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

REPLY IN SUPPORT OF PETITIONERS-PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
April 30, 2021

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INTRODUCTION

Petitioners-Plaintiffs (Plaintiffs) are a certified class of immigrants detained at the Northwest Detention Center (NWDC) who are vulnerable to serious illness and death from COVID-19. Defendant Warden of the NWDC, who administers the facility as an employee of the private prison corporation the GEO Group, Inc. (GEO), is primarily responsible for the day-to-day conditions at the facility. Although the movement of GEO staff members poses a major source of risk for the transmission of the COVID-19 virus in NWDC, the Warden's decisions at the facility—and his failure to enact basic protocols such as regular staff testing—endanger Plaintiffs. In recent weeks, despite the increasing availability of vaccinations, many GEO employees have apparently refused to seek vaccinations, continuing to leave many detained persons exposed to the virus as unvaccinated staff move between the NWDC and the broader community. The danger this poses is evident from the many GEO staff members who have tested positive throughout the course of the pandemic, including in recent months. Recognizing this danger, the Centers for Disease Control and Prevention (CDC) itself has recommended that detention facilities like the NWDC test asymptomatic staff to help ensure the virus does not enter a facility undetected. Despite that guidance, the Warden has not implemented a testing plan, leaving medically vulnerable detainees in his care exposed. Indeed, in his reply brief, the Defendant Warden does not contest otherwise, simply asserting that despite CDC guidance, he knows better and that such testing is not needed.

The Warden's claims also extend far beyond simply asserting that this Court should not order regular COVID-19 testing of his staff. Instead, he makes the sweeping claim that as the Warden of a federal detention facility he cannot be sued simply because he works for a private prison company. The Supreme Court and the Ninth Circuit have resoundingly rejected such

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claims. As the Court of Appeals recently explained, the federal government cannot simply "contract away its constitutional duties." *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 753 (9th Cir. 2020). For that reason, and as courts across the country have repeatedly held, private prison companies and their employees may be sued for injunctive relief.

Finally, if the Court does not grant Plaintiffs' motion to require testing, it should defer a decision on summary judgment under Federal Rule of Civil Procedure 56(d). Class-related discovery is only just beginning in this case, and this Court recently recognized that the parties should receive 90 days to conduct this portion of the case. As a result, and at a minimum, the Court should deny or defer Defendant's motion on the merits. However, Plaintiffs also respectfully request that should this Court decide to defer any substantive ruling, the Court should nevertheless resolve the purely legal question of whether the Warden may be subject to injunctive relief. Doing so will ensure that there is no doubt that Plaintiffs may obtain relief if merited.

ARGUMENT

I. The Current NWDC Warden May Be Sued for Injunctive Relief and Substituted for Former Warden Stephen Langford.

The Supreme Court has explained that a private prison corporation may be sued for injunctive relief regarding the conditions of incarceration at a facility managed by that corporation. As Plaintiffs detailed in their opening brief, the Court's decision in *Correctional Services Corp. v. Malesko* demonstrates this fact. 534 U.S. 61, 74 (2001). In that case, the Court observed that while a person imprisoned in a federal facility operated by a private prison company could not sue for damages under *Bivens*, they still could file "suits in federal court for injunctive relief." *Id*. Such lawsuits, the Court noted, were the "proper means for preventing entities from acting unconstitutionally." *Id.*

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The Warden has no meaningful response to *Malesko*. Faced with that case's clear holding, the NWDC Warden asserts that *Malesko* does not control because it "was not a habeas corpus case, it was a conditions of confinement case." Dkt. 273 at 3. The Warden further posits that because this case involves habeas claims, he cannot be a proper party. *Id.* at 3–4. These arguments are baseless. Multiple Ninth Circuit decisions have now explained that cases like this one challenging the conditions of confinement at ICE detention facilities may be brought under 28 U.S.C. § 1331. *See Hernandez Roman v. Wolf*, 977 F.3d 935, 941–42 (9th Cir. 2020) ("Here, Plaintiffs' due process claims arise under the Constitution, and Plaintiffs invoked 28 U.S.C. § 1331, which provides subject matter jurisdiction irrespective of the accompanying habeas petition."); *Zepeda Rivas v. Jennings*, Nos. 20-16276, 20-16690, 2021 WL 631805, at *3 (9th Cir. Feb. 18, 2021) (similar). Indeed, *prior* to the Warden's filing, this Court made clear that this case is one for injunctive relief and is not a habeas case alone, noting the Ninth Circuit's decisions. Dkt. 272 at 4–6. As a result, jurisdiction in this case exists pursuant to § 1331. The Warden never acknowledges nor addresses this conclusion in his brief. These decisions demonstrate there is no merit in the Warden's argument that this case is a "habeas" matter where he cannot be named as a party. Nor does the Warden attempt to respond to the many different cases that Plaintiffs cite demonstrating that injunctive relief is available against a private detention facility to ensure constitutional conditions. *See* Dkt. 252 at 4–5.[1]

The Warden's attempt to characterize this case as a "habeas corpus case where petitioners are seeking release from detention" is also unavailing. Dkt. 273 at 4. Plaintiffs have requested conditions-oriented relief throughout this case. For example, in their complaint and in their cross

[1] For this reason, Plaintiffs have not failed to address the "on-point authorities" that the Warden cites in his brief. Dkt. 273 at 3. Those habeas cases have no relevance to this one because this Court has jurisdiction over the Warden pursuant to 28 U.S.C. § 1331.

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motion for summary judgment, Plaintiffs sought periodic testing of detainees and staff. *See* Dkt. 167 at 35; Dkt. 252 at 8–16. Similarly, they recently requested vaccinations for detainees, *see* Dkt. 251, which prompted Defendants to act quickly in making them available to detainees, *see* Dkt. 266.[2] In any event, the fact that Plaintiffs have *also* requested release does not simply transform this case into an exclusive habeas corpus action where the NWDC Warden cannot be sued. Indeed, Defendant cites no authority for that proposition. Once again, to the contrary, the Ninth Circuit's *Hernandez Roman* and *Zepeda Rivas* decisions demonstrate that argument is incorrect. As Plaintiffs pointed out in their opening brief, one of the *Hernandez Roman* defendants is GEO's Warden at the Adelanto ICE Processing Center. Dkt. 252 at 4; *see also Hernandez Roman*, 977 F.3d at 938 n.1. That fact should eliminate any remaining ambiguity as to whether the NWDC Warden may be sued in this case to remedy unconstitutional conditions.

For similar reasons, this Court should automatically substitute Bruce Scott for Stephen Langford. Plaintiffs have sued the Warden of the NWDC in his official capacity as a "public officer." Fed. R. Civ. P. 25(d); *see also* Dkt. 167 ¶ 17. Having done so, "the real party in interest . . . is the governmental entity and not the named official." *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *see also Marshall v. Hudson*, 807 F. App'x 743 (10th Cir. 2020) (automatically substituting warden at private prison facility for new warden). Moreover, because the real party in interest is a "governmental entity," ICE cannot simply "add[] an additional layer" and "contract away its constitutional duties" by placing public responsibilities in the hands of a private entity. *Rawson*, 975 F.3d at 753 (internal quotation marks omitted).

In response to these arguments, the NWDC Warden states in conclusory fashion that he is

[2] These examples demonstrate that the Warden is simply wrong that Plaintiffs "have not . . . properly named him here for purposes of addressing distinct issues regarding the conditions of confinement." Dkt. 273 at 4.

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a "new party defendant" and that the "'office of the warden' is not a public office under FRCP 25(d)." Dkt. 273 at 7. The Warden cites no case law for either of these propositions. By contrast, Plaintiffs have explained that district courts, the Ninth Circuit, and the Supreme Court have all made clear that private prison companies may be subject to injunctive relief for violating the constitutional rights of detained or incarcerated persons. In doing so, these courts effectively acknowledge that incarcerating or detaining people is a "state action" or public function. *Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1057 (C.D. Cal. 2019). Accordingly, because a Warden at a private detention facility is acting as a "public officer," the new warden can be automatically substituted. *See* Fed. R. Civ. P. 25(d). Indeed, as Plaintiffs explained before, *see* Dkt. 252 at 8, any other conclusion would allow a private prison company warden to escape responsibility for constitutional violations—an argument to which the Warden has no response, *see* Dkt. 273 at 7.

II. The Court Should Order the Warden to Conduct Regular, Systematic Testing of GEO Staff.

The NWDC Warden's single-page response regarding COVID-19 testing includes no argument on whether Plaintiffs have satisfied the Fifth Amendment legal standard necessary to demonstrate that staff testing—which both Plaintiffs' experts and the CDC recommend—is required. Instead, the Warden claims that this case is somehow different from those in which courts have ordered facilities to conduct testing. Dkt. 273 at 8. The NWDC Warden also erroneously argues (and without any factual support) that vaccination of some detainees means "testing [of staff] is relatively unnecessary." *Id*. Neither claim undermines the need for an order requiring systematic testing of GEO staff at NWDC.

As Plaintiffs have repeatedly explained, the greatest risk for introduction of the virus into NWDC comes from staff and others who enter and leave the facility daily. *Pimentel-Estrada v.*

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Barr, 458 F. Supp. 3d 1226, 1244–45 (W.D. Wash. 2020); Supplemental Decl. of Joseph Amon (Supp. Amon Decl.), Dkt. 255 ¶ 13(j). Indeed, just as many times before, last week Defendants again gave notice that a GEO staff member had contracted the virus. Dkt. 274-1.[3] Staff can still enter the facility with COVID undetected and infect detainees, as has already happened.[4] This creates a great risk, especially as a "fourth wave" of COVID-19 threatens Washington, fueled mostly by dangerous new variants.[5] This new wave recently prompted the Governor to require Pierce County (along with two other counties) to "roll back" to more stringent public health restrictions.[6] Pierce County cases have risen or remain high in recent weeks.[7] Thus the risk of infection for detainees at NWDC is likely higher now than it was even a month ago. Although no general outbreak has yet occurred at NWDC, the high rate of transmission in the community, combined with GEO's failure to regularly test its staff for COVID-19, poses a considerable risk to class members. This is particularly true as more unvaccinated individuals from the southern border have been transferred to NWDC this week, thereby introducing more class members vulnerable to the coronavirus. Dkt. 275-1 ¶¶ 3–4.

In this moment of high risk from the fourth wave, the vaccination of some but not all staff does not lessen the need for mandated testing of GEO staff, but instead strengthens the case for

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[3] ICE dismissed the possibility that this GEO staff member could have introduced the virus into NWDC because the person first felt symptoms more than 48 hours after the person had last worked at NWDC. *See* Dkt. 274-1 ¶ 5. However, the CDC warned over one year ago that a person can have and transmit the virus well before any symptoms appear, or even without any symptoms. Decl. of Joseph Amon, Dkt. 3 ¶ 14.

[4] *See* Dkt. 214-1, Dkt. 216-1, 222-1.

[5] Declaration of Sydney Maltese (Maltese Decl.), Ex. A., Joseph O'Sullivan, *Inslee: Washington has entered its fourth wave of COVID-19*, The Seattle Times, Apr. 22, 2021.

[6] Maltese Decl. Ex. B, Washington Gov. Jay Inslee, *Inslee announces three counties to rollback to Phase 2* (Apr. 12, 2021).

[7] Maltese Decl. Ex. C, Tacoma-Pierce County Pierce County Health Department, *COVID-19 Data Dashboard* (last updated Apr. 29, 2021).

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an order requiring testing. Though some staff members have been vaccinated, many have not, and there is little doubt that some will never accept the vaccine. *See* Dkt. 273 at 8 (asserting, without a supporting declaration or specific data, that "more than half" of GEO staff members have been tested). Staff refusal is particularly dangerous, as the emergence of COVID variants that are more infectious and potentially more deadly now circulate in the community. By refusing the vaccines, staff members are more likely to harbor these more virulent strains of the virus and more likely to transmit those strains to detainees. And although a number of detainees have refused the vaccine, this does not forfeit their constitutional right to reasonable protection of their health and safety. Further, new intakes—including the 64 detainees accepted this week—are unprotected in the period while they are waiting for vaccines, and Defendants have yet to confirm the details of any ongoing vaccination plan. *See* Dkt. 275-1 ¶ 6. Many detainees therefore remain at high risk from staff members who refused vaccines.

Systematic testing of staff is thus urgently needed. Notably, the CDC clearly recommends such testing. As Dr. Amon has advised and as Plaintiffs explained in their cross-motion, current CDC guidance states that facilities should conduct "screening testing" among asymptomatic staff members at detention centers and prisons. Supp. Amon Decl., Dkt. 255 ¶ 17(d); *see also* Dkt. 252 at 11. According to the CDC, such "[v]iral testing of asymptomatic staff or incarcerated/detained persons without known or suspected exposure to SARS-CoV-2 – known as screening testing – in correctional and detention facilities can detect COVID-19 early and stop transmission quickly." Dkt. 253-5 at 7; *see also* Supp. Amon Decl., Dkt. 255 ¶ 17(e) ("NWDC should expand its screening of . . . staff . . . to be better prepared to detect and respond to the introduction and spread of the coronavirus, including new and more easily transmitted variants."). The Defendant Warden does not address this guidance or explain why it does not

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apply to NWDC. Notably, nothing about the guidance suggests that any facilities should be exempt from this recommendation.

Instead of addressing CDC guidance, the Warden claims that the courts that have ordered staff testing did not address employment rights in this context. Dkt. 273 at 8. But the Warden's counsel does not represent GEO's employees. More importantly, the Warden cites no authority—statutes, case law, regulations, or otherwise—for this conclusory assertion. *Id.* And Plaintiffs are not aware of any authority suggesting that employees can refuse a simple test that is found constitutionally necessary to protect vulnerable detainees. To the contrary, as Plaintiffs have explained before, other courts have already ordered such relief, even at facilities operated by GEO. *See Zepedas Rivas v. Jennings*, No. 20-cv-02731-VC, --- F. Supp. 3d ---, 2020 WL 7066346, at *11 (N.D. Cal. Dec. 3, 2020) (ordering staff testing in facility operated by GEO), *appeal docketed*, No. 21-15195 (9th Cir. Feb. 3, 2021); *Savino v. Souza*, 459 F. Supp. 3d 317, 332 (D. Mass. 2020). Indeed, ICE's contract with GEO to operate NWDC requires minimum health requirements for all employees at the facility, including annual tuberculosis tests and random drug testing.[8] ICE's contract with GEO also includes a general requirement that "only employees who are in good health [shall] work under this contract," and that '[a]ll Officers who work under this contract shall pass a medical examination conducted by a licensed physician within 30 days prior to initial assignment."[9] Moreover, the Warden already enforces rules that anyone known to have the virus cannot work in the facility, demonstrating that he can take measures to ensure detainee safety. Despite that authority, he has so far refused to implement systematic testing, even though experts agree that doing so is one of the most important steps

[8] Maltese Decl. Ex. D, *Washington v. GEO*, No. 3:17cv-5806, Dkt. 19 at 1-2, 67–68 (Decl. of Joan Mell and excerpts of exhibit).
[9] *Id.* at 67.

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possible to prevent sick staff from entering the facility in the first place. *See* Dkt. 253-5 (CDC Guidance); Supp. Amon Decl., Dkt. 255 ¶ 17(e); Decl. of Joseph Amon, Dkt. 136 ¶¶ 19(b)–(j); Decl. of Dr. Robert Greifinger, Dkt. 178 ¶ 8. Accordingly, the Court should reject the Warden's unsupported claim that employee rights pose a barrier to ensuring Plaintiffs' safety in his facility.

In sum, a high risk of infection from dangerous new strains continues to exist at NWDC as staff often have entered the facility with the virus undetected. Even so, the Warden has intentionally declined to impose the systematic testing of staff—a known, simple, and effective way to mitigate the risk. These material facts demonstrate objective deliberate indifference and punitive conditions amounting to a violation of detainees' Fifth Amendment rights. *Hernandez Roman,* 977 F.3d at 943; *Jones v. Blanas,* 393 F.3d 918, 932 (9th Cir. 2004). The Court therefore should issue an injunction requiring systematic testing of GEO staff who work at NWDC.

III. Alternatively, the Court Should Postpone Ruling on Summary Judgment Under Federal Rule of Civil Procedure 56(d).

Finally, if this Court does not deny GEO's motion for summary judgment, the Court should postpone ruling on that summary judgment motion until discovery is complete under Federal Rule of Civil Procedure 56(d). This is appropriate when a party has shown "(1) that they have set forth in affidavit form the specific facts that they hope to elicit from further discovery, (2) that the facts sought exist, and (3) that these sought-after facts are 'essential' to resist the summary judgment motion." *Adoma v. Univ. of Phoenix, Inc.*, 779 F. Supp. 2d 1126, 1131 (E.D. Cal. 2011) (citation omitted).

Postponing judgment until discovery can be completed is especially appropriate now that the deadlines for discovery and dispositive motions have been extended. Dkt. 272. Three days before GEO's reply to the instant motion, the Court ordered traditional discovery under the Federal Rules of Civil Procedure, rather than limited habeas discovery. *Id.* at 6 (finding that

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"traditional discovery is appropriate based on the injunctive and declaratory relief sought by Petitioners" and that "the parties have been diligent in conducting discovery and, based on the expansion of the scope of discovery, more time is warranted"). Ignoring this order, Defendant makes conclusory allegations that no discovery could change the fact that Stephen Langford is no longer the facility administrator in charge of staff testing, and that he was never able to order releases or control medical care. Dkt. 273 at 5. But, as discussed in Section I, *supra*, Defendant Stephen Langford was sued in his official capacity and Bruce Scott must be automatically substituted as Defendant. Further, Plaintiffs seek relief aside from releases, including staff testing and other relief as the Court deems fit and proper. Dkt. 167 at 35. Defendant fails entirely to rebut Plaintiffs' assertion that discovery, including depositions and a facility inspection, would bear on other essential issues, such as the implementation of Defendant's COVID-19 protocols. Dkt. 252 at 18.

Further, Plaintiffs complied with Rule 56(d) by setting forth in the declaration of Lauren Kuhlik and in their motion the specific matters for which they seek discovery. Dkt. 254. Defendant wrongly asserts that Plaintiffs' have offered a "simple bullet point" list of issues that require further discovery, ignoring the Rule 56(d) declaration, as well as six and a half pages of argument elucidating what facts Plaintiffs hope to elicit, that the facts exist, and that they are essential to resist summary judgment. Dkt. 252 at 16–23. Therefore, if the Court does not deny Defendant's motion for summary judgment, this Court should postpone ruling on Defendant's summary judgment motion until discovery concludes. However, Plaintiffs respectfully request that the Court decide in the interim the purely legal question of whether Plaintiffs may sue the NWDC Warden for injunctive relief. Doing so will clarify that Plaintiffs are entitled to receive

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discovery from the Warden and will ensure that the parties are clear on whether Plaintiffs may obtain relief against the Warden.

CONCLUSION

For the foregoing reasons, the Court should deny Defendant's motion, grant Plaintiffs' cross-motion, order the periodic testing of GEO staff for COVID-19, and any other further relief that the Court may deem fit and proper.

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Respectfully submitted on this 30th day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2021, 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 30th day of April, 2021.

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