1 51.6 714.TL ( )' ET Q 0 0

Saravia v. Sessions,

I. INTRODUCTION

The COVID-19 pandemic is a public health crisis unprecedented in modern history that has resulted in the infection of hundreds of thousands of people and the deaths of tens of thousands in just a few months. Without immediate and drastic public health measures, it could result in the death of as many as 2.2 million people in the United States alone.

Tens of thousands of people are currently subject to civil immigration detention in the United States. Immigration and Customs Enforcement ("ICE") imprisons them in close quarters in facilities with long track records of egregiously inadequate healthcare documented by the Department of Homeland Security's ("DHS") own Office of Inspector General ("OIG") and multiple other organizations, which ICE has failed to remediate. ICE knows of the acute and imminent threat COVID-19 poses to detained populations; two infectious disease experts retained by DHS itself recently advised that COVID-19 poses an "imminent risk to the health and safety of immigrant detainees, as well as to the public at large, that is a direct consequence of detaining populations in congregate settings."[1] Detained people with certain risk factors—including people who are older, pregnant, or who have underlying medical conditions (enumerated below and hereinafter referred to as "Risk Factors")—are at a heightened risk of serious illness, life-altering complications, and death from COVID-19.

Yet, ICE's response to the COVID-19 is alarmingly inadequate—particularly now that there is now at least one documented positive case of a person in ICE detention. Although ICE has issued some skeletal "guidance" on COVID-19, that guidance is dangerously deficient in numeqh1 1 1 1

ICE's policies and practices do not contemplate identifying persons with Risk Factors, much less taking the significant steps necessary to reduce the risk of c.976097(g2(o)-0.975833(g)-0.975833(i)1845257(t)-15.6733(i)1845242(o)-18.2514(n)16.2942( )

II. FACTS

A. COVID-19 Poses an Extraordinary Risk to People in Detention Centers With Risk Factors.

COVID-19, a disease caused by the novel coronavirus, has reached pandemic status. Almost 400,000 people worldwide have been diagnosed with COVID-19, and over 18,000 people have died as a result.[5] In the United States,

center staff on how to address staffing shortages as the level of medical encounters increase, and as increased staffing becomes necessary to provide infection control measures while transporting patients; (2) fail to include basic infection control measures, including use of masks for anyone with a cough; and (3) do not require social distancing to prevent the spread of infection, including maintaining 6 feet of separation between people, a measure that is impossible to achieve in the limited space available in detention centers. *See generally* Venters Decl. ¶¶ 11-12, 14.

The evidence further establishes that these serious defects are far from anomalous, but rather systemic in nature. Indeed, the attached declarations paint an alarming picture of ICE's inadequate responses to COVID-19 across the entire country, including failures to: test for COVID-19,[19] provide basic and necessary sanitation supplies such as hand sanitizer,[20] check symptoms, provide necessary education ab 'st rcVI19,to pe ainec seonee tnd t

to release detainees with Risk Factors,[33] as well as the recommendations of 3000 medical professionals.[34]

Both ICE and this Court are empowered to release medically vulnerable people during the COVID-19 pandemic. First, ICE has long maintained discretion to release medically vulnerable people from detention so that they may simultaneously adjudicate their removal cases while ensuring that they can seek necessary medical care outside detention.[35] There has been no intervening change of law that prohibits ICE from releasing people.[36]

Second, and crucially, this Court maintains inheren

people with Risk Factors in ICE custody face even worse—and more dangerous—conditions than they would in many jails during the COVID-19 pandemic.

Second, Plaintiffs and the putative subclass also satisfy *Jones*'s alternative test for establishing unconstitutionally punitive conditions, because the "restrictions [imposed on them during the COVID-19 outbreak] are 'employed to achieve objectives that could be accomplished in so many alternative and less harsh methods.'" *See Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1065 (C.D. Cal. 2019) (quoting *Jones*, 393 F.3d at 932). As detailed above, ICE has discretion to release medically vulnerable people during the COVID-19 pandemic.[40]

management classes and discharge services."

conditions that create an even more elevated risk of contracting the virus, which will likely lead to medical isolation or segregation.[44] Because of this, Defendants have a duty under *Olmstead v. L.C. ex rel Zimring,* 527 U.S. 581 (1999) to assess whether this setting is truly appropriate to the subclass members' needs, and if not, take steps to provide them with an alternate placement with less restrictive consequences.

The regulations promulgated pursuant to the ADA (parallel to the Rehabilitation Act) provide that "[a] public entity shall administer services, programs, and activities in the most integrated setting *appropriate to the needs* of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (emphasis added). The Supreme Court held in *Olmstead v. L.C. ex rel Zimring,* that "[u]njustified [institutional] isolation . . . is properly regarded as discrimination based on disability." 527 U.S. 581, 597, 600 (1999). DHS and ICE recognize that they must comply with *Olmstead*. DHS's regulations provide that "[t]he Department shall administer programs and activities in the most integrated setting *appropriate to the needs* of qualified individuals with a disability." 6 C.F.R. § 15.30(d) (emphasis added); *see also ICE National Detention Standards for Non-Dedicated Facilities* at 137 (2019) (Standard 4.7 provides that Facilities are required by the Rehabilitation Act to have an equal opportunity to participate in the facility's programs, services, and activities "in the least restrictive and most integrated setting possible").[45]

The federal agency's duty under *Olmstead* consists of two parts. First, the agency must assess the placement needs of qualified individuals. *Olmstead* makes clear that jurisdictions must provide non-institutional placement "when the State's

[44] Venters Decl. ¶¶ 16-17.

[45] https://www.ice.gov/doclib/detention-standards/2019/nds2019.pdf; ICE, *Performance-Based National Detention Standards 2011*, Standard 4.8 at 344 (rev. 2016), https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf (same).

treatment professionals determine that such placement is appropriate." *Olmstead*, 527 U.S. at 607. Second, the agency must ensure that placement is actually made in the most integrated setting appropriate to those needs.

A covered entity violates *Olmstead*

The same duty to assess the needs of people with disabilities applies here. Because members of the subclass have disabilities and are at heightened risk of isolation during the COVID-19 pandemic as result of those disabilities, Defendants have an affirmative duty under *Olmstead* to assess what setting is appropriate to their needs and to ensure that unnecessary isolation does not take place. As those assessments have not yet occurred, and no alteration has taken place, the subclass's *Olmstead* claim has a high likelihood of success on the merits.

C.

with Risk Factors are at significant risk of serious illness, life-altering complications, and death and will thus suffer irreparable harm absent an injunction.

As noted above, the disability subclass members are also subject to a greater likelihood of contracting the virus; complications and/or death from the virus; and higher morbidity, mortality, and poor health outcomes due to their underlying medical and disability conditions when medical and other care in the facility is taxed by conditions relating to the virus. Meyer Dec. ¶¶ 28, 30, 32; Franco-Paredes Dec. at 6. If any of these risks materializes, subclass members could be subjected to isolation in the extreme,[47] denying them meaningful access to the Defendants' detention programs as result. Such exclusion of people with disabilities from programs or services provided by a covered entity has been found to constitute irreparable injury. *See Hernandez*, 110 F. Supp. 3d at 956-57 (5.15172(t)1.59845( )4Idti03dt .46

2. The Balance of Hardships Tips Decidedly in Plaintiffs' Favor

The balance of equities favors Plaintiffs. Courts "'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (*quoting Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987)). The Ninth Circuit has held that the interest in protecting individuals from physical harm outweighs monetary costs to government entities. *See Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 766 (9th Cir. 2004).

Plaintiffs' interests in preventing exposure to a deadly virus and obtaining adequate health care if exposed or infected is essentially an interest in survival and the preservation of their lives. Further, people with disabilities that place them at heightened risk of infection will continue to be denied meaningful access to programs provided by Defendants if they are sickened or killed by COVID-19.

In sharp contrast to Plaintiffs' hardships, Defendants will merely be required to devise a plan to review people with Risk Factors and release those they cannot adequately care for in light of the spread of COVID-19. Other, safer options are available. These other placements may include placement in the community, which is indisputably among the options legally available to ICE and which has proven successful in the past in ensuring that subject individuals appear in court. Moreover, requiring Defendants to review individual risk factors and release those who they may not adequately protect may result in reducing future costs. Franco-Paredes Decl. at 1 ("the attack rate inside these centers may take exponential proportions consuming significant medical care and financial resources").

3. A Preliminary Injunction is in the Public Interest

Protecting public health by minimizing risk of transmission of COVID-19 is inarguably in the public interest. Immediately implementing measures to protect the health of people with Risk Factors, and releasing those for which such

measures cannot be implemented and who do not pose a danger to the public, protects the health of those people, staff, and the public at large by mitigating or