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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INTRODUCTION

Plaintiffs brought this suit because of the unconscionable conditions of confinement in the eight Tucson Sector Border Patrol stations. As detailed in Plaintiffs' opening brief, the evidence demonstrated that class members were packed into holding cells for hours and even days at a time, often without the space to lie down, and with only a thin foil blanket (if that) between them and the concrete floor. They were exposed to any number of unsanitary and unhygienic practices. And they were deprived of adequate food, water, warmth, medicine, and medical care. The district court's order granting Plaintiffs partial preliminary relief attempted to mitigate some, but not all, of these egregious harms.

Defendants would prefer to be free of even these minimal restrictions. They insist the district court applied the wrong legal standard in concluding these deplorable conditions contravened the Fifth Amendment, and that the court should have been more deferential to Defendants' purported "legitimate objectives" for treating Plaintiffs in this inhumane fashion. They also argue that the district court abused its discretion in directing Defendants to take the minimal step of providing floor mats to individuals held for more than 12 hours, contending that class members should be relegated to sleeping directly on the floor (assuming they even have the space to lie down).

Try as they might, however, Defendants cannot evade their constitutional obligation to provide the individuals they detain with adequate conditions of confinement. The district court committed no legal error in concluding as much; to the contrary, it expressly identified and applied the very standard Defendants claim it ignored. And the district court likewise committed no abuse of discretion in tailoring its remedial order to address the constitutional harms suffered by class members detained for a sufficiently long period of time to be in need of sleep.

But the district court's order did not go far enough. Defendants continue to violate class members' due process rights to adequate medical care, humane sleeping accommodations, and proper hygiene. Defendants' various attempts to invent some sort of "Border Patrol" exception to these constitutional requirements are unavailing: Plaintiffs, as civil detainees, are entitled to better treatment than is accorded to criminal detainees, not the substantially worse conditions they still endure. Far from vacating the district court's order entirely, this Court should instead reverse it to the extent that it allows Defendants to continue indefinitely to contravene their constitutional obligations to provide Plaintiffs with adequate medical care, beds, and showers.

RESPONSE TO DEFENDANTS' CROSS-APPEAL IN NO. 17-15383

COUNTERSTATEMENT OF THE ISSUES

1. Whether the district court correctly identified the legal standard governing civil detainees' constitutional right to adequate conditions of confinement.

2. Whether the district court acted within its discretion in tailoring its remedial order on sleeping mats to class members' need for sleep.

STATEMENT OF THE CASE

Plaintiffs rely on their previous statement of the case (Opening Br. 5-24).

SUMMARY OF ARGUMENT

I. The district court correctly identified the legal standards governing civil detainees' right to adequate conditions of confinement. Contrary to Defendants' contentions, *Bell v. Wolfish*, 441 U.S. 520 (1979) is of limited relevance here, as it applies to pretrial *criminal* detainees, not civil detainees such as Plaintiffs. *Bell* does, however, supply the standard for determining whether the conditions of confinement in the Tucson Sector stations are unconstitutional because they are "punitive." The district court both identified and applied *Bell* for just that purpose. Indeed, the district court expressly recognized that conditions of confinement amount to punishment if they are "excessive in relation to [a] legitimate governmental objective"—precisely the *Bell* standard Defendants invoke. ER12. The district court determined that Defendants are violating due process because

Defendants could point to no objectives that might actually justify the conditions of confinement at issue, not because it failed to recognize the legal relevance of legitimate governmental objectives.

The district court also properly compared the conditions in the Tucson Sector stations to those in jails and prisons. In contending otherwise, Defendants simply ignore binding precedent holding that the confinement of civil detainees in conditions worse than those experienced by criminal detainees is presumptively unconstitutional. The district court thus did not commit legal error in recognizing that class members are entitled to treatment that is at least as considerate, and that Defendants are violating the Constitution by instead subjecting them to worse.

II. The district court acted well within its discretion in requiring Defendants to provide sleeping mats to all class members detained for 12 hours or longer. Defendants assert that the 12-hour threshold is more burdensome than necessary to protect class members' rights. But as the district court found, class members who are held in the Tucson Sector stations for 12 hours will need to be able to lie down to sleep, and thus the remedy is directly tailored to the relevant constitutional harm. The district court did not abuse its discretion in requiring Defendants to respect this minimal subset of Plaintiffs' constitutional rights, notwithstanding Defendants' speculative concerns about delay and capacity issues—which are overstated in any event.

ARGUMENT

I. THE DISTRICT COURT IDENTIFIED AND APPLIED THE CORRECT LEGAL STANDARDS GOVERNING CIVIL DETENTION

As Plaintiffs explained in their opening brief (at 27-33), the Constitution compels the government to care for everyone it takes into custody. *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982). The source of that constitutional mandate and the corresponding scope of the government's obligations depend on the nature of the detainee's confinement. *Jones v. Blanas*, 393 F.3d 918, 931-33 (9th Cir. 2004). Civil detainees such as Plaintiffs are protected by the Fifth Amendment's Due Process Clause, and they are entitled to "more considerate treatment" than pretrial criminal detainees, who are in turn entitled to better treatment than convicted prisoners. *Id.* at 932 (internal quotation marks omitted). At a "bare minimum," Plaintiffs cannot be subjected to treatment that amounts to "punishment," *id.* at 932, with "punishment" defined to encompass conditions excessively harsh in relation to a legitimate governmental objective. *Bell*, 441 U.S. at 539 n.20; *see Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474 (2015).

Although the district court properly recognized these overarching principles (*see* ER11-12), Defendants now assert it applied the wrong legal standard. Defendants do not deny that Plaintiffs are civil detainees. Defs.' Br. 31. Nor do Defendants dispute that Plaintiffs' rights to adequate treatment are secured by the

Fifth Amendment. Defs.' Br. 31. Instead, relying on *Bell v. Wolfish*'s description of the standard governing the rights of pretrial criminal detainees, Defendants insist that the district court erred both by failing to address the government's "operational concerns" and by considering the conditions prevailing at jails and prisons. In each respect, Defendants are mistaken.

A. The District Court Correctly Considered *Bell v. Wolfish*

Defendants' central contention is that the "district court erred by not evaluating Plaintiffs' constitutional claims under *Bell*." Defs.' Br. 38. But Defendants both misunderstand *Bell*'s significance and mischaracterize the district court's decision.

1. Bell *governs pretrial criminal detention, not civil detention*

Although it undoubtedly has some relevance here, *Bell* does not supply the governing standard for civil detention. Instead, in *Bell*, the Supreme Court addressed the "constitutionality of conditions or restrictions of *pretrial detention*"—specifically, the conditions then prevailing in New York City's federal jail. 441 U.S. at 535 (emphasis added). Emphasizing that a pretrial detainee "may not be punished prior to an adjudication of guilt," the Court held that "the proper inquiry is whether th[e] conditions amount to punishment of the detainee." *Id.* The Court proceeded to clarify that "if a particular condition or restriction of

pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Id.* at 539.

Defendants would extend this legal standard to *all* types of detention. They insist, for example, that "the critical question is whether detention conditions at Tucson Sector Border Patrol stations amount to 'punishment,'" citing both *Bell* and *United States v. Salerno*, 481 U.S. 739 (1987), another case involving the rights of pretrial detainees. Defs.' Br. 31. Similarly, Defendants insert the bracketed phrase "[civil detention]" in a lengthy quotation from *Bell* in which the Court was actually referring to the detention of a person "pending trial." Defs.' Br. 31 (quoting *Bell*, 441 U.S. at 537).

This Court, however, has correctly rejected the proposition that *Bell*'s "punishment" standard can be blindly imported into the civil detention context. As explained in *Jones*, "civil detainees retain greater liberty protections than individuals detained under criminal process." 393 F.3d at 931 (citing *Youngberg*, 457 U.S. at 321-22). They are therefore entitled to protections "*at least as great as* those afforded to an individual accused but not convicted of a crime." *Id.* at 932 (emphasis added). Accordingly, subjecting a civil detainee to "punishment" within the meaning of *Bell* surely violates due process: *Bell* establishes the "bare minimum" requirements for "an individual detained under civil process." *Id.* But *Bell* does not describe the limits of civil detainees' constitutional rights. Civil

detainees are entitled to more than just the absence of treatment that amounts to punishment—they are entitled to conditions of confinement that "bear some reasonable relation to the purpose for which [they] are committed." *Id.* at 933 (internal quotation marks omitted).

2. The district court considered and applied Bell

Bell's relevance here is thus limited to assessing whether Defendants' treatment of the class members amounts to constitutionally forbidden "punishment." *Bell*, 441 U.S. at 535; *Jones*, 393 F.3d at 932. Despite Defendants' protestations, the district court rightly applied *Bell* for that very purpose. Defendants thus cannot establish that the district court failed to "identif[y] the correct legal rule" in granting Plaintiffs preliminary relief. *Pimental v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (internal quotation marks omitted).

Even a cursory comparison of Defendants' brief and the district court's decision demonstrates that the court invoked the same legal standard Defendants now contend it ignored. Defendants insist, for example, that, under *Bell*, "in order to be permissible, restrictions must (1) have a legitimate, non-punitive purpose; and (2) not appear excessive in relation to that purpose." Defs.' Br. 32-33 (citing *Bell*, 441 U.S. at 538-39). The district court said the same: "a court may infer that the purpose of a particular restriction or condition is punishment if [(1)] the restriction or condition is not reasonably related to a legitimate governmental

objective or [(2)] is excessive in relation to the legitimate governmental objective." ER12 (citing, *inter alia*, *Bell*, 441 U.S. at 538-39). Likewise, Defendants contend that "legitimate, non-punitive government interests include maintaining jail security and effective management of the detention facility," and assert that correction officials' determinations regarding such interests warrant deference. Defs.' Br. 33 (citing *Bell*, 441 U.S. at 540, 546). Again, the district court said the same: "[m]aintaining institutional security and preserving internal order and discipline are essential goals," and "courts should ordinarily defer" to the judgments of correction officials regarding the achievement of these goals. ER12 (citing, *inter alia*, *Bell*, 441 U.S. at 540 n.23, 546); *see also Demery v. Arpaio*, 378 F.3d 1020, 1029 (9th Cir. 2004) (rejecting contention that district court "applied an erroneous legal standard" in paraphrasing *Bell* and condemning a jail's policy as an "exaggerated" response to purported security concerns).

The district court also applied this standard in Defendants' favor. Indeed, the district court was quite solicitous of Defendants' explanations for their treatment of Tucson Sector detainees (in Plaintiffs' view, overly solicitous). Plaintiffs, for example, challenged Defendants' practices of illuminating the holding cells 24 hours a day and subjecting class members to continuous, sleep-depriving noise. ER18-19. The district court, however, "accept[ed]" Defendants' assertions that the illumination is for legitimate "security reasons," and that the

constant noise is justified by the facilities' need "to provide 24-7 immigration processing." ER18-19. It therefore refused to enjoin either of these sleep-depriving practices—save for Defendants' policy of "scheduling one of the three burrito meals at 4:00 a.m.," for which the district court found "no security reason nor any reason related to the processing activities being conducted at these facilities." ER19.[1] Contrary to Defendants' assertions, the district court thus expressly "consider[ed] the Tucson Sector's unique law enforcement purpose and operational challenges." Defs.' Br. 38.

In contending otherwise, Defendants do not even identify which aspects of the district court's order, if any, enjoin specific practices that are justified by a particular legitimate governmental objective. Defs.' Br. 35-40. They are vague for a reason. *Bell* would put the burden on Defendants to come forward with at least "some evidence that their policies are based on legitimate . . . justifications." *Swift v. Lewis*, 901 F.2d 730, 732 (9th Cir. 1990). Defendants proffered security and

[1] Defendants wrongly suggest that the district court relied on the constant illumination of the hold rooms in determining that Defendants deprived Plaintiffs of their constitutional right to sleep. Defs.' Br. 22-23. But the district court expressly accepted Defendants' justification for this practice and neither criticized nor enjoined it. ER18-19. Although the district court did subsequently determine that "the law and the facts clearly favor Plaintiffs' position that Defendants are violating Plaintiffs' constitutional right to sleep," that conclusion was premised on other practices the district court did enjoin—including, most obviously, Defendants' failure to provide even mats on which class members may sleep. ER19-20.

management explanations for a handful of the policies challenged, such as the constant illumination (discussed above) and the practice of removing class members' outer layers of clothing to check for contraband. *E.g.*, ER104-105; ER126; ER172; SER904-905; SER917-918; SER950; SER952. But for the vast majority of the conditions of confinement at issue here, Defendants provided no cognizable justification for their inhumane treatment of the individuals held in the Tucson Sector stations.

Defendants' practice of compelling class members to sleep on the concrete holding-room floors provides a fitting illustration of that failure. No witness testified that Defendants' refusal to provide beds was the function of a security or similar concern. To the contrary, Defendants' witnesses acknowledged that beds *should* be available. *See* ER183 (Chief George Allen: "It's time to have that provided."); ER210 (Defendants' detention expert Richard Bryce: "I don't think it's appropriate to require someone to sleep on the floor.").

Instead of pointing to justifications for the absence of beds, Defendants offered excuses: the stations were not designed to serve as the detention centers they have become, and it would cost money to enable them to serve that function. *E.g.*, ER592; SER994. But of course, the government cannot justify the unconstitutionally overcrowded conditions of its prisons by asserting that they were originally designed to hold fewer people. *See Brown v. Plata*, 563 U.S. 493,

539 (2011). Likewise, here the district court correctly concluded that "Defendants cannot sidestep reality by relying on the structural limitations of the Border Patrol detention facilities, i.e., that they are not designed for sleeping." ER31. And as the district court also properly observed, the financial costs associated with fulfilling these obligations cannot validate Defendants' failure to meet them: "a deprivation of constitutional rights cannot be justified by fiscal necessity," and "the government may be compelled to expand the pool of resources to remedy a constitutional violation." ER9-10 (citing *Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 512 F.3d 112, 1126 (9th Cir. 2008) and *Peralta v. Dillard*, 774 F.3d 1076, 1083 (9th Cir. 2014) (en banc)). The district court did not commit legal error in recognizing these settled principles.

B. The District Court Did Not Err In Comparing These Detention Centers To Jails And Prisons

The district court also committed no legal error in comparing the stations to jails and prisons. The district court engaged in this analysis for a simple reason: as this Court's precedent makes abundantly clear, the conditions of confinement faced by criminal detainees establish the constitutional floor for the treatment of civil detainees.

Defendants ignore this binding precedent. They assert, for example, that the district court noted "without further analysis" that Plaintiffs are "entitled to 'more considerate treatment' than those who are criminally detained." Defs.' Br. 20

(quoting ER13). But the district court was simply repeating the standard this Court, in accordance with the Supreme Court's guidance, has established: an individual "detained under civil—rather than criminal—process" is "entitled to 'more considerate treatment' than his criminally detained counterparts." *Jones*, 393 F.3d at 932 (quoting *Youngberg*, 457 U.S. at 321-22); *accord*, *e.g.*, *Sharp v. Weston*, 233 F.3d 1166, 1172-73 (9th Cir. 2000).

Similarly, Defendants contend the district court provided "no justification" for looking to "standards designed for correctional institutions" in assessing the constitutionality of the conditions prevailing in these stations. Defs.' Br. 40. But again, the district court's analysis was directly grounded in case law. As this Court has held, if a civil detainee "is confined in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held, [this Court] presume[s] that the detainee is being subjected to 'punishment'" in violation of due process. *Jones*, 393 F.3d at 932. In other words, the conditions of confinement in the Border Patrol stations are presumptively unconstitutional if they are worse than those in jails or prisons—as Defendants have acknowledged is true of the conditions in the Tucson Sector stations. ER181. Defendants do not even attempt to reconcile their criticism of the district court's approach with this binding precedent.

Nor do Defendants identify any reason the civil detainees held in these stations should be subjected to *less* favorable treatment than individuals held pursuant to criminal process. Defendants focus primarily on the length of detention, asserting that people held in jails and prisons will often be confined for longer than the 12-72 hours that the class members here are typically detained. Defs.' Br. 35, 40. But criminal detainees in jails may often be held for similar lengths of time, or even less. *E.g.*, *City of Canton v. Harris*, 489 U.S. 378, 381 (1989) (considering medical treatment claim of individual held in jail for "about an hour"); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1448 (9th Cir. 1989) (jail detainees held for two nights), *overruled on other grounds by Bull v. City & Cty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc). Courts have made clear that such detainees are nevertheless entitled to conditions of confinement significantly better than those prevailing in the Tucson Sector stations. *E.g.*, *id.* (holding jail inmates are entitled to a mattress and a bed when held overnight). The district did not commit legal error by holding Defendants to such requirements. *See* ER17-18.[2]

[2] Defendants observe that Congress has defined "short-term detention" in the "Border Patrol processing centers" to be for a period of "72 hours or less." Defs.' Br. 22; *see* 6 U.S.C. § 211(m)(3). The relevance of this definition is a mystery. Even an individual confined for a "short term" is entitled to constitutionally adequate conditions of confinement, regardless of how "short-term" is defined by statute. And indeed, the cited provision demonstrates Congress's awareness of that

(Footnote continues on next page.)

Defendants' other purported justifications for subjecting Plaintiffs to harsher treatment than criminal detainees do not withstand even the most passing scrutiny. Defendants emphasize that the Tucson Sector stations are located "near the point of th[e class members'] apprehension" (Defs.' Br. 36)—but the same is generally true of jails. *E.g.*, *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 852 (9th Cir. 1992) (affirming population cap imposed on one of the City's local jails). Defendants also assert that the "characteristics and size of the population" in Border Patrol stations can vary, and that agents may be unsure prior to processing which particular individuals "may pose an imminent security threat." Defs.' Br. 36-37. Again, however, the very same (and often worse) is true of jails. *E.g.*, *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 326, 336 (2012) (describing the population variations that may occur in pretrial detention centers, and noting that "[j]ails can be even more dangerous than prisons because officials there know so little about the people they admit at the outset"). Likewise, Defendants contend that the Border Patrol's "broad authority over the border itself" has "no parallel in the criminal justice system." Defs.' Br. 38. That might surprise the officials exercising a State's sovereign power to punish those who transgress its laws. *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973) ("It is difficult to imagine an

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very obligation: Congress required inspections of "short-term detention" in Border Patrol processing centers and the issuance of "recommendations to improve the conditions of such facilities." *Id.* § 211(m)(6).

activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons."). In their effort to avoid responsibility, Defendants even attempt to tar the Plaintiffs as bad actors detained "because of their own choice[s]." Defs.' Br. 39. But most individuals held in this nation's jails and prisons are presumably so confined because of choices they made, and they are nevertheless entitled to humane conditions of confinement. *E.g.*, *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979).[3]

At base, Defendants' ultimate contention is that, unlike jails and prisons, these Border Patrol stations were not *designed* to serve as detention centers. *See* Defs.' Br. 39 ("function as waystations"). But as discussed above, the stations' intended use does not change what they are: places of confinement in which class members are often housed for what may be days at a time. *Supra* pp. 11-12; *see also* Defs.' Br. 39 (acknowledging that "processing individuals at the border takes longer than the booking process in pre-trial detention"). As the district court properly recognized, the Constitution requires Defendants to provide at least the level of treatment to the

[3] Defendants' insinuations in this regard also ignore the complex—and often heartrending—reasons why many individuals flee their home countries and risk their lives by walking through the Arizona desert. For all too many, their lives are at even greater risk in their home countries. *See Dawoud v. Gonzales*, 424 F.3d 608, 612-13 (7th Cir. 2005); *Colmenar v. INS*, 210 F.3d 967, 973 (9th Cir. 2000).

class members so housed that is accorded to criminal detainees, not the substantially worse treatment to which Plaintiffs are currently subjected. *Jones*, 393 F.3d at 932.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REQUIRING SLEEPING MATS FOR INDIVIDUALS DETAINED MORE THAN 12 HOURS

The district court acknowledged the clear holding of this and other courts: people held in custody must be provided with "a mattress and bed or bunk." ER16 (citing, *inter alia*, *Thompson*, 885 F.2d at 1448). Although it then inexplicably failed to require Defendants to provide the beds it recognized are constitutionally mandated (*see infra* pp. 38-44), the district court did impose the minimal requirement that Defendants furnish sleeping mats for all class members detained in the Tucson Sector stations for more than 12 hours. ER20.

Defendants now contend that this limited (indeed, insufficient) remedy represented an abuse of the district court's discretion. Defendants do not and cannot challenge the district court's underlying legal conclusion that due process requires the government to provide at least *some* means of sleeping to those it detains (though they dispute Plaintiffs' contention that beds are constitutionally required). *See* Defs.' Br. 40-44, 50-51. Instead, Defendants object to the district court's having drawn a line at the 12-hour mark. They offer a series of rationales

as to why meeting even this 12-hour sleeping-mat mandate—which is well below what the Constitution actually requires—is unduly burdensome.

Because the District Court identified and applied the correct legal standard, Defendants can prevail only if they show that the court's application of this standard was "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc) (internal quotation marks omitted). Defendants cannot satisfy that test, as the district court's choice of a 12-hour threshold was both logical and supported by the record.

A. The 12-hour Threshold Is Not Arbitrary Or Overly Rigid

The district court's decision to require mats for class members held more than 12 hours was grounded in what one might think is an uncontroversial notion: individuals held "in excess of 12 hours" "need to lie down to sleep." ER18. Indeed, Defendants do not appear to contest that after a certain number of hours any person needs to sleep, and they acknowledge that class members "may sleep while in Border Patrol custody." Defs.' Br. 41. But as the district court also expressly found, class members are not able to sleep if they are confined on cold concrete floors, or in spaces so crowded that some have no room to lie down. ER18. Accordingly, the district ordered that class members held for long enough

to require sleep be provided with the mats that would enable them to lie down. ER20.

The district court's decision to set the threshold at 12 hours is thus a logical reflection of basic human needs. Members of the Plaintiff class do not arrive at the Tucson Sector stations having only recently woken up. To the contrary, because the 12-hour clock begins to run only when the class members arrive at a Border Patrol station, ER4, they generally will have already been awake for a substantial period of time. Defendants note that several hours may elapse between an individual's apprehension and his or her arrival at a holding facility (Defs.' Br. 14); in fact, Defendants' witness testified that "oftentimes by the time we get someone to the station, we're approaching on 12 hours." ER102. Moreover, most class members will presumably have been awake for some period before they were apprehended. By the time they have been held for 12 hours in the Tucson Sector stations, then, class members will need to sleep. Indeed, that common-sense conclusion is reflected in Defendants' own guidance documents for the use of these hold rooms, which provides that "[w]herever possible, a detainee should not be held for more than 12 hours." ER372.

Defendants suggest that the district court should have allowed them a longer time horizon in providing mats, or should have tied the durational threshold to the time of day. Defs.' Br. 41. But depriving Plaintiffs of mats for a longer period—

as would the 24-hour standard Defendants requested below in their motion for reconsideration—would, as the district court found, be "arbitrary" and "not rationally related to the need to sleep and lie down." ER3. And especially given Defendants' repeated emphasis that class members arrive in the Tucson Sector stations at all hours of the day and night, and that these facilities operate "twenty-four hours a day, seven days a week," (Defs.' Br. 2, 42), it was entirely logical for the district court to tie the sleeping-mat obligation to the number of hours class members have been in custody: the duration of custody, rather than the particular time at which it occurs, is likely to reflect each class member's need for sleep.

B. The 12-hour Threshold Is Tailored To Plaintiffs' Constitutional Injury

Defendants' primary attack on this 12-hour requirement is that it is "more burdensome than necessary." Defs.' Br. 41. Contrary to Defendants' assertions, however, the requirement is directly "tailored to the claimed constitutional violation." Defs.' Br. 41.

In contending otherwise, Defendants simply ignore the nature of the constitutional harm they have caused Plaintiffs. Defendants acknowledge that Plaintiffs are entitled to an injunctive remedy sufficient to "provide complete relief." Defs.' Br. 41 (citing *McCormack v. Heideman*, 694 F.3d 1004, 1019 (9th Cir. 2012)). But the Constitution prohibits forcing detainees—particularly civil detainees like Plaintiffs—to sleep on concrete holding-room floors, as Defendants

did before the district court's 12-hour mat requirement was imposed. *E.g.*, *Thompson*, 885 F.2d at 1448 ("failure to provide detainees with a mattress and a bed or bunk runs afoul of the commands of the Fourteenth Amendment"); *Anela v. City of Wildwood*, 790 F.2d 1063, 1069 (3d Cir. 1986) (same).[4] Affording Plaintiffs "complete relief" thus requires *at least* the remedy the district court imposed (and in fact, a good deal more). Because the district court's 12-hour sleeping-mat requirement directly addressed the class members' constitutional injury, Defendants are wrong to assert that it was excessive.

Defendants cannot avoid that conclusion by citing logistical difficulties or costs associated with fulfilling this requirement. That is because the government "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). Accordingly, where an injunction prevents (or, as here, mitigates) an ongoing constitutional violation, it is necessarily consistent with both the balance of the equities and the public interest: the class members' "physical and emotional suffering" are "far more compelling than the possibility of some administrative inconvenience or monetary loss to the government." *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983).

[4] Notwithstanding Defendants' representations (Defs.' Br. 9-11), some class members were denied even the thin foil blankets that Defendants provide for warmth (ER451; ER659), and even children were provided with mats only "when circumstances permit[ted]" (ER164-65; ER265).

Or, as the district court put it in rejecting Defendants' motion for reconsideration, "The Court cannot suspend what it believes are constitutional rights." ER3. The district court did not abuse its discretion in reaching that conclusion.

C. The 12-Hour Threshold Is Not Unduly Burdensome

Regardless, none of the supposed burdens of compliance that Defendants now cite demonstrates that the district court's order exceeded its discretion.

1. The 12-Hour Threshold Causes No Undue Delay

Defendants posit that the "twelve-hour mandate" may be "counterproductive" in certain circumstances because it may lead to delay in processing. Defs.' Br. 42. They hypothesize an individual who arrives at a Tucson Sector station at 1:00 a.m., is still being processed at 12:55 p.m., and could potentially be transferred to ICE custody by 3:00 p.m. Defs.' Br. 42. Defendants assert that the need to provide a mat at the 12-hour mark (*i.e.*, as the clock approaches 1:00 p.m.) would require Border Patrol personnel to "pause [their] processing" in order to provide a mat and "document the transaction," and that this could "delay the individual's transfer to a longer-term facility." Defs.' Br. 42.

But Defendants do not explain how the act of handing a person a mat and documenting this task could cause any sort of material delay. Nor, certainly, do they point to any evidence that might substantiate this claim.

Moreover, and perhaps more significant, Defendants' argument is based on a misunderstanding of the district court's order. A mandate to provide mats to class members held 12 hours or longer does not mean Defendants must provide mats at *exactly* the 12-hour mark. The district court's order in no way obligates Defendants to wait until the last possible minute. Indeed, especially for class members who arrive at a facility late at night, the sensible and humane course would be to provide mats at the most efficient time after it becomes apparent that they will likely be detained for more than 12 hours. Defendants thus retain significant flexibility as to how they comply with the district court's mandate. Whatever minimal administrative difficulties the 12-hour requirement may engender, they do not render the district court's order an abuse of its discretion.

2. Defendants' Speculative Capacity Concerns Do Not Warrant Reversal

Defendants also object to the 12-hour threshold's purported effect on the capacity of the Tucson Sector stations. Defendants complain that "because the sleeping mats take up space"—that is, the space necessary for an individual to lie down—there is "a risk that, during a surge or other urgent situation," the Border Patrol stations will have insufficient capacity to hold all those they seek to detain. Defs.' Br. 43.

Boiled down to its essence, Defendants' argument is a direct attack on their constitutional obligations. Defendants claim they should not be expected to

provide class members with enough room to lie down, but rather may continue to pack them in holding rooms so tightly that some class members will be forced to sleep in the toilet stalls or spend the night sitting or standing up. ER486; ER837; ER434. The district court rejected this contention, emphasizing that it had seen "direct evidence of the crowded conditions in the border patrol stations," and "took this information into consideration when it granted the preliminary injunction." ER2. Rightly so: the government's failure to build or obtain adequate capacity to hold all those it seeks to detain cannot prevent courts from enforcing the Constitution. *See Brown*, 563 U.S. at 511 (courts "must not shrink from their obligation to enforce the constitutional rights of all persons,'" and they "may not allow constitutional violations to continue simply because a remedy" may be intrusive) (internal quotation marks omitted). The district court did not abuse its discretion in adhering to this mandate. A court cannot refuse to enforce the right to sleeping accommodations because of a possible lack of space any more than it could refuse to enforce a right to meals because there might be too many mouths to feed.

Defendants' capacity concerns are overstated in any event. As the district court determined, their claims are belied by video surveillance evidence showing class members packed into holding rooms while other nearby rooms go unused. ER3. Defendants now assert that this evidence is explained by Defendants' need

to segregate detainees by age, gender, and other factors. Defs.' Br. 43 n.13. But their contentions cannot be reconciled with the sheer number of empty hold rooms depicted in the video stills on which the district court relied, which show that those held in a single crowded room could be split into separate holding rooms without implicating Defendants' ability to provide separate spaces for members of particular groups. *E.g.*, ER388. Moreover, as the district court also noted in rejecting Defendants' reconsideration motion, Defendants have claimed that local jails and ICE facilities are unable to provide excess holding capacity, but they have not "report[ed] on any other interagency efforts to relieve overcrowding at the border patrol stations." ER3. On appeal, Defendants neither address this conclusion nor explain why improved coordination between Border Patrol and the related government agencies to which class members are transferred could not alleviate any purported capacity issues.

Defendants' attack on the order is thus grounded in hypothetical "surges" that likely could be addressed by means *other* than continuing to violate class members' constitutional rights. The district court appropriately weighed the need to address the immediate and ongoing injuries suffered by the members of the Plaintiff class more heavily than the need to accommodate the "highly speculative" concerns Defendants cite. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (in granting a preliminary injunction, a "district court need not consider

public consequences that are 'highly speculative'" and should "weigh the public interest in light of the *likely* consequences of the injunction" (emphasis in original, internal quotation marks omitted)).[5]

Finally, for many of the same reasons, Defendants are wrong to contend that the sleeping-mat requirement derogates "fundamental principles of national sovereignty, and may in some cases violate" 8 U.S.C. § 1252(f)(1). Defs.' Br. 43. The cited statute prohibits classwide injunctions restraining the operation of certain statutory provisions governing the inspection, apprehension, exclusion, and removal of aliens. *See* 8 U.S.C. §§ 1221-32. But Plaintiffs do not seek to prevent Defendants from inspecting, apprehending, excluding, or removing aliens. Nor do they challenge the government's power to detain individuals who are suspected of crossing the nation's borders without proper authorization. Instead, Plaintiffs seek to enforce the Constitution's requirement that Defendants provide those they detain with adequate conditions of confinement, including sleeping accommodations. Just as the prohibition against interference with state criminal proceedings, *e.g.*, *O'Shea v. Littleton*, 414 U.S. 488, 499-500 (1974), does not prevent a federal court

[5] Perhaps the best illustration of the purely speculative nature of many of Defendants' claimed burdens is their assertion that the district court should have accounted for "the possibility that future technological developments may provide additional alternatives" to "alleviate the harm Plaintiffs' [*sic*] allege." Defs.' Br. 42-43. Should that day arrive, Defendants might have grounds to seek modification of the district court's order. But in the meantime, the order remains a rational way of accounting for class members' basic human needs.

from compelling a state to provide constitutionally adequate treatment for the convicted criminals it confines, *e.g.*, *Brown*, 563 U.S. at 511, neither "principles of national sovereignty" nor Section 1252(f)(1) preclude courts from imposing classwide injunctive relief with respect to conditions of immigration detention. That is true even if these constitutional obligations may indirectly implicate the manner and means by which the government carries out its responsibilities at the border. *See Rodriguez v. Hayes*, 591 F.3d 1105, 1120-21 (9th Cir. 2010) (approving class of immigration detainees seeking bond hearings, and holding that Section 1252(f)(1) does not prohibit injunctive relief aimed at unconstitutional conduct not authorized by immigration statutes). Were it otherwise, courts would be powerless even to prevent Defendants from failing to provide meals or medical care altogether—requirements which might, in some hypothetical situations, lead the government to release individuals in its custody. The district court acted within its discretion in ordering Defendants to fulfill this minimal aspect of their constitutional obligation to provide adequate sleeping accommodations.

* * * * *

For all of these reasons, this Court should reject the arguments advanced in Defendants' cross-appeal.

REPLY TO DEFENDANTS' RESPONSE IN NO. 17-15381

Far from abusing its discretion in granting the limited relief it did provide, the district court erred in not requiring Defendants to do more to cease their ongoing constitutional violations.

I. THE DISTRICT COURT COMMITTED LEGAL ERROR IN FAILING TO ORDER CONSTITUTIONALLY ADEQUATE MEDICAL CARE

As Plaintiffs have explained and Defendants now concede, "the [C]onstitution requires a system of ready access to adequate medical care." Defs.' Br. 45. Yet Defendants contend that such medical care can be furnished by individuals who are not professionally qualified to provide it. Defs.' Br. 45-50. Defendants offer no authority for that assertion. Nor could they: this Court has repudiated such claims for decades. *E.g.*, *Gibson v. Cty. of Washoe*, 290 F.3d 1175, 1187-91 (9th Cir. 2002) (emphasizing importance of evaluation by "trained medical staff" for arrestee held in county sheriff's custody); *Toussaint v. McCarthy*, 801 F.2d 1080, 1111-12 (9th Cir. 1986) ("unqualified personnel" cannot fulfill prisoners' medical needs); *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982) (same). It should do so again here. Because the district court erred as a matter of law in accepting Defendants' unduly narrow view of the relevant constitutional requirements, it necessarily abused its discretion. *Zepeda v. I.N.S.*, 753 F.2d 719, 724 (9th Cir. 1983).

A. Defendants' Reliance On Medically Untrained Border Patrol Agents Violates Due Process

1. Defendants cannot distinguish precedent holding that medical care must be provided by qualified professionals

Both this Court and its sister circuits have long held that the constitutional right to adequate medical care encompasses a right to treatment from competent, trained medical professionals, not simply access to unqualified intermediaries. Trained individuals must both conduct the initial medical screenings of all individuals detained and make the critical decisions regarding detainees' access to prescription medications. *See* Opening Br. 33-41.

Defendants attempt to characterize this precedent as inapplicable to the Tucson Sector stations. Their arguments fail at every turn.

Defendants contend, for example, that this Court's decision in *Toussaint* is inapposite because there "technical associates and inmates may have been engaged in the practice of medicine," and here Plaintiffs purportedly "do not claim that unqualified individuals are engaged in the practice of medicine at Border Patrol stations." Defs.' Br. 46-47. But that is in fact *exactly* what Plaintiffs claim: Border Patrol agents are "unqualified individuals" who cannot carry out the medical tasks Defendants currently assign them. *Toussaint* stands for the proposition that services furnished by "unqualified personnel" cannot discharge the

government's constitutional duty to provide adequate medical care. 801 F.2d at 1111-12. That principle applies with full force in this case.

Defendants are similarly unable to distinguish *Gibson*. Defendants assert that, unlike the county in *Gibson*, Defendants do not have a "policy of delaying medical screening of combative inmates," and that "no evidence" suggests "medical care for any detainee has been delayed." Defs.' Br. 47. But Defendants' screening policy is inadequate because it exposes *all* class members—not just combative ones—to potential delays in securing proper treatment. ER30. And ample evidence shows that medical care for class members is not just delayed but routinely denied altogether. *E.g.*, ER616; ER634; ER653-54; ER664. If anything, Defendants' practices are more problematic than those condemned in *Gibson*.

Defendants also claim that this Court's decision in *Runnels v. Rosendale*, 499 F.2d 733 (9th Cir. 1974), is inapposite because that case involved "unauthorized" treatment, while Plaintiffs here "are not claiming that they are being subjected to medical procedures without their consent." Defs.' Br. 46. Yet Defendants cannot dispute the fundamental principle established in *Runnels*—namely, that detainees have a constitutional right to medical care whether they are held "for a term of life" or "merely for the night." 499 F.2d at 736 n.3. That principle squarely refutes Defendants' assertion that the purported "brevity and

nature of Border Patrol detention" exempts their system from constitutional scrutiny. Defs.' Br. 48.

Nor can Defendants dismiss the relevance of the out-of-circuit precedent Plaintiffs have cited. *See* Defs.' Br. 47-48. Just as due process prohibits untrained officers from screening prisoners for medical issues, *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981), so too does it prohibit untrained Border Patrol agents from screening class members for medical issues. And just as untrained officers cannot be allowed to decide whether inmates require medical attention, *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1319-20 (10th Cir. 2002), neither can untrained Border Patrol agents decide when class members need medical attention.

Defendants' fundamental argument is that all of these authorities are "inapposite" because they do not involve "Border Patrol stations or any comparable detention facilities." Defs.' Br. 46, 48. But Defendants offer nothing that might justify their "Border Patrol" exception to the constitutional requirement of "a system of ready access to adequate medical care." Defs.' Br. 45-50. Indeed, because Plaintiffs are civil detainees, they are entitled to even greater constitutional protections than the individuals confined pursuant to criminal processes in *Gibson*, *Toussaint*, and the other decisions on which Plaintiffs rely. *Jones*, 393 F.3d at 931-33. In contending otherwise, Defendants point only to the relatively short duration of most class members' detention. But to reiterate, the Constitution does not

permit such deprivations of medical care even for individuals released or transferred "within forty-eight hours." *Contra* Defs.' Br. 47-48; *see Harris*, 489 U.S. at 381-92 (right to adequate care may be violated even if detainee released "[a]fter about an hour"); *Runnels*, 499 F.2d at 736 n.3 (same). Defendants' arguments cannot be squared with these basic principles.

2. Defendants repeatedly mischaracterize the record in seeking to legitimize their unconstitutional policies

Unable to evade these constitutional requirements, Defendants attempt to distort the record to suggest that Border Patrol agents are qualified to render medical care. These efforts likewise fail.

First, Defendants assert that "Border Patrol agents have training as first responders." Defs.' Br. 9, 47. But Defendants' own evidence shows otherwise: while "[a]ll Border Patrol Agents receive basic first aid training," only a "*number* of agents have also received first responder training, which is a 40 hour certification course." SER909 (emphasis added). Even assuming that 40 hours of first-responder training qualified this subset of agents to conduct screenings and medication referrals (which it does not), that would be little comfort to the many remaining class members for whom such critical decisions are made by the other agents trained only to conduct a "kind of pretty common sense looking at somebody, are they bleeding, are they hobbling." ER98.

Second, Defendants note that "[m]any" Border Patrol agents have "training as EMTs and Paramedics." Defs.' Br. 9, 47. But in fact, only 265 of the "over 4,000 agents assigned to the Tucson Sector" are "trained as EMTs," and there is an even "smaller number of paramedics." SER897; SER909; ER117. And again, even if this limited subset of agents is qualified, the vast majority of the agents making critical screening and prescription medication decisions are not. ER115-116.

Third, Defendants contend that "all medical issues are referred to the hospital when medical treatment is needed." Defs.' Br. 47. Yet the evidence again contradicts that claim. During the summer of 2015, Defendants' e3DM data revealed that only 527 out of approximately 17,000 detainees were referred to a hospital. ER29-30. It strains credulity to suggest, as Defendants do, that only 527 individuals required medical treatment during this time.[6] That is particularly true given that summer temperatures in the Arizona desert often reach 115 degrees or more (which can cause heat stroke and dehydration), as well as the fact that

[6] Defendants argue that the district court committed clear error in accepting and relying on this figure, pointing to their expert's testimony that Border Patrol agents referred people to medical treatment for "'a great variety of things.'" Defs.' Br. 45 n.14 (quoting ER187). But the *types* of ailments for which class members were referred says little about the *frequency* with which they received necessary care.

roughly half of all people taken into custody at a typical jail require medication. ER326; ER509-511.

Fourth, Defendants assert that their expert "Dr. Harber testified that agents receive training to identify communicable diseases." Defs.' Br. 48. But Dr. Harber in fact refused to offer such testimony. He instead admitted that he did not "have personal knowledge of" Defendants training agents to identify such diseases, noting only that "they *say* they do." ER188 (emphasis added); *see* SER927 (similar).

Fifth, Defendants also assert that Dr. Harber testified that "any detainee presenting any symptoms of [a communicable disease] is transferred to a hospital." Defs.' Br. 48. But Dr. Harber stated only that Defendants "are recognizing some problems." ER188. He said nothing to support Defendants' suggestion that Border Patrol agents have identified every class member displaying symptoms of a communicable disease.

Sixth, Defendants maintain that agents "regularly interact with and observe detainees." Defs.' Br. 48. But such interaction and observation is irrelevant given the agents' lack of medical training. Defendants also overlook the evidence that any such "interaction between officers and detainees" is exceedingly superficial, limited as it is to "visual inspection, officer-initiated communication, and detainee-initiated communication." SER927.

Seventh, Defendants claim that Plaintiffs' expert Dr. Goldenson deemed the "practice of confiscating medications at intake" to be "acceptable and commonplace in detention facilities." Defs.' Br. 49. Plaintiffs, however, do not object to the confiscation of medicine itself, but rather to the lack of any qualified professionals who ensure that class members subsequently receive necessary medications. Consistent with that focus, Dr. Goldenson noted that while the confiscation of medicine is a standard practice in jails, Defendants' system is woefully inadequate because it does not guarantee detainees consistent access to their medicine, or a timely, professional evaluation of their medication needs. ER325-26. Indeed, as he emphasized, the evidence shows that only "*some* of the people coming in who are on medications are given the opportunity to continue their medications." ER326 (emphasis added). The Constitution prohibits such malfeasance. *Hoptowit*, 682 F.2d at 1252-54.

Eighth, Defendants contend that Plaintiffs' medication claims rest solely on "hearsay declarations." Defs.' Br. 49. But such declarations are admissible at a preliminary injunction hearing, and Defendants do not suggest that the district court could have somehow abused its discretion in considering this evidence. *Americans For Prosperity Found. v. Harris*, 809 F.3d 536, 540 n.3 (9th Cir. 2015). Regardless, this Court need not simply take the declarants' word for it: Defendants admit that they have a "practice of confiscating medications," and that detainees

cannot access their medication without "the supervision of an officer/agent." Defs.' Br. 49. That proves the point—Defendants condition detainees' access to medication on the say-so of unqualified Border Patrol agents. Such a system is unconstitutional.

B. Ordering Untrained Border Patrol Agents To Comply With TEDS Does Not Address Plaintiffs' Constitutional Injuries

Defendants also contend that the district court's order requiring compliance with the National Standards on Transport, Escort, Detention, and Search ("TEDS") was "tailored to the harm alleged." Defs.' Br. 45. But that would be true only if Defendants and the district court were right in their view of the Constitution's requirements—which they are not. The constitutional injury Plaintiffs suffer results from Defendants' practice of allowing untrained Border Patrol agents to act as gatekeepers to critical medical care and medication. Ordering those same untrained agents to comply with TEDS is not remotely "tailored" to remedying this harm.

Indeed, the TEDS standards are patently inadequate. At the intake stage, TEDS simply instructs Border Patrol agents to rely on their own observations and suspicions or the self-reporting of detainees. ER732-734, ER744. But TEDS provides no medical training or instruction to agents tasked with screening detainees, and does not imbue agents with the ability to render professionally responsible medical judgments. The district court's order therefore does nothing to

remedy the underlying constitutional problem: Defendants continue to rely on medically untrained Border Patrol agents to perform intake screening that should be provided by trained medical professionals.

The same is true with regard to Plaintiffs' access to medication. TEDS says nothing about the appropriate ministration of class members' medicine during "general processing" unless 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. Although, as Defendants emphasize (Defs.' Br. 49), TEDS also sets forth the precatory admonition that detainees with non-U.S. medication "*should* have the medication validated by a medical professional, or *should* be taken in a timely manner to a medical practitioner to obtain an equivalent U.S. prescription," even this general statement applies only to detainees "*not* in general processing." ER744 (emphases added). Class members with non-U.S. prescribed medication thus remain at the whims of untrained Border Patrol agents to secure the medication they need while they are being processed—which could be for days at a time.

Accordingly, TEDS does not address the injury Plaintiffs have suffered, and the district court committed legal error in concluding these standards alone were

sufficient. The district court's order should be modified to require that properly trained medical professionals perform these critical functions.

II. THE DISTRICT COURT SHOULD HAVE DIRECTED DEFENDANTS TO SATISFY THEIR CONSTITUTIONAL OBLIGATION TO PROVIDE BEDS

As the district court correctly recognized, detention facilities must provide those "held overnight with beds *and* mattresses." ER16 (internal quotation marks omitted). Yet despite the clarity of both this constitutional obligation and Defendants' contravention of it, the district court required only that Defendants provide Plaintiffs with floor mats. ER20. As Plaintiffs have explained (Opening Br. 48-50), the district court did not and could not offer any logical reason for allowing Defendants to continue denying class members the beds that due process requires. The court therefore abused its discretion. *See Hinkson*, 585 F.3d at 1262.

A. Due Process Requires Defendants To Provide Beds To The Individuals It Detains Overnight

In response, Defendants focus their attention on the district court's legal conclusion, contending that beds are not constitutionally required. Defs.' Br. 50-51. But their arguments cannot be reconciled with the precedent on which the district court properly relied.

Defendants assert that neither this Court's decision in *Thompson*, 885 F.2d 1439, nor the Third Circuit's decision in *Anela*, 790 F.2d 1063, is "relevant to Plaintiffs' argument that Defendants must provide beds to Tucson Sector detainees

held in most cases for less than forty eight hours." Defs.' Br. 51. But both decisions expressly held that beds *and* mattresses are constitutionally required when individuals are detained. *See Thompson*, 885 F.2d at 1448 (adhering to precedent holding "that a jail's failure to provide detainees with a mattress and bed or bunk runs afoul of the commands of the Fourteenth Amendment," and that the county could be held liable if its "failure to provide [the plaintiff] with a bed" was a county policy); *Anela*, 790 F.2d at 1069 (affirming that "the 'unsanitary and humiliating' practice of forcing detainees to sleep on mattresses on the floor does not pass constitutional muster"). And neither decision provides any support for Defendants' contention that this obligation evaporates if the detention is for less than two full days, as is true for some (but by no means all) class members. *See* ER860. In *Thompson*, this Court did not hold that the plaintiff's rights were violated only because he was detained for two nights without a bed rather than a single night; instead, it cited with approval decisions holding that the "use of floor mattresses for pretrial detainees [is] unconstitutional without regard to the number of days for which a prisoner is so confined." 885 F.2d at 1448 (internal quotation marks omitted). In *Anela*, meanwhile, the plaintiffs were detained for less than 12 hours. 790 F.2d at 1064.[7]

[7] Defendants also incorrectly describe *Anela* as a case about "overnight confinement in jail cells" (Defs.' Br. 51); in fact, the plaintiffs in *Anela* "were

(Footnote continues on next page.)

Moreover, as Defendants appear to concede, the two key decisions on which both *Thompson* and *Anela* relied are equally clear in holding that beds are constitutionally required in these circumstances. Defendants acknowledge that *Union County Jail Inmates v. DiBuono*, 713 F.2d 984 (3d Cir. 1983), held that requiring "detainees to sleep on mattresses on the floor violated detainees' due process rights." Defs.' Br. 51. And while Defendants do not address *Lareau* at all despite both Plaintiffs' (Opening Br. 45) and the district court's (ER16) reliance on it, there the Second Circuit plainly held that forcing detainees to sleep on floor mattresses is unconstitutional for *any* length of time. *Laureau*, 651 F.2d at 105.

The purportedly "unique interests and operational needs of Border Patrol stations" (Defs.' Br. 51) do not distinguish this case from those cited above. As described previously (*supra* pp. 11-12), Defendants have submitted no evidence of any legitimate governmental objective that could support requiring class members to go without beds. Certainly, none of their evidence could overcome the presumption of unconstitutionality that arises because, as the district court found (ER14) and the Defendants do not dispute (Defts. Br. 50-52), *criminal* detainees in local jails have access to the beds that Defendants deny *civil* detainees. *Jones*, 393 F.3d at 932. That class members "come and go at all hours of the day and night" (Defs.' Br. 51) might justify some interruption of class members' sleep, as the

(Footnote continued from previous page.)

detained in holding cells in the police station." *Anela*, 790 F.2d at 1064.

district court concluded. ER18-19. But it has no bearing on Defendants' current policy of requiring class members to sleep on the floor, and it cannot justify that practice. *Cf. Anela*, 790 F.2d at 1069 (requiring beds even for detainees brought into holding cell late at night). Likewise, even assuming that the "finite amount of space" in these facilities implicates Defendants' ability to provide the requisite number of beds (Defs.' Br. 51), the interest in "housing more [detainees] without creating more [detention] space" is not a cognizable justification for forcing class members to suffer the constitutional deprivation of going without beds. *Lareau*, 651 F.2d at 104; *see id* at 110 n.14 ("Unconstitutional conditions cannot be tolerated because constitutional requirements are difficult for the state to fulfill."). The government cannot compel the individuals it detains to bear the unconstitutional consequences of its supposed lack of resources. *Peralta*, 774 F.3d at 1083.

B. The District Court Abused Its Discretion In Failing To Require Compliance With This Obligation To Provide Beds

In addition to their attempted rebuke of governing precedent, Defendants defend the district court's refusal to remedy this constitutional violation as a proper exercise of discretion. But much like the district court itself, Defendants can identify no good reason not to require Defendants to begin the process of fulfilling their constitutional obligations.

Defendants contend that any such relief would be "overbroad." Defs.' Br. 52. But the decision on which Defendants rely for that proposition—*McCormack v. Hiedeman*, 694 F.3d 1004 (9th Cir. 2012)—reveals just the opposite. *McCormack* held that a preliminary injunction that granted relief to individuals *other* than the plaintiff was overbroad. *Id.* at 1019-20. In reaching that conclusion, this Court emphasized that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," and "must be tailored to remedy the specific harm alleged." *Id.* at 1019 (internal quotation marks omitted).

Here, an order requiring the government to provide beds in the Tucson Sector stations would not inure to the benefit of anyone *other* than the members of the certified Plaintiff class, which encompasses all individuals who are or will be confined in these stations. ER559-60. And because the deprivation of beds is an unconstitutional "harm" to which these class members are or will be subjected, requiring the provision of those beds is "necessary to provide complete relief to the plaintiffs." *McCormack*, 694 F.3d at 1019 (internal quotation marks omitted). Such an order could by no means be deemed overbroad.

Defendants also assert that the district court properly considered "the resources necessary to implement any remedy" and that "immediate compliance" with any requirement to provide beds is "impossible." Defs.' Br. 51-52. But that a

preliminary injunction could require the government to expend "resources" or might create "logistical difficulties" does not prevent it from being in the public interest where, as here, such difficulties "merely represent the burdens of complying" with the government's legal obligations. *Rodriguez*, 715 F.3d at 1146.

Nor, for that matter, would Defendants' compliance with their constitutional obligation to provide beds necessarily require the sort of drastic steps Defendants suggest. To the contrary, there are a variety of available means through which they might satisfy this mandate. Defendants might, as they suggest, lease new space. Defs.' Br. 52. They might install beds in existing facilities. They might better coordinate with other government agencies to ensure expeditious transfer of those held in the Tucson Sector. They might implement some combination of these three options, or use the power of the federal government to take any number of other steps.

The essential problem with the district court's order is that it did not require Defendants to do anything to ensure class members are no longer required to sleep on the floor. There is no question that the Due Process Clause requires Defendants to provide beds to the individuals it detains for any meaningful length of time, and there is no question that Defendants are not satisfying that mandate. Yet the district court nevertheless permitted Defendants to avoid even beginning the process of fulfilling their constitutional obligations, thus only further delaying the

date at which they might achieve compliance. The burden of that delay falls directly on the members of the Plaintiff class, who must endure these unconstitutional deprivations indefinitely. In allowing Plaintiffs to continue to experience these unnecessary harms, the district court abused its discretion.

III. THE DISTRICT COURT COMMITTED LEGAL ERROR IN FAILING TO ORDER THE PROVISION OF SHOWERS

Finally, the district court committed legal error in concluding that civil detainees such as Plaintiffs are not constitutionally entitled to have access to showers. *See* ER24-25. As this Court has affirmed, even for prisoners, "minimum standards of decency require that lockup inmates without hot running water in their cells be accorded showers three times per week." *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1399 (N.D. Cal. 1984), *aff'd in part, rev'd in part*, 801 F.2d 1080 (9th Cir. 1986). Likewise, pretrial detainees in jails generally have access to showers at least once a day. ER454-455. Providing civil detainees such as Plaintiffs even less favorable treatment is therefore presumptively unconstitutional. *Jones*, 393 F.3d at 932. And Defendants have pointed to no security justification or other legitimate governmental objective for requiring members of the Plaintiff class—who often arrive at the Tucson Sector stations covered in dirt (ER22)—to go without showers altogether. Accordingly, Defendants' current practice of providing the vast majority of class members it detains with mere "adult body wipes" violates due process.

Defendants offer little response to this straightforward argument. They contend that *Toussaint* is distinguishable because Plaintiffs "are rarely in custody for more than forty-eight hours." Defs.' Br. 53-54. But if the prisoners in *Toussaint* were entitled to showers approximately every other day, then the Plaintiffs, as civil detainees, are presumptively entitled to "*more* considerate treatment." *Jones*, 393 F.3d at 932 (emphasis added). Defendants do not and cannot explain why they may instead subject Plaintiffs to substantially worse treatment. Nor do Defendants even address the evidence regarding the prevailing practices in jails or class members' special need for showers—evidence Plaintiffs highlighted in their opening brief (at 52-53). Defendants' silence is telling.

Rather than confront these issues, Defendants emphasize that not all Tucson Sector stations currently have shower facilities. Defs.' Br. 53. Once again, however, the improper design of these facilities, and the resources it might require to update them, cannot justify Defendants' failure to provide the individuals it detains with the treatment to which they are constitutionally entitled. *See supra* pp. 11-12.

Defendants also suggest that the relief the district court ordered was appropriate, even if premised on a legal error, because of Defendants' purported difficulty in meeting this obligation. Defs.' Br. 53. But the court's limited remedy simply enables the continued violation of Plaintiffs' rights. And as explained

(*supra* p. 21), each of the preliminary injunction factors necessarily weighs in Plaintiffs' favor when they seek to prevent the government's ongoing refusal to respect their constitutional rights. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). That is not to say that a court could not take account of Defendants' supposed inability to "*immediately* comply" with their obligation to provide showers. Defs.' Br. 53 (emphasis added). But Plaintiffs ask that this Court require that "Defendants immediately *begin* to take the actions the Constitution requires them to take." Opening Br. 58 (emphasis added). This Court should not permit Defendants to indefinitely postpone the date of their adherence to this constitutional requirement.

CONCLUSION

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

Dated: May 25, 2017

Respectfully submitted,

s/ James R. Sigel

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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 May 25, 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: May 25, 2017

s/ James R. Sigel
James R. Sigel

sf-3769466

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

Date: 5/25/2017

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