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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

WILFREDO FAVELA AVENDANO; J.A.M.;
NAEEM KHAN on behalf of themselves and all
others similarly situated,

Petitioners-Plaintiffs,

v.

NATHALIE ASHER, Director of the Seattle
Field Office of U.S. Immigration and Customs
Enforcement; TONY H. PHAM, Deputy Director
and Senior Official Performing the Duties of the
Director of the U.S. Immigration and Customs
Enforcement; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT; STEPHEN
LANGFORD, Warden, Tacoma Northwest
Detention Center,

Respondents-Defendants.

NO. 2:20-CV-700-JLR-MLP

**AMENDED PETITION FOR WRIT
OF HABEAS CORPUS AND CLASS
ACTION COMPLAINT FOR
INJUNCTIVE AND
DECLARATORY RELIEF**

1 **INTRODUCTION**

2 1. We are eight months into a global pandemic on a scale not seen for over a
3 century. Over a million people have died, including over two hundred thousand people in the
4 United States. Governments around the world continue to mandate social distancing, recognizing
5 that physical separation is still the only way to effectively prevent the spread of a deadly,
6 rapidly-spreading virus with no vaccine and no known cure. But that basic protection is entirely
7 unavailable to people in immigration detention, who are locked up as they await the adjudication
8 of their civil immigration cases or their deportation. Across the country, Immigration Customs
9 and Enforcement (“ICE”) has reported that over seven thousand detainees have tested positive
10 for COVID-19 and seven have died.¹

11 2. Yet in the midst of this pandemic, ICE continues to detain medically vulnerable
12 people at the Northwest Detention Center (“NWDC”) (also known as the Northwest ICE
13 Processing Center), exposing them to an imminent risk of serious illness or death.

14 3. Conditions at NWDC make it impossible for detained people to protect
15 themselves through social distancing by remaining at least six feet apart. Detainees at NWDC
16 live, sleep, bathe, and eat next to other detainees—an environment that forecloses the possibility
17 of maintaining even the *minimum* distancing necessary to slow the virus’s spread. Nor can they
18 protect themselves from the dangerous actions or practices of their custodians, such as their
19 custodians’ failure to reliably wear masks, or by receiving testing if they believe themselves to
20 be exposed.

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22
23 ¹ Ngo Decl., Ex. A, Immigration and Customs Enforcement, *ICE Guidance on COVID-19* (last
24 updated Nov. 1, 2020) (hereinafter “ICE Guidance”) (“Confirmed Cases” page reporting that
7,015 ICE detainees have tested positive for COVID-19 as of Nov. 1, 2020).

1 4. This case challenges the detention of individuals who are highly vulnerable to
2 COVID-19 because of their underlying medical conditions and/or age. Petitioners-Plaintiffs
3 (“Plaintiffs”) and members of the proposed class are noncitizens who are or will be held in civil
4 immigration detention at NWDC in the midst of the COVID-19 pandemic. They are all at high
5 risk of severe illness and death from COVID-19 due to their age and/or underlying medical
6 conditions as identified by the U.S. Centers for Disease Control and Prevention (“CDC”) and
7 public health experts—conditions such as diabetes, asthma, chronic heart conditions, and chronic
8 respiratory conditions. Dkt. 3 (First Amon Decl.) ¶¶ 10–11; Dkt. 4 (McKenzie Decl.) ¶¶ 23, 24,
9 26, 27, 31. Without this court’s timely intervention, they will suffer severe illness, and some may
10 die.

11 5. The continued detention of medically vulnerable people at NWDC in light of the
12 imminent threat of COVID -19 creates not only a humanitarian crisis but also a constitutional
13 crisis. The Fifth Amendment to the Constitution forbids the government from putting civil
14 detainees squarely in the path of a lethal pandemic that poses a high risk of serious illness or
15 death. The nature of the pandemic and the conditions of confinement at NWDC make it
16 impossible for Defendants to provide vulnerable individuals reasonable safety as guaranteed
17 under the Fifth Amendment. The risk of harm is “so grave that it violates contemporary
18 standards of decency to expose anyone unwillingly to such a risk.” *Helling v. McKinney*, 509
19 U.S. 25, 36 (1993) (emphasis omitted).

20 6. This Court has the authority to order Defendants to comply with the Fifth
21 Amendment and release Plaintiffs and the members of the proposed class from civil detention. A
22 judge of this Court has already ordered the release of one detainee from NWDC who is at high
23 risk for serious illness from COVID-19, finding that “Respondents detain Petitioner at the
24

1 NWIPC in conditions that create a substantial risk he will be exposed to the coronavirus and
 2 contract COVID-19.” *Pimentel-Estrada v. Barr*, 458 F. Supp. 3d 1226, 1244 (W.D. Wash. 2020)
 3 (*Pimentel-Estrada I*).

4 7. The Ninth Circuit recently sided with a class of immigrant detainees in a similar
 5 challenge to detention based on COVID-19, finding that “the Government likely failed to meet
 6 its constitutional duty to provide reasonably safe conditions,” and concluding that detained
 7 people were likely to suffer irreparable harm given COVID-19’s high mortality rate. *See Roman*
 8 *v. Wolf*, No. 20-55436, 2020 WL 6040125, at *6 (9th Cir. Oct. 13, 2020); *see also Xochihua-*
 9 *Jaimés v. Barr*, 798 F. App’x. 52 (9th Cir. 2020) (sua sponte release of immigrant petitioner).
 10 Similarly, courts across the country have ordered the immediate release of individuals like
 11 Plaintiffs from ICE detention facilities in light of the potentially fatal consequences of the
 12 continuing constitutional violation.²

13
 14 ² *See, e.g., Zepeda Rivas v. Jennings*, 445 F. Supp. 3d 36 (N.D. Cal. 2020); *Ixchop Perez v. Wolf*,
 15 445 F. Supp. 3d 275 (N.D. Cal. 2020); *Bent v. Barr*, 445 F. Supp. 3d 408 (N.D. Cal. 2020);
 16 *Castillo v. Barr*, 449 F. Supp. 3d 915 (C.D. Cal. 2020); *Hernandez Roman v. Wolf*, No. 5:20-cv-
 17 00768-TJH-PVC, 2020 WL 6107069 (C.D. Cal. Oct. 15, 2020); *Hernandez Roman v. Wolf*, No.
 18 5:20-cv-768-TJH-PVC, 2020 WL 3487632 (C.D. Cal. June 19, 2020), *appeal dismissed*, No. 20-
 19 55662, Dkt. 55-1, at *4 (9th Cir. Oct. 13, 2020); *Alcantara v. Archambeault*, No. 20-cv-756-
 20 DMS (AHG), 2020 WL 2315777 (S.D. Cal. May 1, 2020); *Kaur v. U.S. Dep’t of Homeland Sec.*,
 21 No. 2:20-cv-03172-ODW (MRWx), 2020 WL 1939386 (C.D. Cal. Apr. 22, 2020); *Singh v. Barr*,
 22 No. 20-cv-02346-VKD, 2020 WL 1929366 (N.D. Cal. Apr. 20, 2020); *Doe v. Barr*, No. 20-cv-
 23 02141-LB, 2020 WL 1820667 (N.D. Cal. Apr. 12, 2020); *Ortuño v. Jennings*, No. 20-cv-02064-
 24 MMC, 2020 WL 1701724 (N.D. Cal. Apr. 8, 2020); *see also, e.g., da Silva Medeiros v. Martin*,
 458 F. Supp. 3d 122 (D.R.I. 2020); *Savino v. Souza*, 453 F. Supp. 3d 441 (D. Mass. 2020);
Coronel v. Decker, 449 F. Supp. 3d 274 (S.D.N.Y. 2020); *Basank v. Decker*, No. 449 F. Supp. 3d
 205 (S.D.N.Y. 2020); *Coreas v. Bounds*, 458 F. Supp. 3d 352 (D. Md. 2020); *Vazquez Barrera v.*
Wolf, 455 F. Supp. 3d 330 (S.D. Tex. 2020); *Malam v. Adducci*, 459 F. Supp. 3d 867 (E.D. Mich.
 2020) (*Malam II*); *Fofana v. Albence*, 454 F. Supp. 3d 651 (E.D. Mich. 2020); *Malam v.*
Adducci, 452 F. Supp. 3d 643 (E.D. Mich. 2020), *as amended* (Apr. 6, 2020) (*Malam I*); *Galan-*
Reyes v. Acoff, 460 F. Supp. 3d 719 (S.D. Ill. 2020); *Essien v. Barr*, 457 F. Supp. 3d 1008 (D.
 Colo. 2020); *Yanes v. Martin*, No. 1:20-cv-216-MSM-PAS, 2020 WL 3047515 (D.R.I. June 2,
 2020); *Carlos M.R. v. Decker*, No. 20-6016 (MCA), 2020 WL 4339452 (D.N.J. July 28, 2020);
Vazquez Barrera v. Wolf, No. 4:20-cv-1241, 2020 WL 6130717 (S.D. Tex. Oct. 19, 2020).

1 8. For the reasons given below, this Court should establish a process to consider
2 members of the medically vulnerable Plaintiff class for release from detention, which is the only
3 effective means for them to avoid infection by a lethal virus with no vaccine or cure. The Court
4 should also require Defendants to conduct periodic testing of detainees at NWDC for COVID-19
5 in accordance with CDC guidelines, and limit the number of people detained at NWDC to reduce
6 the risk of viral spread.

7 **JURISDICTION AND VENUE**

8 9. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331
9 (federal question), 5 U.S.C. § 702 (waiver of sovereign immunity), 28 U.S.C. § 1343 (original
10 jurisdiction), 28 U.S.C. §§ 2241, 2243 (habeas jurisdiction), and Article I, Section 9, Clause 2 of
11 the United States Constitution (the Suspension Clause).

12 10. Venue lies in the United States District Court for the Western District of
13 Washington because Plaintiffs are detained by Defendants at NWDC, which is located within the
14 Western District of Washington. 28 U.S.C. § 2242. Venue is proper in the Western District of
15 Washington because a substantial portion of the relevant events occurred in the District and
16 because multiple Defendants reside in the District. 28 U.S.C. § 1391(b), (e)(1).

17 **PARTIES**

18 11. **Plaintiff Wilfredo Favela Avendaño** is a 46-year-old man from Mexico. He has
19 been detained at NWDC since March 13, 2020. He has asthma that is not well-controlled. He
20 uses two inhalers. He uses one inhaler twice daily, once when he wakes up and once before bed.
21 The other inhaler is a rescue inhaler that he uses only when he has symptoms of an asthma
22 attack. At NWDC, he uses this rescue inhaler on average twice every day. His asthma puts him at
23 high risk of serious illness or death if he contracts COVID-19. Dkt. 4 ¶ 26.

1 12. **Plaintiff J.A.M.**³ is a 57-year-old man from El Salvador. Part of his right lung
2 has been removed as the result of a gunshot injury; the bullet was never removed. Due to the
3 presence of the bullet, his right lung does not function properly. He also has Type II diabetes.
4 Due to his medical conditions, he is at high risk of serious illness or death if he contracts
5 COVID-19. Dkt. 4 ¶ 23.

6 13. **Plaintiff Naeem Khan** is a 47-year-old man from Pakistan and a lawful
7 permanent resident of the United States. He has diabetes. His diabetes has worsened while in
8 ICE custody because he is not able to exercise enough or eat properly. Due to his medical
9 condition, he is at high risk of serious illness or death if he contracts COVID-19. Dkt. 4 ¶ 24.

10 14. **Defendant Nathalie Asher** is the Field Office Director for the Seattle Office of
11 ICE. The Seattle Field Office is responsible for carrying out ICE’s immigration detention
12 operations at NWDC. Defendant Asher is a legal custodian of Plaintiffs. She is sued in her
13 official capacity.

14 15. **Defendant Tony H. Pham** is the Deputy Director and Senior Official Performing
15 the Duties of the Director of ICE. Defendant Pham is responsible for ICE’s policies, practices,
16 and procedures, including those relating to the detention of immigrants. Defendant Pham is a
17 legal custodian of Plaintiffs. He is sued in his official capacity.⁴

18 16. **Defendant ICE** is a federal law enforcement agency within the Department of
19 Homeland Security. ICE is responsible for the criminal and civil enforcement of immigration
20 laws, including the detention and removal of immigrants. Enforcement and Removal Operations
21

22 ³ Plaintiff J.A.M. proceeds in this action using only the initials of his first and last name,
pursuant to a protective order issued in this case. Dkt. 61.

23 ⁴ Defendant Pham is automatically substituted for Mathew T. Albence, the former Senior
24 Official Performing the Duties of the Director of ICE, pursuant to Federal Rule of Civil
Procedure 25(d).

1 (“ERO”), a division of ICE, manages and oversees the immigration detention system. Defendant
2 ICE is a legal custodian of Plaintiffs.

3 17. **Defendant Stephen Langford** is employed by the private corporation the GEO
4 Group, Inc. as Warden of the Tacoma Northwest Detention Center, where Plaintiffs are detained.
5 Defendant Langford is a legal custodian of Plaintiffs. He is sued in his official capacity.

6 **FACTS**

7 **I. COVID-19 Poses A Grave Risk of Harm, Including Serious Illness or Death, 8 to Older Adults and Persons with Certain Medical Conditions.**

9 18. In the United States, at least 9,284,966 people have already tested positive for the
10 virus, and at least 231,510 have died.⁵ The United States has more reported cases than any other
11 country in the world.⁶ In Washington, there are at least 113,329 confirmed cases and 2,468
12 known deaths, and rates of both cases and hospitalizations are increasing throughout the state—
13 20% increase in cases and 21% increase in hospitalizations in the past two weeks alone.⁷

14 19. As the CDC now recognizes, COVID-19 can be spread through airborne
15 transmission, via respiratory droplets that contain the coronavirus, such as those produced when
16 an infected person coughs or sneezes, or through even smaller particles called aerosols, which
17 are produced through normal breathing. Dkt. 3 ¶ 13; Second Supplemental Declaration of Joseph
18 Amon (Second Supp. Amon Decl.) ¶¶ 8-9. Viral droplets can spread between people at a
19 distance of at least six feet, and aerosols can spread between people at an even greater distance
20 and remain suspended in the air for hours. *Id.* ¶ 9. Airborne transmission of COVID-19 beyond a

21 ⁵ Ngo Decl., Ex. B, John Hopkins Univ. of Medicine, *COVID-19 Dashboard by the Center for
22 Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU)* (updated Nov. 2,
2020).

23 ⁶ *Id.*

24 ⁷ Ngo Decl., Ex. C, The New York Times, *Washington Covid Map and Case Count* (updated
Nov. 2, 2020).

1 distance of six feet is of particular concern in enclosed spaces with poor ventilation such as
2 detention centers, jails, and prisons. *Id.* ¶¶ 10-11. The virus that causes COVID-19 may also be
3 transmitted when one person touches a surface or object that has the virus on it and then touches
4 their mouth, nose, or eyes. *Id.* People who have contracted COVID-19, but who are
5 asymptomatic, presymptomatic, or only mildly symptomatic can spread the virus and place all
6 others with whom they have contact in danger. *Id.* ¶ 19(g).

7 20. The congregate nature of detention poses greater risks for viral spread. Based on
8 studies of COVID-19 transmission in prisons and jails, the CDC recently clarified that a “close
9 contact” for COVID-19 transmission is defined as anyone who is “within 6 feet of an infected
10 person for a cumulative total of 15 minutes or more over a 24-hour period starting from 2 days
11 before illness onset (or, for asymptomatic patients, 2 days prior to test specimen collection) until
12 the time a patient is isolated.” Detainees are very likely to be in contact for this greater than this
13 time threshold, especially because the time for exposure depends on cumulative exposure.
14 Second Supp. Amon Decl. ¶ 12(d).

15 21. There is no vaccine to prevent COVID-19. Dkt. 3 ¶ 8. Nor is there a known cure
16 or anti-viral treatment. *Id.* The only known means of preventing infection—and the
17 corresponding risk of illness from COVID-19—is maintaining a distance of *at least* six feet from
18 other people, including people who are not symptomatic, a practice known as “social
19 distancing.” *Id.* ¶ 15; *see also* Second Supp. Amon Decl. ¶ 7. Increased sanitization, including
20 frequent hand- and face-washing and sanitization of commonly used surfaces, can mitigate, but
21 not eliminate the risk of infection. Dkt. 3 ¶ 15; Second Supp. Amon Decl. ¶ 7. Lack of
22 appropriate measures to prevent introduction of the virus, rapidly identify cases of COVID-19
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1 with adequate testing, and conduct appropriate contact tracing, quarantine, and isolation
2 compound the challenge to ensure a safe environment. Second Supp. Amon Decl. ¶ 7.

3 22. Outcomes from COVID-19 vary from no or mild symptoms to respiratory failure
4 and death. Dkt. 3 ¶ 8. Individuals who are at least 55 years old and those with certain underlying
5 medical conditions are at the highest risk of severe disease and death if they are infected with
6 COVID-19. *Id.* ¶¶ 10-12.⁸ According to recent estimates, the fatality rate of COVID-19 is about
7 ten times higher than a severe seasonal influenza. *Id.* ¶ 4. For people in the highest-risk
8 populations, the fatality rate of COVID-19 is about 15 percent—or one in seven. *Id.*

9 23. Those who survive severe cases of COVID-19 often have lasting damage.
10 COVID-19 can severely damage lung tissue, requiring long-term rehabilitation. *Id.* ¶ 9. It can
11 also cause significant damage to other organs. COVID-19 can target the heart muscle, causing a
12 condition called myocarditis that can limit a person’s ability to exercise and work for the rest of
13 their life. Dkt. 5 (Golob Decl.) ¶ 9. There is also evidence that COVID-19 may trigger an
14 immune system over-response, leading to permanent damage to organs, such as neurologic
15 damage and kidney damage requiring dialysis. *Id.* People in higher-risk categories who contract
16 COVID-19 are more likely to need advanced support. Dkt. 3 ¶¶ 8-12. This level of supportive
17 care requires highly specialized equipment, such as positive pressure ventilators and
18 extracorporeal mechanical oxygenation. *Id.* ¶ 9.

19 24. The extensive degree of support that COVID-19 patients need can quickly exceed
20 local healthcare resources, and this could be especially true for patients coming from
21 immigration detention centers. *Id.* ¶ 50. By far the best way to avoid further burdening an already
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23 ⁸ See also Ngo Decl. Ex. D, ICE, *Enforcement and Removal Operations COVID-19 Pandemic*
24 *Response Requirements* (Version 5.0, Oct. 27, 2020) (“ERO PRR”).

1 over-taxed healthcare system is to enable individuals, particularly those who are highly
2 vulnerable to serious complications from COVID-19, to avoid infection in the first place. *Id.* ¶
3 55.

4 25. The only way to protect vulnerable people from serious health outcomes,
5 including death, is to prevent them from being infected with the coronavirus. Because
6 meaningful risk mitigation is not possible at NWDC, these individuals must be considered for
7 release to avoid needless suffering or death. First Amon Decl., Dkt. 3 ¶¶ 55-57; Second Supp.
8 Amon Decl. ¶ 7.

9 **II. Conditions at the Northwest Detention Center Increase the Risk of COVID-19**
10 **Infection.**

11 **A. COVID-19 Spreads Rapidly in Detention and Correctional Facilities.**

12 26. The conditions at NWDC place immigrant detainees at serious risk of infection
13 with COVID-19. By detaining them at NWDC, Defendants thus place detainees who are
14 vulnerable to serious illness or death from COVID-19 due to their age and/or underlying medical
15 conditions at serious risk of these consequences.

16 27. COVID-19 continues to spread rapidly through ICE detention centers throughout
17 the country, with outbreaks still occurring late into the pandemic. *See, e.g., Hernandez Roman v.*
18 *Wolf*, 5:20-cv-00768-TJH-PVC, 2020 WL 579798 (C.D. Cal. Sept. 29, 2020); *Zepeda Rivas v.*
19 *Jennings*, No. 20-cv-02731-VC, Dkt. 500 (N.D. Cal. Aug. 6, 2020) (Att. A). As of the date of
20 this filing, there are over 7,000 confirmed cases among people detained by ICE. Moreover,
21 because the only mandated testing that ICE requires is for detainees at initial intake into a
22 facility, there is no systematic means of testing or discovering positive COVID-19 test cases
23 among staff or detainees in the general population after intake. Second Supp. Amon Decl. ¶
24 19(l).

1 28. As the CDC has indicated, enclosed spaces with inadequate ventilation create an
2 environment where the risk of airborne transmission of COVID-19 is even greater. Second Supp.
3 Amon Decl. ¶ 10. Immigration detention centers also present a greater risk of outbreak and
4 spread due to crowding, structural limitations, and limited ability for detainees to practice proper
5 hygiene and take measures to protect themselves from exposure. *Id.*; Dkt. 6 (Schriro Decl.) ¶¶
6 23, 31, 35, 38-40.

7 29. NWDC is an enclosed environment in which contagious diseases easily spread.
8 People live in close quarters and are subject to security measures that make social distancing
9 impossible. Further, people at NWDC are unable to follow the relevant directives promulgated
10 by medical and public health officials for mitigating the spread of COVID-19. *Id.* ¶¶ 35, 36, 38,
11 41, 45-47, 51, 52. For example, ICE’s most recent COVID-19 Pandemic Response
12 Requirements, dated October 27, 2020, acknowledges that “strict social distancing may not be
13 possible in congregate settings such as detention facilities,” and requires social distancing
14 measures only “to the extent practicable.” Such policies are insufficient to protect detainees from
15 COVID-19 transmission. Second Supp. Amon Decl. ¶ 12(f). Nowhere in ICE or NWDC’s
16 policies or documents do Defendants address airborne transmission. *Id.* ¶ 11.

17 30. The spread of COVID-19 at other correctional facilities, which are similarly
18 structured and operated, demonstrates this danger. Many of the largest COVID-19 outbreaks in
19 the nation have occurred in correctional facilities, including the Avenal State Prison in Avenal,
20 California (3,284 confirmed cases); San Quentin State Prison in San Quentin, California (2,557
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1 cases); Marion Correctional Institution in Marion, Ohio (2,453 cases); and Pickaway
2 Correctional Institution in Scioto Township, Ohio (797 cases).⁹

3 31. The University of California, Los Angeles School of Law’s Behind Bars Project
4 has confirmed that over 143,149 incarcerated people and over 30,000 correctional staff have
5 contracted COVID-19 nationwide. Over 1,000 incarcerated people and 56 correctional staff have
6 died of COVID-19. Unsurprisingly, one analysis found that COVID-19 case rates for prisoners is
7 5.5 times higher than the case rate of the general U.S. population, and this rate is likely an
8 underestimate of the actual prevalence of COVID-19 in prison settings.¹⁰

9 **B. Immigration Detainees at NWDC Cannot Engage in Necessary Social**
10 **Distancing.**

11 32. Social distancing is crucial to preventing the spread of COVID-19. Dkt. 3 ¶ 15.
12 The nature of detention at NWDC denies people the opportunity to protect themselves from the
13 spread of COVID-19. Social distancing at NWDC is physically impossible. *Id.* ¶ 30; *see also*
14 *Second Supp. Amon Decl.* ¶ 12. NWDC and other immigration detention facilities are not
15 designed or operated to allow for the necessary physical distancing. *See* Dkt. 3 ¶¶ 22, 23, 29, 30,
16 40, 52; *Second Supp. Amon Decl.* ¶¶ 11–12; Dkt. 6 ¶¶ 31(c), 35–44.

17 33. Recent CDC guidance underscores the threat this inability to social distance poses
18 to detainees. Transmission of the virus to a “close contact” can occur with anyone who is “within
19 6 feet of an infected person for a cumulative total of 15 minutes or more over a 24-hour period.”
20 Because social distancing is not possible at NWDC, an infected person, including a guard, staff
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22 ⁹ Ngo Decl., Ex. E, The New York Times, *Coronavirus in the U.S.: Latest Map and Case Count*
23 (updated Nov. 2, 2020).

24 ¹⁰ Ngo Decl., Ex. F, Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, JAMA Network (July 8, 2020).

1 member, or detainee, is likely to be in contact with others in the facility for a time greater than
2 this cumulative 15-minute threshold. Second Supp. Amon Decl. ¶ 12(d).

3 34. The accounts of detainees and Defendants' own representations to this Court
4 demonstrate why social distancing is not possible at NWDC. Most immigration detainees at
5 NWDC live in pods. Months into the pandemic, these pods still house 20, 30, or even 40
6 detainees. Dkt. 104 (Lippard Decl.) ¶ 38. These pods serve as dormitories for large numbers of
7 detainees, and have common areas in which detainees must congregate by necessity. Dormitories
8 are divided into different sleeping areas, but detainees' beds—usually bunkbeds—are so close
9 that one can reach out and touch the neighboring bunk, much closer than six feet away. Dkt. 7
10 (First Favela Avendaño Decl.) ¶¶ 5, 9, 10; Dkt. 9 (First Khan Decl.) ¶ 5; Dkt. 10 (Diaz Reyes
11 Decl.) ¶ 6; Dkt. 11 (J.A.M. Decl.) ¶ 10. The facility is designed to prevent the beds from being
12 moved. Dkt. 104 ¶ 39.

13 35. Detainees spend nearly all their time, including eating, socializing, and sleeping,
14 in the sleeping areas or common spaces of the pods. This environment makes social distancing
15 impossible. Robles Rodriguez Decl. ¶ 11; Second Khan Decl. ¶¶ 2–3; Cha Decl. ¶ 12; Melgar
16 Alas Decl. ¶ 7.

17 36. Indeed, detainees must share communal areas and surfaces, and they share just a
18 small number of showers, sinks, and toilets among many people and at times must line up to use
19 them. Dkt. 7 ¶ 11; Second Favela Avendaño Decl. ¶¶ 9–10; Dkt. 10 ¶¶ 8, 13. Meals occur at the
20 same time for detainees in each pod, making it difficult to engage in social distancing. Dkt. 7 ¶
21 14; Second Khan Decl. ¶ 3; Cha Decl. ¶ 12; Melgar Alas Decl. ¶ 7.

1 37. Detainees who participate in immigration court hearings are also placed into
2 crowded situations in which social distancing is not possible. They wait in holding areas or in
3 court where social distancing is not feasible. Robles Rodriguez Decl. ¶ 11.

4 38. GEO officers often refuse to engage in social distancing as well, placing
5 themselves and detainees at risk. Dkt. 15 (First Nerheim Decl.) ¶¶ 5, 6, 9.

6 39. These conditions and shared common spaces and objects, such as bathrooms and
7 sinks, maximize the likelihood that COVID-19 will spread rapidly across the facility, infecting
8 vulnerable detainees. Dkt. 3 ¶¶ 15, 22, 23, 29, 30, 40, 42, 43, 52. In addition, movement of
9 detainees, guards, and other staff within and among housing units, as well as to and from other
10 areas of the facility, expose detainees to many new individuals and put them at risk in the
11 absence of the ability to socially distance. Dkt. 6 ¶¶ 37–43.

12 **C. Defendants Fail to Take Necessary Measures Protect Detainees from COVID-19**
13 **at NWDC.**

14 40. Defendants have failed to adopt adequate and appropriate measures to prevent the
15 introduction and spread of the virus.

16 41. In particular, Defendants have failed to rapidly identify cases of COVID-19 with
17 appropriate testing, screening, and contact tracing. Their quarantine and isolation practices of
18 confirmed COVID-19 cases likewise remain inadequate. Defendants have failed to provide
19 specific protections for those who are medically vulnerable to COVID-19. Defendants have also
20 failed to provide adequate measures necessary to mitigate the spread of COVID-19 in the
21 facility, including the rigorous use of face masks and proper sanitation and hygiene.

22 42. **Failure to Test for COVID-19.** While detainees are now tested at intake,
23 COVID-19 testing at NWDC remains sporadic at best and is insufficient to detect the virus
24 among employees and detainees. For example, Defendants have failed to test detainees who

1 likely have been exposed to staff with confirmed COVID-19 cases, even after quarantining these
 2 detainees. Defendants’ current testing and screening practices do not conform with CDC
 3 protocols, or even their own. Second Supp. Amon Decl. ¶ 19(e)-(f), (j).

4 43. ICE’s most recent Pandemic Response Requirements, Version 5.0, acknowledges
 5 and cites to CDC guidance that recommends COVID-19 testing for “asymptomatic individuals
 6 with recent known or suspected exposure to SARS-CoV-2 to control transmission.”¹¹

7 44. Two staff members at NWDC, including a guard employed by GEO and an ICE
 8 Health Service Corps (IHSC) employee have tested positive for COVID-19 in the last two
 9 weeks. In response to the GEO guard’s positive test on October 21, 2020, Defendants placed at
 10 least one housing unit in quarantine because of likely COVID-19 exposure. *See* Declaration of
 11 Emily Simcock Ex. A. But Defendants have categorically refused to conduct any testing of these
 12 detainees who they placed into quarantine, even after detainees or their attorneys requested tests.
 13 *See id.* Similarly, they have made clear that they will not conduct any tests of detainees in
 14 response to the positive test of the IHSC employee. Dkt. 129-1 (Bostock Decl.) ¶ 5. By contrast,
 15 following another GEO guard’s positive test in late September 2020, all detainees in the
 16 quarantined pod were offered voluntary tests. *Compare* Dkt. 122-1 (Bostock Decl.) ¶ 8 (stating
 17 that detainees would be offered tests after guard tested positive) *with* Dkt. 128-1 (Bostock Decl.)
 18 (declining to mention testing for detainees following a second guard’s positive test) *and* Simcock
 19 Decl. Ex. A (email from ICE deportation officer refusing testing to individual in pod where
 20 positive guard had been present). Defendants’ failure to test any detainees after exposure to a
 21 guard with a confirmed case of COVID-19 is inconsistent with the CDC’s guidance. Second
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24 ¹¹ Ngo Decl. Ex. D, ERO PRR (Version 5.0, October 27, 2020) at 33.

1 Suppl. Amon Decl. ¶ 19(e)–(f). Without having tested any of the quarantined detainees,
2 Defendants now claim that there are no active COVID-19 cases at the facility.

3 45. The presence of staff and employees who have tested positive, and ICE’s failure
4 to adequately test detainees after exposure to infected staff, have been the cause of COVID-19
5 outbreaks at other immigration detention facilities. *See, e.g., Hernandez Roman v. Wolf*, No. 20-
6 55436, 2020 WL 5683233 (9th Cir. Sept. 23, 2020); *Zepeda Rivas v. Jennings*, No. 20-cv02731-
7 vc, Dkt. 500 (N.D. Cal. Aug. 6, 2020) (Att. A). Failure to adequately test staff and detainees
8 presents a clear risk of spread of the virus throughout the facility. *Id.* ¶¶ 32, 33, 40; Second
9 Suppl. Amon Decl. ¶ 19(d), (j), (l).

10 46. **Failure to Screen and Conduct Contact Tracing.** Defendants’ screening
11 mechanisms to ensure that COVID-19 does not enter the facility through employees, staff, and
12 vendors are inadequate. Moreover, Defendants’ employees have failed to adhere to existing
13 screening mechanisms.

14 47. For example, on Thursday, October 1, 2020, Defendants reported that a GEO
15 staff member who works in the general population units at NWDC tested positive for COVID-
16 19. Dkt. 122-1 ¶ 3. This staff member had a fever and loss of taste and smell—classic symptoms
17 of COVID-19—on Sunday, September 27, 2020, and called in sick on Monday, September 28,
18 2020. However, the staff member returned to work on Tuesday, September 29, 2020, completed
19 NWDC’s screening questions, and entered the facility. *Id.* ¶ 4. The staff member claimed he had
20 no symptoms that day and was able to clear screening, as the screening inquires only about
21 symptoms “in the last 24 hours.” *Id.* ¶ 5. This episode clearly indicates that NWDC’s screening
22 protocol is inadequate to identify symptomatic cases of COVID-19, and that staff are not
23 adequately educated on the proper steps to take if they experience symptoms. Second Supp.

1 Amon Decl. ¶ 19(c). Defendants also failed to conduct a thorough contact tracing investigation
2 following the identification of this officer, because only detainees in one dorm that the officer
3 last worked were tested; other detainees and officers who may have had contact during the
4 symptomatic period were apparently not tested. Second Suppl. Amon Decl. ¶ 19(d).

5 48. The possibility of asymptomatic or presymptomatic transmission means that
6 monitoring staff or detainees for fever is also inadequate to identify all who may be infected and
7 prevent transmission. Dkt. 3 ¶¶ 14, 32, 53.

8 49. **Inadequate Quarantine and Isolation.** In detention settings, quarantine and
9 isolation are necessary to ensure that individuals who are sick or who have been exposed to
10 COVID-19 do not interact with others. Yet Defendants’ quarantine and medical isolation
11 practices are insufficient, if not dangerous. ICE guidance states that “[d]etainees who do not have
12 fever or symptoms, but meet CDC criteria for epidemiologic risk, are housed separately in a
13 single cell, or as a group.”¹² However, experts have concluded that cohorting vulnerable
14 detainees together *increases* their risk of becoming infected with COVID-19. Dkt. 3 ¶ 36.

15 50. CDC guidance for detention facilities directs that facilities should separate
16 detainees with symptoms of COVID-19 from others.¹³ It instructs that each individual with a
17 confirmed or suspected case of COVID-19 should be assigned their own room and bathroom.¹⁴
18 CDC guidance provides that as a last resort, “if there are no other available options,” multiple
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22 ¹² Ngo Decl., Ex. A, ICE Guidance.

23 ¹³ Ngo Decl., Ex. G, Centers for Disease Control and Prevention, *Interim Guidance on*
Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities
17 (updated Oct. 21, 2020) (“CDC Correctional Guidance”).

24 ¹⁴ *Id.* at 5, 17.

1 *laboratory-confirmed* COVID-19 cases—*not* suspected COVID-19 cases—may be placed
2 together.¹⁵

3 51. Quarantine practices at NWDC also place together detainees who may have been
4 exposed without providing a way for them to socially distance. If one person has symptoms of
5 COVID-19, the entire pod may be quarantined, but no measures are taken to ensure that the
6 individuals in the pod are able to socially distance during this time. Cha Decl. ¶¶ 4, 6-7, 10, 12.
7 This failure to separate detainees with COVID-19 symptoms in a manner consistent with best
8 medical practices exposes other detainees to possible COVID-19 infection, facilitating rather
9 than preventing disease transmission. *See* Dkt. 3 ¶¶ 36, 54.

10 52. This flawed use of quarantine in the place of proper medical care is also
11 dangerous. If an individual is potentially exposed to COVID-19, the pod is placed into
12 quarantine but high-risk individuals are not quarantined separately to protect the most vulnerable
13 from the disease. *See, e.g.*, Dkt. 122-1 ¶ 8 (explaining that Defendants quarantined an entire pod
14 together after a guard tested positive); Cha Decl. ¶¶ 6, 12 (“While quarantined, we are not forced
15 to be socially distant within this space.”).

16 53. Individuals detained at NWDC ordinarily have trouble accessing timely and
17 adequate medical care, even for emergencies. Dkt. 10 ¶¶ 14, 15; Dkt. 9 ¶ 4. An increase in
18 symptomatic individuals would make it difficult for detainees to timely receive the medical care
19 they need for both COVID-19 and other medical problems. Dkt. 3 ¶ 49.

20 54. Individuals may also be placed into solitary confinement cells for medical
21 isolation due to COVID-19. Dkt. 10 ¶ 16. The solitary confinement cells are dirty, poorly
22 ventilated, and windowless. *Id.* ¶ 17. Using solitary confinement cells for this purpose is contrary

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24 ¹⁵ *Id.* at 3, 17, 22.

1 to best correctional practice and is likely to lead individuals to hide symptoms if they fear
2 perceived punishment. Dkt. 6 ¶ 44.

3 **55. Failure to Provide Specific Protections to Medically Vulnerable Detainees.**

4 ICE’s most recent COVID-19 Pandemic Response Requirements (v. 5.0) requires documented
5 temperature and verbal screenings of medically vulnerable detainees twice daily, and designation
6 of rooms near each housing unit for evaluation of individuals with COVID-19 symptoms.
7 Defendants’ failure to implement these protections would place medically vulnerable detainees
8 in danger.

9 **56. Inadequate Provision and Use of Face Masks, Personal Protective**

10 **Equipment, Hygiene, and Sanitation.** Whenever strict social distancing is not possible, masks
11 are necessary to mitigate, although not prevent, the spread of COVID-19. Second Amon Supp.
12 Decl. ¶ 20. CDC guidance instructs everyone to wear face masks in settings where social
13 distancing is not feasible.¹⁶ CDC guidance also provides that those detained must wear personal
14 protective equipment, including coveralls and gloves, while cleaning in an area where a person
15 with a confirmed or suspected case of COVID-19 has been present.¹⁷

16 **57. ICE’s most recent COVID-19 Pandemic Response Requirements (v. 5.0),**

17 however, adds one note not included in the CDC guidance—that workers need not wear a mask
18 “if contraindicated.” This exception places all detainees in danger. Second Suppl. Amon Decl. ¶
19 19(f).

20 **58. Despite CDC guidance, mask use at NWDC is sporadic, including among those**

21 for whom it matters most: guards who interact with detainees. Detainees are not required to wear
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23 ¹⁶ Ngo Decl., Ex. K, CDC, *Recommendation Regarding the Use of Cloth Face Coverings* (last
updated Aug. 7, 2020).

24 ¹⁷ Ngo Decl. Ex. G, CDC Correctional Guidance at 18.

1 masks. Robles Rodriguez Decl. ¶ 13; Second Khan Decl. ¶¶ 4, 6; Second Favela Avendaño ¶ 8.
 2 Even more worryingly, guards regularly fail to wear masks in both the proximity of detainees
 3 and other guards. Robles Rodriguez Decl. ¶¶ 5, 7; Second Khan Decl. ¶ 7; Cha Decl. ¶ 9; Second
 4 Favela Avendaño ¶ 3. Attorneys who regularly visit the facility agree that guards at the facility
 5 regularly exhibit a disregard for this most basic of prevention measures. *See* First Nerheim Decl.,
 6 Dkt. 15 ¶ 9; Second Nerheim Decl. ¶¶ 7-8, 13; Avila Decl. ¶¶ 2-4. This state of affairs
 7 substantially increases the possibility of an outbreak. For example, recently, a guard who
 8 regularly refused to wear a mask tested positive for COVID-19. Dkt. 122-1; Robles Rodriguez
 9 Decl. ¶ 4-5; Cha Decl. ¶ 9. This failure to properly wear personal protective equipment
 10 significantly increases detainees’ risk of exposure to COVID-19. Dkt. 3 ¶¶ 38, 40-41; Second
 11 Suppl. Amon Decl. ¶ 20. Indeed, breakdowns in safety among guards have led to other outbreaks
 12 at immigration and correctional facilities, including the SeaTac Detention Center.¹⁸

13 59. CDC guidance instructs everyone—including people who are incarcerated or
 14 detained—to wash hands often with soap and water for at least 20 seconds and, absent soap and
 15 water, to use a hand sanitizer of at least 60% alcohol.¹⁹ CDC guidance directs that detention
 16 centers provide detainees with no-cost access to soap, running water, hand dryers or disposable
 17 paper towels, and, where possible, hand sanitizer.²⁰ It also directs that those incarcerated or
 18 detained, like all others, cover their mouth and nose with a disposable tissue when coughing or
 19 sneezing.²¹

22 ¹⁸ Ngo Decl., Ex. H, Jim Brunner, “COVID infections hit 31 inmates and 6 staff at federal
 detention center in SeaTac,” *The Seattle Times* (Aug. 28, 2020).

23 ¹⁹ Ngo Decl., Ex. G, CDC Correctional Guidance at 8, 10.

24 ²⁰ *Id.*

²¹ *Id.*

1 60. Individuals detained at NWDC are unable to engage in the hygiene practices
2 necessary to protect themselves from COVID-19. Announcements regarding sanitation and
3 hygiene practices are given only in English and Spanish, and sometimes only in English, with no
4 translation for individuals who do not speak either of those languages. Dkt. 7 ¶ 8; Dkt. 11 ¶ 13.

5 61. Sinks turn off every five or ten seconds, making it difficult for detainees to wash
6 their hands for twenty seconds. Dkt. 7 ¶ 15; Dkt. 9 ¶ 12. Detainees have to push buttons to run
7 the sink or flush the toilet, and those buttons are not disinfected. Dkt. 10 ¶ 13. Soap and towels
8 run out and may not be replaced until the next day Dkt. 9 ¶ 12; Dkt. 10 ¶ 12. The CDC instructs
9 that, in detention facilities, frequently touched surfaces and objects must be cleaned several times
10 per day.²² However, detainees are generally responsible for much of the cleaning, but are not
11 necessarily able to fully sanitize objects after every use or conduct adequate cleaning. Dkt. 9 ¶ 8;
12 Second Khan Decl. ¶ 2; Robles Rodriguez Decl. ¶ 12; Second Favela Avendaño Decl. ¶ 5.
13 Cleaning of common areas and objects does not always happen regularly, or even every day.
14 Second Khan Decl. ¶ 2; Cha Decl. ¶ 13. NWDC's failure to provide adequate sanitation and
15 hygiene measures will allow COVID-19 to spread freely in the facility. Dkt. 3 ¶¶ 29, 37, 40.

16 62. In sum, NWDC has failed to implement measures necessary to protecting the
17 safety and health of detainees in light of the COVID-19 pandemic. *See* Dkt. 3 ¶¶ 52-54; Second
18 Suppl. Amon Decl. ¶¶ 6-21. As a result, Defendants continue to hold Plaintiffs and members of
19 the class in conditions where they are at grave risk of contracting COVID-19.
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24 ²² *Id.* at 9.

1 **III. Continued ICE Detention is Unsafe for Individuals, Like Plaintiffs, who are**
2 **Vulnerable to Serious Illness and Death from COVID-19.**

3 63. Without a vaccine or cure for COVID-19, mitigating the risk of contracting the
4 virus is the only known way to protect those who are most vulnerable to serious harm from
5 infection. Dkt. 3 ¶¶ 15, 55.

6 64. Because the overwhelming danger of infection in detention centers, public health
7 experts with experience in detention and correctional settings have recommended release of
8 vulnerable individuals. Dkt. 3 ¶ 55. Indeed, two medical experts for the Department of Homeland
9 Security have concluded that COVID-19 poses an “imminent risk to the health and safety of
10 immigration detainees,” in light of the nature of detention facilities and have recommended
11 release of vulnerable people, both to mitigate that risk and to reduce the strain on local healthcare
12 systems.²³

13 65. The Named Plaintiffs and putative class members in this case are all individuals
14 who are especially vulnerable to serious illness and death if they are infected with COVID-19.
15 But ICE nonetheless detained or continues to detain them at NWDC. Given ICE’s inability to
16 protect the named Plaintiffs and the proposed class while they remain at NWDC, the only
17 effective remedy is consideration for release.

18 **CLASS ALLEGATIONS**

19 66. Plaintiffs bring this action pursuant to Federal Rules of Civil Procedure 23(a) and
20 23(b)(2), and as a representative habeas action, on behalf of themselves and all other persons
21 similarly situated. The proposed class is defined as follows:
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24 ²³ Dkt. 2-3 (Allen & Rich Letter).

1 All individuals detained at the Northwest Detention Center who are age 55 years
2 or older or have medical conditions²⁴ that place them at heightened risk of severe
3 illness or death from COVID-19 as determined by Centers for Disease Control
4 and Prevention guidelines.

5 See Dkt. 3 ¶¶ 10, 11 (listing medical conditions that the CDC has identified as placing
6 individuals at heightened risk for serious illness and death from COVID-19, including all of the
7 above); Dkt. 86 (Venters Decl.) ¶¶ 12–16 (same).²⁵ Joinder of all members is impracticable. As
8 of September 22, 2020, Defendants were detaining at least 410 people at NWDC.²⁶ A significant
9 proportion of these individuals have serious medical conditions and/or are over the age of 55.
10 Two of these medically vulnerable individuals currently detained at NWDC are Plaintiffs in this
11 case. It is reasonable to infer that there are at least dozens more who are detained at NWDC who
12 fit the class definition.²⁷

13 ²⁴ Those medical conditions include: chronic kidney disease (e.g., receiving dialysis); chronic
14 liver disease (e.g., cirrhosis and chronic hepatitis); endocrine disorders (e.g., diabetes mellitus);
15 compromised immune system (immunosuppression) (e.g., receiving treatment such as
16 chemotherapy or radiation, received an organ or bone marrow transplant and is taking
17 immunosuppressant medications, taking high doses of corticosteroids or other
18 immunosuppressant medications, HIV or AIDS); metabolic disorders (e.g., inherited metabolic
19 disorders and mitochondrial disorders); heart disease (e.g., congenital heart disease, congestive
20 heart failure, and coronary artery disease); lung disease (e.g., asthma, chronic obstructive
21 pulmonary disease (chronic bronchitis or emphysema), or other chronic conditions associated
22 with impaired lung function or that require home oxygen); neurological and neurologic and
23 neurodevelopment conditions (including disorders of the brain, spinal cord, peripheral nerve, and
24 muscle such as cerebral palsy, epilepsy (seizure disorders), stroke, intellectual disability,
moderate to severe developmental delay, muscular dystrophy, or spinal cord injury); current or
recent pregnancy (in the last two weeks); body mass index (BMI) greater than 25; and,
hypertension.

²⁵ See also Ngo Decl. Ex. D, ERO PRR, at 8–9 (adopting definition of conditions placing
individuals at higher risk from *Fraihat v. ICE*, 445 F. Supp. 3d 709 (C.D. Cal. 2020).

²⁶ *Moturi v. ICE Field Office Dir.*, No. C19-2023-RSM-BAT, Dkt. 71, slip op. at 12 (W.D.
Wash. Oct. 1, 2020) (Att. B).

²⁷ Nationally, out of about 24,000 detainees in mid-June 2020, ICE identified 5,736 individuals
(about 24%) who fell into the *Fraihat* subclasses, similarly defined to the class proposed here of
individuals whose age or medical conditions make them medically vulnerable to COVID-19.

Fraihat v. Immig. & Customs Enf't., No. EDCV 19-1546 JGB (SHKx), Dkt. 240, slip. op. at 6–7

1 67. Proposed class members’ detention presents common questions of fact and law.
2 All class members are similarly situated as a result of their increased risk of serious medical
3 complications or death from contracting COVID-19. All class members are similarly situated in
4 that conditions at NWDC make social distancing and other protective measures impossible. They
5 all share the common question of whether their continued detention at NWDC violates the Due
6 Process Clause.

7 68. The claims of the proposed class representatives are typical of the claims of the
8 proposed class. All proposed class representatives face a grave risk of serious illness or death
9 from COVID-19 due to their age and/or underlying medical conditions, and all raise the same
10 due process challenge to their detention. The proposed class representatives’ legal challenges to
11 their detention are identical to those of the proposed class.

12 69. The proposed class representatives are adequate representatives because they seek
13 the same relief as the other members of the class, including: an expedited process for
14 consideration for release by ICE or interim bail by the Court, declaratory relief that their ongoing
15 custody violates the Due Process Clause, final injunctive relief and a writ of habeas corpus
16 requiring their release or alternatively a class-wide conditional writ or final injunctive relief that
17 provides a process for considering release by ICE or the Court; periodic testing of detainees,
18 staff, and employees in accordance with CDC guidelines; and, injunctive relief ensuring that ICE
19 may not detain more than an appropriate level to permit for adequate social distancing. The
20 proposed class representatives do not have any interests adverse to those of the class as a whole.

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24 (C.D. Cal. Oct. 7, 2020) (Att. C). Thus, assuming a similar ratio, there are likely around 100
higher risk individuals currently detained at NWDC.

1 70. The proposed class would be represented by counsel from the ACLU Foundation
2 of Washington, the ACLU Foundation, and the Northwest Immigrant Rights Project. Counsel
3 have extensive experience litigating class action lawsuits, including lawsuits on behalf of
4 incarcerated people generally and immigration detainees in particular.

5 71. Defendants have acted on grounds generally applicable to the class by continuing
6 to detain them in circumstances where they are likely to suffer serious medical complications
7 and/or die from COVID-19. Thus, injunctive and declaratory relief is appropriate with respect to
8 the class as a whole.

9 **LEGAL FRAMEWORK**

10 **I. Immigrant Detainees Are Entitled to Due Process Protections Against Exposure**
11 **to Infectious Disease.**

12 72. Whenever the government detains or incarcerates someone, it has an affirmative
13 duty to provide conditions of reasonable health and safety. As the Supreme Court has explained,
14 “when the State takes a person into its custody and holds him there against his will, the
15 Constitution imposes upon it a corresponding duty to assume some responsibility for his safety
16 and general well-being.” *DeShaney v. Winnebago Cty. Dep’t. of Soc. Servs.*, 489 U.S. 189, 199–
17 200 (1989). As a result, the government must provide those in its custody with “food, clothing,
18 shelter, medical care, and reasonable safety. . . .” *Id.* at 200; *see also Pimentel-Estrada I*, 458 F.
19 Supp. 3d at 1243. As the Ninth Circuit recently made clear, this principle applies with equal
20 force in immigration detention centers during the current pandemic. *See Hernandez Roman*, 2020
21 WL 6040125, at *6.

22 73. Conditions that pose an unreasonable risk of future harm violate the Eighth
23 Amendment’s prohibition against cruel and unusual punishment, even if that harm has not yet
24 come to pass. The Eighth Amendment requires that “inmates be furnished with the basic human

1 needs, one of which is ‘reasonable safety.’” *Helling*, 509 U.S. at 33 (quoting *DeShaney*, 489 U.S.
 2 at 200). Accordingly, “[i]t would be odd to deny an injunction to inmates who plainly proved an
 3 unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to
 4 them.” *Id.* Exposing imprisoned people to the risk of infectious disease is unconstitutional, even
 5 when it is “not alleged that the likely harm would occur immediately and even though the
 6 possible infection might not affect all of those exposed.” *Id.* (citing *Hutto v. Finney*, 437 U.S.
 7 678, 682 (1978)). For this reason, a judge of this Court released a detainee from NWDC, even
 8 though there were no confirmed COVID-19 cases in the detention center at that point. *Pimentel-*
 9 *Estrada*, 458 F. Supp. 3d at 1246, 1253 (citing *Helling*, 509 U.S. at 33; *Hutto*, 437 U.S. at 682;
 10 *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985); *Malam I*, 452 F.Supp.3d at 661.

11 74. Civil immigration detainees, like Plaintiffs and the proposed class, are entitled to
 12 even stronger constitutional protections. In contrast to convicted prisoners, immigration
 13 detainees, regardless of prior criminal convictions, are civil detainees held only to ensure their
 14 appearance for civil removal proceedings or for deportation. Thus, their constitutional
 15 protections in custody derive from the Fifth Amendment Due Process Clause. *See Zadvydas v.*
 16 *Davis*, 533 U.S. 678, 690 (2001) (“[G]overnment detention violates the [Fifth Amendment Due
 17 Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate
 18 procedural protections . . . or, in certain special and ‘narrow’ nonpunitive ‘circumstances’ . . .”);
 19 *Pimentel-Estrada*, 458 F. Supp. 3d at 1250.

20 75. The protections of the Fifth Amendment are stronger than those of the Eighth
 21 Amendment. In contrast to the Eighth Amendment, the government violates the Fifth
 22 Amendment rights of a person in civil detention when the conditions of his or her confinement
 23 “amount to punishment. . . .” *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). The Ninth Circuit has
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1 applied this principle to make clear that civil detainees, like Plaintiffs here, are entitled to
2 conditions of confinement that are *superior* to those of convicted prisoners and even to those of
3 criminal pretrial detainees. *Jones v. Blanas*, 393 F.3d 918, 933–34 (9th Cir. 2004), *cert. denied*,
4 546 U.S. 820 (2005) (holding presumptively punitive, and thus unconstitutional, conditions of
5 confinement for civil detainees that are similar to those faced by pre-trial criminal detainees); *see*
6 *also King v. Cnty. of Los Angeles*, 885 F.3d 548, 557 (9th Cir. 2018) (same).

7 76. Because civil detention is governed by the Fifth Amendment rather than the
8 Eighth Amendment, the “deliberate indifference” standard required to establish constitutional
9 violation in the latter context does not apply to civil detainees like Plaintiffs. *See Jones*, 393 F.3d
10 at 934. “A petitioner can demonstrate punitive conditions by showing that the challenged
11 condition is: (1) expressly intended to punish or (2) not rationally related to a legitimate
12 government objective or is excessive to that purpose.” *Pimentel-Estrada I*, 458 F. Supp. 3d at
13 1250. (citing *Wolfish*, 441 U.S. at 535 & n.16). Thus, a condition of confinement for a civil
14 immigration detainee violates the Constitution “if it imposes some harm to the detainee that
15 significantly exceeds or is independent of the inherent discomforts of confinement and is not
16 reasonably related to a legitimate governmental objective or is excessive in relation to the
17 legitimate governmental objective.” *Unknown Parties v. Johnson*, No. cv-15-250-TUC-DCB,
18 2016 WL 8188563, at *5 (D. Ariz. Nov. 18, 2016), *aff’d sub nom. Doe v. Kelly*, 878 F.3d 710
19 (9th Cir. 2017) (citing *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473–74 (2015)); *see also*
20 *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (outlining elements of pretrial
21 detainee’s failure to protect claim under the Fourteenth Amendment); *Pimentel-Estrada*, 458 F.
22 Supp. 3d at 1244 (citing *Castro*, 833 F.3d at 1071) (same). Immigration detention that places
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1 detainees at a substantial risk of serious illness or death is not rationally related to a legitimate
2 governmental objective and thus violates the Fifth Amendment.

3 **II. Defendants Are Violating Plaintiffs' Fifth Amendment Rights.**

4 77. The conditions described above at NWDC violate Plaintiffs' due process rights.
5 Due process requires that the nature and duration of noncriminal confinement bear "some
6 reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*,
7 406 U.S. 715, 738 (1972). The only legitimate purpose, consistent with due process, for civil
8 immigration detention is to prevent flight and ensure the detained person's attendance for a legal
9 hearing adjudicating their status or for removal, or to otherwise ensure the safety of the
10 community. *See Zadvydas*, 533 U.S. at 690.

11 78. Keeping medically vulnerable people detained in a setting where effective
12 hygiene and social distancing is impossible, in the midst of the COVID-19 pandemic, serves no
13 legitimate purpose. Nor is detention under these circumstances reasonably related to the
14 enforcement of immigration laws. Defendants' continued detention of Plaintiffs and the proposed
15 class at NWDC thus violates the Fifth Amendment.

16 79. Plaintiffs' Fifth Amendment rights are also violated because Defendants have
17 made an intentional decision to detain them under conditions that are objectively unreasonable
18 and that place them at serious risk of being infected with COVID-19.

19 80. COVID-19 poses a serious risk to Plaintiffs. As explained above, Plaintiffs are at
20 extreme risk because of their age and/or underlying health conditions. *See supra* ¶¶ 11–14.
21 COVID-19 is highly contagious and can cause severe illness and death, and the only known
22 measures to prevent the spread of the disease cannot be practiced at NWDC. *See supra* ¶¶ 19–58.

1 81. The best means to protect the Fifth Amendment rights of Plaintiffs and the
2 proposed class is consideration for release through individualized bail hearings. The severe risk
3 to which they are being subjected cannot be abated if they remain at NWDC. Public health
4 experts have made clear that slowing the spread of COVID-19 requires social distancing and
5 increased hygiene and that individuals with Plaintiffs' underlying medical conditions are
6 vulnerable to serious disease and death if they contract the virus. *See supra* ¶¶ 2, 4–5, 24–26, 49,
7 55, 63–65, 96; Dkt. 5 ¶¶ 3, 14. However, Plaintiffs cannot take the requisite social distancing and
8 other protective measures while detained at NWDC. Because risk mitigation at NWDC is
9 impossible, the only effective remedy for the unconstitutional conditions to which Plaintiffs and
10 the proposed class are being subjected is release from the detention center. This process will
11 allow the Court to determine whether a class member can be released, or whether no set of
12 release conditions could ameliorate the risk of flight or danger to public safety.

13 82. Defendants have full knowledge of but are disregarding the serious risk that
14 COVID-19 poses to people like Plaintiffs and the proposed class at NWDC. Defendants have
15 long been on notice of the risk that COVID-19 poses to Plaintiffs and others with serious medical
16 conditions and/or who are at advanced age, and that consideration for release is the only effective
17 way to protect them. Indeed, as early as February 25, 2020, two medical experts for DHS alerted
18 the agency about the specific risk posed to immigrant detainees by COVID-19. On March 19,
19 2020, they brought their concerns to the House and Senate Committees on Homeland Security
20 and warned of the danger of rapid spread of COVID-19 in immigration detention facilities.²⁸
21 They explained that in order to save both the lives of detainees and lives in the community at
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23
24 ²⁸ Dkt. 2-3.

1 large, “minimally, DHS should consider releasing all detainees in high risk medical groups[.]”²⁹
2 John Sandweg, a former acting director of ICE, has written publicly about the need to release
3 detainees because ICE detention centers “are extremely susceptible to outbreaks of infectious
4 diseases” and “preventing the virus from being introduced into these facilities is impossible.”³⁰

5 **III. ICE Regularly Uses Its Authority to Release People Detained in Custody Who**
6 **Are Vulnerable to Serious Medical Conditions.**

7 83. ICE has a longstanding practice of humanitarian releases from custody. The
8 agency has routinely exercised its authority to release particularly vulnerable detainees. In fact,
9 ICE has exercised its discretion to release several particularly vulnerable people from NWDC
10 since the start of the pandemic.³¹

11 84. ICE has a range of highly effective tools at its disposal to ensure that individuals
12 report for court hearings and other appointments, including conditions of supervised released.
13 Dkt. 6 ¶¶ 61–65. For example, ICE’s supervision program, the Intensive Supervision Appearance
14 Program (“ISAP”), relies on, when necessary, the use of electronic ankle monitors, biometric
15 voice recognition software, home visits, reporting to supervise participants. *Id.* ¶ 63. A
16 government-contracted evaluation of this program reported a 99% attendance rate at all
17 immigration court hearings. *Id.* ¶ 62.

18 85. ICE’s release authority is based on a range of statutory and regulatory provisions,
19 and follows a long line of agency directives that explicitly instructed officers to exercise
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21 ²⁹ *Id.*

22 ³⁰ Dkt. 2-14 (John Sandweg, *I Used to Run ICE. We Need to Release the Nonviolent Detainees*,
The Atlantic (Mar. 22, 2020)).

23 ³¹ *See, e.g., Dawson v. Asher*, No. C20-409 JLR-MAT, 2020 WL 1704324, at *3 & n.5 (W.D.
24 Wash. Apr. 8, 2020) (noting that ICE voluntarily released four of nine Plaintiffs claiming severe
risk from COVID-19).

1 favorable discretion in cases involving severe medical concerns and other humanitarian equities
2 militating against detention. For example, under 8 C.F.R. § 212.5(b)(1), ICE has routinely
3 exercised its discretion to release detainees “who have serious medical conditions in which
4 continued detention would not be appropriate.” *See also* 8 U.S.C. §§ 1182(d)(5), 1225(b),
5 1226(a), 1231; 8 C.F.R. §§ 1001.1(q), 212.5, 235.3, 236.2(b).

6 86. While ICE officers may have been exercising discretion to release less frequently
7 in recent years, the statutory and regulatory authority underlying the use of prosecutorial
8 discretion in custodial determinations remains in effect.

9 87. Moreover, ICE has released noncitizens on medical grounds regardless of the
10 statutory basis for a noncitizen’s detention. Dkt. 6 ¶ 29.

11 88. Here, the Due Process Clause of the Fifth Amendment to the U.S. Constitution
12 requires ICE to release detainees where civil detention is unable to provide reasonable safety or
13 has become punitive and where release is the only effective remedy. To be clear, Plaintiffs seek
14 release on constitutional grounds by Court order, and not in the exercise of ICE’s discretion.
15 However, the fact that ICE has the authority to release immigrants from custody and has
16 exercised this authority in the past demonstrates that the remedy Plaintiffs request is neither
17 unprecedented nor unmanageable.

18 **IV. This Court Has Authority to Order Plaintiffs’ Release to Vindicate Their Fifth**
19 **Amendment Rights, and Such Relief Is Necessary Here.**

20 89. Courts have broad power to fashion equitable remedies to address constitutional
21 violations in prisons. *Hutto*, 437 U.S. at 687 n.9; *Hernandez Roman*, 2020 WL 6040125, at *5.
22 “When necessary to ensure compliance with a constitutional mandate, courts may enter orders
23 placing limits on a prison’s population.” *Brown v. Plata*, 563 U.S. 493, 511 (2011); *see also*
24 *Duran v. Elrod*, 713 F.2d 292, 297–98 (7th Cir. 1983) (concluding that court did not exceed its

1 authority in directing release of low-bond pretrial detainees as necessary to reach a population
2 cap).

3 90. “Regardless of the statutory basis for Petitioner’s detention, the Court has the
4 authority to order his release if his continued detention violates the Constitution.” *Pimentel-*
5 *Estrada I*, 458 F. Supp. 3d at 1253 ((releasing detainee subject to mandatory detention) (citing
6 *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15–16 (1971); *Stone v. City & Cty. of*
7 *San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992); *Malam I*, 452 F. Supp. 3d at 647–49 (ordering
8 release of detainee held under 8 U.S.C. § 1226(c)); *Vazquez Barrera*, 455 F. Supp. 3d at 333
9 (same)).

10 91. In light of the imminent threat posed by COVID-19, a chorus of courts across the
11 country have ordered the release of particularly vulnerable detainees from ICE facilities.
12 Recognizing the danger posed by asymptomatic carriers, ICE’s lack of testing, and detention
13 facilities that do not allow for social distancing, courts, as in *Pimentel-Estrada*, have ordered
14 release even where there were no confirmed cases in the facility at issue.³² Since the pandemic
15 has begun, courts across the country, including in the Ninth Circuit, have invoked their inherent
16

17 ³² *Favi v. Kolitwenzew*, No. 20-CV-2087, 2020 WL 2114566, at *1 (C.D. Ill. May 4, 2020)
18 (same); *Doe v. Barr*, 2020 WL 1984266, at *6–7 (N.D. Cal. Apr. 27, 2020) (same) (filed at Dkt.
19 22-1); *Kaur*, 2020 WL 1939386, at *1 (same); *Singh v. Barr*, 2020 WL1929366, at *11 (N.D.
20 Cal. Apr. 20, 2020) (same); *Ixchop Perez*, 445 F. Supp. 3d at 280 (same); *Doe*, 2020 WL
21 1820667, at *1 (same); *Bent v. Barr*, 445 F. Supp. 3d at 411 (same); *Bahena Ortuño*, No. 20-cv-
22 02064-MMC, 2020 WL 1701724, at *5 (N.D. Cal. Apr. 8, 2020) (same for four detainees);
23 *Francisco Hernandez v. Wolf*, No. 5:20-cv-00617-TJH-KS, Dkt. 17, at 1, 14 (C.D. Cal. Apr. 1,
24 2020) (Att. D) (ordering release of one medically vulnerable ICE detainee); *Coreas v. Bounds*,
No. 8:20-v-00780, Dkt. 93, at 1-2 (D. Md. May 7, 2020) (Att. E) (same for two detainees);
Manuel Hernandez v. Kolitwenzew, No 2:20-cv-02088, Dkt. 12, at 1 (C.D. Ill. Apr. 23, 2020
C.D. Ill.) (Att. F); *Amaya-Cruz v. Adducci*, No. 1:20 CV 789, 2020 WL 1903123, at *1 (N.D.
Ohio Apr. 18, 2020) (same); *Zaya v. Adducci*, No. 20-10921, 2020 WL 1903172, at *1 (E.D.
Mich. Apr. 18, 2020) (same); *Vazquez Barrera*, 455 F. Supp. 3d at 333-34 (same); *Fofana*, 454
F. Supp. 3d at 655 (same); *Malam v. Adducci*, No. 20-10829, 2020 WL 1809675, at *3 (E.D.
Mich. Apr. 9, 2020) (same for one); *Malam I*, 452 F. Supp. 3d at 647 (same).

1 authority to order individual bail hearings for civil immigration detainees who filed habeas
 2 petitions and then sought release based on the risk they face of contracting COVID-19 while
 3 detained.³³

4 92. Alternatively, the Court could order ICE to conduct its own review of class
 5 members and determine who to release, starting with the presumption of release that can only be
 6 overcome by a showing of flight risk or danger. *See, e.g., Alcantara v. Archambeault*, No. 3:20-
 7 cv-00756-DMS-AHG, Dkt. 38, at 3 (S.D. Cal. Apr. 30, 2020) (filed at Dkt. 22-4) (“Release of
 8 subclass members shall begin immediately, with the expectation that most subclass members will
 9 be released under appropriate conditions determined by Defendants[.]”); *Hernandez Roman v.*
 10 *Wolf*, No. 5:20-cv-00768-TJH-PVC, 2020 WL 6107069, at *6 (C.D. Cal. Oct. 15, 2020)
 11 (ordering ICE to begin depopulating a facility beginning with individuals covered under *Fraihat*
 12 subclasses). The Court should also separately establish a process for considering bail for those
 13 whom ICE has initially denied release. *See Alcantara*, No. 3:20-cv-00756-DMS-AHG, Dkt. 38,
 14 at 3.

15
 16
 17 ³³ *See, e.g., Hernandez Roman v. Wolf*, No. 5:20-cv-00768-TJH-PVC, 2020 WL 3487632 (C.D.
 18 Cal. June 19, 2020), *stay denied*, No. 20-55662, Dkt. 9 (9th Cir. July 8, 2020), *appeal dismissed*,
 19 Dkt. 55-2 (9th Cir. Oct. 13, 2020) (order establishing bail process for class of habeas petitioners);
 20 *Zepeda Rivas*, 445 F. Supp. 3d at 40 (same); *Malam v. Adducci*, No. 5:20-cv10829-JEL-APP,
 21 Dkt. 168 (E.D. Mich. Aug. 4, 2020) (Att. G), *amended*, Dkt. 177 (E.D. Mich. Aug. 12, 2020)
 22 (Att. H) (same for subclass of medically vulnerable petitioners); *Yanes*, 2020 WL 3047515, at
 23 *1, 5–6 (ordering individual bail hearings for class of habeas petitioners); *Gomes v. Acting Sec’y,*
 24 *U.S. Dep’t of Homeland Sec.*, No. 20-cv-453-LM, 2020 WL 2113642, at *1 (D.N.H. May 4,
 2020) (provisionally certifying a proposed class for the “purpose of holding expedited bail
 hearings for class members”); *Savino*, 453 F. Supp. 3d at 453 (granting several class members to
 bail and issuing decision to consider bail applications for other class members); *Avendaño*
Hernandez v. Decker, 450 F. Supp. 3d 443, 446-49 (S.D.N.Y. Mar. 31, 2020) (admitting habeas
 petitioner to bail due to the threat posed by COVID-19); *Coronel*, 449 F. Supp. 3d at 290
 (same); *Calderon Jimenez v. Wolf*, No. 18-cv-10225-MLW, Dkt. 507-1, at 6 (D. Mass. Mar. 26,
 2020) (Att. I) (same).

1 93. By continuing to detain Plaintiffs, Defendants are subjecting Plaintiffs to
2 unreasonable harm, and to unconstitutional punishment. The course of action that can remedy
3 these unlawful conditions is consideration for release from NWDC.

4 **CLAIM FOR RELIEF**

5 **Violation of the Fifth Amendment**
6 **(All Plaintiffs and the Putative Class)**
7 **(Substantive Due Process; Unlawful Punishment;**
8 **Objectively Unreasonable Risk to Health and Safety)**

9 94. Plaintiffs repeat and reallege all the allegations above and incorporate them by
10 reference here.

11 95. The Fifth Amendment to the United States Constitution guarantees that civil
12 detainees, including immigration detainees, may not be subjected to punishment or to conditions
13 that create an objectively unreasonable risk of serious harm. The federal government violates this
14 substantive due process right when it fails to satisfy its affirmative duty to provide conditions of
15 reasonable health and safety to the people it holds in custody. The federal government also
16 violates substantive due process when it subjects civil detainees to conditions of confinement that
17 amount to punishment.

18 96. By detaining Plaintiffs and the proposed class members at NWDC, Defendants
19 subject them to a heightened risk of contracting COVID-19, for which there is no vaccine or
20 cure, and which is likely to be extremely dangerous or fatal for Plaintiffs and proposed class
21 members. Plaintiffs and the proposed class are vulnerable to serious medical complications from
22 COVID-19 and are at risk of serious illness and death so long as they are held in detention. By
23 subjecting Plaintiffs to this risk, Defendants maintain detention conditions that amount to
24 punishment and fail to ensure reasonable safety and health, in violation of Plaintiffs' due process
rights.

1 97. Likewise, Defendants' continued detention of Plaintiffs at NWDC is deliberately
2 indifferent to Plaintiffs' health and safety because only releasing Plaintiffs from custody can
3 adequately protect them from COVID-19. Defendants are aware of the serious risk posed by
4 COVID-19 and are failing to take the only action that can respond to Plaintiffs' medical needs,
5 which is to release Plaintiffs. Defendants' failure to release Plaintiffs and proposed class members
6 has caused them constitutional harm by continuing to subject them to this unreasonable and
7 potentially fatal risk.

8 98. For these reasons, Defendants' ongoing detention of Plaintiffs violates the Due
9 Process Clause.

10 **PRAYER FOR RELIEF**

11 WHEREFORE Petitioners-Plaintiffs request that the Court grant the following relief:

12 a. Certify the Petitioners and all similarly situated civil immigration detainees held
13 at NWDC as a class, appoint named Petitioners as class representatives, and appoint the
14 undersigned as class counsel;

15 b. Exercise the Court's inherent power to undertake an expedited bail process that
16 would consider the enlargement of custody of individual putative class members, including
17 release from detention, pending a final decision on the merits of their habeas claims;

18 c. Declare that conditions of confinement for Petitioners and putative class members
19 held at NWDC are currently unconstitutional under the Due Process Clause of the Fifth
20 Amendment;

21 d. Issue a Writ of Habeas Corpus or final injunctive relief on behalf of the
22 Petitioners and all putative class members and order their release or placement in community-

1 based alternatives to detention such as conditional release, with appropriate precautionary public
2 health measures;

3 e. If the Court determines that all class members should not be released without
4 further inquiry, issue final injunctive relief requiring Defendants to expeditiously review putative
5 class members for release in which (1) a strong presumption of release applies, (2) Defendants
6 must report denials of release to the Court, and (3) counsel for class members can challenge
7 those denials before the court, subject to the same strong presumption of release.

8 f. Alternatively, issue a class-wide conditional writ or final injunctive relief that
9 provides a process by which the Court can consider individual release applications of the named
10 Plaintiffs and all putative class members to determine their suitability for release.

11 g. Issue injunctive relief that ensures that Defendants may not detain more than an
12 appropriate level to permit adequate social distancing;

13 h. Issue injunctive relief requiring the periodic testing of detainees, NWDC staff
14 members, and ICE employees who interact with detainees in accordance with CDC guidelines

15 i. Award Plaintiffs their costs and reasonable attorneys' fees in this action under the
16 Equal Access to Justice Act ("EAJA"), as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and
17 on any other basis justified under law; and

18 Grant any other and further relief that this Court may deem fit and proper.

19 Respectfully submitted on this 4th day of November, 2020.

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13 *Pro hac vice application forthcoming

14 **Pro hac vice applciation forthcoming; not admitted in DC; practice limited to federal court

15 *Attorneys for Petitioners-Plaintiffs*

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2020, I electronically filed the foregoing and attached declaration with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED this 2nd day of December, 2020.

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