

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
CIVIL MINUTES—GENERAL

Case No.	<b>EDCV 20-835 JGB (SHKx)</b>	Date	September 17, 2021
Title	<i>Melissa Ahlman, et al. v. Don Barnes, et al.</i>		

Present: The Honorable JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ

Deputy Clerk

Not Reported

Court Reporter

Attorney(s) Present for Plaintiff(s):

None Present

Attorney(s) Present for Defendant(s):

None Present

**Proceedings: Order (1) DENYING Defendants’ Motion to Dismiss (Dkt. No. 171); (2) DENYING Motion to Stay (Dkt. No. 177); and (3) VACATING the September 20, 2021 Hearing (IN CHAMBERS)**

Before the Court are two Motions filed by Defendants Don Barnes and Orange County: a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1) and a Motion to Stay. (“MTD” Dkt. No. 171; “Stay Motion,” Dkt. No. 177.) The Court determines these matters appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. After considering all papers filed in support of and in opposition to the Motions, the Court DENIES both the Motion to Dismiss and the Stay Motion. The September 20, 2021 hearing is VACATED.

### I. BACKGROUND

On May 26, 2020, the Court issued an injunction compelling Defendants to implement several practices within the Orange County Jails to quell the spread of COVID-19. (“PI Order,” Dkt. No. 65.)

On July 19, 2021, Defendants filed the MTD. In support, Defendants have requested judicial notice (“RJN,” Dkt. No. 171-1),<sup>1</sup> and filed a number of exhibits. On August 16, 2021,

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<sup>1</sup> Defendants request judicial notice of documents from Campbell v. Barnes, Orange County Superior Court Case No. 30-2020-01141117-CU-WM-CXC, as well as a press release article authored by the ACLU. The Court finds all documents to be matters of public record. (continued . . . )

Plaintiffs opposed the MTD. (“MTD Opp.,” Dkt. No. 178.) On August 27, 2021, Defendants replied. (“MTD Reply,” Dkt. No. 180.) Defendants have also filed evidentiary objections to the MTD Opp. (“Defs’ Ev. Obj.,” Dkt. No. 181.)<sup>2</sup>

On August 13, 2021, Defendants filed the Stay Motion. On August 30, Plaintiffs filed a supplemental memorandum in opposition to the Stay Motion. (“Stay Opp.,” Dkt. No. 182.) Defendants replied on August 30, 2021. (“Stay Reply,” Dkt. No. 183.)

## II. FACTUAL ALLEGATIONS

Plaintiff alleges the following facts, which are assumed to be true for the purposes of the MTD.

Plaintiffs are confined in the Orange County Jail. (FAC ¶ 1.) Covid-19 is a novel coronavirus which is highly contagious and can be fatal. (Id. ¶ 3.) People with certain underlying health conditions are especially vulnerable to severe illness and death from Covid-19. (Id.) Public health experts have issued recommendations to prevent the spread of Covid-19, which include maintaining social distancing of at least six feet, wearing masks, cleaning surfaces, and proper handwashing. (Id. ¶ 4.) The congregate setting of the Orange County Jail increases the likelihood that those detained there will become infected with Covid-19 because social distancing, masking, cleaning surfaces, and handwashing are either difficult or impossible. (Id. ¶ 5.)

At the time the FAC was filed, no vaccine for Covid-19 existed. However, that has changed. The Court takes judicial notice of the existence of Covid-19 vaccines at this point in time.

## III. LEGAL STANDARD

A Federal Rule of Civil Procedure 12(b)(1) motion challenges the court’s subject matter jurisdiction, without which, a federal district court cannot adjudicate the case before it. See Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994). Pursuant to Rule 12(b)(1), a party may seek dismissal of an action for lack of subject matter jurisdiction “either on the face of the pleadings or by presenting extrinsic evidence.” Sierra v. Dep’t. of Family and Children Servs., 2016 WL 3751954, at \*3 (C.D. Cal. Feb. 26, 2016) (quoting Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003)). Thus, a jurisdictional challenge can be either facial or factual. White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the moving party

See Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986). Defendants’ request is granted and notice is taken.

<sup>2</sup> Defendants object to: (1) The August 13, 2021 Declaration of Daisy Ramirez (Dkt. No. 178-1); (2) The August 16, 2021 Declaration of Corene Kendrick (Dkt. No. 178-2); and (3) The August 2, 2021 Declaration of Dr. Salmaan Keshavee, M.D. (Dkt. No. 178-17). As the Court does not rely on the objected-to portions of these documents, Defendants’ objections are denied as moot.

asserts that the allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). When evaluating a facial attack, the court must accept the factual allegations in the plaintiff's complaint as true. Comm. for Immigrant Rights of Sonoma Cty. v. Cty. of Sonoma, 644 F. Supp. 2d 1177, 1189 (N.D. Cal. 2009).

Rule 12(b)(1) is the rule under which arguments about mootness may be raised. “[I]n deciding a mootness issue, the question is not whether the precise relief sought at the time the application for an injunction was filed is still available.” Or. Nat. Res. Council v. U.S. Bureau of Land Mgmt., 470 F.3d 818, 820 (9th Cir. 2006) (alteration in original) (quoting Nw. Env'tl. Def. Ctr. v. Gordon, 849 F.2d 1241, 1244–45 (9th Cir. 1988)). Rather, “[t]he basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted.” 849 F.2d at 1244. Moot cases are cases which are no longer present, live controversies. Id. If an event occurs during litigation “that prevents the court from granting effective relief, the claim is moot and must be dismissed.” Am. Rivers v. Nat'l Marine Fisheries Serv., 126 F.3d 1118, 1123 (9th Cir. 1997).

A court may stay proceedings as part of its inherent power “to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” Landis v. N. Am. Co., 299 U.S. 248, 254 (1936); see also Clinton v. Jones, 520 U.S. 681, 706 (1997) (“The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket.”) (citing Landis). The inherent power to stay includes ordering a stay “pending resolution of independent proceedings which bear upon the case.” Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 863 (9th Cir. 1979).

#### IV. DISCUSSION

Defendants argue that Plaintiffs' claims are moot, and the Court therefore lacks Article III jurisdiction. (MTD 14.) Defendants also argue that res judicata bars this action because a final judgment on the merits has been entered in the parallel state court action, Campbell v. Barnes. (Id. 18.) The Court considers res judicata first.

##### A. Res Judicata and Judicial Admissions

Res judicata is also known as claim preclusion. Under California law, “claim preclusion arises if a second suit involves: (1) the same cause of action (2) between the same parties [or those in privity with them] (3) after a final judgment on the merits in the first suit.” DKN Holdings LLC v. Faerber, 61 Cal.4th 813, 824 (2015). In order for claim preclusion to apply, causes of action must be “identical.” People v. Barragan, 32 Cal. 4th 236, 253 (2004).

This action was not the only one brought concerning Covid-19 in the Orange County Jail. On June 2, 2020, a group of plaintiffs filed a parallel class action against Defendants, Campbell v. Barnes, in state court. (MTD Exh. G.) In December 2020, the Campbell court issued a writ of habeas corpus and a writ of mandate ordering the Jail reduce its density in congregate living

areas, and in June 2021, the court concluded Defendant Barnes had substantially complied with the writs by releasing class members and taking other steps to reduce population density in the Jail. (MTD Exh. A.) Upon resolution of that case, the ACLU, counsel of record in both that suit and this one, issued a press release announcing that as of June 14, 2021, the Orange County Jail was a “model for the nation” in COVID-19 management. (MTD Exh. C.)

Whether *res judicata* bars Plaintiffs from continuing to litigate this suit depends upon whether Campbell involved the same causes of action. Plaintiffs argue they do not—Campbell contained different claims and attended to different violations of law. (Opposition 19-20.) Plaintiffs are correct. Campbell was brought pursuant to state-law writs of mandate and habeas corpus. (MTD Exhs. A, G.) It sought release from custody and reduction in the Jail population as a remedy; its primary concern was release from jail. (*Id.*) In contrast, this case concerns conditions of confinement for those who are not released. (FAC.) Indeed, when Plaintiffs filed the FAC in this case, they abandoned all federal habeas claims from the Complaint. (FAC.) Since June 2020, Plaintiffs have sought no release-based relief in this case, but only improvement in their conditions of confinement. (*Id.*) The Court finds that this case and Campbell do not involve the same causes of action; *res judicata* does not apply.

The Court also does not take the June 14, 2021 statement from the ACLU as a judicial admission that this case is moot. (MTD Exh. C.) The release explains the facts of Campbell, announces that that case has resolved, and the pivots to general talking points about jails and the role of the criminal legal system in society. (*Id.*) It does not state or even suggest that the Covid-19 pandemic has concluded or that there is no longer a need for conditions of confinement to improve. (*Id.*)

## **B. Mootness**

Defendants’ primary argument in the MTD is that this case is moot. (MTD 14-16.) They argue that “Plaintiffs face no ongoing deprivation of any constitutionally protected interest relating to COVID-19 and conditions of confinement at the Jail,” and accordingly, “they lack standing to seek prospective relief from this Court.” (*Id.* 15.)

However, other than the resolution of the Campbell litigation, it is unclear what, exactly, has changed. As discussed above, Campbell was a habeas action concerning release from detention; this case concerns conditions of confinement. Acknowledgments of the end of Campbell do not moot Plaintiffs’ separate claims here. Logically, the Orange County Jail could reduce its population significantly but also still contain unconstitutional conditions of confinement. Defendants provide no other specifics. It appears the real mootness argument—implied but unstated—is that the Covid-19 pandemic is somehow over. (*See* MTD 3, 12, “actual circumstances as they exist presently” merit dismissal; the “conditions that predicated this litigation are no longer in existence.”)

This is not a serious argument. As Plaintiffs’ MTD Opposition notes, the Delta variant of the virus “is moving through Southern California with a higher positivity rate than the initial

strain that (a) prompted this lawsuit; (b) has hospitalized multiple class members and killed at least two people in the Jail; and (c) resulted in a finding of deliberate indifference against Defendants in the state habeas proceeding.” (MTD Opp. 1-2.) Indeed, according to the best available information, only 33% of the 3,247 class members in the Jail have been reported vaccinated against Covid-19. (*Id.* 2.) Moreover, “only 16% of Orange County Sheriff Department staff report being vaccinated” against Covid-19. (Stay Opp. 2.) Such low vaccination rates create significant risk. As of the filing of the MTD Opposition, there were 8 cases of Covid-19 at the jail, and as of the filing of the Stay Opp., there existed a Covid-19 outbreak “at the sheriff’s jail and headquarters complex, with 21 staff members infected so far.” (MTD 2; Stay Opp. 2.) In a lawsuit predicated on the threat of Covid-19 infection, the presence of actual Covid-19 infection in the Jail is strongly moots any claim this case is moot.

Defendants’ vague assurances that the “conditions that predicated this litigation are no longer in existence” do not make this case moot or strip the Court of subject matter jurisdiction. There are still outbreaks of a highly contagious and potentially fatal viral disease at the Orange County Jail. Whether those outbreaks constitute unconstitutional conditions of confinement is the merits question at the heart of this case. It is also not lost on the Court that, as between the parties, only Defendants have steady access to facts, statistics, and data descriptive of the Covid-19 risks present in the Orange County Jail—and Defendants have not provided such information to the Court or to Plaintiffs. Plaintiffs’ MTD Opposition argues that “Defendants have produced virtually no information about Jail conditions during the past four months, and are actively fighting Plaintiffs’ pending requests for a Rule 30(b)(6) deposition regarding COVID-19 vaccinations and a medical expert’s site inspection.” (MTD Opp. 1.) The allegations of the FAC are sufficient to establish Article III standing—this is not meaningfully disputed. Defendants have no facial attack on standing, and the assertion that “circumstances” are different is not evidence sufficient to constitute a factual attack on standing. The MTD is DENIED.

### **C. Stay Motion**

Plaintiffs’ Stay Opp describes the following:

Parties have reached an agreement regarding pending discovery. Plaintiffs agreed to a compromise regarding their requested Jail inspection and will accept 12 hours of video footage from inside the Jail in lieu of a two-day inspection. Plaintiffs further agreed to postpone a 30(b)(6) deposition of Defendant Orange County until the week of the hearing on Defendants’ Motion to Dismiss, pending the outcome of that hearing, and to limit that deposition to four hours. Plaintiffs agree that, as long as Defendants continue to make supplemental productions of documents every three weeks responsive to past requests, Plaintiffs do not plan to propound additional discovery pending this Court’s resolution of the Motion to Dismiss.

(Stay Opp. 1.)

The Court finds that agreement between the parties regarding pending discovery eliminates any claim to “extreme hardship” on the part of Defendants. The Stay Motion is DENIED.

#### **V. CONCLUSION**

For the reasons above, the Court DENIES the Stay Motion and DENIES the Motion to Dismiss. The September 20, 2021 hearing is VACATED.

**IT IS SO ORDERED.**