UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOSE L. VELESACA and ABRAHAM CARLO UZATEGUI NAVARRO, on their own behalf and on behalf of others similarly situated,

Petitioners-Plaintiffs,

v.

THOMAS R. DECKER, in his official capacity as New York Field Office Director for U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MATTHEW ALBENCE, in his official capacity as the Acting Director for U.S. Immigration and Customs Enforcement; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; CHAD WOLF, in his official capacity as Secretary of the U.S. Department of Homeland Security; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; CARL E. DUBOIS, in his official capacity as the Sheriff of Orange County,

Respondents-Defendants.

Case No. 1:20-cv-1803

PETITIONERS-PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

ROBERT HODGSON
AMY BELSHER
CHRISTOPHER DUNN
MEGAN SALLOMI
New York Civil Liberties Foundation
125 Broad Street, 19th Floor
New York, N.Y. 10004
Tel: (212) 607-3300
rhodgson@nyclu.org

THOMAS SCOTT-RAILTON*
NIJI JAIN
JENN ROLNICK BORCHETTA
The Bronx Defenders
360 E. 161st Street
Bronx, N.Y. 10451
Tel: (718) 838-7878
njain@bronxdefenders.org

Counsel for Petitioners-Plaintiffs

Dated: March 16, 2020
New York, N.Y.

* Law Graduate pending admission, practicing under supervision.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Regulations

INTRODUCTION

This lawsuit challenges Immigration and Customs Enforcement's unannounced policy of detaining virtually everyone it arrests, including people who do not pose a risk of flight or danger and people with disabilities. Based on the recommendations of its risk assessment tool, ICE used to release many of these people. But in response to the Trump Administration's immigration directives, ICE manipulated the tool until it could make only one substantive recommendation: detention without bond. Since then, ICE's New York Field Office has adopted a blanket policy of detaining virtually everyone it arrests, even those the tool itself deems low risk.

This illegal practice of mass detention causes enormous and unnecessary irreparable harm, separating people from their families, jobs, and communities and exposing them to serious health risks without any individualized determination of whether the ongoing denial of liberty is justified. Exacerbating these harms—and increasing the urgency of the petitioners' request for relief—is the threat posed by COVID-19, the pandemic experts predict will spread to New York City area immigration detention centers in a matter of days, bringing with it the threat of infection, pneumonia, sepsis, or even death.

The petitioners, a putative class of people arrested by immigration officials in the New York City area and detained without the procedural protections to which they are entitled, seek class-wide preliminary declaratory and injunctive relief to remedy the government's unlawful detention policy. ICE's New York Field Office arrests thousands of people each year. Many of these people are eligible for release pending the outcome of their immigration proceedings and, under prior administrations, would have been released. However, starting in 2017, the New York Field Office implemented a "No-Release Policy," operationalizing a risk assessment tool that only recommends detention and denying release to virtually everyone arrested. The policy applies even to those whom ICE has identified as a low risk of flight and danger: since mid-2017, approximately

3% of this population has secured release on bond or recognizance. Pursuant to the policy, ICE has unlawfully incarcerated thousands of people in violation of its duties under the Immigration and Nationality Act ("INA") and implementing regulations, the Due Process Clause of the U.S. Constitution, the Administrative Procedure Act ("APA"), and the Rehabilitation Act and implementing regulations. To prevent serious harms to the putative class from the No-Release Policy, the petitioners respectfully request that the Court enter a class-wide preliminary injunction requiring the government to adjudicate—or re-adjudicate—ICE's custody determinations based on individualized assessments of each petitioner's flight risk, danger to the community, and special vulnerabilities such as a disability.

FACTUAL BACKGROUND

This lawsuit is brought on behalf of a putative class of people (the "Petitioner Class") in immigration detention arrested by ICE's New York Field Office who are detained pursuant to Section 1226(a) of Title 8 of the United States Code and whom ICE has denied bond or release on recognizance pursuant to the No-Release Policy. This lawsuit is also brought on behalf of a putative subclass of individuals with disabilities under the Rehabilitation Act (the "Rehabilitation Act Subclass") who are detained pursuant to Section 1226(a) and whom ICE has denied bond or release on recognizance under the No-Release Policy. An analysis of the government's own data reveals that, under the policy, virtually all people arrested by immigration authorities in the New York City area are denied bond or release without an individualized determination.

For people arrested within the jurisdiction of the New York Field Office, ICE's post-arrest processing, including the initial custody determination, generally occurs at the ICE offices in New York City at 201 Varick Street or at 26 Federal Plaza. *See* Declaration of Yvette Tay-Taylor (ECF 14-2) ¶ 10. People who are denied release or bond are generally held at one of four county jails that contract with ICE: Orange County Correctional Facility in New York and the Hudson County

Correctional Facility, Bergen County Jail, and Essex County Correctional Facility in New Jersey (collectively "ICE's New York City-area facilities"). *Id.* ¶ 5; Declaration of Sarah Deri Oshiro (ECF 13) ¶ 7.

ICE's Custody Determination Process

Many of the people whom ICE detains in the interior of the United States are eligible to be released from custody while their removal proceedings are pending. *See* 8 U.S.C. § 1226(a) ("Section 1226(a)"). Section 1226(a) provides that, "pending a decision on whether the alien is to be removed from the United States[,]"

> The Attorney General—
> (1) may continue to detain the arrested alien; and
> (2) may release the alien on—
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
> (B) conditional parole . . . .

The implementing regulation delegates the Attorney General's authority to grant bond or conditional parole to ICE officers. *See* 8 C.F.R. § 1236.1(c)(8). Pursuant to this regulation, the officer must make a determination about the appropriateness of release based on two factors: that "such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. § 1236.1(c)(8). ICE officers are required to make this initial custody determination within 48 hours of detaining someone. *See id.* § 287.3(d); *see also id.* § 1236.1(c)(8). Section 1226(a) and its predecessor statute have been consistently interpreted by the Board of Immigration Appeals itself to authorize the detention of noncitizens based only on an individualized analysis of the two factors identified in the regulation: flight risk or danger to the community. *See Matter of Adeniji*, 22 I. & N. Dec. 1102, 1112-13 (BIA 1999) (construing current Section 1226(a)).

In 2013, ICE implemented a risk classification assessment tool to assist its officers to make these initial custody determinations. *See Immigration Detention in the Risk Classification Assessment Era* (ECF 14-1), at 6; *see also* Tay-Taylor Decl. (ECF 14-2) ¶¶ 10-11 (describing how ICE "makes a custody determination [after arrest] with the assistance of a computer program called the Risk Classification Assessment"). ICE officers input information about the arrested person into the assessment tool, which was originally programmed to generate one of four recommendations: (1) release the person on their own recognizance; (2) authorize release of the person upon posting of bond in a specified amount; (3) defer the decision to the ICE supervisor, or (4) order the person detained. *Id*. ICE officers and supervisors then determined whether to affirm or override this recommendation. *Id*.

ICE memorializes its custody decision on Form I-286, Notice of Custody Determination, which the agency serves on the detainee. *See, e.g.*, ICE, *Bond Management Handbook* (2014) at 3 (attached as Exhibit A to the Supplemental Declaration of Robert Hodgson ("Supp. Hodgson Decl.")). At no point in ICE's post-arrest processing or custody review do detainees have a meaningful opportunity to participate or to contest their custody status: detained people are not provided a hearing, are not served with the underlying evidence against them, are not provided any resources or materials explaining how they might challenge the custody decision, and are not given access to counsel during this process. *See* Oshiro Decl. (ECF 13) ¶ 6; Stave et al., *Evaluation of the New York Immigrant Family Unity Project*, Vera Institute of Justice, Nov. 2017 ("*Vera Evaluation*") (ECF 14-17) at 5, 17 n.34, 20.

Consequently, anyone who is not released after an ICE arrest remains incarcerated at a minimum until their initial "master calendar hearing" before an Immigration Judge, at which point they may request a custody redetermination from the immigration court. *See* 8 C.F.R. § 1003.19(a). At the Varick Street Immigration Court, where people detained by the New York Field Office

appear, the average time between an arrest and initial hearing is several weeks, but such wait times fluctuate and as recently as late 2018 the average wait time was nearly three months. *See, e.g.*, Declaration of David Hausman, *Vazquez-Perez v. Decker*, No. 1:18-CV-10683 (Dec. 5, 2018) (ECF 14-19).

In addition, for most people these initial hearings do not offer a meaningful opportunity to apply for bond, especially for those who are not represented by counsel prior to the hearing. There are a number of reasons why this is. Assembling a bond application is factually and legally complex, as well as time-intensive, almost always involving letters of support and an initial application for immigration relief with supporting evidence. The government does not provide people in detention with information about the materials they would need to submit for a bond application or how they might do so. For the many people who do not have counsel until this initial hearing, it is logistically difficult to collect the supporting materials necessary, some of which may be outside of the country, while being held in jail. Moreover, ICE often does not provide relevant evidence supporting its charges until the initial hearing. These hearings are also held by videoconference, which presents numerous challenges for the detained person's ability to submit an application and participate in a bond hearing, as well as for a lawyer who has not been able to meet with a client prior to the hearing. Finally, a significant number of people in immigration detention speak little or no English, which is a further challenge to preparing the necessary documents and participating in the hearing. *See* Oshiro Decl. ¶¶ 11-25.

Accordingly, many people will have to wait even longer in detention after their initial master calendar hearing while preparing their bond application. Once they reach that bond hearing, however, it becomes clear just how many people have been needlessly detained. Since ICE adopted the No-Release Policy, approximately 40% of people in immigration detention appearing

at the Varick Street Immigration Court have ultimately been granted bond. *See Immigration Court Bond Hearings and Related Case Decisions through January 2020* (ECF 14-3) ("TRAC Data").

ICE Implements the No-Release Policy

In mid-2017, ICE removed the risk classification tool's ability to recommend release on recognizance, after an earlier modification removing the ability to recommend release on bond. Hausman Decl. (ECF 12) ¶¶ 17-18. As a result, since mid-2017 the assessment tool—on which ICE offices across the country rely—now can make only one substantive recommendation: detention without bond.

Also in mid-2017, according to data obtained by the New York Civil Liberties Union under the Freedom of Information Act, *see NYCLU v. ICE*, No. 18-cv-11557 (S.D.N.Y. 2018), the New York Field Office implemented a blanket policy of denying bond or release without an individualized determination of whether detention was necessary based on flight or safety risks. This policy shift, coupled with the reliance on the manipulated risk-assessment tool, led to a categorical denial of bond or release in virtually all cases. Even when the tool refers the custody decision to an ICE supervisor, the result is the same: detention in virtually every case. Hausman Decl. (ECF 12) ¶ 15.

Prior to these changes in policy, the New York Field Office had conducted individualized custody determinations in many cases, releasing significant numbers of people who posed no risk of flight or danger to the community. In 2013 and 2014, about 40% of all people arrested by immigration officials in the New York City area were released or granted bond; between mid-2017 to September 2019, less than 2% were released on recognizance and under one-tenth of 1% had bond set. *See Id.* ¶ 14.

Even for individuals who are plainly eligible for release, the New York Field Office virtually always blindly applies its No-Release Policy. Though ICE officers may deny release or

bond based only on two criteria—risk of flight and danger to the community—the New York Field Office now routinely denies release to people whom ICE's own risk-assessment tool has classified as a low risk of both flight and danger to the community. Between mid-2017, when ICE altered the assessment tool, to September 2019, ICE detained approximately 97% of this low-risk population. *Id*. ¶ 13.

The sharp drop in release rates is even more dramatic given the Trump Administration's shift in focus to arresting people without criminal convictions and who have resided in the United States for years. The No-Release Policy began soon after the Trump Administration rescinded the Obama Administration's enforcement priorities that focused on apprehending noncitizens with serious criminal histories. Under the Trump Administration's new "zero tolerance" policy, any removable noncitizen is subject to arrest and deportation. *See* Memorandum from Sec. of Homeland Security John Kelly to U.S. Immigration Officials (Feb. 20, 2017) ("Priorities Memo") (ECF 14-4) at 2. As a result, during the first year of this administration, there was a 334% spike in ICE arrests of noncitizens in New York City with no criminal record who had resided in the United States for ten or more years. *See* NYC Mayor's Office of Immigrant Affairs, *Fact Sheet: ICE Enforcement in New York City* (ECF 14-6) ("Fact Sheet") at 2. By the end of 2018, the number of people with no criminal record arrested by ICE in the New York City area had skyrocketed by 414%. *Id*. People without criminal convictions constituted an even larger portion of overall arrests last year: 36% in 2019 versus 13% in 2016. *Id*.

As immigration officials have expanded arrests beyond those convicted of criminal offenses, more and more people who pose no flight or safety risk are being jailed as a matter of course. For example, named petitioner Abraham Uzategui has strong ties to the community, including a wife and two daughters in Newburgh, New York, where he has lived for several years. Declaration of Abraham Uzategui ("Uzategui Decl.") ¶ 3. He is a regular member of his local

church and volunteers at his older daughter's school. *Id.* ¶¶ 4-5. He has never been arrested and had never been in jail prior to his detention by ICE. *Id.* ¶ 13. His only contact with the criminal justice system is an open summons for allegedly shoplifting children's shoes, at a time when he had lost his job and his daughter was being bullied at school for wearing used clothes. *Id.* ¶¶ 10-11. Yet ICE has detained him without bond.

In addition to the change in who is arrested and kept in detention, the Trump Administration has vastly expanded its enforcement actions. Since President Trump has taken office, the number of ICE arrests in the New York City area has risen by over one third. *See* Fact Sheet (ECF 14-2).

As a result of the convergence of these three separate but related policy changes, the New York Field Office now is arresting record levels of immigration detainees and ordering them detained without bond, even when they present no danger to the community or risk of flight. And yet, as discussed in the previous section, once people detained by ICE receive a bond hearing in front of an Immigration Judge in New York City, approximately 40% ultimately are granted bond based on the Immigration Judge's assessment of the same flight risk and dangerousness factors. *See* TRAC Data (ECF 14-3).

The New York Field Office has provided no explanation—or even acknowledgement—of this sweeping policy change.

The Economic, Legal, Medical, and Psychological Harms of the No-Release Policy

The No-Release Policy results in the blanket detention of thousands individuals, many of whom an Immigration Judge later will determine should be released. *See* TRAC Data (ECF 14-3). This illegal detention has unnecessarily caused and will continue to cause serious harm, illness, injury, deportation, the loss of income on which entire families depend, and even death.

Legal and Economic Consequences

While individuals await bond hearings before an Immigration Judge, ICE detains them in criminal jails under the same restrictions as people held on criminal charges or serving criminal sentences. Oshiro Decl. ¶¶ 6-7; Declaration of Marinda Van Dalen ("Van Dalen Decl.") ¶¶ 14, 18. For many petitioners, this detention prevents them from being able to meaningfully prepare for their immigration cases and seek immigration relief. It is not uncommon for people to give up on their immigration cases, sacrificing any claim they have for relief, simply because of how much they are suffering in detention. Van Dalen Decl. ¶ 37; Declaration of Jose L. Velesaca ("Velesaca Decl.") (ECF 11) ¶ 6. Phone calls and visits in the detention facilities are limited and prohibitively expensive for some. *See* Uzategui Decl. ¶ 25.

Most people arrested under Section 1226 have lived in the U.S. for many years. According to a recent report, approximately half of those with cases in the New York City immigration courts, like the putative class members here, are being kept from their children while detained. *Vera Evaluation* (ECF 14-17) at 19-20 (reporting that, on average, indigent people represented through the NYC immigration public defender program had been living in the U.S. for 16 years and that 47% of them had children living with them in the United States). Two-thirds of those identified in the same report were employed at the time of their arrest, and many were the primary breadwinners for their families. *See id.* at 17. As long as they remain detained, they and their families are denied that vital employment income. *See* Uzategui Decl. ¶ 31.

Medical and Mental Health Consequences

For those with mental or physical health conditions, or who will come to need medical care while detained, the harms of detention are especially acute and can persist until long after they have been released. The health care available at ICE's New York City-area facilities is grossly

inadequate. *See* Van Dalen Decl. ¶¶ 18-45; *Ailing Justice: New Jersey Inadequate Healthcare, Indifference, and Indefinite Confinement in Immigration Detention*, Human Rights First (Feb. 2018) (ECF 14-14) ("*Ailing Justice*") at 1-2, 6-10. The result is severe harm to people's health and, in some cases, even death. *See* Van Dalen Decl. ¶¶ 41-42. ICE's New York City area facilities have a track record of denying people access to vital medical and mental health treatment, including delays in needed surgeries; failure to provide lifesaving medication for people with epilepsy and cancer; failure to provide medically-required food to individuals with diabetes resulting in extreme harm to their health; and placing people at risk of suicide in the equivalent of solitary confinement. *See Ailing Justice* at 1-2, 6-10; Van Dalen Decl. ¶¶ 31-43. At Hudson County Correctional Facility, people have been told to "drink water for serious pain." *See* Detention Watch Network, *Hudson County Correctional Facility: Immigrant Detention Inspection Series* (2016) ("Detention Watch") at 2 (attached as Exhibit E to Supp. Hodgson Decl.). The Department of Homeland Security's own Office of the Inspector General reported invasive procedures, substandard care, long waits for medical care and hygiene products, and mistreatment in ICE detention facilities, including indiscriminate strip searches and, in one case, a multiday lockdown for sharing a cup of coffee. *See* Dep't of Homeland Security, Office of Inspector General, *DHS OIG Inspection Cites Concerns With Detainee Treatment and Care at ICE Detention Facilities* (2017) ("*OIG Report*") (ECF 14-7). Collectively, the deficiencies in the medical care provided at ICE's New York City area facilities subject the petitioners to the risk of serious and even life-threatening medical complications during the weeks and months before they can seek release from an Immigration Judge.

Beyond the medical risks described above, people in detention are also at a higher risk of experiencing severely deteriorating mental health. It is well-established that immigration detention

has "severe mental health consequences" on those who are confined. *See, e.g.*, M. von Werthern et al., *The impact of immigration detention on mental health: a systematic review*, 18 BMC Psychiatry 382 (2018) ("BMC Psych.") (attached as Exhibit D to Supp. Hodgson Decl.). Those who already have mental health challenges risk decompensating as their conditions get worse, while detention can cause new trauma to those without a preexisting diagnosis. *See* Van Dalen Decl. ¶ 36; BMC Psych. In the named petitioner Jose L. Velesaca's case, his mental health condition was "profoundly affected by detention," with his Post-Traumatic Stress Disorder becoming significantly more acute and the development of Major Depressive Disorder, which if it deteriorates further may require hospitalization. Declaration of Joseph Giardino ("Giardino Decl.") ¶¶ 3-7 (Mar. 6, 2020). Because of language barriers, insufficient screening, and general lack of care, even individuals with "obvious symptoms of mental health problems" will see "their needs and requests for care and evaluation go ignored." Van Dalen Decl. ¶ 35. This leads to "mental health difficulties persist[ing] well beyond release." BMC Psych.

Consequently, not only do these New York City area jails fail to provide the care people need when they are first arrested, they expose people to further serious medical and psychological harm that then goes untreated. The results can be as tragic as they are irreversible. Hudson County Jail, where many putative class and subclass members are held, reported six inmate deaths between June 2017 and March 2018 alone, including four suicides. *See* Monsy Alvarado, *After Latest Suicide, Hudson County Takes Steps to Terminate Jail's Medical Provider*, northjersey.com, Mar. 26, 2018) (ECF 14-8). The Essex County Correctional Facility, which was the subject of a recent DHS report documenting "serious issues relating to safety, security, and environmental health that require ICE's immediate attention," DHS OIG, *Issues Requiring Action at the Essex County Correctional Facility*, Feb. 13, 2019 (ECF 14-11) at 2, has had two inmate deaths since 2018, and

over sixty detained people have been placed on suicide watch since 2015, *see* Joe Brandt, *An Inmate Died at the Essex County Jail 4 Days Ago*, nj.com, Mar. 22, 2019 (ECF 14-12).[1] Lack of care has placed individuals at risk of strokes, heart attacks, renal failure, amputation, life-threatening heart conditions, kidney failure, and blindness. Van Dalen Decl. ¶¶ 43(a), (b), (c). And the "serious and possibly irreversible damage to the person's health" that results from such lack of care often lasts long after release. *Id.* ¶ 46.

Detention does not need to be prolonged in order for people to be placed in life-threatening danger, even in the absence of a pandemic. For example, when one local man, Carlos Bonilla, was placed in immigration detention at Hudson County Jail, he suffered from cirrhosis of the liver, a potentially deadly condition if left untreated. Van Dalen Decl. ¶ 41. Although he had been able to manage his condition on the outside, once he was detained the facility did not provide him the care he needed or monitor his condition. *Id.* After bleeding for three days, he was taken to a hospital where he hemorrhaged to death on the very same day that his bond hearing was scheduled before an Immigration Judge. *Id.*

Unmet medical and mental health needs also directly harm individuals' ability to participate effectively in their removal proceedings and in bond applications before an Immigration Judge. Preparing for such proceedings often involves revisiting traumatic past experiences, including violence or rape, both before and during detention, and it may also entail revealing sensitive information such as sexual orientation or gender identity. *See* Oshiro Decl. ¶ 20; Velesaca Decl. ¶¶ 3-5. The experience of trauma can leave individuals with serious difficulty remembering

[1] *See also* Lea Ceasrine, *Dozens of ICE Detainees Have Been Placed on Suicide Watch* at 2, documentedny.com, Apr. 17, 2019 (ECF 14-13).

traumatic events and communicating them, *see* Giardino Decl. ¶¶ 2-4, 6,[2] and it can therefore interfere with an individual's ability to present a coherent first-person account and establish their credibility, both of which can be critical to an application for bond and claims for relief, *see id.*[3] The result is that, as research suggests, "an unknown number of legal permanent residents (LPRs) and asylum seekers with a lawful basis for remaining in the United States may have been unfairly deported from the country because their mental disabilities made it impossible for them to effectively present their claims in court." *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System*, Human Rights Watch & ACLU (2010) (ECF 14-16) at 4, 25-31.

For individuals whose condition has deteriorated in detention, this risk is even greater. Individuals with visual or auditory disabilities are not provided the aids they need, which can limit their ability to communicate or prepare documents effectively. *See* Van Dalen Decl. ¶ 36; Detention Watch at 2 (describing a person having their glasses confiscated and not replaced in detention). Untreated or under-treated medical conditions can make it hard for individuals to accomplish even daily tasks like getting out of bed or walking down the stairs, much less participating in the complex and time-intensive task of preparing for an application for a bond

---

[2] *See also* Chris R. Brewin, *A Cognitive Neuroscience Account of Posttraumatic Stress Disorder and its Treatment*, 39 Behaviour Research & Therapy 373 (2001) ("Disorganization in the trauma memory, indexed by gaps in recall and difficulty in producing a coherent narrative, is typical of normal trauma memories.") (attached as Exhibit F to Supp. Hodgson Decl.); Michael C. Anderson & Collin Green, *Suppressing Unwanted Memories by Executive Control*, 410 Nature 366 (2001) ("When people encounter cues that remind them of an unwanted memory and they consistently try to prevent awareness of it, the later recall of the rejected memory becomes more difficult.") (attached as Exhibit G to Supp. Hodgson Decl.).

[3] *See also* Susan M. Meffert et al., *The Role of Mental Health Professionals in Political Asylum Processing*, 38:4 J. Am. Acad. Psychiatry L. 479, 484 (2010) (attached as Exhibit H to Supp. Hodgson Decl.); Carol M. Suzuki, *Unpacking Pandora's Box: Innovative Techniques for Effectively Counseling Asylum Applicants Suffering from Post-Traumatic Stress Disorder*, 4 Hastings Race & Poverty L. J. 235 (2007) (attached as Exhibit I to Supp. Hodgson Decl.).

hearing or immigration relief. Van Dalen Decl. ¶ 34; Oshiro Decl. ¶¶ 15-23. Consequently, many people end up losing bond or being deported not because their claims lack merit, but because they have a disability.

New York City area detention facilities' lack of medical and mental health care capacity is particularly dangerous to putative class members in light of the ongoing COVID-19 pandemic. During pandemics, correctional facilities become "ticking time bombs" as "[m]any people crowded together, often suffering from diseases that weaken their immune systems, form a potential breeding ground and reservoir for diseases." Saint Louis University, *"Ticking Time Bomb," Prisons Unprepared For Flu Pandemic*, ScienceDaily (2006) (attached as Exhibit B to Supp. Hodgson Decl.). As Dr. Jaimie Meyer, a professor at Yale Medical School and an expert in the field of public health in jails and prisons, describes, "the risk posed by COVID-19 in jails and prisons is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected." Declaration of Dr. Jaimie Meyer ("Meyer Decl.") ¶ 7 (Mar. 15, 2020). This is due to a number of factors: the close proximity of individuals in those facilities; their reduced ability to protect themselves through social distancing; the lack of necessary medical and hygiene supplies ranging from hand sanitizer to protective equipment; ventilation systems that encourage the spread of airborne diseases; difficulties quarantining individuals who become ill; the increased susceptibility of the population in jails and prisons; the fact that jails and prisons normally have to rely heavily on outside hospitals that will become unavailable during a pandemic; and loss of both medical and correctional staff to illness. *Id.* ¶¶ 7-19. ICE's New York City area facilities are no exception: at Bergen County Jail in 2019, a serious mumps outbreak resulted in the quarantine and full lock down of people in ICE custody.

See ICE Jail in Bergen County Quarantined (ECF 14-9); *6 Inmates at New Jersey Jail Came Down With The Mumps* (ECF 14-10).

COVID-19 is highly contagious—currently our immune systems have not built up a tolerance, and no vaccine exists. Meyer Decl. ¶¶ 19-20. As a result, "it is only a matter of time" before Covid-19 appears in jails. Nicole Wetsman, *Prisons and Jails Are Vulnerable To COVID-19 Outbreaks*, TheVerge (Mar. 7, 2020) (attached as Exhibit C to Supp. Hodgson Decl.). While the precise levels of risk are unknown, recent data "suggest[] serious illness occurs in up to 16% of cases, including death." Meyer Decl. ¶ 21. In other countries where the spread of COVID-19 is further advanced, it has spread to jails and prisons, with some countries releasing people from detention in response. *Id.* ¶¶ 24.

Yet while the spread of COVID-19 to New York City area facilities is a matter of "days, not weeks," *id.* ¶ 40, these facilities "are dangerously under-equipped and ill-prepared to prevent and manage a COVID-19 outbreak," *id.* ¶ 26. This ill-preparedness increases both the risk of infection and the risk of morbidity and mortality if infected. *Id.* ¶¶ 25-40. People with serious cases of COVID-19 may require intravenous fluids, supplemental oxygen, ventilators, and intravenous antibiotics, which will likely be quickly depleted to the extent these facilities have them at all. *Id.* ¶¶ 22, 26, 34. The result will be widespread infection, serious illness (such as pneumonia and sepsis), and even death. *Id.* ¶ 25-41. This danger is higher still for class members with chronic health conditions, and ultimately the harm would extend to detained individuals, jail and prison staff, and the broader community alike. *Id.* ¶ 41.

ARGUMENT

The petitioners seek a preliminary injunction enjoining the No-Release Policy and ordering the defendants to perform an individualized assessment for all future release decisions and to re-assess the detention decisions of all class members currently being held pursuant to the No-Release

Policy. To obtain a preliminary injunction, the petitioners must show "'(1) irreparable harm absent injunctive relief; (2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor; and (3) that the public's interest weighs in favor of granting an injunction.'" *Citigroup Glob. Markets, Inc. v. Mun. Elec. Auth. of Georgia*, No. 14-cv-2903-AKH, 2014 WL 3858509, at *2 (S.D.N.Y. June 18, 2014) (quoting *Red Earth LLC v. United States,* 657 F.3d 138, 143 (2d Cir.2011)).

The petitioners are unnecessarily suffering significant irreparable harm due to the No-Release Policy, which violates the INA and its implementing regulations, the Due Process Clause, the APA, and the Rehabilitation Act and its implementing regulations. It is also in the public interest to issue the requested injunction to prevent ICE's ongoing illegal conduct and avoid the significant public expense of unnecessary detention.[4]

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.'" *Citigroup Glob. Markets, Inc.*, 2014 WL 3858509, at *2 (quoting *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009)). 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).

[4] The petitioners have previously filed a Motion for Class Certification on February 28, 2020 (Dkt. Nos. 9, 10), and an Amended Motion for Class Certification on March 16, 2020. 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." *Strouchler v. Shah*, 891 F. Supp. 2d 504, 517 (S.D.N.Y. 2012) (citation and internal quotation marks omitted). 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 the district court did not abuse its discretion in relying on [six affidavits from putative class members] in concluding that the then-putative class suffered irreparable harm warranting a preliminary injunction"); *see also Abdi v. Duke*, 280 F. Supp. 3d 373, 400–01 (W.D.N.Y. 2017) (granting preliminary classwide relief based on evidence of harm to the putative class), *partially vacated on other grounds sub nom Abdi v. McAleenan* (2019).

The petitioners and those similarly situated will suffer irreparable harm without injunctive relief. Their injuries are imminent and certain—the New York Field Office has fully implemented the No-Release Policy and orders people detained daily pursuant to its terms. The petitioners face irreparable harm in the form of detention that exposes people to serious medical risks—increasing daily with the spread of COVID-19—and harms their families, as well as the ongoing violation of constitutional rights.

Detention, especially where it exposes people to other risks, is plainly irreparable harm. Several courts in this circuit have concluded that "[t]he deprivation of [an alien's] liberty is, in and of itself, irreparable harm." *Peralta-Veras v. Ashcroft*, No. CV 02-1840 (IRR), 2002 WL 1267998, at *6 (E.D.N.Y. Mar. 29, 2002). And this harm is compounded by the fact that the petitioners' detention in ICE's New York City-area facilities causes extraordinary emotional and physical distress, including irreversible damage to people's health and even death. *See* discussion *supra* at 8-15; *see also Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir. 2017) (irreparable harms of immigration detention include "subpar medical and psychiatric care").[5] There are numerous putative class members who are especially medically vulnerable, particularly to COVID-19, including: Mr. F.B.G., who is 47 years old and HIV-positive; Mr. U.E.T., who is 63; Mr. O.O.,

[5] In particular, the rapidly-spreading COVID-19 pandemic, the manifest under-preparedness of ICE's New York City-area facilities to address the pandemic, and the fact that detention deprives individuals of the most effective means of protecting themselves, mean that petitioners "face imminent risk to their health, safety, and lives." *See, e.g.*, *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 214 (E.D.N.Y. 2000), *aff'd sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003); *see also City of Costa Mesa v. United States*, No. 820CV00368JLSJDE, 2020 WL 882000, at *1 (C.D. Cal. Feb. 21, 2020) (granting temporary restraining order of government action that would increase risk of COVID-19 transmission). It is not a question of whether but when COVID-19 will spread to these facilities, with Dr. Meyer estimating that it is a matter of days. Meyer Decl. ¶ 40. Other experts in the field join in the assessment that "it is only a matter of time" before COVID-19 appears in jails and "[a]ll prisons and jails should anticipate that the coronavirus will enter their facility." Wetsman, *Prisons and Jails Are Vulnerable.* An approximate rate of serious illness of 16% among those infected in the population at large—which does not account for the "significantly higher risk" in the context of detention—is essentially a guarantee that once COVID-19 enters these facilities some individuals will become gravely ill and that some may even die. Meyer Decl. ¶ 21, 23, 26-36. The risk is even greater for those with special vulnerabilities. *Id.* ¶ 21.

who is 40 and has diabetes; Ms. M.M., who is 33 and has asthma; and Mr. T.Q., who is 31, has hypertension and arrhythmia, and in November 2019 was hospitalized with a life-threatening condition while detained. Declaration of Andrea Saenz ¶¶ 3-7 (Mar. 16, 2020).

Detention also results in families losing access to incomes on which they rely. *See id.* at 995. As just one example, the named petitioner Abraham Uzategui describes how his wife and two young children have struggled to pay the rent and bills, and even struggled to have enough to eat, while he is in detention. *See* Uzategui Decl. ¶¶ 24, 31-32.

Finally, in addition to the medical, emotional, and economic harms resulting from detention, the petitioners have suffered and will continue to suffer constitutional violations. *See* discussion *infra* at 23-26, 30-31. Such violations by definition qualify as irreparable harm. *See, e.g., Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). Because the petitioners are placed in imminent risk of all these severe harms related to the unlawful deprivation of their liberty, they have demonstrated irreparable harm.

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

The New York Field Office's generalized policy of refusing to provide an individualized custody determination to virtually everyone it arrests violates multiple federal statutes and the United States Constitution.[6] First, the No-Release Policy violates the INA and its implementing regulations—which require an individualized custody determination within 48 hours of arrest—and must be set aside as contrary to law pursuant to the APA. Second, ICE separately and independently violated the APA by departing from prior policy *sub silentio* without providing any

[6] Even if the Court were to find that the petitioners had not shown a clear and substantial likelihood of succeeding on the merits of these arguments—which they have—here they need only show a "serious question going to the merits," since the balance of hardships "tip[s] decidedly in [their] favor." *Citigroup Glob. Markets, Inc.*, 2014 WL 3858509, at *2.

justification for doing so. Third, pursuant to a separate requirement of the APA, the No-Release Policy needed to go through notice-and-comment rulemaking, which it did not. Fourth, ICE's violation of its own rules and regulations must be struck down pursuant to the Supreme Court's decision in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Finally, by denying people with disabilities meaningful and equally effective access to their bond hearings and immigration benefits, the No-Release Policy violates the Rehabilitation Act and DHS's own regulations implementing the Act.

A. The No-Release Policy is Contrary to the INA and Its Implementing Regulations

Because the INA and its implementing regulations require that ICE perform an individualized assessment of each putative class member's appropriateness for release within 48 hours of their arrest, the No-Release Policy is contrary to law and must be set aside pursuant to the APA. The petitioners are detained pursuant to 8 U.S.C. § 1226(a), which provides that ICE "may continue to detain" a person it arrests or "may release" that person on bond or on parole. The regulations implementing this provision provide detailed criteria for ICE officers to exercise their discretion in making this custody determination. *See* 8 C.F.R. § 1236.1(c)(8). And the Board of Immigration Appeals' own precedential decisions require that custody determinations be made based on an individualized assessment.

The No-Release Policy violates those standards because the New York Field Office fails to make individualized custody determinations and has instead adopted a blanket policy of detention. Under binding Supreme Court case law, the No-Release Policy therefore violates Section 1226(a) and its implementing regulation on a plain reading of those authorities and as they must be construed to comply with the Constitution.

(1) *The No-Release Policy Unambiguously Violates the INA and its Implementing Regulations*

The Supreme Court repeatedly has recognized that INA provisions that give executive branch officials discretion to release people pending a decision on removal require the government to apply some level of individualized determination in making the custody decision. In *INS v. Nat'l Ctr. for Immigrants' Rights, Inc. ("NCIR")*, the Court analyzed a provision of the INA stating that certain people in immigration detention "'may, in the discretion of the Attorney General . . . be continued in custody; or . . . be released under bond . . . containing such conditions as the Attorney General may prescribe.'" 502 U.S. 183, 191 n. 7 (1991) (quoting 8 U.S.C. §1252(a)). The Court held that, in order to comply with the statute, the permissive "may" language required the Attorney General to perform an "individualized determination," since "in the absence of such judgments, the legitimate exercise of discretion is impossible." *Id.* at 194-95. Here, the detention statute provides exactly the same options to the Attorney General, who "may continue to detain" the person arrested by ICE, or "may release" that person on bond or conditional parole. Section 1226(a)(1)-(2). Consequently, in order to comport with *NCIR*, that decision must be based on an individualized determination and not on a blanket No-Release Policy.

Similarly, in *Reno v. Flores*, the Court considered the same detention statute as in *NCIR*, and it reiterated that the decision whether to detain or release requires "'some level of individualized determination.'" 507 U.S. 292, 313 (1993) (quoting *NCIR*, 502 U.S. at 194). In the context of children held in immigration detention, it held that the government may use "reasonable presumptions and generic rules" to guide detention decisions, but it held that an appropriate exercise of discretion also included "determinations that are specific to the individual and necessary to accurate application of the [implementing] regulation: Is there reason to believe the alien deportable? Is the alien under 18 years of age? Does the alien have an available adult relative

or legal guardian? Is the alien's case so exceptional as to require consideration of release to someone else?" *Id.* at 313-14.

Finally, in *Jean v. Nelson*, the Court considered a statutory provision permitting the Attorney General, "in his discretion," to parole certain people held in immigration detention if their release would be "in the public interest." 472 U.S. 846, 848 (1985) (citing 8 U.S.C. § 1182(d)(5)(A)). Again, the Court held that when immigration officials "exercise[d] their discretion," the statute required them "to make individualized determinations of parole." *Id.* at 857. Interpreting *Jean*, the Tenth Circuit held that the government's failure to make individualized parole determinations violated a federal statute providing discretionary parole for asylum seekers. *See Marczak v. Greene*, 971 F.2d 510, 512-15 (10th Cir. 1992). The court interpreted the statute in light of parole regulations promulgated by the agency, which provided factors for the agency to weigh in considering release, and found the agency was required "to make a comprehensive determination" in each individual case. *See id*. at 515. Applying *Jean*, the court reasoned that "as a logical matter, we do not see how an immigration official *could* base his decision on a general rule, given the Supreme Court's requirement that the district director 'make *individualized determinations* of parole.'" *Id.* (citing *Jean,* 472 U.S. at 857).

Here, because Section 1226(a) provides ICE with the discretion to release people on bond or recognizance, ICE officers cannot adopt a blanket detention policy and must conduct an individualized determination of whether detention is necessary. Like the regulations in *Marczak*, the implementing regulation here contains detailed instructions concerning the exercise of this discretion, providing that ICE officers may release an individual who "demonstrate(s) to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. § 236.1(c)(8).

Furthermore, immigration courts and immigration officials have acknowledged just such an individualized assessment requirement. Section 1226(a) and its predecessor statute have been consistently interpreted by the Board of Immigration Appeals to authorize the detention of noncitizens contingent upon an individualized analysis of the two factors identified in the regulation: flight risk or danger to the community. *See, e.g.*, *Matter of Adeniji*, 22 I. & N. Dec. 1102, 1112-13 (BIA 1999) (construing INA § 236(a) and 8 C.F.R. § 236.1(c)(8)). And the New York Field Office's practice prior to adopting the No-Release Policy reflects that the office itself understood that its custody decisions required individualized consideration. Prior to mid-2017, that office released significant numbers of people who posed no risk of flight or danger to the community. In 2013 and 2014, about 40% of all people arrested by immigration officials in the New York City area were released or granted bond; between mid-2017 to September 2019, less than 2% were released on recognizance and under one-tenth of 1% had bond set. *See* Hausman Decl. ¶ 14.

The No-Release Policy is exactly the type of broad-based, generalized rule incompatible with individualized determinations.[7] Because the policy strips ICE officers of their discretion, requiring them to deny release in virtually every case, it unlawfully nullifies the statute's and the regulation's directive that officers "*may*" release people in ICE custody who do not pose a risk of flight or danger to the community. In the absence of individualized review, "the legitimate exercise of discretion is impossible." *NCIR*, 502 U.S. at 194-95. Thus, the government's No-Release

[7] In a recent case involving ICE field offices denying parole in 92% to 100% of cases, the court held that "the numbers are irrefutable" and ICE had a categorical policy of "denying parole in virtually all cases." *Damus v. Nielsen*, 313 F. Supp. 3d 317, 342 (D.D.C. 2018).

Policy violates the INA and its implementing regulation. Because the policy is contrary to law, it should be enjoined and set aside under the APA. *See* 5 U.S.C. § 706(2)(A).[8]

(2) *The Doctrine of Constitutional Avoidance Mandates That Section 1226(a) and Its Implementing Regulation Be Construed to Require Individualized Initial Custody Determinations*

As described above, the statute is clear, and the Court need not invoke the principle of constitutional avoidance to find that the No-Release Policy violates Section 1226(a) and its implementing regulation. However, were the government to contend—contrary to BIA decisions and ICE's own practice—that the statute and regulations somehow are ambiguous, constitutional concerns raised by any contrary reading of the law would require that any ambiguity be resolved by finding that the statute does not permit the New York Field Office's blanket and unjustified detention policy. Specifically, if the statute permitted detention without any individualized determination, it would run afoul of the Due Process Clause.

Courts must read a statute to avoid serious constitutional doubts when it is "fairly possible" to do so. *Zadvydas*, 533 U.S. at 689; *see also Clark v. Martinez*, 543 U.S. 371, 381 (2005) (the avoidance canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"). In particular, courts have consistently "read significant limitations" into the "immigration statutes in order to avoid their constitutional invalidation." *Zadvydas*, 533 U.S. at 689; *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 843 (2018) (the

[8] In addition, ICE's violation of its own regulations is arbitrary and capricious since "[i]t is axiomatic . . . that an agency is bound by its own regulations" and "an agency action may be set aside as arbitrary and capricious if the agency fails to 'comply with its own regulations.'" *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (internal quotation marks and citations omitted); *see also* 5 U.S.C. § 706(2)(A).

avoidance canon "permits a court to choose between competing plausible interpretations of a statutory text") (internal quotation marks and emphasis omitted).

Here, the Court must construe Section 1226(a) to comply with the Due Process Clause pursuant to a fair reading of the statute. And "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas*, 533 U.S. at 690. As a result, "[d]etention in connection with immigration proceedings is permissible only in 'certain special and narrow nonpunitive circumstances' . . ., where a special justification . . . outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Kouadio*, 352 F. Supp. 3d at 238 (Hellerstein, J.) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)). The Supreme Court has recognized two legitimate "special justifications" for immigration detention: "preventing flight" and "protecting the community." *Zadvydas*, 533 U.S. at 690-91. These are the same two justifications that the INA's implementing regulation require ICE officers to consider when determining a person's custody status. The government cannot invoke either of these "special justifications" to explain the near-categorical detention of the petitioners here; the New York Field Office detains virtually everyone it apprehends, including those it has assessed as being both a low flight risk and low risk of danger to the community.

As such, the Constitution does not permit a reading of the statute that grants the government unlimited discretion to detain people absent any justification based on an assessment of their flight risk or danger to the community. In *Zadvydas*, the Supreme Court found that the words "may detain" in the INA did not confer "unlimited discretion" and could not be constitutionally interpreted to permit indefinite detention. *See* 533 U.S. at 697. Similarly, in *R.I.L-R v. Johnson*, the District Court for the District of Columbia applied the doctrine of constitutional avoidance to

Section 1226(a), finding that it did not afford DHS unfettered discretion to detain people absent individualized assessments of their suitability for release. 80 F. Supp. 3d 164, 186-90 (D.D.C. 2015). Moreover, "[a]s the Second Circuit has made clear, . . . immigration regulations which are derived from and intended to protect constitutional rights are to be liberally applied." *Ying Fong v. Ashcroft*, 317 F. Supp. 2d 398, 403 (S.D.N.Y. 2004) (Hellerstein, J.) (citing *Montilla v. INS,* 926 F.2d 162 (2d Cir.1991) and *Waldron v. INS,* 17 F.3d 511 (2d Cir.1993)). This is plainly the case here, as the statute's implementing regulation safeguards a non-citizen "individual's constitutionally protected interest in avoiding physical restraint." *Kouadio v. Decker*, 352 F. Supp. 3d 235, 238 (S.D.N.Y. 2018) (Hellerstein, J.) (quoting *Zadvydas*, 533 U.S. at 690).

Section 1226(a) must therefore be construed here to preclude generalized, unjustified detention. Instead, it requires the government to conduct individualized initial custody determinations based on the justifications for detention identified in *Zadvydas* and in Section 1226(a)'s implementing regulations: whether the individual is a flight risk or a danger to the community. *See Calderon v. Sessions*, 330 F. Supp. 3d 944, 956 (S.D.N.Y. 2018) (finding a policy violates due process "[w]hen a government agency makes available an immigration process to a class of persons but then deprives a member of the class a fair opportunity to engage in the process, with no explanation or justification"). This is—at the very least—a "fairly possible" reading of the statute, *Zadvydas*, 533 U.S. at 689, since not only federal courts but, as noted above, immigration courts and even immigration officials in practice have so interpreted it.

For these same reasons, separate and apart from any question of statutory construction, the No-Release Policy violates the Due Process Clause. Even if the statute were to grant ICE unfettered discretion to wrench large numbers of people out of their communities and place them in detention without any individualized determination of whether there was "a special justification" that

"outweighs the 'individual's constitutionally protected interest in avoiding physical restraint,'" *Kouadio*, 352 F. Supp. 3d at 238 (quoting *Zadvydas*, 533 U.S. at 690), the Constitution does not.

B. The No-Release Policy is Arbitrary and Capricious in Violation of the APA

As an independent basis for relief, because the government has failed to announce or justify its adoption of the No-Release Policy, it is arbitrary and capricious and must be set aside on that basis alone. Under the APA, an agency is required to announce that it is shifting from a prior policy and must provide an explanation for why it is doing so. ICE has completely failed to do either, instead adopting the No-Release Policy *sub silentio* and without justification.

An agency cannot depart from a prior policy *sub silentio*. It is "a longstanding principle of administrative law that '[a]n administrative agency has a duty to explain its ultimate action.'" *Nat. Res. Def. Council v. Dep't of Interior*, 410 F. Supp. 3d 582, 596 (S.D.N.Y. 2019) (quoting *Cablevision Sys. Corp. v. F.C.C.*, 570 F.3d 83, 92 (2d Cir. 2009)). When an agency changes its position, this "reasoned explanation" requirement "would ordinarily demand that it display awareness that it *is* changing position." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox TV*"); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). Thus, "[a]n agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Fox TV*, 556 U.S. at 515. Instead, it must "display awareness that it is changing position and show that there are good reasons for the new policy." *Encino Motorcars*, 136 S. Ct. at 2126 (internal quotation marks omitted). And "an agency must also be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." *Id.* (internal quotation marks omitted).

None of that happened here. ICE unlawfully changed its established policy of conducting individualized initial custody determinations based on flight risk and danger to the community—provided for in its own regulations, confirmed in BIA decisions, and evidenced by years of prior

practice—when it silently adopted the No-Release Policy in 2017. *See Saget v. Trump*, 375 F. Supp. 3d 280, 355 (E.D.N.Y. 2019) (noting that the explanation requirement applies "equally to practices implied from agency conduct" and is "not limited to formal rules or official policies"). The policy change here can plainly be implied by the agency's conduct: in 2016, ICE allowed release or bond to about half of people assessed as a low risk of flight or danger to the community; since June 5, 2017, it has denied release or bond to nearly all of these people. *See* Hausman Decl. ¶ 14. ICE effected this policy change without "display[ing] awareness that it [wa]s changing position" or "show[ing] that there [we]re good reasons for the new policy." *See Fox TV*, 556 U.S. at 515. Since the time of its enactment, DHS has not provided public notice or even acknowledged the policy change. *See Encino Motorcars*, 136 S. Ct. at 2126; *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 383 (S.D.N.Y. 2019); *Am. Wild Horse Pres. Campaign v. Purdue*, 873 F.3d 914, 927 (D.C. Cir. 2017) ("The [agency's] failure even to acknowledge its past practice and formal policies . . . let alone to explain its reversal of course," is arbitrary and capricious). Moreover, because thousands of people seeking release have relied on the criteria articulated by the prior policy that ICE has effectively abandoned, ICE "must provide a more detailed explanation." *Fox TV*, 556 U.S. at 515-16. Thus, the adoption of the No-Release Policy constitutes an arbitrary and capricious change in agency policy *sub silentio* in violation of the APA and should be set aside and enjoined as an arbitrary and capricious agency action. *See id*. at 514-16.

C. The No-Release Policy Violates the APA's Notice and Comment Requirements

Agencies are required to provide a public notice and comment period prior to an exercise of rulemaking authority. 5 U.S.C. § 553(b-c). Here, as another independent basis for relief, ICE's implementation of the No-Release Policy—which included the modification of its risk assessment tool and the adoption of a blanket policy of detaining people without any individualized

assessment—constituted such an exercise of rulemaking authority but was adopted without the required notice and comment.

Under the APA, agency "substantive" or "legislative" rules that "create new law, rights, or duties" must proceed through public notice and comment rulemaking. *Time Warner Cable Inc. v. F.C.C.*, 729 F.3d 137, 168-69 (2d Cir. 2013) (internal quotations omitted). Where a policy does not "genuinely [leave] the agency and its decisionmakers free to exercise discretion" and "the action has binding effects on private parties or on the agency," the agency has likely created a substantive or "legislative" rule. *The Wilderness Soc. v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006) (internal quotation marks omitted); *see also Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 7 (D.C. Cir. 2011) ("[A]n agency pronouncement will be considered binding as a practical matter if it . . . is applied by the agency in a way that indicates it is binding") (citing *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 383 (D.C. Cir. 2002)).

Accordingly, courts will find that an agency has adopted a substantive or legislative rule if agency decisionmakers rarely depart from a policy in practice. *See U.S. Tel. Ass'n v. F.C.C.*, 28 F.3d 1232, 1234 (D.C. Cir. 1994) (policy was a legislative rule where defendant could only point to 8 exceptions out of 300 cases); *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1319 (D.C. Cir. 1988) (same for 4 exceptions out of 100 cases); *cf. Damus v. Nielsen*, 313 F. Supp. 3d 317, 342 (D.D.C. 2018) (categorical policy existed where data showed parole denial rates ranging from 92% to 100%).[9] Additionally, where "the substantive effect is sufficiently grave" then "notice

[9] The fact that ICE officers exercise discretion in a vanishingly small number of cases does not allow ICE to evade the APA's notice-and-comment requirements. *See Make the Rd. New York v. McAleenan*, 405 F. Supp. 3d 1, 50 (D.D.C. 2019) (rejecting argument that DHS policy could not be a substantive rule subject to notice and comment because "ICE officers retain discretion"); *see also Elec. Privacy Information Center*, 653 F.3d at 7 (that TSA agents had some discretion to stop using a screening tool at airports was less significant than the fact that "a passenger is bound to comply with whatever screening procedure the TSA is using on the date he is to fly at the airport from which his flight departs"). And indeed, courts have not required total uniformity in holding that a policy is, in fact, a

and comment are needed to safeguard the policies underlying the APA." *Time Warner Cable*, 729 F.3d at 168.

Here, ICE's implementation of a blanket No-Release Policy, which included the modification of its risk-assessment tool, constituted a substantive or legislative rule requiring a public notice and comment period. The No-Release Policy imposes a new duty on ICE officers to detain all putative class members without any individualized assessment, and it plainly also affects the rights of class members. As such, it does not "genuinely [leave] the agency and its decisionmakers free to exercise discretion," *Wilderness Soc.*, 434 F.3d at 595 (internal quotation marks omitted), and it is instead "applied by the agency in a way that indicates it is binding," *Elec. Privacy Information Center*, 653 F.3d at 7 (quoting *Gen. Elec. Co.*, 290 F.3d at 383). After ICE adopted the No-Release Policy and manipulated its risk-assessment tool, the rate of release dropped precipitously from around 40% to less than 2%. Hausman Decl. ¶ 14. This included detaining approximately 97% of the people that ICE's own risk-assessment tool classified as low-risk. *Id.* ¶ 13. As to the risk-assessment tool itself, in the New York Field Office, ICE deviates from the tool's "detain" recommendation is less than 1% of cases. *Id.* ¶ 10. The tool's algorithmic classifications and custody recommendations deeply implicate the petitioners' rights under the INA, the regulations, the Constitution, and the Rehabilitation Act. *See* discussion *supra* at 19-29, *infra* at 29-35. And as the data demonstrate, detention rates increased significantly after the modification to the risk assessment tool and the No-Release Policy's implementation. Hausman Decl. ¶ 14. Moreover, the No-Release Policy plainly has and will continue to have grave substantive effects on those detained as a result. *See Time Warner Cable*, 729 F.3d at 168 (holding

---

substantive or legislative rule. *See U.S. Tel. Ass'n*, 28 F.3d at 1234; *McLouth*, 838 F.2d at 1319. A few rare exceptions cannot salvage an otherwise blanket policy.

that notice-and-comment requirements apply when a rule "significantly affects substantive rights"). A policy that binds the agency, particularly in a manner that so directly effects the rights of individuals, is a quintessential substantive or legislative rule.

For these reasons, the No-Release Policy constitutes a substantive rule that could only have been properly adopted through notice-and-comment rulemaking. Given the absence of any such rulemaking, the policy should be set aside.

D. The No-Release Policy Must Be Struck Down Pursuant to the *Accardi* Doctrine

Separate and apart from the violations discussed above, the No-Release Policy runs afoul of the "*Accardi* doctrine," under which the government is bound by its regulations and the rules it has announced for itself. In *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954), the Supreme Court held that "regulations with the force and effect of law supplement the bare bones" of federal statutes, *id.* at 265, vacating a deportation order on the ground that the procedure that preceded the order did not conform to the relevant regulations, *id.* at 267–68. The Second Circuit has explained in the immigration context that *Accardi* doctrine "is premised on fundamental notions of fair play underlying the concept of due process." *Montilla v. I.N.S.*, 926 F.2d 162, 167 (2d Cir. 1991). The Circuit later held, in *Smith v. Resor,* 406 F.2d 141 (2d Cir. 1969), that the *Accardi* rationale applies even when a court is reviewing "the merits of decisions made within the area of discretion delegated to administrative agencies," since courts "have insisted that where the agencies have laid down their own procedures and regulations, those procedures and regulations cannot be ignored by the agencies themselves even where discretionary decisions are involved," *id.* at 145.

Consistent with *Accardi*, this Court held that it violated "due process of law" for ICE to fail to abide by its own regulations when these were "grounded in 'a fundamental right derived from the Constitution or a federal statute, . . . even when the regulation requires more than would

the specific provision of the Constitution or statute that is the source of the right.'" *Ying Fong*, 317 F. Supp. 2d at 403 (citing *Waldron*, 17 F.3d at 518). Similarly, in another decision in this circuit, when presented with a claim and a request for preliminary relief very similar to the one presented here, the court relied on *Accardi* to order ICE to adjudicate parole determinations in compliance with its binding parole determination procedures and based only on the criteria listed in those procedures. *See Abdi,* 280 F. Supp. at 410. For the reasons discussed above, *see* discussion *supra* at 19-26, the No-Release Policy similarly violates an agency regulation, namely 8 C.F.R. § 1236.1(c)(8), and this Court similarly can order the relief requested by the petitioners.

E. The No-Release Policy Violates the Rehabilitation Act and Implementing Regulations

The No-Release Policy systematically and unnecessarily detains individuals with disabilities, and it violates the Rehabilitation Act because ICE officers complying with the policy are precluded from appropriately considering disability when making custody determinations. Internal ICE memos estimate that about 15% of the individuals it detains have mental health disabilities, which is consistent with reports by other organizations, and the total number of people with all types of disabilities well exceeds that number. *See* Memorandum in Support of Class Certification (ECF 10) at 10, 15 (discussing sources). In detention, these individuals may experience severe harms and serious obstacles that arise from their disabilities, resulting in their being denied meaningful and equally effective access to their bond hearings before an Immigration Judge and to immigration relief. This denial violates the Rehabilitation Act and its implementing regulations, and ICE must therefore provide a reasonable modification in the form of an individualized custody determination that takes into account an individual's disabilities.

To make out a violation of Section 504 of the Rehabilitation Act, a plaintiff need only show that: "(1) [they are] a qualified individual with a disability; (2) the defendant is subject to [] the

Act[]; and (3) [they were] denied the opportunity to participate in or benefit from the defendant's services, programs, or activities, or [were] otherwise discriminated against by the defendant because of [their] disability." *Disabled in Action v. Bd. of Elections*, 752 F.3d 189, 196-97 (2d Cir. 2014) (internal quotation marks omitted).

The petitioners readily meet the first two elements. Here, the putative Rehabilitation Act Subclass consists of individuals with disabilities under the Act. *See* Memorandum of Law in Support of Class Certification (ECF 10); *see also* 28 C.F.R. §§ 35.108; Velesaca Decl. ¶¶ 3-7; Uzategui Decl. ¶¶ 7-8, 26-30. And they are "qualified" for the relevant programs, services, or activities—seeking bond before an Immigration Judge and applying for immigration relief—because they meet the "essential eligibility requirements" to participate. *See Mary Jo C. v. New York State & Local Ret. Sys.*, 707 F.3d 144, 155–57 (2d Cir. 2013) (quoting 42 U.S.C. § 12131(2)). The government is clearly subject to the Act, which applies to "any program or activity conducted by any Executive agency." 29 U.S.C. § 794(a); *see also Noel v. New York City Taxi & Limousine Comm'n*, 687 F.3d 63, 68 (2d Cir. 2012) ("services, programs, or activities" is "a catch-all phrase that prohibits all discrimination by a public entity").[10]

As to the third element, under the Act, an agency must "as a practical matter" provide individuals with disabilities "meaningful access to services, programs or activities to which [they are] legally entitled." *Wright v. New York State Dep't of Corr.*, 831 F.3d 64, 72 (2d Cir. 2016) (internal quotation marks omitted); *see also Henrietta D. v. Bloomberg*, 331 F.3d 261, 277 (2d Cir. 2003) (legal entitlement refers to whether someone meets the relevant eligibility requirements). DHS's own implementing regulations require that the agency provide individuals with disabilities

[10] Courts interpret the Rehabilitation Act and the Americans with Disabilities Act (ADA) interchangeably, as outside of a few "subtle distinctions" that are not relevant here courts will "treat claims under the two statutes identically." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003).

with "equally effective" access, meaning "equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement in the most integrated setting appropriate to the individual's needs." 6 C.F.R. § 15.30(b)(1)(ii) & (b)(2). To show that an agency has failed to comply with these requirements, "the demonstration that a disability makes it difficult for a plaintiff to access benefits that are available to both those with and without disabilities is sufficient." *Henrietta D.*, 331 F.3d at 277.

The No-Release Policy makes it more difficult for people with disabilities to access their bond proceedings or immigration relief on account of their disabilities. As with Mr. Velesaca, detention can take such a toll on an individual with disabilities that they consider abandoning their case and letting themselves be deported—even when they have young children in the country. Velesaca Decl. ¶¶ 1, 6; Van Dalen Decl. ¶ 36. In such cases, detention has become a total obstacle to a government-administered benefit. Applying for relief also often involves recalling and communicating past trauma, which is particularly difficult for subclass members in detention who are not receiving adequate care or support. *See Fernandez Aguirre v. Barr*, No. 19-CV-7048 (VEC), 2019 WL 3889800, at *3-4 (S.D.N.Y. Aug. 19, 2019) (irreparable harm existed where person in immigration detention had PTSD and major depressive disorder, and detention was exacerbating these conditions, rendering it difficult for him to pursue his asylum case); *see also* discussion *supra* at 9-15. There are also logistical obstacles for detained subclass members, such as the now widespread use of videoconferencing instead of in-person appearances in court, that impose a particular burden on individuals with disabilities. For example, Immigration Judges can be less able to discern cognitive or mental health disabilities through videoconferencing, even if these would be evident in person. *See* United States Government Accountability Office, *Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing*

Management and Operational Challenges (June 2017), at 55 (describing a situation in which videoconferencing led to such an outcome) (attached to Supp. Hodgson Decl. as Exhibit J).

Detention also inflicts needless and severe harms on many individuals with disabilities, which interfere with their ability to manage even daily life, much less the complex and time-intensive process of applying for bond and seeking immigration relief. The placement of individuals with disabilities in immigration detention causes numerous harms specific to their disabilities: interruption of mental or physical care that people received in the community, including the failure to provide life-saving medications; failure to respond to repeated medical complaints, including reports of acute pain; failure to screen, monitor, and respond to both physical and mental health problems; unconscionable delays in needed care, including surgeries; heightened risk of infection and illness for individuals with preexisting conditions; denial of off-site care, including the failure to take a patient back to a neurosurgeon after spinal surgery; severe decompensation for individuals with mental health disabilities, to the point that they are sometimes placed in what is effectively solitary confinement; lack of basic aids for people with auditory, visual, or mobility-based disabilities, including the deprivation of a wheelchair for an extended period of time; and loss of the presence and assistance of people's families or other community support that could otherwise help a person manage their conditions. Van Dalen Decl. ¶¶ 21-36.

Applying for bond or immigration relief is a complicated and time-consuming process. Oshiro Decl. ¶¶ 14-23. Yet individuals with disabilities in detention can be so debilitated that they can barely accomplish routine daily tasks, cannot concentrate, self-harm, or require urgent medical care. Van Dalen Decl. ¶ 34, 42-43; *Ailing Justice* at 10. It is vastly more difficult for them to navigate their immigration proceedings while receiving inadequate care and being forced to manage their own deteriorating physical and mental health in detention. As a result, unnecessary

detention under the No-Release Policy systematically denies individuals with disabilities equally effective and meaningful access to their bond proceedings and to immigration relief.

To remedy this, ICE must make the reasonable modification of not detaining individuals with disabilities unless it determines that detention is necessary, and this determination must take into account special vulnerabilities such a person's disability. "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." *Hargrave v. Vermont*, 340 F.3d 27, 37–38 (2d Cir. 2003) (quoting 28 C.F.R. § 35.130(b)(7)). It is plainly reasonable to require ICE to provide individualized custody determinations to Rehabilitation Act Subclass members, since it was doing so prior to the adoption of the No-Release Policy. Similarly, it would be reasonable for ICE to take into account an individual's disabilities since it has a number of ways of doing so, including but not limited to asking people about any preexisting diagnoses or relying on initial screenings. Van Dalen Decl. ¶ 16. And indeed, ICE has in fact taken into account a person's health needs in determining whether to release them in specific cases cited by the petitioners. *Id.* ¶ 44. For these same reasons, this modification also would not constitute a "fundamental alteration" to the agency's process, *Hargrave*, 340 F.3d at 37–38—to the contrary, it would simply represent a return to ICE's own preexisting policy.

In sum, the No-Release Policy, which dramatically increases the number of individuals with disabilities who are unnecessarily detained, violates the Rehabilitation Act and its implementing regulations. ICE must therefore provide a reasonable modification of its detention policies in the form of individualized custody decisions for Rehabilitation Act Subclass members that take into account a person's disability.

III. A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST

The balance of equities and the public interest are decidedly in the petitioners' favor. The putative class and subclass seek an order that provides them with access to the procedural protections they are entitled to under the relevant statutes and the Constitution. *See Am. Beverage Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) ("'[I]t is always in the public interest to prevent the violation of a party's constitutional rights.'") (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)). Specifically, the petitioners seek nothing more than an *opportunity* through the process required by DHS's own regulations to be considered for release if there is no legitimate government justification for detaining them.

The government's unlawful policy deprives the petitioners of their liberty for prolonged periods and subjects them to a range of physical, psychological, and financial harms. In contrast, the government is unlikely to suffer any harm from a decision requiring it to follow its own regulations and past practice. There appears to be no legitimate justification for the government's adoption of this cruel and unlawful policy and, in any event, no legitimate government interest warrants the violation of Section 1226(a), its implementing regulation, the Due Process Clause, and the Rehabilitation Act. After all, the "government suffers no harm from an injunction that merely ends unconstitutional practices and/or ensures that constitutional standards are implemented." *Doe v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017) (citations omitted); *see also L.V.M.*, 318 F. Supp. 3d 601, 620 (S.D.N.Y. 2018); *Abdi*, 280 F. Supp. 3d at 410.

In addition, a preliminary injunction would protect not only class members, but also the general public from the risk of COVID-19. In Dr. Meyer's words, "[r]educing the size of the population in jails and prisons can be crucially important to reducing the level of risk both for those within those facilities and for the community at large." Meyer Decl. ¶ 37. Lowering the number of particularly vulnerable individuals in detention facilities will also lessen the risk in those

facilities. Meyer Decl. ¶¶ 37-39. Other experts echo Dr. Meyer's evaluation, recommending that, in response to the threat of COVID-19, jails should "avoid holding people for low-level offenses" and that "[p]eople who aren't a risk to public safety shouldn't be held in a jail." Wetsman, *Prisons and Jails Are Vulnerable To COVID-19 Outbreaks*. An injunction is therefore not only in the interest of the class, it is "crucial" to the health of other individuals in ICE's New York City-area facilities, correctional and medical staff at those facilities, and the nearby communities at large. Meyer Decl. ¶ 41. Accordingly, the balance of harms and the public interest decisively weigh in the petitioners' favor and a preliminary injunction is in the public interest.

IV. REMEDY

Pursuant to the No-Release Policy, ICE is currently unnecessarily and unlawfully detaining class members in facilities where they face a significantly heightened risk of harm and serious illness in a matter of days. For class members who are presently detained, the petitioners respectfully request that the Court issue an order requiring ICE to provide them immediately with individualized custody determinations—preferably within the 48-hour period required by ICE's own regulations. *See* 8 C.F.R. §§ 287.3(d), 1236.1(c)(8). Where an individual has been denied a lawful custody determination, courts in this district have similarly required the government to either provide them with such a determination within an expedited time frame or release them. *See, e.g.*, *Fernandez Aguirre v. Barr*, No. 19-CV-7048 (VEC), 2019 WL 3889800, at *5 (S.D.N.Y. Aug. 19, 2019) (ordering that individual be granted bond hearing within four days or immediately released)*; see also United States v. Carson*, 52 F.3d 1173, 1183–84 (2d Cir. 1995)) (noting that "a district court has broad discretion to enjoin possible future violations of law where past violations have been shown") (internal quotation marks omitted).

Prospectively, future class members should not be placed in facilities that are "ticking time bombs" without a determination that detention is necessary. Accordingly, the petitioners

respectfully request that the Court order that individuals arrested by ICE's New York Field Office be provided a prompt individualized custody determination before being placed into an ICE detention facility, as required by the statute and its implementing regulations.

Finally, particularly in light of the heightened risk of COVID-19 to class members with chronic conditions, the petitioners request that custody determinations for the Rehabilitation Act Subclass members must also take into account any special vulnerabilities such as disabilities. *See* Meyer Decl. ¶¶ 13, 29-30, 39.

CONCLUSION

For the forgoing reasons, the petitioners respectfully request that the Court enter a preliminary injunction on behalf of the named petitioners, the class, and the subclass, requiring the government to promptly provide the petitioners with an individualized determination—or re-determination, for class members who already received a custody assessment pursuant to the No-Release Policy—of whether detention is necessary based on individualized assessments of the petitioners' flight risk, danger to the community, and disability and issue class-wide preliminary declaratory relief ordering the same. Pursuant to its habeas jurisdiction, the Court should order release in the event of noncompliance with this procedural remedy.

Dated: March 16, 2020
New York, N.Y.

Respectfully Submitted,

/s/ Robert Hodgson

ROBERT HODGSON
AMY BELSHER
CHRISTOPHER DUNN
MEGAN SALLOMI
New York Civil Liberties Foundation
125 Broad Street, 19th Floor
New York, NY 10004
Tel: (212) 607-3300
rhodgson@nyclu.org

THOMAS SCOTT-RAILTON*
NIJI JAIN
JENN ROLNICK BORCHETTA
The Bronx Defenders
360 E. 161st Street
Bronx, NY 10451
Tel: (718) 838-7878
njain@bronxdefenders.org

Counsel for Petitioners-Plaintiffs

On the brief:
RYAN BREWER, The Bronx Defenders

* Law Graduate pending admission, practicing under supervision.