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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELISSA AHLMAN; et al., Plaintiffs-Appellees, v. DON BARNES, in his official capacity as Sheriff of Orange County, California; COUNTY OF ORANGE, Defendants-Appellants.	No. 20-55568 D.C. No. 8:20-cv-00835-JGB-SHK Central District of California, Santa Ana ORDER

Before: GRABER, WARDLAW, and R. NELSON, Circuit Judges.

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

I.

Plaintiffs-Appellees, putative classes and subclasses of pre-trial and post-trial inmates housed in four facilities at the Orange County Jail, filed this suit

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

alleging that Defendants failed to take adequate measures to prevent the spread of COVID-19 within the jail. They asserted Eighth Amendment, Fourteenth Amendment, and statutory claims, and sought a preliminary injunction requiring Defendants to implement specific "mitigation efforts" to prevent the spread of the virus.[2]

In the district court, Defendants argued that an injunction was unnecessary because they had already implemented each of the specific mitigation efforts Plaintiffs requested. In support, they proffered a sworn declaration from Commander Joseph Balicki of the Orange County Sheriff's Department's (OCSD) Custody Operations Command. Balicki attested under penalty of perjury that he had reviewed Plaintiffs' complaint[3] and that "OCSD ha[d], at a minimum, already implemented *all* of the mitigation efforts outlined in [their] request for relief." (emphasis added). Balicki's declaration made clear that the "mitigation efforts" he was referring to were those that were identified in the complaint's "Request for

[2] Plaintiffs also asked the district court to order the release of inmates who were medically vulnerable or had disabilities that could put them at particular risk of harm from COVID-19. The district court denied this request, concluding that a release of inmates was not necessary because any harm to these individuals could be mitigated by additional preventative measures within the jail. Plaintiffs have not appealed that denial.

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

Relief." He cited Paragraph 138 of the complaint, where Plaintiffs listed each of their requested "mitigation efforts," including, among other things, that Defendants "[p]rovide adequate spacing of six feet or more between incarcerated people so that social distancing can be accomplished in accordance with CDC guidelines;" "[e]nsure that each incarcerated person receives, free of charge, an individual supply of hand soap and paper towels sufficient to allow frequent hand washing and drying each day;" "[e]nsure that all incarcerated people have access to hand sanitizer containing at least 60% alcohol;" and "[c]onduct immediate testing for anyone . . . displaying known symptoms of COVID-19."

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

than two weeks before the injunction issued—an inmate who was exhibiting COVID-19 symptoms was left in a "medical tank" with non-symptomatic inmates pending the results of his COVID-19 test.

The district court recognized that Plaintiffs' evidence contradicted the declarations submitted by Commander Balicki and other OCSD officials. It resolved this factual conflict in favor of Plaintiffs, concluding that the detailed inmate declarations were more credible than the brief and general declarations of the OCSD officers, which "fail[ed] to explain with specificity how the [County's] policies ha[d] been implemented and enforced and the degree of compliance."

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

After evaluating the evidence before it, the district court found, as a factual

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

matter, that Defendants were "not complying meaningfully with the CDC Guidelines," which it concluded "represent[ed] the floor, not the ceiling, of an adequate response to COVID-19 at the Jail, with at least 369 COVID-19 cases." In light of this finding, the district court concluded that Plaintiffs had established (1) that they were likely to succeed on the merits of their claims, (2) that they were likely to face irreparable harm absent an injunction, and (3) that the balance of the equities and the public interest weighed in favor of injunctive relief. It issued an injunction directing Defendants to comply with fourteen requirements that were taken, essentially word-for-word, from Paragraph 138 of Plaintiffs' complaint.

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

II.

In determining whether to exercise our discretion to stay the injunction, we consider (1) whether Defendants have made "a strong showing of the likelihood of success on the merits;" (2) whether Defendants will be "irreparably injured absent a stay;" (3) "whether a stay will substantially injure other parties;" and (4) "where

the public interest lies." *Doe #1 v. Trump*, 957 F.3d 1050, 1058 (9th Cir. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 426 (2009)). "The first two factors are the most critical," *id.* (cleaned up), and a showing of irreparable injury is an absolute prerequisite. "[I]f the petition has not made a certain threshold showing regarding irreparable harm . . . then a stay may not issue, regardless of the petitioner's proof regarding the other stay factors." *Id.* (quoting *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (per curiam)).

A.

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

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

suddenly become impossible to carry out.[5]

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

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

B.

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

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

The district court's factual findings are reviewed for clear error, *Armstrong v. Brown*, 768 F.3d 975, 979 (9th Cir. 2014), and Defendants have fallen far short of making a strong showing that the findings here were clearly erroneous, *see Valentine v. Collier*, 140 S. Ct. 1598, 1600 (2020) (statement of Sotomayor, J.)

(noting the importance of deferring to the district court's factual findings in the preliminary injunction context).[6] On those facts, which portrayed a response that fell well short of the CDC guidelines and resulted in an explosion of COVID-19 cases in the jail,[7] Defendants are not likely to establish that the issuance of the injunction was an abuse of discretion.[8]

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

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

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

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

This evidence, which post-dates the injunction and is offered for the first time here, on appeal, is simply not relevant to whether Defendants are likely to succeed on the merits of their appeal. Review of a preliminary injunction is "restricted to the limited and often nontestimonial record available to the district court when it granted or denied the injunction motion." *Zepeda v. U.S. Immigration & Naturalization Serv.*, 753 F.2d 719, 724 (9th Cir. 1983); *see also*

We emphasize that the dissent is simply wrong to assert that we have "blessed" the district court's legal findings, "effectively affirm[ed] the notion that the CDC guidelines as drafted are a per se violation of the Eighth Amendment," and "permitt[ed]" the issuance of the preliminary injunction. *See* Dissent at 1, 5. The propriety of the injunction is not before us. Instead, we are tasked only with determining whether Defendants are entitled to a stay pending appeal. On the facts here, Defendants cannot show irreparable harm and have fallen short of making a "strong showing" that they are likely to succeed on the merits. Each of these conclusions, on its own, is a legally sufficient reason to deny the motion to stay.

Wilson v. Williams, __ F.3d __, 2020 WL 3056217, at *1 (6th Cir. June 9, 2020). The evidence submitted by Plaintiffs therefore has no bearing on whether the district court abused its discretion in issuing an injunction on the record before it.[9] *Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 n.5 (9th Cir. 1994); *cf. Ashcroft v. ACLU*, 542 U.S. 656, 671–72 (2004).

III.

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

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

Accordingly, we *sua sponte* remand the case to the district court for the limited purpose of allowing the parties to present any evidence of changed

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

circumstances that might merit modification or dissolution of the preliminary injunction. In the event such evidence is presented, the district court may consider whether it is appropriate to hold an evidentiary hearing. After reviewing any new evidence, the district court may, in its discretion, modify or dissolve the preliminary injunction as it deems appropriate.

The previously established briefing schedule remains in effect.

IT IS SO ORDERED.

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

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

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

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

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

I

To grant a stay of an injunction pending appeal, we must consider: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (internal quotation marks omitted).

A district court's grant of preliminary injunctive relief is reviewed for abuse

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

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

II

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

This first factor weighs in favor of staying the district court's preliminary injunction because the district court based its order on both an erroneous application of the law and clearly erroneous factual findings. As a preliminary matter, the district court's decision to impose numerous requirements on the jail exceeding the CDC guidelines runs contrary to the sound reasoning of our sister circuits' recent decisions. *See Valentine v. Collier*, 956 F.3d 797, 802 (5th Cir. 2020); *Swain v. Junior*, 958 F.3d 1081, 1090 (11th Cir. 2020).

Moreover, whether examined under the Fourteenth Amendment's objective analysis or Eighth Amendment's subjective analysis, there cannot be deliberate

indifference where the jail both intentionally and effectively acted in response to the crisis. Particularly significant is that under the data available to the district court when it entered the preliminary injunction, the jail had already largely curbed the infection rate by implementing its internal guidelines to address the COVID-19 pandemic. While the district court determined Plaintiffs had demonstrated a likelihood of success on the merits based largely on its factual finding that "[r]ates of COVID-19 infection at the Jail are skyrocketing," the data reveals the opposite to be true: the infection rate when the injunction issued was plummeting. More fundamentally, the district court failed to even state the correct legal standards under the objective and subjective deliberate indifference tests.

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

A

As an initial matter, the majority should have followed the approach taken by other circuits staying similar injunctions to the extent they imposed obligations beyond the CDC guidelines. *See, e.g.*, *Valentine*, 956 F.3d at 801 (staying injunction that required specific measures that "go[] even further than CDC guidelines"); *Swain*, 958 F.3d at 1087–88 (staying preliminary injunction where CDC guidelines "formed the basis" of the district court's required measures); *see also Swain v. Junior*, No. 20-11622, 2020 WL 3167628, at *2 (11th Cir. June 15,

2020) (vacating preliminary injunction even though the scope of the district court's injunction was "based largely on the CDC's guidance"). The majority blesses the district court's legal error in finding that the CDC guidelines provide the "floor, not the ceiling," for constitutional claims. But this legal principle is inconsistent with Supreme Court precedent. *See Bell v. Wolfish*, 441 U.S. 520, 543 n.27 (1979) (holding that the guidance of outside organizations, including a Department of Justice Task Force, "simply do not establish the constitutional minima" and "are not determinative of the requirements of the Constitution"). The majority effectively affirms the notion that the CDC guidelines as drafted are a per se violation of the Eighth Amendment during a COVID-19 outbreak. That is inconsistent with both law and reason.

Under the standard followed by the Fifth and Eleventh circuits, most of the injunctive requirements imposed by the district court should be stayed in full or in part because they exceed the CDC guidelines and even conflict with them in some instances. For example, the district court's order requires Appellants to "take the temperature of all class members . . . daily" and to interview "each incarcerated person daily to identify potential COVID-19 infections," while the CDC guidelines provide no such guidance, and only suggest temperature checks for new entrants and "in housing units where COVID-19 cases have been identified[.]" Ctrs. for Disease Control & Prevention, *Interim Guidance on Management of Coronavirus*

Disease 2019 (COVID-19) in Correctional and Detention Facilities, https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf at 22.[2] Additionally, while the CDC guidelines provide that "ideally" at least six feet should be maintained between all individuals, *id.* at 11, the district court went beyond this ideal by mandating that Appellants "provide adequate spacing of six feet or more between incarcerated people" without time, place, or other exceptions.

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

B

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. Prison officials' "deliberate indifference to serious medical needs of prisoners" has been held to violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Where, as here, pretrial detainees challenge conditions of confinement, such a claim "arise[s] under the Fourteenth Amendment's Due Process Clause, rather than

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

under the Eighth Amendment's Cruel and Unusual Punishment Clause." *Gordon v. County of Orange,* 888 F.3d 1118, 1124 (9th Cir. 2018) (internal quotation marks omitted).[3]

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

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

The district court abused its discretion in making these erroneous legal determinations. *See First Amendment Coal. v. U.S. Dep't of Justice,* 878 F.3d

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

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

A district court also abuses its discretion when it "mischaracterize[s]" the appropriate legal standard. *Golden v. Cal. Emergency Physicians Med. Grp.*, 782

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

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

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

C

For the class of individuals here who are not in pre-trial detention, the Eighth Amendment and its subjective deliberate indifference test applies. *Farmer*, 511 U.S. at 837. To show an official's subjective deliberate indifference, an official must "know[] of and disregard[] an excessive risk to inmate health or safety[.]" *Id.* To be sufficiently culpable, "the official must *both* be aware of facts

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

The Fifth Circuit held that under the subjective deliberate indifference standard, a district court should not look to "whether the [d]efendants reasonably abated the risk of infection" or "how [the jail's] policy is being administered." *Valentine*, 956 F.3d at 802 (internal quotation marks omitted). Instead, where a prison took steps to mitigate the risk of infection by increasing internal safety procedures, it could not have consciously "disregarded the risk" to inmate health and safety, even if the measures sometimes fall short of the CDC guidelines. *Id.* at 801–03. Accordingly, the Fifth Circuit granted a stay of the district court's preliminary injunction. *Id.* at 806. The Supreme Court then denied the application to vacate the stay. *Valentine v. Collier*, 140 S. Ct. 1598 (2020).[5]

[5] While the majority quotes Justice Sotomayor's reference to deferring to the district court's factual findings in *Valentine*, it is worth noting Justice Sotomayor

A similar stay of a preliminary injunction in the context of protecting prison inmates from COVID-19 was also granted by the Eleventh Circuit. *See Swain*, 958 F.3d at 1090 (granting a motion to stay a preliminary injunction because prison's mitigation efforts "likely do not amount to deliberate indifference"); *cf. Wilson v. Williams*, No. 20-3447, 2020 WL 3056217, at *7–8 (6th Cir. June 9, 2020) (vacating injunction because the prison "responded reasonably" to the risk by implementing a plan to mitigate the risk, and conditions did not violate the Eighth Amendment).[6] The Eleventh Circuit recently vacated that injunction on the merits, concluding that the district court "abused its discretion in granting the preliminary injunction." *Swain*, 2020 WL 3167628, at *13. For the reasons outlined below, we should have similarly granted the stay here.

i

Subjective deliberate indifference requires both "knowledge" *and* a

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voted with the unanimous Supreme Court not to reimpose the district court's injunction.

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

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

ii

Even supposing that the district court intended to incorporate its objective deliberate indifference reasoning into the subjective analysis to show "conscious disregard" (without saying so), the district court still abused its discretion by relying on clearly erroneous factual findings. The district court relied heavily on

its assertion that "the numbers speak for themselves" to support its deliberate indifference determination. Based on its interpretation of the epidemiological data in the record, the district court claimed the "[r]ates of COVID-19 infection at the Jail are skyrocketing," the number of confirmed cases is "soaring," and "the Jail lacks the ability to contain the infection."[7] The district court reasoned that since jail officials "undoubtedly [knew] of the risks posed by COVID-19 infections," its actions satisfy subjective deliberate indifference.

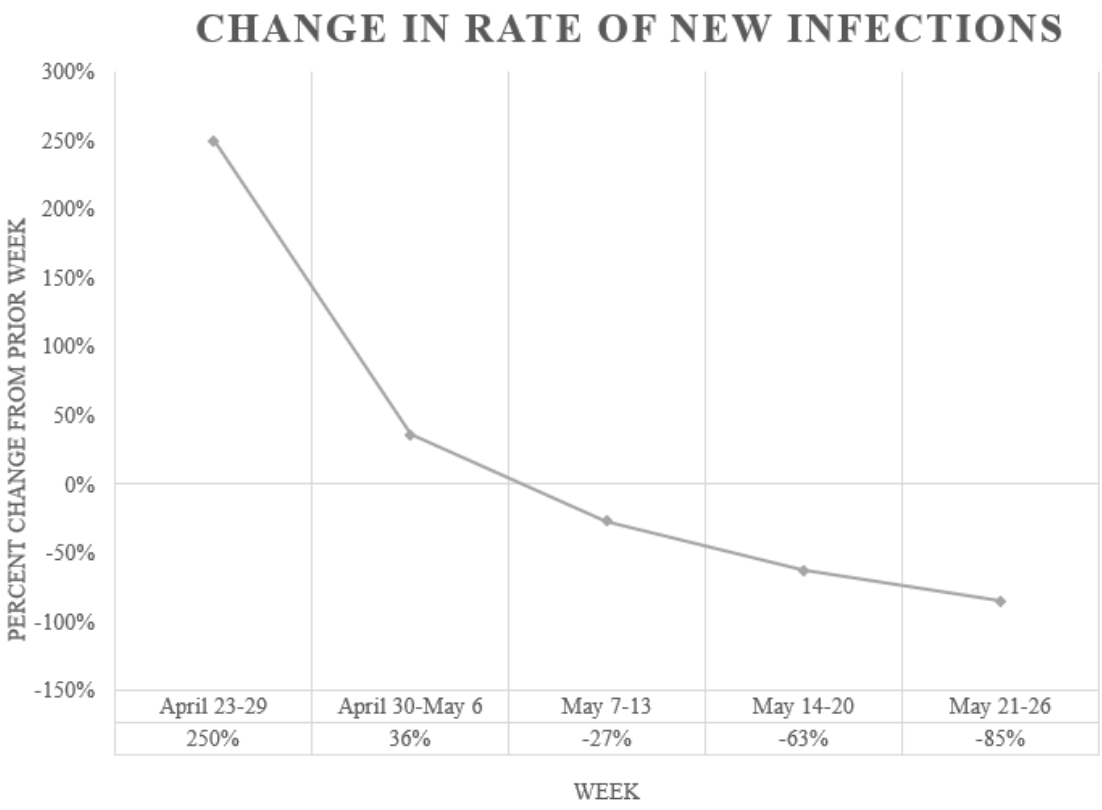
The data, however, supports the exact opposite conclusion. True, the rate of COVID-19 infection and the number of active COVID-19 cases did sharply increase from April 22 to May 8. However, the district court did not issue the injunction until May 26. As data cited in the district court's own order confirms, from May 8—prior to Plaintiffs even filing their motion for a preliminary injunction—until the issuance of the injunction, the rate of new infections decreased by over 52 per cent compared to the previous two-and-a-half weeks.

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

This decrease in the infection rate is apparent in the graphical depiction below. In fact, during the week immediately prior to the court's injunction, the rate of new infections decreased by 76 per cent compared to the previous week. The district court's assertion that the "[r]ates of COVID-19 infection at the Jail are skyrocketing," was thus plainly erroneous: at the time it issued the injunction, the jail had been experiencing a dramatic *decrease* in infection rates for the previous two-and-a-half weeks.[8]

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

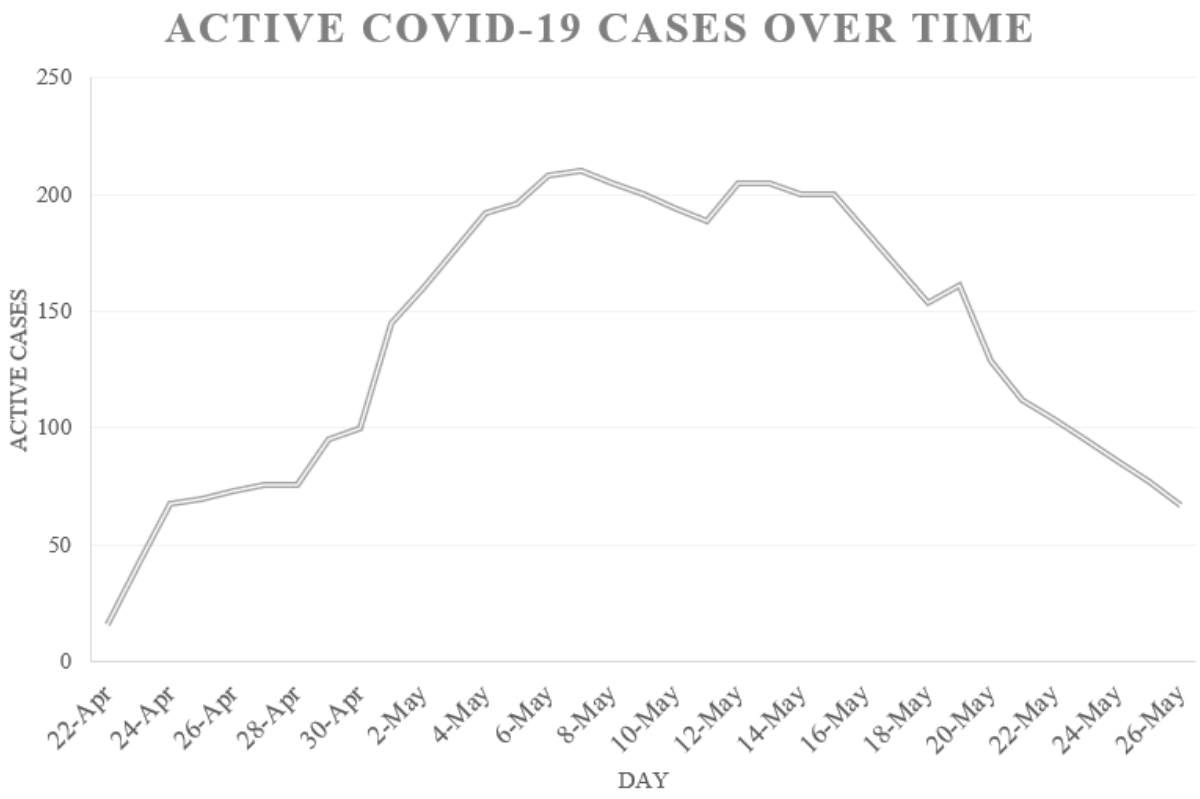
Furthermore, since the injunction issued, the number of active cases dropped to 35 on June 3, and to 23 cases on June 10. The district court can consider this new evidence on remand.



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

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

the kinds of clearly erroneous factual findings that qualify as an abuse of discretion. *See, e.g.*, *Eat Right Foods Ltd. v. Whole Foods Market, Inc.*, 880 F.3d 1109, 1120 (9th Cir. 2018) (finding the district court abused its discretion by incorrectly identifying the time period the relevant facts occurred).



This graphical depiction above of active cases over time illustrates that the prison quickly flattened the curve, protecting a large majority of inmates from infection. Without intervention, the number of active cases would not likely have begun decreasing so early on. More than one hundred nations, fifty states, and thousands of localities have spent billions of dollars attempting to create a COVID-19 graph mirroring the decline in cases seen in the jail here. This is, by any

definition, a sign of success, hardly the subjective deliberate indifference of an Eighth Amendment violation.

While the district court correctly asserts that "the numbers speak for themselves," these numbers tell a different story. The jail's protective measures—well prior to any injunction—appear to have successfully reduced both the number of active COVID-19 cases and the infection rate. As a further illustration, the Sheriff took the extraordinary step of reducing the jail population from 5,303 inmates on March 1 to 2,799 inmates on May 19 in an effort to increase social distancing between inmates, free up housing space, and allow for quarantine and isolation. Releasing nearly 53 per cent of the jail's inmate population to protect against the spread of the virus completely undermines any factual finding that the jail was subjectively deliberately indifferent to the risk of harm from COVID-19.

An increase in internal safety measures coupled with a demonstrable improvement in conditions thus cannot equate to a jail's "conscious disregard" for the welfare of the prisoners. *See Colwell v. Bannister*, 763 F.3d 1060, 1068 (9th Cir. 2014) (internal quotation marks omitted) (noting that defendants must choose a medically unacceptable course under the circumstances in conscious disregard of an excessive risk to rise to the level of deliberate indifference). Instead, these facts support the jail's contention that it actively took measures to reduce the risk of harm posed by the disease, the very opposite of subjective disregard. The district

court cannot find that the jail's active measures rose to the level of conscious disregard merely because "the district court might do things differently." *Valentine*, 956 F.3d at 803.

The district court abused its discretion by determining Appellants had not demonstrated a likelihood of success on the merits based on a clearly erroneous assertion that the rate of the number of COVID-19 infections was increasing and that the jail had knowingly failed to take necessary precautionary measures.

III

Because there is a "strong likelihood [Appellants will] succe[ed] on the merits," they need only show that irreparable harm is probable. *Leiva-Perez*, 640 F.3d at 970. Appellants have carried this burden.

The district court's injunction obstructs Appellants' ability to oversee Orange County's jails without judicial micromanagement. As the Supreme Court has cautioned,

> courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.

Procunier v. Martinez, 416 U.S. 396, 405 (1974). Casting aside this admonition, the district court's injunction wades into the minutia of prison operations, going so far as to dictate the amount of hand soap and number of paper towels available to

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

The district court's micromanagement of prison operations is particularly troubling given that our deference to prison officials should be at its zenith during the COVID-19 pandemic. Chief Justice Roberts recently emphasized the need to defer to elected officials as they confront the immense public policy problems created by COVID-19:

> Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). When those officials "undertake[] to act in areas fraught with medical and scientific

> uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.

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

The district court wrongly assumed the prison administration role in issuing the injunction, throwing up a roadblock that prison officials must now overcome as they try to respond to real time developments in Orange County's jails. *See Valentine*, 956 F.3d at 803 (observing that the preliminary injunction issued by the district court "locks in place a set of policies for a crisis that defies fixed approaches"); *Swain*, 958 F.3d at 1090 ("The injunction hamstrings MDCR officials with years of experience running correctional facilities, and the elected officials they report to, from acting with dispatch to respond to this unprecedented pandemic. They cannot respond to the rapidly evolving circumstances on the ground without first seeking a permission slip from the district court. Such a prohibition amounts to an irreparable harm.") (internal quotation marks and citation omitted)).

The majority entirely ignores the Supreme Court's guidance on the deference owed to prison officials in the midst of this crisis and instead limits its irreparable harm analysis to the "[s]elf-inflicted wound" created by Commander

Balicki's declarations. Shortly after the number of COVID-19 cases in the jails peaked, Commander Balicki signed a declaration attesting that "OCSD has, at a minimum, already implemented all of the mitigation efforts outlined in plaintiffs' request for relief. (See Complaint, ¶138(3)(a)-(o).)[.]" The district court did not hold an in-person evidentiary hearing before weighing conflicting affidavits from Commander Balicki and the prisoners. When Commander Balicki attempted to clarify in a subsequent affidavit that some portions of the district court's injunction potentially endangered the health and welfare of prison officials and inmates, the district court dismissed those concerns (again, without an in-person evidentiary hearing) for the sole reason that they were inconsistent with his first declaration. The majority doubles down on this approach.

To be sure, Commander Balicki's statement in his original declaration lacked nuance. And on remand the district court should hold an in-person evidentiary hearing to give Commander Balicki an opportunity to explain the putative discrepancies in his declarations. But the greater error belongs to the district court. The district court ignored the problems created by the injunction. An injunction must issue (and continue) based on a concrete constitutional violation, not as an apparent sanction for inartfully crafted declarations. Even if Commander Balicki's putative conflicting statements are problematic, they do not justify the judiciary's micromanagement of prison operations during a national

pandemic. *See Swain*, 2020 WL 3167628, at *6, *11 (vacating injunction despite conflicting evidence whether the jail was complying with its stated protocols); *see also Valentine*, 140 S. Ct. at 1600 n.2 (statement of Sotomayor, J.) (agreeing with denial of application to vacate stay while noting that the prison had "regularly fail[ed] to comply with standards far below" the CDC guidelines, despite its representation to the district court that it "updated [its] policy periodically in response to the ever-evolving CDC guidelines," *Valentine*, 956 F.3d at 805 n.2).

There can be little doubt the harm caused by the district court's injunction is irreparable. The injunction requires California to expend and allocate additional scarce public resources to take care of the prisoners in Orange County's jails—potentially at the expense of other prisoners in other jails. In the likely event Appellants prevail on the merits, California cannot recover its misallocation of scarce public resources. *See Swain*, 958 F.3d at 1090. Such a harm is necessarily irreparable. *Id.*

IV

The third and fourth *Nken* factors—harm to the party opposing the injunction and the public interest—"merge when the Government is the opposing party." 556 U.S. at 435. My discussion of the first and second *Nken* factors is dispositive of the third and fourth factors. Prison officials are harmed when the judiciary usurps their authority to manage prisons, particularly during a public

health crisis. And the public is unquestionably interested in the proper management of prisons. Accordingly, these factors also weigh in favor of a stay. *See Valentine*, 956 F.3d at 804; *Swain*, 958 F.3d at 1090–91.

* * *

Because the district court abused its discretion in granting Appellees preliminary injunctive relief, Appellants' emergency motion for a stay of the injunction should have been granted. I therefore respectfully dissent.