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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. C20-700-JLR-MLP

ORDER TO SHOW CAUSE

I. INTRODUCTION

Before the court is Petitioner-Plaintiffs Jose Castañeda Juarez, Wilfredo Favela Avendaño, Josue Andrade-Machado, and Naeem Khan’s (collectively, “Petitioners”) motion for a temporary restraining order (“TRO”) (TRO Mot. (Dkt. #22)) seeking immediate release from the Northwest Detention Center (“NWDC”). Respondent-Defendants Nathalie Asher, Matthew T. Albence, Steven Langford, and United States Immigration and Customs Enforcement’s (“ICE”) (collectively, “Respondents”) oppose Petitioners’ TRO motion. (*See* Resp. (Dkt. #62)).

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1 The court has reviewed Petitioners’ motion, the response, the petition and complaint¹ (Dkt.
2 #1), the parties’ submissions related to the motion, the relevant portions of the record, and the
3 applicable law, and Magistrate Judge Michelle L. Peterson heard oral argument on May 27, 2020.
4 For the reasons set forth below, the court ORDERS Respondents to show cause no later than five
5 (5) days from the date of this Order explaining why ICE, in consultation with its contractor the
6 Geo Group (“GEO”), cannot immediately (a) begin testing of detainees at the NWDC on a
7 voluntary basis; and (b) implement a plan for those that refuse testing.

8 II. BACKGROUND

9 A. Coronavirus and COVID-19

10 COVID-19 is an infection caused by the novel zoonotic coronavirus SARS-CoV-2 (the
11 “virus” or “coronavirus”). Despite measures to contain its spread, the virus has become a global
12 pandemic. Understanding of COVID-19 and the transmission of SARS-CoV-2 is still evolving.
13 Experts believe that people are most contagious when they are most symptomatic, but evidence
14 shows that the virus can be transmitted while an individual is asymptomatic—either before the
15 development of infection, or by infected individuals who never develop symptoms. (Golob Decl.
16 (Dkt. #5) ¶ 6; *see also* Amon Decl. ¶¶ 13-14.) While the degree of asymptomatic transmission is
17 uncertain, the CDC has recognized that “[b]ecause persons with asymptomatic and mild
18 disease . . . are likely playing a role in transmission and spread of COVID-19 in the community,
19 social distancing and everyday preventive behaviors are recommended for persons of all
20 ages” (Amon Decl. ¶ 14) (quoting *Coronavirus Disease 2019 in Children — United States,*
21 *February 12–April 2, 2020*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr.

22
23 ¹ Petitioner-Plaintiffs’ initial filing is a “petition for writ of habeas corpus . . . and complaint for
injunctive relief.” (See Compl. at 1.) For simplicity’s sake, the court refers to the parties as
“Petitioners” and “Respondents” and the petition-complaint as the “petition.”

1 10, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6914e4.htm?s_cid=mm6914e4_w
2 (last accessed May 27, 2020). Given this evidence of asymptomatic and pre-symptomatic
3 transmission, social distancing is the primary strategy for limiting transmission. (*Id.* ¶ 15.)

4 There is no vaccine to prevent transmission of SARS-CoV-2, and there is no known cure
5 for COVID-19. (Schriro Decl. (Dkt. #6) ¶ 15.) The virus' incubation period, meaning the time
6 between infection and the development of symptoms, may vary from as short as two days to an
7 individual never developing symptoms. (Golob Decl. ¶ 6.) Given the evidence that transmission
8 can occur from pre-symptomatic and asymptomatic individuals, Petitioners' expert Dr. Golob
9 maintains that "only with aggressive testing for SARS-CoV-2 can a lack of positive tests establish
10 a lack of risk for COVID-19." (*Id.*) Additionally, guidance from the CDC specifies that individuals
11 in congregate settings with symptoms of COVID-19 are "high priority" for testing. (Amon Decl.
12 ¶ 33) (citing *Evaluating and Testing Persons for Coronavirus Disease 2019 (COVID-19)*,
13 CENTERS FOR DISEASE CONTROL & PREVENTION (May 5, 2020),
14 <https://www.cdc.gov/coronavirus/2019-nCoV/hcp/clinical-criteria.html> (last accessed May 28,
15 2020)).

16 **B. Testing for COVID-19 at the NWDC**

17 The NWDC is a private detention center run by GEO. (Bostock Decl. (Dkt. #63) ¶ 4.) GEO
18 is an independent contractor, and GEO personnel are not employed by ICE. Rather, GEO staff
19 operate under a performance-based contract, wherein the government sets requirements that GEO
20 is required to meet. (*Id.*) The NWDC has the capacity to house 1,575 detainees and historically
21 operates near capacity. (*Id.* ¶ 6.) However, as of May 12, 2020, the NWDC houses 645 detainees
22 and is operating at 40.9% of its typical capacity. (*Id.*)

1 COVID-19 tests are administered at the NWDC based on CDC guidance. (Malakhova
2 Decl. (Dkt. #64) ¶¶ 23, 25.) This guidance “directs clinicians to use their judgment in determining
3 if a patient has signs and symptoms consistent with COVID-19.” (Resp. at 6.) In addition to
4 clinicians using their judgment, an Infectious Disease Prevention Officer consults with Pierce
5 County, Washington health department on whether ordering a COVID-19 test is appropriate.
6 (Malakhova Decl. ¶¶ 24.) As of May 17, 2020, ICE has tested 16 detainees at the NWDC for
7 COVID-19. (Yonkers Decl. ¶ 11; Malakhova Decl. ¶ 24.) Respondents also report that one ICE
8 employee, one ICE contractor, and 13 GEO employees have been tested, all with negative results.
9 (Lippard Decl. ¶ 3.) Petitioners, in contrast, offer expert opinion testimony that “[w]hen a
10 community or institution lacks a comprehensive and rigorous testing regime, a lack of proven cases
11 of COVID-19 is functionally meaningless for determining if there is a risk for COVID-19
12 transmission in a community or institution.” (Golob Decl. ¶ 7.)

13 At oral argument on May 27, 2020, the court questioned Respondents on the availability
14 of COVID-19 tests and whether it was feasible to begin comprehensive testing of detainees.
15 Respondents confirmed that both ICE and GEO have the resources and are prepared to conduct
16 tests once protocols are in place. (*See* May 27, 2020 Motion Hearing Transcript (“Mot. Hrg. Tr.”)
17 at 22) (“GEO has the capacity to do testing of all of the employees as well as all of the detainees
18 right now if ICE and if the protocols that are implemented through the CDC guidelines, as selected
19 and undertaken by ICE, moves forward at a different rate than what they’re currently
20 recommending. . . . [W]e’re prepared, we’re ready, we can do it.”); *id.* at 23 (“ICE has the
21 resources at this point to do that, and IHSC, which is the medical component, has been in talks
22 with headquarters as to the operational process of doing this voluntarily . . .”). Respondents again
23

1 clarified later in the proceeding that they have the resources to test individuals who want to be
2 tested:

3 THE COURT: My understanding from Ms. Mell and Ms. Patrick is that when there
4 is a procedure in place, the Northwest Detention Center is able to test individuals
5 who want to be tested. There's not a problem with resources. It's just a matter of
6 establishing the proper protocols.

7 MS. PATRICK: Yes, at this time we have the resources.

8 (*Id.* at 26.) However, when the court questioned ICE on why they could not immediately begin
9 offering the test to those who are willing to have the test taken voluntarily, counsel replied, "I am
10 unaware of a reason at this time." (*Id.* at 25.)

11 III. ANALYSIS

12 A. Temporary Restraining Order

13 The standard for issuing a TRO is the same as the standard for issuing a preliminary
14 injunction. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2
15 (1977). A TRO is "an extraordinary remedy that may only be awarded upon a clear showing that
16 the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).
17 "The proper legal standard for preliminary injunctive relief requires a party to demonstrate (1)
18 'that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the
19 absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an
20 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).

21 As an alternative to this test, a preliminary injunction is appropriate if "serious questions
22 going to the merits were raised and the balance of the hardships tips sharply in the plaintiff's
23 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

1 (9th Cir. 2011). However, the “serious questions” approach supports the court’s entry of a TRO
2 only so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the
3 injunction is in the public interest. *Id.* at 1135. The moving party bears the burden of persuasion
4 and must make a clear showing that it is entitled to such relief. *Winter*, 555 U.S. at 22.

5 **B. Likelihood of Irreparable Harm**

6 Here, the parties dispute whether irreparable injury to Petitioners is likely in the absence
7 of injunctive relief. Petitioners take the position that entry of COVID-19 into the NWDC is not
8 merely likely but inevitable and, perhaps, has already occurred. (*See* TRO Mot. at 2) (“It is
9 inevitable that COVID-19 will reach NWDC, if it has not already.”). Under this presumption of
10 inadequate screening and testing, Petitioners present compelling arguments as to the inadequacy
11 of social distancing, hygiene measures, and other steps in protecting vulnerable detainees at high
12 risk of serious illness or death if they contract COVID-19.

13 Respondents, in contrast, argue from the position that entry of COVID-19 is not a guarantee
14 based on the sufficiency of their screening, testing, and quarantine measures, which they maintain
15 are in accordance with CDC protocols. (*See* Bostock Decl. ¶ 20; Malakhova Decl. ¶ 17) (discussing
16 the ICE Health Service Corps (“IHSC”) protocols for isolation and monitoring of new and
17 incoming detainees). Indeed, their arguments presume that the virus is not currently spreading
18 undetected through the detainee population. (*See* Resp. at 23) (“There is no evidence that the
19 Government’s precautionary measures are inadequate to contain or properly provide medical care
20 *should a COVID-19 outbreak occur.*”) (emphasis added).

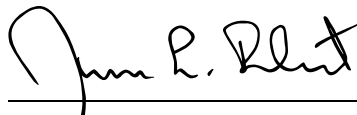
21 As of the date of this Order, the fact that no detainee at the NWDC has tested positive
22 might suggest that Respondents’ measures to identify asymptomatic or pre-symptomatic carriers
23 are effective. At the same time, however, the court acknowledges that 16 tests for a population of

1 645 detainees provides no useful indicator as to whether COVID-19 is already present at the
2 NWDC. Although Petitioners carry the burden to demonstrate a likelihood of irreparable harm,
3 *see Winter*, 555 U.S. at 20, Respondents' failure to conduct comprehensive testing leaves a critical
4 factual question—whether COVID-19 is already present at the facility—to pure speculation.
5 Further, by its nature, the ability to obtain this information lies entirely within Respondents' hands.

6 At oral argument, Respondents confirmed that they have the resources and capability to
7 address this fundamental factual question by beginning testing of detainees on a voluntary basis.
8 (*See Hrg. Tr.* at 22-23, 25.) However, Respondents could not provide a definitive timeline as to
9 when such comprehensive testing could begin, nor why they cannot immediately begin offering
10 the test to those willing to take it voluntarily. (*Id.* at 24-25). Given the court's imperative to
11 consider all relevant facts when issuing its ruling, the court finds further explanation of this issue
12 necessary before ruling on Petitioners' motion.

13 For these reasons, the court ORDERS Respondents to show cause no later than five (5)
14 days from the date of this Order explaining why ICE, in consultation with GEO, cannot
15 immediately (a) begin testing detainees at the NWDC on a voluntary basis; and (b) implement a
16 plan for those that refuse testing.

17 DATED this 28th day of May, 2020.

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21 JAMES L. ROBART
22 United States District Judge
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