

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

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UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILFREDO FAVELA AVENDAÑO,
J.A.M, and NAEEM KHAN,

Petitioners-Plaintiffs,

v.

NATHALIE ASHER, Director of the Seattle
Field Office of U.S. Immigration and
Customs Enforcement; TAE D. JOHNSON,¹
Acting Director of the U.S. Immigrations and
Customs Enforcement; U.S. IMMIGRATION
AND CUSTOMS ENFORCEMENT;
STEPHEN LANGFORD, Warden, Tacoma
Northwest Detention Center,

Respondents-Defendants.

FEDERAL RESPONDENTS' MOTION FOR
SUMMARY JUDGMENT

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

Noting Date: March 26, 2021

¹ Pursuant to Federal Rule of Civil Procedure 25(d), U.S. Immigration and Customs Enforcement ("ICE") Acting Director Tae D. Johnson is automatically substituted in place of Tony H. Pham.

1 Federal Respondents, United States Immigration and Customs Enforcement (“ICE”), ICE
 2 Acting Director Tae D. Johnson, and ICE Seattle Field Office Director Nathalie Asher
 3 (collectively, the “Government”), by and through their attorneys, Tessa M. Gorman, Acting United
 4 States Attorney for the Western District of Washington, and Michelle R. Lambert and James C.
 5 Strong, Assistant United States Attorneys, move this Court to enter summary judgment pursuant
 6 to Federal Rule of Civil Procedure 56. This Court should dismiss the Amended Petition because
 7 Petitioners cannot demonstrate that Petitioner Khan’s detention at the Northwest ICE Processing
 8 Center (“NWIPC”) in Tacoma, Washington, violates the Fifth Amendment because of the
 9 Coronavirus Disease 2019 (“COVID-19”) pandemic in the United States.

10 I. INTRODUCTION

11 Petitioner Naeem Khan’s conditions of confinement at NWIPC squarely satisfy his Fifth
 12 Amendment constitutional rights to reasonable safety and non-punitive detention.² The Court
 13 should grant the Government’s motion for summary judgment because Petitioners fail to
 14 demonstrate that the robust practices and protocols ICE and the ICE Health Service Corps
 15 (“IHSC”) have implemented to protect NWIPC’s detainees and staff, or the conditions inside of
 16 NWIPC, make Petitioner Khan’s detention (1) unreasonably safe, or (2) an excessive condition in
 17 relation to the legitimate objective of immigration detention. *See* Am. Pet., ¶¶ 94-98.

18 The Government’s response to the COVID-19 pandemic has consistently evolved as
 19 knowledge of the virus has developed. The Government’s actions to prevent and protect against
 20 the spread of COVID-19 complies with guidance from the Centers for Disease Control and
 21 Prevention (the “CDC”), local and state public health recommendations, and the Constitution.
 22 Petitioners rely on outdated procedures at NWIPC while falsely alleging that social distancing is
 23 impossible for detainees at NWIPC, that NWIPC staff fail to “reliably wear masks,” and that there
 24 is inadequate availability of COVID-19 testing at NWIPC. Am. Pet., ¶ 3. However, “COVID-19

25
 26 ² Petitioner Khan is the only named Petitioner in detention. The other named Petitioners have been released from
 custody. Dkt. No. 188, Order, at 2 n.1.

1 presents highly unusual and unique circumstances, that have radically transformed our everyday
2 lives in ways previously inconceivable, and have altered [our world] with lighting speed . . . and
3 unprecedented [results.]” *Hope v. Warden York Cty. Prison*, 972 F.3d 310, 330 (3d Cir. 2020)
4 (alterations in original; internal quotation marks and citations omitted). This Court should evaluate
5 the Government’s response to the pandemic in this context and assess the current procedures being
6 applied at NWIPC. Furthermore, as this case is not currently certified as a class action, this Court
7 should limit its evaluation of the conditions of confinement at NWIPC to Petitioner Khan.

8 Summary judgment is appropriate here. First, ICE’s statutory authority to detain Petitioner
9 Khan pursuant to the Immigration and Naturalization Act (“INA”) is without dispute. Second,
10 Petitioner Khan’s continued detention does not violate substantive due process as NWIPC provides
11 for his reasonable safety. Furthermore, as the Supreme Court has repeatedly recognized, detention
12 is a constitutionally permissible aspect of the Government’s enforcement of the immigration laws
13 and fulfills the legitimate purpose of ensuring that individuals appear for their removal
14 proceedings. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018); *Demore v. Kim*, 538 U.S.
15 510, 523 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001). Consistent with the
16 requirements of due process, Petitioner Khan’s confinement is thus “reasonably related” to a
17 legitimate government interest. *Bell v. Wolfish*, 441 U.S. 535, 538-39 (1979).

18 Finally, Petitioners cannot establish a substantive due process violation based on the
19 Government’s purported deliberate indifference to Petitioner Khan’s medical needs. ICE has
20 proactively mobilized to prevent, contain, and treat COVID-19 cases. ICE has implemented CDC
21 guidance, including screening, comprehensive testing, and the quarantining of all new and
22 returning detainees for 14 days, as well as anyone showing COVID-19 symptoms; employed
23 routine prevalence testing of the general population; enacted mask mandates; suspended social
24 visitation at NWIPC; and increased the scope and frequency of sanitation procedures and the
25 availability of cleaning supplies, soap, and masks.

1 Although Petitioners include requests for relief in alternative to release, the Amended
 2 Petition principally seeks the release of Petitioner Khan and the putative class. *See* Am Pet., Prayer
 3 for Relief. This is because the alternative relief they seek is unnecessary or duplicative at NWIPC
 4 and inapplicable to Petitioner Khan. For instance, Petitioners ask the Court to require ICE “to
 5 expeditiously review putative class members for release.” *Id.*, ¶ e. A process is already in place
 6 to identify and review detainees that would fall within the proposed class for release. *See Fraihat*
 7 *v. ICE*, 445 F.Supp.3d 709, 751 (C.D. Cal. Apr. 20, 2020) (nationwide Preliminary Injunction);
 8 *Fraihat v. ICE*, 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020) (clarifying order) (“*Fraihat*”). ICE
 9 has performed multiple reviews of Petitioner Khan through this process. Next, Petitioners show
 10 no reason for an order limiting the population at NWIPC. Am. Pet., Prayer for Relief, ¶ g. ICE
 11 continues to reduce the detainee population at NWIPC, which now is at 15.3% of capacity.
 12 Furthermore, Petitioner Khan is housed in a unit with 11.1% occupancy. Lastly, IHSC already
 13 tests various groups of detainees within the facility and conducts routine prevalence testing
 14 throughout the general population. *Id.*, ¶ h.

15 Accordingly, the Government requests that its motion for summary judgment be granted.

16 II. FACTUAL BACKGROUND³

17 A. NWIPC

18 ICE detains Petitioner Khan at NWIPC as he has been deemed by an Immigration Judge
 19 (“IJ”) to be a danger to the community and a flight risk. *See* Declaration of Jack Lippard, dated
 20 March 4, 2021 (“Lippard Decl.”), ¶ 92. The NWIPC is a private detention center run by The GEO
 21 Group, Inc. (“GEO”). *Id.*, ¶ 5. GEO is an independent contractor that provides the facility,
 22 management, personnel and services for 24-hour supervision of immigrant detainees. *Id.* IHSC,
 23 a federal entity, provides medical, dental, and mental health care to detainees at NWIPC.
 24 Declaration of Dr. Sheri Malakhova, dated March 3, 2021 (“Malakhova Decl.”) ¶ 2. Petitioner

25 _____
 26 ³ A more detailed factual background is available to the Court in the Lippard and Malakhova Declarations filed with
 this motion.

1 Khan has access to IHSC’s medical clinic, which is currently staffed with physicians, nurses,
 2 radiology technicians, records technicians, pharmacists and pharmacy technicians, psychiatrists
 3 and behavioral health specialists, as well as dentists and dental technicians. *Id.*, ¶ 3.

4 Since the start of the pandemic, the Government enacted policies and procedures to prevent
 5 the entry and spread of COVID-19 at NWIPC based on guidance documents prepared by the CDC,
 6 IHSC, and ICE’s Enforcement and Removal Operations (“ERO”). Lippard Decl., ¶¶ 11-16;
 7 Malakhova Decl., ¶¶ 7-8. The specific COVID-19 policies at NWIPC are primarily adopted from
 8 the CDC’s *Interim Guidance on Management of Coronavirus Disease 2019 in Correctional and*
 9 *Detention Facilities* (“CDC Interim Guidance”),⁴ ERO’s *COVID-19 Pandemic Response*
 10 *Requirements* (the “PRR”),⁵ a document developed by ICE in consultation with the CDC, and
 11 IHSC’s *Interim Reference Sheet on 2019-Novel Coronavirus (COVID-19): Detainee Care* (“IHSC
 12 Interim Reference Sheet”).⁶ Lippard Decl., ¶¶ 11-16; Malakhova Decl., ¶ 7. Local ICE federal
 13 compliance personnel perform monthly spot checks at NWIPC to ensure compliance with the PRR
 14 by both GEO and ERO. Lippard Decl., ¶¶ 68-69.

15 ICE’s COVID-19 pandemic response is dynamic and has evolved in response to
 16 developing knowledge concerning COVID-19, changes in criteria and guidance from the CDC, as
 17 well as requirements resulting from ongoing litigation in other jurisdictions. *See* Lippard Decl.,
 18 ¶ 3 (citing *Fraihat*); Malakhova Decl., ¶ 8.

19 The policies and procedures have substantially reduced the threat of COVID-19 infections
 20 and potential outbreaks at NWIPC. As of March 3, 2021, no known COVID-19 positive detainees
 21 are housed at NWIPC. Malakhova Decl., ¶ 52. In total, 34 detainees have tested positive for
 22

23
 24 ⁴ The CDC Interim Guidance can be accessed at <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last visited on Mar. 2, 2021).

25 ⁵ On October 27, 2020, the ERO PRR Version 5.0 was issued.
 26 <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf> (last visited on Mar. 2,
 27 2021).

28 ⁶ On February 8, 2021, Version 12.5 of the IHSC Interim Reference Sheet on 2019 Novel Coronavirus (COVID-19):
 Detainee Care was issued. Malakhova Decl., ¶ 7 & Ex. A.

1 COVID-19 at NWIPC since March 2020, with only 4 detainees in the general population testing
2 positive, and one of those detainees testing positive after he had already recovered from COVID-
3 19 by the time he entered NWIPC. *Id.*, ¶ 52 & n.5. The main source of positive tests has been
4 from newly-admitted detainees prior to their entry to the general population. *Id.* No NWIPC
5 detainees have been hospitalized or died because of COVID-19. Malakhova Decl., ¶ 41. Outside
6 of NWIPC, Pierce County has had 37,002 confirmed cases of COVID-19; 2,753 hospitalizations;
7 and 554 deaths. Washington State Dep't of Health COVID-19 Data Dashboard (data as of March
8 1, 2021), <https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard#dashboard> (last
9 visited March 2, 2021).

10 **B. Procedures at NWIPC that reduce the risk of COVID-19 from entering the facility.**

11 1. *Incoming detainees.*

12 ICE has reduced the detainee population at NWIPC by 72.4% since March 2020. Lippard
13 Decl., ¶ 7 (the current NWIPC population is at 15.3% of capacity). This reduction is due to the
14 shift in ICE's enforcement focus and the significant reduction in cross-border travel. *Id.*, ¶¶ 8-10.
15 Most incoming detainees at NWIPC have been aliens who are public safety risks and those subject
16 to mandatory custody on criminal immigration grounds. *Id.*, ¶ 10. ICE continually reassesses
17 whether to accept new intakes to NWIPC based on housing unit occupation levels and
18 circumstances at the facility. *Id.*

19 As a response to COVID-19, IHSC has implemented certain safety protocols, including
20 those conducted at the initial medical screening. *Id.*, ¶ 17. Prior to entering NWIPC, new detainees
21 undergo temperature and verbal prescreening checks at the facility's sally port. *Id.*, ¶ 18. Any
22 new detainee displaying or reporting symptoms of COVID-19 must wear a face mask and is
23 isolated and referred to an IHSC medical provider for further evaluation. Malakhova Decl., ¶ 16.
24 IHSC conducts comprehensive medical, mental health, and dental screenings within twelve hours
25 of admission. *Id.*, ¶ 21.

1 New detainees may shower and are provided with clean clothing, bedding, towels and
2 personal hygiene items, including instructions outlining proper hygienic practices, like hand
3 washing and covering coughs with the elbow instead of the hands. Lippard Decl., ¶¶ 19-21.
4 Posters, translated into multiple languages and with accompanying pictures, are posted throughout
5 NWIPC and emphasize the importance of proper hand washing and cough covering. *Id.*, ¶ 21.

6 All incoming detainees who do not meet IHSC’s protocol for isolation monitoring due to
7 possible COVID-19 symptoms, exposure or testing, are placed in the New Intake Monitoring
8 housing units (“NIMs”) and monitored for 14 days for any signs or symptoms of possible COVID-
9 19 infection. *Id.*, ¶ 22; Malakhova Decl., ¶ 17. All NIMs housing units have separate cells, which
10 contain their own sinks and toilets. Lippard Decl., ¶ 22. Since January 2021, all detainees in the
11 NIMs units, except for four male detainees, have been assigned to individual cells. *Id.*, ¶ 22 n.7.
12 Detainees in the 14-day observation period are not allowed to comingle with other detainees in
13 common areas during that period. *Id.*, ¶ 22. They eat their meals in their cells and do not go to
14 recreation, court or other areas of the facility. *Id.* If 14 days pass without any detainees in a cell
15 displaying signs or symptoms of COVID-19, the detainees are released to other housing units in
16 the general population of the facility. *Id.* A separate remote medical unit has been established to
17 monitor detainees undergoing 14-day observation in the NIMs housing units. *Id.*; Malakhova
18 Decl., ¶ 18.

19 New intake testing has been implemented in addition to the 14-day observation process as
20 an additional measure to ensure that no COVID-19 positive detainees are admitted to the general
21 population at the facility. Malakhova Decl., ¶ 20. IHSC conducts voluntary COVID-19 testing of
22 all new detainees upon intake to NWIPC. *Id.*; Lippard Decl., ¶ 23. Detainees who consent to
23 COVID-19 testing upon intake are not housed in the same cells in the NIMs with those who decline
24 consent. Malakhova Decl., ¶ 20; Lippard Decl., ¶ 23. Any detainee that tests positive for COVID-
25 19 is transferred to the medical housing unit for continued monitoring in accordance with existing
26 IHSC guidance. Malakhova Decl., ¶ 20; Lippard Decl., ¶ 23. Detainees in the NIMs who tested

1 negative for COVID-19 upon admission are tested again on day 12 of the 14-day observation.
2 Malakhova Decl., ¶ 20; Lippard Decl., ¶ 23. Accordingly, detainees in the NIMs are afforded two
3 COVID-19 testing opportunities and/or at least a two-week monitoring period prior to entry into
4 the general population.

5 2. *Staff entering NWIPC.*

6 The Government also employs procedures to reduce the risk of staff bringing COVID-19
7 into NWIPC. First, ICE and GEO employees have been instructed to stay home if they are sick,
8 experiencing any possible symptoms of COVID-19, or have been in close contact with someone
9 diagnosed with COVID-19. Lippard Decl., ¶ 56. Second, ICE has instituted a telework program
10 for its employees at NWIPC to minimize the number of employees present at the facility. *Id.*, ¶ 59.
11 Third, ICE and GEO have implemented COVID-19 verbal and temperature screening checks of
12 all staff for GEO, ICE, and the Executive Office for Immigration Review (“EOIR”) entering
13 NWIPC. Lippard Decl., ¶ 53. Staff who do not clear the screening process, or who refuse the
14 enhanced health screening, will be denied entry into the facility. *Id.* Staff who do not follow
15 screening safety protocols are subject to possible discipline. *Id.* Finally, staff are required to wear
16 masks when entering the building, and then also in common areas and within six feet of detainees.
17 *Id.*, ¶ 55. N95 face masks are specifically required for all employees entering the NIMs and any
18 quarantine room, cell, or housing unit. *Id.*

19 In addition, all IHSC employees are required to self-monitor for COVID-19 symptoms at
20 the start of every shift and report any possible symptoms to an immediate supervisor. Malakhova
21 Decl., ¶ 12. IHSC staff are required to wear face masks when entering and exiting the facility,
22 always while in the medical clinic, and in all common areas except when actively eating. *Id.*, ¶ 13.

23 To reinforce safety measures, ICE and GEO employees have received multiple instructions
24 and reminders concerning the importance of hand washing and covering coughs to prevent the
25 spread of COVID-19. Lippard Decl., ¶ 52. Extra hand sanitizer has been provided to employees
26 throughout NWIPC. *Id.*

1 3. *Other persons entering NWIPC.*

2 The Government's procedures limit entry of non-staff into NWIPC. Social visitation has
3 been suspended to prevent the spread of COVID-19. Lippard Decl., ¶ 46. However, detainees
4 continue to have communication access through telephones and electronic tablets provided in each
5 housing unit. *Id.* All tours of NWIPC and volunteer work have been cancelled. *Id.*, ¶ 47. Vendors
6 are also prohibited entry to the facility. *Id.*, ¶ 48.

7 For persons that may enter NWIPC, such as attorneys and court visitors, GEO conducts
8 verbal and temperature screening. *Id.*, ¶ 49. Individuals who positively report possible symptoms
9 or exposure to COVID-19 are prohibited from entering NWIPC. *Id.* Attorney visits are limited to
10 non-contact visits unless otherwise approved. If a contact visit is approved, attorneys must wear
11 PPE. *Id.*, ¶ 50. To encourage non-contact visits, ICE offers video visitation at NWIPC. *Id.* Eleven
12 rooms in the facility have been outfitted with electronic tablet access to facilitate private video
13 visits between legal representatives and detainees. *Id.* EOIR and ICE have also adopted multiple
14 measures to reduce the risk of COVID-19 exposure inside of the Tacoma Immigration Court. *Id.*,
15 ¶¶ 60-65.

16 **C. Procedures at NWIPC that reduce the risk of COVID-19 from spreading within
17 NWIPC.**

18 In addition to the procedures outlined above, the Government's policies and procedures
19 reduce the risk of an outbreak or further spread of COVID-19 within the facility. This is largely
20 accomplished through the opportunity for detainees to socially distance themselves from other
21 detainees; the use of masks; hygiene, and testing.

22 1. *Social distancing at NWIPC.*

23 Social distancing is possible for detainees housed at NWIPC. ICE has aggressively
24 reduced the population at NWIPC to the extent that there are now more cells than detainees.
25 Lippard Decl., ¶¶ 7 (NWIPC at 15.3% capacity), 37. ICE has worked with GEO to redistribute
26 the detainees in custody among the housing units as much as possible to allow for greater social
27 distancing. *Id.*, ¶¶ 34, 38. Detainee-to-bed ratios in NWIPC's general population units range from

1 3.3% to 43.8%. *Id.*, ¶ 36. Detainees eat within their housing units and may further socially
2 distance by taking their trays anywhere within the common room or to their bunks to eat. *Id.*, ¶ 39.

3 Other activities have also been altered to allow for greater social distancing and to prevent
4 potential transmission between housing units. Movement of detainees within NWIPC is designed
5 to prevent comingling between different housing units. *Id.*, ¶ 40. Each housing unit has a
6 designated time to go to recreation, religious services, and the law library. *Id.* NWIPC limits the
7 number of occupants within the law library and the seating is arranged to maximize social
8 distancing. *Id.* Barber shop services have been adjusted to stagger the times for different housing
9 units. *Id.*, ¶ 41.

10 NWIPC aids detainees and visitors in identifying social distancing opportunities. IHSC
11 educates detainees about social distancing during weekly medical town hall meetings. *Id.*, ¶ 31.
12 Six-foot indicator marks have been placed on the benches in the court/visitor holding rooms,
13 medical holding room and intake holding rooms to assist detainees in social distancing while in
14 the facility. *Id.*, ¶ 43. Marks have also been placed in the hallways where detainees wait for
15 medications to be dispensed (“pill line”) and for security doors to open. *Id.* In addition, GEO has
16 removed every other chair from the lobby. *Id.*, ¶ 51.

17 Petitioner Khan can socially distance himself from other detainees while at NWIPC. In his
18 housing unit, only 10 out of 90 beds are currently occupied. *Id.*, ¶ 94 (unit at 11.1% capacity).
19 The housing unit’s large common area contains more tables than detainees allowing them to sit at
20 separate tables. *Id.* (2 tables that seat 8 detainees; 11 tables that seat 6 detainees). The housing
21 unit consists of two tiers with three bathroom sinks and four showers on each tier. *Id.* Two
22 additional kitchen sinks are in the common area. Petitioner Khan is assigned as the sole occupant
23 of a bunk on the bottom tier of the housing unit. Nine empty beds surround his bunk. *Id.*

24 Detainees in the medical clinic and MHU, including the intake holding rooms, are always
25 able to maintain at least six feet apart from each other. Malakhova Decl., ¶ 10. IHSC has placed
26 visible guides in the medical unit and MHU to educate and assist detainees to stay at least six feet

1 apart. *Id.* Similar distancing marks have been placed in the medical intake holding rooms and on
2 the floors where detainees stand in the pill line. *Id.* MHU rooms are limited to single patient
3 occupancy. *Id.*, ¶ 11.

4 2. *Face masks.*

5 As described above, both GEO and ICE personnel are mandated to wear masks while in
6 common areas and within six feet of detainees. Lippard Decl., ¶ 55. All IHSC and GEO staff
7 must wear surgical masks while in the medical clinic and MHU. Malakhova Decl., ¶ 13. IHSC
8 stocks the medical clinic with surgical masks, N95 respirator masks and other PPE. *Id.*, ¶ 14.
9 Petitioner Khan concedes that “GEO guards now generally do wear masks.” Dkt. No. 177, Khan
10 Decl., ¶ 21.

11 Face masks are provided to detainees. GEO ensures sufficient stock of PPE, including face
12 masks, for all areas of NWIPC except for the medical clinic. *Id.*, ¶ 29. IHSC conducts weekly
13 medical town hall meetings with the housing units during which IHSC educates and encourages
14 detainees to wear face masks and practice social distancing. *Id.*, ¶ 31. Three days per week, GEO
15 distributes face masks to all detainees for personal use along with written and pictorial instructions
16 on how to properly wear face masks. *Id.*, ¶ 33. Detainees can also request a replacement mask if
17 needed. *Id.* Face masks are mandatory in the law library, barber shop, and pill line. *Id.*, ¶¶ 40,
18 41, 43; Malakhova Decl., ¶ 10.

19 3. *Detainee education, hygiene and sanitation.*

20 Hygiene education and cleaning procedures at NWIPC have been enhanced due to COVID-
21 19. Under the PRR, GEO must ensure that surfaces and objects that are frequently touched,
22 especially those in common areas (e.g. doorknobs, light switches, sink handles, countertops,
23 toilets, recreation equipment) are cleaned and disinfected several times a day. Lippard Decl., ¶ 26.
24 In response to COVID-19, GEO has enhanced cleaning in all NWIPC housing units, food
25 preparation and service areas, intake rooms and other work centers with increased emphasis on
26

1 cleaning contact areas with disinfectant cleaners approved as effective against COVID-19. *Id.*,
2 ¶ 28.

3 Janitorial services are usually conducted by trained detainee workers engaged in the
4 facility's Volunteer Work Program ("VWP"). *Id.*, ¶ 27. VWP workers are required to wear
5 appropriate PPE. *Id.* GEO has enrolled and trained additional detainee workers in the VWP to
6 conduct enhanced cleaning from 8:00a.m.-10:00p.m. seven days per week. *Id.*, ¶ 28. In housing
7 units where no detainees elect to participate in the program, GEO employees have been trained to
8 conduct enhanced cleaning. *Id.* A GEO Sanitation Officer is responsible for monitoring the
9 detainee workers. *Id.*

10 In the Tacoma Immigration Court, EOIR staff cleans all high-contact surfaces of each of
11 the three main courtrooms with sanitizing wipes on a regular basis during the daily docket. *Id.*,
12 ¶ 63. EOIR has also trained GEO bailiffs to follow the same protocol in each of the facility's VTC
13 courtrooms. *Id.* EOIR distributes hand sanitizer in all courtrooms. *Id.*

14 Detainees receive verbal and written education concerning the importance of hand
15 washing, covering coughs, and showering/personal hygiene. Lippard Decl., ¶¶ 20-21, 30. At
16 weekly town hall meetings, GEO instructs detainees on when and how to clean tables and
17 horizontal surfaces, countertops, microwave handles, door handles, exercise equipment, electronic
18 tablets and other high contact surfaces. *Id.*, ¶ 30. GEO is required to provide detainees and staff
19 no-cost, unlimited access to supplies for hand washing, including liquid soap, running water, hand
20 drying machines or disposable paper towels, and no-touch trash receptacles. *Id.*, ¶ 29. GEO has
21 increased the amount of soap, disinfectant cleaner and food service sanitizer in every housing unit.
22 Inventory levels of these supplies are monitored on each shift. *Id.*

23 4. *COVID-19 testing.*

24 In testing for COVID-19, IHSC follows guidance issued by the CDC to safeguard those in
25 its custody and care. Malakhova Decl., ¶ 24. The decision whether to test a patient reporting
26 possible symptoms or illness for COVID-19 is left to the judgment of the medical provider. *Id.*

1 Nonetheless, testing is recommended for all detainees with signs or symptoms of COVID-19, as
2 well as all close contacts of a detainee or staff member who has tested positive for COVID-19. *Id.*
3 In practice, IHSC is testing all detainees at NWIPC in accordance with these recommendations.
4 *Id.* IHSC has administered approximately 2,556 COVID-19 tests to NWIPC detainees.
5 Malakhova Decl., ¶ 52. Petitioner Khan has been tested for COVID-19 eight times during his
6 detention – with negative results each time. *Id.*, ¶ 56.

7 In addition to testing newly admitted detainees to reduce the risk of COVID-19 from
8 entering NWIPC, IHSC performs testing of detainees at various other times, including prior to
9 detainee reassignment from one housing unit to another within the facility, prior to release/book
10 out from the facility, and prior to removal or transfer via ICE Air. Lippard Decl., ¶ 44. As
11 detainees from all housing units are being tested for these purposes, this COVID-19 testing has
12 acted as a form of prevalence testing to ensure that COVID-19 is not spreading asymptotically.
13 *Id.*, ¶ 45; *see also* Dkt. No. 183, Malakhova Decl., ¶ 33 (stating that IHSC tested 179 detainees
14 originating from all housing units between the first week of November 2020 and December 13,
15 2020 due to intra-facility transfers).

16 Moreover, IHSC has also expanded its testing to include routine prevalence testing of
17 detainees and IHSC staff. Malakhova Decl., ¶¶ 33-36. In December 2020, IHSC issued the formal
18 NWIPC Point Prevalence Survey Plan (“PPS”). *Id.*, ¶ 33. Under this plan, 20% of detainees at
19 NWIPC are offered voluntary COVID-19 tests at regular intervals. *Id.* The frequency of
20 prevalence testing is determined by community COVID-19 activity level, i.e. positivity rates in
21 Pierce County where the facility is located. *Id.* When the county positivity rate is 1-4%,
22 prevalence testing is to be conducted monthly. *Id.* When it is 5-10%, prevalence testing is to be
23 conducted twice per month. *Id.* When the positivity rate exceeds 10%, testing is to be conducted
24 weekly. *Id.* The last round of prevalence testing occurred on February 24 and 25, 2021. *Id.*, ¶ 35.

25 Detainees that are COVID-19 positive or presumptive positive are housed individually
26 within the MHU. *Id.*, ¶ 26. The MHU contains eight rooms, including four airborne infection

1 isolation rooms. *Id.* One housing unit has been designated as a medical overflow unit to house
 2 COVID-19 positive and presumptive positive detainees should space be unavailable in the MHU.
 3 *Id.*, ¶ 27. To date, the use of this designated unit has not been necessary to house COVID-19
 4 positive detainees. *Id.*

5 GEO informs ICE of its employees that have been tested or diagnosed with COVID-19.
 6 Lippard Decl., ¶ 57. If a staff member at NWIPC is confirmed to have COVID-19, the relevant
 7 employer will inform other staff of their possible exposure consistent with any legal limitations.
 8 *Id.*, ¶ 58. Exposed or infected staff must stay home and self-monitor for COVID-19 symptoms.
 9 *Id.* Both GEO and ICE perform contact tracing. *Id.*, ¶ 57. When either staff or detainees test
 10 positive for COVID-19, ICE works with the Tacoma-Pierce County Health Department when
 11 conducting contact tracing and making decisions concerning quarantine and/or COVID-19 testing.
 12 *Id.*; Malakhova Decl., ¶¶ 29-30.

13 **D. ICE conducts individualized custody redetermination assessments to minimize the**
 14 **risk of COVID-19 to at-risk detainees.**

15 ERO has conducted custody redetermination assessment reviews of NWIPC detainees
 16 who may meet the CDC's criteria as potentially being at higher risk due to COVID-19. Lippard
 17 Decl., ¶ 71. The list of populations potentially at higher risk for serious illness due to COVID-19
 18 has expanded based on revised CDC criteria and/or criteria certified in *Fraihat*. *Id.*, ¶ 72. IHSC
 19 has identified, and ERO has conducted custody redetermination assessment reviews for NWIPC
 20 detainees that meet the expanding criteria, including Petitioner Khan. Lippard Decl., ¶ 73;
 21 Malakhova Decl., ¶¶ 47-50, 53.

22 ICE issued new guidance concerning *Fraihat* custody redeterminations, which was
 23 incorporated into the latest version of the ERO PRR. Lippard Decl., ¶ 74(g). Major changes to
 24 these custody redeterminations include the instruction that, “[o]nly in rare cases should a *Fraihat*
 25 subclass member not subject to mandatory detention remain in custody.” *Id.* Further, detainees
 26 subject to mandatory custody due to INA § 236(c) must receive individualized custody
 27 determinations where ERO “must not apply the Docket Review Guidance rule against release of

1 aliens detained pursuant to INA § 236(c) [] so inflexibly that none of the *Fraihat* subclass
2 members are released.” *Id.* Although traditional factors, such as danger to the community and
3 risk of flight, may be considered, under the terms of the *Fraihat* preliminary injunction, aliens
4 subject to detention pursuant to INA § 236(c) should continue to be detained only after
5 individualized consideration of the risk of severe illness or death, with due regard to the public
6 health emergency. Lippard Decl., ¶ 74(g). As a result, ERO has been tasked with conducting new
7 custody redeterminations for *Fraihat* subclass members. *Id.*, ¶ 74(h). ICE has completed new
8 custody redetermination assessments for all identified *Fraihat* class members at NWIPC using
9 these amended review standards.

10 Petitioner Khan had previously been identified by IHSC as being at higher risk for serious
11 illness due to COVID-19 because of diabetes. Lippard Decl., ¶ 75. On December 1, 2020, ICE
12 completed a new custody redetermination for Petitioner Khan under the new PRR standards and
13 determined that continued detention is appropriate. *Id.* Petitioner Khan was subsequently
14 identified by IHSC as being at higher risk based on new criterion due to having a body mass index
15 (“BMI”) over 25. *Id.* On March 1, 2021, ICE completed another custody redetermination for
16 Petitioner Khan and decided continued detention is appropriate because his criminal history
17 demonstrates that he represents a danger to the public. *Id.*

18 In addition to custody redetermination assessment reviews, ICE continues to adjudicate
19 independent requests for stays of removal, parole and other forms of release that it receives from
20 detainees and/or their legal representatives. Lippard Decl., ¶ 77.

21 **E. Additional protections for detainees at higher risk of serious illness due to COVID-
22 19.**

23 Pursuant to the PRR, specific procedures apply to detainees potentially at higher risk for
24 serious illness due to COVID-19 or who have otherwise been identified as vulnerable populations
25 under *Fraihat*. Lippard Decl., ¶ 74. The PRR contains the following provisions: notification
26 requirements when detainees are identified as at-risk, access to medical records by detainees, a

1 provision for requesting a new medical review, and testing, screening, and treatment of high-risk
2 detainees. *Id.*

3 Detainees who are high risk receive COVID-19 testing at various times: upon intake to an
4 ICE facility; as directed by medical personnel based on CDC requirements and clinical
5 presentation of COVID-19 related illness; upon release as dictated by the requirements of the
6 receiving country of record or other transfer/removal/release requirements; and upon release to the
7 community or transfer to another detention facility. Lippard Decl., ¶ 74(d).

8 In addition to temperature and verbal COVID-19 screening upon intake, which is part of
9 standard procedure, IHSC conducts twice daily temperature and verbal screening checks of all
10 high-risk detainees. Lippard Decl., ¶ 74(e); Malakhova Decl., ¶ 51.

11 **F. COVID-19 vaccinations of detainees and ICE employees.**

12 In December, the Food and Drug Administration (“FDA”) issued emergency use
13 authorizations for two COVID-19 vaccines.⁷ *Maney v. Brown*, No. 6:20-CV-00570-SB, 2021 WL
14 354384, at *3 (D. Or. Feb. 2, 2021). In response, IHSC issued COVID-19 Vaccination Guidelines
15 and Protocol for detainees based on the priority groups set out by the CDC’s Advisory Committee
16 on Immunization Practices (“ACIP”). Malakhova Decl., ¶ 37. IHSC has identified all detainees
17 at NWIPC by ACIP priority category, but has not yet been informed when vaccines will be
18 available directly through the federal government. *Id.*

19 In addition, IHSC has been in discussion with the local health department concerning
20 COVID-19 vaccinations for NWIPC detainees based on Washington State’s vaccination priority
21 scheduling. *Id.*, ¶ 38. To date, eight detainees currently at NWIPC have received one dose of the
22 COVID-19 vaccine with the second doses to be administered later this month. *Id.* One detainee
23 has received both doses. *Id.* All vaccines have been administered at the facility by the Tacoma-

24
25 ⁷ This week, the FDA authorized the emergency use of a third vaccine. *FDA Issues Emergency Use Authorization for*
26 *Third COVID-19 Vaccine*, Feb. 27, 2021, available at <https://www.fda.gov/news-events/press-announcements/fda-issues-emergency-use-authorization-third-covid-19-vaccine> (last visited March 3, 2021).

1 Pierce County Health Department. *Id.* IHSC continues to monitor detainees for any changes in
2 prioritization category and for any changes in current State vaccination priority groups. *Id.*, ¶ 40.

3 The Department of Homeland Security (“DHS”) intends to offer COVID-19 vaccinations
4 to ICE employees on a voluntary basis. Lippard Decl., ¶ 78. However, vaccine appointments
5 through the federal program are not yet available in Washington State. *Id.*, ¶ 80. In the meantime,
6 ICE encourages its employees who are eligible to receive the COVID-19 vaccine through the State
7 to do so. *Id.*, ¶ 81. As of March 2, 2021, 42 IHSC employees/contractors have reported that they
8 are fully vaccinated, while 5 IHSC employees/contractors have received their first dose. *Id.*, ¶ 83.
9 Six ERO employees have reported receiving the vaccine. *Id.*

10 III. LEGAL STANDARD

11 Summary judgment is appropriate if there is no genuine issue as to any material fact, and
12 the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). The moving
13 party has the initial burden of demonstrating that summary judgment is proper. *Adickes v. S.H.*
14 *Kress & Co.*, 398 U.S. 144, 157 (1970). The moving party must identify the pleadings, depositions,
15 affidavits, or other evidence that it “believes demonstrates the absence of a genuine issue of
16 material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “[T]he mere existence of *some*
17 alleged factual dispute between the parties will not defeat an otherwise properly supported motion
18 for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.”
19 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). “A material
20 issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the
21 parties’ differing versions of the truth.” *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir.
22 1982).

23 The burden then shifts to the opposing party to show that summary judgment is not
24 appropriate. *Celotex*, 477 U.S. at 324. The opposing party’s evidence is to be believed, and all
25 justifiable inferences are to be drawn in its favor. *Anderson*, 477 U.S. at 255. However, to avoid
26 summary judgment, the opposing party cannot rest solely on conclusory allegations. *Berg v.*

1 *Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986). Instead, it must designate specific facts showing
2 there is a genuine issue for trial. *Id.*; *see also Butler v. San Diego District Attorney's Office*, 370
3 F.3d 956, 958 (9th Cir. 2004) (stating that if the defendant produces enough evidence to go beyond
4 the pleadings, then the plaintiff must counter by producing evidence of his own).

5 The evidence here demonstrates the constitutionality of Petitioner Khan's current detention
6 at NWIPC. Accordingly, the Court should grant the Government's motion as a matter of law.

7 **IV. ARGUMENT**

8 **A. ICE lawfully detains Petitioner Khan.**

9 ICE lawfully detains Petitioner Khan pursuant to 8 U.S.C. § 1231. Petitioner Khan does
10 not dispute the lawful statutory basis for his detention. Further, the requirements of due process
11 were met once he was provided with a bond hearing. *Prieto-Romero v. Clark*, 534 F.3d 1053,
12 1066 (9th Cir. 2008) (due process is satisfied once alien receives a bond hearing from neutral
13 adjudicator). At his most recent bond hearing, the IJ concluded that ICE had met its burden to
14 establish by clear and convincing evidence that Petitioner Khan is both a danger and a flight risk.
15 Lippard Decl., ¶ 92. In addition, ICE completed three custody redeterminations for Petitioner
16 Khan because he had been identified by IHSC as being at higher risk for serious illness from
17 COVID-19 due to two medical conditions. *Id.*, ¶ 75. ICE concluded that continued detention is
18 appropriate because he represents a danger to the public. *Id.* Furthermore, a court in this District
19 denied Petitioner Khan's pro se habeas petition alleging that the length of his detention is
20 excessive. *Khan v. ICE Field Office Director*, 20-cv-1548-RSM-BAT, Dkt. No. 10, Order (W.D.
21 Wash. Jan. 25, 2021). Accordingly, Petitioner Khan has received sufficient process and review
22 concerning his detention.

1 **B. The conditions of Petitioner Khan’s confinement are constitutional.**

2 *1. Petitioners cannot demonstrate that Petitioner Khan has been denied reasonably*
 3 *safe conditions at NWIPC.*

4 The NWIPC provides conditions of reasonable safety and health for Petitioner Khan’s
 5 detention. Due process requires the government to assume some responsibility for civil detainees’
 6 safety and well-being, such as “food, clothing, shelter, medical care, and reasonable safety.”
 7 *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989). The Ninth Circuit
 8 applies an objectively unreasonable test to failure-to-protect claims brought under the Due Process
 9 Clause. *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc). “[T]he defendant’s
 10 conduct must be objectively unreasonable, a test that will necessarily ‘turn on the facts and
 11 circumstances of each particular case.’” *Id.* (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 396
 12 (2015) (alterations and internal quotation marks omitted)). Importantly, the governing standard is
 13 not bare negligence, much less strict liability. As the Ninth Circuit explained in the parallel context
 14 of pre-trial detainees, “the pre-trial detainee ‘must prove more than negligence but less than
 15 subjective intent – something akin to reckless disregard.’” *Smith v. Washington*, 781 F. App’x.
 16 595, 598 (9th Cir. 2019) (quoting *Castro*, 833 F.3d at 1071). “[T]he Constitution does not require
 17 that detention facilities reduce the risk of harm to zero.” *C.G.B. v. Wolf*, 464 F. Supp. 3d 174, 212
 18 (D.D.C. 2020) (quoting *Benavides v. Gartland*, 20-cv-46, 2020 WL 1914916, at *5 (S.D. Ga. Apr.
 19 18, 2020) & citing *Dawson v. Asher*, 20-cv-0409-JLR-MAT, 2020 WL 1704324, at *12 (W.D.
 20 Wash. Apr. 8, 2020)).

21 To demonstrate objective deliberate indifference, a petitioner must show:

- 22 (i) The defendant made an intentional decision with respect to the conditions
 23 under which the plaintiff was confined;
- 24 (ii) Those conditions put the plaintiff at substantial risk of suffering serious
 25 harm;
- 26 (iii) The defendant did not take reasonable available measures to abate that risk,
 even though a reasonable officer in the circumstances would have

1 appreciated the high degree of risk involved – making the consequences of
2 the defendant’s conduct obvious; and

3 (iv) By not taking such measure, the defendant caused the plaintiff’s injuries.

4 *Id.*

5 Petitioners cannot meet this standard. First, Petitioners cannot show that the conditions of
6 Petitioner Khan’s confinement put him at a substantial risk of suffering serious harm due to
7 COVID-19. ICE continues to release detainees at risk for COVID-19 while continuously
8 reviewing the standards for such release. *See* Lippard Decl. ¶¶ 7, 72-73. Contrary to Petitioners’
9 assertion that social distancing is impossible, Petitioner Khan can practice social distancing at
10 NWIPC. Am. Pet., ¶ 3. As discussed above, Petitioner Khan’s housing unit is at 11.1% capacity
11 with only 10 out of the 90 beds occupied. Lippard Decl., ¶ 95. He sleeps in his own bunk
12 surrounded by nine empty beds. He can eat at his own table large enough to seat six or eight
13 people. The unit has ample sinks and showers to accommodate Petitioner Khan without crowding.
14 Finally, NWIPC has enacted procedures to maximize social distancing in the medical clinic, law
15 library, and barber shop.

16 NWIPC’s testing procedures and protocols reasonably protect Petitioner Khan from
17 COVID-19. Petitioner Khan has access to COVID-19 testing when indicated, as well as medical
18 care at the medical clinic. IHSC tests detainees with signs or symptoms of COVID-19, as well as
19 close contacts of a detainee or staff member who tested positive for COVID-19. Malakhova Decl.,
20 ¶ 24. In fact, Petitioner Khan has been tested for COVID-19 eight times during his detention.

21 Detainees at NWIPC are tested at crucial times during their detention. First, all new intakes
22 to the facility are tested twice voluntarily. Lippard Decl., ¶ 23. ICE’s robust testing of newly
23 admitted detainees significantly reduces the risk of an outbreak in the general population. Next,
24 detainees are tested any time they are reassigned housing units within the facility. *Id.*, ¶ 44. All
25 detainees are again tested prior to release/book out from the facility, and prior to removal or
26 transfer via ICE Air. *Id.* This testing provides a form of prevalence testing throughout the housing

1 units to ensure that COVID-19 is not spreading asymptotically throughout the facility. *Id.*, ¶ 45;
2 Malakhova Decl., ¶ 32. Finally, IHSC conducts routine prevalence testing throughout the facility.
3 Malakhova Decl., ¶¶ 33-36.

4 Second, the extensive steps taken by the Government are objectively reasonable measures
5 to abate the risk of COVID-19 to Petitioner Khan. The procedures at NWIPC meet or exceed the
6 CDC’s recommendations for congregate settings. *See generally* Lippard Decl. & Malakhova Decl.
7 In addition to pervasive COVID-19 testing, these measures include mask mandates for staff, a
8 significant population reduction, custody redeterminations assessments for Petitioner Khan and
9 the other at-risk detainees, enhanced cleaning and sanitization procedures, and increased access to
10 cleaning and hygiene products. Even if isolated instances of momentary non-compliance by
11 detainees or employees may occur, the failure to follow every CDC recommendation does not
12 demonstrate that a facility’s response to the pandemic is unreasonable or amounts to punishment
13 of its detainees. *Recarte Cruz v. Guadian*, No. 20-3284-JWL, 2020 WL 7024298, at *8 (D. Kan.
14 Nov. 30, 2020).

15 The Government is not required to eliminate all risks of COVID-19 to Petitioner Khan.
16 Where a pandemic, such as this one, poses a threat to everyone without discrimination, Petitioners
17 do not gain a right of release by merely pointing to the same threat posed to everyone. *See also*
18 *Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001) (“Many Americans live under conditions of
19 exposure to various contaminants. The [Constitution] does not require prisons to provide prisoners
20 with more salubrious air, healthier food, or cleaner water than are enjoyed by substantial numbers
21 of free Americans.”). There is no precedent for the suggestion that if the Government cannot
22 eliminate every risk of harm to those in custody, then it cannot maintain custody at all. Indeed,
23 the Fifth Amendment does not require the government to eliminate all risk to Petitioners.
24 *DeShaney*, 489 U.S. at 200.

25 As this Court previously acknowledged in *Dawson*, “[n]o one can entirely guarantee safety
26 in the midst of a global pandemic.” 2020 WL 1704324, at *12. Taking all the robust procedures

1 and protocols instituted at NWIPC in response to COVID-19, Petitioner Khan's conditions of
2 confinement do not violate his Fifth Amendment substantive due process right to reasonable
3 safety.

4 2. *Petitioners cannot demonstrate that ICE's COVID-19 response results in punitive*
5 *conditions of confinement at NWIPC.*

6 Petitioner Khan's detention is not punitive because it is reasonably related to legitimate
7 governmental objectives. When evaluating the constitutionality of civil detention conditions under
8 the Fifth Amendment, a district court must determine whether those conditions "amount to
9 punishment of the detainee." *Bell*, 441 U.S. at 535; *see also Kingsley*, 135 S. Ct. 2466, 2473-74
10 (2015). A petitioner may show punishment through an express intent to punish or a condition that
11 is not "reasonably related to a legitimate governmental objective." *Bell*, 441 U.S. at 539; *see also*
12 *Kingsley*, 576 U.S. at 398 (noting that "a pretrial detainee can prevail by providing only objective
13 evidence that the challenged governmental action is not rationally related to a legitimate
14 governmental objective or that it is excessive in relation to that purpose"). "A restriction is
15 punitive where it is intended to punish, or where it is 'excessive in relation to [its] non-punitive
16 purpose.'" *See Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004).

17 Detention is a constitutionally permissible aspect of the Government's enforcement of the
18 immigration laws and fulfills the legitimate purpose of ensuring that individuals appear for their
19 removal proceedings. *See Jennings*, 138 S. Ct. at 836; *Demore*, 538 U.S. at 523; *Zadvydas*, 533
20 U.S. at 690-91. Furthermore, the conditions at NWIPC are reasonably related to the Government's
21 legitimate interest in effective management of a detention facility. *See Jones*, 393 F.3d at 932.
22 Otherwise, essentially all congregate housing facilities would become a per se "punishment"
23 during a pandemic. That is not the law, and it is not consistent with current CDC guidance on
24 COVID-19 infection control in congregate facilities. As the Supreme Court has emphasized, "[t]he
25 wide range of 'judgment calls' that meet constitutional and statutory requirements [for federal
26 detention] are confided to officials outside of the Judicial Branch of Government." *Bell*, 441 U.S.
27 at 562. The Constitution thus leaves the Government latitude in determining the means by which

1 it may achieve its legitimate interest in executing the immigration laws. In evaluating those
2 determinations, courts must be careful to impose only what the Constitution requires – not “a
3 court’s idea of how best to operate a detention facility.” *Id.* at 539.

4 Petitioner Khan’s detention is justified. Petitioner Khan has a serious and recent criminal
5 history that includes a conviction for violating an order of protection. Lippard Decl., ¶¶ 83, 85.
6 At his most recent bond hearing, the IJ found Petitioner Khan to be both a danger to the community
7 and a flight risk. *Id.*, ¶ 92. Subsequently, ICE completed two custody redeterminations for
8 Petitioner Khan under the new ERO PRR standards and determined that continued detention is
9 appropriate. *Id.*, ¶ 75.

10 The record shows that Petitioners fall well short of demonstrating that the Government’s
11 confinement of Petitioner Khan and others at NWIPC is so excessive that it evinces “an expressed
12 intent to punish on the part of detention facility officials.” *Bell*, 441 U.S. at 538. Moreover,
13 Petitioner Khan’s detention is proportionately related to the Government’s non-punitive
14 responsibilities and administrative purposes. While civil detainees retain greater liberty
15 protections than individuals convicted of crimes, *see, e.g., Youngberg v. Romeo*, 457 U.S. 307,
16 321-22 (1982); *Bell*, 441 U.S. at 535, Petitioner Khan’s continued immigration detention pending
17 removal cannot be described as punitive or excessive in relation to the legitimate governmental
18 purpose of protecting the public and ensuring his removal. This is particularly true considering
19 the substantial steps taken by ICE to reduce the risk of COVID-19 to detainees and staff, and
20 Petitioners’ inability to present evidence that the risk of COVID-19 to Petitioner Khan is imminent.

21 3. *Petitioners fail to demonstrate that the preventive measures taken by the*
22 *Government constitute deliberate indifference towards the risk of COVID-19 at*
NWIPC.

23 Petitioners are unable to show a substantive due process violation based on the
24 Government’s purported deliberate indifference to Petitioner Khan’s medical needs by not
25 releasing him due to the COVID-19 pandemic. Certain government conduct that “shocks the
26 conscience” may violate an individual’s substantive due process rights. *Sacramento v. Lewis*, 523

1 U.S. 833, 853 (1998). Where detention officials have the luxury of making unhurried judgments
2 “largely uncomplicated by the pulls of competing obligations,” their deliberate indifference to
3 detainee welfare can be “truly shocking” so as to abridge substantive due-process limitations. *Id.*
4 Litigants claiming deliberate indifference must establish that government action is “objectively
5 unreasonable” – a standard akin to reckless disregard. *Gordon v. Cty. Of Orange*, 888 F.3d 1118,
6 1125 (9th Cir. 2018). While true that “[a] remedy for unsafe conditions need not await a tragic
7 event,” *Helling v. McKinney*, 509 U.S. 25, 33 (1993), courts applying the deliberate indifference
8 standard – which rests on the understanding that “the [government’s] responsibility to attend to
9 the medical needs of prisoners does not ordinarily clash with other equally important governmental
10 responsibilities” – must take due regard for the particular constraints facing the official. *Wilson v.*
11 *Seiter*, 501 U.S. 294, 302-03 (1991).

12 Here, multiple factors demonstrate that Petitioners have failed to establish a due process
13 violation concerning Petitioner Khan’s medical welfare. ICE has adequately and promptly
14 responded to an unfolding, rapidly changing, public-health emergency. ICE continues to dutifully
15 manage its responsibility for NWIPC’s detainees’ medical needs in the midst of a pandemic, while
16 continuing to manage other important public responsibilities, such as ensuring the continued
17 enforcement of the United States’ immigration laws within real-world constraints involving
18 existing resources and physical facilities. Even in normal contexts, neither general allegations of
19 negligence nor a petitioner’s general disagreement with treatment received is enough to show
20 deliberate indifference. *See Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976). Rather, that standard
21 can be met “only when the decision by the [medical] professional is such a substantial departure
22 from accepted professional judgment, practice, or standards as to demonstrate that the person
23 responsible actually did not base the decision on such a judgment.” *Youngberg*, 457 U.S. at 323.

24 The evidence here defeats any suggestion of deliberate indifference. At NWIPC, ICE has
25 actively sought to address COVID-19 by implementing CDC guidance to the maximum extent
26 possible. The Government’s evidence shows that ICE officials have taken significant

1 precautionary steps to protect the health and well-being of detainees at NWIPC, and to prevent an
2 outbreak of COVID-19 within the facility. *See generally* Lippard Decl. The detainee population
3 at NWIPC remains significantly reduced in response to the COVID-19 pandemic. *Id.*, ¶ 7 (15.3%
4 of capacity – reduced 72.4% since the first week of March 2020).

5 IHSC staff conduct intake medical screenings for all newly-arrived detainees to detect
6 disabilities, illnesses, or other high-risk medical conditions identified in CDC and ICE guidance.
7 Malakhova Decl., ¶¶ 16, 21. IHSC provides voluntary COVID-19 testing and quarantines all new
8 and returning detainees for a minimum of 14 days, as well as anyone showing COVID-19
9 symptoms. To date, this protocol has successfully prevented numerous incoming detainees
10 infected with COVID-19 from placement in general population upon admission to NWIPC.
11 Malakhova Decl., ¶ 52.

12 Most notably, ICE has reduced and rearranged the detainee population such that
13 appropriate and meaningful social distancing is possible. Lippard Decl., ¶¶ 34-39. Because of the
14 reduced population, all of the housing units are at less than half of their designated capacity. *Id.*,
15 ¶ 36. Facility management has additionally been conducting daily assessments and modifying
16 programming and housing in a way that promotes social distancing. *See id.*, ¶¶ 40-43.

17 ICE has responded promptly to an unprecedented public-health emergency that continues
18 to evolve over time. The Government has submitted evidence detailing the significant efforts
19 undertaken at NWIPC, which are consistent with guidance issued by the CDC, to safeguard the
20 detainees in its custody and care. *See generally* Lippard Decl. & Malakhova Decl. There is no
21 legitimate basis for a deliberate indifference claim here.

22 V. CONCLUSION

23 For the above reasons, the Government respectfully requests that the Court grant its motion
24 for summary judgment and dismiss the Amended Petition in its entirety.

1 DATED this 4th day of March, 2021.

2 Respectfully submitted,

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