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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Unknown Parties, Plaintiffs, v. Jeh Johnson, et al., Defendants.	No. CV 15-00250-TUC-DCB **ORDER**

Plaintiffs, three civil immigration detainees who are or were confined in a U.S. Customs and Border Protection (CBP) detention facility in the Tucson Sector of the U.S. Border Patrol, brought this putative class action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). (Doc. 1.) Defendants Jeh Johnson, Secretary of the U.S. Department of Homeland Security (DHS); R. Gill Kerlikowske, CBP Commissioner; Michael J. Fisher, CBP Chief; Jeffrey Self, Commander of the Arizona Joint Field Command of CBP; and Manuel Padilla, Jr., Chief Patrol Agent for the U.S. Border Patrol's Tucson Sector have filed a Motion to Dismiss for lack of standing and failure to state a claim. (Doc. 52). The Motion has been fully briefed. (Docs. 62, 65.)

For the reasons stated below, the Court will grant the Motion in part and deny it in part.

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I. Background

Plaintiffs filed this action in June 2015. At that time, the first two Plaintiffs, Jane Does #1 and #2, were in custody at the Tucson Border Patrol Station in Tucson, Arizona. (Doc. 1 ¶¶ 15, 35.) The third Plaintiff, Norlan Flores, was living in Tucson, Arizona, and had twice been in custody at the Tucson Border Patrol Station, once in 2007, and once in 2014. (*Id.* ¶¶ 52-53, 55-56.)

Plaintiffs assert six claims for relief related to the treatment of Tucson Sector civil immigration detainees. Plaintiffs' first five claims stem from Defendants' alleged violation of the Due Process Clause of the Fifth Amendment based on their subjection of Plaintiffs and proposed class members to deprivation of sleep, deprivation of hygienic and sanitary conditions, deprivation of adequate medical screening and care, deprivation of adequate food and water, and deprivation of warmth. (Doc. 1 ¶¶ 184-218.) Plaintiffs' sixth claim stems from Defendants' alleged violation of the Administrative Procedures Act (APA) based on their failure to enforce their own procedures related to the operation of holding cells in Tucson Sector facilities. (*Id.* ¶¶ 219-24.)

Plaintiffs seek declaratory and injunctive relief, including an Order compelling Defendants to provide Plaintiffs and the proposed class with beds and bedding; access to soap, toothbrushes, toothpaste, and other sanitary supplies; clean drinking water and nutritious meals; constitutionally adequate cell occupancy rates, temperature control, and fire, health, and safety standards; medical, dental, and mental health screening; and emergency medical care. (*Id.* ¶¶ 230-35.) Plaintiffs also request Court-ordered monitoring as appropriate. (*Id.* ¶ 236.)

II. Motion to Dismiss

A. Standing

To sue in federal court, a plaintiff must have standing under Article III of the United States Constitution; that is, the plaintiff "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). The party

invoking federal jurisdiction bears the burden of establishing the three elements of constitutional standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). "The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others." *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir.1993).

Defendants argue that all three Plaintiffs lack the requisite showing of injury for standing because none of them is currently in CBP custody or faces an imminent threat of being so detained in the future. (Doc. 53 at 4.) For purposes of standing, the alleged injury must be "actual or imminent, not conjectural or hypothetical," and it must be "likely, as opposed to speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (internal quotation marks and citations omitted). Defendants argue that Flores does not satisfy this burden because he is not currently in custody, and his purported fear of being detained in the future is merely conjectural. (Doc. 52 at 4.) They argue that the Doe Defendants also fail to show either a current injury or the likelihood of any future injury because they have been transferred out of CBP custody to Immigration and Customs Enforcement (ICE) custody and they would only be returned to CBP custody if they were removed from the United States and then chose to reenter the country illegally. (*Id.* at 4-5.) Absent a more definite showing of future harm, Defendants argue, Plaintiffs lack standing because they cannot show injuries that would be redressed by a favorable decision in this action, and their claims are, for the same reasons, moot. (*Id.*)

Defendants' arguments are inapt in this case because it is undisputed that the two Doe Plaintiffs were in CBP custody when the Complaint was filed, and they alleged constitutionally inadequate treatment at that time. (Doc. 1 ¶¶ 15-51.) These Plaintiffs therefore presented actual injuries capable of redress by the relief sought in this action. Although, as Defendants argue, changes in circumstances that cause the cessation of a plaintiff's alleged injuries ordinarily deprive that plaintiff of standing and moot his or her claims for future injunctive relief, the standing and mootness analyses require more

elasticity in cases such as this where Plaintiffs' claims and those of the class they seek to represent are "inherently transitory." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991). The Supreme Court squarely addressed just such a situation in *County of Riverside*, in which the named plaintiffs, who had been arrested without warrants, claimed they were not afforded timely bail hearings or probable cause determinations. (*Id.* at 49.) The Court found that these plaintiffs plainly had injuries when they filed their complaint that were, "at that moment[,] capable of being redressed through injunctive relief." (*Id.* at 51.) Even though these claims were subsequently rendered moot because the plaintiffs were eventually given probable cause determinations or released, the Court found such circumstantial relief an insufficient basis to deny standing where the constitutionally objectionable practice continued and where class certification "preserved the merits of the controversy." (*Id.*) The Court maintained this position even though in that case, as here, the putative class had not been certified before the named plaintiffs' injuries ceased. (*Id.*) The Court cited a number of similar cases for the proposition that even after the claims of proposed class representatives expire, "the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." (*Id.*, *citing, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 110 (1975); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980)).

Because the Court finds, based on the above, that the Doe Plaintiffs have standing to sue on behalf of themselves and the putative class on the claims set forth in the Complaint, it need not determine for purposes of this motion whether Plaintiff Flores, who was not confined at the time this action was filed, has standing on the grounds that he faces the likely threat of future detention. *See Leonard*, 12 F.3d at 888.

B. Sufficiency of Plaintiff's Claims

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). Dismissal of the complaint, or any claim within it, may be based on either a "'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable

legal theory.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)). A complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). But "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what . . . the claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (internal quotation omitted).

In determining whether a complaint states a claim under this standard, the allegations in the complaint are taken as true and the pleadings are construed in the light most favorable to the nonmovant. *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007). A court may not consider evidence outside the pleadings unless it converts the Rule 12(b)(6) motion into a Rule 56 motion for summary judgment and gives the nonmovant an opportunity to respond. Fed. R. Civ. P. 12(d); *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). A court may, however, consider documents attached to the complaint or incorporated by reference in the complaint, or matters of judicial notice, without converting the motion into one for summary judgment. *Ritchie*, 342 F.3d at 908.

1. Constitutional Claims

Plaintiffs allege that the conditions of their detentions in CBP facilities give rise to a number of Fifth Amendment due process claims. Detainees held solely for suspected violations of civil immigration laws are subject to civil, not criminal, proceedings, which the Supreme Court has stated are to be "non-punitive in purpose and effect." *Zadvydas v. Davis*, 533 U.S. 678, 690, (2001). As to detention practices, the Supreme Court has held that civil detainees "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). The Ninth Circuit has accordingly found in the civil commitment context that a detainee awaiting adjudication as to his or her commitment "is entitled to due process protections at least as great as those afforded

to a civilly committed individual and at least as great as those afforded to an individual accused but not convicted of a crime." *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004). At a minimum, therefore, "an individual detained under civil process—like an individual accused but not convicted of a crime—cannot be subjected to conditions that 'amount to punishment.'" *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 536 (1979)). Conditions amounting to punishment exist, either (1) "where the challenged restrictions are expressly intended to punish," or (2) "[where] the challenged restrictions serve an alternative, non-punitive purpose but are nonetheless excessive in relation to the alternative purpose, or are employed to achieve objectives that could be accomplished in so many alternative and less harsh methods." *Jones*, 393 F.3d at 932 (internal quotation marks and citations omitted).

Defendants contend that Plaintiffs' constitutional claims must be dismissed for failure to state a claim because, they argue, CBP's short-term processing facilities do not implicate the same standards that apply in more typical detention settings. (Doc. 52 at 8.) They further argue that the allegedly deficient conditions that the Plaintiffs claim violate their due process rights do not constitute constitutional violations because they are reasonable in light of CBP's limited and short-term purpose of processing recently apprehended immigration detainees for intended transfer or release. (*Id.* at 8-17.)

As to the claim for "deprivation of sleep," Defendants argue that Plaintiffs fail to allege any facts showing they were intentionally kept awake for punitive reasons, and the facts they do allege fail to show that their rights to sleep were clearly violated. (*Id.* at 9.) They maintain, for example, that both Doe Plaintiffs received "aluminum blankets," were able to get some sleep, and were only interrupted by immigration authorities asking immigration-related questions or performing operationally-necessary tasks. (*Id.* at 9-10.) Likewise, they argue that even though Flores claimed he got "little to no sleep during his 36 hour detention," his allegations show he spent time in four different cells, indicating he was being actively processed during that time. (*Id.* at 10.) Defendants maintain that the various factors Plaintiffs assert contribute to a lack of sleep, such as continuous

lighting, cold temperatures, interruptions, and periodic overcrowding, are merely incidental conditions that are reasonably related to the orderly operation of CBP facilities, and they do not rise to the level of constitutional violations. (*Id.* at 10-11.)

Defendants make similar arguments with respect to all of Plaintiffs' constitutional claims. They argue (1) that the alleged unsanitary conditions of CBP's holding cells are *de minimis* and do not rise to the level of constitutional violations, and Plaintiffs do not allege that they were deprived of showers, towels, and hygiene products, such as soap and toothpaste, for punitive reasons; (2) any overcrowding is merely a function of Defendants' mandate to detain everyone apprehended in CBP's Tucson Sector until they are processed for transfer or release and thus inevitably fluctuates and is incidental to the legitimate purpose of the facilities; (3) Plaintiffs have not alleged that they suffered from any serious medical conditions that went untreated or had known illnesses or ailments that were deliberately disregarded as a way to punish or inflict ongoing harm; (4) Plaintiffs' allegations of lack of adequate food and water show only that the sustenance provided was limited and not to their tastes, not that they were significantly deprived of these necessities; and (5) Plaintiffs' complaints about temperature are likewise *de minimis* and based purely on preferences for warmer temperatures; Plaintiffs do not show that the temperature in holding cells was intended to punish or led to any medical issues, and Plaintiffs acknowledge receiving blankets; thus, the alleged lack of warmth also does not rise to the level of a constitutional violation. (Doc. 52 at 11-17.)

Plaintiffs argue, and the Court agrees, that Defendants primarily challenge the substantive merits of Plaintiffs' case and not the sufficiency of their allegations to state a claim. (*See* Doc. 62 at 16.) Indeed, Defendants' repeated assertions that the alleged conditions at CBP facilities are "reasonable" due to the unique purpose and temporary nature of civil immigration detentions relies on an interpretation of facts that is premature at this stage of the proceedings. "'[T]he 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 v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008)

(quoting Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1356).

The proper inquiry here is whether Plaintiffs have alleged sufficient facts that, taken as true, plausibly state a claim that conditions of detention at CBP facilities violate their due process rights. As set forth above, it is possible to state such a claim even where the alleged deprivations serve a legitimate purpose, but where those deprivations are nonetheless alleged to be excessive under the circumstances or the same purposes could plausibly be served using less harsh methods. *See Jones*, 393 F.3d at 932.

Here, Plaintiffs have alleged that none of the named Plaintiffs or potential class members was given access to beds or mattresses, and they were forced to spend the night on concrete floors or benches (Doc. 1¶ 103); the temperatures in holding cells are extremely cold, and Border Patrol agents often ignore requests to turn the temperature up (*id.* ¶¶ 111-112); "holding cells are often dirty and littered with garbage and discarded food wrappers," and piles of trash accumulate because there are no trash bins in holding cells and cleaning is cursory and infrequent (*id.* ¶ 123); detainees are not given any medical screening and are denied access to prescribed medication or requested relief for known physical ailments (*id.* ¶¶ 129-133); and detainees are not provided adequate food, may not have access to drinking water for hours at a time, and are not given sufficient drinking cups (*id.* ¶¶ 136, 142, 144).

Taken as true, these and numerous similar allegations in the Complaint show that Plaintiffs have suffered or that they or putative class members are likely to suffer deprivations of adequate sleep, sanitary conditions, medical care, food and water, and warmth in CBP Tucson Sector facilities as Plaintiffs claim.[1] Whether such deprivations

[1] Defendants argue for the first time in their Reply brief that the Court should consider only the allegations of harm pertaining specifically to the named Plaintiffs because a putative class action cannot proceed unless these Plaintiffs can, themselves, state a claim. The Court need not consider arguments raised for the first time in a reply brief. *See Marlyn Nutraceuticals, Inc. v. Improvita Health Prods.*, 663 F. Supp. 2d 841, 848 (D. Ariz. 2009) (citing *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir.1990) (noting that legal arguments raised for the first time in the reply brief are deemed waived). Defendants' argument is in any case unavailing because, unlike in *Boyle v. Madigan*, 492 F.2d 1180 (9th Cir. 1974), to which Defendants cite, the Court has

are reasonable in light of the limited duration and purpose of CBP detention, as Defendants assert, requires weighing the evidence on both sides and goes beyond the scope of the instant motion. Accordingly, the Court will deny Defendants' Motion to Dismiss as to Plaintiffs' constitutional claims.

2. APA Claim

The APA provides for judicial review of "final agency action." 5 U.S.C. § 704; *City of San Diego v. Whitman*, 242 F.3d 1097, 1101 (9th Cir. 2001); *Pacific Coast Fed'n of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1033 (9th Cir. 2001) ("only final agency decisions are subject to review under the APA."). For agency action to be final, the action must (1) "mark the consummation of the agency's decisionmaking process," and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted). The action must therefore "impose an obligation, deny a right[,] or fix some legal relationship." *City of San Diego v. Whitman*, 242 F.3d 1097, 1102 (9th Cir. 2001).

Defendants argue that Plaintiffs' APA claim should be dismissed because it does not pertain to any final agency action and, therefore, does not warrant judicial review. (Doc. 52 at 5-6.) In response, Plaintiffs point to a June 2, 2008 CBP Memorandum entitled *Hold Rooms & Short Term Custody* ("2008 Memorandum") issued by then-Chief of the U.S. Border Patrol David V. Aguilar (Doc. 62 at 12), and they argue that the

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determined that Plaintiffs have standing with respect to an existing case or controversy. Further, Plaintiffs have alleged that all the named Plaintiffs were subject to the same policies and conditions of detention for which they seek class-wide relief. *See*, *e.g.*, Doc. 1 ¶ 79 ("The conditions experienced by the Plaintiffs are standard in holding cells in all short-term holding CBP facilities currently operated within the Tucson Sector and thus have been or will be experienced by all putative class members"); ¶¶ 81-86 (alleging that each Plaintiff has been subjected to each of the enumerated deficiencies–lack of bedding, extreme cold, lack of hygiene supplies, lack of medical screening, lack of food and water—alleged in the Complaint). Plaintiffs have additionally alleged that all named Plaintiffs have suffered harm from their exposures to these conditions. (*Id.* ¶ 175.) Taken together, these allegations are sufficient for Plaintiffs to state a claim as to the alleged unconstitutional conditions.

statements of policy contained in—but not limited to—this Memorandum constitute final agency action. (*Id.* at 13.) Plaintiffs further contend that under 5 U.S.C. § 706(1), which requires the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed," they have stated a claim to have the Court compel Defendants to act in accordance with their own standards. (Doc. 62 at 13-15.)

In *Norton v. Southern Utah Wilderness Alliance*, the Supreme Court made clear that "[f]ailures to act are sometimes remediable under the APA, but not always." 542 U.S. 55, 61 (2004). Significantly, the Court emphasized that "the only agency action that can be compelled is action legally *required*." *Id.* at 63 (emphasis in original). This limitation "rules out judicial direction of even discrete agency action that is not demanded by law" or by agency regulations "that have the force of law." *Id.* at 65. Defendants argue, and the Court agrees, that the documents Plaintiffs rely on to compel Defendants to act do not have the force of law required to support their APA claim.

In *River Runners for Wilderness v. Martin*, a coalition of environmental groups similarly argued that the National Park Service was legally obligated by its own policies to set forth restrictions on the use of motorized vehicles in Grand Canyon National Park. 593 F. 3d 1064, 1071 (9th Cir. 2010). The Ninth Circuit found, however, that the policies upon which these plaintiffs relied lacked the force of law and were instead "intended only to provide guidance within the Park Service, not to establish rights in the public generally." *Id.* In reaching this conclusion, the court applied the following two-part test from *United States v. Fifty–Three (53) Eclectus Parrots*, 685 F.2d 1131 (9th Cir. 1982), for when agency pronouncements have the force and effect of law:

> To have the force and effect of law, enforceable against an agency in federal court, the agency pronouncement must (1) prescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice—and (2) conform to certain procedural requirements. To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority

> and in conformance with the procedural requirements imposed by Congress.

Id. (quoting *Eclectus Parrots*, 685 F.2d at 1136. The court in *River Runners* found that because the Park Service policies merely set forth the practices and procedures to be followed by its own personnel in operating the national park system, they fell in the category of "interpretive rules, general statements of policy or rules of agency organization, procedure or practice" and thus failed to meet the first prong of this test. *River Runners*, 593 F. 3d at 1071. The court also found that the policies failed to meet the second prong because they were not published in the Federal Register 30 days before going into effect as required for substantive rules under 5 U.S.C. § 553(d), and they were never published in the Code of Federal Regulations as are agency rules intended to create substantive rights of third parties. *Id.* at 1072.

Here, Plaintiffs refer in their Complaint to both the 2008 Memorandum and CBP Security Policy and Procedures Handbook, HB1400-02B ("2009 CBP Handbook"). (Doc. 1 ¶ 76.) They cite to these sources as setting forth policies on such things as holding room sizes; lengths of detention; bedding requirements; safety and cleanliness; provision of food, water, restrooms, showers, and hygiene supplies; access to medical personnel; and access to phones, that they allege Defendants routinely violate. (*Id.* ¶¶ 90, 94, 101, 114, 116, 117, 123, 124, 127, 136, 142, 148.) Plaintiffs have not alleged any facts, however, to support that these policy statements represent substantive rules that are legally binding as opposed to being general rules of practice and procedure within the agency. Plaintiffs quote from the forward to the 2009 CBP Handbook which states that it implements policies from "a number of relevant source documents." (*Id.* ¶ 77.) Although some of these documents, such as "Public laws . . . regulations, [and] rules" may have the force of law, this does not mean that the Handbook, itself, is legally binding on Defendants, and Plaintiff's do not otherwise allege violations of any source documents that would give rise to an APA claim. Plaintiffs have also not alleged that either the 2008 Memorandum or the 2009 CBP Handbook were ever published in the Federal Register or

otherwise promulgated as substantive rules, and they do not allege that these documents were ever published in the Code of Federal Regulations. Based on the above, Plaintiffs have not plausibly alleged that the agency policies referred to in the Complaint have the force of law. Accordingly, Plaintiffs' allegations that CBP regularly fails to abide by its own policies fails to state a cognizable claim under the APA, and the Court will dismiss Plaintiffs' APA claim. Dismissal of the APA claim does not affect the Court's findings relevant to class certification.

Accordingly,

IT IS ORDERED that the Defendants' Motion to Dismiss (Doc. 52) is **granted in part** with respect to Plaintiffs' APA claim, and **denied in part** with respect to Plaintiffs' constitutional claims.

Dated this 11th day of January, 2016.

David C. Bury
United States District Judge