UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Heredia Mons, *et al*.,	)	
	)	
Plaintiffs,	)	
	)	No. 19-cv-1593 (JEB)
v.	)	
	)	
Chad Wolf, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO
MOTION FOR PRELIMINARY INJUNCTION

Defendants Chad Wolf, Acting Secretary of the U.S. Department of Homeland Security ("DHS"); Matthew T. Albence, Acting Director of U.S. Immigration and Customs Enforcement ("ICE"); Nathalie Asher, Acting Executive Associate Director of ICE Enforcement and Removal Operations; and George Lund III, Director of ICE's New Orleans Field Office, in their official capacities (collectively, "Defendants"), file this opposition to Plaintiffs' motion for preliminary injunction.

SUMMARY OF ARGUMENT

Plaintiffs profess that they "are not seeking to challenge the outcome of the individualized parole assessments" themselves, but only to obtain an order from the Court requiring ICE to "immediately administer to all present and future class members individualized parole assessments, in a method consist[ent] with the applicable regulations and standards of the [2009 Parole] Directive." (ECF No. 61-1, Pl. Mem. at 16) But this Court already issued a preliminary injunction on September 5, 2019, directing ICE to conduct individualized assessments of parole requests made by asylum seekers who have obtained a credible fear

determination and who are detained at facilities within the New Orleans Field Office. Thus, if Plaintiffs' assertion is to be credited, there is no need for the Court to issue another preliminary injunction that is duplicative of the one already in place. Nor could Plaintiffs establish irreparable harm from the absence of an additional order that would be redundant of the existing one.

Although Plaintiffs contend as the basis for seeking duplicative relief that Defendants "continue to defy this Court's injunction" (ECF No. 61-1, Pl. Mem. at 16; ECF No. 61, Pl. Mot. at 1), they have failed to support that contention. They acknowledge that recent monthly reports by the agency reflect parole grant rates approaching 40 percent at some facilities, which is an increase from near zero at the time Plaintiffs' original motion for preliminary injunction was filed. (ECF No. 61-1, Pl. Mem. at 31-32) Based on this Court's prior analysis, which considered the near-zero parole grant rate to be indicative of non-compliance with the Parole Directive, this substantial increase in grant rates demonstrates that individualized determinations are occurring consistent with the Court's September 5, 2019 order.[1] Moreover, it is likewise telling that, of the hundreds of parole determinations and re-determinations that have occurred since the Court's September 5, 2019 preliminary injunction order, Plaintiffs proffer declarations of only eight detainees. And those declarants fail to identify any recent instances of non-compliance with the Parole Directive, but instead reference a few, isolated instances of alleged

[1] Defendants continue to maintain that the use of grant rates as a benchmark for compliance with the Parole Directive is improper, but, as that is something that this Court (and Plaintiffs) have previously relied on as being indicative of non-compliance over Defendants' objection, consistency demands that the Court likewise recognize that a substantial increase in grants necessarily is evidence of compliance.

non-compliance that allegedly occurred months ago, with some even pre-dating the Court's September 5, 2019 order. Thus, Plaintiffs' suggestion that their motion is necessitated by non-compliance with the Court's existing order is an obvious pretext, particularly given that other mechanism are available to Plaintiffs for bringing isolated issues of alleged non-compliance to the Court's attention as they have done previously. (*see, e.g.*, ECF No. 53)[2]

Thus, what is at issue here is Plaintiffs' attempt to shoehorn the COVID-19 situation into this narrowly framed Administrative Procedure Act ("APA") case. Indeed, when Plaintiffs met and conferred with undersigned counsel regarding this motion by email dated March 20, 2020 (as referenced in ECF No. 61, Pl. Mot. at 2, "Local Rule 7(m) Statement"), they advised that they would be filing an entirely different motion from what actually has been filed. At that time, they described the motion as one for "a Temporary Restraining Order seeking release of *Heredia Mons* class members, and enjoining the New Orleans ICE Field Office from detaining any future class members, until the abatement of this pandemic." (Ex. 1 hereto)

In response to Plaintiffs' March 20, 2020 email, undersigned counsel observed that "[t]he TRO motion that you have outlined below goes well beyond the limited scope of this lawsuit and, in effect, would be asking the Court to make parole adjudications – i.e., to, in effect, order the granting of parole to all members of the Mons class. The court, however, already has

[2] At the status conference on January 7, 2020, the Court also discussed with the parties possible recourse for Plaintiffs in the event Defendants' statistics failed to improve, and renewing their preliminary injunction motion was not an option that the Court identified. (Tr. at 23-24) Defendants' statistics, of course, have improved significantly since that time. And, in the recent status report, Plaintiffs have opposed Defendants' request for a summary judgment briefing schedule on the basis that more monthly reports are needed "for this Court to reach a sound, well-informed conclusion regarding Defendants' compliance with the Parole Directive." (ECF No. 63 at 4)
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recognized that it has no jurisdiction over the parole determinations themselves. *See Damus*, 313 F. Supp. 3d at 327 (observing that "[t]o the extent Plaintiffs are challenging the [parole] determinations themselves – i.e., the actual balancing of the merits of each application for parole – this Court agrees that it lacks jurisdiction")." (*Id.*)

Having abandoned asking this Court to order the release of all detainees outright, Plaintiffs now are asking this Court to order automatic re-determinations under the 2009 Parole Directive for *all* detainees within the New Orleans Field Office who fall within the broadly defined *Mons* class that take into consideration the detainee's age and medical conditions – and, indeed, "favor" those factors over others – in light of the COVID-19 situation. (ECF No. 61, Pl. Mot. at 2) This Court, however, lacks jurisdiction to entertain a requested injunction that exceeds the scope of the narrow framework of this lawsuit as pled in the Complaint, which is confined to the four corners of the 2009 Parole Directive and alleged non-compliance with that directive based on allegations wholly unrelated to COVID-19.

Aside from this threshold jurisdictional defect, Plaintiffs misunderstand the limited scope of the Parole Directive and the resulting narrow scope of their APA claim in this lawsuit.[3] Although the Parole Directive sets forth certain procedures to be followed in evaluating individual parole requests, including making individualized determinations, nothing in the Parole Directive or the overarching regulation, 8 C.F.R. § 212.5(b), requires the granting of parole based on any one, or combination, of the factors Plaintiffs identify. Nor does the Parole

[3] Much of Plaintiffs' motion re-iterates arguments already addressed by the Court in connection with briefing on Defendants' motion to dismiss and Plaintiffs' prior motion for preliminary injunction. Recognizing that the Court already has resolved those arguments in its prior order, Defendants are not reiterating their position here, but incorporate their prior filings in that regard by reference and reserve all rights in that regard.

Directive dictate how such factors should be balanced against other competing factors that are relevant to any particular parole determination. Such decisions and balancing of competing factors remain within ICE's discretion under the Parole Directive. As the applicable regulations make clear, parole is to be assessed on a "case-by-case basis," 8 C.F.R. § 212.5(b), and whether a medical condition warrants parole in any specific individual situation is a determination entirely within ICE's discretion. *Id.* § 212.5(b)(1).

Thus, Plaintiffs cannot establish a likelihood of success on their claim that ICE has violated the Parole Directive by allegedly failing in its individualized determinations to afford greater weight to an individual's age or medical condition in the context of the current COVID-19 situation than to other factors. Plaintiffs have likewise failed to proffer any evidence that detainees with medical conditions placing them at high-risk for COVID-19 have not received individualized parole determinations. Indeed, of the eight individuals who submitted declarations in support of Plaintiffs' motion, only two could be considered high-risk based on the CDC criteria – O.M.H. (HIV positive and Hepatitis C) and S.U.R. (60 year old with hypertension and a heart murmur) – and both recently have been released from detention. (Hartnett Decl. ¶ 26 and Ex. B thereto)

Plaintiffs, moreover, cannot establish irreparable harm if they are not afforded the relief that they seek, namely, an order from the Court directing ICE to conduct new parole determinations for all detainees within the *Mons* class, regardless of whether a re-determination is requested, and without regard to a detainee's age or medical situation. The Parole Directive already permits a detainee to request a re-determination of a prior denial and affords ICE discretion in how to conduct that re-determination. (2009 Parole Directive ¶ 8.9) Accordingly,

detainees who are concerned about COVID-19 based on their age or medical condition can request a re-determination under the directive and thus would suffer no irreparable harm if the relief requested by Plaintiffs (court-ordered re-determinations) is not granted.

Finally, the order that Plaintiffs request is not in the public interest. It is not narrowly tailored to those detainees who may fall within high-risk categories identified by the CDC, but would cover all detainees regardless of their age, medical condition or whether they even want a re-determination. Accordingly, it would require the unnecessary expenditure of resources by ICE that could otherwise be used to fulfill ICE's mission at a particularly challenging time.

Ultimately, it appears that Plaintiffs may be using the vehicle of a preliminary injunction motion as a means of inviting this Court to assume a role in monitoring the conditions of the detention facilities within the New Orleans Field Office. This Court, however, lacks jurisdiction to assume such a role based on the narrowly pled APA claims that are before this Court, which rest entirely on the so-called *Accardi* doctrine as their legal basis.[4] Those claims are limited to the four corners of the 2009 Parole Directive, and the procedures established by that directive on ICE's otherwise unfettered discretion in making parole determinations. Because that directive does not speak to the conditions of the detention facilities, and the conditions at the facilities did not form the basis for Plaintiffs' APA claims under the *Accardi* doctrine as pled in the Complaint, any attempt by Plaintiffs to ask this Court to assume a role outside the scope of this lawsuit should be summarily rejected.

[4] Defendants are aware that this Court has sought information from ICE regarding the conditions at certain Family Residence Centers at issue in *O.M.G. v. Wolf,* Case No. 20-786 (JEB), but the Complaint in that case asserted claims specifically based on the conditions at those facilities. Those claims as pled were not narrowly tailored as here to the four-corners of the Parole Directive.

ARGUMENT

I. This Case As Pled Is Limited To The Four Corners Of The Parole Directive.

This case as pled by Plaintiffs is limited to two claims under the APA based on ICE's alleged categorical denial of parole for asylum seekers who have been issued a credible fear determination and who are detained at facilities within ICE's New Orleans Field Office. Specifically, Plaintiffs alleged that, at the time the Complaint was filed in May 2019, DHS had "effectively rescinded the 2009 Parole Directive" in the New Orleans ICE Field Office and that the parole determinations pertaining to them, as well as to members of the putative class, were denied categorically without an individualized determination. (Compl. ¶¶ 129-137) In support of these claims, they allege that parole was denied in "virtually all cases in 2018" (Compl. ¶ 48) and also cite to a statement made in November 2018 by the Assistant Field Office Director for the New Orleans Field Office, Brian Acuna, that they view as an admission that the New Orleans Field Office was not following the directive at that time.[5]

Plaintiffs argued that the alleged "categorical denial" of parole violates the provisions of the 2009 Parole Directive, which Plaintiffs contends imposes certain requirements on ICE in the manner by which it exercises its discretion in making parole determinations that are subject to that directive. Importantly, of the five categories of aliens who may meet the parole standards as set forth in 8 C.F.R. § 212.5(b), the Parole Directive seeks to interpret only one of those five categories, specifically, subsection (b)(5), which refers to "[a]liens whose continued detention is

5 Mr. Acuna has clarified that he misspoke in connection with the response that he provided in November 2018, and confirms that all offices within the New Orleans area of responsibility are adjudicating parole requests in accordance with the 2009 parole directive." (ECF No. 26-3, Acuna Decl. ¶ 14) In any event, this allegation does not speak to whether ICE currently is complying with the Parole Directive.

not in the public interest." The Parole Directive explains how the term "public interest" is to be interpreted to "guide" the exercise of the agency's discretion with respect to this specific subsection and also "mandate[s] uniform record-keeping and review requirements" for parole decisions under section 212.5(b). (Parole Directive ¶ 4.4) The factors that the Parole Directive identifies for consideration in evaluating the "public interest" specifically include the individual's potential as a flight risk and the individual's potential danger to the community. Issues pertaining to an individual's medical condition are not specified as considerations under the "public interest" assessment. Instead, under 8 C.F.R. § 212.5(b)(1), an individual's "serious medical condition" may be considered as a basis for parole on a "case-by-case" basis.

As this Court has previously recognized, by statute the decision whether or not to grant parole under any of the subsections of 8 C.F.R. § 212.5(b) is a discretionary one that is not subject to judicial review under the APA. *See Damus v. Nielsen,* 313 F. Supp. 3d 317, 327 (D.D.C. 2018) ("[t]o the extent Plaintiffs are challenging the [parole] determinations themselves – i.e., the actual balancing of the merits of each application for parole – this Court agrees that it lacks jurisdiction"). This Court, however, has permitted Plaintiffs' APA claims here to proceed because Plaintiffs purportedly are not challenging individual parole determinations but instead challenge more narrowly the agency's alleged failure to comply with the procedures of the Parole Directive based on the alleged practice of categorically denying all parole requests (and thus allegedly not engaging in individualized determinations).

Plaintiffs' APA claims[6] thus survived Defendants' motion to dismiss solely on the basis of the "*Accardi* doctrine," which, as applied by this Court,[7] can form the basis for an APA claim when an agency allegedly fails to following guidelines that it has established to govern the agency's discretionary decisionmaking. (ECF No. 32, Mem. Op. at 18) Relying on the *Accardi* doctrine, this Court found the Parole Directive to constitute binding guidance over the agency's discretionary decisionmaking in parole determinations, and thus permitted Plaintiffs to proceed with their APA claim based on Plaintiffs' allegations that ICE failed to conduct individualized parole determinations and instead followed a practice of categorically denying parole contrary to the directive. (ECF No. 32, Mem. Op. at 19)

On September 5, 2019, this Court also granted Plaintiffs' motion for preliminary injunctive relief and ordered ICE to conduct individualized parole determinations in accordance with the provisions of the Parole Directive. Since that order, ICE has been providing monthly reports to the Court reflecting the rate at which parole is now being granted at its facilities within the New Orleans Field Office. In that regard, the report filed on February 24, 2020 reflected a 36 percent grant rate for both re-determinations and initial parole determinations, and the report field on March 23, 2020, reflected a 29% grant rate for re-determinations and a 13.6% grant rate for initial determinations. In contrast, at the time this lawsuit was filed, the grant rate was near

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[6] Plaintiffs also asserted a claim for violation of due process under the Fifth Amendment for alleged non-compliance with the procedures of the Parole Directive, but the Court dismissed that claim without prejudice by order dated September 5, 2019. (ECF No. 33)

[7] Defendants continue to reserve their position that the *Accardi* doctrine is not applicable to the Parole Directive, and are simply discussing above this Court's ruling on Defendants' motion to dismiss.

zero according to Plaintiffs' allegations, evidence that figured prominently in their Complaint and this Court's granting of preliminary injunctive relief.

II. This Court Lacks Jurisdiction To Issue Injunctive Relief Based On Allegations That Fall Outside The Narrow Scope Of This Lawsuit.

"As a general rule, 'a preliminary injunction may not issue when it is not of the same character as that which may be granted finally and when it deals with matter outside the issues in the underlying suit.'" *Sai v. Transp. Sec. Admin.*, 54 F. Supp. 3d 5, 9 (D.D.C. 2014). Thus, a preliminary injunction that "deals with a matter lying wholly outside the issues in the suit" or would provide relief that could not be provided "in any final injunction that may be entered" would not be proper. *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945).

This established rule "cuts to the subject matter jurisdiction of the court." *Sai*, 54 F. Supp. 3d at 9. "Thus, just as a court lacks jurisdiction over a motion for a preliminary injunction in the absence of a complaint . . ., the court also lacks jurisdiction over a motion when it 'raises issues different from those presented in the complaint.'" *Id.; see also Adair v. England*, 193 F. Supp. 2d 196, 200 (D.D.C. 2002); *accord Stewart v. U.S. Immigration and Naturalization Serv.*, 762 F.2d 193, 198-99 (2d Cir. 1985).

Plaintiff purports to bring this preliminary injunction motion based on ICE's failure to provide individualized parole determinations in accordance with the procedures set forth in the Parole Directive. But this Court already has entered a preliminary injunction providing that relief and, as discussed below, Plaintiffs have failed to support with competent evidence their contention of non-compliance by ICE with the existing injunction. Indeed, were the Court to

find non-compliance with its existing order, the proper remedy would not be for the Court to issue a duplicative preliminary injunction.

The preliminary injunction order that is actually being requested is one that would require ICE to conduct re-determinations of parole for *all* detainees within the New Orleans Field Office who fall within the broadly defined *Mons* class based on the COVID-19 situation. (ECF No. 61-2) But nothing in the existing Complaint supports that relief. The allegations are limited to narrowly pled APA claims based on the *Accardi* doctrine that allege (1) a policy and practice of "ignoring the Parole Directive" (Count I) and (2) a failure to provide individualized determinations in accordance with the Parole Directive and to instead categorically deny parole in virtually all cases (Count II). (Compl. ¶¶ 129-137)

In their motion for preliminary injunction, Plaintiffs state that they are re-asserting these two claims "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." (ECF No. 61-1, Pl. Mem. at 23) This assertion is an admission that Plaintiffs are seeking relief outside the scope of the existing Complaint and attempting, by motion, to advance new claims. That Complaint, which was filed in May 2019, pre-dates the COVID-19 situation and does not allege a violation of the 2019 Parole Directive based on any individual's particular health status, age or conditions of detention. Plaintiffs' attempt to assert *by motion* what amount to new claims based on events that had not arisen at the time that Complaint was filed is improper and fails to afford jurisdiction to this Court to consider a requested injunction based on such unpled claims.

When Plaintiffs' narrowly pled Complaint is compared to recent lawsuits against ICE filed by other litigants based on the COVID-19 situation, the limited nature of this lawsuit *as pled* is even more apparent. Those lawsuits assert constitutional challenges to the living conditions at certain ICE facilities based on COVID-19 and seek injunctive relief on the basis of allegations specifically raised in the Complaints filed in those actions. *See, e.g., Dawson v. Asher*, Case No. 20-409 (W.D. Wash.).[8] In one recent example, 17 detainees in five facilities within the New Orleans Field Office (LaSalle, Richwood, Etowah, Adams and Winn) recently filed such a lawsuit in the Eastern District of Louisiana, alleging that they are high-risk to COVID-19 either by age or health conditions (i.e., diabetes, chronic lung condition, kidney disease, and hypertension) and that the conditions at the facilities are unsafe for them for that reason and that they should be released. *See Dada, et al. v. Witte*, Case No. 20-1093 (E.D. La.).[9]

What is relevant here for purposes of this Court's jurisdiction is not the outcome of the motion in *Dada* (dismissal for lack of jurisdiction) and similar lawsuits, but the different character of such lawsuits as compared to the narrowly pled Complaint here. The Complaint here does not plead facts pertaining to the COVID-19 situation or attempt to base any claim for relief on the living conditions at facilities within the New Orleans Field Office relative to any individual's particular age or medical condition. Indeed, standing in this lawsuit was derived from a putative class that is defined in a manner entirely unconnected to any class member's age or medical condition.

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8 The motion for temporary restraining order was denied in the above-cited case.

9 At least one of the plaintiffs in *Dada* appears to fall within the *Mons* class as that class has been defined by this Court.

Yet, Plaintiffs base their motion for preliminary injunction on conditions in the detention facilities, which they contend render them unsafe in light of COVID-19 and thus, in their view, require ICE to conduct automatic, across-the-board re-determinations of parole for all detainees. But the APA claims as pled in the existing Complaint are not based on alleged unsafe living conditions or any detainees' age or medical condition, nor does the Complaint present the Court with a claim that would require it to assess those conditions. As pled, this lawsuit is limited to the four corners of the Parole Directive and that directive does not in any way purport to limit ICE's discretion in weighing such issues in parole determinations. Nor does it require that ICE conduct automatic, across-the-board re-determinations of parole in the event of a health crisis. Under the directive, individual detainees can request a re-determination of a prior denial of parole and ICE has discretion in how that is conducted. (2009 Parole Directive ¶ 8.9) Moreover, while the regulations governing parole recognize "serious medical conditions" and "humanitarian reasons" as a potential basis for parole, that is to be assessed in ICE's discretion on a "case-by-case" basis. 8 C.F.R. § 212.5(b).

This Court already has issued a preliminary injunction that falls within the scope of the allegations as narrowly pled in the Complaint. Plaintiffs' instant motion would be redundant were it to seek relief that this Court already has granted. Instead, it is properly understood as seeking relief related to the COVID-19 situation based on the conditions at the facilities within the New Orleans Field Office, matters over which this Court lacks jurisdiction in this narrowly framed lawsuit. As such, Plaintiffs' motion goes beyond the scope of this lawsuit and should be denied on that basis.

III. Plaintiffs Have Failed To Meet Their Burden To Establish An Entitlement To Preliminary Injunctive Relief.

Even were the Court to find that it has jurisdiction over Plaintiffs' motion despite the limited nature of this lawsuit, Plaintiffs have failed to meet their burden to obtain preliminary injunctive relief. A "preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24 (2008). A party seeking preliminary relief must make a "clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest." *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016). The moving party bears the burden of persuasion and must demonstrate, "by a clear showing," that the requested relief is warranted. *Hospitality Staffing Solutions, LLC v. Reyes*, 736 F. Supp. 2d 192, 197 (D. D.C. 2010).

Before the Supreme Court's decision in *Winter*, courts weighed these factors on a sliding scale, allowing an unusually strong showing on one of the factors to overcome a weaker showing on another. *Davis v. PBGC*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009) This Circuit has suggested, without deciding, that *Winter*—which overturned the Ninth Circuit's "possibility of irreparable harm" standard— "should be read to abandon the sliding-scale analysis in favor of a 'more demanding burden' requiring Plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm." *Bartko v. Dep't of Justice*, 2015 WL 13673371, at *1 (D.D.C. 2015) (citing *Sherley v. Sebelius*, 644 F.3d 388, 392–93 (D.C. Cir. 2011), and *Davis*, 571 F.3d at 1292); *see also League of Women Voters*, 838 F.3d at 7 (declining to address whether "sliding scale" approach is valid after *Winter*).

Even before *Winter*, courts in this Circuit consistently stressed that "a movant must demonstrate 'at least some injury' for a preliminary injunction to issue." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting *CityFed Fin. Corp. v. OTS*, 58 F.3d 738, 747 (D.C. Cir. 1995)). Thus, "if a party makes no showing of irreparable injury, the court may deny the motion without considering the other factors." *Henke v. Dep't of Interior*, 842 F. Supp. 2d 54, 59 (D.D.C. 2012) (quoting *CityFed Fin. Corp.*, 58 F.3d at 747); *see also Chaplaincy of Full Gospel Churches*, 454 F.3d at 297 ("A movant's failure to show any irreparable harm is … grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief.").

A movant alleging "speculative injuries" cannot meet the "'high standard for irreparable injury' sufficient to warrant the extraordinary relief" of a preliminary injunction and "the Court need not reach the other factors relevant to the issue of injunctive relief." *United Farm Workers v. Chao*, 593 F. Supp. 2d 166, 171 (D.D.C. 2009) (quoting *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297); *see Bartko*, 2015 WL 13673371 at *2 ("[t]he Court need not grant injunctive relief 'against something merely feared as liable to occur at some indefinite time'") (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). "[T]he movant must demonstrate the injury is of such 'imminence' that there is a clear and present need to equitable relief to prevent irreparable harm." *Id.* (quoting *Judicial Watch, Inc. v. Dep't of Homeland Security*, 514 F. Supp. 2d 7, 10 (D.D.C. 2007). And where a party seeks to change the status quo through action rather than merely to preserve the status quo—typically the moving party must meet an even higher standard than in the ordinary case: the movant must show 'clearly' that [it] is entitled

to relief or that extreme or very serious damage will result." *Farris v. Rice*, 453 F. Supp. 2d 76, 78 (D.D.C. 2006) (citing authorities).

As discussed below, Plaintiffs have fallen far short of meeting their burden to establish that they have met any of the four factors by either the "clear showing" standard or the somewhat higher standard applicable when the injunction would alter the status quo. *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 319 F. Supp. 3d 70, 81 (D.D.C. 2018); *Farris*, 453 F. Supp. 2d at 78.

A. Plaintiffs Have Not Demonstrated A Likelihood Of Success On The Merits

Plaintiffs have not shown that they have a strong likelihood of success on the merits. Plaintiffs nominally contend that their motion is necessary on the basis that Defendants are in violation of this Court's existing preliminary injunction order, and they devote most (if not all) of their discussion of the likelihood of success factor to essentially re-litigating their earlier motion. (ECF No. 61-1, Pl. Mem. at 31-42) However, as discussed below, Plaintiffs have failed to proffer to the Court competent evidence sufficient for this Court to find Defendants currently to be in violation of the September 5, 2019 order. Indeed, if alleged non-compliance with the existing order were the true basis for Plaintiffs' motion, the requested injunction would be redundant of relief already granted by the Court and unnecessary in light of other potential remedies available to Plaintiffs.

What is at issue instead is Plaintiffs' contention that automatic, across-the-board re-determinations of parole are necessary in light of COVID-19. As already discussed above, this Court lacks jurisdiction to consider that claim since it goes beyond the scope of this lawsuit as narrowly framed in the Complaint. But even if the Court had jurisdiction, Plaintiffs

mischaracterize the Parole Directive in making this argument. They contend that "Defendants should . . . be required to fully comply with all applicable regulations delineated in the Parole Directive, including those that favor the granting of parole to class members who 'have serious medical conditions, where continued detention would not be appropriate,' and class members 'whose continued detention is not in the public interest.'" (ECF No. 61, Pl. Mot. at 2)

However, the referenced regulations do not "favor" granting parole on any specific basis, but simply identify categories in which parole may be justified based on the exercise of ICE's discretion. Neither the Parole Directive nor the referenced regulation, 8 C.F.R. § 212.5(b), dictates how ICE is to weigh competing factors in evaluating parole on a case-by-case basis. Nor have Plaintiffs identified any provision of the Parole Directive that would entitle them to automatic, across-the-board re-determinations based on these factors. And their limited evidence fails to demonstrate that ICE is not conducting individualized determinations of individuals who have requested re-determinations in light of COVID-19. For all of these reasons, Plaintiffs cannot establish a likelihood of success on the merits of their new, unpled claim.

1. Plaintiffs Have Proffered Insufficient Evidence Of Non-Compliance

As a basis for contending that ICE is in violation of this Court's September 2019 preliminary injunction order, Plaintiffs cite to the current grant rates at facilities within the New Orleans Field Office, which they acknowledge approach 40 percent at some facilities but still characterize as "abysmal". (ECF No. 61-1, Pl. Mem. at 32) They also cite to what they characterize as testimony by their declarants reflecting "egregious behavior" by Defendants regarding their compliance with the existing order. (*Id.*) Neither argument has merit.

In terms of the grant rates, Plaintiffs appear to take the position that the 75 percent grant rate allegedly existing several years ago somehow constitutes the benchmark for what constitutes compliance with the Parole Directive. Not only is that a baseless assertion, but it overlooks the underlying premise of the APA claims in their Complaint and in their original motion for preliminary injunction. Both focused on the near-zero grant rate existing at the time this lawsuit was filed. In that regard, the Complaint asserted claims under the APA on the basis that ICE had a "policy and practice of ignoring the Parole Directive" that is arbitrary and capricious (Count I) and that ICE is failing to make individualized parole determinations and instead is "issuing denials on a categorical basis." (Count II) (Compl. ¶¶ 129-137)

These are the only claims currently at issue in this case, and the only claims on which a request for injunctive relief can be based. Clearly, a recent grant rate approaching 40 percent at some facilities (and over 30 percent across all facilities as reflected in the recently-filed monthly reports) conclusively establishes that individualized parole determinations are occurring, that the Parole Directive is not being "ignor[ed]," and that denials are not being issued on a "categorical basis." *See, e.g.*, *R.I.L.R. v. Johnson*, 80 F. Supp. 3d 164, 174 (D.D.C. 2015) (JEB) ("Although these materials certainly do not reflect a large body of favorable release determinations, the Court is reluctant to find an across-the-board No-Release Policy when it appears that — at least in some small number of cases — ICE does grant bond on the basis of individualized considerations.") While Plaintiffs may prefer a higher grant rate, that preference is not a basis for contending that Defendants are failing to conduct individualized determinations in violation of this Court's September 2019 order.

Most of Plaintiffs' discussion concerns sweeping assertions regarding Defendants alleged non-compliance with this Court's September 5, 2019 order (ECF No. 61-1, Pl. Mem. at 32-41) that are untethered from the supporting "evidence" that Plaintiffs have proffered. But the assertions made by counsel in a legal brief are not evidence. A close review of the referenced declarations submitted with Plaintiffs' motion – the only "evidence" presented – reveals the exaggerated nature of these assertions.

Defendants discuss below each of the purported fact declarations submitted with Plaintiffs' motion to the extent they purport to address ICE's alleged non-compliance with the 2009 Parole Directive. As that discussion reflects, to the extent these declarations even allege non-compliance with the 2009 Parole Directive (as opposed to dissatisfaction with the outcome of their parole determinations), they are limited to isolated acts that occurred several months ago and, in some instances, prior to this Court's September 5, 2019 preliminary injunction order. And, to the extent these declarants take issue with the amount of information on their denial letters explaining the basis for the decisions, this Court's September 5, 2019 order did not require ICE to provide any more detail than provided on its form denial letter (indeed, the Parole Directive requires nothing more than a "brief" explanation (Parole Directive § 6.5)). Thus, although Plaintiffs make sweeping assertions of non-compliance in their preliminary injunction motion, their supporting declarations fail to support those contentions.

A discussion of the eight declarations submitted with Plaintiffs' motion follows and demonstrates the dated nature of the allegations of alleged non-compliance in these declarations. The dated nature of the allegations is significant in two ways. First, it demonstrates that there is no alleged imminent need for Plaintiffs' motion to the extent it is based on alleged non-

compliance. *See, e.g., Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (delay of four months indicates a lack of imminence sufficient to support preliminary injunctive relief). Second, Plaintiffs' near complete reliance on dated, isolated examples reflects the absence of any present issue regarding compliance. Indeed, since the Court's preliminary injunction order, hundreds of parole determinations have been made. Against that backdrop, Plaintiffs identification of only a few isolated instances of alleged non-compliance from months ago falls far short of Plaintiffs' burden to establish a present violation of this Court's September 5, 2019 order. A close review of Plaintiffs' declarations reveals the following:

***B.A.E.*:** B.A.E. identifies one act of alleged non-compliance that allegedly occurred in November 2019 when parole was denied before B.A.E. submitted an application, and one isolated comment in November 2009 that is contradicted by recent grant rate statistics. (ECF No. 61-3 at ¶¶ 8-9) B.A.E.'s dissatisfaction with the outcome of the parole determinations and the absence of a more detailed explanation for the denials (which is not required by this Court's preliminary injunctive order or the Parole Directive) is not evidence of non-compliance. According to ICE's records, B.A.E.'s most recent parole denial was March 29, 2020. (Ex. B to Hartnett Decl.)

***K.S.R.*:** K.S.R. identifies one act of alleged non-compliance at the S. Louisiana facility when, in December 2019, K.S.R. was denied parole as a flight risk without being interviewed. (ECF No. 61-4 at ¶ 7) According to K.S.R.'s declaration, K.S.R. requested re-determinations of that denial on three occasions and was denied each time. (*Id.* ¶ 8) K.S.R. does not identify any issues of non-compliance associated with any of those denials. (*Id.*) According to ICE's records, K.S.R.'s most recent parole denial was

March 12, 2020. (Ex. B to Hartnett Decl.)

***L.P.C.*:** L.P.C. identifies one instance in November 2019 at the S. Louisiana facility where an officer allegedly refused to accept the parole application and stated that parole is not granted in Louisiana (a contention contradicted by recent parole grant statistics). (ECF No. 61-5 at ¶¶10-12) L.P.C. asserts that "over the last four months" other parole requests were made and were denied, with the flight risk box checked on the denial letter and no further explanation. (*Id.*) L.P.C. does not identify any issues of non-compliance regarding these requests and neither this Court's preliminary injunction order nor the Parole Directive require any explanation beyond what was included in these denial letters. According to ICE's records, L.P.C.'s last parole denial was January 30, 2020. (Ex. B to Hartnett Decl.)

***O.M.H.*:** O.M.H. identifies an issue with a parole denial occurring in or about July 2019, *prior* to the Court's September 5, 2019 preliminary injunction order. (ECF No. 61-6 at ¶ 5) O.M.H. also makes a generic assertion that ICE officers at Richwood would not accept parole requests, but the timeframe when this allegedly occurred appears to have been some time prior to December 2019. (*Id.* at ¶ 9) O.M.H. filed a parole request on March 26, 2020, but does not assert any issues of non-compliance with respect to that request. (*Id.* at ¶ 10) According to ICE's records, that request was denied on March 30, 2020, but O.M.H. was subsequently released on his own recognizance on April 2, 2020. (Hartnett Decl. ¶ 26 and Ex. B thereto)

R.P.H.: R.P.H. allegedly applied for parole four times and all of her requests have been denied. R.P.H. identifies no issues of non-compliance with respect to any of those requests, but simply expresses the belief that the requests should have been granted. (ECF No. 61-7 at ¶ 14) According to ICE's records, R.P.H.'s last request was denied March 12, 2020. (Ex. B to Hartnett Decl.)

S.U.R.: S.U.R. was transferred to the River Correctional Facility in April 2019 and apparently requested parole shortly thereafter. (ECF No. 61-8 at ¶¶ 8-9) Although S.U.R. alleges that there was no interview in connection with that application or any decision on that request, that application apparently occurred *prior* to this Court's September 5, 2019 order based on the chronology provided in S.U.R.'s declaration. (*Id.*) In November 2019, S.U.R. was transferred to the Adams facility where a parole request was made and denied. (*Id.* ¶ 10) S.U.R. does not identify any issues of non-compliance with that request. (*Id.*) According to ICE's records, S.U.R. was granted parole on April 3, 2020. (Hartnett Decl. ¶ 26 and Ex. B thereto)

***T.M.F.*:** T.M.F. alleges that, while in the Tallahatchie facility for approximately one week in late November/early December 2019, officers told him parole was not granted in Louisiana and that his parole request was denied. (ECF No. 61-9 at ¶¶ 8-9) On December 10, 2019, T.M.F. was transferred to River Correctional Facility and in early January 2020 was transferred to LaSalle, where T.M.F. allegedly had difficulty contacting a deportation officer. (*Id.* ¶ 11) According to ICE's records, T.M.F. was last denied parole on January 31, 2020. (Ex. B to Hartnett Decl.) T.M.F. claims to have been denied parole several times, but does not identify any issue of non-compliance with

respect to any of those denials. (ECF No. 61-9 at ¶¶ 9-10) T.M.F. expresses dissatisfaction with the outcome of his parole requests and the absence of a detailed explanation for the denials. (*Id.*) According to ICE's records, an Immigration Judge issued a ruling in T.M.F.'s favor on March 10, 2020, and ICE has reserved appeal. (Ex. B to Hartnett Decl.)

***Y.P.T.*:** Y.P.T. identifies one issue of alleged non-compliance that occurred either before, or around the time of, this Court's September 5, 2019 order based on the chronology presented in Y.P.T.'s declaration. (ECF No. 61-10 at ¶¶ 8-9) Specifically, Y.P.T. alleges that parole was denied while at the Tallahatchie facility in late August or early September 2019 without Y.P.T. having the opportunity to submit documents in support of parole. (*Id.*) Y.P.T. alleges that there have been three other parole requests which have been denied. (*Id.* ¶ 10) Y.P.T. does not identify any issues of non-compliance with the Parole Directive in connection with any of those requests. (*Id.*) Instead, like T.M.F., Y.P.T. expresses dissatisfaction with the outcome of the determinations and the lack of a more detailed explanation for the denials. (*Id.*) According to ICE's records, an Immigration Judge ordered Y.P.T. removed on January 10, 2020, and Y.P.T.'s appeal to the BIA remains pending. (Ex. B to Hartnett Decl.) Y.P.T.'s last parole denial was February 28, 2020. (*Id.*)

Rivera Declaration: Plaintiffs' motion also is accompanied by a declaration of Laura Rivera, one of the attorneys representing Plaintiffs in this action. (ECF No. 61-11) That declaration is focused mainly on the COVID-19 situation, recent guidelines at the facilities within the New Orleans Field Office placing restrictions on visitation, and

> hearsay regarding the conditions at two facilities (LaSalle and Pine Prairie). To the extent parole is referenced in that declaration, Ms. Rivera discusses two clients who were denied parole before the COVID-19 situation, and also denied parole again after the onset of COVID-19. (ECF No. 61-11 at ¶¶ 11-12) Although Ms. Rivera disagrees with those determinations, Ms. Rivera does not identify any issues of alleged non-compliance with the Parole Directive with respect to those determinations. (*Id.*)

Thus, these declarations fail to establish any current, ongoing violation of this Court's September 5, 2019 order. Instead, they at most reflect dated, isolated instances of alleged non-compliance that arose several months ago. Accordingly, Plaintiffs have failed to meet their burden of establishing the likelihood of success factor to the extent it is premised on alleged non-compliance with this Court's existing order.

2. Plaintiffs Have Failed To Establish A Lack Of Individual Determinations For Individuals At High Risk Of COVID-19

Plaintiffs other apparent basis for filing this motion for preliminary injunction is their speculation that ICE is failing to consider in its parole determinations whether individuals requesting parole are at high risk for complications from COVID-19. Plaintiffs state that they are re-asserting the two counts of their Complaint "as the basis for injunctive relief requested to enjoin Defendants from acting in a manner specifically harmful to Plaintiffs' during the COVID-19 pandemic." (ECF No. 61-1, Pl. Mem. at 23) Indeed, one of the two "expert" declarations submitted with Plaintiffs' filing frames the question this way: "The present case involves a question as to whether the New Orleans Immigration and Customs Enforcement ("ICE") Field Office should use its authority and discretion to release detained asylum-seekers in order to protect them from health risks caused by potential and actual exposure to the novel Coronavirus

(COVID-19)." (ECF No. 61-13 at ¶ 10)

Plaintiffs insist that they "are not seeking to challenge the outcome of the individualized parole assessments itself." (ECF No. 61-1, Pl. Mem. at 16) Instead, Plaintiffs are asking this Court to require ICE to emphasize certain factors over others in conducting individual parole assessments. In their motion, they explain the basis for this contention as follows:

> Defendants should also be required to fully comply with all applicable regulations delineated in the Parole Directive, including those that favor the granting of parole to class members who "have serious medical conditions, where continued detention would not be appropriate," and class members "whose continued detention is not in the public interest." Parole Directive at ¶ 4.3, citing 8 C.F.R. § 212.5(b). As required by the Parole Directive, Defendants should incorporate into their individualized assessment of class members' parole eligibility, the danger that COVID-19 poses to those in detention, especially those with serious medical conditions; and should weigh whether the continued detention of parole-eligible class members is in the public interest, given the danger posed by the COVID-19 outbreak.

(ECF No. 61, Pl. Mot. at 2)

Defendants already have established that this contention reflects a new claim that has not been pled in the Complaint and that therefore is outside the scope of this lawsuit. But even were the Court to consider it, Plaintiffs have failed to establish a likelihood of success of prevailing on the merits of this contention for two reasons. First, nothing in the Parole Directive or referenced regulation "favor[s] the granting of parole to class members who 'have a serious medical condition'" or states that continued detention is not in the public interest when a detainee has a serious medical condition. Although the Parole Directive explains the meaning of "public interest" in 8 C.F.R. § 212.5(b)(5) (Parole Directive § 4.4), the factors that the Parole Directive identifies in making that determination are set forth in section 8.3 of the Parole Directive and do not directly reference medical issues. And, while the regulation addressing parole, 8 C.F.R. § 212.5(b), refers to a "serious medical condition" as a potential basis for parole, *id.* § 212.5(b)(1),

that subsection is distinct from the "public interest" subsection, *id.* § 212.5(b)(2), that is specifically addressed in the Parole Directive. (Parole Directive § 4.4)

Ultimately, whether to grant parole based on the existence of a "serious medical condition" or "public interest" – in the context of COVID-19 or otherwise – is subject to ICE's discretion based on a weighing of various factors that might be at issue in any given "case-by-case" analysis. Thus, neither the Parole Directive, nor 8 C.F.R. § 212.5(b), requires ICE to "favor" a requester's age or medical condition over any other factor that ICE might consider in evaluating a parole request. Accordingly, Plaintiffs cannot state a claim based on the *Accardi* doctrine – which is the basis for their APA claims as pled in the Complaint – for ICE's alleged failure to "favor" such factors in its individualized determinations. Nor does this Court have jurisdiction to direct ICE to do so. *See Damus*, 313 F. Supp. 3d at 327 (observing that "[t]o the extent Plaintiffs are challenging the [parole] determinations themselves – i.e., the actual balancing of the merits of each application for parole – this Court agrees that it lacks jurisdiction"); *see also* 8 U.S.C. § 1182(d)(5)(A) ("The [DHS Secretary] may … in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States…"); 8 U.S.C. § 1252(a)(2)(B)(ii) ("no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security," except for asylum determinations).

Second, Plaintiffs have failed to proffer any evidence that ICE has failed to consider an individual's medical condition in its case-by-case analysis of parole requests in any event. The only "evidence" that Plaintiffs offer to contend that persons who suffer from medically serious conditions are not afforded individualized assessments are the outcomes of a limited number of parole determinations that Plaintiffs have identified since the onset of COVID-19 in Louisiana.[10] In light of the discretionary nature of a parole determination, and the other factors that are weighed in such determinations, that exceedingly small sample size is not evidence that individualized determinations are not occurring.

Not only is the sample size too small to draw any such conclusion, but Plaintiffs proffered declarations reflect that most, if not all, of the declarants who were denied parole within the last 30 days are not within the high-risk categories identified by the CDC, which are consistent with the categories identified in the declaration accompanying Plaintiffs' motion (ECF No. 61-12 at 7-8).[11] Of the eight individuals who have proffered declarations, only four (B.A.E., K.S.R., O.M.H. and R.P.H.) were denied parole within the last 30 days and none are 65 years of age or older (the ages are: B.A.E. (no age stated); R.P.H. (50); K.S.R. (27) and O.M.H. (32))

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[10] The first presumptive case of COVID-19 in Louisiana was announced on March 9, 2020. *See* https://www.wwltv.com/article/news/health/coronavirus/coronavirus-timeline/289-9204d79c-2ac6-4b27-971b-3f32be49d134.

[11] Those categories include individuals 65 years and over, individuals with chronic lung disease or severe asthma, individuals with serious heart conditions, conditions that can cause a person to be immunocompromised, severe obesity, diabetes, chronic kidney disease and those undergoing dialysis, and liver disease. *See* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html.

In addition, of the four denied parole within the last 30 days, only two identify a specific underlying medical condition – R.P.H. (breast cancer survivor) and O.M.H. (HIV positive and Hepatitis C) – and, of those, only O.M.H. arguably falls within a recognized high risk category.[12] Notably, O.M.H. was released on his own recognizance on April 2, 2020. (Hartnett Decl. ¶ 26 and Ex. B thereto) Of the remaining two, one (K.S.R.) claims to have had the flu in early March and the other (B.A.E.) references a muscle injury in his chest, neither of which constitutes a high-risk category.

As regards the other four of the eight declarants, only one – S.U.R. – potentially falls within a high-risk category as a 60 year old with hypertension and a heart murmur. (*Id.*) The other three do not.[13] S.U.R. was granted parole on April 3, 2020. (Hartnett Decl. ¶ 26 and Ex. B thereto)

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[12] R.P.H.'s assertion that she is a breast cancer survivor does not place her within a high-risk category absent evidence that R.P.H. is undergoing treatment that makes her immune-compromised, which is not asserted in her declaration. O.M.H.'s contention of suffering from Hepatitis C may place O.M.H. in a high-risk category of having liver disease. Being HIV positive, however, is not listed by the C.D.C. as a high-risk category provided the condition is being controlled. *See* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html.

[13] The remaining three declarants age and medical conditions are as follows according to their declarations: L.P.C (26 years old, no current medical condition identified) (ECF No. 61-5); T.M.F. (44 years old, no current medical condition identified other than pain from unidentified chronic injuries) (ECF No. 61-9); Y.P.T. (30 years old, fractured foot, claustrophobia, nausea, anxiety and depression) (ECF No. 61-10). To the extent these and the other declarants make representations about the medical conditions of other detainees, those statements are hearsay and should not be considered by the Court. These declarants do not purport to be medical professionals or to have access to other detainees' medical records. Their statements, therefore, are either based on speculation or information provided to them by others. Under either scenario, the statements are inadmissible.

Thus, of the eight declarants supporting Plaintiffs' motion, the two with potentially high-risk medical conditions (O.M.H. and S.U.R.) have been released.[14] The remaining six do not claim to have medical conditions that would place them in a high-risk category, nor are they of an age that would place them in a high-risk category. To the extent they make representations about the medical conditions of other detainees, those assertions are inadmissible hearsay. *See supra* note 13. Thus, when their conclusory assertions are set aside and their declarations are closely examined, Plaintiffs have offered no competent evidence that individuals with serious medical conditions are not receiving individualized determinations under the Parole Directive.

3. Plaintiffs Have Not Pled Any Claim Challenging Their Conditions Of Confinement Under The APA And Thus Their Assertions Regarding Such Conditions Fall Outside The Scope Of This Lawsuit

Although Plaintiffs have not asserted a claim in their narrowly pled Complaint challenging the conditions of their confinement under the APA,[15] a large portion of their motion for preliminary injunction and supporting evidence focuses on those conditions in the context of the COVID-19 situation. Those allegations fall outside the scope of this narrowly framed

[14] As regards O.M.H.'s recent denial of parole prior to his subsequent release, it bears mentioning that O.M.H. had received an adverse ruling by an Immigration Judge (Ex. B to Hartnett Decl.), thus increasing his potential as a flight risk as this Court previously recognized. (Mem. Op. at 13, "[a]s the Government argues, an alien facing an order of removal from an IJ presents a fundamentally different flight risk from one who is merely awaiting a hearing before an IJ").

[15] Although Plaintiffs have not brought a claim under the APA challenging the conditions of their confinement, Defendants nonetheless observe that Plaintiffs have not identified a specific final agency action, much less demonstrated exhaustion of remedies as would be necessary to assert such a claim. *Vetcher v. Sessions*, 316 F. Supp. 3d 70, 78-79 (D.D.C. 2018) (dismissing a challenge to the conditions of confinement under the APA because plaintiff failed to identify the policies plaintiff was challenging and how he had administratively exhausted any grievance about those policies).

lawsuit and should not be considered by the Court.

Defendants nevertheless note the following. First, Plaintiffs' declarants most recent place of confinement is at four of the 23 facilities within the New Orleans Field Office, specifically, Adams, S. Louisiana, Catahoula and LaSalle. (Ex. A-B to Hartnett Decl.) Although Plaintiffs assert that there is overcrowding at the referenced facilities, none in fact are operating over capacity and many are operating under capacity. (Hartnett Decl. ¶¶ 4-23 and Ex. A thereto) Moreover, contrary to Plaintiffs' contentions, ICE provides a sanitary environment, including by providing detainees with soap for the shower and hand soap for sink handwashing. (Hartnett Decl. ¶ 41) As described in the accompanying declaration, ICE also provides soap and paper towels that are present in bathrooms and work areas within the facilities. Everyday cleaning supplies such as soap dispensers and paper towels are routinely checked and are available for use. Detainees are encouraged to communicate with local staff when additional hygiene supplies or products are needed. (*Id.*)

Additionally, comprehensive protocols are in place for the protection of staff and detainees, including the appropriate use of personal protective equipment (PPE), in accordance with CDC guidance. ICE also instituted screening guidance for new detainees who arrive at facilities to identify those who meet CDC's criteria for epidemiologic risk of exposure to COVID-19.[16] ICE Health Services Corps ("IHSC") isolates detainees with fever and/or

[16] As of the time of the preparation of the accompanying declaration, there have been two confirmed cases of COVID-19 among the detainee population or staff in the facilities within the New Orleans Field Office. (Hartnett Decl. ¶ 27) On April 1, 2020, a detainee at the Pine Prairie ICE Processing Center (PPIPC), Pine Prairie, Louisiana tested positive for COVID-19. That detainee remains in isolation in a negative pressure cell within the PPIPC medical clinic. On April 5, 2020, a detainee at LaSalle Correctional Cener tested positive for COVID-19. The detainee remains under medical observation and in an isolation cell. (*Id.*)

respiratory symptoms who meet these criteria and observe them for a specified time period. IHSC staff consult with the local health department, as appropriate, to assess the need for testing. Detainees without fever or respiratory symptoms who meet epidemiologic risk criteria are monitored for 14 days. (Hartnett Decl. ¶ 38)

As explained in the accompanying declaration, detainees who meet CDC criteria for epidemiologic risk of exposure to COVID-19 are housed separately from the general population. ICE places detainees with fever and/or respiratory symptoms in a single medical housing room, or in a medical airborne infection isolation room specifically designed to contain biological agents, such as COVID-19. (Hartnett Decl. ¶ 39) ICE also transports individuals with moderate to severe symptoms, or those who require higher levels of care or monitoring, to appropriate hospitals with expertise in high-risk care. Detainees who do not have fever or symptoms, but meet CDC criteria for epidemiologic risk, are housed separately in a single cell, or as a group, depending on available space. (*Id.*)

As explained in the accompanying declaration, ICE has reviewed its "at risk population" to include the elderly, pregnant detainees, and others with compromised immune systems to ensure that detention is appropriate given the circumstances. Custody determinations are made on a case-by-case basis at each detention facility and include, among other factors, the public safety risk that such release could create and the requirement to detain certain aliens under law. ICE will continue to review its "at risk population" in the days and weeks ahead when deciding whether any detainees should be released from custody. (Hartnett Decl. ¶ 42)

Thus, even if the conditions at the facilities were relevant to this lawsuit as narrowly pled in the Complaint, which Defendants dispute, Plaintiffs' limited contentions are insufficient to

establish that conditions at the specific facilities they discuss in their declarations, or at other facilities within the New Orleans Field Office, are unsafe in the current environment.

B. Plaintiffs Have Not Shown Irreparable Injury

"Regardless of how the other three factors are analyzed, it is required that the movant demonstrate an irreparable injury." *Mdewakanton Sioux Indians of Minnesota*, 255 F. Supp. 3d 48, 51 (D.D.C. 2017) (footnote omitted). "The basis of injunctive relief in the federal courts has always been irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 88 (1974); *see also CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995). The Supreme Court's "frequently reiterated standard requires Petitioners seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original). Moreover, conclusory or speculative allegations are not enough to establish a likelihood of irreparable harm. *Henke*, 842 F. Supp. 2d at 59; *see Bartko*, 2015 WL 13673371 at *2 ("[t]he Court need not grant injunctive relief 'against something merely feared as liable to occur at some indefinite time'"). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22; *Northeastern Fla. Chapter of Ass'n of Gen. Contractors v. Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (irreparable injury must be neither remote nor speculative, but actual and imminent). Petitioners cannot make this showing.

Here, the Parole Directive permits detainees to request re-determinations of a parole denial and does not set any limit on how many such re-determinations can be requested. (2009 Parole Directive ¶ 8.9) Accordingly, to the extent any detainee has a concern about COVID-19

as it pertains to their specific medical situation, the detainee can seek a re-determination without the need of an order from this Court. As this Court can neither dictate the outcome of that determination nor the factors that ICE must consider in any such re-determination, the relief requested in this motion – that ICE conduct re-determinations of all detainees – would afford detainees a procedure that already is available to them. Accordingly, Plaintiffs have failed to establish that any detainee would suffer irreparable harm if the injunction request is denied.

In asserting the existence of irreparable harm, Plaintiffs resort to speculation and arguments that fail to account for the limited relief that they seek. They contend that, "[w]ithout injunctive relief, present and future class members are likely to become infected with COVID-19." (ECF No. 61-1, Pl. Mem. at 43) Not only is that assertion speculative, but it is misplaced in the context of the specific injunctive relief requested in this motion and the narrow framework of this lawsuit. Equally misplaced are Plaintiffs' arguments that existing protocols at ICE facilities are insufficient to address the COVID-19 situation. All such contentions go far beyond the four corners of the 2009 Parole Directive, which is the sole basis for this lawsuit, as well as the specific relief requested in the instant motion, which is that the Court order ICE to conduct automatic re-determinations of parole denials for all detainees within the *Mons* class. Indeed, although Plaintiffs profess that they "are not seeking to challenge the outcome of the individualized parole assessments" themselves, and acknowledge that the Court would lack jurisdiction over such a challenge (ECF No. 61-1, Pl. Mem. at 16), their arguments for irreparable harm are premised on the proposition that all detainees must be released, the very claim they disavow. Accordingly, Plaintiffs' assertion that they are "likely to become infected

with COVID-19" if re-determinations are not ordered fails to account for the specific injunctive relief that they seek or the narrow scope of this lawsuit, and should be rejected.

An injunction is "unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged [] -- a 'likelihood of substantial and immediate irreparable injury.'" *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Accordingly, Plaintiffs have not met their burden to show that they will suffer irreparable harm in the absence of the preliminary relief they seek.

C. The Balance Of Interests And Public Interest Factors Favor Defendants

The final two factors required for preliminary injunctive relief – harm to the opposing party and the public interest– merge when the Government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Additionally, courts should "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982).

The balance of hardships and public interest weigh in favor of Defendants. Interference with the manner in which ICE exercises its discretionary authority, 8 U.S.C. § 1182(d)(5)(A), and carries out its statutory mandates, 8 U.S.C. § 1225(b), on a preliminary basis significantly harms the Government and cannot truly be said to be in the public interest. It is well-settled that the public's interest in enforcement of U.S. immigration laws is paramount, and even more so where, as here, Congress has exercised its plenary legislative authority and control over the Nation's border. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981) ("The Supreme Court has recognized that the public interest in

enforcement of the immigration laws is significant."); *see also Nken*, 556 U.S. at 435 ("There is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and permit[s] and prolong[s] a continuing violation of United States law." (internal marks omitted)).

Plaintiffs ask for an order directing ICE to conduct re-determinations of all detainees within the facilities of the New Orleans Field Office, without regard to their age, medical condition or desire for such a re-determination. Given the vast expanse and indiscriminate nature of Plaintiffs' requested order, the balance of interests clearly favors Defendants. Plaintiffs' requested order is not narrowly tailored as required when seeking injunction relief, *State of Neb. Dep't of Health & Human Servs. v. U.S. Dep't of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006), and would require ICE to direct resources away from other aspects of its mission at a particularly challenging time. Because Plaintiffs cannot show that the balance of hardships and public interest tips in their favor, the Court should deny Plaintiffs' request for a preliminary injunction.

CONCLUSION

For the foregoing reasons, the motion for preliminary injunction should be denied.

Respectfully submitted,

TIMOTHY J. SHEA, D.C. Bar #437437
United States Attorney

DANIEL F. VAN HORN, D.C. BAR # 924092
Civil Chief

By: ____/s/_____
JEREMY S. SIMON, D.C. BAR #447956

Assistant United States Attorney
Civil Division
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-2528
Jeremy.Simon@usdoj.gov

Counsel for Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Heredia Mons, *et al*.,	)	
	)	
Plaintiffs,	)	
	)	No. 19-cv-1593 (JEB)
v.	)	
	)	
Chad Wolf, *et al.*,	)	
	)	
Defendants.	)	

ORDER

Upon consideration of Plaintiffs' motion for preliminary injunction, the opposition thereto, and the entire record herein, it is this _____ day of April 2020,

ORDERED that Plaintiffs' motion is **DENIED**.

.

SO ORDERED.

_____
United States District Judge

DECLARATION OF JOHN HARTNETT, DEPUTY FIELD OFFICE DIRECTOR, NEW ORLEANS FIELD OFFICE

I, John Hartnett, hereby make the following declaration:

1. I am a Deputy Field Office Director, New Orleans Field Office, employed by the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO). In this capacity, I manage ERO personnel and provide oversight over many of ERO's operations in the New Orleans Field Office. I also provide oversight over a number of detention facilities within the New Orleans Field Office, including the LaSalle ICE Processing Center (LIPC), Jena, Louisiana; the LaSalle Correctional Center (LCC), Olla, Louisiana; the South Louisiana ICE Processing Center (SLIPC), Basile, Louisiana; the Catahoula Correctional Center (Catahoula), Harrisonburg, Louisiana; and the Adams County Detention Center (ACDC), Natchez, Mississippi. I have been employed by the former Immigration and Naturalization Service (INS) and ICE since 1995.

2. This declaration is based upon knowledge and information obtained from various records and systems maintained by DHS in the regular course of business. I provide this declaration based on the best of my knowledge, information, belief, and reasonable inquiry for the above captioned case.

3. ICE is charged with removing aliens who lack lawful immigration status in the United States. Detention is an important and necessary part of immigration enforcement. ICE detains people to secure their presence both for immigration proceedings and their removal, with a special focus on those who represent a risk to public safety, or for whom detention is mandatory by law.

4. LIPC is a private detention center run by The GEO Group, Inc. (GEO). GEO is an independent contractor that provides the facility, management, personnel and services for the 24-hour supervision of the immigrant detainees in ICE custody at the LIPC.

5. Medical care at LIPC is overseen by the ICE Health Services Corps (IHSC), which provides medical services through the combination of U.S. Public Health Service Commissioned Corps (USPHS) officers, federal civil servants, and contract health professionals.

6. LIPC currently consists of 11 male dorms and three female dorms. Both male and female dorms are open-style dorms with bunk beds for the detainees to sleep on. All dorms currently meet or exceed the standards set forth in the 2011 Performance-Based National Detention Standards (PBNDS). The male dorms have the capacity to house 72 to 96 detainees (based upon size of the dorm) and currently house an average of 86 detainees. The three female dorms have the capacity to house 44, 80, and 80 detainees, respectively, and currently house an average of 59 detainees. Detainees of both genders are separated and housed based upon detention classification. In addition to the 14 open dorms, LIPC also contains three dorms that consist of empty dorms (open space) surrounded by segregation cells. Two of these segregation dorms are used for male detainees while one is used for female detainees.

7. LIPC has the capacity to house 1,335 detainees. As of today, there are 1,092 detainees housed at the facility.

8. LCC is a private detention center run by LaSalle Corrections. LaSalle Corrections is an independent contractor that provides the facility, management, personnel and services for the 24-hour supervision of the immigrant detainees in ICE custody at LCC.

9. Medical care at LCC is provided by contract medical professionals employed by LaSalle Corrections.

10. LCC currently consists of seven male dorms. The dorms are open-style dorms with bunk beds for the detainees to sleep on. All dorms currently meet or exceed the standards set forth in the 2011 PBNDS. The dorms have the capacity to house 60 to 100 detainees (based upon size of dorm) and currently house an average of 39 detainees. Detainees are separated and housed based upon detention classification. In addition to the seven open dorms, LCC contains eight segregation cells.

11. LCC has the capacity to house 620 detainees. As of today, there are 276 detainees housed at the facility.

12. SLIPC is a private detention center run by GEO. GEO is an independent contractor that provides the facility, management, personnel and services for the 24-hour supervision of the immigrant detainees in ICE custody at SLIPC.

13. Medical care at SLIPC is provided by contract medical professionals employed by GEO.

14. SLIPC currently consists of 16 female dorms. All dorms are open-style dorms with bunk beds for the detainees to sleep on. All dorms currently meet or exceed the standards set forth in the 2011 PBNDS. The dorms have the capacity to house anywhere from 22 to 72 detainees (based upon size of dorm) and currently house an average of 65 detainees. Detainees are separated and housed based upon detention classification. In addition to the 16 open dorms, SLIPC also contains 43 segregation cells with bunk beds.

15. SLIPC has the capacity to house 1,000 detainees. As of today, there are 373 detainees housed at the facility.

16. Catahoula is a private detention center run by LaSalle Corrections.

17. Medical care at Catahoula is provided by contract medical professionals employed by LaSalle Corrections.

18. Catahoula currently consists of eight male dorms. The dorms are open-style dorms with bunk beds for the detainees to sleep on. All dorms currently meet or exceed the standards set forth in the PBNDS. The dorms have the capacity to house 64 to 106 detainees (based upon size of dorm) and currently house an average of 91 detainees. Detainees are separated and housed based upon detention classification. In addition to the eight open dorms, the Catahoula contains 10 segregation cells.

19. Catahoula has the capacity to house 800 detainees. As of today, there are 733 detainees housed at the facility.

20. ACDC is a private detention center run by Core Civic Corrections (CCC). CCC is an independent contractor that provides the facility, management, personnel and services for the 24-hour supervision of the immigrant detainees in ICE custody at ACDC.

21. Medical care at ACDC is provided by contract medical professionals employed by CCC.

22. ACDC consists of 14 male dorms and three female dorms. Both male and female dorms are open-style dorms with bunk beds for the detainees to sleep on. All dorms currently meet or exceed the standards set forth in the 2011 PBNDS. The male dorms have the capacity to house 120 to 140 detainees (based upon size of dorm) and currently house an average of 60 detainees. The three female dorms have the capacity to house 120 detainees and currently house an average of 50 detainees. Detainees of both genders are separated and housed based upon detention classification. In addition to the 14 open dorms, ACDC contains four dorms that consist of empty dorms (open space) surrounded by segregation cells that will house 60 detainees in each. Two of these segregation dorms are used for male detainees.

23. ACDC has the capacity to house 2,300 detainees. As of today, there are 920 detainees housed at the facility.

24. The attached spreadsheet includes the maximum capacity and current alien detainee population at all of the detention facilities within the New Orleans Field Office. *See* Exhibit A.

25. The attached chart provides context for the status of the eight named Declarants, two of whom have recently been released from ICE custody. *See* Exhibit B.

26. Parole was considered for each of the named Declarants. In accordance with ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture, each case is reviewed on a case-by-case basis. Individualized determinations were made based on factors specific to the case. Factors that are weighed in making a determination include: did the alien establish his or her identity to include a review of the identity documents provided by the alien, is the alien considered a flight risk, does the alien have sufficient ties to or a stable residence within the United States, their stability and relationship to a sponsor, and does the alien pose a danger to the community. Additional factors that may be considered, include, among other things, whether the alien established an urgent humanitarian reason (such as a severe medical condition) or significant public benefit to warrant release. As a threshold matter, the alien must establish that they are not a danger to the community or a flight risk to warrant a grant of parole in accordance with the Parole Directive. Parole determinations are made on a case-by-case basis in the exercise of ICE's discretion after weighing the various factors that may apply to any specific request. Most recently, after reviewing his parole request and in accordance with the Parole Directive, S.U.R. was released on his own recognizance. In addition, O.M.H. was released from ICE custody by means other than parole. *See* Exhibit B.

27. As of today, there have been two confirmed case of COVID-19 among the detainee population or staff in the facilities within the New Orleans Field Office. On April 1, 2020, a detainee at the Pine Prairie ICE Processing Center (PPIPC), Pine Prairie, Louisiana tested positive

for COVID-19. That detainee remains in isolation in a negative pressure cell within the PPIPC medical clinic. On April 5, 2020, a detainee at LCC tested positive for COVID-19. The detainee remains under medical observation and in an isolation cell.

28. Based on information received from CDC and recommendations from our medical professionals, ICE is taking appropriate steps to protect both staff and detainees.

29. As a precautionary measure, ICE has temporarily suspended social visitation in all detention facilities.

30. In an effort to ensure the current detained population is protected, detainees are being thoroughly screened at intake and asked a series of questions to assess their risk of being a carrier of COVID-19. Individuals that are high risk or present with symptoms are immediately isolated.

a. During intake medical screening or any clinical encounter, if a detainee reports having had close contact with a person with laboratory-confirmed COVID-19 in the past 14 days and/or the detainee traveled from or through geographic area(s) with widespread or sustained community transmission in the past 14 days, and the detainee has a fever and/or symptoms of respiratory illness, medical staff refer the detainee to a medical provider and implement medical isolation in a single medical housing room which may be an airborne infection isolation room.

b. If a detainee has a fever, or symptoms of respiratory illness and has not traveled from or through area(s) with sustained community transmission in the past 14 days and if they have not had close contact with a person with laboratory-confirmed COVID-19 or their respiratory secretions in the past 14 days, medical staff refer the detainee to a medical provider for evaluation.

31. Isolation protocols for detainees with fever and/or symptoms of respiratory illness under evaluation for COVID-19 include but are not limited to the following:

a. House the detainee in a private medical housing room, which may be an airborne infection isolation room if available. If no single occupancy medical housing unit room is available, placement in other areas of the facility may be utilized to house the ill detainee separately from the general detention population.

b. Call the local and/or state health department for notification and guidance if needed.

c. Medical providers consider laboratory testing for COVID-19 through commercial laboratories or through local and/or state health departments.

d. If the detainee has an underlying illness or is acutely ill, or symptoms do not resolve, providers consult with a supervising physician or infectious disease specialist.

e. If the detainee is referred to a local hospital, staff call the hospital in advance to notify medical staff of the detainee's recent relevant travel history and symptoms.

f. Detainees isolated for respiratory illness, who have epidemiologic risk for COVID-19 exposure wear a tight-fitting surgical mask when outside of the isolation room.

32. For detainees meeting epidemiologic risk criteria based on CDC guidance who do not present with fever or symptoms, staff implement monitoring. Staff monitor detainees for 14 days after initial apprehension.

33. Cohorting is an ICE infection-prevention strategy which involves housing detainees together who were exposed to a person with an infectious organism but who are asymptomatic. Cohorting lasts for the duration of the incubation period – in this case, 14 days.

34. There is currently no FDA-approved medication for COVID-19. People infected with the disease will receive supportive care such as rest, fluids and fever control to help relieve symptoms. For severe cases, treatment should include care to support vital organ functions. Some moderate to severe cases will be referred to hospitals.

35. Detainees have access to comprehensive medical care while at the facility and those that are isolated for COVID-19 are seen daily by nursing and medical staff. Medical providers at the facilities assess detainee's health status and make determinations as to what is medically necessary for the detainee based on clinical indicators. ICE transports individuals with who require higher levels of care as determined by medical evaluation, to local hospitals with expertise in high risk care.

36. Currently, the CDC advises self-monitoring at home for people in the community who meet epidemiologic risk criteria, and who do not have fever or symptoms of respiratory illness. In detention settings, cohorting serves as an alternative to self-monitoring at home. *See attached IHCS Interim Recommendations for Risk Assessment of Persons with Potential 2019-Novel Coronavirus (COVID-19) Exposure in Travel-, Community-, Custody Settings, updated March 11, 2020.*

37. Comprehensive protocols are in place for the protection of staff and patients, including the appropriate use of personal protective equipment (PPE), in accordance with CDC guidance. ICE has maintained a pandemic workforce protection plan since February 2014, which was last updated in May 2017. This plan provides specific guidance for biological threats such as

COVID-19. ICE instituted applicable parts of the plan in January 2020 upon the discovery of the potential threat of COVID-19. The ICE Occupational Safety and Health Office is in contact with relevant offices within the Department of Homeland Security, and in January 2020, the DHS Workforce Safety and Health Division provided DHS components additional guidance to address assumed risks and interim workplace controls. This includes the use of N95 masks, available respirators, and additional PPE.

38. ICE instituted screening guidance for new detainees who arrive at facilities to identify those who meet CDC's criteria for epidemiologic risk of exposure to COVID-19. IHSC isolates detainees with fever and/or respiratory symptoms who meet these criteria and observe them for a specified time period. IHSC staff consult with the local health department, as appropriate, to assess the need for testing. Detainees without fever or respiratory symptoms who meet epidemiologic risk criteria are monitored for 14 days.

39. Detainees who meet CDC criteria for epidemiologic risk of exposure to COVID-19 are housed separately from the general population. ICE places detainees with fever and/or respiratory symptoms in a single medical housing room, or in a medical airborne infection isolation room specifically designed to contain biological agents, such as COVID-19. This prevents the spread of the agent to other individuals and the general public. ICE transports individuals with moderate to severe symptoms, or those who require higher levels of care or monitoring, to appropriate hospitals with expertise in high-risk care. Detainees who do not have fever or symptoms, but meet CDC criteria for epidemiologic risk, are housed separately in a single cell, or as a group, depending on available space.

40. ICE reviews CDC guidance daily and continues to update protocols to remain consistent with CDC guidance.

41. ICE provides detainees with soap for the shower and hand soap for sink handwashing. ICE also provides soap and paper towels that are present in bathrooms and work areas within the facilities. Everyday cleaning supplies such as soap dispensers and paper towels are routinely checked and are available for use. Detainees are encouraged to communicate with local staff when additional hygiene supplies or products are needed.

42. ICE has reviewed its "at risk population" to include the elderly, pregnant detainees, and others with compromised immune systems to ensure that detention is appropriate given the circumstances. Custody determinations are made on a case-by-case basis at each detention facility and include, among other factors, the public safety risk that such release could create and the requirement to detain certain aliens under law. *See* Section 236 of Act, 8 U.S.C. § 1226. ICE will continue to review its "at risk population" in the days and weeks ahead when deciding whether any detainees should be released from custody.

Pursuant 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 7th day of April 2020,

John Hartnett
Deputy Field Office Director
U.S. Department of Homeland Security
U.S. Immigration and Customs Enforcement
Oakdale, Louisiana

	General Facility Information						ICE Capacity	
	DETLOC	Name	City	State	AOR	Type	Capacity	Current population
1	JENADLA	LASALLE ICE PROCESSING CENTER (JENA)	JENA	LA	NOL	IGSA	1,170	1080
2	TALLAMS	TALLAHATCHIE CO CORR FACILITY	TUTWILER	MS	NOL	USMS IGA		Not Used
3	PINEPLA	PINE PRAIRIE ICE PROCESSING CENTER	PINE PRAIRIE	LA	NOL	IGSA	730	428
4	JKPCCLA	JACKSON PARISH CORRECTIONAL CENTER	JONESBORO	LA	NOL	IGSA	1,000	392
5	LAWINCI	WINN CORRECTIONAL CENTER	WINNFIELD	LA	NOL	IGSA	1,553	930
6	RWCCMLA	RICHWOOD CORRECTIONAL CENTER	RICHWOOD	LA	NOL	IGSA	1,000	218
7	RVRCCLA	RIVER CORRECTIONAL CENTER	FERRIDAY	LA	NOL	IGSA	650	136
8	ETOWAAL	ETOWAH COUNTY JAIL (ALABAMA)	GADSDEN	AL	NOL	USMS IGA	320	118
9	BOSSRLA	BOSSIER PARISH COR. CENTER	PLAIN DEALING	LA	NOL	USMS IGA		Not Used
10	BASILLA	SOUTH LOUISIANA DETENTION CENTER	BASILE	LA	NOL	IGSA	1,000	373
11	ADAMSMS	ADAMS COUNTY DET CENTER	NATCHEZ	MS	NOL	BOP	2,300	920
12	APPSCLA	ALLEN PARISH PUBLIC SAFETY COMPLEX	OBERLIN	LA	NOL	IGSA	260	68
13	CATAHLA	CATAHOULA CORRECTIONAL CENTER	HARRISONBURG	LA	NOL	IGSA	750	723
14	DEKALAL	DEKALB COUNTY DETENTION CENTER	FORT PAYNE	AL	NOL	USMS IGA	40	0
15	STTAMLA	SAINT TAMMANY PARISH JAIL	COVINGTON	LA	NOL	IGSA		Not used
16	DAVIDTN	DAVIDSON COUNTY SHERIFF	NASHVILLE	TN	NOL	IGSA		Not Used
17	BALDWAL	BALDWIN COUNTY CORRECTIONAL CENTER	BAY MINETTE	AL	NOL	IGSA	3	0
18	TNWESDF	WESTERN TENNESSEE DETENTION FACILITY	MASON	TN	NOL	USMS IGA	15	0
19	MNTGMAL	MONTGOMERY CITY JAIL	MONTGOMERY	AL	NOL	IGSA	3	0
20	LONPDAR	LONOKE POLICE DEPARTMENT	LONOKE	AR	NOL	IGSA	3	0
21	SEBASAR	SEBASTIAN COUNTY DETENTION CENTER	FORT SMITH	AR	NOL	USMS IGA	5	0
22		LASALLE CORRECTIONAL CENTER	OLLA	LA	NOL	IGSA	650	225
23	MILLRAR	MILLER COUNTY JAIL	TEXARKANA	AR	NOL	USMS IGA	3	0

Name	Case Status	Parole Status	Detention Status
B.A.E.	Pending individual hearing with immigration judge on 5/13/20.	Denied – 3/29/20	LaSalle ICE Processing Center (LIPC)
K.S.R.	Pending master calendar hearing with immigration judge on 4/28/20	Denied – 3/12/20	South Louisiana ICE Processing Center (SLIPC)
L.P.C.	Pending master hearing with immigration judge on 4/16/20	Denied- 1/30/20	South Louisiana ICE Processing Center (SLIPC)
O.M.H.	Ordered removed by immigration judge on 10/8/19. Appeal pending with Board of Immigration Appeals.	Denied – 3/30/20	LaSalle Correctional Center (LCC) – Released on own recognizance on 4/2/20.
R.P.H.	Pending master calendar hearing with immigration judge on 5/7/20.	Denied – 3/12/20	South Louisiana ICE Processing Center (SLIPC)
S.U.R.	Ordered removed by immigration judge on 8/28/19. Appeal pending with Board of Immigration Appeals.	Granted – 4/3/20	Adams County Detention Center (ACDC) – Released on 4/3/20.
T.M.F.	Immigration judge granted relief on 3/10/20. DHS has reserved appeal.	Denied – 1/31/20	LaSalle ICE Processing Center (LIPC)
Y.P.T.	Ordered removed by immigration judge on 1/10/20. Appeal pending with Board of Immigration Appeals.	Denied – 2/28/20	Catahoula Correctional Center

IHSC Interim Recommendations for Risk Assessment of Persons with Potential 2019-Novel Coronavirus (COVID-19) Exposure in Travel-, Community-, or Custody Settings[1]

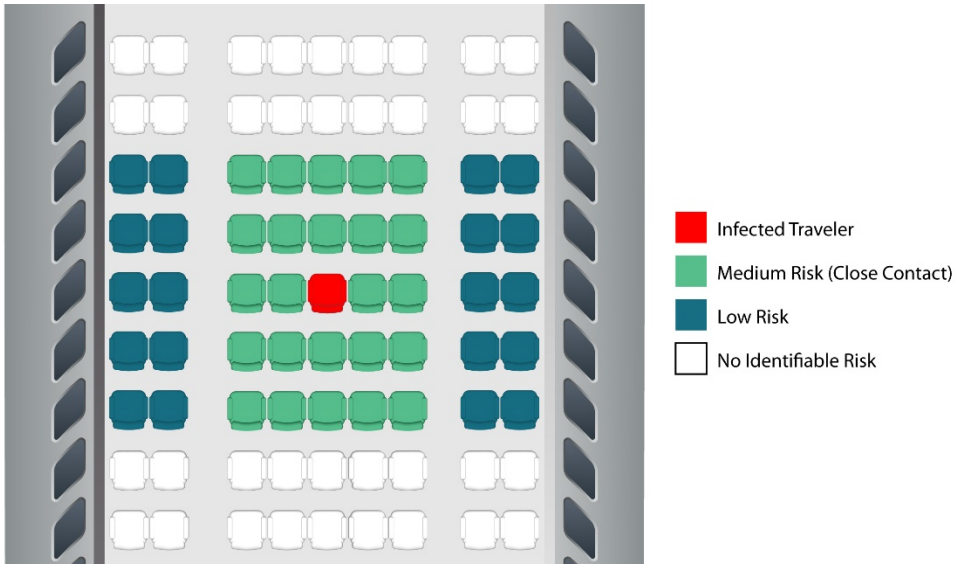
Updated March 11, 2020

Exposure Risk Category	Centers for Disease Control and Prevention (CDC) Definition (as of March 7, 2020)	IHSC Detention Setting Definition
High risk	• Travel from Hubei Province, China or Iran	• Travel from or through Hubei Province, China or Iran
	• Living in the same household as, being an intimate partner of, or providing care in a nonhealthcare setting (such as a home) for a person with symptomatic laboratory-confirmed COVID-19 infection ***without using recommended precautions*** for home care and home isolation	• Housing in the same 2–4-person cell or sleeping with head position within 6 feet of a person with symptomatic laboratory-confirmed COVID-19
Medium risk (assumes not having any exposures in the high-risk category)	• Travel from a country with widespread sustained transmission, other than Hubei Province, China or Iran • Travel from a country with sustained community transmission	• Travel from or through international area(s) with sustained community transmission* in the past 14 days other than Hubei Province, China or Iran *Please see CDC website listing of geographic area(s) with widespread or sustained community transmission at https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-criteria.html

Exposure Risk Category	**Centers for Disease Control and Prevention (CDC) Definition (as of March 7, 2020)**	**IHSC Detention Setting Definition**
	• Close contact with a person with symptomatic laboratory-confirmed COVID-19 • On an aircraft, being seated within 6 feet (two meters) of a traveler with symptomatic laboratory-confirmed COVID-19 infection; this distance correlates approximately with 2 seats in each direction • Living in the same household as, an intimate partner of, or caring for a person in a nonhealthcare setting (such as a home) to a person with symptomatic laboratory-confirmed COVID-19 infection ***while consistently using recommended precautions*** for home care and home isolation	• Close contact[2] with a person with symptomatic laboratory-confirmed COVID-19) • On an aircraft, bus, or van, being seated within 6 feet (two meters) of a traveler with symptomatic laboratory-confirmed COVID-19; this distance correlates approximately with 2 rows or 2 seats in each direction • Housing in the same unit as a person with symptomatic laboratory-confirmed COVID-19 but not in the same 2–4- person cell and not sleeping with head position within 6 feet of a person with symptomatic laboratory-confirmed COVID-19
Low risk (assumes not having any exposures in the high- or medium risk categories)	• Travel from or through any other country	• Travel from or through any other country
	• Being in the same indoor environment (e.g., a classroom, a hospital waiting room) as a person with symptomatic laboratory-confirmed COVID-19 for a prolonged period of time but not meeting the definition of close contact	• Being in the same indoor environment (e.g., general detention population, dining hall, recreation, work duty, library, or religious services) as a person with symptomatic laboratory-confirmed COVID-19 for a prolonged period of time but not meeting the definition of close contact[2]
	• On an aircraft, being seated within two rows of a traveler with symptomatic laboratory-confirmed 2019-nCoV infection but not within 6 feet (2 meters) (refer to graphic) AND not having any exposures that meet a medium- or a high-risk definition (refer to graphic)	• On an aircraft, bus, or van being seated within two rows of a traveler with symptomatic laboratory-confirmed COVID-19 but not within 6 feet (2 meters) (refer to graphic)

Exposure Risk Category	**Centers for Disease Control and Prevention (CDC) Definition (as of March 7, 2020)**	**IHSC Detention Setting Definition**
	N/A	Direct close contact[2] with a person under investigation for COVID-19 that is pending laboratory confirmation
No identifiable risk	Interactions with a person with symptomatic laboratory-confirmed COVID-19 infection that do not meet any of the high-, medium- or low-risk conditions above, such as walking by the person or being briefly in the same room.	Interactions with a person with symptomatic laboratory-confirmed COVID-19 or a person under investigation for COVID-19 that do not meet any of the high-, medium- or low-risk conditions above, such as walking by the person or being briefly in the same room.
No risk	N/A	Exposure to an asymptomatic person who was exposed to another person with high-, medium, low-, or no identifiable risk of exposure to COVID-19

Graphic



Sample seating chart for a COVID-19 aircraft contact investigation showing risk levels based on distance from the infected traveler.[1]

[1]Source and adapted from CDC | Interim US Guidance for Risk Assessment and Public Health Management of Persons with Potential Coronavirus Disease 2019 (COVID-19) Exposures: Geographic Risk and Contacts of Laboratory-confirmed Cases

[2]**Close contact** is defined as:

a) being within approximately 6 feet (2 meters) of a COVID-19 case for a prolonged period of time; close contact can occur while caring for, living with, visiting, or sharing a healthcare waiting area or room with a COVID-19 case

– or –

b) having direct contact with infectious secretions of a COVID-19 case (e.g., being coughed on)

IHSC Interim Recommended Actions Based on Risk Assessment of Persons with Potential 2019 Novel Coronavirus (COVID-19) Exposure in Travel-, Community-, or Custody Settings[1]

Updated March 11, 2020

Exposure Risk Category	CDC Recommended Management (as of March 7, 2020)	IHSC Detention Setting Selected Recommended Actions (used in conjunction with Reference Sheet)
SYMPTOMATIC [refer also to 2019 Novel Coronavirus Resource Page]		
High risk	• Immediate isolation with consideration of public health orders • Public health assessment to determine the need for medical evaluation; if medical evaluation warranted, diagnostic testing should be guided by CDC's PUI definition • If medical evaluation is needed, it should occur with pre-notification to the receiving HCF and EMS, if EMS transport indicated, and with all recommended infection control precautions in place. • Controlled travel: Air travel only via air medical transport. Local travel is only allowed by medical transport (e.g., ambulance) or private vehicle while symptomatic person is wearing a face mask.	• ISOLATION • Promptly place a surgical mask over the patient's face and nose • Refer to a provider • Promptly place in an airborne infection isolation room (AII); priority for AII room use • Consult with the local health department for guidance on testing for COVID-19 • Consult with Regional Clinical Director and Infectious Disease Program • Implement administrative and environmental controls • Implement strict hand hygiene • Implement standard precautions • Implement transmission-based precautions; see Reducing the Risk of COVID-19 Transmission • Request medical hold • Recommend no transfer or transport • Document in Lower Respiratory Illness Tracking Tool
Medium risk	• Self-isolation • Public health assessment to determine the need for medical evaluation; if medical evaluation warranted, diagnostic testing should be guided by CDC's PUI definition	• ISOLATION • Promptly place a surgical mask over the patient's face and nose • Refer to a provider

Exposure Risk Category	CDC Recommended Management (as of March 7, 2020)	IHSC Detention Setting Selected Recommended Actions (used in conjunction with Reference Sheet)
	• If medical evaluation is needed, it should ideally occur with pre-notification to the receiving HCF and EMS, if EMS transport indicated, and with all recommended infection control precautions in place. • Controlled travel: Air travel only via air medical transport. Local travel is only allowed by medical transport (e.g., ambulance) or private vehicle while symptomatic person is wearing a face mask.	• Promptly place in an AII room; priority for AII room use • Consult with the local health department for guidance on testing for COVID-19 • Consult with Regional Clinical Director and Infectious Disease Program • Implement administrative and environmental controls • Implement strict hand hygiene • Implement standard precautions • Implement transmission-based precautions; see Reducing the Risk of COVID-19 Transmission • Request medical hold • Recommend no transfer or transport • Document in Lower Respiratory Illness Tracking Tool
Low risk	• Self-isolation, social distancing • Person should seek health advice to determine if medical evaluation is needed. • If sought, medical evaluation and care should be guided by clinical presentation; diagnostic testing for COVID-19 should be guided by CDC's PUI definition. • Travel on commercial conveyances should be postponed until no longer symptomatic.	• ISOLATION • Promptly place in an AII room if available, or other single room • Use discretion to prioritize AII room needs, including high- and medium- risk and symptoms consistent with COVID-19, tuberculosis (TB), influenza, varicella, etc. • Refer to a provider • Consult with the local health department for guidance on testing for COVID-19 • Consult with Regional Clinical Director and Infectious Disease Program • Implement administrative and environmental controls • Implement strict hand hygiene • Implement standard precautions

Exposure Risk Category	CDC Recommended Management (as of March 7, 2020)	IHSC Detention Setting Selected Recommended Actions (used in conjunction with Reference Sheet)
		• Implement transmission-based precautions; see Reducing the Risk of COVID-19 Transmission • Request medical hold • Recommend no transfer or transport • Document in Lower Respiratory Illness Tracking Tool
No Identifiable Risk[2]	• Self-isolation, social distancing • Person should seek health advice to determine if medical evaluation is needed. • If sought, medical evaluation and care should be guided by clinical presentation; diagnostic testing for COVID-19 should be guided by CDC's PUI definition. • Travel on commercial conveyances should be postponed until no longer symptomatic.	• ISOLATION • Promptly place in an AII room if available, or other single room • Use discretion to prioritize AII room needs, including high- and medium- risk and symptoms consistent with COVID-19, tuberculosis (TB), influenza, varicella, etc. • Refer to a provider • Consult with the local health department for guidance on testing for COVID-19 • Consult with Regional Clinical Director and Infectious Disease Program • Implement administrative and environmental controls • Implement strict hand hygiene • Implement standard precautions • Implement transmission-based precautions; see Reducing the Risk of COVID-19 Transmission
No risk	N/A	No restriction

ASYMPTOMATIC **[refer also to 2019 Novel Coronavirus Resource Page]**		
High risk	• Quarantine (voluntary or under public health orders) in a location to be determined by public health authorities. • No public activities. • Daily active monitoring, if possible based on local priorities • Controlled travel	• MONITORING • Cohort alone or as a group with other asymptomatic persons under monitoring for 14 days after initial DHS apprehension • Prioritize medical housing unit needs based on acuity and suspected or known contagiousness • Implement administrative and environmental controls • Implement strict hand hygiene • Implement standard precautions • See Reducing the Risk of COVID-19 Transmission • Monitor daily for fever and symptoms • Add medical alert • Recommend no transfer or transport during monitoring period • Document in Lower Respiratory Illness Tracking Tool
Medium risk	**Close contacts in this category:** • Recommendation to remain at home or in a comparable setting • Practice social distancing • Active monitoring as determined by local priorities • Recommendation to postpone long-distance travel on commercial conveyances **Travelers from mainland China (outside Hubei Province) or Iran** • Recommendation to remain at home or in a comparable setting • Practice social distancing	• MONITORING • Cohort alone or as a group with other asymptomatic persons under monitoring for 14 days after initial DHS apprehension • Prioritize medical housing unit needs based on acuity and suspected or known contagiousness • Implement administrative and environmental controls • Implement strict hand hygiene • Implement standard precautions • See Reducing the Risk of COVID-19 Transmission • Monitor daily for fever and symptoms • Add medical alert • Recommend no transfer or transport during monitoring period

	• Self-monitoring with public health supervision as determined by local priorities • Recommendation to postpone additional long-distance travel on commercial conveyances after they reach their final destination **Travelers from other country with widespread transmission** • Recommendation to remain at home or in a comparable setting, • Practice social distancing • Self-monitoring • Recommendation to postpone additional long-distance travel on commercial conveyances after they reach their final destination **Travelers from country with sustained community transmission** • Practice social distancing • Self-observation	• Document in Lower Respiratory Illness Tracking Tool

Low risk	• No restriction on movement • Self-observation	• MONITORING • Cohort alone or as a group with other asymptomatic persons under monitoring for 14 days after initial DHS apprehension • Prioritize medical housing unit needs based on acuity and suspected or known contagiousness • Implement administrative and environmental controls • Implement strict hand hygiene • Implement standard precautions • See Reducing the Risk of COVID-19 Transmission • Monitor daily for fever and symptoms • Document in Lower Respiratory Illness Tracking Tool
No identifiable risk	None	No restriction
No risk	N/A	No restriction

[1]Source and adapted from CDC | Interim US Guidance for Risk Assessment and Public Health Management of Persons with Potential Coronavirus Disease 2019 (COVID-19) Exposures: Geographic Risk and Contacts of Laboratory-confirmed Case

EXHIBIT 1

Simon, Jeremy (USADC)

From: Simon, Jeremy (USADC)
Sent: Friday, March 20, 2020 5:59 PM
To: Victoria Mesa
Cc: Luz Lopez; Bruce Hamilton; Mich Gonzalez; Christina LaRocca
Subject: RE: Heredia-Mons v. Wolf- request for information

Victoria,

Thank you for the email. ICE has made available information on its website addressing issues pertaining to the Coronavirus -- see www.ice.gov/covid19 -- and, in response to your question below, I refer you to the sections discussing detention/visitation at detention facilities that can be found at this link.

In terms of any motion for TRO along the lines you outline below, Defendants would oppose any such motion. While Defendants' position will be set forth more fully in its opposition, it bears mentioning that the only claim presently in this case is an APA claim alleging non-compliance by ICE with the provisions of the Parole Directive. The TRO motion that you have outlined below goes well beyond the limited scope of this lawsuit and, in effect, would be asking the Court to make parole adjudications – i.e., to, in effect, order the granting of parole to all members of the Mons class. The court, however, already has recognized that it has no jurisdiction over the parole determinations themselves. *See Damus,* 313 F. Supp. 3d at 327 (observing that "[t]o the extent Plaintiffs are challenging the [parole] determinations themselves – i.e., the actual balancing of the merits of each application for parole – this Court agrees that it lacks jurisdiction").

Please feel free to contact me if you have any questions regarding Defendants' position.

Thanks.

Jeremy

From: Victoria Mesa <victoria.mesa@splcenter.org>
Sent: Friday, March 20, 2020 1:05 PM
To: Simon, Jeremy (USADC) <JSimon@usa.doj.gov>
Cc: Luz Lopez <luz.lopez@splcenter.org>; Bruce Hamilton <bhamilton@laaclu.org>; Mich Gonzalez <mich.gonzalez@splcenter.org>; Christina LaRocca <christina.larocca@splcenter.org>
Subject: Heredia-Mons v. Wolf- request for information

Good afternoon, Jeremy,

On behalf of the *Heredia Mons* class, we are writing to request information on the procedures for the prevention and management of COVID-19 at all ICE Facilities under the jurisdiction of the New Orleans ICE Field Office.

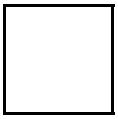
As you know, CDC guidance provides that older adults and people who have chronic medical conditions including heart disease, asthma, HIV, diabetes, and lung disease are at higher risk for getting very sick or dying from COVID-19. The CDC advises that these higher risk people take precautions such as avoiding crowds and close contact with others. Where there is COVID-19 spreading in the community, the CDC recommends that these higher risk individuals take extra measures including increasing the distance between themselves and others.

Moreover, the disease quickly spreads in environments where persons are in close proximity, as is the case with our class members, who find themselves in civil detention awaiting the resolution of their asylum claims. Our class members cannot protect themselves through tools like social distancing, that the CDC and most states are currently advocating for the population at-large.

We ask in good faith for the immediate release from detention all of Heredia Mons class members, particularly those who are at high risk of serious illness or even death, including people 60 and older, those with the above-named underlying health conditions, people who have weakened immune systems, and people who are pregnant or suffering from other serious medical issues.

In the event that the New Orleans ICE Field office is not willing to release our clients, please advise whether your clients will oppose Plaintiffs' filing of a Temporary Restraining Order seeking release of *Heredia Mons* class members, and enjoining the New Orleans ICE Field Office from detaining any future class members, until the abatement of this pandemic. Please promptly advise us whether your clients wish to further confer on this matter. Otherwise, we will proceed to file the above-referenced Motion for a Temporary Restraining Order with the Court.

Sincerely,



Victoria Mesa-Estrada
Senior Staff Attorney | Immigrant Justice Project
Southern Poverty Law Center
T 786.347.2056 C 786.216.9168
victoria.mesa@splcenter.org | www.splcenter.org

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Heredia Mons, *et al*.,	)	
	)	
Plaintiffs,	)	
	)	No. 19-cv-1593 (JEB)
v.	)	
	)	
Chad Wolf, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO
MOTION FOR PRELIMINARY INJUNCTION

Defendants Chad Wolf, Acting Secretary of the U.S. Department of Homeland Security ("DHS"); Matthew T. Albence, Acting Director of U.S. Immigration and Customs Enforcement ("ICE"); Nathalie Asher, Acting Executive Associate Director of ICE Enforcement and Removal Operations; and George Lund III, Director of ICE's New Orleans Field Office, in their official capacities (collectively, "Defendants"), file this opposition to Plaintiffs' motion for preliminary injunction.

SUMMARY OF ARGUMENT

Plaintiffs profess that they "are not seeking to challenge the outcome of the individualized parole assessments" themselves, but only to obtain an order from the Court requiring ICE to "immediately administer to all present and future class members individualized parole assessments, in a method consist[ent] with the applicable regulations and standards of the [2009 Parole] Directive." (ECF No. 61-1, Pl. Mem. at 16) But this Court already issued a preliminary injunction on September 5, 2019, directing ICE to conduct individualized assessments of parole requests made by asylum seekers who have obtained a credible fear

determination and who are detained at facilities within the New Orleans Field Office. Thus, if Plaintiffs' assertion is to be credited, there is no need for the Court to issue another preliminary injunction that is duplicative of the one already in place. Nor could Plaintiffs establish irreparable harm from the absence of an additional order that would be redundant of the existing one.

Although Plaintiffs contend as the basis for seeking duplicative relief that Defendants "continue to defy this Court's injunction" (ECF No. 61-1, Pl. Mem. at 16; ECF No. 61, Pl. Mot. at 1), they have failed to support that contention. They acknowledge that recent monthly reports by the agency reflect parole grant rates approaching 40 percent at some facilities, which is an increase from near zero at the time Plaintiffs' original motion for preliminary injunction was filed. (ECF No. 61-1, Pl. Mem. at 31-32) Based on this Court's prior analysis, which considered the near-zero parole grant rate to be indicative of non-compliance with the Parole Directive, this substantial increase in grant rates demonstrates that individualized determinations are occurring consistent with the Court's September 5, 2019 order.[1] Moreover, it is likewise telling that, of the hundreds of parole determinations and re-determinations that have occurred since the Court's September 5, 2019 preliminary injunction order, Plaintiffs proffer declarations of only eight detainees. And those declarants fail to identify any recent instances of non-compliance with the Parole Directive, but instead reference a few, isolated instances of alleged

[1] Defendants continue to maintain that the use of grant rates as a benchmark for compliance with the Parole Directive is improper, but, as that is something that this Court (and Plaintiffs) have previously relied on as being indicative of non-compliance over Defendants' objection, consistency demands that the Court likewise recognize that a substantial increase in grants necessarily is evidence of compliance.

non-compliance that allegedly occurred months ago, with some even pre-dating the Court's September 5, 2019 order. Thus, Plaintiffs' suggestion that their motion is necessitated by non-compliance with the Court's existing order is an obvious pretext, particularly given that other mechanism are available to Plaintiffs for bringing isolated issues of alleged non-compliance to the Court's attention as they have done previously. (*see, e.g.*, ECF No. 53)[2]

Thus, what is at issue here is Plaintiffs' attempt to shoehorn the COVID-19 situation into this narrowly framed Administrative Procedure Act ("APA") case. Indeed, when Plaintiffs met and conferred with undersigned counsel regarding this motion by email dated March 20, 2020 (as referenced in ECF No. 61, Pl. Mot. at 2, "Local Rule 7(m) Statement"), they advised that they would be filing an entirely different motion from what actually has been filed. At that time, they described the motion as one for "a Temporary Restraining Order seeking release of *Heredia Mons* class members, and enjoining the New Orleans ICE Field Office from detaining any future class members, until the abatement of this pandemic." (Ex. 1 hereto)

In response to Plaintiffs' March 20, 2020 email, undersigned counsel observed that "[t]he TRO motion that you have outlined below goes well beyond the limited scope of this lawsuit and, in effect, would be asking the Court to make parole adjudications – i.e., to, in effect, order the granting of parole to all members of the Mons class. The court, however, already has

[2] At the status conference on January 7, 2020, the Court also discussed with the parties possible recourse for Plaintiffs in the event Defendants' statistics failed to improve, and renewing their preliminary injunction motion was not an option that the Court identified. (Tr. at 23-24) Defendants' statistics, of course, have improved significantly since that time. And, in the recent status report, Plaintiffs have opposed Defendants' request for a summary judgment briefing schedule on the basis that more monthly reports are needed "for this Court to reach a sound, well-informed conclusion regarding Defendants' compliance with the Parole Directive." (ECF No. 63 at 4)
.

recognized that it has no jurisdiction over the parole determinations themselves. *See Damus*, 313 F. Supp. 3d at 327 (observing that "[t]o the extent Plaintiffs are challenging the [parole] determinations themselves – i.e., the actual balancing of the merits of each application for parole – this Court agrees that it lacks jurisdiction")." (*Id.*)

Having abandoned asking this Court to order the release of all detainees outright, Plaintiffs now are asking this Court to order automatic re-determinations under the 2009 Parole Directive for *all* detainees within the New Orleans Field Office who fall within the broadly defined *Mons* class that take into consideration the detainee's age and medical conditions – and, indeed, "favor" those factors over others – in light of the COVID-19 situation. (ECF No. 61, Pl. Mot. at 2) This Court, however, lacks jurisdiction to entertain a requested injunction that exceeds the scope of the narrow framework of this lawsuit as pled in the Complaint, which is confined to the four corners of the 2009 Parole Directive and alleged non-compliance with that directive based on allegations wholly unrelated to COVID-19.

Aside from this threshold jurisdictional defect, Plaintiffs misunderstand the limited scope of the Parole Directive and the resulting narrow scope of their APA claim in this lawsuit.[3] Although the Parole Directive sets forth certain procedures to be followed in evaluating individual parole requests, including making individualized determinations, nothing in the Parole Directive or the overarching regulation, 8 C.F.R. § 212.5(b), requires the granting of parole based on any one, or combination, of the factors Plaintiffs identify. Nor does the Parole

[3] Much of Plaintiffs' motion re-iterates arguments already addressed by the Court in connection with briefing on Defendants' motion to dismiss and Plaintiffs' prior motion for preliminary injunction. Recognizing that the Court already has resolved those arguments in its prior order, Defendants are not reiterating their position here, but incorporate their prior filings in that regard by reference and reserve all rights in that regard.

Directive dictate how such factors should be balanced against other competing factors that are relevant to any particular parole determination. Such decisions and balancing of competing factors remain within ICE's discretion under the Parole Directive. As the applicable regulations make clear, parole is to be assessed on a "case-by-case basis," 8 C.F.R. § 212.5(b), and whether a medical condition warrants parole in any specific individual situation is a determination entirely within ICE's discretion. *Id.* § 212.5(b)(1).

Thus, Plaintiffs cannot establish a likelihood of success on their claim that ICE has violated the Parole Directive by allegedly failing in its individualized determinations to afford greater weight to an individual's age or medical condition in the context of the current COVID-19 situation than to other factors. Plaintiffs have likewise failed to proffer any evidence that detainees with medical conditions placing them at high-risk for COVID-19 have not received individualized parole determinations. Indeed, of the eight individuals who submitted declarations in support of Plaintiffs' motion, only two could be considered high-risk based on the CDC criteria – O.M.H. (HIV positive and Hepatitis C) and S.U.R. (60 year old with hypertension and a heart murmur) – and both recently have been released from detention. (Hartnett Decl. ¶ 26 and Ex. B thereto)

Plaintiffs, moreover, cannot establish irreparable harm if they are not afforded the relief that they seek, namely, an order from the Court directing ICE to conduct new parole determinations for all detainees within the *Mons* class, regardless of whether a re-determination is requested, and without regard to a detainee's age or medical situation. The Parole Directive already permits a detainee to request a re-determination of a prior denial and affords ICE discretion in how to conduct that re-determination. (2009 Parole Directive ¶ 8.9) Accordingly,

detainees who are concerned about COVID-19 based on their age or medical condition can request a re-determination under the directive and thus would suffer no irreparable harm if the relief requested by Plaintiffs (court-ordered re-determinations) is not granted.

Finally, the order that Plaintiffs request is not in the public interest. It is not narrowly tailored to those detainees who may fall within high-risk categories identified by the CDC, but would cover all detainees regardless of their age, medical condition or whether they even want a re-determination. Accordingly, it would require the unnecessary expenditure of resources by ICE that could otherwise be used to fulfill ICE's mission at a particularly challenging time.

Ultimately, it appears that Plaintiffs may be using the vehicle of a preliminary injunction motion as a means of inviting this Court to assume a role in monitoring the conditions of the detention facilities within the New Orleans Field Office. This Court, however, lacks jurisdiction to assume such a role based on the narrowly pled APA claims that are before this Court, which rest entirely on the so-called *Accardi* doctrine as their legal basis.[4] Those claims are limited to the four corners of the 2009 Parole Directive, and the procedures established by that directive on ICE's otherwise unfettered discretion in making parole determinations. Because that directive does not speak to the conditions of the detention facilities, and the conditions at the facilities did not form the basis for Plaintiffs' APA claims under the *Accardi* doctrine as pled in the Complaint, any attempt by Plaintiffs to ask this Court to assume a role outside the scope of this lawsuit should be summarily rejected.

[4] Defendants are aware that this Court has sought information from ICE regarding the conditions at certain Family Residence Centers at issue in *O.M.G. v. Wolf,* Case No. 20-786 (JEB), but the Complaint in that case asserted claims specifically based on the conditions at those facilities. Those claims as pled were not narrowly tailored as here to the four-corners of the Parole Directive.

ARGUMENT

I. This Case As Pled Is Limited To The Four Corners Of The Parole Directive.

This case as pled by Plaintiffs is limited to two claims under the APA based on ICE's alleged categorical denial of parole for asylum seekers who have been issued a credible fear determination and who are detained at facilities within ICE's New Orleans Field Office. Specifically, Plaintiffs alleged that, at the time the Complaint was filed in May 2019, DHS had "effectively rescinded the 2009 Parole Directive" in the New Orleans ICE Field Office and that the parole determinations pertaining to them, as well as to members of the putative class, were denied categorically without an individualized determination. (Compl. ¶¶ 129-137) In support of these claims, they allege that parole was denied in "virtually all cases in 2018" (Compl. ¶ 48) and also cite to a statement made in November 2018 by the Assistant Field Office Director for the New Orleans Field Office, Brian Acuna, that they view as an admission that the New Orleans Field Office was not following the directive at that time.[5]

Plaintiffs argued that the alleged "categorical denial" of parole violates the provisions of the 2009 Parole Directive, which Plaintiffs contends imposes certain requirements on ICE in the manner by which it exercises its discretion in making parole determinations that are subject to that directive. Importantly, of the five categories of aliens who may meet the parole standards as set forth in 8 C.F.R. § 212.5(b), the Parole Directive seeks to interpret only one of those five categories, specifically, subsection (b)(5), which refers to "[a]liens whose continued detention is

5 Mr. Acuna has clarified that he misspoke in connection with the response that he provided in November 2018, and confirms that all offices within the New Orleans area of responsibility are adjudicating parole requests in accordance with the 2009 parole directive." (ECF No. 26-3, Acuna Decl. ¶ 14) In any event, this allegation does not speak to whether ICE currently is complying with the Parole Directive.

not in the public interest." The Parole Directive explains how the term "public interest" is to be interpreted to "guide" the exercise of the agency's discretion with respect to this specific subsection and also "mandate[s] uniform record-keeping and review requirements" for parole decisions under section 212.5(b). (Parole Directive ¶ 4.4) The factors that the Parole Directive identifies for consideration in evaluating the "public interest" specifically include the individual's potential as a flight risk and the individual's potential danger to the community. Issues pertaining to an individual's medical condition are not specified as considerations under the "public interest" assessment. Instead, under 8 C.F.R. § 212.5(b)(1), an individual's "serious medical condition" may be considered as a basis for parole on a "case-by-case" basis.

As this Court has previously recognized, by statute the decision whether or not to grant parole under any of the subsections of 8 C.F.R. § 212.5(b) is a discretionary one that is not subject to judicial review under the APA. *See Damus v. Nielsen,* 313 F. Supp. 3d 317, 327 (D.D.C. 2018) ("[t]o the extent Plaintiffs are challenging the [parole] determinations themselves – i.e., the actual balancing of the merits of each application for parole – this Court agrees that it lacks jurisdiction"). This Court, however, has permitted Plaintiffs' APA claims here to proceed because Plaintiffs purportedly are not challenging individual parole determinations but instead challenge more narrowly the agency's alleged failure to comply with the procedures of the Parole Directive based on the alleged practice of categorically denying all parole requests (and thus allegedly not engaging in individualized determinations).

Plaintiffs' APA claims[6] thus survived Defendants' motion to dismiss solely on the basis of the "*Accardi* doctrine," which, as applied by this Court,[7] can form the basis for an APA claim when an agency allegedly fails to following guidelines that it has established to govern the agency's discretionary decisionmaking. (ECF No. 32, Mem. Op. at 18) Relying on the *Accardi* doctrine, this Court found the Parole Directive to constitute binding guidance over the agency's discretionary decisionmaking in parole determinations, and thus permitted Plaintiffs to proceed with their APA claim based on Plaintiffs' allegations that ICE failed to conduct individualized parole determinations and instead followed a practice of categorically denying parole contrary to the directive. (ECF No. 32, Mem. Op. at 19)

On September 5, 2019, this Court also granted Plaintiffs' motion for preliminary injunctive relief and ordered ICE to conduct individualized parole determinations in accordance with the provisions of the Parole Directive. Since that order, ICE has been providing monthly reports to the Court reflecting the rate at which parole is now being granted at its facilities within the New Orleans Field Office. In that regard, the report filed on February 24, 2020 reflected a 36 percent grant rate for both re-determinations and initial parole determinations, and the report field on March 23, 2020, reflected a 29% grant rate for re-determinations and a 13.6% grant rate for initial determinations. In contrast, at the time this lawsuit was filed, the grant rate was near

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[6] Plaintiffs also asserted a claim for violation of due process under the Fifth Amendment for alleged non-compliance with the procedures of the Parole Directive, but the Court dismissed that claim without prejudice by order dated September 5, 2019. (ECF No. 33)

[7] Defendants continue to reserve their position that the *Accardi* doctrine is not applicable to the Parole Directive, and are simply discussing above this Court's ruling on Defendants' motion to dismiss.

zero according to Plaintiffs' allegations, evidence that figured prominently in their Complaint and this Court's granting of preliminary injunctive relief.

II. This Court Lacks Jurisdiction To Issue Injunctive Relief Based On Allegations That Fall Outside The Narrow Scope Of This Lawsuit.

"As a general rule, 'a preliminary injunction may not issue when it is not of the same character as that which may be granted finally and when it deals with matter outside the issues in the underlying suit.'" *Sai v. Transp. Sec. Admin.*, 54 F. Supp. 3d 5, 9 (D.D.C. 2014). Thus, a preliminary injunction that "deals with a matter lying wholly outside the issues in the suit" or would provide relief that could not be provided "in any final injunction that may be entered" would not be proper. *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945).

This established rule "cuts to the subject matter jurisdiction of the court." *Sai*, 54 F. Supp. 3d at 9. "Thus, just as a court lacks jurisdiction over a motion for a preliminary injunction in the absence of a complaint . . ., the court also lacks jurisdiction over a motion when it 'raises issues different from those presented in the complaint.'" *Id.; see also Adair v. England*, 193 F. Supp. 2d 196, 200 (D.D.C. 2002); *accord Stewart v. U.S. Immigration and Naturalization Serv.*, 762 F.2d 193, 198-99 (2d Cir. 1985).

Plaintiff purports to bring this preliminary injunction motion based on ICE's failure to provide individualized parole determinations in accordance with the procedures set forth in the Parole Directive. But this Court already has entered a preliminary injunction providing that relief and, as discussed below, Plaintiffs have failed to support with competent evidence their contention of non-compliance by ICE with the existing injunction. Indeed, were the Court to

find non-compliance with its existing order, the proper remedy would not be for the Court to issue a duplicative preliminary injunction.

The preliminary injunction order that is actually being requested is one that would require ICE to conduct re-determinations of parole for *all* detainees within the New Orleans Field Office who fall within the broadly defined *Mons* class based on the COVID-19 situation. (ECF No. 61-2) But nothing in the existing Complaint supports that relief. The allegations are limited to narrowly pled APA claims based on the *Accardi* doctrine that allege (1) a policy and practice of "ignoring the Parole Directive" (Count I) and (2) a failure to provide individualized determinations in accordance with the Parole Directive and to instead categorically deny parole in virtually all cases (Count II). (Compl. ¶¶ 129-137)

In their motion for preliminary injunction, Plaintiffs state that they are re-asserting these two claims "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." (ECF No. 61-1, Pl. Mem. at 23) This assertion is an admission that Plaintiffs are seeking relief outside the scope of the existing Complaint and attempting, by motion, to advance new claims. That Complaint, which was filed in May 2019, pre-dates the COVID-19 situation and does not allege a violation of the 2019 Parole Directive based on any individual's particular health status, age or conditions of detention. Plaintiffs' attempt to assert *by motion* what amount to new claims based on events that had not arisen at the time that Complaint was filed is improper and fails to afford jurisdiction to this Court to consider a requested injunction based on such unpled claims.

When Plaintiffs' narrowly pled Complaint is compared to recent lawsuits against ICE filed by other litigants based on the COVID-19 situation, the limited nature of this lawsuit *as pled* is even more apparent. Those lawsuits assert constitutional challenges to the living conditions at certain ICE facilities based on COVID-19 and seek injunctive relief on the basis of allegations specifically raised in the Complaints filed in those actions. *See, e.g., Dawson v. Asher*, Case No. 20-409 (W.D. Wash.).[8] In one recent example, 17 detainees in five facilities within the New Orleans Field Office (LaSalle, Richwood, Etowah, Adams and Winn) recently filed such a lawsuit in the Eastern District of Louisiana, alleging that they are high-risk to COVID-19 either by age or health conditions (i.e., diabetes, chronic lung condition, kidney disease, and hypertension) and that the conditions at the facilities are unsafe for them for that reason and that they should be released. *See Dada, et al. v. Witte*, Case No. 20-1093 (E.D. La.).[9]

What is relevant here for purposes of this Court's jurisdiction is not the outcome of the motion in *Dada* (dismissal for lack of jurisdiction) and similar lawsuits, but the different character of such lawsuits as compared to the narrowly pled Complaint here. The Complaint here does not plead facts pertaining to the COVID-19 situation or attempt to base any claim for relief on the living conditions at facilities within the New Orleans Field Office relative to any individual's particular age or medical condition. Indeed, standing in this lawsuit was derived from a putative class that is defined in a manner entirely unconnected to any class member's age or medical condition.

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8 The motion for temporary restraining order was denied in the above-cited case.

9 At least one of the plaintiffs in *Dada* appears to fall within the *Mons* class as that class has been defined by this Court.

Yet, Plaintiffs base their motion for preliminary injunction on conditions in the detention facilities, which they contend render them unsafe in light of COVID-19 and thus, in their view, require ICE to conduct automatic, across-the-board re-determinations of parole for all detainees. But the APA claims as pled in the existing Complaint are not based on alleged unsafe living conditions or any detainees' age or medical condition, nor does the Complaint present the Court with a claim that would require it to assess those conditions. As pled, this lawsuit is limited to the four corners of the Parole Directive and that directive does not in any way purport to limit ICE's discretion in weighing such issues in parole determinations. Nor does it require that ICE conduct automatic, across-the-board re-determinations of parole in the event of a health crisis. Under the directive, individual detainees can request a re-determination of a prior denial of parole and ICE has discretion in how that is conducted. (2009 Parole Directive ¶ 8.9) Moreover, while the regulations governing parole recognize "serious medical conditions" and "humanitarian reasons" as a potential basis for parole, that is to be assessed in ICE's discretion on a "case-by-case" basis. 8 C.F.R. § 212.5(b).

This Court already has issued a preliminary injunction that falls within the scope of the allegations as narrowly pled in the Complaint. Plaintiffs' instant motion would be redundant were it to seek relief that this Court already has granted. Instead, it is properly understood as seeking relief related to the COVID-19 situation based on the conditions at the facilities within the New Orleans Field Office, matters over which this Court lacks jurisdiction in this narrowly framed lawsuit. As such, Plaintiffs' motion goes beyond the scope of this lawsuit and should be denied on that basis.

III. Plaintiffs Have Failed To Meet Their Burden To Establish An Entitlement To Preliminary Injunctive Relief.

Even were the Court to find that it has jurisdiction over Plaintiffs' motion despite the limited nature of this lawsuit, Plaintiffs have failed to meet their burden to obtain preliminary injunctive relief. A "preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24 (2008). A party seeking preliminary relief must make a "clear showing that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest." *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016). The moving party bears the burden of persuasion and must demonstrate, "by a clear showing," that the requested relief is warranted. *Hospitality Staffing Solutions, LLC v. Reyes*, 736 F. Supp. 2d 192, 197 (D. D.C. 2010).

Before the Supreme Court's decision in *Winter*, courts weighed these factors on a sliding scale, allowing an unusually strong showing on one of the factors to overcome a weaker showing on another. *Davis v. PBGC*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009) This Circuit has suggested, without deciding, that *Winter*—which overturned the Ninth Circuit's "possibility of irreparable harm" standard— "should be read to abandon the sliding-scale analysis in favor of a 'more demanding burden' requiring Plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm." *Bartko v. Dep't of Justice*, 2015 WL 13673371, at *1 (D.D.C. 2015) (citing *Sherley v. Sebelius*, 644 F.3d 388, 392–93 (D.C. Cir. 2011), and *Davis*, 571 F.3d at 1292); *see also League of Women Voters*, 838 F.3d at 7 (declining to address whether "sliding scale" approach is valid after *Winter*).

Even before *Winter*, courts in this Circuit consistently stressed that "a movant must demonstrate 'at least some injury' for a preliminary injunction to issue." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting *CityFed Fin. Corp. v. OTS*, 58 F.3d 738, 747 (D.C. Cir. 1995)). Thus, "if a party makes no showing of irreparable injury, the court may deny the motion without considering the other factors." *Henke v. Dep't of Interior*, 842 F. Supp. 2d 54, 59 (D.D.C. 2012) (quoting *CityFed Fin. Corp.*, 58 F.3d at 747); *see also Chaplaincy of Full Gospel Churches*, 454 F.3d at 297 ("A movant's failure to show any irreparable harm is … grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief.").

A movant alleging "speculative injuries" cannot meet the "'high standard for irreparable injury' sufficient to warrant the extraordinary relief" of a preliminary injunction and "the Court need not reach the other factors relevant to the issue of injunctive relief." *United Farm Workers v. Chao*, 593 F. Supp. 2d 166, 171 (D.D.C. 2009) (quoting *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297); *see Bartko*, 2015 WL 13673371 at *2 ("[t]he Court need not grant injunctive relief 'against something merely feared as liable to occur at some indefinite time'") (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). "[T]he movant must demonstrate the injury is of such 'imminence' that there is a clear and present need to equitable relief to prevent irreparable harm." *Id.* (quoting *Judicial Watch, Inc. v. Dep't of Homeland Security*, 514 F. Supp. 2d 7, 10 (D.D.C. 2007). And where a party seeks to change the status quo through action rather than merely to preserve the status quo—typically the moving party must meet an even higher standard than in the ordinary case: the movant must show 'clearly' that [it] is entitled

to relief or that extreme or very serious damage will result." *Farris v. Rice*, 453 F. Supp. 2d 76, 78 (D.D.C. 2006) (citing authorities).

As discussed below, Plaintiffs have fallen far short of meeting their burden to establish that they have met any of the four factors by either the "clear showing" standard or the somewhat higher standard applicable when the injunction would alter the status quo. *Dunlap v. Presidential Advisory Comm'n on Election Integrity*, 319 F. Supp. 3d 70, 81 (D.D.C. 2018); *Farris*, 453 F. Supp. 2d at 78.

A. Plaintiffs Have Not Demonstrated A Likelihood Of Success On The Merits

Plaintiffs have not shown that they have a strong likelihood of success on the merits. Plaintiffs nominally contend that their motion is necessary on the basis that Defendants are in violation of this Court's existing preliminary injunction order, and they devote most (if not all) of their discussion of the likelihood of success factor to essentially re-litigating their earlier motion. (ECF No. 61-1, Pl. Mem. at 31-42) However, as discussed below, Plaintiffs have failed to proffer to the Court competent evidence sufficient for this Court to find Defendants currently to be in violation of the September 5, 2019 order. Indeed, if alleged non-compliance with the existing order were the true basis for Plaintiffs' motion, the requested injunction would be redundant of relief already granted by the Court and unnecessary in light of other potential remedies available to Plaintiffs.

What is at issue instead is Plaintiffs' contention that automatic, across-the-board re-determinations of parole are necessary in light of COVID-19. As already discussed above, this Court lacks jurisdiction to consider that claim since it goes beyond the scope of this lawsuit as narrowly framed in the Complaint. But even if the Court had jurisdiction, Plaintiffs

mischaracterize the Parole Directive in making this argument. They contend that "Defendants should . . . be required to fully comply with all applicable regulations delineated in the Parole Directive, including those that favor the granting of parole to class members who 'have serious medical conditions, where continued detention would not be appropriate,' and class members 'whose continued detention is not in the public interest.'" (ECF No. 61, Pl. Mot. at 2)

However, the referenced regulations do not "favor" granting parole on any specific basis, but simply identify categories in which parole may be justified based on the exercise of ICE's discretion. Neither the Parole Directive nor the referenced regulation, 8 C.F.R. § 212.5(b), dictates how ICE is to weigh competing factors in evaluating parole on a case-by-case basis. Nor have Plaintiffs identified any provision of the Parole Directive that would entitle them to automatic, across-the-board re-determinations based on these factors. And their limited evidence fails to demonstrate that ICE is not conducting individualized determinations of individuals who have requested re-determinations in light of COVID-19. For all of these reasons, Plaintiffs cannot establish a likelihood of success on the merits of their new, unpled claim.

1. Plaintiffs Have Proffered Insufficient Evidence Of Non-Compliance

As a basis for contending that ICE is in violation of this Court's September 2019 preliminary injunction order, Plaintiffs cite to the current grant rates at facilities within the New Orleans Field Office, which they acknowledge approach 40 percent at some facilities but still characterize as "abysmal". (ECF No. 61-1, Pl. Mem. at 32) They also cite to what they characterize as testimony by their declarants reflecting "egregious behavior" by Defendants regarding their compliance with the existing order. (*Id.*) Neither argument has merit.

In terms of the grant rates, Plaintiffs appear to take the position that the 75 percent grant rate allegedly existing several years ago somehow constitutes the benchmark for what constitutes compliance with the Parole Directive. Not only is that a baseless assertion, but it overlooks the underlying premise of the APA claims in their Complaint and in their original motion for preliminary injunction. Both focused on the near-zero grant rate existing at the time this lawsuit was filed. In that regard, the Complaint asserted claims under the APA on the basis that ICE had a "policy and practice of ignoring the Parole Directive" that is arbitrary and capricious (Count I) and that ICE is failing to make individualized parole determinations and instead is "issuing denials on a categorical basis." (Count II) (Compl. ¶¶ 129-137)

These are the only claims currently at issue in this case, and the only claims on which a request for injunctive relief can be based. Clearly, a recent grant rate approaching 40 percent at some facilities (and over 30 percent across all facilities as reflected in the recently-filed monthly reports) conclusively establishes that individualized parole determinations are occurring, that the Parole Directive is not being "ignor[ed]," and that denials are not being issued on a "categorical basis." *See, e.g.*, *R.I.L.R. v. Johnson*, 80 F. Supp. 3d 164, 174 (D.D.C. 2015) (JEB) ("Although these materials certainly do not reflect a large body of favorable release determinations, the Court is reluctant to find an across-the-board No-Release Policy when it appears that — at least in some small number of cases — ICE does grant bond on the basis of individualized considerations.") While Plaintiffs may prefer a higher grant rate, that preference is not a basis for contending that Defendants are failing to conduct individualized determinations in violation of this Court's September 2019 order.

Most of Plaintiffs' discussion concerns sweeping assertions regarding Defendants alleged non-compliance with this Court's September 5, 2019 order (ECF No. 61-1, Pl. Mem. at 32-41) that are untethered from the supporting "evidence" that Plaintiffs have proffered. But the assertions made by counsel in a legal brief are not evidence. A close review of the referenced declarations submitted with Plaintiffs' motion – the only "evidence" presented – reveals the exaggerated nature of these assertions.

Defendants discuss below each of the purported fact declarations submitted with Plaintiffs' motion to the extent they purport to address ICE's alleged non-compliance with the 2009 Parole Directive. As that discussion reflects, to the extent these declarations even allege non-compliance with the 2009 Parole Directive (as opposed to dissatisfaction with the outcome of their parole determinations), they are limited to isolated acts that occurred several months ago and, in some instances, prior to this Court's September 5, 2019 preliminary injunction order. And, to the extent these declarants take issue with the amount of information on their denial letters explaining the basis for the decisions, this Court's September 5, 2019 order did not require ICE to provide any more detail than provided on its form denial letter (indeed, the Parole Directive requires nothing more than a "brief" explanation (Parole Directive § 6.5)). Thus, although Plaintiffs make sweeping assertions of non-compliance in their preliminary injunction motion, their supporting declarations fail to support those contentions.

A discussion of the eight declarations submitted with Plaintiffs' motion follows and demonstrates the dated nature of the allegations of alleged non-compliance in these declarations. The dated nature of the allegations is significant in two ways. First, it demonstrates that there is no alleged imminent need for Plaintiffs' motion to the extent it is based on alleged non-

compliance. *See, e.g., Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (delay of four months indicates a lack of imminence sufficient to support preliminary injunctive relief). Second, Plaintiffs' near complete reliance on dated, isolated examples reflects the absence of any present issue regarding compliance. Indeed, since the Court's preliminary injunction order, hundreds of parole determinations have been made. Against that backdrop, Plaintiffs identification of only a few isolated instances of alleged non-compliance from months ago falls far short of Plaintiffs' burden to establish a present violation of this Court's September 5, 2019 order. A close review of Plaintiffs' declarations reveals the following:

***B.A.E.*:** B.A.E. identifies one act of alleged non-compliance that allegedly occurred in November 2019 when parole was denied before B.A.E. submitted an application, and one isolated comment in November 2009 that is contradicted by recent grant rate statistics. (ECF No. 61-3 at ¶¶ 8-9) B.A.E.'s dissatisfaction with the outcome of the parole determinations and the absence of a more detailed explanation for the denials (which is not required by this Court's preliminary injunctive order or the Parole Directive) is not evidence of non-compliance. According to ICE's records, B.A.E.'s most recent parole denial was March 29, 2020. (Ex. B to Hartnett Decl.)

***K.S.R.*:** K.S.R. identifies one act of alleged non-compliance at the S. Louisiana facility when, in December 2019, K.S.R. was denied parole as a flight risk without being interviewed. (ECF No. 61-4 at ¶ 7) According to K.S.R.'s declaration, K.S.R. requested re-determinations of that denial on three occasions and was denied each time. (*Id.* ¶ 8) K.S.R. does not identify any issues of non-compliance associated with any of those denials. (*Id.*) According to ICE's records, K.S.R.'s most recent parole denial was

March 12, 2020. (Ex. B to Hartnett Decl.)

***L.P.C.*:** L.P.C. identifies one instance in November 2019 at the S. Louisiana facility where an officer allegedly refused to accept the parole application and stated that parole is not granted in Louisiana (a contention contradicted by recent parole grant statistics). (ECF No. 61-5 at ¶¶10-12) L.P.C. asserts that "over the last four months" other parole requests were made and were denied, with the flight risk box checked on the denial letter and no further explanation. (*Id.*) L.P.C. does not identify any issues of non-compliance regarding these requests and neither this Court's preliminary injunction order nor the Parole Directive require any explanation beyond what was included in these denial letters. According to ICE's records, L.P.C.'s last parole denial was January 30, 2020. (Ex. B to Hartnett Decl.)

***O.M.H.*:** O.M.H. identifies an issue with a parole denial occurring in or about July 2019, *prior* to the Court's September 5, 2019 preliminary injunction order. (ECF No. 61-6 at ¶ 5) O.M.H. also makes a generic assertion that ICE officers at Richwood would not accept parole requests, but the timeframe when this allegedly occurred appears to have been some time prior to December 2019. (*Id.* at ¶ 9) O.M.H. filed a parole request on March 26, 2020, but does not assert any issues of non-compliance with respect to that request. (*Id.* at ¶ 10) According to ICE's records, that request was denied on March 30, 2020, but O.M.H. was subsequently released on his own recognizance on April 2, 2020. (Hartnett Decl. ¶ 26 and Ex. B thereto)

R.P.H.: R.P.H. allegedly applied for parole four times and all of her requests have been denied. R.P.H. identifies no issues of non-compliance with respect to any of those requests, but simply expresses the belief that the requests should have been granted. (ECF No. 61-7 at ¶ 14) According to ICE's records, R.P.H.'s last request was denied March 12, 2020. (Ex. B to Hartnett Decl.)

S.U.R.: S.U.R. was transferred to the River Correctional Facility in April 2019 and apparently requested parole shortly thereafter. (ECF No. 61-8 at ¶¶ 8-9) Although S.U.R. alleges that there was no interview in connection with that application or any decision on that request, that application apparently occurred *prior* to this Court's September 5, 2019 order based on the chronology provided in S.U.R.'s declaration. (*Id.*) In November 2019, S.U.R. was transferred to the Adams facility where a parole request was made and denied. (*Id.* ¶ 10) S.U.R. does not identify any issues of non-compliance with that request. (*Id.*) According to ICE's records, S.U.R. was granted parole on April 3, 2020. (Hartnett Decl. ¶ 26 and Ex. B thereto)

***T.M.F.*:** T.M.F. alleges that, while in the Tallahatchie facility for approximately one week in late November/early December 2019, officers told him parole was not granted in Louisiana and that his parole request was denied. (ECF No. 61-9 at ¶¶ 8-9) On December 10, 2019, T.M.F. was transferred to River Correctional Facility and in early January 2020 was transferred to LaSalle, where T.M.F. allegedly had difficulty contacting a deportation officer. (*Id.* ¶ 11) According to ICE's records, T.M.F. was last denied parole on January 31, 2020. (Ex. B to Hartnett Decl.) T.M.F. claims to have been denied parole several times, but does not identify any issue of non-compliance with

respect to any of those denials. (ECF No. 61-9 at ¶¶ 9-10) T.M.F. expresses dissatisfaction with the outcome of his parole requests and the absence of a detailed explanation for the denials. (*Id.*) According to ICE's records, an Immigration Judge issued a ruling in T.M.F.'s favor on March 10, 2020, and ICE has reserved appeal. (Ex. B to Hartnett Decl.)

***Y.P.T.*:** Y.P.T. identifies one issue of alleged non-compliance that occurred either before, or around the time of, this Court's September 5, 2019 order based on the chronology presented in Y.P.T.'s declaration. (ECF No. 61-10 at ¶¶ 8-9) Specifically, Y.P.T. alleges that parole was denied while at the Tallahatchie facility in late August or early September 2019 without Y.P.T. having the opportunity to submit documents in support of parole. (*Id.*) Y.P.T. alleges that there have been three other parole requests which have been denied. (*Id.* ¶ 10) Y.P.T. does not identify any issues of non-compliance with the Parole Directive in connection with any of those requests. (*Id.*) Instead, like T.M.F., Y.P.T. expresses dissatisfaction with the outcome of the determinations and the lack of a more detailed explanation for the denials. (*Id.*) According to ICE's records, an Immigration Judge ordered Y.P.T. removed on January 10, 2020, and Y.P.T.'s appeal to the BIA remains pending. (Ex. B to Hartnett Decl.) Y.P.T.'s last parole denial was February 28, 2020. (*Id.*)

Rivera Declaration: Plaintiffs' motion also is accompanied by a declaration of Laura Rivera, one of the attorneys representing Plaintiffs in this action. (ECF No. 61-11) That declaration is focused mainly on the COVID-19 situation, recent guidelines at the facilities within the New Orleans Field Office placing restrictions on visitation, and

> hearsay regarding the conditions at two facilities (LaSalle and Pine Prairie). To the extent parole is referenced in that declaration, Ms. Rivera discusses two clients who were denied parole before the COVID-19 situation, and also denied parole again after the onset of COVID-19. (ECF No. 61-11 at ¶¶ 11-12) Although Ms. Rivera disagrees with those determinations, Ms. Rivera does not identify any issues of alleged non-compliance with the Parole Directive with respect to those determinations. (*Id.*)

Thus, these declarations fail to establish any current, ongoing violation of this Court's September 5, 2019 order. Instead, they at most reflect dated, isolated instances of alleged non-compliance that arose several months ago. Accordingly, Plaintiffs have failed to meet their burden of establishing the likelihood of success factor to the extent it is premised on alleged non-compliance with this Court's existing order.

2. Plaintiffs Have Failed To Establish A Lack Of Individual Determinations For Individuals At High Risk Of COVID-19

Plaintiffs other apparent basis for filing this motion for preliminary injunction is their speculation that ICE is failing to consider in its parole determinations whether individuals requesting parole are at high risk for complications from COVID-19. Plaintiffs state that they are re-asserting the two counts of their Complaint "as the basis for injunctive relief requested to enjoin Defendants from acting in a manner specifically harmful to Plaintiffs' during the COVID-19 pandemic." (ECF No. 61-1, Pl. Mem. at 23) Indeed, one of the two "expert" declarations submitted with Plaintiffs' filing frames the question this way: "The present case involves a question as to whether the New Orleans Immigration and Customs Enforcement ("ICE") Field Office should use its authority and discretion to release detained asylum-seekers in order to protect them from health risks caused by potential and actual exposure to the novel Coronavirus

(COVID-19)." (ECF No. 61-13 at ¶ 10)

Plaintiffs insist that they "are not seeking to challenge the outcome of the individualized parole assessments itself." (ECF No. 61-1, Pl. Mem. at 16) Instead, Plaintiffs are asking this Court to require ICE to emphasize certain factors over others in conducting individual parole assessments. In their motion, they explain the basis for this contention as follows:

> Defendants should also be required to fully comply with all applicable regulations delineated in the Parole Directive, including those that favor the granting of parole to class members who "have serious medical conditions, where continued detention would not be appropriate," and class members "whose continued detention is not in the public interest." Parole Directive at ¶ 4.3, citing 8 C.F.R. § 212.5(b). As required by the Parole Directive, Defendants should incorporate into their individualized assessment of class members' parole eligibility, the danger that COVID-19 poses to those in detention, especially those with serious medical conditions; and should weigh whether the continued detention of parole-eligible class members is in the public interest, given the danger posed by the COVID-19 outbreak.

(ECF No. 61, Pl. Mot. at 2)

Defendants already have established that this contention reflects a new claim that has not been pled in the Complaint and that therefore is outside the scope of this lawsuit. But even were the Court to consider it, Plaintiffs have failed to establish a likelihood of success of prevailing on the merits of this contention for two reasons. First, nothing in the Parole Directive or referenced regulation "favor[s] the granting of parole to class members who 'have a serious medical condition'" or states that continued detention is not in the public interest when a detainee has a serious medical condition. Although the Parole Directive explains the meaning of "public interest" in 8 C.F.R. § 212.5(b)(5) (Parole Directive § 4.4), the factors that the Parole Directive identifies in making that determination are set forth in section 8.3 of the Parole Directive and do not directly reference medical issues. And, while the regulation addressing parole, 8 C.F.R. § 212.5(b), refers to a "serious medical condition" as a potential basis for parole, *id.* § 212.5(b)(1),

that subsection is distinct from the "public interest" subsection, *id.* § 212.5(b)(2), that is specifically addressed in the Parole Directive. (Parole Directive § 4.4)

Ultimately, whether to grant parole based on the existence of a "serious medical condition" or "public interest" – in the context of COVID-19 or otherwise – is subject to ICE's discretion based on a weighing of various factors that might be at issue in any given "case-by-case" analysis. Thus, neither the Parole Directive, nor 8 C.F.R. § 212.5(b), requires ICE to "favor" a requester's age or medical condition over any other factor that ICE might consider in evaluating a parole request. Accordingly, Plaintiffs cannot state a claim based on the *Accardi* doctrine – which is the basis for their APA claims as pled in the Complaint – for ICE's alleged failure to "favor" such factors in its individualized determinations. Nor does this Court have jurisdiction to direct ICE to do so. *See Damus*, 313 F. Supp. 3d at 327 (observing that "[t]o the extent Plaintiffs are challenging the [parole] determinations themselves – i.e., the actual balancing of the merits of each application for parole – this Court agrees that it lacks jurisdiction"); *see also* 8 U.S.C. § 1182(d)(5)(A) ("The [DHS Secretary] may … in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States…"); 8 U.S.C. § 1252(a)(2)(B)(ii) ("no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security," except for asylum determinations).

Second, Plaintiffs have failed to proffer any evidence that ICE has failed to consider an individual's medical condition in its case-by-case analysis of parole requests in any event. The only "evidence" that Plaintiffs offer to contend that persons who suffer from medically serious conditions are not afforded individualized assessments are the outcomes of a limited number of parole determinations that Plaintiffs have identified since the onset of COVID-19 in Louisiana.[10] In light of the discretionary nature of a parole determination, and the other factors that are weighed in such determinations, that exceedingly small sample size is not evidence that individualized determinations are not occurring.

Not only is the sample size too small to draw any such conclusion, but Plaintiffs proffered declarations reflect that most, if not all, of the declarants who were denied parole within the last 30 days are not within the high-risk categories identified by the CDC, which are consistent with the categories identified in the declaration accompanying Plaintiffs' motion (ECF No. 61-12 at 7-8).[11] Of the eight individuals who have proffered declarations, only four (B.A.E., K.S.R., O.M.H. and R.P.H.) were denied parole within the last 30 days and none are 65 years of age or older (the ages are: B.A.E. (no age stated); R.P.H. (50); K.S.R. (27) and O.M.H. (32))

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[10] The first presumptive case of COVID-19 in Louisiana was announced on March 9, 2020. *See* https://www.wwltv.com/article/news/health/coronavirus/coronavirus-timeline/289-9204d79c-2ac6-4b27-971b-3f32be49d134.

[11] Those categories include individuals 65 years and over, individuals with chronic lung disease or severe asthma, individuals with serious heart conditions, conditions that can cause a person to be immunocompromised, severe obesity, diabetes, chronic kidney disease and those undergoing dialysis, and liver disease. *See* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html.

In addition, of the four denied parole within the last 30 days, only two identify a specific underlying medical condition – R.P.H. (breast cancer survivor) and O.M.H. (HIV positive and Hepatitis C) – and, of those, only O.M.H. arguably falls within a recognized high risk category.[12] Notably, O.M.H. was released on his own recognizance on April 2, 2020. (Hartnett Decl. ¶ 26 and Ex. B thereto) Of the remaining two, one (K.S.R.) claims to have had the flu in early March and the other (B.A.E.) references a muscle injury in his chest, neither of which constitutes a high-risk category.

As regards the other four of the eight declarants, only one – S.U.R. – potentially falls within a high-risk category as a 60 year old with hypertension and a heart murmur. (*Id.*) The other three do not.[13] S.U.R. was granted parole on April 3, 2020. (Hartnett Decl. ¶ 26 and Ex. B thereto)

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[12] R.P.H.'s assertion that she is a breast cancer survivor does not place her within a high-risk category absent evidence that R.P.H. is undergoing treatment that makes her immune-compromised, which is not asserted in her declaration. O.M.H.'s contention of suffering from Hepatitis C may place O.M.H. in a high-risk category of having liver disease. Being HIV positive, however, is not listed by the C.D.C. as a high-risk category provided the condition is being controlled. *See* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html.

[13] The remaining three declarants age and medical conditions are as follows according to their declarations: L.P.C (26 years old, no current medical condition identified) (ECF No. 61-5); T.M.F. (44 years old, no current medical condition identified other than pain from unidentified chronic injuries) (ECF No. 61-9); Y.P.T. (30 years old, fractured foot, claustrophobia, nausea, anxiety and depression) (ECF No. 61-10). To the extent these and the other declarants make representations about the medical conditions of other detainees, those statements are hearsay and should not be considered by the Court. These declarants do not purport to be medical professionals or to have access to other detainees' medical records. Their statements, therefore, are either based on speculation or information provided to them by others. Under either scenario, the statements are inadmissible.

Thus, of the eight declarants supporting Plaintiffs' motion, the two with potentially high-risk medical conditions (O.M.H. and S.U.R.) have been released.[14] The remaining six do not claim to have medical conditions that would place them in a high-risk category, nor are they of an age that would place them in a high-risk category. To the extent they make representations about the medical conditions of other detainees, those assertions are inadmissible hearsay. *See supra* note 13. Thus, when their conclusory assertions are set aside and their declarations are closely examined, Plaintiffs have offered no competent evidence that individuals with serious medical conditions are not receiving individualized determinations under the Parole Directive.

3. Plaintiffs Have Not Pled Any Claim Challenging Their Conditions Of Confinement Under The APA And Thus Their Assertions Regarding Such Conditions Fall Outside The Scope Of This Lawsuit

Although Plaintiffs have not asserted a claim in their narrowly pled Complaint challenging the conditions of their confinement under the APA,[15] a large portion of their motion for preliminary injunction and supporting evidence focuses on those conditions in the context of the COVID-19 situation. Those allegations fall outside the scope of this narrowly framed

[14] As regards O.M.H.'s recent denial of parole prior to his subsequent release, it bears mentioning that O.M.H. had received an adverse ruling by an Immigration Judge (Ex. B to Hartnett Decl.), thus increasing his potential as a flight risk as this Court previously recognized. (Mem. Op. at 13, "[a]s the Government argues, an alien facing an order of removal from an IJ presents a fundamentally different flight risk from one who is merely awaiting a hearing before an IJ").

[15] Although Plaintiffs have not brought a claim under the APA challenging the conditions of their confinement, Defendants nonetheless observe that Plaintiffs have not identified a specific final agency action, much less demonstrated exhaustion of remedies as would be necessary to assert such a claim. *Vetcher v. Sessions*, 316 F. Supp. 3d 70, 78-79 (D.D.C. 2018) (dismissing a challenge to the conditions of confinement under the APA because plaintiff failed to identify the policies plaintiff was challenging and how he had administratively exhausted any grievance about those policies).

lawsuit and should not be considered by the Court.

Defendants nevertheless note the following. First, Plaintiffs' declarants most recent place of confinement is at four of the 23 facilities within the New Orleans Field Office, specifically, Adams, S. Louisiana, Catahoula and LaSalle. (Ex. A-B to Hartnett Decl.) Although Plaintiffs assert that there is overcrowding at the referenced facilities, none in fact are operating over capacity and many are operating under capacity. (Hartnett Decl. ¶¶ 4-23 and Ex. A thereto) Moreover, contrary to Plaintiffs' contentions, ICE provides a sanitary environment, including by providing detainees with soap for the shower and hand soap for sink handwashing. (Hartnett Decl. ¶ 41) As described in the accompanying declaration, ICE also provides soap and paper towels that are present in bathrooms and work areas within the facilities. Everyday cleaning supplies such as soap dispensers and paper towels are routinely checked and are available for use. Detainees are encouraged to communicate with local staff when additional hygiene supplies or products are needed. (*Id.*)

Additionally, comprehensive protocols are in place for the protection of staff and detainees, including the appropriate use of personal protective equipment (PPE), in accordance with CDC guidance. ICE also instituted screening guidance for new detainees who arrive at facilities to identify those who meet CDC's criteria for epidemiologic risk of exposure to COVID-19.[16] ICE Health Services Corps ("IHSC") isolates detainees with fever and/or

[16] As of the time of the preparation of the accompanying declaration, there have been two confirmed cases of COVID-19 among the detainee population or staff in the facilities within the New Orleans Field Office. (Hartnett Decl. ¶ 27) On April 1, 2020, a detainee at the Pine Prairie ICE Processing Center (PPIPC), Pine Prairie, Louisiana tested positive for COVID-19. That detainee remains in isolation in a negative pressure cell within the PPIPC medical clinic. On April 5, 2020, a detainee at LaSalle Correctional Cener tested positive for COVID-19. The detainee remains under medical observation and in an isolation cell. (*Id.*)

respiratory symptoms who meet these criteria and observe them for a specified time period. IHSC staff consult with the local health department, as appropriate, to assess the need for testing. Detainees without fever or respiratory symptoms who meet epidemiologic risk criteria are monitored for 14 days. (Hartnett Decl. ¶ 38)

As explained in the accompanying declaration, detainees who meet CDC criteria for epidemiologic risk of exposure to COVID-19 are housed separately from the general population. ICE places detainees with fever and/or respiratory symptoms in a single medical housing room, or in a medical airborne infection isolation room specifically designed to contain biological agents, such as COVID-19. (Hartnett Decl. ¶ 39) ICE also transports individuals with moderate to severe symptoms, or those who require higher levels of care or monitoring, to appropriate hospitals with expertise in high-risk care. Detainees who do not have fever or symptoms, but meet CDC criteria for epidemiologic risk, are housed separately in a single cell, or as a group, depending on available space. (*Id.*)

As explained in the accompanying declaration, ICE has reviewed its "at risk population" to include the elderly, pregnant detainees, and others with compromised immune systems to ensure that detention is appropriate given the circumstances. Custody determinations are made on a case-by-case basis at each detention facility and include, among other factors, the public safety risk that such release could create and the requirement to detain certain aliens under law. ICE will continue to review its "at risk population" in the days and weeks ahead when deciding whether any detainees should be released from custody. (Hartnett Decl. ¶ 42)

Thus, even if the conditions at the facilities were relevant to this lawsuit as narrowly pled in the Complaint, which Defendants dispute, Plaintiffs' limited contentions are insufficient to

establish that conditions at the specific facilities they discuss in their declarations, or at other facilities within the New Orleans Field Office, are unsafe in the current environment.

B. Plaintiffs Have Not Shown Irreparable Injury

"Regardless of how the other three factors are analyzed, it is required that the movant demonstrate an irreparable injury." *Mdewakanton Sioux Indians of Minnesota*, 255 F. Supp. 3d 48, 51 (D.D.C. 2017) (footnote omitted). "The basis of injunctive relief in the federal courts has always been irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 88 (1974); *see also CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995). The Supreme Court's "frequently reiterated standard requires Petitioners seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original). Moreover, conclusory or speculative allegations are not enough to establish a likelihood of irreparable harm. *Henke*, 842 F. Supp. 2d at 59; *see Bartko*, 2015 WL 13673371 at *2 ("[t]he Court need not grant injunctive relief 'against something merely feared as liable to occur at some indefinite time'"). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22; *Northeastern Fla. Chapter of Ass'n of Gen. Contractors v. Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (irreparable injury must be neither remote nor speculative, but actual and imminent). Petitioners cannot make this showing.

Here, the Parole Directive permits detainees to request re-determinations of a parole denial and does not set any limit on how many such re-determinations can be requested. (2009 Parole Directive ¶ 8.9) Accordingly, to the extent any detainee has a concern about COVID-19

as it pertains to their specific medical situation, the detainee can seek a re-determination without the need of an order from this Court. As this Court can neither dictate the outcome of that determination nor the factors that ICE must consider in any such re-determination, the relief requested in this motion – that ICE conduct re-determinations of all detainees – would afford detainees a procedure that already is available to them. Accordingly, Plaintiffs have failed to establish that any detainee would suffer irreparable harm if the injunction request is denied.

In asserting the existence of irreparable harm, Plaintiffs resort to speculation and arguments that fail to account for the limited relief that they seek. They contend that, "[w]ithout injunctive relief, present and future class members are likely to become infected with COVID-19." (ECF No. 61-1, Pl. Mem. at 43) Not only is that assertion speculative, but it is misplaced in the context of the specific injunctive relief requested in this motion and the narrow framework of this lawsuit. Equally misplaced are Plaintiffs' arguments that existing protocols at ICE facilities are insufficient to address the COVID-19 situation. All such contentions go far beyond the four corners of the 2009 Parole Directive, which is the sole basis for this lawsuit, as well as the specific relief requested in the instant motion, which is that the Court order ICE to conduct automatic re-determinations of parole denials for all detainees within the *Mons* class. Indeed, although Plaintiffs profess that they "are not seeking to challenge the outcome of the individualized parole assessments" themselves, and acknowledge that the Court would lack jurisdiction over such a challenge (ECF No. 61-1, Pl. Mem. at 16), their arguments for irreparable harm are premised on the proposition that all detainees must be released, the very claim they disavow. Accordingly, Plaintiffs' assertion that they are "likely to become infected

with COVID-19" if re-determinations are not ordered fails to account for the specific injunctive relief that they seek or the narrow scope of this lawsuit, and should be rejected.

An injunction is "unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged [] -- a 'likelihood of substantial and immediate irreparable injury.'" *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). Accordingly, Plaintiffs have not met their burden to show that they will suffer irreparable harm in the absence of the preliminary relief they seek.

C. The Balance Of Interests And Public Interest Factors Favor Defendants

The final two factors required for preliminary injunctive relief – harm to the opposing party and the public interest– merge when the Government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Additionally, courts should "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982).

The balance of hardships and public interest weigh in favor of Defendants. Interference with the manner in which ICE exercises its discretionary authority, 8 U.S.C. § 1182(d)(5)(A), and carries out its statutory mandates, 8 U.S.C. § 1225(b), on a preliminary basis significantly harms the Government and cannot truly be said to be in the public interest. It is well-settled that the public's interest in enforcement of U.S. immigration laws is paramount, and even more so where, as here, Congress has exercised its plenary legislative authority and control over the Nation's border. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1221 (D.C. Cir. 1981) ("The Supreme Court has recognized that the public interest in

enforcement of the immigration laws is significant."); *see also Nken*, 556 U.S. at 435 ("There is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and permit[s] and prolong[s] a continuing violation of United States law." (internal marks omitted)).

Plaintiffs ask for an order directing ICE to conduct re-determinations of all detainees within the facilities of the New Orleans Field Office, without regard to their age, medical condition or desire for such a re-determination. Given the vast expanse and indiscriminate nature of Plaintiffs' requested order, the balance of interests clearly favors Defendants. Plaintiffs' requested order is not narrowly tailored as required when seeking injunction relief, *State of Neb. Dep't of Health & Human Servs. v. U.S. Dep't of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006), and would require ICE to direct resources away from other aspects of its mission at a particularly challenging time. Because Plaintiffs cannot show that the balance of hardships and public interest tips in their favor, the Court should deny Plaintiffs' request for a preliminary injunction.

CONCLUSION

For the foregoing reasons, the motion for preliminary injunction should be denied.

Respectfully submitted,

TIMOTHY J. SHEA, D.C. Bar #437437
United States Attorney

DANIEL F. VAN HORN, D.C. BAR # 924092
Civil Chief

By: ____/s/_____
JEREMY S. SIMON, D.C. BAR #447956

Assistant United States Attorney
Civil Division
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-2528
Jeremy.Simon@usdoj.gov

Counsel for Defendants