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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JESUS CHAVEZ FLORES,

Plaintiff,

v.

UNITED STATES IMMIGRATION AND
CUSTOMS ENFORCEMENT; THOMAS D.
HOMAN, Deputy Director and Senior
Official Performing the Duties of the Director
of the U.S. Immigration and Customs
Enforcement; BRYAN WILCOX, Director of
the Seattle Field Office of U.S. Immigration
and Customs Enforcement; WILLIAM
PENALOZA, Assistant Field Office Director,
Detention, Seattle Field Office of U.S.
Immigration and Customs Enforcement; THE
GEO GROUP, INC., a Florida corporation;
LOWELL CLARK, Warden, Northwest
Detention Center,

Defendants.

NO.

**MOTION FOR TEMPORARY
RESTRAINING ORDER**

**NOTED FOR HEARING ON
FRIDAY, FEBRUARY 23, 2018.**

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiff Jesus Chavez Flores (“Chavez”) is a civil detainee awaiting adjudication of his immigration case at the Northwest Detention Center (“NWDC”), an immigration detention facility in Tacoma, Washington. Defendant the GEO Group, Inc. (“GEO”) operates NWDC

1 under the supervision and oversight of Defendant Immigration and Customs Enforcement
2 (“ICE”) under a contract for their collective mutual benefit and GEO’s profit. Together,
3 Defendants employ a number of guards and supervisory staff at the facility. Defendants’
4 employees and agents improperly retaliated against Mr. Chavez for the peaceful exercise of his
5 First Amendment rights by physically assaulting him, placing him into solitary confinement, and
6 denying him necessary medical care.

7 Earlier this month, over 120 immigrant detainees at NWDC participated in a hunger
8 strike to protest their conditions of confinement. After detainees in Mr. Chavez’s unit joined the
9 hunger strike, guards under Defendants’ supervision and oversight incorrectly singled him out as
10 the leader of the strike. Minutes later, a guard assaulted him and other detainees who participated
11 in the hunger strike, shoving detainees against a wall, choking a detainee, and punching Mr.
12 Chavez in the eye. Defendants’ guards then imprisoned Mr. Chavez in an isolation unit on false
13 disciplinary charges, subjected him to further restrictions and reprisal after a Tacoma Police
14 Department officer came to the facility to investigate the assault, deprived Mr. Chavez of
15 required procedural protections, and denied Mr. Chavez access to appropriate medical care. Mr.
16 Chavez remains locked in the isolation unit.

17 Participation in a hunger strike is a form of protected speech under the First Amendment.
18 Defendants’ abusive, retaliatory actions have violated and continue to violate Mr. Chavez’s First
19 Amendment rights. He seeks a Temporary Restraining Order (“TRO”) that requires his release
20 from solitary confinement and prohibits Defendants from engaging in any further retaliation for
21 his exercise of free speech.

1 **II. FACTS**

2 **A. Guard Assaults Detainees, Including Mr. Chavez, after the Start of a Peaceful**
3 **Hunger Strike**

4 On February 7, 2018, over 120 immigrant detainees at NWDC began a hunger strike to
5 protest their conditions of confinement.¹ Through the hunger strike, detainees sought to raise
6 grievances with the food they receive and their daily wage of one dollar per day paid for
7 cooking, cleaning, and otherwise maintaining the center.²

8 More detainees in the facility joined the hunger strike the next day. On Thursday,
9 February 8, 2018, all of the detainees in Unit C-3, where Mr. Chavez was housed, decided to
10 participate in the hunger strike at lunchtime. When lunch was served, they declined their meal
11 trays. A guard demanded that detainees eat, and threatened to put them in a holding cell if they
12 did not. Decl. of Jesus Chavez Flores ¶¶ 2-4; Decl. of Jose Mesino Garcia ¶¶ 3-4; Decl. of Benito
13 Vasquez Sanchez ¶¶ 2-4.

14 When the strike began, Mr. Chavez discussed why he was participating in the strike with
15 another detainee. A guard (Guard # 1) overheard Mr. Chavez talking, and told him to “shut up.”
16 Guard # 1 then instructed him to come to the front of the unit. Mr. Chavez complied. Chavez
17 Decl. ¶¶ 5-6.

18 When the Captain entered the unit, he asked who was responsible for the strike. Guard #
19 1 pointed at Mr. Chavez, and said his name. The Captain tried to remove Mr. Chavez and
20

21 ¹ Press Release, Northwest Detention Center Resistance, *Over 100 People Detained in ICE Custody Begin Hunger*
Strike and Work Stoppage Inside the Northwest Detention Center (Feb. 7, 2018),
22 <http://www.nwdcresistance.org/wp-content/uploads/2015/09/feb-hunger-strike-press-release-pdf>.

23 ² The State of Washington has filed suit against GEO to enforce state minimum wage laws on behalf of immigrant
24 detainees at NWDC. See *Washington v. GEO Group, Inc.*, No. 3:17-05806, 2017 WL 6034369 (W.D. Wash. Dec. 6,
2017). Immigrant detainees have also challenged forced labor and wage practices at GEO’s Aurora, Colorado
detention center. *Menocal v. GEO Group, Inc.*, No. 17-1125, 2018 WL 797165 (10th Cir. Feb. 9, 2018). These
underlying employment issues are not the subject of this complaint.

1 another detainee named Mr. Orozco, who was interpreting for Mr. Chavez, out of the unit. The
2 other detainees in the unit objected to their removal. They told the guards that they wanted to
3 hear; they were all participants in the hunger strike. Chavez Decl. ¶¶ 6-7; Mesino Decl. ¶ 5.

4 Several additional guards entered the unit. One of these guards (Guard # 2) was known to
5 be aggressive; Mr. Chavez had seen him target and injure other detainees in the past. Guard # 2
6 pushed at detainees near the entrance of the unit, including Mr. Chavez. The guard pushed so
7 hard that detainee Benito Vasquez Sanchez hit a phone station and injured his side. The guard
8 then grabbed detainee Jose Mesino Garcia around the neck. He choked Mr. Mesino three times.
9 Chavez Decl. ¶¶ 8-9; Mesino Decl. ¶ 6; Vasquez Decl. ¶¶ 6-7.

10 Guard # 2 let go of Mr. Mesino and swung at Mr. Chavez. He punched Mr. Chavez in the
11 left eye. Upon impact, Mr. Chavez bent over, and tried to cover his eye with his hands. Chavez
12 Decl. ¶ 9; Mesino Decl. ¶ 6; Vasquez Decl. ¶ 7.

13 Mr. Chavez was taken to the medical unit, where he was examined by a doctor. He was
14 given two over-the-counter pills for pain. No other treatment was offered. Chavez Decl. ¶ 12.

15 After the medical exam, the Captain spoke to Mr. Chavez and Mr. Orozco. The Captain
16 again accused Mr. Chavez of being the leader of the hunger strike. Mr. Chavez explained that
17 this was not the case; everyone in the unit had decided to participate together. Chavez Decl. ¶ 13.

18 Some detainees, including Mr. Chavez, continued to participate in the hunger strike after
19 the assaults. Some detainees did not continue the strike for fear of further retribution, because the
20 guards began to write down the names of those who refused food. One guard told detainees that
21 if they did not eat, it would prejudice and negatively impact their immigration cases. Chavez
22 Decl. ¶ 15; Mesino Decl. ¶¶ 11-12.

1 **B. Guards Further Retaliate Against Mr. Chavez, Placing Him into Segregation on**
2 **False Disciplinary Charges.**

3 On Saturday, February 10, 2018, Mr. Chavez returned to the medical unit. His vision was
4 blurry and it was still difficult for him to open his eye. He was examined by a different doctor
5 than on the day of his injury. She told him he should go to an offsite hospital for an eye
6 examination. However, the other doctor in the unit denied the offsite hospital visit. Mr. Chavez
7 returned to his unit. Chavez Decl. ¶ 17.

8 When Mr. Chavez returned to Unit C-3, he sat with some other detainees. A guard
9 approached them and pointed to a box in the unit. He asked another detainee sitting with him,
10 who speaks some English, whose it was. The other detainee replied that he did not know. Chavez
11 Decl. ¶ 18.

12 Approximately thirty minutes later, guards left a copy of an Evidence/Search report on
13 each detainee's bed. These records described any confiscated property taken from detainees after
14 an inspection for contraband. Mr. Chavez's report, completed by guards at 2:45 p.m. that day,
15 indicated that he had nothing in his property that had been confiscated. Chavez Decl. ¶ 19;
16 Chavez Decl. Exh. A (Evidence/Search Report).

17 At 3:00 p.m., the guards in the unit changed shifts. One guard instructed Mr. Chavez to
18 go to the doctor. Although Mr. Chavez had already gone to the doctor that morning, he complied
19 and returned to the medical unit. At the medical unit, he was told he did not have to be there, and
20 was instructed to return the following week. Chavez Decl. ¶ 20.

21 When Mr. Chavez returned to the unit, he informed the guard that he had been told not to
22 return to the medical unit until the following week. The guard again instructed Mr. Chavez to go
23 back to the medical unit. Chavez Decl. ¶¶ 20-21.

1 Mr. Chavez was then taken by guards out of the unit. He was not taken to the medical
2 unit, but instead, to a small room. In this room, a guard (Guard # 3) asked Mr. Chavez in
3 Spanish, “when is the party going to be?” Mr. Chavez responded, “what party?” Guard # 3
4 replied, “the party that you are preparing for after the strike, because regularly, after a hunger
5 strike, they celebrate with wine.” Mr. Chavez responded that he did not know what the guard
6 was talking about. Chavez Decl. ¶ 22.

7 Guard # 3 showed Mr. Chavez a photo of a bag with apples and water in it, used to make
8 alcohol. He informed Mr. Chavez that the bag had been found in his property. Guard # 3 then
9 informed Mr. Chavez that he was going to be put into segregation. Mr. Chavez informed the
10 guard that the bag was not his, and that he believed that someone else had put the contraband in
11 his property. He asked the guard to review the cameras, which provide 24-hour video
12 surveillance of the residential unit. Chavez Decl. ¶ 22-23.

13 The guard handed Mr. Chavez several forms. The Incident Report, which was completed
14 at 3:48 p.m., stated that an officer had found a bag of fermented fruit with a strong odor in Box #
15 1033. The Incident Report noted that Box # 1033 was assigned to Mr. Chavez. Cho Decl. Exh. E
16 (Incident Report). The Administrative Detention Order stated that Mr. Chavez was being placed
17 into the Restrictive Housing Unit pending a charge for adulterating food and drink. The order
18 was issued at 4:20 p.m. Chavez Decl. Exh. C (Administrative Detention Order). The Notice of
19 Disciplinary Panel Hearing stated that Mr. Chavez would have a Unit Disciplinary Committee
20 (“UDC”) hearing two days later, on February 12, 2018 at 11:00 a.m. Chavez Decl. Exh. B
21 (Notice of Disciplinary Panel Hearing). Although NWDC is required to provide all documents to
22 detainees in Spanish, these documents were in English, not Spanish. Exhs. B, C, E. The guard
23 then told Mr. Chavez that he would have a chance to talk with a judge from GEO who would

1 decide if he should continue to be in segregation. Mr. Chavez again asked the guard to check the
2 cameras. He was then handcuffed and placed in segregation. Chavez Decl. ¶¶ 23-25.

3 **C. Mr. Chavez is Placed in Disciplinary Segregation after a Tacoma Police Department**
4 **Investigation of NWDC Guards.**

5 Mr. Chavez has been held in segregation since February 10, 2018. He is permitted only
6 one hour outside in a small “yard” by himself each day. He is prohibited from participating in
7 any programming, and is allowed to shower only three times per week. He is otherwise required
8 to spend 23 hours per day alone in a small cell with only a bed, sink, toilet, table, and chair.

9 Although Mr. Chavez was told that he would have a disciplinary hearing on February 12, 2018,
10 no one came to talk to him on that date. Chavez Decl. ¶¶ 26-27.

11 Mr. Chavez’s situation worsened after February 14, 2018, when a police officer from the
12 Tacoma Police Department visited him at NWDC. Mr. Chavez’s wife had called the police
13 department to report his assault by the guard. During the visit, the police officer asked Mr.
14 Chavez about what had happened; the officer also took a statement from NWDC guards
15 regarding the incident. Chavez Decl. 28; Chavez Decl. Exh. D (Tacoma Police Department
16 Incident Notification Report).

17 A few hours after the police officer’s visit, Mr. Chavez was informed that he would be
18 placed in disciplinary segregation for a total of 20 days, less time served. Mr. Chavez was given
19 a copy of the Institution Disciplinary Panel (“IDP”) Report. Chavez Decl. ¶ 29. Like the
20 disciplinary documents of February 10, 2018, the report was issued in English, not Spanish. The
21 report stated that he had been found guilty of violating Code Section 210: Adulteration of Food
22 or Drink. The report was signed by GEO Lieutenant Raich and Warden Lowell Clark, and by an
23 ICE Supervisory Detention and Deportation Officer. Cho Decl. Exh. F (Institution Disciplinary
24 Panel Report).

1 Since Mr. Chavez was placed in disciplinary segregation, his treatment by guards has
2 worsened. The guards now handcuff both Mr. Chavez’s hands and feet when he leaves the
3 isolation cell, which they did not do previously. Mr. Chavez is the only detainee in the unit who
4 has to follow that protocol, despite the fact that he has not demonstrated any aggressive or
5 violent tendencies. On Thursday, February 15, 2018, Guard # 2—the guard who assaulted Mr.
6 Chavez—was assigned to bring him out of the isolation cell. Mr. Chavez did not want to come
7 out because he was scared. Chavez Decl. ¶ 30.

8 Mr. Chavez must fill out a form to request phone calls and medical attention. The form is
9 in English, and he has trouble filling out the form because he cannot read and write in English
10 and because he cannot see well out of his injured eye. He was told that officers would review his
11 requests, and provide a response within two days. The guards have not provided him with
12 assistance in filling out the forms. Even when Mr. Chavez has completed a request for the phone,
13 he has not received a response. Mr. Chavez has reluctantly stopped participating in the hunger
14 strike because he fears for his physical safety and does not want to face further retribution and
15 unfounded disciplinary measures. Chavez Decl. ¶¶ 30-32.

16 III. ARGUMENT

17 Mr. Chavez requests a Temporary Restraining Order enjoining Defendants from further
18 retaliation, including his incarceration in segregation, solitary confinement, or isolation, based on
19 his engagement in protected free speech activities through the hunger strike.

20 A. Standard for Issuance of Temporary Restraining Order

21 The standard for issuing a temporary restraining order is identical to the standard for a
22 preliminary injunction. *Stuhlbarg Int’l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d
23 832, 839 n.7 (9th Cir. 2001); *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F.

1 Supp. 1320, 1323 (N.D. Cal. 1995). To prevail on a motion for a preliminary injunction, the
2 Plaintiff must establish: (1) a likelihood of success on the merits; (2) a likelihood of irreparable
3 harm; (3) that the balance of equities tip in his favor; and (4) that an injunction is in the public
4 interest. *Winter v. Natural Resources Defense Council, Inc.*, 55 U.S. 7, 20 (2008).

5 The Ninth Circuit employs a “sliding scale” approach to preliminary injunctions, “so that
6 a stronger showing of one element may offset a weaker showing of another.” *Alliance for the*
7 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Within this “sliding scale”
8 approach lays the “serious question” test: “a preliminary injunction could issue where the
9 likelihood of success is such that ‘serious questions going to the merits were raised and the
10 balance of hardships tips sharply in [plaintiff’s] favor.’” *Id.* at 1131 (citation omitted). To
11 succeed under the “serious question” test, the plaintiff must show that he is likely to suffer
12 irreparable harm and an injunction is in the public’s interest. *Id.* at 1132.

13 **B. Mr. Chavez is Likely to Succeed on the Merits**

14 Mr. Chavez is likely to succeed on the merits of his First Amendment retaliation claim.
15 After Mr. Chavez participated in a hunger strike and was (incorrectly) identified by Defendants’
16 guards as a leader of the strike, he was assaulted by a guard and placed into solitary confinement
17 on false grounds. Defendants’ actions were intended to suppress his speech and dissuade other
18 detainees from engaging in similar protected speech in the future. This constitutes a violation of
19 Mr. Chavez’s First Amendment rights, and the violation is ongoing.

20 A First Amendment retaliation claim requires five elements. First, the Plaintiff must have
21 engaged in conduct protected by the First Amendment. Second, a state actor must have taken
22 adverse action against the Plaintiff. Third, the Plaintiff must allege a causal connection between
23 the adverse action and the protected conduct. Fourth, the plaintiff must show that the “official’s

1 acts would chill or silence a person of ordinary firmness from future First Amendment
2 activities.” *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012) (quoting *Rhodes v. Robinson*,
3 408 F.3d 559, 567-68 (9th Cir. 2005)). Fifth, the Plaintiff must show that the action did not
4 reasonably advance a legitimate institutional goal. *Watison*, 668 F.3d at 1114; *Rhodes*, 408 F.3d
5 at 567-68.

6 **1. Mr. Chavez’s Participation in a Hunger Strike is Protected by the First**
7 **Amendment.**

8 Mr. Chavez’s participation in a hunger strike is a protected First Amendment activity.
9 “The First Amendment literally forbids the abridgement only of ‘speech,’” but “its protection
10 does not end at the spoken or written word.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989). For
11 this reason, the Supreme Court has clarified that the First Amendment does not solely protect the
12 “spoken or written word,” but also protects “conduct [that] may be ‘sufficiently imbued with
13 elements of communication to fall within the scope of the First and Fourteenth Amendments.’”
14 *Johnson*, 491 U.S. at 404; *see also Roulette v. City of Seattle*, 97 F.3d 300, 302-03 (9th Cir.
15 1996) (“The First Amendment protects not only the expression of ideas through printed or
16 spoken words, but also symbolic speech.”). When deciding whether expressive conduct “has
17 sufficient communicative elements” for First Amendment protection, a court must ask whether
18 “[a]n intent to convey a particularized message was present, and [whether] the likelihood was
19 great that the message would be understood by those who viewed it.” *Johnson*, 491 U.S. at 404
20 (internal citation omitted).

21 Hunger strikes constitute such protected conduct. In the prison context, “a hunger strike
22 may be protected by the First Amendment if it was intended to convey a particularized message.”
23 *Stefanoff v. Hays Cnty.*, 154 F.3d 523, 527 (5th Cir. 1998) (per curiam); *Dumbrique v. Brunner*,
24 No. 14-CV-02598-HSG, 2016 WL 3268875, at *7 (N.D. Cal. June 15, 2016) (“A hunger strike

1 that is intended to convey a particularized message and has a high likelihood of conveying that
2 message is therefore speech protected by the First Amendment.”). Hunger strikes are uniquely
3 expressive, given the hardship suffered by the speaker. As Justice Brennan noted, “[t]he passive
4 nonviolence of King and Gandhi are proof that the resolute acceptance of pain may communicate
5 dedication and righteousness more eloquently than mere words ever could.” *F.T.C. v. Sup. Ct.*
6 *Trial Lawyers Ass’n*, 493 U.S. 411, 450 (1990) (Brennan, J., dissenting). For this reason, hunger
7 strikes are a “special form of political communication” that “convey[] an emotional message that
8 is absent in . . . even a protest march.” *F.T.C.*, 493 U.S. at 450.

9 Here, Mr. Chavez and other detainees engaged in a peaceful hunger strike to protest
10 conditions of confinement at NWDC. They intended to use the hunger strike to convey their
11 grievances related to food and wages provided to detainees at the facility. After the start of the
12 hunger strike in Mr. Chavez’s unit, officials at NWDC, the intended audience of the grievances,
13 met with detainees. Chavez Decl. ¶ 14; Mesino Decl. ¶ 10. There is little doubt that the hunger
14 strike constituted expressive conduct protected by the First Amendment.

15 Chavez’s status as a non-citizen immigrant detainee is irrelevant. Noncitizens in the
16 United States enjoy freedom of speech under the First Amendment. *Bridges v. Wixon*, 326 U.S.
17 135, 148 (1945). The First Amendment, moreover, does not distinguish between classes of
18 speakers—for example, between prisoners and civil immigrant detainees—in its application. In
19 fact, “the Government may commit a constitutional wrong when by law it identifies certain
20 preferred speakers.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010).

21 As civil detainees, immigrant detainees are entitled to treatment and conditions of
22 confinement at least equal to, if not better, than convicted prisoners and pre-trial criminal
23 detainees. *Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004) (concluding that civil detainees

1 are “entitled to ‘more considerate treatment’” than criminally detained counterparts). The First
2 Amendment clearly shields prisoners from retaliation for voicing their grievances regarding
3 conditions of confinement: “[b]ecause purely retaliatory actions taken against a prisoner for
4 having exercised those rights necessarily undermine those protections, such actions violate the
5 Constitution quite apart from any underlying misconduct they are designed to shield.” *Rhodes*,
6 408 F.3d at 567. Any distinction in First Amendment protections between civil immigrant
7 detainees and prisoners would thus impermissibly “deprive[] the disadvantaged person or class
8 of the right to use speech to strive to establish worth, standing, and respect for the speaker’s
9 voice. The Government may not by these means deprive the public of the right and privilege to
10 determine for itself what speech and speakers are worthy of consideration.” *Citizens United*, 558
11 U.S. at 340–41.

12 **2. Mr. Chavez’s Assault and Placement in Isolation Constitute Adverse Action**
13 **by State Actors.**

14 Mr. Chavez’s assault and subsequent imprisonment in an isolation unit by NWDC guards
15 constitute adverse action by state actors. Assaulting a prisoner for speaking out about conditions
16 of confinement is prohibited by the First Amendment. *Rhodes*, 409 F.3d at 568 (finding First
17 Amendment retaliation where officers assaulted prisoner for filing grievance); *Solomon v.*
18 *Petray*, 795 F.3d 777, 787-88 (8th Cir. 2015) (finding assault by officer in retaliation to
19 prisoner’s protected expression an adverse action). The First Amendment likewise prohibits the
20 use of segregation as punishment for speaking out about conditions of confinement. *Hines v.*
21 *Gomez*, 108 F.3d 265, 269 (9th Cir. 1997) (ten-day confinement in segregation is sufficiently
22 serious to support First Amendment retaliation claim); *Gray v. Hernandez*, 651 F. Supp. 2d
23 1167, 1175 (S.D. Cal. 2009) (placement in solitary confinement constitutes adverse action). And

1 neither does the First Amendment permit jailers to file false disciplinary charges leading to
2 placement in segregation for engaging in protected speech. *Watison*, 668 F.3d at 1115.

3 Mr. Chavez suffered each of these adverse actions at the hands of government actors,
4 including ICE and GEO. With regard to the former, as a detainee awaiting adjudication of his
5 immigration case, Mr. Chavez is in the custody of ICE, a federal agency. ICE officials signed off
6 on his placement in disciplinary detention, and signed approval of the Institution Disciplinary
7 Panel Report. Cho Decl. Exh. F (Institution Disciplinary Panel Report). ICE’s Seattle Field
8 Office also maintains close oversight of the use of segregation at NWDC. For example, under the
9 terms of ICE’s own policies, the Performance Based National Detention Standards (2011)
10 (“PBNDS”),³ which govern the facility, ICE must be immediately notified and provided with a
11 copy of all administrative segregation orders. Cho Decl. Exh. K (ICE/GEO Contract); PBNDS
12 §§ 2.12(II)(3), 2.12(V)(A)(2)(f). ICE’s Field Office must be consulted when developing
13 procedures governing the management of administrative segregation units. PBNDS §
14 2.12(V)(A). NWDC’s facility administrator must coordinate with ICE’s Field Office Director in
15 considering whether less restrictive housing or custodial options are available for detainees in
16 segregation. NWDC must notify ICE’s Field Office Director in writing whenever ICE detainees
17 have been held in extended segregation placements, and must provide immediate notification of
18 initial placements of ICE detainees in segregation on the basis of disability, medical or mental
19 illness, or other special vulnerabilities. The facility administrator must notify the ICE Field
20 Office Director when such detainees have been released from segregation. PBNDS § 2.12(V)(C).

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23 ³ U.S. Immigration and Customs Enforcement, *Performance Based National Detention Standards 2011, Rev. 2016*
24 (2016), available at <https://www.ice.gov/detention-standards/2011>. Relevant sections have been provided as Exhibits H-J to the Declaration of Eunice Cho.

1 And NWDC’s facility administrator must also send written justification for continued custody of
2 detainees in disciplinary segregation after 30 days. PBNDS § 2.12(V)(B)(1).

3 Although NWDC guards are employed by GEO, which is a private for-profit corporation,
4 it is well-established that their ongoing retaliatory actions against Mr. Chavez are government
5 action. Private entities are considered government actors for First Amendment purposes “when
6 the challenged entity performs functions that have been ‘traditionally the exclusive prerogative
7 of the Federal Government.’” *San Francisco Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S.
8 522, 544 (1987) (citations omitted). “When private individuals or groups are endowed by the
9 State with powers or functions governmental in nature, they become agencies or
10 instrumentalities of the State and subject to its constitutional limitations.” *Evans v. Newton*, 382
11 U.S. 296, 299 (1966).

12 GEO not only performs a core government function in its detention of federal immigrant
13 detainees at NWDC, it operates that facility as a joint enterprise that is mutually beneficial to it
14 and ICE. As ICE’s contract with GEO specifies, “ICE /[Detention & Removal Operations] is
15 responsible for the detention of illegal aliens apprehended at the border and elsewhere.” Exh. K
16 at 1 (ICE/GEO Contract). Under the terms of this contract, GEO performs the functions of the
17 federal agency by providing “housing, safekeeping, transportation, and stationary guard services
18 for detainees of all nationalities in its custody.” Exh. K at 1. Indeed, it is by virtue of this
19 contractual agreement that the actions of GEO’s guards are cloaked in government authority:
20 without such authority, they would not have had physical custody over Mr. Chavez, the power to
21 place him in solitary confinement, or the ability to deny him medical treatment. *See, e.g. Street v.*
22 *Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996) (concluding that private corporation acted
23 “under color of state law” by performing the “traditional state function” of operating a prison);

1 *Olivas v. Corr. Corp. of Am.*, 408 F. Supp. 2d 251, 254 (N.D. Tex. 2006) (finding liability for
2 private prison corporation because “the operation of a prison is a fundamental government
3 function.”).

4 GEO is also subject to the First Amendment as a government actor because its activities
5 are “entwined with governmental policies,” and because government is “entwined in [its]
6 management or control.” *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S.
7 288, 296 (2001) (quoting *Evans v. Newton*, 382 U.S. 296, 299 (1966)) (ellipses in original).

8 Although GEO is responsible for the day-to-day operations of the facility, ICE is fully
9 intertwined in its overall operation. As ICE’s contract with GEO specifies, “[a] major intent of
10 this acquisition is to create a ‘partnership’ between ICE and the Contractor.” Exh. K at 8. ICE
11 oversees GEO's operations at NWDC, and ICE officials are located onsite at the NWDC. Exh. K
12 at 17. Most relevant to this matter, GEO staff must immediately report to ICE any instances of
13 use of physical force and incidents that result in physical harm or threaten the safety, health, or
14 welfare to any person at NWDC. Exh. K at 13-14. ICE also sets standards for the operation of
15 the detention center through the PBNDS and its contract with GEO. Exh. K at 21-22.

16 In exchange for operating the facility under the overall supervision and direction of ICE,
17 GEO profits handsomely. In 2015, GEO received \$326 million in revenue from ICE detention
18 contracts nationwide.⁴ This amount is projected to grow, as ICE requested a 25 percent increase
19 in detention beds in 2017.⁵ GEO’s management of the facility to increase profits, such as by
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22 ⁴ Carl Takei, et al., *Shutting Down the Profiteers: Why and How the Department of Homeland Security Should Stop*
23 *Using Private Prisons* 10 (2016), https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf.

24 ⁵ John Burnett, *Big Money As Immigrant Jails Boom*, NPR Radio (Nov. 21, 2017),
<https://www.npr.org/2017/11/21/565318778/big-money-as-private-immigrant-jails-boom>.

1 paying detainees only one dollar a day to provide essential services like maintenance and food
2 preparation, also inures to the benefit of ICE in the form of cost savings.

3 **3. Defendants Assaulted and Placed Mr. Chavez in Isolation on False Charges**
4 **Because He Participated in a Hunger Strike.**

5 Ample evidence establishes that Defendants improperly punished Mr. Chavez for his
6 participation in the hunger strike. When considering the connection between the adverse action
7 and the protected conduct, circumstantial evidence can be sufficient to establish causality. *Hines*
8 *v. Gomez*, 108 F.3d 265, 268 (9th Cir. 1997). “[T]iming can properly be considered as
9 circumstantial evidence of retaliatory intent.” *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003)
10 (quoting *Pratt v. Rowland*, 65 F.3d 802, 808 (9th Cir. 1995)). “Because direct evidence of
11 retaliatory intent rarely can be pleaded in a complaint, allegation of a chronology of events from
12 which retaliation can be inferred is sufficient to survive dismissal.” *Watson*, 668 F.3d at 1114.
13 Indeed, suspect timing of an investigation, the use of stale evidence, and statements by
14 authorities that suggest cause for targeting a specific individual together can demonstrate a
15 retaliatory motive. *Bruce*, 351 F.3d at 1289.

16 The chronology of events surrounding Mr. Chavez’s assault and placement in isolation
17 strongly suggests improper retaliation. From the very outset, Defendants’ agents and employees
18 (incorrectly) singled out Mr. Chavez as a leader of the hunger strike. A guard pointed to Mr.
19 Chavez at the start of the hunger strike, identifying him as the leader. The captain also accused
20 Mr. Chavez of leading the strike. Moments after guards entered the unit to address the detainees
21 who began the hunger strike, a guard assaulted Mr. Chavez and other detainees. Chavez Decl. ¶¶
22 6, 9, 13.

23 Two days after the hunger strike began, Mr. Chavez was charged with possession of
24 adulterated food in his property, and eventually sentenced to twenty days in disciplinary

1 segregation. Chavez Decl. ¶¶ 23, 29; Exh. B (Notice of Disciplinary Panel Hearing); Exh. F
2 (Institution Disciplinary Panel Report). The circumstances surrounding his charge are highly
3 suspect. On February 10, 2018, at approximately 2:15 p.m., a guard approached Mr. Chavez and
4 other detainees to ask who was assigned a specific property box in the unit. Chavez Decl. ¶¶ 18-
5 20. At 2:45 p.m., Mr. Chavez was issued an Evidence/Search report indicating that guards had
6 found no contraband in his property. Chavez Decl. ¶ 19; Exh. A (Evidence/Search Report). At
7 approximately 3:00 p.m., Mr. Chavez was instructed, under pretext, to leave the unit to go to the
8 doctor, even though he had already seen the doctor that day. When he arrived in the medical unit,
9 he was told that he did not need to be there. When Mr. Chavez came back to the housing unit, the
10 guard again instructed him to return to the medical unit. Mr. Chavez complied, but was instead
11 taken by a guard to a room where he was informed of his disciplinary charge. Chavez Decl. ¶¶
12 20-22.

13 At 4:20 p.m., Mr. Chavez received a disciplinary charge that adulterated food had been
14 found in his property box, even though he had just received an Evidence/Search report indicating
15 that guards had found no contraband in his property. Exh. B (Notice of Disciplinary Panel
16 Hearing). The disciplinary charge was based on an incident report prepared at 3:48 p.m. Exh. E
17 (Incident Report). The disciplinary committee refused to review security cameras that provide
18 video surveillance of the unit, even though Mr. Chavez repeatedly requested the review. Chavez
19 Decl. ¶¶ 23-24. Moreover, statements made during the disciplinary charge process further
20 suggest improper motive. Before informing Mr. Chavez of his disciplinary charge, the guard
21 asked Mr. Chavez, “When is the party going to be?,” adding, “the party you are preparing for
22 after the strike, because regularly, after a hunger strike, they celebrate with wine.” Chavez Decl.
23 ¶ 22.

1 Defendants' guards failed to provide him with a fair opportunity to contest his charges.
2 ICE's own PBNDS policies provide safeguards for detainees before their placement in
3 disciplinary segregation, the most restrictive form of segregation in an ICE facility. PBNDS §§
4 2.12, 3.1. Mr. Chavez, however, did not enjoy these required protections. Because Mr. Chavez
5 was not given a copy of the UDC decision or written notification of charges and a hearing before
6 the IDP, he was unable to exercise his right to attend the entire IDP hearing, present statements
7 and evidence, or appeal the committee's determination. Chavez Decl. ¶¶ 27, 29. Although the
8 IDP order must be provided in a language understood by the detainee, and although ICE policies
9 require that all written materials provided to detainees must generally be translated into Spanish,
10 the order was provided only in English. PBNDS § 2.12(II)(21); Exh. B (Notice of Disciplinary
11 Panel Hearing); Exh. C (Administrative Detention Order); Exh. E (Incident Report); Exh. F (IDP
12 Report); Exh. G (Disciplinary Segregation Order). Mr. Chavez's IDP report also indicates that no
13 documentary evidence other than the incident report was considered. Although Mr. Chavez had
14 requested video to be reviewed, the IDP declined to do so, explaining only that he "could not
15 provide any potential date or time when somebody might have put items in box." Exh. F (IDP
16 Report).

17 Taken together, the suspect timing surrounding Mr. Chavez's disciplinary charges,
18 inconsistent evidence, official statements suggesting retaliatory motive, and lack of opportunity
19 to fairly contest his charges provide sufficient evidence to allege that Defendants placed him in
20 disciplinary segregation on false charges because of his participation in a hunger strike.

21 **4. Defendants' Actions Chilled Mr. Chavez's Exercise of His First Amendment**
22 **Rights**

1 Defendants' assault and placement of Mr. Chavez in disciplinary segregation on false
2 charges is conduct that "would chill or silence a person of ordinary firmness from future First
3 Amendment activities." *Rhodes*, 408 F.3d at 568-69; *see also Austin v. Terhune*, 367 F.3d 1167,
4 1170-71 (9th Cir. 2004) (prisoner stated claim for retaliation where he alleged that he was placed
5 in segregation for filing grievance). The Ninth Circuit has specifically held that placement in
6 segregation on the basis of false charges can chill First Amendment activity. *Hines v. Gomez*,
7 108 F.3d 265, 268-69 (9th Cir. 1997). As the court noted, "there are no procedural safeguards
8 protecting a prisoner from false retaliatory accusations; a guard may, and often does, file an
9 accusation solely on his own word, making his mere accusation the only 'modicum of
10 evidence.'" *Id.*

11 The chilling effect of segregation on speech is evident in this instance. Chavez stopped
12 his hunger strike after placement in isolation out of fear of continued or additional retaliation.
13 Chavez Decl. ¶ 31. Further, the chilling effect of assaulting or placing individuals in segregation
14 on other detainees who witness such retaliation is immense. Other detainees have since halted
15 their participation in the hunger strike out of fear. Mesino Decl. ¶ 11-12; Vasquez Decl. ¶ 10.

16
17 **5. Defendants' Actions Do Not Reasonably Advance Any Legitimate
Institutional Goal.**

18 Defendants' retaliatory actions—assault of hunger striking detainees and Mr. Chavez's
19 imprisonment in an isolation unit on false charges—do not serve to advance legitimate goals of
20 the institution. "A plaintiff successfully pleads this element by alleging, in addition to a
21 retaliatory motive, that the defendant's actions were arbitrary and capricious, or that they were
22 'unnecessary to the maintenance of order in the institution.'" *Watison*, 668 F.3d at 1114-15
23 (quoting *Franklin v. Murphy*, 745 F.2d 1221, 1230 (9th Cir. 1984)). Even where a Defendant

1 tries to articulate a post-hoc legitimate institutional interest, actual retaliatory motive and
2 arbitrary actions invalidate that interest. *See Clement v. California Dept. of Corr.*, 364 F.3d 1148,
3 1152 (9th Cir. 2004); *Williams v. Lane*, 851 F.2d 867, 875 (7th Cir. 1988).

4 Assault of detainees serves no legitimate institutional purpose, and is unnecessary to the
5 maintenance of order at the facility. In fact, assault and abuse of force are counter to the
6 legitimate goals of the institution. ICE's own policies prohibit the use of chokeholds and other
7 neck restraints, and the use of force against detainees offering no resistance. PBNDS § 2.15(E).

8 Similarly, Mr. Chavez's placement in isolation on false charges does not advance a
9 legitimate institutional goal. As discussed above, Defendants sought to retaliate against Mr.
10 Chavez because of his participation in the hunger strike, and more specifically, because they
11 believed that he had led the strike in his unit. Defendants engaged in arbitrary, capricious, and
12 retaliatory conduct by filing false disciplinary charges against Mr. Chavez, without proper
13 opportunity for him to contest the charges. Moreover, Mr. Chavez's placement in segregation
14 was unnecessary to the maintenance of order in the facility. Mr. Chavez had spent two days in
15 the unit after the start of the hunger strike and assault, with no incident threatening the order of
16 the facility.

17
18 **C. Mr. Chavez's Continued Detention in Solitary Confinement Will Cause Irreparable Harm.**

19 Mr. Chavez has suffered, and will continue to suffer irreparable harm if a temporary
20 restraining order is not granted. Mr. Chavez has suffered irreparable harm through the
21 deprivation of his First Amendment freedoms. Defendants have violated his First Amendment
22 rights by retaliating against him for engaging in a hunger strike. "The loss of First Amendment
23 freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*
24 *v. Burns*, 427 U.S. 347, 373 (1976); *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)

1 (finding no abuse of discretion where Plaintiffs “faced irreparable harm in the form of a
2 deprivation of constitutional rights absent a preliminary injunction.”); *Mitchell v. Cuomo*, 748
3 F.2d 804, 805-06 (2d. Cir 1984) (upholding finding of irreparable harm where prisoners showed
4 possible deprivation of constitutional rights). Furthermore, Mr. Chavez is likely to suffer further
5 irreparable injury because of his continued placement in solitary confinement. *See Adams v.*
6 *Carlson*, 488 F.2d 619, 629 (7th Cir. 1973) (“Imprisonment in segregation is the condition
7 perhaps most paradigmatic of [irreparable harm].”).

8
9 **D. The Balance of the Hardships and the Public Interest Both Support Issuance of a
Temporary Restraining Order.**

10 When considering whether a temporary restraining order should issue, “courts must
11 balance the competing claims of injury and must consider the effect on each party of the granting
12 or withholding of the requested relief.” *Winter*, 55 U.S. at 24. Here, Mr. Chavez is irreparably
13 injured by the ongoing punishment he is suffering. “The loss of First Amendment freedoms, for
14 even minimal periods of time, unquestionably constitutes irreparable injury.” *Klein v. City of San*
15 *Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). Moreover, Mr. Chavez poses no threat to the
16 orderly operations of the NWDC. Authorities mistakenly, and without basis, singled him out as a
17 leader of the hunger strike in the unit. Prior to the incident, he had no disciplinary issues at the
18 facility. No evidence indicates that Defendants engaged in any required analysis as to whether an
19 alternative disposition other than disciplinary segregation would adequately “regulate the
20 detainee’s behavior.” PBNDS § 2.12(II)(6). By contrast, absent a showing of an actual threat to
21 the orderly operations of the Northwest Detention Center, any countervailing injury Defendants
22 may allege is not sufficient to defeat a Temporary Restraining Order. *Sammartano v. First*
23 *Judicial Dist. Court, in & for Cnty. of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002).

1 Finally, the Ninth Circuit has recognized the “significant public interest” in upholding
2 free speech principles. *Klein*, 584 F.3d at 1208. This is especially true where the infringement
3 affects not only the individual plaintiff, “but also . . . anyone seeking to express their views in
4 this manner.” *Id.* Here, all detainees are chilled by ICE’s actions. The harms suffered by Mr.
5 Chavez, his fellow detainees, and the public interest outweigh any injury suffered by Defendants.

6 IV. CONCLUSION

7
8 For the above reasons, Mr. Chavez should be granted a Temporary Restraining Order
9 enjoining Defendants from further retaliation, including his incarceration in segregation, solitary
10 confinement, or isolation, based on his engagement in protected free speech activities through
11 the hunger strike.

12
13 RESPECTFULLY SUBMITTED this 23rd of February, 2018.

14
15 AMERICAN CIVIL LIBERTIES UNION OF
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