SUPREME COURT OF THE UNITED STATES

No. 20A19

DON BARNES, SHERIFF, ORANGE COUNTY, CALIFORNIA, ET AL. *v.* MELISSA AHLMAN, ET AL.

ON APPLICATION FOR STAY

[August 5, 2020]

The application for stay presented to JUSTICE KAGAN and by her referred to the Court is granted, and the district court's May 26, 2020 order granting a preliminary injunction is stayed pending dispose-tion 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. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

JUSTICE BREYER and JUSTICE KAGAN would deny the application.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting from the grant of stay.

Today, this Court steps in to stay a preliminary injunction requiring Sheriff Don Barnes and Orange County (collectively, the Orange County Jail, or Jail) to implement certain safety measures to protect their inmates during the unprecedented COVID–19 pandemic. The injunction's requirements are not remarkable. In fact, the Jail initially claimed that it had already implemented each and every one of them. Yet, apparently disregarding the District Court's detailed factual findings, its application of established law, and the fact that the Court of Appeals for the Ninth Circuit has twice denied a stay pending its review of the District Court's order, this Court again intervenes to grant a stay before the Circuit below has heard and decided the case on the merits. See *Little v. Reclaim Idaho, ante*; at 1, and n. 1 (SOTOMAYOR, J., dissenting from grant of stay) (noting the frequency with which the Court has begun granting such stays). The Jail's application does not warrant such extraordinary intervention. Indeed, this Court stays the District Court's preliminary injunction even though the Jail recently reported 15 new cases of COVID–19 in a single week (even with the injunction in place), even though the Jail misrepresented under oath to the District Court the measures it was taking

to combat the virus' spread, and even though the Jail's central rationale for a stay (that the injunction goes beyond federal guidelines) ignores the lower courts' conclusion that the Jail's measures fell "well short" of the Centers for Disease Control and Prevention (CDC) Guidelines. 2020 WL 3547960, *4 (CA9, June 17, 2020).

I

The Orange County Jail currently houses a population of over 3,000 pretrial detainees and inmates. At the time of the District Court's injunction, the Jail had witnessed an increase of more than 300 con-firmed COVID–19 cases in a little over a month. The Jail, moreover, was well aware of the risk that the virus could spread rapidly through its congregate population and that addressing that risk would require certain precautionary measures. The District Court found that several organizations, including a group of Orange County Sheriff deputies, had "repeatedly warned . . . of the dangers from COVID–19 in the Jail." ___ F. Supp. 3d ___, ___, 2020 WL 2754938, *12 (CD Cal., May 26, 2020). Indeed, the Jail claims that it sprang into action as soon as the Jail's first documented case of COVID–19 appeared in March of 2020, collaborating closely with local health officials on preventative measures to contain the virus' spread. When respondents brought suit,

seeking an injunction that would require the Jail to implement a number of safety measures to protect inmates against the virus, the Jail told the District Court that such relief was not needed because it had, "at a minimum, already implemented all of the mitigation efforts" requested. Decl. of Joseph Balicki in No. 8: 20–cv–00835, Doc. 44–10, ¶ 2 (CD Cal., May 12, 2020) (Balicki Decl.); see also id., ¶ 9 ("There is not a single 'mitigation effort' outlined in Plaintiffs' Complaint that has not already been implemented in the jails"). The Jail claimed that it had already achieved proper social distancing, provided inmates enough soap for frequent handwashing, and isolated and tested all symptomatic individuals.

Dozens of inmate declarations told a different story. Although the Jail had been warned that "social distancing is the cornerstone of reducing transmission of COVID–19," Exh. B to Balicki Decl., Doc. 44–12, inmates described being transported back and forth to the jail in crammed buses, socializing in day-rooms with no space to distance physically, lining up next to each other to wait for the phone, sleeping in bunk beds two to three feet apart, and even being ordered to stand closer than six feet apart when inmates tried to socially distance. Moreover, although the Jail told its inmates that they could "best protect" themselves by washing their hands with "soap and water throughout the day," Exh. C to Balicki Decl., Doc. 44–13, numerous inmates reported receiving just one small,

hotel-sized bar of soap per week. And after symptomatic inmates were removed from their units, other inmates were ordered to dispose of their belongings without gloves or other protective equipment. Finally, despite the Jail's stated policy to test and isolate individuals who reported or exhibited symptoms consistent with COVID–19, multiple symptomatic detainees described being denied tests, and others recounted sharing common spaces with infected or symptomatic inmates.

II

Based on detailed factual findings, which the Ninth Circuit credited, the District Court concluded that the risk of harm in the Jail was "undeniably high." ___ F. Supp. 3d, at ___, 2020 WL 2754938, *10. The court further determined that while the Jail may have formally adopted a policy to mitigate that risk, its actual compliance was "piecemeal and inadequate." *Ibid.* On this evidence, the District Court held that respondents were likely to succeed in showing that the Jail was deliberately indifferent to the health and safety of its inmates and that it had violated federal disability rights law. In response, the court imposed a preliminary injunction that closely followed the CDC Guidelines for correctional and detention facilities.

This Court now stays that injunction, even though this case presents none of the typical indicia warranting certiorari. See *Maryland v. King,* 567 U. S. 1301, 1301 (2012) (ROBERTS, C. J., in chambers) (an applicant for a stay "must demonstrate (1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay'" (quoting *Conkright v. Frommert*, 556 U. S. 1401, 1402 (2009) (GINSBURG, J., in chambers))). The District Court and Ninth Circuit applied well-established law to the particular facts of this case to conclude that the Jail knew of and disregarded an "excessive risk to inmate health or safety." *Farmer v. Brennan,* 511 U. S. 825, 837 (1994). That conclusion is not clearly wrong. The Jail argues that, because it voluntarily released 53 percent of its population, it necessarily could not have been deliberately indifferent to the needs of its inmates. But the release of even a large number of inmates does not absolve the Jail of its responsibility for the health and safety of the roughly 3,000 individuals left behind. And while the Jail claims that it largely implemented the CDC Guidelines and radically increased hygiene and cleaning within its walls, the District Court, whose factual findings are owed deference, found the reality

to be very different.[1] The District Court concluded that by demonstrating the Jail's failure to implement basic safety measures of which it was well aware, respondents had established a likelihood of success on their claim that the Jail had been deliberately indifferent to the serious risk COVID–19 posed to the health of its inmates.

Even if this Court disagrees with the District Court's conclusion, "error correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari." S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice §5.12(c)(3), p. 5–45 (11th ed. 2019); see also *Farmer,* 511 U. S., at 842 (noting that deliberate indifference is a "question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence"). That is especially true where, as here, the Jail fails to contest an entirely independent and sufficient ground for the District Court's injunction: respondents' claims under federal disability rights law.

The Jail nonetheless argues that the Ninth Circuit created a certworthy circuit split because, in the Jail's view, it endorsed a preliminary injunction that went

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[1] Notably, the Jail has since resisted respondents' attempts to verify the Jail's compliance with the District Court's preliminary injunction.

beyond the CDC Guidelines. But no circuit split exists. Like other Circuits, the Ninth Circuit considered the Jail's request for a stay by applying established law to the facts and equities before it. Its decision turned on the conclusion that, in practice, the Jail's measures fell "well short" of the CDC Guidelines, not on whether the District Court's injunction exceeded them. Indeed, in a case presenting different facts and equities, the Ninth Circuit recently stayed an injunction to the extent it exceeded the CDC Guidelines. See *Roman v. Wolf,* 2020 WL 2188048, *1 (CA9, May 5, 2020). Moreover, the Jail's claim that "most of" the injunction's requirements exceed the CDC Guidelines is greatly exaggerated. Application for Stay 10. The Jail points to just two alleged discrepancies: first, that the District Court ordered the Jail to provide adequate spacing of six feet or more between incarcerated people, whereas the CDC Guidelines suggest only that six feet of space is "'ideal[ ]'"; and second, that the injunction requires daily temperature checks and screening questions. *Id.,* at 10–11. As to the former, the CDC Guidelines acknowledge that social distancing can be difficult in a correctional facility, but the Jail has not argued that its physical layout does not permit it.[2] And as to the latter, as the Jail

[2] Moreover, the injunction directs the Jail to "provide adequate spacing of six feet or more between incarcerated people so that social distancing can be accomplished in accordance with CDC

itself admits, the Guidelines provide for daily temperature checks in housing units where COVID–19 has been identified. Indeed, updated CDC Guidelines now recommend daily symptom and temperature screening in any correctional facility with a reported case.

The Jail also faces an uphill battle in its claim of irreparable harm. The measures it now decries as vexatious judicial micromanagement are the same measures that just months ago it claimed were, "at a minimum," already being implemented. If the Jail is already doing everything required by the injunction, then what irreparable harm does the injunction pose? And if it is not, and the Jail misrepresented its actions under oath to the District Court, then why should the Jail benefit from this Court's equitable discretion? See *Trump v. International Refugee Assistance Project*, 582 U. S. ___, ___ (2017) (*per curiam*) (slip op., at 10) ("In assessing the lower courts' exercise of equitable discretion, we bring to bear an equitable judgment of our own"). This Court normally does not reward bad behavior, and certainly not with extraordinary

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guidelines," ___ F. Supp. 3d ___, ___, 2020 WL 2754938, *14 (CD Cal., May 26, 2020), and therefore arguably requires the Jail to implement social distancing only to the extent required by the Guidelines.

equitable relief.[3] And while "[c]ourts must be sensitive to the . . . need for deference to experienced and expert prison administrators," they "may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Brown v. Plata*, 563 U. S. 493, 511 (2011).

* * *

At the time of the injunction, there were nearly 3,000 inmates still in the Jail's care, 488 of whom were medically vulnerable to COVID–19. "[H]aving stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials" must "'take reasonable measures to guarantee the[ir] safety.'" *Farmer*, 511 U. S., at 832–833; see also *Valentine v.*

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[3] Given the nature of the "rare and exceptional" relief the Jail seeks, *Fargo Women's Health Organization v. Schafer*, 507 U. S. 1013, 1014 (1993) (O'CONNOR, J., concurring in denial of application), this Court has an independent obligation to weigh the equities. The Jail's misrepresentations to the District Court are one factor to consider. Another is that on the very same day it asked this Court to intervene in its pending appellate proceedings, the Jail requested from the Ninth Circuit a 1-month extension to file its opening brief. One might wonder, then, whether the Jail's need for relief is quite as urgent as the Jail makes out.

Collier, 590 U. S. ___, ___–___ (2020) (statement of SOTOMAYOR, J.) (slip op., at 6–7) ("It has long been said that a society's worth can be judged by taking stock of its prisons. That is all the truer in this pandemic, where inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm"). The District Court found that, despite knowing the severe threat posed by COVID–19 and contrary to its own apparent policies, the Jail exposed its inmates to significant risks from a highly contagious and potentially deadly disease. Yet this Court now intervenes, leaving to its own devices a jail that has misrepresented its actions to the District Court and failed to safeguard the health of the inmates in its care. I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 20-55568, 20-55668

MELISSA AHLMAN; DANIEL KAUWE; MICHAEL SEIF; JAVIER ESPARZA; PEDRO BONILLA; CYNTHIA CAMPBELL; MONIQUE CASTILLO; MARK TRACE; CECIBEL CARIDAD ORTIZ; DON WAGNER, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,

v.

DON BARNES, in his official capacity as Sheriff of Orange County, California; COUNTY OF ORANGE, Defendants-Appellants.

OPINION

Appeal from the United States District Court
for the Central District of California
Jesus G. Bernal, District Judge, Presiding

Argued and Submitted September 1, 2021
Pasadena, California

[Filed December 10, 2021]

BEFORE: SANDRA S. IKUTA, MARK J. BENNETT, AND RYAN D. NELSON, Circuit Judges.
OPINION BY JUDGE R. NELSON

SUMMARY *

Prisoner Civil Rights

The panel dismissed as moot an action brought pursuant to 42 U.S.C. § 1983 by several inmates in Orange County jails against the County and the sheriff for alleged failure to combat COVID-19.

The district court granted Plaintiffs' provisional class certification and issued a preliminary injunction under the Prison Litigation Reform Act ("PLRA"), which required the County to implement increased protective measures. The district court denied a stay pending appeal, as did this court, in a split disposition. See *Ahlman v. Barnes*, No. 20-55568, 2020 WL 3547960, at *5 (9th Cir. June 17, 2020). This court remanded the case to the district court to determine in the first instance whether changed circumstances warranted modification or dissolution of the preliminary injunction. On remand, the district court did not dissolve the preliminary injunction, but granted plaintiffs' motion for expedited discovery. The

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

County then filed a new notice of appeal of the district court's orders on remand. In the meantime, the United States Supreme Court granted the County's emergency application, staying the preliminary injunction pending disposition of the appeal in the Ninth Circuit and, as appropriate, at the Supreme Court. *Barnes v. Ahlman*, 140 §S. Ct. 2620, 2620 (2020).

The panel 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. The panel rejected the County's contention that the Supreme Court's emergency stay of the preliminary injunction saved this appeal from mootness. The panel stated that while the Supreme Court's stay may have prevented the injunction from having any further effect, it did not toll the 90-day limit unambiguously detailed in the PLRA. Indeed, the court's traditional equitable power is expressly proscribed by the PLRA's plain statutory limitations, as the Supreme Court has held in a similar PLRA provision in *Miller v. French*, 530 U.S. 327 (2000).

The panel rejected the County's assertion that the appeal fell within an exception to mootness because the issue was capable of repetition but evading review. The County argued that if this appeal was dismissed, plaintiffs would likely request another injunction, thus satisfying the second factor of the capable-of-repetition test, a reasonable likelihood that the same party will be subject to the action again. The panel

noted that circumstances had changed since the original injunction issued and given the Supreme Court's stay of the injunction, any subsequent injunction would have to be analyzed under the correct Constitutional framework. Thus, the chance that plaintiffs would successfully acquire another preliminary injunction, at least without significantly worse conditions than previously existed, was remote. Certainly, any subsequent injunction would be based on an entirely new set of factual circumstances. Because the second factor of the capable-of repetition test was not satisfied, no exception to mootness applied.

The panel held that to the extent the provisional class certification was proper under Federal Rule of Civil Procedure 23, it depended on, and was in service of, its preliminary injunction. If the preliminary injunction is infirm, the class certification necessarily fails as well, regardless of whether class certification was otherwise proper under Federal Rule of Civil Procedure 23. Thus, the provisional class certification expired along with the preliminary injunction.

COUNSEL

Kayla N. Watson (argued), Deputy County Counsel; D. Kevin Dunn (argued) and Rebecca S. Leeds, Senior Deputies County Counsel; Laura D. Knapp, Supervising Deputy County Counsel; Leon J. Page, County Counsel; Office of the County Counsel, Santa Ana, California; for Defendants-Appellants.

Stacey Grigsby (argued) and Amia Trigg, Covington & Burling LLP, Washington, D.C.; Mitchell Kamin and Aaron Lewis, Covington & Burling LLP, Los Angeles, California; Paul Hoffman, Schonbrun Seplow Harris & Hoffman LLP, Hermosa Beach, California; John Washington, Schonbrun Seplow Harris Hoffman & Zeldes LLP, Los Angeles, California; Cassandra Stubbs, American Civil Liberties Union Foundation, Durham, North Carolina; Carl Takei, American Civil Liberties Union Foundation, New York, New York; Zoe Brennan-Krohn, American Civil Liberties Union Foundation, Immigrants' Rights Project, San Francisco, California; Peter Eliasberg, American Civil Liberties Fund of Southern California, Los Angeles, California; for Plaintiffs-Appellees.

OPINION

R. NELSON, Circuit Judge:

Several inmates in Orange County jails brought § 1983 and other federal claims against the County and the sheriff for alleged failure to combat COVID-19. The district court granted Plaintiffs' provisional class certification and issued a preliminary injunction under the Prison Litigation Reform Act ("PLRA"). Because the PLRA provides that any preliminary injunction automatically expires 90 days after being issued (absent further finalization), the injunction

and provisional class certification are no longer in effect. We therefore dismiss the appeal as moot.

I

Several inmates sued the County of Orange ("County"), alleging an unconstitutional failure to effectively combat COVID-19 within the jails. Plaintiffs sought a preliminary injunction under the PLRA, along with provisional class certification for purposes of seeking that preliminary injunction. The district court granted provisional class certification and granted in part and denied in part Plaintiffs' application for a preliminary injunction.

The preliminary injunction required the County to provide "adequate spacing of six feet or more between incarcerated people"; self-hygiene supplies such as hand soap, paper towels, hand sanitizer, and disinfectant products; and "access to daily showers . . . [and] clean laundry, including clean personal towels and washrags after each shower." The County also had to "require that all Jail staff wear personal protective equipment, . . . wash their hands, apply hand sanitizer, . . . or change their gloves both before and after interacting with any person or touching surfaces." Finally, the County had to (1) "take the temperature of all class members, Jail staff, and visitors daily"; (2) "assess (through questioning) each incarcerated person daily to identify potential COVID-19 infections"; (3) "conduct immediate testing for anyone . . . displaying known symptoms of COVID-19"; (4) "respond to all emergency . . . requests for

medical attention within an hour"; (5) "waive all medical co-pays for those experiencing COVID-19-related symptoms"; and (6) "ensure that individuals identified as having COVID-19 or having been exposed to COVID-19 receive adequate medical care and are properly quarantined . . . in a nonpunitive setting, with continued access to showers, recreation, mental health services, reading materials, phone and video visitation with loved ones, communications with counsel, and personal property.

The district court denied a stay pending appeal. So did this court, in a split disposition. See *Ahlman v. Barnes*, No. 20-55568, 2020 WL 3547960, at *5 (9th Cir. June 17, 2020). We remanded the case to the district court to determine in the first instance whether changed circumstances warranted modification or dissolution of the preliminary injunction. *Id.* One judge dissented in part and would have granted the stay because the order granting the preliminary injunction was "wrong both on the law and the facts," and required the County "to comply with safety requirements *exceeding* the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities." *Id.* at *5–6 (R. Nelson, J., concurring in part and dissenting in part) (emphasis in original). Moreover, the County had implemented "increased protective measures . . . well prior to the issuance of the injunction . . . [which] resulted in a drastically *decreased* COVID-19 infection rate within the jail." *Id.* at *5 (R. Nelson, J., concurring in part and dissenting in part) (emphasis in original). Thus, the County was

"likely to succeed on the merits" of the constitutional challenges. *Id.* at *6 (R. Nelson, J., concurring in part and dissenting in part).

On remand, the district court did not dissolve the preliminary injunction, but granted Plaintiffs' motion for expedited discovery. The County then filed this new notice of appeal of the district court's orders on remand. In the meantime, however, the United States Supreme Court granted the County's emergency application, staying the preliminary injunction pending disposition of the appeal in the Ninth Circuit and, as appropriate, at the Supreme Court. *Barnes v. Ahlman*, 140 S. Ct. 2620, 2620 (2020)[1]

Plaintiffs then moved to dismiss this appeal as moot. They argue that the preliminary injunction automatically expired 90 days after its issuance under the PLRA. The County argues that the appeal is not moot because the Supreme Court stay "suspend[s] in place" the injunction, thus keeping it alive beyond its expiration; and, in any event, the issue is capable of repetition and will evade review.

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[1] For the Supreme Court to grant an application for a stay, "an applicant . . . must demonstrate (1) a reasonable probability that [the Supreme] Court will grant certiorari, (2) a fair prospect that the court will then reverse the decision below, and (3) a likelihood that irreparable harm will result from the denial of a stay." *Barnes,* 140 S. Ct. at 2622 (Sotomayor, J., dissenting) (cleaned up).

II

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. We have "jurisdiction to review a grant of a preliminary injunction under 28 U.S.C. § 1292(a)(1)." *Chamber of Com. of U.S. v. Bonta,* 13 F.4th 766, 773 n.1 (9th Cir. 2021). Before reaching the merits of the appeal, however, "we first address . . . the question of mootness," because when an appeal is moot, we "lack[] jurisdiction and must dismiss the appeal." *Shell Offshore Inc. v. Greenpeace, Inc.,* 815 F.3d 623, 628 (9th Cir. 2016). "Generally, the expiration of an injunction challenged on appeal moots the appeal." *Norbert v. City & Cnty. of San Francisco,* 10 F.4th 918, 926–27 (9th Cir. 2021) (cleaned up).

III

A

The district court issued the preliminary injunction under the PLRA. *See* 18 U.S.C. § 3626. The PLRA states that any prospective relief relating to prison conditions must be narrowly drawn, go no further than necessary, and be the least intrusive remedy. *Id.* § 3626(a)(1)(A). The statute provides more limitations for preliminary injunctions: the injunction "shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) . . . and makes the order final." *Id.* § 3626(a)(2).

"We begin with the statutory text, and end there as well if the text is unambiguous. When the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *Connell v. Lima Corp.*, 988 F.3d 1089, 1097 (9th Cir. 2021) (cleaned up). The statutory text of the PLRA unambiguously states that any preliminary injunction expires automatically after 90 days unless the district court makes subsequent required findings and makes the order final. The district court did not make such findings under § 3626(a)(1)(A). Given the plain statutory language, we have little pause in holding that the preliminary injunction has expired and this appeal is moot. *See Norbert*, 10 F.4th at 926–27. Other circuits to have considered this question have similarly held that preliminary injunctions issued under the PLRA expire automatically after 90 days, thus making a pending appeal moot. *See, e.g., Ga. Advoc. Off. v. Jackson,* 4 F.4th 1200, 1210–11 (11th Cir. 2021); *Banks v. Booth*, 3 F.4th 445, 448 (D.C. Cir. 2021).

The County contends that the Supreme Court's emergency stay of the preliminary injunction saves this appeal from mootness because a stay holds "a ruling in abeyance to allow an appellate court the time necessary to review it." *Nken v. Holder*, 556 U.S. 418, 421 (2009); *see also Barnes,* 140 S. Ct. 2620. We disagree.

As the Supreme Court recognized, "[a] stay does not make time stand still." *Nken*, 556 U.S. at 421. While the Supreme Court's stay may have prevented the injunction from having any further effect, it did

not toll the 90-day limit unambiguously detailed in the PLRA. Indeed, the court's traditional equitable power is expressly proscribed by the PLRA's plain statutory limitations, as the Supreme Court has held in a similar PLRA provision in *Miller v. French,* 530 U.S. 327 (2000). In *Miller*, the Supreme Court held that the PLRA automatic stay provision could not be enjoined by a court's equitable powers. *Id.* at 336–41. Though courts should "not lightly assume that Congress meant to restrict the equitable powers of the federal courts, . . . where Congress has made its intent clear, we must give effect to that intent." *Id.* at 336 (cleaned up). The Court held that the PLRA's text, such as the use of "shall" instead of "may" and how it "specifie[d] the points at which the operation of the stay is to begin and end," "confirm[ed] that Congress intended to prohibit federal courts from exercising their equitable authority to suspend operation of the automatic stay." *Id.* at 337–38. Thus, this provision of the PLRA was a clear enough congressional command to "displace [the] courts' traditional equitable authority." *Id.* at 340.

Likewise, the PLRA provision here clearly "displace[s] [the] courts' traditional equitable authority." *Id.* Like the automatic stay provision in *Miller*, 18 U.S.C. § 3626(a)(2) uses a mandatory "shall" when explaining that preliminary injunctions "shall" expire 90 days after entered. Indeed, § 3626(a)(2) provides no way to extend a preliminary injunction other than making the injunctive relief final. Under the statute, a preliminary injunction shall automatically expire 90 days after entry "unless the court makes the findings

required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period." § 3626(a)(2). The district court did not make the relevant findings under § 3626(a)(1)(A). Section 3626(a)(2) details the only way to extend an injunction issued under the PLRA beyond 90 days. The provision displaces the courts' traditional equitable power, which includes the power for a stay of the injunction to extend it beyond 90 days. Therefore, the injunction here has expired, and the County's appeal is moot.

The County still argues, however, that even if otherwise moot, the appeal falls within an exception to mootness because the issue is "capable of repetition, yet evading review." *Native Village of Nuiqsut v. Bureau of Land Mgmt.*, 9 F.4th 1201, 1209 (9th Cir. 2021). "In order for [this] exception to apply, (1) the duration of the challenged action or injury must be too short to be fully litigated; and (2) there must be a reasonable likelihood that the same party will be subject to the action again." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1287 (9th Cir. 2013) (cleaned up). It 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. There is little reason to suspect, however, that the second factor is satisfied here.

We have held that a reasonable expectation requires more than "a mere possibility that something *might* happen [because this] is too remote to keep alive a case as an active controversy." *Foster v.*

Carson, 347 F.3d 742, 748 (9th Cir. 2003) (emphasis in original). The County argues that if this appeal is dismissed, Plaintiffs will likely request another injunction, thus satisfying the second factor of the "capable of repetition" test. But throughout this litigation, the County also maintained that circumstances had so changed since the original injunction issued that an injunction was no longer necessary.

Indeed, we previously remanded for the district court to reconsider just those changed circumstances. *See Ahlman*, 2020 WL 3547960, at *5. There is already evidence that conditions at the jail have significantly improved. *See id.* at *10–11 (R. Nelson, J., concurring in part and dissenting in part). And, given the Supreme Court's stay of the injunction, any subsequent injunction would have to be analyzed under the correct Constitutional framework. *See Barnes*, 140 S. Ct. at 2620; *Ahlman*, 2020 WL 3547960, at *6–11 (R. Nelson, J., concurring in part and dissenting in part) (concluding the district court misapplied "the Fourteenth Amendment's objective analysis [and the] Eighth Amendment's subjective analysis"). Thus, the chance that Plaintiffs successfully acquire another preliminary injunction, at least without significantly worse conditions than previously existed, is remote. Certainly, any subsequent injunction would be based on an entirely new set of factual circumstances. Because the second factor of the capable-of-repetition test is not satisfied, no exception to mootness applies. The appeal is therefore moot.

B

To the extent the provisional class certification was proper under Federal Rule of Civil Procedure 23, we vacate it because it "depended on, and was in service of, its preliminary injunction. If the preliminary injunction is infirm, the class certification necessarily fails as well, regardless of whether class certification was otherwise proper under Federal Rule of Civil Procedure 23." *Fraihat v. U.S. Immigr. and Customs Enf't*, 16 F.4th 613, 635 (9th Cir. 2021). Thus, the provisional class certification expired along with the preliminary injunction.

IV

Because the district court's injunction was not expressly made final by the district court, the preliminary injunction expired 90 days after it was issued under the PLRA. As such, both the preliminary injunction and provisional class certification have expired and no longer have any legal effect.

DISMISSED AS MOOT.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

USDC No. 8:20-cv-00835-JGB-SHK

MELISSA AHLMAN; et al.
Plaintiffs,

v.

DON BARNES; et al.
Defendants.

ORDER

[Filed June 26, 2020]

Proceedings: Order (1) DENYING Defendants' Ex Parte Application to Dissolve Injunction (Dkt. No. 86); (2) GRANTING Plaintiffs' Motion for Expedited Discovery (Dkt. No. 83); (3) DENYING Plaintiff's Ex Parte Application to Shorten Time (Dkt. No. 89); and (4) VACATING the July 20, 2020 Hearing (IN CHAMBERS)

Before the Court is (1) an Ex Parte Application to Immediately Dissolve Preliminary Injunction file by Defendants Don Barnes and Orange County; (2) a Motion for Expedited Discovery filed by Plaintiffs Melissa Ahlman, Pedro Bonilla, Cynthia Campbell, Monique Castillo, Javier Esparza, Daniel Kauwe, Cecibel Caridad Ortiz, Michael Seif, Mark Trace, and Don Wagner. ("Application," Dkt. No. 86; "Motion," Dkt. No. 83.) The Court finds these matters appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support of and in opposition to the Motion, the Court DENIES the Application and GRANTS the Motion.[1] The Court VACATES the hearing set for July 20, 2020 on the Motion.

I. BACKGROUND

On May 26, 2020, the Court issued an injunction compelling Defendants to implement several practices within the Orange County Jails to quell the spread of COVID-19. ("PI Order," Dkt. No. 65.) Defendants then requested that both this Court and the Ninth Circuit stay the injunction. (Dkt. Nos. 66, 68.) Those requests were denied. (Dkt. Nos. 72, 75, 80.)

On June 18, 2020, Plaintiff filed a motion requesting expedited discovery. (Motion.) Defendants filed an ex parte application requesting that the Court

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[1] Plaintiffs' ex parte application to shorten the time for the Motion hearing is DENIED AS MOOT. (See Dkt. No. 89.)

immediately dissolve the preliminary injunction on June 19, 2020. (Application.)

II. DISCUSSION

After finding that Defendants' response to the COVID-19 outbreak in Orange County Jail was inadequate, the Court ordered Defendants to implement several remedial measures aimed at stopping the spread of the disease. (*See* PI Order.) Now, Defendants seek to dissolve that injunction, arguing that it is no longer necessary. The request is premature.

Dissolution of a preliminary injunction is only proper only if there has been a significant change that renders the original preliminary injunction inequitable. *Alto v. Black*, 738 F3d 1111, 1120 (9th Cir. 2013). Defendants insist that the rate of infection is now zero. (Application at 5.) However, they support this assertion with their own evidence and testimony from County employees. Certainly, the County employees are incentivized to submit evidence that will support the County's position.

Before the Court can conclude that the circumstances have truly changed in such a way to warrant dissolution of the injunction, Plaintiffs must have the opportunity to evaluate Defendants' evidence and determine whether other evidence contradicts it. Because it would serve both parties' interests to quickly determine the actual state of the outbreak, there is good cause for ordering expedited discovery. *See* Fed. R. Civ. Pro. 26(d)(1); *Semitool, Inc.*

v. Tokyo Electron Am., Inc., 208 F.R.D. 273, 276 (N.D. Cal. 2002) ("Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.")

Moreover, even though Defendants now insist that there is zero transmission within the Jail, they acknowledge that there are still six active cases. (Application at 5.) As Defendants have previously demonstrated, six cases can rapidly become three hundred in the absence of sufficient mitigating measures. The country remains deep in the throes of the outbreak—tens of thousands of new cases are still being reported every day.[2] Even if Defendants have dropped the transmission rate to zero, it is certainly not time yet to draw down preventative measures—unless Defendants consistently implement those steps outlined in the injunctive order, a second spike is likely occur.

Defendants have repeatedly insisted that they are going above and beyond what is necessary to stop the spread of infection—including implementing all the measures that the court ordered with the injunction. (*See, e.g.*, Dkt. No. 44-10 ¶ 2 ("OCSD has, at a minimum already implemented all of the mitigation efforts outlined in plaintiffs' request for relief.").) Yet they have filed four separate requests asking to be relieved of the obligation to do what they have long claimed to be doing. And they refuse to provide Plaintiffs with

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[2] https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html

any information regarding their compliance with the Court's order. (Application, Exhibit A.)

III. CONCLUSION

For the reasons above, the Court:

1. DENIES Defendants' Application;
2. GRANTS Plaintiffs' Motion;
3. ORDERS that by July 8, 2020,
   (1) Defendants will serve responses to all outstanding written discovery,
   (2) the parties will agree on a date for inspection of the Jail to be no later than July 15, 2020, and
   (3) the parties will agree on a time and date for the video depositions of Erin Winger, Dr. C. Hsien Chiang, and Commander Joseph Balicki to be no later than July 15, 2020;
4. ORDERS the parties to meet and confer regarding additional discovery;
5. ORDERS Defendants to submit weekly updates to Plaintiffs regarding compliance with the injunction so long as the injunction remains in effect;
6. ADMONISHES both parties to fully comply with the entirety of this Order and all other orders applicable to this case—failure to do so will result in sanctions;
7. VACATES the hearing set for July 20, 2020 on the Motion.
8. DENIES as moot Plaintiffs' ex parte

application to shorten the time for the Motion hearing (See Dkt. No. 89.).

IT IS SO ORDERED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 20-55568

MELISSA AHLMAN; DANIEL KAUWE; MICHAEL SEIF; JAVIER ESPARZA; PEDRO BONILLA; CYNTHIA CAMPBELL; MONIQUE CASTILLO; MARK TRACE; CECIBEL CARIDAD ORTIZ; DON WAGNER, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,

v.

DON BARNES, in his official capacity as Sheriff of Orange County, California; COUNTY OF ORANGE, Defendants-Appellants.

ORDER

[Filed June 17, 2020]

BEFORE: GRABER, WARDLAW, AND R. NELSON, Circuit Judges.

Defendants-Appellants Orange County and Sheriff Don Barnes (Defendants) have filed a motion to stay the district court's May 26, 2020, preliminary injunction order. We deny the motion to stay, but remand for the limited purpose of allowing the district court to consider whether changed circumstances justify modifying or dissolving the injunction.[1]

I.

Plaintiffs-Appellees, putative classes and sub-classes of pre-trial and post-trial inmates housed in four facilities at the Orange County Jail, filed this suit alleging that Defendants failed to take adequate measures to prevent the spread of COVID-19 within the jail. They asserted Eighth Amendment, Fourteenth Amendment, and statutory claims, and sought a preliminary injunction requiring Defendants to implement specific "mitigation efforts" to prevent the spread of the virus.[2]

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[1] On June 12, 2020, we issued an order denying the motion to stay and explaining that a written order giving the court's reasoning would follow in due course. This order supplies that reasoning.

[2] Plaintiffs also asked the district court to order the release of inmates who were medically vulnerable or had disabilities that could put them at particular risk of harm from COVID-19. The district court denied this request, concluding that a release of inmates was not necessary because any harm to these

In the district court, Defendants argued that an injunction was unnecessary because they had already implemented each of the specific mitigation efforts Plaintiffs requested. In support, they proffered a sworn declaration from Commander Joseph Balicki of the Orange County Sheriff's Department's (OCSD) Custody Operations Command. Balicki attested under penalty of perjury that he had reviewed Plaintiffs' complaint[3] and that "OCSD ha[d], at a minimum, already implemented all of the mitigation efforts outlined in [their] request for relief." (emphasis added). Balicki's declaration made clear that the "mitigation efforts" he was referring to were those that were identified in the complaint's "Request for Relief." He cited Paragraph 138 of the complaint, where Plaintiffs listed each of their requested "mitigation efforts," including, among other things, that Defendants "[p]rovide adequate spacing of six feet or more between incarcerated people so that social distancing can be accomplished in accordance with CDC guidelines;" "[e]nsure that each incarcerated person receives, free of charge, an individual supply of hand soap and paper towels sufficient to allow frequent hand washing and drying each day;"

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individuals could be mitigated by additional preventative measures within the jail. Plaintiffs have not appealed that denial.

[3] Plaintiffs have since amended their complaint in the district court. All references in this order are to the original petition for habeas corpus and complaint, which was the operative complaint at the time the district court issued the preliminary injunction.

"[e]nsure that all incarcerated people have access to hand sanitizer containing at least 60% alcohol;" and "[c]onduct immediate testing for anyone . . . displaying known symptoms of COVID-19."

Although Defendants maintained that they were already voluntarily providing all of the relief sought in the complaint (other than a release of inmates), Plaintiffs produced evidence to the contrary. According to declarations from inmates at the jail, Defendants housed multiple inmates in the same room, with beds less than six feet apart; placed some inmates in overcrowded holding units; allowed quarantined inmates to use the same common spaces as the general population; failed to provide inmates with sufficient cleaning and hygiene supplies, including sufficient soap for hand-washing; and gave inmates cloth masks that, in some cases, were not replaced for weeks or were "made from blood-and[-] feces-stained sheets." Inmates also reported that Defendants were not testing all individuals with suspected cases of COVID-19 and that on May 13, 2020—less than two weeks before the injunction issued—an inmate who was exhibiting COVID-19 symptoms was left in a "medical tank" with non-symptomatic inmates pending the results of his COVID-19 test.

The district court recognized that Plaintiffs' evidence contradicted the declarations submitted by Commander Balicki and other OCSD officials. It resolved this factual conflict in favor of Plaintiffs, concluding that the detailed inmate declarations were more credible than the brief and general declarations

of the OCSD officers, which "fail[ed] to explain with specificity how the [County's] policies ha[d] been implemented and enforced and the degree of compliance."

The district court also considered the results of COVID-19 testing within the jail. It noted that as of May 26, 2020—the day it issued its order—369 inmates had tested positive for COVID-19, an increase of more than 300 confirmed cases in a little over a month. And while the district court acknowledged that Defendants reported that 302 of those inmates had recovered, it explained that there were likely still 57 inmates[4] who had contracted the virus within the previous two weeks.

After evaluating the evidence before it, the district court found, as a factual matter, that Defendants were "not complying meaningfully with the CDC Guidelines," which it concluded "represent[ed] the floor, not the ceiling, of an adequate response to COVID-19 at the Jail, with at least 369 COVID-19 cases." In light of this finding, the district court concluded that Plaintiffs had established (1)that they were likely to succeed on the merits of their claims, (2) that they were likely to face irreparable harm absent an injunction, and (3) that the balance of the equities and the public interest weighed in favor of injunctive relief. It issued an injunction directing Defendants to

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[4] The district court may have meant to say that there were 67 inmates who had likely contracted the virus within the previous two weeks—the difference between the 369 positive tests and the 302 recoveries. The arithmetical discrepancy is immaterial for our purposes.

comply with fourteen requirements that were taken, essentially word-for-word, from Paragraph 138 of Plaintiffs' complaint.

Defendants moved to stay the injunction pending appeal. The district court denied the motion, concluding, among other things, that Defendants could not establish irreparable injury because the injunction did nothing more than require them to implement the very same measures that Commander Balicki had specifically stated, under oath, had already been put in place. Defendants then appealed the grant of the preliminary injunction and asked us to grant a stay.

II.

In determining whether to exercise our discretion to stay the injunction, we consider (1) whether Defendants have made "a strong showing of the likelihood of success on the merits;" (2) whether Defendants will be "irreparably injured absent a stay;" (3) "whether a stay will substantially injure other parties;" and (4) "where the public interest lies." *Doe #1 v. Trump*, 957 F.3d 1050, 1058 (9th Cir. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 426 (2009)). "The first two factors are the most critical," id. (cleaned up), and a showing of irreparable injury is an absolute prerequisite. "[I]f the petition has not made a certain threshold showing regarding irreparable harm . . . then a stay may not issue, regardless of the petitioner's proof regarding the other stay factors." *Id.*

(quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (per curiam)).

A.

We begin with the issue of irreparable harm. Defendants argue that they will be irreparably harmed because the requirements imposed by the district court's injunction are "impossible" to adhere to. In support, they have submitted a new declaration from Commander Balicki, who now asserts that "portions of the [injunction] require action that the Sheriff simply cannot comply with due to safety and security concerns for jail staff and inmates."

Defendants' new position cannot be reconciled with Balicki's sworn statement in the district court, which represented not only that Defendants were willing and able to implement each of the specific measures requested by Plaintiffs (and later incorporated into the injunction), but that they had in fact *already implemented them.* Nowhere in their papers have Defendants attempted to explain why the measures they assured the district court had already been taken have suddenly become impossible to carry out.[5]

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[5] The dissent contends that Commander Balicki's declaration was merely "inartfully crafted" and "lacked nuance." Dissent at 21. This blinks reality. There can be no doubt about the message Balicki intended to convey to the district court. His declaration precisely mirrored Defendants' litigating position: that "there [wa]s not a single 'mitigation effort' outlined in Plaintiffs ex parte application that ha[d] not already been implemented in the jails."

"Self-inflicted wounds are not irreparable injury." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) (cleaned up). An injunction cannot cause irreparable harm when it requires a party to do nothing more than what it maintained, under oath, it was already doing of its own volition. On these particular facts, where Defendants have advanced an argument that is diametrically opposed to their litigating position in the district court, they cannot show irreparable harm. Either Defendants were already willingly complying with the requirements of the injunction before it issued, in which case they will suffer no irreparable injury from it, or they misrepresented the nature of their response to COVID-19 in the district court, in which case they are not entitled to discretionary relief in the form of a stay. *See Doe #1*, 957 F.3d at 1058; *see also Virginian Ry. Co. v. United States*, 272 U.S. 658, 672–73 (1926) (explaining that a stay is "not a matter of right" and that "[t]he propriety of its issue is dependent upon the circumstances of the particular case").

B.

The absence of irreparable harm is alone sufficient reason to deny Defendants' motion, *Doe #1*, 957 F.3d at 1061, but we also address whether Defendants have made a "strong showing" that they are likely to succeed on the merits of this appeal.

First, Defendants argue that the claims in this case are unlikely to succeed because they have satisfied their obligations under the Eighth and

Fourteenth Amendments by implementing the CDC guidelines "to the extent practicable to do so." But in advancing this argument, Defendants focus largely on their own evidence, ignoring the fact that the district court expressly credited the accounts of several inmates who painted a much different picture of conditions at the jail. For example, while Defendants contend that they "test[] any inmate who exhibits COVID-19 symptoms and isolate[] that inmate according to CDC Guidance," the district court credited the accounts of inmates who reported that Defendants were not testing all suspected cases and had recently left at least one inmate exhibiting COVID-19 symptoms in the same area as inmates who did not have symptoms.

The district court's factual findings are reviewed for clear error, *Armstrong v. Brown*, 768 F.3d 975, 979 (9th Cir. 2014), and Defendants have fallen far short of making a strong showing that the findings here were clearly erroneous, *see Valentine v. Collier*, 140 S. Ct. 1598, 1600 (2020) (statement of Sotomayor, J.) (noting the importance of deferring to the district court's factual findings in the preliminary injunction context). [6] On those facts, which portrayed a response

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[6] The dissent notes that Justice Sotomayor ultimately agreed with the Supreme Court's decision not to overturn a stay issued by the Fifth Circuit. Dissent at 10 n.5. But as Justice Sotomayor made clear, she did so because she could not conclude that the Fifth Circuit was "demonstrably wrong" in determining that the plaintiffs had failed to exhaust their administrative remedies, as required by the Prison Litigation Reform Act (PLRA). *Valentine*, 140 S. Ct. at 1598. In contrast here, Defendants have not

that fell well short of the CDC guidelines and resulted in an explosion of COVID-19 cases in the jail,[7] Defendants are not likely to establish that the issuance of the injunction was an abuse of discretion.[8]

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challenged the district court's finding that Plaintiffs likely satisfied the PLRA's exhaustion requirement.

[7] The dissent makes much of the fact that the *rate* of infection was decreasing in the days immediately preceding the issuance of the injunction. Dissent at 13–17. But it is undisputed that the *number* of cases was still increasing at an alarming rate—at least 57 new cases (and perhaps 67) in the two weeks before the injunction was issued. Given the potential for serious illness, or even death, faced by each of those newly infected inmates, this is hardly the rosy picture the dissent makes it out to be.

[8] Although we recently stayed an injunction in a different case to the extent it imposed requirements beyond the CDC guidelines, *Roman v. Wolf*, No. 20-55436, 2020 WL 2188048, at *1 (9th Cir. May 5, 2020), that case involved a detention facility that did not yet have any confirmed cases of COVID-19, *see Roman v. Wolf*, No. EDCV 20-768 TJH (PVCx), 2020 WL 1952656, at *3 (C.D. Cal. Apr. 23, 2020). Given the district court's findings that Defendants fell significantly short of complying with the CDC guidelines in a jail in which more than 300 inmates tested positive for COVID-19 in a one-month period, we do not believe Defendants are likely to show that the district court abused its discretion in ordering them to implement the mitigation efforts outlined in Plaintiffs' complaint, which they represented were already in effect.

We emphasize that the dissent is simply wrong to assert that we have "blessed" the district court's legal findings, "effectively affirm[ed] the notion that the CDC guidelines as drafted are a per se violation of the Eighth Amendment," and "permitt[ed]" the issuance of the preliminary injunction. See Dissent at 1, 5. The propriety of the injunction is not before us. Instead, we are tasked only with determining whether Defendants are entitled to a stay

Next, Defendants argue that the injunction is likely to be overturned because the situation in the jail has improved significantly in the weeks since it issued. They insist that the injunction "is based on outdated information" and that we must consider the current conditions in the jail in determining whether they are likely to prevail on appeal. In support, Defendants have filed a motion to supplement the record on appeal with evidence that they contend demonstrates that there are now only 23 inmates currently suffering from COVID-19 and that all new cases have come from COVID-19-positive inmates being booked into the jail, rather than from the spread of the virus within jail facilities.

This evidence, which post-dates the injunction and is offered for the first time here, on appeal, is simply not relevant to whether Defendants are likely to succeed on the merits of their appeal. Review of a preliminary injunction is "restricted to the limited and often nontestimonial record available to the district court when it granted or denied the injunction motion." *Zepeda v. U.S. Immigration & Naturalization Serv.*, 753 F.2d 719, 724 (9th Cir. 1983); *see also Wilson v. Williams*, __ F.3d __, 2020 WL 3056217, at *1 (6th Cir. June 9, 2020). The evidence submitted by Plaintiffs therefore has no bearing on whether the district court abused its discretion in

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pending appeal. On the facts here, Defendants cannot show irreparable harm and have fallen short of making a "strong showing" that they are likely to succeed on the merits. Each of these conclusions, on its own, is a legally sufficient reason to deny the motion to stay.

issuing an injunction on the record before it. [9] *Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 n.5 (9th Cir. 1994); *cf. Ashcroft v. ACLU*, 542 U.S. 656, 671–72 (2004).

III.

In sum, we conclude that Defendants have failed to carry their burden of establishing that a stay of the preliminary injunction is appropriate. We therefore deny the motion for a stay pending appeal.

Nevertheless, we recognize that the circumstances surrounding the COVID-19 pandemic are evolving rapidly. While we express no view on the new evidence proffered by Defendants on appeal, we believe the parties should be permitted to present any evidence of changed circumstances to the district court, which can determine in the first instance whether it is appropriate to modify or dissolve the injunction. See Fed. R. App. P. 8(a)(1)(C) ("A party must ordinarily move first in the district court for . . . an order suspending [or] modifying . . . an injunction while an appeal is pending.").

Accordingly, we *sua sponte* remand the case to the district court for the limited purpose of allowing the parties to present any evidence of changed circumstances that might merit modification or dissolution of the preliminary injunction. In the event such evidence is presented, the district court may

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[9] Defendants' emergency motion to supplement the record is denied.

consider whether it is appropriate to hold an evidentiary hearing. After reviewing any new evidence, the district court may, in its discretion, modify or dissolve the preliminary injunction as it deems appropriate.

The previously established briefing schedule remains in effect.

IT IS SO ORDERED.

Melissa Ahlman v. Don Barnes, et al., No. 20-55568

R. Nelson, Circuit Judge, concurring in part and dissenting in part:

The exceptional threats COVID-19 poses to individual health and safety have created unforeseen challenges in all aspects of our society. It has altered how we work, how we interact, how we worship, and how we educate our children. Perhaps nowhere are these impacts more apparent than in our prison systems. I am sympathetic to the plight of our incarcerated populations and the unique health risks confinement presents during this pandemic. Despite these realities, our Article III judicial role is confined to deciding the legal questions before us, not to mandate conditions unless required by statute or the Constitution.

Splitting with recent decisions from three of our sister circuits, the majority adopts an unprecedented interpretation of the Eighth and Fourteenth Amendments by permitting a district court to issue a preliminary injunction ordering a jail to comply with safety requirements *exceeding* the CDC's Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities ("CDC guidelines"). And the majority does this in spite of jail officials' implementation of increased protective measures *prior* to the Plaintiffs' motion for a preliminary injunction and well prior to

the issuance of the injunction; measures that resulted in a drastically *decreased* COVID-19 infection rate within the jail.

This decision is wrong both on the law and the facts as they existed when the district court issued its injunction. Most significantly, between March 1 and May 19, 2020, Appellants released about 53 per cent of the inmates to increase social distancing and alleviate the outbreak. This unprecedented step alone negates the subjective deliberate indifference necessary for an Eighth Amendment violation. Because Appellants are likely to succeed on the merits and have also demonstrated an almost inherent likelihood of irreparable harm in the form of judicial micromanagement of prison affairs and resources, they are entitled to a stay of the injunction. I respectfully dissent.[1]

I

To grant a stay of an injunction pending appeal, we must consider: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether

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[1] I concur with the majority that the district court should be allowed to consider Appellants' new evidence of recent developments in the jail's COVID-19 conditions on a limited remand. Because the injunction was unwarranted on May 26, and conditions have improved even more significantly, the district court will hopefully take advantage of this opportunity for a redo and lift the injunction.

issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (internal quotation marks omitted).

A district court's grant of preliminary injunctive relief is reviewed for abuse of discretion. *See Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1158–59 (9th Cir. 2011). A district court abuses its discretion when it "base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 942 (9th Cir. 2014) (internal quotation marks omitted).

II

The first *Nken* factor, "whether the stay applicant has made a strong showing that he is likely to succeed on the merits," requires a "minimum quantum of likely success necessary to justify a stay—be it a reasonable probability or fair prospect[.]" *Leiva-Perez v. Holder*, 640 F.3d 962, 967 (9th Cir. 2011) (internal quotation marks omitted).

This first factor weighs in favor of staying the district court's preliminary injunction because the district court based its order on both an erroneous application of the law and clearly erroneous factual findings. As a preliminary matter, the district court's decision to impose numerous requirements on the jail exceeding the CDC guidelines runs contrary to the sound reasoning of our sister circuits' recent decisions. See *Valentine v. Collier,* 956 F.3d 797, 802 (5th Cir.

2020); *Swain v. Junior,* 958 F.3d 1081, 1090 (11th Cir. 2020).

Moreover, whether examined under the Fourteenth Amendment's objective analysis or Eighth Amendment's subjective analysis, there cannot be deliberate indifference where the jail both intentionally and effectively acted in response to the crisis. Particularly significant is that under the data available to the district court when it entered the preliminary injunction, the jail had already largely curbed the infection rate by implementing its internal guidelines to address the COVID-19 pandemic. While the district court determined Plaintiffs had demonstrated a likelihood of success on the merits based largely on its factual finding that "[r]ates of COVID-19 infection at the Jail are skyrocketing," the data reveals the opposite to be true: the infection rate when the injunction issued was plummeting. More fundamentally, the district court failed to even state the correct legal standards under the objective and subjective deliberate indifference tests.

Appellants have thus demonstrated more than a reasonable probability of success on the merits.

A

As an initial matter, the majority should have followed the approach taken by other circuits staying similar injunctions to the extent they imposed obligations beyond the CDC guidelines. *See, e.g., Valentine*, 956 F.3d at 801 (staying injunction that required specific measures that "go[] even further

than CDC guidelines"); *Swain*, 958 F.3d at 1087–88 (staying preliminary injunction where CDC guidelines "formed the basis" of the district court's required measures); *see also Swain v. Junior,* No. 20-11622, 2020 WL 3167628, at *2 (11th Cir. June 15, 2020) (vacating preliminary injunction even though the scope of the district court's injunction was "based largely on the CDC's guidance"). The majority blesses the district court's legal error in finding that the CDC guidelines provide the "floor, not the ceiling," for constitutional claims. But this legal principle is inconsistent with Supreme Court precedent. *See Bell v. Wolfish*, 441 U.S. 520, 543 n.27 (1979) (holding that the guidance of outside organizations, including a Department of Justice Task Force, "simply do not establish the constitutional minima" and "are not determinative of the requirements of the Constitution"). The majority effectively affirms the notion that the CDC guidelines as drafted are a per se violation of the Eighth Amendment during a COVID-19 outbreak. That is inconsistent with both law and reason.

Under the standard followed by the Fifth and Eleventh circuits, most of the injunctive requirements imposed by the district court should be stayed in full or in part because they exceed the CDC guidelines and even conflict with them in some instances. For example, the district court's order requires Appellants to "take the temperature of all class members . . . daily" and to interview "each incarcerated person daily to identify potential COVID-19 infections," while the CDC guidelines provide no such guidance, and

only suggest temperature checks for new entrants and "in housing units where COVID-19 cases have been identified[.]" Ctrs. for Disease Control & Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf at 22.[2] Additionally, while the CDC guidelines provide that "ideally" at least six feet should be maintained between all individuals, *id.* at 11, the district court went beyond this ideal by mandating that Appellants "provide adequate spacing of six feet or more between incarcerated people" without time, place, or other exceptions.

Even where the injunction simply requires substantial compliance with the CDC guidelines, however, Appellants are still likely to succeed on the merits of their deliberate indifference claims, as outlined below.

B

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. Prison officials' "deliberate indifference to serious medical needs of prisoners" has been held to violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. *Estelle*

[2] As Commander Balicki observed, mandatory daily temperature checks increases dangers for both inmates and staff because it significantly increases in-person contact between them.

v. Gamble, 429 U.S. 97, 104 (1976). Where, as here, pretrial detainees challenge conditions of confinement, such a claim "arise[s] under the Fourteenth Amendment's Due Process Clause, rather than under the Eighth Amendment's Cruel and Unusual Punishment Clause." *Gordon v. County of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018) (internal quotation marks omitted).[3]

That standard requires that an official show *objective* deliberate indifference for a Fourteenth Amendment violation. *Id.* Under that standard, an official must fail to "take reasonable available measures to abate [a substantial] risk [of serious harm], even though a reasonable official in the circumstances would have appreciated the high degree of risk involved." *Id.* at 1125. A plaintiff "must prove more than negligence but less than subjective intent—something akin to reckless disregard." *Id.* (internal quotation marks omitted).

The district court determined the jail was objectively deliberately indifferent under the Fourteenth Amendment because it was "aware of the CDC Guidelines and able to implement them but fail[ed] to do so." The district court also held that the law required the jail to "fully and consistently" apply the CDC guidelines, as well as its own additional guidelines, to "abate the spread of infection."

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[3] Because about 57 per cent of the jail population was being held pretrial and the other 43 per cent was serving a sentence of incarceration, I provide separate analyses under both the Fourteenth and Eighth Amendments. *See Gordon*, 888 F.3d at 1124–25.

The district court abused its discretion in making these erroneous legal determinations. *See First Amendment Coal. v. U.S. Dep't of Justice*, 878 F.3d 1119, 1126 (9th Cir. 2017) (a district court abuses its discretion by applying an "incorrect legal standard"). The Fourteenth Amendment's objective deliberate indifference standard asks whether the jail took "reasonable available measures to abate [the] risk," *Gordon*, 888 F.3d at 1125, not whether the jail was "aware" of specific measures in the CDC guidelines.[4] Appellants' "aware[ness]" only relates to the subjective deliberate indifference standard, involving an entirely different analysis under the Eighth Amendment test. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The district court failed to mention (much less analyze) how a reasonable official would have acted under the circumstances—or why releasing 53 per cent of the detained inmates was not reasonable enough. Because the district court employed an "incorrect legal standard" to arrive at its conclusion of likely objective deliberate indifference by

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[4] While the district court appears to have merged the Fourteenth Amendment's objective deliberate indifference standard outlined in *Gordon* (only applicable to pretrial detainees) with the objective prong of the Eighth Amendment, these are two distinct tests in the Ninth Circuit. Regarding the Eighth Amendment's "objectively sufficiently serious" deprivation prong, which requires Appellees to demonstrate they are being "incarcerated under conditions posing a substantial risk of serious harm," *Farmer v. Brennan,* 511 U.S. 825, 834 (1994),Appellees have likely met this burden with respect to the risk of COVID-19 infection the jail's inmates face. See *Swain*, 2020 WL 3167628, at *5.

the jail, it abused its discretion. *First Amendment Coal.*, 878 F.3d at 1126.

A district court also abuses its discretion when it "mischaracterize[s]" the appropriate legal standard. *Golden v. Cal. Emergency Physicians Med. Grp.*, 782 F.3d 1083, 1093 (9th Cir. 2015). Here, the district court abused its discretion by finding the jail "must fully and consistently" apply the CDC guidelines because it was "able" to in order to avoid objective deliberate indifference. "Full and consistent" compliance is a higher standard than required by the Constitution, and the district court fails to point to any precedent to the contrary. When our precedents provide that "even gross negligence," *see Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1082 (9th Cir. 2013), or a "lack of due care by a state official," *see Gordon*, 888 F.3d at 1125, are insufficient to show objective deliberate indifference, "full and consistent" compliance mischaracterizes the appropriate legal standard.

Given its reliance on an incorrect and mischaracterized interpretation of the objective standard, the district court abused its discretion in determining Appellants have not demonstrated a likelihood of success on the merits regarding objective deliberate indifference.

C

For the class of individuals here who are not in pre-trial detention, the Eighth Amendment and its subjective deliberate indifference test applies.

Farmer, 511 U.S. at 837. To show an official's subjective deliberate indifference, an official must "know[] of and disregard[] an excessive risk to inmate health or safety[.]" *Id.* To be sufficiently culpable, "the official must *both* be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, *and he must also draw the inference*," as with the criminal recklessness standard. *Id.* (emphasis added). A court cannot support a deliberate indifference finding based on a mere "difference of medical opinion"; rather the official's actions must have been "*in conscious disregard* of an excessive risk to [inmate] health." *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (requiring a prison's choice of treatment to be "medically unacceptable" for prisoner to show Eighth Amendment violation) (emphasis added).

The Fifth Circuit held that under the subjective deliberate indifference standard, a district court should not look to "whether the [d]efendants reasonably abated the risk of infection" or "how [the jail's] policy is being administered." *Valentine*, 956 F.3d at 802 (internal quotation marks omitted). Instead, where a prison took steps to mitigate the risk of infection by increasing internal safety procedures, it could not have consciously "disregarded the risk" to inmate health and safety, even if the measures sometimes fall short of the CDC guidelines. *Id.* at 801–03. Accordingly, the Fifth Circuit granted a stay of the district court's preliminary injunction. *Id.* at 806. The

Supreme Court then denied the application to vacate the stay. *Valentine v. Collier*, 140 S. Ct. 1598 (2020).[5]

A similar stay of a preliminary injunction in the context of protecting prison inmates from COVID-19 was also granted by the Eleventh Circuit. *See Swain,* 958 F.3d at 1090 (granting a motion to stay a preliminary injunction because prison's mitigation efforts "likely do not amount to deliberate indifference"); *cf. Wilson v. Williams*, No. 20-3447, 2020 WL 3056217, at *7–8 (6th Cir. June 9, 2020) (vacating injunction because the prison "responded reasonably" to the risk by implementing a plan to mitigate the risk, and conditions did not violate the Eighth Amendment).[6] The Eleventh Circuit recently vacated that injunction on the merits, concluding that the district court "abused its discretion in granting the preliminary injunction." *Swain*, 2020 WL 3167628, at

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[5] While the majority quotes Justice Sotomayor's reference to deferring to the district court's factual findings in *Valentine*, it is worth noting Justice Sotomayor voted with the unanimous Supreme Court not to reimpose the district court's injunction.

[6] Similar to these recent cases from our sister circuits, the mere fact that there was an outbreak in COVID-19 cases in the Orange County jails is insufficient on its own to justify the injunction. The COVID-19 outbreaks in *Valentine* and *Wilson* were more severe, with at least one inmate's death reported in *Valentine*,140 S. Ct. at 1599, and at least six inmate deaths and other inmates placed on ventilators in *Wilson*, 2020 WL 3056217 at *2, *12. Here, by contrast, the outbreak was thankfully mild, with 302 of 369 cases (81 percent) recovering before the injunction was imposed, not a single death, and only two cases requiring hospitalization.

*13. For the reasons outlined below, we should have similarly granted the stay here.

i

Subjective deliberate indifference requires both "knowledge" *and* a "conscious disregard" of an excessive risk. Yet in determining whether jail officials were subjectively deliberately indifferent, the district court relied solely on the evidence that the jail "knew, by way of the CDC Guidelines, that failure to take certain precautionary measures would result in an increase in the spread of infections." Because the district court failed to articulate how the jail then "conscious[ly] disregard[ed]" this knowledge, its determination that the jail acted with subjective deliberate indifference was based "on an erroneous view of the law." *Weber,* 767 F.3d at 942. As with the jail in *Swain*, "[n]either the resultant harm of increasing infections nor the impossibility of achieving six-foot social distancing in a jail environment establishes that the defendants acted with subjective recklessness as used in the criminal law." 2020 WL 3167628, at *6 (internal quotation marks omitted). The district court thus abused its discretion by failing to address how the jail disregarded the COVID-19 risk. *See Sali v. Corona Reg'l Med. Ctr.,* 909 F.3d 996, 1002 (9th Cir. 2018) (holding a district court abuses its discretion when it "omits a substantial factor" of the analysis).

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Even supposing that the district court intended to incorporate its objective deliberate indifference reasoning into the subjective analysis to show "conscious disregard" (without saying so), the district court still abused its discretion by relying on clearly erroneous factual findings. The district court relied heavily on its assertion that "the numbers speak for themselves" to support its deliberate indifference determination. Based on its interpretation of the epidemiological data in the record, the district court claimed the "[r]ates of COVID-19 infection at the Jail are skyrocketing," the number of confirmed cases is "soaring," and "the Jail lacks the ability to contain the infection."[7] The district court reasoned that since jail officials "undoubtedly [knew] of the risks posed by COVID-19 infections," its actions satisfy subjective deliberate indifference.

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[7] The district court also claimed the rate of infection that existed at the time of its order was 12.4%, which it calculated by comparing the total *confirmed* COVID-19 cases to an assumed total jail population of 2,826. This calculation is misleading because it provides no insight regarding how many active COVID-19 cases are in the prison at one time. For instance, even if the prison had *zero* active COVID-19 cases at the time the injunction was issued, the district court's rate of infection would still be 12.4% under this method of computation. A more accurate method of calculating this rate would be to compare each week's rate of new infections to the previous week's rate, thus showing whether the number of active COVID-19 cases in the jail is increasing or decreasing over time.

The data, however, supports the exact opposite conclusion. True, the rate of COVID-19 infection and the number of active COVID-19 cases did sharply increase from April 22 to May 8. However, the district court did not issue the injunction until May 26. As data cited in the district court's own order confirms, from May 8—prior to Plaintiffs even filing their motion for a preliminary injunction—until the issuance of the injunction, the rate of new infections decreased by over 52 per cent compared to the previous two-and-a-half weeks. This decrease in the infection rate is apparent in the graphical depiction below. In fact, during the week immediately prior to the court's injunction, the rate of new infections decreased by 76 per cent compared to the previous week. The district court's assertion that the "[r]ates of COVID-19 infection at the Jail are skyrocketing," was thus plainly erroneous: at the time it issued the injunction, the jail had been experiencing a dramatic decrease in infection rates for the previous two-and-a-half weeks.[8]

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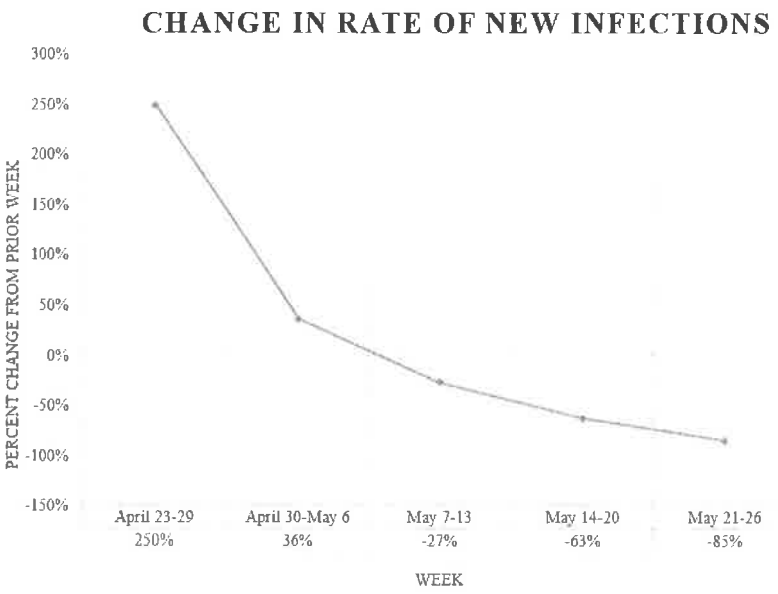
[8] This graph (and the following one) merely provides a visual representation of the exact data the district court relied on. Had the preliminary injunction been issued in early May, this would have perhaps been a different case, with a demonstrably "skyrocketing" infection rate in the jail as characterized by the district court. But *see Valentine*, 956 F.3d at 802. But by May 26, this description was factually inaccurate.

Furthermore, since the injunction issued, the number of active cases dropped to 35 on June 3, and to 23 cases on June 10. The district court can consider this new evidence on remand.



The same is true for the number of active COVID-19 cases. From May 8 until the issuance of the injunction, the jail saw a 67 per cent decrease in the number of active COVID-19 cases.[9] Like the rate of infection, the district court's claim that the number of cases of COVID-19 are "soaring," misrepresented the data because the number of active COVID-19 cases decreased in the immediate two-and-a-half weeks

[9] The Eleventh Circuit vacated an injunction even though the number of confirmed COVID-19 cases spiked from zero cases at the time Plaintiffs filed their complaint to 163 positive tests just three weeks later. *Swain*, 2020 WL 3167628, at *4. This surge in cases took place right before the district court entered its preliminary injunction, *id.*, in stark contrast with the sharp decline of cases here.