

District Judge James L. Robart
Magistrate Judge Michelle L. Peterson

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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILFREDO FAVELA AVENDAÑO, *et al.*,

Petitioners-Plaintiffs,

v.

NATHALIE ASHER, *et al.*,

Respondents-Defendants.

FEDERAL RESPONDENTS' OPPOSITION TO
PETITIONERS' MOTION TO CONVERT
TEMPORARY RESTRAINING ORDER TO
PRELIMINARY INJUNCTION

Case No. 20-cv-700-JLR-MLP

Noting Date: October 15, 2021

1 Federal Respondents, United States Immigration and Customs Enforcement, Acting ICE
2 Director Tae D. Johnson, and ICE Seattle Field Office Director Nathalie Asher (collectively,
3 “ICE”), by and through their attorneys, Nicholas W. Brown, United States Attorney for the
4 Western District of Washington, and Michelle R. Lambert and James C. Strong, Assistant United
5 States Attorneys, submit this opposition to Petitioners’ motion to convert the Court’s August 23,
6 2021 Temporary Restraining Order (“TRO”), Dkt. No. 370, to a preliminary injunction. Dkt. No.
7 400 (the “Motion”).
8

9 I. INTRODUCTION

10 This Court should not convert the TRO to a preliminary injunction as it is overbroad and
11 unnecessarily impairs ICE’s intake of new detainees from non-southern border facilities. The TRO
12 requires “ICE to test detainees for COVID-19 prior to transfer to [Northwest ICE Processing
13 Center (“NWIPC”)] and to take all reasonable measures to ensure there is no cross exposure
14 between COVID-19 positive detainees and COVID-19 negative detainees during transport.” TRO,
15 at 17. In the context of the TRO, both parties focused on transfers from the southern border that
16 arrived routinely starting in June. While the record before the Court contemplates detainees
17 transported to NWIPC from southern border facilities, NWIPC has received small-scale transfers
18 of detainees, typically one or two detainees at a time, throughout the pandemic from other locales.¹
19 Petitioners provide no evidence that these small-scale detainee transfers pose a serious risk of harm
20 to class members.²
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24 ¹ As Petitioners previously conceded, only 34 detainees had confirmed COVID-19 cases from March 2020 through
25 April 12, 2021. Dkt. No. 324, at 12. These types of small-scale transfers occurred throughout this period.

26 ² The class is defined as “All individuals detained at the [NWIPC] who are age 55 years or older or who have
27 medical conditions that place them at heightened risk of severe illness or death from COVID-19 as determined by
28 Centers for Disease Control and Prevention guidelines.” Dkt. No. 245, at 3.

1 Even if the Court continues to hold that class members' right to reasonable safety is likely
2 violated by transfers from United States Customs and Border Protection ("CBP") facilities at the
3 southern border, the TRO improperly disrupts ICE's intake of detainees that would otherwise
4 satisfy the Centers for Disease Control and Prevention ("CDC") guidance. For example, the TRO
5 requires ICE to test detainees prior to transfer to NWIPC. This is unnecessary, duplicative, and
6 often complicates the acceptance of detainees from state or federal facilities that already test
7 detainees for COVID-19 prior to transport. Therefore, if the Court issues a preliminary injunction
8 here, the order should not require ICE to test detainees when test results are available through other
9 agencies. Further, ICE receives detainees directly brought to NWIPC by other agencies. The
10 TRO's mandate is overbroad as ICE does not have the opportunity to have these detainees tested
11 prior to transport. Finally, the same inherent risks of large transfers of detainees are not present in
12 the small-scale transfers as described here.³

14 The Court implemented the TRO because of the increased number of COVID-19 positive
15 detainees at NWIPC after it began accepting flights of hundreds of new detainees from the southern
16 border. *See* TRO, at 3-5. Petitioners do not allege and have not demonstrated that the type of
17 small-scale transfers of detainees that have been continuous throughout the pandemic violates class
18 members' right to reasonable safety or violates the CDC's *Interim Guidance for Transporting by*
19 *Air into, from, or within the United States of People with COVID-19 or COVID-19 Exposure*
20 *("CDC Transport Guidance")*⁴ or the CDC's *Interim Guidance for SARS-COV-2 Testing in*
21 *Correctional and Detention Facilities ("CDC Testing Guidance")*.

25 ³ Transfer scenarios are described in the Declaration of Jack Lippard, dated Oct. 6, 2021 ("Supp. Lippard. Decl.").

26 ⁴ Most of the small-scale transfers are done by vehicle rather than by air, so the CDC Transport Guidance is not
always applicable here.

1 As a result, Petitioners have not met their heavy burden and this Court should deny the
2 Motion.

3 II. RELEVANT BACKGROUND

4 Federal Respondents incorporate the facts provided in the previous Declarations of Jack
5 Lippard and Dr. Sherri Malakhova. Dkt. No. 347 (“Lippard Decl.”) and Dkt. No. 348 (“Malakhova
6 Decl.”), as well as their supplemental declarations submitted herewith. (“Supp. Lippard Decl.”
7 and “Supp. Malakhova Decl.”).

9 A. The TRO.

10 Since the start of the pandemic, ICE enacted policies and procedures to prevent the entry
11 and spread of COVID-19 at NWIPC based on guidance from the CDC, ICE Health Services Corp
12 (“IHSC”), and ICE’s Enforcement and Removal Operations (“ERO”). Dkt. No. 401, (Stipulation
13 of Facts, hereafter “Stip.”), ¶ 13 (describing ICE *Pandemic Response Requirement*, (“PRR”));⁵
14 Lippard Decl., ¶ 4; Malakhova Decl., ¶ 6. ICE’s COVID-19 pandemic response is dynamic and
15 has evolved in response to developing knowledge concerning COVID-19, changes in criteria and
16 guidance from the CDC, as well as requirements resulting from ongoing litigation in other
17 jurisdictions. Lippard Decl., ¶ 4; Malakhova Decl., ¶ 6.

19 Throughout the pandemic, NWIPC received small-scale transfers of detainees from state
20 and federal agencies. Supp. Lippard Decl., ¶¶ 6, 9. Between March 2020 and April 2021, NWIPC
21 did not receive transfers of new detainees from the southern border. Dkt. No. 265, ¶ 8. Primarily
22 starting in June, however, NWIPC resumed receiving large transfers of detainees from the southern
23 border, as permitted under certain circumstances.⁶ Stip., ¶ 1; Lippard Decl., ¶¶ 8-9; *see also* PRR
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26 ⁵ Version 6.0, March 16, 2021, available at: <https://www.ice.gov/coronavirus/prr> (accessed October 11, 2021).

27 ⁶ NWIPC received one flight of 60 detainees in April 2021. Lippard Decl., ¶ 9.

1 at 34 (discontinuing the transfer of ICE detainees unless necessary for medical evaluation, medical
2 isolation/quarantine, clinical care, extenuating security concerns, release or removal, or to prevent
3 overcrowding); CDC *Interim Guidance on Management of COVID-19 in Correctional and*
4 *Detention Facilities* (“CDC Interim Guidance”), at 8 (recommending that detention facilities “limit
5 transfers of incarcerated/detained persons to and from other jurisdictions and other facilities unless
6 necessary” for the same reasons as those stated in the PRR).⁷

7
8 After NWIPC began accepting transfers from southern border facilities, NWIPC
9 experienced an uptick in COVID-19 positive tests for detainees, mainly in the New Intake
10 Monitoring Unit (“NIMs”). See Malakhova Decl., ¶ 44. In response, Petitioners sought a TRO
11 and alleged that the mass transfers from the southern border violated CDC guidance and
12 endangered class members. See Dkt. No. 324. This Court issued a TRO requiring “ICE to test
13 detainees for COVID-19 prior to transfer to NWIPC and to take all reasonable measures to ensure
14 there is no cross exposure between COVID-19 positive detainees and COVID-19 negative
15 detainees during transport.” TRO, at 17. As a result, ICE last transported detainees directly from
16 CBP facilities at the southern border to NWIPC on August 13, 2021. Supp. Lippard Decl., ¶ 5.
17 Furthermore, ICE has had to decline several small-scale transfers from other facilities due to the
18 overbroad wording of the TRO even though nothing in the record supports the prohibition of the
19 transfers. *Id.*, ¶ 25.

21 **B. Non-southern border transfers of new detainees to NWIPC.**

22 NWIPC is located within the Seattle Field Office’s area of responsibility and is the only
23 dedicated ICE detention facility for noncitizens apprehended in Washington, Oregon, and Alaska.
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26 ⁷Available at [https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-](https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html)
[detention.html](https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html) (last visited Oct. 11, 2021).

1 *Id.*, ¶ 7. Due to geographic proximity, NWIPC also provides bed space to noncitizens apprehended
2 in northern California and parts of Idaho. *Id.* Because of adjustments to ICE's enforcement
3 posture, most individuals admitted to NWIPC are individuals that ICE has determined are public
4 safety risks or subject to mandatory custody based on criminal grounds. *Id.*, ¶ 8. All new intakes
5 from these locations throughout the pandemic have involved small numbers of individuals,
6 typically one or two detainees per transport. *Id.*, ¶ 9. The sole exception is transfers from Boise,
7 Idaho, which average about six detainees per month. *Id.*

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9 In many instances, the initiating agencies have reported to ICE that they test incoming
10 detainees for COVID-19 prior to transport to NWIPC. For example, according to information
11 provided to ICE, the Seattle Federal Detention Center's current protocol for release to ICE is to
12 place detainees on 14 days of quarantine prior to the scheduled release date and to conduct a point
13 of care COVID-19 test (commonly referred to as a rapid test) on the day of release. *Id.*, ¶ 11.
14 Additionally, the Oregon Department of Corrections and Idaho Department of Corrections report
15 they test unvaccinated detainees for COVID-19 prior to release from custody to ICE, although not
16 always for vaccinated detainees. *Id.*, ¶ 13. If a detainee is arriving from Washington or Oregon,
17 the detainee will be transported by vehicle to NWIPC. *Id.*, ¶ 14.

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19 NWIPC receives a limited number of transfers of detainees being released from state and
20 federal criminal custody in California due to a lack of available immigration detention bed space
21 in facilities there, specifically in the area covered by ICE's San Francisco Field Office. *Id.*, ¶ 22.
22 Where ICE has determined that no bed space is available locally, the detainees are released to ICE
23 in California and immediately transferred to NWIPC by escorted commercial flight. *Id.*
24 According to information provided by the San Francisco Field Office, the California Bureau of
25 Prisons and the California Department of Corrections and Rehabilitation test detainees for
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1 COVID-19 seven days before release from custody and the results are usually available
 2 approximately two days before release.⁸ *Id.*, ¶ 23.

3 ICE takes detainees into custody under various circumstances in Idaho. First, ICE takes
 4 individuals into custody directly following release from the Idaho Department of Corrections
 5 (“IDOC”). *Id.*, ¶ 17. ICE understands that IDOC tests unvaccinated detainees for COVID-19 prior
 6 to release, but not vaccinated detainees. *Id.* Second, ICE conducts field apprehensions of
 7 noncitizens in Idaho who meet enforcement priorities. *Id.* In addition, ICE receives a limited
 8 number of detainees apprehended by CBP in Idaho. These detainees are transferred by CBP to the
 9 custody of ICE’s Boise Office. *Id.* Detainees apprehended in Idaho are immediately transported
 10 to NWIPC when transport is available the same day. *Id.*

12 NWIPC also receives detainees from CBP in eastern Washington. *Id.*, ¶ 15. There, the
 13 individuals apprehended are transported to Yakima for further transport to NWIPC via bus or van.
 14 *Id.* If same-day transport could not be arranged for detainees arriving from eastern Washington or
 15 Idaho, the detainees are placed temporarily in the Spokane County Jail or in local Idaho jails
 16 pursuant to intergovernmental agreements. *Id.*, ¶¶ 17-18. The local jails both in Spokane and
 17 Idaho occasionally test detainees for COVID-19 prior to transfer.

19 Finally, ICE receives a limited number of detainees at NWIPC who have been apprehended
 20 by CBP at or near the Blaine, Washington Port of Entry or at the Seattle-Tacoma International
 21 Airport Port of Entry. *Id.*, ¶ 21. In these cases, CBP transports the individual to NWIPC and
 22 therefore the subject is not in ICE custody prior to transport. *Id.* Previously, ICE did not require
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26 ⁸ While the San Francisco Field Office noted that detainees can decline to consent to testing, ERO Tacoma is requiring
 that all detainees transferred to NWIPC from California have a negative COVID-19 test. *Id.*, ¶ 23.

1 these individuals to have been tested for COVID-19 prior to their transport to NWIPC and ICE has
 2 no ability to test them prior to their physical transfer.⁹ *Id.*

3 **C. Procedures that reduce the risk of COVID-19 from entering the facility.**

4 As a response to COVID-19, IHSC has implemented certain safety protocols for new
 5 intakes. Specifically, upon admission to NWIPC, ICE requires that medical and mental health
 6 screening shall be conducted “to identify requirements for medical care, special needs and housing,
 7 and to protect the health and safety of others in the facility.” Lippard Decl., ¶ 20 (quoting 2011
 8 PBNDS Standard 2.1, Part I.V).
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10 Prior to entering NWIPC, new detainees undergo temperature and verbal prescreening
 11 checks again at the facility’s sally port. Lippard Decl., ¶ 21; Malakhova Decl., ¶ 14; *see also* PRR,
 12 at 32 (requiring facilities to conduct pre-intake screening of all new entrants for symptoms of
 13 COVID-19); CDC Interim Guidance, at 9 (conduct pre-intake screening and temperature checks
 14 for all new entrants). Any new detainee displaying or reporting symptoms of COVID-19 is
 15 immediately separated, required to wear a face mask, and referred to a medical provider for further
 16 evaluation. Lippard Decl., ¶ 22; Malakhova Decl., ¶ 14. IHSC conducts comprehensive medical,
 17 mental health, and dental screenings within twelve hours of admission. Malakhova Decl., ¶ 15.
 18 The remaining incoming detainees then move through full intake medical screening. Lippard
 19 Decl., ¶ 23. During full medical intake screening, detainees undergo temperature testing and
 20 verbal screening for COVID-19 a second time. Malakhova Decl., ¶ 15. IHSC also administers a
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 24 ⁹ CBP has informed ICE that all adults seeking entry to the United States at the Seattle Tacoma International Airport
 25 are required to have been tested for COVID-19 within three calendar days of their departing flight. *Id.*, ¶ 21 n.4;
 26 (citing U.S. Department of State, *COVID-19 Testing Required for U.S. Entry*, available at:
https://travel.state.gov/content/travel/en/international-travel/before-you-go/covid-19_testing_required_US_Entry.html (accessed Oct. 11, 2021)) (outlining full testing requirements and limited
 exemptions).

1 voluntary COVID-19 test of all new detainees upon intake via RT-PCR testing. Supp. Lippard
2 Decl., ¶ 4; Stip. ¶ 14.

3 Detainees who do not meet the current IHSC protocol requirements for isolation
4 monitoring due to possible COVID-19 symptoms or exposure are placed in separate, designated
5 housing units for 14 days of medical monitoring for signs or symptoms of COVID-19 (commonly
6 referred to as the New Intake Monitoring housing units, or “NIMS”). Malakhova Decl., ¶ 16; *see*
7 *also* PRR, at 36. The number of NIMS units and which housing units are designated as NIMS
8 varies depending on operational need and capability. Lippard Decl., ¶ 25. Detainees in the 14-
9 day observation period are not allowed to comingle with other detainees in common areas during
10 that period. Stip. ¶ 16; Lippard Decl., ¶ 27. If 14 days pass without any detainees in a cell
11 displaying signs or symptoms of COVID-19, the detainees are released to other housing units in
12 the general population of the facility. Lippard Decl., ¶ 27. A separate remote medical unit has
13 been established to monitor detainees undergoing 14-day observation in the NIMS housing units.
14 *Id.*; Malakhova Decl., ¶ 17. Overall, medical intake processing takes approximately 20-45 minutes
15 per detainee, depending on the complexity of a detainee’s medical history and medical issues.
16 Malakhova Decl., ¶ 23. The number of detainees that can be processed at one time is limited by
17 the space available in the medical clinic to individually examine each detainee. *Id.* It takes IHSC
18 approximately 6 hours to complete medical intake processing for a flight of 60 incoming detainees
19 and 10-11 hours to complete the processing for a flight of 100-130 detainees, including the time
20 needed to complete RT-PCR testing for COVID-19. *Id.*
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1 Detainees at NWIPC are housed in the NIMs in the following preference order: single
 2 occupancy cell,¹⁰ double occupancy cell, cell occupancy of 3-4 detainees; and finally, open bay
 3 dormitory. Lippard Decl., ¶ 26. NIMs placements at NWIPC are currently based on daily
 4 admissions, i.e., detainees arriving together on the same date and having the same risk
 5 classification level may be placed in the same cell but those arriving on different dates or of
 6 different risk classification levels may not be housed together.¹¹ *Id.*; *see also* PRR, at 36 (stating
 7 that facilities “should consider cohorting daily admissions; two day of admissions, or multiple days
 8 of admissions...”).

9
 10 **D. Testing capabilities at NWIPC.**

11 NWIPC uses two different COVID-19 tests at different points during the NIMs process.
 12 Malakhova Decl., ¶¶ 19, 21. On the first day in NIMs, detainees are tested using a RT-PCR test,
 13 which takes between 2-3 days to receive results, which provides a better, more accurate and safer
 14 method of intake testing given the physical capacity at NWIPC. *Id.*, ¶¶ 19, 22. On day 10-12 of
 15 the quarantine, detainees are tested again using the RT-PCR test due to an increased number of
 16 intakes. *Id.*, ¶ 21; Stip. ¶ 16.

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 18 IHSC has three Abbott ID Now machines at NWIPC, which can run 2-3 tests per machine
 19 per hour. Malakhova Decl., ¶ 24. Each Abbott ID Now test must be run through the machine
 20 within 60 minutes of specimen collection, which makes it impossible for IHSC to collect
 21 specimens for testing from all the detainees during their medical intake processing. *Id.* Assuming
 22 optimal performance at three tests per hour per machine (or nine tests total for the facility), intake
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 25 ¹⁰ All cells have their own sinks and toilets. Lippard Decl., ¶ 26 n. 8.

26 ¹¹ Where an open bay housing unit is used, only detainees arriving together on the same flight are placed in the NIMs
 27 unit. Lippard Decl., ¶ 26 n.9. Detainees from other flights or arriving on other days are not added to that NIMs unit.
 28 *Id.*

1 testing for COVID-19 via Abbott ID NOW would add approximately 6.7 hours of intake
 2 processing for a flight of 60 detainees or 13.3 hours for a flight of 120 detainees.¹² *Id.*
 3 Additionally, such testing would require at least two additional IHSC staff members simply to
 4 conduct the testing. *Id.*

5 III. LEGAL STANDARD

6 “It frequently is observed that a preliminary injunction is an extraordinary and drastic
 7 remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden
 8 of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original) (internal
 9 quotations omitted); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Plaintiffs
 10 seeking preliminary injunctive relief must establish that: (1) they are likely to succeed on the
 11 merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the
 12 balance of equities tips in their favor; and (4) an injunction is in the public interest.” *Garcia v.*
 13 *Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citing *Winter*, 555 U.S. at 20). Alternatively,
 14 plaintiffs can show that there are “‘serious questions going to the merits’ and the ‘balance of
 15 hardships tips sharply towards’ [plaintiffs], as long as the second and third *Winter* factors are [also]
 16 satisfied.” *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017). “[P]laintiffs
 17 seeking a preliminary injunction face a difficult task in proving that they are entitled to this
 18 extraordinary remedy.” *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). Plaintiffs’
 19 burden is aptly described as a “heavy” one. *Id.*

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 25 ¹² Current IHSC guidance requires all detainees to be tested for COVID-19 within 12 hours of admission, though that
 26 time frame may be extended up to 24 hours “if facility collection logistics require additional time.” See IHSC Interim
 27 Guidance, at 3. All regular medical intake processing must be completed within 12 hours. See 2011 Performance-
 28 based National Detention Standard (“PBNDS”) 4.3, Section J. IHSC would not be able to meet the 12-hour timelines
 if Abbott ID NOW was added as an intake testing method at NWIPC. Malakhova Decl., ¶ 26 n. 2.

1 The purpose of a preliminary injunction “is to preserve the status quo and the rights of the
2 parties until a final judgment issues in the cause.” *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d
3 1091, 1094 (9th Cir. 2010). A preliminary injunction may not be used to obtain “a preliminary
4 adjudication on the merits,” but only to preserve the status quo pending final judgment. *Sierra*
5 *On-Line, Inc.*, 739 F.2d at 1422.

6 Here, Petitioners have not met their heavy burden to demonstrate that the TRO should be
7 converted to a preliminary injunction.
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9 IV. ARGUMENT

10 A. Petitioners cannot demonstrate a likelihood of success on the merits.

11 The law and facts do not clearly favor Petitioners’ position here. The Government’s
12 transport and intake of detainees throughout the pandemic at NWIPC has complied with the PRR
13 and CDC guidance. Federal Respondents acknowledge that the Court issued the TRO after finding
14 that Petitioners made a clear showing that they were likely to succeed on the merits, or
15 alternatively, raised serious questions going to the merits of their petition on Fifth Amendment
16 grounds. TRO, at 8. For the reasons argued in opposition to the TRO, Federal Respondents
17 respectfully disagree with the Court’s decision. Dkt. No. 346, at 15-23.
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19 However, if this Court finds that that a preliminary injunction is appropriate, the wording
20 of the TRO should be limited and clarified to (1) allow small-scale transfers from non-southern
21 border facilities without pre-transport COVID-19 testing, and (2) allow COVID-19 testing to be
22 performed by any entity prior to transport – not just ICE. Petitioners have presented no evidence
23 that these types of transfers violate class members’ Fifth Amendment rights.
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1 ***1. NWIPC’s small-scale intake of noncitizens from state and federal agencies***
 2 ***throughout the pandemic does not violate Petitioners’ due process rights.***

3 a. The right to reasonable safety

4 Petitioners are unlikely to succeed on a claim that the Government has violated their Fifth
 5 Amendment right to reasonable safety at NWIPC by accepting small-scale intakes of new
 6 detainees from state and federal agencies throughout the pandemic. There is no dispute that prior
 7 to the resumption of transfers of detainees from CBP facilities at the southern border, NWIPC
 8 experienced a low rate of COVID-19 positive cases in the detainee population. Petitioners neither
 9 allege that these transfers were the impetus of seeking a preliminary injunction nor that these
 10 transfers violate CDC guidance. The low number of COVID-19 positive detainees from March
 11 2020 to April 2021 demonstrates that ICE’s NIMs process successfully identified individuals with
 12 COVID-19 and contained any potential outbreak from spreading to other parts of the facility. This
 13 is a result of Respondents continued rigorous adherence to CDC guidance and specifically,
 14 COVID-19 precautions. Furthermore, Petitioners have not shown that the transport of new
 15 detainees in small groups or the NIMs process subjects newly-identified class members to a
 16 substantial risk of COVID-19.
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18 Due process requires the government to assume some responsibility for civil detainees’
 19 safety and well-being, such as “food, clothing, shelter, medical care, and reasonable safety.”
 20 *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989). The Ninth Circuit
 21 applies an objectively unreasonable test to failure-to-protect claims brought under the Due Process
 22 Clause. *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc). “[T]he defendant’s
 23 conduct must be objectively unreasonable, a test that will necessarily ‘turn on the facts and
 24 circumstances of each particular case.’” *Id.* (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 396
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1 (2015) (alterations and internal quotation marks omitted). To demonstrate objective deliberate
2 indifference, a petitioner must show:

- 3 (i) The defendant made an intentional decision with respect to the conditions
under which the plaintiff was confined;
- 4 (ii) Those conditions put the plaintiff at substantial risk of suffering serious
5 harm;
- 6 (iii) The defendant did not take reasonable available measures to abate that risk,
even though a reasonable officer in the circumstances would have
7 appreciated the high degree of risk involved – making the consequences of
the defendant’s conduct obvious; and
- 8 (iv) By not taking such measure, the defendant caused the plaintiff’s injuries.

9 *Id.*

10 The extensive steps taken by ICE are objectively reasonable measures to abate the risk of
11 COVID-19 from transport and admission of detainees to NWIPC. *See generally* Lippard Decl.;
12 Malakhova Decl. To include all types of transfers as part of a preliminary injunction, Petitioners
13 must show that all transfers of detainees from all facilities to NWIPC creates conditions at NWIPC
14 that put class members at substantial risk of suffering serious harm. To do so, Petitioners must
15 show that the precautions taken to prevent harm to class members are “objectively unreasonable,”
16 not just that there is a potential risk of the injury they are concerned about. *See Kingsley*, 576 U.S.
17 at 389. Importantly, the governing standard is not bare negligence, much less strict liability. As
18 the Ninth Circuit explained in the parallel context of pre-trial detainees, “the pre-trial detainee
19 ‘must prove more than negligence but less than subjective intent – something akin to reckless
20 disregard.’” *Smith v. Washington*, 781 F. App’x. 595, 598 (9th Cir. 2019) (quoting *Castro*,
21 833 F.3d at 1071). Indeed, the Fifth Amendment does not require the government to eliminate all
22 risk to Petitioners. *DeShaney*, 489 U.S. at 200.

24 Accordingly, at minimum, the Court here should tailor any injunction to exclude harms not
25 presented in any of the briefing by Petitioners. *See Chicago Bd. of Educ. v. Substance, Inc.*, 354
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1 F.3d 624, 631-32 (7th Cir. 2003) (holding that courts have an “independent duty” to ensure that
2 injunctions “be specific in terms” and “describe in reasonable detail ... the act or acts sought to be
3 restrained”); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Inc.*, 518 F. Supp. 2d 1197, 1226-
4 27 (C.D. Cal. 2007) (citing *NLRB v. Express Pub. Co.*, 312 U.S. 426, 435 (1941)).

5 b. ICE should not be required to re-test detainees for COVID-19 prior to transport
6 if testing has already been conducted by other entities.

7 In many circumstances, ICE has access to COVID-19 testing conducted by other
8 government agencies prior to transport. However, the TRO requires ICE to conduct COVID-19
9 testing prior to transport. TRO, at 17. No justification exists for this limitation when valid test
10 results are otherwise available. If ICE itself must conduct the COVID-19 test prior to transfer, it
11 effectively prohibits NWIPC from accepting any new detainees from correctional or law
12 enforcement agencies because ICE does not have access to such individuals before their release.
13 Thus, such a requirement is operationally infeasible to implement.

14 Any issues raised by Petitioners concerning pre-transport testing are addressed when other
15 entities perform COVID-19 testing prior to transport. Many agencies conduct COVID-19 testing
16 as part of their release process and make the results available to ICE prior to transport, which
17 should be equally reliable as testing conducted by ICE. *See* Supp. Lippard Decl., ¶¶ 11, 13, 23.
18 Moreover, testing prior to transfer whether conducted by ICE or another state or federal agency
19 unquestionably complies with CDC guidance to conduct testing at either the sending or receiving
20 facility if a transfer between detention facilities occurs. *See* CDC’s Testing Guidance (providing
21 various scenarios for movement-based screening testing and recommending testing and a 14-day
22 quarantine should at minimum occur at one of the facilities involved in the transfer). In addition,
23 ICE requires all incoming detainees to go through the isolation and quarantine NIMs process,
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1 which includes at least two COVID-19 tests for each detainee prior to release to the general
2 population.

3 c. Small-scale transfers without pre-transport testing do not violate Petitioners' right
4 to reasonable safety.

5 Throughout the pandemic, ICE has accepted small-scale transfers of detainees where no
6 immediate COVID-19 test results were available from the initiating agency. This includes
7 noncitizens that are transported to NWIPC by other agencies. Supp. Lippard Decl., ¶ 21. These
8 smaller transfers inherently present fewer challenges in risk reduction of COVID-19 than large
9 scale transfers of noncitizens by airplane from the southern border. Most significant, the risk of
10 cross-exposure is minimal for single-detainee or small-cohort transfers where mask wearing is
11 required and social distancing during transport is possible.

12
13 As with all transfers, the detainees arriving under this scenario are tested at NWIPC during
14 NIMs and immediately isolated, therefore complying with CDC guidance. *See* CDC Testing
15 Guidance, at 6 (“Ideally, testing and a 14-day quarantine would occur at the originating facility
16 before transfer and again at the destination facility at intake; at a minimum it should occur at one
17 facility or the other.”). When only one or two detainees are transferred, those detainees are isolated
18 in one or two cells in the NIMs unit separate from detainees arriving on different days. Lippard
19 Decl., ¶ 26. Therefore, the risk of cross-contamination after arrival at NWIPC is minimal even if
20 a detainee was not tested prior to transport.

21
22 Injunctive relief requiring pre-transport testing of small-scale transfers is not supported by
23 the evidence presented by Petitioners nor the rationale used by the Court to issue the TRO.
24 Accordingly, the Court should not grant a preliminary injunction requiring pre-transport testing
25 for all transfers.
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1 **B. Petitioners cannot show a likelihood of irreparable harm.**

2 To establish irreparable harm, the movant must first “demonstrate that irreparable injury is
3 likely in the absence of an injunction;” it “will not issue if the person or entity seeking injunctive
4 relief shows a mere possibility of some remote future injury.” *Park Village Apartment Tenants*
5 *Association v. Foster*, 636 F.3d 1150 (9th Cir. 2011) (internal citation and quotation marks
6 omitted); *see also Winter*, 555 U.S. at 22. “Issuing a preliminary injunction based only on a
7 possibility of irreparable harm is inconsistent with” the Supreme Court’s “characterization of
8 injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that
9 the plaintiff is entitled to such relief.” *Id.* Conclusory or speculative allegations are not enough to
10 establish a likelihood of irreparable harm. *Herb Reed Enters., LLC v. Florida Entm’t Mgmt., Inc.*,
11 736 F.3d 1239, 1250 (9th Cir. 2013).

12 Petitioners have not established that “irreparable injury is likely in the absence of an
13 injunction.” *Winter*, 555 U.S. at 22. Petitioners have presented no evidence that the small-scale
14 transfers that have been ongoing throughout the pandemic creates the likelihood of irreparable
15 harm to class members. Petitioners present evidence that only pertains to the alleged risks caused
16 by large-scale transfers by airplane without pre-transport COVID-19 testing – not transfers of one
17 or a small-cohort of detainees. Accordingly, the Court should deny Petitioners’ request to grant
18 conversion of the overbroad language of the TRO into a preliminary injunction.
19

20
21 **C. ICE’s interests would be harmed, and the Public’s interests would not be served by**
22 **the grant of injunctive relief.**

23 The remaining equities do not weigh in Petitioners’ favor. The potential harm to ICE is
24 great if this Court mandates heightened requirements above those provided by the CDC. As shown
25 above, not all the CDC provisions are mandatory or feasible when applied to the facts here. For
26

1 instance, the CDC does not mandate testing at both facilities involved in a transfer. Petitioners
2 seek that mandate here. If granted, the order would have the effect of enjoining ICE from
3 transporting detainees from CBP facilities at the southern border to NWIPC, as well as from
4 accepting individual or small-scale detainee transfers from local facilities and agencies as
5 described above.

6 This Court should reject Plaintiffs' ill-advised attempt to micro-manage carefully
7 coordinated pandemic safety precautions. The public interest is better served by allowing medical
8 professionals at NWIPC, and other staff following the guidance of such professionals, to
9 implement medical procedures and protocols to protect detainees from exposure to COVID-19.
10 *See Youngberg v. Romeo*, 457 U.S. 307, 322-23 (1982) (urging judicial deference and finding
11 presumption of validity regarding decisions of medical professionals concerning conditions of
12 confinement).

13
14 Accordingly, the Court should deny the Motion.

15 V. CONCLUSION

16 Because Petitioners cannot satisfy any of the requirements for preliminary injunctive relief,
17 ICE respectfully requests the Court deny Petitioners' Motion for Conversion of the Temporary
18 Restraining Order to a Preliminary Injunction. In the alternative, the Court should tailor any
19 injunctive relief (1) to allow small-scale detainee transfers without pre-transport testing and (2)
20 allow ICE to accept COVID-19 tests performed by any state or federal agencies prior to transport
21 for all transfers.
22

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25 //

1 DATED this 12th day of October, 2021.

2 Respectfully submitted,

3 NICHOLAS W. BROWN
4 United States Attorney

5 /s/ Michelle R. Lambert
6 MICHELLE R. LAMBERT NY#4666657
7 Assistant United States Attorney
8 United States Attorney's Office
9 1201 Pacific Avenue, Suite 700
Tacoma, WA 98402
Telephone No. (253) 428-3824
E-mail michelle.lambert@usdoj.gov

10 /s/ James C. Strong
11 JAMES C. STRONG, OR # 131597
12 Assistant United States Attorney
13 United States Attorney's Office
14 700 Stewart Street, Suite 5220
15 Seattle, Washington 98101-1271
16 Phone: 206-553-7970
17 Fax: 206-553-4073
18 E-mail: james.strong@usdoj.gov