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

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I. INTRODUCTION

Like the first TRO motion, this Court should deny the Plaintiffs' second TRO motion Dkt. No. 36 ("Mot.") because they have not demonstrated that their detention at the Northwest ICE Processing Center ("NWIPC") violates due process solely because of the Coronavirus Disease 2019 ("COVID-19") pandemic in the United States. In fact, this TRO motion is tantamount to a motion for reconsideration of their original TRO. Plaintiffs assert that "key developments" since this Court's order denying their TRO have changed the "narrow set of circumstances before the Court." Mot., at 1. These key developments include, *inter alia*, an unpublished *sua sponte* Ninth Circuit order releasing a detainee from a different detention facility, orders from other federal courts that have released individuals on bail or delayed imprisonment, local governments that have released prisoners, and a letter from two doctors to Congress recommending that the Department of Homeland Security ("DHS") should consider releasing detainees in high risk medical groups.

However, Plaintiffs continue to fail to demonstrate that the protocols U.S. Immigration and Customs Enforcement ("ICE") has implemented to protect those in its care and custody from COVID-19 or the conditions inside of NWIPC make their detention an excessive condition in relation to the legitimate objective of immigration detention. NWIPC has had no confirmed cases of COVID-19. Second Rivera Decl., ¶ 11. In addition, overcrowding is not an issue: NWIPC is only at 53.2% capacity. Bostock Decl., ¶ 6. Importantly, ICE and the ICE Health Service Corp ("IHSC") have implemented robust procedures and protocols to protect the detainees, as described below. Plaintiffs ignore these facts, instead emphasizing the state of COVID-19 outside of NWIPC.

Plaintiffs again ask the Court to order their immediate release. Plaintiffs assert, "release is the *only* mechanism that can safeguard Plaintiffs' safety and lives in the present crisis. Mot., at 2. Plaintiffs' motion is based on the assumption that Plaintiffs are unsafe in NWIPC – a facility with no confirmed COVID-19 cases and excellent medical care available to the detainees – and speculation that Plaintiffs will be safer in the metropolitan area they describe as "the center of one of the largest known outbreaks in the United States." Mot., at 5. Notably absent from Plaintiffs' filings are declarations explaining where Plaintiffs intend to go if released, or if they even intend to abide by social distancing. 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 constitutional claims lack merit. Second, Plaintiffs do not have a cognizable injury, much less an irreparable one. Finally, the balance of equities and public interest tilt against granting a temporary restraining order. Accordingly, Defendants respectfully request the Court deny Plaintiff's motion.

II. FACTUAL BACKGROUND

A. Measures at NWIPC in response to COVID-19.

1. Detainee intake at NWIPC.

NWIPC is an ICE Health Service Corps ("IHSC")-staffed facility that houses ICE detainees. Dkt. No. 31, Second Decl. of Dr. Rivera, ¶ 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 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 DHS, 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.

Overcrowding is not an issue at NWIPC. NWIPC currently houses 838 detainees while it has the capacity to hold 1,575 detainees. Bostock Decl., ¶ 6. Moreover, ICE does not anticipate transfers from the southern border in the foreseeable future. *Id.*, ¶ 7. ICE has also adjusted its enforcement posture to ensure safety in light of the ongoing COVID-19 pandemic to focus its enforcement on public safety risks and individuals subject to mandatory detention based on criminal grounds. *Id.*, ¶ 8. For individuals who do not fall into those categories, ICE is currently exercising its discretion to delay enforcement actions until after the COVID-19 crisis or utilize alternatives to detention, as appropriate. Accordingly, ICE anticipates a limited number of incoming detainees at NWIPC during the COVID-19 crisis. *Id.*, ¶ 9.

As of March 26, 2020, IHSC has implemented temperature and prescreening checks of all new detainees arriving at the NWIPC prior to entrance to the facility. Bostock Decl., ¶ 11. 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. Dkt. 31, Rivera Decl., ¶ 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.

As of March 20, 2020, all incoming detainees to the NWIPC who do not meet the current IHSC protocol requirements for isolation monitoring due to possible COVID-19 symptoms, exposure or testing, are placed in two separate housing units for 14 days of monitoring for signs or symptoms of COVID-19. Bostock Decl., ¶ 14. One unit is designated for male detainees and another for female detainees. *Id.* These housing units contain separate cells. *Id.* Each cell may house up to four detainees, however not every cell is filled to maximum occupancy. *Id.* Detainees who are admitted to the facility on the same date and who are determined to be the same risk classification level may be housed in the same cell. *Id.* Detainees admitted on separate dates and those at different risk classification levels are not housed together. *Id.* Detainees in the 14-day observation period are not allowed to commingle with other detainees in common areas during that 14-day period. *Id.* If 14 days pass without any detainees in a cell displaying signs or symptoms of COVID-19, the detainees are released

to other housing units in the facility. *Id.* A separate remote medical unit has been established to monitor detainees undergoing 14-day observation in these two housing units. *Id.*

2. Detainee education, hygiene and sanitation at NWIPC.

The GEO Group ("GEO") is an independent contractor that provides the facility, management, personnel and services for 24-hour supervision of immigrant detainees in ICE custody at NWIPC. Bostock Decl., ¶ 4. In response to COVID-19, GEO has informed ICE that it has enhanced cleaning in all housing units, food preparation and service areas, intake rooms and other work centers with increased emphasis on cleaning contact areas with disinfectant cleaners approved as effective against COVID-19. *Id.*, ¶ 16. Soap and cleaning supplies are made available by GEO to detainees in all housing units and work areas at NWIPC. *Id.*, ¶ 17. GEO has informed ICE that it has increased the amount of soap, disinfectant cleaner and food service sanitizer in every housing unit in response to COVID-19, and that inventory levels of these supplies are monitored on each shift to ensure ready availability. *Id.*

As a response to COVID-19, GEO's executive staff have been conducting weekly town hall meetings with detainees in every housing unit at NWIPC specifically to educate detainees on hand washing and covering coughs. *Id.*, ¶ 18. At these meetings, GEO instructs detainees to clean tables and horizontal surfaces with San-T-10 Plus Food Service Sanitizer before each meal and a neutral disinfectant after each meal. *Id.* Detainees are further instructed to clean countertops, microwave handles, door handles, exercise equipment, electronic tablets used for detainee entertainment and communication, telephones and any high-risk contact areas with disinfectant cleaner. *Id.* A demonstration is provided as to how to clean electronic tablets and telephones and detainees are instructed to clean them after each use. *Id.*

3. Detainee visitation and staff safety measures.

ICE has taken strong precautionary measures to protect detainees from COVID-19 entering NWIPC. ICE has temporarily suspended social visitation in all detention facilities. *Id.*, ¶ 19. All tours of NWIPC have been cancelled. *Id.*, ¶ 20. GEO is screening all contractors, vendors, attorneys and court visitors through a questionnaire that includes, inter alia, questions regarding whether the individual is currently experiencing any possible symptoms of COVID-19 and recent travel history. *Id.*, ¶ 21. Individuals who positively report possible symptoms, possible exposure to COVID-19, or recent travel to areas of concern are prohibited from entering NWIPC. *Id.* Attorney visits at NWIPC are limited to noncontact visits unless a contact visit is necessary and approved by the ICE Officer in Charge or the Assistant Officer in Charge. *Id.*, ¶ 22.

ICE has instituted a telework program for its employees at the NWIPC, minimizing the number of employees present at the facility. *Id.*, ¶ 26. For the employees that must appear at NWIPC, ICE and GEO employees have received multiple instructions and reminders concerning the importance of hand washing and covering coughs to prevent the spread of COVID-19. *Id.*, ¶ 23. Extra hand sanitizer has been provided to employees throughout NWIPC. *Id.* ICE has provided its own employees with disinfectant wipes so they may conduct extra daily cleaning of high contact areas within their workspaces (door handles, phones, computers, etc.) in addition to the daily cleaning provided by GEO maintenance staff. *Id.*

In addition, ICE and GEO employees have been instructed to stay home in the event that they are sick, experiencing any possible symptoms of COVID-19, or have been in close contact with someone diagnosed with COVID-19. *Id.*, ¶ 24. Staff have also been asked about recent travel to areas with COVID-19 outbreaks, such as New York. *Id.* Both GEO and ICE

employees who are ill or believe they may have been exposed to COVID-19 are instructed to follow the advice of their personal care providers. *Id.* No ICE or GEO employees or staff at the NWIPC have reported testing positive for COVID 19. *Id.*

4. COVID-19 testing at NWIPC.

IHSC conducts COVID-19 testing pursuant to guidance issued by the Centers for Disease Control ("CDC"): *CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*. Second Rivera Decl., ¶ 8. The clinician will screen for signs and symptoms compatible with COVID-19, such as fever, cough, difficulty breathing (and other respiratory illness symptoms). *Id.* The clinician will also consider epidemiologic factors such as the occurrence of local community transmission of COVID-19 infections in a jurisdiction and is encouraged to test for other causes of respiratory illness. *Id.* The resulting analysis of these factors will determine if the individual meets the criteria for testing. *Id.* The local health department is always consulted prior to obtaining samples. *Id.* The samples are sent to IHSC's contract commercial laboratory, the local health department or the CDC depending on availability of testing. *Id.*

There have been no positive COVID-19 tests within the IHSC staffed detained population since IHSC started screening in January. *Id.*, ¶ 11. While testing has been conducted only on symptomatic individuals, IHSC monitors daily, separately or within cohorts, detainees who do not have symptoms arriving from countries with community transmission of COVID-19 and detainees with exposure to known positive COVID-19 individuals. *Id.* In addition, high-risk detainees are monitored through chronic care clinics and all detainees have daily access to sick call and are treated according to their needs. *Id.*, ¶ 9.

5. Alternatives to detention.

Early last week, ICE's Enforcement Removal Operations ("ERO") Tacoma began conducting a discretionary review of detainee cases identified by IHSC as meeting the CDC's criteria as at-risk due to COVID-19, based on their medical records. Bostock Decl., ¶ 31. Such a review process is labor intensive as it requires not only identification by IHSC that a detainee falls within an at-risk category, but also a review of each detainee's immigration and criminal history to determine whether they are subject to various mandatory custody provisions. *Id.* If an identified detainee is not subject to mandatory custody, a case-by-case analysis is then conducted to determine whether each detainee is a danger and/or flight risk such that release is not appropriate. *Id.* As a result of this ongoing review process, ICE has already released six detainees from custody, including two of the named Plaintiffs. *Id.*, ¶ 32.

B. Plaintiff's immigration and criminal histories.[1]

Out of the nine Plaintiffs, only seven remain at NWIPC. After IHSC identified two Plaintiffs as being at-risk for a severe illness due to COVID-19, ICE reviewed their cases and released Plaintiffs Alfredo Espinoza-Esparza and Leonidas Plutin Hernandez. Bostock Decl., ¶¶ 34, 39; see also Lambert Decl., Ex. A. In addition, Plaintiff Maria Gonzalez-Mendoza is scheduled for an individual hearing before an Immigration Judge ("IJ") on March 31, 2020, where she may raise the issue of bond. *Id.*, ¶ 37. Plaintiff Jesus Gonzalez-Herrerra is currently detained pursuant to INA § 236(a). *Id.*, ¶ 41. ICE will not oppose a request for a bond hearing. *Id.*

Many of Plaintiffs are not eligible for release at this time. Plaintiff Joe Hlupheka Bayana's actual name is Mketwa Phiri. *Id.*, ¶ 38. He has been arrested approximately twenty-

[1] For a more detailed recitation, please OIC Bostock's Declaration, ¶¶ 33-42.

two times for charges such as trespassing, lardeny, drugs, assault, and harassing communications. *Id.* Plaintiff Kelvin Melgar-Alas, convicted of methamphetamine distribution and a RICO violation, and a former MS-13 gang member, was denied bond in February 2020 after an IJ found him to be a danger to the community and a flight risk. *Id.*, ¶ 40. Plaintiff Norma Lopez Nunez has been designated as a *Franco-Gonzalez* class member with a court-appointed representative who withdrew her last request for bond and has never renewed the request. *Id.*, ¶ 35. Maria Ramirez-Ochoa, convicted of felony robbery that included the use of a firearm, is being held pursuant to Immigration and Nationality Act § 235(b), without eligibility for bond. *Id.*, ¶ 36. Plaintiff Karlena Dawson is ineligible for bond as she is also being held pursuant to INA § 235(b). *Id.*, ¶ 42.

C. This Court's Order denying Plaintiff's motion for a TRO.

On March 19, 2020, this Court denied Plaintiffs' first motion for a TRO. Dkt. No. 33. The Court held that Plaintiffs did not meet their burden to make a clear showing that they are likely to succeed on the merits or that they are likely to suffer from irreparable harm. *Id.*, at 4. The Court did not identify a Fifth Amendment violation. The Court found that "Plaintiffs' current confinement does not appear excessive" in relation to ICE's legitimate governmental objective in "preventing detained aliens from absconding and ensuring that they appear for removal proceedings." *Id.*, at 5. The Court further stated that even if there was a due process violation, Plaintiffs failed to provide authority justifying immediate release as requested. *Id.* In finding Plaintiffs failed to show that they are likely to suffer from irreparable harm, the Court noted, "There is no evidence of an outbreak at the detention center or that Defendants' precautionary measures are inadequate to contain such an outbreak or properly provide medical care should it occur." *Id.*, at 6.

As described above, there has been no identified cases of COVID-19 at NWIPC since the Court's Order, and Plaintiffs still fail to show that Defendants' precautionary measures are inadequate to contain infected individuals or properly provide medical care should it occur.

III. OBJECTIONS TO PLAINTIFFS' DECLARATIONS

Defendants object to the declaration of Andrew Lorenzen-Strait. Dkt. No. 40. Mr. Lorenzen-Strait is a former DHS employee, and as such, any testimony he provides related to DHS is subject to DHS's "Touhy" regulations at 6 C.F.R. § 5.41, *et seq.* Mr. Lorenzen-Strait does not speak on behalf of DHS. He did not seek, nor did DHS grant, permission for him to provide testimony on the topics in his declaration. *See* Lambert Decl., Ex. B. Moreover, as Mr. Lorenzen-Strait recognizes, ICE is vested with discretion to release certain individuals from detention. Lorenzen Decl., ¶ 3. The observations of this former DHS employee as to how ICE exercised its discretion in past years are not instructive in deciding Plaintiffs' request, which asks this Court to override ICE's statutory and regulatory discretion and order Plaintiffs released.

Defendants recognize that the COVID-19 public health emergency has made it difficult for Plaintiffs' counsel to obtain signed declarations from Plaintiffs. That does not change the fact that the declarations purporting to demonstrate Plaintiffs' health and the conditions at the detention facilities are inherently unreliable.

In this regard, Defendants object to the declarations of Emma Rekart, Dkt No. 41, and Alejandra Gonza, Dkt. No. 42, as being replete with hearsay and/or not based on the personal knowledge of the declarant. The Court should afford little or no weight to these unreliable declarations. Courts may, in their discretion, give some weight to hearsay and otherwise inadmissible evidence when considering whether to issue emergency relief. *See, e.g.*, *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988); *Flynt Distrib. Co., Inc. v.*

Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984). The above declarations warrant little or no weight because they are significantly lacking in foundational support and other indicia of reliability.

Likewise, the declarant physicians lack a sufficient factual basis about the current conditions at NWIPC, and therefore any specialized opinions about NWIPC's conditions hold little weight. Opinions based on scientific, technical, or specialized knowledge are governed by Rule 702. Importantly, Rule 702 requires the trial judge to ensure that expert opinions are not only relevant, but also reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). To be reliable, the underlying facts or data upon which an expert relies must be reliable; when an expert does not cite factual support for their opinion, it lacks indicia of reliability. *United States ex rel. Jordan v. Northrop Grumman Corp.*, No. CV 95-2985 ABC (EX), 2003 WL 27366247, at *3 (C.D. Cal. Feb. 24, 2003) (finding the expert testimony unreliable because it amounted to "conclusory opinions lacking any factual basis.").

In addition, the physicians that wrote to Congress are not DHS's experts in this matter, contrary to Plaintiffs' assertions otherwise. Lambert Decl., Ex. C. And the physicians' letter to Congress is an unsworn statement, thereby lacking indicia of reliability. *Northrop Grumman Corp.*, 2003 WL 27366247, at *3. Because the physicians' declarations do not rely on sufficient facts and data, this Court should afford them little to no weight.

IV. 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).

V. ARGUMENT

The Court should again deny Plaintiffs' Motion for TRO as they have failed to establish standing,[2] a likelihood of success on the merits, and the suffering of irreparable harm. As well, Plaintiffs have not established that public interest weighs decidedly in their favor. Accordingly, and for reasons further discussed below, Defendants respectfully request that the Court deny Plaintiffs' request for a TRO.

A. Plaintiffs do not satisfy the requirements for preliminary relief.

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*, 786 F.3d at 740 (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. Plaintiffs allege that *any* confinement of an individual more susceptible to COVID-19 due to age or medical affliction violates the Constitution.[3] Plaintiffs in effect invite the Court to recognize a due process right to immediate, discretionary release. Plaintiffs have no such due process right.

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[2] Standing is being addressed in a separate reply in response to Plaintiffs' response to the Court's Order to Show Cause. Dkt. No. 46.

[3] Plaintiffs ostensibly request relief on behalf of all individuals at a heightened risk for COVID-19. Pet., Prayer for Relief, ¶ c. Yet Plaintiffs have not obtained class certification or even filed a motion to do so. Moreover, Plaintiffs make no attempt to comply with the requirements of Federal Rule of Civil Procedure 23, which establishes the prerequisites for a suit to be maintained as a class action. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (individuals seeking to bring a class action must satisfy "four requirements—numerosity, commonality, typicality, and adequate representation"); *Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 529 (D.C. Cir. 2006). Without satisfying Rule 23, Plaintiffs cannot justify "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–701 (1979). As such, their claims for sweeping relief should be dismissed as improperly pleaded.

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

As Plaintiffs acknowledge, they 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.[4]

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 "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. Title 8 U.S.C. § 1182(d)(5)(A) provides that the Attorney General[5] 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

[4] 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.

[5] 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").

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 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." *Wong*, 373 F.3d at 968. Accordingly, because Plaintiffs have no liberty interest to assert with regard to discretionary parole, they can state no claim for release.

2. *ICE's robust preventative measures against COVID-19 do not violate the Fifth Amendment.*

In its Order denying Plaintiffs' first motion for a TRO, this Court stated that to evaluate the constitutionality of detention under the Fifth Amendment, a district court must determine whether pretrial detention conditions "amount to punishment of the detainee." Order, at 4. The Court specifically described punishment as an "express intent or a restriction or condition that is not reasonably related to a legitimate governmental objective." *Id.* (internal quotation marks omitted). The Court found no express intent alleged; and cited Supreme Court precedent finding detention during immigration proceedings as a legitimate governmental objective. *Id.* The Court specifically found that Plaintiffs failed to cite to any authority "that detention itself becomes an 'excessive' condition solely due to the risk of a communicable disease outbreak.

Plaintiffs attempt to rectify this failure by citing to a recent Ninth Circuit order and various other orders from other courts and localities. Mot., at 12-13. However, these cases are distinguishable in that none of them involve NWIPC. Moreover, the Ninth Circuit order does not hold that continued detention would violate the detainee's Fifth Amendment due process right.[6] *Xochihua-Jaimes v. Barr*, No. 18-71460, 2020 WL 1429877 (9th Cir. March 24, 2020). Plaintiffs continue to rely on *Helling v. McKinney*, 509 U.S. 25 (1993), to contend that their allegation of potential medical complications should they be exposed to COVID-19 satisfies the objective element of their due process claim. Mot., at 15. However, as this Court noted in its

[6] While the *Xochihua-Jaimes* order was initially designated "for publication," the Ninth Circuit has corrected that designation, stating that the order has not been selected for publication, and is subject to Ninth Circuit Rule 36-3. *See* 2020 WL 1429877. Under Ninth Circuit Rule 36-3, unpublished orders such as this are not precedent. In any event, even if the *Xochihua-Jaimes* order could be cited as precedent, it contains no discussion or analysis of any facts specific to the petitioner or immigration detention center in that case that might prove instructive in the instant case. The order was also issued *sua sponte*, without the benefit of briefing from either party on any claim for release based on COVID-19, or on the factual specifics related to such a claim.

order denying Plaintiffs' first TRO motion, *Helling* is clearly distinguishable. The injury in *Helling* 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. At base, Plaintiffs do not allege that they are exposed to COVID-19 in NWIPC.

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 NWIPC. 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*. Second Rivera Decl., ¶¶ 8-10. They have provided staff with guidance on the use of personal protective equipment including N95 masks and available respirators. Dkt. No. 31, Rivera Decl., ¶7. The lack of any confirmed COVID-19 cases at any IHSC-staffed facility nationwide, including NWIPC, underscores the effectiveness and care the Government has taken to protect vulnerable detainees. *Id.*, ¶17.

3. Plaintiffs have not shown deliberate indifference.

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) (en banc) ("[There is] a single 'deliberate indifference' test for plaintiffs who bring a constitutional claim—whether under the Eighth Amendment or the

Fourteenth Amendment."); *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. Mot., at 15 n.12.

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." Mot., at 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 process…cannot be subjected to conditions that amount to punishment." *Jones*, 393 F.3d at 932. *Jones* also held 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).

Having established that there is a legitimate interest in continued detention, the focus turns to the "conditions of confinement" in the civil detention context. "Prison officials must provide humane conditions of confinement and must take reasonable measures to guarantee the safety of inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). The Ninth Circuit "ha[s] long analyzed claims that government officials failed to address pretrial detainees' medical needs using the same standard as cases alleging that officials failed to protect pretrial detainees in some other way." *Gordon*, 888 F.3d at 1124. The elements of a civil detainee's medical care claim under the due process clause of the Fourteenth Amendment are:

> (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries.

Gordon, 888 F.3d at 1125. "The mere lack of due care by a state official does not deprive an individual of life, liberty, or property under the Fourteenth Amendment." *Id.* As civil detainees, Plaintiffs "prove more than negligence but less than subjective intent—something akin to reckless disregard." *Id.* (quoting *Castro*, 833 F.3d at 1071). "The 'more protective'

Fourteenth Amendment standard requires more than minimal necessities, but does not require conditions of confinement free from discomfort" or from risks inherent to a detention setting. *Unknown Parties v. Nielsen*, No. CV-15-00250-TUC-DCB, 2020 U.S. Dist. LEXIS 27890, at *8 (D. Ariz. Feb. 19, 2020) (citing *Jones*, 393 F.3d at 932)).

The record demonstrates that Defendants have taken substantial efforts to provide a safe and sanitary environment for those housed at NWIPC. Rivera Decl., ¶¶ 5, 8, 11-15; Second Rivera Decl., ¶¶ 8-12. Plaintiffs take issue with the measures that Defendants have taken to prevent and/or stymie any potential spread of COVID-19 in Defendants' facilities because those measures do not include release. Plaintiffs, in essence, argue that if Defendants cannot do what Plaintiffs' describe as "virtually impossible[,]" (Mot., at 5) any confinement *per se* violates Plaintiffs' constitutional rights. This is not so. As civil detainees, Plaintiffs "must show" that the precautions taken to prevent a COVID-19 are "objectively unreasonable." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). "Prison regulations . . . are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights[.]" *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 349 (1987). This "reasonableness" test is applicable in both the civil and criminal detention contexts. *Riggins v. Nevada*, 504 U.S. 127, 135 (1992).

Plaintiffs' claim that anything less than preventing the "virtually impossible" is a constitutional violation is unfounded. Plaintiffs' demands of absolute perfection in preventive medicine and a warranty of good heath have never been required under the constitution. *Sacal-Micha v. Longoria*, No. 1:20-CV-37, 2020 U.S. Dist. LEXIS 53474, at *15 (S.D. Tex. Mar. 27, 2020) ("the fact that ICE may be unable to implement the measures that would be required to fully guarantee Sacal's safety does not amount to a violation of his constitutional rights and

does not warrant his release"). In *Kingsley*, the Supreme Court made clear that the due process test for conditions of civil confinement is an objective one based on reasonableness. Inherently, reasonableness has limits. "[A] court must take account of the legitimate interests in managing a jail, acknowledging as part of the objective reasonableness analysis that deference to policies and practices needed to maintain order and institutional security is appropriate." *Kingsley*, 135 S. Ct at 2474. The requirement under the Fifth and Eighth Amendments that Defendants must provide "safe and sanitary" conditions to those in custody are not—nor could they be—guarantees against injury or infirmary during government custody. While the government is obliged to make reasonable efforts to provide healthy conditions, detention facilities do not operate in a sphere of strict liability. *Steading v. Thompson*, 941 F.2d 498, 499 (7th Cir. 1991) ("neither negligence nor strict liability is the appropriate inquiry in prison-conditions cases."). Rather, Plaintiffs must show that Defendants have acted with objective disregard, and that this disregard has caused the conditions in which they are housed to become objectively unreasonable and unsafe. *Kingsley*, 135 S. Ct. at 2473; *see also Carroll v. DeTella*, 255 F.3d 470, 472 (7th Cir. 2001) ("Many Americans live under conditions of exposure to various contaminants. The [Constitution] does not require prisons to provide prisoners with more salubrious air, healthier food, or cleaner water than are enjoyed by substantial numbers of free Americans."). Plaintiffs are not relieved of their burden of proof by simply citing to the pandemic. *Sacal-Micha v. Longoria*, No. 1:20-CV-37, 2020 U.S. Dist. LEXIS 53474, at *15 (S.D. Tex. Mar. 27, 2020).

Here, Defendants have taken numerous reasonable precaution to prevent the outbreak of COVID-19 in its facilities, and have action plans in place to prevent the spread of COVID-19 if it is introduced to NWIPC. Rivera Decl., ¶¶ 11-12; Second Rivera Decl., ¶ 10. The fact that

Plaintiffs' medical experts insist on release does not show that Defendants' preventive/precautionary measures are unreasonable. At most, Plaintiffs' medical experts express disagreement with any detention, but do not speak to how Defendants' actions constitute deliberate indifference if detention is maintained. "Deliberate indifference is a high legal standard; a difference of opinion concerning treatment, negligence, or medical malpractice does not amount to deliberate indifference." *McGinnis v. Lopez*, No. 19-00625 DKW-WRP, 2020 U.S. Dist. LEXIS 41882, at *9 (D. Haw. Mar. 11, 2020). Even if Plaintiffs—without evidence—genuinely believe that release into the "Seattle, Washington metropolitan area, the center of one of the largest known outbreaks in the United States" (Mot. at 5) is, for whatever reason, the better preventive medicine practice, this opinion represents little more than a difference in approaches to preventive treatment, and does not demonstrate deliberate indifference on Defendants' part. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) ("a plaintiff's showing of nothing more than 'a difference of medical opinion' as to the need to pursue one course of treatment over another was insufficient, as a matter of law, to establish deliberate indifference.").

Defendants have expended good faith efforts to provide safe and sanitary conditions to those within its care at NWIPC. *See* Rivera Decl. ¶¶ 5, 8, 11-15; Second Rivera Decl. ¶¶ 8-12. Good faith efforts and deliberate indifference are mutually incompatible findings. *Kingsley*, 135 S. Ct. at 2474 ("the use of an objective standard adequately protects an officer who acts in good faith…."). The fact that Defendants have taken extensive precautionary measures demonstrates that Defendants have not been deliberately indifferent to Plaintiffs' health. *Sacal-Micha*, 2020 U.S. Dist. LEXIS 53474, at *11-12 ("the record reflects that ICE has provided constant medical attention to Sacal, and 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 for Sacal or otherwise exhibited wanton disregard for his serious medical needs.").

B. Plaintiffs have not shown irreparable harm.

This Court held that Plaintiffs failed to show the likelihood of suffering an irreparable harm in the absence of an injunction. Order, at 6. The Court specifically found that Plaintiffs had not shown evidence of an outbreak at NWIPC, nor that Defendants' precautionary methods were insufficient to contain an outbreak, nor that Defendants could not provide proper medical care if an outbreak should occur. *Id.* Plaintiffs' second motion similarly fails.

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 NWIPC 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.

C. The balance of interests and public interest favor Defendants.

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)). As discussed above, the harm that Plaintiffs allege is based on fear of the possibility of contracting COVID-19. Notably, Plaintiffs omit any discussion of the legitimate governmental objective in detaining aliens who are in removal proceedings. *See, e.g.*, *Demore*, 538 U.S. at 513. These interests are to protect the community (including, sometimes, protecting detainees from themselves) and prevent absconding so that they appear for their immigration court hearings. *Id.* at 515.

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.[7] 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 detainees 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.

CONCLUSION

Plaintiffs have not satisfied their high burden of establishing entitlement to mandatory injunctive relief, and their Motion for a Temporary Restraining Order should be denied.

DATED this 30th day of March, 2020.

Respectfully submitted,

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[7] 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.

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