No. 08-195

In The Supreme Court of the United States

COUNTY OF ORANGE,

Petitioner,

vs.

FRED PIERCE, TIMOTHY LEE CONN, FERMIN VALENZUELA, and LAURIE D. ELLERSTON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION BRIEF

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I. THE HOLDING THAT NINETY MINUTES OF WEEKLY EXERCISE IS CONSTITUTIONALLY REQUIRED IS INEXTRICABLY TIED TO THE PROTECTIONS AFFORDED BY THE EIGHTH AMENDMENT.

Respondents contend that the many cases where other Circuits have admonished against bright-line rules regarding exercise in the penological setting and have rejected similar exercise-related challenges should be disregarded because the Ninth Circuit below did not use the phrase "cruel and unusual punishment." The suggestion that cases involving convicted prisoner's exercise-related claims should be ignored is unfounded; for purposes of assessing the constitutionality of exercise time-related procedures, the fundamental constitutional standard is substantively one and the same. *See*, *Jurado v. Beggs*, 2008 WL 4191387, *3 (W.D. Okla. 2008) ("the court has not adopted a set weekly total for regular or daily exercise for *detainees/inmates*, nor has the court recognized a constitutional right to outdoor exercise for detainees") (emphasis added).

Indeed, the Ninth Circuit did not draw sharp distinctions between the analysis of the exercise-based claim in this case from similar claims brought under the Eighth Amendment and explained that pretrial detainees are protected by "specific substantive guarantees of the federal Constitution, such as the First and *Eighth* Amendments" and that "[e]xercise is one of the *basic human necessities* protected by the *Eighth* Amendment." (App. 29, 46;

emphasis added.) The Ninth Circuit's conclusion that 90 minutes of weekly exercise "does not give meaningful protection to this *basic human necessity*" is unquestionably grounded in well-established Eighth Amendment law relating to the constitutional threshold dictated by "basic human necessities." *See, Barney v. Pulsipher,* 143 F.3d 1299, 1310 (10th Cir. 1998) (the Eighth Amendment requires jail officials to provide conditions of confinement that ensure the "basic necessities of adequate food, clothing, shelter, and medical care"); *see also*, *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986) (both the Eighth and Fourteenth Amendments "prohibit the infliction of 'cruel and unusual' punishment"). Thus, the Ninth Circuit's analysis and attendant holding that providing pretrial detainees with 90 minutes of dedicated exercise time results in actionable and unconstitutional "punishment," are inextricably tied to longstanding constitutional parameters under the Eighth Amendment.

Respondents overlook the significance of this inextricable connection between a pretrial detainee's constitutional rights and the Eighth Amendment's protection of all inmates' basic human necessities. Indeed, it is well-established that although a pretrial detainee's claim "arises under the due process clause, the [E]ighth [A]mendment guarantees provide a *minimum* standard for determining [his] rights as a pretrial detainee." *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) (emphasis added); *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998) ("Although the Due Process Clause governs a pretrial detainee's claim of

unconstitutional conditions of confinement . . . *the Eighth Amendment standard provides the benchmark for such claims*. . . .") (citing *Bell v. Wolfish,* 441 U.S. 520, 535, 99 S.Ct. 1861 (1979) (emphasis added); *Turner v. Spence*, 2008 WL 927709, *6 (E.D. Cal. 2008) ("pretrial detainees' Fourteenth Amendment rights are analogized to the rights of prisoners under the Eighth Amendment") (citing *Redman v. County of San Diego,* 942 F.3d 1435, 1441-1445 (9th Cir. 1991) (en banc); *Thompson v. County of Medina, Oh.*, 29 F.3d 238, 242 (6th Cir. 1994) (pretrial detainees are "entitled to the same Eighth Amendment rights as other inmates"); *Robertson v. Montgomery County*, 2006 WL 1207646, *1 (M.D. Tenn. 2006) ("claims brought by pretrial detainees challenging conditions of confinement are analyzed under the Eighth Amendment").

Since the Eighth Amendment establishes the minimum standard for examining the conditions of confinement in the pretrial detention context, this vast legal backdrop should not be ignored in determining the potential impact of the Ninth Circuit's holding that providing pretrial detainees with 90 minutes weekly of dedicated exercised time "constitutes punishment for purposes of § 1983." (App. 49.) Moreover, the inability to reconcile the Ninth Circuit's holding from those in the many cases where similar exercise claims have been rejected should not be brushed aside as Respondents suggest. The fundamental principles at issue are the same, regardless of whether the claim is brought under the Eighth or

Fourteenth Amendments. The Ninth Circuit's holding, therefore, should not be compartmentalized in this fashion but scrutinized in this broader and more meaningful constitutional context.

II. THE REVERSALS OF THE DISTRICT COURT'S ADA-RULING CANNOT BE RECONCILED WITH THE RELEVANT RECORD AND THE CONTROLLING STANDARD OF REVIEW.

Proper application of the "clearly erroneous" standard requires substantial deference to the district court, and prohibits the court of appeals from substituting its own judgment for that of the district court. Accordingly, when applying the "clearly erroneous" standard, a court of appeals may not reverse a district court's judgment based on disagreements as to the weighing and interpretation of the evidence, including witness credibility determinations.

The specific substance of the District Court's rulings – issued after a six-day bench trial – cannot be reconciled with Respondents' insistence that the Ninth Circuit's reversals of the District Court's factual findings and conclusions of law did not violate this longstanding standard of review. If anything, the portions of the record Respondents cite demonstrate how the Ninth Circuit did not afford the District Court the substantial deference to which it was entitled, and reversed the subject rulings based on its

disagreement with the District Court's interpretation of the competing evidence presented at trial.

A. The Affirmance Of The District Court's Other Rulings Exemplifies The Proper Application Of The Controlling Standard Of Review.

The Ninth Circuit affirmed most of the District Court's rulings, ranging from case management and pretrial issues to the finding in favor of Petitioner on 12 of the 14 *Stewart* injunctive orders. The affirmance of these rulings reflected the appropriate application of the "clearly erroneous" standard of review. For example, with respect to the two *Stewart* orders pertaining to the provision of seating while awaiting transport to or from court and time for meals, the Ninth Circuit did not independently weigh the competing evidence presented in the District Court, or substitute its own judgment for that of the District Court. Rather, Ninth Circuit observed that Petitioner presented evidence showing that it had actively sought to provide adequate meal time and seating in holding cells, and that such evidence was a sufficient basis on which to support the District Court's judgment. (App. 36-37.)

The Ninth Circuit, however, did not exercise similar restraint in ruling on the ADA issues. There is in fact a marked contrast between the Ninth Circuit's treatment of the record with respect to these two *Stewart* orders – where the Ninth Circuit appropriately

observed that certain evidence was presented and determined that such evidence supported the District Court's finding – and its treatment of the record in ruling on the ADA issues, where the Ninth Circuit inappropriately disregarded the District Court's assessment of the strengths, weaknesses, and weight of the competing evidence presented at trial. While the former approach embodies a proper application of the "clearly erroneous" standard, the latter does not. Indeed, this disparate treatment of the record highlights the Ninth Circuit's erroneous review and reversal of the District Court's ADA-related rulings.

B. The District Court's ADA-Related Rulings Were Based On Its Evaluation Of The Relevant And Competing Evidence And Should Therefore Not Have Been Disturbed.

Respondents argue that the Ninth Circuit correctly ruled that the District Court's findings were clearly erroneous, citing a few excerpts of trial testimony. Respondents' argument, however, cannot overcome the fact that the District Court concluded that Respondents had failed to make "the rest of the required showing" to prevail on their ADA-based physical barrier claim and that "the defense showed other effective remedies are in use, and decisions are being made concerning structural modifications in keeping with effective prison administration and based on legitimate penological interests." (App. 101.) The District Court also found of "limited value"

Respondents' purported expert witness, Peter Robertson,[1] whose testimony did not address key factual topics and offered "no analysis of accessability [*sic*] to programs or mainstreaming." (App. 100, n.7.) These highly probative conclusions – reached after presiding over a six-day bench trial during which 26 witnesses testified – should not have been disturbed.

Respondents' limited citations to the record only further demonstrate how the Ninth Circuit improperly weighed competing evidence and substituted its own judgment for that of the District Court. For example, Respondents refer to Mr. Robertson's testimony that certain architectural changes could be made to accommodate disabled inmates (the same testimony cited by the Ninth Circuit in its opinion). The District Court, however, found that Mr. Robertson's testimony consisted of "broad, conclusory statements" that did not justify injunctive relief because there was no analysis or cost study accompanying the

[1] Despite the District Court's explicit discounting of the probative value of Mr. Robertson's testimony, the Ninth Circuit repeatedly pointed to his assertions regarding purported architectural deficiencies. (App. 61, 62, 64-66.) Not only was reversing the District Court's findings based on a divergent impression of Mr. Robertson's testimony improper, the Ninth Circuit did not mention the fact that Mr. Robertson was a self-professed "accessologist" and was not certified or licensed by any professional organization. (Ct. App. SER 12634:24-12636:1 [Vol. 41].) *See*, *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-574, 105 S.Ct. 1504 (1985) (explaining at length the impropriety of disregarding the district court's factual and credibility determinations).

testimony. (App. 100.) Respondents have not pointed to any analysis or cost study outside of these "broad, conclusory statements," and neither have they cited to any portion of the record that would demonstrate that the District Court clearly erred by finding Mr. Robertson's testimony to be insufficiently persuasive and specific. While Respondents (and the Ninth Circuit) may disagree with the District Court's assessment of the probative value of Mr. Robertson's testimony, under the "clearly erroneous" standard, disagreement as to the weight of the competing evidence does not justify reversal of the trier-of-fact's factual findings.

The testimony of Captain Board with respect to programs and services available to disabled inmates is further evidence of the Ninth Circuit's inappropriate manner of review. The cited testimony clearly indicates that Captain Board established that disabled inmates have access to work, rehabilitation and education programs. (Ct. App. SER 13204-13206, 13209-13211 [Vol. 44].) That the District Court found persuasive Captain Board's testimony in reaching its conclusion that "[t]he facts taken as a whole show the County is acting in a reasonable manner, making programs accessible and usable, with due regard to legitimate penological interests" should not have subjected the ruling on the program-related ADA claim to reversal. Simply put, the District Court's finding against Respondents on this claim did not come close to being contrary to the record; rather, the District Court's ruling was a direct manifestation of

its evaluation of the merits and implications of the competing evidence at trial. Such rulings should not be reversed based on a court of appeals' belief that the evidence was wrongly interpreted.[2]

III. THE LONG-TERM CONSEQUENCES OF REQUIRING PROGRAM PARITY THROUGHOUT UMBRELLA ORGANIZATIONS SHOULD NOT BE DOWNPLAYED.

Review is also warranted because the Ninth Circuit, admittedly without any supporting case law authority, held that umbrella organizations could not "exclude the disabled from particular facilities with superior programs and services" and that "[a]ny type of educational, vocational, rehabilitative, or recreational program, service, or activity offered to nondisabled detainees should, when viewed in its entirety, *be similarly available to disabled detainees who, with or without reasonable accommodations, meet the essential eligibility requirements to participate*." (App. 71; emphasis added.) This holding establishes an extremely burdensome threshold for ADA compliance

[2] Recently, the Ninth Circuit took an additional step to cement the reversal of the District Court's factual findings. On October 24, 2008, the Ninth Circuit entered an order for the Court Commissioner to recommend an attorneys' fees award as to the issues that Respondents "prevailed" on appeal, including the ADA claims. Respondents, obviously, could not be treated as prevailing parties on these claims if this Court were to grant review of the Ninth Circuit's application of the clearly erroneous standard of review to the District Court's ADA rulings.

for any public entity that operates more than one facility at which programs and services are offered (to disabled and nondisabled persons).

Respondents seek to downplay the broad practical consequences of this holding by noting that the Ninth Circuit explained that the District Court "is not required to ensure that each individual program or service offered at Theo Lacy and Musick is offered in complete parity with an offering at the Central Jail [where disabled inmates are housed]." (App. 71-72.) This narrow exception – that *complete parity is not required* – to the broad declaration that programs and services offered to nondisabled persons must be made "similarly available" to disabled persons who are qualified to participate, with or without reasonable accommodations, is not a meaningful exception. The definition of "similarly available" is murky at best, and public entities, like Petitioner, will invariably face the choice of eliminating programs and services or repeatedly defending themselves in protracted and resources-draining ADA lawsuits. In *Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996), the D.C. Circuit recognized the vagaries of this difficult dilemma in explaining that jail officials "may well respond by reducing, to a constitutional minimum, the number of programs offered to all inmates." *Id.* at 925.

The Ninth Circuit's approach is in direct contrast to that of the D.C. Circuit, and Respondent submits that granting certiorari will enable this Court to provide umbrella public organizations throughout the

country with much-needed guidance on how to reconcile requirements under the ADA with the practical reality of servicing individuals at multiple facilities, where uniformity of programs and activities is infeasible and impracticable.

IV. THE REMANDING OF THIS ACTION FOR FURTHER FACTUAL FINDINGS ON ADA ISSUES IS ANOTHER REASON FOR GRANTING CERTIORARI.

Respondents also argue that the review should not be granted because the Ninth Circuit's decision regarding the two ADA issues is not final in that the Ninth Circuit remanded this case for further fact-finding: (1) to determine current state of the physical barriers to "areas to which disabled persons should have access" and to order required remedial measures; and (2) to determine the programs and activities to which disabled persons have access and to order remedial measures to make programs and services accessible to mobility and dexterity-impaired inmates. (App. 87.) This remand order essentially mandates a retrial on these ADA issues after the Ninth Circuit has already found Petitioner has "violated the ADA." (App. 81.)

This procedural posture (with a looming re-trial on these ADA issues) cannot be reconciled with Respondents' contention that this Court should refrain from granting certiorari at this juncture. Indeed, the further fact-finding required by the Ninth Circuit

provides even more reason for granting review now. As Respondents, themselves, point out, should the parties expend the time and effort required by another trial, the unsuccessful party is likely to appeal the outcome to the Ninth Circuit "for further review of the ADA issues." (Opp. at 24.) Such an appeal, and the re-trial on ADA issues, could be avoided if this Court were to grant certiorari and review the propriety of the Ninth Circuit's reversal of the District Court's rulings as to these ADA claims. Thus, the Ninth Circuit's remand instructions only further magnify the necessity for review at this juncture, as opposed to a much later stage, by which time the parties and the District Court will have had to exhaust significant resources to comply with the Ninth Circuit's directions on remand.

V. CONCLUSION

The petition for writ of certiorari should therefore be granted.

Respectfully submitted,

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