

The Honorable James L. Robart
The Honorable Michelle L. Peterson

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

WILFREDO FAVELA AVENDAÑO, et
al.,

Petitioners-Plaintiffs,

v.

NATHALIE ASHER, et al.,

Respondents-Defendants.

Case No. 2:20-cv-700-JLR-MLP

**PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING
ORDER**

NOTING DATE: August 6, 2021*

ORAL ARGUMENT REQUESTED

* Plaintiffs have noted their motion for August 6 in accordance with the stipulated briefing schedule that accompanies this motion.

1 **I. INTRODUCTION**

2 Over the past seven weeks, Respondent-Defendants’ (Defendants) decision to resume
3 mass transfers of immigrants to the Northwest Detention Center (NWDC) has needlessly
4 exposed and sickened an unprecedented number of detainees at the facility and posed a serious
5 threat to the health of medically vulnerable class members in this case. Since June 10, 2021, 112
6 immigrants detained at NWDC have tested positive for COVID-19. Two medically vulnerable
7 class members have been sent to the hospital for COVID-19 related illness. And just this week,
8 three GEO officers have tested positive, including a GEO officer who works in the NWDC’s
9 medical isolation unit and an officer in GEO’s Transport Division.

10 This outbreak is the direct result of Defendants’ failure to take basic precautions to
11 protect detainees in their custody. For much of the pandemic, the Centers for Disease Control
12 and Prevention (CDC) has provided a series of guidelines that require testing of individuals
13 transferred between detention facilities and guidelines for safe air transport during the pandemic.
14 Those air transport guidelines require a commonsense measure: the separation of people who
15 have COVID-19, close contacts of COVID-19 cases, and uninfected passengers during air
16 transport. Despite these well-established guidelines and the widespread availability of testing,
17 Defendants have chosen to disregard these basic precautions, directly exposing detainees to
18 COVID-19 with increasingly alarming results. Absent this Court’s intervention, Defendants will
19 continue to endanger medically vulnerable class members.

20 In light of this urgent situation, Petitioners-Plaintiffs (Plaintiffs), a certified class of
21 individuals who are medically vulnerable to COVID-19, seek a Temporary Restraining Order
22 (TRO). Notably, the relief and solution that Plaintiffs seek does not stop transfers or significantly
23 alter Defendants’ operations. Instead, Plaintiffs ask only for an order that will ensure that
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1 detainees admitted to NWDC have been transferred in compliance with CDC guidelines. Given
2 the limited scope of requested relief, Defendants' disregard of CDC guidance, and their failure to
3 provide safe conditions for class members, Plaintiffs meet the requirements for relief under a
4 TRO. Accordingly, Plaintiffs respectfully request that the Court issue an order enjoining
5 Defendants from admitting to NWDC detainees whose transport to the facility is not in
6 accordance with the CDC's *Interim Guidance for Transporting by Air into, from, or within the*
7 *United States of People with COVID-19 or COVID-19 Exposure*, and the CDC's *Interim*
8 *Guidance for SARS-CoV-2 Testing in Correctional and Detention Facilities*. Under the terms of
9 the order, Defendants may continue to admit detainees to NWDC provided transfer and transport
10 comply with those policies.

11 II. FACTUAL BACKGROUND

12 Since June 2021, when Plaintiffs agreed to suspend discovery and enter settlement
13 discussions, *see* Dkt. 284, Defendants have transferred hundreds of immigrant detainees to
14 NWDC.¹ Defendants have conducted most of these transfers—those from Customs and Border
15 Protection (CBP) detention facilities to NWDC—without the most basic COVID-19 protections.
16 Indeed, they have flouted CDC guidelines for detention facility testing and air transport during
17 the pandemic. These failures have directly resulted in the unprecedented number of COVID-19
18 cases at NWDC.

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¹ The parties have agreed to continue mediation as to the other safety measures at the Northwest
ICE Processing Center (NWIPC), but have reached an impasse as to how to resolve the issue of
transfers to NWIPC. In order to facilitate review of this matter, they have provided a proposed
briefing schedule to the Court and a series of stipulated facts addressing many of the most
important aspects of the transfer process. Plaintiffs conferred with Defendants about this footnote
prior to representing any information from the mediation process, and the parties will follow up
separately with Chief Magistrate Judge Creatura about next steps of mediation. Plaintiffs cite to
the stipulated facts using the following convention: Stip. ¶ #.

1 In the last two months, Defendants have transferred at least 806 people to the NWDC on
2 9 flights operated by Immigration and Customs Enforcement's (ICE) Air Operations Division
3 (ICE Air). Decl. of Danielle Surkatty (Surkatty Decl.), ¶¶ 7–17; *see* Stip. ¶ 3. ICE Air provides
4 aviation support to ICE's Enforcement and Removal Operations Division by transferring
5 detainees to various detention facilities by air within the United States, including from the
6 southern border. Maltese Decl. Ex. A, Enf't & Removal Operations, *ICE Air Operations*
7 *Handbook* at 5 (Sept. 1, 2015) (ICE Air Operations Handbook). However, as ICE Defendants
8 have admitted, and as class members have confirmed, detainees transferred from CBP detention
9 facilities are not tested for COVID-19 prior to their flights to NWDC. Stip. ¶¶ 5, 10; Decl. of
10 Cristian Amaya Vargas ¶ 7; Decl. of Carlos Arevalo Montilla ¶ 5.² Notably, there is no testing
11 even though the Department of Homeland Security (DHS) apparently has the tools to do so. *See*
12 Amaya Vargas Decl. ¶ 5 (noting that some detainees were tested in CBP custody); Decl. of
13 Mohammed Ghazal ¶ 4 (noting that he recalls being tested in CBP custody).³

14 Even worse, ICE has placed detainees with COVID-19 symptoms on flights that may
15 include over 100 detainees at a time. Amaya Vargas Decl. ¶¶ 10–11; Ghazal Decl. ¶¶ 4, 7;
16 Arevalo Montilla Decl. ¶ 4. In at least one instance, ICE Defendants transferred detainees to
17 NWDC on an ICE Air flight despite the known exposure of many individuals to a COVID-19
18 positive case. Dkt. 287-1 ¶ 6. Detainees are unable to practice social distancing during transport,
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20 ² Detainees also are not offered vaccinations prior to transport. Stip. ¶ 6.

21 ³ Plaintiffs understand that as to transfers from ICE detention facilities, ICE conducts testing
22 prior to transfer, as required by CDC guidance. Stip. ¶¶ 2, 10; *see also* Maltese Decl. Ex. B, *ICE*
23 *Pandemic Response Requirements* at 19 (Version 6.0 Mar. 16, 2021) (ICE PRR). However, ICE
24 and its parent agency, DHS, do not ensure testing occurs in the identical scenario of a transfer
from CBP custody to ICE custody, despite the same risks that each type of transfer faces. Stip.
¶¶ 5, 10; Amaya Vargas ¶ 7. This only underscores that ICE is aware of the risks associated with
transfers that fail to honor CDC guidance requiring pre-transfer testing.

1 and their hands and feet are shackled during the transfer process. Stip. ¶ 12; Amaya Vargas Decl.
2 ¶¶ 8–9; Ghazal Decl. ¶ 7; Arevalo Montilla Decl. ¶ 4. ICE officials who accompany detainees
3 during transfer also do not always reliably wear masks. Amaya Vargas Decl. ¶ 8.

4 ICE has also failed to adequately screen detainees who are symptomatic for COVID-19
5 prior to flight, as required by its own policy. The ICE Air Operations Handbook specifies that
6 ICE Air flights include a Flight Nurse who “determine[s] suitability of a detainee’s health status
7 to board an ICE Air aircraft.” Maltese Decl. Ex. A, ICE Air Operations Handbook at 9; *see also*
8 Stip. ¶ 9. According to the handbook, “[a]ny ICE detainee who . . . is suspected of having a
9 health-risk condition potentially contagious to other detainees, staff and/or third parties, will be
10 denied boarding and referred to an ICE approved facility for screening.” Maltese Decl. Ex. A,
11 ICE Air Operations Handbook at 11. Yet the available evidence suggests this process is not
12 followed. As noted above, class members have reported seeing other detainees with COVID-19
13 symptoms on these flights. Amaya Vargas Decl. ¶¶ 6, 11. Moreover, the large number of
14 detainees testing positive in the days following arrival at NWDC further suggests that ICE has
15 placed COVID-19 positive individuals on these flights, resulting in infection of other detainees
16 during transport, despite the nurse’s verbal screening. *See* Suppl. Decl. of Dr. Joseph Amon
17 ¶¶ 10–13 (Amon Decl.) (explaining that the data demonstrates detainees are becoming infected
18 during transfer and intake process because of failure to identify COVID-19 positive individuals).
19 Indeed, this should come as no surprise, since it is well-known that some COVID-19 positive
20 individuals may be asymptomatic. Dkt. 3 (First Amon Decl.) ¶¶ 14, 32(c)–(d).

21 Defendants’ practices also explicitly flout the *Interim Guidance for SARS-CoV-2 Testing*
22 *in Correctional and Detention Facilities* (last updated June 7, 2021) (CDC Testing Guidance),
23 which outlines basic precautionary measures for testing of detainees prior to transfer. *See*
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1 Maltese Decl. Ex. C. This guidance directs that authorities must “[t]est incarcerated/detained
2 persons before transfer to another correctional/detention facility” and “[w]ait for a negative test
3 result before transfer.” *Id.* at 6. As noted above, ICE does not contest that it does not test
4 detainees for COVID-19 prior to transfer from CBP detention facilities, Stip. ¶¶ 5, 10, in contrast
5 to testing done for transfers from other ICE facilities and correctional facilities. *See, e.g.*, Maltese
6 Decl. Ex. B, ICE PRR at 19 (requiring testing for all ICE transfers between facilities); Dkt. 183
7 (Malakhova Decl.) ¶ 33 (explaining that ICE tests “all NWIPC detainees prior to . . . removal or
8 transfer via ICE Air”).

9 ICE also fails to transport detainees to NWDC from CBP detention facilities in
10 accordance with the CDC’s *Interim Guidance for Transporting or Arranging Transportation by*
11 *Air into, from, or within the United States of People with COVID-19 or COVID-19 Exposure*
12 (last updated Jan. 19, 2021) (CDC Transport Guidance). *See* Maltese Decl. Ex. D. This transport
13 guidance applies to “all aircraft operators who wish to provide transportation by air into, from, or
14 within the United States to people with air transportation within the United States to people with
15 confirmed or probable COVID-19 or people who are close contacts of a person with COVID-
16 19.” *Id.* at 1 (emphasis added). The CDC’s transport guidance generally prohibits people with
17 COVID-19 or their close contacts from traveling on scheduled passenger airline flights in the
18 United States until completing isolation or quarantine.⁴ The transport guidance, however,
19 provides an exception if passengers with varied levels of infection or exposure to COVID-19 are
20 cohorted and transported on separate flights. Under this exception, the CDC permits transport of

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22 ⁴ In a separate guidance to travelers, the CDC recommends that any person who is not fully
23 vaccinated be tested for COVID-19 prior to domestic travel. The CDC further instructs “[d]o
24 NOT travel if you were exposed to COVID-19, you are sick, you test positive for COVID-19, or
you are waiting for results of a COVID-19 test.” Maltese Decl. Ex. E, CDC, *Domestic Travel*
During COVID-19 at 2 (last updated Jun. 21, 2021).

1 people with COVID-19 and their close contacts in carefully controlled circumstances. First,
2 people who do not have COVID-19 should not be transported with infected passengers. Maltese
3 Decl. Ex. D, CDC Transport Guidance at 4. Second, people with confirmed cases of COVID-19
4 should remain in isolation until the flight, and can be transported together as a cohort, although
5 positive, asymptomatic people should not be included absent a positive nucleic acid
6 amplification test (NAAT). *Id.* at 2, 4. Third, people who are asymptomatic for COVID-19 but
7 who are close contacts of a confirmed COVID-positive individual can be transported in cohorts,
8 so long as cohorts of different exposed people are separated by six feet. *Id.* Symptomatic close
9 contacts of confirmed COVID-19 cases should be assumed to be infectious and should be tested
10 for COVID-19 prior to flight. *Id.* Despite this guidance, Defendants have not tested detainees for
11 COVID-19 and have failed to place people on separate, cohorted flights according to their level
12 of infection or exposure to COVID-19. Stip. ¶¶ 5, 10; Amon Decl. ¶¶ 14–15.

13 Once the ICE Air flight lands at the Yakima, Washington airport, detainees are unloaded
14 and placed on buses operated by the GEO Group, Inc. for travel to NWDC. Stip. ¶ 11. Upon
15 arrival at NWDC, ICE Health Service Corps (IHSC) employees perform a Polymerase Chain
16 Reaction (PCR) COVID-19 test on detainees at intake. *Id.* ¶ 14. The COVID-19 test, however, is
17 not a rapid or real-time PCR test that provides results before detainees are given housing
18 assignments at NWDC. Instead, the test results are not available for 2-3 days. *Id.* Defendants
19 thus place detainees together in New Intake Monitoring (NIMs) units, where detainees are held
20 in quarantine for at least 14 days, without knowing whether a detainee has COVID-19 and can
21 transmit the virus to others in that unit. *Id.* ¶¶ 15–16; Arevalo Montilla Decl. ¶ 7 (noting that
22 cellmate tested positive after arrival). Although Defendants previously placed detainees in
23 individually walled-off cells designated as NIMs units earlier this year, Dkt. 265 (Lippard Decl.)
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¶ 22, ICE has more recently resorted to placing detainees in open bay units with over 100 people at a time, and designated those dorms as NIMs units. *See* Dkt. 293-1 ¶ 4; Dkt. 318-1 ¶ 7; Ghazal Decl. ¶ 8. The CDC’s correctional facility guidance, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (last updated June 9, 2021) (CDC Correctional Guidance), explains that such intake quarantine measures should only be used as a last resort and are not a preferred form of quarantining individuals because it can *facilitate* spread of COVID-19. Maltese Decl. Ex. F at 17 (CDC Correctional Guidance). This is especially true at NWDC, as these units are not well ventilated as required by CDC guidance. NWDC’s ventilation system in these open bay units in fact promotes secondary transmission of the virus, and air filtration at NWDC is at the lowest possible rating, well below levels required to filter viral particles from circulating air. Decl. of Joseph Clair ¶¶ 20–24.

Taken together, these actions have created a grave situation that continues to unfold. As epidemiological expert Dr. Joseph Amon explains, “ICE’s failure to ensure social distancing and to adhere to the CDC’s transport guidance has endangered detainees in transit and at the NWDC by substantially increasing the risk of COVID-19 transmission.” Amon Decl. ¶ 26. According to his analysis, 73 detainees have tested positive for COVID-19 upon arrival at NWDC in the past seven weeks. *Id.* ¶ 10. This number underscores the importance of testing prior to transfer, as these 73 people were in close contact with other uninfected detainees during transit and while in intake monitoring units for 3-4 days while awaiting PCR results. *Id.* Throughout this entire time, these detainees can infect other people, threatening the health of class members. Indeed, ICE’s data indicates that at least 40 additional detainees at NWDC became infected with COVID-19 during transit or during the new intake monitoring quarantine period since June 10, 2021. *Id.* ¶ 12. Dr. Amon’s analysis indicates that nearly every instance of a positive COVID-19 result upon

1 arrival caused at least one additional infection in detention. In some instances, 11 or 12
2 additional detainees became infected. *Id.* ¶ 13. In light of this data, and consistent with CDC
3 guidance, Dr. Amon observes that “[w]ithout pre-transfer testing, rapid testing on arrival,
4 thorough contact tracing and proper infection control procedures . . . it is not surprising to see
5 ongoing transmission of the SARS-CoV-2 virus among detainees.” *Id.* ¶ 11.

6 ICE’s failure to take these basic precautions poses grave dangers to detainees, staff, and
7 community alike. Two class members have already been sent to the hospital for COVID-related
8 illness in the last seven weeks. *Stip.* ¶ 19; *Amaya Vargas Decl.* ¶¶ 17–18 (describing visit to
9 hospital for pneumonia-like symptoms). NWDC detainees, including medically vulnerable class
10 members, often have not had the opportunity for vaccination until after transit and quarantine at
11 the facility. *Stip.* ¶ 6. Only approximately half of GEO employees at NWDC are vaccinated,
12 leading to continued risk of spread among employees, detainees throughout the facility, and the
13 broader community. *Amon Decl.* ¶ 39. Indeed, since the introduction of new transfers, four GEO
14 guards have tested positive. *See Dkt.* 322-1 ¶ 4; *Dkt.* 310-1 ¶ 17; *Dkt.* 323-1 ¶ 4. Notably, one of
15 these officers works in medical isolation unit of NWDC, while another works in GEO’s
16 Transport Division. *Dkt.* 310-1 ¶ 17; *Dkt.* 323 ¶ 4. This suggests that the officers were exposed
17 to COVID-19 because of ICE’s current failure to adopt basic safety precautions in its transfer
18 protocols and the resulting positive cases at NWDC.

19 Notably, ICE continues to take these actions in a worsening pandemic environment. Over
20 the past month, COVID-19 cases again have spread rapidly because of the Delta variant of the
21 virus. *Amon Decl.* ¶ 31. The highly contagious Delta variant of the COVID-19 virus is 60%
22 more transmissible than prior variants because individuals infected with the variant are infectious
23 more quickly and with higher viral shedding compared to previous strains. *Id.* ¶ 33. Such
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1 transmission is especially likely to occur among detainees transferred from CBP detention
2 facilities, where they have not yet received a vaccine. *See, e.g., id.* ¶ 34; Stip. ¶ 6. Thus, absent
3 quick action to ensure transfers that comply with the limited, basic precautions the CDC outlines,
4 medically vulnerable class members are in even further danger from COVID-19. *Id.*

5 III. LEGAL STANDARD

6 On a motion for a TRO, the movant “must establish that he is likely to succeed on the
7 merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
8 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*
9 *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Stuhlbarg Int’l Sales Co. v. John D. Brush &*
10 *Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (noting that preliminary injunction and TRO
11 standards are “substantially identical”). A TRO may issue where “serious questions going to the
12 merits [are] raised and the balance of hardships tips sharply in [plaintiff’s] favor.” *All. for the*
13 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (second alteration in original)
14 (citation omitted). A plaintiff may succeed under the “serious question” test if they are likely to
15 suffer irreparable injury and show that an injunction is in the public’s interest. *Id.* at 1134–35.

16 IV. ARGUMENT

17 A. Plaintiffs Are Likely to Succeed on the Merits.

18 Nearly a year and a half into the pandemic, the threat posed by COVID-19 is familiar, but
19 no less serious, particularly with the increasing concerns around the Delta variant. Despite the
20 ongoing danger, Defendants have radically changed conditions inside of NWDC. They have
21 done so by introducing mass transfers of individuals from detention facilities where those
22 individuals have not been tested for COVID-19 prior to transfer or cohorted during flight based
23 on their test results or exposure. This is despite the fact that from the start of this case,
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1 Defendants have repeatedly touted the reduction in numbers, the decision to halt transfers from
2 the southern border, and the number of positive cases as primary evidence that they are taking
3 meaningful steps to reasonably protect vulnerable class members. *See, e.g.*, Dkt. 236 at 5–6
4 (explaining that summary judgment is appropriate in part because the current detainee population
5 was then 15.3% capacity, ICE was not seeing large numbers of new admissions, and only 34
6 detainees had tested positive); Dkt. 238, Lippard Decl. ¶¶ 7–10 (explaining that Defendants had
7 suspended southern border transfers, limiting new intakes to NWDC); Dkt. 181 at 17 (asserting
8 that relief was not warranted in part because the detainee population was then at 18.4%
9 capacity).

10 Moreover, even after resuming transfers from the southern border, Defendants have
11 ignored CDC guidance and knowingly exposed medically vulnerable individuals to COVID-19
12 at NWDC. Yet precautionary measures required by the CDC throughout the course of this
13 pandemic are as necessary now as ever, given the widespread outbreaks among transferees and
14 class members that have occurred.

15 Relief for the class is thus appropriate. Indeed, this Court has already granted class
16 certification, recognizing that class members “face the same risk of . . . serious illness or death
17 due to COVID-19.” Dkt. 209 at 13; Dkt. 245. Additionally, this Court has recognized that
18 Plaintiffs may challenge “the current conditions at NWIPC.” Dkt. 209 at 11. Here, Plaintiffs
19 merely request an order that ensures Defendants only admit to NWDC detainees whose transfer
20 and transport accords with CDC guidance. Notably, this relief would not significantly alter
21 Defendants’ operations or their ability to transfer detainees to NWDC. Instead, it would only
22 ensure that they do so in a safe manner to protect class members. In light of these facts, and as
23 detailed below, Plaintiffs’ narrowly-tailored request for relief is appropriate.

1 1. Plaintiffs Are Likely to Succeed on the Merits of their Due Process Claim in
2 Light of the COVID-19 Outbreaks at NWDC.

3 Factual circumstances at the NWDC have dramatically changed since the Court last
4 considered Plaintiffs' requests for a TRO. Class members now face a substantially increased risk
5 of harm because of Defendants' deliberate practices, and they are now likely to succeed on the
6 merits of their Fifth Amendment claim. First, Defendants' own filings indicate that several
7 outbreaks of COVID-19 have occurred because of Defendants' intentional decision to transfer
8 detainees to the facility without adhering to applicable CDC guidance. *See* Dkt. 287-1, 289-1,
9 290-1, 291-1, 293-1, 294-1, 296-1, 297-1, 298-1, 299-1, 300-1, 301-1, 302-1, 303-1, 304-1, 305-
10 1, 307-1, 308-1, 309-1, 310-1, 311-1, 313-1, 314-1, 317-1, 318-1, 319-1, 321-1, 322-1; 323-1;
11 *see also* Amon Decl. Ex. B. As noted *supra*, after Plaintiffs agreed to enter settlement
12 negotiations and suspend discovery proceedings, Defendants transferred hundreds of detainees
13 from the southern border into the NWDC, *see* Dkt. 287-1, Bostock Decl. ¶ 3; Surkatty Decl.,
14 ¶¶ 7–17, a practice which they had previously suspended, *see* Dkt. 238, Lippard Decl. ¶¶ 7–10.
15 Consequently, the detainee population at the NWDC has increased from 212 detainees at the
16 beginning of June 2021 (13.4% capacity), Dkt. 287-1 ¶ 4, to as many as 684 detainees (43.4%
17 capacity) as of July 19, 2021, Dkt. 314-1 ¶ 13.

18 Despite this dramatic change, and by their own admission, Defendants have declined to
19 adhere to CDC's testing and transport guidance with respect to transfers of detainees between
20 CBP and ICE detention facilities. Stip. ¶¶ 5, 10. This failure to adopt safety measures for
21 transfers to NWDC has predictably resulted in an unprecedented number of COVID-19 cases at
22 the facility. As Defendants previously noted, the number of confirmed COVID-19 cases of
23 detainees in the facility between March 2020 and April 12, 2021, was 34. Dkt. 264 at 13. Yet, in
24 the last seven weeks *alone*, the number of confirmed cases among detainees has reached at least

1 112 and two class members have been sent to the hospital for COVID-19 related illness. Stip.
2 ¶ 20; Dkt. 289-291, 293-294, 296-303. Four staff members have also tested positive—including
3 one who worked in the medical isolation unit and one in GEO’s Transport Division—
4 underscoring COVID-19’s ability to spread despite Defendants’ efforts to manage the spread in
5 the facility. Dkt. 322-1 ¶ 4; Dkt. 310-1 ¶ 17; Dkt. 323-1 ¶ 4.

6 Defendants’ explicit failure to adhere to CDC guidance regarding testing, transfers, and
7 transport of people between detention facilities has led to the rapid spread of COVID among
8 detainees at NWDC. As detailed above, Dr. Amon explains that Defendants’ failure to abide by
9 CDC guidance requiring testing prior to transfer and cohorting during transport has directly
10 caused many class members to become infected with COVID-19 and has sent two class members
11 to the hospital. Amon Decl. ¶¶ 8, 12–13; Stip. ¶ 19. He explains that Defendants’ notices to the
12 Court show that dozens of new detainees have initially tested negative for COVID-19 at intake,
13 but then later test positive because of exposure during transfer or quarantine in the NIMs units.
14 Amon Decl. ¶¶ 8, 12–13. These second positive tests (after an initial negative test) often occur
15 well after arrival at NWDC, and in many cases, over a week after transfer. *See id.* ¶¶ 8–9. This
16 data demonstrates that Defendants have recklessly exposed class members to COVID-19 during
17 transit and intake at NWDC. It also underscores that Defendants are doing so despite having the
18 tools—the testing and cohorting policies the CDC requires—to significantly reduce the danger
19 posed to detainees.

20 The gravity of the threat posed to class members in the past seven weeks demonstrates
21 the need for immediate relief even where the Court has denied prior motions for relief. As an
22 initial matter, Defendants’ filings plainly indicate *multiple* outbreaks have occurred in recent
23 weeks. By contrast, this Court previously concluded that relief was not warranted in part because
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1 the Court could not reasonably find an outbreak was likely to occur in light of Defendants’
 2 prevention measures. *See* Dkt. 91 at 14–15. Similarly, Defendants are no longer taking the
 3 “significant measures” this Court relied upon to deny relief months ago. *See id.*; *see also* Dkt.
 4 188 at 16. While Defendants are taking some measures in accordance with CDC guidance, they
 5 have introduced new risk to the facility through mass transfers of new detainees. In doing so,
 6 they have explicitly refused to adopt key protections regarding testing and transport of
 7 individuals from CBP detention facilities. Indeed, despite the recent COVID-19 outbreaks that
 8 resulted from these transfers, Defendants have not indicated that they plan to either halt transfers
 9 or comply with the CDC’s detention transfer and transport guidance. Their decision to continue
 10 transfers in the past seven weeks despite the high infection rates and class members requiring
 11 hospital visits makes this clear. Thus, rather than prevent the introduction and spread of
 12 COVID-19 into the NWDC, Defendants have engaged in transfers in a manner that all but
 13 guarantees COVID-19 outbreaks.

14 2. By Knowingly Transferring Detainees in Violation of CDC Guidance,
 15 Defendants Violate Plaintiffs’ Due Process Rights.

16 The dramatic number of COVID-19 cases and serious illness at NWDC in the last two
 17 months demonstrate that Plaintiffs face a grave threat to their health. Defendants have been
 18 deliberately indifferent to that threat by creating this danger and declining to take the most basic
 19 of safety precautions: adherence to CDC guidance. As detailed below, these circumstances
 20 violate Plaintiffs’ right to due process. The Ninth Circuit recently addressed the applicable due
 21 process standard in determining whether immigration detainees are subjected to an unreasonable
 22 risk of harm in the COVID-19 pandemic:

23 The Fifth Amendment requires the government to provide conditions of
 24 reasonable health and safety to people in its custody. *See DeShaney v. Winnebago*

1 *Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989); *Doe v. Kelly*, 878 F.3d
2 710, 714 (9th Cir. 2017). The government has violated this duty when:

- 3 (i) [It] made an intentional decision with respect to the conditions
4 under which the plaintiff was confined; (ii) those conditions put the
5 plaintiff at substantial risk of suffering serious harm; (iii) the
6 [government] did not take reasonable available measures to abate
7 that risk, even though a reasonable official in the circumstances
8 would have appreciated the high degree of risk involved . . . ; and
9 (iv) by not taking such measures, the [government] caused the
10 plaintiff's injuries.

11 *Gordon v. County of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018). “With respect
12 to the third element, the [government’s] conduct must be objectively unreasonable,
13 a test that will necessarily ‘turn[] on the facts and circumstances of each particular
14 case.’” *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en
15 banc) (second alteration in original) (quoting *Kingsley v. Hendrickson*, 576 U.S.
16 389, 397 (2015)). A “mere lack of due care” is not enough; a plaintiff must show
17 “something akin to reckless disregard.” *Gordon*, 888 F.3d at 1125 (quoting *Castro*,
18 833 F.3d at 1071). To satisfy the fourth element, a plaintiff need only prove a
19 “sufficiently imminent danger[],” because a “remedy for unsafe conditions need
20 not await a tragic event.” *Helling v. McKinney*, 509 U.S. 25, 33–34 (1993).

21 *Hernandez Roman v. Wolf*, 977 F.3d 935, 943 (9th Cir. 2020) (alterations in original).

22 Importantly, civil detainees’ Fifth Amendment claims are not judged under the subjective
23 “deliberate indifference” standard applicable to Eighth Amendment claims. *Jones v. Blanas*, 393
24 F.3d 918, 931–34 (9th Cir. 2004) (lower court applying Eighth Amendment standard to civil
detainee “mistook the amendment that was to be applied”). Instead, the standard is an objective
one and does not require any showing of the Defendants’ state of mind. *See Kingsley v.*
Hendrickson, 576 U.S. 389, 397-98 (2015) (objective rather than subjective deliberate
indifference applies to detainees not serving criminal sentences); *Hernandez Roman*, 977 F.3d at
943 (same).

Plaintiffs satisfy this standard. Defendants have knowingly and repeatedly brought
hundreds of people who have not been tested for COVID-19 into NWDC, many of whom have
the virus and have passed it to others during transport and later in the facility. Defendants have

1 failed to safely and separately transport detainees on flights according to their COVID infection
2 or exposure as required by the CDC, further increasing the risk of viral spread. Amon Decl. ¶¶
3 11, 13. Since resuming these mass transfers, Defendants have not taken any measures to comply
4 with applicable CDC guidance. Stip. ¶¶ 5, 10, 12. Two class members have gone to the hospital
5 because of these actions. *Id.* ¶ 19. This should come as no surprise, as Plaintiffs are vulnerable to
6 serious illness or death from the coronavirus. *See* Dkt. 245 (granting class certification). The
7 only rational conclusion that can be drawn is that these transfers drastically jeopardize the health
8 and safety both of class members already detained at the facility and those who become class
9 members as they enter the facility after being transported with other untested people. As a result,
10 there is no doubt that ICE’s actions have caused this ongoing danger.

11 This intentional decision to place class members at risk has also occurred even though
12 “reasonable available measures [exist] to abate that risk.” *Gordon*, 888 F.3d at 1125.
13 Specifically, crystal clear prevention measures—i.e., testing prior to transfer and cohorting
14 during transport—are known and readily available, but ICE has not undertaken them, leaving
15 Plaintiffs in grave jeopardy. Indeed, the “reasonable available measures” ICE has failed to take
16 are outlined in ICE’s own policies and applicable CDC guidelines. ICE’s own COVID-19
17 Pandemic Response Requirements states that it must test people transported between facilities,
18 Maltese Decl. Ex. B, ICE PRR at 19, but it apparently does not apply this policy to transfers
19 from CBP detention facilities. More importantly, the CDC’s detention testing guidance mandates
20 such testing, Maltese Decl. Ex C, CDC Testing Guidance at 6, making obvious there is no reason
21 to treat transfers from CBP any differently than a transfer from any other detention facility. As to
22 the actual transportation of detainees, the ICE Air Operations Handbook requires separating and,
23 in some instances, denying transport to those suspected of having contagious diseases. Maltese
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1 Decl. Ex. A, ICE Air Handbook at 18–19. Similarly, the CDC transport guidance requires the
 2 separate air transport of people who have tested positive for COVID-19, close contacts of
 3 COVID-19 cases, and uninfected people. Maltese Decl. Ex. D, CDC Transport Guidance at 4. It
 4 is undisputed that Defendants fail to abide by these policies with respect to transfers from CBP
 5 detention facilities Stip. ¶¶ 5, 10; *see also* Amaya Vargas Decl. ¶¶ 6–7, 11; Arevalo Montilla
 6 Decl. ¶ 5.⁵ And DHS engages in these transfers even though the agency apparently has the
 7 capacity to test people held in CBP detention facilities. Amaya Vargas Decl. ¶ 5; Ghazal Decl.
 8 ¶ 4.

9 This intentional failure to follow ICE and CDC guidance on testing and air transport only
 10 underscores the extent of Defendants’ disregard for Plaintiffs’ constitutional rights. The 112
 11 positive COVID-19 detainees at NWDC (in addition to the four guards) in the past seven weeks
 12 demonstrate that ICE could not be on clearer notice that the failure to test and safely transport
 13 people results in greater exposure and infection of class members. By failing to test, it appears
 14 that ICE wishes to remain willfully blind to the problem—knowing that it would require them to
 15 adopt the most basic of safety precautions to fulfill its constitutional obligations. As other courts
 16 have recognized, this amounts to “reckless disregard” for the risk posed to Plaintiffs, not to
 17 mention all detainees and ICE and GEO staff. The situation thus emphatically evidences
 18 objective deliberate indifference under the *Gordon* standard. *See Hernandez Roman v. Wolf*, No.
 19 EDCV-20-00768TJH-PVCX, 2020 WL 5797918, at *3 (C.D. Cal. Sept. 29, 2020) (holding that

21 ⁵ The Ninth Circuit has made clear that civil detainees “are entitled to more considerate treatment
 22 and conditions of confinement than criminals whose conditions of confinement are designed to
 23 punish.” *Jones*, 393 F.3d at 931 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982)).
 24 ICE’s actions regarding the transfers from CBP facilities go further than treating class members
 less favorably than those convicted of crimes; ICE is treating some detainees less favorably than
 it does *other ICE detainees* with regard to the same health and safety measures required for
 transfer to facilities within the interior of the country.

1 ICE official’s decision not to conduct universal testing “was not based on scientific evidence,”
 2 failed to “consider . . . the Centers for Disease Control[’s recommendation],” and “was
 3 objectively unreasonable and in callous disregard of [detainees’ constitutional right] to
 4 reasonable safety”), *aff’d in part, vacated in part, remanded*, 977 F.3d 935 (9th Cir. 2020);
 5 *Zepeda Rivas v. Jennings*, 504 F. Supp. 3d 1060, 1065 (N.D. Cal. 2020) (“[R]easons why the
 6 defendants’ conduct amounted to deliberate indifference . . . include the defendants’ conscious
 7 avoidance of widespread testing for fear that positive tests would require them to take measures
 8 to protect the safety of detainees that they preferred not to take.”). Indeed, courts throughout the
 9 COVID-19 pandemic and before it have recognized that the failure to follow CDC guidelines
 10 “strongly indicates” deliberate indifference requiring court intervention. *Hernandez v. Cnty. of*
 11 *Monterey*, 110 F. Supp. 3d 929, 942–45 (N.D. Cal. 2015); *see also Ahlman v. Barnes*, 445 F.
 12 Supp. 3d 671, 691 (C.D. Cal. 2020); *Fraihat v. U.S. Immig. & Customs Enf’t*, 445 F. Supp. 3d
 13 709, 744 (C.D. Cal. 2020).⁶ Accordingly, Defendants’ failure to abide by CDC guidance—and
 14 willful blindness to the problem—is a deliberate decision demonstrating reckless disregard for
 15 the health and safety of class members.

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⁶ Conditions of confinement also violate a civil detainee’s Fifth Amendment due process rights when the conditions “amount to punishment of the detainee.” *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *see also Kingsley v. Hendrickson*, 576 U.S. 389, 397–99 (2015). Conditions are punitive when they are not reasonably related to a legitimate government objective or are excessive to that purpose. *Bell*, 441 U.S. at 561; *Jones*, 393 F.3d at 932–33. Conditions or practices violate these principles where they are “employed to achieve objectives that could be accomplished in so many alternative and less harsh methods.” *Bell*, 441 U.S. at 539 n.20. The ICE Defendants, by failing to take crucial safety measures that are required by their own policies and CDC guidance to mitigate the serious risk of harm to which the class is exposed from the transfers, are violating class members’ Fifth Amendment rights under this branch of Fifth Amendment analysis as well.

3. The Court Has Authority to Grant Relief that Protects Class Members.

This Court has authority to remedy unconstitutional conditions of confinement, including through a TRO that ensures only detainees transferred under conditions consistent with CDC guidance may be admitted to NWDC. *See Zepeda Rivas v. Jennings*, No. 20-CV-02731-VC, 2020 WL 9066082, at *1 (N.D. Cal. Dec. 23, 2020) (enjoining transfers into facility for duration of the outbreak there); *Fraihat v. U.S. Immigr. & Customs Enf't*, No. EDCV191546JGBSHKX, 2020 WL 6541994, at *8 (C.D. Cal. Oct. 7, 2020) (ordering “a suspension of transfers with a narrow and well-defined list of exceptions consistent with CDC”). Indeed, “[c]ourts have long recognized the existence of an implied cause of action through which plaintiffs may seek equitable relief to remedy a constitutional violation.” *Hernandez Roman*, 977 F.3d at 941. Thus, the Ninth Circuit recently reaffirmed that “28 U.S.C. § 1331 . . . provides subject matter jurisdiction” over Plaintiffs’ due process claims, and “an implied cause of action exists for Plaintiffs to challenge allegedly unconstitutional conditions of confinement.” *Id.*; *see also Zepeda Rivas v. Jennings*, 845 F. App’x 530, 534 (9th Cir. 2021). Further, “[f]ederal courts possess whatever powers are necessary to remedy constitutional violations because they are charged with protecting these rights.” *Stone*, 968 F.2d at 861. “Once a constitutional right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.” *Hernandez Roman*, 977 F.3d at 942 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)).

Consistent with this authority, district courts in the Ninth Circuit and across the country have (in addition to other forms of relief) enjoined transfers in and out of facilities to prevent COVID-19 transmission. This includes cases like this one, in which courts have certified classes

1 of immigrant detainees at a specific facility. *See, e.g., Zepeda Rivas v. Jennings*, No. 20-CV-
2 02731-VC, 2020 WL 4554646, at *1 (N.D. Cal. Aug. 6, 2020) (maintaining cap on intakes into
3 the facility); *Hernandez Roman v. Wolf*, No. ED CV 20-00768 TJH, 2020 WL 6107069, at *5
4 (C.D. Cal. Oct. 15, 2020) (“The Government shall not transfer detainees for the sole purpose of
5 complying with this [facility] Population Reduction Order.”); *Immigrant Legal Res. Ctr. v. City*
6 *of McFarland*, 472 F. Supp. 3d 779, 786 (E.D. Cal. 2020) (enjoining GEO from “transferring any
7 detainee into or out of, and accepting any transfer of any detainee into or out of [the contested
8 facility]”); *Savino v. Souza*, 459 F. Supp. 3d 317, 332 (D. Mass. 2020) (“No immigration
9 detainee shall be transferred from the [facility] to another detention center until the testing
10 required by the preliminary injunction has been performed and the Court has been informed that
11 the test was negative.”); *Garcia v. Wolf*, No. 120CV821LMBJFA, 2020 WL 4668189, at *1
12 (E.D. Va. Aug. 11, 2020) (enjoining transfer of “any plaintiff out of the Farmville Detention
13 Center without the consent of the plaintiff and his counsel” and the transfer of “any detainees
14 into the Farmville Detention Center until further Order of the Court”).

15 In sum, Plaintiffs have shown that they are likely to succeed on the merits of their claim
16 that Defendants’ practice violates the Fifth Amendment. The Court should therefore grant the
17 limited relief requested by Plaintiffs to enjoin these unsafe and unlawful admissions.

18 **B. The Remaining Factors Weigh in Favor of Plaintiffs.**

19 1. Exposure to a Lethal Virus Constitutes Irreparable Harm.

20 Exposing detainees to the virus in a confined area exposes Plaintiffs to irreparable harm.
21 In a similar case, the Ninth Circuit held that irreparable harm was likely “given COVID-19’s
22 high mortality rate.” *Hernandez Roman*, 977 F.3d at 944; *see also Immigrant Legal Res. Ctr.*,
23 472 F. Supp. 3d at 785 (finding irreparable harm from “immediate and extreme risks to public
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1 health posed by transferring detainees during the COVID-19 pandemic”); *Hernandez v. Sessions*,
2 872 F.3d 976, 995 (9th Cir 2017) (recognizing that conditions of detention that are dangerous to
3 a person’s health constitute irreparable harm). Irreparable harm occurs where the government’s
4 actions threaten an individual’s health. *See, e.g., M.R. v. Dreyfus*, 663 F.3d 1100, 1111–14 (9th
5 Cir. 2011), *as amended by*, 697 F.3d 706 (9th Cir. 2012). It also is well established that the
6 deprivation of constitutional rights constitutes irreparable injury and is sufficient to warrant an
7 injunction. *Hernandez*, 872 F.3d at 994; *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir.
8 2012). For the reasons described above, Plaintiffs have established each of these forms of
9 irreparable harm.

10 2. The Public Interest and Balance of Equities Weigh Heavily in Plaintiffs’
11 Favor.

12 The final two factors in this case merge, as Defendants are government actors. *Nken v.*
13 *Holder*, 556 U.S. 418, 435 (2009). These factors also favor Plaintiffs. Indeed, given the
14 “preventable human suffering” at issue, the “balance of hardships tips decidedly in [P]laintiffs’
15 favor.” *Hernandez*, 872 F.3d at 996. The government cannot say that it is being harmed by being
16 required to follow the law. *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). And it is always
17 in the public interest to vindicate constitutional rights. *Melendres*, 695 F.3d at 1002.

18 Defendants are likely to claim that the balance of equities weigh in their favor by
19 asserting that transfers are necessary to prevent overcrowding in facilities near the border. But
20 Plaintiffs are not seeking to stop such transfers—they only ask the Court to ensure they are done
21 *safely*, in a manner consistent with CDC guidance. Alleged overcrowding at the border cannot
22 justify dangerous transfer conditions that leave class members at increased risk of serious illness
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1 and death.⁷ Amon Supp. Decl. ¶¶ 12–13; *see also supra* Sec. II. Plaintiffs seek only an order
 2 preventing the admission of detainees whose transfer does not observe CDC guidance requiring
 3 testing and safe cohorting of individuals in transport. Because Plaintiffs ask only that Defendants
 4 adhere to CDC guidance and use widely available tools, any burden on the government here is
 5 minimal, particularly when compared with the grave risk to class members. Amon Decl. ¶¶ 12–
 6 13.

7 Moreover, Plaintiffs’ requested relief will also protect both the health and safety of
 8 Defendants’ staff and the public at large. *See Immigrant Legal Res. Ctr.*, 472 F. Supp. 3d at 786
 9 (“[B]alance of hardships tips sharply in [petitioners’] favor where there are “risks to the public
 10 health by allowing the transfers to proceed.”). Adhering to the CDC’s transport guidance is
 11 critical to prevent the spread of COVID-19. Amon Decl. ¶ 25. Because many of Defendants’
 12 staff are in close contact with detainees, proper preventative measures are also important for their
 13 own health and that of the community. *See* Dkt 322-1 ¶ 4 (noting that GEO guard from medical
 14 isolation tested positive); Dkt. 323-1 ¶ 4 (noting that guard from GEO’s Transport Division
 15 tested positive). Further, with the spread of new variants including the Delta variant, any
 16 outbreak in NWDC can have a detrimental impact on healthcare capacity for members of the
 17 public in the surrounding area. As one court has explained, “[a]n outbreak at [the detention
 18 center] would, further, endanger all of us – detainees, [detention center] employees, [county]

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 21 ⁷ Administrative convenience or claims of limited administrative options are not nearly enough
 22 to overcome the class members’ constitutional rights to reasonable health and safety, particularly
 23 because the Defendants’ own actions are causing the precipitous rise in COVID-19 cases at
 24 NWDC. *See Lopez-Valenzuela v. Harper*, 770 F.3d 772, 785 (9th Cir. 2014) (en banc)
 (“[A]dministrative convenience’ is a thoroughly inadequate basis for the deprivation of core
 constitutional rights.” (citation omitted)); *see also Immigrant Legal Res. Ctr.*, 472 F. Supp. 3d at
 786 (potential financial burdens “do not outweigh the gravity of the risks to the public health by
 allowing the transfers [during the COVID-19 pandemic] to proceed”).

1 residents . . . , residents of the State . . . , and our nation as a whole.” *Bravo Castillo v. Barr*, 449
2 F. Supp. 3d 915, 923 (C.D. Cal. 2020).

3 **V. CONCLUSION**

4 For these aforementioned reasons, the Court should GRANT Plaintiffs’ motion for a
5 Temporary Restraining Order.

6 Respectfully submitted on this 29th day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2021, 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 29th day of July, 2021.

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