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26 IN THE UNITED STATES DISTRICT COURT  
27 FOR THE DISTRICT OF ARIZONA

28 Fred Graves, et al., ) No. CV 77-479-PHX-NVW  
29 )  
30 Plaintiffs, ) **PLAINTIFFS' PRETRIAL BRIEF**  
31 )  
32 v. )  
33 )  
34 Joseph Arpaio, et al., )  
35 )  
36 Defendants. )

37 Pursuant to the Court's form proposed Final Pretrial Order for Bench Trial,  
38 Plaintiffs file their brief on all contested issues of law in this case.

39 **INTRODUCTION**

40 This case is a § 1983 class action alleging constitutional violations in the  
41 conditions of confinement of pretrial detainees housed in the Maricopa County Jails,  
42 including lack of adequate medical, mental health, and dental care, and inhumane and

1 dangerous housing conditions. The plaintiff class consists of all pretrial detainees  
2 (hereafter referred to as “inmates”) who have been housed or are currently housed in  
3 the Maricopa County Jails (“MCJ” or “Jails”).

4 In 1995, pursuant to stipulation of the parties, this Court approved an Amended  
5 Judgment in this case relating to various conditions of confinement issues. On  
6 September 25, 2001,<sup>1</sup> Defendants filed a renewed Motion to Terminate the Amended  
7 Judgment under 18 U.S.C.A. § 3626(b), alleging that there were no current or ongoing  
8 violations of the inmates’ federal rights, and therefore termination was required as a  
9 matter of law. The evidentiary hearing on that motion is scheduled to commence  
10 August 12, 2008.

11 Under the Prison Litigation Reform Act (PLRA), when a party moves to  
12 terminate a consent decree, prospective relief “shall not terminate if the court makes  
13 written findings based on the record that prospective relief remains necessary to  
14 correct a current and ongoing violation of the Federal right, extends no further than  
15 necessary to correct the violation of the Federal right, and that the prospective relief is  
16 narrowly drawn and the least intrusive means to correct the violation.” *Id.*  
17 § 3626(b)(3). The Court must assess the circumstances at the jails at the time  
18 termination is sought. *Pierce v. County of Orange*, 526 F.3d 1190, 1205 (9th Cir.  
19 2008) (citing *Gilmore v. California*, 220 F.3d 987, 1010 (9th Cir. 2000)). The Court  
20 has ruled that in this case, the relevant time period in assessing the current conditions  
21 at the Jails is June 1, 2007, through May 31, 2008.

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22  
23  
24 <sup>1</sup> Defendants seek to terminate all of the provisions of the Amended Judgment  
25 in this case. Plaintiffs do not contest Defendants’ motion to terminate the following  
26 paragraphs in the Amended Judgment: ¶¶ 1-8, 16, 17, 20-22, 24-39, -42, 44, 48-55,  
27 63, 65-66, 68, 73-83, 87-94, 96-97, 99, 101, 105-111, 113 and 115-116. Plaintiffs  
28 also do not contest Defendants’ motion to terminate with respect to the following  
provisions in the Order as follows: ¶ 9 (the references to First Avenue, Madison,  
Avondale and Mesa Jails, which have been closed); and ¶ 84 (the reference to First  
Avenue Jail, which has been closed).

1           If the evidence establishes a current and ongoing violation of federal rights at  
2 the Jails, the Court is obliged to provide a remedy, whether that violation affects few  
3 prisoners or many. “A district court is bound to maintain or modify any form of relief  
4 necessary to correct a current and ongoing violation of a federal right, so long as that  
5 relief is limited to enforcing the constitutional minimum.” *Gilmore*, 220 F.3d at 1000;  
6 *see also id.* at 1007-08. If the Court finds that current and ongoing violations exist,  
7 but the existing relief is no longer appropriate to current conditions, the court should  
8 amend the relief or design new relief appropriate to remedy the current violations. *Id.*  
9 at 1008. The party seeking to terminate relief bears the burden of proving its  
10 compliance with constitutional mandates in the areas covered by the decree. *Id.*

11           Given Defendants’ burden of proving their compliance with constitutional  
12 mandates, conditions shown to exist in the past are presumed to continue, absent  
13 evidence to the contrary. *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1449 (9th  
14 Cir. 1989) (holding that jail conditions found to exist in 1978 would be presumed to  
15 continue in 1985 in the absence of evidence to the contrary; noting that “it is a  
16 bedrock common law principle that in certain situations, once a condition has been  
17 proven to exist, it is presumed in the absence of proof to the contrary that the  
18 condition has remained unchanged”).

19           Pretrial detainees are protected by the Due Process provisions of the Fifth and  
20 Fourteenth Amendments. *Bell v. Wolfish*, 441 U.S. 520, 535-36 & n.16 (1979);  
21 *Pierce*, 526 F.3d at 1205. Detainees may in some circumstances be entitled to greater  
22 protection under the Fourteenth Amendment than prisoners under the Eighth  
23 Amendment. *Demery v. Arpaio*, 378 F.3d 1020, 1029 (9th Cir. 2004) (“[T]he  
24 Fourteenth Amendment prohibits all punishment of pretrial detainees, while the  
25 Eighth Amendment only prevents the imposition of cruel and unusual punishment on  
26 convicted prisoners.”); *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004) (“The  
27 Fourteenth Amendment requires the government to do more than provide the ‘minimal  
28 civilized measure of life’s necessities’ for non-convicted detainees.” (citation

1 omitted)). Because due process rights are at least as great as Eighth Amendment  
2 protections afforded convicted prisoners, the guarantees of the Eighth Amendment  
3 provide pretrial detainees a “minimum standard of care for determining their rights.”  
4 *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983). Courts evaluating the  
5 claims of pretrial detainees under the Fourteenth Amendment use the Eighth  
6 Amendment’s analytical framework of deliberate indifference to analyze these claims.  
7 *See Redman v. County of San Diego*, 942 F.2d 1435, 1441 n.7 (9th Cir. 1991);  
8 *Burdette v. Butte County*, 121 F. App’x 701, 702 n.1 (9th Cir. 2005).

9 Prisoners prove an Eighth Amendment violation when they show that they  
10 were incarcerated under conditions posing a substantial risk of serious harm to their  
11 health or safety, and officials acted with deliberate indifference, that is, with  
12 conscious disregard for that risk. *Farmer v. Brennan*, 511 U.S. 825, 834, 839-840  
13 (1994). Evidence of objective risk of serious injury may establish defendants’  
14 knowledge of such risks. *See id.* at 846 n.9 (“If, for example, the evidence before a  
15 district court establishes that an inmate faces an objectively intolerable risk of serious  
16 injury, the defendants could not plausibly persist in claiming lack of awareness, any  
17 more than prison officials who state during the litigation that they will not take  
18 reasonable measures to abate an intolerable risk of which they are aware could claim  
19 to be subjectively blameless for purposes of the Eighth Amendment, and in deciding  
20 whether an inmate has established a continuing constitutional violation a district court  
21 may take such developments into account.”).

22 Unsafe conditions that “pose an unreasonable risk of serious damage to [a  
23 prisoner’s] future health” may violate the Eighth Amendment even if the damage has  
24 not yet occurred and may not affect every prisoner exposed to the conditions. *Helling*  
25 *v. McKinney*, 509 U.S. 25, 33 (1993). Prison officials may not “ignore a condition of  
26 confinement that is sure or very likely to cause serious illness and needless suffering  
27 the next week or month or year” merely because no harm has yet occurred, and a  
28

1 “remedy for unsafe conditions need not await a tragic event.” *Id.* at 33; *accord*  
2 *Farmer*, 511 U.S. at 845.

3 Conditions that have “a mutually enforcing effect that produces the deprivation  
4 of a single, identifiable human need such as food, warmth, or exercise” violate the  
5 Eighth Amendment in combination, even if the conditions separately would not be  
6 unconstitutional. *Wilson v. Seiter*, 501 U.S. 294, 304 (1991). Further, “the length of  
7 confinement cannot be ignored in deciding whether the confinement meets  
8 constitutional standards. A filthy, overcrowded cell and a diet of ‘gruel’ might be  
9 tolerable for a few days and intolerably cruel for weeks or months.” *Hutto v. Finney*,  
10 437 U.S. 678, 686-87 (1978).

11 Corrections officials’ treatment of prisoners violates the Eighth Amendment,  
12 whether or not it causes physical injury, when it “‘offend[s] contemporary concepts of  
13 decency, human dignity, and precepts of civilization which we profess to possess.’”  
14 *Hope v. Pelzer*, 536 U.S. 730, 737 & n.6, 738 (2002) (quoting *Gates v. Collier*, 501  
15 F.2d 1291, 1306 (5th Cir. 1974)); *Hutto*, 437 U.S. at 685 (recognizing that the Eighth  
16 Amendment’s ban on cruel and unusual punishment extends beyond physical  
17 punishment, and proscribes penalties that “transgress today’s ‘broad and idealistic  
18 concepts of dignity, civilized standards, humanity, and decency’” (quoting *Estelle v.*  
19 *Gamble*, 429 U.S. 97, 102 (1976))).

20 Circumstantial evidence may support a finding of deliberate indifference, and  
21 the very fact that a risk is obvious may allow a fact finder to conclude that prison  
22 officials knew of a substantial risk. *Farmer*, 511 U.S. at 842-43 (evidence of  
23 “longstanding, pervasive, well-documented, or expressly noted by prison officials in  
24 the past, and the circumstances suggest that the defendant-official being sued had  
25 been exposed to information concerning the risk and thus ‘must have known’ about it,  
26 [] could be sufficient to permit a trier of fact to find that the defendant-official had  
27 actual knowledge of the risk”).

28

1 ANALYSIS

2 **I. Defendants Are Aware of and Disregard Inmates’ Serious Medical, Dental**  
3 **and Mental Health Needs, Subjecting Them to Excessive Risks of Serious**  
4 **Harm.**

5 Pretrial detainees have a right to adequate care for serious medical, mental  
6 health and dental needs. The constitutional standard for claims alleging deficient care  
7 under the Eighth Amendment is “deliberate indifference” to “serious medical needs.”  
8 *Estelle*, 429 U.S. at 103 (1976).<sup>2</sup>

9 The evidence at hearing will show that the medical, dental and mental health  
10 care provided to detainees at MCJ is objectively inadequate, and that Defendants are  
11 aware of and disregard detainees’ serious health needs, and unnecessarily subject  
12 them to pain and to substantial risk of significant injury and deterioration of their  
13 health. Plaintiffs will offer in evidence the deposition testimony of Dr. Todd Wilcox,  
14 who was a consultant and management expert for Correctional Health Services from  
15 November 2004 through late February 2008, who worked as a clinician at MCJ for  
16 most of that period, and who was MCJ’s medical director from January 1, 2005, to  
17 February 2006. Dr. Wilcox is also certified by NCCHC as an advanced instructor in  
18 the delivery of health care in correctional settings. Dr. Wilcox testified from personal  
19 knowledge that during the time he worked in MCJ, the medical, dental and psychiatric  
20 care provided by Defendants did not meet constitutional standards, despite the fact  
21 that the facility was NCCHC accredited. Plaintiffs’ medical expert, Dr. Joe  
22 Goldenson, and their psychiatric expert, Dr. Pablo Stewart, will testify, based on their

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23 <sup>2</sup> Professional accreditation does not establish that a facility is operating a  
24 constitutionally adequate medical care system. Courts have found facilities accredited  
25 by professional accreditation agencies to violate the Constitution. *See Morales*  
26 *Feliciano v. Rossello Gonzalez*, 13 F. Supp. 2d 151, 158 (D.P.R. 1998) (during the  
27 same period that the NCCHC accredited the Puerto Rico prison system, court  
28 monitors have found non-compliance on at least one essential standard accredited by  
the NCCHC); *Gates v. Cook*, 376 F.3d 323, 343 (5th Cir. 2004) (finding that  
“MDOC’s assertion that it is already in compliance with ACA and NCCHC standards  
is incongruous with the trial courts’ findings, including the statement that ‘the mental  
health care afforded the inmates on Death Row is grossly inadequate.’”).

1 recent visits to MCJ and review of the services provided by Defendants, that systemic  
2 barriers to the provision of adequate medical and mental health care at MCJ, which  
3 Dr. Wilcox found to exist as of February 2008, continue to exist to the present day.  
4 Plaintiffs will show, further, that a number of the systemic deficiencies identified by  
5 these physicians were confirmed even by Defendants' own psychiatric expert, Dr.  
6 Kathryn Burns.

7       Officials may be deliberately indifferent if they “deny, delay or intentionally  
8 interfere with medical treatment,” or if the method by which they provide care is  
9 inadequate. *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988); *Shapley*  
10 *v. Nevada Bd. of State Prison Comm’rs*, 766 F.2d 404, 407-08 (9th Cir. 1985) (noting  
11 that a delay in surgery or treatment can constitute deliberate medical indifference if  
12 the delay is harmful); *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982)  
13 (recognizing that prison officials' deliberate indifference is also shown “if prisoners  
14 are unable to make their medical problems known to the medical staff”).

15       When the entire system of health care is challenged in a class action suit,  
16 deliberate indifference “may be shown by proving repeated examples of negligent acts  
17 which disclose a pattern of conduct by the prison medical staff, or by proving there  
18 are such systemic and gross deficiencies in staffing, facilities, equipment, or  
19 procedures” that effectively deny inmates access to adequate medical care. *Ramos v.*  
20 *Lamm*, 639 F.2d 559, 575 (10th Cir. 1980) (citation omitted); *Cabrales v. County of*  
21 *Los Angeles*, 864 F.2d 1454, 1461 (9th Cir. 1988) (“[A]ccess to medical staff is  
22 meaningless unless that staff is competent and can render competent care.”), *vacated*  
23 *and remanded*, 490 U.S. 1087 (1989), *reinstated*, 886 F.2d 235 (9th Cir. 1989);  
24 *Gibson*, 290 F.3d at 1196 (“When policymakers know that their medical staff  
25 members will encounter those with urgent mental health needs yet fail to provide for  
26 the identification of those needs, it is obvious that a constitutional violation could well  
27 result.”); *Toussaint v. McCarthy*, 801 F.2d 1080, 1111-13 (9th Cir. 1986).

1 Denial of needed medication constitutes deliberate indifference to a serious  
2 medical need. *See, e.g., Sullivan v. County of Pierce*, No. 98-35399, 2000 WL  
3 432368, at \*1-2 (9th Cir. Apr. 21, 2000) (reversing and remanding for reconsideration  
4 of deliberate indifference where a detainee who needed AIDS medication did not  
5 receive that medication for at least two days). Inadequate medical recordkeeping  
6 constitutes a systemic failure in the provision of health care amounting to deliberate  
7 indifference. *See, e.g., Newman v. Alabama*, 503 F.2d 1320, 1323 n.4 (5th Cir. 1974);  
8 *Madrid v. Gomez*, 889 F. Supp. 1146, 1258 (N.D. Cal. 1995). Failure to maintain up-  
9 to-date medical supplies or to put in place a sufficiently organized system for  
10 medication delivery constitutes deliberate indifference. *See, e.g., Williams v.*  
11 *Edwards*, 547 F.2d 1206, 1216-17 (5th Cir. 1977).

12 Medical staff must be competent—capable of examining prisoners and  
13 diagnosing illnesses. *Hoptowit*, 682 F.2d at 1253. Medical providers must also be  
14 able to either treat medical issues identified or refer inmates to other providers, either  
15 within the facility or outside the prison if accessible in a timely manner.” *Id.* The  
16 number of medical staff must be adequate to provide adequate services. *Casey v.*  
17 *Lewis*, 834 F. Supp. 1477, 1548 (D. Ariz. 1993) (“Because of inadequate numbers of  
18 staff, the existing staff cannot adequately treat inmates and their constitutional rights  
19 are violated.”).

20 Conditions of confinement that expose inmates and detainees to  
21 “communicable diseases and identifiable health threats” implicate constitutional  
22 guarantees. *Wilson v. Lynaugh*, 878 F.2d 846, 849 (5th Cir. 1989); *DeGidio v. Pung*,  
23 920 F.2d 525, 531 (8th Cir. 1990). Conditions that significantly affect a person’s  
24 daily activities or cause chronic and substantial pain constitute serious medical needs,  
25 even if they are not life-threatening. *See, e.g., McGuckin v. Smith*, 974 F.2d 1050,  
26 1059-60 (9th Cir. 1997) (“[T]he presence of a medical condition that significantly  
27 affects an individual’s daily activities[,] or the existence of chronic and substantial  
28 pain are examples of indications that a prisoner has a ‘serious’ need for medical



1 treatment.”), *overruled in part on other grounds by WMX Technologies, Inc. v. Miller*,  
2 104 F.3d 1133, 1136 (9th Cir. 1997); *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir.  
3 2006) (citing *Estelle v. Gamble*, 429 U.S. at 104).

4 Serious mental health needs are no less objectively serious than physical health  
5 needs. *Doty v. County of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994). A minimally  
6 adequate prison mental health care delivery system must include: (1) a systematic  
7 program for screening and evaluating inmates to identify those in need of mental  
8 health care; (2) a treatment program that involves more than segregation and close  
9 supervision of mentally ill inmates; (3) employment of a sufficient number of trained  
10 mental health professionals; (4) maintenance of accurate, complete and confidential  
11 mental health treatment records; (5) administration of psychotropic medication only  
12 with appropriate supervision and periodic evaluation; and (6) a basic program to  
13 identify, treat, and supervise inmates at risk for suicide. *Coleman v. Wilson*, 912 F.  
14 Supp. 1282, 1298 (E.D. Cal. 1995) (citing *Balla v. Idaho State Bd. of Corr.*, 595 F.  
15 Supp. 1558, 1577 (D. Idaho 1984)).

16 **II. The Conditions of Confinement in the Intake Area of 4<sup>th</sup> Avenue Jail**  
17 **Violate Detainees’ Rights Under the Eighth and Fourteenth Amendments.**

18 The evidence presented at the hearing will show that the conditions of  
19 confinement in the Intake area of 4<sup>th</sup> Avenue Jail are objectively deficient and that  
20 Defendants are aware of, and disregard, detainees’ needs, and unnecessarily subject  
21 them to pain and to substantial risk of significant injury. Inmates are booked and held  
22 in Intake pending their initial court appearance and subsequent release or transfer to  
23 an assigned jail facility. Although Defendants concede that the entire intake process  
24 should take no more than 24 hours, during the relevant time period in this case 23,987  
25 inmates were held in Intake for more than 24 hours. Of this number, 1,910 inmates  
26 were in Intake for more than 48 hours, of which 353 inmates were held in Intake for  
27 more than 72 hours.

1           Each Intake holding cell consists only of a concrete floor, two concrete  
2 benches, one uncovered toilet, and one sink. Inmates are not provided mattresses,  
3 portable beds, or any bedding. Inmates are packed into cells in such numbers that  
4 they must sleep sitting up or lying on each other on the floor. Detainees are not  
5 provided access to a shower, nor are they provided materials for personal hygiene,  
6 such as toothpaste, a toothbrush, warm water or soap. The holding cells are also  
7 filthy, and the toilets are soiled and often unusable. Moreover, Defendants do not  
8 adequately supervise or perform security walks or welfare checks in Intake despite the  
9 fact that very little is known about inmates at this stage of the process.

10           Plaintiffs contend that in light of the length of time that a large number of  
11 inmates are held in Intake, the overcrowded nature of the holding cells in which they  
12 are detained, the failure to provide personal hygiene materials, the unsanitary  
13 conditions, the increased risk of disease transmission and infection created by these  
14 conditions, and Defendants' failure to provide security and supervision in the holding  
15 cells, the present conditions in Intake violate inmates' due process rights under the  
16 Eighth and Fourteenth Amendments. *See, e.g., Bowers v. City of Philadelphia*, No.  
17 06-CV-3229, 2007 WL 219651, at \*35 (E.D. Pa. Jan. 25, 2007 ("The conditions that  
18 existed in the intake unit . . . violated the constitutional rights" of pretrial detainees in  
19 part because inmates were held post arraignment for days in holding cells in numbers  
20 that exceeded the capacity of the cells, which required detainees to sit and sleep on  
21 concrete floors and on top of each other, inmates were not provided beds and bedding  
22 or materials for personal hygiene, including soap, warm water, toothpaste,  
23 toothbrushes and shower facilities, and were subjected to "unsanitary and unavailable  
24 toilet facilities"); *see also Thompson v. City of Los Angeles*, 885 F.2d 1439, 1448 (9th  
25 Cir. 1989) (court reversed grant of summary judgment, holding that detainee's  
26 allegation that he was provided with neither a bed or a mattress "unquestionably"  
27 constituted a cognizable constitutional claim); *Thomas v. Baca*, 514 F. Supp. 2d 1201  
28

1 (C.D. Cal. 2007) (finding Eighth Amendment violation when detainees slept on floor  
2 in holding cells).

3 **III. The Conditions of Confinement in Towers, Estrella, Durango Housing**  
4 **Units D8 and D9, and the Court Holding Cells at Madison Jail Violate**  
5 **Detainees' Rights Under the Eighth and Fourteenth Amendments.**

6 Overcrowding may have harmful effects on inmates that form the basis for a  
7 constitutional violation. These effects include increased violence, the reduction of  
8 other constitutionally required services such that they fall below Eighth Amendment  
9 standards, and the deterioration of shelter to a point that it is unfit for human  
10 habitation. *Toussaint v. Yockey*, 722 F.2d 1490, 1492 (9th Cir. 1984) (a constitutional  
11 violation may occur as a result of overcrowded prison conditions engendering  
12 “violence, tension and psychiatric problems”); *Hoptowit*, 682 F.2d at 1249; *Akao v.*  
13 *Shimoda*, 832 F.2d 119, 120 (9th Cir. 1987) (per curiam) (reversing district court’s  
14 dismissal of claim that overcrowding caused increased “stress, tension, communicable  
15 disease, and a high increase in confrontation between inmates”).

16 Plaintiffs contend that the totality of conditions at Towers, Estrella, two  
17 warehouse dorms at Durango, and the court holding cells at Madison Jail violate  
18 detainees’ Eighth and Fourteenth Amendment constitutional rights. As Plaintiffs’  
19 expert sanitarian, Dr. Bob Powitz, will testify, detainees in each of these Maricopa  
20 County Jail facilities are housed in overcrowded conditions, with wholly inadequate  
21 space in their cells, dorms, dayrooms, and with regard to Madison, the holding cells.  
22 Moreover, as discussed in further detail below, none of the inmates in Towers,  
23 Estrella, and Durango receive daily outdoor exercise and recreation, which  
24 exacerbates the effects of overcrowding. This is particularly important with respect to  
25 those segregated detainees held in tiny cells in Towers and Estrella who are locked  
26 down for at least 23 hours every day. Furthermore, several of these facilities,  
27 including the court holding cells at Madison, are unsanitary and filthy.

28 The significant overcrowding and lack of sufficient sanitary facilities in many  
of these units cause significant health risks, as well as serious risks of the spread of

1 infectious diseases. Overcrowded conditions are further exacerbated by the failure to  
2 provide adequate medical and mental health care, as outlined above. Jim Aiken,  
3 Plaintiffs' correctional expert, will also testify at trial that the overcrowded conditions  
4 in these facilities result in serious risk of harm to inmates and staff alike, and  
5 substantially affect safety and security in the Jails. This risk of harm is made even  
6 greater by Defendants' failure to provide adequate security and supervision over  
7 inmates in the Jails, a fact to which Mr. Aiken will attest.

8 Furthermore, the Court will hear testimony about the use of "portable beds" at  
9 LBJ and Durango during the relevant time period. At LBJ, inmates were forced to  
10 sleep in portable beds placed in two-person cells with only 18 inches of space  
11 separating the portable bed and the bunks in these cells. At Durango, portable beds  
12 were placed in dayrooms, severely reducing the unencumbered space in the dayrooms.  
13 Captain Robert Barcelo, the Commander of LBJ, will testify that he was ordered by  
14 his direct superior to remove all portable beds prior to the inspections made by the  
15 experts in this case. Defendants were able to move inmates to different areas of the  
16 Jails such that every inmate had a hard bed during the inspections; but certainly,  
17 without a court order mandating such a practice, Defendants would be free to return to  
18 their practice of using portable beds that create overcrowded conditions.

19 In addition to the factors discussed above, the lack of an operationally adequate  
20 grievance system aggravates and intensifies the effects of overcrowding in the Jails.  
21 Inmates are not always provided grievance forms when they request them, detention  
22 officers sometimes refuse to pick up grievance forms, and inmates are discouraged by  
23 officers from filing them. Moreover, Defendants sometimes fail to respond to  
24 grievance forms. Even when grievances make it as far as an "external referee," those  
25 referees are biased in favor of Defendants, rendering the grievance system utterly  
26 ineffective.

1 **IV. The Lack of Exercise Opportunities for Inmates at Towers, Estrella,**  
2 **Durango, and the General Population Housing Units at 4<sup>th</sup> Avenue,**  
3 **Violates Pretrial Detainees' Rights Under the Eighth and Fourteenth**  
4 **Amendments.**

5 Exercise is one of the basic human necessities protected by the Eighth  
6 Amendment. *Pierce*, 526 F.3d at 1211. Some form of regular outdoor exercise is  
7 extremely important to the psychological and physical well-being of inmates. *Spain v.*  
8 *Procunier*, 600 F.2d 189, 199 (9th Cir. 1979); *Bailey v. Shillinger*, 828 F.2d 651, 653  
9 (10th Cir. 1987) (per curiam). "It is generally recognized that a total or near-total  
10 deprivation of exercise or recreational opportunity, without penological justification,  
11 violates Eighth Amendment guarantees." *Mitchell v. Rice*, 954 F.2d 187, 192 (4th  
12 Cir. 1992) (quoting *Patterson v. Mintzes*, 717 F.2d 284, 289 (6th Cir. 1983)); *see also*  
13 *Anderson v. Coughlin*, 757 F.2d 33, 35 (2d Cir. 1985) ("some opportunity for exercise  
14 must be afforded to prisoners"); *Ruiz v. Estelle*, 679 F.2d 1115, 1152 (5th Cir. 1982)  
15 ("confinement of inmates for long periods of time without opportunity for regular  
16 physical exercise constitutes cruel and unusual punishment"), *vacated in part on other*  
17 *grounds*, 688 F.2d 266 (5th Cir. 1982). Moreover, the cost or inconvenience of  
18 providing adequate recreation facilities is not a defense to a constitutional violation.  
19 *Spain*, 600 F.2d at 200; *Mitchell*, 954 F.2d at 192 (prison required to show that other  
20 alternatives for providing sufficient recreation were not feasible, excepting financial  
21 justifications); *Hamilton v. Love*, 358 F. Supp. 338 (E.D. Ark. 1973) (lack of  
22 resources "can never be an adequate justification" for failure to provide exercise and  
23 recreation equipment for pretrial inmates).

24 At the evidentiary hearing, Plaintiffs will present testimony demonstrating that  
25 inmates at Durango, Towers, and Estrella do not receive the opportunity to exercise  
26 for at least one hour each day. Defendants may attempt to excuse this violation of  
27 inmates' constitutional rights by arguing that they have insufficient staff or recreation  
28 yards to provide sufficient opportunities for exercise and recreation; however, as

1 noted above, the lack of staff or recreation yards is a mere financial consideration that  
2 cannot justify the violation of inmates' constitutional rights.

3         Additionally, despite the fact that general population inmates at 4<sup>th</sup> Avenue are  
4 offered the opportunity to exercise every day for approximately one hour, Plaintiffs  
5 will present evidence demonstrating that the exercise and recreation facilities at 4<sup>th</sup>  
6 Avenue are insufficient. Dr. Powitz will testify that the reasonable number of inmates  
7 that can actually use one of the 4<sup>th</sup> Avenue recreation yards is 17 – less than half the  
8 number of inmates who are offered recreation at one time. Defendants, therefore, are  
9 effectively denying adequate recreation opportunities to these inmates. This failure is  
10 aggravated by Defendants' current lockdown policy – general population inmates in  
11 4<sup>th</sup> Avenue are provided, at most, eight hours of dayroom access each day.

12  
13 **V. The Food Served to Inmates Violates Their Rights Under the Eighth and  
Fourteenth Amendments.**

14         The Eighth Amendment requires that prisons and jails serve inmates  
15 nutritionally adequate food that is prepared and served under conditions which do not  
16 present an immediate danger to the health and well being of the inmates who consume  
17 it. *Ramos*, 639 F.2d at 571; *see also French v. Owens*, 777 F.2d 1250, 1255 (7th Cir.  
18 1985) (same, quoting *Ramos*); *Robles v. Coughlin*, 725 F.2d 12, 15 (2nd Cir. 1983)  
19 (same, quoting *Ramos*); *Thompson v. Michigan Dep't of Corr.*, 234 F.3d 1270, at \*2  
20 (6th Cir. 2000) (same); *Burgen v. Nix*, 899 F.2d 733, 734 (8th Cir. 1990); *Divers v.*  
21 *Dep't of Corr.*, 921 F.2d 191, 194 (8th Cir. 1990); *see also Jones v. Diamond*, 636  
22 F.2d 1364, 1378 (5th Cir. 1981) (*en banc*) (inmates must be provided reasonably  
23 adequate food), *overruled on other grounds by Int'l Woodworkers of Am. v.*  
24 *Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986); *Lunsford v. Bennett*, 17 F.3d  
25 1574, 1580 (7th Cir. 1994); *Campbell v. Cauthron*, 623 F.2d 503, 508 n.5 (8th Cir.  
26 1980) (“[T]he state is under a duty to provide an adequate diet for all inmates.”).

27         As Plaintiffs will show at trial, Defendants are unable to demonstrate that they  
28 are providing nutritionally adequate food to inmates. Although Defendants concede

1 that inmates should be provided a minimum of 2400 calories per day, their own  
2 records establish that they have failed to provide the required minerals and vitamins to  
3 inmates as required by U.S. Dietary guidelines. Defendants have not maintained any  
4 records showing menus actually served to inmates, nor do they have any way to  
5 confirm that they have in fact provided the required nutrition to inmates.

6 The Court will also hear inmates testify about moldy bread, spoiled fruit and  
7 contaminants in their food, and will hear Dr. Powitz testify that Defendants' engage in  
8 considerable temperature abuse with regard to the food. These failures pose a serious  
9 risk to the health of inmates, due both to the potential for sickness and food poisoning  
10 as a result of eating spoiled food, and because inmates cannot eat spoiled food and  
11 thus do not receive adequate nutrition. Furthermore, Plaintiffs will present testimony  
12 concerning the difficulty inmates have of obtaining replacement meals when they  
13 receive spoiled or otherwise inedible food.<sup>3</sup> In short, Defendants are unable to meet  
14 their burden of proof that they are complying with constitutional mandates regarding  
15 the provision of nutritionally adequate food to inmates.

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<sup>3</sup> As discussed above, the inmate grievance system in MCJ is defective and thus exacerbates Defendants' failure to provide nutritionally adequate food.

1 DATED this 30th day of July, 2008.

2 OSBORN MALEDON, P.A.

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21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on July 30, 2008, I electronically transmitted the attached  
23 document to the Clerk's Office using the CM/ECF System for filing and transmittal of  
24 a Notice of Electronic Filing to the following CM/ECF registrants:

- 25 • Michele M. Iafrate
- 26 • Courtney R. Cloman
- 27 • Thomas E. Lordan
- 28 • Hanh Nguyen
- Daniel J. Pochoda
- Adam S. Polson
- Dennis I. Wilenchik
- Margaret Winter

I hereby certify that on July 30, 2008, I served the attached document by first-class mail on the Honorable Neil V. Wake, United States District Court, Sandra Day



1 O'Connor U.S. Courthouse, Suite 524, 401 West Washington Street, SPC 52,  
2 Phoenix, AZ 85003.

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