No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MELISSA AHLMAN, et al.,

Plaintiffs-Respondents,

v.

DON BARNES and ORANGE COUNTY, CALIFORNIA,

Defendants-Applicants.

To the Honorable Elena Kagan, Associate Justice
of the United States Supreme Court and
Circuit Justice for the Ninth Circuit

EMERGENCY APPLICATION FOR STAY OF INJUNCTIVE RELIEF PENDING APPEAL OF DENIAL OF STAY APPLICATION IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
RELIEF REQUESTED BY FRIDAY, JULY 24, 2020

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QUESTION PRESENTED

Whether a federal court erred in issuing an injunction against the Orange County Sheriff that exceeds the scope of CDC Guidelines based on findings of objective and subjective deliberate indifference under the Fourteenth and Eighth Amendments of the United States Constitution, where the Sheriff had released inmates, amplified hygiene and safety protocols, distributed PPE and reduced intra-jail transmission to zero?

PARTIES AND RULE 29.6 STATEMENT

Applicants-Appellants-Defendants here are the County of Orange and Don Barnes, Sheriff of Orange County, California. Respondents-Plaintiffs here are ten inmates at the Orange County Jails and a class of "medically vulnerable" inmates with representative status.

OPINIONS BELOW

The opinions of the Ninth Circuit were unreported but may be found at *Ahlman v. Barnes*, No. 20-55568, 2020 WL 3547960 and *Ahlman v. Barnes*, No. 20-55668, Dkt. 4 and reprinted in the Exhibits. The relevant orders of the United States District Court for the Central District of California from *Ahlman v. Barnes,* No. 8:20-cv-00835 are also unreported and are reprinted in the Exhibits.

JURISDICTION

The Ninth Circuit entered an order denying an application for emergency stay and stay pending appeal on May 26, 2020. The Ninth Circuit issued a denial of a second application for stay on June 12, 2020. This Court has jurisdiction under 28 U.S.C. § 1253.

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Applicants-Appellants the County of Orange and Don Barnes, Sheriff of Orange County, California respectfully request for an emergency stay of the injunction issued by the United States District Court for the Central District of California, and the United States Court of Appeals' denial of a stay of that order.

OVERVIEW

The Ninth Circuit declined to stay an injunction issued by the United States District Court for the Central District of California, Judge Jesus G. Bernal presiding, which hamstrings the Sheriff's Department from an effective and fluid COVID-19 response and which was based on erroneous findings of both objective and subjective deliberate indifference in a population where, at the time, COVID-19 infections were continuing to fall and there remained only a handful of cases all from new arrestees. By the second application there were four (4) inmates with COVID-19, all cases were from new arrestees, not internal jail transmission. Despite this, the United States Court of Appeal for the Ninth Circuit twice endorsed the District Court's injunction exceeding CDC Guidelines, without modification.

The Ninth Circuit's decision is in direct conflict with the decisions of other United States Circuits that have addressed the issue; it is unsupported by law and does not assist in the efforts to contain COVID-19 in the jails. Indeed, such an outlier of law on this issue and the approach taken by other circuits is the Ninth Circuit here that it is best

illustrated by this Court denying to lift a stay (as requested here) in the case of *Valentine v. Collier,* 590 U.S. _____ (2020), 2020 WL 1899274 (SD Tex., Apr. 16, 2020). Simply put: had Petitioners here been within the jurisdiction of the Fifth Circuit, there would be no current federal injunction requiring the Sheriff to exceed CDC Guidelines in his administration of the jails.

The Ninth Circuit's decision hardens the conflict in the Circuits by taking such a diametrically opposite approach from other Circuits that have faced this issue, and indeed, in contravention of orders made by this honorable Court on the same issue. COVID-19 is not quickly departing as a pressing health concern. The issue here will arise repeatedly in the lower courts during the course of this pandemic, which affects every custodial institution in the United States. In the meantime, courts in the conflicting circuits that have taken a position will continue to reach opposite conclusions on similar facts.

Significantly, the Ninth Circuit's conflicting approach here, when measured against the majority of other Circuits and this Court's precedents, is also wrong on the law under the Eighth and Fourteenth Amendments to the United States Constitution. It has never been and simply cannot be the constitutional standard in this country that if a Sheriff's response to a heretofore unknown pandemic will subject him to federal court management by injunction due to objective and subjective deliberate indifference to the well-being of inmates, when he has (1) largely implemented to the extent possible CDC Guidelines across the

board, (2) released half of the inmate population to provide social distancing, (3) radically increased cleaning and hygiene, (4) provided staff and inmates with personal protective equipment ("PPE") and (5) essentially eliminated COVID within the jail population with the exception of new detainees.

There is no doubt that there are significant and dangerous outbreaks in some custodial institutions in this country. The Orange County Jails are not one of them, and the use of a federal injunction to micromanage their daily operations is unsupported in fact or law. Most importantly, however is that the constantly shifting CDC Guidelines must dictate how a Sheriff responds to this pandemic, not a sole Order from a single judge, which requires some measures that may actually cause more physical contact between inmates and staff and hence, worsen the potential infection rate. The Order at issue places staff and inmates at a higher risk by requiring actions not endorsed by the CDC. We respectfully request a stay of the injunction splitting from alignment with the majority of Circuits and this Court's settled precedent, to allow for the issue to be resolved on the merits below.

STATEMENT

On May 26, 2020, the District Court issued a mandatory injunction (ECF 65[1], the "Order") against the Orange County Sheriff ("Sheriff") and the County of Orange ("County" or collectively

[1] All references to ECF are to filings in the District Court case (8:20-cv-00835-JGB-SHK), while references to Dkt. are to filings in the Court of Appeals case (20-55568).

"Defendants") requiring the Sheriff to implement COVID-19 protocols that (1) exceed CDC Interim Guidelines, (2) irreparably harm the Sheriff's custodial operations, and (3) exacerbate the health, safety and security risks to both inmates and staff. ECF 65. On May 28, 2020, the Sheriff appealed to the United States Court of Appeals for the Ninth Circuit and Requested an Emergency Stay. ECF 68. On June 12, 2020, the Ninth Circuit denied the stay but *sua sponte* issued an immediate remand of the matter to the District Court for consideration of further evidence regarding dissolving or modifying the injunction. Dkt. 16 & 19-1. On June 17, 2020, the Ninth Circuit Court issued a written decision, which included a lengthy and strenuous dissent, which would have granted the requested relief immediately. Dkt. 19-2.

Specifically, the Ninth Circuit Court ordered:

> 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 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.

Id. at p. 11-12.

The dissent noted, "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." Dkt. 19-2 at p. 2.

To facilitate the Ninth Circuit's remand instructions, on June 19,

2020 Appellants filed an *ex parte* application with the district court to dissolve the injunction or in the alternative, to set an evidentiary hearing on an expedited basis to allow further showing of evidence supporting dissolving the injunction. ECF 86. The application was supported by several declarations from Lieutenants and Sergeants at the Orange County Jails as well as Erin Winger and Dr. Chiang, the director of Correctional Health Services, attesting to *only 6 remaining COVID cases* at the jail, and that such cases were from new arrestees, not transmission among inmates. ECF 86-3. Moreover, Applicants-Appellants supplemented this with information on June 24, 2020 that there remained only ***four* (4)** [2] such cases, again, all from new arrestees. ECF 90. The evidence showed that there is currently zero transmission of COVID at the Orange County jails. Appellants-Defendants interposed Appellees'-Plaintiffs' request for expedited discovery.

On June 26, 2020, the district court entirely denied any relief for Appellants and granted entirely Appellees'-Plaintiffs' request for

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[2] This number is going to fluctuate day to day and there will always be COVID cases ***entering*** the Jail via new bookings as long as COVID exists within the community. The Sheriff has no control over that. No one has any control over that. The point of Appellants-Defendants reporting case numbers to the district court, was not only to show the ***significant decline*** in COVID cases but also to show that ***all of the COVID cases were coming from community spread, new bookings, and not from becoming infected in the Jail.*** Even if this number were to triple for example, it would not because the person became infected in the Jail, but because they became infected in the community and then were booked into custody for committing a crime.

intrusive and expedited discovery, without argument or hearing. ECF 93.

Appellants immediately challenged this Order in the Ninth Circuit. Many of the Order's mandates are not found in the CDC Interim Guidelines and are infeasible to comply with as it would compromise the safety of inmates and staff at the Jail. Appellants-Defendants have requested—to no avail—that the District Court stay its mandatory injunction Order and have likewise sought relief before the United States Court of Appeals for the Ninth Circuit. Denied, Applicants now seek relief here.

REASONS FOR GRANTING THE STAY

A. The Ninth Circuit's Reasoning in this Case Underscores the Need for Immediate Remedy of the Split in the Circuits.

The judicial role under Article III is confined to deciding the legal questions before the Court, and not to mandate jail conditions unless required by statute or the Constitution. Veering away from the recent decisions of three other circuits, the Ninth Circuit has adopted an extraordinary interpretation of the Eighth and Fourteenth Amendments. It permits 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"). The court so opined, despite the Sheriff's implementation

of robust safety and hygiene measures prior to Plaintiffs' motion for a preliminary injunction and issuance of the injunction; measures that resulted in significantly reduced COVID-19 infection rates within the jail.

The decision is erroneous both on the law and the facts as they existed when the district court issued its injunction, and directly at odds with at least three other Circuits that have addressed the issue. Indeed, the decision is at odds with the order issued by this Court regarding this issue during the pandemic. This Court let stand a stay issued by the Fifth Circuit in *Valentine v. Collier,* 590 U.S. _____ (2020), 2020 WL 1899274 (SD Tex., Apr. 16, 2020). which contained nearly identical facts. This begs the question of whether had the Petitioners here been within the jurisdiction of the Fifth Circuit, would they currently be subject to a federal court injunction exceeding CDC Guidelines. The answer is no, and the answer would be no in at least two other United States appellate circuits.

Between March 1 and May 19, 2020, Applicants voluntarily released approximately 53 percent of the inmates to permit increased social distancing within the jail. This alone should negate any subjective deliberate indifference necessary for an Eighth Amendment violation. Applicants here are likely to prevail on the merits and have demonstrated likelihood of irreparable harm in the form of judicial micromanagement of state executive branch jail affairs and resources, especially where they have proven demonstrably successful.

B. Applicable Standard

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

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).

C. Applicants Here Have Shown A Strong Likelihood of Success on the Merits

The first *Nken* factor is "whether the stay applicant has made a strong showing that he is likely to succeed on the merits," and 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 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. Moreover, the district court's imposition of numerous

mandates exceeding the CDC guidelines directly contradicts the sound reasoning of other recent Circuit court decisions. *See Valentine v. Collier*, 956 F.3d 797, 802 (5th Cir. 2020); *Swain v. Junior*, 958 F.3d 1081, 1090 (11th Cir. 2020).

Whether examined under the Fourteenth Amendment's objective analysis or Eighth Amendment's subjective analysis, there simply cannot be a finding of deliberate indifference where the jail voluntarily and effectively responded to the impending crisis. Moreover, as shown by evidence to the district court when it issued the preliminary injunction, the jail had already largely mitigated the infection by implementing its internal safety and hygiene protocols to address COVID-19.

The district court found Respondents-Plaintiffs had demonstrated a likelihood of success on the merits relying on its factual finding that "[r]ates of COVID-19 infection at the Jail are skyrocketing." Dkt. 19-2 at p. 4. Yet, the evidence at the time showed this was not accurate, and in fact, the infection rate when the injunction issued was already dropping dramatically within the OC Jails. Petitioners have demonstrated a probability of success on the merits.

1. The Circuits Are Split as to Injunctions Exceeding CDC Guidelines

Here, the Ninth Circuit shunned the precedential 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").

Instead, here, the Ninth Circuit endorses the legally flawed approach of the district court. The CDC Guidelines are simply interim guidance for custodial institutions and not a constitutional minimum for correctional institutions. *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 Ninth Circuit effectively rules that the CDC guidelines are a *per se* violation of the Eighth Amendment during a pandemic. That is not the law.

Illustrating the Circuit split at issue, under the standard followed by the Fifth and Eleventh circuits, most of the mandates imposed by the district court would be stayed in full or in part because they exceed the CDC guidelines. Some conflict with the guidelines. As Petitioners have pointed out, the district court's order requiring Petitioners to "take the temperature of all class members . . . daily" and to interview "each incarcerated person daily to identify potential COVID-19 infections,"

are nowhere found in the CDC Guidelines. The Guidelines only while the CDC guidelines merely recommend temperature checks for new entrants and "in housing units where COVID-19 cases have been identified" with which the Sheriff complies. 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. Another example is found where the CDC guidelines provide that "ideally" at least six feet should be maintained between all individuals, *id.* at 11, the district court explicitly mandated that Petitioners "provide adequate spacing of six feet or more between incarcerated people" without time, place, or other exceptions or consideration of the physical limitations of the facility. Mandatory daily temperature checks and interviews of the entire jail population *increases* dangers for both inmates and staff because it significantly increases in-person contact.

2. There Was No Objective Deliberate Indifference under the Fourteenth Amendment as a Matter of Law to Support the Injunction

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 v. Gamble*, 429 U.S. 97, 104 (1976). A challenge by pretrial detainees to conditions of confinement "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]

Thus, Respondents-Plaintiffs are required to establish that an official show *objective* deliberate indifference for a Fourteenth Amendment violation. *Id.* 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 establish more than negligence but less than subjective intent—something akin to reckless disregard." *Id.* (internal quotation marks omitted).

Here, the district court found 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 determined 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." ECF 65 at p. 17. This is absolutely and patently false.

The district court abused its discretion in making these clearly 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

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[3] The jail population was/is split between pretrial detainees and individuals on a sentence of incarceration. As such, it requires analyses under both the Fourteenth and Eighth Amendments. *See Gordon*, 888 F.3d at 1124–25.

abuses its discretion by applying an "incorrect legal standard"). The objective deliberate indifference standard examines whether a jail took "reasonable available measures to abate [the] risk," *Gordon*, 888 F.3d at 1125. It does not inquire as to whether the jail was "aware" of specific measures in the CDC guidelines. Indeed, "aware[ness]" is only a consideration under the subjective deliberate indifference standard—an Eighth Amendment test. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994). It is unclear why the district court did not find that voluntarily releasing 53 percent of the detained inmates was reasonable enough.

The district court employed an "incorrect legal standard" to arrive at its conclusion of objective deliberate indifference by the jail, and it abused its discretion in doing so. *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 found that the jail "must fully and consistently" apply the CDC guidelines because it was "able," to avoid an objective deliberate indifference finding. Yet, "full and consistent" compliance is a higher standard than required by the Constitution, and this standard is not found in precedent. To the contrary, Ninth Circuit 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. Given its reliance on an incorrect application of the objective standard, the district court abused its discretion in determining Petitioners have not demonstrated a likelihood of success on the merits regarding "objective deliberate indifference."

3. There Was No Subjective Deliberate Indifference Under the Eighth Amendment as a Matter of Law to Support the Injunction

For the sentenced inmates, the Eighth Amendment and its "subjective deliberate indifference" standard applies. *Farmer*, 511 U.S. at 837. To establish subjective deliberate indifference, a Plaintiff must show an official "knows of and disregards an excessive risk to inmate health or safety[.]" *Id.* "[T]he 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*." *Id.* (emphasis added). A deliberate indifference finding cannot be based on simple "difference of medical opinion." The actions must be "in *conscious disregard* of an excessive risk to [inmate] health." *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (emphasis added).

In direct contrast, the Fifth Circuit held that under the subjective deliberate indifference standard, a district court should not examine "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). Rather, where a prison took steps to mitigate the risk of contagion by increasing internal safety

protocols, it did not consciously "disregarded the risk" to inmate health and safety, even if the actions sometimes fell short of the CDC guidelines. *Id.* at 801–03. And here, the district court's injunction mandates procedures beyond CDC Guidelines. The Fifth Circuit granted a stay of the district court's preliminary injunction. *Id.* at 806. This honorable Court then denied application to vacate the stay. *Valentine v. Collier*, 140 S. Ct. 1598 (2020).

As found in these recent cases from other Circuits, the fact that there was an outbreak in COVID-19 cases in the Orange County jails is insufficient on its own to justify an injunction. And to demonstrate how far the gap in the circuit split has become, the outbreaks in *Valentine* and *Wilson v. Williams*, No. 20-3447, 2020 WL 3056217 were far more substantial (at least one inmate's death was reported in *Valentine*, 140 S. Ct. at 1599, and at least six inmate deaths and other inmates on ventilators in *Wilson*, 2020 WL 3056217 at *2, *12.) By contrast the Orange County Sheriff had 302 of 369 of cases (81 percent) recover from COVID before the injunction was imposed. There has not been a single death in the OC Jails and there have been only three cases requiring hospitalization, all of whom have recovered. How such efforts by the OC Jails can be deemed deliberative indifference is unclear.

The Ninth Circuit's decision here is also a departure from precedent in the Eleventh Circuit, where a similar stay of a preliminary injunction in the context of protecting prison inmates from COVID-19 was also granted. *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). 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 *13. The same result, by law, should have obtained here.

a. The District Court's Flawed Analysis and Its Adoption by the Ninth Circuit

Here, 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." Yet, "subjective deliberate indifference" requires both "knowledge" *and* a "conscious disregard" of an excessive risk. The district court failed to articulate how the jail then "conscious[ly] disregard[ed]" this knowledge. As such, 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 should resulted here if not for the Ninth Circuit's deviation, 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 here abused its discretion by failing to analyze 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).

b. The District Court's Clearly Erroneous Factual Findings and their Adoption by the Ninth Circuit

Even without this error, the Ninth Circuit affirmed the district court's abuse of discretion by relying on clearly erroneous factual findings. The district court relied heavily on its belief that "the numbers speak for themselves" to support its deliberate indifference determination. Based on its interpretation of the epidemiological evidence in the record, the district court asserted that 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." ECF 65 at p. 14. To the district court, since the Sheriff "undoubtedly [knew] of the risks posed by COVID-19 infections," its actions satisfied subjective deliberate indifference.

The district court also mistakenly found that 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 analysis is severely flawed. The number provides no information as to how many active COVID-19 cases are in

the jail at any given time. Even if the prison had *zero* active COVID-19 cases at the time the injunction was issued, the district court's assumed rate of infection would still be 12.4% under this flawed analysis. Put another way, the cumulative number of cases (that have ever passed through the jail will always go up and can never go down. A more accurate and precise approach to 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.

While it is true that the rate of COVID-19 infection and the number of active COVID-19 cases did increase from April 22 to May 8, the district court did not issue the injunction until May 26, 2020; and it remains in place today. As the evidence cited in the district court's own order shows, from May 8—prior to Respondents-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. In fact, during the week immediately prior to the district court's injunction, new infections decreased by 76 per cent compared to the previous week. The district court's finding that "[r]ates of COVID-19 infection at the Jail are skyrocketing," was thus clearly erroneous. Moreover, since the injunction issued, the number of cases dropped to 35 on June 3, and to 23 cases on June 10. On limited remand the district court was presented with preliminary evidence in the form of sworn declarations

that the number had dropped to four (4) cases, and that those were from new arrestees, not transmission within the jail. Nevertheless, the district court denied relief on remand, failed to hold an evidentiary hearing, issued discovery orders, and the Ninth Circuit again refused to intervene to correct the situation. Petitioners were denied an opportunity for a hearing to show both the efforts undertaken and the success of those measures. Further, despite the overwhelming evidence submitted of reduced jail COVID infections, the court refused to consider it.

Likewise, from May 8 until the injunction issued there was a 67 per cent decrease in the number of active COVID-19 cases. Similar to the infection rate, the district court's finding that the number of cases of COVID-19 was "soaring," was factually inaccurate because the number of active COVID-19 cases decreased in the two-and-a-half weeks before the injunction issued.

As to the split in the Circuits on this issue, the Eleventh Circuit vacated an injunction notwithstanding that the number of confirmed COVID-19 cases rose from zero at the time Plaintiffs filed their complaint to 163 just three weeks later. *Swain*, 2020 WL 3167628, at *4. This increase in cases occurred just before the district court entered its preliminary injunction, *id.*, in sharp contrast with the significant decrease in cases here. The district court's findings are the type of clearly erroneous factual findings that qualify as an abuse of discretion. *See, e.g.*, *Eat Right Foods Ltd. v. Whole Foods Market, Inc.*, 880 F.3d

1109, 1120 (9th Cir. 2018) (finding the district court abused its discretion by incorrectly identifying the time period the relevant facts occurred).

Indeed, Applicants-Appellants agree with the district court's finding that "the numbers speak for themselves;" however, what the numbers tell is a story of prompt and successful intervention in the face of an incoming pandemic. The jail's robust measures—prior to any injunction—successfully decreased the number of active COVID-19 cases as well as the infection rate. The Sheriff took the unprecedented step of voluntarily lowering the jail population from 5,303 inmates on March 1 to 2,799 inmates on May 19 to increase social distancing between inmates, free up housing space, and provide for quarantine and isolation. The fact that the Sheriff voluntarily released approximately 53 per cent of the jail population to mitigate the spread of COVID-19 vitiates the factual finding that the jail was subjectively deliberately indifferent to the risk of harm to the inmates.

Increased safety and hygiene protocols and a clear improvement in jail conditions simply cannot equate to "conscious disregard" for the welfare of inmates. *See Colwell v. Bannister*, 763 F.3d 1060, 1068 (9th Cir. 2014) (internal quotation marks omitted). Rather the evidence shows that the Sheriff actively undertook voluntary measures to mitigate the risk of harm posed by COVID-19. As described in *Valentine*, the district court cannot find conscious disregard solely because "the district court might do things differently." *Valentine*, 956

F.3d at 803.

The district court abused its discretion by determining Petitioners had not demonstrated a likelihood of success on the merits based on a clearly erroneous assertion that the rate of the number of COVID-19 infections was increasing and that the jail had knowingly failed to take necessary safety measures. The Ninth Circuit, in supporting the district court's factually and legally erroneous ruling, created a split among the Circuits on this issue, during a national pandemic response.

D. APPLICANTS HAVE MADE A STRONG SHOWING OF LIKELIHOOD OF SUCCESS ON THE MERITS AND NEED ONLY SHOW PROBABLE IRREPARABLE HARM

There is a "strong likelihood [Applicants here will] succe[ed] on the merits," and as such, Applicants need only show that irreparable harm is *probable*. *Leiva-Perez*, 640 F.3d at 970. The district court's injunction prevents Applicants-Defendants from managing the Orange County's jails without federal judicial supervision. As this Court itself has cautioned, courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities. *Procunier v. Martinez*, 416 U.S. 396, 405 (1974). In direct contrast to this, the district court here delves into micromanagement of jail operations—it mandates the amount of hand soap and number of paper towels available to each inmate. The majority side of the circuit

split has avoided federal courts usurping the role of jail management from the elected officials of Orange County, California. *Contra Maryland v. King*, 567 U.S. 1301, at *3 (2012) (Roberts, C.J., in chambers) (finding irreparable harm where injunction interfered with the state's "enforcement and public safety interests"); *see also Valentine*, 956 F.3d at 803 ("The Texas Legislature assigned the prerogatives of prison policy to TDCJ. The district court's injunction prevents the State from effectuating the Legislature's choice and hence imposes irreparable injury.") (internal citation omitted); *Swain*, 958 F.3d at 1090 ("Absent a stay, the defendants will lose the discretion vested in them under state law to allocate scarce resources among different county operations necessary to fight the pandemic. Through its injunction, the district court has taken charge of many administrative decisions typically left to MDCR officials."); *Swain*, 2020 WL 3167628, at *12 (same).

The issue of comity and deference to local executive officials is particularly important during the COVID-19 pandemic. Chief Justice Roberts recently emphasized the need to defer to elected officials as they confront the immense public policy problems created by COVID-19:

> Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). When those officials "undertake[] to act in areas fraught with medical and scientific "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable

to the people.

S. Bay United Pentecostal Church v. Newsom, No. 19A1044, 2020 WL 2813056, at *1 (U.S. May 29, 2020) (Roberts, C.J., in chambers).

Here, the district court's injunction seizes the role of administration of the jail, prevents nimble responses to the virus in an ever-changing landscape, and puts focus on compliance with the order and avoiding contempt, rather than squarely on combatting the contagion. *See Valentine*, 956 F.3d at 803 (observing that the preliminary injunction issued by the district court "locks in place a set of policies for a crisis that defies fixed approaches"); *Swain*, 958 F.3d at 1090 ("The injunction hamstrings MDCR officials with years of experience running correctional facilities, and the elected officials they report to, from acting with dispatch to respond to this unprecedented pandemic. They cannot respond to the rapidly evolving circumstances on the ground without first seeking a permission slip from the district court. Such a prohibition amounts to an irreparable harm.") (internal quotation marks and citation omitted)).

The Ninth Circuit, in countenancing this injunction clashes with this Court's own guidance regarding the deference owed to jail officials. Moreover, even if the evidence was conflicting below, it does not justify judicial micromanagement, as the other side of the circuit split have properly found. *See Swain*, 2020 WL 3167628, at *6, *11 (vacating injunction despite conflicting evidence whether the jail was complying with its stated protocols); *see also Valentine*, 140 S. Ct. at 1600 n.2 (statement of Sotomayor, J.) (agreeing with denial of application to

vacate stay while noting that the prison had "regularly fail[ed] to comply with standards far below" the CDC guidelines, despite its representation to the district court that it "updated [its] policy periodically in response to the ever-evolving CDC guidelines," *Valentine*, 956 F.3d at 805 n.2).

The district court's injunction causes irreparable harm. It requires the Sheriff to allocate public resources in a specific manner, without regard to the specific institutional needs and potentially draws those resources away from other safety measures that could be implemented to better effect. prisoners in other jails. Those expenditures and their effects cannot be recovered. *See Swain*, 958 F.3d at 1090. Such harm is necessarily irreparable. *Id.*

E. THE THIRD AND FOURTH *NKEN* FACTORS ALSO SUPPORT A STAY HERE DUE TO THE DISTRICT COURT'S MICROMANAGMENT OF JAIL OPERATIONS DURING A PANDEMIC

The third and fourth *Nken* factors—harm to the party opposing the injunction and the public interest—"merge when the Government is the opposing party." 556 U.S. at 435. The elected Sheriff, and by extension the voters of Orange County, are harmed when the judiciary usurps its authority to manage the jails, especially during a global pandemic. Moreover, the public is undoubtedly interested in the proper management of jails. The fourth and fifth *Nken* factors here also weigh in favor of a stay. *See Valentine*, 956 F.3d at 804; *Swain*, 958 F.3d at 1090–91.

F. CONCLUSION

Applicants-Defendants respectfully ask for a stay of the district court's May 26, 2020 injunction to preserve the *status quo* and allow the Sheriff to continue to nimbly respond to this virus while the issue is resolved on the merits below.

Respectfully submitted,

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