UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KARLENA DAWSON, et al., Petitioners-Plaintiffs, v. NATHALIE ASHER, et al., Respondents-Defendants.	Case No. C20-0409-JLR-MAT

DECLARATION OF DR. ADA RIVERA

I, Dr. Ada Rivera make the following statements under oath and subject to the penalty of perjury:

1. I am currently the Deputy Assistant Director for Clinical Services/Medical Director of the ICE Health Service Corps (IHSC) of Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement (ICE). I have held this position since July 2017.

2. In my current position, I oversee and monitor all clinical services at IHSC-staffed facilities that house ICE detainees, including the Northwest ICE Processing Center (NIPC) in Tacoma, Washington.

3. IHSC provides direct medical, dental, and mental health patient care to approximately 13,500 detainees housed at 20 IHSC-staffed facilities throughout the nation.

4. IHSC comprises a multidisciplinary workforce that consists of U.S. Public Health Service Commissioned Corps (USPHS) officers, federal civil servants, and contract health professionals.

5. Since the onset of reports of Coronavirus Disease 2019 (COVID-19), ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to IHSC staff for the screening and management of potential exposure among detainees.

6. Moreover, ICE has maintained a pandemic workforce protection plan since February 2014, which was last updated in May 2017. This plan provides specific guidance for biological threats such as COVID-19. ICE instituted applicable parts of the plan in January 2020 upon the discovery of the potential threat of COVID-19.

7. Also, IHSC has been in contact with relevant offices within the Department of Homeland Security, and in January 2020, the DHS Workforce Safety and Health Division provided DHS components additional guidance to address assumed risks and interim workplace controls, including the use of N95 masks, available respirators, and additional personal protective equipment.

8. As a precautionary measure, ICE has temporarily suspended social visitation in all detention facilities.

9. In testing for COVID-19, IHSC is also following guidance issued by the Centers for Disease Control to safeguard those in its custody and care.

10. IHSC has issued recommendations to the field units at detention centers, which it updates and shares on a real-time basis.

11. In summary, during intake medical screenings, comprehensive health assessments or based on detainee complaints, detainees are assessed for fever and respiratory illness, are asked to confirm if they have had close contact with a person with laboratory-confirmed COVID-19 in the past 14 days, and whether they have traveled from or through area(s) with sustained community transmission in the past two weeks.

12. The detainee's responses and the results of these assessments will dictate whether to monitor or isolate the detainee. Those detainees that present symptoms compatible with COVID-19 will be placed in isolation, where they will be tested. If testing is positive, they will remain isolated and treated. In case of any clinical deterioration, they will be referred to a local hospital.

13. In cases of known exposure to a person with confirmed COVID-19, asymptomatic detainees are placed in cohorts with restricted movement for the duration of the most recent incubation period (14 days after most recent exposure to an ill detainee) and are monitored daily for fever and symptoms of respiratory illness. Those that show onset of fever and/or respiratory illness are referred to a medical provider for evaluation. Cohorting is discontinued when the 14-day incubation period completes with no new cases.

14. In the case of exposure to a person with fever or symptoms being evaluated or under investigation for COVID-19 but not confirmed, the process is the same except that cohorting is discontinued if the index patient receives an alternate diagnosis excluding COVID-19.

15. Field units have also been instructed to educate detainees to include the importance of hand washing and hand hygiene, covering coughs with the elbow instead of with hands, and requesting sick call if they feel ill.

16. Currently, IHSC has the following information for the NIPC:

    - There are currently 3 detainees under isolation for fever and/or symptoms plus having epidemiologic risk. Their dates of isolation are as follow:

- 03/16/2020 (Not tested for COVID-19 – The statement on this detainee's medical record reveals that he has not traveled from a country with sustained community spread in the past and has not had contact with a known case in the past 2 weeks, which means that he does not meet the CDC criteria for testing at this time. The detainee is isolated in a single cell and is being monitored closely for clinical worsening of any signs/symptoms consistent with COVID-19)
- 03/16/2020 (Tested for COVID-19 on 03/17/2020; results are pending)
- 03/13/2020 (Tested for COVID-19 on 03/13/2020; results negative for COVID-19)

- There are currently 2 detainees under monitoring for epidemiologic risk without fever or symptoms. Monitoring started on:
  - 03/06/2020
  - 03/03/2020
- There were 2 additional asymptomatic/afebrile detainees under monitoring that were previously released from monitoring after completion of the 14- day monitoring period. Monitoring started:
  - 03/02/2020
  - 01/30/2020
- There have been 2 dorms cohorted at the facility. These dorms are related to the detainees with symptoms who have been tested.
  - Housing Unit B2 74 detainees started 03/13/2020
  - Housing Unit F4 72 detainees started 03/16/2020

17. As of today, IHSC has not received any positive COVID-19 results from the NIPC or any of the rest of the IHSC staffed ICE facilities

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I declare, under penalty of perjury under 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge, information and belief.

DATED: March 18, 2020

ADA I RIVERA Digitally signed by ADA I RIVERA
Date: 2020.03.18 13:24:03 -04'00'

Dr. Ada Rivera
Deputy Assistant Director for Clinical Services/Medical Director
ICE Health Service Corps
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement

The Honorable James L. Robart
The Honorable Mary Alice Theiler

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

KARLENA DAWSON; ALFREDO ESPINOZA-ESPARZA; NORMA LOPEZ NUNEZ; MARJORIS RAMIREZ-OCHOA; MARIA GONZALEZ-MENDOZA; JOE HLUPHEKA BAYANA; LEONIDAS PLUTIN HERNANDEZ; KELVIN MELGAR-ALAS; JESUS GONZALEZ HERRERA,

Petitioners-Plaintiffs,

v.

NATHALIE ASHER, Director of the Seattle Field Office of U.S. Immigration and Customs Enforcement; MATTHEW T. ALBENCE, Deputy Director and Senior Official Performing the Duties of the Director of the U.S. Immigration and Customs Enforcement; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; STEPHEN LANGFORD, Warden, Tacoma Northwest ICE Processing Center,

Respondents-Defendants.

Case No. 20-0409 JLR-MAT

RESPONDENTS-DEFENDANTS' RESPONSE IN OPPOSITION TO THE MOTION FOR A TEMPORARY RESTRAINING ORDER

COMES NOW the Federal Respondents, by and through their attorneys, Brian T. Moran, United States Attorney for the Western District of Washington, and Michelle R.

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Lambert, Assistant United States Attorney for said District, pursuant to the Court's Order Directing Service (ECF 17), and submit this Response to Plaintiffs-Petitioners' Motion for a Temporary Restraining Order.

INTRODUCTION

Neither Plaintiffs' Complaint nor their Motion for a Temporary Restraining Order make any specific allegations about any of the protocols U.S. Immigration and Customs Enforcement ("ICE") has implemented to protect those in its care and custody from the Coronavirus Disease 2019 ("COVID-2019") or the conditions inside the Tacoma Northwest ICE Processing Center ("NIPC"). Instead Plaintiffs claim a constitutional violation purportedly requiring their immediate release from custody because: (1) they are elderly and/or suffer from medical conditions that make them more susceptible to the virus; and (2) the detention center is located near Seattle, where there have been a large number of confirmed COVID-19 cases.

Plaintiffs speculate "[i]t is highly likely…that COVID-19 will reach NIPC," Compl. 8, and their continued detention, under any circumstances, would be unconstitutional because they are particularly vulnerable should they become infected. Plaintiffs ask this Court to hold that detention of anyone at NIPC over age fifty or suffering from certain medical conditions is per se unconstitutional. And, Plaintiffs ask the Court to order their immediate release from a facility with no confirmed COVID-19 cases to a metropolitan area they describe as "the epicenter of the largest COVID-19 outbreak in the United States, and one of the largest known outbreaks in the world." Pls. Mot. for TRO 3. The implications of such a holding would be staggering. Under this theory, not just Plaintiffs, but accused criminals subject to pretrial detention who enjoy broader constitutional protections than Plaintiffs would be constitutionally entitled to release.

The Court should deny the TRO. First, Plaintiffs do not have a cognizable injury, much less an irreparable one. Second, habeas relief is inappropriate for Plaintiffs' conditions of confinement claims, which must be brought under the Civil Rights Statute. Finally, because Plaintiffs constitutional claims lack merit and because the balance of equities and public interest tilt against granting a temporary restraining order, Defendants respectfully request the Court deny Plaintiff's motion.

FACTUAL BACKGROUND

NIPC is an ICE Health Service Corps ("IHSC")-staffed facility that houses ICE detainees. Decl. of Dr. Rivera at ¶ 2. IHSC provides direct medical, dental, and mental health patient care to approximately 13,500 detainees housed at 20 IHSC-staffed facilities throughout the nation. *Id.* ¶ 3. IHSC comprises a multidisciplinary workforce that consists of U.S. Public Health Service Commissioned Corps ("USPHS") officers, federal civil servants, and contract health professionals. *Id.* ¶ 4.

Since the initial reports of COVID-19, ICE epidemiologists have been tracking the outbreak, regularly updating infection prevention and control protocols, and issuing guidance to IHSC staff for the screening and management of potential exposure among detainees. *Id.* ¶ 5. Moreover, ICE has maintained a pandemic workforce protection plan since February 2014, which was last updated in May 2017. This plan provides specific guidance for biological threats such as COVID-19. ICE instituted applicable parts of the plan in January 2020 upon the discovery of the potential threat of COVID-19. *Id.* ¶ 6. IHSC has also been in contact with relevant offices within the Department of Homeland Security, and in January 2020, the DHS Workforce Safety and Health Division provided DHS components additional guidance to

address assumed risks and interim workplace controls, including the use of N95 masks, available respirators, and additional personal protective equipment. *Id.* ¶ 7.

As a precautionary measure, ICE has temporarily suspended social visitation in all detention facilities. *Id.* ¶ 8. In testing for COVID-19, IHSC is also following guidance issued by the Centers for Disease Control ("CDC") to safeguard those in its custody and care. *Id.* ¶ 9. HSC has issued recommendations to the field units at detention centers, which it updates and shares on a real-time basis. *Id.* ¶ 10.

During intake medical screenings, routine comprehensive health assessments, or screenings occasioned by detainee complaints, detainees are assessed for fever and respiratory illness, are asked to confirm if they have had close contact with a person with confirmed COVID-19 in the past 14 days, and whether they have traveled from or through areas with sustained community transmission in the past two weeks. *Id.* ¶ 11. The detainee's responses and the results of these assessments will dictate whether to monitor or isolate the detainee. Those detainees that present symptoms compatible with COVID-19 are placed in isolation, where they are tested. If testing is positive, they will remain isolated and treated. In case of any clinical deterioration, detainees will be referred to a local hospital. *Id.* ¶ 12.

In cases of known exposure to a person with confirmed COVID-19, asymptomatic detainees are placed in cohorts with restricted movement for the duration of the most recent incubation period (14 days after most recent exposure to an ill detainee) and are monitored daily for fever and symptoms of respiratory illness. Those that show onset of fever and/or respiratory illness are referred to a medical provider for evaluation. Cohorting is discontinued when the 14-day incubation period completes with no new cases. *Id.* ¶ 13. In the case of exposure to a person with fever or symptoms being evaluated or under investigation for

COVID-19 but not confirmed, the process is the same except that cohorting is discontinued if the index patient receives an alternate diagnosis excluding COVID-19. *Id.* ¶ 14.

Field units have also been instructed to educate detainees to include the importance of hand washing and hand hygiene, covering coughs with the elbow instead of with hands, and requesting sick call if they feel ill. *Id.* ¶ 15.

As of March 17, 2020, IHSC has cohorted two asymptomatic individuals based on their travel history. *Id.* ¶16. Two additional asymptomatic individuals were cohorted due to travel history or exposure to confirmed cases. Both were released after they completed the 14-fay incubation period without presenting symptoms. *Id.* Three detainees with symptoms have also been isolated, but none have tested positive for COVID-19. *Id.* In fact, as of today, IHSC has not received any positive COVID-19 results from Tacoma NIPC or any IHSC-staffed facility nationwide. *Id.* ¶ 17.

Plaintiffs are nine immigration detainees housed at NIPC who are elderly and/or have various pre-existing medical conditions that require medical treatment.[1] Compl. ¶¶ 41, *et seq*. Plaintiffs allege that their many pre-existing conditions render them at increased risk for serious illness or death if they contract COVID-19. Plaintiffs note that they receive treatment for all of

[1] Among Plaintiffs is Melgar-Alas, a convicted drug distributor for the Mara Salvatrucha ("MS-13") gang. *See, e.g., United States v. Melgar, et al.*, No. 10-50535 (9th Cir. 2011). Plaintiff Lopez-Nunez who has been repeatedly convicted of unlawful entry, removed from the United States on multiple occasions under different identities, assisted others to violate the immigration laws, and was the subject of a civil suit for defrauding the Social Security Administration. [1]Indictment (ECF No. 9), *United States v. Nunez-Lopez*, No. 2:15-cr-01108 (D. Ariz. 2015); Plea Agreement (ECF No. 30), *United States v. Zanabria*, 4:08-cr-01500-CKJ-GEE (D. Ariz. 2008); Plea Agreement (ECF No. 34), *United States v. Zanabria*, No. 2:07-cr-00380 (D. Ariz. 2007); Judgment (ECF No. 54), *United States v. Lopez*, No. 3:13-cr-00226 (S.D. Cal. 2013); Information (ECF No. 12), *United States v. Lopez*, 3:11-cr-01341 (S.D. Cal. 2011); Complaint, *United States v. Zanabria*, No. 2:08-cv-00142 (D. Ariz. 2008). *See also* Wilcox Decl., ¶¶ 8-15 (providing Plaintiff histories).

their pre-existing conditions while residing at NIPC. Compl. ¶¶ 41, *et seq.* Plaintiffs do not allege any particularized deficiency in their medical treatment or in the conditions in which they are housed. *Id.* Nor do Plaintiffs specify any failure of NIPC to respond to and take appropriate measures to protect them from COVID-19. *See id.*

LEGAL STANDARD

The standard for issuing a temporary restraining order is "substantially identical" to the standard for issuing a preliminary injunction. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). "It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original) (internal quotations omitted); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). In moving for a temporary restraining order or a preliminary injunction plaintiffs "must establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Id.*

The Ninth Circuit has adopted a "sliding scale" test for issuing preliminary injunctions, under which "serious questions going to the merits and a hardship balance that tips *sharply* towards the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011) (emphasis added). Thus, Plaintiffs must show that the injunction or TRO is in the public interest and that there is a likelihood, not merely a possibility of irreparable injury. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009).

However, "[w]here a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo pendente lite, courts should be extremely cautious about issuing a preliminary injunction." *Martin v. International Olympic Committee*, 740 F.2d 670, 675 (9th Cir. 1984); *see also Committee of Cent. American Refugees v. Immigration & Naturalization Service*, 795 F.2d 1434, 1442 (9th Cir. 1986). For mandatory preliminary relief to be granted Plaintiffs "must establish that the law and facts *clearly favor* [thei]r position." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (emphasis in original).

ARGUMENT

I. Plaintiffs Lack Article III Standing

"Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The "irreducible constitutional minimum of standing" contains three requirements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, a plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* Second, the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the Court." *Id.* Third, it must be "likely," as opposed to merely "speculative" that the injury will be "redressed by a favorable decision." *Id.* at 560-61 (internal citations omitted). Plaintiffs do not raise a cognizable injury, nor is the alleged injury redressable by this Court.

A. Plaintiffs Lack Injury in Fact

Plaintiffs' allege that, "Defendants' ongoing detention of Plaintiffs violates the Due Process Clause" under the Fifth Amendment because "they risk serious illness and death if infected with COVID-19." Compl. ¶¶ 84-85. Plaintiffs allege that because of their varied pre-existing medical conditions, they bear an elevated risk of serious, adverse outcomes if they contract COVID-19. However, Plaintiffs' assertion that detention *per se* poses an increased risk of health complications or death from COVID-19 is purely speculative. Moreover, ICE has expended extensive resources and efforts to address the very issues that Plaintiffs have identified. Rivera Decl. ¶¶ 5-17.

To establish injury in fact, a plaintiff must show that he or she suffered "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560. Injury in fact is a "constitutional requirement" and is the "[f]irst and foremost" of standing's three elements. *Id.* at 1547-48 (quoting *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 103 (1998)). To be "particularized" the injury "must affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. "Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.'" *Spokeo, Inc*, 136 S. Ct. at 1548. A "concrete" injury must be "'*de facto*'; that is, it must actually exist[,]" that is, it must be "real," and not "abstract." *Id.*

While "the risk of real harm" may, in some circumstances, be sufficiently concrete, "imminence . . . cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes -- that the injury is '*certainly* impending,'" *Lujan*, 504 U.S. at 568; *see Andrews v. Cervantes*, 493 F.3d 1047, 1056 (9th Cir. 2007) ("The common definition of 'imminent,' however, does not refer only to events that are already

taking place, but to those events ready to take place or hanging threateningly over one's head.").

Plaintiffs' alleged harm—that their detention increases their risk of COVID-19—is speculative. Plaintiffs have not alleged that COVID-19 has spread to the NIPC facility. Even assuming the "crowded conditions" Plaintiffs allege, crowding in and of itself does not cause COVID-19 infection if none in the group has contracted COVID-19. *See* Decl. of Marc Stern at ¶ 7 (Dkt. 6). Plaintiffs' claims of future injury are hypothetical, and Plaintiffs are not entitled to immediate release from detention based on a conjectural injury that they have not suffered. An injunction is "unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged [] -- a 'likelihood of substantial and immediate irreparable injury.'" *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

Moreover, even if COVID-19 were introduced to NIPC, Plaintiffs have not alleged—nor could they allege—that Defendants are unprepared to respond to that contingency, particularly in light of the known facts concerning ICE's response to the challenges posed by COVID-19. Rivera Decl. ¶¶5-17. Indeed, Plaintiffs' Complaint demonstrates that Defendants have provided Plaintiffs with fully-funded medical care and medication for a number of different conditions, and have transported Plaintiffs to outside hospitals when circumstances require. Compl. ¶¶41-65).

Any allegation that Defendants would inadequately attend to Plaintiffs' medical needs in the future, at no cost to Plaintiffs, is contradicted by the remainder of their Petition and by their expert declaration. Notably, Andrew Lorenzen-Strait, who "oversaw [ICE's] health and welfare programs and services in immigration detention, including innovative programs to

serve vulnerable populations" does not claim that the preventative measures, including health-related "segregation," are inadequate to prevent the spread of COVID-19. *See* Decl. of Lorenzen-Strait (ECF No. 7) at ¶¶ 2, *et seq.* Plaintiffs cannot show, as they must, that there is a "likelihood of substantial and immediate irreparable injury," *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), in light of the efforts ICE has made to contain and protect NIPC detainees from COVID-19 and the lack of a single confirmed case of COVID-19 at the facility. Rivera Decl. ¶17.; *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (finding standing based on fear, even one that is reasonable, "improperly waters down the fundamental requirements of Article III.").

B. Plaintiffs' Alleged Injury—a Heightened Risk for Serious Consequences from COVID-19—is not Redressable by Release

Plaintiffs' alleged injury—that they are subject to a heightened risk of death or serious illness if they contract COVID-19—will not be redressed by ordering their release. "Redressability requires an analysis of whether the court has the power to right or to prevent the claimed injury." *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (Kennedy, J.). For purposes of standing, a plaintiff's injury is redressable where there is "a 'substantial likelihood' that the requested relief will remedy the alleged injury." *Vermont Agency of Natural Res. v. United States* ex rel. *Stevens*, 529 U.S. 765, 771 (2000) (citation omitted). Plaintiffs' desired relief—release from detention—will not ameliorate or diminish their claimed heightened risk of injury or death resulting from COVID-19, nor can a court order requiring release prevent Plaintiffs from contracting COVID-19.

Notably, Plaintiffs do not explain how release from NIPC, a facility without a single confirmed case of COVID-19, into the greater Seattle area, the "epicenter" of America's COVID-19 crisis, will reduce their risk of injury or death. Pls. Mot. for TRO 3. IHSC provides

medical care at no cost to detainees at NIPC, including Plaintiffs. By reason of their detention, Plaintiffs have greater access to robust medical care than the general public. Ordering their release from NIPC would leave Plaintiffs without their present access to health care would arguably put Plaintiffs at greater risk of serious complications in the event that they contract COVID-19.

II. Plaintiffs May not Challenge the Conditions of his Confinement Through a Habeas Petition Seeking Immediate Release

Plaintiffs' petition for habeas relief seeking immediate release is inappropriate in the context of a conditions of confinement claim. "[T]he writ of habeas corpus is limited to attacks upon the legality or duration of confinement." *Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir. 1979). In *Crawford*, the Ninth Circuit held that "release from confinement" was not the appropriate remedy to address the petitioner's claims "alleg[ing] that the terms and conditions of [petitioner's] incarceration constitute[d] cruel and unusual punishment" and "violated his due process rights." *Id.* at 891-92. Such a claim must be brought as a civil rights claim, *Dohner v. Seifert*, 5 F.3d 535 (9th Cir. 1993), that if proven, would be remedied by "a judicially mandated change in conditions and/or an award of damages." *Crawford*, 599 F.2d at 892. Thus, because Plaintiffs do not assert any illegality or impermissible duration of confinement, Plaintiffs' petition for habeas relief seeking immediate release is inappropriate in the context of their conditions of confinement claim.

III. Plaintiffs Do Not Satisfy the Requirements for Preliminary Relief

A. Plaintiffs are Unlikely to Succeed on the Merits

Likelihood of success on the merits is a threshold issue: "[W]hen 'a plaintiff has failed to show the likelihood of success on the merits, [the court] need not consider the remaining

three [elements].'" *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (quoting *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 944 (9th Cir. 2013)) (internal quotation marks omitted). Plaintiffs' constitutional claims are unlikely to succeed on the merits. Though Plaintiffs fashion their complaint as a challenge to their "conditions of confinement," Plaintiffs do not allege any concrete deficiency in the manner in which they are confined. Rather, Plaintiffs allege that *any* confinement of an individual more susceptible to COVID-19 due to age or medical affliction violates the Constitution. Plaintiffs in effect invite the Court to recognize a due process right to immediate, discretionary release. Plaintiffs have no such due process right.

1. Denial of Discretionary Relief to which Plaintiffs Lack a Legitimate Claim of Entitlement Does not Violate Due Process.

Plaintiffs' prayer for relief makes clear that this litigation has nothing to do with the conditions of Plaintiffs' confinement. Compl. at 19-20. It *does not request a single improvement to their conditions of confinement*. *Id.* As Plaintiffs acknowledge, they essentially seek—and claim a due process interest in—an exercise of "discretion to release." Compl. ¶¶74-75. Therefore, the question is whether Plaintiffs have a due process right to a discretionary grant of parole for "urgent humanitarian reasons or significant public benefit" under 8 U.S.C. § 1182(d)(5)(A); *see also* 8 C.F.R. §§ 212.5(b), 235.3. Compl. ¶74. Plaintiffs do not have such a right.[2]

As a threshold matter this Court is without jurisdiction to review Defendants' decision to grant or deny parole. Title 8 U.S.C. § 1182(d)(5) grants the Attorney General discretion to

[2] Plaintiffs make no effort to distinguish between aliens detained under 8 U.S.C. § 1226(c) and 1231, which mandate detention and others detained under 1225 and 1226(a) for whom discretionary release is available. Congress has expressly prohibited release for individuals detained under 8 U.S.C. § 1226(c) or 1231.

"parole [aliens] into the United States temporarily under such conditions as he may prescribe." Because the authority for the parole decision is specified to "be in the discretion of the Attorney General," 8 U.S.C. § 1252(a)(2)(B)(ii) strips all courts of jurisdiction to review it.

Moreover, to claim a due process interest, Plaintiffs must first allege a legitimate claim of entitlement to a liberty or property interest. Where the benefit sought is discretionary, there can be no due process claim to it. At issue in this case is Plaintiffs' claim of a liberty interest in a discretionary grant of humanitarian parole. Mot. for TRO 15-17. Title 8 U.S.C. § 1182(d)(5)(A) provides that the Attorney General[3] may "in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission…" 8 U.S.C. § 1182(d)(5)(A). The Supreme Court has made clear that "a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005); *see also Appiah v. United States INS*, 202 F.3d 704, 709 (4th Cir. 2000) ("Because suspension of deportation is discretionary, it does not create a protectable liberty or property interest.").

The Ninth Circuit has already determined that parole under § 1182(d)(5)(A) is discretionary, and "[could] discern no substantive liberty or property interest… in temporary parole status[.]" *Kwai Fun Wong v. United States INS*, 373 F.3d 952, 968 (9th Cir. 2004). For that reason, the Ninth Circuit concluded "there is no statutorily created protected interest in

[3] On March 1, 2003, the Immigration and Naturalization Service ("INS") ceased to exist as an independent agency within the Department of Justice, and its functions were transferred to the newly formed Department of Homeland Security ("DHS"). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441, 451, 471, 116 Stat. 2135 (Nov. 25, 2002). The INS was divided into three separate agencies, ICE, Customs and Border Protection ("CBP"), and Citizenship and Immigration Services ("USCIS").

parole." *Wong*, 373 F.3d at 968 ("The INA does not create any liberty interest in temporary parole that is protected by the Fifth Amendment. Rather, the statute makes clear that whether and for how long temporary parole is granted are matters entirely within the discretion of the [Secretary of Homeland Security]."); *Munoz v. Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003) ("Since discretionary relief is a privilege created by Congress, denial of such relief cannot violate a substantive interest protected by the Due Process Clause."); *Regents II*, 298 F. Supp. 3d at 1310 ("Our court of appeals has accordingly held there is no protected interest in temporary parole, since such relief is 'entirely within the discretion of the [Secretary of Homeland Security].' . . . [This] foreclose[s] any argument that plaintiffs have a protected interest in . . . advance parole[.]") (citing *Wong*, 373 F.3d at 967-68). "The INA does not create any liberty interest in temporary parole that is protected by the Fifth Amendment." *Kwai Fun Wong v. United States INS*, 373 F.3d 952, 968 (9th Cir. 2004). Accordingly, because Plaintiffs have no liberty interest to assert with regard to discretionary parole, they can state no claim for release.

2. Plaintiffs Cannot be Substantially Likely to Prevail on the Merits Where they Fail to Address an Essential Element of their Constitutional Claim—Deliberate Indifference

The Supreme Court held in *Helling v. McKinney*, 509 U.S. 25 (1993), that Eighth Amendment claims have a subjective and an objective component. *Id.* at 35. The objective component requires "more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused" by the allegedly unconstitutional conduct. *Id.* at 36. "It also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Id.* Regarding the

subjective element, the Court held that while "accidental or inadvertent failure to provide adequate medical care to a prisoner would not violate the Eighth Amendment, 'deliberate indifference to serious medical needs of prisoners' violates the Amendment because it constitutes the unnecessary and wanton infliction of pain contrary to contemporary standards of decency." *Id.* at 32 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

Plaintiffs, relying on *Helling*, contend that their allegation of potential medical complications should they be exposed to COVID-19 satisfies the objective element of their due process claim. Pls. Mot. for TRO 14. However, *Helling* is clearly distinguishable. Without deciding the merits of the case, the Court held that a prisoner whose cellmate had a five-pack-a-day cigarette habit had standing to bring an Eight Amendment claim challenging an *existing* "condition of confinement that is sure or very likely to cause serious illness and needless suffering." *Helling*, 509 U.S. at 33, 35. Thus, standing was premised on the prisoner's *actual* exposure to smoke, not the facility's location in an area with a high incidence of heavy smokers and the speculative likelihood that one of those smokers would one day share a cell with the petitioner, adversely impacting his health. Plaintiffs would have this Court find the latter cognizable. The other cases cited by Plaintiff are distinguishable for the same reason. Each addressed the petitioner's exposure to *existing* conditions that created a risk of future harm. *See, e.g.*, *Hutto v. Finney*, 437 U.S. 678 (1978) (mingling of inmates with inmates with infectious diseases with others); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (same). At base, Plaintiffs do not allege that they are exposed to COVID-19 in NIPC.

More importantly, Plaintiffs do not even address or argue that the Government has acted with deliberate indifference. Nor could they. ICE has gone to great lengths to implement procedures and protocols to protect its staff and the detainees in their care, including at NIPC.

They have set up screening procedures to identify and isolate potentially infected individuals, in accordance with CDC guidance, to avoid the mingling of infected with uninfected inmates at issue in *Hutto* and *Gates*. Rivera Decl. ¶¶11-14. They have provided staff with guidance on the use of personal protective equipment including N95 masks and available respirators. *Id.* ¶7. The lack of any confirmed COVID-19 cases at any IHSC-staffed facility nationwide, including NIPC underscores the effectiveness and care the Government has taken to protect vulnerable detainees. *Id.* ¶17.

3. Even Applying the Standard Urged by Plaintiffs, their Due Process Claim fails Because their Detention is Related to a Legitimate Government Interest

The Ninth Circuit has made clear that the deliberate indifference requirement extends beyond Eighth Amendment claims to conditions of confinement claims brought under the Due Process Clause by pretrial detainees who enjoy a presumption of innocence, describing deliberate indifference as "akin to reckless disregard." *Castro v. County of Los Angeles*, 833 F.3d 1060, 1068-71 (9th Cir. 2016); *see also Gordon v. County of Orange*, 888 F.3d 1018 (9th Cir. 2018). Rather than address deliberate indifference, Plaintiffs argue that individuals in civil detention, including those in immigration detention, enjoy broader constitutional protections than criminal detainees, therefore there is no need to show deliberate indifference. Pls.' Mot. for TRO 13.

Plaintiffs cite to the Ninth Circuit's decision in *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004), for the proposition that the Constitution entitles them "to conditions of confinement that are superior to those of convicted prisoners." Pls.' Mot. for TRO 14. First, Plaintiffs disregard decades of Supreme Court precedent finding that immigration detainees enjoy *fewer* constitutional protections than the civilly detained U.S. citizen in *Jones*. *See, e.g.*, *Mathews v.*

Diaz, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."); *Demore v. Kim*, 538 U.S. 510, 521 (2003); *Reno v. Flores*, 507 U.S. 292, 305–306 (1993); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *United States v. Verdugo–Urquidez*, 494 U.S. 259, 273 (1990).

Second, even applying the standard proposed by Plaintiffs, they still fail to raise a colorable constitutional claim. *Jones* held that "an individual detained under civil processs…cannot be subjected to conditions that amount to punishment." *Jones*, 393 F.3d at 932. *Jones* holds that civil confinement is presumptively punitive, and therefore unconstitutional if the conditions are "identical to, similar to, or more restrictive than, those in which his criminal counterparts are held." *Id.* at 932. If the presumption applies, the burden shifts to the defendant to show "legitimate, non-punitive interests justifying the conditions of [the detainee's] confinement" and "that the restrictions imposed ... [are] not 'excessive' in relation to these interests." *Id.* at 935. In the immigration context, the Supreme Court has consistently upheld the constitutionality of detention, citing the Government's legitimate interest in protecting the public and preventing aliens from absconding into the United States and never appearing for their removal proceedings. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018); *Demore*, 538 U.S. at 520-22; *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001). Nor is detention pending removal an "excessive" means of achieving those interests. The Supreme Court for over a century has affirmed detention as a "constitutionally valid aspect of the deportation process." *Demore*, 538 U.S. at 523 (listing cases).

B. Plaintiffs have not Shown Irreparable Harm

The Supreme Court's "frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* Conclusory or speculative allegations are not enough to establish a likelihood of irreparable harm. *Herb Reed Enters., LLC v. Florida Entm't Mgmt.*, Inc., 736 F.3d 1239, 1250 (9th Cir. 2013); *see also Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) ("Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction."); *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) (finding irreparable harm not established by statements that "are conclusory and without sufficient support in facts").

As stated above, Plaintiffs allege that only release from NIPC into Seattle, the epicenter of the American COVID-19 crisis, will spare them the heightened risk of adverse consequences from COVID-19 due to their pre-existing conditions. This is not only speculative, but it is unlikely. Plaintiffs do not explain how they will suffer irreparable harm in the absence of an order requiring their release, given that Plaintiffs' existing medical care would be interrupted if not ended as a consequence of their release. If Plaintiffs continue to receive adequate medical care and shelter from COVID-19 in immigration detention, their harm is non-existent much less irreparable.

C. The Balance of Interests and Public Interest Favor Respondents

It is well-settled that the public interest in enforcement of United States immigration laws is significant. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *Blackie's*

House of Beef, Inc. v. Castillo, 659 F.2d 1211, 1221 (D.C. Cir. 1981) ("The Supreme Court has recognized that the public interest in enforcement of the immigration laws is significant."); *see also Nken v. Holder*, 556 U.S. 418, 435 (2009) ("There is always a public interest in prompt execution of removal orders: The continued presence of an alien lawfully deemed removable undermines the streamlined removal proceedings IIRIRA established, and permit[s] and prolong[s] a continuing violation of United States law." (internal marks omitted)).

Plaintiffs ask the Court to order Defendants to declare unconstitutional the detention of "all people over fifty years old and [all] persons of any age with underlying medical conditions[.]" Compl. at 20.[4] Given the vast expanse and indiscriminate nature of Plaintiffs' requested order, the balance of interests clearly favors Defendants. The disruptive effect of such an order would long survive the COVID-19 pandemic, and would serve to release many criminal aliens slated for removal back into the general public. Moreover, the public interest is best served by allowing the orderly medical processes and protocols implemented by government professionals. *See Youngberg v. Romeo*, 457 U.S. 307, 322-23 (1982) (urging judicial deference and finding presumption of validity regarding decisions of medical professionals concerning conditions of confinement). This type of burden and attendant harm, and its potential impact on ICE operations nationwide, is too great to be permissible at this preliminary stage.

Because Plaintiffs cannot show that the balance of hardships and public interest tips in their favor, the Court should deny Plaintiffs' request for preliminary relief.

[4] Considering that ICE detains many individuals that fall into this sweeping category and provides for their medical care, the Court should consider carefully what effect such a release order would impose on the public at a time when states are struggling to provide healthcare resources to address the COVID-19 pandemic.

CONCLUSION

Because Plaintiffs lack standing, have improperly brought their conditions of confinement claims in a habeas petition and cannot satisfy the requirements for preliminary relief, Defendants respectfully request the Court deny Plaintiffs' Motion for a Temporary Restraining Order.

DATED this 18th day of March, 2020.

Respectfully submitted,

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