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UNITED STATES DISTRICT COURT

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 of Homeland Security, et al., Defendants.	**Case No. 4:15-cv-00250-DCB** **DEFENDANTS' MOTION TO DISMISS**

Defendants hereby move to dismiss the Complaint in its entirety. In support of their Motion, Defendants rely on the following Memorandum of Points and Authorities, the attached exhibits, and all matters of record.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a case about what substantive due process requires regarding conditions in short-term immigration processing facilities run by U.S. Customs and Border Protection ("CBP") in Tucson Sector, one of the busiest areas in the nation for illegal alien apprehensions. Border Patrol apprehends aliens throughout the Tucson Sector, at all times of the day and night, at locations covering most of the southern region of Arizona.

See Declaration of Manuel Padilla, Jr. ("Padilla Decl."), ECF No. 39-1, ¶¶ 4, 7. In turn, Border Patrol facilities operate around the clock, twenty-four hours each day, seven days a week, so that individuals can be processed and transferred out of Border Patrol stations at all hours. *See id.* ¶ 8. Border Patrol stations are not designed for long-term care or detention; rather they are short-term facilities, and every effort is made to promptly process, transfer, or remove those in custody at the stations as quickly as is appropriate and operationally feasible. *Id.* ¶ 11. The amount of time an alien spends in Border Patrol custody will be impacted by a variety of factors, including decisions made by other agencies to prosecute the alien, place the alien in immigration proceedings, detain or release the alien, or remove the alien. *Id.*

The Complaint should be dismissed as an initial matter because Plaintiffs fail to meet their jurisdictional burden. Plaintiff Flores lacks standing, and the claims of both Does are moot. Moreover, Plaintiffs' claim under the Administrative Procedure Act ("APA") should be dismissed because Plaintiffs have not challenged any final agency action. Even if they were to establish jurisdiction, Plaintiffs also fail to state a claim because due process may not be divorced from the operational reality of the brief initial processing that occurs in Border Patrol stations for all aliens apprehended and believed to be unlawfully present within the United States. Indeed, Plaintiffs' Complaint wholly fails to acknowledge the unique nature of short-term immigration processing, which may vary based on a number of factors including fluctuating numbers of individuals crossing the U.S. border and requiring processing, the criminal history of detained aliens, and the complexity of the immigration issues an alien raises. The fundamental problem with Plaintiffs' Complaint is that it is premised on a flawed fictional one-size-fits-all approach to due process. The Constitution provides more flexibility in the real world.

Further, while the 56-page Complaint is replete with adjectives such as "vulnerable individuals" (ECF No. 1 at 6) and describes "irreparable harm" (*id.*), upon closer inspection, not one of the three named Plaintiffs alleges facts that fit in either category, even by Plaintiffs' definition. No named Plaintiff was elderly, pregnant, or a

juvenile. Indeed, no named Plaintiff even asserts any injury that might have required medical attention. Even assuming the truth of all of Plaintiffs' allegations, Plaintiffs still fail to state any claim because they have not alleged, and cannot allege, that the nature and duration of the conditions they experienced at Border Patrol facilities did not bear a reasonable relation to the purpose of those facilities: short-term immigration processing. Thus, the Complaint should be dismissed.

II. PROCEDURAL OVERVIEW

Plaintiffs assert jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346 (federal question). They assert six claims challenging the legality of CBP's short-term holding facilities in Tucson Sector, five of which they base on the Due Process Clause of the Fifth Amendment and one based on the APA, 5 U.S.C. § 706(1). Compl. ¶¶ 184-224.

Specifically, Plaintiffs assert that the detention conditions are unconstitutional in that they: (1) deprive them of sleep (Compl. ¶¶ 184-193); (2) are unhygienic and unsanitary (Compl. ¶¶ 194-198); (3) do not provide adequate medical screening and care (Compl. ¶¶ 199-205); (4) deprive them of adequate food and water (Compl. ¶¶ 206-213); and (5) deprive them of warmth (Compl. ¶¶ 214-218). They also assert a claim based on the APA, alleging that CBP has failed to enforce policies and procedures in its 2008 Memorandum and Security Policy and Procedures Handbook (HB1400-02B), which amounts to final agency action unlawfully withheld or unreasonably delayed. Compl. ¶¶ 219-224.

III. ARGUMENT

A. PLAINTIFFS' COMPLAINT MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

1. The Complaint Should Be Dismissed Because Plaintiff Flores Lacks Standing, and the Claims of the Doe Plaintiffs Are Moot.

Courts have routinely held that a litigant must have "standing" to invoke the power of a federal court, and it has been noted that the standing requirement "is perhaps the most important of these doctrines." *Allen v. Wright*, 468 U.S. 737, 750 (1984); U.S.

Const. art. III, § 2, cl. 1. In *Lujan v. Defenders of Wildlife*, the Supreme Court stated that one key element of the standing requirement is that the plaintiff must establish that he has an "injury in fact." 504 U.S. 555, 560 (1992). To establish an "injury in fact" Plaintiffs must show that they have suffered "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (citations and internal quotations omitted). A plaintiff must also show that it is "'likely,' as opposed to merely 'speculative,' that the alleged injury will be 'redressed by a favorable decision.'" *Id.* at 560-61 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)).

Plaintiff Flores should be dismissed from the case because he lacks standing. *See* Compl. at 11-13, ¶¶ 55-64. At the time the Complaint was filed, Plaintiff Flores was not in Border Patrol custody, and therefore he cannot allege that he was suffering any "actual or imminent" injury at the hands of Border Patrol. His only allegation is that he "remains very apprehensive about being detained" by Border Patrol in the future, and "believes he could be detained by Border Patrol again." Compl. ¶ 64. This conjectural fear of future detention does not satisfy *Lujan*, because it is merely speculative whether the injunctive relief that Plaintiffs seek – changes to the conditions at Border Patrol facilities – would redress the injuries he is alleging. Because he cannot show redressability, Plaintiff Flores should be dismissed for lack of standing. *Id.* at 560-61.

The case or controversy requirement of Article III of the Constitution also deprives the court of jurisdiction to hear moot cases. *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983). A case becomes moot if the "issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). A plaintiff must have suffered an actual injury that is traceable to the defendant and can be redressed by a favorable decision. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

While the Doe Plaintiffs were in Border Patrol custody at the time the Complaint was filed, they were transferred out of Border Patrol custody soon afterwards into ICE

custody, and now are in ICE custody at the Eloy Detention Center. *See* Declaration of George Allen, at ¶¶ 8-10 (attached hereto). The Doe Plaintiffs were apprehended after illegally crossing the U.S. border into Arizona, and their Complaint provides no basis to believe that the Doe Plaintiffs will be returned to Border Patrol custody at any time in the future unless they are removed from the United States and decide to illegally cross the U.S. border a second time; therefore, there is no basis to find that any injunction regarding the conditions at Border Patrol facilities will affect their rights in any way. Thus, the Doe Plaintiffs should be dismissed because they no longer have any "legally cognizable interest in the outcome" of this case, and their claims are moot. *Murphy*, 455 U.S. at 481.[1]

2. Plaintiffs' APA Claim (Sixth Claim) Should Be Dismissed Because Plaintiffs Have Not Alleged Any Final Agency Action.

Under the APA, "[a]gency action made reviewable by statute *and final agency action* for which there is no adequate remedy in a court" is subject to judicial review. 5 U.S.C. § 704 (emphasis added); s*ee also Lujan*, 497 U.S. at 882 ("When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'"); *see also Defenders of Wildlife v. Tuggle*, 607 F. Supp. 2d 1095, 1099 (D. Az. 2009). "In the Ninth Circuit, agency action is final: 1) if it marks the consummation of the agency's decisionmaking process and 2) if it is one by which rights

[1] Defendants recognize that while the claims of the named Plaintiffs are moot, the putative class claims potentially could proceed under the inherently transitory claims exception to the mootness rule. *See County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Under *McLaughlin*, the "relation-back" doctrine might save those claims if a class is certified. *Id.* at 1090-91. However, the application of this doctrine highlights why class certification is inappropriate in this case. As evident from the discussion of Plaintiffs' claims below, the question of whether Plaintiffs have stated a claim for any violation of their Fifth Amendment rights requires an assessment of each individual Plaintiff's allegations regarding the conditions that he or she experienced while in Border Patrol custody. Indeed, some of the claims in this lawsuit are entirely unsupported by the factual allegations of the named Plaintiffs, and should be dismissed. Because analysis of the constitutional claims requires individualized assessments of the experiences of each Plaintiff, class certification is inappropriate, and as a result the "inherently transitory class" exception does not save the class claims in this case.

or obligations have been determined, or from which legal consequences will flow." *Tuggle*, 607 F. Supp. 2d at 1099 (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

"Plaintiffs have the burden of identifying specific federal conduct and explaining how it is 'final agency action' . . ., and identifying a discrete agency action that the federal agency was legally required to take but failed to do so . . . ." 607 F. Supp. 2d at 1099 (citing *Lujan*, 497 U.S. at 882; *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004)). Plaintiffs here have done neither. Plaintiffs challenge the conditions experienced by individuals who are in Border Patrol custody, at Border Patrol stations, at different times and under a multitude of different conditions. Plaintiffs have provided absolutely no explanation how those conditions are the sort of Government action that is reviewable under the APA. Moreover, even if Plaintiffs' allegations are read generously as a claim that CBP generally fails at Border Patrol stations to follow its own policies, such a failure would not constitute the conclusion of any decision-making process, nor would such allegations establish a failure to take any legally-required action. Thus Plaintiffs have failed to state any claim under the APA, and their Sixth Claim should be dismissed.

B. PLAINTIFFS' CONSTITUTIONAL CLAIMS MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM

Plaintiffs' Constitutional claims (First through Fifth Claims) should be dismissed because they fail to state any claim for relief. The Court may dismiss a complaint as a matter of law for "(1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal claim." *SmileCare Dental Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th Cir. 1996) (citation omitted). To avoid dismissal, a plaintiff must plead facts sufficient to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Where a complaint pleads facts that are 'merely consistent' with a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

1. Legal Background of Substantive Due Process in Detention Setting

Due process requires that the nature and duration of detention bear some reasonable relation to the purpose for which an individual is detained. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future). Pretrial detainees retain greater liberty protections than individuals detained under criminal process. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Similarly, individuals "who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982). But "it is not always clearly established how much more expansive the rights of civilly detained persons are than those of criminally detained persons." *Hydrick v. Hunter*, 500 F.3d 978, 990 (9th Cir. 2007). What is clear is that the Government's legitimate interests stemming from its need to manage the facility in which the individual is detained may justify imposing conditions on an individual without rendering the detention unconstitutional. *See Bell*, 441 U.S. at 539-540.

Thus, the Government does not dispute that immigration detainees, like other individuals not criminally detained, merit "conditions of confinement that are not punitive." *Jones v. Blanas*, 393 F.3d 918, 933 (9th Cir. 2004). But that detention may be subject to conditions that relate to legitimate non-punitive governmental objectives such as "maintaining security and order' and 'operating the [detention facility] in a manageable fashion." *Pierce v. County of Orange*, 526 F.3d 1190, 1205 (9th Cir.2008) (quoting *Bell*, 441 U.S. at 540 n. 23).

2. Legal Standard in Immigration Processing Cases

As with prisons, the Constitution "does not mandate comfortable" detention facilities. *Rhodes v. Chapman*, 452 U.S. 337, 345–50 (1981). "[M]aintaining jail security" and "effective management of a detention facility" constitute legitimate, non-punitive government interests. *Jones*, 393 F.3d at 932; *see also Valdez v. Rosenbaum*, 302 F.3d 1039, 1046 (9th Cir. 2002) ("if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment").

While Plaintiffs assert that they have suffered due process violations, they do not, and cannot, cite any case that precisely establishes a relevant standard governing conditions in short-term Border Patrol processing facilities, which are more akin to a central booking facility than to the long-term detention facilities addressed in the cases upon which Plaintiffs rely. The primary purpose of this short-term immigration detention at Border Patrol facilities, during which an alien is processed and screened before being transferred or released, is to secure America's borders by detecting and preventing the illegal entry of aliens and contraband between the ports of entry. The Court must assess reasonableness in this case through the prism of that purpose.[2]

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[2] It is also important to remember that the custody and processing that occurs at Border Patrol stations is governed by the Immigration and Nationality Act ("INA"), which mandates detention of certain aliens at various stages throughout their immigration proceedings, and permits detention of others. Immigration officers have the statutory authority to arrest aliens entering or attempting to illegally enter the United States. 8 U.S.C. § 1357. Those apprehended near the border are commonly placed in an accelerated removal process known as "expedited removal." *See* 69 Fed. Reg. 48,877 (Aug. 11, 2004); 8 U.S.C. § 1225(b). Congress has explicitly mandated the detention of individuals who are in the expedited removal process, and have not yet been found to have a credible fear of persecution. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). Certain criminal aliens are also subject to mandatory detention. 8 U.S.C. § 1226(c). Aliens who have been previously removed from the United States and have illegally re-entered may be subject to a reinstated removal order, and may be detained pending removal under 8 U.S.C. § 1231. The INA also provides a general discretionary authority for DHS to detain any alien during the pendency of removal proceedings. 8 U.S.C. § 1226(a). Thus, during initial processing, there is no question that CBP has the authority to detain recently-apprehended aliens, and they simply cannot be released or transferred until they are processed and it is determined what statutory authority will govern the next stage of their immigration enforcement proceedings.

3. Each of Plaintiffs' Constitutional Claims Should Be Dismissed For Failure to State a Claim

a. Plaintiffs' First Claim fails as a matter of law.

Plaintiffs First Claim involves an alleged "deprivation of sleep." ECF No. 1 at 46. As a threshold matter, Plaintiffs have not shown that they were denied sleep as a result of any intent to punish. Overall, no Plaintiff alleges that any member of the Border Patrol ever expressed any policy or desire to keep them awake. Plaintiffs also do not claim that they were deliberately harassed, asked questions unrelated to their immigration detention and status, or forced to perform tasks to keep them awake.

Plaintiffs also do not explain how the absence of beds, presence of lights, or any other challenged conditions are unrelated to the purpose of maintaining a short-term facility for the purpose of prompt immigration processing. Importantly, the 24-hour nature of immigration processing at Border Patrol stations makes it impossible to ensure darkened sleeping conditions without creating risks to the safety of all individuals in the facilities. Moreover, the remainder of the conditions Plaintiffs seek to have Border Patrol provide, while they might be reasonable at facilities equipped for long-term detention, are not reasonably required at facilities that serve the limited purpose of overnight processing for illegal aliens recently apprehended in the United States.

The facts that the named Plaintiffs actually plead – as opposed to the generalized assertions throughout Plaintiffs' Complaint – raise no constitutional claim. For instance, even though Plaintiff Jane Doe #1 alleges that she was not provided access to "a bed or bedding," she acknowledges that she received an "aluminum blanket" and "got about five hours of sleep." Compl. ¶¶ 26-27. Additionally, Doe #1 does not allege that she was intentionally kept awake, or that anyone forbade her to sleep. Instead, she concedes that part of the reason she was unable to sleep was that officials would "come in and ask [detainees] questions." Compl. ¶ 26. Yet Doe #1 does not allege that immigration authorities asked her any questions unrelated to her immigration processing. Five hours of sleep during active immigration processing following a lawful arrest in the desert of an

alien who was unlawfully present in the United States simply does not amount to any punitive deprivation of sleep, much less a Due Process violation. *See Jones*, 393 F.3d at 432. Likewise, although Jane Doe #2 also alleges that she "was not provided access to a bed or bedding," she concedes that she received an "aluminum blanket" and did sleep. Compl. ¶¶ 41, 45. She, too, does not allege that she was purposely kept awake, asked questions unrelated to her immigration processing, or forced to perform unrelated tasks.[3] Thus, any allegations of "sleep deprivation" do not demonstrate any cognizable claim because the conditions that Plaintiffs actually experienced were plainly incidental to immigration processing.

During Plaintiff Flores's first detention, in 2007, Flores acknowledges that he was able to sleep, albeit "very little." Compl. ¶ 53. During Plaintiff Flores's 2014 detention, Flores claims that he got "little to no sleep during his 36 hour detention." *Id.* at ¶ 56. Flores does not claim any express punitive intent, or any purposeful deprivation of his sleep. He also does not allege that any portion of the 36 hours he spent at a Border Patrol facility was unrelated to his immigration processing. Indeed, Flores acknowledges that he spent time in four different cells during this processing time in 2014, which illustrates that Flores was being actively processed during that time.

While the named Plaintiffs variously complain about the lights and temperatures, such conditions were incidental to orderly operation of the facility, detainee safety, and active processing of aliens at all hours. Similarly, none of the three alleges that their dislike of any food, or any smell or condition of the processing areas, kept them awake—much less that these factors were excessive or punitive given their short-term processing.

Flores also asserts that over-crowding contributed to his lack of sleep during his stay in Border Patrol custody in August 2014 (Compl. ¶ 56). However, an unprecedented increased numbers of families and unaccompanied children illegally entered the United

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[3] To the extent either Doe Plaintiff alleges she was deprived of sleep because they were transferred between Border Patrol facilities, *see* Compl. ¶¶ 17-18, 48, this too is incidental to the immigration processing that was being conducted, and is not a punitive condition.

States in the summer of 2014. Border Patrol must process all aliens who come into its custody, and it seeks to do so as quickly and efficiently as possible in order to transfer individuals to the custody of other agencies or agency components, or to release them as necessary. Even accepting plaintiffs' allegations as true, periods of crowding may occur due to circumstances out of Border Patrol's control. This does not rise to the level of a constitutional violation.

In sum, Plaintiffs' allegations of "sleep deprivation" simply express their dislike of the movement, questioning, and discomfort incidentally related to the necessary ongoing processing of recently-apprehended aliens at all hours of the day. None states any claim as a matter of law.

b. Plaintiffs' Second Claim fails as a matter of law.

Defendants do not dispute that detainees, like prisoners, have the right not to be exposed to severe unsanitary conditions. *See Anderson v. County of Kern,* 45 F.3d 1310, 1314–15 (9th Cir. 1995); *Youngberg,* 457 U.S. at 315-16 (establishing a right to "personal security" for involuntary committed persons). The *Anderson* Court noted that subjecting a prisoner to a lack of sanitation that is severe or prolonged can constitute an infliction of pain within the meaning of the Eighth Amendment, but ultimately held that testimony from some plaintiffs that a cell was dirty and smelled bad did not violate the Constitution. 45 F.3d at 1314-15. "There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." *Bell,* 441 U.S. at 539, n.21. Some crowding and loss of freedom of movement is one of the inherent discomforts of confinement. *Id. at* 542; *see also Demery,* 378 F.3d at 1030 (noting that *Bell* determined that "the additional discomfort of having to share the already close corners with another detainee was not sufficiently great to constitute punishment"). Even if crowding were to constitute more than a *de minimis* harm, Plaintiffs must allege that the condition was intended to punish or was excessive in relation to a non-punitive purpose. *Jones,* 393 F.3d at 432; *see also Endsley v. Luna,* 2010 WL 3118584 *20 (C.D. Cal. 2010) (confining civilly committed person in state psychiatric hospital to overcrowded room

that was grimy and had walls that had been stained with phlegm or mucus for four hours per day did not violate due process clause, since claim was not objectively serious and it did not significantly exceed inherent discomforts of confinement).

As a threshold matter, none of the named Plaintiffs cites any challenged restriction expressly designed to punish with respect to any alleged deprivation of hygienic and sanitary conditions. Plaintiff Doe #1 asserts that she was not provided access to showers, or given toothpaste or a toothbrush, and that there was no soap at the Casa Grande facility. Compl. ¶ 23. She acknowledges that she had access to hand sanitizer in Casa Grande at least twice. *Id.* at ¶ 24.[4] Doe #1 acknowledges that a toilet was present in both Casa Grande and Tucson, and does not assert that the detention cell in either facility was itself unclean or unsanitary. *See generally* Compl. ¶¶ 15-34. Similarly, Plaintiff Doe #2 asserts that she was not provided access to showers, cleaning supplies, soap, toothpaste, or a toothbrush at either the Casa Grande or Tucson facilities. *Id.* at ¶¶ 44, 49. But Doe # 2 likewise acknowledges access to a toilet in both facilities, and does not assert that the detention cell in either facility was unclean or unsanitary. *Id.* at ¶¶ 47, 49. Thus, notably neither Jane Doe #1 nor Jane Doe #2 makes any specific allegation concerning the cleanliness of the detention cells, including any reference to trash, exposure to diseases, or deprivation of access to toilets. *See generally* Compl. at 5-10. The Doe Plaintiffs' allegations are therefore limited to assertions that they were denied access to soap, showers, toothpaste, and toothbrushes while in Border Patrol custody. Neither Plaintiff asserts that such denial occurred for any punitive purpose; rather, they simply allege that such supplies were not available at the Border Patrol Stations. Plaintiffs cannot show that the absence of such supplies in Border Patrol stations is unreasonable – such that it amounts to a constitutional violation – given the short-term purpose of Border Patrol stations. Therefore, both Doe Plaintiffs fail to state a claim for unsanitary conditions.

[4] It appears that Plaintiff Doe #1 may have had access to soap in the Tucson facility. *See* Compl. ¶ 23.

Plaintiff Flores likewise asserts that during his three-day detention in 2007, there was no soap, and he was not given access to showers, towels, a toothbrush, or toothpaste. Compl. ¶ 53. Regarding his August 2014 detention, which lasted about 36 hours, Plaintiff Flores asserts that he spent a total of 36 hours in four different holding cells in the Tucson Border Patrol Station following his arrest by the Tucson police. Compl. ¶¶ 55-56. Plaintiff Flores asserts that none of these cells had soap or towels, and that he was not given access to a shower, toothbrush, or toothpaste. *Id.* at ¶ 58. He asserts that the cells were "filthy" and "smelled terrible," and complains about crowding. *Id.* at ¶¶ 56, 59.

As noted above, any crowding experienced by an individual in Border Patrol custody is directly related to the numbers of individuals who may illegally enter the United States in the Tucson Sector in a given time-period, and require processing in the custody of Border Patrol. Border Patrol must maintain custody of all individuals who are apprehended and require processing until it can transfer or release those individuals. Thus any crowding that may occur is directly incidental to the express purposes of the facility.

Although Plaintiff Flores alleges that there was "garbage on the floor of all of the cells and no trash bins," he acknowledges that at least once the cell was cleaned. *Id.* at ¶ 59. Further, while Plaintiff Flores claims that one cell lacked toilet paper, he does not allege that he ever requested more toilet paper, and further acknowledges that another cell had at least two working toilets. *Id.* Even taken together, the conditions Plaintiff Flores alleges fail to state any harm beyond *de minimis* inconveniences incident to his detention during immigration processing. *See Anderson*, 45 F.3d at 1314-15.

None of the conditions alleged by the named Plaintiffs state any claim for a constitutional violation because they are reasonable in light of the short-term processing purposes of Border Patrol facilities. The Second Claim therefore should be dismissed.

c. Plaintiffs' Third Claim fails as a matter of law.

In the context of the Eighth Amendment, mere negligence in diagnosing or treating a medical condition does not violate constitutional standards, and an inmate must demonstrate that he was confined under conditions posing a risk of "objectively, sufficiently serious" harm and that the offender had a "sufficiently culpable state of mind" in denying proper medical care. *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002), citing *Wallace v. Baldwin*, 70 F.3d 1074, 1076 (9th Cir.1995). The Ninth Circuit has stated that civilly committed sexually violent predators ("SVPs") may be entitled to a higher degree of protection than provided by the deliberate indifference standard. *See Hydrick*, 500 F.3d at 989 ("[T]he rights afforded prisoners set a floor for those that must be afforded SVPs"). A civilly-committed individual's claim that his medical care violated constitutional standards is governed by the "professional judgment" standard set forth in *Youngberg v. Romeo, 457 U.S. 307 (1982).* The Supreme Court has declared: "[T]he decision if made by a professional, is presumptively valid; liability may be imposed only when the decision is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323. Thus, under any standard, mere negligence or medical malpractice does not violate the Constitution. *See Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Patten v. Nichols*, 274 F.3d 829, 842-43 (4th Cir. 2001) (applying *Youngberg* "professional judgment" standard to a denial of medical care claim by a civilly committed psychiatric patient and holding that more than negligence is required).

A "serious" medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain." *Id. (*citing *Estelle*, 429 U.S. at 104). The Court should thus consider whether Plaintiffs have met their burden by considering whether: (1) a reasonable doctor would think that the condition is worthy of comment or treatment; (2) the condition significantly affects the prisoner's daily activities; and (3) the condition is chronic and accompanied by

substantial pain. *Doty v. County of Lassen*, 37 F.3d 540, 546 n.3 (9th Cir.1994) (citation omitted).

Plaintiffs cite to no challenged restriction expressly designed to punish with respect to any alleged lack of medical care. Moreover, while Plaintiffs broadly assert a claim for a lack of medical "screening," no named Plaintiff alleges any untreated injury. Indeed, the closest Plaintiffs come to alleging any injury is Plaintiff Jane Doe #1's assertion that she had an "abrasion on her left foot." ECF No. 1 at 7. She adds that she "has had no opportunity to have it looked at by a medical professional." *Id*. She does not allege that she suffered any continuing harm from the abrasion, or that it developed into any more serious condition, or that any doctor has stated that it required treatment. No Plaintiff alleges any emergent injury, deprivation of medication, or even any urgent illness. No Plaintiff alleges that he or she ever made any assertion to Border Patrol of any need for medical care. None of the named Plaintiffs even alleges medical conditions for which they requested attention such as dehydration, heat exhaustion, or foot blisters. While Plaintiff Doe #1 claims that she was forced to "sit in the hot desert for almost two hours," Compl. ¶ 37, she does not allege heat exhaustion, fatigue from the heat, or even a sunburn. While all three Plaintiffs mention an inability to shower or brush their teeth, none alleges any emergent dental issue, untreated infected wound, or any request for medical attention.

In sum, none of the three Plaintiffs alleges any injury that would necessitate medical attention. Thus, Plaintiffs fail to state a claim under any legal standard.

d. Plaintiffs' Fourth Claim fails as a matter of law.

"Adequate food is a basic human need protected by the Eighth Amendment." *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996) (citation omitted), amended by 135 F.3d 1318 (9th Cir. 1998). "While prison food need not be tasty or aesthetically pleasing, it must be adequate to maintain health." *Id.* (quotation omitted); compare *Foster v. Runnels*, 554 F.3d 807, 812-13 (9th Cir. 2009) (holding that prisoner alleging 16 meals withheld over 23 days, leading to weight loss and dizziness, was sufficient to state a

claim); with *Sumahit v. Parker*, 2009 WL 2879903 *18 (E.D. Cal. 2009) (finding that a complaint of cold food does not state a claim for punitive conditions).

None of the named Plaintiffs alleges that Border Patrol has any restriction expressly designed to punish with respect to any alleged lack of food and water. Moreover, none of them alleges that he or she was deprived of food or water for the purpose of punishment. While all three named Plaintiffs complain in various ways about the quality and quantity of food, no named Plaintiff alleges the type of effects or symptoms that would be expected from punitive lack of adequate food, such as starvation, diarrhea, or vomiting—or even stomach discomfort based on the food.

Plaintiff Doe #1 acknowledges that she received at least two burritos, two packets of cookies, and two juice boxes, and had access to drinking water. Compl. ¶ 28. She alleges that this was "only a small amount of food[,]" and that she was "extremely hungry" as a result, but does not allege that she asked for more food, or that food was otherwise withheld from her for any purpose, punitive or otherwise. *Id.* Similarly, Plaintiff Doe #2 alleges that she received "little food" because she "sporadically" received burritos, cookies, and juice, and also had access to drinking water. *Id.* ¶ 46. She too does not allege that she asked for food and was denied, or that food was otherwise withheld from her. Plaintiff Flores asserts that during his 2007 detention, he received juice, crackers, and access to drinking water. *Id.* ¶ 53. During his 2014 detention, Plaintiff Flores received crackers, juice, and a burrito, along with access to drinking water. *Id.* ¶¶ 60-61.

This cause of action should be dismissed because complaints about the quality of food provided at Border Patrol facilities are *de minimis*, and do not amount to a constitutional claim. Plaintiffs do not allege that the food was inedible, spoiled, or otherwise unfit for consumption; rather, they allege that they did not like the food that they were served, and that they were hungry, but did not tell anyone that they were hungry or ask anyone to provide them with additional food. Plaintiffs simply cannot establish that it is unreasonable for Border Patrol to provide meals that are limited in

variety, or undesirable to Plaintiffs' tastes, during short-term processing at Border Patrol facilities. Accordingly, Plaintiffs have not alleged a constitutional violation and this cause of action should be dismissed.

e. Plaintiffs' Fifth Claim fails as a matter of law.

Plaintiffs complain about deprivation of warmth. Notably, none of the named Plaintiffs alleges that the temperature at any facility was expressly designed to punish, or that any temperature was unrelated to the reasonable needs of the facility. As discussed more fully above, no Plaintiff alleges requiring, much less requesting, medical attention as a result of the cold temperatures, nor do they allege that the cold made it impossible to sleep. Further, no Plaintiff asserts conditions such as hypothermia, frostbite, or even muscle stiffness as a result of the cold. Indeed, no Plaintiff alleges any temperature inconsistent with the legitimate, non-punitive government interests of "maintaining [facility] security" and "effective management of a detention facility." *Jones*, 393 F.3d at 932. Notably, Plaintiffs do acknowledge that they received blankets. Based on Plaintiffs allegations, it appears that their claims are based on their preference for a warmer temperature. That is precisely the type of "de *minimis* level of imposition with which the Constitution is not concerned." *Bell*, 441 U.S. at 539, n.21. Because Plaintiffs' complaints about the temperature do not assert a constitutional violation, the Fifth Claim should be dismissed.

IV. CONCLUSION

Plaintiffs fail to meet their jurisdictional burden, and to state any claim based on the particular circumstances experienced by the named Plaintiffs. Thus, for the foregoing reasons, the Complaint should be dismissed.

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DATED: August 14, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. I certify that all participants are CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 14, 2015

Respectfully submitted.

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