UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DETENTION WATCH NETWORK and CENTER FOR CONSTITUTIONAL RIGHTS,

Plaintiffs,

- against -

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT AGENCY and UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendants.

No. 14 Civ. 583 (LGS)

ECF Case

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Defendants respectfully submit this memorandum in opposition to Plaintiffs' motion for a preliminary injunction. Plaintiffs commenced this Freedom of Information Act ("FOIA") action no more than two months after Defendants U.S. Immigration and Customs Enforcement ("ICE") and the Department of Homeland Security ("DHS" and, together with ICE, the "Government") received Plaintiffs' FOIA request, and they then moved for a preliminary injunction without even waiting for the Government's time to respond to the Complaint to run. Plaintiffs suggest that the Government has not acted promptly in locating the records sought, but in their rush to Court they failed even to exhaust their administrative remedies against DHS.[1] Plaintiffs have also steadfastly refused to narrow or more clearly define their FOIA Request in writing, leaving the Government at a loss as to the universe of documents sought. Yet Plaintiffs' motion seeks immediate, extraordinary and irreversible injunctive relief that is the entirety of the substantive relief sought in this sweeping lawsuit.

Plaintiffs, however, have not carried their heavy burden to satisfy any of the standards for a preliminary injunction. First, Plaintiffs are not entitled to expedited processing under the applicable law, since they are neither an organization primarily engaged in the dissemination of information nor is the information they are seeking regarding undisputedly lawful immigration detentions urgently necessary to inform the public. Indeed, significant portions of the underlying facts Plaintiffs purport to immediately need are already publicly available – as evident from Plaintiffs' own submissions in this lawsuit – and the allegedly impending legislative action Plaintiffs cite in order to establish an immediate need, the eventual passage of the applicable

[1] Plaintiffs' failure to exhaust their administrative remedies against DHS is more fully discussed in DHS's separate Memorandum of Law in Support of Motion to Dismiss. For purposes of these motions, the Government does not contest that Plaintiffs have exhausted their administrative remedies against ICE.

2015 federal appropriations bill, has not been shown to be either imminent or likely to alter existing policy, which has been in place since 2009 and which is subject to separate, non-appropriations statutory provisions. That bill, moreover, neither threatens any new or ongoing violation of anybody's rights, nor does it relate to a material change in policy sufficient to justify the extraordinary relief Plaintiffs seek.

Second, Plaintiffs cannot show a substantial likelihood of success on the merits of their FOIA Request because that Request is overly broad and does not "reasonably describe" the records sought, such that Plaintiffs are unable to prevail on any challenge to the adequacy of the Government's searches for responsive records. Plaintiffs also cannot show that they or anybody else will suffer irreparable injury if the agencies take the necessary time to conduct a thorough search and to process any responsive documents, especially because significant information they contend is essential to an informed public debate is, in fact, already in the public domain.

Finally, the balance of equities and public interest tips heavily in the Government's favor. There is no authority for a FOIA requester to commandeer agency resources with an overbroad request—thereby diverting the Government from thousands of other, properly framed requests—only because the records sought relate indirectly to a federal appropriations bill. Indeed, the logic of Plaintiffs' motion would require every single FOIA Request relating to appropriation-funded programs to be expedited upon request, while also causing a stop to all other FOIA work until Plaintiffs' demand for immediate action has been met. Such arguments bear no merit, and Plaintiffs' motion for a preliminary injunction should be denied.

BACKGROUND

A. The Detention Bed Mandate

Plaintiffs' request concerns ICE and DHS's interpretation of what Plaintiffs have called

the "Detention Bed Mandate," a long-standing federal appropriations bill provision that provides financing for the detention of up to 34,000 individuals a day, and the financial and political incentives for, and consequences of, maintaining the existing level of immigration detentions. *See* Declaration of Natalie N. Kuehler dated March 5, 2014 ("Kuehler Decl.") Ex. A (Declaration of Catrina Pavlik-Keenan, dated March 5, 2014, ("Pavlik-Kennan Decl."), Ex. 1). Plaintiffs do not argue that ICE or DHS is unlawfully detaining individuals due to the so-called Detention Bed Mandate. Rather, they allege that ICE and DHS mistakenly interpret the Detention Bed Mandate as requiring the actual detention of 34,000 individuals daily, many of which they claim the Government, in its discretion, would otherwise choose not to detain. *See id*.

B. Plaintiffs' FOIA Request and Court Proceedings

On November 27, and December 2, 2013, respectively, ICE and DHS received identical Freedom of Information Act ("FOIA") requests (collectively, the "FOIA Request") from Plaintiffs. *See* Kuehler Decl. Exs. A (Pavlik-Keenan Decl. ¶ 6 and Ex. 1) and B (Declaration of James V.M.L. Holzer, dated March 5, 2014, ("Holzer Decl."), ¶ 9 and Ex. A). The 8-page, single-spaced Request seeks production of a vast and ill-defined array of records relating to the Detention Bed Mandate. *See id.* Plaintiffs' Request seeks nine different substantive categories of records, several of which contain multiple subparts, and potentially implicate millions of pages of responsive records. *Id.*; *see also* Kuehler Decl. Ex. A (Pavlik-Keenan Decl. ¶ 6). Four of those requests, for example, seek all "records," paper as well as electronic, "related to" or "about" press communications, releases from detention due to budget constraints or loss of funding, ICE or DHS communications with "local, state or Congressional officials or law enforcement agencies" related to the monetary impact or contractual implications of detaining

individuals, and "the relationship between ICE and private prison corporations." Kuehler Decl. Exs. A (Pavlik-Keenan Decl. Ex. 1) and B (Holzer Decl. Ex. A).

The Request also seeks a full fee waiver and expedited processing, neither of which was granted by ICE or DHS. *See id*. Plaintiffs allege that they have constructively exhausted DHS's and ICE's denials of expedited processing, *see* Plaintiffs' Brief in Support of their Motion for Preliminary Injunction ("Pls. Br.") at 18, even though they never responded to letter from DHS dated December 6, 2013, advising that, absent further clarification, their FOIA Request would be closed for failure to sufficiently define the records sought. Kuehler Decl. Ex. B (Holzer Decl. Ex. B). Moreover, despite several unexpected days of government closure following receipt of Plaintiffs' letter contesting ICE's determination that their Request was insufficiently defined and overly broad, ICE by letter dated January 24, 2014, and post-marked January 27, 2014, promptly wrote to Plaintiffs seeking further clarification of the records sought. *Id.* Ex. A (Pavlik-Keenan Decl. ¶¶ 15-19 and Ex. 7). Plaintiffs, however, failed to provide any such clarification, choosing instead to file their Complaint on January 30, 2014. Eleven days later, on February 11, 2014, long before Defendants' March 4, 2014, deadline for answering the Complaint, Plaintiffs filed the instant motion for a preliminary injunction.

Since February 12, 2014, the very day an AUSA was assigned to represent ICE and DHS in this action, the Government has engaged Plaintiffs in numerous telephone conference calls and letters in an attempt to obtain clarification and/or narrowing of Plaintiffs' Request. *See* Kuehler Decl. Exs. E and F (correspondence between AUSA Natalie N. Kuehler and Ghita Schwarz regarding the scope of Plaintiffs' FOIA Request). As it now stands, however, Plaintiffs have not stipulated to any such clarifying or narrowing, and persist by this motion to seek an order compelling Defendants to produce and release potentially millions of pages within ten days. *Id.*

ARGUMENT

Plaintiffs cannot establish that they are entitled to expedited processing or, for that matter, the production of any documents at all in response to their overbroad FOIA Request. Plaintiffs also cannot demonstrate that they are likely to suffer any irreparable harm. Plaintiffs' motion for a preliminary injunction therefore should be denied in its entirety.

A. Preliminary Injunction Standard

A preliminary injunction is an extraordinary remedy and "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) (per curiam) (emphasis in original); *see also Munaf v. Geren,* 553 U.S. 674, 689 (2008) ("A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right.") (citations and internal quotation marks omitted); *Grand River Enter. Six Nations, Ltd. v. Pryor,* 481 F.3d 60, 66 (2d Cir. 2007) ("[T]he preliminary injunction is one of the most drastic tools in the arsenal of judicial remedies.") (citation and internal quotation marks omitted); *Medical Soc'y of New York v. Toia,* 560 F.2d 535, 538 (2d Cir. 1977) (A preliminary injunction is an "extraordinary and drastic remedy which should not be routinely granted.").

In order to obtain a preliminary injunction, the movant must satisfy the following four-part test:

> A plaintiff seeking a preliminary injunction 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. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (citing cases). "It is clear beyond cavil that two of the prongs of the four-factor preliminary injunction test – likelihood of success and irreparable injury – are the most significant aspects of the court's inquiry because they relate directly to the purpose of a preliminary injunction." *Electronic Privacy Information*

Center ("EPIC") v. U.S. DOJ, No. 13-cv-1961, 2014 WL 521544, at *4 (D.D.C. Feb. 11, 2014). "In exercising their sound discretion, courts … should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter,* 555 U.S. at 24.

B. Plaintiffs Have Not Shown a "Clear" or "Substantial" Likelihood of Success on the Merits

Where a party seeks a preliminary injunction "that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme," the party must, "by a *clear showing*, carr[y] the burden of persuasion," and must "establish a *clear or substantial* likelihood of success on the merits." *Sussman v. Crawford*, 488 F.3d 136, 139-40 (2d Cir. 2007) (second emphasis added). A rigorous "likelihood of success" showing is also required in this case because Plaintiffs' request, if granted, would "alter the status quo by commanding some positive act." *Tom Doherty Assocs. v. Saban Entm't, Inc.,* 60 F.3d 27, 34 (2d Cir. 1995). This standard is "especially appropriate when a preliminary injunction is sought against [the] government." *D.D. ex rel V.D. v. New York City Bd. of Educ.,* 465 F.3d 503, 510 (2d Cir. 2006). Here, Plaintiffs have not demonstrated a likelihood of success on the merits of their request for expedited processing or the underlying FOIA action, let alone a "clear" or "substantial" one.

1. Plaintiffs Cannot Demonstrate That They Are Entitled to Expedited Processing

Ordinarily, agencies process requests for records and information on a first-in, first-out basis. 6 C.F.R. § 5.5. To obtain expedited processing of their FOIA Requests, Plaintiffs must show a "compelling need" for the records requested by establishing either (1) that failure to obtain expedited processing would pose an "imminent threat to the life or physical safety of an individual"; or (2) both that they are "primarily engaged in disseminating information" and that there is an "urgency to inform the public concerning actual or alleged Federal Government activity.". 5 U.S.C. § 552(a)(6)(E). Plaintiffs claim that they are entitled to expedited processing

under the second category, *see* Pls. Br. at 2-3, 16, but fail to meet its rigorous standards. An agency's denial of a request for expedited processing is subject to *de novo* judicial review "based on the record before the agency at the time of the determination." 5 U.S.C. § 552(a)(6)(E)(iii); *see also Landmark*, 910 F. Supp. 2d at 277; *ACLU of N. Cal. v. Department of Justice*, No. C 04-4447 (PJM), 2005 WL 588354, at *7-8 (N.D. Cal. Mar. 11, 2005).[2]

(i) Plaintiffs Are Not Primarily Engaged in the Dissemination of Public Information

It is well-established that the "specified categories for compelling need [under the FOIA expedited processing provision] are intended to be narrowly applied." *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001) (quoting H.R. Rep. No. 104-795, at 26 (1996), 1996 U.S.C.C.A.N. 3448, 3469). This is due to Congress' concern for agencies' "finite resources" and the possibility that overuse of the expedited process would unfairly disadvantage other requesters. *Id.* As a result, courts "must be cautious in deeming non-media organizations as persons primarily engaged in information dissemination." *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 275-76 (D.D.C. 2012). This is especially true "at the preliminary injunction stage where the movant has the burden of showing a substantial likelihood of success on the merits and where the sought-after remedy is to be granted 'sparingly.'" *Id.*, at 276 n. 7. Indeed, the legislative history of the 1996 FOIA amendment providing for expedited processing under limited circumstances notes that the category "should not include individuals who are engaged only *incidentally* in the dissemination of information. The standard of 'primarily engaged' requires

[2] Plaintiffs attempt to bolster their allegations that they are primarily engaged in the dissemination of public information by submitting declarations an other materials to the Court that were not provided to the Government during the administrative process. *See* Declaration of Ghita Schwarz, dated February 11, 2014, Exs. F-H, J-O. Because the Court's review is based on the record before the agency at the time, these submissions should be disregarded for purposes of determining whether Plaintiffs are entitled to expedited processing. *See* 5 U.S.C. § 552(a)(6)(E)(iii); *see also ACLU of N. Cal.*, 2005 WL 588354, at *7-8.

that information dissemination be the *main activity* of the requestor, although it need not be their sole occupation." H.R. Rep. No. 104-795, at 26, 1996 U.S.C.C.A.N. 3448, 3469 (emphasis added).

Here, Plaintiffs have not established that they are organizations primarily engaged in disseminating information to the public, but rather merely that doing so is one of their activities, albeit a substantial one. In support of their request for expedited processing, Plaintiffs' FOIA Requests alleged, *inter alia*, that

> [CCR] is a non-profit, public interest, legal, and public education organization that engages in litigation, public advocacy, and the production of publications in the fields of civil and international human rights. . . . One of CCR's primary activities is the publication of newsletters, know-you[r]-rights handbooks, legal analysis of current immigration law issues, and other materials for public dissemination. . . . CCR operates a website … [,] regularly issues press releases and operates a listserv of over 50,000 members . . . .

FOIA Request at 5-6. The requests further allege that

> [DWN] is a national collation of organizations and individuals working to expose and challenge the injustices of the U.S. immigration and deportation system and advocate for profound change. . . . [DWN] is recognized as the "go-to" resource on detention issues by media and policymakers and known as a crucial national advocate for just policies that promote an eventual end to immigration detention. As a member-led network, we unite diverse constituencies to advance the civil and human rights of those impacted by the immigration detention and deportation system through collective advocacy, public education, communications, and field-and-network building. . . .

Id. These descriptions preclude a finding that the dissemination of information is "*the* main activity" CCR and DWN engage in. *ACLU of N. Cal.*, 2005 WL 588354, at 14 (emphasis in original). Indeed, CCR's self-description establishes that its main activities are "litigation, public advocacy and production of publications," while DWN characterized itself as a network engaged in "advocacy, public education, communications, and field-and-network building."

FOIA Request at 5-6. Because neither Plaintiff is primarily engaged in the dissemination of public information, they cannot qualify for expedited processing. *See ACLU of N. Cal.*, 2005 WL 588354, at *14. In the strongly analogous *ACLU of N. Cal.*, the court held that the ACLU is not an organization *primarily* engaged in the dissemination of information despite sending bi-monthly newsletters to 40,000 people, maintaining a website, issuing right-to-know documents, press releases, brochures, and pamphlets, because the dissemination of public information, though "substantial," is merely "*a*" main activity of the ACLU. *Id.*; *see also Landmark*, 910 F. Supp. 2d at 276 (denying motion for a preliminary injunction and holding that plaintiff failed to show that it is "primarily, and not just incidentally, engaged in information dissemination.") As the *Landmark* court explained, "[a] contrary reading of the statutory requirement would allow nearly any organization with a website, newsletter, or other information distribution channel to qualify as primarily engaged in disseminating information." *Landmark*, 910 F. Supp. 2d at 276.

The only non-media organization the government is aware of that has ever been found to be primarily engaged in disseminating information is the Leadership Conference on Civil Rights. *See Leadership Conf. on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005). In that case, however, the court found that plaintiff had established that its mission was "to serve as the site of record for relevant and up-to-the minute civil rights news and information." *Id.* Here, by contrast, Plaintiffs have shown no more than that the dissemination of information is one component of their overall advocacy mission and that they are "recognized" by various third parties as, rather than primarily established to be, a "go-to" resource.[3] FOIA Request at 5-6.

[3] Indeed, with respect to DWN, Plaintiffs have at best alleged that DWN is "the 'go-to' resource on detention issues by media and policymakers," rather than the public at large, "*and* known as a critical national advocate for just policies that promote an eventual end to immigration detention" FOIA Request at 5-6 (emphasis added).

This is precisely the type of mixed activity that the *ACLU of N. Cal.* and *Landmark* courts deemed insufficient to meet the rigorous statutory requirements for expedited processing.

(ii) Plaintiffs Cannot Establish Urgency to Inform the Public

Even if Plaintiffs had demonstrated that they were primarily engaged in disseminating information to the public, their request for expedited processing would nonetheless fail because they cannot show an urgency to inform the public. *See* 5 U.S.C. § 552(a)(6)(E). In evaluating whether there is such an urgency, courts consider at least three factors: "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." *Al-Fayed*, 254 F.3d at 310. These factors "must be narrowly applied." *Long v. Dep't of Homeland Sec.*, 436 F. Supp. 2d 38, 42 (D.D.C. 2006).

Here, the only reason Plaintiffs identified to support their asserted urgent need to inform the public was that "[t]he appropriations debate will begin in a matter of months and it is paramount that the public have the requested information to meaningfully engage in the public debate surrounding the cost of detention; decisions regarding the number of beds ICE is required to occupy; and incentives by local governments to arrest and fill ICE detention beds," as well as a "bipartisan critique of the Detention Bed Mandate". Kuehler Decl. Exs. A (Pavlik-Keenan Decl. Ex. 1) and B (Holzer Decl. Ex. A) at 7. These arguments are insufficient to establish Plaintiffs' entitlement to the unusual step of expediting their Requests over those of all others submitted to the Government. As an initial matter, given that federal appropriations bills fund virtually every single discretionary aspect of the federal Government, Plaintiffs' argument that an imminent need for disclosure exists merely because the appropriations bill debate is about to commence "would likely sweep almost any FOIA request into the ambit of 'urgency.'"

Landmark, 910 F. Supp. 2d at 277 (denying motion for expedited treatment where plaintiffs claimed to need the information urgently because it related to an issue at play in a presidential election). Indeed, every single FOIA Request designed to elicit information about any of the federal government's discretionary activities would, under Plaintiffs' theory, be a matter of urgent exigency. As *Landmark* shows, courts are reluctant to require expediting in such circumstances. *See id.*

Moreover, there is no immediate need for disclosure of the information at issue in Plaintiffs' Request because the Detention Bed Mandate is neither a new program, nor one for which too little information to meaningfully engage in a public debate is known. Plaintiffs' FOIA Requests themselves are based on the Detention Bed Mandate being first discussed in 2006, and being included in every federal appropriations bill since 2009. Kuehler Decl. Exs. A (Pavlik-Keenan Decl. Ex. 1) and B (Holzer Decl. Ex. A); Pls. Br. at 5 (the Detention Bed Mandate was "[f]irst introduced as an unfunded Congressional policy in 2006 [and] has been part of appropriations bills in every year since 2009"). Indeed, Plaintiffs, in their moving papers acknowledge that they already have much of the most important information they claim is urgently necessary for the public to be able to engage in a meaningful debate, including that: (i) the "cost of detention" is cited as $2.8 billion (Pls. Br. at 9 (noting New York Times report that the Detention Bed Mandate "has attendant cots of $2.8 billion")); and (ii) the "number of beds" ICE is allegedly required to occupy as identified 34,000 (Pls. Br. at 1, 6 ("The Detention Bed Quota appears to have been interpreted by ICE to require that 34,000 detention beds be filled each day."); *see also* Shah Decl. ¶ 11 ("The total number of individuals who have spent time in immigration detention within a given year has increased from 204,459 in 2001 to 478,000 in

2012" and "the number of immigrants held in detention daily has more than quadrupled between 7,475 in Fiscal Year 1995 to 33,330 in Fiscal Year 2011.")).

Although Plaintiffs also cite urgency based on the need to determine "incentives by local governments to arrest and fill ICE detention beds", only a single one of their individual FOIA Requests, request (h), is arguably designed to elicit that information, and no connection – or, at most, an indirect connection – can be drawn between the records it requests and the federal appropriations bill debate.[4] In fact, Plaintiffs themselves implicitly recognize that the federal appropriations debate will not be impacted by the information they seek, because the appropriations bill merely "*fund*[*s*]" 34,000 beds and does not require them to be filled. Shah Decl. ¶ 21 (emphasis in original); *see also* Kuehler Decl. Ex. D (testimony by DHS, ICE and the Transportation Security Admin. to the U.S. House of Reps. Committee on Homeland Security's Subcommittee on Oversight and Management Efficiency on April 12, 2013) (sequestration may leave "ICE unable to maintain 34,000 detention beds with the funding provided," such that ICE will instead "place low-risk, non-mandatory detainees in lower cost, parole-like alternatives to detention programs….") and Ex. C (Joint Statement for the Record by DHS, ICE and other agencies before the U.S. House of Reps. Committee on Homeland Security) (same).

This stands in stark contrast to the line of cases Plaintiffs cite in an attempt to establish an urgent need for the records they seek. All of those cases found that exigency existed only

[4] Requests (a) and (b) seek documents relating to "most recent copies of executed agreements related to detention facilities or detention beds", many of which are in any event already publicly available on ICE's website. Request (c) seeks communications regarding detention space, financing and bed numbers in certain geographic regions. Request (d) seeks data and statistics related to detention and payments to private prison corporations. Request (e) seeks information relating to certain media articles. Request (f) seeks reports and memoranda of detention-related appropriations decisions within the federal government. Request (g) seeks records relating to the impact of the federal government's funding decisions on releases from detention. Request (i) seeks records related to the relationship between ICE an private prison corporations.

because the legislative action actually under debate would proscribe or prohibit certain governmental actions. *See Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence*, 542 F. Supp. 2d 1181, 1186-87 (N.D. Cal. 2008) (expedited processing warranted where Congress was "considering legislation that would amend the FISA and the records may enable the public to participate meaningfully in the debate over such pending legislation"); *Elec. Frontier Found. v. Office of the Dir. of Nat'l Intelligence,* No. C 07-5278 (SI), 2007 WL 4208311, at *7 (N.D. Cal. Nov. 27, 2007) (same); *Gonzales*, 404 F. Supp. 2d at 260 (expedited processing warranted where records related to the imminent expiration of, and efforts to re-authorize, the Voting Rights Act); *ACLU v. U.S. DOJ*, 321 F. Supp. 2d 24, 29 (D.D.C. 2004) (expedited processing warranted where records sought related to the "renewal and/or amendment of the Patriot Act").

Plaintiffs have not cited, and cannot cite, a single case where, as Plaintiffs are arguing here, the funding of a lawful, discretionary action as part of the overall federal appropriations bill was sufficient to establish "exceptional need or urgency" sufficient to require expedited processing. Rather, because the passage of the applicable federal appropriations bill alone cannot compromise any "significant recognized interest" implicated in the records sought by Plaintiffs' FOIA Request, Plaintiffs are unable to meet their heavy burden of showing that they are entitled to expedited processing. *See Al-Fayed*, 254 F.3d at 310.

2. Plaintiffs Cannot Demonstrate That They Are Entitled to the Production of Records

Plaintiffs also cannot establish a "clear" or "substantial" likelihood of success on the merits because their overbroad FOIA Request does not satisfy the statutory requirement that requests "reasonably describe" the records sought. 5 U.S.C. § 552(a)(3)(A). As one district court has explained:

> [I]t is the requester's responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome, and to enable the searching agency to determine precisely what records are being requested. The rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters.

Assassination Archives & Research Ctr., Inc. v. CIA, 720 F. Supp. 217, 219 (D.D.C. 1989) (internal cite omitted). "Broad, sweeping requests lacking specificity are not sufficient." *Dale v. IRS,* 238 F. Supp. 2d 99, 104 (D.D.C. 2002). Furthermore, "[a]n agency is not required to undertake a search that is so broad as to be unduly burdensome." *Contreras v. DOJ,* 729 F. Supp. 2d 167, 170-71 (D.D.C. 2010); *see also Halpern v. FBI*, 181 F. 3d 279, 288 (2d Cir. 1999) ("an agency need not conduct a search that plainly is unduly burdensome").

In the event this case proceeds to summary judgment motions—the usual mechanism for resolving FOIA cases, *see, e.g., Miscavige v. IRS,* 2 F.3d 366, 369 (11th Cir. 1993); *Jones-Edwards v. Appeal Bd. of Nat'l Sec. Agency,* 352 F. Supp. 2d 420, 423 (S.D.N.Y. 2005)—defendants may raise the overbreadth of plaintiffs' FOIA Request as part of the calculus for determining the adequacy-of-search issue. *See Moore v. FBI,* 283 F. App'x 397, 400 (7th Cir. 2008) ("In the end, a lack of specificity to [plaintiff's] requests may be one of many defenses the [agency] will assert to justify nonproduction."). Courts routinely rule in the Government's favor when the FOIA Request at issue is too broad to satisfy section 552(a)(3)(A). *See Am. Fed'n of Gov't Empls. v. U.S. Dep't of Commerce,* 907 F.2d 203, 208-09 (D.C. Cir. 1990) (affirming grant of summary judgment for agency and finding request too broad because it "require[d] the agency to locate, review, redact, and arrange for inspection a vast quantity of material"); *Marks v. U.S. DOJ,* 578 F.2d 261, 263 (9th Cir. 1978) (affirming grant of summary judgment for agency and declaring that "broad, sweeping requests lacking specificity are not permissible"); *Mason v. Callaway,* 554 F.2d 129, 131 (4th Cir. 1977) (affirming district court's ruling that request for "all

correspondence, documents, memoranda, tape recordings, notes, and any other material pertaining to the atrocities committed against plaintiffs" failed section 552(a)(3)(A) requirement); *Dale,* 238 F. Supp. 2d at 104-05 (dismissing FOIA complaint and finding no obligation for agency to search for records in response to request for "any and all" documents about taxpayer); *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 27-28 (D.D.C. 2000) (granting summary judgment to Export-Import Bank on portion of request that was "unreasonably broad").

Judicial Watch is particularly illustrative. In the district court's words, the FOIA Requester demanded "all records pertaining to contacts between [two appointees to the Export-Import Bank] and 'companies, entities, and/or persons related or doing or conducting business in any way' with the People's Republic of China." *Judicial Watch*, 108 F. Supp. 2d at 26. The Bank did not conduct any search for responsive records on the ground that the request was overbroad. *See id.* at 27. The court found that the request "d[id] not reasonably describe the records sought," was "unreasonably broad" and "impose[d] an unreasonable burden on the Bank." *Id*. The court also noted that the plaintiff there, as here, "declined the Bank's repeated attempts [to] clarify the request" and that the Bank "acted properly" in not conducting *any* search with respect to this portion of the request. *Id*. at 28.

Here, similarly, Plaintiffs' FOIA Request – which seeks records spanning from June 2006 to the present – is unduly broad. *See* FOIA Request at 1-4 (demanding, *inter alia,* "most recent copies of executed agreements related to detention facilities or detention beds" between the Government and "private prison corporations" or "local, state, city or municipal governments" and all "communications regarding" "renewal, supplemental agreements, addendums, riders, etc. of the[se] agreements" from 2006 to the present; all "agreements (formal and informal) regarding

detention space, financing of detention beds, and the allocation of beds" in certain geographic regions from 2006 to the present; "copies of all regularly generated statistical reports on detention" and cumulative data as well as "financial records of actual payments" by the Government to private corporations" from 2007 to the present; all documents "about releases from detention due to budget constraints or loss of funding" from June 2006 to the present; all "records of ICE or DHS communications with local, state or Congressional officials or law enforcement agencies related to costs, reimbursements, profits, or monetary agreements for detention" from June 2006 to the present, and all "records related to the relationship between ICE and private prison corporations" from June 2006 to the present).

Indeed, despite repeated requests by the Government, Plaintiffs have refused to sufficiently define or narrow their Request even now, agreeing to more concretely define the set of documents requested "for purposes of the preliminary injunction motion only". *See* Kuehler Decl. Ex. G. Accordingly, like plaintiffs in *Service Women's Action Network v. U.S. Dep't of Defense*, No. 311 cv 1534 (SRU), 2013 WL 1149946, at *4 (D. Conn. Mar. 19, 2013), Plaintiffs here seek "to litigate the merits of their settlement proposal, which was rejected, without accepting the disadvantages of formally narrowing their request, *i.e.* relinquishing their claim to a broader set of documents." And like plaintiff in that case, Plaintiffs here are, therefore, unlikely to succeed on any motion for summary judgments on the merits of their FOIA Request. *See id.* (denying motion to reconsider order granting defendant's motion for summary judgment on grounds that plaintiff's FOIA Request was overbroad).

3. Plaintiffs Cannot Demonstrate That They Are Entitled to Receive Any Records Within 10 Days

Even if Plaintiffs could establish a right to the production of any documents, they certainly cannot demonstrate a likelihood that they are entitled to receive responsive records

within 10 days. Plaintiffs argue that a preliminary injunction compelling such a draconian production schedule is appropriate because they "simply ask requesting [sic] that Defendants fulfill the obligations under [FOIA]." Pl. Br. 23. Like plaintiffs in *EPIC*, this argument appears to "flow[] from [the] belief that [the Government's] failure to respond to the FOIA Request within 20 days, as set forth in the FOIA statute, constitutes a *per se* violation of the law that entitles the requester to get the requested records immediately." *EPIC*, 2014 WL 521544, at *5. However, as the *EPIC* court recognized, "nothing in the FOIA statute establishes that an agency's failure to comply with this 20-day deadline automatically results in the agency's having to produce the requested documents without continued processing." *Id.* To the contrary, case law "clearly establishes that no such result follows." *Id.* Rather "the 'penalty' [for an agency's failure to produce documents within 20 days] is that the agency cannot rely on the administrative exhaustion requirement to keep cases from getting into court." *Citizens for Responsibility & Ethics in Washington ("CREW") v. FEC*, 711 F.3d 180, 189-190 (D.C. Cir. 2013). The *EPIC* court therefore explained that "far from [plaintiff's] reading of the FOIA to require an agency to immediately hand over all of the requested documents as a result of its failure to meet the deadline, *CREW* makes clear that the impact of blowing the 20-day deadline relates *only to the requester's ability to get into court*." *EPIC*, 2014 WL 421544, at *6 (emphasis in original); *see also NAACP Legal Defense & Educ. Fund v. U.S. Dep't of Housing & Urban Dev.*, No. 07 Civ. 3378 (GEL), 2007 WL 4233008, at *4 (S.D.N.Y Nov. 30, 2007). The *EPIC* court, therefore, went on to deny plaintiffs' motion for a preliminary injunction ordering the agency to produce responsive records within 20 days even though, in that case – unlike here – the government had during the administrative process already agreed that plaintiffs' FOIA request was entitled to be expedited. *EPIC*, 2014 WL 421544, at *7.

Here, similarly, Plaintiffs' motion for a preliminary injunction attempting to impose an impossible production schedule on the Government should be denied. FOIA does not oblige defendants to produce records in the order plaintiffs prefer by a deadline plaintiffs set. *See id.* Rather, defendants' obligation is to "promptly" produce responsive records that are "reasonably describe[d]" by plaintiffs' Request. 5 U.S.C. § 552(a)(3)(A). In this regard, "FOIA does not require an agency to mobilize its full resources for compliance with FOIA requests." *Long v. OPM*, 692 F.2d 185, 192 (2d Cir. 2012). Instead, even where, unlike here, expedited processing is appropriate, "the particular FOIA request moves 'to the front of the agency's queue' and the agency must process it 'as soon as practicable.'" *EPIC*, 2014 WL 421544, at *8 (quoting *Gonzales*, 404 F. Supp. 2d at 259-60).

Plaintiffs also cannot show a clear or substantial likelihood of success on the merits with respect to their request for a fee waiver. Judicial review of an agency's denial of a fee waiver request under FOIA is *de novo*, and generally resolved on a summary judgment motion. *Carney v. U.S. DOJ,* 19 F.3d 807, 814 (2d Cir. 1994). Defendants have promulgated regulations governing the issuance of fee waivers, with one of the factors being whether the "[d]isclosure of the requested information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government." 6 C.F.R. § 5.11(k)(1)(i). Even assuming *arguendo* that certain documents in Plaintiffs' Request are likely to contribute to the public understanding of ICE's interpretation of the Detention Bed Mandate, an application for a fee waiver should be denied where the "FOIA request . . . is far broader tha[n] its justification for a fee waiver." *NRDC v. EPA,* 581 F. Supp. 2d 491, 502 (S.D.N.Y. 2008). Here, plaintiffs have not complied with FOIA's requirement that the request "reasonably describe" the records sought, *see* 5 U.S.C. § 552(a)(3)(A) and *supra* at 13-16, and have

requested a universe of records that is well beyond the public interest in obtaining information about whether ICE has interpreted the Detention Bed Mandate as requiring it to fill a certain number of detention beds. Accordingly, Plaintiffs cannot justify requiring the public to pay the costs of responding to their defective and burdensome Request.

Under these facts and circumstances, plaintiffs cannot show a "clear" or "substantial" likelihood of success on the merits and thus are not entitled to mandatory injunctive relief.

C. Plaintiffs Have Not Shown a Likelihood of Irreparable Harm

Plaintiffs' motion is also fatally flawed because it does not show irreparable harm absent injunctive relief. This showing "is the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transp. Malmo AB v. Wabtec Corp.,* 559 F.3d 110, 118 (2d Cir. 2009) (citation and internal quotation marks omitted); *see USA Recycling v. Town of Babylon,* 66 F.3d 1272, 1295 (2d Cir. 1995) (Irreparable harm is the "*sine qua non* for preliminary injunctive relief."). Indeed, "[i]n the absence of a showing of irreparable harm, a motion for a preliminary injunction should be denied." *Rodriguez v. DeBuono,* 175 F.3d 227, 234 (2d Cir. 1999).

"To satisfy the irreparable harm requirement, Plaintiffs must demonstrate that absent a preliminary injunction 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) (citation and internal quotation marks omitted). A mere *possibility* of harm will not suffice; plaintiffs must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original). "The irreparable injury requirement erects a very high bar for a

movant." *Coal. for Common Sense in Gov't Procurement v. United States*, 576 F. Supp. 2d 162, 168 (D.D.C. 2008).

Here, Plaintiffs articulate only a nebulous irreparable harm argument that fails to establish a likely irreparable injury that they will suffer if the records are not released immediately because they are not able to meaningfully engage in a substantive debate surrounding the appropriations bill of 2015 without access to the documents. However, "it is also clear from case law that a movant's general interest in being able to engage in an ongoing public debate using information that it has requested under FOIA is not sufficient to establish that irreparable harm will occur unless the movant receives immediate access to that information." *EPIC*, 2014 WL 521544, at *10." As discussed *supra* at 11, Plaintiffs argument is also belied by the fact that significant portions of the very information Plaintiffs rely on to establish urgent need is already in the public domain. Moreover, the information they purportedly remain "confused" about, namely their belief that ICE and DHS are improperly interpreting the Detention Bed Mandate as requiring a certain number of detention beds to be filled, Pls. Br. at 3, is a miniscule portion of their FOIA Request. It is also an issue for which Plaintiffs can establish no urgency, since the relevant statutory language has been in place since at least 2009, and Plaintiffs themselves state that the eventual passage of the 2015 appropriations bill would only provide funding for, rather than the filling of, a maximum number of beds. *See* Pl. Br. At5-7. In any event, even if the 2015 federal appropriations bill had a bearing on Plaintiffs' FOIA request, they have not "pointed to any scheduled committee hearings, let alone committee or floor votes, that indicate that action on [that bill] is imminent." *EPIC*, 2014 WL 521544, at *10. Plaintiffs, therefore, have demonstrated no urgency that warrants immediate injunctive relief.

D. The Balance of Equities Tips Decidedly in Defendants' Favor

In considering a motion for preliminary injunction, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (citation and internal quotation marks omitted). Here, the balance of equities tips decidedly in favor of the Government.

As demonstrated above, Plaintiffs' purported irreparable harm is entirely unsupported by the facts. The injuries the Government would suffer if the proposed preliminary injunction were granted, meanwhile, are concrete and substantial. Even a cursory review of Plaintiffs' FOIA request belies Plaintiffs' attempt to downplay that Request as seeking only "a limited number of specific records," through a "remarkably detailed" request as to which responsive records "should not be difficult to locate." Pls. Br. 3, 21, 23. As explained in the agency declarations submitted in support of this brief, Plaintiffs' overly broad FOIA Request make searching for, processing, and producing such records complicated and time-consuming. *See* Kuehler Decl. Exs. A (Pavlik-Keenan Decl.) and B (Holzer Decl.). Plaintiffs' request for immediate production, moreover, would catapult Plaintiffs' FOIA Request above all others currently being processed by the Government despite Plaintiff's "utter failure to explain why, in this era of diminished government resources, its own 'expedited' request should take precedence over any of the other 'expedited' requests pending." *EPIC*, 2013 WL 521544, at *8.

Given that the Government is already are in the process of searching for records responsive to the FOIA Request based on counsel's oral representation of what types of records Plaintiffs actually seek, an injunction requiring the Government to complete that production and produce a *Vaughn* index within days of the court's decision is unnecessary. Such a decision would also eliminate the Government's ability to confer with other necessary branches of the

government and private parties regarding the release of certain records implicating their protected interests. As such, the potential harm resulting from an order granting the relief Plaintiffs seek is significantly more severe than any speculative harm to Plaintiffs resulting from the release of responsive records in the ordinary course. Accordingly, the balance of equities tips in favor of denying Plaintiffs' motion for a preliminary injunction.

E. The Public Interest Is Not Served by Granting Plaintiffs' Motion

Finally, "[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (citation and internal quotation marks omitted). This factor also weighs in favor of denying Plaintiffs' motion.

As discussed above, the preliminary injunction sought by Plaintiffs would hinder the Government's ability to process other meritorious FOIA Requests, and therefore "would most clearly impose an undue hardship on other FOIA requesters." *EPIC*, 2014 WL 521544, at *10; *see also Long*, 436 F. Supp. 2d at 44 (preliminary injunction would harm public interest because it would "merely place plaintiffs' request ahead of others that are awaiting responses to their requests") (collecting cases); *Nation Magazine v. Dep't of State*, 805 F. Supp. 68, 74 (D.D.C. 1992) ("Granting plaintiffs the emergency relief they seek will harm third parties). Indeed, as the *Nation* court recognized in denying a motion for the expedited production of records under FOIA relating to a candidate for presidency in advance of the national election, "[w]hile the Court does not belittle the pubic importance of disseminating information concerning Mr. Perot before the election, it must acknowledge and consider the interests of others in timely obtaining the information they seek from government agencies." *Nation Magazine*, 805 F. Supp. at 74. Here, ICE currently has a backlog of approximately 520 direct FOIA requests, 209 of which

were received prior to Plaintiffs' Request, and 42,029 indirect FOIA requests referred to ICE by the U.S. Citizenship and Immigration Services FOIA Office. *See* Kuehler Decl. Ex. A (Pavlik-Keenan Decl. ¶¶ 24, 25). DHS, similarly, has 141 open FOIA requests currently awaiting processing, 50 of which were received prior to Plaintiffs' Request. *See id.* Kuehler Decl Ex. B (Holzer Decl. ¶ 19). All of these previously-pending requests would be processed more slowly as a result of any decision requiring the expedition of Plaintiffs' FOIA Request.

A preliminary injunction would also increase the risks that the Government is unable to orderly administer the FOIA process, including conducting a full search for records responsive to Plaintiffs' FOIA Request and applying appropriate FOIA exemptions, thereby harming the public interest by increasing the risk of disclosure of exempt records. *See United Technologies Corp. v. U.S. Dep't of Defense*, 601 F.3d 557, 559 (D.C. Cir. 2010) ("In enacting FOIA, the Congress sought to balance the public's interest in governmental transparency against legitimate governmental and private interests [that] could be harmed by release of certain types of information.") (citation and internal quotation marks omitted). The entry of a preliminary injunction expediting Plaintiff's FOIA request over other pending requests therefore "would severely jeopardize the public's interest in an orderly, fair, and efficient administration of … FOIA." *Nation Magazine*, 805 F. Supp. at 74; *see also EPIC*, 2014 WL 521544, at *10 ("allowing [plaintiff] to jump to the head of the line would upset the agency's processes"). These concerns are compounded here, where Plaintiffs have "failed to explain why the public interest can only be served by the *immediate* release of the records requested." *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 514 F. Supp. 2d 7, 11 (D.D.C. 2007) (emphasis in original).

Plaintiffs improperly rely on two other cases related to immigration detention, *ACLU v. U.S. Dep't of Homeland Sec.*, No. 11 Civ. 3786 (RMB), 2013 WL 4885518 (S.D.N.Y Sept. 9,

2013), *appeal pending*, No. 14-406 (2d Cir.) and *New York Times Co. v. U.S. Dep't of Homeland Sec.*, No. 12 Civ. 8100 (SAS), 2013 WL 2952021 (S.D.N.Y. June 13, 2013), in an effort to establish public interest. The FOIA requests in both of those cases, unlike Plaintiffs' FOIA Request here, related to the allegedly *unlawful* detention of immigrants. Indeed, Plaintiffs' selective quotation of Judge Berman's opinion in *ACLU* is highly misleading. *See* Pls. Br. 25. Judge Berman's holding, quoted in full, makes it clear that that he considered the "public interest in disclosure" of the requested information "particularly compelling" because it related to the allegedly unlawful detention of individuals. *See ACLU*, 2013 WL 4885518, at *8 ("The public interest in disclosure is particularly compelling here because the ACLU seeks to highlight ICE's historically troublesome practices of prolonged immigration detention – for months, if not years – *without adequate procedures in place to determine whether their detention is justified*.") (emphasis supplied) (internal quotation marks omitted).

Judge Scheindlin's holding in *New York Times Co.*, a case that like *ACLU* involved the allegedly unlawful detention of individuals by ICE, moreover, did not even relate to a motion for preliminary injunction. Rather, Judge Scheindlin, in the context of weighing the privacy interests of individuals whose identities the New York Times sought to discover against the public's interest in the disclosure of their identities, found that their identities should be disclosed because "the public has an interest in knowing how ICE handles aliens convicted of crimes who are required to be released." 2013 WL 2952021, at *4. These issues have no bearing on the question before the Court here of whether Plaintiffs met their heavy burden of establishing that the entry of a preliminary injunction is in the public interest. Plaintiffs plainly have not.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be denied.

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Respectfully submitted,

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