

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

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOSUE CASTAÑEDA JUAREZ, et al.,

Petitioners-Plaintiffs,

v.

NATHALIE ASHER, et al.,

Respondents-Defendants.

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

**PETITIONERS' REPLY IN  
SUPPORT OF MOTION FOR A  
TEMPORARY RESTRAINING  
ORDER**

NOTING DATE: MAY 20, 2020

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## INTRODUCTION

1  
2 A judge of this Court recently granted a temporary restraining order (TRO) requiring that  
3 Respondents-Defendants (Respondents) immediately release a medically vulnerable immigrant  
4 detainee from the Northwest Detention Center (NWDC) because of the imminent danger to his  
5 health posed by COVID-19. *Pimentel-Estrada v. Barr*, No. 2:20-cv-495 RSM-BAT, --- F. Supp.  
6 3d ---, 2020 WL 2092430 (W.D. Wash. Apr. 28, 2020). Respondents do not dispute that  
7 Petitioners-Plaintiffs (Petitioners) and the members of the class they seek to represent are all  
8 particularly vulnerable to COVID-19. Instead Respondents argue that their response to the virus  
9 adequately protects Petitioners. Respondents, however, have not addressed the “glaring  
10 deficiencies” highlighted by the *Pimentel* court. *Id.* at \*14. In fact, conditions at NWDC have  
11 grown more dangerous. Shortly after Petitioners filed the motion for a TRO, Respondents  
12 acknowledged that they transferred a *second* person to the NWDC who had tested positive for  
13 COVID-19. Dkt. 65 ¶ 18.

14 Although Respondents have identified 128 detainees who are medically vulnerable to  
15 COVID-19 at NWDC, they have released only 16 of these people, and have informed members  
16 of Congress that they have no further plans for release. Dkt. 56-1, Letter from Sen. Patty Murray,  
17 et al., to GEO and Respondent Asher, May 12, 2020 (Murray Letter). Nor has testing for  
18 COVID-19 meaningfully improved at NWDC: ICE has tested only 13 detainees since the start of  
19 the pandemic. *See* Dkt. 65 ¶ 11 (Yonkers Decl.). As the Court explained in *Pimentel*,  
20 Respondents have failed to provide “reasonably safe conditions of confinement in violation of  
21 [the detainee’s] Fifth Amendment due process rights.” *Pimentel*, 2020 WL 2092430 at \*16.

22 Petitioners’ immediate release may mean the difference between life and death. After the  
23 first reported death of an immigrant detainee from COVID-19 two weeks ago, there is now  
24 confirmation of another immigrant detainee and three officers working at ICE detention facilities  
25 who have also died from the virus.<sup>1</sup> Respondents cannot dispute that COVID-19 has now entered  
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<sup>1</sup> Dkt. 2-1; Ngo Decl. Ex. A, Noah Lanard, *A Honduran Man Has Died of COVID-19 After Leaving an ICE Jail Plagued by the Virus*, Mother Jones, May 14, 2020; *id.* Ex. B, Nomaan Merchant, *Two Guards at ICE Jail Die After*

1 NWDC and more than fifty immigration detention facilities nationwide. Ngo Decl., Ex. D, ICE,  
 2 *ICE Guidance on COVID-19: Confirmed Cases* (updated May 19, 2020) (ICE Confirmed Cases).  
 3 The motion should be granted.

#### 4 ARGUMENT

##### 5 I. Conditions at NWDC Violate Petitioners' Due Process Rights.

6 Respondents' assertions as to their evolving response to COVID-19, Dkt. 62 at 2, 19, fail  
 7 to satisfy their duty to protect medically vulnerable Petitioners from serious illness or death. As  
 8 an initial matter, Respondents cannot dispute that COVID-19 has entered the facility, because  
 9 they have transferred detainees with known cases of COVID-19 to NWDC twice in the last two  
 10 weeks. Dkt. 65 ¶¶ 12, 15. Their decision to transfer those individuals (as well as other  
 11 individuals who have not been tested) to NWDC underscore their failure to safeguard Petitioners.  
 12 And as the *Pimentel* court found, Respondents' measures are insufficient to ensure that COVID-  
 13 19 will not enter, or has not yet entered, the facility through other means. *Pimentel*, 2020 WL  
 14 2092430 at \*15. The fact that the virus runs rampant at other detention facilities that have  
 15 applied the same ICE COVID-19 protocols in place at NWDC further undermines Respondents'  
 16 contention that they are able to ensure Petitioners' reasonable safety.

17 In their opposition to Petitioners' emergency motion, Respondents describe several  
 18 measures that they have allegedly taken to combat the threat of COVID-19. Dkt. 62 at 4-12.  
 19 However, as Petitioners argued in their motion, and as detailed below, the protocols implemented  
 20 by Respondents are woefully insufficient. Nor have Respondents taken sufficient steps to address  
 21 the "glaring deficiencies" found by the Court in *Pimentel*. *Pimentel*, 2020 WL 2092430, at \*14.  
 22 Social distancing is not a realistic possibility at NWDC, and hygiene and cleaning measures are  
 23 inadequate to prevent and control the spread of COVID-19. Respondents have failed to take  
 24 sufficient efforts to protect medically vulnerable Petitioners; they have also failed to engage in  
 25 meaningful testing, as the sparse numbers of detainees tested at NWDC is far short of what is

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*Contracting Coronavirus*, Associated Press, Apr. 29, 2020; *id.* Ex. C, Emily Kassie (@emilykassie), Twitter (May 14, 2020, 5:43 PM), <https://bit.ly/3bF5zwQ> (last accessed May 19, 2020).

1 necessary. These failures place Petitioners' health and lives at serious risk.

2 **A. COVID-19 Is Present at NWDC and Poses a Grave Risk to Petitioners.**

3 Respondents have knowingly transferred people who have already been confirmed as  
4 positive for COVID-19 to NWDC. On May 8, 2020, ICE transferred a detainee who had tested  
5 positive for COVID-19 to NWDC, along with three other detainees from the Florence Service  
6 Processing Center (FSPC) in Arizona, where there is a confirmed outbreak of the virus. Dkt. 65  
7 ¶¶ 12-17.<sup>2</sup> Last Friday, on May 15, 2020, ICE again transferred a detainee with a confirmed  
8 diagnosis of COVID-19 to NWDC. *Id.* ¶ 18.

9 ICE's transfer of detainees with confirmed cases of COVID-19 contravenes guidance by  
10 the Centers for Disease Control and Prevention (CDC) and the Department of Homeland  
11 Security's (DHS) own medical experts. Dkt. 2-10 at 6 (CDC Correctional Guidance) (advising  
12 facility administrators to "put plans in place . . . to prevent confirmed and suspected COVID-19  
13 cases and their close contacts from being transferred between jurisdictions"); Dkt. 2-3 (Letter  
14 from DHS experts Drs. Scott Allen and Josiah Rich) ("Transferring detainees between facilities  
15 should be kept to an absolute minimum. The transfer process puts the immigrants being  
16 transferred, populations in new facilities, and personnel all at increased risk of exposure.").  
17 Indeed, there has been *no* explanation for the fact that the first person was brought back to  
18 NWDC after testing positive at the ICE facility in Arizona. These transfers introduce  
19 unreasonable danger to detainees and staff at the facility. *Id.*

20 Not only have Respondents introduced COVID-19 to NWDC, they have also failed to  
21 enact adequate measures to prevent the entry of COVID-19 to NWDC by pre- or asymptomatic  
22 carriers of the virus. *See* Dkt. 3 ¶ 53 (Declaration of Dr. Joseph Amon). The procedures  
23 Respondents have designed to quarantine detainees or screen staff ignore that "[t]he incubation  
24 period . . . for COVID-19 is typically 5 days," a period during which viral transmission can  
25 occur. Dkt. 5 ¶ 6 (Declaration of Dr. Jonathan Golob); Dkt. 3 ¶ 14, 32. This point is especially

26 <sup>2</sup> As of May 19, 2020, there are 11 confirmed cases of COVID-19 at FSPC, including 10 detainees and one ICE employee. Ngo Decl., Ex. D, ICE Confirmed Cases.

1 critical, as large percentages of COVID-19 cases may be entirely asymptomatic but still  
2 contagious. *See, e.g.*, Dkt. 3 ¶ 14 (noting that some studies show up to half of individuals testing  
3 positive report no or mild symptoms).

4 NWDC's intake procedure for new detainees is also flawed. As Dr. Amon, an infectious  
5 disease and correctional health expert, explains, ICE cohorts incoming individuals together in the  
6 same unit, but allows them to leave at different times, meaning that a new arrival could spread  
7 the virus to an individual entering the general population. Dkt. 3 ¶ 36; Dkt. 63 ¶ 20 (Bostock  
8 Decl.). In effect, Respondents admit that individuals arriving at different times are housed  
9 together in the same pod, meaning the initial quarantine may do little to stop the virus's entry  
10 into NWDC. Moreover, Respondents have failed to explain precisely how they determine who to  
11 quarantine upon entry. *See* Dkt. 63 ¶ 17, 20. This failure is particularly dangerous, as "the  
12 prevalence of COVID-19 is now growing to such an extent that a large share of newly arrived  
13 people may have recent contact with someone who is infected, or will have been in areas of  
14 community spread. ICE would therefore need to use this level of individual monitoring for every  
15 person arriving in detention." Dkt. 3 ¶ 32(b); Dkt. 64-1 (describing ICE's screening protocols).  
16 Indeed, the reason Respondents are aware that the detained immigrant admitted on May 15, 2020  
17 had contracted COVID-19 was because he had been tested by the Department of Corrections.  
18 Dkt. 65 ¶ 19. Otherwise, as an asymptomatic person, he would have likely slipped through  
19 Respondents' screening protocol undetected, exposing staff and all other detainees subject to the  
20 initial 14-day screening period.

21 Respondents also do not contest that there are other pathways for the virus to enter the  
22 facility through asymptomatic transmission, including attorneys still attending court and  
23 detainees interacting with staff. Dkt. 16 at 1 (Augustine Decl.). While Respondents have made  
24 some changes to their protocols, the key failures remain, as social distancing remains an illusion  
25 in this congregate carceral setting. The explosive growth of COVID-19 cases in ICE detention  
26 facilities across the country makes clear that NWDC faces similar risks. This is particularly true

1 because ICE facilities have implemented the *identical* COVID-19 response plan at other  
2 facilities. Dkt. 63 ¶ 13; Dkt. 3 ¶ 29. But that plan has failed catastrophically: ICE confirmed its  
3 first case of a detained immigrant with COVID-19 only in late March, less than two months ago.  
4 *See* Dkt. 23-8. Since then, in a matter of weeks, infections in ICE facilities nationwide have  
5 ballooned to over 1,100 confirmed cases, which is especially notable given limited testing. Ngo  
6 Decl. Ex. D, ICE Confirmed Cases; *see also* Dkt. 3 ¶ 26 (describing recent research on the  
7 expected infection rates at ICE facilities); *id.* ¶ 49. Over 50% of detainees whom ICE has tested  
8 were confirmed to have COVID-19; the reported number of confirmed cases is likely an  
9 undercount due to lack of testing. Ngo Decl. Ex. D, ICE Confirmed Cases; Dkt. 3 ¶ 49.

#### 10 **B. Respondents Knowingly Put Medically Vulnerable Detainees at Risk.**

11 Respondents have not disputed that Petitioners are vulnerable to serious illness or death if  
12 they contract COVID-19. Nor do they dispute that they have identified at least 128 medically  
13 vulnerable detainees at NWDC, but have released only 16 and are refusing to release more. Dkt.  
14 56-1 at 1 (Murray Letter). Moreover, they “have not taken any steps to protect Petitioner[s], who  
15 they know [are] high-risk individual[s].” *Pimentel*, 2020 WL 2092430, at \*15. As is clear from  
16 Respondents’ filings, ICE’s guidance merely delineates a process for identifying vulnerable  
17 individuals. Dkt. 63 ¶ 64-65; Dkt. 64 ¶ 37 (Malakhova Decl.). Neither ICE’s guidance nor the  
18 court’s order in the *Fraihat* litigation mandates their release nor require other protective  
19 measures. *See Fraihat v. ICE*, No. 5:19-cv-01546, --- F. Supp. 3d ---, 2020 WL 1932570 (C.D.  
20 Cal. Apr. 20, 2020); Dkt. 3 ¶ 31(c); Supplemental Declaration of Dr. Amon ¶ 8(a). To the  
21 contrary, as Dr. Amon has explained, ICE’s cohorting policies threaten to trap and infect  
22 detainees in the event of an outbreak. Dkt. 3 ¶ 36.

23 Respondents assert that they have interviewed selected medically vulnerable detainees—  
24 without specifying how many or under what criteria—to offer them special accommodations,  
25 and that a majority have declined to relocate. Dkt. 62 at 10; Dkt. 63 ¶ 35. However, as Dr. Amon  
26 observes, Respondents “fail[] to describe what the accommodations actually entailed—i.e.,

1 whether it was perceived to or actually entailed punitive isolation . . . which may explain why the  
 2 majority of detainees declined this ‘opportunity.’” Amon Supp. Decl. ¶ 8(b); *cf.* Dkt. 7 ¶ 7  
 3 (Favela Avendaño Decl.) (describing officials’ punitive measures against detainees protesting  
 4 NWDC’s COVID-19 practices, including isolation); Dkt. 12 ¶ 21 (Lopez Gonzalez Decl.)  
 5 (similar); Dkt. 14 ¶ 11 (Bonarov Decl.) (similar). More fundamentally, “accommodation” that  
 6 consists only of moving a medically vulnerable detainee to a less crowded unit “is insufficient”  
 7 because there is still no guarantee that they can engage in social distancing, either in the sleeping  
 8 area or in other aspects of daily life in a congregate setting. Amon Supp. Decl. ¶ 8(b). Petitioner  
 9 Castañeda Juarez’s experience demonstrates this fact. Despite being in a pod at 37.8% capacity,  
 10 he nevertheless cannot maintain a six feet distance from others while sleeping, showering, lining  
 11 up for shared bathrooms, food and medicine, and in other common spaces. Amon Supp. Decl. ¶  
 12 8(c); Dkt. 8 ¶¶ 3, 5-10 (Castañeda Juarez Decl.).<sup>3</sup>

13 By continuing to detain so many medically vulnerable individuals at NWDC,  
 14 Respondents all but guarantee that the facility will be overrun when an outbreak occurs and that  
 15 they will be unable to provide Petitioners with the care they require. Dkt. 3 ¶¶ 49-50. Indeed, by  
 16 choosing to transfer two COVID-19 positive cases into NWDC, they have already used two of  
 17 their four negative pressure rooms, Dkt. 65 ¶¶ 18, 22, Dkt. 64 ¶ 26, highlighting the lack of  
 18 available facilities needed to contain an outbreak. *See* Amon Supp. Decl. ¶ 9(d).

### 19 **C. COVID-19 Testing at NWDC Is Inadequate.**

20 Petitioners are also likely to succeed on their due process claim because Respondents’  
 21 testing practices continue to be entirely inadequate. As of May 15, 2020, ICE has tested only 13  
 22 detainees at NWDC since the start of the pandemic, out of approximately 650 detainees, Dkt. 64  
 23 ¶ 24, which suggests “a highly restrictive policy on testing.” Amon Supp. Decl. ¶ 10(a). Due to  
 24 the demonstrated risk for widespread transmission of COVID-19 in a detention setting, experts  
 25 warn that NWDC must adopt a more rigorous testing regime. *Id.*; Dkt. 6 ¶ 20 (Schriro Decl.).

26 \_\_\_\_\_  
<sup>3</sup> Notably, while Respondents tout that Petitioner Favela-Avenado’s sleeping area, which consists of 10 bunks, is only half occupied, they admit that this means every lower bunk is occupied. Dkt. 63 ¶ 77.

1 Contrary to Respondents’ assertions, Dkt. 62 at 6, testing at NWDC is *not* being performed in  
2 accordance with either the CDC or local guidelines. Amon Supp. Decl. ¶¶ 10(b-d).

3 Respondents’ policy is to leave testing “to the judgment of the medical provider” based  
4 on the patient’s medical history, symptoms, and medical examination. Dkt. 64 ¶ 23; Dkt. 64-1 at  
5 2. This is inconsistent with CDC guidelines, which specifically identify symptomatic residents in  
6 congregate living settings, like NWDC, as “high priority” for testing. Amon Supp. Decl. ¶ 10(b);  
7 Dkt. 64-3 at 2. As Dr. Amon explains, “[l]eaving it up to the medical provider rather than the  
8 CDC guidelines has and will continue to leave testing essentially up to chance.” Amon Supp.  
9 Decl. ¶ 10(b). Moreover, guidance from the Tacoma-Pierce County Health Department and the  
10 Washington State Department of Health prioritizes testing for residents of congregate living  
11 settings and requires testing for all patients with symptoms of COVID-19, regardless of their age  
12 or health status. *Id.*; Ngo Decl. Ex. E, Tacoma-Pierce Health Department, *COVID-19 Frequently*  
13 *Asked Questions: Testing COVID-19*; Ngo Decl. Ex. F, Wash. State Dep’t of Health, *Interim*  
14 *COVID-19 Guidance for Healthcare Providers*. Yet detainee accounts, along with Respondents’  
15 admission that they have conducted only 13 tests, demonstrate that COVID-19 tests are not  
16 provided within CDC or local guidelines, but, rather, only as an absolute last resort. *See, e.g.*,  
17 Amon Supp. Decl. ¶ 10(a) (discussing Petitioner Castañeda Juárez’s recent testing); Declaration  
18 of Damilola Adekunle ¶ 19; Dkt. 17 ¶¶ 7-9 (Martinez Acosta Decl.).

19 For that reason, Respondents’ claim that their testing decisions have been approved by  
20 the local health department misses the mark because Respondents *first* exercise their discretion  
21 on whether to test *before* approaching the local health department, and Respondents still have not  
22 articulated clear guidelines as to when to administer a test. Dkt. 64 ¶ 24; *see also* Dkt. 62 at 6;  
23 Amon Supp. Decl. ¶¶ 10(a), (e). Although Respondents acknowledge that many cases of  
24 COVID-19 are mild or without symptoms, Dkt. 3-5 at 3, they have made a conscious decision to  
25 maintain a discretionary policy that leaves testing as a last resort. Amon Supp. Decl. ¶ 10(b). As  
26 a result, NWDC’s testing policy continues to manifest a clear disregard for Petitioners’ safety



1 and rights, because “[b]y the time a case is confirmed, it will almost certainly be too late to  
2 protect Petitioner’s constitutional rights.” *Malam v. Adducci*, No. 20-10829, 2020 WL 1672662,  
3 at \*11 (E.D. Mich. Apr. 5, 2020).

#### 4 **D. Detainees Cannot Practice Social Distancing at NWDC.**

5 As the Court concluded in *Pimentel*, “the biggest challenge to controlling the spread of  
6 COVID-19 is presented by the communal conditions in the [NWDC]. In almost all aspects, life  
7 among detainees is a shared experience that does not allow for social distancing.” 2020 WL  
8 2092430 at \*7. This is critical, as social distancing is the “cornerstone of reducing transmission  
9 of respiratory diseases,” including in detention facilities. Dkt. 2-10, CDC Correctional Guidance  
10 at 4; *see also* Amon Supp. Decl. ¶ 7; Dkt. 3 ¶¶ 15, 24; Dkt. 6 ¶ 36. Social distancing goals cannot  
11 merely be aspirational: detainees must be able to practice social distancing at all times in the  
12 facility. Amon Supp. Decl. ¶ 7; Dkt. 3 ¶¶ 24, 30. Respondents claim that social distancing is now  
13 “possible,” at least at some times and for some individuals. Dkt. 62 at 18, 21. However, in  
14 reality, because “crowding is baked into the floor plan and facility operations[,]” detainees  
15 cannot maintain social distancing. Dkt. 6 ¶ 37; *see also* Amon Supp. Decl. ¶ 7.

16 The population reduction at NWDC is insufficient to ensure social distancing. Multiple  
17 housing units have been emptied, leaving other housing units crowded. Dkt. 63 ¶¶ 31-33; Amon  
18 Supp. Decl. ¶ 7(b); Dkt. 12 ¶ 9, Dkt. 13 (Lopez Nuñez Decl.) ¶ 4; Dkt. 8 ¶ 2; Dkt. 10 (Diaz  
19 Reyes Decl.) ¶ 9; Dkt. 9 (Khan Decl.) ¶ 5; Dkt. 7 ¶ 5; Dkt. 14 ¶ 3. These housing units crowd  
20 dozens of detainees together in tight quarters to eat, sleep, shower, recreate, and toilet. *See*  
21 Declaration of V. Mitch McEwen, Ex. B.

22 Respondents implicitly concede that social distancing is not possible within the housing  
23 units. They suggest that, in order to remain socially distanced at mealtimes, detainees purchase  
24 pre-packaged food from the commissary and eat at their bunks rather than eat the provided meals  
25 at tables in the facilities. Dkt. 62 at 10; Dkt. 63 ¶ 36. Most detainees cannot afford pre-packaged  
26 commissary food earning \$1 a day, and regardless, they must line up close together to use the

1 microwave. Dkt. 9 ¶ 8; *Dawson v. Asher*, 2:20-cv-00409, Dkt. 107 (Supp. Schriro Decl.) ¶ 26(e).  
2 Detainee declarations make clear that social distancing is not possible in the housing units: they  
3 must line up in close proximity to receive food, and use the microwave, toilets, showers, tablets,  
4 and phones; bolted down chairs and tables do not allow them to sit at least six feet apart. Dkt. 12  
5 ¶¶ 6 12; Dkt. 9 ¶ 10; Dkt. 13 ¶¶ 7-10; Dkt. 8 ¶ 8; Dkt. 7 ¶ 11; Dkt. 14 ¶ 7.

6 Respondents also admit that “beds/bunks within the [NWDC] are bolted on the ground  
7 and cannot be further spaced apart.” Dkt. 63 ¶ 34. This set-up hinders detainees’ ability to  
8 socially distance even with decreased population. At night and during “count” each day,  
9 detainees sleep and sit on their beds in their cells with other detainees or in pods with dozens of  
10 others where the beds are mere feet apart. Amon Supp. Decl. ¶ 7(a); Dkt. 6 ¶ 38; Dkt. 9 ¶ 5; Dkt.  
11 12 ¶¶ 7-8; Dkt. 13 ¶ 6; Dkt. 7 ¶ 5; Dkt. 10 ¶ 6; Dkt. 14 ¶ 4; Adekunle Decl. ¶ 6.

12 Finally, Respondents misstate the record in asserting that in response to COVID-19 they  
13 have reduced the population to “40.9% the number that is usually housed at [NWDC].” Dkt. 63 ¶  
14 6; Dkt. 62 at 9, 16. Rather, as the GEO Warden has explained, “[t]he headcount for the past six  
15 months has been in the 700 range.” Dkt. 67 ¶ 24 (Langford Decl.); *see also* Dkt. 63 ¶ 6 (“On  
16 March 2, 2020, there were 874 detainees at NWIPC.”). Thus, the reduction is much more  
17 modest. Moreover, even Respondents concede this is a result of the government’s program  
18 returning back asylum seekers at the border under “Migrant Protection Protocols.” Dkt. 63 ¶ 7.

#### 19 **E. Hygiene and Sanitation Practices at NWDC Are Inadequate.**

20 The evidence also makes clear that the hygiene and cleaning measures at NWDC will not  
21 meaningfully protect against an outbreak. To the contrary, Respondents continue to acknowledge  
22 that cleaning responsibilities are passed on to detainees. Dkt. 63 ¶¶ 23, 25. Respondents contend  
23 that “enhanced cleaning” is occurring, with cleanings occurring more frequently and increased  
24 hygiene supplies. Dkt. 62 at 8-9. However, detainee declarations demonstrate that the cleaning of  
25 frequently shared objects and surfaces does not always occur or is inadequate. Dkt. 12 ¶ 12; Dkt.  
26 13 ¶¶ 7, 10; Dkt. 10 ¶ 11; Dkt. 8 ¶¶ 5, 8; Dkt. 9 ¶ 8; Dkt. 7 ¶ 11; Dkt. 6 ¶¶ 45-47. To the extent

1 that GEO is shifting its obligation to keep the facility clean onto untrained detainees, this is  
2 insufficient to keep detainees safe. *See, e.g.*, Dkt. 8 ¶ 5; Dkt. 10 ¶ 11; Dkt. 3 ¶ 40(d); Amon  
3 Supp. Decl. ¶ 11(d); Dkt. 6 ¶¶ 46-49. Notably, Respondents have not “present[ed] [any] evidence  
4 that professional cleaning occurs within the housing units,” *id.*, even though “the lack of social  
5 distancing increases the need for regular professional cleaning.” *Pimentel*, 2020 WL 2092430, at  
6 \*8, \*14 n.19. Detainees also report running out of the hygiene supplies that Respondents claim  
7 should always be available. Dkt. 8 ¶ 6; Dkt. 10 ¶ 12; Dkt. 6 ¶ 52. Respondents provide this Court  
8 with only general assertions regarding their policies or what they have told others. By contrast,  
9 Petitioners and other detainees present detailed, firsthand accounts about NWDC, which  
10 Respondents never meaningfully address.

11       Additionally, as Respondents concede, staff are not mandated to wear masks. Dkt. 16 ¶¶  
12 3-11; Dkt. 8 ¶ 13; Dkt. 7 ¶ 16; Dkt. 11 ¶ 14; Dkt. 9 ¶ 13; Dkt. 14 ¶ 10; Dkt. 10 ¶ 21 Dkt. 12 ¶ 13;  
13 Dkt. 13 ¶ 13. Many guards display a “cavalier attitude” about such basic safety protocols, and  
14 refuse to wear masks even when actively displaying symptoms of COVID-19. Dkt. 15 ¶¶ 5, 9;  
15 *see also* Dkt. 9 ¶ 13. Detainees are not protected by such toothless, voluntary policies. Amon  
16 Supp. Decl. ¶ 11. Officer Bostock suggests that a new mask policy may be forthcoming, but does  
17 not contend that such a policy will be mandatory for all staff members nor specify when GEO  
18 will implement the policy. Dkt. 63 ¶ 48. In summary, Respondents’ continue to fail to comply  
19 with CDC guidelines, violating Petitioners’ constitutional rights to reasonable safety.

## 20 **II. Respondents’ Actions Violate the Fifth Amendment.**

21       Respondents’ arguments boil down to a single claim: that their response to COVID-19 is  
22 sufficient to avoid a constitutional violation. They argue that they have taken “extensive steps”  
23 Dkt. 62 at 20, to the “maximum extent possible” to prevent the danger of COVID-19 posed to  
24 Petitioners, and ask that the court take “due regard” for “constraints facing the official,” *id.* at 16.  
25 But as described above, Respondents have objectively failed to take reasonable steps necessary  
26 to provide Petitioners with the safety they are entitled to under the Fifth Amendment Due

1 Process Clause. *Pimentel* at \*23-24. Instead, they attempt to dodge their affirmative duty to  
2 provide conditions of reasonable health and safety for people in its custody, *DeShaney v.*  
3 *Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989), and the uniquely protective  
4 standard accorded to conditions of confinement for civil immigrant detainees. *Jones v. Blanas*,  
5 393 F.3d 918, 931-32 (9th Cir. 2004); *King v. Cty. of Los Angeles*, 885 F.3d 548, 556-57 (9th  
6 Cir. 2018); *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982); accord *Pimentel*. As Chief Judge  
7 Martinez explained in *Pimentel*, the standard for this inquiry is objective. 2020 WL 2092430, at  
8 \*11. As a result, the question is whether Petitioners face a substantial risk of serious harm if they  
9 remain at NWDC and whether Respondents have made intentional decisions that failed to take  
10 reasonable measures to abate this risk. As detailed above, Respondents' "intentional decision[s]"  
11 constitute a failure to "take reasonable available measures to abate that risk" and place detainees  
12 at "substantial risk of suffering serious harm," in violation of the Constitution. *Gordon v. Cty. of*  
13 *Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018); see also *Pimentel*, 2020 WL 2092430, at \*11.

14 Respondents also fail to note that detention conditions are punitive where they are  
15 "employed to achieve objectives that could be accomplished in so many alternative and less  
16 harsh methods." *Jones*, 393 F.3d at 932 (citation omitted). Petitioners have readily shown that  
17 the government's legitimate interest in "protecting the public and ensuring their removal," Dkt.  
18 62 at 22, can be accomplished by a number of means other than physical detention. Dkt. 6 ¶¶ 61-  
19 65. Petitioners' continued detention in light of COVID-19 has no reasonable relationship to a  
20 non-punitive purpose. *Pimentel*, 2020 WL 2092430, at \*17. Finally, the evidence of irreparable  
21 harm is also overwhelmingly in Petitioners' favor: Respondents cannot and do not dispute that  
22 contracting COVID-19 would be tragic for Petitioners in light of their medical vulnerability.

### 23 **III. The Balance of Equities and Public Interest Weigh Heavily in Petitioners' Favor.**

24 The remaining factors strongly favor injunctive relief. As in *Pimentel*, Petitioners'  
25 continued detention "create[s] far more serious consequences"—serious illness and death—  
26 "than are justified by Respondent[s'] need to ensure [their] presence at removal" or "to protect

1 the community.” *Pimentel*, 2020 WL 2092430, at \*17. Moreover, under Petitioners’ proposed  
 2 order, Respondents may impose individualized conditions of release to ensure future appearances  
 3 and protect public safety. Dkt. 22-1 ¶¶ 2, 4; *see also* Dkt. 6 ¶¶ 61-65 (describing ICE’s  
 4 supervised release programs). The Ninth Circuit has recognized the “empirically demonstrated  
 5 effectiveness of such conditions.” *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017); *see*  
 6 *also id.* (noting that ICE’s “Intensive Supervision Appearance Program . . . resulted in a 99%  
 7 attendance rate at all [court] hearings and a 95% attendance rate at final hearings”); *accord*  
 8 *Pimentel*, 2020 WL 2092430, at \*18.<sup>4</sup>

9 Respondents further assert that Petitioners may not be safer if released. Dkt. 62 at 24.  
 10 This argument “strains credulity.” *Pimentel*, 2020 WL 2092430, at \*10 (citation omitted). As the  
 11 *Pimentel* court observed, it is implausible that “someone will be safer from a contagious disease  
 12 while confined in close quarters with dozens of other detainees and staff than while at liberty.”  
 13 *Id.* (citation omitted).

14 Finally, Respondents argue that, should the Court grant a TRO or preliminary injunction,  
 15 the order should expire upon the lifting of any shelter-in-place order at each class members’  
 16 address. Dkt. 62 at 24. Such a limitation is unwarranted: the mere lifting of a shelter-in-place  
 17 order does not mean that NWDC will become a safe environment for medically vulnerable  
 18 detainees. *See Amon Supp. Decl.* ¶ 12. Respondents are free to ask this Court to modify any  
 19 order it issues if new developments warrant a change. Thus, Petitioners submit that, if granted, a  
 20 court order requiring release should remain in place until further order from this Court.

## 21 CONCLUSION

22 For the aforementioned reasons, Petitioners’ Motion for a TRO should be granted.  
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25 <sup>4</sup> Respondents cite Petitioners Favela Avendano’s and Khan’s criminal histories. Dkt. 62 at 23. Mr. Favela  
 26 Avendano has one conviction, for a DUI in 2014. Dkt. 7 ¶ 19. He currently does not have a driver’s license. *Id.* If  
 released, he will not drive unless and until his license is restored and, in any case, can meet his needs in other ways.  
*Id.* Petitioner Khan was convicted of violating a domestic violence no-contact order and of stalking his ex-wife in  
 2019. Dkt. 9 ¶ 16. He has no intention of contacting his ex-wife if he is released. *Id.*

1 Respectfully submitted on this 20th of May, 2020.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 20, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED this 20th day of May, 2020.

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