

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

VASIF “VINCENT” BASANK; FREDDY BARRERA CARRERRO; MANUEL BENITEZ PINEDA; MIGUEL ANGEL HERNANDEZ BALBUENA; LATOYA LEGALL; CARLOS MARTINEZ; ESTANLIG MAZARIEGOS; MANUEL MENENDEZ; ANTAR ANDRES PENA; and ISIDRO PICAZO NICOLAS,
Petitioner,

V.

THOMAS DECKER, in his official capacity as
Director of the New York Field Office of U.S.
Immigrations & Customs Enforcement;
CHAD WOLF, in his official capacity as Acting
Secretary, U.S. Department of Homeland Security,
Respondents.

Civ. No. 1:20-cv-02518

**PETITIONERS' APPLICATION
FOR ORDER TO SHOW CAUSE
AND PRELIMINARY INJUNCTION
AND TEMPORARY RESTRAINING
ORDER**

In light of the global pandemic COVID-19, which threatens the life and safety of Petitioners while they are detained by Immigration and Customs Enforcement (“ICE”), and pursuant to their Petition for Habeas Corpus, Petitioners respectfully request that the Court issue an order requiring Respondents to release them upon their own recognizance, subject to reasonable and appropriate conditions, and enjoin Respondents from arresting Petitioners for civil immigration detention purposes during the pendency of their immigration proceedings. In the alternative, Petitioners request that the Court conduct telephonic bail hearings where Respondents must prove, by clear and convincing evidence, that Petitioners’ ongoing detention is necessary and does not violate due process.

Counsel for Petitioners provided notice of Petitioners' intent to file this application to

counsel for Respondents at the U.S. Attorney's Office for the Southern District of New York.

Dated: March 25, 2020
Brooklyn, New York

Respectfully submitted,

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**TELEPHONIC ORAL
ARGUMENT
REQUESTED**

**Memorandum of Law in Support of Application for Order to Show Cause and
Preliminary Injunction and Temporary Restraining Order**

INTRODUCTION

As the global pandemic caused by the novel COVID-19 virus and resulting Coronavirus disease (“COVID-19”) disrupts daily functioning around the world and has taken over 20,000 lives and counting, Immigration and Customs Enforcement (“ICE”) continues to refuse to release the most vulnerable immigrants in their custody, including Petitioners, each of whom faces an imminent risk of death or serious injury in immigration detention if exposed to COVID-19 due to their pre-existing medical conditions, including diabetes, heart disease, asthma, and chronic obstructive pulmonary disease (COPD). In the past several days, all of the detention centers in which Petitioners are detained have confirmed that either detainees or staff have tested positive for COVID-19, illustrating that a

rapid expansion of the deadly virus at each of these facilities is imminent.

ICE's decision to continue detaining Petitioners ignores this rapidly-changing reality, disregards precedent in this Circuit, and infringes on Petitioners' due process rights under the United States Constitution. Without action by this Court, Petitioners will likely be infected with COVID-19 and be left without access to adequate treatment, leading to near-certain serious medical complications and in some cases, death. In light of these serious, imminent risks to their health, Petitioners must be immediately released to safeguard their right to life. Every additional minute they spend detained, they are at an extremely high risk of contracting the illness and, once they do, it will be too late. Any delay thus presents an extreme and unjustified danger to their life and safety. In addition, delay adds to public health concerns and endangers others, as the longer they remain detained in jail-like conditions favorable to the spread of infectious disease, the more likely they are to be infected with COVID-19, suffer from a severe case of coronavirus due to their underlying conditions, infect others around them, and add to the overwhelming stress on local health care facilities.

Due to similar concerns, at least one judge in this district has already ordered the redetermination of a federal criminal detainee's bail application, ordering his immediate release pursuant to conditions of supervision. *See* Exhibit A, Opinion & Order, *United States v. Stephens*, 1:15-cr-00095 (AJN), Doc. No. 2798 (S.D.N.Y. March 19, 2020). On Monday, the Ninth Circuit *sua sponte* ordered the release of a petitioner with a petition for review pending before that court "in light of the rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers." *See* Exhibit B, Order, *Xochihua-Jaimes v. Barr*, 18-71460, Doc. No. 53 (9th Cir. Mar. 23, 2020). And today, U.S. District Judge Wolf in the District of Massachusetts ordered the release of an immigration detainee, finding "that the ongoing health crisis tipped the scales in [the petitioner's] favor, particularly because his is a civil immigration detention." *See* Chris Villani, *Releasing ICE Detainee, Judge Says Jail No Safer Than Court*, Law360, March 25,

2020 (citing *Calderon Jimenez et al. v. Cronen et al.*, 1:18-cv-10225, Doc. No. 506 (Mar. 25, 2020 D. Mass.)).¹

Petitioners have demonstrated that they are likely to succeed on the merits of their claims that ICE's inaction violates their due process rights, that they will suffer irreparable harm absent action by this Court, and that the balance of equities weigh in their favor. Accordingly, Petitioners respectfully ask that this Court issue an order pursuant to Federal Rule of Civil Procedure 65 requiring Respondents to release them immediately or to conduct bail hearings before this Court.

ARGUMENT

Petitioners are entitled to a preliminary injunction and temporary restraining order instructing ICE to release them before they suffer serious consequences from COVID-19 because they have demonstrated (1) that they are “likely to suffer irreparable harm in the absence of preliminary relief”; (2) that they are “likely to succeed on the merits”; and (3) that the balance of equities tips in their favor, and that an injunction is in the public interest.” *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 825 (2d Cir. 2015) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)); *see also Andino v. Fischer*, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008) (“The standard for granting a temporary restraining order and a preliminary injunction pursuant to Rule 65 of the Federal Rules of Procedure are identical.”). Alternatively, Petitioners have shown “irreparable harm and . . . ‘sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief’” that is sufficient to justify preliminary relief. *Am. Civ. Liberties Union*, 785 F.3d at 825 (citing *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206, 215 (2d Cir. 2012)).²

¹ Available at <https://www.law360.com/classaction/articles/1256985?>.

² Petitioners seek a prohibitory injunction that orders the government to release them from civil immigration detention. *See New York ex rel. Spitzer v. Cain*, 418 F. Supp. 2d 457, 472 (S.D.N.Y.

I. Petitioners will suffer irreparable harm absent preliminary relief.

In the Second Circuit, 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) (internal quotations and citations omitted). That harm must be “actual and imminent” rather than speculative. *Id.* Here, the harm that Petitioners have *already* suffered to their constitutional due process rights as a result of ICE’s refusal to release them in light of their already compromised health and in the face of the imminent spread of COVID-19 in the detention facilities will be exacerbated if they remain in detention. Because COVID-19 has already reached each of the facilities where Petitioners are detained, and because those facilities are simply not prepared to adequately protect Petitioners, that harm is imminent.

In the Second Circuit, it is well settled that an alleged constitutional violation constitutes irreparable harm. *See, e.g., Connecticut Dept. of Environmental Protection v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004) (“[W]e have held that the alleged violation of a constitutional right triggers a finding of irreparable injury.”) (internal quotations and citations omitted); *Statharos v. New York City Taxi & Limousine Comm’n*, 198 F.3d 317, 322 (2d Cir.1999) (“Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary.”); *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996) (clarifying that “it is the *alleged* violation of a constitutional right that triggers a finding of irreparable harm” and a substantial likelihood of success on the merits of a constitutional violation is not necessary) (emphasis in original); *Sajous v. Decker*, No. 18-cv-2447 (AJN), 2018 WL 2357266, at *12 (S.D.N.Y. May 23, 2018) (finding that immigrant established irreparable harm by alleging that prolonged immigration detention violated his constitutional due process rights). Here,

2006) (“An injunction that prevents a defendant from continuing to interfere with a plaintiff’s rights, while altering the status quo (by commanding a cessation of the interference) is [] a prohibitory injunction.”). Because the injunction they seek is properly characterized as a prohibitory injunction, they need not meet the higher standard for a mandatory injunction.

Petitioners allege that the government officials detaining them deprived them of their right to due process by refusing to release them despite not being equipped to adequately protect them from COVID-19 and despite the inherent risks posed by their detention in a jail environment.

Even absent that constitutional harm, Petitioners face substantial harm caused by the highly infectious COVID-19. Detention in county jail during this outbreak will by itself cause substantial irreparable harm to Petitioners. *See Sajous*, 2018 WL 2357266, at *12 (S.D.N.Y. May 23, 2018) (“[T]he deprivation of [an alien’s] liberty is, in and of itself, irreparable harm.”) (quoting *Peralta-Veras v. Ashcroft*, No. 02-cv-1840 (IRR), 2002 WL 1267998, at *6 (E.D.N.Y. Mar. 29, 2002)).

This harm will be further exacerbated if, or more likely *when*, Petitioners contract COVID-19. Because of their medical conditions, which include asthma, diabetes, heart disease, hypertension, obesity and respiratory problems including COPD, the chances of them developing serious and possibly lethal medical complications are particularly high. As individuals suffering from serious underlying conditions, Petitioners are at much higher risk of serious illness or death than the general population. According to the World Health Organization, “[P]ersons with pre-existing medical conditions [like Petitioners] . . . appear to develop serious illness more often than others.” The Centers for Disease Control has added that people, such as Petitioners, with advanced age or chronic underlying medical conditions “are at greater risk of getting very sick from this illness.”³ They specifically name, among other conditions "moderate to severe asthma," "heart disease," "obesity," and "diabetes" as conditions that trigger higher risk of severe illness from COVID-19.⁴ Thus the serious illness or possible death that Petitioners face constitutes irreparable harm.

³ *See People at Risk for Serious Illness from COVID-19*, Centers for Disease Control, <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/high-risk-complications.html> (“Older people and people of all ages with severe underlying health conditions — like heart disease, lung disease and diabetes, for example — seem to be at higher risk of developing serious COVID-19 illness.”).

⁴ *See Information for Healthcare Professionals: COVID-19 and Underlying Conditions*, Centers for Disease Control, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/underlying-conditions.html>

II. PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR WRIT OF HABEAS CORPUS

Petitioners are likely to succeed on the merits of their claim that ICE’s failure to provide them with adequate protection from COVID-19 or to release them from custody violates their due process rights. Because ICE is subjecting Petitioners to unconstitutional, dangerous conditions without adequately protecting them or providing them with necessary health care to address their serious medical needs and is refusing to release them, ICE is infringing on Petitioners’ constitutional due process rights under Second Circuit precedent.

a. Petitioners are likely to prevail on the merits of their first due process claim.

Petitioners are likely to succeed on their claim that ICE’s refusal to provide them adequate protection during the COVID-19 outbreak violates the due process clause of the Fifth Amendment of the United States Constitution. The Due Process Clause forbids the government from depriving a person of life, liberty, or property without due process of law. *Mathews v. Eldridge*, 424 U.S. 319 (1976). It applies to “all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). “Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.” *Id.* at 690. Because this interest is even more significant in the case of civil confinement, heightened burdens apply. *See, e.g., Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (“[D]ue process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of money.”) (citation and quotation marks omitted).

The U.S. Constitution prohibits pretrial and civil detainees from being detained in punitive conditions of confinement because the purpose of such detention is allegedly not punitive. *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). These detainees, including immigrant detainees, “may not be

punished in any manner—neither cruelly and unusually nor otherwise.” *Id.*

As civil detainees—such as immigrant detainees like Petitioners—cannot be detained for punitive reasons, their constitutional rights to be housed in safe conditions of confinement “are at least as great as the Eighth Amendment protections available to a convicted prisoner.” *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983); *see also Darnell*, 849 F.3d at 33. Because the rights of these detainees are broader than those guaranteed under the Eighth Amendment, the Due Process Clause of the Fifth Amendment govern the claims of immigrant detainees who challenge punitive or otherwise unsafe or inhumane conditions. *Charles v. Orange County*, 925 F.3d 73, 82 (2d Cir. 2019); *Darnell*, 849 F.3d 17, 29; *see also DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989).

Because of the nature of conditions in the county jails that serve as immigration detention facilities, including the three facilities where Petitioners are detained, Petitioners are not able to take steps to protect themselves—such as social distancing, using hand sanitizer, or washing his hands regularly—and the government has not provided adequate protections. Now that COVID-19 has reached the immigrant detention facilities, the already deplorable conditions in these facilities will be exacerbated, and the ability to protect oneself from infection will become even more impossible. These were the same reasons that led U.S. District Judge Wolf, in the District of Massachusetts, to order an immigrant detainee’s release just today. *See* Chris Villani, *Releasing ICE Detainee, Judge Says Jail No Safer Than Court*, Law360, March 25, 2020 (“We are living in the midst of a coronavirus pandemic, some infected people die, not all, but some infected people die,” Judge Wolf said. “Being in a jail enhances risk. Social distancing is difficult or impossible, washing hands repeatedly may be difficult. There is a genuine risk this will spread throughout the jail.”).⁵

⁵ Available at <https://www.law360.com/classaction/articles/1256985?>.

The government's failure to adequately protect Petitioners from these punitive conditions, or release them from these conditions altogether, constitutes an egregious violation of Petitioner's due process rights.

b. Petitioners are likely to prevail on the merits of their second due process claim.

Petitioners' medical conditions place them at a heightened risk of contracting COVID-19 and suffering serious medical harm, or even death, as a result. Because Respondents are aware that failing to adequately protect Petitioners could have tragic results and yet have not taken necessary or appropriate precautions, Respondents have acted with deliberate indifference to their serious medical needs in violation of the Due Process Clause.

Immigrant detainees establish a due process violation for unconstitutional conditions of confinement by showing that a government official "knew, or should have known" of a risk to a condition of confinement that "posed an excessive risk to health." *Darnell*, 849 F.3d at 35; *Charles*, 925 F.3d at 87; *see also Darnell*, 849 F.3d at 29. Where a risk is obvious, such as during a highly contagious disease outbreak, it is fair for a factfinder to assume that the government official was aware of the risk. *See, e.g., Charles*, 925 F.3d at 87.

Immigrant detainees need not demonstrate that "they actually suffered from serious injuries" to show a due process violation. *Darnell*, 849 F.3d at 31; *Helling*, 509 U.S. at 33. Rather showing conditions that "pose an unreasonable risk of serious damage to [one's] future health" may be sufficient. *Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002) (quoting *Helling*, 509 U.S. at 35). The Supreme Court has reiterated that it has "great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems" where prison authorities "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year," such as "exposure of inmates to a serious, communicable disease." *Helling*, 509 U.S. at 33.

This is precisely what is occurring here. Just in the past few days, the number of cases in Bergen, Essex and Hudson Counties – where Petitioners are detained – has exploded. As of today, Bergen reports 701 cases, Essex reports 342 and Hudson County reports 234 cases.⁶ New Jersey now has the second-highest known number of cases in the United States, surpassing Washington.⁷ At the time of writing, the number of COVID-19 related deaths in New Jersey is doubling every day.⁸ Two medical experts who work for DHS have sent a letter to Congress warning of the “imminent risk to the health and safety of immigrant detainees” and the public as COVID-19 spreads to immigration detention centers, in what they call a “tinderbox scenario.”⁹ They explain that because such a great number of detainees will be infected, “[a]s local hospital systems become overwhelmed by the patient flow from detention center outbreaks, precious health resources will be less available for people in the community.” They recommend that detainees be released in order to protect the detainees and the broader community.

The former head of ICE, John Sandweg, has similarly stated that “shrinking the population [of ICE detainees] is exactly what he would do if he still led the agency, focusing first on releasing people over the age of 65 and those with compromised immune systems.”¹⁰ As Sandweg explained, “The goal

⁶ COVID-19 Cases by County, https://www.state.nj.us/health/cd/topics/covid2019_dashboard.shtml (on Mar. 24, 2020, showing 190 confirmed cases in Hudson County).

⁷ See Mitch Smith, Karen Yourish et. al., *Coronavirus in the U.S.: Latest Map and Case Count*, The New York Times (updated March 25, 2020, 12:03pm EST) <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#g-cases-over-time>

⁸ See Josh Katz and Margot Sanger-Katz, *Coronavirus Deaths by U.S. State and Country Over Time: Daily Tracking*, The New York Times (updated Mar 25, 2020, 8:20am EST), <https://www.nytimes.com/interactive/2020/03/21/upshot/coronavirus-deaths-by-country.html>

⁹ Catherine E. Shoichet, *Doctors Warn of “Tinderbox scenario” if Coronavirus Spreads in ICE Detention*, CNN (Mar. 20, 2020), <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.

¹⁰ Camilo Montoya-Galvez, *“Powder kegs”: Calls grow for ICE to release immigrants to avoid coronavirus outbreak*, CBS News, March 19, 2020, available at <https://www.cbsnews.com/news/coronavirus-ice-release-immigrants-detention-outbreak/>.

here has to be, though, to shrink down the population so much that you can get some of that social distancing, and eliminate the ability of the virus to spread once it's in the facility, and diminish the exposure to the ICE agents, the work force, and then the public at-large.”¹¹

Most alarming, all of the facilities where Petitioners are detained now report positive cases of COVID-19. On Tuesday, both Bergen County Jail¹² and Essex County Jail¹³ reported positive cases. On Sunday, Hudson County Correctional Facility, confirmed two cases of COVID-19 at the facility.¹⁴ All three jails have now responded with punitive and confusing lockdown conditions in which detainees are only allowed out of their cells for a brief period every day. Detainees at these facilities report rapidly deteriorating conditions, including sick inmates, a lack of any medical attention whatsoever, hunger strikes and threats of violence from jail staff enforcing constantly-changing responses to the virus.¹⁵

Now that the virus has reached these facilities, it will spread “‘like wildfire’ due to close quarters, unsanitary conditions, a population that is more vulnerable to COVID-19, and the large number of

¹¹ Matt Katz, WNYC, *In Their Own Words: ICE Detainees Locked Up In NY & NJ Live In Fear Of Coronavirus Spread Behind Bars*, Gothamist, March 24, 2020, available at <https://gothamist.com/news/their-own-words-ice-detainees-locked-ny-nj-live-fear-coronavirus-spread-behind-bars>

¹² Steve Janoski and Monsy Alvarado, *Bergen County Jail Goes on Lockdown After Immigration Detainee Tests Positive*, NorthJersey.com (Mar. 24, 2020), <https://www.northjersey.com/story/news/coronavirus/2020/03/24/bergen-county-jail-lockdown-detainee-tests-positive-coronavirus/2910131001/>.

¹³ Monsy Alvarado, *Handful of Guards in Self-Quarantine After Essex County Jail Officer Positive for Coronavirus*, NorthJersey.com (March 24, 2020), <https://www.northjersey.com/story/news/new-jersey/2020/03/24/essex-county-jail-corrections-officer-tests-positive-coronavirus/2907930001/>

¹⁴ See David Noriega, *2 Coronavirus Cases Confirmed in New Jersey Prison with ICE Detainees*, VICE News (Mar. 22, 2020), https://www.vice.com/en_us/article/epg744/2-confirmed-coronavirus-cases-in-hudson-county-correctional-facility.

¹⁵ See, e.g., Dara Lind, *ICE Detainee Says Migrants Are Going on a Hunger Strike for Soap*, ProPublica, March 23, 2020, available at <https://www.propublica.org/article/ice-detainee-says-migrants-are-going-on-a-hunger-strike-for-soap>; Matt Katz, WNYC, *In Their Own Words: ICE Detainees Locked Up In NY & NJ Live In Fear Of Coronavirus Spread Behind Bars*, Gothamist, (Mar. 24, 2020), <https://gothamist.com/news/their-own-words-ice-detainees-locked-ny-nj-live-fear-coronavirus-spread-behind-bars>.

people that cycle through” the facilities.¹⁶ The close proximity between people, rules and regulations that bar some basic disease prevention measures, and restrictions that prevent people from taking steps to protect themselves from infection, such as accessing hand sanitizer or gloves, or frequently washing their hands with soap. Yet ICE and the county jails remain woefully unprepared and incapable of taking necessary precautions to protect people in their custody, including Petitioners, against a life-threatening illness. Lockdown procedures such as those currently being implemented by the detention facilities are both impermissibly punitive and insufficient to stop the spread of the disease.¹⁷ Indeed, the primary recommended way to avoid the spread of the virus—social distancing—is effectively impossible in a jail setting.

ICE’s failure to recognize this inevitability and take adequate precautions, including releasing people, demonstrates a disregard for the constitutional rights, well-being, and humanity of immigrant detainees, including Petitioners. As individuals suffering with a range of underlying medical issues, Petitioners are particularly unsafe in the jail environment. ICE’s inability to protect them and failure to release them amount to a life-threatening violation of their constitutional right to due process.

III. The balance of equities and public interest weigh in Petitioners’ favor.

Finally, the balance of the equities and the public interest weigh heavily in favor of Petitioners. As discussed above, Petitioners seek to avoid the irreparable harm that they will suffer if they continue to be detained in violation of their constitutional rights, in a jail-like environment where, due to their

¹⁶ The Justice Collaborative, *Explainer: Prisons and Jails Are Particularly Vulnerable to COVID-19 Outbreaks*, <https://thejusticecollaborative.com/wp-content/uploads/2020/03/TJCVulnerabilityofPrisonsandJailstoCOVID19Explainer.pdf>.

¹⁷ *See Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, Centers for Disease Control (Mar. 23, 2020), <http://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (recommending extensive testing, cleaning and quarantining procedures to contain the spread of infection); *see also* Declaration of Dr. Jaimie Meyer, *Velesaca v. Wolf*, 20-cv-1803, ¶ 7 (AKH) (S.D.N.Y. Feb. 28, 2020), ECF 42 (“Meyer Decl.”) (noting that disciplinary segregation and solitary confinement are “not an effective disease containment strategy”).

underlying medical conditions, they face an elevated risk of suffering from a severe case of COVID-19, and possible death, should they contract this highly-contagious virus. This harm to Petitioners greatly outweighs any harm that the government may suffer as a result of their release. The harm to the government if Petitioners are released—that it might be required to create conditions of release or re-detain them at some point, should the pandemic resolve—is purely fiscal or administrative. The Second Circuit has held that where, as here, “a plaintiff alleges constitutional violations, the balance of hardships tips decidedly in the plaintiff’s favor despite arguments that granting a preliminary injunction would cause financial or administrative burdens on the Government.” *Sajous v. Decker*, No. 18-cv-2447 (AJN), 2018 WL 2357266, at *13 (S.D.N.Y. May 23, 2018) (citing *Mitchell v. Cuomo*, 748 F.2d 804, 808 (2d Cir. 1984)); *see also Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017) (characterizing government’s claimed fiscal and administrative harm as “minimal”).

Similarly, the public interest weighs in favor of granting Petitioners’ relief. No public interest is served by permitting the government to detain vulnerable individuals who are at heightened risk of severe illness or death should they be exposed to COVID-19 in a jail setting.

Indeed, the public has an obvious interest in ensuring public health and safety. *See, e.g., Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005) (referring to “public health” as a “significant public interest”). The enormous resources already dedicated around the world demonstrate that the public has a compelling interest in containing the coronavirus pandemic. Fulfilling that interest is critical to preventing the transmission of the virus itself, avoiding overburdening health care facilities, and countless other effects that have been detailed over the last weeks and months. Indeed, public officials throughout the United States, including New York and New Jersey, have determined that, in light of the risks presented by the COVID-19 pandemic, public

interest compels easing jail populations.¹⁸ Just today, the United Nations High Commissioner for Human Rights called on governments around the world to work to decrease jail populations in light of the spread of the virus, noting that detention “should be a measure of last resort, particularly during this crisis.”¹⁹ The High Commissioner “urged governments and relevant authorities to work quickly to reduce the number of people in detention” including “examin[ing] ways to release those particularly vulnerable to COVID-19, among them older detainees and those who are sick . . .” *Id.* Thus the release of Petitioners and other at-risk detainees clearly serves the public interest. The longer they remain detained in jail-like conditions favorable to the spread of infectious disease, the more likely they are to be infected with COVID-19, suffer severe cases of coronavirus due to their underlying conditions, infect others around them, and add to the overwhelming stress on local health care facilities.

Moreover, apart from public health concerns, the public interest is also served when the laws are followed and constitutionally guaranteed process is provided. *See Sajous*, 2018 WL 2537266 at *13 (“The public interest is best served by ensuring the constitutional rights of persons within the United States are upheld.”). As Judge Nathan further determined, in issuing an opinion ordering the

¹⁸ *See, e.g.*, Zusha Elinson and Deanna Paul, *Jails Release Prisoners, Fearing Coronavirus Outbreak*, The Wall Street Journal (March 22, 2020), <https://www.wsj.com/articles/jails-release-prisoners-fearing-coronavirus-outbreak-11584885600> (“Local governments across the U.S. [including in California, New York, Ohio, and Texas] are releasing thousands of inmates in an unprecedented effort to prevent a coronavirus outbreak in crowded jails and prisons.”); Noah Higgins-Dunn, *Coronavirus: New York City to release 300 nonviolent inmates from Rikers Island*, CNBC (Mar. 24, 2020), <https://www.cnbc.com/amp/2020/03/24/coronavirus-new-york-city-to-release-300-nonviolent-inmates-from-rikers-island.html> (describing Mayor Bill de Blasio’s desire to “release inmates who are over age 70 or who have any of the five preexisting health conditions that make them most vulnerable to the coronavirus”); Ganesh Setty and Kara Scannell, *New Jersey will release low-level offenders from jail to prevent coronavirus spread*, CNN (Mar. 24, 2020), <https://www.cnn.com/2020/03/24/us/new-jersey-low-level-offenders-release-coronavirus/index.html> (quoting New Jersey’s Attorney General as saying “But this is the most significant public health crisis we face in our state’s history. And it’s forcing us to take actions that we wouldn’t consider during normal times.”)

¹⁹ *See Urgent action needed to prevent COVID-19 “rampaging through places of detention” – Bachelet*, UNHCR (Mar. 25, 2020), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25745&LangID=e> (“The High Commissioner urged governments and relevant authorities to work quickly to reduce the number of people in detention, noting several countries have already undertaken some positive actions.”)

release of a federal criminal pre-trial detainee in light of the COVID-19 emergency, conditions of release are appropriate as an alternative to incarceration. *See* Exhibit A, Opinion & Order, *United States v. Stephens*, 1:15-cr-00095 (AJN), Doc. No. 2798 (S.D.N.Y. March 19, 2020) (ordering “conditions of 24-hour home incarceration and electronic location monitoring”). An immigration detainee can be ordered to comply with similar conditions, such as check-in appointments with ICE or electronic monitoring, and these types of alternatives to detention regularly report near-perfect compliance rates. *See, e.g., Hechvarria v. Whitaker*, 358 F. Supp. 3d 277, 243-44 n.13 (W.D.N.Y. 2019) (describing DHS’s ability to impose conditions of release but noting the importance of ensuring that a condition does not interfere with medical care); *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) (observing that one of ICE’s ATD programs, the Intensive Supervision Appearance Program, “resulted in a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings”). Thus, there being no countervailing government interest in their continued detention in unsafe conditions, it is in the public interest to release Petitioners, and the equities clearly favor granting them preliminary relief.

CONCLUSION

For the foregoing reasons, Petitioners are entitled to a temporary restraining order and preliminary injunction ordering Respondents to release them, under any appropriate conditions, and enjoining Respondents from arresting them for the purposes of civil immigration detention, during the pendency of their removal proceedings.

Dated: March 25, 2020
Brooklyn, New York

Respectfully submitted,

/s/ Brooke Menschel
Brooke Menschel, Esq.
Mary (Van Houten) Harper, Esq.
Alexandra Lampert, Esq.
Hannah McCrea, Esq.

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Counsel for Petitioner

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

VASIF “VINCENT” BASANK; FREDDY
BARRERA CARRERRO; MANUEL BENITEZ
PINEDA; MIGUEL ANGEL HERNANDEZ
BALBUENA; LATOYA LEGALL; CARLOS
MARTINEZ; ESTANLIG MAZARIEGOS;
MANUEL MENENDEZ; ANTAR ANDRES
PENA; and ISIDRO PICAZO NICOLAS,

Petitioner,

v.

THOMAS DECKER, in his official capacity as
Director of the New York Field Office of U.S.
Immigrations & Customs Enforcement;
CHAD WOLF, in his official capacity as Acting
Secretary, U.S. Department of Homeland Security,

Respondents.

Civ. No. 20-cv-02518

**[PROPOSED] ORDER
TO SHOW CAUSE**

Upon consideration of the declaration of Mary S. (Van Houten) Harper dated March 25, 2020, the Memorandum of Law, and the Petition for Writ of Habeas Corpus, pursuant to Rule 65 of the Federal Rules of Civil Procedure, IT IS HEREBY ORDERED that:

1. Respondents must file a return on the Order to Show Cause why the Petition for Writ of Habeas Corpus and preliminary injunction should not be granted by _____;
2. Petitioners shall have the opportunity to reply by _____;
3. Further relief as the Court may find appropriate;
4. Service of this Order shall be effected electronically by Petitioners on the United States Attorney for the Southern District of New York by _____ am/pm on _____ and shall be deemed good and sufficient service thereof.

Dated: New York, New York

Issued: _____

UNITED STATES DISTRICT JUDGE