

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, *et al.*,  
Petitioners-Plaintiffs,

v.

NATHALIE ASHER, *et al.*,  
Respondents-Defendants.

FEDERAL RESPONDENTS' OPPOSITION TO  
PETITIONERS' MOTION FOR A TEMPORARY  
RESTRAINING ORDER

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

Noting Date: December 13, 2020

1 Federal Respondents, United States Immigration and Customs Enforcement (“ICE”), ICE  
2 Senior Official Performing the Duties of the Director Tony H. Pham, and ICE Seattle Field Office  
3 Director Nathalie Asher (collectively, the “Government”), by and through their attorneys, Brian  
4 T. Moran, United States Attorney for the Western District of Washington, and Michelle R.  
5 Lambert and Matt Waldrop, Assistant United States Attorneys, submit this opposition to  
6 Petitioners’ motion for temporary restraining order. Dkt. No. 175 (the “Motion” or “TRO”).

7 **I. INTRODUCTION**

8 In response to the first detainee to test positive for COVID-19 in the general population at  
9 the Northwest ICE Processing Center (“NWIPC”) in over nine months since the pandemic began,<sup>1</sup>  
10 Petitioner Naeem Khan, the only detained named Petitioner, seeks immediate release from  
11 detention alleging that he “face[s] imminent danger of COVID-19 infection at [NWIPC].” TRO,  
12 at 1. However, this ignores the robust practices and protocols that ICE and the ICE Health Service  
13 Corp (“IHSC”) have implemented – generally and in response to every positive COVID-19 test –  
14 to protect the detainees and staff at NWIPC. Furthermore, Petitioner fails to demonstrate that the  
15 conditions inside of NWIPC cause his detention to be an excessive condition in relation to the  
16 legitimate objection of immigration detention.

17 Petitioner Khan is currently located in the Medical Housing Unit (“MHU”) in an airborne  
18 infection isolation room. Since December 7, 2020, IHSC has administered to him three COVID-  
19 19 tests that have returned with negative results. In addition, he has a pending COVID-19 test  
20 with results expected early this week.

21 In addition to Petitioner Khan’s release, Petitioners, on behalf of the proposed class ask the  
22 Court to (1) grant provisional certification of the proposed class, (2) “order a process to identify  
23 and provided expedited review of proposed class members for release,” (3) order a limit to  
24

25 \_\_\_\_\_  
26 <sup>1</sup> As of December 13, 2020, approximately 900 COVID-19 tests have been administered to detainees residing in the  
27 general population, with only one resulting in a positive test. Malakhova Decl., ¶ 45.

1 NWIPC's detention population necessary to permit adequate social distancing, and (4) order  
2 periodic COVID-19 testing of detainees, staff, and employees. TRO, at 1-2.

3 Petitioners cannot demonstrate a need for provisional certification. As a preliminary  
4 matter, Petitioners' motion is fully briefed and pending before the Court. Dkt. Nos. 134, 156, 164.  
5 Furthermore, the class relief they seek is unnecessary. A process is already in place to identify  
6 and review detainees that would fall within the proposed class for release. *See Fraihat v. ICE*, 445  
7 F.Supp.3d 709, 751 (C.D. Cal. Apr. 20, 2020) (nationwide Preliminary Injunction); *Fraihat v. ICE*,  
8 2020 WL 6541994 (C.D. Cal. Oct. 7, 2020) (clarifying order). Petitioners show no reason for an  
9 order limiting the population at NWIPC. ICE continues to reduce the detainee population at  
10 NWIPC, which now is at 18.4% of capacity. Lastly, IHSC performs testing of various groups of  
11 detainees within the facility, and will be implementing periodic prevalence testing throughout the  
12 general population.

13 Petitioners cannot satisfy the high standard for obtaining preliminary relief in this case.  
14 First, Petitioners are unlikely to succeed on their claim that the conditions at NWIPC violate  
15 Petitioner Khan's or the proposed class members' right to reasonable safety at the NWIPC. As  
16 the understanding of COVID-19 has evolved, so too have the preventative measures implemented  
17 at NWIPC. The Government's actions to prevent and protect against the spread of COVID-19  
18 comply with guidance from the Centers for Disease Control and Prevention (the "CDC"), local  
19 and state public health recommendations, and the Constitution. The Government has implemented  
20 substantial protocols and practices at NWIPC to prevent an outbreak at the facility and has swiftly  
21 acted to prevent the potential spread of COVID-19.

22 Second, Petitioners are unlikely to succeed in establishing that the conditions of Petitioner  
23 Khan's confinement constitute a "punishment" without due process of law. As the Supreme Court  
24 has repeatedly recognized, detention is a constitutionally permissible aspect of the Government's  
25 enforcement of the immigration laws and fulfills the legitimate purpose of ensuring that individuals  
26 appear for their removal proceedings. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018);

1 *Demore v. Kim*, 538 U.S. 510, 523 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001).  
2 Consistent with the requirements of due process, Petitioner Khan’s confinement is thus  
3 “reasonably related” to a legitimate government interest. *Bell v. Wolfish*, 441 U.S. 535, 538-39  
4 (1979).

5 Finally, Petitioners cannot show that Petitioner Khan is facing immediate, irreparable harm  
6 or that the public interest would be served by his immediate release. Petitioner Khan has been  
7 identified by the Immigration Judge (“IJ”) as a flight risk and a danger to the community and has  
8 been convicted of violating a court’s protective order. Accordingly, the Government requests that  
9 the Motion be denied.

## 10 II. FACTUAL BACKGROUND

### 11 A. Framework for COVID-19 Response at NWIPC.

12 The policies and procedures that have been implemented to prevent the entry and spread  
13 of COVID-19 at the NWIPC are based on guidance documents prepared by the CDC and ICE’s  
14 Enforcement and Removal Operations (“ERO”), including ICE’s 2011 Performance-Based  
15 National Detention Standards (“2011 PBNDS”), which mandate that facilities have written plans  
16 addressing the management of infectious diseases, including the use of isolation, prevention,  
17 treatment and education, and also requires collaboration and reporting to state and local health  
18 departments. Dkt. 63, ¶¶ 11, 13. ICE also maintains a pandemic workforce protection plan,  
19 portions of which were implemented in January 2020 in response to COVID-19. Dkt. 64, ¶ 5.

20 ICE’s COVID-19 pandemic response is dynamic. Policies and procedures have been  
21 implemented and are updated in response to developing knowledge concerning COVID-19,  
22 changes in criteria and guidance from the CDC, as well as requirements resulting from ongoing  
23 litigation in other jurisdictions. *See* Bostock Decl., ¶ 3 (citing *Frailhat v. ICE*, 445 F. Supp. 3d  
24 709, 751 (C.D. Cal. Apr. 20, 2020) (nationwide Preliminary Injunction); *Frailhat v. ICE*, 2020 WL  
25 6541994 (C.D. Cal. Oct. 7, 2020) (clarifying order) (“*Frailhat*”).

1 The specific COVID-19 policies in place at NWIPC are primarily adopted from the CDC’s  
 2 *Interim Guidance on Management of Coronavirus Disease 2019 in Correctional and Detention*  
 3 *Facilities* (“CDC Interim Guidance”), ERO’s *COVID-19 Pandemic Response Requirements* (the  
 4 “ERO PRR”), a document developed by ICE in consultation with the CDC, and IHSC’s *Interim*  
 5 *Reference Sheet on 2019-Novel Coronavirus (COVID-19): Detainee Care* (“IHSC Interim  
 6 Reference Sheet”).<sup>2</sup> Dkt. 63, ¶¶ 12, 16; Dkt. 64, ¶ 7.

7 Based on the above guidance, and as further described in the Bostock Declaration, NWIPC  
 8 has implemented a variety of policies and procedures reducing NWIPC’s detainee population  
 9 (Bostock Decl., ¶¶ 7-11), increasing safety measures for the intake of new detainees (*Id.*, ¶¶ 18-  
 10 24) and for visitors and staff (*Id.*, ¶¶ 47-65), providing resources for COVID-19 education, testing,  
 11 screening, and the use of PPE (*Id.*, ¶¶ 25-34, 45-46), enacted compliance measures (*Id.*, ¶¶ 69-70),  
 12 and changes that allow for social distancing to be practiced at NWIPC (*Id.*, ¶¶ 35-44).

13 **B. The Latest Amendments to the ERO PRR.**

14 On October 27, 2020, the ERO PRR Version 5.0 was issued.  
 15 <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf> (last  
 16 visited on Dec. 12, 2020). This version of the ERO PRR includes amendments and clarifications  
 17 required under the district court’s October 7, 2020 order that clarified the preliminary injunction  
 18 order in *Fraihat*. Many of these requirements were already being met or exceeded at NWIPC.

19 Pertinent to this litigation, a new section has been added to the ERO PRR concerning  
 20 detainees potentially at higher risk for serious illness due to COVID-19 or who have otherwise  
 21 been identified as vulnerable populations under *Fraihat*. Bostock Decl., ¶ 75. This section  
 22 contains the following provisions: notification requirements when detainees are identified as at-

23  
 24 <sup>2</sup> On October 23, 2020, Version 12.3 of the ICE Health Service Corps (“IHSC”) Interim Reference Sheet on 2019  
 25 Novel Coronavirus (COVID-19): Detainee Care was issued. Malakhova Decl., ¶ 7, Ex. A.

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

3 The PRR has been amended to reflect that detainees who are high risk will receive COVID-  
4 19 testing at various times: upon intake to an ICE facility; as directed by medical personnel based  
5 on CDC requirements and clinical presentation of COVID-19 related illness; upon release as  
6 dictated by the requirements of the receiving country of record or other transfer/removal/release  
7 requirements; and upon release to the community or transfer to another detention facility. *See*  
8 PRR, at 14. These testing procedures are already in place at the NWIPC. Bostock Decl., ¶ 75(d).

9 In addition to temperature and verbal COVID-19 screening upon intake, which is part of  
10 standard procedure, the PRR has added a requirement that all high risk (vulnerable) detainees  
11 receive temperature and verbal screening for COVID-19 twice per day “utilizing a structured  
12 screening tool and documented in the facility’s records.” *See* PRR, at 14. This requirement,  
13 which required national coordination, is to be implemented at the NWIPC facility-wide starting  
14 December 14, 2020. Bostock Decl., ¶ 75(e); Malakhova Decl., ¶ 44.

15 Furthermore, ICE issued new guidance concerning *Fraihat* custody redeterminations,  
16 which was incorporated into the latest version of the ERO PRR. *See* ERO PRR, at 19. Major  
17 changes to these custody redeterminations include the instruction that, “Only in rare cases should  
18 a *Fraihat* subclass member not subject to mandatory detention remain in custody.” *Id.* Further,  
19 detainees subject to mandatory custody due to INA § 236(c) must receive individualized custody  
20 determinations where ERO “must not apply the Docket Review Guidance rule against release of  
21 aliens detained pursuant to INA § 236(c) [ ] so inflexibly that none of the *Fraihat* subclass  
22 members are released.” *Id.* Although traditional factors, such as danger to the community and  
23 risk of flight, may be considered, under the terms of the *Fraihat* preliminary injunction, aliens  
24 subject to detention pursuant to INA § 236(c) should continue to be detained only after  
25 individualized consideration of the risk of severe illness or death, with due regard to the public  
26 health emergency. Bostock Decl., ¶ 75(g).

1 As a result, ERO has been tasked with conducting new custody redeterminations for  
2 *Fraihat* subclass members. *Id.*, ¶ 75(h). ICE initially identified 156 NWIPC *Fraihat* subclass  
3 members for new custody redeterminations. *Id.* Of the 156 individuals identified, it was  
4 determined that 33 had already been removed from the United States. *Id.* On November 20, 2020,  
5 ICE completed the custody redeterminations for the remaining 123 detainees still in custody. *Id.*  
6 Of those, ICE released 51 following custody redeterminations. *Id.* ICE is conducting new custody  
7 redetermination assessments for all identified *Fraihat* class members under the amended review  
8 standards. *Id.*

### 9 C. Current Conditions at NWIPC.

10 Petitioners base most of their exigency claims on an alleged “outbreak” involving the IHSC  
11 pharmacy and a positive detainee from the general population. TRO, at 2-3. The Government  
12 provides the following facts to inform the Court about these incidents, and specifically how ICE  
13 has quickly responded to ensure the safety of NWIPC detainees and staff.

#### 14 1. The COVID-19 positive IHSC employees/contractors.

15 One exposure incident at NWIPC resulted in an IHSC pharmacist and two IHSC contract  
16 pharmacy technicians testing positive for COVID-19. Bostock Decl., ¶ 96. As explained below,  
17 this incident was not a result of deficiencies in the COVID-19 safety protocols at the NWIPC.  
18 Furthermore, exposure was limited to the pharmacy as the pharmacy staff did not have contact  
19 with any detainees or other employees during the course of their duties. *Id.*, ¶ 99.

20 On November 24, 2020, an asymptomatic contract pharmacy technician was tested for  
21 COVID-19 after learning that an immediate family member had tested positive. Bostock Decl.,  
22 ¶ 97. When reporting to work on November 25, 2020, the contractor did not reveal at the front  
23 entrance screening that she had had close contact with a person known to be infected with COVID-  
24 19. *Id.* Consistent with the PRR, one of the verbal screening questions for staff seeking entrance  
25 to the NWIPC is, “In the past fourteen days, have you had contact with a person known to be  
26 infected with COVID-19 where you were not wearing the recommended proper PPE?” *See* ERO

1 PRR at 26. Any employee that answers this question affirmatively is sent home and not permitted  
2 to enter the facility. Bostock Decl., ¶ 97

3 After later revealing that she had been exposed or tested positive for COVID-19, the IHSC  
4 contract pharmacy technician was immediately sent home and advised to quarantine and consult  
5 with her personal medical care provider. Bostock Decl., ¶ 98. She was subsequently terminated  
6 for violation of COVID-19 safety protocols. *Id.*

7 The contractor worked in a secured pharmacy room with one IHSC pharmacist and one  
8 other IHSC contract pharmacy technician. *Id.*, ¶ 99. None of them had contact with any detainees  
9 or other employees during the normal course of their duties. *Id.* They were required to wear  
10 personal protective equipment, including a face mask while in the facility. *Id.*

11 Both employees with whom the contractor worked in the pharmacy were tested by IHSC  
12 for COVID-19 using Abbott ID Now rapid testing and both tested negative on November 25, 2020.  
13 *Id.*, ¶ 100. The employees were then immediately sent home to quarantine and instructed to re-  
14 test for COVID-19 on November 29, 2020. *Id.* They subsequently reported testing positive for  
15 COVID-19 on November 30, 2020 and December 10, 2020. Neither has returned to the NWIPC  
16 since being sent home on November 25th. *Id.*

17 In response to this incident, IHSC conducted retraining of all IHSC employees and  
18 contractors concerning COVID-19 procedures if an employee is ill, tests positive for COVID-19,  
19 or is potentially exposed to someone with COVID-19. *Id.*, ¶ 101.

20 *2. ICE's rapid response and preventative procedures in the A3 housing unit.*

21 ICE was notified on December 7, 2020 that a former NWIPC detainee who was transferred  
22 to Florence, Arizona for removal tested positive for COVID-19. Bostock Decl., ¶ 79. Prior to this  
23 notification, ICE had no reason to believe that this detainee was positive for COVID-19. The  
24 former detainee was removed from the A3 housing unit on November 30, 2020 and tested for  
25 COVID-19 via Abbott ID Now test with negative results. *Id.* After receiving the negative test  
26 results, the detainee was placed in a separate, clean housing unit designated for detainees awaiting

1 departure from the NWIPC where he was not allowed to come in contact with detainees from other  
2 housing units. *Id.* The detainee's medical records from the date of his departure from the NWIPC  
3 on December 1, 2020 indicate he was not exhibiting any signs or symptoms of COVID-19 the  
4 morning of his departure when he was cleared to fly via ICE Air. *Id.*

5 ICE has not reached a conclusion that this detainee had COVID-19 at the time he departed  
6 NWIPC. *Id.*, ¶ 79. The detainee departed NWIPC at approximately 6:00 a.m. on December 1,  
7 2020 and traveled for 48 hours through two other staging facilities prior to reaching the Florence  
8 Service Processing Center on December 3, 2020, where he was again tested for COVID-19. *Id.*  
9 Consultation with the Tacoma Pierce County Health Department concluded that no definitive  
10 determination can be made as to whether the former detainee was or was not COVID-19 positive  
11 at the time he was last at the NWIPC. *Id.*

12 The A3 housing unit had been in cohorting status prior to the notification of the former  
13 detainee's positive COVID-19 status. On December 3, 2020, ICE placed the A3 housing unit in  
14 cohorting status due to a different detainee from that housing unit complaining of chills and a  
15 headache. *Id.*, ¶ 81. This detainee was transferred to medical isolation in the medical housing unit  
16 ("MHU") on December 3, 2020 where he was tested for COVID-19 via Labcorp's PCR testing. *Id.*  
17 This detainee's complaints of symptoms had resolved by December 4, 2020, but he remained in  
18 the MHU while the test results were pending. *Id.* The test results were received on December 6,  
19 2020 and were negative for COVID-19. *Id.* He was tested again on December 7, 2020 via Abbott  
20 ID NOW and the results were again negative.<sup>3</sup> *Id.* He was tested for COVID-19 a third time via  
21 Labcorp's PCR testing prior to release from the facility and the test results were negative for  
22 COVID-19.<sup>4</sup> *Id.*

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24 <sup>3</sup> While this detainee was in the MHU, ICE completed a *Fraihat* custody reassessment for this detainee and  
25 determined he would be released from custody. He was released from the facility on December 8, 2020, which is  
the reason for the third COVID-19 test.

26 <sup>4</sup> This is the detainee referred to in Petitioner Khan's declaration. See Docket No. 177 at ¶ 6. Contrary to  
27 Petitioner's declaration, the detainee was not removed from the housing unit on December 1st and he was not taken  
to be removed. *Id.*

1 As a result of the former NWIPC detainee in Florence testing positive, all the detainees  
2 who were in the A3 housing unit<sup>5</sup> on December 7, 2020 were tested for COVID-19 via Labcorps  
3 PCR test and the housing unit continued on cohorting status. *Id.*, ¶ 82. This decision was made  
4 after IHSC consultation with the Tacoma-Pierce County Health Department. *Id.* As an additional  
5 precautionary measure, twelve IHSC staff members were tested for COVID-19 on December 7-  
6 10, 2020 using Abbott ID NOW testing. *Id.*, ¶ 83. All the test results were negative for COVID-  
7 19. *Id.*

8 On December 10, 2020, the A3 detainees' test results returned. *Id.*, ¶ 84. Thirteen of the  
9 test results, including Petitioner Khan's, were negative for COVID-19. *Id.* One test result was  
10 positive. *Id.* The detainee who tested positive for COVID-19 was transferred to an airborne  
11 infection isolation room in the MHU where he remains at this time. *Id.* He has been asymptomatic.  
12 *Id.* He was subsequently re-tested via Abbott ID NOW test with negative results. *Id.*, ¶ 88.  
13 Because of the negative results, the detainee was tested again via Labcorps PCR testing the same  
14 day. *Id.* Those test results are pending at this time and expected early this week. *Id.*

15 On the morning of December 10, 2020, IHSC medical staff informed the remaining thirteen  
16 detainees from the A3 housing of the positive COVID-19 test result from their housing unit. *Id.*,  
17 ¶ 85. The detainees were provided clean uniforms to change into and then relocated to an unused,  
18 clean housing unit (hereinafter "quarantine housing unit") consisting of 4-person cells where they  
19 have been housed one detainee per cell. *Id.* The facility was locked down and the hallways  
20 emptied during relocation. *Id.* All detainees being relocated were required to wear face masks.  
21 GEO and IHSC staff were required to wear personal protective equipment ("PPE"), including N95  
22 masks. *Id.* Detainees were not allowed to bring toiletry items from their prior housing unit and  
23 have been provided new toiletries. *Id.*

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26 <sup>5</sup> At that time, there were 14 detainees (including Petitioner Khan) in a 90-bed housing unit. Bostock Decl., ¶ 82  
27 FEDERAL RESPONDENTS' OPPOSITION TO  
28 MOTION FOR A TEMPORARY RESTRAINING ORDER  
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1           Once in the quarantine housing unit, all thirteen detainees consented to COVID-19 testing  
2 via Abbott ID NOW testing, which resulted in negative test results for all thirteen. *Id.*, ¶ 86.

3           IHSC consulted with the Tacoma-Pierce County Health Department regarding the COVID-  
4 19 positive test result as well as quarantine and re-testing plans. *Id.*, ¶ 87. In consultation with the  
5 Health Department, it was determined that the detainees in the quarantine housing unit would be  
6 re-tested for COVID-19 via Labcorps PCR testing on December 14, 2020 and again on December  
7 21, 2020, and that the detainees would remain in quarantine under medical monitoring for 14 days  
8 from the date of the last exposure. *Id.*

9           On the night of December 11, 2020, IHSC conducted COVID-19 prevalence testing of  
10 detainees in all housing units that may have had potential exposure to a GEO officer who had been  
11 in the A3 housing unit. *Id.*, ¶ 89. In total, 38 detainees from 9 different housing units were tested  
12 for COVID-19 via Abbott ID NOW. *Id.* Six additional detainees declined testing. *Id.* The housing  
13 units had a combined population of 163 detainees. *Id.* This resulted in testing 23.3% of the  
14 population of those 9 housing units. *Id.* All the test results were negative for COVID-19. *Id.*

15           On December 12, 2020, Petitioner Khan, who was in the quarantine housing unit, reported  
16 to IHSC that he was experiencing sore throat and lack of sense of taste. *Id.*, ¶ 90. He was  
17 immediately transferred to medical isolation in the MHU where he was again tested for COVID-  
18 19 via Abbott ID NOW test. *Id.* The test results were negative for COVID-19. *Id.* A nasal swab  
19 was taken for Labcorps PCR testing. *Id.* The results are expected on Tuesday, December 15,  
20 2020. Petitioner Khan will remain in the MHU until the test results are received. *Id.*; *see also*  
21 Malakhova Decl., ¶¶ 50-51.

22           A short time later, the detainee in the cell next to Petitioner Khan's in the quarantine  
23 housing unit complained of chills, feeling feverish and muscle pain. *Id.*, ¶ 91. He was also  
24 transferred to an airborne infection isolation room and tested for COVID-19 via Abbott ID NOW  
25 test. *Id.* His test results were also negative for COVID-19. *Id.* A nasal swab was taken for  
26 Labcorps PCR testing and is expected early this week. *Id.*

1 None of the remaining eleven detainees in the quarantine housing unit have reported or  
2 demonstrated any signs or symptoms of COVID-19. *Id.*, ¶ 92. They are scheduled to be re-tested  
3 for COVID-19 via Labcorp PCR testing on Monday, December 14, 2020. *Id.* Meanwhile, they  
4 will remain under medical monitoring in the quarantine housing unit. *Id.* Detainees in the  
5 quarantine housing unit are not permitted to commingle during the quarantine period. *Id.* Each  
6 cell in the quarantine housing unit has its own toilet and sink. *Id.* Meals are being served to the  
7 detainees in their cells. *Id.* Quarantined detainees are provided access to electronic tablets and  
8 cordless phones for communication outside the facility. *Id.* Any court hearings for quarantined  
9 detainees will be rescheduled. *Id.* Detainees will be provided regular medical and mental health  
10 monitoring by IHSC staff. *Id.* A remote medical station has been set up so that detainees from  
11 the quarantine housing unit do not need to be transferred to the medical clinic for care. *Id.* ICE  
12 and GEO staff who will access the quarantine unit have been informed of the PPE requirements  
13 appropriate for their level of contact. *Id.*

14 At this time, the only detainee to have tested positive for COVID-19 while in the general  
15 population at the NWIPC is the detainee transferred to the MHU from the A3 housing unit on  
16 December 10, 2020, who then tested negative for COVID-19 the next day. *Id.*, ¶ 95. All other  
17 COVID-19 positive test results have come from newly admitted detainees who were housed in the  
18 14-day new intake monitoring housing units (NIMs) and tested as part of intake processing. *Id.*

19 **D. Petitioner Khan's Removal Proceedings.**

20 Petitioner Naeem Khan is a 47-year old native and citizen of Pakistan, whose status was  
21 adjusted to lawful permanent resident in 2006. Dkt. 63, ¶ 78. On November 13, 2018, Khan was  
22 enjoined under a protective order from the Snohomish County South District Court related to  
23 contact with his ex-wife. *Id.* On April 4, 2019, Khan was convicted in Snohomish County  
24 Superior Court for the offense of felony Stalking-Domestic Violation and sentenced to 12 months  
25 imprisonment. *Id.* On April 24, 2019, Khan was convicted of violating the protective order and  
26 sentenced to 364 days, which was suspended. *Id.* ICE took him into custody on October 7, 2019

1 and served him with a Notice to Appear, charging him with removability under 8 U.S.C.  
2 § 1227(a)(2)(E)(ii).

3 On October 18, 2019, the Snohomish County Superior Court issued a restraining order,  
4 finding that Khan represented a credible threat to the physical safety of his ex-wife and children.  
5 *Id.* At a bond hearing on October 24, 2019, the IJ found that Khan was a flight risk and danger to  
6 the community and ordered him held without bond. *Id.*

7 Petitioner Khan was ordered removed on June 25, 2020. *Id.*, ¶ 106. He currently has a  
8 petition for review pending before the Ninth Circuit and a temporary stay of removal is in effect.  
9 *Id.*, ¶ 12. Accordingly, he is detained pursuant to 8 U.S.C. § 1231.

### 10 III. LEGAL STANDARD

11 The standard for issuing a TRO is “substantially identical” to the standard for issuing a  
12 preliminary injunction. *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7  
13 (9th Cir. 2001). “It frequently is observed that a preliminary injunction is an extraordinary and  
14 drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the  
15 burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original)  
16 (internal quotations omitted); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). In  
17 moving for a TRO, petitioners “must establish that [they are] likely to succeed on the merits, that  
18 [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of  
19 equities tips in [their] favor, and that an injunction is in the public interest.” *Id.*

20 The Ninth Circuit has adopted a “sliding scale” test for issuing TROs, under which “serious  
21 questions going to the merits and a hardship balance that tips *sharply* towards the plaintiff can  
22 support issuance of an injunction, assuming the other two elements of the *Winter* test are also met.”  
23 *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011) (emphasis added).  
24 Thus, Petitioners must show that the TRO is in the public interest and that there is a likelihood,  
25 not merely a possibility, of irreparable injury. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127  
26 (9th Cir. 2009).

1 As the function of a preliminary injunction is to maintain the status quo before the case is  
2 adjudicated on the merits, there is “heightened scrutiny” for mandatory preliminary injunctions.  
3 *Dahl v. HEM Pharms. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993). However, “[w]here a party seeks  
4 mandatory preliminary relief that goes well beyond maintaining the status quo pendente lite, courts  
5 should be extremely cautious about issuing a preliminary injunction.” *Martin v. International*  
6 *Olympic Committee*, 740 F.2d 670, 675 (9th Cir. 1984); *see also Committee of Cent. American*  
7 *Refugees v. Immigration & Naturalization Service*, 795 F.2d 1434, 1442 (9th Cir. 1986). For  
8 mandatory preliminary relief to be granted, Petitioners “must establish that the law and facts  
9 *clearly favor* [thei]r position.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (emphasis  
10 in original).

#### 11 IV. ARGUMENT

##### 12 A. Petitioners cannot demonstrate a likelihood of success on the merits.

13 Petitioners primarily allege that their continued detention at NWIPC violates their Fifth  
14 Amendment substantive due process rights. *See* TRO, 14-20. As set forth below, Petitioners have  
15 not shown a likelihood of success on their Constitutional claim.

##### 16 1. *Petitioner Khan has not shown that he or other “at risk” detainees* 17 *have been denied reasonably safe conditions at NWIPC.*

18 Petitioners allege that Petitioner Khan’s and the proposed class’ continued detention during  
19 the COVID-19 pandemic violates their Fifth Amendment right to reasonable safety while in  
20 custody. *See* TRO, 15-18. This Court should again find that Petitioners are unlikely to succeed  
21 on their claim that the Government violated their Fifth Amendment right to reasonable safety at  
22 NWIPC. Dkt. No. 91, Order, at 14. Petitioners are incorrect that the factual and legal  
23 circumstances at NWIPC have changed demonstrating the likelihood of their success. TRO, at 14.  
24 If anything, the Government’s amplified practices and protocols have been shown to provide  
25 reasonable safety to all detainees in the face of the pandemic outside of the facility’s walls.  
26

1 Due process requires the government to assume some responsibility for civil detainees’  
 2 safety and well-being, such as “food, clothing, shelter, medical care, and reasonable safety.”  
 3 *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989). The Ninth Circuit  
 4 applies an objectively unreasonable test to failure-to-protect claims brought under the Due Process  
 5 Clause. *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc). “[T]he defendant’s  
 6 conduct must be objectively unreasonable, a test that will necessarily ‘turn on the facts and  
 7 circumstances of each particular case.’” *Id.* (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 396  
 8 (2015) (alterations and internal quotation marks omitted). To demonstrate objective deliberate  
 9 indifference, a petitioner must show:

- 10
- 11 (i) The defendant made an intentional decision with respect to the conditions  
 under which the plaintiff was confined;
  - 12 (ii) Those conditions put the plaintiff at substantial risk of suffering serious  
 13 harm;
  - 14 (iii) The defendant did not take reasonable available measures to abate that risk,  
 15 even though a reasonable officer in the circumstances would have  
 16 appreciated the high degree of risk involved – making the consequences of  
 the defendant’s conduct obvious; and
  - 17 (iv) By not taking such measure, the defendant caused the plaintiff’s injuries.

18 *Id.*

19 Petitioners ignore the rigorous processes instituted by ICE because of the COVID-19  
 20 pandemic to abate the risks that may be posed to NWIPC detainees. The extensive steps taken by  
 21 the Government are objectively reasonable measures to abate the risk of COVID-19 within  
 22 NWIPC. In order to prevail on their claim that the conditions at NWIPC are so unsafe as to violate  
 23 the Constitution, Petitioners must show that the precautions taken to prevent harm are “objectively  
 24 unreasonable,” not just that there is a potential risk of the injury they are concerned about. *See*  
 25 *Kingsley*, 576 U.S. at 389. Importantly, the governing standard is not bare negligence, much less  
 26 strict liability. As the Ninth Circuit explained in the parallel context of pre-trial detainees, “the

1 pre-trial detainee ‘must prove more than negligence but less than subjective intent – something  
2 akin to reckless disregard.’” *Smith v. Washington*, 781 F. App’x. 595, 598 (9th Cir. 2019) (quoting  
3 *Castro*, 833 F.3d at 1071).

4 Here, Petitioners’ fail to demonstrate that the Government acted with objective deliberate  
5 indifference to Petitioner Khan’s or any “at risk” detainee’s safety at NWIPC. Petitioners allege  
6 that the fact that a detainee in the A3 housing unit tested positive for COVID-19 demonstrates that  
7 the Government has failed to abate a substantial risk of serious harm to vulnerable detainees at  
8 NWIPC. TRO, at 16. Although the Government’s substantial response to the positive test is still  
9 ongoing, and without any additional positive COVID-19 test results from detainees that were  
10 housed in that unit, Petitioners allege that NWIPC “is on the verge of an outbreak of COVID-19.”  
11 *Id.*

12 In doing so, Petitioners continue to improperly increase the “reasonable safety” standard  
13 required by due process to a “guaranteed safety” standard. However, as this Court previously  
14 acknowledged in *Dawson v. Asher*, “[n]o one can entirely guarantee safety in the midst of a global  
15 pandemic. 20-cv-0409-JLR-MAT, 2020 WL 1704324, at \*12 (W.D. Wash. Apr. 8, 2020). In  
16 order to prevail on their claim that the conditions at NWIPC are so unsafe as to violate the  
17 Constitution, Petitioners must show that the precautions taken to prevent harm are “objectively  
18 unreasonable,” not just that there is a potential risk of the injury they are concerned about. *See*  
19 *Kingsley*, 576 U.S. at 389. Importantly, the governing standard is not bare negligence, much less  
20 strict liability. As the Ninth Circuit explained in the parallel context of pre-trial detainees, “the  
21 pre-trial detainee ‘must prove more than negligence but less than subjective intent – something  
22 akin to reckless disregard.’” *Smith v. Washington*, 781 F. App’x. 595, 598 (9th Cir. 2019) (quoting  
23 *Castro*, 833 F.3d at 1071).

24 Where a pandemic, such as this one, poses a threat to everyone without discrimination,  
25 Petitioners do not gain a right of release by merely pointing to the same threat posed to everyone.  
26 *See also Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001) (“Many Americans live under

1 conditions of exposure to various contaminants. The [Constitution] does not require prisons to  
2 provide prisoners with more salubrious air, healthier food, or cleaner water than are enjoyed by  
3 substantial numbers of free Americans.”). There is no precedent for the suggestion that if the  
4 Government cannot eliminate every risk of harm to those in custody, then it cannot maintain  
5 custody at all. Indeed, the Fifth Amendment does not require the government to eliminate all risk  
6 to Petitioners. *DeShaney*, 489 U.S. at 200. Yet the absolute elimination of risk of COVID-19 at  
7 NWIPC is the measurement by which Petitioners assess the Government’s practices and protocols  
8 here.

9 Petitioners’ rely on the Ninth Circuit’s holding in *Hernandez Roman v. Wolf*, 977 F.3d 935  
10 (9th Cir. 2020), and the decision in *Pimentel-Estrada v. Barr*, 464 F. Supp. 3d 1225 (W.D. Wash.  
11 June 3, 2020), throughout the Petition for support that ICE’s actions at NWIPC are “objectively  
12 unreasonable,” the Government has provided evidence that addresses most of the concerns cited  
13 in that case. *Hernandez Roman* concerns the conditions of the Adelanto ICE Processing Center  
14 and at the time of the Ninth Circuit’s decision “58 detainees and eight staff members had tested  
15 positive for COVID-19 . . . Nine detainees had been hospitalized.” 977 F.3d at 938. This is very  
16 different from the current conditions at NWIPC. Furthermore, the factual findings cited to in  
17 *Hernandez Roman* have not been found by this Court and do not comport with the policies and  
18 procedures at NWIPC. *See id.*, at 942-943 (finding too many detainees at Adelanto to allow for  
19 social distancing, cleaning issues, the commingling of new intake detainees with the general  
20 population and other detainees arriving on different dates, guards were not required to wear masks,  
21 etc.).

22 In contrast, Petitioners here have not demonstrated that social distancing is unattainable at  
23 NWIPC. NWIPC’s population is currently at 18.4% of capacity. Bostock Decl., ¶ 7. The housing  
24 units have detainee to bed ratios of only 7.8% to 45.3%. *Id.*, ¶ 37. Petitioner Khan’s prior housing  
25 unit had only 14 detainees in a 90-bed unit before December 10, 2020. *Id.*, ¶ 82. In addition, the  
26 A3 housing unit has 13 tables in the common area, all of which are designed to seat 8 people. Dkt.

1 No. 104, ¶ 108. There are 7 toilets and 8 showers. *Id.* Therefore, Petitioner Khan's unit provided  
2 him and the other inhabitants ample room for social distancing.

3 ICE has also reduced and rearranged the detainee population such that appropriate and  
4 meaningful social distancing is possible. *See* Bostock Decl., ¶¶ 7 n.1, 36-38. A mask mandate is  
5 in place at NWIPC. Bostock Decl., ¶ 56. Even Petitioner Khan's declaration acknowledges that  
6 the GEO guards in his former housing unit wore masks or face coverings. Dkt. No. 177, ¶ 21.  
7 New detainees at NWIPC are not commingled with the general population or other new detainees  
8 that arrive on different dates. *Id.*, ¶ 23. Sanitation and hygiene measures at NWIPC have been  
9 increased since the pandemic began. *Id.*, ¶¶ 25-30.

10 Additionally, the decision in *Pimentel-Estrada* is six months old, during which time the  
11 practices and protocols at NWIPC have evolved as more knowledge about COVID-19 has been  
12 obtained. Moreover, the safety concerns noted in *Pimentel-Estrada* are not at issue now. *Pimentel-*  
13 *Estrada*, 464 F. Supp. 3d at 1235 (describing inability for social-distancing by detainees and that  
14 guards were not required to wear masks). The population of the facility and the housing units has  
15 been reduced since that time. Bostock Decl., ¶ 7 n.1. Guards are now required to wear masks  
16 when encountering or interacting with others, and while in common areas of the facility. *Id.*, ¶ 56.

17 Contrary to Petitioners' assertion that ICE's testing is inadequate as it only encompasses  
18 new detainees (TRO, at 6-7), detainees at NWIPC are tested at crucial times during their detention.  
19 First, all new intakes to the facility are tested voluntarily. Bostock Decl., ¶ 24. Next, detainees  
20 are tested any time they are reassigned housing units within the facility. *Id.*, ¶ 45. All detainees  
21 are again tested prior to release/book out from the facility, and prior to removal or transfer via ICE  
22 Air. *Id.* This testing provides a form of prevalence testing throughout the housing units to ensure  
23 that COVID-19 is not spreading asymptotically throughout the facility. *Id.*, ¶ 46; Malakhova  
24 Decl., ¶ 33. Since approximately the first week in November, excluding tests for new arrivals,  
25 ICE has tested 179 detainees for these purposes and every test has been negative. *Id.* IHSC also  
26 tests detainees at the NWIPC with signs or symptoms of COVID-19, as well as close contacts of

1 a detainee or staff member who tested positive for COVID-19. Malakhova Decl., ¶ 24.

2 Testing is expanding at NWIPC. Malakhova Decl., ¶¶ 31-33. IHSC is currently in the  
3 process of developing a Prevalence Testing Operational Plan for NWIPC. *Id.*, ¶ 32. At this time,  
4 the plan envisions a level of periodic COVID-19 testing of NWIPC detainees throughout the  
5 facility. *Id.*

6 To date, the safety precautions at NWIPC have been effective in preventing the spread of  
7 COVID-19 within the facility. This is clearly demonstrated by ICE’s response to the positive test  
8 in the A3 housing unit. Bostock Decl., ¶¶ 79-95; Malakhova Decl., ¶¶ 47-51. Petitioners fail to  
9 say what more could have been done to provide for the reasonable safety of Petitioner Khan after  
10 NWIPC learned of the positive test from the transferred detainee. And importantly, ICE had no  
11 way of knowing that the transferred detainee would later test positive, as he tested negative for  
12 COVID-19 prior to leaving NWIPC. Accordingly, Petitioners cannot demonstrate that the  
13 Government has violated their Fifth Amendment substantive due process right to reasonable safety  
14 based on this incident.

15 Without the facts concerning the Government’s response to the positive test in the A3  
16 housing unit, Petitioners’ expert, Dr. Robert B. Greifinger, opines that “it is clear that [NWIPC] is  
17 at serious, imminent risk of a COVID-19 outbreak at the facility.” Dkt. No. 178, at 1. He  
18 generalizes the duties of the three IHSC employee/contractors as “provid[ing] medical care to  
19 detainees at NWIPC.” *Id.*, at 2. However, the three IHSC employee/contractors had no detainee  
20 contact as they worked in the pharmacy. Bostock Decl., ¶ 99. Dr. Greifinger also states that “two  
21 detainees in the general population unit tested positive for COVID-19. Dkt. No. 178, at 2. Yet,  
22 as described above, there has only been one detainee from the general population that has tested  
23 positive for COVID-19. The detainee that was transferred to Florence tested negative while at  
24 NWIPC, and only tested positive over two days after leaving NWIPC.<sup>6</sup> Bostock Decl., ¶ 79.

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25  
26 <sup>6</sup> The TRO cites to studies that define a close contact 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

1 Furthermore, Dr. Greifinger fails to acknowledge the various times COVID-19 testing is  
 2 conducted at NWIPC other than during intake. Dr. Greifinger also fails to acknowledge that  
 3 NWIPC now only houses 18.4% of its capacity, and that the dorm that Petitioner Khan was housed  
 4 in – prior to being placed in medical isolation – housed only 14 out of a possible 90 detainees, or  
 5 approximately 16% of capacity. Accordingly, Dr. Greifinger’s opinion is based on very important  
 6 mistaken facts. Finally, Dr. Greifinger provides no methodology to support his assessment that  
 7 releases are necessary to permit greater social distancing at the facility.

8 Accordingly, Petitioners cannot demonstrate that the Government has violated their Fifth  
 9 Amendment substantive due process right to reasonable safety.

10 **2. Petitioners fail to show that ICE’s COVID-19 response results in punitive  
 11 conditions of confinement at NWIPC.**

12 Petitioners allege that their continued detention during the COVID-19 pandemic violates  
 13 due process because it amounts to punishment. *See* TRO, at 18-20. While evaluating the  
 14 constitutionality of civil detention conditions under the Fifth Amendment, a district court must  
 15 determine whether those conditions “amount to punishment of the detainee.” *Bell*, 441 U.S. at  
 16 535; *see also Kingsley*, 135 S. Ct. 2466, 2473-74 (2015). A petitioner may show punishment  
 17 through an express intent to punish or a condition that is not “reasonably related to a legitimate  
 18 governmental objective.” *Bell*, 441 U.S. at 539; *see also Kingsley*, 576 U.S. at 398 (noting that “a  
 19 pretrial detainee can prevail by providing only objective evidence that the challenged  
 20 governmental action is not rationally related to a legitimate governmental objective or that it is  
 21 excessive in relation to that purpose”). “A restriction is punitive where it is intended to punish, or  
 22 where it is ‘excessive in relation to [its] non-punitive purpose.’” *See Jones v. Blanas*, 393 F.3d  
 23 918, 933-34 (9th Cir. 2004).

24 \_\_\_\_\_  
 25 asymptomatic patients, 2 days prior to test specimen collection) until the time a patient is isolated.” TRO, at 4.  
 26 Arguably, this would mean that because the detainee first tested positive as a result of a test two days after he left  
 27 NWIPC, then the other detainees in A3 would not have been close contacts to him. *See Malakhova Decl.*, ¶ 46  
 28 (stating that it is not possible to definitely conclude that the former detainee had COVID-19 at the time he departed  
 NWIPC).

1           Petitioner Khan’s continued detention is reasonably related to a legitimate government  
2 interest. Detention is a constitutionally permissible aspect of the Government’s enforcement of  
3 the immigration laws and fulfills the legitimate purpose of ensuring that individuals appear for  
4 their removal proceedings. *See Jennings*, 138 S. Ct. at 836; *Demore*, 538 U.S. at 523; *Zadvydas*,  
5 533 U.S. at 690-91. In addition, the conditions at NWIPC are reasonably related to the  
6 Government’s legitimate interest in effective management of a detention facility. *See Jones v.*  
7 *Blanas*, 393 F.3d 918, 932 (9th Cir. 2004). Otherwise, essentially all congregate housing facilities  
8 would become a per se “punishment” during a pandemic. That is not the law, and it is not  
9 consistent with current CDC guidance on COVID-19 infection control in congregate facilities.

10           Petitioner Khan’s detention is justified. Petitioner Khan has a serious and recent history  
11 that includes a conviction for violating an order of protection. He has been evaluated for release  
12 by an IJ who found him to be a danger to the community and a flight risk. On December 1, 2020,  
13 ICE completed a new custody redetermination for Petitioner Khan under the new ERO PRR  
14 standards and determined that continued detention is appropriate. *Bostock Decl.*, ¶ 76. Although  
15 Petitioners argue that the imminent danger posed by COVID-19 outweighs any government  
16 interest in continued detention (TRO, at 19-20), the procedures and protocols in place at NWIPC  
17 have provided Petitioner Khan with the reasonable safety due process requires. Furthermore, he  
18 is now in medical isolation pending his fourth COVID-19 test in a week to ensure his continued  
19 safety.

20           Moreover, Petitioners allegations fail to show that the detention of the proposed class is  
21 not proportionately related to the Government’s non-punitive responsibilities and administrative  
22 purposes. While civil detainees retain greater liberty protections than individuals convicted of  
23 crimes, *see, e.g., Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982); *Bell*, 441 U.S. at 535,  
24 Petitioners’ continued immigration detention pending removal cannot be described as punitive or  
25 excessive in relation to the legitimate governmental purpose of protecting the public and ensuring  
26 their removal. Although a detainee in the general population has tested positive, ICE’s substantial

1 response to abate the risk of COVID-19 from spreading throughout the facility due to the COVID-  
 2 19 positive detainee have been effective thus far. Furthermore, the fact that there has only been  
 3 one detainee in the general population that has tested positive for COVID-19 since the onset of the  
 4 pandemic clearly shows that ICE’s practices and protocols have “thus far been effective at  
 5 preventing a COVID-19 outbreak and containing the virus’ spread.” Dkt. No. 91, Order, at 16  
 6 (finding that the conditions at NWIPC do not amount to punishment).<sup>7</sup>

7 **B. Petitioners cannot show a likelihood of irreparable harm.**

8 To establish irreparable harm, the movant must first “demonstrate that irreparable injury is  
 9 likely in the absence of an injunction;” it “will not issue if the person or entity seeking injunctive  
 10 relief shows a mere possibility of some remote future injury.” *Park Village Apartment Tenants*  
 11 *Association v. Foster*, 636 F.3d 1150 (9th Cir. 2011) (internal citation and quotation marks  
 12 omitted); *see also Winter*, 555 U.S. at 22. “Issuing a preliminary injunction based only on a  
 13 possibility of irreparable harm is inconsistent with” the Supreme Court’s “characterization of  
 14 injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that  
 15 the plaintiff is entitled to such relief.” *Id.* Conclusory or speculative allegations are not enough to  
 16 establish a likelihood of irreparable harm. *Herb Reed Enters., LLC v. Florida Entm’t Mgmt., Inc.*,  
 17 736 F.3d 1239, 1250 (9th Cir. 2013).

18 Petitioners have not established that “irreparable injury is likely in the absence of an  
 19 injunction.” *Winter*, 555 U.S. at 22. There is no evidence that the Government’s precautionary  
 20 measures are inadequate to contain or properly provide medical care should a COVID-19 outbreak  
 21 occur. *See Dawson*, 2020 WL 1704324, at \*12; *Sacal-Micha*, 2020 WL 1518861, at \*5 (finding  
 22

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23  
 24 <sup>7</sup> Petitioners fail to demonstrate an authority in habeas for the expedited bail process that they seek. The Ninth Circuit  
 25 in *Hernandez Roman* did not reach this issue because Plaintiffs had also brought a class action for declaratory and  
 26 injunctive relief. 977 F.3d at 941. A bail hearing process for release is not appropriate for maintenance of the status  
 quo via a temporary restraining order. The Government’s position is that jurisdiction is lacking for an expedited bail  
 process in this habeas proceeding. In any event, the extraordinary relief of reducing the population at NWIPC is not  
 necessary because NWIPC’s population is already significantly reduced.

1 no likelihood of success on substantially the same due process claim based on absence of evidence  
2 that the detention facility is incapable of protecting the petitioner from COVID-19). Accordingly,  
3 Petitioners fail to meet their burden of clearly showing that irreparable harm is likely in the absence  
4 of an injunction.

5 **C. The Government’s interests would be harmed and the Public’s interests  
6 would not be served by the grant of injunctive relief.**

7 The equities do not weigh in Petitioners’ favor. There is a strong public and governmental  
8 interest in addressing flight risk to ensure respondents in removal proceedings appear for their  
9 hearing and, if not granted relief from removal, be repatriated. *See Nken v. Holder*, 556 U.S. 418,  
10 436 (2009) (“There is always a public interest in prompt execution of removal orders.”); *Jones*,  
11 393 F.3d at 932 (“Legitimate, nonpunitive government interests include ensuring a detainee’s  
12 presence at trial, maintaining jail security, and effective management of a detention facility.”).

13 There is also an obvious strong interest in protecting the public from dangerous persons.  
14 As described above, Petitioner Khan has been found to be a danger to the community and a flight  
15 risk. He has violated a protective order leading to a criminal conviction in 2019. To the extent  
16 Petitioners ask this Court to establish a bail process or direct ICE to conduct custody reviews for  
17 proposed class members, ICE is already conducting reviews of detainees that would likely fall  
18 within the proposed class here as a result of *Fraihat*. Bostock Decl., ¶¶ 73, 75(g) & (h). As a  
19 practical matter, Petitioner Khan is currently in isolation and release would be improper at this  
20 time. *See Albino-Martinez v. Adducci*, No. 2:20-cv-10893, 2020 WL 1872362, at \*10 (E.D. Mich.  
21 Apr. 14, 2020) (“Every person in the United States, whether in a detention facility or not, faces  
22 COVID-19 exposure.”); *United States v. Steward*, No. 20-cr-0052(DLC), 2020 WL 1468005, at  
23 \*1 (S.D.N.Y. Mar. 26, 2020) (“there is also no reason to find that the defendant’s release would  
24 lessen the risk to his health presented by COVID-19”); *see also United States v. Taylor*, No. 5:19-  
25 CR-192-KKC-MAS, 2020 WL 1501997, at \*5 (E.D. Ky. Mar. 26, 2020) (“there is little reason to  
26 believe that [the detainee] would be more at risk if detained versus being released”). Accordingly,

1 the injunctive relief would provide little, if any, protective measures addressing the public's safety  
2 or health.

3 **V. CONCLUSION**

4 Because Petitioners cannot satisfy any of the requirements for preliminary injunctive relief,  
5 the Government respectfully requests the Court deny Petitioners' Motion for a Temporary  
6 Restraining Order. For the same reasons Petitioners are not entitled to a TRO, the Court should  
7 also decline to provisionally certify the proposed class.

8 DATED this 13th day of December, 2020.

9 Respectfully submitted,

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