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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FAOUR ABDALLAH FRAIHAT, et al.,

PLAINTIFF(S)

v.

U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT, et al.,

DEFENDANT(S).

CASE NUMBER:

5:19-cv-01546-JGB (SHKx)

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[Proposed] Order Granting Emergency Motion for Preliminary Injunction

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Plaintiffs
Party Represented

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION – RIVERSIDE**

FAOUR ABDALLAH FRAIHAT, *et al.*,
Plaintiffs,
v.
U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT, *et al.*,
Defendants.

Case No.: 19-cv-01546-JGB(SHKx)

**[Proposed] Order Granting
Emergency Motion for Preliminary
Injunction**

1 Plaintiffs Faour Fraihat, Jimmy Sudney, Aristoteles Sanchez Martinez, Alex
2 Hernandez, and Martin Munoz, on behalf of themselves and a class of those
3 similarly situated, have moved for a preliminary injunction requiring Defendant
4 United States Immigration and Customs Enforcement to immediately (i) identify
5 all people in ICE custody with one or more Risk Factors;¹ (ii) conduct a
6 comprehensive, evidence-based assessment of medically necessary precautions
7 that should be implemented to ensure the health and safety of such persons during
8 the COVID-19 pandemic, including assurance that all such persons have access to
9 competent, sufficient, and appropriately qualified staffing, medical care, screening,
10 social distancing measures, access to necessary medical equipment; (iii) promptly
11 (within 48 hours) effectuate the release of individuals with one or more Risk
12 Factors if medically necessary safeguards cannot be immediately (within 24 hours)
13 provided to ensure health and safety, and absent an individualized finding of
14 dangerousness to community; (iv) modify its existing COVID-19 protocols to
15 remediate all Protocol Deficiencies.² Plaintiffs also seek the appointment of a
16 Special Master to oversee this process.

17 Having considered the parties' papers and argument and the evidence
18 presented, the Court finds that Plaintiffs have satisfied the requirements for a
19 preliminary injunction: they are likely to succeed on the merits of their claims; they
20 are likely to suffer irreparable harm in the absence of preliminary relief; the
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22 ¹ Risk Factors include: people who are over the age of 55; people who are
23 pregnant; and people who have one or more of the following underlying chronic
24 conditions: cardiovascular disease (congestive heart failure, history of myocardial
25 infarction, history of cardiac surgery); high blood pressure; chronic respiratory
26 disease (asthma, chronic obstructive pulmonary disease including chronic
27 bronchitis or emphysema, or other pulmonary diseases); diabetes; cancer; liver
28 disease; kidney disease; autoimmune diseases (psoriasis, rheumatoid arthritis,
systemic lupus erythematosus); severe psychiatric illness; history of transplantation
or HIV/AIDS.

² The Protocol Deficiencies are set forth in paragraph 14 of the Declaration of
Homer Venters in Support of Motion for Preliminary Injunction and Class
Certification. Those deficiencies may change as the ICE Protocols are modified.

1 balance of equities tip in their favor; and an injunction is in the public interest.

2 Plaintiffs seek a preliminary injunction on behalf of people in ICE custody
3 with Risk Factors. Plaintiffs claim that these people are at substantial risk of
4 serious harm from the COVID-19 pandemic, Defendants' response to that
5 pandemic, and the general quality of healthcare provided in detention centers.
6 Plaintiffs bring claims under the due process clause of the Fifth Amendment, and
7 under Section 504 of the Rehabilitation Act.

8 The Court finds that the Plaintiffs are likely to prevail on both their due
9 process claims and their Section 504 claims.

10 First, Plaintiffs have provided substantial fact and expert evidence that
11 Defendants' policies and practices concerning medical care—in their totality—
12 constitute objective deliberate indifference to a substantial risk of suffering serious
13 harm. *Gordon v. County of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018).
14 People with Risk Factors are at significant risk of serious illness and death from
15 the COVID-19 pandemic, and this risk is exacerbated in the detention setting.
16 Infectious disease experts retained by defendant Department of Homeland Security
17 have concluded that COVID-19 poses a substantial risk of harm to people in
18 detention settings, as have numerous other medical professionals. Plaintiffs have
19 also submitted extensive fact and expert evidence showing that Defendants have
20 been objectively deliberately indifferent to these risks. This evidence sufficiently
21 establishes that ICE's COVID-19 policies and practices will not identify people
22 with Risk Factors, will not protect those persons from serious illness and death,
23 and are not consistent with guidelines issued by the Center for Disease Control
24 concerning COVID-19 in detention settings. The evidence also establishes – based
25 in part by reports issued by DHS itself – that even before the pandemic, medical
26 care in detention centers, and ICE's oversight of those detention centers, has been
27 seriously deficient.

1 This conclusion is supported by a recent Ninth Circuit order releasing a
2 person in immigration detention because of “the rapidly escalating public health
3 crisis, which public health authorities predict will especially impact immigration
4 detention centers.” *Xochihua-Jaimes v. William P. Barr*, Case No. 18-71460 (9th
5 Cir. March 23, 2020).

6 Second, Plaintiffs have submitted substantial factual and expert evidence
7 both that persons detained in ICE custody are subject to conditions of confinement
8 related to COVID-19 that are more restrictive and dangerous than those held in
9 criminal detention, and that these conditions are employed to achieve objectives
10 that could be accomplished in alternative, less harsh methods. *See Jones v. Blanas*,
11 393 F.3d 918, 934 (9th Cir. 2004). This evidence establishes that ICE has – despite
12 DHS’s experts’ urging to the contrary – failed to implement protocols to assess the
13 propriety of continuing to detain people with Risk Factors during the COVID-19
14 pandemic, notwithstanding that numerous jails and prisons throughout the country
15 have released prisoners in light of the pandemic. Further, ICE has discretion to
16 release people held in detention centers, but instead has chosen to continue to
17 confine many people with Risk Factors in conditions that place them at substantial
18 risk of serious harm. Cumulatively this evidence creates a presumption under
19 *Jones* that these conditions of confinement are punitive in violation of the due
20 process clause.

21 Third, Plaintiffs in the Disability Subclass have provided substantial fact and
22 expert evidence to show that Defendants’ systemic failure to take appropriate
23 affirmative precautions for detained persons with chronic health conditions violates
24 Section 504 of the Rehabilitation Act by failing to provide such persons
25 meaningful access to Defendants’ programs and activities. This evidence shows
26 that Plaintiffs in the Subclass, as people with chronic health conditions, are
27 qualified people with disabilities, and Defendants are covered entities under the
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1 Rehabilitation Act. 42 U.S.C. § 12102; 29 U.S.C. § 794 (a). The evidence further
2 establishes that Plaintiffs in the Subclass are at risk of severe illness or death if
3 exposed to COVID-19, and Defendants have failed to comply with their
4 obligations as entities that operate detention facilities to affirmatively identify
5 detained persons with Risk Factors, conduct evaluations to determine appropriate
6 precautions to protect such persons from contracting the virus, and implement
7 those precautions. *See, e.g., Armstrong v. Brown*, 732 F.3d 955, 958-62 (9th Cir.
8 2013); *Updike v. Multnomah County*, 870 F.3d 939, 949 (9th Cir. 2017). As a
9 result, Defendants' failure to identify and implement appropriate precautions for
10 detained persons with chronic health conditions in light of their heightened Risk
11 Factors if exposed to COVID 19, denies those persons meaningful access to
12 Defendants' programs and activities in violation of Section 504.

13 Last, Plaintiffs in the Disability Subclass have provided substantial fact and
14 expert evidence to show that Defendants' policies and practices violate Section 504
15 of the Rehabilitation Act by subjecting detained people with chronic health
16 conditions to unnecessarily restrictive placements. As noted above, this evidence
17 establishes that Plaintiffs with chronic health conditions have an even more
18 elevated risk of contracting the virus, which will likely lead to medical isolation or
19 segregation. Accordingly, in light of the risks Plaintiffs face of significant isolation
20 and segregation if they are exposed to COVID-19, Defendants have a duty under
21 Section 504 and *Olmstead v. L.C.*, 527 U.S. 581 (1999) to assess whether the
22 detention setting is truly appropriate to the Plaintiffs' needs, and if not, take steps
23 to provide them with an alternate placement with less restrictive consequences.
24 Plaintiffs' evidence has sufficiently shown that Defendants have failed to
25 undertake those assessments, nor have they altered the Plaintiffs' placements in
26 light of COVID-19, further violating Section 504 of the Rehabilitation Act.

27 Plaintiffs have established that they and members of the Subclass are likely
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1 to suffer irreparable harm in the absence of preliminary relief. COVID-19 puts
2 people with Risk Factors at substantial risk of serious injury or death, particularly
3 so in the detention setting, and ICE's response to these risks has been grossly
4 deficient. This sufficiently demonstrates that without the requested relief, Plaintiffs
5 and members of the Subclass are likely to suffer irreparable harm, including loss of
6 their due process rights, deprivation of meaningful access to the detention program,
7 unnecessary isolation, as well as injury or death. *See, e.g., Melendres v. Arpaio*,
8 695 F.3d 990, 1002 (9th Cir. 2012) (holding that deprivation of constitutional
9 rights constitutes irreparable injury); *Hernandez v. Cty. of Monterey*, 110 F. Supp.
10 3d at 956-57 (irreparable harm found and preliminary relief granted where jail
11 facility failed to provide persons with disabilities access to its programs and
12 activities); *Brantley v. Maxwell-Jolly*, 656 F. Supp. 2d 1161 (N.D. Cal. 2009)
13 (irreparable harm where proposed funding cuts to Medi-Cal program likely place
14 people with disabilities at serious risk of institutionalization); *Jones v. Texas Dep't*
15 *of Criminal Justice*, 880 F.3d 756, 759 (5th Cir. 2018) (holding that the risk of
16 injury establishes irreparable harm).

17 Plaintiffs have established that the balance of equities tip in their favor. The
18 interest in protecting individuals from physical harm outweighs monetary costs to
19 government entities. *See Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754,
20 766 (9th Cir. 2004). As set forth above, people with Risk Factors are at substantial
21 risk of serious harm. Defendants, on the other hand, will simply be required to
22 devise a plan to review people with Risk Factors and release those they cannot
23 adequately care for in light of the spread of COVID-19.

24 Finally, Plaintiffs have established that an injunction is in the public interest.
25 Immediately implementing measures to protect the health of detainees with Risk
26 Factors, and releasing those for which such measures cannot be implemented and
27 who do not pose a danger to the public protects the health of those detainees, the
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1 staff of detention centers, and the public at large by mitigating or eliminating a
2 situation in which detainees become infected by COVID-19 and must rely on
3 hospitals and medical equipment.

4 For these reasons, the Court hereby enters the following injunction:

5 Defendant United States Immigration and Customs Enforcement must
6 immediately (i) identify all people in ICE custody with one or more Risk Factors;³
7 (ii) conduct a comprehensive, evidence-based assessment of medically necessary
8 precautions that should be implemented to ensure the health and safety of such
9 persons during the COVID-19 pandemic, including assurance that all such persons
10 have access to competent, sufficient, and appropriately qualified staffing, medical
11 care, screening, social distancing measures, access to necessary medical
12 equipment; (iii) promptly (within 48 hours) effectuate the release of individuals
13 with one or more Risk Factors if medically necessary safeguards cannot be
14 immediately (within 24 hours) provided to ensure health and safety, and absent an
15 individualized finding of dangerousness to community; (iv) modify its existing
16 COVID-19 protocols to remediate all Protocol Deficiencies identified in paragraph
17 14 of the Declaration of Homer Venters in Support of Motion for Preliminary
18 Injunction and Class Certification.

19 The Court will also appoint a Special Master to oversee this preliminary
20 injunction. Within one business day of this Order, the Parties must meet and confer
21 to try to reach agreement on a Special Master, and in the absence of such
22 agreement, must each submit the names of three possible Special Masters to the
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24 ³ Risk Factors include: people who are over the age of 55; people who are
25 pregnant; and people who have one or more of the following underlying chronic
26 conditions: cardiovascular disease (congestive heart failure, history of myocardial
27 infarction, history of cardiac surgery); high blood pressure; chronic respiratory
28 disease (asthma, chronic obstructive pulmonary disease including chronic
bronchitis or emphysema, or other pulmonary diseases); diabetes; cancer; liver
disease; kidney disease; autoimmune diseases (psoriasis, rheumatoid arthritis,
systemic lupus erythematosus); severe psychiatric illness; history of transplantation
or HIV/AIDS.

1 Court, complete with biographical information.

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IT IS SO ORDERED.

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DATED: _____

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The Honorable Jesus Bernal
UNITED STATES DISTRICT JUDGE

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