PATRICK GAYLE,

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is before the Court on Petitioners' Emergency Motion for Temporary Restraining Order and Motion for Preliminary Injunction for Proposed Class, ECF No. 4, Petitioners' Expedited Motion for Class Certification, ECF No. 81, and Petitioners' Motion to Compel Compliance with the Court's April 30, 2020, Temporary Restraining Order, ECF 106.

Petitioners are immigration detainees being held at three detention centers in South Florida. Petitioners assert that Respondents failure to protect them from infection with the coronavirus disease ("COVID-19") while detained violates their constitutional rights. Petitioners also assert that they are at imminent risk of contracting COVID-19 because their detention renders them unable to comply with the Centers for Disease Control and Prevention's ("CDC") guidelines. Accordingly, Petitioners request, , emergency injunctive relief in the form of release from government custody, protective health measures that help prevent transmission of COVID-19, and to enjoin the transfer of the detainees to any other detention facility.

On April 13, 2020, Petitioners filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, ECF No. 1, and an Emergency Motion for Temporary Restraining Order ("TRO") and Motion for Preliminary Injunction for Proposed Class ("Motion for TRO/Preliminary Injunction"), ECF No. 4, alleging that Respondents are not taking proper measures to prevent the transmission of COVID-19. Petitioners assert three claims: (1) violation of the Due Process Clause of the Fifth Amendment (violation of detention standards), (2) violation of the Due Process Clause of the Fifth Amendment (violation of right to reasonable safety), and (3) violation of the Due Process Clause of the Fifth Amendment (state-created danger). In support of the Motion for TRO/Preliminary Injunction, Petitioners submitted the following declarations[3]:

1. Declaration of Dr. Joseph Shin, MD, MSc ("Shin Declaration," ECF No.1-2); and
2. Declaration of Dr. Pedro J. Greer, Jr., MD, FACP, FACG ("Greer Declaration," ECF No. 1-3).

In response to Magistrate Judge Jonathan Goodman's post-hearing administrative Orders, ECF Nos. 18; 19; 20, ICE submitted the following declarations:

1. Declaration of Juan A. Lopez Vega, Assistant Field Office Director ("Vega Declaration," ECF No. 30-1).[4]
2. Declaration of Liana J. Castano, Acting Officer in Charge of the Krome Service Processing Center. ("Castano Declaration," ECF No. 33-1).[5]

on the Motion to Compel and instructed the parties to be prepared to discuss the Motion to Compel at the May 27, 2020, Motion Hearing. (ECF No. 107.)

On May 27, 2020, the Court held a hearing on Petitioners' Motion for TRO/Preliminary Injunction and Motion to Compel. (ECF No. 120.) On May 28, 2020, Respondents consented to an extension of the TRO for an additional seven days. (ECF No. 119.) On June 2, 2020, the Court held a second hearing on the Petitioners' Motion for TRO/Preliminary Injunction, during which Petitioners presented testimony from Dr. Joseph Shin. On June 3, 2020, the Court held a third hearing on the Petitioners' Motion for TRO/Preliminary Injunction, during which Petitioners presented testimony from three detainees—Steve Cooper, a 39-year-old Jamaican native currently detained at Glades, Alejandro Ferrera Borges, a 29-year-old Cuban native currently detained at BTC, and Deivys Perez Valladares, a 35-year old Cuban native currently detained at Krome.[8]

Since the filing of this action, the coronavirus pandemic has continued to spread. To date, over 100,000[9] people have died from COVID-19 in America

is an airborne virus spread by individuals who are pre-symptomatic (individuals who have contracted the disease but do not yet display symptoms of the disease), asymptomatic[13] (individuals displaying no symptoms despite having contracted the virus), and symptomatic (individuals that have contracted the virus and exhibit symptoms of the disease) spread the disease. (Shin Dec. ¶22.) Indeed, estimates suggest that as many as 15-57% of infected

are over 1,600 confirmed COVID-19 cases among those detained in ICE custody nationwide.[18] Moreover, congregate settings such as detention facilities where people share common dining areas, bathrooms, and other common areas allow for rapid spread of infectious diseases. (Greer Decl. ¶¶9-10; Castano Decl. ¶15.) Detention facilities are often over-crowded, under-resourced, and ill-equipped in the event of a contagion. (Shin Decl. ¶14; Greer Decl. ¶11.)

Detainees often have to wait several days to see a medical doctor for serious medical concerns. (Greer Decl. ¶25.) Further, detention facilities often lack onsite medical facilities or 24-hour medical care, which can be crucial in identifying and managing infectious disease. (Greer Decl. ¶¶12-13.) During a contagion, staff may fall ill and fail to attend work, which in turn increases the risk of spread because of the reduced level of care provided. (Greer Decl. ¶15.) Thus, the risk of wide-spread transmission of COVID-19 o-g9nh cat2nsm

Some ICE detention centers are subject to ICE's Performance-Based National Detention Standards 2011 ("PBNDS"),[23] while other detention centers are subject to ICE's National Detention Standards ("NDS").[24] Section 4.3(II)(10) of ICE's PBNDS requires that "Centers for Disease Control and Prevention (CDC) guidelines for the prevention and control of infectious and communicable diseases shall be followed." (PBNDS at 258.) Similarly, section 1.1(I) of the NDS, mandates "facilit[ies] will operate in accordance with all applicable regulations and codes, such as those of . . . the Centers for Disease Control and Prevention (CDC). . . ." (NDS at 1.) Accordingly, ICE issued its own set of directives and guidelines regarding the coronavirus pandemic that largely comports with the CDC's described guidelines.

On April 10, 2020, ICE released its COVID-19 Pandemic Response Requirements,[25] which .d16 (h .d16 (h .d16 (h .d16 (h .drl)]TJue)70.0 (a) (,)-)-10)70.0 (a) (,)-ccor 1(c)1p Tc 0.e th,y,re2 (

prevent transmission of other infectious diseases to the higher-risk individual (For example, allocate more space for a higher-risk individual within a shared isolation room)." at 15.

As to transfers, ICE's PRR also states, "[w]here possible, restrict transfers of detained non-ICE populations to and ginatio / E

Declarations submitted in this matter contain substantially similar allegations. Common to each detention facility at issue is that: (1) Petitioners are held in a cohort quarantine; (2) Petitioners cannot social distance; (3) Petitioners have developed a cough but has not been tested for COVID-19; (4) Petitioners sleep in bunkbeds less than a meter away from each other; (4) Petitioners do not have adequate amounts of soap throughout the day; (5) Petitioners have difficulty washing their hands for 20 seconds because the water turns off

forced to either sit close to one another while they eat meals since tables and chairs are fixed to the floor or forced to wait in line together for meals. (Greer Decl. ¶24.)

The Krome medical facility has only a "limited number" of COVID-19 test kits. (ECF No. 63 at 37.)

At the onset of this action there were no confirmed cases of COVID-19 at Krome and no detainees being cohorted at Krome for exhibiting symptoms of COVID-19. (ECF No. 63 at 35.) Now, 20 Krome detainees have tested positive for COVID-19.[28]

Glades is a county jail, which houses immigration detainees pursuant to an inter-governmental service agreement with ICE. (Greer Decl. ¶7.)

Detainees at Glades

At present, ICE is cohorting 320 detainees "as a precautionary measure, per the established protocol."[30]

At the onset of this action there were no confirmed cases of COVID-19 at Glades County Detention Center, and no detainee was subject to cohorting. (Castano Decl. ¶14.) To date, 60 Glades detainees have tested positive for COVID-19.[31]

BTC is a private facility. The GEO Group operates the facility pursuant to an ICE contract. (Greer Decl. ¶7.)

At the BTC,upon entering the facility, medical screenings are conducted on all detainees within a 12-hour time frame and detainees are screened for fevers and respiratory illnesses. (Vega Decl. ¶9.) During intake, Detainees are asked to confirm if they have had close contact with a person with laboratory- confirmed COVID-19 in the past 14 days, and whether they have traveled from or through area(s) with sustained community transmission in the past two weeks ( )

Detainees are housed in rooms and separated by gender, with a maximum of six detainees per room. (at ¶22.) Bunk beds in the male rooms are two feet apart. ( ) Bunk beds in the female rooms are 6.5 feet apart. ( ) Bunk beds in the male rooms are two feet apart. ( ) Bunk beds in the female rooms are 6.5 feet apart. ( ) The distance between chairs in the dining hall is four feet. ( ) The facility is also practicing social distancing by staggering meal lines with reduced numbers of individ41aesms eehei -

In cases of known exposure to a person with confirmed COVID-19, asymptomatic detainees are placed in cohorts for 14 days after most recent exposure to an ill detainee and are monitored twice daily for fever and symptoms of respiratory illness. (at ¶11.)

ICE states that BTC detainees are granted daily access to medical treatment at an onsite medical observation room, pharmacy, tele-psychiatry, and access to 24/7 specialty services and hospital care within the community. (at ¶13.) However, Dr. Greer that detainees often wait several days to have access to a medical doctor for serious medical concerns. (Greer Decl. ¶25.)

At BTC, all detainees over 60 years of age have been released and the overall detention population has been reduced by 35 percent in accordance with ICE's Guidelines. (Vega Decl. ¶23.)

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5. Immediately comply with the CDC and ICE guidelines on providing adequate amounts of soap and water and cleaning materials to detainees at each of the three detention centers at issue. ICE was also required to provide masks to all detainees and

As to transfers between and among detention facilities, ICE explains that on May 5, 2020, after the TRO issued, ICE's Enforcement and Removal Operations division ("ERO") introduced a new COVID-19 checklist intended to provide ERO and contracted staff with

and well-being of Petitioners and others in its custody at Krome, Glades, and BTC.[35] On May 20, 2020, Petitioners filed a Motion to Compel alleging that although ICE touts population reductions at the three facilities, ICE actually utilizes transfers to "[shuffle] people around the country to make the population statistics at Krome, Glades, and BTC look better on paper." (ECF No. 106 at 2.)

Petitioners further allege that despite the aggressive utilization of transfers, ICE has not improved the conditions at any of the three detention centers. Most notably, social distancing is not possible at these facilities. (ECF No. 106 at 2.) Further, access to soap, hand sanitizer, masks, gloves, and cleaning supplies is still not reliable or consistent. (ECF No. 106 at 2.) Petitioners request that this Court compel ICE to provide documentation of its determination for each detained individual before transferring them to a different facility.

The Petitioners' submitted declarations support these allegations. The submitted declarations allege that they were either given ripped masks during detention or they were given masks for the very first time during transfer. (ECF No. 106-2 at 4, 18.) Most disturbing, some detainees are being transferred to different facilities within Florida without being first evaluated for COVID-19. (ECF No. 106-2.) Some detainees allege that they are transferred to processing centers where their temperatures are checked upon arrival, however soap is not readily available at the processing centers. (ECF No. 106-2 at 5.) In sum, the declarations assert that social distancing is not possible at the detention centers at issue, hygiene products are still in limited supply, and the use and distribution of masks among staff and detainees is inconsistent. (ECF No. 106.)

By contrast, ICE asserts that it properly exercised its broad discretionary authority pursuant to 8 U.S.C. §1231(g)(1) to transfer detainees to other locations. (ECF No. 116 at 3-6.) ICE maintains that prior to transfer, ICE reviews the detainees' medical history and

[35] On June 3, 2020, Petitioners presented live witnesses currently held at each of the three detention centers and each testified that ICE had not educated the detainees on mask use or the importance of mask use. To the extent that ICE erected posters about COVID-19 and mask use, the posters were typically presented only in English. The witnesses also testified that during the transfer process there were not tested for COVID-

obtains a medical clearance. (at 7.) ICE also states that it created a new COVID-19 checklist to mitigate the effects of COVID-19 when transferring, removing, or releasing an alien from custody. (at 7.) The checklist requires completion by ICE staff prior to a detainee being transferred out of the detention facility and is served on the detainee. (at 7.) ICEwhen t9 Tw -1

F.R.D. 315, 323 (S.D. Fla. 1996). Generally, Rule 23 is liberally construed in order to further its objectives.

transferred to other detention centers. ICE also argues that this Court lacks jurisdiction over detainees transferred or released from ICE detention. The Magistrate Judge issued an Amended R&R recommending that the Court the class certification motion concerning the habeas corpus demand for release but the motion, in part, and certify a class of all current detainees at the three South Florida facilities for the conditions-of-confinement claims (as opposed to the claim for release). (ECF No. 123 at 4-5.)

The Court must first address the threshold issue of standing as it applies to the proposed class. To satisfy constitutional standing in federal court, a habeas petitioner (like other litigants) "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." Spencer v. Kemna, 523 U.S. 1, 7 (1998) (quoting Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990)).

Here, Petitioners are threatened with a heightened risk of severe illness and death upon contracting COVID-19, and said threat is easily traceable to their confinement in ICE custody. Accordingly, the Court rules that the Petitioners easily meet Article III's standing requirements.

Rule 23(a)(1) requires that the class be so numerous that joinder of all members f-0.009 Tc l me

size less than twenty-one is typically considered inadequate, while a class size of more than forty is generally adequate. , 213 F.R.D. 484, 489-90 (S.D. Fla. 2003) (citing , 784 F.2d 1546, 1553 (11th Cir. 1986)).

The number of class members, however, is not the determinative factor for establishing numerosity. Since the focus under Rule 23(a)(1) is on whether joinder of all members is practicable in view of the numerosity of the class, courts must consider a number of relevant factors, such as the geographic diversity of the class members, the nature of the action, the size of each plaintiff's claim, judicial economy and the inconvenience of trying individual lawsuits, and the ability of the individual class members to institute individual lawsuits. 651 F.2d at 1038;

138 F.R.D. at 599.

Petitioners are filing on behalf of a putative class of approximately 1400 individuals. nIn addition to the large number of members here, the class is also geographically dispersed across different counties in South Florida—detainees are being held in three ICE detention centers. The size and geographical diversity of the class renders joinder of all members impracticable. 102 F.R.D. 490 (W.D.Ark. 1984) (joinder was impracticable where potential class members were located throughout a number of counties). For these reasons, the Court finds that the numerosity requirement of Rule 23(a)(1) has been met.

The second prerequisite of Rule 23(a) requires that there be questions of law or fact common to the class. This prerequisite does not require that of the questions of law or fact raised by the case be common to all the plaintiffs. ., 784 F.2d 1546, 1557 (11th Cir.1986), , 479 U.S. 883 (1986);

694 F.Supp. 864, 877 (S.D.Fla.1988), 872 F.2d 1555 (11th Cir.1989). However, commonality "requires at least one question common to all of the class members, the answer to which is "apt to drive the resolution of the litigation."

, Nos. 20-cv-2093, 20-cv-2094, 2020 WL 1820660, at *14 (N.D. Ill. Apr. 10, 2020) (internal citation omitted). "Commonality [also] requires the plaintiff to demonstrate that the class members have suffered the same injury." , 564 U.S. at 350. The common

contention of injury "must be of such a nature that it is capable of class wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."

Petitioners admit that there are "some factual differences between the class members claims." (ECF No. 81 at 9). Nevertheless, Petitioners assert that the commonality requirement is a low threshold, which is satisfied here because controlling questions of law and fact are common to the entire class-- whether ICE has been deliberately indifferent to the risk that people detained at Krome, BTC, and Glades will contract COVID-19 due to the unhygienic conditions and an inability to protect themselves through social distancing and ICE's failure to implement its Alternatives to Detention Program. (at 9-12.) Petitioners further argue that given how viruses spread, that deliberate indifference applies uniformly to all people in ICE custody at the three facilities at issue here. ( ) Petitioners also assert that ICE's uniformly unsanitary practices and its consistent refusal to follow CDC Guidelines at Krome, BTC, and Glades expose each class member to the same "substantial risk of serious harm." ( )

ICE asserts that the Motion should be denied because Petitioners have not satisfied the commonality requirement due to the "dissimilarities within the proposed class." (ECF No. 92 at 6.) ICE points to the fact that each of the three facilities has a different physical plant, configuration, as well as capacity for detaining individuals. ( ) ICE also argues that the Court cannot resolve claims central to each class member because whether a particular detainee's living arrangement meets CDC Guidelines, or demonstrates a lack of deliberate indifference, will depend upon an individualized determination. Thus, ICE contends that this is not a resolution of a claim central to each class member's claim "in one stroke." ( )

Petitioners claim entitlement to a comprehensive response to the pandemic. However, the Court observes that the relief sought by Petitioners is particularized and necessarily requires an individualized assessment of each detainees' vulnerabilities to COVID-19, as well as an individualized assessment as to each detainee's eligibility for release. It is feasible that at least some petitioners will be denied release. But, Petitioners also allege a course of common conduct, which includes failure to implement adequate precautionary measures and protocols, lack of access to hygiene products, health products, education, testing, and personal protective equipment, and most important, social distancing has not been achieved. (ECF No.

123 at 44.) The Petitioners share two main legal questions—whether ICE's conduct at the three detention centers amount to deliberate indifference and expose detainees to substantial risk of harm, and whether such conduct results in conditions of confinement that violate Petitioners constitutional rights. , 564 U.S. at 350 (commonality does not require perfect uniformity.) The existence, scope, and adequacy of those measures are central to all Petitioners' claims.

The Court finds that Petitioners have met the commonality requirement of 23(a)(2) only with respect to their conditions of confinement claim.

Under this third requirement of Rule 23(a), the named plaintiffs must present claims that are typical of the claims of the class. The typicality requirement centers on the relatio20.1 004 0 4 -2eq(n)-10 (ot (a)-1e7 Te)-4c 0.[(r)-4 c 0 Tw 8Peti(n)-10 (6)-8 (9s)3 (es)6.9[(r)-8 ()-1 (

The final prerequisite of Rule 23(a) requires a showing that the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4);

, 168 F.R.D.at 327. Adequacy of the representation is a question of fact that depends on the assessment of two factors: "(1) whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation and . . . (2) whether plaintiffs have interests antagonistic to those of the rest of the class."

, 213 F.R.D. 484, 496 (S.D. Fla. 2003) (quoting , 827 F.2d 718, 726 (11th Cir. 1987)).

In determining whether a proposed class representative will adequately protect the interests of the class, the Court asks whether the proposed class representatives and their counsel have any conflicts of interest with any class members and whether the proposed class representatives and their counsel will prosecute the action vigorously on behalf of the class.

, 150 F.3d 1011, 1020 (9th Cir. 1998).

ICE has not challenged the adequacy of Petitioners' counsel. The Court notes that Petitioners' counsel have extensive experience in representing clients in class action suits throughout the United States2/21 (te)-kapa,

members; and (ii) a class action must be superior to other available methods for the fair and efficient adjudication of the controversy at hand. Fed. R. Civ. P. 23(b)(3).

To certify a class under Rule23(b)(2), the Court must first find that common issues of law or fact predominate over individual issues. The critical inquiry is "whether class members seek uniform relief from a practice applicable to all of them." , 591 F.3d at 1125-26 (9th Cir. 2010) (internal citation and quotation marks omitted) (finding certification under Rule 23(b)(2) proper where "proposed members of the class each challenge Respondents' practice of prolonged detention of detainees without providing a bond hearing and seek as relief a bond hearing with the burden placed on the government").

Because ICE's actions and inactions apply to the class generally, the Court determines that Rule 23(b)(2)'s requirements are satisfied. 754 F.3d 657, 689 (9th Cir. 2014) (finding Rule 23(b)(2) satisfied where the state department of corrections established policies and practices that placed "every inmate in custody in peril" and all class members sought essentially the same injunctive relief). In addition, it would be extremely inconvenient and a waste of valuable judicial resources to try several hundred individual lawsuits.

The Court finds that class certification is appropriate.

The Court now considers whether a preliminary injunction is appropriate here. A preliminary injunction is an "extraordinary and drastic remedy," and a party seeking the relief bears the "burden of persuasion" to clearly establish all four prerequisites. , 840 F.3d 1244, 1247 (11th Cir. 2016) (citing , 234 F.3d 1163, 1176 (11th Cir. 2000)); , 51 F.3d 982, 985 (11th Cir. 1995). However, districts courts are empowered with broad equitable power—particularly in these uncertain times-- to grant a remedy that may present the only adequate remedy.

and that the balance of equities and public interest heavily weigh in favor of granting preliminary relief.[37]

Petitioners assert three claims: (1) Fifth Amendment violation (violation of detention standards), (2) Fifth Amendment and Eighth Amendment violations (violation of right to reasonable safety), and (3) Fifth Amendment violation (state-created danger).

Immigration detainees, like the Petitioners here, are subject to the same rights as civil detainees. , 783 F. App'x 938, 941 (11th Cir. 2019) (holding that the district court improperly classified immigration detainee as a prisoner rather than as a civil detainee). And civil detainees are afforded "more constitutional protection, more considerate treatment, and conditions of confinement than criminals whose conditions of confinement are designed to punish." , 457 U.S. 307, 321-22 (1982). The Government may not impose on civil detainees conditions that would violate a convicted prisoner's Eighth Amendment rights. , 774 F.2d 1567, 1573-74 (11th Cir. 1985) (citing , 463 U.S. 239, 244 (1983) ("[T]he due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner.").

[37] Several district courts across the country have ordered the release of § 2241 alien detainee-petitioners, explaining that pressing health risks of COVID-19 combined with ICE detention necessitate release. , No. 20-cv-00605, 2020 WL 1502864 (C.D. Cal. March 27, 2020) (releasing petitioners and granting petitioners' application for a TRO because "[u]nder the Due Process Clause, a civil detainee cannot be subject to the current conditions of confinement at Adelanto" even though there had been no confirmed cases reported at the facility); , No. 20-cv-00768, 2020 U.S. Dist. LEXIS 72080 (C.D. Cal. Apr. 23, 2020)(granting immigration detainees' § 2241 petition for preliminary injunction and releasing them); , No. 20-cv-1034-WJM, 2020 U.S. Dist. LEXIS 72422 (D.Co. Apr. 24, 2020)(granting immigration detainee's § 2241 petition for preliminary injunction and releasing 55-year old petitioner who suffered from hypertension even though there were no confirmed COVID-19 cases at the immigration detention center); , No. 20-cv-10829, 2020 U.S. Dist. LEXIS 59407 (E.D. Mich. Apr. 5, 2020)(granting TRO and releasing habeas petitioner because she was "likely to succeed on the merits of her claim that her continued confinement during the COVID-19 pandemic violates her Fifth Amendment rights.")

The minimum standard of care to be provided to civil detainees under the Due Process Clause of the Fifth Amendment is the same as that allowed by the Eighth Amendment for convicted persons. , 774 F.2d at 1574; , 441 U.S. 520, 535 n. 16

officials acted with deliberate indifference to the serious medical need. Third, the detainee must show that the injury was caused by ICE's wrongful conduct. , 510 F.3d 1312, 1326 (11th Cir. 2007) (citing 50 F.3d 1579, 1582 (11th Cir.1995).

Determining whether one had a serious medical need is an objective inquiry. A medical need satisfies the objective component when it "is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." While most cases are mild, COVID-19 has proven itself to be lethal in the most severe cases, with some portion of the infected expected to require either a ventilator or other intravenous treatment. (Greer Decl. ¶20.) Further, although experts agree that the most vulnerable demographics are the elderly or those with underlying medical conditions, COVID-19 attacks all age groups indiscriminately and it is impossible to determine who will succumb to the illness. It is possible that if Petitioners contract the disease, at least some of them will require a doctor's attention.

, 509 U.S. 25, 33 (1993) ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.") Petitioners have satisfied the objective component of the deliberate indifference test.

A medical need satisfies the subjective component when a plaintiff shows (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than negligence." , 510 F.3d at 1327. Here, it's hard to imagine that ICE is unaware of the risk of serious harm involved in contracting COVID-19. Indeed, ICE's conduct—creating a set of guidelines and recommendations specifically addressing the pandemic—at least impliedly acknowledges a risk of serious harm.

As previously noted, the CDC's Guidelines are clear that that transfers should be avoided or restricted and utilized as a last resort (a)-12 (2 Tc72 Td[(a)-12 (v6 (l)-f(a)-1l(s)3 (a).11 ( )20 (aaracl

that to the extent that a transfer is "absolutely necessary," ICE is to "perform verbal screening and a temperature check as outlined in the [CDC Guidelines] before the individual leaves the facility." (at 9.) If an individual does not clear the screening process, ICE is expected to "delay the transfer and follow the protocol for a suspected COVID-19 case— including putting a face mask on the individual, immediately placing them under medical isolation[38], and evaluating them for possible COVID-19 testing." ( ) And "[i]f the transfer must still occur, ensure that the receiving facility has capacity to properly isolate the individual upon arrival." ( )

ICE's PRR similarly states, "[w]here possible, restrict transfers of detained non-ICE populations to and from other jurisdictions and facilities necessary for medical evaluation, isolation/quarantine, clinical care, or extenuating security concerns." (PRR at 13.) ICE has submitted to the Court that it has created checklists utilized to evaluate each detainee.

Yet, the Court has been presented with declarations and live testimony claiming that ICE continues to flout this Court's Order by (1) failing to consistently evaluate detainees for COVID-19 before transferring them to other detention centers,[39] (2) failing to provide protective masks during the transfer process; and (3) failing to provide meaningful access to hygiene products soap, hand sanitizers, masks, gloves and cleaning supplies. (ECF Nos.106; 106-2.).

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[38] Medical isolation is not the equivalent of quarantining. Rather, medical isolation "refers to confining a confirmed or suspected COVID-19 case (ideally to a single cell with solid walls and a solid door that closes), to prevent contact with others and to reduce the risk of transmission." (CDC Guidelines at 3.)

[39] ICE openly admits that testing at some of the detention centers are limited. (ECF No. 33-1 ¶15.) The Court is well aware that testing capabilities is limited nationwide. However, since the introduction of COVID-19, experts have developed antibody tests which effectively demonstrate whether an individual ever contracted the disease in the past. To the Court's knowledge, such antibody tests are more readily available and accessible than COVID-19 tests. Accordingly, the Court speculates that ICE may utilize such antibody tests in making a thorough assessment about a detainee's COVID-19 status, which may in turn inform whether a detainee should be transferred. While unproven, experts believe that people who have contracted the disease retain at least some immunity to the virus for a period of time. https://www.livescience.com/covid-19-immunity.html. Presumably, detainees who test positive for COVID-19 antibodies may have acquired immunity which would make them a candidate for transfer.

At the June 3, 2020, Hearing Mr. Borges provided testimony about his lived experience with ICE's transfer process. Mr. Borges testified that he was not tested for COVID-19 before he was transferred from BTC to Stewart Detention Center ("Stewart") in Georgia. He also testified that he was not processed at Stewart upon arrival. Rather, he was almost immediately transferred back to BTC. He was not tested before he was transferred from Stewart back to BTC. Mr. Borges also testified that he was not provided a mask during the transfer process, so he used the same mask, soiled from two days of wear, before his transfer from BTC to Stewart. Mr. Borges wore the same mask when he was transferred back to BTC. Disturbingly, guards did not wear masks during Mr. Borges' transfer process. Indeed, the ICE guard that escorted Mr. Borges to the Hearing was not donning a mask, despite being seated a mere two feet away from Mr. Borges. Such behavior not only violates the spirit and the letter of TRO, it also amounts to deliberate indifference because it demonstrates a blameworthy disregard of the risks posed by COVID-19 by exponentially increasing the risk of spreading the virus to other detention centers[40]—conduct that far exceeds mere negligence and evidences a reckless state of mind. ICE does not test all detainees before transferring them because it doesn't have enough tests to do so. (ECF No. 63 at 37.) Instead, ICE only tests people who display symptoms ( )—which may have resulted in the transfer of some detainees who are asymptomatic but still carry the virus. In fact, media reports state that an increase in COVID-19 cases across all three detention centers largely correlates with the increase in ICE transfers during the pandemic.[41]

Congress conferred broad discretionary authority to the Attorney General of the United States, to determine the places of detention for aliens detained pending removal or a decision on removal. 8 U.S.C. § 1232(g)(1). The same authority is conferred to ICE by extension. , 663 F.3d 680 (3rd Cir. 2011). However, ICE's authority is not absolute. District Courts are granted authority to review agency action and hold unlawful and set aide agency action found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. § 706

detainees without first screening them for COVID-19 or providing any protective equipment is not only a violation on ICE's authority, it is a violation of Petitioners' constitutional rights.

Further, the CDC's Guidelines state that the practice of cohorting should be utilized "only if there are no available options." (CDC's Guideline at 15.) Both the CDC's Guidelines and ICE's PRR state, "[o]nly individuals who are laboratory confirmed COVID-19 cases should be placed under medical isolation as a cohort. Do not cohort confirmed cases with suspected cases or case contacts." (at 16; PRR at 14.) Despite the fact that its own Guidelines call for detention facilities to avoid group cohorting, ICE flagrantly flouts its own rules on the subject and groups asymptomatic[42] detainees together. ICE admits that it is currently cohorting 320 detainees at Glades—the entire detainee population—"as a precautionary measure, per the established protocol." On June 3, 2020, Mr. Borges testified that upon transferring back to BTC, he was quarantined for 14 days. During his quarantine he was taken to recreation at the same time as individuals known to be sick with COVID-19. Such practices substantially increase a detainee's exposure to COVID-19. And ICE's failure to comply with its own Guidelines, which explicitly acknowledges the risks involved in cohorting in the manner described herein is further evidence of deliberate indifference.

ICE's submissions to the Court establish that ICE considers a sizeable portion of its population to be mandatory detainees. However, 25.9% of the detainee's ICE classifies as mandatory detainees have no conviction or pending charges. (ECF No. 142 at p.60.) Notably, ICE does not claim mandatory detention for 23.3% of the populations across all three detention centers. (at p.58.) But ICE has not released such individuals and has not provided any explanation as to why. Moreover, ICE's conduct flies in the face of directives from Attorney Gen. William Barr to the Federal Bureau of Prisons urging the prioritization of home confinement, noting "[w]e have to move with dispatch . . . to move vulnerable inmates out of these institutions."[43] Under such directives,[44] ICE would be expected to make

[42] It is unclear to the Court how ICE manages to determine which detainees are asymptomatic considering that COVID-19 tests are limited and ICE has stated that it only tests detainees for COVID-19 if they display symptoms. (ECF No. 63 at 37.)
[43] April 3, 2020 Memorandum of Hon. W. Barr to the Director of Bureau of Prisons, at 1.
[44] Although Mr. Barr's Memorandums are directed to the Federal Bureau of Prisons, ICE's guidelines contain specific standards that mirror Mr. Barr's directives with respect to which detainees should be immediately released.

meaningful utilize its "Alternatives to Detention Program" by determining who among the 23.3% can be released to alternative confinement. Petitioners have satisfied the subjective component of the deliberate indifference test.

Pursuant to the PRR, ICE is tasked with maintaining social distancing among detainees, (PRR at 14), providing each detainee with hygiene products, (PRR at 8), and providing each detainee with masks, (PRR at 9)[45]. Credible testimony and sworn declarations fhed1 (e)-10 (e)-4.96nra

To demonstrate irreparable harm, a movant must show "that the injury cannot be undone through monetary remedies." , 32 F.Supp.3d 1206, 1223 (S.D.Fla.2014). "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" , 427 U.S. 347, 373 (1976)).

Petitioners establish irreparable harm by alleging a deprivation of constitutional rights. The " violation of a constitutional right ... triggers a finding of irreparable harm," , 76 F.3d 468, 482 (2d Cir. 1996). Here, Petitioners allege that their substantive and procedural due process rights have been violated. Accordingly, "no further showing of irreparable injury is necessary." , 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

Petitioners have established they will suffer the irreparable harm of increased likelihood of severe illness and death if a preliminary injunction is not entered. The Constitution protects those in detention against "a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week ou, P llvd 0m DDtnter1(ow)pv4

the pandemic, the threat is even clearer. As previously noted, the number of COVID-19 cases within each detention center at issue has risen, especially with the aggressive utilization of transfers—evidence that there truly is a heightened risk of contracting the disease within the detention centers. ICE does not argue that COVID-19 poses serious risk to detainees. Rather, ICE asserts that the Court should respect its unfettered authority to manage and maintain the detention centers.[47] The Court reminds ICE that it has not made any efforts to usurp its role in the administration of detention centers. Rather, the Court has ordered that ICE follow its own guidelines in its management of the pandemic within detention centers. ICE reports that it has complied with the TRO in this regard. Still, there are credible reports from the Petitioners stating otherwise. (ECF No. 106-2.)

Where the government is the opposing party, balancing of the harm and the public interest merge. , 556 U.S. 418, 435 (2009). Thus, the Court asks whether any significant "public consequences" would result from issuing the preliminary injunction. , 555 U.S. at 24.

The balance of the equities weighs in favor of granting an injunction. The Petitioners face irreparable harm to their constitutional rights and health. Indeed, there is no harm to the Government from engaging in unlawful practices. 2020 WL 1932570, at *28 (C.D. Cal. Apr. 20, 2020) ("The balance of equities sharply incline in Plaintiffs' favor. 'It is always in the public interest to prevent the violation of a party's constitutional rights.'") (citation omitted); , 2020 WL 1952656, at *12 (C.D. Cal. Apr. 23, 2020) ("The balance of equities, here, tip sharply in favor of the class members; the class members

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demonstrated a likelihood of success on claim government's actions constituted deliberate indifference to their medical needs which predisposed them to higher risk of COVID-19; , No. 2:20-cv-03172-ODW, 2020 U.S. Dist. LEXIS 71228 (C.D. Cal. Apr. 22, 2020) (granting TRO and releasing alien detainee § 2241 petitioners who demonstrated a likelihood of success on their due process claim); , No. 20-cv-3430, 2020 U.S. Dist. LEXIS 69220 (D.N.J. Apr. 21, 2020) (granting TRO and releasing 2241 immigration detainee petitioner); -

face irreparable harm to their constitutional rights and health. The Government is not harmed when a court prevents the Government from engaging in unlawful practices.").

Petitioners maintain ICE is merely "shuffling people around the country to make the population statistics at Krome, Glades, and BTC look better on paper." Rather than releasing detainees under its Alternatives to Detention Program. (ECF No. 106 at 2.) Petitioners assert

in place that detainees may utilize and that the Court should defer to ICE's judgment in its efforts to manage its facilities during the pandemic.

first engage ICE's protracted grievance mechanisms. Accordingly, the Motion to Compel is .[50]

It is hereby as follows:

1. The Amended R&R on Petitioners' Motion for Class Certification, ECF No. 123, is as the Order of this Court. It is hereby that the Court now certifies the following class: All current civil immigration detainees who are now held by ICE at Krome, BTC, and Glades when this action was filed, since this action was filed, or in the future.
2. Petitioners' Emergency Motion for Temporary Restraining Order and Motion for Preliminary Injunction for Proposed Class and Incorporated, ECF No. 4, is as a preliminary injunction as follows:
    a. ICE shall immediately comply with the CDC and ICE guidelines by providing Petitioners and the class members with unrestricted access to hand soap, hand sanitizer, and disposable hand towels to facilitate handwashing.
    b. Provide cleaning supplies for each housing area and CDC-recommended disinfectants in sufficient quantities to facilitate frequent cleaning, including in quantities sufficient for each inmate to clean and disinfect the floor and all surfaces of his own housing cubicle, and provide new gloves and masks for each inmate during each time they are cleaning or performing janitorial services.
    c. Provide all inmates and staff members with masks and educate them on the importance and proper use of masks.
    d. Increase regular cleaning and disinfecting of all common areas and surfaces, including common-use items such as television controls, books, and gym and sports equipment.
    e. Limit transportation of detainees to only instances regarding immediately necessary medical appointments and release from custody.

a. ICE is permitted to transfer detainees but ____ after performing a verbal screening and a temperature check as outlined in the CDC Guidelines before the individual leaves the facility.
b. Within ten (10) days of this Order, ICE shall submit weekly Court documentation of its evaluations for release before any transfer is executed. The documentation must include an evaluation of each prospective transfer candidate for COVID-19.
c. ICE must provide a new mask to each transferee before the transfer process begins.

5. The Court shall retain jurisdiction over all class members who are transferred to other facilities regardless of where those facilities are located.
6. ICE shall not engage in the practice of cohorting unless ICE confirms through testing or other means that a prospective cohort candidate i 0 Tde i are l Tc 0 T TD6.