UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

Gloria Carolina Manzo-Hernandez, Victor Zepeta-Jasso, Moises Amadeo Mancia-Mendoza, Mercy Rocio Duchi-Vargas, Jatzeel Antonio Cuevas-Cortes, Victor Manuel Nuñez-Hernandez, Petitioners, v. Warden Omar Juarez, *in his official capacity*, Respondent.	Civil Action No. 5:20-cv-00095

PETITIONERS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Petitioners are six individuals unlawfully detained as federal material witnesses at La Salle County Regional Detention Center in Encinal, Texas. Petitioners have not been charged with a crime; their detention is not and cannot be punitive. For months, they have desperately awaited their release from custody, but they are subject to the whims of court proceedings they do not attend, that do not consider them, and over which they have no control. Each Petitioner is deprived of their liberty in the same way, pursuant to a mechanical scheme that ignores their individual circumstances.

Their confinement is unlawful, under color of boilerplate detention orders that do not reflect individual findings as to critical incarceration-related questions. These detention orders do not rebut the presumption that Petitioners should be released rather than detained, do not show that Petitioners can pay an automatically imposed $25,000 bond, and do not find that their testimony cannot be secured by prompt deposition in lieu of continued detention. This is true even though the cases in which Petitioners are designated to testify, prosecutions under 8 U.S.C. § 1324, expressly contemplate the admission of videotaped deposition testimony. 8 U.S.C. § 1324(d). And Petitioners are detained without *any* hearing testing these critical questions.

Petitioners bring this case on behalf of hundreds of similarly situated material witnesses who are, like them, detained at the La Salle County Regional Detention Center. All witnesses are automatically detained, automatically subject to a $25,000 bond, and held by Respondent for months "pending disposition" of federal criminal proceedings. What is more, while the purpose of their detention is to provide testimony, the overwhelming majority will never testify in any form because they will be released without testifying *after* a guilty plea.

While the COVID-19 pandemic has upended court processes, delaying the disposition of criminal proceedings and causing criminal justice stakeholders to adapt to remote practices, the automatic treatment of material witnesses remains the same. Witnesses are confined indefinitely in conditions where they cannot distance from others, suffering stress-related illness and anxiously guarding their own health against the novel coronavirus, apart from their loved ones during a frightening and deadly time.

By this Motion, Petitioners seek a temporary restraining order and preliminary injunction prohibiting Warden Omar Juarez, La Salle County Regional Detention Center, from continuing to detain Petitioners and class members in violation of federal statutes and the Due Process Clause.

NATURE AND STATUS OF THE PROCEEDINGS

This is a class action seeking habeas corpus relief under 28 U.S.C. § 2241 and declaratory judgment and further relief under 28 U.S.C. §§ 2201 and 2202. Petitioners' detention violates federal statutes and the Constitution. Approximately 139 people designated as material witnesses are currently detained at La Salle, having been similarly deprived of a hearing, counsel, and individual findings.

This Motion requests a temporary restraining order immediately enjoining Respondent from detaining Petitioners in the absence of a lawful detention order and that this Court immediately appoint material-witness counsel to Petitioners Zepeta-Jasso and Mancia-Mendoza for any subsequent proceedings related to their status as material witnesses. Subject to a hearing, Petitioners seek a preliminary injunction affording the same relief to a putative class, including by imposing procedural safeguards to Petitioners' and class members' liberty.

SUMMARY OF ISSUES

This motion seeks a temporary restraining order and preliminary injunction under Federal Rule of Civil Procedure 65(a) and (b).

On a motion for a temporary restraining order, the plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The same showing is required for a preliminary injunction. *See Jones v. Tex. Dep't of Criminal Justice*, 880 F.3d 756, 759 (5th Cir. 2018).

The key difference between a TRO and a preliminary injunction is that a court may issue a TRO without notice if petitioners will suffer immediate and irreparable injury before the adverse party can be heard in opposition. Fed. R. Civ. Pro. 65(b)(1). Earlier on June 17, 2020, Petitioners advised Respondent as to their Petition this forthcoming request for emergency relief. Further, copies of the Complaint and this Motion have been provided to the United States Attorney's Office for the Southern District of Texas, pursuant to the requested method of service during the COVID-19 pandemic. Immediate relief is necessary to prevent irreparable injury before Respondents can be heard in opposition.

SUMMARY OF ARGUMENT

The Material Witness Statute, 18 U.S.C. § 3144, enunciates critical incarceration-related questions that must be individually determined prior to detention: detention is a disfavored last resort, and courts must determine the least restrictive conditions necessary to secure a witness's appearance, cannot impose a financial condition that results in pretrial detention, and must consider each witness's ability to pay before imposing money bond; and *no* witness can be

detained pursuant to the Material Witness Statute if their testimony can adequately be secured by deposition.

The Statute further defines the procedures by which these questions must be tested. Witnesses are entitled to, at least, a prompt, adversarial, evidentiary hearing where they are represented by counsel; they must have proper notice of the critical incarceration-related questions, and an opportunity to be heard on these questions; and detention orders must detail factual findings and the reasons for detention.

In sum, the authority to detain witnesses requires at least the *affirmative* and *individual* determination of the critical incarceration-related questions enunciated in the Statute, and that this determination be tested by prompt, represented, adversarial hearings. Given the failure to provide this process and make these findings, there is no authority to detain Petitioners and class members.

Even if there were ambiguity in the Statute as to whether such determinations must be made to order detention, or the procedures required, the Constitution leaves no room for doubt. Petitioners are deprived of their liberty, an injury which is permissible only insofar as it is narrowly tailored to a compelling government interest, and only insofar as adequate procedural safeguards fairly protect the liberty at stake. These principles compel the above requirements, subject to the above procedures.

Petitioners and hundreds of similarly situated material witnesses are detained in violation of the Material Witness Statute and the Constitution. They have suffered at La Salle for *months*, at substantial cost to their physical, mental, and spiritual health. Immediate release or other relief is necessary to prevent ongoing irreparable injury and, by enforcing federal statutes and the Constitution, would serve the public interest as well. This Court should order Petitioners' release.

BACKGROUND

I. Petitioners Were Summarily Designated as Material Witnesses and Detained Without Critical Findings or a Hearing.

Petitioners are automatically detained as material witnesses pursuant to a non-individualized scheme devoid of due process. Each Petitioner was initially arrested by agents of the United States Border Patrol. Docket No. 1-1, Declaration of Gloria Carolina Manzo-Hernandez ("Manzo-Hernandez Decl.") at ¶ 3.[1] Each Petitioner has been designated as a material witness in a criminal proceeding alleging human smuggling in violation of 8 U.S.C. § 1324. Each Petitioner is alleged to possess similar information: specifically, they can provide information about how they were transported, and some may be able to identify the alleged smuggler. *See* Manzo-Hernandez Decl. at Ex. A.[2] Importantly, several Petitioners *cannot* identify their alleged smuggler. *See* Manzo-Hernandez Decl. ¶¶ 2-3.[3]

The identical affidavits submitted for each Petitioner contain identical proposed orders. Manzo-Hernandez Decl. at Ex. A.[4] In each case, magistrates adopted the proposed orders without revision and without a hearing. Each Petitioner is detained on a $25,000 secured bond. Manzo-Hernandez Decl. at Ex. B.[5] No document in the record reflects individual findings of the

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[1] *See also* Docket No. 1-2, Declaration of Victor Zepeta-Jasso ("Zepeta-Jasso Decl.") at ¶ 3; Docket No. 1-3, Declaration of Moises Amadeo Mancia-Mendoza ("Mancia-Mendoza Decl.") at ¶ 3; Docket No. 1-4, Declaration of Mercy Rocio Duchi-Vargas ("Duchi-Vargas Decl.") ¶ 3; Docket No. 1-5, Declaration of Jatzeel Antonio Cuevas-Cortes ("Cuevas-Cortes Decl.") at ¶ 3; Docket No. 1-6, Declaration of Victor Manuel Nuñez-Hernandez ("Nuñez-Hernandez Decl.").

[2] *See also* Zepeta-Jasso Decl. at Ex. A; Mancia-Mendoza Decl. at Ex. A; Duchi-Vargas Decl. at Ex. A; Cuevas-Cortes Decl. at Ex. A; Nuñez-Hernandez Decl. at Ex. A.

[3] *See also* Mancia-Mendoza Decl. at ¶ 2; Duchi-Vargas Decl. at ¶ 10; Cuevas-Cortes Decl. at ¶ 3; Nuñez-Hernandez Decl. at ¶ 3.

[4] *See also* Zepeta-Jasso Decl. at Ex. A; Mancia-Mendoza Decl. at Ex. A; Duchi-Vargas Decl. at Ex. A; Cuevas-Cortes Decl. at Ex. A; Nuñez-Hernandez Decl. at Ex. A.

[5] *See also* Zepeta-Jasso Decl. at Ex. B; Mancia-Mendoza Decl. at Ex. B; Duchi-Vargas Decl. at Ex. B; Cuevas-Cortes Decl. at Ex. B; Nuñez-Hernandez Decl. at Ex. B.

possibility of conditional release, Petitioners' ability to pay the $25,000 bond, or the need to detain Petitioners.

Petitioners are detained at La Salle County Regional Detention Center. Manzo-Hernandez Decl. at ¶ 2.[6] Petitioners have been detained for as long as six months, and in no event shorter than 90 days. The criminal defendants against whom Petitioners are designated to testify have received detention hearings, and several have been released on bond. Manzo-Hernandez Decl. at ¶ 12; Cuevas-Cortes Decl. ¶ 12; Duchi-Vargas Decl. ¶ 11; Nuñez-Hernandez Decl. ¶ 11.

Petitioners' cases have been continued, without explanation, and yet there is no indication that the court considered whether they should be released. *See, e.g.*, Duchi-Vargas Decl. ¶ 17; Cuevas-Cortes Decl. ¶ 15. This is true even in cases in which the lead defendant has already pleaded guilty, and the government confirmed it does not oppose release. Duchi-Vargas Decl. ¶ 15; Cuevas-Cortes Decl. ¶ 14. There is no indication that the court considered the impact of these changing circumstances on the need for their continued detention.

This detention has taken a substantial toll on Petitioners' physical, mental, and spiritual wellbeing. Duchi-Vargas Decl. ¶ 18.[7] Petitioners are unable to provide for their families during this period of detention. *Id.* ¶ 20.[8] Though Petitioners Duchi-Vargas and Mancia-Mendoza seek to request affirmative immigration relief, they have not had the opportunity to do so. Duchi-Vargas Decl. ¶ 3; Mancia-Mendoza Decl. ¶ 2. This is not only because they are not working and cannot afford an immigration attorney or the cost of calling out of the detention center, but also

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[6] *See also* Cuevas-Cortes Decl. ¶ 2; Mancia-Mendoza Decl. ¶ 2; Zepeta-Jasso ¶ 2; Nuñez-Hernandez Decl. ¶ 2; Duchi-Vargas Decl. ¶ 2.
[7] *See also* Cuevas-Cortes Decl. ¶ 16–18; Mancia-Mendoza Decl. ¶ 10; Zepeta-Jasso ¶ 11; Nuñez-Hernandez Decl. ¶ 14; Manzo-Hernandez ¶ 17.
[8] *See also* Cuevas-Cortes Decl. ¶ 17; Zepeta-Jasso Decl. ¶ 12; Nuñez-Hernandez Decl. ¶ 13; Manzo-Hernandez ¶ 16.

because of their limited access to information—immigration officers have not advised them as to the nature and status of immigration proceedings, or their right to counsel in such proceedings. *See* Mancia-Mendoza Decl. ¶ 3. Moreover, conditions of confinement threaten Petitioners' physical and psychological health and well-being, especially as exacerbated by the COVID-19 pandemic. Duchi-Vargas Decl. ¶ 18.[9]

II. Hundreds of People Have Been Designated as Material Witnesses and Unlawfully Detained Under the Same Process.

Petitioners have been treated in the same manner as hundreds of other material witnesses. They all are ordered detained *ex parte*, "pending disposition" of criminal proceedings against defendants. Docket No. 1-7, Declaration of Caitlin Halpern ("Halpern Decl.") at ¶ 6. Without hearings or regard to ability to pay, magistrates uniformly order detention, impose secure $25,000 bonds on material witnesses, and do not make explicit findings as to whether testimony could be secured by deposition. *Id.* ¶ 6. Most witnesses will never provide testimony in any form. *Id.* ¶ 5.

This process, by which material witnesses are ordered detained and subject to secured bonds without a hearing, and then held in custody subject to criminal proceedings over which they have no control, is consistent for at least 139 material witnesses currently detained pursuant to orders of the Laredo Division. Halpern Decl. ¶¶ 4, 6-12.

ARGUMENT

The Petitioners have established each of the four requirements for a temporary restraining order and preliminary injunction: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury

[9] *See also* Cuevas-Cortes Decl. ¶ 19; Mancia-Mendoza Decl. ¶ 10; Zepeta-Jasso ¶ 11; Nuñez-Hernandez Decl. ¶ 15; Manzo-Hernandez ¶ 18.

if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Jones*, 880 F.3d at 759; *see also Winter*, 555 U.S. at 20 (same).

I. Petitioners are Detained in Violation of the Statute and the Constitution and Likely to Succeed on the Merits of their Claim.

The Statute enables courts to arrest and detain putative witnesses to secure testimony for federal criminal proceedings under strict guidelines. 18 U.S.C. § 3144. Upon arrest, witnesses have the same rights and are entitled to the same procedures as federal pretrial detainees held pursuant to the Bail Reform Act. 18 U.S.C. § 3144 (witnesses are to be treated in accordance with 18 U.S.C. § 3142). Ultimately, as explained below, a magistrate may only order detention upon finding that detention is the least restrictive condition that would reasonably assure the witness's appearance, that testimony cannot adequately be secured by deposition, and that further detention is necessary to prevent a failure of justice. *Ashcroft v. al-Kidd*, 563 U.S. 731, 733 (2011) ("[F]ederal law requires release if [witness's] testimony 'can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice.'") (quoting 18 U.S.C. § 3144).

Magistrates have not made any of the individual findings required for detention, and Petitioners and class members have been deprived of every procedural right required by the Statute. In Laredo, material witness detention is *automatic*. Halpern Decl. ¶¶ 6-7. Petitioners and class members were all ordered detained without a hearing. Manzo-Hernandez Decl. ¶ 7.[10] And at their uncounseled, non-evidentiary initial appearances—Petitioners' first and only appearances before the court—the court did not consider alternatives to detention, such as conditional release

[10] *See also* Zepeta-Jasso Decl. ¶ 6; Mancia-Mendoza Decl. ¶ 5; Duchi-Vargas Decl. ¶ 5; Cuevas-Cortes Decl. ¶ 6; Nuñez-Hernandez Decl. ¶ 7.

or securing testimony by deposition, or make any individual findings regarding the necessity of detention. Manzo-Hernandez Decl. ¶ 8.[11] Of the hundreds of witnesses detained over several months, the court has ordered the deposition and release of witnesses in ***just one*** case. Halpern Decl. ¶ 11. These uniform outcomes show the deficiency of the procedures in place. *Cf. ODonnell v. Harris County*, 892 F.3d 147, 159 (5th Cir. 2018). ("Far from demonstrating sensitivity ... Judges almost always set a bail amount that detains the indigent."). That fundamental unfairness permeates the reality for each Petitioner and class member. Not only does this treatment violate the Statute, it also violates Petitioners' constitutional rights.

A. Petitioners and Class Members are Detained Without Individual Findings on Critical Incarceration-Related Questions.

To order detention, the Statute requires that the court make affirmative, reasoned, individual, written findings as to the least restrictive conditions necessary to secure appearance, the witness's ability to satisfy any monetary release condition, the adequacy of the deposition procedure, and the necessity of detention to prevent a failure of justice. These statutory requirements are essential to protect witnesses' due process rights. Yet Petitioners and class members are detained without any such findings.

1. Detention Without Individual Findings Violates the Statute.

Under the statute, judges must make individual findings as to the "least restrictive" conditions necessary to "reasonably assure the appearance of the [witness] as required." 18 U.S.C. § 3142(c)(1); *see also id.* § 3142(c)(1)(B) (listing potential release conditions, such as "remain[ing] in the custody of a designated person," "abid[ing] by specific restrictions on … travel," or "report[ing] on a regular basis to a designated law enforcement agency"). If, "after a

[11] *See also* Zepeta-Jasso Decl. ¶ 7; Mancia-Mendoza Decl. ¶ 6; Duchi-Vargas Decl. ¶ 6; Cuevas-Cortes Decl. ¶ 8; Nuñez-Hernandez Decl. ¶ 9.

hearing" described *infra*, the magistrate determines that conditional release will not assure the witness's appearance, then the magistrate may order detention by "written findings of fact and a written statement of the reasons for the detention." 18 U.S.C. § 3142(e), (i). Judges must thus individually determine the viability of alternatives to confinement and memorialize their analyses in written findings. Here, however, Petitioners and class members are detained pursuant to a system that *automatically* commits witnesses to confinement until the disposition of criminal proceedings, without any consideration of less restrictive alternatives or individual findings. Halpern Decl. ¶¶ 6-12.

Further, the Statute prohibits imposition of "a financial condition that results in pretrial detention." 18 U.S.C. § 3142(c)(2); *see also* 18 U.S.C. § 3144 ("No material witness may be detained because of inability to comply with any condition of release" including financial conditions, "if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice."). Petitioners cannot pay a $25,000 bond. Manzo-Hernandez Decl. ¶ 9.[12] These bonds were imposed notwithstanding findings that Petitioners are indigent and thus entitled to appointment of counsel, pursuant to an *automatic* schedule assigning witnesses a $25,000 bond. Halpern Decl. ¶ 10. Imposition of a $25,000 bond, without regard to ability to pay, violates the Statute.

In addition, the court must also make an individual assessment as to whether "the testimony of such witness can adequately be secured by deposition, and [whether] further detention is not necessary to prevent a failure of justice." 18 U.S.C. § 3144. These findings are dispositive of whether a witness may be detained because the Statute precludes detention for

[12] *See also* Zepeta-Jasso Decl. ¶ 9; Mancia-Mendoza Decl. ¶ 8; Duchi-Vargas Decl. ¶ 6; Cuevas-Cortes Decl. ¶ 9; Nuñez-Hernandez Decl. ¶ 9.

"inability to comply with *any* condition of release." *Id.* (emphasis added). The Supreme Court has said that "[m]aterial witnesses enjoy the same constitutional right to pretrial release as other federal detainees, and federal law *requires* release if their testimony 'can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice.'" *al-Kidd*, 563 U.S. at 733 (quoting 18 U.S.C. § 3144) (emphasis added). To give effect to this provision, courts must "engage in a case-by-case evaluation" of these factors. *ODonnell*, 892 F.3d at 163.

Findings as to the adequacy of the deposition procedure are critical to the Statute's purpose and effect. Petitioners are detained to testify in proceedings initiated under 8 U.S.C. § 1324. Pursuant to Section 1324(d), as amended in 1996, "the videotaped (or otherwise audiovisually preserved) deposition of a witness . . . may be admitted into evidence . . . if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence." 8 U.S.C. § 1324(d). By amending Section 1324 to expressly provide for recorded depositions, Congress reiterated its intention that witnesses be deposed and released, "eliminating the need to detain such aliens in the United States." H.R. Rep. 104-863, at 206.

Separately, Federal Rule of Criminal Procedure 46 commands that, *"[t]o eliminate unnecessary detention*, the court must supervise the detention within the district of . . . any persons held as material witnesses." Fed. R. Crim. Pro. 46(h)(1) (emphasis added). The Rule further commands that "[a]n attorney for the government must report biweekly to the court, listing each material witness held in custody for more than 10 days .... For each material witness listed in the report, an attorney for the government must state why the witness should not be released with or without a deposition being taken under Rule 15(a)." *Id.* 46(h)(2).

The plain text of the Material Witness Statute, as well as additional federal directives, reflect Congress's unambiguous intention that courts depose and release, rather than detain,

material witnesses unless detention is necessary to prevent a failure of justice. In failing to determine the adequacy of the deposition procedure, the Laredo Division's practices nullify not only the Material Witness Statute's clear command, but also Federal Rule of Criminal Procedure 46 and Congress's clear intent reflected in 8 U.S.C. § 1324.

Finally, even if detention is ordered, the Statute mandates that release may be delayed only "for a *reasonable* period of time until the deposition of the witness can be taken." 8 U.S.C. § 3144 (emphasis added). These reasonable periods likewise must be individually determined. *Cf. See Stack v. Boyle*, 342 U.S. 1, 5 (1951) ("Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.").

Here, Petitioners' detention is not limited by their individual circumstances; they are instead subject to the fluctuations of criminal proceedings outside of their control. Petitioners have all been impacted by this arbitrary and unpredictable system. With respect to Petitioners Duchi-Vargas and Cuevas-Cortes, for example, the defendants in their cases have been out on bond since February, and the cases have been continued no fewer than three times, with one defendant having pleaded guilty and no deadlines pending in the case. Duchi-Vargas Decl. ¶¶ 11–16; Cuevas-Cortes Decl. ¶¶ 12–15.

2. Detention Without Individual Findings Violates the Constitution.

Even if the statutory commands were not so clear, the canon of constitutional avoidance and the Constitution itself require the same result. "When 'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (quoting *Crowell v. Benson*, 285 U.S. 22, 62

(1932)). If one interpretation of a statute "would raise a multitude of constitutional problems, the other should prevail." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).[13]

Accordingly, if the Court finds ambiguity as to whether the Statute requires individual findings as a precondition of detention, it should nonetheless adopt the interpretation advocated above to avoid the serious constitutional problems outlined below. Alternatively, if the Court concludes that it must reach the constitutional questions, the outcome is the same: Petitioners are entitled to individual findings under the Due Process Clause.

Witnesses have a specific liberty interest, deriving from the Material Witness Statute and the Due Process Clause, in individual findings as to the least restrictive conditions necessary to secure their appearance, their ability to pay money bond, and the adequacy of the deposition procedure. *Cf. ODonnell*, 892 F.3d at 157 ("Liberty interests protected by the due process clause can arise from two sources," the laws and the Due Process Clause itself.) (citing *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)).

The Bail Reform Act creates such interests. "The incarceration of those who cannot [satisfy release conditions, including paying money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978). Resting on Due Process grounds, the Fifth Circuit has said that courts "must . . . engage in a case-by-case evaluation of a given arrestee's circumstances, taking into account the various factors required by … law," including "ability to pay." *ODonnell*, 892 F.3d at 163. Among other procedures, evaluation of these factors requires "a reasoned decision by an impartial decisionmaker." *Id.*

[13] The canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark*, 543 U.S. at 381.

Atop these rights, the Material Witness Statute itself creates a vested liberty interest in affirmative findings as to the adequacy of the deposition procedure. The Fifth Circuit held more than 25 years ago that "undocumented aliens have an overriding liberty interest in not being detained as material witnesses, when the deposition procedure serves as an adequate alternative to prolonged detention." *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 419-20 (5th Cir. 1992). Courts *must* make findings as to these conditions, as "requirements intended for the protection of the citizen, and to prevent a sacrifice of his property, and by disregard of which his rights might be and generally would be injuriously affected, are not directory but mandatory." *French v. Edwards*, 80 U.S. 506, 508 (1871); *see also ODonnell*, 892 F.3d at 163 (holding that when a law creates a conditional liberty interest, the detaining authority must consider the "various factors required by … law" and reach a "reasoned decision" as to each factor).

Even if the Statute did not create this specific liberty interest, it would derive from the fundamental due-process principle that the government may not infringe on fundamental liberty interests "*at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993) (emphasis in original)).[14] Detention violates the Due Process Clause unless it is ordered in a criminal proceeding with adequate procedural protections or, "in certain special and narrow nonpunitive circumstances where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)

[14] *Accord Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (identifying "heightened protection against government interference with certain fundamental rights and liberty interests" (citation omitted)); *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977) (holding that liberty interests protected by substantive due process "require particularly careful scrutiny of the state needs asserted to justify their abridgment").

(citations omitted). The government cannot deprive anyone of their physical liberty without "determining . . . in [that] particular instance" that compelling state interests outweigh an individual's liberty, and the deprivation of liberty is narrowly tailored to those interests. *Washington v. Harper*, 494 U.S. 210, 220 (1990) (quoting *Mills v. Rogers*, 457 U.S. 291, 299 (1982)); *see also Glucksberg*, 521 U.S. at 720; *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992). The Supreme Court has held repeatedly that "[e]ven if the initial commitment was permissible, 'it could not constitutionally continue after that basis no longer existed.'" *Foucha*, 504 U.S. at 77 (quoting *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975)). It is the government's burden to demonstrate why a specific period of detention is necessary, and Petitioners cannot be detained without a reasoned determination to that effect. *See id.* at 79-81 (striking down detention scheme under which "the State need prove nothing to justify continued detention"); *Morrissey v. Brewer*, 408 U.S. 471, 487, 489 (1972) (holding that to revoke probation, both initial probable cause determination and subsequent revocation hearing require written factual findings and statements of the reasons for infringing on liberty).

The failure of narrow tailoring is evident here. Petitioners have been detained for months—through continuances, a pandemic, fundamental changes to court procedures, and guilty pleas—without any assessment beyond their initial, identical, and non-individual detention orders. What is more, the government's authority to detain pursuant to the Material Witness Statute derives from its interest in "securing [the witness's] testimony for trial." *al-Kidd*, 563 U.S. at 736.[15] If past is prologue, Petitioners and the vast majority of class members *will never provide testimony in any form*. Halpern Decl. ¶ 5.

[15] While the court did not explicitly hold that these are compelling state interests, Petitioners here treat them as such for purposes of this litigation.

The Statute and the Constitution demand more.

B. Petitioners and Putative Class Members are Held Without Counseled, Evidentiary Hearings.

Every Petitioner and class member was ordered detained without a hearing. Halpern Decl. ¶ 7; Manzo-Hernandez Decl. ¶ 7.[16] At their uncounseled, non-evidentiary initial appearances, which lasted an average of just 7 minutes, Petitioners were told they would remain in detention until the defendants pleaded guilty and were not told about the availability of alternatives to detention, including conditional release or submitting testimony by deposition. Halpern Decl. ¶¶ 8-9; Manzo-Hernandez ¶ 8.[17] Quite the contrary, the witnesses were told that their detention was automatic, would likely end after 90 days, and that there was nothing they could do to change their circumstances. Manzo-Hernandez Decl. ¶ 8.[18] This process, or lack thereof, violates both the Statute and the Constitution.

1. Detention Without a Hearing Violates the Statute.

Following an arrest, the Statute permits detention only "[i]f, *after a hearing*, . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required." 18 U.S.C. § 3142(e) (emphasis added). These hearings must be promptly held—a matter of days, not months—minimizing unnecessary deprivation of liberty. 18 U.S.C. § 3142(f)(2)(B) (requiring hearings "immediately upon the person's first appearance before the judicial officer" and permitting the government to seek a continuance not exceeding three days); *see also United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990)

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[16] *See also* Zepeta-Jasso Decl. ¶ 6; Mancia-Mendoza Decl. ¶ 5; Duchi-Vargas Decl. ¶ 5; Cuevas-Cortes Decl. ¶ 6; Nuñez-Hernandez Decl. ¶ 7.
[17] *See also* Zepeta-Jasso Decl. ¶¶ 7-8; Mancia-Mendoza Decl. ¶¶ 6-7; Duchi-Vargas Decl. ¶¶ 6-7; Cuevas-Cortes Decl. ¶ 8; Nuñez-Hernandez Decl. ¶ 9.
[18] *See also* Zepeta-Jasso Decl. ¶¶ 7-8; Mancia-Mendoza Decl. ¶¶ 6-7; Duchi-Vargas Decl. ¶¶ 6-7; Cuevas-Cortes Decl. ¶ 8; Nuñez-Hernandez Decl. ¶ 9.

(Because "a vital liberty interest is at stake" in proceedings under Section 3142, "the time limitations of the Act must be followed with care and precision."); *United States v. O'Shaughnessy*, 764 F.2d 1035, 1038 (5th Cir. 1985) (The immediacy requirement "delicately balances detaining a person prior to trial with procedural safeguards."). At the hearings, material witnesses are entitled "to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise." 18 U.S.C. § 3142(f)(2)(B).

Additionally, material witnesses have the right to be represented by counsel and to have counsel appointed if they cannot afford to obtain adequate representation. *Id.* Though all Petitioners and class members have been appointed counsel, the Criminal Justice Act extends this right to "every stage of the proceedings from [their] initial appearance before the United States magistrate judge." 18 U.S.C. § 3006A(c). Petitioners and class members have been systematically deprived of the right to counsel at their initial appearance. Counsel is appointed during the brief initial appearance, and the appointed attorney is typically not present in the courtroom. Halpern Decl. ¶ 9. To make matters worse, two Petitioners and several other class members *declined* the appointment of counsel at their initial appearance because they were misinformed by the judge as to the nature and significance of the appointment. Mancia-Mendoza Decl. ¶¶ 2, 7; Zepeta-Jasso Decl. ¶¶ 2, 8. All Petitioners were similarly misinformed. Manzo-Hernandez Decl. ¶ 10.[19]

The Statute requires a counseled, evidentiary hearing, and Petitioners have not received one. Indeed, Petitioners and class members have been detained without any hearing at all.

[19] *See also* Duchi-Vargas Decl. ¶ 6; Cuevas-Cortes Decl. ¶ 10; Nuñez-Hernandez Decl. ¶ 9.

Noncompliance with these requirements precludes detention under 18 U.S.C. § 3142. Petitioners must be released.

2. Detention Without a Hearing Violates the Constitution.

The Court's inquiry should begin and end with the plain language of the Statute, which the Fifth Circuit has found to be "clear, unambiguous and mandatory." *O'Shaughnessy*, 764 F.2d at 1038. But in the event the Court determines that statutory interpretation does not compel the relief requested here, the Statute should be construed to be consistent with the Constitution. *See Jennings*, 138 S. Ct. at 842; *Clark*, 543 U.S. at 381. Despite the constitutional requirement that Petitioners and class members receive counseled, evidentiary, adversarial hearings to protect them from unwarranted deprivations of physical liberty, Petitioners have been held for several months without *any* hearing.

The right to physical liberty is fundamental. *See, e.g.*, *Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."); *Foucha*, 504 U.S. at 80 ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause."). In this regard, the Supreme Court has instructed that "[m]aterial witnesses enjoy the same constitutional right to pretrial release as other federal detainees." *al-Kidd*, 563 U.S. at 731. This means, at least, that a "full-blown adversary hearing" is required before the government deprives a material witness of their liberty. *United States v. Salerno*, 481 U.S. 739, 750 (1987).

To satisfy the hearing requirement, courts must provide notice of the conditions that will determine detention and a "fair opportunity to present, and to dispute, relevant information." *Turner v. Rogers*, 564 U.S. 431, 448 (2011). The Supreme Court has repeatedly required

hearings in other circumstances where a person may be detained in order to prevent unjustified encroachments on individual liberty. *See, e.g.*, *id.* (civil contempt proceedings that may result in detention); *Foucha*, 504 U.S. at 81–82 (civil commitment); *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (probation revocation); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973) (probation revocation); *Morissey*, 408 U.S. at 488-89 (parole revocation).

In addition, the Due Process Clause presumptively requires appointment of counsel to indigent persons where they "may be deprived of [their] physical liberty," and counsel must be present when the courts test critical incarceration-related questions. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26–27 (1981); *see also, e.g.*, *In re Gault*, 387 U.S. 1, 34–42 (1967) (requiring appointed counsel in juvenile delinquency proceedings in light of "the awesome prospect of incarceration"); *Vitek v. Jones*, 445 U.S. 480, 495–97 (1980) (holding that prisoners facing involuntary transfer to a mental hospital "are threatened with immediate deprivation of liberty" and are likely to need assistance exercising their rights).[20]

It is by no means simple for a pro se witness to articulate whether her release will result in a "failure of justice" within the meaning of the Material Witness Statute, a determination which requires intimate knowledge of substantive criminal elements, procedural rules, and customary practices in federal criminal litigation. Indeed, the circumstances of this case bear this out. No Petitioner understood that they could invoke any mechanism to secure their release, let

[20] The Supreme Court has held that the presumption requiring appointment of counsel prior to detention can be overcome only under unique circumstances not applicable here. Counsel would not "alter significantly the nature of the proceeding" at issue, resulting in a level of formality that would make the proceedings less fair, and there is no risk of creating an "asymmetry of representation." *See Turner*, 564 U.S. at 447 (child support contempt proceedings) (quoting *Gagnon*, 411 U.S. at 787 (probation revocation proceedings)); *Wolff v. McDonnell*, 418 U.S. 539, 569 (1974) (prisoner disciplinary proceedings). The proceeding at issue here is a federal criminal prosecution, a proceeding of the highest possible formality, where both the government and the defendant are represented by counsel. Nor are the issues here "simple," *Gagnon*, 411 U.S. at 787, or "straightforward," *Turner*, 564 U.S. at 446.

alone the process or standard for doing so. Manzo-Hernandez Decl. ¶ 8.[21] This problem is not limited to Petitioners: *no witness* has invoked these procedures, successfully or otherwise. Halpern Decl. ¶ 11. Witnesses' liberty interests are too significant, and the benefits of counsel too important, to authorize detention without representation. *See In re Class Action Application for Habeas Corpus*, 612 F. Supp. 940, 944 (W.D. Tex. 1985) (finding that due process requires appointment and representation of counsel for material witnesses); *Caliste v. Cantrell*, 329 F.Supp.3d 296, 314–15 (E.D. La. 2018) (requiring counsel at any bail hearing where the defendant may be subject to pretrial detention in light of "the individual's great interest in the accuracy of the outcome of the hearing," "the government's interest in that accuracy and the financial burden that may be lifted by releasing those arrestees who do not require pretrial detention"). Petitioners' detention without representation by counsel at an adversarial hearing therefore violates both the Statute and the Constitution.

* * *

It is the courts' duty to ensure that all of the conditions of detention have been met, including "a fundamentally fair determination of the critical incarceration-related question[s]." *Turner*, 564 U.S.at 435. The sufficiency of less restrictive conditions to assure a witness's appearance, the witness's ability to pay a proposed bond amount, the adequacy of the deposition procedure, the reasonable time for detention, and the potential for a failure of justice are all critical incarceration-related questions. *See Aguilar-Ayala*, 973 F.2d at 419 (holding that courts *must* release witnesses whose testimony can adequately be secured by deposition unless they find a failure of justice would occur). Ensuring a fair mechanism for consideration and determination

[21] *See also* Zepeta-Jasso Decl. ¶ 8-9; Mancia-Mendoza Decl. ¶ 9; Duchi-Vargas Decl. ¶ 17; Cuevas-Cortes Decl. ¶ 15; Nuñez-Hernandez Decl. ¶ 9.

of these questions requires, at minimum, notice that conditional release or deposition may be sought as an alternative to detention and a fair hearing on those issues.

Over hundreds of cases, no party has shown that Petitioners' or class members' testimony cannot adequately be secured by conditional release or deposition, or that further detention is necessary to prevent a failure of justice. Halpern Decl. ¶¶ 5, 9. Not only does this failure read critical incarceration-related questions out of the Material Witness Statute, it ignores a constellation of other rights-conferring federal statutes, and it violates Petitioners' and class members' constitutional rights. This Court's urgent intervention is required.

II. Petitioners Are Suffering Irreparable Injury—Loss of Physical Liberty—In the Absence of an Injunction.

The deprivation of constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality opinion) (addressing First Amendment harms); *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (where petitioner alleges deprivation of constitutional rights, "no further showing of irreparable injury is necessary") (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 1995)).

Nowhere is this more clearly the case than where an individual is *detained*, striking "the core of the liberty protected by the Due Process Clause." *Foucha*, 504 U.S. at 80; *see also Zadvydas*, 533 U.S.at 690. Even one night of unjustified detention causes irreparable harm. *See, e.g., United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1988) ("[U]nnecessary deprivation of liberty clearly constitutes irreparable harm."); *Jarpa v. Mumford*, 211 F.Supp.3d 706, 711 (D. Md. 2016) ("[I]f [Plaintiff's] continued detention is indeed unconstitutional, every subsequent day of detention without remedy visits harm anew" and "cannot be undone or totally remedied

through monetary relief."); *Burdine v. Johnson*, 87 F. Supp. 2d 711, 717 (S.D. Tex. 2000) ("Burdine suffers irreparable harm each day that he is imprisoned in violation of the United States Constitution."). It is precisely to prevent these irreparable injuries that the Statute guarantees rights and procedures to detained witnesses, whose "overriding liberty interest in not being detained" compels courts and the government to "explore alternatives to extended detention." *Aguilar-Ayala*, 973 F.2d at 419–20.

Here, Petitioners have been detained for as long as six months, inflicting psychological and economic harms to themselves and their families. Duchi-Vargas Decl. ¶¶ 18-20.[22] Petitioners are desperate. *Id.* ¶ 18.[23] They are uncertain about their futures, anxious about their health, unable to work, and struggling even to communicate with their families. *Id.* ¶¶ 18-20.[24] The ingrained stress of detention has resulted in lasting physical harm. *Id.* ¶ 18.[25] And because Petitioners have not—and except in the most unusual cases will not—provide testimony in any form, their detention ultimately may be for naught.

III. Vindicating Petitioners' Rights is in the Public Interest and Will Not Harm Respondent.

To obtain a temporary restraining order or preliminary injunction, Petitioners must demonstrate that the balance of equities tips in their favor, and an injunction is in the public interest. *See Winter*, 555 U.S. at 22; *Jones*, 880 F.3d at 759. In *Nken v. Holder*, the Supreme Court observed that these factors "merge when the Government is the opposing party." 556 U.S. 418, 420 (2009).

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[22] *See also* Manzo-Hernandez Decl. ¶¶ 16-17; Zepeta-Jasso Decl. ¶¶ 11-12; Mancia-Mendoza Decl. ¶ 10; Cuevas-Cortes Decl. ¶¶ 16–18; Nuñez-Hernandez Decl. ¶¶ 13-14.
[23] *See also* Zepeta-Jasso Decl. ¶ 11; Cuevas-Cortes Decl. ¶ 16.
[24] *See also* Manzo-Hernandez Decl. ¶¶ 16-17; Zepeta-Jasso Decl. ¶¶ 11-12; Mancia-Mendoza Decl. ¶ 10; Cuevas-Cortes Decl. ¶¶ 16–18; Nuñez-Hernandez Decl. ¶¶ 13-14.
[25] *See also, e.g.*, Cuevas-Cortes Decl. ¶ 16.

The balance of equities tips sharply in Petitioners' favor. "[T]he public interest always is served when public officials act within the bounds of the law and respect the rights of the citizens they serve." *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 93 (5th Cir. 1992) (citation omitted). Additionally, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012)).

Compared to Petitioners' liberty interests, the government's interests in continued detention are low. Each Petitioner has been designated to provide testimony in proceedings alleging violations of 8 U.S.C. § 1324 (alien smuggling), which expressly permits the introduction of videotaped deposition testimony. 8 U.S.C. § 1324(d); *Aguilar-Ayala*, 973 F.2d at 419 ("putting to rest any lingering confusion over the admissibility of deposition testimony"). Moreover, over 99% of proceedings involving smuggling nationwide resolved without trial in 2018. *See* UNITED STATES COURTS, JUDICIAL BUSINESS 2018, Table D-10. In the small number of cases that do go to trial, and therefore potentially require live testimony, the government has myriad tools to ensure that witnesses are available to testify. Hence, the Fifth Circuit long ago emphasized that "[i]t would be the rare case, indeed, in which *the government* could establish the inadequacy of the deposition procedure and hence the potentiality of a 'failure of justice'" requiring detention of material witnesses. *Aguilar-Ayala*, 973 F.2d at 419 (emphasis in original).

The relief requested here does not create new obligations for the government. Instead, it would enforce duties the government was obligated to fulfill *immediately* upon Petitioners' first appearance before a magistrate, 18 U.S.C. § 3142(f)(2), namely, to individually determine whether each Petitioner must be detained and for how long. The public interest is served by "the possibility that shorter terms of incarceration and the decrease in costs of jailing material

witnesses[] could offset any expense [otherwise incurred]." *In re Class Action*, 612 F. Supp. at 946. The public interest is further served by following procedures structured to assure proper factual findings and the informed exercise of judicial discretion. *Cf. Morrissey*, 408 U.S. at 484 ("[T]here is no interest on the part of the State" in depriving a person of liberty "without any procedural guarantees[.]"). Urgent intervention is required not only to prevent irreparable injury to Petitioners and class members, but in furtherance of the public interest.

IV. The Court Should Not Require Plaintiffs to Provide Security Prior to Issuing a Temporary Restraining Order.

Federal Rule of Civil Procedure 65(c) provides that "[t]he court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." In holding that the amount of security required is a matter for the discretion of the trial court, the Fifth Circuit has ruled that the court "may elect to require no security at all." *Corrigan Dispatch Co. v. Casa Guzman, S. A.*, 569 F.2d 300, 303 (5th Cir. 1978). Plaintiffs, as detained individuals seeking to enforce their civil rights, request that this Court exercise its discretion to require no security in issuing this relief. *See, e.g.*, *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996); *Advocacy Ctr. for Elderly & Disabled v. Louisiana Dep't of Health & Hosps*., 731 F. Supp. 2d 603, 626-27 (E.D. La. 2010).

CONCLUSION

Petitioners, and hundreds of similarly situated material witnesses detained at La Salle County Regional Detention Center, are detained without the findings and procedures required by the Statute and the Constitution as prerequisites to their detention. This Court should immediately order Petitioners' release. Further, this Court should certify a class as described in the Petition and enter a preliminary injunction enjoining Warden Juarez from detaining material

witnesses in the absence of a lawfully issued detention order. This relief is compelled by law and necessary to prevent irreparable harm; it serves the public interest by ensuring fulfillment of the law and protection of constitutional rights; and it comes at no cost to Respondent that Respondent was not already required to bear immediately upon seizing named Petitioners and putative class members.

Respectfully submitted,

Caitlin Halpern*

Barrett H. Reasoner

Sam W. Cruse III

GIBBS & BRUNS, LLP

/s/David A. Donatti
David A. Donatti (*Attorney-in-charge)*

Andre Segura

ACLU FOUNDATION OF TEXAS, INC.