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Democracy Dies in Darkness

ICE delayed its pandemic response, putting detainees at ‘substantial’ risk of harm, judge finds

By **Meagan Flynn**

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A federal judge on Monday ordered immigration authorities to begin considering for release all detained immigrants at higher risk of complications from covid-19, admonishing U.S. Immigration and Customs Enforcement in stark terms for a slow, insufficient response to the pandemic which he said has put lives in jeopardy.

U.S. District Judge Jesus Bernal, based in Los Angeles, granted an emergency preliminary injunction at the request of immigrants with serious medical conditions or disabilities who said ICE had failed to take meaningful steps to protect them from the virus over the past month.

Bernal, in siding with the immigrants, said they were likely to succeed in their arguments that ICE has shown “medical indifference” and has put them at “substantial risk of harm” because of a month-long delay in developing a systemwide plan to combat the pandemic in the close quarters of detention buildings.

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His order requires the agency to address shortcomings in current plans and create “minimum acceptable conditions” that all facilities must follow to ensure the safety of medically vulnerable immigrants who remain in custody. The case is Fraihat, et al. v. U.S. Immigration and Customs Enforcement.

“As a result of these deficiencies, many of which persist more than a month into the COVID-19 pandemic, the Court concludes Defendants have likely exhibited callous indifference to the safety and well-being of the [vulnerable detained immigrants],” wrote Bernal, an Obama appointee in the Central District of California. “The evidence suggests systemwide inaction that goes beyond a mere ‘difference of medical opinion or negligence.’”

ICE could not immediately be reached for comment late Monday night. In court filings, the agency said it had taken measures to protect detainees and defended them as sufficient and in line with guidance from federal health authorities.

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Bernal's order is among the most sweeping yet affecting immigrant detention, while others have targeted family detention centers where children are housed. Bernal's ruling requires all public and privately operated facilities housing immigrants across the country to consider for release all inmates over 55, who are pregnant or who have serious underlying health conditions.

In recent weeks, many immigrants with health conditions ranging from diabetes to cardiovascular disease have desperately sought relief in individual petitions, and several judges have ordered the release of other at-risk immigrants in smaller groups. As The Washington Post's Marissa J. Lang reported recently, some have waged hunger strikes in protest of the conditions, living in cramped quarters without the ability to practice social distancing or to wash hands frequently.

Bernal said that the number of infected detainees and staff is increasing at "an alarming rate." So far, 220 detainees and 30 ICE detention center staff members have tested positive for coronavirus, up from 11 total cases on April 2, according to ICE data. The judge said that at larger facilities, "a COVID-19 outbreak could result in dozens of deaths."

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ICE does have a “Pandemic Response Requirements” plan in place as of April 10, which includes social distancing measures and asks field offices to flag medically vulnerable detainees. It also requires pre-intake screenings for all new arrivals or anyone entering the facility, and requires isolating immigrants who test positive for coronavirus away from healthy people, as well as giving them face masks.

But Bernal questioned why it took a full month from the time the World Health Organization declared a global pandemic for ICE to create a plan with actual requirements. Before April 10, local field offices were operating under nonbinding “guidelines” with questionable compliance, according to the ruling.

Bernal said he was “disturbed” that ICE’s earlier guidance, for weeks, did not “strongly recommend” social distancing measures or personal protective equipment for vulnerable immigrants, and said that as a result of the delays in implementing more robust plans, “any medically vulnerable individual in an ICE facility likely confronts an unreasonable risk of infection, severe illness, and death.”

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The judge reasoned that ICE’s most recent plan may ultimately address some of his concerns, but because of the agency’s “halting start” he still believed court intervention was necessary to make sure ICE followed its own rules.

“The Court has noted at least two probable serious failures to act: first, the month-long failure to quickly identify individuals most at risk of COVID-19 complications and to require specific protection for those individuals,” Bernal wrote, “and second, the failure to take measures within ICE’s power to increase the distance between detainees and prevent the spread of infectious disease, for example by promptly releasing individuals from detention to achieve greater spacing between medically vulnerable individuals and the general population.”

Since March, roughly 700 people have been released from ICE custody under the agency’s original nonbinding guidelines. The number represents a tiny slice of the total population of detainees, according to the ruling. Roughly 32,000 immigrants are currently detained.

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In legal filings, immigrants raised concerns that the failure to release more people from custody meant ICE was unprepared for an outbreak, lacking appropriate space to isolate those showing symptoms.

“Our clients have been calling since this happened completely terrified,” Pilar Gonzalez Morales, a staff attorney with Civil Rights Education and Enforcement Center, told The Washington Post Monday night.

The center filed the suit along with the Southern Poverty Law Center and Disability Rights Advocates, among others advocacy groups.

The detainees are “really scared,” said Gonzalez Morales. “To begin with, ICE was not quick in providing information about what the virus is, how to help contain it. ... They were hearing of this deadly virus, how it could be spread very easily, but they weren’t seeing facilities staff clean more or wear masks or wear gloves.”

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In a written declaration to the court on March 21, an immigrant who is also a licensed medical doctor said he was “extremely worried” about inadequate protection for everyone detained at Aurora Contract Detention Facility in Colorado, which is operated by private-prison contractor GEO Group. “It’s business as usual in here, and I am afraid for my life and that of other detained people,” the immigrant, Mikhail Solomonov, wrote.

He said he brought his concerns to the warden, saying that the facility was failing to take asymptomatic carriers into consideration and observing that some immigrants arrived from jails where they had been in contact with sick people but were detained with the regular population anyway.

“We are up to 80 people in a dorm with capacity of 82 people, and it is impossible to stay away from other people in here,” Solomonov wrote.

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Bernal, in making his case that court intervention was necessary, noted that numerous ICE detention centers are operated by private-prison contractors who “are unlikely to take independent or decisive action given the economic imperative to maintaining full capacity.”

He compared ICE’s response to that of the Federal Bureau of Prisons, which he said has taken firmer measures. Attorney General William P. Barr, for example, ordered the bureau director in a memo to “immediately maximize” release of medically vulnerable inmates from prison to home confinement.

Meanwhile, ICE guidelines merely said “please” consider some for release on an individual basis, “arguably lacking the same sense of urgency or concern,” Bernal said.

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To Bernal, the comparison indicated that civil detainees in the immigration system were likely being treated similarly to or worse than convicted criminals in federal prison. Immigrants in the detention centers are typically awaiting adjudication of their cases on civil matters, such as fighting deportation, awaiting asylum, or for violating terms of a visa.

Bernal suggested in one footnote that ICE could make things easy by simply releasing all immigrants who haven't been convicted of crimes and have no charges pending, cutting its detention population roughly in half, "but it has not elected to do so."

He didn't buy ICE's argument that it was necessary to detain them to protect the safety of the public, considering that an outbreak at any facility could further burden already strapped resources at local hospitals and put more people at risk of infection and death.

It didn't make sense to detain them, either, for the purpose of securing their appearance before immigration judges court if hundreds of immigrants end up seriously ill with coronavirus.

Immigrants who die of covid-19, Bernal said, certainly can't make an appearance.

