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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JOSUE CASTANEDA JUAREZ; WILFREDO
FAVELA AVENDANO; J [REDACTED] A [REDACTED]
M [REDACTED]; NAEEM KHAN, on behalf of
themselves and all others similarly situated,

Petitioners-Plaintiffs,

v.

NATHALIE ASHER, Director of the Seattle
Field Office of U.S. Immigration and Customs
Enforcement; MATTHEW T. ALBENCE, Deputy
Director and Senior Official Performing the
Duties of the Director of the U.S. Immigration
and Customs Enforcement; U.S. IMMIGRATION
AND CUSTOMS ENFORCEMENT; STEPHEN
LANGFORD, Warden, Tacoma Northwest
Detention Center,

Respondents-Defendants.

No. 2:20-cv-700

**PETITION FOR WRIT OF
HABEAS CORPUS AND CLASS
ACTION COMPLAINT FOR
INJUNCTIVE AND
DECLARATORY RELIEF**

1 INTRODUCTION

2 1. We are in the midst of a global pandemic on a scale not seen for over a century.
3 Hundreds of thousands of people have died in a matter of months. Governments around the
4 world are mandating social distancing, recognizing that physical separation is the only way to
5 prevent the spread of a deadly, rapidly-spreading virus with no vaccine and no known cure. But
6 that basic protection is entirely unavailable to people in immigration detention, who are locked
7 up as they await the adjudication of their civil immigration cases or their deportation. Just days
8 ago, a 57-year-old immigrant with preexisting medical conditions died from COVID-19 after
9 contracting the virus in Immigration and Customs Enforcement (“ICE”) detention.¹ Across the
10 country, hundreds of immigration detainees have begun to test positive for COVID-19.²

11 2. In the midst of this pandemic, ICE continues to detain medically vulnerable
12 people at the Northwest Detention Center (“NWDC”) (also known as the Northwest ICE
13 Processing Center), exposing them to an imminent risk of serious illness or death. People
14 detained at NWDC cannot engage in the necessary social distancing and hygiene required to
15 avoid infection by COVID-19, even with the best-laid plans.

16 3. Conditions at NWDC make it impossible for detained people to protect
17 themselves through social distancing—remaining at least six feet apart. Detainees at NWDC live,
18 sleep, bathe, and eat cheek by jowl with other detainees, and have little or no access to masks,
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22 ¹ Declaration of My Khanh Ngo (“Ngo Decl.”), Ex. A, Kate Morrissey, *First ICE Detainee Dies from COVID-19*
After Being Hospitalized from Otay Mesa Detention Center, San Diego Union-Tribune (updated May 7, 2020).

23 ² Ngo Decl., Ex. B, Immigration and Customs Enforcement, *ICE Guidance on COVID-19* (last updated May 8,
24 2020) (hereinafter “ICE Guidance”) (“Confirmed Cases” page reporting that 788 ICE detainees have tested positive
for COVID-19 as of May 8, 2020).

1 gloves, soap, or hand sanitizer to guard against infection in such close quarters. The
2 government’s own medical experts have described this as a “tinderbox scenario.”³

3 4. This case challenges the detention of individuals who are highly vulnerable to
4 COVID-19 due to their underlying medical conditions and/or age. Petitioners-Plaintiffs
5 (“Plaintiffs”) and members of the proposed class are noncitizens who are or will be held in civil
6 immigration detention at NWDC in the midst of the COVID-19 pandemic. They are all at high
7 risk of severe illness and death from COVID-19 due to their age and/or underlying medical
8 conditions as identified by the U.S. Centers for Disease Control and Prevention and public health
9 experts—conditions such as diabetes, asthma, chronic heart conditions, and chronic respiratory
10 conditions. Declaration of Dr. Joseph Amon (“Amon Decl.”) ¶¶ 10-11; Declaration of Dr.
11 Katherine McKenzie (“McKenzie Decl.”) ¶¶ 23, 24, 26, 27, 31. Without this court’s timely
12 intervention, they will suffer severe illness, and some may die.

13 5. The continued detention of medically vulnerable people at NWDC in light of the
14 imminent threat of COVID -19 creates not only a humanitarian crisis but also a constitutional
15 crisis. The Fifth Amendment to the Constitution forbids the government from putting civil
16 detainees squarely in the path of a lethal pandemic that poses, for them, a high risk of serious
17 illness or death. The nature of the pandemic and the conditions of confinement at NWDC make
18 it impossible for Defendants to protect vulnerable individuals from risk of infection. That risk of
19 harm is “so grave that it violates contemporary standards of decency to expose anyone
20 unwillingly to such a risk.” *Helling v. McKinney*, 509 U.S. 25, 36 (1993) (emphasis omitted).

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24 ³ Ngo Decl., Ex. C, Letter from Drs. Scott A. Allen & Josiah Rich to Rep. Bennie Thompson et al. (Mar. 19, 2020) [hereinafter “Allen & Rich Letter”].

1 6. This Court has the authority and the obligation to order Defendants to comply
 2 with the Fifth Amendment and release Plaintiffs and the members of the proposed class from
 3 civil detention. A judge of this Court has already ordered the release of one detainee from
 4 NWDC who is at high risk for serious illness from COVID-19, finding that “Respondents detain
 5 Petitioner at the NWIPC in conditions that create a substantial risk he will be exposed to the
 6 coronavirus and contract COVID-19.” *Pimentel-Estrada v. Barr*, --- F. Supp. 3d ----, 2020 WL
 7 2092430, at *12 (W.D. Wash. Apr. 28, 2020).

8 7. Courts across the country have ordered the immediate release of medically
 9 vulnerable individuals like Plaintiffs from ICE detention facilities, even where there has been no
 10 confirmed case of COVID-19, in light of the potentially fatal consequences of the continuing
 11 constitutional violation. *See, e.g., id; Francisco Hernandez v. Wolf*, No. 5:20-cv-617-TJH-KS,
 12 Dkt. 17 (C.D. Cal. Apr. 1, 2020); *Malam v. Adducci*, --- F. Supp. 3d ----, 2020 WL 1672662
 13 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020) [hereinafter *Malam I*]; *Bahena Ortuño v.*
 14 *Jennings*, No. 20-cv-2064-MMC, 2020 WL 1701724 (N.D. Cal. Apr. 8, 2020); *Malam v.*
 15 *Adducci*, No. 20-10829, 2020 WL 1809675 (E.D. Mich. Apr. 9, 2020) [hereinafter *Malam II*];
 16 *Bent v. Barr*, No. 19-cv-6123-DMR, 2020 WL 1812850 (N.D. Cal. Apr. 9, 2020); *Doe v. Barr*,
 17 No. 3:20-cv-2141-LB, 2020 WL 1820667 (N.D. Cal. Apr. 12, 2020); *Ixchop Perez v. Wolf*, No.
 18 5:19-cv-5191-EJD, 2020 WL 1865303 (N.D. Cal. Apr. 14, 2020); *Fofana v. Albence* No. 20-
 19 10869, --- F. Supp. 3d ----, 2020 WL 1873307 (E.D. Mich. Apr. 15, 2020); *Vazquez Barrera v.*
 20 *Wolf*, No. 4:20-cv-1241, --- F. Supp. 3d ----, 2020 WL 1904497 (S.D. Tex. Apr. 17, 2020);
 21 *Amaya-Cruz v. Adducci*, No. 1:20-cv-789, 2020 WL 1903123 (N.D. Ohio Apr. 18, 2020); *Zaya*
 22 *v. Adducci*, No. 20-10921, 2020 WL 1903172 (E.D. Mich. Apr. 18, 2020); *Singh v. Barr*, No. 20-
 23 cv-2346-VKD, 2020 WL1929366 (N.D. Cal. Apr. 20, 2020); *Kaur v. U.S. Dep’t of Homeland*

1 *Sec.*, No. 2:20-cv-3172-ODW (MRWx), 2020 WL 1939386 (C.D. Cal. Apr. 22, 2020); *Manuel*
2 *Hernandez v. Kolitwenzew*, No. 2:20-cv-2088-SLD, Dkt. 12 (C.D. Ill. Apr. 23, 2020); *Doe v.*
3 *Barr*, No. 1:20-cv-2263-RMI, 2020 WL 1984266 (N.D. Cal. Apr. 27, 2020); *Favi v.*
4 *Kolitwenzew*, No. 20-cv-2087, 2020 WL 2114566, at *1 (C.D. Ill. May 4, 2020); *Coreas v.*
5 *Bounds*, No. 8:20-cv-780-TDC, Dkt. 93 (D. Md. May 7, 2020).

6 8. For the reasons given below, this Court should require Defendants to release the
7 detained Plaintiffs and the proposed class from custody, which is the only effective means for
8 them to avoid infection by a lethal virus with no vaccine or cure.

9 JURISDICTION AND VENUE

10 9. This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331
11 (federal question), 5 U.S.C. § 702 (waiver of sovereign immunity), 28 U.S.C. § 1343 (original
12 jurisdiction), 28 U.S.C. § 2241 (habeas jurisdiction), and Article I, Section 9, Clause 2 of the
13 United States Constitution (the Suspension Clause).

14 10. Venue lies in the United States District Court for the Western District of
15 Washington because Plaintiffs are detained by Defendants at NWDC, which is located within the
16 Western District of Washington. 28 U.S.C. § 2242. Venue is proper in the Western District of
17 Washington because a substantial portion of the relevant events occurred in the District and
18 because multiple Defendants reside in the District. 28 U.S.C. § 1391(b), (e)(1).

19 PARTIES

20 11. **Plaintiff Josue Castañeda Juarez** is a 36-year-old man from Mexico. He has
21 been detained at NWDC since March 10, 2020. He has asthma and uses two inhalers a day. His
22 asthma is not well-controlled. He has had to go to the emergency room multiple times due to
23 asthma, most recently in December 2019. He has also been diagnosed with aortic stenosis, a
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1 condition that causes the valve that goes to his aorta to calcify and prevents adequate blood flow
2 to his aorta. He has not received treatment for his aortic stenosis while detained. He suffered
3 from gastrointestinal bleeding in 2018, a condition which can reoccur. He has also suffered from
4 undiagnosed lung issues since being detained, including lung pain, a cough, difficulty breathing,
5 and coughing up blood. Due to his medical conditions, he is at high risk of serious illness or
6 death if he contracts COVID-19. McKenzie Decl. ¶ 27.

7 12. **Plaintiff Wilfredo Favela Avendaño** is a 46-year-old man from Mexico. He has
8 been detained at NWDC since March 13, 2020. He has asthma that is not well-controlled. He
9 uses two inhalers. He uses one inhaler twice daily, once when he wakes up and once before bed.
10 The other inhaler is a rescue inhaler that he uses only when he has symptoms of an asthma
11 attack. At NWDC, he uses this rescue inhaler on average twice every day. His asthma puts him at
12 high risk of serious illness or death if he contracts COVID-19. McKenzie Decl. ¶ 26.

13 13. **Plaintiff J [REDACTED] A [REDACTED]-M [REDACTED]** is a 57-year-old man from El Salvador. Part
14 of his right lung has been removed as the result of a gunshot injury; the bullet was never
15 removed. Due to the presence of the bullet, his right lung does not function properly. He also has
16 Type II diabetes. Due to his medical conditions, he is at high risk of serious illness or death if he
17 contracts COVID-19. McKenzie Decl. ¶ 23.

18 14. **Plaintiff Naeem Khan** is a 47-year-old man from Pakistan and a lawful
19 permanent resident of the United States. He has diabetes. His diabetes has worsened while in
20 ICE custody because he is not able to exercise enough or eat properly. Due to his medical
21 condition, he is at high risk of serious illness or death if he contracts COVID-19. McKenzie
22 Decl. ¶ 24.

1 known deaths.⁵ Current projections indicate that up to 200 million people in the United States
2 could contract COVID-19, and up to 1.5 million could die, in the absence of appropriate social
3 distancing and hygiene measures. Declaration of Dr. Jonathan Golob (“Golob Decl.”) ¶ 11.

4 20. COVID-19 infects people who come into contact with respiratory droplets that
5 contain the coronavirus, such as those produced when an infected person coughs or sneezes.
6 Amon Decl. ¶ 13. Such droplets can spread between people at a distance of at least six feet, and
7 possibly up to 13 feet. *Id.* The virus that causes COVID-19 may also be transmitted when one
8 person touches a surface or object that has the virus on it and then touches their mouth, nose, or
9 eyes. *Id.* Individuals who are asymptomatic or mildly symptomatic can spread the virus. *Id.* ¶ 14.

10 21. There is no vaccine to prevent COVID-19. *Id.* ¶ 8. Nor is there a known cure or
11 anti-viral treatment. *Id.* The only known means of preventing infection—and the corresponding
12 risk of illness from COVID-19—is maintaining a distance of at least six feet from other people,
13 including people who are not symptomatic, a practice known as “social distancing.” *Id.* ¶ 15.
14 Increased sanitization, including frequent hand- and face-washing and sanitization of commonly
15 used surfaces, can mitigate but not eliminate the risk of infection. *Id.*

16 22. Outcomes from COVID-19 vary from no or mild symptoms to respiratory failure
17 and death. *Id.* ¶ 8. Individuals who are at least 60 years old and those with certain underlying
18 medical conditions are at the highest risk of severe disease and death if they are infected with
19 COVID-19. *Id.* ¶¶ 10-12. According to recent estimates, the fatality rate of COVID-19 is about
20 ten times higher than a severe seasonal influenza. *Id.* ¶ 4. For people in the highest-risk
21 populations, the fatality rate of COVID-19 is about 15 percent—or one in seven. *Id.*

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24 ⁵ Ngo Decl., Ex. E, Wash. Dep’t of Health, *COVID-19 Data Dashboard* (updated May 8, 2020).

1 23. Those who survive severe cases of COVID-19 may have lasting damage. COVID-
2 19 can severely damage lung tissue, requiring long-term rehabilitation. *Id.* ¶ 7. It can also cause
3 significant damage to other organs. COVID-19 can target the heart muscle, causing a condition
4 called myocarditis that can limit a person’s ability to exercise and work for the rest of their life.
5 Golob Decl. ¶ 9. There is also evidence that COVID-19 may trigger an immune system over-
6 response, leading to permanent damage to organs, such as neurologic damage and kidney
7 damage requiring dialysis. *Id.* Patients can show the first symptoms of infection within two days
8 of exposure. *Id.* ¶ 6.

9 24. People in higher-risk categories who contract COVID-19 are more likely to need
10 advanced support. Amon Decl. ¶¶ 8-12. This level of supportive care requires highly specialized
11 equipment, such as positive pressure ventilators and extracorporeal mechanical oxygenation. *Id.*
12 ¶ 9.

13 25. The extensive degree of support that COVID-19 patients need can quickly exceed
14 local healthcare resources, and this could be especially true for patients coming from
15 immigration detention centers. *Id.* ¶ 50. By far the best way to avoid further burdening an already
16 over-taxed healthcare system is to enable individuals, particularly those who are highly
17 vulnerable to serious complications from COVID-19, to avoid infection in the first place. *Id.* ¶
18 55.

19 26. The only way to protect vulnerable people from serious health outcomes,
20 including death, is to prevent them from being infected with the coronavirus. Because
21 meaningful risk mitigation is not possible at NWDC, these individuals must be released to avoid
22 needless suffering or death.

II. Conditions at the Northwest Detention Center Increase the Risk of COVID-19 Infection.

A. COVID-19 Spreads Rapidly in Detention and Correctional Facilities.

27. The conditions at NWDC place immigrant detainees at serious risk of infection with COVID-19. By detaining them at NWDC, Defendants thus place detainees who are vulnerable to serious illness or death from COVID-19 due to their age and/or underlying medical conditions at serious risk of these consequences.

28. COVID-19 is spreading rapidly through ICE detention centers throughout the country. Indeed, a recent study by public health experts projects that, in the next few months, 72 percent to 99 percent of immigration detainees are likely to be infected with the COVID-19 virus absent significant mitigation measures, including release.⁶

29. As of the date of this filing, there are 788 confirmed cases among people detained by ICE, out of 1,593 total detainees tested, and 42 confirmed cases among ICE employees at detention centers.⁷ ICE’s statistics do not include positive COVID-19 tests among employees of third-party contractors working at ICE facilities, such as the GEO officers at NWDC, because ICE takes the position that it need not release that information.⁸

30. Because ICE is not conducting widespread testing, the extent of the COVID-19 outbreak is unknown—including at NWDC. Declaration of Dora Schriro (“Schriro Decl.”) ¶¶ 15, 20, 25. However, there has been extensive testing at one facility, Otay Mesa in California, and

⁶ Ngo Decl., Ex. F, Michael Irvine, et al., *Modeling COVID-19 and Impacts on U.S. Immigration and Enforcement (ICE) Detention Facilities, 2020*, 97 J. Urban Health (forthcoming 2020) [hereinafter “Irvine Study”].

⁷ Ngo Decl., Ex. B, ICE Guidance.

⁸ Ngo Decl., Ex. G, Acacia Coronado, *At Least Seven Texas Detention Center Employees Who Tested Positive for COVID-19 Were Not Officially Reported by ICE*, Texas Observer, Apr. 16, 2020.

1 the results demonstrate the danger of the conditions in immigration detention. 133 detainees have
2 tested positive for COVID-19, and one has died.⁹

3 31. The structure and operation of NWDC presents ideal incubation conditions for the
4 rapid spread of COVID-19. Enclosed group environments, like cruise ships or nursing homes,
5 have become the sites for the most severe outbreaks of COVID-19. Amon Decl. ¶ 23.

6 Immigration detention centers present an even greater risk of outbreak and spread due to
7 crowding, structural limitations, and limited ability for detainees to practice proper hygiene. *Id.*;
8 Schiro Decl. ¶¶ 23, 31, 35, 38-40. NWDC is an enclosed environment in which contagious
9 diseases easily spread. People live in close quarters and are subject to security measures that
10 make social distancing impossible. Further, people at NWDC are unable to follow the relevant
11 directives promulgated by medical and public health officials for mitigating the spread of
12 COVID-19. Schiro Decl. ¶¶ 35, 36, 38, 41, 45-47, 51, 52.

13 32. The spread of COVID-19 at other correctional facilities, which are similarly
14 structured and operated, demonstrates this danger. Four of the five largest COVID-19 outbreaks
15 in the nation have occurred in correctional facilities, including the Marion Correctional
16 Institution in Marion, Ohio (2,356 confirmed cases); Pickaway Correctional Institution in Scioto
17 Township, Ohio (1,784 cases); Trousdale Turner Correctional Center in Hartsville, Tennessee
18 (1,285 cases); and Cook County Jail in Chicago, Illinois (970 cases).¹⁰

19 33. The University of California, Los Angeles School of Law's Behind Bars Project
20 has confirmed that over 21,000 incarcerated people and over 8,000 correctional staff have
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23 ⁹ Ngo Decl., Ex. A, Morrissey; *id.*, Ex. B, ICE Guidance.

24 ¹⁰ Ngo Decl., Ex. H, The New York Times, *Coronavirus in the U.S.: Latest Map and Case Count* (updated May 8, 2020).

1 contracted COVID-19 nationwide. 295 incarcerated people and 34 correctional staff have died of
2 COVID-19. These numbers are likely an underestimate.¹¹

3 **B. Immigration Detainees at NWDC Cannot Engage in Necessary Social Distancing.**

4 34. Social distancing is crucial to, and the main strategy for, preventing the spread of
5 COVID-19. Amon Decl. ¶ 15. But the nature of detention at NWDC denies people the
6 opportunity to protect themselves from the spread of COVID-19. Social distancing at NWDC is
7 physically impossible. Amon Decl. ¶ 30. NWDC and other immigration detention facilities are
8 not designed or operated to allow for the necessary physical distancing. See Amon Decl. ¶¶ 22,
9 23, 29, 30, 40, 52; Schriro Decl. ¶¶ 31(c), 35-44

10 35. At NWDC, most immigration detainees live in pods. These pods contain
11 dormitories housing dozens of detainees and common areas in which detainees congregate. The
12 dormitories are divided into different sleeping areas, but there are no full walls or other physical
13 divisions separating them. Their beds, usually bunkbeds, are so close that they could reach out
14 and touch a neighboring bunk, much less than six feet away. Declaration of Wilfredo Favela
15 Avendaño (“Favela Avendaño Decl.”) ¶¶ 5, 9,10; Declaration of Josue Castañeda Juarez
16 (“Castañeda Juarez Decl.”) ¶ 3; Declaration of Naeem Khan (“Khan Decl.”) ¶ 5; Declaration of
17 Elsa Diaz Reyes (“Diaz Reyes Decl.”) ¶ 6; Declaration of J█████ A█████-M█████ (“A█████-
18 M█████ Decl.”) ¶ 10; Declaration of Flavio Lopez Gonzalez (“Lopez Gonzalez Decl.”) ¶¶ 7, 8;
19 Declaration of Norma Lopez Nuñez (“Lopez Nuñez Decl.”) ¶¶ 5, 6.

20 36. Although the population of NWDC has decreased, the detention center has
21 combined some pods and closed others, so detainees in many pods are still in crowded
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23 ¹¹ Ngo Decl., Ex. I, Alice Speri, *Mass Incarceration Poses a Uniquely American Risk in the Coronavirus Pandemic*,
24 *The Intercept*, May 6, 2020.

1 conditions, with nearly all beds occupied. Diaz Reyes Decl. ¶ 9; Lopez Gonzalez Decl. ¶ 9;
2 Lopez Nuñez Decl. ¶ 4.

3 37. Detainees spend nearly all their time, including eating, socializing, and sleeping,
4 in the crowded pod areas. Favela Avendaño Decl. ¶¶ 9, 12, 14; Castañeda Juarez Decl. ¶¶ 5-9;
5 Khan Decl. ¶¶ 5, 7, 10; Diaz Reyes Decl. ¶¶ 6, 7; A ██████-M ██████ o Decl. ¶¶ 10, 12; Declaration
6 of Maksym Bonarov (“Bonarov Decl.”) ¶¶ 4-6; Lopez Gonzalez Decl. ¶ 4. Many must recreate
7 in small yard spaces in which social distancing is impossible. Castañeda Juarez Decl. ¶ 9; Diaz
8 Reyes Decl. ¶ 10; Lopez Nuñez Decl. ¶ 12. Detainees must share communal areas and surfaces.
9 They share just a few showers, sinks, and toilets among many people and must line up to use
10 them. Favela Avendaño Decl. ¶ 11; Castañeda Juarez Decl. ¶¶ 2, 6, 7; Diaz Reyes Decl. ¶¶ 8, 13;
11 Lopez Nuñez Decl. ¶¶ 8, 9. They eat at crowded tables, just a few inches apart from one another.
12 Favela Avendaño Decl. ¶ 14; Castañeda Juarez Decl. ¶ 5; Khan Decl. ¶ 7; Bonarov Decl. ¶ 6;
13 Lopez Gonzalez Decl. ¶ 6; Lopez Nuñez Decl. ¶ 7. They share a small number of tablets, phones,
14 and microwaves, and often line up in close proximity to use them. Castañeda Juarez Decl. ¶¶ 5,
15 8; Diaz Reyes Decl. ¶ 7; Bonarov Decl. ¶ 5; L Lopez Nuñez Decl. ¶¶ 7, 10, 11.

16 38. Individuals who have medical complications may have even more trouble socially
17 distancing. Detainees must wait in tiny rooms for medical appointments, during which time they
18 are two to three feet away from one another, and sometimes much closer if it is crowded.
19 Castañeda Juarez Decl. ¶ 10.

20 39. Detainees who participate in immigration court hearings are also placed into
21 crowded situations in which social distancing is not possible. They wait in holding areas with
22 many detainees together in a small room. Lopez Gonzalez Decl. ¶ 5. Many detainees are forced
23 to sit in small courtrooms, although the hearings are conducted remotely by video. Declaration of
24

1 Mark Nerheim (“Nerheim Decl.”) ¶¶ 12-14; Declaration of Andrew Augustine (“Augustine
2 Decl.”) ¶¶ 5, 6. Bonarov Decl. ¶ 14. They are not provided masks while they wait for their
3 hearings. *Id.* ¶ 14. Nor are the tables cleaned or hand sanitizer provided between hearings.
4 Augustine Decl. ¶ 7.

5 40. GEO officers often refuse to engage in social distancing as well, placing
6 themselves and detainees at risk. Nerheim Decl. ¶¶ 5, 6, 9.

7 41. These crowded conditions and shared common spaces and objects, such as
8 bathrooms and sinks, maximize the likelihood that COVID-19 will spread rapidly across the
9 facility, infecting vulnerable detainees. Amon Decl. ¶¶ 15, 22, 23, 29, 30, 40, 42, 43, 52. The
10 extensive movement within and among housing units, as well as to and from other areas of the
11 facility, expose detainees to many new individuals and put them at risk in the absence of the
12 ability to socially distance. Schriro Decl. ¶¶ 37-43.

13 42. The threat of the spread of infectious disease is not just theoretical: there is
14 currently a suspected outbreak of scabies at NWDC. Declaration of Gustavo Garcia Cruz
15 (“Garcia Cruz Decl.”) ¶¶ 2-4.

16 **C. Immigration Detainees at NWDC Cannot Practice Other Mitigation Strategies.**

17 43. Social distancing is paramount to prevent transmission of COVID-19. Other
18 mitigation strategies are also necessary to prevent transmission, including adequate hygiene and
19 sanitation practices. Whenever strict social distancing is not possible, masks are necessary to
20 mitigate, although not prevent, the spread of COVID-19. In detention settings, quarantine and
21 isolation are necessary to ensure that individuals who are sick or who have been exposed to
22 COVID-19 do not interact with others.
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1 44. CDC guidance also instructs everyone—including people who are incarcerated or
 2 detained—to wash hands often with soap and water for at least 20 seconds and, absent soap and
 3 water, to use a hand sanitizer of at least 60% alcohol.¹² CDC guidance directs that detention
 4 centers provide detainees with no-cost access to soap, running water, hand dryers or disposable
 5 paper towels, and, where possible, hand sanitizer.¹³ It also directs that those incarcerated or
 6 detained, like all others, cover their mouth and nose with a disposable tissue when coughing or
 7 sneezing.¹⁴

8 45. Individuals detained at NWDC are unable to engage in the hygiene practices
 9 necessary to protect themselves from COVID-19. Announcements regarding sanitation and
 10 hygiene practices are given only in English and Spanish, and sometimes only in English, with no
 11 translation for individuals who do not speak either of those languages. Favela Avendaño Decl. ¶
 12 8; A ██████ -M ██████ Decl. ¶ 13. Some detainees receive no instruction at all. Lopez Nuñez Decl.
 13 ¶ 14; Bonarov Decl. ¶ 9.

14 46. Sinks turn off every five or ten seconds, making it difficult for detainees to wash
 15 their hands for twenty seconds. Favela Avendaño Decl. ¶ 15; Castañeda Juarez Decl. ¶ 6; Khan
 16 Decl. ¶ 12; Lopez Gonzalez Decl. ¶ 10. Detainees have to push buttons to run the sink or flush
 17 the toilet, and those buttons are not disinfected. Diaz Reyes Decl. ¶ 13. Soap and towels run out
 18 and may not be replaced until the next day. Castañeda Juarez Decl. ¶ 6; Khan Decl. ¶ 12; Diaz
 19 Reyes Decl. ¶ 12. Detainees who want access to soap when it runs out at the facility must
 20 purchase it from the commissary. Khan Decl. ¶ 11. They must also purchase soap for showering.
 21 Lopez Gonzalez Decl. ¶ 10; Lopez Nuñez Decl. ¶ 9.

22 _____
 23 ¹² Ngo Decl., Ex. J, CDC, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in
 Correctional and Detention Facilities* 10, Mar. 23, 2020 [hereinafter “CDC Correctional Guidance”].

24 ¹³ *Id.*

¹⁴ *Id.*

1 47. The CDC instructs that, in detention facilities, frequently touched surfaces and
2 objects must be cleaned several times per day.¹⁵ This does not occur at NWDC. Showers may be
3 cleaned only once per day and are used many times between cleanings. Favela Avendaño Decl. ¶
4 11. Detainees are generally responsible for much of the cleaning, but are not necessarily able to
5 fully sanitize objects after every use. Castañeda Juarez Decl. ¶¶ 5, 8; Khan Decl. ¶ 8. Cleaning of
6 common areas and objects does not always happen regularly. Diaz Reyes Decl. ¶ 11; Lopez
7 Gonzalez Decl. ¶ 12; Lopez Nuñez Decl. ¶ 10. Even when officers are supposed to clean certain
8 objects or surfaces, they sometimes do not clean at all and other times do not clean properly.
9 Favela Avendaño Decl. ¶ 16.

10 48. NWDC’s failure to provide adequate sanitation and hygiene measures will allow
11 COVID-19 to spread freely in the facility. Amon Decl. ¶¶ 29, 37, 40.

12 49. CDC guidance further instructs everyone to wear face masks in settings where
13 social distancing is not feasible.¹⁶ CDC guidance also provides that those detained must wear
14 personal protective equipment, including masks and gloves, while cleaning in an area where a
15 person with a confirmed or suspected case of COVID-19 has been present.¹⁷

16 50. Despite CDC guidance, some detainees at NWDC are only provided with a single
17 mask every week, if any. Khan Decl. ¶ 6. Others are offered face masks out of a communal box
18 that officers who are not wearing masks or gloves have touched. Diaz Reyes Decl. ¶ 21.
19 Detainees are not required to wear masks. Bonarov Decl. ¶ 8. Officers rarely wear masks, even
20 when requested. Castañeda Juarez Decl. ¶¶ 13, 14; Khan Decl. ¶ 13; Diaz Reyes Decl. ¶ 21;
21 Bonarov Decl. ¶ 10; Augustine Decl. ¶ 3; Lopez Gonzalez Decl. ¶ 13; Lopez Nuñez Decl. ¶ 13.

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23 ¹⁵ Ngo Decl., Ex. J, CDC Correctional Guidance at 9.

¹⁶ Ngo Decl., Ex. K, CDC, *Recommendation Regarding the Use of Cloth Face Coverings*, Apr. 10, 2020.

¹⁷ Ngo Decl. Ex. J, CDC Correctional Guidance at 18.

1 They refuse to wear masks even when actively displaying symptoms of COVID-19. Nerheim
 2 Decl. ¶ 9. Detainees and attorneys are not required to, or even offered, masks or other personal
 3 protective equipment in the immigration courtroom. Augustine Decl. ¶¶ 10,11. This failure to
 4 properly wear personal protective equipment further increases detainees’ risk of exposure to
 5 COVID-19. Amon Decl. ¶¶ 38, 40-41.

6 51. Quarantine and medical isolation practices are similarly insufficient, if not
 7 dangerous. ICE guidance states that “[d]etainees who do not have fever or symptoms, but meet
 8 CDC criteria for epidemiologic risk, are housed separately in a single cell, or as a group.”¹⁸
 9 However, experts have concluded that cohorting vulnerable detainees together *increases* their
 10 risk of becoming infected with COVID-19. Amon Decl. ¶ 36.

11 52. CDC guidance for detention facilities directs that facilities separate detainees with
 12 symptoms of COVID-19 from others.¹⁹ It instructs that each individual with a confirmed or
 13 suspected case of COVID-19 should be assigned their own room and bathroom.²⁰ CDC guidance
 14 provides that as a last resort, “if there are no other available options,” multiple *laboratory-*
 15 *confirmed* COVID-19 cases—*not* suspected COVID-19 cases—may be placed together.²¹

16 53. Quarantine practices at NWDC place together detainees who may have been
 17 exposed without providing a way for them to socially distance. When individuals first come to
 18 NWDC, they may be placed in a quarantine pod with several other individuals. Favela Avendaño
 19 Decl. ¶ 3. If one person has symptoms of COVID-19, the entire pod may be quarantined, but no
 20 measures are taken to ensure that the individuals in the pod are able to socially distance during
 21 this time. *Id.* ¶ 17; Bonarov Decl. ¶ 12. Individuals are transferred into the quarantine pod. Lopez

22 ¹⁸ Ngo Dec., Ex. B, ICE Guidance.

23 ¹⁹ Ngo Decl., Ex. J, CDC Correctional Guidance at 10.

24 ²⁰ *Id.* at 15.

²¹ Ngo Decl., Ex. J, CDC Correctional Guidance at 19, 3 (defining cohorting).

1 Gonzalez Decl. ¶ 14. This failure to separate detainees with COVID-19 symptoms in a manner
2 consistent with best medical practices exposes other detainees to possible COVID-19 infection.
3 This practice is likely to facilitate rather than prevent disease transmission. *See* Amon Decl. ¶¶
4 36, 54.

5 54. Use of quarantine in the place of proper medical care is also dangerous. If an
6 individual is symptomatic for COVID-19, the pod is placed into quarantine but individuals are
7 not provided any COVID-19 tests; nor are high-risk individuals quarantined separately to protect
8 the most vulnerable from the disease. Favela Avendaño Decl. ¶ 17; Lopez Gonzalez Decl. ¶¶ 14-
9 17. When medically vulnerable detainees are housed with individuals who display COVID-19
10 symptoms, they are not isolated or tested for COVID-19. Castañeda Juarez Decl. ¶ 4; Khan Decl.
11 ¶ 5. Individuals detained at NWDC ordinarily have trouble accessing timely and adequate
12 medical care, even for emergencies. Diaz Reyes Decl. ¶¶ 14, 15; Khan Decl. ¶ 4; Lopez
13 Gonzalez Decl. ¶¶ 15-17. An increase in symptomatic individuals would make it difficult for
14 people to get the medical care they need for both COVID-19 and other medical problems. Amon
15 Decl. ¶ 49.

16 55. Individuals may also be placed into solitary confinement cells for medical
17 isolation due to COVID-19. Diaz Reyes Decl. ¶ 16. The solitary confinement cells are dirty,
18 poorly ventilated, and windowless. *Id.* ¶ 17. Individuals placed into these cells for medical
19 isolation are subject to the same rules and regulations, including limited opportunity to bathe, as
20 detainees placed there for rules infractions. *Id.* Using solitary confinement cells for this purpose
21 is contrary to best correctional practice and likely to lead individuals to hide symptoms if they
22 fear perceived punishment. Schriro Decl. ¶ 44.

1 56. Detainees are not told how to access tests for COVID-19 and are not regularly
2 tested. Castañeda Juarez Decl. ¶ 12; A ██████-M ██████ Decl. ¶ 14; Bonarov Decl. ¶ 13; Lopez
3 Gonzalez Decl. ¶¶ 17-19. Those who request tests due to symptoms that could indicate COVID-
4 19 are refused. Declaration of Perla Martinez Acosta (“Martinez Acosta Decl.”) ¶¶ 7-9;
5 Castañeda Juarez Decl. ¶ 12.

6 57. The possibility of asymptomatic transmission means that monitoring staff or
7 detainees for fever is also inadequate to identify all who may be infected and prevent
8 transmission. Amon Decl. ¶¶ 14, 32, 53. Failure to regularly test staff and detainees presents a
9 daily risk of spread of the virus throughout the facility. *Id.* ¶¶ 32, 33, 40.

10 58. In sum, it is impossible to stop the spread of the virus within NWDC, where
11 social distancing and necessary mitigation measures are not feasible. *See* Amon Decl. ¶¶ 52-54.
12 But Defendants continue to hold Plaintiffs and members of the class in conditions where they are
13 at grave risk of contracting COVID-19.

14 **III. Continued ICE Detention is Unsafe for Individuals, Like Plaintiffs, who are**
15 **Vulnerable to Serious Illness and Death from COVID-19.**

16 59. Without a vaccine or cure for COVID-19, mitigating the risk of contracting the
17 virus is the only known way to protect those who are most vulnerable to serious harm from
18 infection. Amon Decl ¶¶ 15, 55.

19 60. Because the risk of infection is at its zenith in detention centers, public health
20 experts with experience in detention and correctional settings have recommended release of
21 vulnerable individuals from custody. Amon Decl. ¶ 55. Indeed, two medical experts for the
22 Department of Homeland Security have concluded that COVID-19 poses an “imminent risk to
23 the health and safety of immigration detainees,” in light of the nature of detention facilities and
24

1 have recommended release of vulnerable people, both to mitigate that risk and to reduce the
2 strain on local healthcare systems.²²

3 61. This call for release is underscored by a new study showing that 72% to 99% of
4 immigration detainees are likely to be infected with COVID-19 in the next few months absent
5 significant mitigation measures such as release.²³

6 62. Immigration detention facilities like NWDC lack adequate medical care
7 infrastructure to address a COVID-19 outbreak. Amon Decl. ¶¶ 48-50.

8 63. The Named Plaintiffs and putative class members in this case are all individuals
9 who are especially vulnerable to serious illness and death if they are infected with COVID-19.
10 But ICE nonetheless detained or continues to detain them at NWDC. Given ICE’s inability to
11 protect the named Plaintiffs and the proposed class while they remain at NWDC, the only
12 effective remedy is release.

13 **CLASS ALLEGATIONS**

14 64. Plaintiffs bring this action pursuant to Federal Rules of Civil Procedure 23(a) and
15 23(b)(2), and as a representative habeas action, on behalf of themselves and all other persons
16 similarly situated. The proposed class is defined as follows:

17 All individuals detained at the Northwest Detention Center who are age 60 years
18 or older or have medical conditions that place them at heightened risk of severe
19 illness or death from COVID-19 as determined by Centers for Disease Control
and Prevention guidelines.

Those underlying medical conditions include:

- 20 1. Chronic kidney disease (e.g., receiving dialysis);
- 21 2. Chronic liver disease (e.g., cirrhosis and chronic hepatitis);
- 22 3. Endocrine disorders (e.g., diabetes mellitus);
- 23 4. Compromised immune system (immunosuppression) (e.g., receiving
treatment such as chemotherapy or radiation, received an organ or bone
marrow transplant and is taking immunosuppressant medications, taking

24 ²² Ngo Decl., Ex. C, Allen & Rich Letter.

²³ Ngo Decl., Ex. F, Irvine Study.

- high doses of corticosteroids or other immunosuppressant medications, HIV or AIDS);
- 5. Metabolic disorders (e.g., inherited metabolic disorders and mitochondrial disorders);
- 6. Heart disease (e.g., congenital heart disease, congestive heart failure, and coronary artery disease);
- 7. Lung disease (e.g., asthma, chronic obstructive pulmonary disease (chronic bronchitis or emphysema), or other chronic conditions associated with impaired lung function or that require home oxygen);
- 8. Neurological and neurologic and neurodevelopment conditions (including disorders of the brain, spinal cord, peripheral nerve, and muscle such as cerebral palsy, epilepsy (seizure disorders), stroke, intellectual disability, moderate to severe developmental delay, muscular dystrophy, or spinal cord injury);
- 9. Current or recent pregnancy (in the last two weeks);
- 10. Body mass index (BMI) greater than 40; and
- 11. Hypertension.

See Amon Decl. ¶¶ 10, 11 (listing medical conditions that the CDC has identified as placing individuals at heightened risk for serious illness and death from COVID-19, including all of the above).

65. The class is so numerous that joinder of all members is impracticable. NWDC has an average daily population of 920 in FY2020.²⁴ A significant proportion of these individuals have serious medical conditions and/or are over the age of 60.²⁵ Four individuals currently detained at NWDC are the Plaintiffs in this case. Two other detained individuals who are vulnerable due to age and/or underlying health conditions have submitted declarations as well. Martinez Acosta Decl. ¶ 3-5; Lopez Gonzales Decl. ¶ 2. It is reasonable to infer that there are at

²⁴ Ngo Decl., Ex. L, ICE, ERO Custody Management Division Authorized Dedicated Facility List, Apr. 6, 2020.
²⁵ A U.S. Department of Justice study found that 43.9% of people detained in prisons and jails nationwide had “a current chronic medical condition” that approximately correlates with those identified by the CDC for COVID-19. See Ngo Decl., Ex. M, Laura M. Marushack et al., *Medical Problems of State and Federal Prisoners and Jail Inmates*, at *3, 2011-12, U.S. Dep’t of Justice, Oct. 4, 2016. Between 26% and 30% of detainees have high blood pressure, and 14% to 21% suffer from tuberculosis, Hepatitis B or C, or a sexually transmitted disease. *Id.* 62% to 74% range from overweight to morbidly obese. *Id.*

1 least dozens more who are detained at NWDC who fit the class definition. *See also* Lopez Nunez
2 Decl. ¶15.

3 66. Proposed class members' detention presents common questions of fact and law.
4 All class members are similarly situated as a result of their increased risk of serious medical
5 complications or death from contracting COVID-19. All class members are similarly situated in
6 that conditions at NWDC make social distancing and other protective measures impossible. They
7 all share the common question of whether their continued detention at NWDC violates the Due
8 Process Clause.

9 67. The claims of the proposed class representatives are typical of the claims of the
10 proposed class. All proposed class representatives face a grave risk of serious illness or death
11 from COVID-19 due to their age and/or underlying medical conditions, and all raise the same
12 due process challenge to their detention. The proposed class representatives' legal challenges to
13 their detention are identical to those of the proposed class.

14 68. The proposed class representatives are adequate representatives because they seek
15 the same relief as the other members of the class: declaratory relief that their ongoing custody
16 violates the Due Process Clause, and injunctive relief and a writ of habeas corpus requiring their
17 release. The proposed class representatives do not have any interests adverse to those of the class
18 as a whole.

19 69. The proposed class would be represented by counsel from the ACLU Foundation
20 of Washington, the ACLU Foundation, and the Northwest Immigrant Rights Project. Counsel
21 have extensive experience litigating class action lawsuits, including lawsuits on behalf of
22 incarcerated people generally and immigration detainees in particular.

1 70. Defendants have acted on grounds generally applicable to the class by continuing
2 to detain them in circumstances where they are likely to suffer serious medical complications
3 and/or die from COVID-19. Thus, injunctive and declaratory relief is appropriate with respect to
4 the class as a whole.

5 **LEGAL FRAMEWORK**

6 **I. Immigrant Detainees Are Entitled to Due Process Protections Against Exposure
7 to Infectious Disease.**

8 71. Whenever the government detains or incarcerates someone, it has an affirmative
9 duty to provide conditions of reasonable health and safety. As the Supreme Court has explained,
10 “when the State takes a person into its custody and holds him there against his will, the
11 Constitution imposes upon it a corresponding duty to assume some responsibility for his safety
12 and general well-being.” *DeShaney v. Winnebago Cty. Dep’t. of Soc. Servs.*, 489 U.S. 189, 199-
13 200 (1989). As a result, the government must provide those in its custody with “food, clothing,
14 shelter, medical care, and reasonable safety. . . .” *Id.* at 200; *see also Pimentel-Estrada*, 2020 WL
15 2092430, at *11.

16 72. Conditions that pose an unreasonable risk of future harm violate the Eighth
17 Amendment’s prohibition against cruel and unusual punishment, even if that harm has not yet
18 come to pass. The Eighth Amendment requires that “inmates be furnished with the basic human
19 needs, one of which is ‘reasonable safety.’” *Helling*, 509 U.S. at 33 (quoting *DeShaney*, 489 U.S.
20 at 200). Accordingly, “[i]t would be odd to deny an injunction to inmates who plainly proved an
21 unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to
22 them.” *Id.* Exposing imprisoned people to the risk of infectious disease is unconstitutional, even
23 when it is “not alleged that the likely harm would occur immediately and even though the
24 possible infection might not affect all of those exposed.” *Id.* (citing *Hutto v. Finney*, 437 U.S.

1 678, 682 (1978)). For this reason, a judge of this Court released a detainee from NWDC, even
2 though there were no confirmed COVID-19 cases in the detention center at that point. *Pimentel-*
3 *Estrada*, 2020 WL 2092430, at *16, *19 (citing *Helling*, 509 U.S. at 33; *Hutto*, 437 U.S. at 682;
4 *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985); *Malam I*, 2020 WL 1672662, at *13).

5 73. Civil immigration detainees, like Plaintiffs and the proposed class, are entitled to
6 even stronger constitutional protections. In contrast to convicted prisoners, immigration
7 detainees, regardless of prior criminal convictions, are civil detainees held only to ensure their
8 appearance for civil removal proceedings or for deportation. Thus, their constitutional
9 protections in custody derive from the Fifth Amendment Due Process Clause. *See Zadvydas v.*
10 *Davis*, 533 U.S. 678, 690 (2001) (“[G]overnment detention violates th[e] [Fifth Amendment Due
11 Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate
12 procedural protections . . . or, in certain special and ‘narrow’ nonpunitive ‘circumstances’ . . .”);
13 *Pimentel-Estrada*, 2020 WL 2092430, at *17.

14 74. The protections of the Fifth Amendment are stronger than those of the Eighth
15 Amendment. In contrast to the Eighth Amendment, the government violates the Fifth
16 Amendment rights of a person in civil detention when the conditions of his or her confinement
17 “amount to punishment. . . .” *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). The Ninth Circuit has
18 applied this principle to make clear that civil detainees, like Plaintiffs here, are entitled to
19 conditions of confinement that are *superior* to those of convicted prisoners and even to those of
20 criminal pretrial detainees. *Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004), *cert. denied*,
21 546 U.S. 820 (2005) (holding presumptively punitive, and thus unconstitutional, conditions of
22 confinement for civil detainees that are similar to those faced by pre-trial criminal detainees); *see*
23 *also King v. Cnty. of Los Angeles*, 885 F.3d 548, 557 (9th Cir. 2018) (same).

1 75. Because civil detention is governed by the Fifth Amendment rather than the
2 Eighth Amendment, the “deliberate indifference” standard required to establish constitutional
3 violation in the latter context does not apply to civil detainees like Plaintiffs. *See Jones*, 393 F.3d
4 at 934. “A petitioner can demonstrate punitive conditions by showing that the challenged
5 condition is: (1) expressly intended to punish or (2) not rationally related to a legitimate
6 government objective or is excessive to that purpose.” *Pimentel-Estrada*, 2020 WL 2092430, at
7 *17 (citing *Wolfish*, 441 U.S. at 535 & n.16). Thus, a condition of confinement for a civil
8 immigration detainee violates the Constitution “if it imposes some harm to the detainee that
9 significantly exceeds or is independent of the inherent discomforts of confinement and is not
10 reasonably related to a legitimate governmental objective or is excessive in relation to the
11 legitimate governmental objective.” *Unknown Parties v. Johnson*, No. cv-15-250-TUC-DCB,
12 2016 WL 8188563, at *5 (D. Ariz. Nov. 18, 2016), *aff’d sub nom. Doe v. Kelly*, 878 F.3d 710
13 (9th Cir. 2017) (citing *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473-74 (2015)); *see also*
14 *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (outlining elements of pretrial
15 detainee’s failure to protect claim under the Fourteenth Amendment); *Pimentel-Estrada*, 2020
16 WL 2092430, at *11 (citing *Castro*, 833 F.3d at 1071) (same). Immigration detention that places
17 detainees at a substantial risk of serious illness or death is not rationally related to a legitimate
18 governmental objective and thus violates the Fifth Amendment.

19 **II. Defendants Are Violating Plaintiffs’ Fifth Amendment Rights.**

20 76. The conditions described above at NWDC violate Plaintiffs’ due process rights.
21 Due process requires that the nature and duration of noncriminal confinement bear “some
22 reasonable relation to the purpose for which the individual is committed.” *Jackson v. Indiana*,
23 406 U.S. 715, 738 (1972). The only legitimate purpose, consistent with due process, for civil
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1 immigration detention is to prevent flight and ensure the detained person’s attendance for a legal
2 hearing adjudicating their status or for removal, or to otherwise ensure the safety of the
3 community. *See Zadvydas*, 533 U.S. at 699-700.

4 77. Keeping medically vulnerable people detained in a setting where effective
5 hygiene and social distancing is impossible, in the midst of the COVID-19 pandemic, serves no
6 legitimate purpose. Nor is detention under these circumstances reasonably related to the
7 enforcement of immigration laws. Defendants’ continued detention of Plaintiffs and the proposed
8 class at NWDC thus violates the Fifth Amendment.

9 78. Plaintiffs’ Fifth Amendment rights are also violated because Defendants have
10 made an intentional decision to detain them under conditions that are objectively unreasonable
11 and that place them at serious risk of being infected with COVID-19.

12 79. COVID-19 poses a serious risk to Plaintiffs. As explained above, Plaintiffs are at
13 extreme risk because of their age and/or underlying health conditions. *See supra* ¶¶ 11-14; 59-61.
14 COVID-19 is highly contagious and can cause severe illness and death, and the only known
15 measures to prevent the spread of the disease cannot be practiced at NWDC. *See supra* ¶¶ 19-58.

16 80. Defendants have full knowledge of but are disregarding the serious risk that
17 COVID-19 poses to people like Plaintiffs and the proposed class at NWDC. Defendants have
18 long been on notice of the risk that COVID-19 poses to Plaintiffs and others with serious medical
19 conditions and/or who are at advanced age, and that release is the only effective way to protect
20 them. Indeed, as early as February 25, 2020, two medical experts for DHS alerted the agency
21 about the specific risk posed to immigrant detainees by COVID-19. On March 19, 2020, they
22 brought their concerns to the House and Senate Committees on Homeland Security and warned
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1 of the danger of rapid spread of COVID-19 in immigration detention facilities.²⁶ They explained
2 that in order to save both the lives of detainees and lives in the community at large, “minimally,
3 DHS should consider releasing all detainees in high risk medical groups[.]”²⁷

4 81. John Sandweg, a former acting director of ICE, has written publicly about the
5 need to release detainees because ICE detention centers “are extremely susceptible to outbreaks
6 of infectious diseases” and “preventing the virus from being introduced into these facilities is
7 impossible.”²⁸

8 82. The only means to protect the Fifth Amendment rights of Plaintiffs and the
9 proposed class is release. The severe risk to which they are being subjected cannot be abated if
10 they remain at NWDC. Public health experts have made clear that slowing the spread of COVID-
11 19 requires social distancing and increased hygiene and that individuals with Plaintiffs’
12 underlying medical conditions are vulnerable to serious disease and death if they contract the
13 virus. *See supra* ¶¶ 22, 34, 43, 48, 58; Golob Decl. ¶¶ 3, 14. However, Plaintiffs cannot take the
14 requisite social distancing and hygiene measures while detained at NWDC. Because risk
15 mitigation at NWDC is impossible, the only effective remedy for the unconstitutional conditions
16 to which Plaintiffs and the proposed class are being subjected is release from the detention
17 center.

18 **III. ICE Regularly Uses Its Authority to Release People Detained In Custody Who**
19 **Are Vulnerable to Serious Medical Conditions.**

20 83. ICE has a longstanding practice of humanitarian releases from custody. The
21 agency has routinely exercised its authority to release particularly vulnerable detainees. In fact,

22 _____
²⁶ Ngo Decl., Ex. C, Allen & Rich Letter.

23 ²⁷ *Id.*

24 ²⁸ Ngo Decl., Ex. N, John Sandweg, *I Used to Run ICE. We Need to Release the Nonviolent Detainees*, *The Atlantic* (Mar. 22, 2020).

1 ICE has exercised its discretion to release several particularly vulnerable people from NWDC
2 since the start of the pandemic.²⁹

3 84. ICE has a range of highly effective tools at its disposal to ensure that individuals
4 report for court hearings and other appointments, including conditions of supervised released.
5 Schriro Decl. ¶¶ 61-65. For example, ICE’s supervision program, the Intensive Supervision
6 Appearance Program (“ISAP”), relies on, when necessary, the use of electronic ankle monitors,
7 biometric voice recognition software, home visits, reporting to supervise participants. *Id.* ¶ 63. A
8 government-contracted evaluation of this program reported a 99% attendance rate at all
9 immigration court hearings. *Id.* ¶ 62.

10 85. ICE’s release authority is based in a range of statutory and regulatory provisions,
11 and follows a long line of agency directives that explicitly instructed officers to exercise
12 favorable discretion in cases involving severe medical concerns and other humanitarian equities
13 militating against detention. For example, under 8 C.F.R. § 212.5(b)(1), ICE has routinely
14 exercised its discretion to release detainees “who have serious medical conditions in which
15 continued detention would not be appropriate.” *See also* 8 U.S.C. §§ 1182(d)(5), 1225(b),
16 1226(a), 1231; 8 C.F.R. §§ 1001.1(q), 212.5, 235.3, 236.2(b).

17 86. While ICE officers may have been exercising discretion to release less frequently
18 in recent years, the statutory and regulatory authority underlying the use of prosecutorial
19 discretion in custodial determinations remains in effect.

20 87. Moreover, ICE has released noncitizens on medical grounds regardless of the
21 statutory basis for a noncitizen’s detention. Schriro Decl. ¶ 29.

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²⁹ *See, e.g., Dawson v. Asher*, No. C20-409 JLR-MAT, 2020 WL 1704324, at *3 & n.5 (W.D. Wash. Apr. 8, 2020)
(noting that ICE voluntarily released four of nine Plaintiffs claiming severe risk from COVID-19).

1 88. Here, the Due Process Clause of the Fifth Amendment to the U.S. Constitution
2 requires ICE to release detainees where civil detention is unable to provide reasonable safety or
3 has become punitive and where release is the only effective remedy. To be clear, Plaintiffs seek
4 release on constitutional grounds, and not in the exercise of ICE’s discretion. However, the fact
5 that ICE has the authority to release immigrants from custody and has exercised this authority in
6 the past demonstrates that the remedy Plaintiffs request is neither unprecedented nor
7 unmanageable.

8 **IV. This Court Has Authority to Order Plaintiffs’ Release to Vindicate Their Fifth**
9 **Amendment Rights, and Such Relief Is Necessary Here.**

10 89. Courts have broad power to fashion equitable remedies to address constitutional
11 violations in prisons. *Hutto*, 437 U.S. at 687 n.9. “When necessary to ensure compliance with a
12 constitutional mandate, courts may enter orders placing limits on a prison’s population.” *Brown*
13 *v. Plata*, 563 U.S. 493, 511 (2011); *see also Duran v. Elrod*, 713 F.2d 292, 297-98 (7th Cir.
14 1983) (concluding that court did not exceed its authority in directing release of low-bond pretrial
15 detainees as necessary to reach a population cap).

16 90. “Regardless of the statutory basis for Petitioner’s detention, the Court has the
17 authority to order his release if his continued detention violates the Constitution.” *Pimentel-*
18 *Estrada*, 2020 WL 2092430, at *18 ((releasing detainee subject to mandatory detention) (citing
19 *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971); *Stone v. City & Cty. of*
20 *San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992); *Malam I*, 2020 WL 1672662, at *1–*2
21 (ordering release of detainee held under 8 U.S.C. § 1226(c)); *Vazquez Barrera*, 2020 WL
22 1904497, at *1 (same)).

91. In light of the imminent threat posed by COVID-19, a growing chorus of courts across the country have ordered the release of particularly vulnerable detainees from ICE facilities. Recognizing the danger posed by asymptomatic carriers, ICE’s lack of testing, and detention facilities that do not allow for social distancing, courts, as in *Pimentel-Estrada*, have ordered release even where there were no confirmed cases in the facility at issue. *Francisco Hernandez*, Dkt. 17, at 1, 14 (ordering release of one medically vulnerable ICE detainee); *Malam I*, 2020 WL 1672662, at *2 (same); *Bahena Ortuño*, 2020 WL 1701724, at *5 (same for four detainees); *Malam II*, 2020 WL 1809675, at *3 (same for one) *Bent*, 2020 WL 1812850, at *1 (same); *Doe*, 2020 WL 1820667, at *1 (same); *Ixchop Perez*, 2020 WL 1865303 , at *1 (same); *Fofana*, 2020 WL 1873307, at *1 (same); (E.D. Mich. Apr. 15, 2020); *Vazquez Barrera*, 2020 WL 1904497, at *8 (same); *Amaya-Cruz*, 2020 WL 1903123, at *2-*3 (same); *Zaya*, 2020 WL 1903172, at *1 (same); *Singh*, 2020 WL1929366, at *11 (same); *Kaur*, 2020 WL 1939386, at *1 (same); *Manuel Hernandez*, Dkt. 12, at 1 (same); *Doe*, 2020 WL 1984266, at *6-*7 (same); *Favi*, 2020 WL 2114566, at *1 (same); *Coreas*, Dkt. 93, at 1-2 (same for two detainees).

92. By continuing to detain Plaintiffs, Defendants are subjecting Plaintiffs to unreasonable harm, and to unconstitutional punishment. The only course of action that can remedy these unlawful conditions is release from NWDC.

CLAIMS FOR RELIEF

CLAIM ONE

**Violation of the Fifth Amendment
(All Plaintiffs and the Putative Class)
(Substantive Due Process; Unlawful Punishment;
Objectively Unreasonable Risk to Health and Safety)**

93. Plaintiffs repeat and reallege all the allegations above and incorporate them by reference here.

1 94. The Fifth Amendment to the United States Constitution guarantees that civil
2 detainees, including immigration detainees, may not be subjected to punishment or to conditions
3 that create an objectively unreasonable risk of serious harm. The federal government violates this
4 substantive due process right when it fails to satisfy its affirmative duty to provide conditions of
5 reasonable health and safety to the people it holds in custody. The federal government also
6 violates substantive due process when it subjects civil detainees to conditions of confinement that
7 amount to punishment.

8 95. By detaining Plaintiffs and the proposed class members at NWDC, Defendants
9 subject them to a heightened risk of contracting COVID-19, for which there is no vaccine or
10 cure, and which is likely to be extremely dangerous or fatal for Plaintiffs and proposed class
11 members. Plaintiffs and the proposed class are vulnerable to serious medical complications from
12 COVID-19 and are at risk of serious illness and death so long as they are held in detention. By
13 subjecting Plaintiffs to this risk, Defendants maintain detention conditions that amount to
14 punishment and fail to ensure reasonable safety and health, in violation of Plaintiffs' due process
15 rights.

16 96. Likewise, Defendants' continued detention of Plaintiffs at NWDC is deliberately
17 indifferent to Plaintiffs' health and safety because only releasing Plaintiffs from custody can
18 adequately protect them from COVID-19. Defendants are aware of the serious risk posed by
19 COVID-19 and are failing to take the only action that can respond to Plaintiffs' medical needs,
20 which is to release Plaintiffs. Defendants' failure to release Plaintiffs and proposed class members
21 has caused them constitutional harm by continuing to subject them to this unreasonable and
22 potentially fatal risk.

1 97. For these reasons, Defendants’ ongoing detention of Plaintiffs violates the Due
2 Process Clause.

3 **PRAYER FOR RELIEF**

4 WHEREFORE Petitioners-Plaintiffs request that the Court grant the following relief:

5 a. Certify, pursuant to Fed. R. Civ. P. 23(a) and (b)(2), the following Plaintiff class:

6 All individuals detained at the Northwest Detention Center who are age 60
7 years or older or have medical conditions that place them at heightened
8 risk of severe illness or death from COVID-19 as determined by Centers
9 for Disease Control and Prevention guidelines.

10 b. Appoint the undersigned as class counsel pursuant to Fed. R. Civ. P. 23(g);

11 c. Issue a writ of habeas corpus on the ground that the continued detention of
12 Plaintiffs and those similarly situated to them violates the Due Process Clause, and order the
13 release of Plaintiffs and those similarly situated to them, with appropriate precautionary public
14 health measures and reasonable conditions of release if necessary;

15 d. Issue injunctive relief ordering Defendants to release Plaintiffs and those similarly
16 situated to them, with appropriate precautionary public health measures and reasonable
17 conditions of release if necessary, on the ground that their continued detention violates the Due
18 Process Clause;

19 e. Issue a declaration that Defendants’ continued civil immigration detention at
20 NWDC of individuals at increased risk for severe illness or death from COVID-19 violates the
21 Due Process Clause;

22 f. Award Plaintiffs their costs and reasonable attorneys’ fees in this action under the
23 Equal Access to Justice Act (“EAJA”), as amended, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and
24 on any other basis justified under law; and

g. Grant any other and further relief that this Court may deem fit and proper.

Respectfully submitted on this 8th day of May, 2020.

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*Pro hac vice application forthcoming

**Pro hac vice applciation forthcoming; not admitted in DC; practice limited to federal court

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