

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

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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 TO CONVERT
TEMPORARY RESTRAINING
ORDER TO PRELIMINARY
INJUNCTION**

NOTING DATE: October 15, 2021

1 **I. INTRODUCTION**

2 Immigration and Customs Enforcement (ICE) Respondents-Defendants (Defendants)
3 effectively concede that this Court’s Temporary Restraining Order (TRO) should remain in place
4 as a preliminary injunction. Defendants do not contest that testing immigrant detainees for
5 COVID-19 prior to mass transfers to the Northwest Detention Center (NWDC) is critical to
6 protecting Petitioners-Plaintiffs’ (Plaintiffs) health and safety. Unable to point to changed facts or
7 law, Defendants raise no new arguments beyond those in their earlier opposition (Dkt. 346), which
8 this Court already rejected in its TRO decision (Dkt. 370).

9 Instead, for the first time in their current opposition (Dkt. 413), Defendants attempt to focus
10 on the effect of the TRO on “small-scale” detainee transfers. In doing so, Defendants err twice.
11 First, they assume a conflict where there is none: Plaintiffs do not object to allowing ICE to accept
12 COVID-19 tests performed by other government agencies before transferring detainees to NWDC.
13 Second, in proposing for the first time that this Court permit small-scale transfers of detainees to
14 NWDC *without* pre-transport testing, Defendants fail to refute Plaintiffs’ evidence that pre-transfer
15 testing is necessary to protect Plaintiffs’ health and safety. Such pre-transfer testing is feasible,
16 practicable, and critical to protecting the health and safety of detainees and the surrounding
17 community, regardless of the number of detainees that Defendants seek to transport. Indeed, the
18 consequences of the spread of COVID-19 at the NWDC are tragically clear, in light of information
19 that an ICE officer at NWDC who tested positive for COVID-19 on September 18, 2021, passed
20 away from the virus earlier this week.¹

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¹ Declaration of Eunice Cho, Ex. A, Email from Michelle Lambert; *see also* Dkt. 396-1 at 2 (informing Court of an ICE Enforcement and Removal Operations (ERO) employee who tested positive for COVID-19, and last worked at NWDC on September 16, 2021, the same date as symptom onset).

1 In light of the continuing need for the basic COVID-19 precautions enforced under this
2 Court's TRO, a preliminary injunction is required and warranted.

3 **II. ARGUMENT**

4 **A. Defendants Raise No Viable Arguments Against a Preliminary Injunction,
5 Demonstrating that The Facts and Law Continue to Warrant Injunctive Relief.**

6 Defendants make no attempt to meaningfully contest the facts and law which support a
7 preliminary injunction. They make no new arguments to challenge an order that would continue
8 to require basic safety measures for transfers from Customs or Border Protection (CBP) or ICE
9 facilities near the southern border. Instead, Defendants essentially reduce their argument to a single
10 sentence, asserting that, “[f]or the reasons argued in opposition to the TRO, [Defendants]
11 respectfully disagree with the Court’s decision” to grant the TRO. Dkt. 413 at 12. Nor do
12 Defendants even try to explain why they believe the Court’s prior order was erroneous or to show
13 that some intervening change in the law or facts now merits reconsideration or a different outcome.
14 Indeed, rather than directly address Plaintiffs’ arguments that injunctive relief is *necessary*,
15 Defendants spend the balance of their opposition explaining why in their view the requested relief
16 is overbroad. Defendants’ mere disagreement with the Court’s prior conclusions and emphasis on
17 the scope of relief makes plain that they have no viable defense against the undisputed facts and
18 law, which warrant the continued protection of relief in the form of a preliminary injunction.

19 As Plaintiffs have explained in their opening motion, nothing material has changed since
20 the Court deemed a TRO necessary to protect class members, other than a precipitous drop in
21 COVID-19 cases at NWDC. Dkt. 400 at 3–13. That decrease illustrates that unsafe transfers of
22 untested detainees were a key cause of the outbreak and continued injunctive relief is therefore
23 essential. *See id.* at 19. The parties have stipulated to virtually the same facts as they did for the
24 TRO briefing, *compare* Dkt. 326 *with* Dkt. 401, giving rise to the same risk of unsafe transfers

1 that, as the Court previously found, unreasonably put class members at substantial risk of serious
2 harm from COVID-19. Dkt. 370 at 12–13. This Court has already found that the Centers for
3 Disease Control and Prevention (CDC) advises that individuals should be tested prior to transfer
4 from one facility to another and cohorted by COVID-19 status upon transfer, *id.* at 5, but that
5 Defendants require neither testing prior to transfer nor cohorting, *see id.* at 4. Rather, Defendants
6 have intentionally transferred over 1,000 detainees to NWDC since June 2021, knowing they were
7 untested for COVID-19, with grave consequence to class members’ health and safety. *Id.* at 11–
8 12. These consequences include the infection of over 200 detainees with COVID-19 and five class
9 member hospitalizations. *Id.* at 12.

10 Finally, despite this Court’s prior finding that “[t]here is nothing in the record to support
11 ICE’s position that there are no reasonable available measures to test detainees before they board
12 flights for transfer to NWIPC,” *id.* at 13, Defendants once more provide *no* evidence that they
13 cannot test prior to transfer. *See generally* Dkt. 413. This failure to establish ICE’s inability to test
14 is consistent with the common knowledge that nearly two years into the pandemic, COVID-19
15 testing programs are widely available, even in field conditions. *See* Dkt. 400 at 16 n.8; Decl. of
16 Elizabeth Winterbauer and Dr. Christina Silcox, Medical Experts on COVID-19 Testing, ¶¶ 24–
17 36 (Winterbauer and Silcox Decl.) (describing off-site COVID-19 testing and ability to conduct
18 rapid testing before transfers to NWDC). These unchanged facts—which Defendants have failed
19 to challenge with new arguments or even explicitly address in their opposition—demonstrate that
20 this Court’s prior conclusion that Plaintiffs are likely to succeed on the merits of their Fifth
21 Amendment claim remains sound.

22 In the same vein, the Court’s conclusions that class members will be irreparably harmed
23 absent injunctive relief and that the balance of the equities and public interest favor them remain
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1 undisturbed. Dkt. 370 at 14–16; Dkt. 400 at 20–23. Defendants make no meaningful attempt to
2 challenge this Court’s prior findings—based on circumstances that remain virtually unchanged—
3 that these remaining *Winter* factors in general favor Plaintiffs. *See Winter v. Nat. Res. Def. Council,*
4 *Inc.*, 555 U.S. 7, 20 (2008). Instead, Defendants mischaracterize the relevant inquiry by suggesting
5 that Plaintiffs have failed to show they will be irreparably harmed or that the balance of the equities
6 favors them if the *scope* of the relief is slightly narrowed. That is not the question before this Court.
7 The appropriate inquiry considers whether Plaintiffs will be irreparably harmed *absent* any
8 injunctive relief at all, and whether the balance of the equities generally favors the issuance of an
9 injunction. *See Winter*, 555 U.S. at 20, 22. This Court should accordingly reaffirm its previous
10 holding, and convert the TRO to a preliminary injunction.

11 **B. Defendants’ Proposed Limit on The Injunction for “Small-Scale” Transfers Is Not**
12 **Justified.**

13 Rather than addressing the circumstances that led this Court to issue a TRO, Defendants
14 for the first time raise new concerns regarding certain detainees from “small-scale transfers” who
15 have not been tested for COVID-19 by ICE but by other agencies, or have not been tested for
16 COVID-19 at all, prior to transfer to NWDC. Dkt. 413 at 3, 12. At no point during the TRO briefing
17 or in court proceedings have Defendants raised these concerns. *See generally* Dkt. 346. Based on
18 these new arguments, Defendants propose modifying the scope of any injunctive relief in two
19 ways: “(1) to allow small-scale detainee transfers without pre-transport testing and (2) allow ICE
20 to accept COVID-19 tests performed by any state or federal agencies prior to transport for all
21 transfers.” Dkt. 413 at 18. As discussed in greater detail below, Plaintiffs do not object to the
22 second proposed modification so long as the tests are conducted and test results are received no
23 more than three days prior to transfer to ensure their reliability. However, as to the first proposed
24 modification, Defendants fail to counter Plaintiffs’ evidence and this Court’s conclusion in its TRO

1 decision that permitting the transfer of untested detainees to NWDC would likely violate Plaintiffs’
2 Fifth Amendment due process right to reasonably safe conditions, cause Plaintiffs to suffer
3 irreparable harm, and contravene the public interest. *See* Dkt. 370 at 8, 14–16; Dkt. 400 at 14–23.

4 **1. Plaintiffs Do Not Object to Defendants’ Proposed Modification to Permit COVID-
5 19 Tests by Other Government Agencies Prior To Transfer to NWDC.**

6 Throughout this litigation, this Court has been guided by the CDC and public health
7 recommendations to determine the scope of reasonable protections owed to Plaintiffs during this
8 unprecedented pandemic. *See, e.g.*, Dkt. 370 at 5–6. In drafting the TRO, the Court fashioned a
9 specific remedy that enshrined the essence of two key protocols in the CDC’s transport and testing
10 guidance: (1) detainees must be tested prior to transfer to NWDC, and (2) detainees must be
11 cohorted by COVID-19 status during transport “to ensure there is no cross-exposure.” *Id.* at 16.
12 For this reason, Plaintiffs do not object to Defendants’ second proposed modification to the
13 injunction, which would allow ICE to accept COVID-19 tests performed by any state or federal
14 agency prior to transfer to NWDC. Dkt. 413 at 18. As Dr. Amon notes, “[t]he usual time period
15 for testing prior to travel, endorsed by the CDC and others, is no more than 3 days prior,” which
16 is necessary to minimize the risk of post-testing infection and transmission during transfer.
17 Supplemental Declaration of Dr. Joseph Amon ¶ 8. This modification maintains the intent behind
18 the Court’s original order—the assurance that Defendants minimize COVID-19 transmission from
19 positive cases during and after transfer. Accordingly, Plaintiffs have no objection to accepting
20 COVID-19 testing from agencies other than ICE, so long as the tests are conducted and the test
21 results are received within three days prior to transfer. *See* Plaintiffs’ Proposed Modified Order.

1 **2. Defendants Fail to Support Their Proposed Modification to Allow “Small-Scale”**
 2 **Transfers Without Testing Detainees Prior to Transport.**

3 Defendants’ first proposed modification, however, would undermine the purpose of the
 4 Court’s order by creating an ambiguous, ill-defined exception that contravenes CDC guidance.
 5 Notably, Defendants do not limit or define “small-scale transfers.” Dkt. 413 at 3, 18. Although
 6 Defendants describe past transfers as involving “small numbers of individuals, typically one or
 7 two detainees per transport,” Dkt. 413 at 6; *see also* Dkt. 414, Lippard Decl. ¶ 9, nothing in
 8 Defendants’ proposed language cabins the no-testing exception to such circumstances. Under
 9 Defendants’ proposal, ICE could transfer ten, twenty, or as many detainees as could fit on a bus
 10 from a “local” facility to NWDC, on hours-long drives with no social distancing and without any
 11 testing prior to transfer. *See* Dkt. 414, Lippard Decl. ¶ 17 (describing transport of detainees from
 12 as far as ICE’s Boise Office—an eight-hour drive to NWDC). While it would technically constitute
 13 a “smaller-scale” transfer than the flights from CBP facilities at the southern border, such a transfer
 14 would raise the same threats to the health and safety of the Plaintiff class. Such transfers still
 15 present a significant risk of cross-contamination and exposure concerns that the Court’s TRO
 16 decision and the CDC Testing Guidance are meant to address. *See* Suppl. Amon Decl. ¶¶ 7–12.

17 To support their argument, Defendants continue to misconstrue the CDC Testing Guidance
 18 as recommending testing and quarantine “at minimum . . . at one of the facilities involved in the
 19 transfer.” Dkt. 413 at 15. But this omits the relevant language of the CDC Testing Guidance, which
 20 clearly instructs:

21 **Before transfer to another facility.** Test incarcerated/detained persons *before*
 22 transfer to another correctional/detention facility. Wait for a negative test result
 23 before transfer. For persons who are not fully vaccinated, testing before transfer
 24 can be combined with a 14-day observation period (sometimes referred to as
 “routine transfer quarantine”) before an individual’s projected transfer.

1 Dkt. 327-3 Ex. C at 7 (emphasis added). As Dr. Amon explains, “it is important to ensure that *all*
2 detainees are tested prior to transfer to NWDC” for multiple reasons, especially as the highly
3 contagious Delta variant makes up 99% of all COVID-19 cases in the United States and has caused
4 even more severe illness than previous variants. Suppl. Amon Decl. ¶¶ 9, 9(b). This is all the more
5 relevant here given that the areas from which ICE is proposing to accept transfers without testing
6 have high levels of community transmission as documented by the CDC—including Alaska, the
7 state with the highest rate of COVID-19 cases per capita in the country. *Id.* ¶ 9(d).

8 Moreover, Plaintiffs have already demonstrated that transfers without testing pose a
9 significant risk to class members, as well as others present at NWDC. As Plaintiffs have explained
10 in their opening motion, uncontested evidence shows that the failure to identify and separate
11 COVID-19 positive individuals led to the spread of COVID-19 among dozens of detainees. Dkt.
12 400 at 8–9; *see also* Dkt. 370 at 13. Defendants’ failures also resulted in the spread of COVID-19
13 among many detention facility staff, who similarly faced significant exposure to COVID-19
14 positive individuals without knowing who was positive. Dkt. 400 at 8, 10–11. As detailed before,
15 this outbreak resulted in the hospitalization of at least five detainees and the spread of COVID-19
16 into NWDC’s general population units. *Id.* at 10–11. Defendants did not contest any of this
17 evidence or these conclusions in their response to Plaintiffs’ motion, effectively conceding these
18 points. The tragic death of one of ICE’s employees of COVID-19 just this week underscores the
19 continued threat and need for simple and practical measures that have proven to protect not only
20 Plaintiffs, but also the staff and community at large.

21 Faced with this evidence, this Court already concluded that the transfer of detainees
22 without prior COVID-19 testing threatens Plaintiffs’ due process right to reasonably safe
23 conditions. *See* Dkt. 370 at 8–14. Although the Court primarily considered evidence related to the
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1 COVID-19 outbreaks specifically resulting from ICE’s transfers of detainees from the southern
2 border, this evidence also applies to the “small-scale” transfers Defendants wish to conduct
3 without testing. Indeed, as noted above and in Plaintiffs’ opening motion, the Court concluded that
4 a failure to test prior to transport creates a significant risk that COVID-19 will spread among
5 detainees, ICE employees, and other transport staff. *See id.* at 13 (agreeing that the “the timing
6 between dates of transfers and dates of positive tests in comparison to the average time from
7 exposure to symptoms[] indicat[es] exposure likely occurred during transport or in NIMs units
8 during intake quarantine”); *see also id.* at 12 (concluding that “the recent outbreaks in both
9 quarantine units and general population show [Defendants’] safety measures [during and following
10 transport] have not contained the spread of COVID-19 at [NWDC]”). As a result, this Court
11 concluded that “[w]ere [Defendants] permitted to continue transferring untested detainees,
12 [Plaintiffs] face a substantial risk of serious harm. The equities favor [Plaintiffs].” *Id.* at 15. The
13 carefully phrased TRO recognized that “transferring untested detainees,” *id.*, likely violates
14 Plaintiffs’ due process rights. *See id.* at 16 (“The Court finds Petitioners have made a clear showing
15 of the *Winter* factors and are therefore entitled to a TRO to remedy the likely constitutional
16 violations.”). Defendants’ attempt to reintroduce untested transfers through undefined small-scale
17 transfers would thus reintroduce the risk of unsafe conditions that prompted the Court to issue the
18 TRO in the first place.

19 Lastly, Defendants have failed to show that testing or requiring testing from another agency
20 prior to local transfers is unfeasible or unreasonable, especially in light of the risks to public health
21 of acting otherwise. *See Suppl. Amon Decl.* ¶ 10 (“Given the protection conferred by rapid
22 COVID-19 tests, the barriers for correctional institutions to follow the CDC’s testing guidance are
23 comparatively low.”). The vast majority of local agencies, including the Federal Detention Center
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1 in Seattle, the Federal Bureau of Prisons in Oregon, the Idaho Department of Corrections, and
 2 Spokane County Jail, are already providing testing to most detainees prior to transfer. Dkt. 414,
 3 Lippard Decl. ¶¶ 11, 13, 16–17. In fact, Defendants admit that “ERO Tacoma is requiring that all
 4 detainees transferred to the NWIPC from California have a negative COVID-19 test prior to
 5 transport.” *Id.* ¶ 23. Despite recognizing the inherent transmission risks from receiving transfers
 6 in certain contexts, Defendants fail to explain why they cannot adopt a similar requirement for
 7 transfers from other local jurisdictions. As Plaintiffs’ COVID-19 testing experts explain in detail,
 8 at this point in the pandemic, such an expectation is perfectly reasonable and necessary to protect
 9 health and safety. *See* Winterbauer and Silcox Decl. ¶¶ 17–36. Testing has become a fact of life
 10 for students, teachers, athletes, employees and travelers, and has been established in diverse field
 11 settings. *Id.* ¶¶ 22, 24. ICE simply “has not identified any specific constraints that would prevent
 12 them from testing individuals for COVID-19 prior to transfer or requiring the transferor agencies
 13 and facilities to test before transport.” *Id.* ¶ 36.

14 **III. CONCLUSION**

15 For the reasons above, the Court should grant Plaintiffs’ Motion to Convert the TRO to a
 16 Preliminary Injunction with a singular modification to permit COVID-19 testing by agencies
 17 other than ICE, with such testing conducted and test results received no more than three days
 18 prior to transfer to NWDC.²

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 24 ² As explained above, Plaintiffs dispute Defendants’ first proposed modification to permit small-
 scale transfers of untested detainees and urge this Court to reject this proposal. However, should
 the Court be inclined to modify the injunction to accommodate small-scale transfers without
 testing, Plaintiffs believe that any such an exception should apply only to individual transfers of
 no more than one individual at a time in order to eliminate concerns with cross-contamination
 between detainees, and that ICE must administer a COVID-19 rapid test upon intake. *See* Suppl.
 Amon Decl. ¶ 11. As Defendants confirm, NWDC has more than enough capacity to administer a
 COVID-19 rapid test for individual transfers. *See* Dkt. 348 (Malakhova Decl.) ¶ 24 (describing

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17 capacity to run up to nine Abbott ID NOW tests in an hour). The Court could therefore order in
18 the alternative to the Plaintiffs’ Proposed Modified Order (Exh. []) that:

19 “Having considered the Plaintiffs’ Motion to Convert Temporary Restraining
20 Order into a Preliminary Injunction, the Court GRANTS the Motion.
21 Accordingly, the Court ORDERS ICE to either test detainees for COVID-19, or
22 receive results of a COVID-19 test performed no more than three days in
23 advance of transfer from another agency, prior to transfer to NWIPC, and to take
24 all reasonable measures to ensure there is no cross-exposure between COVID-
19 positive detainees and COVID-19 negative detainees during transport.
Further, Respondents are ENJOINED from admitting any detainee into NWIPC
that was not transferred in compliance with this order **unless ICE is
transferring only one detainee and administers a rapid COVID-19 test
immediately upon intake.**” (emphasis added).

Respectfully submitted on this 15th day of October, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 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 15th day of October, 2021.

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