("ICE") detainees are held during the pandemic likely violate the Constitution, and if so, what measures can and should be taken to ensure constitutionally permissible conditions of detention.

A. Procedural Background

On August 19, 2019, Faour Abdallah Fraihat, Marco Montoya Amaya, Raul Alcocer Chavez, Jose Segovia Benitez, Hamida Ali, Melvin Murillo Hernandez, Jimmy Sudney, José Baca Hernández, Edilberto García Guerrero, Martín Muñoz, Luis Manuel Rodriguez Delgadillo, Ruben Darío Mencías Soto, Alex Hernandez, Aristoteles Sanchez Martinez, Sergio Salazar Artaga,[1] ("Individual Plaintiffs"), Inland Coalition for Immigrant Justice ("ICIJ"), and Al Otro Lado ("Organizational Plaintiffs) (collectively, "Plaintiffs") filed a putative class action complaint for declaratory and injunctive relief. ("Complaint," Dkt. No. 1 ¶¶ 21-126.) The Defendants are U.S. Immigration and Customs Enforcement ("ICE"), U.S. Department of Homeland Security ("DHS"), DHS Acting Secretary Kevin McAleenan, ICE Acting Director Matthew T. Albence, ICE Deputy Director Derek N. Brenner, ICE Enforcement and Removal Operations ("ERO") Acting Executive Associate Director Timothy S. Robbins, ERO Assistant Director of Custody Management Tae Johnson, ICE Health Service Corps ("IHSC") Assistant Director Stewart D. Smith, ERO Operations Support Assistant Director Jacki Becker Klopp, and DHS Senior Official Performing Duties of the Deputy Secretary David P. Pekoske (collectively "Defendants"). (Id. ¶¶ 127-36.)

Plaintiffs are immigration detainees with a range of serious health conditions and two organizations that provide services to detainees. (Id. at ¶¶ 21-126.) Together they claim Defendants have failed to ensure minimum lawful conditions of confinement at immigration detention facilities across the country. (Id. ¶¶ 1-13.) Plaintiffs assert four claims: (1) Due Process Clause of the Fifth Amendment - failure to monitor and prevent "Challenged Practices"[2] (all Plaintiffs and the Class against all Defendants); (2) Due Process Clause of the Fifth Amendment - failure to monitor and prevent "Segregation Practices" (Organizational Plaintiffs, Segregation Plaintiffs and Segregation Subclass against all Defendants); (3) Due Process Clause of the Fifth Amendment - failure to monitor and prevent "Disability-Related Practices" that constitute punishment (Organizational Plaintiffs, Disability Plaintiffs, and Disability Subclass against all Defendants); (4) violation of § 504 of the Rehabilitation Act ("Rehab Act"), 29 U.S.C. § 794 (Organizational Plaintiffs, Disability Plaintiffs, and Disability Subclass against DHS, ICE, and IHSC). (Compl.) On April 15, 2020 the Court Denied Defendants' motion to dismiss, sever, or transfer venue. (MTD Order, Dkt. No. 126.)

[1] The Court will refer to Individual Plaintiffs by their last names, unless Plaintiffs have the same last name, in which case the Court will use full names. The remainder of the Order will omit diacritical marks.

On March 25, 2020, Plaintiffs filed the Class Certification and PI Motions. (Class Cert. Mot.; PI Mot.) Plaintiffs included in support of the Class Certification Motion the following documents:

> Declaration of William F. Alderman, ("Alderman Declaration," Dkt. No. 83-2 (attaching Exhibit A));
> Declaration of Michael W. Johnson, ("Johnson Declaration," Dkt. No. 83-2);
> Declaration of Stuart Seaborn, ("Seaborn Declaration," Dkt. No. 83-4 (attaching Exhibits A to J));
> Declaration of Lisa Graybill, ("Graybill Declaration," Dkt. No. 83-5);
> Declaration of Timothy P. Fox, ("Fox Declaration," Dkt. No. 83-6);
> Declaration of Alex Hernandez, ("Hernandez Declaration," Dkt. No. 83-7);
> Declaration of Aristoteles Sanchez, ("Sanchez Declaration," Dkt. No. 83-8);
> Declaration of Faour Abdallah Fraihat, ("Fraihat Declaration," Dkt. No. 83-9);
> Declaration of Jimmy Sudney, ("Sudney Declaration," Dkt. No. 83-10); and
> Declaration of Martin Munoz, ("Munoz Declaration," Dkt. No. 83-11).

In support of the PI Motion, Plaintiffs filed the following supporting documents:

B. Facts[4]

medical attention and increased chances of death. (Id. ¶ 10; see also Venters Decl. ¶ 10 ("[isolated detainees] quickly experience increased psychological distress that manifests in self-harm and suicidality, which requires rapid response and intensive care outside the facility . . . ").) Unless an individual is held in a negative pressure room, his or her respiratory droplets may still flow outwards to the rest of the facility. (Meyers Decl. ¶ 10.) Third, people held in jails and prisons are more likely than others to have chronic underlying health conditions that make them susceptible to infectious disease. (Id. ¶ 13.) Finally, new information about COVID-19 suggests it may be transmissible through shared bathrooms and cell toilets without lids. (Venters Decl. II ¶ 2(a).)

On April 2, 2020, six ICE detainees and five ICE staff at detention facilities had tested positive for COVID-19. That number has dramatically increased. As of the drafting of this Order, ICE reports 124 confirmed detainee cases at 25 facilities around the country and thirty confirmed cases of ICE detention facility staff at many of the same locations.[5] Due to shortages in testing nationwide and because asymptomatic individuals may spread the disease, the known cases are likely the "tip of the iceberg." (Venters Decl. ¶ 7.)

An immigration facility outbreak would also menace the non-detained: a surge in preventable cases would further strain local hospital and healthcare resources. (Id. at 8; Seaborn Decl., Ex. E at 4 ("a detention center with a rapid outbreak could result in multiple detainees—five, ten or more—being sent to the local community hospital where there may only be six or eight ventilators over a very short period.").) In the "alternate scenario," a facility outbreak is averted and a community's "survival is maximized." (Id. (also noting that many detention centers are in remote areas with limited access to health facilities).)

2. CDC Guidance and ICE's Systemwide Response to COVID-19

On March 6, 2020, ICE Health Services Corp ("IHSC") provided interim guidance to detention facilities. (Venters Decl. ¶ 14.) The ICE website also provides guidance, which is updated periodically. See ICE Guidance on COVID-19, ICE, https://www.ice.gov/covid19. The ICE Guidance purports to incorporate or be consistent with CDC guidance. (Id.)

On March 23, 2020, the CDC issued interim guidance on management of COVID-19 in correctional and detention facilities ("CDC Interim Guidance," Jordan Decl. III, Ex. D.). The guidance mentions many of the same risks of COVID-19 transmission noted above, and notes several others, including: the inability of detainees to exercise frequent handwashing, restrictions on soap or paper towels, the likelihood of introduction of the disease due to staff ingress and egress and detainee transfers, and limited options for medical isolation. (CDC Interim Guidance at 2.) The CDC Interim Guidance provides recommendations on a wide range of topics,

[5] The number of ICE staff at detention facilities does not appear to include individuals such as guards, vendors, or medical service providers who work at those facilities and are not employed by ICE. ICE Guidance on COVID-19, U.S. Immigration and Customs Enforcement, https://www.ice.gov/coronavirus.

Facilities).) The Action Plan includes some, but not all of the CDC policies, and provides advice that sometimes conflicts with the CDC policies.

On April 4, 2020, ICE released docket review guidance, which ordered Field Office Directors ("FODs") across the country to identify individuals in certain CDC-defined categories for heighted risk of death due to COVID-19, and to make individualized determinations regarding continued custody. ("Docket Review Guidance," Dkt. No. 121-4.) Per the Docket Review Guidance, vulnerable detainees who are mandatorily detained do not receive any consideration, however. The Docket Review Guidance is described in greater detail in the next Section. See Section I.B.3.

Most recently, on April 10, 2020, ICE Enforcement and Removal Operations ("ERO") issued COVID-19 Pandemic Response Requirements. ("Pandemic Response Requirements," Dkt. No. 124-1.) The Pandemic Response Requirements set forth "mandatory requirements" for all facilities housing ICE detainees as well as best practices. (Id. at 3.) Dedicated detention facilities—those housing only ICE detainees—as well as non-dedicated facilities with mixed populations, including local jails, "must" (1) comply with their applicable detention standards and facility contract[8]; (2) comply with the CDC Interim Guidelines and the March 27, 2020 Action Plan; (3) notify the local FOD and FMC of known or suspected COVID-19 cases; and (4) notify the FOD and FMC "as soon as practicable" of any detainee meeting CDC's criteria for higher risk of harm, (id. at 5-7). Whereas the April 4, 2020 Docket Review Guidance drew the line for vulnerable individuals at sixty years of age and listed pregnancy as a qualifying condition for release, the Pandemic Response Requirements raise the age to 65 and omit pregnancy.

The Pandemic Response Requirements also state all facilities housing ICE detainees must:

> Instruct staff and detainees to wear cloth face coverings when PPE supply is limited;
> Provide staff and detainees with no cost unlimited access to supplies for hand cleansing, including liquid soap, water, paper towels or dryers, and no-touch receptacles;
> Require all persons in the facility to avoid touching their eyes, nose, or mouth without cleaning their hands first;
> Prohibit sharing of eating utensils, dishes, and cups;
> Prohibit non-essential contact such as handshakes, hugs, and high-fives;
> Staff should clean shared equipment like radios and weapons;
> Where possible, restrict transfers of detained non-ICE populations and facilities

[8] The Court observes that different detention standards apply to different facilities. Thus, some facilities will only comply with the legacy Immigration and Naturalization Service 2000 National Detention Standards, whereas others will comply with more recent Performance-Based National Detention Standards, which came out in 2008 and were revised in 2011 ("PBNDS"). See ICE Detention Standards, https://www.ice.gov/factsheets/facilities-pbnds.

> "Efforts should be made" to reduce the population to approximately 75% of capacity, to promote social distancing

(Id. at 7-14.) In addition, the Pandemic Response Requirements for the first time acknowledge the CDC's tiered housing preferences for individuals under medical isolation (e.g. separate single cells with solid walls and door are much preferable to cohorted multi-person cells without solid barriers). (Id. at 15.) The Response Requirements also note that if the number of confirmed cases at a facility exceeds individual isolation spaces, ICE must be promptly notified to arrange transfer.

For additional operational background, Defendants provide the declaration of the Deputy Assistant Director for Clinical Services and Medical Director of IHSC. (Vick Decl., Ex. 2 ¶ 1.) The IHSC Deputy Assistant Director oversees clinical services at the 20 IHSC-staffed facilities, which hold approximately 13,500 detainees. (Id. ¶ 2.) The Deputy Director states that IHSC is following CDC guidance in testing for COVID-19, but does not specify what the guidance calls for. (Id. ¶ 9.) Similarly, she states ICE has a pandemic workforce protection plan and that ICE instituted "applicable parts of the plan" in January 2020, but she does not attach excerpts of the plan, specify what the plan requires, or explain how it will address the needs of medically vulnerable detainees. (Id. ¶ 6.)

ICE appears to be engaging in at least some centralized monitoring of facility conditions, though Defendants do not submit evidence that they are enforcing IHSC or CDC guidelines at all ICE facilities. The best evidence of coordinated pandemic tracking is the ICE website, which is regularly updated with information about reported staff and detainee COVID-19 cases. Second, IHSC Field Medical Coordinators ("FMCs") receive reports from medical leadership at contract facilities.[9] (Id. ¶ 11.) Each facility is supposed to report to FMCs any detainee they identify as "meeting CDC requirements for cohorting monitoring, or isolation." (Id.) Until April 10, 2020, Defendants did not require facilities to provide ICE with information about which detainees are most vulnerable to severe illness or death from COVID-19. Defendants do not provide information about any independent tracking they conduct with regard to disabled or medically vulnerable individuals before or during the pandemic.

3. Individualized Release Determinations

The number of individuals in ICE custody has slightly decreased since the declaration of a national emergency. As of March 13, 2020, ICE had 35,980 single adults in custody. (Holt Decl. ¶ 13.) More than half of ICE's average daily population at that time had not been convicted of a criminal offense and had no pending criminal charge. (Seaborn Decl., Ex. F.) A month later, on

[9] Further declarations submitted by Defendants clarify that FMCs "oversee" clinical services at Intergovernmental Service Agreement Facilities ("IGSA"), and "ensure" the medical care provided by contractors meets detention standards under the contract. (Vick Decl., Ex. 2 ¶¶ 2-3.) The FMCs "monitor" but do not provide hands-on care, or direct the care. (Id.)

Detainees over 60 years old
Detainees of any age having chronic illnesses which would make them immune-compromised, including but not limited to
- Blood disorders
- Chronic kidney disease
- Compromised immune system
- Endocrine disorders
- Metabolic disorders
- Heart disease
- Lung disease
- Neurological and neurologic and neuro development conditions

(Id. at 1-2.) The Docket Review Guidance asks FODs to "please" identify "all cases within your [areas of responsibility] that meet any of the criteria above and validate that list with assistance from IHSC or your [FMC] to ensure the conditions listed are still present and do result in the detainee potentially having a higher risk for serious illness from COVID-19." (Id. at 2.) The guidance goes on to request FODs to review these cases to determine whether ongoing detention is appropriate, but notes that presence of a risk factor "may not always be determinative." (Id.) The guidance does not acknowledge that individuals who are detained under 8 U.S.C. § 1226(c) may be released, and remarks that even in cases of discretionary detention, an at-risk individual should not be released in cases of potential danger to property or persons. (Id.)

In a supplemental filing ICE notes individualized release determinations began prior to this April 10, 2020 Docket Review Guidance. (Holt Decl. ¶ 10.) Since March 2020, ICE has released 693 individuals using a methodology similar to the Docket Review Guidance. (Holt Decl. ¶ 10.) ICE does not state how many eligible detainees have been identified, and notes that the time needed for each review depends on the complexity of the case. (Id. ¶ 11.)

4. Plaintiffs' Criticisms of ICE's Systemwide Action or Inaction

Plaintiffs sharply criticize ICE's March 6, 2020 guidelines. For example, the guidelines focus on questionnaires, rather than checking for active symptoms of staff, and tend to ignore that COVID-19 has arrived in full force and can be carried by asymptomatic individuals. (Venters Decl. ¶ 10(a).) In addition, the guidelines do not include access to hand sanitizer and use of masks for individuals with a cough; do not include guidance for administrators to plan surge capacity needs; do not provide guidance on when to test patients for COVID-19 other than by reference to the CDC; do not propose identification of individuals with high risk of illness and death from COVID-19; and largely ignore CDC guidelines for social distancing strategies. (Id. ¶ 10(b)-(f).) To the extent ICE envisions use of "isolation rooms," Plaintiffs contend, most facilities only have 1-4 rooms that fit that definition and so will be quickly overrun. (Id. ¶ 16.)

In their Reply, Plaintiffs argue that even after the March 27, 2020 Action Plan and April 4 Docket Review Guidance, ICE's systemic response to the COVID-19 pandemic falls short of

CDC benchmarks. (PI Reply at ;Venters Decl. II.) Dr. Venters notes several discrepancies and gaps in ICE's global response, including that it:

> Does not require symptomatic detainees be given a mask and placed in medical isolation;
> Does not mandate nose and mouth coverings for those who cannot engage in social distancing;
> Does not present a plan for isolation when the number of people needing to be isolated exceeds existing isolation rooms or cells;
> Does not limit transportation of detainees;
> Does no identify what precautions should be taken to protect people with risk factors in ICE custody;
> Fails to include certain risk factors identified by the CDC and which FODs and their staff may not be aware;
> Delegates medical screening for custody review to FODs and staff who are not medical professionals, and advises them to check with medical professionals only after the fact;
> Does not urgently command risk factor screening measures, but merely requests them, without any timeline;
> Fails to account for the fact that detained populations are 10-15 years more progressed than chronological age;
> Does not ensure risk factors reflect evolving data and science;
> Does not include nationwide surveillance, coordination, or communication measures.

(Venters Decl. ¶¶ 3-4.)

Plaintiffs also argue that ICE systematically fails to track individuals with disabilities and medical vulnerabilities, both before and during the COVID-19 pandemic. In support of this contention, they include an Office of the Inspector General report, which discusses ICE's Risk Classification Assessment ("RCA") tool, which was designed to assist with release and custody classification decisions. ("OIG Report," Jordan Decl., Ex. A.) The OIG Report explains that when ICE Enforcement and Removal Operations ("ERO") detains a noncitizen, it uses the RCA to generate recommendations for detention or release, including for alternatives to detention, unless the person is mandatorily detained. (Id. at 5-6.)

The OIG Report provides some information on at least one of ICE's screening mechanisms: it notes that RCA questions on "special vulnerabilities" conflict with ICE's Performance Based National Detention Standards ("PBNDS") medical screening guidance. For example, an ICE ERO officer using the RCA tool does not have medical training and might not ask questions in a private setting, whereas the PBNDS call for someone with training—a medical professional or trained detention officer—to conduct the screening. (Id. at 12.) The OIG Report contrasts the PBNDS medical screening questions, which include 31 fields, with the RCA special vulnerabilities "checklist" which includes only yes/no data fields for (as relevant to this case)

"serious physical illness," "disabled," "elderly," and "pregnant." (OIG Report, Appendix G, at 29.)

Apart from this limited tool, and any reports provided by facilities to IHSC FMCs regarding detainee health, it appears ICE does not have a centralized screening, let alone tracking, mechanism or procedure to identify medically vulnerable or disabled individuals in its custody during the COVID-19 pandemic. Plaintiffs repeat the refrain from their Complaint that ICE has failed to ensure compliance with detention standards, and this failure extends to COVID-19 protocol compliance. (Compl. ¶¶ 522-537; PI Mot. at 12 (incorporating by reference additional OIG reports, dealing with management and oversight of detainee medical care).)

5. Reported Immigration Detention Facility Conditions

Plaintiffs provide evidence of the recent conditions at fourteen facilities in Alabama, California, Colorado, Georgia, Louisiana, and Texas. Plaintiffs also include anecdotal evidence of conditions in about fifteen additional facilities nationwide. Although the facts are cumulative, the Court summarizes the conditions below, by state and locality, along with any response provide by the government.

a. Etowah County Detention Center (Gadsen, Alabama)

An Etowah County immigration detainee, Hernandez, states that as of March 24, 2020, he had not received formal education about COVID-19, though there was an informative flyer in the dorm, which is in English only. (Hernandez Decl. ¶ 3.) Hernandez had not had his body temperature checked and has not seen other individuals having their temperatures taken. (Id. ¶ 4.) Soap must be purchased at commissary, and Hernandez did not observe officers wearing gloves or masks. (Id. ¶ 4.) New detainees and guards enter the facility regularly. (Id. ¶ 5.) Recently, a transferee reported feeling sick, and went to medical, where he did not have his temperature taken or receive any treatment, but was restricted to his cell. (Id. ¶ 6.) Individuals in Hernandez's unit demanded the transferee be removed. Two individuals tied nooses around their necks and stepped onto railings of the second floor, threatening suicide unless the facility took preventive action. (Id.) After this incident, detainees in the unit were provided one surgical mask each, and the unit is on lockdown except for two half-hour increments daily. (Id. ¶¶ 6-7.)

Defendants state that Etowah screens each detainee for disabilities upon admission. (Vick Decl., Ex. 11 ¶ 7 (not stating which disabilities are screened, or how many individuals qualify as disabled at Etowah).) Defendants do not state whether Etowah has identified detainees at greater risk for contracting COVID-19, and do not say what measures are being taken to protect those detainees. However, they do note Etowah provides a list of "chronic care" detainees and two detainees over the age of 60. (Id. ¶ 11.) They state that as of April 8, 2020, there are no confirmed COVID-19 cases at Etowah. (Id. ¶ 13(a)-(c); Nelson Decl. ¶ 17(a).) The facility has increased sanitation frequency and supplies, including hand sanitizer, soap, masks, and gloves "readily available" for both staff and detainee use. (Vick Decl., Ex. 11 ¶ 15.)

detainees, or whether the criteria used conform with CDC guidelines. The facility has increased sanitation frequency and supplies. (Id. ¶ 15.)

Defendants state that as of April 10, 2020, there are no confirmed COVID-19 cases at Adelanto, and no housing units on monitoring fo

access to disinfectants, sanitizer, and soap in every housing unit, and is "encouraging . . . general population to use these tools often and liberally." (Id. ¶ 16.) As of April 17, 2020 seven detainees and one ICE staff member tested positive for COVID-19 at Stewart.[15]

g. Irwin Detention Center (Ocilla, Georgia)

One detainee at Irwin reported to SIFI staff that there were confirmed cases of COVID-19 in the facility and that it was under quarantine. (Rivera Decl. ¶ 17.) A March 19, 2020, a detainee caller reported that neither ICE nor guards had given information about COVID-19, and that at least one person in his housing had a worsening cough, but had not been removed from the unit. (Id. ¶ 18.) As of April 17, ICE Reports one COVID-19 case at Irwin.[16]

h. South Louisiana ICE Processing Center (Basile, Louisiana)

The legal director of Las Americas Immigrant Advocacy Center reports that detainees have no access to soap or sanitizer, and that guards ran out of gloves. (Corchado Decl. ¶ 10.) Toilet paper is limited, adding to hygiene concerns, and multiple people in the barracks were coughing. (Id. ¶ 10.) One immune-compromised detainee was working in the facility kitchen until at least March 20, 2020. (Id. ¶ 11.) Las Americas reports HIV positive detainees are scheduled to be transferred by bus and/or plane, through various detention centers. (Id. ¶ 12.) Parole-eligible detainees with family in the U.S. have had pending parole applications for up to three weeks. (Id. ¶ 13.)

i. LaSalle Detention ICE Processing Center (Jena, Louisiana)

SIFI staff received a March 19, 2020 call from an individual held at LaSalle who complained of fever, chest pain, difficulty breathing while trying to sleep, and of coughing blood. (Rivera Decl. ¶ 11.) The detainee stated he tested negative for the flu but had not been tested for COVID-19, and he could only obtain ibuprofen, syrup, and salt. He reported sharing a unit with others with similar symptoms. (Id. ¶ 11.) He stated that GEO staff were not routinely using gloves. (Id. ¶ 11.) On March 20, 2020, SIFI received information from two clients who had engaged in a 120-day hunger strike that they would likely be force fed on March 23 or 24, 2020. (Id. ¶ 13.) The ICE field office twice denied their parole applications, despite evidence of medical vulnerability. (Id.) ICE Response to requests for release "remains spotty" and many applications are denied or receive no decision for months. (Id. ¶¶ 14-15.) As of April 17, 2020, one detainee has tested positive at this facility.[17]

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[15] ICE Guidance on Covid-19, https://www.ice.gov/coronavirus.

[16] ICE Guidance on Covid-19, https://www.ice.gov/coronavirus.

[17] ICE Guidance on Covid-19, https://www.ice.gov/coronavirus.

j. Pine Prairie Detention Center (Pine Prairie, Louisiana)

As of March 16, 2020, detainees informed a SIFI staff member that they lacked access to hand soap, and that the facility operator, GEO Group, had not altered protocols in response to the pandemic. (Rivera Decl. ¶ 7.) During a visit, the SIFI staff member submitted to a temperature check and questionnaire, but noted staff and detainees did not wear masks or gloves. (Id. ¶ 6.) On March 18, 2020, a detainee told SIFI staff that he and about 60 others in Charlie Alpha unit were under quarantine, after someone in the unit was suspected of having COVID-19. (Id. ¶ 8.) Individuals in the unit had to clean their own unit, and had no access to hand soap or sanitizer, except soap they had for showers. (Id.) No spacing measures had been implemented. (Id.) The following day, a detainee in another unit stated they were receiving hygiene supplies every two days, and that two individuals with COVID-19 symptoms had been removed from the unit.

On the day after that, March 20, 2020, a SIFI member visited detainees from the quarantined unit, but staff did not check her temperature. (Id. ¶ 10.) The staff member observed some staff wore masks and others did not. (Id.) The detainees stated they did not have masks inside the unit, and that detainees were still cleaning the dorm without gloves. (Id.) Transferees or newly detained individuals continued to be admitted to the unit. (Id.) As of April 17, 2020, four detainees at Pine Prairie have tested positive.[18]

k. Joe Corley Detention Facility (Conroe, Texas)

Las Americas received several complaints from clients concerned about the lack of preventive measures a Joe Corley Detention Facility. (Corchado Decl. ¶ 17.) The facility places 36 people in each barrack. (Id. ¶ 22.) Cafeteria workers organized a three-day strike, and access to food was disrupted, resulting in one detainee suffering an epileptic seizure. (Id. ¶ 18.) Clients report to Las Americas there are others in their dorms sick with what seems like the flu, and who have been denied medical visits. (Id. ¶ 19.) Two clients have asthma and have not received inhalers, and another detainee with bullets in his legs has not been able to obtain pain medication. (Id. ¶¶ 18-21.) Deportation Officers have informed all but one Las Americas clients that ICE will not consider their parole applications, because they were formerly placed in Migrant Protection Protocols ("MPP"), even though such individuals are eligible and similarly situated clients have obtained parole before. (Id. ¶ 23.)

l. Houston Contract Detention Facility (Houston, Texas)

A detainee at this facility declares that as of March 24, 2020, he did not receive formal information about COVID-19 beyond informational flyers, and observed no increase in cleaning supplies to support additional handwashing. (Sanchez Decl. ¶ 7.) Detainees with cleaning assignments had to mop and sweep without gloves or protective equipment, and guards did not wear gloves or masks. (Id. ¶ 7.) Social distancing in the 40-person open dorm with bunk beds

[18] ICE Guidance on Covid-19, https://www.ice.gov/coronavirus.

four feet apart was not possible. (Id. ¶ 10.) The week prior, new transferees from Otay Mesa were added to the facility. (Id. ¶ 11.) As of April 20, 2020, one ICE employee tested positive at this facility.

m. South Texas ICE Processing Center (Pearsall, Texas)

On March 17, 2020, six detainees reported they had not received information about COVID-19 from the facility. (Steglich Decl. ¶ 6.) Detainees did not know what precautionary measures they should be taking, and no protective gear was available. (Id.) New arrivals continued to come to the facility, without information as whether they had been screened. (Id. ¶ 7.) None of the detainees reported temperature checks. (Id.) Court rooms at the facility were functioning as normal, with judges, attorneys, court staff, and respondents in close proximity. (Id. ¶ 10.) Respondents were held in a crowded, closed cells before and after their hearings. (Id. ¶ 11.)

n. Other Facilities

Plaintiffs also provide declarations from legal service providers about the response to COVID-19 at immigration detention facilities in their region. An immigration legal services provider covering New Jersey facilities with COVID-19 cases reports that transferees continue to arrive in housing units where people exhibited symptoms of the virus. (Saenz Decl. ¶¶ 7-9.) At Bergen County Jail, clients are locked down in close quarters with their cellmates for all but a few hours a day, have no recreation or phone access, and must use toilets that cannot be flushed regularly. (Id. ¶ 13.) The conditions at Hudson County Jail in Kearny have been similar. (Id.) The service provider, New York Immigrant Family Unity Project, submitted release requests to ICE for 16 particularly vulnerable people, but ICE had not answered as of March 23, 2020. (Id. ¶ 15.)

The National Immigrant Justice Center ("NIJC") covers the following facilities: McHenry County Jail in Woodstock, Illinois; Jerome Combs Detention Center in Kankakee, Illinois; Boone County Jail in Burlington, Kentucky; Clay County Detention Center in Brazil, Indiana; Kenosha County Detention Center in Kenosha, Wisconsin; Pulaski County Detention Center in Ullin, Illinois; Dodge County Detention Center in Juneau, Wisconsin; Otay Mesa Detention Center in San Diego California; Cibola County Correctional Center in Milan, New Mexico; and South Texas Detention Complex in Pearsall, Texas. (Zwick Decl. ¶¶ 3-4.) NIJC notes that "[m]ost clients reported that they received no information whatsoever from ICE or facility staff, much less medical staff, about the virus, and were learning what they knew almost exclusively from watching television." NIJC clients reported lack of access to soap, water, hand sanitizer, disinfectants, or other necessary supplies. (Id. ¶¶ 15-25.)

Another organization, Friends of Miami-Dade Detainees ("FOMDD"), provided anecdotes regarding Krome Service Processing Center in Miami, Florida; Broward Transitional Center in Pompano Beach, Florida, and Glades County Jail in Moore Haven Florida. (Conlin Decl. ¶ 2.) FOMDD has not been allowed to bring cleaning supplies, masks, gloves, or hand

Defendants next argue that a finding of impracticability of joinder is barred by the fact that two Named Plaintiffs have sought and obtained release, and "scores if not hundreds" of ICE detainees have sought release across the country. (Class Cert. Opp'n at 12.) Defendants fail to articulate why this fact is relevant to the impracticability inquiry. If anything it tends to show the turmoil, expense, and difficulty caused by a piecemeal approach. Moreover, Plaintiffs' Motions seek a centralized ICE process of COVID-19 harm reduction for the most at-risk individuals, not release on bond. It would be inconvenient and difficult, if not impossible, for detainees to obtain timely relief by filing conditions of confinement suits for each detention facility or unit in the country. Given the many obstacles to accessing counsel during the COVID-19 pandemic, the Court is concerned that many putative class members would not be able to proceed on their own, a fact which further highlights the impracticability of joinder.

2. Commonality

The commonality requirement is satisfied when plaintiffs assert claims that "depend upon a common contention . . . capable of classwide resolution—which means that determination

The proposed class representatives and class counsel can adequately represent the class. The named Plaintiffs establish their willingness to work with class counsel to effectively represent the interests of the class as a whole. (Fraihat Decl., ¶¶ 12-14; Sudney Decl., ¶¶ 15-17; Sanchez Decl., ¶¶ 21-23; Hernandez Decl. ¶¶ 9-10; Munoz Decl. ¶¶ 13-14.) Plaintiffs' counsel,

a. Standing

Defendants argue that Plaintiffs lack Article III standing,[23] and cannot therefore succeed on any of their claims. (PI Opp'n at 14-15.) Defendants do not raise concerns about whether the harm alleged can be fairly traced to them. Instead they argue narrowly that the asserted harm is speculative and not redressable, because no COVID-19 cases have been identified in Plaintiffs' facilities. That is no longer true. Seven detainees at Stewart Detention Center in Lumpkin Georgia, where Martinez is held, have tested positive for COVID-19, and thirty more are suspected to have the disease.[24] Even if no detainee or staff member had tested positive, for reasons described in the irreparable harm section below (Part III.C.2), the Court rejects the contention that the risk of COVID-19 is overly speculative.[25]

b. Medical Indifference

The standard for medical indifference in violation of the Fifth Amendment was recently articulated in a case involving pretrial detainees, Gordon v. County of Orange, 888 F.3d 1118 (9th Cir. 2018). The elements of a medical indifference claim by pretrial detainees are:

> (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—

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[23] "Constitutional standing concerns whether the plaintiff's personal stake in the lawsuit is sufficient to make out a concrete 'case' or 'controversy' to which the federal judicial power may extend under Article III, § 2." Pershing Park Villas Homeowners Ass'n v. United Pacific Ins. Co., 219 F.3d 895 (9th Cir. 2000). "[T]he irreducible constitutional minimum of standing" is comprised of three elements: (1) an injury-in-fact; (2) a causal connection between the injury and challenged conduct such that the injury is "fairly traceable" to the challenged action; and (3) it must be "likely," not merely "speculative" that the injury can be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). The injury-in-fact must

making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries.

888 F.3d at 1125. "With respect to the third element, the defendant's conduct must be objectively unreasonable, a test that will necessarily 'turn[ ] on the facts and circumstances of each particular case.'" Id. (quoting Castro v. Cty. of Los Angeles, 833 F.3d 1060, 1070-71 (9th Cir. 2016)). Objective unreasonableness is "more than negligence but less than subjective intent—something akin to reckless disregard." Id.

Plaintiffs are likely to succeed on the merits of their medical indifference claim. The Court analyzes each element below.

i. Intentional Decision

A failure to act with respect to a known condition of confinement may constitute an intentional decision. See Castro v. Cty. of Los Angeles, 833 F.3d 1060 (9th Cir. 2016) (permitting a failure-to-protect due process claim under 42 U.S.C. § 1983 where officers knew of the risk); Flentoil v. Santa Clara Cty. Dep't of Corr., 2020 WL 571025, at *7 (N.D. Cal. Feb. 5, 2020) (refusal to provide medication). Some courts have found that where the defendant did not have time to act, however, there is not an intentional decision. Pajas v. Cty. of Monterey, 2018 WL 5819674, at *8 (N.D. Cal. Nov. 5, 2018) (finding no jury could find the sheriff acted intentionally towards a condition of confinement by his "failure to revamp jail policies and procedures," because he had just taken office less than three weeks earlier).

Defendants made an intentional decision to promulgate only non-binding guidance for the first month of the pandemic, despite some knowledge of the risk posed by COVID-19. The March 6, March 27, and April 4, 2020 ICE guidance documents illustrate Defendants' awareness

iv. Causation

Defendants' action, or inaction, has caused harm to the Subclasses. First, Defendants exercise control over the size of the detainee population as a whole, and thus determine one of the most important factors in the spread of disease: the density of the detained population.[31] Defendants also discretion to release individuals, including those who are "mandatorily detained" and to use alternatives to detention to achieve governmental objectives. (Jordan Decl., Ex. A.) Across facilities, it is ICE—not the facility—that decides whether an individual may be released.[32]

Next, as Defendants' own declarations attest, (Vicks Decl. Exs. 10-13), ICE purports to exercise oversight and monitoring powers at contract detention facilities, and to correct any observed deficiencies. Defendants do not dispute that they have the authority to mandate compliance, but a month into the pandemic merely "recommended" compliance. As the exhaustive list of facility conditions in the fact section above illustrates, most facilities had significant compliance gaps even in mid to late March 2020, despite the fact that ICE issued guidance on March 6, 2020. As a result, the dangerous conditions to which detainees are subjected can be laid at Defendants' doorstep. In sum, Plaintiffs are likely to succeed on their medical indifference claim.

c. Punitive Conditions of Confinement

Plaintiffs are also likely to succeed on their claim of punitive conditions of confinement. If a civil detainee is not afforded "more considerate" treatment than that available in a criminal pretrial facility, this creates a rebuttable presumption of punitiveness, which defendants may

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found the subjective component to be satisfied because "there is no dispute that Respondents were and are subjectively aware of the risk that COVID-19 poses to both healthy and high-risk individuals" and "evidence supports the conclusion that as of the time of the filing . . . Respondents were disregarding the risk." Coreas v. Bounds, Case No. 8:20-cv-00780 (D. Md. Apr. 4, 2020), ECF No. 56. A similar analysis could support a finding of the subjective prong in this case, were that necessary.

[31] Notably, ICE could reduce the detained population by about half, simply by releasing detainees with no prior convictions and no pending charges, (Seaborn Decl. Ex. F), but it has not elected to do so. This would not require individualized determinations, could be achieved quickly, and would provide significant protection to the Subclass members who remain in detention.

[32] Perhaps contract facilities could refuse to maintain dangerous population levels during the pandemic. However, the Court is unaware of a facility that has done so, and finds facilities are unlikely to take independent or decisive action given the economic imperative to maintaining full capacity and the contractual obligation to make a certain number of beds available for ICE detainees.

counter by offering legitimate, non-punitive justifications for the restrictions. Jones v. Blanas, 393 F.3d 918, 934 (9th Cir. 2004) (citing Youngberg v. Romeo, 457 U.S. 307, 321-22 (1982)). Restrictions are also presumptively punitive where they are "employed to achieve objectives that could be accomplished in so many alternative and less harsh methods." Id. (citing Hallstrom v. City of Garden City, 991 F.2d 1473, 1484 (9th Cir. 1993)).

During a pandemic such as this, it is likely punitive for a civil detention administrator to fail to mandate compliance with widely accepted hygiene, protective equipment, and distancing measures until the peak of the pandemic, and to fail to take similar systemwide actions as jails and prisons. Here, the protective actions taken by comparable prison and jail administrators have been as favorable or more favorable than Defendants'. For example, the federal Bureau of Prisons ("BOP") has issued a more decisive and urgent call to action. (Reply at 10-11; Jordan Declaration, Ex. D, Memorandum from Att'y Gen. William Bar to Director of BOP (April 3, 2020).) The Attorney General directed BOP to prioritize the use of home confinement, noting "[w]e have to move with dispatch . . . to move vulnerable inmates out of these institutions." Id. at 1. The Memorandum commands the Director of BOP to "IMMEDIATELY MAXIMIZE" appropriate transfers to home confinement, and goes so far as to authorize transfer to home confinement where electronic monitoring is not available. Id. at 1-2. In contrast, the Docket Review Guidelines ask FODs to "please" make individualized determinations as to release, and arguably fails to communicate the same sense of urgency or concern. To the Court's knowledge, there is still no requirement that FODs take such action.

Defendants only weakly argue a legitimate, non-punitive justification for their month-long failure to meaningfully track medical vulnerabilities and to issue more than proposals. The legitimate purpose advanced by immigration detention is to secure attendance at hearings and to ensure the safety of the community. See Zadvydas v. Davis, 533 U.S. 678, 699 (2001). However, attendance at hearings cannot be secured reliably when the detainee has, is at risk of having, or is at risk of infecting court staff with a deadly infectious disease with no known cure. Participation in immigration proceedings is not possible for those who are sick or dying, and is impossible for those who are dead. Another purpose of detention, public safety, is not advanced by delay. Plaintiffs establish that public safety as a whole is seriously diminished by facility outbreaks, which further tax community health resources. (Meyers Decl.; Venters Decl.) As a result, Defendants' inactions are likely "arbitrary or purposeless," and are excessive given the nature and purpose civil detention. Bell v. Wolfish, 441 U.S. 520, 539 (1979).

d. Section 504 of the Rehab Act

Plaintiffs are also likely to succeed on their Section 504 claim. To bring a Section 504 claim, a plaintiff must show that "(1) he is an individual with a disability; (2) he is otherwise qualified to receive the benefit; (3) he was denied the benefits of the program solely by reason of his disability; and (4) the program receives federal financial assistance." Updike v. Multnomah Cty., 870 F.3d 939, 949 (9th Cir. 2017) (quoting Duvall v. Cty. of Kitsap, 260 F.3d 1124, 1135

acknowledged the importance of tracking medical vulnerabilities and the inadequacy of their existing detainee tracking tools when they ordered facilities to provide that information to them. (Pandemic Response Requirements at 5-7.) As a result of these systemwide failures, Plaintiffs are likely to succeed on their Rehab Act claims, and have met the first requirement for a preliminary injunction.

2. Likelihood of Irreparable Harm

A plaintiff must demonstrate she is likely to suffer irreparable harm in the absence of a preliminary injunction. See Winter, 555 U.S. at 20. The Ninth Circuit cautions that "[s]peculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." Caribbean Marine Servs. v. Baldridge, 844 F.2d 668, 674 (9th Cir. 1988). A plaintiff seeking injunctive relief must demonstrate that "remedies available at law, such as monetary damages, are inadequate to compensate" for the injury. Herb Reed Enters., LLC v. Fla. Entm't Mgmt., 736 F.3d 1239, 1249 (9th Cir. 2013). "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)).

Plaintiffs 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 or month or year." Helling v. McKinney, 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

3. Balance of the Equities and Public Interest

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

The balance of equities and public interest sharply incline in Plaintiffs' favor. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." Melendres, 695 F.3d at 1002 (quotation omitted). Moreover, there can be no public interest in exposing vulnerable persons to increased risks of severe illness and death. "Faced with . . . preventable human suffering, [the Ninth Circuit] ha[s] little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor." Hernandez v. Sessions, 872 F.3d 976, 996 (9th Cir. 2017) (quoting Lopez v. Heckler, 713 F.2d 1432, 1437 (9th Cir. 1983)). Plaintiffs also attach evidence suggesting that a failure to protect the most vulnerable detainees could quickly overwhelm local hospitals with insufficient ICU beads or respirators, diminishing the available health resources for all. (Seaborn Decl., Ex. E at 4.) If a preliminary injunction is entered, however, survival is maximized. (Id.; see also Public Health Amicus at 19-23.)

4. Scope of Relief

The most serious systemic deficiencies noted, and which must be addressed to provide relief to the Subclasses, are as follows: (1) lack of any requirement, to the Court's knowledge, that Field Offices make individualized custody determinations for at risk detainees, as opposed to a mere request that they do so; (2) discrepancy between the risk factors identified in the Subclass definition and the risk factors triggering individualized custody determinations under the Docket Review Guidance; (3) lack of a performance standard for the safe detention of at risk detainees pending custody decisions, or in the event ICE deems detainees ineligible for release; (4) inconstant adherence to ICE detention standards pertinent to COVID-19. In the Conclusion below, the Court orders relief narrowly tailored to resolve these deficiencies.

Defendants ask that the Court limit the scope of injunctive relief by excluding detainees who have filed separate actions. However, the fact that some detainees have started down one avenue should not prevent ICE from exploring more expeditious paths to relief. See Pride v. Correa, 719 F.3d 1130, 1137 (9th Cir. 2013). In addition, some of those individuals have been or will be denied relief, and will still require safe conditions of confinement.

Until this point, the Order has tended to use a systems perspective, weighing public health or other structural factors. The Court therefore pauses to note the possibility of differences in detainee perspective. To proceed in the safest manner, it would also be in the public interest for FODs adhering to the Docket Review Guidance to consider the willingness of

community is flattened by having fewer people detained." (Venters Decl. II ¶ 6.) While this may be true as a general proposition, given the many dangers and uncertainties of the pandemic, involuntary release of the most vulnerable detainees could be counterproductive.

Finally, it is possible that Defendants' actions since the hearing, or actions of which the Court is unaware, have addressed some of the Court's concerns. However, Defendants' halting start to pandemic response does not remove the need for preliminary relief, because Defendants have not argued or shown that delays or non-enforcement of ICE facility-wide policies will cease. McCormack v. Herzog, 788 F.3d 1017, 1025 (9th Cir. 2015) ("an executive action that is not governed by any clear or codified procedures cannot moot a claim").

IV. CONCLUSION

For the above reasons, the Court GRANTS the motions to file amicus briefs. The Court DENIES AS MOOT the ex parte application for leave to file a supplement. The Court GRANTS Plaintiffs' emergency motion to certify subclasses. A separate order defining the Subclasses and Risk Factors, and appointing representatives and class counsel will issue concurrently. The Court further GRANTS Plaintiffs' motion for preliminary injunction as follows:

> Defendants shall provide ICE Field Office Directors with the Risk Factors identified in the Subclass definition;
>
> Defendants shall identify and track all ICE detainees with Risk Factors. Most should be identified within ten days of this Order or within five days of their detention, whichever is later;
>
> Defendants shall make timely custody determinations for detainees with Risk Factors, per the latest Docket Review Guidance. In making their determinations, Defendants should consider the willingness of detainees with Risk Factors to be released, and offer information on post-release planning, which Plaintiffs may assist in providing;
>
> Defendants shall provide necessary training to any staff tasked with identifying detainees with Risk Factors, or delegate that task to trained medical personnel;
>
> The above relief shall extend to detainees with Risk Factors regardless of whether they have submitted requests for bond or parole, have petitioned for habeas relief, have requested other relief, or have had such requests denied;
>
> Defendants shall promptly issue a performance standard or a supplement to their Pandemic Response Requirements ("Performance Standard") defining the minimum acceptable detention conditions for detainees with the Risk Factors, regardless of the statutory authority for their detention, to reduce their risk of COVID-19 infection pending individualized determinations or the end of the pandemic;

Defendants shall monitor and enforce facility-wide compliance with the Pandemic Response Requirements and the Performance Standard.

These measures shall remain in place as long as COVID-19 poses a substantial threat of harm to members of the Subclasses. The parties may apply to modify or terminate the injunction.

IT IS SO ORDERED.