

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

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

WILFREDO FAVELA AVENDAÑO, *et al.*,
Petitioners-Plaintiffs,

v.

NATHALIE ASHER, *et al.*,
Respondents-Defendants.

FEDERAL RESPONDENTS' OPPOSITION TO
PETITIONERS' MOTION FOR A TEMPORARY
RESTRAINING ORDER

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

Noting Date: August 6, 2021

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1 Federal Respondents, United States Immigration and Customs Enforcement, Acting ICE
 2 Director Tae D. Johnson, and ICE Seattle Field Office Director Nathalie Asher (collectively,
 3 “ICE”), by and through their attorneys, Tessa M. Gorman, Acting United States Attorney for the
 4 Western District of Washington, and Michelle R. Lambert and James C. Strong, Assistant United
 5 States Attorneys, submit this opposition to Petitioners’ motion for temporary restraining order.
 6 Dkt. No. 324 (the “Motion” or “TRO”).

7 I. INTRODUCTION

8 For the second time, Petitioners seek an injunction from this Court based on allegations
 9 that Respondents are not following guidance issued by the Centers for Disease Control and
 10 Prevention (“CDC”) resulting in an “unprecedented number” of COVID-19 cases at the Northwest
 11 ICE Processing Center (“NWIPC”). TRO, at 2, 12; Dkt. No. 175, at 3. Like before, this Court
 12 should deny the Motion as ICE has taken extensive measures that comport with CDC guidance to
 13 ensure the safety of all detainees at NWIPC. Dkt. No. 188, Order Denying TRO.

14 As a result of an increasingly large influx of individuals crossing the southern border,
 15 NWIPC has accepted detainees from the southern border consisting mainly of new intake detainees
 16 from Customs and Border Protection (“CBP”) 72-hour holding facilities. As reported to the Court,
 17 numerous detainees have tested positive for COVID-19 shortly after their arrival at NWIPC.

18 Petitioners now request that this Court enjoin ICE:

19 from admitting to [NWIPC]¹ detainees whose transport to the facility is not in
 20 accordance with the CDC’s *Interim Guidance for Transporting by Air into, from,*
 21 *or within the United States of People with COVID-19 or COVID-19 Exposure,* and
 the CDC’s *Interim Guidance for SARS-CoV-2 Testing in Correctional and*
Detention Facilities.

22 TRO, at 3. An order worded as Petitioners request would be unworkable. Petitioners do not set
 23 forth the minimum standards suggested by the CDC or what the CDC mandates. Not all provisions
 24 in the CDC guidance cited are mandatory or feasible to apply in every situation, as recognized by
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26 ¹ Throughout the TRO, Petitioners incorrectly refer to NWIPC as the “Northwest Detention Center” or “NWDC.”

1 the CDC. For instance, the CDC's *Interim Guidance for SARS-CoV-2 Testing in Correctional and*
 2 *Detention Facilities* provides various scenarios for movement-based screening testing, but
 3 recommends testing and a 14-day quarantine should at minimum occur at one of the facilities
 4 involved in the transfer. Dkt. No. 327-3, at 6. While the transport of detainees from CBP facilities
 5 may not follow the ideal scenario of movement-based testing and quarantine at both ends of the
 6 transfer, the New Intake Monitoring ("NIMs") process at NWIPC overall meets the CDCs
 7 recommendations here.

8 Despite the recent positive test results, Petitioners cannot demonstrate that ICE's practices
 9 are contrary to CDC guidance or that transportation and intake of detainees from the southern
 10 border place class members at a greater risk of COVID-19. All the recent COVID-19 positive
 11 results have been newly-admitted detainees that have not been housed in NWIPC's general
 12 population. ICE has contained and prevented any outbreak from spreading outside of the NIMs
 13 units to other parts of the facility. Today, NWIPC's population remains reduced at 635 detainees
 14 or 40.3% of capacity. Declaration of Jack Lippard, dated Aug. 4, 2021 ("Lippard Decl."), ¶ 10.
 15 NWIPC's population has remained reduced even with the new intakes from the southern border
 16 because ICE performs custody redeterminations for detainees who are identified during intake as
 17 being at potential higher risk to COVID-19. These custody determinations have resulted in the
 18 release of approximately 569 detainees since June 1, 2021. *Id.*, ¶¶ 35-36. Moreover, ICE and the
 19 ICE Health Service Corp ("IHSC") have instituted an aggressive vaccination policy. On August 2,
 20 2021, the detainee COVID-19 vaccination rate at NWIPC was 72.7% facility-wide.² Decl. of Dr.
 21 Sheri Malakhova, dated Aug. 4, 2021 ("Malakhova Decl."), ¶ 41.

22 Petitioners cannot satisfy the high standard for obtaining preliminary relief in this case.
 23 First, Petitioners are unlikely to succeed on their claim that the transport and intake of detainees
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25 ² The vaccination rate at NWIPC fluctuates as new detainees are admitted to the facility and others are released.
 26 Malakhova Decl., ¶ 41. In contrast, according to the CDC, only 49.7% of the U.S. population is fully vaccinated.
 27 COVID Data Tracker, <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (last visited Aug. 4, 2021).

1 from CBP facilities create conditions at NWIPC that violate the class members' right to reasonable
 2 safety. ICE's actions to prevent and protect against the spread of COVID-19 comply with guidance
 3 from the CDC, local and state public health recommendations, and the Constitution. ICE has
 4 implemented substantial protocols and practices at NWIPC to prevent an outbreak at the facility
 5 and has swiftly acted to prevent the potential spread of COVID-19.

6 Second, Petitioners cannot show that class members are facing immediate, irreparable harm
 7 or that the public interest would be served by injunctive relief. NWIPC has resumed the intake of
 8 detainees from CBP's southern border facilities to prevent overcrowding and maintain pandemic
 9 protocols at other ICE facilities without sacrificing safety at NWIPC. Accordingly, ICE requests
 10 that the Motion be denied.

11 II. FACTUAL BACKGROUND

12 A. NWIPC

13 ICE detains the class members at NWIPC. Dkt. No. 326 (Stipulation of Facts, hereafter
 14 "Stip."), ¶ 1. NWIPC is a private detention center run by The GEO Group, Inc. ("GEO"). GEO is
 15 an independent contractor that provides the facility, management, personnel, and services for 24-
 16 hour supervision of immigrant detainees. Lippard Decl., ¶ 5. IHSC, a federal entity, provides
 17 medical, dental, and mental health care to detainees at NWIPC. Malakhova Decl., ¶ 2; Lippard
 18 Decl., ¶ 6. Class members have access to IHSC's medical clinic, which is currently staffed with
 19 physicians, nurses, radiology technicians, records technicians, pharmacists and pharmacy
 20 technicians, psychiatrists and behavioral health specialists, as well as dentists and dental
 21 technicians.³ Malakhova Decl., ¶ 3.

22 Since the start of the pandemic, ICE enacted policies and procedures to prevent the entry
 23 and spread of COVID-19 at NWIPC based on guidance from the CDC, IHSC, and ICE's
 24

25 ³ Medical care at NWIPC is generally governed by the 2011 Performance-Based National Detention Standards
 26 concerning medical care. *See* 2011 Performance-Based National Detention Standards ("2011 PBNDS") Standard 4.3.
 Malakhova Decl., ¶ 4; Lippard Decl., ¶ 11.

1 Enforcement and Removal Operations (“ERO”). Stip. ¶ 13 (describing ICE *Pandemic Response*
 2 *Requirement*, (“PRR”));⁴ Lippard Decl., ¶ 4; Malakhova Decl., ¶ 6. ICE’s COVID-19 pandemic
 3 response is dynamic and has evolved in response to developing knowledge concerning COVID-
 4 19, changes in criteria and guidance from the CDC, as well as requirements resulting from ongoing
 5 litigation in other jurisdictions. Lippard Decl., ¶ 4; Malakhova Decl., ¶ 6.

6 **B. New Arrivals to NWIPC from the Southern Border**

7 NWIPC resumed receiving detainees from the southern border,⁵ primarily starting in June.⁶
 8 Stip., ¶ 1; Lippard Decl., ¶¶ 8-9; *see also* PRR at 34 (discontinuing the transfer of ICE detainees
 9 unless necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating
 10 security concerns, release or removal, or to prevent overcrowding); CDC *Interim Guidance on*
 11 *Management of COVID-19 in Correctional and Detention Facilities* (“CDC Interim Guidance”),
 12 at 8 (recommending that detention facilities “limit transfers of incarcerated/detained persons to
 13 and from other jurisdictions and other facilities unless necessary” for the same reasons as those
 14 stated in the PRR).⁷ The transfer of detainees from the southern border to NWIPC has mostly
 15 consisted of new intake detainees arriving directly from CBP holding facilities, although the
 16 NWIPC has received two flights of transfers of detainees from ICE detention facilities in Texas
 17 and Arizona.⁸ Lippard Decl., ¶ 8. In total, NWIPC has received 1,095 detainees from the southern
 18 border since late April 2021, as outlined in the chart below.

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 20 ⁴ Version 6.0, March 16, 2021, available at: <https://www.ice.gov/coronavirus/prr> (accessed July 30, 2021).

21 ⁵ According to U.S. Customs and Border Protection (“CBP”), encounters on the southern border have jumped from
 22 78,442 in January 2021 to 188,829 in June 2021. *See* <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>
 23 (last visited Aug. 4, 2021).

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

25 ⁷ *See* <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>
 26 (last visited Aug. 4, 2021).

27 ⁸ Unlike CBP holding facilities, which are designed for 72-hour holding purposes, ICE detention facilities are designed
 28 for longer term use. Lippard Decl., ¶ 8 n. 2. This means that detainees arriving at NWIPC from CBP holding facilities
 are likely to only have been in the United States for several days, while those arriving from other ICE facilities may
 have been in the United States (and in ICE custody) for several weeks. *Id.* While detainees arriving from both are
 often referred to as “southwest border transfers,” detainees arriving at NWIPC directly from CBP holding facilities
 are technically new intakes to ICE custody while those arriving from other ICE detention facilities are transfers. *Id.* A
 detainee arriving at NWIPC from a CBP holding facility is not formally processed into ICE custody until arrival at

Date of Flight	Number of Detainees	Origination Location
April 28, 2021	60	CBP Holding Facility
June 8, 2021	78	CBP Holding Facility
June 9, 2021	79	CBP Holding Facility
June 11, 2021	108	ICE Detention Facility
June 15, 2021	115	CBP Holding Facility
June 25, 2021	101	CBP Holding Facility
June 29, 2021	79	CBP Holding Facility
July 6, 2021	102	CBP Holding Facility
July 8, 2021	57	CBP Holding Facility
July 14, 2021	60	CBP Holding Facility
July 18, 2021	116	ICE Detention Facilities
July 28, 2021	60	CBP Holding Facility
August 2, 2021	80	CBP Holding Facility

11 *Id.*, ¶ 9.

12 Due to the large number of detainees ICE subsequently processes for release, however, the
 13 total detainee population at NWIPC during this time averaged 235 detainees in May 2021, 424
 14 detainees in June 2021 and 571 detainees in July 2021, which is between 14.9%-36.3% of the
 15 facility's total capacity of 1,575. *Id.*, ¶¶ 7, 10. As of the morning of August 4, 2021, the total
 16 detainee population at NWIPC is 635, or 40.3% of capacity. *Id.*, ¶ 10.

17 To receive new intakes from the southern border, ERO's Seattle Field Office reports the
 18 facility's bed space capacity and availability to ICE Headquarters daily. *Id.*, ¶ 11. The Seattle Field
 19 Office then receives specific requests for bed space from ICE Headquarters as national need
 20 determines. *Id.* A request for bed space includes a basic set of information needed for the field
 21 office to determine whether the local detention facility can accommodate the requested number of
 22 detainees, including: (1) the projected number of detainees needing accommodation; (2) their
 23 origination location (e.g., whether from a CBP holding facility or an ICE detention facility); (3)
 24 gender; (4) risk classification levels; and (5) a projected date of flight. *Id.*, ¶ 12.

25 _____
 26 NWIPC, i.e. ICE databases reflecting a detainee's custody history will not reflect the detainee as being in ICE custody
 until their admission to NWIPC. *Id.*

1 With the information provided in a bed space request, ERO assesses whether it can accept
 2 new intakes or transfers to NWIPC while maintaining the COVID-19 safety protocols in place at
 3 the facility in accordance with ICE and CDC standards. *Id.*, ¶ 13. ERO’s assessment is based on
 4 several factors, such as housing occupation levels and other circumstances within the facility. *Id.*
 5 When assessing housing occupancy levels, ERO examines the facility in its entirety, including but
 6 not limited: (1) which housing units are currently occupied versus unoccupied; (2) whether those
 7 housing units are celled, open bay or mixed units; (3) whether the housing units are general
 8 population housing units versus New Intake Monitoring (“NIMs”) housing units; and (4) the
 9 occupancy levels of each housing unit; including the risk classification levels and gender of the
 10 populations included in those housing units. *Id.*

11 ERO also assesses other relevant factors, such as whether housing units are on COVID-19
 12 quarantine and, if so, when such quarantine is projected to end;⁹ the recency of the last incoming
 13 flight and the general COVID-19 positivity rate of detainees from that flight; as well as the
 14 availability of isolation space within the medical housing unit and medical overflow housing units
 15 in the event that additional existing or incoming detainees test positive for COVID-19. *Id.* ERO’s
 16 determinations are often made in consultation with IHSC to ensure that ERO can continue to safely
 17 accommodate incoming detainees and to provide the appropriate levels of medical care to both
 18 current and incoming detainees. *Id.*

19 **C. Transportation to NWIPC from the Southern Border**

20 When a request for bed space is approved, detainees must be transported from the southern
 21 border to NWIPC. For those detainees arriving directly from CBP, ICE takes custody of them at
 22 the airport near the border, after being transported there by bus by CBP. *Stip.* ¶¶ 7-8. At the airport,
 23 ICE Air medical personnel conduct temperature and verbal screenings for COVID-19 prior to
 24 detainees boarding their flight. A nurse determines on a case by case basis whether a detainee

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 26 ⁹ Housing units on quarantine cannot receive additional new detainees to their population and may not be combined
 with other housing units to make additional space. Lippard Decl., ¶ 13 n. 3.

1 reporting any COVID-19 symptom(s) may board the airplane and anyone with a temperature over
 2 99 degrees is refused boarding. Stip. ¶ 9; Lippard Decl., ¶ 14. The detainees that pass screening
 3 are placed on the airplane for transportation to the airport in Yakima, Washington. Stip. ¶ 3.
 4 According to information provided by ICE Air Operations,¹⁰ the maximum seating capacity for
 5 aircraft used for these transport flights range from 132-135 seats. Lippard Decl., ¶ 14. To the extent
 6 possible (based on the size of the plane and the number of detainees), the detainees will be socially
 7 distanced aboard the aircraft and required to wear masks, along with all ICE personnel aboard.¹¹
 8 Stip. ¶ 12. A nurse also travels with the detainees from the southern border to Yakima. Stip. ¶ 9.

9 Upon arrival in Yakima, detainees disembark the aircraft. Stip. ¶ 11; Lippard Decl., ¶ 15.
 10 Once detainees disembark, they are transferred to a bus or buses for transport to NWIPC. Stip.
 11 ¶ 11; Lippard Decl., ¶ 15. Transportation is provided by GEO Transport, Inc. (“GTI”). Lippard
 12 Decl., ¶ 15. According to information provided by GEO, GTI has the following vehicles to
 13 transport NWIPC detainees: (1) four buses that can accommodate 61 passengers each; (2) six buses
 14 that can accommodate 53 passengers each; and (3) five buses that can accommodate 50 passengers
 15 each. *Id.* Again, to the extent possible, the detainees are socially distanced on the buses transporting
 16 them to NWIPC. Stip. ¶ 12.

17 Detainees are required to wear face masks during transport on the buses to NWIPC.
 18 Lippard Decl., ¶ 16. GTI staff wear personal protective equipment (“PPE”), including N95 masks,
 19 medical gowns, and gloves while aboard. *Id.* The windows on the buses are left open as weather
 20 permits during transit to increase the flow of outside air. *Id.*, ¶ 17. NWIPC, which is located in
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 24 ¹⁰ ICE Air Operations provides air transportation services to ERO’s field offices, facilitating the movement of
 25 noncitizens within the United States and the removal of noncitizens worldwide. Lippard Decl., ¶ 14, n. 4. *See ICE Air
 Operations Fact Sheet*, Aug. 13, 2020, available at: <https://www.ice.gov/factsheets/ice-air-operations> (accessed Aug.
 2, 2021).

26 ¹¹ Assuming a maximum capacity of 132 seats, seven of the thirteen ICE Air flights NWIPC has received from the
 southern border had fewer than 60% of seats filled by detainee passengers and four had fewer than 50% filled. Lippard
 Decl., ¶ 14, n. 5. The remaining five flights had 60.2% to 87.8% of seats filled. *Id.*

1 Tacoma, is approximately 324 miles from the airport in Yakima with a transit time of two hours,
2 forty-four minutes. *Id.*, ¶ 18. All buses are thoroughly cleaned by GEO after use. *Id.*, ¶ 19.

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

4 As a response to COVID-19, IHSC has implemented certain safety protocols for new
5 intakes. Specifically, upon admission to NWIPC, ICE requires that medical and mental health
6 screening shall be conducted “to identify requirements for medical care, special needs and housing,
7 and to protect the health and safety of others in the facility.” *Id.*, ¶ 20 (quoting 2011 PBNDS
8 Standard 2.1, Part I.V).

9 Prior to entering NWIPC, new detainees undergo temperature and verbal prescreening
10 checks again at the facility’s sally port. Lippard Decl., ¶ 21; Malakhova Decl., ¶ 14; *see also* PRR,
11 at 32 (requiring facilities to conduct pre-intake screening of all new entrants for symptoms of
12 COVID-19); CDC Interim Guidance, at 9 (conduct pre-intake screening and temperature checks
13 for all new entrants). Any new detainee displaying or reporting symptoms of COVID-19 is
14 immediately separated, required to wear a face mask, and referred to a medical provider for further
15 evaluation. Lippard Decl., ¶ 22; Malakhova Decl., ¶ 14. IHSC conducts comprehensive medical,
16 mental health, and dental screenings within twelve hours of admission. Malakhova Decl., ¶ 15.
17 The remaining incoming detainees then move through full intake medical screening. Lippard
18 Decl., ¶ 23. During full medical intake screening, detainees undergo temperature testing and verbal
19 screening for COVID-19 a second time. Malakhova Decl., ¶ 15. IHSC also administers a voluntary
20 COVID-19 test of all new detainees upon intake via RT-PCR testing. *Id.*, ¶ 19; Stip. ¶ 14.

21 Detainees who do not meet the current IHSC protocol requirements for isolation
22 monitoring due to possible COVID-19 symptoms or exposure are placed in separate, designated
23 housing units for 14 days of medical monitoring for signs or symptoms of COVID-19 (commonly
24 referred to as the New Intake Monitoring housing units, or “NIMS”). Malakhova Decl., ¶ 16; *see*
25 *also* PRR at 36. The number of NIMS units and which housing units are designated as NIMS varies
26 depending on operational need and capability. Lippard Decl., ¶ 25. Detainees in the 14-day

1 observation period are not allowed to comeingle with other detainees in common areas during that
2 period. Stip. ¶ 16; Lippard Decl., ¶ 27. If 14 days pass without any detainees in a cell displaying
3 signs or symptoms of COVID-19, the detainees are released to other housing units in the general
4 population of the facility. Lippard Decl., ¶ 27. A separate remote medical unit has been established
5 to monitor detainees undergoing 14-day observation in the NIMs housing units. *Id.*; Malakhova
6 Decl., ¶ 17. Overall, medical intake processing takes approximately 20-45 minutes per detainee,
7 depending on the complexity of a detainee’s medical history and medical issues. Malakhova Decl.,
8 ¶ 23. The number of detainees that can be processed at one time is limited by the space available
9 in the medical clinic to individually examine each detainee. *Id.* It takes IHSC approximately 6
10 hours to complete medical intake processing for a flight of 60 incoming detainees and 10-11 hours
11 to complete the processing for a flight of 100-130 detainees, including the time needed to complete
12 RT-PCR testing for COVID-19. *Id.*

13 Detainees at NWIPC are housed in the NIMs in the following preference order: single
14 occupancy cell,¹² double occupancy cell, cell occupancy of 3-4 detainees; and finally, open bay
15 dormitory. Lippard Decl., ¶ 26. NIMs placements at NWIPC are currently based on daily
16 admissions, i.e. detainees arriving together on the same date and having the same risk classification
17 level may be placed in the same cell but those arriving on different dates or of different risk
18 classification levels may not be housed together.¹³ *Id.*; *see also* PRR, at 36 (stating that facilities
19 “should consider cohorting daily admissions; two day of admissions, or multiple days of
20 admissions...”).

21 To date, open bay housing units have been used at NWIPC as NIMs units on only two
22 occasions. Lippard Decl., ¶ 30. The first instance was inadvertent. *Id.* ICE had worked with GEO
23 to clear celled housing units for use as NIMs units for an incoming flight arriving from a CBP
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25 ¹² All cells have their own sinks and toilets. Lippard Decl., ¶ 26 n. 8.

26 ¹³ Where an open bay housing unit is used, only detainees arriving together on the same flight are placed in the NIMs
unit. Lippard Decl., ¶ 26 n. 9. Detainees from other flights or arriving on other days are not added to that NIMs unit.
Id.

1 holding facility on June 11, 2021. *Id.* The arriving detainees were not placed in the celled housing
2 units as planned due to human error. *Id.* Three open bay housing units consisting of 80 beds, 75
3 beds, and 75 beds were used as NIMs units to accommodate that flight of 105 detainees. *Id.* This
4 placed each open bay NIMs unit at 26%, 56% and 56% capacity respectively. *Id.* On the second
5 occasion, ICE determined that no celled housing units were available at the facility for use as NIMs
6 units but that it could safely accommodate an incoming flight from another ICE detention facility
7 on July 18, 2021 using open bay housing units as NIMs units. *Id.*, ¶ 31. This assessment was
8 reached because the Seattle Field Office was informed that all the arriving detainees on that flight
9 had completed and cleared new intake quarantine at the sending facility and that they had tested
10 negative for COVID-19 prior to transfer.¹⁴ *Id.* ICE used two open bay housing units consisting of
11 80 beds and 75 beds each to accommodate the 116 incoming detainees from that flight. *Id.* The
12 housing units were at 74% and 63% capacity respectively. *Id.*

13 **E. ERO's continuing efforts to limit the population at NWIPC**

14 Any detainee meeting the criteria for potentially being at higher risk of severe illness from
15 COVID-19 must be referred to ERO within 12 hours of identification for a custody reassessment.
16 Lippard Decl., ¶ 35. ERO then conducts a custody reassessment to determine whether release is
17 appropriate. *Id.* Since June 1, 2021, ICE has released 569 detainees who have arrived at NWIPC
18 from the southern border following custody redeterminations. *Id.*, ¶ 36.

19 In addition to the significant number of releases of class members following custody
20 redeterminations, ICE is also using its discretion to release many non-class members after they
21 receive a positive credible fear determination from an Asylum Officer. *Id.* Almost every identified
22 class member who has arrived at NWIPC from the southern border has been released from custody
23 following a custody redetermination. *Id.* Most of these releases occur in the first week or two after
24

25 ¹⁴ Despite COVID-19 testing and COVID-19 vaccination of at least 37 of the detainees prior to transfer, two detainees
26 from that flight nevertheless tested positive for COVID-19 upon intake to NWIPC. Lippard Decl., ¶ 31, n. 10 (citing
Dkt. No. 318).

1 the detainee arrives at NWIPC – usually before the detainee even completes new intake quarantine
 2 (NIMs). *Id.* The release of these incoming detainees arriving from the southern border has enabled
 3 ICE to maintain its COVID-19 safety protocols and keep the overall detainee population at NWIPC
 4 below 45% to date. *Id.*, ¶¶ 10, 36.

5 **F. Testing Capabilities at NWIPC**

6 NWIPC uses two different COVID-19 tests at different points during the NIMs process.
 7 Malakhova Decl., ¶¶ 19, 21. On the first day in NIMs, detainees are tested using a RT-PCR test,
 8 which takes between 2-3 days to receive results, which provides a better, more accurate and safer
 9 method of intake testing given the physical capacity at NWIPC. *Id.*, ¶¶ 19, 22. On day 10-12 of
 10 the quarantine, detainees are tested again using the RT-PCR test due to an increased number of
 11 intakes. *Id.*, ¶ 21; *but see* Stip. ¶ 16.¹⁵

12 IHSC has three Abbott ID Now machines at NWIPC, which can run 2-3 tests per machine
 13 per hour. Malakhova Decl., ¶ 24. Each Abbott ID Now test must be run through the machine within
 14 60 minutes of specimen collection, which makes it impossible for IHSC to collect specimens for
 15 testing from all the detainees during their medical intake processing. *Id.* Assuming optimal
 16 performance at three tests per hour per machine (or nine tests total for the facility), intake testing
 17 for COVID-19 via Abbott ID NOW would add approximately 6.7 hours of intake processing for a
 18 flight of 60 detainees or 13.3 hours for a flight of 120 detainees.¹⁶ *Id.* Additionally, such testing
 19 would require at least two additional IHSC staff members simply to conduct the testing. *Id.*

20 NWIPC has 263 cells spread throughout the entirety of the facility, including the medical
 21 housing unit, the Special Management Unit and the NIMs housing units as well as in general

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 24 ¹⁵ The stipulation provides that IHSC used the Abbott ID Now test on day 10-12 of the NIMs process. Stip. ¶ 16. This
 week and after the stipulation was filed, IHSC changed to using a RT-PCR test for day 10-12. Malakhova Decl., ¶ 21.

25 ¹⁶ Current IHSC guidance requires all detainees to be tested for COVID-19 within 12 hours of admission, though that
 time frame may be extended up to 24 hours “if facility collection logistics require additional time.” *See* IHSC Interim
 26 Guidance at p. 3. All regular medical intake processing must be completed within 12 hours. *See* 2011 Performance-
 based National Detention Standard (“PBNDS”) 4.3, Section J. IHSC would not be able to meet the 12-hour timelines
 if Abbott ID NOW was added as an intake testing method at NWIPC. Malakhova Decl., ¶ 26 n. 2.

1 population. Lippard Decl., ¶ 34 n.9. Detainees must clear medical intake processing before they
2 can be placed in NIMs. Malakhova Decl., ¶ 25.

3 **G. Vaccination Protocols at NWIPC**

4 IHSC's practices and policies regarding COVID-19 vaccinations for NWIPC detainees
5 have undergone significant revision as vaccines have become more widely available and medical
6 knowledge concerning the vaccines has evolved. *Id.*, ¶ 37. IHSC offers COVID-19 vaccinations
7 to all eligible detainees as soon as IHSC receives confirmation that the detainee's COVID-19
8 intake test results are negative for COVID-19. *Id.*, ¶ 38. Because administration of a vaccine to a
9 COVID-19 positive individual is not currently medically recommended, if an unvaccinated
10 detainee tests positive for COVID-19, IHSC offers the detainee a vaccination as soon as the
11 detainee completes the requisite isolation period. *Id.*

12 IHSC is administering one dose Johnson and Johnson/Janssen ("J&J") COVID-19
13 vaccinations. *Id.*, ¶ 39. IHSC has immediate access to sufficient vaccinations for all NWIPC
14 detainees and any new arrivals. *Id.* IHSC also monitors the number of detainees arriving at NWIPC
15 who report having already received COVID-19 vaccinations in their home countries and provides
16 medical advice to those detainees as to whether additional vaccination is recommended under U.S.
17 vaccination standards. *Id.*, ¶ 40. As of August 2, 2021, the detainee COVID-19 vaccination rate at
18 NWIPC was 72.7% facility-wide. *Id.*, ¶ 41.

19 Nevertheless, COVID-19 vaccinations are not fully effective until two weeks after
20 administration of the final dose of the vaccination series. *Id.*, ¶ 42. This means that a person can
21 still get infected with COVID-19 just before or just after receiving the vaccine as it typically takes
22 two weeks after full vaccination for the body to build immunity. *Id.* Even assuming the detainees
23 had been vaccinated with the one dose J&J vaccine as soon as they were apprehended, they would
24 not likely have developed immunity to COVID-19 while in CBP custody or prior to transport to
25 NWIPC. *Id.* Some of the detainees who have arrived at NWIPC from ICE detention facilities at

1 the southern border have been offered and received COVID-19 vaccinations at the sending ICE
2 facility prior to transport to NWIPC. *Id.*

3 III. LEGAL STANDARD

4 The standard for issuing a TRO is “substantially identical” to the standard for issuing a
5 preliminary injunction. *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7
6 (9th Cir. 2001). “It frequently is observed that a preliminary injunction is an extraordinary and
7 drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the
8 burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original)
9 (internal quotations omitted); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). In
10 moving for a TRO, petitioners “must establish that [they are] likely to succeed on the merits, that
11 [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of
12 equities tips in [their] favor, and that an injunction is in the public interest.” *Id.*

13 The Ninth Circuit has adopted a “sliding scale” test for issuing TROs, under which “serious
14 questions going to the merits and a hardship balance that tips *sharply* towards the plaintiff can
15 support issuance of an injunction, assuming the other two elements of the *Winter* test are also met.”
16 *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011) (emphasis added).
17 Thus, Petitioners must show that the TRO is in the public interest and that there is a likelihood,
18 not merely a possibility, of irreparable injury. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127
19 (9th Cir. 2009).

20 As the function of a preliminary injunction is to maintain the status quo before the case is
21 adjudicated on the merits, there is “heightened scrutiny” for mandatory preliminary injunctions.
22 *Dahl v. HEM Pharms. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993). However, “[w]here a party seeks
23 mandatory preliminary relief that goes well beyond maintaining the status quo pendente lite, courts
24 should be extremely cautious about issuing a preliminary injunction.” *Martin v. International*
25 *Olympic Committee*, 740 F.2d 670, 675 (9th Cir. 1984); *see also Committee of Cent. American*
26 *Refugees v. Immigration & Naturalization Service*, 795 F.2d 1434, 1442 (9th Cir. 1986). For

1 mandatory preliminary relief to be granted, Petitioners “must establish that the law and facts
2 *clearly favor* [thei]r position.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (emphasis
3 in original).

4 IV. ARGUMENT

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

6 The law and facts do not clearly favor Petitioners’ position here. The Government’s
7 transport and intake of detainees at NWIPC has complied with the PRR and CDC guidance.
8 Petitioners request the issuance of “an order that ensures [Respondents] only admit to [NWIPC]
9 detainees whose transfer and transport accords with CDC guidance.”¹⁷ TRO, at 11. This Court
10 should deny the TRO. Besides the vague wording of the requested injunction, Petitioners cannot
11 demonstrate that the ICE has “flouted CDC guidelines for detention facility testing and air
12 transport during the pandemic.” TRO, at 3. Furthermore, Petitioners cannot show that the
13 Government “knowingly exposed” class members to COVID-19 at NWIPC. TRO, at 11. As set
14 forth below, Petitioners have not shown a likelihood of success or a serious question going to the
15 merits on their claim that the transfer of detainees from CBP facilities violates Petitioners’ due
16 process rights.

17 1. *This Court does not have jurisdiction over CBP’s facilities at the southern border.*

18
19 CBP is not a party to this litigation.¹⁸ While both agencies fall under the Department of
20 Homeland Security (“DHS”), ICE is a separate agency from CBP. *See* DHS Organizational Chart,
21 https://www.dhs.gov/sites/default/files/publications/21_0402_dhs-organizational-chart.pdf. (last
22 visited August 3, 2021). The core allegation here is that the transport of noncitizens from CBP’s
23

24 ¹⁷ The specific CDC guidance at issue here are the CDC’s *Interim Guidance for Transporting by Air into, from, or*
25 *within the United States of People with COVID-19 or COVID-19 Exposure* (“CDC Transport Guidance”), and the
26 CDC’s *Interim Guidance for SARS-COV-2 Testing in Correctional and Detention Facilities* (“CDC Testing
27 Guidance”). TRO, at 3.

28 ¹⁸ When Petitioners refer to DHS in the motion or in supporting declarations, the Court should note that they are
referencing CBP or authorities not party to this litigation. *See* TRO, at 4; Dr. Amon Decl.

1 southern border facilities to NWIPC and their subsequent intake violates Petitioners' due process
2 rights because the detainees are not tested for COVID-19 prior to transport. ICE does not take
3 custody of the detainees until at an airport; thus, testing by ICE prior to transport is not practical.
4 However, ICE has no authority over CBP facilities. Consequently, this Court does not have
5 jurisdiction in this case to order injunctive relief at CBP facilities. *See Zepeda v. U.S. I.N.S.*, 753
6 F.2d 719, 727 (9th Cir. 1983) ("A federal court may issue an injunction if it has personal
7 jurisdiction over the parties and subject matter jurisdiction over the claim; it may not attempt to
8 determine the rights of persons not before the court.").

9 Other reasons indicate that this Court should not entertain an injunction implicating CBP
10 in this case. First, in addition to a lack of jurisdiction, an injunction based on CBP's practices is
11 beyond the scope of this case, which is about conditions at NWIPC. Petitioners may argue that
12 they only seek an injunction concerning detainees that are transported to NWIPC and impact the
13 conditions at the facility. Yet at the same time, Petitioners allege that the CDC requires testing
14 prior to ICE taking custody of the detainees at transport. TRO, at 6. The requested injunction also
15 extends beyond the class definition, which only includes individuals once they are detained at
16 NWIPC (not before). *See infra*, at 19 n.20.

17 **2. *NWIPC's intake of noncitizens from CBP's southern border facilities does not***
18 ***violate Petitioners' due process rights.***

19 a. The right to reasonable safety

20 Petitioners are unlikely to succeed on their claim that the Government has violated their
21 Fifth Amendment right to reasonable safety at NWIPC because of the recent admission of
22 detainees from CBP's southern border facilities. *See* TRO, at 12-18. There is no dispute that
23 numerous detainees have tested positive either at intake or during the NIMs process. TRO, at 12.
24 Even so, there is no evidence that any member of the general population at NWIPC has tested
25 positive during this period. *Id.* This demonstrates that ICE's NIMs process has successfully
26 identified individuals with COVID-19 and contained any potential outbreak from spreading to

1 other parts of the facility. This is a result of Respondents’ continued rigorous adherence to CDC
 2 guidance and specifically, COVID-19 precautions. Furthermore, Petitioners cannot show that the
 3 transport of new detainees or the NIMs process subjects newly-identified class members to a
 4 substantial risk of COVID-19.

5 Due process requires the government to assume some responsibility for civil detainees’
 6 safety and well-being, such as “food, clothing, shelter, medical care, and reasonable safety.”
 7 *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989). The Ninth Circuit
 8 applies an objectively unreasonable test to failure-to-protect claims brought under the Due Process
 9 Clause. *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc). “[T]he defendant’s
 10 conduct must be objectively unreasonable, a test that will necessarily ‘turn on the facts and
 11 circumstances of each particular case.’” *Id.* (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 396
 12 (2015) (alterations and internal quotation marks omitted). To demonstrate objective deliberate
 13 indifference, a petitioner must show:

- 14 (i) The defendant made an intentional decision with respect to the conditions
- 15 (ii) Those conditions put the plaintiff at substantial risk of suffering serious
- 16 (iii) The defendant did not take reasonable available measures to abate that risk,
- 17 even though a reasonable officer in the circumstances would have
- 18 (iv) By not taking such measure, the defendant caused the plaintiff’s injuries.

19 *Id.*

20 The extensive steps taken by ICE are objectively reasonable measures to abate the risk of
 21 COVID-19 from transport and admission of detainees to NWIPC. *See generally* Lippard Decl.;
 22 Malakhova Decl. To prevail here, Petitioners must show that the transfer of detainees from CBP
 23 facilities on the southern border to NWIPC creates conditions at NWIPC that are so unsafe for
 24 class members as to violate the Constitution. To do so, Petitioners must show that the precautions
 25 taken to prevent harm to class members are “objectively unreasonable,” not just that there is a
 26 potential risk of the injury they are concerned about. *See Kingsley*, 576 U.S. at 389. Importantly,

1 the governing standard is not bare negligence, much less strict liability. As the Ninth Circuit
 2 explained in the parallel context of pre-trial detainees, “the pre-trial detainee ‘must prove more
 3 than negligence but less than subjective intent – something akin to reckless disregard.’” *Smith v.*
 4 *Washington*, 781 F. App’x. 595, 598 (9th Cir. 2019) (quoting *Castro*, 833 F.3d at 1071). Indeed,
 5 the Fifth Amendment does not require the government to eliminate all risk to Petitioners.
 6 *DeShaney*, 489 U.S. at 200.

7 Relevant here, the certified class includes both detainees already in the general population
 8 and newly-admitted detainees in the NIMs process that have been identified as potentially being
 9 at a higher risk for serious illness or death from COVID-19.¹⁹ Dkt. No. 245, Order Granting Class
 10 Certification. Petitioners allege, “The only rational conclusion that can be drawn is that these
 11 transfers drastically jeopardize the health and safety both of class members already detained at the
 12 facility and those who become class members as they enter the facility after being transported with
 13 other untested people.” TRO, at 16. This is false. Since NWIPC has resumed the intake of detainees
 14 from the southern border, the safety protocols employed at NWIPC have successfully prevented
 15 COVID-19 from entering the general population. In addition, the detainees that have been
 16 identified as new class members after entering NWIPC are provided reasonable safety during
 17 transport to NWIPC and during the intake process.

18 *i. Transport to NWIPC.*

19 Recently, ICE resumed transfers of detainees from CBP’s southern border facilities. *Stip.*,
 20 ¶ 1. ICE provided notice to the Court of this changed circumstance. Dkt. No. 275-1, Lippard Decl.,
 21 ¶ 3 (dated Apr. 26, 2021). ICE’s transport of detainees from the southern border to NWIPC
 22 comport with CDC guidance. *See* CDC Transport Guidance (providing guidance on the
 23
 24

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

1 transportation of individuals with known or suspected COVID-19, or who have close contact with
2 a person with COVID-19).

3 ICE has taken objectively reasonable available measures to abate the risk of COVID-19 to
4 detainees during transportation to NWIPC. Prior to accepting new detainees to NWIPC, ICE
5 performs a comprehensive analysis of whether the transfer will allow NWIPC to maintain the
6 COVID-19 safety protocols in place in accordance with CDC guidance and the PRR. *See* Lippard
7 Decl., ¶¶ 11-14. Once ICE takes custody of the detainees at an area airport, medical professionals
8 screen them for COVID-19 symptoms and their temperatures are taken before boarding an ICE
9 Air charter flight to Yakima, Washington. *See* Stip., ¶ 9. The pre-screening process is implemented
10 to identify asymptomatic detainees or detainees that have had a close contact with someone with
11 COVID-19 prior to the flight. Detainees that do not pass the COVID-19 pre-screening do not board
12 the flight. Lippard Decl., ¶ 14. On the flight, masks are utilized, and a nurse accompanies the
13 flight. *Id.*

14 Without any factual basis, Petitioners assume that ICE *intentionally* transports detainees
15 with confirmed or probable COVID-19 or that have been exposed to COVID-19 from a CBP
16 facility to NWIPC in violation of the CDC Transport Guidance. There is no evidence that ICE has
17 placed a detainee with a known positive COVID test on an ICE Air flight to NWIPC with other
18 detainees. Furthermore, as Petitioners have pointed out in the TRO, when ICE has had knowledge
19 that detainees were exposed to someone with COVID-19 prior to transfer, ICE transported those
20 detainees from the southern border on a separate flight from detainees who had not been exposed.
21 TRO, at 4 (citing Dkt. No. 287-1, ¶ 6). Petitioners cannot rely on declarations from former or
22 current detainees to demonstrate that “ICE has also failed to adequately screen detainees who are
23 symptomatic for COVID-19 prior to flight.” TRO, at 5. These declarations present the opinions of
24 laymen without any foundation that they can testify as to medical opinions as to what constitutes
25 sufficient screening. Moreover, they do not provide a basis of knowledge of screening measures
26 for other detainees on their flights.

1 Contrary to Petitioners' assertions, the CDC Testing Guidance does not mandate testing
2 prior to transfer between facilities and mandating a negative test result before transfer. TRO, at 5-
3 6. The relevant CDC Testing Guidance provision at issue includes the following: "Ideally, testing
4 and a 14-day quarantine would occur at the originating facility before transfer and again at the
5 destination facility at intake; at a minimum it should occur at one facility or the other CDC Testing
6 Guidance, at 6. As described in the Lippard and Malakhova Declarations, ICE voluntarily tests
7 detainees upon their arrival to NWIPC and each detainee is subject to the NIMs process. Lippard
8 Decl., ¶ 23; Malakhova Decl., ¶ 19. Testing prior to intake by ICE is not currently feasible.
9 COVID-19 testing of numerous detainees while on an airport tarmac is not a reasonable abatement
10 measure because of the time required to complete the testing and facilities required. *See* Malakhova
11 Decl., ¶ 24 (describing the lengthy process to test groups of 60-120 people by "rapid test").

12 Petitioners in essence ask this Court to substitute their own judgment for that of the CDC
13 and ICE. But "[lawyers and judges] are not epidemiologists and have no expertise managing either
14 pandemics or detention facilities. It should go without saying that the Executive Branch is the more
15 appropriate body to decide these and other such questions." *Lopez-Marroquin v. Barr*, No. 18-
16 72922, 2020 U.S. App. LEXIS 11208, at *5-6 (9th Cir. Apr. 9, 2020) (Callahan, C.J., dissenting)
17 (*citing Turner v. Safley*, 482 U.S. 78, 85 (1987)).

18 Accordingly, ICE's protocols for transporting detainees from CBP facilities at the southern
19 border to NWIPC comports with the CDC Transport Guidance. An injunction is unnecessary.

20 *ii. The intake process at NWIPC.*

21 ICE's NIMs process utilizes objectively reasonable available measures to significantly
22 abate the risk of COVID-19 to class members identified during intake. In addition to a COVID-19
23 verbal and temperature screening prior to transport, detainees are screened for COVID-19 prior to
24 entering NWIPC and again during the medical intake process. Malakhova Decl., ¶¶ 14, 15.
25 Detainees with symptoms are separated from those without. *Id.* The detainees who pass COVID-
26 19 screening are placed in separate routine intake quarantine housing units or NIMs. *Id.*, ¶ 16.

1 As celled units are typically used, this reduces the risk of exposure of new intakes to asymptomatic
2 COVID-19 carriers by quarantining detainees either by themselves or at most with three other
3 people per cell. Lippard Decl., ¶ 26. Only detainees who arrive at NWIPC on the same day are
4 grouped in the same cell. Because of this, there is not a potential for cross-contamination between
5 different flights or cohorts. *See id.* For a group of 60 incoming detainees from a flight, it takes
6 IHSC approximately 6 hours to complete medical intake and 10-11 hours for an incoming flight
7 of 100–130 detainees. Malakhova Decl., ¶ 23.

8 In addition to the multiple verbal and temperature screenings, new intakes are voluntarily
9 tested for COVID-19 at least twice during the NIMs process, including during intake. Malakhova
10 Decl., ¶¶ 19, 21. Those who test positive are transferred to the medical housing unit or medical
11 overflow unit. *Id.*, ¶ 20. If the positive detainee arrived on a flight from the southern border, all
12 detainees from that flight are placed in quarantine as close contacts and re-tested for COVID-19
13 on the fifth day of quarantine. *Id.*

14 Petitioners’ take fault with two aspects of the NIMs process at NWIPC. First, Petitioners
15 complain that ICE does not use a “rapid or real-time PCR test” prior to entering their housing
16 assignments. TRO, at 7. Second, Petitioners are concerned with the use of open bay housing units
17 for NIMs. TRO, at 7-8.

18 ICE offers COVID-19 tests to all incoming detainees using a RT-PCR test that provides
19 results in two to three days rather than a “rapid or real-time PCR test” or test using an Abbott ID
20 NOW machine. Stip., ¶ 14; Malakhova Decl., ¶ 19. IHSC has determined that RT-PCR testing is
21 a better, more accurate and safer method of intake testing given the physical capacity at the facility.
22 Malakhova Decl., ¶ 22. Any potential benefits of using the Abbott ID NOW testing (which for a
23 single individual returns test results in approximately 15 minutes) would be negated by the time it
24 would take to run a large group of detainees from a southern border flight and the time detainees
25 would have to wait prior to being quarantined in the NIMs unit. *See id.*, ¶ 24.

26 The use of open bay units does not violate CDC guidance. Lippard Decl., ¶ 26 n.9. ICE has

1 only used these units for NIMs purposes twice and prefers to use celled units when available.
2 Lippard Decl., ¶¶ 30-31. Of the two times open bay units have been used, once was in error and
3 the other was for a transfer of detainees from another ICE facility – not a CBP facility. *Id.*; *see*
4 *also* Dkt. No. 332 Ghazal Decl., ¶¶ 6-8 (describing his transfer from an ICE facility to NWIPC).
5 Thus, the second use of the open bay unit presented less risk because the detainees had been tested
6 prior to transport from the other ICE facility.

7 ICE has consistently notified the Court about NWIPC detainees and staff that have tested
8 positive for COVID-19. There is no dispute that recently most of these detainees were transported
9 to NWIPC from CBP facilities at the southern border. There should also be no dispute that it is, in
10 most circumstances, impossible to pinpoint where those detainees were exposed to COVID-19
11 during their journey (pre-detention; at CBP facility; during transport; or at NIMs) due to relatively
12 short length of time between initial detention, transport, and arrival at NWIPC. While it is possible
13 that there has been transmission after detainees have arrived at NWIPC, Dr. Amon’s assertion that
14 at least forty COVID-19 cases were a result of transmission during transit or at NIMs is
15 speculative. Dkt. No. 328, Amon Decl., ¶¶ 12-13. He then states that “in nearly every case where
16 a positive case of an individual infected upon arrival is reported, at least one additional case is
17 reported of an individual who was transferred on the same day and who was initially negative and
18 subsequently found to be infected.” *Id.*, ¶ 13. He provides no analysis of whether the detainees
19 were housed together or were even close contacts after arriving at NWIPC. Finally, he cannot
20 state with any certainty whether the detainees that tested positive after arrival at NWIPC were
21 exposed to COVID-19 prior to be taken into ICE custody.

22 No evidence supports Petitioners’ allegations that ICE has acted with deliberate
23 indifference when accepting detainees from CBP facilities at the southern border without prior
24 COVID-19 testing. TRO, at 17-18. Detainees are tested and quarantined during intake in
25 compliance with CDC guidelines and any risk of an outbreak is mitigated by the NIMs process.
26 Due to testing capabilities, it is not reasonable to expect ICE to test detainees on an airport tarmac

1 when ICE first takes custody from another agency, and neither this Court nor ICE can require CBP
 2 to test detainees prior to leaving their facilities. Unlike cases cited by Petitioners concerning
 3 deliberate indifference by agencies, ICE is not avoiding widespread COVID-19 testing of
 4 detainees or potential positive test results as transferred detainees are offered voluntary testing
 5 upon arrival to NWIPC. *See* TRO, at 18. ICE has reported all positive results to the Court.

6 Accordingly, Petitioners cannot demonstrate that the Government has violated their Fifth
 7 Amendment substantive due process right to reasonable safety.²⁰

8 **B. Petitioners cannot show a likelihood of irreparable harm.**

9 To establish irreparable harm, the movant must first “demonstrate that irreparable injury is
 10 likely in the absence of an injunction;” it “will not issue if the person or entity seeking injunctive
 11 relief shows a mere possibility of some remote future injury.” *Park Village Apartment Tenants*
 12 *Association v. Foster*, 636 F.3d 1150 (9th Cir. 2011) (internal citation and quotation marks
 13 omitted); *see also Winter*, 555 U.S. at 22. “Issuing a preliminary injunction based only on a
 14 possibility of irreparable harm is inconsistent with” the Supreme Court’s “characterization of
 15 injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that
 16 the plaintiff is entitled to such relief.” *Id.* Conclusory or speculative allegations are not enough to
 17 establish a likelihood of irreparable harm. *Herb Reed Enters., LLC v. Florida Entm’t Mgmt., Inc.*,
 18 736 F.3d 1239, 1250 (9th Cir. 2013).

19 Petitioners have not established that “irreparable injury is likely in the absence of an
 20 injunction.” *Winter*, 555 U.S. at 22. ICE’s precautionary measures have thus far prevented
 21 COVID-19 from entering general population since resuming transfers from the southern border to
 22

23 ²⁰ In a footnote, Petitioners argue that ICE is also violating class members’ Fifth Amendment right to be free from
 24 punishment. TRO, at 18 n.6. However, Plaintiffs have failed to set forth facts that the transfer of individuals from the
 25 southern border is unrelated to a legitimate government interest. Detention is a constitutionally permissible aspect of
 26 the Government’s enforcement of the immigration laws and fulfills the legitimate purpose of ensuring that individuals
 appear for their removal proceedings. *See Jennings*, 138 S. Ct. at 836; *Demore*, 538 U.S. at 523; *Zadvydas*, 533 U.S.
 at 690-91. The transfers are directly related to the individuals’ detention and their safety. In addition, the conditions
 at NWIPC are reasonably related to the Government’s legitimate interest in effective management of a detention
 facility. *See Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004).

1 NWIPC. Furthermore, Petitioners cannot show that the detainees with COVID-19 were exposed
2 to the virus during the transportation or admission to NWIPC. As stated above, due to the short
3 period between initial detention and transfer to NWIPC and the nature detention while in CBP
4 holding facilities, it is unlikely that exposure can be pinpointed to a specific occurrence. Finally,
5 there is no evidence that the Government's precautionary measures are inadequate to contain or
6 properly provide medical care should a COVID-19 outbreak occur. *See Dawson v. Asher*, 20-cv-
7 409, 2020 WL 1704324, at *12 (W.D. Wash. Apr. 8, 2020). IHSC has been able to isolate COVID-
8 19 positive detainees in their medical housing unit or medical overflow unit. When additional
9 medical treatment is necessitated, IHSC sends those detainees to area hospitals. Accordingly,
10 Petitioners fail to meet their burden of clearly showing that irreparable harm is likely in the absence
11 of an injunction.

12 **C. ICE's interests would be harmed, and the Public's interests would not be
13 served by the grant of injunctive relief.**

14 The remaining equities do not weigh in Petitioners' favor. The potential harm to ICE is
15 great if this Court mandates heightened requirements above those provided by the CDC. As shown
16 above, not all the CDC provisions are mandatory or feasible when applied to the facts here. For
17 instance, the CDC does not mandate testing at both facilities involved in a transfer. Plaintiffs seek
18 that mandate here. If granted, the order would have the effect of enjoining ICE from transporting
19 detainees from CBP facilities at the southern border to NWIPC.

20 ICE began transporting detainees from the southern border to NWIPC as part of a
21 comprehensive strategy to prevent overcrowding and maintain pandemic safety precautions in
22 other ICE facilities. This benefits the Public and ICE. These transfers have been made in a manner
23 consistent with CDC guidelines and are only accepted if NWIPC can safely manage the additional
24 detainees. Lippard Decl., ¶¶ 13-14. Although numerous detainees have tested positive for COVID-
25 19 after their arrival at NWIPC, the NIMs process has worked in containing the spread of COVID-
26 19 beyond the NIMs units and preventing its entry into the general population.

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

8 Furthermore, it is in the Public's interest for ICE to quickly determine whether detainees
9 can be released to avoid overcrowding at ICE facilities and to provide additional protection to
10 medically vulnerable detainees from potential harm due to COVID-19. Most class members
11 transferred to NWIPC from the southern border have been released because of these custody
12 reassessments. Lippard Decl., ¶ 36. ICE is coordinating with the Washington State Department of
13 Health regarding the release of all detainees who test positive for COVID-19 or have known
14 exposure to COVID-19 so that these detainees can be offered the option to be released to a
15 Washington DOH isolation and quarantine facility for temporary housing. Malakhova Decl., ¶ 48.

16 Accordingly, the Court should deny the TRO.

17 **V. CONCLUSION**

18 Because Petitioners cannot satisfy any of the requirements for preliminary injunctive relief,
19 ICE respectfully requests the Court deny Petitioners' Motion for a Temporary Restraining Order.

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1 DATED this 4th day of August, 2021.

2 Respectfully submitted,

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