No. 20-55568

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MELISSA AHLMAN, et al.,

Plaintiffs-Appellees,

v.

DON BARNES and ORANGE COUNTY, CALIFORNIA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
NO. 8:20-cv-00835-JGB-SHK

APPELLANTS' OPPOSITION TO APPELLEES' MOTION TO DISMISS

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INTRODUCTION

Appellees'/Plaintiffs' Motion to Dismiss (Dkt. 37 [1]) seeks to have this Court directly undermine the ruling of the United States Supreme Court—in this very case. On August 5, 2020, the United States Supreme Court stayed the District Court's preliminary injunction ***pending disposition on the merits of this appeal and any petition for writ of certiorari, if timely sought***. *Barnes v. Ahlman*, 591 U.S. ____ (2020), No. 20A19; Dkt. 35, p. 1. The Supreme Court did not intervene on an emergency basis and grant a stay pending appeal on the merits, if the issues were about to be moot. And the Supreme Court could not have been clearer that it anticipated continued litigation of this issue on the merits. The Supreme Court's stay provides:

> The application for stay presented to JUSTICE KAGAN and by her referred to the Court is granted, and the district court's May 26, 2020 order granting a preliminary injunction is stayed pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.
>
> *Id.*

The "threshold consideration" that is "consistently required" for the issuance of a stay by the United States Supreme Court is whether there is a "reasonable probability" that *certiorari* will be granted by the Court. *Graves v. Barnes,* 405 U.S. 1201, 1203 (1972) (Powell, J., in

[1] All references to ECF are to filings in the District Court case, while references to Dkt. are to filings in the Court of Appeals case.

chambers). By granting a stay, not only is it clear that the high court found the issue on appeal to be of significant import and likely to recur, but also that at least four Justices are ***likely to grant certiorari,*** if sought. The Supreme Court's ruling unequivocally indicates Appellants issues on appeal are ripe for consideration. This Court should deny Appellees' Motion.

ARGUMENT

"The test of mootness of an appeal is whether the appellate court can give the appellant ***any effective relief*** in the event it decides the matter on the merits in his favor. If it grants such relief, the matter is not moot." *Farcia v. Lawn,* F.2d 1400, 1402 (9th Cir. 1986) [emph. added]. "In general a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt,* 455 U.S. 478, 481 (1982).

Appellants/Defendants have a legally cognizable interest in proceeding with this appeal. The District Court made findings that Appellants' COVID-19 mitigation protocols at the jail constituted cruel and unusual punishment and issued an injunction that imposes irreparable harm on the Orange County Sheriff, the County of Orange, the inmates the injunction was meant to protect, and the public at large. For all the reasons stated in Appellants' Opening Brief, (Dkt. 38) incorporated herein by reference, such findings and orders were clear legal error and this Motion must be denied and the appeal should proceed on the merits.

Moreover, Appellees' allegation that the injunction is moot because "Appellants' challenge has expired by operation of law" is contrary to the definition of a stay. The injunction was issued on May 26, 2020. ECF 65. A stay was issued by the Supreme Court on August 5, 2020. *Barnes v. Ahlman*, 591 U.S. ____ (2020), No. 20A19. A stay specifically holds "a ruling in abeyance to allow an appellate court the time necessary to review it." *Nken v. Holder*, 556 U.S. 418, 421 (2009). As such, the injunction was ***suspended in place*** before its alleged expiration date of August 24, 2020, and therefore, Appellee's Motion is entirely without merit.

Even more, the Supreme Court issued an emergency stay specifically to allow this Court the time necessary to review the merits of the District Court's findings. The Supreme Court is well aware of the Prison Litigation Reform Act ("PLRA") and its elements. Nowhere in the Supreme Court's order is mootness mentioned—even in dissent. The high court did not intervene only to have this Court declare the issue moot shortly after; Appellees' advocacy of such a notion is absurd.

If Appellees/Plaintiffs were genuine in their legal position, they would first be filing a pleading in the ***district court*** for an order to terminate prospective relief. 28 U.S.C. § 3626(b), upon which Appellees rely in bringing this motion—entitled termination of prospective relief—in subsection (3), specifically ***limits*** termination of prospective relief. Explicitly directed by the statute that Appellees invoke is an opportunity by the district court to make continued findings. Appellees'

Motion to Dismiss not only undermines the Supreme Court, it also end-runs the district court that granted Appellees' injunction in the first place. By filing this action in the appellate court, rather than district court, Appellees/Plaintiffs aver that they could not make a showing in the district court presently that prospective relief is necessary or legally supported. Because, if they were able to make that showing presently, they would have gone to the district court with such information. Until the district court is requested and finds that there is no ongoing violation of a federal right or until the Supreme Court lifts its stay, Appellees' Motion is improper.

Next, if Appellees' legal position were correct, nothing would prevent them from applying for another injunction in the district court, and another, thereby making the issue capable of repetition and accordingly, not moot, as relief from vexatious, repetitive prospective relief requests can be avoided by the appeal.

Appellees cite to the case of *Mayweathers v. Terhune,* 136 F. Supp. 2d 1152, 1153 for the proposition that the preliminary injunction expires as a matter of law after 90 days. However, Appellees fail to point out that in *Mayweathers*, "the court granted plaintiffs' second motion for a preliminary injunction on identical grounds." *Id*. Thereafter, the court went on to grant a third preliminary injunction on the same facts, stating that, "the process requires periodic reconsideration of the propriety of continued interim relief…" *Id*. at 1154. Here, the very basis of Appellants' appeal is the findings made by

the District Court which serve as ***the basis*** for the initial injunction. Without a review by this Court of the legal error committed below in making the findings to support the injunction, there is nothing preventing the District Court from entering a preliminary injunction every 90 days throughout the life of this case, continually repeating the legal error for which Appellants' currently seek redress. Indeed, this is likely Appellees'/Plaintiffs' planned next step in this litigation.

Appellees also cite to *Calderon v. Moore,* 518 U.S. 149, 150 (1996). Yet, *Calderon* does not support Appellees' position at all. To the contrary, in *Calderon,* after the Court of Appeals dismissed the case as moot, the United States Supreme Court ***reversed*** the judgement of the Court of Appeals, granted the petition for writ of *certiorari* on the grounds that "even a 'partial remedy' is 'sufficient to prevent [a] case from being moot.'" *Id.*, at p. 150. "Because a decision in the State's favor would release it from the burden of the new trial itself, the Court of Appeals is not prevented from granting 'any effectual relief whatever' in the State's favor, *Mills, supra,* at 653, 16 S.Ct., at 133, and the case is clearly not moot." *Id.* The fact that Appellees are raising this issue is a detailed illustration of why the merits of this case are ripe for adjudication by this Court—to prevent continued repetition of the legal error of which Appellants complain, and which the Supreme Court appears poised to grant *certiorari.*

Appellees effectively concede the gravamen of the legal issue on appeal by their arguments in their Motion to Dismiss—that there is no

ongoing violation of a federal right under the PLRA, nor was there at the time of the injunction, and as such, the injunction was unwarranted and based on serious errors *ab initio*. The PLRA requires specific findings under subsection (a): that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. 13 U.S.C. § 3626 (a)(1). In arguing that the issues on appeal are moot, Appellees appear to concede that there is no legal basis for an injunction, that none of these elements under the PLRA exist, and never did—***the substantive issues on the merits Appellants seek to adjudicate***.

Lastly, Appellees' flagrant misstatements must be addressed. Appellees state, "[b]riefing for this appeal has not moved expeditiously," (Case No. 20-55568, Dkt. 37, p 2; Case No. 20-55668, Dkt. 11, p. 2) yet, they simultaneously "request that the Court 'stay the schedule for record preparation and briefing pending the Court's disposition of [this] motion.' Cir. R. 27-11(a)(1)." *Id*. p. 1. Appellees continue to complain that, "Appellants then sought a 30-day extension of time to file an opening brief, which this Court granted." *Id*. p. 2. Appellees ***stipulated*** to the 30-day extension of time. *See* Case No. 20-55568, Dkt. 21; Case No. 20-55668, Dkt. 8. "After receiving a second 30-day extension of time, Appellants filed an emergency application for a stay of the District Court's injunction in the Supreme Court…" Case No. 20-55568, Dkt. 37, p. 2; Case No. 20-55668, Dkt. 11, p. 2. Again, Appellees

stipulated to the second 30-day extension of time about which they now complain. Case No. 20-55568, Dkt. 31. Appellees' Motion to Dismiss is merely a gamesman's attempt have this Court vacate the Supreme Court's Order granting a stay of the injunction until the merits can be decided. The Motion to Dismiss should be denied.

CONCLUSION

For the reasons stated herein, Appellees' Motion to Dismiss should be denied.

Respectfully submitted,

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KAYLA N. WATSON, DEPUTY

Dated: September 4, 2020 By: s/Kayla N. Watson
Kayla N. Watson, Deputy

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DON BARNES and
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CERTIFICATE OF SERVICE

I certify that on September 4, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by and served the parties in the action [along with parties registered to receive NEF's in CM/ECF] using the appellate CM/ECF system.

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I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed in Santa Ana, California this Fourth day of September, 2020.

/S/ Simon Perng
Simon Perng