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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSUE CASTAÑEDA JUAREZ, *et al.*,

Petitioner-Plaintiffs,

v.

NATHALIE ASHER, *et al.*,

Respondent-Defendants.

Case No. C20-700 JLR-MLP

ORDER GRANTING MOTION FOR
TEMPORARY RESTRAINING
ORDER

I. INTRODUCTION

Before the Court is Petitioners’ motion for a temporary restraining order (“TRO”). (TRO (dkt. # 324).) Federal Respondents filed a response (Fed. Resp. (dkt. # 346)) and Respondent Bruce Scott filed a response¹ (Scott Resp. (dkt. # 343)). Petitioners filed a reply. (Reply (dkt. # 351)). The Court has reviewed the Petitioners’ motion, the responses, the reply, the amended petition and complaint (Am. Pet. (dkt. # 167)), the relevant portions of the record, the applicable law, and Magistrate Judge Peterson heard oral argument on August 20, 2021. Being fully

¹ Respondent Scott renews his prior objections to his substitution as a Respondent in this matter and reiterates that he has no ability to test or vaccinate detainees. (Scott Resp. at 1-2.) He also joins the Federal Respondents’ opposition to the instant motion for a TRO. (*Id.* at 3.)

1 advised, the Court GRANTS, in part, Petitioners’ motion for a TRO for the reasons discussed
2 below.

3 II. BACKGROUND

4 A. Procedural Background

5 Petitioners are individuals either currently or previously held in civil detention by United
6 States Immigration and Customs Enforcement (“ICE”) at the Northwest ICE Processing Center
7 (“NWIPC”) in Tacoma, Washington. NWIPC is a private detention center run by an independent
8 contractor, The GEO Group, Inc. (“GEO”), to supervise noncitizen detainees in ICE custody.
9 (8/4/21 Lippard Decl. (Dkt. # 347) at ¶ 5.)

10 Petitioners brought this action in May 2020, arguing they are “vulnerable to serious
11 medical complications from COVID-19 and are at risk of serious illness and death so long as
12 they are held in detention” due to their medical conditions. (Dkt. # 1 at ¶ 95.) Petitioners sought
13 release. (*Id.* at ¶ 82.) Petitioners subsequently amended their petition and complaint, modifying
14 their requested relief to include, *inter alia*, periodic testing for COVID-19 and limiting the
15 number of detainees held at NWIPC. (Am. Pet. at ¶ 8.) On March 18, 2021, the Court granted
16 Petitioners’ second motion for class certification, certifying a class defined as:

17 All individuals detained at the [NWIPC] who are age 55 years or older or who have
18 medical conditions that place them at heightened risk of severe illness or death from
19 COVID-19 as determined by Centers for Disease Control and Prevention
20 guidelines.

(Dkt. # 245.)

21 Petitioners previously filed two motions for a temporary restraining order that the Court
22 denied. (5/11/2020 TRO (Dkt. # 22); 12/11/2020 TRO (Dkt. # 175).) Petitioners filed the instant
23 motion for a temporary restraining order seeking to enjoin Respondents from admitting detainees
to NWIPC whose transfer is not in accordance with the Center for Disease Control and

1 Prevention’s (“CDC”) *Interim Guidance for Transporting or Arranging Transportation by Air*
2 *into, from, or within the United States of People with COVID-19 or COVID-19 Exposure* (“CDC
3 Transport Guidance”) (*see* Maltese Decl. (dkt. # 327), Ex. D) and the CDC’s *Interim Guidance*
4 *for SARS-CoV-2 Testing in Correctional and Detention Facilities* (“CDC Testing Guidance”)
5 (*see id.*, Ex. C). Petitioners also assert aspects of NWIPC’s intake process do not comply with
6 the *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in*
7 *Correctional and Detention Facilities* (“CDC Correctional Guidance”). (*See id.*, Ex. F.)

8 **B. Factual Background**

9 *1. Stipulated Facts*

10 The parties submitted the following stipulated facts:

11 In response to the COVID-19 pandemic, ICE adopted a Pandemic Response
12 Requirements (“PRR”) setting forth policies and procedures to prevent COVID-19 outbreaks at
13 detention centers, including NWIPC. (Stip. of Facts (Dkt. # 326) at ¶ 13.) As set forth in the
14 PRR, ICE discontinued transferring ICE detainees “unless necessary for medical evaluation,
15 medical isolation/quarantine, clinical care, extenuating security concerns, release or removal, or
16 to prevent overcrowding.” *See* <https://www.ice.gov/coronavirus/prr> at 34 (last visited
17 August 22, 2021). In early June 2021, ICE resumed transferring detainees from the southern
18 border to NWIPC. (Stip. of Facts at ¶ 1.) The detainees are transferred from Customs and Border
19 Protection (“CBP”) facilities, which are designed to be 72-hour holding facilities, and from other
20 ICE facilities. (*Id.* at ¶¶ 2, 4.)

21 *a. Transfer Process to NWIPC*

22 Detainees from CBP facilities are first transported by bus to an airport near the southern
23 border to board flights to Yakima, Washington. (Stip. of Facts at ¶¶ 7, 9.) The Department of

1 Homeland Security (“DHS”) does not require the detainees in CBP facilities be tested for
2 COVID-19 prior to their transfer and the detainees are not offered COVID-19 vaccinations. (*Id.*
3 at ¶¶ 5-6.) Detainees from other ICE facilities are tested prior to transfer and may have been
4 offered vaccinations. (*Id.* at ¶¶ 6, 10.) Once CBP detainees arrive at the airport, ICE takes
5 custody and verbally screens for COVID-19 symptoms. (*Id.* at ¶ 9.) Screening includes taking
6 temperature checks and asking detainees if they have any COVID-19 risk factors. (*Id.*) ICE does
7 not test detainees from CBP facilities who are asymptomatic or have not been in close contact
8 with an individual that is COVID-19 positive before or during the flight. (*Id.* at ¶ 10.) A nurse
9 accompanies the detainees on their flight to Yakima. (*Id.* at ¶ 9.) Detainees are required to wear
10 masks during the transfer process and are also placed in hand and feet restraints. (*Id.* at ¶ 12.)
11 When social distancing is not possible, detainees may be within 6 feet of another detainee. (*Id.*)
12 Once in Yakima, the detainees are transferred to NWIPC by buses operated by GEO. (*Id.* at
13 ¶ 11.)

14 b. Intake Process

15 ICE subjects detainees to an intake process upon arrival at NWIPC. (Stip. of Facts at
16 ¶ 14.) ICE conducts a medical examination and ICE Health Service Corps (“IHSC”) conducts a
17 polymerase chain reaction (“PCR”) COVID-19 test that provides results in approximately 2-3
18 days. (*Id.*) Detainees are then placed in the New Intake Monitoring (“NIMs”) units for intake
19 quarantine. (*Id.* at ¶ 15.) Detainees in the NIMs units may be confined in a cell by themselves, a
20 cell with 2-4 detainees, or in an open bay unit that houses detainees in an open space with other
21 detainees. (*Id.*)

22 Detainees who do not exhibit signs of COVID-19 symptoms during intake and
23 quarantine, who do not test positive for COVID-19, and who do not have known exposure to

1 COVID-19 stay in NIMs units for 14 days. (*Id.* at ¶ 16.) The detainees may not commingle with
2 detainees from other cells or units. (*Id.*) After 10-12 days in quarantine, detainees receive an
3 Abbott ID NOW² COVID-19 test that returns results in 15-20 minutes. (*Id.*) Detainees who
4 exhibit symptoms, test positive, or have known exposure to COVID-19 are placed in the Medical
5 Housing Unit (“MHU/overflow”). (*Id.* at ¶ 17.) If a cell or unit mate tests positive for COVID-
6 19, detainees restart the 14-day intake quarantine. (*Id.* at ¶ 18.)

7 2. *Additional Facts*

8 The Court considers the following additional facts:

9 a. CDC Guidelines

10 The CDC Testing Guidelines set out recommendations for movement-based screening
11 that includes screening individuals at intake and before transfer to another facility. (*See* Maltese
12 Decl., Ex. C at 6.) It advises that an individual should be tested “before transfer to another
13 correctional/detention facility” and to wait for a negative test result before the individual is
14 transferred. (*Id.*)

15 The CDC Transport Guidelines advises generally that those who are infected with
16 COVID-19 may be cohorted for transfer regardless of symptoms, but that those who do not have
17 COVID-19 should not be transported with infected passengers. (*Id.*, Ex. D at 4.) It also advises
18 that asymptomatic close contacts who have tested negative may be grouped within existing
19 cohorts and with other cohorts of similar status if they may stay six feet apart. (*Id.*) It further
20 advises that symptomatic close contacts should be tested before transport and if they test
21 negative and clinical suspicion of infection is low, they may be transported with asymptomatic
22 contacts. (*Id.*)

23

² ICE now uses RT-PCR testing at this stage in the intake process. (Resp. at 12 n.15.)

1 The CDC Correctional Guidance provides recommendations on how to quarantine
2 individuals, including, *inter alia*, using separate, single cells, or cohorts in cells that are well-
3 ventilated. (*Id.*, Ex. F at 17.) It advises that if the ideal choice does not exist, the next best
4 alternative that reduces harm should be used. (*Id.*)

5 b. Recent Positive COVID-19 Tests

6 At least 1,095 detainees from the southern border have been transferred to NWIPC since
7 late April 2021. (Fed. Resp. at 5; 8/4/2021 Lippard Decl. at ¶ 9.) Petitioners estimate more than
8 12% of detainees transferred from the southern border have tested positive for COVID-19,
9 including detainees in general population. (Reply at 6.) There were approximately 137 positive
10 cases between June 2021 to early August 2021. (*Id.* at 6 n.4; 7/29/2021 Suppl. Amon Decl. (Dkt.
11 # 328) at ¶¶ 7, 9.) Since then, there have been over 90 more detainees that have tested positive.
12 (*See* Dkt. ## 340, 345, 349, 350, 353, 354, 356, 357, 358, 359, 360, 362, 364, 365, 368.)

13 In recent months, several class members have been hospitalized due to COVID-19
14 symptoms. One detainee transferred from the southern border tested positive and was admitted to
15 the hospital overnight. (Stip. of Facts at ¶ 19.) Another transfer detainee tested positive and was
16 sent to the hospital for examination, however, the detainee was not admitted and was returned to
17 NWIPC. (*Id.*) On August 6, 2021, a detainee was transported to the emergency room due to
18 shortness of breath and low oxygen saturation levels. (8/6/21 Lippard Decl. (Dkt. # 350-1) at
19 ¶ 16.) The detainee was stable and not admitted to the hospital. (*Id.*) The detainee received a
20 monoclonal antibody infusion and was returned to NWIPC within several hours. (*Id.*) On August
21 9, 2021, a vaccinated detainee was transported to the hospital with COVID-19 symptoms.
22 (8/10/21 Lippard Decl. (Dkt. # 354-1) at ¶ 15.) On August 18, 2021, another vaccinated detainee
23

1 was sent to the hospital. (8/18/21 Lippard Decl. (Dkt. # 364-1) at ¶ 18.) Reports indicate the
2 detainee had shortness of breath and low oxygen saturation levels but was stable. (*Id.*)

3 GEO and IHSC staff members have also recently tested positive for COVID-19. Since
4 the end of July 2012, approximately sixteen GEO employees and two IHSC employees tested
5 positive. (*See* Dkt. ## 338, 340, 349, 358, 359, 360, 362, 364, 366.) As of August 21, 2021,
6 NWIPC was at 33.8% capacity. (8/21/21 Lippard Decl. (Dkt. # 368-1) at ¶ 8.)

7 III. DISCUSSION

8 A. Legal Standards

9 1. *Temporary Restraining Order*

10 The standard for issuing a TRO is the same as the standard for issuing a preliminary
11 injunction. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2
12 (1977). A TRO is “an extraordinary remedy that may only be awarded upon a clear showing that
13 the plaintiff is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22
14 (2008). “The proper legal standard for preliminary injunctive relief requires a party to
15 demonstrate (1) ‘that he is likely to succeed on the merits, (2) that he is likely to suffer
16 irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his
17 favor, and (4) that an injunction is in the public interest.’” *Stormans, Inc. v. Selecky*, 586 F.3d
18 1109, 1127 (9th Cir. 2009) (citing *Winter*, 555 U.S. at 20).

19 As an alternative to this test, a preliminary injunction is appropriate if “serious questions
20 going to the merits were raised and the balance of the hardships tips sharply in the plaintiff’s
21 favor,” thereby allowing preservation of the status quo when complex legal questions require
22 further inspection or deliberation. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35
23 (9th Cir. 2011). However, the “serious questions” approach supports the court’s entry of a TRO

1 only if the plaintiff also shows that there is a likelihood of irreparable injury and that the
2 injunction is in the public interest. *Id.* at 1135. The moving party bears the burden of persuasion
3 and must make a clear showing that it is entitled to such relief. *Winter*, 555 U.S. at 22.

4 **A. Likelihood of Success on the Merits**

5 To obtain a TRO, Petitioners must make a clear showing that they are likely to succeed
6 on the merits or, alternatively, have raised serious questions going to the merits of their petition
7 on Fifth Amendment grounds.³ To succeed on a habeas petition, Petitioners must show that they
8 are “in custody in violation of the Constitution or laws or treaties of the United States.” *See* 28
9 U.S.C. § 2241.

10 For the reasons stated below, the Court concludes that Petitioners have made a clear
11 showing that they are likely to succeed on the merits of their Fifth Amendment claims.

12 *1. Right to Reasonably Safe Conditions⁴*

13 “[W]hen the State takes a person into its custody and holds him there against his will, the
14 Constitution imposes upon it a corresponding duty to assume some responsibility for his safety
15 and general well-being.” *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–
16 200 (1989).⁵ The government thus violates the Due Process Clause if it fails to provide civil
17 detainees with “food, clothing, shelter, medical care, and reasonable safety.” *Id.* at 200.

18 ³ Petitioners are protected by the Fifth Amendment because they are federal civil detainees. *See Zadvydas*
19 *v. Davis*, 533 U.S. 678, 690 (2001).

20 ⁴ In a footnote, Petitioners also assert that by allegedly failing to take safety measures required by
21 Respondents’ policies and CDC guidelines to mitigate the risk of harm regarding COVID-19,
22 Respondents are violating their Fifth Amendment rights because the conditions amount to punishment.
(TRO at 18 n.6.) Because the Court finds Petitioners are likely to succeed on their Fifth Amendment
claims regarding the right to reasonably safe conditions, discussed below, the Court need not address this
argument.

23 ⁵ In *DeShaney*, the Supreme Court analyzed the petitioners’ rights under the Fourteenth Amendment. *See*
489 U.S. at 194–95. Fifth Amendment due process claims and Fourteenth Amendment due process claims
are analyzed in the same way. *See Paul v. Davis*, 424 U.S. 693, 702 n.3 (1976).

1 The Ninth Circuit has analyzed such conditions of confinement claims under an objective
2 deliberate indifference standard. *See Castro v. Cnty. of L.A.*, 833 F.3d 1060, 1071 (9th Cir. 2016)
3 (en banc) (adopting objective deliberate indifference standard based on *Kingsley v. Hendrickson*,
4 576 U.S. 389, 135 S. Ct. 2466 (2015), to evaluate failure to protect claim brought by pretrial
5 detainee); *see also Habibi v. Barr*, No. 20-618, 2020 WL 1864642, at *3–*4 (S.D. Cal. Apr. 14,
6 2020) (applying *Castro*'s objective deliberate indifference standard to the petitioner's reasonable
7 safety claim based on COVID-19). The elements of such a claim are:

- 8 (i) The defendant made an intentional decision with respect to the conditions
9 under which the plaintiff was confined;
- 10 (ii) Those conditions put the plaintiff at substantial risk of suffering serious harm;
- 11 (iii) The defendant did not take reasonable available measures to abate that risk,
12 even though a reasonable officer in the circumstances would have appreciated the
13 high degree of risk involved—making the consequences of the defendant's
14 conduct obvious; and
- 15 (iv) By not taking such measures, the defendant caused the plaintiff's injuries.

16 *Castro*, 833 F.3d at 1071.

17 Petitioners argue Respondents have failed to provide reasonably safe conditions by
18 failing to test detainees for COVID-19 before transfer to NWIPC and failing to safely cohort
19 detainees during transfer based on test results or exposure. (TRO at 10-12.) Petitioners argue
20 Respondents are therefore not complying with CDC guidance and have knowingly transferred
21 untested detainees, exposing class members to COVID-19. (*Id.*) Petitioners also argue
22 Respondents fail to provide rapid PCR tests before designating housing assignments during
23

1 intake at NWIPC, thereby creating the potential for a detainee who unknowingly has COVID-19
2 to transmit it to others in the quarantine unit.⁶ (*Id.* at 7.)

3 In support of their arguments, Petitioners direct the Court to the increase in positive cases
4 at NWIPC since ICE's resumption of transferring detainees from the southern border, including
5 outbreaks in NIMs units and general population, and hospitalizations due to COVID-19
6 symptoms. (*Id.* at 12-13.) Petitioners also assert that dozens of transferred detainees have tested
7 negative at intake, but later test positive due to exposure during transfer or quarantine in NIMs
8 units. (*Id.* at 13 (citing 7/29/2021 Suppl. Amon Decl. at ¶¶ 8, 12-13).) Petitioners argue that by
9 failing to take reasonable available measures to abate the risk of detainees contracting COVID-
10 19, and failing to follow CDC guidelines, Respondents have made an intentional decision to
11 transport untested detainees to NWIPC that has caused Petitioners injury. (Reply at 6-7 (citing,
12 *e.g.*, *Hernandez Roman v. Wolf*, No. EDCV-20-00768TJH-PVCX, 2020 WL 5797918, at *3
13 (C.D. Cal. Sept. 29, 2020) (pointing to the failure to test and follow CDC guidelines as reasons
14 ICE was deliberately indifferent), *aff'd in part, vacated in part, remanded*, 977 F.3d 935 (9th
15 Cir. 2020); *Zepeda Rivas v. Jennings*, 504 F. Supp. 3d 1060, 1065 (N.D. Cal. 2020) (similar).)

16 Respondents contend CDC guidance does not mandate testing prior to transfer between
17 facilities, but rather recommends at a minimum testing at one facility or the other, and that the
18 procedures Respondents currently have in place are objectively reasonable available measures to
19 abate the risks associated with COVID-19. (Fed. Resp. at 20 (citing CDC Testing Guidance).)

21 ⁶ Petitioners also contend the use of open bay units should only be used as a last resort according to CDC
22 guidelines. (TRO at 7-8.) Respondents report ICE has used open bay housing units twice as NIMs units.
23 (8/4/2021 Lippard Decl. at ¶ 30.) On one occasion, detainees were placed in open bay housing instead of
celled housing units due to human error. (*Id.*) On the second occasion, no celled housing units were
available and ICE determined it could use open bay housing for an incoming flight of detainees because
they had cleared new intake quarantine at the sending facility and tested negative for COVID-19 prior to
their transfer. (*Id.*) However, two of the detainees from that transfer tested positive for COVID-19 during
intake at NWIPC. (*Id.* at ¶ 31 n.10.)

1 Respondents note ICE screens detainees before transport, before entrance to NWIPC, and during
2 medical intake, and also voluntarily tests detainees upon arrival at NWIPC and subjects detainees
3 to the NIMs process. (*Id.*)

4 Respondents also argue testing prior to ICE custody is not currently feasible. (*Id.*)
5 Specifically, Respondents assert the number of detainees that can be processed at one time is
6 limited due to the space and time needed to examine each detainee, and that the intake process
7 for a flight of 60 detainees can take approximately 6 hours and a flight of 100-130 detainees can
8 take approximately 10-11 hours. (*Id.* (citing 8/4/2021 Malakhova Decl. (Dkt. # 348) at ¶¶ 19,
9 23).) Respondents assert that testing large numbers of detainees on an airport tarmac prior to
10 transfer and conducting rapid testing for incoming detainees at NWIPC before intake would be
11 too lengthy and require additional staff.⁷ (*Id.* at 21.)

12 a. Intentional Decision

13 The Court finds Respondents' conduct constitutes an intentional decision. Since resuming
14 the transfer of detainees from the southern border, ICE has transferred over 1,000 detainees
15 knowing that detainees from CBP facilities are not tested. Although ICE screens detainees upon
16 taking custody from CBP, temperature checks and asking for self-reports regarding risk factors is
17 insufficient to identify asymptomatic detainees. Further, the increase in numbers of positive tests
18 in recent months indicates the southern border transfers are exposing detainees at NWIPC to
19 COVID-19. Between March 2020 and April 12, 2021, only 34 COVID-19 cases were confirmed
20 at NWIPC. (4/12/21 Malakhova Decl. (Dkt. # 266) at ¶ 57.) Since ICE resumed transferring

21 _____
22 ⁷ Respondents also argue CBP is not a party to this litigation, and therefore the Court lacks jurisdiction
23 over testing CBP detainees before ICE custody. (Fed. Resp. at 15-16.) Respondents further contend that
Petitioners' request for an injunction regarding testing detainees prior to ICE custody extends beyond the
class at issue which is defined as individuals that are detained at NWIPC. (*Id.*) The Court finds that
regardless of the Court's jurisdiction over CBP, it has jurisdiction over ICE and its actions that may
violate the rights of current class members confined at NWIPC.

1 detainees in June 2021, over two hundred detainees have tested positive and at least five class
2 members have been hospitalized. Additionally, GEO and IHSC employees have tested positive.
3 Notably, almost every flight transferring detainees from the southern border to NWIPC since
4 June 2021 has transported detainees who have tested positive for COVID-19 at NWIPC.
5 (*Compare* 8/4/2021 Lippard Decl. at ¶ 9 (summary of transfer dates of detainees) *with* 7/29/2021
6 Suppl. Amon Decl. at ¶ 13 (showing number of detainees to test positive upon arrival at NWIPC
7 for each transfer.) Despite this surge in positive cases, Respondents continue to transfer untested
8 detainees thereby exposing detainees and class members to COVID-19 at NWIPC. The Court
9 finds Respondents have acted intentionally. *See Castro*, 833 F.3d at 1070 (a failure to act with
10 respect to a known condition of confinement may constitute an intentional decision).

11 b. Substantial Risk of Serious Harm

12 The Court finds Petitioners have shown the circumstances regarding transferring
13 detainees from the southern border to NWIPC establish a substantial risk of serious harm of
14 exposing class members to COVID-19. While “[n]o one can entirely guarantee safety in the
15 midst of a global pandemic,” *Dawson v. Asher*, No. C20-409-JLR-MAT, 2020 WL 1704324, at
16 *12 (W.D. Wash. Apr. 8, 2020), the sharp increase in positive cases and hospitalization of class
17 members since ICE resumed transferring detainees shows its practice of transferring untested
18 detainees poses a risk of serious harm. Further, the recent outbreaks in both quarantine units and
19 general population show Respondents’ safety measures have not contained the spread of
20 COVID-19 at NWIPC.

21 Respondents argue Petitioners cannot show that COVID-19 positive detainees were
22 exposed to the virus during transportation or intake at NWIPC. (Fed. Resp. at 22.) However, this
23 argument is unpersuasive in light of the timing of the increase in positive cases with ICE’s

1 resumption of transferring detainees, as well as evidence presented by Petitioners detailing the
2 timing between dates of transfers and dates of positive tests in comparison to the average time
3 from exposure to symptoms, indicating exposure likely occurred during transport or in NIMs
4 units during intake quarantine. (7/29/2021 Suppl. Amon Decl. at ¶¶ 7-13, 28; 8/6/2021 Sec.
5 Suppl. Amon Decl. (Dkt. # 352) at ¶¶ 15(e)-(g).)

6 c. Reasonable Available Measures

7 Respondents contend the procedures in place are reasonable available measures to abate
8 the risk of exposure to COVID-19. However, the increase in cases despite these measures shows
9 otherwise. The Court is likewise unpersuaded by Respondents' argument that testing detainees
10 before boarding flights to NWIPC is not feasible. There is nothing in the record to support ICE's
11 position that there are no reasonable available measures to test detainees before they board
12 flights for transfer to NWIPC. Rather, the record only provides information regarding
13 Respondents' ability, or lack thereof, to conduct rapid testing of transferred detainees prior to
14 intake at NWIPC. (8/4/2021 Malakhova Decl. at ¶¶ 23-24 (explaining the time needed to collect
15 each test, the number of tests that can be run at a time, and the need to run each test within a
16 specified time of collection).) Thus, the Court finds Petitioners have made a showing that
17 Respondents have not taken reasonable available measures to test detainees before transport to
18 prevent exposure of COVID-19 to class members at NWIPC, even though a reasonable officer in
19 the circumstances would appreciate the degree of risk of transferring untested detainees.

20 With regard to conducting rapid testing prior to intake at NWIPC, the Court finds this
21 measure is not required at this time. Pursuant to this order, any detainee transferred by ICE and
22 admitted to NWIPC will have been tested prior to transfer. Respondents also provide voluntary
23 testing upon arrival at NWIPC. Thus, Respondents will be able to immediately separate

1 detainees who are infected from those who are not and detainees who test negative will be
2 subject to quarantine and retesting during the NIMs process.

3 d. Causation

4 Courts have recognized that unsafe prison conditions that create a risk of future injury are
5 sufficient to sustain a constitutional violation without an additional showing of harm. *See, e.g.,*
6 *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (recognizing that prison authorities may not
7 “ignore a condition of confinement that is sure or very likely to cause serious illness and needless
8 suffering the next week or month or year,” and noting that prison officials could not escape
9 liability for exposing inmates to a serious, communicable disease on the ground that the
10 complaining inmate showed no serious current symptoms)

11 Here, Petitioners have established a likelihood that the conditions at NWIPC place them
12 at risk of serious harm, and in fact, numerous class members have already contracted COVID-19
13 and at least five have been hospitalized. Accordingly, Petitioners have satisfied the elements of
14 the objective deliberate indifference test.

15 **C. Likelihood of Suffering Irreparable Harm**

16 The Ninth Circuit makes clear that a showing of immediate irreparable harm is essential
17 for prevailing on a temporary restraining order. *See Caribbean Marine Co., Inc. v. Baldrige*, 844
18 F.2d 668, 674 (9th Cir. 1988). Petitioners must make a clear showing that “irreparable harm is
19 likely in the absence of an injunction.” *Winter*, 555 U.S. at 22. “Speculative injury does not
20 constitute irreparable injury sufficient to warrant granting a preliminary injunction.” *Id.* “It is
21 well established that the deprivation of constitutional rights ‘unquestionably constitutes
22 irreparable injury.’” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v.*
23 *Burns*, 427 U.S. 347, 373 (1976)). Courts have found irreparable harm likely with regard to

1 COVID-19 based on its high mortality rate. *Hernandez Roman v. Wolf*, 977 F.3d 935, 944 (9th
2 Cir. 2020). As discussed above, since ICE began resuming transfers from the southern border,
3 over 1,000 detainees have been transferred to NWIPC. In the past several months, there has been
4 an increase in positive tests and hospitalizations and outbreaks in both quarantine units and
5 general population. The Court finds Petitioners have established a likelihood of success on the
6 merits of their claims and therefore have established that irreparable injury is likely.

7 **D. Balance of Hardships and Public Interest**

8 When the government is a party, the last two prongs of the injunction analysis merge.
9 *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*,
10 556 U.S. 418, 435 (2009)). In weighing equities, “the Court considers each party’s claimed
11 injury, as well as the effect that granting or denying Plaintiff’s motion would have on the
12 parties.” *Quinault Indian Nation v. Kempthorne*, No. C9-5064 RBL, 2009 WL 734682, at *3
13 (W.D. Wash. Mar. 18, 2009). Respondents argue that not all CDC guidance is mandatory and
14 that if they were required to test detainees at both facilities during a transfer, they would
15 essentially be enjoined from transporting CBP detainees from the southern border. (Fed. Resp. at
16 24.) However, Petitioners’ requested relief would only prevent Respondents from transferring
17 untested detainees in an unsafe manner. Were Respondents permitted to continue transferring
18 untested detainees, Petitioners face a substantial risk of serious harm. The equities favor
19 Petitioners.

20 As to public interest, “it is always in the public interest to prevent the violation of a
21 party’s constitutional rights.” *Melendres*, 695 F.3d at 1002 (internal quotation marks omitted).
22 Respondents assert it is in the public’s interest for ICE to promptly determine which detainees
23 can be released to avoid overcrowding at ICE facilities and provide more protection to medically

1 vulnerable detainees. (Fed. Resp. at 25.) Although there may be an interest in avoiding
2 overcrowding at ICE facilities, it is always in the public's interest to prevent a violation of
3 Petitioners' constitutional rights, which is the subject of this motion. Moreover, requiring ICE to
4 take reasonable measures to prevent the spread of COVID-19 among detainees and employees at
5 NWIPC is in the public's interest. Public interest favors Petitioners.

6 **E. Remedy**

7 The Court finds Petitioners have made a clear showing of the *Winter* factors and are
8 therefore entitled to a TRO to remedy the likely constitutional violations. Petitioners request the
9 Court order that Respondents are:

10 enjoined from admitting detainees to the Northwest Detention Center (NWDC)
11 whose transfer and transport to the facility is not in accordance with the Center for
12 Disease Control and Prevention's (CDC) *Interim Guidance for Transporting by Air*
13 *into, from, or within the United States of People with COVID-19 or COVID-19*
14 *Exposure* and the CDC's *Interim Guidance for SARS-CoV-2 Testing in*
15 *Correctional and Detention Facilities*. Provided transfers and transport comply
16 with those policies, Defendants may continue to admit detainees to NWDC.

17 (Proposed Order (Dkt. # 324-1).)

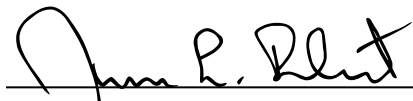
18 While the Court agrees Petitioners are entitled to relief, the Court finds the proposed
19 language overly broad. CDC guidance is just that – guidance – and even the CDC acknowledges
20 that its recommendations are not always feasible. The Court hereby orders that ICE is required to
21 test detainees for COVID-19 prior to transfer to NWIPC and to take all reasonable measures to
22 ensure there is no cross-exposure between COVID-19 positive detainees and COVID-19
23 negative detainees during transport. Respondents are enjoined from admitting any detainee into
NWIPC that was not transferred in compliance with this order.

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IV. CONCLUSION

For the foregoing reasons, the Court orders Petitioners' motion for temporary restraining order (dkt. # 324) be GRANTED, in part. The Court ORDERS ICE to test detainees for COVID-19 prior to transfer to NWIPC and to take all reasonable measures to ensure there is no cross-exposure between COVID-19 positive detainees and COVID-19 negative detainees during transport. Further, Respondents are ENJOINED from admitting any detainee into NWIPC that was not transferred in compliance with this order.

Dated this 23rd day of August, 2021.



JAMES L. ROBART
United States District Judge

Recommended for Entry this 23rd day of August, 2021.



MICHELLE L. PETERSON
United States Magistrate Judge