

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

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

WILFREDO FAVELA AVENDAÑO, et  
al.,

Petitioners-Plaintiffs,

v.

NATHALIE ASHER, et al.,

Respondents-Defendants.

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

**MOTION FOR TEMPORARY  
RESTRAINING ORDER AND  
EXPEDITED BAIL HEARINGS**

NOTE ON MOTION CALENDAR:  
December 11, 2020

**ORAL ARGUMENT REQUESTED**

## INTRODUCTION

Petitioners-Plaintiffs (Plaintiffs) are persons detained at the Northwest Detention Center (NWDC) who are vulnerable to serious illness and death from COVID-19. Plaintiffs face imminent danger of COVID-19 infection at NWDC. Yesterday, Respondents-Defendants (Defendants) informed the Court that a detainee in Plaintiff Naeem Khan's housing unit, Unit A-3, and yet *another* ICE Health Service Corps (IHSC) worker, have tested positive for COVID-19. Bostock Decl., Dkt. 173-1 ¶ 3; Third Khan Decl. ¶ 1. These positive tests follow reports of more than a dozen confirmed COVID-19 cases at NWDC since late October, including two GEO officers and three other ICE Health Service Corps (IHSC) medical staff employees. The pandemic has already killed over 290,000 people in the United States; currently a record of more than 3,000 people are dying each day. Experts warn that the worst is yet to come.

As the Ninth Circuit Court of Appeals recently confirmed, it is appropriate for this Court to order the release of immigrant detainees because of the substantial risk of serious and irreparable harm posed by the threat of COVID-19. *Hernandez Roman v. Wolf*, 977 F.3d 935 (9th Cir. 2020); *see also Pimentel-Estrada v. Barr*, 458 F. Supp. 3d 1226, 1251 (W.D. Wash. 2020) (*Pimentel-Estrada I*); *infra* nn.12–13.

The Court's intervention is urgently needed. Plaintiffs, on behalf of themselves and the Proposed Class, bring this emergency request for a temporary restraining order to release Mr. Khan from NWDC. Plaintiffs also request that the Court (1) grant provisional certification of the Proposed Class, (2) order a process to identify and provide expedited review of Proposed Class members for release, (3) order a limit to the detention population at NWDC necessary to permit adequate social distancing, and (4) order periodic COVID-19 testing of detainees, staff, and

employees. Without action by this Court, medically vulnerable detainees will remain trapped at the facility, and Defendants' failure to act may be a death sentence.<sup>1</sup>

### FACTUAL BACKGROUND

#### **I. COVID-19 Is Now Active within the NWDC, Endangering Medically Vulnerable Detainees, and Defendants Cannot Point to Its Source.**

Yesterday afternoon, Defendants informed the Court that a detainee in Mr. Khan's housing unit at NWDC had tested positive for COVID-19. Bostock Decl., Dkt. 173-1 ¶ 3. In addition, another IHSC worker at NWDC tested positive. *Id.* These positive tests follow Defendants' earlier notice this week that another detainee, housed in the same unit, likely had been positive for COVID-19 while at NWDC before his transfer to another facility. *See* Bostock Decl., Dkt. 171-1 ¶ 3. The transferred detainee tested positive for COVID-19 upon entry to another facility, shortly after leaving NWDC. *Id.* Defendants have not identified how this person contracted COVID-19 at NWDC, suggesting that the source and scope of the current outbreak is unknown. *See id.* ¶¶ 3–5; *see also* Third Khan Decl. ¶¶ 4–16 (describing events in Mr. Khan's unit, the positive test, and the failure of NWDC staff and ICE to provide information about what was happening). Indeed, prior to Defendants filing their notice yesterday with the Court, the Executive Office for Immigration Review sent out a nationwide email warning that the Tacoma Immigration Court—which is housed at NWDC—was closed as of 2 p.m. yesterday “[d]ue to a possible COVID-19 exposure.”<sup>2</sup>

These latest cases and court closure follow twelve other confirmed cases of COVID-19 at NWDC since November 2020. In the same notice filed yesterday, Defendants informed the

<sup>1</sup> Plaintiffs' counsel informed Defendants' counsel of their intent to file this motion earlier today. Defendants' counsel will also receive notice via ECF.

<sup>2</sup> Maltese Decl. Ex. A, Executive Office of Immigration Review, EOIR Stakeholder Update – Dec. 10, 2020, regarding EOIR Operational Status Update, (Dec.10, 2020, 3:24 PM).

1 Court that a *third* IHSC employee had tested positive for the virus in the space of two weeks.  
 2 Bostock Decl., Dkt. 173-1 ¶ 12. Defendants reported that the first IHSC employee tested positive  
 3 on November 26, 2020. Lippard Decl., Dkt. 163-1 ¶ 3. Defendants have since reported that the  
 4 first IHSC employee infected two other employees (including the one from yesterday), *see*  
 5 Bostock Decl., Dkt. 165-1 ¶ 3; Bostock Decl., Dkt. 173-1 ¶ 12, and that Defendants “terminated  
 6 [one of the employees] for violating COVID-19 safety protocols,” Bostock Decl., Dkt. 165-1 ¶ 5.  
 7 Two GEO employees have also tested positive at the facility in recent weeks. *See* Bostock Decl.,  
 8 Dkt. 152-1 ¶ 3 (GEO employee); Lippard Decl., Dkt. 162-1 ¶ 3 (another GEO employee).

9 This outbreak among employees and detainees comes despite Defendants’ repeated  
 10 insistence that Mr. Khan and other medically vulnerable individuals will be kept safe at NWDC.  
 11 Defendants have repeatedly told this Court their “safety precautions” are “effective in preventing  
 12 the transmission of COVID-19 within the facility,” Dkt. 102 at 18, but the new outbreaks and  
 13 Defendants’ inability to identify the outbreak’s source belie that claim. COVID-19 has entered  
 14 the general population, and Defendants cannot identify the source or scope of the outbreak,  
 15 which may now include areas far from Unit A-3, including the immigration court at NWDC.  
 16 Maltese Decl. Ex. A.

## 17 **II. Once Present in a Detention Facility, COVID-19 Spreads Rapidly and Poses Grave** 18 **Risks to Medically Vulnerable People.**

19 Once introduced in a detention facility, COVID-19 spreads with rapid speed. Greifinger  
 20 Decl. ¶ 6; Golob Decl., Dkt. 5 ¶ 12; Schriro Decl., Dkt. 6 ¶ 19. COVID-19 spreads through  
 21 airborne transmission, via respiratory droplets that contain the coronavirus, or even through  
 22 smaller particles called aerosols, which are produced through normal breathing. Second Supp.  
 23 Amon Decl., Dkt. 136 ¶¶ 8–9. Viral droplets can spread between people at a distance of at least  
 six feet, and aerosols can spread between people at an even greater distance and remain

suspended in the air for hours. *Id.* Airborne transmission of COVID-19 beyond a distance of six feet is of particular concern in enclosed spaces with poor ventilation such as detention centers, jails and prisons. *Id.* ¶¶ 10–11. People who have contracted COVID-19, but who are asymptomatic, presymptomatic, or only mildly symptomatic can easily spread the virus. *Id.* ¶ 19(f).

Recent studies of COVID-19 transmission in correctional facilities have led the CDC to define a “close contact” for COVID-19 transmission as anyone who is “within 6 feet of an infected person for a cumulative total of 15 minutes or more over a 24-hour period starting from 2 days before illness onset (or, for asymptomatic patients, 2 days prior to test specimen collection) until the time a patient is isolated.” *Id.* ¶ 12(d). Detainees are very likely to be in contact with staff and one another for this time threshold and longer, especially because risk of transmission is based on cumulative exposure. *Id.* The only way to protect vulnerable people from serious harm to their health and possible death is to prevent them from being infected with the coronavirus. *Id.* ¶ 7. Yet people held in jails, prisons, and detention centers have greater danger of contracting COVID-19 than in the general community, and face increased mortality from the virus. The case rate of COVID-19 in immigration detention facilities is on average more than 13 times the rate among the general population.<sup>3</sup>

The chance for spread of COVID-19 from staff or new detainees grows even higher as COVID-19 cases increase dramatically outside the facility. When Plaintiffs filed their initial complaint six months ago, about 75,852 people in the United States had died from the virus and nearly 1.25 million people had contracted it. Dkt. 1 at 6. Since then, the pandemic has grown

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<sup>3</sup> Maltese Decl. Ex. B, Parsa Erfani, Nishant Uppal, Caroline Lee, *COVID-19 Testing and Cases in Immigration Detention Centers, April-August 2020*, JAMA (Oct. 29, 2020).

1 exponentially worse. At least 294,144 people in the United States have died from COVID-19,  
 2 and nearly 15 million people in the country have contracted the virus.<sup>4</sup> On Wednesday, the  
 3 United States set a new record as daily deaths from COVID-19 topped 3,000.<sup>5</sup> Washington state  
 4 is no different: on December 9, 2020, 192,413 people had confirmed cases of COVID-19, and  
 5 2,850 people had died from the virus.<sup>6</sup>

6 While everyone is at risk of contracting the virus, people of advanced age and those with  
 7 certain medical conditions face greater chances of serious illness or death from the virus. Golob  
 8 Decl., Dkt. 5 ¶ 3; Amon Decl., Dkt. 3 ¶ 11; Venters Decl., Dkt. 86 ¶¶ 13–14; Second Supp.  
 9 Amon Decl., Dkt. 136 ¶ 13. COVID-19 can severely damage lung tissue and may also target the  
 10 heart muscle, causing a medical condition called myocarditis and reducing the heart's ability to  
 11 pump. Golob Decl., Dkt. 5 ¶ 9. For people in the highest risk populations, the fatality rate of  
 12 COVID-19 is about 15 percent—or one in seven. *Id.* ¶ 4. Patients in high-risk categories who do  
 13 not die from COVID-19 face a prolonged recovery, including the need for extensive  
 14 rehabilitation for profound reconditioning, loss of digits, neurologic damage, and loss of  
 15 respiratory capacity. *Id.*

16 Although the Federal Drug Administration is expected to approve a COVID-19 vaccine  
 17 in the near future, the CDC estimates that vaccines will not be widely available for all adults  
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21 <sup>4</sup> Maltese Decl. Ex. C, Johns Hopkins University & Medicine, COVID-19 Dashboard by the  
 Centerfor Systems Science and Engineering (CSSE) at Johns Hopkins (updated Dec. 11, 2020,  
 2:28PM).

22 <sup>5</sup> Maltese Decl. Ex. D, New York Times, *A Grim New Record for the U.S. As Daily Deaths from*  
*the Virus Top 3,000*.

23 <sup>6</sup> Maltese Decl. Ex. E, Washington State Department of Health, COVID-19 Data Dashboard,  
 Dec. 10, 2020.

1 until later in 2021.<sup>7</sup> Until then, the only effective measure to reduce the risk for vulnerable  
 2 people from injury or death from COVID-19 are those that prevent them from being infected in  
 3 the first place. *Id.* ¶ 10.

### 4 **III. Defendants Have Failed to Protect Medically Vulnerable People Detained at** 5 **NWDC.**

6 ICE confirmed its first case of a detained immigrant with COVID-19 in late March. Dkt.  
 7 23-8. Over the past nine months, confirmed cases have ballooned to nearly 8,000 immigrant  
 8 detainees.<sup>8</sup> As of December 9, 2020, there are 496 active cases in ICE custody. Eight immigrant  
 9 detainees have died from COVID-19 nationwide. *See* Dkt. 135-1. Outbreaks have also occurred  
 10 at the Bureau of Prisons facility in SeaTac, Washington. *See* Dkt. 135-8.

11 Defendants, however, have not taken adequate steps to guard against an outbreak at  
 12 NWDC or to protect Plaintiffs' health and lives. Greifinger Decl. ¶¶ 5–11; Second Supp. Amon  
 13 Decl., Dkt. 136 ¶¶ 12–20.

14 First, ICE's testing and contact tracing procedures fail in significant respects. Testing at  
 15 NWDC is inadequate. Defendants' policies incorrectly assume that the testing of newly booked  
 16 detainees is sufficient to prevent COVID-19 from entering the facility and they have no clear  
 17 plan for identifying cases once the virus enters the facility through other means. Defendants still  
 18 do not have a protocol for routine periodic testing of the general population or of employees.  
 19 Second Supp. Amon Decl., Dkt. 136 ¶¶ 19(c), (i). This leaves NWDC unprotected against  
 20 asymptomatic transmission from facility or medical staff to the general population or from new

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 22 <sup>7</sup> Maltese Decl. Ex. F, Katie Thomas, *FDA Advisory Panel Gives Green Light to Pfizer Vaccine*,  
 New York Times (updated Dec. 11, 2020); *see also* Maltese Decl. Ex. G, CDC, *Frequently*  
 23 *Asked Questions About COVID-19 Vaccination*, Dec. 3, 2020.

<sup>8</sup> Maltese Decl. Ex. H, U.S. Immigration & Customs Enf't, *ICE Guidance on COVID-19: ICE*  
*Detainee Statistics* (updated Dec. 9, 2020).

1 entry quarantine spilling into the general population. *Id.* ¶¶ 19(b)–(j); Greifinger Decl. ¶ 8. The  
2 latest example of COVID-19 transmission in Mr. Khan’s unit exemplifies this problem:  
3 Defendants only learned about a positive COVID-19 test *after* the detainee was tested at another  
4 facility upon transfer. Defendants have not identified how COVID-19 entered the general  
5 population, demonstrating that their current testing has failed to keep medically vulnerable  
6 individuals like Mr. Khan safe. *Supra* pp. 2–3; Greifinger Decl. ¶¶ 7–9. Given Defendants’ lack  
7 of clarity regarding the source of COVID-19 infection in Mr. Khan’s unit, it is “quite possible  
8 that COVID-19 could be spreading undetected throughout the facility.” *Id.* ¶ 8.

9 Plaintiffs have repeatedly warned about the need for Defendants to conduct more testing,  
10 yet Defendants have refused to do more. *See, e.g.*, Amon Decl., Dkt. 3 ¶ 33, First. Supp. Amon  
11 Decl., Dkt. 69 ¶ 10; Second Supp. Amon Decl., Dkt. 136 ¶ 19. As Dr. Amon recently explained,  
12 although ICE is now testing new detainees at intake, “ICE’s screening mechanisms are clearly  
13 insufficient to detect COVID-19 among employees, lawyers, vendors, and other essential staff  
14 who cycle between the community and the facility.” Second Supp. Amon Decl., Dkt. 136 ¶  
15 19(b); *see also* Greifinger Decl. ¶¶ 9–10. He points to the recent positive tests among staff  
16 members—who worked in NWDC and may have exposed the general population—to  
17 demonstrate the deficiencies in Defendants’ testing policies. Second Supp. Amon Decl., Dkt. 136  
18 ¶ 19(b). Defendants have also refused to test detainees who were likely exposed to a confirmed  
19 case. For example, ICE refused to provide COVID-19 testing to a detainee placed into quarantine  
20 after a guard who had worked the unit tested positive for COVID-19, claiming she was not a  
21 “close contact,” in contravention of ICE policy and CDC guidance, and despite a request from  
22 counsel to do so. *Id.* ¶¶ 19(e)–(f); *see* Simcock Decl., Dkt. 142 ¶¶ 3–6 & Ex. A. Defendants’  
23 failure to test adequately is especially dangerous, as large percentages of COVID-19 cases may



1 be entirely asymptomatic. *See, e.g.*, Amon Decl., Dkt. 3 ¶ 14. As Dr. Robert Greifinger, a  
2 correctional health expert, observes, “[t]esting to mitigate the risk of COVID-19 in a detention  
3 facility should be frequent and not once-off,” and “should be at least weekly to be able to  
4 respond rapidly to any new infections and isolate those who are infected.” Greifinger Decl. ¶ 10.  
5 Even worse, ICE’s COVID-19 Pandemic Response Requirements (PRR) still allow officers who  
6 have been exposed to a COVID-19 case to nevertheless continue working when they are  
7 asymptomatic. Second Supp. Amon Decl., Dkt. 136 ¶ 19(f). This, Dr. Amon concludes, can be a  
8 “recipe for disaster.” *Id.*

9       Second, Defendants are not following their own screening procedures for high-risk  
10 individuals. Under the latest PRR, they are required to conduct “temperature and verbal  
11 screening of high risk (vulnerable) detainees . . . twice daily.” *Id.* ¶ 14. But Mr. Khan states that  
12 this screening had not occurred over the past week, even though he is high risk in a unit that has  
13 been undisputedly exposed to COVID-19. Third Khan Decl. ¶ 11 (“In last 9 days since this  
14 quarantine started, we did not have our temperatures taken, but today, in the morning, they took  
15 our temperatures[.]”). This failure to screen the most-at-risk in a unit that was exposed to  
16 COVID-19—a practice that violates Defendants’ own policy—further underscores the danger  
17 Mr. Khan and class members face.

18       Third, detainees face a heightened risk of infection given NWDC staff’s ongoing failure  
19 to wear masks. Guards are routinely in very close proximity to detained persons. Second  
20 Avendaño Decl., Dkt. 141 ¶ 7; Second Khan Decl., Dkt. 138 ¶ 7; Robles Rodriguez Decl., Dkt.  
21 137 ¶ 7; Cha Decl., Dkt. 139 ¶ 9; Melgar Alas Decl., Dkt. 140 ¶ 9. And guards often do not wear  
22 masks or gloves in the facility, despite the mask mandate that Defendants adopted following the  
23 filing of this litigation, Second Avendaño Decl., Dkt. 141 ¶ 3; Second Khan Decl., Dkt. 138 ¶ 7;

Robles Rodriguez Decl., Dkt. 137 ¶ 7; Cha Decl., Dkt. 139 ¶ 9; Melgar Alas Decl., Dkt. 138 ¶¶ 4, 9, and even after Chief Judge Martinez’s statement that he was “troubled” by evidence of staff not complying with the mask requirement. *Moturi v. ICE Field Office Dir.*, No. C19-2023-RSM-BAT, Dkt. 71 (W.D. Wash. Oct. 1, 2020). Attorneys have also noted NWDC staff’s ongoing failure to wear masks. *See* Second Nerheim Decl., Dkt. 143 ¶¶ 7–8; *see also* Avila Decl., Dkt. 144 ¶¶ 2–4; First Nerheim Decl., Dkt. 15 ¶ 5. Such a failure to abide by basic safety protocols puts Mr. Khan and other putative class members at grave risk.

Fourth, it remains impossible for detainees at NWDC to socially distance. In June, Chief Judge Martinez noted that “[d]espite reducing the overall population and the populations within housing units, housing units remain crowded” and “despite Respondents’ efforts, practicing adequate social distancing remains impossible.” *Pimentel-Estrada v. Barr*, 464 F. Supp. 3d 1225, 1231–32 (W.D. Wash. 2020) (*Pimentel-Estrada II*). That fact remains true. Plaintiffs and other detained persons explained in recently-filed declarations that they are housed in crowded “pods” where many people are housed together in a confined space. Second Khan Decl., Dkt. 138 ¶ 3; Melgar Alas Decl., Dkt. 140 ¶ 3; Robles Rodriguez Decl., Dkt. 137 ¶ 2; Cha Decl., Dkt. 139 ¶ 10. Detained persons continue to sit close together at meals, stand closely in lines to obtain food and medicine, recreate together, and are crowded into groups to attend court or visit the medical clinic. Second Avendaño Decl., Dkt. 141 ¶¶ 8–10; Second Khan Decl., Dkt. 138 ¶¶ 3–4; Robles Rodriguez Decl., Dkt. 137 ¶¶ 10–11; Cha Decl., Dkt. 139 ¶¶ 12, 14; Melgar Alas Decl., Dkt. 140 ¶¶ 5, 7, 9. As one detainee put it, “[e]ven if we [the detainees] wanted to be socially distant, it would not be possible for us to be 6 feet apart within [certain spaces like] the day room.” Cha Decl., Dkt. 139 ¶ 12; *see also* Melgar Alas Decl., Dkt. 140 ¶ 7 (“In the pod, there is not [sic] social distancing.”); Second Khan Decl., Dkt. 138 ¶ 3 (similar); Second Supp. Amon

Decl., Dkt. 136 ¶¶ 12(a)–(e).

Fifth, Defendants’ policies and practices regarding hygiene and cleaning fall short and cannot stop the virus’s spread. The primary responsibility for cleaning is still left to detainees, who are paid a dollar each day to clean bathrooms, common areas, and shared surfaces. Third Khan Decl. ¶ 9; Second Avendaño Decl., Dkt. 141 ¶ 5; Robles Rodriguez Decl., Dkt. 137 ¶ 12; Cha Decl., Dkt. 139 ¶ 13. Defendants still have produced no “evidence that professional cleaning occurs within the housing units[.]” *Pimentel-Estrada I*, 458 F. Supp. 3d at 1240, and instead, “continue to leave nearly all cleaning to the detainees,” *Pimentel-Estrada II*, 464 F. Supp. 3d at 1232; *see also* Second Supp. Amon Decl., Dkt. 136 ¶ 20(f) (noting “issues in lack of comprehensive and regular cleaning when it is outsourced to detainees”).

Finally, Defendants’ plan to stop an outbreak is inadequate and most importantly it has not worked. The situation in the facility now endangers medically-vulnerable individuals by trapping them in a housing unit that has been exposed to COVID. The current outbreak demonstrates exactly this point. Mr. Khan explains in his most recent declaration that, around a week ago, Defendants imposed a quarantine on his unit. Third Khan Decl. ¶ 7. But rather than separate undisputedly high-risk individuals like Mr. Khan, Defendants left him in the unit with others. *Id.* ¶¶ 7, 9, 11. When Plaintiffs first filed this case, Dr. Amon explained that by forcing individuals who are infected into “close proximity” with those who are not, cohorting will likely *facilitate* infection within the pod, rather than prevent it. Amon Decl, Dkt. 3 ¶ 36(f). Yet as Mr. Khan’s experience demonstrates, in cases where NWDC has suspected there might be (or even has confirmed) a positive case, ICE and GEO have done exactly this, without taking additional measures to stop the virus’s spread in potentially exposed groups. *See, also e.g.*, Bonarov Decl., Dkt. 14 ¶ 12. Defendants’ practices have now significantly heightened the possibility that Mr.

1 Khan has been exposed to COVID-19—a result that Plaintiffs have warned about for months.<sup>9</sup>

2 **IV. Mr. Khan and the Proposed Class Face Serious Illness and Death from COVID-19**  
 3 **and Should Be Released to Safety.**

4 Mr. Khan is a 48-year-old citizen of Pakistan and lawful permanent resident whom ICE  
 5 has detained at NWDC for over a year. *See* First Khan Decl., Dkt. 9 ¶ 1–2. As a diabetic, he is at  
 6 high risk for serious health complications or even death if he becomes infected with COVID-19.  
 7 This fact is not disputed. Just last week, Defendants issued a *Fraihat* determination for Mr.  
 8 Khan, identifying his diabetes as a chronic care condition and serious COVID-19 risk factor that  
 9 warranted his consideration for release. *See* Maltese Decl. Ex. I; *see also Fraihat v. U.S.*  
 10 *Immigration & Customs Enf't*, 445 F. Supp. 3d 709 (C.D. Cal. 2020). In addition, Defendants  
 11 have not disputed his high-risk status in previous filings to this Court. *See* Malakhova Decl., Dkt.  
 12 103 ¶ 48. Dr. Katherine McKenzie has also assessed that Mr. Khan faces high risk of serious  
 13 health issues because of his diabetes. *See* McKenzie Decl., Dkt. 4 ¶ 24.

14 Mr. Khan has provided the Court with a clear plan of release that ensures he will pose  
 15 neither a flight risk nor danger if released. As he explained before, he will live with a close friend  
 16 in the Seattle area. First Khan Decl., Dkt. 9 ¶ 17. He is a long-time resident of this region and has  
 17 a “strong support network” who would be able to assist him if released. *Id.* Mr. Khan  
 18 acknowledges that he has made mistakes in the past and has made clear that if released he will  
 19 not contact his ex-wife or children. *Id.* ¶ 16; *see also* Third Khan Decl. ¶ 25. Mr. Khan also has a

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 21 <sup>9</sup> As Dr. Amon noted, this is already taking place among new detainees who are forced to co-  
 22 mingle with each other while awaiting their test results. Second Supp. Amon Decl., Dkt. 136 ¶  
 23 19(g). This practice of placing detainees in close quarters makes it very likely that, if any  
 detainee had COVID-19, it would spread to all other detainees in the cohort. Amon Decl., Dkt. 3  
 ¶¶ 43–45 (describing the extreme rate of infection at the Rikers Island jail in New York City and  
 other outbreaks in jails); Bostock Decl., Dkt. 116-1 ¶¶ 3, 9 (describing how admission of one  
 COVID-19 positive individual was quickly followed by three other detainees testing positive).

1 strong claim for relief from removal: an immigration judge has already approved his application  
 2 for cancellation of removal, meaning that he would remain a lawful permanent resident of this  
 3 country. First Khan Decl., Dkt. 9 ¶ 19. The government appealed the immigration judge's  
 4 decision to the BIA, who sustained the appeal, Lippard Decl., Dkt. 104 ¶ 106, and Mr. Khan now  
 5 has a pending petition for review and temporary stay of removal. *Khan v. Barr*, Case No. 20-  
 6 72191, Dkts. 1, 6 (9th Cir. 2020). Finally, Mr. Khan will comply with all conditions of his  
 7 release, and understands that a violation of those conditions would only result in his arrest and  
 8 re-detention. First Khan Decl., Dkt. 9 ¶¶ 16, 18; *see also* Third Khan Decl. ¶ 25.<sup>10</sup>

9 In addition, Mr. Khan and the other Named Plaintiffs seek to represent a class of  
 10 medically vulnerable individuals. *See* Dkt. 134 at 13; Dkt. 167 ¶ 66. Putative class members are  
 11 primarily those that both ICE and the CDC have identified as high risk for death or serious health  
 12 complications from COVID-19. As described above, COVID-19 poses an especially grave risk  
 13 for such individuals. *Supra* Sec. II. Correctional and public health experts agree that release is a  
 14 critical tool to safeguard the lives and health of these individuals. Indeed, two medical experts  
 15 for the Department of Homeland Security have concluded that COVID-19 poses an “imminent  
 16 risk to the health and safety of immigration detainees,” in light of the nature of detention  
 17 facilities. Dkt. 2-3 at 3. As a result, they have recommended release of vulnerable people. *Id* at 6.

18 Accordingly, release provides putative class members the only realistic chance they have  
 19 to avoid the needless suffering or death that is likely to occur if they remain detained—especially  
 20 when there is an active outbreak at NWDC. Amon Decl., Dkt. 3 ¶¶ 55–57; Second Supp. Amon

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 22 <sup>10</sup> Defendants have released the other named Plaintiffs in this case. Josue Castaneda Juarez  
 23 prevailed in his immigration case. Dkt. 98. J.A.M. was released immediately after Plaintiffs filed  
 this case, Bostock Decl., Dkt. 63 ¶ 79, and he has since prevailed before the Ninth Circuit in his  
 case. *See J.R. v. Barr*, 975 F.3d 778 (9th Cir. 2020). Defendants also recently released Petitioner  
 Wilfredo Favela Avendaño. Dkt. 151.

Decl., Dkt. 136 ¶ 7. The Court should also consider for release other Proposed Class members in an expedited process where the Court can assess other factors, such as alleged potential flight risk or danger.

### LEGAL STANDARD

On a motion for a TRO, the movant “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (noting that preliminary injunction and TRO standards are “substantially identical”). A TRO may issue where “serious questions going to the merits [are] raised and the balance of hardships tips sharply in [plaintiff’s] favor.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (second alteration in original) (citation omitted). A plaintiff may succeed under the “serious question” test if they are likely to suffer irreparable injury and show that an injunction is in the public’s interest. *Id.* at 1134–35.

### ARGUMENT

#### **I. Plaintiffs Are Likely to Succeed on the Merits.**

The threshold legal questions in this case have already been resolved in Plaintiffs’ favor: First, this Court has recognized that individuals have standing to challenge their detention based on the unsafe conditions at NWDC during the COVID-19 pandemic. *See Dawson v. Asher*, No. C20-0409JLR-MAT, 2020 WL 1704324, at \*8 (W.D. Wash. Apr. 8, 2020). This Court also recognized that Plaintiffs may seek habeas relief under 28 U.S.C. § 2241 based on unlawful conditions. *See id.* at \*8–9; *see also, e.g., Pimentel-Estrada I*, 458 F. Supp. 3d at 1242. Moreover, the Ninth Circuit has reaffirmed that individuals may seek injunctive relief under 28

1 U.S.C. § 1331 to address a constitutional violation in detention conditions. *See Hernandez*  
 2 *Roman*, 977 F. 3d. at 941–42 (“Once a [constitutional] right and a violation have been shown, the  
 3 scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and  
 4 flexibility are inherent in equitable remedies.”) (quoting *Swann v. Charlotte-Mecklenburg Bd. of*  
 5 *Educ.*, 402 U.S. 1, 15 (1971)). The Court therefore has “the authority both to entertain Plaintiffs’  
 6 constitutional challenges and to grant injunctive relief in response to them,” including “a  
 7 reduction in the facility’s population . . . required for detainee safety.” *Id.* at 942.

8 **a. The Factual and Legal Circumstances at NWDC Have Changed**  
 9 **Dramatically Demonstrating Likelihood of Success on the Merits.**

10 Although this Court has previously denied preliminary relief, the circumstances have  
 11 changed so as to require issuance of a TRO. In light of this Court’s prior orders, Defendants’  
 12 own admission that they have failed to stop COVID-19 from entering the general population at  
 13 NWDC, and the Ninth Circuit’s opinion in *Hernandez Roman*, Plaintiffs can now show a  
 14 likelihood of success in the Fifth Amendment claim. *See Dawson v. Asher*, 447 F. Supp. 3d  
 15 1047, 1050 n.4 (W.D. Wash. 2020) (acknowledging that the “rapidly changing nature of the  
 16 COVID-19 pandemic” may make emergency relief appropriate later in pandemic).

17 As this Court has previously recognized, to succeed on their substantive due process  
 18 challenge, Plaintiffs must show that they face an unreasonable risk of serious illness or death that  
 19 violates either (1) their right to reasonably safe conditions of confinement, and/or (2) their right  
 20 to conditions that do not amount to punishment. *See* Dkt. 91 at 11, 15. In denying Plaintiffs’ first  
 21 TRO, the Court relied heavily on the results of one round of mass testing in June 2020, in which  
 22 only one detainee out of the 360 detainees tested (out of a total population of 450 at NWDC)  
 23 tested positive for COVID-19. *Id.* at 14. Moreover, that individual was not in the general  
 population. *See* Dkt. 89 (noting that the individual was in the new intake monitoring unit). Since



1 then, however, multiple employees have tested positive, *see* Dkt. 122-1, 128-1, 129-1, 152-1,  
 2 162-1, 163-1, 165-1, Dkt. 173-1, including staff who worked in the general population units, *see*  
 3 Dkt. 152-1, 162-1. Most troublingly, as described above, two detainees of the general  
 4 population’s A3 unit—where Plaintiff Mr. Khan was housed—have very recently tested positive  
 5 for COVID-19, and he and his entire unit are currently under quarantine from the potential  
 6 exposure. *See* Dkt. 173-1. As Dr. Greifinger notes, “[o]nce introduced to a congregate facility,  
 7 COVID-19 can spread like wildfire.” Greifinger Decl. ¶ 6. Defendants have yet to identify the  
 8 source of this infection, demonstrating the flaws in their protocols.

9 Moreover, since this Court’s TRO decision, the Ninth Circuit has addressed the impact of  
 10 the COVID-19 pandemic on ICE detention, holding that “the Government likely failed to meet  
 11 its constitutional duty to provide reasonably safe conditions to Plaintiffs” at a facility where  
 12 detainees were unable to socially distance or practice strict hygiene. *See Hernandez Roman*, 977  
 13 F. 3d at 943. Importantly, the court noted that “[t]he Government was aware of the risks these  
 14 conditions posed, especially in light of high-profile outbreaks at *other carceral* facilities that had  
 15 already occurred at the time.” *Id.* (emphasis added). The court therefore concluded that the  
 16 district court did not abuse its discretion in issuing injunctive relief—including a population  
 17 reduction order, among other restrictions—in response to the violation of the Fifth Amendment  
 18 right to reasonable health and safety from COVID-19. *Id.* at 942–43. This new precedent, as well  
 19 as the alarming news of the recent positive detainees, make clear that Plaintiffs are likely to  
 20 succeed on the merits of their due process claims.

21 **b. Subjecting Detainees to an Unreasonable Risk of Serious Illness or Death**  
 22 **Violates Their Fifth Amendment Right to Reasonable Safety in Custody.**

23 As this Court affirmed, whenever the government detains or incarcerates someone, it has  
 an affirmative duty to provide conditions of reasonable health and safety. Dkt. 91 at 11–12



(quoting *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989)).  
 “The government thus violates the Due Process Clause if it fails to provide civil detainees [like  
 Plaintiffs] with ‘food, clothing, shelter, medical care, and reasonable safety.’” *Id.* (quoting  
*DeShaney*, 489 U.S. at 200); accord *Pimentel-Estrada I*, 458 F. Supp. 3d at 1243.

Immigration detainees are civil detainees protected by the Due Process Clause of the  
 Fifth Amendment. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Because civil detention is  
 governed by the Fifth Amendment rather than the Eighth Amendment, the “deliberate  
 indifference” standard required under the Eighth Amendment does not apply to civil detainees  
 like Plaintiffs. *Jones v. Blanas*, 393 F.3d 918, 933–34 (9th Cir. 2004). For example, in the  
 pretrial criminal context, detainees need only show “an intentional decision” regarding  
 conditions that puts them at “substantial risk of suffering serious harm” and a failure to “take  
 reasonable available measures to abate that risk.” *Gordon v. Cnty. of Orange*, 888 F.3d 1118,  
 1125 (9th Cir. 2018) (applying the “objective deliberate indifference” standard for pretrial  
 detainees outlined in *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1070–71 (9th Cir. 2016) (en  
 banc)); *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473-74 (2015); see also *Pimentel-Estrada I*,  
 458 F. Supp. 3d at 1244, 1250.

As a member of this Court has explained, applying the objective standard outlined in  
*Castro* reveals “several glaring deficiencies” in Defendants’ efforts to abate the “substantial risk  
 of serious harm” to vulnerable detainees at NWDC from COVID-19, violating Plaintiffs’ due  
 process rights. *Pimentel-Estrada I*, 458 F. Supp. 3d at 1244–50. The recent, unexplained positive  
 test of a member of the general population living in the same housing unit as Plaintiff Khan now  
 demonstrates this risk has increased dramatically. Given these alarming indications that the  
 NWDC is on the verge of an outbreak of COVID-19, there can be no doubt that Defendants have

1 failed to abate the “substantial risk of serious harm” to vulnerable detainees at NWDC. *See id.* at  
2 1250; *Hernandez Roman*, 977 F.3d at 943. They have therefore violated Plaintiffs’ due process  
3 rights by “fail[ing] to meet [their] constitutional duty to provide reasonably safe conditions to  
4 [individuals like] Plaintiffs” held in immigration detention centers. *Hernandez Roman*, 977 F.3d  
5 at 943. Indeed, Chief Judge Martinez found months ago that detainees are at risk of exposure to  
6 the highly contagious and dangerous coronavirus because of facility conditions, given that social  
7 distancing and scrupulous hygiene remains impossible, guards are inconsistently wearing masks,  
8 and testing is inadequate. *Pimentel-Estrada II*, 464 F. Supp. 3d at 1235.

9 As detailed above, many of the same deficiencies that the Ninth Circuit identified at the  
10 facility in *Hernandez Roman* and Chief Judge Martinez identified at NWDC persist, and now  
11 gravely threaten Mr. Khan and putative class members’ health. First, ICE’s screening procedures  
12 fail in significant respects because Defendants do not conduct adequate testing, cannot identify  
13 the source of their current outbreak, and do not following their own regular screening policy.  
14 Second, detainees and immigration attorneys alike have recently reported repeated failure to  
15 scrupulously follow the most basic of safety protocols: mask wearing. Third, “practicing  
16 adequate social distancing remains impossible,” placing detained persons even further at risk.  
17 *Pimentel-Estrada II*, 464 F. Supp. 3d at 12315. Defendants’ hygiene and cleaning policies have  
18 also predictably failed to stop the virus’s spread. Finally, Defendants have placed Plaintiff Khan  
19 and the other detainees within his unit in a cohort within a pod at the facility, trapping them into  
20 an area where those who have already been infected are now likely to be exposed.

21 In these circumstances, Defendants’ failure to take reasonable measures to abate the  
22 substantial risk faced by Plaintiffs is objectively unreasonable. *Castro*, 833 F.3d at 1071. The  
23 deficiencies in Defendants’ practices found in *Pimentel-Estrada* remain and have resulted in

undoubted grave risk to Mr. Khan and all other medically vulnerable detainees. Defendants have been on notice about both the risk to medically vulnerable detainees in NWDC and the deficiencies in conditions and practices Plaintiffs have flagged since at least early March 2020 when the first COVID-19 litigation was filed. *Dawson*, No. 2:20-cv-409, Dkt. 1 (filed Mar. 16, 2020). Nonetheless, as detailed above, Defendants have failed to take these concrete precautions to adequately protect medically vulnerable detainees at NWDC. The result is the increased and grave risk of serious illness or death for Mr. Khan and the Proposed Class. For these reasons, Defendants' actions violate the Due Process Clause.

**c. Detention of Class Members During the COVID-19 Pandemic Is Excessive in Relation to the Government's Interest, in Violation of Substantive Due Process.**

As this Court has noted, Plaintiffs can also show a due process violation if "their continued detention . . . amounts to punishment."<sup>11</sup> Dkt. 91 at 15. The question is not whether Plaintiffs' detention would be justified under normal circumstances, but whether it is reasonable during a pandemic. Here, Plaintiffs' detention at NWDC additionally violates due process because "it imposes some harm to the detainee that significantly exceeds or is independent of the inherent discomforts of confinement and is not reasonably related to a legitimate governmental

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<sup>11</sup>As previously briefed, in contrast to convicted prisoners, who derive protection from the Eighth Amendment, civil detainees are entitled to greater constitutional protection. *Jones*, 393 F.3d at 931-32; *King v. Cnty. of Los Angeles*, 885 F.3d 548, 556-57 (9th Cir. 2018); *see also Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982). Civil detention cannot "amount to punishment of the detainee." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *see also Kingsley*, 135 S. Ct. at 2473-74. Detention is punitive where it is not "reasonably related to a legitimate governmental objective." *Doe v. Kelly*, 878 F.3d 710, 720 (9th Cir. 2017) (quoting *Bell*, 441 U.S. at 539). Detention that "is arbitrary or purposeless" violates the detainee's due process rights. *Id.* (quoting *Bell*, 441 U.S. at 539). Moreover, civil detainees like Plaintiffs are entitled to even stronger protections than pretrial defendants: conditions of confinement for civil detainees are presumptively punitive if they are "identical to, similar to, or more restrictive" than those of criminal pretrial detainees. *Jones*, 393 F.3d at 931-32; *King*, 885 F.3d at 557.

1 objective or is excessive in relation to the legitimate governmental objective.” *Unknown Parties*  
2 *v. Johnson*, No. CV-15-250-TUC-DCB, 2016 WL 8188563, at \*5 (D. Ariz. Nov. 18, 2016)  
3 (citing *Kingsley*, 135 S.Ct. at 2473–74), *aff’d sub nom., Doe v. Kelly*, 878 F.3d 710 (9th Cir.  
4 2017).

5 The heightened risk that Plaintiffs face from COVID-19—both from their medical  
6 vulnerabilities and the nature of NWDC’s congregate setting—outweighs the government’s  
7 interest in their continued detention. Civil immigration detention is justified only when necessary  
8 to ensure the individual’s appearance for removal proceedings or deportation, or to protect the  
9 community from harm. *Zadvydas*, 533 U.S. at 690. Just as “[t]here is no sufficiently strong  
10 special justification . . . for indefinite civil detention,” *id.*, detention is not justified where  
11 detention conditions create a substantial risk of serious harm because “[t]hese conditions create  
12 far more serious consequences for [individuals] than are justified by [the government]’s need to  
13 ensure . . . presence at removal,” *Pimentel-Estrada I*, 458 F. Supp. 3d at 1251; *Hernandez*  
14 *Roman*, 977 F.3d at 943-44 (citing with approval *Helling v. McKinney*, 509 U.S. 25, 35 (1993),  
15 which held that involuntary exposure of second-hand smoke could form basis the for a challenge  
16 to conditions of confinement); *Perez v. Wolf*, 445 F. Supp. 3d 275, 294 (N.D. Cal. 2020) (holding  
17 that “given [petitioner’s] health concerns, his detention is excessive in relation to the  
18 Government’s needs”). Even worse, ICE has decided to keep medically vulnerable people  
19 detained during this deadly pandemic even though alternatives to detention are readily available.  
20 As the Ninth Circuit has recognized, ICE has highly effective tools at its disposal to supervise  
21 individuals in the community and ensure that they report for court hearings and other  
22 appointments. *See Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017); *Perez*, 445 F. Supp.  
23 3d at 294–95 (“The Government’s legitimate concerns [with danger] can still be advanced by a

1 limited release [i.e., conditions of release].”); *see also* Schriro Decl., Dkt. 6 ¶¶ 61–65. And  
 2 Plaintiffs, like Mr. Khan, and class members have homes or other locations available to them  
 3 upon release where they can remain and adhere to guidelines for self-quarantine, further  
 4 undercutting any interest in confinement. *See supra* p. 11.

5 Plaintiffs’ continued detention in light of the risks posed by COVID-19 is thus excessive  
 6 in relation to any legitimate governmental interest. *Pimentel-Estrada II*, 464 F. Supp. 3d at 1236;  
 7 *see also Alcantara v. Archambeault*, No. 20-cv-756-DMS (AHG), --- F. Supp. 3d ----, 2020 WL  
 8 2315777, at \*9 (S.D. Cal. May 1, 2020); *Fraihat*, 445 F. Supp. 3d at 746–47 (holding that the  
 9 federal government’s failures to implement effective COVID-19 protocols for medically  
 10 vulnerable detainees “are excessive given the nature and purpose [of] civil detention”).

11 **d. The Court Has Authority to Order Release and Establish a Process for**  
 12 **Expedited Consideration for Release.**

13 This Court has clear authority to remedy unconstitutional detention, either by directing  
 14 the release of medically vulnerable individuals, *see Pimentel-Estrada I*, 458 F. Supp. 3d at  
 15 1253,<sup>12</sup> or establishing an expedited process by which ICE or the Court identifies and considers

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16 <sup>12</sup> As previously noted, courts across the country have ordered the immediate release of  
 17 individuals like Plaintiffs. *See, e.g., Ixchop Perez v. Wolf*, 445 F. Supp. 3d 275 (N.D. Cal. 2020);  
 18 *Bent v. Barr*, 445 F. Supp. 3d 408 (N.D. Cal. 2020); *Castillo v. Barr*, 449 F. Supp. 3d 915 (C.D.  
 19 Cal. 2020); *Hernandez Roman v. Wolf*, No. 5:20-cv-768-TJH-PVC, 2020 WL 3487632 (C.D.  
 20 Cal. June 19, 2020), *appeal dismissed*, No. 20-55662, Dkt. 55-1, at \*4 (9th Cir. Oct. 13, 2020);  
 21 *Kaur v. U.S. Dep’t of Homeland Sec.*, No. 2:20-cv-03172-ODW (MRWx), 2020 WL 1939386  
 22 (C.D. Cal. Apr. 22, 2020); *Singh v. Barr*, No. 20-cv-02346-VKD, 2020 WL 1929366 (N.D. Cal.  
 23 Apr. 20, 2020); *Doe v. Barr*, No. 20-cv-02141-LB, 2020 WL 1820667 (N.D. Cal. Apr. 12, 2020);  
*Ortuño v. Jennings*, No. 20-cv-02064-MMC, 2020 WL 1701724 (N.D. Cal. Apr. 8, 2020); *see*  
*also, e.g., da Silva Medeiros v. Martin*, 458 F. Supp. 3d 122 (D.R.I. 2020); *Savino v. Souza*, 453  
 F. Supp. 3d 441 (D. Mass. 2020); *Coronel v. Decker*, 449 F. Supp. 3d 274 (S.D.N.Y. 2020);  
*Basank v. Decker*, 449 F. Supp. 3d 205 (S.D.N.Y. 2020); *Coreas v. Bounds*, 458 F. Supp. 3d 352  
 (D. Md. 2020); *Vazquez Barrera v. Wolf*, 455 F. Supp. 3d 330 (S.D. Tex. 2020); *Malam v.*  
*Adducci*, 459 F. Supp. 3d 867 (E.D. Mich. 2020) (*Malam II*); *Fofana v. Albence*, 454 F. Supp. 3d  
 651 (E.D. Mich. 2020); *Malam v. Adducci*, 452 F. Supp. 3d 643 (E.D. Mich. 2020), *as amended*  
 (Apr. 6, 2020) (*Malam I*); *Galan-Reyes v. Acoff*, 460 F. Supp. 3d 719 (S.D. Ill. 2020); *Essien v.*

putative class members for release, *see Zepeda Rivas v. Jennings*, 445 F. Supp. 3d 36, 40–41 (N.D. Cal. 2020) (establishing bail process); *Hernandez Roman v. Wolf*, No. 5:20-cv-00768-TJH-PVC, 2020 WL 6107069, at \*5 (C.D. Cal. Oct. 15, 2020) (depopulation order).<sup>13</sup>

“Federal courts possess whatever powers are necessary to remedy constitutional violations because they are charged with protecting these rights.” *Stone v. City & Cnty. of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992). Moreover, it is well-established that a federal court may release individuals to remedy unconstitutional conditions of confinement. *See Brown v. Plata*, 563 U.S. 493, 511 (2011). As noted above, the Ninth Circuit has recently reaffirmed that “an implied cause of action exists for Plaintiffs to challenge allegedly unconstitutional conditions of confinement.” *Hernandez Roman*, 977 F.3d at 941. The court analogized its COVID-19 ICE detention case to *Plata*, in which the Supreme Court had affirmed the lower court’s order to depopulate California state prisons that were overcrowded in violation of the Eighth Amendment. *Id.* at 942. Such is the case here. Plaintiffs may challenge the condition at

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*Barr*, 457 F. Supp. 3d 1008 (D. Colo. 2020); *Yanes v. Martin*, 464 F. Supp. 3d 467 (D.R.I. 2020) (D.R.I. 2020); *Carlos M.R. v. Decker*, No. 20-6016 (MCA), 2020 WL 4339452 (D.N.J. July 28, 2020); *Vazquez Barrera v. Wolf*, No. 4:20-cv-1241, 2020 WL 6130717 (S.D. Tex. Oct. 19, 2020).

<sup>13</sup> *See also, e.g., Hernandez Roman v. Wolf*, No. 5:20-cv-00768-TJH-PVC, 2020 WL 3487632 (C.D. Cal. June 19, 2020), *stay denied*, No. 20-55662, Dkt. 9 (9th Cir. July 8, 2020), *appeal dismissed*, Dkt. 55-2 (9th Cir. Oct. 13, 2020) (order establishing bail process for class of habeas petitioners); *Malam v. Adducci*, No. 5:20-cv10829-JEL-APP, Dkt. 168 (E.D. Mich. Aug. 4, 2020), *amended*, Dkt. 177 (E.D. Mich. Aug. 12, 2020) (same for subclass of medically vulnerable petitioners); *Savino v. Souza*, 453 F. Supp. 3d 441, 453 (D. Mass. 2020) (granting several class members to bail and issuing decision to consider bail applications for other class members); *Gomes v. Acting Sec’y, U.S. Dep’t of Homeland Sec.*, No. 20-cv-453-LM, 2020 WL 2113642, at \*1 (D.N.H. May 4, 2020) (provisionally certifying a proposed class for the “purpose of holding expedited bail hearings for class members”); *Yanes*, 464 F. Supp. 3d at 476 (ordering individual bail hearings for class of habeas petitioners); *Avendaño Hernandez v. Decker*, 450 F. Supp. 3d 443, 446-49 (S.D.N.Y. 2020) (admitting habeas petitioner to bail due to the threat posed by COVID-19); *Coronel*, 449 F. Supp. 3d at 290 (same); *Calderon Jimenez v. Wolf*, No. 18-cv-10225-MLW, ECF No. 507-1, at 6 (D. Mass. Mar. 26, 2020) (same).



NWDC and argue both for release and other injunctive relief “to cure the . . . Fifth Amendment violation and . . . for detainee safety.” *Id.*

In sum, Plaintiffs have shown that they are likely to succeed on the merits of their claim that their continued detention violates the Fifth Amendment. The Court should therefore establish a process to consider them for release.

## **II. Irreparable Harm and Other TRO Factors**

### **a. Exposure to a Lethal Virus Which Cannot Be Effectively Contained Constitutes Irreparable Harm.**

In a similar case challenging conditions at another ICE facility run by the GEO Group, the Ninth Circuit has held that irreparable harm was likely without relief “given COVID-19’s high mortality rate.” *Hernandez Roman*, 977 F.3d at 944. In addition, the Ninth Circuit has recognized that conditions of detention dangerous to human health constitute irreparable harm. *Padilla v. U.S. Immigration & Customs Enf’t*, 953 F.3d 1134, 1147 (9th Cir. 2020); *see also Hernandez*, 872 F.3d at 995. Irreparable harm also occurs where the government’s actions threaten an individual’s health. *See, e.g., M.R. v. Dreyfus*, 663 F.3d 1100, 1111–14 (9th Cir. 2011), *as amended by*, 697 F.3d 706 (9th Cir. 2012). It also is well established that the deprivation of constitutional rights constitutes irreparable injury and is sufficient to warrant an injunction. *Hernandez*, 872 F.3d at 994; *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). For the reasons described above, Plaintiffs have established each of these forms of irreparable harm.

### **b. The Public Interest and Balance of Equities Weigh Heavily in Plaintiffs’ Favor.**

Finally, given the “preventable human suffering” at issue, the “balance of hardships tips decidedly in [P]laintiffs’ favor.” *Hernandez*, 872 F.3d at 996 (citation omitted). The government

1 “cannot reasonably assert that it is harmed” by being compelled to follow the law. *Zepeda v.*  
 2 *I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). Indeed, it is always in the public interest to prevent  
 3 violations of fundamental rights. *Melendres*, 695 F.3d at 1002. Moreover, as explained above,  
 4 class members can be released on reasonable conditions of supervision to address the  
 5 government’s interests. *See, e.g., Hernandez Roman*, 977 F.3d at 944 (finding that the balance of  
 6 equities weighs in favor of issuing a TRO, in part, because the government’s concerns about  
 7 flight risk may be addressed through alternatives to detention); *Pimentel Estrada I*, 458 F. Supp.  
 8 3d at 1253 (ordering petitioner released on “reasonable conditions of supervision”).

9 Furthermore, release is in both the public and Defendants’ own interest. Here, release of  
 10 Mr. Khan and considering the release of class members will reduce the risk of their death, the  
 11 health risk for remaining detainees and facility staff at NWDC, and the risk to the surrounding  
 12 local community. Amon Decl., Dkt. 3 ¶¶ 50, 58. Given the current outbreak, the Court may also  
 13 tailor its order to ensure compliance with local public health protocols for self-quarantine and  
 14 social distancing by class members upon release.

15 The public also has an interest in mitigating spread of COVID-19 among detainees and  
 16 detention center staff so as to avoid overwhelming the local healthcare infrastructure that  
 17 supports NWDC. *Cf. Pimentel-Estrada I*, 458 F. Supp. 3d at 1252. “The public has a critical  
 18 interest in preventing the further spread of the coronavirus. An outbreak at [the detention center]  
 19 would, further, endanger all of us – detainees, [detention center] employees, [county] residents . .  
 20 . , residents of the State . . . , and our nation as a whole.” *Bravo Castillo v. Barr*, 449 F. Supp. 3d  
 21 915, 923 (C.D. Cal. 2020); *accord Zepeda Rivas*, 445 F. Supp. 3d at 40.

22 Further, release is in the public interest because Mr. Khan does not pose a danger to the  
 23 community or present a flight risk. As described above, Mr. Khan has been a lawful permanent



1 resident of the United States since 2006 and has strong ties to the community in Seattle. An  
2 immigration judge granted his application for cancellation of removal, and that case is now  
3 before the Ninth Circuit. In addition, Mr. Khan has a clear plan for release, has acknowledged his  
4 past mistakes, and has committed to ensuring they do not happen again. The Court can also  
5 fashion conditions of release to alleviate any concerns regarding flight or danger.

6 Finally, class members can be evaluated individually by the Court either through the bail  
7 process or by directing ICE to conduct custody reviews for class members, subject to this Court's  
8 review. This process will allow the Court to determine whether a class member can be released,  
9 or whether no set of release conditions could ameliorate the risk of flight or danger to public  
10 safety. Several courts, including courts in the Ninth Circuit, have ordered bail hearings<sup>14</sup> or  
11 directed ICE to conduct custody reviews and imposed a presumption of release with a process  
12 for class members to challenge denials.<sup>15</sup>

### 13 CONCLUSION

14 For the foregoing reasons, this Court should grant Plaintiffs' motion for a temporary  
15 restraining order to release Mr. Khan, provisionally certify the proposed class, direct Defendants  
16 to immediately identify class members to consider them for release, limit population levels at the  
17 facility, and order regular COVID-19 testing.

18  
19  
20  
21  
22 <sup>14</sup> See *supra* n.13.

23 <sup>15</sup> See, e.g., *Alcantara v. Archambeault*, No. 3:20-cv-00756-DMS-AHG, Dkt. 38, at 3 (S.D. Cal. Apr. 30, 2020) (filed at Dkt. 22-4) ("Release of subclass members shall begin immediately, with the expectation that most subclass members will be released under appropriate conditions determined by Defendants[.]").

Respectfully submitted on this 11<sup>th</sup> day of December, 2020.

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 11, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

DATED this 11th day of December, 2020.

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