

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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C.G.B., <i>et al.</i>)	
)	Case No. 1:20-cv-01072-CRC
<i>Petitioners,</i>)	
)	
v.)	
)	
CHAD WOLF, <i>et al.</i>)	
)	
<i>Respondents.</i>)	
_____)	

RESPONSE TO RESPONDENTS’ SUPPLEMENT TO RECORD
CONCERNING *FRAIHAT*

Petitioners respectfully submit this response to Respondents’ Supplement to Record (ECF No. 31):

During the May 6, 2020 telephonic hearing on Petitioners’ motion for a temporary restraining order, this Court closely questioned the parties regarding the processes Immigration and Customs Enforcement is using to evaluate detainees pursuant to the preliminary injunction in *Fraihat v. U.S. Immigration & Customs Enforcement*, No. EDCV 19-1546 JGB (SHKx), 2020 U.S. Dist. LEXIS 72015 (C.D. Cal. Apr. 20, 2020). At the end of the hearing, the Court directed Respondents to supplement the record with answers to several specific questions about how ICE is complying with the *Fraihat* order. *See* Transcript of Telephonic Motion Hearing (“Tr.”) at 71:11-21 (May 6, 2020).

The Court directed Respondents to provide a “better explanation of the standards that are being applied in these *Fraihat* reviews,” specifically including:

- Who is making the determinations;
- What standards they are applying; and

- What process is used in determining “who gets one and who doesn’t get one,” *i.e.*, which detainees will be recommended for release.

Tr. at 71:11-21. Neither the Supplement to Record (“Supp.”) nor the attached Declaration of Russell Hott (“Hott Decl.”) contains any such information. Rather, the Government simply represents that it has identified more than 4,400 potential subclass members and that “ICE has been conducting new custody reviews as soon as possible following the identification of subclass members.” *Id.* at 2; *see also* Hott Decl. ¶ 18 (same).

The Supplement does not even attempt to answer all of the Court’s questions. Accordingly, in this Response, Petitioners provide additional information available in the public record in *Fraihat* relevant to the Court’s requests.

The Government has been only slightly less opaque in the *Fraihat* litigation itself. In a joint status report regarding injunction-related discovery in *Fraihat*, the Government stated that once a detainee is identified as a subclass member, ICE Enforcement and Removal Operations offices make custody redeterminations. *See* Joint Meet and Confer Statement Regarding Plaintiffs’ Notice and Information/Document Requests (“*Fraihat* Joint Stmt.”) at 12, *Fraihat*, No. EDCV 19-1546 JGB (SHKx), (C.D. Cal. filed May 8, 2020) (ECF No. 147).¹ The Government also stated that those ERO offices “do not review medical files and do not determine if a detainee has or does not have a risk factor.” *Id.*²

¹ A true and correct copy of the *Fraihat* Joint Statement is attached hereto as Exhibit 1.

² The Government stated that medical professionals are determining whether detainees have the health risk factors that qualify them for membership in the *Fraihat* subclasses, but asserted that “ICE cannot provide the identity of the person who made the risk factor determination, that individual’s qualifications, nor the date the determination was made because such information would require the manual review of thousands of records and is disproportionate to the needs of this case.” *Fraihat* Joint Stmt. at 14.

The Government also stated that it could not provide the *Fraihat* plaintiffs with the names of those officials making custody redeterminations, nor could it state the reasons for each refusal to release a subclass member, because doing so would require manual review of thousands of records. *Fraihat* Joint Stmt. at 19. The only specific criterion used in the custody redeterminations that the Government mentioned was its statement that ICE will not release any detainee held pursuant to 8 U.S.C. § 1226(c), which the Government contends prohibits release of those detainees (a contention Petitioners here and the *Fraihat* plaintiffs dispute). *Id.*

The Court also directed Respondents to provide the status of the *Fraihat* reviews of each named Petitioner. Tr. at 71:11-14. The declarations Respondents filed on May 11 reveal that ICE has denied *Fraihat* relief to each named Petitioner, either because ICE determined they were not members of a *Fraihat* subclass or denied them release.

Respondents' declarations indicate serious flaws and inconsistencies in the *Fraihat* review process. For example, ICE denied release, purportedly because of their criminal convictions, to K.S. and K.M., both of whom are living with HIV and have other medical risk factors. *See* Supplemental Cantrell Decl. ¶¶ 58-62 (ECF No. 33-5). However, K.S.'s convictions were for nonviolent crimes (conspiracy to commit theft and possession of a credit card without the owner's consent), *id.* ¶ 49, and in the midst of this pandemic other courts have ordered the release of ICE detainees convicted of far more serious crimes than theft or battery. *See, e.g., Zaya v. Adducci*, No. 20-10921, 2020 U.S. Dist. LEXIS 76549, at *21-23 (E.D. Mich. Apr. 30, 2020) (extending TRO granting immediate release to ICE detainee convicted of second-degree murder, domestic violence, and selling cocaine); *Bent v. Barr*, No. 19-cv-06123-DMR, 2020 U.S. Dist. LEXIS 62792, at *27 (N.D. Cal. Apr. 9, 2020) (granting TRO and ordering release on condition of providing a suitable release plan of detainee convicted of voluntary

manslaughter and attempted murder); *Leandro R. P. v. Decker*, No. 20-3853 (KM), 2020 U.S. Dist. LEXIS 67607, at *27-29 (D.N.J. Apr. 17, 2020) (granting TRO and ordering release of ICE detainee convicted of multiple crimes including attempted strangulation, possession of stolen property, criminal contempt, and petit larceny).

The Government's process for reviewing detainees' medical histories also is suspect. ICE has refused to classify M.R.P. as a *Fraihat* subclass member despite the fact that she is infected with Hepatitis A and liver disease is a specific risk factor. *See* Supplemental Acosta Decl. ¶¶ 75, 77 (ECF No. 33-1). ICE also has refused to classify K.R.H. as a subclass member despite her history of childhood asthma and ongoing treatment for tachycardia. *See* Supplemental Ciliberti Decl. ¶¶ 47, 49 (ECF No. 33-6).

None of these internal agency reviews appear to be subject to any independent oversight, right of appeal by any detainee or any other indicia of due process.

Petitioners respectfully submit that Respondents' failure to answer the Court's straightforward questions starkly illustrates the kind of systemic shortcomings in the management of civil detainees that have left Petitioners with no choice but to turn to the Court for relief from their unconstitutional conditions of confinement.

May 14, 2020

Respectfully submitted,

/s/ Matthew E. Kelley

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the foregoing Response to Respondents' Supplement to Record to be served via the Court's CM/ECF system upon all counsel of record.

Dated: May 14, 2020

/s/ Matthew E. Kelley
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