No. 22-_____

In the Supreme Court of the United States

DON BARNES, SHERIFF AND ORANGE COUNTY, CALIFORNIA, PETITIONERS

v.

MELISSA AHLMAN, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a preliminary injunction issued under the Prison Litigation Reform Act ("PLRA") and stayed by this Honorable Court shall evade appellate review due to the PLRA's 90-day expiration provision.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are DON BARNES, SHERIFF-CORONER for Orange County, California and ORANGE COUNTY, CALIFORNIA.

Respondents are MELISSA AHLMAN, DANIEL KAUWE, MICHAEL SEIF, JAVIER ESPARZA, PEDRO BONILLA, CYNTHIA CAMPBELL, MONIQUE CASTILLO, MARK TRACE, CECIBEL CARIDAD ORTIZ, and DON WAGNER, on behalf of themselves and all others similarly situated, et al.

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PETITION FOR A WRIT OF CERTIORARI

Orange County Sheriff-Coroner Don Barnes and the County of Orange ("Petitioners"), respectfully petition for a writ of certiorari to review the order issued by the United States Court of Appeals for the Ninth Circuit on December 10, 2021.

OPINIONS BELOW

The opinion of the United States Supreme Court granting emergency stay is found at *Barnes v. Ahlman*, 140 S. Ct. 2620 (2020) and is reprinted in **Appendix A**.

The opinion of the Ninth Circuit is found at *Ahlman v. Barnes*, 20 F.4th 489 (9th Cir. December 10, 2021) and is reprinted in **Appendix B**.

JURISDICTION

The Ninth Circuit entered an order dismissing the underlying appeal as moot on December 10, 2021. This petition is timely based on Rule 13(1) of this Court. This Court has jurisdiction under 28 U.S.C. § 1254. It is not a requirement of certiorari to review an order of a federal court that such order be a final decision. 28 U.S.C. §§ 1254, 2101(e); *Air Line Pilots Ass'n, Intern. v. UAL Corp.*, 897 F.2d 1394 (7th Cir. 1990).

STATUTORY PROVISIONS INVOLVED

The Prison Litigation Reform Act of 1995 (PLRA): 42 U.S.C. § 1997e and 18 U.S.C. § 3626.

STATEMENT

On April 30, 2020, ten inmates at the Orange County Jail ("Respondents"), filed a putative class action pursuant to 42 U.S.C. § 1983 against Petitioners for their alleged failure to combat COVID-19.

On May 26, 2020, the District Court for the Central District of California granted Respondents' provisional class certification and issued a preliminary injunction under the PLRA, which required the Petitioners to issue protective measures that (1) exceeded the then existing CDC guidance for correctional facilities; (2) jeopardized the Petitioners ability to safely manage and secure the Orange County Jail; and (3) increased the likelihood of transmission of COVID-19 in the Orange County jail.

The District Court denied a stay pending appeal, as did the Ninth Circuit. *See Ahlman v. Barnes,* No. 20-55568, 2020 WL 3547960, at *5 (9th Cir. June 17, 2020). However, the Ninth Circuit *sua sponte* issued an immediate remand to the District Court to determine in the first instance whether changed circumstances warranted modification or dissolution of the preliminary injunction.

On June 26, 2020, the District Court on remand did not dissolve the preliminary injunction and instead granted Respondents' request for expedited discovery.

On July 1, 2020, Petitioners filed a new appeal of the District Court's orders on remand in case number 20-55668[1], and sought another emergency stay, which the Ninth Circuit denied on July 4, 2020. On July 21, 2020, 42 Petitioners filed an emergency application for stay of injunctive relief pending appeal before this Honorable Court. On August 5, 2020, the emergency application was granted, staying the preliminary injunction "pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought." *Barnes v. Ahlman*, 591 U.S. ____; 140 S. Ct. 2620 (2020); **Appendix A** – [USSC Order.]

On August 25, 2020, Respondents filed a motion to dismiss the appeal as moot, which Petitioners opposed on September 4, 2020. The Ninth Circuit did not rule on Respondents' motion to dismiss the appeal as moot before oral argument.

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[1] On October 15, 2020, the two appeals were consolidated into case no. 20-55568.

On August 31, 2020, Petitioners filed their opening brief. On September 28, 2020, Respondents filed their response to Petitioners' opening brief, and on October 19, 2020, Petitioners filed their reply brief.

Oral argument was held on September 1, 2020, and on December 10, 2021, the Ninth Circuit ruled that under the PLRA, the preliminary injunction expired 90 days after its issuance, despite this Court's stay order issued on August 5, thus rendering the appeal moot. *Ahlman v. Barnes*, 20 F.4th 489 (9th Cir. December 10, 2021); **Appendix B** – [Dkt. 99-1]. The Ninth Circuit held that "because the PLRA provides that any preliminary injunction automatically expires 90 days after being issued (absent further finalization), the injunction and provisional class certification were no longer in effect and the appeal was moot." *Id.* The Ninth Circuit rejected Petitioners' contention that the Supreme Court's emergency stay of the preliminary injunction saved this appeal from mootness, as the stay "did not toll the 90-day limit unambiguously detailed in the PLRA." *Ibid.*

Pursuant to Supreme Court Rule 13, the deadline to file a petition for writ of certiorari is March 10, 2022, therefore this Petition is timely.

REASONS FOR GRANTING THE PETITION

By its order dismissing this appeal as moot, the Ninth Circuit established a rule that allows a preliminary injunction erroneously issued by a District Court under the PLRA to always evade

appellate review, even after a stay issued by this Honorable Court.

Certiorari is further warranted here because the Ninth Circuit misinterpreted the PLRA's automatic stay provision and this Court's holding in *Miller v. French*, 530 U.S. 327 (2000), finding that federal courts, including this Honorable Court, are prohibited from exercising their inherent authority to stay a preliminary injunction under the PLRA pending their review. In addition, irrespective of whether the preliminary injunction expired in this case, this is clearly a matter that is a capable of repetition and evading review.

By granting *certiorari* here, this Court has a unique opportunity to settle an issue of critical national importance and to determine whether a PLRA preliminary injunction escapes appellate review because of the PLRA's 90-day expiration clause.

Custodial facilities face a particularly extreme dilemma in cases such as this, where elected officials accountable to the public, who are currently combatting the COVID-19 pandemic on the ground,[2] are directly undermined and hamstrung by erroneous and, ultimately, *unreviewable* district court orders that directly threaten their ability to protect the health and safety of the inmates committed to their care. *Cf. South Bay United Pentecoastal Church v. Newsom*, 592 U.S. ____; 140 S. Ct. 1613 (2021) (Roberts, J., concurring.) This

[2] This Court has on at least five occasions, summarily rejected the Ninth Circuit's analysis during the COVID-19 pandemic, and for the reasons addressed herein, this Court should similarly do so here.

Court's decision would determine what appellate remedies are available to custodial institutions under the PLRA and would reenforce the PLRA's purpose of "reduc[ing] the quantity and improv[ing] the quality of prisoner suits." *Woodford v. Ngo*, 548 U.S. 81, 93-94 (2006).

ARGUMENT

I. REVIEW IS NECESSARY BECAUSE THE NINTH CIRCUIT'S RULING RENDERS THIS COURT'S EMERGENCY STAY ORDER A LEGAL NULLITY

A. The Case Is Not Moot Because This Court's Stay Suspended the Expiration of the Preliminary Injunction

This Court issued an emergency order staying the preliminary injunction to allow the District Court's ruling to be reviewed on the merits by the Ninth Circuit. The Ninth Circuit sidestepped this responsibility, misinterpreted this Court's authority to issue a stay, misinterpreted the effect of this Court's stay order, and incorrectly identified the issue as moot. As addressed below, the issue is not moot because the stay issued by this Court was interposed *before* the expiration of the 90-day period thereby tolling (i.e., suspending) the 90-day period to allow the Ninth Circuit the necessary time to review the legality of the preliminary injunction.

In *Nken v. Holder*, 556 U.S. 418 (2009), this Court had occasion to discuss federal appellate courts' authority to issue stays.

> An appellate court's power to hold an order in abeyance while it assesses the legality of the order has been described as "inherent," preserved in the grant of authority to federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," All Writs Act, 28 U.S.C. § 1651(a). See *In re McKenzie*, 180 U.S. 536, 551, (1901).

The power to grant a stay pending review has been described as part of a court's "traditional equipment for the administration of justice." *Id.*, at 427, citing *Scripps–Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-10 (1942). That authority was "firmly imbedded in our judicial system," "consonant with the historic procedures of federal appellate courts," and "a power as old as the judicial system of the nation." *Id.,* citing *Scripps-Howard, supra*, at 13, 17.

This Court went on to describe the purpose of such stays in furtherance of justice:

> A reviewing court must bring considered judgment to bear on the matter before it, but that cannot always be done quickly enough to afford relief to the party aggrieved by the order under review. The choice for a reviewing court should not be between justice on the fly or participation in what may be an "idle ceremony." The ability to grant interim relief is accordingly not simply "[a]n historic procedure for preserving rights during the pendency of an appeal," but also a means of ensuring that appellate courts can responsibly fulfill their role in the judicial process.

Nken at 427, [internal citations omitted].

This Court has stated that "a stay 'simply suspend[s] judicial alteration of the status quo" *Id*. at 429. The status quo at the time this Honorable Court issued its stay was that there was a preliminary injunction issued against Petitioners as they worked to combat the burgeoning COVID-19 pandemic. This Court undoubtedly had the "inherent" authority to issue a stay to, among other things, hold the operation of the PLRA's 90-day expiration period in abeyance, so that the legality of the injunction could be reviewed by the Ninth Circuit Court of Appeals, and by this Court, if necessary. In this way, the stay operates akin to a tolling of the underlying statute "because the appellate court lacks sufficient time to decide the merits." *Nken* at 432.

Just as in *Nken*, where this Court found that "[a]n alien seeking a stay of removal pending adjudication of a petition for review does not ask for a coercive order against the Government, but rather for the temporary setting aside of the source of the Government's authority to remove." Here, the stay likewise suspended the operation of PLRA section 3626(a)(2)'s expiration clause to afford appellate review.[3] "The whole idea is to hold the matter under review in abeyance because the appellate court lacks sufficient time to decide the merits." *Id.*

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[3] After significant discussion comparing and contrasting stays and injunctions, the opinion in *Nken* concludes, "Whether such a stay might technically be called an injunction is beside the point…" Thus, even if this Court's stay could be viewed as an injunction against the operation of the 90-day expiration it makes little difference in legal effect.

> It takes time to decide a case on appeal. Sometimes a little; sometimes a lot. "No court can make time stand still" while it considers an appeal, and if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review. That is why it "has always been held, ... that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it.

Nken, supra, at 421, [internal citations omitted].

Moreover, nothing in 18 U.S.C. § 3626 indicates a Congressional intent to deprive federal courts of their long-standing inherent authority to issue stays to preserve a matter for appellate review. This Court has specifically acknowledged the "presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident," *Nken* at 433, citing *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). "[T]he Court is loath to conclude that Congress would, 'without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review'." *Id.* *Nken* reiterated that "Congress's failure expressly to confer the authority in a statute allowing [a stay for] appellate review should not be taken as an implicit denial of that power." *Id.* at 426. "The search for significance in the silence of Congress is too often the pursuit of a mirage." *Scripps-Howard, supra,* at 11.

In sum, the Ninth Circuit's ruling cannot be harmonized with either the precedent of this Court or the effect of this Court's emergency stay order. The Ninth Circuit's decision finding the appeal moot thus suggests that this Court engaged in the idle act of intervening with an emergency stay order, and inviting this Petition for Writ of Certiorari, while not actually preserving the underlying issue (i.e., whether the preliminary injunction was erroneously granted) for this Court's ultimate review. Because the Ninth Circuit clearly erred, certiorari should be granted.

B. Miller v. French *Has No Applicability Here*

The Ninth Circuit relied largely on this Court's prior decision in the case of *Miller v. French*, 530 U.S. 327 (2000). It went so far as to interpret the case to hold that the courts have no power to effectively stay the application of a PLRA preliminary injunction to review its merits. *Ahlman v. Barnes*, 20 F.4th 489, 494 (9th Cir. December 10, 2021). Yet, *Miller* is distinguishable as it addresses an entirely separate statutorily mandated automatic stay provision of the PLRA and has no relevance here.

Miller v. French involved a 1975 district court injunction issued against Indiana prison authorities, an injunction that remained in effect to remedy violations of the Eighth Amendment regarding conditions of confinement. Congress subsequently enacted the PLRA, which sets a standard for the entry and termination of prospective relief in civil actions challenging conditions in correctional

facilities. Specifically, 18 U.S.C. § 3626(b) allows a defendant to move to terminate prospective relief and subsection(e)(2) dictates that when a motion to terminate is filed, it "shall operate as a stay" of the injunction beginning 30 days after the motion is filed and ending when the court rules on the motion.

In *Miller*, prison officials filed a motion to terminate the remedial order under section 3626(b) , triggering the stay of the injunction 30 days later. Respondent prisoners then moved to enjoin the operation of the automatic stay. The District Court granted the prisoners' motion and enjoined the stay. The State appealed, and the United States intervened to defend section 3626(e)(2)'s constitutionality. This Court ultimately determined that, given the clear, statutory intent to provide prison officials with an automatic stay beginning 30 days after filing a section 3626(b) motion, a court could not enjoin such a stay unless and until the court made the findings required under subsection (b)(3).

The legal issue in *Miller* is entirely absent here. Neither party in this case filed a motion under section 3626(b). Section 3626(e) of the PLRA is not even remotely at issue in this case, as there is no section 3636(b) motion to terminate injunctive relief. Indeed, no automatic stay under section 3626(e)(2) never existed in this case. *Miller* simply cannot be the decisive precedent on which this case turns, and

yet it was the fundamental basis for the Ninth Circuit's ruling. [4]

In an effort to address the large number of prisoner complaints filed in federal court, Congress enacted the Prison Litigation Reform Act of 1995 ("PLRA"), 110 Stat. 1321-71, as amended, 42 U.S.C. § 1997e, *et seq.* Among other reforms, the PLRA mandates early judicial screening of prisoner complaints [*Jones v. Bock,* 549 U.S. 199, 202 (2007)] and attempts to eliminate unwarranted federal court interference with the administration of prisons. *Woodford v. Ngo*, 548 U.S. 81, 93–94 (2006).

Nothing in the PLRA or *Miller* can be interpreted as stripping this Court of its inherent authority to issue a discretionary stay of a PLRA preliminary injunction issued against a correctional facility while its merits are considered on appeal. [5] The *Miller* Court itself noted that the presumptive applicability of its inherent authority and warned that parties should "not lightly assume that Congress meant to

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[4] *Miller* also did not address mootness under the PLRA's 90-day preliminary injunction expiration provisions in 18 U.S.C. section 3626(a)(2) nor any exceptions to the mootness doctrine that may apply. To the extent that this Court finds that *Miller* has any applicability, Petitioner respectfully requests this Court clarify its ruling in *Miller* in light of the facts and circumstances of this case.

[5] While the Ninth Circuit's decision sets forth that this Court has no power to extend the preliminary injunction beyond the expiration 90-day expiration identified in the PLRA, this Court did nothing of the sort. As addressed *Nken* at 421, the stay order simply held the preliminary injunction in abeyance, effectively tolling the statute, to allow the Ninth Circuit the time necessary to review it.

restrict the equitable powers of the federal courts." *Id.* at 336. An interpretation that would hamstring this Court's ability to stay a preliminary injunction to consider its merits would contradict the purpose of the PLRA to limit the burdens of prison litigation on government agencies.

The Ninth Circuit's finding that federal courts are without power to effectively stay the operation of a preliminary injunction on appeal runs directly afoul of Congressional intent, discourages review of injunctions on the merits, and encourages meritless complaints and preliminary injunctions leaving elected officials such as the Orange County Sheriff with no ability to effectively appeal. If the Ninth Circuit's ruling stands, prisoners' counsel will be incentivized to seek emergency injunctive relief under the PLRA knowing that, even if stayed, the emergency injunctive relief will be insulated from any appellate review on the merits.

II. REVIEW IS NECESSARY TO RESOLVE JUDICAL ERROR THAT PREVENTS PETITIONERS FROM OBTAINING APPELLATE REVIEW ON THE MERITS AND LEAVES THEM IN CONSTANT THREAT OF A RENEWED PRELIMINARY INJUNCTION

This case squarely presents a controversy capable of repetition but evading review, thus it qualifies as a justifiable exception from mootness. A Court may address an otherwise ostensibly moot issue if it falls within the "capable of repetition yet evading review" exception to the mootness doctrine. *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). To apply, a party must demonstrate that "(1)

the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (*per curiam*).

Here, both criteria are met. First, the short 90-day expiration clause of the PLRA prevented the Ninth Circuit from reviewing the merits of the District Court's order. In fact, the Ninth Circuit agreed that this element is met. *Ahlman v. Barnes*, 20 F.4th at 494. It even noted, "[i]t is likely true that because of the brief duration of a preliminary injunction under the PLRA, many such appeals (as here) will not be fully litigated before the injunction expires." *Id.* Second, there is a strong likelihood, and demonstrated history, of preliminary injunction orders being sought and granted under the PLRA, enjoining the Petitioners' administration of their custodial facilities. See *Gibson v. County of Orange*, United States District Court, C.D. California, March 8, 2021, 2021 WL 860000; *Moon v. County of Orange* (Ninth Circuit, October 22, 2021) Not Reported in Fed. Rptr. 2021 WL 4936945. While the preliminary injunction may be for a limited period of time, such injunctions nevertheless hamstring officials and prevent them from acting with dispatch when responding to, not only public health emergencies, but to any dangerous situation that can arise in a custodial facility that houses violent individuals. *Swain v. Junior*, 958 F.3d 1081, 1090 (5th Cir. 2020); *Valentine v. Collier*, 956. F.3d 797, 804 (6th Cir. 2020). Each one of these injunctions pose a direct threat to the safety and security of the inmates and

staff who work in any custodial setting. Thus, this issue is likely to reoccur and evade review.

As with the other COVID-19 cases that this Court has reviewed, Petitioners here must maintain the ability to respond quickly to changing CDC guidance. See *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ____; 141 S. Ct. 63, 68 (2020); *Tandon v. Newsom, supra,* 141 S. Ct 1294, 1297; *High Plains Harvest Church v. Polis*, 592 U.S. ____; 141 S. Ct. 527 (2020).

However, due to the Ninth Circuit's decision, the findings made by the District Court have not been reversed and remain existing law of the case. This increases the likelihood that the same or similar injunction will be sought and issued. *See, e.g., Mayweathers v. Terhune*, 136 F.Supp.2d 1152, 1153 (E.D.Cal. 2004) (finding that law of the case applied to support implementing successive identical preliminary injunctions under the PLRA.) In fact, the damage resulting from the District Court's unreviewed preliminary injunction order has already metastasized as it has been cited with approval by other District Courts in issuing similar preliminary injunctions against other local authorities. See, e.g., *Criswell v. Boudreaux,* 2020 WL 5235675 at *5 fn.3, *12, *25 (E.D.Cal. September 2, 2020); *Maney v. Brown*, 516 F.Supp.3d 1161, 1171 (D.Ore. February 2, 2021); *Chatman v. Otani*, 2021 WL 2941990 at *11, *20 (D.Haw. July 13, 2021).

Moreover, the Ninth Circuit has read the likelihood of recurrence element too narrowly. The likelihood of the identical injunction being ordered is irrelevant. The reality is that Petitioners, as public entities charged with administering a custodial

facility, will undoubtedly be sued again under the PLRA, and, under the current state of the law, Petitioners are barred from any meaningful appellate review of a preliminary injunction because not even a stay by this Court will allow the issue to reach the Ninth Circuit before the 90-day expiration period. For Petitioners, the issue is more than capable of repetition, it is a certainty to repeat.

III. THIS CASE PRESENTS AN IMPORTANT AND UNIQUE OPPORTUNITY TO RESOLVE THESE URGENT QUESTIONS

This case, factually and procedurally, presents a "lightning in a bottle" scenario to resolve the dysfunction of PLRA preliminary injunctions evading appellate review. It is an ideal vehicle for this Honorable Court to establish that defendants in PLRA litigation have a right to have preliminary injunctions stayed and subsequently reviewed on the merits by an appellate court. Without this, the stringent requirements of the PLRA for preliminary injunctive relief, the intent of Congress, and this Court's stay, are rendered a nullity.

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CONCLUSION

Petitioners respectfully request that this Honorable Court grant this Petition for Writ of Certiorari.

Respectfully submitted.

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Dated: March 7, 2022

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