IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Ángel Alejandro Heredia Mons et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No.: 1:19-cv-01593**
	)	
Kevin K. McALEENAN et al.	)	
	)	
***Defendants/Respondents*.**	)	
	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS'

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

In accordance with this Court's decisions in *Mons v. McAleenan*, No. CV 19-1593 (JEB), 2019 WL 4225322, (D.D.C. Sept. 5, 2019), and *Damus v. Nielsen*, 313 F. Supp. 3d 317, (D.D.C., 2018), and due to the likelihood of irreparable harm that COVID-19 poses to Plaintiffs-class members' well-being and safety, Plaintiffs move this Court to expeditiously grant their request for a preliminary injunction and order Defendants to act as follows: 1) immediately conduct individualized parole assessments for all present and future members of the provisional class, as defined by this Court in *Mons*[1]; 2) enjoin from denying parole to any provisional class members, absent an individualized determination that such provisional class member presents a flight risk or a danger to the community, as concluded pursuant only to the process[2] and limits on use of discretion provided in Enforcement Directive No. 11002.1 ("Directive"); 3) base individualized determinations of flight risk and danger to the community on the specific facts of each provisional class member's case, not categorical criteria; 4) provide class members with parole determinations that conform to all substantive and procedural requirements of the Directive; 5) given the dangers posed by COVID-19, ensure compliance with parole standards pertaining to individuals with a) serious medical conditions, and/or b) whose continued detention is not in the public interest, pursuant to the Immigration and Nationality Act ("INA") and its implementing regulations.

[1] The Court finds that this proposed class meets the conditions supplied by Rule 23 for substantially the same reasons that the *Damus* plaintiffs satisfied those same requirements. *See Damus*, 313 F. Supp. 3d at 329–35. *Mons v. McAleenan*, 2019 WL 4225322, at *8.

[2] Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009).

INTRODUCTION

Plaintiffs' travails are not novel to this Court.[3] Despite this Court's prior Order, over seventy-five percent of Plaintiffs are still denied parole without an individualized assessment.[4] The harrowing COVID-19 pandemic that has ravaged most of the world is sweeping through the United States, presenting a grave threat of irreparable harm to Plaintiffs-class members. Plaintiffs first discuss the nature and scope of this deadly, novel disease, the magnitude of which is unprecedented, and the conditions present in the facilities where Plaintiffs-class members are detained, rendering them vulnerable to imminent risk of irreparable harm and death during the pandemic. Plaintiffs also present evidence supporting their request for immediate, individualized assessments of parole eligibility for all present and future class members; and urge this Court to require NOLA ICE officials to comply with the applicable regulations and parole standards when engaging in these immediate, individualized parole assessments, including standards applicable to class members with serious medical conditions, and whose continued detention is not in the public interest, given the dangers posed by the COVID-19 pandemic.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiffs are all present and future members of the class that this Court has provisionally certified, (Doc. No. 33), i.e., arriving aliens eligible for parole, who are currently detained or will be detained by Defendant NOLA ICE. Plaintiffs are or will be detained at the various detention

[3] *See*

B. The COVID-19 Virus

illness or death caused by COVID-19 are social distancing and improved hygiene, which have led to unprecedented public health measures around the world and in the United States.[11]

Detention of any kind requires large groups of people to be held together in a confined space and creates the worst type of setting for curbing the spread of a highly contagious infection such as COVID-19. Franco-Paredes Exp. Decl. ¶23. People who are confined in detention centers will find it virtually impossible to engage in the necessary social distancing and hygiene required to mitigate the risk of transmission, even with thoughtful guidance and plans in place. Franco-Paredes Exp. Decl. ¶¶11,12. For this reason, several jurisdictions at the urging of public health experts, are ordering the release of people from jails, prisons and detention centers.[12]

Louisiana that on March 22, 2020, Governor Bel Edwards issued a statewide "stay-at-home" order, in an attempt to stem the horrific growth of the COVID-19 virus in the state.[14]

C. COVID-19 Poses a Grave Risk of Harm to Persons in Congregate Unhygienic Environments Such as the Facilities Currently Housing All Class Members.

Immigration detention centers in the United States are tinderboxes for the transmission of highly transmissible infectious pathogens including the SARS-CoV-2, which causes COVID-19. Franco-Paredes Exp. Decl. ¶15. In addition, these detention centers are often unhygienic environments. Scharf Exp. Decl. ¶18 at (a)(i). Once an outbreak is underway inside a detention facility, a person in such a facility is expected to be at a high risk of acquiring the virus and transmitting it to others inside.[15] Infectious diseases that are communicated by air or touch are more likely to spread in these environments. Franco-Paredes Exp. Decl. ¶23. A recent study showed that the virus could survive for up to three hours in the air, four hours on copper, up to twenty-four hours on cardboard, and up to two to three days on plastic and stainless steel.[16] This presents an increased danger for the spread of COVID-19 if and when it is introduced into a detention facility. Franco-Paredes Exp. Decl. ¶¶18,20.

John Bel Edwards urges residents to heed stay-at-home order

Enclosed group environments, like cruise ships or nursing homes, have become the sites for the most severe outbreaks of COVID-19.[17] Immigration detention facilities have even greater risk of infectious spread because of crowding, the proportion of vulnerable people detained, and often scant medical care resources. Franco-Paredes Exp. Decl. ¶¶12,13. People living in such close quarters cannot achieve the "social distancing" needed to effectively prevent the spread of COVID-19. Franco-Paredes Exp. Decl. ¶12. *See also* Scharf Exp. Decl. ¶¶24,26. In addition, many immigration detention facilities lack adequate medical infrastructure to address the spread of infectious disease and treatment of people most vulnerable to illness in detention. Franco-Paredes Exp. Decl. ¶ 13.

Class members are held in crowded confinement with dangerously unsafe hygienic conditions. At Richwood, for example, some are housed in dorms with as many as 100 men who are forced to share four toilets, four sinks, and five showers in a shared room. O.M.H. Decl. ¶10. At Adams, some are housed in dorms holding as many as 240 men w ʿ a ד q N ʲ tevא ʿ a ʿ ex

Class members also report suffering from diarrhea and lack of nutrition due to the poor quality of food they are provided. S.U.R. Decl. ¶13; O.M.H. Decl. ¶10; K.S.R Decl. ¶10; R.P.H. Decl. ¶19; and L.P.C. Decl. ¶23. At most of the facilities, class members report that detention center staff are not taking recommended precautions, are not providing COVID-19 education, are not consistently utilizing masks or gloves, and are not providing hand sanitizer, disinfectant or sufficient soap for detainees to clean themselves. T.M.F. Decl. ¶¶15-16, 19; Y.P.T. Decl. ¶¶15-16, 22-23; R.P.H. Decl. ¶¶19-21; L.P.C. Decl ¶¶15, 22; O.M.H. Decl. ¶ 8; S.U.R. Decl. ¶¶ 14-15; and K.S.R. Decl. ¶¶14,18. Many who are desperate for information related to COVID-19 hav p e T M

D. Older Adults and Those with Certain Medical Conditions Are Particularly Vulnerable to the Grave Risk of Harm, Including Serious Illness or Death.

The COVID-19 pandemic is devastating the United States. As of March 29, 2020, there have been 103,321 confirmed cases and 1,668 deaths.[19] Moreover, the transmission of COVID-19 grows exponentially. Franco-Paredes Exp. Decl. ¶20-21. People

Preliminary data from China showed that twenty percent of people in high-risk categories who have contracted COVID-19 there have died.[23]

As of March 29, 2020, there were 3,540 confirmed cases of COVID-19 and 151 deaths from COVID-19 reported in Louisiana.[27] As of March 29, 2020, there were 847 confirmed cases and 16 deaths from COVID-19 reported in Mississippi.[28] The COVID-19 outbreak in Louisiana has resulted in unprecedented health measures to facilitate and enforce social distancing, as evidenced by the Governor's "stay-in-place" order issued March 22, 2020.

F. Many Class Members Present High-Risk Vulnerability to COVID-19.

People who are over fifty or of any age with certain specified medical conditions, "are deemed to be at high risk of developing severe disease and dying from COVID-19." Franco-Paredes Exp. Decl. ¶16. R.P.H. is a 50-year-old Cuban national currently detained at South Louisiana. R.P.H. Decl. ¶1. She has been detained by ICE since July 25, 2019. *Id* at ¶13. R.P.H. is a breast cancer survivor who has undergone multiple rounds of radiation throughout her life and is currently experiencing spinal cord inflammation affecting her nervous system. *Id* at ¶¶4-5,20. She is eligible for parole, but she has been denied four times despite submitting requests supported by evidentiary documents. *Id* at ¶14. R.P.H.'s health is rapidly deteriorating in detention, where she has experienced flu-like symptoms including body pain, sore throat, ear pain, fever, dizziness, nausea, headaches, and loss of vision. *Id* at ¶¶15-18. She is exposed to at least seventy-two other detained women, with many presenting flu-like symptoms and is unable to practice social distancing. *Id* at ¶¶22,25. R.P.H. is critically vulnerable to COVID-19 because of her weakened immune system, history of recurring cancer, and the conditions of confinement at South Louisiana.

O.M.H. is a thirty-two year-old Venezuelan national detained at LaSalle. O.M.H. Decl. ¶1. He has been detained by ICE since May 2019, and was recently transferred from Richwood, where he spent most of his time in detention. *Id* at ¶¶1,4. He is eligible for parole, but his requests for release have not been granted and his last application remains pending. *Id* at ¶¶6,10. O.M.H. is HIV-positive and suffers from Hepatitis C, depression, and anxiety. *Id* at ¶¶1,6. O.M.H. was not provided medication to treat his HIV condition until about January 2020. *Id* at ¶6. Despite the threat of COVID-19 and the overcrowded dorms, ICE continued to transfer new detainees to Richwood as recently as March 23, 2020, without implementing any proper quarantine precautions. *Id* at ¶9. O.M.H. lost a significant amount of weight, necessitating at least two visits

to the nearest hospital. *Id* at ¶¶9,11. O.M.H. is vulnerable to COVID-19 because of his HIV and Hepatitis C diagnoses, as well as his deteriorating health due to his conditions of confinement.

B.A.E. is a Cameroonian national currently detained at LaSalle. B.A.E. Decl. ¶1. He has been detained by ICE since October 2019. *Id* at ¶6. B.A.E. suffers from a chest muscle injury, a recurrent fever, and a wound in his throat. *Id* at ¶ 8-9. He is currently seeing blood in his stool and when he coughs. *Id*

request but never received a response. *Id*

guards who do not exercise safety precautions or provide education to prevent COVID-19 from spreading in the facility. *Id* at ¶¶16-17. K.S.R. is vulnerable to COVID-19 because of her weakened immune system as a result of contracting H1N1 influenza and her conditions of confinement.

G. This Court Should Require NOLA ICE to Immediately Reassess Parole for All of Class Members and Should Prioritize the Cases Most Vulnerable to COVID-19.

As risk mitigation is the only known strategy that can protect people from COVID-19, public health experts with experience in immigration detention and correctional settings have recommended the release of vulnerable detainees from custody. Franco-Paredes Exp. Decl. ¶¶ 27-

their lives to escape persecution and torture in their home countries for what they believed was a safe haven in the United States. These asylum-seekers now find themselves trapped in a what has essentially become a ticking-timebomb and, for many, a tomb.

II. LEGAL STANDARD

A. Preliminary Issues

1) Jurisdiction.

This Court has jurisdiction to adjudicate Plaintiffs' Emergency Motion for Preliminary Injunction.[32] As a result of the COVID-19 crisis, Plaintiffs seek an injunction requiring that NOLA ICE officials immediately administer to all present and future class members individualized parole assessments, in a method consisted with the applicable regulations and standards of the Directive; they are not seeking to challenge the outcome of the individualized parole assessments itself. *See Abdi v. Duke*, 280 F. Supp. 3d 373, 385 (W.D.N.Y. 2017) (federal district court had jurisdiction beyond the jurisdictional bar of § 1252(a)(2)(B)(ii), where plaintiffs were not asking the court to review the propriety of any given parole decision, but, instead, simply sought compliance with

U G L V S K 1/ I H G H U 1˜T€ 0 F R U L 1˜Rp K MW X U C P V P Q@V p D Q W L ` € 7 J E W UH 3 @

D P 0 W P' p L U H

> "[b]ut '[w]here ... a petitioner seeks to enjoin conduct that allegedly is not even authorized[,] ... the court is not enjoining the operation of [the statute], and [INA] – § 1252(f)(1) therefore is not implicated.'" *Mons* 2019 WL 4225322, at *4 (internal quotations and citations omitted).

Therefore, Plaintiffs here challenge "'an overarching agency' action as unlawful – in this case, Defendants' systematic failure to follow the Directive [and this Court's September 5 Order], and to instead impose detention without its safeguards and individualized determinations." *Damus*, 313 F. Supp. 3d at 328. (citing *R.I.L-R. v. Johnson*, 80 F. Supp. 3d 164, 176 (D.D.C. 2015)). In this case, NOLA ICE's disavowal of the Directive will likely result in irreparable harm to the Plaintiffs, as outbreaks of the deadly COVID-19 are likely to sweep through the Louisiana detention facilities housing class members.

2) *Class Certification*

Plaintiffs are part of the class that this Court certified, consisting of:

> "[(1)] [a]ll arriving asylum-seekers (2) who receive positive credible fear determinations; and (3) who are or will be detained by U.S. Immigration and Customs Enforcement; (4) after having been denied parole by the New Orleans ICE Field Office.'"
> *Mons*, 2019 WL 4225322, at *8; *See also*, *Damus* 313 F. Supp. 3d at 329–35.

B. Legal Framework Governing Parole Decisions

1) The INA and Impi560003➢22 9.1605200bting Regul7.58.46 399 13.8 refBT06399 13. 27.6 ref-560520

"permitting these individuals for 'urgent humanitarian reasons or significant public benefit.' *See* 8 U.S.C. § 1182(d)(5)(A).

The INA's implementing regulations further provide that DHS must exercise its parole discretion on a "case-by-case basis" and that it may parole arriving aliens who "present neither a security risk nor a risk of absconding" and "whose continued detention is not in the public interest". 8 C.F.R. § 212.5(b); *Mons*, 2019 WL 4225322, at *1; *see also* 8 C.F.R. § 235.3(c).[33]

2) The Directive

The Directive defines circumstances under which there is a "public interest" in granting parole pursuant to the INA and implementing regulations. It provides that, absent exceptional overriding factors, an asylum-seeker who has established a credible fear of persecution should be granted parole in the "public interest," and released from detention while pursuing an asylum claim, so long as the individual establishes their identity and presents neither a flight risk nor danger to the community. Directive ¶ 6.2. In considering parole applications, the Directive requires that "[e]ach alien's eligibility for parole should be considered and analyzed on its own merits, and based on the facts of the individual alien's case." *Id.*

The Directive also delineates a number of procedural requirements for DHS's adjudication of parole applications. These prescribe that the agency must inform asylum-seekers that they have a right to seek parole in a language they understand," *id.* at ¶ 6.1; conduct a parole interview within "seven days following a finding that an arriving [noncitizen] has a credible fear," *id*. at ¶ 8.2; provide written notification of the parole decision that contains "a brief explanation of the reasons for any decision to deny parole" within seven days of the interview, *id.* at ¶ 6.5-6.6;

notify applicants whose applications are denied that they may request a redetermination, *id.* at § 8.2; and, consider whether setting a reasonable bond and/or" an alternative to detention program would mitigate any flight risk concerns,

2018 and 100% of requests made thus

languish in crowded detention centers, and those who are sick suffer without access to adequate health care. Experts warn that class members face a certainty of irreparable harm and death once these detention centers experience COVID-19 outbreaks, as they are congregate environments that are simply ill equipped to prevent and successfully navigate an outbreak of such unprecedented, deadly proportions. Franco-Paredes Exp. Decl. ¶¶ 12, 13.

C. Legal Requisites for Establishing a Preliminary Injunction

In deciding whether to issue a preliminary injunction, a court must consider "whether (1) the plaintiff has a substantial likelihood of success on the merits; (2) the plaintiff would suffer irreparable injury were an injunction not granted; (3) an injunction would substantially injure other interested parties; and (4) the grant of an injunction would further the public interest. Þ 9 outbreS

III. ARGUMENT

A. Likelihood of success on merits

In order to obtain injunctive relief, plaintiffs must demonstrate that they are likely to prevail on the merits of their claims. The determination as to whether a party has successfully demonstrated such likelihood is informed by the circumstances of the particular case and claims being made. *See*

§212(d)(5)(A), which grants the Secretary of DHS authority to make parole determinations pursuant to its provisions. INA §212(d)(5)(A). Furthermore, through the INA, Congress delegated rulemaking power to the Secretary, as it required that they "shall establish such regulations … as he deems necessary for carrying out his authority under the provisions" of the INA. 8 U.S.C. § 1182(d)(5)(A). The Secretary has delegated parole authority to the three immigration agencies which are components of DHS: USCIS, CBP, and ICE.[35]

The authority granted by the Secretary to ICE includes the non-law enforcement functions of parole programs, including the authority to make parole deterul T _ m S T d P c_r p%

Secretary of the Interior under an act of Congress). Agencies are empowered by the delegation of authority to promulgate rules and policies that serve as implem

applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency…" 5 U.S.C. § 551.

The Directive satisfies the definition of a rule under the APA. . 5 U.S.C §551(4) *et seq*. (1946). It is a statement applicable to the particular agency action of making parole determinations that was promulgated by the Defendants – an administrative agency (ICE), and the federal

2) *The Directive is binding o nICE and DHS under the Accardi doctrine.*

The *Accardi* doctrine established that agencies are required to adhere to their own rules, including internal agency policies, such as the Directive. *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Morton*, 415 U.S. at 200, 235 (requiring an agency to comply with a directive that provides guidance on internal procedures, and holding that the agency's failure to comply constituted a violation of the APA as "arbitrary" and "capricious"). This remains true, even when procedures set out are potentially more rigorous than required. *Id*. Adherence by an agency to its rules is particularly significan

impacts individual rights when rights or obligations of plaintiff's are determined by those actions, or legal consequences flow from those actions. 5 U.S.C. § 704.

The Directive sets out the definitions, guidance, internal procedures, and standards used to make a determination of parole, as well as the mitigating factors required to deny individuals parole. Directive ¶ 1-9. Freedom of movement is a fundamental personal liberty under the U.S. Constitution. *Aptheker v. Sec'y of State*, 378 U.S. 500, 505-509 (1964), U.S. Const. amend. V. Thus, the determination of whether Plaintiffs will be granted parole is simultaneously a determination of whether, and to what extent, Plaintiffs will be deprived of a liberty interest prior to their asylum hearings, or if they will instead be able to exercise their right to freedom of movement.

During the COVID-19 virus pandemic, the Directive has even more extensive impact on individual rights of arriving aliens than under circumstances where no public health emergency is present. Until the pandemic is abated, the Directive impacts Plaintiffs' individual rights to bodily integrity and reasonable safety. *See DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989); *see also Youngberg v. Romeo*, 457 U.S. 324, 319 (1982). Additionally, while the Directive requires individualized parole determinations for all arriving aliens found to have a credible fear, it separately emphasizes that, for "urgent humanitarian reasons" or "significant public benefit," such individualized review is made available to individuals who "have serious medical conditions, where continued detention would not be appropriate" and "whose continued detention is not in the public interest." Directive at ¶ 4.3, citing 8 C.F.R. § 212.5(b). Thus, in addition to establishing the right of individualized review of parole eligibility for all arriving aliens with credible fear, the Directive specifically highlights that individuals of vulnerable health also have this right. Since it is established that the Directive is binding, the existence of these rights

persists despite any attempt by Defendants to disclaim the creation of rights using boilerplate language.

Therefore, as this Court has already established, and Plaintiffs further demonstrate, the Directive impacts individual rights and liberties of Plaintiffs, and is thus binding pursuant to the *Accardi* doctrine. *Aracely v. Nielsen*, 319 F.Supp.3d 110, 149, 157 (D.D.C. 2018).

b. The Directive is binding because the boilerplate language it contains is ineffective and does not enable Defendants to evade legal challenges.

Defendants included a disclaimer in the Directive, stating that it "is not intended to, shall not be construed to, may not be relied upon to, and does not create, any rights, privileges, or benefits, substantive or procedural, enforceable by any party against the United States." Directive ¶ 10. In recent prior cases, arriving aliens have argued to this Court that Defendants' purpose in including this language is to attempt to prevent the Directive from becoming binding, in order to avoid APA claims from being brought against them. *See Aracely* 319 F.Supp.3d 110; *see also Damus*, 313 F.Supp.3d at 341–42,.

Nonetheless, this Court has established that an agency cannot

of arriving aliens." Directive ¶ 1. Though an agency's discretion over an issue or process may be subject to no, or fewer, limitations prior to the implementation of a relevant rule, once that agency "announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion'." *Lopez v. FAA*, 318 F.3d 242, 246–48 (D.D.C. 2003); *Damus v. Nielsen*, 313 F.Supp.3d at 337–38 (D.D.C. 2018). Since departure from any implemented rule limiting agency discretion results in invalidation of that departing action, rules imposing such constraints on agency discretion are binding upon implementation.

The aforementioned statement explaining the Directive's purpose effectively announced, in 2009, that the information contained in the Directive would govern the use of discretion in parole determinations by Defendants. While Defendants may not originally have been bound to perform parole determinations pursuant to factors, considerations, and measures such as those set out in the Directive, their discretion to ignore those measure ceased upon the date which the Directive went into effect. Thus, the Directive is binding on Defendants as of January 4, 2009.

3) Defendants persistently refuse to adhere to the binding directive during the COVID-19 pandemic, despite the issuance of a prior order by this Court granting injunctive relief.

In September 2019, this Court found Plaintiffs provided sufficient evidence to demonstrate that Defendants were not following the binding Directive. (Doc. No. 33) . To make that determination, the Court considered statistics demonstrating the abysmal rates of parole grants. *Id*. These statistics included that in the years immediately following implementation of the Directive, asylum-seekers were granted parole at a rate of ninety percent nationwide, but since 2017 the rates of release on parole dramatically declined, despite confirmation by the DHS and NOLA ICE that

the Directive was being followed. *Id*. NOLA ICE was shown to deny parole requests at a rate of 98.5% in 2018 and 100% in 2019, being the lowest release rate in the country. *Id*.

Additionally, affidavits of arriving aliens supported that numerous individuals who had met all requirements for parole eligibility under the Directive were denied parole, whether they had submitted all required documents or, as occurs many times, had not been given sufficient time to submit documents. Affidavits also evidenced failure to provide parole interviews, failure to provide information regarding rights to and engagement in the parole process, failure to translate or explain the contents of documents or processes to detainees, neglect and inattention to detainees who tried to seek answers, and the regular vocalization of comments assuring that parole would not be granted to detainees in adherence to the Directive.

The Court should again find that Plaintiffs provide sufficient evidence to demonstrate continued failure to follow the binding Directive and provide individualized determinations of flight risk and danger.

a. Parole grant rates continue to be abysmal and a departure from previous application of the Directive, with no rational justification.

oq $! A V À 2= p3ÙÐ •G ³ € € ‰Ð U D C : R

zero percent at La Salle, zero percent at Catahoula, and zero percent at Allen Parish Correctional Center.

Though rates did appear to begin to grant rise slightly in 2020, statistics demonstrating such increases are missing relevant data. *Id*. Additionally, the rise that has occurred is still an astounding departure from previous grant rates, with no justification for such decline (as discussed below). *Id*.

Furthermore, witnesses continue to provide testimony of continued egregious behavior of Defendants in violation of the Directive, despite the injunctive relief and measures ordered by this Court in September 2019. Witness testimony evidences that determinations over parole persistently fail to be individualized.

b. Defendants often deny parole without arriving aliens ever having applied, indicating that they are not conducting individualized determinations as required by the Directive.

Arriving aliens have been denied parole without ever being given information about parole

application informing decisionmakers of the particular circumstances of an individual to be considered. Directive at ¶ 4.3, citing 8 C.F.R. § 212.5(b).

c. Defendants explicitly state that applying for parole is futile, and parole grants will not be issued.

Arriving aliens are often discouraged from applying for parole by officers who make comments explicitly assuring them of the futility of submitting a parole application. B.A.E. Decl., ¶ 9 (revealing that arriving aliens were told by ICE officials at River that ICE "does not grant parole to anyone in Louisiana"); T.R.O. Decl., ¶ 12 (was told by ICE Officer Silva that "parole is not granted in Louisiana."); R.P.H. Decl., ¶ 15 (revealing that declarant has been told by ICE agents, on multiple occasions, that she will not be granted parole unless her cancer returns); T.M.F. Decl., ¶ 9 (revealing that declarant was told by an ICE officer not to place hope in parole). Officers have told arriving aliens that they will not be getting parole. Sometimes, they have stated that denials will be given under all circumstances, and other times, they have stated that grants will only be given to certain persons, such as those who have cancer. R.P.H. Decl., ¶ 15 (revealing that declarant has been told by ICE agents, on multiple occasions, that she will not be granted parole unless her cancer returns). Other times, comments have been mad

d.

continue to be categorical, and if any notice of denial is provided, at all such notice does not explain how the applicant falls into the category for which they were denied, usually "flight risk." This action by Defendants indicates that such determinations are made arbitrarily and without reasoning based on particular facts of applicants' circumstances and cases. B.A.E. Decl., ¶9 (informing that the parole applicant was denied parole for alleged "flight risk" despite submitting all required evidence to the contrary and received no further explanation); R.P.H. Decl., ¶15 (explaining that applicant is eligible for parole and has applied four times, but was denied repeatedly, three times for "flight risk" despite having extensive family in Florida to sponsor her, and the last for "lack of additional documents.").

Many denied applicants have sponsors who are U.S. citizens, and who provide all necessary evidence of citizenship, can attest to the arriving alien's good character, and have a close relationship, willingness, and ability to support them. B.A.E. Decl., ¶9 (explaining that arriving alien was denied as a "flight risk" even though her husband, who was released on parole in another region and is making an asylum claim under the same facts as this arriving alien, has same parole sponsor, who is a U.S. citizen cousin who lives in Tampa, Florida, and has presented evidence in support of the arriving alien's request for parole numerous times, including copies of their 2018 tax returns, evidence of U.S. citizenship, copies of bills, additional letters of support, documentation of arriving alien's clean criminal history, and a copy of arriving alien's birth certificate); R.P.H. Decl., ¶15 (stating that although eligible for parole and having applied four times, arriving alien has been denied repeatedly, the first three times for "flight risk" despite having extensive family in Florida to sponsor her, and the final time for "lack of additional documents."); K.S.R. Decl., ¶7 (explaining that their sponsor is a U.S. citizen); O.M.H. Decl., ¶11 (explaining that their sponsor is a U.S. citizen); S.U.R. Decl., ¶8 (explaining that their sponsor is a U.S. citizen);

a response on their application despite having their attorney prepare a parole application on their behalf, having a U.S. citizen sponsor, and having submitted all required documentation).

Officials at the detention centers have sometimes refused to accept applications requesting parole at all. T.R.O. Decl., ¶11-12 (describing that, despite many attempts to request parole, ICE officers refused to accept parole application, and individual was told that she would have to wait until her court date); O.M.H. Decl., ¶9 (explaining that ICE officers stopped visiting detainees and refused to accept parole requests or provide information despite being asked). Such actions are evidently contrary to the individualized determination requirement in the Directive.

f. Defendants disregard the vulnerability of individuals with medical issues and ignore provisions that parole of such persons is justified.

¶1,5 (explaining declarant was denied parole without ever havin

failure to adhere to directive constituted final agency action subject to judicial review under the APA).

As in *Ramirez*, Plaintiffs challenge the routine and systematic failure of Defendants to adhere to the Directive, which serves to implement parole procedures under the INA. Action being challenged by Plaintiffs also similarly includes Defendants' fa

In *INS v. Yang*, 519 U.S. 26 (1996), the Supreme Court held that an irrational departure from policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as "arbitrary [or] capricious," within the meaning of the APA, 5 U.S.C. § 706(2)(A). In contrast to the behavior of defendants in *Yang*, Defendants in *Mons* are not merely narrowing or expanding a definition, but instead entirely disregarding a binding directive requiring the provision by the agency of an individualized *determination* of eligibility. *Yang*, 519 U.S. at 32 (finding that taking a narrow view of what constitutes a term in a statute where no definition was provided by that statute, while still adhering to the provision containing the term, does not violate the APA).

The issue with Defendants' actions in *Mons* is not whether Defendant agencies can elaborate what constitutes a flight risk or danger where there is no definition provided under the INA. Instead, the issue consists of Defendants' failure to conduct individualized determinations to Plaintiffs as required by the INA, as demonstrated by their failure to provide any reasoning as to why they consistently conclude that each of the individuals, in the vast majority of applicants denied parole by Defendants, present a flight risk or danger.[36]

This Court explained that it found Defendants offered "absolutely no explanation for the precipitous nosedive in the parole-grant rates issued by an Office that has allegedly preserved the same underlying policy = ʻ ɮ ɮ icy

Nor have Defendants made an avowed alteration of the Directive. As no explanation has been provided, no avowed alteration has occurred, and no lawful or valid explanation is readily apparent, Defendants actions constitute an irrational departure from binding agency policy. Thus, their actions are arbitrary and capricious under the APA.

b. Defendants' actions are contrary to law, as they violate the INA.

As set forth in the INA, parole applications are to be granted on a "case-by-case" basis for "urgent humanitarian reasons or significant public benefit," provided the aliens present neither a security risk nor a risk of absconding. INA § 212(d)(5)(A).

While the act does not provide definitions of "urgent humanitarian reasons" or "significant public interest," it does provide examples of what would be considered to constitute such terms. *Id*. These examples are not an exhaustive list. *Id*. Instead, these are groups of persons highlighted as specifically justifiable. *Id*. The INA further establishes this list as a floor, not a ceiling, as it states that all other arriving aliens may also be granted parole, so long as they meet initial eligibility conditions, are provided with an individualized review, and are not concluded to be risk of flight or danger as a result of that individual review. 8 C.F.R. 212.5(c)-(d).

The practice of providing notice in the form of a "check" indicating a category for denial with no further explanation indicates that individualization on a "case-by-case" of review has not occurred, as required by the INA. 8 C.F.R. § 212.5. Additionally, as discussed earlier in this motion, Defendants persistently engage in other actions that demonstrate failure to provide individualized determinations in violation of the INA, such as denying Parole toarriving aliens who have not applied, explicitly stating that applying for parole is futile as no parole grants will be issued, failing to provide a reasonable amount of time for arriving aliens to submit documents to be evaluated, and failing to conduct parole interviews prior to denial of parole applications.

there and here are "beyond remediation." 313 F. Supp. 3d at 342. *Mons* 2019 WL 4225322, at *11. The Court recognized that Defendants' non-compliance with the Directive subjected asylum-seekers to prolonged detention and suffering. *Id*. The COVID-19 pandemic is not theoretical; it is a very real, deadly threat to the physical well-being of Plaintiffs. Should COVID-19 strike NOLA ICE's detention facilities, most Plaintiffs will suffer irreparable harm beyond remediation. As Professor Scharf concludes:

> "[d]espite explicit guidelines and standards mandating proactive efforts to reduce disease in the facilities, [] ICE has failed to respond to obvious warnings, risk factors and direct information to reduced the risks of COVID-19 posed to people detained in their custody. The risks of irreparable harm posed to these individuals, including the more probable than not consequence of long-term illness and death, is in my opinion substantial and avoidable if appropriate releas

Paredes Exp. Decl. ¶20. Plaintiffs describe residing in a petri dish-like environment. Experts agree that given the poor conditions present in the immigration detention facilities in Louisiana and Mississippi, and high population de

There is little doubt that, should any of the detention facilities that house Plaintiffs suffer a COVID-19 outbreak, Plaintiffs will suffer irreparable harm. Given the fast spread of this unprecedented disease, Plaintiffs' risk of injury is imminent and certain. As such, the injuries caused by the Defendants' continued non-compliance with the Directive are "of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Chaplaincy*, 454 F.3d at 297 (internal quotation marks and citation omitted).

3) Current Protocols of ICE to Address COVID-19 Do Not Address, and Instead Worsen and Increase Likelihood of, Infection and/or Death from COVID-19.

As this Court recognized, Plaintiffs have already experienced unspeakable trauma in their home countries and journies to the United States. Plaintiffs' injuries from a COVID-19 outbreak would sure be "beyond remediation." Plaintiffs do not seek monetary compensation for their injuries. Rather, they seek injunctive and declaratory relief that requires NOLA ICE to immediately provide individualized parole assessment to all present and future class members, and to comply with all of the Directive's regulations and procedures, including those that recognize the need to parole persons with serious medical issues, and those whose release would benefit the public interest.

According to experts, risk mitigation is the only known strategy that can protect vulnerable groups from COVID-19, and release of vulnerable detainees from custody is the best mitigation strategy. Franco-Paredes Exp. Decl. ¶¶ 27-28. *See also* Scharf Exp. Decl. ¶¶ 18, 34. Dr. Peter Scharf has concluded "[t]he reality that this region's ICE facilities are located in remote or rural areas with limited resources and that medical resources proximate to the relevant ICE detention facilities leads to the conclusion that, were a COVID-19 infection to occur, widespread, long-term morbidity and mortality are more probable than not." *Id.* at ¶ 34. Because ICE protocols are insufficient to protect Plaintiffs from the specter of grave illness and death, Plaintiffs urge this

Court to require Defendants to fully comply with the Directive, and immediately give all present and future Plaintiffs fair, individualized parole reviews.

C. The Balance of Harms and the Public Interest Both Favor Injunctive Relief.

In 2018, this Court established that issuance of injunctive relief is in the public interest, when the same Defendants present in *Mons* failed to comply with the same Directive presently at issue. *Aracely v. Nielsen*, 319 F.Supp.3d 110 (Jul. 3, 2018) (holding that granting injunctive relief is in the public interest where the government and its agencies have failed to comply with the Directive).

While the INA issuing the authority to make parole determinations does not elaborate on the meaning of the term "public interest" within its provisions, ICE has permissibly, under the APA, elaborated on its meaning through the promulgation of a guide for implementation of the INA, in order to "fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974); 8 C.F.R. § 212.5.

The Directive mandates that an alien's "continued detention is not in the public interest." Directive ¶ 6.2. It states the public interest is met when an arriving alien is paroled who ivi Ô eIt ɪ ɹ ive

Defendants consistently disregard the public interest by refusing to apply the binding Directive, pursuant to the APA, as they fail to release individuals who evidently meet the aforementioned requirements, without providing any justification or explanation as to why those individuals fall into categories meriting denial despite their obvious eligibility and satisfaction of all requirements. This action by Defendants results in the "continued detention" the Directive explicitly sets out as not being in the public interest. Directive ¶ 6.2, 8.3; *see Aracely*, 319 F.Supp.3d 110 (Jul. 3, 2018).

Most notably, among those consistently denied in violation of the Directive, and thus in violation of the public interest, are individuals who have serious medical conditions, where continued detention would not be appropriate." Directive at ¶ 4.4 (citing 8 C.F.R. § 212.5(b)). While Defendants' non-compliance violates this particular provision on a regular basis, the extent of Defendants' violation is even greater during the COVID-19 pandemic, as the heightened vulnerability of those individuals makes their continued detention even more inappropriate at this time.

This court has established that the public interest "surely does not cut in favor of permitting an agency to fail to comply with its own binding policies impacting the rights of individuals." *See Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 58–59 (D.C. Cir. 1977) (recognizing that "there is an overriding public interest ... in the general importance of an agency's faithful adherence to its statutory mandate"). Furthermore, Plaintiffs find no harm that could result from this Court requiring Defendants to comport with existing regulations that require an orderly process for granting freedom to asylum-seekers meriting such. Therefore, in order to

serve the public interest, and to prevent this non-compliance that is harmful to and violative of individual rights and the public interest during the COVID-19 pandemic, a grant of the injunctive relief requested is necessary.

CONCLUSION

For the foregoing reasons, Plaintiffs' emergency motion for a preliminary injunction should be GRANTED.

Respectfully submitted:

MELISSA CROW (D.C. Bar #453487)
Senior Supervising Attorney

//s// Luz Virginia López

Luz Virginia López
SOUTHERN POVERTY LAW CENTER
1101 17th St., NW, Suite 750
Washington, DC 20036
Tel: (202) 355-4471
luz.lopez@splcenter.org

Attorneys for Plaintiffs

Michelle P. Gonzalez
Victoria Mesa-Estrada
SOUTHERN POVERTY LAW CENTER
2 South Biscayne Blvd., 32nd Floor
Miami, FL 33131
Tel: (786) 753-1383
mich.gonzalez@splcenter.org
victoria.mesa@splcenter.org

Bruce Hamilton
AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA FOUNDATION
P.O. Box 56157
New Orleans, LA 70156
Tel: (504) 522-0628
bhamilton@laaclu.org

Luz Virginia López
SOUTHERN POVERTY LAW CENTER
1101 17th St., NW, Suite 750
Washington, DC 20036
Tel: (202) 355-4471