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

P.L., A.Q., K.T., R.F.J., A.R.B., B.M.B., and J.C., individually and behalf of all others similarly situated; BROOKLYN DEFENDER SERVICES; THE LEGAL AID SOCIETY; and THE BRONX DEFENDERS, Plaintiffs v. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF JUSTICE; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; RONALD VITIELLO, Deputy Director and Acting Director of ICE, in official capacity; KIRSTJEN NIELSEN, Secretary of Homeland Security, in official capacity; WILLIAM P. BARR, United States Attorney General, in official capacity; MATTHEW T. ALBENCE, Executive Associate Director of ICE Enforcement Removal Operations, in official capacity; THOMAS R. DECKER, Director of New York Field Office of ICE, in official capacity; WILLIAM P. JOYCE, Deputy Director of New York Field Office of ICE, in official capacity; JAMES MCHENRY, Director of Executive Office for Immigration Review, in official capacity; and DANIEL J. DAUGHERTY, Assistant Chief Immigration Judge, in official capacity, Defendants	**Civil Action No. 1:19-cv-01336-ALC** **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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I. INTRODUCTION

Federal law guarantees immigrants certain fundamental rights during deportation proceedings. Defendants are violating those rights for hundreds of immigrants by conducting their removal proceedings in a manner that prevents these immigrants from appearing in, understanding, and participating in their cases. These violations began in June 2018 when ICE's New York Field Office ("ICE NY Field Office") suddenly and without warning ended its long-standing practice of bringing people it had arrested to immigration court. This policy ("Refusal to Produce Policy" or "Policy") forces detained immigrants to make an unacceptable choice: either they must litigate their cases over unreliable video teleconferencing ("VTC"), miles away from their counsel, the judge, and language interpreters—frequently enduring months of adjournments when VTC lines fail or are not available—or they must forgo participation in their cases and let their fates be decided in their absence. This motion seeks a preliminary injunction that would prevent the irreparable harm that Defendants' Policy is causing each day and restore the status quo of immigrants litigating their cases in person.

Defendants were on direct notice that forcing immigrants to appear over video for all proceedings would cause harm. As early as April 2017, a report commissioned by Defendant Executive Office for Immigration Review ("EOIR") concluded that court proceedings by VTC should be limited to "procedural matters" because use of VTC across all proceedings could cause "due process issues." Likewise, the Government Accountability Office ("GAO") warned against "using VTC to conduct merits and asylum hearings, which generally address substantive case issues." In the months that the all-VTC policy has been in place, Plaintiffs have repeatedly notified Defendants of the many constitutional and statutory violations it has caused, but Defendants have failed to end these violations or offer a credible or consistent rationale for

refusing to bring immigrants to court. Instead, Defendants seek to expand the use of VTC, recently announcing that they will add additional VTC-only courtrooms at Varick Street Immigration Court beginning in March 2019.

The harms caused by Defendants' Policy are significant. They include but are not limited to: hindering the ability of immigrants to review evidence presented in court; preventing confidential communications with counsel during hearings; preventing immigrants who are not fluent in English from fully understanding proceedings; impairing immigration judges' ability to assess the veracity and credibility of testimony; and prolonging detention when cases are adjourned due to faulty, insufficient, and unavailable VTC lines. The Policy causes even further harm for immigrants with disabilities, who face heightened obstacles to participating in hearings and need in-person assessment of their disabilities to ensure necessary accommodations.

The Representative Plaintiffs and putative class members ("Plaintiffs"),[1] along with the three Organizational Plaintiffs that comprise the New York Immigrant Family Unity Project ("NYIFUP"), seek preliminary injunctive relief to stop these myriad harms. Specifically, Plaintiffs and Organizational Plaintiffs seek immediate relief from violations of their rights under the U.S. Constitution's Due Process Clause; the Immigration and Nationality Act ("INA"); the Administrative Procedure Act ("APA"); and the Rehabilitation Act. Defendants' Policy is causing significant and irreparable harm, while Defendants face little, if any, risk of harm from resuming the policy of in-person production that they previously followed for years and have

[1] Hereinafter, "Plaintiffs" refers to the individual Plaintiffs identified in the Complaint in this matter and the unidentified putative class members. The class is defined as "all individuals who are now, or will in the future be, detained by the ICE NY Field Office for removal proceedings" and who ICE has not produced pursuant to the Refusal to Produce Policy. (Mot. for Class Cert. 8, Feb. 15, 2018, ECF No. 18). Plaintiffs respectfully request that this Court "conditionally certify the class" to ensure that relief also be granted to the putative class members, to the extent the class is not certified at the time the injunction issues. *Strouchler v. Shah*, 891 F. Supp. 2d 504, 517-19 (S.D.N.Y. 2012).

already partially reinstituted in a haphazard fashion. Overall, the balance of equities and public interest weigh strongly in favor of a preliminary injunction.

Accordingly, Plaintiffs respectfully request that the Court issue a preliminary injunction requiring Defendants to produce Plaintiffs in person for all hearings in their immigration proceedings during the pendency of this action.[2]

II. FACTUAL BACKGROUND

A. Prior to June 2018, Detained Immigrants Were Produced in Person for All Immigration Court Appearances

Prior to the implementation of the Refusal to Produce Policy, the ICE NY Field Office transported detained immigrants from county jails to Varick Street Immigration Court for their immigration proceedings. (Declaration of Andrea Saenz ("BDS Decl.") ¶ 5; Declaration of Sarah Deri Oshiro ("BxD Decl.") ¶ 6; Declaration of Leena Khandwala ("LAS Decl.") ¶ 8).

In-person production allowed detained immigrants to fully participate in their proceedings. Because they appeared in person, detained immigrants were able to consult with counsel at the Varick Street Immigration Court before, during, and after hearings to discuss case updates and strategy, clarify facts, review evidence, ask questions, and receive advice about the day's proceedings. (BDS Decl. ¶ 29; BxD Decl. ¶ 8; LAS Decl. ¶ 8). These important in-court consultations were possible because both attorney and client were physically present at Varick

[2] The detained immigrants in this lawsuit are subject to removal proceedings, commonly referred to as deportation proceedings. Throughout the proceedings, detained immigrants participate at status hearings referred to as "master calendar hearings," bond hearings, final merits hearings referred to as "individual hearings," and, where necessary, "M-A-M hearings" to assess competency. The initial master calendar hearing marks the first time detained immigrants appear before the immigration court and often the first time they meet their attorneys. If the Court determines that full in-person production is not warranted at this time, Plaintiffs request that the Court order Defendants to produce Plaintiffs for all initial master calendar hearings, bond hearings, M-A-M hearings, individual hearings, and any other hearings in which evidence may be presented or detained immigrants' credibility may be assessed. The putative Rehabilitation Act Subclass—defined in the Motion for Class Certification, ECF No. 18, as "all individuals who are now, or will in the future be, detained by the ICE NY Field Office for removal proceedings who have a disability, as defined by the Rehabilitation Act, and who ICE has not produced or will not produce in person for those proceedings because of Defendants' Refusal to Produce Policy"—would still need to be produced for all hearings.

Street. In-person production also facilitated interpretation for detained immigrants who communicate best in a language other than English. Interpreters were routinely available, with the majority appearing in person sitting next to the immigrant, allowing for efficient, simultaneous interpretation. (BDS Decl. ¶ 22; LAS Decl. ¶ 24; P.L. Decl. ¶ 4). Appearing in person also allowed detained immigrants to follow who was speaking and alert the court through the interpreter if they were unable to understand any aspect of the proceeding. (P.L. Decl. ¶ 4).

Since 2014, detained immigrants who could not afford private counsel could be assigned an attorney through NYIFUP on the day of the individual's initial court appearance. (LAS Decl. ¶ 8; *see also* BDS Decl. ¶ 2; BxD Decl. ¶ 6). Because detained immigrants appeared in person, NYIFUP attorneys were able to conduct in-person and confidential one-on-one eligibility interviews and provide initial legal advice. (BxD ¶¶ 6-7; LAS Decl. ¶ 8).

B. Defendants Abruptly Institute the Refusal to Produce Policy

On June 27, 2018, the ICE NY Field Office announced without warning that effective immediately it would no longer produce detained immigrants in person for hearings. (BDS Decl. ¶ 5; LAS Decl. ¶ 9). Defendants' announcement came three days after President Trump declared that when immigrants arrive in the United States "we must immediately, with no Judges or Court Cases, bring them back from where they came." (Complaint ¶ 78, Feb. 12, 2019, ECF No. 1). Since ICE's June announcement, immigrants detained by the ICE NY Field Office must participate in their own hearings through VTC.[3] (BDS Decl. ¶ 5; LAS Decl. ¶ 9; K.T. Decl. ¶ 3).

[3] On December 10, 2018, ICE, by its own admission, "temporarily resume[d]" production of detained immigrants from the Bergen County Jail for hearings at the Varick Street Immigration Court, while ICE continued "efforts to augment the VTC capacity at that facility"—implicitly acknowledging the inadequacy of VTC capacity at the facility. (LAS Decl. ¶ 19). And as recently as February 2019, the NY Field Office has occasionally produced some immigrants detained at Hudson County Jail for in-person hearings at 26 Federal Plaza, a different immigration court. (BDS Decl. ¶ 5). But because ICE represented the decision to resume production as temporary and because ICE can move detained immigrants between facilities without warning, Plaintiffs held at Bergen—as well as Plaintiffs held at Hudson and Orange County Jails, who must still appear by VTC—still have standing to pursue injunctive relief.

Defendants' explanation for their sudden policy change has repeatedly shifted. At first, Defendants claimed that they implemented the Policy due to an unspecified security threat, purportedly related to a small and peaceful protest outside of the Varick Street Immigration Court regarding the federal government's effort to separate children from parents at the border. (Boisture Decl., Ex. 7). Although the protest ended quickly, in-person production did not resume. (*Id*., Ex. 7). A month later, ICE re-characterized the Policy as a means to protect ICE employees and limit the spread of "misinformation." (*Id*., Ex. 8). To date, ICE has not identified any specific threats against ICE employees or any instances where in-person production of detained immigrants for court appearances at the Varick Street Immigration Court has led to the spread of "misinformation." (*See id*., Ex. 8). On September 27, 2018, Defendant Decker, Director of the ICE NY Field Office, provided yet another unsupported rationale for the Policy, claiming it was implemented because it is more cost-effective. (*Id*., Ex. 3). Several weeks later, ICE claimed for the first time that the Policy was part of a larger nationwide plan to stop producing detained immigrants in person. (*Id*., Ex. 4). Then, in a November 7, 2018 letter to Plaintiffs' counsel, ICE reverted to the original rationale, implying that security and safety concerns were the chief motivation for the change. (*Id*., Ex. 4).

C. The Refusal to Produce Policy Has Harmed, and Continues to Harm, Detained Immigrants

The Refusal to Produce Policy impedes the fair and efficient administration of justice and exercise of Plaintiffs' rights in several important and fundamental respects.

Repeated Delays Prolong Detention. The exclusive use of VTC interferes with the conduct of hearings and causes repeated adjournments, delaying the resolution of immigration cases and detaining immigrants far longer than warranted. (BDS Decl. ¶ 7; BxD Decl. ¶ 9; LAS Decl. ¶¶ 10, 36; K.T. Decl. ¶ 6; R.F.J. Decl. ¶ 6). Immigration judges are forced to repeatedly

delay or adjourn proceedings because VTC lines fail or are unavailable for use. (BxD Decl. ¶ 9; BDS Decl. ¶¶ 8-9, 12-13; LAS Decl. ¶ 11). Similarly, immigration judges must often delay or adjourn proceedings that require interpretation because of the need to do consecutive (instead of simultaneous) interpretation, which causes the proceedings to run long. (BDS Decl. ¶¶ 22-24; LAS Dec. ¶ 24). When hearings are adjourned for these reasons, new hearings are typically rescheduled for weeks or months later. (BDS Decl. ¶¶ 9, 11; LAS Decl. ¶ 11). These delays are often compounded if similar challenges persist during the next scheduled hearing. (BDS Decl. ¶ 9). For example, Plaintiff R.F.J. was scheduled to appear at their[4] individual hearing eight months after they were initially detained by ICE. (R.F.J. Decl. ¶ 6). On the scheduled date, the court adjourned R.F.J.'s hearing because no VTC line was available to use at the jail where they were detained. (*Id.*) As a result, R.F.J. remained in detention an additional three months. (*Id.*) Three months later, R.F.J.'s hearing began but was adjourned before it was completed because there were not adequate VTC lines for the other judges to use. (*Id.* ¶¶ 7-8). R.F.J. must wait an additional four months for the hearing to continue. (*Id.* ¶ 8).

These consistent failures lead immigration judges to urge attorneys to waive their clients' right to appear rather than adjourn the proceedings. (BDS Decl. ¶ 15; LAS Decl. ¶ 12). Attorneys face an unacceptable choice: either sacrifice their clients' right to participate or request an adjournment, thereby extending their clients' detention by an often indeterminate amount of time. (LAS Decl. ¶ 12; *see also* BDS Decl. ¶ 16 (attorneys must balance client participation with emotional, physical, and financial suffering of clients and their families caused by prolonged detention)). For example, Plaintiffs A.R.B. and K.T. were both prepared to appear by VTC, but their hearings proceeded without their participation and without them knowing what

[4] Plaintiff R.F.J. identifies as gender non-conforming and uses they/them pronouns.

was occurring in the courtroom while they waited at the jail. (*Cf.* A.R.B. Decl. ¶ 6; K.T. Decl. ¶ 6).

Technical Failures Impair Participation of Detained Immigrants. Low-quality video and audio connections, interruptions, obstructed views, and other technical failures inherent in ICE's VTC system regularly interfere with Plaintiffs' ability to participate in immigration proceedings. (BDS Decl. ¶¶ 18-21; BxD ¶ 9; LAS Decl. ¶¶ 13-14; P.L. Decl. ¶ 6; K.T. Decl. ¶¶ 8-9; A.R.B. ¶ 5). These barriers prevent detained immigrants from seeing and hearing counsel, interpreters, witnesses, and judges. (BDS Decl. ¶¶ 19-24; LAS Decl. ¶¶ 13-14; P.L. Decl. ¶¶ 5-6; K.T. Decl. ¶ 7; A.R.B. Decl. ¶ 5; B.M.B. Decl. ¶ 6). For example, Plaintiff A.R.B. was not able to follow his hearing because the video feed froze repeatedly. (A.R.B. Decl. ¶ 5; *see also* BDS Decl. ¶ 21 (clients who were technically present via faulty VTC frequently later tell their attorneys they did not understand what was happening at the hearing)).

Additionally, audio issues inhibit effective and accurate interpretation, as simultaneous interpretation is not possible over VTC. (BDS Decl. ¶¶ 22-24; LAS Dec. ¶ 24). Instead, interpreters in the courtroom must either provide consecutive interpretation—which causes miscommunication and unnecessary delays—or provide summary, rather than complete, interpretation. (BDS Decl. ¶ 24; LAS Decl. ¶ 24). And accurate interpretation is nearly impossible when interpreters participate from a third location via speakerphone into the courtroom, which is then broadcast through VTC. (BDS Decl. ¶ 23; LAS Decl. ¶ 25). These obstacles prevent Plaintiffs who rely on interpreters from following, responding, or communicating at their hearings, and they can result in attorneys waiving interpretation at the request of the court, essentially nullifying client participation. (BDS Decl. ¶ 24). For instance, Plaintiff B.M.B. had difficulty communicating with the interpreter (and thereby the court)

through VTC and could not understand portions of the proceedings. (B.M.B. Decl. ¶ 6). Similarly, Plaintiff P.L. could not determine who was speaking, and consecutive interpretation made it difficult to follow the proceedings in his case. (P.L. Decl. ¶¶ 5-6). These difficulties are further exacerbated for individuals with disabilities. (LAS Decl. ¶ 33).

Moreover, the technological failures associated with VTC impede the ability of immigration judges to assess veracity and credibility, appreciate Plaintiffs' testimony and demeanor, analyze the weight of evidence, or identify disabilities that require safeguards. (BDS Decl. ¶¶ 20, 33; LAS Decl. ¶¶ 13-14, 26, 28-29, 31-32; P.L. Decl. ¶ 9; K.T. Decl. ¶ 7). For instance, because of both poor video quality and placement, immigration judges' view of detained immigrants is limited when they appear by VTC, making it easy to miss the import of emotional testimony. (*See* P.L. Decl. ¶ 9; K.T. Decl. ¶ 7). Similarly, for individuals communicating with the immigration court through an interpreter, pauses and synopses of testimony mean that emotion, gravity, and details are literally lost in translation. (LAS Decl. ¶¶ 24, 26; P.L. Decl. ¶ 5). For immigrants with disabilities who appear over VTC, judges often cannot see or assess the severity of disabilities that keep individuals from fully participating in their hearings. (LAS Decl. ¶¶ 29, 32).

The Policy Undermines Confidentiality. Detained immigrants are not provided with confidential space in the county jails to "appear" by VTC for hearings. (BDS Decl. ¶ 27; LAS Decl. ¶ 27; A.Q. Decl. ¶¶ 4-7; K.T. Decl. ¶¶ 3-5; R.F.J. Decl. ¶ 7; B.M.B. Decl. ¶ 6). Instead, rooms where detained immigrants testify or listen to hearings are often not soundproof and other detained immigrants and facility-based staff may overhear proceedings. (BDS Decl. ¶ 28). In some instances, officers refuse to leave the room or allow the door to be closed during hearings. (K.T. Decl. ¶¶ 3-5; A.Q. Decl. ¶¶ 4-7; R.F.J. Decl. ¶ 7; B.M.B. Decl. ¶ 6). The harm from being

forced to testify within earshot of jail officials and other detainees is significant: testimony concerning confidential or sensitive information like a person's sexual orientation or gender identity, experiences of violence or rape, medical diagnoses, law enforcement cooperation, or violence and discrimination in the jail can present a safety risk to the detained immigrant. (BDS Decl. ¶¶ 25, 27). Because detained immigrants often fear that they will be overheard and suffer as a result, they are reluctant to testify about sensitive information that may be relevant to their cases. (BDS Decl. ¶ 27; LAS Decl. ¶ 27; K.T. Decl. ¶¶ 4; A.Q. Decl. ¶¶ 4, 7-9; R.F.J. Decl. ¶ 7; B.M.B. Decl. ¶ 6). For example, Plaintiff A.Q. repeatedly asked officers to close the door during his testimony and even notified the immigration judge when they refused. (A.Q. Decl. ¶¶ 4-6). When the officers disregarded the judge's instruction, A.Q. feared for his safety and was unable to provide the judge with full information about his sexual orientation. (*Id.* ¶¶ 8-9). Similarly, R.F.J. could not provide comprehensive information about sexual orientation and gender identity for fear that people at the jail could overhear and harm them. (R.F.J. Decl. ¶ 7).

VTC Impedes Communication with Counsel. The Refusal to Produce Policy also hinders detained immigrants' ability to confidentially communicate with counsel and review evidence during hearings. (BDS Decl. ¶¶ 26, 29-30; BxD ¶ 8; LAS Decl. ¶¶ 20-22). Under the Policy, detained immigrants have no reliable way to confidentially confer with counsel on the day of a hearing. (BDS Decl. ¶¶ 29, 31; BxD Decl. ¶ 8; LAS Decl. ¶¶ 20-21).[5] Similarly, there is no option for Plaintiffs to ask their attorneys clarifying questions during the hearing. (P.L. Decl. ¶ 7). Because Plaintiffs are not present in the courtroom, attorneys who need to confidentially

[5] *Cf.* BxD Decl. ¶¶ 6-7 (noting that before the Policy was implemented, attorneys were able to meet with clients before and after each hearing to outline strategy for the next stage of the proceedings); LAS Decl. ¶ 8 (describing meetings at the Varick Street Immigration Court before the Policy was implemented where attorneys and clients could discuss case updates and strategy, clarify facts, review evidence, ask questions, and receive advice about the day's proceedings); BDS Decl. ¶ 29 (explaining that attorneys could confer with clients during proceedings—either in the courtroom or in a private adjoining room during a brief adjournment—prior to implementation of the Policy).

counsel clients or seek additional information during a hearing cannot do so without disrupting the proceedings. (BDS Decl. ¶¶ 29-31; LAS Decl. ¶ ¶ 21-22). Indeed, the only option is to ask the judge to clear the courtroom and allow for a brief, attorney-client conference. (BDS Decl. ¶¶ 26, 30-31; LAS Decl. ¶ 21). Yet judges hesitate to clear the courtroom since that requires suspending the court's entire docket and thus holds up other cases. (*See* BDS ¶ 31; LAS Decl. ¶ 21). Even when judges clear the courtroom, government lawyers, court personnel, and private security guards contracted by ICE often remain present or reenter the room, and officers as well as other detainees at the facility may overhear the conversation. (*Id.*).

D. Despite Efforts to Remedy the Harm Caused by the Policy, No Relief Has Been Granted

Plaintiffs' attorneys have repeatedly informed Defendants of the constitutional and statutory violations caused by the Policy and sought clarification of the rationale for continuing to refuse to produce detained immigrants in person. Defendants have responded with shifting and unsupported rationales for the Policy, all the while failing to remedy the serious legal violations described above. (Boisture Decl., Exs. 3-4, 7-8). Despite several attempts by Plaintiffs' attorneys, productive negotiations floundered, and Defendants' promise of improvements failed to materialize; Plaintiffs thus had no choice but to commence this action.[6]

III. THE COURT SHOULD ENJOIN DEFENDANTS FROM REFUSING TO PRODUCE PUTATIVE CLASS MEMBERS IN PERSON FOR THEIR REMOVAL PROCEEDINGS

Plaintiffs are entitled to a preliminary injunction ordering Defendants to resume in-person production for immigration proceedings because Plaintiffs have demonstrated "(1) irreparable

[6] *Compare* Boisture Decl., Ex. 4 (ICE promising additional soundproof booths) *with* BDS Decl. ¶ 28 (relaying an instance where ICE officers were able to hear proceedings notwithstanding the use of such booths). Even if additional VTC lines or confidentiality protections had materialized, they would not have fully remedied the constitutional and statutory violations created by the refusal to physically produce detained immigrants for their proceedings.

harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest." *See N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018). Specifically, Plaintiffs seek to return to the "last actual, peaceable uncontested status which preceded the pending controversy"—here, the years-long practice of producing detained immigrants in person for their immigration removal proceedings—through a prohibitory injunction. *Id.*[7] Preliminary injunctive relief may issue so long as Plaintiffs establish a likelihood of success on at least one claim. *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 618 (S.D.N.Y. 2018). Here, preliminary injunctive relief is warranted because, as set forth below, Defendants' Policy has and will continue to cause irreparable harm; Plaintiffs are substantially likely to succeed on the merits of their claims; the balance of equities favors Plaintiffs; and a preliminary injunction is in the public interest.

A. Plaintiffs Will Suffer Irreparable Harm Absent Preliminary Injunctive Relief

"A showing 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) (citation omitted). Irreparable harm must be "neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Id*. (citation omitted). Here, Plaintiffs will suffer irreparable harm in the absence of preliminary injunctive relief. In the Second Circuit, courts presume that irreparable injury will result whenever a party alleges a constitutional violation. *Statharos v. New York City*

[7] Because Plaintiffs seek a prohibitory injunction, they need not meet the heightened "substantial likelihood of success on the merits" standard required for a mandatory injunction. Nonetheless, Plaintiffs *have* established a substantial likelihood of success on the merits that would be required for a mandatory injunction. *N. Am. Soccer League, LLC*, 883 F.3d at 37.

Taxi and Limousine Comm'n, 198 F.3d 317, 322 (2d Cir. 1999) ("Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary.).

Plaintiffs assert that Defendants' Policy violates the Fifth Amendment rights of the putative class members. (Compl. ¶¶ 198-203, Feb. 12, 2019, ECF No. 1). This constitutional violation constitutes irreparable harm. *See Mahmood v. Nielsen*, 312 F. Supp. 3d 417, 425 (S.D.N.Y. 2018) (finding irreparable harm where an immigrant "alleges that he is detained in violation of his Due Process rights"); *Sajous v. Decker*, 2018 WL 2357266, at *13 (S.D.N.Y. May 23, 2018) (irreparable harm where Petitioner alleged a violation of his due process rights when he was detained by ICE without a bond hearing). Moreover, irreparable harm is especially well-established here, because implementation of the Policy causes ongoing constitutional violations. *See Hardy v. Fischer*, 701 F. Supp. 2d 614, 619 (S.D.N.Y. 2010) ("[A]n ongoing constitutional violation more closely resembles irreparable injury than . . . [one] . . . suffered in the past" and "constitute[s] quintessential irreparable harm.").

Beyond the well-settled principle that an alleged constitutional violation establishes irreparable harm, the Plaintiffs here face multi-faceted harms as a result of Defendants' Policy. First, Plaintiffs have been and will continue to be subjected to prolonged detention as a result of the Policy: hearings are delayed, adjourned, or rescheduled while detained immigrants languish in jail, and cases that would resolve quickly in person drag on for weeks or months. (BDS Decl. ¶¶ 7-11; BxD Decl. ¶¶ 7, 9; LAS Decl. ¶¶ 10-11, 22; K.T. Decl. ¶ 6; R.F.J. Decl. ¶ 6); *see L.V.M.*, 318 F. Supp. 3d at 618 (irreparable harm where government policy caused average 35-day delay in release of unaccompanied minors from detention). This unnecessary detention imposes severe physical, psychological, and financial stress and burdens. *See, e.g.*, *Leiva-Perez v. Holder*, 640 F.3d 962, 969-70 (9th Cir. 2011) (citation omitted) (separation from family

members, medical needs, and potential economic hardship are "important irreparable harm factors"); (*cf.* BDS Decl. ¶¶ 16-17; A.R.B. Decl. ¶ 8; B.M.B. Decl. ¶¶ 8-9; R.F.J. Decl. ¶ 9).

Moreover, Defendants' Policy also inflicts irreparable harm by interfering with Plaintiffs' ability to litigate their immigration cases. As an initial matter, because of Defendants' Policy, Plaintiffs have difficulty obtaining counsel in the first instance and then conferring confidentially before, during, and after court appearances to discuss strategy, evidence, and issues in the case. (BDS ¶¶ 29-31; BxD ¶¶ 7-8; LAS ¶¶ 15-18). The impact of these barriers is severe: denying access to counsel or hamstringing the effectiveness of one's attorney decreases the likelihood of success in immigration proceedings. Indeed, a 2017 evaluation report estimated that 48 percent of NYIFUP clients achieve successful outcomes in their cases—a 1,100 percent increase from the 4 percent success rate for unrepresented immigrants. (Boisture Decl., Ex. 12 at 6). Even with the benefit of attorneys though, Plaintiffs suffer serious irreparable harm because of the Policy. Because the government regularly refuses to provide evidence before the date of a hearing and Plaintiffs are not in the courtroom, detained immigrants often have no opportunity to review the evidence with counsel. (LAS Decl. ¶ 18). Even more troubling, the only option for Plaintiffs to review the evidence is through blurry images over the flawed VTC connections. (*Id.*)

Similarly, the Policy creates barriers to communicating with the court and impedes judges' ability to accurately assess the veracity and credibility of the detained immigrant's testimony. By leaving Plaintiffs no option other than to testify from the confines of a county jail where privacy is compromised and their safety can be threatened, the Policy deters detained immigrants from fully presenting their cases. (BDS Decl. ¶ 27; LAS Decl. ¶ 27; K.T. Decl. ¶¶ 3-5; A.Q. Decl. ¶¶ 8-9; R.F.J. Decl. ¶ 7; B.M.B. ¶ 6). Even when Plaintiffs do testify, the Policy

hampers immigration judges' ability to assess the weight and credibility of that testimony. (BDS Decl. ¶ 20; LAS Decl. ¶¶ 13-14, 26, 28, 31; K.T. Decl. ¶ 7; *see* P.L. Decl. ¶ 9). Where Plaintiffs rely on interpreters to communicate with the court, these harms are especially significant. (BDS Decl. ¶¶ 22-24; LAS Decl. ¶¶ 23-25; B.M.B. Decl. ¶ 5; *see* P.L. Decl. ¶¶ 5-6). The harm that Plaintiffs face is imminent and ongoing: each day, more detained immigrants are denied these same due process rights. Moreover, more detained immigrants will be subjected to this harm as a result of Defendants' plan to add new VTC-only courtrooms in March 2019. (BDS ¶ 14; LAS Decl. ¶ 39; Boisture Decl., Exs. 10-11).

Plaintiffs have sought in good faith to work with Defendants to reduce the significant harm caused by the Policy, but Defendants have yet to take meaningful actions to remedy the harms. Instead, Defendants maintain that they will not resume in-person production of detained immigrants for proceedings at the Varick Street Immigration Court. Plaintiffs have established irreparable harm because they have alleged that they are experiencing both a constitutional violation and ongoing harm that will not be remedied absent this Court's intervention.

B. Plaintiffs Are Substantially Likely to Succeed—and, at a Minimum, Have Raised Serious Questions—on the Merits

Removal proceedings conducted over VTC must comport with guaranteed constitutional due process rights and other statutory requirements. *See Aslam v. Mukasey*, 537 F.3d 110, 114 (2d Cir. 2008); 8 U.S.C. § 1229a(b)(2)(A)(iii). Because Plaintiffs can demonstrate that the Policy violates due process and statutory requirements, they are substantially likely to succeed on the merits of their constitutional due process, INA, Rehabilitation Act, and APA claims.

1. Plaintiffs Are Substantially Likely to Succeed on the Merits of Their Procedural Due Process Claims

The Second Circuit has recognized that "while [VTC is] statutorily permitted, [it] must nevertheless still accord with the constitutional requirements for due process under *Mathews v. Eldridge*." *Aslam*, 537 F.3d at 114. Under *Mathews*, whether the provided procedures are constitutionally sufficient is determined by weighing (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional procedural safeguards; and (3) the government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Defendants' exclusive use of VTC for all proceedings in lieu of in-person production increases the likelihood of an erroneous deprivation of Plaintiffs' due process rights, and the cost to Defendants of producing Plaintiffs in person is minimal. The Policy therefore fails the balancing test set forth in *Mathews*.

First, Plaintiffs have a substantial interest in ensuring that their immigration cases proceed in accordance with "fundamental fairness." *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24 (1981); *see also Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (immigrants are "entitled to a fair hearing when threatened with deportation"). As discussed above, fairness in Plaintiffs' proceedings relies on their ability to participate in hearings, confer with counsel, review evidence, present testimony, and understand the proceedings. *See supra* Section II-C. Further, Plaintiffs have a substantial interest in their personal liberty. Because of the Policy, problems permeate appearances that determine whether an immigrant will continue being detained during the pendency of proceedings—including, *inter alia*, bond, competency, and termination hearings. Freedom from detention "lies at the heart of the liberty [interest] that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *see also Hernandez v. Decker*, 2018 WL 3579108, at *5-*7 (S.D.N.Y. July 25, 2018) (concluding that

unreasonably prolonged detention violates the Due Process Clause). These are not individualized problems cabined to a particular detainee's case; they are problems in the operation of all proceedings under the Policy, *writ large* and *en masse*.

Second, Defendants' Policy creates significant risks that Plaintiffs will be erroneously denied these important due process interests. The sweeping disconnect and isolation of immigrants from their removal proceedings strike at the heart of fair process. As described in Section II-C, Plaintiffs cannot fully and confidentially collaborate with counsel, cannot review and contest evidence during their hearings, cannot properly advance a defense, and sometimes cannot appear at their hearings at all. The Policy also impedes immigration judges' ability to assess Plaintiffs' testimony and examine the weight of evidence, and it interferes with Plaintiffs' ability to raise or address matters relevant to potential release. These obstacles affect whether Plaintiffs will be released on bond, granted immigration relief, or provided safeguards to accommodate for their disabilities. As a result, the Policy greatly increases the risk that Plaintiffs remain in detention improperly or unnecessarily.

These problems should come as no surprise to Defendants, who have long been aware that the exclusive use of VTC technology for immigration proceedings can cause widespread harms and may be unlawful. An April 2017 report commissioned by Defendant EOIR, the entity responsible for adjudicating immigration cases, concluded that "[f]aulty VTC equipment, especially issues associated with poor video and sound quality, can disrupt cases to the point that *due process issues may arise*." (Boisture Decl., Ex. 1 at 23) (emphasis added). The report's authors further acknowledged that "[i]t is difficult for judges to analyze eye contact, nonverbal forms of communication, and body language over VTC." (*Id.*) Based on concerns about these risks, the report recommended that EOIR "[l]imit the use of VTC to procedural matters." (*Id.*)

Likewise, the GAO found in a separate report that multiple immigration judges "had changed their assessment of a respondent's credibility that was initially made during a VTC hearing after holding a subsequent in-person hearing." (Boisture Decl., Ex. 2 at 55). That report also warned that attorneys could not confer confidentially with their clients, and immigrants participating by VTC could not review evidence against them. (*Id.* at 56). The GAO reported "concerns with EOIR increasingly using VTC to conduct merits and asylum hearings, which generally address substantive case issues and can result in a decision." (*Id.* at 55). As these publications concede, Defendants' all-VTC Policy exacerbates the risk of a deprivation of Plaintiffs' rights.

Finally, in-person production poses only minimal costs and administrative burdens on Defendants. Although the government has an interest in efficiently managing immigration proceedings, Defendants' implementation of the Policy has been vastly less efficient than in-person production.[8] Proceedings by VTC have been replete with delays caused by technological failures and insufficient or unavailable VTC lines. *See supra* Sec. II-C. The jails where Plaintiffs are detained do not have sufficient VTC connections to meet the demand of the Varick Street docket. (BDS ¶ 13). Immigration judges are routinely forced to delay proceedings for hours or adjourn them altogether because no line is available. (BxD Decl. ¶ 9; BDS Decl. ¶¶ 8-9, 12-13; LAS Decl. ¶ ¶ 10-11). Even when a VTC line is available, technical difficulties interrupt the connections, often forcing immigration judges to adjourn hearings. (BDS Decl. ¶¶ 18-21; BxD ¶ 9; LAS Decl. ¶¶ 10-11). The use of VTC has therefore been substantially less efficient than the prior practice of producing immigrants in person for their hearings. Nor can Defendants' sometimes-claimed safety concerns justify the Policy, as Defendants rely on

[8] Indeed, Defendants have already tacitly conceded that the current VTC system is inadequate. On December 7, 2018, ICE decided to "temporarily resume transport of detainees housed at Bergen County Jail for in person hearings before the Immigration Court" because it needed to "continue [its] efforts to augment VTC capacity at that facility." (Boisture Decl., Ex. 9).

unspecified threats and an ambiguous concern that stemmed from a June 2018 protest that ceased long ago.

Each of the *Mathews* factors thus weighs sharply in Plaintiffs' favor: Plaintiffs' interests in fair proceedings and remaining free from improper detention are significant, exclusive use of VTC for all proceedings substantially increases the likelihood of an erroneous deprivation of those interests, and the government's interest in its Policy is minimal. Plaintiffs are therefore substantially likely to succeed on the merits of their due process claim.

2. Plaintiffs Are Substantially Likely to Succeed on the Merits of Their INA Claim

For substantially similar reasons, Defendants' Policy violates the INA's guarantee that detained immigrants are afforded "a reasonable opportunity to examine the evidence against [them], to present evidence on [their] own behalf, and to cross-examine witnesses presented by the Government." 8 U.S.C. § 1229a(b)(4)(B). In *Rapheal v. Mukasey*, the Seventh Circuit held that the plaintiff was denied her right under the INA to a reasonable opportunity to examine evidence against her due to limitations caused by VTC. 533 F.3d 521, 532-33 (7th Cir. 2008). Here, too, the detained immigrants appearing over VTC cannot adequately examine evidence in their cases. *See supra* Section II-C. Since they are not present in the courtroom, and the government often offers evidence during hearings without providing it in advance, Plaintiffs are regularly denied the opportunity to review crucial evidence, confront government witnesses, or discuss evidence with counsel during a hearing. (LAS Decl. ¶¶ 18, 22).

As described in Section II-C above, appearing by VTC presents significant hurdles to Plaintiffs' participation in their cases. For those who rely on interpreters, VTC compromises their ability to understand what is happening during hearings and meaningfully participate in their cases. (*See, e.g.*, BDS Decl. ¶¶ 22-24; LAS Decl. ¶¶ 23-25; P.L. Decl. ¶¶ 5-6). Plaintiffs'

absence from the courtroom, compounded by the technological malfunctions inherent in VTC, makes it challenging—if not impossible—for judges to understand detained immigrants' testimony, perceive their body language and demeanor, and discern the credibility and importance of testimony. (BDS Decl. ¶ 20; LAS Decl. ¶¶ 26-28, 31; K.T. Decl. ¶ 7; P.L. Decl. ¶ 9). These challenges are further exacerbated for immigrants with disabilities. (B.M.B. Decl. ¶ 4-5; A.Q. Decl. ¶ 9). Because the Policy denies Plaintiffs the "opportunity to examine [or] present evidence," Plaintiffs are substantially likely to succeed on the merits of their INA claim under 8 U.S.C. § 1229a(b)(4)(B).

3. The Class and Organizational Plaintiffs Are Substantially Likely to Succeed on the Merits of Their APA Claim

The Class and Organizational Plaintiffs are substantially likely to succeed on their APA claim because the Refusal to Produce Policy is arbitrary, capricious, and not in accordance with law. *See* 5 U.S.C. § 706. An agency may reverse a prior policy if it provides "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). Defendants' Policy reverses years of settled and well-considered practice without reasoned explanation. Its value and purported purpose are contradicted by all available evidence. Defendants' shifting rationales do not justify the Policy's grave costs and do not meet the APA's requirements. (Boisture Decl., Exs. 3-4, 7-8).

Defendants' blanket imposition of the Policy, just three days after the President urged that immigrants be deported without due process, violated a "basic procedural requirement" of administrative action: that agencies provide "adequate reasons for [their] decisions" and "articulate a satisfactory explanation for [their] action including a rational connection between the facts found and the choice made." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125

(2016) (citation omitted); *see also New York v. United States Dep't of Commerce*, 2019 WL 190285, at *91-92 (S.D.N.Y. Jan. 15, 2019) (noting that informal agency action is subject to arbitrary and capricious review), *cert granted*, 2019 WL 331100 (U.S. Feb. 15, 2019). Defendants have provided no such explanation. While Defendant ICE originally claimed that the Policy was instituted for security reasons related to protests near the Varick Street Immigration Court, those protests were peaceful and ended quickly (Boisture Decl., Ex. 7). Despite repeatedly—and intermittently—returning to the security rationale, ICE has failed to identify any other safety risk, even after Defendants temporarily resumed in-person production of immigrants from the Bergen County Jail in December.[9]

Defendants' haphazard decision-making—with Plaintiffs' rights at stake—demonstrates that Defendants failed to account for the Policy's inadequacies. This failure is especially egregious in light of the EOIR and GAO Reports, which put Defendants on notice that universal use of VTC may violate the due process rights of detained immigrants. (Boisture Decl., Exs. 1-2). Defendants have thus failed to meet the Court's requirement that they "articulate a satisfactory explanation for [their] action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto.*

[9] Indeed, none of ICE's various rationales for the Policy provides a credible basis for its implementation. In a letter to Plaintiffs' counsel dated September 27, 2018, Defendant Decker reiterated that the Policy was implemented "in response to protests, threats, and the possibility of court cancellations," but provided, for the first time, a *post hoc* rationale: ICE's refusal to produce class members to Varick Street was continuing because it was "far more cost effective." (Boisture Decl., Ex. 3). However, as described above, the exclusive use of VTC has been extraordinarily inefficient compared to in-person production, increasing the amount of time required to resolve proceedings, as well as the duration and costs of detention. (BDS Decl. ¶ 7).

In a November 7, 2018 letter, Defendant Joyce reverted to ICE's earlier rationale, implying that disconnected and unsupported security and safety concerns were the chief motivation behind the policy change, pointing to the June 2018 protest, a 2015 breach of security unrelated to transporting detained immigrants to the court, and three court cancellations due to inclement weather during 2017 and 2018. (Boisture Decl., Ex. 4). But those concerns were wholly unrelated to the practice of producing detained immigrants in person for their court appearances. Such an "unexplained inconsistency" between the reasons provided for an agency policy and the facts "is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Encino Motorcars*, 136 S. Ct. at 2126 (citation omitted). Indeed, Defendants implicitly conceded the arbitrariness of their decision when they "temporarily resume[d]" production of detained immigrants at the Bergen County Jail, while inexplicably continuing the Policy for the other jails.

Ins. Co., 463 U.S. 29, 43 (1983). Because Defendants' rationales are divorced from reality, Plaintiffs are substantially likely to succeed on the merits of their APA claim.

4. The Subclass Plaintiffs Are Substantially Likely to Succeed on the Merits of Their Rehabilitation Act Claims

Plaintiffs J.C., A.Q., B.M.B., P.L. and the putative Rehabilitation Act Subclass are substantially likely to succeed on the merits of their Rehabilitation Act claim. To assert a claim under section 504 of the Rehabilitation Act, plaintiffs must demonstrate that "(1) [they are] qualified individual[s] with a disability; (2) the defendant is subject to [] the Act[]; and (3) [plaintiffs 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 disabilit[ies]." *Disabled in Action v. Bd. of Elections*, 752 F.3d 189, 196-97 (2d Cir. 2014). A qualified individual is one who has (1) a physical or mental impairment (2) that affects a "major life activity," and (3) the impairment "substantially limits" the major life activity. *Weixel v. Bd. of Educ.*, 287 F.3d 138, 147 (2d Cir. 2002) (citation omitted). When an individual's disability meets those criteria, the government must make reasonable accommodations to ensure that the person will "have access to and take a meaningful part in public services." *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 85 (2d Cir. 2004). Where plaintiffs are unable to meaningfully access the benefit offered—here, full and fair participation in their removal proceedings—because of their disability, the Act has been violated. *See Alexander v. Choate*, 469 U.S. 287, 301 (1985).

Plaintiffs with disabilities meet the elements required to succeed on their Rehabilitation Act claim. Defendants DHS, ICE, DOJ, and EOIR are executive agencies within the meaning of the Rehabilitation Act. *See Franco-Gonzales v. Holder*, 767 F. Supp. 2d 1034, 1056 n.17 (C.D. Cal. 2010). Plaintiffs and putative class members with disabilities qualify as persons with

disabilities for the purposes of Section 504 of the Rehabilitation Act. *See* 29 U.S.C. § 705(20)(A)(i) (2014) (defining "individual with a disability" to include a person who has a "mental impairment which . . . constitutes or results in a substantial impediment" to certain functions); *see also* 6 C.F.R. § 15.3(d) (DHS regulations implementing the Rehabilitation Act include "condition[s] . . . affecting . . . [n]eurological [systems]," "mental retardation, organic brain syndrome, . . . specific learning disabilities," and epilepsy). Finally, the putative Rehabilitation Act Subclass members' disabilities prevent them from effectively participating in their immigration hearings. For example, plaintiff J.C.'s psychologist determined that he is "intellectually compromised" and functions "much below his age and grade group in all areas assessed." (LAS Decl. ¶ 34). The psychologist assessed that the use of VTC will likely cause J.C. to "become anxious, confused, befuddled, and disorganized." (LAS Decl. ¶ 35). Based on his psychologist's testimony at a competency hearing, the immigration judge expressed concern that requiring J.C. to appear for his merits hearing over VTC would violate "due process and fundamental fairness," given his mental limitations. (LAS Decl. ¶ 37). The immigration judge stated that, given the psychologist's testimony, "[i]f he appears via video, I see a problem with that. I have to protect his constitutional rights and I have an expert who told me that this guy shut down when he interviewed him because of certain technical type issues." (*Id.*) As the judge noted, "clearly the VTC format would add to that stress for anybody, particularly somebody with first grade level cognitive abilities."[10] (*Id.*)

More generally, the harms caused by VTC are amplified for immigrants with disabilities. As explained above, a report commissioned by EOIR concluded that VTC makes it "difficult for

[10] Even after noting that J.C.'s "constitutional rights" were at stake, the immigration judge declined to order Defendant ICE to produce him for his merits hearing, instead urging ICE to voluntarily produce him, which it has provided no assurances of doing. (LAS Decl. ¶ 38). As the immigration judge observed, J.C. could testify more fully—and the immigration judge could observe his demeanor more accurately—if he were produced in person.

judges to analyze eye contact, nonverbal forms of communication, and body language." (Boisture Decl., Ex. 1 at 23). Immigration judges also have reported "being unable to identify a respondent's cognitive disability over VTC, but that the disability was clearly evident when the respondent appeared in person at a subsequent hearing, which affected the judge's interpretation of the respondent's credibility." (*Id*., Ex. 2 at 55).

The Rehabilitation Act requires Defendants to make reasonable accommodations for members of the Rehabilitation Act Subclass. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 274-75 (2d Cir. 2003). Courts have previously recognized the need for reasonable accommodations for disabilities in immigration proceedings, and those accommodations have been flexible to address the identified risks. For example, a court has held that an immigrant with cognitive impairments stated a claim under the Rehabilitation Act by "alleging that his disability require[d] face-to-face meetings with his attorney." *Palamaryuk ex rel. Palamaryuk v. Duke*, 306 F. Supp. 3d 1294, 1301 (W.D. Wash. 2018). Similarly, in *Franco-Gonzales v. Holder*, the court granted a preliminary injunction under the Rehabilitation Act requiring the federal government to provide representatives to detained immigrants with mental disabilities, reasoning that the safeguards provided to immigrants determined to be mentally incompetent were inadequate to provide meaningful access to the immigration proceedings. 767 F. Supp. 2d at 1056-58.

Likewise, Plaintiffs' disabilities make it vital for them to be able to confidentially consult in person with attorneys, appear face-to-face before the judges who will decide whether their disabilities require safeguards during the proceedings, and appear alongside attorneys and interpreters who can help them understand and meaningfully participate in proceedings. As a reasonable accommodation, the Court should enjoin Defendants from applying the Policy to the Rehabilitation Act Subclass for any of their hearings—*i.e.*, return to the *status quo*.

C. The Balance of Equities Tips Decidedly in Plaintiffs' Favor

The balance of equities tips decidedly in favor of Plaintiffs, putative class members, and the Rehabilitation Act Subclass. As Defendants' Policy violates Plaintiffs' constitutional and statutory rights, Defendants "cannot suffer any harm from an injunction that terminates an unlawful practice." *L.V.M.*, 318 F. Supp. 3d at 620 (citing *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013)). Any claim of harm from a preliminary injunction restoring the *status quo* is belied by the facts. The protests that Defendants initially identified as a threat ended months ago, and Defendants have not indicated any safety concerns since temporarily resuming in-person production from the Bergen County Jail in late 2018 (Boisture Decl., Ex. 7). Moreover, Defendants cannot credibly argue that reverting to the *status quo* by transporting detained immigrants to the Varick Street Immigration Court strains financial resources or undermines efficiency. For years, Defendants consistently transported detained immigrants to Varick Street. (Boisture Decl., Ex. 3) (referring to the transportation of detained immigrants as "the traditional process").[11] Any cost associated with resuming its years-long practice during the pendency of this litigation will be modest compared to Plaintiffs' harms. *Sajous*, 2018 WL 2357266, at *13 (where a plaintiff experiences a "deprivation of liberty without due process . . . the balance of hardships tips decidedly in the plaintiff's favor despite arguments that granting a preliminary injunction would cause financial or administrative burdens on the Government" (citing *Mitchell v. Cuomo*, 748 F.2d 804, 808 (2d Cir. 1984))).[12]

[11] And, as detailed above, they are doing so again for detained immigrants in Bergen, albeit on a temporary basis.
[12] Indeed, in-person production may conserve government resources by ending the constant case delays caused by the use of VTC and reducing the costs of prolonged detention.

D. Preliminary Injunctive Relief Is in the Public Interest

The public interest is served by granting preliminary injunctive relief in this case. The public and government have an interest in ensuring that all persons, including immigrants, obtain constitutionally adequate legal proceedings. *Sajous*, 2018 WL 2357266, at *13 ("The public interest is best served by ensuring the constitutional rights of persons within the United States are upheld."); *see also L.V.M.*, 318 F. Supp. 3d at 620 ("[S]etting aside an unlawful practice [cannot] be against the public interest."). The success rates for immigrants represented by NYIFUP counsel at Varick Street Immigration Court demonstrate that assistance of counsel and access to the courts protect the due process rights of detained immigrants and reduce unlawful detention. (LAS Decl. ¶ 5). Restoring Plaintiffs' ability to attend their court proceedings in person would allow them to consult with their attorney, confront the witnesses and evidence against them, and meaningfully participate in their removal proceedings. The public interest is served by ensuring that immigrants receive their constitutionally-protected fair hearings.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court issue a preliminary injunction requiring Defendants to produce Plaintiffs in person for all hearings in their immigration proceedings during the pendency of this action, and grant such further relief as the Court may deem just and proper.[13]

[13] Federal Rule of Civil Procedure 65(c) provides that no preliminary injunction shall issue except upon the provision of a security by the applicant "to pay the costs and damages sustained by any party found to have been wrongfully enjoined." Individual plaintiffs represent that they and the putative class members are financially unable to post security in any significant amount. This court has held that "indigents, suing individually or as class plaintiffs, ordinarily should not be required to post a bond under Rule 65(c) … and the court should order no security." *Bass v. Richardson*, 338 F. Supp. 478, 490 (S.D.N.Y. 1971). Nor is a nominal bond warranted here, where "it will not provide any meaningful protection for the [government] against 'costs and damages' occasioned by the injunction." *Id.* at 491. Instead, "the allocation of risk for not complying with federal law … properly rests upon the defendant governmental bodies whose administration of the program is at issue." *Id.*

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Respectfully submitted,

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