UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Uriel VAZQUEZ PEREZ, on his own behalf and on behalf of others similarly situated,

Petitioner-Plaintiff,

v.

Thomas DECKER, in his official capacity as New York Field Office Director for U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; Ronald D. VITIELLO, in his official capacity as the Acting Director for U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; Kirstjen NIELSEN, in her official capacity as Secretary of the U.S. DEPARTMENT OF HOMELAND SECURITY; James McHENRY, in his official capacity as Director of the EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; Matthew G. WHITAKER, in his official capacity as the Acting Attorney General of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; UNITED STATES DEPARTMENT OF JUSTICE; the EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; and Carl E. DUBOIS in his official capacity as the Sheriff of Orange County and the official in charge of the Orange County Correctional Facility,

Respondents-Defendants.

Case No. 18-cv-10683 (AJN)

MEMORANDUM OF LAW IN SUPPORT OF THE PETITIONER-PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Petitioner-Plaintiff Uriel Vazquez Perez seeks preliminary declaratory and injunctive relief on behalf of the proposed class to remedy the Respondents-Defendants' unlawful policy and practice of detaining individuals for months without providing them access to their statutorily mandated opportunity to challenge their detention and deportation before an immigration judge. The New York Field Office of the U.S. Immigration and Customs Enforcement agency arrests between 1000 and 2000 people per year on civil immigration charges. After they are presented to a judge, 30-40% will win release on bond, nearly one in ten will have their cases terminated because they are not removable at all, and many more will go on to win relief from removal and the right to remain in the United States. Yet the Respondents are subjecting these individuals to needless months of detention by depriving them of timely access to the judges who have the power to release them and assess their defenses to removal. This excessive detention without process inflicts irreparable harm in the form of loss of liberty, family separation, and a cascading series of hardships in violation of procedural and substantive due process under the Fifth Amendment and the Administrative Procedure Act's prohibition against unreasonable delay. To prevent these harms, Petitioners respectfully request that the Court enter a class-wide preliminary injunction requiring Respondents to promptly present Petitioners to a judge or, in the alternative, release Petitioners from detention.

FACTUAL BACKGROUND

U.S. Immigration and Customs Enforcement ("ICE") is a subcomponent of the U.S. Department of Homeland Security ("DHS") that serves as the arresting, jailing, and prosecuting agency in removal proceedings. The immigration courts, under a subcomponent of the Department of Justice called the Executive Office for Immigration Review ("EOIR"), serve as

the adjudicating agency for Petitioners' removal and bond proceedings. Petitioners are individuals arrested by ICE's New York Field Office ("NYFO") and detained pursuant to 8 U.S.C. § 1226; they have a right to challenge their detention and removal charges in immigration court. As detailed below, Petitioners are being subjected to months of needless and unlawful detention because of pervasive, systemic, and growing delays in the period between arrest and an individual's first appearance before the immigration court.

Detention and Delays Prior to Initial Appearance in Immigration Court

Individuals arrested and detained by ICE's NYFO are placed in removal proceedings at the New York City Immigration Court located at 201 Varick Street in Manhattan ("Varick Court"). Declaration of Alberto A. Casadevall, Ex.[1] A, Declaration of Andrea Sáenz ("Sáenz Decl.") ¶ 23. While they await the initial appearance in their civil removal proceedings, these individuals are detained in criminal jails that contract with ICE to provide bed space. *Id*. ¶ 8; Ex. B, Declaration of Laura F. Redman ("Redman Decl.") ¶ 13. Before their initial court appearance, most detainees lack basic information about the charges and evidence against them, access to critical documents in a language they can understand, knowledge of the steps required to prepare to apply for bond or to defend themselves in their removal cases, knowledge or resources for such preparation, and lawyers. Ex. A, Sáenz Decl. ¶¶ 11, 15, 18, 26–27; Ex. C, Declaration of former Assistant Chief Immigration Judge Sarah Burr ("Burr Decl.") ¶¶ 11, 14–15; Ex. D, Jennifer Stave, et al., *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity*, Vera Institute of Justice, Nov. 2017[2] ("Vera Evaluation"), at 5, 17 n.34, 20 (explaining that between 50%–64% of ICE detainees were unrepresented prior to their first appearance); *see, e.g.*, Ex. E, Declaration of

[1] "Ex." refers to the exhibits annexed to the Casadevall Decl.

[2] The Vera Evaluation looked at approximately two and a half years of data regarding individuals detained by ICE and placed in proceedings at the Varick Court.

Shemar Tammara Michel ("Michel Decl.") ¶¶ 2, 14–15 (describing how she was given almost no information about her case before seeing a judge and did not know she could ask for prompt access to a bond hearing to return to her two-year-old child); Ex. F, Declaration of James Henri Busse ("Busse Decl.") ¶ 8 (describing the feeling of helplessness in being a U.S. citizen locked in immigration detention without access to a judge or money to hire a lawyer and being told by ICE that there was nothing to do but wait to see the judge). As a result, detainees cannot make meaningful progress on their cases prior to their initial appearance in court, which is when they may seek release, assert defenses to removal, and begin preparing their cases. The pre-presentment period, therefore, extends overall detention. Ex. C, Burr Decl. ¶ 23.

Individuals arrested and detained by ICE's NYFO are subject to months-long and increasing periods of detention before seeing an immigration judge ("judge"). In 2014, Respondents' own data demonstrate that the median wait time between arrest and initial appearance before a judge at the Varick Court was eleven days. Ex. G, Declaration of David Hausman ("Hausman Decl.") ¶ 5(a). In 2015, that number grew to eighteen days, and in 2016, it grew to thirty-seven days. *Id.* ¶ 5(b), (c). By 2017, the median wait time from arrest to initial appearance before a judge ballooned to forty-two days. *Id.* ¶ 5(d). In 2018, the period of detention before presentment to a judge has increased precipitously. *Id.* ¶ 5(e)–(n). The most recent quarter of available data shows that, from August-October 2018, the median wait time between arrest and an immigration detainee's first opportunity to see a judge at the Varick Court was over eighty days. *Id.* ¶ 5(l)–(n). Over this period, 86% of detainees waited in jail for over two months before seeing a judge and 38% waited over three months. *Id.* ¶ 6; *see, e.g.*, Ex. F, Busse Decl. ¶ 10 (U.S. citizen waited two months in detention to see a judge); Ex. H, Declaration of Gustavo Alzate ("Alzate Decl.") ¶¶ 33, 35 (individual separated from, and unable to provide

for, his family waited almost three months in detention to see a judge); Ex. I, Declaration of Jason Nembhard ("Nembhard Decl.") ¶¶ 4-5 (LPR waited four months in detention to see a judge); Ex. J, Declaration of Andrew Quarey ("Quarey Decl.") ¶¶ 3, 5–7, 11–22 (currently detained wheelchair-bound individual with serious medical issues whose initial hearing is set for two and a half months after his arrest). As discussed *infra*, these delays serve no legitimate purpose and detainees have no effective mechanism to mitigate these delays or to win release in advance of their initial appearance.

Initial Appearance Before an Immigration Judge

The initial master calendar hearing ("MCH") is the first substantive step for an individual in removal proceedings. At this hearing, the individual is presented—for the first time—before a neutral adjudicator, an immigration judge, who: (a) provides information in a language the detainee understands, Ex. K, EOIR Immigration Judge Benchbook, Tools – Guides – Introduction to the Master Calendar ("IJ Benchbook"), at 12–13; (b) describes, in plain "non-technical language," the nature of the proceedings and the allegations and charges in the Notice to Appear ("NTA"), which is the charging document in removal proceedings, 8 C.F.R. § 1240.10(a)(6); (c) reviews the NTA for defects and ensures it has been properly served, Ex. K, IJ Benchbook, at 2–3; (d) notifies the individual of their right to be represented at no expense to the government and of available *pro bono* legal services, 8 C.F.R. §§ 1240.10(a)(1), (2); (e) has a first opportunity to assist the individual in identifying defenses to deportation, 8 C.F.R. § 1240.11(a)(2); (f) advises the individual of their rights to examine and object to the evidence against them, cross-examine government witnesses, and present evidence on their own behalf, 8 C.F.R. § 1240.10(a)(4)); and (g) observes the individual to determine if there are "any indicia of incompetency," triggering the judge's obligation to "take measures to determine whether [the

individual] is competent to participate in proceedings" and to explore safeguards, *Matter of M-A-M-*, 25 I. & N. Dec. 474, 480 (B.I.A. 2011). *See generally* Ex. C, Burr Decl. ¶¶ 10, 14.

For Petitioners, the initial appearance is particularly valuable because New York City has created a public defender program[3] that offers free removal defense counsel to all indigent detained individuals who are unrepresented when they first appear for removal proceedings at the Varick Court. However, detainees are not generally provided free counsel through this program until at, or after, their first court appearance. Ex. A, Sáenz Decl. ¶ 10. At the Varick Court, ICE has also historically served its initial evidence at the first MCH.[4] *Id.* ¶ 17.

The initial appearance is also the earliest point at which a judge can review ICE's custody determination and release an individual on bond. Ex. C, Burr Decl. ¶¶ 13–14; Ex. A, Sáenz Decl. ¶¶ 20, 22; *see, e.g.*, Ex. E, Michel Decl. ¶¶ 1–2, 16 (mother of two-year-old U.S. citizen, childcare provider, and Brooklyn resident for fifteen years who was released on the minimum bond at her initial appearance after spending six weeks in detention without access to a judge). All Petitioners are entitled to some form of custody review before a judge. 8 C.F.R. §§ 1003.19(a), 1003.19(h)(2)(ii). Approximately 30%-40% of detainees appearing at the Varick Court are released on bond because they are neither a flight risk nor a danger to the community. Ex. A, Sáenz Decl. ¶ 19; Ex. D, Vera Evaluation, at 50; Ex. G, Hausman Decl. ¶¶ 12–13.

With the benefit of the processes set forth above, the first MCH is also the first practical opportunity for an individual wrongfully arrested by ICE to move to terminate their proceedings and get released. Ex. A, Sáenz Decl. ¶ 26; Ex. C, Burr Decl. ¶ 26. Termination is the mechanism to dismiss a removal case where an individual is not removable. *Id.* Over the past five years, and

[3] The public defender system, known as the New York Immigrant Family Unity Project ("NYIFUP"), has provided universal representation at the Varick Court since 2014. *See generally* Ex. A, Sáenz Decl. ¶¶ 7–11.

[4] At times, ICE has strayed from this practice. Failure of ICE to serve such readily available threshold evidence would raise separate due process problems not addressed herein.

throughout 2018, approximately one in ten people (9%) arrested and detained by ICE's NYFO for removal proceedings have had their cases terminated. Ex. G, Hausman Decl. ¶¶ 15–16; *see also* Ex. D, Vera Evaluation, at 28. This includes wrongfully detained U.S. citizens and lawful permanent residents ("LPR") who had to endure months of detention prior to termination because of the delays in their presentment to a judge. *See, e.g.*, Ex. F, Busse Decl. ¶¶ 11–12 (wrongfully detained U.S. citizen released following initial MCH when his attorney moved to terminate, after two months of detention without access to a judge); Ex. I, Nembhard Decl. ¶¶ 4, 33, 38 (wrongfully detained LPR held for four months without access to a judge and later released following termination); *see also* Ex. A, Sáenz Decl. ¶ 26.

Detainees who are removable but wish to challenge their deportation may seek various forms of relief from the judge—for example, asylum, 8 U.S.C. § 1158, adjustment to LPR status, 8 U.S.C. §§ 1255, 1255(a), 1255(b), protection under the Violence Against Women Act, 8 U.S.C. § 1229b(b)(2), or special immigrant juvenile status, 8 U.S.C. § 1153(b). Ex. C, Burr Decl. ¶ 10. Approximately 15% of detainees are ultimately granted relief, allowing individuals to lawfully remain in the United States. Ex. G, Hausman Decl. ¶¶ 18–19; *see also* Ex. D, Vera Evaluation, at 33–34. The initial MCH is generally the first point where individuals may learn of their eligibility for relief and the steps they need to take to apply. Ex. A, Sáenz Decl. ¶ 27; Ex. C, Burr Decl. ¶ 14. As a practical matter, it is the earliest point at which detainees can begin the lengthy process of preparing and litigating their relief applications. *Id*. Certain relief applications are time sensitive. *See, e.g.*, 8 U.S.C. § 1158(a)(2)(B) (requiring applications for asylum be filed within one year of entry); 8 C.F.R. § 204.11(c)(1) (requiring that an applicant for special immigrant juvenile status be under twenty-one years old). The months of pre-presentment detention may cause individuals to become inelgible for such relief. Ex. A, Sáenz Decl. ¶ 30.

Unfortunately, the lengthy period of detention prior to initial appearances wears down some detainees, who ultimately choose to forego strong legal defenses and, instead, accept a removal or voluntary departure order to expedite their release from custody. *Id*. ¶ 29; *see, e.g.*, Ex. F, Busse Decl. ¶¶ 9–10 (explaining how "even though [he] knew [he] was a U.S. citizen" he was "so distraught" and suicidal after months of detention without access to a judge that he "wanted to accept a deportation order just to get out of detention"); Ex. J, Quarey Decl. ¶ 29 (explaining that the months of detention have been so devastating that, if he does not get bond, he will give up his right to challenge removal to expedite his release); *see also* Ex. H, Alzate Decl. ¶¶ 23, 37. Even for individuals who wish to accept a removal or voluntary departure order, prompt access to a judge remains important, as the initial appearance is the first opportunity to concede removability or seek voluntary departure to expedite release. Ex. A, Sáenz Decl. ¶ 28.

ICE Post-Arrest Charging and Custody Procedures

ICE's NYFO arrests between 1000 and 2000 people annually on civil immigration charges. Ex. G, Hausman Decl. ¶ 5. For these individuals, ICE's post-arrest processing generally occurs at the ICE offices at 201 Varick Street, New York, NY 10014 or at 26 Federal Plaza, New York, NY 10278 or, sometimes, at a location in Newburgh, NY. Ex. A, Sáenz Decl. ¶ 13. Prior to their initial appearance before a judge, ICE's post-arrest processing procedures do not afford immigration detainees any meaningful way to challenge the legality or necessity of their detention. ICE does not obtain judicial warrants prior to making civil immigration arrests. Nor does ICE seek post-arrest judicial review of their unilateral decision to arrest someone. Instead, ICE may arrest and detain Petitioners either (1) pursuant to a document referred to as an administrative "warrant," which is signed by an ICE officer, without impartial review, and which

contains no particularized facts,[5] 8 U.S.C. § 1226(a); 8 C.F.R. § 236.1(b), or (2) without an administrative "warrant" if an ICE officer has "reason to believe" an individual is a noncitizen violating immigration law and a flight risk. 8 U.S.C. § 1357(a)(2).[6]

Initial determinations about Petitioners' removability and custody are made by ICE officers without any process in which arrestees can meaningfully participate. 8 C.F.R. §§ 236.1(c)(8) (ICE custody determinations), 239.1(a) (issuance of NTAs), 287.3(d) (requirement for prompt ICE custody determinations), 287.5(e)(2) (issuance of administrative "warrants"). These determinations are sometimes, but not always, reviewed by an additional officer. 8 C.F.R. § 287.3(a) (permitting ICE agents to "review" their own arrest if additional review would cause "unnecessary delay"). ICE's charging determinations are memorialized in the NTA and its custody determination is memorialized on the Form I-286, both of which are served on the detainee. Ex. M, sample Form I-862, NTA; Ex. N, sample Form I-286, Notice of Custody Determination. The NTA is written in English and in technical legal language, providing individuals only with bare bones notice of the charges against them and certain facts related to those charges. Ex. M, sample NTA. The immigration court's jurisdiction over removal proceedings vests when ICE files the NTA, 8 C.F.R. § 1003.14(a); however, detainees are not generally notified of the filing of the NTA and in some instances ICE waits weeks to file, *see, e.g.*, Ex. F, Busse Decl. ¶ 6; Ex. E, Michel Decl. ¶ 15; Ex. H, Alzate Decl. ¶ 24; *see also* Ex. A, Sáenz Decl. ¶ 25. At some point after the filing of the NTA, the immigration court will schedule an initial hearing. 8 C.F.R. § 1003.18(a).

[5] There is no standard for issuing administrative warrants and no requirement that they be based on sufficient suspicion of removability. *See* 8 C.F.R. § 236.1; Ex. L, sample of Form I-200, ICE Warrant of Arrest for Alien.

[6] "Reason to believe" under the INA is equivalent to the constitutional requirement of "probable cause." *United States v. Sanchez*, 635 F.2d 47, 62 n.13 (2d Cir. 1980). In the border context, which is not relevant to the Petitioners in this case, ICE has additional warrantless arrest authority. 8 U.S.C. § 1357(a)(2).

While ICE is charged with making initial determinations regarding flight risk and danger to the community and has independent authority to release individuals on bond immediately following an arrest, 8 C.F.R. §§ 236.1(c)(8), 287.3(d), it now universally declines to exercise that authority. In 2014, ICE released over one-quarter (26%) of arrestees on bond. Ex. G, Hausman Decl. ¶ 9. In 2015, that number declined precipitously to 3%. *Id.* Since 2016, ICE has issued bonds in 0% of all cases for individuals, like the Petitioners, detained under 8 U.S.C. § 1226.[7] *Id.*; *see also* Ex. A, Sáenz Decl. ¶ 14.

Both the NTA and the Form I-286 provide mechanisms for detainees to request access to a judge. The NTA allows the detainee to request an "immediate hearing" and the Form I-286 allows them to request that a judge review ICE's custody determination. Ex. M, sample NTA; Ex. N, sample Form I-286. However, neither request has any impact on the length of time an individual will remain detained before seeing a judge. Ex. A, Sáenz Decl. ¶¶ 21, 24; Ex. C, Burr Decl. ¶ 19; *see, e.g.*, Ex. F, Busse Decl. ¶¶ 6, 10 (detainee requested a "prompt hearing" and "waived [his] right to a ten-day waiting period," yet waited two full months to see a judge); Ex. H, Alzate Decl. ¶ 16–17, 35 (detainee requested an "immediate hearing" on NTA and a custody redetermination on the I-286, yet waited almost three months to see a judge).

Significant Harms Caused to Putative Class Members and their Families by the Extended Period of Pre-Presentment Detention

Extended detention without access to a judge subjects immigration detainees to a variety of harms. Most critically, delayed access to judicial review delays an individual's ability to win

[7] The NYFO's no bond policy has now been reinforced by national ICE policy developments. In 2017, ICE modified a risk assessment tool used in custody determinations to remove the "release" recommendation option and instead, automatically recommend that all arrestees be "detained." Ex. O, Mica Rosenberg and Reade Levinson, *Trump's Catch-and-Detention Policy Snares Many Who Have Long Called U.S. Home*, REUTERS (June 20, 2017). The impact of these changes has been felt across the country, as the Trump Administration's refusal to exercise discretion to set bond in initial custody reviews has contributed to a 38% surge in the number of bond redetermination requests to judges in the Administration's first year. *Id*.

release from custody, whether on bond, as the result of termination, after a grant of relief, or even after the entry of a removal order. The extended and unnecessary loss of liberty caused by Respondents has a devastating physical, emotional, and financial impact on detainees and their families. *See, e.g.*, Ex. E, Michel Decl. ¶¶ 9–13, 18–20 (describing the separation from her children, husband, and elderly grandmother, limited access to the family while detained, degrading treatment and conditions in detention, her deteriorating mental health and the lasting emotional turmoil after release for her, her husband, and her children, and the financial strain of her pre-presentment detention); Ex. F, Busse Decl. ¶¶ 8–10, 14–17 (describing the despair and loss of hope during the months of pre-presentment detention, the suicidal ideation it triggered, the loss of his job, the loss of his home, and the way his life has been "permanently impacted" by the continuing severe mental and emotional distress he suffers); Ex. H, Alzate Decl. ¶¶ 25–34 (describing psychological torture, fear, emotional hardship to himself and his wife, and financial hardship to his wife without his income); Ex. Q, Declaration of Leonardo Navarro ("Navarro Decl.") ¶¶ 26–41 (describing fear, depression, and thoughts of hurting himself, wife's fear and suicidal ideation, emotional distress of daughters, and financial hardship to family due to detention); Ex. I, Nembhard Decl. ¶¶ 8, 17, 29–35 (describing pain and depression due to isolation from family, missing the birth of his daughter, and financial hardship to family); Ex. J, Quarey Decl. ¶¶ 6–8, 10–12, 15–26, 29 (describing extreme pain due to deprivation of vital medical care and emotional suffering from family separation). For Petitioner-Plaintiff Mr. Vazquez-Perez's family, the loss of his income while he was detained awaiting a court date caused them to fall behind on rent and fear losing their apartment. Ex. P, Declaration of Uriel Vazquez Perez ("Vazquez Perez Decl.") ¶¶ 9–11. His wife and sons—particularly his younger

son, age eleven—experienced emotional distress, and Mr. Vazquez Perez was distraught at the prospect of missing his son's baptism, scheduled for December 15.[8] *Id.* ¶¶ 12–13.

Most individuals arrested by ICE's NYFO for removal proceedings have lived in this country for long periods of time and are deeply integrated into local communities and families. On average, Petitioners have lived in the United States for approximately sixteen years when ICE arrests them and almost a third (30%) are LPRs. Ex. D, Vera Evaluation, at 18. Approximately half (47%) have children living with them in the United States. *Id.* at 20. Such parents have, on average, two children and a significant majority of those children (86%) have some form of legal status, primarily U.S. citizenship. *Id.* Approximately 64% are employed at the time of their arrest by ICE. *Id.* at 17. Extended pre-presentment detention separates and devastates detainees and their families. *See, e.g.*, Ex. P, Vazquez Perez Decl. ¶¶ 9–14; Ex. E, Michel Decl. ¶¶ 9–13, 18–20; Ex. F, Busse Decl. ¶¶ 8–10, 14–17; Ex. Q, Navarro Decl. ¶¶ 26–41; Ex. I, Nembhard Decl. ¶¶ 8, 17, 29–30, 34–35, 41, 44.

After arrest by ICE's NYFO, individuals are held in criminal jails, where the NYFO rents bed space, and subject to harsh conditions of confinement. Ex. A, Sáenz Decl. ¶ 8; Ex. B, Redman Decl. ¶ 13. For example, after physical contact with loved ones, detainees are subjected to invasive strip searches conducted by jail staff. Ex. E, Michel Decl. ¶ 9. Phone calls and visits are limited and prohibitively expensive for some. Ex. E, Michel Decl. ¶¶ 9–10; Ex. F, Busse Decl. ¶ 9; Ex. Q, Navarro Decl. ¶ 28; Ex. H, Alzate Decl. ¶ 31. In addition, the threat of violence and sexual assault hangs over detainees at these facilities. Ex. H, Alzate Decl. ¶¶ 28–30.

[8] After his detention by ICE on October 30, Mr. Vazquez Perez received an NTA which stated his initial appearance would take place on November 15, but no hearing was held on that date, nor was he informed when a hearing would be scheduled. Shortly after he filed the complaint in this action, he received a court date for November 28. He was granted bond on that date and released from ICE custody two days later.

The gross inadequacies of the medical and mental health care available at the jails where Petitioners are detained have been recognized and documented by multiple organizations, as well as by Respondent DHS's own Inspector General, and have led to severe negative consequences for detainees' health and, in some cases, even deaths. Ex. B, Redman Decl. ¶¶ 17–38 (documenting the inadequacies and explaining that one facility where Petitioners are detained has reported six inmate deaths since June 2017 alone). ICE's New York City-area facilities, where Petitioners are held, have a documented track record of denying detainees access to vital medical treatment, such as dialysis and blood transfusions; subjecting detainees to weeks- and months-long delays in providing access to necessary medications, care, and even vital surgeries; ignoring repeated complaints and requests for care from detainees with serious symptoms or acute pain, including individuals recovering from car accidents and gunshot wounds; refusing to continue effective treatments that detainees were receiving prior to detention, including for individuals with chronic conditions such as HIV, cancer, or diabetes; and failing to provide interpretation and translation services for detainees with limited English proficiency who seek medical care. *Id.* ¶¶ 21–30; *see also, e.g.*, Ex. J, Quarey Decl. ¶¶ 6–8, 10–12, 15–22 (currently detained wheelchair-bound individual being deprived of adequate medical care for his torn meniscus, diabetes, severely swollen leg, heart murmur, sleep apnea, painfully ingrown toenails, and arthritis); Ex. E, Michel Decl. ¶ 12 (detainee explaining how she was threatened with solitary confinement after declining an unsolicited medical procedure in an unhygienic, rust-covered room). Collectively, the deficiencies in the medical care provided at ICE's New York City-area facilities subject Petitioners to the risk of serious and even life-threatening medical complications during the months before they can even seek release from a judge.

ARGUMENT

To obtain a preliminary injunction, the Petitioners "must show (1) irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest." *North Am. Soccer League, LLC v. U.S. Soccer Fed., Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (citing *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015)). For a mandatory injunction, the party seeking the injunction must show "a clear or substantial likelihood of success on the merits." *North Am. Soccer League*, 883 F.3d at 37.

Because Respondents' practice of holding individuals for months without access to their statutorily mandated hearing before a judge to challenge their detention and removal violates procedural and substantive due process requirements and constitutes unreasonable delay under the APA, and because Petitioners are suffering significant irreparable harm from their unnecessary extended detention, it is in the public interest to issue the requested injunction.[9]

I. A PRELIMINARY INJUNCTION WILL PREVENT IRREPARABLE HARM

A showing of irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (citation omitted). The harm alleged must "be imminent, not remote or speculative" and be "incapable of being fully remedied by monetary damages." *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990). Petitioners' unlawful extended detention is functionally the equivalent of criminal incarceration and causes extraordinary

[9] Petitioner has previously filed a Motion for Class Certification on November 15, 2018 (Dkt. No. 3). However, the Court "may conditionally certify the class or otherwise award a broad preliminary injunction, without a formal class ruling, under its general equitable powers." *Stroucher v. Shah*, 891 F. Supp. 2d 504, 517 (S.D.N.Y. 2012) (citation and internal quotation marks omitted).

emotional and physical distress. *Supra* pp. 9-12.[10] This type of liberty deprivation and suffering establishes irreparable harm. *Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017) (irreparable harms of immigration detention include "subpar medical and psychiatric care, the economic burdens imposed on detainees and their families as a result of detention, and the collateral harms to children of detainees whose parents are detained"); *United States v. Bogle*, 855 F.2d 707, 710–11 (11th Cir. 1988) ("[U]nnecessary deprivation of liberty clearly constitutes irreparable harm."); *see also Abdi v. Duke*, 280 F. Supp. 3d 373, 404–05 (W.D.N.Y. 2017) (finding that immigrant detainees had established irreparable harm "through the negative physical and mental health effects of prolonged detention") *order clarified sub nom. Abdi v. Nielsen*, 287 F. Supp. 3d 327 (W.D.N.Y. 2018).

In addition to the tangible effects of detention, the Petitioners have suffered and will continue to suffer constitutional violations, *see infra* at pp. 15–26, which by definition qualify as irreparable harm. *Sajous v. Decker*, No. 18-CV-2447 (AJN), 2018 WL 2357266, at *12 (S.D.N.Y. May 23, 2018) (Nathan, J.) (recognizing that "[s]everal courts in this circuit have concluded that '[t]he deprivation of [an alien's] liberty is, in and of itself, irreparable harm'") (citing cases) (citations omitted); *see generally Bery v. City of New York*, 97 F.3d 689, 693–94 (2d Cir. 1996). In particular, unconstitutional detention is classic irreparable harm. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1144–45 (9th Cir. 2013) (holding that unconstitutional detention of asylum-seekers constituted irreparable harm for preliminary injunction); *Mahmood v. Nielsen*, 312 F. Supp. 3d 417, 425 (S.D.N.Y. 2018) (recognizing that "[a] number of courts have held that detention in violation of constitutional rights establishes irreparable harm" and citing cases).

[10] The Court may rely on evidence of likely harm to putative class members in deciding this motion. *See LaForest v. Former Clean Air Holding Co., Inc.*, 376 F.3d 48, 56 (2d Cir. 2004) (holding "that district court did not abuse its discretion in relying on [six affidavits from similarly situated individuals] in concluding that the then-putative class suffered irreparable harm warranting a preliminary injunction").

II. PETITIONERS HAVE A CLEAR AND SUBSTANTIAL LIKELIHOOD OF SUCCEEDING ON THE MERITS

A. Respondents' Practices Violate Procedural Due Process

Like all other persons in the United States, for immigration detainees "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty" protected by the Due Process Clause. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). In recognition of this paramount due process concern, Congress and the immigration agencies have established a set of procedural protections available before an immigration judge to ensure that detention is justified. *See supra* pp. 4–7. In recent years, however, the period of incarceration that the Respondents cause immigrant detainees to endure before accessing these protections has ballooned—from approximately eleven days in 2014 to a staggering eighty-one days in October 2018. Ex. G, Hausman Decl. ¶ 5(a), (n). Through this motion, Petitioners seek prompt access to the existing statutory protections against unnecessary and unlawful detention; they do not seek any new or additional procedural protections. *See supra* pp. 4–7.

Petitioner's claim is assessed under the test established in *Mathews v. Eldridge*, which balances (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. 319, 335 (1976). Petitioners' claim must also be assessed against a backdrop of cases holding in a variety of contexts that due process requires a prompt hearing following the deprivation of a liberty or property interest in order to protect against wrongful deprivation during the pendency of proceedings. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 747 (1987) (criminal detention); *Schall v. Martin*, 467

U.S. 253, 269–70 (1984) (juvenile detention); *Commissioner of Internal Revenue v. Shapiro*, 424 U.S. 614, 629 (1976) (tax seizure); *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972) (parole revocation); *Nnebe v. Daus*, 644 F.3d 147, 163 (2d Cir. 2011) (vocational license suspension); *Spinelli v. City of New York*, 579 F.3d 160, 173 (2d Cir. 2009) (gun seizure and gun dealer license suspension); *Krimstock v. Kelly*, 306 F.3d 40, 67–70 (2d Cir. 2002) (car seizure). Further, the Supreme Court has hinged its condonation of immigration detention on an express expectation that the onset of immigration proceedings would follow quickly on the heels of arrest. *See e.g.*, *Reno v. Flores*, 507 U.S. 292, 309 (1993) (upholding the regime at issue in part because the Court "[would] not assume . . . that an excessive delay will invariably ensue" between the time of arrest and initiation of proceedings); *see also Demore v. Kim*, 538 U.S. 510, 532–33 (2003) (Kennedy, J., concurring) (upholding mandatory immigration detention but cautioning that different outcome might result if there were "unreasonable delay . . . in pursuing and completing deportation proceedings"). As set forth below, Petitioners are likely to establish that Respondents' practices violate their rights to procedural due process.

1. Petitioners Have a Substantial Interest in their Liberty

There is no question that "physical confinement of an individual is the ultimate deprivation of liberty." *United States v. Melendez-Carrion*, 790 F.2d 984, 998 (2d Cir. 1986); *see also Zadvydas*, 533 U.S. at 690. The harsh conditions of confinement suffered by the Petitioners—all of whom are held in criminal jails under the same restrictions as criminal detainees with inadequate access to medical and mental health care, *see supra* pp. 11–12—further exacerbates their liberty deprivation. *See Youngberg v. Romeo*, 457 U.S. 307, 322 (1982) (holding that civil detainees are "entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."). Notably,

the liberty interest at stake for Petitioners is significantly greater than the property interest which was at stake in a number of Supreme Court and Second Circuit cases finding a procedural due process right to prompt presentment. *See, e.g.*, *Barry v. Barchi*, 443 U.S. 55, 68 (1979) (vocational license suspension); *Shapiro*, 424 U.S. at 629 (tax seizure); *North Ga. Finishing, Inc.* v. DI-Chem, Inc., 419 U.S. 601, 607 (1975) (asset garnishment); *Nnebe*, 644 F.3d at 163 (vocational license suspension); *Spinelli*, 579 F.3d at 173 (gun seizure and gun dealer license suspension); *Krimstock*, 306 F.3d at 60–62 (car seizure). It is "obvious" that where "[t]he Constitution demands greater procedural protection even for property" than are provided for "human liberty," "serious constitutional problem" arise. *Zadvydas*, 533 U.S. at 692.

The physical separation of parents from children and families caused by Petitioners' immigration detention and the resulting mental anguish, *see supra* pp. 10–11, is also a paramount liberty interest at stake in immigration detention. *See also Gerstein v. Pugh*, 420 U.S. 103, 113–14 (1975) (discussing how the "the stakes are [] high" with "[p]retrial confinement" because it "may imperil the suspect's job, interrupt his source of income, and impair his family relationships") (citations omitted). Immigration detention further causes significant disruption to Petitioner' ability to pursue their livelihoods. *See supra* pp. 9–11; *see also Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (discussing how the termination of welfare benefits may deprive recipient of "the very means by which to live while he waits" in assessing due process rights); *Nnebe*, 644 F.3d at 159 (describing the "enormous" due process interest in one's livelihood).

2. Respondents' Practices Risk Erroneously Detaining Petitioners and Prompt Presentment to a Judge Would Significantly Reduce that Risk

Petitioners are substantially likely to establish that prompt access to existing procedural safeguards available before an immigration judge would protect hundreds of individuals each year from months of unjustified or illegitimate detention; it would also reduce all Petitioners'

deprivation of liberty by eliminating an unnecessary period of extended pre-presentment incarceration. Specifically, Respondents' policies and practices—including, as more fully explained below, the *de facto* ICE policy not to set bond and the absence of mechanisms for challenging removal charges or detention before presentment to a judge—together result in Petitioners being held unlawfully for months. As one court in this district has explained, immigration agents have "every incentive to continue to detain aliens" and "little incentive" to release them, a structural scheme that "creates a powerful potential for bias against aliens," whereas "an impartial decisionmaker would greatly lessen the likelihood of bias, and the possibility of an erroneous deprivation of the alien's constitutionally protected liberty interest." *St. John v. McElroy*, 917 F. Supp. 243, 251 (S.D.N.Y. 1996). Meanwhile, the "additional" safeguards Petitioners seek are not new: Petitioners merely seek prompt access to existing procedures already provided upon presentment under current law. *See Corley v. United States*, 556 U.S. 303, 320–21 (2009) (citing *McNabb v. United States*, 318 U.S. 332, 347 (1943)) (recognizing "presentment is the point at which the judge is required to take several key steps to foreclose Government overreaching" and "[t]he history of liberty has largely been the history of observance of procedural safeguards"); *Armstrong v. Squadrito*, 152 F.3d 564, 573 (7th Cir. 1998) ("Because many of these rights involve the delivery of information—information that allows an arrestee to take appropriate legal action—a first appearance amounts to the established procedure that ensures an arrestee receives this information from a neutral source.")

As the record shows, ICE procedures, as implemented by the NYFO, are wholly inadequate to protect against the wrongful detention of individuals who pose no risk of flight or danger to the community and are entitled to bond. Over the past several years, the NYFO has enacted a virtually uniform no bond policy, *see supra* pp. 8–9 (noting that ICE's bond grant rate

has dropped from 26% in 2015 to 0% today), despite being charged by the regulations with making individualized custody determinations, 8 C.F.R. §§ 236.1(c)(8), 287.3(d). The record shows that in New York, ICE's custody review has become an empty exercise. In *Mathews* terms, the NYFO's failure to release people on bond creates a high risk of erroneously depriving class members, who present neither a flight risk nor a danger, of their liberty for months.

In contrast, once individuals are presented to a judge, they have the opportunity to pursue custody review procedures with the aid of counsel in an adversarial hearing. *See supra* p. 5. At those hearings, they can present and review evidence before an impartial adjudicator empowered to make a *de novo* assessment of bond eligibility, *see id.,* which results in 30%–40% of detainees being granted bond. *See* Ex. D, Vera Evaluation, at 50 (reporting that 40% of individuals are granted bond); *see also* Ex. A, Sáenz Decl. ¶ 19 (reporting that 40% of individuals are released on bond); Ex. G, Hausman Decl. ¶¶ 12–13 (reporting that 30%–33% of individuals are granted bond). That translates to hundreds of individuals annually who are denied bond by ICE being unnecessarily detained for months, and then later released after a judge issues bond. *See Krimstock I*, 306 F.3d at 44 (holding that due process requires a prompt impartial determination whether "less drastic measures than deprivation pendente lite," such as release on "bond" "are available and appropriate" to satisfy the government's interest); *see generally* Ex. G, Hausman Decl. ¶ 5 (1000–2000 individuals are presented to the Varick Court annually),

In addition, a significant category of U.S. citizens and wrongfully arrested LPRs who are simply not deportable also have no adequate mechanism to challenge their wrongful detention before ICE. ICE procedures to avoid such wrongful arrests do not provide meaningful mechanisms for detainees to be heard before ICE's detention determinations and provide no pre- or post-arrest impartial review to screen for errors. *See supra* pp. 7–9. In contrast, once presented

to a judge, individuals receive a bundle of procedural protections, *see supra* pp. 4–7, which provide the first meaningfully opportunity for most wrongfully detained individuals to challenge the charges against them. Ex. A, Sáenz Decl. ¶ 26; Ex. C, Burr Decl. ¶ 10.

The Court need not speculate as to the relative value of these safeguards: nearly one in ten (9%) individuals detained for removal proceedings by the NYFO will have their case terminated by an immigration judge because they are simply not removable. Ex. G, Hausman Decl. ¶¶ 15–16; *see also* Ex. D, Vera Evaluation, at 28. Furthermore, because this group is largely comprised of U.S. citizen and LPRs not subject to removal, *see supra* p. 6, their wrongful detention raises unique concerns. *Watson v. United States*, 865 F.3d 123, 147 (2d Cir. 2017) (C.J., Katzmann concurring in part and dissenting in part) (discussing ICE's "deeply troubl[ing]" "wrongful" detention of a U.S. citizen "on the basis of a 'grossly negligent' investigation").

Moreover, even individuals who are not released on bond by a judge but challenge their deportation must do so by pursuing applications for relief. *See supra* p. 6–7. Until they receive the bundle of procedures and protections associated with a first appearance before a judge, however, most have no realistic mechanism to identify relevant forms of relief and begin the time-consuming task of preparing and presenting applications. *See supra* p. 6. Extensive delays in presentment therefore delay the presentation and adjudication of such applications, thereby unnecessarily extending detention. *See* Ex. D, Vera Evaluation, at 33 (noting that 45% of cases involve an application for relief); *cf.* Ex. G, Hausman Decl. ¶¶ 18–19. Likewise, even for those who wish to concede deportation at their first appearance, the extended period of pre-presentment detention inflicts needless months of detention prior to deportation. *See supra* p. 7.

3. Prompt Presentment Would Not Undermine Government Interests

Petitioners seek the prompt provision of procedural protections already guaranteed to them under the statutory scheme but that are currently delivered to them months too late. Requiring prompt presentment would create minimal, if any, burdens beyond those already imposed by the statutes and existing practices. *Armstrong*, 152 F.3d at 572 (holding that, where the existing scheme "provides for a first appearance, it would place a small burden on the state to ensure the timeliness of that appearance.").

Congress has made clear its determination that the Government's interests are served by prompt presentment of individuals detained for removal proceedings. *See* 8 U.S.C. § 1229(b)(1) (recognizing that where requested, removal proceeding may commence in less than ten days); 8 U.S.C. § 1229(d)(1) ("In the case of an alien who is convicted of an offense which makes the alien deportable, the Attorney General shall *begin any removal proceeding as expeditiously as possible* after the date of the conviction.") (emphasis added)). The respondent agencies themselves have also expressed an interest in prompt initiation and adjudication of detained removal cases. *See, e.g.*, *Matter of Chirinos*, 16 I. & N. Dec. 276, 277 (B.I.A. 1977) ("Our primary consideration in a bail determination is that the parties be able to place the facts as promptly as possible before an impartial arbiter."); 8 C.F.R. § 1239.2(f) (requiring that removal proceedings be completed as "promptly as possible"); Ex. R, Immigration Court Practice Manual ("ICPM") §§ 9.1(e) (requiring that "[p]roceedings for detained aliens are expedited"), 9.3(d) (requiring that bond hearings be scheduled on the "earliest possible date").

Any argument that the lengthy pre-hearing detention is justifiable because of the administrative backlog should fail, as courts have generally found that administrative backlog is insufficient to justify extended deprivations of significant due process interests. *See, e.g.*, *Kuck v.*

Danaher, 600 F.3d 159, 166–67 (2d Cir. 2010) (rejecting government's reliance administrative backlog because "there is no indication that [the delay was] required to gather evidence, perform additional investigation, or formally consider the appeal. Instead, the complaint suggests that the appeal sits gathering dust for nearly all of the interim period, awaiting the scheduled hearing date"); *Ly v. Hansen*, 351 F.3d 263, 272–73 (6th Cir. 2003) (detention unreasonable because INS "drag[ged] its heels indefinitely in making a decision"); *cf. Pereira v. Sessions*, 138 S.Ct. 2105, 2118–19 (2018) (rejecting the government's argument that the "administrative realities of removal proceedings" make scheduling of hearings at the time of NTA issuance impracticable).

In any event, as the former Assistant Chief Immigration Judge in charge of the Varick Court has explained, the problem of extended and growing pre-presentment delays could be solved either by "appointing more judges to the court to serve on the detained docket and/or by detailing judges from 26 Federal Plaza[, the non-detained New York City Immigration Court,] to [the] Varick [Court] to assist." Ex. C, Burr Decl. ¶ 25. Judge Burr explains that detailing judges from the non-detained court would increase processing times in that court but that tradeoff is entirely consistent with the EOIR priorities. *Id.* ¶ 26. Moreover, the Respondents' track record of previously having been able to facilitate presentment in a substantially shorter time period belies any claim of insurmountable burdens. *See* Ex. G, Hausman Decl. ¶ 5(a) (showing median time to presentment was eleven days just a few years ago).

Hiring additional judges would, of course, cost money; however, the government cannot systemically underfund the system for affording process and then object to the burden that due process imposes. *See Fuentes v. Shevin*, 407 U.S. 67, 90 n.22, 92 n.29 (1972) ("[T]he Court has made clear that the avoidance of the ordinary costs imposed by the opportunity for a hearing is not sufficient to override the constitutional right."); *Goldberg*, 397 U.S. at 261 ("While the

problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process."); *Sajous*, 2018 WL 2357266, at *13 (Nathan, J.) (explaining that "where a plaintiff alleges constitutional violations" relief is appropriate "despite arguments that granting a preliminary injunction would cause financial or administrative burdens on the Government."). In addition, insofar as prompter presentment would reduce detention time for many, *see supra* pp. 17–20, the government's fiscal interests are served by not paying the cost of unnecessary detention. *See* Ex. S, DHS ICE Budget Overview FY 2018 (excerpted), at ICE-14 (setting a target FY2018 per diem detention rate of up to $133.99)

* * *

In balancing the *Mathews* factors, the Second Circuit has found due process to require prompt presentment to a neutral arbiter when the deprivation at issue was far less serious than it is in this case, and the court's reasoning further compels the conclusion that Petitioners' due process rights are being violated. Specifically, in *Krimstock*—a class action challenging New York City's practice of seizing vehicles from individuals arrested for driving under the influence without providing a prompt mechanism to challenge such seizures before an impartial adjudicator— the Second Circuit held that the lack of prompt access to a "neutral judicial or administrative officer" before whom the claimant could challenge the validity of the seizure and/or to argue for release of the car on bond, violated due process. 306 F.3d at 43–44, 69–70. In so holding, the court focused on the "significant temporal gap" of three weeks to over two months, *id.* at 53–60; the absence of alternative "prompt and effective means" to challenge the seizure, *id.*; and the fact that the deprivation affected "the means to earn a livelihood," *id.* at 61, and ultimately ordered the City to provide a hearing within ten days. *Krimstock III*, 464 F.3d at 249–50. *Compare* discussion *supra* pp. 3–4, 7–10 (noting eighty-day temporal gap here, where

human beings are seized and detained with no alternative means to secure prompt, impartial review); *see also Morrissey*, 408 U.S. at 485 (requiring interim custody review "as promptly as convenient after arrest"); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (establishing forty-eight hours as the default standard for presentment in criminal matters). Moreover, the Ninth Circuit has recently and squarely held that the balance of *Mathews* factors requires a prompt hearing before a judge following an immigration arrest. *See Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018) (holding that, under *Mathews*, due process requires a "prompt hearing" before a judge within seven days of an immigration arrest to permit minors to contest the gang allegations against them).

In light of the paramount private interest at stake, the serious risk of erroneous deprivation without prompt access to an immigration judge, the probable value of such access and the absence of a legitimate government interest in the current extended pre-hearing delay, Petitioners have a clear and substantial likelihood of success on their claim that due process requires, at minimum, prompt presentment to a judge following arrest by ICE.

B. Extended Pre-Proceeding Detention Violates Substantive Due Process

Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Flores*, 507 U.S. at 301–02. It is beyond dispute that this constitutional right extends to noncitizens. *See id.* at 306. In *Zadvydas*, the Court held that immigrants subject to a final order of removal could not be detained indefinitely while the government sought their deportation in part because the purpose of the statute—securing removal—was not served by continued detention. 533 U.S. at 690. The Court reasoned that detention is arbitrary and impermissible where the ongoing deprivation of liberty does not serve

the alleged government interest underlying detention. *Id.* (stating that detention must "bear . . . [a] reasonable relation to the purpose for which the individual [was] committed") (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

Here, the purpose of initial detention is to allow for an individualized custody determination and to commence and advance removal proceedings. *See* 8 U.S.C. § 1226. But this determination is not made and these proceedings cannot substantively begin unless and until an individual first appears before a judge. *Supra* pp. 4–10. Detention for several months prior to that appearance is not tied to any legitimate government interest. *See Demore*, 538 U.S. at 532–33 (Kennedy, J., concurring) (explaining that when there is "an unreasonable delay by the INS in pursuing and completing deportation proceedings, it [] become[s] necessary then to inquire whether the detention is not to facilitate deportation, or protect against risk of flight or dangerousness, but to incarcerate for other reasons"); *Bugianishvili v. McConnell*, No. 1:15-cv-3360 (ALC), 2015 WL 3903460 (S.D.N.Y. June 24, 2015) ("The surest sign of unreasonable detention is unreasonable delay by the government in pursuing and completing removal proceedings."); *Debel v. Dubois*, No. 13 Civ. 6028(LTS)(JLC), 2014 WL 1689042 (S.D.N.Y. Apr. 24, 2014) (Swain, J.) ("[T]he principal factor [] in constitutional review of detention pending removal proceedings is the degree to which the proceedings have been prolonged by unreasonable government action.").

Outside the immigration context, many courts have likewise recognized that it violates substantive due process to detain individuals while failing to promptly advance the proceedings that form the basis for the detention. *See Squadrito*, 152 F.3d 564 (holding that civil detention for fifty-seven days without initiating proceedings violates substantive due process); *see also Coleman v. Frantz*, 754 F.2d 719, 723 (7th Cir. 1985) (holding that eighteen days in criminal

custody without initiating proceedings violates substantive due process); *Hayes v. Faulkner Cty.*, 388 F.3d 669, 675 (8th Cir. 2004) (holding that thirty-eight days in criminal custody without initiating proceedings violates substantive due process).

Because their detention for months prior to seeing a judge burdens a fundamental right and serves no government interest, Petitioners are likely to establish a due process violation.

C. Respondents' Delay Violates the Administrative Procedure Act

Petitioners are likely to prevail in their claim that the Respondents' delay in commencing removal proceedings for months violates the Administrative Procedure Act ("APA"). 5 U.S.C. § 555(b) (requiring that "within a reasonable time, each agency shall proceed to conclude a matter presented to it"). Under the APA, courts may compel actions that an agency is required to take but has unreasonably delayed. 5 U.S.C. § 706(1); *Norton v. South Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

Once an individual is detained under 8 U.S.C. § 1226, the government is required to initiate removal proceedings. 8 U.S.C. § 1229a(a) (immigration judges conduct removal proceedings). That is done through an initial MCH. Ex. R, ICPM § 4.15. ICE is required to facilitate this initial hearing by "refer[ing] the case to an immigration judge for further inquiry" in cases, like Petitioners', where no other action is appropriate or authorized by law. 8 C.F.R. § 287.3(b)[11]; *see also* 8 C.F.R. § 1003.14 (jurisdiction vests with the Immigration Court upon ICE's filing of a charging document); 8 C.F.R. § 1003.18(a) (Immigration Court is responsible for scheduling proceedings). A delay of over two months in holding that hearing runs afoul of the APA's requirement that agencies act without unreasonable delay.

[11] This regulation, applicable to noncitizens detained without administrative warrants, also authorizes ICE officers to "order the alien removed" or take other lawful action. But for class members, whose detention under § 1226 means they are entitled to undergo removal proceedings before an immigration judge, there is no other lawful action to take. *Cf.* 8 U.S.C. § 1225(b)(1) (authorizing detention and expedited removal of non-citizens only in limited circumstances).

In assessing whether delay has gone on so long as to become unreasonable in a particular case, courts frequently rely on six factors first set forth in *Telecommunications Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 79–80 (D.C. Cir. 1984) ("*TRAC*"), which include:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

Families for Freedom v. Napolitano, 628 F. Supp. 2d 535, 541 (S.D.N.Y. 2009) (quoting *TRAC*).

Under the first and second factors, the delay here is manifestly unreasonable. In no other context are people in confinement in the United States routinely left to sit for months before a first court appearance. *County of Riverside*, 500 U.S. at 56 (requiring a probable cause determination within forty-eight hours of arrest absent a "bona fide emergency or other extraordinary circumstance"); *Project Release v. Prevost*, 722 F.2d 960, 974 (2d Cir. 1983) (approving of New York's procedures for civil confinement because a hearing is available within five days upon the request of a patient, relative or friend); *see also supra* pp. 23–24 (listing cases requiring prompt presentment following arrest). Congress and indeed the Respondents' own agencies have also indicated that they expect the commencement of removal proceedings and the opportunity for a custody review by an immigration judge to occur rapidly. *See supra* pp. 21–22. Tellingly, ICE makes an initial charging decision within forty-eight hours of arrest, 8 C.F.R. § 287.3(d) (requiring a determination "within 48 hours of the arrest" as to whether to issue a)—leaving no barrier to prompt commencement of proceedings thereafter.

Under the third and fifth factors, the tremendous toll that detention for months on end inflicts on "human health and welfare" also militates strongly in favor of a finding that the delay is unreasonable. *Families for Freedom*, 628 F. Supp. 2d at 541 (applying *TRAC* factors to find agency's delay in promulgating minimum standards for immigration detention unreasonable). As the Petitioners set forth *supra* pp. 2–4, 9–12, immigration detention, particularly in county jails, inflicts significant harms on detainees' health, relationships, and ability to prepare their cases. *Hernandez*, 872 F.3d at 995 (harms of immigration detention include "subpar medical and psychiatric care, the economic burdens imposed on detainees and their families as a result of detention, and the collateral harms to children of detainees whose parents are detained"). *Abdi*, 280 F. Supp. 3d at 405 (detention "substantially burdened [putative class members'] ability to adequately prepare for an asylum hearing before an immigration judge"). By contrast, under the fourth *TRAC* factor, speedier action would impose little hardship on the government, *see supra* pp. 21–23, as Petitioners seek no more process then is currently afforded them.

These factors weigh overwhelmingly in favor of the Petitioners. Thus, the Petitioners are likely to succeed in establishing that the Respondents have violated their duty to act under the APA without unreasonable delay.

III. A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST

Petitioners seek an order that requires prompt access to procedural protections that Congress has already created. The balance of equities and the public interest are decidedly in Petitioners' favor. Petitioners' ongoing prolonged and unconstitutional detention, their wholesale loss of freedom—and the attendant separation of Petitioners from their families and livelihoods—stands in stark contrast to whatever ministerial encumbrances the Government asserts to justify the current systemic delays.

Moreover, ICE has the power to mitigate any bottleneck it has created in overtaxing the immigration court if it resumed making individualized determinations about which arrestees to release, as it used to do with over one-quarter of the people it arrested. Ex. G, Hausman Decl. ¶ 9. Release of the significant class of individuals who pose no danger or flight risk, *see supra* pp. 5, 19, would be consistent with the regulatory scheme, 8 C.F.R. §§ 236.1(c)(8), 287.3(d), and with the public interest. This in turn would free up judicial resources for the required prompt hearings for those who remain detained.

In any event, the government, of course, "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d at 1145; *see also L.V.M. v. Lloyd*, No. 18 Civ. 1453 (PAC), 2018 WL 3133965, at *11 (S.D.N.Y. June 27, 2018); *Abdi*, 280 F. Supp. 3d at 410. Petitioners seek to ensure that the due process protections Congress and the agencies established are not undermined by systemic and unconstitutional delays that result in 1000 to 2000 individuals per year being needlessly and unconstitutionally jailed for months away from their homes, loved-ones, and livelihoods, thereby costing the government unnecessary and great expense. A preliminary injunction is therefore in the public interest.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court issue a class-wide preliminary declaration that Respondents-Defendants' practice of detaining putative class members for extended periods without providing prompt access to an immigration judge is unlawful and a preliminary injunction requiring Respondents to promptly provide putative class members a meaningful opportunity to challenge their detention and removal before a judge or, in the alternative, release them from detention.

Respectfully Submitted,

Dated: December 4, 2018
New York, N.Y.

/s/ Peter Markowitz

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