

January 5, 2023

VIA EMAIL

The Honorable Alejandro Mayorkas  
Secretary of Homeland Security  
U.S. Department of Homeland Security  
2801 Nebraska Ave., NW  
Washington, DC 20528

The Honorable Tae D. Johnson  
Acting Director  
U.S. Immigration and Customs Enforcement  
500 12<sup>th</sup> St. SW  
Washington, DC 20536



**Re: ICE's Failure to Conduct Custody Redeterminations and Ensure Availability of COVID-19 Antiviral Drugs in ICE Detention Facilities**

Dear Secretary Mayorkas and Acting Director Johnson:

As we have discussed in the past, U.S. Immigration and Customs Enforcement (ICE) detention centers pose a high risk of COVID-related harm to medically vulnerable people, especially in light of new COVID-19 variants, and ICE's continued failure to ensure robust protections, including medical care, in detention facilities. To date, over 50,339 detained people have tested positive for COVID-19.<sup>1</sup> COVID-19 infection rates in ICE detention facilities have reached as high as 20 percent greater than in the general public.<sup>2</sup>

On November 1, 2022, ICE revised its COVID-19 Pandemic Response Requirements (v. 10) (PRR),<sup>3</sup> which has glaring failures that will endanger the lives and health of detained people, particularly those who remain at high risk of serious illness, hospitalization, and death from COVID-19. First, the PRR has removed all provisions regarding release of medically vulnerable people from custody, which remains one of the most significant ways to reduce the heightened risk of COVID-19 exposure in congregate settings. Second, ICE fails to require detention facilities to make available COVID-19 antiviral drugs, such as Paxlovid (nirmatrelvir-ritonavir), which provide vital protections against hospitalization

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<sup>1</sup> ICE, *COVID-19 ICE Detainee Statistics by Facility* (last updated Jan. 3, 2023), <https://www.ice.gov/coronavirus#detStat>.

<sup>2</sup> Isabelle Niu & Emily Rhyne, 4 Takeaways From Our Investigation Into ICE's Mishandling of Covid-19 (updated Apr. 26, 2021), <https://www.nytimes.com/2021/04/25/video/immigration-detention-covid-takeaways.html?searchResultPosition=2>.

<sup>3</sup> ICE, Enforcement and Removal Operations, COVID-19 Pandemic Response Requirements, v. 10, Nov. 1, 2022, <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>.

and death. Instead, the only medical treatment that ICE requires its detention facilities to provide to detained people are monoclonal antibodies, which are no longer authorized for the treatment of COVID-19.<sup>4</sup> ICE's failure to require the most basic options and easily-administered treatments for COVID-19 to medically vulnerable immigrants in detention, unless quickly addressed, will lead to foreseeable, serious illness and/or death. For these reasons, as discussed below, we recommend that ICE immediately issue guidance requiring that all detention facilities timely diagnose and provide COVID-19 antiviral medication to all eligible detained people, ensure that each detention facility has sufficient supply of COVID-19 antiviral medication, and conduct custody determinations for the release of medically vulnerable people.



### **I. Conduct Custody Redeterminations for Medically Vulnerable People.**

Although the Preliminary Injunction in *Fraihat v. ICE* is no longer in effect,<sup>5</sup> ICE retains the authority and ability to exercise its discretion to release people, including those who are most vulnerable to serious illness and death, from detention.<sup>6</sup> Even at this stage of the pandemic, the congregate and long-term nature of ICE detention centers continues to pose a heightened risk of COVID-19 to detained people, as noted by the CDC.<sup>7</sup> For this reason, ICE should continue to consider medical vulnerability to COVID-19 in its custodial decisions, and release those at risk of serious illness from COVID-19 from detention.

### **II. ICE's Failure to Require All Detention Facilities to Provide COVID-19 Antiviral Drugs Will Lead to Avoidable Harm, In Violation of Constitutional Protections.**

Antiviral medications, such as Paxlovid, are among the most effective and easily administered treatments to prevent serious illness and death from COVID-19. Early clinical trials found that Paxlovid reduced the risk of hospitalization and death by 89 percent for unvaccinated people at high risk for severe COVID-19.<sup>8</sup> A recent study found that even those with previous infection and vaccination

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<sup>4</sup> *Id.*; Joseph Choi, *FDA Pauses Authorization for Last Remaining COVID-19 Monoclonal Antibody Treatment*, The Hill, Nov. 30, 2022, <https://thehill.com/policy/healthcare/3756877-fda-pauses-authorization-for-last-remaining-covid-19-monoclonal-antibody-treatment/>; Food and Drug Administration, *FDA Announces Bebtelovimab Is Not Currently Authorized in Any U.S. Region*, Nov. 30, 2022, <https://www.fda.gov/drugs/drug-safety-and-availability/fda-announces-bebtelovimab-not-currently-authorized-any-us-region>.

<sup>5</sup> *Fraihat v. ICE*, 445 F. Supp. 3d 709 (C.D. Cal. 2020).

<sup>6</sup> ICE, *Prosecutorial Discretion and the ICE Office of the Principal Legal Advisor* (last updated Sept. 12, 2022), <https://www.ice.gov/about-ice/opla/prosecutorial-discretion> (noting that OPLA attorneys may "exercise their inherent prosecutorial discretion on a case-by-case basis.").

<sup>7</sup> CDC, *COVID-19, Homeless Service Sites & Correctional Facilities*, Nov. 29, 2022, <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-correctional-settings.html>.

<sup>8</sup> Jennifer Hammond, et al., *Oral Nirmatrelvir for High-Risk, Nonhospitalized Adults with COVID-19*, 386 New England J. Med. 1397 (2022), <https://www.nejm.org/doi/full/10.1056/NEJMoa2118542>.



benefit from Paxlovid, which reduced their rate of hospitalization by 51 percent.<sup>9</sup> Paxlovid is also shown to reduce the risk of long COVID: a recent study showed that patients who took the drug were 26 percent less likely to have long-term post-COVID symptoms.<sup>10</sup>

There is no reason that ICE should not require the provision of COVID-19 antiviral medication in all detention facilities. Paxlovid is widely available to the general public. Although it was initially in short supply after its authorization, the medication is “now in ample supply.”<sup>11</sup>

However, ICE’s COVID-19 policy for detention facilities fails to require its detention facilities to provide COVID-19 antiviral drugs to people in immigration custody. Instead, the only medical treatment suggested and recommended are monoclonal treatments, which are no longer authorized for treatment of COVID-19.<sup>12</sup> The most recent available data show that ICE detained over 20,974 people in custody, 258 of whom were under isolation or monitoring after testing positive for COVID-19.<sup>13</sup> Given persistent undertesting and lack of reporting, the number of detained people with COVID-19 is likely even higher.<sup>14</sup>

ICE’s policy is inconsistent with the Centers for Disease Control and Prevention’s (CDC) COVID-19 guidance for correctional and detention facilities, which instructs detention facilities to “[s]upport timely treatment for those eligible,”<sup>15</sup> including antiviral treatments such as Paxlovid, Remdesivir

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<sup>9</sup> M.M. Shah, et al, *Paxlovid Associated with Decreased Hospitalization Rate Among Adults with COVID-19 — United States*, MMWR Morb Mortal Wkly Rep., November 2, 2022, <http://dx.doi.org/10.15585/mmwr.mm7148e2>.

<sup>10</sup> Yan Xie, Taeyoung Choi, Ziyad Al-Aly, *Nirmatrelvir and the Risk of Post-Acute Sequelae of COVID-19*, MedRxiv 2022, <https://www.medrxiv.org/content/10.1101/2022.11.03.22281783v1>; Pam Belluck, *Paxlovid May Reduce Risk of Long COVID in Eligible Patients, Study Finds*, NY Times, Nov. 7, 2022, <https://www.nytimes.com/2022/11/07/health/paxlovid-long-covid.html>.

<sup>11</sup> White House, *Fact Sheet: Biden Administration Increases Access to COVID-19 Treatments and Boosts Patient and Provider Awareness*, Apr. 26, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/26/fact-sheet-biden-administration-increases-access-to-covid-19-treatments-and-boosts-patient-and-provider-awareness/>.

<sup>12</sup> Joseph Choi, *FDA Pauses Authorization for Last Remaining COVID-19 Monoclonal Antibody Treatment*, The Hill, Nov. 30, 2022, <https://thehill.com/policy/healthcare/3756877-fda-pauses-authorization-for-last-remaining-covid-19-monoclonal-antibody-treatment/>; Food and Drug Administration, *FDA Announces Bebtelovimab Is Not Currently Authorized in Any U.S. Region*, Nov. 30, 2022, <https://www.fda.gov/drugs/drug-safety-and-availability/fda-announces-bebtelovimab-not-currently-authorized-any-us-region>.

<sup>13</sup> ICE, *COVID-19 ICE Detainee Statistics by Facility* (last updated Jan. 3, 2023), <https://www.ice.gov/coronavirus#detStat>.

<sup>14</sup> Erika Tyangi, Neal Marquez, Joshua Manson, *A Crisis of Undertesting: How Inadequate COVID-19 Detection Skews the Data and Costs Lives* (2021), [https://uclacovidbehindbars.org/assets/cfr\\_report\\_final.pdf](https://uclacovidbehindbars.org/assets/cfr_report_final.pdf).

<sup>15</sup> CDC, *COVID-19, Homeless Service Sites & Correctional Facilities*, Nov. 29, 2022, <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-correctional-settings.html>.

(Veklury), and Molnupiravir (Lagevrio).<sup>16</sup>As the CDC notes, “[e]ffective treatments are now widely available and must be started within a few days after symptoms develop to be effective.”<sup>17</sup>

ICE’s failure to ensure the provision of COVID-19 antiviral drugs falls below the standard of care required for people in government custody and violates the constitutional rights of detained people.<sup>18</sup> This failure echoes the agency’s indifference to detained people throughout the pandemic. ICE failed to timely implement a COVID-19 vaccination program in detention, and did so only under court order;<sup>19</sup> later, it similarly failed to implement a COVID-19 booster program.<sup>20</sup>



### III. Recommendations

For the reasons discussed above, we urge the agency to address these failures by taking the following actions to protect the health and safety of thousands of individuals in ICE custody:

1. Issue clear, mandatory guidance requiring that all detention facilities timely diagnose and provide COVID-19 antiviral medication to all eligible detained people.
2. Ensure that each detention facility maintain adequate supplies of COVID-19 antiviral medication, and that accessible educational materials in multiple languages regarding COVID-19 treatment are available for all detained people.
3. Conduct and review custody determinations, and release people who are medically vulnerable to COVID-19 based on age or a pre-existing health condition or are otherwise not an enforcement priority.

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<sup>16</sup> CDC, *COVID-19 Treatments and Medications*, Dec. 5, 2022,

<https://www.cdc.gov/coronavirus/2019-ncov/your-health/treatments-for-severe-illness.html>.

<sup>17</sup> CDC, *COVID-19, Homeless Service Sites & Correctional Facilities*, Nov. 29, 2022,

<https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-correctional-settings.html>.

<sup>18</sup> *DeShaney v. Winnebago Cnty. Dep’t of Sec. Servs.*, 389 U.S. 189, 199-200 (1989); *Baker v. Dist. of Columbia*, 326 F. 3d 1302, 1306 (D.C. Cir. 2003); *Banks v. Booth*, 468 F. Supp. 3d 101, 153 (D.D.C. 2020).

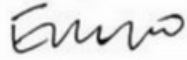
<sup>19</sup> Maria Sacchetti, *ICE Has No Clear Plan for Vaccinating Thousands of Detained Immigrants Fighting Deportation*, Washington Post, Mar. 12, 2021,

[https://www.washingtonpost.com/immigration/ice-detainees-covid-vaccine/2021/03/12/0936ee18-81f5-11eb-81db-b02f0398f49a\\_story.html](https://www.washingtonpost.com/immigration/ice-detainees-covid-vaccine/2021/03/12/0936ee18-81f5-11eb-81db-b02f0398f49a_story.html); *Fraihat v. ICE*, No. 5:19-cv-1546-JGB-SHK (C.D. Cal. June 23, 2021), 2021 WL 2580512.

<sup>20</sup> Letter from Senator Ben Cardin, et al., to Alejandro Mayorkas, DHS Secretary, Feb. 8, 2022, <https://bit.ly/3BusHO4> (“As of January 6, 2022, ICE has administered only 671 booster shots nationwide, to the over 22,000 detainees nationwide in ICE custody each day ... ICE’s apparent failure to successfully administer booster shots places individuals in its custody in great danger.”).

We appreciate your prompt attention and response to this matter. Please contact Eunice Cho, Senior Staff Attorney, ACLU National Prison Project, at [echo@aclu.org](mailto:echo@aclu.org), with any questions.

Sincerely,



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ACLU National Prison Project

Cc: Royce Murray, Claire Trickler-McNulty, Deborah Fleischaker, Ramzi Kassem

