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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KARLENA DAWSON, et al.,
Petitioner-Plaintiffs,

v.

NATHALIE ASHER, et al.,
Respondent-Defendants.

CASE NO. C20-0409JLR-MAT

ORDER DENYING
PETITIONERS' SECOND
MOTION FOR A
TEMPORARY RESTRAINING
ORDER

I. INTRODUCTION

Before the court are (1) Petitioner-Plaintiffs Karlena Dawson, Norma Lopez Nunez, Marjoris Ramirez-Ochoa, Maria Gonzalez-Mendoza, Joe Hlupheka Bayana, Kelvin Melgar-Alas, Jesus Gonzalez Herrera, Alfredo Espinoza-Esparza, and Leonidas Plutin Hernandez's (collectively, "Petitioners") second motion for a temporary restraining order ("TRO") (2d TRO Mot. (Dkt. # 36)) and (2) Petitioners' response to the court's order to show cause regarding standing (Pet. OSC Resp. (Dkt. # 46); *see also* OSC (Dkt. # 34)).

1 Respondent-Defendants Nathalie Asher, Matthew T. Albence, Steven Langford,
 2 and United States Immigration and Customs Enforcement’s (“ICE”) (collectively,
 3 “Respondents”¹) oppose Petitioners’ second TRO motion (2d TRO Resp. (Dkt. # 64))
 4 and filed a reply regarding the issue of Petitioners’ Article III standing (Res. OSC Resp.
 5 (Dkt. # 63)). The court has reviewed Petitioners’ motion and the parties’ submissions
 6 related to that motion and the court’s order to show cause, the relevant portions of the
 7 record, and the applicable law. Being fully advised,² the court (1) concludes that
 8 Petitioners have Article III standing; (2) concludes that the court has jurisdiction to
 9 adjudicate Petitioners’ Fifth Amendment claim under the habeas statute, 28 U.S.C.
 10 § 2241; and (3) DENIES Petitioners’ second motion for a TRO.

11 II. BACKGROUND

12 A. Procedural Background

13 On March 16, 2020, Petitioners filed their petition-complaint, seeking a writ of
 14 habeas corpus, or in the alternative, injunctive relief, against Respondents. (*See* Pet. at
 15 20.) Petitioners represent that they are “particularly vulnerable to serious illness or death
 16 if infected by COVID-19” due to their age and/or medical conditions. (*See id.* ¶¶ 39-66.)

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19 ¹ Petitioners’ filing is a “petition for writ of habeas corpus . . . and complaint for
 20 injunctive relief.” (*See* Pet. (Dkt. # 1) at 1.) Because the court concludes that it has jurisdiction
 to review Plaintiffs’ Fifth Amendment claim under 28 U.S.C. § 2241, *see infra* § III.D, the court
 now refers to petitioner-plaintiffs as “Petitioners” and respondent-defendants as “Respondents.”

21 ² Neither party requests oral argument (*see* 2d TRO Mot. at 1; 2d TRO Resp. at 1), and
 22 the court finds oral argument unnecessary to its disposition of the motion, *see* Local Rules LCR
 7(b)(4); LCR 65(b)(3).

1 On the same day, Petitioners filed their first TRO motion seeking “immediate
2 release” from detention as they awaited adjudication of their immigration cases. (*See* 1st
3 TRO Mot. (Dkt. # 2) at 7.) Petitioners argued that “[t]he conditions of immigration
4 detention facilities pose a heightened public health risk for the spread of COVID-19”
5 because of “crowding, the proportion of vulnerable people detained, and often scant
6 medical care resources,” in addition to the inability to achieve the social distancing
7 needed to effectively prevent the spread of COVID-19. (*See id.*) Petitioners contended
8 that their continued detention in the face of the COVID-19 pandemic violated their Fifth
9 Amendment right to reasonable safety while in custody. (*See id.* at 12.) Respondents
10 opposed the motion and argued that Petitioners’ lack Article III standing and that the
11 court lacked jurisdiction to hear Petitioners’ claim in the form of a habeas petition. (*See*
12 1st TRO Resp. (Dkt. # 28) at 7-11.)

13 On March 19, 2020, the court denied Petitioners’ first TRO motion because
14 Petitioners had not shown a likelihood of success on the merits or a likelihood of
15 irreparable harm. (*See* 3/19/20 Order (Dkt. # 33) at 4-6.) The following day, the court
16 ordered Petitioners to respond to Respondents’ arguments regarding Article III standing.
17 (*See* OSC at 2.) On the same day, Petitioners requested a status conference and sought
18 expedited discovery from Respondents. (*See* Discovery Request (Dkt. # 35).)

19 On March 24, 2020, Petitioners filed their second TRO motion, and on March 25,
20 2020, they filed their response to the court’s order to show cause. (*See* 2d TRO Mot.; *see*
21 Pet. OSC Resp.) Petitioners’ second TRO motion is premised on the following
22 developments: (1) the Ninth Circuit Court of Appeals’ March 23, 2020, *sua sponte* order

1 releasing an individual from immigration detention “[i]n light of the rapidly escalating
 2 public health crisis, which public health authorities predict will especially impact
 3 immigration detention centers” (*see* 2d TRO Mot. at 2 (quoting *Xochihua-Jaimes v. Barr*,
 4 No. 18-71460, 2020 WL 1429877, at *1 (9th Cir. Mar. 24, 2020));³ (2) other federal
 5 court orders releasing individuals “on bail or delay[ing] their imprisonment in light of the
 6 COVID-19 crisis” (*see id.* at 2); (3) a letter from “two doctors who serve as subject
 7 matter experts for the Department of Homeland Security” warning of “tinderbox”
 8 conditions at detention centers (*see id.* at 2-3 (citing Ngo Decl. (Dkt. # 37) ¶ 4, Ex. A
 9 (“Allen-Rich Ltr.”) at 4); and (4) the fact that individuals have tested positive for
 10 COVID-19 “at other immigration detention facilities in the United States” (*see id.* at 3).

11 After filing their second TRO motion, Petitioners filed notices of supplemental
 12 authority informing this court of several orders in other districts granting TROs on the
 13 basis of conditions at detention facilities that increase the risk of contracting COVID-19.
 14 (*See* 1st Pet. Not. of Supp. Auth. (Dkt. # 56) ¶ 1 (citing *Basank v. Decker*, No. 20 CIV.
 15 2518 (AT), 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020)); ¶ 2 (citing *Coronel v. Decker*,
 16 --- F. Supp. 3d ---, 2020 WL 1487274, at *10 (S.D.N.Y. Mar. 27, 2020)); 2d Pet. Not. of
 17 Supp. Auth. (Dkt. # 61) at 1 (citing *Castillo et al. v. Barr et al.*, --- F. Supp. 3d ----, 2020
 18 WL 1502864 (C.D. Cal. Mar. 27, 2020)); 3d Pet. Not. of Supp. Auth. (Dkt. # 71) at 1

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20 ³ The Ninth Circuit’s order was initially marked for publication, but subsequently the
 21 Ninth Circuit entered an order stating that the “for publication” designation was a clerical error
 22 and removed it. *Xochihua-Jaimes*, No. 18-71460, Dkt. # 54 (9th Cir. Mar. 24, 2020). Moreover,
 the order does not set forth its analysis in a manner that allows this court to apply it to
 Petitioners’ case.

1 (citing *Thakker et al. v. Doll et al.*, No. 1:20-CV-480, 2020 WL 1671563, at *1 (M.D. Pa.
2 Mar. 31, 2020)).) Respondents also filed a notice of supplemental authority, citing cases
3 in which courts in this district denied motions for TROs to release immigration detainees
4 on Fifth Amendment grounds. (*See* Resp. Not. of Supp. Auth. (Dkt. # 85) at 1-2 (citing
5 *Almeida v. Barr*, No. C20-490RSM-BAT, Dkt. # 11 (W.D. Wash. Apr. 6, 2020); *Patel v.*
6 *Barr*, C20-488RSM-BAT, Dkt. # 9 (W.D. Wash. Apr. 2, 2020)).)

7 On March 31, 2020, in a separate but related development, the Ninth Circuit
8 transferred to this district several emergency motions for release from the Tacoma
9 Northwest Detention Center (“NWDC”) due to the COVID-19 pandemic and construed
10 the motions as petitions for habeas corpus under 28 U.S.C. § 2241. *See, e.g., Almeida*,
11 No. C20-490RSM-BAT, Almeida Transfer Order (Dkt. # 1-1) at 2 (W.D. Wash. Mar. 31,
12 2020); *Patel*, No. C20-0488RSM-BAT, Patel Transfer Order (Dkt. # 1-1) at 2 (W.D.
13 Wash. Mar. 31, 2020); *Pablo v. Barr*, No. C20-489RSM-BAT, Pablo Transfer Order
14 (Dkt. # 1-1) at 2 (W.D. Wash. Mar. 31, 2020).⁴

15 **B. Petitioners and Their Detention Status**

16 Petitioners are five individuals who ICE is currently holding in civil detention at
17 the NWDC in Tacoma, Washington and four who ICE has released.⁵ (*See* Pet. ¶¶ 39-66.)

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19 ⁴ The petitioner in *Pablo* voluntarily dismissed his case on April 3, 2020. *See Pablo*, No. C20-489RSM-BAT, Not of Vol. Dismissal (Dkt. # 10) at 1 (W.D. Wash. Apr. 3, 2020).

20 ⁵ On March 27, 2020, Petitioners notified the court that Mr. Espinoza-Esparza and Mr.
21 Hernandez were released from detention. (*See* 1st Not. of Release (Dkt. # 57) at 1.) On March
22 30, 2020, Respondents notified the court that ICE has released Ms. Dawson from immigration
custody on an order of supervised release. (*See* 2d Not. of Release (Dkt. # 70) at 1.) On April 7,
2020, Respondents notified the court that ICE has released Ms. Gonzalez-Mendoza. (*See* 3d
Not. of Release (Dkt. # 88) at 1.)

1 Ms. Ramirez-Ochoa is 43 years old and a citizen of Cuba who suffers from high
2 blood pressure, chronic kidney disease, epilepsy, and respiratory problems. (*See*
3 Ramirez-Ochoa Decl. (Dkt. # 9) ¶¶ 1-2, 5-7, 9.) Ms. Ramirez-Ochoa has several
4 convictions for shoplifting, petit theft, and a 2016 conviction for theft in the third degree.
5 (*See* 1st Bostock Decl. (Dkt. # 66) ¶ 36.) On April 3, 2019, Ms. Ramirez-Ochoa was
6 convicted of felony robbery in the second degree, an offense that involved the use of a
7 firearm. (*See id.*) She was sentenced to six months and placed into ICE custody on April
8 4, 2019. (*See id.*) On March 5, 2020, an immigration judge ordered Ms. Ramirez-Ochoa
9 removed to Cuba. (*See id.*)

10 Mr. Bayana is 57 years old and a citizen of Zimbabwe who has type II diabetes
11 and takes medication for seizures. (1st Bayana Decl. (Dkt. # 13) ¶¶ 1, 3-4.) Respondents
12 believe his real name is Mketwa Phiri and that Joe Hlupheka Bayana is a false name that
13 Mr. Bayana has used on a fraudulently obtained South African passport, which Mr.
14 Bayana presented to an immigration judge to obtain bond on May 16, 2002. (*See* 1st
15 Bostock Decl. ¶ 38.) After accepting an order of voluntary departure to South Africa,
16 Mr. Bayana failed to depart voluntarily and subsequently failed to report for removal
17 twice. (*See id.*) Mr. Bayana has been arrested approximately 22 times for charges that
18 include trespassing, larceny, drugs, assault, and harassing communications. (*See id.*) Mr.
19 Bayana was an immigration fugitive from August 30, 2012, until April 5, 2018. (*See id.*)
20 After applying for work authorization, ICE took Mr. Bayana into custody on October 17,
21 2018. (*See id.*) The South African government subsequently notified ICE and provided

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1 documentation confirming that the real Joe Hlupheka Bayana was deceased, establishing
2 that Joe Hlupheka Bayana is not Mr. Bayana's real name. (*See id.*)

3 Mr. Melgar-Alas is 40 years old and a citizen of El Salvador who has been in a
4 wheelchair since a September 27, 2015, shooting that resulted in a spinal cord injury.
5 (*See Melgar-Alas Decl. (Dkt. # 15) ¶¶ 1, 4.*) Mr. Melgar-Alas has a colonoscopy bag and
6 "has to catheterized (sic) up to five times each day." (*Id.* ¶ 6.) Since first being detained
7 at the NWDC in July 2018, he has been hospitalized five times, "including multiple times
8 for probable pneumonia." (*Id.* ¶ 7.) Mr. Melgar-Alas has convictions for distribution of
9 methamphetamine and was convicted in 2013 of a RICO offense for his membership and
10 participation in the Mara Salvatrucha gang, also known as MS-13. (*See 1st Bostock*
11 *Decl. ¶ 40.*) He was sentenced to 27 months in prison and released to ICE on July 18,
12 2018. (*See id.*) On February 6, 2020, an immigration judge denied Mr. Melgar-Alas
13 bond, finding him to be both a danger and a flight risk. (*See id.*)

14 Mr. Herrera is 46 years old and suffers from diabetes and high blood pressure.
15 (*See Herrera Decl. (Dkt. # 16) ¶¶ 1, 5.*) He came into ICE custody following a conviction
16 on July 22, 2019, for burglary. (*See 1st Bostock Decl. ¶ 41.*)

17 Ms. Lopez Nunez is a 65 year old citizen of Mexico who suffers from
18 hypertension, heart disease, and mental health issues. (*See Maltese Decl. (Dkt. # 8) ¶ 9,*
19 *Ex. C.*) She has multiple prior removals and approximately five prior convictions for
20 illegal re-entry. (*See 1st Bostock Decl. ¶ 35.*) Ms. Lopez Nunez was transferred to the
21 NWDC on April 28, 2017. She has been denied bond multiple times after being found to
22 be a flight risk. (*See id.*)

1 **C. Conditions at the NWDC**

2 The parties rely on a series of declarations in support of and in opposition to
3 Petitioners' second motion for a TRO. Petitioners rely primarily on (1) the individual
4 declarations of Petitioners and other current and former NWDC detainees⁶ (*see*
5 Ramirez-Ochoa Decl.; Gonzalez-Mendoza Decl. (Dkt. # 11); Bayana Decl.; Melgar-Alas
6 Decl.; Herrera Decl.; Maltese Decl.; Dawson Decl. (Dkt. # 78); Espinoza-Esparza Decl.
7 (Dkt. # 79); Lopez Gonzalez Decl. (Dkt. # 80); Hernandez Decl. (Dkt. # 82); Lopez
8 Nunez Decl. (Dkt. # 81)), and (2) declarations from a series of subject matter experts who
9 opine on the COVID-19 pandemic and the conditions at detention centers generally (*see*,
10 *e.g.*, Allen-Rich Ltr.; Rekart Decl. (Dkt. # 41); Gonza Decl. (Dkt. # 42)). Respondents
11 rely primarily on the declarations of (1) Drew H. Bostock, the Officer in
12 Charge ("OIC") with DHS, ICE, Enforcement and Removal Operations ("ERO") in the
13 Seattle Field Office ("ERO Seattle") (1st Bostock Decl.; 2d Bostock Decl. (Dkt. # 76); 3d
14 Bostock Decl. (Dkt. # 84)), (2) NWDC Facility Administrator Stephen Langford (1st
15 Langford Decl. (Dkt. # 68); 2d Langford Decl. (Dkt. # 74)), and (3) Clinical Director for
16 the ICE Health Services Corps ("IHSC") Sheri Malakhova (1st Malakhova Decl. (Dkt.
17 # 75); 2d Malakhova Decl. (Dkt. # 86)).

18 The NWDC is a private detention center run by The GEO Group, Inc. ("GEO").
19 (1st Bostock Decl. ¶ 4.) It has the capacity to house 1,575 detainees and historically
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21 ⁶ On April 1, 2020, the court ordered Respondents to file additional evidence regarding
22 the conditions at the NWDC and the measures Respondents are taking to prevent the spread of
COVID-19 and allowed Petitioners to file additional evidence if they wished to do so. (*See*
4/1/2020 Order (Dkt. # 73) at 2-5.)

1 operates near capacity. (*Id.* ¶ 6.) However, as of April 3, 2020, the NWDC has only 794
2 detainees, which represents only 50.4% of its typical number of detainees. (2d Bostock
3 Decl. ¶ 29.) Between March 1, 2020, and April 2, 2020, 407 detainees arrived at the
4 NWDC and 399 detainees departed. (*Id.* ¶ 27.) One hundred and thirty-eight of the
5 detainees who arrived at the NWDC during that span arrived on March 1, 2020, and most
6 of those detainees were transferred from the southern border. (*Id.* ¶ 27 n.3.) However,
7 ICE last transferred detainees from the southern border to the NWDC on March 5, 2020,
8 and does not anticipate any additional transfers from that area in the reasonably
9 foreseeable future. (1st Bostock Decl. ¶ 7.)

10 On March 18, 2020, ICE announced that due to the ongoing COVID-19 pandemic,
11 it would adjust enforcement to focus on public safety risks and individuals subject to
12 mandatory detention based on criminal grounds. (*Id.* ¶ 8.) For individuals who do not
13 fall within these categories, ICE is currently exercising its discretion to delay
14 enforcement actions until after the COVID-19 crisis or to use alternatives to detention,
15 where appropriate. (*Id.*) Due to this change, ICE expects only a limited number of
16 incoming detainees at the NWDC during the COVID-19 crisis—the majority of whom
17 will be aliens who represent public safety risks and are subject to mandatory custody
18 provisions. (*Id.* ¶ 9.)

19 As a response to the COVID-19 crisis, IHSC, which oversees medical care at the
20 NWDC, implemented certain safety protocols. (*Id.* ¶ 11.) On March 26, 2020, IHSC
21 implemented temperature and prescreening checks for all new detainees arriving at the
22 NWDC prior to entrance into the facility. (*Id.*; 1st Malakohva Decl. ¶¶ 2-28.) Regular

1 procedures at the NWDC require that all incoming detainees' personal property and
2 valuable are inventoried and stored. (1st Bostock Decl. ¶ 12.) Further, all incoming
3 detainees are afforded the opportunity to shower and given clean clothing, bedding,
4 towels, and personal hygiene items. (*Id.*) OIC Bostock testifies that GEO provides all
5 detainees with an instructional flyer outlining proper hand washing hygiene and the
6 importance of covering coughs, and that in response to the COVID-19 pandemic,
7 additional posters in multiple languages concerning hand washing hygiene and covering
8 coughs have been placed in each housing unit at the NWDC. (*Id.* ¶ 13.)

9 As of March 20, 2020, all incoming detainees who do not meet current IHSC
10 protocol requirements for isolation monitoring due to possible COVID-19 symptoms,
11 exposure, or testing, are placed in three separate housing units for 14 days of monitoring
12 for signs or symptoms of COVID-19. (*Id.* ¶ 14; 2d Bostock Decl. ¶ 23.) Detainees in the
13 14-day observation period are not allowed to commingle with other detainees in common
14 areas during the 14-day period. (1st Bostock Decl. ¶ 14.) Detainees admitted on the
15 same date and who are determined to be at the same risk classification may be housed in
16 the same cell for the 14-day observation period. (*Id.*) Detainees admitted on separate
17 dates and those at different risk classification levels are not housed together. (*Id.*) If the
18 14-day period passes without any detainees in a cell displaying signs or symptoms of
19 COVID-19, the detainees are released to other housing units in the facility. (*Id.*) A
20 separate remote medical unit has been established to monitor detainees undergoing the
21 14-day observation. (*Id.*)

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1 In response to the COVID-19 pandemic, OIC Bostock testifies that GEO has
2 enhanced its cleaning in all units, food preparation and service areas, intake rooms and
3 other work centers with increased emphasis on cleaning contact areas with disinfectant
4 cleaners approved as effective against COVID-19. (*Id.* ¶ 16.) GEO makes soap and
5 cleaning supplies available to detainees in all housing units and work areas at the NWDC
6 and has increased the amount of soap, disinfectant cleaner, and food service sanitizer in
7 every housing unit in response to COVID-19. (*Id.* ¶ 17.) GEO also holds weekly town
8 hall meetings with detainees in every housing unit to educate detainees on hand washing
9 and covering coughs. (*Id.* ¶ 18.) Nevertheless, some current and former detainees
10 declare that they did not receive adequate information on prevention techniques. (*See,*
11 *e.g.*, Dawson Decl. ¶ 6; Nunez Lopez Decl. ¶ 14.) GEO instructs detainees to clean
12 tables and horizontal surfaces before each meal and to disinfect such surfaces after each
13 meal. (1st Bostock Decl. ¶ 18.) GEO also instructs detainees to clean countertops,
14 microwave handles, door handles, exercise equipment, electronic tablets, telephones, and
15 any high-risk contact areas with disinfectant cleaner. (*Id.*)

16 On March 13, 2020, ICE temporarily suspended social visitation at the NWDC,
17 and other detention facilities, to prevent the spread of COVID-19, and cancelled all tours
18 of the NWDC. (*Id.* ¶¶ 19-20.) GEO screens all contractors, vendors, attorneys, and court
19 visitors through a questionnaire that covers whether the individual is currently
20 experiencing any possible COVID-19 symptoms and recent travel history and prohibits
21 entry to anyone who positively reports symptoms or possible exposure to COVID-19.
22 (*Id.* ¶ 21.) Visitors are limited to noncontact visits unless a contact visit is absolutely

1 necessary and has been approved by the OIC or Assistant OIC. (*Id.* ¶ 22.) If an
2 attorney’s request for a contact visit is approved, the attorney must wear personal
3 protective equipment (“PPE”), including a mask. (*Id.*) In addition, ICE has implemented
4 a daily duty officer to facilitate unmonitored attorney-client phone calls from each
5 housing unit so that detainees do not have to move throughout the facility. (*Id.*)
6 ICE and GEO are collaborating on a process to implement temperature checks of
7 all employees and staff for GEO, ICE, and Executive Office for Immigration Review
8 (“EOIR”) at the NWDC starting on March 27, 2020. (*Id.* ¶ 24.) ICE and GEO
9 employees are instructed to stay home if they are sick, experiencing any possible
10 COVID-19 symptoms, or have been in close contact with someone diagnosed with
11 COVID-19. (*Id.* ¶ 25.) GEO is voluntarily notifying ICE if any of its employees test
12 positive or are diagnosed with COVID-19. (*Id.*) As of March 27, 2020, no ICE or GEO
13 employee or staff at the NWDC had reported testing positive for COVID-19.⁷ (*Id.*) In
14 addition, ICE instituted a telework program for its employees at the NWDC to minimize
15 the number of employees present at the facility. (*Id.* ¶ 26.)

16 In response to the court’s order to file additional evidence, the parties filed
17 contrasting evidence regarding detainees’ ability to engage in physical distancing. Mr.
18 Langford declares that detainees at the NWDC have the ability to maintain at least six
19 feet of physical distance from each other, that there is 2,848 square feet of day room

21 ⁷ Because the presence of an active COVID-19 case at the NWDC would be a significant
22 development, the court ORDERS Respondents to inform Petitioners and the court as soon as
practicable but at least within 24 hours after learning that any individual physically present at the
NWDC tests positive for or is otherwise diagnosed with COVID-19.

1 space in Unit A-2, which when divided by 80 detainees, represents 35.6 square feet per
2 detainee. (2d Langford Decl. ¶ 6.) However, several current and former detainees
3 declare that it was difficult to maintain physical distance at the medical clinic (*see, e.g.*,
4 Dawson Decl. ¶ 4; Espinoza-Esparza Decl. ¶ 4;), when eating (*see, e.g.*, Dawson Decl.
5 ¶ 5; Espinoza-Esparza Decl. ¶ 5; Gonzalez Decl. ¶ 4), and while waiting to use the
6 restroom (*see* Espinoza-Esparza Decl. ¶ 6). A detainee and attorney declare that
7 maintaining physical distance is not possible while at immigration court. (Gonzalez
8 Decl. ¶ 5 (declaring that detainees are “bunched together” in a holding room and in the
9 hall prior to entering the courtroom); Augustine Decl. (Dkt. # 83) ¶¶ 3-5 (describing
10 crowded conditions while waiting to enter the courtroom).)

11 When at maximum capacity, NWDC detainees would normally sleep less than six
12 feet apart. (2d Langford Decl. ¶ 7.) However, NWDC has been operating at roughly
13 half-capacity, and GEO has spread out the sleeping arrangements to allow for greater
14 distance between detainees. (*Id.*) Dividing the available sleeping space by the present
15 detainee population yields 31 square feet of sleeping space per detainee. (*Id.* ¶ 8.) When
16 detainees are assigned to sleep in a bunk bed, there is only four feet of space between the
17 top bunk and lower bunk. (*Id.* ¶ 14.) However, there is a metal and mattress barrier
18 dividing that space. (*Id.*) Nevertheless, Ms. Dawson, who left the NWDC on March 30,
19 2020, declares that the beds were about a foot apart. (Dawson Decl. ¶ 3.) Mr.
20 Espinoza-Esparza declares that detainees’ beds were inches apart. (Espinoza-Esparza
21 Decl. ¶ 3.) Mr. Langford declares that situations exist in which detainees may choose to
22 be within six feet of each other, including meal preparation for those who volunteer, or

1 participation in the voluntary work program (“VWP”), which is not required. (2d
2 Langford Decl. ¶ 14.)

3 Director Malakhova declares that the medical clinic and the Medical Housing Unit
4 (“MHU”), including the line where medications are dispersed, has posted signs and color
5 footprints placed on the floor to assist detainees in maintaining physical distance. (1st
6 Malakhova Decl. ¶ 2.)⁸ To increase social distancing, MHU rooms at the NWDC are
7 limited to single patient occupancy. (*Id.* ¶ 3.) Detainees may come within six feet of
8 IHSC staff within the medical clinic and MHU. (*Id.* ¶ 4.) To mitigate the risk of
9 contracting COVID-19, MHU, IHSC, and GEO have implemented measures that include
10 temperature check screening all IHSC employees upon entry, implementing a universal
11 mask policy for IHSC staff on April 1, 2020, requiring GEO staff in the medical clinic to
12 wear surgical masks at all times, stocking N95 respirator masks for use by medical staff
13 for individuals with COVID-19 presumptive symptoms, and cancelling outside elective
14 medical appointments. (*Id.* ¶¶ 4-5.) Director Malakhova declares that IHSC has the
15 necessary resources to execute all of its COVID-19 response plans. (*Id.* ¶ 23.)

16 Notwithstanding the above measures, current and former detainees complain of a
17 number of other conditions at the NWDC. Those include using the same water fountain
18 that is not cleaned between uses (Dawson Decl. ¶ 8); using the same toilets, showers,
19 sink, and microwaves (*id.* ¶ 8); inadequate cleaning of food trays (*id.*); having to request

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21 ⁸ One released Petitioner, Ms. Dawson, declares that “[t]hey did not put any marks on the
22 ground so we could tell how far apart six feet is.” (Dawson Decl. ¶ 7.) However, it is unclear to
which area of the NWDC Ms. Dawson refers.

1 access to the janitor's closet to obtain the cleaning solution for those on cleaning duty (*id.*
2 ¶ 9); provision of a sanitizing spray instead of hand sanitizer (Espinoza-Esparza Decl.
3 ¶ 6); and being forced to buy soap for showers (Gonzalez Decl. ¶ 10).

4 In late March 2020, ERO Tacoma began conducting a discretionary
5 review of certain detainees who meet the current CDC criteria as at-risk due to
6 COVID-19. (1st Bostock Decl. ¶ 31.) The review requires that IHSC and ICE identify
7 detainees who fall within an at-risk category and who are not subject to various
8 mandatory custody provisions based on their immigration and criminal histories. (*Id.*) If
9 an identified detainee is not subject to mandatory custody, ERO Tacoma determines
10 whether the detainee is otherwise a danger to the public and/or a flight risk such that
11 release is not appropriate. (*Id.*) ICE is currently conducting this review on an
12 individualized basis to determine in the totality of the circumstances whether each
13 detainee is a danger to the community or a significant flight risk such that release is not
14 appropriate. (2d Bostock Decl. ¶ 39.) As a result of this labor-intensive review, by
15 March 27, 2020, ICE had already released seven detainees from custody, including four
16 Petitioners in this case. (*See* 1st Bostock Decl. ¶¶ 31-32; *see also* 1st Not. of Release at
17 1; 2d Not. of Release at 2; 3d Not. of Release at 3.) Among the five Petitioners still
18 detained at the NWDC, Ms. Lopez Nunez, Ms. Ramirez Ochoa, Mr. Melgar-Alas, and
19 Mr. Bayana are subject to mandatory custody. (3d Bostock Decl. ¶ 12.) Mr. Herrera's
20 custody is currently subject to ICE's review process described above. (*Id.*)

21 Finally, ICE has been regularly assessing current conditions and future projections
22 regarding the course of the virus, regularly updating prevention and control protocols,

1 and working with IHSC, GEO, and EOIR staff to ensure appropriate procedures are
2 implemented at the NWDC in compliance with CDC recommendations. (2d Bostock
3 Decl. ¶ 30.)

4 III. ANALYSIS

5 Petitioners contend that their continued detention in the face of the COVID-19
6 pandemic violates their Fifth Amendment right to reasonable safety while in custody.
7 (See 2d TRO Mot. at 12.) Respondents disagree, and further oppose Petitioners' motion
8 on the grounds that Petitioners lack Article III standing and the court lacks jurisdiction to
9 hear this case as a habeas petition under 28 U.S.C. § 2241. (See generally 1st TRO
10 Resp.; 2d TRO Resp.; Res. OSC Resp.) For the reasons set forth below, the court (1)
11 concludes that Petitioners have Article III standing, (2) concludes that the court has
12 jurisdiction to adjudicate Petitioners' Fifth Amendment claims under the habeas statute,
13 28 U.S.C. § 2241, and (3) DENIES Petitioners' second motion for a TRO.

14 A. Article III Standing

15 Respondents contend that Petitioners lack Article III standing. (See 1st TRO
16 Resp. at 7-11; Res. OSC Resp. at 1-9.) Standing has three elements: "The plaintiff must
17 have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of
18 the defendant, and (3) that is likely to be redressed by a favorable judicial
19 decision." *Spokeo, Inc. v. Robins*, --- U.S. ---, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan*
20 *v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Friends of the Earth, Inc. v. Laidlaw*
21 *Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). The plaintiff bears the burden of
22 establishing these elements, and when "a case is at the pleading stage, the plaintiff must

1 ‘clearly . . . allege facts demonstrating’ each element.” *Id.* (quoting *Warth v. Seldin*, 422
2 U.S. 490, 518 (1975)). The standing inquiry is distinct from the merits of Petitioners’
3 claims. *See, e.g., Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (stating that the
4 court’s “threshold inquiry into standing ‘in no way depends on the merits’” of the
5 plaintiff’s claim).

6 “To establish injury in fact, a plaintiff must show that he or she suffered an
7 invasion of a legally protected interest that is concrete and particularized and actual or
8 imminent, not conjectural or hypothetical.” *Friends of the Earth, Inc.*, 528 U.S. at 181,
9 (quoting *Lujan*, 504 U.S. at 560); *see also Clapper v. Amnesty Int’l USA*, 568 U.S. 398,
10 409 (2013). Petitioners must show that the injury is “certainly impending” or “there is a
11 substantial risk that the harm will occur.” *Susan B. Anthony List v. Driehaus*, 573 U.S.
12 149, 158 (2014) (internal quotation marks omitted). “A future injury need not be
13 ‘literally certain,’ but there must be a ‘substantial risk’ that it will occur.” *Nw.*
14 *Requirements Utils. v. F.E.R.C.*, 798 F.3d 796, 805 (9th Cir. 2015) (quoting *Clapper*, 568
15 U.S. at 432). “[T]he question becomes whether any perceived threat . . . is sufficiently
16 real and immediate to show an existing controversy.” *O’Shea v. Littleton*, 414 U.S. 488,
17 496 (1974). Nevertheless, unsafe conditions in a prison or detention center in and of
18 themselves constitute a concrete injury, even if further resulting harm has not yet
19 occurred. *See, e.g., Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985) (holding
20 that prisoners “have the right not to be subjected to the unreasonable threat of injury or
21 death by fire and need not wait until actual casualties occur in order to obtain relief from
22 such conditions.”); *id.* (“Failure to provide adequate cell cleaning supplies, under

1 | circumstances such as these, deprives inmates of tools necessary to maintain minimally
2 | sanitary cells, seriously threatens their health, and amounts to a violation of the Eighth
3 | Amendment.”).

4 | The court concludes Petitioners have Article III standing. Five Petitioners are
5 | currently detained at the NWDC. (*See* Pet. ¶ 39.) Petitioners allege that in the face of the
6 | COVID-19 pandemic, “social distancing and hygiene measures are Petitioners’ only
7 | defense against COVID-19.” (*See id.* ¶ 82.) Petitioners further allege that their current
8 | detention conditions make it “exceedingly difficult, if not impossible” to exercise
9 | distancing and hygiene measures because Petitioners “share toilets, sinks, and showers,
10 | eat in communal spaces, and are in close contact with the many other detainees and
11 | officers around them.” (*See id.*)

12 | Petitioners sufficiently allege a concrete injury in the form of unsafe conditions at
13 | the NWDC, where five Petitioners are currently detained. The detention conditions are
14 | fairly traceable to Respondents, who keep Petitioners in detention. Finally, Petitioners’
15 | adequately allege that their injury “is likely to be redressed” by the relief Petitioners
16 | seek—release from the NWDC.

17 | **B. Jurisdiction Under 28 U.S.C. § 2241**

18 | In addition to challenging Petitioners’ Article III standing, Respondents also
19 | challenge this court’s jurisdiction to adjudicate Petitioners’ Fifth Amendment claim as a
20 | petition for a writ of habeas corpus because Plaintiffs’ claim is about the conditions of
21 | their confinement, not the fact or duration of their confinement. (*See* 1st TRO Resp. at
22 | 11; 2d TRO Resp. at 2-3.) Petitioners disagree, and argue in part that they may pursue a

1 writ of habeas corpus because “their confinement is unlawful” and they are entitled to
2 immediate release. (*See* 2d TRO Mot. at 21 n.16.)

3 The court disagrees with Petitioners that this is not a conditions of confinement
4 claim. The basis for Petitioners’ claim rests on specific conditions within the NWDC that
5 Petitioners allege expose them to a greater risk of contracting COVID-19. (*See* Pet.
6 ¶¶ 67-73 (discussing case law regarding, *e.g.*, “conditions of reasonable health and
7 safety” and “[c]onditions that pose an unreasonable risk of harm.”), ¶ 84 (alleging that the
8 NWDC’s “conditions of confinement” subject Petitioners to a heightened risk of
9 contracting COVID-19.); 2d TRO Mot. at 9 (“[A]nything less than aggressive screening
10 and testing of all detainees, staff, officials and others who enter the facility is insufficient
11 to contain COVID-19’s spread.”), ¶ 21 (discussing constitutional prohibitions on “unsafe
12 prison conditions” and “detention conditions amounting to punishment”).) If those
13 alleged conditions could be remedied—notwithstanding Petitioners’ assertions that they
14 cannot—Petitioners do not raise any separate challenge to the authority under which they
15 were detained or the length of their detention. (*See generally* Pet.; 1st TRO Mot.; 2d
16 TRO Mot.) Accordingly, this is a conditions of confinement case, and the court evaluates
17 it as such.

18 The United States Supreme Court has not yet resolved the question of whether a
19 conditions of confinement claim may be brought in the form of a petition for a writ of
20 habeas corpus. *See Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979) (“Thus, we leave to
21 another day the question of the propriety of using a writ of habeas corpus to obtain
22 review of the conditions of confinement, as distinct from the fact or length of the

1 confinement itself.”). The majority of federal circuit courts allow detainees to challenge
2 their conditions of confinement via a habeas petition. *See Aamer v. Obama*, 742 F.3d
3 1023, 1036-37 (D.C. Cir. 2014) (citing *United States v. DeLeon*, 444 F.3d 41, 59 (1st Cir.
4 2006); *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008); *Woodall v. Fed. Bureau*
5 *of Prisons*, 432 F.3d 235, 242 & n.5 (3d Cir. 2005); *McNair v. McCune*, 527 F.2d 874,
6 875 (4th Cir. 1975); *Adams v. Bradshaw*, 644 F.3d 481, 482-83 (6th Cir. 2011)). The
7 Ninth Circuit has not yet decided the issue. *See Nettles v. Grounds*, 830 F.3d 922, 931
8 (9th Cir. 2016) (holding that if a state prisoner’s claim “would not necessarily spell
9 speedier release,” it does not lie at “the core of habeas corpus,” and must be brought, if at
10 all, under 42 U.S.C. § 1983; but explicitly stating that the Ninth Circuit would not
11 address how this standard “applies to relief sought by prisoners in federal custody”).

12 Nevertheless, a three-judge panel on the Ninth Circuit recently transferred to this
13 district several emergency motions in other matters that the Ninth Circuit construed as
14 habeas petitions. *See, e.g., Almeida Transfer Order; Patel Transfer Order; Pablo*
15 *Transfer Order*. In those emergency motions, like Petitioners’ TRO motions here, the
16 detainees challenge their detention at the NWDC based on conditions that allegedly
17 increase the risk of COVID-19 infection. *See Almeida Transfer Order at 2; Patel*
18 *Transfer Order at 2; Pablo Transfer Order at 2*. Like the Petition before this court, the
19 transferred petitions challenge the conditions of confinement, not the fact or duration of
20 confinement. *See generally Almeida*, No. C20-0490RSM-BAT, *Almeida Pet.* (Dkt. # 1)
21 (W.D. Wash. Mar. 31, 2020); *Patel*, No. C20-0488RSM-BAT, *Patel Pet.* (Dkt. # 1)

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1 (W.D. Mar. 31, 2020); *Pablo*, No. C20-489RSM-BAT, Pablo Pet. (Dkt. # 1) (W.D.
2 Wash. Mar. 31, 2020).

3 The Ninth Circuit’s transfer orders holding that this district court should consider
4 the transferred emergency motions as habeas petitions are unpublished, and therefore the
5 transfer orders do not definitively resolve this unsettled area of law. (*See* Almeida
6 Transfer Order at 1; Patel Transfer Order at 1; Pablo Transfer Order at 1.) Nevertheless,
7 because both the transferred emergency motions are similar to present Petition, this court
8 will follow the Ninth Circuit’s direction in the transfer orders—to adjudicate the
9 emergency motions as petitions for writs of habeas corpus under 28 U.S.C. § 2241—and
10 consider the present Petition under the rubric of 28 U.S.C. § 2241 as well.

11 **C. Standards for a TRO**

12 The standard for issuing a TRO is the same as the standard for issuing a
13 preliminary injunction. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434
14 U.S. 1345, 1347 n.2 (1977). A TRO is “an extraordinary remedy that may only be
15 awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat.*
16 *Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). “The proper legal standard for
17 preliminary injunctive relief requires a party to demonstrate (1) ‘that he is likely to
18 succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of
19 preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an
20 injunction is in the public interest.’” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th
21 Cir. 2009) (citing *Winter*, 555 U.S. at 20).

22 //

1 As an alternative to this test, a preliminary injunction is appropriate if “serious
2 questions going to the merits were raised and the balance of the hardships tips sharply in
3 the plaintiff’s favor,” thereby allowing preservation of the status quo when complex legal
4 questions require further inspection or deliberation. *All. for the Wild Rockies v. Cottrell*,
5 632 F.3d 1127, 1134-35 (9th Cir. 2011). However, the “serious questions” approach
6 supports the court’s entry of a TRO only so long as the plaintiff also shows that there is a
7 likelihood of irreparable injury and that the injunction is in the public interest. *Id.* at
8 1135. The moving party bears the burden of persuasion and must make a clear showing
9 that it is entitled to such relief. *Winter*, 555 U.S. at 22.

10 **D. Petitioners’ Motion**

11 The court concludes that Petitioners have not made a clear showing that they are
12 entitled to the extraordinary remedy they request.

13 1. Likelihood of Success on the Merits

14 To obtain a TRO, Petitioners must make a clear showing that they are likely to
15 succeed on the merits or, alternatively, have raised serious questions going to the merits
16 of their habeas petition on Fifth Amendment grounds. To succeed on a habeas petition,
17 Petitioners must show that they are “in custody in violation of the Constitution or laws or
18 treaties of the United States.” *See* 28 U.S.C. § 2241. For the reasons stated below, the
19 court concludes that Petitioners fail to make a clear showing that they are likely to
20 succeed on the merits of their claim or that they have raised serious questions going to the
21 merits.

22 //

1 When the government detains a person pursuant to an immigration violation, the
2 person is a civil detainee. See *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). To evaluate
3 the constitutionality of a pretrial detention condition under the Fifth Amendment, a
4 district court must determine whether those conditions “amount to punishment of the
5 detainee.” *Bell*, 441 U.S. at 535; see also *Kingsley v. Hendrickson*, --- U.S. ---, 135 S. Ct.
6 2466, 2473-74 (2015). Punishment may be shown through an express intent to punish or
7 a restriction or condition that “is not reasonably related to to a legitimate governmental
8 objective.” *Bell*, 441 U.S. at 539; see also *Kingsley*, 135 S. Ct. at 2473-74 (clarifying that
9 “a pretrial detainee can prevail by providing only objective evidence that the challenged
10 governmental action is not rationally related to a legitimate governmental objective or
11 that it is excessive in relation to that purpose”). In addition, “when the State takes a
12 person into its custody and holds him there against his will, the Constitution imposes
13 upon it a corresponding duty to assume some responsibility for his safety and general
14 well-being.” *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199-200
15 (1989).⁹ Thus, for example, the government violates the Due Process Clause if it fails to
16 provide civil detainees with “food, clothing, shelter, medical care, and reasonable safety.”
17 *Id.* at 200. In the context of a Due Process Clause failure-to-protect claim, the Ninth
18 Circuit declared that “the defendant’s conduct must be objectively unreasonable, a test
19 that will necessarily ‘turn on the facts and circumstances of each particular case.’”

21 ⁹ In *DeShaney*, the Supreme Court analyzed the petitioners’ rights under the Fourteenth
22 Amendment. See 489 U.S. at 194-95. Fifth Amendment due process claims and Fourteenth
Amendment due process claims are analyzed in the same way. See *Paul v. Davis*, 424 U.S. 693,
702 n.3 (1976).

1 *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1071 (9th Cir. 2016) (quoting *Kingsley*, 135 S. Ct.
2 at 2473) (alterations and internal quotation marks omitted).¹⁰

3 Petitioners do not present allegations or evidence to show an “express intent” to
4 punish Petitioners. (*See generally* 2d TRO Mot.) Moreover, Plaintiffs do not dispute that
5 preventing detained aliens from absconding and ensuring that they appear for removal
6 proceedings is a legitimate governmental objective. *See Jennings v. Rodriguez*,
7 --- U.S. ---, 138 S. Ct. 830, 836 (2018); *Demore v. Kim*, 538 U.S. 510, 520-22 (2003);
8 *Zadvydas v. Davis*, 533 U.S. at 690-91. Therefore, Petitioners may succeed on their Fifth
9 Amendment claim if their confinement is not reasonably related to to a legitimate
10 governmental objective or is excessive in relation to the legitimate governmental
11 objective, *see Kingsley*, 135 S. Ct. at 2473-74, or if Respondents fail to provide for
12 Petitioners’ reasonable safety, *see DeShaney*, 489 U.S. at 200.¹¹

13 As of the date of this order, there is no confirmed COVID-19 case among any
14 detainees, staff, or visitors at the NWDC. Nevertheless, Petitioners contend that due to

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16 ¹⁰ “[T]he Supreme Court has treated medical care claims substantially the same as other
17 conditions of confinement violations including failure-to-protect claims.” *Gordon v. Cty. of
Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018), *cert. denied sub nom. Cty. of Orange, Cal. v.
Gordon*, 139 S. Ct. 794, 202 L. Ed. 2d 571 (2019).

18 ¹¹ In addition to Petitioners’ Fifth Amendment arguments, Petitioners rely on a series of
19 court orders regarding bail and other discretionary determinations relating to confinement or
20 release. (*See* 2d TRO Mot. at 13-14 (citing, among other cases, *United States v. Stephens*, No.
21 15-CR-95 (AJN), 2020 WL 1295155, at *1 (S.D.N.Y. Mar. 19, 2020) (granting bail); *United
22 States v. Raihan*, No. 20-cr-68 (BMC) (JO), Dkt. # 20 at 10:12-19 (E.D.N.Y. Mar. 12, 2020)
(continuing a criminal defendant on pretrial release)).) However, the decisions courts make with
respect to bail, in addition to the other discretionary determinations, bear little on the task before
the court, which involves adjudicating Petitioners’ claim that Respondents violate their Fifth
Amendment rights. That weighty analysis cannot be conducted on the basis of discretionary
decisions made with respect to individuals and circumstances not before this court.

1 the rampant spread of COVID-19, it will inevitably sweep through the NWDC, and when
2 it does, Petitioners will be powerless to protect themselves because they are unable to
3 engage in the necessary physical distancing. (*See* 2d TRO Mot. at 2 (asserting that the
4 COVID-19 pandemic “will, if it has not already,” reach the NWDC).) Petitioners assert
5 that “[p]reventive measures that may be effective . . . such as remaining separated from
6 other persons and frequent disinfection after occasional contact with other persons, are
7 simply not possible in the detention setting.” (*See id.* at 22-23).

8 At the outset, the court rejects as irrelevant Petitioners’ evidence of the conditions
9 at detention facilities or jails that are not at issue in this case. For example, Drs. Allen
10 and Rich testify about the potential risks to immigrant detainees generally due to the
11 COVID-19 pandemic. (*See generally* Allen-Rich Ltr.) The court does not dismiss these
12 concerns but notes that nothing in Drs. Allen and Rich’s letter addresses the actual
13 conditions at the NWDC. (*See generally id.*) Instead, Drs. Allen and Rich point to
14 reported conditions at prisons in China and Iran, the presence of COVID-19 at New
15 York’s Rikers Island, the possible presence of COVID-19 among immigrant detainees at
16 ICE’s Aurora facility, and a reported positive COVID-19 test for a member of ICE’s
17 medical staff at a detention center in New Jersey. (*See id.* at 3.) The fact that other
18 immigration detention centers “have faced outbreaks of other infectious diseases in recent
19 years,” or that, for example, “ICE mishandled and failed to take adequate measures to
20 protect detainees in Virginia,” is not evidence of the conditions facing Petitioners at the
21 NWDC in this case. (*See id.* at 9; *see also* Stern Decl. (Dkt. # 6) ¶ 7 (discussing the
22 conditions of “detention facilities” but not conditions at the NWDC specifically); 1st

1 Greifenger Decl. (Dkt. # 4) ¶¶ 10-12 (discussing the conditions at “[m]any immigration
2 detention facilities”); Lorenzen-Strait Decl. (Dkt. # 40) ¶¶ 1-16 (discussing ICE policies
3 generally.)

4 In contrast to the conditions at other facilities, here, Respondents submit evidence
5 that they are taking substantial measures at this moment to prevent an outbreak of
6 COVID-19 at the NWDC and contain an outbreak should one occur. Those measures
7 include, among others, (1) policies under which the “[t]he last transfer of ICE detainees
8 the [NWDC] received from the southern border occurred on or about March 5, 2020”
9 (*see* 1st Bostock Decl. ¶ 6); (2) exercising discretion to delay enforcement actions that
10 limit the number of new detainees at the NWDC (*id.* ¶¶ 8-9); (3) “temperature and
11 prescreening checks of all new detainees arriving at the [NWDC] prior to entrance to the
12 facility” (*id.* ¶ 11); (4) providing each detainee an instructional flyer “outlining proper
13 hand washing hygiene and the importance of covering coughs” and placing in each
14 housing unit “additional posters in multiple languages concerning hand washing hygiene
15 and covering coughs” (*id.* ¶ 13); (5) enhancing cleaning measures, including “increased
16 emphasis on cleaning contact areas with disinfectant cleaners approved as effective
17 against COVID 19” (*id.* ¶ 16); (6) providing “[s]oap and cleaning supplies” to “detainees
18 in all housing unites and work areas” (*id.* ¶ 17); (7) conducting weekly meetings “to
19 educate detainees on hand washing and covering coughs” (*id.* ¶ 18); (8) suspending social
20 visitation and cancelling all tours (*id.* ¶¶ 19-20); (9) providing extra hand sanitizer to ICE
21 employees and disinfectant wipes so they can conduct extra cleaning of “high contact
22 areas” such as door handles, phones, and computers (*id.* ¶ 23); (10) instituting

1 temperature checks and instructing ICE and GEO employees to stay home if they are sick
2 or have been in close contact with someone diagnosed with COVID-19 (*id.* ¶ 25); and
3 (11) implementing a telework program under which only half of ERO employees are
4 present at the NWDC at any one time (*id.* ¶ 26). Further, the court notes that
5 Respondents have made the discretionary decision to release four Petitioners, which
6 provides these individuals with all of the relief they request pursuant to the present
7 motion. (*See* 1st Not. of Release at 1; 2d Not. of Release at 1; 3d Not. of Release at 1.)

8 These measures generally track the recommendations of DHS’s medical subject
9 matter experts and other public health authorities in responding to COVID-19. (*See*
10 Allen-Rich Ltr. at 6 (recommending processes for screening, testing, isolation and
11 quarantine, limiting transport and transfer of immigrant detainees, rapidly identifying a
12 positive COVID-19 case, “consultation with CDC and public health officials to forge
13 optimal infection prevention control strategies to mitigate the health risks to detained
14 patient populations and correctional workers,” and considering the release of detainees
15 who do not pose an immediate risk to public safety); 1st Bostock Decl. ¶ 28.) Although
16 Drs. Allen and Rich may recommend “releasing all detainees in high risk medical
17 groups” (*see* Allen-Rich Ltr. at 6), Respondents cannot do so without first assessing
18 whether such release is otherwise authorized by law and in the public’s interest in any
19 given case. Indeed, ICE is presently engaged in such a case-by-case analysis and has
20 begun to release high-risk detainees on this basis. (*See* 1st Bostock Decl. ¶¶ 31-32.)

21 Nevertheless, Petitioners raise additional concerns in declarations filed on April 3,
22 2020, regarding their ability to maintain social distancing in all circumstances while

1 detained. (*See, e.g.*, Dawson Decl. ¶¶ 4-5; Espinoza-Esparza Decl. ¶¶ 5-6; Gonzalez
2 Decl. ¶ 4.) Indeed, Drs. Allen and Rich recommend implementing “immediate social
3 distancing to reduce the likelihood of exposure to detainees, facility personnel, and the
4 general public.” (*See* Allen-Rich Ltr. at 6.) Nevertheless, under the Fifth Amendment,
5 Respondents are not required to eliminate any risk to Petitioners. Instead, Respondents
6 are required to provide for their “reasonable safety.” *See DeSahney*, 489 U.S. at 200. In
7 the face of the measures Respondents are taking to prevent and contain a potential
8 COVID-19 outbreak, Petitioners’ evidence of current conditions at the NWDC is
9 insufficient to warrant the “extraordinary relief” of a TRO. The court is persuaded from
10 the evidence filed in this case that Respondents are taking active and substantial measures
11 to respond to a unique, unprecedented, and extremely challenging public health crisis.
12 These measures create conditions that are reasonably related and not excessive in relation
13 to the government’s interests in preventing flight and protecting public safety—
14 particularly when ICE is not authorized by statute to release several Petitioners and has
15 legitimate concerns about releasing others with extensive criminal histories. Moreover,
16 Respondents’ measures generally track the recommendations of public health authorities.
17 (*See* Allen-Rich Ltr. at 6.)

18 The court is aware that other district courts in other parts of the country have
19 recently granted TRO motions in favor of immigration detainees on Fifth Amendment
20 grounds. However, the evidence of current conditions at the NWDC differs in significant
21 ways from the evidence before those other district courts. *See, e.g., Basank*, 2020 WL
22 1481503, at *7 (“Each of the jails where a Petitioner is being housed has reported

1 confirmed cases of COVID-19.”); *Coronel*, 2020 WL 1487274 at *4 (stating that, unlike
2 in this case, “the record demonstrates that ICE has not taken any action to address the
3 particular risks COVID-19 poses to high-risk individuals”); *Castillo*, 2020 WL 1502864
4 at *1 (stating that “[o]ver the years, and as recently as 2018, DHS’s Office of the
5 Inspector General had, repeatedly, found that significant and various health and safety
6 risks existed at Adelanto”). It would be improper for this court to rely on conditions at
7 other detention facilities to conclude that the conditions at the NWDC represent a Fifth
8 Amendment violation.

9 2. Likelihood of Irreparable Harm

10 The court also concludes that Petitioners do not meet their burden to show that
11 “irreparable injury is likely in the absence of an injunction.” *Winter*, 555 U.S. at 22. As
12 discussed above, given the measures Respondents are currently taking, the court cannot
13 conclude either that the spread of COVID-19 inside the NWDC is inevitable, or that
14 Respondents will be unable to contain it if it occurs. No one can entirely guarantee safety
15 in the midst of a global pandemic. However, the standard under which the court
16 evaluates Petitioners’ second TRO motion is not guaranteed safety—an impossible
17 standard to meet no matter the circumstances—but rather a likelihood of irreparable
18 harm. The evidence before the court does not meet that standard. Therefore, the court
19 DENIES Petitioners’ second motion for a TRO.¹²

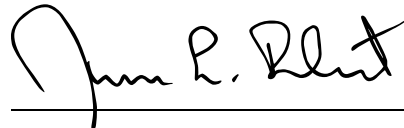
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21 _____
22 ¹² Having concluded that Petitioners fail to meet the first two prongs of the TRO
standard, the court finds it unnecessary to address the third and fourth prongs.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the court DENIES Petitioners' second motion for a
3 temporary restraining order (Dkt. # 36) and ORDERS Respondents to inform Petitioners
4 and the court as soon as practicable but within at least 24 hours after learning that any
5 individual physically present at the NWDC tests positive for or is otherwise diagnosed
6 with COVID-19.

7 Dated this 8th day of April, 2020.

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9
10 JAMES L. ROBART
United States District Judge

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