



**U.S. Department of Justice**

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March 11, 2021

Honorable Lawrence J. Vilardo  
United States District Court  
Western District of New York  
2 Niagara Square  
Buffalo, NY 14202-3350

**Re: Jones, et al. v. Wolf, et al.  
20-CV-00361 LJV**

Dear Judge Vilardo:

Respondents write to provide additional information to the Court and to Petitioners regarding questions that have arisen throughout this recent litigation.

**1. The Federal Emergency Management Agency**

The creation and operation of the Federal Emergency Management Agency (“FEMA”) is governed by the Disaster Relief Act of 1974, as amended by the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121 *et seq.* Congressional intent in creating FEMA was “to provide an orderly and continuing means of assistance by the Federal Government to State and local governments” during disasters and emergencies. § 5121(b). Thus, FEMA’s mandate is to assist state and local governments, not co-agencies of the federal government. This necessarily limits the assistance that FEMA can provide at the Buffalo Federal Detention Facility (“BFDF”).

Additionally, as was indicated in prior correspondence, counsel for FEMA has indicated that the agency does not have an independent supply of vaccine. Its function during this pandemic is to assist state and local governments in setting up vaccine distribution sites in underserved areas, or areas where distribution may otherwise pose a challenge, so that the state and local governments can fully administer their own vaccine supply.

**2. Centers For Disease Control And Prevention Supply Of Vaccine To Other Federal Agencies**

The Centers for Disease Control and Prevention (“CDC”) controls the supply of all COVID-19 vaccine in the United States. As this Court knows, the general procedure has been for the federal government—through the CDC—to allocate and provide vaccine supply to the various states for distribution to their populations.

In limited circumstances, the CDC has provided vaccine supply to other federal entities. Generally, to obtain such vaccine supply, the federal entities had to have a “sufficient medical footprint” (“SMF”).<sup>1</sup> In order to have a SMF, the CDC looks at whether the agency requesting supply can meet four main criteria: (1) capability to administer the vaccine; (2) ability to follow CDC reporting requirements; (3) cold-storage or super-cold-storage to store the vaccine, when necessary; and (4) sufficient population to ensure CDC-compliant use of the entire allocation.

With respect to the qualifying criteria, although the BFDf can meet most, if not all, of them, that is not true of the Department of Homeland Security (“DHS”) or Immigration and Customs Enforcement (“ICE”) as a whole. Indeed, ICE often utilizes local and county jails for detention, and it is unknown how many, if any, of these facilities have the necessary cold-storage available to maintain the vaccine, or the electronic systems required to meet the CDC’s criteria. Indeed, as this Court is aware from recent filings, most of these county jail locations holding ICE detainees have been provided vaccine supply directly by the states they are located in. With respect to electronic reporting requirements, facilities receiving vaccine would have to be able to submit daily inventory reports to the VaccineFinder program, and utilize the Vaccine Adverse Event Reporting System (“VAERS”). It is likewise unknown how many DHS or ICE facilities have the ability to report as required.

To date, only five federal entities qualified to receive vaccine supply: (1) the Bureau of Prisons; (2) the Department of Defense; (3) the Department of State; (4) the Indian Health Service; and (5) the Veterans Health Administration (“VHA”).<sup>2</sup> Notably, of these five agencies, two are actually entire Departments and two are health-focused agencies; none is under the purview of DHS or a party to this action.

### **3. Vaccination Of DHS Employees By The VHA**

As noted above, DHS was not one of the federal entities which received COVID-19 vaccine supply. As such, DHS and VHA entered a Memorandum of Understanding (“MOU”) to allow DHS employees in “prioritized positions” to be vaccinated at VHA facilities. This MOU, and CDC guidance, does not allow for the provision of vaccine supply by VHA to DHS; this MOU only allows for the vaccination of DHS employees by VHA employees at VHA facilities.<sup>3</sup>

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<sup>1</sup> This process is not outlined in writing, at least as far as the undersigned could locate. The requirements track the general requirements that the CDC places on all vaccine providers. *See* <https://www.cdc.gov/vaccines/covid-19/vaccination-provider-support.html>.

<sup>2</sup> *See COVID-19 Vaccination Program Interim Playbook for Jurisdiction Operations*, October 29, 2020, at pg. 25; available at [https://www.cdc.gov/vaccines/imz-managers/downloads/COVID-19-Vaccination-Program-Interim\\_Playbook.pdf](https://www.cdc.gov/vaccines/imz-managers/downloads/COVID-19-Vaccination-Program-Interim_Playbook.pdf)

<sup>3</sup> The undersigned has reviewed the MOU, but is not filing it. It is not a public document. To the extent the Court wishes to view the MOU, Respondents respectfully request that they be

#### 4. Vaccination Administration by the BFDF

Respondents originally identified 85 individuals at the BFDF who met the eligibility requirements of the New York State Department of Health's guidance for Phase 1a and 1b.<sup>4</sup>

Of those who are eligible, 20 have declined vaccination in any form, when asked the simple question of whether they would or would not like to receive the vaccine.<sup>5</sup>

Of the remaining 65 detainees, 12 were released from ICE custody since the report was first exchanged.

Of the remaining 53 detainees, 22 have contracted COVID-19 within the last 90 days, and are not currently eligible for the COVID-19 vaccine under NYSDOH guidance; in some cases, detainees will not be eligible again until June 13, 2021.<sup>6</sup>

Thus, in total, 31 detainees remain who are eligible for the COVID-19 vaccine pursuant to NYSDOH's eligibility guidelines. This creates an issue regarding the possible receipt of COVID-19 vaccine by the BFDF from NYSDOH or a vaccine manufacturer, since vaccine is provided in increments of 100 doses, and at the BFDF the vast majority of vaccine would not go to individuals who meet the current eligibility or priority classification. *See COVID-19 Vaccination Program Interim Playbook for Jurisdiction Operations*, October 29, 2020, at pg. 30; available at [https://www.cdc.gov/vaccines/imz-managers/downloads/COVID-19-Vaccination-Program-Interim\\_Playbook.pdf](https://www.cdc.gov/vaccines/imz-managers/downloads/COVID-19-Vaccination-Program-Interim_Playbook.pdf).

#### 5. Conclusion

Respondents have endeavored to portray the facts above in a non-argumentative manner, in an attempt to provide additional information and guidance to the Court and Petitioners. Nonetheless, one argumentative fact stands out: ICE, IHSC and the BFDF have not engaged in deliberate indifference such that the lack of administration of a vaccine to detainees gives rise to a substantive violation. To the contrary, the CDC has supplied states with the vaccine, and the states control distribution. The BFDF, ICE and the DHS are unable

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allowed to file it *in camera*, or, barring that, under seal. A separate motion to file under seal can be made if needed.

<sup>4</sup> This is a larger number than that of detainees who meet the CDC's vulnerable guidelines, since the NYSDOH's eligibility criteria are broader and include conditions not included by the CDC.

<sup>5</sup> Apart from this Court's Order on March 11, ICE Health Service Corps queried *every* detainee at the BFDF as to whether they wanted the vaccine, in preparation for the eventual vaccination of all consenting detainees.

<sup>6</sup> All of this information has been provided to Petitioners' counsel, and Petitioner's counsel has been updated repeatedly—sometimes multiple times a day—as new information is learned or circumstances change.

to alter this process, which is an executive-branch, agency-reviewed process dictated by the CDC. Far from evincing deliberate indifference, staff at the BFDF have undertaken resource-intensive and time-intensive efforts to safeguard the health of all detainees, and to prepare themselves for immediate administration of vaccine, once supply becomes available. This salient fact is fatal to Petitioners' Motion to Amend the Preliminary Injunction, and this Court should allow the vaccine supply to take its natural course, which, hopefully in the near future, will include vaccine availability to all detainees at the BFDF.<sup>7</sup>

Respectfully submitted,

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BY: /s/ Adam A. Khalil  
Assistant United States Attorney

cc via ECF:

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Prisoners Legal Services  
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<sup>7</sup> On March 11, 2021, President Biden announced his strategy to make the vaccine more available throughout the nation, with the intended purpose of making it available to every single person who chooses to be vaccinated by May 1. *See Fact Sheet: President Biden to Announce All Americans to be Eligible for Vaccinations by May 1, Puts the Nation on a Path to Get Closer to Normal by July 4th* (March 11, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/11/fact-sheet-president-biden-to-announce-all-americans-to-be-eligible-for-vaccinations-by-may-1-puts-the-nation-on-a-path-to-get-closer-to-normal-by-july-4th/>. This date is only 45 days from now, and Respondents respectfully submit that this Court should at least give DHS and ICE that much time to attempt to obtain a supply of vaccine.