UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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U.S. COURT OF APPEALS

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. 20-55668 D.C. No. 8:20-cv-00835-JGB-SHK Central District of California, Santa Ana ORDER

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

On June 12, 2020, in appeal No. 20-55568, we denied Defendants-Appellants Orange County and Sheriff Don Barnes' (collectively "Defendants") emergency motion to stay the district court's May 26, 2020 preliminary injunction order, but remanded for the limited purpose of allowing the district court to consider whether changed circumstances justified modifying or dissolving the injunction.

On remand, Defendants moved to dissolve the injunction immediately, arguing that evidence of a declining rate of COVID-19 infections in the Orange County Jail demonstrated that the injunction was no longer necessary. On June 26, 2020, the district court denied Defendants' motion to dissolve the injunction as

premature and ordered expedited discovery regarding the current conditions in the Orange County Jail.

Defendants challenge the district court's June 26, 2020 order in the instant appeal. They have filed an emergency motion to stay the district court's May 26, 2020 preliminary injunction order in light of the evidence of changed circumstances they presented in support of the motion to dissolve the injunction in the district court.

In evaluating whether to issue a stay pending appeal, we review the following factors: "(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." *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011) (quoting *Nken v. Holder*, 16 556 U.S. 418, 434 (2009)).

We review for abuse of discretion the district court's denial of a motion to dissolve, modify, or clarify a preliminary injunction. *See Karnoski v. Trump*, 926 F.3d 1180, 1198 (9th Cir. 2019). An applicant "seeking modification or dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000).

Defendants presented evidence to the district court showing that the infection rate among inmates at the Orange County Jail has decreased since the imposition of the preliminary injunction. The district court concluded, however, that it could not meaningfully evaluate this evidence without first allowing Plaintiffs to conduct the discovery necessary to respond to it. On appeal, Defendants argue that this court should stay the injunction pending this appeal, because the evidence Defendants presented to the district court was sufficient, on its own, to justify dissolving the injunction immediately. We disagree.

This court's 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. Consistent with our June 12, 2020 order, the district court ordered expedited discovery to be completed by July 15—an order that was necessary only because Defendants had refused to respond voluntarily to Plaintiffs' discovery requests regarding the current conditions in the jail. It was particularly appropriate for the district court to allow Plaintiffs to conduct expedited discovery before ruling on the motion to dissolve given Defendants' conflicting statements about their ability to comply with the requirements of the injunction. In light of these circumstances, Defendants have not demonstrated a strong likelihood of success in showing the

district court abused its discretion in denying the motion to dissolve the injunction as premature.

We therefore deny Defendants' emergency motion to stay the preliminary injunction (Docket Entry No. 2).

The previously established briefing schedule remains in effect.

IT IS SO ORDERED.

R. NELSON, Circuit Judge, dissenting:

The district court ordered expedited discovery in accordance with our instructions on limited remand to determine whether changed circumstances may warrant the preliminary injunction's dissolution. This is a positive first step. Nevertheless, the district court based its decision to deny Appellants' motion on erroneous legal principles. At a minimum, the court should have stayed the injunction in light of Appellants' new evidence brought forward showing that it is now likely unjustified, and granted the motion for an expedited evidentiary hearing. I dissent because the district court abused its discretion, *see Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811, 816 (9th Cir. 2019) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." (internal quotation marks omitted)), and I would grant Appellants' requested relief pending an evidentiary hearing.

First, the district court erred in holding 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." The district court based its conclusion largely on the fact that the country "remains deep in the throes of the outbreak" and COVID-19 spreads "rapidly." Beyond suggesting that attaining *zero* transmission may not be enough for the Jail to avoid an Eighth Amendment violation, the district court also maintains the injunction will continue to be necessary until Appellants "consistently implement those steps outlined in the injunctive order" to prevent a second spike in cases. This approach would justify imposing the district court's sweeping injunction on every correctional facility in the country, regardless of current conditions within those facilities—an unprecedented extension of the judicial power.

Even assuming a constitutional violation here (highly unlikely at this point), enjoining the Jail until it "consistently implements" the district court's measures exceeds the district court's authority under the Prison Litigation Reform Act (PLRA) because the injunction extends "further than necessary to correct" the ongoing violation found by the district court. *See* 18 U.S.C. § 3626(a)(2). By requiring full and consistent compliance with measures well beyond what the CDC's Interim Guidelines require, the district court's remedy is not "narrowly

tailored" as the PLRA requires, and thus an abuse of discretion. *Cf. Graves v. Arpaio*, 623 F.3d 1043, 1050-51 (9th Cir. 2010) (finding district court's ordered relief was narrowly tailored to the requirements of the Eighth Amendment by requiring detainees "be provided food that *meets* . . . the Department of Agriculture's *Dietary Guidelines*") (emphasis added). This error is only compounded by the district court's failure to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief" and to "respect the principles of comity" as required by the PLRA. § 3626(a)(2).

Lastly, the district court erred because its initial reason for granting the injunction—that "[r]ates of COVID-19 infection at the Jail are skyrocketing"—is not factually accurate, *see Ahlman v. Barnes*, No. 20-55568, 2020 WL 3547960 at *6 (9th Cir. June 17, 2020) (order denying stay of preliminary injunction) (R. Nelson, J., dissenting), and is only further undermined by Appellants' evidence of changed circumstances in a rapidly improving environment. Appellants informed the district court that the Jail had just six active COVID-19 cases (down to just four as of June 24, 2020), with zero transmission, and that these new positive cases are now only coming from new bookings. This information at a minimum justifies staying the injunction until it can be tested through additional discovery and an evidentiary hearing.

Because the district court abused its discretion, I respectfully dissent.