

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

Aamir SHAIKH, *et al.*,

Plaintiffs,

v.

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

Defendants.

No. 1:21-cv_____

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR APPLICATION FOR A
TEMPORARY RESTRAINING ORDER AND MOTION FOR A PRELIMINARY
INJUNCTION**

INTRODUCTION

Plaintiffs Aamir Shaikh, Marvin Hernandez Villalobo, Liliana Cardenas Solis, [REDACTED], and James Mayen Mayen (collectively, “Plaintiffs”) are medically vulnerable people held by U.S. Immigration and Customs Enforcement (ICE) and the U.S. Department of Homeland Security (DHS) (collectively, “Defendants”) at detention facilities while they await adjudication of their civil immigration cases. As COVID-19 continues to spread rapidly in ICE detention facilities, Plaintiffs fear for their health and their lives. Since the emergence of the Omicron variant, COVID-19 has surged in ICE detention centers. Since January 3, 2022, the number of COVID-19 cases among people held in ICE detention has grown astronomically, and it continues to increase.¹

Plaintiffs, who are eligible for COVID-19 vaccine booster doses, have not been able to receive COVID-19 booster shots in detention. COVID-19 vaccine booster shots provide critical protection against serious illness and death from the virus: messenger RNA (“mRNA”) booster shots are 90 percent effective against hospitalization due to the Omicron variant, in comparison to 57 percent for vaccinated people without boosters. Declaration of Dr. Tara Vijayan (“Vijayan Decl.”) ¶ 21. A vaccinated person without an mRNA vaccine booster shot is approximately three and a half times more likely to be hospitalized and four times more likely to die from COVID-19 than a vaccinated person with an mRNA vaccine booster shot. *Id.* at ¶ 20.² For this reason, the

¹ Declaration of Nathalie Amazan (“Amazan Decl.”), Ex. A, Camilo Montoya-Galvez, *Government Medical Advisors Urge ICE to Expand COVID-19 Vaccinations for Immigrant Detainees*, CBS NEWS (Jan. 26, 2022), <https://www.cbsnews.com/news/immigration-ice-detainees-covid-19-vaccines/> (noting increase by 848 percent between January 3 and 26, 2022).

² Dr. Vijayan’s declaration explains that “[t]he risk of hospitalization for unvaccinated people due to COVID-19 is 4 times higher than vaccinated people without a booster dose (who would be otherwise eligible for a booster), and 14 times higher than fully vaccinated people with booster shots. The death rate among unvaccinated persons is 12.7 times greater than that of persons who are vaccinated without a booster and 53.2 times greater than persons who have been

federal government has repeatedly emphasized the importance of COVID-19 vaccine booster shots, encouraging the public to receive boosters as soon as they are eligible.³

Plaintiffs, however, cannot do so. They have requested booster shots at their detention facilities, but they have been told that none are available, or that they should wait an indeterminate period of time, or their requests have simply been ignored. One Plaintiff, who was advised not to take the Johnson & Johnson vaccine as a booster dose due to adverse reactions, was nevertheless informed that mRNA booster shots were unavailable. The Johnson & Johnson booster shot provides limited protection against the Omicron variant, has a greater risk of serious side effects in comparison to the mRNA vaccines,⁴ and falls below the established professional standard of medical care, unless there is a contraindication to the mRNA vaccine. Vijayan Decl. ¶¶ 23–24.⁵

Despite knowledge that ICE detains approximately 5,200 people who are medically vulnerable to serious illness and death from COVID-19,⁶ and ample knowledge that vaccine booster shots provide critically important protection against the virus, Defendants have done

vaccinated with a booster.” Vijayan Decl. ¶ 20. Accordingly, the hospitalization risk calculation is $14/4 = 3.5$, and the death rate calculation is $53.2/12.7 = 4.1889$.

³ See, e.g., Amazan Decl. Ex. B, Press Release, The White House, Statement by President Joe Biden on the Omicron COVID-19 Variant (Nov. 26, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/26/statement-by-president-joe-biden-on-the-omicron-covid-19-variant/> (“Get your booster shot now . . .”).

⁴ Amazan Decl. Ex. C, Centers for Disease Control and Prevention (CDC), *Johnson & Johnson’s Janssen COVID-19 Vaccine Overview and Safety*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/janssen.html> (updated Dec. 28, 2021) (“In most situations, Pfizer-BioNTech or Moderna COVID-19 vaccines are preferred over the J&J/Janssen COVID-19 vaccine for primary and booster vaccination due to the risk of serious adverse events.”).

⁵ Amazan Decl. Ex. D, CDC, *COVID-19 Vaccine Booster Shots*, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/booster-shot.html> (updated Jan. 21, 2022).

⁶ Amazan Decl. Ex. E, Camilo Montoya Galvez, *Coronavirus Infections inside U.S. Detention Surge by 520 Percent in 2022*, CBS NEWS (Jan. 14, 2022), <https://www.cbsnews.com/news/immigration-detention-covid-cases-surge/>.

little to ensure that detained people can receive booster shots. As of this date, ICE has failed to establish any plan to provide COVID-19 booster shots to people in its custody nationwide. ICE has not given any instruction requiring that its approximately 200 detention facilities provide COVID-19 booster shots to detained people. ICE also has no plan in place to identify or notify detained people who are eligible for booster shots, nor does it have any plan to educate detained people about the importance of booster doses. As a result, medically vulnerable people in immigration detention lack this basic, widely available, and critical protection against a lethal virus.

Plaintiffs bring this emergency request for a Temporary Restraining Order and a Preliminary Injunction requiring Defendants to make available and provide them with an mRNA COVID-19 vaccine booster shot in accordance with Centers for Disease Control and Prevention (CDC) guidance. Plaintiffs are likely to succeed on their claims that Defendants' failure to provide booster shots violates their Fifth Amendment due process rights (Claim I) by imposing an unreasonable risk to their health and safety, and constitutes unlawful punishment. Plaintiffs Hernandez Villalobo, Rojo Rocha, and Cardenas Solis are also likely to succeed on their claim that ICE is violating its own policy (Claim II), which requires adherence to CDC infectious disease guidance at the facilities where they are detained. Without prompt provision of COVID-19 vaccine booster shots, Plaintiffs in this case lack adequate protection against serious illness and death from COVID-19. The Temporary Restraining Order and Preliminary Injunction should be granted.

I. FACTUAL BACKGROUND

A. COVID-19 Vaccine Booster Shots Are Necessary to Protect Plaintiffs from Serious Illness and Death from COVID-19, Especially in Light of the Omicron Variant.

COVID-19 continues to pose a significant risk of serious illness and death, with more

than 19.2 million new cases and over 55,900 new deaths in the past four weeks.⁷ Due to the highly infectious Omicron variant, which is five times as contagious as the original form of the COVID-19 virus, daily COVID-19 case counts and hospitalization rates have increased dramatically, with hospitalizations consisting primarily of the medically vulnerable and the unvaccinated. Vijayan Decl. ¶¶ 9–10. As of January 15, 2022, over 99 percent of COVID-19 cases in the United States are estimated to have been caused by the Omicron variant. *Id.* at ¶ 9. 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. *Id.* at ¶ 10.

The risk of spread of COVID-19 is heightened in long-term, high-risk settings such as ICE detention facilities, where detainees can be held for a significant period of time, often months or even years. *Id.* at ¶¶ 8, 15–18. 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.”⁸ Since December 28, 2021, the number of COVID-19 cases in ICE detention facilities has grown by more than 940 percent.⁹ According to ICE’s own data, 3,110 people in ICE detention facilities as of January 27, 2022 are currently positive for

⁷ Amazan Decl. Ex. F, Johns Hopkins University Coronavirus Resource Center, *COVID-19 Dashboard*, <https://coronavirus.jhu.edu/map.html> (last visited Jan. 30, 2022).

⁸ Amazan Decl. Ex. G, CDC, *FAQs for Correctional and Detention Facilities*, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/faq.html> (updated Jan. 26, 2021).

⁹ Amazan Decl. Ex. H, U.S. Immigration & Customs Enforcement (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); Amazan Decl. Ex. I, ICE, *ICE Guidance on COVID-19: ICE Detainee Statistics*, <https://www.ice.gov/coronavirus#detStat> (last updated January 28, 2022) (showing that as of Jan. 27, 2022, there were 3,110 people with COVID-19 in ICE custody, over a 940 percent increase in cases).

COVID-19, compromising over 14 percent of all detainees in custody.¹⁰

The risk of serious illness and death due to COVID-19 is greatest among those who are unvaccinated and those who are vaccinated and eligible for a booster shot but have not received one. Booster doses are critical to preventing hospitalization and death caused by COVID-19. Vijayan Decl. ¶ 20. Recent data published by the CDC confirms that with the rise of the Omicron variant, mRNA vaccine booster shots (Pfizer-BioNTech and Moderna) are 90 percent effective against hospitalization, whereas two doses of the vaccine without the booster are only 57 percent effective against hospitalization. *Id.* at ¶ 21.

The federal government has repeatedly emphasized the importance of the COVID-19 vaccine booster shots. Since October 21, 2021, the CDC has encouraged all individuals 18 and older who are eligible and live in high-risk settings, which include ICE detention facilities, to receive a booster shot for protection against serious illness and death from COVID-19.¹¹ 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.”¹²

¹⁰ ICE, *ICE Guidance on COVID-19: Detainee Statistics* (updated Jan. 28, 2022), *supra* note 9.

¹¹ Amazan Decl. Ex. J, Press Release, CDC, *CDC Expands Eligibility for COVID-19 Booster Shots* (Oct. 21, 2021), <https://www.cdc.gov/media/releases/2021/p1021-covid-booster.html>.

¹² Amazan Decl. Ex. K, 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://www.whitehouse.gov/briefing-room/statements-releases/2021/12/02/fact-sheet-president-biden-announces-new-actions-to-protect-americans-against-the-delta-and-omicron-variants-as-we-battle-covid-19-this-winter/>; *see also* Amazan Decl. Ex. L, The White House, *President Biden on the Omicron Variant: Vaccination and Boosters Offer High Level of Protection*, YOUTUBE (Dec. 28, 2021), <https://www.youtube.com/watch?app=desktop&v=aQj4ecpAMUQ>; Press Release, CDC, *CDC Expands COVID-19 Booster Recommendations* (Nov. 29, 2021), *supra* note 11.

Under current CDC guidance, all individuals who initially received a Pfizer-BioNTech or Moderna vaccine are eligible for a COVID-19 booster shot once five months have elapsed after completion of their primary vaccination series. Individuals who received a Johnson & Johnson vaccine are eligible for a COVID-19 booster two months after completion of their primary vaccination dose. The CDC recommends that everyone 18 and older—and, in the case of individuals who initially received a Pfizer-BioNTech vaccine, 12 and older—receive a booster shot.¹³

A booster shot of an mRNA vaccine such as Moderna or Pfizer-BioNTech is necessary to provide effective immunity against the Omicron variant. It is now clear that mRNA vaccines produce immunologically superior responses when used as a booster dose and are highly preferable to the viral vector Johnson & Johnson vaccine. Vijayan Decl. ¶ 23. The CDC has also clarified that “Pfizer-BioNTech or Moderna COVID-19 vaccines are preferred over the J&J/Janssen COVID-19 vaccine for primary and booster vaccination due to the risk of serious adverse events.”¹⁴ Indeed, the CDC instructs that, prior to vaccination, patients “should be informed that mRNA vaccines are preferred over the [Johnson & Johnson] 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 As a result, the established

¹³ CDC, *COVID-19 Vaccine Booster Shots*, *supra* note 5.

¹⁴ CDC, *Johnson & Johnson’s Janssen COVID-19 Vaccine Overview and Safety*, *supra* note 4.

¹⁵ Amazan Decl. Ex. O, 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>.

standard of medical care is to provide mRNA booster shots to eligible patients; offering only a Johnson & Johnson vaccine booster, absent a medical contraindication, would fall below the established standard of care. Vijayan Decl. ¶ 24; *see also* Amazan Decl. Ex. M (Letter from Concerned Medical Faculty to DHS Secretary Alejandro Mayorkas and ICE Acting Director Tae D. Johnson, Jan. 27, 2022); Amazan Decl. Ex. N (Letter from DHS Medical Experts Dr. Scott Allen and Dr. Josiah Rich to DHS Secretary Mayorkas and ICE Acting Director Johnson, Jan. 26, 2022).

In light of this evidence, the CDC has formally recommended in its guidance that 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.”¹⁶

Moreover, mRNA vaccines continue to be widely available in the United States. Indeed, the CDC issued its guidance in support of the use of mRNA boosters 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.

B. Without mRNA Vaccine Booster Shots, Medically Vulnerable Plaintiffs Face a Heightened and Unreasonable Risk of Serious Illness and Death from COVID-19.

Plaintiffs in this case are all medically vulnerable to COVID-19. They have been diagnosed with medical conditions such as diabetes, hypertension, and tuberculosis. Declaration of Aamir Shaikh (“Shaikh Decl.”) ¶ 2; Declaration of Marvin Hernandez Villalobo (“Hernandez

¹⁶ CDC, *Johnson & Johnson’s Janssen COVID-19 Vaccine Overview and Safety*, *supra* note 4.

Villalobo Decl.”) ¶ 2; Declaration of Liliana Cardenas Solis (“Cardenas Solis Decl.”) ¶ 2; Declaration of [REDACTED] (“[REDACTED] Decl.”) ¶ 2; Declaration of James Mayen Mayen (“Mayen Mayen Decl.”) ¶ 2. According to the CDC, individuals with these and certain other medical conditions “are more likely to get severely ill from COVID-19.”¹⁷ Severe illness means that a person with COVID-19 may be hospitalized, need intensive care, require a ventilator to help them breathe, or die.¹⁸ Without booster shots, specifically mRNA booster shots, Plaintiffs are particularly vulnerable to COVID-19 infection and severe illness, including death. Vijayan Decl. ¶¶ 6–7.

1. Plaintiffs Suffer from Medical Conditions that Place Them at Risk of Serious Illness or Death from COVID-19.

Plaintiff Aamir Shaikh is a 49-year-old man who is presently detained at the Etowah County Detention Center (“Etowah”) in Gadsden, Alabama. Shaikh Decl. ¶ 1. He has been detained by Defendants since October 2019, for over two years. *Id.* Mr. Shaikh has diabetes, high blood pressure, heart conditions, and was diagnosed with tuberculosis, all of which put him at high risk of serious illness or death from COVID-19. *Id.* at ¶ 2. He is vaccinated but has been unable to obtain a booster. *Id.* at ¶¶ 4, 6. A nurse at Etowah told him that the facility does not provide boosters and that he would be unable to get one until the State of Alabama approves them. *Id.* at ¶ 6. Mr. Shaikh’s housing unit contains COVID-positive individuals. *Id.* at ¶ 8. Without a booster shot, he feels “hopeless and unprotected.” *Id.* at ¶ 5.

Plaintiff Marvin Hernandez Villalobo is a 29-year-old man who is presently detained at

¹⁷ Amazan Decl. Ex. P, CDC, *People with Certain Medical Conditions*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#:~:text=Having%20heart%20conditions%20such%20as,severely%20ill%20from%20COVID%2D19> (updated Dec. 14, 2021).

¹⁸ *Id.*

the Stewart Detention Center (“Stewart”) in Lumpkin, Georgia. Hernandez Villalobo Decl. ¶ 1. He has been in Defendants’ custody for over a year and half, since July or August 2020. *Id.* He has several medical conditions that make him vulnerable to serious illness or death from COVID-19, including obesity and schizophrenia. *Id.* at ¶ 2. He experiences difficulty breathing at night and has blood circulation issues. *Id.* He received two doses of an mRNA vaccine in the spring of 2021. *Id.* at ¶ 4. He has asked Stewart officials for a COVID-19 booster shot at least twice but he has been unable to receive one, nor is he slated to receive one. *Id.* at ¶ 6. He previously had what he characterizes as a “very difficult” bout with COVID-19. *Id.* at ¶ 8. He fears being infected again. *Id.* Since the start of the pandemic, at least 1,301 individuals detained at Stewart have tested positive for COVID-19.¹⁹

Plaintiff Liliana Cardenas Solis is a 34-year-old woman who is presently detained at the Aurora Contract Facility (“Aurora”) in Aurora, Colorado. Cardenas Solis Decl. ¶ 1. She has several medical conditions that make her vulnerable to serious illness or death from COVID-19, including anemia and depression. *Id.* at ¶ 2. She received two doses of the Moderna vaccine between February and May 2021. *Id.* at ¶ 4. In December 2021, she requested a booster by submitting a written request. *Id.* at ¶ 6. 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. *Id.* She has not received any other information since. *Id.* 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. *Id.* at ¶ 8. Since the start of the pandemic, at least 561 individuals detained at Aurora have tested positive for

¹⁹ ICE, *ICE Guidance on COVID-19, Detainee Statistics* (last updated Jan. 28, 2022), *supra* note 9.

COVID-19.²⁰

Plaintiff [REDACTED] is a 24-year-old man who is presently detained at Golden State Annex Detention Center (“Golden State Annex”) in McFarland, California. [REDACTED] Decl. ¶ 1. He has several medical conditions that make him vulnerable to serious illness or death from COVID-19, including asthma and obesity. *Id.* at ¶ 2. He received two doses of the Moderna vaccine around December 2020. *Id.* at ¶ 4. Mr. [REDACTED] has made multiple requests for a booster shot at Golden State Annex, including by submitting a sick call note in mid-December 2021 and another on January 6, 2022, and by speaking with a physician on January 12, 2022. *Id.* at ¶¶ 7–9. Mr. [REDACTED] was repeatedly told that he was on a list, but was not given an estimate on when he would get a booster shot. *Id.* On January 19, 2022, two detainees from Mr. Rojo Rocha’s housing unit were offered the Johnson & Johnson booster shot, but they both declined given the greater risk of side effects. *Id.* at ¶ 10. Other than these two detainees, he does not know any other detainee at the facility who was offered a booster shot. *Id.* He has still never been offered one and tested positive for COVID-19 on January 26, 2022. *Id.* at ¶ 12.

Plaintiff James Mayen Mayen is a 41-year-old man who is presently detained at Clinton County Correctional Facility (“Clinton County”) in McElhattan, Pennsylvania. Mayen Mayen Decl. ¶ 1. He has several medical conditions that make him vulnerable to serious illness or death from COVID-19, including hepatitis B, a recent tuberculosis diagnosis, and post-traumatic stress disorder. *Id.* at ¶ 2. He received a dose of the Johnson & Johnson COVID-19 vaccine around May 10, 2021. *Id.* at ¶ 4. Because of his earlier adverse action to the Johnson & Johnson vaccine, he was advised not to take a Johnson & Johnson booster shot. *Id.* at ¶ 6. He thus requested a Pfizer or Moderna booster shot, but was informed that they were unavailable. *Id.* Since that time,

²⁰ *Id.*

Mr. Mayen Mayen has requested a Moderna or Pfizer booster shot many times, including in writing, but has not yet received a booster shot. *Id.* at ¶¶ 6–7. He desperately wants to receive a COVID-19 booster shot as he has already contracted COVID-19 three times while in ICE custody. *Id.* at ¶ 7. Most recently, he had to postpone his February 2, 2022 immigration hearing as a result of his illness. *Id.* at ¶¶ 7–8.

All Plaintiffs have been detained for at least several months, if not years, despite their medical vulnerability to COVID-19. Shaikh Decl. ¶¶ 1–3; Hernandez Villalobo Decl. ¶¶ 1–3; Cardenas Solis Decl. ¶¶ 1–3; ██████████ Decl. ¶¶ 1–3; Mayen Mayen Decl. ¶¶ 1–3.

2. Plaintiffs Have Been Unable to Obtain COVID-19 Booster Shots in ICE Detention.

Plaintiffs have all received their primary COVID-19 vaccine doses, and enough time has elapsed for each of them to receive a COVID-19 booster shot. Shaikh Decl. ¶ 4; Hernandez Villalobo Decl. ¶ 4; Cardenas Solis Decl. ¶ 4; ██████████ Decl. ¶ 4; Mayen Mayen Decl. ¶ 4. Some 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. Shaikh Decl. ¶ 6; Hernandez Villalobo Decl. ¶ 6; Cardenas Solis Decl. ¶ 6; ██████████ Decl. ¶¶ 7–9. One Plaintiff, who had an adverse reaction to the Johnson & Johnson vaccine and was advised not to take another dose of that vaccine, was nevertheless informed that mRNA booster doses were unavailable at the ICE detention facility. Mayen Mayen Decl. ¶ 6; *see also* ██████████ Decl. ¶ 10 (describing two other detainees offered only the Johnson & Johnson vaccine booster, who turned it down because of the greater risk of side effects associated with the Johnson & Johnson vaccine). Plaintiffs have not received booster shots, leaving them acutely vulnerable to COVID-19 infection and serious illness. Shaikh Decl. ¶ 8; Hernandez Villalobo Decl. ¶¶ 5–8; Cardenas Solis Decl. ¶¶ 5–8; ██████████ Decl. ¶¶ 10–12; Mayen Mayen Decl. ¶ 7. Defendants have not

provided Plaintiffs any information or education about booster shots. Shaikh Decl. ¶ 7; Hernandez Villalobo Decl. ¶ 7; Cardenas Solis Decl. ¶ 6; ██████████ Decl. ¶ 11. Plaintiffs report that they are aware of the existence and benefits of booster shots only from watching television, reading the news, or conversations with loved ones. Shaikh Decl. ¶ 5; Hernandez Villalobo Decl. ¶ 5; Cardenas Solis Decl. ¶ 5; ██████████ Decl. ¶ 5; Mayen Mayen Decl. ¶ 5.

Plaintiffs' experiences are consistent with the experiences of other declarants who were eligible for and sought COVID-19 booster shots, but could not obtain them from ICE and subsequently fell ill. 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." She believes that if she had received a booster shot in time, as she had asked, she would have been better protected against COVID-19. Declaration of Blanca Rivera Morales ("Rivera Morales Decl.") ¶¶ 1, 15. Ms. Rivera Morales has diabetes, hyperlipidemia, hypertension, PTSD and depression, *id.* at ¶ 2, 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. *Id.* at ¶¶ 10–14. Declarant Ramon Dominguez Gonzalez has been detained at the Imperial Regional Adult Detention Facility in Calexico, California, for over two years, since January 2019. Declaration of Ramon Dominguez Gonzalez ("Dominguez Gonzalez Decl.") ¶ 1. He is medically vulnerable to COVID-19 because of his obesity and breathing issues. Mr. Dominguez Gonzales also requested a booster shot multiple times over the span of several weeks, but never received one, and tested positive for COVID-19 on January 17, 2022. *Id.* at ¶¶ 6–7.

C. Defendants Have Failed to Provide COVID-19 Vaccine Boosters to Immigrant Detainees.

It is evident that Defendants lack any plan to ensure that eligible detainees, such as Plaintiffs, are provided with COVID-19 booster shots. ICE's current version of the Pandemic Response Requirements ("PRR"), which establishes COVID-19 mitigation requirements for detention facilities that hold ICE detainees, contains no provision regarding booster doses, even though the CDC has encouraged eligible individuals, including Plaintiffs, to receive a booster shot since October 21, 2021.²¹ ICE's failure to adopt a booster shot plan is clear from the paltry number of booster shots it has administered to individuals in its custody. Of the approximately 21,500 people detained in ICE detention facilities daily, as of January 5, 2022 (when data was last made public), only 671 immigrants in ICE custody had received a booster shot.²²

Defendants' failure to provide booster shots to eligible detainees carries particularly severe consequences for medically vulnerable detainees. According to a recent news report, as of late December 2021, ICE detained approximately 5,200 immigrants whose health issues or age place them at higher risk of severe illness or death if they contract COVID-19.²³ Under the terms of a preliminary injunction that remains in effect, ICE is required to review their medical histories and consider releasing these individuals from detention.²⁴ Nevertheless, many

²¹ Amazan Decl. Ex. Q, ICE, *ICE ERO COVID-19 Pandemic Response Requirements (Version 7.0)* 6 (Oct. 19, 2021),

<https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf> (providing that the PRR "sets forth expectations and assists ICE detention facility operators in sustaining detention operations while mitigating risk to the safety and wellbeing of detainees, staff, contractors, visitors, and stakeholders due to COVID-19").

²² Montoya-Galvez, *Coronavirus Infections inside U.S. Detention*, *supra* note 6.

²³ *Id.*

²⁴ *Fraihat v. ICE*, 445 F. Supp. 3d 709 (C.D. Cal. 2020), *overruled by Fraihat v. ICE*, 16 F.4th 613 (9th Cir. 2021); *see also* 9th Cir. R. 41-2 (timing of mandate) (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,

medically vulnerable individuals remain detained in ICE custody, often for several months, if not years.

Compounding the danger of ICE’s failure to adopt a booster shot plan is its reliance on the Johnson & Johnson vaccine for detainees’ primary vaccine dose,²⁵ which is less effective against COVID-19 variants. Recent data show that mRNA vaccines are most effective at reducing viral transmission and controlling COVID-19 infections, as compared to the Johnson & Johnson vaccine which also carries a greater risk of serious side effects. Vijayan Decl. ¶¶ 21, 23. Studies also show that the Johnson & Johnson vaccine does not produce sufficient quantities of antibodies against Omicron.²⁶ *Id.*

1. Defendants Knew of the Risk Posed to Plaintiffs by Their Failure to Provide COVID-19 Booster Shots.

Defendants are aware that Plaintiffs are medically vulnerable. All of the Plaintiffs submitted requests for release to ICE referencing their medical conditions, including requests under the terms of the preliminary injunction issued in *Fraihat*, which requires ICE to “make timely custody determinations for” medically vulnerable detainees like Plaintiffs. *See* Shaikh

Fraihat 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).

²⁵ Amazan Decl. Ex. R, 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>; Amazan Decl. Ex. N, Letter from DHS Medical Experts Dr. Scott Allen and Dr. Josiah Rich to DHS Secretary Mayorkas and Acting ICE Director Johnson, at 3 (Jan. 26, 2022), <https://whistleblower.org/wp-content/uploads/2022/01/012622-LETTER-TO-MAYORKAS-FROM-DRS-RE-COVID-IN-IMM-DETENTION.pdf> (“DHS has offered vaccination to detainees with the single shot Johnson & Johnson (J&J) vaccine, an approach that at one time was appropriate.”).

²⁶ Amazan Decl. Ex. S, Wesley H. Self, MD, et al., *Comparative Effectiveness of Moderna, Pfizer-BioNTech, and Janssen (Johnson & Johnson) Vaccines in Preventing COVID-19 Hospitalizations Among Adults Without Immunocompromising Conditions — United States, March–August 2021*, CDC (Sep. 24, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7038e1.htm>.

Decl. ¶ 3; Hernandez Villalobo Decl. ¶ 3; Cardenas Solis Decl. ¶ 3; Mayen Mayen Decl. ¶ 3; Rojo Rocha Decl. ¶ 3; s; *see also* 445 F. Supp. 3d at 751, *supra* note 24.

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. As noted above, federal government officials as well as the CDC have repeatedly made public announcements underscoring the vital role booster shots play in protecting public health and mitigating the spread of COVID-19. Moreover, 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 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.”²⁷ 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.²⁸

2. Other Custodial Agencies Have Shown That Boosters Can Be Made Available, Underscoring ICE’s Failure.

ICE’s ongoing failure to provide booster shots stands in contrast to the approach taken by other custodial entities, including the Federal Bureau of Prisons (BOP) and state departments of correction. The BOP’s COVID-19 Vaccine Guidance, issued on October 13, 2021, provides that BOP would offer the Pfizer-BioNTech COVID-19 booster shot to individuals who were then

²⁷ Amazan Decl. Ex. T, Letter from ACLU, to DHS Secretary Mayorkas and ICE Acting Director Johnson (Dec. 15, 2021), <https://www.aclu.org/letter/letter-demanding-dhs-provide-covid-19-vaccine-boosters-people-ice-detention>.

²⁸ Letter from Dr. Scott Allen and Dr. Josiah Rich (Jan. 26, 2022), *supra* note 25.

eligible for it under CDC guidance.²⁹ 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.”³⁰ Moreover, multiple state departments of correction have administered many thousands of booster shots to people in their custody.³¹ For example, as of January 28, 2022, the Michigan Department of Corrections has administered 10,988 booster shots to people in its custody.³²

ICE’s failure to provide COVID-19 vaccine boosters is not an anomaly for the agency. ICE’s sluggish vaccine roll-out in 2021 does not bode well for people like Plaintiffs who rely on Defendants to promptly provide them booster shots. As early as January 25, 2021, ICE Enforcement and Removal Operations (ERO) suggested that the ICE Health Service Corps (IHSC) add COVID-19 vaccine guidelines and protocols to the next version of the PRR, to ensure “across the board implementation.”³³ As one official stated in an email, “[u]ltimately we should have a consistent, comprehensive rollout for all 200+ facilities within our detention

²⁹ Amazan Decl. Ex. U, 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.

³⁰ Amazan Decl. Ex. V, Gov’t of the Dist. of Columbia, Dep’t of Corr., *Coronavirus Prevention*, <https://doc.dc.gov/page/coronavirus-prevention> (updated Dec. 22, 2021).

³¹ See, e.g., Amazan Decl. Ex. W, 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.”); Amazan Decl. Ex. X, 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); Amazan Decl. Ex. Y, 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).

³² Amazan Decl. Ex. Z, Michigan.gov, *COVID-19 Dashboard*, https://www.michigan.gov/coronavirus/0,9753,7-406-98178_103214-547150--,00.html (last updated Jan. 28, 2022).

³³ Amazan Decl. Ex. AA, E-mail from Ricardo Wong, Dep. Asst. Dir., Detention Management Division, to Ada Rivera, Dep. Assistant Dir. Clinical Services, ICE Health Services Corps (Jan. 25, 2021, 2:47 PM).

network [as] opposed to only IHSC staffed facilities.”³⁴ This email concerned ICE PRR version 6.0, but that document was not released until nearly two months later, on March 16, 2021.³⁵ What is more, the ICE PRR 6.0 did not, in fact, engage in any “consistent” or “comprehensive” rollout at all, and the agency failed to supply detention facilities with vaccine doses, leaving vaccine rollout up to each facility.³⁶ Defendants did not update their policy regarding vaccine procurement until six months later, after a court order.³⁷

II. LEGAL STANDARD

To obtain a temporary restraining order or a preliminary injunction, a plaintiff “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014); *Sibley v. Obama*, 810 F. Supp. 2d 309, 310 (D.D.C. 2011) (articulating the elements of a temporary restraining order based on the preliminary injunction standard). Courts in this Circuit have traditionally applied these factors on a sliding scale, where a stronger showing on some factors can compensate for a weaker showing on others. *See, e.g., Davenport v. Int’l Brotherhood of Teamsters*, 166 F.3d 356, 360 (D.C. Cir. 1999). It has been suggested, but not decided, that a likelihood of success on the merits may be required. *See Sherley v. Sebelius*, 644 F.3d 388, 392–93 (D.C. Cir. 2011) (citing *Winter*, 555 U.S. at 20–22). Under either approach, Plaintiffs make the necessary showing. The standards for

³⁴ *Id.*

³⁵ Amazan Decl. Ex. BB, ICE, *ICE Pandemic Response Requirements (Version 6.0)* (Mar. 16, 2021), <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities-v6.pdf>.

³⁶ *Id.* at 24.

³⁷ *Fraihat v. ICE, No. 5:19-cv-1546-JGB-SHK* (C.D. Cal. June 23, 2021), 2021 WL 2580512.

issuing a temporary restraining order and a preliminary injunction are “the same” and therefore can be analyzed together. *Singh v. Carter*, 168 F. Supp. 3d 216, 223 (D.D.C. 2016).

III. ARGUMENT

A. Plaintiffs Are Likely to Succeed on the Merits.

Plaintiffs are likely to establish that Defendants’ failure to provide them COVID-19 vaccine booster shots poses an unreasonable risk to their health and constitutes punishment as it lacks a rational relationship to any legitimate governmental interest, in violation of their Fifth Amendment substantive due process rights. Plaintiffs Marvin Hernandez Villalobo, [REDACTED], [REDACTED], and Liliana Cardenas Solis are also likely to establish that Defendants’ failure to provide booster shots violates their own binding detention standards, and is therefore arbitrary, capricious, and contrary to law in violation of the Administrative Procedure Act (APA).

1. Defendants’ Failure to Provide COVID-19 Vaccine Booster Shots Violates Plaintiffs’ Substantive Due Process Rights Under the Fifth Amendment Because It Poses an Unreasonable Risk to Plaintiffs’ Health.

Whenever the government detains or incarcerates someone, it has an affirmative duty to provide conditions of reasonable health and safety as well as reasonably adequate medical care. As the Supreme Court has explained, “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989). As a result, the government must provide those in its custody with “food, clothing, shelter, medical care, and reasonable safety” *Id.* at 200.

The Eighth Amendment prohibits the government from exposing prisoners to “an unreasonable risk of damage to their health.” *Banks v. Booth*, 468 F. Supp. 3d 101, 153 (D.D.C.

2020), *appeal dismissed, cause remanded*, 3 F.4th 445 (D.C. Cir. 2021). The Eighth Amendment similarly prohibits the government from disregarding a “serious medical need” that causes an “excessive risk” to a prisoner’s health and safety. *Baker v. Dist. of Columbia*, 326 F.3d 1302, 1306 (D.C. Cir. 2003) (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). To show a violation of the Eighth Amendment, prisoners must demonstrate that a government official acted with deliberate indifference, where the official had subjective knowledge of and recklessly disregarded the excessive risk to the prisoner’s health or safety. *Baker*, 326 F.3d at 1306.

The same basic principles apply to immigrant detainees, with an important distinction. Plaintiffs are “civil immigration detainees . . . protected by the Fifth Amendment’s Due Process Clause.” *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 210 (D.D.C. 2020). Like pre-trial detainees, civil immigrant detainees “have not been convicted of any present crime,” and they “may not be subjected to punishment of any description.” *Id.* As the Supreme Court concluded in *Kingsley v. Hendrickson*, pre-trial detainees bringing excessive force claims need only demonstrate that the use of force was objectively unreasonable. 576 U.S. 389, 397 (2015). Following the Supreme Court’s instruction, this District has concluded that pre-trial detainees “do not need to show deliberate indifference in order to state a due process claim for inadequate conditions of confinement.” *Banks*, 468 F. Supp. 3d at 152. Instead, pre-trial detainees “need only show that prison conditions are objectively unreasonable in order to state a claim under the due process clause.” *Id.* This test also applies to immigrant detainees. *C.G.B.*, 464 F. Supp. 3d at 211 n.31 (“The Court is persuaded, both by the language of *Kingsley* and by its fellow courts, to apply the *Kingsley* standard here as well. Accordingly, [p]laintiffs need not prove deliberate indifference.”). Defendants thus violate Plaintiffs’ due process rights under the Fifth Amendment

when they “knew or should have known that the [detention] conditions posed an excessive risk to their health and intentionally or recklessly failed to act.” *Banks*, 468 F. Supp. 3d at 111.

Defendants’ failure to provide COVID-19 vaccine booster shots to Plaintiffs violates their Fifth Amendment substantive due process rights. Defendants knew or should have known that their failure to provide booster shots constitutes an unreasonable risk to Plaintiffs’ health, and nevertheless failed to provide them. Defendants recklessly disregarded Plaintiffs’ serious medical need for a COVID-19 vaccine booster shot.

a. Defendants’ Failure to Provide COVID-19 Vaccine Booster Shots Poses an Unreasonable Risk to Plaintiffs’ Health.

Defendants’ failure to provide COVID-19 booster shots constitutes an unreasonable risk to Plaintiffs’ health. “Determining whether or not [p]laintiffs have been exposed to an unreasonable risk is an objective analysis which ‘requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk.’” *Banks*, 468 F. Supp. 3d at 111 (quoting *Helling*, 509 U.S. at 36) (emphasis in original)). “In other words, the [detainee] must show that the risk of which he complains is not one that today’s society chooses to tolerate.” *Helling*, 509 U.S. at 36. Defendants may not impose conditions that pose an unreasonable risk of future harm, even if that harm has not yet come to pass. “It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.” *Id.* at 33.

Defendants’ failure to provide booster shots exemplifies this unreasonable risk. As numerous courts have concluded, failure to provide adequate protection against COVID-19 in jail or detention poses an unreasonable risk to the health of detainees. *See, e.g., Banks*, 468 F. Supp. 3d at 111; *Ferreyra v. Decker*, 456 F. Supp. 3d 538, 550 (S.D.N.Y. 2020) (“Petitioners

have established . . . that Respondents [(including ICE)] have left in place conditions of confinement that result in COVID-19 posing an unreasonable risk of serious damage to their health.”); *Malam v. Adducci*, 455 F. Supp. 3d 384, 395 (E.D. Mich. 2020) (same); *Zepeda Rivas v. Jennings*, 445 F. Supp. 36, 40 (N.D. Cal. 2020) (same).

As discussed above, it is well-established that the primary vaccination doses alone, absent a booster shot, provide inadequate protection against COVID-19 because the immunity provided by the initial vaccine doses wanes over time. Vijayan Decl. ¶¶ 21–24. Defendants’ failure to offer booster shots to Plaintiffs “prevent[s] Plaintiffs from being able to take the preventative and precautionary steps that the larger, non-detained population has been able to take to slow the spread of COVID-19.” *Banks*, 468 F. Supp. 3d at 112. Moreover, booster shots are even more critical given the surge in COVID-19 cases caused by the highly infectious Omicron variant. Vijayan Decl. ¶¶ 24–25, Amazan Decl. Ex. N (Letter from Dr. Allen and Dr. Rich); Amazan Decl. Ex. M (Letter from Concerned Medical Faculty). As a result, Defendants’ failure to provide COVID-19 vaccine booster shots to Plaintiffs constitutes an unreasonable risk to Plaintiffs’ health.

b. Plaintiffs Have a “Serious Medical Need” for a COVID-19 Vaccine Booster Shot.

Given that COVID-19 vaccine booster shots are necessary to protect the health and safety of Plaintiffs and prevent serious illness or death from COVID-19, Plaintiffs have a serious medical need for a COVID-19 vaccine booster shot.

“A medical need is serious if it either is diagnosed by a physician as mandating treatment or is so obvious that a lay person easily would recognize the necessity of a physician’s attention.” *Coleman-Bey v. United States*, 512 F. Supp. 2d 44, 47 (D.D.C. 2007). Furthermore, “[w]here denial or delay causes an inmate to suffer a life-long handicap or permanent loss, the

medical need is considered serious.” *Oladokun v. Corr. Treatment Facility*, 5 F. Supp. 3d 7, 15 n.9 (D.D.C. 2013). The well-known risks of serious illness, including hospitalization and death, from COVID-19 for medically vulnerable individuals “easily push [Plaintiffs’] claim into the category of serious medical needs.” *Brown v. D.C.*, 514 F.3d 1279, 1284 (D.C. Cir. 2008).

Numerous courts have concluded that vulnerability to COVID-19 constitutes a “serious medical need.” *Coronel v. Decker*, 449 F. Supp. 3d 274, 283 (S.D.N.Y. 2020) (concluding that immigrant detainees with medical vulnerabilities “have a serious medical need . . . to avoid contracting [COVID-19] and thereby potentially suffering ‘death, degeneration, or extreme pain.’”); accord *Coreas v. Bounds*, 451 F. Supp. 3d 407, 426 (D. Md. 2020); *Gayle v. Meade*, No. 20-21553-CIV, 2020 WL 3041326, at *18 (S.D. Fla. June 6, 2020), *reconsideration denied*, No. 20-21553-CIV, 2021 WL 1255627 (S.D. Fla. Mar. 24, 2021). Moreover, courts have determined that “the COVID-19 vaccine is a ‘serious medical need’” for people in custody. *Maney v. Brown*, No. 6:20-CV-00570-SB, 2021 WL 354384, at *11 (D. Or. Feb. 2, 2021); see also *Patel v. Cnty. of Orange*, No. 817CV01954JLSDFM, 2019 WL 4238875, at *6 (C.D. Cal. June 19, 2019) (concluding, based on the Supreme Court’s holding in *Helling*, that “the exposure to the risk of contracting hepatitis is enough to state an Eighth Amendment claim” that “the need for vaccines to *prevent* the contraction of hepatitis logically is a ‘serious’ medical need”).

c. Defendants Knew or Should Have Known That Their Failure to Provide COVID-19 Vaccine Booster Shots Posed an Excessive Risk to Plaintiffs’ Health, and Recklessly Failed to Act.

Defendants knew or should have known that failure to provide COVID-19 vaccine boosters posed an excessive risk to Plaintiffs’ health. As explained above, to succeed on the merits of their Fifth Amendment due process claim, pre-trial detainees need only “show[] that the Defendants knew or should have known that the jail conditions posed an excessive risk to

their health and intentionally or recklessly failed to act.” *Banks*, 468 F. Supp. 3d at 111; *see also* *Miranda v. Cnty. of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) (concluding that “medical-care claims brought by pretrial detainees . . . are subject only to the objective unreasonableness inquiry identified in *Kingsley*”); *Brawner v. Scott Cty., Tennessee*, 14 F.4th 585, 596 (6th Cir. 2021) (same); *Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1120, 1122–25 (9th Cir. 2018) (same); *Darnell v. Piniero*, 849 F.3d 17, 34–35 (2d. Cir. 2017); *but see Strain v. Regalado*, 977 F.3d 984, 991 (10th Cir. 2020); *Whitley v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *Dang by & through Dang v. Sheriff, Seminole Cnty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017); *Alderson v. Concordia Parish Corr. Facility*, 848 F.3d 415, 419 n.4 (5th Cir. 2017).

Defendants have recklessly failed to provide COVID-19 booster shots to Plaintiffs.³⁸ They knew or should have known, based on the recurrent public recommendations discussed above, that COVID-19 booster shots are necessary to provide Plaintiffs adequate protection against COVID-19. *See supra* § I.A, II.C.1. These public announcements, made repeatedly by the CDC and the federal government over the past several months, are sufficient to establish that Defendants knew or should have known that the failure to provide COVID-19 vaccine booster shots poses an excessive risk to Plaintiffs’ health. *See, e.g., Farmer*, 511 U.S. at 826 (“[A] factfinder may conclude that the official knew of a substantial risk from the very fact that it was obvious.”). By failing to provide booster shots to people in ICE detention, Defendants “have

³⁸ Because “[t]he civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known,” *Farmer*, 511 U.S. at 836, “to establish that conditions of confinement violate due process, a [pre-trial detainee] need establish only that detaining officials know or should know that those conditions objectively constitute a serious risk to the defendant’s health,” *United States v. Otunyo*, No. CR 18-251 (BAH), 2020 WL 2065041, at *13 (D.D.C. Apr. 28, 2020).

disregarded those risks by failing to take comprehensive, timely, and proper steps to stem the spread of the virus.” *Banks*, 468 F. Supp. 3d at 119.

d. While Plaintiffs Need Only Show that Defendants Recklessly Failed to Act under *Kingsley*, Defendants Also Had Subjective Knowledge of The Risk to Plaintiffs.

Because Plaintiffs are civil immigrant detainees, they are not required to establish that Defendants acted with deliberate indifference, a subjective intent or awareness of the risk of harm posed to Plaintiffs by their failure to act, as is required for Eighth Amendment claims brought by convicted prisoners. *See Kingsley*, 576 U.S. at 397; *see also Banks*, 468 F. Supp. 3d at 110–11; *C.G.B.*, 464 F. Supp. 3d at 211 n.31.

However, even if Plaintiffs were required to demonstrate that Defendants had subjective awareness of the risk posed by their failure to act, Defendants clearly were “aware of facts from which the inference could be drawn that a substantial risk of serious harm exists” and “dr[ew] the inference.” *Farmer*, 511 U.S. at 837. Plaintiffs are not required to “show that [Defendants] acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.” *Id.* at 842.

Defendants have acknowledged the threat of COVID-19 in their own policy documents³⁹ and is aware of over 5,200 medically vulnerable detainees in custody whom they have declined to release after administrative review of their files, including Plaintiffs.⁴⁰ *See supra* § I.C.i. In addition, as noted above, the ACLU sent Defendants a letter in December 2021 regarding the

³⁹ ICE, *ICE ERO COVID-19 Pandemic Response Requirements (Version 7.0)*, *supra* note 21 at 6–7.

⁴⁰ *Fraihat*, 445 F. Supp. 3d at 751, *supra* note 24; Galvez-Montoya, *Coronavirus Infections inside U.S. Detention Surge by 520 Percent in 2022*, *supra* note 6.

importance of booster shots to detainees, as did DHS’s own medical experts in January 2022.⁴¹

As a result, Defendants’ subjective awareness of the substantial risk of harm that Plaintiffs would face without a COVID-19 booster shot, and their failure to act demonstrate Defendants’ deliberate indifference.

2. Defendants’ Failure to Provide COVID-19 Boosters Constitutes Punishment in Violation of Plaintiffs’ Fifth Amendment Substantive Due Process Rights.

Because Plaintiffs are civil immigration detainees, they cannot be subject to conditions that constitute punishment. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Defendants’ failure to provide COVID-19 booster shots to Plaintiffs constitutes unlawful punishment and violates Plaintiffs’ due process rights because their inaction is not “rationally related to a legitimate nonpunitive government purpose or appear[s] excessive in relation to that purpose.” *C.B.G.*, 464 F. Supp. 3d. at 211 (quoting *Kingsley*, 576 U.S. at 397); *see also Southern Poverty Law Ctr. v. U.S. Dep’t of Homeland Sec.*, 2020 WL 3265533, *18 (D.D.C. June 17, 2020) (considering whether the contested condition “is objectively unreasonable or excessive relative to the Government’s proffered justification.”).

As medically vulnerable individuals, Plaintiffs are at risk of serious illness or death if they contract COVID-19, which is highly likely to occur in ICE detention. Vijayan Decl. ¶¶ 7, 15–17. ICE’s failure to provide a COVID-19 vaccine booster shot exposes Plaintiffs to the avoidable risks of hospitalization and death from COVID-19, and lacks any relation to any legitimate interest held by the government. As an initial matter, Defendants’ responsibility to provide detainees “with medical care ordinarily does not conflict with competing administrative

⁴¹ Letter from ACLU to Sec. Alejandro Mayorkas, COVID-19 Vaccine Booster Availability in ICE Detention Facilities (Dec. 15, 2021), *supra* note 27; Letter from Dr. Scott Allen and Josiah Rich (Jan. 26, 2022), *supra* note 25.

concerns.” *Hudson v. McMillan*, 503 U.S. 1, 6 (1992) (citing *Whitley v. Albers*, 475 U.S. 312, 320 (1986)). Failure to provide a vaccine booster shot to detained immigrants, moreover, is not rationally related to the government’s interest in ensuring appearance at future immigration proceedings or preventing danger to the community. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Providing COVID-19 vaccine booster shots to people in immigration detention does not in any way impede those goals. In fact, Defendants’ failure to provide booster shots may even run counter to their interests, as quarantine protocols due to infection or facility outbreaks have precluded detained immigrants from appearance in court proceedings.⁴²

Nor can Defendants argue that their failure to provide Plaintiffs with vaccine booster shots is justified by an interest in saving costs. It is well-established that budgetary interests cannot justify denial of care for a detainee’s serious medical needs. *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) (“Lack of resources is not a defense to a claim” for lack of medical care); *Wright v. Rushen*, 642 F.2d 1129, 1134 (9th Cir. 1981) (“[C]osts cannot be permitted to stand in the way of eliminating conditions below Eighth Amendment standards.”); *Koselik v. Maloney*, 221 F. Supp. 2d 156, 161 (D. Mass. 2002) (“It is not, however, permissible to deny an inmate adequate medical care because it is costly.”). As discussed in detail above, it is beyond dispute that protection from COVID-19, particularly for medically vulnerable individuals, constitutes a “serious medical need.” *See, e.g., Banks*, 459 F. Supp. 3d at 155 (noting lack of

⁴² Amazan Decl., Ex. CC, Marissa Armas, ‘Putting Our Lives At Risk’: Detainees at Aurora Facility Claim COVID Prolongs Stay, CBS4 NEWS (Jan. 20, 2022), <https://denver.cbslocal.com/2022/01/20/covid-aurora-ice-detention-facility/>; Amazan Decl., Ex. DD, Sofia Mejias-Pascoe, COVID-19 Cases at San Diego Detention Center Reach All-Time High, NEWSOURCE (Jan. 18, 2022), <https://inewssource.org/2022/01/18/covid-19-cases-san-diegos-ice-detention-center>.

dispute regarding the threat of COVID-19 to the health of people in detention); *see also supra* § III.A.1.b.

Defendants' failure to provide COVID-19 booster doses to detained immigrants, such as Plaintiffs, is also unreasonable in light of the policies and programs established by other custodial entities, such as the BOP and state departments of correction, to provide booster shots to prisoners. Where civil detainees, such as Plaintiffs, face conditions that are "not more considerate than those at pretrial and prison facilities," such conditions "may be punitive in nature and may therefore violate the substantive due process clause." *Southern Poverty Law Ctr.*, 2020 WL 3265533, at *19 (quoting *Torres v. United States Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1065 (C.D. Cal. 2019)); *Jones v. Blanas*, 393 F.3d 918, 934 (9th Cir. 2004) ("[A] presumption of punitive conditions arises where the individual is detained under conditions identical to, similar to, or more restrictive than those under which pretrial criminal detainees are held."). Unlike ICE's PRR, the BOP's October 2021 COVID-19 Vaccine guidance instructed its facilities nationwide to provide booster doses to eligible prisoners.⁴³ The District of Columbia Department of Corrections issued similar guidance in December 2021, noting that it "continues to offer a COVID-19 vaccine to all residents who are eligible."⁴⁴ State departments of correction have likewise issued similar guidance, and have reported provision of booster shots to thousands of incarcerated individuals.⁴⁵ Defendants' failure to provide booster shots, in light of conditions in prisons, is therefore unconstitutionally punitive, in violation of Plaintiffs' due process rights.

⁴³ Fed. Bureau of Prisons, *COVID-19 Vaccine Guidance*, Version 14.1, 5–6, *supra* note 29.

⁴⁴ Gov't of the Dist. of Columbia, *Coronavirus Prevention*, *supra* note 30.

⁴⁵ Delaware Dep't of Corr., *Active COVID-19 Cases (Offenders)*, *supra* note 31 (noting that "1,448 vaccinated inmates have received COVID-19 booster shots."); Missouri Dep't of Corr., *COVID-19 Data*, *supra* note 31 (boosters administered to 4,151 inmates); Minnesota Dep't of Corr., *COVID-19 Data*, *supra* note 31 (33 percent of incarcerated population fully vaccinated

3. Defendants' Failure to Provide Booster Shots at Facilities Covered by ICE's 2011 Performance-Based National Detention Standards Violates the APA.

The APA requires that courts “hold unlawful and set aside agency action” that is “arbitrary, capricious, . . . or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). As set forth below, ICE’s own detention standards for the majority of its contracted facilities instruct that “Centers for Disease Control and Prevention (CDC) guidelines for the prevention and control of infectious and communicable diseases *shall be followed.*”⁴⁶ Those CDC guidelines clearly recommend in turn that detained persons like Plaintiffs receive COVID-19 booster shots. *See supra* § I.A. By failing to provide booster shots, Defendants therefore have failed to follow their own binding detention standards, and acted in a manner that is arbitrary, capricious, and contrary to law.

Pursuant to the *Accardi* doctrine, it is well-settled that courts may require an agency to follow the procedural and substantive standards contained in its own regulations. *Holden v. Finch*, 446 F.2d 1311, 1315 (D.C. Cir. 1971); *see also Service v. Dulles*, 354 U.S. 363, 388 (1957) (requiring agency to adhere to the “more rigorous substantive and procedural standards” adopted in its regulations); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267–68 (1954). In particular, “[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.” *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (citing *Service*, 354 U.S. at 388); *accord Jefferson v. Harris*, 285 F. Supp. 3d 173, 185 (D.D.C. 2018) (“[I]nterference with regulations that seek to safeguard a plaintiff’s individual rights implicates

and boosted); Michigan.gov, *COVID-19 Dashboard*, *supra* note 32 (boosters administered to 10,988 inmates).

⁴⁶ Amazan Decl. Ex. EE, ICE, *2011 Performance-Based National Detention Standards*, Standard 4.3.II.10 (revised Dec. 2016), <https://www.ice.gov/doclib/detention-standards/2011/4-3.pdf> (emphasis added) [hereinafter “2011 Detention Standards”].

the *Accardi* doctrine and its requirement that agencies abide by their own procedures.”); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 336 (D.D.C. 2018) (same).

The requirement that an agency follow its own directives is not “limited to rules attaining the status of formal regulations.” *Mass. Fair Share v. Law Enf’t Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985); accord *Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977). Thus, even an unpublished manual or policy binds the agency if “an examination of the provision’s language, its context, and any available extrinsic evidence” supports the conclusion that it is “mandatory rather than merely precatory.” *Doe*, 566 F.2d at 281. Again, this is particularly so “[w]here the rights of individuals are affected,” *Morton*, 415 U.S. at 235, and where the guidance provides one of “the only safeguard[s] . . . against unlimited agency discretion,” *Lopez v. Fed. Aviation Admin.*, 318 F.3d 242, 247 (D.C. Cir. 2003).

CDC guidelines regarding booster shots are binding on ICE under this standard. ICE’s 2011 Performance-Based National Detention Standards (“PBNDS” or “Detention Standards”), which establish standards for conditions of confinement at ICE detention facilities,⁴⁷ provide that “Centers for Disease Control and Prevention (CDC) guidelines for the prevention and control of infectious and communicable diseases *shall be followed*.”⁴⁸ Moreover, ICE has required compliance with CDC guidelines to protect individual rights—that is, to “ensure[] that detainees

⁴⁷ Thus, the PBNDS specifically governs conditions of confinement at Stewart, Golden State Annex, and Aurora, where Plaintiffs Hernandez Villalobo, ██████████ a, and Cardenas Solis are currently detained. See Amazan Decl. Ex. FF, ICE ERO Custody Management Div’n, *Authorized Dedicated and Non-Dedicated Facility List* (Jan. 6, 2022), <https://www.ice.gov/doclib/facilityInspections/dedicatedNonDedicatedFacilityList.xlsx>. ICE does not have a uniform set of detention standards for all facilities in its system, but utilizes several different sets of detention standards based on factors such as size of facility and year of initial contract. See ICE, *ICE Detention Standards* (Nov. 21, 2021), <https://www.ice.gov/factsheets/facilities-pbnbs>.

⁴⁸ 2011 Detention Standards, § 4.3.II.10 (emphasis added), *supra* note 46.

have access to appropriate and necessary medical . . . care.”⁴⁹ Those CDC guidelines in turn specifically recommend that eligible individuals in high-risk settings where people are held for months or years, such as detention centers, receive COVID-19 booster shots.⁵⁰ Vijayan Decl. ¶ 23; *see also, supra* § I.A.

Thus, as another district court has found, “[i]t is abundantly clear that ICE is required to comply with CDC’s guidelines pursuant to its own regulations and policy statements.” *Gayle v. Meade*, No. 20-21553, 2020 WL 2086482, at *6 (S.D. Fla. Apr. 30, 2020), *ord. clarified*, No. 20-21553, 2020 WL 2203576 (S.D. Fla. May 2, 2020); *see also Torres v. U.S. Dep’t of Homeland Sec.*, 411 F. Supp. 3d 1036, 1068 (C.D. Cal. 2019) (applying *Accardi* for ICE’s failure to enforce its own attorney access requirements in the Detention Standards); *Innovation Law Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1079 (D. Or. 2018) (finding a likelihood of success on plaintiffs’ APA claim that defendants failed to follow the Detention Standards). The plain language of the Detention Standards expressly provides that CDC guidelines for the prevention and control of infectious and communicable diseases—which now include the CDC’s recommendations regarding booster shots—“shall be followed.” *See supra* & notes 46, 48. Moreover, this rule

⁴⁹ *Id.*, § 4.3. The Detention Standards further provide that covered detention facilities “shall have written plans that address the management of infectious and communicable diseases, including . . . immunization”; provides that such plans “shall include” procedures for immunization; and requires oversight of facilities’ “[i]nfectious and communicable disease control activities” at quarterly administrative meetings.” *Id.*, Standard § 4.3.V.C.1; *see also id.*, Standard § 4.3.V.EE.

⁵⁰ *See, e.g.*, Press Release, CDC, *CDC Expands Eligibility for COVID-19 Booster Shots* (Oct. 21, 2021), *supra* note 11 (recommending booster shots for people “[a]ge 18+ who work or live in high-risk settings,” such as detention centers); Amazon Decl. Ex. GG, CDC, *CDC Statement on ACIP Booster Recommendations* (Sept. 24, 2021), <https://www.cdc.gov/media/releases/2021/p0924-booster-recommendations-.html> (recommending booster shot of Pfizer vaccine for persons in “high risk occupational and institutional settings”).

clearly seeks to safeguard the health and safety of detained individuals.⁵¹ Yet Defendants have failed to provide Plaintiffs booster shots, in violation of CDC guidelines they have made binding on their covered own detention centers. Defendants' failure to provide booster shots to Plaintiffs in those locations is therefore arbitrary, capricious, and contrary to law.

Under the APA, the Court may set aside and enjoin unlawful agency action that is "final agency action." 5 U.S.C. § 504. Defendants' failure to provide Plaintiffs booster shots, in violation of their own detention standards, clearly constitutes final agency action. An agency action is final if two conditions are satisfied: (1) "the action must mark the consummation of the agency's decisionmaking process," and (2) "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotation marks and citations omitted). "Courts take a pragmatic approach to finality." *Ramirez v. U.S. Immigr. & Customs Enf't*, 338 F. Supp. 3d 1, 40 (D.D.C. 2018) (citing *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1815 (2016)).

Plaintiffs Hernandez Villalobo, [REDACTED], and Cardenas Solis meet both requirements for finality here. First, an agency's failure to act may represent final agency action when "administrative inaction has precisely the same impact on the rights of the parties as denial of relief." *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987); *see also Stone v. U.S. Embassy Tokyo*, No. CV 19-3273 (RC), 2020 WL 4260711, at *5 (D.D.C. July 24, 2020) (same);

⁵¹ Furthermore, ICE itself regularly seeks to ensure compliance with the PBNDS through annual inspections of its detention centers, which further demonstrates that ICE views them as mandatory in nature. *See, e.g., Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1069 (C.D. Cal. 2019); Amazan Decl. Ex. HH, U.S. Gov't Accountability Off., *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards* 30, 35–40 (Oct. 2014), <https://www.gao.gov/assets/gao-15-153.pdf>.

5 U.S.C. § 551(13) (defining “agency action” as including a “failure to act” and the “denial” of agency “relief”). Here, Defendants have failed to provide Plaintiffs booster shots, despite their requests that they do so. *See supra* § I.B. Their inaction has thus denied Plaintiffs relief in the form of essential protection against COVID-19, in violation of binding CDC guidelines.

Moreover, because there are no further avenues through which Plaintiffs may request boosters, no “further agency decision-making is forthcoming,” putting Plaintiffs at the immediate and ongoing risk of severe illness or even death from COVID-19. *Stone*, 2020 WL 4260711, at *5. Such “exigent circumstances render [Defendants’ action] equivalent to a final denial of [Plaintiffs’] request.” *Id.* (internal quotation marks and citation omitted).

Second, Defendants’ failure to provide boosters has determined “rights and obligations,” *Bennett*, 520 U.S. at 177–78, by denying Plaintiffs the protections afforded them under binding CDC guidelines. This failure has profound and immediate consequences for Plaintiffs, who as a result of Defendants’ inaction face a heightened threat of illness or even death from COVID-19. *See supra* § I.B; Vijayan Decl. ¶¶ 6–7, 20–22; *see also CSI Aviation Servs., Inc. v. U.S. Dep’t of Transp.*, 637 F.3d 408, 412 (D.C. Cir. 2011) (finding that agency action was final where it imposed “immediate and significant burden” on regulated party); *Pharm. Research & Mfrs. of Am. v. U.S. Dep’t of Health & Human Servs.*, 138 F. Supp. 3d 31, 46 (D.D.C. 2015) (infliction of “acute burden” and “real consequences” supported existence of final agency action). Thus, Defendants’ failure to provide booster shots constitutes final agency action and should be set aside and enjoined under the APA.

B. The Remaining Factors Weigh Heavily in Plaintiffs’ Favor.

1. The Denial of Readily Available Protection from a Lethal Virus Constitutes Irreparable Harm.

A temporary restraining order or preliminary injunction “requires only a likelihood of irreparable injury.” *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 8–9 (D.C. Cir. 2016) (citing *Winter*, 555 U.S. at 7), and while the harm must be “imminent,” that means only that there must be a “clear and present need for equitable relief to prevent irreparable harm.” *Id.* at 8. (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). The harm also “must be beyond remediation.” *Id.* (quoting *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297).

This district has already concluded that an individual’s “risk of contracting COVID-19 and the resulting complications, including the possibility of death, is the prototypical irreparable harm.” *Banks*, 459 F. Supp. 3d at 159 (citing *Harris v. Bd. of Supervisors, Los Angeles Cnty.*, 366 F.3d 754, 766 (9th Cir. 2004)). Indeed, courts in this district have “often [found] a showing of irreparable harm where the movant’s health is in imminent danger.” *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 20 (D.D.C. 2005) (citation omitted) (granting preliminary injunction where cancer patient’s “health and future remain[ed] in serious doubt”); *see also, e.g., Banks*, 459 F. Supp. 3d at 159 (granting preliminary injunction where incarcerated plaintiffs “produced expert evidence that they are ‘at a significantly higher risk of infection with COVID-19 as compared to the population in the community’ and ‘at a significantly higher risk of harm if they do become infected’”).

Here, Plaintiffs have submitted evidence describing their medical vulnerability to COVID-19, the danger they face from Defendants’ failure to provide them with COVID-19 vaccine booster shots, and their desire for protection via vaccine booster shot. *See* Shaikh Decl. ¶ 5; Hernandez Villalobo Decl. ¶¶ 5, 8; Cardenas Solis Decl. ¶¶ 5; ██████████ Decl. ¶ 12; Mayen Mayen Decl. ¶ 7; *see also* Vijayan Decl ¶¶ 19–20, 27. In just a few weeks, the number of

individuals in ICE detention testing positive for COVID-19 has grown by about 940 percent,⁵² and is projected to continue growing given low vaccination rates among staff and Defendants’ lack of any plan to provide COVID-19 booster shots to eligible individuals in detention. Vijayan Decl. ¶¶ 15–18. ICE detainees report increasing numbers of cases within detention, including individuals who requested but were denied booster shots and subsequently fell ill with COVID-19. *See* ██████████ Decl. ¶¶ 7–9, 12; Mayen Mayen Decl. ¶¶ 6–7; Rivera Morales Decl. ¶¶ 5–17 (describing anger and frustration with ICE for not providing booster before she fell ill); Dominguez Gonzalez Decl. ¶¶ 6–7; *see also* Shaikh Decl. ¶ 8 (expressing concern regarding spread of cases at Etowah); Hernandez Villalobo Decl. ¶ 8 (same at Stewart); Rivera Morales Decl. ¶ 17 (same); Cardenas Solis Decl. ¶ 8 (same at Aurora); ██████████ Decl. ¶ 11–12 (same at Golden Gate Annex). As noted above, without the requested relief, Plaintiffs are approximately three and a half times more likely to be hospitalized and four times more likely to die from COVID-19 because of ICE’s failure to provide them COVID-19 booster shots. Vijayan Decl. ¶ 20.⁵³ Such injuries are also indisputably “beyond remediation” because the harms from unlawful conditions of detention “cannot be remedied after the fact.” *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (citations omitted).

2. The Balance of Equities and Public Interest Weigh Heavily in Plaintiffs’ Favor.

The final two factors—balance of the equities and the public interest—merge in this case, as Defendants are government actors. *Pursuing Am.’s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016). These factors also favor Plaintiffs. As discussed above, Plaintiffs have established a likelihood that they will prevail on the merits of their due process claims, and “[i]t

⁵² *See supra* note 9.

⁵³ *See supra* note 2.

is always in the public interest to prevent the violation of a party's constitutional rights." *Banks*, 459 F. Supp. 3d at 160 (citing *Simms v. Dist. of Columbia*, 872 F. Supp. 3d 90, 105 (D.D.C. 2012)). In other words, "[t]here is no harm to the Government when a court prevents unlawful practices." *Id.*; see also *R.I.L-R*, 80 F. Supp. 3d at 191.

Moreover, granting injunctive relief which significantly reduces the risk that Plaintiffs will suffer serious illness or death from COVID-19 is in the public interest "because it supports public health." *Banks*, 459 F. Supp. 3d at 160. As the *Banks* court aptly described, "[n]o man's health is an island." *Id.* Booster shots promote public health by reducing the risk of COVID-19 to Plaintiffs and others detained in the facilities, which also minimizes transmission risk to staff members and local communities. Vijayan Decl. ¶¶ 17–18. New variants of COVID-19 have and will inevitably continue to arise. *Id.* at ¶ 13. At a time when community resources are still limited and the overall healthcare infrastructure heavily strained, it would also benefit the public to prevent Plaintiffs from suffering serious COVID-19 complications which may require hospitalization. *Id.* at ¶¶ 10–12, 17. Thus, ordering Defendants to take the basic precaution of providing COVID-19 vaccine booster shots to protect Plaintiffs from risk of infection and serious illness also benefits the public. *Banks*, 459 F. Supp. 3d at 160.

Lastly, the modest requested relief does not impose an undue burden on Defendants. COVID-19 vaccine booster shots, including mRNA vaccine booster shots, are widely available to the U.S. public. Defendants, as federal government agencies, should have unparalleled immediate access to these vaccines.⁵⁴ Vijayan Decl. ¶ 25. When endorsing the clinical preference

⁵⁴ Amazan Decl. Ex. II, Tom Randall, Cedric Sam, et al., *More Than 20 Billion Shots Given: COVID-19 Tracker*, BLOOMBERG <https://www.bloomberg.com/graphics/covid-vaccine-tracker-global-distribution/> (last visited Jan. 28, 2022) ("More than half of the U.S. population has been fully vaccinated, and supply of shots is plentiful The U.S. is sending some of its excess supply to other hard-hit regions of the world.").

for mRNA vaccines, the CDC noted that “[t]he U.S. supply of mRNA vaccines is abundant – with nearly 100 million doses in the field for immediate use.”⁵⁵ This Court would not be ordering Defendants to provide any protection that has not already been made available to the broader, non-incarcerated public. Further, by undertaking this simple task of providing booster shots, Defendants will benefit in the long run with fewer detainees becoming infected and getting very sick from COVID-19, thereby freeing up healthcare and staffing resources. Vijayan Decl. ¶ 17.

In light of the grave and irreparable harm Plaintiffs face, ordering Defendants to merely comply with the CDC’s recommendations and offer COVID-19 booster shots is not only appropriate but imperative.

IV. CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully request that this Court issue a temporary restraining order and a preliminary injunction directing Defendants to make available and provide each of them with an mRNA COVID-19 vaccine booster shot and medical consultation in accordance with the CDC’s guidance on COVID-19 vaccine booster shots.

⁵⁵ Amazan Decl. Ex. JJ, 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#>.

Dated: January 31, 2022

Respectfully submitted,

/s/ Eunice H. Cho

Eunice H. Cho†
Patrick Taurel* (D.C. Bar No. 1741700)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
NATIONAL PRISON PROJECT
915 Fifteenth St. NW, 7th Floor
Washington, DC 20005
(202) 548-6616
echo@aclu.org
ptaurel@aclu.org

Michael Tan*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
Aditi Shah*
NATIONAL PRISON PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2600
mtan@aclu.org
ashah@aclu.org

/s/ Arthur B. Spitzer

Arthur B. Spitzer (D.C. Bar No. 235960)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
OF THE DISTRICT OF COLUMBIA
915 Fifteenth St. NW, 2nd Floor
Washington, DC 20005
(202) 601-4266
aspitzer@acludc.org

My Khanh Ngo*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
(415) 343-0764
mngo@aclu.org

*application for admission *pro hac vice*
forthcoming

†*Pro hac vice* application forthcoming; bar
application pending in DC; practice limited to
federal courts

Counsel for Plaintiffs