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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION – RIVERSIDE

FAOUR ABDALLAH FRAIHAT, *et al.*,

Plaintiffs,

v.

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

Defendants.

Case No.: 19-cv-01546-JGB(SHKx)

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

Date: April 13, 2020
Time: 9:00 a.m.
Hon. Jesus G. Bernal

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I. Introduction

In the sixteen days since Plaintiffs filed their Emergency Motion for a Preliminary Injunction, almost 390,000 more people in the United States have become infected with COVID-19, and over 14,000 more have perished from the disease.[1] That exponential growth has been mirrored in ICE detention facilities, where the number of COVID-19 cases grew from one confirmed case upon filing of our motion, to "only [eight]" by the time of Defendants' opposition, ECF 95 at 4, to 37 today.[2] While many of us have been able to protect ourselves from this pandemic by isolating at home, the thousands of people ICE is warehousing in detention facilities do not have the option of social distancing. The most high-risk among them remain "sitting ducks" in an ever-more perilous pond. Decl. of Anne Rios in Supp. of Mot. for Prelim. Inj. and Class Certification ¶ 13, ECF No. 81-13.

Defendants acknowledge that "COVID-19 presents a significant and fast-developing challenge." Defs.' Opp'n to Pls.' Emergency Mot. for Prelim. Inj. at 2, ECF No. 95 ("Opp'n"). They nevertheless insist that Plaintiffs' fears are "premature" because they "do not have a cognizable injury." *Id.* at 4. As public health officials and Plaintiffs' experts have vividly shown, however, Defendants' assurances about conditions in ICE detention do not reflect the reality of the pandemic. Rather, "public health authorities predict" that "the rapidly escalating public health crisis . . . will especially impact immigration detention centers." *Xochihua-Jaimes v. Barr*, No. 18-71460 (9th Cir. March 23, 2020) (unpublished order directing immediate release). Defendants' arguments on the merits of

[1] *Compare* Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, ECF No. 81-1 ("PI") (46,000 people in the United States diagnosed with COVID-19 and almost 600 deaths) *with* Coronavirus COVID-19 Global Cases by the Ctr. for Sys. Sci. and Eng'g (CSSE) at John Hopkins Univ., JOHN HOPKINS UNIV. & MED. (Apr. 8, 2020), https://coronavirus.jhu.edu/map.html (over 432,000 confirmed cases and over 14,800 deaths).

[2] https://www.ice.gov/coronavirus

Plaintiffs' claims are equally without merit.

Ultimately, this crisis poses an immediate and substantial threat to Plaintiffs' and the putative class members' lives. It calls out for an urgent, system-wide remedy. Defendants cite several of the cases in which district courts have recently granted individuals release or mandated protective measures like those Plaintiffs seek here. But while every person at risk from COVID-19 in an ICE facility has a right to plead for individual relief, a significant majority of them do not have a lawyer, and the courts would be overwhelmed if each person had to file a separate plea for protection. This case properly seeks a system-wide set of safeguards for ***all*** people in ICE custody. Plaintiffs' motion for a preliminary injunction should be granted. *See generally Padilla v. Immigration & Customs Enf't*, No. 19-35565, 2020 WL 1482393, -- F.3d -- (9th Cir. Mar. 27, 2020) (affirming entry of preliminary injunction addressing immigration detention issues).

II. Plaintiffs Satisfy Article III Standing.

Defendants assert that Plaintiffs lack standing to assert their claims because they have not yet suffered an injury in fact and fail to show redressability. But Plaintiffs need not wait to become ill themselves with COVID-19—a disease that can kill within days of infection—to seek relief. Plaintiffs show "injury" by demonstrating that they are subjected to policies and practices that subject them to a substantial risk of serious harm. *Parsons v. Ryan*, 754 F.3d 657, 680 (9th Cir. 2014) (exposure to a substantial risk of serious harm is, "in its own right, a constitutional injury"). Indeed, "a remedy for unsafe conditions need not await a tragic event." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). Plaintiffs are not required to show symptoms, nor that there are confirmed COVID-19 cases in the three detention facilities where they are detained, to establish an injury for standing

purposes in the detention context.[3] Moreover, this Court has previously noted that one "cannot say, with any degree of certainty, that no one–staff or detainee–at Adelanto has not been, or will not be, infected with the coronavirus." *Fraihat v. Wolf*, No. ED CV 20-00590 TJH (KSx), at *8-9 (C.D. Cal. Mar. 30, 2020), ECF No. 18; *Hernandez v. Wolf*, No. ED CV 20-00617 TJH (KSx), at *10-11 (C.D. Cal. Apr. 1, 2020), ECF No. 17; *Castillo v. Barr*, No. CV 20-00605 TJH (AFMx), 2020 WL 1502864, at *8-9 (C.D. Cal. Mar. 27, 2020), ECF No. 32.[4]

Plaintiffs have also shown redressability by producing multiple expert opinions that the relief sought here will abate the risk of illness, complications, and death.[5] The current measures undertaken by ICE, including "cohorting" detained individuals, simply cannot prevent the spread of COVID-19 in detention centers. *See* Decl. of Homer Venters in Supp. of Mot. for Prelim. Inj. and Class Certification ¶¶ 14-18, ECF No. 81-11 ("Venters Decl.").

III. Plaintiffs Are Likely to Prevail on Their Claims.

A. A. Plaintiffs and the Putative Subclass Are Likely to Succeed on Their Fifth Amendment Deliberate Indifference Claim.

Substantial evidence demonstrates that Defendants' response to the COVID-19 pandemic is "objectively unreasonable" and thus constitutes objective deliberate indifference in violation of the Fifth Amendment. *Gordon v. Cnty. of Orange*, 888

[3] *See Thakker v. Doll*, No. 1:20-cv-480, at *5-6 (M.D. Pa. Mar. 31, 2020) (ruling that plaintiffs have standing despite currently lacking symptoms because COVID-19 is spreading rapidly and a remedy "need not await a tragic event"); *Jones v. Wolf*, No. 20-CV-361, 2020 WL 1643857, at *27-28 (W.D. N.Y. April 2, 2020) (finding that plaintiffs meet the standard for a TRO because vulnerable plaintiffs face an imminent risk); *Malam v. Adducci*, No. 20-10829, at *29 (E.D. Mich. Apr. 5, 2020) (finding that anyone in highly confined conditions are at a substantial risk of COVID-19 due to underlying health conditions, even if there are no confirmed cases in the facility)

[4] This is especially true given that many people are asymptomatic.

[5] *See, e.g.* Corr. Decl. of Dr. Carlos Franco-Paredes at 8, ECF No. 91 ("Franco-Paredes Decl."); *See* Venters Decl. ¶¶ 8-9, 22-23.

F.3d 1118, 1125 (9th Cir. 2018). As detailed below, Defendants' arguments to the contrary rest on fundamental misunderstandings of the nature of Plaintiffs' claims and of the law itself. Emergency relief is necessary to remediate Defendants' defective response to COVID-19 and thereby protect the health and very lives of Plaintiffs and the putative subclass.

As a threshold matter, Defendants recycle the same flawed argument from their Motion to Dismiss when they argue (at 18-19) that "the deliberate indifference analysis turns on the facts of each case at each facility." Not so. Courts have long recognized a crucial distinction between individual deliberate indifference cases and cases like this one, which allege systemic deliberate indifference due to myriad and interconnected defects in a detention system that, in their totality, subject whole classes of people to a substantial risk of serious harm. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 505 n.3 (2011); *Parsons*, 754 F.3d at 677-78. The focus in such systemic cases is not—as Defendants erroneously contend—on the individual circumstances of particular people or facilities, but rather whether defects in the medical system, taken as a whole, constitute deliberate indifference. *See, e.g.*, *Hernandez v. Cnty. of Monterey*, 305 F.R.D. 132, 152-53, 155 n. 138 (N.D. Cal. 2015) (observing that in systemic cases, deliberate indifference may be shown by, *inter alia*, "systematic or gross deficiencies in staffing, facilities, equipment or procedures").

Defendants further ignore controlling law by suggesting that the Government can evade constitutional scrutiny so long as "ICE is responding" to COVID-19. Opp'n at 18. Contrary to Defendants' contention, the question is not simply whether ICE has taken *any* precautionary measures at all in response to COVID-19, but rather whether those precautionary measures are constitutionally adequate given the substantial risk of serious harm that COVID-19 poses to the

lives and health of medically vulnerable people.[6] They are not. Plaintiffs' evidence shows that—far from "demonstrat[ing] a unified and thorough response" to COVID-19, Opp'n at 3, Defendants' response is objectively unreasonable on a system-wide basis. Both of Dr. Venters' expert declarations detail numerous and significant deficiencies in ICE's response to COVID-19, ranging from serious discrepancies with CDC guidelines to the dangerous absence of any meaningful coordination and oversight of COVID-19 responses. These examples, described in detail below and in the attached declarations, stem from ICE's failure to establish an adequate protocol and enforce it consistently across all its facilities.[7]

First, Dr. Venters notes that ICE's guidance is inadequate because it contradicts important CDC recommendations, and omits others, concerning screening, monitoring, and care for symptomatic patients, social distancing, transportation, environmental cleaning, adequate staffing and training, and—crucially—the protection of people with medical vulnerabilities.[8] Defendants have not persuasively rebutted any of the other troubling variations from CDC guidance. Nor could they on this record.

Second, this is a nationwide pandemic that has already been confirmed in many ICE detention centers, with the number growing each day. It is thus essential that ICE have a comprehensive approach, which allows it to obtain and

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[6] *See Coleman et al v. Newsom*, No. 2:90-cv-0520 KJM DBP (E.D. Cal., Apr. 4, 2020); *Plata et al v. Newsom*, No. 01-cv-01351-JST (N.D. Cal., Apr. 4, 2020) at *8 (Eighth Amendment requires adequate steps to curb COVID-19).

[7] Defendants cite to the declaration of Plaintiff Martin Munoz, ECF No. 83-11, who was moved from a dorm of 72 people to 22 people, Opp'n at 17-18, but fail to mention that he and the other people in that dorm were detained "two people per cell" at "less than six feet apart." ¶ 5. Defendants also cite to the declaration of Plaintiff Alex Hernandez, ECF No. 83-7, for the proposition that the detainees in his unit were provided with surgical masks, but again omit the fact that those masks initially were denied and only provided after detainees took drastic measures in protest. ¶ 6.

[8] Venters Decl. ¶¶ 14-15.

analyze on-the-ground data and to effectively communicate and coordinate its resources and guidance to detention centers. ICE has altogether failed to implement such a plan, and thus cannot ensure that its detention centers have the clinical guidance, staffing, resources, capacity, and competence to respond to COVID-19. Given the rapidly evolving nature of COVID-19, updating all medical providers about prevailing clinical guidance should be a "core aspect of outbreak management," yet ICE has failed to implement this basic yet essential measure.[9]

Third, ICE has failed to implement an adequate centralized surveillance plan to ensure that ICE can both track and meet the medical needs of people in its custody. As Dr. Venters points out, "centralized surveillance is absolutely necessary in COVID-response." Venters Suppl. Decl. ¶ 4(b)(iii). Such measures should, at a minimum, cover not only clinical surveillance (*e.g.*, number of patients awaiting tests, number of patients awaiting hospitalization) but also resource allocation, such as staffing and equipment deficits. *Id.* Absent such tracking methods, ICE will be unable to ensure that crucially needed resources—such as hospital beds and ventilators—are available to people in its custody, particularly given resource scarcities. Yet, the evidence demonstrates that ICE has failed to implement these necessary centralized surveillance tools to coordinate the care of the people in its custody—especially those at high risk for Covid-19.

Fourth, ICE has likewise failed to implement meaningful mechanisms to ensure compliance with its already deficient COVID-19 guidance and other medical standards. For example, although ICE's March 27 guidance provides that facilities are expected to maintain "appropriate staffing," there is no evidence that ICE will monitor or enforce that expectation.[10] To the contrary, the evidence

[9] Suppl. Decl. of Homer Venters in Supp. of Pls.' Reply Br. in Supp. of Emergency Mot. for Prelim. Inj. ¶ 4(b)(ii) ("Venters Suppl. Decl.").

[10] Of note, this memo states that it only applies to "IHSC-staffed and non-IHSC-staffed, ICE-dedicated facilities," thus apparently omitting detention centers

shows that ICE has a long history of failing to ensure that facilities follow ICE's own standards, which has materially impeded adequate quality assurance in its detention system.[11] The risk that facilities are currently not following ICE's COVID-19 guidance is neither remote nor hypothetical. In fact, there is substantial evidence in the record demonstrating that ICE's COVID-19 policies are already not being followed on a system-wide basis, as detailed in the various declarations from legal service providers and detained people.[12] Defendants have provided no persuasive evidence to rebut Plaintiffs' evidence, showing the absence of crucially needed oversight measures during COVID-19.

On April 4, 2020, ICE issued new guidance concerning possible release of people with risk factors, but this new guidance continues to be materially deficient because it: (1) omits several important risk factors currently identified in CDC guidelines; (2) explicitly does not apply to people held in mandatory detention, for whom (according to the guidance) ICE does not have the discretion to release but a federal court does; (3) does not provide for any precautions to safeguard the health of people with risk factors who are not released (or during the time that ICE is determining whether to release them); (4) places initial responsibility to identify people with risk factors on Field Directors who are not medical providers; (5) fails

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operated by public and private contractors. ICE Mem. on Coronavirus Disease 2019 (COVID-19) Action Plan, Revision 1 (Mar. 27, 2020), ECF No. 95-3 (hereinafter "ICE COVID-19 Action Plan").

[11] *See* Office of Inspector Gen., U.S. Dep't of Homeland Sec., *OIG-18-47: ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, at 2 (Jun. 26, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf (Compl. ¶ 176 n.75); Office of Inspector Gen., U.S. Dep't of Homeland Sec., *OIG-19-18: ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards*, at 5 (Jan. 29, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf (Compl. ¶ 160 n.45).

[12] *See* PI at 7-8 n.12.

to provide that this process must be done promptly in order to protect the health and safety of medically vulnerable people; (6) fails to provide clinical guidance; (7) is simply in the nature of guidance and is not determinative, even as to risk factors; and (8) vests too much discretion to ICE Field Directors, instead of making clear that there is a strong presumption in favor of release. *See Rodriguez v. Robbins*, 804 F.3d 1060, 1087 (9th Cir. 2015) (reversed on other grounds) (government bears burden of proving that individual is a flight risk or danger by clear and convincing evidence).[13] *See* Venters Suppl. Decl. ¶¶ 3, 3(g), 4(a).

Finally, Defendants have likewise failed to rebut the evidence showing that the substantial defects in Defendants' COVID-19 response will be magnified and compounded by ICE's already-broken medical system. Tellingly, Defendants do not submit any counterevidence whatsoever showing that ICE's medical system was well-functioning on a systemic level prior to COVID-19. Nor could they. Left with no evidence in their favor, Defendants merely—and mistakenly—attack the weight and admissibility of Plaintiffs' evidence showing systemic defects in ICE's medical system before COVID-19. But these arguments are meritless. First, Plaintiffs do not rely exclusively on news articles[14] to show ICE's broken medical

[13] The new guidance does not moot Plaintiffs' claim for injunctive relief as Plaintiffs and members of the subclasses continue to face a cognizable danger of harm caused by their continued confinement in detention centers. *See, e.g., Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009) ('the mere cessation of illegal activity in response to pending litigation does not moot a case, unless the party alleging mootness can show that the 'allegedly wrongful behavior could not reasonably be expected to recur.'" (citation omitted)); *FTC v. Affordable Media, LLC*, 179 F. 3d 1228, 1237-8 (9th Cir. 1999) (same); *Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1164 (D. Or. 2018) (where a situation is "fluid" and "ever-changing," there is "little guarantee that the policies currently in place will remain in place going forward").

[14] In any event, courts have specifically found news articles properly included as part of an array of evidence supporting allegations that officials were deliberately

system but also rely, *inter alia*, on reports by DHS.[15] Second, "[a] district court may . . . consider hearsay in deciding whether to issue a preliminary injunction." *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009).

In sum, the evidence overwhelmingly shows that Defendants' response to COVID-19 is not only reckless but also dangerous. Defendants deliberately created the patchwork detention system they now oversee, and Defendants must now affirmatively ensure that the people within that system are adequately protected from COVID-19. Yet, the evidence shows that Defendants are continuing their dangerous pattern of abdicating monitoring and oversight of detention centers, thereby systemically failing to ensure its detention system has the necessary guidance, resources, and oversight that are crucial to protecting the lives of people, especially those who are medically vulnerable, during this pandemic. Absent immediate relief, needless suffering and preventable deaths will occur as a result of Defendants' dangerously inadequate response.

B. Plaintiffs are Likely to Succeed on their Claim that Defendants' COVID-19 Response Subjects Plaintiffs to Punitive Conditions.

ICE's response to COVID-19 subjects Plaintiffs and the putative subclasses to conditions that are far more restrictive than those under which people held in jails and prisons are currently held. For that reason, ICE's conduct amounts to punishment in violation of the Fifth Amendment. *King v. Cnty. of Los Angeles*, 885 F.3d 548 (9th Cir. 2018); *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004).

The evidence establishes that ICE is unnecessarily subjecting medically vulnerable people to dangerous, even deadly conditions, when ready alternatives

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indifferent. *See, e.g.*, *NeSmith v. Cty. of San Diego*, No. 15-cv-0629-JLS (JMA), 2016 WL 4729309, at *6 (S.D. Cal. Sept. 12, 2016).

[15] *See, e.g.*, Off. of Inspector Gen., Off. of Homeland Sec., OIG-18-32: Concerns About ICE Detainee Treatment and Care at Detention Facilities, at 7 (Dec. 11, 2017), https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf (Compl. ¶ 185 n.97).

exist. For example, although social distancing and proper hygiene are the only known effective means to stop the spread of COVID-19,[16] and Defendants acknowledge the challenge of maintaining six feet of separation in their facilities,[17] they have failed to adequately and consistently implement measures to protect and, where possible, remove vulnerable individuals from their facilities.[18] In contrast, the Federal Bureau of Prisons ("BOP") has begun to review and immediately process all at-risk inmates who are suitable for home confinement.[19] Similar measures aimed at minimizing pre-trial populations have also been implemented in jails across the country.[20] Further evincing punitive conditions, ICE has failed to warn against unnecessary transfers[21] and continues to conduct facility-to-facility

[16] *Thakker v. Doll*, No. 20-CV00480, at *21 (M.D. Pa. Mar. 31, 2020); *Fraihat v. Wolf*, No. 20-CV-590 (C.D. Cal. Mar. 30, 2020).

[17] Opp'n at 21.

[18] Defendants claim they have responded thoroughly to COVID-19 by releasing individuals from detention and implementing COVID-19 protocols in consideration of CDC guidelines. Opp'n at 27. In support, Defendants cite one case, *Coronel, et al. v. Decker, et al.*, wherein ICE released three detained individuals *after* the petition was filed. No. 20-CV-2472 (AJN), 2020 WL 2020 WL 1487274, *1 n.1 (S.D.N.Y. Mar. 27, 2020). The court in *Coronel* notes that ICE had not provided any information about steps taken to protect high-risk detainees. *Id.* at *6.

[19] Jordan Decl., Ex. D.

[20] *See e.g.*, Letter from Chief Justice Bernette Johnson, Louisiana State Supreme Court, to Louisiana District Judges (April 2, 2020), *available at* http://www.lasc.org/COVID19/2020-04-02-LASC-ChiefLetterReCOVID-19andjailpopulation.pdf ("For those convicted of a misdemeanor crime, consider modification to a release and supervised probation or simply time-served"); *Ivey order allows for release of some county jail inmates*, WSFA12News (April 2, 2020), https://www.wsfa.com/2020/04/02/ivey-order-allows-release-some-local-inmates/.

[21] Transfers are absent entirely from ICE's Guidance on Covid-19, *see* https://www.ice.gov/coronavirus, (last visited Apr. 7, 2020). *Cf.* CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidancecorrectional-

transfers of medically vulnerable individuals,[22] whereas BOP has taken precautions with respect to transfer of inmates.[23] In addition, the evidence also shows that ICE is failing to follow even its own inadequate standards.[24] This failure alone is sufficient to demonstrate presumptively punitive conditions, and Defendants have not rebutted that presumption. *See Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1065 (C.D. Cal. 2019) (failure to follow ICE's own standards constitutes punitive conditions).

Defendants argue that the statutory authority governing ICE's discretion to detain individuals in removal proceedings rebuts any presumption of punitiveness arising from immigration detention. This is not true. Indeed, "a bare assertion of the requirement of keeping detainees will not suffice." *Torres*, 411 F. Supp. 3d at 1065. Although Defendants maintain that they have a legitimate interest in preventing individuals from "absconding" and ensuring their appearance for removal proceedings,[25] courts have found this risk to be minimal considering the current global pandemic. *Fraihat*, No. 20-CV-590, at *10. Even so, confining medically vulnerable individuals in "unsanitary conditions, which include overcrowding and a high risk of COVID-19 transmission, [cannot be] rationally related to that legitimate government objective." *Thakker*, No. 20-cv-480, at *21; *Hope v. Doll*, No. 20-cv-00562 (M.D. Pa. Apr. 7, 2020); *Basank v. Decker*, No. 20 Civ. 2518 (AT) (S.D.N.Y. Mar. 26, 2020), ECF No. 11. Moreover, Defendants have no legitimate interest in maintaining these unsanitary conditions or in

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detention.pdf (last updated Mar. 23, 2020) (directing facilities to restrict transfers of incarcerated/detained persons to and from other jurisdictions and facilities).

[22] Decls. in Supp. of Mot. for Prelim. Inj. and Class Certification of Aristoteles Sanchez Martinez, ECF No. 83-8; Linda Corchado, ECF No. 81-5.

[23] "It is vital that we not inadvertently contribute to the spread of COVID-19 by transferring inmates from our facilities." Jordan Decl., Ex. D.

[24] *See* PI at 7-8 n.12.

[25] Opp'n at 27.

maintaining inadequate medical practices in response to COVID-19. Finally, because there are many alternatives to physical detention that would accomplish Defendants' enforcement objectives—such as release on recognizance, conditional release on bond, release on an order of supervision, remote monitoring and routine check-ins—without endangering the lives of subclass members, facility staff, and the greater community,[26] Defendants' continued detention of the subclass—absent immediate implementation of adequate safeguards—violates due process. *Bell v. Wolfish*, 441 U.S. 520 (1979).[27]

C. Defendants Fail to Refute Plaintiffs' Showing of Likelihood of Success Under Section 504.

As entities that operate a detention program covered by the Rehabilitation Act ("the Act"), Defendants fundamentally misinterpret their obligations under the Act[28] and *Olmstead v. L.C.*, 527 U.S. 581 (1999). Defendants do not deny that the Second Proposed Subclass[29] comprises qualified individuals with disabilities. Nor do Defendants deny that they are a program or activity of an Executive agency to which the Act and *Olmstead* apply.

Rather, Defendants' Rehabilitation Act argument hinges on the assertion that Defendants have no responsibilities at all under the Act unless people with disabilities formally make accommodation requests. Opp'n at 28-29. But

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[26] *Thakker*, at *22.

[27] Civil detention of any individuals–even those with criminal histories–in these conditions is punitive and courts have granted release. *See, e.g., Hernandez v. Wolf*, CV 20-00617-TJH (KSx) (C.D. Cal. Apr. 1, 2020); *Munoz v. Wolf*, CV 20-00625 TJH (SHKx) (C.D. Cal. Apr. 2, 2020).

[28] As described in Plaintiffs' original briefing, under the Rehabilitation Act, "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . . under any program or activity conducted by any Executive agency." 29 U.S.C. § 794(a).

[29] *See* Pls.' Mem. in Supp. of Mot. for Class Certification at 1-2, ECF No. 83-1 (defining subclass).

Defendants fail to understand the higher standard that applies in the detention context: Covered entities that imprison or detain have an affirmative obligation to identify and accommodate the needs of people with disabilities under their custody to ensure that they have meaningful access to the entities' programs.[30] *See Armstrong v. Brown*, 732 F.3d 955, 958-62 (9th Cir. 2013); *see also Updike v. Multnomah Cnty.*, 870 F.3d 939, 949 (9th Cir. 2017) (citing *Duvall v. County of Kitsap*, 260 F.3d 1124, 1136 (9th Cir. 2001).

Although Defendants hint at an effort to identify disabilities (though only at intake), none is an attempt to affirmatively accommodate Plaintiffs' disability-related needs as they relate to COVID-19 under the Act. *See* Decls. of Captain Jennifer Moon ¶ 7, ECF Nos. 95-11, -12, -13 ("Moon Decls."). Defendants further argue that Plaintiffs fail to show how Defendants' precautionary measures are unreasonable in relation to qualifying disabilities under the Act. Opp'n at 28-29. However, Plaintiffs' experts describe in detail how Defendants' protocols fail to identify and accommodate detained individuals with disabilities that place them at high risk of complications and severe illness, perhaps even death, if they contract COVID-19. *See, e.g.*, Venters Decl. ¶¶ 14(f)-15, 20-23. Further, what Plaintiffs seek in relief is exactly the kind of systemic affirmative identification and accommodation procedure required under the Act *before* known exposure occurs, which Defendants have so far failed to undertake.

As to *Olmstead*, Defendants do not refute that DHS's own regulations require that "[t]he Department shall administer programs and activities in the most

[30] This affirmative duty is "at its apex" in detention facilities, "because inmates necessarily rely totally upon corrections departments for all of their needs while in custody and do not have the freedom to obtain such services (or the accommodations that permit them to access those services) elsewhere." *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 269 (D.D.C. 2015) (emphasis in original) (referring to the affirmative obligations of state prison facilities to accommodate the needs of inmates with disabilities).

integrated setting appropriate to the needs of qualified individuals with a disability." 6 C.F.R. § 15.30(d). Instead, they argue that "Plaintiffs have not shown that Defendants have failed to make a disability assessment, . . . or that any treatment professional of a Named Plaintiff has indicated an appropriate placement and that placement has been refused." Opp'n at 29. But it is enough to note that nothing in all the declarations or arguments submitted by Defendants describes an assessment or recommendation of what setting is most appropriate to the needs of persons whose disabilities place them at risk of severe illness or death if exposed to the COVID-19, in light of the ongoing pandemic. *See* Decl. of Ada Rivera, ECF No. 95-3; ICE COVID-19 Action Plan; Moon Decls. ¶ 7. And although these facilities have allegedly made efforts to identify people in detention who would be at greater risk in some way,[31] the declarations describe no precautions that are being taken in light of that elevated risk. *See* Moon Decls. ¶ 11.

Ultimately, Defendants failure to meet their affirmative obligations as detention providers, coupled with their neglect to assess whether Plaintiffs are detained in the least restrictive environment appropriate for their disability-related needs in light of COVID-19, violates Section 504 of the Rehabilitation Act and the integration mandate under *Olmstead*.

IV. Plaintiffs Have Demonstrated They Will Suffer Irreparable Harm.

Plaintiffs demonstrated in their opening brief that they will suffer irreparable harm, absent intervention by this Court. PI at 22-23. Defendants' only response is that "there is no evidence of confirmed COVID-19 cases" or that "Defendants' precautionary measures are inadequate to contain or properly provide medical care should an outbreak occur." Opp'n at 30. These assertions should be rejected.

[31] The Stewart facility was unable to identify any people in detention at all "who would be at greater risk for contracting COVID-19," raising serious questions about its methodology. Decl. of Captain Jennifer Moon ¶ 11, ECF No. 95-13.

First, as set forth above, the unrebutted evidence from Plaintiffs' experts is that COVID-19 is already in many detention centers and will spread to many more—and that spread will be devastating given ICE's inadequate response. *See supra* Part II. This constitutes irreparable harm. *See, e.g.*, *Basank, et al v. Decker*, 2020 WL 1481503, at *4-5 (S.D.N.Y. March 26, 2020) ("The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm . . ."); *Thakker v. Doll*, 1:20-cv-00480-JEJ at *7-14.

Second, Plaintiffs have submitted extensive evidence that Defendants' COVID-19 protocols contradict important CDC guidelines and are contrary to well-established medical opinions. *See supra* Part III.A.

Further, as noted in Plaintiffs' original briefing, the disability subclass members are subject to a greater likelihood of experiencing complications and/or death from the virus. Corr. Decl. of Jaimie Meyer in Supp. of Mot. for Prelim. Inj. and Class Certification ¶¶ 28, 30, 32, ECF No. 90 ("Meyer Decl."); Franco-Paredes Decl. at 6. Their heightened risk of complications, including severe illness if exposed to COVID-19, places disability subclass members at heightened risk of isolation in the extreme, denying them meaningful access to the Defendants' detention programs as a result. Such exclusion of people with disabilities from programs or services has been found to constitute irreparable injury, both as to denial of meaningful access to Defendants' programs, s*ee Hernandez*, 110 F. Supp. 3d at 956-57; *D.R. v. Antelope Valley Union High Sch. Dist.*, 746 F. Supp. 2d 1132, 1145–46 (C.D. Cal. 2010), and as to a more restrictive placement under *Olmstead*. *See, e.g.*, *M.R. v. Dreyfus*, 663 F.3d 1100, 1111 (9th Cir. 2011), *amended on other grounds by and reh'd denied*, 697 F.3d 706 (9th Cir. 2012).

V. The Balance of Equities and Public Interest Strongly Favor Issuance of Plaintiffs' Requested Preliminary Injunction.

The Government has failed to rebut Plaintiffs' showing that the equities and public interest are in their favor, an analysis that merges when the Government is the defendant. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

Plaintiffs presented robust evidence that continued introduction of COVID-19 into the ICE detention system would be a public health crisis of the highest order, spreading quickly through the detention centers, moving between staff and detained people, and spilling over into the community. *See* Venters Decl. at 8; Meyer Decl. at 7-8; Franco-Paredes Decl. at 8. This is the consensus of public health professionals, and the Government has presented no contrary evidence. Evidence already foreshadows the devastating impact of COVID-19 on detention systems.[32]

Numerous courts have concluded that the public interest and the balance of equities favor avoidance of a public health catastrophe. *See, e.g.*, *Thakker*, No. 20-cv-00480 at *23-24 ("Efforts to stop the spread of COVID-19 and promote public health are clearly in the public's best interest . . ."); In Chambers—Order Re Pls.' *Ex Parte* Appl. for Restraining Order and Order to Show Cause Re Prelim. Inj. [733] at 12, *Flores v. Barr*, No. CV 85-4544-DMG (AGRx) (C.D. Cal. Mar. 28, 2020). ("[T]he public's interest in preventing outbreaks of COVID-19 [in ICE custody] that will infect [ICE] staff, spread to others in geographic proximity, and likely overwhelm local healthcare systems tips the balance of equities sharply in Plaintiffs' favor.").[33]

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[32] *Report: Cluster of COVID-19 Cases at Cook County Jail the Largest in the Nation*, NBC CHICAGO (Apr. 7, 2020), https://www.nbcchicago.com/news/local/report-cluster-of-covid-19-cases-at-cook-county-jail-the-largest-in-the-nation/2252000/

[33] This Court has found it to be in the public interest to take action to avoid a public health crisis of "epidemic proportion," a description applicable here. *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1151 (C.D. Cal. 2000)

Defendants' argument – that they have an interest in the orderly administration of the immigration laws, implying that such administration requires the continued detention of civil detainees in a pandemic – fails for several reasons.

First, the majority of people in removal proceedings are not confined in detention centers. For example, in Fiscal Year 2019, the vast majority of removal proceedings were on the non-detained docket in immigration court. *See* Decl. of Elizabeth Jordan in Supp. of Pls.' Reply Br. in Supp. of Emergency Mot. for Prelim. Inj. ("Jordan Decl."), Ex. E at 7. This includes the execution of final orders and removal of people from the United States. *See* Jordan Decl., Ex. F at 14, 16 (describing the use of "bag and baggage" letters in the removal process). Further, Defendants' argument has already been rejected in *Zhang*, in which the court noted that even though the petitioner was released, he would still be in removal proceedings. Zhang v. Barr, No. 5:20-cv-00331-AB-RAO, at *13 (C.D. Cal. Mar. 27, 2020), ECF No. 20; *see also Thakker*, No. 20-cv-00480 at *23 (finding that released people are unlikely to be flight risk). Finally, as the *Flores* court noted, "Any countervailing financial and administrative concerns do not outweigh public health and safety in the midst of pandemic . . . ." *Flores*, No. CV 85-4544-DMG at *12. The Government's interest is similarly outweighed here.

The balance of hardships clearly tips in favor of plaintiffs with disabilities who would be deprived of necessary treatment. *Rodde v. Bonta*, 357 F.3d 988, 999 (9th Cir. 2004). Likewise, the balance of hardships here tips sharply in Plaintiffs' favor. As detailed above, the harms to the Plaintiffs from failure to adequately respond to the spread of COVID-19 are immense. In contrast, Defendants urge that the "relief Plaintiffs request would require substantial changes to ICE detention facility operations and intergovernmental service agreements with state and local

(further noting that granting the preliminary injunction "may involve the protection of life itself").

governments." Opp'n at 32. However, what the disability subclass requests in relief goes no further than requiring that Defendants have an appropriate system in place to identify and assess disability-related needs tied to the ongoing pandemic.

Moreover, a preliminary injunction enjoining Defendants' violations of the Rehabilitation Act would serve the public's interest in enforcement of federal disability law. *Enyart v. Nat'l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1167 (9th Cir. 2011). Protecting Plaintiffs with disabilities with the relevant risk factors and promoting federal disability law are both in the public interest.

VI. Defendants' Procedural Objections Lack Merit.

A. Plaintiffs' Claims for Preliminary Injunctive Relief Are Sufficiently Related to the Claims Based in the Underlying Complaint.

Defendants contend that the PI is inadequately connected to their underlying complaint. Opp'n at 13-14. But there is a "sufficient nexus between the claims raised in a motion for injunctive relief and the claims set forth in the underlying complaint itself" when injunctive relief "would grant relief of the same character as that which may be granted finally." *Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015) (quotations and citations omitted). That is plainly the case here.

Plaintiffs' PI and Complaint both allege that Defendants' policies and practices violate the Fifth Amendment and the Rehabilitation Act by subjecting Plaintiffs and the putative subclass to a substantial risk of serious harm, to punitive conditions of confinement, and to disability discrimination. *Compare* PI at 2, *with* Compl. for Declaratory and Inj. Relief ¶¶ 189-194 ("Compl."). Indeed, Defendants themselves characterize the preliminary injunction as seeking "the very same relief that Plaintiffs ultimately seek through their Complaint." Opp'n at 12.

Further, Plaintiffs' PI includes factual allegations that are present in the underlying Complaint, such as the inadequacy of screening, training, care for

individuals with chronic conditions, and discrimination against individuals with disabilities.[34] New assertions of misconduct may support additional claims if they are not entirely unrelated to the conduct asserted in the underlying Complaint. *Pac. Radiation Oncology, LLC*, 810 F.3d at 636. The new factual allegations regarding COVID-19—non-existent at the time of filing—fall squarely within the pre-existing claims, given that Plaintiffs' Complaint alleges systemic defects in medical care. Moreover, this Court has authority to issue relief in a preliminary injunction that was not explicitly requested in the Complaint. *Medina v. U.S. Dep't of Homeland Sec.*, 313 F. Supp. 3d 1237, 1247-48 (W.D. Wash. 2018). In any event, the underlying Complaint requests "further relief as the Court deems just and proper," which encompasses release. ¶ 657(xiv).

B. This Court Has the Authority to Enter the Relief Requested by the Plaintiffs.

Defendants erroneously suggest that this Court should not enter the comprehensive injunction sought by Plaintiffs. Opp'n at 1. But courts routinely enjoin authorities who are responsible for detention systems to remediate systemic defects in their provision of medical care, such as increasing staffing and monitoring. *See, e.g., Braggs v. Dunn*, 383 F .Supp. 3d 1218, 1228 (M.D. Ala. 2019) (entering immediate and permanent injunction regarding staffing and other problems with mental health care practices in Alabama prisons). As the *Bragg* court demonstrated, courts can act quickly when the constitutional violations alleged require an urgent response, as they do here. If ICE cannot promptly show

[34] *See, e.g.*: lack of adequate screening, *Cf.* PI at 10, 17, *with* Compl. at 101-107; inadequate training of staff and unqualified staff *Cf.* PI at 3-4, 7, 10-11 *with* Compl. at 84-81, 108-119; failure to implement necessary medical care for detained individuals with chronic health conditions *Cf.* PI at 17-18, *with* Compl. at 72-83.; subjecting individuals with disabilities to unnecessarily restrictive placements in violation of Section 504 *Cf.* PI at 17-18 *with* Compl. at 165-169.; and failing to identify, track, and accommodate detained individuals with disabilities. *Cf.* PI at 17-18, *with* Compl. at 162-165.

that it can safely detain people – including by providing adequate medical care and social distancing, measures that the unrebutted evidence shows have not been taken – this Court has the inherent power to order their release, as courts across the country have already done.[35]

Further, release is not an extraordinary measure or disruptive of the immigration system as a whole. The individuals in ICE custody are in civil detention, the purpose of which is merely to assure they are present for proceedings, but there are numerous other ways of accomplishing this. ICE has identified home confinement where released persons check in telephonically on a periodic basis or wear ankle monitors as options. *See* Jordan Decl., Ex. A. ICE's own data demonstrates that only fifteen percent of people detained in detention centers are classified as a high security threat,[36] and that the vast majority of those people who are released show up for removal proceedings.[37] Ordering release would be consistent with agency practice of releasing detainees for medical and humanitarian reasons and allowing them to continue their immigration case in a non-detained setting.[38]

Finally, the Government erroneously suggests that any injunction should be geographically limited. Opp'n at 1. "The scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018) (citation omitted). Because the problems with ICE's COVID-19 protocols are

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[35] PI at 14; *see also Xochihua-Jaimes v. Barr*, No. 18-71460 (9th Cir. Mar. 23, 2020) (unpublished); *Bravo Castillo v. Barr*, No. 5CV 20-00605 TJH (AFMx) (C.D. Cal. Mar. 27, 2020), ECF No. 32; *Calderon Jimenez v. Cronen*, No. 18-10225-MLW (D. Mass. Mar. 26, 2020), ECF No. 507; *Basank v. Decker*, No. 20 Civ. 2518 (AT) (S.D.N.Y. Mar. 26, 2020), ECF No. 11. *See generally* cases cited in Jordan Decl., App. 1.

[36] Jordan Decl., Ex. B.

[37] Jordan Decl., Ex. C.

[38] *See* PI at 14 nn.35-36.

systemic, a systemic injunction is necessary, particularly since "there is an important need for uniformity in immigration policy." *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1283 (9th Cir. 2020) (quotations and citations omitted). Indeed, the Ninth Circuit recently emphasized that "in immigration cases, we 'consistently recognize[] the authority of the district courts to enjoin unlawful policies on a universal basis.'"[39] Further, courts routinely certify injunctive classes against entire detention systems. *See, e.g.*, *Braggs*, 383 F. Supp. 3d at 1243 (permanent injunction against state prison system).

VII. The Court Can and Should Appoint a Special Master to Monitor Compliance with Its Preliminary Injunction.

Defendants argue that the Court should decline to appoint a special master because the request is premature and there are no exceptional circumstances warranting such an appointment. Both arguments should be rejected.

Defendants themselves acknowledge the "exceptional circumstances" presented by the COVID-19 crisis, citing the "unprecedented global pandemic" that "presents a significant and fast-developing challenge." Opp'n at 1, 2. District courts in this circuit regularly appoint special masters to monitor compliance with injunctions in immigration and prison conditions cases, recognizing the complexity inherent in settings like that here. *See, e.g., Flores v. Sessions*, No. CV 85-4544-DMG, 2018 WL 6133665 (C.D. Cal. Nov. 11, 2018); *Coleman v. Wilson*, 912 F. Supp. 1282, 1324 (E.D. Cal. 1995) (systemwide deficiencies in delivery of mental health care in prison system warrant appointment of special master to monitor

[39] *Id.* at 1284. Defendants' argument that only a geographically-limited injunction should be entered to permit the "adversarial testing of evidence" (Opp'n at 1) ignores the urgency necessitated by a fast-moving, deadly pandemic. The scope of an injunction is "dependent as much on the equities of a given case as the substance of the legal issues it presents," and courts must tailor the scope "to meet the exigencies of the particular case." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

compliance with injunction). The need for a special monitor is especially acute here given ICE's long history of failing to oversee its detention facilities.[40]

Defendants' prematurity argument is likewise belied by their acknowledgment of the "fast-developing challenge" COVID-19 poses to the immigration detention system. Opp'n at 2. The Ninth Circuit recognizes that a special master may be appointed to monitor compliance with preliminary injunctions no less than permanent injunctions. *Nat'l Org. For the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536 (9th Cir. 1987). Nor is it overstatement to warn that every day matters in the life-or-death circumstances we confront here. The Court should also order that Defendants pay the special master's fees and expenses. *See, e.g., Hook v. Arizona Dep't. of Corrections*, 107 F.3d 1397 (9th Cir. 1997).

VIII. CONCLUSION

The Court should grant and enter the requested preliminary injunction.

[40] *See, e.g.*, Off. of Inspector Gen., U.S. Dep't of Homeland Sec., OIG-18-47: *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements* (Jun. 26, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf.

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