Matter of M-A-M-* proceeding are presumed to require in-person hearings. However, given the individualized and fact-specific nature of the inquiries as to the existence of a disability under the Rehabilitation Act,[278] a finding of incompetency under *Matter of M-A-M-*,[279] and a determination of the reasonableness of the accommodation under section 504,[280] this Comment suggests that the reasonableness of in-person proceedings for a particular respondent be analyzed at the *M-A-M-* hearing itself. As such, the IJ would then individually determine whether that particular accommodation would give the respondent meaningful access to the immigration court.[281] The specifics regarding this presumption in favor of in-person court appearances and both the respondent's and the government's ability to rebut or limit the accommodation based upon the particular circumstances of the individual are further addressed in this Comment's policy section.

F. Rejecting the Anticipated Challenges to Mandating Presumptive in-Person Court Appearances as a Reasonable Accommodation for Mentally Incompetent Detainees

Given the novelty of this request, the government is likely to combat the implementation of a presumption that all detainees declared mentally incompetent are entitled to in-person court appearances. The government's two main arguments will likely be that, even if the use of VTC for mentally impaired detainees amounts to a prima facie violation of section 504, presumptively mandating in-person court appearances for all such respondents will impose "undue financial and administrative burdens" on it and will require "a fundamental alteration"

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276. 28 C.F.R. § 35.150(a)(3) (2019).
277. *See infra* Section III.F.
278. *See supra* note 266 and accompanying text.
279. *See supra* notes 271–72 and accompanying text.
280. *See supra* notes 263–64 and accompanying text.
281. *See* Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *5 (C.D. Cal. Apr. 23, 2013) (citing Mark H. v. Hamamoto, 620 F.3d 1090, 1098 (9th Cir. 2010)).

in the nature of the immigration courts, such that EOIR will not have the capacity or funding to implement the change and should not be required to do so.[282]

In assessing the potential for undue financial or administrative burdens, courts tend to treat an accommodation as unreasonable if it imposes such an undue hardship on the agency or program.[283] In other words, "the defendant's burden of persuading the factfinder that the plaintiff's proposed accommodation is unreasonable merges, in effect, with its burden of showing, as an affirmative defense, that the proposed accommodation would cause it to suffer an undue hardship."[284] According to the Rehabilitation Act's implementing regulations, the factors to consider in determining whether an accommodation would impose an undue hardship on the operation of the program or activity include: (1) the overall size of the agency's program or activity with respect to the number of employees, number and type of facilities, and size of budget; (2) the type of the agency's operation, including the composition and structure of the agency's workforce; and (3) the nature and cost of the accommodation needed.[285] In analyzing these factors, the agency must not just consider the costs it is asked to assume, but also the benefits to others that will result—i.e. the agency must conduct a cost/benefit analysis.[286]

Here, the government's argument that mandating in-person court appearances as a reasonable accommodation would impose an undue financial or administrative burden on it should fail. If ICE's own statistics are accepted as true, then only between two and five percent of the immigrants in its custody suffer from serious mental illness.[287] These numbers cannot possibly be significant enough to amount to a

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282. *See* Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138 (2d Cir. 1995) (quoting Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 287 n.17 (1987)) ("Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee, or requires 'a fundamental alteration' in the nature of [the] program." (alteration in original)).

283. *See* Gilbert v. Frank, 949 F.2d 637, 642 (2d Cir. 1991) (finding that the regulations on reasonable accommodations equate a finding that an accommodation is not reasonable with the employer's burden in proving undue hardship); *see also* Hall v. U.S. Postal Serv., 857 F.2d 1073, 1080 (6th Cir. 1988) (holding that an accommodation will not be found to be reasonable if it imposes an undue hardship).

284. *Borkowski*, 63 F.3d at 138.

285. 45 C.F.R. § 84.12 (2019).

286. *See Borkowski*, 63 F.3d at 139.

287. Franco-Gonzales First Amended Class-Action Complaint, *supra* note 74, at 33.

concern that presumptive in-person court appearances would create an undue financial or administrative burden.[288] While the true numbers are estimated to be higher, with around fifteen percent of the immigrant population having a mental disability,[289] these numbers are still not so overwhelming as to amount to a cost-benefit analysis tipping in the government's favor.

Applying the above-mentioned factors shows that this Comment's proposed accommodation would not be an undue burden for EOIR. First, EOIR is a massive agency, estimated to account for 3,761 positions, 1,641 of which are attorney positions, in 2020.[290] Its requested budget for Fiscal Year 2020 totals $673 million, a sizable budget.[291] Second, the agency is structurally composed of various parts, including sixty-one immigration courts nationwide, the BIA as the appellate component, and the Office of the Chief Administrative Hearing Officer.[292] Third, in comparison to this vast structure and large budget, the nature of the accommodation involves presumptively asking for mandated in-person court appearances for less than fifteen percent of all detained respondents.[293]

Based on the above-mentioned statistics and information, the financial and administrative costs of transporting a small percentage of detainees from their (often remotely based) detention centers to immigration courts so that they could appear in person would not be unduly burdensome.[294] The plaintiffs in the *Franco-Gonzalez* class action

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288. *See infra* notes 289–93 and accompanying text.

289. HRW & ACLU, *supra* note 66, at 3.

290. *See* EOIR FY 2020 BUDGET, *supra* note 258.

291. *Id.*; *see also* U.S. DEP'T OF JUSTICE, FY 2020 BUDGET REQUEST AT A GLANCE: DISCRETIONARY BUDGET AUTHORITY (2020), https://www.justice.gov/jmd/page/file/1142306/download (comparing the size of EOIR's budget to that of other offices within DOJ as shown in the Discretionary Budget Authority table).

292. *See* EOIR FY 2020 BUDGET, *supra* note 258.

293. *See* HRW & ACLU, *supra* note 66, at 3.

294. Regarding the financial burden, in 2010, such cost would have represented, at most, about 0.2% of EOIR's budget. *See id.* (stating that at least fifteen percent of the immigration detainees are mentally disabled); Lenni B. Benson & Russell R. Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication*, ADMIN. CONFERENCE OF THE U.S. 95 (2012), https://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf [https://perma.cc/VE7B-DE6T] (finding that in 2010, EOIR would have needed around $4.4 million in funds—fifteen percent of which is $660,000—if it were not able to use VTC for hearings); *see also* U.S. DEP'T OF

also noted that the number of immigrants who are incompetent due to mental disabilities is small compared to the overall population of immigrants in removal proceedings.[295] In assessing whether a reasonable accommodation may impose an undue financial burden, the general rule does not preclude *some* financial burden resulting from the accommodation to fall on the government.[296] Courts have in particular recognized that when faced with "a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor."[297] The totality of these considerations leans in favor of implementing in-person court appearances as a presumptively reasonable accommodation given the serious and severe harm that disabled detainees face while appearing via VTC and the even more serious possibility of death if deported to their home countries. In fact, one possible way to mitigate at least some of the government's financial burden, if not some of its administrative burden, could be transporting detainees declared mentally incompetent after a *Matter of M-A-M-* hearing to detention facilities located closer to the site of their immigration court so that they can be more easily produced in person throughout the course of their ongoing proceedings.

In addition to its undue burden argument, the government would also have the potential defense that the creation of a presumptive mandate for in-person court appearances for all detainees found mentally incompetent would amount to a "fundamental alteration" of the immigration court system. In *Franco-Gonzalez*, for example, the government argued that mandating the appointment of QRs for immigrants with mental disabilities would be a fundamental or substantial

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JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW (EOIR): FY 2011 BUDGET REQUEST AT A GLANCE (2011), https://www.justice.gov/sites/default/files/jmd/legacy/2014/04/14/fy11-eoir-bud-summary.pdf (noting that EOIR's budget for FY 2010 was $298.9 million).

295. Franco-Gonzales First Amended Class-Action Complaint, *supra* note 74, at 33.

296. Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492, at *5 (C.D. Cal. Apr. 23, 2013) (citing United States. v. Cal. Mobile Home Park Mgmt., 29 F.3d 1413, 1417 (9th Cir. 1994)); *see also* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995) (noting that it would be almost impossible for a state agency to prevail on an undue hardship claim, as the action would have to require "significant difficulty or expense," reasoning that logically extends to a federal agency).

297. Rodde v. Bonta, 357 F.3d 988, 999 (9th Cir. 2004) (quoting Lopez v. Heckler, 713 F.2d 1432, 1437 (9th Cir. 1983)).

alteration to the immigration court system.[298] In addressing and refuting this argument, the *Franco-Gonzalez* court divided its "fundamental alteration" analysis into three sub-holdings: that the requested accommodation (1) did not impose an undue financial burden, (2) did not contravene the statutory framework governing the privilege of counsel, and (3) did not expand the scope of benefits available to class members.[299] Given those three findings, Judge Gee held that the mandatory appointment of QRs would not constitute a "fundamental alteration" to removal proceedings and met the reasonableness requirement for a reasonable accommodation under the Rehabilitation Act.[300]

Applying the *Franco-Gonzalez* court's latter two sub-categories here, the government may seek to advance the potential defenses that presumptively mandated in-person court appearances both contravene the statutory framework and unfairly expand the scope of benefits available to mentally incompetent detainees in comparison to other individuals. In negating the first defense, a plain language interpretation of the INA statute authorizing VTC states that proceedings "may" take place in person *or* through VTC.[301] The unambiguous interpretation of this language is that the statute therefore does not forbid the use of in-person court appearances for mentally incompetent detainees. Furthermore, mandating in-person court appearances as a reasonable accommodation could not possibly contravene the statutory framework because it is in essence a return to the traditional standard. In-person appearances were the norm prior to the 1996 amendments to the INA that memorialized the use of VTC,[302] and even despite these amendments, in-person appearances remained the predominant approach for decades prior to the Trump Administration's shift in policy towards favoring remote appearances via VTC.[303]

Next, in rebutting the government's potential defense of an unfair expansion of benefits, this class of mentally incompetent detainees statutorily has access to the same "rights and privileges" as other immigrants but are unable to exercise them because of their incompetency. The provision of in-person appearances is merely a means by which they can exercise the same benefits as other non-disabled immigrants and is not

298. *Franco-Gonzalez*, 2013 WL 3674492, at *5.
299. *Id.* at *5–7.
300. *Id.* at *5; Wolf, *supra* note 7, at 356.
301. 8 C.F.R. § 1003.25(c) (2020).
302. *See supra* notes 19–20 and accompanying text.
303. Shepherd, *supra* note 29.

the benefit itself.[304] As such, mentally incompetent detainees are not seeking automatic relief from removal but only the meaningful ability to participate in the court process and exercise their statutory rights.[305] In-person court appearances thus simply level the playing field for mentally incompetent detainees and other immigrants who have the ability to competently testify via VTC and comprehend their proceedings. Such was the conclusion in *Franco-Gonzalez*, in which Judge Gee found no "fundamental alteration" because mentally impaired immigrants, though provided with a QR, are not automatically being afforded relief from deportation.[306] Rehabilitation Act case law further strengthens the notion that presumptive in-person court appearances would not unfairly expand the scope of benefits available to mentally incompetent respondents.[307] This case law suggests that preferences are sometimes necessary to achieve the "basic equal opportunity goal of the Rehabilitation Act" and that "by definition any special 'accommodation' requires the employer to treat an employee with a disability differently, i.e. preferentially."[308]

Finally, the government may argue that *Matter of M-A-M-*, in setting forth a non-exhaustive list of safeguards for mentally incompetent immigrants and requiring an individualized analysis,[309] should suffice without mandating presumptive in-person court appearances. However, as the *Franco-Gonzalez* court reasoned, "the majority of these 'safeguards' . . . are left to the [IJ]'s discretion, and none guarantee that the incompetent alien may participate in his [or her] proceedings as fully as an individual who is not disabled."[310] Applied to the VTC context, while statutorily IJs retain the discretion to conduct proceedings in person whenever they desire, IJs rarely invoke this option and will likely continue to use VTC without such a presumptive accommodation in favor of appearances in person.[311] Furthermore, *Matter of M-A-M-* did not even discuss the use of VTC in hearings, as VTC was not nearly as common in 2011 when the BIA decided this case

304. *See* 45 C.F.R. § 84.12(a) (2019); *see also Franco-Gonzalez*, 2013 WL 3674492, at *5.
305. *See Franco-Gonzalez*, 2013 WL 3674492, at *5.
306. *Id.*; Wolf, *supra* note 7, at 356.
307. Wolf, *supra* note 7, at 356.
308. *Id.* (quoting U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002)).
309. *E.g.*, Matter of M-A-M-, 25 I&N Dec. 474, 480 (B.I.A. 2011).
310. *Franco-Gonzalez*, 2013 WL 3674492, at *8.
311. *See supra* note 28 and accompanying text.

as it is today.[312] As such, the government cannot argue that *Matter of M-A-M-* provides sufficient safeguards in the VTC context, which strengthens this Comment's argument that presumptively required in-person appearances are not only a reasonable but necessary accommodation to build into the immigration legal landscape.

G. Section 504 in the Immigration World and Other Contexts

P.L. v. ICE was one of the most recent lawsuits to argue that the use of VTC, in particular for the case's subclass of mentally incompetent plaintiffs, violates section 504 of the Rehabilitation Act.[313] In summary, it argued that individuals with cognitive and psychological disabilities qualify as persons with disabilities; that DHS, ICE, and EOIR are executive agencies; that these agencies are required to make reasonable accommodations for persons with disabilities to ensure that they are able to access the same protections and benefits as others; and that the Refusal to Produce Policy prevents mentally impaired detainees from being identified and from fully participating in their hearings.[314] The goal was to permanently enjoin the defendants from requiring mentally incompetent detainees to appear for their hearings exclusively via VTC.[315] Despite the lawsuit's dismissal for jurisdictional issues,[316] it demonstrates the prevalence and relevance of utilizing section 504 of the Rehabilitation Act to attack problematic practices outside of the due process context. Other scholars have utilized section 504 to argue against policies such as prolonged detention of mentally incompetent detainees,[317] fast-track removal proceedings for mentally

312. *See supra* notes 31–36 and accompanying text.

313. P.L. v. ICE Class Action Complaint, *supra* note 8, at 52–54.

314. *Id.* at 53–54.

315. *Id.*

316. *See* P.L. v. ICE, No. 1:19-CV-01336(ALC), 2019 WL 2568648, at *1 (S.D.N.Y. June 21, 2019) (granting the defendants' motion to dismiss on subject matter jurisdiction grounds).

317. *See* Sarah Sherman-Stokes, *No Restoration, No Rehabilitation: Shadow Detention of Mentally Incompetent Noncitizens*, 62 VILL. L. REV. 787, 791 (2017) (contending that prolonged detention violates section 504 because the system provides inadequate care and procedural protection, which denies mentally incompetent detainees meaningful access to the courts).

impaired respondents,[318] and changes to the public charge regulations.[319] Most recently, a nationwide class action lawsuit was filed in August 2019, challenging the government's failure to ensure that detained immigrants with disabilities are provided accommodations in detention, in particular regarding their appropriate medical and mental health care, as section 504 of the Rehabilitation Act requires.[320] On April 20, 2020, the United States District Court for the Central District of California granted the plaintiffs' motion to certify its subclass and issued a preliminary injunction to implement protections due to heightened risks of COVID-19 spreading through immigration detention facilities.[321] All of these examples demonstrate the potential for courts to utilize section 504 to provide justice for immigrants that has been continually denied to them under the Fifth Amendment.

IV. POLICY RECOMMENDATIONS

Presumptively mandating in-person court appearances instead of VTC hearings for mentally incompetent immigrants is certainly a request of the government, but not one that is unattainable. To support this Comment's argument, this Section provides a procedural and legal framework and guidance for implementing this reasonable accommodation. First, this accommodation should follow from the *Matter of M-A-M-* proceeding that IJs conduct and track its results. Upon a finding of incompetency, the presumptive requirement would be that the individual is entitled to appear in-person, as opposed to VTC, for the remainder of his or her removal proceedings. However, given

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318. *See* Aimee L. Mayer-Salins, *Fast-Track to Injustice: Rapidly Deporting the Mentally Ill*, 14 CARDOZO PUB. L. POL'Y & ETHICS J. 545, 546 (2016) ("Fast-track removal proceedings are problematic for all noncitizens because of the limited procedural protections and dire consequences of such proceedings.").

319. *See* Weber, *supra* note 183, at 246 (noting that the Trump Administration's new regulations changed the standards for excluding immigrants from the United States on the basis of their likelihood to become a public charge).

320. Fraihat v. U.S. Immigration and Customs Enforcement, CIV. RTS. EDUC. & ENFORCEMENT CTR., https://creeclaw.org/fraihat-v-immigration-and-customs-enforcement [https://perma.cc/ER2B-ZAJ7].

321. Fraihat v. ICE, 445 F. Supp. 3d 709, 721–22 (C.D. Cal. 2020). The court's subsequent October 7, 2020 order clarified the terms of the preliminary injunction due to what it characterized as the government's "spotty compliance" with the terms. Order Granting in Part and Denying in Part Plaintiff's Motion to Enforce April 20, 2020 Preliminary Injunction at 7, Fraihat v. ICE, 445 F. Supp. 3d 709 (C.D. Cal. 2020) (No. 19-1546).

that a *Matter of M-A-M-* hearing is an individualized inquiry that accounts for the individual's particular circumstances[322] and that the Rehabilitation Act creates an affirmative duty to gather sufficient information from disabled persons and qualified experts as needed to determine whether an accommodation is reasonable,[323] this Comment proposes allowing the presumption to be rebutted, limited, or refused should the individual circumstances not warrant a need or desire for appearing in person.

For example, not all mental impairments rise to such a degree of severity that they would have the same detrimental impact as other disabilities would. Further, an individual may maintain an appropriate level of cognitive functioning such that the appointment of a QR would cure any potential statutory defects or Rehabilitation Act violations. Given the extremely individualized and fluid nature of disabilities, should the government refuse to presumptively require in-person appearances for *all* immigrants because of these inherent difficulties, it should at least do so for those who have a condition amounting to a *severe* mental illness. Were the government to take this approach, it should utilize the mental conditions identified in the implementing regulations of the 2008 amendments to the ADA as virtually always amounting to a disability, which include major depressive disorder, bipolar disorder, PTSD, obsessive compulsive disorder, and schizophrenia when the conditions substantially limit brain function.[324]

Furthermore, some individuals, though they may have an impairment that qualifies as a disability and that might significantly undermine their ability to testify through a screen, may actually prefer to appear through VTC as opposed to in-person. Although this Comment advocates for in-person appearances as a presumptive protection for mentally incompetent detainees, it recognizes that some of those individuals may in fact feel more comfortable testifying through VTC instead of directly in front of a judge. This Comment seeks to preserve immigrants' autonomy and dignity in making these choices for themselves, and for those who choose to appear in person, they can elect during their *Matter of M-A-M-* proceedings to refuse the presumptive accommodation. Another option is to elect to limit the

322. *See* Matter of M-A-M-, 25 I&N Dec. 474, 480 (B.I.A. 2011).

323. Mark H. v. Hamamoto, 620 F.3d 1090, 1098 (9th Cir. 2010) (citing Duvall v. Cty. of Kitsap, 260 F.3d 1124, 1136 (9th Cir. 2001)).

324. 29 C.F.R. § 1630.2 (2019).

presumption, such that it applies only to final merits hearings as opposed to master calendar hearings, which are shorter and generally not outcome-determinative. Under the approach this Comment explains, either the government or the respondent could likely ask for this limitation.

Various ways to implement these protections for mentally incompetent detainees exist. First, an amendment to the INA's language or a regulation could memorialize the idea that VTC cannot be used without the mentally incompetent respondent's consent, or that in-person court appearances are a presumptively mandated reasonable accommodation available to respondents should they so choose. Second, EOIR and ICE could jointly issue a new nationwide policy or promulgate formalized guidance, similar to the 2013 EOIR guidance, in formally adopting the presumption of mandated in-person appearances for mentally incompetent detainees.[325] Both of these options are perhaps preferable to waiting for a court to take the precedential step of issuing a permanent injunction, as the *Franco-Gonzalez* court did, to mandate presumptive in-person court appearances for mentally incompetent respondents under section 504 of the Rehabilitation Act.

CONCLUSION

VTC has been proven to harm IJs' abilities to assess respondents' credibility, body language, demeanor, and nonverbal communication cues. These issues associated with VTC are only compounded for detainees suffering from serious mental conditions such as major depression, schizophrenia, bipolar disorder, obsessive-compulsive disorder, panic disorder, PTSD, and borderline personality disorder, among others. Not only do respondents with these conditions have difficulty testifying and understanding the nature of their proceedings, but it is also more difficult for their IJs to recognize their mental disabilities over video as opposed to in-person.[326] The potential consequences of these failures are extreme, as studies have shown that many mentally impaired detainees are often unfairly deported, a mistake that lends itself to a possible death sentence for those deported back to countries with rampant violence or without adequate legal and

325. EOIR PHASE I GUIDANCE, *supra* note 113.
326. HRW & ACLU, *supra* note 66, at 35.

medical safeguards to aid in treating and managing their mental conditions.[327]

By extending the rationale in *Franco-Gonzalez*, this Comment urges that in-person court appearances be presumptively mandated as a reasonable accommodation under section 504 of the Rehabilitation Act for detainees declared mentally incompetent by an IJ. Per the requirements of a prima facie case under section 504, this Comment shows that (1) mentally incompetent detainees appearing via VTC qualify as persons with disabilities within the meaning of the Rehabilitation Act; (2) they are otherwise qualified for the benefit or services sought from the government agency; (3) they are denied full participation in their proceedings and meaningful access to the benefit or services sought because of their disability when forced to appear via VTC as opposed to in person; and (4) EOIR, the agency providing the benefit, is a federal executive agency under the umbrella of the DOJ to which section 504 applies. Given that all four elements of a prima facie case are met when mentally incompetent detainees are required to appear via VTC for their hearings, in-person court appearances should be presumptively required as a reasonable accommodation so that this population is given the chance to effectively argue their cases and meaningfully participate in their removal proceedings. Failure of the government to provide this accommodation amounts to a violation of section 504, as the accommodation would not be unduly burdensome on the government, nor would it fundamentally alter the immigration court system.

The government officials in charge of administering our immigration system need to be reminded that immigrants in removal proceedings are entitled to "rights and privileges" in practice, rather than just by the words of the statute. In a time when immigrants are under attack, it is more important than ever to ensure that they have equal access to justice and to empower them with opportunities to advocate for themselves and their communities. It is furthermore essential that we systematically change the laws, systems, and policies in place so that people like Client X can truly have their day in court and be able to tell their stories loudly and fearlessly.[328]

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327. *See supra* note 121 and accompanying text.

328. In January 2020, Client X was granted a form of immigration relief entitling him to permanently remain in the United States. Although the government has appealed this outcome, he is expected to be released from detention within the coming months and reunited with his family.