Nos. 17-15381, 17-15383

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, United States Customs and Border Protection; RONALD VITIELLO, Chief, United States Border Patrol; JEFFREY SELF, Commander, Arizona Joint Field Command; PAUL BEESON, Chief Patrol Agent – Tucson Sector,

Defendants-Appellees-Cross-Appellants.

Preliminary Injunction Appeals from the United States District Court for Arizona, Tucson, Hon. David C. Bury (Case No. 4:15-cv-00250-DCB)

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JURISDICTIONAL STATEMENT

This is an appeal from a district court order granting a preliminary injunction in a civil case. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1346. The district court issued a preliminary injunction against Defendants-Appellees-Cross-Appellants John F. Kelly, Kevin K. McAleenan, Ronald Vitiello, Jeffery Self, and Paul Beeson (collectively, "Defendants") on November 18, 2016. ER5. Defendants filed a timely motion for reconsideration on December 2, 2016 (ER51), which the district court denied on January 3, 2017. ER1. Plaintiffs-Appellants-Cross-Appellees Norlan Flores et al. ("Plaintiffs") filed a timely notice of appeal on March 2, 2017. ER44; *see* Fed. R. App. P. 4(a)(1)(B), (a)(4)(A); *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1142 (9th Cir. 1998). Defendants filed a notice of appeal later that same day. ER39. This Court has jurisdiction under 28 U.S.C. § 1292(a).

STATEMENT OF THE ISSUES

1. Whether, having concluded that the Constitution requires providing civil immigration detainees access to adequate medical care, the district court erred as a matter of law in concluding that medically untrained agents could conduct medical screening and prescription drug determinations.

2. Whether, having expressly recognized that Defendants' ongoing failure to provide civil immigrant detainees with beds violated Due Process, the

district court could nevertheless permit this unconstitutional practice to continue pending trial.

3. Whether, having expressly recognized that civil immigration detainees have a constitutional right to personal hygiene, the district court erred as a matter of law in not recognizing this right entailed showers, not just the provision of adult body wipes.

INTRODUCTION

When the government takes people into custody, it becomes responsible for their well-being. This case concerns the government's failure to fulfill that fundamental obligation in eight Border Patrol stations in southern Arizona.

Every year, the Border Patrol apprehends tens of thousands of individuals and confines them in these stations. There, these individuals await transfer to other locations, sometimes for as long as three days or more. For most, transfer cannot come soon enough: the conditions of confinement facing those unfortunate enough to be housed in the stations are harsh and degrading.

As the record shows, detainees are packed into overcrowded and filthy holding cells, stripped of outer layers of clothing, and forced to endure brutally cold temperatures. They are denied beds, bedding, and sleep. They are deprived of basic sanitation and hygiene items like soap, sufficient toilet paper, sanitary napkins, diapers, and showers. And they are forced to go without adequate food,

water, medicine, and medical care. The surveillance photo below—showing individuals packed into a room, pressed together on the concrete floor, and shielded only by thin, foil-like "sheets"—provides just a sample of the inhumane conditions they are forced to endure:

ER392.

The Constitution prohibits the government from treating *anyone* in this fashion, let alone the civil immigration detainees held in Border Patrol stations. And thankfully, in the order from which this appeal arises, the district court largely recognized as much. The district court granted Plaintiffs—a certified class of detainees who are or will be held in these stations—preliminary injunctive relief

directing Defendants to remedy some of the more egregious violations of the class members' rights.

But the district court's order did not address all of Defendants' continuing constitutional violations. Instead, in three areas in particular, the district court permitted Defendants to continue to defy their legal obligations. First, class members are entitled to adequate medical care, but the district court erred as a matter of law in concluding that this constitutional obligation does not require medically trained personnel to conduct medical screenings—instead concluding that Border Patrol agents who are neither qualified nor adequately trained may act as the gatekeepers to critical care and medication. Second, as the district court expressly recognized, Due Process requires that class members held overnight be given beds—but its order allows Defendants' violation of this mandate to persist, requiring only that Defendants provide floor mats. Third, although Due Process demands that class members be given the means with which to adequately wash themselves, the district court legally erred in concluding that this mandate does not include showers—instead allowing Defendants to provide patently insufficient "adult body wipes."

Civil detainees such as Plaintiffs are entitled to better treatment than that accorded to criminal detainees held in prisons or jails. Yet even with the district court's injunction in place, Plaintiffs are subjected to conditions considerably

worse, and they suffer irreparable harm as a result. This Court should reverse the district court's order in part and remand for it to award relief sufficient to prevent Defendants from continuing to shirk their constitutional obligations.

STATEMENT OF THE CASE

A. Factual Background

1. The Tucson Sector stations

Plaintiffs are civil detainees confined in U.S. Customs and Border Protection (CBP) facilities within the Tucson Sector of the U.S. Border Patrol. Some fled their native land out of fear for their safety or the safety of their loved ones. ER462. Others have U.S. citizen children and spouses. ER462. Those detained include parents with young children and pregnant women. ER441; ER403. They are generally apprehended following grueling, perilous journeys that have left them exhausted, hungry, and dehydrated. ER458; ER454. Many are sick or injured and in need of immediate medical care. ER358.

Upon apprehension, these class members are taken to one of eight Tucson Sector "stations." ER5. As all agree, these stations were not designed for overnight detention. As one agent explained, Border Patrol is generally "an interdiction organization. We're not in the detention business." ER84. Thus, the stations were meant to serve as processing centers in which Border Patrol agents quickly determine the identity and status of detainees and then either release them

or send them to their next destination. ER608; ER589. These subsequent destinations, such as Immigration and Customs Enforcement detention centers or local jails, are actually designed to house individuals for days at a time. ER245, ER249.

While the Tucson Sector stations were not supposed to be detention centers—and the agents who run them were not supposed to be jailers—that is what they have become. For a variety of reasons, the processing and transfer of individuals detained in the Tucson Sector often takes a substantial amount of time. Between October 1, 2015 and October 2, 2016, approximately 95,800 individuals were processed out of the Tucson Sector Stations. ER860; ER255. Of the roughly 95,800 individuals, 54,688 were held for 12 hours or more; 26,367 were held for 24 hours or more; 10,348 were held for 36 hours or more; 3,913 were held for 48 hours or more; and 473 were held for 72 hours or more. ER860; *see also* ER522 (similar figures for the period between June 10 and September 28, 2015). The deplorable conditions in which these individuals are held during these prolonged periods gave rise to the present suit.

2. Sleeping accommodations

Over the lengths of time class members are routinely being held, human beings need sleep. But the "hold rooms" in which class members are confined

during their time in the Tucson Sector stations are "not designed for sleeping." ER432. To the contrary, nearly everything about these hold rooms inhibits sleep.

The rooms feature bare concrete floors and benches. ER436; ER434, ER443. There are no beds or mattresses in any of the facilities. ER439; ER486-487; ER15; ER544-545. Although stations have thin mats, they are rarely given to detainees. ER523; ER440-441; ER486-487; ER544. Surveillance footage shows people lying on concrete floors while mats go unused in other unoccupied cells:

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ER388.

As a result, most class members are forced to try to sleep directly on the hold rooms' concrete floors and benches. ER523. The only coverings they receive are Mylar sheets, which are paper-thin and look like tin foil (though they are apparently more durable). ER122; ER439; ER19. Some are denied even that. ER541. It is undisputed that Mylar sheets do not provide any insulation or cushion against the ground. ER122.

But the class members are particularly susceptible to cold. ER496-497. Upon arrival, they are stripped of their outer layers of clothing, often leaving them with only thin t-shirts. ER494; ER845. They are largely sedentary because, regardless of the duration of their confinement, they are never permitted to exercise. ER172. And the temperatures in the hold rooms can reach as low as 58.8° Fahrenheit. ER495. Even at higher temperatures, the lack of movement, drafts from air vents, inadequate clothing, and the heat-draining concrete surfaces cause class members to feel extremely cold. ER496-497; ER820; ER823. Indeed, the hold rooms have become known as "hieleras," or freezers. ER496-497. Needless to say, sleeping under these conditions is extremely difficult, and often impossible. ER848.

Even children are subjected to such treatment. Although the Border Patrol's policy is to provide mats to juveniles "when possible" (ER124, ER165),

Defendants' data shows that they provided substantially fewer mats than the number of children detained. ER265; ER523, ER525. Video surveillance confirms that children were forced to sleep on cold concrete surfaces without mats. ER854-858; ER390. Other detainees report children crying through the night due to the cold. ER640; ER668-669.

Sleep is made all the more difficult by severe overcrowding. Defendants have set hold-room capacities based on the erroneous assumption that the individuals held in them will not need to lie down. ER160; ER18. As a result, the space afforded class members is demonstrably insufficient. Surveillance footage reveals people crushed wall-to-wall in hold rooms overnight:

ER392. In some instances, individuals are forced to sleep near or in the hold rooms' toilet stalls. ER486; ER837. In other cases, some have to sit or stand for all or part of the night because there is insufficient room for everyone in the cell to lie down. ER434.

ER390. One man reported that, due to overcrowding, he and 15 others were forced to remain standing throughout the night and were unable to sleep. ER615.

3. Sanitation and personal hygiene

The conditions in which class members are held are also highly unsanitary. ER480-481. Many arrive at the Tucson Sector stations dirty from days of travel in the desert. ER454-455; ER282-283. Nevertheless, as the district court found, "Defendants fail to recognize the basic human need to wash." ER24.

In fact, class members are never given the ability to clean themselves during the entirety of their confinement. ER454-455; ER826. All but two of the stations lack shower facilities that detainees are permitted to use. ER172-173. Even at those stations, they are virtually never allowed to shower. ER524 (less than 1% of detainees reportedly received a shower).

Aside from the lack of showers, class members are not even able to properly wash their hands—not when they arrive, not after they use the toilet, and not before they eat. ER489-490. That is because Defendants regularly fail to provide hot water, soap, and towels. ER489-490. In fact, nearly all of the stations lack hot water in their hold rooms. ER490; ER264-265. Soap is not available consistently: inspections revealed that one station provided no soap at all in its hold rooms, and others had soap dispensers that were broken or empty. ER488. And while the employee restrooms have paper towels, none are provided to class members. ER282-283.

Defendants also do not reliably provide other hygiene products. Women often must go without sanitary napkins. ER524-525 (half of one percent of detainees received feminine hygiene supplies); ER455. Babies often go without clean diapers. ER644 (eighteen-month-old child without clean diaper for 19 hours). Toothbrushes and toothpaste are also rarely provided. ER534 (according

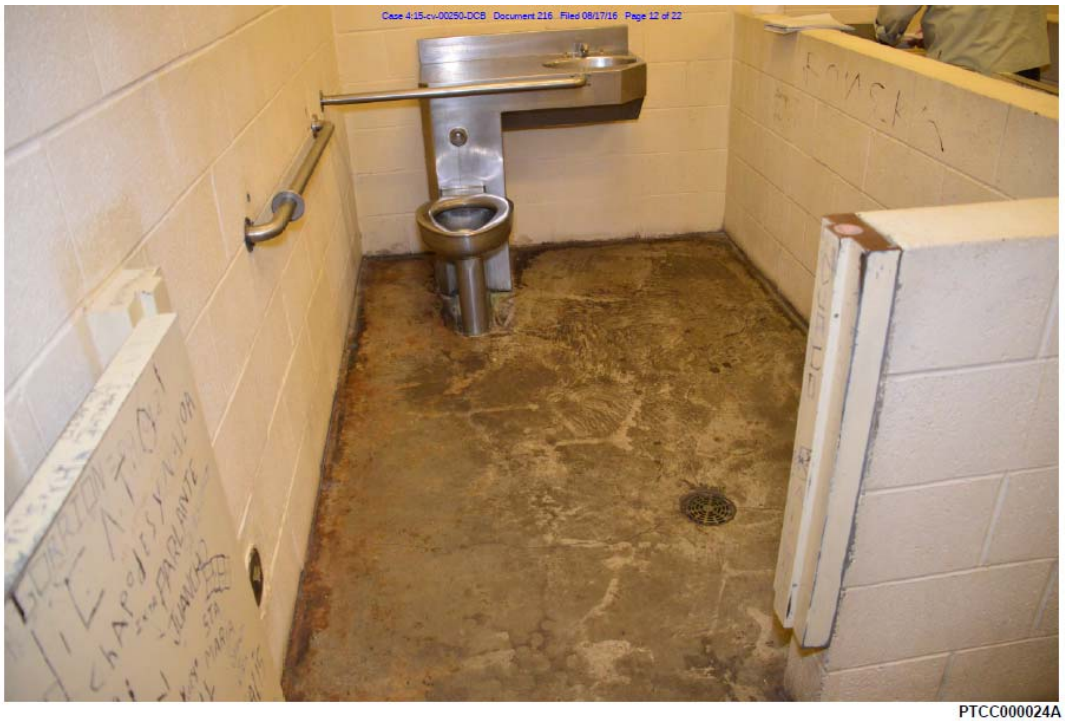
to Defendants' database only 9% of detainees received toothbrush or toothpaste); ER489; ER524.

The lack of basic hygienic products is made worse by the unsanitary conditions in which class members are kept: if they are not dirty when they arrive at the stations, they will be by the time they leave. The hold room floors, walls, and fixtures are covered in filth and sometimes mold. ER483-485. And class members spend prolonged periods of time surrounded by trash because cleaning services at the stations are infrequent and inadequate. ER545. Indeed, the photo below depicts a mother changing her child's diaper on top of a Mylar sheet while both are surrounded by trash:

ER386; *see also* ER545-546 (single water jug used by a dozen detainees over the course of five days never cleaned); ER491 (no place in stations for cleaning of water coolers provided to detainees).

Much of this filth derives from the toilets class members are provided. The toilets are in the hold room and usually surrounded by a low brick wall (an area in which individuals are sometimes forced to sleep due to overcrowding). ER486. Many leak and are stained with built up grime from overuse. ER487. Cleaning staff also fail to clean common touch points or to segregate cleaning supplies for toilets from food preparation areas. ER494.

Defendants' policy requires hold rooms to have 1 toilet per 15 detainees (ER279)—a ratio substantially higher than that recommended by the American Correction Association. *See* ER437 (1 toilet per 12 men and 1 toilet per 8 women). But Defendants often do not meet even their own standard. ER437. For example, on one occasion there was a single toilet for 40 people; on another there were two toilets for 60 people; and at other times there were three working toilets for 90 people. *See* ER615-616; ER620-621; ER659.



ER357.

Matters are made worse by the ubiquitous lack of trash cans. ER481; ER438. Even in the toilet stalls, there are often no trash cans for feminine napkins or diapers. ER481. Coupled with the lack of adequate cleaning services, this deficiency ensures that the hold rooms and toilet stalls are regularly covered in trash. ER481-482; ER545.

ER365.

4. Medical care

Defendants' failure to ensure the proper identification and treatment of the medical needs of the vulnerable population they house compounds the problems associated with the stations' unsanitary conditions. While the Tucson Sector stations held roughly 65,000 individuals during 2016, none of the stations has a single medical professional on staff. ER171-172. Instead, Defendants rely on

Border Patrol agents—who are not medical professionals, and who generally have received nothing more than first-aid training—to assess class members' needs for medical care. ER768-769; ER115-116; ER564-565.

The only medical screening that occurs (if any occurs at all) is in the field, where Border Patrol agents scan the physical condition of apprehended individuals to determine if any are in need of treatment. ER768-769; ER115-116; ER564-565. These agents are supposed to fill out certain informal medical information "checklists," but the forms are rarely used. ER115; ER150-151; ER842. Even when used, the forms do not cover many important medical issues—failing to ask, for example, about dehydration, mental health issues or suicide, skin problems, or tuberculosis. ER318-319. And the agents filling out these forms are not trained medical professionals able to discern whether an individual has any particular needs beyond emergency medical care that require additional attention. ER319. As a result, the agents are likely to miss signs of infectious diseases such as measles and chicken pox—which may spread rapidly through the overcrowded population. ER286; ER322-323.

In addition to conducting these "screenings," Border Patrol agents are responsible for ensuring that class members have access to prescription drugs. Agents confiscate *all* non-U.S. prescribed medication and then decide whether the individuals who were carrying that medication should be referred to a doctor to

secure replacements. ER458; ER769; ER154. Class members report having their medication confiscated and never replaced—including, for example, prescription medications needed to treat an ovarian cyst and a heart condition. ER616-617; ER514. They also report agents ignoring their requests for needed medication. ER513.

Border Patrol agents also determine whether individuals will receive any other medical care. ER769; ER154. Internal emails show that at least some agents do not take class members' complaints seriously. ER815 (mocking one detainee's illness and referring to others having "fake" heart attacks). And Defendants' own data shows that instances in which class members receive medical assistance are astonishingly rare. ER538. At other detention facilities, it is not unusual for roughly half of those in custody to require medical treatment upon admission. ER327 (testimony of Dr. Goldenson that, in facilities he has worked with, roughly 40-50% of incoming detainees require medication); *see Graves v. Arpaio,* 48 F. Supp. 3d 1318, 1340 (D. Ariz. 2014) ("Almost half of inmates booked each day are identified as needing further evaluation by a registered nurse"). By contrast, during the period sampled, the Tucson Sector stations obtained medical treatment for only 527 (3%) of the roughly 17,000 people held. ER538. As Plaintiffs' expert noted, this figure is especially remarkable given that many class members have

been apprehended after days of travel through the desert without sufficient food, water, or medicine, and thus are particularly high-risk. ER509-510.

Numerous class members report having their requests for medical assistance ignored. ER458; ER506-507. For example, one agent told a mother that there was no medicine for her child suffering an ear infection. ER630. Another agent told a woman who experienced heavy, sustained vaginal bleeding that it was just her period. ER634. Another dismissed a man's deep gash on his chest as "nothing." ER664.

5. Food and water

Finally, individuals held at the Tucson Sector stations are also often deprived of adequate water and food. Due to the nature of their journey across the desert, dehydration is a serious risk for class members. ER510; ER817. But adequate potable water is often not available. ER318; ER444-445. Some of the stations rely on "bubblers" that are attached to the toilets in the hold rooms. But many of these bubblers are inoperative. ER446-447. Even when not broken, the bubblers are likely to be infected by fecal matter due to their proximity to the toilets and the systemic lack of soap. ER485. At other stations, Defendants provide water in five-gallon coolers. ER444-445. But because of a lack of cups, class members sometimes have to drink straight from the coolers or use discarded juice boxes. ER444-445; ER545-546. In one case, surveillance footage shows a

dozen individuals—none of whom was ever given a cup—drinking out of the same plastic jug over the course of five days. ER445-446.

Defendants' provision of food is little better. Many class members are not fed for 12 hours or more. ER527-528 (5,575 instances of food gap extending 15 hours or more; 2,425 instances of gap extending 20 hours or more; and 1,400 instances of gap extending 24 hours or more). ER448-449. Even when they do receive food, it is nutritionally inadequate: every meal consists of some combination of a microwavable burrito, snack-size crackers, and a small fruit juice. ER25; ER448; ER835. And class members are made to fear losing even these paltry meals, as Border Patrol agents threaten to withhold food to keep them quiet. ER450.

B. Procedural History

1. Plaintiffs seek judicial relief

In June 2015, Plaintiffs filed suit on behalf of themselves and all others similarly situated. As relevant here, they alleged that Defendants hold the people in their custody in conditions that violate their Fifth Amendment right to Due Process. ER717. The district court certified a class of "all individuals who are now or in the future will be detained at a CBP facility within the Border Patrol's Tucson Sector." ER559-560.

Plaintiffs then moved for a preliminary injunction to prevent Defendants from continuing to treat the individuals held in these stations in an unconstitutional manner. In support of their motion, Plaintiffs cited evidence derived from detainee declarations, expert inspections and reports, Defendants' tracking data, and video surveillance footage. ER393-425. Plaintiffs' access to the latter two categories of evidence was secured, in part, by the district court's order sanctioning Defendants for willfully destroying video surveillance evidence. ER599, ER602.[1] The vast majority of the critical facts regarding the conditions of confinement in the Tucson Sector—including the Border Patrol agents' role in the medical screening program, the total lack of beds, and the near-total deprivation of showers—are undisputed.

2. The district court orders preliminary relief

After a two-day evidentiary hearing, the district court granted Plaintiffs' request for an injunction in part. ER6; ER32. The district court observed that civil detainees such as Plaintiffs are entitled to conditions of confinement at least as humane as those accorded to criminal detainees held in jails or prisons. ER13-14. And as the district court emphasized, the Defendants openly admitted that the conditions in the local jail were far superior to those confronting individuals held in the Tucson Sector stations. ER14.

[1] More recently, the district court found that the Defendants had violated its prior orders and imposed additional sanctions for their repeated spoliation of video surveillance evidence. ER36-37.

Applying the four-factor test for preliminary relief, the district court determined that the Plaintiffs had shown "a likelihood of success on the merits" of their claims, that Plaintiffs would suffer irreparable harm in the absence of a preliminary injunction, that the balance of equities was in their favor, and that an injunction was in the public interest. ER31-32. Accordingly, the district court ordered, among other things, that Defendants comply with certain of their written policies (including the National Standards on Transport, Escort, Detention, and Search, known as "TEDS"), and that Defendants ensure that class members have access to adequate food, potable water, working sinks and toilets, and personal hygiene items. ER10; ER32.

But the district court did not grant Plaintiffs the relief they sought in three areas in particular: medical screening, sleeping arrangements, and showers.

With respect to medical screening, the district court correctly noted that "denying, delaying, or mismanaging intake screening violates the Constitution," which "require[s Defendants] to provide a system of ready access to adequate medical care." ER27. The district court further concluded that the evidence showed Defendants were not providing adequate medical screening or care. ER29-30. But in response to these constitutional violations, the district court simply ordered Defendants to (1) comply with their existing written policies and (2) ensure that all Border Patrol agents consistently use the TEDS medical

screening checklist currently used only sporadically. ER30. The district court's order thus did not address the primary constitutional deficiency in the Defendants' existing medical program: the unqualified Border Patrol agents who remain tasked with making the critical determinations regarding class members' medical needs. ER27.

With respect to sleeping accommodations, the district court recognized that "[d]etention facilities (and prisons) must provide detainees held overnight with beds *and* mattresses," and that "the absence of *either* violates detainees' due process rights." ER16 (quoting *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1448 (9th Cir. 1989)). It rejected Defendants' attempt to invoke as a suitable comparison the "holding cells used at a jail facilities for its booking process," finding that booking in such facilities "take[s] hours," while the "processing being conducted at the Border Patrol stations . . . takes days." ER18. The district court further concluded that Defendants plainly violated this constitutional requirement: as the undisputed facts show, despite holding large number of individuals overnight, Defendants never provide beds and only rarely provide even mats. ER15-16. But rather than compel adherence to these constitutional principles, the district court simply ordered Defendants to provide detainees held longer than 12 hours with mats and Mylar sheets—which they can use while sleeping on the hold rooms' concrete benches and floors. ER32. The district court never explained

why it allowed Defendants to withhold the beds it expressly recognized were constitutionally required.

With respect to personal hygiene, the district court recognized that "[a] sanitary environment is a basic human need" that the government must meet. ER20. It also concluded that Defendants were not satisfying this need because class members "are being denied the ability to wash or clean themselves for several days." ER25. But the district court concluded that showers were not required. ER24-25. Instead, it simply ordered Defendants to "provide some means or materials for washing and/or maintaining personal hygiene when detainees are held longer than 12 hours." ER25.

3. The district court denies reconsideration

Defendants filed a motion for reconsideration and/or clarification of the district court's order. In their motion, Defendants asked whether they could satisfy the requirement that they provide class members with "some means or materials for washing" by granting them access to showers in the two stations where showers are "available for detainee use," and handing out "adult body wipes" in all other locations. ER55; ER60.

The district court denied the motion for reconsideration. ER3. Regarding Defendants' request for clarification, the district court declared that its order was "clear." ER3. Condoning Defendants' proposed use of adult body wipes, the

district court explained that Defendants need only furnish detainees "some means to maintain personal hygiene," and that showers were not necessary. ER3.

Plaintiffs filed a timely notice of appeal. ER44-50. Defendants have cross-appealed. ER39-43.

SUMMARY OF ARGUMENT

The Fifth Amendment's Due Process Clause guarantees civil detainees adequate conditions of confinement. Indeed, civil detainees such as Plaintiffs here are generally entitled to better treatment than pretrial criminal detainees, who are in turn entitled to better treatment than convicted prisoners. But in many crucial respects, Defendants' treatment of the individuals it houses in the Tucson Sector Border Patrol stations falls far below even the minimal standards that prevail in jails or prisons. And nothing inherent in the purpose or nature of Plaintiffs' confinement can justify such abhorrent treatment—Defendants' purely financial excuses are insufficient as a matter of well-established law.

The district court correctly acknowledged many of these legal principles. Yet it failed to recognize the full extent of Defendants' constitutional violations or to provide an adequate remedy for those affected.

First, the district court erred when it concluded that unqualified Border Patrol agents may both conduct the medical screening of class members and determine whether they can continue taking prescription medication. This Court

has held that detainees' constitutional right to medical care includes both a right to adequate medical screening and a right to access needed medications. As this Court has also recognized, for these rights to have any real meaning, qualified medical professionals must perform the critical tasks of screening those the government takes into custody and ensuring they have the medications they need. The district court's order must be modified to ensure that Defendants' medical policies comport with these basic constitutional requirements.

Second, the district court abused its discretion by failing to direct Defendants to provide class members with beds when they are held overnight. As the district court correctly concluded, Plaintiffs have a right to beds, not just mats on the floor. But the district court ordered Defendants to provide only floor mats. The unduly limited scope of this relief was not and cannot be justified. Given the undisputed facts establishing the deprivation of beds and the continued harm that Plaintiffs suffer as a result, the district court should have ordered Defendants to begin the process of providing the beds that the Due Process Clause requires.

Third, the district court also erred in concluding that Defendants could satisfy their obligation to ensure Plaintiffs' personal hygiene simply by giving them adult body wipes. In holding that showers are not constitutionally required, the district court cited the relatively abbreviated nature of class members' stays in these stations. But even prisoners and jail inmates are generally entitled to shower

at a more frequent rate than the civil detainees held in the Tucson Sector. There is no justification for subjecting Plaintiffs to worse treatment. Indeed, after trudging through the desert and then being packed with others who have done the same, members of the Plaintiff class are far more likely to need showers than criminal detainees. This Court should reverse the district court's order and direct it to require showers as well.

STANDARD OF REVIEW

This Court reviews the district court's grant or denial of a preliminary injunction for abuse of discretion. *Harris v. Bd. of Supervisors, L.A. Cty.*, 366 F.3d 754, 760 (9th Cir. 2014). A plaintiff is entitled to preliminary injunctive relief when she shows: (1) she is likely to succeed on the merits; (2) she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in her favor; and (4) an injunction is in the public interest. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009). Additionally, if a plaintiff demonstrates that there are "serious questions going to the merits and a hardship balance that tips sharply" in her favor, she is entitled to preliminary injunctive relief so long as there is also a likelihood of irreparable injury and the injunction is in the public interest. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2009).

In evaluating the district court's assessment of these factors, this Court accepts the district court's factual findings unless clearly erroneous, *id.*, but it reviews de novo the "district court's interpretation of the underlying legal principles." *Rodriguez v. Robbins*, 715 F.3d 1127, 1133 (9th Cir. 2013) (internal quotation marks omitted). The district court "necessarily abuses its discretion when it bases its decision on an erroneous legal standard." *Harris*, 366 F.3d at 760 (internal quotation marks omitted). If the district court identifies "the correct legal standard," it abuses its discretion when its application of that standard is "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc) (internal quotation marks omitted).

ARGUMENT

I. THE DUE PROCESS CLAUSE REQUIRES THE GOVERNMENT TO PROVIDE CIVIL DETAINEES WITH ADEQUATE CONDITIONS OF CONFINEMENT

A. Civil Detainees Are Entitled To Considerate Treatment Consistent With The Nature And Purpose Of Their Detention

Whenever the government takes individuals into custody, the Constitution requires that it provide them the basic necessities of life, including "adequate food, shelter, clothing, and medical care." *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982). "The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders

him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *DeShaney v. Winnebago Cty. Dept. of Social Servs.*, 489 U.S. 189, 199-200 (1989) (emphasis in original).

The scope of the government's duty depends on the purpose of confinement. The government's obligations with respect to convicted prisoners are the least onerous. Incarcerated in institutions designed to punish, and shielded only by the Eighth Amendment's prohibition against "cruel and unusual" punishment, prisoners are entitled solely to the "minimal civilized measure of life's necessities." *Foster v. Runnels*, 554 F.3d 807, 812 (9th Cir. 2009) (internal quotation marks omitted).

The Constitution guarantees more favorable treatment to detainees awaiting criminal trial. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983). Because such individuals have not yet been convicted, their rights are secured by the Due Process Clause, which "requires the government to do more than provide the minimal civilized measure of life's necessities." *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004) (internal citation and quotation omitted). Instead, the government must ensure that pretrial detainees are not subjected to conditions that "amount to punishment." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

This focus on "'punishment' does not mean that proof of intent (or motive) to punish is required," though such proof would suffice. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473-74 (2015); *accord Castro v. Cty. of L.A.*, 833 F.3d 1060, 1069-70 (9th Cir. 2016) (en banc) (recognizing that whether conditions amount to "punishment" requires application of an objective standard), *cert. denied*, 137 S. Ct. 831 (2017). "Rather, to constitute punishment, the harm or disability caused by the government's action must either significantly exceed, or be independent of, the inherent discomforts of confinement." *Demery v. Arpaio*, 378 F.3d 1020, 1030 (9th Cir. 2004). Conditions unrelated to "legitimate governmental objectives," or even excessively harsh in relation to such legitimate objectives, qualify as "punishment" proscribed by the Constitution. *Kingsley*, 135 S. Ct. at 2474; *Bell*, 441 U.S. at 539 n.20.

Civil detainees, in turn, are entitled to even more "considerate treatment." *Jones*, 393 F.3d at 932 (quoting *Youngberg*, 457 U.S. at 321-22). Due process "requires that the nature and duration of [their] commitment bear some reasonable relation to the purpose for which [they] are committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). At the "bare minimum," civil detainees—like individuals held pending criminal trial—cannot be "subjected to conditions that 'amount to punishment.'" *Jones*, 393 F.3d at 932. And because civil detainees are entitled to more favorable treatment than criminal detainees, the conditions prevailing in jails

and prisons establish the minimum requirements: if a civil detainee is "confined in conditions identical to, similar to, or more restrictive than those in which his criminal counterparts are held," then he is presumptively "being subjected to 'punishment'" in violation of the Constitution. *Id.*; *see id.* at 933 ("[P]urgatory cannot be worse than hell.").

It bears emphasis, moreover, that the prevailing conditions in jails represent the constitutional *floor* for civil detainees. Comparing the conditions that face civil detainees to those facing criminal detainees can minimize the rights of civil detainees—a court may be tempted to simply presume that the constitutional standards established for criminal detainees should translate directly to the civil context. But civil detainees are entitled to even better treatment, and any deprivations must be justified by some aspect of the purpose for which they are detained. *Id.* at 932-33. The government cannot satisfy its constitutional obligations simply by meeting the minimal standards that govern in the criminal context.

B. Plaintiffs' Treatment In The Tucson Sector Stations Is Inconsistent With Due Process

Given the foregoing, there can be little question that the conditions of confinement in the Tucson Sector stations contravene the Constitution. The individuals held in these facilities are not criminals, or even charged; they are civil detainees entitled to the full protection of the Due Process Clause. *Zadvydas v.*

Davis, 533 U.S. 678, 693 (2001); *see Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012) ("mere unauthorized presence in the United States is not a crime"). Thus, not only must the government provide them with the basic necessities of life afforded to *all* detainees, it must ensure they are accorded the more "considerate treatment" that their civil status demands. *Jones*, 393 F.3d at 932 (internal quotation marks omitted).

But Defendants do nothing of the sort. Indeed, Defendants fail to provide these individuals—many of whom are detained in these facilities for 72 hours or longer (*supra* p. 6)—with proper medical care, beds, nutritional food, basic hygienic materials, or an opportunity to adequately bathe. As even Assistant Chief Patrol Agent George Allen—Defendants' primary witness at the evidentiary hearing—acknowledged, someone arrested for armed robbery and booked into a local jail would "[a]bsolutely" enjoy better conditions of confinement than those suffered by the civil detainees at the Tucson Sector stations. ER181.

No legitimate governmental objective is or could be served by requiring Plaintiffs to endure such deprivations. The government's purpose in holding individuals in these facilities is to process them for release or transfer to another agency. ER590. Denying these civil detainees adequate medical care and screening, requiring them to sleep on the floor, depriving them of showers and other basic hygienic needs—none of this treatment has any "reasonable relation to

the purpose for which [they] are committed." *Jackson*, 406 U.S. at 738. Nor can other legitimate goals, such as maintaining security or effectively managing the facilities, justify such treatment. *Jones*, 393 F.3d at 932 (describing such "[l]egitimate, non-punitive government interests"). Plaintiffs can be processed in a secure and efficient environment without being subjected to inhumane conditions of confinement.

Instead, the sole justifications Defendants offer for treating class members in this fashion are economic: it would cost money to provide adequate medical care, appropriate sleeping arrangements, or showers. *E.g.*, ER592. But of course, the same might be said of any prison, jail, or other detention facility—it would always be easier (and cheaper) to deny detainees medical treatment, sleeping accommodations, and showers. For that reason, as this Court has repeatedly held, the government cannot justify such continuing deprivations by invoking fiscal concerns. *See, e.g.*, *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) (en banc) ("Lack of resources is not a defense to a claim for prospective relief because prison officials may be compelled to expand the pool of existing resources in order to remedy continuing Eighth Amendment violations."); *Wright v. Rushen*, 642 F.2d 1129, 1134 (9th Cir. 1981) (similar). "Unconstitutional conditions cannot be tolerated because constitutional requirements are difficult for [Defendants] to fulfill." *Lareau v. Manson*, 651 F.2d 96, 110 n.14 (2d Cir. 1981).

Accordingly, as further detailed below, Due Process requires that civil immigration detainees be provided with medical screening conducted by properly trained staff, with beds, and with the means to ensure their personal hygiene, including showers. No government purpose can justify the denial of these basic needs.

II. THE DISTRICT COURT COMMITTED LEGAL ERROR IN FAILING TO ORDER DEFENDANTS TO PROVIDE CONSTITUTIONALLY ADEQUATE MEDICAL CARE

A. The District Court Erroneously Concluded That Unqualified Border Patrol Agents Can Control Access To Medical Care

As the district court properly recognized, the Constitution entitles all detainees to "a system of ready access to adequate medical care." *Hoptowit v. Ray*, 682 F.2d 1237, 1253-54 (9th Cir. 1982); *see* ER27. This rule applies whether individuals are detained "for a term of life" or "merely for the night." *Runnels v. Rosendale*, 499 F.2d 733, 736 n.3 (9th Cir. 1974) (internal quotation marks omitted); *see City of Canton v. Harris*, 489 U.S. 378, 381, 392 (1989) (detainee may have constitutional claim for inadequate care even if she "was released from custody" "[a]fter about an hour").

But the district court was mistaken as to *who* may serve as an appropriate gatekeeper to such medical care. The district court concluded that medically untrained, unqualified Border Patrol agents may both: (1) conduct medical screening at intake, and (2) determine class members' access to medication. ER30.

The district court erred as a matter of law in both respects, because the Constitution requires that these critical tasks be performed by qualified medical professionals. *Hoptowit*, 682 F.2d at 1253 (district court's determination regarding the constitutionally permissible qualifications of personnel making medical decisions is a "conclusion[] of law"). In making these legal errors, the district court necessarily abused its discretion. *Zepeda v. I.N.S.*, 753 F.2d 719, 724 (9th Cir. 1983).

1. Medically untrained border patrol agents cannot perform constitutionally adequate medical screening

The district court fundamentally erred by leaving the medical screening of detainees to either their own self-reporting or the suspicions of untrained law enforcement agents. The constitutional right to adequate medical care requires the government to provide those it detains with treatment by trained individuals who are capable of rendering professionally responsible medical diagnoses. *Toussaint v. McCarthy*, 801 F.2d 1080, 1111-12 (9th Cir. 1986) (right to adequate care violated if "unqualified personnel regularly engage in medical practice"); *Hoptowit*, 682 F.2d at 1252 (same). At the intake stage, this right to competent treatment encompasses a right to prompt screening by medical staff, which is necessary to identify health emergencies, medication needs, and contagious diseases requiring quarantine. *Gibson v. Cty. of Washoe*, 290 F.3d 1175, 1187-91 (9th Cir. 2002).

Thus, in *Gibson*, this Court held that inadequate jail intake screening violates detainees' right to medical care. *Id.* Although the county in that case had implemented policies requiring "medical staff" to screen detainees, it delayed screening for "combative" individuals, which meant that many detainees with urgent mental-health issues would not receive a prompt "evaluation by a trained medical staff member." *Id.* 1189-90. In reversing the grant of summary judgment in favor of the county, this Court made clear that the need for adequate, professional screening at the intake stage was a constitutional imperative. *Id.*

The Second Circuit reached a similar conclusion in *Lareau*. There, "no screening of incoming inmates [was] done by any medical personnel," and the "only intake medical evaluation [was] that of a corrections officer who note[d] obvious medical or psychiatric problems." 651 F.2d at 102. The Second Circuit held that such untrained screening was constitutionally inadequate. *Id.* at 109. Indeed, particularly as to "communicable diseases," the "failure to adequately screen newly arrived inmates" threatened "the well-being of [all] inmates," and thus constituted "'punishment' in violation of the Due Process Clause." *Id.*

The Tenth Circuit has also held that the Constitution requires adequate medical screening. *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1319-20 (2002). In *Olsen*, the county had an "intake screening procedure for undefined mental illness or 'psychiatric disorders,'" but it allowed purportedly "'health trained correctional

deputies' to use their discretion in dealing with sundry 'mental disorders.'" *Id.* at 1310-11. As a result, the plaintiff received no care for his obsessive-compulsive disorder during the several hours he was detained. *Id.* The Tenth Circuit held that, despite the officers' nominal status as "health trained," the county violated detainee's constitutional rights if it failed to adequately train those officers to identify and handle the symptoms of obsessive-compulsive disorder. *Id.* at 1319-20. The court explained that untrained officers could not be "left with discretion in determining whether an inmate suffers from a psychological disorder requiring medical attention." *Id.*

Here, Defendants have violated, and continue to violate, these well-established principles. Despite detaining 65,000 people in 2016 alone, the Tucson Sector stations admittedly do not have a *single* medical professional on their staff. ER171-172. Instead, class members "are preliminarily screened in the field by apprehending agents." ER597; ER115. With only basic first-aid training, these agents conduct "a basic field interview" of each individual, which involves just "brief questioning" and a "kind of pretty common sense looking at somebody, are they injured, are they bleeding, are they hobbling, is there something wrong with their leg, are they, you know, sweating profusely, coughing." ER98-99; ER116; ER810. After arriving at "the facility, the same type of thing is done," although agents may "ratchet it up a little bit further" by employing "a checklist." ER116.

The district court's order countenances such constitutionally inadequate practices. The district court readily acknowledged that Defendants' screening process was "cursory." ER30. Yet the district court nevertheless allowed untrained Border Patrol agents to continue screening class members so long as: (1) agents use the same "Medical Screening Form" at all stations; and (2) the form is modified to comply with TEDS by including questions about "physical and mental health concerns," "prescription medications," and "pregnancy and whether a detainee is nursing." ER30.

But because this screening process will still be administered by agents lacking medical training, the district court's order does not address the principal constitutional problem. As a result, the policies the district court approved do not provide Plaintiffs constitutionally adequate medical screening—even if combined, and even if followed uniformly. The Constitution requires competent medical screening from trained, qualified personnel; reliance on class members' self-reporting and the suspicions of medically untrained agents is insufficient. *See, e.g.*, *Gibson*, 290 F.3d at 1187-90.

2. Medically untrained border patrol agents cannot provide constitutionally adequate care with respect to medication

Untrained Border Patrol agents are also constitutionally prohibited from acting as the gatekeepers to Plaintiffs' medication. The Constitution guarantees individuals meaningful access to medicine while in custody. *Lolli v. Cty. of*

Orange, 351 F.3d 410, 420 (9th Cir. 2003) (barring government from denying insulin to "detainee whom it has reason to believe is diabetic"); *Tolbert v. Eyman*, 434 F.2d 625, 626 (9th Cir. 1970) (prohibiting government from denying inmate "authorized medicine that he needed to prevent serious harm to his health"). Meaningful access to medicine requires that trained healthcare professionals safeguard and dispense medications. *Hoptowit*, 682 F.2d at 1252-54 (holding that prisoners' constitutional rights violated by allowing "inadequately trained" staff to "dispense medications"); *see Toussaint*, 801 F.2d at 1111-12 (holding that constitutional right to medical care is violated if "unqualified personnel regularly engage in medical practice," like dispensing medication).

Accordingly, the government may not allow untrained law-enforcement officers to confiscate medication without providing immediate access to those medicines when necessary—regardless of how long an individual is held. *See Gibson*, 290 F.3d at 1189-90; *see also Mitchell v. Aluisi*, 872 F.2d 577, 578-81 (4th Cir. 1989) (Wilkinson, J.) (confiscating medication may be unconstitutional even if detention lasted only "three and one-half hours"). Thus, in *Gibson*, this Court held that a policy requiring the confiscation of detainees' prescription medication at the intake stage "exacerbated" the constitutional violation resulting from a lack of medical screening. 290 F.3d at 1189. The policy required officers to confiscate and turn over to medical staff any medication found on a detainee, and then

required staff to secure the medication or designate it "for follow up care." *Id.* But because the policy "did not include using the medication to determine and alleviate the arrestee's *immediate* medical needs," the policy contributed to the detainee's constitutional injury. *Id.*

The district court's order will permit Defendants' treatment of Plaintiffs to continue to fall below constitutional standards. It is undisputed that Border Patrol agents routinely confiscate and withhold the medications of class members, or otherwise deny them access to medicine during confinement. ER511-512. In one particularly notable instance, agents confiscated prescription pain medication from a woman—who was seven-months pregnant and suffering from a dislocated ankle—even though she was prescribed that medication at a U.S. medical facility immediately before being taken to the station. ER653-654. The agents withheld the pregnant woman's medication even though she "yelled from the pain and begged for the pills," telling her not to cry because she "was just going to be deported." ER653-654.

The record is replete with comparable evidence, including:

- The government confiscated and withheld a woman's "medication for an ovarian cyst" for the entire "12 hours" she was confined, even though she "had the prescription in [her] bag." ER624.

- The government confiscated and withheld a woman's migraine-headache medicine after she and her three-year-old daughter turned themselves in to border patrol. ER648-649.

- The government ignored a man's plea for the prescription medication he needed to treat a painful heart condition. ER616.

The district court, however, concluded that Defendants need only ask class members questions about prescription medications at the intake stage and then follow TEDS thereafter. ER30. In so holding, the district court failed to recognize the government's constitutional obligations. TEDS permits detainees to access their medication during "general processing" if—but *only* if—the medication was "prescribed in the United States, validated by a medical professional if not U.S.-prescribed, or in the detainee's possession during general processing in a properly identified container with the specific dosage indicated." ER744; *see* U.S. Customs and Border Protection, *National Standards on Transport, Escort, Detention, and Search* § 4.10 (Oct. 2015), https://www.cbp.gov/sites/default/files/documents/cbp-teds-policy-20151005_1.pdf (last checked March 30, 2017). Unless a detainee is carrying a labeled U.S. prescription or is able to have her medication verified by U.S. doctors (which few if any class members likely are), the government has *no* policy regarding the dispersal of her or her children's medication while in custody. ER744. Thus, the district court's order allows Border Patrol agents to continue to confiscate, withhold, and dispense at their discretion potentially life-saving medication—despite having no medical licensing or training. That contravenes

this Court's decisions. *Toussaint*, 801 F.2d at 1111-12; *Hoptowit*, 682 F.2d at 1252-54.

B. Plaintiffs Are Entitled To Preliminary Relief Requiring That Qualified Medical Professionals Perform These Critical Tasks

Once the district court's legal errors are taken into account, it is plain that Plaintiffs are entitled to greater preliminary relief than was granted them. The district court's order should be modified to ensure that qualified medical professionals conduct medical screening and make the critical determinations regarding the confiscation and replacement of medications. Plaintiffs have established each of the requirements for such preliminary relief.

First, Plaintiffs have established a likelihood of success on the merits. As explained above, the Constitution requires that trained medical staff screen detainees and secure access to prescription medication. *See supra* pp. 34-40. And there is no factual dispute as to whether Defendants meet these obligations; indeed, the Tucson Sector stations employ no medical professionals at all. ER170-171; *see also* ER120 (acknowledging Border Patrol agents are the "conduit" to medical care).

Second, Plaintiffs will suffer irreparable harm if the district court's order is not modified. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres*, 695 F.3d at 1002 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). That is particularly true when

(as here) the government continues to deny that it has violated any constitutional rights. *Id.* As the district court found, Plaintiffs presented substantial evidence that the government needlessly exposed them to countless "medical risks associated with being unable to continue taking prescription medications or being exposed to communicable diseases." ER30. But because the district court's order did not remove the primary source of this problem, Plaintiffs continue to face these constitutionally unacceptable risks.

Third, the balance of equities favors Plaintiffs. As this Court has held, the government "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez*, 715 F.3d at 1145. And when the choice is "between financial concerns and preventable human suffering," this Court has "little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor." *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) (holding that "physical and emotional suffering" are "far more compelling than the possibility of some administrative inconvenience or monetary loss to the government").

Fourth, granting Plaintiffs preliminary relief against these unconstitutional practices is also in the public interest. Indeed, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994), cited with approval in *Sammartano v. First Judicial District Court*, 303 F.3d 959 (9th Cir. 2002). That

maxim holds particularly true here. Preventing the spread of communicable diseases through adequate medical screening is undoubtedly in the public interest. Preventing the unnecessary pain and suffering of immigrant detainees through adequate medication policies is likewise in the public interest. And while the public also has an interest in the enforcement of its immigration laws, that interest is not jeopardized by an appropriate preliminary injunction in this case: nothing in federal immigration law or policy justifies—much less compels—inadequate medical screening or a lack of meaningful access to medication. *Arizona v. United States*, 567 U.S. 387, 132 S. Ct. 2492, 2499 (2012) ("Discretion in the enforcement of immigration law embraces immediate human concerns."). The public interest thus warrants enjoining the government's callous violation of these fundamental constitutional rights.

III. HAVING CORRECTLY HELD THAT DUE PROCESS REQUIRES PROVIDING THE DETAINEES WITH BEDS, THE DISTRICT COURT SHOULD NOT HAVE ALLOWED THAT UNCONSTITUTIONAL DEPRIVATION TO CONTINUE

The district court's refusal to order Defendants to provide Plaintiffs with beds should also be reversed. The district court properly identified the correct legal rule, expressly recognizing that this Court's precedent requires that detainees be provided with beds *and* mattresses and that the "use of floor mattresses . . . is unconstitutional 'without regard to the number of days a prisoner so confined.'" ER16 (citations omitted). But the district court then directed Defendants to do

exactly what it had acknowledged to be unconstitutional, ordering Defendants to provide "floor mattresses"—more accurately, mats that are at best an inferior approximation of mattresses—and floor mattresses *only*. The district court abused its discretion in allowing Defendants to continue to inflict such plainly unconstitutional conditions on the individuals it detains.

A. The District Court Correctly Determined That The Constitution Requires That Civil Detainees Held Overnight Be Given Mattresses And Beds

The district court got the law right: forcing civil detainees to sleep overnight on the floor—with or without a mattress—violates Due Process. As this Court held in *Thompson v. City of Los Angeles*, "a jail's failure to provide detainees with a mattress *and* bed or bunk runs afoul of the commands of the Fourteenth Amendment." 885 F.2d 1439, 1448 (9th Cir.1989) (emphasis added), *overruled on other grounds by Bull v. City & Cty. of San Francisco*, 595 F.3d 964, 980-81 (9th Cir. 2010) (en banc).

This constitutional right to sleep in a bed is triggered whenever a pretrial or civil detainee is held overnight. For example, the plaintiff in *Thompson* was forced to spend only two nights on a cell floor, and yet he was still deemed entitled to a bed. *Id.* This Court's holding—that the "uncontroverted allegation that [Thompson] was provided with neither a bed nor even a mattress unquestionably

constituted a cognizable Fourteenth Amendment claim," *id.*—did not turn on how many nights an individual is detained.

The decisions on which *Thompson* relied confirm this understanding. In *Lareau*, the Second Circuit upheld the district court's determination that the overcrowded conditions at the Hartford Community Correction Center violated the constitutional rights of pretrial detainees and sentenced inmates alike. 651 F.2d at 109-11. On the issue of floor mattresses, the court brooked no exceptions and set no temporal limits. Characterizing the use of floor mattresses as "egregious," it held the practice unconstitutional "without regard to the number of days for which a prisoner is so confined." *Id.* at 105. It issued a "blanket prohibition . . . against the quartering of inmates on mattresses on cell floors," a prohibition that (unlike the other constitutional requirements identified) was categorical and not subject to an emergency exception. *Id.* at 108.

Similarly, in *Union County Jail Inmates v. Di Buono*, the Third Circuit addressed conditions of confinement at New Jersey's Union County Jail that resulted from a "statewide prison overcrowding emergency." 713 F.2d 984, 986 & n.1 (3d Cir. 1983). The district court held that the "totality of circumstances resulting from overcrowding at the Jail, and *most notably forcing pre-trial detainees to sleep on mattresses placed on the floor*, constituted a violation of detainees' due process rights." *Id.* at 988–89 (emphasis added). Although the

Special Master's report concluded that "requiring detainees to sleep on mattresses laid adjacent to toilets in single cells, *for more than a few days*" constituted punishment in violation of the Fourteenth Amendment, its recommendation was categorical: "the floor mattress practice should be eliminated." *Id.* at 994 & n.11 (emphasis added) (citation omitted). The district court and the Third Circuit agreed, condemning in no uncertain terms the "unsanitary and humiliating practice of forcing detainees to sleep on mattresses placed either on the floor adjacent to the toilet and at the feet of their cellmates, or elsewhere in the Jail." *Id.* at 996.

Finally, in *Anela v. City of Wildwood*, six women were arrested at 11:15 P.M. and confined in unfurnished holding cells until 11 A.M. the next morning. 790 F.2d 1063, 1064, 1069 (3d Cir. 1986). Although the district court dismissed their claim, the Third Circuit reversed, holding that forcing pretrial detainees to sleep on holding cell floors for *one night* "constituted privation and punishment in violation of the Fourteenth Amendment." *Id.*

As these decisions make plain, jail inmates are entitled to beds even when their confinement lasts only a night. Plaintiffs, as civil detainees, cannot be subject to worse treatment. *Jones*, 393 F.3d at 932. To the contrary, if the Constitution requires that criminal detainees be given beds—and detainees in local jail are in fact given beds, as Defendants admitted (ER181-182; *see also* ER829)—then Plaintiffs are at the very least entitled to beds. *Id.*

Defendants cannot avoid this obligation simply by asserting that the Tucson Sector stations are intended to serve as mere processing centers, not detention centers. *E.g.*, ER130. Whatever the stations are supposed to be is not what they actually are. Defendants' aspirational descriptions of how the stations *should* work do not diminish their constitutional obligations to provide beds to those who are detained overnight. Defendants might well address their ongoing constitutional violation by expediting processing times so that Tucson Sector detainees no longer require beds. But because the undisputed facts show that class members are often held for days, the stations cannot be compared to the short-term holding cells used in jails or police stations where individuals are held for mere "hours," as the district court recognized. ER18; *see also Anela*, 790 F.2d at 1064, 1069 (police station booking facility required to provide beds when detainees held overnight).

Nor can Defendants evade their constitutional obligations by asserting that it might be "expensive" to retrofit the Tucson Sector stations to provide for beds (or to otherwise ensure that Plaintiffs have beds through, for example, faster processing). ER592. Such a "basically economic" interest—an interest, essentially, "in housing more prisoners without creating more prison space"—cannot justify forcing civil detainees to sleep on the floor. *Lareau*, 651 F.2d at 104; *see supra* p. 32.

B. The District Court Abused Its Discretion In Failing To Direct The Government To Remedy This Constitutional Violation

Despite correctly recognizing these governing legal principles (ER16-18), the district court permitted Defendants to continue to violate the Constitution. ER20. The district court did not explain why it failed to enforce the constitutional mandate entitling detainees to beds, as opposed to mere floor mats. Nor could it have offered any explanation that would withstand scrutiny. Quite to the contrary, each of the preliminary injunction factors weighed heavily in favor of Plaintiffs' request for more fulsome relief. Because the district court did not and could not offer any logical reason for not requiring Defendants to begin immediately complying with the Due Process Clause, it abused its discretion. *Hinkson*, 585 F.3d at 1261 ("the court of appeals must reverse if the district court's determination is 'illogical or implausible'").

To start, there can be no doubt that Plaintiffs have demonstrated a likelihood of success on the merits. As the district court recognized, the law is clear: civil detainees are entitled to beds. ER16. There is, moreover, no factual dispute regarding Defendants' noncompliance with this constitutional requirement: Defendants do not provide beds to any class members, no matter how long they are held. ER122; ER782. There is no remaining uncertainty—Defendants are engaged in a continuing violation of the Constitution.

Nor can the district court's refusal to remedy this ongoing constitutional violation be justified on the ground that Plaintiffs will suffer no irreparable harm. Again—as the district court expressly recognized (ER31)—a constitutional violation *always* causes irreparable harm. *Melendres*, 695 F.3d at 1002. And as it stands, the district court's order does little to remediate the deplorable conditions depicted in the photographs above. *See supra* pp. 9-10. That class members now have mats on which to lie may mitigate, to some extent, the extreme cold and obvious discomfort they suffered when they were forced to sleep, largely unclothed, directly on the hard concrete. ER19. But they will still be lying on the floor next to toilets and garbage receptacles, huddled together cheek to jowl and head to toe. The Constitution forbids such conditions of confinement, *Thompson*, 885 F.2d at 1448, yet Plaintiffs continue to suffer the harm of being forced to endure them.

If the district court's decision to order Defendants to provide mats alone rested instead on a determination that the balance of equities or the public interest weighed against more complete relief, that determination was equally illogical. Defendants may well need to spend time and money to ensure they comply with their obligation to provide beds. ER592. But as discussed (*see supra* p. 32), such "financial concerns" cannot outweigh the harms caused when the government violates constitutional rights, *Lopez*, 713 F.2d at 1437, and the public interest

necessarily favors the protection of such rights, *Sammartano*, 303 F.3d at 974. There is no reason for Plaintiffs to suffer through any unnecessary delay before their constitutional rights are vindicated. *Cf. Lareau*, 651 F.2d at 111 & n.15 (ordering that the mandate issue immediately because "it is important that the appellants take steps immediately to rectify the conditions considered by all members of the court to be violative of detainees' rights").

"In fashioning a remedy for constitutional violations, a federal court must order effective relief." *Toussaint*, 801 F.2d at 1087; *see Melendres*, 784 F.3d at 1265 ("injunctive relief must be tailored to remedy the specific harm alleged") (internal quotation marks omitted). The district court's order in this case does not accomplish that goal. By failing to direct the government to begin this remedial process, the district court abused its discretion. This Court should remand with instructions that the district court order Defendants to present it with a plan as to how they will ensure that detainees held overnight have beds and mattresses rather than just floor mats.

IV. THE DISTRICT COURT COMMITTED LEGAL ERROR IN FAILING TO RECOGNIZE THAT CIVIL DETAINEES ARE ENTITLED TO SHOWERS

A. Plaintiffs' Constitutional Right To Adequate Hygiene Includes The Ability to Shower

The district court acknowledged the government must provide those in its custody with adequate resources to ensure their personal hygiene. ER20; *see*

Keenan v. Hall, 83 F.3d 1083, 1091 (9th Cir. 1996); *Hoptowit*, 682 F.2d at 1246. Its understanding of what this constitutional right to hygiene encompasses, however, was unduly narrow. The district court believed that Defendants may satisfy their constitutional obligations merely through the provision of adult body wipes. ER24-25; ER1, ER3. But civil detainees such as Plaintiffs are constitutionally entitled to have access to showers, and thus the district court erred as a matter of law. *Zepeda*, 753 F.2d at 724.

Indeed, it has long been established that *prisoners*—who are shielded only by the Eighth Amendment and not the more protective Due Process Clause—are entitled to showers. Thus, in *Toussaint*, this Court affirmed a district court order requiring that a state prison provide even those inmates in segregation with shower facilities that have "adjustable valves for hot and cold water." 801 F.2d at 1110-11. Such facilities were necessary to "reduce the adverse effects of confinement in a filthy environment." *Id.*

In concluding that Plaintiffs are entitled to less considerate treatment, the district court emphasized the "temporary" period of time in which Tucson Sector detainees are forced to go without showers. ER24. In support, it cited a pair of out-of-Circuit decisions concluding that prisoners and criminal detainees could be denied showers for three days or more without violating the Constitution. ER24-25 (citing *Shakka v. Smith*, 71 F.3d 162, 168 (4th Cir. 1995), and *Griffin v. S.*

Health Partners, Inc., No. 1:12CV-P174-M, 2013 WL 530841, at *9 (W.D. Ky., Feb. 11, 2013)).

But *this* Court's precedent requires more of the government even as to convicted prisoners. In *Toussaint*, this Court affirmed an injunction that guaranteed prison inmates showers at least "three times per week," a more frequent rate than that contemplated in either of the non-binding decisions on which the district court relied. *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1399 (N.D. Cal. 1984); *see Toussaint*, 801 F.2d at 1111.

More important, Plaintiffs here are *civil* detainees. As such, they are entitled to "'more considerate' treatment than [their] criminally detained counterparts." *Jones*, 393 F.3d at 932 (quoting *Youngberg*, 457 U.S. at 321-22). In denying civil detainees the ability to shower altogether even though their detention may last three days or even longer, Defendants are not providing "more considerate treatment." To the contrary, individuals detained in jail generally receive far *better* treatment: industry standards require that jail inmates have access to showers at least once a day. ER454-455. Defendants' refusal to provide the individuals in their custody with even this minimal standard of cleanliness is for that reason alone presumptively unconstitutional. *Jones*, 393 F.3d at 932.

As a practical matter, moreover, Plaintiffs have even greater need for access to showers than do the jail inmates who regularly receive them. Class members

often reach the Border Patrol stations after walking through the Arizona desert for days or even weeks, and they arrive covered in dirt. ER454; ER22. Then, still wearing their soiled clothes, they are herded into the overcrowded holding cells, where they are pressed together with numerous other individuals in a similarly unhygienic state. ER20; ER831. The "adult body wipes" the district court countenanced cannot be sufficient in this context. These wipes are advertised as a "great alternative" to showers for "bicyclists, runners, campers, travelers, hikers, commuters, golfers, picnics, beaches, playgrounds, motorcyclists, [and] after the gym." ER54. Although Plaintiffs might generously be categorized as "travelers" or "hikers," their hygienic needs undoubtedly exceed those of a person completing a round of golf. Nor do Plaintiffs have the requisite privacy, or even space, to use these wipes effectively.

Such a deprivation cannot be justified. No legitimate government purpose is furthered by refusing to permit detainees to shower. Detainee processing is not made more accurate, nor is Border Patrol station security advanced, by depriving class members the opportunity to properly clean themselves. Instead, the only government interest that might by furthered by this practice is financial—and that interest, again, cannot justify substandard conditions of confinement. *Peralta*, 744 F.3d at 1083.

B. Plaintiffs Are Entitled To Preliminary Relief Requiring The Provision Of Showers

Because the district court misunderstood the underlying constitutional right, it committed legal error, thus necessarily abusing its discretion in granting Plaintiffs only partial relief. *Harris*, 366 F.3d at 760. For many of the same reasons detailed above (*see supra* pp. 41-43, 48-50), Plaintiffs have established each of the prerequisites for the more expansive relief they seek.

Because it is undisputed that Defendants do not provide showers in at least six of the eight Tucson Sector stations, Plaintiffs have established both a likelihood of success on the merits and the threat of irreparable harm. Plaintiffs have shown the Constitution requires that Defendants provide them with showers. *Supra* pp. 50-53. As such, Plaintiffs have necessarily demonstrated they will succeed on the merits. *See Rodriguez*, 715 F.3d at 1138-39. And depriving Plaintiffs of this constitutional right undoubtedly causes irreparable harm. That is true both because the denial of a constitutional right always produces irreparable injury, *Melendres*, 695 F.3d at 1002, and because providing showers will improve hygiene and therefore prevent the potential spread of communicable disease, including MRSA and skin ailments. ER439. Plaintiffs should not continue to be forced to endure such health risks.

Likewise, given the constitutional rights at stake, the balance of equities and the public interest favor Plaintiffs—whatever the budgetary considerations that

Defendants might invoke. *E.g.*, *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014) ("[B]y establishing a likelihood that Defendants' policy violates the U.S. Constitution, Plaintiffs have also established that both the public interest and the balance of the equities favor a preliminary injunction."). Defendants have suggested that a strict 12-hour deadline for all showers might produce certain administrative complications. ER55. While such considerations might provide reason to afford Defendants flexibility in devising a plan to provide showers, it cannot justify their continued refusal to provide showers to anyone in six of the eight Tucson Sector stations. ER54, ER60. This Court should ensure that Defendants immediately begin to take the actions the Constitution requires them to take.

CONCLUSION

For the foregoing reasons, the district court's order should be reversed insofar as it grants Plaintiffs only partial preliminary relief. The case should be remanded with instructions directing the district court to issue a preliminary injunction that will also secure Plaintiffs' constitutional rights to adequate medical care, bedding, and showers.

Dated: March 30, 2017

Respectfully submitted,

s/ James R. Sigel

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STATEMENT OF RELATED CASES PURSUANT TO CIRCUIT RULE 28-2.6

Counsel for Plaintiffs-Appellants are unaware of any related cases pending in this Court.

Dated: March 30, 2017 s/ James R. Sigel

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 30, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 30, 2017

s/ James R. Sigel
James R. Sigel

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Signature of Attorney or Unrepresented Litigant: s/ James R. Sigel

Date: 3/30/2017

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