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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jane Doe #1; Jane Doe #2; Norlan Flores, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Jeh Johnson, Secretary, United States Department of Homeland Security, in his official capacity; R. Gil Kerlikowske, Commissioner, United States Customs & Border Protection, in his official capacity; Michael J. Fisher, Chief of the United States Border Patrol, in his official capacity; Jeffrey Self, Commander, Arizona Joint Field Command, in his official capacity; Manuel Padilla, Jr., Chief Patrol Agent-Tucson Sector, in his official capacity,

Defendants.

Case No. 4:15-cv-00250-TUC-DCB

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

CLASS ACTION

(Assigned to the Honorable David C. Bury)

Action Filed: June 8, 2015

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I. INTRODUCTION

Jane Doe #1, Jane Doe #2, and Norlan Flores (together "Plaintiffs") are civil immigration detainees who were confined in U.S. Customs and Border Protection (CBP) facilities and who challenge the harsh and punitive conditions of their confinement. Plaintiffs seek injunctive relief on behalf of themselves and members of the following proposed class:

> All individuals who are now or in the future will be detained for one or more nights at a CBP facility, including Border Patrol facilities, within the Border Patrol's Tucson Sector.

Given the short-term nature of their detention, the members of this proposed class will be constantly changing. Current detainees will be released as new ones are taken into custody, with no single individual—not even Plaintiffs—expected to remain in the class throughout all stages of the litigation. Defendants point to the transience of Plaintiffs' claim in order to challenge their standing and entitlement to injunctive relief. But the United States Supreme Court has established protections specifically for "inherently transitory" classes such as this one. *See, e.g., U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980). Here, the temporary nature of Plaintiffs' detention should not—and does not—bar them from litigating their claim or obtaining the relief they seek.

Defendants' challenge to Plaintiffs' Administrative Procedure Act ("APA") claim also fails. As Defendants note, Plaintiffs have alleged that Defendants fail to enforce mandatory statements of policy governing how detainees are "processed" and creating minimum conditions of detention. (Motion to Dismiss at 6 ("Mot."), ECF No. 52.) These policies, some of which are set forth in the *Hold Rooms & Short Term Custody* Memorandum, mark the consummation of the CBP's decision-making process and determine individual rights and obligations. They thus constitute final agency action subject to judicial review.

With respect to Plaintiffs' constitutional challenge, Defendants concede the existence of at least one cognizable legal theory—one that was articulated by the Ninth Circuit in *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004), *cert. denied*, 546 U.S. 820

(2005), and is asserted by Plaintiffs here. (Mot. at 7-8.) Defendants concede that the Plaintiffs have alleged facts that, if accepted as true and construed in Plaintiffs' favor, state a plausible claim for relief. Plaintiffs allege, among other things, that no access to beds and constant lighting deprived them of sleep (Mot. at 9-10 (citing Complaint)); that the filthy hold rooms combined with no soap, and insufficient feminine hygiene products and toilet paper created unsanitary and unhealthy conditions of detention (Mot. at 12-13 (citing Complaint)); and that they were deprived of adequate food and water (Mot. at 16 (citing Complaint)). Defendants fail to demonstrate, as they must, that Plaintiffs' pleadings are in any way factually "anemic." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) ("Twombly"). Instead, Defendants improperly attempt to reach and argue the merits, although it is well-settled that a "motion [to dismiss] is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiffs case." *Williams v. Gerber Prods.*, 552 F.3d 934, 938 (9th Cir. 2009) (citing 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1356).

Plaintiffs have stated several claims for relief.

II. STATEMENT OF RELEVANT FACTS

Plaintiffs and putative class members have been or will be apprehended by Border Patrol at or near the U.S. border with Mexico and detained in one or more of the eight Tucson Sector Border Patrol Stations located throughout southern Arizona. Many of them—including the Doe Plaintiffs—are fleeing dangerous conditions in their home countries, and are seized after a long and perilous journey across the Sonoran desert. They arrive exhausted, thirsty and hungry, often suffering from dehydration, heat stroke, diarrhea, bleeding and blistered feet, and other conditions requiring medical attention.

While in Border Patrol's custody, Plaintiffs and putative class members have been and continue to be detained in overcrowded cells for more than twelve hours—sometimes for several nights—in filthy, unsanitary conditions, with lights glaring at all hours of the day and night, stripped of outer layers of clothing and forced to suffer in unreasonably cold temperatures; deprived of beds, bedding and sleep; denied adequate food, water,

medicine and medical attention, and basic hygiene items such as soap, sufficient toilet paper, sanitary napkins, diapers, and showers.

Although CBP has promulgated mandatory policies and procedures related to the operation of holding cells, including minimum space requirements per detainee and the provision of food, water and medical care, Defendants have failed to enforce those procedures. Plaintiffs bring this action to challenge these harsh and degrading conditions on behalf of themselves and all those similarly situated.

III. LEGAL STANDARDS

The standard for a motion to dismiss under Federal Rule of Civil Procedure 12 is well-established. In reviewing a motion to dismiss for lack of subject matter jurisdiction, the Court "'must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party.'" *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). The Court must draw all reasonable inferences from the complaint in the complainant's favor. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

Similarly, in determining whether a complaint states a claim upon which relief can be granted, the Court must assume that "all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555. From the factual allegations in the complaint, the Court then "draws all reasonable inferences in favor of the plaintiff." *Ass'n for L.A. Deputy Sheriffs v. Cnty. of L.A.*, 648 F.3d 986, 991 (9th Cir. 2011). The complaint need only "'state a claim to relief that is plausible on its face,'" alleging no more than the "factual content" necessary that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). At the pleading stage, plaintiffs must merely "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

IV. ARGUMENT

A. Defendants Concede That This Court Has Subject Matter Jurisdiction.

1. Defendants Concede That The Doe Plaintiffs Have Article III Standing.

Standing is established as long as "one named plaintiff meets the requirements." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc) (citation omitted). Plaintiffs meet the requirements.

The Doe Plaintiffs allege that while in Defendants' custody, they were subjected to unconstitutional conditions of confinement. Specifically, they allege that they suffered concrete and particularized injuries—deprivation of sleep, punitively low temperatures, denial of food—directly traceable to Defendants. (Compl. ¶¶ 16-51, ECF No. 1.) Defendants concede that the Doe Plaintiffs were in their custody when the Complaint was filed. (Mot. at 4.) In other words, Defendants concede that the Doe Plaintiffs' injuries were ongoing at the time of the Complaint, and thus were "at that moment capable of being redressed through injunctive relief." *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991). Having alleged injury, traceability, and redressability, the Doe Plaintiffs have established standing for themselves and for this action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Given this fact, this Court need not address Defendants' challenge to Norlan Flores's standing. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 944 (9th Cir. 2011) (declining to consider standing arguments of a second plaintiff where the standing of first was established) (internal citations and quotations omitted). Regardless, Norlan Flores credibly alleges that he faces a "real and immediate threat of repeated injury." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974). Mr. Flores, a resident of Tucson, has been detained by Tucson Sector Border Patrol twice, and on both occasions was subjected to the unlawful conditions detailed in the Complaint (Compl. ¶¶ 52-64). Because he continues to live in Tucson, Mr. Flores remains under a realistic risk of being arrested by Border Patrol and detained in a Tucson Sector holding

cell, *see Melendres v. Arpaio*, 695 F.3d 990, 997-99 (9th Cir. 2012), and the injunctive relief sought here would eliminate any threat of further injury in any future detention, providing him with a meaningful remedy.

2. Defendants Concede That The "Inherently Transitory" Exception To The Mootness Doctrine Applies To This Case.

Defendants argue that Plaintiffs' claims expired before this Court certified the proposed class; and that their individual interest in injunctive relief expired when they were released from Border Patrol custody, which was weeks ago. Even if true, Defendants are wrong that this moots the case because—as Defendants concede—this case satisfies the "inherently transitory" exception to the mootness doctrine. (Mot. at 5 n.1.)

Where, as here, a class action involves "inherently transitory" claims—where, in other words, "the trial court will not have enough time to rule on a motion for class certification before the proposed representative's interest expires"—the "'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." *McLaughlin*, 500 U.S. at 52 (citations omitted); *accord Sosna v. Iowa*, 419 U.S 393, 398-402 (1975). Thus, even if a named plaintiff's individual claim is moot, the class-wide claim survives and the names plaintiff may continue to represent the class. *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1092 (9th Cir. 2011) (citation omitted).

Like the pretrial detainees in *McLaughlin* who were released from Riverside County Jail before the court could certify the class, the Doe Plaintiffs—who were detained at Tucson and Casa Grande stations for 30 hours—were transferred to ICE custody before this Court could rule on certification. As in *McLaughlin*, the Doe Plaintiffs and putative class members are a paradigmatic example of an "inherently transitory" class. Indeed, as short-term detainees, this class is indistinguishable from other classes that have qualified for the same exception. *See, e.g.*, *Rivera v. Holder*, No. C14-1597RSL, 2015 WL 1632739, at *6 (W.D. Wash. April 13, 2015) (immigration detainees awaiting custody proceedings); *Garcia v. Johnson*, No. 14-cv-01775-YGR, 2014 WL 6657591, at *11

(N.D. Cal. Nov. 21, 2014) (foreign nationals in short-term detention pending deportation hearings); *Lyon v. U.S. Immigr. & Customs Enforcement*, 300 F.R.D. 628, 639 (N.D. Cal. 2014) (ICE detainees).

For Plaintiffs such as these, courts are entitled to draw on "the flexible character of [Article] III mootness doctrine." *Geraghty*, 445 U.S. at 401. Here, the dispositive question is not whether the named plaintiffs retain a "personal stake," but rather whether the countless unnamed members still have "[an] interest in the outcome." *Id.* at 396. They do. Even though each individual Plaintiff's detention may be temporary, "the constant existence of a class of persons suffering the alleged deprivation is certain." *Lyon*, 300 F.R.D. at 639 (citing *Gerstein v. Pugh*, 420 U.S. 103, 111 n.11 (1975)).

B. This Court May Review Plaintiffs' APA Claim Because Defendants' Action Is Final.

Plaintiffs assert that Defendants have failed to enforce mandatory statements of policy that governs how detainees are "processed" and the conditions under which individuals are detained during processing. These statements include—but are *not* limited to—a June 2, 2008, Memorandum entitled *Hold Rooms & Short Term Custody* ("2008 Memorandum") issued by then-Chief of the U.S. Border Patrol David V. Aguilar. (Coles Decl. ISO Mot. for Expedited Discovery, Ex. A, ECF No. 26-1.) Defendants do not deny that the Memorandum articulates mandatory statements of policy at all Border Patrol stations. (Mot. at 5-6.) Nor could they, having elsewhere conceded this fundamental point.[1]

[1] Defendant Department of Homeland Security ("DHS"), through counsel in this very action, has vouched for the Memorandum in pleadings filed in federal court. Citing the Memorandum, DHS asserted that "CBP sets and enforces clear standards for safe and sanitary conditions at the Border Patrol stations through facilities design guides and written policy guidance." (*See* Declaration of Elizabeth Balassone ISO Opp'n to Dismiss ("Balassone Decl."), Ex. A, Defs.' Resp. in Opp'n to Pls.' Mot. to Enforce Settlement of Class Action at 20, *Flores v. Holder*, No. 2:85-CV-04544 DMG (C.D. Cal. Feb. 27, 2015), ECF No. 121.) An agency is bound by its internal guidelines where an agency intends to bind itself. *Chiron Corp. v. Nat'l Transp. Safety Bd.*, 198 F.3d 935, 943-44 (D.C. Cir. 1999). The DHS did so in *Flores*. *See Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir.

(Footnote continues on next page.)

Rather, Defendants assert that Plaintiffs have failed to "identify [Defendants'] specific federal conduct and explain[] how it is 'final agency action'" reviewable under the APA. (Mot. at 6 (citing *Lujan v. Defenders of Wildlife*, 497 U.S. 871, 882 (1990).) Defendants also assert that their alleged failure to follow their own mandatory policies "would not constitute the conclusion of any decision-making process, nor . . . establish a failure to take any legally-required action." (*Id.* at 6.) Defendants are wrong.

1. The Memorandum Constitutes Agency Action With The Force And Effect Of Law.

"'[A]gency action' is defined in [5 U.S.C.] § 551(13) to include 'the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act.*'" *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004) (emphasis added). A party can sue under the APA to compel an agency to abide by its own statement of policy when such a statement constitutes "agency action." 5 U.S.C. § 706(1) (requiring court to "compel agency action unlawfully withheld or unreasonably delayed.").

The APA defines the term "rule" as "an agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). An agency statement that meets this definition constitutes agency action. *See, e.g.*, *Defenders of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1114 (D. Ariz. 2009) (Bury, J.) (agency's "Standard Operating Procedure" was a "rule" under APA). Such a statement has the force and effect of law, and can be enforced under the APA, when it (1) prescribe[s] substantive rules—not interpretive rules, general statements of policy or rules of agency organization—and (2) conforms to certain procedural requirements. *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1071 (9th Cir. 2010) (citation omitted). "To satisfy

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(Footnote continued from previous page.)

1977) (Agency intent is "ascertained by an examination of the provision's language, its context, *and any available extrinsic evidence.*") (emphasis added).

the first requirement, the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated in response to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress." *Id.*

The Memorandum constitutes a "rule" and enforceable guidance under the *River Runners* standard. Its stated purpose—to "establish[] national policy for the short-term custody of persons … detained in [Border Patrol] hold rooms"—demonstrates that it is a "rule" under § 551(4). (2008 Memorandum ¶ 1.) It specifically states that "[a]ll persons arrested or detained by the Border Patrol will be held in facilities that are safe, secure, and clean" (*id.* ¶ 5.1), and then dictates minimum standards that unquestionably affect the individual rights of all detainees in Border Patrol stations (*id.* ¶¶ 6.7-6.11, 6.14, 6.16, 6.21 (detailing the standards for medical care, meals, drinking water, restrooms, hygiene items, bedding, showers, cell cleaning, and access to phones)). It also sets out agency obligations, specifying who is responsible for ensuring that the standards are followed (*id.* ¶ 4); what records must be kept (*id.* ¶ 6.4); when supervisors are to be notified (*id.* ¶¶ 6.2.2-3); and how compliance will be measured (*id.* ¶ 7). Finally, it states specifically the statutory, regulatory and other authority under which it was promulgated. (*Id.* ¶ 2.) Thus it satisfies the *River Runner* standard.

2. The Memorandum Establishes Final Agency Action.

Defendants' unsubstantiated assertion notwithstanding (Mot. at 5), the action is final. Agency action is final if (1) it marks the consummation of the agency's decision-making process; and (2) it is one by which rights or obligations have been determined or from which legal consequences flow. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). This Court should take a "flexible" and "pragmatic" approach to finality, favoring the general presumption of judicial review. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-52 (1967), *abrogated on other grounds by Cailfano v. Sanders*, 430 U.S. 99 (1977).

The Memorandum marks the consummation of agency decision-making in that it "establishes national policy for the short-term custody of persons … detained in hold

rooms." (2008 Memorandum ¶ 1.) Insofar as it "supersede[s] all existing detention and hold rooms policies utilized by the U.S. Border Patrol" (*id.* at 1), it is the agency's "last word on the matter," *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 984 (9th Cir. 2006) (quoting *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 478 (2001)).

Its protocols, moreover, "are not advisory and they are not interlocutory [but rather] direct and immediate." *Tuggle*, 607 F. Supp. 2d at 1114. Indeed, Border Patrol's "day-to-day operation . . . is being carried out under" the Memorandum. *Id.* By establishing national policy that Border Patrol agents must follow, the Memorandum has the "status of law or comparable legal force [such that] immediate compliance with its terms is expected." *Or. Nat. Desert Ass'n*, 465 F.3d at 987 (citation omitted).

An "agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the 'force of law,' but the record indicates otherwise." *Croplife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) (quoting *Gen. Elec. v. EPA*, 290 F.3d 377, 383-85 (D.C. Cir. 2002)). The Memorandum establishes final agency action subject to judicial review.

C. Plaintiffs Have Stated A Claim For Violation Of Their Substantive Due Process Rights.

Defendants articulate the correct standard that shows Plaintiffs should survive this motion to dismiss for failure to state a claim: Plaintiffs have asserted (1) a cognizable legal theory and (2) sufficient facts under a cognizable legal claim for violation of their substantive due process rights. (*See* Mot. at 6 (citing *SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996).) First, Defendants fail to refute—and indeed concede—the existence of a cognizable legal theory for Plaintiffs' claims. (*Id.* at 7.) This theory was articulated by the Ninth Circuit in *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004), *cert. denied*, 546 U.S. 820 (2005), and is asserted by Plaintiffs here.

Second, Defendants concede that "Plaintiffs assert that they have suffered due process violations" (Mot. at 8) in five separate claims for relief: (1) deprivation of sleep

(Compl. ¶¶ 184-193); (2) deprivation of unhygienic and unsanitary conditions (*id.* ¶¶ 194-198); (3) deprivation of adequate medical screening and care (*id.* ¶¶ 199-205); (4) deprivation of adequate food and water (*id.* ¶¶ 206-213); and (5) deprivation of warmth (*id.* ¶¶ 214-218). Defendants' motion puts the cart before the horse by improperly attempting to reach the merits of Plaintiffs' claims, although it is well-settled that a motion to dismiss "is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case." *Williams*, 552 F.3d at 938 (citation omitted).[2] Defendants' motion to dismiss for failure to state a claim should be denied.

1. Defendants Concede That Plaintiffs Allege A Cognizable Legal Theory.

Immigration detainees are not convicted prisoners; they are civil detainees held pursuant to civil immigration laws. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("The proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect").[3] Immigration detainees' protections are thus derived from the Fifth Amendment, which shields any person in the custody of the United States from conditions that amount to punishment without due process of law. *See Wong Wing v. United States*, 163 U.S. 228, 237 (1896).

In *Jones*, the Ninth Circuit held that conditions of confinement for civil detainees—which includes Plaintiffs here—must be superior not only to convicted prisoners, but also to pre-trial criminal detainees. 393 F.3d at 934. If civil detainees are

[2] Defendants' conclusory attempt to justify the conditions in their facilities as necessary due to the "short-term" nature of the detention (*see, e.g.*, Mot. at 2, 8) is not plausible and certainly does not render Plaintiffs' claims implausible. *Starr v. Baca*, 652 F.3d 1202, 1216-17 (9th Cir. 2011) ("If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under *Rule 12(b)(6)*. Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *implausible*. The standard at this stage of the litigation is not plaintiff's explanation must be true or even probable.") (emphasis added).

[3] (*See also* Balassone Decl. Ex. B, *Detention Management*, U.S. Immigr. & Customs Enforcement ("ICE"), U.S. Dep't of Homeland Sec., http://www.ice.gov/detention-management (last visited Sept. 16, 2015) (ICE "manages and oversees the nation's civil immigration detention system").)

confined under conditions equal or inferior to pre-trial detainees or convicted prisoners, those conditions are presumptively punitive and unconstitutional. *Id.* Additionally, a condition of confinement will be deemed "punitive" if it meets only one prong in a three-prong test: where a condition is (1) "intended to punish;" *or* (2) "excessive in relation to [its non-punitive] purpose;" *or* (3) "employed to achieve objectives that could be accomplished in so many alternative and less harsh methods." *Id.* at 933 (citations omitted).

Plaintiffs fully alleged this theory in their Complaint. (*See* Compl. ¶¶ 192, 197, 204, 212, 217 ("Defendants' policies and practices are inflicted upon Plaintiffs and putative class members with the intent to punish them and are excessively harsh in relation to any non-punitive or legitimate purpose. Moreover, any non-punitive purpose that Defendants may have could be accomplished through alternative methods consistent with the constitutional rights of Plaintiffs and class members.").) In their Motion, Defendants concede the existence of this theory. (Mot. at 7 (citing *Jones*, 393 F.3d at 933).) Plaintiffs have plainly alleged a cognizable legal theory to support their substantive due process claims.

2. Plaintiffs Plead Facts That, Taken As True, Plausibly Give Rise To An Entitlement To Relief.

In conjunction with this legal theory, Plaintiffs have sufficiently alleged facts which, if proved, could entitle them to relief under the Due Process Clause of the Fifth Amendment. *Iqbal*, 556 U.S. at 679. The crux of Defendants' motion involves improper arguments regarding the merits of Plaintiffs' claims. (*See, e.g.*, Mot. at 2 (arguing that the Complaint "fails to acknowledge the unique nature of short-term immigration processing . . . .").) Even if they were proper, Defendants' arguments misinterpret the injuries Plaintiffs allege. Defendants contend, for example, that Plaintiffs cannot demonstrate any cognizable claims because they got "very little" sleep, or suffered from a foot abrasion but not a "more serious" medical condition. (*Id.* at 10, 15.) But Plaintiffs have alleged—with

great detail and specificity—unconstitutional conditions of confinement and they have alleged injury. That is all that is required.

a. Deprivation of Sleep

Plaintiffs assert that Defendants violate Plaintiffs' due process rights by routinely holding Plaintiffs and class members overnight (or longer) in cells without beds or bedding and under conditions that inhibit sleep. (Compl. ¶¶ 184-93.) Plaintiffs allege that they were held for one or more nights in Tucson Sector stations without beds, mattresses, or bedding, and that they were deprived of sleep as a consequence. (*Id.* ¶¶ 26, 43, 53.) Plaintiffs also allege that Defendants' practices—constant illumination, interrogation during sleeping hours, confiscation of clothing, and uncomfortably cold temperatures—exacerbated this deprivation. (*Id.* ¶¶ 26, 45, 53, 56 and 82.) Defendants' contention that one Plaintiff got some sleep, even if "very little," (Mot. at 10) is irrelevant to Plaintiffs' allegations that they were subjected to these unconstitutional conditions.

Defendants cite no case law to support their contention that Plaintiffs' allegations regarding sleep deprivation are insufficient to state a claim. On the contrary, the Ninth Circuit and "several [other] courts have held that a jail's failure to provide detainees with a mattress and bed or bunk runs afoul of the commands of the Fourteenth Amendment." *Thompson v. City of L.A.*, 885 F.2d 1439, 1448 (9th Cir.1989) (citing cases), *overruled on other grounds by Bull v. S.F.*, 595 F.3d 964 (9th Cir. 2010) (en banc); *see also Bowers v. City of Phila.*, No. 06-CV-3229, 2007 WL 219651 (E.D. Pa. Jan. 25, 2007) (denial of beds in short-term detention violates due process). As for Plaintiffs' allegations regarding the constant illumination of cells, the Ninth Circuit has explained that, even for convicts in prisons, "[t]here is no legitimate penological justification for requiring [inmates] to suffer physical and psychological harm by living in constant illumination. This practice is unconstitutional." *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996) (citation omitted). Plaintiffs have alleged "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

b. Deprivation of Hygienic and Sanitary Conditions

Plaintiffs assert that Defendants violate Plaintiffs' due process rights by routinely holding Plaintiffs and class members in unsanitary and hazardous hold cells. Specifically, Plaintiffs assert that Tucson Sector hold cells are unclean, cold, and lack working toilets, soap, feminine hygiene products, showers and other facilities and items critical to detainee hygiene and good health. (Compl. ¶ 195.) Defendants repeatedly attempt to minimize these experiences (*see* Mot. at 11-13), but do not—and cannot—refute that Plaintiffs alleged facts showing that they experienced these conditions. (Compl. ¶¶ 15-64.)

Defendants do not dispute detainees' "right not to be exposed to severe unsanitary conditions." (Mot. at 11.) But they argue, without supporting authority, that Plaintiffs' claim fails because they do not cite "any challenged restriction expressly designed to punish with respect to any alleged deprivation of hygienic and sanitary conditions." (*Id.* at 12.) Plaintiffs need not make such showing; Plaintiffs need only allege that one of the three prongs from the *Jones* test has been met. (*See* discussion *supra* Part C.1.) Plaintiffs have not only alleged sufficient facts to satisfy this test, but have alleged sufficient facts to support a more burdensome Eighth Amendment claim. *E.g.*, *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1411 (N.D. Cal. 1984), *aff'd in part & rev'd in part on other grounds*, 801 F.2d 1080 (9th Cir. 1986) (no solid waste containers, garbage on floors, and other unsanitary conditions in prison "inconsistent with any standard of decency and present a serious hazard to the health"). Thus they easily support a Fifth Amendment claim. *See City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (Due process rights under the Fifth Amendment, which are applicable to civil detainees, are at least as great as Eighth Amendment protections for convicted prisoners.)

c. Deprivation of Adequate Medical Screening and Care

Plaintiffs assert that Defendants violate Plaintiffs' due process rights by depriving Plaintiffs and class members of adequate medical screening and care. Defendants contend that this claim should be dismissed because Plaintiffs have not alleged a "more serious medical condition"—beyond Plaintiff Jane Doe #1's assertion that she had an "abrasion

on her left foot"—or "emergent injury," "untreated infected wound," or "request for medical attention." (Mot. at 15.)

Defendants' argument highlights their fundamental misunderstanding of the claim. Plaintiffs allege that they were subjected to—and injured by—Defendants' practice of detaining individuals without providing them with medical screening and care. (Compl. ¶¶ 199-205.) Plaintiffs allege that they were provided with *no* screening whatsoever during the entirety of their time in CBP custody. (*Id.* ¶¶ 20, 40, 62.) As Plaintiffs have alleged, Defendants' systematic failure to medically screen and medically treat is contrary to established medical guidelines (*id.* ¶¶ 199-205), as well as the Constitution, *see Graves v. Arpaio*, 48 F. Supp. 3d 1318, 1340 (D. Ariz. 2014) (an arrestee must be provided with a "receiving screening" prior to being placed in the general population); *Hernandez v. Cnty. of Monterey*, Case No. 5:13-CV-2354-PSG, _ F. Supp. 3d _, 2015 WL 3868036, at *7 (N.D. Cal. Apr. 14, 2015) ("[K]nown noncompliance with generally accepted guidelines for inmate health strongly indicates deliberate indifference to a substantial risk of serious harm.") (citation omitted).

Defendants again assert that Plaintiffs' claim is insufficient because "Plaintiffs cite to no challenged restriction expressly designed to punish with respect to any alleged lack of medical care[.]" (Mot. at 15.) Defendants suggest that Plaintiffs must plead a subjective intent to punish for each of their constitutional claims. Not so. Plaintiffs have met the *Jones* test by alleging that these policies and practices are inflicted "with the intent to punish them and are excessively harsh in relation to any non-punitive or legitimate purpose," and that "any non-punitive purpose" may be accomplished through methods consistent with Plaintiffs' and putative class members' constitutional rights. (Compl. ¶ 204.)

d. Deprivation of Adequate Food and Water

Plaintiffs assert that Defendants violate Plaintiffs' due process rights by depriving Plaintiffs and class members of adequate food and water. Defendants contend that this cause of action "should be dismissed because complaints about the quality of the food

provided at Border Patrol facilities are *de minimus*, and do not amount to a constitutional claim." (Mot. at 16.) Defendants fail to recognize that Plaintiffs' claim is fundamentally about the quantity and nutritional insufficiency of food provided. (Compl. ¶ 209 ("Pursuant to Defendants' practices, provision of food to Plaintiffs and putative class members is erratic and inadequate."); *id.* (alleging food is "calorically inadequate" and in "inadequate portions").)

Failure to provide nutritionally adequate food can violate the Eighth Amendment as well as the due process clause. *Foster v. Runnels*, 554 F.3d 807, 813 n.2 (9th Cir. 2009); *Graves v. Arpaio*, 623 F.3d 1043, 1050-51 (9th Cir. 2010) (because food is one of life's necessities, prisons have an obligation to provide sufficient calories and nutrition to protect the health of the inmate). Moreover, courts have indicated that when plaintiffs are "already infirm," as Plaintiffs and class members often are (*e.g.*, Compl. ¶ 208), a court can look to whether the "alleged deprivation of food could possibly have more severe repercussions for him than a [detainee] in good health." *Reed v. McBride*, 178 F.3d 849, 853-54 (7th Cir. 1999).

Again, Plaintiffs need not allege "that Border Patrol has any restriction expressly designed to punish with respect to any alleged lack of food and water" or that they were "deprived of food or water for the purpose of punishment." (Mot. at 16.) Plaintiffs need only allege, as per *Jones v. Blanas*, that "Defendants' policies and practices are inflicted upon Plaintiffs and class members with the intent to punish them and are excessively harsh in relation to any non-punitive or legitimate purpose. Moreover, any non-punitive purpose that Defendants may have could be accomplished through alternative methods consistent with the constitutional rights of Plaintiffs and putative class members." (Compl. ¶ 212.)

e. Deprivation of Warmth

Defendants attempt to minimize Plaintiffs' deprivation of warmth allegations as merely a "preference for warmer temperature." (Mot. at 17.) Defendants urge this Court to reject Plaintiffs' claim for failure to allege "hypothermia, frostbite, or even muscle

stiffness as a result of the cold." (*Id.*) Defendants cite no authority to support their contention that Plaintiffs' allegations are insufficient to state a constitutional claim.

To the contrary, courts have found such allegations satisfy even the higher standard for pleading Eighth Amendment claims. *See, e.g.*, *Sanders v. Sheahan*, 198 F.3d 626 (7th Cir. 1999) (holding valid a cause of action by prisoner bringing a due process claim under the Eighth Amendment alleging "inadequate heat and ventilation due to several broken windows, which caused him to suffer from 'excessive cold.'") (citation omitted); *Del Rarine v. Williford*, 32 F.3d 1024, 1050-51 (7th Cir. 1994) (holding that continued exposure to short periods of unreasonably cold temperatures can violate the Eighth Amendment); *Dixon v. Godinez*, 114 F.3d 640, 643 (7th Cir. 1997) (explaining that it is not just the severity of the cold, but the duration of the condition, and also whether inmate has adequate means to combat the cold, which determines whether the conditions of confinement are unconstitutional).

Plaintiffs' allegations here are plainly sufficient to state a due process claim for deprivation of warmth.

V. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied. If, however, this Court grants Defendants' motion, it "should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (citations omitted).

Dated: September 17, 2015 By: */s/ Harold J. McElhinny*

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2015, I caused a PDF version of the documents listed below to be electronically transmitted to the Clerk of the Court, using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to all CM/ECF registrants and non-registered parties.

Harold J. McElhinny	/s/ *Harold J. McElhinny*
(typed)	(signature)