No. 20A19

IN THE

Supreme Court of the United States

DON BARNES, SHERIFF,
ORANGE COUNTY, CALIFORNIA, et al.,

Applicants.

v.

MELISSA AHLMAN, et al.,

Respondents.

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR STAY

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July 30, 2020

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INTRODUCTION

There is a COVID-19 crisis in the Orange County Jail ("the Jail"). Prior to the district court's injunction, Applicants were shuffling inmates around the Jail in defiance of Centers for Disease Control and Prevention ("CDC") Guidelines and leaving detainees packed into dayrooms sharing the same air and bathrooms without social distancing; symptomatic individuals were not being separated from asymptomatic ones, and at least one COVID-positive detainee was housed with individuals who had not tested positive; Applicants provided watered-down disinfectant and make-shift masks made from blood-stained sheets; and symptomatic detainees were being denied tests. As the district court found, "compliance [with the CDC Guidelines] has been piecemeal and inadequate." ECF No. 65 at 14.[1] Perhaps unsurprisingly, 369 detainees had tested positive as of the time the preliminary injunction was issued, reflecting "an increase of more than 300 confirmed cases in a little over a month." 9th Cir. Appeal No. 20-55568, Dkt. No. 19-1 at 4. In granting the preliminary injunction, the district court denied a request to order the release of detainees and limited its relief to measures that Applicants' declarant had testified the Jail had "already implemented." Balicki Decl., ECF No. 44-10 ¶ 2.

The facility's testing failures mean that any figures on COVID-19 infections are understated. Reported cases decreased for a time after entry of the injunction,

[1] All references to ECF are citations to the district court docket (Case No. 8:20-cv-00835-JGB-SHK). All references to 9th Cir. Dkt. are citations to the Ninth Circuit dockets (Appeal No. 20-55568 and Appeal No. 20-55668).

but the crisis has far from abated. From June 24 to July 24, the number of positive cases reported as "Medical Isolation (Symptomatic)" in the Jail increased by 1400%. *See infra* Part III at 38–41. Three days *after* filing their Application to Justice Kagan, Applicants informed the district court of 40 new confirmed positive tests, including 15 cases of likely transmission from a current detainee housed in the general population while actively infected with COVID-19. Defs.' 7/24/20 Compliance Report, ECF No. 111 at 2. Yet against this backdrop, and after multiple requests for a stay in the district court and court of appeals have been denied, Applicants ask for the extraordinary relief of a stay from this Court.

Their Application is a case study in why this Court gives "considerable deference" to a district court's decision to deny a stay, *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers), and why there is an "especially heavy burden" when, as here, the "matter is pending before the Court of Appeals" and "the Court of Appeals denied" a stay, *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, J., in chambers). The very premise of the Application—that Applicants have "reduced intra-jail transmission to zero," Application at ii (Question Presented)—is false and contradicted by Applicants' own disclosures last week. The core legal issue they purport to present—whether the injunction should have "exceed[ed] the scope of CDC Guidelines," *id.*—is a curious basis for review of a decision that was based on a finding that Applicants "*are not complying meaningfully with the CDC Guidelines*," and an injunction that tracks those Guidelines. ECF No. 65 at 16 (emphasis added). And Applicants do not even question the district court's

conclusion that plaintiffs are likely to succeed under the Americans with Disability Act and the Rehabilitation Act, a determination that independently supports the preliminary injunction granted here and makes this case an inappropriate vehicle to consider the constitutional issues on which Applicants seek review.

Neither do Applicants mention, much less refute, the court of appeals' reason for finding no irreparable harm from the injunction: that Applicants have "represented not only that [they] 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*." 9th Cir. Appeal No. 20-55568, Dkt. No. 19-1 at 6. To be sure, Plaintiffs do not agree that Applicants have sufficiently implemented these measures. But Applicants are either "already willingly complying with the requirements of the injunction" and so "will suffer no irreparable injury from it," or else "they misrepresented the nature of their response to COVID-19 in the district court, in which case they are not entitled to discretionary relief." *Id.* at 7. Applicants' representations were thus a "sufficient reason" for the court of appeals to deny a stay. *Id.* at 8. In this Court as well, Applicants' "fail[ure] to show irreparable injury from the denial of the stay" means that likelihood of success on the merits "need not be considered." *Ruckelshaus*, 463 U.S. at 1317 (Blackmun, J., in chambers). And while Applicants fail to demonstrate any irreparable harm from the injunction, the risk of serious illness and even death in the absence of an injunction is indisputably irreparable.

Applicants also neglect to mention, much less satisfy, the threshold requirement for a stay from this Court: establishing that a grant of certiorari is

probable. They have failed to demonstrate any basis for a grant of certiorari to review what is, after all, merely a preliminary injunction in a prison-conditions case applying well-settled law to the particular facts presented by a single facility. District courts enter such injunctions frequently across the country, and this Court rarely intervenes. Applicants have shown no basis to depart from that practice here. They fail to identify any split in the Circuits on any legal question. Their real quarrel is with the district court's application of settled legal standards to the facts of this case, and even its credibility determinations. And as noted, Applicants do not even challenge the district court's determinations on the statutory grounds that independently support the injunction. A grant of certiorari is exceedingly unlikely, yet another reason to deny the stay.

Applicants' lack of urgency in the proceedings below only underscores that the extraordinary relief of a stay should not be granted. While pursuing this relief, Applicants are asking the court of appeals for a second extension of time for their opening brief, pointing to the ongoing discovery in the district court. *See* 9th Cir. Appeal No. 20-55568, Dkt. No. 31 at 5. At bottom, Applicants' stay request seeks to shortcut discovery before the district court and normal appellate review by the Ninth Circuit.

Should circumstances improve at the Jail, the courthouse doors remain open to Applicants. The district court has not ruled out granting relief from the injunction in appropriate circumstances, finding only that Applicants' rapid request to dissolve the injunction was "premature." ECF No. 93 at 2. Instead of presenting a rosy spin on the facts to this Court, Applicants are free to present

actual evidence in the district court. But the extraordinary relief they seek from this Court would quite literally endanger the health and wellbeing of everyone who cycles in and out of the Orange County Jail. The Application should be denied.

STATEMENT

1. As the Court is well aware, the COVID-19 pandemic is the most serious public health crisis in generations. It is especially dangerous in jails, whose population includes pretrial detainees and where inmate turnover is more frequent than in prisons. On April 30, 2020, Plaintiffs ("the Detainee Class") filed a complaint on behalf of two classes of individuals alleging that the confinement conditions in the Jail violated the Eighth Amendment, the Fourteenth Amendment,[2] the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act. ECF No. 1. The Detainee Class sought judicial relief to release the most medically-vulnerable people in the Jail and to adopt measures to mitigate the risk of COVID-19 transmission in the Jail.

The Detainee Class presented evidence that Applicants failed to take reasonable prevention measures recommended by the CDC and other public health experts. Applicants had failed to implement appropriate social distancing measures, disregarding the CDC's recommendations. Dayrooms were crowded. *See* Bonilla Decl., ECF No. 41-20 at ¶ 7. Detainees stood shoulder-to-shoulder to use the Jail's telephones, and detainees were required to clean the bedding of detainees who tested positive for COVID-19. *See* Maldonado Decl., ECF No. 79-15 at ¶ 15; Ahlman 5/15/20 Decl., ECF No. 79-33 at ¶ 3. Applicants also failed to implement quarantine and

[2] Plaintiffs' Eighth Amendment claims apply to incarcerated individuals serving a sentence, while the Fourteenth Amendment claims apply to pretrial detainees.

isolation protocols in accordance with CDC Guidelines. *See* Wagner Decl., ECF No. 79-1 at ¶ 5. Instead, symptomatic individuals were not medically isolated. In one case, after a detainee tested positive for COVID-19, he was housed with those who had not tested positive, sharing "the same showers, phones, and pass[ing] the same newspaper around cell to cell." Miranda Decl., ECF No. 41-14 at ¶ 25. Others that were infected and/or symptomatic were allowed to "comingle . . . in the common day room, playing chess and cards," with no regard for their ability to infect others. *See* Ramirez Decl., ECF No. 41-10 at ¶¶ 20, 22, 24.

Applicants further failed to provide adequate cleaning supplies, personal hygiene supplies, and personal protective equipment to curtail the spread of the virus. Applicants provided "watered down" disinfectant and "dirty rags" to detainees to clean common spaces. *See* Farias Decl., ECF No. 41-17 at ¶ 13; Ramirez Decl., ECF No. 41-10 at ¶ 14; Bonilla Decl., ECF No. 41-20 at ¶ 16. Frequently-touched surfaces such as telephones and table tops were not cleaned between uses. *See* Baguiao Decl. ECF No. 41-26 at ¶ 14; Farias Decl., ECF No. 41-17 at ¶ 14. While makeshift "masks" were ostensibly provided, they were fashioned from t-shirts, towels, or "soiled sheets, with stains of feces and blood." Bonilla Decl., ECF No. 41-10 at ¶¶ 10, 11, 14–17.

Applicants also failed to implement an adequate testing regimen at the Jail. Multiple detainees testified to experiencing COVID-19 symptoms, requesting tests, and being denied or ignored. *See* Ramirez Decl., ECF No. 41-10 at ¶ 21; Farias Decl., ECF No. 41-17 at ¶ 9.

2. Based on these facts, the Detainee Class filed an application for a temporary restraining order and a motion for a preliminary injunction to implement protections

against COVID-19 transmission. ECF No. 41. Applicants argued that no preliminary relief was necessary because they had "already . . . implemented" all of the measures that the Detainee Class sought in the complaint, except for releasing certain detainees. ECF No. 44-1 at 9.

On May 26, 2020, the district court entered a preliminary injunction after oral argument and weighing the evidence submitted by the parties. ECF No. 65. The district court found that the "risk of harm within the Jail is undeniably high," that Applicants were not "complying meaningfully with the CDC Guidelines," and the Detainee Class demonstrated a likelihood of success on their claims. *Id.* at 14, 16, 18. The district court concluded that "an institution that is aware of the CDC Guidelines and able to implement them but fails to do so demonstrates that it is unwilling to do what it can to abate the risk of the spread of infection." *Id.* at 17. At the same time, the district court explained that "the CDC Guidance 'is not a statute, nor is it a mandate,'" and "do[es] not contemplate hundreds of infections within the population." *Id.* at 16–17. "Accordingly," the district court reasoned, "the CDC Guidelines represent the floor, not the ceiling, of an adequate response to COVID-19 at the Jail, with at least 369 COVID-19 cases." *Id.* at 17. The district court found the equities weighed in the Detainee Class's favor.

Based on these findings, the district court therefore ordered Applicants to implement certain measures and protocols to bring the Jail into compliance with the CDC Guidelines, and to better ensure the health and safety of the detainees it houses. *Id.* at 20–21. For example, the preliminary injunction requires Applicants to "provide adequate spacing of six feet or more between incarcerated people"; to "ensure that all

incarcerated people have access to hand sanitizer containing at least 60% alcohol"; and to conduct daily health assessments of incarcerated people "to identify potential COVID-19 infections." *Id.* The preliminary injunction also requires Jail staff to wear protective equipment and wash their hands, use hand sanitizer, or change their gloves both before and after interacting with detainees or touching common surfaces. *Id.* at 21. These measures implement the CDC Guidelines in a way tailored to the specific circumstances and conditions in the Jail, as the Guidelines expressly contemplate. *See infra* Part II.D. The district court denied, however, a request to release all medically vulnerable and disabled individuals, finding that the Detainee Class had not "met their burden to prove that the balance of equities tilts in favor" of that relief. *Id.* at 20.

3. Applicants then filed an *ex parte* application to stay the preliminary injunction pending appeal. The district court denied a stay on June 2, 2020, holding that Applicants had not demonstrated they were likely to succeed on appeal, and had submitted no evidence of irreparable injury from the injunction. ECF No. 72. The district court noted that the preliminary injunction order did not require Applicants to implement anything beyond what was requested in the complaint—which Applicants argued they had already implemented prior to the preliminary injunction motion. *See* ECF No. 44-1 at 9. The district court explained that Applicants "cannot claim to have already implemented the requested mitigation measures and also claim that implementation will cause irreparable injury." ECF No. 72 at 2.

Applicants then filed an appeal in the Ninth Circuit and moved for both an Emergency Stay of Injunction and a Stay of Injunction Pending Appeal. The Ninth Circuit denied both motions. In denying the motion for a stay of injunction pending

appeal, the Ninth Circuit held that Applicants "failed to carry their burden of establishing that a stay of the preliminary injunction is appropriate." 9th Cir. Appeal No. 20-55568, Dkt. No. 19-1 at 11.

In reaching this conclusion, the Ninth Circuit underscored that "a showing of irreparable injury is an absolute prerequisite" when seeking a stay of injunctive relief, *id.* at 6, and found that Applicants failed to demonstrate irreparable harm caused by the injunction when they had previously represented to the district court that they were willingly complying with the requirements of the injunction. *See id.* at 7.

Although the Ninth Circuit explained that "the absence of irreparable harm is alone sufficient reason to deny" Applicants' motion for a stay, *id.* at 8, it further concluded that Applicants were not likely to demonstrate that the district court abused its discretion in issuing the injunction, *id.* at 9. The appeals court explained that the district court's factual findings are reviewed for clear error, and the facts "portrayed a response that fell well short of the CDC guidelines and resulted in an explosion of COVID-19 cases in the jail." *Id.* The court of appeals ordered a remand, however, "for the limited purpose of allowing the district court to consider whether changed circumstances justify modifying or dissolving the injunction." *Id.* at 1; *see id.* at 11–12. Judge Nelson dissented, concluding that the district court misapplied the law and clearly erred in assessing the facts, which in his view showed that the Applicants had taken protective measures that had sufficiently reduced the infection rate within the Jail. 9th Cir. Appeal No. 20-55568, Dkt No. 19-2 at 1.

4. On remand, the Detainee Class moved for expedited discovery because Applicants repeatedly refused to provide information on their compliance with the

preliminary injunction. ECF No. 83. One day after the Detainee Class moved for expedited discovery, Applicants filed an *ex parte* application requesting that the district court immediately dissolve the preliminary injunction. ECF No. 86.

The district court granted the motion for expedited discovery and denied Applicants' motion. ECF No. 93 at 3. The district court explained that before it could consider whether circumstances had changed to warrant dissolution of the injunction, the Detainee Class must have the opportunity to evaluate Applicants' evidence. *Id.* at 2. "Because it would serve both parties' interests to quickly determine the actual state of the outbreak," the district court reasoned, "there is good cause for ordering expedited discovery." *Id.* at 2. The district court further noted the oddity of Applicants requesting to dissolve the preliminary injunction even as they (1) "insist[] 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," and (2) "refuse to provide the [Detainee Class] with any information regarding their compliance with the" preliminary injunction. *Id.* at 3.

Applicants filed a second appeal with the Ninth Circuit, Appeal No. 20-55668, and filed an emergency motion for a stay of the preliminary injunction in light of the evidence of changed circumstances they presented in support of their application to dissolve the injunction in the district court. 9th Cir. Appeal No. 20-55668, Dkt. No. 2-1. The Ninth Circuit denied the motion on July 3, 2020. The Ninth Circuit agreed with the district court that the one-sided evidence of changed circumstances proffered by Applicants did not compel dissolving the injunction immediately, without further discovery. The Ninth Circuit explained that its prior order "explicitly contemplated

that the district court would receive evidentiary submissions from *both* sides in evaluating whether current circumstances warrant modification of the preliminary injunction." 9th Cir. Appeal No. 20-55668, Dkt. No. 4 at 3 (emphasis in original). The district court's order of expedited discovery was consistent with the remand and "necessary only because Defendants had refused to respond voluntarily to Plaintiffs' discovery requests regarding the current conditions in the jail." *Id.* Moreover, it was "particularly appropriate" for the district court to allow the Detainee Class to conduct expedited discovery before ruling on the motion to dissolve the preliminary injunction, "given Defendants' conflicting statements about their ability to comply with the requirements of the injunction." *Id.* Therefore, the Ninth Circuit concluded Applicants had not demonstrated a likelihood of success in showing the district court abused its discretion in denying the motion to dissolve the injunction as premature. Judge Nelson again dissented, stating that the district court should have stayed the preliminary injunction pending expedited discovery because of evidence of decreased transmission of COVID-19 within the Jail. *Id.* at 4–7.

5. Meanwhile, COVID-19 has continued rapidly spreading throughout southern California and Orange County, and the Jail is no exception. As of July 24, 2020, there were a record high 56 symptomatic individuals in medical isolation in the Jail (21 in the Intake Release Center and 35 in Theo Lacy Facility),[3] an increase of 1400% between June 24, 2020 and July 24, 2020, indicating exponential growth while Applicants were supposedly bringing things under control. *See infra* Part III at 38–41.

[3] The Jail houses inmates across four facilities: Theo Lacy, the Men's Central Jail, the Women's Central Jail, and the Intake and Release Center. ECF No. 65 at 4.

Even these numbers are likely an underestimate of the true extent of the disease in the Jail, because Applicants have never attempted or even claimed to test everyone, regardless of symptoms. *See, e.g.,* ECF No. 106 at 2 (reporting total cumulative tests for detainees since March and current tests, both far below the cumulative and current population numbers). The risk of COVID-19 in the Jail includes the increased potential of new infections from the outside community, using both staff and newly-booked detainees as vectors (especially considering the fact that staff are not required to be tested, as Commander Balicki recently confirmed in a deposition). Failures to take adequate precautionary measures at the Jail have allowed infected individuals to mingle with the Jail's general population, including in close quarters while in transit and at court. This in turn has led to greater spread of the virus. Defs.' 7/24/20 Compliance Report, ECF No. 111 at 2–3; Defs.' 7/10/20 Compliance Report, ECF No. 106 at 2–3. All of these developments demonstrate the persistent likelihood of re-seeding the Jail outbreak from the Orange County community, the ongoing risk of harm, and the continued need for compliance with CDC Guidelines and the preliminary injunction order.

ARGUMENT

The Court or a single Justice "will grant a stay pending appeal only under extraordinary circumstances, and a district court's conclusion that a stay is unwarranted is entitled to considerable deference." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983) (Blackmun, J., in chambers). Where, as here, the "matter is pending before the Court of Appeals [on the merits of the preliminary injunction]," and "the Court of Appeals denied [the applicant's] motion for a stay," the "applicant has an

especially heavy burden." *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, J., in chambers); *see also Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay application) ("When a matter is pending before a court of appeals, it long has been the practice of members of this Court to grant stay applications only upon the weightiest considerations." (citations omitted)); *Heckler v. Redbud Hosp. Dist.*, 473 U.S. 1308, 1312 (1985) (Rehnquist, J., in chambers) ("[A] stay application to a Circuit Justice on a matter before a court of appeals is rarely granted." (citations omitted)).

To establish the propriety of a stay, the applicant must make a four-part showing: (1) "a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; (3) "a demonstration that irreparable harm is likely to result from the denial of a stay"; and (4) "in a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

Applicants do not even cite or address the appropriate standard, nor do they acknowledge the heavy burden they bear. They fail to satisfy any of the requirements for a stay.

I. The Court Is Unlikely to Grant Certiorari.

A "reasonable probability" that certiorari will be granted is a "threshold consideration" that is "consistently required" for the issuance of a stay. *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). Yet Applicants do not

even mention this requirement, much less satisfy it. For a host of reasons, the Court is unlikely to grant certiorari. There is no split in the circuits, and this case does not present an "important federal question" that calls for Supreme Court review. Sup. Ct. R. 10(a). The decision below did nothing more than apply well-established precedent to the particular facts and circumstances of this case. The principal question at issue here—whether Applicants were deliberately indifferent to a substantial risk of harm presented by COVID-19—is a fundamentally fact-bound question. Indeed, as this Court has recognized, deliberate indifference "is a question of fact subject to demonstration in the usual ways." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

Applicants' stay request reflects little more than their narrow disagreement with the district court's factual findings and amounts to a request for mere error correction. *See, e.g.*, Application at 7 ("The decision is erroneous both on the law and the facts as they existed when the district court issued its injunction . . . ."); *id.* at 17 ("[T]he Ninth Circuit affirmed the district court's abuse of discretion by relying on clearly erroneous factual findings."); *id.* at 19 (district court's finding "was factually inaccurate"). The district court's factual findings turned on its determination that Plaintiffs' evidence and testimony was more credible and entitled to more weight than Applicants' competing evidence. *See, e.g.*, ECF No. 65 at 14 n.10 ("To the extent that the OCSD officer testimony submitted by Defendants conflicts with the inmate testimony submitted by Plaintiffs, the Court finds the inmate testimony more credible."); *see also* 9th Cir. Appeal No. 20-55568, Dkt. No. 19-1 at 4 ("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 . . . .").

This Court does not grant certiorari to review credibility determinations. *See Moore v. Illinois*, 423 U.S. 938, 939 (1975) (Stewart, J., separate statement) ("[W]e cannot from this vantage point intelligently reassess the state courts' determination of questions of credibility."). Nor does it "act as a court of simple error correction." *Overton v. Ohio*, 534 U.S. 982 (2001) (Breyer, J., statement respecting denial of certiorari). It is thus exceedingly unlikely that the Court would grant certiorari to review the district court's findings of fact and determinations of credibility.

A. There is no split in the Circuits.

Applicants attempt to manufacture a circuit split, but there is none. Applicants contend that the Ninth Circuit's decisions here conflict with the decisions of three other circuits—the Fifth, Sixth, and Eleventh—which addressed deliberate indifference claims based on the ongoing COVID-19 pandemic. Application at 6, 14–16. *See Swain v. Junior*, 958 F.3d 1081 (11th Cir. 2020); *Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020); *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020). According to Applicants, these circuits each struck down injunctions that compelled officials to adopt protective measures in detention facilities above and beyond those required by CDC Guidelines, whereas the decisions below purportedly imposed requirements "exceeding CDC Guidelines." Application at 9–11. No such conflict exists—these cases all applied the same legal standards, and merely reflect the unremarkable fact that conditions in different jails are different, responses to the pandemic in different jails have been different, and some deliberate indifference claims are stronger than others.

First, Applicants' key premise is wrong: the district court did not impose requirements exceeding the CDC Guidelines, and the very examples Applicants provide comport with those Guidelines. *See infra* Part II.D. Indeed, the critical basis of the district court's decision was that Applicants *were not complying with the CDC Guidelines*, and it specifically framed its injunction as "Mandating Compliance with CDC Guidelines." ECF No. 65 at 16, 19.

Second, although Applicants insist that these circuits stayed or vacated preliminary injunctions "*because* they exceed the CDC guidelines," Application at 10 (emphasis added), the decisions do not say that.

In *Swain*, for example, there is no indication that the Eleventh Circuit vacated the district court's injunction *on the basis* that it imposed requirements exceeding CDC Guidelines, or that the court even believed that the injunction imposed requirements in excess of those Guidelines. To the contrary, the Eleventh Circuit noted that the CDC's Guidelines "'formed the basis' of [the] requirements" imposed by the district court. *Swain*, 958 F.3d at 1087; *see also Swain v. Junior*, 961 F.3d 1276, 1281 (11th Cir. 2020) ("[T]he district court entered a 14-day TRO, *based largely on the CDC's guidance* for correctional facilities." (emphasis added)). In *Wilson*, there is likewise no indication that the Sixth Circuit either believed that the district court's injunction imposed requirements exceeding CDC Guidelines, or that doing so would be a basis for vacatur. *See generally Wilson*, 961 F.3d 829. Nor could that have been the basis for the decision, as the district court's order only "provide[d] for mitigation efforts in line with CDC guidelines." *Wilson v. Williams*, No. 4:20-CV-00794, 2020 WL 1940882, at *4 (N.D. Ohio Apr. 22, 2020), *vacated*, 961 F.3d 829 (6th Cir. 2020). And while the

Fifth Circuit in *Valentine* noted that "[s]ome of the conduct required of Defendants under the injunction goes even further than CDC guidelines," 956 F.3d at 801, the court of appeals determined that officials were largely complying with CDC Guidelines, and that their failure to take additional measures, by itself, was insufficient to demonstrate deliberate indifference. *See id.* at 802. By contrast, the district court here determined that the Jail was *not* complying with CDC Guidelines.

Third, the outcomes in *Swain*, *Valentine*, and *Wilson* rested on facts and circumstances materially different from those present here. At a high level of generality, each case involved claims of deliberate indifference in responding to risks presented by COVID-19, and in each case a court of appeals considered whether to stay an injunction. But the similarities stop there.

In *Swain* and *Valentine*, for instance, the Eleventh and Fifth Circuits respectively stayed the district courts' injunctions largely for reasons not present here. Both cases were decided, at least in part, on the basis of a failure by the Plaintiffs to exhaust grievance procedures or prove unavailability of those procedures, as required by the PLRA. *See Valentine*, 956 F.3d at 804–05; *Swain*, 958 F.3d at 1091-92. No such issue is present here. 9th Cir. Appeal No. 20-55568 Dkt. No. 19-1 at 9 n.6 ("Defendants have not challenged the district court's finding that Plaintiffs likely satisfied the PLRA's exhaustion requirement."). Both also found legal error in the lower court's failure to appropriately distinguish between objective and subjective indifference, *Valentine*, 956 F.3d at 802; *Swain*, 958 F.3d at 1089, whereas the court here made precisely that distinction. *See infra* Parts II.A, II.B.

Similarly, although the *Wilson* court ultimately vacated the district court's

order, it did so only after a fact-intensive inquiry into the reasonableness of the federal Bureau of Prison's ("BOP") response to COVID-19. That inquiry found that the BOP had sufficiently implemented effective measures. The court of appeals in *Wilson* recognized that an institution's failure to comply with its protocols may be evidence of deliberate indifference, but found that—unlike in the present case—no such failure was evident there. *Wilson*, 961 F.3d at 843; *see also* ECF No. 65 at 14 ("[A]lthough Defendants may have a policy to comply with the CDC Guidelines, actual compliance has been piecemeal and inadequate."). Here, by contrast, the district court granted the preliminary injunction after a searching, if preliminary, factual inquiry and then declined to maintain its findings until the parties had the opportunity to develop the factual record further through expedited discovery.

More importantly, however, different outcomes under different facts does not remotely mean there is a split of authority on any *question of law*. *Swain*, *Valentine*, and *Wilson* all applied the same legal standards to different facts and evidentiary records in determining that the government was likely to succeed on the merits. None asserted a rule that conflicts with the court of appeals here; applying the same constitutional standards, each looked at the nature of the facilities in which the plaintiffs were incarcerated, the particularities of COVID-19 spread (or lack thereof) in each facility, the specific measures taken by each facility to protect detainee welfare, and the particular requirements of the injunctions issued by each lower court. For instance, although Applicants assert that the outbreaks in these cases "were far more substantial" than the outbreak in this case, Application at 15, the actual data show otherwise. In *Swain*, 163 inmates were infected with COVID-19—approximately one-

third as many as in the present case. *Swain v. Junior*, No. 1:20-CV-21457-KMW, 2020 WL 2078580, at *2 (S.D. Fla. Apr. 29, 2020), *vacated and remanded*, 961 F.3d 1276 (11th Cir. 2020). In *Wilson* there were even fewer cases—only 59—in a facility housing similar numbers of individuals as the Orange County Jail. *Wilson*, 961 F.3d at 840. And in *Valentine*, the district court appeared to have been aware of only a single confirmed case of COVID-19 when it issued its injunction. *See Valentine v. Collier*, No. 4:20-cv-1115, 2020 WL 1916883, at *9 (S.D. Tex. Apr. 20, 2020) ("[T]he Pack Unit has already reported one confirmed case of COVID-19. . . ."). That is not a split. That is how the system is supposed to work; lower courts applying the same legal standard to different circumstances should reach different results.

On top of this there are myriad other fact-intensive distinctions among the cases: the nature of the facilities (local jails like the Orange County Jail have significantly more population turnover than prisons), the length of time over which inmates were being infected, differences in the prevalence of COVID-19 in different communities, and the extent to which experts found that the facility was consistently and sufficiently implementing appropriate policies. The court of appeals in *Swain*, for example, found in favor of the defendants only after a district court-commissioned expert found that the facility's staff "should be commended for their commitment to protect the staff and inmates in this facility during this COVID-19 pandemic." 958 F.3d at 1089. Likewise, the court of appeals in *Valentine* stayed the district court's injunction only after concluding that defendants were already taking adequate protective measures, including "many of the things that the district court [had] ordered." 956 F.3d at 801–02.

The differences extend to the prison officials' responses. Unlike in *Swain* and *Valentine*, the district court here determined that Applicants "undoubtedly know of the risks posed by COVID-19 infections" because they had "been repeatedly warned by several organizations—including a group of Orange County Sherriff deputies—of the dangers from COVID-19 in the Jail." ECF No. 65 at 17. The court further found that Applicants "knew, by way of the CDC Guidelines, that failure to take certain precautionary measures would result in an increase in the spread of infections." *Id.* at 17–18. On this basis, the district court concluded "that Plaintiffs have established the likelihood of subjective deliberate indifference." *Id.* at 18.

Further, Applicants provided the district court with contradictory information, while Plaintiffs have provided significant evidence of Jail staff's failure to comply with policies, of Applicants' outright refusal to follow court orders, and of hazardous conditions in which COVID-19 continues to spread rapidly inside the institution. *See infra* Part I.B.; *see also* ECF Nos. 106, 107, 108, 111, 66-4.

Thus, to the extent the outcome in this case differs from the outcomes in *Swain* and *Valentine*, the difference merely reflects that the district court was presented with a different factual record and therefore made different factual findings. As discussed above, those factual disputes do not constitute a split meriting this Court's review.

B. This case would be an inappropriate vehicle to address any asserted split in the Circuits.

In any event, the decision below rests not only on the Eighth and Fourteenth Amendments, but also independently on the ADA and Section 504 of the Rehabilitation Act. The district court certified a subclass of disabled detainees and determined that

their ADA and Rehabilitation Act claims are likely to succeed, and Applicants do not even challenge the district court's findings with respect to those claims, much less point to any split in the circuits. ECF No. 65 at 18. All of the relief ordered by the district court's preliminary injunction can be sustained squarely as unchallenged relief under disability rights laws. All of the changes ordered in the decision below are orders for reasonable modifications and nondiscriminatory methods of administration necessary under the ADA and Section 504 of the Rehabilitation Act to avoid disability discrimination. These changes must be implemented throughout the Jail to address the violations of the statutory rights of the members of the disabled subclass, who live and move throughout the Jail. As those statutory grounds provide an independent and unchallenged basis for the preliminary injunction, this case would be an inappropriate vehicle to address any conflicts regarding the constitutional claims, even if such conflicts existed. Applicants' failure even to address the statutory bases for the injunction is sufficient, in itself, to deny certiorari.

There are additional vehicle problems as well. This case is at a preliminary stage and discovery remains ongoing. This Court generally prefers to review final judgments with fully developed factual records. The interlocutory status of this case is a particularly strong factor counseling against review in light of the factual record's state of flux. Indeed, in its June 26 order denying Applicants' *ex parte* application to dissolve the injunction, the district court also expedited discovery to allow Plaintiffs the opportunity to properly evaluate Applicants' evidence. As the court explained: "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." ECF No. 93 at 2.

Applicants' inconsistent litigation positions have likewise clouded the factual record. While the preliminary injunction motion was pending, Applicants maintained, in sworn declarations, that they had "already implemented all of the mitigation efforts outlined in [Plaintiffs'] request for relief." Balicki Decl., ECF No. 44-10 at 2. In their second motion for a stay pending appeal, however, Applicants changed course and submitted a new declaration asserting 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." Am. Balicki Decl., 9th Cir. Appeal No. 20-55568, Dkt. No. 9 at 2. As the Ninth Circuit noted, "Defendants' new position cannot be reconciled with [their prior] 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*." 9th Cir. Appeal No. 20-55568, Dkt. No. 19-1 at 2. The uncertainties created by Applicants' shifting factual claims render this case a poor vehicle for resolving the issues presented. *See Taylor v. Yee*, 136 S. Ct. 929, 930 (2016) (Alito, J., concurring in the denial of certiorari) ("The convoluted history of this case makes it a poor vehicle for reviewing the important question it presents. . . .").

II. The Court Is Unlikely to Reverse the Lower Court's Decisions.

A. The district court correctly stated and appropriately applied the objective deliberate indifference standard.

Applicants contend that the district court abused its discretion by misstating, mischaracterizing, or misapplying the correct legal standard for determining whether prison officials acted with objective deliberate indifference. Application at 11–14. But a review of the district court's order confirms that the district court identified and applied the correct standard. In the unlikely event this Court were to eventually grant certiorari, there is little chance it would reverse.

To establish objective deliberate indifference, a plaintiff must prove that "the defendant did not take reasonable available measures to abate [a substantial risk of harm], even though a reasonable official in the circumstances would have appreciated the high degree of risk involved." *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018), *cert. denied sub nom. Cty. of Orange, Cal. v. Gordon*, 139 S. Ct. 794 (2019); *see also Farmer*, 511 U.S. at 847 (prison official is deliberately indifferent if, among other things, he "disregards [a substantial risk of serious harm] by failing to take reasonable measures to abate it"); *Shorter v. Baca*, 895 F.3d 1176, 1190 (9th Cir. 2018). To satisfy this element, "the defendant's conduct must be objectively unreasonable." *Gordon*, 888 F.3d at 1125 (quoting *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016)). "Thus, the plaintiff must 'prove more than negligence but less than subjective intent—something akin to reckless disregard.'" *Id.* (quoting *Castro*, 833 F.3d at 1071).

In its May 26 order, the district court determined that Plaintiffs had established

objective deliberate indifference. ECF No. 65 at 14. Specifically, the court found that "[t]he risk of harm within the Jails is undeniably high" given the ongoing spread of COVID-19, that Applicants had failed to "comply[] meaningfully with the CDC Guidelines" to abate the risk of infection, and that Applicants' "failure to comply demonstrates deliberate indifference toward the health and safety of the inmates." *Id.* at 14–17. Based on these findings, the court concluded that "Plaintiffs have demonstrated a likelihood of establishing that defendants are deliberately indifferent" to the risk of COVID-19 infection faced by Plaintiffs. *Id.* at 17.[4]

Although Applicants baldly assert that "[t]he district court employed an 'incorrect legal standard' to arrive at its conclusion of objective deliberate indifference," Application at 13, they do not contest that the district court set forth the appropriate legal standard. Nor could they, as the district court cited and quoted the same Ninth Circuit decisions that Applicants cite to establish the objective deliberate indifference standard. *Compare* ECF No. 65 at 13–14 (citing and quoting *Gordon*, 888 F.3d at 1125), *with* Application at 12 (same).

Instead, Applicants latch onto two sentences in the order to argue that the

[4] Applicants opine that "[i]t is unclear why the district court did not find that voluntarily releasing 53 percent of the detained inmates was reasonable enough." App. at 13. Although Applicants describe this measure as "voluntary," they neglect to mention that a large number of these releases were pursuant to court orders under a statewide "zero bail" order, which zeroed out bails for most minor offenses. *See* JUDICIAL BRANCH OF CALIFORNIA, *Judicial Council Adopts New Rules to Lower Jail Population, Suspend Evictions and Foreclosures* (Apr. 6, 2020), https://newsroom.courts.ca.gov/news/judicial-council-adopts-new-rules-to-lower-jail-population-suspend-evictions-and-foreclosures; *see* ECF No. 44-9 at 2; *see infra* Part II.C. This order has since been rescinded, contributing to the now rising population of detainees in the Jail. *See, e.g.*, ECF No. 110 at 3.

district court mischaracterized and misapplied the appropriate legal standard (i.e., whether the defendant failed to take reasonable available measures to abate a substantial risk of harm). These sentences cannot bear the weight Applicants place upon them.

First, in concluding that Applicants' failure to comply with CDC Guidelines demonstrated their deliberate indifference, the court stated: "An institution that is aware of the CDC Guidelines and able to implement them but fails to do so demonstrates that it is unwilling to do what it can to abate the risk of the spread of infection." ECF No. 65 at 17. Applicants contend that because a defendant's subjective beliefs about available measures is irrelevant to objective deliberate indifference, their "aware[ness]" of the CDC Guidelines is immaterial. Application at 13. But Applicants acknowledge that "[t]he objective deliberate indifference standard examines whether a jail took 'reasonable available measures to abate [the] risk.'" *Id.* (alteration in original). And the district court's order explained at length that Applicants had failed to take reasonable available measure to abate the risk of COVID-19 infections, including by failing to comply with CDC Guidelines.

Second, Applicants make much of the district court's statement that "they must fully and consistently comply [with CDC Guidelines]," ECF No. 65 at 17, contending that "'full and consistent' compliance is a higher standard than required by the Constitution, and this standard is not found in precedent." Application at 13. Read in context, however, the district court's statement plainly does not treat the CDC Guidelines as binding law; it merely reflects the commonsense notion that Applicants' manifestly incomplete compliance with CDC Guidelines is evidence of deliberate

indifference. As the court explained (in text Applicants notably omit), regular and consistent compliance with CDC Guidelines helps ensure "that the compliance is an effective tool to abate the spread of infection." ECF No. 65 at 17.

In short, Applicants cannot establish that the Court misstated or mischaracterized the relevant legal standard for establishing objective deliberate indifference.

B. The district court correctly stated and appropriately applied the subjective deliberate indifference standard.

Under the Eighth Amendment, an official acts with deliberate indifference when he or she: (1) "knows that inmates face a substantial risk of serious harm," and (2) "disregards that risk by failing to take reasonable measures to abate it." *Farmer*, 511 U.S. at 827); *see also Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1078 (9th Cir. 2013). Therefore, in addition to the objective deliberate indifference required for a Fourteenth Amendment violation, a plaintiff must show that an official acted with subjective deliberate indifference, i.e., that an official knew of the substantial risk of serious harm, to establish an Eighth Amendment violation.

Applicants argue that the district court abused its discretion by applying the incorrect legal standard for the subjective element of the Eighth Amendment claim. First, Applicants argue that the district court erred because it "relied solely" on 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." Application at 16. This is not true. The district court also relied on the fact that Defendant Barnes received "repeated[] warn[ings] by several organizations—including

a group of Orange County Sherriff deputies—of the dangers from COVID-19 in the Jail." ECF No. 65 at 17.

Second, Applicants argue that the district court erred by failing to explicitly analyze whether Applicants "consciously 'disregarded'" their knowledge that failure to take certain precautionary measures would increase the spread of COVID-19 infections. Application at 15–17. However, Applicants mischaracterize the proper legal analysis, which does not require courts to separately analyze whether an official "consciously disregarded" a risk. This Court has made clear that to violate the Eighth Amendment, "it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer*, 511 U.S. at 842.

Here, the district court applied the proper legal standard to conclude that the Detainee Class showed a likelihood of success on their claim that Applicants acted with deliberate indifference in violation of the Eighth Amendment. The district court correctly reasoned that Applicants "undoubtedly kn[e]w of the risks posed by COVID-19 infections," as they received repeated warnings about the risk and guidance from the CDC about the spread of infections. ECF No. 65 at 17. The district court also correctly concluded that Applicants' failure to meaningfully comply with the CDC Guidelines demonstrated a failure to take reasonable measures to abate the substantial risk of serious harm posed by the COVID-19 pandemic. *See id.* at 16–18. Therefore, the district court properly applied the standard for subjective deliberate indifference by considering: (1) whether Applicants knew that inmates faced a substantial risk of serious harm, and (2) whether Applicants failed to take reasonable measures to abate that risk. *See Farmer*, 511 U.S. at 847.

C. The district court correctly found that the Jail officials were aware that COVID-19 presented a substantial risk of serious harm to the Detainee Class.

Applicants also argue that the district court abused its discretion by relying on clearly erroneous factual findings. This contention has no merit. A district court's "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. Proc. 52(a)(6). In "applying [this] standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (citation omitted). As long as "the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 573–74. Applicants' mere assertions are not enough to show that the district court made any errors, let alone clear errors.

In the preliminary injunction order, the district court considered evidence of COVID-19 testing results in the Jail from April 22 to May 26, 2020. ECF No. 65 at 16. This data revealed a consistent increase in the total number of positive COVID-19 tests in the Jail, which the district court accurately described as a "soaring number of confirmed cases." *Id.* As of the date that the district court entered the preliminary injunction, there were 369 confirmed COVID-19 cases in the Jail. *Id.* at 15.

Applicants do not dispute the underlying data that the district court relied on, which showed that the total number of confirmed cases consistently increased in the

weeks leading up to the preliminary injunction order. Instead, Applicants just quibble with how the district court described the data. Applicants contend that the district court's finding that the number of confirmed cases was "soaring" at the time of the preliminary injunction is clearly erroneous because the district court should have weighed the facts about the number of infections differently. Application at 17–19. This cannot be clear error. *See Anderson*, 470 U.S. at 573–74.

Applicants suggest that rather than considering the increase in the total number of confirmed cases in the Jail, the district court should have focused on evidence that the number of new infections increased *at a slower rate* in the weeks immediately preceding the district court's preliminary injunction order. Application at 18 ("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."). Yet that does not change the fact that just a few weeks earlier the Jail was indeed in the midst of an alarming and rapid climb in cases, and the total number of infections still continued to increase. *See* ECF No. 65 at 16. The district court found that the available data showed that COVID-19 cases were "soaring," and that the increase in positive test results was not merely due to an increase in testing. The court compared the total number of confirmed cases to the total number of recovered cases to conclude that there were "57 inmates who likely contracted the virus within the past two weeks." *Id.* at 15. Given that the total number of infections continued rising in the weeks leading to the preliminary injunction order, the district court's finding that cases were "skyrocketing" was well-grounded in the evidence in the record – it was obviously not clear error, even if Applicants believe some other approach might have been more "precise."

Moreover, Applicants concede that the *rate* of new infections (their preferred focus) did continue to increase from April 22 to May 8—just two-and-a-half weeks before the district court entered the preliminary injunction. *See* Application at 18. Even though the rate of new positive COVID-19 tests temporarily slowed in the days immediately preceding the injunction, it was not clear error for the district court to view the recent trend of increasing infection rates as cause for concern, particularly when the number of total infections was continuing to increase at the time. Again, Applicants' disagreement with how the district court weighed the COVID-19 testing results does not amount to clear error.

Applicants next suggest that the fact that the Sheriff voluntarily released a large percentage of the jail population "vitiates the [district court's] factual finding that the jail was subjectively deliberately indifferent to the risk of harm to the inmates." Application at 20. However, the fact that the Jail released some number of inmates does not render the district court's factual findings clearly erroneous. The record is replete with evidence demonstrating that Applicants were aware of a serious risk of substantial harm to the inmates that remained within the Jail at the time the district court entered the preliminary injunction. The district court acknowledged that "Defendants have reduced the Jail's population." ECF No. 65 at 5. Yet the district court concluded that Applicants were aware that the 2,826 individuals who remained in the Jail at the time were exposed to a serious risk of substantial harm from COVID-19.[5] The district court found that despite the releases, Applicants were not

[5] The number of detainees in the Jail has risen since the district court entered the preliminary injunction. The Jail population was 3,310 as of July 24, 2020. Defs.'

maintaining social distancing measures. *Id.* at 6. The district court credited declarations that inmates with known exposure were not quarantined, and the Jail allowed symptomatic individuals to mingle in common areas with asymptomatic individuals. *Id.* at 5–6. The court also credited testimony that inmates did not "receive sufficient cleaning supplies to keep their living areas clean and disinfected." *Id.* at 6.

Given this evidence, the court did not err in concluding the confinement conditions posed a serious risk of harm to inmates, because "[w]hen Defendants fail to quarantine symptomatic individuals or provide sufficient cleaning supplies, all inmates are at risk." *Id.* at 15. The district court also concluded that Applicants were aware of that risk because they received repeated warnings about the dangers of COVID-19 in the Jail, and the CDC Guidelines informed them that "failure to take certain precautionary measures would result in an increase in the spread of infections." *Id.* at 17–18. The record clearly supports the district court's finding that Applicants acted with subjective deliberate indifference because their failure to take precautionary measures exposed the inmates to serious risk of substantial harm, and Applicants were aware of that risk.

Applicants further contend that the district court "refused to consider" their evidence that infection rates dropped from June 3 to June 10, 2020, when it denied their application to dissolve the preliminary injunction. Application at 18–19. This is false. The district court did not refuse to consider Applicants' evidence—it just refused to treat Applicants' *unilateral* assertions of the facts as dispositive. Instead the district

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7/24/20 Compliance Report, ECF No. 111 at 3.

court properly granted a motion for expedited discovery to "determine the actual state of the outbreak" and to give Respondents an opportunity to evaluate Applicants' evidence. ECF No. 93 at 2. Moreover, the district court explained that "[e]ven 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 to occur." *Id.* The district court was sadly prescient; a second spike is currently occurring. *See* Defs.' 7/24/2020 Compliance Report, ECF No. 111; *infra* Part III.

This Court is especially unlikely to reverse the district court's factual findings given the preliminary nature of this case. Aside from the fact that the district court's factual findings are not clearly erroneous, it is far from likely that this Court would review the factual findings in their current form, because the factual findings will be updated to reflect ever-evolving developments regarding the spread and risk of COVID-19. Indeed, discovery is currently ongoing to provide additional evidence of changed circumstances. ECF No. 93. Applicants' arguments regarding the evolving facts since the district court granted the preliminary injunction are premature. The district court must be given the opportunity to evaluate these facts along with the information that discovery will provide regarding whether officials have been complying with preventative measures ordered in the preliminary injunction. The fact-specific nature of Applicants' arguments and the preliminary posture of this case reinforce that an emergency stay is inappropriate.

Moreover, the Court is unlikely to reverse the district court's factual findings because they were based on credibility determinations. The district court examined

the parties' evidence and testimony, including assessing the credibility of witnesses. The Detainee Class submitted 43 declarations from inmates in the Jail, describing the conditions in the Jail during the initial spread of COVID-19. Applicants submitted declarations from officers regarding the precautionary measures they had taken to prevent the spread of the virus. The district court found that to the extent the officer testimony submitted by Applicants conflicts with the inmate testimony submitted by Plaintiffs, "the Court finds the inmate testimony more credible." ECF No. 65 at 14 n.10. The court explained that the officer testimony is "general, brief, and only broadly describes the Jail's policies," whereas the inmate testimony "describes repeatedly and in exacting detail Defendants' failures to implement the CDC Guidelines." *Id.* Moreover, the court noted that the inmates submitted "dozens" of corroborating declarations, while only three officers submitted declarations.[6] *Id.* The court concluded that Applicants submitted "no persuasive evidence contradicting the accounts of the inmates." *Id.* at 15. Applicants have not challenged the district court's credibility determinations, and rightly so. The record amply supports the district court's credibility determinations and factual findings. *See Anderson*, 470 U.S. at 574–75.

D. The district court did not abuse its discretion in setting the scope of its preliminary injunction.

Applicants frame the question presented as whether the district court "erred in issuing an injunction . . . that exceeds the scope of the CDC Guidelines." Application

[6] Additionally, those declarations that Applicants submitted were vague and relied heavily on second-hand information and assumptions, as recently confirmed in depositions of these officers.

at ii; *see also id.* at 15. And this supposed error also forms the basis of their claimed circuit split. *See* Application at 9; *but see supra* Part I.A. Yet Applicants make no argument as to *why* to the district court committed any legal error in setting the scope of its injunction.

Applicants' premise is wrong: the preliminary injunction generally tracks the Guidelines, applying them to the particular circumstances of the Jail. For example, the Guidelines state that "ideally" inmates should be provided with six feet of space, *see* CENTERS FOR DISEASE CONTROL AND PREVENTION, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (last accessed July 29, 2020) ("CDC Interim Guidance"), and the district court determined that this Guideline was appropriate in the circumstances of the Jail and adopted it as a requirement.[7] ECF No. 65 at 20; *see* Application at 11 (identifying this as a part of the injunction purportedly exceeding the Guidelines). The Guidelines expressly contemplate that they "may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions," and state that individual facilities

[7] Similarly, Applicants' contention that the district court's order exceeds the CDC Guidelines because the order requires Petitioners to take the temperature of all class members daily mischaracterizes the CDC Guidelines. *See* Application at 10. The CDC Guidelines suggest that "[i]f individuals with COVID-19 have been identified among staff or incarcerated/detained persons anywhere in a facility," the facility should "consider implementing regular symptom screening and temperature checks in housing units that have *not* yet identified infections, until no additional infections have been identified in the facility for 14 days." *See* CDC Interim Guidance (emphasis in original).

"should adapt these guiding principles to the specific needs of their facility." *See* CDC Interim Guidance. The district court did just that.

Even if the injunction could fairly be viewed as exceeding the CDC Guidelines in some respects, the district court committed no error. "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (per curiam). Having found a likelihood of success on the merits of Plaintiffs' claims, the district court acted well within its discretion in fashioning relief. That relief was based on Applicants' failure to take appropriate measures—including its failure to comply *with the CDC Guidelines*, ECF No. 65 at 16—together with the troubling rise in COVID-19 cases at the Jail. As the district court found, the CDC Guidelines were not intended as the "floor" of an adequate response in a jail "with at least 369 COVID-19 cases," since "[a]s the rate of infection rises, so must the required response." ECF No. 65 at 17. Applicants do not explain what was erroneous about that finding, much less how it could have constituted a reversible abuse of the district court's equitable discretion.

III. Applicants Have Not Demonstrated that Denial of a Stay Will Cause Irreparable Harm, Yet Granting a Stay Would Significantly Harm the Detainee Class.

When Applicants first opposed Plaintiffs' motion for a preliminary injunction, they argued that the motion was unnecessary because Applicants had "already implemented all of the mitigation efforts outlined in plaintiffs' request for relief." Balicki Decl. ECF No. 44-10 at 2. Applicants changed their position after the motion was granted. They argued in their requests to the district court and Ninth Circuit for

a stay pending appeal of the preliminary injunction that compliance was either impossible or unsafe. *See* 9th Cir. Appeal No. 20-55568, Dkt. No. 8-1 at 1; 9th Cir. Appeal No. 20-55568, Dkt. No. 14 at 6. As the Ninth Circuit observed in denying Applicants' request, "[a]n 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." *See* 9th Cir. Appeal No. 20-55568, Dkt. No. 19-1 at 7. Applicants previously represented "not only that [they] were willing and able to implement each of the specific measures requested by [the Detainee Class] (and later incorporated into the injunction), but that they had in fact *already implemented them*." *Id.* at 6 (emphasis in original).

The Application never addresses, much less refutes, this fact, which the Ninth Circuit considered dispositive in denying a stay. 9th Cir. Appeal No. 20-55568, Dkt. No. 19-1 at 8. Nor could Applicants contest it. Even in their stay application, Applicants assert that they have "(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." Application at 2–3. Applicants' failure to engage with *their own sworn evidence* that the injunction poses no harm to them is reason enough to deny the Application.

Unable to respond to the Ninth Circuit's chief reason for denying a stay or even to articulate any concrete harm from the injunction, Applicants simply make generic legal arguments. For the first time, Applicants argue without support that they 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." Application at 7. Putting aside the troubling suggestion that the current circumstances at the Jail represent "demonstrable success," this is just an abstract claim of legal harm—Applicants provide no factual or legal support to establish how administration of the Jail will actually be harmed, let alone irreparably. Applicants claim that they will have to spend public resources because of the injunction (which again is curious when they previously stated that they were already complying with the terms of the injunction), but they also have not presented any evidence, for instance, that the injunction would lead to undue costs or other harms. Application at 24. Even assuming that "judicial micromanagement" is a cognizable harm rather than just a claimed legal error, Applicants have not explained how such a harm is irreparable and could not be addressed through the normal course of appeal. They do not engage with the uniqueness and urgency of this pandemic, and the fact that any judicial supervision would hopefully not need to be prolonged if and when proper action is taken and the pandemic subsides.

Applicants' inability to state or substantiate any irreparable harm has been constant throughout this litigation, pointing to one conclusion: they cannot articulate any concrete harm from the injunction, but simply object to the concept of operating under a court order. That is not a substantiated claim of irreparable harm capable of warranting extraordinary relief. The district court therefore did not abuse its discretion by ordering expedited discovery to explore the factual basis for Applicants' new, contradictory position that the Sheriff cannot comply with the social distancing

requirements and other components of the preliminary injunction order, *see* 9th Cir. Appeal No. 20-55668, Dkt. No. 2-1 at viii–x, rather than granting an immediate dissolution of the preliminary injunction based on these new, untested factual assertions. *See Ruckelshaus*, 463 U.S. at 1317 (Blackmun, J., in chambers) ("An applicant's likelihood of success on the merits need not be considered . . . if the applicant fails to show irreparable injury from the denial of the stay."); *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (without adequate proof of irreparable harm, "a stay may not issue, regardless of the [applicants'] proof regarding the other stay factors.").

Nor did the district court abuse its discretion in determining that the risk of harm to the Detainee Class remains grave. COVID-19 can cause permanent damage, regardless of whether the infected individual has recovered. And it is estimated that 1–2% of those who are infected by the virus could die. Parker Decl., ECF No. 79-10, at ¶ 27. As the district court has noted, "[b]ecause the virus is contagious . . . the uninfected inmates are likely to contract the disease if they remain in the Jail. And the 488 medically vulnerable inmates are likely to get very sick and possibly die." ECF No. 65 at 14.

Contrary to Applicants' representations, the situation has worsened, not improved. As Applicants themselves acknowledge, "COVID-19 is not quickly departing as a pressing health concern," and there are "significant and dangerous outbreaks in some custodial institutions in this country." Application at 2–3. Applicants maintain that the Jail is "not one of them," and that the health crisis in its facilities was either not that bad, or that it has since improved. These

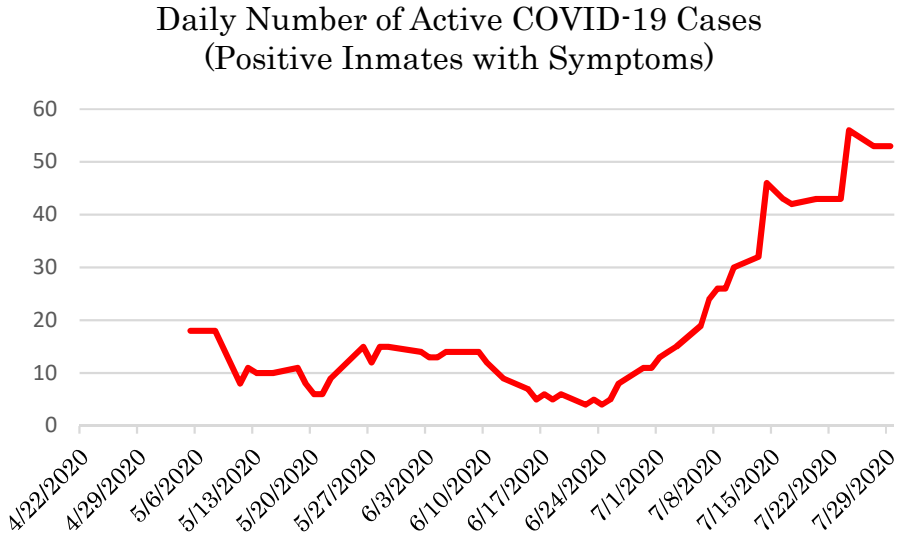
arguments are best presented to the district court, which has been carefully monitoring the developments on the ground.

More fundamentally, though, Applicants' representations are not credible. These representations are belied by Applicants' own records indicating a *surge* of cases when the district court granted the preliminary injunction on May 24, 2020, and an ongoing rapidly rising number of COVID-19 cases since June 24, 2020. These are *new* cases, not accumulated old ones as Applicants imply. Application at 17–18. Although the Applicants filed their stay application on July 21, 2020, they conveniently referred to statistics only up until June 24, 2020, when there were reportedly four active COVID-19 cases from new arrestees. Applicants neglected to mention that since June 24, 2020, their own records indicate that the number of active cases has increased dramatically. Applicants represented to this Court that "there is currently zero transmission of COVID at the Orange County jails," Application at 5, while concurrently submitting a status report to the district court identifying 40 confirmed positive tests as of July 24, including 15 likely arising from intra-jail transmission from a COVID-19-positive inmate housed in the general population at Theo Lacy Facility. Defs.' 7/24/20 Compliance Report, ECF No. 111 at 2–3. It is remarkable that just days before releasing this information, Applicants would falsely boast to this Court that they had "reduced intra-jail transmission to zero." Application at ii.

The Sheriff's Department's reports separately indicate that as of July 24, 2020, there were a record high 56 active cases reported as "Medical Isolation (Symptomatic),"

an increase of 1400% between June 24, 2020 and July 24, 2020.[8] There are now more of these cases than at the time of issuance of the injunction; in fact, over the past week, there have been more such cases than at any point since the Sheriff's Department began reporting the number of active cases on May 5, 2020, as shown in Figure 1.

Figure 1



These facts, which should be addressed in the first instance by the district court with the aid of additional discovery, confirm that Applicants do not face any irreparable harm by complying with the preliminary injunction, and that any irreparable harm would be to the inmates who could potentially become ill or die as a result of COVID-

[8] The Orange County Sheriff's Department appears to publish a daily count of active, pending, and recovered cases of COVID-19 in Orange County Jails. The daily count is accessible at the URL https://www.ocsd.org/documents/sheriff/COVIDStats[date].pdf where [date] refers to a particular date in the following format: 7.24.20 for July 24, 2020. For example, the daily count for July 24, 2020 is accessible at the URL https://www.ocsd.org/documents/sheriff/COVIDStats7.24.20.pdf. There is a daily count available for most, but not all, days beginning April 22, 2020, until July 29, 2020. Respondents were able to access 63 daily counts from April 22, 2020 to July 29, 2020 to compile these statistics.

19 transmission in the Jail. Applicants' continued attempts to thwart a preliminary injunction issued to prevent just such transmissions should be rejected, and Applicants should focus on taking measures to prevent the worsening proliferation of COVID-19 cases in the Jail.

IV. The Balance of Hardships and Public Interest Favor Denial of a Stay.

As the district court explained in issuing the preliminary injunction order, "[t]he balance of equities and public interest tilt heavily [in] [the Detainee Class's] favor" with regard to the relief the court provided. ECF No. 65 at 19. Requiring Applicants to comply with the preliminary injunction order while proceeding with targeted expedited discovery to determine what infection control measures Applicants may be implementing is likewise in the public interest.

COVID-19 cases are currently spiking in Orange County. This puts additional pressures on the Jail. Assuming Applicants' "new" information is substantiated, at least four cases of COVID-19 have entered the Jail from the community within the last few weeks, and the records show 56 active cases as of July 24, 2020. 9th Cir. Appeal No. 20-55668, Dkt. No. 2-1 at vi–vii. As cases rise in the outside community, stress will increase on already-taxed hospitals. Parker Decl., ECF No. 79-10, at ¶ 28. A fresh eruption of cases in the Jail would only exacerbate that strain. *Id.* at ¶ 30. Further, as community spread increases, so do the chances that Jail staff and newly-incarcerated individuals will bring the virus with them into the Jail. *Id.* at ¶ 31. A vicious cycle of infectious spread between the Jail and the outside community is a real and frightening possibility. *Id.* at ¶ 18.

Congregate environments, especially carceral settings, are highly prone to outbreaks of disease. Applicants do not dispute that the Jail itself played host to a major COVID-19 outbreak in which hundreds of incarcerated individuals were infected. It is impossible to tell how much long-term damage this has done to those individuals' health, nor is it possible to know the extent to which the cases in the Jail contributed to broader community spread.

Given the clear harm caused by the first wave of COVID-19 infections in the Jail and the current increase, a stay would expose the public and the Jail's residents to immense risk. Applicants claim that, due to their vigilance, the first wave of COVID-19 in the Jail has ebbed. Even if the rate of infections were decreasing, an assertion contradicted by Applicants' own records, the district court correctly found that staying the preliminary injunction without offering the Detainee Class and the court a meaningful opportunity to evaluate Applicants' new representations would be ill-advised. The grave threat to the health and safety of detainees in the Orange County Jail vastly outweighs the abstract objections to "judicial micromanagement" Applicants have mustered. This Court should deny the application for a stay and allow the district court to proceed with determining the facts on the ground to prevent further illness and deaths. The first wave of cases in the Jail was a tragedy. The second wave is unconscionable, and granting Applicants' stay application would make it worse.

CONCLUSION

For all these reasons, the Court should deny the application for a stay of injunctive relief pending appeal.

July 30, 2020

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