

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AAMIR SHAIKH

Etowah County Jail
827 Forrest Ave
Gadsden, AL 35901,

MARVIN HERNANDEZ VILLALOBO

Stewart Detention Center
146 CCA Rd
Lumpkin, GA 31815,

LILIANA CARDENAS SOLIS

Aurora Detention Facility
3130 N. Oakland St.
Aurora, CO 80010,



Golden State Annex
611 Frontage Rd
McFarland, CA 93250,

JAMES MAYEN MAYEN

Clinton County Correctional Facility
58 Pine Mountain Rd.
McElhattan, PA 17748,

Plaintiffs,

v.

**U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT,**

500 Twelfth Street SW
Washington, DC 20536,

**U.S. DEPARTMENT OF HOMELAND
SECURITY,**

3801 Nebraska Avenue, NW
Washington, D.C. 20016,

Defendants.

No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
(Refusal to provide COVID-19 booster shots to medically vulnerable ICE detainees)

Plaintiffs Aamir Shaikh, Marvin Hernandez Villalobo, Liliana Cardenas Solis, [REDACTED], [REDACTED], and James Mayen Mayen (collectively, “Plaintiffs”) bring this action against U.S. Immigration and Customs Enforcement and the U.S. Department of Homeland Security (collectively, “Defendants”), and allege as follows:

INTRODUCTION

1. In recent weeks, the United States has endured an astronomic spread of COVID-19, especially among those living in jails, prisons, and detention centers. In an astonishingly short amount of time, the Omicron variant has led to a record number of infections, hospitalizations, and deaths nationwide. Hospitals are overwhelmed, reporting widespread staffing shortages and overflowing intensive care units. The few medications available to treat the Omicron variant remain in extremely short supply, available only to the most aged and infirm. As of January 30, 2022, in the United States, more than 19.2 million people have become infected with COVID-19 and over 55,900 people have died from COVID-19 in the past four weeks.¹

2. Yet there is a critical bright spot: the COVID-19 vaccine booster. Recent Centers for Disease Control and Prevention (CDC) studies confirm that people who receive a highly effective messenger RNA (mRNA) COVID-19 booster shot gain significant protection against the virus. The CDC, medical experts, and federal government officials have repeatedly emphasized the importance of COVID-19 vaccine booster shots, encouraging eligible individuals to receive a booster shot as quickly as possible.

3. Plaintiffs are medically vulnerable people held by U.S. Immigration and Customs Enforcement (ICE) at detention facilities while they await adjudication of their civil immigration

¹ Johns Hopkins University Coronavirus Resource Center, *COVID-19 Dashboard*, <https://coronavirus.jhu.edu/map.html> (last visited Jan. 30, 2022).

cases. As COVID-19 spreads rapidly in ICE detention facilities, Plaintiffs fear for their health and their lives. Since the emergence of the Omicron variant, COVID-19 has surged through ICE detention centers. In the last month alone, COVID-19 cases in ICE detention facilities have grown by approximately 1,000 percent.²

4. Plaintiffs are eligible for and want to receive a COVID-19 booster shot and have not been able to receive one in ICE detention. They have requested booster shots, only to be told that none are available or that they should wait an indeterminate time, or their requests have been simply ignored. One Plaintiff, who has had adverse reactions to the Johnson & Johnson vaccine and was advised not to take another dose of that vaccine, was nevertheless informed that mRNA vaccine booster shots (such as Pfizer-BioNTech and Moderna) were unavailable.

5. Despite knowing that ICE detains a large number of people who are medically vulnerable to serious illness and death from COVID-19, and despite knowing that the booster shots provide critically important protection against the virus, Defendants have done little to ensure that detained people can receive booster shots. As of this date, they have failed to develop any plan to provide COVID-19 booster shots to people in ICE custody nationwide. Defendants have provided no instruction requiring that the approximately 200 ICE detention facilities nationwide provide COVID-19 booster shots to eligible detained people. In addition, Defendants have no plan in place to track or notify detained people who are eligible for booster shots, nor do they have a plan to educate detained people about the importance of booster doses.

² ICE, *ICE Guidance on COVID-19: ICE Detainee Statistics*, <https://web.archive.org/web/20220101102807/https://www.ice.gov/coronavirus> (last updated Dec. 28, 2021) (showing that as of Dec. 28, 2021, there were 299 people with COVID-19 in ICE custody); ICE, *ICE Guidance on COVID-19: ICE Detainee Statistics*, <https://www.ice.gov/coronavirus#detStat> (last updated Jan. 28, 2022) (showing that as of Jan. 27, 2022, there were 3,110 people with COVID-19 in ICE custody, a 940 percent increase in cases).

6. Defendants' failure to provide COVID-19 booster shots places Plaintiffs at an unreasonable risk of serious illness and death and constitutes unlawful punishment of Plaintiffs, who are civil immigrant detainees. Defendants' failure to provide booster shots further violates ICE's own detention standards on medical care, which require adherence to CDC infectious disease guidelines. Finally, Defendants' failure to provide booster shots violates Section 504 of the Rehabilitation Act, because they have failed to provide appropriate accommodations for Plaintiffs' disabilities.

7. Without prompt provision of COVID-19 vaccine booster shots, Plaintiffs in this case lack adequate protection against serious illness and death from COVID-19. This Court should order Defendants to immediately make available and provide Plaintiffs an mRNA COVID-19 vaccine booster shot and medical consultation in accordance with the CDC's guidance on COVID-19 vaccine booster shots.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the Constitution and laws of the United States, specifically the Fifth Amendment to the United States Constitution, the Rehabilitation Act, 29 U.S.C. § 794, and the Administrative Procedure Act, 5 U.S.C. §§ 701–706. This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1346 because the United States is a defendant. Defendants have waived sovereign immunity for purposes of this action. 5 U.S.C. §§ 702, 706.

9. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201–02, 5 U.S.C. § 706, and the inherent equitable powers of this Court.

10. Personal jurisdiction and venue are proper in this district pursuant to 28 U.S.C. § 1391(e) because Defendants are agencies of the United States and a substantial part of the events

or omissions giving rise to Plaintiffs' claims occurred in this District.

PARTIES

11. Plaintiff AAMIR SHAIKH is a 49-year-old man who is presently detained by ICE at the Etowah County Detention Center in Gadsden, Alabama.

12. Plaintiff MARVIN HERNANDEZ VILLALOBO is a 29-year-old man who is presently detained by ICE at the Stewart Detention Center in Lumpkin, Georgia.

13. Plaintiff LILIANA CARDENAS SOLIS is a 34-year-old woman who is presently detained by ICE at the Aurora Contract Detention Facility in Aurora, Colorado.

14. Plaintiff [REDACTED] is a 24-year-old man who is presently detained by ICE at the Golden State Annex Detention Center in McFarland, California.

15. Plaintiff JAMES MAYEN MAYEN is a 41-year-old man who is presently detained by ICE at Clinton County Correctional Facility in McElhattan, Pennsylvania.

16. Defendant U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) is a federal law enforcement agency within the U.S. Department of Homeland Security. ICE is responsible for the criminal and civil enforcement of immigration laws, including the detention and removal of immigrants.

17. Defendant U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) is a cabinet-level department of the U.S. government. DHS is charged with enforcement of Title 8 of the United States Code under which Plaintiffs are purportedly detained. 8 U.S.C. § 1103(a)(1). Defendant ICE is a component of DHS.

FACTS

A. COVID-19 Vaccine Booster Shots Provide Critical Protection from Serious Illness and Death, Especially in Light of the Omicron Variant.

18. COVID-19 continues to pose a significant risk of serious illness and death, with about 3,801,110 COVID-19 cases and 15,857 deaths due to COVID-19 nationwide in just the last week (Jan. 23-Jan. 30, 2022).³ With the rise of the highly infectious Omicron variant, daily COVID-19 case counts and hospitalization rates have increased dramatically, with hospitalized patients consisting primarily of medically vulnerable, unvaccinated, or un-boosted individuals. As of January 22, 2022, over 99 percent of COVID-19 cases in the United States are estimated to have been caused by the Omicron variant.⁴ Although in many cases the Omicron variant may cause “mild” illness, those with underlying medical conditions and who are immunocompromised continue to face a substantial risk of serious illness or death from COVID-19. Declaration of Dr. Tara Vijayan (hereinafter “Vijayan Decl.”) ¶ 10.

19. The risk of spread of COVID-19 is heightened in congregate settings such as ICE detention facilities, especially as detainees are typically held in these facilities for a significant period of time, often months or years. Vijayan Decl. ¶¶ 14–15. As the CDC has explained, “[p]eople in correctional and detention facilities are at greater risk for some illnesses, such as COVID-19, because of close living arrangements with other people.”⁵ According to ICE’s own

³ CDC, COVID Data Tracker, *United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction*, https://covid.cdc.gov/covid-data-tracker/#cases_last7-count (last updated Jan. 30, 2022).

⁴ CDC, CDC COVID Data Tracker, *Variant Proportions*, <https://covid.cdc.gov/covid-data-tracker/#variant-proportions> (last updated Jan. 22, 2022).

⁵ CDC, COVID-19, *FAQs for Correctional and Detention Facilities*, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/faq.html> (last updated Jan. 26, 2021).

data, as of January 27, 2022 there are 3,110 individuals who have tested positive for COVID-19 and remain in ICE custody.⁶ Between December 28, 2021 and January 26, 2022, COVID-19 cases in ICE detention have grown by more than 940 percent.⁷ As of January 27, 2022, each of the detention facilities where Plaintiffs are located have individuals who have tested positive for COVID-19 and remain in custody,⁸ and there are likely even more COVID-19 positive detainees due to insufficient testing.⁹

20. The risk of serious illness and death due to COVID-19 is greatest among those who are unvaccinated and those who are vaccinated but have not received a booster shot. Vijayan Decl. ¶ 20. On October 21, 2021, the CDC announced that all individuals 18 and older who had received primary doses of the Pfizer-BioNTech or Moderna vaccines at least six months ago and live in high-risk settings, which include immigration detention facilities, and all individuals 18 and older who received the Johnson & Johnson vaccine at least two months ago, may receive a booster shot for additional protection against COVID-19.¹⁰ Since then, it has become abundantly clear that booster shots are critical to keeping people safe from the worst health risks caused by COVID-19. Recent data published by the CDC confirms that with the rise of the Omicron variant, the Messenger RNA (mRNA) vaccine booster shots, Pfizer-BioNTech and Moderna, are *90 percent* effective against hospitalization, compared to only *57 percent* effectivity against hospitalization 180 days after receiving the second primary dose of an mRNA vaccine. Vijayan Decl. ¶ 21.

⁶ ICE, *ICE Guidance on COVID-19: ICE Detainee Statistics*, <https://www.ice.gov/coronavirus#detStat> (last updated Jan. 28, 2022).

⁷ See *supra* note 2.

⁸ ICE, *ICE Guidance on COVID-19: ICE Detainee Statistics*, *supra* note 6.

⁹ See Office of the Inspector General, *ICE's Management of COVID-19 in Its Detention Facilities Provides Lessons Learned for Future Pandemic Responses*, OIG-21-58 (Sept. 7, 2021), 25-26, <https://www.oig.dhs.gov/sites/default/files/assets/2021-09/OIG-21-58-Sep21.pdf>.

¹⁰ CDC, *CDC Expands Eligibility for COVID-19 Booster Shots* (Oct. 21, 2021), <https://www.cdc.gov/media/releases/2021/p1021-covid-booster.html>.

Moreover, the Johnson & Johnson vaccine has been found to provide insufficient quantities of antibodies against Omicron. *Id.* As a result, it is well established that the primary doses of the COVID-19 vaccines alone, absent an mRNA booster shot, fail to offer adequate protection once the initial protection they provide wanes. *Id.*

21. The mRNA vaccine booster shots are the established medical standard of care. It falls below the professional standard of care for Defendants to offer only the Johnson & Johnson booster shot to a detainee. *Id.* ¶ 24. DHS’s own experts have specifically called for the provision of mRNA booster shots to detainees,¹¹ as have medical faculty nationwide.¹² Several studies have confirmed that the mRNA vaccine booster shots are more effective in preventing serious illness and death from COVID-19 and are less likely to cause side effects such as blood clots in comparison to the viral vector Johnson & Johnson vaccine.¹³ *See* Vijayan Decl. ¶¶ 21, 23. As a result, the CDC has explained that “Pfizer-BioNTech or Moderna (COVID-19 mRNA vaccines) are preferred” for booster shots and the Johnson & Johnson vaccine should only be given as a booster shot in rare circumstances, such as if someone “[h]ad a severe reaction after an mRNA vaccine dose” or “ha[s] a severe allergy to an ingredient of Pfizer-BioNTech or Moderna,” if they “[w]ould otherwise remain unvaccinated for COVID-19 due to limited access to Pfizer-BioNTech or Moderna,” or “[w]ants to get the J&J/Janssen COVID-19 vaccine despite the safety concerns.”¹⁴

¹¹ Letter from Dr. Scott Allen and Dr. Josiah Rich to DHS Sec’y. Alejandro Mayorkas (Jan. 26, 2022), <https://whistleblower.org/wp-content/uploads/2022/01/012622-LETTER-TO-MAYORKAS-FROM-DRS-RE-COVID-IN-IMM-DETENTION.pdf>.

¹² Letter from Concerned Medical Faculty to DHS Sec’y. Alejandro Mayorkas (Jan. 27, 2022), <https://phr.org/our-work/resources/open-letter-on-covid-19-boosters-in-ice-detention/>.

¹³ CDC, *Selected Adverse Events Reported after COVID-19 Vaccination* (Jan. 24, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html>.

¹⁴ CDC, *COVID-19 Vaccine Booster Shots*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html> (last visited Jan. 30, 2022); CDC, *Johnson & Johnson’s Janssen COVID-19 Vaccine Overview and Safety* (Dec. 28, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/janssen.html>.

Moreover, the CDC instructs that prior to vaccination, patients “should be informed that mRNA vaccines are preferred over the Janssen COVID-19 Vaccine” and that “[a]ll people who elect to receive a Janssen COVID-19 Vaccine booster should be informed about the risk and symptoms of TTS [(thrombosis with thrombocytopenia syndrome—a blood clotting disease)] that could occur after vaccination . . . and the availability of mRNA COVID-19 vaccines instead of the Janssen COVID-19 Vaccine.”¹⁵

22. The mRNA vaccine booster shots are widely available. Indeed, the CDC took into consideration the supply of mRNA vaccines when issuing its recommendation for COVID-19 booster shots in December 2021, noting that “the U.S. supply of mRNA vaccines is abundant – with nearly 100 million doses in the field for immediate use.” Vijayan Decl. ¶ 25.

23. The federal government has repeatedly emphasized the importance of the COVID-19 vaccine booster shots. The White House issued a statement on December 2, 2021, that “[a]s we face the Omicron variant, boosters are more important than ever. Boosters increase the strength of your antibody response, so when the virus mutates, a booster makes it more likely that your antibodies can protect you against the new variant.”¹⁶ The federal government has accordingly prioritized access to COVID-19 vaccines and booster shots for people nationwide as a necessary

¹⁵ CDC, *Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Approved or Authorized in the United States* (Jan. 6, 2022), <https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html#considerations-covid19-vax-booster>.

¹⁶ Press Release, The White House, President Biden Announces New Actions to Protect Americans Against the Delta and Omicron Variants as We Battle COVID-19 this Winter (Dec. 2, 2021), <https://bit.ly/32EYm16>; see also Press Release, CDC, *CDC Expands Eligibility for COVID-19 Booster Shots* (Oct. 21, 2021), <https://www.cdc.gov/media/releases/2021/s1129-booster-recommendations.html> (CDC Director Dr. Rochelle Walensky: “The recent emergence of the Omicron variant (B.1.1.529) further emphasizes the importance of vaccination, boosters, and prevention efforts needed to protect against COVID-19.”); CBS News, *Dr. Anthony Fauci on the Threat from Omicron: “If You Want to Be Fully Protected, Get Boosted”* (Dec. 30, 2021), <https://www.cbsnews.com/news/anthony-fauci-covid-vaccine-booster-omicron/> (“Fauci said Thursday in an interview on CBSN. ‘If you are not boosted, get boosted.’”).

measure to protect people's health. Defendants' failure to provide COVID-19 booster shots to Plaintiffs therefore risks Plaintiffs' health and lives in defiance of medical, public health, and government authorities.

B. Without a Booster Shot, Plaintiffs, Who Are Medically Vulnerable, Face an Unreasonable Risk of Serious Illness and Death from COVID-19.

24. Plaintiffs are all medically vulnerable to COVID-19 and face an unreasonable risk of serious illness and death from COVID-19 without the critical protection of a booster shot. They are all otherwise qualified persons with a disability under the Rehabilitation Act.

25. The CDC has identified several medical conditions which place individuals at a high risk for serious illness and death from COVID-19. These conditions include: lung disease, heart disease, heart conditions, hypertension, chronic kidney disease, chronic liver disease, moderate to severe asthma, diabetes, being overweight or obese, blood disorders, compromised immune systems, developmental disabilities, mood disorders including depression and schizophrenia spectrum disorders, and others.¹⁷ According to the CDC, individuals with these medical conditions “are more likely to get severely ill from COVID-19.”¹⁸ “Severe illness means that a person with COVID-19 may: be hospitalized, need intensive care, require a ventilator to help them breathe, [or] die.”¹⁹ Vijayan Decl. ¶¶ 6–7.

26. Plaintiff Aamir Shaikh has been detained by ICE at the Etowah County Detention Center (“Etowah”) in Gadsden, Alabama since approximately April 2021. He first entered ICE custody around October 2019 and was detained by ICE at the Hudson County Detention Center in New Jersey before being transferred to Etowah. Mr. Shaikh has diabetes and high blood pressure.

¹⁷ CDC, *People with Certain Medical Conditions*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last updated Dec. 14, 2021).

¹⁸ *Id.*

¹⁹ *Id.*

He also has a heart condition and has had tuberculosis and problems with kidney stones. He is an otherwise qualified person with a disability under the Rehabilitation Act. ICE is aware of his medical vulnerability to COVID-19 because he filed requests for release on the basis of his medical conditions under *Fraihat v. U.S. Immigration & Customs Enforcement*, which requires ICE to “make timely custody determinations for” medically vulnerable detainees like Plaintiffs. 445 F. Supp. 3d 709, 751 (C.D. Cal. 2020), *overruled by* 16 F. 4th 613 (9th Cir. 2021). He received two doses of the Moderna vaccine around February 2021, meeting the required five-month wait period to be eligible for a booster shot.

27. Mr. Shaikh has made multiple requests for a booster shot to nurses at Etowah’s medical unit, yet has been unable to receive one. The staff at Etowah have either ignored his requests or told him that he would not receive a booster shot until the State of Alabama “approved them” at an unspecified date in the future. Mr. Shaikh also does not know any other detainee at Etowah who has received a booster shot, and Etowah has not provided any educational materials or information about booster shots to detainees. Mr. Shaikh is worried about the spread of COVID-19 at Etowah. He has observed that dozens of new ICE detainees from another state have been transferred to Etowah and placed in his unit without any testing or quarantine. He is housed in a unit with people who have tested positive for COVID-19 and are still sick. The facility has also failed to consistently provide masks and failed to test detainees who have been exposed to others with COVID-19.

28. Plaintiff Marvin Hernandez Villalobo has been detained by ICE at the Stewart Detention Center (“Stewart”) in Lumpkin, Georgia since approximately July or August 2020. Mr. Hernandez Villalobo has several medical conditions that make him vulnerable to serious illness or death from COVID-19, including obesity and schizophrenia. He suffers from auditory

hallucinations, experiences difficulty breathing at night, and has blood circulation issues. He is an otherwise qualified person with a disability under the Rehabilitation Act. ICE is aware of his medical conditions because he filed a request for release on the basis of his medical conditions under *Frailhat*. He received two doses of an mRNA vaccine around March or April 2021.

29. Mr. Hernandez Villalobo has made repeated requests at Stewart for a booster shot but has been unable to receive one. On at least two occasions in January 2022, he requested a booster shot from Stewart officials. The first official, a unit manager, told Mr. Hernandez Villalobo that he did not have time to speak with him; the second official, a person in the medical unit, relayed that booster shots were not available. Mr. Hernandez Villalobo does not know any other detainee at Stewart who has received a booster shot. He has already been infected with COVID-19 once before, and is afraid without a booster shot he will become ill and does not want to go through the “very difficult” experience he had with COVID-19 again. He is concerned about the spread of COVID-19 at Stewart as many people there are infected, and he wants to protect his health for his partner and children who depend on him.

30. Plaintiff Liliana Cardenas Solis has been detained by ICE at the Aurora Contract Detention Facility (“Aurora”) in Aurora, Colorado since June 9, 2021. Ms. Cardenas Solis suffers from anemia and depression. She is an otherwise qualified person with a disability under the Rehabilitation Act. ICE is aware of her medical conditions because she has filed several requests for release based on her underlying medical conditions under *Frailhat*. She was vaccinated for COVID-19 between February and May 2021, when she received two doses of the Moderna vaccine.

31. In December 2021, Ms. Cardenas Solis requested a booster shot at Aurora by submitting a written medical request. She was provided with a written response that she would be

added to a waiting list, but did not receive any information about when or where she would receive a booster shot. She has not received any other information since. She is concerned about the spread of COVID-19 at Aurora because she has frequently observed officers without masks, and is aware of an increasing number of COVID-19 cases at the facility. She wants to receive a booster shot so that she can be better protected from COVID-19.

32. Plaintiff [REDACTED] has been detained by ICE at the Golden State Annex Detention Center (“Golden State Annex”) in McFarland, California since September 16, 2021. Mr. [REDACTED] has asthma for which he uses an inhaler when he experiences shortness of breath and is medically categorized as obese. He is an otherwise qualified person with a disability under the Rehabilitation Act. ICE is aware of his medical conditions because he submitted a letter requesting release to the ICE Field Office in Los Angeles that informed ICE of his medical conditions. He was vaccinated for COVID-19 around December 2020 and received two doses of the Moderna vaccine.

33. Mr. [REDACTED] has made multiple requests for a booster shot at Golden State Annex. He made his first request in mid-December 2021 by submitting a sick call note, to which the medical department staff at the facility responded that he was on a list to receive the booster shot, but did not give him any information about when or where he would receive the booster. He received the same response from the medical department staff when he submitted another request for a booster on January 6, 2022. Finally, on January 12, Mr. [REDACTED] asked a physician at the facility about the booster shot, who—again—told him that he was on the list but did not know when they would be given. On January 19, two detainees from Mr. [REDACTED] housing unit were offered the Johnson & Johnson booster shot. Both of them declined to receive the shot because of the greater risk of side effects with the Johnson & Johnson vaccine. Other than these

two detainees, he does not know any other detainees at the facility who were offered a booster shot. Mr. [REDACTED] wants to receive a booster shot because he is worried for his safety and health without it. He is worried about the spread of COVID-19 at the facility. On January 21, 2022, someone in his housing unit tested positive for COVID-19 and Mr. [REDACTED] has been on quarantine since then. On January 26, he received a positive test result for COVID-19. [REDACTED] still wants to receive a booster shot when he again becomes eligible to protect his health and safety.

34. Plaintiff James Mayen Mayen has been detained by ICE for approximately four years. He is currently detained at the Clinton County Correctional Facility (“Clinton County”) in McElhattan, Pennsylvania, where he has been held since August 2021. Mr. Mayen Mayen has been diagnosed with hepatitis B, and recently tested positive for tuberculosis. He has also been diagnosed with post-traumatic stress disorder. He is an otherwise qualified person with a disability under the Rehabilitation Act. ICE is aware of his medical conditions because his immigration attorney has made requests for his release to ICE that informed the agency of his health issues. On or about May 10, 2021, he received a dose of the Johnson & Johnson COVID-19 vaccine while detained by ICE at the York County Prison in York, Pennsylvania. He suffered an adverse reaction, and lost consciousness for approximately 20 minutes after being vaccinated.

35. In December 2021, Mr. Mayen Mayen requested a COVID-19 booster shot from medical staff at Clinton County. Because of his earlier adverse reaction to the Johnson & Johnson vaccine, he was advised not to take a Johnson & Johnson booster shot. He thus requested a Pfizer or Moderna booster shot, but was informed that they are unavailable. Since that time, he has requested a Moderna or Pfizer booster shot many times, including in writing, but has not yet received a booster shot. Mr. Mayen Mayen desperately wants to receive a COVID-19 booster

shot. Since he has been detained by ICE, he has contracted COVID-19 three times. He first contracted COVID-19 in December 2020, again in September 2021, and most recently tested positive again on January 24, 2022. His most recent infection resulted in postponement of his long-awaited immigration hearing.

36. Plaintiffs all have a serious medical need for a COVID-19 booster shot given their medical vulnerabilities and the heightened risk they will get COVID-19 while they are in detention. Without receiving a booster shot, Plaintiffs have a greater chance of becoming seriously ill or even dying from COVID-19 because of Defendants' failure to promptly provide boosters.

37. Declarant Blanca Rivera Morales, a 48-year-old woman who has been detained by ICE at Stewart since March 2021 and tested positive for COVID-19 in January 2022, felt angry and frustrated that if she had received a booster shot in time, as she had asked, she would have been better protected against COVID-19. She has diabetes, hyperlipidemia, hypertension, PTSD and depression, and experienced serious symptoms as a result of getting COVID-19 without having received a booster shot, including a fever, headache, chills, cough, chest pain, and trouble breathing. Other ICE detainees, like Declarant Ramon Dominguez Gonzalez at the Imperial Regional Adult Detention Center in Calexico, California, have also become infected with COVID-19 without receiving a booster shot, although they made multiple requests, and despite their medical vulnerability to COVID-19.

38. Except for Mr. Mayen Mayen, Plaintiffs did not receive any information or medical consultation regarding booster shots at their facilities. As DHS's own medical experts, Dr. Scott Allen and Dr. Josiah Rich, have emphasized, COVID-19 vaccine provision "must be accompanied by an effective education and counseling effort to allow for informed consent and to overcome

misinformation and confusion regarding the safety and efficacy of vaccinations.”²⁰

39. If Plaintiffs become seriously ill from COVID-19, they will not be able to participate in their removal proceedings as they will not be able to go to court, testify before an immigration judge, and submit applications for relief.

C. Defendants Are Responsible for the Medical Care and Safety of People in Their Custody, Such as Plaintiffs.

40. ICE Enforcement and Removal Operations (“ERO”) is the component of ICE responsible for apprehending and deporting noncitizens. ERO is responsible for overseeing conditions of confinement across all detention facilities where ICE detainees are held.

41. ERO also publishes ICE’s COVID-19 Pandemic Response Requirements (“PRR”), which includes performance standards “defin[ing] the ‘minimum acceptable detention conditions for detainees with [medical] risk factors,’” and “sets forth expectations” for the management of COVID-19 at all detention facilities nationwide.²¹ ERO ensures that detention facilities comply with the requirements set forth in the PRR by conducting monthly in-person visits at each detention facility. The PRR is intended for use across ICE’s “entire detention network, applying to all facilities housing ICE detainees.”²²

42. ERO has also established standards that more broadly govern medical care and other conditions of confinement at detention facilities, including the 2011 Performance Based

²⁰ Letter from Scott A. Allen, MD, and Josiah D. Rich, MD, to Alejandro Mayorkas, Sec’y, DHS, and Tae Johnson, ICE, Acting Dir. (Jan. 26, 2022), <https://whistleblower.org/wp-content/uploads/2022/01/012622-LETTER-TO-MAYORKAS-FROM-DRS-RE-COVID-IN-IMM-DETENTION.pdf>.

²¹ ICE, *ICE ERO Covid-19 Pandemic Response Requirements*, 6, 6 n.1 (Oct. 19, 2021), <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>.

²² *Id.* at 9.

Detention Standards (“PBNDS”).

43. ICE Health Service Corps (“IHSC”) is a component of ICE that is responsible for overseeing health care at all immigration detention facilities in the country, and directly provides medical services at approximately 20 detention facilities.

44. ICE is also responsible for ensuring that detainees receive reasonable disability accommodations and do not suffer discrimination based on disability.

D. Defendants Have No Plan to Provide COVID-19 Vaccine Booster Shots to People in ICE Custody.

45. Defendants have no plan for providing COVID-19 booster shots to people in ICE custody.

46. ICE’s most recent PRR, version 7.0, makes no mention whatsoever about the provision of COVID-19 vaccine booster shots to detainees.²³ ICE issued version 7.0 of the PRR on October 19, 2021.

47. However, as early as September 24, 2021, the CDC recommended that people 65 and older as well as ages 50-64 with underlying medical conditions receive a booster shot six or more months after they received a primary series of the Pfizer-BioNTech vaccine.²⁴ At that time, the CDC also permitted people ages 18-49 with underlying medical conditions and people ages 18-64 who are at increased risk for COVID-19 due to institutional setting to receive a booster shot six or more months after they received a primary series of the Pfizer-BioNTech vaccine.²⁵ On October 21, 2021, the CDC went further and recommended COVID-19 booster shots to all people who received the Johnson & Johnson vaccine two or more months ago, and to all people ages 18

²³ *Id.*

²⁴ CDC, *CDC Statement on ACIP Booster Recommendations* (Sept. 24, 2021), <https://www.cdc.gov/media/releases/2021/p0924-booster-recommendations-.html>.

²⁵ *Id.*

or older who received either the Pfizer-BioNTech or Moderna vaccine six or more months ago and reside in high-risk settings, which include detention centers.²⁶

48. Thus, all qualifying adults in ICE custody have been eligible for a booster for over three months. Yet ICE has not updated the PRR with any information regarding booster shots or issued any plans regarding booster shots.

49. Defendants' failure to adopt a nationwide plan to provide COVID-19 vaccine booster shots to people in its custody is evident from the paltry number of booster shots it has administered to people in ICE detention facilities so far. Of the over 21,000 people detained in ICE detention facilities daily—many of whom are eligible for booster doses—as of January 5, 2022, only 671 immigrants in ICE custody had received a booster shot.²⁷

50. Furthermore, ICE has failed to adopt a plan regarding booster shots even though its own detention standards instruct that “Centers for Disease Control and Prevention (CDC) guidelines for the prevention and control of infectious and communicable diseases *shall be followed*” at the applicable detention facilities.²⁸ Those CDC guidelines clearly recommend in turn that detained persons like Plaintiffs receive COVID-19 booster shots.

51. Defendants should be, and are, aware of the danger posed by COVID-19 to individuals in its care, and of the critical importance of boosters. On December 15, 2021, the American Civil Liberties Union (ACLU) sent a letter to DHS Secretary Alejandro Mayorkas and ICE Acting Director Tae Johnson urging them to “take immediate action to address” the agency’s

²⁶ CDC, *CDC Expands Eligibility for COVID-19 Booster Shots* (Oct. 21, 2021), <https://www.cdc.gov/media/releases/2021/p1021-covid-booster.html>.

²⁷ Camilo Montoya-Galvez, *Coronavirus Infections inside U.S. Immigration Detention Centers Surge by 520% in 2022*, CBS News (Jan. 14, 2022), <https://www.cbsnews.com/news/immigration-detention-covid-cases-surge/>.

²⁸ ICE, Performance-Based National Detention Standards 2011, Standard 4.3.II.10 (rev. Dec. 2016), <https://www.ice.gov/doclib/detention-standards/2011/4-3.pdf> (emphasis added).

failure to adopt and implement a booster shot plan “before further harm is done to the people in ICE custody and the community at large.”²⁹

52. Furthermore, on January 26, 2022, Dr. Scott Allen and Dr. Josiah Rich, who serve as medical experts for DHS, sent a letter to Secretary Mayorkas and Acting Director Johnson, warning of the urgent need for ICE to provide COVID-19 vaccination and boosters to detainees.³⁰

53. Defendants’ failure to implement a plan to provide COVID-19 vaccine booster shots to people in its custody carries particularly severe consequences for the significant number of persons in ICE custody who, like Plaintiffs, are medically vulnerable to COVID-19. According to a recent news report, there were 5,200 immigrants in ICE detention as of late December 2021 whose health issues or age placed them at higher risk of getting severely ill or dying if they contracted COVID-19.³¹ Under the terms of a preliminary injunction that remains in effect, ICE is required to consider releasing these individuals from detention.³² Nevertheless, these and other individuals continue to languish in ICE custody without receiving the basic and necessary protection of a COVID-19 booster shot.

54. Compounding the danger of Defendants’ failure to adopt a booster shot plan is

²⁹ Letter from Eunice Cho and Michael Tan, ACLU, to Alejandro Mayorkas, Sec’y, DHS, and Tae Johnson, Acting Dir., ICE (Dec. 15, 2021), <https://www.aclu.org/letter/letter-demanding-dhs-provide-covid-19-vaccine-boosters-people-ice-detention>.

³⁰ See *supra* note 11.

³¹ Montoya-Galvez, *supra* note 27.

³² See *Frailhat v. ICE*, 445 F. Supp. 3d 709 (C.D. Cal. 2020), *overruled by Frailhat v. ICE*, 16 F.4th 613 (9th Cir. 2021); see also 9th Cir. R. 41-2 (providing that a mandate will issue seven days after the time to file a motion for reconsideration expires); Order Granting Appellees’ Second Unopposed Motion for Extension of Time to File Petition for Rehearing, *Frailhat v. ICE*, No. 20-55634 (9th Cir. Jan. 4, 2022), ECF No. 88 (requiring petition for rehearing to be filed on or before Apr. 5, 2022).

ICE's heavy reliance for people in its custody on the Johnson & Johnson vaccine,³³ which as discussed above has proven far less effective against COVID-19 variants. Vijayan Decl. ¶¶ 21–23. The CDC's formal recommendation of mRNA COVID-19 vaccines over Johnson & Johnson's COVID-19 vaccine followed a “robust discussion of the latest evidence on vaccine effectiveness, vaccine safety and rare adverse events, and consideration of the . . . abundant” supply of mRNA vaccine consisting of “nearly 100 million doses in the field for immediate use.”³⁴

55. Defendants' sluggish roll-out of COVID-19 primary vaccines in 2021 does not bode well for people like Plaintiffs who are relying on Defendants to promptly provide them booster shots. Internal agency emails illustrate Defendants' failure to quickly formulate, communicate, and implement a clear plan for detention facilities after COVID-19 vaccines became available. Shortly after the Food and Drug Administration (FDA) issued emergency use authorization for COVID-19 vaccines, and as early as January 25, 2021, ICE ERO staff suggested that the agency add COVID-19 vaccine guidelines and protocols to the next version of the PRR to ensure “across the board implementation.”³⁵ As one official stated in an email, “[u]ltimately we should have a consistent, comprehensive rollout for all 200+ facilities within our detention network [as] opposed to only IHSC staffed facilities.”³⁶ This email concerned ICE PRR version 6.0, but that document was not released until nearly *two months later*, on March 16, 2021.³⁷

56. The ICE PRR 6.0 did not, however, establish any “consistent” or “comprehensive”

³³ Priscilla Alvarez, *DHS Begins Administering J&J vaccine to Immigrant Detainees*, CNN Politics (July 13, 2021), <https://www.cnn.com/2021/07/13/politics/immigrant-detainees-vaccine-dhs/index.html>.

³⁴ Press Release, CDC, CDC Endorses ACIP's Updated COVID-19 Vaccine Recommendations (Dec. 16, 2021), <https://www.cdc.gov/media/releases/2021/s1216-covid-19-vaccines.html>.

³⁵ E-mail from Ricardo Wong, Dep. Asst. Dir., Detention Management Division, to Ada Rivera, Dep. Asst. Dir. Clinical Services, ICE Health Services Corps (Jan. 25, 2021, 2:47 PM).

³⁶ *Id.*

³⁷ See ICE, *ICE ERO Covid-19 Pandemic Response Requirements* (Mar. 16, 2021).

rollout of vaccines, and failed to provide any support at all to detention facilities with respect to the procurement or administration of vaccine.³⁸ Instead, it left vaccine rollout up to each facility, stating, “[d]etention facility staff should contact their state’s COVID-19 vaccine resource (i.e., state or county department of health) to obtain vaccine.”³⁹ Defendants’ failure to procure and supply vaccine doses to detention facilities and the lack of more detailed guidance spurred widespread confusion, and many detention facilities nationwide did not provide COVID-19 vaccines to detainees for several more months, requiring a district court to order vaccines for high-risk individuals.⁴⁰ It was not until October 19, 2021, in ICE PRR version 7.0, that ICE finally offered vaccine procurement assistance to detention facilities—roughly ten months after the first vaccine became available,⁴¹ and five months after half of all adults in the United States had already received at least one shot.⁴²

57. Between December 11, 2020, the date the first Emergency Use Authorization was

³⁸ *Id.* at 24.

³⁹ *Id.*

⁴⁰ *Fraihat v. U.S. Immigr. & Customs*, No. EDCV191546JGBSHKX, 2021 WL 2580512 (C.D. Cal. June 23, 2021); *see, e.g.*, Caroline Simon, *National Vaccination Effort Leaves ICE Detainees Behind*, Roll Call (May 14, 2021), <https://www.rollcall.com/2021/05/14/national-vaccination-effort-leaves-ice-detainees-behind/>; Maria Sacchetti, *ICE Has No Clear Plan for Vaccinating Thousands of Detained Immigrants Fighting Deportation*, Wash. Post (Mar. 12, 2021), https://www.washingtonpost.com/immigration/ice-detainees-covid-vaccine/2021/03/12/0936ee18-81f5-11eb-81db-b02f0398f49a_story.html; Noah Lanard, “*You’re Doing Nothing*”: Judge Slams ICE for Failing to Vaccinate Detainees, Mother Jones (Mar. 4, 2021), <https://www.motherjones.com/politics/2021/03/youre-doing-nothing-judge-slams-ice-for-failing-to-vaccinate-detainees/>.

⁴¹ ICE, *ICE ERO Covid-19 Pandemic Response Requirements* at 25, *supra* note 21 (“sites may request that ICE ship a COVID-19 vaccine directly to the facility by sending an email request to vaccinerequest@ice.dhs.gov.”); Press Release, FDA, *FDA Takes Key Action in Fight Against COVID-19 By Issuing Emergency Use Authorization for First COVID-19 Vaccine* (Dec. 11, 2020), <https://www.fda.gov/news-events/press-announcements/fda-takes-key-action-fight-against-covid-19-issuing-emergency-use-authorization-first-covid-19>.

⁴² Emily Anthes, Madeleine Ngo & Eileen Sullivan, *Adults in All U.S. States Are Now Eligible for Vaccination, Hitting Biden’s Target. Half Have Had at Least One Dose.*, N.Y. Times (Apr. 19, 2021), <https://www.nytimes.com/2021/04/19/world/adults-eligible-covid-vaccine.html>.

issued by the FDA to a COVID-19 vaccine, and October 19, 2021, the date ICE finally offered to supply detention facilities with vaccine doses, at least two noncitizens died in ICE custody from complications due to COVID-19.⁴³ This figure does not include hospitalization numbers (which are not publicly reported by ICE) or hospitalized individuals released by ICE immediately prior to dying from COVID-19.⁴⁴

58. ICE's delay in developing and implementing a booster shot plan stands in contrast to other custodial entities, including the Federal Bureau of Prisons (BOP) and state departments of correction. The BOP COVID-19 Vaccine Guidance, Version 14.1, issued on October 13, 2021 provides that the BOP should offer the Pfizer-BioNTech COVID-19 booster shot to individuals who were then eligible for it under CDC guidance.⁴⁵ The District of Columbia's Department of Corrections announced on December 22, 2021 that it "continues to offer a COVID-19 vaccine to all residents and is offering the booster to all residents who are eligible."⁴⁶ Multiple states have administered many thousands of booster shots to individuals incarcerated pursuant to criminal

⁴³ ICE, *Detainee Death Report – Montes, Felipe*, 2 <https://www.ice.gov/doclib/foia/reports/ddrMontesFelipe.pdf> (last visited Jan. 28, 2022); ICE, Press Release, *Venezuelan Man in ICE Custody Passes away in Mississippi Hospital* (Oct. 4, 2021); <https://www.ice.gov/news/releases/venezuelan-man-ice-custody-passes-away-mississippi-hospital>.

⁴⁴ See Grace Vitaglione & Sammy Sussman, *Dying in Silence: Families, Advocates, ACLU Question ICE's Accounting of Deaths in Detention*, Investigative Reporting Workshop (Nov. 15, 2021), <https://investigativereportingworkshop.org/investigation/dying-in-silence/>; see also U.S. Gov't Accountability Off., *Immigration Detention: ICE Efforts to Address Covid-19 in Detention Facilities*, 22 (June 2021), <https://www.gao.gov/assets/gao-21-414.pdf> (noting that 209 ICE detainees required hospitalization as a result of COVID-19 in 2020).

⁴⁵ Fed. Bureau of Prisons, Clinical Guidance, *COVID-19 Vaccine Guidance*, Version 14.1, 5–6 (Oct. 13, 2021), https://www.bop.gov/resources/pdfs/covid_19_vaccine_guidance_v14_0_2021.pdf.

⁴⁶ Gov't of the Dist. of Columbia, Dep't of Corr., *Coronavirus Prevention*, <https://doc.dc.gov/page/coronavirus-prevention> (updated Dec. 22, 2021).

process.⁴⁷ For example, as of January 28, 2022, the Michigan Department of Corrections has administered 10,988 booster shots to individuals in its custody.⁴⁸

CLAIMS FOR RELIEF

CLAIM I (All Plaintiffs)

Violation of Plaintiffs' Fifth Amendment Right to Substantive Due Process

59. Defendants have an affirmative obligation to provide conditions of reasonable health and safety to individuals in their custody, including reasonably adequate medical care.

60. The Fifth Amendment to the United States Constitution guarantees that civil detainees, including people in immigration detention, may not be subjected to conditions that create an objectively unreasonable risk of serious harm.

61. Defendants are violating Plaintiffs' substantive due process rights under the Fifth Amendment because they knew or should have known that Plaintiffs, medically vulnerable people in ICE detention facilities who have not received a COVID-19 vaccine booster shot, face an unreasonable risk to their health and have recklessly disregarded their serious medical need for a COVID-19 vaccine booster shot.

62. Defendants have also acted with deliberate indifference towards Plaintiffs. Defendants have actual knowledge that COVID-19 vaccine booster shots are integral to protecting Plaintiffs' health and safety, yet have failed to provide COVID-19 vaccine booster shots to

⁴⁷ See, e.g., Delaware Dep't of Corr., *Active COVID-19 Cases (Offenders)*, https://doc.delaware.gov/assets/documents/Confirmed_COVID_Cases.pdf (updated Jan. 20, 2022) (noting that "1,448 vaccinated inmates have received COVID-19 booster shots."); Missouri Dep't of Corr., *COVID-19 Data*, <https://doc.mo.gov/media-center/newsroom/covid-19/data> (last visited Jan. 30, 2022) (boosters administered to 4,151 inmates); Minnesota Dep't of Corr., *MN DOC COVID-19 Data Dashboard*, <https://mn.gov/doc/about/covid-19-updates/> (last updated Jan. 27, 2022) (33 percent of incarcerated population fully vaccinated and boosted).

⁴⁸ Michigan.gov, *COVID-19 Dashboard*, https://www.michigan.gov/coronavirus/0,9753,7-406-98178_103214-547150--,00.html (last updated Jan. 28, 2022).

Plaintiffs.

63. Defendants also violate the Fifth Amendment when they subject civil immigrant detainees to conditions of confinement that amount to punishment.

64. Defendants' failure to provide COVID-19 booster shots to Plaintiffs is not rationally related to its interest in the enforcement of immigration laws. ICE's failure to provide booster shots therefore amounts to unconstitutional punishment.

65. Plaintiffs have suffered and will suffer injury as a proximate result of Defendants' violation of their right to be free from unreasonable risk of serious harm and from punitive conditions of confinement under the Due Process Clause of the Fifth Amendment.

CLAIM II (Only as to Plaintiffs Hernandez Villalobo, Cardenas Solis, and [REDACTED])
Violation of Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and *Accardi* Doctrine:
Unlawful Agency Action

66. The *Accardi* doctrine requires that agencies follow their own regulations, policies, and procedures. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

67. ICE's 2011 Performance Based Detention Standards provide that "Centers for Disease Control and Prevention (CDC) guidelines for the prevention and control of infectious and communicable diseases *shall be followed*" at ICE detention facilities.⁴⁹ Those CDC guidelines recommend in turn that all detained persons receive COVID-19 vaccine booster shots.

68. Plaintiffs Hernandez Villalobo, Cardenas Solis, and Rojo Rocha are detained at facilities governed by ICE's 2011 detention standards, which incorporate CDC guidelines on infectious and communicable diseases.

69. Defendants have nonetheless failed to provide Plaintiffs Hernandez Villalobo,

⁴⁹ ICE, 2011 Performance-Based National Detention Standards, Standard 4.3.II.10 (emphasis added).

Cardenas Solis, and [REDACTED] COVID-19 booster shots, in violation of binding CDC guidelines.

70. Defendants' actions are arbitrary, capricious, and contrary to law in violation of the APA. 5 U.S.C. § 706(2)(A).

CLAIM III (All Plaintiffs)

Violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794: Failure to Provide Reasonable Accommodation to Persons with Disabilities

71. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the regulations promulgated thereunder, prohibit discrimination against persons with disabilities by federal agencies, including DHS and ICE, and entities receiving federal financial assistance.

72. Defendants are federal agencies within the meaning of 28 U.S.C. § 794(a), and the contract facilities at which some Plaintiffs are detained are entities receiving federal financial assistance within the meaning of 28 U.S.C. § 794(a).

73. Plaintiffs are individuals with disabilities as defined under Section 504 who are otherwise qualified to participate in programs and activities such as their immigration proceedings. *See* 29 U.S.C. § 705(9); 42 U.S.C. § 12102(1).

74. Plaintiffs have medical and psychological conditions, including diabetes, asthma, schizoaffective disorder, and post-traumatic stress disorder, that substantially impair major life activities including breathing, thinking, concentrating, functional immune systems, and normal bodily functions. 42 U.S.C. §§ 12102(2)(A)–(B).

75. Plaintiffs also have existing conditions that are by regulation presumptive disabilities. *See* 28 C.F.R. § 35.108(d)(2)(iii).

76. Because of these conditions, Plaintiffs are more likely than others to suffer serious illness or death from COVID-19. The CDC has emphasized the importance of COVID-19 vaccines

(initial doses and boosters) to individuals in this category of medically vulnerable individuals.

77. Defendants have engaged in and continue to engage in unlawful discrimination against Plaintiffs in violation of the Rehabilitation Act by failing to make reasonable accommodations for Plaintiffs necessary to ensure equal access to their immigration proceedings.

78. Defendants have also failed to meet their affirmative obligations to screen and provide accommodations for Plaintiffs, who are in the custody of Defendants and therefore rely on Defendants to receive any programs or services.

79. ICE's failure to identify and provide COVID-19 boosters to Plaintiffs constitutes discrimination solely by reason of Plaintiffs' disability, in violation of Section 504 of the Rehabilitation Act and its implementing regulations.

80. Section 504 of the Rehabilitation Act is the source of an implied private right of action against federal Executive agencies.

81. Absent injunctive relief, Plaintiffs will continue to experience discrimination by Defendants in their removal proceedings and immigration detention.

CLAIM IV (All Plaintiffs)

Violation of Administrative Procedure Act, 5 U.S.C. § 706: Failure to Provide Reasonable Accommodation to Persons with Disabilities as Required under the Rehabilitation Act

82. Defendant ICE is a constituent agency within Defendant DHS, an agency whose final actions are subject to judicial review under the APA, 5 U.S.C. §§ 701, 704.

83. The APA requires courts to “(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency actions, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short

of statutory right.” 5 U.S.C. § 706.

84. Defendants’ actions violate these provisions because they violate the substantive requirements of the Rehabilitation Act for the reasons described in Count III.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

- a. Declare Defendants’ failure to provide Plaintiffs COVID-19 vaccine booster shots unconstitutional under the Due Process Clause of the Fifth Amendment;
- b. Declare Defendants’ failure to provide Plaintiffs Marvin Hernandez Villalobo, Liliana Cardenas Solis, and [REDACTED] COVID-19 vaccine booster shots unlawful under the APA;
- c. Declare Defendants’ failure to provide Plaintiffs COVID-19 vaccine booster shots to violate Section 504 of the Rehabilitation Act, 28 U.S.C. § 794;
- d. Issue injunctive relief ordering Defendants to immediately make available and provide each Plaintiff an mRNA COVID-19 vaccine booster shot and medical consultation in accordance with the CDC’s guidance on COVID-19 vaccine booster shots.
- e. Award Plaintiffs their costs and reasonable attorneys’ fees in this action under the Equal Access to Justice Act (“EAJA”), as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and on any other basis justified under law; and
- f. Grant any other and further relief that this Court may deem fit and proper.

Dated: January 31, 2022

Respectfully submitted,

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