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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

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I. INTRODUCTION

Earlier today, Respondents-Defendants (Defendants) reported ten new positive cases of COVID-19 at the Northwest Detention Center (NWDC), bringing the total to 137 in the past two months. Respondents also informed the Court that one of these was a medically vulnerable class member in a general population unit who was hospitalized for COVID-19, requiring monoclonal antibody treatment. This is the third class member sent to the hospital for COVID-19 in recent weeks. In the last week alone, Respondents-Defendants' (Defendants) mass transfers of immigrants to the NWDC have led to *thirty* new cases of COVID-19 at the facility. In addition, since Petitioners-Plaintiffs (Plaintiffs) filed their TRO Motion last week, nine more medically vulnerable class members, six GEO officers, and one Immigration and Customs Enforcement (ICE) Health Service Corps (IHSC) employee have tested positive.

Defendants have only themselves to blame for this situation. Defendants do not dispute that they fail to test detainees for COVID-19 before transfer from border detention facilities to NWDC, contrary to the Center for Disease Control and Prevention's (CDC) detention testing guidance. They do not dispute that rapid COVID-19 testing is now widely available. Nor do they dispute that the CDC's air transport guidance requires that ICE separate people on flights based on COVID-19 infection or exposure, and that they have failed to do this. Defendants' own declarations demonstrate that at least forty-two previously uninfected detainees at NWDC likely have contracted COVID-19 because of these failures. And while Defendants based much of their motion on the lack of a positive case in the general population, that is no longer the case.

Plaintiffs' Motion is of great urgency, and they request a hearing and ruling at the earliest available opportunity in light of the dangerous and developing situation at NWDC. Moreover, Plaintiffs request modest relief to address that urgency: an order enjoining the admission to NWDC of detainees whose transport is not in compliance with CDC guidelines, including testing prior to transfer and cohorting of detainees based on COVID-19 exposure during transport.

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II. ARGUMENT

A. Defendants Have Ignored CDC Guidelines and Endangered the Health and Safety of Medically Vulnerable Class Members.

In their Response, Defendants effectively concede that they do not follow the CDC's guidance on testing in detention facilities or its air transport guidance. The CDC's guidance on COVID-19 testing in detention facilities instructs that COVID-19 testing should occur prior to the transfer of people between facilities. Specifically, in the section entitled "Before transfer to another facility," the guidance instructs authorities to "[t]est incarcerated/detained persons *before* transfer to another correctional/detention facility. Wait for a negative test result *before* transfer." Dkt. 327-3, CDC Detention Testing Guidance at 6 (emphasis added). The CDC adds that "[i]deally, testing and a 14-day quarantine would occur at the originating facility before transfer *and again* at the destination facility at intake; at a minimum it should occur at one facility or the other." *Id.* (emphasis added). In their response, Defendants suggest they have complied with this guidance by testing detainees *after* transfer, Dkt. 346 at 20, and that their verbal screening prior to flight provides sufficient protection. Dkt. 346 at 19; *see also* Dkt. 326, Stip. ¶¶ 5, 10.

Defendants' attempt to avoid CDC guidance does not succeed. Most importantly, the CDC's detention testing guidance demonstrates that pre-transfer testing is a critical mitigation tool.[1] Verbal screening and temperature checks are not sufficient to mitigate risk of spread, as they do not detect asymptomatic cases of COVID-19.[2] Post-transfer testing and quarantine

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[1] For similar reasons, Defendants' objections that Plaintiffs' proposed order is "vague" are unwarranted. Dkt. 346 at 15. The CDC guidance leaves little doubt that pre-transfer testing is necessary in the case of air transport. To the extent the Court agrees the proposed order is unclear, Plaintiffs can provide the Court with an updated proposed order that further makes clear pre-transfer testing is required.

[2] Defendants claim that this verbal "pre-screening process is implemented to identify *asymptomatic* detainees." Dkt. 346 at 19 (emphasis added). That is impossible, and precisely why testing is so important. The verbal pre-screening tool requires individuals to report *active* COVID-19 *symptoms*; it cannot detect asymptomatic people. *See* Dkt. 328, Amon Decl. ¶ 37 ("Screening testing allows early identification and isolation of persons who are asymptomatic or pre-symptomatic, or have only mild symptoms and who may be unknowingly transmitting the virus." (quoting CDC guidance)); Dkt. 347, Lippard Decl. ¶ 14 (acknowledging that the verbal

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provide only minimal protection and makes more sense in cases of detainees transferred from local facilities where prolonged exposure is a less weighty concern (for example, in the case of ground transfer from the SeaTac Federal Detention Center in SeaTac to NWDC in Tacoma). Moreover, the CDC's air transport guidance assumes that passengers have been tested COVID-19 testing prior to flight. The guidance generally prohibits people with COVID-19 or their close contacts from air travel, but provides an exception if the carrier cohorts and transports passengers with varied levels of COVID-19 infection or exposure on separate flights. *See* Dkt. 327-4, CDC Air Transport Guidance at 2, 4.

Defendants claim that they do not "intentionally" violate the CDC's air transport guidance by placing COVID-19 individuals or close contacts on planes with others. Dkt. 346 at 19. The record belies that conclusion. Nearly every single ICE Air flight to NWDC from the border since early June has included COVID-19 positive individuals. *Compare* Dkt. 347, Lippard Decl. ¶ 9 (summary of transfer dates and number of transferred individuals) *and* Dkt. 329, Surkatty Decl. ¶¶ 7–14 (same) *with* Dkt. 328, Amon Decl. ¶ 13 (summarizing number of individuals testing positive upon arrival at NWDC for each transfer); *and* Supp. Decl. of Joseph Amon ¶¶ 7–9 (same). Indeed, ICE considers the "general COVID-19 positivity rate of detainees from [the last incoming] flight" to the facility when assessing whether new detainees can be transferred to NWDC. Dkt. 347, Lippard Decl. ¶ 13. Defendants therefore know they are transporting COVID-19 positive individuals on their planes and that this practice exposes previously uninfected detainees to the deadly virus. Alarmingly, Defendants have chosen to

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pre-screening relies on a detainee to "report[] any symptom or symptoms"). The process is also ineffective, as a detainee has reported an individual with symptoms was on their flight, and large numbers of COVID-19 positive detainees have been transferred. Dkt. 330, Amaya Vargas Decl. ¶ 10–11, Dkt. 326, Stip. ¶ 20; Dkt. 328, Amon Decl. ¶¶ 9–10. Indeed, Defendants' most recent notice of positive cases stated that detainees from the most recent transfer "were immediately placed in cells in a regular quarantine housing unit because other detainees from the flight had reported possible symptoms of COVID-19 upon intake." Dkt. 350-1 ¶ 6. This report suggests ICE is not meaningfully screening transferees prior to transfer.

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ignore CDC guidance even though the Department of Homeland Security (DHS) has testing tools at CBP facilities on the southern border. *See* Dkt. 330, Amaya Vargas Decl. ¶ 5; Dkt. 332, Mohammed Ghazal Decl. ¶ 4.

Defendants' failure to follow the CDC's testing and transport guidance has predictably led to an unprecedented number of COVID-19 cases at NWDC. As of today, it is now confirmed that COVID-19 has also entered the general population. Dkt. 350-1 ¶¶ 10–17. 137 detainees have now tested positive since early June 2021. *See* Dkt. 326 ¶ 20, Dkt. 338-1 ¶ 4; Dkt 339-1 ¶ 4; Dkt. 345-1 ¶ 4; Dkt. 350-1 ¶ 4; Supp. Amon Decl. ¶¶ 8–12, Exh. A. Six GEO officers and one IHSC medical staff member have tested positive in the same timeframe, including two from GEO's Transport Division and one who was assigned to the medical isolation unit, demonstrating that Defendants' practices may also endanger staff. *See id*.; Dkt. 322-1 ¶ 4; Dkt. 310-1 ¶ 17; Dkt. 323-1 ¶ 4; Dkt 338-1 ¶ 8; Supp. Amon Decl. ¶¶ 11–13. And three detainees—all of them class members—have been sent to the hospital for COVID-19 in recent weeks. Dkt. 326, Stip. ¶ 19; Dkt. 330, Amaya Vargas Decl. ¶¶ 17–18; Dkt. 350-1 ¶ 16.[3] Notably, one class member from a general population unit was hospitalized yesterday. Dkt. 350-1 ¶¶ 10–17.

Many of these infections have occurred in transport or in the NIMs unit. Dr. Joseph Amon has painstakingly explained how Defendants' own positive case notices demonstrate that their practices are infecting detainees. *See* Dkt. 328, Amon Decl. ¶¶ 7–13, 28; *see also* Supp. Amon Decl. ¶¶ 15(e)–(g). Defendants assert without any basis that Dr. Amon's explanation of the data is "speculative." Dkt. 346 at 22. But Dr. Amon's conclusion—that at least forty-two

[3] Dr. Malakhova appears to dismiss this danger once again by noting that many of the detainees who have tested positive have been asymptomatic. Dkt. 348, Malakhova Decl. ¶¶ 44–45. But the danger to medically vulnerable class members is much higher. For them, this can be a life or death situation, as yesterday's hospitalization demonstrates, Dkt. 350-1 ¶ 16, and as a recent death in ICE custody at the southern border also shows. *See* Hamed Aleaziz, *A 37-Year-Old Nicaraguan Woman Died in ICE Custody After Testing Positive For COVID-19*, Buzzfeed News (Aug. 4, 2021); s*ee also* Amon Supp. Decl. ¶ 27.

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COVID-19 cases were likely the result of transmission during transit or new intake monitoring—is based on the timeline provided by ICE of each case and on current scientific knowledge of COVID-19 and CDC guidance. Supp. Amon Decl. ¶¶ 15(e)–(g). As he explains, these detainees initially tested negative upon arriving at NWDC, and then tested positive after the median incubation period for COVID-19, indicating infection during transit or detention. Dkt. 328, Amon Decl. ¶¶ 9, 13, 28; Supp. Amon Decl. ¶¶ 15(e)–(h). Moreover, Defendants exacerbate this situation by refusing to use rapid tests at intake (in addition to PCR tests) to separate likely-positive individuals more quickly from those who are not. As Dr. Amon has explained, this places COVID-19 positive individuals together with those who do not have COVID-19, facilitating the virus's transmission. Dkt. 324 at 8–9, Dkt. 328, Amon Decl. ¶¶ 10–11.

Defendants' focus on the reported lack of confirmed cases in general population units is irrelevant and as of today, outdated and inaccurate. *See* Dkt. 346 at 16, 18, 23–24; Dkt. 350-1 ¶¶ 10–17. Like detainees in general population, medically vulnerable people detained in the NIMs units are also class members. And these class members are becoming infected because of Defendants' failure to abide by CDC guidelines. Dkt. 328, Amon Decl. ¶¶ 7–13, 28. Indeed, Defendants cite no case law for their argument that the Court should concern itself only with the danger posed to class members in the general population. Nor could they: the class definition leaves no doubt that medically vulnerable detainees who are in the NIMs unit are just as much a part of the class—and thus entitled to constitutional protection—as those in the general population. *See* Dkt. 245 at 3 (certifying class).

More importantly, as of today, and as Plaintiffs warned, Defendants have confirmed that COVID-19 has entered the general population. Dkt. 350-1 ¶¶ 10–17. The hospitalization of a class member held in general population underscores the risk posed to all class members. Notably—and despite the dramatic increase in positive cases *at NWDC*, including COVID-positive staff members, *see* Supp. Amon Decl. ¶¶ 12–15, Defendants have ended their testing of

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members of the general population, except for cases of transfer or deportation, Dkt. 348, Malakhova Decl. ¶ 35. This lack of testing is itself inconsistent with the CDC's guidance, Supp. Amon Decl. ¶¶ 15(c)–(d), and today's positive case notice from general population underscore how shortsighted that policy change was. Moreover, Defendants' apparent failure to immediately test close contacts who are not fully vaccinated puts other detainees in general population at risk and increases the risk of further spread within the facility. *Id.* ¶ 14.

B. Plaintiffs Are Likely to Succeed on the Merits, as ICE's Failure to Test and Safely Transport Detainees Is Deliberately Indifferent to Class Members at NWDC.

Defendants' actions and apparent disregard for the safety of class members reflects their deliberate indifference and the likelihood of Plaintiffs' success on their Fifth Amendment due process claim. All parties agree on the appropriate standard, which Plaintiffs clearly meet. *See Gordon v. County of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018) (summarizing test).

First, Defendants have "made an intentional decision with respect to the conditions under which [Plaintiffs are] confined." *Id*. As described in Plaintiffs' motion and above, Defendants have intentionally brought hundreds of people from congregate settings who have not been tested for COVID-19 into NWDC, in defiance of the CDC's guidance for air transport and detention facility testing. Dkt. 324 at 3–4; *supra* pp. 2–3. Second, these conditions put Plaintiffs "at substantial risk of suffering serious harm." *Gordon*, 888 F.3d at 1125. Already, over 12% of detainees transferred to NWDC from the southern border have tested positive for COVID-19, and now, at least one detainee in the general population has become sick and been hospitalized (in addition to the 136 other cases from NIMs).[4] Third, Defendants "did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved." *Gordon*, 888 F.3d at 1125. Despite the

[4] This is a conservative estimate. Plaintiffs count 137 positive cases since early June 2021, *supra* p. 4, out of the 1,095 detainees that Defendants acknowledge have been transferred from the southern border since late April 2021. Dkt. 346 at 5.

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known dangers from COVID-19 in congregate settings, and despite the CDC's guidance to test before transfer and transport people based on COVID-19 status and exposure, Defendants have not taken the most minimal precautions. While Defendants assert that ICE has not placed a detainee with *known* positive COVID test on an ICE Air flight with other detainees, Dkt. 346 at 19, that assertion is meaningless given that ICE is not testing in the first place. Failure to test precludes knowledge of who is positive, despite the widespread availability of rapid testing and prevalence of COVID-19 among transferred individuals. Dkt. 326 ¶¶ 5, 9, 20; Supp. Amon Decl. ¶ 22. Lastly, because of Defendants' failure to take such basic preventive measures, they have "caused the [Plaintiffs'] injuries." *Gordon*, 888 F.3d at 1125. At least forty-two of the recent COVID-19 cases can be traced to infection from the transit process or NWDC's NIMs units. Dkt. 328, Amon Decl. ¶¶ 9, 12, 28; Supp. Amon Decl. ¶¶ 9, 15(e)–(g). Three class members have been sent to the hospital. Dkt. 326 ¶ 19; Dkt. 350-1 ¶ 10.

Despite meeting all of these factors, Defendants claim that they are not deliberately indifferent to class members. Defendants rely on their intake testing and quarantine procedures, while asserting that ICE cannot test detainees prior to transfer. Dkt. 346 at 20–23. These claims should be rejected. First, courts in this Circuit have recognized that a failure to test despite a known problem of COVID-19 positive individuals amounts to deliberate indifference. *See Hernandez Roman v. Wolf*, No. EDCV-20-00768TJH-PVCX, 2020 WL 5797918, at *3 (C.D. Cal. Sept. 29, 2020) (pointing to the failure to test and follow CDC guidelines as reasons ICE was deliberately indifferent), *aff'd in part, vacated in part, remanded*, 977 F.3d 935 (9th Cir. 2020); *Zepeda Rivas v. Jennings*, 504 F. Supp. 3d 1060, 1065 (N.D. Cal. 2020) (similar). Defendants completely fail to respond to these cases. Second, Defendants have failed to adhere to CDC guidance. *See supra* pp. 2–3. As Plaintiffs explained in their motion, the failure to adhere to CDC guidance is also strong evidence of deliberate indifference. *See* Dkt. 324 at 18 (citing cases).

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Defendants never address these arguments, other than to claim that testing of detainees prior to transfer would be difficult. Dkt. 346 at 22–23. As an initial matter, this argument lacks factual support. It is common knowledge that rapid, mass testing is now widely available and has been for some time. Supp. Amon Decl. ¶ 22 (describing mass, rapid test capacity at various institutions). People test regularly to play sports, travel, or work. *See, e.g.*, Port of Seattle, Travel and COVID-19 Testing Options (last accessed Aug. 5, 2021), https://www.portseattle.org/page/travel-and-covid-19-testing (describing routine, onsite testing at Seattle-Tacoma International airport); Yuri Kageyama, *In Effort to Curb COVID-19 Tokyo Olympics Collect Lots of Spit*, Associated Press, July 30, 2021 (noting that "athletes . . . get tested *daily*" (emphasis added)); Mae Anderson & Ricardo Alonso-Zaldivar, *Explainer: Employers Have Legal Right to Mandate COVID Shots*, Associated Press, July 27, 2021, (noting that many employers now require vaccination or weekly testing). Asking Defendants to do the same for people whose health they are required to protect is thus not especially burdensome. Supp. Amon Decl. ¶ 22. Indeed, as noted above, DHS already appears to have some capacity to test detainees located near the southern border prior to transfer. Amaya Vargas Decl. ¶ 5; Mohammed Ghazal Decl. ¶ 4.

The same applies for rapid testing at NWDC. Defendants claim that adding rapid testing at intake would require several additional hours to process detainees and a few additional nurses. Dkt. 348, Malakhova Decl. ¶ 24. This is not a hefty burden, particularly when class members' health—and in some cases, their lives—may be at stake. Moreover, it is unclear why (1) this problem could not be solved by simply providing additional testing capacity, and (2) conducting that testing alongside the other intake process with additional nurses. *See* Supp. Amon Decl. ¶ 22. In other words, by providing additional staff and testing capacity, Defendants could easily resolve the alleged burden and the time that intake processing entails. As described above, doing so would ensure that COVID-19 positive detainees are more quickly separated from others.

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Moreover, even if testing and cohorting imposed a significant burden on Defendants, the Constitution would still require them. As the Supreme Court has explained, where "a constitutional violation has been found, the remedy does not 'exceed' the violation if the remedy is tailored to cure the 'condition that offends the Constitution.'" *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) (citation omitted); *see also id.* at 289–91 (injunction that required expenditure of funds to remedy constitutional violation was appropriate because the "District Court ha[d] . . . properly enforced the guarantees of the Fourteenth Amendment"). Indeed, "financial constraints may not be used to justify the creation or perpetuation of constitutional violations." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 392 (1992); *see also Wyatt v. Aderholt*, 503 F.2d 1305, 1315 (5th Cir. 1974) ("[T]he state may not fail to provide treatment for budgetary reasons alone . . . . Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights." (internal quotation marks omitted)). Accordingly, given the availability of the tools to cure the constitutional violation at issue here, an injunction is appropriate to ensure class members' safety.

C. Medically Vulnerable Class Members Are Likely to Suffer Irreparable Harm Absent the TRO.

Plaintiffs are currently experiencing irreparable harm from exposure to and infection by a lethal disease due to Defendants' failure to follow basic CDC guidance. Defendants point to the fact that there have not been recent cases in general population, but that is no longer true. Dkt. 350-1 ¶¶ 7–17. Moreover, that argument ignores that 42 people, many of whom are class members, have been infected after initially testing negative upon intake, and that they have stopped COVID-19 testing in general population. *See* Dkt. 328, Amon Decl. ¶¶ 9, 13, 28; Dkt. 348, Malakhova Decl. ¶ 35; Supp. Amon Decl. ¶ 15(c). While Defendants claim that Plaintiffs have failed to show that their precautionary measures are inadequate "should a COVID-19 outbreak occur," Dkt. 346 at 24, the record demonstrates that Defendants are repeatedly causing outbreaks and the spread of COVID-19 at NWDC. It is well-established that COVID-19 is

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deadly and also carries long-term health consequences for many of those who survive; recent evidence suggests that the Delta variant may cause even more severe disease and higher rates of hospitalization. Supp. Amon Decl. ¶¶ 23–26. Such a threat to health amounts to irreparable harm. *See Hernandez v. Sessions*, 872 F.3d 976, 995 (9th Cir 2017); *Hernandez Roman*, 977 F.3d at 944 (irreparable harm likely due to "COVID-19's high mortality rate"). Likewise, subjecting Plaintiffs to a constitutional deprivation amounts to irreparable harm. *Hernandez*, 872 F.3d at 994.

D. The Public Interest and Balance of Equities Weigh in Favor of the TRO.

The final two factors clearly "tip[] decidedly in [P]laintiffs' favor" here where a TRO will prevent human suffering and bring Defendants in accord with the Constitution. *Hernandez*, 872 F.3d at 996 (citation omitted). Defendants cite no compelling reason to the contrary.

First, Defendants assert that a TRO would effectively enjoin ICE from transporting detainees from overcrowded CBP facilities at the southern border. Dkt. 346 at 24. Not so. Plaintiffs do not seek an injunction on all transfers into NWDC (despite existing precedent for doing so, *see* Dkt. 324 at 19–20 (citing cases)). Instead, Plaintiffs merely seek an injunction against Defendants' dangerous transfers, which are inconsistent with CDC guidance. Dkt. 324-1. Defendants are free to continue their transfers from the southern border so long as they test and safely cohort individuals by COVID-19 status and exposure during transport.[5] Far from "attempt[ing] to micro-manage carefully coordinated pandemic safety precautions," Dkt. 346 at 25, Plaintiffs are merely asking that Defendants follow CDC guidance and their own guidance for transport between ICE facilities, which does require testing in analogous situations.

[5] Defendants argue, and Plaintiffs do not contest, that it is in the public interest for ICE to quickly conduct custody assessments and release class members from NWDC. Dkt. 346 at 25. But Defendants' release of class members is not at issue here. By the time a class member is released, Defendants' dangerous actions have already caused harm to class members.

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Lastly, administrative burden and cost for compliance provide no grounds for denying relief where Plaintiffs' constitutional rights are at stake.[6] *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citing *Sammartano v. First Judicial District Court*, 303 F.3d 959, 974 (9th Cir 2002)); *see also Hernandez*, 872 F.3d at 995–96; *see also supra* p. 9. In addition, the government cannot have an interest in the enforcement of an unconstitutional practice. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1145–46 (9th Cir. 2013), *abrogated on other grounds sub nom. Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). Notably, Plaintiffs raised this point in their Motion, Dkt. 324 at 22 n.7 (citing additional cases), and Defendants have no response to it.

E. This Court Has Jurisdiction to Order the Requested Relief.

The government argues that this Court lacks jurisdiction to grant an injunction against CBP. Dkt. 346 at 15–16. But that is beside the point: there is no dispute that this Court has jurisdiction to enjoin *ICE's* failure to ensure class members' reasonable safety from COVID-19. The government complains that testing by ICE prior to transport is "not practical," *id*. at 16, but that goes to the merits of Plaintiffs' motion and Plaintiffs' entitlement to relief—*not* this Court's jurisdiction. Nor does the fact that Plaintiffs seek testing prior to individuals' arrival at NWDC counsel against relief, as Defendants suggest. *See id*. There is no dispute that many individuals transferred from the border will enter the class upon arrival at the facility. Moreover, preventing infections among new admits bears directly on the health and safety of *all* class members presently detained at NWDC, including in the new intake and general population units. The government's arguments against jurisdiction should be rejected.[7]

[6] As discussed above, *supra* p. 8, Defendants cannot show substantial burden or cost in the first place, as they have access to rapid tests and additional staff time to conduct such tests.

[7] Defendant Bruce Scott separately asserts in his response that he is not subject to this Court's jurisdiction. Dkt. 343 at 1–2. This Court has already rejected that argument, *see* Dkt. 282; Dkt. 316, and should do so again here.

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F. Plaintiffs Request Prohibitory, Not Mandatory, Relief.

Contrary to ICE Defendants' suggestion, Dkt. 346 at 14–15, Plaintiffs request prohibitory, not mandatory relief. The TRO requested would simply bar the Defendants from admitting to NWDC any detainees who were not transported consistently with the CDC guidelines. Plaintiffs are not asking the Court to require them to follow CDC guidelines if they unwisely continue to choose not to. Plaintiffs ask only that if ICE does admit new detainees, that those persons have been transported pursuant to CDC guidance.

A request for an order that "prevents future constitutional violations" is "a classic form of prohibitory injunction…" *Hernandez*, 872 F.3d at 998. Plaintiffs' request to prevent unconstitutionally unsafe transfers is exactly this kind of prohibitory injunction and is subject to the less demanding standard applicable to such injunctions. *See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878-79 (9th Cir. 2009).

III. CONCLUSION

As detailed above, Defendants' failure to comply with CDC guidance has resulted in hospitalizations of medically vulnerable detainees, an unprecedented number of COVID-19 infections throughout the facility, and the danger of even further spread. Defendants continue to take these actions despite knowing their grave consequences, violating class members' constitutional rights. Accordingly, the Court should GRANT Plaintiffs' motion for a Temporary Restraining Order.

Respectfully submitted on this 6th day of August, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2021, I electronically filed the foregoing and attached declaration 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 6th day of August, 2021.

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