

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.

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

6 Neither Plaintiffs' Complaint nor their Motion for a Temporary Restraining Order make
7 any specific allegations about any of the protocols U.S. Immigration and Customs Enforcement
8 ("ICE") has implemented to protect those in its care and custody from the Coronavirus Disease
9 2019 ("COVID-2019") or the conditions inside the Tacoma Northwest ICE Processing Center
10 ("NIPC"). Instead Plaintiffs claim a constitutional violation purportedly requiring their
11 immediate release from custody because: (1) they are elderly and/or suffer from medical
12 conditions that make them more susceptible to the virus; and (2) the detention center is located
13 near Seattle, where there have been a large number of confirmed COVID-19 cases.
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15 Plaintiffs speculate "[i]t is highly likely...that COVID-19 will reach NIPC," Compl. 8,
16 and their continued detention, under any circumstances, would be unconstitutional because they
17 are particularly vulnerable should they become infected. Plaintiffs ask this Court to hold that
18 detention of anyone at NIPC over age fifty or suffering from certain medical conditions is per
19 se unconstitutional. And, Plaintiffs ask the Court to order their immediate release from a
20 facility with no confirmed COVID-19 cases to a metropolitan area they describe as "the
21 epicenter of the largest COVID-19 outbreak in the United States, and one of the largest known
22 outbreaks in the world." Pls. Mot. for TRO 3. The implications of such a holding would be
23 staggering. Under this theory, not just Plaintiffs, but accused criminals subject to pretrial
24 detention who enjoy broader constitutional protections than Plaintiffs would be constitutionally
25 entitled to release.
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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

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

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

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

17 In cases of known exposure to a person with confirmed COVID-19, asymptomatic
18 detainees are placed in cohorts with restricted movement for the duration of the most recent
19 incubation period (14 days after most recent exposure to an ill detainee) and are monitored
20 daily for fever and symptoms of respiratory illness. Those that show onset of fever and/or
21 respiratory illness are referred to a medical provider for evaluation. Cohorting is discontinued
22 when the 14-day incubation period completes with no new cases. *Id.* ¶ 13. In the case of
23 exposure to a person with fever or symptoms being evaluated or under investigation for
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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-day 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. ¹Indictment (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).

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

6 LEGAL STANDARD

7 The standard for issuing a temporary restraining order is “substantially identical” to the
 8 standard for issuing a preliminary injunction. *Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*,
 9 240 F.3d 832, 839 n.7 (9th Cir. 2001). “It frequently is observed that a preliminary injunction is
 10 an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a*
 11 *clear showing*, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972
 12 (1997) (emphasis in original) (internal quotations omitted); *Winter v. Nat. Res. Def. Council,*
 13 *Inc.*, 555 U.S. 7, 22 (2008). In moving for a temporary restraining order or a preliminary
 14 injunction plaintiffs “must establish that [they are] likely to succeed on the merits, that [they
 15 are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of
 16 equities tips in [their] favor, and that an injunction is in the public interest.” *Id.*

17 The Ninth Circuit has adopted a “sliding scale” test for issuing preliminary injunctions,
 18 under which “serious questions going to the merits and a hardship balance that tips *sharply*
 19 towards the plaintiff can support issuance of an injunction, assuming the other two elements of
 20 the *Winter* test are also met.” *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32
 21 (9th Cir. 2011) (emphasis added). Thus, Plaintiffs must show that the injunction or TRO is in
 22 the public interest and that there is a likelihood, not merely a possibility of irreparable injury.
 23 *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009).

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

8 **ARGUMENT**

9 **I. Plaintiffs Lack Article III Standing**

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 11 “Standing to sue is a doctrine rooted in the traditional understanding of a case or
 12 controversy. The doctrine developed in our case law to ensure that federal courts do not exceed
 13 their authority as it has been traditionally understood.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540,
 14 1547 (2016). The “irreducible constitutional minimum of standing” contains three
 15 requirements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, a plaintiff must
 16 have suffered an “injury in fact”—an invasion of a legally protected interest which is (a)
 17 concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’”
 18 *Id.* Second, the injury has to be “fairly . . . trace[able] to the challenged action of the defendant,
 19 and not . . . the result [of] the independent action of some third party not before the Court.” *Id.*
 20 Third, it must be “likely,” as opposed to merely “speculative” that the injury will be “redressed
 21 by a favorable decision.” *Id.* at 560-61 (internal citations omitted). Plaintiffs do not raise a
 22 cognizable injury, nor is the alleged injury redressable by this Court.

23 **A. Plaintiffs Lack Injury in Fact**

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

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

22 While “the risk of real harm” may, in some circumstances, be sufficiently concrete,
 23 “imminence . . . cannot be stretched beyond its purpose, which is to ensure that the alleged
 24 injury is not too speculative for Article III purposes -- that the injury is ‘*certainly* impending,’”
 25 *Lujan*, 504 U.S. at 568; see *Andrews v. Cervantes*, 493 F.3d 1047, 1056 (9th Cir. 2007) (“The
 26 common definition of ‘imminent,’ however, does not refer only to events that are already
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1 taking place, but to those events ready to take place or hanging threateningly over one's
2 head.").

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

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

20 Any allegation that Defendants would inadequately attend to Plaintiffs' medical needs
21 in the future, at no cost to Plaintiffs, is contradicted by the remainder of their Petition and by
22 their expert declaration. Notably, Andrew Lorenzen-Strait, who "oversaw [ICE's] health and
23 welfare programs and services in immigration detention, including innovative programs to
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1 serve vulnerable populations” does not claim that the preventative measures, including health-
 2 related “segregation,” are inadequate to prevent the spread of COVID-19. *See* Decl. of
 3 Lorenzen-Strait (ECF No. 7) at ¶¶ 2, *et seq.* Plaintiffs cannot show, as they must, that there is a
 4 “likelihood of substantial and immediate irreparable injury,” *Los Angeles v. Lyons*, 461 U.S.
 5 95, 111 (1983), in light of the efforts ICE has made to contain and protect NIPC detainees from
 6 COVID-19 and the lack of a single confirmed case of COVID-19 at the facility. Rivera Decl.
 7 ¶17.; *see also Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 416 (2013) (finding standing based
 8 on fear, even one that is reasonable, “improperly waters down the fundamental requirements of
 9 Article III.”).

11
 12 **B. Plaintiffs’ Alleged Injury—a Heightened Risk for Serious Consequences**
 13 **from COVID-19—is not Redressable by Release**

14 Plaintiffs’ alleged injury—that they are subject to a heightened risk of death or serious
 15 illness if they contract COVID-19—will not be redressed by ordering their release.

16 “Redressability requires an analysis of whether the court has the power to right or to prevent
 17 the claimed injury.” *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (Kennedy, J.).

18 For purposes of standing, a plaintiff’s injury is redressable where there is “a ‘substantial
 19 likelihood’ that the requested relief will remedy the alleged injury.” *Vermont Agency of*
 20 *Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (citation omitted).

21 Plaintiffs’ desired relief—release from detention—will not ameliorate or diminish their claimed
 22 heightened risk of injury or death resulting from COVID-19, nor can a court order requiring
 23 release prevent Plaintiffs from contracting COVID-19.

24 Notably, Plaintiffs do not explain how release from NIPC, a facility without a single
 25 confirmed case of COVID-19, into the greater Seattle area, the “epicenter” of America’s
 26 COVID-19 crisis, will reduce their risk of injury or death. Pls. Mot. for TRO 3. IHSC provides
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1 medical care at no cost to detainees at NIPC, including Plaintiffs. By reason of their detention,
 2 Plaintiffs have greater access to robust medical care than the general public. Ordering their
 3 release from NIPC would leave Plaintiffs without their present access to health care would
 4 arguably put Plaintiffs at greater risk of serious complications in the event that they contract
 5 COVID-19.
 6

7 **II. Plaintiffs May not Challenge the Conditions of his Confinement Through a Habeas** 8 **Petition Seeking Immediate Release**

9 Plaintiffs' petition for habeas relief seeking immediate release is inappropriate in the
 10 context of a conditions of confinement claim. "[T]he writ of habeas corpus is limited to attacks
 11 upon the legality or duration of confinement." *Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir.
 12 1979). In *Crawford*, the Ninth Circuit held that "release from confinement" was not the
 13 appropriate remedy to address the petitioner's claims "alleg[ing] that the terms and conditions
 14 of [petitioner's] incarceration constitute[d] cruel and unusual punishment" and "violated his
 15 due process rights." *Id.* at 891-92. Such a claim must be brought as a civil rights claim,
 16 *Dohner v. Seifert*, 5 F.3d 535 (9th Cir. 1993), that if proven, would be remedied by "a judicially
 17 mandated change in conditions and/or an award of damages." *Crawford*, 599 F.2d at 892.
 18 Thus, because Plaintiffs do not assert any illegality or impermissible duration of confinement,
 19 Plaintiffs' petition for habeas relief seeking immediate release is inappropriate in the context of
 20 their conditions of confinement claim.
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24 **III. Plaintiffs Do Not Satisfy the Requirements for Preliminary Relief**

25 **A. Plaintiffs are Unlikely to Succeed on the Merits**

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

1 “parole [aliens] into the United States temporarily under such conditions as he may prescribe.”
 2 Because the authority for the parole decision is specified to “be in the discretion of the Attorney
 3 General,” 8 U.S.C. § 1252(a)(2)(B)(ii) strips all courts of jurisdiction to review it.
 4

5 Moreover, to claim a due process interest, Plaintiffs must first allege a legitimate claim
 6 of entitlement to a liberty or property interest. Where the benefit sought is discretionary, there
 7 can be no due process claim to it. At issue in this case is Plaintiffs’ claim of a liberty interest in
 8 a discretionary grant of humanitarian parole. Mot. for TRO 15-17. Title 8 U.S.C. §
 9 1182(d)(5)(A) provides that the Attorney General³ may “in his discretion parole into the United
 10 States temporarily under such conditions as he may prescribe only on a case-by-case basis for
 11 urgent humanitarian reasons or significant public benefit any alien applying for admission...” 8
 12 U.S.C. § 1182(d)(5)(A). The Supreme Court has made clear that “a benefit is not a protected
 13 entitlement if government officials may grant or deny it in their discretion.” *Town of Castle*
 14 *Rock v. Gonzales*, 545 U.S. 748, 756 (2005); *see also Appiah v. United States INS*, 202 F.3d
 15 704, 709 (4th Cir. 2000) (“Because suspension of deportation is discretionary, it does not create
 16 a protectable liberty or property interest.”).
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19 The Ninth Circuit has already determined that parole under § 1182(d)(5)(A) is
 20 discretionary, and “[could] discern no substantive liberty or property interest... in temporary
 21 parole status[.]” *Kwai Fun Wong v. United States INS*, 373 F.3d 952, 968 (9th Cir. 2004). For
 22 that reason, the Ninth Circuit concluded “there is no statutorily created protected interest in
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25 ³ On March 1, 2003, the Immigration and Naturalization Service (“INS”) ceased to exist as an
 26 independent agency within the Department of Justice, and its functions were transferred to the
 27 newly formed Department of Homeland Security (“DHS”). *See* Homeland Security Act of
 28 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”).

1 parole.” *Wong*, 373 F.3d at 968 (“The INA does not create any liberty interest in temporary
 2 parole that is protected by the Fifth Amendment. Rather, the statute makes clear that whether
 3 and for how long temporary parole is granted are matters entirely within the discretion of the
 4 [Secretary of Homeland Security].”); *Munoz v. Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003)
 5 (“Since discretionary relief is a privilege created by Congress, denial of such relief cannot
 6 violate a substantive interest protected by the Due Process Clause.”); *Regents II*, 298 F. Supp.
 7 3d at 1310 (“Our court of appeals has accordingly held there is no protected interest in
 8 temporary parole, since such relief_ is ‘entirely within the discretion of the [Secretary of
 9 Homeland Security].’ . . . [This] foreclose[s] any argument that plaintiffs have a protected
 10 interest in . . . advance parole[.]”) (citing *Wong*, 373 F.3d at 967-68). “The INA does not create
 11 any liberty interest in temporary parole that is protected by the Fifth Amendment.” *Kwai Fun*
 12 *Wong v. United States INS*, 373 F.3d 952, 968 (9th Cir. 2004). Accordingly, because Plaintiffs
 13 have no liberty interest to assert with regard to discretionary parole, they can state no claim for
 14 release.
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 16

17
 18 **2. Plaintiffs Cannot be Substantially Likely to Prevail on the Merits**
 19 **Where they Fail to Address an Essential Element of their**
 20 **Constitutional Claim—Deliberate Indifference**

21 The Supreme Court held in *Helling v. McKinney*, 509 U.S. 25 (1993), that Eighth
 22 Amendment claims have a subjective and an objective component. *Id.* at 35. The objective
 23 component requires “more than a scientific and statistical inquiry into the seriousness of the
 24 potential harm and the likelihood that such injury to health will actually be caused” by the
 25 allegedly unconstitutional conduct. *Id.* at 36. “It also requires a court to assess whether society
 26 considers the risk that the prisoner complains of to be so grave that it violates contemporary
 27 standards of decency to expose *anyone* unwillingly to such a risk.” *Id.* Regarding the
 28

1 subjective element, the Court held that while “accidental or inadvertent failure to provide
2 adequate medical care to a prisoner would not violate the Eighth Amendment, ‘deliberate
3 indifference to serious medical needs of prisoners’ violates the Amendment because it
4 constitutes the unnecessary and wanton infliction of pain contrary to contemporary standards of
5 decency.” *Id.* at 32 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).
6

7 Plaintiffs, relying on *Helling*, contend that their allegation of potential medical
8 complications should they be exposed to COVID-19 satisfies the objective element of their due
9 process claim. Pls. Mot. for TRO 14. However, *Helling* is clearly distinguishable. Without
10 deciding the merits of the case, the Court held that a prisoner whose cellmate had a five-pack-a-
11 day cigarette habit had standing to bring an Eighth Amendment claim challenging an *existing*
12 “condition of confinement that is sure or very likely to cause serious illness and needless
13 suffering.” *Helling*, 509 U.S. at 33, 35. Thus, standing was premised on the prisoner’s *actual*
14 exposure to smoke, not the facility’s location in an area with a high incidence of heavy smokers
15 and the speculative likelihood that one of those smokers would one day share a cell with the
16 petitioner, adversely impacting his health. Plaintiffs would have this Court find the latter
17 cognizable. The other cases cited by Plaintiff are distinguishable for the same reason. Each
18 addressed the petitioner’s exposure to *existing* conditions that created a risk of future harm.
19 *See, e.g., Hutto v. Finney*, 437 U.S. 678 (1978) (mingling of inmates with inmates with
20 infectious diseases with others); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (same). At
21 base, Plaintiffs do not allege that they are exposed to COVID-19 in NIPC.
22
23
24

25 More importantly, Plaintiffs do not even address or argue that the Government has acted
26 with deliberate indifference. Nor could they. ICE has gone to great lengths to implement
27 procedures and protocols to protect its staff and the detainees in their care, including at NIPC.
28

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

8
 9 **3. Even Applying the Standard Urged by Plaintiffs, their Due Process**
 10 **Claim fails Because their Detention is Related to a Legitimate**
 11 **Government Interest**

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

21
 22 Plaintiffs cite to the Ninth Circuit’s decision in *Jones v. Blanas*, 393 F.3d 918 (9th Cir.
 23 2004), for the proposition that the Constitution entitles them “to conditions of confinement that
 24 are superior to those of convicted prisoners.” Pls.’ Mot. for TRO 14. First, Plaintiffs disregard
 25 decades of Supreme Court precedent finding that immigration detainees enjoy *fewer*
 26 constitutional protections than the civilly detained U.S. citizen in *Jones*. *See, e.g., Mathews v.*
 27
 28

1 *Diaz*, 426 U.S. 67, 79–80 (1976) (“In the exercise of its broad power over naturalization and
 2 immigration, Congress regularly makes rules that would be unacceptable if applied to
 3 citizens.”); *Demore v. Kim*, 538 U.S. 510, 521 (2003); *Reno v. Flores*, 507 U.S. 292, 305–306
 4 (1993); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *United States v. Verdugo–Urquidez*, 494 U.S.
 5 259, 273 (1990).

7 Second, even applying the standard proposed by Plaintiffs, they still fail to raise a
 8 colorable constitutional claim. *Jones* held that “an individual detained under civil
 9 processs...cannot be subjected to conditions that amount to punishment.” *Jones*, 393 F.3d at
 10 932. *Jones* holds that civil confinement is presumptively punitive, and therefore
 11 unconstitutional if the conditions are “identical to, similar to, or more restrictive than, those in
 12 which his criminal counterparts are held.” *Id.* at 932. If the presumption applies, the burden
 13 shifts to the defendant to show “legitimate, non-punitive interests justifying the conditions of
 14 [the detainee’s] confinement” and “that the restrictions imposed ... [are] not ‘excessive’ in
 15 relation to these interests.” *Id.* at 935. In the immigration context, the Supreme Court has
 16 consistently upheld the constitutionality of detention, citing the Government’s legitimate
 17 interest in protecting the public and preventing aliens from absconding into the United States
 18 and never appearing for their removal proceedings. *See Jennings v. Rodriguez*, 138 S. Ct. 830,
 19 836 (2018); *Demore*, 538 U.S. at 520-22; *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001).
 22 Nor is detention pending removal an “excessive” means of achieving those interests. The
 23 Supreme Court for over a century has affirmed detention as a “constitutionally valid aspect of
 24 the deportation process.” *Demore*, 538 U.S. at 523 (listing cases).

26 **B. Plaintiffs have not Shown Irreparable Harm**

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

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

21 **C. The Balance of Interests and Public Interest Favor Respondents**

22 It is well-settled that the public interest in enforcement of United States immigration
 23 laws is significant. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *Blackie’s*
 24

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

8 Plaintiffs ask the Court to order Defendants to declare unconstitutional the detention of
 9 “all people over fifty years old and [all] persons of any age with underlying medical
 10 conditions[.]” Compl. at 20.⁴ Given the vast expanse and indiscriminate nature of Plaintiffs’
 11 requested order, the balance of interests clearly favors Defendants. The disruptive effect of
 12 such an order would long survive the COVID-19 pandemic, and would serve to release many
 13 criminal aliens slated for removal back into the general public. Moreover, the public interest is
 14 best served by allowing the orderly medical processes and protocols implemented by
 15 government professionals. *See Youngberg v. Romeo*, 457 U.S. 307, 322-23 (1982) (urging
 16 judicial deference and finding presumption of validity regarding decisions of medical
 17 professionals concerning conditions of confinement). This type of burden and attendant harm,
 18 and its potential impact on ICE operations nationwide, is too great to be permissible at this
 19 preliminary stage.

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

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

1 **CONCLUSION**

2 Because Plaintiffs lack standing, have improperly brought their conditions of
3 confinement claims in a habeas petition and cannot satisfy the requirements for preliminary
4 relief, Defendants respectfully request the Court deny Plaintiffs' Motion for a Temporary
5 Restraining Order.
6

7
8 DATED this 18th day of March, 2020.

9 Respectfully submitted,

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