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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **EUREKA DIVISION**

15 VICTOR JIMENEZ and JORGE MUTZUTZ,

16 **Petitioners-Plaintiffs,**

17 **v.**

18 U.S. IMMIGRATION AND CUSTOMS
19 ENFORCEMENT; PATRICK
20 LECHLEITNER, Deputy Director and Senior
21 Official Performing the Duties of the Director,
22 U.S. Immigration and Customs Enforcement;
23 MOISES BECERRA, Director of San
24 Francisco Field Office, Enforcement and
25 Removal Operations, U.S. Immigration and
26 Customs Enforcement,

27 **Respondents-Defendants.**

Case No. 1:23-cv-06353-RMI

NOTICE OF MOTION AND MOTION
FOR PRELIMINARY INJUNCTION

(Failure to provide COVID-19 antiviral
medications to medically vulnerable
immigrants detained at Golden State
Annex)

DATE: January 30, 2024
TIME: 11:00 A.M.

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 20 No. 3:20-cv-02731-VC, Dkt. 1205-1 (N.D. Cal. Jan. 27, 2022) (attached as
 21 Cipriano Decl., Ex. I) 22

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NOTICE OF MOTION AND MOTION

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2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE NOTICE
3 that, on January 30, 2023, at 11:00 a.m., or at the nearest available date at which counsel may be
4 heard, Plaintiffs-Petitioners Victor Jimenez and Jorge Mutzutz (“Plaintiffs”) will move for a
5 preliminary injunction to remedy Defendants U.S. Immigration and Customs Enforcement (“ICE”),
6 Patrick Lechleitner, and Moises Becerra’s (“Defendants”) failures to make available timely and
7 adequate testing and antiviral medication for COVID-19.

8 The Motion is based on this Notice of Motion, the accompanying Memorandum of Points
9 and Authorities, the supporting declarations, all pleadings and papers filed in this action, and such
10 additional papers and arguments as may be presented at or in connection with the hearing.

I. INTRODUCTION

11
12 Years after the SARS-CoV-2 (“COVID-19”) pandemic first began, communities across the
13 world continue to grapple with the devastation. The U.S. helped lead global efforts to rein in
14 COVID-19 through its development of novel vaccines and therapeutics, such as antiviral
15 treatments. Yet, despite substantial efforts to combat the effects of COVID-19, the U.S.
16 government has failed to fully utilize the tools available to mitigate the risk of severe cases of the
17 virus. In particular, Defendants have failed to provide proven, effective treatment options for
18 COVID-19 infections to medically vulnerable immigrants that they hold in detention.

19 The Centers for Disease Control and Prevention (“CDC”) and National Institutes of Health
20 (“NIH”) currently recommend antiviral treatment for COVID-19 to medically vulnerable people
21 within days of symptom onset.¹ This antiviral treatment reduces the risk of severe illness and death
22 of medically vulnerable people by nearly 90% percent.² For a year and a half after COVID-19
23 antivirals became available, Defendants provided no guidance to their detention facilities regarding

24
25 ¹ *COVID-19 Treatments and Medications*, <https://www.cdc.gov/coronavirus/2019-ncov/your-health/treatments-for-severe-illness.html> (last updated May 11, 2023); *Coronavirus 2019 (COVID-19) Treatment Guidelines*, <https://www.covid19treatmentguidelines.nih.gov/> (last accessed Nov. 1, 2023).

26
27 ² See President Joseph Biden, *Remarks of President Joe Biden – State of the Union Address as Prepared for Delivery*, THE WHITE HOUSE (March 1, 2022),
28 <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/01/remarks-of-president-joe-biden-state-of-the-union-address-as-delivered/>.

1 the use of these essential treatments for people in their custody. Rather, as recently as early May
2 2023, Defendants recommended the use of monoclonal antibodies for treatment—a treatment
3 option for which the U.S. Food and Drug Administration (“FDA”) had revoked emergency
4 authorization due to its lack of efficacy.³ Defendants did not update their guidance to even mention
5 the use of antiviral treatment options until May 2023.⁴ Defendants *still* do not require detention
6 facilities to provide antiviral drugs like Paxlovid, nor has ICE updated its formulary to require that
7 facilities stock these medications. *See* Cipriano Decl., Ex. A. This failure continues ICE’s pattern
8 of disregard for basic COVID-19 safety measures. For example, a district court found—and the
9 Ninth Circuit affirmed—that ICE exercises “reckless disregard for detainee safety” at another
10 California detention facility. *Roman v. Wolf*, 977 F.3d 935, 943 (9th Cir. 2020). And the
11 Department of Homeland Security (“DHS”) found at another ICE facility that medical units are
12 grossly understaffed, detained individuals are not provided with timely medical assistance when
13 requested, and medications to treat the virus are not ordered, dispensed, or administered in time to
14 treat the virus properly.⁵

15 At ICE’s Golden State Annex Detention Center (“GSA”), Defendants fail to adequately and
16 timely identify and treat COVID-19 infections in detained individuals who are medically vulnerable
17 to serious, adverse health outcomes, as the experiences of those detained at GSA demonstrate.
18 Plaintiffs Victor Jimenez and Jorge Mutzutz are both medically vulnerable to COVID-19 due to a
19 documented history of cardiovascular issues, and both qualify for treatment with COVID-19
20 antiviral medications like Paxlovid. Mr. Jimenez reported COVID-19 symptoms and was not tested
21 for over two weeks. Mr. Mutzutz tested positive for COVID-19 and did not receive an antiviral
22 medication. Declarant Mikhael Moiseev (57 years old) complained about COVID-related
23 symptoms three times before being tested; after testing positive for the virus, she was only provided

25 ³ Joseph Choi, *FDA Pauses Authorization for Last Remaining COVID-19 Monoclonal*
26 *Antibody Treatment* (last updated Nov. 30, 2022, 4:41 PM),
<https://thehill.com/policy/healthcare/3756877-fda-pauses-authorization-for-last-remaining-covid-19-monoclonal-antibody-treatment/>.

27 ⁴ *See* Dkt. No. 1, at 8.

28 ⁵ *Violations of Detention Standards Amid COVID-19 Outbreak at La Palma Correctional Center*
in Eloy, AZ, OFF. OF INSPECTOR GEN., DEP’T OF HOMELAND SEC., (Mar. 30, 2021),
<https://www.oig.dhs.gov/sites/default/files/assets/2021-04/OIG-21-30-Mar21.pdf>.

1 with cough drops, nasal strips, and electrolyte drinks. Other reports similarly show that GSA has
 2 “den[ied] antiviral medication such as Paxlovid” during a recent COVID-19 outbreak.⁶ Plaintiffs
 3 seek to represent a class of individuals who are, or will be, detained by ICE at GSA who are 50
 4 years old or over or who have a medical condition that the CDC recognizes as a medical
 5 vulnerability to COVID-19⁷ (“Class Members” or the “Class”). Defendants’ failure to provide
 6 adequate and timely COVID-19 antiviral treatments to Class Members violates the Class’s Fifth
 7 Amendment rights. Plaintiffs request that this Court enjoin Defendants from further denying the
 8 Class timely and adequate access to testing and treatment.

9 II. STATEMENT OF FACTS

10 A. COVID-19 Poses a Grave Risk to the Plaintiff Class.

11 Through proactive vaccination programs and effective therapeutics, governments across the
 12 world have reduced the risks associated with widespread COVID-19 infections to the point where
 13 COVID-19 is no longer a global health emergency. However, the virus remains a serious public
 14 health concern, particularly for individuals with medical vulnerabilities. Since the start of the
 15 COVID-19 pandemic, over 772 million cases of COVID-19 infections have been reported globally,
 16 of which nearly 7 million cases have resulted in death.⁸ In the U.S., over 1.1 million people have
 17 died thus far from COVID-19.⁹ In California—where GSA is located—state officials have reported
 18 12,251,820 total COVID-19 cases and 110,371 total deaths.¹⁰ The risks of COVID-19 are even
 19 greater in detention facilities such as GSA, where congregate living conditions can cause outbreaks
 20 to rapidly spread.¹¹ And although COVID-19 is a threat to healthy individuals, medically

21 ⁶ John Donegan, *Detainees, advocates outraged over COVID outbreak at Golden State Annex*,
 22 BAKERSFIELD CALIFORNIAN (Sep. 13, 2023), https://www.bakersfield.com/news/detainees-advocates-outraged-over-covid-outbreak-at-golden-state-annex/article_c3a441f4-5288-11ee-9ab5-47c8c213a4f0.html (quotation marks omitted).

23 ⁷ *People with Certain Medical Conditions*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last updated May 11, 2023).

24 ⁸ *COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker/#maps_percent-covid-deaths
 25 (last updated Dec. 11, 2023).

26 ⁹ *COVID Data Tracker*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last updated Nov. 27, 2023).

27 ¹⁰ *Track Covid-19 in California*, <https://www.nytimes.com/interactive/2023/us/california-covid-cases.html> (last updated Dec. 12, 2023).

28 ¹¹ *COVID-19, Homeless Service Sites & Correctional Facilities*, (Nov. 29, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-correctional-settings.html> (“CDC Detention Guidance”).

1 vulnerable people—including those with certain underlying medical conditions or those over the
 2 age of 50—are more likely than healthy persons to be at risk for severe COVID-19, be hospitalized,
 3 need intensive care, require a ventilator to help them breathe, or die.¹² The Class Members are all
 4 medically vulnerable individuals most susceptible to serious illness and death from COVID-19.

5 **B. ICE Denies COVID-19 Antivirals to Medically Vulnerable Class Members.**

6 The FDA has authorized one antiviral drug for treatment of COVID-19, Paxlovid, and
 7 granted emergency use authorization to two others, Veklury and Lagevrio.¹³ The CDC instructs
 8 medical providers to provide these antiviral medications to treat COVID-19.¹⁴ These antiviral
 9 drugs are highly effective in reducing the likelihood of serious illness or death from COVID-19.¹⁵
 10 Numerous studies have shown that Paxlovid is a highly effective treatment option.¹⁶ For example,
 11 clinical trials found that people who were infected with COVID-19 previously or who were
 12 vaccinated when taking Paxlovid within five days of diagnosis have a 51% lower hospitalization
 13 rate than those not prescribed with the drug.¹⁷ The established standard of care is to assess and
 14 treat all people who are at risk for progression to severe COVID-19 for treatment with these
 15 antiviral medications,¹⁸ including people over 50 and people with medical vulnerabilities—in other
 16 words, the Class. As of May 2023, more than 11.6 million treatment courses of Paxlovid alone
 17 have been prescribed in the U.S.¹⁹ Paxlovid is the preferred treatment for COVID-19 and is
 18 recommended to be administered within five days of symptom onset unless it cannot be taken
 19
 20

21 _____
 22 ¹² See *supra* note 7; *Interim Clinical Considerations for COVID-19 Treatment in Outpatients*,
[https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/outpatient-treatment-](https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/outpatient-treatment-overview.html)
 23 [overview.html](https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/outpatient-treatment-overview.html) (last updated Nov. 14, 2023).

24 ¹³ See *supra* note 1.

25 ¹⁴ *Id.*

26 ¹⁵ *What Are The Possible Treatment Options for COVID-19*, ADMIN. FOR STRATEGIC
 27 PREPAREDNESS & RESPONSE, [https://aspr.hhs.gov/COVID-19/Treatments/Pages/Possible-](https://aspr.hhs.gov/COVID-19/Treatments/Pages/Possible-Treatment-Options-for-COVID19.aspx)
 28 [Treatment-Options-for-COVID19.aspx](https://aspr.hhs.gov/COVID-19/Treatments/Pages/Possible-Treatment-Options-for-COVID19.aspx) (last visited December 12, 2023).

¹⁶ Vijayan Decl., ¶ 12.

¹⁷ *Id.* at ¶¶ 12, 14–15.

¹⁸ *Id.* at ¶ 16.

¹⁹ *Pfizer's Paxlovid Receives FDA Approval for Adult Patients at High Risk of Progression to Severe Covid-19*, [https://www.pfizer.com/news/press-release/press-release-detail/pfizers-](https://www.pfizer.com/news/press-release/press-release-detail/pfizers-paxlovidtm-receives-fda-approval-adult-patients)
[paxlovidtm-receives-fda-approval-adult-patients](https://www.pfizer.com/news/press-release/press-release-detail/pfizers-paxlovidtm-receives-fda-approval-adult-patients) (May 25, 2023).

1 because of some contraindication.²⁰ Alternatively, individuals who cannot take Paxlovid due to a
2 contraindication are recommended for treatment with Veklury or Lagevrio.

3 Despite the standard of care being to treat symptomatic Class Members who test positive
4 for COVID-19 with these antiviral medications, Defendants fail to do so. On May 11, 2023, ICE
5 updated its administrative guidelines that set the minimal requirements for ICE detention facilities.
6 Cipriano Decl., Ex. B. ICE’s updated guidelines for the first time recommended that each detainee
7 newly diagnosed with COVID-19 be assessed for possible treatment with antivirals; however, ICE
8 does not *require* this assessment. *Id.* at 16. Paxlovid, Veklury, and Lagevrio are currently not
9 included in ICE’s formulary list—meaning that detention facilities are not required to stock these
10 drugs and medical providers must take additional administrative steps before providing them. *See*
11 Cipriano Decl., Ex. A. And even though ICE updated its guidelines again in July 2023, ICE failed
12 to address these deficiencies. Cipriano Decl., Ex. C. Moreover, a critical piece of the CDC’s
13 guidance, which Defendants fail to enact, is a requirement that antiviral medications be provided
14 in a timely manner to eligible COVID-positive individuals presenting with symptoms.²¹ The
15 effectiveness of COVID-19 antiviral medications depends on their prompt administration after
16 symptom onset—which requires robust testing protocols.²² Defendants fail to require consistent
17 testing for COVID-19 of individuals who are detained at GSA. For example, at the time of filing
18 this Motion, individuals at GSA are only tested for COVID-19 at intake if they present with an
19 elevated temperature or with COVID-like symptoms. *See* Dkt. No. 1, at 4–6. Once intake is
20 complete, individuals detained at GSA are only tested after either coming in contact with someone
21 who is COVID-positive or after exhibiting symptoms. *Id.*

22 These failures are made clear by Plaintiffs’ and Declarant’s experiences. Plaintiff Jorge
23 Mutzutz has a history of cardiovascular issues, including high blood pressure, and wears a heart

24
25 ²⁰ *Therapeutic Management of Nonhospitalized Adults with Mild to Moderate COVID-19 Who Do*
26 *Not Require Supplemental Oxygen*, Table 2a, NAT’L INSTS. OF HEALTH (last updated Nov. 2,
2023) [https://www.covid19treatmentguidelines.nih.gov/tables/therapeutic-management-of-](https://www.covid19treatmentguidelines.nih.gov/tables/therapeutic-management-of-nonhospitalized-adults/)
nonhospitalized-adults/; *see supra* note 1.

27 ²¹ *See* CDC Detention Guidance (“Effective treatments are now widely available and must be
28 started within a few days after symptoms develop to be effective. Support timely treatment for
those eligible”).

²² Vijayan Decl., ¶ 25.

1 monitor. He is medically vulnerable to serious illness from COVID-19. *See* Mutzut Decl., ¶ 5.
2 In August 2023, Mr. Mutzut contracted COVID-19 while detained at GSA and displayed physical
3 symptoms of the disease including pain in his throat, head, and chest. *Id.* at ¶ 6. The facility
4 physician examined Mr. Mutzut and administered a COVID-19 test. *Id.* at ¶ 7. While waiting for
5 the results, the facility physician prescribed Mr. Mutzut with Zithromax. *See* Cipriano Decl., Ex.
6 D at 2. Zithromax (azithromycin) is an antibiotic that is not included in the CDC or NIH treatment
7 recommendations.²³ In fact, studies have concluded that “adding azithromycin to standard care
8 treatment did not reduce the risk of subsequent hospital admission or death” from COVID-19,²⁴
9 and that it increases the chance of complications in COVID-19 patients who, like Mr. Mutzut and
10 Mr. Jimenez, have a history of cardiovascular issues.²⁵ After Mr. Mutzut tested positive for
11 COVID-19, the facility physician failed to prescribe him an antiviral medication, like Paxlovid.
12 Mutzut Decl., ¶¶ 8, 10. Aside from the antibiotic, Mr. Mutzut was only provided with cough
13 medicine, sore throat lozenges, and Tylenol to treat his COVID-19 infection. *See* Cipriano Decl.,
14 Ex. D. at 2.

15 Plaintiff Victor Jimenez is a 54-year-old man detained at GSA who suffers from
16 hypertension and cardiovascular issues. *See* Jimenez Decl., ¶¶ 1, 3. He was recently held in a unit
17 where multiple people tested positive for COVID-19 and experienced severe symptoms. *Id.* at ¶ 6.
18 On August 10, 2023, Mr. Jimenez complained to the facility physician that he was experiencing
19 headaches. *See* Cipriano Decl., Ex. E at 45–48 (showing an August 10, 2023, headache

20
21 ²³ *See supra* note 1.

22 ²⁴ *See, e.g.,* Timothy S C Hinks, et al., *Azithromycin versus standard care in patients with mild-*
23 *to-moderate COVID-19 (ATOMIC2): an open-label, randomized trial*, *The Lancet Respiratory*
24 *Medicine* (Jul. 9, 2021), [https://www.thelancet.com/journals/lanres/article/PIIS2213-](https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(21)00263-0/fulltext)
25 [2600\(21\)00263-0/fulltext](https://www.thelancet.com/journals/lanres/article/PIIS2213-2600(21)00263-0/fulltext); *see also* Catherine E. Oldenburg, et al. *Effect of Oral Azithromycin vs*
26 *Placebo on COVID-19 Symptoms in Outpatients with SARS-CoV-2 Infection*, *J. OF THE AM.*
27 *MED. ASSOC.* (Jul. 16, 2021), <https://jamanetwork.com/journals/jama/fullarticle/2782166>
28 (concluding after a randomized, controlled clinical trial that the “findings do not support the
routine use of azithromycin for outpatient SARS-CoV-2 infection”).

26 ²⁵ Maria Bergami, et al. *Relationship Between Azithromycin and Cardiovascular Outcomes in*
27 *Unvaccinated Patients with COVID-19 and Preexisting Cardiovascular Disease*, *J. OF THE AM.*
28 *HEART ASSOC.* (Jul. 14, 2023), <https://www.ahajournals.org/doi/10.1161/JAHA.122.028939>
(finding that “azithromycin therapy was consistently associated with an increased risk of acute
heart failure and death in [COVID-19] patients with preexisting cardiovascular disease”).

1 assessment). Five days later, Mr. Jimenez reported chest pains and told the physician that it hurt
2 to lay down. *See id.* at 41–44 (showing an August 15, 2023, chest-pain assessment). The next day,
3 Mr. Jimenez reported feeling feverish, continued chest pains, and having a runny nose. *See id.* at
4 39. At this point, the physician also prescribed him with Zithromax, allergy medicine, and
5 ibuprofen. *See id.* at 40. GSA failed to test Mr. Jimenez for COVID-19 until August 22 when there
6 appeared to be a COVID-19 outbreak at GSA. *See id.* at 15 (showing Mr. Jimenez was administered
7 a “COVID Abbott Rapid Test” on August 22, 2023). At this point, twelve days after Mr. Jimenez
8 first presented with COVID-like symptoms, he tested negative. *See id.* at 15, 45–48. Mr. Jimenez
9 does not know whether the symptoms he experienced in August 2023 were COVID-related because
10 of the delay in testing and failure to confirm his negative result. Mr. Jimenez continues to fear
11 contracting COVID-19 due to his medical conditions. Jimenez Decl., ¶ 11 These fears are
12 exacerbated by his conversations with detained individuals who previously contracted COVID-19,
13 who have informed him that they were only provided with Tylenol and water, with no mention of
14 antiviral medication. *Id.* at 13.

15 Declarant Mikhael Moiseev is 57 years old. Moiseev Decl., ¶ 2. According to the CDC,
16 her age puts her at risk for severe COVID-19, and she qualifies for the use of a COVID-19 antiviral.
17 When Ms. Moiseev was transferred to GSA, she informed the GSA facility staff of her COVID-
18 like systems on three separate occasions but was not tested for COVID-19 until two weeks after
19 she had first notified the staff of her symptoms. *Id.* at ¶ 5. When she was finally tested, and received
20 a positive result, GSA facility staff only provided her with cough drops, nasal strips, and electrolyte
21 drinks, not an antiviral drug. *Id.* at ¶ 6.

22 **III. LEGAL STANDARD**

23 Plaintiffs are entitled to a preliminary injunction if they show: (1) “that [they are] likely to
24 succeed on the merits,” (2) “that [they are] likely to suffer irreparable harm in the absence of
25 preliminary relief,” (3) “that the balance of equities tips in [their] favor,” and (4) “that an injunction
26 is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “Where the
27 government is a party to a case in which a preliminary injunction is sought, the balance of equities
28 and public interest factors merge.” *Roman*, 977 F.3d at 940–41. Under the Ninth Circuit’s sliding

1 scale approach, a stronger showing of one element may offset a weaker showing of another. *See*
2 *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012). Where “the balance of hardships . . .
3 tips sharply towards the plaintiff, a plaintiff need only show serious questions going to the merits,
4 rather than likelihood of success on the merits.” *Roman*, 977 F.3d at 941 (internal quotation
5 omitted). To succeed under the “serious questions” test, Plaintiffs must show only that they are
6 likely to suffer irreparable injury and that an injunction is in the public’s interest. *Id.*

7 **IV. ARGUMENT**

8 **A. Plaintiffs are Likely to Succeed on the Merits.**

9 Plaintiffs raise two independent Fifth Amendment violations in this case: (1) the failure to
10 provide conditions of reasonable health and safety; and (2) unconstitutional punishment. Either
11 permits the Court to enter an injunction.

12 ***1. Defendants’ Failure to Provide COVID-19 Antiviral Drugs at GSA Violates the Fifth*** 13 ***Amendment Right to Reasonable Health and Safety.***

14 The Fifth Amendment requires the U.S. government to provide conditions of reasonable
15 health and safety to people in its custody. *Roman*, 977 F.3d at 943; *Youngberg v. Romeo*, 457 U.S.
16 307, 315–16 (1982). The U.S. government violates this right when: “(i) [the U.S. government]
17 ma[kes] an intentional decision with respect to the conditions under which the plaintiff was
18 confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the
19 [U.S.] government did not take reasonable available measures to abate that risk, even though a
20 reasonable official in the circumstances would have appreciated the high degree of risk involved;
21 and (iv) by not taking such measures, the [U.S. government] caused the plaintiff’s injuries.” *Roman*,
22 977 F.3d at 943 (citation and alterations omitted). “With respect to the third element, the
23 defendant’s conduct must be objectively unreasonable, a test that will necessarily ‘turn[] on the
24 facts and circumstances of each particular case.’” *Castro v. Cnty. of L.A.*, 833 F.3d 1060, 1071
25 (9th Cir. 2016).

26 “[C]laims for violations of the right to adequate medical care” under the Fifth Amendment
27 “must be evaluated under an objective deliberate indifference standard.” *See Gordon v. Cnty. of*
28 *Orange*, 888 F.3d 1118, 1125–26 (9th Cir. 2018) (considering right to adequate medical care under

1 the Fourteenth Amendment) (cleaned up); *Roman*, 977 F.3d at 943 (applying *Gordon* to Fifth
2 Amendment claims brought by detained immigrants). A plaintiff need not show that the relevant
3 government officials are “subjectively aware that their [actions are] unreasonable;” they instead
4 must only show that “a reasonable official in the circumstances would have appreciated the high
5 degree of risk involved.” *Gordon*, 888 F.3d at 1123, 1125. These constitutional protections extend
6 to “future harm,” including a “condition of confinement that is sure or very likely to cause serious
7 illness and needless suffering the next week or month or year.” *See Helling v. McKinney*, 509 U.S.
8 25, 33 (1993).

9 *i. The Government’s Refusal to Provide Access to Paxlovid Is Intentional.*

10 The first *Roman* factor, “the [Government] ma[kes] an intentional decision with respect to
11 the conditions under which the plaintiff was confined,” *Roman*, 977 F.3d at 944, requires that either
12 Defendants took an “affirmative act . . . knowingly and purposefully” or, when a claim involves
13 “inaction rather than action,” that Defendants’ “conduct with respect to the plaintiff was
14 intentional.” *Castro*, 833 F.3d at 1070 (9th Cir. 2015). “For example, if the claim relates to housing
15 two individuals together, the inquiry at this step would be whether the placement decision was
16 intentional.” *Id.* “Or, if the claim relates to inadequate monitoring of the cell, the inquiry would
17 be whether the officer chose the monitoring practices rather than, for example, having just suffered
18 an accident or sudden illness that rendered him unconscious and thus unable to monitor the cell.”
19 *Id.* A decision not to “implement responsive measures specific to high-risk detainees . . . despite
20 knowledge of the acute risks posed to them” by COVID-19 represents an “intentional decision.”
21 *Urdaneta v. Keeton*, No. CV-20-00654, 2020 WL 2319980, at *10 (D. Ariz. May 11, 2020).

22 Here, Defendants have made an intentional decision not to implement responsive measures
23 that would protect the health and safety of the Class despite being fully aware of the risks COVID-
24 19 poses to them. Defendants’ COVID-19 guidelines include a section on treatment of COVID-19
25 infections for people with risk factors. *See Cipriano Decl.*, Ex. C at 16. This section explains that
26 COVID-19 “can lead to severe symptoms, hospitalization, and death.” *Id.* Court findings of
27 constitutional violations in other lawsuits have also put ICE on notice of the need for measures to
28

1 protect medically vulnerable detained immigrants from the risk of severe COVID-19. *See e.g.*,
2 *Roman*, 977 F.3d at 943; *Zepeda Rivas v. Jennings*, 845 F. App'x 530, 534 (9th Cir. 2021).

3 Defendants are also aware of the specific danger posed by the lack of access to COVID-19
4 antivirals.²⁶ Defendants' own COVID-19 guidelines acknowledge that "treatment with antiviral
5 medication . . . reduces the risk of progression to severe disease, decreases the need for
6 hospitalization, and reduces the severity of disease thereby improving survival," *see* Cipriano Decl.,
7 Ex. C at 16, and an email from the Chief Pharmacist of Defendant ICE's Health Services Corps
8 that was produced in FOIA litigation notes the importance of "encourag[ing] . . . use of therapeutic
9 products like Paxlovid and Lagevrio to reduce risk of serious outcomes in vulnerable individuals."
10 *See* Cipriano Decl., Ex. F at 1. In addition, the ACLU wrote a letter to Defendants on January 5,
11 2023, citing evidence showing that Paxlovid significantly decreased the rate of COVID-19
12 hospitalization and of long-term post COVID-19 symptoms.²⁷ The letter highlighted CDC
13 guidance urging antiviral treatment to be administered within a few days of symptom onset.²⁸
14 Further underscoring Defendants' knowledge that they should provide antiviral treatment is another
15 document produced in the FOIA litigation, which shows ICE's "talking points" for conversations
16 with the press. *See* Cipriano Decl., Ex. G at 1. These talking points assure the press that "ICE
17 provides . . . antiviral treatment to detainees who test positive for COVID-19 in accordance with
18 the FDA's emergency use authorizations." *Id.* at 7. That Defendants know to tell the press that
19 they provide antiviral drugs—even when those assurances conflict with the poor care Defendants
20 actually provide—shows that Defendants are well aware that they should provide these drugs.

21 Despite knowing the risks associated with COVID-19 and the failure to provide access to
22 antiviral treatments, Defendants chose not to take steps to address these risks. Plaintiffs and
23 Declarant explain that detained immigrants at GSA are not timely tested and are not offered
24 antiviral medication even when eligible, and Plaintiffs' medical records corroborate their

25 _____
26 ²⁶ *See, e.g.*, Letter from ACLU to Sec. Alejandro Mayorkas, *ICE's Failure to Conduct Custody*
27 *Redeterminations and Ensure Availability of COVID-19 Antiviral Drugs in ICE Detention*
28 *Facilities* (Jan. 5, 2023), <https://www.aclu.org/letter/letter-dhs-re-ices-failure-conduct-custody-redeterminations-and-ensure-availability-covid-19>.

²⁷ *See supra* note 26.

²⁸ *Id.*

1 explanations. *See supra* at 8–10. These statements are further supported by an article about a
2 recent outbreak at GSA explaining that the facility “den[ies] antiviral medication such as
3 Paxlovid.”²⁹ Defendants’ failure to remedy these conditions, despite their knowledge of the
4 particular risks COVID-19 poses to those with medical vulnerabilities, is an intentional decision.
5 *Roman*, 977 F.3d at 943. Defendants’ intent is demonstrated even more starkly by their decision
6 to enact policies that have fallen short of what would be required to ensure access to antiviral
7 medication. For example, Defendants have yet to list antivirals in their formulary. *See* Cipriano
8 Decl., Ex. A. The National Commission on Correctional Health Care defines a formulary as “a
9 written list of prescription and nonprescription medications that are ordinarily available to
10 authorized prescribers . . . working for the facility.” *See* Cipriano Decl., Ex. H at 71. It explains
11 that although “[t]he presence of a formulary does not necessarily prohibit use of nonformulary
12 medications prescribed by community health professionals,” these non-formulary medications are
13 “subject to review and approval by the responsible physician.” *Id.* at 72. As researchers have
14 observed for other types of medication, “[d]rug formularies are a key determinant of access by
15 incarcerated patients to . . . medications.”³⁰ Defendants’ decision not to list COVID-19 antiviral
16 drugs on their formulary thus decreases the likelihood that detained immigrants who qualify for
17 these medications will receive them. The delays associated with an additional layer of approval for
18 a non-formulary medication is particularly problematic in the context of COVID-19 antivirals that
19 should be started “within a few days” to maximize their efficacy.³¹ The practical effects of
20 Defendants’ decision to leave COVID-19 antivirals off their formulary are apparent in Plaintiffs’
21 experiences. Both Plaintiffs were denied COVID-19 antivirals and instead were prescribed
22 Zithromax (azithromycin)—a drug that is ineffective against COVID-19 and risks complications
23 for people who, like both Plaintiffs, have cardiovascular issues.³² Azithromycin appears on
24 Defendants’ formulary, *see* Cipriano Decl., Ex. A at 1, which likely explains why Plaintiffs
25 received it instead of the non-formulary COVID-19 antivirals they actually needed. Further,

26 ²⁹ *See supra* note 6.

27 ³⁰ Nathaniel P. Morris, *et al.*, *Drug Formularies in Correctional Settings*, 48 J. OF THE AM.
ACADEMY OF PSYCHIATRY AND THE L. 2, 2 (2020) <https://jaapl.org/content/48/1/2#xref-ref-24-1>.

28 ³¹ *See* CDC Detention Guidance.

³² *See supra* note 24.

1 although ICE’s guidelines for facilities acknowledge that treatment of COVID-19 “appears to work
 2 best when started early after the diagnosis is made in appropriately selected patients,” they fall short
 3 of requiring that people with risk factors be evaluated for this medication. *See* Cipriano Decl., Ex.
 4 C at 16. Instead, these guidelines merely make a non-binding recommendation “that each detainee
 5 newly diagnosed with COVID-19 be assessed for possible treatment,” *id.*—a recommendation that
 6 the evidence shows is routinely ignored at GSA. *See supra* at 8–10. Thus, there is sufficient
 7 evidence to show that Defendants made an intentional decision not to timely supply antiviral
 8 treatment to the detained individuals.

9 *ii. Defendants’ Failure to Supply Antivirals Creates Significant Risk.*

10 For Class Members, COVID-19 infections pose a serious harm or risk of death if not timely
 11 and effectively treated. The CDC recognizes that “the congregate living arrangements in . . .
 12 detention facilities” increases COVID-19 transmission, and COVID-19 risk factors in people in
 13 those facilities increases both “the risk of COVID-19 transmission” and “the risk for severe
 14 outcomes from COVID-19.”³³ Class Members are at significant risk of serious complications from
 15 COVID-19, including major organ damage; blood clots and strokes; long-term neurological,
 16 cardiac, and pulmonary issues; and death.³⁴ Antiviral medications are highly effective at reducing
 17 this risk.³⁵ For example, initial clinical trials for Paxlovid showed the drug reduced the risk of
 18 hospitalization and death by 89%.³⁶ Defendants’ failure to ensure the availability of these life-
 19 saving COVID-19 drugs thus sharply increases the risk that Class Members will die or face serious
 20 complications from COVID-19. This risk is not merely theoretical: Defendants have reported at
 21 least 11 COVID-19 deaths of people in their custody, a likely undercount.³⁷ *See Romero-Lorenzo*

22 ³³ *See* CDC Detention Guidance.

23 ³⁴ Vijayan Dec., ¶¶ 6–7; *see also COVID-19 Risks and Information for Older Adults*,
<https://www.cdc.gov/aging/covid19/index.html> (last updated Feb 22, 2023); *see supra* note 7.

24 ³⁵ *Id.* at ¶¶ 10–15.

25 ³⁶ *Id.* at ¶ 12.

26 ³⁷ UCLA Law COVID Behind Bars Data Project, *U.S. Immigrations and Customs Enforcement*
 (last visited Dec. 14, 2023), <https://uclacovidbehindbars.org/ice>; Dan Glaun, *How ICE Data*
Undercounts COVID-19 Victims, PBS Frontline (Aug. 11,
 2020), [https://www.pbs.org/wgbh/frontline/article/how-ice-data-undercounts-covid-19-](https://www.pbs.org/wgbh/frontline/article/how-ice-data-undercounts-covid-19-victims/)
 27 [victims/](https://www.pbs.org/wgbh/frontline/article/how-ice-data-undercounts-covid-19-victims/); *see also* Maura Turcotte, Rachel Sherman, Rebecca Griesbach and
 Ann Hinga Klein, *The Real Toll from Prison Covid Cases May Be Higher than Reported*, NEW
 28 YORK TIMES (Aug. 30, 2021), [https://www.nytimes.com/2021/07/07/us/inmates-incarcerated-](https://www.nytimes.com/2021/07/07/us/inmates-incarcerated-covid-deaths.html)
[covid-deaths.html](https://www.nytimes.com/2021/07/07/us/inmates-incarcerated-covid-deaths.html).

1 v. *Koehn*, No. CV2000901, 2023 WL 2924882, at *18 (D. Ariz. Mar. 30, 2023) (finding two
2 COVID-19 deaths in custody to support a showing of significant risk).

3 *iii. Defendants Have Not Taken Reasonably Available Measures to Abate COVID-19 Risks.*

4 Defendants are not taking “reasonable available measures to abate th[e] risk” that their
5 policies pose to people with COVID-19 risk factors, “even though a reasonable official in the
6 circumstances would . . . appreciate[] the high degree of risk involved.” *Roman*, 977 F.3d at 943,
7 947. When an antiviral medication is available and clinically indicated, the Constitution requires
8 detention facilities to make it available. *Stafford v. Carter*, No. 17-cv-00289, 2018 WL 4361639,
9 at *20 (S.D. Ind. Sept. 13, 2018); *Chimenti v. Wetzel*, No. 15-3333, 2018 WL 3388305, at *9 (E.D.
10 Pa. July 12, 2018).³⁸ Defendants’ policies and practices ignore NIH guidance for COVID-19
11 treatment, CDC guidance for COVID-19 prevention in detention centers, and the President’s
12 statements and stance on how to manage COVID-19.³⁹ Defendants even acknowledge that antiviral
13 medication “reduces the risk of progression [of COVID-19], decreases the need for hospitalization,
14 and reduces the severity of disease thereby improving survival.” See Cipriano Decl., Ex. C at 16.

15 Defendants have failed to implement the reasonably available measures that Plaintiffs seek.
16 Antiviral medications are reasonably available. These antiviral drugs have been widely distributed
17 through hospital and primary care practices throughout the U.S., with over 11 million courses of
18 one drug, Paxlovid, distributed by May of 2023.⁴⁰ Antivirals have become the standard of care
19 across the U.S. Vijayan Decl., ¶ 16. The California Correctional Health Services lists both
20 Paxlovid and Veklury on its formulary.⁴¹ “Guidance from the CDC and NIH make clear that such
21 medications are available to detention facilities.” *Romero-Lorenzo*, 2023 WL 2924882, at *25. For
22 these reasons, at least one other court has found that a “fact finder could . . . conclude that not
23

24 ³⁸ *Stafford* and *Chimenti* address claims under the Eighth Amendment by people serving criminal
25 sentences rather than the Fifth Amendment claims at issue here. The Eighth Amendment sets a
26 higher bar than the Fifth Amendment, so these opinions’ holdings, a fortiori, apply here. *City of*
Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) (holding that “the due process rights of a
27 person . . . are at least as great as the Eighth Amendment protections available to a convicted
28 prisoner.”).

³⁹ See *supra* notes 1–2.

⁴⁰ See *supra* note 19.

⁴¹ California Correctional Health Care Services, *Drug Formulary*, 70 (Rev’d Oct. 13,
2023), <https://cchcs.ca.gov/wp-content/uploads/sites/60/MS/CCHCS-CDCR-Formulary.pdf>.

1 having antiviral medications readily available to treat . . . COVID-19 positive detainees is not
2 objectively reasonable” and could violate the Fifth Amendment. *Id.* Here, too, when Defendants
3 fail to make COVID-19 antivirals available, they fail to take “reasonable available measures to
4 abate th[e] risk” Class Members face, in violation of the due process rights of the Class. *Roman*,
5 977 F.3d at 943.

6 *iv. Defendants Caused Plaintiffs’ Injuries.*

7 A plaintiff seeking injunctive relief “need only prove a sufficiently imminent danger” to
8 warrant relief under the Fifth Amendment “because a remedy for unsafe conditions need not await
9 a tragic event.” *Roman*, 977 F.3d at 943 (citing *Helling*, 509 U.S. at 33–34) (quotation marks
10 omitted); *see also Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (“[H]aving stripped [incarcerated
11 people] of virtually every means of self-protection and foreclosed their access to outside aid, the
12 government and its officials are not free to let the state of nature take its course.”); *Smith v.*
13 *Washington*, 781 F. App’x 595, 598 (9th Cir. 2019) (recognizing harm caused by a pandemic).

14 Here, Defendants have put the Class in imminent danger caused by the unsafe conditions
15 that Defendants fail to mitigate. *See Roman*, 977 F.3d at 943. The Class is in the agonizing position
16 of being detained in an environment known to drastically increase the risk of contracting COVID-
17 19⁴² while simultaneously facing potentially life-threatening medical complications from the
18 disease.⁴³ Defendants deny the Class antiviral medications that are highly effective in preventing
19 serious illness and death from COVID-19.⁴⁴ This denial places the Class in imminent danger.

20 **2. Defendants’ Failure to Provide Paxlovid Is Unconstitutional Punishment.**

21 In the alternative, Defendants violate the Class’s right to be free of punishment in civil
22 detention. The Ninth Circuit has held that conditions of confinement for civil detainees must be
23 *superior* not only to people serving prison sentences, but also to people detained pre-trial. *See*
24 *Jones v. Blanas*, 393 F.3d 918, 933–34 (9th Cir. 2004), *cert. denied*, 546 U.S. 820 (2005); *King v.*
25 *Cnty. of L.A.*, 885 F.3d 548, 552, 557 (9th Cir. 2018). The Ninth Circuit has also held that when a
26 civil “detainee is confined in conditions identical to, similar to, or more restrictive than, those in

27 ⁴² *See* CDC Detention Guidance.

28 ⁴³ *See supra* note 7.

⁴⁴ Vijayan, Decl. ¶ 10.

1 which his criminal counterparts are held, we presume that the detainee is being subjected to
 2 ‘punishment.’” *Jones*, 393 F.3d at 932. Here, Plaintiffs are being held in more restrictive
 3 conditions than their criminal counterparts.

4 Individuals detained in California’s criminal system, either awaiting trial or already
 5 convicted, are provided access to COVID-19 antivirals. For instance, the California Correctional
 6 Health Care Services includes Paxlovid and Veklury on its formulary,⁴⁵ and the Orange County
 7 Jail agreed to provide, *inter alia*, “therapeutic antiviral medications” to people confined in the jail.
 8 *Ahlman v. Barnes*, No. SACV20835, 2022 WL 16957837, at *2 (C.D. Cal. Sept. 12, 2022).
 9 Similarly, San Quentin State Prison recently updated its COVID-19 protocols to make Paxlovid,
 10 Veklury, and/or Lagevrio available.⁴⁶ Unlike their counterparts described above, Plaintiffs—
 11 individuals in civil detention—do not have access to life-saving COVID-19 treatment. This
 12 disparity represents unconstitutional punishment because Plaintiffs are being “confined in
 13 conditions . . . more restrictive” than their criminal counterparts in the California state prisons and
 14 in the Orange County Jail. *Jones*, F.3d at 932.

15 **B. Defendants’ Failure to Provide Paxlovid Causes Plaintiffs and Other Detainees to**
 16 **Suffer Irreparable Harm.**

17 “It is well established that the deprivation of constitutional rights unquestionably constitutes
 18 irreparable injury.” *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (cleaned up).
 19 Defendants have violated the Class’s Fifth Amendment rights. “Because [they are] likely to
 20 succeed on the merits of [their] due process claim, [they have] carried [their] burden as to
 21 irreparable harm.” *Perera v. Jennings*, No. 21-CV-04136, 2021 WL 2400981, at *5 (N.D. Cal.
 22 June 11, 2021) (quotation marks omitted). Dangerous, unsafe detention conditions also constitute
 23 irreparable harm. *See Roman*, 977 F.3d at 944 (“The district court also correctly concluded that
 24 Plaintiffs were likely to suffer irreparable harm absent relief given COVID-19’s high mortality
 25 rate.”). Likewise, the Class suffers irreparable harm because the Defendants’ actions threaten to
 26 worsen an individual’s health. *See M.R. v. Dreyfus*, 663 F.3d 1100, 1111 (9th Cir. 2011), *as*

27 ⁴⁵ CALIFORNIA CORRECTIONAL HEALTH CARE SERVICES, *supra* note 65.

28 ⁴⁶ Bostyon Johnson, *San Quentin Issues New COVID-19 Protocols*, San Quentin News, 10
 (September 2022), https://sanquentinnews.com/wp-content/uploads/2022/10/SQN_Edition_148_September_2022.pdf.

1 amended by 697 F.3d 706 (9th Cir. 2012). Here, Plaintiffs are denied necessary medical care
2 because Defendants do not provide access to antivirals—despite acknowledging that doing so
3 would improve COVID-19 survivability. See Cipriano Decl., Ex. C at 16. By refusing the Class
4 adequate access to COVID-19 antivirals, Defendants—at a minimum—threaten to worsen
5 Plaintiffs’ health by not having the potentially lifesaving treatment on hand when Plaintiffs
6 inevitably contract COVID-19. See *M.R.*, 663 F.3d at 1111. Thus, Plaintiffs have suffered
7 irreparable harm.

8 **C. The Balance of Equities and the Public Interest Weigh in Plaintiffs’ Favor.**

9 Plaintiffs are entitled to a preliminary injunction if, among other factors, they can show that
10 the balance of interests tips in their favor. See *Winter*, 555 U.S. at 20. When balancing both parties’
11 interests, this Court has held that this balancing tips in a party’s favor if it “faces irreparable harm
12 to [its] constitutional rights and health,” and “there is no harm to the Government when a court
13 prevents the Government from engaging in unlawful practices.” *Castillo*, 449 F. Supp. 3d at 923.
14 Indeed, “[f]aced with . . . preventable human suffering, [the Ninth Circuit] ha[s] little difficulty
15 concluding that the balance of hardships tips decidedly in plaintiffs’ favor.” *Hernandez*, 872 F.3d
16 at 996 (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)). “It is always in the public
17 interest to prevent the violation of a party’s constitutional rights.” *Sammartano v. First Judicial*
18 *District Court*, 303 F.3d 959, 974 (9th Cir. 2002). Maintaining these protections is especially
19 important “to those most in need of such [constitutional] protection.” *Cobine v. City of Eureka*,
20 No. C 16-02239, 2016 WL 1730084, at *7 (N.D. Cal. May 2, 2016) (granting injunction because
21 plaintiffs’ constitutional injury was irreparable, while the city’s potential harm was monetary).

22 Here, the balance of the equities weighs in favor of the Plaintiffs. The Class is detained in
23 a congregate facility and all have risk factors for severe COVID-19. The Class thus faces a
24 preventable, high risk of serious harm from COVID-19 so long as Defendants continue to deny
25 them adequate access to antiviral medication.⁴⁷ Conversely, Defendants face no harm if the Court
26 grants Plaintiffs’ injunction. “[T]here is no harm to the Government when a court prevents the
27 Government from engaging in unlawful practices.” *Castillo*, 2020 WL 1502864, at *6. Defendants

28 ⁴⁷ Vijayan Dec., ¶¶ 6–8.

1 would face no harm because granting Plaintiffs’ injunction would require Defendants to simply
2 take steps to convert the non-binding recommendation in their guidance to a mandatory policy.

3 **D. Plaintiffs’ Proposed Injunction is Appropriately Tailored.**

4 Plaintiffs’ attached Proposed Injunction is supported by scientific evidence and tailored to
5 address the constitutional violations. *Roman*, 977 F.3d at 946 (“[T]he injunction should, to the
6 extent possible, reflect the scientific evidence about COVID-19 presented to the district court.”).

7 **1. Stocking Antiviral Treatments on Site and Promptly Initiating Treatment**

8 GSA should initiate treatments of Paxlovid, Veklury, and Lagevrio within 12 hours of a
9 prescription. Paxlovid and Lagevrio should both be initiated as soon as possible but must be
10 initiated within five days of symptom onset.⁴⁸ Veklury must be initiated within seven days of
11 symptom onset.⁴⁹ CDC guidelines also provide that detention facilities should “[s]upport *timely*
12 treatment for those eligible” with the antiviral drugs mentioned above.⁵⁰ “[P]rompt testing,
13 diagnosis, and provision of treatment is critical.”⁵¹ By the time detained immigrants have noticed
14 their symptoms, reported them, been tested for COVID-19, been evaluated by a provider, and
15 received a prescription days may have elapsed. Initiating treatment within 12 hours of prescription
16 avoids delays that could impact effectiveness or eligibility. This timeframe is also reasonable
17 because it comports with ICE’s general medical requirements that medications “shall be provided
18 to detainees on schedule and without interruption.”⁵² In order to ensure this timely delivery, GSA
19 should stock these three antiviral drugs on site and avoid transportation-related delays. *Romero-*
20 *Lorenzo*, 2023 WL 2924882, at *25 (finding it is not “objectively reasonable for a correctional
21 facility not to acquire and stock [COVID-19 antiviral] treatments. . .” on site).

22 **2. Testing Individuals Who Exhibit Symptoms with a Risk Factor**

23 GSA must offer rapid COVID-19 testing to any Class Member who exhibits symptoms.
24 The CDC’s guidance to correctional and detention facilities instructs that “treatments . . . must be

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26 ⁴⁸ Vijayan Dec. ¶¶ 11,15.

27 ⁴⁹ *Id.* at ¶ 14.

28 ⁵⁰ CDC Detention Guidance (emphasis added); *see also* Vijayan Dec. ¶ 22.

⁵¹ Vijayan Dec. ¶ 16.

⁵² *ICE Performance Based National Detention Standards 2011*, 273 (2016 Rev.),
<https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf>.

1 started within a few days as symptoms develop to be effective.”⁵³ When a detained immigrant who
 2 might qualify for antiviral medication (i.e., a Class Member) reports COVID-19 symptoms, they
 3 should receive a rapid test as soon as possible to maximize the odds that they will be diagnosed
 4 within an appropriate timeframe for the antiviral medication.⁵⁴ A 24-hour timeframe between
 5 reporting of symptoms and testing is readily practicable: ICE requires all medical requests to be
 6 “triaged by appropriate medical personnel within 24 hours after a detainee submits the request.”⁵⁵
 7 In fact, another nearby ICE facility has committed to test all people within 120 minutes. *Zepeda*
 8 *Rivas v. Jennings*, No. 3:20-cv-02731-VC, Dkt. 1205-1, at 12 (N.D. Cal. Jan. 27, 2022) (attached
 9 as Cipriano Decl., Ex. I).

10 **3. Evaluation by Provider and Offer of Prescription**

11 The Court should require that every Class Member at GSA who tests positive within five
 12 days of symptom onset be evaluated by a provider consistent with the NIH guidelines (which
 13 currently recommend evaluation for Paxlovid, Veklury, and Lagevrio) and be offered one of these
 14 drugs if the evaluation indicates it is appropriate for prescription.⁵⁶ For the reasons described above
 15 regarding the 24-hour requirement for testing, a 24-hour requirement for this evaluation is
 16 important. Additionally, given the facility’s history of noncompliance with basic medical practice,
 17 medical staff should be required to document any decisions that conflict with the NIH guidance so
 18 that they are in writing and can be reported to Plaintiffs’ counsel as described below.

19 **4. Educational Materials for Antiviral Treatments**

20 The Court should require GSA to post educational materials on antiviral treatment for
 21 COVID-19 in all housing units. It is particularly crucial that detained immigrants are provided
 22 educational materials on COVID-19 antivirals. In a detention setting, the materials provided by
 23 the facility are generally the only source of information. “In light of the specific risks posed by
 24 COVID-19 in carceral settings, the CDC has issued guidance to correctional and detention facilities

25 _____
 26 ⁵³ Vijayan Dec. 22.

⁵⁴ See Vijayan Dec. ¶ 25.

⁵⁵ See *supra* note 52.

⁵⁶ See *supra* note 1; *Therapeutic Management of Nonhospitalized Adults with COVID-19* (last updated Nov. 2, 2023), <https://www.covid19treatmentguidelines.nih.gov/management/clinical-management-of-adults/nonhospitalized-adults--therapeutic-management/>.

1 to ensure that they support access to COVID-19 antiviral treatment.”⁵⁷ ICE has recognized this
2 need for information in the related context of COVID-19 vaccines, requiring “all detention facilities
3 to post educational materials in different languages about the COVID-19 vaccine to help improve
4 vaccine knowledge.” *See* Cipriano Decl., Ex. C at 17. No such materials are available for COVID-
5 19 antiviral medications. It is crucial that detained immigrants are aware of their medical treatment
6 options so they can make informed decisions regarding their medical care and so they know the
7 importance of reporting of potential symptoms early.

8 **5. Monthly Reporting**

9 The Court should require Defendants to file reports that will help Plaintiffs’ counsel verify
10 Defendants’ compliance, and to raise any issues with the Court. Plaintiffs set out their proposed
11 contents of these reports in full in the Proposed Injunction attached to this Motion. This type of
12 reporting is commonplace in litigation such as this. *Roman v. Wolf*, No. EDCV2000768, 2020 WL
13 5797918, at *6 (C.D. Cal. Sept. 29, 2020) (requiring weekly reporting of COVID-related
14 information as part of a preliminary injunction); *Ahlman v. Barnes*, 2022 WL 16957837, at *3
15 (approving a settlement involving weekly reporting of COVID-related information).

16 **V. CONCLUSION**

17 Plaintiffs respectfully request that this Court grant Plaintiffs’ motion for a preliminary
18 injunction.

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⁵⁷ Vijayan Dec. ¶ 22.

1 Dated: December 14, 2023

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