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

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE

I. INTRODUCTION

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

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Assistant United States Attorney for said District, submit this Reply to Plaintiffs' Response to the Order to Show Cause. Dkt. No. 46 ("OSC Resp.").

Plaintiffs' response to the Order to Show Cause fails to demonstrate their standing in this litigation. Plaintiffs allege that their Fifth Amendment rights are violated by their very detention. Pet., ¶ 84. In their response to this Court's order, Plaintiffs ignore the procedures and protocols implemented by Immigration and Customs Enforcement ("ICE") within Northwest ICE Processing Center ("NWIPC"). Plaintiffs also fail to acknowledge the fact that NWIPC has not had an identified COVID-19 infection. Instead, as the basis for standing, Plaintiffs rely on generalizations concerning detention facilities by "experts" that do not attest to having ever visited NWIPC.

II. ARGUMENT

A. Plaintiffs May Not Challenge The Conditions Of Their Confinement Through A Habeas Petition Seeking Immediate Release.

Plaintiffs assert that they have met the jurisdictional requirements for a habeas claim. OSC Resp., at 2. Contrary to Plaintiffs' assertions that they are not challenging their conditions of confinement, that is the central focus of this litigation. Specifically, whether their detention exposes them to a higher risk of exposure to COVID-19. Plaintiffs have not shown that the medical staff at the facilities are failing to treat medical conditions that are known to them. Nor do Plaintiffs ask this Court to order any different medical treatment or sanitation practices for detainees at NWIPC. Instead, Plaintiffs argue that the only valid method of protection is release. *Id.* To do so, Plaintiffs must demonstrate that the conditions at NWIPC are insufficient to protect them. Accordingly, Plaintiffs are making a conditions-of-confinement claim.

A 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). "It is a well-settled general principle that a habeas petition is the appropriate means to challenge the 'actual fact or duration' of one's confinement, whereas a civil rights claim is the proper means to challenge the 'conditions' of one's confinement. *Kamara, v. Farquharson*, 2 F. Supp. 2d 81, 88 (D. Mass. 1998) (citing *Heck v. Humphrey*, 512 U.S. 477, 481 (1994) and *Viens v. Daniels*, 871 F.2d 1328, 1333 (7th Cir.1989)). 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, 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, their petition for habeas relief, and the remedy of immediate release, are both inappropriate.

A. Plaintiffs lack 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 traceable to Defendants, nor is the alleged injury redressable by this Court.

1. Plaintiffs lack injury in fact.

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.*, 136 S. Ct. at 1548 (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 define their particularized harm as "exposure to a lethal harm that is particularly dangerous to them, with no vaccine or cure. OSC Resp., at 3. Plaintiffs concede that harm cannot be "imaginary or speculative." *Id.* However, Plaintiffs' assertion that detention at NWIPC poses a substantial risk to them contracting COVID-19 remains speculative. No COVID-19 cases have been identified at NWIPC. Moreover, ICE has expended extensive resources and efforts to address the very issues that Plaintiffs have identified. *See generally* Bostock Decl.; Dkt. 31, Rivera Decl.; Second Rivera Decl.

Plaintiffs' response to the order to show cause brings very little new to the table. Plaintiffs' claims of future injury remain hypothetical. Plaintiffs have not alleged that COVID-19 has spread to the NWIPC facility since the Court's order denying their first motion for a TRO. Thus, 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 NWIPC, 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. Dkt. 31, Rivera Decl., ¶¶ 5-17. Moreover, ICE implements its testing in line with the CDC's recommendations. Second Rivera Decl., ¶ 8. Plaintiffs' experts have not addressed any alleged deficiencies with the CDC's recommendations for detention facilities. Plaintiffs cannot show, as they must, that there is a "likelihood of substantial and immediate irreparable injury," *Lyons*, 461 U.S. at 111, in light of the efforts ICE has made to contain and protect

NWIPC 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.").

In support, Plaintiffs rely on cases in which the alleged conditions existed in the facility at the time of the litigation. OSC Resp., at 6 (citing *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (prisoner housed in cell with ill prisoner); *Parsons v. Ryan*, 754 F.3d 657, 677 (9th Cir. 2014) (alleging inadequate medical care); *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985) (alleging inadequate fire safety standards)). Plaintiffs also rely on cases in other districts involving other facilities that have identified cases of COVID-19 infections. However, the analyses of other district courts are not appropriate to determine whether release is warranted at NWIPC. *Sacal-Micha v. Longoria*, 20-cv-37, 2020 U.S. Dist. LEXIS 53474, at *11-12 (S.D. Tex. Mar. 27, 2020) ("The decisions by other district courts considering similar requests demonstrate the fact-specific nature of the analysis.").

2. Even if Plaintiffs could allege an injury, such injury is not fairly traceable to Defendants

To meet the standing requirements of Article III, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). Plaintiffs allege that their continued confinement places them in "dire jeopardy" and that Defendants could release them at any time. OSC Resp., at 7.

As Plaintiffs acknowledge, COVID-19 is a global pandemic and no one and no place is immune, including the area into which they seek release. Dkt. No. 36, Second Motion for a Temporary Restraining Order, at 5, 8 ("Second TRO Mot."). Neither Defendants, nor any

other person or entity, including this Court, can entirely ameliorate the risk of contracting COVID-19. Plaintiffs rely on *Bell v. Wolfish*, 441 U.S. 520, 535 (1979), and *Helling v. McKinney*, 509 U.S. 25, 33 (1993), to argue that a condition of confinement for a civil detainees "violates [] constitutional principle where disease and sickness threaten the infection of a detained or incarcerated person." Second TRO Mot., at 14-15. However, Plaintiffs misread these cases – a constitutional violation only occurs where a detainee's malady is traceable to Defendants' deliberate indifference to current medical conditions or purposeful ignorance to conditions that are "sure or very likely to cause serious illness." *Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("prison authorities may not be deliberately indifferent to an inmate's current health problems[, nor can they] ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year."). Plaintiffs' injury must be traceable to Defendants' deliberate indifference, not to COVID-19 in and of itself. *Henderson v. Sheahan*, 196 F.3d 839, 848 (7th Cir. 1999) (in § 1983 context, noting that the plaintiff's injury must be shown to be "caused by a defendant's deliberate indifference to that risk" of future injury). Where Plaintiffs have not shown any deliberate indifference on the part of Defendants, the risk posed by COVID-19 is more fairly to the nature of pathology of COVID-19 itself, and not Defendants' conduct. *Sacal-Micha*, 2020 U.S. Dist. LEXIS 53474, at *11-12 ("ICE … has implemented preventative measures to reduce the risk of Sacal contracting COVID-19. Those measures may ultimately prove insufficient. But the implementation of those measures preclude a finding that ICE has refused to care … or otherwise exhibited wanton disregard for his serious medical needs. In other words, Sacal has not demonstrated that the conditions in which ICE maintains him in custody arise to the level of a constitutional violation.").

Plaintiffs are not entitled to – and the government cannot guarantee – absolute safety from COVID-19, or any other illness. ICE, however, has taken robust measures to prevent the spread of COVID-19 in NWIPC. *See generally* Bostock Decl.; Second Rivera Decl. Plaintiffs' alleged injury if they contract COVID-19 is insufficient to show that this speculative future harm is fairly traceable to their detention or lack of release.

3. 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.

Plaintiffs allege that only release can adequately address Plaintiffs "right to reasonable protection from the lethal contagious disease placing them at grave risk of serious illness and death." OSC Resp., at 9. Notably, Plaintiffs have not established how release from NWIPC, a facility without a single confirmed case of COVID-19, into "the Seattle, Washington metropolitan area, the center of one of the largest known outbreaks in the United States" will reduce their risk for contracting COVID-19. Second TRO Mot., at 5, 8 ("the Seattle-Tacoma Washington area has been an epicenter of the pandemic in the United States"). Plaintiffs do not

claim that, if released, they would have their own space and resources where they could practice prevention methods such as social distancing and increased hygiene. IHSC provides medical care at no cost to detainees at NWIPC, including Plaintiffs. By reason of their detention, Plaintiffs have greater access to robust medical care than the general public.

Conspicuously missing from Plaintiffs' voluminous filings are declarations explaining where Plaintiffs would go if released or if those conditions would allow Plaintiffs to practice more robust prevention methods than while detained. *See* https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html, last visited March25, 2020. Absent such showing, Plaintiffs cannot establish redressability. *America's Community Bankers v. FDIC*, 200 F.3d 822, 827 (D.C.Cir.2000) (Plaintiffs must demonstrate redressability by "establish[ing] that it is likely, as opposed to merely speculative, that a favorable decision by this court will redress the injury suffered. ").

CONCLUSION

Because Plaintiffs lack standing and have improperly brought their conditions of confinement claims in a habeas petition, Defendants respectfully request the Court to dismiss the Petition.

DATED this 30th day of March, 2020.

Respectfully submitted,

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