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

DEFENDANTS-APPELLEES-CROSS-APPELLANTS' BRIEF

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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.

[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."

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

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

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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.

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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Dated April 27, 2017

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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.

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