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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jane Doe # 1; Jane Doe # 2; and Norlan Flores, on behalf of themselves and all others similarly situated

Plaintiffs,

v.

Jeh Johnson, Secretary, United States Department of Homeland Security, in his official capacity; R. Gil Kerlikowske, Commissioner, United States Customs & Border Protection, in his official capacity; Michael J. Fisher, Chief of the United States Border Patrol, in his official capacity; Jeffrey Self, Commander, Arizona Joint Field Command, in his official capacity; and Manuel Padilla, Jr., Chief Patrol Agent–Tucson Sector, in his official capacity,

Defendants.

Case No. 4:15-cv-00250-TUC-DCB

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

CLASS ACTION

(Assigned to the Honorable David C. Bury)

Action Filed: June 8, 2015

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I. INTRODUCTION

Defendants do not dispute that the Fifth Amendment prohibits them from depriving detainees of sleep, warmth, sanitation, medical care, food, and water. They do not dispute, nor can they, that the Fifth Amendment obligates them "to do more than provide the 'minimal civilized measure of life's necessities.'" *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004) (citation omitted). Defendants nonetheless argue that their "mission," their so-called "operational reality," gives them a free pass. Defendants are mistaken. Government entities tasked with difficult and unpredictable missions—prisons, jails, police precincts—must abide by the Constitution, and so must Defendants.

Plaintiffs' evidence in support of their motion for a preliminary injunction unequivocally demonstrates that Defendants routinely and systematically mistreat those in their care. Defendants and their experts do not, because they cannot, refute or rebut *any* of Plaintiffs' photographs depicting overcrowded and filthy cells, ubiquitous floor sleeping, and detainees wrapped in flimsy Mylar sheets, huddled together for warmth. Confronted with their own documented failure to provide adequate and regular food, Defendants disavow the accuracy and integrity of their own e3DM data. (Declaration of Justin Bristow ("Bristow Decl.") ¶¶ 11-12, ECF No. 142-7.) This is an astonishing representation coming from Defendants, who not long ago argued to this very Court that their e3DM data was comprehensive and could adequately substitute for the video footage they destroyed. (Opp'n to Mot. for Sanctions at 8 & n.4, 16, ECF No. 60.)

Faced with irrefutable evidence of degrading, punitive, and unconstitutional conditions, Defendants contend that the remedy Plaintiffs seek will have a "substantial impact on the ability of Border Patrol to continue its twenty-four hour operations." (Opp'n to Mot. for Prelim. Inj. at 3, ECF No. 133.) But aside from beds, lighting, and showers, Defendants do not even argue, much less demonstrate, that an injunction will have any impact whatsoever

on their operations.[1] To the contrary, Defendants claim that they already provide, or can provide, most of the relief Plaintiffs seek.

Defendants' "operational interests" argument is, ultimately, a chimera. Scratch the surface and it is apparent that Defendants' concern is predominantly fiscal. It is the purportedly "permanent and expensive changes" and "sunk costs" that Defendants bemoan. (*Id.* at 1-2.) These concerns do not carry the day: As the Ninth Circuit has held on a motion for preliminary injunction, deprivation of constitutional rights cannot be justified by cries of fiscal necessity. *Golden Gate Rest. Ass'n v. City & Cty. of S.F.*, 512 F.3d 1112, 1126 (9th Cir. 2008) (citation omitted), *rev'd on other grounds*, 546 F.3d 639 (9th Cir. 2008).

Plaintiffs are not impinging in any way on how Defendants perform their statutory mandate. Defendants may continue to detain and process immigrant detainees. But what Defendants may not do is punish them. If Defendants detain an immigrant for over eight hours in a calendar day, they are obligated to provide minimum, constitutional care while that immigrant is in their custody. This Court should grant the preliminary injunction to ensure that Defendants comply with this obligation.

II. LEGAL STANDARD

A. The Injunction Plaintiffs Seek is Prohibitory, Not Mandatory.

Defendants claim that the injunction Plaintiffs seek is mandatory. (Opp'n to Mot. for Prelim. Inj. at 4-5.) They claim that Plaintiffs ask "the Court to rule on the ultimate factual and legal issue in this case." (*Id.* at 4.) This mischaracterizes the injunction and the relief sought.

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[1] Moreover, with respect to beds, neither of Defendants' Border Patrol witnesses—Assistant Chief George Allen and Justin Bristow—even mentions beds, much less discusses the impact that providing them would have on operations. (*See* Declaration of George Allen ("Allen Decl."), ECF No. 133-2; Bristow Decl.) Without some evidentiary support, Defendants' arguments carry no weight. With respect to lighting and showers, Assistant Chief Allen makes the conclusory statement that dimming the lights and providing showers would slow down processing—although he provides no details in support of this view. (Allen Decl. ¶¶ 33, 47.) But this in itself is not a reasonable objection. Providing food to detainees surely interferes with operations and slows down processing, but Defendants do not claim that meals are unnecessary.

While the parties litigate, real people suffer in Border Patrol stations. Plaintiffs seek only to enjoin Defendants from depriving detainees of their constitutional due process rights during the pendency of this action. Defendants concede that under their own policies and procedures, they have an obligation as well as the ability to provide detainees with adequate sleep, food, water, warmth, medical care, and sanitation. (*See infra* Section III.) This is the status quo that a prohibitory preliminary injunction is meant to preserve while the parties litigate. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1060-61 (9th Cir. 2014) ("[T]he 'status quo' refers to the legally relevant relationship between the parties before the controversy arose."). Thus the preliminary injunction that Plaintiffs seek is properly intended to "prevent[] the irreparable loss of rights *before* judgment," not to litigate the merits. *Sierra OnLine, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) (emphasis added). But even if this Court finds that the injunction is mandatory, because Plaintiffs have shown a "strong likelihood" of success on the merits, they have met "the heightened burden required for issuance of a mandatory preliminary injunction." *Katie A., ex rel. Ludin v. L.A. Cty.*, 481 F.3d 1150, 1157 (9th Cir. 2007).

B. Defendants Misstate the Fifth Amendment Due Process Standard.

Defendants claim that Plaintiffs "must establish" that the conditions in the Tucson Sector stations "are punitive, and bear no reasonable relationship to the legitimate operational interests of Border Patrol." (Opp'n to Mot. for Prelim. Inj. at 5.) This mischaracterizes applicable law. In order to establish a due process violation, a civil detainee can prevail by providing "proof of intent (or motive) to punish" *or* "objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective *or* that it is excessive in relation to that purpose." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473-74 (2015) (emphasis added). Defendants erroneously attempt to run from the disjunctive and fail altogether to mention the third prong.

C. Defendants Are Legally Obligated to Provide Sleep, Warmth, Sanitation, Medical Care, Food and Water.

Defendants do not dispute that detainees have a substantive due process right to warmth (Opp'n to Mot. for Prelim. Inj. at 10), sanitation (*id.* at 17), as well as food and water (*id.* at 21). Nor do Defendants dispute their obligation to conduct medical screening on intake; but they take issue with Plaintiffs' request that medically-trained personnel conduct the screening. (*Id.* at 14.) Defendants argue that *Graves v. Arpaio*, 48 F. Supp. 3d 1318 (D. Ariz. 2014) and *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995), on which Plaintiffs rely, are inapplicable because they address screening in long-term facilities, not short-term facilities. (Opp'n to Mot. for Prelim. Inj. at 13-14.) As Plaintiffs' expert Eldon Vail stresses, however, the Tucson Sector facilities are not, in fact, "short-term": because detainees are held for 72 hours or more, these facilities are more akin to jails than other holding or processing facilities. (Declaration of Eldon Vail in Support of Reply Mot. for Prelim. Inj. ("Vail Reply Decl.") ¶¶ 3-7.) Moreover, Defendants' argument ignores a fundamental purpose of medical screening—protecting other detainees (not to mention Border Patrol agents) from communicable disease, which can spread regardless of the duration of confinement. (Declaration of Joe Goldenson, M.D. in Support of Reply Mot. for Prelim. Inj. ("Goldenson Reply Decl.") ¶ 6.) *See Madrid*, 889 F. Supp. at 1257 ("The facility should screen newly arrived inmates . . . [in a manner] sufficient to protect other inmates from infectious diseases.").[2] Finally, Defendants are resoundingly silent about sleep (*id.* at 24-25), but the cases are clear that floor sleeping, ubiquitous in Border Patrol stations, violates due process (Mot. for Prelim. Inj. at 10, ECF No. 76 [Sealed Lodged] (citing cases).)

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[2] The danger of communicable disease was highlighted in the Office of Inspector General's July 30, 2014 report entitled "Oversight of Unaccompanied Alien Children [UAC]." This report concludes: "Many UAC and family units require treatment for communicable diseases, including respiratory illnesses, tuberculosis, chicken pox, and scabies." (Declaration of Kevin Coles in Support of Mot. for Expedited Discovery, Ex. O at 2, ECF No. 26-1.) The report further states that "DHS employees reported exposure to communicable diseases and becoming sick on duty." (*Id.* at 3.) Nogales was one of the stations inspected. (*Id.* at Attachment 1.)

III. ARGUMENT

A. Defendants Fail to Rebut What They Do Not Already Concede.

Plaintiffs' evidence—over 50 declarations from former detainees,[3] over 75 inspection photographs, over 70 still images selected from many hundreds of hours of video surveillance, and Defendants' own e3DM data—demonstrates beyond the shadow of a doubt that due process violations abound. Defendants fail to refute *any* of it.

They fail to refute photographs of overcrowded, filthy hold rooms; of detainees huddled under Mylar sheets shielding their eyes from the constant light and their bodies from the constant cold; of piles of trash, feces-soiled paper, and diapers. They fail to refute their own e3DM data, which substantiates the statements by numerous former detainees that they were provided sporadic and inadequate meals. They do not even try to refute the fact that detainees are forced to sleep, for days at a time, on packed concrete floors and concrete benches.

Instead, Defendants mechanically recite their TEDS standards,[4] as if policy demonstrated practice; they claim Plaintiffs' declarations are hearsay, while conceding that written declarations are permissible on a motion for a preliminary injunction (Opp'n to Mot. for Prelim. Inj. at 11 n.9); and they otherwise take pot shots at Plaintiffs' evidence, at detainees' culture, and—remarkably—at their own e3DM data. After telling this Court that they "themselves fully intend to use all available footage to show that conditions . . . fully comply with the requirements of the Constitution" (Opp'n to Mot. for Sanctions at 7 n.3),

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[3] These declarations, which testify to "the widespread and deplorable conditions in the holding cells at Border Patrol stations," easily outweigh the testimony of two Border Patrol agents and their paid experts "regarding CBP's policies." (*See* Order re Plaintiffs' Mot. to Enforce Settlement of Class Action & Defendants' Mot. to Amend Settlement Agreement, *Flores v. Johnson*, No. 2:85-cv-04544-DMG-AGR (E.D. Cal. July 24, 2015), ECF No. 177.)

[4] Defendants admit that Border Patrol hold rooms are "unique" (Declaration of Diane Skipworth ("Skipworth Decl.") ¶ 40, ECF No. 133-4), while elsewhere claiming that they are just like "intake, hold room, and booking areas of jails and detention centers around the nation" (Declaration of Richard Bryce ("Bryce Decl.") ¶¶ 31, 34-35, ECF No. 140-5). The crucial difference is that police stations and booking facilities hold people for a few hours, not overnight or even for a few days. (Vail Reply Decl. ¶¶ 3-7.)

Defendants use none of it—presumably because it undermines the inspections they staged for "experts" on their payroll.[5]

1. Sleep

Defendants concede that they provide no beds; or, to use their euphemism, "traditional sleeping accommodations." (Opp'n to Mot. for Prelim. Inj. at 2, 24; Answer to Complaint ("Answer") ¶¶ 4, 98, ECF No. 143.) They concede that hold rooms are only "equipped with benches to *sit* on until they are transported to another facility or processed" (Bryce Decl. ¶ 104 (emphasis added)), which can take 72 hours or more (Allen Decl. ¶ 10). They concede that lights are on twenty-four hours a day, seven days a week (Opp'n to Mot. for Prelim. Inj. at 25; Answer ¶ 4), and that detainees are disturbed throughout the night because of detainee intake, processing, and the inexplicable 4 a.m. meal (Allen Decl. ¶¶ 38, 45). Defendants do not dispute that, as a result of these practices, floor-sleeping is ubiquitous. Defendants, in other words, do not dispute that Plaintiffs are deprived of sleep—sometimes for days on end.[6] Yet somehow, Defendants conclude that "Border Patrol does not deprive detainees of any due process right to sleep." (Opp'n to Mot. for Prelim. Inj. at 24.) This conclusion should be given no credence: the Constitution requires beds *and* mattresses "without regard to the number of days a prisoner is so confined." *Lareau v. Manson*, 651 F.2d 96, 105 (2d Cir. 1981); *accord Thompson v. City of L.A.*, 885 F.2d 1439, 1448 (9th Cir. 1989), *overruled on other grounds by Bull v. City & Cty. of S.F.* (9th Cir. 2010).

2. Overcrowding

Despite video stills depicting detainees packed head to toe, Defendants rely on Mr. Bryce's opinion to deny that hold rooms are "regularly overcrowded." (Opp'n to Mot.

[5] Ms. Skipworth admits that she is currently on the Department of Homeland Security's payroll, and has been since 2011. (Skipworth Decl. ¶ 5.)

[6] Defendants' medical expert opines that "any lack of full alertness" due to lack of sleep does not harm detainees because they are not "driv[ing], operat[ing] machinery, etc." (Declaration of Philip Harber ("Harber Decl.") ¶ 65, ECF No. 140-9.) But as Defendants concede, detainees are questioned about their criminal and immigration history (Opp'n to Mot. For Prelim. Inj. at 1, 7)—the answers to which can determine conclusively whether they will be removed, imprisoned, or granted asylum. The government appears to have no qualms about questioning sleep-deprived detainees if doing so assists its efforts to deport them.

for Prelim. Inj. at 17-18.) But this is only a defense if the government may violate constitutional due process rights *sometimes*. It may not. *See* U.S. Const. art. VI, cl. 3 ("[A]ll executive . . . Officers . . . of the United States . . . shall be bound by Oath or Affirmation, to support this Constitution."). Moreover, the factual basis for Mr. Bryce's opinion is unsound. Mr. Bryce relies on "data, interviews of Border Patrol leadership, and inspection of Tucson Sector facilities." (Bryce Decl. ¶ 37.) But Mr. Bryce fails to explain what this data is and why it's reliable. He fails to explain how a one-day inspection would allow him to conclude that hold rooms are not "regularly overcrowded." (Vail Reply Decl. ¶¶ 13, 15.) And he fails to explain how statements by Border Patrol leadership refute Plaintiffs' photographic evidence of detainees sitting or lying on every inch of bench and floor (Declaration of Kevin M. Coles in Support of Mot. for Prelim. Inj. ("Coles Decl.") ¶¶ 35–36, ECF No. 76 [Sealed Lodged]—a level of demonstrably severe overcrowding that Defendants attempt, absurdly, to characterize as *de minimis* (Opp'n to Mot. for Prelim. Inj. at 17). Finally, Defendants fail entirely to address Plaintiffs' argument that overcrowding has negative spillover effects on sleep, hygiene, and temperature. (Vail Decl. ¶¶ 47–51.) In fact, they concede it. (Skipworth Decl. ¶ 73 (noting that detainee to toilet ratios could exceed ACA standards if hold rooms filled to capacity).)

3. Hygiene

To explain away Plaintiffs' footage depicting filthy, trash-strewn cells, Defendants' experts respond with service contracts, statements by Border Patrol agents, and attacks on detainees' "culture." None of it helps Defendants' case.

Service contracts—which were not presented to the Court or even produced to Plaintiffs despite this Court's Order (Declaration of Kevin M. Coles in Support of Reply Mot. for Prelim. Inj. ("Coles Reply Decl.") ¶¶ 2-3.)—are evidence of policy, not practice. And it is certainly not the case, logically or factually, that "the statements of work found in these contracts are sufficient to ensure adequate sanitation of the hold rooms in Tucson Sector." (Skipworth Decl. ¶ 27.) For neither expert *observed* anyone cleaning, or *observed* what hold rooms looked like in the days before and after they inspected. (Skipworth Decl. ¶¶ 36-60;

Harber Decl. ¶¶ 60-62.) In contrast, Plaintiffs *did* observe hold rooms that went uncleaned for 48 hours. (Coles Decl. ¶ 41.) Without evidence that the service contracts are actually implemented, entirely missing here, the contracts prove nothing. (Declaration of Robert W. Powitz in Support of Reply Mot. for Prelim. Inj. ("Powitz Reply Decl.") ¶ 10.)

Having failed to observe any cleaning, both experts assure this Court that Border Patrol agents "confirmed that hold rooms are cleaned" regularly. (Skipworth Decl. ¶ 48; *accord* Harber Decl. ¶ 62.) But such self-serving hearsay from unidentified agents does nothing to controvert Plaintiffs' photographs depicting accumulated trash and filth in hold cells throughout the Tucson Sector.

Lacking evidence that hold rooms are clean (or cleaned), Defendants blame the victims. According to Assistant Chief Allen, while "Border Patrol has a cleaning contract and trash receptacles[7] in the hold room, some social challenges among detainees have to be overcome daily." (Allen Decl. ¶ 32.) These "social challenges," he later makes clear, are detainees' "countries/cultures." (*Id.*) Likewise, Ms. Skipworth blames filthy hold rooms on detainees' "cultural problem[s]," which, she continues condescendingly, "can be remedied through educating detainees on proper hygiene practices in the United States." (Skipworth Decl. ¶ 53.) Putting aside that neither Assistant Chief Allen nor Ms. Skipworth has demonstrated any expertise in the cultures about which they opine, detainees' purportedly improper hygiene practices do not absolve Defendants of their duty to ensure that cells are clean, safe, and hygienic. *See DeShaney v. Winnebag Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (the obligation to provide for basic human needs falls on the jailer, not the jailed).

[7] Flatly contradicting Assistant Chief Allen, Chief Patrol Agent Padilla states that "[t]here are no trashcans in the hold rooms for safety reasons." (Declaration of Manuel Padilla, Jr., Opp'n to Mot. for Expedited Discovery ¶ 14, ECF No. 39-1.) Defendants' inability to keep their story straight suggests their willingness to bend the facts to their defense or to change what is "operationally feasible" when it is expedient for them to do so. (Allen Decl. ¶ 31.)

4. Food

Plaintiffs argue, based on analyzing several months of Defendants' e3DM data, that Defendants fail to feed detainees, sometimes for over 24 hours at a time, and what they do feed them—burritos, crackers, and juice three times a day for days—is not nutritionally adequate. (Mot. for Prelim. Inj. at 17.) In response, Defendants first assert that they spent $387,000 on food in 2015. (Opp'n to Mot. for Prelim. Inj. at 23.) So what? Defendants' contextually unmoored food budget is not proof that they feed detainees regularly or that the food they provide is nutritionally adequate.

Defendants' second response is simply astonishing. Unable to explain their own e3DM data, Defendants are compelled to impeach it: "E3DM . . . was not designed to show or provide a comprehensive historical analysis of an alien's detention history [and] was not designed to capture every single action that may correspond to an alien [and] was not designed to capture an aggregate picture of food-related statistics." (Bristow Decl. ¶¶ 11-12, 17.)

But this is the very same data Defendants told this Court *was* comprehensive and *could* adequately substitute for the video footage Defendants destroyed: "[O]ther evidence also exists to support or dispute Plaintiffs[']s claims. This includes records such as the e3DM system, in which agents log actions taken concerning particular aliens in custody such as *meal times*, medical care, and whether showers were provided." (Opp'n to Mot. for Sanctions at 8 (emphasis added); *see also id.* n.4 (citing additional information logged in the e3DM).) It is also the very same data on which Defendants themselves rely to establish the length of time class members spend in custody. (Bristow Decl. ¶¶ 19-21.) Defendants cannot have it both ways. If Defendants use e3DM data to support their case, so too may Plaintiffs.

Defendants' strategic attempt to impeach their e3DM data backfires for another reason. While confirming that "[a]ll meal service must be documented in the appropriate electronic system(s) of record" (Skipworth Decl. ¶ 92), Defendants confess that their agents routinely fail to do so (Bristow Decl. ¶¶ 11–12, 17). This confession calls into question much of Defendants' evidentiary submission. Throughout their brief, Defendants cite their

policies—the TEDS standards in particular—as evidence that their agents undertake certain actions. But as the e3DM example shows, Defendants are aware that agents regularly deviate from policy requirements.

5. Water

Defendants argue that Plaintiffs' evidence of malfunctioning bubblers, of hold rooms with water but no clean cups, and of detainees forced to share a water jug should be discounted "in the face of significant evidence to the contrary." (Opp'n to Mot. for Prelim. Inj. at 24.) But the only evidence Defendants offer is conclusory statements by their experts that when they inspected Tucson Sector stations, potable water was available. (*Id.*) And aside from Mr. Bryce's statement that he "found no issues" with the bubblers (Bryce Decl. ¶ 46), Defendants offer nothing—no photos, no video, nothing—that demonstrates this statement is true. The best that Defendants can do is to present a transparently contrived photo entitled "Hold room in Nogales," which depicts a five-gallon jug, paper cups, juice boxes, and mats, neatly arranged on a wooden bench in a clean hold room. (Bryce Decl., Attachment C at 1.) Defendants' response falls flat.

6. Medical Care

Defendants proffer no evidence that they medically screen; that they are able to respond to medical emergencies; or that they provide detainees with a substitute for the medicine they routinely confiscate from detainees. (Opp'n to Mot. for. Prelim. Inj. at 13-17.) Instead, here, as elsewhere, Defendants cite their TEDS standards as if they establish a constitutional baseline for minimally acceptable conditions in their detention facilities (they do not), and as if the mere existence of those standards demonstrated that Defendants operate their facilities in a constitutional manner. (*Id.* at 14-15.) Defendants rely on their TEDS standards despite their steadfast denial that the TEDS standards constitute a mandatory policy that their agents must follow. (Mot. to Dismiss at 6, ECF No. 52.) And they do so without presenting any evidence that the TEDS standards are, in fact, implemented.

For example, Defendants claim that "Border Patrol provides detainees with access to medical care . . . in a manner that is constitutionally sufficient." (Opp'n to Mot. for Prelim.

Inj. at 14.) As proof, Defendants cite the TEDS standards and Dr. Harber's declaration. (*See id.* at 14-15.) But Dr. Harber doesn't actually know whether the TEDS standards are implemented; during his inspection of but two stations, he saw no one being treated. (Harber Decl. ¶¶ 29-37; *see also* Declaration of Joe Goldenson, M.D., in Support of Reply Mot. for Prelim. Inj. ("Goldenson Reply Decl.") ¶¶ 4-5.) No wonder, then, that Dr. Harber does little more than say that the policies are adequate. (Harber Decl. ¶ 55.) No wonder, then, that he bases his "knowledge" on unsworn, hearsay statements made by Border Patrol officials. (*Id.* ¶ 34.)

7. Warmth

Defendants concede that they strip people of outer clothing. (Skipworth Decl. ¶ 142.) They concede that detainees "may sometimes find that [hold room] temperatures feel cooler than they are accustomed to." (Opp'n to Mot. for Prelim. Inj. at 10 n.8.) They concede that temperatures in hold rooms can reach a bone-chilling 58.8 degrees Fahrenheit, but blame it on an anomalous cooling system malfunction. (*Id.* at 12 n.11; Allen Decl. ¶ 17.)

Defendants focus almost exclusively on temperature logs and measurements to suggest that detainees are provided with adequate warmth. (Opp'n to Motion for Prelim. Inj. at 10-12.) Nowhere do they acknowledge that detainees are often kept for days in hold rooms so crowded that physical activity is virtually impossible. Defendants effectively force detainees to remain sedentary on concrete benches and floors—without extra layers of clothing, or proper blankets or adequate nutrition—leaving them with little ability to generate or conserve body heat. (Vail Reply Decl. ¶ 9.) Defendants entirely ignore ample video evidence of detainees huddled together through the night to stave off the cold; and they ignore the fact that nearly every detainee who has provided a sworn declaration in this case has complained of cold.

Defendants throw up their hands and claim that they are incapable of changing the temperature. (Opp'n to Mot. for Prelim. Inj. at 12 n.12; Skipworth Decl. ¶¶ 135, 145.) Defendants then blame detainees for not reporting when they are cold (Skipworth Decl. ¶ 144), as if it were not clearly apparent from the way they huddle together under thin Mylar

sheets. Despite the overwhelming evidence that these sheets do little to keep detainees warm, Defendants stand by this as an acceptable solution. Notably, Defendants previously provided blankets, but discontinued doing so only because of problems with one vendor. (Allen Decl. ¶ 19.) They could again provide blankets, in addition to remedying the temperature issues. (Vail Reply Decl. ¶ 9.) They simply choose not to.

B. Defendants "Legitimate Operational Interests" Argument Fails.

Defendants attempt to justify the punitive, unconstitutional conditions in Tucson Sector stations by claiming that these are in some unspecified way connected to government interests of security, "effective management," and cost. (Opp.'n to Mot. for Prelim. Inj. at 6, 26-27.) This argument fails.

First, Plaintiffs are aware of no case that supports the proposition that it is constitutionally acceptable to detain pretrial detainees or prisoners without providing them with a bed and mattress, *except* for the specific purpose of "behavior modification" or where a prisoner is demonstrably suicidal. Thus, limited bedding may be acceptable for mentally ill patients who are "argumentative, defiant, and basically ungovernable." *Green v. Baron*, 879 F.2d 305, 307, 309–310 (8th Cir. 1989).[8] No bedding, or limited bedding, may also be acceptable where the prisoner has previously tried to commit suicide using bedsheets. *McMahon v. Beard*, 583 F.2d 172, 175 (5th Cir. 1978). In all other instances, regardless of the proffered governmental interest, a bed or a mattress is always required—a point that Defendants do not even try to contest. *Lareau*, 651 F.2d at 105.

Second, when constitutional rights are at issue, cost is not a legitimate government interest. Plaintiffs made this point in their moving brief (Mot. for Prelim. Inj. at 23), and Defendants have cited no case—not one—in rebuttal. Here, the law is clear: "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

[8] Even here, however, staff provided the committed individual with "bedding when they believed he was cold"—a consideration Defendants have not shown Plaintiffs. *Green*, 879 F.2d at 310.

Amendment violations." *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 946 (2015); *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979) ("The cost or inconvenience of providing adequate facilities is not a defense to the imposition of a cruel punishment."). Thus, the cost of installing showers or providing beds is not a legitimate reason for Defendants to subject Plaintiffs to unconstitutional conditions of confinement.

Third, while it is not entirely clear what, exactly, Defendants mean by "effective management," they appear to mean delay. (Opp'n to Mot. for Prelim. Inj. at 21, 24-25 (providing showers, beds, and dimmed lights will slow detainee processing).) If so, they have articulated no reason why providing soap, toilet paper, clean cells, toothbrushes, toothpaste, feminine hygiene products, diapers, baby wipes, formula, baby food, potable water, paper cups, warmth (or clothing), nutritionally adequate meals, or medical screening will interfere with "effective management."

As to showers, beds, and dimmed lights, Defendants misstate Plaintiffs' remedy. Defendants argue that providing showers, beds, and dimmed lights will "slow the processing of *every* individual." (*Id.* at 21 (emphasis added).) No it won't, because Plaintiffs do not ask that *every* detainee be given a shower, a bed, or dimmed lights to sleep, but only those detained for more than eight hours in a calendar day. Even if this minimal burden were to cause the government "severe logistical difficulties," which it would not, these difficulties "would merely represent the burdens of complying with . . . the Constitution." *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013).

Fourth and last, Defendants' appeals to "security" are without merit. Beds and showers bear no reasonable relationship to security—or, if they do, Defendants have failed either to articulate what that relationship might be or provide any evidence in support. (*See* note 1, *supra*.) As to lighting, Defendants merely declare that darkened hold cells would create safety risks. They do not explain why, nor are they entitled to rely on fear-mongering or on images of detainees as "criminals" in darkened cells. (*See* Opp'n to Mot. for Prelim. Inj. at 5 n.5 (falsely tarring all detainees as criminals).)

C. Plaintiffs Are Likely to Suffer Irreparable Harm in the Absence of an Injunction.

Defendants' evidentiary argument—that Plaintiffs' case is founded on hearsay statements alone—is utterly without merit. (*Id.* at 26.) Not only does it ignore the experts' inspections, photographs, video footage, and e3DM data produced by Plaintiffs, but as Defendants concede, hearsay evidence is admissible. (*Id.* at 11 n.9.) *See also Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009) ("[Defendants] object in particular to the district court's reliance on the interested declaration of Plaintiffs' counsel and unverified client complaints. A district court may, however, consider hearsay in deciding whether to issue a preliminary injunction."). There can be no question that individuals are harmed when they are deprived of sleep, adequate food and water, and warmth—even for a few days. Defendants, moreover, cite no cases to rebut established Ninth Circuit law holding that "the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1059 (9th Cir. 2009) (citations omitted) ("[C]onstitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm."). By depriving Plaintiffs of life's basic necessities—sleep, warmth, access to sufficient and adequate food and water, medical screening and care, and a sanitary environment—Defendants violate Plaintiffs' constitutional rights and cause irreparable harm.

D. The Public Interest and Balance of Hardships Support an Injunction to Ensure Constitutional Conditions of Detention

Public interest considerations also weigh in favor of Plaintiffs. Indeed, "[o]nce a Plaintiff shows that a constitutional rights claim is likely to succeed, the remaining preliminary injunction factors weigh in favor of granting an injunction." *Vivid Entm't, LLC v. Fielding*, 965 F. Supp. 2d 1113, 1136 (C.D. Cal. 2013), *aff'd*, 774 F.3d 566 (9th Cir. 2014). The Ninth Circuit has held that "'it is *always* in the public interest to prevent the violation of a party's constitutional rights.'" *Melendres*, 695 F.3d at 1002 (quoting *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002)) (emphasis added). Defendants' citation to *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)—a Fourth

Amendment case—for the proposition that the Court must "balanc[e] the interests at stake" in an entirely different context is thus inapplicable. *Id.* at 556.

The balance of hardships also favors Plaintiffs. The government "cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns." *Rodriguez*, 715 F.3d at 1145. Defendants, moreover, cite no cases supporting their statement that the relief that Plaintiffs seek is too burdensome to be permissible on a preliminary injunction motion—especially since most of the remedies Plaintiffs seek Defendants say they already provide. (Opp.'n to Mot. for Prelim. Inj. at 28, *passim*.) In fact, courts have granted injunctive relief in similar contexts. *See Bowers v. City of Phila.*, No. 06-Civ-3229, 2007 WL 219651, at *28 (E.D. Pa. Jan. 25, 2007) (holding "denial of constitutional rights" to be a "far greater" cost than "the cost associated with providing conditions of detentions that pass constitutional muster"); *Hernandez v. Cty. of Monterey*, 110 F. Supp. 3d 929, 959 (N.D. Cal. 2015) (ordering defendants to implement an adequate "tuberculosis identification, control and treatment program" despite cost concerns).

E. 8 U.S.C. § 1252(f)(1) Is Inapplicable and Does Not Preclude the Relief Plaintiffs Seek.

Defendants argue that 8 U.S.C. § 1252(f)(1) precludes class-wide injunctive relief. (Opp.'n to Mot. for Prelim. Inj. at 28.) Enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009 (1996), 8 U.S.C. § 1252(f)(1) prohibits courts from enjoining sections 231 to 241 of the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1221-1231. Defendants misconstrue the nature of the relief that Plaintiffs seek, arguing that §1252(f)(i) "precludes this Court from ordering Border Patrol to release individuals held in its custody on a class-wide basis." (Opp'n to Mot. for Prelim. Inj. at 27.) Plaintiffs do not seek to have detainees released prior to the completion of the immigration process, either as set forth in the INA or as required by Defendants. Plaintiffs only ask that detainees be provided with minimum, constitutional care.

Courts have made clear that IIRIRA's jurisdictional restrictions must be narrowly interpreted and limited to their express language. *See, e.g.*, *Andreiu v. Ashcroft*, 253 F.3d

477, 481 (9th Cir. 2001); *Rodriguez v. Hayes*, 591 F.3d 1105, 1118-120 (9th Cir. 2010) (en banc). Plaintiffs do not seek to restrain *any* provisions of the INA. Instead, they allege violations of their constitutional rights and seek injunctive relief to ensure that Defendants comply with constitutional requirements in enforcing the nation's immigration laws.

Courts routinely allow class actions seeking injunctive relief when the class seeks to enjoin unlawful conduct not authorized by the INA sections specified in section 1252(f)(1). *See, e.g.*, *Rodriguez*, 591 F.3d at 1121 (finding section1252(f)(1) did not bar class-wide injunctive relief where members did "not seek to enjoin the operation of Part IV provisions" but rather "to enjoin conduct alleged not to be authorized by the proper operation of Part IV provisions"). The unlawful conduct at issue here—unconstitutional conditions of confinement—is not authorized by any relevant section of the INA. *See* 8 U.S.C. §§ 1225, 1226, 1231. Accordingly, section 1252(f)(1) is inapplicable.

IV. EVIDENTIARY OBJECTIONS

Plaintiffs object to certain of Defendants' expert testimony. The following opinions are based on vague references to documents, data, or interviews with unidentified individuals that were never produced to Plaintiffs and never presented as evidence to the Court. This testimony should be excluded because it lacks foundation (Federal Rule of Evidence ("FRE") 702(b)), is not based on facts or data reasonably relied upon by experts in their fields (FRE 703), and constitutes hearsay (FRE 802): Bryce Decl. ¶¶ 52, 57-60, 78, 79, 92, 107, 114-119; Harber Decl. ¶¶ 21, 25, 31, 35-37, 48, 57-58, 63, 64; Skipworth Decl. ¶¶ 46-48, 67, 77, 85, 90, 95-100, 122, 131, 158-162; Bristow Decl. ¶¶ 19, 20, 21.

Additionally, the following statements include broad conclusions about Border Patrol's actual practices based on text from policy documents or one-time station inspections. The testimony should be excluded because it is not based on personal knowledge (FRE 602), not rationally based on the witness's perception (FRE 701), and is neither based on sufficient facts or data nor helpful to the trier of fact (FRE 702(a), (b)): Bryce Decl. ¶¶ 57-60, 92, 107, 114-119; Harber Decl. ¶¶ 21, 25, 31, 36, 48, 63; Skipworth Decl. ¶¶ 46-48, 85, 96-100, 122, 159, 161, 162; Bristow Decl. ¶¶ 19, 20, 21.

V. CONCLUSION

For the foregoing reasons, this Court should grant a preliminary injunction.

Dated: March 10, 2016 By: */s/ Harold J. McElhinny*

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***Admitted pursuant to Ariz. Sup. Ct. R. 38(f)*

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2016, I caused a PDF version of the documents listed below to be electronically transmitted to the Clerk of the Court, using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to all CM/ECF registrants and non-registered parties.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

DECLARATION OF KEVIN M. COLES IN SUPPORT OF PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION (with exhibits)

DECLARATION OF JOE GOLDENSON, M.D. IN SUPPORT OF PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

DECLARATION OF ROBERT W. POWITZ IN SUPPORT OF PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

DECLARATION OF ELDON VAIL IN SUPPORT OF PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION (with exhibits)

Harold J. McElhinny	/s/ *Harold J. McElhinny*
(typed)	(signature)