No. 17-15383

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANE DOE #1; JANE DOE #2; NORLAN FLORES, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants-Cross-Appellees,

v.

JOHN F. KELLY, Secretary, United States Department of Homeland Security; KEVIN K. MCALEENAN, Acting Commissioner, U.S. Customs And Border Protection; CARLA L. PROVOST, Acting Chief, United States Border Patrol; FELIX CHAVEZ, Acting Commander, Arizona Joint Field Command & Acting Chief Patrol Agent – Tucson Sector,

Defendants-Appellees-Cross-Appellants.

PRELIMINARY INJUNCTION APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
NO. 15-CV-00250-DCB

DEFENDANTS-APPELLEES-CROSS-APPELLANTS' REPLY BRIEF

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director

SARAH B. FABIAN
Senior Litigation Counsel

CHRISTINA PARASCANDOLA
Trial Attorney
Office of Immigration Litigation
District Court Section
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
(202) 514-3097

Attorneys for Defendants-Appellees-Cross-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CALIFORNIA SEXUALLY VIOLENT PREDATOR ACT

INTRODUCTION

Plaintiffs' opposition to the Government's appeal is premised on their contention that the framework laid out by the Supreme Court in *Bell v. Wolfish*, 441 U.S. 520 (1979), for evaluating conditions of pretrial detention, does not apply in full to Border Patrol detention. However, Plaintiffs' argument fails because it completely ignores the bedrock principle that any evaluation of confinement conditions must balance liberty interests against the relevant state interest. Although Plaintiffs concede that *Bell* establishes the relevant constitutional standard for conditions of confinement at Border Patrol stations, they seem to suggest that a court should not consider the operational justification for those conditions, which is a critical element of the *Bell* analysis. Because Plaintiffs do not address this important principle, nor do they explain how conditions of confinement in Border Patrol stations can properly be assessed without reference to the *Bell* framework, their arguments fail.

This Court should reverse the district court's decision because it did not establish a clear legal standard or identify factual findings on the basis of the record before it. Without a clear legal standard or factual findings, the district court's decision provides no clear articulation of the standard Defendants should apply in assessing confinement conditions, or any clear explanation of how the facts of this case meet the applicable standard.

The district court did not apply the proper legal analysis in *Bell*, 441 U.S. at 538-39, and thus failed to consider whether each condition or restriction at issue: (1) had a legitimate non-punitive interest; and (2) did not appear excessive in relation to that purpose. Instead, the district court relied on *dicta* in judicial decisions regarding whether claims of sleep deprivation in confinement could be brought as a procedural matter, to support the proposition that not providing bedding beyond Mylar blankets, by definition, violates a detainees' constitutional right to sleep. The district court also incorrectly relied on the standard for evaluating confinement conditions of individuals detained—frequently for long-term periods of confinement—under the California Sexually Violent Predators Act ("SVPA") ("purgatory cannot be worse than hell"), but provided no explanation why that standard for long-term detention should be applied to Border Patrol detention, which is much shorter in duration and serves far different purposes. Because the district court did not apply the correct legal standard, the preliminary injunction order should be set aside.

Moreover, even if the district court applied the proper legal standard, the district court's remedy of requiring the Tucson Sector to provide sleeping mats to all detainees after twelve hours is overly rigid, and the alleged constitutional requirement could be satisfied by more flexible means. Law enforcement flexibility is a critical component of *Bell*. Thus, even if the conditions at Border

Patrol stations were found to violate the Constitution, any judicial relief should allow the Border Patrol sufficient operational flexibility to determine how to satisfy the relevant constitutional standard. The district court therefore abused its discretion in issuing the preliminary injunction order. Thus, the Court should remand this case, order the district court to apply the correct legal analysis and to make specific findings as to whether the conditions Plaintiffs complained of violated their constitutional rights, and, if so order appropriate relief narrowly tailored to remedy the violation.

ARGUMENT

I. When evaluating the conditions of confinement in Border Patrol stations, the Supreme Court's analysis set forth in *Bell v. Wolfish* governs.

Whether a civilly confined individual's constitutional rights have been violated must be determined by balancing his or her liberty interest against the relevant state interest. *Youngberg v. Romeo*, 457 U.S. 305, 320 (1982) (citing *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (opining regarding the need to balance "the liberty of the individual" with "the demands of an organized society"). Under the Supreme Court's test in *Bell*, the condition or restriction at issue must: (1) have a legitimate non-punitive interest; and (2) not appear excessive in relation to that purpose. *Bell*, 441 U.S. at 538-39. Conversely, if the condition or restriction is not reasonably related to a legitimate goal—if it is

arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees. *Id*. at 539. In establishing this test, the Supreme Court rejected a requirement that pretrial detainees be subjected to only those conditions that "inhere in their confinement itself or which are justified by compelling necessities of jail administration," *i.e.*, the compelling-necessity test, noting the lack of a basis for such a test in the Constitution. *Id*. at 532.

In its reasoning supporting this two-part analysis, the Supreme Court considered that the state may detain an individual who has not been adjudged guilty of any crime but rather has only a "judicial determination of probable cause" and the state's interest in ensuring that such an individual appears for trial. *Id*. at 535-37. It further considered the state's interest in maintaining security and order at the institution, which includes preventing weapons and illicit drugs from reaching detainees. *Id*. at 539-40.

Plaintiffs' position with respect to *Bell* is contradictory. Plaintiffs concede that *Bell* "suppl[ies] the standard for determining whether the conditions of confinement in the Tucson Sector stations are unconstitutional because they are 'punitive.'" Pltffs' Resp. Br. (filed May 25, 2017) at 3. Later in their brief, however, while conceding again that *Bell* "undoubtedly has some relevance here," Plaintiffs suggest that *Bell* does not govern instances of civil detention. *Id.* at 6.

Plaintiffs' attempt to muddy the waters with respect to the legal standard is unavailing, however, because *Bell* plainly applies in this context. At bottom, Plaintiffs want the underlying legal standard under *Bell*, *i.e.*, whether a condition of confinement is "punitive," but they want this Court to decline to recognize the deference that the *Bell* Court afforded to legitimate law enforcement operations. Their argument fails because the basis for their position—a purported distinction between pretrial civil and criminal detention—is immaterial. Plaintiffs provide no good reason to find otherwise.

In fact, detention in a Tucson Sector Border Patrol station serves a similar, although not identical, purpose to pretrial detention. The Border Patrol detains individuals who have recently been apprehended—usually after a Border Patrol agent has probable cause to suspect a violation of United States immigration laws—and who must remain in detention until they can be identified, processed, and either released or delivered to the custody of another agency. Importantly though, Border Patrol custody is distinguishable from pretrial confinement, which can last for weeks or even months in many cases. The primary distinguishing characteristic of Border Patrol detention is brevity, considering that it lasts less than forty-eight hours in ninety percent of cases, and less than seventy-two hours in almost all cases. This distinction does not render the *Bell* analysis inapplicable to Border Patrol detention; .rather, it is a factor to be considered in applying the

Bell analysis.

At bottom, Plaintiffs' argument that the Court should not apply *Bell* seeks to have the Court determine whether a condition of confinement is punitive without considering any law enforcement justification for the condition at issue. Plaintiffs couch this as an argument for a standard that requires "more considerate treatment" than inmates in jails and prisons. Pltffs' Resp. Br. at 7. In articulating their proposed standard, Plaintiffs rely on *Youngberg v. Romeo*, 457 U.S. 305, 320 (1982), and *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004), two cases in which courts analyzed long-term, involuntary civil commitment of severely mentally disabled individuals and violent sexual predators. *Id*. However, the Court should decline to adopt Plaintiffs' proposed standard for two reasons: first, both of these cases ultimately rely on the *Bell* analysis in evaluating the conditions at issue in each case; and second, there is simply no parallel to be drawn between Border Patrol detention and involuntary civil commitment for severely mentally disabled or dangerous individuals, and Plaintiffs articulate none.

In *Youngberg*, contrary to Plaintiffs' suggestion, the Supreme Court did not rule that all civilly confined individuals—regardless of the length or purpose of confinement—are entitled to more considerate treatment than pretrial detainees. Rather, it recognized that persons involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose

conditions of confinement are designed to punish. *Youngberg*, 457 U.S. at 321-22. In that case a severely mentally disabled thirty-three-year-old man with the mental capacity of an infant, whose condition and family circumstances required him to be institutionalized in state custody, claimed that the state's failure to prevent injuries he suffered, his physical restraints for long periods of time, and the lack of appropriate treatment or rehabilitation programs for his condition, infringed on his liberty interests in safety, freedom of movement, and training. *Id*. at 310-11, 315.

Relying on *Bell*, the Supreme Court noted that determining whether an individual's constitutional rights had been violated required balancing his liberty interests against the relevant state interest. *Id*. at 321. It then rejected the lower court's compelling-necessity and substantial-necessity tests, and held that when determining whether a condition of confinement is reasonable (the second step of the *Bell* test), courts must show deference to the judgment exercised by a qualified professional. *Id*. at 233 & n. 29 (quoting *Bell*, 441 U.S. at 539 ("[c]ourts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility."). Notably, the Supreme Court's reliance on *Bell* in *Youngberg* provides all the more reason for this Court to find that considering the *Bell* analysis is essential when evaluating conditions of confinement for those who are civilly detained.

Plaintiffs nonetheless argue that the standard for evaluating conditions of detention at Tucson Sector is found in *Jones*, 393 F.3d at 931. *See* ER 13-14. In *Jones*, this Court refined *Youngberg* by holding that an individual detained awaiting the conclusion of civil commitment proceedings but not yet committed must be tested by a standard "at least as solicitous" to the rights of the detainee as the standards applied to a civilly committed individual and to an individual accused but not convicted of a crime. *Jones*, 393 F.3d at 932. The plaintiff in *Jones* had been transferred to the Sacramento County Jail, near the end of his sentence for a parole violation, to await a hearing on a petition for civil commitment, under the SVPA, Cal. Welf. & Inst. Code §§ 6600 *et seq*., as a sexually violent predator. *Id*. at 923. Although the SVPA limited such detentions to forty-five days beyond an individual's scheduled release, Cal. Welf. & Inst. Code §§ 6601(c)-(i); 6601.3, the plaintiff was incarcerated at the county jail for more than two years while he awaited a decision on the petition, *Jones*, 393 F.3d. at 923-24. For approximately the first twelve months of that incarceration period the plaintiff was housed with the general criminal population, and for the second twelve months in administrative segregation, where conditions were far more restrictive than those afforded the general prison population, including limits on physical activity, phone time, visiting privileges, and out-of-cell time. *Id*. at 924. Throughout his two-year civil incarceration while awaiting the outcome of his civil

commitment proceedings, the plaintiff suffered numerous strip searches, some conducted outdoors or at gunpoint in the middle of the night and accompanied by intimidating tactics. *Id*. The plaintiff brought an action claiming that the conditions of his confinement violated his substantive due process rights. *Id*.

In deciding what standard applied when evaluating the plaintiff's claims, this Court noted that when detainees have not been convicted of a crime, the more protective Fourteenth Amendment, as opposed to the Eight Amendment, standard applies. *Id*. at 931 (citing *Bell*, 441 U.S. 520, and noting that Fourteenth Amendment applied to pretrial detainees) (other citations omitted). The Court further noted that confinement while awaiting civil commitment proceedings implicates the intersection between two distinct Fourteenth Amendment imperatives. *Id*. First, the Court noted, individuals who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish. *Id.* (citing *Youngberg*, 457 U.S. at 321-22). Second, the Court noted, "when the state detains an individual on a criminal charge, that person, unlike a criminal convict, 'may not be *punished* prior to an adjudication of guilt in accordance with due process of law.'" *Id*. at 931-932 (quoting and adding emphasis to *Bell*, 441 U.S. at 535). The Court then noted that civil detainees retain greater liberty protections than individuals "detained under criminal process," *id*. at

932 (citing *Youngberg*, 457 U.S. at 321-24), and pre-adjudication detainees retain greater liberty interest than convicted ones, *id*. (citing *Bell*, 441 U.S. at 535-36). Thus, the Court concluded that an individual who is detained awaiting civil commitment proceedings is entitled to protections at least as great as those afforded to a civilly committed individual, and at least as great as those afforded to an individual accused but not convicted of a crime. *Id*. The Court added that, "at a bare minimum," an individual detained under civil process cannot be subjected to conditions that amount to punishment, citing the two-part *Bell* test. *Id*.

Analyzing the specific detention at issue in that case then, the Court reasoned that the civil nature of SVPA confinement provides an important gloss on the meaning of "punitive," and that when an SVPA detainee is confined in conditions identical or similar to or more restrictive than those in which his criminal counterparts are held, the Court presumes that the detainee is being subjected to punishment. *Id*. (citation omitted). Moreover, comparing the conditions of the plaintiff's long-term detention prior to SVPA commitment, with the conditions of SVPA commitment, the Court concluded that pre-commitment detainees cannot be subjected to conditions of confinement substantially worse than they would face upon SVPA commitment, reasoning that "purgatory cannot be worse than hell." *Id*. at 933.

The important takeaway from these two cases—which Plaintiffs entirely ignore—is that *Youngberg* and *Jones* both apply the standards laid out in *Bell* to analyze specific instances of involuntary long-term civil detention. The type of detention at issue in both those cases differs substantially from short-term Border Patrol detention, serves purposes completely divergent from Border Patrol's operational concerns. This Court should not do as Plaintiffs urge and ignore the fact that *Bell* is at the heart of both decisions, and instead should conclude that *Bell* provides the standard for analyzing the short-term Border Patrol detention at issue in this case.

Moreover, Plaintiffs have provided no basis for their contention that instead of applying the *Bell* analysis to Border Patrol detention, this Court should selectively choose language from *Jones* to craft a standard. Plaintiffs in effect urge this Court to adopt a short-cut in its analysis that has no basis in reason. Simply put, there is no parallel to be drawn between the types of custody at issue in *Jones* and in the case at hand. In *Jones*, the Court applied *Bell* to analyze the long-term detention of a potentially dangerous individual under a statutory scheme crafted to protect communities from sexual predators. Here, the Court should similarly require that the district court apply the full two part test in *Bell* to analyze short-term detention in a Border Patrol facility.

It also is important to note that the district court conflated this Court's two holdings in *Jones* in the preliminary injunction order. ER 13-14. First, the district court stated that:

> the civil nature of [Plaintiffs'] confinement provides an important gloss on the meaning of "punitive" in the context of their confinement. Because they are detained under civil, rather than criminal, process, they are most decidedly entitled to "more considerate treatment" than those criminally detained.

ER 13 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Youngberg*, 457 U.S. at 321-22).[1] Second, noting the other holding of *Jones*, that civil detainees cannot be subjected to conditions of confinement substantially worse than they would face upon commitment (notably, without mentioning the context of the SVPA), the district court, quoting *Jones*, reasoned that "purgatory cannot be worse than hell" and concluded "this must be precisely the case here" relying on a comparison between conditions of Border Patrol detention and the Santa Cruz county jail. ER 14.

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[1] The nearly identical passage in *Jones* states:

> The civil nature *of SVPA confinement* provides an important gloss on the meaning of "punitive" in this context. Because he is detained under civil—rather than criminal—process, *an SVPA detainee* is entitled to "more considerate treatment" than his criminally detained counterparts. *Youngberg*, 457 U.S. at 321–22.

Jones, 393 F.3d at 932 (emphasis added).

Contrary to the district court's and Plaintiffs' reading, *Jones* did not hold that *any* civilly confined detainee—regardless of the length of time or purpose of his or her detention—is entitled to more considerate treatment than would be accorded any long-term pretrial detainee. ER 13; Pltffs' Resp. Br. at 7. Rather, *Jones* was decided in the specific context of an individual confined for a substantial period of time while awaiting the outcome of commitment proceedings under the SVPA. There is no parallel to be drawn between the long-term detention at issue in *Jones* and the short-term Border Patrol detention at issue here, and the district court provides none. Moreover, no other court in this Circuit has applied *Jones*'s presumption in any scenario *other* than confinement under the SVPA.

It simply should not be ignored or glossed over that Border Patrol detainees are civilly detained for a completely different purpose than the SVPA, and under completely different circumstances that do not lend themselves to comparison with each other. Unlike the two-year detention in *Jones*, Border Patrol detention is brief, in most instances not lasting more than forty-eight hours and, in all but a handful of cases, not lasting more than seventy-two hours. Had the plaintiff in *Jones* been detained for forty-eight hours or less while he awaited a decision on whether he was to be civilly committed, the outcome of that case likely would have been vastly different. In evaluating claims regarding conditions of confinement, courts *must* consider duration. *See Bell*, 441 U.S. at 542 (finding no due process violation

in double bunking in cells of a specified size where pretrial detainees were detained for generally less than sixty days, with the caveat that "confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship *over an extended period of time* might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment") (emphasis added); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996*), opinion amended on denial of reh'g*, 135 F.3d 1318 (9th Cir. 1998) (noting that when evaluating Eighth Amendment claim whether less egregious condition or combination of conditions or factors would meet the test requires case-by-case, fact-by-fact consideration, including whether the prisoner is likely to be transferred in the near future) (citing *Hutto v. Finney*, 437 U.S. 678, 686–87 (1978) ("[T]he length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards. A filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months.").

The conditions at issue in the two cases are vastly different as well. The plaintiff in *Jones* was housed for years in a jail with prisoners serving sentences of incarceration for their crimes. By contrast, detainees in Border Patrol custody are never held with prisoners who are currently serving their sentences for criminal convictions, and the population of a hold room is constantly changing as Border

Patrol identifies individuals in its custody, processes them, and moves them out of Border Patrol custody. At any given moment, the population at a Border Patrol station may be comprised of men or women, or families traveling with children, all of whom, for safety reasons, are segregated by gender, family status, and known criminal history, and rarely spend the entire time of their detention in the same room. Moreover, unlike SVPA proceedings, which will end in either civil commitment or release, Border Patrol processing results in any one of a number of outcomes, including repatriation, transfer to the custody of another agency, referral for prosecution, or release. Because the purpose, nature, and length of Border Patrol custody is so vastly different from the detention at issue in *Jones*, comparisons to *Jones* are inapt.

Having applied the incorrect standard, and provided little rationale for any standard it did apply, the district court abused its discretion, and the preliminary injunction order should be reversed. *See Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (noting that a district court abuses its discretion in granting a preliminary injunction when it does not identify the correct legal rule to apply to the relief requested). This Court therefore should remand the preliminary injunction order for the district court to apply the correct legal standard in *Bell*, 411 U.S. 420, to Plaintiffs' claims. Specifically, the district court should be required to address the conditions of confinement at Border Patrol stations based upon Border

Patrol's mission and operational needs and whether each condition is excessive in light of those needs, not by imposing standards tailored to facilities that serve functions entirely distinct from Border Patrol's.

II. To the extent the district court articulated the *Bell v. Wolfish* analysis, the court erred in applying it only to some conditions of confinement.

Plaintiffs contend that Defendants are incorrect in their argument that the District court failed to apply the *Bell* analysis in its order. And it is true that the district court did articulate the *Bell* balancing test, and did note in some limited instances the legitimate non-punitive interests in maintaining security and preserving internal order at Border Patrol stations. ER 12. The court also noted that Border Patrol stations are designed for processing detainees for next steps elsewhere, ER 14, and that, relatedly, Border Patrol stations are twenty-four hour operations and that a significant number of detainees are apprehended during evening and nighttime hours, ER 15, thereby giving voice, at least in part, to Border Patrol's operational needs. Further, the court did acknowledge that for all but a handful of detainees—476 out of approximately 17,000, or 2.8 percent, during the period June 10 through September 28, 2015—Border Patrol detention lasts fewer than seventy-two hours, although the court did not acknowledge evidence that these numbers likely overstated the amount of time individuals actually spend in Border Patrol stations. ER 16.

Importantly though, while the court noted the *Bell* analysis and gave voice to Border Patrol's operational interests, it did not evaluate the conditions Plaintiffs complained of under *Bell*, *i.e.*, whether each condition did not appear excessive in relation to the legitimate government purpose. Compounding the problem was that the district court did not articulate discrete findings of fact and the application of a legal standard to the relevant factual findings. *See* ER 17-20 (accepting, without explanation, Plaintiffs' expert's opinion that Border Patrol detention conditions must be evaluated under prison standards and rejecting, without explanation, Defendants' expert's opinion that Border patrol detention was short term and should be evaluated as would conditions of confinement during the booking process); ER 20-23 (reciting the parties' allegations regarding sanitation and concluding that Defendants "were making ongoing efforts to rectify personal hygiene and sanitation problems which in large part appear to be noncompliance issues" and ordering monitoring); ER 25-28 (reciting the parties allegations regarding the lack of showers and ordering monitoring and the provision of some means or materials for washing); ER 21-23 (same, with regard to food, without ordering any remedy); ER 27-30 (same, with regard to medical care, ordering measures to ensure that a medical screening form compliant with relevant standards is in use at all stations).

The district court did apply *Bell* in part to two aspects of Plaintiffs' sleep claim. The district court concluded that serving the first meal of the day at 4:00 a.m. and waking detainees for that meal did not serve a legitimate, non-punitive interest, ER 19, and therefore, implicit in the district court's decision, was a determination that this condition did not meet the first part of *Bell*. The district court also considered that Tucson Sector hold rooms are illuminated on a twenty-four basis for security reasons, ER 18-19, thus, satisfying the first step in *Bell*, of serving legitimate non-punitive interest and, at least implicitly, the district court concluded that the constant illumination was not excessive in relation to that operational interest—the second step in *Bell*.

But the district court also did not provide the requisite factual finding, and ignored *Bell* with regard to the remaining aspects of Plaintiffs' sleep claim. It considered a surveillance video still image submitted by Plaintiffs showing men sleeping on a the floor of a hold room and next door to an empty hold room piled with mattresses and inferred form the snapshot in time that the detainees were denied sleep. ER 17; *see* ER 410-12, 433-34. But the district court did not articulate the extent of the factual findings it was making based on the photograph. For example, the court's decision does not articulate whether the court considered that the photograph was a single snapshot in time of a single hold room at a single facility that did not show what was happening elsewhere in the facility or in the

Tucson Sector. Nor did the court comply with the first step in *Bell* by considering the legitimate, non-punitive purpose for Border Patrol in keeping an empty hold room with sleeping mats in its facility because the Tucson Sector, for security reasons, would need to maintain an available hold room with sleeping mats in case the Border Patrol apprehended any families with children that day. It also did not apply the second step of considering whether detaining the men in a hold room without sleeping mats was excessive in light of this interest.

In sum, Plaintiffs are incorrect in their contention that the district court did anything more than acknowledge the holding of *Bell* and identify some of the Tucson Sector Border Patrol's operational needs. Because the district court did not apply the *Bell* analysis fully and completely to Plaintiffs' claims, the preliminary injunction order should be reversed and remanded.

III. The district court's requirement to provide sleeping mats to all detainees in Tucson Sector stations after twelve hours is overly rigid, and the alleged constitutional violation could be satisfied by more flexible means.

Defendants do not contend that there is no situation in which they could be required to provide some means by which detainees may sleep. Rather, they challenge the district court's rigid requirement that Border Patrol provide a sleeping mat to each detainee after twelve hours. *See* ER 32. The requirement is more burdensome than necessary, and the district court's goal of remedying the

alleged constitutional violation may be satisfied by more flexible means. Thus, the remedy constitutes an abuse of discretion. *McCormack v. Heideman*, 694 F.3d 1004, 1019 (9th Cir. 2012).

Plaintiffs do not deny the consequences the twelve-hour sleeping mat requirement has had on the Tucson Sector's ability to carry out its mission of apprehending individuals evading United States immigration laws. Defs' Br. at 25. Because the mission of the Tucson Sector Border Patrol includes apprehending and facilitating emergency medical care for individuals traveling through a large swath of Arizona desert, its stations are in remote areas, and it uses the Tucson Coordinating Center as a transportation hub and coordination point for detainees who must be transferred to another detention facility or agency. Compliance with the twelve-hour sleeping mat requirement significantly reduces the capacity of Tucson Sector stations, and at times when Tucson Sector needs to be able to utilize the full extent of the capacity available to it at Tucson Sector stations, this reduction has a significant effect on the operations of the Tucson Coordinating Center. *Id*. (citing SUPP ER 993-94). The capacity loss has, at times, resulted in lost opportunities to prosecute individuals who have been charged with crimes, including smuggling.[2] *Id*.; SUPP ER 993-94; *see* SUPP ER 996 (attesting to the

[2] Plaintiffs' argument that the current Tucson Sector capacity shortage and

November 20, 2016 inability to prosecute a twelve-person drug smuggling case involving individuals detained at the Ajo station for lack of timely presentment and the November 21, 2016 failure to prosecute nineteen individuals and November 23, 2016 failure to prosecute five individuals eligible for prosecution). Plaintiffs' arguments that the impact of compliance with the twelve-hour sleeping mat requirement on the Tucson Sector is "speculative," Pltffs' Resp. Br. at 22-23, ignores this plain evidence of actual effects from this requirement, and this evidence gives good reason to believe that such effects are likely to occur again in the future if the population level at Tucson Sector Border Patrol stations approaches full capacity.[3]

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logistical problems resulting from immediate compliance with the twelve-hour sleeping mat requirement could have been averted by the government's acquisition or construction of more buildings ignores the preliminary nature of the ordered relief, and the realities of the Government acquisition process. *See* Pltffs' Resp. Br. at 24. The district court reasonably did not require Defendants to immediately "build or obtain adequate capacity to hold all it seeks to detain." *Id*. Moreover, such an invasive requirement is entirely outside the scope of what reasonably should be required to comply with an order for preliminary injunctive relief.

[3] Plaintiffs' argument that they "do not seek to prevent Defendants from inspecting, apprehending, excluding, or removing aliens," Pltffs' Resp. Br. at 26, hints at a misunderstanding of the Border Patrol's mission. While it is correct that the Border Patrol apprehends individuals, and that the lions' share of the individuals are aliens (the Border Patrol usually does not know an individual's immigration status until it processes the individual, and it does encounter U.S citizens, including those engaged in smuggling), the Border Patrol is not the primary entity within DHS that detains individuals prior to removal. But, Border

Plaintiffs now argue, with tenuous factual support, that a twelve-hour threshold is "logical" because detainees "do not arrive at the Tucson Sector stations having only recently woken up" and because the Assistant Chief Patrol Agent George Allen testified that "oftentimes by the time we get someone to the station, we're approaching on 12 hours." Pltffs' Resp. Br. at 19 (quoting ER 102). However this argument ignores the fact that the point at which a sleeping mat can or should be required under the Constitution is not tied to "logic," but to a balancing of the operational needs of the facility against any constitutional rights of the detainees. Thus, as Defendants previously acknowledged, while there may well be cases where providing a sleeping mat at the twelve hour custody mark is appropriate when those interests are balanced, there will be many other instances where providing a sleeping mat at that mark substantially interferes with Border Patrol's processing of individuals and its ability to move them quickly out of Border Patrol custody. It is this failing of the rigid twelve-hour requirement that renders it more burdensome than necessary to remedy the alleged harm.

More importantly, the district court's conclusion that class members are denied a constitutional right to sleep unless they are provided mattresses or beds is

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Patrol does rely on its short-term detention facilities to determine who, for instance, should be further detained for removal or other proceedings, or could be immediately removed.

based on a misreading, ER 12, that Plaintiffs continue to advocate (*see* Pltffs. Br. at 20-21) of *Thompson v. City of Los Angeles*, 884 F.2d 1439, 1448 (9th Cir. 1989), and *Anela v. City of Wildwood*, 790 F.2d 1063, 1069 (3d Cir. 1986), that not providing detainees bedding "runs afoul" of the commands of the Fourteenth Amendment, when neither decision contains a holding to that effect. *See Thompson*, 884 F.3d at 1448 (holding that where a federal district court had found twenty years earlier at the jail where the plaintiff was detained that the jail was not providing each inmate with bed because of frequent overcrowded conditions, and county failed to refute the plaintiff's claim that he was not provided with bed or mattress or to provide evidence of corrective measures taken to comply with the twenty-year-old court order, it would be presumed that county maintained custom of unconstitutional jail conditions in form of bed shortages and could be held liable for arrestee's injuries resulting from constitutional deprivation in failing to provide him bed or mattress in a civil rights action). In *Anela*, 790 F.2d. at 1069, the Third Circuit held that, where a city failed to follow a New Jersey Supreme Court rule designed to protect arrestees' rights, by requiring the police officer in charge to issue a summons and release the arrestee in lieu of continued detention, and the city instead confined plaintiffs to jail cells overnight as a matter of practice, the city could be liable for any constitutional claims arising out of conditions of detention. *Id*. at 1066-69. *Anela* settled whether the detention emanated from the

city, rather than the discretion of an independent municipal judge. *Id*. at 1065-66. The Third Circuit noted that noncompliance with the New Jersey state law had been standard practice at the city and could be ascribed to municipal decisionmakers, and, thus, it amounted to a policy exposing the city to liability for claims that conditions of confinement, including being deprived of food, drinking water and beds while detained overnight, violated arrestees' Fourteenth Amendment due process rights. *Id*. at 1069. *Anela* does not impose a rule that lack of beds deprives a detainee of constitutional rights. In sum, the statements in *Thompson* and *Anela* that Plaintiffs and the district court rely upon are dicta.

Plaintiffs still have not cited any judicial decisions holding that not providing beds or mattresses to detainees who are held for a relatively short time amounts to a due process violation. This is not surprising, considering that in *Bell* the Supreme Court established a rule for evaluating conditions and restrictions of confinement on a case-by-case basis and was reluctant to issue one-size-fits-all rules governing even common aspects of detention. *See Bell*, 441 U.S. at 547-48 (declining to adopt a one-man, one-cell rule). Thus, Plaintiffs' argument that Defendants cannot suffer harm because the remedy the court ordered "ends an unlawful" practice, Pltffs' Resp. Br. at 21, is based on an incorrect reading of *Thompson* and *Anela* to impose a rule that not providing beds or mattresses to Border Patrol detainees amounts to a due process violation. Most of Plaintiffs'

remaining argument rests on this misreading. *See* Pltffs' Resp. Br. at 23 (describing Defendants' argument that the twelve-hour mattress requirement has impeded the Tucson Sector's ability to carry out its mission by resulting in reduced capacity and missed prosecutions as "a direct attack on [Defendants'] constitutional obligations"); *id*. at 24 (arguing that the district court may not refuse to order relief in response to a constitutional violation just because of a lack of space); *id*. at 26 (describing providing sleeping mats to all Tucson Sector detainees after twelve hours in detention as a constitutional requirement). The proper course of action would have been for the district court to apply the two-part analysis in *Bell*, for determining when a confinement condition amounts to a constitutional violation. This Court should remand the preliminary injunction for the district court to apply the correct legal standard in *Bell*, 411 U.S. 420, in lieu of its misreading of *Thompson* and *Anela* to impose a rule that not providing beds in any and all civil detention context deprives a detainee of the right to sleep. Further, the Court should order that if, upon remand and after applying *Bell*, or some other appropriate standard, the district court concludes, that Defendants have denied Plaintiffs of their right to sleep, the remedy that is fashioned must be narrowly tailored as to not impede the Tucson Sector's operations.

CONCLUSION

This Court should remand the preliminary injunction for the district court to apply the correct analysis in *Bell*, 411 U.S. 420. Alternatively, and if the Court declines to grant any relief with regard to the legal standard being applied, the Court should require the district court to modify the requirement to provide sleeping mats after twelve hours by replacing it with a more flexible requirement that takes into account the Tucson Sector's operational needs.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director

SARAH B. FABIAN
Senior Litigation Counsel

/s/ Christina Parascandola
CHRISTINA PARASCANDOLA
Trial Attorney
Office of Immigration Litigation
District Court Section
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044
(202) 514-3097

Attorneys for Respondent

Dated June 8, 2017

CERTIFICATE OF SERVICE

I certify that on June 8, 2017, I electronically filed the foregoing Defendants-Appellants' Opening Brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. I also certify that Plaintiffs-Appellees' counsel are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Christina Parascandola
CHRISTINA PARASCANDOLA

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