IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM IN SUPPORT OF PLAINTIFF
EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

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In accordance with this Court's decisions in *Mons v. McAleenan*, No. CV 19-1593 (JEB), 2019 WL 4225322, (D.D.C. Sept. 5, 2019), and

Plaintiffs' travails are not novel to this Court.[3] Despite this Court's prior Order, over seventy-five percent of Plaintiffs are still denied parole in violation of the Directive.[4] The harrowing COVID-19 pandemic that has ravaged most of the world is sweeping through the United States, presenting a grave threat of irreparable harm to Plaintiffs-class members. Plaintiffs first discuss the nature and scope of this deadly, novel disease, the magnitude of which is unprecedented, and the conditions present in the facilities where Plaintiffs-class members are detained, rendering them vulnerable to imminent risk of irreparable harm and death during the pandemic. Plaintiffs also present evidence supporting their request for immediate, individualized assessments of parole eligibility for all present and future class members; and urge this Court to require NOLA ICE officials to comply with the applicable regulations and standards when engaging in these immediate, individualized parole assessments, including those applicable to class members with serious medical conditions, and whose continued detention is not in the public interest, given the dangers posed by the COVID-19 pandemic.

II. FACTUAL BACKGROUND

A. The Parties

Plaintiffs are all present and future members of the class that this Court has provisionally certified, (Doc. No. 33), i.e., arriving aliens eligible for parole, who are currently detained or will be detained by Defendant NOLA ICE. Plaintiffs are or will be detained at the various detention facilities that the NOLA ICE region comprises,[5] as they await the final adjudication of their civil immigration removal proceedings.

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[3] *See* Order granting preliminary injunction and provisional class certification, R. Doc. 33.

[4]

Many Plaintiffs are older adults or have medical conditions that lead to high risk of serious COVID-19 infection, including diabetes, asthma, hypertension, human immunodeficiency virus (HIV), weakened immune systems from prior treatments for cancer, and psychiatric illness.[6] The State of Louisiana is home to the largest number of immigration detention facilities in the NOLA ICE region, with Mississippi a distant second.

There is no vaccine against COVID-19 and there is no known cure.[9] According to preliminary data from China, South Korea, Italy, Spain, and the United States, 80 percent of confirmed cases tend to occur in persons 30 to 69 years of age regardless of underlying medical conditions, and 20 percent of those individuals develop severe symptoms or become critically ill. Franco-Paredes Exp. Decl. ¶17. COVID-19 is most likely to cause serious illness and elevated risk of death for older adults and those with certain medical conditions or underlying disease. Franco-Paredes Exp. Decl. ¶12. Those particularly vulnerable includes people with weakened immune systems (including due to cancer treatment), chronic lung disease, asthma, serious heart conditions, diabetes, renal failure, liver disease, and possibly pregnancy.[10]

Among those with severe clinical manifestations, regardless of their age or underlying medical conditions, the virus progresses into respiratory failure, septic shock, and multiorgan dysfunction requiring intensive care support including the use of mechanical ventilator support. Franco-Paredes Exp. Decl. ¶17. The only known effective measures to reduce the risk of serious illness or death caused by COVID-19 are social distancing and improved hygiene, which have led to unprecedented public health measures around the world and in the United States.[11]

Detention of any kind requires large groups of people to be held together in a confined space and creates the worst type of setting for curbing the spread of a highly contagious infection such as COVID-19. Franco-Paredes Exp. Decl. ¶23. People who are confined in detention centers

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[9] Expert Declaration of Joshua Sharfstein, ¶6, filed in support of Plaintiffs' Motion for Temporary Restraining Order in *Las Americas v. Trump*, available at https://www.splcenter.org/sites/default/files/documents/0029._03-27-2020_emergency_motion_for_tro.pdf. ("Sharfstein Decl."). See also, World Health Organization, Q & A on COVID-19, March 9, 2020, https://www.who.int/news-room/q-a-detail/q-a-coronaviruses.

[10] *Id*.

[11] Expert Declaration of Dr. Robert Greifinger, ¶4, available at https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr

will find it virtually impossible to engage in the necessary social distancing and hygiene required to mitigate the risk of transmission, even with thoughtful guidance and plans in place. Franco-Paredes Exp. Decl. ¶¶11,12. For this reason, several jurisdictions at the urging of public health experts, are ordering the release of people from jails, prisons and detention centers.[12]

Moreover, a release of and moratorium on the detention of future class members allows for greater risk mitigation for all people detained or working in these detention centers. Franco-Paredes Exp. Decl. ¶¶22,28. Release of *Mons* class members from custody would also reduce the burden on the region's limited health care infrastructure, as it lessens the likelihood of an overwhelming number of people becoming seriously ill from COVID-19 at the same time. Franco-Paredes Exp. Decl. ¶27. Louisiana Governor John Bel Edwards recently reported that Louisiana has seen the fastest rate of growth of COVID-19 virus in the world.[13] The situation is so dire in Louisiana that on March 22, 2020, Governor Bel Edwards issued a statewide "stay-at-home" order, in an attempt to stem the horrific growth of the COVID-19 virus in the state.[14]

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[12] Prison Policy Initiative, "Responses to the Covid-19 Pandemic," March 27, 2020, available at https://www.prisonpolicy.org/virus/virusresponse.html. *See also* BBC News, "US jails begin releasing prisoners to stem Covid-19 infections," March 19, 2020 available at https://www.bbc.com/news/world-us-canada-51947802 (noting efforts in the states of Ohio, California, Colorado, New York, Alabama, New Jersey, South Carolina, Florida, Texas,

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often scant medical care resources. Franco-Paredes Exp. Decl. ¶¶12,13. People living in such close quarters cannot achieve the "social distancing" needed to effectively prevent the spread of COVID-19. Franco-Paredes Exp. Decl. ¶12. *See also* Scharf Exp. Decl. ¶¶24,26. In addition, many immigration detention facilities lack adequate medical infrastructure to address the spread of infectious disease and treatment of people most vulnerable to illness in detention. Franco-Paredes Exp. Decl. ¶13.

Class members are held in crowded confinement with dangerously unsafe hygienic conditions. At Richwood, for example, some are housed in dorms with as many as 100 men who are forced to share four toilets, four sinks, and five showers in a shared room. O.M.H. Decl. ¶10. At Adams, some are housed in dorms holding as many as 240 men who are forced to share six toilets, 12 sinks, and one shower room with 12 showerheads in close proximity. S.U.R. Decl. ¶13. At South Louisiana, as many as 72 women are housed in a single dorm with beds less than two feet apart from one another and forced to share three toilets, three sinks, and six phones, none of which are properly sanitized. K.S.R. Decl.¶15; L.P.C. Decl. ¶¶14,16. These women also report that they are not provided enough toilet paper and had no toilet paper for nearly a week in March 2020. *Id*. At LaSalle, some class members are housed in dorms with more than 90 men who are forced to share five toilets, eight sinks and one shower room. T.M.F. Decl. ¶14.

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

22-23; R.P.H. Decl. ¶¶19-21; L.P.C. Decl ¶¶15,22; O.M.H. Decl. ¶8; S.U.R. Decl. ¶¶14-15; and K.S.R. Decl. ¶¶14,18. Many who are desperate for information related to COVID-19 have been met with force or harm in these facilities.[18] Under these conditions, class members cannot practice proper social distancing or hygiene, the only known methods to stem the rapid spread of COVID-19. Franco-Paredes Exp. Decl. ¶¶11,12; *see also* Scharf Exp. Decl. ¶24.

Moreover, given the high population density of these facilities and the ease of transmission of this viral pathogen, the infection rate will be exponential if even a single person, with or without symptoms, who is shedding the virus enters a facility. Franco-Paredes Exp. Decl. ¶20. Of those infected, about one-fifth will get so ill that they require hospital admission. *Id*. About ten percent will develop severe disease requiring treatment only available in the intensive care unit, at least five percent of whom will likely die from respiratory failure, septic shock and multiorgan failure. *Id*. If those who require it cannot be hospitalized, many more will die in detention without access to necessary medical equipment, such as ventilators. *Id* at ¶21.

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

The COVID-19 pandemic is devastating the United States. As of March 29, 2020, there have been 103,321 confirmed cases and 1,668 deaths.[19] Moreover, the transmission of COVID-19 grows exponentially. Franco-Paredes Exp. Decl. ¶20-~~21.~~ People over the age of 50 and those with

[18] Mother Jones, "ICE Detainees Were Pepper-sprayed During a Briefing on Coronavirus," March 26, 2020, available at https://www.motherjones.com/politics/2020/03/ice-

certain medical conditions face greater chances of serious illness or death from COVID-19. Certain underlying medical conditions increase the risk of serious COVID-19 disease for people of any age, including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and

including washing hands with soap and water, are the only known effective measures for protecting vulnerable people from COVID-19. Scharf Exp. Decl. ¶24. Projections by the Centers for Disease Control and Prevention (CDC) indicate that between 160 million and 214 million people in the United States could be infected with COVID-19 over the course of the epidemic without effective

resulted in unprecedented health measures to facilitate and enforce social distancing, as evidenced by the Governor's "stay-in-place" order issued March 22, 2020.[29] While schools, businesses, and government facilities close around the state, a high risk remains that COVID-19 will spread at the numerous immigration detention facilities in the State. Franco-Paredes Exp. Decl. ¶15.

Louisiana has the highest per capita rate of COVID-19 incidence in the world. Scharf. Exp. Decl. ¶17 at (h). The areas in which ICE NOLA centers are located are characterized by low medical access and public citizen health illiteracy.

This Court has jurisdiction to adjudicate Plaintiffs' Emergency Motion for Preliminary Injunction.[32] As a result of the COVID-19 crisis, Plaintiffs seek an injunction requiring that NOLA ICE officials immediately administer to all present and future class members individualized parole assessments, in a method consisted with the applicable regulations and standards of the Directive; they are not seeking to challenge the outcome of the individualized parole assessments itself. *See Abdi v. Duke*, 280 F. Supp. 3d 373, 385 (W.D.N.Y. 2017) (federal district court had jurisdiction

313 F. Supp. 3d at 328. (citing *R.I.L-R. v. Johnson*, 80 F. Supp. 3d 164, 176 (D.D.C. 2015)). In this case, NOLA ICE's disavowal of the Directive will likely result in irreparable harm to the Plaintiffs, as outbreaks of the deadly COVID-19 are likely to sweep through the Louisiana detention facilities housing class members.

2) *Class Certification*

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

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

B. Legal Framework Governing Parole Decisions

1) The INA and Implementing Regulations

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Moreover, the Directive's applicable regulations describe five categories of "aliens who may meet the parole standards based on a case-by-case determination, provided they do not present a flight risk or security risk . . ." *Id.* at ¶ 4.3. Among the five categories are: "(1) aliens who have *serious medical conditions*, where continued detention would not be appropriate;" and "(5) aliens whose *continued detention is not in the public interest*." *Id*. (emphasis added).

ICE Field Offices have historically relied on the Directive to grant parole to thousands of asylum-seekers with credible fears of persecution, based on individualized findings that their detention was unnecessary. This is not surprising, as the overwhelming majority of asylum-seekers who establish a credible fear lack any criminal history, pose no threat to public safety, and do not need to be detained to ensure their appearance for court proceedings.[34] Since enacting the Directive, DHS has not 7(ourTQq0TQq 3.7(i)7(v)-20(ef0-6(a)7e] TJET(v)-20(s)-6(yl2 0 612 792 reW* nBT/F5

For example, class member O.M.H. was denied parole despite having HIV and Hepatitis C and remains in detention. Decl. ¶1,5. Class member K.S.R. tested positive for H1N1 but was nonetheless denied parole and remains in custody despite a weakened immune system. Decl. ¶9. Class member L.P.C. knows individuals currently in detention without parole who suffer from medical conditions, such as asthma, diabetes, cancer, and lupus, that could result in death, should a COVID-19 outbreak take place. Decl. ¶22. Class member Y.P.T. remains in detention, after NOLA ICE officials denied all four of his parole requests, despite satisfying all parole requirements, providing all necessary evidence, and being confined to a wheelchair. Decl., ¶ 19-26, 28. Class member B.A.E., reports coughing "clots of blood," having "blood in [his] feces, and suffering from continuous fever, but only receives Ibuprofen and remains detained in a crowded bunk. Decl., ¶ 10. Class member R.P.H., who was denied parole despite having been a cancer survivor, was explicitly told she would not receive parole unless her cancer returned. Decl., ¶ 4-5, 15. And class member S.U.R.'s nephew remains detained despite having only one functioning kidney. Decl., ¶ 12.

All Plaintiff-witnesses have applied for release on parole at least once. Most suffer from serious medical problems and are considered part of high-risk populations that are being decimated by COVID-19. There is no public benefit in keeping these asylum-seekers in detention, at the risk of irreparable injury. The experts agree that keeping these vulnerable class members detained during the COVID-19 pandemic will result in risk of irreparable physical injury, and even death.

As the anecdotal evidence from class members shows, NOLA ICE officials continue to defy the Directive, even weeks after the dangers of COVID-19 became a reality. Class members languish in crowded detention centers, and those who are sick suffer without access to adequate health care. Experts warn that class members face a certainty of irreparable harm and death once

these detention centers experience COVID-19 outbreaks, as they are congregate environments that are simply ill equipped to prevent and successfully navigate an outbreak of such unprecedented, deadly proportions. Franco-Paredes Exp. Decl. ¶¶ 12, 13.

C. Legal Requisites for Establishing a Preliminary Injunction

being made. *See Hi-Tech Pharmacal Co. v. United States FDA,* 587 F. Supp. 2d 1, 8 (D.D.C. 2008). While the four factors of injunctive relief are not considered in isolation from one another, a strong showing of likely success on the merits may warrant issuance of preliminary injunctive relief, even if the plaintiff makes a less compelling showing on the other factors in injunctive-relief analysis. *Morgan Stanley DW Inc. v. Rothe,* 150 F. Supp. 2d 67, 72 (D.D.C. 2001); *Hi-Tech Pharmacal Co.*, 587 F. Supp. 2d at 7.

Plaintiffs re-assert the first two claims presented in their original complaint to the Court, but now make these assertions as the basis for injunctive relief requested to enjoin Defendants from acting in a manner specifically harmful to Plaintiffs' during the COVID-19 pandemic. Plaintiffs will demonstrate that they are likely to succeed on the merits of these claims, which consist of the following:

1) Defendants' policy and practice of ignoring the Directive is arbitrary, capricious, and contrary to the law in violation of [the APA]," *See* Compl., ¶ 133.
2) Defendants' "failure to provide individualized determinations of flight risk and danger" violate the INA and implementing regulations and the APA *See* Compl., ¶¶ 133-137.

The INA, codified in Title 8 of the U.S. Code, contains important provisions of U.S. immigration law. For example, the basis for the existing parole system in the U.S. is found in INA §212(d)(5)(A), which grants the Secretary of DHS authority to make parole determinations pursuant to its provisions. INA §212(d)(5)(A). Furthermore, through the INA, Congress delegated rulemaking power to the Secretary, as it required that they "shall establish such regulations … as he deems necessary for carrying out his authority under the provisions" of the INA. 8 U.S.C. §

1103(a)(3) (2008). The Secretary has delegated parole authority to the three immigration agencies which are components of DHS: USCIS, CBP, and ICE.[35]

The authority granted by the Secretary to ICE includes the non-law enforcement functions of parole programs, including the authority to make parole determinations for arriving aliens who have passed credible fear interviews, and are awaiting an asylum hearing. *Id*. In addition to delegating this authority over general parole determination, the Secretary also delegated to ICE the supplemental specific authority to grant parole to arriving aliens due to "urgent humanitarian interest" or "significant public benefit." 8 C.F.R. § 212.5. Groups whose need for parole constitute urgent humanitarian interest or significant public interest include, but are not limited to, individuals who "have serious medical conditions, where detention would not be appropriate," and "whose continued detention is not in the public interest." Directive at ¶ 4.3 (citing 8 C.F.R. § 212.5(b)).

The power of an administrative agency to administer authority granted to it by Congress, such as the INA authority over parole determinations delegated to ICE by the Secretary, "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (explaining that rulemaking power was necessary for an agency to carry out the powers delegated to it by the Secretary of the Interior under an act of Congress). Agencies are empowered by the delegation of authority to promulgate rules and policies that serve as implementing regulations. *Id*.

1)

[35] (Memorandum of Agreement Between USCIS, ICE, and CBP: Coordinating the Concurrent Exercise by USCIS, ICE, and CBP, of the Secretary's Parole Authority Under INA § 212(d)(s)(A); Homeland Security Act, 6 U.S.C. § 251-98 (transferring authorities exercised exclusively by the former Immigration and Naturalization Service to DHS).

that was promulgated by the Defendants – an administrative agency (ICE), and the federal executive department which delegated parole determination powe

that provides guidance on internal procedures, and holding that the agency's failure to comply constituted a violation of the APA as "arbitrary" and "capricious"). This remains true, even when procedures set out are potentially more rigorous than required. *Id*. Adherence by an agency to its rules is particularly significant where the rights of individuals are impacted by agency action and rulemaking. *Id.* at 235*; e.g. Aracely v. Nielsen*, 319 F.Supp.3d 110, 149, 157 (D.D.C. 2018) (holding that Defendants must re-evaluate plaintiff's request for parole in strict compliance with the ICE Directive of 2009, as that Directive impacts individual rights); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363, 38 (1957); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

Prior to the filing of this motion, this Court already established that the specific Directive in question in *Mons* and this request is binding written agency policy for the following reasons: a) it impacts individual rights of arriving aliens, b) the boilerplate disclaimer language included in it is not effective, and 3) it imposes constraints on an agency's previously unfettered discretion over parole grants upon taking effect.

a. The Directive is binding because it impacts rights of arriving aliens.

This Court has established that the Directive is binding written agency policy, as it impacts individual rights of arriving aliens, and legal consequences flow from DHS and ICE failure to implement the Directive in making parole determinations. *Bennet v. Spear*, 520 U.S. 154, 177-78 (1997), *Aracely*, 319 F.Supp.3d at 150 (2018); *Damus*, 313 F.Supp.3d at 343. Agency action impacts individual rights when rights or obligations of plaintiff's are determined by those actions, or legal consequences flow from those actions. 5 U.S.C. § 704.

The Directive sets out the definitions, guidance, internal procedures, and standards used to make a determination of parole, as well as the mitigating factors required to deny individuals

parole. Directive ¶ 1-9. Freedom of movement is a fundamental person

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

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

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

Nonetheless, this Court has established that an agency cannot use such boilerplate language to evade legal challenges or judicial review under the APA. *Aracely*, 319 F.Supp.3d at 152; *Damus*, 313 F.Supp.3d at 337-38; §706(2); 5 U.S.C. § 551. Such language is ineffective and does not enable Defendants to evade legal challenges. Thus, the Directive does, in fact, impact rights of individuals, and remains binding on the DHS and ICE, despite the use of boiler plate disclaimer language.

i. **The Directive is binding as it imposes constraints on those**

In its first paragraph, the Directive contains an explanation that describes its purpose, stating it "provides guidance" on agency officials' use of their "discretion to consider the parole of arriving aliens." Directive ¶ 1. Though an agency's discretion over an issue or process may be subject to no, or fewer, limitations prior to the implementation of a relevant rule, once that agency

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

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

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

Plaintiffs now provide the most recent statistics on the most recent parole grant rates, which still evidence an irrational departure from binding agency policy in the Directive, despite the issuance of the Order providing injunctive relief in September. *INS v. Yang*, 519 U.S. 26 (1996). Plaintiffs remind the Court that, in 2016, about 75% of parole applications were successful. (Scharf Decl., ¶ 14). In 2018, fewer than 2% of parole applications were granted. *Id*. At the present time, in March 2020, data reported by Defendants demonstrate that parole rates are as follows: 12% at Atlanta City Detention Center, 30% at Jackson Parish Correctional Center, 32% at Winn, 35% at Richwood, 19% at Basile Detention Center, 34% percent at River, 41% percent at Pine Prairie, zero percent at La Salle, zero percent at Catahoula, and zero percent at Allen Parish Correctional Center.

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

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

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

Arriving aliens have been denied parole without ever being given information about parole or the opportunity to apply. B.A.E. Decl., ¶ 8 (stating that a denial was given only three days to apply for parole and was denied without ever applying when was not able to meet the deadline); O.M.H. Decl., ¶ 5 (informing that arriving alien was denied parole without having applied for it); S.U.R. Decl., ¶ 7 (explaining that arriving alien was denied parole about three days after passing credible fear interview, without ever having applied for parole); Y.P.T. Decl., ¶ 12 (informing that arriving alien was denied parole before even being given opportunity to apply). At times, it is upon receipt of their denial notice that they learn about parole. *Id*. Denial has often happened just days after arriving aliens having been found to have credible fear. *Id*. As the Directive requires individualized determinations of flight risk or danger to be made, Defendants have violated the Directive, since it is impossible to make an individualized determination without having an application informing decisionmakers of the particular circumstances of an individual to be

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

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

When Defendants do accept parole applications, they do not provide a reasonable amount of time for arriving aliens to submit required documents. B.A.E. Decl., ¶ 8 (explaining that declarant was given only three days to apply for parole and was not able to meet the deadline). In order to apply for parole, an individual must first determine who will serve as their sponsor. S.U.R. Decl., ¶8-9. Then, they must collect several documents to demonstrate their eligibility for parole, and their sponsor's ability to serve as such. *Id*. This involves collecting evidence such as identity documents, often from a country individuals have just fled in fear of persecution, tax documents from sponsors, proof of homeownership, utility bills, and letters of support from the sponsor and any other individuals available to attest to the good character of the applicant. Directive Par. 8.3-8.4; S.U.R. Decl., ¶8-9. In some instances, parole applicants have been given as little as three days to collect these documents and determine where to submit them, with little, if any, guidance from officers. B.A.E. Decl., ¶8 (revealing declarant was given three days to apply for parole and was not able to meet the deadline).

These acts by Defendants confirm they do not have an interest in providing an individualized determination of eligibility for parole. By failing to allow a reasonable amount of time for individuals to submit all required materials, Defendants effectively deprive arriving aliens of the opportunity to sincerely undergo an individualized determination of their eligibility as required by the Directive.

e. Defendants continue to determine flight risk and danger arbitrarily, despite mounting evidence in favor of granting parole.

Denials continue to be issued despite mounting evidence in favor of applicants' eligibility and satisfaction of all requirements for parole. B.A.E. Decl., ¶9; R.P.H. Decl., ¶15. These denials continue to be categorical, and if any notice of denial is provided, at all such notice does not explain how the applicant falls into the category for which they were denied, usually "flight risk." This

action by Defendants indicates that such determinations are made arbitrarily and without reasoning based on particular facts of applicants' circumstances and cases. B.A.E. Decl., ¶9 (informing that the parole applicant was denied parole for alleged "flight risk" despite submitting all required evidence to the contrary and received no further explanation); R.P.H. Decl., ¶15 (explaining that applicant is eligible for parole and has applied four times, but was denied repeatedly, three times for "flight risk" despite having extensive family in Florida to sponsor her, and the last for "lack of additional documents.").

Many denied applicants have sponsors who are U.S. citizens, and who provide all necessary evidence of citizenship, can attest to the arriving alien's good character, and have a close relationship, willingness, and ability to support them. B.A.E. Decl., ¶9 (explaining that arriving alien was denied as a "flight risk" even though her husband, who was released on parole in another region and is making an asylum claim under the same facts as this arriving alien, has same parole sponsor, who is a U.S. citizen cousin who lives in Tampa, Florida, and has presented evidence in support of the arriving alien's request for parole numerous times, including copies of their 2018 tax returns, evidence of U.S. citizenship, copies of bills, additional letters of support, documentation of arriving alien's clean criminal history, and a copy of arriving alien's birth certificate); R.P.H. Decl., ¶15 (stating that although eligible for parole and having applied four times, arriving alien has been denied repeatedly, the first three times for "flight risk" despite having extensive family in Florida to sponsor her, and the final time for "lack of additional documents."); K.S.R. Decl., ¶7 (explaining that their sponsor is a U.S. citizen); O.M.H. Decl., ¶11 (explaining that their sponsor is a U.S. citizen); S.U5 184.42 d (D)-6(e)7(c)7(l)7(., d (¶)-48, d (re)-14(xpl)7(a)7(i)7(ni)7(ng)

4) final agency action, entitling them to judicial review of those claims under the APA.

As the claims brought by Plaintiffs' challenge final agency action, Plaintiffs are entitled to judicial review of those claims. 5 U.S.C. § 704. The APA grants the authority to bring legal action, including writs of prohibitory or mandatory injunction, in a court of competent jurisdiction, as the Plaintiffs have done in *Mons*. 5 U.S.C. § 704. Persons suffering legal wrongs because of agency

if the actions in question: 1) impact plaintiffs' rights, and 2) are final agency actions. 5 U.S.C. §

Bennett v. Spear,

520 U.S. 154, 177-78 (1997).

In order to be reviewable as a final action, the agency action at issue does not need to be in writing. *See Venetian Casino Resort LLC v. EEOC,* 530 F.3d 925, 929 (D.D.C. 2008) (entertaining an APA challenge to the agency's "decision ... to adopt [an unwritten] policy of disclosing confidential information without notice" because such a policy is "surely a consummation of the agency's decision making process" and it impacted the plaintiff's rights); *R.I.L R v.* , 80 F.Supp.3d 164, 184 (holding that ICE's deterrence policy is a final agency action subject to APA review, despite the lack of a writing memorializing the policy).

This Court has established that routine and sys stl-

As in *Ramirez*, Plaintiffs challenge the routine and systematic failure of Defendants to adhere to the Directive, which serves to implement parole procedures under the INA. Action being

overturned as "arbitrary [or] capricious," within the meaning of the APA, 5 U.S.C. § 706(2)(A). In contrast to the behavior of defendants in *Yang*, Defendants in *Mons* are not merely narrowing or expanding a definition, but instead entirely disregarding a binding directive requiring the provision by the agency of an individualized *determination* of eligibility. *Yang*, 519 U.S. at 32 (finding that taking a narrow view of what constitutes a term in a statute where no definition was provided by that statute, while still adhering to the provision containing the term, does not violate the APA).

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

This Court explained that it found Defendants offered "absolutely no explanation for the precipitous nosedive in the parole-grant rates issued by an Office that has allegedly preserved the same underlying policy for making those decisions all along." *See Mons*, No. 19-1593 JEB, 2019 WL 4225322 at 21. Approximately seven months later, Defendants still have not offered an explanation for continued abysmal parole-grant rates and persistent departure from the Directive. Nor have Defendants made an avowed alteration of the Directive. As no explanation has been provided, no avowed alteration has occurred, and no lawful or valid explanation is readily

[36] Class members report that ICE officers merely check a box next to select a category,

determination can occur, demonstrating Defendants' lack of intent to consider the individual facts of arriving aliens' cases, in violation of the INA. *Id*; 8 C.F.R. § 212.5.

Furthermore, as the Directive provides binding agency policy on the technical details and implementation of parole, about which Congress provided no guidance, it is the authority for

transmission of this viral pathogen, the attack rate inside these centers may reach exponential proportions consuming significant medical care and financial resources." *Id*. In addition, these detention centers "are often unhygienic environments" exacerbating the propagation of COVID-19. Scharf Exp. Decl. ¶18 at (a)(i).

Class members relate harrowing conditions that will make the spread of COVID-19 among these detained asylum-seekers inevitable: Plaintiffs are housed in dorms with as many 100 men, forced to share four toilets, four sinks, and five showers in a shared room. O.M.H. Decl. ¶10. At Adams, some are housed in dorms holding up to 240 men , who are forced to share six toilets, twelve sinks, and one shower room with twelve showerheads in close proximity. S.U.R. Decl. ¶13. At South Louisiana, as many as 72 women are housed in a single dorm with beds less than two feet apart from one another, and forced to share three toilets, three sinks, and six phones, none of which are ever properly sanitized. K.S.R. Decl. ¶15; L.P.C. ¶14,16. These women also report that they are not provided sufficient toilet paper and had no toilet paper for nearly a week in March 2020. *Id*. At LaSalle some Plaintiffs' class members are housed in dorms with more than 90 men, who are forced to share have five toilets, eight sinks and one shower room. T.M.F. Decl. ¶14. In these environments, Plaintiffs' cannot practice proper social distancing or hygiene, the only known methods to stem the rapid spread of COVID-19. Franco-Paredes Exp. Decl. ¶11,12. *See also* Scharf Exp. Decl. ¶ 24.

The facts are stark and frightening. Given the high population density of these facilities and the ease of transmission of this viral pathogen, the infection rate will be exponential if even a single person, with or without symptoms, that is shedding the virus enters a facility. Franco-Paredes Exp. Decl. ¶20. Plaintiffs describe residing in a petri dish-like environment. Experts agree that given the poor conditions present in the immigration detention facilities in Louisiana and

Mississippi, and high population density (exacerbated by Defendants' refusal to comply with the Directive), the spread of COVID-19 is inevitable.

2) *Plaintiffs Will Likely Become Ill and/or Die from Infection if They Remain in Detention.*

Plaintiffs here have established that they will suffer irrepa

caused by the Defendants' continued non-compliance with the Directive are "of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Chaplaincy*, 454 F.3d at 297 (internal quotation marks and citation omitted).

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

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

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

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

The Directive mandates that an alien's "continued detention is not in the public interest." Directive ¶ 6.2. It states the public interest is met when an arriving alien is paroled who is found to have a credible fear of persecution, establishes, to the satisfaction of ICE, his or her identity and that he or she presents neither a flight risk nor a danger to the community, and presents no additional factors that weigh against release. § 212.5(b)(5); Directive Par. 6.2, 8.3; *Aracely*, 319 F.Supp.3d 110 (Jul. 3, 2018). In other words, the Directive establishes that, once these requirements are met, an individual should be released on parole "on the basis that his or her continued detention is not in the public interest." *Id*

Defendants consistently disregard the public interest by refusing to apply the binding Directive, pursuant to the APA, as they fail to release individuals who evidently meet the aforementioned requirements, without providing any justification or explanation as to why those individuals fall into categories meriting denial despite their obvious eligibility and satisfaction of all requirements. This action by Defendants results in the "continued detention" the Directive explicitly sets out as not b

individual rights and the public interest during the COVID-19 pandemic, a grant of the injunctive relief requested is necessary.

CONCLUSION

For the foregoing reasons, Plaintiffs' emergency motion for a preliminary injunction should be GRANTED.[39]

[39] A note of thanks to Christina LaRocca, Law Fellow, for her invaluable contributions to this Brief.