No. 20A19

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

APPLICANTS' REPLY IN SUPPORT OF 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

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Applicants-Appellants-Defendants the County of Orange and Don Barnes, Sheriff of Orange County, California respectfully submit the following Reply in support of their application 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.

Respondents-Appellees-Plaintiffs overlook recent decisions by this Court supporting Applicants' position, depart from the factual record in their argument, and fail to meaningfully distinguish the cases that are the subject of the current Circuit split here.

I. Recent Decisions in this Court Establish that the Likelihood of Four Justices Granting Certiorari is High

The issue here is not whether Applicants seek to end COVID-19 mitigation measures or avoid CDC Guidelines. They do not, as evidenced by immediate implementation of robust COVID-19 protocols long before Respondents' initiation of this litigation. The issue is whether a United States District Court can find objective and subjective deliberate indifference under the Eighth and Fourteenth Amendments where elected local officials are aggressively (and successfully) fighting a novel pandemic, and issue an injunction which limits local officials' ability to make time-sensitive responses to circumstances on the ground, without fear of running afoul of a federal court injunction.

Applicants' position is supported by recent decisions by this Honorable Court. This Court has now ruled twice during this pandemic that broad latitude must be given to the local officials entrusted with protecting the health and safety of its citizens during this pandemic. In the *Calvary Chapel Dayton Valley v. Sisolak,* No. 19A1070, 2020 WL 4251360 (U.S. July 24, 2010) decision issued on July 24, 2020, this Court denied a request to stay enforcement of restrictions on worship services on the ground that courts should defer to the decisions made by state officials regarding health and safety measures put in place to protect their communities from the virus. *Id*. The Court denied the request of Calvary Chapel Dayton Valley for emergency injunctive relief from Nevada's 50-person limitation on indoor religious services aimed at curbing the spread of COVID-19. This decision follows this Court's earlier decision on May 29, 2020 in *South Bay United Pentecostal Church v. Newsom,* No. 19A1044, 140 S.Ct. 1613 (U.S. May 29, 2020), 2020 WL 2813056 where this Court also rejected a church's request for emergency injunctive relief from California's restrictions on worship services. These cases illustrate why the injunction issued in this case should not stand and a stay should be issued.

The *South Bay Pentecostal* opinion notes that "especially broad" latitude should be given to the officials entrusted with protecting health and safety during this pandemic and "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." *Id., at* 1613-1614. In rejecting the request for injunctive relief in *Calvary Chapel*, this Court deferred to the decisions made by state officials regarding the health and safety measures put in place to protect their communities from the virus. No such deference was shown to Applicants.

The *Calvary Chapel* and the *South Bay Pentecostal* cases are similar to Applicants' case. Here the District Court erred by essentially disempowering Applicants of their ability to assess and implement COVID-19 protocols in their custodial facilities, or make any adaptations, despite substantial evidence showing that they have the knowledge and expertise to best make those decisions based on the security requirements and limitations of their institution, without judicial supervision.

The District Court in *Calvary Chapel* aptly noted that interceding would require courts to potentially engage in daily or weekly decisions about public health measures that have traditionally been left to state and local officials. *Calvary Chapel Dayton Valley v. Sisolak*, 2020 WL 4260438, at *3 (D. Nev. June 11, 2020). That restraint was not exercised here. Indeed, here the District Court ordered Applicants to submit weekly compliance reports ensuring the Sheriff is in compliance with the CDC Guidelines and the injunction. See ECF 93, p. 3.[1]

The District Court in *Calvary Chapel* also explained that:

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

> …where state officials must also consider the public safety implications of enforcement of social distancing. That is to say that such enforcement could result in greater harm than that sought to be avoided by the Directive. The choice between which regulations or laws shall be enforced in social settings is a choice allocated generally to the executive, *not* the judiciary, absent clear patterns of unconstitutional selective enforcement.

Id., at 4.

As here, whether certain CDC Guidelines are feasible to the letter in a maximum security custodial facility, such as 6 feet or more social distancing among inmates at all times, is a fact-intensive analysis that should be allocated to the executive elected to run the institution, and not the judiciary. *Id.*

Deference to local executive officials on the front lines is particularly important during the COVID-19 pandemic. Chief Justice Roberts emphasized the need to defer to elected local 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).

South Bay United Pentecostal, supra, at 1613-1614.

In the present case, the District Court's injunction misapplies or disregards this Court's decisions discussed above. The injunction seizes all aspects of jail administration as to COVID19 mitigation measures and prevents critical and rapid responses to the virus in an ever-changing landscape. Furthermore, it distracts focus to compliance with

the injunction, (which is in parts contrary to the spirit and letter of the CDC Guidelines) rather than squarely combatting the contagion head on. *See Valentine v. Collier*, 956 F.3d 797, 802-803 (5th Cir. 2020) (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 v. Junior*, 958 F.3d 1081, 1090 (11th Cir. May 5, 2020), 2020 WL 2161317 ("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. Appellants in this case cannot respond to the rapidly evolving circumstances COVID brings to the jails due to the impractical mandates within the injunction. Essentially, the District court requires the Sheriff to first seek a permission slip before implementing vital emergency changes to the COVID policies. Such a prohibition amounts to an irreparable harm.") (internal quotation marks and citation omitted)).

The Ninth Circuit, in approving this injunction contradicts other Circuits and this Court's own guidance regarding the deference owed to the Sheriff and other County officials. Moreover, even if the evidence was conflicting below, it does not justify judicial micromanagement, as the weight of authority on the other side of the circuit split have properly found. *See Swain v. Junior*, 961 F.3d 1276 (11th Cir. June 15, 2020), 2020 WL 3167628; *Valentine v. Collier, supra*. Applicants assert this issue is of significant import and is likely to continue to recur

during this pandemic, such that four Justices are likely to grant *certiorari*.

II. Respondents' Opposition Departs from the Factual Record

Respondents assert that, "[p]rior to the district court's injunction, Applicants were shuffling inmates around the Jail in defiance of CDC Guidelines and leaving detainees packed into dayrooms sharing the same air and bathrooms without social distancing." Opp. at p. 1. This is nothing more than rhetorical flourish without factual support in the record. To the contrary, as has been established throughout this case, Applicants began implementing the CDC Guidelines to prevent the spread of COVID-19 ***the day they were issued***, March 23, 2020. ECF 44-10; ECF 44-15. Further, long before this case was filed, Applicants began the early release of hundreds[2] of inmates on March 27, 2020, to allow for as much social distancing as practicable and to allow for proper medical quarantine and isolation for symptomatic and COVID-19 positive inmates. ECF 44-2 at ¶11; ECF 44-7.

Respondents state that, "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." Opp. at 1. Yet, what the factual record prominently shows is that Applicants have a robust medical quarantine and isolation procedure in

[2] The Orange County Sheriff, at the time the Injunction was issued, had released 53% of its inmate population or roughly 2,300 inmates in a 2 month time frame.

place that is successfully minimizing spread. ECF 44-10; ECF 44-12.

Respondents proclaim, "the facilities testing failures," *Id.*, yet, at the time the injunction was issued, the Applicant's had tested 1,118 inmates out of approximately 2,800. ECF 65 at p. 16; ECF 61 at ¶ 2. As of July 31, 2020, Applicants have tested 2,929 inmates out of a 3,380 inmate population. ECF 112 at p. 2. Since testing began on or around March 27, 2020, Applicants have only had a cumulative total of 476 positive cases, the vast majority of which currently come from new arrestees. *Id.*

Respondents assert that "any figures on COVID-19 infections are understated." Opp. at p. 1. This appears to be a conclusion drawn by counsel, rather than a fact existing in the record. By contrast, to date, Applicants have tested 86% of its population and have reported out to the public on a daily basis since April 22, 2020. Opp. at p. 40, fn. 8; *Id.* The statement by Respondents is unsupported and in direct conflict with the evidence in the record.

Plaintiffs state that, "medical isolation (symptomatic) in the Jail increased by 1400%." Opp. at p. 2. This number is misleading at best. Respondents fail to explain that "medical isolation (symptomatic)" simply means the inmate is showing symptoms, ***not*** that they have tested positive. While Respondents point to this "fact," it is a case study in the effective response measures in place by Applicants. Indeed, this statement ***supports*** Applicants' position that it is taking aggressive, proactive measures to stop the spread of COVID-19 by isolating more

people who are exhibiting symptoms, rather than leaving them in cells with other non-symptomatic inmates.

Respondents' assert that, "Applicants informed the district court of 40 new confirmed positive tests, including 15 of likely transmission from a current detainee housed in the general population." Opp. at p. 2. Again, this paradoxically demonstrates how effective Applicants' mitigation protocols are. Applicants immediately identified the COVID positive inmate, contact traced back to all people with whom the inmate had contact, and quarantined and tested where medically appropriate. Rather than a complete outbreak throughout the Jail, these cases were quickly identified and mitigated, and led to just 15 positive cases (out of 3,310 inmates). ECF 111 at p. 2-3. Respondents-Plaintiffs conspicuously fail to mention that of the 40 new confirmed positive tests, ***24 are new bookings***. *Id.* at p. 3: lines 22-24. Applicants have no control over the general public and cannot deny new inmates into custody because they test positive or are showing COVID-19 symptoms.

What the factual record before this Court shows is that Applicants have developed and implemented effective protocols (consistent with CDC Guidelines) to identify new cases coming into the Jail and prevent the spread of COVID-19 amongst the general population at the Jail. This is not objective and subjective deliberate indifference under the Eighth and Fourteenth Amendments, subject to federal judicial injunction.

III. Respondents Fail to Distinguish the Cases from Three Circuits that Are Split from the Outlying Ninth Circuit on this Issue

Despite Respondents' general assertions that "conditions in different jails are different" and responses in different jails have been different, (Opp. at p. 15) the law applied by the lower court here is directly at odds with ***at least*** three other Circuits that have addressed this issue. The District Court's imposition of numerous mandates exceeding the CDC Guidelines undoubtedly directly contradicts the recent decisions of other United States Circuits. *See Valentine v. Collier*, 956 F.3d 797, 802 (5th Cir. 2020); *Swain v. Junior*, 958 F.3d 1081, 1090 (11th Cir. 2020); *Wilson v. Williams,* 961 F.3d 829 (6th Cir. 2020), 2020 WL 3056217; *see also Money v. Pritzker,* 2020 WL 1820660 (7th Cir. 2020).

At a minimum, the Ninth Circuit departed from its own precedent in *Roman v. Wolf,* where it issued a stay to the extent the injunction exceeded CDC Guidelines. *Roman v. Wolf*, 2020 WL 2188048, at *1 (9th Cir. May 5, 2020). Furthermore, the Ninth Circuit contradicted other circuits that stayed similar injunctions to the extent they imposed obligations beyond CDC guidelines. *See, e.g.*, *Valentine*, 956 F.3d at 801 (staying injunction that required specific measures that "go[] even further than CDC guidelines"); *Swain*, 958 F.3d at 1087–88 (staying preliminary injunction where CDC guidelines "formed the basis" of the district court's required measures); *see also Swain v. Junior*, No. 20-11622, 2020 WL 3167628, at *2 (11th Cir. June 15, 2020) (vacating preliminary injunction even though the scope of the district court's injunction was "based largely on the CDC's guidance").

The CDC Guidelines are merely interim guidance for custodial

institutions, 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 has effectively ruled that CDC Guidelines dictate a *per se* violation of the Eighth Amendment bar during a pandemic. Under the standard followed by the Fifth and Eleventh circuits, most, if not all of the mandates imposed by the district court here would be stayed in full or in part because they exceed the CDC Guidelines.

The District Court in this case found Applicants were objectively deliberately indifferent under the Fourteenth Amendment because they were "aware of the CDC Guidelines and able to implement them but fail[ed] to do so." 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). The District Court also determined that the law required Applicants 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. Yet, the objective deliberate indifference standard merely examines whether a jail took "reasonable available measures to abate [the] risk," *Gordon v. County of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018). It does not inquire as to whether the Sheriff was "aware" of specific measures in the CDC Guidelines.

That said, it is entirely unclear what "full[] and consistent[]" compliance with ***evolving*** CDC Guidelines would look like. The opening of the recently-updated CDC Guidelines provides:

> This interim guidance is based on what is currently known about the transmission and severity of coronavirus disease 2019 (COVID-19) as of the date of posting, July 14, 2020.
>
> The US Centers for Disease Control and Prevention (CDC) will update this guidance as needed and as additional information becomes available. Please check the CDC website periodically for updated interim guidance.
>
> 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 visited August 3, 2020)

In bold letters in the section, "Who is the Intended Audience for this Guidance?" it provides:

> **The guidance may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions**.
>
> *Id*.

Thus, adapting CDC Guidelines to "individual facilities' physical space, staffing, population, operations, and other resources and conditions" is explicitly contemplated by, and is fully compliant with, CDC Guidelines. Yet, the injunction at issue here dangerously scribes in stone mitigation measures that are constantly evolving, leaving no room for individualized adaptation, as clearly contemplated by the CDC Guidelines. Applicants have no ability to pivot from an existing policy

due to the injunction issued by the District Court. The ruling prevents that which it requires: for the Jail to implement "its own additional guidelines, to 'abate the spread of infection'." ECF 65 at p. 17.

As noted in the Application, the Eighth Amendment and its "subjective deliberate indifference" standard applies to sentenced inmates. *Farmer*, 511 U.S. at 837. Directly contrasting with the ruling in the case at bar, 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, as here, it did not consciously "disregard[] the risk" to inmate health and safety, even if the actions sometimes fell short of the CDC guidelines. *Id.* at 801–03.

As noted in the Application, 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 Applicants had 302 of 369 of cases (81 percent) recover from COVID before the injunction was imposed, and not a single death due to COVID-19 in the Orange County Jail (which still remains true today.)

IV. CONCLUSION

Applicants-Appellants respectfully urge a stay of the District Court's May 26, 2020, injunction to preserve the *status quo* allowing the Orange County Sheriff to adapt to changing circumstances on the ground, to keep inmates and staff safe during this pandemic, while the legal issue subject to a Circuit split is resolved on the merits below.

Respectfully submitted,

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