UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEFINA CORONEL, *et al.*, Petitioners, - against - THOMAS DECKER, *et al.*, Respondents.	**No. 20 Civ. 2472 (AJN)**

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR A TEMPORARY RESTRAINING ORDER

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PRELIMINARY STATEMENT

The Court should deny the petitioners' motion for a temporary restraining order because they have failed to establish a likelihood of success on their claims. To succeed on their substantive due process claims, the petitioners must show that the government is deliberately indifferent to their medical needs as a result of the present COVID-19 pandemic. They cannot show this because the government has responded to the COVID-19 pandemic and has taken steps to prevent and to treat COVID-19 infection in the facilities where the petitioners are detained. The government understands that COVID-19 is a grave public health risk, and while the petitioners may disagree with the steps the government has taken, the government's efforts do not "shock the contemporary conscience" as required for the petitioners to succeed on their constitutional claims. *Charles v. Orange County*, 925 F.3d 73, 85 (2d Cir. 2019). In addition, the petitioners have failed to establish a likelihood of success on their procedural due process claims because they are alleging procedural defects in bond hearings that have not happened yet.

The government respectfully requests that the Court dismiss as moot all claims brought by the three petitioners who have already been released from detention. The government also respectfully requests that the Court sever the present petition into single habeas petitions for each petitioner who remains detained.

BACKGROUND[1]

I. Procedural History

The petitioners are seven aliens detained or previously detained by Immigration and Customs Enforcement ("ICE"). On March 20, 2020, the petitioners initiated the present action by

filing a single "Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief." ECF No. 1 (the "Petition"). The Petition seeks habeas relief on behalf of each of the seven petitioners, namely his or her immediate release or, in the alternative, a bond hearing within 48 hours. *Id.* at Prayer for Relief. The petitioners allege that each of them has health conditions that render their continued detention during the present novel coronavirus ("COVID-19") pandemic unconstitutional. *See generally* Petition.

On March 23, 2020, the petitioners filed a motion for a temporary restraining order seeking essentially identical relief to their petition—the immediate release of each petitioner. *See* ECF No. 16.

As of March 25, 2020, three petitioners, Josefina Coronel, Ramon Garcia Ponce, and Florencio Moristica have been released. On March 25, 2020, the remaining four petitioners, Juan Morocho Sumba, Jose Madrid, Jose Otero, and Miguel Miranda, sought emergency relief from the Court and submitted a proposed Order to Show Cause Without Emergency Relief. *See* ECF No. 20.

II. The Remaining Petitioners

A. Juan Morocho Sumba

Morocho Sumba is a native and national of Ecuador. Morocho Sumba reported to a deportation officer that he entered the United States without inspection in Arizona in 2004.

[1] All facts relating to petitioners have been provided to the undersigned by ICE based on its records. Given the timeframe for the government's response (approximately fourteen hours overnight), the government has been unable to obtain sworn declarations by the filing deadline. *See* ECF No. 21.

[redacted].[2]

ICE has detained Morocho Sumba since December 20, 2019. ICE filed the Notice to Appear with the Immigration Court on [redacted], and Morocho Sumba has had four master calendar hearings. Morocho Sumba has a master calendar hearing scheduled for [redacted]. Morocho Sumba has filed a motion to suppress and terminate proceedings in immigration court, and DHS intends to oppose Morocho Sumba's motion. Morocho Sumba has filed a request for a bond hearing.

B. Jose Madrid

Madrid is a native and national of Honduras. Madrid reported to a deportation officer that he entered the United States without inspection by crossing the border with Mexico in 1997. [redacted].

ICE has detained Madrid since [redacted]. ICE filed his NTA with the Immigration Court on [redacted], and Madrid has had three master calendar hearings. He has a continued master calendar hearing scheduled for [redacted]. Madrid's immigration counsel asked whether she could make an oral bond application at this upcoming master calendar hearing and was asked to submit a written bond request at least three days prior to the hearing.

C. Jose Otero

Otero is a native and national of El Salvador. Otero reported to a deportation officer that he entered the United States without inspection by crossing the border with Mexico in 2003.

[2] [redacted]

[redacted]

ICE has detained Otero since November 4, 2019. ICE filed the NTA in his case with the Immigration Court on [redacted], and Otero has had four master calendar hearings. He has a bond hearing scheduled for [redacted] DHS has stipulated to appropriate safeguards at future hearings in light of competency issues.

D. Miguel Miranda

Miranda is a native and national of Mexico. Miranda entered the United States without inspection or admission at an unknown place and time. Miranda was apprehended attempting to cross the border with Mexico three times in 2006 and, each time, was voluntarily returned to Mexico. [redacted]

ICE has detained Miranda since February 13, 2020. ICE filed an NTA with the Immigration Court on [redacted], and Miranda has had two master calendar hearings. He has a bond and master calendaring hearing scheduled for [redacted].

III. Statutory and Regulatory Framework

Morocho Sumba, Madrid, Otero, and Miranda are detained pursuant to 8 U.S.C. § 1226(a). Under § 1226(a), the government has discretion to detain or release on bond these remaining four petitioners. Section 1226(a) provides that "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." It also states that "[e]xcept as provided in [a subsection concerning mandatory detention, 8 U.S.C. § 1226(c)] and pending such decision [on whether the alien is to be removed], the Attorney General may continue to detain the arrested alien [and may release the alien on bond under certain circumstances]."

Regulations detail how the government exercises its discretion under 8 U.S.C. § 1226(a). In particular, 8 C.F.R. § 236.1(c)(8) provides that

> Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien not described in section 236(c)(1) of the [Immigration and Nationality Act, "the Act"], under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such *release would not pose a danger to property or persons*, and that the alien is likely to appear for any future proceeding.

(emphasis added). For each remaining petitioner, ICE has informed the undersigned that ICE has considered his present detention under 8 U.S.C. § 1226(a) and determined not to release him.

ARGUMENT

I. The Court should dismiss the three petitioners who already have been released because their claims are moot.

Courts in this Circuit have consistently held that a habeas petition brought by an alien is rendered moot once the petitioner has been released from ICE custody. *See, e.g.*, *Leybinsky v. ICE*, 553 F. App'x 108 (2d Cir. 2014) (habeas petition moot upon petitioner's release by ICE); *Pierrilus v. ICE*, 293 F. App'x 78, 79 (2d Cir. 2008) ("[P]etitioner's challenge to the length of his detention is moot as a result of his release from DHS custody."); *Remy v. Chadbourne*, 184 F.

App'x 79, 80 (2d Cir. 2006) (dismissing as moot an appeal from the dismissal of a habeas petition challenging detention where ICE released the alien from detention during the appeal); *Edwards v. Ashcroft*, 126 F. App'x 4 (2d Cir. 2005) (habeas petition challenging detention rendered moot upon release from custody); *Chocho v. Shanahan*, 308 F. Supp. 3d 772, 774 (S.D.N.Y. 2018) (holding that petition was moot after petitioner was released from custody and granted a one-year administrative stay of removal); *Samuda v. Decker*, No. 17 Civ. 9919 (VEC), ECF No. 13 (S.D.N.Y. Mar. 28, 2018) (holding that habeas petition was moot after petitioner was released under parole). Coronel, Garcia Ponce, and Moristica have been released from ICE custody, and therefore the Court should dismiss their claims as moot. To the extent this is in dispute, any urgency has been dispelled because of their release such that the court need not address their requested relief in petitioners' request for emergency relief.

II. The remaining petitioners' claims should be severed and brought in four separate habeas petitions.

The current petition is improper and should be severed into individual habeas actions, one for each of the four petitioners who remains detained. The Second Circuit grappled with the question of when multi-party habeas actions can be allowed in *United States ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974), a case challenging the imposition of four-year reformatory sentences for young adults for misdemeanors for which adults receive maximum terms of one year or less. There, the Second Circuit observed that the Federal Rules of Civil Procedure did not apply in all respects in habeas actions, including in particular Rule 23's class action provisions. *See id.* at 1125. Nevertheless, the Second Circuit explained that the All Writs Act authorized courts to fashion for habeas actions "appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage." *Id.* (internal quotation marks omitted). The court concluded that the "unusual circumstances" in that case presented "a

compelling justification for allowing a multi-party proceeding similar to the class action authorized by the Rules of Civil Procedure." *Id.* The court reasoned that "the charge that the four-year reformatory sentence violates equal protection [was] applicable on behalf of the entire class, uncluttered by subsidiary issues." *Id.* at 1125-26. The court also reasoned that, absent class action–like treatment, most of the "more than 500" petitioners, who were "likely to be illiterate or poorly educated" and unlikely to "have the benefit of counsel to prepare habeas corpus petitions," would never receive relief. *Id.* at 1126. The court also observed that a multi-party action would reduce the "expenditure of judicial time and energy in hearing and deciding numerous individual petitions presenting the identical issue," and would reduce the costs of appointing counsel for each individual petitioner. *Id.*

Chief Judge McMahon recently applied the standards set forth in *Sero* to order the severance of a joint habeas action brought by three detainees challenging their medical treatment during immigration detention. *See Bob v. Decker*, Order, 19-cv-8226 (CM), ECF No. 4 (S.D.N.Y. Oct. 15, 2019). In ordering severance, the Chief Judge noted that each detainee's claims relating to their medical care were different—one detainee's issues related to nerve damage; another's, to hypertension, diabetes, and musculoskeletal injuries; and the third's, to dental care—and so their joint action was not "uncluttered by subsidiary issues." *Id.* at 3 (quoting *Sero*, 506 F.2d at 1125).

This multi-party action does not meet the standards set forth in *Sero*. There are not a large number of petitioners (only four) and the petitioners do not assert the exact same claim (like the claim by the petitioners in *Sero* that an extra four years in a reformatory harmed them). Rather,

the petitioners each have different medical needs and are at three different detention facilities,[3] each presenting different circumstances relating to COVID-19, such as the amount of exposure to individuals who have the virus and the precise precautions and any treatments that have been undertaken on each petitioner's behalf. Nor is there reason to think that, if the case was severed, some of the petitioners would lose access to counsel (there are two large legal services providers representing them, The Legal Aid Society and Bronx Defenders). Thus, as in *Bob*, the petitioners here do not present common claims "uncluttered by subsidiary issues." *Bob*, No. 19-cv-8226, at 3 (quoting *Sero*, 506 F.2d at 1125). Severance is appropriate here because the court's determination of the claims in this action will turn on the particular circumstances of each of the four petitioners who remains detained.

Moreover, even under a traditional severance analysis, severance is appropriate:

> Courts in this Circuit consider the following factors in determining if severance is appropriate: (1) whether the claims arise out of the same transaction or occurrence; (2) whether the claims present some common questions of law or fact; (3) whether settlement of the claims or judicial economy would be facilitated; (4) whether prejudice would be avoided if severance were granted; and (5) whether different witnesses and documentary proof are required for the separate claims. Severance requires the presence of only one of these conditions.

Oram v. SoulCycle, LLC, 979 F. Supp. 2d 498, 502-03 (S.D.N.Y. 2013) (citations and quotation marks omitted). In the present case, "different witnesses and documentary proof [will be] required for the separate claims" of the petitioners. *Id.* While the COVID-19 pandemic provides a general backdrop for each of the petitioners' claims, the petitioners are essentially asking the Court to rule on the constitutionality of each of their separate detentions. This involves consideration of the petitioners' individual medical conditions, criminal histories, length of

[3] Morocho Sumba is detained at the Orange County Jail (in New York), Madrid and Miranda are detained at Bergen County Jail (in New Jersey), and Otero is detained at Essex County Jail (in New Jersey).

detention (and any delays), and immigration histories. But the petitioners' medical conditions, criminal histories, and immigration histories are distinct, as noted. Indeed, other aliens have sought similar emergency relief because of COVID-19, but they have done so in the context of individually filed habeas petitions, raising the particular circumstances of the petitioner's case. *See Genus v. Decker*, No. 19 Civ. 10647 (JPO); *Arana v. Barr*, No. 19 Civ. 7924 (PGG); *Rosemond v. Decker*, No. 19 Civ. 9657 (NSR); *Umana Jovel v. Decker*, No. 20 Civ. 308 (GBD) (SN); *Guerrero v. Decker*, No. 19 Civ. 11644 (KPF); *Nikolic v. Decker*, No. 19 Civ. 6047 (LTS). Moreover, another large legal services provider, Brooklyn Defender Services, has recently filed eight new habeas actions in the past week, each (properly) naming a single petitioner. *See Flores v. Decker*, No. 20 Civ. 2422 (LJL); *Graham v. Decker*, No. 20 Civ. 2423 (PKC); *Paul v. Decker*, No. 20 Civ. 2425 (KPF); *Peña v. Decker*, No. 20 Civ. 2482 (ALC); *Bonilla v. Decker*, No. 20 Civ. 2483 (VSB); *Nikolic v. Decker*, No. 20 Civ. 2500 (LGS); *Basank v. Decker*, No. 20 Civ. 2518 (AT); *Rosario Disla v. Decker*, No. 20 Civ. 2551 (UA).[4]

III. The Court Should Deny the Motion for a Temporary Restraining Order

A. Legal Standards

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted). "First, the party must demonstrate that it will suffer irreparable harm in the absence of the requested relief." *Latino Officers Ass'n v. Safir*, 170 F.3d 167, 171 (2d Cir. 1999). Ordinarily, even if the moving party establishes

[4] For reasons that have not been disclosed to the government, Brooklyn Defenders, however, just switched course and decided last night to amend its petition in *Basank v. Decker*, No. 20 Civ. 2518 (AT), to add nine additional petitioners who are detained in one of three separate facilities in New Jersey and allegedly suffer from a variety of different conditions.

irreparable harm, the Court may not grant the requested injunction unless the moving party also demonstrates either (a) that it is likely to succeed on the merits or (b) that there are sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships that tips decidedly in favor of the moving party. *Charette v. Town of Oyster Bay*, 159 F.3d 749, 754 (2d Cir. 1998). Where, as here, "the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme," however, "the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard.'" *Wright v. Giuliani*, 230 F.3d 543, 547 (2d Cir. 2000) (citation omitted); *see also Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 424 (2d Cir. 2004) (because "government action[s] taken in furtherance of a regulatory or statutory scheme [are] presumed to be in the public interest[,] in such situations, a plaintiff must meet a more rigorous likelihood-of-success standard'" to obtain preliminary injunctive relief (internal citation omitted)).

An even higher standard of proof applies in this case, because the temporary restraining order that the petitioners seek would alter, rather than maintain, the status quo. *See Wright*, 230 F.3d at 547. In this context, the movant must show not only a likelihood of success on the merits, but a "clear" or "substantial" one. *Id*; *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd*., 598 F.3d 30, 35 n.4 (2d Cir. 2010). Finally, "[w]henever a request for a preliminary injunction implicates public interests, a court should give some consideration to the balance of such interests in deciding whether a plaintiff's threatened irreparable injury and probability of success on the merits warrants injunctive relief." *Time Warner Cable of New York City v. Bloomberg L.P.*, 118 F.3d 917, 929 (2d Cir. 1997).

B. The petitioners are unlikely to succeed on the merits of their substantive due process claims.

The Court should deny the motion for a temporary restraining order because the petitioners have failed to establish a sufficient likelihood of success on their claims. The petitioners are asking this Court to constitutionalize how the government deals with detained individuals during an ongoing and uncertain public health crisis. Such a determination would be contrary to well-established law controlling conditions-of-confinement claims. In particular, the government's efforts to prevent petitioners' infection with COVID-19 and its provision of medical care to petitioners, should they become ill, do not amount to deliberate indifference to petitioners' medical needs. On the contrary, the government is making deliberate, ongoing efforts to address petitioners' and other detained individuals' medical needs.

The Second Circuit recently delineated the requirements of a conditions-of-confinement claim brought by immigration detainees alleging inadequate medical care under the Due Process Clause. In *Charles v. Orange County*, 925 F.3d 73 (2d Cir. 2019), the Circuit held that "[i]n order to establish a violation of a right to substantive due process, a plaintiff must demonstrate not only government action but also that the government action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 85 (citation and quotation marks omitted). In particular, an immigration detainee raising a constitutional challenge to the medical care provided in detention must establish "(1) that [the detainee] had a serious medical need . . . , and (2) that the Defendants acted with deliberate indifference to such needs." *Id.* at 86. The Second Circuit further explained that, to establish deliberate indifference in the context of a detainee's medical needs, the detainee had to prove that the defendant failed to provide treatment while having actual or constructive knowledge that doing so would pose a substantial risk to the detainee's health:

> [A] detainee asserting a Fourteenth Amendment claim for deliberate indifference to his medical needs can allege either that the defendants knew that failing to provide the complained of medical treatment would pose a substantial risk to his health or that the defendants should have known that failing to provide the omitted medical treatment would pose a substantial risk to the detainee's health.

Id. at 87.

Petitioners cannot meet this standard for establishing deliberate indifference. In the present case, the government has taken steps to provide petitioners with adequate medical care, both with respect to the prevention of infection with COVID-19 as well as the treatment of detainees infected with COVID-19. *See* Declaration of Captain Jennifer Moon ¶¶ 5, 8-10, 15-18, *Velesaca v. Wolf*, No. 20-cv-1803 (S.D.N.Y. March 25, 2020), ECF No. 57. For example, the facilities where petitioners are detained "have increased sanitation frequency and provide sanitation supplies." *Id.* ¶ 14. The facilities where petitioners are detained have also "identified housing units for the quarantine of patients who are suspected of or test positive for COVID-19 infection." *Id.*¶ 19. The government is also assessing detainees for fever or respiratory illness and isolating and testing certain detainees for COVID-19. *Id.* ¶¶ 8-9. "In testing for COVID-19, [the ICE Health Service Corps] is following guidance issued by the Centers for Disease Control (CDC) to safeguard those in its custody and care." *Id.* ¶ 6. Moreover, "[s]ince the onset of reports of [COVID-19], ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to field staff on screening and management of potential exposure among detainees." *Id.* ¶ 5.

While petitioners may disagree with the government's efforts to prevent the spread of and treat COVID-19, the relevant standard here is deliberate indifference. The government's ongoing efforts to respond to the COVID-19 crisis do not amount to deliberate indifference.

Courts around the country have recently received challenges to detention on the grounds of COVID-19 in the criminal bail context and have recognized the government's public health efforts, particularly the efforts of the Bureau of Prisons, to address the COVID-19 crisis. *See United States v. Martin*, No. PWG-19-140-13, 2020 WL 1274857, at *4 (D. Md. 2020); *United States v. Jefferson*, No. CCB-19-487, 2020 WL 1332011, at *1 (D. Md. 2020); *United States v. Hamilton*, No. 19-CR-54-01 (NGG), 2020 WL 1323036, at *2 (E.D.N.Y. 2020); *United States v. Gileno*, No. 3:19-cr-161-(VAB)-1, 2020 WL 1307108, at *4 (D. Conn. 2020). The government has also taken measures to address the COVID-19 crisis at the facilities in which petitioners are detained, and the Court should not dismiss these efforts as unconstitutional deliberate indifference.

The government recognizes that last week this Court reconsidered a criminal defendant's bail application, in part on the basis of the COVID-19 pandemic. *See* Opinion & Order, *United States v. Stephens*, No. 15-cr-95 (AJN) (March 19, 2020), ECF No. 2798. The government respectfully submits that the appropriate standards are different when confronted with a claim of unconstitutional deliberate indifference to medical needs versus an application for bail. Specifically, petitioners are asking this Court to hold the government's response to COVID-19 unconstitutional, a different task than applying statutory bail provisions.

C. Petitioners have failed to establish a likelihood of success on their procedural due process claims.

Petitioners have failed to establish a likelihood of success on their procedural due process claims because their claims are premature. Petitioners do not appear to be challenging procedural defects in bond hearings that have already occurred: instead, they seem to be challenging procedural defects in bond hearings in the future. *See* Petitioners' Mem. of Law in Support of Their Motion for a Temporary Restraining Order, at 19-22, ECF No. 17. The appropriate course

would be for the petitioners to amend their claims after they receive bond hearings if they wish to challenge them as unconstitutional (assuming they are not released on bond).

D. The petitioners have failed to establish irreparable harm on their procedural due process claims.

The petitioners have failed establish irreparable harm on their procedural due process claims. "To satisfy the irreparable harm requirement, [petitioners] must demonstrate that absent [relief] they will suffer an injury that is 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." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005) (quotation marks omitted). According to ICE, the petitioners each have bond hearings (or master calendar hearings at which they may seek bond, in the cases of Madrid and Morocho Sumba) in the coming weeks. The petitioners may be granted bond at these hearings. Any injury they are presently claiming from the possibility of procedurally defective bond hearings is therefore speculative and cannot constitute irreparable harm.

With respect to the petitioners' substantive due process claims, the government understands that the possibility of infection with COVID-19 is a grave risk, but the petitioners' invocation of irreparable harm in the present case overlooks the ongoing steps that the government has taken to prevent infection at the facilities where the petitioners are detained. *See* Moon Decl. ¶¶ 5, 8-10, 15-18.

E. The balance of the equities weighs in the government's favor.

The balance of the equities weighs in the government's favor. First, the public interest is served when the immigration laws are enforced. *Cf. Nken v. Holder*, 556 U.S. 418, 436 (2009) ("There is always a public interest in prompt execution of removal orders."). One of these laws is the INA's discretionary detention provision, 8 U.S.C. § 1226(a). Second, the government is

responding to an ongoing public health crisis, and constitutionalizing aspects of its response on a limited record is not in the public interest.

CONCLUSION

For the foregoing reasons, the Court should deny the petitioners' motion for a temporary restraining order.

Dated: New York, New York
March 26, 2020

Respectfully,

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