Larry A. Hammond, 004049
Debra A. Hill, 012186
Sharad H. Desai, 025255
OSBORN MALEDON, P.A.
2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793
(602) 640-9000
lhammond@omlaw.com
dhill@omlaw.com
sdesai@omlaw.com

Margaret Winter (admitted *pro hac vice*)
Hanh Nguyen (admitted *pro hac vice*)
ACLU National Prison Project
915 15th Street, N.W., 7th Floor
Washington, D.C. 20005
(202) 548-6605
mwinter@npp-aclu.org
hnguyen@npp-aclu.org

Daniel J. Pochoda, 021979
American Civil Liberties Union of Arizona
P.O. Box 17148
Phoenix, Arizona 85011-0148
(602) 650-1854
dpochoda@acluaz.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Fred Graves, et al., Plaintiffs, v. Joseph Arpaio, et al., Defendants.	No. CV 77-479-PHX-NVW **PLAINTIFFS' PRETRIAL BRIEF**

Pursuant to the Court's form proposed Final Pretrial Order for Bench Trial, Plaintiffs file their brief on all contested issues of law in this case.

INTRODUCTION

This case is a § 1983 class action alleging constitutional violations in the conditions of confinement of pretrial detainees housed in the Maricopa County Jails, including lack of adequate medical, mental health, and dental care, and inhumane and

dangerous housing conditions. The plaintiff class consists of all pretrial detainees (hereafter referred to as "inmates") who have been housed or are currently housed in the Maricopa County Jails ("MCJ" or "Jails").

In 1995, pursuant to stipulation of the parties, this Court approved an Amended Judgment in this case relating to various conditions of confinement issues. On September 25, 2001,[1] Defendants filed a renewed Motion to Terminate the Amended Judgment under 18 U.S.C.A. § 3626(b), alleging that there were no current or ongoing violations of the inmates' federal rights, and therefore termination was required as a matter of law. The evidentiary hearing on that motion is scheduled to commence August 12, 2008.

Under the Prison Litigation Reform Act (PLRA), when a party moves to terminate a consent decree, prospective relief "shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." *Id.* § 3626(b)(3). The Court must assess the circumstances at the jails at the time termination is sought. *Pierce v. County of Orange*, 526 F.3d 1190, 1205 (9th Cir. 2008) (citing *Gilmore v. California*, 220 F.3d 987, 1010 (9th Cir. 2000)). The Court has ruled that in this case, the relevant time period in assessing the current conditions at the Jails is June 1, 2007, through May 31, 2008.

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[1] Defendants seek to terminate all of the provisions of the Amended Judgment in this case. Plaintiffs do not contest Defendants' motion to terminate the following paragraphs in the Amended Judgment: ¶¶ 1-8, 16, 17, 20-22, 24-39, -42, 44, 48-55, 63, 65-66, 68, 73-83, 87-94, 96-97, 99, 101, 105-111, 113 and 115-116. Plaintiffs also do not contest Defendants' motion to terminate with respect to the following provisions in the Order as follows: ¶ 9 (the references to First Avenue, Madison, Avondale and Mesa Jails, which have been closed); and ¶ 84 (the reference to First Avenue Jail, which has been closed).

If the evidence establishes a current and ongoing violation of federal rights at the Jails, the Court is obliged to provide a remedy, whether that violation affects few prisoners or many. "A district court is bound to maintain or modify any form of relief necessary to correct a current and ongoing violation of a federal right, so long as that relief is limited to enforcing the constitutional minimum." *Gilmore*, 220 F.3d at 1000; *see also id.* at 1007-08. If the Court finds that current and ongoing violations exist, but the existing relief is no longer appropriate to current conditions, the court should amend the relief or design new relief appropriate to remedy the current violations. *Id.* at 1008. The party seeking to terminate relief bears the burden of proving its compliance with constitutional mandates in the areas covered by the decree. *Id.*

Given Defendants' burden of proving their compliance with constitutional mandates, conditions shown to exist in the past are presumed to continue, absent evidence to the contrary. *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1449 (9th Cir. 1989) (holding that jail conditions found to exist in 1978 would be presumed to continue in 1985 in the absence of evidence to the contrary; noting that "it is a bedrock common law principle that in certain situations, once a condition has been proven to exist, it is presumed in the absence of proof to the contrary that the condition has remained unchanged").

Pretrial detainees are protected by the Due Process provisions of the Fifth and Fourteenth Amendments. *Bell v. Wolfish*, 441 U.S. 520, 535-36 & n.16 (1979); *Pierce*, 526 F.3d at 1205. Detainees may in some circumstances be entitled to greater protection under the Fourteenth Amendment than prisoners under the Eighth Amendment. *Demery v. Arpaio*, 378 F.3d 1020, 1029 (9th Cir. 2004) ("[T]he Fourteenth Amendment prohibits all punishment of pretrial detainees, while the Eighth Amendment only prevents the imposition of cruel and unusual punishment on convicted prisoners."); *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004) ("The Fourteenth Amendment requires the government to do more than provide the 'minimal civilized measure of life's necessities' for non-convicted detainees." (citation

omitted)). Because due process rights are at least as great as Eighth Amendment protections afforded convicted prisoners, the guarantees of the Eighth Amendment provide pretrial detainees a "minimum standard of care for determining their rights." *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983). Courts evaluating the claims of pretrial detainees under the Fourteenth Amendment use the Eighth Amendment's analytical framework of deliberate indifference to analyze these claims. *See Redman v. County of San Diego*, 942 F.2d 1435, 1441 n.7 (9th Cir. 1991); *Burdette v. Butte County*, 121 F. App'x 701, 702 n.1 (9th Cir. 2005).

Prisoners prove an Eighth Amendment violation when they show that they were incarcerated under conditions posing a substantial risk of serious harm to their health or safety, and officials acted with deliberate indifference, that is, with conscious disregard for that risk. *Farmer v. Brennan*, 511 U.S. 825, 834, 839-840 (1994). Evidence of objective risk of serious injury may establish defendants' knowledge of such risks. *See id.* at 846 n.9 ("If, for example, the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness, any more than prison officials who state during the litigation that they will not take reasonable measures to abate an intolerable risk of which they are aware could claim to be subjectively blameless for purposes of the Eighth Amendment, and in deciding whether an inmate has established a continuing constitutional violation a district court may take such developments into account.").

Unsafe conditions that "pose an unreasonable risk of serious damage to [a prisoner's] future health" may violate the Eighth Amendment even if the damage has not yet occurred and may not affect every prisoner exposed to the conditions. *Helling v. McKinney*, 509 U.S. 25, 33 (1993). Prison officials may not "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year" merely because no harm has yet occurred, and a

"remedy for unsafe conditions need not await a tragic event." *Id.* at 33*; accord Farmer*, 511 U.S. at 845.

Conditions that have "a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise" violate the Eighth Amendment in combination, even if the conditions separately would not be unconstitutional. *Wilson v. Seiter*, 501 U.S. 294, 304 (1991). Further, "the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards. A filthy, overcrowded cell and a diet of 'gruel' might be tolerable for a few days and intolerably cruel for weeks or months." *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978).

Corrections officials' treatment of prisoners violates the Eighth Amendment, whether or not it causes physical injury, when it "'offend[s] contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.'" *Hope v. Pelzer*, 536 U.S. 730, 737 & n.6, 738 (2002) (quoting *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974)); *Hutto*, 437 U.S. at 685 (recognizing that the Eighth Amendment's ban on cruel and unusual punishment extends beyond physical punishment, and proscribes penalties that "transgress today's 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency'" (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976))).

Circumstantial evidence may support a finding of deliberate indifference, and the very fact that a risk is obvious may allow a fact finder to conclude that prison officials knew of a substantial risk. *Farmer*, 511 U.S. at 842-43 (evidence of "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, [] could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk").

ANALYSIS

I. Defendants Are Aware of and Disregard Inmates' Serious Medical, Dental and Mental Health Needs, Subjecting Them to Excessive Risks of Serious Harm.

Pretrial detainees have a right to adequate care for serious medical, mental health and dental needs. The constitutional standard for claims alleging deficient care under the Eighth Amendment is "deliberate indifference" to "serious medical needs." *Estelle*, 429 U.S. at 103 (1976).[2]

The evidence at hearing will show that the medical, dental and mental health care provided to detainees at MCJ is objectively inadequate, and that Defendants are aware of and disregard detainees' serious health needs, and unnecessarily subject them to pain and to substantial risk of significant injury and deterioration of their health. Plaintiffs will offer in evidence the deposition testimony of Dr. Todd Wilcox, who was a consultant and management expert for Correctional Health Services from November 2004 through late February 2008, who worked as a clinician at MCJ for most of that period, and who was MCJ's medical director from January 1, 2005, to February 2006. Dr. Wilcox is also certified by NCCHC as an advanced instructor in the delivery of health care in correctional settings. Dr. Wilcox testified from personal knowledge that during the time he worked in MCJ, the medical, dental and psychiatric care provided by Defendants did not meet constitutional standards, despite the fact that the facility was NCCHC accredited. Plaintiffs' medical expert, Dr. Joe Goldenson, and their psychiatric expert, Dr. Pablo Stewart, will testify, based on their

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[2] Professional accreditation does not establish that a facility is operating a constitutionally adequate medical care system. Courts have found facilities accredited by professional accreditation agencies to violate the Constitution. *See Morales Feliciano v. Rossello Gonzalez*, 13 F. Supp. 2d 151, 158 (D.P.R. 1998) (during the same period that the NCCHC accredited the Puerto Rico prison system, court monitors have found non-compliance on at least one essential standard accredited by the NCCHC); *Gates v. Cook*, 376 F.3d 323, 343 (5th Cir. 2004) (finding that "MDOC's assertion that it is already in compliance with ACA and NCCHC standards is incongruous with the trial courts' findings, including the statement that 'the mental health care afforded the inmates on Death Row is grossly inadequate.'").

recent visits to MCJ and review of the services provided by Defendants, that systemic barriers to the provision of adequate medical and mental health care at MCJ, which Dr. Wilcox found to exist as of February 2008, continue to exist to the present day. Plaintiffs will show, further, that a number of the systemic deficiencies identified by these physicians were confirmed even by Defendants' own psychiatric expert, Dr. Kathryn Burns.

Officials may be deliberately indifferent if they "deny, delay or intentionally interfere with medical treatment," or if the method by which they provide care is inadequate. *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988); *Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407-08 (9th Cir. 1985) (noting that a delay in surgery or treatment can constitute deliberate medical indifference if the delay is harmful); *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982) (recognizing that prison officials' deliberate indifference is also shown "if prisoners are unable to make their medical problems known to the medical staff").

When the entire system of health care is challenged in a class action suit, deliberate indifference "may be shown by proving repeated examples of negligent acts which disclose a pattern of conduct by the prison medical staff, or by proving there are such systemic and gross deficiencies in staffing, facilities, equipment, or procedures" that effectively deny inmates access to adequate medical care. *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980) (citation omitted); *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1461 (9th Cir. 1988) ("[A]ccess to medical staff is meaningless unless that staff is competent and can render competent care."), *vacated and remanded*, 490 U.S. 1087 (1989), *reinstated*, 886 F.2d 235 (9th Cir. 1989); *Gibson*, 290 F.3d at 1196 ("When policymakers know that their medical staff members will encounter those with urgent mental health needs yet fail to provide for the identification of those needs, it is obvious that a constitutional violation could well result."); *Toussaint v. McCarthy*, 801 F.2d 1080, 1111-13 (9th Cir. 1986).

Denial of needed medication constitutes deliberate indifference to a serious medical need. *See, e.g.*, *Sullivan v. County of Pierce*, No. 98-35399, 2000 WL 432368, at *1-2 (9th Cir. Apr. 21, 2000) (reversing and remanding for reconsideration of deliberate indifference where a detainee who needed AIDS medication did not receive that medication for at least two days). Inadequate medical recordkeeping constitutes a systemic failure in the provision of health care amounting to deliberate indifference. *See, e.g.*, *Newman v. Alabama*, 503 F.2d 1320, 1323 n.4 (5th Cir. 1974); *Madrid v. Gomez*, 889 F. Supp. 1146, 1258 (N.D. Cal. 1995). Failure to maintain up-to-date medical supplies or to put in place a sufficiently organized system for medication delivery constitutes deliberate indifference. *See, e.g.*, *Williams v. Edwards*, 547 F.2d 1206, 1216-17 (5th Cir. 1977).

Medical staff must be competent—capable of examining prisoners and diagnosing illnesses. *Hoptowit*, 682 F.2d at 1253. Medical providers must also be able to either treat medical issues identified or refer inmates to other providers, either within the facility or outside the prison if accessible in a timely manner." *Id.* The number of medical staff must be adequate to provide adequate services. *Casey v. Lewis*, 834 F. Supp. 1477, 1548 (D. Ariz. 1993) ("Because of inadequate numbers of staff, the existing staff cannot adequately treat inmates and their constitutional rights are violated.").

Conditions of confinement that expose inmates and detainees to "communicable diseases and identifiable health threats" implicate constitutional guarantees. *Wilson v. Lynaugh*, 878 F.2d 846, 849 (5th Cir. 1989); *DeGidio v. Pung*, 920 F.2d 525, 531 (8th Cir. 1990). Conditions that significantly affect a person's daily activities or cause chronic and substantial pain constitute serious medical needs, even if they are not life-threatening. *See, e.g.*, *McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1997) ("[T]he presence of a medical condition that significantly affects an individual's daily activities[,] or the existence of chronic and substantial pain are examples of indications that a prisoner has a 'serious' need for medical

treatment."), *overruled in part on other grounds by WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997); *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing *Estelle v. Gamble*, 429 U.S. at 104).

Serious mental health needs are no less objectively serious than physical health needs. *Doty v. County of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994). A minimally adequate prison mental health care delivery system must include: (1) a systematic program for screening and evaluating inmates to identify those in need of mental health care; (2) a treatment program that involves more than segregation and close supervision of mentally ill inmates; (3) employment of a sufficient number of trained mental health professionals; (4) maintenance of accurate, complete and confidential mental health treatment records; (5) administration of psychotropic medication only with appropriate supervision and periodic evaluation; and (6) a basic program to identify, treat, and supervise inmates at risk for suicide. *Coleman v. Wilson*, 912 F. Supp. 1282, 1298 (E.D. Cal. 1995) (citing *Balla v. Idaho State Bd. of Corr.*, 595 F. Supp. 1558, 1577 (D. Idaho 1984)).

II. The Conditions of Confinement in the Intake Area of 4th Avenue Jail Violate Detainees' Rights Under the Eighth and Fourteenth Amendments.

The evidence presented at the hearing will show that the conditions of confinement in the Intake area of 4th Avenue Jail are objectively deficient and that Defendants are aware of, and disregard, detainees' needs, and unnecessarily subject them to pain and to substantial risk of significant injury. Inmates are booked and held in Intake pending their initial court appearance and subsequent release or transfer to an assigned jail facility. Although Defendants concede that the entire intake process should take no more than 24 hours, during the relevant time period in this case 23,987 inmates were held in Intake for more than 24 hours. Of this number, 1,910 inmates were in Intake for more than 48 hours, of which 353 inmates were held in Intake for more than 72 hours.

Each Intake holding cell consists only of a concrete floor, two concrete benches, one uncovered toilet, and one sink. Inmates are not provided mattresses, portable beds, or any bedding. Inmates are packed into cells in such numbers that they must sleep sitting up or lying on each other on the floor. Detainees are not provided access to a shower, nor are they provided materials for personal hygiene, such as toothpaste, a toothbrush, warm water or soap. The holding cells are also filthy, and the toilets are soiled and often unusable. Moreover, Defendants do not adequately supervise or perform security walks or welfare checks in Intake despite the fact that very little is known about inmates at this stage of the process.

Plaintiffs contend that in light of the length of time that a large number of inmates are held in Intake, the overcrowded nature of the holding cells in which they are detained, the failure to provide personal hygiene materials, the unsanitary conditions, the increased risk of disease transmission and infection created by these conditions, and Defendants' failure to provide security and supervision in the holding cells, the present conditions in Intake violate inmates' due process rights under the Eighth and Fourteenth Amendments. *See, e.g.*, *Bowers v. City of Philadelphia*, No. 06-CV-3229, 2007 WL 219651, at *35 (E.D. Pa. Jan. 25, 2007 ("The conditions that existed in the intake unit . . . violated the constitutional rights" of pretrial detainees in part because inmates were held post arraignment for days in holding cells in numbers that exceeded the capacity of the cells, which required detainees to sit and sleep on concrete floors and on top of each other, inmates were not provided beds and bedding or materials for personal hygiene, including soap, warm water, toothpaste, toothbrushes and shower facilities, and were subjected to "unsanitary and unavailable toilet facilities"); *see also Thompson v. City of Los Angeles*, 885 F.2d 1439, 1448 (9th Cir. 1989) (court reversed grant of summary judgment, holding that detainee's allegation that he was provided with neither a bed or a mattress "unquestionably" constituted a cognizable constitutional claim); *Thomas v. Baca*, 514 F. Supp. 2d 1201

(C.D. Cal. 2007) (finding Eighth Amendment violation when detainees slept on floor in holding cells).

III. The Conditions of Confinement in Towers, Estrella, Durango Housing Units D8 and D9, and the Court Holding Cells at Madison Jail Violate Detainees' Rights Under the Eighth and Fourteenth Amendments.

Overcrowding may have harmful effects on inmates that form the basis for a constitutional violation. These effects include increased violence, the reduction of other constitutionally required services such that they fall below Eighth Amendment standards, and the deterioration of shelter to a point that it is unfit for human habitation. *Toussaint v. Yockey*, 722 F.2d 1490, 1492 (9th Cir. 1984) (a constitutional violation may occur as a result of overcrowded prison conditions engendering "violence, tension and psychiatric problems"); *Hoptowit*, 682 F.2d at 1249; *Akao v. Shimoda*, 832 F.2d 119, 120 (9th Cir. 1987) (per curiam) (reversing district court's dismissal of claim that overcrowding caused increased "stress, tension, communicable disease, and a high increase in confrontation between inmates").

Plaintiffs contend that the totality of conditions at Towers, Estrella, two warehouse dorms at Durango, and the court holding cells at Madison Jail violate detainees' Eighth and Fourteenth Amendment constitutional rights. As Plaintiffs' expert sanitarian, Dr. Bob Powitz, will testify, detainees in each of these Maricopa County Jail facilities are housed in overcrowded conditions, with wholly inadequate space in their cells, dorms, dayrooms, and with regard to Madison, the holding cells. Moreover, as discussed in further detail below, none of the inmates in Towers, Estrella, and Durango receive daily outdoor exercise and recreation, which exacerbates the effects of overcrowding. This is particularly important with respect to those segregated detainees held in tiny cells in Towers and Estrella who are locked down for at least 23 hours every day. Furthermore, several of these facilities, including the court holding cells at Madison, are unsanitary and filthy.

The significant overcrowding and lack of sufficient sanitary facilities in many of these units cause significant health risks, as well as serious risks of the spread of

infectious diseases. Overcrowded conditions are further exacerbated by the failure to provide adequate medical and mental health care, as outlined above. Jim Aiken, Plaintiffs' correctional expert, will also testify at trial that the overcrowded conditions in these facilities result in serious risk of harm to inmates and staff alike, and substantially affect safety and security in the Jails. This risk of harm is made even greater by Defendants' failure to provide adequate security and supervision over inmates in the Jails, a fact to which Mr. Aiken will attest.

Furthermore, the Court will hear testimony about the use of "portable beds" at LBJ and Durango during the relevant time period. At LBJ, inmates were forced to sleep in portable beds placed in two-person cells with only 18 inches of space separating the portable bed and the bunks in these cells. At Durango, portable beds were placed in dayrooms, severely reducing the unencumbered space in the dayrooms. Captain Robert Barcelo, the Commander of LBJ, will testify that he was ordered by his direct superior to remove all portable beds prior to the inspections made by the experts in this case. Defendants were able to move inmates to different areas of the Jails such that every inmate had a hard bed during the inspections; but certainly, without a court order mandating such a practice, Defendants would be free to return to their practice of using portable beds that create overcrowded conditions.

In addition to the factors discussed above, the lack of an operationally adequate grievance system aggravates and intensifies the effects of overcrowding in the Jails. Inmates are not always provided grievance forms when they request them, detention officers sometimes refuse to pick up grievance forms, and inmates are discouraged by officers from filing them. Moreover, Defendants sometimes fail to respond to grievance forms. Even when grievances make it as far as an "external referee," those referees are biased in favor of Defendants, rendering the grievance system utterly ineffective.

IV. The Lack of Exercise Opportunities for Inmates at Towers, Estrella, Durango, and the General Population Housing Units at 4th Avenue, Violates Pretrial Detainees' Rights Under the Eighth and Fourteenth Amendments.

Exercise is one of the basic human necessities protected by the Eighth Amendment. *Pierce*, 526 F.3d at 1211. Some form of regular outdoor exercise is extremely important to the psychological and physical well-being of inmates. *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979); *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987) (per curium). "It is generally recognized that a total or near-total deprivation of exercise or recreational opportunity, without penological justification, violates Eighth Amendment guarantees." *Mitchell v. Rice*, 954 F.2d 187, 192 (4th Cir. 1992) (quoting *Patterson v. Mintzes*, 717 F.2d 284, 289 (6th Cir. 1983)); *see also Anderson v. Coughlin*, 757 F.2d 33, 35 (2d Cir. 1985) ("some opportunity for exercise must be afforded to prisoners"); *Ruiz v. Estelle*, 679 F.2d 1115, 1152 (5th Cir. 1982) ("confinement of inmates for long periods of time without opportunity for regular physical exercise constitutes cruel and unusual punishment"), *vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982). Moreover, the cost or inconvenience of providing adequate recreation facilities is not a defense to a constitutional violation. *Spain*, 600 F.2d at 200; *Mitchell*, 954 F.2d at 192 (prison required to show that other alternatives for providing sufficient recreation were not feasible, excepting financial justifications); *Hamilton v. Love*, 358 F. Supp. 338 (E.D. Ark. 1973) (lack of resources "can never be an adequate justification" for failure to provide exercise and recreation equipment for pretrial inmates).

At the evidentiary hearing, Plaintiffs will present testimony demonstrating that inmates at Durango, Towers, and Estrella do not receive the opportunity to exercise for at least one hour each day. Defendants may attempt to excuse this violation of inmates' constitutional rights by arguing that they have insufficient staff or recreation yards to provide sufficient opportunities for exercise and recreation; however, as

noted above, the lack of staff or recreation yards is a mere financial consideration that cannot justify the violation of inmates' constitutional rights.

Additionally, despite the fact that general population inmates at 4th Avenue are offered the opportunity to exercise every day for approximately one hour, Plaintiffs will present evidence demonstrating that the exercise and recreation facilities at 4th Avenue are insufficient. Dr. Powitz will testify that the reasonable number of inmates that can actually use one of the 4th Avenue recreation yards is 17 – less than half the number of inmates who are offered recreation at one time. Defendants, therefore, are effectively denying adequate recreation opportunities to these inmates. This failure is aggravated by Defendants' current lockdown policy – general population inmates in 4th Avenue are provided, at most, eight hours of dayroom access each day.

V. The Food Served to Inmates Violates Their Rights Under the Eighth and Fourteenth Amendments.

The Eighth Amendment requires that prisons and jails serve inmates nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well being of the inmates who consume it. *Ramos*, 639 F.2d at 571; *see also French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985) (same, quoting *Ramos*); *Robles v. Coughlin*, 725 F.2d 12, 15 (2nd Cir. 1983) (same, quoting *Ramos*); *Thompson v. Michigan Dep't of Corr.*, 234 F.3d 1270, at *2 (6th Cir. 2000) (same); *Burgen v. Nix*, 899 F.2d 733, 734 (8th Cir. 1990); *Divers v. Dep't of Corr.*, 921 F.2d 191, 194 (8th Cir. 1990); *see also Jones v. Diamond*, 636 F.2d 1364, 1378 (5th Cir. 1981) (*en banc*) (inmates must be provided reasonably adequate food), *overruled on other grounds by Int'l Woodworkers of Am. v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986); *Lunsford v. Bennett*, 17 F.3d 1574, 1580 (7th Cir. 1994); *Campbell v. Cauthron*, 623 F.2d 503, 508 n.5 (8th Cir. 1980) ("[T]he state is under a duty to provide an adequate diet for all inmates.").

As Plaintiffs will show at trial, Defendants are unable to demonstrate that they are providing nutritionally adequate food to inmates. Although Defendants concede

that inmates should be provided a minimum of 2400 calories per day, their own records establish that they have failed to provide the required minerals and vitamins to inmates as required by U.S. Dietary guidelines. Defendants have not maintained any records showing menus actually served to inmates, nor do they have any way to confirm that they have in fact provided the required nutrition to inmates.

The Court will also hear inmates testify about moldy bread, spoiled fruit and contaminants in their food, and will hear Dr. Powitz testify that Defendants' engage in considerable temperature abuse with regard to the food. These failures pose a serious risk to the health of inmates, due both to the potential for sickness and food poisoning as a result of eating spoiled food, and because inmates cannot eat spoiled food and thus do not receive adequate nutrition. Furthermore, Plaintiffs will present testimony concerning the difficulty inmates have of obtaining replacement meals when they receive spoiled or otherwise inedible food.[3] In short, Defendants are unable to meet their burden of proof that they are complying with constitutional mandates regarding the provision of nutritionally adequate food to inmates.

[3] As discussed above, the inmate grievance system in MCJ is defective and thus exacerbates Defendants' failure to provide nutritionally adequate food.

DATED this 30th day of July, 2008.

OSBORN MALEDON, P.A.

By s/Debra A. Hill

Larry A. Hammond
Debra A. Hill
Sharad H. Desai
2929 North Central Avenue
Suite 2100
Phoenix, Arizona 85012-2793

Margaret Winter (admitted *pro hac vice*)
Hanh Nguyen (admitted *pro hac vice*)
ACLU National Prison Project
915 15th Street, N.W., 7th Floor
Washington, D.C. 20005

Daniel J. Pochoda
American Civil Liberties Union of Arizona
P.O. Box 17148
Phoenix, Arizona 85011-0148

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2008, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

- Michele M. Iafrate
- Courtney R. Cloman
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- Dennis I. Wilenchik
- Margaret Winter

I hereby certify that on July 30, 2008, I served the attached document by first-class mail on the Honorable Neil V. Wake, United States District Court, Sandra Day

O'Connor U.S. Courthouse, Suite 524, 401 West Washington Street, SPC 52, Phoenix, AZ 85003.

s/Karen L. McClain

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