

1 Rene L. Valladares
2 Federal Public Defender
3 Nevada State Bar No. 11479
4 Erin Gettel
5 Assistant Federal Public Defender
6 411 E. Bonneville, Ste. 250
7 Las Vegas, Nevada 89101
8 (702) 388-6577
9 Erin_Gettel@fd.org

10 Attorney for Petitioners

11 United States District Court
12 District of Nevada

13 Jess Elijo Carranza, Jimmy Carter Kim,
14 Plaintiffs/Petitioners,¹
15 v.
16 Brian Koehn, Warden, Nevada Southern
17 Detention Center,
18 Defendant/Respondent.

19 Case No. 2:20-cv-1586

20 Petition for Writ of Habeas Corpus
21 Pursuant to 28 U.S.C. § 2241 and
22 Complaint for Declaratory and
23 Injunctive Relief

24
25 “It has long been said that a society’s worth can be judged by taking stock of its
26 prisons. That is all the truer in this pandemic, where inmates everywhere are
27 rendered vulnerable and often powerless to protect themselves from harm.”²

28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

¹ Both petitioners are charged in criminal cases in this district in which they are represented by the Federal Public Defender’s Office.

² *Valentine v. Collier*, 140 S. Ct. 1598, 1601 (May 14, 2020) (statement of Sotomayor, J., joined by Ginsburg, J.).

Introduction

COVID-19 is an ongoing, once-in-a-century public health crisis that needs little introduction. The disease has spread rapidly throughout the world, and particularly jails and prisons. By mid-June, the five largest clusters of COVID-19 in this country were inside correctional institutions.³ In the previous month, the number of known infected incarcerated individuals doubled and prison deaths increased by 73%.⁴ A recent study confirmed that in prisons and jails, COVID-19 not only spreads more rapidly, but is also more deadly: Prisoners are 5.5 times more likely to contract the virus than the general U.S. population and 3 times more likely to die from it.⁵

The Federal Bureau of Prisons is no exception. As of this filing, COVID-19 has expanded its foothold to 109 BOP facilities.⁶ Eleven thousand nine hundred and four BOP inmates have contracted the disease—roughly 10.7% of the BOP prison population.⁷ One hundred and sixteen have died.⁸ These numbers do not include privately managed prisons contracted by the BOP, or those in the custody of the United States Marshals Service (USMS).

³ Timothy Williams, *et al.*, *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*, June 16, 2020, available at <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>.

⁴ *Id.*

⁵ The Journal of the American Medical Association, “*COVID-19 Cases and Deaths in Federal and State Prisons*,” July 8, 2020, available at <https://jamanetwork.com/journals/jama/article-abstract/2768249> (concluding that inmates are 5.5 times more likely to contract the virus than the general U.S. population and 3 times more likely to die from the disease).

⁶ <https://www.bop.gov/coronavirus/> (last accessed August 26, 2020).

⁷ *Id.*

⁸ *Id.*

1 The USMS does not own or operate detention facilities but houses prisoners
2 in state or local facilities, BOP facilities, and private detention facilities. The USMS
3 is responsible for approximately 57,000 prisoners each day through contracts (or, in
4 the case of state and local facilities, intergovernmental agreements) with roughly
5 750 facilities.⁹ The subject of this litigation is Nevada Southern Detention Center
6 (NSDC), a private facility owned by CoreCivic¹⁰ and contracted by the USMS.
7 NSDC primarily houses pretrial detainees, but also houses sentenced prisoners,
8 prisoners in-transit between BOP facilities across the country, and ICE detainees.

9 **Parties**

10 Petitioner Jess Elijo Carranza is a pretrial detainee at NSDC, charged in
11 Case No. 2:19-cr-00310-RFB-BNW. His jury trial is currently scheduled for October
12 19, 2020. Petitioner Carranza has been exposed to COVID-19 and has experienced
13 symptoms but has not been tested despite numerous requests. Carranza suffers
14 from type 1 diabetes and high blood pressure, which the Centers for Disease Control
15 (CDC) recognizes may increase the risk of severe illness from COVID-19.¹¹

16 Petitioner Jimmy Carter Kim is a pretrial detainee at NSDC, charged by
17 complaint in Case No. 2:18-mj-00836-DJA. His preliminary hearing is currently
18 scheduled for October 16, 2020. Petitioner Kim has been exposed to COVID-19 and
19 was confirmed positive. After completing a 14-day medical isolation period, Kim
20 was returned to his dormitory style unit but not retested.

21
22
23 ⁹ <https://www.documentcloud.org/documents/7033924-U-S-Marshals-Response-to-Vice-Inquiries-on-Covid.html> (last accessed August 18, 2020).

24 ¹⁰ Previously the Corrections Corporation of America.

25 ¹¹ https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html (last
26 accessed August 25, 2020).
27

1 Respondent Brian Koehn is the Warden of NSDC. He is named in his official
2 capacity as Petitioners' immediate custodian.

3 **Jurisdiction and Venue**

4 This Court has subject-matter jurisdiction over this petition under 28 U.S.C.
5 § 1331 (federal question) and 28 U.S.C. § 2241 (habeas corpus), as Carranza and
6 Kim are held in violation of the Fifth Amendment to the U.S. Constitution.

7 The District of Nevada is the proper venue because a substantial part of the
8 events and omissions giving rise to these claims occurred and continue to occur in
9 this district.

10 **Statement of Facts**

11 **I. COVID-19**

12 1. As of this filing, there are 5,752,653 total COVID-19 cases and 177,59
13 deaths in the United States. Nevada has 66,680 reported cases and 1,259 deaths.¹²

14 2. Although older adults and people who have severe underlying medical
15 conditions seem to be at higher risk for developing more serious complications from
16 COVID-19 illness, anyone can have severe symptoms.¹³

17 3. There is currently no vaccine to prevent COVID-19.¹⁴

18 4. According to the CDC, the best way to prevent illness is to avoid being
19 exposed to the virus.¹⁵

23 ¹² <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>
24 (last accessed August 26, 2020).

25 ¹³ [https://www.cdc.gov/coronavirus/2019-ncov/symptoms-
testing/symptoms.html](https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html) (last accessed August 26, 2020).

26 ¹⁴ [https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-
sick/prevention.html](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html) (last accessed August 26, 2020).

27 ¹⁵ *Id.*

1 5. The virus spreads mainly from person-to-person through respiratory
2 droplets produced when an infected person coughs, sneezes, or talks.¹⁶

3 6. Some recent studies have suggested that COVID-19 may be spread by
4 people who are not showing symptoms.¹⁷

5 7. To avoid spread, the CDC recommends: washing hands with soap and
6 water or using a hand sanitizer that contains at least 60% alcohol;¹⁸ maintaining
7 six feet of distance between yourself and those outside your household; wearing a
8 mask, though it cautions that this is *not* a substitute for social distancing; and
9 cleaning “AND” disinfecting frequently touched surfaces daily.¹⁹

10 **II. COVID-19 in jails and prisons**

11 The CDC has recognized the unique challenges COVID-19 poses in
12 correctional and detention settings, including:²⁰

13 8. Detainees live within congregate environments, heightening the
14 potential for the virus to spread once introduced.

15 9. Some settings, particularly jails and detention centers, have high
16 turnover, admitting new entrants from a variety of locations daily who may have
17 been exposed to the virus.

18 10. The ability of detainees to practice disease-prevention measures and
19 social distancing may be limited and is determined by the supplies provided in the
20 facility as well as security and space considerations.

21
22
23 ¹⁶ *Id.*

24 ¹⁷ *Id.*

25 ¹⁸ *Id.*

26 ¹⁹ *Id.*

27 ²⁰ This is summarized from the full list *available at*
[https://www.cdc.gov/coronavirus/2019-ncov/community/correction-
detention/guidance-correctional-detention.html](https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html) (last accessed August 18, 2020).

1 11. Detainees may hesitate to report symptoms of COVID-19 or to seek
2 medical care due to stigma and fear of isolation.

3 12. Because limited outside information is available to many detainees,
4 unease and misinformation about COVID-19 may be high.

5 13. Attached as Exhibit 1 is a declaration by Karla D. Magner, PhD, an
6 Associate Professor in the School of Community Health Sciences at the University
7 of Nevada, Reno. Dr. Wagner explains that incarcerated individuals are subject to
8 increased risk from COVID-19 and that prophylactic precautions and widespread
9 screening/detection are critical. She recommends reducing the inmate population;
10 universal testing; sufficient space for social distancing; monitoring for symptoms;
11 rapid testing and isolation of suspected cases; contact tracing; and access to soap,
12 water, and hand sanitizer. She further recommends that precautions be taken to
13 ensure that these measures do not result in deterioration of conditions for detainees
14 or interfere with their ability to access information or communicate with people
15 outside the facility.

16 14. Attached as Exhibit 2 is a declaration by Brie Williams, MD, MS, an
17 associate professor of medicine at University of California, San Francisco (UCSF)
18 School of Medicine. Dr. Williams further explains the heightened risk COVID-19
19 poses to incarcerated people. She recommends universal testing; halting new
20 admissions or, if not possible, quarantining all new arrivals for 14 days; enhancing
21 inmates' communication with friends and family outside of prison while temporarily
22 eliminating in-person contacts; reducing the inmate population; and ensuring
23 inmates and staff have a comprehensive understanding of COVID-19 policies and
24 practices.

25 **III. Conditions at NSDC**

26 The Federal Public Defender for the District of Nevada (FPD) represents the
27 vast majority of pretrial detainees at NSDC in their criminal cases. This petition is

1 primarily based on information relayed by FPD clients to FPD employees,²¹ but also
2 includes information gleaned from court proceeding, court filings, and informal
3 testing reports provided by the USMS.

4 The NSDC increases the risk of infection for detainees in a number of ways,
5 including by: failing to test all current inmates for COVID-19; failing to test even
6 symptomatic detainees; failing to re-test positive detainees before deeming them
7 “cleared;” failing to test staff and encouraging staff to work, even if symptomatic;
8 failing to provide sufficient cleaning supplies, properly sanitize common spaces, and
9 provide proper personal protective equipment (and enforce its use); placing COVID-
10 19 positive detainees in “the hole,” where they are denied basic necessities, which
11 discourages reporting symptoms; moving detainees and staff between quarantined
12 and non-quarantined units; and, until very recently, failing to test and properly
13 quarantine all newly arriving inmates.

14 Detainees are also being denied access to programming; communication with
15 their attorneys, other professionals, families, and friends; outside medical services;
16 and public safety information. One result is a more tense environment for
17 detainees and staff, making violence more likely. Due to lack of transparency and
18 inadequate testing, the true number of COVID-19 cases at NSDC is unknown. Due
19 to lack of proper prevention and detection, Petitioners have been exposed to COVID-
20 19 and they are subjected to more restrictive conditions of confinement as units
21 constantly cycle in and out of quarantine/cohort status and individuals in and out of
22 medical isolation. Below is a summary of current conditions at NSDC as relevant to
23 this petition.

24
25
26
27 ²¹ Exhibit A (Declaration of FPD Investigator Michele Blackwill).

1 **A. Lack of COVID-19 Testing**

2 15. Detainees are denied testing for the virus, even where symptomatic,
3 including head, muscle, and body aches, loss of taste or smell, and chills.²²

4 16. NSDC will not test detainees unless they meet a certain temperature
5 threshold regardless of other symptoms. This was previously reported as 102
6 degrees and, more recently, 100.4 degrees.

7 17. On August 12, 2020, a detainee reported that he had just been released
8 from quarantine—where he had been placed after exhibiting symptoms *but without*
9 *being tested*. This detainee was also not tested before being returned to general
10 population.

11 18. Detainees who are tested must remain in their assigned units while
12 test results are pending, which typically takes a few days. For example, in early
13 July 2020, Petitioner Kim was permitted to remain in his dorm unit (Unit G4) for
14 two days while his test was pending and was only removed after it returned
15 positive.

16 19. Petitioner Carranza was housed in Unit G4 when Kim remained in the
17 unit while his test was pending. During this time, Carranza suffered symptoms
18 including head and body aches, shortness of breath, and dry cough. He repeatedly
19 requested testing but was denied because he did not have a fever of at least 100.4
20 degrees.

21 20. Numerous detainees in Unit G4 fell ill and requested testing during
22 this time but were denied.

23
24 _____
25 ²² The CDC has identified the following as possible symptoms for COVID-19:
26 fever or chills; cough; shortness of breath or difficulty breathing; fatigue; muscle or
27 body aches; headache; new loss of taste or smell; sore throat; congestion or runny
nose; nausea or vomiting; diarrhea. <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last accessed August 18, 2020).

1
2 **B. Disciplinary Measures Rather than Treatment for COVID-19**
3 **Positive Detainees**

4 21. Detainees are placed in the “the hole” after testing positive (or as
5 described in ¶ 17, NSDC suspects they are positive but deliberately avoids testing
6 them in order to avoid reporting the detainee as positive).

7 22. In early July, Kim collapsed on the floor in the medical wing after
8 finally being removed from his unit after his COVID-19 test returned positive.
9 Kim’s symptoms included fever, chest pains, dry mouth, fatigue, head and body
10 aches, difficulty breathing, stiff joints, lock jaw, and his arms and hands were
11 seizing up. NSDC staff picked him up off the floor, placed him in a wheelchair,
12 handcuffed him, and wheeled him to the hole. Staff did not give Kim any medicine
13 to treat his symptoms, let alone schedule an appointment with a doctor before
14 placing him in the hole.

15 23. The cell in which Kim was placed was filthy; he had no bedding for five
16 hours and no soap until the next day. He was not given medicine to ease his
17 symptoms before being placed in the hole and was forced to drink water out of the
18 sink.

19 24. Kim was not permitted access to a phone to call his attorney for five
20 days. Additionally, he was not permitted to take a shower for seven days.

21 25. After 14 days, Kim was moved from the hole back to his unit. He was
22 never retested.

23 26. While quarantined in the hole, COVID-19 positive individuals do not
24 have access to the recreation room, law library, phones/email, or yard.

25 27. Even when in the hole for medical rather than disciplinary reasons,
26 detainees are handcuffed any time they leave the cell, including immediately before
27 and after entering the shower.

1 28. Some detainees hesitate to report symptoms to avoid being placed in
2 the hole.

3 29. The only treatment offered is Tylenol/Ibuprofen.

4 **C. Inadequate Screening and Quarantining of Detainees and Staff**

5 30. Until August 20, 2020, new individuals arriving at the facility were not
6 tested for COVID-19 and were not quarantined for 14 days before being placed in
7 general population.

8 31. As described above, even symptomatic detainees remain in their units
9 pending test results.

10 32. COVID-19 positive individuals are not retested before being placed
11 back into their units, nor are they consistently quarantined for 14 days after testing
12 positive.

13 33. On June 9, 2020, G2 Unit Manager Sapp told detainees “it is what it
14 is” in response to their protests that they had been exposed to a newly arrived
15 infected individual who was not quarantined properly.

16 34. On June 10, 2020, multiple G2 Unit detainees told Sapp that they
17 would report the above exposure to their attorneys. Sapp told them “I hope you
18 have a good lawyer. I’ll be waiting for your lawsuit. Good luck with that.”

19 35. Correctional officers move between quarantined, high risk, and non-
20 quarantined units. So do medical staff. Staff do not always change their gloves and
21 wipe down equipment between units.

22 36. C.O. Sample reported symptoms. NSDC denied testing, and still came
23 to work. He disappeared for a week or two, and, when he returned, indicated that
24 he sought out testing on his own and was indeed COVID-19 positive. It is unclear
25 whether NSDC required him to provide a negative test before returning to work.
26 Several other staff members told detainees that they were sick but were threatened
27 with write-ups if they did not come to work.

1 37. A detainee overheard a nurse say: “It’s bullshit what they are doing to
2 you guys and what you all have to go through with the outbreak in housing G2
3 [Unit].”

4 38. During the week of August 17th, the FPD Office received numerous
5 reports that COVID-19 high-risk clients (those with underlying medical conditions)
6 being housed in protective custody were given an ultimatum: sign a waiver agreeing
7 to be housed with general population, COVID-19 high-risk inmates or be placed in
8 the hole.

9 **D. Inadequate Personal Protective Equipment (PPE), Cleaning**
10 **Supplies, Sanitation Practices, and Social Distancing**

11 39. Detainees report that units are sprayed with disinfectant at night but
12 that the disinfectant is watered down and wiped up without being allowed to sit for
13 the necessary amount of time.

14 40. At least one detainee reported watching a COVID-19 positive detainee
15 being removed from his unit and his bunk not being sanitized after. Other
16 detainees washed it with soap and water.

17 41. Though detainees have now been issued masks, they are not required
18 to wear them while in their units, and NSDC staff are inconsistent with proper
19 mask use.

20 42. The NSDC does not issue hand sanitizer or disinfectant wipes, nor are
21 these items available for purchase in commissary.

22 43. The only personal hygiene items NSDC provides is bar soap and liquid
23 soap in the bathroom, which is often empty.

24 44. There is no protocol for regular, facility-sponsored mask cleaning.
25 Many detainees have been using the same mask for months. Some report washing
26 their own, sending out with regular laundry, or asking a case manager to use an
27 “iron” to “clean” it.

1 45. Detainees housed in dorm-style housing units report that social
2 distancing is impossible as these units are full or near-full and the bunk beds are
3 only a few feet apart.

4 46. Phones and computers are not cleaned between use, and there are no
5 cleaning products available to do so. Detainees wipe the phone with shirt sleeves or
6 towels.

7 47. Unit porters (detainees) are responsible for cleaning the bathrooms,
8 not staff. The quality of the cleaning is uneven.

9 **E. Lack of Access to Friends and Family, Programming, and**
10 **Exercise**

11 48. Video visits at the facility remain suspended, so detainee access to
12 outside friends and family has greatly decreased and become significantly more
13 expensive.

14 49. Detainees are only given one free phone call (maximum of 20 minutes)
15 per week, and access is further limited due to long lines, inability to clean phones
16 between use, and cost.²³ For example, there are only five working phones in the G4
17 Unit, which houses around 90 people. These phones must be shared between those
18 placing legal as well as personal calls.

19 50. Access to computers is also extremely limited due to long lines and lack
20 of cleaning supplies. For example, the G4 Unit has 2 working computers and it
21 costs \$.04/minute to use the inmate e-mail system.

22 51. Detainees are permitted outdoors only in a caged-in cement area about
23 half the size of a basketball court.

24 52. Detainees in non-dormitory units, like Unit AA, are kept in their cells
25 23 hours per day.

26
27 ²³ A 20-minute phone call costs \$4.10.

1 53. When dormitory units are placed on quarantine (typically after a
2 detainee inside tests positive), they are not permitted to go to medical, church, or
3 the recreation/program room. Units remain in a more-restrictive quarantine state,
4 and must continually return to it, due to NSDC's failure to properly test for and
5 contain the virus.

6 54. Most, if not all, rehabilitative programming is suspended.

7 **F. Lack of Access to Medical Care**

8 55. Detainees do not have adequate access to outside medical services.

9 56. For example, one detainee's appointment to have an infected tooth
10 extracted has been repeatedly cancelled, as was another's x-ray appointment. A
11 female detainee's appointment for an MRI and surgical referral was repeatedly
12 canceled despite a breast mass and discharge.

13 57. Medical kites are not answered for several days and sometimes not for
14 up to one–two weeks, and requests for testing or treatment are denied.

15 58. The only way to get medical attention in a quarantined unit is to “man
16 down.”

17 59. When COVID-19 positive (or suspected positive) detainees are removed
18 from their units, they are placed in cells designated for disciplinary housing, where
19 they are watched by correctional staff rather than medical staff.

20 60. NSDC is located in Pahrump, Nevada, which has a population of
21 approximately 36,400. A COVID-19 outbreak would exceed the capacity of the local
22 health infrastructure because treatment for serious cases requires significant
23 medical intervention, including ventilator assistance and intensive care support.

24 **G. Lack of Access to Public Safety Information**

25 61. Due to lack of testing, the true number of COVID-19 cases at NSDC is
26 unknown. Since limited testing began, there has consistently been positive cases at
27 the facility.

1 62. Detainees do not receive accurate and up-to-date information about the
2 number of cases and COVID-19 protocols.

3 63. Each Monday, NSDC, through the USMS, sends the FPD office a list of
4 current positive, pending, and negative tests. This list includes only FPD clients. A
5 positive result is considered “cleared” and no longer positive for reporting purposes
6 once the detainee finishes the medical-isolation period. However, there is no new
7 testing.

8 64. As of August 12, 2020, NSDC reported one positive, two negatives, one
9 pending, and one “cleared” FPD client.

10 65. Detainees have been told by NSDC staff that they will not be tested
11 unless they have a cough and a temperature of at least 100.4 degrees, unless
12 directed by USMS or ICE. But when detainees complain about the lack of testing to
13 USMS, they are told that USMS cannot direct NSDC who to test.

14 66. At an April 30, 2020, evidentiary hearing in *U.S. v. David Cox*, 2:19-cr-
15 271-RFB-VCF, NSDC Warden Brian Kohen testified that the facility has as many
16 nasal tests as needed but that NSDC must receive permission from the USMS in
17 order to administer a test.

18 67. On May 27, 2020, Chief Unit Manager Sapp informed the G2 Unit
19 population that at least 60 to 70% of them had asymptomatic COVID-19 and that if
20 they did not have more than 2 or 3 symptoms, including fever, they would not be
21 tested.

22 68. In May, the Deputy Warden informed the detainees that NSDC had
23 ceased movement of inmates between facilities because of COVID-19 concerns. But
24 NSDC now states they cannot cease movement because they have contracts to
25 fulfill.
26
27

1 69. On one Friday in June, the Assistant Warden told G2 Unit detainees
2 they would be tested the next week. She never returned to the Unit, and the
3 promised unit-wide testing never occurred.

4 70. As described in ¶ 17, it appears NSDC is deliberately avoiding testing
5 symptomatic individuals—even those it so strongly suspects are positive that they
6 require placement in medical isolation—to avoid reporting positive tests.

7 71. At the above-referenced evidentiary hearing in *Cox*, 2:19-cr-271-RFB-
8 VCF, NSDC Warden Brian Kohen also testified that each pod (unit) has its own
9 ventilation system, including Unit BB, which is the unit used to house medically
10 vulnerable detainees.

11 72. In late July or early August, NSDC staff deployed pepper spray in Unit
12 BA. Unaware that Unit BA had been sprayed, detainees in Unit BB began
13 coughing and sneezing. One detainee who had previously been exposed to pepper
14 spray immediately recognized it. He believes that the chemical came through
15 ventilation in a wall shared by Units BA and BB. When BB detainees asked about
16 the spray, the C.O.s said that there had been lots of problems in Unit BA, which
17 must have led to the unit being pepper sprayed.

18 73. That pepper spray deployed in Unit BA infiltrated Unit BB suggests
19 that the units do not have entirely separate ventilation systems and that the virus,
20 like the pepper spray, could also be spread between quarantined/infected and
21 uninfected units through the ventilation system and, specifically, into Unit BB, the
22 medically vulnerable unit. It also shows a lack of transparency on the part of
23 NSDC.

24 74. Detainees in Unit AA have prepared a working affidavit describing
25 conditions at NSDC, one of which has 56 signatures. NSDC staff refuse to notarize
26 the document, which further shows a lack of transparency on the part of NSDC and
27 an active attempt to conceal the true nature of conditions there.

Statement of Law

1
2 A federal district court is authorized to grant a writ of habeas corpus under
3 28 U.S.C. § 2241 where a petitioner is “in custody under or by color of the authority
4 of the United States . . . in violation of the Constitution or laws or treaties of the
5 United States.”²⁴ The Supreme Court has left open whether detainees challenging
6 “large-scale policy decisions concerning the conditions of confinement imposed . . .
7 might be able to challenge their confinement conditions via a petition for writ of
8 habeas corpus.”²⁵ Aside from § 2241, this Court has jurisdiction under 28 U.S.C. §
9 1331, as an equitable cause of action under the Constitution.²⁶ The Ninth Circuit
10 has recognized an equitable cause of action to enjoin unconstitutional official
11 conduct.²⁷ Sections 2201–02 of Title 28 of the United States Code further provide
12

13
14 ²⁴ 28 U.S.C. §§ 2241(c)(1), (3).

15 ²⁵ *Ziglar v. Abassi*, 137 S.Ct. 1843, 1862 (2017); *Boumediene v. Bush*, 553 U.S.
16 723, 792 (2008). See *Bell v. Wolfish*, 441 U.S. 520, 526, n.6 (1979) (“[W]e leave to
17 another day the question of the propriety of using a writ of habeas corpus to obtain
18 review of the conditions of confinement”); *Preiser v. Rodriguez*, 411 U.S. 475, 499
19 (1973) (“When a prisoner is put under additional and unconstitutional restraints
20 during his lawful custody, it is arguable that habeas corpus will lie to remove the
21 restraints making custody illegal”).

22 A divided en banc panel of the Ninth Circuit held that “when a prisoner’s
23 claim would not necessarily spell speedier release, that claim does not lie at ‘the
24 core of habeas corpus.’” *Nettles v. Ground*, 830 F.3d 922, 930 (9th Cir. 2016)
25 (internal citation and quotation marks omitted). In a footnote, the Ninth Circuit
26 observed that its ruling did not apply to federal prisoners; the Supreme Court had
27 yet to address the issue and federal prisoners had resorted to *Bivens*, not to § 1983.
Id. at 931 n.6.

²⁶ See *Ziglar*, 137 S. Ct. at 1865 (observing that alien detainees challenging
their conditions of confinement could seek “an injunction requiring the warden to
bring his prison into compliance with the regulations discussed above [C.F.R.s] or
some other form of equitable relief”).

²⁷ *Sierra Club v. Trump*, 929 F.3d 670, 695 (9th Cir. 2019) (recognizing
equitable cause of action to enforce Appropriations Clause notwithstanding that
plaintiffs also had cause of action under the Administrative Procedure Act).

1 that a court may, upon the filing of an appropriate pleading, declare the rights and
2 other legal relations of any party seeking such declaration.

3 The Due Process Clause of the Fifth Amendment forbids the government
4 from depriving a person of life, liberty, or property without due process of law.²⁸
5 Pretrial detainees have a Constitutional right to be free from punishment prior to
6 conviction,²⁹ which includes a right to reasonable safety and medical care.³⁰ A
7 prison official violates these rights when he acts with “deliberate indifference” to
8 detainees’ safety or serious medical needs.³¹ Unlike convicted prisoners, whose
9 claims arise under the Eighth Amendment, and therefore require a showing of both
10 subjective and objective deliberate indifference, pretrial detainees need only show
11 “objective recklessness” by jail officials.³² “Objective recklessness” means that the
12 jail official “did not take reasonable available measures to abate [a substantial risk
13 of harm facing petitioners], even though a reasonable officer in the circumstances
14 would have appreciated the high degree of risk involved—making the consequences
15 of the [the jail official’s] conduct obvious.”³³

17 **Claim for Relief**

18 **Fifth Amendment violations for Deliberate** 19 **indifference to Petitioners’ safety and serious** 20 **medical needs (28 U.S.C. § 2241, 28 U.S.C. § 1331, and** 21 **28 §§ U.S.C. 2201–02)**

22 ²⁸ U.S. Const. amend. V.

23 ²⁹ *See Bell v. Wolfish*, 441 U.S. 520, 99 (1979) (“holding that, under Due
24 Process Clause, a detainee may not be punished prior conviction”).

25 ³⁰ *Gordon v County of Orange*, 888 F.3d 118, 1124–25 (9th Cir. 2018).

26 ³¹ *Id.*; *Castro v. Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc).

27 ³² *Castro*, 833 F.3d at 1071.

³³ *Id.*

- 1 b. Ensure that detainees have access to hand sanitizer containing at
2 least 60% alcohol;
- 3 c. Ensure that detainees have daily access to showers and clean
4 laundry, including personal towels and wash rags after each
5 shower;
- 6 d. Require that all NSDC staff wear PPE consistent with CDC
7 Guidance, including masks and gloves, when interacting with
8 detainees;
- 9 e. Provide an anonymous mechanism for detainees and NSDC staff to
10 report their concerns regarding COVID-19 directly to the USMS
11 and the Court;
- 12 f. Conduct immediate testing for anyone displaying or reporting any
13 symptom of COVID-19, as identified by the CDC, or who has been
14 exposed to someone displaying or reporting symptoms; to any
15 detainee or staff member who desires a test; and to any newly
16 arriving detainees.
- 17 g. Implement a facility sponsored process for adequate mask cleaning
18 and ensure that each detainee has two masks;
- 19 h. Ensure that COVID-19 positive individuals are properly
20 quarantined in a non-punitive setting, with continued access to
21 showers, recreation, mental health services, reading materials,
22 commissary, phone and video visitation with loved ones,
23 communication with counsel, and personal property;
- 24 i. Clean and disinfect frequently touched surfaces with disinfectant
25 products effective against the virus that causes COVID-19 (at the
26 manufacturers recommended concentration), as well as surfaces in
27

1 common areas, every two hours during waking hours, and at least
2 once during the night;

- 3 j. Provide detainees with sufficient and effective cleaning supplies
4 free of charge so that they can clean frequently touched items, such
5 as phones, before use;
- 6 k. Update detainees and the FPD weekly about all current positive
7 and outstanding tests, and do not deem a positive individual
8 “cleared” until he has tested negative;
- 9 l. Respond to all medical kites within 12 hours and ensure that
10 detainees have access to routine medical care;
- 11 m. Respond to all emergency (as defined by the medical community)
12 requests for medical attention within one hour;
- 13 n. Provide free testing to NSDC staff, screen staff for symptoms at the
14 beginning of each shift, and require testing for symptomatic staff;
- 15 o. Maintain separate units for those who are at high risk for severe
16 complications from COVID-19 with continued separation for those
17 in need of protective custody;
- 18 p. Provide no less than one phone for every ten detainees and 500 free
19 phone minutes per week;³⁴
- 20 q. Appoint an independent site inspector who can conduct
21 unannounced inspections at NSDC to ensure compliance with this
22 Court’s order. This individual should also be given access to all
23 internal surveillance;
- 24

25 ³⁴ Because in-person visits are suspended, the BOP has made all calls free of
26 charge and increased the phone limit to 500 minutes per month.
27 https://www.bop.gov/coronavirus/covid19_status.jsp (Last accessed August 25,
2020).

1 r. If Constitutional conditions of confinement cannot be established,
2 order Petitioners' released pending trial; and

3 s. Grant any further relief this Court deems appropriate.

4 Further, as an interim measure if the writ cannot be immediately granted,
5 Petitioners seek:

6 75. Court-mandated and supervised fact-finding of the actual conditions at
7 NSDC. A district court granted a similar request in *Stirling v. Salazar*, 3:20-cv-
8 00712, ECF No. 24 (D. Or. 2020).³⁵ See also *In re Coronavirus/COVID-19*
9 *Pandemic*, Administrative Order No. 2020-14 (E.D.N.Y. Apr. 2, 2020);³⁶ *Gomes v.*
10 *Department of Homeland Security*, 20-cv-453, ECF No. 123 at 56–61 (D.N.H. May
11 14, 2020);³⁷ *Urdaneta v. Keeton*, 20-cv-654, ECF No. 52 at 22 (D. Ariz. May 11,

15 ³⁵ The Court granted partial interim relief requiring respondent to provide
16 the court and FPD with the following information within two days: (1) current
17 protocols for screening and testing for COVID-19; (2) the number of inmates at the
18 facility who have been tested and the number of positive tests; (3) number of staff
19 and correctional ; (4) all efforts currently undertaken at the facility to slow the
20 spread of COVID-19. The Court defined protocols as including, but not limited to:
21 (a) the specific type of COVID-19 test being employed; (b) the typical or average
22 time the facility must wait to receive results; (c) the criteria for determining who
23 will be tested, when they will be tested, and what frequency and under what
24 circumstances tests will be re-administered, including persons who have tested
25 negative.

26 ³⁶ The General order requires bi-monthly status updates for detention
27 facilities housing defendants in cases filed within the district, including regarding
(1) protocols for screening and testing inmates, staff, and others entering or leaving
each facility; (2) the number of inmates tested and the number of positive tests; (3)
the number of staff and other correctional workers testing positive; and (4) “[a]ll
efforts undertaken to mitigate the spread of COVID-19.” Available at
<https://bit.ly/3l6zP9F>.

³⁷ The Court ordered a report concerning detailed issues related to testing
and mitigation measures in local jail holding federal detainees.

1 2020).³⁸ Due to the lack of transparency and testing at NSDC, court-supervised
2 fact-finding is appropriate here.

3 Dated August 26, 2020.

4 Respectfully submitted,

5
6 Rene L. Valladares
7 Federal Public Defender

8 */s/ Erin Gettel*

9

Erin Gettel
10 Assistant Federal Public Defender

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

26 ³⁸. This Order solicited proposed measures from parties to ensure adequate
27 health standards in a federal detention facility including placement in single-
occupancy cell, meals delivered to cell, free, unlimited PPE, hygiene supplies, and
disinfectant, requiring all staff to wear PPE, and requiring testing.