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**IN THE UNITED STATES DISTRICT COURT**

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**FOR THE DISTRICT OF ARIZONA**

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9 Unknown Parties, et al.,

No. CV-15-00250-TUC-DCB

10

Plaintiffs,

**FINDINGS OF FACT AND  
CONCLUSSIONS OF LAW**

11

v.

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Kirstjen M Nielsen, et al.,

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Defendants.

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**BACKGROUND**

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Plaintiffs filed this action on June 8, 2015, seeking injunctive relief related to alleged inhumane and punitive treatment of civil immigration detainees by Customs and Border Patrol (CBP) in the Tucson Sector at the Brian A. Terry Station/Naco Station, Casa Grande Station, Douglas Station, Nogales Station, Sonoita Station, Tucson Station, Why/Ajo Station, Willcox Station, and Three Points Station. The Tucson Station and Three Points Station process detainees at the Tucson Coordination Center (TCC), which serves as a hub for coordinating the movement of the majority of detainees out of CBP custody. Plaintiffs charge the Defendants with violating the Due Process Clause of the Fifth Amendment based on alleged deprivations of sleep, of hygienic and sanitary conditions, of adequate medical screening and care, of providing inadequate food and water, and of a lack of warmth in CBP holding cells. (Doc. 1 ¶¶ 184-218.) The case is a class action lawsuit. (Order (Doc. 117)).

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1           Following a seven-day trial, the Court grants Plaintiffs’ request for a Permanent  
2 Injunction because CBP’s mission is to arrest, process, and turn detainees over to United  
3 States Immigration and Customs Enforcement (ICE), Office of Enforcement and  
4 Removal Operations (ERO), the Office of Refugee Resettlement (ORR); the United  
5 States Marshals Service; or another agency (OA), as appropriate. CBP stations and  
6 holding facilities are designed within the context of this mission for short-term holds,  
7 lasting hours not days. There is no legitimate governmental interest to hold detainees  
8 longer than the time needed to complete this mission.

9           The evidence reflects that the extended detentions currently occurring at CBP  
10 facilities are, in large part, caused when receiving agencies, including ICE, ERO, ORR,  
11 the United States Marshals, and other agencies, are unable, usually due to capacity  
12 constraints, to accept CBP transfers. The Plaintiffs, who are civil detainees in CBP  
13 holding cells, face conditions of confinement after 12 hours which are substantially worse  
14 than detainees face upon commitment to either a civil immigration detention facility or  
15 even a criminal detention facility, like a jail or prison. The Court finds that the conditions  
16 of detention in CBP holding cells, especially those that preclude sleep over several  
17 nights, are presumptively punitive and violate the Constitution. The Defendants have  
18 overcome this presumption to a limited extent, and the Court limits its injunctive relief,  
19 accordingly. CBP shall be enjoined from holding detainees, who are “processing  
20 complete,” i.e., meaning the detainee has been processed by CBP and the appropriate  
21 receiving agency has been identified, longer than 48 hours from book-in time. Detention  
22 may not extend into a third night under the “no longer than 48 hours” rule, unless and  
23 until CBP can provide conditions of confinement that meet detainees’ basic human needs  
24 for sleeping in a bed with a blanket, a shower,<sup>1</sup> food that meets acceptable dietary  
25 standards, potable water, and medical assessment performed by a medical professional.

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28 <sup>1</sup> A shower is a bath in which water is showered (as in to wet with a spray, fine stream, or drops) on the body. *Webster’s Dictionary* (1979). A “paper-shower” or “shower-wipe, by definition, is not a shower.

1 The Court shall afford the parties an opportunity to be heard regarding any express  
2 terms necessary for the effectuation of the Permanent Injunction not contained herein.

3 A. Conditions of Confinement and Civil Detainees

4 ““When the State takes a person into custody and holds him there against his will,  
5 the Constitution imposes upon it a corresponding duty to assume some responsibility for  
6 his safety and general well-being: Under this rationale, the State must provide for a  
7 detainee’s ‘basic human needs—e.g., food, clothing, shelter, medical care, and reasonable  
8 safety—.’” (Order (Doc. 244) at 6 (quoting *DeShaney v. Winnebago Cty. Dep’t of Soc.*  
9 *Servs.*, 489 U.S. 189, 199-200 (1989)). ““The more basic the particular need, the shorter  
10 the time it can be withheld.” *Id.* at 20 (quoting *Hoptowit v. Ray*, 682 F.2d 1237, 1259 (9th  
11 Cir. 1982)). Less critical needs may be denied for reasonable periods of time when  
12 warranted by exceptional circumstances such as an emergency or disciplinary need. *Id.*  
13 (citing *Hoptowit* citing *Spain v. Procnier*, 600 F.2d 189, 199 (9th Cir. 1979)). The Court’s  
14 task is to “determine whether a challenged punishment comports with human dignity,”  
15 *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (BRENNAN, J., concurring), and the Court  
16 must carefully scrutinize the challenged conditions and application of realistic yet humane  
17 standards, *Rhodes v. Chapman*, 452 U.S. 337, 361 (1981).

18 It is undisputed that CBP holds the Plaintiffs as civil detainees, pursuant to civil  
19 immigration laws.<sup>2</sup> “Pretrial detainees cannot be punished because they have not yet been  
20 convicted,” *Lynch v. Baxley*, 744 F.2d 1452, 1461 (9th Cir. 1984) (citing *Bell v. Wolfish*,  
21 441 U.S. 520 (1979)); “[civil] detainees cannot be subjected to conditions of confinement  
22 substantially worse than they would face upon commitment,” *Lynch*, 744 F.2d at 1461.

23 As civil detainees, Plaintiffs are protected under the Fifth Amendment from being

24 <sup>2</sup> “Plaintiffs are civil detainees awaiting civil commitment; some may be awaiting criminal  
25 commitment.” (Order (Doc. 383) at 9 (citing (Reply (Doc. 359), Ex. 1: 11/15/16  
26 Evidentiary Hearing George Allen, Assistant Chief Patrol Agent-Tucson Sector at 107)).  
27 According to Defendants, the Plaintiffs are detained as civil detainees pursuant to 8  
28 U.S.C.A. § 1225 (an alien arriving at the United States border is deemed to be an applicant  
for admission, subject to being determined inadmissible and subject to removal); § 1226  
(detention pending a decision on whether the alien is to be removed); § 1231 (subsequent  
to an order of removal, an alien is detained pending deportation), and § 1252 (detention as  
a result of expedited removal proceedings). (Ds’ Proposed Findings of Facts (Doc. 441) ¶  
12.)

1 held without due process of law under conditions that amount to punishment. *Wong Wing*  
2 *v. United States*, 163 U.S. 228, 237 (1896). The Eighth Amendment’s prohibition against  
3 cruel and unusual punishment requires prison officials to provide humane conditions of  
4 confinement, including adequate food, clothing, shelter, sanitation, and medical care, and  
5 take reasonable measures to guarantee the safety of the inmates. *Farmer v. Brennan*, 511  
6 U.S. 825, 832 (1994). Under the Eighth Amendment, a prison official must act with  
7 deliberate indifference to an inmate’s health or safety. *Id.* at 834. Therefore, conditions of  
8 confinement that violate the Eighth Amendment will necessarily violate the Fifth  
9 Amendment.

10 Because Plaintiffs are civil detainees and not prisoners, the Fifth Amendment,  
11 mirrored by the Fourteenth Amendment Due Process Clause,<sup>3</sup> apply; both protect a non-  
12 convicted detainee from punishment prior to an adjudication of guilt. *Bell v. Wolfish*, 441  
13 U.S. 520, 534–35 (1979). ““This standard differs significantly from the standard relevant  
14 to convicted prisoners, who may be subject to punishment so long as it does not violate the  
15 Eighth Amendment’s bar against cruel and unusual punishment.”” (Order (Doc. 244) at 7  
16 (quoting *Pierce v. County of Orange*, 526 F.3d 1190, 1205 (9<sup>th</sup> Cir. 2008)). Fourteenth  
17 Amendment due process claims are evaluated under an objective deliberate indifference  
18 standard. *Gordon v. County of Orange*, 888 F.3d 1118, 1124-35 (9<sup>th</sup> Cir. 2018) (applying  
19 *Castro v. Los Angeles*, 833 F.3d 1060 (9<sup>th</sup> Cir. 2016) (en banc), *Kinsley v. Hendrickson*,  
20 135 S. Ct. 2466 (2015). The “more protective” Fourteenth Amendment standard requires  
21 more than minimal necessities, *Jones v. Blanas*, 393 F.3d 918, 931 (9<sup>th</sup> Cir. 2004),<sup>4</sup> but  
22 does not require conditions of confinement free from discomfort, *Bell*, 441 U.S. at 537.  
23 “[D]ue process requires that the nature and duration of commitment bear some reasonable  
24 relation to the purpose for which the individual is committed.” *Jackson v. Indiana*, 406

25 <sup>3</sup> The Due Process Clause of the Fourteenth Amendment bars any State from depriving any  
26 person of rights secured under the Bill of Rights (the first eight amendments). Therefore,  
27 the Court relies equally on cases applying the Fourteenth and Fifth Amendment Due  
28 Process Clauses.

<sup>4</sup> Overruled in part by *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9<sup>th</sup> Cir. 2014) (holding  
monetary damages as a retroactive remedy is unavailable against an official capacity  
defendant who lacks authority over budgeting decisions, but may factor into assessing  
subjective intent for deliberate indifference analysis in Eighth Amendment case).

1 U.S. 715, 738, (1972). The Court evaluates the conditions in light of contemporary  
2 standards of decency “in reference to their severity and duration,” with any “resulting  
3 injury being merely one factor that may suggest an unjustified infliction of harm compared  
4 to being plausibly necessary.” (Order (Doc. 383) at 6-7 (citing *Darnell v. Pineiro*, 849 F.3d  
5 17, 30 (2ndh Cir. 2018) (citing *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)), *see also*  
6 *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003) (citing same).

7 To evaluate the constitutionality of a pretrial detention condition under the Fifth  
8 Amendment, a district court must determine whether those conditions amount to  
9 punishment of the detainee. *Bell*, 441 U.S. at 535; *Pierce*, 526 F.3d at 1205; *Demery v.*  
10 *Arpaio*, 378 F.3d 1020, 1029 (9<sup>th</sup> Cir. 2004). In the absence of evidence of express intent,  
11 a court may infer that the purpose of a particular restriction or condition is punishment if  
12 the restriction or condition is not reasonably related to a legitimate governmental  
13 objective or is excessive in relation to the legitimate governmental objective. *Pierce*, 526  
14 F.3d at 1205 (citing *Bell*, 441 U.S. at 539); *Demery*, 378 F.3d at 1028 (citing *Bell*, 441 at  
15 538). There is no evidence in this case of any intent by CBP to create punitive conditions  
16 of confinement. The evidence reflects that CBP has stretched existing resources to  
17 provide the best conditions of confinement available under the circumstances. A  
18 presumption, however, exists that the challenged conditions of confinement are punitive  
19 because in the context of CBP operations, there is no legitimate governmental interest for  
20 the extended detentions currently occurring at CBP facilities, and the Plaintiffs, who are  
21 civil detainees, face conditions of confinement in CBP stations, Tucson Sector, which are  
22 more restrictive than they will face upon commitment to either a civil or criminal  
23 detention facility. The Ninth Circuit recognizes an exigent circumstances exception for  
24 constitutional violations, but this is a narrow exception *Oliver v. Baca*, 913 F.3d 852, 858  
25 (9<sup>th</sup> Cir. 2019) and does not apply here because by all accounts the detainee  
26 demographics currently existing in the Tucson Sector have existed since at least 2015 and  
27 are expected to continue into the future.

28 In considering assertions of legitimate governmental objectives and interests,

1 “maintaining institutional security and preserving internal order and discipline are essential  
2 goals that may require limitation or retraction of the retained constitutional rights of both  
3 convicted prisoners and pretrial detainees.” *Bell*, 441 U.S. at 546; *Pierce*, 526 F.3d at 1205.  
4 In the absence of substantial evidence that indicates officials have exaggerated their  
5 responses, courts should ordinarily defer to the expert judgment of correction officials to  
6 determine whether detention restrictions or conditions are reasonably related to  
7 maintaining security and order and operating the institution in a manageable fashion. *Bell*,  
8 441 U.S. at 540 n. 23. The government does not need to show an “exact fit” or proof that  
9 the policy in fact advances the legitimate governmental objective, or even that it is the  
10 “least restrictive alternative.” *Valdez v. Rosenbaum*, 302 F.3d 1039, 1045 (9<sup>th</sup> Cir. 2002).  
11 The correction official must have reasonably thought that the policy would advance a  
12 legitimate governmental objective. *Id.* Such legitimate non-punitive justifications must,  
13 however, be specific to the penological interests involved in the Plaintiffs’ detention, which  
14 here is for commitment as civil detainees in immigration-type civil facilities. (Order (Doc.  
15 383) at 10 (citing *King v. Los Angeles County*, 885 F.3d 548, 554-555 (9<sup>th</sup> Cir. 2018))).

16 In summary, a condition of confinement for an inmate who has not been convicted  
17 violates the Fifth and Fourteenth Amendments if it imposes some harm to the detainee that  
18 significantly exceeds or is independent of the inherent discomforts of confinement and is  
19 not reasonably related to a legitimate governmental objective or is excessive in relation to  
20 the legitimate governmental objective. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473-74  
21 (2015). Under the Fourteenth Amendment, the Court makes an objective assessment  
22 whether there is a reasonable relationship between the government’s conduct and a  
23 legitimate purpose. *Id.* at 2469. The civil nature of Plaintiffs’ confinement provides an  
24 important gloss on the meaning of “punitive”; Plaintiffs must be afforded “more  
25 considerate treatment” than even pretrial detainees, who are being criminally detained prior  
26 to trial. *Cf. Estelle v. Gamble*, 429 U.S. 97, 104, (1976); *Youngberg v. Romeo*, 457 U.S.  
27 307, 321–22, (1982). Constitutional rights in respect to conditions of confinement for  
28 prisoners establish a floor for the constitutional rights of the Plaintiffs. *Padilla v. Yoo*, 678

1 F.3d 748, 759 (9<sup>th</sup> Cir. 2012) (citations omitted). The Court must presume detainees are  
2 subjected to punishment if they are confined in conditions identical to, similar to, or more  
3 restrictive than those under which the criminally convicted are held. *See Sharp v. Weston*,  
4 233 F.3d 1166, 1172–73(9<sup>th</sup> Cir. 2000) (finding that *Youngberg* required that individuals  
5 civilly confined at a commitment center receive “more considerate” treatment than inmates  
6 at the correctional center in which the commitment center was located).

7 The evidence is undisputed that conditions of confinement at Tucson Sector CBP  
8 stations are substantially worse than conditions afforded criminal detainees at the Santa  
9 Cruz County jail or other jail facilities, where detainees are medically screened by medical  
10 professionals; have a bed with cloth sheets, blankets, and pillows, and an opportunity for  
11 uninterrupted sleep; have clean clothing, including second layers for warmth; showers,  
12 toothbrushes and toothpaste, and warm meals with a variety of food choices, including  
13 fruits and vegetables, accommodating food allergies and religious beliefs. Likewise, the  
14 conditions of confinement for civil immigration detainees similarly improve once they are  
15 transferred from CBP holding cells to detention centers operated by the United States  
16 Marshals, ICE, ERO, Health and Human Services (HHS), and other immigration detention  
17 agencies and organization. Accordingly, there is a presumption that the conditions of  
18 extended confinement at the Tucson Sector stations violate the Plaintiffs’ constitutional  
19 rights.

20 When the Court denied the Plaintiffs’ Motion for Summary Judgment, it held that  
21 the Defendants had to be afforded an opportunity at trial to rebut the presumption that the  
22 challenged conditions of confinement are punitive by presenting evidence that the severity  
23 and duration of the conditions of confinement are rationally related to the CBP’s  
24 interdiction mission. (Order (Doc. 383) at 5-11.)

#### 25 B. Conditions of Confinement under the Preliminary Injunction

26 On November 18, 2016, when the Court issued the preliminary injunction, the Court  
27 considered the constitutionality of the conditions of confinement given the nature, purpose,  
28 and duration, of the detainees’ time in a CBP station. The Court found: “Border Patrol



1 stations are twenty-four-hour operations, and in fact a significant number of individuals  
2 who are detained in Border Patrol stations are apprehended during the evening and night-  
3 time hours.” (Order (Doc. 244) at 11.) Defendants then described the following:

4       Border Patrol processing begins in the field, but on arrival at the detention  
5 facility intake begins in the “sally port” where detainees’ outer-clothing is  
6 removed for security reasons, leaving detainees without sweatshirts, jackets,  
7 or second layers of clothing for warmth. Detainees are placed into group-  
8 holding rooms based on age, gender, family units, or criminal suspects.  
9 Processing consists of obtaining biographical information and biometrics  
10 and submitting this information through the e3Nex Generation  
Identification system to determine prior criminal and immigration arrests.  
Fully processing a detainee includes preparing an arrest report, immigration  
processing, service of immigration forms, consular notifications, and  
communication with family members and attorneys as appropriate. If  
uninterrupted and if there is no remarkable criminal or immigration history,  
processing would take between two and two and one-half hours.

11 (Order (Doc. 244) at 11 (citations to the record omitted.) The evidence reflected that there  
12 were, however, interruptions “caused by a large number of prior apprehensions and the  
13 criminal background of the detainees awaiting processing, the need to dispense meals,  
14 medical or health care, to arrange consular communications, phone calls to family members  
15 or attorneys, to conduct investigations, and computer system outages.” *Id.* The evidence  
16 also revealed “that detention in Border Patrol holding rooms is also extended because of  
17 delays by the receiving agencies ICE, ERO, and the United States Marshal in accepting the  
18 Border Patrol transfers.” *Id.*

19       The Court summarized: “between June 10, 2015 and September 28, 2015, only  
20 about 3,000 of approximately 17,000 detainees were processed out of CBP station  
21 detention within 12 hours: [o]f these 17,000 detainees, 8,644 people were held at CBP  
22 stations up to 23 hours, 6,807 were held up to 47 hours, 1,207 were held up to 71 hours,  
23 and 476 were held for 72 hours or more.” *Id.* at 12. The expert testimony at the evidentiary  
24 hearing for the preliminary injunction was: “CBP tries diligently to process detainees  
25 promptly, and generally does so within 24 hours,” *id.* (quoting Skipworth Decl. ¶ 154));  
26 “nearly all detainees were processed within 48 hours,” *id.* (quoting Bryce Decl. ¶ 38.) The  
27 Court understood this evidence in the context of processing to mean the transfer of  
28 detainees by CBP to receiving agencies, ICE, ERO, the United States Marshals.



1           The Court found the Plaintiffs were likely to prevail on the constitutional claims  
2 related to alleged cell conditions as follows: overcrowding, with concrete hard and cold  
3 floors and bench surfaces, cold temperatures, no blankets or mats, precluding sleeping;  
4 unsanitary cell conditions, with lack of waste receptacles and insufficient housekeeping,  
5 lack of personal hygiene products and showers, insufficient food and lack of potable water.  
6 The Court was concerned about the lack of a universal medical questionnaire designed by  
7 medical professionals for use by CBP agents, especially because medical screening was  
8 being performed by agents without any medical training.

9           The Court ordered full and immediate compliance “with CBP’s 2008 Hold Rooms  
10 and Short-Term Custody Policy (2008 Policy) and the National Standards on Transport,  
11 Escort, Detention, and Search (TEDS) standards and that the standard requiring clean  
12 bedding includes mats for detentions exceeding 12 hours.” (Order (Doc. 383) at 1.) The  
13 Court clarified that 12 hours begins to run when a detainee is booked-in at a station, not  
14 when he or she is detained in the field. After 12 hours of detention, CBP must provide  
15 bedding, including a sleeping mat and Mylar blanket, and showers or a body-wipe where  
16 showers were not available. The Court reasoned that conditions of confinement in the field  
17 and for the first 12 hours of detention at the Station were rationally related to the CBP’s  
18 24-7 operations and governmental interests, including: interdiction, arrest, detention and  
19 processing. The Court reasoned that Defendants could not side-step the reality that over  
20 half the detainees were being held longer than 12 hours and, therefore, physiologically had  
21 the human need to lie down and sleep. (Order (Doc. 244) at 12-17, 27-28.) For purposes of  
22 granting the permanent injunction the Court affirms these findings.

23           The Court adds to the 12-hour sleeping mat requirement, that floor mat-sleeping is  
24 only acceptable outside the toilet areas of the holding cells. The Court understands that  
25 holding cell design and floor sleeping, with mats, creates capacity issues, but the alternative  
26 of detainees lying directly on cold floors, covered only by Mylar sheets does not resolve  
27 the capacity issues caused by sleeping in holding cells. The capacity issues are not caused  
28 by the sleeping mats; the capacity issues are caused by holding cell designs that do not

1 accommodate sleeping, with or without a mat. Prior to sleeping mats, detainees were  
2 sleeping directly on the floor in the toilet areas of the holding cells when cells were  
3 overcrowded. Regardless of whether a detainee is sleeping on a mat or directly on the  
4 concrete floor, being forced to sleep in a toilet area due to overcrowding offends the notions  
5 of common decency; it is unsanitary and degrading for all detainees who either have to  
6 sleep in the toilet area or try to use the toilet when others are sleeping there. Regardless of  
7 the duration of overcrowding, CBP is enjoined from overcrowding holding cells to the  
8 extent that detainees are sleeping on the floor in toilet areas of the holding cells.

### 9 C. Purpose of Plaintiffs' Pre-commitment Detention by CBP

10 Under both the Fifth Amendment and the Fourteenth Amendment Due Process  
11 Clause, the Court must consider the penological interests of the pre-commitment conditions  
12 of confinement, i.e., the purpose of the detention. For purposes of issuing the permanent  
13 injunction, the Court considers legitimate non-punitive justifications specific to the  
14 penological interests involved in detaining the Plaintiffs for commitment as civil detainees  
15 in immigration-detention type facilities, not prisons. In the context of such civil detention,  
16 the Tucson Sector is part of CBP and responsible for: “[f]undamentally securing our  
17 nation’s borders, operating in between the ports of entry to ensure that illicit narcotics,  
18 contraband, undocumented aliens, terrorists and [] don’t enter the United States.” (TR  
19 1/15/2020 (Day 3) (Doc. 471): Defraitas at 30) at 30.) Hold-room detentions beyond the  
20 time needed for CBP to process a detainee for transport to a receiving agency, like ICE,  
21 ERO, or the United States Marshals, are not related to the CBP’s interdiction mission.

22 The Court, based on the Finding of Facts and Conclusions of Law set out below,  
23 grants Plaintiffs a permanent injunction enjoining Defendant CBP, Tucson Sector, from  
24 detaining individuals under existing conditions for periods of time unrelated to the CBP  
25 mission to interdict, process and transport detainees to receiving agencies ICE, ERO,  
26 HHS, United States Marshals, and others. The injunction issues because CBP operations  
27 and facilities are not designed to meet a detainees’ basic human needs, including  
28 sleeping, warmth, food, water, personal hygiene, and medical care for extended periods

1 of time. The evidence reflects that CBP processing, generally, takes between a couple of  
2 hours and 12 hours and may involve at least one night-time detention in a CBP holding  
3 cell due to: 1) processing when an arrest occurs at night or in the evening or 2)  
4 transportation to a receiving agency cannot occur at night because the receiving agency  
5 does not have 24 hour operations, i.e., it is closed at night, or because Mexico will not  
6 receive detainees for repatriation at night or because judicial operations are closed at  
7 night and on weekends and holidays.<sup>5</sup> The logistics of being unable to transport detainees  
8 to receiving agencies at night extend the time necessary for CBP to process and transfer a  
9 detainee for approximately 12 hours during the night-time detention. To accommodate  
10 the logistics of night-time precluded transportation operations, the Court adopts a “no  
11 longer than 48-hours” rule based on the finding that detentions beyond 48 hours are,  
12 generally, not related to CBP operations. Detentions longer than 48 hours for detainees  
13 who have been designated “processing complete” are because receiving agencies fail to  
14 green-light the CBP detainee transfers. This forces CBP to step into the ill-fitting shoes of  
15 a detention facility and perform the detention responsibilities of such agencies as ICE,  
16 ERO, ORR, HHS, and other civil immigration detention agencies. It is undisputed that all  
17 of the receiving agencies afford detainees a bed, with real cloth sheets, blankets, and  
18 pillows, provide warmth by dispensing second layers of clothing, have shower facilities,  
19 offer hot meals prepared pursuant to professional dietary standards, have clean potable  
20 water readily available, and have medically trained staff who conduct medical screenings  
21 of the detainees and provide care as appropriate.

22 In 2019, the average time spent in CBP custody in the Tucson Sector was 53.92  
23 hours, with 34 percent of 63,490 detainees being held longer than 48 hours: 9,798

24 \_\_\_\_\_  
25 <sup>5</sup> The Court treats the weekend and holiday closures by the judiciary the same as the night-  
26 time logistic impediment CBP faces in carrying out its duty to transfer detainees to receiving  
27 agencies. The Court intends that the Permanent Injunction will accommodate the logistical  
28 impossibility for CBP to transport a detainee to a receiving agency due to court closures  
during the night, weekends and holidays, with CBP making every possible effort to provide  
such detainees with conditions of confinement meeting basic human needs to sleep in a  
bed, have a shower, etc., if it becomes logistically impossible for CBP to transfer a detainee  
pursuant to the “no longer than 48 hours” rule because the courts are only open on  
weekdays and closed holidays.

1 individuals were held up to 72 hours and 12,030 individuals were held longer than 72  
2 hours. Therefore, the Court finds that Defendant Chad Wolf, Acting Secretary of United  
3 States Department of Homeland Security,<sup>6</sup> and the other Defendants administer a  
4 detention system that deprives detainees, who are held in CBP stations, Tucson Sector,  
5 longer than 48 hours, of conditions of confinement that meet basic human needs because  
6 CBP holding cells are designed so as to preclude beds, with detainees being forced over a  
7 period of several nights (more than 2) to sleep on mats on concrete floors or benches in  
8 fully-lit holding cells. CBP does not provide a second layers of clothing and the holding  
9 cells are uncomfortably cold even with floor mats, especially at night because body  
10 temperature drops due to inactivity and the Mylar blankets are not effective to provide  
11 warmth as they are designed to prevent the loss of body heat. (Order (Doc. 244) at 15  
12 (referencing preliminary injunction testimony reflecting efficacy of Mylar blanket  
13 depends on comfortable room temperatures because it does not provide insulation but  
14 merely prevents evaporation of approximately 80% of body heat). Sleeping is constantly  
15 interrupted because CBP operations include 24-7 processing that continuously moves  
16 detainees in and out of holding cells where other detainees are attempting to sleep. This is  
17 especially disruptive, when detainees, who have been fully processed, i.e., “processing  
18 complete,” occupy the same holding cells that new arrivals are being moved in and out of  
19 during processing. Disruption is compounded by intermittent overcrowding, especially at  
20 TCC, when detainees are forced to step over each other, step on each other’s mats, and  
21 even sleep in toilet stall areas, thereby, making it impossible to move about the cell to get  
22 water or use the bathroom without disrupting other detainees who are trying to sleep.

23 The Plaintiffs ask the Court to enjoin the Defendants from holding detainees in  
24 these conditions for more than one night. The Court’s permanent injunction is more  
25 limited. The “no longer than 48-hours” rule allows a third night detention only when it is  
26 necessary due to incomplete processing or the logistic impossibility of making an agency  
27 transfer at night. The Court limits the permanent injunction to detainees that are transfer

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28 <sup>6</sup> ICE is an agency within the Department of Homeland Security; CBP is an agency within the Department of Homeland Security.

1 ready, i.e., the detainee has been processed by CBP and the appropriate receiving agency  
2 has been identified—the detainee is “processing complete.”

3 The Court finds that each of the conditions of confinement existing in the CBP  
4 holding cells described above, and all of them together, are presumptively punitive because  
5 they are more restrictive than the conditions of confinement described above as existing  
6 for pretrial detainees held in jails or prisons and for civil detainees held in ICE, ERO, HHS  
7 or other civil detention facilities. Considering the conditions of confinement in CBP  
8 holding cells in the context of holding these detainees for the purpose of civil immigration  
9 proceedings, the conditions of confinement are especially harsh and unrelated to the  
10 purpose of their confinement. In the context of CBP’s legitimate government interests,  
11 CBP admits that detention responsibilities lasting beyond the time period necessary to  
12 process detainees takes away from its ability to carry out its patrol duties along the border.  
13 *See* (Joint Exhibit (JE) 759: Memorandum from Kevin K. McAleenan, Commissioner, U.S.  
14 CBP, Southwest Border Security and Humanitarian Crisis: U.S. Customs and Border  
15 Protection Immediate Action Plan (April 9, 2019) 2-3 (explaining objective of Action Plan  
16 is to restore USBP in-custody numbers to safely managed thresholds, allowing USBP to  
17 return our law enforcement resources to our border and national security priorities as  
18 quickly as possible.”) Once CBP has processed detainees, identified the receiving agency,  
19 and had a reasonable time to make the transfer (the time needed to transport the detainee  
20 to the receiving agency), the governmental interests that warrant the existing conditions of  
21 confinement end. The 48-hour rule accommodates this governmental interest. Under the  
22 “no longer than 48-hours” rule, a detainee, who is processing complete, may not be held  
23 into a third night or longer, unless CBP can provide conditions of confinement that provide  
24 for basic human needs, especially uninterrupted sleeping in a bed, warmth, showers, food  
25 that meets acceptable dietary standards, potable water, and a medical assessment made by  
26 a medically trained professional.

### 27 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

28 On January 13 through 17, and 21 through 22, 2020, this action was tried before this

1 Court, sitting without a jury. Having heard the testimony and having examined the proofs  
2 offered by the parties, and having heard the arguments of counsel and being fully advised  
3 herein, the Court now finds generally in favor of Plaintiff and against the Defendant, and  
4 hereby makes the following special Findings of Fact and Conclusions of Law pursuant to  
5 the Federal Rules of Civil Procedure, Rule 52(a) which constitutes the decision of the Court  
6 herein:

7 **A. Findings of Fact**

8 To the extent these Findings of Fact are also deemed to be Conclusions of Law, they  
9 are hereby incorporated into the Conclusions of Law that follow.

10 1. The CBP's primary mission is detecting and preventing the entry of  
11 terrorists, weapons of mass destruction, and unauthorized aliens, as well as interdicting  
12 drug smugglers and other criminals entering the United States between the ports of entry.  
13 (Ds' Proposed Findings of Fact (Ds PFOF) (Doc. 441) ¶¶ A.1-A.2); (TR 1/15/2020 (Day  
14 3) (Doc. 471): Defraitas at 30) (describing CBP mission: "[f]undamentally securing our  
15 nation's borders, operating in between the ports of entry to ensure that illicit narcotics,  
16 contraband, undocumented aliens, terrorists and [] don't enter the United States.")

17 2. In carrying out this "interdiction mission," a CBP agent in the Tucson  
18 Sector apprehends an individual and brings him or her to one of eight Tucson Sector  
19 stations—Ajo, Brian A. Terry, Casa Grande, Douglas, Nogales, Sonoita, Tucson  
20 Coordination Center ("TCC") or Willcox. Agents at the Tucson Station and Three Points  
21 Station bring individuals directly to the TCC. (DPFOF (Doc. 441) ¶ A.3.)

22 3. Once an individual arrives at a station, CBP agents ascertain the  
23 individual's identity, and immigration and criminal history. The individual is processed  
24 to determine whether he or she may be repatriated, transferred into the custody of another  
25 agency, referred for prosecution in accordance with the law, or, in rare circumstances,  
26 released on his or her own recognizance. *Id.* ¶ A.4.

27 4. Individuals awaiting the completion of processing and transfer out of CBP  
28 custody wait in hold rooms within the CBP station. CBP stations, like CBP itself, operate



1 twenty-four hours a day, seven days a week. A significant number of Tucson Sector CBP  
2 apprehensions occur at night. *Id.* ¶ A.6.

3 5. Once detained, individuals are often transferred from one hold room to  
4 another as operational demands require including, but are not limited to, the Prison Rape  
5 Elimination Act (“PREA”), Pub. L. No. 108-79, 117 Stat. 972 (Sept. 4, 2003) (codified at  
6 42 U.S.C. §§ 15601, *et seq.*); United States Customs and Border Protection (“CBP”)’s  
7 National Standards on Transport, Escort, Detention, and Search (“TEDS”) detainee and  
8 occupational safety requirements, and to maintain facility cleanliness. *Id.* ¶ A.7.

9 6. Tucson Sector CBP aims to maintain a safe environment both for  
10 individuals in custody and for its agents, other employees, and on-site contractors. There  
11 is no evidence of any express intent to punish detainees. *Id.* ¶ A.9.

12 7. CBP stations are intended and designed for short-term holding during  
13 processing and are not long-term detention facilities. Processing generally takes between  
14 2 and 2.5 hours. (JE 121 ¶ 5 (Allen Decl 2/24/16)). CBP operations, such as bedding  
15 accommodations, food, and personal hygiene, are designed to move detainees out of CBP  
16 custody within 12 to 24 hours and detention exceeding 24 hours is “extended” (Plaintiffs’  
17 Exhibit (PE) 1234 (4/7/17 Allen Dep. at 155:13-21)) or “prolonged” *id.* at 162:19-163:3.  
18 *See also* Deposition Video (PE 1234) (8/23/17 Raleigh Leonard (describing CBP as not  
19 being in business of detaining people longer than 24 hours); Deposition Video (PE 1234)  
20 (7/14/16 George Allen (describing food standards, cell capacities and sleeping  
21 accommodations being based on 12-24 holds). Agent Carrie Davison, Special Operations  
22 Supervisor, described holding time beyond 72 hours to be an extended time. (TR Day 4:  
23 Davison (questioned by the Court) (Doc. 473) at 90.)

24 8. CBP’s hold room design standards mandate at least 7 square feet of  
25 unencumbered square feet per detainee. (JE 4 at USA000089-90.) These standards  
26 assume detainees will not lie down, since “a hold room is not designed for sleeping.” (*Id.*  
27 at USA-0000091.)

28

1           9.       ICE hold room standards also mandate at least 7 square feet of  
2 unencumbered square feet per detainee. (JE 910: National Detention Standards for Non-  
3 Dedicated Facilities Revised 2019 at 38.) ICE’s standards are clear that hold room  
4 capacities are based on seating capacity, with no accommodations for sleeping  
5 apparatuses; detainees “may not be held in a hold room for more than 12 hours.” (JE 910  
6 at 38.)

7           10.       The memorandum, *Hold Rooms and Short Term Custody*, dated June 2,  
8 2008 (2008 Memorandum Policy), is the national guiding policy on short-term custody  
9 pertaining to CBP Tucson Sector hold-rooms. (JE 9.) Another national level policy was  
10 also published, U.S. Customs and Border Protection National Standards on Transport,  
11 Escort, Detention and Search (TEDS), dated October 2015. (JE 74.) TEDS is the  
12 comprehensive CBP policy related to the safety, security, and care of detainees, which  
13 reinforces the Hold Rooms and Short Term Custody policy. Where the two policies  
14 differ, the more restrictive policy takes precedence. (JE 863: Memorandum, October 3,  
15 2019.)

16           11.       Under the 2008 Memorandum Policy: “Detainees will be promptly  
17 processed and turned over to United States Immigration and Customs Enforcement (ICE),  
18 Office of Detention and Removal Operations (ERO), the Office of Refugee Resettlement  
19 (ORR); the United States Marshals Service; or another agency (OA), as appropriate.”  
20 CBP Policy: Hold Rooms and Short Term Custody § 5.2. “Whenever possible, a detainee  
21 should not be held for more than 12 hours. Every effort will be made to promptly process,  
22 transfer, transport, remove, or release those in custody as appropriate and as operationally  
23 feasible.” *Id.* § 6.2.1. The senior shift supervisor must be notified of a detention that  
24 reaches or exceeds 24 hours and shall make every effort to promptly move the detainee,  
25 *id.* § 6.2.2; the Sector Staff Duty Officer shall be notified when a detention period reaches  
26 or exceeds 72 hours and shall make every effort to promptly move the detainee, *id.* §  
27 6.2.3. The same durational limits apply to UACs, and the *Flores* Settlement requires that  
28 UACs must be placed in an ORR-approved facility within 72 hours, but the maximum

1 time allowed under extenuating circumstances for placing UAC in an ORR approved  
2 facility is five days. *Id.* §§ 6.24-6.2.4.2.

3 12. Under TEDS: “Detainees should generally not be held for longer than 72  
4 hours in CBP hold rooms or holding facilities. Every effort must be made to hold  
5 detainees for the least amount of time required for their processing, transfer, release, or  
6 repatriation as appropriate and as operationally feasible.” (JE 74 § 4.1.)

7 13. Neither the 2008 Memorandum Policy nor the TEDS reflect the  
8 constitutional standard, but both establish that CBP holding cells and station operations  
9 are not designed to hold detainees, routinely, longer than 12 hours.

10 14. In FY 2015, Tucson Sector CBP apprehended 63,397 individuals; in 2016,  
11 CBP apprehended 64,891 individuals; in 2017, CBP apprehended 38,657 individuals, and  
12 in 2018, CBP apprehended 52,172 individuals. In FY 2019, Tucson Sector CBP  
13 apprehended 63,490 individuals, an increase in 22 percent from the previous fiscal year.  
14 Of the 63,490 individuals apprehended in FY 2019 by Tucson Sector, 5,105 were  
15 unaccompanied alien children (UAC), 16,199 were members of family units (FMUA),  
16 and 42,186 were single adults. (DPFOF (Doc. 441) ¶ A.8.) The 2019 apprehensions  
17 reflect the general demographics for detainees since at least the inception of this case.  
18 (TR Day 3: DeFrieitas (Direct) (Doc. 471) at 79-89 (describing demographic  
19 consistencies with slight variations since 2016 in numbers of Mexican nationals and  
20 other-than Mexico, UACs, FMUAs, and single adults; explaining increases in UACs and  
21 FMUAs is national problem being experienced more dramatically in other sectors but  
22 nevertheless affecting Tucson Sector’s ability to place UACs and FMUAs because all  
23 sectors compete nationally for limited ICE detention space).

24 15. In FY 2019, the average time an individual spent in custody in Tucson  
25 Sector was 53.92 hours. More specifically, the times in custody for the 63,490 individuals  
26 apprehended by Tucson Sector in FY 2019 were as follows: 3,008 individuals (5%) were  
27 held for fewer than 12 hours; 15,238 individuals (24%) were held for 12 to 24 hours;  
28 23,416 individuals (37%) were held for 24 to 48 hours; 9,798 individuals (15%) were

1 held for 48 to 72 hours; and 12,030 individuals (19%) were held for longer than 72 hours.  
2 (DPFOF (Doc. 441) ¶ A.10.)

3 16. Time in custody has increased over previous years. “Discovery in this case  
4 reflects that in 2015, between June 10, 2015 and September 28, 2015, about 3,000 [18%]  
5 of approximately 17,000 detainees were processed out of CBP station detention within 12  
6 hours. (Gaston Decl. ¶ 20.) Of these 17,000 detainees, 8,644 people [51%] were held at  
7 CBP stations up to 23 hours; 6,807 [40%] were held up to 47 hours; 1,207 [7%] were  
8 held up to 71 hours, and 476 [2%] were held for 72 hours or more. [] Defendants’ expert,  
9 Diane Skipworth, indicated that based on her review ‘CBP tries diligently to process  
10 detainees promptly, and generally does so within 24 hours.’ (Skipworth Decl. ¶ 154.)  
11 Defendants’ other expert, Richard Bryce, believe[d] that nearly all detainees were  
12 processed within 48 hours. (Bryce Decl. ¶ 38.)” (Order (Doc. 244) at 12.)

13 17. Time in detention for purpose of this case means: time in custody at a CBP  
14 station, calculated from book-in at a station, not apprehension in the field, therefore,  
15 detention times underestimate the extent to which detainees are deprived of sleep and  
16 hygiene. The long transportation times between field apprehension and book-in at a  
17 station mean that detainees are in grave need of a facility that can accommodate the basic  
18 human needs for sleep, food, and a shower.

19 18. The custody of individuals apprehended by Tucson Sector CBP is governed  
20 by applicable immigration detention statutes. *See* 8 U.S.C. §§ 1225, 1226, 1231, 1252.  
21 An individual may also be detained by Tucson Sector CBP pending referral for criminal  
22 prosecution. In most instances, Tucson Sector must keep individuals in its custody for the  
23 time that it takes to complete their individual processing and to arrange transportation to  
24 each individual’s next destination: United States Marshals Service, ICE, ERO, HHS, etc.  
25 (DPFOF ¶ A.12.)

26 19. The Commissioner of the United States Customs and Border Protection has  
27 acknowledged the significant increase in the numbers of aliens remaining in custody over  
28 72 hours. “These volumes of apprehensions and aliens in custody have created

1 unprecedented humanitarian and safety concerns which we must continue to urgently  
2 address.” The delivery of soft-sided and modular structures could address immediate  
3 capacity needs.” (JE 759: Memorandum from Kevin K. McAleenan, Commissioner, U.S.  
4 CBP, Southwest Border Security and Humanitarian Crisis: U.S. Customs and Border  
5 Protection Immediate Action Plan (April 9, 2019) at 1).

6         20. The Immediate Action Plan for CBP, April 9, 2019, set out by the  
7 Commissioner, includes actions to be undertaken by CBP along the Southwest Border to  
8 address “increasing throughput challenges associated with processing unprecedented  
9 numbers of Unaccompanied Alien Children (UAC) and Family Unit Aliens (FMUA); and  
10 [the] significant challenges transferring these aliens to other appropriate entities, . . .  
11 “specifically . . . a significant increase in UAC and FMUA- as well as total numbers of  
12 aliens- remaining in custody over 72 hours.” (JE 759: Memorandum from Kevin K.  
13 McAleenan, Commissioner, U.S. CBP, Southwest Border Security and Humanitarian  
14 Crisis: U.S. Customs and Border Protection Immediate Action Plan (April 9, 2019) at 1).  
15 The 2019 Actions include: 1) increase processing capacity, 2) efficiently implement  
16 limited Own Recognizance (OR) releases of FMUA, to reduce in custody populations all  
17 round, especially moving FMUAs out of CBP custody creates more room for other  
18 detainee classifications, *id.* at 2-3, and 3) add soft-sided modular structures to address  
19 immediate capacity needs, *id.* at 5-11. The objective of the 2019 Action Plan is “to  
20 restore USBP in-custody numbers to safely managed thresholds, allowing USBP to return  
21 our law enforcement resources to our border and national security priorities as quickly as  
22 possible.” *Id.* at 2-3.

23         21. The length of time individuals spend in the custody of Tucson Sector  
24 depends on a number of factors, including, but not limited to: age; gender; family status;  
25 criminal history; country of origin; immigration history; the number of individuals  
26 apprehended together; overall CBP apprehension numbers; and the ability of the ICE,  
27 ERO, HHS, or the United States Marshals Service, to take custody. (DPFOF (Doc. 441)  
28 at ¶ A.11.)

1           22.    The number of individuals in any given station or hold room within Tucson  
2 Sector will depend on a number of factors that are constantly changing. These factors  
3 include, but are not limited to: the number of individuals apprehended in the Tucson  
4 Sector in a given day or night; the breakdown of those apprehended by age, gender,  
5 family group, and criminal status; an individual’s destination; any safety or health  
6 concerns that may arise related to individuals at the station; and the pace of processing,  
7 which may itself depend on each individual’s criminal and immigration history.  
8 Additionally, temporary issues with station facilities impacting detention conditions—  
9 such as temperature, availability of potable water, functioning toilets, and sanitation  
10 needs—may impact the number of individuals in a given hold room or station. *Id.* ¶ A.13.

11           23.    Many of these factors are further dependent on a variety of other factors  
12 such as the time of year, weather, conditions in other countries, and the custody space  
13 available with other agencies whose participation is needed to transfer individuals out of  
14 CBP custody. There is no basis on which CBP can accurately predict on any given day  
15 whether tens or thousands of individuals will show up at a specific location or at a  
16 specific time along the border, even if the CBP is monitoring the movement of large  
17 groups towards the United States border. *Id.* ¶ A.14.

18           24.    The number of individuals in a given hold room is never intended to create  
19 discomfort or challenges for those in custody, but rather is determined by operational  
20 concerns. Food, water, sanitation, hygiene items, bedding, medical care, etc., are not  
21 withheld as a punitive measure, and station temperatures are not set for punitive  
22 purposes. *Id.* ¶ A.15.

23           25.    Tucson Sector has internal review processes in place to ensure that it is  
24 complying with policies and procedures (e.g., PREA, TEDS, 2008 Hold Rooms and  
25 Short-Term Custody memorandum), as well as any court orders, including the  
26 preliminary injunction issued in this case. In addition, every quarter, the Tucson Sector  
27 Policy and Compliance Division conducts “no-notice” compliance evaluations of each  
28 Tucson Sector station where individuals are held in custody and provides the results of



1 that evaluation to the Tucson Sector Chief Patrol Agent. The Chief Patrol Agent then  
2 sends a memorandum to the respective location's leadership that documents the  
3 compliance evaluation results as well as any remedial steps that need to be taken. Among  
4 other things, these evaluations assess both physical layout and data input, and the  
5 evaluators have the authority to suggest recommended actions. Where these review  
6 processes result in a finding that Tucson Sector is out of compliance, Tucson Sector takes  
7 steps to return to compliance. *Id.* ¶ A.16.

8         26. Overcrowding is intermittent. There was no evidence presented as to how  
9 many of the 63,490 individuals apprehended by Tucson Sector in FY 2019 were held in  
10 overcrowded cells or for how long the overcrowding lasted. Routine intermittent  
11 overcrowding occurs at the TCC because both Tucson Sector and Three Points Sector  
12 book detainees, directly, into the TCC. Most detainees spend a short time at Tucson  
13 Sector stations before being transported to the TCC for further processing and/or they  
14 await transfer to a receiving agency.

15         27. Overcrowding is especially acute at night when cell capacity is cut almost  
16 in half to accommodate sleeping mats. (Motion for Reconsideration (Doc. 252) at 5  
17 (reporting that cell capacity, previously calculated as seating capacity cut in half to  
18 accommodate lying down to sleep on a floor mat after 12 hours of detention).  
19 Overcrowding is especially acute at TCC because it is the transportation hub and point of  
20 coordination for detainees requiring further detention for processing and/or transfer to a  
21 long-term detention facility like ICE and ERO; bus routes and detainee transportation,  
22 sector-wide, are set up around the TCC. When the TCC is at maximum capacity, stations  
23 are forced to hold detainees longer. (Ds' Motion for Reconsideration (Doc. 252) at 5-6.)

24         28. The majority of all detainees, including those who will be criminally  
25 prosecuted, are likely at some point to be processed through the TCC. *Id.* Overcrowding  
26 at the TCC at night occurs because detainees are routinely routed through TCC holding  
27 cells at 4 a.m. Monday through Thursday for morning court appearances.

28

1           29. Surveillance video reveals overcrowding so severe that, at times, detainees  
2 have no place to sit, much less lie down on mats; detainees (including children) sleep in  
3 toilet stalls for lack of space; detainees (including mothers holding children) are forced to  
4 climb over benches to reach toilets and drinking water; and detainees are forced to sleep  
5 sitting up. *E.g.*, JE 507.143 at VTCC000762, JE 507.149 at VTCC000790-794 (no place  
6 to sit or lie down); JE 507.46, JE 507.55, JE 507.80, JE 507.99, JE 507.143, JE 507.160  
7 (sleep in toilets, including children); JE 507.80 at VTCC000386, JE 507.108 at  
8 VTCC000525, JE 507.151 at VTCC000811, JE 507.85 at VTCC000407-409 (climbing);  
9 JE 507.157 at VTCC000872-873 (sleep sitting); JE 507.143 at VTCC000756-758.

10           30. Overcrowding exacerbates other deprivations, including sleep, as well as  
11 access to toilets and potable water, and compounds personal hygiene needs. Floor  
12 sleeping in toilet areas is humiliating to both the detainee sleeping there and any detainee  
13 needing to use the toilet, and it also poses a risk to a detainee of infection or  
14 contamination with fecal matter and other bodily fluids.

15           31. A large number of detainees in Defendants' custody are detainees  
16 designated in CBP records as "processing complete" —*i.e.*, the detainee has been  
17 processed by CBP and the receiving agency has been identified, and the detainee is  
18 detained by CBP waiting for transfer due to the inability of a designated receiving  
19 agency, such as the United States Marshals Service, ICE, ERO, HHS, etc., to take  
20 custody. (*E.g.*, JE 857 at 5 (DHS data shows many, if not most, detainees are "processing  
21 complete")). It may be possible to identify "processing complete" detainees pursuant to  
22 information logged in e3DM, Defendants' database, as "PRCMP." (JE 22.)

23           32. Hold time due to detention after processing is complete is unrelated to any  
24 legitimate custodial governmental interests related to CBP operations, except as it is  
25 necessary to accommodate day-time logistics necessary for transporting and transferring  
26 detainees to facilities that are not open at night, including repatriation to Mexico.

27           33. Hold time due to detention after processing is complete is unrelated to any  
28 legitimate custodial governmental interests related to CBP operations, except as it is

1 necessary to logistically accommodate court scheduled judicial proceedings for pretrial  
2 detainees that do not occur on weekends and holidays.

3 34. Overcrowding due to detention after processing is complete, when  
4 detainees have been processed, the appropriate transfer has been determined, and the  
5 detainee is awaiting transfer because a receiving agency cannot accept the transfer, is  
6 unrelated to any legitimate custodial governmental interests related to CBP operations or  
7 mission.

8 35. The “no longer than 48 hours” rule is rationally related to, and necessary,  
9 for CBP to carry out its governmental interests to interdict and process detainees, and to  
10 account for the logistical need for daytime hours to transport detainees to receiving  
11 agencies, ICE, ERO, HHS, etc., to Mexico for repatriation, or for court appearances.

12 36. Individuals in Tucson Sector custody are permitted to sleep and do sleep.  
13 (DPFOF (Doc. 441) ¶B1.) Detainees held longer than 12 hours after being booked-in at a  
14 Tucson Sector station have the basic human need to sleep. (Order (Doc. 244) at 16, 27.)

15 37. Tucson Sector hold rooms have built-in concrete or metal benches that are  
16 fastened to the ground, on which individuals can sit and lie down. Concrete and metal  
17 surfaces are used in CBP stations because they can be cleaned easily and quickly, and  
18 inhibit the growth of microorganisms that cause disease, thereby protecting the health of  
19 individuals in custody. These hard surfaces are cold and disruptive of sleeping. CBP  
20 provides a sleeping mat and a Mylar blanket to each detainee upon arrival at a Tucson  
21 Sector station. Individuals can place these mats on the floor or on any of the benches in a  
22 hold room, providing a more comfortable, including warmer, surface on which an  
23 individual can rest or sleep. *Id.* ¶ B.2.)

24 38. Tucson Sector will provide an individual in custody a new Mylar blanket  
25 upon request. Mylar blankets are not effective to provide warmth as they are designed to  
26 prevent the loss of body heat because it does not provide insulation but merely prevents  
27 evaporation of approximately 80% of body heat, therefore, the efficacy of Mylar blanket  
28 depends on comfortable room temperatures. (Order (Doc. 244) at 15.)

1           39. For safety reasons, Tucson Sector confiscates adults' outer layer(s) of  
2 clothing and permits them to keep one layer of their own clothing. Tucson Sector  
3 maintains all clothing it confiscates while its owner is in custody and returns the clothing  
4 to the individual when he or she leaves Border Patrol custody. Children are generally  
5 permitted to keep an additional layer of clothing while in Tucson Sector custody.  
6 (DPFOF (Doc. 441) ¶ F.12.)

7           40. Except for a single washer and dryer in the TCC, Tucson Sector stations do  
8 not have laundry facilities on site, making the use of cloth blankets that must be cleaned  
9 after each use impractical. Moreover, the location of the stations and the large volume of  
10 individuals in custody would make the use of cloth blankets prohibitively expensive to  
11 clean. Finally, providing cloth blankets or other cloth bedding poses a health risk,  
12 because cloth can transmit diseases if shared by individuals who are being held in close  
13 proximity during their custody. (DPFOF (Doc. 441) ¶ B.5.)

14           41. Tucson Sector maintains hold rooms at temperatures between 66 and 80  
15 degrees. This temperature range is reasonable. Tucson Sector checks hold room  
16 temperatures once per shift and records the temperatures for each station hold room in  
17 e3DM, and work orders are issued to address hold rooms with temperatures beyond that  
18 range and the affected hold room may be deemed temporarily out of use until the  
19 temperature issue is remedied. *Id.* ¶ F.1.

20           42. For safety reasons, Tucson Sector confiscates adults' outer layer(s) of  
21 clothing and permits them only one layer of their own clothing. Tucson Sector maintains  
22 all clothing it confiscates while its owner is in custody and returns the clothing to the  
23 individual when he or she leaves CBP custody. Children are generally permitted to keep  
24 an additional layer of clothing while in Tucson Sector custody. *Id.* ¶ F.4.

25           43. Tucson Sector station hold rooms do not contain movable beds because  
26 beds or pieces of furniture can be used as weapons, and also because placing beds in hold  
27 rooms would greatly reduce the amount of available space in the hold room—thus  
28

1 making it difficult for individuals in custody, agents, employees, and contractors, to move  
2 quickly and easily within the hold room as needed. *Id.* ¶ B.3.

3 44. Tucson Sector has established hold room capacities that are based on the  
4 number of sleeping mats that can be fully unfolded on the floor of the hold rooms with  
5 minimal or no overlapping, and with a sufficient area of the floor clear for walking into  
6 and out of the hold room and to and from the hold room toilet(s) and water. Tucson  
7 Sector makes every effort to not exceed these hold room capacities, and if it must do so—  
8 out of operational necessity—it makes every effort to limit the time period in which such  
9 capacities are exceeded. *Id.* ¶ B.4.

10 45. There are intermittent periods of overcrowding in holding rooms when  
11 detainees are forced to sleep in toilet areas and when access to water and the toilets is  
12 impeded because detainees cannot move around the holding cell without stepping over  
13 and on sleeping mats. *E.g.*, JE 507.143 at VTCC000762, JE 507.149 at VTCC000790-  
14 794 (no place to sit or lie down); JE 507.46, JE 507.55, JE 507.80, JE 507.99, JE  
15 507.143, JE 507.160 (sleep in toilets, including children); JE 507.80 at VTCC000386, JE  
16 507.108 at VTCC000525, JE 507.151 at VTCC000811, JE 507.85 at VTCC000407-409  
17 (climbing); JE 507.157 at VTCC000872-873 (sleep sitting); JE 507.143 at VTCC000756-  
18 758.

19 46. Tucson Sector keeps station hold rooms illuminated at all hours to maintain  
20 the continuity of operations, and to ensure the safety and security of individuals in  
21 custody as well as the safety and security of agents, other employees, and on-site  
22 contractors. Turning lights off in hold rooms would make it difficult for agents to monitor  
23 activity in those rooms, which would in turn create a risk to the safety of individuals held  
24 there as well as to the safety of employees and on-site contractors who enter the hold  
25 rooms. (DPFOF (Doc. 441) ¶ B.6. Dimming lights within safety standards is not done  
26 because Tucson Sector stations are not equipped to dim holding room lights. (TR Day 2:  
27 Eldon Vail (Direct) (Doc. 469) at 14-15, Eldon Vail (Cross) (Doc. 469) at 90-92)  
28 (describing prevailing practices of jails to dim lights during typical sleeping hours and

1 unusual to keep them on all night); (TR Day 4: Carrie Davison (Doc. 473) at 23  
2 (explaining lights remain on because it is not possible to turn them off because there is no  
3 dimming capability at the stations).

4 47. The numbers of toilets in Tucson Sector station hold rooms are adequate,  
5 and include privacy walls which are consistent with, toilet facilities used in correctional  
6 facilities where individuals are held and are positioned at a height that affords a  
7 reasonable level of privacy while still providing enough visibility to minimize safety and  
8 security risks. Tucson Sector also blocks the view of the toilet on its surveillance cameras  
9 to ensure privacy. (DPFOF (Doc. 441) ¶ C.1.)

10 48. Tucson Sector CBP has cleaning contracts with professional cleaning  
11 companies for each of its stations. These contracts provide for at least daily cleaning of  
12 the hold rooms (although in practice, cleaning is ordinarily performed twice daily). Hold  
13 rooms also are inspected by CBP personnel multiple times each day (generally by a  
14 supervisor at the beginning of each shift) for a variety of things, including cleanliness,  
15 ventilation, temperature, and presence/absence of pests. The results of these checks are  
16 required to be placed into e3DM (e.g., “amenity reports”), and responses indicating that  
17 something is out of compliance are tracked to assure a remedy was sought. *Id.* ¶ C.3.

18 49. Tucson Sector’s general practice is to provide trash cans inside station hold  
19 rooms. When trash cans cannot be provided inside the hold rooms, they are made  
20 available outside the rooms, cleaning personnel collect the trash during each hold room’s  
21 cleaning. Trash sometimes accumulates in between regular cleanings. Additionally, dirt  
22 may be tracked in when individuals enter the hold rooms. CBP agents inspect hold rooms  
23 for insects, rodents, and vermin, and report any such findings through the e3DM system.  
24 Tucson Sector addresses such issues promptly. Sleeping mats placed on the floor are  
25 subject to contamination from being in contact with the floor, especially when placed  
26 near the toilet facilities. *Id.* ¶ C.4.

27 50. All individuals who remain in Tucson Sector custody for longer than 12  
28 hours are provided an opportunity to clean themselves. Most stations provide body wipes



1 to meet this human need for personal hygiene. Until recently, only two Tucson Sector  
2 stations had showers: TCC and Nogales. More recently, other Tucson Sector stations  
3 have signed contracts to build shower facilities. Ajo, Willcox, and Douglas stations will  
4 each have a single shower, and the Brian A. Terry station will have two showers. *Id.* ¶  
5 C.5.

6 51. A universal policy of providing showers to all individuals upon their arrival  
7 to a Tucson Sector station—or when they have only been in CBP custody for a short time  
8 period—would significantly slow the processing of every individual, and would in many  
9 cases extend the time the individual spends in custody at a station. At a minimum,  
10 Tucson Sector makes reasonable efforts to provide showers for juveniles approaching 48  
11 hours in custody and for adults who are approaching 72 hours in custody, including  
12 transporting such individuals to facilities with showers in order to accomplish this goal.  
13 *Id.* ¶ C.6.

14 52. In addition to body-wipes, Tucson Sector generally provides personal  
15 hygiene items, including toothbrushes and toilet paper in hold rooms. Tucson Sector  
16 makes sanitary napkins, diapers, diaper cream, and baby wipes readily available. In the  
17 section of the TCC where children and families are generally held, many of these items  
18 are readily accessible on a cart immediately outside—and in view of—this population’s  
19 unlocked hold rooms or in the case of holding rooms where females are routinely held,  
20 female hygiene items s are placed in the toilet area. *Id.* ¶ C.7-8.

21 53. All of the Tucson Sector hold rooms have been fitted with soap dispensers,  
22 which provide individuals with the ability to wash their hands in the hold rooms. Tucson  
23 Sector uses the “air-drying method” for handwashing, which the Centers for Disease  
24 Control and Prevention recognizes as an effective hand drying method. Tucson Sector  
25 has determined that providing paper towels is operationally problematic as individuals in  
26 custody would frequently throw the paper towels on the floor or put them into the toilet,  
27 creating clogs. *Id.* ¶ C.9.

28

1           54. Clean, potable, drinking water is always available to individuals in Tucson  
2 Sector hold rooms. Each hold room in Tucson Sector has a bubbler, water fountain, or  
3 faucet with clean paper cups. Tucson Sector regularly tests the water flow and arc of the  
4 drinking water portion of the bubbler to ensure that water is suitable for drinking directly,  
5 or filling a cup, from the fountain. In addition, Tucson Sector may provide five-gallon  
6 Igloo coolers of clean water (as well as clean paper cups) for drinking. *Id.* ¶ D.2-3.

7           55. Tucson Sector provides a meal or snack to each individual upon their  
8 arrival to a station. For hot meals, Tucson Sector offers bean (vegetarian) or meat  
9 burritos. For snacks, Tucson Sector has generally offered cheese- and peanut butter-filled  
10 crackers, as well as juice. Tucson Sector offers at least two hot meals at regularly  
11 scheduled mealtimes per day and provides snacks in between meal times. Tucson Sector  
12 is in the process of implementing a new food contract that provides additional variety in  
13 the meals of an egg/breakfast burrito and snacks, such as raisins, applesauce, and fruit  
14 cups. Additionally, juveniles at the TCC have open access to all of the above items, as  
15 well as granola/cereal bars, animal crackers, and dairy-free (i.e., soy/almond) milk. When  
16 an adult in custody requests additional food in between mealtimes, a CBP agent may  
17 grant the request. *Id.* ¶¶ D.5-D.6, D.8.

18           56. Tucson Sector provides children and pregnant, or nursing, individuals with  
19 meals every six hours and snacks are available at all times. In the section of the TCC  
20 where children and families are generally held while in Tucson Sector custody, snacks  
21 are readily accessible on a cart immediately outside—and in view of—this population’s  
22 unlocked hold rooms so that individuals may take the items as needed. Tucson Sector  
23 also uses signage, in English and Spanish, and pictures to demonstrate that snacks and  
24 hygiene items are available upon request. *Id.* ¶ D.9.

25           57. Tucson Sector stations keep in stock and provide age-appropriate food,  
26 such as formula, baby food, and toddler food. Tucson Sector’s practice of providing  
27 packaged foods that are served in their original, unopened packages is a safe food-  
28 handling practice that serves to protect the health of individuals in custody. Food

1 expiration dates are noted, and food is discarded if it is not used by the expiration date.  
2 Food, and its expiration date, is specifically tracked in multiple different review  
3 processes, including by the Tucson Sector’s “no-notice” quarterly compliance evaluations  
4 and the Management Inspection Division’s unannounced evaluations. *Id.* ¶¶ D.10-11.

5 58. The food Tucson Sector provides individuals is nutritionally adequate for  
6 relatively short periods of time spent in custody, no longer than 48 hours. *Id.* ¶ D.12.

7 59. Tucson Sector CBP employs a multi-layered approach to identify and treat  
8 medical concerns for individuals in its custody. *Id.* ¶ E. 1.

9 60. First, individuals have contact with agents in the field who begin assessing  
10 detainees visually and through oral communications. Agents actively screen individuals  
11 by asking them about their health and medical needs and passively screen them by  
12 observing for any medical concerns. If an agent has a medical concern about an  
13 individual, the agent may arrange for the detainee to be taken to the hospital for medical  
14 care prior to being transported to a CBP station for processing. (TR Day 5: Dr. Tarantino  
15 (Doc. 475) at 22: ln14-23: ln 18.)

16 61. Second, when an individual arrives at a Tucson Sector station other than the  
17 TCC, the detainee is given a health intake interview by a CBP agent who completes a  
18 universal screening form, which has been approved by medical experts. The CBP agent  
19 asks each detainee a series of questions and records the individual’s answers. If this  
20 screening identifies any medical concerns, the detainee is referred for a medical  
21 assessment by either an in-house medical professional or sending the detainee to a local  
22 hospital for care. In some cases, a CBP agent, who is also a certified Emergency Medical  
23 Technician (“EMT”) or paramedic, may provide applicable medical care to individuals.  
24 (TR Day 5: Dr. Tarantino (Doc. 475) at 23: ln 25-27:ln 3.)

25 62. The health intake interview form includes questions that are designed to  
26 identify suicide risk, and agents will refer individuals for medical care or take other  
27 appropriate action if such risks are identified. (JE 881.)  
28

1           63.     Third, a medical assessment is performed by medical personnel, who  
2 provide in-house medical examinations and/or applicable medical care. Most individuals  
3 are transferred from Tucson Sector stations to TCC related to processing and/or transport  
4 to receiving agencies like ICE or ERO. Therefore, medical personnel are strategically  
5 located at the TCC, and soon to be located at the Nogales Station, to be available to  
6 provide medical assessments and medical care as an alternative to referring a detainee to  
7 a local hospital. (TR Day 5: Dr. Tarantino (Doc. 474) at 26: ln 16-27: ln 10.) The in-take  
8 processes at TCC includes the health intake interview, even if previously completed at  
9 another station, with a medical assessment by a medical professional to follow shortly  
10 thereafter. *Id.* at 28: ln 18-29: ln 2.

11           64.     Tucson Sector agents and medical professionals are proficient, if not fluent,  
12 in the Spanish language and are able to converse with and obtain necessary information  
13 from more than ninety percent of individuals in custody for purposes of providing  
14 medical screening. For individuals who do not speak English or Spanish, Tucson Sector  
15 relies on a contract service that provides foreign language speakers who interpret  
16 conversations between agents/medical professionals and individuals in custody via the  
17 telephone. *Id.* ¶ E.5.

18           65.     In all cases where an agent or medical professional identifies a medical  
19 condition in need of medical attention, the agent will refer the individual for medical  
20 care, or on-site care will be provided as appropriate. In most cases, medical care is  
21 provided by transporting the individual to a local hospital. In some cases, a CBP  
22 paramedic or EMT may provide medical care consistent with his or her level of training  
23 and certification. At the TCC, on-site medical personnel may provide non-emergency  
24 medical care, and Tucson Sector has an arrangement with St. Mary's Hospital emergency  
25 department, in Tucson, Arizona, where a physician advisor is on call twenty-four hours a  
26 day to provide Tucson Sector with medical advice. *Id.* ¶¶ E.7, E.13.

27           66.     Tucson Sector agents regularly receive health-related training and guidance.  
28 Tucson Sector agents receive policy updates and training concerning infectious diseases.

1 These materials are updated periodically to reflect changes in epidemic and endemic  
2 situations. *Id.* ¶¶ E.8-E.10.

3 67. Tucson Sector agents constantly interact with and observe individuals  
4 throughout their time in custody. Such interaction and observation provide many  
5 opportunities to identify signs and symptoms of health conditions and may lead to agent-  
6 initiated communications regarding potential health concerns, including some mental  
7 health concerns. *Id.* ¶ E.11.

8 68. Individuals may request medical care while in custody at any time, even  
9 after they have completed their screening and processing. Tucson Sector agents will  
10 convey an individual's request to seek medical attention to a supervisor, and Tucson  
11 Sector will transport individuals to local medical care facilities or provide on-site care as  
12 appropriate in response to such requests. *Id.* ¶ E.12.

13 69. If an individual arrives with medication prescribed by a United States  
14 physician, the CBP, Tucson Sector, stores the medication, and make it available to the  
15 individual to take consistent with the prescription, throughout their time in Tucson Sector  
16 custody. *Id.* ¶ E.14.

17 70. If an individual arrives in Tucson Sector custody with a medication that is  
18 not prescribed by a United States physician, or states that he or she needs a particular  
19 medication while they remain in Tucson Sector custody, then Tucson Sector will refer the  
20 individual to a medical professional to obtain a United States prescription for the  
21 medication. *Id.* ¶ E.15

22 71. Tucson Sector's policy of confiscating non-United States medications that  
23 individuals have in their possession at the time of apprehension is necessary to protect  
24 against the introduction of contraband at the CBP stations. *Id.* ¶ E.16.

25 72. It is undisputed that all of the receiving civil immigration detention  
26 agencies and jails and prisons, afford detainees better conditions of confinement as  
27 follows: a bed, with cloth sheets, blankets, and pillows; provide warmth by dispensing  
28 second layers of clean clothing; have shower facilities; have hot meals prepared pursuant

1 to professional dietary standards, with a variety of food choices; have clean potable water  
2 readily available, and have medically trained staff who conduct medical screenings of the  
3 detainees and provide medical care when needed.

4 73. Detainees in CBP stations face substantially worse conditions of  
5 confinement which in the aggregate, include: holding cell conditions which impede  
6 sleeping because the cells are fully lit, with floor sleeping on hard cold surfaces, even  
7 with the 12-hour provision for sleeping mats and Mylar blankets; no clean or second set  
8 of cloths for warmth; sleep is interrupted by CBP 24-7 operations, especially when  
9 overcrowding occurs, detainees must walk over, around, and on each other and sleeping  
10 mats to navigate the holding room and sometimes sleep on the floor in the toilet area of  
11 the holding cell. There is no variety in hot food choices, except between bean, meat or  
12 egg burritos; there is some snack variations. There is limited to no availability for  
13 showers or clean clothes. At 12 hours or before, body wipes are provided and help with  
14 personal hygiene but are ineffective to meet the full personal hygiene needs of detainees,  
15 who have been traversing the desert for days, and the smell in holding cells reflects  
16 human unwashed bodies until detainees can shower. Generally, non-medical staff  
17 performs medical screening by using a universal medical questionnaire, which was  
18 developed by medical professionals for this purpose. Recently, CBP has place medical  
19 professionals at TCC to conduct medical assessments and provide onsite medical  
20 services. These conditions of confinement are necessary for CBP to effectively and  
21 efficiently carry out their 24-7 CBP operations, which is to interdict, detain for  
22 processing to determine the appropriate civil or criminal detention path for detainees, and  
23 transfer detainees to receiving agencies ICE, ERO, the United States Marshals Service,  
24 and any other agency.

25 74. Once CBP has processed detainees, identified the receiving agency, and  
26 had a reasonable time to make the transfer (the time needed to transport the detainee to  
27 the receiving agency), the governmental interests that warrant the existing conditions of  
28 confinement end. The reasonable time for processing and transferring a detainee is no



1 longer than 48 hours, which accounts for logistical realities caused by CBP detentions  
2 that extend over 12-hour nighttime periods when CBP cannot transfer detainees at night.  
3 Under the “no longer than 48-hours” rule, a detainee, who is processing complete, may  
4 not be held into a third night or longer, unless CBP can provide conditions of  
5 confinement that provide for basic human needs, especially uninterrupted sleeping in a  
6 bed, warmth, showers, food that meets acceptable dietary standards, potable water, and a  
7 medical assessment made by a medically trained professional.

### 8 **B. Conclusions of Law**

9 To the extent these Conclusions of Law are also deemed to be Findings of Fact,  
10 they are hereby incorporated into the preceding Findings of Fact.

11 1. This is a class action lawsuit brought pursuant to 28 USCA § 1331, which  
12 grants this Court original jurisdiction over all civil actions arising under the Constitution,  
13 laws, and treaties of the United States. Plaintiffs allege a deprivation of their Fifth  
14 Amendment constitutional rights. To prevail, Plaintiffs must prove the alleged  
15 constitutional violation by a preponderance of the evidence. *Johnson v. Houser*, 704 F.2d  
16 1049, 1051 (8<sup>th</sup> Cir. 1983); *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1072 (9th Cir.  
17 2016).

18 2. To obtain injunctive relief, the Plaintiffs have the burden to establish that  
19 they were wronged and, must also, establish that there is a sufficient likelihood that they  
20 will again be wronged in a similar way. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111  
21 (1983). Plaintiffs satisfy the preconditions for the equitable relief they seek because  
22 existing immigration demographics will not change in the future, the existing conditions  
23 of confinement are likely to remain in the future, and Plaintiffs face future irreparable  
24 injury which is both great and immediate should they or any other member of the Plaintiffs’  
25 class be detained by CBP, Tucson Sector. (Order (Doc. 118) (denying Motion to Dismiss  
26 for lack of standing.)

27 3. The Court adopts by reference the law as set out in its prior Orders, relevant  
28 to establishing that basic human needs include sleeping and sleeping in beds, without

1 lights and in a warm environment; sanitation, including personal hygiene needs for  
2 showers; food, including potable water, and medical screening and care provided by  
3 medical professionals. (Order (Doc. 244) at 12, 13 n.7, 16, 20, 21, 23.); (Order (Doc.  
4 383) at 4-10.)

5 4. “[W]hen the State by the affirmative exercise of its power so restrains an  
6 individual's liberty that it renders him unable to care for himself, and at the same time  
7 fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and  
8 reasonable safety—it transgresses the substantive limits on state action set by the Eighth  
9 Amendment and the Due Process Clause.” *DeShaney v. Winnebago Cty. Dep’t of Soc.*  
10 *Servs.*, 489 U.S. 189, 199-200 (1989)) (citing *Estelle v. Gamble*, 429 U.S. 97, 103–104  
11 (1976).

12 5. Plaintiffs are civil detainees, protected under the Fifth Amendment,  
13 mirrored by the Fourteenth Amendment Due Process Clause, which precludes pretrial  
14 detainees from being held without due process of law under conditions that amount to  
15 punishment prior to an adjudication of guilt. *Bell v. Wolfish*, 441 U.S. 520, 534–35  
16 (1979); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896). Constitutional rights in  
17 respect to conditions of confinement for prisoners establish a floor for the constitutional  
18 rights of the Plaintiffs. *Padilla v. Yoo*, 678 F.3d 748, 759 (9<sup>th</sup> Cir. 2012) (citations  
19 omitted).

20 6. A condition of confinement for an inmate who has not been convicted  
21 violates the Fifth and Fourteenth Amendments if it imposes some harm to the detainee  
22 that significantly exceeds or is independent of the inherent discomforts of confinement  
23 and is not reasonably related to a legitimate governmental objective or is excessive in  
24 relation to the legitimate governmental objective. *Kingsley v. Hendrickson*, 135 S. Ct.  
25 2466, 2473-74 (2015) (citing *Bell v. Wolfish*, 441 U.S. at 561)).

26 7. Civil detainees cannot be subjected to “conditions of confinement  
27 substantially worse than they would face upon commitment,” *Lynch v. Baxley*, 744 F.2d  
28 1452, 1461 (9<sup>th</sup> Cir. 1984) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)). The civil nature

1 of Plaintiffs' confinement provides an important gloss on the meaning of "punitive,"  
2 requiring that the Plaintiffs be afforded "more considerate treatment" than even pretrial  
3 detainees, who are being criminally detained prior to trial. *Cf. Estelle v. Gamble*, 429  
4 U.S. 97, 104, (1976); *Youngberg v. Romeo*, 457 U.S. 307, 321–22, (1982). The Court  
5 must presume detainees are subjected to punishment if they are confined in conditions  
6 identical to, similar to, or more restrictive than those under which the criminally  
7 convicted are held. *See Sharp v. Weston*, 233 F.3d 1166, 1172–73 (9<sup>th</sup> Cir. 2000).

8         8. The Plaintiffs are civil detainees, who are confined under conditions  
9 substantially worse than those imposed on detainees who are criminally convicted or  
10 confined in immigration detention facilities. There is a presumption that the conditions of  
11 confinement in CBP stations, Tucson Sector, are punitive.

12         9. In the absence of evidence of express intent to punish, the Court may infer  
13 that the purpose of a particular restriction or condition is punishment if the restriction or  
14 condition is not reasonably related to a legitimate governmental objective or is excessive  
15 in relation to the legitimate governmental objective. *Pierce*, 526 F.3d at 1205 (citing *Bell*,  
16 441 U.S. at 539); *Demery*, 378 F.3d at 1028 (citing *Bell*, 441 at 538). Legitimate non-  
17 punitive justifications must, however, be specific to the penological interests involved in  
18 the Plaintiffs' detention, which here is for commitment as civil detainees in immigration-  
19 type facilities. (Order (Doc. 383) at 10 (citing *King v. Los Angeles County*, 885 F.3d 548,  
20 554-555 (9<sup>th</sup> Cir. 2018)).

21         10. The Court evaluates the conditions of confinement at issue in this case in  
22 light of contemporary standards of decency "in reference to their severity and duration,"  
23 with any "resulting injury being merely one factor that may suggest an unjustified  
24 infliction of harm compared to being plausibly necessary." (Order (Doc. 383) at 6-7  
25 (citing *Darnell v. Pineiro*, 849 F.3d 17, 30 (2<sup>nd</sup> Cir. 2018) (citing *Hudson v. McMillian*,

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1 503 U.S. 1, 8 (1992)), *see also* *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003)  
2 (citing same).

3 11. “Maintaining institutional security and preserving internal order and  
4 discipline are essential goals that may require limitation or retraction of the retained  
5 constitutional rights of both convicted prisoners and pretrial detainees.” *Bell*, 441 U.S. at  
6 546; *Pierce*, 526 F.3d at 1205.

7 12. In the absence of substantial evidence that indicates officials have  
8 exaggerated their responses, courts should ordinarily defer to the expert judgment of  
9 correction officials to determine whether detention restrictions or conditions are  
10 reasonably related to maintaining security and order and operating the institution in a  
11 manageable fashion. *Bell*, 441 U.S. at 540 n. 23. The government does not need to show  
12 an “exact fit” or proof that the policy in fact advances the legitimate governmental  
13 objective, or even that it is the “least restrictive alternative.” *Valdez v. Rosenbaum*, 302  
14 F.3d 1039, 1045 (9<sup>th</sup> Cir. 2002). The correction official must have reasonably thought that  
15 the policy would advance a legitimate governmental objective. *Id.*

16 13. The government cannot assert a lack of resources defense against an  
17 injunction because it is prospective relief, and the government may be compelled to  
18 expand the pool of resources to remedy a constitutional violation. *Peralta v. Dillard*, 744  
19 F.3d 1076, 1083 (9<sup>th</sup> Cir. 2014).

20 14. The Ninth Circuit views floor-sleeping, with or without a mattress, as  
21 offending ‘basic’ concepts of decency, as well as reasonable respect for constitutional  
22 rights.’” *Thomas v. Baca*, 514 F.Supp.2d 1201, 1216 (9<sup>th</sup> Cir. 2007) (citing *Thompson v.*  
23 *City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989), *Rutherford v. Pitchess*, 457 F. Supp.  
24 104 (C.D. Cal. 1978)). “Quite simply, that a custom of leaving inmates nowhere to sleep  
25 but the floor constitutes cruel and unusual punishment is nothing short of self-evident.”  
26 *Thomas*, 514 F. Supp.2d at 1216.

27 15. In *Thomas*, the court excluded processing time from its mandate to provide  
28 a bunk for the night immediately following the inmate’s initial processing within the

1 facility or transfer to a medical center or other place of screening or treatment, and for  
2 every night thereafter and held; a reasonable amount of time should not take more than  
3 24 hours. *Id.* at 1219.

4 16. The Ninth Circuit recognizes an exigent circumstances exception for  
5 constitutional violations, but this is a narrow exception and overcrowding or regular  
6 classification considerations do not constitute exigent circumstances that would justify  
7 floor-sleeping.” Exigent circumstances could justify floor-sleeping in response to “[a]  
8 sudden, extreme rise in inmate population caused by an acute event, such as a civil  
9 disturbance, may affect the length of time that is reasonable for processing. *Oliver v.*  
10 *Baca*, 913 F.3d 852, 858 (9<sup>th</sup> Cir. 2019). The periodic surges occurring along the border  
11 is a chronic condition and not an exigent exception to justify unconstitutional conditions  
12 of confinement.

13 17. The Ninth Circuit instructs that the Court should look at the circumstances,  
14 nature, and duration of an alleged deprivation. *Johnson v. Lewis*, 217 F.2d 726, 731 (9<sup>th</sup>  
15 Cir. 2000). This approach is explained by the Second Circuit in *Darnell v. Pineiro*, 849  
16 F.3d 17 (2<sup>nd</sup> Cir. 2018). *See Turano v. County of Alameda*, 2018 WL 5629341 \*5 (N.D.  
17 Cal. Oct. 30, 2018) (finding *Darnell* persuasive). “The more basic the particular need, the  
18 shorter the time it can be withheld.” *Hoptowit v. Ray*, 682 F.2d 1237, 1259 (9<sup>th</sup> Cir.  
19 1982).

20 18. There is no “static test” to determine whether a deprivation is sufficiently  
21 serious to violate the Constitution. The Court evaluates the conditions themselves in light  
22 of contemporary standards of decency. *Darnell*, 849 F.3d at 30 (citing *Blissett v.*  
23 *Coughlin*, 66 F.3d 531, 537 (2<sup>d</sup> Cir. 1995); *Rhodes v. Chapman*, 452 U.S. 337, 346  
24 (1981)). The Court analyzes allegedly unconstitutional conditions of confinement in  
25 reference to their severity and duration, and resulting injury is merely one factor that may  
26 suggest an unjustified infliction of harm compared to being plausibly necessary. *Darnell*,  
27 849 F.3d at 30 (citing *Hudson v. McMillian*, 503 U.S. 1, 8 (1992)), *see also Martinez v.*  
28 *Stanford*, 323 F.3d 1178, 1184 (9<sup>th</sup> Cir. 2003) (citing same).

1           19. The Court follows the approach taken by the Second Circuit in *Darnell*,  
2 wherein the court considered a temporary (between 10 to 24 hours) holding facility and  
3 held that occasional and temporary deprivations of sanitary and temperate conditions,  
4 without more, do not constitute a sufficiently serious deprivation to constitute  
5 punishment, ““but only when they have a mutually enforcing effect that produces the  
6 deprivation of a single, identifiable human need such as food, warmth, or exercise.””  
7 *Darnell*, 849 F.3d at 30 (quoting *Wilson v. Seiter*, 501 U.S. 294, 304 (1991)). Conditions  
8 of confinement are analyzed in combination, not in isolation, at least where one alleged  
9 deprivation has a bearing on another. *Darnell*, 849 F.3d at 32 (citing *Wilson*, 501 U.S. at  
10 304 (noting the synergy between cold temperatures and the failure to provide blankets in  
11 establishing an Eighth Amendment violation)).

12           20. The Court looks through the lens of severity and duration to balance the  
13 conditions of confinement at CBP facilities in the Tucson sector with the operational  
14 needs of the CBP Tucson Sector. The severity of the exposure to sleeping on floor mats  
15 in sometimes overcrowded cells that force detainees to sleep in the toilet area, coupled  
16 with the alleged lack of warmth, clean clothes, showers, etc., may be less quantifiable  
17 than duration ““but [] qualitative offense to a [detainee’s] dignity [is] given due  
18 consideration.”” *Darnell*, 849 F.3d at 31 (quoting *Willey v. Kirkpatrick*, 801 F.3d 51, 68  
19 (2ndh Cir. 2017)).

20           21. Conditions of confinement, as they currently exist, in CBP holding rooms  
21 that are worse than conditions of confinement in criminal and civil detention facilities are  
22 reasonably related to CBP’s legitimate governmental interests in protecting the United  
23 States border through interdiction and 24-7 processing operations to determine the  
24 appropriate detention, civil or criminal, facility and transfer a detainee no longer than 48  
25 hours. To the extent that the conditions of confinement are related to CBP’s legitimate  
26 governmental interests, Defendants overcome the presumption that the conditions of  
27 confinement are punitive because they are harsher than the conditions of confinement  
28

1 faced by criminal, pretrial, and civil detainees held in jails, prisons, or ICE detention  
2 facilities.

3 22. The severity of the existing conditions of confinement, separately and  
4 aggregately, do not violate the Fifth Amendment to the extent that the duration of  
5 confinement does not exceed the time necessary for CBP to process a detainee to  
6 determine the appropriate transfer for either criminal detention to a jail or prison or civil  
7 immigration detention at an ICE, ERO, HHS or other agency facility. The Court finds  
8 that the reasonable time from book-in at a CBP station to “processing complete” is no  
9 longer than 48 hours. As for this duration of time, Defendants have established that the  
10 challenged conditions of confinement, separately and aggregately, are not excessive in  
11 relation to the legitimate government interests of CBP 24-7 operations or the penological  
12 interests involved in Plaintiffs civil detention in immigration facilities.

13 **Accordingly,**

14 **IT IS ORDERED** that the Court finds in favor of Plaintiffs and against  
15 Defendants and GRANTS Plaintiff’s request for a permanent injunction. The Clerk of the  
16 Court shall enter Judgment for Plaintiffs.

17 **IT IS FURTHER ORDERED** that CBP shall be enjoined from holding  
18 detainees, who are “processing complete,” as defined herein, “no longer than 48 hours,  
19 unless CBP provides conditions of confinement that meet basic human needs for sleeping  
20 in a bed with a blanket, a shower, food that meets acceptable dietary standards, potable  
21 water, and medical assessments performed by a medical professional.

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1           **IT IS FURTHER ORDERED** that within 7 days of the filing date of this Order,  
2 the Plaintiffs shall file a proposed Order for Permanent Injunction. The Defendants shall  
3 have 7 days, thereafter, to file an Objection.

4                           Dated this 19th day of February, 2020.

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Honorable David C. Bury  
United States District Judge