UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RAFAEL PIMENTEL-ESTRADA, Petitioner, v. WILLIAM P. BARR, et al., Respondents.	CASE NO. C20-495 RSM-BAT ORDER CONVERTING TEMPORARY RESTRAINING ORDER INTO PRELIMINARY INJUNCTION

I. INTRODUCTION

This matter is before the Court following the Court's Order Granting Motion for Temporary Restraining Order. Dkt. #51. That Order directed Respondents[1] to show cause why the temporary restraining order ("TRO") should not be converted into a preliminary injunction. *Id.* at 42. Respondents timely responded (Dkt. #54-2 ("Respondents' Response")) and filed two supporting declarations. Similarly, Petitioner filed a response (Dkt. #58 ("Petitioner's Response")) and ten supporting declarations. On May 22, 2020, the Court held a preliminary injunction hearing with argument from the parties. At the end of that hearing, the Court converted the TRO to a

[1] The Respondents are U.S. Immigration and Customs Enforcement ("ICE"); Nathalie Asher, Director of the Seattle Field Office of ICE; Matthew T. Albence, Deputy Director and Senior Official Performing the Duties of the Director of ICE; and Steven Langford, Warden of the Northwest ICE Processing Center ("NWIPC"). *See* Dkt. #18 (Am. Pet.) at 1.

Preliminary Injunction, indicating that a complete order detailing the Court's reasoning would follow.

II. BACKGROUND

The Court's TRO recounted the relevant factual and procedural background at length. *See* Dkt. #51. The Court adopts Section II of that Order (Background) as findings of fact in support of this Order. The Court summarizes those findings before visiting further factual developments.

A. Summary[2]

Petitioner Rafael Pimentel-Estrada, a 66-year-old native and citizen of Mexico, pleaded guilty to a controlled substances violation arising out of his possession of, with the intent to deliver, approximately one pound of methamphetamine, in 2013. After being released from incarceration in early 2019, Petitioner was detained by U.S. Immigration and Customs Enforcement ("ICE"). Though Petitioner was previously a lawful permanent resident, ICE initiated removal proceedings because of Petitioner's criminal conviction and, since that time, have held him at the Northwest ICE Processing Center ("NWIPC") in Tacoma, Washington. Petitioner sought relief from removal, but an Immigration Judge denied Petitioner relief and ordered him removed. Petitioner' appeal to the Board of Immigration Appeals was dismissed, and his petition for review of that decision remains pending before the Ninth Circuit Court of Appeals. *See Pimentel-Estrada v. Barr*, No. 20-70384 (9th Cir.).

As the COVID-19 pandemic upended our lives, Petitioner began learning that his age and medical history made him more vulnerable to serious illness or death should he contract the coronavirus. Concerned that Respondents were not adequately protecting him from this grave risk,

[2] The Court provides this summary only as general background. To the extent the summary in this Section conflicts with any of the factual findings of the TRO, it is unintended.

Petitioner filed an emergency motion in the Ninth Circuit Court of Appeals seeking immediate release. The Ninth Circuit Court of Appeals referred the fully briefed motion to this Court for expedited consideration as a petition for writ of habeas corpus. Dkt. #1-1. Petitioner amended his habeas petition and sought a temporary restraining order. Petitioner argued that his age and medical history place him at a high risk of serious illness or death should he be exposed to COVID-19. Petitioner alleged that the actions taken by Respondents to address the grave threat of COVID-19 were not adequate to protect him and argued that this was a violation of his Fifth Amendment rights, as a civil detainee, to reasonable safety and freedom from punishment.

Respondents argued that they were taking adequate steps to protect Petitioner while he was detained at the NWIPC. Respondents pointed to their preparation of written guidance for facility operators[3] on how to adequately protect ICE detainees and staff. Respondents further recounted efforts to decrease the custodial population at the NWIPC, limit the number of staff and visitors entering the NWIPC, and to exclude infected individuals from the facility. Recognizing that serious risks remained, Respondents indicated that the on-site medical services would allow them to adequately address and control any small outbreaks, should they occur.

On April 28, 2020, the Court issued a TRO granting Petitioner relief. The TRO recounted the serious risk of harm presented by COVID-19, the heightened risk Petitioner faced due to his detention, age, and medical history, and the difficulty Petitioner faced in following preventative strategies—such as handwashing and social distancing—while detained. The Court noted the numerous measures Respondents implemented to prevent the introduction of COVID-19 into the NWIPC. But Petitioner established that the number of possible vectors, the nature of the virus, and numerous procedural gaps made it nearly inevitable that COVID-19 would reach inside the

[3] The NWIPC is operated by The GEO Group, Inc. ("GEO"), an independent contractor.

NWIPC. Further, Petitioner established that Respondents had not implemented measures sufficient to prevent the rampant spread of the virus should it make it into the facility. This was in large part due to the congregate nature of the facilities, a lack of adequate cleaning, and a complete inability for detainees to practice social distancing. While significant on their own, these concerns were further compounded by an apparent lack, without explanation, of testing for both new and existing detainees with possible exposure. In sum the conditions presented a real risk that the coronavirus would be rapidly disseminated throughout the facility.

The Court had little trouble concluding that a TRO should issue on its considerable factual findings. Petitioner demonstrated a likelihood of success on his "reasonable safety" claim because Respondents made intentional decisions that placed Petitioner at a substantial risk of serious harm, did not implement objectively reasonable measures to keep him reasonably safe, and caused him harm. Likewise, Petitioner demonstrated a likelihood of success on his "punitive conditions" claim because housing Petitioner in unsafe conditions was excessive in relation to Respondents' need to ensure Petitioner's presence at removal and to protect the community. These constitutional violations established irreparable harm and the Court concluded that the balance of the equities and public interest weighed in favor of Petitioner. To remedy these apparent constitutional violations, the Court ordered Petitioner released and ordered Respondents to "show cause why [the TRO] should not be converted to a preliminary injunction." Dkt. #51 at 42.

B. Factual Developments

In large part, the parties leave the factual record unchanged. The most significant factual development is Respondents' notice, in a separate case, indicating that the NWIPC now houses a detainee who has tested positive for COVID-19 and has not recovered. *See Dawson v. Asher*, Case No. 20-cv-409-JLR, Dkt. #103 (W.D. Wash. May 15, 2020); *United States v. Wilson*, 631 F.2d

118, 119 (9th Cir.1980) (court may take judicial notice of records in other cases). In that notice, Drew H. Bostock, the ICE Officer in Charge assigned to the NWIPC, declares that ICE took custody of a prisoner from the Oregon Department of Corrections and was informed that the individual was "asymptomatic but had tested positive for COVID-19." *Id.*, Dkt. #103-1 at ¶¶ 3–4. That individual was transported to the NWIPC, where he is now detained in "medical isolation [in] an airborne isolation room in the medical housing unit." *Id.* at ¶¶ 5–8.

1. Respondents' Additional Evidence

For their part, Respondents have submitted slightly updated declarations of Dr. Sheri Malakhova, a doctor of internal medicine and the "Clinical Director for ICE Health Services Corps ("IHSC") at the [NWIPC]," (Dkt. #54-3 ("2nd Malakhova Decl.") at ¶ 1) and Mr. Bostock (Dkt. #55 ("2nd Bostock Decl." at ¶ 1). However, the Court finds that these declarations are largely unchanged from their earlier iterations.

a. Dr. Malakhova

The changes to Dr. Malakhova's declaration are of little importance. Dr. Malakhova does provide some further explanation of the testing protocols being implemented by IHSC at the NWIPC, especially as to new detainees and the results of the limited testing conducted.[4] 2nd Malakhova Decl. at ¶¶ 10, 15, 26–27. The additional explanation is appreciated, but Respondents' screening process for new detainees continues to suffer the same infirmities. It relies on new detainees to know of and self-report their "close contact with a person with laboratory-confirmed COVID-19 in the past 14 days and whether they have traveled through or are from area(s) with

[4] Respondents also rely on Dr. Malakhova's declaration to rebut factual allegations from Petitioner and three non-party detainees as to the medical they received while detained. 2nd Malakhova Decl. at ¶¶ 31–60. The Court finds this testimony to be of little relevance. The primary question before the Court does not substantially relate to the quality of medical care afforded to Petitioner and other detainees at the NWIPC.

sustained community transmission in the past two weeks." *Id.* at ¶ 15.a. But, as Petitioner's expert notes, relying on data from the United States Centers for Disease Control and Prevention ("CDC") data, "[t]he entire state of Washington is listed as having 'widespread' community transmission." Dkt. #60 at ¶¶ 32(a). Without positive answers and in the absence of the most obvious symptoms, new detainees who unknowingly contacted asymptomatic or unverified carriers may be released straight to general population housing units. Similarly, Dr. Malakhova does not clarify or contest that new detainees are permitted to commingle, making it possible for a new detainee to be exposed to asymptomatic cases immediately before being released to general population housing units. As the Court previously noted, "Petitioner's expert opines—without dispute from Respondents—that 'there is little to no ability to adequately screen [] for new, asymptomatic infection.'" Dkt. #51 at 26 (citing Dkt. #23 at ¶ 8).

b. Mr. Bostock

Likewise, Mr. Bostock's updated declaration provides little additional information. Mr. Bostock provides the Court with updated figures representing the total detainee population, its relationship to the total capacity of the NWIPC, and the specific utilization of housing units within the NWIPC.[5] 2nd Bostock Decl. at ¶¶ 6, 25–27. He also provides additional evidence demonstrating that Respondents now afford the NWIPC detainees slightly more information and supplies that may allow detainees, on their own, to reduce their risk of exposure to the coronavirus. *Id.* at ¶¶ 16, 22–24. By far, the most welcome development in this regard is that Respondents now make three "surgical face masks" available, per week, to "detainees for voluntary use" and may

[5] The Court notes that Mr. Bostock does not maintain that the decreased overall detainee population at the NWIPC has resulted in proportionally decreased detainee populations within individual housing units. At most, Mr. Bostock indicates that "ICE has worked with GEO to redistribute the detainees in custody among the housing units as much as possible to allow for greater social distancing." 2nd Bostock Decl. at ¶ 25.

request additional masks. *Id.* at ¶ 24. Lastly, Mr. Bostock informs the Court that prior to Petitioner's Court-ordered release, he was housed as "the sole occupant assigned to [a] cell since March 17, 2020."[6] *Id.* at ¶ 66.

2. Petitioner's Additional Evidence

a. Conditions at the NWIPC

Petitioner submits numerous declarations demonstrating that despite Respondents' purported efforts, detainees continue to be unable to practice adequate social distancing.[7] Despite reducing the overall population and the populations within housing units, housing units remain crowded. Dkt. #64 ("Diaz Reyes Decl.") at ¶ 6; Dkt. #61 ("Castañeda Juarez Decl.") at ¶ 2; Dkt. #62 ("Favela Avendaño Decl.") at ¶ 9. Detainees still rely entirely on shared facilities for personal hygiene, cooking, eating, exercising, leisure, and communication with the outside world and, at least sometimes, these facilities are not thoroughly cleaned. Diaz Reyes Decl. at ¶¶ 7–8; Castañeda Juarez Decl. at ¶¶ 5–8; Dkt. #63 ("Bonarov Decl.") at ¶¶ 5–6. While detainees may be able to self-isolate for much of their time, they still must have close interaction with others while waiting for food, while eating, while waiting for medications, while utilizing recreational and leisure resources, and while attending court. Castañeda Juarez Decl. at ¶ 5; Favela Avendaño Decl. at ¶ 14; Bonarov Decl. at ¶¶ 6, 14. Likewise, while some detainees may be afforded single occupancy

[6] Respondents make much of this point. *See, e.g.*, Respondents' Response at 2 (arguing that Respondents housed "Petitioner in a single occupancy unit as early as March 17, 2020," that this change was as a "protective measure," and this "significantly undercuts [Petitioner's] claims that THE NWIPC has failed to take protective measures in his case"). However, the Court affords it little weight as Respondents provide no explanation for their own failure to bring this fact to the Court's attention previously and provide no evidence establishing that Petitioner's housing was the result of Respondents' forethought, as opposed to mere happenstance.

[7] Petitioners' experts roundly agree that detainees are not able to practice adequate social distancing. Dkt. #22 at ¶¶ 7–8; Dkt. #23 at ¶¶ 13, 16(f); Dkt. #61 ("Amon Decl.") at ¶¶ 22–23.

sleeping areas, many continue to sleep in close quarters. Castañeda Juarez Decl. at ¶ 3; Favela Avendaño at ¶¶ 5, 10; Bonarov Decl. at ¶ 4; Diaz Reyes Decl. at ¶ 6. Further, Petitioner establishes that despite Respondents' efforts, practicing adequate social distancing remains impossible. Castañeda Juarez Decl. at ¶¶ 6–10; Favela Avendaño Decl. at ¶ 12; Bonarov Decl. at ¶ 9; Diaz Reyes Decl. at ¶ 20.

Petitioner makes clear that Respondents continue to rely primarily on preventing COVID-19 from reaching the general population[8] and have not implemented measures to contain possible spread. Petitioner establishes that there continues to be comingling between pods, a fact that Respondents accept. Bonarov Decl. at ¶ 14; Castañeda Juarez Decl. at ¶ 10; 2nd Bostock Decl. at ¶ 31 (noting that "*[m]ost* movement within the facility is unit-specific") (emphasis added). Likewise, Petitioners provide evidence that even when housing units are "quarantined," guards may move from the quarantined housing unit to other housing units that are not quarantined. Castañeda Juarez Decl. at ¶ 11. Still more troubling, Petitioner establishes that guards are not required to wear masks while interacting with detainees—except in limited situations—and most do not. Castañeda Juarez Decl. at ¶ 13; Favela Avendaño Decl. at ¶ 16; Bonarov Decl. at ¶ 10; Diaz Reyes Decl. at ¶ 21.

Petitioner also establishes that despite the potential for the spread of COVID-19 within the NWIPC, Respondents continue to leave nearly all cleaning to the detainees. Respondents have required the guards to take a more active role, but implementation is inconsistent, with conditions often remaining far from optimal. Castañeda Juarez Decl. at ¶¶ 5, 8; Bonarov Decl. at ¶ 7; Diaz Reyes Decl. at ¶ 11; Favela Avendaño Decl. at ¶ 16 (noting both a change in policy requiring

[8] The fact that COVID-19 is now within the NWIPC, even if contained, makes this proposition more difficult.

guards to take a more active role in cleaning and the guards' inconsistent implementation). Still further, Petitioner establishes that detainees continue to run out of adequate cleaning supplies and sometimes find themselves unable to practice proper hand hygiene. Castañeda Juarez Decl. at ¶ 6; Diaz Reyes Decl. at ¶ 12; Favela Avendaño Decl. at ¶ 15.

b. Expert Testimony

Petitioner also provides new expert testimony from Mr. Joseph J. Amon, "an infectious disease epidemiologist," to aid the Court in understanding the efficacy of the measures implemented by Respondents at the NWIPC. Dkt. #60 ("Amon Decl.") at ¶ 1. The Court finds Mr. Amon to be well qualified as he is credited with 60 peer-reviewed articles, has served as an "epidemiologist in the Epidemic Intelligence Service of the US Centers for Disease Control and Prevention," and has a current research focus on "infectious disease control, clinical care, and obligations of government related to individuals in detention settings." *Id.* at ¶ 2–4 (emphasis in original). From this perspective, Mr. Amon considers ICE's general guidance for addressing the risk of COVID-19 in immigration detention centers, ICE's Pandemic Response Requirements ("ERO PRR") which guide GEO's actions at the NWIPC, and Respondents' overall implementation of ICE's guidance. Mr. Amon concludes that the procedures, both as conceived and as implemented, "are inadequate to prevent or mitigate the rapid transmission of COVID-19 in the" the NWIPC. *Id.* at ¶ 29.

Mr. Amon's criticisms reasonably begin with Respondents' reliance on identifying infected individuals before entry into the NWIPC and their concurrent inability to do so. *Id.* at ¶ 32, 33. The widespread and asymptomatic nature of the coronavirus means that most new detainees have likely been exposed in some manner, decreasing the effectiveness of screening and increasing the need for isolation of all new detainees. *Id.* at ¶ 32(a)–(c). But Respondents cohort

new detainees with possible exposure for observation and release detainees into the general population with no clear indication as to whether they may be infected. *Id.* Without widespread testing, Respondents cannot identify "confirmed cases"—the lynchpin that causes them to take further preventative procedures. *Id.* at ¶ 33. Mr. Amon further notes that while ICE indicates that it will test individuals in compliance with CDC guidelines, those CDC guidelines specify that individuals in congregate settings with symptoms of COVID-19 are a "high priority" for testing. *Id.* (citing *Evaluating and Testing Persons for Coronavirus Disease 2019 (COVID-19)*, CDC (May 5, 2020), https://www.cdc.gov/coronavirus/2019-nCoV/hcp/clinical-criteria.html (last accessed May 28, 2020)). Yet, even as "[t]he CDC has expanded its list of common COVID-19 symptoms" the amount of testing at the NWIPC is disproportionately low, demonstrating "poor monitoring of symptoms consistent with COVID-19." Amon Decl. at ¶ 42.f. Because of insufficient testing, Respondents are likely to detect infected detainees only when they are already critically ill. *Id.* at ¶ 30(b).

A second area of substantial criticism remains the inability of detainees to practice social distancing, "the primary means of preventing transmission of the virus." *Id.* at ¶ 30(c). Respondents have taken steps to promote social distancing but have "fail[ed] to make clear that social distancing is required rather than just recommended." *Id.* at ¶ 30. Even then, the steps taken "fall short of what is necessary to prevent transmission" once the virus enters the facility. *Id.* at ¶ 30(a). While access to masks may somewhat mitigate Respondents' failure to require social distancing, Mr. Amon notes, with concern, that during meal times detainees are both unable to socially distance or wear face masks. *Id.* at ¶ 36(b). Because Respondents are unable to implement

CDC guidance related to social distancing at the NWIPC, all detainees are placed "in jeopardy, especially those at high risk of severe disease and death."[9] *Id.* at ¶ 52.

Overall, Mr. Amon concludes that Respondents' policies themselves are insufficient, even if the policies were being fully implemented. *Id.* at ¶ 53. "Even where ICE has stated that it is addressing this source of infection, discrepancies between the stated policies and the declarations of [detainees] provide a basis for concerns that ideal response plans are not being implemented." *Id.* at ¶ 37(a). Mr. Amon agrees that the inherent nature of detention at the NWIPC—with its shared facilities, lack of cleaning, limited access to hygiene products and handwashing facilities, limited access to PPE, inconsistent use of PPE, and inability to socially distance—makes the virus difficult for Respondents to control. *Id.* at ¶ 41. But this only further cements his conclusion that "[t]he only viable public health strategy available is risk mitigation" through release. *Id.* at ¶ 55.

III. DISCUSSION

A. Legal Standards for a TRO

Granting a preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "The proper legal standard for preliminary injunctive relief requires a party to demonstrate (1) 'that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his

[9] Mr. Amon notes further that Respondents have taken a narrow view of which detainees are high-risk and "do[] not identify the steps they are taking to protect these high-risk patients from contacting COVID-19." Amon Decl. at ¶ 31(a)–(c). This "lack of specific attention to date in ICE's guidance on COVID-19 indicates that they do not plan to establish special protections for high-risk patients, instead waiting for them to become symptomatic. This will lead to unnecessary illness and death for the people most vulnerable to this disease." *Id.* at ¶ 29.

favor, and (4) that an injunction is in the public interest.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (citing *Winter*, 555 U.S. at 20).

As an alternative to this test, a preliminary injunction is appropriate if "serious questions going to the merits were raised and the balance of the hardships tips sharply" in the moving party's favor, thereby allowing preservation of the status quo when complex legal questions require further inspection or deliberation. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011). However, the "serious questions" approach supports a preliminary injunction only so long as the moving party also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest. *Id.* at 1135. The moving party bears the burden of persuasion and must make a clear showing that he is entitled to such relief. *Winter*, 555 U.S. at 22.

B. Likelihood of Success on the Merits

As the Court has noted, relatively little has changed since the Court issued its TRO. For this reason, the Court adopts the legal reasoning of the prior TRO as conclusions of law to the extent not inconsistent with this Order. For the same reasons, the Court finds that Petitioner is likely to succeed on the merits of his claims.

1. Reasonable Safety

"[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).[10] The government thus violates the Due Process Clause if it fails to provide civil

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

detainees with "food, clothing, shelter, medical care, and reasonable safety." *Id.* at 200. The Ninth Circuit has analyzed such conditions of confinement claims under an objective deliberate indifference standard. *See Castro v. Cnty. of L.A.*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc) (adopting objective deliberate indifference standard based on *Kingsley v. Hendrickson*, 576 U.S. 389, 135 S. Ct. 2466 (2015), to evaluate failure to protect claim brought by pretrial detainee). That standard demands that:

> (1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;
>
> (2) Those conditions put the plaintiff at substantial risk of suffering serious harm;
>
> (3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and
>
> (4) By not taking such measures, the defendant caused the plaintiff's injuries.

Castro, 833 F.3d at 1071.

As the Court concluded previously, Petitioner is likely to succeed on such a claim. Respondents are acting intentionally. *See Castro*, 833 F.3d at 1070 (a failure to act with respect to a known condition of confinement may constitute an intentional decision). To date 1,392 detainees at ICE detention facilities and 166 ICE employees have confirmed cases of COVID-19. ICE Guidance on COVID-19, Confirmed Cases, https://www.ice.gov/coronavirus (last visited May 29, 2020). ICE is wholly aware of the serious risks posed by COVID-19, particularly for those at high risk for serious illness or death. ICE developed the ERO PRR to guide its detention facilities in responding to the virus. Together, Respondents have acted to implement that guidance at the NWIPC.

The Court previously concluded that "Petitioner has made a clear showing that he is likely to succeed on his claim that the conditions of his detention place him at substantial risk of suffering serious harm." Dkt. #51 at 31. Respondents have done nothing to alter the Court's conclusion. Respondents attempt to argue that Petitioner is not high-risk because he does not suffer from additional health risks. But, even if this argument was not belied by the record, Petitioner is over the age of 65. *See* CDC, *Coronavirus Disease 2019-COVID*, *People who are at higher risk for severe illness*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last visited May 29, 2020). Petitioner's age alone places him at a substantial risk of serious harm from COVID-19.

Likewise, Respondents have done failed to mitigate the risk of the coronavirus entering and spreading within the NWIPC. As noted previously, the risk is heightened as Respondents now house a COVID-19 positive detainee at the NWIPC. While Respondents may have acted to reduce populations within housing units and reduce cross-contact between housing units, social distancing remains impossible,[11] guards are not required to wear masks, and cleaning is inconsistent. Further, Petitioner presents additional expert testimony—consistent with the testimony of his earlier experts—indicating that ICE's guidance for responding to the pandemic, as applied at the NWIPC, is insufficient to prevent the infiltration of the coronavirus.

Petitioner has also established "a likelihood that Respondents failed to take reasonable available measures to abate the risk such that their conduct was objectively unreasonable." Dkt.

[11] Respondents argue flatly that "social distancing is possible at the NWIPC given the significantly reduced detainee capacity and ICE's redistribution of detainees in custody among the hous[ing] units." Respondents' Response at 14 (citing 2nd Bostock Decl. at ¶¶ 6, 25). But that assertion mischaracterizes Mr. Bostock's testimony. He testifies that overall detainee population has been reduced and that detainees have been distributed between different housing units. Mr. Bostock does not assert that social distancing is possible.

#51 at 31. Social distancing remains impossible and is not mandated, detainees continue to have contact with detainees from other housing units, guards are not required to wear PPE, and testing remains inadequate. *Id.* at 31–35. Respondents argue that Petitioner was in fact housed in a single occupancy cell before his release and that he could be similarly accommodated if he was returned to custody. But there is no indication in the record that Petitioner was afforded a single occupancy cell because of the risk COVID-19 posed for him or that single occupancy allowed Petitioner to adequately protect himself. Petitioner's pre-release housing appears to have been a coincidence, not the result of Respondents' recognition of, and response to, the risks posed to Petitioner.

Respondents do not challenge whether Petitioner is likely to establish causation and the Court concludes, as it did previously, that "Petitioner has made a clear showing that he is likely to prevail on his claim that Respondents have failed to provide him with reasonably safe conditions of confinement in violation of his Fifth Amendment due process rights." Dkt. #51 at 36.

2. Punitive Conditions of Confinement

Conditions of confinement 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*, 135 S. Ct. at 2473–74. Relevant here, punitive conditions can be found upon a showing that the challenged condition is not rationally related to a legitimate government objective or is excessive to that purpose. *Id.*; *see also Jones v. Blanas*, 393 F.3d 918, 933–34 (9th Cir. 2004) (holding that conditions are punitive where they are "employed to achieve objectives that could be accomplished in so many alternative and less harsh methods"). Such is the case here.

Respondents do not unconstitutionally punish Petitioner by detaining him pending removal, as that action is rationally related to the legitimate governmental interest of ensuring noncitizens appear for their removal proceedings and preventing danger to the community. *See*

Jennings v. Rodriguez, --- U.S. ---, 138 S. Ct. 830, 836 (2018); *Demore v. Kim*, 538 U.S. 510, 520–22 (2003); *Zadvydas v. Davis*, 533 U.S. at 690–91. However, the Court cannot find that holding Petitioner in conditions likely to cause him serious injury or death is rationally related to those interests. Further, Respondents invoke these interests only in the abstract. Respondents have not provided any evidence beyond Petitioner's drug conviction or his order of removal pending review to indicate that Petitioner will fail to appear for his removal proceedings or will pose any danger to the community. Petitioner's detention in conditions presenting him a serious risk of harm or death is not rationally related to these generalized governmental interests.

"[T]he Court concludes that Petitioner has established a likelihood that the conditions of his detention are not reasonably related to the legitimate governmental interests such that his continued detention is punitive in violation of his due process rights." Dkt. #51 at 38.

C. Irreparable Harm, Balance of Equities, and Public Interest

As previously noted, Petitioner's likelihood of success on the merits of his due process claims constitutes a sufficient finding of irreparable harm. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Petitioner has established that irreparable injury is likely.

When the government is a party, the balance of equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Here, the risk of harm to Petitioner far outweighs the governmental interests at stake. Further, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (quoted source omitted).

For all the reasons above and as stated in the Court's April 28, 2020 Order Granting Motion for Temporary Restraining Order (Dkt. #51)—to the extent not inconsistent with this Order—the Court finds that the TRO should be converted into a Preliminary Injunction.

D. Conditions of Release

Respondents request that Petitioner's continued release be conditioned on him residing and sheltering in place at one location and that Petitioner not leave that location "except to obtain medical care, to appear at immigration court proceedings, or to obey any order issued by" the Department of Homeland Security. Respondents' Response at 25; Dkt. #73 at 2. Additionally, Respondents request the ability to re-detain Petitioner, with no advanced notice to this Court or Petitioner, for violations of release conditions or if his ultimate removal from the United States becomes possible. *Id.*

The Court finds that the requested conditions, which are not justified by reference to the record, are overly restrictive. Again, Respondents allege that Petitioner is a flight risk only on the generalized basis that he is subject to an order of removal under further judicial review. Likewise, Respondents allege that Petitioner is a danger to the community solely on the generalized basis that he has been convicted of a crime—for which he has served his sentence. The Court does not find that these generalized concerns warrant the overly restrictive conditions sought. Provided Petitioner maintains reasonable contact with Respondents, Respondents do not establish that further restrictions on Petitioner's movement are warranted. Accordingly, the Court orders that Petitioner's continued release be conditioned only on his compliance with federal, state, and local laws, and his keeping ICE reasonably informed of his current residence and mailing address.

IV. CONCLUSION

Having reviewed the parties' briefing and supporting evidence, having heard the parties' arguments, and having considered the entirety of the record, the Court hereby finds and ORDERS:

1. The Court ADOPTS, to the extent not inconsistent with this Order, its April 28, 2020 Order Granting Motion for Temporary Restraining Order as findings of fact and conclusions of law in support of this Order.
2. The Court's Order Granting Motion for Temporary Restraining Order (Dkt. #51) is hereby CONVERTED to this Preliminary Injunction.
3. For the pendency of this action, Respondents shall not detain Petitioner without further order of this Court, provided that Petitioner: (a) shall keep ICE reasonably apprised of his residence and mailing address and (b) shall not violate any federal, state, or local law.

DATED this 3rd day of June, 2020.

RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE