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

P.L., *et al.*,

Plaintiffs,

v.

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*,

Defendants.

Civil Action No. 1:19-cv-01336

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTIONS FOR A PRELIMINARY INJUNCTION AND CLASS CERTIFICATION

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PRELIMINARY STATEMENT

Last month, John Kelly, Acting Inspector General of Defendant DHS, was asked during his Congressional testimony about the Government's Refusal to Produce Policy at Varick Street Immigration Court. His response: "[W]hat you just described does not sound . . . to be the kind of principles that the United States wants to stand for." Ex. 1, *Hearing on Homeland Security Inspector General Before the Subcomm. on Homeland Sec. of the H. Appropriations Comm.* (Mar. 6, 2019). This is the Policy that the Government now attempts to justify.

As detailed in Plaintiffs' opening briefs (D.I. 18, D.I. 37), Defendants' Policy has violated and continues to violate the rights of immigrants detained by the ICE NY Field Office, causing significant and irreparable harm to the putative class. As a result, Plaintiffs seek to certify a class of detained immigrants who are subject to the Government's Policy, and to obtain a preliminary injunction that enjoins the Policy and requires the ICE NY Field Office to produce those class members in-person for immigration court hearings during the pendency of this action. The Government's opposition brief (D.I. 77) ("Opp.") fails to engage with the material facts and legal issues. Instead, the Government repeatedly mischaracterizes Plaintiffs' claims—first as a challenge to individual uses of VTC and then as a challenge to the INA generally—and suggests that this dispute can only be resolved on a case-by-case basis. Not so. Plaintiffs' challenge is to Defendants' blanket Policy, a Policy imposed on all class members regardless of circumstance, which denies them the opportunity to participate meaningfully in their immigration proceedings. This uniform policy inflicts irreparable harm on all class members.

Because Congress has not limited this Court's jurisdiction to adjudicate Plaintiffs' claims, Plaintiffs have demonstrated each of the prerequisites necessary for preliminary injunctive relief, and Plaintiffs' claims are precisely the kind that are suitable for class resolution, this Court should enter a preliminary injunction and certify the proposed classes.

I. THE COURT SHOULD EXERCISE JURISDICTION OVER PLAINTIFFS' CLAIMS

This Court may properly exercise jurisdiction here because 8 U.S.C. §§ 1252(a)(5), (b)(9), and (f)(1) preserve jurisdiction over Plaintiffs' claims and the relief they seek. Section 1252(f)(1) precludes efforts to enjoin the operation of the INA on a classwide basis by parties *not* subject to removal proceedings. Sections 1252(a)(5) and (b)(9) dictate the process for challenging final removal orders in individual cases. Here, Plaintiffs do not seek review of final orders of removal, but rather ask the Court to evaluate whether the Policy violates the INA, the Constitution, and other federal laws. No statute bars such claims, nor the relief Plaintiffs seek.

A. Classwide Relief Is Permissible And Section 1252(f)(1) Is No Bar

The Government repeatedly mischaracterizes Plaintiffs' claims as an effort to ban the use of VTC. Plaintiffs do not seek to enjoin any provision of the INA or prohibit the use of VTC entirely, nor do they contest that the INA allows hearings to be conducted via VTC. Instead, Plaintiffs simply seek to ensure that the use of VTC comports with the guarantees of the INA, the Constitution, and other federal laws. Compl. (D.I. 2) 56; Prelim. Inj. Br. (D.I. 37) ("PI Br.") 3.[1]

Claims seeking lawful administration of the INA are not prohibited by § 1252(f)(1). Indeed, Plaintiffs contend that the Policy itself *violates* the INA and the Constitution. Compl. (D.I. 2) ¶¶ 204-223. No statute bars relief for such claims. *See e.g.*, *Abdi v. Duke*, 280 F. Supp. 3d 373, 409 (W.D.N.Y. 2017) (no prohibition on classwide injunctive relief where "the moving party does not seek to enjoin the operation of" INA provisions "and instead, seeks to enjoin

[1] Although the INA provides that VTC "may" be used in removal proceedings, that authorization must be construed in light of the broader statutory scheme, which guarantees access to counsel, and the opportunity to examine and present evidence and witnesses. *See generally* 8 U.S.C. §§ 1229a(b)(2), (4). Moreover, § 1229a(b)(2) must be interpreted to avoid implicating constitutional questions. *See Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (concluding term "may . . . detain" is ambiguous and must be interpreted as consistent with constitutional constraints).

violations of the statutory and regulatory framework"); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 328 (D.D.C. 2018) (§ 1252(f)(1) not implicated "where a petitioner seeks to enjoin conduct that allegedly is not even authorized"); *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1205 n.19 (N.D. Cal. 2017) (finding that preliminarily enjoining due process violations "neither enjoins nor restrains the proper operation" of the relevant sections of the INA and is therefore not barred by § 1252(f)(1)).

Moreover, 8 U.S.C. § 1252(f)(1) expressly does not apply where the party seeking relief is currently in removal proceedings. 8 U.S.C. § 1252(f)(1) (acknowledging limits on injunctive relief do not apply to immigrants "against whom proceedings under [§§ 1221-1232] have been initiated"). The Representative Plaintiffs and putative class members are all presently in removal proceedings. Compl. (D.I. 2) ¶¶ 17-23; Class Certification Br. (D.I. 18) ("Class Cert. Br.") 9 (proposed class includes those "detained by the ICE NY Field Office for removal proceedings"). Such claims by a class of individuals, all of whom are subject to removal proceedings, are not barred by § 1252(f)(1). *See, e.g.*, *Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018) (§ 1252(f)(1) does not bar jurisdiction where putative class members were subject to removal proceedings); *cf. Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) (statute's reference to "any individual" does not indicate that usual rule allowing class actions "is not controlling").

The cases that the Government cites do not hold otherwise. *See* Opp. 10. *Jennings v. Rodriguez* did not base its holding on the applicability of § 1252(f)(1). Rather, the Supreme Court expressly remanded for a determination of whether an injunction could lie on constitutional grounds. *See* 138 S. Ct. 830, 851 (2018). The other cases are equally inapposite. *See Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-82 (1999) (considering whether § 1252(f)(1) provides an affirmative grant of jurisdiction and generally

characterizing statute's effect in dictum); *Nken v. Holder*, 556 U.S. 418, 431 (2009) (characterizing government's argument regarding § 1252(f)(1) but not independently analyzing provision); *Alli v. Decker*, 650 F.3d 1007, 1011 n.6 (3d Cir. 2011) (noting *AADC* assessed "whether § 1252(f)[(1)] is a grant of or limit on" jurisdiction but did not "address [its] scope").[2]

B. Neither Section 1252(a)(5) Nor (b)(9) Preclude Jurisdiction

By its terms, § 1252(b)(9) "applies only '[w]ith respect to review of an order of removal under subsection (a)(1).'" *INS v. St. Cyr*, 533 U.S. 289, 313 (2001) (quoting statute); *see also Chehazeh v. Att'y Gen. of U.S.*, 666 F.3d 118, 131 n.16 (3d Cir. 2012) (same); *Michalski v. Decker*, 279 F. Supp. 3d 487, 493 (S.D.N.Y. 2018) (§ 1252(b)(9) "by its plain text applies only to review of orders of removal"). Because none of the class members have final orders of removal, and they do not seek to challenge the results of their removal proceedings, § 1252(b)(9) is inapplicable. The § 1252(b)(9) "zipper clause" was an "effort to streamline . . . uncertain and piecemeal review of orders of removal" by "consolidating all challenges to an order of removal" and limiting immigrants to "one bite of the apple." *Chehazeh*, 666 F.3d at 131 n.16 (quoting *Bonhometre v. Gonzalez*, 414 F.3d 442, 446 (3d Cir. 2005)). Section § 1252(b)(9) is "not aimed at consolidating claims arising from administrative actions unrelated to an order of removal," such as those at issue here. *Id.* The Supreme Court recognized this limitation in *Jennings*. 138 S. Ct. at 840 (characterizing the "absurd[ity]" of interpreting § 1252(b)(9) in an "extreme way"

[2] The *Alli* court also recognized that "the jurisdictional limitations in § 1252(f)(1) do not encompass declaratory relief." 650 F.3d at 1013. That relief, which Plaintiffs seek in this case, may be issued on a preliminary injunction. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Doe*, 868 F. Supp. 532, 536 (S.D.N.Y. 1994) (finding that preliminary declaratory relief is available). And contrary to the Government's argument that declaratory relief alone cannot sustain this action, Opp. 35-36, there are many forms of declaratory relief this court could issue that would "clarify[] or settl[e] the legal issues involved." *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359 (2d Cir. 2003). To give just one example, the court could declare that the use of VTC in hearings where defendants give testimony violates the Due Process Clause.

that resulted in "cramming" judicial review of questions that did not concern the outcome of removal proceedings into review of final orders).

The "substance of the relief" test for determining district court jurisdiction that Defendants cite, Opp. 12, supports that conclusion. For example, in *Delgado v. Quarantillo*, in assessing § 1252(b)(9)'s bar on challenges to removal orders, the Second Circuit noted that while "a suit brought against immigration authorities is not *per se* a challenge to a removal order," the petitioner's district court litigation was precisely that. 643 F.3d 52, 55 (2d Cir. 2011). Because the petitioner had a final order of removal and the "substance of the relief" sought was vacating that order, the claim was barred. *Id*. Not so here, where Plaintiffs do not have final removal orders, do not seek review of the merits or ultimate outcome of any class member's case, and offer no position on the outcome of their removal proceedings.[3] By definition, their claims accrue before a final removal order exists and regardless of whether one is ultimately entered. If § 1252(b)(9) barred jurisdiction here, the Government's constitutional violations would go unchallenged in every case where a class member wins deportation relief. The Supreme Court has expressly disavowed that result. *See Jennings*, 138 S. Ct. at 840 (rejecting "extreme way" of reading § 1252(b)(9) that would deprive immigrants who won immigration relief of "any meaningful chance for judicial review").

The Government's claim that "courts of appeals confirm that a petition for review is the proper forum for plaintiffs' claims" is wrong. Opp. 13-14. The cases the Government cites to support that assertion generally do not deal with classwide challenges to a broadly imposed policy, nor do they involve alleged due process violations caused by such policies[4] or relief that

[3] Plaintiffs do not waive, on behalf of themselves or any members of the putative class, the right to contest their removal proceedings outside of this litigation.

[4] A notable outlier on this point is *Aguilar v. U.S. Immigration & Customs Enforcement Division*,

is independent from the outcome of the removal proceedings. Here, Plaintiffs cannot effectively vindicate their rights through petitions for review under § 1252(a)(5) because they challenge the uniform Government Policy that causes collective constitutional and statutory violations, as opposed to challenging the outcome of any specific removal proceeding.[5]

Finally, because neither the INA nor any other statute precludes jurisdiction, the Administrative Procedure Act waives sovereign immunity in this case. *See also* Compl. (D.I. 2) ¶ 14. Further, there is no adequate alternative remedy for Plaintiffs to bring their constitutional and statutory challenges to the Policy, which is imposed on a classwide basis. *See* 8 U.S.C. § 1252(b)(4) (describing the scope of petitions for review).

II. PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION

A. Plaintiffs Are Likely To Succeed On The Merits

1. The Policy Fails To Accord With Due Process

As Defendants acknowledge, the use of VTC in immigration proceedings "must accord with the constitutional requirements of the Due Process Clause," including the right of detained immigrants to fully and effectively participate in their hearings. *Aslam v. Mukasey*, 537 F.3d 110, 114-15 (2d Cir. 2008). Defendants also acknowledge "that individual circumstances may require the physical presence of a detained alien at a hearing." Opp. 7. The Policy, however,

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which did consider a pattern or practice but explicitly recognized that § 1252(b)(9) cannot be read to preclude "claims that cannot effectively be handled through the available administrative process." 510 F.3d 1, 7, 11 (1st Cir. 2007) (noting that removal proceedings are limited to determining deportation and that independent civil claims, including potentially those for money damages, are not foreclosed by § 1252(b)(9)). Moreover, neither *Aguilar* nor the other case on which Defendants heavily rely in discussing § 1252(b)(9), *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1031 (9th Cir. 2016), are binding on this Court.

[5] The Organizational Plaintiffs' claim, Compl. (D.I. 2) ¶¶ 233-239, also cannot be vindicated through a petition for review.

denies *all* class members the opportunity to meaningfully participate in their cases.[6] It therefore violates their rights and results in a high likelihood of erroneous deprivations.

Defendants argue that courts have not found that the use of VTC violates due process, but that misses the point. Plaintiffs do not challenge the statutory authorization to use VTC in particular circumstances, so long as it is consistent with due process. Rather, they seek to enjoin the slapdash blanket Policy that has caused and continues to cause widespread harm and due process violations. Compl. (D.I. 2) 56. Unlike in the cases that the Government cites for support, all class members here are forced to appear over VTC for all proceedings, without any assessment as to whether VTC is appropriate for the particular individual or the specific proceeding. *See, e.g.*, *Rapheal v. Mukasey*, 533 F.3d 521, 532-33 (7th Cir. 2008) (petitioner did not receive a fair VTC hearing because she could not review evidence presented against her).[7]

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[6] The Government's suggestion that it makes individualized determinations of when VTC is appropriate is belied by its own statements. *See* Kinder Decl. (D.I. 19), Ex. 3 ("ERO ***will not return to the production of respondents 'in person'*** for court." (emphasis added)), Ex. 4 ("ERO-NYC ***will not resume producing detained aliens*** for hearings in the New York Immigration Court. ERO-NYC is committed to the use of VTC technology as ***the means*** of producing aliens for their immigration court hearings." (emphasis added)); *see also* LAS Supp. Decl. ¶¶ 4-5, 12; BxD Supp. Decl. ¶¶ 3-5; BDS Supp. Decl. ¶¶ 4, 7. And the Government's token reliance on the one-time, in-person production of J.C. only further emphasizes this point. J.C. is the only example offered by the Government—and the only instance known to the organizational Plaintiffs—in which the Government utilized in-person production based on an allegedly individualized assessment. *See* LAS Supp. Decl. ¶¶ 4-5; BxD Supp. Decl. ¶¶ 3-5; BDS Supp. Decl ¶¶ 3-4. Even then, J.C., who just so happened to be a Representative Plaintiff, was produced only after this lawsuit and the motion for class certification were filed and without any notice to him or his attorney that he would be produced in person. LAS Supp. Decl. ¶ 6. Apart from this sole example, in the nine months since the Policy has been in effect, none of NYIFUP's many requests have in-person production have been granted. *See id.*, ¶ 5; BxD Supp. Decl. ¶ 5; BDS Supp. Decl. ¶ 11.

[7] The cases that the Government cites to argue that VTC does not violate due process, Opp. 19-20, are distinguishable on other factual grounds as well. Unlike here, the harms petitioners faced in those cases were partly "self-inflicted." *See, e.g.*, *Rusu v. INS*, 296 F.3d 316, 323-24 (4th Cir. 2002) (petitioner decided to testify in a second language); *Veliz v. Holder*, 375 F. App'x 148, 149-50 (2d Cir. 2010) (petitioner rejected IJ's proposal of a change of venue to permit an in-person hearing); *Aslam*, 537 F.3d at 115 (same). And Plaintiffs here have articulated the many

The Government also fails to establish that the "safeguards" designed by Congress—the removal proceedings themselves—adequately protect Plaintiffs' interests. In reality, the Policy interferes with the ability of immigration judges ("IJs") to "perform their statutory roles of determining plaintiffs' removability." Opp. 18; *see, e.g.*, Boisture Decl. (D.I. 48), Ex. 2 at 55 (GAO report finding that IJs "had changed their assessment of a respondent's credibility that was initially made during a VTC hearing after holding a subsequent in-person hearing"). Notably, under the Policy, IJs refuse to order in-person production and, instead, the prosecuting authority is left to implement the Policy as it sees fit. BDS Supp. Decl. ¶ 11; LAS Supp. Decl. ¶¶ 4-5. In the sole instance identified by the Government where a class member was produced in person because ICE allegedly considered due process concerns, the IJ suggested in-person production by ICE but did not order it. LAS Supp. Decl. ¶¶ 4-5; *supra* n.6.

Finally, in arguing that the Government's interest favors the Policy, the Government claims that Plaintiffs "do not specify how VTC is less efficient than in-person production." Opp. 19. That assertion simply ignores the record. Plaintiffs have shown that ICE's universal reliance on VTC is widely inefficient. *See* PI Br. 17-18 (describing lengthy delays in proceedings and/or adjournments because VTC lines are not available or are rife with technical problems). Further, the Government fails to provide any support for how its alleged efficiency interests outweigh the

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ways in which VTC under the Policy prevents them from adequately participating in their cases. *See infra* Section II.B; *Eke v. Mukasey*, 512 F.3d 372, 383 (7th Cir. 2008) (petitioner did "not explain" how VTC "prevented the IJ from considering" potentially relevant evidence); *Vilchez v. Holder,* 682 F.3d 1195, 1199-20 (9th Cir. 2012) (IJ and petitioner "spoke up" and "successfully . . . address[ed]" problems with the VTC); *Hermez v. Gonzales*, 227 F. App'x 441, 445 (6th Cir. 2007) ("IJ . . . could hear the attorneys, [petitioner] and [petitioner's] one witness clearly"); *Aslam*, 537 F.3d at 115 ("at the hearing, the petitioner had a full opportunity to confront and cross-examine the witness, . . . and to draw attention to any credibility issues or inconsistencies in her testimony"). Critical to the Second Circuit's determination in *Aslam* that due process was not violated by the use of VTC was the fact that it was a witness appearing over VTC, and not the petitioner. *Id.*

substantial due process concerns and costs here. The frequent delays and adjournments caused by the Policy inarguably result in longer detention, often months longer. That cost is likely to outweigh the cost of transporting detained immigrants to their handful of court appearances.[8]

2. The Policy Violates The INA

For similar reasons, the Policy violates the INA's guarantee that immigrants be afforded a reasonable opportunity to examine evidence against them and present evidence on their own behalf. *See* PI Br. 13, 18-19; *Rapheal*, 533 F.3d at 532-33 (finding VTC hearing to be unfair where petitioner could not review government's evidence).[9] The Policy fails to meet the INA's requirements in myriad ways. For example, as conceded by the Government, VTC at Varick Street has been replete with technical issues that impair Plaintiffs' ability—on a classwide basis—to review and present evidence. *See* PI Br. 7-8; Boyd Decl. (D.I. 79) ¶¶ 37, 50, 64, 73-74. Even an EOIR-commissioned report found 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." D.I. 48-1 at 23. Defendants ignore these findings and the recommendation to "[l]imit the use of VTC to procedural matters." *Id.*

3. The Policy Is Arbitrary And Capricious

[8] *See* Ex. 2, U.S. Government Accountability Office, *Immigration Detention* 14 n.22 (2018), *available at* https://www.gao.gov/assets/700/691330.pdf (estimating cost of housing a detained immigrant at $132.59 *per day*).

[9] Contrary to Defendants' assertion, Plaintiffs have a cause of action to enforce § 1229a(b)(4)(B) of the INA pursuant to the APA because they "arguably" fall within the INA's "zone of interests." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). The "zone of interests" test "is not meant to be especially demanding." *Id.* at 225. Plaintiffs satisfy this standard. In *East Bay Sanctuary Covenant v. Trump*, the Ninth Circuit concluded that pro bono legal providers fall within the zone of interests of the INA, and therefore have a cause of action to challenge the "substantive validity" of government action violating the INA. 909 F.3d 1219, 1243-45 (9th Cir. 2018). *A fortiori*, immigrants granted rights by the INA have an APA cause of action to enforce those rights.

Defendants admit that in-person production at Varick Street Immigration Court was the "normal practice" until June 2018 (Joyce Decl. (D.I. 78) ¶ 11), and that they "accelerated" implementation of VTC for all removal proceedings. Opp. 26. Yet Defendants have not pointed to any concrete, consistent justifications for the Policy.[10] *See* PI Br. 20 & n.9. In their opposition brief, the Government raises new purported rationales, stating that the Policy was implemented for the "wellbeing of detainees" and that the Policy "limits disruptions to the daily schedules of detainees." Opp. 6, 26-27. In fact, Plaintiffs themselves have established that their "wellbeing" is served by appearing in person to litigate their claims. *See, e.g.,* BDS Supp. Decl. ¶¶ 8-9; LAS Supp. Decl. ¶¶ 3, 7, 11.[11] Plaintiffs describe actual, tangible harms caused by Defendants' refusal to produce them in person, including instances where the safety of putative class members is endangered by the lack of confidentiality the Policy causes. *See* S.V. Decl. ¶¶ 10-14 (due to the Policy, S.V.'s sexual orientation was revealed within the jail, and he has been harassed and fears for his safety).

Moreover, Defendants admit they implemented the Policy despite insufficient technological and logistical resources. *See* Opp. 6-7; Joyce Decl. (D.I. 78) ¶¶ 13, 15-17. And despite Defendants' representations—advanced for the first time in litigation—that they respect that physical presence may be required under the Policy, Opp. 7, they implemented the Policy

[10] Regardless of VTC being contemplated by statute, Defendants must still provide reasoned and adequate explanations for their decision to reverse a settled and well-considered practice, which they have not done. *See Karpova v. Snow*, 497 F.3d 262, 268 (2d Cir. 2007) (an agency must "examine[] the relevant data and . . . set out a satisfactory explanation including a rational connection between the facts found and the choice made," so "the agency's path to its conclusion may reasonably be discerned").

[11] In addition, EOIR's own reporting, as well as independent studies and literature, demonstrate the harm that the use of VTC can cause in immigration proceedings. *See* Amici Brief filed by the Center for Constitutional Rights, Central American Legal Assistance, Immigrant Defense Project, New York Immigration Coalition, and New Sanctuary Coalition (D.I. 69) at 11-20.

without a process in place to request, adjudicate, or effectuate such production. *See* LAS Supp. Decl. ¶¶ 5, 12 (describing how ICE will not bring detained individuals to IJs who preside over the new detained-docket courtrooms that opened in March, since there is no space at these courtrooms for detained immigrants to await their appearances); BxD Supp. Decl. ¶¶ 3-5. Even the one time an individual was produced at ICE's discretion, the haphazard production showed a complete lack of process or procedure to effectuate production. LAS Supp. Decl. ¶ 6; *supra* n.6

4. The Policy Violates The Rights Of Detained Immigrants With Disabilities

Defendants assert that immigrants with disabilities cannot be "'qualified' for the 'benefit' of in-person removal proceedings" because the INA allows the use of VTC. Opp. 24. But that is the wrong inquiry. The Rehabilitation Act entitles individuals with disabilities to reasonable accommodations providing "meaningful access" to government activities. *Disabled in Action v. Bd. of Elections of N.Y.*, 752 F.3d 189, 196-97 (2d Cir. 2014). The government activity at issue here is a hearing consistent with Plaintiffs' due process rights. *See Aslam*, 537 F.3d at 115.

The Refusal to Produce Policy, however, does not provide meaningful access to such hearings for the reasons listed above and in Plaintiffs' opening brief. *See* BDS Decl. (D.I. 45) ¶¶ 20, 33; LAS Decl. (D.I. 47) ¶¶ 13-14, 26, 28-29, 31-32, 34-35, 37; P.L. Decl. (D.I. 39) ¶ 9; A.Q. Decl. (D.I. 40) ¶¶ 8-9; B.M.B. Decl. (D.I. 44) ¶ 6. These harms are exacerbated for members of the Subclass. *See id.*; *see also* LAS Decl. (D.I. 47) ¶ 37 (the IJ overseeing J.C.'s case noted as a general matter, "clearly the VTC format would add to that stress for anybody, particularly somebody with first grade level cognitive abilities").

The blanket Policy also infringes on the rights of the Subclass because excluding Plaintiffs from the courtroom means IJs can fail to perceive Plaintiffs' disabilities or the way in which those disabilities may affect their testimony. *See* PI Br. 22-23. As the Government has long known, these failures interfere with the procedural safeguards under *Matter of M-A-M-*, 25

I. & N. Dec. 474, 481-83 (BIA 2011), which the Government refers to in its brief. *See* D.I. 48-2 at 55 (an IJ was unable to identify a cognitive disability over VTC, but identified it at a subsequent in-person hearing, affecting the IJ's credibility determination).

Defendants have failed to rebut the collective harms facing the Subclass members or demonstrated why reasonable accommodations are not necessary "[t]o assure meaningful access" for this Subclass.[12] *See Disabled in Action*, 752 F.3d at 197 (citing *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273 (2d Cir. 2003)). Nor have they disputed that in-person production would constitute a reasonable accommodation for the Subclass.

B. A Preliminary Injunction Would Prevent Irreparable Harm And Serve The Public Interest

Because Plaintiffs have demonstrated a likelihood of success with respect to the asserted constitutional violations, irreparable harm is presumed. *See* PI Br. 11-12. Defendants have failed to overcome that presumption. Moreover, the actual, concrete, and imminent harms that Plaintiffs describe in their opening brief, *id.* at 12-14, continue even as the implementation of the Policy has evolved. *See* BDS Supp. Decl. ¶¶ 2, 3, 10, 11 (threats to confidentiality, impediments to fair immigration proceedings, and persistent due process violations continue); BxD Supp. Decl. ¶ 6; LAS Supp. Decl. ¶¶ 2-4, 9-10. Since that filing, even more clients have suffered delays, technical disruptions, translation and comprehension issues, and confidentiality concerns as a result of the Policy. *See, e.g.,* S.V. Decl. ¶¶ 10-12 (VTC testimony forced S.V. to reveal sexual orientation in front of ICE officers and fellow detainees at the jail, significantly impeding his testimony and exposing him to bullying and harassment); LAS Supp. Decl. ¶ 3 (VTC connection issues prevented attorneys from conferring with potential clients and offering legal

[12] Indeed, DHS and DOJ regulations provide that the Departments "shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with a disability." 6 C.F.R. § 15.50; *see also* 28 C.F.R. § 39.150.

representation to otherwise eligible individuals); BDS Supp. Decl. ¶¶ 8-9 and LAS Supp. Decl. ¶ 11 (technological limitations and comprehension issues impeded testimony and the ability of judges to appreciate testimony and assess credibility).

These harms not only continue but are accelerating and expanding due to the additional Varick Street courtrooms designed solely for VTC, the rapid advancement of merits hearings that interfere with attorneys' ability to confidentiality confer with clients, and a new "no dark courtrooms" policy that encourages the use of VTC for both respondents and judges to ensure that all courtrooms are in use, even if the presiding judge is not available. LAS Supp. Decl. ¶ 13; BDS Supp. Decl. ¶¶ 5-7.[13]

Defendants' sole response to both the constitutional presumption and Plaintiffs' showing of irreparable harm is that Plaintiffs have other available avenues of relief. However, the availability of individual petitions for review of final removal orders does not provide an adequate remedy for the immediate and irreparable harms caused by a uniformly-applied government policy. Absent the potential for classwide relief, hundreds of detained immigrants will continue to suffer harm while piecemeal appeals resolve, and the Policy will remain in effect. The onus must not be on individual detained immigrants to address the constitutional defects of a blanket Policy.

Moreover, the balance of equities and the public interest weigh strongly in favor of granting a preliminary injunction. PI Br. 24-25. Defendants are correct that there is a public

[13] Defendants do not explain how providing information regarding visitation policies at jails that providers are already familiar with, and giving "know your rights" information to detainees, mitigates the significant harms outlined above or the due process violations. Opp. 7; D.I. 78 ¶ 19. In fact, Defendants admit that they implemented the Policy before technological and logistical resources that they deemed necessary were in place. *See* Opp. 6-7; D.I. 78 ¶¶ 13, 15-17.

interest in ensuring the law is enforced; however, the law guarantees due process and fair hearings. Given the strong public interest in ensuring compliance with the Constitution and federal laws, a preliminary injunction restoring the *status quo* is in the public interest.

III. THE COURT SHOULD CERTIFY THE PROPOSED CLASSES

As Defendants have repeatedly made clear, "ERO *will not return to the production of respondents 'in person'* for court" because it is "committed" to the blanket use of VTC as "*the means* of producing aliens for their immigration court hearings." *See* D.I. 19-3 (emphasis added); D.I. 19-4 (emphasis added). The Government does not and cannot dispute that its uniform Refusal to Produce Policy applies equally to all members of the putative class and gives rise to their claims. Plaintiffs seek to enjoin this uniform policy in a way that would resolve all class members' claims. This critical and indisputable fact disposes of virtually all of the Government's arguments in opposition to class certification.

The Government argues that Plaintiffs fail to meet the commonality and typicality requirements of Rule 23(a), and classwide injunctive relief is not appropriate under Rule 23(b)(2). Opp. 28-47. At bottom, the Government's repeated argument in opposing certification is that the proposed class members' claims are too fact-specific to be adjudicated on a classwide basis.[14] But the Government mischaracterizes Plaintiffs' position as seeking individual relief from the particular harms faced by the Representative Plaintiffs. Plaintiffs instead seek relief from a uniform Policy given its incompatibility with applicable laws. The Government simply ignores the long line of cases holding that minor factual differences between class members' claims or circumstances do not preclude class certification. *See* Class Cert. Br. 12-16. Indeed,

[14] The Government also argues that the jurisdictional provisions of 8 U.S.C. § 1252(f)(1) strips this Court of its ability to enter the classwide relief sought by Plaintiffs. Those arguments fail for the same reasons as articulated *supra* at Section I.A.

because all class members are similarly harmed by a single Government policy, classwide injunctive relief is appropriate, and Plaintiffs' proposed classes should be certified.

A. The Proposed Classes Meet The Commonality Requirement

Commonality is satisfied "if there is a common issue that 'drive[s] the resolution of the litigation.'" *Sykes v. Mel S. Harris & Assocs.*, 780 F.3d 70, 84 (2d Cir. 2015). Of particular relevance here, commonality is satisfied where the plaintiffs' injuries "derive from a unitary course of conduct by a single system." *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997). Rather than engaging with the fact that its Policy applies the same conduct or practice to all class members, the Government focuses solely on minor factual variations in the injuries suffered by the Representative Plaintiffs. But "[c]ommonality does not mandate that all class members make identical claims and arguments." *Stinson v. City of New York*, 282 F.R.D. 360, 369 (S.D.N.Y. 2012). Plaintiffs challenge whether the Government's uniform stated Policy of relying on VTC as "***the means*** of producing aliens for their immigration court hearings" complies with the law. D.I. 19-4 (emphasis added). This is a classwide issue, and the injuries of the putative class members "derive from a unitary course of conduct." Commonality is satisfied.

Courts repeatedly have held that differences among class plaintiffs do not preclude certification. For example, in *Marisol*, the Second Circuit upheld certification of a class even though "each named plaintiff challenge[d] a different aspect of the child welfare system" and the alleged deficiencies "implicate[d] different statutory, constitutional and regulatory schemes," because the disparate injuries "derive[d] from a unitary course of conduct." 126 F.3d at 375-77; *see also Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 418-19 (S.D.N.Y. 2012) (same). Here too, while Defendants' Policy is so fraught with deficiencies that it runs afoul of numerous constitutional and statutory protections, the deficiencies all arise from Defendants' "unitary course of conduct": the blanket Refusal to Produce Policy.

Defendants argue that Plaintiffs' claims are so fact specific that they do not generate *any* common questions of law or fact. Opp. 30. That is flatly incorrect. Defendants' uniform Policy raises numerous questions that implicate the whole class, which Defendants have not refuted and cannot refute, including but not limited to:

- Whether it is consistent with due process to adjudicate removal proceedings where all detained immigrant class members are precluded from appearing in person;
- Whether, in fact, Defendants' Policy has been motivated by the rationale of expediting deportations at the expense of due process as specifically and repeatedly advocated by the President of the United States and his Administration; and
- Whether due process requires individualized determinations of the appropriateness of VTC with respect to both individual detainees and the type of hearing.

Any one of these questions qualifies as an aspect of a claim that "is common to all proposed class members." *Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 8 (D.D.C. 2010).

Unlike in *Wal-Mart v. Dukes*, 564 U.S. 338 (2011) (on which Defendants rely, Opp. 31), *all* putative class members here face similar injuries. The Government's Policy, among other things, subjects all members to removal without any ability to appear in person at their hearings, requires all members to testify at merits hearings via VTC, and prevents all members from confidentially conferring with their attorneys during their hearings. Plaintiffs also all allege the same harm based on Defendants' arbitrary and capricious implementation of the Policy. Thus, all claims "depend upon a common contention," namely that the blanket use of VTC under the Policy violates the due process and related rights of class members. *Wal-Mart*, 564 U.S. at 350.

Moreover, *Wal-Mart*'s holding crucially turned on the plaintiffs' failure to provide "convincing proof of a *companywide* discriminatory pay and promotion *policy*." *Wal-Mart*, 564 U.S. at 359 (emphasis added). Here, the Government concedes that it has such a Policy: to use

"VTC proceedings in lieu of in person hearings."[15] Opp. 5. As courts in this district have held post-*Wal-Mart*, "[w]hen the plaintiff class seeks to enjoin a practice or policy, rather than individualized relief, commonality is assumed." *Shepard v. Rhea*, No. 12-cv-7220, 2014 WL 5801415, at *4 (S.D.N.Y. Nov. 7, 2014). As a result, numerous post-*Wal-Mart* decisions have certified classes under circumstances similar to those here. *See, e.g.*, *R.F.M. v. Nielsen*, No. 18-cv-5068, 2019 WL 1219425, at *10-11 (S.D.N.Y. Mar. 15, 2019) (certifying class challenging policy affecting "special immigrant juvenile" status adjudications as it constituted "a single alleged policy").[16]

The same is true for the Rehabilitation Act Subclass. Courts have recognized that a class of individuals with "diverse disabilities" may satisfy commonality where the class challenges "a [widely-applicable] policy" that fails to account for "the needs of disabled citizens," even where the policy does not affect all class members in "the same way." *Brooklyn Ctr.*, 290 F.R.D. at 413, 418-19. Here, the Subclass challenges the Government's uniform Policy, which substantially inhibits subclass members' full participation in their proceedings, and the Government's failure to account for protections afforded the Subclass given their disabilities.

B. The Proposed Classes Meet The Typicality Requirement

Defendants' argument regarding typicality closely resembles their commonality argument, alleging that the fact-specific nature the claims defeats typicality. The Government misses the mark here too. Typicality is satisfied where plaintiffs "establish[] the existence of [a]

[15] *See supra* n.6.

[16] *See also Nak Kim Chhoeun v. Marin*, No. 17-01898, 2018 WL 6265014, at *1, *4 (C.D. Cal. Aug. 14, 2018) (certifying class challenging "uniform policy or practice" of re-detainment without "notice or opportunity to be heard"); *Nio v. U.S. Dep't of Homeland Sec.*, 323 F.R.D. 28, 30, 32 (D.D.C. 2017) (certifying class challenging policy delaying naturalization of non-citizen soldiers because questions relating to the permissibility and constitutionality of the policy were common to the class, regardless of "the factual variations among class members").

blanket policy" that applies to all putative class members. *M.G. v. N.Y.C. Dep't of Educ.*, 162 F. Supp. 3d 216, 241 (S.D.N.Y. 2016). Because each putative class member is harmed by the Policy, "each class member's claim arises from the same course of events" and "each class member makes similar legal arguments to prove the defendant's liability." *Id.* at 232 (quoting *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 245 (2d Cir. 2007)). The claims of the Representative Plaintiffs are thus typical.

Defendants' contention that the "prejudice" suffered by Plaintiffs is highly fact-specific does not change this analysis.[17] Defendants would have the Court ignore that the harms result from the Policy's application to the class as a whole. But "a finding that . . . these practices are unconstitutional means, *ipso facto*, that they have the potential to harm anyone who is subjected to them," and "[t]he purpose of classwide declaratory relief is to avert any such likelihood." *Padilla v. U.S. Immigration & Customs Enf't*, No. C18-928, 2019 WL 1056466, at *3 (W.D. Wash. Mar. 6, 2019) (certifying class). Accordingly, "courts regularly resolve procedural due process claims on a class-wide basis when addressing the constitutionality of immigration agencies' policies and practices."[18] *Id.* at *4. Courts in this circuit have routinely rejected similar typicality arguments. *See, e.g.*, *R.F.M.*, 2019 WL 1219425, at *10 ("plaintiffs do not seek to litigate individual claims but rather a policy the agency uses to adjudicate those claims"); *M.G.*, 162 F. Supp. 3d at 236 ("plaintiffs do not seek to vindicate individual students' rights" but instead seek "relief from limitations" posed by the challenged policy).

[17] The cases Defendants cite in support of this contention all relate to challenges to final orders of removal. Opp. 33-34. But Plaintiffs do not seek to indirectly challenge any removal orders; they seek to enjoin a Government Policy that is uniformly applied to the class.

[18] Moreover, the level of prejudice suffered by any individual class member has no bearing on whether the class is amenable to certification. *See Flores v. Anjost Corp.*, 284 F.R.D. 112, 127 (S.D.N.Y. 2012) ("differences among the Plaintiffs" that might bear on liability are not relevant to "amenability of the plaintiffs' claims to the class action form").

Here, the Government concedes that its "practice of using VTC" gives rise to this lawsuit, Opp. 8, and it does not refute that the Policy is a uniform "practice or policy from which the proposed class members' claims arise and upon which [their] legal theory is based." Class Cert. Br. 14 (quoting *Open Hous. Ctr., Inc. v. Samson Mgmt. Corp.*, 152 F.R.D. 472, 478 (S.D.N.Y. 1993)). Nor does the Government refute that Plaintiffs seek declaratory and injunctive relief for the entire class, which provides "ample basis for a finding that the claims of the named plaintiffs are typical of those of the proposed class." *Marisol A. v. Giuliani*, 929 F. Supp. 662, 691 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 372 (2d Cir. 1997). Because all Representative Plaintiffs are subject to and harmed by the Policy, they are typical of the proposed classes.

C. Classwide Relief Is Appropriate Under Rule 23(b)(2)

Finally, Defendants argue that classwide resolution is inappropriate under Rule 23(b)(2). Opp. 35-41. That argument is meritless because, as the Government acknowledges, Rule 23(b)(2) applies "when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart*, 564 U.S. at 360. That is precisely what Plaintiffs seek: a single, classwide injunction, *not* individualized relief. *See* Compl. (D.I. 2) at 56. And there can be no dispute that an injunction prohibiting blanket use of VTC at Varick Street Immigration Court would resolve all claims for all class members. That is enough for Rule 23(b)(2).

Defendants' speculation that if Plaintiffs prevail "each of the individual plaintiffs—and each of the putative class members—would be entitled to different relief," Opp. 39, is both inaccurate and irrelevant. Plaintiffs do not seek differing relief; they seek a single injunction that would resolve their collective claims. At this stage of the litigation, it is unnecessary "to speculate about the precise contours of [the ultimate] relief. All that matters is that the Court has the equitable power and the practical ability to fashion some form of injunctive or declaratory relief that would apply to all members." *Houser v. Pirtzker*, 28 F. Supp. 3d 222, 249 (S.D.N.Y.

2014). Any differences in how the challenged policy affects the proposed class members do not matter because such "differences do not affect the Court's ability to craft an injunction that would remedy all of the eligible class members' injuries in one fell swoop." *Id.* at 250.

Finally, Defendants' reliance on dicta in *Jennings* disregards the fact that courts have long held that class actions are the appropriate vehicle to resolve constitutional challenges to government policies, including due process claims. Defendants simply ignore the long line of cases establishing that civil rights cases, like this one, are "prime examples" of Rule 23(b)(2) class actions. *See* Class Cert. Br. 18; *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991) (class action challenging procedures for adjustment of immigration status).[19] Indeed, as noted above, "courts regularly resolve procedural due process claims on a class-wide basis when addressing the constitutionality of immigration agencies' policies." *Padilla*, 2019 WL 1056466, at *4. And courts have continued certifying similar classes post-*Jennings*. *See, e.g.*, *id.*; *R.F.M.*, 2019 WL 1219425, at *2; *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 609 (S.D.N.Y. 2018). Thus, Rule 23(b)(2) certification is appropriate.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' request for a preliminary injunction and certify the proposed classes.

[19] *See also* Alexandra D. Lahav *et al.*, *Government Class Actions After* Jennings v. Rodriguez, Harv. L. Rev. Blog (May 8, 2018), https://blog.harvardlawreview.org/ government-class-actions-after-jennings-v-rodriguez/ ("Due process challenges lend themselves to class certification because they often raise generic questions about how uniform hearing procedures impact a group of people who depend on them for relief.").

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Respectfully submitted,

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