

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

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

WILFREDO FAVELA AVENDAÑO, et
al.,

Petitioners-Plaintiffs,

v.

NATHALIE ASHER, et al.,

Respondents-Defendants.

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

**PLAINTIFFS' MOTION TO
CONVERT TEMPORARY
RESTRAINING ORDER TO
PRELIMINARY INJUNCTION**

NOTING DATE: October 15, 2021

I. INTRODUCTION

1
2 In June 2021, Respondents-Defendants (Defendants) resumed mass transfers of
3 immigrant detainees to the Northwest Detention Center (NWDC) without the most basic of
4 safety precautions against COVID-19 transmission. During that time, Defendants transported
5 over 1,000 detainees on cross-country flights from the border without first testing them for
6 COVID-19. By doing so, Defendants failed to abide by the Centers for Disease Control and
7 Prevention's (CDC) guidelines requiring testing of individuals transferred between detention
8 facilities and guidelines for safe air transport during the pandemic. In the following weeks, over
9 300 people at NWDC tested positive for COVID-19, compared with only 34 cases during the
10 entire first thirteen months of the pandemic. Five medically vulnerable detainees were sent to the
11 hospital for COVID-19. Defendants' actions also led COVID-19 to enter and spread rapidly in
12 NWDC's general population units, infecting dozens of medically vulnerable people. Only this
13 Court's Temporary Restraining Order (TRO) (Dkt. 370), which required Defendants to test
14 detainees prior to transfer from the border, made a difference in slowing this outbreak. Since
15 entry of the order, the COVID-19 outbreak at NWDC has gradually abated, leading to a decline
16 in positive cases at NWDC among new intakes. Although cases have continued to spread among
17 staff, in the past two weeks, Defendants have reported two new COVID-19 cases among
18 detainees, a welcome reduction from the hundreds of positive cases and many hospital visits that
19 occurred before the Court's order.

20 Despite the positive effects of this Court's order, the continual need for vigilance against
21 COVID-19, and the fact that the same legal standard and similar evidence are now before this
22 Court, Defendants resist conversion of this Court's TRO into a preliminary injunction. Instead,
23 they insist that they should be allowed to return to the same conditions and lack of protections
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1 that had led this Court to issue the TRO. This Court should accordingly convert its TRO into a
2 preliminary injunction. Doing so will ensure that Petitioners-Plaintiffs (Plaintiffs), a certified
3 class of individuals who are medically vulnerable to COVID-19, can continue to receive the
4 most basic of protections during transport and their detention at NWDC. Notably, this Court's
5 order simply required Defendants to test detainees prior to their transfer, an efficient and
6 affordable tool used to prevent COVID-19's spread in diverse settings across the United States.
7 Moreover, the Court's order ensured that Defendants have the option to continue transferring
8 detainees to NWDC, provided that they follow these basic safety guidelines. A preliminary
9 injunction is thus warranted and necessary to continue to protect Plaintiffs' health and safety.

10 **II. FACTUAL BACKGROUND**

11 From early June 2021 until August 23, 2021, Defendants transferred over 1,000
12 immigrant detainees on cross-country flights to NWDC. Defendants conducted most of these
13 transfers—those from Customs and Border Protection (CBP) detention facilities to NWDC—
14 without the most basic COVID-19 protections. Indeed, they flouted CDC guidelines for
15 detention facility testing and air transport during the pandemic. These failures directly resulted in
16 an unprecedented number of COVID-19 cases and hospitalizations at NWDC that only this
17 Court's TRO managed to begin to remedy.

18 **A. Defendants' Pre-TRO Transfer Practices**

19 Prior to June 2021, Defendants had suspended mass transfers to NWDC because of the
20 COVID-19 pandemic, except for one transfer during April 2021. Dkt. 238, Lippard Decl. ¶ 10;
21 Dkt. 347, Lippard Decl. ¶¶ 7–9. Then, beginning in June 2021, Defendants transferred over
22 1,035 people to NWDC on at least twelve flights operated by Immigration and Customs
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1 Enforcement’s (ICE) Air Operations Division (ICE Air).¹ Dkt. 370 at 3, 6; Dkt. 329, Surkatty
2 Decl. ¶¶ 7–17; Dkt. 347, Lippard Decl. ¶ 9; Stip. ¶ 3.²

3 ICE Air provides aviation support to ICE’s Enforcement and Removal Operations
4 Division by transferring detainees to various detention facilities within the United States,
5 including from the southern border. *See* Dkt. 327-1, Enf’t & Removal Operations, *ICE Air*
6 *Operations Handbook* at 5 (Sept. 1, 2015) (ICE Air Operations Handbook). However, as ICE
7 Defendants have admitted, and as class members have confirmed, detainees transferred from
8 CBP detention facilities are not tested for COVID-19 prior to their flights to NWDC. Dkt. 370 at
9 3–4 (“The Department of Homeland Security (‘DHS’) does not require the detainees in CBP
10 facilities be tested for COVID-19 prior to their transfer and the detainees are not offered
11 COVID-19 vaccinations.”); Stip. ¶¶ 5, 10; Dkt. 347, Lippard Decl. ¶ 14; Dkt. 330, Amaya
12 Vargas Decl. ¶ 7; Dkt. 331, Arevalo Montilla Decl. ¶ 5.³ Notably, there is no testing even though
13 DHS apparently has the tools to do so. *See* Dkt. 330, Amaya Vargas Decl. ¶ 5 (noting that some
14 detainees were tested in CBP custody); Dkt. 332, Ghazal Decl. ¶ 4 (noting that he recalls being
15 tested in CBP custody).⁴

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18 ¹ The actual number of transferees and flights is higher, as Defendants continued to conduct
19 transfers after August 2 (when they last reported all transfers to this Court, *see* Dkt. 347, Lippard
20 Decl. ¶ 9) and until at least August 23, 2021.

21 ² The parties have submitted a set of stipulated facts that is nearly identical to the prior set of
22 stipulated facts submitted with the TRO briefing. Plaintiffs cite this new filing as Stip. ¶ #.

23 ³ Detainees also are not offered vaccinations prior to transport. Stip. ¶ 6.

24 ⁴ Plaintiffs understand that as to transfers from ICE detention facilities, ICE conducts testing
prior to transfer, as required by CDC guidance. Stip. ¶¶ 2, 10; *see also* Dkt. 327-2, Maltese Decl.
Ex. B, *ERO COVID-19 Pandemic Response Requirements* at 19 (Version 6.0 Mar. 16, 2021)
(ICE PRR). However, ICE and its parent agency, DHS, do not ensure testing occurs in the
identical scenario of a transfer from CBP custody to ICE custody, despite the same risks that
each type of transfer faces. Stip. ¶¶ 5, 10; Amaya Vargas ¶ 7. This only underscores that ICE is
aware of the risks associated with transfers that fail to honor CDC guidance requiring pre-
transfer testing.

1 The evidence also demonstrates that prior to this Court’s order, Defendants placed
2 detainees with COVID-19 on flights with other people who did not have COVID-19. Virtually
3 every ICE Air flight to NWDC from CBP facilities since early June and until this Court’s order
4 included COVID-19 positive individuals. *See* Dkt. 370 at 12 (“Notably, almost every flight
5 transferring detainees from the southern border to [NWDC] since June 2021 has transported
6 detainees who have tested positive for COVID-19 at [NWDC].”); *compare* Dkt. 347, Lippard
7 Decl. ¶ 9 (summarizing transfer dates and number of transferred individuals) *and* Dkt. 329,
8 Surkatty Decl. ¶¶ 7–14 (same) *with* Amon Decl. ¶¶ 11–12 (summarizing number of individuals
9 testing positive upon arrival at NWDC for each transfer).⁵ Often, these flights contained well
10 over 100 people. Dkt. 347, Lippard Decl. ¶ 9; Dkt. 330, Amaya Vargas Decl. ¶¶ 10–11; Dkt.
11 332, Ghazal Decl. ¶¶ 4, 7; Dkt. 331, Arevalo Montilla Decl. ¶ 4. In addition, detainees are
12 unable to practice social distancing during transport, and their hands and feet are shackled during
13 the transfer process. Dkt. 370 at 4; Stip. ¶ 12; Dkt. 330, Amaya Vargas Decl. ¶¶ 8–9; Dkt. 332,
14 Ghazal Decl. ¶ 7; Dkt. 332, Arevalo Montilla Decl. ¶ 4. ICE officials who accompany detainees
15 during transfer also do not always reliably wear masks. Dkt. 330, Amaya Vargas Decl. ¶ 8.

16 ICE’s primary tool to protect class members prior to this Court’s TRO—verbal and
17 temperature screening—failed to adequately identify both symptomatic and asymptomatic
18 detainees before flight. The ICE Air Operations Handbook specifies that ICE Air flights include
19 a Flight Nurse who “determine[s] suitability of a detainee’s health status to board an ICE Air
20 aircraft.” Dkt. 327-1, ICE Air Operations Handbook at 9; *see also* Stip. ¶ 9. According to the
21 handbook, “[a]ny ICE detainee who . . . is suspected of having a health-risk condition potentially
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23 ⁵ Plaintiffs have submitted a new declaration from Dr. Joseph Amon, an expert on infectious
24 disease epidemiologist, along with this filing. Plaintiffs cite this new filing as Amon Decl. ¶ #.

1 contagious to other detainees, staff and/or third parties, will be denied boarding and referred to
2 an ICE approved facility for screening.” Dkt. 327-1, ICE Air Operations Handbook at 11. Yet
3 once again, the record shows serious shortcomings in this mechanism, to class members’ peril. In
4 several declarations, ICE officials admitted that detainees showed symptoms of COVID-19 upon
5 arrival at NWDC, only hours after the agency allegedly had screened them prior to transfer. *See*
6 Dkt. 350-1 ¶ 6 (notifying Court that transferees from August 2 transfer “were immediately
7 placed in cells in a regular quarantine housing unit because other detainees from the flight had
8 reported possible symptoms of COVID-19 upon intake”); Dkt. 354-1 ¶ 7 (same, for August 6
9 transfer); Dkt. 359-1 ¶ 6 (same, for August 11 transfer); Dkt. 362-1 ¶ 7 (same, for August 13
10 transfer). In addition, class members reported seeing other detainees with COVID-19 symptoms
11 on these flights. Dkt. 330, Amaya Vargas Decl. ¶¶ 6, 11. Moreover, asymptomatic individuals
12 may still transmit the virus, a problem that verbal screening can never eliminate. *See* Dkt. 3, First
13 Amon Decl. ¶¶ 14, 32(c)–(d). In its TRO order, this evidence led the Court to correctly conclude
14 that “asking for self-reports regarding risk factors is insufficient to identify asymptomatic
15 detainees.” Dkt. 370 at 11.

16 ICE’s practices also flouted the CDC’s *Interim Guidance for SARS-CoV-2 Testing in*
17 *Correctional and Detention Facilities* (last updated June 7, 2021) (CDC Testing Guidance),
18 which outlines basic precautionary measures for testing of detainees prior to transfer. *See* Dkt.
19 327-3. This guidance directs that authorities must “[t]est incarcerated/detained persons before
20 transfer to another correctional/detention facility” and “[w]ait for a negative test result before
21 transfer.” *Id.* at 6. As noted above, this Court found—and Defendants do not contest—that ICE
22 does not test detainees for COVID-19 prior to transfer from CBP detention facilities, Dkt. 370 at
23 3–4; Stip. ¶¶ 5, 10, in contrast to testing done for transfers from other ICE facilities and
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1 correctional facilities. *See, e.g.*, Dkt. 327-2, ICE PRR at 19 (requiring testing for all ICE transfers
2 between facilities).

3 Prior to the TRO, ICE also failed to take other measures to separate COVID-19 positive
4 individuals from other non-infected detainees. Most notably, the agency did not transport
5 detainees to NWDC from CBP detention facilities in accordance with the CDC's *Interim*
6 *Guidance for Transporting or Arranging Transportation by Air into, from, or within the United*
7 *States of People with COVID-19 or COVID-19 Exposure* (last reviewed Jan. 19, 2021) (CDC
8 Transport Guidance). *See* Dkt. 327-4. This transport guidance applies to "all aircraft operators
9 who wish to provide transportation by air into, from, or within the United States to people with
10 confirmed or probable COVID-19 or people who are close contacts of a person with COVID-
11 19." *Id.* at 1 (emphasis added). The CDC's transport guidance generally prohibits people with
12 COVID-19 or their close contacts from traveling on scheduled passenger airline flights in the
13 United States until completing isolation or quarantine.⁶

14 The transport guidance, however, provides an exception if passengers with varied levels
15 of infection or exposure to COVID-19 are cohorted and transported on separate flights. Under
16 this exception, the CDC permits transport of people with COVID-19 and their close contacts in
17 carefully controlled circumstances. First, "passengers who do not have COVID-19 should not be
18 transported with infected passengers." Dkt. 327-4 at 4. Second, people with confirmed cases of
19 COVID-19 should remain in isolation until the flight, and can be transported together as a
20 cohort. *Id.* at 2, 4. Third, people who are asymptomatic for COVID-19 but who are close

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22 ⁶ In a separate guidance to travelers, the CDC recommends that any person who is not fully
23 vaccinated be tested for COVID-19 prior to domestic travel. The CDC further instructs "[d]o
24 NOT travel if you were exposed to COVID-19, you are sick, you test positive for COVID-19, or
you are waiting for results of a COVID-19 test." Dkt. 327-5, CDC, *Domestic Travel During*
COVID-19 at 2 (updated Jun. 10, 2021).

1 contacts of a confirmed COVID-positive individual can be transported in cohorts, so long as
2 cohorts of different exposed people are separated by six feet. *Id.* at 4. Symptomatic close
3 contacts of confirmed COVID-19 cases should be assumed to be infectious and should be tested
4 for COVID-19 prior to flight. *Id.* Despite this guidance, prior to this Court’s TRO, Defendants
5 did not test detainees for COVID-19 and did not take other “reasonable measures to ensure there
6 is no cross-exposure between COVID-19 positive detainees and COVID-19 negative detainees
7 during transport.” Dkt. 370 at 17; *see also id.* at 3–4, 13 (finding that Defendants do not test prior
8 to transfer and that failure to do so was not reasonable); Stip. ¶¶ 5, 10 (no testing); Amon Decl.
9 ¶¶ 26, 36.

10 Once ICE Air flights land at the Yakima, Washington airport, detainees are unloaded and
11 placed on buses operated by the GEO Group, Inc. for travel to NWDC. Stip. ¶ 11. Upon arrival
12 at NWDC, ICE Health Service Corps (IHSC) employees perform a Polymerase Chain Reaction
13 (PCR) COVID-19 test on detainees at intake. Dkt. 370 at 4; Stip. ¶ 14. The COVID-19 test at
14 intake, however, is not a rapid or real-time PCR test that provides results before detainees are
15 given housing assignments at NWDC. Instead, the test results are not available for two to three
16 days. Dkt. 370 at 4; Stip. ¶ 14. Prior to this Court’s order, Defendants placed detainees together
17 in New Intake Monitoring (NIMs) units, where detainees are held in quarantine for at least 14
18 days, without knowing whether a detainee has COVID-19 and can transmit the virus to others in
19 that unit. Dkt. 370 at 4–5, 13; Stip. ¶¶ 15–16; Dkt. 331, Arevalo Montilla Decl. ¶ 7 (noting that
20 cellmate tested positive after arrival). Although Defendants previously had placed detainees in
21 individually walled-off cells designated as NIMs units earlier this year, Dkt. 265, Lippard Decl.
22 ¶ 22, the transfers that ICE undertook after June 2021 led NWDC officials to place detainees in
23 open bay units with over 100 people at a time and designate those dorms as NIMs units. *See* Dkt.

1 370 at 4; Dkt. 293-1 ¶ 4; Dkt. 318-1 ¶ 7; Dkt. 332, Ghazal Decl. ¶ 8. The CDC’s correctional
2 facility guidance, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19)*
3 *in Correctional and Detention Facilities* (last updated June 9, 2021) (CDC Correctional
4 Guidance), explains that such intake quarantine measures should only be used as a last resort and
5 are a disfavored form of quarantining individuals because it can *facilitate* spread of COVID-19.
6 Dkt 327-6 at 17–18.

7 **B. The Results of Defendants’ Pre-TRO Transfer Practices**

8 Taken together, these actions created a dangerous and unprecedented outbreak at NWDC
9 prior to the TRO. As epidemiological expert Dr. Joseph Amon explains, “ICE’s failure to ensure
10 social distancing and to adhere to the CDC’s transport guidance and correctional testing
11 guidance has endangered detainees in transit and at the NWDC by substantially increasing the
12 risk of COVID-19 transmission.” Amon Decl. ¶ 36.⁷ Indeed, between June 10, 2021 (when
13 transfers began to occur regularly) and August 23, 2021 (the date of the TRO), 247 people tested
14 positive at NWDC. *Id.* ¶ 11 & Ex. A. Of those 247 people, 127 detainees tested positive for
15 COVID-19 upon arrival at NWDC. *Id.* ¶¶ 11–12. This number underscores the importance of
16 testing prior to transfer, as these 127 people were in close contact with other uninfected detainees
17 during transit and while in intake monitoring units for three to four days while awaiting PCR
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19 _____
20 ⁷ Since this Court’s order, more evidence has emerged that testing prior to transfers on flights is
21 vital to protecting class members. A study conducted of thousands of airline passengers to Italy
22 demonstrated that pre-flight testing dramatically reduced the threat of COVID-19 transmission.
23 See Maltese Decl. Ex. A, Aaron J. Tande et. al, SARS-CoV-2 Testing Prior to International
24 Airline Travel, December 2020-May 2021, *Mayo Clinic Proceedings* (2021), at 7 (“These data
suggest that even at this higher level of active community infection, a single molecular test
performed within 72 hours of departure can decrease the rate of active infection on board a
commercial aircraft to a level that is several orders of magnitude below active community
infection rates.”).

1 results. *Id.* ¶ 13. Throughout this entire time, these detainees could infect other people,
2 threatening the health of class members and others.

3 Indeed, ICE’s data also indicate that, prior to the TRO, at least 64 previously uninfected
4 detainees at NWDC became infected with COVID-19 during transit or during the new intake
5 monitoring quarantine. *Id.* ¶ 12. To draw this conclusion, Dr. Amon points to the timeline
6 provided by ICE of each positive case, the current scientific knowledge of COVID-19, and CDC
7 guidance. *Id.* ¶¶ 6, 11–13. As he observes, these detainees initially tested negative upon arriving
8 at NWDC (using highly accurate PCR tests), and then tested positive after the median incubation
9 period for COVID-19, indicating infection during transit or detention. *Id.* ¶¶ 11–13. Notably, Dr.
10 Amon’s analysis indicates that nearly every instance of a positive COVID-19 result upon arrival
11 caused at least one additional infection in detention. *Id.* ¶ 22. In some instances, 11 or 12
12 additional detainees became infected. *Id.* While Defendants previously contested this evidence,
13 in its TRO decision, this Court correctly concluded the “evidence presented by [Plaintiffs]
14 detailing the timing between dates of transfers and dates of positive tests in comparison to the
15 average time from exposure to symptoms[] indicat[es] exposure likely occurred during transport
16 or in NIMs units during intake quarantine.” Dkt. 370 at 13. In light of this data, and consistent
17 with CDC guidance, Dr. Amon observes that “[w]ithout pre-transfer testing, rapid testing on
18 arrival, thorough contact tracing and proper infection control procedures . . . it was not surprising
19 to see ongoing transmission of the SARS-CoV-2 virus among detainees.” *Id.* ¶ 20; *see also supra*
20 n.7 (citing study published after TRO explaining that pre-flight testing is critical to preventing
21 COVID-19 transmission).

22 ICE’s failure to take these basic precautions poses grave dangers to detainees, staff, and
23 community alike. This is best exemplified by the hospitalizations and outbreak in general
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1 population that Defendants' actions prior to the TRO caused. Five class members were sent to
2 the hospital for COVID-related illness prior to the TRO. Dkt. 370 at 6–7 (detailing cases of
3 individuals sent to hospital); Stip. ¶ 19 (same); Dkt. 330, Amaya Vargas Decl. ¶¶ 17–18
4 (describing visit to hospital for pneumonia-like symptoms); *see also* Dkt. 350-1 ¶¶ 10–16; Dkt.
5 354-1 ¶ 15; Dkt. 364-1 ¶ 18; Dkt. 376-1 ¶ 7. In one case, a detainee was sent to the hospital for
6 nine days, released back to ICE custody, and then re-hospitalized for over two weeks, suggesting
7 grave and perhaps life-threatening effects from the COVID-19 diagnosis. Stip. ¶ 19; Dkt. 364-1
8 ¶ 18; Dkt. 376-1 ¶ 7; Kyrka Decl. ¶ 4. The threat of hospitalization is particularly acute for class
9 members who have been recently transferred and have not had the opportunity for vaccination
10 until after transit and quarantine at the facility. *See* Dkt. 370 at 4; Stip. ¶ 6.

11 Defendants' reckless transfers also caused a severe COVID-19 outbreak in NWDC's
12 general population. During the period prior to the TRO, ICE reported numerous cases of GEO
13 employees who became infected with COVID-19 and had been working with transferred
14 detainees, COVID-19 infected detainees, and general population detainees. Dkt. 310-1 ¶ 17; Dkt.
15 322-1 ¶ 4; Dkt. 323-1 ¶ 4; Dkt 338-1 ¶ 8; Dkt. 340 ¶ 4; Dkt. 353 ¶ 10; Dkt. 358-1 ¶ 11; Dkt. 359
16 ¶ 12; Dkt. 360-1 ¶ 10; Dkt. 364-1 ¶ 21; Dkt. 366-1 ¶ 4; Dkt. 369-1 ¶ 15. ICE's notices of positive
17 cases describe on several occasions GEO employees working in general population units shortly
18 before becoming symptomatic or testing positive (and many others fail to indicate whether
19 employees worked with detainees). Dkt. 338-1 ¶ 10; Dkt. 359 ¶ 14; Dkt. 360-1 ¶ 12; Dkt. 365-1
20 ¶ 7; Dkt 366-1 ¶ 9; Dkt. 368-1 ¶ 5; Dkt. 369-1 ¶¶ 5, 17. There is thus no question that the
21 outbreak in general population units is closely related to the dangerous situation created by
22 Defendants' unsafe transfers, which resulted in an outbreak among staff members, and in turn,
23 detainees in general population. Amon Decl. ¶ 18. Notably, in arguing that a TRO was
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1 unnecessary, Defendants pointed to the lack of cases in the general population, Dkt. 346 at 16,
2 but since then, dozens of people have tested positive in the general population. *Id.* ¶¶ 11–12.

3 Similar data shows that the threat to staff from unsafe transfers is equally serious. Only
4 approximately half of GEO employees at NWDC are vaccinated, leading to continued risk of
5 spread among employees, detainees throughout the facility, and the broader community. *See id.*
6 ¶¶ 14, 57, 59. Indeed, after Defendants resumed transfers, 40 GEO and ICE employees have
7 tested positive (including in the period since this Court’s TRO). Amon Decl. ¶¶ 11–12. Notably,
8 several of these employees work in medical isolation or quarantined units of NWDC, while
9 several others worked in GEO’s Transport Division. Dkt. 322-1 ¶ 6; Dkt. 322-1 ¶ 6; Dkt. 338-1
10 ¶ 11; Dkt. 358-1 ¶ 13; Dkt. 359-1 ¶¶ 13–14; Dkt. 366-1 ¶ 6; Dkt. 369-1 ¶¶ 16–17. This suggests
11 that the officers were exposed to COVID-19 because of ICE’s failure to adopt basic safety
12 precautions in its transfer protocols, resulting in the many positive cases at NWDC. And
13 although some of these employees tested positive after the TRO, many of these cases are almost
14 certainly related to the outbreak caused by Defendants’ transfer practices.

15 Notably, ICE wishes to return to its dangerous practices despite a worsening pandemic
16 environment. In past few months, COVID-19 cases again have spread rapidly because of the
17 Delta variant of the virus. Amon Decl. ¶ 44. The highly contagious Delta variant of the COVID-
18 19 virus is 60% more transmissible than prior variants because individuals infected with the
19 variant are infectious more quickly and with higher viral shedding compared to previous strains.
20 *Id.* ¶ 46. Such transmission is especially likely to occur among detainees transferred from CBP
21 detention facilities, where they have not yet received a vaccine. *See Stip.* ¶ 6; *see also* Amon
22 Decl. ¶ 48 (noting evidence that even vaccinated may be infected by Delta variant). As a result,
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1 allowing ICE to return to its dangerous practices and to ignore CDC testing guidelines before
2 transfer will gravely threaten medically vulnerable class members. Amon Decl. ¶ 52.

3 Finally, the evidence also demonstrates that the situation at NWDC has improved
4 considerably since this Court’s TRO. Since early June, 311 people tested positive for COVID-19
5 at NWDC. *See id.* ¶ 7. Of those, and as noted above, 247 cases occurred between June 10, 2021,
6 and August 23, 2021. *Id.* ¶ 11. But since August 23, only three detainees have tested positive at
7 intake, while the rest of the detainees testing positive were in general population units—swept up
8 in an outbreak that Defendants caused through their dangerous practices. *Id.* ¶ 12. The number of
9 positive cases has decreased as the continued reintroduction of COVID-19 to the facility via
10 unsafe transfers has abated. *Id.* ¶¶ 12–13. Indeed, in the past two weeks, two detainees have
11 tested positive. Dkt. 391-1 ¶ 4; Dkt. 398-1 ¶ 4. These data underscore the positive impact the
12 TRO had in remedying conditions at NWDC—improvement that Defendants now wish to
13 abandon.

14 III. LEGAL STANDARD

15 On a motion for a preliminary injunction, the movant “must establish that he is likely to
16 succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary
17 relief, that the balance of equities tips in his favor, and that an injunction is in the public
18 interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A preliminary injunction
19 may issue where “serious questions going to the merits [are] raised and the balance of hardships
20 tips sharply in [plaintiff’s] favor.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th
21 Cir. 2011) (second alteration in original) (citation omitted). A plaintiff may succeed under the
22 “serious question” test if they are likely to suffer irreparable injury and show that an injunction is
23 in the public’s interest. *Id.* at 1134–35.

1 Significantly, as this Court noted in its prior order, “[t]he standard for issuing a TRO is
2 the same as the standard for issuing a preliminary injunction.” Dkt. 370 at 7; *see also Stuhlbarg*
3 *Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (noting that
4 preliminary injunction and TRO standards are “substantially identical”). As a result, absent
5 changed circumstances, a preliminary injunction is appropriate. *See, e.g., Pimentel-Estrada v.*
6 *Barr*, 464 F. Supp. 3d 1225, 1234 (W.D. Wash. 2020) (“As the Court has noted, relatively little
7 has changed since the Court issued its TRO. For this reason, the Court adopts the legal reasoning
8 of the prior TRO . . . [and] finds that Petitioner is likely to succeed on the merits of his claims.”);
9 *Torres v. U.S. Dep’t of Homeland Sec.*, No. EDCV182604JGBSPX, 2020 WL 3124305, at *1
10 (C.D. Cal. Apr. 24, 2020) (preliminary injunction was appropriate where “underlying facts
11 prompting the TRO have not significantly changed since the issuance of the TRO”). This is
12 particularly true in this case, where the parties fully litigated the TRO and each side had the
13 opportunity to present arguments, introduce evidence, and be heard at a hearing before this
14 Court. *Cf. Karnoski v. Trump*, 926 F.3d 1180, 1198 (9th Cir. 2018) (party seeking dissolution of
15 preliminary injunction must show “a significant change in facts or law [that] warrants revision or
16 dissolution of the injunction” (internal quotation marks omitted)).

17 **IV. ARGUMENT**

18 **A. Plaintiffs Are Likely to Succeed on the Merits.**

19 Only one month ago, faced with a similar record as here, this Court concluded that
20 Plaintiffs “made a clear showing that they are likely to succeed on the merits of their Fifth
21 Amendment claims.” Dkt. 370 at 8. Specifically, the Court held that Plaintiffs had satisfied all
22 elements of the objective deliberate indifferent test. *See Hernandez Roman v. Wolf*, 977 F.3d
23 935, 943 (9th Cir. 2020) (explaining deliberate indifference for civil detainees’ Fifth Amendment
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1 due process claims challenging conditions at federal detention center). First, the Court concluded
2 that Defendants “acted intentionally” because “[d]espite th[e] surge in positive cases,
3 [Defendants] continue[d] to transfer untested detainees thereby exposing detainees and class
4 members to COVID-19.” *Id.* at 11. Second, the Court held that Defendants had created a
5 “substantial risk of serious harm of exposing class members to COVID-19,” noting that “the
6 recent outbreaks in both quarantine units and general population show Respondents’ safety
7 measures have not contained the spread of COVID-19.” *Id.* at 12. Third, the Court also reasoned
8 Defendants “ha[d] not taken reasonable available measures to test detainees before transport to
9 prevent exposure of COVID-19 to class members . . . , even though a reasonable officer in the
10 circumstances would appreciate the degree of risk of transferring untested detainees.” *Id.* at 13.
11 Finally, the Court concluded that Defendants’ actions had created “a likelihood that the
12 conditions at [NWDC] place [class members] at risk of serious harm [because] numerous
13 class members have already contracted COVID-19 and at least five have been hospitalized.” *Id.*
14 at 14.

15 Since then, nothing has occurred that would change the analysis of any of those factors.
16 Indeed, the parties have stipulated to virtually the same set of facts as the one they presented to
17 this Court for purposes of the TRO. *Compare* Dkt. 326 *with* Stipulated Facts for Pls.’ Mot. For a
18 Prelim. Inj. And in fact, the record reflects that not only was the TRO instrumental in stemming
19 the escalating rise of COVID-19 cases at the facility, but also that continued relief is necessary to
20 protect class members from the same risk they would face if Defendants were allowed to resume
21 unsafe transfers. Amon Decl. ¶¶ 10, 12, 55. Plaintiffs merely request that the Court maintain the
22 status quo by converting the TRO into a preliminary injunction, enjoining Defendants from
23 admitting to NWDC detainees who were not tested prior to transfer and whose transport did not
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1 include “reasonable measures to ensure there is no cross-exposure between COVID-19 positive
 2 detainees and COVID-19 negative detainees during transport.” Dkt. 370 at 17. This Court has
 3 already held that such narrowly tailored relief was appropriate. Because the evidence supporting
 4 the Court’s earlier analysis is unchanged, Plaintiffs continue to clearly show they are likely to
 5 succeed on the merits of their due process claims. *See Pimentel-Estrada*, 464 F. Supp. 3d at 1234
 6 (preliminary injunction appropriate where factual circumstances were same at time of the court’s
 7 TRO and preliminary injunction order); *Torres* 2020 WL 3124305, at *1 (same).

8 The Court has already found the following pertinent facts in support of the TRO, and they
 9 remain unchanged: (1) the CDC Testing Guidelines advise that an individual should be tested
 10 before transfer from one detention facility to another, and the CDC Transport Guidelines advise
 11 that passengers should be cohorted by COVID-19 status, Dkt. 370 at 5; (2) despite these
 12 guidelines, Defendants do not require the detainees in CBP facilities be tested for COVID-19
 13 prior to their transfer, *id.* at 3–4; (3) since June 2021, Defendants intentionally transferred over
 14 1,000 detainees from CBP facilities, knowing they were not tested and leading to over 200
 15 detainees testing positive and at least five class members being hospitalized, *id.* at 11, 14; (4) the
 16 timing of the transfers and dates of positive tests indicate that detainees were likely exposed to
 17 COVID-19 during transport or in the NIMs units during intake quarantine, *id.* 12–13; and
 18 (5) nothing in the record supports ICE’s position that there are no reasonable available measures
 19 to test detainees before they board flights for transfer to NWDC, *id.* at 13.⁸

20
 21 ⁸ Indeed, this Court was unpersuaded by Defendants’ “argument that testing detainees before
 22 boarding flights to [NWDC] is not feasible.” Dkt. 370 at 13. To the extent Defendants now
 23 renew this argument, there is also ample evidence of the widespread availability of rapid and
 24 efficient COVID-19 testing programs in large group settings, even in field conditions. *See Amon*
 Decl. ¶ 39 (describing testing programs in universities for student athletes, at secondary schools
 and colleges for students and staff, and at airports). Moreover, the White House announced that it
 will invest to increase testing in long-term facilities, community testing sites, shelters for people

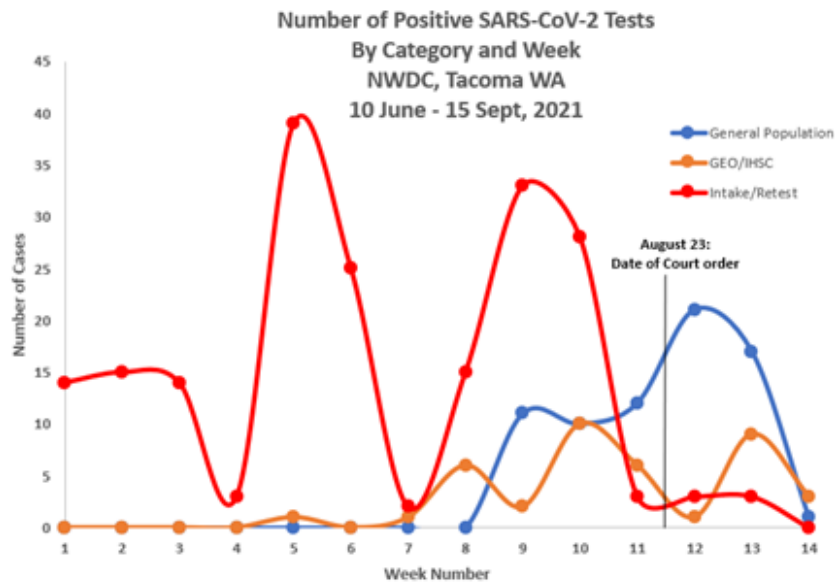
1 Despite the Court’s conclusions about the substantial risk of serious harm caused by these
 2 types of transfers, Defendants refuse to stipulate to abide by the TRO through a preliminary
 3 injunction. But as Dr. Amon explains, there is “extremely compelling evidence that the TRO,
 4 requiring pre-transfer testing, has been effective in limiting the transfer of individuals infected
 5 with SARS-CoV-2 to NWDC and of limiting transmission from these individuals during transit
 6 and while in group quarantine.” Amon Decl. ¶ 52. Between June 10 and August 23—the date of
 7 this Court’s TRO order—there were 247 cases of COVID-19 reported at NWDC, 51% of which
 8 were identified upon intake and 26% of which followed a false negative initial test or were the
 9 result of exposure during transit or intake quarantine. *Id.* ¶ 11. Conversely, between August 24
 10 and September 21, there were 64 cases of COVID-19 reported at NWDC, with less than 5% of
 11 cases arising from new intakes and the majority among the general population (65%) and staff
 12 (25%). *Id.* ¶ 12. And as noted above, this lingering outbreak among the staff and general
 13 population was itself the result of Defendants’ unsafe transfers and the COVID-19 transmission
 14 they caused at NWDC. *See supra* p. 10; Amon Decl. ¶ 18 (“ICE’s notices to the Court regarding
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 16

17 experiencing homelessness, prisons and jails, and other congregate settings. *See* The White
 18 House, *Path Out of the Pandemic: President Biden’s COVID-19 Action Plan*,
 19 <https://www.whitehouse.gov/covidplan/#testing-masking> (last accessed Sept. 20, 2021). This
 20 reaffirms that implementing a rapid testing program is not a question of feasibility but rather
 21 directing resources and staffing. *See also Christensen v. Cheeks*, No. 21-10850, 2021 WL
 22 3680313, at *4 (E.D. Mich. Aug. 18, 2021) (“[T]he agency has imposed — and continues to
 23 impose — many restrictions on prison operations to address the risks posed by the pandemic. For
 24 example, . . . requiring ‘rapid antigen’ testing of both visitors and prisoners scheduled for
 visits.”); *Smith v. Barr*, 512 F. Supp. 3d 887, 895 (S.D. Ind. 2021) (“The defendants have touted
 the availability of testing but have chosen not to utilize rapid testing of staff and visitors who
 enter prison grounds.); *see also id.* at 899 (“Lack of resources cannot explain the failure to
 implement broad-based testing, as ‘FCC Terre Haute has multiple rapid Abbot[t] test machines,
 and uses them to immediately test symptomatic inmates in order to isolate and quarantine them
 more quickly.’”).

1 positive cases suggest that the high rates of infection among transferred detainees caused
 2 infections among GEO employees, who in turn caused the outbreak in general population.”).

3 **COVID-19 Cases at NWDC Before and After TRO:**
 4 **June 10 – August 23, 2021 and August 24 – September 21, 2021⁹**

Indicator	June 10 -Aug 23, 2021		Aug 24 – Sept 21, 2021	
	Number of Cases	Percentage	Number of Cases	Percentage
Positive test on arrival (detainee)	127	51%	3	5%
Negative Initial test (detainee)	64	26%	0	0%
Ratio (# positive detainees/# days)	2.6 cases per day		0.1 cases per day	
General population outbreak (detainee)	31	12.5%	41	65%
Detainee other	1	>1%	4	5%
Employees	24	10%	16	25%
<i>*Medically vulnerable class members</i>	<i>109</i>	<i>44%</i>	<i>37</i>	<i>57%</i>



9 This chart is derived from and also included in Dr. Joseph Amon’s declaration. See Amon Decl. ¶ 12.

1 There are two key takeaways from this data. First, the TRO was “an essential step” in
2 reducing the risk of COVID-19 transmission into and among detainees at NWDC. Amon Decl.
3 ¶ 10. In comparing the data in the weeks leading up to and following the TRO, it is clear that the
4 nature of the outbreak at NWDC has changed. *Id.* ¶ 19. Second, and more importantly, removing
5 the injunction and allowing ICE to resume unsafe transfers of detainees “would inevitably lead to
6 spikes in the number of COVID-19 cases resulting from both transmission in transit and during
7 quarantine after arrival with the possibility of further spread to employees and general population
8 detainees.” *Id.* ¶ 10. In other words, allowing the TRO to expire would be equivalent to throwing
9 the proverbial umbrella away during a rainstorm.

10 Indeed, the experiences of one class member, Frank Ramirez Navarette, who was
11 hospitalized for over 25 days due to COVID-19, demonstrates the ever-present risk of harm that
12 the rest of the class would face if Defendants resumed their unsafe transfer practices. Kyrka
13 Decl. ¶ 4. This individual case underscores that “[t]he COVID-19 pandemic remains a serious
14 threat and will continue to remain a serious threat, especially with the emergence of new viral
15 variants.” Amon Decl. ¶ 10. As of September 17, the United States and Washington state
16 continue to see sharp increases in COVID-19 cases, driven by the emergence of the highly
17 contagious Delta variant. *Id.* ¶ 44. It is therefore “crucial to remain vigilant” and maintain
18 practices that have proven effective at preventing transmission. *Id.* ¶ 10.

19 In sum, the Court correctly granted a TRO in response to Defendants’ reckless actions
20 and consequent outbreaks at NWDC. Without a preliminary injunction, Defendants threaten to
21 return class members to the same or even higher risk of danger and cause cases again to rise at
22 NWDC among the general population and staff. Allowing Defendants to resume unsafe transfers
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24

1 at this critical point would all but guarantee further outbreaks, and as result, this Court should
 2 convert its TRO into a preliminary injunction order.¹⁰

3 **B. The Remaining Factors Continue to Weigh Sharply in Favor of Plaintiffs.**

4 **1. The Substantial Risk of Irreparable Harm Remains.**

5 Plaintiffs must also show that “irreparable harm is likely in the absence of an
 6 injunction,” *Winter*, 555 U.S. at 22 (emphasis omitted). In its TRO ruling, the Court found
 7 irreparable harm based on two interrelated grounds: first, the ongoing deprivations of
 8 constitutional rights constituted irreparable harm, and second, the outbreak of COVID-19 created
 9 a likelihood of irreparable harm due to the lethality of the virus. Dkt. 370 at 14–15. Ninth Circuit
 10 case law strongly supports the Court’s conclusions in this regard. *See, e.g., Porretti v. Dzurenda*,
 11 No. 20-16111, --- F.4d ---, 2021 WL 3853052, at *8 (9th Cir. Aug. 30, 2021) (holding that
 12 district correct did not abuse its discretion in determining that failure to address incarcerated
 13 plaintiff’s health needs constituted irreparable harm and supported preliminary injunction);
 14 *Hernandez Roman*, 977 F.3d at 944 (risk from COVID-19 meets irreparable harm requirement);

16 ¹⁰ As this Court recognized in issuing the TRO, this Court possesses the authority to remedy
 17 unconstitutional conditions of confinement, including through a preliminary injunction that
 18 ensures the basic, reasonable measures enforced by the TRO. The Ninth Circuit recently
 19 reaffirmed that “28 U.S.C. § 1331 . . . provides subject matter jurisdiction” over Plaintiffs’ due
 20 process claims, and “an implied cause of action exists for Plaintiffs to challenge allegedly
 21 unconstitutional conditions of confinement.” *Hernandez Roman*, 977 F.3d at 941. District courts
 22 in the Ninth Circuit and across the country have accordingly enjoined transfers in and out of
 23 facilities to prevent COVID-19 transmission, in addition to other forms of relief. *See, e.g.,*
 24 *Zepeda Rivas v. Jennings*, No. 20-CV-02731-VC, 2020 WL 9066082, at *1 (N.D. Cal. Dec. 23,
 2020) (enjoining transfers into facility for duration of the outbreak there). Furthermore, even if
 testing and the reasonable measures Defendants are required to take under the TRO imposed a
 significant burden on Defendants, the Constitution would still require them. As the Supreme
 Court has explained, where “a constitutional violation has been found, the remedy does not
 ‘exceed’ the violation if the remedy is tailored to cure the ‘condition that offends the
 Constitution.’” *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (citation omitted).

1 *M.R. v. Dreyfus*, 663 F.3d 1100, 1111–14 (9th Cir. 2011), *as amended by*, 697 F.3d 706 (9th Cir.
 2 2012) (threat to plaintiffs’ health constitutes irreparable harm); *Melendres v. Arpaio*, 695 F.3d
 3 990, 1002 (9th Cir. 2012) (violation of constitutional rights “constitutes irreparable harm”).

4 On the same question now presented, the answer is identical, and the injunction remains
 5 necessary to prevent the likely recurrence of the irreparable harm the Court found. As detailed
 6 above, this is because absent the TRO, ICE could resume transfers of hundreds of new detainees
 7 without testing or measures to separate infected people from others. The evidence before this
 8 Court resoundingly demonstrates that a return to these practices would cause COVID-19 to
 9 spread among class members, just as it did before. Amon Decl. ¶¶ 10–12. Indeed, nothing
 10 material has changed that would suggest the injunction now in place could be lifted without
 11 Plaintiffs again being seriously and unnecessarily threatened with devastating infection. *Id.* ¶ 10
 12 (describing how allowing ICE to resume transfers would “inevitably lead to spikes in the number
 13 of COVID-19 cases”); *see also* Kyrka Decl. ¶ 4 (describing lengthy hospitalization of class
 14 member). Accordingly, this factor also supports Plaintiffs.

15 **2. The Public Interest and Balance of Harms Remain as Found in the TRO** 16 **Order.**

17 As with the irreparable harm factor, this Court previously concluded that these final two
 18 factors also favor Plaintiffs.¹¹ Dkt. 370 at 15–16. The Court should reaffirm this holding, as
 19 nothing has changed regarding these factors.

20 In contesting the TRO, ICE claimed that the government would be harmed by an
 21 injunction because it would prevent ICE from bringing detainees from the southern border. Dkt.
 22 346 at 24. The Court disagreed that the government was harmed at all, stating that the TRO

23 ¹¹ Because a governmental agency is a party, these two factors merge for analytical purposes.
 24 *Nken v. Holder*, 556 U.S. 418, 435 (2009).

1 “would only prevent Respondents from transferring untested detainees in an unsafe manner.”
2 Dkt. 370 at 15. Defendants may now try to claim that the TRO has actually prevented them from
3 bringing detainees from the southern border, but to the extent those transfers have stopped, it is
4 entirely through ICE’s own choice not to follow the Court’s modest and clear requirements for
5 basic health and safety. *See supra* p. 15 n.8 (noting how widespread and efficient testing is
6 available in a variety of settings). The injunction itself thus causes ICE no cognizable harm,
7 while an end to the injunction would again create a great risk of harm to Plaintiffs.

8 This Court also found that it is always in the public interest to vindicate constitutional
9 rights. Dkt. 370 at 15 (citing *Melendres*, 695 F.3d at 1002). Notably, since the TRO, the Ninth
10 Circuit has again affirmed that this is an important public interest factor in the context of
11 incarcerated and detained persons. *See Porretti*, 2021 WL 3853052, at *8. In addition, this Court
12 concluded that it is in the public interest to require ICE to “take reasonable measures to prevent the
13 spread of COVID-19 among detainees and employees at NWPIC,” Dkt. 370 at 16. And though
14 the Court found that while ICE has an interest in preventing overcrowding at ICE facilities, the
15 Court concluded that this interest did not overcome the substantial public interest supporting the
16 injunction. *Id.* This is especially true because, once again, the TRO allows transfers, so long as
17 they are done safely. As a result, even though a government interest is implicated here,
18 Defendants can vindicate that interest simply by following the Court’s limited and modest order.

19 Finally, the general public has an interest in protection from the influx of COVID-19
20 caused by the unsafe transports to NWDC. *See, e.g., Bravo Castillo v. Barr*, 449 F. Supp. 3d 915,
21 923 (C.D. Cal. 2020) (“An outbreak at [the detention center] would, further, endanger all of us –
22 detainees, [detention center] employees, [county] residents . . . , residents of the State . . . , and
23 our nation as a whole.”). The risk to the community can be mitigated by following safety
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1 procedures like those ordered by the Court, as the TRO’s success demonstrates. This additional
2 public interest in the calculus makes the balance of harms and the public interest factors tip
3 overwhelmingly in Plaintiffs’ favor.

4 **V. CONCLUSION**

5 For all these reasons, the Court should GRANT Plaintiffs’ motion to convert the TRO
6 into a Preliminary Injunction.

7 Respectfully submitted on this 23rd day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2021, I electronically filed the foregoing and attached declaration with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED this 23rd day of September, 2021.

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