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Plaintiffs respectfully request the following: (1) issuance of an order requiring Defendants, Immigration and Customs Enforcement, New Orleans Field Office (hereinafter "NOLA ICE" or "Defendants"), to show cause why they should not be held in contempt for contravening the Court's Preliminary Injunction Order, entered on September 5, 2019 (hereinafter "the Court's Order" or "the September 5th Order"); (2) expedited discovery in support of said Motion to Show Cause; and (3) should this Court grant Plaintiffs' Motion to Show Cause, the appointment of a Special Master (hereinafter "Master") to ensure compliance with this Court's September 5th and subsequent, related Orders.

Careful review of data from the Defendants' monthly reports to this Court, yearly parole data for the NOLA ICE Region compiled by the Defendants over that pae M Â d

The evidence before the Court will sufficiently support a finding that Defendants are in contempt of the September 5th Order (*See* Ct. Order ¶ 1-9); and continue to disregard the Parole Directive in violation of the Court's Order. More than eight months have elapsed since this Court issued the September 5th Order, enjoining Defendants from disavowing the Parole Directive and from continuing to imp

Defendants do not offer an explanation for these reportedly low numbers of parole-redetermination adjudications.

In the seven months since the Court's Order has been in effect, NOLA ICE has reportedly granted a mere 13.5 percent of 2,052 parole requests. *See* Ex. 1D. Indeed, Plaintiffs are concerned that the effective grant rate is likely much lower, because at least 17 class members received parole denial letters that were not reflected in Defendants' monthly reports,[5] and upon information and belief, as few as 36 and as many as 300 class members have not received parole determinations at all. *See* Ex. 1D (reflecting 20 pending requests); Huber Decl. at ¶ 2d; RCL Decl. at ¶ 21; LPC Decl. at ¶ 17; KSR Decl. at ¶ 22 (reporting that an ICE officer recently stated, "there are only four of us, 300 of you and everyone has applied for parole"). Moreover, Defendants have not reported parole data on the following facilities within the NOLA ICE region: Tallahatchie County Correctional Facility; Etowah County Detention Center; and the Alexandria Staging Facility. Several class members report blanket denials of their initial parole requests at the Tallahatchie facility since the Court's Order. *See* CLH Decl. at ¶¶ 5-6; DAA Decl. at ¶ 7; YPT Decl.at ¶ 6; YMT Decl. at ¶ 6; MB Decl. ¶¶ 7-8.

Additionally, during parole reviews, NOLA ICE continues to engage in the very practices—including failure to provide parole interviews, failure to ensure language access and denying parole on non-individualized, categorical grounds — that the Court enjoined in its September 5th Order. ECF No. 33 at ¶¶ 4-5. In the face of these facts, the Court sho

Plaintiffs do not move for contempt lightly. Plaintiffs raised many of these ongoing issues with Defendants' counsel on numerous occasions via electronic correspondence and requested assistance in getting Defendants to address them. *See generally* Exs. 32-38.[6] Plaintiffs' concerns have been met with reluctance or silence. *Id*. Plaintiffs waited eight months since the Court's Order was issued in the hopes that the parole practices and grant rate by NOLA ICE would substantively improve. They have not. Accordingly, Plaintiffs file the instant motion for contempt.

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

The Parole Directive provides that, absent exceptional circumstances, ICE should release asylum-seekers who establish their identity and show that they are neither a flight risk nor a danger to the community. On May 30, 2019, Plaintiffs filed a complaint for injunctive and declaratory relief before this Court against NOLA ICE for their failure to

Mot., ECF No. 15, (Jun. 28, 2019). On July 18, 2019, Plaintiffs filed a motion for preliminary injunction on behalf of its class. Prelim. Inj. Mot., ECF No. 22, (Jul. 18, 2019). On September 5, 2019, this Court issued a memorandum opinion and order granting Plaintiffs' motions for class certification and preliminary injunction against Defendants. Prelim. Inj. Mem. Op., ECF No. 32 (Sep. 5, 2019); *see also* Prelim. Inj. Order, ECF No. 33 (Sep. 5, 2019).

A. The Preliminary Injunction Order

The Court entered a class-wide preliminary injunction on September 5, 2019 based on the unjustified, dramatic drop from historically consistent parole-grant rates that inexplicably occurred after 2016 within NOLA ICE, and on additional evidence reflecting violations of the Parole Directive. Prelim. Inj. Order, ECF No. 33 (Sep. 5, 2019). Specifically, the Court enjoined Defendants from denying parole to any class member without an i

compliance with [its] procedures."[8] The Directive specifically instructs that ICE "shall maintain national and local statistics on parole determinations and have quality assurance process in place to monitor parole decision-making."[9] Yet, careful analysis outlined *infra* illustrates that Defendants are violating this mandate.

Additionally, Defendants have failed to comply with the Court's Order to adhere to the Parole Directive's "substantive and procedural requirements"[10] as follows:

1. Procedural Violations

i. Per the Parole Directive, ICE must provide arriving asylum-seekers with a Parole Advisal and Scheduling Notification ("Parole Advisal"). The contents therein shall be explained in a language the asylum seeker understands, and if necessary, through an interpreter. Parole Directive §§ 6.1, 8.1.

Since the Court's September 5th order and as recently as February 2020, Defendants have failed to ensure that class members are consistently provided with a Parole Advisal and rarely, if ever, do officers ensure that an interpreter or translation is provided to class members that are not English

unreasonably short timelines to submit supporting documents. *Id*. *See also* Ex. 26; Ex. 27 (Copies of Parole Advisals with Two and One-Day Deadlines to Submit Supporting Documents). At some facilities under Defendant's purview, class members report officers refusing to

iii. ICE officers must interview arriving asylum seekers to assess their eligibility for parole, no later than seven days after a positive credible fear finding. Parole Directive § 8.2.

Class members report not receiving parole interviews. *See* YMT Decl. at ¶¶ 6, 9-10; YMT Decl. at ¶ 6; MB Decl. at ¶¶ 6-8, DAA at ¶ 7; YCF Decl. at ¶¶ 4-6; KSR Decl. at ¶ 7; CLH Decl. at ¶ 6; Fonte Decl. at ¶ 2b; Giardina Decl. at ¶ 1; Crawford Decl. at ¶ 3a. Since the Court's September injunction one advocate "worked on 25 parole requests for individuals detained in Louisiana" and states that "23 of these 25 clients report not being given a parole interview after their parole application was submitted." Huber Decl. at ¶ 2a. One class member reports that he never received a parole interview of any kind despite his numerous requests over the course of ten months. *See* APE Decl. generally.[11]

Others report receiving an English-language questionnaire without translation or interpretation assistance in lieu of an interview. *See* YCF Decl. at ¶¶ 8, 12; MPI Decl. at ¶ 10; KSR Decl. at ¶ 18. One class member reports that a parole-denial letter issued to him wrongfully stated he had received a parole interview when

response I've gotten from anyone here in Jena." DAA Decl. at ¶ 15. Similarly, in April 2020, one class member detained at the Winn Correctional Center shared: "The last time I submitted a parole interview form and packet was on March 10, 2020, to my then-assigned DO, Officer Paredes. However, on March 12, 2020, DO Paredes and the other DOs from that time period left, and new ones arrived. Eventually, I was able to ask my newly assigned DO about the status of my previously submitted parole request. He informed me that it was denied … he never provided me the denial letter.

However, after the DOs shifted, the new DO informed me that he did not see any of my documents and had no idea where my parole packet was. I had to begin the process of collecting documents from within this jail all over again, including original notarized letters." RCL Decl. at ¶ 15.

2. Substantive Violations

i. "The applicable regulations describe five categories of [asylum-seekers] who may meet the parole standards based on a case-by-case determination, provided they do not present a flight risk or security risk" including individuals "who have serious medical conditions, where continued detention would not be appropriate" and those "whose continued detention is not in the public interest." Parole Directive § 4.3

Class members and their legal representatives report that NOLA ICE is not properly weighing "serious medical conditions" and "public interest" when reviewing parole requests, particularly in light of the COVID-19 pandemic and the serious health risks it presents to those detained in the NOLA ICE region. *See generally* Isbister Decl.; *see also* Giardina Decl. at ¶ 5; KSR Decl. at ¶¶ 22-23; MPI Decl. at ¶ 11; DAA Decl. at ¶¶ 8, 16-18; YPT Decl. at ¶ 19; LPC Decl. at ¶ 22. Mr. Giardina represents at least seven class members who suffer chronic medical conditions that make them particularly vulnerable to grave illness or death should they contract COVID-19, and whom NOLA ICE "continues to deny access to parole without explaining what makes them a flight risk or a danger to the community." *See* Giardina Decl. at ¶ 5.

ii. "In order to be considered for release" an asylum-seeker "must present sufficient evidence demonstrating his or her likelihood of appearing when required." The Parole Directive instructs that factors appropriate for consideration of this requirement include "community and family ties, employment history, manner of entry and length of residence in the United States, stability of residence in the United States, record of appearance for prior court hearings and compliance with past reporting requirements, prior immigration and criminal history, ability to post bond, property ownership, and possible relief or protection from removal available" to the asylum-seeker. "Officers should exercise their discretion to determine what reasonable assurances … are warranted on a case-by-case basis to mitigate flight risk." ICE officers are also encouraged to "request that parole applicants provide any supplementary

information that would aid [them] in reaching a decision." Parole Directive §§ 8.3 (2), 8.4

Legal advocates for class members report submitting thorough parole requests with extensive supplementary documentation and receiving boilerplate denial letters in response that suggest the evidence submitted was not taken into consideration by NOLA ICE. *See* Fonte Decl. at ¶ 2d; Giardina Decl. at ¶ 5; Crawford Decl. at ¶¶ 3d-3h; Isbister Decl. at ¶ 9; Huber Decl. at ¶ 3; *see also* Kelley Decl. and attached request; Arsolino Decl. and attached request. Class members broadly report that NOLA ICE continuously refuses to provide individualized reasons for determining that they are flight risks and that officers fail to properly consider extensive evidence they submit to the contrary. *See* MPI Decl. at ¶ 12; YCF Decl. at ¶ 13; YPT Decl. at ¶¶ 10-19; LPC Decl. at ¶¶ 12-13; MB Decl. at ¶18; RCL Decl. at ¶ 17; YMT Decl. at ¶¶ 7, 10.

Class members also express frustration at refusals to provide clarity on what supporting documents or underlying factors would sufficiently satisfy NOLA ICE that they are not a flight risk. For example, one class member detained at the Winn Correctional Center shares, "[m]y proposed sponsors are my brother, a Lawful Permanent Resident, and his wife, a US citizen. They are waiting to receive me in their home in Arizona." RCL Decl. at ¶ 10. RCL submitted letters of support, affidavits from each of his proposed sponsors, copies of their identity documents evidencing their immigration status, copies of their tax returns evidencing their ability to financially provide for him, and proof of their fixed residential address where he would live once released. *Id* at ¶ 20. Additionally, RCL notes that ICE failed to take into consideration that he would be eligible for Lawful Permanent Residence one year from his release on parole. *Id.*

KSR arrived as the U.S. border with her husband, driven by the same fear of persecution by Cuban authorities because of their political opinions. KSR Decl. at ¶¶ 2-4. However, they were separated, and he was detained in the custody of a different ICE field office. They had the same

proposed sponsor, her U.S. citizen cousin residing in Tampa, Florida. *Id* at ¶¶ 9-10. Yet, KSR's husband was released months ago, while she continues to languish in the South Louisiana ICE Processing Center, despite submitting multiple requests with extensive evidence, including her cousin's 2018 tax returns, evidence of his U.S. citizenship, copies of his bills, documentation of her clean criminal history, and additional letters of support from family and friends with lawful immigration status. *Id* at ¶¶ 6, 10. As a result of her prolonged detention, KSR contracted H1N1 influenza in March 2020, developed chronic hypertension in April 2020, and has now been waiting approximately two months for a decision on her most recent request for parole. *Id* at ¶¶ 22-24.

C. A Careful Examination of Data Provided by Defendants Reveals Continued Noncompliance with the Preliminary Injunction Order and Subsequent Orders

The data sources provided by Defendants and relied on by Plaintiffs *infra* are summarized below:

1. As required by the Court, Defendants filed monthly data reports reflecting the parole grant rate for NOLA ICE. *See* Minute Order, ECF No. 35 (Oct. 7, 2019). This data provides parole decisions from September 2019 to April 17, 2020, by the NOLA ICE Field Office for: 1) individuals seeking redetermination of their parole decision; and 2) individuals seeking a first-time parole decision from NOLA ICE.

2. Data received through Freedom of Information requests by the American Civil Liberties Union and relied upon by this Court in issuing the Preliminary Injunction. This data summarizes parole decisions by the ICE Field Offices for arriving aliens found to have a credible fear of persecution from January 2016 to February 2019.[13]

i. Available Reports Show that Starting in February 2017 There Was a Dramatic Jump in Denials Relative to Grants that Continues Today

The number of parole grants was typically *three times* the number of parole denials in all of 2016 and January 2017. (emphasis added) *See* Ex. 1F. In February 2017, this practice reversed, and the number of parole denials has vastly outnumbered the number of parole grants since. The cause of this sudden reversal is unclear. Plaintiffs are not aware of any changes in formal policies,

[13] *See* Beiers Decl. at ¶3, ECF No. 22-3.

described below, NOLA ICE's reasons for denial, post-injunction, appear to be indiscriminate and are inconsistent with the mix of NOLA ICE's reasons for denial pre-injunction. As a result, NOLA ICE's reasons for denial are evidently not based on the individual facts and circumstances specific to each person seeking parole.

ii. Use of Flight Risk as a Reason for Denial Has Inexplicably Become Extensive

From January 13, 2016 to January 31, 2019, NOLA ICE denied 248 parole applications out of 437 parole determinations. *See* Ex. 1J. In data received through Freedom of Information requests by the American Civil Liberties Union and relied upon by this Court in issuing the Preliminary Injunction, ICE provided reasons for such denials. The basis for parole denials reflected in the data are consistent with the Parole Directive and include: 1) inability to establish identity; 2) pose a flight risk; 3) pose a danger to the community; 4) exceptional or overriding factors; and 5) no justification for redetermination.[15] In some instances in 2018, the data indicated more than one reason for denial.[16] *See* Ex. 1J.

In 2016, ICE denied 15.3 percent of its parole requests due to flight risk (35 out of 229 determinations). By comparison, the use of flight risk rose after 2016. From January 1, 2017 to January 31, 2019, 84 of the 208 determinations, or 40 percent, were denied due to "Flight Risk." During the entire pre-injunction period starting in 2016, the highest number of denials based on flight risk by NOLA ICE occurred in 2018. During 2018, 73 out of 127 determinations, or 57.5 percent, were based on NOLA ICE's determination of flight risk. *See* Exs. 1J, 1K. The use of the flight risk determination increased again post-injunction with substantially higher denials due to

[15] Parole Directive at § 8.3.
[16] For example, row 9 in the "NOL" tab in the spreadsheet titled "redacted CredFearReport 072018-tf.xlsm" shows a parole denial based on flight risk (2), danger to the community (3), and additional factors (4).

flight risk compared to the already elevated rates shown in 2017–2019. *See* Exs. 1L, 1M. From September 5, 2019 through April 16, 2020, NOLA ICE considered 1,393 requests for parole applicants seeking redetermination and found that 1,132 were determined to be flight risks (81%).[17]

based on the same evidence submitted in their own parole requests. *See* KSR Decl. at ¶¶ 9-10; MPI Decl. at ¶ 10. Prior to her transfer to the Louisiana region, KSR was detained at the West Texas Detention Facility where "[she] witnessed that ICE officers took time to explain the parole process to people and to provide a thorough parole interview … [and that] women who were denied parole were expressly told what evidence would be helpful to ICE in making a positive determination in their parole request." KSR Decl. at ¶ 5.

iii. Data Provided by Defendants' Shows Inconsistencies and Deficiencies in Record-Keeping and Reporting

NOLA ICE manually prepares parole determination reports for redetermination decisions and uses a computer-generated report for first-time parole decisions. *See* ECF No. 71, Metoyer Declaration at ¶¶ 4-6. Reports for first-time parole decisions do not indicate reasons for denial, even though ICE must provide a reason for denial in every parole consideration.[20] Reports for first-time parole decisions do not identify the facilities where asylum-seekers are detained. Relatedly, class members are often transferred, and the ICE officers assigned to review their custody are frequently shifted. *See generally* Exs. 2-12. Additionally, Defendants fail to provide submission dates for parole redetermination requests, making it impossible to determine if they are in full compliance with the Parole Directive, and therefore, the Court's Order.[21]

Data provided by NOLA ICE in compliance with this Court's Oct. 7 Minute Order, reveal inconsistencies and deficiencies in its record-keeping and reporting. These inconsistencies and deficiencies should not be present if NOLA ICE followed the processes laid out in the Parole Directive.[22] These errors also make verifying compliance with the Parole Directive more

[20] Parole Directive at § 8.2.
[21] *See* ECF Nos. 42, 44, 56, 58, 59 and 71.
[22] Parole Directive § 8.11.

challenging. In terms of record-keeping and reporting, NOLA ICE data contain multiple errors and deficiencies. For example, no parole-request date is recorded in 10 first-time parole decisions. *See*

last determination. *See* Ex. 1E. The data for redetermination end on March 15, 2020, which means asylum seekers likely remained in ICE custody additional days beyond the 190-day average. For example, one class member seeking redetermination has been in ICE custody for 374 days as of March 13, 2020, according to ICE's reported data.[25]

Since the Court's Order, NOLA IC

lawful Order). Once a court issues an injunction, those persons subject to it must obey terms of the order, as long as the injunction remains in effect: "`[a] court has the 'inherent power to protect [its] integrity and prevent abuses of the judicial process' by holding parties in contempt and ordering sanctions for violations of the court's orders." *Cobell v. Babbitt*, 37 F.Supp. 2d 6, 9 (D.D.C. 1999) (citing *Webb v. District of Columbia,* 146 F.3d 964, 971 (D.C.Cir.1998)). This power to enforce, or civil contempt power, "is essential to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice." *United States v. Latney's Funeral Home, Inc.*, 41 F.Supp.3d 24, 29 (D.C.Cir. 2014) (citing *Broderick v. Donaldson,* 437 F.3d 1226, 1234 (D.C.Cir.2006)).

When a party invokes a court's civil contempt power by alleging a violation of a court order, the party moving for a civil contempt finding "bears the initial burden of demonstrating by clear and convincing evidence that: (1) there was a clear and unambiguous court order in place; (2) that order required certain conduct by Defendants; and (3) Defendants failed to comply with that order." *Latney's Funeral Home, Inc.*, 41 F. Supp. 3d at 30 (citing *Int'l Painters & Allied Trades*

IV. ARGUMENT

A. Defendants' Noncompliance Satisfies the Legal Standard for Civil Contempt, Enabling the Court to Exercise its Inherent Power to Enforce its Order.

As parties to the original action, the Plaintiffs may invoke the Court's power by initiating a proceeding for civil contempt. *See Latneys' Funeral Home*, 41 F.Supp.3d at 30*; see also Gompers v. Bucks Stove & Range Co*., 221 U.S. 418, 444-45 (1911). Plaintiffs have demonstrated by clear and convincing evidence that they have met their initial burden of satisfying the three factors for civil contempt: 1) there was a clear and unambiguous court order issued by this Court on September 5, 2019; 2) the Court's Order required Defendants to take specific steps to comply with the Order and the Parole Directive; and 3) Defendants have failed to comply with both. *Latney's Funeral Home*

The Court's Order is valid, clear, unambiguous and meets the Fed. R. Civ. P. 65(d) requirement that injunctions describe in reasonable detail the acts sought to be restrained. *See Schmidt v. Lessard,* 414 U.S. 473, 475 (1974); *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 461 (7th Cir. 1993); *Stotler*, 870 F.2d at 1163. The specificity provisions of Rule 65(d) are not mere technical requirements. Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is enjoined.

In the present case, this Court's Order details with particularity the precise nature of the conduct it prohibits, stating in plain language:

"Defendants are hereby ENJOINED from denying parole to any provisional class members absent an individualized determination, through the parole process, that such provisional class member presents a flight risk or a danger to the community." (*See* Ct. Order ¶ 3). "The individualized determinations of flight risk and danger to the community referenced above shall be based on the specific facts of each provisional class member's case. Such determinations, moreover, shall not be based on categorical criteria applicable to all provisional class members." (*See* Ct. Order ¶ 4). "Defendants shall provide provisional class members with parole determinations that conform to all of the substantive and procedural requirements of U.S. Immigration and Customs Enforc41 nal

enforceable by the district court's power of contempt.") (citing

The Court's Order further required Defendants to abide by the procedural and substantive requirements of the Parole Directive. *Id* at ¶ 5. These extensive, detailed requirements are outlined *supra* note II.B. The Court's Order and the Parole Directive are unambiguous regarding the specific actions required by Defendants to comply with both. Unfortunately for the Plaintiffs, though more than eight months have elapsed since the Court's Order, Defendants com cr

which characterized the NOLA ICE region prior to January 2017. In fact, Plaintiffs are concerned that the effective grant rate is likely much lower. *Supra* note I.[35]

More troubling is the fact that Defendants' April monthly report shows a downward trend in parole decisions and grants. *See* Ex. 1B. According to the last two monthly reports, fewer than ten and as few as zero parole-redetermination adjudications occurred at several facilities. *See* Ex. 1C.

Class members also report not receiving parole interviews, a violation of § 8.2 of the Parole Directive. *Supra* note II.B.1.iii. Defendants also fail to provide language assistance to class members seeking parole. *Id.* In some cases, Defendants' failure was outcome determinative. *Id*. Yet, Defendants' counsel has represented to the Court, that Defendants "find unreasonable and do not consider their obligation the provision of parole advisals in a language understood by arriving aliens." Ex. 28 at 17-20.

Defendants are not in compliance with notification requirements of the Parole Directive, despite the Court's Order. *See Parole Directive* §§ 6.5, 6.6, 8.2. Plaintiffs present ample evidence of Defendants' rampant refusal to provide notice of parole decisions. *Supra* note II.B.1.iv. Defendants also flout the Parole Directive's seven-day time frame by which to issue a determination. *Id*. Finally, the evidence shows that Defendants, in many cases, do not adhere to the Parole Directive's required record-keeping practices regarding documents that class members submit in support of their parole request. *See* § 8.10. Several class members report NOLA ICE officials refusing to accept or claiming to have never received parole documents in support of an application. LPC Decl. at ¶ 16; RCL Decl. at ¶ 15.

iv. Defendants are unlikely to demonstrate justifiable reasons for their failure to comply with the Court's Order.

Plaintiffs have presented a plethora of evidence supporting the conclusion that Defendants have defied the Court's Order and continue to disregard the requirements of the Parole Directive. The burden now falls upon Defendants to show that they have "taken all reasonable steps within [their] power to comply" with the Court's Order: "[o]nce the court determines that the movant has made the above three-part showing, the burden shifts to the defendant to justify the noncompliance." *Int'l Painters & Allied Trades Indus. Pension Fund,* 736 F.Supp.2d at 38, 40 (requiring "adequate detailed proof" of good faith substantial compliance).

requests, making it impossible to determine whether they are in full compliance with the Parole Directive, and therefore, the Court's Order.[37]

Further, Defendants' monthly reports demonstrate that class members are frequently subjected to prolonged detention, at least in part due to NOLA ICE's failure to properly adjudicate their requests for release on parole. *Supra* note II.C.iii. Defendants' errors and omissions extend to the Parole-related documents that it issues to class members. For example, Defendants have issued letters meant for one class member to another. *See* Ex. 21; Ex. 24D.

While NOLA ICE is likely aware of these omissions, inaccuracies, and other acts of noncompliance, it does nothing to correct these errors. For example, Plaintiffs have raised the concerns regarding the reliability and accuracy of the court-ordered monthly reports to no avail. *See generally* Exs. 32-38. The Court need not find that Defendants willfully violated the order. *Latney's Funeral Home*

ordered obligations further demonstrates an overall inability to comply with the Injunction," and as such, justifies a finding of contempt. *Latney's Funeral Home, Inc.*, 41 F. Supp. 3d at 35.

B. Plaintiffs have presented a quantum of proof adequate to demonstrate to a reasonable certainty that a violation occurred, therefore satisfying the clear and convincing standard of proof.

Plaintiffs have established by a quantum of proof that Defendants continue to defy ¶¶ 3-5 of the Court's Order: "'In the context of civil contempt, the clear and convincing standard requires a quantum of proof adequate to demonstrate a reasonable certainty that a violation occurred.'" *Latney's Funeral Home*, 41 F.Supp.3d at 30 (quoting *Phillips v. Mabus,* 894 F.Supp.2d 71, 91 (D.D.C. 2012).

A. Plaintiffs merit expedited discovery as their requests pass both the "Notaro" and "Reasonableness" tests, meriting a grant of the discovery, and Defendants should therefore be required to respond to such requests in a timely manner.

The Court can inquire into compliance by requiring responses to expedited discovery. Fed. R. Civ. P. Rule 26. Two approaches have been adopted by this Court to determine appropriateness of expedited discovery: 1) the *Notaro v. Koch*, 95 F.R.D. 403 (S.D.N.Y. 1982) test, and 2) the "reasonableness test." *In re Fannie Mae Derivative Lit*., 227 F.R.D. 142 (D.D.C. Feb. 23, 2005). Expedited discovery will address Defendants' noncompliance by providing information pre-requisite to identify problems, solutions, and relief; prevent further irreparable harm to Plaintiffs; and establish a road to compliance. Plaintiffs will seek discovery on: 1) methods for collection of applicant data (recording systems tracking collection and status of applications, technical functions of systems, personnel managing such systems); and 2) Implementation of required procedures and safeguards, documentation regarding denial, and relevant depositions.

1) Plaintiffs' request for expedited discovery satisfies the *Notaro* test, indicating that Plaintiffs merit a grant of their request.

In *Notaro v. Koch*

worried about that." *Id*. As this Court noted when issuing its Order, "detention irreparably harms individuals 'in myriad ways,' and the injuries at stake there and here are 'beyond remediation.'" *Mons*, No. 19-1593 (JEB), 2019 WL 4225322, 23 (D.D.C. Sep. 5, 2019). Since the Court's Order, Defendants' noncompliance has persisted, causing Plaintiffs to continue suffering irreparable harm. *See* Exs. 2-12; Exs. 13-27; Exs. 1A-1Q.

ii) Plc[005500480050004800b0048005500480066>.0050[intiffs est66>.080025000c000f00031>4.7fh as

Furthermore, Defendants are legally required to compile and retain data and information pursuant to The Federal Records Act (hereinafter “the Reco

should not be unduly burdensome for Defendants to produce those records in response to a request for expedited discovery.

This Court's Order does not require – nor are Plaintiffs asking – Defendants to take on any new responsibilities or burdens. Defendants have repeatedly complained about burdens associated with compliance with the Court's record-keeping requests, raising the burden of administrative costs and lack of resources as excuses for not including additional information in their monthly reports, such as identifying the language spoken by class members. *See* Ex. 28;[39] *see also* Ex. 29; Parole Directive, No. 11002.1 (Dec. 8, 2009). Yet, under administrative law, Defendants, like any agency which promulgates directives, have always had the obligation to fully comply with the Parole Directive, including its record-keeping requirements. *See* Pl.[s'] Emergency Mot. for Prelim. Inj., at p. 27-41 (Docket No. 61-1).

Thus, the burden of compliance with this Court's Order, the very subject upon which Plaintiffs seek discovery, is no greater on Defendants than the burden of complying with the law. Therefore, there should be no difficulty in responding to requests for demonstration of that compliance. Compliance with the law is a duty which Defendants cannot escape no matter how burdensome

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[39]*See* Ex. 28, at 4-5, 14-17 (showing, as Plaintiffs' Counsel, that Defendants failed to disseminate information about parole, as ordered by the Court, and took a lengthy a e Co E ² b

they may argue it is. But given Defendants' existing record-keeping requirements, Plaintiffs' request for expedited discovery would not cause any undue burden to Defendants.

2) Plaintiffs' request for expedited discovery satisfies the "reasonableness" test, indicating that they merit such expedited discovery.

The "reasonableness test" calls for the Court to decide the appropriateness of expedited discovery based on "the reasonableness of the request in light of all of the surrounding circumstances ..." *In re Fannie Mae Derivative Lit.*, 227 F.R.D. at 142 (citing *Entm't Tech. Corp. v. Walt Disney Imagineering*, No. 03-3546, WL 22519440, at 3-5 (E.D. Pa. 2003)). The factors to be considered by the Court in making that determination include: i) whether a preliminary injunction is pending; ii) the breadth of the discovery requests; iii) the purpose for requesting the expedited discovery; iv) the burden on the defendants to comply

to community when determining parole grant or denial (not categorical or automatic determinations), determinations based on the specific facts of each provisional class, and Defendants to conform to all of the substantive and procedural requirements of the Parole Directive. ECF No. 32; s*ee Guttenberg v. Emery*, 26 F.Supp 3d 88, 98 (Mar. 19, 2014).

Plaintiffs' discovery requests are firmly ensconced within the bounds set by the Court's Order. *See Guttenberg v. Emery*, 26 F. Supp 3d. at 98 (stating that Plaintiffs' discovery requests needed to be narrowly tailored to reveal information related to the preliminary injunction, as opposed to the case as a whole). Plaintiffs have delineated that they seek only information related to Defendants' compliance with the Parole Directive pursuant to the Court's Order.

For example, depositt ,

procedures that Defendants are implementing to comply with the Court's Order, and the areas where compliance is lacking. Section IV(A)(1)(ii) of this Memorandum sheds light on how a grant of expedited discovery would result in the avoidance of further irreparable harm to the Plaintiffs. Because Plaintiffs seek expedited discovery for the ethical and lawful purpose of establishing and remedying Defendants' noncompliance, Plaintiffs request should be granted.

iv)

U.S. 101 (1922) (explaining that a Master "occupies a position of honor, responsibility, and trust; the court looks to him to execute its decrees thoroughly, accurately, impartially, and in full response to the confidence extended…"); Fed. R. Civ. P. 53(a)(2). The Court must give the parties notice and an opportunity to be heard before appointing a Master. Fed. R. Civ. P. 53(b)(1).

Pursuant to the Federal Rules of Civil Procedure, the Court must also issue an appointing order, directing the master to proceed with "all reasonable diligence" and must state various details regarding mux

***ii) This Court has established that a Master may be appointed where a party fails to comply with a court order, such as Defendants have failed to comply in* this case.**

This Court has established that a Master may be appointed where a party fails to comply with a court order. In *Evans v. Fenty*, 480 F.Supp.2d 280 (D.D.C. 2007), this Court appointed multiple masters to make findings and r

Defendants compliance. *Id*; *see* ECF 32; ECF 33; *see also* Ex. 28. Defendants in this case, unlike in *Evans*, have never acknowledged their noncompliance, even after the Court found that Plaintiffs' were likely to succeed in proving that Defendants were in violation of the Parole Directive. *See* Ex. 28 at 6, lines 6-10, *supra* note 6; see also Ex. 29 at 27-29, *supra* note 6. It is therefore not surprising that Defendants are not close to achieving compliance several months after this Court ordered compliance. Exs. 1A-1Q.

Defendants' continued noncompliance further accentuates the need for a Master, as Defendan # s

Defendants have also called into question the numerous declarations by Plaintiff asylum-seekers, detailing the harms to which they are exposed in prolonged detention, and the numerous ways that Defendants continue to disregard the Court's Order and the Parole Directive. *See* Ex. 28 at 6, lines 6-10, *supra* note 6. When this Court has called upon Defendants to maintain accurate records about their processes, Defendants have not been responsive to the challenge. Thus, it is unlikely that Defendants would provide direct evidence of their noncompliance without an order from this Court.

b) Without this Court ordering expedited discovery, Plaintiffs would be unable

agency of which ICE is a component and which is a Defendant to the present case, has reported on failures by ICE to manage, impose consequences upon, and ensure accountability of those it trusts to implement its policies, procedures, and standards. As recently as January 2019, DHS released a report discussing ICE's failure to hold detention facility contractors accountable for failing to meet ICE standards, and its apparent apathy at noncompliance with these policies, procedures, and standards. While the report specifically discusses ICE's apathy and lack of accountability regarding the discriminatory conduct in which its contractors allegedly engage, the report nonetheless speak volumes about the overall systemic misconduct in which ICE engages and its permissiveness and apathy toward violations of its policies, procedures, standards, which impact the rights and safety of the detainees in its care.

Government reports expose that ICE, in practice, does not adequately require those it entrusts to comply with its policies, standards, and guidelines, nor does it implement accountability for noncompliance with those measures. This is the reality of ICE's conduct, despite ICE's claims on paper that it employs management, oversight, and accountability systems. OFF. OF INSPECTOR GEN., *supra* note 43, at 10. This level of apathy and inaction endangers Plaintiffs, who also cannot trust ICE to ensure that violations of the Parole Directive are prevented, addressed and resolved, to spare them from the harm of unnecessary prolonged detention.

DHS has revealed ICE's unreliability and failure to properly keep and utilize data. Not only has it reported that ICE fails to track data and use it to analyze effectiveness, it has also reported that it has sometimes failed to gather or keep data at all. *Id.* at 11. Furthermore, it also reported lack of direct access to important files and information by ICE, which has prevented "key

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Follow Fed. Procurement Guidelines When Contracting for Det. Servs., at 19 (Feb. 21, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-02/OIG-18-53-Feb18.pdf.

stakeholders” from having access to important information, despite ICE actually being *required* by DHS to maintain suc

implement their own internal accountability measures, and DHS has no control over such failure by ICE, Defendants conduct, both systemic and particular to this case, necessitates the appointment of a master to obtain compliance with the Court's Order.

v) The efficacy of the Master is not diminished by the unprecedented circumstances that the pandemic presents.

Plaintiffs assert that a Master would be capable of playing an important role in securing compliance from Defendants during the duration of the pandemic, despite the limitations on travel to detention facilities in the NOLA ICE region.

Defendants can provide the Master with a list of the relevant NOLA ICE officials from whom it can seek information on compliance, and work to ascertain both relevant policies and systems in place, as well as determine whether Defendants are actually implementing these on a consistent basis. For example, a Master could be provided with lists, on a rolling basis, of reviewing officers, deportation officers, field officers, and all officials employed by Defendants and engaged in the parole process. Additionally, NOLA ICE can provide the Master lists, on a rolling basis, of the individuals detained at each center under Defendants' custody who qualify for parole determinations; information on the dates that applications are submitted, their statuses, notes taken during review of applications or from ICE-initiated parole determinations; copies of receipts confirming submissions; and a log containing dates of receipt of parole applications and the determination dates. Using the lists and data, as well as other information he or she may determine is needed, a Master could conduct interviews to evaluate compliance, identify problem areas, and develop tailored resolutions to issues inhibiting full compliance. After the resolution of the pandemic, a Master could safely conduct detention center visits.

V. CONCLUSION

Plaintiffs' class members continue to be vulnerable at the hands of Defendants, and they again place their faith in the justice system. For the foregoing reasons, Plaintiffs request that this Court require Defendants to show cause that they are not in contempt of the Court's Order, order expedited discovery to determine the extent of Defendants' contempt, and appoint a Master to ensure that Defendants do not continue to disavow their legal responsibilities to this Court.

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CERTIFICATE OF SERVICE

I hereby certify that, on May 12, 2020, I electronically filed the attached MEMORANDUM IN SUPPORT OF THE PLAINTIFFS' MOTION FOR AN ORDER TO SHOW CAUSE, EXPEDITED DISCOVERY, AND APPOINTMENT OF SPECIAL MASTER with the Court via the CM/ECF system, which will send a Notice of Electronic Filing to all CM/ECF registrants for this case.

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