

December 15, 2021

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 12th St. SW
Washington, DC 20536



Re: COVID-19 Vaccine Booster Availability in ICE Detention Facilities

Dear Secretary Mayorkas and Acting Director Johnson:

Throughout the COVID-19 pandemic, U.S. Immigration and Customs Enforcement (ICE) detention centers have been among the most dangerous places in the United States. To date, over 31,441 detained people have tested positive for COVID-19,¹ and COVID-19 infection rates in ICE detention facilities are 20 times higher than in the general public.² COVID-19 continues to pose a grave danger to people in ICE detention, particularly as new COVID-19 variants have emerged, highlighting the importance of continued, aggressive measures against the virus.³

Only robust action can adequately meet the continued challenges of COVID-19. ICE, however, has throughout the pandemic repeatedly failed to timely implement basic public health measures necessary to protect detained people in their custody from COVID-19.⁴ We write now to underscore how ICE's

¹ U.S. Immigration & Customs Enf't, ICE Guidance on COVID-19: Detainee Statistics (updated Dec. 13, 2021), <https://www.ice.gov/coronavirus#detStat>.

² 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>; see also Washington Post, *ICE Is the Superspreader Agency* (May 2, 2021), https://www.washingtonpost.com/opinions/ice-is-the-superspreader-agency/2021/05/01/eb079944-a9f2-11eb-8c1a-56f0cb4ff3b5_story.html.

³ See, e.g., 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/>.

⁴ See, e.g., ACLU Letter to Secretary Mayorkas and Acting Director Johnson, Re: COVID-19 Vaccine Availability in ICE Detention Facilities (May 27, 2021),



inaction is endangering detained people through a glaring gap in its COVID-19 protocols: ICE has *no plan* in place to ensure that detention facilities provide detained people with COVID-19 booster vaccine doses. We urge you to take immediate action to address this failure before further harm is done to the people in ICE custody and the community at large.

I. ICE Has No Plan or Policy in Place to Provide COVID-19 Booster Shots to Detained People.

As we have previously documented, ICE has repeatedly failed to act in response to the COVID-19 pandemic, despite clear guidance from the Centers for Disease Control and Prevention (CDC) and other medical experts. For instance, even after COVID-19 vaccines became widely available, ICE nevertheless failed to adopt a comprehensive plan to provide vaccines to those in its custody, who are at higher risk of contracting and spreading the coronavirus than the general public.⁵ In contrast, the U.S. Bureau of Prisons adopted a vaccination plan at least five to six months before ICE began providing vaccines on a more programmatic scale to high-risk individuals (under court order),⁶ and ICE's own COVID-19 Pandemic Response Requirements (PRR) did not mention the provision of vaccines until October 2021⁷—ten months after the Food and Drug Administration (FDA) authorized the Pfizer-BioNTech COVID-19 Vaccine for emergency use⁸ and two months after half the U.S. population had been vaccinated.⁹

<https://www.aclu.org/letter/letter-dhs-secretary-mayorkas-regarding-vaccine-access> (regarding ICE's failure to provide a coordinated vaccine strategy for people in detention).

⁵ See, e.g., Caroline Simon, *National Vaccination Effort Leaves ICE Detainees Behind*, Roll Call, May 14, 2021, <https://www.rollcall.com/2021/05/14/national-vaccination-effort-leaves-ice-detainees-behind/>; Noah Lanard, "You're Doing Nothing": Judge Slams ICE for Failing to Vaccinate Detainees, Mother Jones (Mar. 4, 2021),

<https://www.motherjones.com/politics/2021/03/youre-doing-nothing-judge-slams-ice-for-failing-to-vaccinate-detainees/>; Maria Sacchetti, *ICE has no clear plan for vaccinating thousands of detained immigrants fighting deportation*, Wash. Post, Mar. 12, 2021,

https://www.washingtonpost.com/immigration/ice-detainees-covid-vaccine/2021/03/12/0936ee18-81f5-11eb-81db-b02f0398f49a_story.html

⁶ Order Accepting Special Master's First Report and Recommendation, *Fraihat v. U.S. Immigration & Customs Enf't*, No. 5:19-cv-1546-JGB-SHK (C.D. Cal. June 23, 2021), ECF No. 318.

⁷ U.S. Immigration & Customs Enf't, ERO COVID-19 Pandemic Response Requirements, Version 7.0 25 (Oct. 19, 2021),

<https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>.

⁸ Press Release, Food and Drug Administration, FDA Takes Key Action in Fight Against COVID-19 By Issuing Emergency Use Authorization for First COVID-19 Vaccine (Dec. 11, 2020), <https://www.fda.gov/news-events/press-announcements/fda-takes-key-action-fight-against-covid-19-issuing-emergency-use-authorization-first-covid-19>.

⁹ Diedre McPhillips, *Half of US Population is fully vaccinated against Covid-19, official says*, CNN, Aug. 6, 2021, <https://www.cnn.com/2021/08/06/health/coronavirus-us-half-population-fully-vaccinated/index.html>.



ICE's experience with COVID-19 boosters is no better. As of this date, ICE has no coordinated strategy to ensure that detained people can receive COVID-19 booster shots, despite urgent need and ample notice. As early as September 24, 2021, the CDC recommended that people with underlying medical conditions or people who are at increased risk for COVID-19 exposure and transmission in high-risk institutional settings may receive a booster shot six or more months after they received a primary series of the Pfizer vaccine.¹⁰ On October 21, 2021, the CDC recommended COVID-19 booster shots to *all* people who received the Johnson & Johnson COVID-19 vaccine two or more months ago, and to all people ages 18 or older who received either the Pfizer or Moderna COVID-19 vaccine six or more months ago and reside in high-risk settings, which include detention centers.¹¹ Thus, all qualifying adults in ICE custody have been eligible for a booster for well over a month. Yet detained people and advocates nationwide have reported that booster shots have not been made available, even upon request. This oversight is particularly acute given that ICE has relied heavily on the Johnson & Johnson vaccine, which has been shown to be less effective against COVID-19 variants.¹²

Alarming, ICE's most recent COVID-19 PRR, which sets COVID-19 policies for detention centers nationwide, makes *no mention whatsoever* about the provision of booster doses.¹³ An ICE official recently confirmed that the agency has no plan in place for detention facilities nationwide to identify detained people who are eligible for booster shots, to offer booster doses without a medical encounter, or to provide education about booster shots.¹⁴ ICE's inadequate provision of COVID-19 vaccines, including its clear failure to administer booster doses, endangers the health and safety of detained people, in continued violation of their constitutional rights.¹⁵

¹⁰ CDC, CDC Statement on ACIP Booster Recommendations (Sept. 24, 2021), <https://www.cdc.gov/media/releases/2021/p0924-booster-recommendations-.html>.

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

¹² 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>; Apoorva Mandavilli, *J.&J. Vaccine May Be Less Effective Against Delta, Study Suggests*, N.Y. Times (updated Aug. 29, 2021), <https://www.nytimes.com/2021/07/20/health/coronavirus-johnson-vaccine-delta.html>.

¹³ U.S. Immigration & Customs Enf't, ERO COVID-19 Pandemic Response Requirements, Version 7.0 (Oct. 19, 2021), <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>.

¹⁴ NGO-ICE Stakeholder Engagement Call: COVID-19 in ICE Detention, Meeting Notes, Nov. 17, 2021.

¹⁵ *Helling v. McKinney*, 509 U.S. 25, 36 (1993); *see also Maney v. Brown*, 516 F. Supp. 3d 1161, 1182, 1184 (D. Or. 2021) (finding deliberate indifference for failure to provide COVID-19 vaccinations for people in custody); Order Accepting Special Master's First Report and Recommendation, *Fraihat v. U.S. Immigration & Customs Enf't*, No. 5:19-cv-1546-JGB-SHK (C.D. Cal. June 23, 2021), ECF No. 318 (ordering ICE to provide vaccinations to subclass of all individuals in ICE custody with certain high risk factors for COVID-19); *see also* Minute Order, *Fraihat* (C.D. Cal. Sept. 28, 2021), ECF No. 344 (clarifying that previous order applied to all subclass members going forward); Order Setting Status Conference, *Malam v. Adducci*, No. 5:20-

II. Conclusion

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. ICE must immediately issue clear guidance requiring that all detention facilities provide COVID-19 vaccines and booster shots to all detained people upon eligibility. ICE must ensure that both vaccines and booster shots are offered affirmatively at intake as well as on a regular basis to all eligible individuals. Those who are unsure about their eligibility should have opportunities to consult a health care provider.
2. ICE must ensure that there are adequate supplies of the vaccines available, and that accessible educational materials in multiple languages regarding COVID-19 vaccines and booster doses are available for all detained people.
3. Above all, ICE should continue to 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.



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 and Michael Tan, Deputy Director, ACLU Immigrants' Rights Project at mtan@aclu.org with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Eunice' or similar, written over a light blue rectangular background.

/S/ Michael Tan

Eunice Cho
Sr. Staff Attorney
ACLU National Prison Project

Michael Tan
Deputy Director
ACLU Immigrants' Rights Project

CC: Tim Perry, Royce Murray, Charyana Krishnaswami, Claire Trickler-McNulty, Deborah Fleischaker, Angela Kelly, Esther Olavarria