No. 11-10339

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JARED LEE LOUGHNER,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona
Honorable Larry Alan Burns, District Judge

APPELLANT'S REPLY BRIEF

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UNITED STATES, Plaintiff-Appellee, v. JARED LEE LOUGHNER, Defendant-Appellant.	U.S.C.A. No. 11-10339 U.S.D.C. No. 11CR187-TUC (LAB) **APPELLANT'S REPLY BRIEF**

I.

INTRODUCTION

In his opening brief, Mr. Loughner raised three arguments: (1) that the prison denied him substantive due process by forcing him to take anti-psychotic drugs while rejecting admittedly effective, less intrusive means to mitigate danger because they don't treat Mr. Loughner's mental illness; (2) that the prison denied him procedural due process, because application of *Mathews v. Eldridge's* balancing test requires that a judge, not a prison administrator, decide whether a pretrial detainee like Mr. Loughner can be forcibly medicated; and (3) that no matter what standard is applied, the prison denied Mr. Loughner procedural and substantive due process, (a) by violating its own rules in denying Mr. Loughner the right to call a witness, (b) by finding treatment "medically appropriate" without even knowing, let alone

specifying, the involuntary medication regime to which he would be subjected, and (c) by finding that Mr. Loughner could be forcibly drugged because he presented a danger to mere property.

The government's response to these arguments is that *Washington v. Harper*, in considering the substantive and procedural rights of a convicted inmate—and not a pretrial detainee like Mr. Loughner—decided these issues. The government urges that this case "is *Harper*," that no other cases matter, and not even subsequent Supreme Court authority interpreting and extending *Harper* can inform the due process calculus. The government misreads *Turner v. Safley* and *Bell v. Wolfish*, and their evaluation of prisons' general security restrictions, as supporting the idea that pretrial detainees and convicted inmates are the same for all purposes and from this misreading concludes that the *Harper* standard for medicating a convicted inmate is applicable to a pretrial detainee. Alternatively, the government claims that due process protects detainees only against punishment and that because forcible administration of anti-psychotic drugs is not punishment, the Constitution does not further restrict such drugging of a detainee. Finally, the government claims the prison complied with any due process concerns by "considering" less intrusive means of mitigating danger.

The government's positions lack merit. First, the Supreme Court's express statements concerning the limits of *Harper's* holding cannot be ignored, nor can its subsequent holdings in *Riggins* and *Sell v. United States*. Both of these cases establish that a pretrial detainee has different interests than a convicted inmate, and is entitled to greater procedural and substantive protections before he may be forcibly medicated.

Second, prison restrictions of general applicability—such as double-bunking, cell searches, and limits on care packages at issue in *Bell*—simply are not the same as forcing upon an individual mind-altering drugs. The government disregards these differences and ignores all of the relevant interests at play in the forcible medication context except one: general institutional security concerns. It is these other interests, in a fair trial and avoiding correction except upon conviction of a crime, not general security concerns, that alter the due process calculus and require that Mr. Loughner be afforded greater protection than a convicted inmate. For this reason, neither *Turner*, *Bell*, nor *Harper* can support the government's argument that forcibly medicating a pretrial detainee is the same as treating a convicted inmate. The government's assertion that pretrial detainees are protected only against punishment is equally unsupportable. The punishment prohibition concerns only those governmental actions that do violate any express constitutional guarantee.

Finally, considering less intrusive means but rejecting these for reasons unrelated to legitimate governmental interests in security violates the Due Process Clause.

II.

THE SUBSTANTIVE DUE PROCESS VIOLATION

A. THE CORRECT SUBSTANTIVE STANDARD IS WHETHER, "CONSIDERING LESS INTRUSIVE ALTERNATIVES," FORCED MEDICATION IS "ESSENTIAL" FOR THE SAKE OF SAFETY

The government's first argument, that the substantive weighing conducted by *Washington v. Harper*, 494 U.S. 210 (1990), controls the case of a pretrial detainee, is wrong. GB 24-25. Throughout this litigation, the government has contended that *Harper* sets the outer limits of any process that Mr. Loughner, a pretrial detainee convicted of no crime, is due. Addressing the government's stance, the opening brief explained that *Harper* itself stated that its holding was driven by the context of the convicted inmate's confinement, a context which differs significantly from Mr. Loughner's pretrial status. AOB 15-16. Despite *Harper's* express statement concerning context, the government essentially reasons that *Harper* actually intended its substantive balancing to apply to pretrial detainees because it never said, "By the way, this does *not* apply to pretrial detainees." This argument ignores the limitation *Harper* placed on its holding, *see* GB 24, and is entirely dispelled by the Supreme

Court's subsequent cases, *Riggins v. Nevada*, 504 U.S. 127 (1992), and *Sell v. United States*, 539 U.S. 166 (2003).

Writing two years after *Harper*, *Riggins* acknowledged that *Harper* had *not* determined the circumstances under which a detainee could be forcibly medicated: "[W]e have not had occasion to develop substantive standards for judging forced administration of such drugs in the trial or pretrial settings. . . .". *Riggins*, 504 U.S. at 135. This is why the government's contention that *Harper* conclusively decided the issue is just flat-out wrong—the Supreme Court has said the exact opposite. The question of when a pretrial detainee could be forcibly medicated was, as *Riggins* recognized, simply not before the Court in *Harper*.

That question was, however, at issue in *Riggins* and *Sell*. *Riggins* stated that a pretrial detainee could be medicated if the treatment was medically appropriate and, considering "less intrusive" means, "essential" to the detainee's own safety or the safety of others. 504 U.S. at 135; *see also* AOB 18-19 (explaining that this standard, which is more stringent than that applicable to convicted inmates, applies here). The government contends that *Riggins* did not articulate a constitutional standard, but only condoned a hypothetical action that would have satisfied due process. GB 31. This is wrong. Whatever the plausibility of this argument before 2003, it is no longer tenable after the Supreme Court's decision in *Sell*. *Sell*, in considering when a

pretrial detainee could be medicated to restore competency, concluded that: (1) determinations of whether dangerousness justified medication should be addressed before considering whether to medicate for competency; (2) the standard announced in *Riggins* was appropriate for judging the question; and (3) the decision should be made by courts. 539 U.S. at 179 (interpreting *Riggins* as holding that an "essential" or "overriding" state interest was necessary to overcome a pretrial detainee's liberty interest in remaining free from unwanted psychotropic drugs).

Unsurprisingly, the government has no answer to the point that *Riggins* itself took care to distinguish the "unique circumstances of *penal* confinement" in *Harper* from the "trial or pretrial settings," *see* AOB 19—other than its familiar refrain urging this Court to simply ignore *Riggins* and *Sell* and focus solely on *Harper*.

Equally unpersuasive is its effort to support this "only *Harper* matters" argument by interpreting every reference to *Harper* in the *Sell* opinion as an endorsement of the procedural and substantive standards approved in that case. *See* GB 30-31 (citing *Sell*, 539 U.S. at 181-82). The plain text of *Sell* refutes the government's reading; *Sell*, and the cases that follow it, use the term "*Harper*" in discussing the governmental purpose of mitigating dangerousness, not as a blanket incorporation of every aspect of that case. *See Sell*, 539 U.S. at 182 (mentioning

Harper to reference "the purposes set out in *Harper* related to the individual's dangerousness").

B. PRETRIAL DETAINEES AND CONVICTED PRISONERS ARE NOT IDENTICALLY SITUATED

Although the holdings of the Supreme Court in *Riggins* and *Sell* foreclose the government's arguments and confirm the defense position regarding both the substantive and procedural protections he is due, the opening brief nevertheless returned to the fundamental due process balancing tests as applied in *Harper* to demonstrate that the differing interests of the convicted inmate and the pretrial detainee supported his understanding that the Supreme Court had adopted two different standards and sets of procedures for determining when forcible medication was constitutionally permissible. AOB 17-33. The opening brief identified two main areas where the interest-balancing is different between the pretrial and post-conviction contexts: (1) the private interest in fair trial rights, present pretrial but absent post-conviction, AOB 22-25; and (2) the governmental interest in long-term treatment and rehabilitation, absent pretrial but present post-conviction, AOB 26-28.

In response, the government does not confront these arguments so much as sidestep them. In fact, it never discusses the interests asserted by appellant. Instead, it supports this argument through a flawed reading of caselaw. Noting that *Harper*,

in developing its standard, relies on *Turner v. Safley*, 482 U.S. 78 (1987), and *Bell v. Wolfish*, 441 U.S. 520 (1979), GB 25, the government observes that *Bell*, in deciding the constitutionality of prison restrictions of general applicability, did not distinguish between pretrial detainees and convicted inmates. GB 26-27; *see also* GB 32-33 (citing *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc)). The government's conceit is that if pretrial detainees and convicted inmates may be treated the same when considering *general restrictions*, such as cell searches, strip searches, and restrictions on receipt of hardback books, they may be treated the same when considering any other deprivation, so long as the government asserts that an interest in institutional security motivates its actions.

To state the argument succinctly demonstrates its bankruptcy. Pretrial detainees and inmates are not the same. General restrictions of liberty intended to maintain the safety and security of a prison are not the same as the forcible administration of drugs that (1) are intended to alter the thinking of an individual; (2) may cause permanent debilitating side effects; and (3) may deprive the detainee of his right to a fair trial. Supported by Supreme Court precedent, the opening brief explained how these differ and how those differences support the application of the rigorous standard articulated in *Riggins* and a requirement that this standard be judged by a court of law. AOB 22-25, 26-28. The government's inability to confront

these arguments directly—in particular, its failure to explain why double-bunking or a cell search is really the same as forcibly injecting an individual with mind-altering drugs—is tantamount to a concession.

What the government fails to grasp is that while the prison facility's *security* interests may be the same with respect to either inmates or detainees—this is what *Bell* and *Turner* stand for—there exist other, different interests at play in the forced medication context, interests that tip the due process balance in favor of a pretrial detainee. In fact, cases the government cites make this point. For example, in *Bull*, this Circuit distinguishes between governmental interests applicable only in the post-conviction (and not pretrial) context and governmental interests applicable in both contexts:

> While penological interests in punishment or rehabilitation may *not be applicable* outside of a prison setting, the penological interest in security and safety *is applicable* in all correction facilities.

595 F.3d at 974 n.10 (emphases added). *Bull* establishes exactly the point made in the opening brief: that although institutional security is a legitimate goal whenever the government incarcerates an individual, "treatment and correction are legitimate aims of a criminal sentence imposed as punishment for a crime" but not of pretrial detention. AOB 26. The government quotes, but ignores, the very distinction drawn by *Bull*. *See* GB 33.

Turner, *Bell*, and *Bull* all involved general prison regulations whose application could not differ between the pretrial and post-conviction contexts. It makes no difference to a facility's interest in prohibiting receipt of hardback books, *Bell*, 441 U.S. at 549-50, prohibiting care packages, *id.*, or conducting regular cell searches and body cavity searches, *id.; see also Bull*, 595 F.3d 964 (strip searches), whether an individual is suspected of a crime or has been convicted of one. Every person detained at the institution must be subjected to the same restrictions or they will be ineffectual. Moreover, each of these policies, unlike forcible medication, concern individual interests of exactly the same *nature*, regardless of conviction status. And, nothing about receipt of hardback books or cell searches affects a detainee's ability to receive a fair trial, nor is the government's interest in taking these actions enhanced by convicting the individual in custody.

Here, by contrast, two categories of interests relevant to forcible medication differ *in nature* between the pretrial and post-conviction contexts. AOB 22-25 (private interest in fair trial), 26-28 (government interest in correction and rehabilitation). Before conviction, Mr. Loughner maintains an interest in, indeed a right to, a fair trial. Before conviction, the government has neither right nor interest in treating or correcting him. This puts the lie to the government's assertion that

pretrial detainees are *always* treated the same as convicts for due process purposes. They are not; context matters.

C. *BELL* DOES NOT HOLD THAT DUE PROCESS RESTRICTS ONLY GOVERNMENT ACTIONS THAT AMOUNT TO "PUNISHMENT"

The government's third argument is that, under *Bell*, the only due process restriction on its treatment of a pretrial detainee is "whether [the challenged] conditions amount to punishment of the detainee." GB 26-27 (citing *Bell*, 441 U.S. at 535-36). It argues that forcibly medicating Mr. Loughner did not violate due process because "treatment with psychotropic drugs is not punishment." GB 27-28.

The government's selective quotation of *Bell*'s "punishment" language is designed to leave the impression that the existence of punishment is the only due process limitation upon government actions against pretrial detainees. *Harper*, the central case on which the government relies, shows this argument to be error. In *Harper*, the state had convicted the individual and obtained the right to punish and correct him. *See Bell v. Wolfish*, 441 U.S. at 535-36. Despite this, due process restricted the circumstances under which it could forcibly medicate the individual.

The portion of *Bell* on which the government relies pertains only to "an aspect of pretrial detention that is not alleged to violate any express guarantee of the Constitution." 441 U.S. at 534. That part of *Bell* analyzed double-bunking—a

practice against which a detainee can claim only a vague interest in personal comfort. *See id.* at 530-43. Double-bunking does not infringe on any identifiable constitutional interest—hence the Supreme Court's limitation of its "punishment" analysis to restrictions that are "*not* alleged to violate any express guarantee of the Constitution." *Id.* at 534 (emphasis added).

By contrast, freedom from forced medication has been recognized repeatedly as a protected liberty interest. *See, e.g.*, *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 691 (9th Cir. 2010) ("The Supreme Court has thrice recognized a liberty interest in freedom from unwanted antipsychotic drugs."). Moreover, this affirmative intrusion on an individual's bodily and mental integrity simply is not a general "condition[] or restriction[] of pretrial detention" in the sense intended by *Bell*, which addressed uniformly applied conditions of confinement. *Bell*, 441 U.S. at 535. In sum, nothing about *Bell* supports the farfetched notion that the "punishment" test has somehow supplanted other due process standards including the "reasonable relationship"/ "exaggerated response" standard set forth in *Turner v. Safley* or the "overriding justification . . . considering less intrusive means, essential to . . . safety" test of *Riggins*." *See, e.g.*, *Harper*, 494 U.S. at 224-25 (applying the *Turner* test).

The government seeks support for its argument from dicta in a Tenth Circuit decision, *Jurasek v. Utah State Hosp.*, 158 F.3d 506, 511 (10th Cir. 1998). *See* GB 38 n.14 (citing *Jurasek*). There, the court made the following remarks:

> One could argue that because a pretrial detainee has not been convicted of a crime, he deserves greater due process protections than a prisoner. The Court, however, implicitly rejected this argument in *Riggins* by applying the *Harper* standards to an incompetent pretrial detainee.

Jurasek, 158 F.3d at 511. As noted above, these comments are dicta, for the case concerns not pretrial detainees but long-term civil commitment, and the individual in *Jurasek* stood in a position far different from that of Mr. Loughner. He had, in fact, been accorded due process of law. As described by the Tenth Circuit:

> At the commitment hearing, a Utah state court determined (1) Jurasek suffered from a mental illness, (2) Jurasek posed an immediate physical danger to himself and others because of his mental illness, (3) Jurasek lacked the ability to engage in rational decision-making regarding the acceptance of mental treatment, (4) there was no appropriate less-restrictive alternative to a court order of commitment, and (5) the Hospital could provide Jurasek with adequate and appropriate treatment. Jurasek was examined by an independent psychiatrist prior to the commitment hearing and was represented by counsel at the hearing.

158 F.3d at 509. So, through a judicial proceeding at which Jurasek was represented by counsel, the state established that he was not competent to make decisions about his own medication and obtained the right to treat Jurasek's mental illness, concomitantly extinguishing his right to avoid unwanted treatment. In addition, since

not charged with a crime, Jurasek had no fair trial right to be balanced in the due process calculus. Moreover, the Tenth Circuit, in judging the actions of the hospital, applied the *Riggins* standard, requiring the state to show an "overriding justification" and to establish medication to be, "considering less intrusive alternatives, essential for the sake of . . . safety." *Jurasek*, 158 F.3d at 512. In other words, the Tenth Circuit's review confirms that Jurasek received the substantive and procedural protections which Mr. Loughner seeks.

In any case, to the extent the *Jurasek* panel believed *Riggins* confirmed the standard set out in *Harper*, it is flatly wrong. As discussed above, *Riggins* proclaims that *Harper* did not determine when a pretrial detainee could be forcibly medicated and then goes on to set out a standard which differs significantly from that applied in *Harper*: were this not the case, there would be no conflict between the government and appellant. *Jurasek*'s claim that the *Riggins* standard is identical to that articulated in *Harper* is made without citation to either of those cases, and without addressing the Supreme Court's own language distinguishing the pretrial from post-conviction context. *See* AOB 19.

D. FORCIBLE MEDICATION VIOLATED MR. LOUGHNER'S SUBSTANTIVE DUE PROCESS RIGHTS

The opening brief argued that the forcible medication decision violated the substantive due process standard because the prison improperly rejected the admittedly effective "less intrusive" and non-brain-altering alternative of using minor tranquilizers, seclusion, and restraints on an improper basis—the desire to provide "treatment" for the underlying mental illness. AOB 29-33. In response, the government minimizes the severity of the intrusion on Mr. Loughner's liberty by characterizing the psychotropic drugs as "positive" and contends that it was enough for the prison to have merely "considered" the use of alternatives. These arguments lack factual and legal support.

1. The Government's Rejection of Concerns About the Intended and Unintended Side Effects of Psychotropic Drugs is Misplaced

The government rejects Mr. Loughner's significant interest in being free of the intended effects of powerful psychotropic drugs (AOB at 18-21), and their unwanted and unintended side effects, (AOB at 21-24). *See* GB at 39-42. It does so for three reasons, none of which justify rejection of their significance in the context of pretrial detention.

First, the government returns to its *Harper* refrain: *Harper* considered side effects and permitted forced medication. Of course, as discussed above, *Harper* had

no occasion to consider the impact of these drugs on a pretrial detainee. And *Harper* itself requires this Court to consider the context in which such drugs are administered when defining the substantive standard. *See* 494 U.S. at 222. This is what the Supreme Court did in *Riggins* and *Sell*, following *Harper*. It considered the adverse impact that both the intended and unintended effects these drugs have on a defendant's fair trial rights. *See Riggins*, 504 U.S. at 137 (raising concern about psychotropics causing "drowsiness," "confusion," as well as "affect thought processes," "outward appearance," "the content of . . . testimony . . . [and the] ability to follow the proceedings or the substance of his communication with counsel"); *id.* at 138-39, 144 (Kennedy, J., concurring) (equating forced medication to tampering with material evidence); *Sell*, 539 U.S. at 177, 185 (same). The government's claim that such fair trial concerns are raised prematurely, *see* GB at 54-56, is explicitly rejected by *Sell*. *See* 539 U.S. at 177 ("whether Sell has a legal right to avoid forced medication, perhaps in part because medication *may make a trial unfair*, differs from the question whether forced medication did make a trial unfair," and that legal right may be enforced pretrial).

The government's second argument is that Mr. Loughner "overlooks the nature of the drugs at issue and the positive effects of those drugs in treating mental illness." GB at 40. This argument misses the point. Even assuming these drugs represent a

well-accepted means of treating mental illness, this status does not mean they are "essential for the sake of [the detainee's] own safety or the safety of others." *Riggins*, 504 U.S. at 135, or "necessary to control a patient's potentially dangerous behavior . . . ," *Sell*, 539 U.S. at 182 (explaining the dangerousness standard in the pretrial context). Not even *amici* can claim they are essential to mitigating danger. Rather, like the government, they say only that these drugs "are an accepted and often irreplaceable treatment for acute psychotic illnesses . . . ." APA Br. at 12.

Long-term treatment for mental illness may be appropriate in a *correctional* context for a convicted prisoner insofar as it represents a legitimate aim of a criminal sentence. *See, e.g.*, *Harper*, 494 U.S. at 225; AOB at 26-29. But it is not one of the two legitimate goals for pretrial detention, securing a defendant's presence at trial and maintaining security in a detention facility. *See Demery v. Arpaio*, 378 F.3d 1020, 1031 (9th Cir. 2004); AOB at 26-29. Critical to the *Riggins/Sell* standard is the fact that it "decline[s] to give carte-blanche deference to doctors acting in the exercise of professional judgment." *Brandt v. Monte*, 626 F.Supp.2d 469, 489 (D.N.J. 2009). So even if psychotropic drugs may be medically appropriate for a person suffering from psychosis, the doctors must *first* "deem involuntary medication *necessary* to avert [potential dangerousness]." *Id.* (emphasis added).

The government also focuses on the fact that Mr. Loughner is currently taking "a newer, *second*-generation antipsychotic drug, risperidone," arguing without citation that this drug "does not pose a serious risk of physical harm." GB at 41. It makes this point in an attempt to distinguish the severe side-effect profile of the "older, first-generation antipsychotic medications that were at issue in *Harper* (Haldol), *Riggins* (Mellaril), and [*United States v.*] *Ruiz-Gaxiola*, [623 F.3d 684 (9th Cir. 2010)] (Haldol) . . . ." GB at 40. Incredibly, though, the government buries in a footnote the fact that Mr. Loughner *is also prescribed* one of these first-generation drugs, injectable Haldol, as backup if he refuses to take the oral risperidone being forced on him. Moreover, contrary to the government's assertions, risperidone is known to cause numerous side effects, including neuroleptic malignant syndrome, tardive dyskinesia, hyperglycemia and diabetes mellitus, hyperprolactinemia, orthostatic hypotension, agranulocytosis, cognitive and motor impairment, seizures, dysphagia, disruption of body temperature regulation, and diseases or conditions that could affect metabolism or hemodynamic responses.[1] These side effects have been the topic of significant controversy surrounding the overprescription of Risperdal.[2]

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[1]*See* Full U.S. Prescribing Information for Risperdal/Risperidone available at http://www.risperdal.com/sites/default/files/shared/pi/risperdal.pdf.

[2]*See, e.g.*, Duff Wilson, *Child's Ordeal Shows Risks of Psychosis Drugs for Young*, The New York Times, Sept. 1, 2010 (chronicling the overprescription of

In particular, Risperdal's potential for wreaking havoc on the metabolism and increasing the risk of massive weight gain and serious diseases like diabetes, known to pharmaceutical companies for some time, have come to light as of late. *See, e.g.*, *State v. Johnson & Johnson*, 704 S.E.2d 677, 681 (W.Va. 2010) (studies in 2003 revealed a connection between atypical antipsychotics—like Risperdal—and hyperglycemia, causing the FDA to require manufacturers to include a warning about "the increased risk of hyperglycemia, diabetes mellitus and ketoacidosis, a serious complication of diabetes that can lead to a coma or death," a risk so serious that the FDA recommended that all patients receiving such drugs be subject to regular monitoring). The risk of these side effects are actually "*increased* among patients using atypical [aka second generation] antipsychotics as compared to other classes of antipsychotics." *Id.* (emphasis added).

The government's third point is equally meritless. It argues that Mr. Loughner has "tolerated the prescribed medication well, without the significant side effects he discusses, and showed improvement when taking it." GB at 42. For this claim, the government relies on a footnote in its own district court filing that claims without citation that Mr. Loughner is "tolerating the medication well." SER 19 n.12. It also

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antipsychotics to young children in the past decade and quoting National Institute of Mental Health chief Dr. Ben Vitello, explaining the phenomenon as "driven by the misperception that these agents are safe and well tolerated").

relies on the statements of a prison psychiatrist describing a brief eight-day period when Mr. Loughner was forced to take these drugs before this court issued its temporary injunction. But even if there existed medical literature validating the reliability of such a small window of observation (which neither the government nor the APA provides), the point is irrelevant to the issue presented here. After-the-fact observations, particularly ones based on a minute window of observation as here, have no place in the due process analysis of the initial decision to medicate.[3]

2. The Government's Argument that Less Restrictive Means Were "Considered" by the Prison Fails Because They Were Rejected on an Invalid Basis.

The government argues that the prison satisfied *Riggins*' "less intrusive alternative" test because it did not "overlook" less intrusive means such as seclusion, restraints, and sedatives, and that they were in fact "considered" by the prison. Again, the government misses the point. While the prison may have "considered" the

[3] The government's attempt to expand the record is at its own risk. Such expansion would reveal that the prison recently began medicating Mr. Loughner in response to a complaint by him with a drug, benzatropine, designed to combat unwanted side effects such as parkinsonism, akathisia, and dystonia. *See* http://en.wikipedia.org/wiki/Benzatropine (last visited on 8/11/11).

alternatives in the sense that it acknowledged their effectiveness and availability, it rejected them on an invalid basis, and thus did not *properly* consider them.[4]

The government first argues that use of minor tranquilizers "is not supported by literature or sound clinical practice." GB at 42-43 (quoting APA Br. at 19-20). But the report of the prison's own clinicians belies this claim. The report states that "[m]inor tranquilizers (benzodiazepines) are useful in reducing agitation," ER 8, the very symptom that the prison claims made Mr. Loughner dangerous. Yet it rejects the use of these drugs, not because they aren't effective in mitigating dangerousness, but because they "have no direct effect on the core manifestations of the mental disease." *Id.* Completely ignoring this conclusion of its own doctors, the government instead turns to the APA brief for relief, quoting the following passage:

> Sedatives do nothing to address the symptoms that may drive the patient to harm himself and others; even when sedated, a patient therefore may still be dangerous, and there is no reason to expect that the danger will be diminished after the sedative wears off. Use of sedatives alone . . . not only carries its own risk of side effects but also fails to address the patient's underlying illness, and is thus more akin to physical restraint than the use of appropriate medication.

GB at 43 (quoting APA Br. at 19-20). Amazingly, in a brief that cites to 26 pieces of medical literature and studies for other propositions, the APA provides no support

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[4]The government also mischaracterizes Mr. Loughner as advocating a "*least* restrictive alternative" test, rather than the "less intrusive alternative" test he has consistently applied. *Compare* GB at 42 (emphasis added) *with* AOB at 17.

for the conclusion that "[s]edatives do nothing to address the symptoms that may drive the patient to harm himself and others." We simply have the APA brief writer's say-so and the government's repetition. Double say-so does not undercut the prison psychiatrist's own medical conclusion that anxiolytics do address the symptoms creating any dangerousness on Mr. Loughner's part.

The government next turns to the alternatives of physical restraints and seclusion. It claims that "*Harper* noted that physical restraints and seclusion *often* are not acceptable substitutes for medication." GB at 43 (emphasis added). The government fails to acknowledge that *Harper* says these alternatives actually *are* effective, but only in "the short term." 494 U.S. at 226. Of course, unlike the lengthy period of confinement implicated in *Harper*, pretrial detention is necessarily of temporary duration. *See* AOB at 8-9. More important, however, is the fact that the prison psychiatrist here did not reject seclusion and restraints because he deemed them ineffective; he did so because they "are merely temporary protective measures with no direct effect on mental illness." ER 8. Indeed, for the six-plus months preceding the prison's decision to forcibly medicate Mr. Loughner, these means *were* sufficient to protect the safety of Mr. Loughner and others. *See* July 12 Order (DE 10) (noting that the prison "has managed to keep Loughner in custody for over six months without injury to anyone.").

In sum, the prison did not adequately consider whether the readily available, less intrusive, and effective alternatives to psychotropic drugs would satisfy its *safety* concerns. It rejected these alternatives on the ground that they don't adequately treat mental illness. But treating mental illness is not a legitimate pretrial detention interest. *See Demery*, 378 F.3d at 1031. Because the government rejects—indeed, ignores—its own doctor's medical opinion as to the effectiveness of these alternatives, it cannot demonstrate that psychotropic drugs were "essential" to mitigating dangerousness.

III.

THE PROCEDURAL DUE PROCESS VIOLATION

The opening brief argued that the Due Process Clause requires a decision to forcibly medicate a pretrial detainee to be made by a court upon presentation of clear and convincing evidence. AOB 35-46. As explained there, this result emerges from proper application of the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

In response, the government contends (1) that the procedural issue should be reviewed under the "plain error" standard because *Mathews* was only discussed a handful of times in the district court proceedings, GB 46, and (2) that, once again, this Court need not look further than *Harper*, GB 38, 47.

A. *MATHEWS V. ELDRIDGE* SETS OUT THE CORRECT STANDARD

The government suggests that *Mathews v. Eldridge* does not apply or that its application is somehow subject to "plain error review," *see* GB 46-47, apparently expecting this Court to cast aside the balancing test applied in every procedural due process case since 1976 because the seminal Supreme Court decision setting forth that test was only "cited . . . once" and "mentioned briefly . . . at oral argument." GB 46. Unsurprisingly, the government cites no authority to support its position.

Obviously, *Mathews* sets forth the applicable standard. This may be the most uncontroversial point made in the entire course of this litigation. Even *Harper* expressly applies the *Mathews* standard:

> The procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in the particular case. . . . The factors that guide us are well established. Under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), we consider the private interests at stake in a governmental decision, the governmental interests involved, and the value of procedural requirements in determining what process is due under the Fourteenth Amendment.

Harper, 494 U.S. at 229 (quotation marks omitted). Given the prominence of *Mathews* not just in federal constitutional law, but also in the small universe of forcible medication cases, the government takes an unjustifiably dim view of the district court in accusing it of "not divining the alleged significance of a case that was only cited in passing." GB 46. The defense disagrees with the government's view

of the district court as ignorant of *Mathews*; the district court simply misapplied *Mathews*.

B. UNDER *MATHEWS*, A COURT, NOT PRISON ADMINISTRATORS, MUST MAKE THE DETERMINATION WHETHER TO FORCIBLY MEDICATE A PRETRIAL DETAINEE

As explained in the opening brief, consideration of the private and governmental interests at stake in the pretrial context, as well as the added value of the additional procedural safeguards, results in the *Mathews* balance coming out in favor of the pretrial detainee. AOB 35-46. The different interests in the pretrial context as opposed to the postconviction context addressed in *Harper*—specifically, the presence of the individual's fair trial interests and absence of the government's rehabilitative/correctional interests—are what ultimately drive this result.

The government has nothing to add to this analysis beyond "*Harper* already resolved this question." GB 47. It is incorrect for all of the reasons set forth in the substantive due process section above. The government's reliance on the out-of-circuit decisions in *United States v. White*, 431 F.3d 431 (5th Cir. 2005); *United States v. Green*, 532 F.3d 538 (6th Cir. 2008); *United States v. Grape*, 549 F.3d 591 (3d Cir. 2008); and *United States v. Morrison*, 415 F.3d 1180 (10th Cir. 2005), is also unavailing. *See* GB 35-38. The government claims that these cases have "rejected the argument that . . . a judge should have made the *Harper* determination instead of

BOP." GB 35. Not so. In reality, not a single one of these cases considered the issue raised here—whether due process requires a decision to forcibly medicate a pretrial detainee be made by a court.

Two of these cases, *White* and *Green*, support the proposition advocated by Mr. Loughner—that a detainee is entitled to a two-step process involving an administrative hearing *first* (because the regulations create that right), at which he could be determined to be non-dangerous, and if not, a subsequent judicial determination before medication is authorized. In *White*, the government skipped the first step, the administrative hearing, thus depriving the defendant of the opportunity to be found non-dangerous by the administrative board, and took its cause straight to the district court where it prevailed. *See* 431 F.3d at 434. Far from "rejecting" the district court's involvement in the forcible medication decision, the Fifth Circuit faulted the government for forum-shopping and thus depriving the defendant of his right to contest dangerousness administratively *before* going to the district court. *Id.* (reversing because "the government made an end run around the regulatory scheme" having offered no "excuse [for] its failure to exhaust the administrative procedure"). The Sixth Circuit echoed this sentiment in *Green*. 532 F.3d at 543 n.3 (approving the procedures followed there, where the § 549.43 hearing was "conducted *in advance* of the district court hearing") (emphasis added).

The remaining cases relied on by the government simply don't bear the weight it saddles them with. The appellate courts in *Green*, *Grape*, and *Morrison* were concerned only with the propriety of a *Sell* order to medicate to restore competency. In each of these cases, the government seizes upon background language used in a descriptive sense to explain the different types of governmental justification for forced medication that have been recognized by the Supreme Court. By no stretch of the imagination have any of these cases considered, let alone "rejected," the arguments presented here.

Finally, the government has no response to the fact that the Supreme Court and this Court have, in decisions regarding forcible medication of pretrial detainees, employed language that clearly contemplates that a "court," not an administrative body, would be the decision maker in this context. *See* AOB 44-46 (citing *Sell*, 539 U.S. at 182-83; *United States v. Hernandez-Vasquez*, 513 F.3d 908, 914, 919 (9th Cir. 2008). The best the government can muster is the assertion that "*Hernandez-Vasquez* did not [so] rule." GB 34. It is unable to refute the fact that *Sell* used the term "court" at least four times in discussing the utility of making a dangerousness determination, or the fact that *Hernandez-Vasquez* urged the "district court" to consider the dangerousness justification as a precursor to passing on the competency restoration rationale.

IV.

THE PRISON'S REMAINING VIOLATIONS

A. VIOLATION OF THE RIGHT TO CALL WITNESSES

As explained in the opening brief, the record plainly shows that Mr. Loughner asked for his "attorney" as a witness at his administrative hearing. AOB 47-49. There is no other reasonable way to interpret the fact that he responded, "Just my attorney," to being "asked . . . if he desired any witnesses present." AOB 48; ER 169. The district court clearly erred when it rejected the sole reasonable reading of the record and instead adopted the government's self-serving interpretation that what Mr. Loughner really meant when he said he wanted "my attorney" as his "witness[]" was that he wanted his attorney to be present in her role as an attorney.

In response, the government simply repeats the argument it advanced below. GB 50-51. It has no explanation for the portion of the record excerpted above, *see also* AOB 48, which speaks for itself. The government's silence speaks volumes. There is no other explanation for Mr. Loughner's request for his attorney to appear as a "witness."

The government also asserts that his attorney's presence at the hearing, at which she would have testified that Mr. Loughner never lunged at her, ER 73, contrary to the prison's unsupported "finding" that he did, would have made no

difference to the hearing's outcome. GB 51. This claim—that the hearing was effectively immune to relevant, eyewitness evidence—appears to be a tacit admission that the outcome of the hearing was predetermined.

B. FAILURE TO SPECIFY MEDICATION AND MAXIMUM DOSAGE

Mr. Loughner's next argument was that the prison violated *Hernandez-Vasquez* by finding forced medication in general "medically appropriate," without specifying what medication it was considering and at what maximum dosage. AOB 49-53 (explaining that *Hernandez-Vasquez*'s rule emerged from its interpretation of the same "medical appropriateness" prong required in both *Sell*-type restoration orders and *Harper*-type dangerousness orders). The government offers no real response to this point at all. To say that *Hernandez-Vasquez* was "based on *Sell* and *Riggins*" rather than *Harper*, as the government does, entirely fails to engage Mr. Loughner's point. It fails to dispute the critical point that *Sell* adopted *in toto* the "medical appropriateness" requirement from *Harper*—and thus that the two "medical appropriateness" requirements are identical.

The government's second contention, that it was enough for a BOP doctor to prescribe a specific medication *after* the forcible medication decision, GB 52-53, is flawed for obvious reasons. *Hernandez-Vasquez* requires the identity and dosage of medication to be specified *before* the conclusion is made that forcible drugging is

"medically appropriate." How could a decisionmaker possibly decide whether a particular drug is "essential" in light of "less intrusive alternatives" if he doesn't know what drug is being considered and therefore what the alternatives are?

Indeed, elsewhere in its brief, the government concedes that different types of psychotropics pose different levels of risk and effectiveness. *See* GB 40-42 (arguing that second generation antipsychotics pose a "significantly lower" risk of "serious physical side effects" than first generationn antipsychotics). Accepting *arguendo* the government's assertions, this means that a first-generation antipsychotic would *not* be "medically appropriate" in light of the efficacy and lower risk of side effects of second-generation drugs. Yet the prison nonetheless prescribed a first-generation antipsychotic for Mr. Loughner—injectable Haldol—as a backup. GB 41 & n.15 (admitting as much). It seems that the government itself has provided proof that the forced medication decision violated the "medical appropriateness" requirement of *Harper* and *Hernandez-Vasquez*.

C. FORCED MEDICATION MAY NOT BE BASED ON POTENTIAL DANGER TO PROPERTY

Mr. Loughner's final argument was that the prison's decision to medicate was based partly on the risk that he would "cause significant property damage," a plainly inadequate justification for such a severe infringement on his mental and bodily integrity. AOB 54-55. The warden's decision denying the appeal relies on risk to property as a basis for approving forced medication, and it is the decision of the

highest administrative body that this Court reviews, AOB 55—a point made by Judge Wardlaw at oral argument on the emergency stay motion in this case.

In response, the government contends that this argument is subject to plain error review, GB 53, and fails entirely to respond to the authority establishing that it is the warden's decision that this Court reviews. The government is incorrect; "the Supreme Court has made clear [that] it is claims that are deemed waived or forfeited, not arguments." *United States v. Guzman-Padilla*, 573 F.3d 865, 877 n.1 (9th Cir. 2009). Mr. Loughner has consistently preserved the "claim" that the forced medication decision violated his due process rights. The point that the violation was due to the "damage to property" basis is "merely an additional argument raised in support of that claim." *Id.*

In any event, reversal is necessary even under the plain error standard. It is plainly erroneous to uphold forcible medication on the basis of risk of harm to mere property, and the error affected Mr. Loughner's substantial rights, and the fairness and integrity of the proceedings, because it resulted in his bodily and mental integrity being violated by brain-altering chemicals.

V.

CONCLUSION

The district court's decision should be reversed.

Respectfully submitted,

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DATED: August 15, 2011

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 11-10339

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I hereby certify that on August 15, 2011 , I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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CERTIFICATION OF IDENTITY WITH ELECTRONICALLY FILED BRIEF IN COMPLIANCE WITH RULE 6(c), ADMINISTRATIVE ORDER REGARDING ELECTRONIC FILING IN ALL NINTH CIRCUIT CASES (8/15/11)

CASE NO. 11-10339

I certify that the foregoing printed brief is identical to the version submitted electronically on August 15, 2011.

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