UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

JAIRO ALEXANDER GONZALEZ RECINOS, 1:19-cv-95
On his own behalf and on behalf of all those similarly situated;
GERARDO HENRIQUE HERRERA RIVERA,
On his own behalf and on behalf of all those similarly situated;
KEVIN EDUARDO RIZZO RUANO,
On his own behalf and on behalf of all those similarly situated; and
JONATHAN FERNANDO BELTRAN RIZO,
On his own behalf and on behalf of all those similarly situated;

JAVIER ERNESTO GIRON MONTERROZA, 1:19-cv-103
On his own behalf and on behalf of all those similarly situated, through his next friend, his sister, Marlene Giron;
WILLIAM ANTHONY PEREZ VALLE,
On his own behalf and on behalf of all those similarly situated, through his next friend, his cousin, Roberto Valle;

SANTOS ZUNIGA, 1:19-cv-118
On his own behalf and on behalf of all those similarly situated, through his next friend, Santos Alberto Castillo;
JORGE LANDAVERDE,
On his own behalf and on behalf of all those similarly situated, through his next friend, Rosalinda Landaverde;
HUGO FLANDEZ,
On his own behalf and on behalf of all those similarly situated, through his next friend, Ernesto Giron;

BRYAN LOPEZ-LOPEZ, 1:19-cv-126
On his own behalf and on behalf of all those similarly situated, through his next friend, Juan Ramon Lopez;
WILLIAM ABEL SANTAY-SON,
On his own behalf and on behalf of all those similarly situated;

HECTOR SIGIFREDO RIVERA ROSA, **1:19-cv-138**
On his own behalf and on behalf of all those similarly situated, through his next friend, JULIO RIVERA;

JUAN CARLOS ACENSIO Y ACENSIO,
On his own behalf and on behalf of all those similarly situated, through his next friend, RUTH ISABEL ACENSIO;

JOSE NEFTALI ARIAS HERNANDEZ,
On his own behalf and on behalf of all those similarly situated, through his next friend, ZULMA CHAVARRIA VANEGAS;

JAVIER ALEXANDER REYES VIGIL,
On his own behalf and on behalf of all those similarly situated, through his next friend, ZULEYMA STEFANY SANCHEZ; and

JOSE WILLIAM RECINOS NOLASCO,
On his own behalf and on behalf of all those similarly situated, through his next friend, JOSE IVAN LOPEZ.

PETITIONERS/PLAINTIFFS

v.

KEVIN K. McALEENAN,
Acting Secretary, U.S. Department of Homeland Security and Commissioner, United States Customs & Border Protection;

JOHN P. SANDERS,
Acting Commissioner of CBP;

CARLA PROVOST,
Chief of the United States Border Patrol;

RODOLFO KARISCH,
Chief Patrol Agent-Rio Grande Valley Sector; and

MICHAEL J. PITTS, Field Office Director, ICE/ERO, Port Isabel Service Processing Center.

RESPONDENTS/DEFENDANTS.

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF PLAINTIFFS/PETITIONERS

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I. INTRODUCTION AND STATEMENT OF ISSUES

Custom and Border Protection's ("CBP") facilities are black holes: detainees are cut off from the outside world with little to no ability to contact their family members and, critically, their attorneys—even when they have an attorney-client relationship. And though its facilities are not designed for even a single overnight stay[1] and its own policy limits detention to only up to 72 hours, CBP is now detaining individuals in Texas's Rio Grande Valley incommunicado for weeks on end—in direct contravention of Congressional authorization and leading to dire constitutional violations.

Holding individuals incommunicado for weeks has severe repercussions. They are unable to advance their immigration case, which may include petitioning for asylum, preparing for a credible fear interview, obtaining documents from their country of origin that they may need for their case, or even evaluating the complicated decision whether to sign a voluntary departure form. Moreover, as recent months have shown, detainees who are isolated are placed in extreme and inhumane detention conditions, with no ability to expose or challenge their illegal treatment through an attorney.

The degrading and unconstitutional conditions detailed in Plaintiffs' Motion for Preliminary Injunction ("Plaintiffs' Motion") include extreme overcrowding; a lack of access to basic hygiene necessities, including showers; inhumane sleeping conditions; and a lack of adequate food and water.

These conditions have been ongoing in the McAllen and Brownsville divisions of the

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[1] CBP's own policies state its facilities are "not designed for sleeping" and have "no beds." U.S. Customs and Border Patrol Office of Internal Affairs Security Management Division, CBP Security Policy and Procedures Handbook, HB1400-02B, (Washington, DC, August 13, 2009), at 494, *available at* https://info.publicintelligence.net/CBP-SecurityHandbook.pdf.

Southern District of Texas for months. The Department of Homeland Security Office of Inspector General ("OIG") has issued an alarming report on the Rio Grande Valley Sector, documenting severe and "dangerous overcrowding and prolonged detention" during June 2019.[2] On June 12, 2019 at CBP's Fort Brown facility, for instance, OIG documented 88 adult men held in a cell with a maximum capacity of 41, and with some of the men pressing notes against the window or pointing to their beards to indicate the extreme length of time they had been in custody.[3] On July 12, 2019— a month later—Vice President Mike Pence visited the McAllen Border Patrol Station, where he toured "a swelteringly hot room called a sally port with hundreds of men, a strong smell of sweat and overcrowding so extreme there was no room for cots, the migrants left to sleep on concrete beneath mylar blankets."[4]

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[2] Office of Inspector General, *Management Alert – DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley* (July 2, 2019), *available at* https://www.oig.dhs.gov/sites/default/files/assets/2019-07/OIG-19-51-Jul19_.pdf.

[3] *Id.* at 8, Figure 6 (overcrowding of families observed by OIG on June 12, 2019, at Border Patrol's McAllen, TX, station).

[4] Betsy Klein & Pamela Brown, Pence: Border facility conditions are unacceptable, CNN (July 13, 2019) *available at* https://www.cnn.com/2019/07/12/politics/mike-pence-border-immigration/index.html.

[5]

[6]

[5] *See supra* n.2 at 4, Figure 1 (overcrowding of families observed by OIG on June 10, 2019, at Border Patrol's McAllen, TX, station).

[6] *Id.* at 5, Figure 3 (overcrowding of families observed by OIG on June 11, 2019, at Border Patrol's Weslaco, TX, station).

The American Civil Liberties Union Foundation of Texas and the American Civil Liberties Union Foundation (collectively the "ACLU" or "Amici") file this amicus brief in support of Plaintiffs' Motion for a Preliminary Injunction. Amici write to emphasize two issues of law. **First**, CBP's practice of detaining individuals incommunicado for prolonged periods, with no ability to access attorneys, is unconstitutional. **Second**, CBP's determination that it may detain individuals for prolonged periods of time in conditions designed for short-term detention is an unlawful violation of both statutory authority and its own internal policies.

For these reasons, and those asserted by Plaintiffs, amici respectfully submit that this Court should grant Plaintiffs' request for injunctive relief and require Defendants to 1) remove obstacles that prevent detainees from having access to counsel while in CBP custody; 2) improve conditions at CBP facilities to comply with statutory and constitutional requirements; and 3) comply with its own standards and cease detaining individuals for longer than 72 hours.

II. INTERESTS OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU of Texas is an affiliate of the ACLU and engages in legal advocacy to protect the fundamental liberties and basic civil rights of all persons in the state. The ACLU of Texas is particularly focused on advocating for the rights of immigrants held in detention facilities by the United States. The ACLU's National Prison Project works to ensure that prisons, jails, and other places of detention throughout the United States comply with the Constitution, domestic law, and international human rights principles.

The ACLU frequently participates as a party and amicus curiae in cases involving civil liberties and incarceration issues, including unlawful detention and immigrants' rights. *See Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018); *In re Hutto Family Det. Ctr.,* A-07-CA-164, 2007 WL 9757682 (W.D. Tex. May 29, 2007); *Graves v. Penzone*, CV-77-00479, 2017 WL 782991 (D. Ariz. Mar. 1, 2017); *Lyon v. U. S. Immig. & Customs Enf't*, 300 F.R.D. 628 (N.D. Cal. 2014), *modified*, 308 F.R.D. 203 (N.D. Cal. 2015).

III. ARGUMENT

A. CBP's Blanket Policy of Holding Detainees for Extended Periods Incommunicado From Counsel and The Courts is Plainly Unconstitutional.

CBP's policies and practices comprehensively deny detainees access to or by counsel. Individuals who have attorney-client relationships are denied attorney access. *See* Pls.' Mot. for a Preliminary Injunction at 2-3, 7-9, 27, Dkt. No. 23-1 (hereinafter "Pls.' Mot."). An attorney is not permitted to visit his or her client, and phone access is so rarely granted as to be functionally non-existent. *Id*. Detainees are not given any information about potential free or low-cost attorneys, and, as a matter of course, are not allowed to make phone calls that could secure an attorney. *Id.* Simultaneously, attorneys and non-profit organizations are not allowed to access the CBP holding facilities to determine if any individuals wish to be represented or to give know-your-rights presentations. As CBP continues to hold detainees for longer than the 72 hours set out in their own guidelines, these restrictions result in individuals being detained incommunicado for weeks—unable to engage counsel to defend against removal proceedings, to present claims for asylum, or to challenge the conditions under which they are being held.

As explained below, courts have regularly required detention facilities to provide greater access to and by legal counsel, even in much less extreme cases than what is currently occurring in CBP facilities in the McAllen and Brownsville divisions of the Southern District of Texas.

1. Courts consistently enjoin restrictions on attorney access where they effectively deny access to counsel and the courts.

Nearly a century ago, the Supreme Court made clear that "reasonable access to the courts has been a constitutional imperative." *Nunez v. Boldin*, 537 F. Supp. 578, 581 (S.D. Tex. 1982), *appeal dism'd without op.*, 692 F.2d 755 (5th Cir. 1982) (citing *Ex Parte Hull*, 312 U.S. 546 (1941)). As the Supreme Court has observed, "[i]t is now established beyond doubt that prisoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821(1977); *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989) ("The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights."). Related to this right, the government may not detain individuals incommunicado—with no access to the outside world:

> There is a well established tradition against holding prisoners incommunicado in the United States. It would be hard to find an American who thought people could be picked up by a policeman and held incommunicado, without the opportunity to let anyone know where they were, and without the opportunity for anyone on the outside looking for them to confirm where they were.

Halvorsen v. Baird, 146 F.3d 680, 688-89 (9th Cir. 1998).

The right to court access is violated whenever a detention facility imposes restrictions that unduly impede the ability of those detained to meaningfully challenge the fact or conditions of their confinement. This includes the ability of individuals to obtain "adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 828.

As set forth below, numerous courts throughout the country have held that detainees held in immigration custody must also be afforded the ability to meaningfully consult with counsel.

Nunez, 537 F. Supp. at 582 ("The requirement of access to courts and counsel extends to civil [immigration] matters as well as criminal proceedings.").

In assessing whether conditions violate the right to court access, courts "must strike a balance between the interests of the prisoner and the institution's interests of security and order." *Id*. And ultimately "restrictions which are not reasonably related to orderly administration cannot stand." *Id*.; *see also Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 384 (C.D. Cal. 1982) ("'[r]egulations and practices that unjustifiably obstruct the ability of professional representation or other aspects of the right of access to the courts are invalid.'") (quoting *Procunier*, 416 U.S. at 419). Further, in the civil immigration detention context, the government's interests of "security and order" are not as substantial as when detention is "criminal" in nature. *Nunez*, 537 F. Supp. at 582 (noting "the detention center does not have the same security problems as a jail or prison," because "[m]ost of the detainees are not 'criminals'—their only wrongdoing is having entered this country illegally").

A detainee's interest in accessing the courts is paramount, and government officials must "[r]efrain from placing obstacles in the way of communications between prisoners and their attorneys . . . ." *Id.* (quoting *Bounds*, 430 U.S. at 827-29); *see also Innovation Law Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1080 (D. Or. 2018) ("The right to counsel in immigration proceedings, including asylum proceedings, requires that [non-citizens] be provided 'reasonable time to locate counsel and permit counsel to prepare for the hearing.'") (quoting *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005)).

Under this framework, the Southern District of Texas in *Nunez* found restrictions placed on attorney access at an immigration detention facility in south Texas to be excessive—restrictions that, as discussed below, pale in comparison to the categorical denial of attorney

access at issue here. 537 F. Supp. at 582. Among other things, the court held that permitting attorney visitation only until 3:30 pm and not allowing paralegals or legal assistants to visit with clients denied the clients their right to access the courts. *Id*. Accordingly, the court entered an injunction mandating longer attorney access hours and that paralegals and legal assistants be allowed to visit clients. *Id.*

Likewise, in *Orantes-Hernandez*, the Central District of California rejected similar restrictions on the right to access attorneys, including limited visiting hours and a ban on written materials. 541 F. Supp. at 384 (reasoning that the right to access court stems from "the notion that incarcerated persons, though most in need of an opportunity to be heard, are least able to learn about their rights"); *see also Lyon,* 171 F. Supp. 3d at 994 (denying in part defendants' motion for summary judgment in detained immigrants' challenge to lack of telephone access).

More recently, in *Innovation Law Lab*, 342 F. Supp. 3d 1067, the District of Oregon enjoined the practices and policies of a federal Bureau of Prisons ("BOP") site that "effectively den[ied] access to counsel" for the more than 100 immigrants who were being detained there. *Id.* at 1080. There, the BOP had refused to allow a direct services organization to provide know-your-rights presentations, did not allow detainees to make free-of-charge phone calls to find an attorney, limited attorney-client visits to nine hours a week in a single room, and repeatedly denied attorneys' attempts to meet with clients. In issuing injunctive relief, the court considered the "cumulative effect" that these policies had on the right to access counsel. To remedy these ongoing violations, the court mandated, among other things, access to two attorney visitation rooms six hours a day, seven days a week, and that telephones be installed permitting free direct calls to legal service providers. *Id.* at 1074.

Again, in *Castillo v. Nielsen*, No. 5:18-cv-01317, 2018 WL 6131172, (C.D. Cal. June 21, 2018), the court entered injunctive relief requiring defendants to cease denying access to counsel to immigrants held in a BOP facility in Victorville, California. The court found "most concerning" "that many of the detainees were without access to legal communication for as many as to 9 to 13 days." *Id.* at *3. Accordingly, the court ordered the facility to provide attorney access through both telephone calls and in person visits, and implement a protocol to permit know-your-rights presentations. It further ordered that defendants could not proceed with immigration proceedings of detainees at Victorville, nor deport any detainee, until each detainee had the opportunity to consult with an attorney or attend a know-your-rights training.

Thus, the authority of this Court to correct the policies and practices at issue here that restrict attorney access in immigration detention facilities is well established.

2. CBP's extreme policies of denying attorney access, no matter how long detention may last, warrants injunctive relief.

Here, CBP's denial of attorney access is even more extreme than the restrictions at issue in the cases cited above. CBP effectively treats their holding facilities as black sites, and individuals who go into CBP holding often are not heard from again until they are removed, released, or transferred to Immigration and Customs Enforcement ("ICE"). Unlike in the cases discussed above, those detained in facilities in the Rio Grande Valley not only have restrictions on when they can access an attorney, they are essentially categorically barred from contact or communication with an attorney at any time and through any means.

As detailed above and in Plaintiffs' Motion, individuals in CBP detention are generally cut off from the outside world and have no ability to contact an attorney, and even where an individual does manage to obtain representation, that attorney is not allowed physical access to the facility, and has extremely limited or non-existent phone access. For example, Plaintiffs have

submitted the redacted declaration of a 16 year-old child from Honduras, who testified that CBP officers attempted to coerce him into lying and accused him of being an adult while simultaneously prohibiting him from making any phone calls, including to a lawyer. *See* Dkt. No. 24, Pls.' Ex. N at 7, ¶¶ 4-5 Plaintiffs have also submitted the declaration of an attorney who, despite having an attorney-client relationship with an individual detained in CBP custody, was denied the ability to meet with his client. *See* Dkt. No. 24, Pls.' Ex. K at ¶4.

CBP's detention of a U.S. citizen, Francisco Erwin Galicia, which recently made national headlines, is illustrative. On June 27, 2019, Mr. Galicia, an 18 year-old *U.S. citizen*, was on his way to a college scouting event with his younger brother and a group of friends from his hometown of Edinburg to Houston when they were stopped at a CBP checkpoint in Falfurrias, about 100 miles north of the US-Mexico border.[7] CBP arrested Mr. Galicia on suspicion of unlawful presence in the United States and detained him at a nearby CBP facility. When Mr. Galicia asked to call his family or an attorney, he was told that he *did not have any rights* while he was being detained by CBP. Simultaneously, an attorney retained by his family tried to contact him for over a week but was denied access by Border Patrol. All in all, Mr. Galicia was detained for 23 days by CBP, in conditions so deplorable he almost chose to sign voluntary departure forms, even though he is a U.S. citizen. It was only after he was transferred to an ICE facility (separate from the CBP facilities at issue here) that Mr. Galicia was able to speak with his family.[8] While seemingly extreme, Mr. Galicia's experience of being held incommunicado is

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[7] Nick Valencia, Alberto Moya & Chelsea J. Carter, *US-born teen detained for weeks by CBP says he was told 'you have no rights'*, CNN (July 26, 2019), https://www.cnn.com/2019/07/25/us/us-citizen-detained-texas/index.html.

[8] *Id.*

in fact typical of those detained by CBP in the McAllen and Brownsville divisions. *See* Pls.' Mot. at 2-3, 7-9, 27.

No countervailing governmental interests could justify the blanket prohibition on attorney-client communication. Defendants are likely to argue that providing access to counsel is not feasible because CBP facilities were not designed to provide attorney access, but as explained below, these facilities were also not designed to hold detainees for more than 72 hours. If the government seeks to convert CBP facilities to a different use than intended and designed, then the government must bear the cost to ensure that constitutional minimal standards are met. In fact, the Supreme Court has previously held that, while economic factors may be considered in choosing the methods used to provide meaningful access to the courts, "the cost of protecting a constitutional right cannot justify its total denial." *Bounds*, 430 U.S. at 825.

Further, the federal government has previously created temporary structures to provide access for detained populations. For example, at the Family Detention Center in Dilley, Texas, the government used trailers for lawyer visits and even for courtrooms.[9] Similarly, a trailer for lawyer visitation was also set up at a makeshift detention center in Artesia, New Mexico.[10] At a recently opened children's detention center in Carrizo Springs, Texas, trailers were erected to house children and some were designed with the specific purpose of allowing children to make

[9] Molly Hennessy-Fiske, *Immigration lawyers handling a border surge: 'This is really an emergency room situation*,' Los Angeles Times, (July 26, 2015), *available at* https://www.latimes.com/nation/la-na-immigration-lawyers-20150726-story.html.

[10] Wil S. Hylton, *The Shame of America's Family Detention Camps*, the New York Times Magazine, (Feb. 4, 2015), *available at* https://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html.

phone calls.[11] There is no reason that CBP cannot, with its $14.7 billion annual budget, provide for meaningful attorney access at its facilities in the Rio Grande Valley.[12]

CBP's practice of denying attorney access to all individuals in its custody is unconstitutional, and the minimal burden that would be imposed on the government to rectify this harm cannot justify the continued violation of Plaintiffs' constitutional rights.

B. Detaining People in CBP Facilities for Prolonged Periods Exceeds the Agency's Congressional and Regulatory Authority.

A fundamental principle of American law is that an agency must follow applicable statutes and regulations. *Texas v. U.S. Envtl. Prot. Agency,* 829 F.3d 405, 430 (5th Cir. 2016). Here, however, Defendants have flagrantly cast aside CBP's authorizing statute, the Trade Facilitation and Trade Enforcement Act ("TFTEA"), and its own internal standards, the National Standards on Transport, Escort, Detention, and Search ("TEDS"), both of which limit CBP to short-term detention, not to exceed 72 hours. CBP's decision to hold individuals for weeks, even over a month, in facilities that were designed and authorized only for a maximum detention of 72 hours is a clear violation of law and must be enjoined.

As the Fifth Circuit has made clear, "[a]gency actions must be assessed according to the statutes and regulations in effect at the time of the relevant activity . . . '[I]t is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned.'" *U.S. Envtl. Prot. Agency,* 829 F.3d at 430 (citing

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[11] Nomaan Merchant, *New holding center for migrant children opens in Texas*, PBS, (July 10, 2019), *available at* https://www.pbs.org/newshour/nation/new-holding-center-for-migrant-children-opens-in-texas.

[12] *The Cost of Immigration Enforcement and Border Security*, American Immigration Council, (Aug. 2019), *available at* https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security.

Reuters Ltd. v. FCC, 781 F.2d 946, 950 (D.C. Cir. 1986)); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (where an agency uses its coercive powers to enforce a statute, "[t]he action at least can be reviewed to determine whether the agency exceeded its statutory powers"). Further, "[a]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

The prohibition against arbitrary departure from rules and regulations applies to an agency's internal standards as well. "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." *Morton v. Ruiz,* 415 U.S. 199, 235 (1974); *Hall v. Schweiker*, 660 F.2d 116, 119 (5th Cir. 1981) (same); *Am. Stewards of Liberty v. Dep't of the Interior*, 370 F. Supp. 3d 711, 728 (W.D. Tex. 2019) (noting that "[m]any courts have concluded that an agency's failure to comply with its own regulations is arbitrary and capricious").

Here, both CBP's authorizing statute and the standards which govern CBP's interactions with detainees mandate that CBP engage only in short-term detention. CBP cannot arbitrarily and capriciously disregard those mandates. *See also Innovation Law Lab,* 342 F. Supp. 3d at 1079-80 (holding that ICE's disregard for its manual, the 2011 Performance Based National Detention Standards, constituted a violation of the Administrative Procedure Act).

CBP has ceased using its facilities for only short-term detention. The July 2, 2019 report by the OIG that focused on Border Patrol facilities in the Rio Grande Valley found serious overcrowding and prolonged detention. Specifically, of the approximately 8,000 detainees in custody at the time of the OIG's inspection 3,400 were held for longer than 72 hours, and 1,500 were held for more than 10 days.[13] Indeed, in this case, every single named Plaintiff was

[13] *See supra* n.2 at 2-3.

detained for more than 10 days, only two were detained for less than 20 days, and at least three were detained for *more than 50 days*. Dkt No. 29, Plaintiffs' Second Amended Consolidated Petition at ¶¶ 20-35.[14]

CBP's decision to detain individuals for prolonged periods in excess of its authority is an invalid agency action that should be enjoined.

1. CBP's decision to expand its detention of immigrants beyond a short-term period violates its statutory mandate.

CBP's statutory mandate authorizes only short term detention. CBP was first created as part of the establishment of the Department of Homeland Security in 2002. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2192 (2002). However, it was not until 2015 that CBP received comprehensive congressional authorization through the Trade Facilitation and Trade Enforcement Act. *See* TFTEA of 2015, Pub. L. No. 114-125, 130 Stat 122

[14] Defendants may argue that these issues and other raised by amici have been alleviated by an increase in CBP detention space. However, any increased CBP capacity has no implication for the unconstitutional denial of attorney access, and may not affect CBP's arbitrary and unlawful decision to engage in prolonged detention or the conditions in which people are kept. Moreover, where a defendant's claim of mootness relies on the alleged voluntary cessation of the offending activity, the defendant bears a "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 170 (2000) (citation and quotation omitted); *see also Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1163 (D. Or. 2018) (granting temporary restraining order and rejecting defendants' argument that change in practice to allow attorney visitation rendered moot the relief sought by plaintiffs). CBP cannot meet this burden. Indeed, as of two weeks ago, Border Patrol Division Chief Lloyd Easterling admitted that CBP's new facilities are also reaching capacity: "Unfortunately, we are filling these facilities as soon as they are constructed." *See* U.S. Customs and Border Protection, *New Temporary Facilities in Texas and Arizona Expand CBP Holding Capacity*, (Aug. 6, 2019) *available at* https://www.cbp.gov/newsroom/spotlights/new-temporary-facilities-expand-cbp-holding-capacity.

(2016).[15] This statute, codified at 6 U.S.C. § 211, sets forth the exclusive authority for the creation of CBP and the extent of its powers. *Id.* at § 211(a) ("There is established in the Department an agency to be known as U.S. Customs and Border Protection.").

TFTEA authorizes CBP to conduct only *short-term* detention. *Id.* at § 211(c)(8)(B) (setting forth that one of the duties of CBP is "the detection, interdiction, removal, departure from the United States, *short-term detention*, and transfer of persons unlawfully entering, or who have recently unlawfully entered, the United States") (emphasis added). Importantly, TFTEA defines "short-term detention" as "detention in a U.S. Customs and Border Protection processing center for 72 hours or less." *Id.* at § 211(m)(3). Accordingly, CBP is only statutorily authorized to operate short-term detention facilities that hold individuals for 72 hours or less. CBP's decision to exceed the time for which they are authorized to detain individuals is invalid. *Fox Television Stations, Inc*., 556 U.S. at 515; *U.S. Envtl. Prot. Agency*, 829 F.3d at 430.

In fact, the federal government has conceded that Congress authorized CBP to detain individuals for only 72 hours. In *Doe v. Kelly*, a challenge to conditions in Border Patrol facilities in Arizona, the federal government argued that Congress has authorized *up to 72 hours* of detention by CBP—not the 12 hour maximum sought by plaintiffs in that case. Specifically, the government argued there that "the Court should decline to issue any preliminary injunction that imposes significant requirements on Border Patrol at the arbitrary deadline of twelve hours," relying primarily on the fact that "[r]ecognizing the realities of Border Patrol operations, Congress defined 'short-term detention' as 'detention in a U.S. Customs and Border Protection

[15] *Available at* https://www.cbp.gov/trade/trade-enforcement/tftea.

processing center for *72 hours or less.*'" *See* Ex. A at 10 (emphasis added).[16] Similarly, in appealing the district court's preliminary injunction, the government argued that "[t]he court also ignored the fact that Congress has defined short-term detention in the context of Border Patrol custody *as detention for up to seventy-two hours*." *See* Ex. B at 22 (emphasis added).[17]

High-ranking government officials from the Department of Homeland Security, including Defendants in this lawsuit, have also consistently confirmed that their facilities are not capable of nor designed for long term custody. On May 8, 2019, the Executive Assistant Commissioner of CBP, the Chief of Border Patrol, and the Director of Joint Task Force-West of DHS testified before the U.S. Senate Committee on the Judiciary that "[o]ur short-term holding facilities were neither designed for the larger volume of family units nor for longer-term custody."[18]

On July 18, 2019, the Acting Secretary of DHS testified that "[s]hort-term holding facilities at POEs and Border Patrol stations were designed neither for the large volume of inadmissible persons and apprehensions nor the long-term custody of individuals awaiting transfer to ICE Enforcement and Removal Operations detention facilities."[19]

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[16] Ex. A, Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction at 10, *Unknown Parties v. Johnson,* No. CV-15-00250-TUC-DCB (D. Ariz. Feb. 25, 2016) (*Doe v. Kelly*, discussed *supra*, was filed under the original caption *Unknown Parties v. Johnson*).

[17] Ex. B, Brief of Defendants-Appellees-Cross-Appellants at 22, *Doe v. Kelly*, Nos. 17-15381 & 17-15383 (9th Cir. Apr. 27, 2017).

[18] *At the Breaking Point: the Humanitarian and Security Crisis at our Southern Border, Before the Senate Comm. On the Judiciary*, 116th Cong. 1 (2019) (statement of Todd Owen, Executive Assistant Commissioner Office of Field Operations U.S. CBP, Carla L. Provost Chief of U.S. Border Patrol U.S. CBP, and Manuel Padilla, Director of Joint Task Force-West, DHS), *available at* https://www.judiciary.senate.gov/imo/media/doc/Owen-Provost-Padilla%20Joint%20Testimony.pdf.

[19] *The Trump Administration's Child Separation Policy: Substantiated Allegations of Mistreatment, Before the H.Comm. on Oversight and Reform*, 116th Cong. 1 (2019) (statement of Kevin K. McAleenan, Acting Secretary U.S. DHS), *available at*

Accordingly, it is clear that CBP's decision to no longer engage only in short-term detention, but to hold individuals for periods of time greatly exceeding 72 hours, violates its statutory authorization from Congress, and is therefore unlawful. *U.S. Envtl. Prot. Agency*, 829 F.3d at 430; *Heckler*, 470 U.S. at 832.

2. CBP's own policies authorize only short-term detention.

In the same year that Congress authorized CBP to provide only short-term detention, CBP itself issued rules limiting its detention of individuals to 72 hours. In 2015, the National Standards on Transport, Escort, Detention, and Search ("TEDS") were promulgated.[20] TEDS is a "policy document" containing "agency-wide policy that sets forth the first nationwide standards which govern CBP's interaction with detained individuals," and stating that such standards reflect "key legal and regulatory requirements."[21]

Among the requirements set forth by TEDS is the rule that "Detainees should generally not be held for longer than 72 hours in CBP hold rooms or holding facilities," and "*every effort* must be made to hold detainees for the least amount of time required . . ."[22]; *see also* Ex. B at 15 (federal government's acknowledgment that "[u]nder [TEDS] Border Patrol stations must make every effort to promptly transfer, transport, process, release, or repatriate detainees as

https://docs.house.gov/meetings/GO/GO00/20190718/109813/HHRG-116-GO00-Wstate-McAleenanK-20190718.pdf.

[20] *National Standards on Transport, Escort, Detention, and Search*, U.S. Customs and Border Protection, (Oct. 2015), *available at* https://www.cbp.gov/sites/default/files/assets/documents/2017-Sep/CBP%20TEDS%20Policy%20Oct2015.pdf.

[21] *Id.* at 3.

[22] *Id.* at 14 (emphasis added).

appropriate, according to each operational office's policies and procedures, and as operationally feasible, and *in any event, should not hold detainees longer than seventy-two hours*") (emphasis added).[23]

Here, the Office of the Inspector General has found that CBP was violating TEDS by detaining individuals in the Rio Grande Valley sector for longer than 72 hours. In its report on the Rio Grande Valley sector, the OIG noted that CBP was holding "3,400 [detainees] longer than the 72 hours generally permitted under the TEDS standards. Of those 3,400 detainees, Border Patrol held 1,500 for more than 10 days."[24] The report specifically pointed out that "providing long-term detention is the responsibility of ICE, not CBP."[25]

Accordingly, CBP's determination that it may engage in prolonged detention in contravention of its own standards is unlawful, and this Court should enjoin CBP from continuing that practice. *Ruiz,* 415 U.S. at 235; *see also Schweiker*, 660 F.2d at119; *Innovation Law Lab,* 342 F. Supp. 3d at 1079-80.

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[23] Defendants may argue that the use of the term "generally" in the TEDS standards grants them leeway to detain individuals for more than 72 hours. However, because Congress has expressly limited CBP's authority to *only* 72 hours of detention, CBP may not adopt an interpretation at odds with Congressional intent. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Regardless, any reasonable interpretation of the TEDS standards would mean only that in unique circumstances CBP might have to detain a certain individual for slightly more than 72 hours, while still making "every effort" to keep to the 72 hour limit. Here, when thousands of people are being held for ten or more days at CBP facilities, and CBP has the option to release those individuals on their own recognizance, *see infra*, it is clear that Defendants are not abiding by the standard that they "generally" do not detain people for more than 72 hours or that they make "every effort" to limit detention to 72 hours.

[24] *See supra* n.2 at 2-3.

[25] *Id.*

3. CBP has the authority and discretion to end its current illegal detention practices.

CBP's unlawful overcrowding and prolonged detention are the natural result of the agency's recent decision to refuse to exercise its clear authority to release people, as it has previously done. CBP has the discretion to and has historically released individuals on bond or on their own recognizance. INA § 212(d)(5)(A). In fact, in the El Paso region, in response to a similar report from the OIG on overcrowding in 2019, CBP stated that it was using its discretion to release families on their own recognizance.[26] CBP, however, has refused to exercise this discretion to any meaningful degree in the Rio Grande Valley, which is a primary factor exacerbating unlawful long-term detention.

CBP is refusing to cease detaining individuals in short-term cells for weeks or months on end despite its clear authority to do so and the obvious fact that using such authority would also remedy the unconstitutional practices that are currently ongoing. In a teleconference conducted by OIG with ICE leaders discussing the overcrowding at CBP facilities, ICE leaders confirmed CBP's authority to release individuals, especially in situations like the one at hand. Ex. C at 4 (summarizing call where ICE senior leader states that "if BP feels that they are at a breaking point with managing the masses, BP has the same authority as ICE to assess and release. . . . [R]eleasing people on [their own recognizance] is not in BP's culture but they have the authority;

[26] Office of Inspector General, Management Alert – DHS Needs to Address Dangerous Overcrowding Among Single Adults at El Paso Del Norte Processing Center, (May 30, 2019), at 13, *available at* https://www.oig.dhs.gov/sites/default/files/assets/2019-05/OIG-19-46-May19.pdf.

in addition, there is no policy that prohibits them from releasing detainees but they are fine with ICE doing it for them.").[27]

CBP's intransigent refusal to release individuals on their own recognizance cannot justify the continued constitutional and legal violations wrought by detaining individuals in facilities that were designed only for short-term detention for weeks or even months at a time. Accordingly, the Court should enjoin CBP from continuing to hold individuals beyond 72 hours.

IV. Conclusion

For the foregoing reasons, and those stated in Plaintiffs' brief, *amici* respectfully submit that this court should grant the injunctive relief requested by Plaintiffs.

[27] Exhibit C, Redacted Memorandum Record of May 14, 2019 Teleconference with ICE ERO senior leaders.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served upon counsel of record through the Court's electronic filing system on August 19, 2019.

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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, et al.**, *Defendants.*	CASE NO.CV-15-00250-TUC-DCB (PSOT) **DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

The primary mission of the U.S. Border Patrol ("Border Patrol") has remained unchanged since 1924: to detect and prevent the illegal entry of aliens into the United States.[1] And on any given day, the Border Patrol must be prepared to confront challenges that are completely unforeseen and unprecedented.[2] The only predictable aspect of the operation of Border Patrol is the total unpredictability of the types of situations to which agents will be required to respond. In FY 2015, Tucson Sector Border Patrol apprehended 63,397 individuals, the second highest of any other sector throughout the United States.[3] In that same time period, Tucson Sector agents had 30,518 accepted prosecutions of apprehended aliens – more than twice as many as the next highest sector. *Id.* Tucson Sector agents out in the field further conducted 790 rescues of aliens. *Id.*[4]

Aliens apprehended within the Tucson Sector must be brought to Tucson Sector Border Patrol stations, their immigration and criminal history must be ascertained and reviewed, and they must be fully processed, before they can be released or transferred into the custody of another agency. There are eight Border Patrol stations in the Tucson Sector that process aliens apprehended in the sector. Tucson Sector Border Patrol agents apprehend aliens at all times of the day and night at locations covering most of the southern region of Arizona. Thus, Border

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[1] *See* Border Patrol Overview, available at: http://www.cbp.gov/border-security/along-us-borders/overview.

[2] These daily challenges can include any number of scenarios, including dealing with spontaneously-created global pandemics, *see* http://www.azcentral.com/news/articles/2009/04/30/20090430swineflu-immig0430.html, processing thousands of Cuban nationals suddenly crossing the border on a single day, *see* http://www.krgv.com/story/31053253/thousands-of-cuban-refugees-crossing-the-border, combatting dangerous drug and human trafficking operations, *see* http://www.eacourier.com/news/border-patrol-works-to-combat-advanced-activity/article_d996740c-da7a-11e5-b362-030b6aabbf80.html, and providing unexpected care for a large number of unaccompanied minors during a surge, *see* http://tucson.com/news/local/border/more-children-crossing-border-using-dangerous-arizona-corridor/article_f754148a-0ced-5bd0-98bf-3b5ee2f17935.html.

[3] *See* United States Border Patrol, Sector Profile – FY 2015, available at: http://www.cbp.gov/sites/default/files/documents/USBP%20Stats%20FY2015%20sector%20profile.pdf.

[4] *See also* Border Patrol Search, Trauma, and Rescue (BORSTAR), available at: http://www.cbp.gov/sites/default/files/documents/Border%20Patrol%20Search%2C%20Trauma%2C%20and%20Rescue.pdf; Declaration of George Allen ("Allen Decl.") ¶ 25, Exhibit 1..

Patrol stations operate around the clock, twenty-four hours each day, seven days a week, so that all individuals who are apprehended in the Tucson Sector can be processed and transferred out of Border Patrol custody on a continuous basis.

Border Patrol provides all individuals with food when they arrive at a Border Patrol station, and again at regular intervals (and as requested). Water is available in the hold rooms at the stations at all times. Border Patrol also carefully screens all individuals for immediate medical concerns when they are apprehended out in the field, and again when they arrive at the station, and monitors them throughout their time at the station. If any immediate medical concerns are identified, or if the alien states a need for medical care, medical care is quickly and competently provided by local emergency medical personnel either at the station, or at a local hospital.

Border Patrol ensures that hold rooms are kept in a sanitary condition that does not create any risk of harm to detainees. Trash sometimes accumulates for a short time from the blankets and food that is provided to detainees, but Border Patrol has cleaning contracts at each station that ensure that regular cleaning is conducted to remove trash and to clean and sanitize the hold rooms. Border Patrol also provides a number of personal hygiene items for detainees to use, and, if possible, makes showers available for those detainees who may need to remain at a Border Patrol station for longer than 72 hours. The temperature at Tucson Sector Border Patrol stations generally ranges between 68-80 degrees, and all detainees are also provided Mylar blankets for additional warmth. Finally, because the purpose of Border Patrol stations is to allow for continuous processing to move individuals out of the stations as quickly as possible, and because the busiest time at Border Patrol stations is frequently at night, Border Patrol stations do not provide traditional sleeping accommodations, nor is it possible to turn off the lights at night.

Thus, when the conditions at Tucson Sector Border Patrol stations are considered as a whole, rather than in the selective snapshots provided by Plaintiffs, and when the operational interests of Border Patrol are also taken into account, the evidence clearly shows that Tucson Sector Border Patrol stations do not violate the constitutional rights of detainees. Plaintiffs' motion for a preliminary injunction ("PI Motion") does not paint an accurate picture for the

1 Court because it completely ignores Border Patrol's operational interests, and relies selectively
2 on limited snapshots of the available evidence.

3 Plaintiffs ask the Court to rule on the ultimate question in this case – do the conditions at
4 Tucson Sector Border Patrol stations violate the constitutional rights of detainees – and on the
5 basis of this ruling, to then issue substantial preliminary relief. *See* PI Motion at 24-25; Proposed
6 Order. Yet Plaintiffs have failed to establish – both factually and legally – that they are likely to
7 succeed on this ultimate question for any of their five causes of action. Moreover, aspects of the
8 relief Plaintiffs are seeking would have a substantial impact on the ability of Border Patrol to
9 continue its twenty-four hour operations, and would require Tucson Sector Border Patrol to make
10 permanent and expensive changes to its facilities and operations. Such extensive changes are not
11 properly sought in a preliminary injunction motion. Finally, Plaintiffs have made no showing
12 that there is an imminent danger of harm – or, in fact, any danger of harm – to individuals who
13 pass through Tucson Sector Border Patrol stations. In fact, not a single individual has provided
14 evidence of any concrete long lasting harm from his or her stay at a Border Patrol facility. Thus
15 preliminary relief is unnecessary, and given the substantial impact on Border Patrol operations
16 that the preliminary relief Plaintiffs are seeking would have, it is also unwarranted.

17 Simply put, Border Patrol does everything in its power to provide accommodating
18 conditions at its stations for the aliens who find themselves briefly in its custody. But Border
19 Patrol also has no control over the population it will encounter on a daily basis. The common
20 sense challenges that this creates do not result in constitutional violations, they are simply the
21 reality of having to secure a 2,000 mile border in a world of finite resources and infinite demand
22 to enter the United States. Because Border Patrol has done everything possible with the resources
23 provided by Congress to ensure that conditions at its stations protect the health and safety of the
24 individuals in its custody, the court should deny Plaintiffs' PI Motion.

25 **ARGUMENT**

26 **I. Standard of Review for Preliminary Injunctions**

27 It is well-settled that a preliminary injunction is "an extraordinary and drastic remedy"
28 which "should not be granted unless the movant, by a clear showing, carries the burden of

persuasion." *Mazurek v. Armstrong*, 529 U.S. 968, 972 (1997) (per curiam) (citations and quotations omitted). This court may issue a preliminary injunction only when the movant demonstrates that: "there is a substantial likelihood plaintiff will succeed on the merits; plaintiff will be irreparably injured if an injunction is not granted; an injunction will not substantially injure the other party; and the public interest will be furthered by an injunction." *Friendly House v. Whiting*, 846 F. Supp. 2d 1053, 1055 (D. Az. 2012) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)).

"[T]he elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Planned Parenthood Arizona, Inc. v. Humble*, 13 F. Supp. 2d 1017, 1019 (D. Az. 2014) (quoting *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105–1106 (9th Cir. 2012) (quotations omitted)). Thus, all four factors must be met for the court to grant a preliminary injunction. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

Finally, because the function of a preliminary injunction is to maintain the status quo before the case is adjudicated on the merits, there is "heightened scrutiny" for mandatory preliminary injunctions. *Dahl v. HEM Pharms. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993) (Mandatory injunctions are "subject to a heightened scrutiny and should not be issued unless the facts and law clearly favor the moving party."). "A mandatory injunction orders a responsible party to take action," and thus, "goes well beyond simply maintaining the status quo." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (internal citations and quotation marks omitted). Accordingly, "mandatory injunctions 'are not granted unless extreme or very serious damage will result and are not issued in doubtful cases . . . .'" *Id.* at 879 (quoting *Anderson v. United States*, 612 F.3d 1112, 1115 (9th Cir. 1979)).

II. Plaintiffs Have Fallen Far Short of Proving Any Entitlement to Mandatory Preliminary Injunctive Relief

Plaintiffs ask the Court to rule on the ultimate factual and legal issue in this case – do the conditions in Tucson Sector Border Patrol facilities violate the constitutional rights of detainees – and then seek a preliminary injunction that would require Tucson Sector Border Patrol to provide the very same relief that Plaintiffs are ultimately seeking through their complaint. Pl

Motion at 24-25; Proposed Order. Because Plaintiffs are seeking this kind of expansive affirmative relief, that would require the expenditure of significant sunk costs that cannot be recovered if Defendants ultimately prevail, they must show "the facts and law *clearly favor*" their position in order to satisfy the heightened scrutiny test for mandatory injunctions. *Dahl*, 7 F.3d at 1403 (emphasis added). Plaintiffs have failed, and their PI Motion should be denied.

a. <u>Plaintiffs' Likelihood of Success on the Merits is Extremely Low.</u>

Likelihood of success on the merits is a threshold issue: "[W]hen 'a plaintiff has failed to show the likelihood of success on the merits, [the court] need not consider the remaining three [elements].'" *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) (quoting *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 944 (9th Cir. 2013)) (internal quotation marks omitted). Plaintiffs' likelihood of success on the merits in this case is exceedingly low because they have failed to establish – both factually and legally – that the conditions in Tucson Sector Border Patrol stations violate the constitutional rights of detainees.

1. To succeed, Plaintiffs must establish that the conditions in Tucson Sector Border Patrol facilities are punitive, and bear no reasonable relationship to the legitimate operational interests of Border Patrol.

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). While this means that civil detainees such as those held in Border Patrol stations may have due process rights that are distinct from those held in purely criminal detention, "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). But what is clear is that the Government's legitimate interests stemming from its need to manage its detention facilities may justify imposing some conditions on an individual without rendering the detention unconstitutional. *See Bell v. Wolfish*, 441 U.S. 520, 539-40 (1979).

Immigration detainees merit "conditions of confinement that are not punitive." *Jones v. Blanas*, 393 F.3d 918, 933 (9th Cir. 2004).[5] But the Constitution "does not mandate

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[5] While Border Patrol custody is not criminal detention, it is also important to note that at the time an individual is taken into Border Patrol custody, he or she most likely has effectively been "arrested" for committing the crime of "Improper entry by alien." *See* 8 USC § 1325. Many have also

comfortable" detention facilities. *Rhodes v. Chapman*, 452 U.S. 337, 345–50 (1981). Thus, detention may be subject to conditions that relate to legitimate non-punitive governmental objectives, such as "maintaining jail security" and "effective management of a detention facility" without raising constitutional concerns. *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"); *see also Pierce v. County of Orange*, 526 F.3d 1190, 1205 (9th Cir.2008).

2. Plaintiffs' 12 hour time limit is arbitrary, unrelated to any constitutional standard, and inconsistent with Border Patrol processing operations.

Plaintiffs seek broad relief for all individuals held at Tucson Sector Border Patrol stations for more than twelve hours. But this time limit is arbitrary and Plaintiffs fail to tie it in any way to the specific claims that they are raising. Moreover, it ignores the reality of the processing operations that occur at Tucson Sector Border Patrol stations.

Plaintiffs' claim for injunctive relief is premised on their challenge to Defendants' contention that Border Patrol stations are short-term processing facilities. They claim instead that "detention for days on end is the norm." PI Motion at 2. Yet the evidence does not bear that out. In fact, during the time period that was the subject of Plaintiffs' expedited discovery in this case (June 10, 2015 to September 28, 2015), only 9.4% of those apprehended in the Tucson Sector were in Border Patrol custody for 48 hours or more, and only 2.79% of aliens— [redacted] —remained in Border Patrol custody for 72 hours or more. Declaration of Justin Bristow ("Bristow Decl."), ¶¶ 19-20, Exhibit 5. Moreover, these detention durations in the e3DM system are calculated from the point of apprehension, not from the time detainees enter the Border Patrol station. *Id.* ¶ 18. Thus, even these numbers do not reflect the actual lengths of time that individuals spend being processed at Border Patrol stations, which would be even lower. *Id.*

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committed more serious crimes such as reentry by a removed alien, *see* 8 U.S.C. § 1326, alien smuggling, 8 U.S.C. §§ 1323, 1324, and 1327, or document fraud 8 U.S.C. § 1324C. Thus in most cases, detention in Border Patrol custody is best compared to confinement during criminal processing immediately following arrest.

The reality of processing operations at Tucson Sector Border Patrol stations also paints a very different picture than the "days on end" detention that Plaintiffs allege to support their claims for relief. When an individual arrives at a Border Patrol station, he or she is brought into the facility through an area referred to as the "sally port" or "intake." Allen Decl. ¶ 3. Individuals are searched, and outer clothing and bags are removed and stored for security reasons. *Id.*.

Detainees then are brought inside to the processing area, where they are placed into hold rooms based on a number of factors including age, gender, whether they are traveling as a family unit, and if they are suspected of a more serious crime. *Id.* ¶ 4. They also will be placed into different rooms depending on what stage of processing they are in. *Id*. Detainees are likely to be transferred between hold rooms as they move through processing, for meals, for consular interviews,[6] and for hold room cleaning. *Id.*

The first stage of processing is the identification of prior arrest and apprehension history. *Id.* ¶ 5. After a detainee is identified, he or she is fully processed, including the preparation of an arrest report, immigration processing, service of immigration forms, consular notifications, and communication with family members as appropriate. *Id*. For an individual with an unremarkable criminal or immigration history, this stage would likely take between two to two and one half hours if it were allowed to continue uninterrupted. *Id*. However, it is rarely if ever possible to complete any individual's processing in a single, uninterrupted sitting, and a number of factors such as the number of detainees pending processing, meals, medical or health needs, consular communications, use of the phone to call family members or attorneys when appropriate, and criminal investigations, may cause an individual's total processing time to be extended. *Id*.

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[6] Consular officials from the Consulate of Mexico and the Consulate of Guatemala visit the Tucson Coordination Center ("TCC") twice a day, seven days a week to conduct interviews and communicate with nationals of their countries. Allen Decl. ¶ 11. The Consulate of Mexico also conducts daily visits to the Douglas and Nogales stations. *Id.* The Mexican Consulate further operates a 24-hour call center providing around the clock communication with their nationals in Border Patrol custody. *Id.* Where detainees raise issues or concerns with their consular officials, those officials frequently relay that information to the Border Patrol. *Id.* This provides a process that ensures quick responses to issues that may arise regarding personal needs, concerns, medical needs, or questions regarding procedures for individuals in Border Patrol custody. *Id.* ¶¶ 11-12.

Once a detainee has been identified and processed, Border Patrol works with other agencies to determine the next action for that detainee. *Id.* ¶ 7. Possible next actions include immediate repatriation, transfer to U.S. Immigration and Customs Enforcement (“ICE”), transfer to the U.S. Marshals Service, or transfer to other law enforcement agencies due to outstanding warrants or violations of state and local laws. *Id*.

TCC, located within the Tucson Border Patrol Sector Headquarters compound, serves as a transportation hub for the eight Border Patrol stations located within the Tucson Sector. *Id.* ¶ 8. Thus while all stations use the same intake and identification procedures described above, for various operational reasons some stations begin the processing steps and then transfer the detainee to TCC for completion of processing. *Id*. In general, detainees who are required to remain in custody for immigration purposes, criminal proceedings, transfer to other agencies, or repatriation through distant ports of entry are transferred to TCC. *Id*.

Once all of these processing steps are completed, detainees are transferred to other facilities and to other agencies as soon as possible. *Id.* ¶ 9. However, although it is not frequent, sometimes a receiving agency is unable to receive a detainee due to a breakdown in their intake procedures or lack of space. *Id*. If that happens, for the safety of the alien, transfer from Border Patrol will not be accepted until the receiving agency resolves their issue. *Id.*

When all of these operational interests are considered, it is clear that there is not, as Plaintiffs contend, a “gap between purpose and practice” at Border Patrol stations. PI Motion at 2. Rather, there are a variety of reasons why Border Patrol policy generally acknowledges that processing at Border Patrol stations is likely to take anywhere between twelve and seventy-two hours. *See* Declaration of Manuel Padilla, ECF No. 39-1, ¶ 11; U.S. Customs and Border Protection, National Standards on Transport, Escort, Detention, and Search (“TEDS”), October 2015, § 4.1, available at: https://www.cbp.gov/sites/default/files/documents/cbp-teds-policy-20151005_1.pdf.

For Plaintiffs to contend that those held in Border Patrol stations for longer than twelve hours are necessarily suffering constitutional violations suggests that it is Plaintiffs’ position that those individuals are no longer being detained for legitimate governmental purposes related to

Border Patrol processing. However, this position ignores reality, and thus it is not surprising that Plaintiffs' PI Motion entirely fails to acknowledge the reality of Border Patrol operations.[7] Notably, on February 24, 2016, the Trade Facilitation and Trade Enforcement Act of 2015 was signed into law. In this Act, Congress laid out "Short-Term Detention Standards," including standards regarding the provision of food and water at Border Patrol facilities, inspection of the facilities, and the timing of repatriation. H.R. Con. Res. 644, 114th Cong., Title VIII, § 411(m) (2015) (enacted). Recognizing the realities of Border Patrol operations, Congress defined "short-term detention" as "detention in a U.S. Customs and Border Protection processing center for 72 hours or less, before repatriation to a country of nationality or last habitual residence." *Id.* at § 411(m)(3).

This Court should decline to issue any preliminary injunction that imposes significant requirements on Border Patrol at the arbitrary deadline of twelve hours, when there is clear evidence that Border Patrol may still legitimately be processing individuals at that time. Instead, in keeping with the legal standard discussed above, in order to properly assess whether any constitutional violation is occurring with regard to any of Plaintiffs' five claims, the Court should consider the possibility of ongoing processing operations by Border Patrol and the relationship between the alleged violation and those processing operations.

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[7] It should be noted that there is simply no incentive for Border Patrol to intentionally prolong anyone's custody at its facilities, given that this delay would simply diminish its ability to hold and process newly-arriving aliens. Border Patrol has every incentive to process its detainees quickly in order to maintain the safety and security of its facilities and its agents.

3. Tucson Sector Border Patrol stations are generally maintained between 68-80 degrees, and do not deprive detainees of any due process right to warmth.

Plaintiffs have not demonstrated a likelihood of success on the merits for their claim that the conditions in Tucson Sector Border Patrol stations violate their constitutional right to warmth. There is little case law governing the precise contours of any rights related to the temperature of detention facilities. The Ninth Circuit has found that "[t]he Eighth Amendment guarantees adequate heating." *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir.1996) (citing *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir.1980)). It does not, however, guarantee that the temperature will always be comfortable. *Id.*; *see also Graves v. Arpaio*, Case No. CV-77-0479, 2008 WL 4699770, at * 19 (D. Ariz., Oct. 22, 2008) ("The Fourteenth Amendment requires that the temperature of the areas in which pretrial detainees are held or housed must not constitute punishment, *i.e.*, deviations from a reasonably comfortable temperature must be reasonably related to a legitimate governmental objective.").

Nationwide, Border Patrol policy requires that the temperature at Border Patrol facilities be kept "within a reasonable and comfortable range for both detainees and officers/agents." TEDS, October 2015, at § 4.6. Officers and agents are further prohibited from using temperature in a punitive manner. *Id.*

The temperature at Tucson Sector Border Patrol stations is set between 71 and 74 degrees, and generally ranges between 68 and 80 degrees in practice. *See* Allen Decl. ¶¶ 13-14; Declaration of Diane Skipworth ("Skipworth Decl.") ¶¶ 35, 134, 137-41, Exhibit 2; Declaration of Richard Bryce ("Bryce Decl.") ¶¶ 82, 83, Exhibit 3. This temperature range is within normally accepted standards in detention facilities, and does not create any risk to the health and safety of detainees. Skipworth Decl. ¶¶ 35, 133, 147-48; Bryce Decl. ¶ 82; Declaration of Philip Harber ("Harber Decl.") ¶ 66, Exhibit 4.[8] Border Patrol also provides every detainee with a Mylar

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[8] Individuals in Border Patrol custody frequently come from regions in which air conditioning is not common, and may sometimes find that these temperatures feel cooler than they are accustomed to. However, maintaining the facilities at temperatures significantly above the comfortable range in response to this preference would create other risks to the health of both detainees and Border Patrol agents. Facilities that are too hot would have the same potential for punitive effect as facilities that are too cold.

blanket for additional warmth when they arrive at a Border Patrol station. Allen Decl. ¶ 19; Skipworth Decl. ¶¶ 149-50; Harber Decl. ¶ 67; Bryce Decl. ¶ 115.[9]

Notably, Plaintiffs do not challenge the fact that a temperature range of 68-80 is acceptable and does not violate detainees' constitutional rights. *See* PI Motion at 13 (acknowledging that Border Patrol policy is to keep the temperature in Tucson Sector stations between 68 and 72 degrees). Instead, Plaintiffs point to just 2 entries, out of the hundreds of hold room checklists for four Border Patrol stations that were provided to them,[10] to support their assertion that Tucson Sector stations fall below this acceptable range of temperature. PI Motion at 13 (citing USA001461; USA01838-39). One of those is an entry logged at 10:27 pm on September 18, 2015 showing a recorded cell temperature of 58.8 degrees in one of the cells at the Douglas station (USA001461). The other is two days of entries on July 29-30, 2015, recording that the temperatures in several of the cells in TCC were registering 62-66 degrees, and that detainees were complaining that it was cold (USA01838-39).

A review of the entirety of the evidence makes clear that this extremely limited evidence cited by Plaintiffs is not sufficient to establish that variations below the acceptable range of

[9] Plaintiffs' assertion that Border Patrol does not always provide a Mylar blanket to detainees is based entirely on statement made in three inadmissible declarations. *See* PI Motion at 13-14; Powell Dec. ¶ 106. These declarations were made over a year ago, and constitute inadmissible hearsay testimony. *See* Fed. R. Evid. 801(c). While the Court may consider inadmissible evidence for the purposes of deciding a preliminary injunction motion, its inadmissibility may be considered in determining what weight to give such evidence. *See Rubin ex rel. N.L.R.B. v. Vista Del Sol Health Services, Inc.*, 80 F. Supp. 3d 1058, 1073 (C.D. Cal. 2015) (quoting *Garcia v. Green Fleet Sys., LLC*, No. CV 14–6220, 2014 WL 5343814, *5 (C.D. Cal., Oct. 10, 2014)) (Issues concerning authentication and hearsay "go to weight, rather than admissibility."). Here, inadmissible statements made by only three individuals more than a year ago hardly provide sufficient evidence to support Plaintiffs' assertion that detainees are "not always" given Mylar blankets, and "in practice some detainees get nothing." PI Motion at 13-14. Significant evidence, including many of the other declarations submitted by Plaintiffs, the declarations of Plaintiffs themselves, the video evidence submitted by Plaintiffs, Border Patrol policy, and the testimony of Border Patrol officials and Defendants' experts, support the position that all detainees in Border Patrol custody are given Mylar blankets for warmth.

[10] Defendants produced to Plaintiffs hold room checklists for all four stations at issue during the expedited discovery period from the time period of June through October 2015. Those checklists reflect the recorded temperatures at Douglas in September and October, at TCC from July through October; and at Nogales from August through October. *See* Hold Room Checklists (USA000700-2064), Exhibit 2, Attachment 2D.

temperature are the rule, rather than the exception. While temperatures below 68 degrees are occasionally recorded in those checklists, a substantial majority of the temperatures recorded are within the acceptable range. *See* Exhibit 2, Attachment 2D (USA000700-2064). Thus, the two temperatures highlighted by Plaintiffs are demonstratively not the norm throughout Tucson Sector.

Moreover, the totality of the Hold Room Checklists produced to Plaintiffs show that while some cells fell below the designated range at Douglas during a limited time period (including the temperature of 58.8 degrees referenced by Plaintiffs), temperature significantly below that range were not the norm at Douglas overall during the time that temperatures were recorded at Douglas.[11] Exhibit 2, Attachment 2D (USA001427-1569). Similarly, although Plaintiffs cite to two days (July 29-30) where the temperatures at TCC fell below 68, *all* of the other temperatures recorded in TCC during the months of July and August reflect cell temperatures that were in or above that range. Exhibit 2, Attachment 2D (USA001758-1857).

The snapshot of evidence to which Plaintiffs cite simply does not establish that temperatures below 68 are in any way a routine occurrence throughout the Tucson Sector. Therefore, Plaintiffs have not established a likelihood of success on their claim that temperatures in Tucson Sector Border Patrol stations are unconstitutional.[12]

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[11] During the months of September and early October, Douglas experienced problems with its A/C units that required repairs. Allen Decl. ¶ 17. In response to those problems, Border Patrol issued extra clothing to detainees, and attempted to limit the use of the affected cells. *Id.*

[12] Plaintiffs further try to establish a likelihood of success on this claim by alleging that "agents lower hold room temperatures to punish detainees who speak to one another or who request that cell temperatures be raised." PI Motion at 14 (*citing* Vail Decl. ¶ 108; Powitz Decl. ¶ 100). But again, the only evidence for this contention is found in a small number of inadmissible declarations, which are adopted by Plaintiffs' experts without further examination. *See* Vail Decl. ¶ 108; Powitz Decl. ¶ 100. Neither Plaintiffs, nor their experts, explain how this evidence can be found credible in light of the declaration of George Allen (which was provided to Plaintiffs), who explained that in TCC, Douglas, and Casa Grande stations, Border Patrol agents have no access to the temperature controls and have to contact facility staff off site to have the temperature changed at those stations. Declaration of George Allen, Oct. 19, 2015, ¶ 4 (USA000675-76) (explaining that other than at the Nogales station, temperature at Tucson Sector stations "is controlled off site and the Border Patrol agents on station do not have access to the thermostat"); *see also* Allen Decl. ¶¶ 13-15 (explaining that in all stations in Tucson Sector other than Nogales, agents do not have access to the system that controls the temperature); Skipworth Decl. ¶¶ 145-46. Bryce Decl. ¶ 81. None of the declarations cited by

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4. Tucson Sector Border Patrol does not deprive detainees of any constitutional right to medical care.

Plaintiffs' claim that they are deprived of constitutionally sufficient medical care is premised on three assertions: 1) Border Patrol is required to screen incoming detainees and fails to do so; 2) Border Patrol is required to maintain an onsite medical treatment program; and 3) Border Patrol's "practice of confiscating incoming detainees' medication, creates an impermissible and heightened risk that detainees will experience a medical emergency." PI Motion at 18-20. However, Plaintiffs fail to establish a likelihood of success on this claim because all of these assertions are factually and legally incorrect.

Plaintiffs do not explain exactly what it is they contend that the Constitution requires in the context of medical care at a short-term processing facility such as a Border Patrol station. As a general matter, Plaintiffs state that "denying, delaying, or mismanaging intake screening violates the Constitution[,]" but they do not more fully explain what constitutes denial, delay, or mismanagement in this context, nor do they provide any specific examples of such conduct. PI Motion at 18.

Plaintiffs cite to *Graves v. Arpaio*, 48 F. Supp. 3d 1318, 1340–1344 (D. Ariz. 2014) and *Madrid v. Gomez*, 889 F. Supp. 1146, 1257 (N.D. Cal. 1995), for their contention that there is an affirmative duty to screen incoming detainees at short-term detention facilities. However in *Graves*, the Court was addressing the screening needs for pre-trial detainees being placed into general population at a jail facility, and in *Madrid* the Court was addressing the screening of inmates in a prison. Plaintiffs do not explain how either of those situations translates to a constitutional requirement for formalized medical intake screening procedures at a short-term Border Patrol processing facility.

In *Madrid*, in the context of a prison, the Court stated that "the Eighth Amendment does require that defendants 'provide a system of ready access to adequate medical care.'" 889 F. Supp. at 1146 (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982); *Casey v. Lewis*, 834 F.Supp. 1477, 1545 (D. Ariz. 1993)). And in the context of a long-term prison facility, the

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Plaintiffs' experts are from individuals who were at Nogales. Thus, Plaintiffs have established no likelihood that they can succeed on this claim based on these factually impossible allegations.

Hoptowit Court did suggest that such access should be provided by on-site medical staff. *See* PI Motion at 19 (citing *Hoptowit*, 682 F.2d at 1253). But Plaintiffs provide no basis to find that such a requirement also applies in the context of a short-term Border Patrol processing facility.[13] Moreover, Plaintiffs provide no factual support for their assertion that "Defendants fail to maintain a medical treatment program capable of 'responding to emergencies' that arise after detainees are placed in the holding cells." PI Motion at 19 (quoting *Hoptowit*, 682 F.2d at 1253). In fact, Plaintiffs point to no examples of any harm to any class member that resulted from any delayed, denied, or inadequate medical care provided to an individual at a Tucson Sector Border Patrol facility to support their claim.

When the medical screening and care that are provided at Tucson Sector Border Patrol facilities are looked at in light of the operational interests involved, it is clear that Border Patrol provides detainees with access to medical care – using the medical care available from local emergency medical professionals and facilities – in a manner that is constitutionally sufficient. The system of medical screening and care at Border Patrol facilities has long required agents to provide immediate medical assistance and transport to a medical facility when they encounter individuals who they believe are injured, and to do so "regardless of their immigration status, citizenship or involvement in potential criminal activity." Policy for Encounters with Injured Subjects (USA000045), Exhibit 4, Attachment 4C; *see also* Harber Decl. ¶¶ 51-52. That policy has not changed. TEDS requires that before a detainee is placed into a Border Patrol hold room, a Border Patrol agent:

> must ask detainees about, and visually inspect for any sign of injury, illness, or physical or mental health concerns and question the detainee about any prescription medications. Observed or reported injuries or illnesses should be communicated to a supervisor, documented in the appropriate electronic system(s) of

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[13] Plaintiffs rely on the testimony of their medical expert, Joe Goldenson, who did not visit the Tucson Sector Border Patrol facilities, but who nonetheless asserts that "around-the-clock access to medical staff is standard throughout similar facilities." Goldenson Decl. ¶¶ 13, 16. However, Dr. Goldenson does not describe the "similar facilities" on which he bases his assertion. Moreover, he relies on standards which address facilities that are very different from Border Patrol facilities at issue here, and his assertions regarding what medical care is required are thus more appropriately applied to a long-term facility. *See* Harber Decl. ¶¶ 43, 56.

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record, and appropriate medical care should be provided or sought in a timely manner.

2 TEDS, § 4.3. TEDS further requires that protective precautions be taken for observed or reported
3 medical conditions, *id.*, and that in the case of medical emergencies, injured detainees must be
4 transferred to emergency medical services, including for hospitalization, and that upon discharge,
5 treatment plans and medication accompany detainees even after they are transferred. TEDS §
6 4.10. These policies create a system that is designed to protect the health of detainees in Border
7 Patrol custody. *See* Harber Decl. ¶ 55.

8 In practice, these policies mean that if any agent or officer identifies *any* immediate
9 medical need, or if a detainee brings any urgent medical need to the attention of any Border
10 Patrol personnel at any time after apprehension, Border Patrol will either call an ambulance or
11 transport the individual to the closest emergency medical facilities for care. TEDS ¶ 4.10; Allen
12 Decl. ¶¶ 20-22; Harber Decl. ¶¶ 29, 33-34, 49; *see also id.* ¶ 36 (noting that even less serious
13 medical issues are frequently transferred for treatment, which indicates that Border Patrol treats
14 detainee health complaints seriously). Thus a wide range of medical care is quickly and readily
15 available to detainees at Tucson Sector Border Patrol facilities. *See* Harber Decl. ¶¶ 35, 37.

16 Plaintiffs provide nothing that would give reason to conclude that this system of readily
17 available medical care is not constitutionally sufficient. *See* Harber Decl. ¶ 49. Plaintiffs' claim
18 that "those who ask for medical assistance are ignored or rebuffed" is without merit, and based
19 solely on hearsay declarations from lay individuals who allege that they were denied medical
20 care for non-specific medical complaints. *See* PI Motion at 4 (citing Vail. Decl. ¶ 139;
21 Goldenson Decl. ¶¶ 43-46). But none of these statements allege any harm resulting from any
22 denial of medical care for those complaints, nor is there any testimony from any medical
23 professional that any of those hearsay statements is evidence of a serious medical condition that
24 went untreated. *See* Harber Decl. ¶¶ 38-41 (explaining why Dr. Goldenson's opinion that
25 effective health screening did not occur improperly relies on unreliable testimony that does not
26 adequately support the conclusions he draws). Notably, Plaintiffs do not provide a single
27 example of a serious medical condition for which any delay in or denial of care resulted in any
28 serious harm. *See* Harber Decl. ¶ 41.

1 Finally, Plaintiffs' claims regarding Border Patrol's "practice of confiscating" medication
2 ignore the operational need to maintain safe and secure facilities, and the reality of Border Patrol
3 practice. Border Patrol policy provides for the safe and legal use of medication while detainees
4 are in their custody. Specifically, Border Patrol requires that medication taken by individuals
5 who are in their custody be either prescribed or validated by a medical professional. TEDS ¶
6 4.10. This is common practice for detention facilities, and protects the health and safety of
7 detainees by preventing the possibility that the medication in a detainees' possession is
8 improperly prescribed, out-of-date, or otherwise illegal. *See* Harber Decl. ¶ 28; Bryce Decl. ¶
9 110.
10 Plaintiffs' expert states that it is "standard in detention facilities similar those within the
11 Tucson Sector of the U.S. Border Patrol to have in place a policy maximizing a detainee's ability
12 to continue prescribed medication." Goldenson Decl. ¶ 47. Border Patrol has such a policy.
13 TEDS provides that medication "in the detainee's possession during general processing" may be
14 used while in detention provided it is "in a properly identified container with the specific dosage
15 indicated." TEDS ¶ 4.10. Detainees "with non U.S.-prescribed medication, should have the
16 medication validated by a medical professional, or should be taken in a timely manner to a
17 medical practitioner to obtain an equivalent U.S. prescription." *Id.*; *see also* Allen Decl. ¶ 22
18 (explaining that individuals are allowed to continue their medication, but in order to do so are
19 sent to the hospital for appropriate care and prescription of medication by a U.S. doctor); Harber
20 Decl. ¶ 34 (explaining that his conversations with Border Patrol agents confirmed that this was
21 standard practice); Bryce Decl. ¶ 111.
22 Again, Plaintiffs provide only limited evidence that this policy is not followed, in the
23 form of a small number of hearsay declarations from lay individuals claiming they were denied
24 access to medications. Goldenson Decl. ¶ 49-52. Notably none of those statements are
25 inconsistent with the policy described above, as they all state that Border Patrol agents told them
26 that they could not give out medications, and that medications needed to be prescribed by a
27 doctor. *Id.* Plaintiffs provided no evidence that denial of access to medication is widespread, or
28

1 that any individual has suffered harm while in Border Patrol custody from a denial of access to
2 medication.

3 Thus, for all of the above reasons, Plaintiffs have failed to establish a likelihood of
4 success on the merits of their claim that detainees in Tucson Sector Border Patrol stations are
5 denied access to constitutionally sufficient medical care.

6 **5. Border Patrol maintains its stations in a clean, safe, and sanitary condition that is constitutionally sufficient.**

7 It is undisputed that detainees, like prisoners, have the right not to be exposed to severe,
8 unsanitary conditions. *See Anderson v. County of Kern*, 45 F.3d 1310, 1314–15 (9th Cir. 1995);
9 *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (establishing a right to "personal security" for
10 involuntary committed persons). But "[t]here is, of course, a *de minimis* level of imposition with
11 which the Constitution is not concerned." *Bell*, 441 U.S. at 539, n.21. Some crowding and loss of
12 freedom of movement is one of the inherent discomforts of confinement. *Id.*, at 542; *see also*
13 *Demery v. Arpaio*, 378 F.3d 1020, 1030 (9th Cir. 2004) (noting that Bell determined that "the
14 additional discomfort of having to share the already close corners with another detainee was not
15 sufficiently great to constitute punishment"). Further, even if crowding is more than *de minimis*,
16 Plaintiffs must allege that the condition was intended to punish or was excessive in relation to a
17 non-punitive purpose. *Jones*, 393 F.3d at 432; *see also Graves v. Arpaio*, No. CV-77-0479-PHX-
18 NVW, 2008 U.S. Dist. LEXIS 85935, at *19-21 (D. Ariz. Oct. 22, 2008) (citing *Rhodes v.*
19 *Chapman*, 452 U.S. 337, 347-49, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981)) ("Overcrowding
20 cannot be found to be unconstitutional under the Eighth Amendment without evidence that it has,
21 in fact, increased violence, deprived pretrial detainees of constitutionally required services, or
22 violated contemporary standards of decency."). The conditions at Tucson Sector Border Patrol
23 stations are safe and sanitary, and are in no way designed to punish.

24 Plaintiffs have not sufficiently supported their assertion that hold rooms in the Tucson
25 Sector Border Patrol stations are "regularly overcrowded." *See* Bryce Decl. ¶¶ 37 ("As a
26 recognized expert on the issue of jail and prison crowding, my review of the data, interviews of
27 Border Patrol leadership, and inspection of Tucson Sector facilities does not show evidence to
28 support Plaintiffs' claim of overcrowding, much less that Tucson Sector facilities are 'regularly

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1 overcrowded.'"). Moreover, the numbers of individuals in any given cell at a Border Patrol
2 station will depend on a number of factors, including the numbers of individuals who unlawfully
3 cross the U.S. border and are apprehended in the Tucson Sector in a given day or night; the
4 breakdown of those apprehended by age, gender, family group, and criminal status; any safety or
5 health concerns that may arise related to individuals at the station; and the pace of processing
6 which may itself depend on each individual's criminal and immigration history. *See* Allen Decl.
7 ¶ 4; Bryce Decl. ¶ 38. Border Patrol facilities are truly unique in that there is no basis to predict
8 on any given day whether tens or thousands of aliens will show up a specific location or at a
9 specific time along the border. It is thus impossible to have facilities that are designed for every
10 single contingency.

11 These numbers may also be affected by what Border Patrol determines – along with other
12 federal agencies such as the U.S. Attorney's office or ICE – are the next steps for that individual.
13 Allen Decl. ¶¶ 7, 9. In addition, for operational reasons detainees are transferred between cells as
14 they progress through different stages of their processing. Allen Decl. ¶ 4.Thus, the number of
15 individuals in a given cell is never designed to create discomfort or challenges for detainees, but
16 is determined by a number of operational concerns.

17 Plaintiffs complain that the number of toilets in Border Patrol cells is insufficient for the
18 numbers of detainees. However, the number of toilets in Tucson Section Border Patrol facilities
19 is consistent with the ACA Plumbing Fixtures Standard (4-ALDF-4B-08). *See* Skipworth Decl.
20 ¶ 69, 71. While some hold rooms in Tucson Sector could exceed this number in cases where
21 there was a surge of immigration, and cells were required to be used at maximum capacity, the
22 short-term nature of surge situations means that such a situation would not pose a significant
23 health risk to detainees. Skipworth Decl. ¶73. In addition, the privacy walls around the toilets in
24 the hold rooms are consistent with those used in other detention facilities, and are positioned at a
25 height that affords a reasonable level of privacy while still providing enough visibility to
26 minimize safety and security issues. Bryce Decl. ¶ 49. Border Patrol also blacks out the view of
27 the toilet on its surveillance cameras to ensure privacy. Bryce Decl. ¶ 50; Skipworth Decl. ¶ 72.
28

1 To maintain its hold rooms, Tucson Sector Border Patrol has cleaning contracts with professional cleaning companies for each of its stations. Allen Decl. ¶¶ 29-30; Skipworth Decl. ¶¶ 42-44, 49. These contracts provide for at least daily cleaning of the hold rooms (although in practice cleaning is ordinarily performed twice daily), and ensure a hygienic and safe environment for detainees. Skipworth Decl. ¶¶ 45-48. Hold rooms also are inspected by Border Patrol personnel multiple times each day to check for sanitation conditions, supply levels, lighting, temperature, and needed repairs. *See* USA000700-002064 (hold room checklists for the Casa Grande, Douglas, Nogales, and TCC stations).

Plaintiffs allege that "cleaning is infrequent and irregular" and that "hold rooms lack cleaning supplies and often trash cans." PI Motion at 16. Yet the only actual evidence that supports this contention is a statement by Plaintiffs' counsel describing "general observations" made by "reviewers" under his direction. *See* PI Motion at 7; 16 (citing Vail Decl. ¶ 52 (citing Coles Declaration ¶ 41)). This limited, inadmissible, and non-specific evidence simply does not establish that problems with cleanliness and sanitation are the norm at Tucson Sector stations, or even that such problems exist on any regular basis.[14] As Ms. Skipworth extensively details, the cleaning at Tucson Sector Border Patrol facilities ensures that the facilities are reasonably clean, and the minimal lack of cleanliness identified by Plaintiffs, which results from the day-to-day operations of the stations, simply does not present any serious hygiene concerns. Skipworth Decl. ¶¶ 50-60.

Border Patrol does provide trash cans inside detainee hold rooms, although detainees frequently do not use them. Allen Decl. ¶¶ 31-32; Skipworth Decl. ¶¶ 63, 66. When trash cans cannot be provided inside the hold rooms, they are made available outside the rooms, and cleaning personnel collect the trash during hold room cleanings. Skipworth Decl. ¶ 64. While trash sometimes accumulates in between regular cleanings because detainees do not use the trash

[14] Following the recent site visits by Defendants' experts, and based in part on feedback from those experts, Casa Grande station leaders have identified some issues with the quality of cleaning services that were being provided under the existing contract. To resolve those issues, Border Patrol has increased its monitoring of the cleaning services at that station, and the cleaning staff has adjusted their work hours in order to be on site for 8 continuous hours. Allen Decl. ¶ 30; Skipworth Decl. ¶ 51, 56.

cans that are provided, and some new dirt may be tracked in when new detainees are brought into hold rooms, all of that is handled through routine cleaning of the facilities, and Border Patrol stations do not present any of the usual problems with insects, rodents, or vermin, that would present themselves in cases of serious trash accumulation or poor cleaning. Skipworth Decl. ¶¶ 65, 67.

Border Patrol policy also provides that personal hygiene items must be provided. TEDS § 4.11. In compliance with this policy, Border Patrol provides toilet paper in hold rooms, and makes sanitary napkins, diapers, diaper cream, and baby wipes, available to detainees. *See* Skipworth Decl. ¶¶ 79-81; Bryce Decl. ¶¶ 90-91, 94. Border Patrol also provides toothbrushes to detainees upon request. Skipworth Decl. ¶ 85; Bryce Decl. ¶ 92. Thus, Border Patrol provides the personal hygiene products necessary to ensure safe and sanitary conditions for detainees given the short term nature of these facilities. Skipworth Decl. ¶¶ 88-91; Bryce Decl. ¶ 88; Harber Decl. ¶ 58.

Plaintiffs rely on four hearsay declarations to assert that detainees "are routinely and systematically denied sanitary napkins and diapers for babies and small children . . .," and provide no evidentiary support for their further contention that the same denial occurs for toothbrushes and toothpaste. PI Motion at 15. But this extremely limited evidence flies in the face of the statement of Plaintiffs' own expert, Dr. Powitz, who acknowledged that he saw towels, toothbrushes, and personal hygiene items at the Tucson Sector stations. Powitz Decl. ¶ 58. Plaintiffs suggest that despite the fact that Border Patrol has these supplies, it nonetheless fails to provide them to detainees. *See* Powitz Decl. ¶¶ 58-60. But this suggestion defies logic, and lacks evidentiary support.[15]

Plaintiffs further assert that in order to comply with the Constitution, Border Patrol must provide a shower to every detainee upon arrival to a Border Patrol station. Vail Decl. ¶ 123. They ask the Court to order Border Patrol to provide daily showers to detainees, *see* PI Motion,

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[15] Moreover, because the notation of these items [redacted], and may be made in a number of different ways that may not have been identified by Plaintiffs' witness, the fact that Plaintiffs' witness did not identify entries [redacted] confirming that these products were offered or requested is not sufficient to establish that they were not made available to detainees. *See* Bristow Decl. ¶¶ 15-16.

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1 Proposed Order ¶ m, despite the fact that their own expert states that showers once every three
2 days would be sufficient. Vail Decl. ¶ 123. Providing showers to every detainee upon their
3 arrival to a Border Patrol and then again once per day for those who remained, would require
4 significant structural changes to Border Patrol facilities, most of which have limited or no
5 showers. Allen Decl. ¶ 33. More importantly, it would significantly slow the processing of every
6 individual, and would extend the time they spend at Border Patrol facilities. *Id.*

7 Consistent with Mr. Vail's suggestion, Border Patrol does provide showers if possible for
8 those individuals who may approach the 72-hour mark in Border Patrol custody. TEDS ¶ 4.1;
9 Allen Decl. ¶ 33. This is sufficient to protect the health of detainees. Harber Decl. ¶ 68. Plaintiffs
10 simply have not otherwise provided any evidence that showers are constitutionally required for
11 the majority of individuals, who are at Border Patrol stations for a much shorter period of time.

12 Plaintiffs also allege that Border Patrol has a practice of "routinely and systematically
13 den[ying] soap" to detainees. PI Motion at 15. Yet Border Patrol policy states that that
14 "[w]henever operationally feasible, soap may be made available," TEDS § 4.1, and in
15 accordance with this policy all of the cells in Tucson Sector Border Patrol stations have been
16 fitted with soap dispensers. Allen Decl. ¶ 34; Skipworth Decl. ¶ 82. This provides individuals
17 with the ability to wash their hands in the hold rooms. Skipworth Decl. ¶ 82. Border Patrol uses
18 the "air-drying method" for handwashing – which has been recognized by the Centers for
19 Disease Control as an effective hand drying method – because it was determined that providing
20 paper towels was operationally problematic as detainees would throw the paper towels on the
21 floor or put them into the toilet. Allen Decl. ¶ 35; Skipworth Decl. ¶¶ 83-84.

22 For all for the reasons discussed above, Tucson Sector Border Patrol stations are sanitary,
23 and do not pose any risk to detainee health or safety. Harber Decl. ¶¶ 25, 60, 74; Skipworth Decl.
24 ¶¶ 25, 36, 67. Thus, Plaintiffs simply have not shown a likelihood of success on the merits in
25 establishing a constitutional deprivation of safety and sanitation.

26 **6. Border Patrol does not deprive detainees of food or water.**

27 "Adequate food is a basic human need protected by the Eighth Amendment." *Keenan v.*
28 *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).

All stations in the Tucson Sector provide meals within set time intervals. Allen Decl. ¶¶ 37-38; *see also* Skipworth Decl. ¶¶ 96-100; Bryce Decl. ¶ 54. For example, TCC provides adults with three meals per day at 4:00AM, 12:00PM, and 8:00PM, consisting of a burrito, crackers, and juice, and 3 snacks per day at 8:00AM, 4:00PM, and 12:00AM, consisting of juice and crackers. Allen Decl. ¶ 38. Detainees are also generally provided a meal when they arrive at a station, or when they are scheduled to transfer out of a facility, to ensure that they do not miss meals that would have occurred during their transport. Allen Decl. ¶¶ 37, 39. Juveniles and pregnant women also have regular access to snacks, juice and other food items. Allen Decl. ¶ 38; Skipworth Decl. ¶¶ 114-17 ; Bryce Decl. ¶¶ 67-69.

Plaintiffs' reliance on case law assessing the nutritional adequacy of food in a long-term prison setting is not applicable to detainees who are in Border Patrol stations for only a short time period. *See* PI Motion at 17. The food provided to detainees is commercially-produced, and similar to what is commonly available in stores across the United States. Skipworth Decl. ¶¶ 102-104. Food storage and preparation at Border Patrol stations complies with approved methods, and is done in a safe and acceptable manner. Skipworth Decl. ¶¶ 105-12; Bryce Decl. ¶ 64-66. Moreover the food provided is nutritionally safe and adequate for individuals who are held in short-term detention in Border Patrol stations. Skipworth Decl. ¶ 122; Bryce Decl. ¶¶ 61-63; Harber Decl. ¶ 59.

Plaintiffs' claim that they are constitutionally deprived of food is without merit. Plaintiffs contend that Border Patrol does not follow its own policies and "regularly fail[s] to feed detainees . . . ." PI Motion at 16-17. But even the analysis Plaintiffs provide shows that "[REDACTED]]" Gaston Decl.

¶ 38, and "[redacted]." *Id.* ¶ 49.[16] Other evidence also establishes that meals were provided during the time period in question. *See e.g.,* Nogales Food Log (USA002178-2183), Exhibit 2, Attachment 2E (recording food service in the Nogales station from June through November 2015); Exhibit 2, Attachment 2D (USA001427-1569) (recording the number of burritos served at Douglas station each day); Allen Decl. ¶ 41 (explaining that "[i]n the 2015 calendar year Tucson Sector spent $386,246.04 for food and juice alone. Broken down Tucson Sector spent $177,495.44 on burritos, $111,543.92 on juice, and $97,206.68 on crackers."); Bryce Decl. ¶ 72; Skipworth Decl. ¶¶ 118, 125.[17] Thus, there is little basis to conclude that Border Patrol fails to comply with its own policies, and to regularly and consistently feed all individuals in Border Patrol stations.

Plaintiffs also fail to establish any claim that water is denied to detainees. In fact, potable water is available to detainees at all times while they are in Border patrol custody. Allen Decl. ¶ 44; Skipworth Decl. ¶ 131. Many of the hold rooms have water fountains, and if they do not, or if those water fountains are not operational, water coolers with cups are placed in the cells to provide detainees with water. *Id.*; Skipworth Decl. ¶¶ 127-130; Bryce Decl. ¶ 73. The stainless steel drinking fountains provided in Border Patrol hold rooms are of the same type that are frequently found in holding cells, jails, and prisons, and provide access to sanitary and potable water. Skipworth Decl. ¶¶ 127-28, 131; Bryce Decl. ¶¶ 74-75.

Plaintiffs suggest that cups are stored at Border Patrol stations but that in at least one five day period in Casa Grande, they were not provided to detainees. *See* Vail Decl. ¶ 79. However, the cells at Casa Grande station are all equipped with water bubblers, from which water can be

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[16] Plaintiffs' analysis [redacted] does not necessarily establish that food was not provided, but merely that a notation was not made in a manner that fell within the search parameters used by Plaintiffs' witness. *See* Bristow Decl. ¶ 17. In light of the significant evidence that food is widely available and regularly provided to detainees, there is little basis to conclude that any actual failure to feed detainees regularly occurs.

[17] Plaintiffs' allegation that food is frequently withheld as punishment lacks evidentiary support. TEDS makes clear that "Food and water should never be used as a reward, or withheld as a punishment." TEDS § 4.13; *see also* TCC Meal Policy (USA000650). Plaintiffs' claim that this policy is not followed relies on the hearsay testimony of only two individuals, *see* Vail Decl. ¶ 100, which not only lack reliability, but are also insufficient to establish that any such practice is widespread. *See also* Bryce Decl. ¶ 72; Skipworth Decl. ¶ 118.

had without using a cup. Bryce Decl. ¶ 76.[18] Ultimately, Plaintiffs rely on the hearsay statements of only three individuals for their contention that Border Patrol denies detainees access to water. Vail Decl. ¶ 80. In the face of significant evidence to the contrary, these three statements are simply not sufficient to establish that detainees are not provided regular access to potable water at Border Patrol stations.

Thus, Plaintiffs have not established any likelihood of success on their claim that Tucson Sector Border Patrol deprives detainees of food and water.

7. Border Patrol does not deprive detainees of any due process right to sleep.

Border Patrol stations are not designed for sleeping, and Border Patrol does not provide detainees with beds, nor does it turn off the lights at night in its stations. Allen Decl. ¶¶ 45-47. However, the reasonableness of these conditions must be assessed with due consideration given to the nature, purpose, and duration, of an individual's time in a Border Patrol station. Reasonableness, particularly with regards to sleep, is assessed in light of duration. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (recognizing that due process requires that the nature and duration of detention bear some reasonable relation to the purpose for which an individual is detained); *Jones v. Blanas*, 393 F.3d 918, 933 (9th Cir. 2004) (discussing expected length of detention in assessing reasonableness).

Plaintiffs ask the Court to require Border Patrol to provide all detainees with access to beds and dim lighting once their time in a Border Patrol facility has reached twelve hours, regardless of whether they are still in active immigration processing. However, Border Patrol stations are twenty-four hour operations, and in fact a significant number of individuals who are detained in Border Patrol stations are apprehended during the evening and night time hours. Allen Decl. ¶ 46. The only way to accomplish the relief Plaintiffs seek would be to turn off the lights at night, and provide sleeping facilities at Border Patrol stations. This would not only require significant structural changes to Border Patrol facilities, but it would also create safety

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[18] Plaintiffs' contention that detainees are regularly forced to drink from water jugs misunderstands the evidence. Border Patrol frequently provides water jugs to individuals who are thirsty at the time of apprehension in the desert, and may allow those individuals to retain the jug when they arrive at a Border Patrol station. *See* Allen Decl. ¶ 44; Bryce Decl. ¶¶ 76-77. Detainees sometimes share these jugs, even though other water sources are available to them in the hold rooms. Allen Decl. ¶ 44.

risks for both detainees and Border Patrol agents, and would make it effectively impossible for Border Patrol stations to operate during the time when they are frequently the busiest. Allen Decl. ¶¶ 46-47; Bryce Dec. ¶¶ 100-01. It would also therefore result in significantly extended detention times in Border Patrol stations. Allen Decl. ¶ 47; Skipworth Decl. ¶ 153; Bryce Dec. ¶ 101.

The lighting and lack of bedding in Border Patrol stations is not punitive, but rather is reasonably related to the purpose and function of Border Patrol stations. Bryce Dec. ¶ 102.[19] Moreover, it does not result in harm to detainees given the short periods of time during which sleep may be denied. Harber Decl. ¶ 65. Thus, Plaintiffs have not established that providing such accommodations to individuals who are in active immigration processing is constitutionally necessary.[20] Because Plaintiffs have not shown that the lack of sleeping accommodations for individuals in ongoing immigration processing is a constitutional violation, they have failed to show any likelihood of success on this claim.

b. Plaintiffs Cannot Show a Likelihood of Irreparable Harm

To establish irreparable harm, the movant must first "demonstrate that irreparable injury is *likely* in the absence of an injunction;" it "will not issue if the person or entity seeking injunctive relief shows a mere possibility of some remote future injury." *Park Village Apartment Tenants Association v. Foster*, 636 F.3d 1150 (9th Cir. 2011) (internal citation and quotation

[19] For example, Plaintiffs claim through their experts that "[p]hotographs demonstrate that floor sleeping is ubiquitous." PI Motion (*citing* Val Decl. ¶ 33, *which cites* Exhibit 158). But the timeframe surrounding those photographs shows that processing is ongoing at all hours of the night, with individuals steadily entering and leaving the hold room every 10-15 minutes. Many of the individuals are sitting or lying down for brief stretches, hardly establishing that "floor sleeping" is an "ubiquitous" practice.

[20] In cases where a detainee is required to remain in Border Patrol custody for a longer period of time because of delays related to transfer to another agency, the detainee may be booked out of Border Patrol custody and into ICE ERO custody or a county jail for overnight housing. Allen Decl. ¶ 10; Skipworth Decl. ¶ 156. While this option is not always possible, Border Patrol makes its best efforts to utilize it where Border Patrol custody has exceeded or will exceed a seventy-two hour processing period. *Id.*. This practice does not interfere with processing operations, but provides an option for Border Patrol to provide sleeping accommodations to those whose time at a Border Patrol station has exceeded the standards.

marks omitted). The relief being sought "must be tailored to remedy the *specific harm alleged*." *Id.* (internal citation and quotation marks omitted).

Plaintiffs have not established any likelihood of irreparable harm because their claims are supported by nothing more than the hearsay statements of only a few individuals which their experts have adopted without further analysis even in the face of contrary evidence, and a selective presentation of limited evidence that ignores the bigger picture of the operations of Tucson Sector Border Patrol. Notably, Plaintiffs have not provided evidence of a single individual who experienced any lasting harm, let alone any irreparable harm, from his or her time in a Tucson Sector Border Patrol station.[21]

In addition, Plaintiffs have not sought to tailor the preliminary relief they are seeking to the exact contours of the harm alleged. In seeking broad relief after the arbitrary time limit of twelve hours in Border Patrol custody, they make no effort to consider the interplay between the conditions they are challenging and the processing operations of Tucson Sector Border Patrol. This element is designed to prevent the Court from issuing just this sort of broad preliminary relief based on minimal evidence, and therefore counsels against granting preliminary relief in this case.

c. The Government's Interests Would be Harmed, and the Public Interest Would Not Be Served by the Grant of Injunctive Relief

It is well-settled that the public interest in enforcement of United States immigration laws is significant. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976). The broad injunctive relief that Plaintiffs ask the Court to arbitrarily impose for all individuals whose processing at Border Patrol stations may take longer than twelve hours would have a significant impact on the operations of Tucson Sector Border Patrol, and therefore on its ability to

[21] Plaintiffs' lack of urgency in seeking preliminary injunctive relief also counsels against them on this factor. All of Plaintiffs' allegations of harm are based on declaratory evidence that was gathered between July 2014 and May 2015. Yet Plaintiffs waited until December to file their PI Motion, including multiple unexplained delays. Unexplained delays in filing a motion for preliminary injunction "impl[y] a lack of urgency and irreparable harm." *Grand Canyon Trust, et al v. Williams*, Case No. CV–13–08045–PCT–DGC, 2015 WL 3385456, at *4 (D. Ariz., May 26, 2015) (quoting *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985)).

effectively play its role with regard to immigration enforcement. This potential impact is extremely detrimental to the public interest.

Moreover, some portions of the relief that Plaintiffs have arbitrarily crafted in their PI Motion would require substantial changes both to Border Patrol operations, and to the physical structure of Border Patrol stations. This type of burden, and its potential wide-reaching impact on Tucson Sector Border Patrol, is too great to be permissible at this preliminary stage. This type of relief should only be imposed, if at all, after the parties have the opportunity to explore the evidence, and to present a full and complete factual record to the Court.

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

III. 8 U.S.C. § 1252(f)(1) Precludes This Court From Entering Class-Wide Injunctive Relief Related to the Operations of Border Patrol.

Certain types of class-wide injunctive relief is proscribed by the INA. *See* 8 U.S.C. § 1252(f)(1); *see also Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 482 (1999) ("By its plain terms, and even by its title, [8 U.S.C. § 1252(f)] is nothing more or less than a limit on injunctive relief."). Specifically, 8 U.S.C. § 1252(f)(1) provides that "no court other than the Supreme Court shall have jurisdiction or authority to enjoin or restrain the operations of the provisions of [8 U.S.C. §§ 1221-1231], other than with respect to an individual alien against whom proceedings under such part have been initiated."

Plaintiffs ask this Court to order Border Patrol not to hold individuals in its custody for more than twelve hours unless certain conditions are met. PI Motion, Proposed Order. However, Border Patrol's authority to detain individuals during their immigration processing is pursuant to 8 U.S.C. §§ 1225, 1226, and 1231, and 8 U.S.C. § 1252(f)(1) therefore precludes this Court from ordering Border Patrol to release individuals held in its custody on a class-wide basis. To the extent that Plaintiffs are asking the Court to order class-wide relief that would enjoin the operations of Border Patrol, and require Defendants to release individuals in its custody before immigration processing and the transfer of custody could be completed, such relief is precluded by 8 U.S.C. § 1252(f)(1).

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CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' motion for preliminary injunctive relief.

DATED: February 25, 2016

Respectfully submitted,

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1
CERTIFICATE OF SERVICE

2 I hereby certify that the foregoing document filed through the ECF system will be sent
3 electronically to the registered participants as identified on the Notice of Electronic Filing and
4 paper copies will be sent to those indicated as non-registered participants.

5

6 DATED: February 25, 2016

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EXHIBIT B

Nos. 17-15381 & 17-15383

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANE DOE #1; JANE DOE #2; NORLAN FLORES, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants-Cross-Appellees,

v.

JOHN F. KELLY, Secretary, United States Department of Homeland Security; KEVIN K. MCALEENAN, Acting Commissioner, U.S. Customs And Border Protection; CARLA L. PROVOST, Acting Chief, United States Border Patrol; FELIX CHAVEZ, Acting Commander, Arizona Joint Field Command & Acting Chief Patrol Agent – Tucson Sector,

Defendants-Appellees-Cross-Appellants.

PRELIMINARY INJUNCTION APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
NO. 15-CV-00250-DCB

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INTRODUCTION

The U.S. Border Patrol is charged with, among other duties, securing the land border between the United States and Mexico. This land border spans several thousand miles and requires the Border Patrol to operate in a rugged, unpredictable, and often isolated environment, unlike that in which any other law enforcement agency operates. The Border Patrol's primary mission is detecting and preventing the entry of terrorists, weapons of mass destruction, and unauthorized aliens, as well as interdicting drug smugglers and other criminals entering the United States between the ports of entry.[1] Given the nature of Border Patrol's mission, Border Patrol agents frequently encounter and detain individuals who are attempting to evade immigration laws, including those who are also engaged in other types of criminal activities, such as smuggling drugs or human trafficking.

Border Patrol agents in Tucson Sector patrol 262 miles of the United States-Mexico border in southern Arizona. In fiscal year 2016, the Tucson Sector apprehended 64,891 individuals, the second highest of any Border Patrol sector.[2]

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[1] This case therefore does not concern individuals arriving in the United States at ports of entry.

[2] CBP Total Monthly Apprehensions by Sector and Area (FY 2000 - FY 2016) (available at https://www.cbp.gov/sites/default/files/assets/documents/2016-Oct/BP%20Total%20Monthly%20Apps%20by%20Sector%20and%20Area%2C%20FY2000-FY2016.pdf) (viewed April 20, 2017) ("Total Monthly Apprehensions").

The number of individuals it apprehends each month varies widely. Between 2009 and 2016, total apprehensions each month varied by nearly a factor of ten, from a high of 31,432 in March 2009, to a low of 4,071 in July 2015.

When a Border Patrol agent in the Tucson Sector apprehends an individual, the agent brings him or her to one of eight stations (Ajo, Brian A. Terry, Casa Grande, Douglas, Nogales, Sonoita, Tucson, or Willcox). At that station, the Border Patrol ascertains the individual's identity and immigration and criminal history, and he or she is fully processed to determine the next steps for that individual. The individual may be repatriated, transferred into the custody of another agency, referred for prosecution in accordance with the law or, in rare circumstances, released. It is rarely possible to complete an individual's processing in a single, uninterrupted sitting because of the volume of individuals to be processed and the need to ensure that they receive all appropriate attention. For example, all individuals undergo intake, biometric capture, and processing but, depending on a particular individual's needs and responses, the individual may also be provided with medical care, meet with consular officials, undergo a more extensive interview, or meet with pre-trial services. Individuals awaiting the completion of processing and transfer out of Border Patrol custody wait in hold rooms, which like Border Patrol itself, operate twenty-four hours a day, seven days a week since individuals can be encountered and apprehended at any time.

That said, a significant number of Tucson Sector Border Patrol apprehensions occur at night.

Once detained, individuals may be transferred from one hold room to another as they progress through the stages of processing or as operational demands require. Such operational demands include the Prison Rape Elimination Act, Pub. L. No. 108-79, 117 Stat. 972 (Sept. 4, 2003) (codified at 42 U.S.C. §§ 15601, *et seq*.); the National Standards on Transport, Escort, Detention, and Search ("TEDS"), available at: https://www.cbp.gov/sites/default/files/documents/cbp-teds-policy-20151005_1.pdf (viewed Apr. 25, 2017); detainee and occupational safety requirements; and facility cleanliness needs. As a result, the population of a Border Patrol station tends to be in constant flux.

The total amount of time an apprehended individual spends in Tucson Sector Border Patrol custody is relatively short, usually between twelve and seventy-two hours, and rarely exceeds forty-eight hours. During the period May 1 through October 31, 2016, approximately half of the 32,144 individuals taken into Border Patrol Tucson Sector custody were released or transferred to the custody of another agency within twenty-four hours, eight percent were in custody for forty-eight hours or more, and two percent were in custody for seventy-two hours or more. *See* Excerpts of Record ("ER") 71-74; Supplemental Excerpts of Record ("SUPP ER") 899-900, 1000. Moreover, since time in custody is measured starting at

apprehension, which can be in a remote location in the desert, the time a detainee spends in hold rooms actually is much less.

Plaintiffs are a class of individuals temporarily held at any one of the eight Tucson Sector stations. Plaintiffs claim that the conditions of their brief detention violate the Due Process Clause of the Fifth Amendment, and they sought a preliminary injunction relating to the claimed constitutional violations. The district court noted that Border Patrol detention is civil in nature and not a criminal sentence, but did not properly consider the nature of Border Patrol's operations, and determined that standards applicable to state prisons or local jails should provide a baseline for evaluating whether conditions in Border Patrol stations were constitutional. Based on this assumption, the district court concluded that, with respect to some of Plaintiffs' detention condition allegations, they are likely to succeed on the merits of their due process claim. The court thus and granted Plaintiffs' preliminary injunction request. It ordered Tucson Sector Border Patrol to immediately: (1) provide sleeping mats and mylar blankets for detainees held longer than twelve hours; (2) provide detainees held longer than twelve hours a means to wash or clean themselves; and (3) implement the universal use of the Tucson Sector's Medical Screening Form at all stations and ensure that the questions on the form reflect the TEDS requirements for the delivery of medical

care to detainees.[3]

As an initial matter, the district court erred because it did not consider Plaintiffs' constitutional claims in the light of the law enforcement purposes that Border Patrol stations serve and the stations' unique operational needs, as required under *Bell v. Wolfish*, 441 U.S. 520, 536-37 (1979). The district court committed legal error because it relied exclusively on various judicial rulings regarding conditions in certain prisons, jails, and facilities that serve the purpose of longer-term civil commitment, and did not identify how or why those standards should be applicable in the unique, and very different, setting of short-term Border Patrol detention. Defendants ask this Court to clarify the legal standard that should apply to individuals briefly detained in Border Patrol custody, and to remand the case to

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[3] The district court also ordered Tucson Sector Border Patrol to monitor, through the use of its e3DM system, its compliance with several provisions of TEDS. E3DM is the Border Patrol's system for recording certain data regarding each individual it apprehends, including biographical information, criminal and immigration history, transfers in and out of custody, other Border Patrol interactions with the individual, and information related to detention conditions and events, such as the dates and times meals were offered to the individual while in custody. ER 70-73; SUPP ER 896-99.

As discussed herein, Defendants dispute that this (or any) remedy is appropriate, because the district court did not apply the correct analysis in evaluating whether conditions of Plaintiffs' detention in Border Patrol custody violated their Fifth Amendment due process rights. However, the parties do not otherwise raise any specific challenges to this provision of the district court's order.

the district court for further consideration of Plaintiffs' preliminary injunction request in accordance with the proper legal standard.

Second, even if this Court finds that the district court did not err in finding a potential constitutional violation with regard to Plaintiffs' claims regarding sleep deprivation, the Court should find that by ordering Defendants to provide sleeping mats for detainees after twelve hours, the district court abused its discretion because it did not tailor the remedy to the harm alleged. Specifically, the district court did not properly consider the impact that this remedy would have, as ordered, on Tucson Sector's operations. The remedy has, at times, adversely affected Tucson Sector's ability to carry out its mission, where a less rigid remedy that would have a lesser effect on Border Patrol operations would have sufficed. Thus, even if the Court does not vacate the preliminary injunction order and remand the case to provide the district court the opportunity to analyze Plaintiffs' constitutional claims under *Bell v. Wolfish*, the Court should at a minimum direct the district court to refashion the twelve-hour sleeping mat requirement.

Finally, even if the Court declines the relief Defendants request, the Court should nonetheless deny Plaintiffs' appeal, because Plaintiffs have not shown that the remainder of the relief the district court ordered does not provide them complete relief from the harm they alleged. Thus, the Court should affirm the remaining remedies as within the district court's discretion to order.

STATEMENT OF JURISDICTION

The district court has jurisdiction 28 U.S.C. § 1291(a)(1), which confers jurisdiction over appeals from interlocutory orders of district courts granting or refusing to dissolve or modify injunctions.

STATEMENT OF THE ISSUES

I. Whether this Court should vacate the District Court's preliminary injunction because the district court did not properly apply *Bell*, 441 U.S. 520, when it ignored the unique and legitimate government interests and operational difficulties involved in effectively operating a Border Patrol station in addressing Plaintiffs' challenge to their detention conditions, and thus did not apply the correct legal standard in granting Plaintiffs' request for a preliminary injunction

II. Whether the Due Process Clause imposes a rigid constitutional mandate that Tucson Sector Border Patrol must distribute sleeping mats to each and every detainee after twelve hours, regardless of the adverse impact of such a requirement on Tucson Sector's ability to carry out its basic mission.

III. Assuming, *arguendo*, that Plaintiffs are likely to succeed on the merits of their constitutional claims, thereby meriting injunctive relief, whether, considering the unique mission and operational needs of Border Patrol stations and the relative brevity of Border Patrol detention, the district court

properly exercised its discretion to require the Tucson Sector to:

A. Implement the universal use of the TEDS standards for delivery of medical care to detainees, in lieu of the medical screening regime proposed by Plaintiffs;

B. Provide detainees with sleeping mats after a specified period of time, rather than requiring that all detainees be provided access to beds;

C. Provide detainees the ability to clean themselves after twelve hours in custody, rather than requiring all detainees to be given showers.

STATEMENT OF THE CASE

After apprehending an individual in the field, a Border Patrol agent conducts a basic field interview and visual inspection of each individual. During this interview and inspection, Border Patrol seeks to determine whether the individual requires immediate medical attention, in which case the agent calls 911 and an ambulance is dispatched to transport the individual to the closest hospital emergency room or urgent care clinic. ER 98-99, 115-16, 369-84, 744; SUPP ER 909-10, 921, 923. Individuals with less urgent medical issues may sometimes be transported to the closest Border Patrol station for identification and then, if necessary, to a medical facility for treatment. ER 98-99, 115-16, 118-24 (describing the circumstances under which the Tucson Sector brings an individual to a treatment facilities and the process of completing a Treatment Authorization

Request). All Border Patrol agents are trained as First Responders and approximately half have more advanced training in first aid. ER 117. Many are certified as Emergency Medical Technicians ("EMTs"). ER 117, 119; SUPP ER 924. If the agent is unsure of whether an individual is in need of emergency medical care, the agent may call an EMT for backup, or may send the individual to the hospital so that the medical staff there can determine if treatment is necessary. ER 119, 153-54; SUPP ER 910, 929. It has been a long standing policy and practice for Border Patrol agents to provide immediate medical assistance and transfer to a medical facility to any individual believed to be injured, regardless of immigration status or participation in criminal activity. SUPP ER 923-24, 934-35.

Individuals apprehended in the field are searched and brought to the nearest Border Patrol station for identification. ER 99-100, 104. At the arrival point, known as the sally port, individuals are searched again for contraband, and their property and outer clothing layers are properly secured. ER 104, 172; SUPP ER 904. Juveniles, however, are permitted to keep all of their clothing. SUPP ER 904, 950. Because Border Patrol stations are secured—agents do not carry weapons while inside the detention area—the search is very important for detainee and Border Patrol employees' safety. ER 105. All detainees are provided a mylar

blanket for warmth.[4] ER 122-23.

All medicines are confiscated. TEDS Standards ¶ 4.10. This is standard practice in detention facilities and is done to prevent introduction of drugs. ER SUPP 954; ER 325-26. If the Tucson Sector confiscates a detainee's medication, it will ask the detainee follow-up questions to ascertain the purpose of the medication and when it was last taken and, if the detainee has immediate need for the medication, or if the Border Patrol agent is unsure whether there is an urgent need for the medication, the Tucson Sector will transport the detainee to the hospital for an evaluation by a doctor and the provision of medication. ER 121-22. From intake and throughout the detainee's stay, Border Patrol agents ask about and visually inspect for any signs of illness and injury. ER SUPP 923; TEDS Standards ¶¶ 4.3, 4.10. Border Patrol agents have ongoing interactions with the detainees throughout their detention, which gives agents the opportunity to observe detainee health conditions and respond to signs and symptoms of illness and any acute medical conditions that may develop or present thereafter. ER 186-88; ER SUPP 923-24.

[4] The Tucson Sector at one time provided cloth blankets but no vendor was able to keep up with the pace of washing and restocking them, in order to provide each detainee with a clean blanket. ER 123; SUPP ER 909. Mylar blankets are more hygienic and are recycled. ER 124; SUPP ER 909.

After intake in the sally port, and the initial identification process (including gathering initial biographic information), detainees are transferred to the interior of the station for further processing. ER 104-05; SUPP ER 904. Detainees are placed into hold rooms based on a number of factors including age, gender, whether they are traveling as a family unit, if they are suspected of having committed a serious crime, or if they have expressed a fear of persecution. ER 107-08; SUPP ER 904-05. Tucson Sector stations make available items for mothers and children, such as diapers, bottles, baby formula, and toddler foods, either by providing access to these items or hanging posters showing items that are available. ER 106; SUPP ER 966-68, 980-88. Families with children are provided sleeping mats. ER 124-25. Before the district court's preliminary injunction, sleeping mats were not provided to all detainees because of space limitations and the interruptions that sleeping mat distribution to a large population of detainees poses, where detainees are constantly coming and going at all hours of the day and night. ER 124-29.

For security reasons, lights are kept on in the hold rooms throughout the day and night. ER 126. This allows the Tucson Sector staff to keep an eye on detainees, and is for everyone's protection. ER 126. Turning off the lights during certain hours would foreclose the Tucson Sector's ability to process detainees twenty-four hours a day, leading to longer detention periods and possible placement of violent criminals with other detainees, jeopardizing their safety. ER 126.

Temperatures in Tucson Sector hold rooms are set at seventy-three to seventy-four degrees and, at most stations, are controlled by computer and cannot be adjusted by station staff. ER 114-15; SUPP ER 949, 974-77. Actual temperature readings are taken at least once during each shift. ER 115. If the range of the temperature falls outside of an acceptable range a maintenance contractor is called. ER 115. If another room has a more suitable temperature, detainees are transferred to that room. ER 115.

Identification and processing requires several steps, including conducting records checks and submitting prints to several indices, to determine whether the individual has had prior encounters with law enforcement. ER 107; ER SUPP 904-05. The next steps may include preparing an arrest report, immigration processing, service of immigration forms, consular notifications, and communication with family members. ER SUPP 904-05. Officials from the Consulates of Guatemala and Mexico visit the Tucson Coordination Center twice each day, conduct interviews, and communicate with their countries' nationals. ER 80, 110; SUPP ER 907.

After processing, the Border Patrol works with other agencies to determine the next course of action for each detainee, including repatriation, transfer to Immigration and Customs Enforcement ("ICE") Enforcement and Removal Operations, the United States Marshals Service, or, if the detainee is an

unaccompanied minor, transfer to the appropriate housing under the Office of Refugee Resettlement. ER 78-79, 110-13; SUPP ER 905-06. Detainees found to be subject to an outstanding warrant for violations of state or local law are referred to the appropriate law enforcement agency. ER 110-13; SUPP ER 905-06. For example, if a detainee had an outstanding arrest warrant in Wichita, Kansas, the Tucson Sector would contact authorities in Wichita to verify the warrant. Wichita authorities would place a hold on the detainee and request that the Tucson Sector detain him until they can arrange for transportation of the detainee to Wichita. ER 111. Detainees who are kept in custody for criminal prosecution or other reasons generally are transferred to the Tucson Coordination Center, which serves as the transportation hub for the eight Tucson Sector stations. ER 99-100; SUPP ER 905-06. Once processing is completed, detainees are transferred to other facilities and agencies as soon as possible; but when a receiving agency is unable to accept the individual, for reasons such as lack of space, the individual will remain in Border Patrol custody. ER 100-03; SUPP ER 906. The Tucson Sector looks for alternative placement options if it appears that an individual's time in Border Patrol custody will be prolonged. ER 113. For instance, Border Patrol may utilize ICE facilities to allow detainees to sleep and/or take a shower. ER 113. The Tucson Sector also has certain access to the Santa Cruz County Jail, which is under contract to ICE and has beds and showers. ER 113-14.

The Tucson Sector strives to transfer each and every detainee from its custody as soon as possible. ER 102. Border Patrol calculates time in custody starting from the time of initial apprehension until transfer to another agency, and does not limit it to time spent at a Border Patrol station. ER 72-73. Thus, Border Patrol's data regarding detention length may include periods of time in which off-site medical treatment was provided, including inpatient treatment that lasts several days, time in which a detainee was transferred out to a facility to have access to beds and showers, or the time it took for a detainee to appear for a court hearing. ER 74, 100-01; SUPP ER 899-901. Accordingly, in many instances detainees reported to be in custody for more than forty-eight hours may actually have not been physically at a Border Patrol station for a significant portion of that time. ER 74, 103; SUPP ER 899-901. Many unavoidable but common events, such as providing meals, responding to medical needs, consular communications, telephone calls to family members and counsel, and criminal investigations, extend processing times, which also may extend an individual's time detention. ER 73-74, 107-10, 177; SUPP ER 904, 907. Another factor that may extend the time in detention for some detainees is the repatriation agreement between the Mexican and United States governments limiting repatriation of certain individuals to daylight hours, which affects Mexican nationals apprehended in the late afternoon. ER 102-03, 111-12. In recent years, the Tucson Sector has encountered an

increasing number of nationals from countries other than Mexico and from non-Spanish-speaking countries, including Brazil, Haiti, India, and countries in the Middle East, which adds time to detention while the Border Patrol locates interpreters. ER 75-76, 79-80, 108-09.

On October 5, 2015, CBP issued the TEDS standards. Under these standards Border Patrol stations must make every effort to promptly transfer, transport, process, release, or repatriate detainees as appropriate, according to each operational office's policies and procedures, and as operationally feasible, and in any event, should not hold detainees longer than seventy-two hours. TEDS ¶¶ 1.8, 4.1. Under TEDS, agents must conduct screening that includes questions designed to ascertain, document, and obtain more information about health conditions, including pregnancy, and injury, illness, and physical and mental health concerns, communicate any concerns to a supervisor, and document them. TEDS ¶¶ 4.2, 4.3. TEDS also requires that Border Patrol must provide all juveniles bedding, and make reasonable efforts to provide soap, showers, and clean towels to detainees approaching seventy-two hours in detention. TEDS ¶¶ 4.11, 4.12.

During the period May 1 through October 31, 2016, half (49.92 percent) of individuals taken into Border Patrol Tucson Sector custody were released or transferred to the custody of another agency within twenty-four hours, 8.08 percent were in custody for forty-eight hours or more, and 2.13 percent were in custody for

seventy-two hours or more.[5] *See* ER 71-74; SUPP ER 899-900, 1000.

Plaintiffs filed their complaint in this case on June 8, 2015, and on January 11, 2016, the district court certified a class. On June 27, 2016 the district court amended the class definition to include "all individuals who are now or in the future will be detained at a CBP facility within the Border Patrol's Tucson Sector." ECF No. 117, 173. On August 17, 2016, Plaintiffs filed a motion seeking a preliminary injunction, which claimed that Border Patrol detention exceeding twelve hours was inherently punitive and unconstitutional. ER 402.

Plaintiffs argued that the combination of alleged overcrowding and cold room temperatures, removal of outer layers of clothing upon intake, and concrete flooring and benches, continuous illumination and noise in hold rooms deprived them of sleep. ER 410-14. In support of their allegation of sleep deprivation Plaintiffs presented a snapshot of surveillance video footage of detainees sleeping in a Tucson Coordination Center hold room. ER 410-12, 433-34.

Plaintiffs also argued that they are denied adequate medical care and screening because screening is not conducted by medical personnel. ER 418-20 (citing ER 504-06). Plaintiffs submitted a declaration by a medical doctor opining

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[5] As noted, *supra*, at 14, these reported times overstate the actual time spent in hold rooms.

that the Tucson Sector should adopt the National Commission on Correctional Health Care ("NCCHC") standards that are in place at correctional facilities. ER 504-05. Plaintiffs did not submit any evidence of harm to any detainee from lack of screening, nor did they provide studies showing increased risk of harm based on the Tucson Sector's screening processes in place at that time.

Plaintiffs further claimed that they were denied a "safe and sanitary environment" because, *inter alia*, "they are routinely and systematically denied access to showers and hot running water." ER 415-16. Plaintiffs relied on a number of declarations, apparently by former detainees, attesting to conditions in Tucson Sector stations, and on the testimony of their expert witness Dr. Robert Powitz. ER 476-500.

Defendants opposed Plaintiffs' preliminary injunction motion. ECF 133 at 6. Defendants noted that Plaintiffs' twelve-hour standard was arbitrary, unrelated to any constitutional standard, and did not account for Border Patrol's mission or operational needs. *Id.* at 6-9. Defendants noted that Congress has defined short-term detention as lasting seventy-two hours or less, ECF 133 at 10 (citing Trade Facilitation and Trade Enforcement Act, Pub. L. No. 114-125, tit. VIII, § 411(m), 130 Stat. 122, 208 (Feb. 24, 2016)), and that the vast majority of apprehended individuals spend much less time than that in Tucson Sector hold rooms. ECF 133 at 6-9. Defendants also noted that Plaintiffs' factual allegations regarding

detention, and their experts' opinions, which relied on those allegations, were based on unreliable, biased, and suspect declarations (which were composed and typed in English by someone else) from individuals who did not speak or read English. These declarants were never cross-examined as to their declarations' contents. The declarations described conditions that were not detrimental to public health and were compliant with commonly accepted practices, or were taken out of context.[6]

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[6] Plaintiffs repeat a number of these allegations in their brief to the Court. *See* Brief for Plaintiffs-Appellants-Cross-Appellees ("Pls' Br."). For example, Plaintiffs assert "temperatures in hold rooms can reach as low as 58.8° Fahrenheit." *Id*. at 8 (citing ER 495 (citing observation based on Douglas station temperature log). Plaintiffs omit that this temperature drop occurred on September 28, 2015, and was caused by a cooling system malfunction and that detainees were provided jackets and sweaters while the problem was being fixed. SUPP ER 908-09. Plaintiffs also reference several alleged failures to provide medical care, but proffered no follow-up declarations regarding the effects of the alleged failures to provide medical attention. *See* Pls' Br. at 17 (declarants asserting that they were denied medication for ovarian cysts and a heart condition, ER 513-14, 616-17); *id*. at 18 (citing ER 507, 630, declarant asserting that Border Patrol agent told her that medicine was not available for her child's ear infection); *id*. (citing ER 634, declarant asserting that she asked for medical attention after complaining of heavy vaginal bleeding and was given tampons and not examined until five days later when in ICE custody). Finally, Plaintiffs seek to supplement the record with one electronic mail exchange between Tucson Sector agents regarding a detainee's medical issue, for which the detainee had been promptly transferred to University of Arizona Medical Center. Pls' Br. 17 (citing ER 815). Plaintiffs call attention to the statement by one employee that the detainee had not presented a "fake heart attack" or hurt hand to avoid prosecution. ER 154. Plaintiffs cross-examined Chief Allen about the message at the district court's hearing on the preliminary injunction. ER 154-59. Chief Allen acknowledged that the messages were

Defendants' opposition described the Tucson Sector's responsibilities related to processing apprehended individuals, and determining whether to release, repatriate or transfer each individual to the custody of another agency. Defendants noted that Tucson Sector facilities operate around the clock, over 262 linear miles of the United States-Mexico border and apprehend individuals at all times, but largely during evening hours. ECF 133 at 1-9; SUPP ER 917. Defendants contended that the conditions experienced by detainees at Tucson Sector Border Patrol stations were necessary in light of the realities of Border Patrol operations, and that as a result Plaintiffs were not likely to succeed on their claims and no preliminary injunction should be issued.

On March 10, 2016, Plaintiffs filed a reply in support of their preliminary injunction request, arguing that Defendants' interests were entirely fiscal and that cost avoidance was not a legitimate government interest. ECF 145. Following briefing, on November 14-15, 2016, the district court held a two-day hearing. ER 65-348. Plaintiffs presented testimony from: Joseph Gaston, an ediscovery analyst

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exchanged among Tucson Sector employees internally and that the context of one of the responses to the original message about the medical condition was that the original message contained more information about the condition than was necessary to share. ER 155-59. At no point, however, do Plaintiffs assert that the Tucson Sector denied medical care to a detainee who genuinely suffered a heart attack or hurt hand.

with the firm representing Plaintiffs; Joe Goldenson, M.D.; and Eldon Vail, an expert on administration of correctional facilities. ER 251-347. Defendants presented testimony from: George Allen, Assistant Chief Patrol Agent for the Tucson Sector; Justin Bristow, Acting Chief, Strategic Planning and Analysis, Border Patrol; Richard Bryce, retired Undersheriff of Ventura County Sheriff's Department, California; Amy Butler, acting strategic policy advisor for CBP; and Philip Harber, M.D., a physician and Professor of Public Health at the Mel and Enid Zuckerman College of Public Health, University of Arizona. ER 69-225.

On November 18, 2016 the district court granted Plaintiffs' motion. ER 5-32. The court stated that the constitutional standard to be applied came from *Bell*. ER 11-13. It then noted that Plaintiffs are detained under civil, rather than criminal, process, and without further analysis, reasoned that Plaintiffs are entitled to "more considerate treatment" than those who are criminally detained. In support, the court cited judicial opinions involving prisoners and individuals who had been civilly committed, either as several mentally disabled individuals unable to care for themselves, sexually violent predators, and enemy combatants, for long periods of time. *See* ER 13-14 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that noncompliance with physician advice to permit prisoner rest and disciplining of prisoner after he complained of pain constituted deliberate indifference and violated prisoner's Eighth Amendment right to be free from cruel and unusual

punishment); *Youngberg v. Romeo*, 457 U.S. 307, 321–22, (1982) (holding that severely mentally disabled individual civilly committed to state institution had a constitutionally protected liberty interests in safe confinement conditions and freedom from unreasonable bodily restraints). The district court reasoned that decisions defining the constitutional rights of these criminal prisoners in vastly different facilities establish "a floor for the constitutional rights of the Plaintiffs." ER 13 (citing *Padilla v. Yoo*, 678 F.3d 748, 759 (9th Cir. 2012) (noting that enemy combatant detained at Guantanamo Bay may have been entitled to the constitutional protections provided convicted prisoners)). The district court then presumed that Plaintiffs are being punished if they are detained in conditions identical to, similar to, or more restrictive than those under which the criminally convicted are held, ER 13-14 (citing *Sharp v. Weston*, 233 F.3d 1166, 1172-73 (9th Cir. 2000)), based on the reasoning that, "purgatory cannot be worse than hell," ER 14 (quoting *Jones v. Blanas*, 393 F.3d 918, 933 (9th Cir. 2004) (internal quotations omitted)). The district court also considered that detainees in the Santa Cruz County Jail are provided a bed, blankets, clean clothing, showers, toothbrush, toothpaste, warm meals, and an opportunity for uninterrupted sleep. ER 14.

The district court also acknowledged the reliance of Plaintiffs' expert on the American Correctional Association CORE Jail Standards (June 2010) ("CORE Jail Standards"), "United States Department of Justice National Institute of Corrections

Standards,"[7] and United Nations Body of Principles for the Protection of all Persons Under any Form of Detention or Prison. ER 17-18. It also cited the correctional industry crowding standards requiring thirty-five square feet of space for each occupant when detention exceeds ten hours, ER 17-18; *see* CORE Jail § 1–CORE–1A–07 (2010). The district court noted that the Border Patrol established holding room capacity limits based on the assumption that detainees were sitting up, *see* ER 160, and stated that "[d]etainees need to lie down to sleep because they are detained at Border Patrol stations in excess of 12 hours." ER 18.

The district court the rejected the opinion of Bryce, Defendants' expert, that Border Patrol stations resembled short-term holding cells used in the booking process at jails, ER 18, 203-04; SUPP ER 943, reasoning that while the booking process "takes hours," Border Patrol processing "takes days (48 hours)," ER 18. The court also ignored the fact that Congress has defined short-term detention in the context of Border Patrol custody as detention for up to seventy-two hours. *See* Trade Facilitation and Trade Enforcement Act, Pub. L. No. 114-125, tit. VIII, § 411(m), 130 Stat. 122, 208 (Feb. 24, 2016). Pointing to the twenty-four-hour

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[7] The United States Department of Justice National Institute of Corrections Standards and Inspection Programs Resource and Implementation Guide (Apr. 2007) ("DOJ-NIC Guidance"), available at http://static.nicic.gov/Library/022180.pdf (viewed Apr. 25, 2017), does not contain standards but rather guidance for jurisdictions to develop their own standards.

illumination of hold rooms (although simultaneously affirming a legitimate government interest in such illumination), and the dependence of the efficacy of mylar blankets on comfortable room temperatures, the district court concluded that Defendants were violating Plaintiffs' right to sleep. ER 19-20. As a remedy, it ordered Defendants to provide clean bedding that includes a mat and mylar blanket, for all detainees held more than twelve hours. ER 16.

With regard to Plaintiffs' medical claim, the district court considered the testimony by Plaintiffs' expert Joseph Goldenson, M.D. that there was no evidence of a formalized screening process at Tucson Sector stations, and that the Tucson Sector's e3DM data reflected 527 incidents of medical treatment out of a population of 17,000 detainees, during the period June 10 through September 28, 2015. ER 28-30. The district court considered Goldenson's suggestion that a detainee screening method contain two components: (1) immediate medical triage to determine the existence of issues that would preclude acceptance to a Border Patrol station; and (2) a more thorough medical and mental health screening. ER 28. The second stage would include a face-to-face interview using a structured questionnaire and, where possible, a review of the detainee's medical record. ER 28. The district court noted that the questionnaire being used at the time omitted questions listed in the TEDS standards about physical and mental health concerns and prescription medications. ER 29-30; SUPP ER 999. The district court also

noted that the form did not ask whether the detainee is pregnant or nursing. ER 30. The district court ordered Defendants to implement the universal use of a medical screening form that complies with the TEDS standards and concluded that without this compliance Plaintiffs were likely to prevail on their claim that their right to intake screening. ER 30.

With regard to Plaintiffs' sanitation claim, the district court concluded that Defendants failed to recognize the need to wash oneself during detention but that courts nevertheless were reluctant to find constitutional violations based on temporary deprivation of personal hygiene and grooming items. ER 24. The district court noted that when materials are provided for the detainee to clean oneself, a constitutional violation is averted. ER 24-25. The district court noted that two, and possibly three, of the eight Tucson Sector stations have showers and found that transfer of a detainee after seventy-two hours to a place with showers does not solve the problem. ER 21. As a remedy, the district court ordered Defendants to provide detainees a means to clean themselves after twelve hours.[8] ER 25.

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[8] The district court also ordered Defendants to monitor certain conditions, such as hold room temperature, for compliance with the TEDS standards and to reschedule the morning meal, which was provided at 4:00a.m. ER 23, 26. Neither party appeals these forms of preliminary relief, except to the extent that Defendants challenge the underlying finding that *any* preliminary injunctive relief is warranted, considering that the district court did not apply the correct legal standard for evaluating Plaintiffs' claims of constitutional violations.

On December 2, 2016, Defendants asked the district court to reconsider the twelve-hour sleeping mat requirement. ECF 252. Defendants noted that immediate compliance with this requirement reduced hold room capacities to a significant degree (by half in some stations), and that this greatly diminished the Tucson Coordinating Center's capacity as the transportation hub and coordination point for detainees requiring further detention or transfer to another agency. *Id*. at 5-9 (citing SUPP ER 993-94. The loss of capacity at Tucson Coordination Center prevented the transfer of detainees from remote locations to the courthouse for timely presentment, resulting in the declination of criminal prosecutions, and thus thwarting a strong and legitimate government purpose for Border Patrol operations. *Id*. at 7 (citing SUPP ER 993-94). To alleviate this unanticipated consequence of the preliminary injunction order, Defendants asked the district court to amend the order to require sleeping mats after twenty-four (rather than twelve) hours, considering that most detainees are released before then. *Id.* at 9-15. Plaintiffs did not contest Defendants' statements regarding the consequences of the twelve-hour sleeping mat requirement. ECF 254.

On January 3, 2017, the district court denied reconsideration, finding that Defendants had not presented newly-discovered facts. ER 1-4. The district court noted that it ordered the twelve-hour sleeping mat requirement because it would necessitate each detainee taking up more space and that this would alleviate the

crowded conditions it observed in Border Patrol station hold rooms. ER 2. The district court found unpersuasive Defendants' argument that hold room capacity had been reduced, citing its observation of empty hold rooms adjacent full hold rooms, without identifying the source of its observations. ER 3. The district court also clarified that the requirement that Defendants provide detainees held longer than twelve hours a means to clean oneself did not necessitate showers. ER 3.[9]

Plaintiffs appealed. ER 44-50. Defendants cross-appealed. ER 39-43.

SUMMARY OF THE ARGUMENT

The Court should vacate the preliminary injunction because the district court, in its evaluation of Plaintiffs' claims that their detention conditions violated their Fifth Amendment due process rights, failed to meaningfully consider the unique and legitimate government interests and operational challenges involved in administering a Border Patrol station, and whether there existed a reasonable relationship between the conditions complained of and the legitimate government interest, as required under *Bell v. Wolfish*. The district court's evaluation of Plaintiffs' detention conditions under standards applicable to the management of jails and prisons, in lieu of performing the analysis required under *Bell*, constituted

[9] The district court also clarified that for purposes of compliance with its preliminary injunction, time in custody begins when the individual arrives at the station, not when he or she is apprehended in the field. ER 3-4. Defendants do not challenge this clarification.

legal error. Consequently, this Court should vacate the preliminary injunction order, and should remand the case to the district court for further consideration of Plaintiffs' preliminary injunction request in accordance with the proper legal standard.

Regardless of whether it finds that the correct legal standard was not applied by the district court, the Court should, at a minimum, remand to the district court for the purpose fashioning a remedy tailored to Plaintiffs' allegation of harm based on lack of sleeping facilities in hold rooms. Due Process simply does not impose a rigid mandate that the Border Patrol must distribute sleeping mats to each and every detainee after twelve hours, regardless of the legitimate government interests that must be accommodated during that time frame. The twelve-hour sleeping mat requirement has, at times, undermined the ability of the Tucson Sector to perform its mission, resulting in missed prosecutions and delayed repatriations. A more flexible requirement that is tied to the operational purpose of Border Patrol detention could provide Plaintiffs relief from the harm they allege, but also allow Tucson Sector to perform its critical operations.

Finally, assuming, *arguendo*, that the Court agrees with the district court that Plaintiffs are likely to succeed on the merits of their constitutional claims, thereby meriting injunctive relief, this Court should affirm the remaining forms of injunctive relief that the district court ordered. These remedies are tailored to the

harms Plaintiffs complain of and therefore are well within the district court's discretion to order. They include the requirements to: implement the universal use of the TEDS standards for delivery of medical care to detainees, in lieu of the medical screening regime proposed by Plaintiffs; provide detainees with sleeping mats after a specified period of time, so that detainees may sleep with a modicum of comfort, but not necessarily beds; and provide detainees the ability to clean themselves, though not necessarily with showers. To modify each of these forms of relief as Plaintiffs are requesting would be more burdensome to the Tucson Sector than is necessary to provide Plaintiffs complete relief. The Court therefore should deny their requests.

ARGUMENT

I. Standard of review

A plaintiff seeking a preliminary injunction must establish: (1) likely success on the merits; (2) likely irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the plaintiff's favor; and (4) that an injunction is in the public interest. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105–06 (9th Cir. 2012) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Under this Court's "sliding scale" approach, "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131

(9th Cir. 2011) (citing *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)).

A preliminary injunction should only be set aside if the district court "abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016) (citing *United States v. Peninsula Commc'ns, Inc*., 287 F.3d 832, 839 (9th Cir. 2002)). Legal conclusions are reviewed *de novo*, applying a two-part test: first, determining whether the district court identified the correct legal rule to apply to the requested relief and second, determining whether the court's application of that rule was illogical, implausible, or without support from inferences that may be drawn from facts in the record. *Pimentel*, 670 F.3d at 1105. Stated differently, "'[a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.'" *Am. Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Wildwest Inst. v. Bull*, 472 F.3d 587, 590 (9th Cir. 2006)).

The district court has broad discretion to fashion remedies once constitutional violations are found. *Hoptowit v. Ray*, 682 F.3d 1237, 1245 (9th Cir. 1982). This discretion is not unchecked, however, and the Court may reverse if the judge has abused his or her discretion in fashioning a remedy. *Id*. at 1245-46

(citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971)); *see also Nat'l Wildlife Federation v. Nat'l Marine Fisheries Svc.*, 524 F.3d 917, 936-37 (9th Cir. 2008) (affirming as reasonable district court's remedy that federal agency collaborate with States an Tribes to achieve stated goals)). Injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs. *McCormack v. Hiedeman*, 694 F.3d 1004, 1019 (9th Cir. 2012) (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). Injunctive relief is an extraordinary remedy and must be tailored to the harm alleged. *Id.* (citing *Winter*, 555 U.S. at 24)).

The Court reviews a district court's denial of a motion to modify or dissolve a preliminary injunction for an abuse of discretion, and reviews any underlying legal issues *de novo*. *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1126, n.7 (9th Cir. 2005).

II. The district court erred by failing to consider the unique interests and operational challenges faced by Tucson Sector Border Patrol when determining what conditions satisfy the Constitution under *Bell v. Wolfish*.

Plaintiffs do not challenge the Border Patrol's authority to apprehend individuals or to detain them while it completes a set of processes that are vital to the national security and integrity of the Nation's borders—confirming an individual's identity, tracking any potential criminal or immigration history, and

determining the appropriate next steps for an individual, whether it is repatriation, release, or transfer of custody to another law enforcement agency. For purposes of this appeal, the critical question is whether detention conditions at Tucson Sector Border Patrol stations amount to "punishment" in violation of the Fifth Amendment's guarantee of due process. *United States v. Salerno*, 481 U.S. 739, 746–47 (1987); *Bell*, 441 U.S. at 535. This standard differs significantly from the standard relevant to convicted prisoners, who may be punished as long as it does not violate the Eighth Amendment's bar against cruel and unusual punishment. *Pierce v. County of Orange*, 526 F.3d 1190, 1205 (9th Cir. 2008) (citing *Bell*, 411 U.S. at 535, n.16).

Not every disability imposed during civil detention amounts to "punishment" in the constitutional sense. *Bell*, 411 U.S. at 535. Indeed, any detention will impose burdens and limitations on freedom that would not exist if the individual were not being held. *Id.* As the Supreme Court noted in *Bell*,

> [t]raditionally, [civil detention] has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into "punishment."

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Bell, 441 U.S. at 535–37. The mere desire to be free from discomfort thus does not rise to the level of an infringement of fundamental liberty interests. *Id*. at 534-35 (citations omitted).

Unless imposed with the intent to punish, a condition of detention is generally constitutional if it serves a legitimate government objective. *Id.* at 539. The *Bell* court explained that there is contrast between those conditions imposed to promote a legitimate government objective and those that are "arbitrary and purposeless," from which "a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees." *Id*. "Absent evidence of punitive intent, it may be possible to infer a given restriction's punitive status from the nature of the restriction." *Pierce*, 526 F.3d at 1205 (quoting *Valdez v. Rosenbaum*, 302 F.3d 1039, 1045 (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." *Bell*, 441 U.S. at 539. Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees. *Id*. Thus, in order to be permissible, restrictions must: (1)

have a legitimate, non-punitive purpose; and (2) not appear excessive in relation to that purpose. *Bell*, 441 U.S. at 538–39.

A reasonable relationship between the governmental interest and challenged condition or restriction does not require an exact fit. *Valdez*, 302 F.3d at 1046 (citing *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999)). Nor does it require the least restrictive alternative. *Id*. (citing *Thornburgh v. Abbott*, 490 U.S. 401, 410-12 (1989)). “Otherwise, every administrative judgment would be subject to the possibility that that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand.” *Id*. (quoting *Thornburgh*, 490 U.S. at 410-11 (internal quotation makes omitted).

In the civil detention context, legitimate, non-punitive government interests include maintaining jail security and effective management of the detention facility. *See Bell*, 441 U.S. at 540; *Jones*, 393 F.3d at 932. These are “essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees.” *Bell*, 441 U.S. at 546. “For example, the Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach inmates.” *Bell*, 441 U.S. at 540.

The Supreme Court cautioned courts against enmeshing themselves in the minutiae of facility operations in the name of the Constitution. “Courts must be

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mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." 441 U.S. at 539 (citing *United States v. Lovasco*, 431 U.S. 783, 790 (1977)); *United States v. Russell*, 411 U.S. 423, 435 (1973)). It is well-settled that in evaluating whether a condition is punitive, courts must be deferential. "The difficulties of operating a detention center must not be underestimated by the courts." *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. 318, 326 (2012). "[T]the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution . . . The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside the Judicial Branch of Government." *Bell*, 441 U.S. at 562. Since problems that arise in the day-to-day operation of corrections facilities are not susceptible to easy solutions, prison administrators should be accorded wide-ranging deference in adoption and execution of policies and practices that, in their judgment, are needed to preserve order and discipline and maintain institutional security. *Bell*, 411 U.S. at 547-48 (citations omitted). Accordingly, in *Bell*, the Supreme Court did not issue universal bright line rules for when a condition of civil detention is unconstitutional. *See id*. at 543 ("We disagree . . . that there is some sort of 'one man, one cell' principle lurking in the Due Process Clause of the Fifth

Amendment."). Notably, the Supreme Court recognized that length of detention is an important point to consider when evaluating the constitutionality of detention conditions. *See id*. at 543 ("Our conclusion in this regard is further buttressed by the detainees' length of stay . . .").

Unlike detention in jail or prison, Border Patrol detention is only for short-term processing and almost always ends in forty-eight hours or less. ER 71-74, 103; SUPP ER 1000. By its very nature, it ends as soon as the individual's processing can be completed and he or she can be either released or transferred into the custody of another agency. By contrast, detention in jail can last for months and prison a lifetime, and the lengths of detention are often predetermined.[10] Moreover, at many jails and prisons, the processing and

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[10] Black's Law Dictionary defines "prison" as

A building or complex where people are kept in long-term confinement as punishment for a crime, or in short-term detention while waiting to go to court as criminal defendants; specif., a state or federal facility of confinement for convicted criminals, esp. felons. — Also termed penitentiary; penal institution; adult correctional institution.

PRISON, Black's Law Dictionary (10th ed. 2014).

It defines "jail" as

A prison; esp., a local government's detention center where persons awaiting trial or those convicted of misdemeanors are confined . . . Also termed holding cell; lockup; jailhouse; house of detention; community correctional center."

detention functions are located in the same building or closely connected set of buildings. Tucson Sector Border Patrol stations, in contrast, serve as short-term holding points for individuals who are apprehended in remote locations many miles from other facilities and allow the Tucson Sector to process individuals near the point of their apprehension before they are transferred elsewhere. This distinguishes Tucson Sector stations from jails and prisons, which need not be located near where their residents committed their crimes or were arrested.

Managing a Border Patrol station also poses unique operational challenges that do not exist for jails or prisons. The characteristics and size of the population at a Border Patrol station can vary dramatically from hour to hour, day to day, month to month, and year to year, depending on conditions at the border, individuals apprehended and even events in other countries. Between 2009 and 2016, total apprehensions each month in the Tucson Sector varied by nearly a factor of ten: The low was 4,071 in July 2015, and the high was 31,432 in March 2009.[11] In contrast to jails and prisons, which have some ability to control and manage their incoming and outgoing populations, Border Patrol is likely to receive little warning of the sizes or characteristics of the populations that may come into

JAIL, Black's Law Dictionary (10th ed. 2014).

[11] *See*, *supra*, note 2.

its custody in a given time period. *See* ER 78 (testimony of Justin Bristow that the number of unaccompanied children skyrocketed since entry of the *Flores* settlement agreement); ER 79-80 (testimony that proportion of those apprehended who are Mexican nationals dropped from ninety percent to half, adding to the time required to obtain travel documents from various countries); ER 100 (testimony of Chief Allen to the rising number of Mexican nationals seeking asylum); ER 148 (testifying that number of criminals and families that the Tucson Sector interdicted has increased and the number of political asylum claims has increased dramatically); ER 171 (testifying that the Tucson Sector encounters all kinds of individuals, including aggravated felons, drug smugglers, human traffickers, and migrants, and individuals from various non-Spanish speaking countries including India and Pakistan). Moreover, because most of the individuals it apprehends are not United States citizens or lawful permanent residents, Border Patrol usually has no way of knowing until processing the individual's identity, previous criminal history, whether imminent prosecution is appropriate, or if the individual is civilly removable. Thus, Border Patrol's ability to differentiate, prior to detaining the individual for processing at a station, between those who may pose an imminent security threat and those who simply are unlawfully entering the United States is limited, if it exists at all.

The Border Patrol's need to administer its stations efficiently also is tied to

its broad authority over the border itself, which has no parallel in the criminal justice system. Indeed, Border Patrol's ability to establish conditions for short-term processing that meet its operational needs is closely connected to fundamental principles of national sovereignty. *See Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application."). The core point of the Supreme Court's decision in *Bell* was to underscore that conditions of detention that serve legitimate governmental objectives are generally constitutional. 441 U.S. at 539. Indeed, the *Bell* Court eschewed bright-line rules and fixed analysis, instead focusing on the justification for a particular condition. It would be impossible to follow *Bell*'s direction without tailoring the analysis of these justifications in the context of the conditions in which the Border Patrol operates.

The district court erred by not evaluating Plaintiffs' constitutional claims under *Bell*, 441 U.S. at 538. The district court failed to take any meaningful account of the unique nature of detention at Border Patrol facilities, and their differences in purpose, operation, and legitimate government aims from jails and prisons. ER 17-18. It did not consider the Tucson Sector's unique law enforcement purpose and operational challenges. Any *Bell* analysis regarding Border Patrol custody must take into account that the vast majority of the individuals who are

detained in Border Patrol stations are detained because of their own choice to enter into the United States unlawfully, often in remote areas and under cover of night. It must take into account that processing individuals at the border takes longer than the booking process in pre-trial detention, considering that the Border Patrol encounters a population comprised almost entirely of non-citizens, who are much less likely than citizens to be known to federal, state, or local government and law enforcement agencies. It must consider that the Border Patrol detains only for the purpose of ensuring that processing is completed and the individual is released or transferred somewhere else, as required under the Immigration and Nationality Act. In this way, the Border Patrol stations, unlike jails, prisons, and other types of civil commitment institutions, function as waystations rather than destinations. The Border Patrol in fact has a practical interest in releasing or transferring detainees as soon as possible after intake, and instituting measures relating to the conditions of a detainee's custody that have the effect of prolonging this detention are not in the government's interest, any more than they are in the interest of the detainees. Nonetheless, despite these many unique and important factors that are inextricably related to custody at a Border Patrol station and thus to the governmental interests at stake, any discussion of these facets of Border Patrol operations and their relation to conditions of detention at Tucson Sector stations was absent from the

district court's decision.[12]

While ignoring the unique operational concerns of Border Patrol stations, the district court then erroneously applied standards designed for correctional institutions, where prisoners are sentenced to a period of confinement, usually lasting much longer than forty-eight hours. ER 17-18. The court provided no justification for doing so, other than a single unexplained reference to Plaintiffs' expert witness that detention lasting more than ten hours is not short-term. ER 18.

The court's failure to apply the correct legal rule is a legal error warranting dissolution of the preliminary injunction. *Pimentel*, 670 F.3d at 1105. This Court should therefore articulate the correct standard consistent with *Bell*, by which the district court must evaluate Plaintiffs' constitutional claims, and remand this case to the district court for consideration of Plaintiffs' preliminary injunction request consistent with the proper standard.

III. The Due Process Clause does not impose a rigid mandate that the Border Patrol must distribute sleeping mats to each and every detainee after twelve hours, regardless of circumstances.

District courts have broad discretion to fashion remedies once constitutional

[12] For all of these reasons, the district court's comparison of Border Patrol stations to the Santa Cruz County Jail, where inmates are provided beds, blankets, clean clothing, showers, toothbrushes and toothpaste, warm meals, and an opportunity for uninterrupted sleep, was also erroneous. ER 14. This comparison entirely ignores Border Patrol stations' purpose and the short time that detainees spend there, compared to a jail.

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violations are found. *Ray*, 682 F.3d at 1245. However, injunctive relief should be no more burdensome than necessary to provide complete relief to the plaintiffs, *McCormack*, 694 F.3d 1019, and must be tailored to the harm alleged. *Id*. (citing *Winter*, 555 U.S. at 24)). The district court's remedy of requiring Tucson Sector Border Patrol to provide all detainees with a mat once at a Tucson Sector station for twelve hours is more burdensome than necessary because it interferes with stations' operations and is not sufficiently tailored to the claimed constitutional violation.

Defendants do not contest that detainees may sleep while in Border Patrol custody. Defendants do object, however, to requiring sleeping mats to be provided after twelve hours, without exception, irrespective of the time of day or night, and without any consideration of operational needs. The requirement is overly rigid in that it allows compliance only one way (by providing sleeping mats after twelve hours), even when the detainee does not need mat and regardless of circumstances of his or her processing or the time of day.

The rigid mandate ignores the purpose of Border Patrol custody which is to allow for the identification and processing of individuals, so that they can be promptly released or transferred into the custody of other agencies, and interferes with the Border Patrol's legitimate interests. See SUPP ER 993-97 (noting hold

room capacity reductions and inability to prosecute detainees accused of trafficking). More specifically, it ignores evidence Defendants presented that it is not possible in many cases to complete processing in less than twelve hours, especially in light of other important needs that detainees have that must be met, such as meals and consular meetings. ER 73-74, 107-10, 177; SUPP ER 992.

While in some cases a twelve-hour mandate may be workable, in others it is counterproductive. If an individual arrives for intake at a Tucson Sector station at 1:00 a.m., and the Tucson Sector still is in the midst of processing him at 12:55 p.m. and reasonably foresees that processing can be completed and the individual transferred to long-term ICE custody by 3:00 p.m., it nonetheless must pause its processing, provide the individual a sleeping mat, and document the transaction. This may delay the individual’s transfer to a long-term facility where he can sleep comfortably and receive the other amenities available in long term facilities. At the same time, providing a sleeping mat at the twelve hour mark will not necessarily ensure that a detainee will get meaningful rest at that time because he still may be required to participate in processing.

The rigid mandate also interferes with the Tucson Sector’s legitimate interests because it lacks a safety valve for “surge” situations, or other unforeseen situations which may occur in a law enforcement that operates twenty-four hours a day, seven days a week. It does not take into account the possible existence of

alternative ways to alleviate the harm Plaintiffs' allege and the possibility that future technological developments may provide additional alternatives. It effectively reduces the capacity of Tucson Sector stations because the sleeping mats take up space, and creates a risk that, during a surge or other urgent situation, the Border Patrol would be unable to detain every individual it apprehends, and thus, as a practical matter, would be compelled to release them so as not to disobey the Court's order. This situation is a derogation of fundamental principles of national sovereignty, and may in some cases violate the Immigration and Nationality Act. *See* 8 U.S.C. § 1252(f)(1) (prohibiting courts from fashioning class wide injunctive relief that would enjoin or restrain the operation of the detention provisions of the Act). In fashioning the twelve-hour sleeping mat requirement, the district court articulated no analysis of the Tucson Sector's functions or operational needs, nor whether the remedy would be excessive in light of these legitimate interests.[13] In denying Defendants' request for reconsideration of the remedy, the district court reasoned that a missed prosecution is "not the

[13] The district court also erred in relying on its observation that some hold rooms remained empty based on a few photographs presented by Plaintiffs. ECF 261 at 3. Defendants presented significant evidence that Border Patrol stations must separate detainees by age, gender, and other factors, which would explain why, at a particular moment, a hold room full of male detainees might be located in the same station as an empty hold room, which must remain available to hold female detainees or family groups. ER 107-08; SUPP ER 904.

same as releasing a detainee." ER 3. This reflects that the district court did not meaningfully consider the Border Patrol's mission to promptly transfer, transport, process, release, or repatriate detainees as appropriate. TEDS ¶¶ 1.8, 4.1. It also disregards the seriousness of the consequences of complying with the twelve-hour sleeping mat requirement, which have included missed prosecutions and, for some detainees, increased detention times. SUPP ER 993. Therefore, even if this Court declines to find that the district court relied on an improper analysis of the constitutional standard, and finds that detainees in Tucson Sector Border Patrol stations have some right to the provision of items that assist with enabling sleep during their time in Border Patrol custody, the Court should nonetheless remand to the district court to establish a remedy for any such violation that is more appropriately tailored to address the alleged harm.

IV. The Court should deny Plaintiffs' appeal because the district court did not abuse its discretion in fashioning the remaining forms of injunctive relief in its preliminary injunction order.

A. The district court did not abuse its discretion in requiring the Tucson Sector to use a medical screening form that is consistent with the TEDS Standards.

Defendants do not contest that the constitution requires a system of ready access to adequate medical care, but, consistent with Section II, above, contend that the access to medical care provided at Tucson Sector Border Patrol stations satisfies the constitution when properly considered under the test laid out in *Bell*. However, should this Court let stand the district court's conclusions regarding Plaintiffs' access to medical care, then the Court should further conclude that the district court's remedy was tailored to the harm alleged. ER 30. The district court was persuaded by the observation of Plaintiffs' expert that, between June 10 and September 28, 2015, the Tucson Sector referred 527 out of approximately 17,000 detainees to hospitals or other medical facilities.[14] That Tucson Sector did not

[14] This conclusion ignores and fails to meaningfully consider the testimony of Defendants' expert, Dr. Harber, who testified at the hearing that he reviewed a number of Treatment Authorization Forms from Tucson Sector Border Patrol and concluded that "there is a great variety of things for which they are referring, something as simple as a rash or a cactus spine in the hand, on up to people like this who—like this particular one you're showing me, somebody who needs medication, to things that may be imminently in need of medical care. So that it's clear they are doing referrals and, secondly, it's not just for the most serious cases." ER 186-87. Notably, Plaintiffs' expert Dr. Goldenson acknowledged that

appear to have a formal screening program in place, and that Tucson Sector was not using a screening form that met TEDS standards. ER 29-30. Plaintiffs now object to the remedy ordered by the district court of requiring Defendants to implement the TEDS standards for medical screening, because, in Plaintiffs' view, only "medical personnel" are qualified to perform intake screening, and the TEDS standards allow Border Patrol agents to screen individuals at intake. Pls' Br. at 33-43. Plaintiffs do not define "medical personnel." Plaintiffs rely on a number of judicial opinions in support of their position. *See* Pls' Br. at 33-34. While all of them concern the right of a detainee to screening or ready access to medical care, all are inapposite to the instant case and do not actually support Plaintiffs' position. *Runnels v. Rosendale*, 499 F.2d 733 (9th Cir. 1974), concerned harm that doctors inflicted on an inmate by performing unauthorized surgery without his consent which gave rise to a colorable claim of a violation of his Fourteenth Amendment right to security in the privacy of his own body. Considering that Plaintiffs are not claiming that they are being subjected to medical procedures without their consent, *Runnels* s inapposite. Plaintiffs rely on *Toissant v. McCarthy*, 801 F.2d 1080, 1111-12 (9th Cir. 1986), Pls' Br. at 34, in which the Court observed that medical

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he had not reviewed Defendants' production of Treatment Authorization Forms. ER 334-35. It appears therefore that even if the Court did make a finding of fact, it was clear error.

technical associates and inmates may have been engaged in the practice of medicine at Folsom Prison, and that, if true, this may have constituted deliberate indifference to plaintiffs' medical needs. Here, Plaintiffs do not claim that unqualified individuals are engaged in the practice of medicine at Border Patrol stations. In fact, the evidence shows that Border Patrol agents have training as first responders, with some having training as EMTs and Paramedics, and that all medical issues are referred to the hospital when medical treatment is needed. SUPP ER 924; ER 117. Plaintiffs also rely on *Gibson v. Cty. of Washoe*, 290 F.3d 1175, 1187-91 (9th Cir. 2002), Pls' Br. at 34, in which a county jail's policy of delaying medical screening of combative inmates led to the decedent's death from a heart attack. However, Plaintiffs point to no evidence that suggests that Border Patrol has any such policy, or that medical care for any detainee has been delayed by Border Patrol's medical policies and practices. In *Lareau v. Manson*, 651 F.2d 96, 102, 109 (2d Cir. 1981), Pls' Br. at 35, the Second Circuit ruled that failure to screen for communicable diseases at an overcrowded prison facility constituted punishment in violation of the Due Process clause and ordered that no inmate be confined for more than forty-eight hours without an examination by a physician or nurse or medically trained technician acting under a physician's direction. In contrast, in the instant case, nearly all detainees are released within forty-eight hours, making such a requirement unnecessary and unduly burdensome if imposed

here, especially if it is imposed, as Plaintiffs request, prior to the forty-eight hour detention mark. Moreover, Dr. Harber testified that agents receive training to identify communicable diseases and regularly interact with and observe detainees, and any detainee presenting any symptoms of such conditions is transferred to a hospital and provided medical care. SUPP ER 927-28; ER 188. Finally, Plaintiffs rely on *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1319-20 (10th Cir. 2002), Pls' Br. at 35-36, in which an arrestee with obsessive-compulsive disorder had a panic attack while seated in a squad car and prebooking officers at the jail incorrectly recorded his condition as "CDC" rather than "OCD." The Tenth Circuit concluded that the county jail's scant procedures for dealing with mental illness and the prebooking officers' apparent ignorance to the arrestee's requests for medication may have violated the arrestees' rights. *Id.* at 1320. However, the court of appeals in that case did not hold (or even suggest) that it was required for a medical or mental health professional to conduct screening during prebooking, and the decision therefore is not applicable to the case at hand.

Notably, Plaintiffs rely on inapplicable opinions addressing medical screening at several types of institutions, but not Border Patrol stations or any comparable detention facilities. Plaintiffs' are silent regarding the brevity and nature of Border Patrol detention, the training that Border Patrol agents receive to screen and identify a variety of medical issues that may require treatment by a

medical professional, and policies and practices of Border Patrol which result in a number of detainees' being transferred to area hospitals and receiving care for a wide range of conditions identified by Border Patrol agents.

Moreover, Plaintiffs' argument that the practice of confiscating medications at intake—a practice their own expert deems acceptable and commonplace in detention facilities, ER 110, 121, 325-26—is unconstitutional when done by Border Patrol agents, Pls' Br. at 37-40, is equally unpersuasive. Plaintiffs again rely on hearsay declarations provided by declarants who did not compose them, could not read them, and were never cross examined about their contents, asserting that Border Patrol agents confiscated their medication. *See*, *e.g.*, Pls' Br. at 39 (citing ER 653-54 asserting that Border Patrol agents withheld a pregnant woman's medication and told her that she would be deported). Plaintiffs further assert that Defendants have no policy for dispersal of confiscated medications, Pls' Br. at 40, but ignore the TEDS standard stating that non-United States-prescribed medications should be validated by a medical professional or taken to a medical practitioner to obtain an equivalent United States prescription. TEDS § 4.10. The TEDS standards further provide that exceptions to the validation requirement may be made after consultation with a medical professional. *Id*. Finally, TEDS provides that while in Border Patrol custody an individual's medication should "be self-administered under the supervision of an officer/agent." *Id*. Both parties' experts

testified that referring a patient to the hospital to obtain a U.S. prescription for their medications is acceptable. ER 120, 121, 153, 326-27, 337, 342; SUPP ER 922-23.

The district court concluded that Plaintiffs were likely to prevail on their claims unless Defendants were in compliance with the TEDS standards with regard to medical care. Thus, the district court ordered Defendants to ensure that their medical screening form was in use at all stations, and contained questions that complied with those TEDS requirements. Plaintiffs have not shown that the district court abused its discretion in crafting this remedy. ER 30. The district court's requirement to implement a screening form complies with the TEDS standards is a workable solution narrowly tailored to its findings regarding the adequacy of Defendants' medical screening process.

B. The district court did not abuse its discretion to require the Tucson Sector to provide detainees with sleeping mats and not necessarily beds for sleeping.

Plaintiffs challenge the district court's decision to require Defendants to provide mats, rather than beds, to detainees, and argue that detainees who are held overnight are entitled to sleep in a bed, regardless of the context. Pls' Br. at 44. The United States Constitution does not discuss sleeping at all, much less imply that a sleeping mat, rather than a bed on legs, would violate it somehow. Plaintiffs rely on *Thompson v. City of Los Angeles*, 884 F.2d 1439, 1448 (9th Cir. 1989), in which the Court noted that a pre-trial detainee's detention lasting two nights

without being provided a bed *or* a mattress constituted a cognizable Fourteenth Amendment claim. Pls' Br. at 45. Plaintiffs also rely on *Anela v. City of Wildwood*, 790 F.2d 1063, 1069 (3d Cir. 1986), in which the Third Circuit ruled that overnight confinement in jail cells without drinking water, food, or sleeping facilities—neither beds nor mattresses—constituted punishment. Pls' Br. at 46. But neither *Thomspon* nor *Anela* are relevant to Plaintiffs' argument that Defendants must provide beds to Tucson Sector detainees held in most cases for less than forty-eight hours, and that sleeping mats are unacceptable. While in *Union County Jail Inmates v. DiBuono*, 713 F.2d 984, 988-99 (3d Cir. 1983), the Third Circuit ruled that forcing detainees to sleep on mattresses on the floor violated detainees' due process rights, *see* Pls' Br. at 45 (citing *DiBuono*), Plaintiffs' argument once again does not take into account the unique interests and operational needs of Border Patrol stations, where detainees come and go at all hours of the day and night and are detained in hold rooms with a finite amount of space, and the facility must have the flexibility to roll out sleeping mats when needed.

Plaintiffs oversimplify the issue by contending that Defendants' primary concern is financial limitations. Pls' Br. 47. In the context of this preliminary injunction motion, it was reasonable for the district court to consider the resources necessary to implement any remedy it decided to order. Even assuming hypothetically that the Tucson Sector had unlimited financial resources, immediate

compliance with a requirement to provide beds to each and every detainee would be impossible, considering that the district court's preliminary injunction ordered immediate, affirmative relief. Providing beds to all detainees would require Tucson Sector Border Patrol to construct or lease buildings, and to make substantial changes to its facilities and operations. Such expansive relief is rarely, if ever, appropriate in the context of a preliminary injunction. *McCormack*, 694 F.3d at 1019 (holding that a district court abuses its discretion by issuing an overbroad preliminary injunction). Injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs. *Id*. Thus, if this Court denies Defendants' appeal as discussed above regarding the district court's error in ordering Tucson Sector Border Patrol to provide detainees with mats after twelve hours in Border Patrol custody, it should leave that remedy in place, and should not order the additional, substantial, affirmative relief urged by Plaintiffs.

C. The district court did not abuse its discretion in not requiring Tucson Sector Border Patrol to provide showers to detainees after twelve hours.

Plaintiffs ask the Court to require Defendants to provide detainees with showers, rather than body wipes. Pls' Br. at 50-55; ER 21. Plaintiffs claim that Border Patrol is "refusing to permit detainees to shower," Pls' Br. at 53, but this misstates the evidence. Rather, Chief Allen submitted testimony that, consistent

with TEDS, Tucson Sector Border Patrol provides detainees an opportunity to shower if their detention approaches seventy-two hours, but that it is not possible to provide every detainee with a shower upon arrival at the facility because showers are not available at all stations, and because the time that this would take would significantly delay the processing of individuals and prolong their time in Border Patrol custody. SUPP ER 913. Plaintiffs do not provide any explanation how Tucson Sector Border Patrol could immediately comply with a requirement to provide showers at stations that lack shower facilities, nor do they acknowledge the significant burden that such a requirement would place on the operations of Tucson Sector Border Patrol, to the detriment of both the agency and the detainees. Again, injunctive relief is an "extraordinary remedy," *Winter*, 555 U.S. at 24, and "must be tailored to remedy the specific harm alleged." *McCormack*, 694 F.3d at 1019. An overbroad injunction is an abuse of discretion. *Id*. The Tucson Sector would not be capable of immediate compliance with an order to provide showers for all detainees when only two of the eight stations have shower facilities. The district court therefore acted within its discretion to allow the Tucson Sector the flexibility to provide detainees the ability to clean themselves by means other than showers.

Plaintiffs cite to the Court's injunction in *Toussaint v. McCarthy*, 597 F.Supp. 1388, 1399 (N.D. Cal. 1984), *aff'd in part*, *rev'd in part*, 801 F.2d 1080, requiring a prison to provide inmates the opportunity to shower at least three times

in one week. Pls Br. at 52. However, this timeframe is inapplicable to this case because individuals detained in Tucson Sector are rarely in custody for more than forty-eight hours. ER 71-72, 103; SUPP ER 1000. Again, by allowing Defendants to provide body wipes, which are manufactured for the purpose of cleaning off after intense physical activity and for use in environments where showers are not available, the district court tailored the remedy to the alleged harm, while at the same time ensuring that it did not burden the defendant more than necessary to provide complete relief. *McCormack*, 694 F.3d at 1019. The district court therefore acted within its discretion in fashioning the remedy requiring Defendants to provide detainees with the means to clean themselves, which need not be showers, after twelve hours in detention.

CONCLUSION

This Court should remand the preliminary injunction for the district court to apply the correct legal standard in *Bell*, 411 U.S. 420. Or, if the Court declines to grant any relief with regard to the legal standard being applied, the Court should require the district court to modify the requirement to provide sleeping mats after twelve hours by replacing it with a more flexible requirement that takes into account the Tucson Sector’s operational needs. Finally, the Court should find that the remainder of the remedies ordered by the district court were within its discretion, and were properly tailored to provide relief for the alleged harms.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because the brief is proportionately spaced using Times New Roman 14-point typeface and contains 12,999 words exclusive of the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Counsel for Defendants used Microsoft Word 2010 to prepare this brief. The undersigned certifies that the text of the electronic brief is identical to the text in the paper copies filed with the Court and that the virus detection program Microsoft Forefront Endpoint Protection 2010 was run on this document and no viruses were detected.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the respondent states that based on a survey of the attorneys in her office, there are no other cases involving factual or legal issues similar to those in the instant case.

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CERTIFICATE OF SERVICE

I certify that on April 27, 2017, I electronically filed the foregoing Defendants-Appellants' Opening Brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. I also certify that Plaintiffs-Appellees' counsel are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Christina Parascandola
CHRISTINA PARASCANDOLA

EXHIBIT C

FOR OFFICIAL USE ONLY

Office of Inspector General
Special Reviews and Evaluations

Project #19-039-SRE-CBP

FY 2019 CBP Spot Inspections

Preparer/Date: 5/14/2019
Reviewer/Date: 5/15/2019

Memorandum of Record

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Location: 395 E. St. SW, Washington, D.C. (Conference Call)

Date/Time: May 14, 2019, 11:00 a.m. – 12:00 p.m. EST

Purpose: Teleconference with ICE ERO senior leaders to discuss the CBP/ICE relationship managing the influx of immigrants at the southern border to include information about bed space management.

1
2 **Conclusion:**
3 ICE ERO has some challenges in offering up bed space to Border Patrol (BP)
4 due to the sheer volume of illegal immigrants crossing the southern border;
5 however, they are working diligently to communicate bed space to the BP
6 stations as quickly as possible. Based on ICE response, BP may not be making

7 the best decisions in prioritizing placement of those illegal immigrants who may
8 take longer to remove. In addition, ICE stated that BP has the authority to
9 release migrants without waiting on ICE to take custody. It may also benefit BP
10 to embed at the detention centers to manage illegal immigrant placement. Bed
11 space is very limited at the ICE detention centers due to the heavy surge of
12 illegal immigrants crossing the border. The amount of people coming into the
13 country will not be sustainable with limited resources available to process and
14 house the illegal immigrants
15
16 **Details:**
17 [REDACTED], Chief Inspector, began the meeting by explaining the
18 project overview to the ICE participants, stating that the team conducting BP
19 Port of Entry and BP stations Spot Inspections, as done with ICE detention
20 facilities in the past. [REDACTED] elaborated that we have visited the Tucson AZ,
21 Yuma AZ, and El Paso TX areas. While conducting spot inspections in El Paso
22 last week, there was some concern from Border Patrol (BP) - El Paso claiming
23 that ICE is a bottleneck that is having BP holding detainees longer than the 72-
24 hour limit. [REDACTED] explained that due to the conditions found in El Paso, a
25 Management Alert is currently in production. Based off the comments by BP,
26 the OIG wanted to get the ICE and ICE Enforcement and Removal Operations
27 (ERO) perspective on the southern border influx of immigrants and the
28 movement of the immigrants out of BP custody. [REDACTED] explained that this
29 discussion is not a criticism of ICE and wanted to have this discussion to
30 present the best possible accurate picture of the current relevant issues.
31
32 [REDACTED] asked [REDACTED] to elaborate on the ICE bottleneck. [REDACTED]
33 [REDACTED] said that BP made claim that beds for single adults are not available
34 and there are people staying in BP custody for 40 days, which exceeds all
35 standards. BP did not think that ICE was working to help move the flood of
36 immigrants crossing the southern border and that communications with ICE is
37 limited as it relates to bed space. For example, BP claimed that ICE said beds
38 were available so they loaded a bus with detainees and headed to the detention
39 center. Upon arrival, ICE told BP there were no beds available and BP had to
40 return with the illegal immigrants. [REDACTED] asked if BP provided any
41 documentation, or evidence proving this point and [REDACTED] said no, not at
42 this time. [REDACTED] elaborated that this review is an observation driven effort
43 and not a comprehensive evaluation; and the conditions OIG observed in El
44 Paso were overwhelming so attempting to obtain items like emails was no
45 longer a priority. [REDACTED] also implored the ICE members on the call to
46 describe their challenges with this current situation.
47

48 [REDACTED] thanked the OIG team for giving her and the other members
49 on the teleconference call an opportunity to provide some feedback and to
50 explain the ICE removal process and debunk any fiction. [REDACTED] stated
51 several times that they are not on the call to point fingers at BP but rather
52 explain the process. [REDACTED] stated that this situation is serious and that
53 both BP and ICE officers are utilizing all resources trying to work this
54 humanitarian crisis at the border and that all are "drained" trying to address
55 this challenge that OIG has "nailed" through our recent site visits. [REDACTED]
56 went on to say that, this is a "crisis" and an "absolute disaster" with
57 unprecedented numbers are arriving at the border; BP has 20,000 people to
58 process and BP and ICE are improving communication and processes as we go.
59 [REDACTED] finished by stating that we should work this humanitarian crisis
60 together.
61
62 [REDACTED] stated that he would simplify the process on the ground. Each
63 day, BP, the U.S. Marshal's, ICE's Homeland Security Investigations, and ERO
64 feed into ICE detention. Every day ICE reports beds that are available to
65 everyone but recently they have been prioritizing BP. Family units are the vast
66 majority but they have been getting many singles (meaning single adults) from
67 Central America and other countries such as Cuba. [REDACTED] explained that
68 Cubans are more complex to move, as they stay longer.
69
70 [REDACTED] said beds are available each day for many different reasons; an illegal
71 immigrant faces release on a bond, transfer, to another interior bed, or
72 removed given ICE/ERO's finite resources. Yesterday, BP received 276 beds but
73 it could be anywhere from 5 to 276 beds; however, it is up to BP to identify who
74 gets precedence for the bed space depending on criminal history, time in
75 custody, causing issues in their holding cells by acting up/becoming violent,
76 medical concerns, or other factors. ICE does not dictate who goes into the
77 detention centers. Beds ebb and flow on a daily basis by the hour. ICE Officers
78 work from 0600 to 2200 every day of the week, taking in single adults from BP.
79 [REDACTED] said it is a rare occasion that there are zero beds available stating
80 that it would be an instance where a high population of illegal immigrants were
81 about to head out on a flight but it was grounded instead. [REDACTED] added that
82 he could not recall where ICE ERO has not taken single adults from BP within
83 a day.
84
85 [REDACTED] stated that communication is good, at least at the senior level. [REDACTED]
86 [REDACTED] explained how he speaks to his counterpart at BP [Chief patrol Agent
87 Aaron Hull, El Paso BPS] all the time, even on weekends. In addition, there is a
88 scheduled call Monday-Friday for deputies to have discussions. [REDACTED] said
89 that sometimes there are communication issues at the lower level though.

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90
91 [redacted] reiterated what [redacted] stated saying that it is BP who determines
92 who is going to ICE. [redacted] explained that BP time in custody (TIC) is a
93 continuous clock from apprehension to release; they have no defined time to
94 stop the clock. For example, the detained alien may still be in medical or some
95 other situation where they are not ready to come to an ICE facility and by the
96 time they are the 72 hours have already passed, exceeding the time limit.
97
98 [redacted] said that she received a call from the Chief, stating there is a high
99 Cuban population coming through the border. Cuban's are more volatile and
100 BP needs to manage Cubans differently. BP can move Cubans to the front of
101 the line over the Guatemalans that has been there for three days and that is
102 their operational authority and not ICE ERO's decision. She said that all
103 parties are frustrated and that ICE is feverishly looking for more beds. It is a
104 concentrated unit of people, monitoring the facilities trying to identify beds and
105 get flights moving. The current situation is not sustainable for both ICE and
106 BP; the system is broken. BP agents on ground must be frustrated, as are the
107 ICE officers but they are a well-oiled machine, working together to move family
108 units and single adults.
109
110 [redacted] stated that she wanted to make sure the report is another voice
111 showing that this surge of illegal immigrants entering the country is not
112 sustainable and asked ICE to provide statistics; for example, when looking at
113 time in custody, how many Cuban females did ICE take in.
114
115 [redacted] explained that if BP feels that they are at a breaking point with
116 managing the masses, BP has the same authority as ICE to assess and release.
117 Female beds are a premium. BP has the authority to release on own
118 recognizance (OR) or they can pass the female to ICE to do the same thing. Ms.
119 Asher said that releasing people on OR is not in BP's culture but they have the
120 authority; in addition, there is no policy that prohibits them from releasing
121 detainees but they are fine with ICE doing it for them. She explained that
122 Karnes Family Residential Center in San Antonio is now an all-female bed
123 space facility due to the flood on single adults. There is a constant flow to
124 identify beds across the Area of Responsibility (AOR).
125
126 [redacted] pointed out that we see some stations are releasing migrants on OR
127 and some or not. [redacted] said that he has seen a disparity among the BP
128 stations. There are those stations who are willing to serve the OR and others
129 who do not want to and want ERO to do it.
130
131 [redacted]l asked if perhaps BP is not making the best decision of placement.

132 [redacted] reiterated that BP is the decision maker. ICE does not determine
133 who goes to the detention facilities because that is within BP's jurisdiction and
134 is not sure what criteria they use to decide who gets the bed. She said beds
135 change by the day not by the hour. She added that this is an organic and
136 changing environment for management bed space.
137
138 [redacted] stated that he is curious to know whether the individual was
139 physically present for the 40 days' TIC; did they go the hospital or were they
140 turned over to the Marshal's to serve time or were they actually with BP the
141 entire time.
142
143 [redacted] said that the team saw in the database when detainees were
144 processed and maybe had to go to medical. However, for the sub-population of
145 Cuban male and females, the TIC is really going up and the team is just
146 following up because BP made mention that ICE has no beds.
147
148 [redacted] stated that there is a crisis at the border. One day alone there were
149 1,850 people apprehended at the border.
150
151 [redacted] asked if an illegal immigrant has to clear medical assessment with
152 BP before ICE will take them in. [redacted] explained that each illegal immigrant
153 comes with a medical summary that outlines the medical screening the illegal
154 immigrant receives. If the individual has, a serious medical issue, like a
155 disease, being 8-months pregnant, or a serious communicable disease that
156 cannot be treated, or injury; ICE will not accept the person for a bed and ICE
157 will release them because ICE is unable to handle severe medical issues. [redacted]
158 [redacted] explained that BP could release the person but they do not do this per the
159 reasons explained above and they send the papers to ICE for review, which
160 causes a delay in releasing the migrant.
161
162 [redacted] asked hypothetically, if an individual went to a medical center and
163 has a baby, will the mother return to BP custody. [redacted] stated that in the
164 El Paso area, this situation is rare but the release for the mother and baby is
165 imminent, however, sometimes the mother will return to BP custody and BP
166 will wait to have ICE release her.
167
168 [redacted] asked ICE ERO to explain the mechanics of how ICE reports
169 bed space information to BP. [redacted] explained that ICE ERO has one
170 mailbox that ICE officers monitor continuously. In addition, they also have a
171 phone number that ICE ERO supervisors monitor and then raise the inquiry to
172 the Assistant Officer in Charge. BP does not have a single mailbox or one
173 person dedicated to reaching out to ICE for bed space information. Instead,

174 requests are coming from various locations and a variety of people. [redacted]
175 said they suggest BP have one point of contact and recommend that BP embed
176 an agent at ICE ERO El Paso Service Processing Center (SPC) so BP knows how
177 to prioritize individuals.
178
179 [redacted] asked what the benefits would be if BP were to implement that
180 recommendation. [redacted] explained that if they had one central person, BP
181 would have all the necessary information to prioritize those immigrants
182 detained at the border. If there were errors in paperwork, there would be a BP
183 official to fix it immediately instead of returning the immigrant to BP. It will
184 speed up the intake process.
185
186 [redacted] asked ICE ERO to elaborate on the difference between Cuban and
187 Guatemalans and to explain why ICE ERO believes that Cuban's are more
188 volatile. [redacted] said that both nationalities can get the exact same bed but
189 Guatemalans will be removed quite a bit faster that the Cubans, possibly
190 within ten days. Removal proceedings for Cubans take quite a bit longer
191 because obtaining travel documents takes quite a bit longer than countries like
192 Guatemala. ICE ERO does not dictate who gets a bed based on nationality; ICE
193 bases bed space on classification, whether the immigrant is male or female and
194 criminal or noncriminal. At one point, Cuban immigrants would come to the
195 country and were released; now things are different and they get a little volatile
196 because detainment is not what they were expecting.
197
198 [redacted] [redacted] asked if bed space only opened up in the geographic
199 location where the detainment took place or if bed space is available across the
200 country. [redacted] said that they have a network of detention facilities through
201 the country and, for example, in the El Paso AOR there are 2,666 beds and
202 they currently have 3,000 illegal immigrants in detention within that AOR.
203 They do coordinate with other AORs and identify bed space daily with available
204 ground and air transportation. The BP agent on the ground probably does not
205 realize that there are other locations of detention centers. Immigrants detained
206 by BP will move to the El Paso station, in process, and then move to another
207 location. [redacted] added that managing bed space issues, which most BP
208 agents on the ground likely do not need to care about, are more of an art than
209 a science for ICE ERO. [redacted] responded that she now understands how
210 there is a misconception within BP about how there is available ICE ERO bed
211 space in just the El Paso area versus other AORs.
212
213 [redacted] stated there are intricacies behind the scenes to get people all
214 transferred via ground or air transportation across the country. She explained
215 that the challenge is when there are 50 beds in Buffalo, 100 beds in Chicago,

216 60 in Seattle, 300 elsewhere, etc., so the issue is getting migrants to the beds.
217 She added as an example that beds in the New Orleans AOR can open and
218 then be gone within "nanoseconds". She said that ICE ERO does not have the
219 luxury of having 500 beds open for several days. As soon as ICE ERO opens
220 200 beds, all 200 are taken from stations all across the border. ICE ERO
221 officers have rolling intake but they have other jobs to do. They may only be
222 able to intake 150 people because of fire marshal code, as example. The
223 infrastructure is not growing enough to sustain the current crisis. ERO is
224 understaffed. She said she tells [leadership or Congress] that ERO needs more
225 beds and more Detention and Deportation Officers but the answer is no. She
226 reiterated that managing bed space is an art, not a science, for ICE ERO
227 because there is not "one way" to find beds.
228
229 ██████ summarized the comments made by ICE ERO stating that they key
230 takeaways are prioritizing bed space and communication between ICE ERO
231 and BP. She added that ICE ERO asserts that BP has the authority to release
232 aliens through OR. ██████ asked what recommendations ICE would make
233 to improve the situation.
234
235 ██████ said that having BP embedded at the SPC would help. It is important
236 for people to understand unintended consequences. ██████ said there are a
237 number of families coming across and none can be detained. He explained that
238 ERO sends its officers to conduct OR which cuts into resources. BP asks ICE
239 ERO to complete the family processing. El Paso ERO has 30 local staff and 30
240 staff detailed from the interior to handle OR, now ERO does not have the staff
241 to handle single adults. Of the detailed staff, 8 work on adult detention. ERO
242 surged to attempt to fill the gap but they are still short-handed.
243
244 ██████ said ICE ERO needs resources to manage this surge. For all of the
245 unaccompanied minors, ICE is paying the transportation to get them to Health
246 and Human Services (HHS) and is currently running in the red. ICE ERO has
247 released 175,000 immigrants into the interior and BP released 38,000, that is
248 over 200,000 illegal immigrant released. With the Flores restrictions, UACs
249 cannot be held longer than 20 days, so there are 50,000 – 60,000 released to
250 the community. In addition, the Executive Office for Immigration Review (EOIR)
251 has over 800,000 cases to adjudicate. ██████ stated that 6,000 illegal
252 immigrants are entering the country on a weekly basis, there are currently 2.1
253 million non-detained illegal immigrants in the country, and there are maybe
254 5,500 ICE officers managing these cases.