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

JOSEFINA CORONEL, et al.,

*Petitioners-Plaintiffs*,

v.

THOMAS DECKER, in his official capacity as Field Office Director, New York City Field Office, U.S. Immigration & Customs Enforcement, et al.

*Respondents-Defendants.*

**Civil Action No. 20-cv-2472**

# PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER

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TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases and Agency Decisions**

**Statutes, Rules, and Regulations**

**Miscellaneous**

## INTRODUCTION

To prevent potentially fatal consequences during a time of unprecedented crisis, the seven plaintiffs—all civil immigration detainees—seek a temporary restraining order for their immediate release pending further proceedings in this case. Each plaintiff suffers from medical conditions that render them particularly vulnerable to severe illness or death if infected by COVID-19—vulnerabilities that are heightened in detention. The risk of infection is imminent: COVID-19 has already spread to at least two of the jails where Immigration and Customs Enforcement ("ICE") is holding five of the plaintiffs. And detainees at all four jails report unsanitary conditions, visibly sick detainees who remain in the general population, and no dissemination of information about testing for COVID-19.

Public health experts agree that in carceral settings, the window of opportunity to mitigate harm from COVID-19 is fast closing. Last week, the Department of Homeland Security's own medical experts warned of the "serious medical risks" from ICE's current detention practices and urged the agency to release at-risk individuals to protect the health of detainees and the general public. Despite these extraordinary circumstances, and the confirmed cases at Hudson and Bergen County Jails, ICE has failed to respond to the pleas of these seven vulnerable plaintiffs for release.

ICE's inaction leaves this Court as Plaintiffs' only recourse. They seek an order directing their immediate release while this case proceeds in order to prevent potentially irreversible injury, in a situation where the "magnitude of risk [] grow[s] exponentially" by the day and even the hour. *United States v. Stephens,* No. 15-cr-95 (AJN), 2020 WL 1295155 at *2 (S.D.N.Y. Mar. 19, 2020). Medical experts agree that for individuals as vulnerable as Plaintiffs, there are simply no conditions of confinement that can adequately manage the serious risk of harm during

this pandemic. Worse, the jails where ICE is holding them have documented track records of providing substandard medical care even in non-emergency conditions. ICE's continued detention of Plaintiffs in these circumstances constitutes deliberate indifference to a medical need of the utmost urgency. Moreover, the existing processes available to Plaintiffs are manifestly inadequate given the deprivations of liberty, and potentially life, at stake. They therefore respectfully request that the Court exercise its inherent authority to order their immediate release on appropriate conditions pending further proceedings.

## FACTUAL BACKGROUND

### I. THE PLAINTIFFS ARE CIVIL IMMIGRATION DETAINES WHO FACE A GRAVE RISK OF SEVERE HARM IF THEY CONTRACT COVID-19.

The seven plaintiffs in this case each has one or more underlying medical conditions that renders them particularly vulnerable to severe harm, including respiratory and kidney failure and death, if they contract COVID-19. Declaration of Dr. Ranit Mishori (MD, MHS, FAAFP) ("Mishori Decl.") ¶ 9, Ex. 1. Analysis of close to 1,600 COVID-19 cases in China found that patients with at least one co-morbidity—including cardiovascular disease, diabetes and chronic kidney diseases—"had a 79% greater chance of requiring intensive care or a respirator or both, or of dying."[1] Plaintiffs fall into these risk groups.

**Josefina Coronel** is a 48-year-old survivor of human trafficking who has been incarcerated by ICE since October 2019. An immigration judge ("IJ") granted her relief from removal in February 2020, finding that she would face persecution and torture if deported. She suffers from congestive heart failure, hypertension, and diabetes, and in July 2019, she had a

[1] Sharon Begley, *Who is Getting Sick, and How Sick? A Breakdown of Coronavirus Risk by Demographic Factors*, STAT NEWS (Mar. 3, 2020), https://www.statnews.com/2020/03/03/who-is-getting-sick-and-how-sick-a-breakdown-of-coronavirus-risk-by-demographic-factors/.

severe cardiac incident resulting in cardiac catheterization and hospitalization for several days. Over the course of the past ten days, Ms. Coronel has experienced dizziness, numbness in her right arm, abnormally low blood pressure and acute anxiety about how COVID-19 could affect her health. If released, Ms. Coronel will reside and receive services at a home for survivors of human trafficking. Declaration of Katherine Kim ¶ 3, 4, 5, 7, 12. ("Kim Decl."), Ex. 3.

**Ramon Garcia Ponce** is a 56-year-old father to four U.S. citizen children who is deeply rooted in his New York City community. In January 2019, Mr. Garcia went to the hospital with a severe headache and was diagnosed with subarachnoid hemorrhage, a type of life-threatening stroke, and immediately operated on. In addition to a history of stroke, he suffers from diabetes and high blood pressure. If released, he will return to his family in the Bronx. *Id.* ¶¶ 18-19**.**

On March 17, 2020, Mr. Garcia, through counsel, submitted an urgent motion to calendar a bond hearing within 48 hours in light of his medical concerns. The Immigration Court ignored the emergency request and calendared the hearing for March 30, 2020. *Id.* ¶ 22**.**

**Jose Madrid** is 41 years old and has lived in the United States for over 20 years. He is a beloved member of his large family of U.S. citizens and lawful permanent residents who reside in New York. Mr. Madrid has type 2 diabetes, a condition that has already affected his health, as he is obese and has impaired vision. He was previously being treated at a health center in his community in Peekskill, NY, where a doctor had prescribed him two medications to control his diabetes. While in ICE custody, Mr. Madrid's health has deteriorated; he is experiencing frequent headaches and ringing in his ears, and his eyesight has worsened. He is also receiving only one prescription for his diabetes. Since the worsening of the public health crisis, Mr. Madrid has been locked in his cell with another detainee for most of the day. If released, he will have the

support of his family in Westchester County, NY. Declaration of Karla Ostolaza ("Ostolaza Decl.") ¶¶ 4, 6-7, Ex. 5.

**Miguel Miranda** is a 44-year-old who has resided in this country for over a decade. His long-term partner has fallen into a major depression since his detention, causing her to stop working and lose her livelihood along with his support since ICE arrested him in February 2020. Mr. Miranda has type 2 diabetes and suffers from gastrointestinal problems. As a result of these conditions, Mr. Miranda must use the bathroom with extreme frequency and rarely is able to sleep at night. Mr. Miranda has recently been suffering from severe diarrhea. He was given pills to allegedly address this, however the jail recently switched his prescription and then abruptly stopped his medication, without explaining why. If released, he will return to living with his partner of multiple years, and support her and his stepchildren through his work as a delivery person for the same restaurant at which he previously worked for years. Ostolaza Decl. ¶¶ 13-19.

**Florencio Moristica Ochoa** has been detained by ICE since July 2018. In March 2020, an IJ terminated Mr. Moristica's removal proceedings, and he is detained pending the government's appeal. Mr. Moristica suffers from a severe neurocognitive disorder that impairs his ability to function and understand his surroundings to such an acute degree that he is unable to articulate his own age or answer basic questions about his personal history or present circumstances. He is frequently unable to understand his own medical condition or need for treatment and will be unable to verbalize his needs or advocate for himself when his health deteriorates, or take the self-protective steps necessary in a facility where he is in close proximity with so many other detainees and lacks a support network. If released, he will live with a cousin who was previously his caretaker. Kim Decl. ¶ 28, 29, 31.

After he prevailed in his removal case before the IJ, Mr. Moristica moved for a new bond hearing on March 13, 2020. His counsel made several attempts to communicate with the court about calendaring this hearing but received no response. *Id.* ¶ 33**.**

**Juan Morocho Sumba** is a 45-year-old father to two U.S. citizen children who ICE has detained since December 2019. He suffers from aortic valve disease and hypertension, had open-heart surgery in 2014, and visited the emergency room just three months ago because of chest pain. The emergency room staff found that he had an abnormal electrocardiogram and an enlarged heart and advised that he see a cardiologist for continuing care. Since that emergency room visit, he has not seen a cardiologist while in ICE custody despite ongoing chest pain on a regular basis. If released, he will live with his sister. *See* Kim Decl. ¶¶ 23-25.

**Jose Otero** is 38 years old and has lived in this country since 2003. ICE has detained him since November 2019. Mr. Otero was the victim of a violent assault that forced him to have a nephrectomy (removal of left kidney), partial liver resection, and left lung resection. As a result of partial removal of major organs, his immune system is significantly compromised. He has also been diagnosed with Post Traumatic Stress Disorder, major depressive disorder, and a major neurocognitive disorder. Mr. Otero suffers from constant pain and health issues that require specialized care and have not been adequately treated in custody. If released, he will return to living with his U.S. citizen uncle, with whom he has resided since 2003. Ostolaza Decl. ¶¶ 9-10.

Mr. Otero was scheduled for a hearing in immigration court on March 11, 2020, at which an IJ was supposed to determine whether he is competent to participate in immigration proceedings in light of his mental health diagnoses and neurocognitive disorder. Although Mr. Otero and counsel were present in court, the IJ rescheduled the hearing without going forward as

she was concerned about COVID-19 infection as a different individual in the court's waiting room was visibly ill. *Id.* ¶ 11.

## II. JAILS PRESENT HEIGHTENED RISK OF TRANSMISION OF COVID-19.

Carceral settings pose "significantly higher" risk for the spread of infectious diseases like COVID-19 than in the general community. Mishori Decl. ¶ 16. Even when public access is curtailed, it is impossible to seal entry and exit for staff and vendors; it is thus simply not possible to isolate people within jails from viruses circulating outside. *Id.* ¶ 35. "Essential" preventative strategies like social distancing are "an oxymoron" in congregate settings like jails; hand sanitizing and proper ventilation are also largely inaccessible and ineffective. Letter from Dr. Scott A. Allen, Professor, Univ. of Cal. Riverside Sch. of Med. & Dr. Josiah "Jody" Rich, Professor, Brown Univ. to Bennie Thompson, Chairman, House Comm. on Homeland Sec., et. al. 5 (Mar. 19, 2020) ("Allen Letter") (Exh. 8);[2] Mishori Decl. ¶¶ 36, 24.[3] As a result, widespread outbreak in jail settings is virtually inevitable. Mishori Decl. ¶¶ 19,31, 32, 36, 41.

Once an outbreak occurs, jails are ill-equipped to engage in adequate containment and medical treatment for sick detainees. Mishori Decl. ¶¶ 19, 42-43. This "creates an enormous public health risk, not only because disease can spread so quickly, but because those who contract COVID-19 with symptoms that require medical intervention will need to be treated at local hospitals, thus increasing the risk of infection to the public at large and overwhelming

[2] Both Dr. Allen and Dr. Rich "currently serve as medical subject matter experts for the Department of Homeland Security's Office of Civil Rights and Civil Liberties." Allen Letter at 1-2.

[3] *See also United States v. Martin*, No. CR PWG-19-140-13, 2020 WL 1274857, at *2 (D. Md. Mar. 17, 2020) ("With no known effective treatment, and vaccines months (or more) away, public health officials have been left to urge the public to practice "social distancing," frequent (and thorough) hand washing, and avoidance of close contact with others (in increasingly more restrictive terms)—all of which are extremely difficult to implement in a detention facility.").

treatment facilities." Allen Letter at 4. In the face of the current pandemic, release of vulnerable detainees is a critical mitigation tool: "Not doing so is not only inadvisable but also reckless given the public health realities we now face in the United States." Mishori Decl. ¶ 45. Only by releasing detainees from high risk congregate settings can "survival [be] maximized" and the "local mass outbreak scenario [] averted." Allen Letter at 4.

Recognizing this reality, jurisdictions around the country, including New York City, have announced efforts to reduce their detained populations, and many are focusing their release efforts on individuals classified as high-risk.[4] Despite the consensus in the medical community about the need to release the most vulnerable, and in sharp contrast to the efforts of officials around the United States to comply with such recommendations, ICE continues to detain the seven at-risk plaintiffs at issue here. In fact, the agency recently announced that it has no policy to release individuals in response to COVID-19.[5]

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[4] *See e.g*, *U.S. Jails Begin Releasing Prisoners to Stem Covid-19 Infections*,, BBC NEWS (Mar. 19, 2020), www.bbc.com/news/world-us-canada-51947802 (describing efforts by New York City, Los Angeles, and Cleveland); David Struett, *Cook County Jail Releases Several Detainees 'Highly Vulnerable' to Coronavirus,* CHICAGO SUN TIMES (MAR. 17 2020), https://chicago.suntimes.com/coronavirus/2020/3/17/21183289 /cook-county-jail-coronavirus-vulnerable-detainees-released-covid-19 (Cook County Jail in Chicago has released "several" medically vulnerable inmates); *Mike Freeman on Individuals Held in Hennepin County Jail*. HENNEPIN CNTY ATTY https://www.hennepinattorney.org/news/news/2020/March/mike-freeman-statement-hennepin-county-jail (last visited Mar. 23, 2020); (County Attorney plans to release inmates from the Hennepin County Jail in Minnesota); Darwin BondGraham, *San Francisco Officials Push to Reduce Jail Population to Prevent Coronavirus Outbreak* – THE APPEAL (Mar. 11, 2020) https://theappeal.org/coronavirus-san-francisco-reduce-jail-population/ (San Francisco District Attorney working and public defenders have worked to release vulnerable individuals from jail).

[5] *See* Spencer Ackerman, *ICE: No Plan to Free Migrants in Jail, but Will Arrest Fewer Due to Pandemic*, Daily Beast (Mar. 19, 2020), https://www.thedailybeast.com/ice-says-it-has-no-plan-to-free-migrants-in-jail-but-will-arrest-fewer-due-to-coronavirus-pandemic

## III. THE RISKS OF HARM IS ESPECIALLY PRONOUNCED IN THE JAILS WHERE THE PLAINTIFFS ARE DETAINED.

The New York-area jails where Plaintiffs are detained—Bergen, Hudson, Essex, and Orange County Jails—are especially vulnerable to rapid transmission of COVID-19 because of the unsanitary and hazardous conditions within the facilities and their history of providing inadequate medical treatment. *See* Declaration of Sarah Deri Oshiro ¶¶ 15-20 ("Oshiro Decl."), Ex. 4 (detailing lack of basic sanitation like access to toilet paper, soap, and hand sanitizer and feces on cell walls at Hudson; lack of basic sanitation at both Orange and Bergen; detainees' hunger strike at Essex in protest of unsanitary conditions;); Declaration of Marinda Van Dalen ¶¶ 18-45 ("Van Dalen Decl."), Ex. 2.

Under these conditions, over the last several days the experts' dire predictions about COVID-19 transmission in jail settings have come to pass. As of March 22, 2020, both Bergen and Hudson County jails have confirmed cases of COVID-19. Oshiro Decl. ¶ 13; Declaration of Bridget Kessler ¶ 4 ("Kessler Decl."), Ex. 6; March 19, 2020 Press Release from the Bergen County Sheriff's Office, p. 1 ("Bergen Press Release"), Ex. 7. Based on the presence of visibly sick individuals, a number of detainees have reported concerns that they are being held with people who already have COVID-19, demonstrating the fear and uncertainty detainees face in this time of crisis. Oshiro Decl. ¶¶ 16, 19-20. Dr. Mishori's prediction that it is a matter of "days, not weeks" for the virus to spread at these facilities, Mishori Decl. ¶ 48, has quickly become fact: Hudson staff has reported that due to the two confirmed cases, the entire facility will be on a full lockdown for 14 days, Kessler Decl. ¶ 4.

Further contributing to the elevated risk of harm is these jails' track record of failure to provide adequate and prompt medical care even before the pandemic. *See* Declaration of

Marinda Van Dalen ¶¶ 18-45; Ailing Justice: New Jersey Inadequate Healthcare, Indifference, and Indefinite Confinement in Immigration Detention, (Feb. 2018) at 1-2, 6-10, https://www.humanrightsfirst.org/sites/default/files/Ailing-Justice-NJ.pdf. Examples of inadequate care at these specific facilities includes a history of: denial of vital medical treatment such as dialysis and blood transfusions; subjecting detainees in need of surgeries to unconscionable delays; altering establish treatment regimens; failing to provide necessary mental health services; overuse of solitary confinement; and ignoring repeated requests for care from detainees with serious symptoms. Van Dalen Decl. ¶¶ 23-36. These deficiencies in medical treatment have placed individuals at risk of strokes, heart attacks, renal failure, amputation, kidney failure, and blindness. *Id.* ¶¶ 41-44. Just last year, a mumps outbreak involving multiple cases at Bergen County Jail resulted in the lengthy quarantine of dozens of immigration detainees.[6] The Department of Homeland Security's own Office of the Inspector General reported substandard care, long waits for medical care and hygiene products, and mistreatment in ICE detention facilities. *See* DHS, Office of Inspector General, DHS OIG Inspection Cites Concerns With Detainee Treatment and Care at ICE Detention Facilities (2017) ("OIG Report") Ex. 10. Given their failure to provide consistent access to hygiene and adequate health care under normal circumstances, it is unlikely that these jails will be able to respond effectively to the

[6] Stephen Rex Brown, *ICE Jail in Bergen County Quarantined*, nydailynews.com (Jun. 11, 2019); Doug Criss, *6 Inmates at a New Jersey Jail Came Down With The Mumps*, CNN (June 13, 2019), https://www.cnn.com/2019/06/12/us/mumps-jersey-bergen-county-jail-trnd/index.html; *see also* Letter from Representatives Carolyn B. Maloney & Jamie Raskin to the Acting Sect. of Homeland Security (Mar. 11, 2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-03-11.CBM%20and%20JR%20to%20Wolf-DHS%20re%20COVID-19.pdf

pandemic.[7] These "facilities are dangerously under-equipped and ill-prepared to prevent and manage a COVID-19 outbreak, which would result in severe harm to detained individuals, jail and prison staff, and the broader community." Mishori Decl. ¶ 34.

## IV. THE GOVERNMENT HAS NOT EXERCISED ITS DISCRETION TO MITIGATE THE RISK OF HARM TO THE PLAINTIFFS.

ICE has undisputed authority to release Plaintiffs whose detention is governed by the discretionary detention statute, 8 U.S.C. § 1226(a). Indeed, counsel for Plaintiffs, The Legal Aid Society ("LAS") and The Bronx Defenders ("BXD"), often request the release of clients with compelling circumstances. Oshiro Decl. ¶ 11. As news of the pandemic grew more dire, LAS and BXD reached out to the government and identified high-risk clients at the four facilities, including the seven plaintiffs in this case. *Id.* ¶ 11; Ostolaza Decl. ¶¶ 8, 12 ,18, 19; Kim Decl. ¶¶ 10-15, 21, 26, 34. Through counsel, all Plaintiffs submitted release requests to ICE that described the medical conditions and other vulnerabilities that render them high-risk for adverse health outcomes from COVID-19. Ostolaza Decl. ¶¶ 8, 12, 18-19; Kim Decl. ¶¶ 10, 21, 26, 34. As of today, the government has not responded substantively to these requests or released any of the plaintiffs. Ostoloza Decl. ¶¶ 8, 12, 18; Kim Decl. ¶¶ 16, 21, 26, 34.

Plaintiffs also cannot access timely or adequate bond hearings at the Varick Immigration Court given recent events. Under ordinary circumstances, Plaintiffs could have sought either initial or changed-circumstances bond hearings at Varick. However, the immigration court's docket is presently in considerable disarray and does not offer a forum for meaningful relief. *See* Oshiro Decl. ¶¶ 21-32 (explaining how routine operations have changed, including the absence

[7] "This pandemic is unprecedented in our lifetime. While measures are being taken by facilities all over the world, no facility is prepared." *United States v. Barkman*, No. 3:19-cr-52-RCJ-WGC, 2020 U.S. Dist. LEXIS 45628, at *5 (D. Nev. Mar. 17, 2020).

of the three regular judges and replacement with two judges who do not accept filings electronically; describing the court's failure to craft policies responsive to the current public health crisis). Several previously-scheduled bond hearings have not gone forward to decision as the lack of an electronic filing system prevented judges from accessing bond submissions. *See* Oshiro Decl. ¶ 30. Several LAS and BXD staff have also been unsuccessful in their attempts to schedule a prompt bond hearing for their clients. *See* Oshiro Decl. ¶¶ 31-32 (court did not adjudicate requests to schedule or advance bond hearings, or scheduled them into April); Kim Decl. ¶¶ 22, 33-34 (describing failed attempts to schedule bond hearings for two plaintiffs on expedited basis).

Moreover, even when a bond hearing does take place, an individual must bear the burden of proving "to the satisfaction of the Immigration Judge" why he or she is not a danger to the community or a flight risk, and immigration judges are not required under agency precedent to consider alternative conditions of release. *Matter of Guerra*, 24 I. & N. Dec. 37 (B.I.A. 2006); Ostolaza Decl. ¶¶ 21-23.[8]

Further complicating access to a meaningful forum are the challenges in communicating with Plaintiffs and other clients currently detained by ICE. All of the jails have suspended legal contact visits. Neither Bergen nor Essex County jails provide consistent or easy access to free, confidential telephone calls, and the quality of the video teleconference systems at Orange and Hudson County jails is consistently poor. *See* Ostolaza Decl. ¶ 20; Kim Decl. ¶ 32; Oshiro Decl.

[8] Judges routinely draw adverse inferences and deny bond when individuals fail to produce documentary evidence, such as criminal court documents, police reports, proof of employment, hospital and school records, and letters from community organizations, to support their applications for bond. *See id* ¶¶ 21-23. Making such a showing is nearly impossible under the present circumstances given widespread closures of public and private institutions and the ensuing unavailability of records. *Id*.

¶ 12. There is consequently little opportunity for attorney-client communication that would allow for adequate preparation for a bond hearing. Even if the situation improves in the coming weeks, the current risk of severe harm to Plaintiffs is counted in "days," Mishori Decl. ¶ 12, meaning that any relief from the immigration courts will almost certainly be too late.

## ARGUMENT

To prevail on the pending motion, Plaintiffs 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 the injunction." *Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d Cir. 2011) (setting forth preliminary injunction standard); *Spencer Trask Software & Info. Servs., LLC v. RPost Int'l, Ltd.*, 190 F. Supp. 2d 577, 580 (S.D.N.Y. 2002) ("The standard for granting a temporary restraining order and a preliminary injunction . . . are identical."). Plaintiffs meet all four factors.

### I. THE PLAINTIFFS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A TEMPORARY RESTRAINING ORDER.

The risk of irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (quoting *Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999)). The harm alleged must "be imminent, not remote or speculative." *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990). Here, the plaintiffs are irreparably harmed because they "face imminent risk to their health, safety, and lives." *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 Baur v. Veneman*, 352 F.3d 625, 633 n.7 (2d Cir. 2003) (citing conditions of confinement

precedent, stating, "the Supreme Court has decided cases in which it appears to assume that enhanced risk may cause real injury").

With two of the four jails confirming that people are testing positive for COVID-19, the imminent risk to the plaintiffs represents irreparable harm of the gravest magnitude. They remain trapped in close quarters with dozens of other detainees and staff in locations of confirmed or likely COVID-19 transmission; deprived of basic levels of preventive hygiene; and forced to share necessities like toilets, showers, and phones. *See Stephens*, 2020 WL 1295155, at *2 (describing the "unprecedented and extraordinarily dangerous nature of the COVID-19 pandemic" and recognizing that "inmates may be at heightened risk of contracting COVID-19 should an outbreak develop"). Moreover, the plaintiffs are confined within facilities that have demonstrably failed to provide adequate medical care even outside times of crisis. Finally, DHS's own medical experts have warned that ICE's "track record" for implementing "[p]rotocols for early screening, testing, isolation and quarantine . . . has been inconsistent." Allen Letter at 5. Events in the comparable setting of New York City's jails indicate that the risk of harm will quickly metastasize: within six days, 21 people in custody and 17 city employees tested positive for COVID-19. *See* Letter from Jacqueline Sherman, Interim Chair, N.Y.C. Bd. of Corr., to N.Y.C. Criminal Justice Leaders 1-2 (Mar. 21, 2020), Ex. 9.

These extraordinary circumstances pose a particularly severe risk to the seven plaintiffs given their underlying medical conditions. Plaintiffs all have serious co-morbidities, including heart disease, diabetes, hypertension, a brain hemorrhage, severe cognitive impairment, a resected lung, and kidney and liver disease. *See supra* Facts Section I. If the plaintiffs contract COVID-19, they are more likely to need intensive, hospital-level care, more likely to experience

severe damage to their organs and neurological and respiratory capacity, and more likely to succumb to the virus after contracting pneumonia and sepsis. *See* Mishori Decl. ¶¶ 9-12.

Far from being theoretical or remote, these irreversible injuries are imminent, calculated in a matter of "days, not weeks," Mishori Decl. ¶ 48, if not even sooner than that.[9] Once an outbreak is confirmed, even if Plaintiffs themselves do not immediately contract the virus, health authorities may quarantine everyone within a particular jail—a scenario that hundreds of people on cruise ships and in nursing homes have already endured. Indeed, such a quarantine appears to be unfolding at the Hudson County Jail where two of the plaintiffs—Ms. Coronel and Mr. Garcia Ponce—are held. To wait any longer will be to wait too long to effectively mitigate irreparable harm. *See* Mishori Decl. ¶ 48 ("Once a case of COVID-19 is identified in a facility, it will likely be too late to prevent a widespread outbreak."); *cf. Manrique*, 2020 WL 1307109 at *1 (rejecting as "impractical" the government's suggestion that the court wait until "there is a confirmed outbreak" to release individual, noting that "[b]y then it may be too late.").[10]

## II. THE PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO PREVAIL ON THEIR CLAIM THAT THE GOVERNMENT IS DELIBERATELY INDIFFERENT TO THEIR SERIOUS MEDICAL NEEDS.

Due Process prohibits detention conditions that "either alone or in combination, pose an unreasonable risk of serious damage to [a detainee's] health," including "their future health."

[9] Without any indication of widespread testing, the Court should not credit the government's assertions that no ICE detainees at the jails has yet contracted the virus. *See In re Extradition of Manrique*, No. 19-mj-71055-MAG-1 (TSH), 2020 WL 1307109 at *1 (N.D. Cal. Mar. 19, 2020) ("The Court is glad to hear that there are currently no reported cases of COVID-19 at [county jail], but is unsure what that means if people are not being tested.").

[10] Irreparable harm is also presumed in cases alleging deprivation of constitutional rights. *See Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984).

*Darnell v. Piniero*, 849 F.3d 17, 30 (2d Cir. 2017).[11] In a recent case involving immigration detainees at Orange County Jail—one of the four jails where Plaintifs in this action are detained—the Second Circuit found that the defendants had violated Plaintiffs' constitutional right to adequate medical care based on a two-pronged analysis: "(1) that Plaintiffs had a serious medical need . . . and (2) that the Defendants acted with deliberate indifference to such [a] need[]." *Charles v. Orange County*, 925 F.3d 73, 86 (2d Cir. 2019). Under *Charles*, Plaintiffs are substantially likely to prevail on their claim that ICE's decision to continue to incarcerate them constitutes deliberate indifference to serious medical need.

*A*. *The Plaintiffs in this Case Have Serious, Unmet Medical Needs.*

"The serious medical needs standard contemplates a condition of urgency such as one that may produce death, degeneration, or extreme pain[.]" *Charles*, 925 F.3d at 86. Courts have found that the risk of contracting a communicable disease constitutes an "unsafe, life-threatening condition." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). *See also Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) ("[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease"); *Narvaez v. City of New York*, No. 16-CV-1980 (GBD), 2017 WL 1535386, at *9 (S.D.N.Y. Apr. 17, 2017) (denying "motion to dismiss Plaintiff's claim that the City of New York violated Plaintiff's rights under the Due Process Clause by repeatedly deciding to continue housing him with inmates with active-TB").

Here, the rapid community and jail-based transmission of COVID-19 in the New York area; the presence of confirmed or suspected cases in the facilities where plaintiffs are detained; and the real probability that the virus will soon spread exponentially within those jails, creates

[11] Due process claims brought under the Fifth Amendment against federal defendants are subject to the same standard and analysis as due process claims brought under the Fourteenth Amendment against state and local officials. *See Darnell*, 849 F.3d at 21.

the "condition of urgency" required by *Charles*, 925 F.3d at 86; *see also* Allen Letter at 5-6. And Plaintiffs, whose underlying medical conditions render them particularly susceptible to severely adverse health outcomes if infected, face "death, degeneration, or extreme pain" if they remain detained. *Charles*, 925 F.3d at 86.

The imminent spread of COVID-19 in New York-area immigration detention facilities and Plaintiffs' pre-existing conditions together establish a serious medical need and a constitutional violation. The medical need here is enhanced by a specific constellation of additional factors that contribute to a "mutually enforcing effect." *Wilson v. Seiter*, 501 U.S. 294, 304 (1991). As the Second Circuit has explained, "[c]onditions of confinement may be aggregated to rise to the level of a constitutional violation . . . [u]nsanitary conditions, especially when coupled with other mutually enforcing conditions, such as poor ventilation and lack of hygienic items (in particular, toilet paper), can rise to the level of an objective deprivation." *Darnell*, 849 F.3d at 30. In this case, mutually enforcing additional factors include the unsanitary and hazardous conditions at these jails (including a lack of soap, hand sanitizer, and toilet paper in recent weeks); the jails' well-documented history of inadequately addressing medical needs of detainees; and ICE's track record, according to DHS' own medical experts, of failing to develop early detection and containment protocols for infectious diseases outbreaks. The existence of these conditions, in the aggregate, further establishes that Plaintiffs are substantially likely to succeed in demonstrating the existence of a serious medical need. [12]

[12] The situation presented last week, to a district court in Seattle, was distinct in material aspects from the quickly-escalating situation here. Last week, that court declined order the release of immigration detainees from a facility in Tacoma, Washington. *See Dawson v. Asher*, 2:20-cv-409-JLR-MAT, 2020 WL 1304557 (W.D. Wash. Mar. 19, 2020) (slip op.). Unlike in *Dawson*, the record in this case includes evidence of COVID-19 *already* circulating within at least two of the jails that house plaintiffs and suspected instances of transmission at other facilities; detainees

*B. Defendants are Acting with Deliberate Indifference Towards the Plaintiffs' Serious Medical Need.*

To establish deliberate indifference in cases involving civil immigration detention, plaintiffs must show "either that the defendants *knew* that failing to provide the complained of medical treatment would pose a substantial risk to [plaintiffs'] health or that the defendants *should have known* that failing to provide the omitted medical treatment would pose a substantial risk to the detainee's health." *Charles*, 925 F.3d at 87; *accord Darnell*, 849 F.3d at 35 (explaining that deliberate indifference exists where defendants "recklessly failed to act with reasonable care to mitigate [] risk . . . even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety."). This Court may draw inferences from circumstantial evidence in determining if the government has acted with deliberate indifference. *Charles*, 925 F.3d at 87.[13]

Plaintiffs are substantially likely to prevail in showing that the defendants acted with deliberate indifference towards their serious medical needs. First, each of the plaintiffs has notified the government about the particular circumstances of their cases, their high risk of harm, and their need for prompt release. *See* Facts § IV; *cf. Thomas v. Ashcroft*, 470 F.3d 491, 493, 496 (2d Cir. 2006) (in *Bivens* action, finding sufficient allegations that supervisors were on notice of plaintiff's medical needs given complaints by plaintiff and warnings of medical specialists).

Second, not only was ICE aware of the particular circumstances of each of the plaintiffs, it knew, or should have known, about the grave risk that COVID-19 poses in carceral settings to

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reporting unsanitary and dangerous conditions; and a documented history of inadequate medical care. Additionally, the court in *Dawson* did not have the benefit of the dire warnings of two doctors who serve as medical experts for DHS.

[13]This Court may also consider hearsay evidence in determining whether to grant expedited relief. *See Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010) ("hearsay evidence may be considered by a district court in determining whether to grant a preliminary injunction").

medically-vulnerable people like Plaintiffs. As Dr. Mishori explains, there exists a "consistent [] view of the medical profession as a whole that there are no conditions of confinement in carceral settings that can adequately manage the serious risk of harm for high-risk individuals during the COVID-19 pandemic." Mishori Decl. ¶ 46. Indeed, even DHS's own medical experts shared [their] concerns about the serious medical risks from specific public health and safety threats associated with immigration detention" with DHS officials. *See* Allen Letter at 2-3; *cf. Melvin v. Cty. of Westches*ter, No. 14-CV-2995, 2019 WL 1227903, at *12 (S.D.N.Y. Mar. 15, 2019) (finding that jail doctor's conduct, which was "contrary to accepted medical standards" could support a finding of deliberate indifference).[14]

Significantly, to grant relief, this Court need not make any determinations beyond the specific facts of these particular plaintiffs—it need neither determine the propriety of immigration detention generally or its impact on medically-vulnerable populations broadly. The Second Circuit has counseled that deliberate indifference is established with regard to the particular plaintiff in a case, so that even if a policy is "generally justifiable," its application to a particular individual could still "amount[] to deliberate indifference." *Johnson v. Wright*, 412 F.3d 398, 404 (2d Cir. 2005) ("The operative question in this case is not whether the Guideline's

[14] Given the consensus amongst medical experts that release is the only remedy capable of abating harm to the most medically vulnerable, Defendants cannot justify their position by arguing that the steps ICE or the jails have taken are reasonable—particularly where detainees continue to complain of unsanitary and dangerous conditions, where these specific jails have a history of providing substandard care, and where DHS' own medical experts warn of deficiencies in ICE's early detention and containment protocols. Nor can the government defend its position by pointing to other jurisdictions that have not released medically vulnerable detainees—both because there are several examples of jurisdictions that have taken the opposite approach, *see supra* at n. 4, and because the Second Circuit has "repeatedly rejected the argument that institutional practices must be defective in the maximum degree before a violation of constitutional rights can be found and corrected," *Todaro v. Ward*, 565 F.2d 48, 53 (2d Cir. 1997); *id.* (refusing to "condone" an argument that "would encourage a levelling of prison health standards to the 'lowest common denominator'").

substance abuse policy is generally justifiable, but whether a jury could find that the application of the policy in plaintiff's case could have amounted to deliberate indifference to plaintiff's medical needs."); *see also Roe ex rel. Roe v. Elyea*, 631 F.3d 843, 860 (7th Cir. 2011) (explaining that even if protocols are generally acceptable, "[w]ith respect to an individual case . . . prison officials still must make a determination that application of the protocols result in adequate medical care"). Here, without deciding whether ICE's detention policies and practices are "generally justifiable" during this unprecedented crisis, the Court can and should find that ICE has acted with deliberate indifference given Plaintiffs' particular facts.

## III. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO PREVAIL ON THEIR CLAIM THAT CONTINUED DETENTION WITOUT ADEQUATE PROCEDURAL PROTECTIONS VIOLATES DUE PROCESS.

Even if the Court finds that the current detention of Plaintiffs does not constitute deliberate indifference to a serious medical need, they are still entitled to relief in the form of additional procedural safeguards. They are substantially likely to prevail on their claim that existing procedures for testing the validity of their continued detention are insufficient to protect their weighty life and liberty interests from erroneous deprivation. Defendants can cite to little authority to the contrary given the "overwhelming consensus" amongst district courts in this Circuit that the existing custody review process for immigration detainees like Plaintiffs is constitutionally deficient. *Medley v. Decker*, 18-cv-7361 (AJN), 2019 WL 7374408, at *3-4 (S.D.N.Y. Dec. 11, 2019). The growing public health crisis that endangers plaintiffs' very survival urgently requires constitutionally-sufficient procedures that account for Plaintiffs' specific vulnerabilities. *See Stephens*, 2020 WL 1295155, at *2 (in the context of a pretrial bail determination, noting that "comprehensive view of the danger the Defendant poses to the

community requires considering all factors—including [substantial medical and security challenges that would arise from COVID-19 outbreak at MCC]").

Because of their limited criminal histories, Plaintiffs are statutorily entitled to bond hearings in Immigration Court. *See* 8 U.S.C. § 1226(a). However, the existing procedures for these hearings—as mandated by Board of Immigration Appeals precedent—require detainees to bear the burden of proving they are not a danger or flight risk, and immigration judges need not consider alternatives to detention or ability to pay in making release determinations. *See Matter of Guerra*, 24 I. & N. Dec. 37, 38-40 (B.I.A. 2006). Courts have almost uniformly found these procedures to violate procedural due process, ordered the government to bear the burden of proof, by clear and convincing evidence, to justify continued detention, and required adjudicators to consider whether alternatives to detention could sufficiently account for the government's interest in preventing flight and danger to the community. *See, e.g., Fernandez Aguirre v. Barr*, 19-CV-7048 (VEC), 2019 WL 3889800, at *2-3 (S.D.N.Y. Aug. 19, 2019).[15] Nonetheless, the agency continues to enforce these unconstitutional procedures. *See Matter of R-A-V-P-*, 27 I. &

[15] The number of courts who have found the same continues to grow; some are listed here. *See, e.g., Guerrero v. Decker*, No. 19 Civ. 11644 (KPF), 2020 WL 1244124, at *1 (S.D.N.Y. Mar. 16, 2020); *Brevil v. Jones*, No. 17 CV 1529-LTS-GWG, 2018 WL 5993731, at *2-4 (S.D.N.Y. Nov. 14, 2018); *Velasco Lopez v. Decker*, No. 19-cv-2912 (ALC), 2019 WL 2655806, at *3 (S.D.N.Y. May 15, 2019); *Joseph v. Decker*, No. 18-CV-2640 (RA), 2018 WL 6075067, at *10-12 (S.D.N.Y. Nov. 21, 2018); *Rajesh v. Barr*, No. 6:19-cv-06415-MAT, 2019 WL 5566236, at *7 (W.D.N.Y. Oct. 29, 2019); *Navarijo-Orantes v. Barr*, No. 19-CV-790, 2019 WL 5784939, at *7-8 (W.D.N.Y. Nov. 6, 2019); Order, *Liranzo de la Cruz v. Barr*, No. 19-CV-7375 (AKH) (S.D.N.Y. Sept. 13, 2019) ECF No. 10; *Adejola v. Barr*, 408 F. Supp. 3d 284, 287 (W.D.N.Y. 2019);; *Blandon v. Barr*, No. 6:18-CV-06941 EAW, 2019 WL 7759228, at *4-5 (W.D.N.Y. Oct. 28, 2019); *Fallatah v. Barr,* No. 19-CV-1032, 2020 WL 428060, at *6 (W.D.N.Y. Jan. 28, 2020); *Pensamiento v. McDonald*, 315 F. Supp. 3d 684, 692 (D. Mass. 2018); *Diaz-Ceja v. McAleenan*, No. 19-CV-824-NYW, 2019 WL 2774211, at *10-12 (D. Colo. July 2, 2019); *Hernandez-Lara v. Immigration & Customs Enf't Acting Dir.*, No. 19-cv-394-LM, 2019 WL 3340697, at *6-7 (D.N.H. July 25, 2019).

N. Dec. 803, 804 (B.I.A. 2020) (reaffirming burden allocation on the individual in a precedential decision).

In light of this overwhelming consensus that the existing custody review procedures are unconstitutional, Plaintiffs have demonstrated a substantial likelihood of success on their procedural due process claim. Indeed, their particular situation warrants *greater* procedural protections as a number of courts have already recognized, in related contexts. Those judges have held that necessary components of any custody determination during the COVID-19 pandemic are timeliness and consideration of how detention will impact an individual during the crisis. *See Stephens*, 2020 WL 1295155 at *2-3 (granting emergency motion for reconsideration of bail conditions in light of COVID-19 pandemic); *United States v. Raihan*, No. 20-cr-68-BMC-JO, E.C.F. No. 20, Proc. At 10:12-19 (E.D.N.Y. Mar. 12, 2020) E.C.F. No. 20 (continuing defendant on pretrial release rather than remanding him in part due to recognition that "[t]he more people we crowd into that facility, the more we're increasing the risk to the community"); *Manrique*, 2020 WL 1307109 at *1 (agreeing that where detainee was 74 years old and at risk of serious illness or death in custody, the "risk that this vulnerable person will contract COVID-19 while in jail is a special circumstance that warrants bail"); *United States v. Barkman*, No. 3:19-cr-52-RCJ-WGC, 2020 U.S. Dist. LEXIS 45628, at *10 (D. Nev. Mar. 17, 2020) (suspending requirement for defendant to enter detention facility as probation condition "to satisfy the interests of everyone during this rapidly encroaching pandemic").

Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances, . . . but is flexible and calls for such procedural protections as the particular situation demands." *Martinez v. McAleenan*, 385 F. Supp. 3d 349, 363 (S.D.N.Y. 2019) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)). Here, in the context of an unprecedented public

health emergency, plaintiffs are substantially likely to succeed on their claim that the Constitution demands heightened procedural protections including promptly-held bond hearings that account for the grave and specific risks they face in detention, and justification by ICE for why no lesser form of custody or conditional release will suffice.

## IV. THE REMAINING FACTORS WEIGH HEAVILY IN FAVOR OF A TEMPORARY RESTRAINING ORDER.

The balance of the equities and the public interest also weigh in Plaintiffs' favor. The "public interest is best served by ensuring the constitutional rights of persons within the United States are upheld." *Sajous v. Decker*, No. 18-CV-2447 (AJN), 2018 WL 2357266, at *13 (S.D.N.Y. May 23, 2018) (internal citation omitted). Moreover, plainly here, the public and Plaintiffs' interest overlap: both benefit from ensuring community and individual health and safety. *See, 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"); *Barkman*, 2020 U.S. Dist. LEXIS 45628, at *4 (identifying risk of individuals carrying the virus into jails and noting that "[t]he men and women incarcerated at Washoe County Detention Facility are a part of our community and all reasonable measures must be taken to protect their health and safety."). The general public benefits from release of the most medically vulnerable detainees, which reduces the overall burden for hospitals serving surrounding communities. *See* Mishori Decl. ¶¶ 26, 45 (describing strain on surrounding hospitals from jail outbreak). "[W]here detainees are released from high risk congregate setting, the tinderbox scenario of a large cohort of people getting sick all at once is less likely to occur, and the peak volume of patients hitting the community hospital would level out." Allen Letter at 4. Whatever minimal interest Defendants may assert in

Plaintiffs' continued detention, it is outweighed by the harm they, other detainees, jail staff, and the public at large face if they remain detained in violation of their due process rights.

## V. THE COURT SHOULD ORDER THE PLAINTIFFS' IMMEDIATE RELEASE ON REASONABLE CONDITIONS, THE SOLE EFFECTIVE REMEDY HERE.

Based on the record before the Court, the sole effective remedy is Plaintiffs' immediate release on reasonable conditions pending further proceedings in this case. While ordering release might be an extraordinary remedy, these are plainly extraordinary times, and anything less fails to adequately address Plaintiffs' imminent risk of irreparable harm. And there is ample support for the Court's authority to order release, particularly as an interim measure while the parties fully litigate this case, under two related equitable doctrines.

First, the Second Circuit has held that where a case presents "extraordinary circumstances . . . that make the grant of bail necessary to make the habeas remedy effective," federal courts have the inherent authority to release individuals from immigration detention pending final disposition of their claims. *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001); *see also Elkmiya v. DHS*, 484 F.3d 151, 153-54 (2d Cir. 2007) (affirming court's "authority to admit [detained aliens] to bail"). This case meets all three criteria for interim release set forth in *Mapp* and *Elkmiya*. First, as detailed above, *see supra* Sections II & III, Plaintiffs have raised "substantial claims" on which they are likely to prevail. *Mapp*, 241 F.3d at 230. Second, Plaintiffs' severe medical harms and the imminent threat of death if they remain detained constitute "extraordinary circumstances." *Id.*; *see e.g.*, *Nadarajah v. Gonzales*, 443 F.3d 1069, 1084 (9th Cir. 2006) (ordering immediate release of immigration detainee and explaining that "[t]here is undisputed evidence in the record that his health is deteriorating, a deterioration that is only exacerbated by continued detention"); *S.N.C. v. Sessions*, No. 18 CIV. 7860 (LGS), 2018 WL 6175902 at *6

(S.D.N.Y. Nov. 26, 2018) (ordering release under *Mapp* given the deterioration of petitioner's mental health in custody); *Kiaddi v. Sessions*, 18-cv-1584 (AT), Order at 2-3 (ECF No. 9) (S.D.N.Y. Mar. 2, 2018) (granting release under *Mapp* as "[t]he fact of Petitioner's deteriorating health, therefore, supports her release"); *D'Alessandro v. Mukasey*, No. 08 Civ. 914, 2009 WL 79957 at *3 (W.D.N.Y. Mar. 25, 2009) (finding extraordinary circumstances where petitioner had "serious, potentially debilitating health problems"). Finally, immediate relief is necessary to make the ultimate remedy in this case effective because if Plaintiffs are not promptly released, they may well lose the ability to access any recourse at all through irreversible illness and even possibly death. *See Mapp*, 241 F.3d at 230.[16]

The second doctrine that supports Plaintiffs' release arises out of litigation around unconstitutional conditions of confinement at prisons and jails. Both the Supreme Court and the Second Circuit have ordered the release of detainees when necessary to cure the underlying constitutional violation. *See Brown v. Plata*, 563 U.S. 493, 511 (2011) (finding that court's broad equitable powers can extend to "orders placing limits on a prison's population" when such an order is "necessary to ensure compliance with a constitutional mandate"); *Rhem v. Malcolm*, 507 F.2d 333, 341 n.20 (2d Cir. 1974) ("This Court . . . can and must require the release of persons held under conditions which violate their constitutional rights, at least where the correction of

[16] To mitigate the risk of harm that flows from Plaintiffs' conditions of confinement, medical experts agree that immediate release before the virus spreads further is the only effective remedy. As for Plaintiffs' claim regarding procedural protections, the record demonstrates that the Varick Immigration Court is not a functional venue for prompt or reliable bond hearings at the moment given the inability of detainees to communicate with counsel, the inability of the court to effectively and consistently accommodate remote access by attorneys, and the inability of detainees and their attorneys to collect evidence given myriad constraints imposed by the pandemic. *See* Oshiro Decl. ¶¶ 21-32; Ostolaza Decl. ¶¶ 21-23. Thus, release is required as an interim remedy on all claims because Plaintiffs are at such imminent risk and the effectiveness of a procedural remedy could be vitiated by plaintiffs' infection by COVID-19.

such conditions is not brought within a reasonable period of time."); *Detainees of Brooklyn House of Detention for Men v. Malcolm*, 520 F.2d 392, 399 (2d Cir. 1975) (same). In these cases, the Courts afforded defendants a "reasonable period of time" to remedy unconstitutional conditions of confinement before issuing release orders. But given the extraordinary and unprecedented circumstances of the COVID-19 pandemic, whose epicenter is now the New York region, and ICE's failure to act on plaintiffs' requests for release, there is simply no "reasonable time" left nor any safe way to remedy the detention conditions that are inherently life-threatening.[17]

**CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that the Court issue a temporary restraining order.

[17] Plaintiffs understand that in ordering immediate release, the Court may do so subject to certain reasonable conditions.

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New York, NY

Respectfully submitted,

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