No. _____ 08-195 AUG 13 2008

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit has established an unwarranted bright-line rule of constitutional liability and created a stark inter-circuit conflict by holding that providing inmates in administrative segregation with 90 minutes of dedicated exercise time per week constitutes cruel and unusual punishment.

2. Whether the Ninth Circuit disregarded longstanding and controlling precedent established by *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985) and failed to afford the required deference to the District Court's factual findings reached after a six-day bench trial.

3. Whether the Ninth Circuit's holding that the County of Orange violated 42 U.S.C § 12132 of the Americans with Disabilities Act by not offering to physically disabled inmates housed at one detention facility every program and activity offered at two other detention facilities, threatens to dramatically disrupt and reduce the scope of programs and activities offered by umbrella organizations throughout the country.

LIST OF PARTIES (Rule 14.1(b))

The petitioner is the County of Orange of California, which was a defendant and appellee in the proceedings below. Fred Pierce, Timothy Lee Conn, Fermin Valenzuela, and Laurie D. Ellerston were the plaintiffs and appellants below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reported at 526 F.3d 1190 (9th Cir. 2008) and filed on May 15, 2008, is reprinted at Appendix ("App.") 1-86.[1] In this opinion, the Ninth Circuit entered an order denying the petition for rehearing *en banc* and amended certain sections of the original opinion reported at 519 F.3d 985 (9th Cir. 2008). The District Court's unreported Findings of Fact and Conclusions of Law, filed on April 27, 2005, is reprinted at App. 86-103.

JURISDICTION

The Court of Appeals for the Ninth Circuit denied a timely petition for rehearing *en banc*, filed an amended Opinion, and entered judgment on May 15, 2008. (App. 2-4.)

This petition is filed within 90 days of the entry of the judgment pursuant to 28 U.S.C. § 1201(c) and United States Supreme Court Rule 13.3. The jurisdiction of this Court to review the judgment

[1] The references herein to "App." are to the accompanying Appendix. References to the appellate record below will be referred to as "Ct. App. AER" (Appellants' Excerpts of Record") or "Ct. App. SER" (Appellees' Supplemental Excerpts of Record).

of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions relevant to this petition are as follows:

1. The Eighth Amendment to the Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. The Fourteenth Amendment to the Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

3. 18 U.S.C. § 3626(b)(3) provides:

> Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further

than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

4. 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

5. 42 U.S.C. § 12132 of the Americans with Disabilities Act provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

6. Federal Rules of Civil Procedure, Rule 52(a) provides in pertinent part:

> (a) Findings and Conclusions.
>
> (1) *In General.* In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and

> state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.
>
> . . .
>
> (6) *Setting Aside the Findings.* Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

STATEMENT OF THE CASE

This action involved a multi-faceted challenge, under 42 U.S.C. § 1983 and the Americans with Disabilities Act ("ADA"), to various conditions of pre-trial confinement at the jail facilities operated by Defendant County of Orange ("the County") in Santa Ana, California. The subject jail facilities are the Men's and Women's Central Jail ("Central Jail"), James A. Musick Facility, and Theo Lacy Facility. (App. 7.)

I. DISTRICT COURT PROCEEDINGS

Plaintiffs Fred Pierce, Timothy Lee Conn, Fermin Valenzuela, and Laurie D. Ellerston ("Plaintiffs") originally asserted these claims in a proposed class action. (App. 9-10.) Plaintiffs sought certification of a

class consisting of pre-trial detainees who had allegedly experienced violations of certain rights addressed by 14 separate injunctive orders, regarding various conditions of pretrial detention, originally issued in *Stewart v. Gates*, 450 F.Supp. 583 (C.D. Cal. 1978) ("*Stewart*"). (App. 7-8, 10, 87-88.)

Plaintiffs also sought certification of a subclass of physically disabled detainees whose rights under the ADA had allegedly been violated. (App. 10-11.) Plaintiffs claimed that the County had violated the ADA by failing to address structural barriers and failing to provide "adequate access to various programs offered by the County's jails." (App. 9.) The ADA claim relating to inadequate access to programs was based on the fact that mobility and dexterity-impaired inmates (hereinafter referred to as "physically disabled") are housed at the Central Jail, along with non-disabled inmates, and that certain programs offered to inmates at the two other jail facilities are not offered at the Central Jail. (App. 67.)

This proposed class action ultimately proceeded to a bench trial as an equitable relief class action without damages claims and was ordered consolidated with *Stewart* over which the District Court had jurisdiction. (App. 11-12.) The District Court also received evidence regarding whether the existing *Stewart* orders should be revised, modified, or vacated. (App. 12-13.)

During the ensuing six-day bench trial, the parties presented percipient and expert witness testimony, and submitted written closing arguments and trial briefs addressing the effect of the competing evidence on the questions of liability. (Ct. App. AER 9517 (Vol. 34) – 9716 (Vol. 35).) After close of evidence and submission of written closing arguments, the District Court issued its "Findings of Fact and Conclusions of Law" – in which it concluded that the 14 *Stewart* orders were no longer necessary and that Plaintiffs had failed to establish entitlement to ADA relief. (App. 87-103.)

II. NINTH CIRCUIT PROCEEDINGS

Plaintiffs appealed, and in a published opinion, the Ninth Circuit affirmed most of the challenged rulings but reversed the termination of two of the *Stewart* orders (regarding access for administrative segregation detainees to religious services and two hours of exercise per week) and declared the County to be in violation of the ADA. (App. 52-75.) The reinstatement of the two *Stewart* injunctive orders was based on the Ninth Circuit's conclusion that: (1) there was "consistent denial of access to the chapel . . . and to religious advisers to those in administrative segregation"; and (2) 90 minutes of exercise per week for administrative segregation inmates constituted cruel and unusual punishment. (App. 41, 49.) The Ninth Circuit held that based on these findings, the two corresponding *Stewart* orders must be reinstated to prevent ongoing violations of federal rights. (App. 45,

49.) Reversal on these grounds necessarily entailed the conclusion that the District Court had "clearly erred" in reaching factual findings to the contrary after the six-day bench trial.

The Ninth Circuit also held that the District Court had clearly erred in finding that "'various inmate programs are also available to disabled inmates'" and that "disabled inmates had access to all programs" but for one drug rehabilitation program. (App. 68, 101.) The Ninth Circuit found that the inmate programs and services available at the James A. Musick and Theo Lacy Facilities were not equally available at the Central Jail, citing as examples programs in agriculture, woodworking, welding, and access to recreational activities such as softball fields and volleyball courts. (App. 69.) The Ninth Circuit concluded that disabled inmates at the Central Jail, "by virtue of their status as disabled – have no possibility of access to the superior services offered outside of the Central Jail Complex." (App. 69.) At the same time, the Ninth Circuit noted that "[t]he ADA does not require perfect parity among programs offered by various facilities that are operated by the same umbrella institution" and that "[t]here is no clear case authority" as to "whether the ADA permits an umbrella organization to exclude the disabled from particular facilities with superior programs and services, so long as there is one accessible facility with inferior programs." (App. 70.)

Nevertheless, the Ninth Circuit reversed and remanded the matter for further fact-finding, requiring the District Court to "examine the feasibility of

offering similar programs at the Central Jail, and the extent to which the programs offered at the Theo Lacy or Musick are capable of being offered at the Central Jail without eliminating those programs at Theo Lacy or Musick." (App. 72.)

Defendants sought petition for rehearing *en banc*, and on May 15, 2008, the Ninth Circuit denied the petition for rehearing *en banc* and amended its original Opinion. (App. 2-4.)

REASONS FOR GRANTING THE PETITION

I. THE ANNOUNCEMENT OF A BRIGHT-LINE RULE THAT NINETY MINUTES OF WEEKLY EXERCISE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT HAS CREATED AN INTER-CIRCUIT CONFLICT THAT REQUIRES IMMEDIATE ATTENTION.

The Eighth and Fourteenth Amendments provide baseline constitutional protections against cruel and unusual punishment, the deprivation of necessary medical care and nourishment, and other fundamental rights. There is *no* unanimity, however, as to the nature and scope of the right *to exercise* in the penal setting. Here, in reinstating the *Stewart* order regarding exercise as to administrative segregation

inmates,[2] the Ninth Circuit has created a stark circuit conflict and carved a bright-line into a legal landscape where such bright lines have been consistently eschewed. This holding – that "ninety minutes of exercise per week constitutes punishment for purposes of § 1983" – warrants immediate review. (App. 49.)

Constitutional claims based on the amount of exercise in the penal setting have involved policies ranging from less than one hour per week to five or more hours per week. In examining these claims, courts have consistently held that the required inquiry is necessarily *fact-specific*, resulting in diverse analyses and holdings, and the consistently stated mantra *against* bright-line demarcations. *See*, *Rodgers v. Jabe*, 43 F.3d 1082, 1088 (6th Cir. 1995) ("restrictions on exercise may violate the Eighth Amendment *under some circumstances*") (emphasis added); *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987) (while "some courts have held a denial of fresh air and exercise to be cruel and unusual punishment under certain circumstances . . . [n]one, however, has ruled that such a denial is per se an Eighth Amendment violation."); *see also*, *Caldwell v. Miller,* 790 F.2d 589, 600 (7th Cir. 1986) ("The Eighth Amendment does not provide a fixed formula for

[2] This injunctive order requires "[r]ooftop exercise and recreation at least twice each week for a total of not less than 2 hours." (App. 86.)

determining whether the effect of particular conditions constitutes cruel and unusual punishment. . . .").

The divisive impact of the holding below that 90 minutes of exercise per week constitutes cruel and unusual punishment is clearly illustrated by cases from several circuits where very similar denial of exercise claims were rejected as having not stated a basis for constitutional relief. For example, in *Wishon v. Gammon*, 978 F.2d 446 (8th Cir. 1992), an inmate assigned to a state prison's protective custody unit claimed that the limitation of 45 minutes per week of out-of-cell recreation time constituted cruel and unusual punishment. *Id.* at 447-448. The Eighth Circuit affirmed the summary dismissal of this claim because the plaintiff "did not suffer any injury or decline in health resulting from his limited out-of-cell exercise time," and he had additional opportunities for out-of-cell activities, such as visiting and telephone calls. *Id.* at 449. Clearly, the Eighth Circuit's holding cannot be reconciled with the holding below that 90 minutes of exercise per week necessarily constitutes cruel and unusual punishment.

In *Rodgers*, 43 F.3d 1082, the Sixth Circuit granted prison officials qualified immunity against an administrative segregation inmate's claim that he had been subject to cruel and unusual punishment because he had not been provided with at least one hour of out-of-cell exercise per day, five days per week. *Id.* at 1088. The prison policy required "out-of-cell exercise one hour per day, five days a week – but *only every thirty days*." *Id.* at 1084 (emphasis added).

Qualified immunity was granted in light of the absence of any clearly defined constitutional minimums with respect to outdoor exercise – despite the fact that over a more than five-month period, the plaintiff had been allowed to exercise just 26 times (an average of just over one session per week). *Id.* at 1084, 1088. The Sixth Circuit reasoned that in its prior cases, it had not "specifically set a minimum of exercise required in order to avoid violating the Eighth Amendment's objective component[,]" and therefore, a reasonable prison official "would not have known that it was unconstitutional to limit a prisoner's exercise to one hour per week, five days a week every thirty days as a means of punitive sanction." *Id.* at 1086, 1088; *see also*, *Brown v. McGinnis*, 1998 WL 670028, *1 (6th Cir. 1998) (in a case challenging the same exercise policy as in *Rodgers*, qualified immunity granted because *Rodgers* "did not define the contours of a prisoner's right to exercise, and no case subsequent to *Rodgers* has clarified this right in such a way as to put the defendants in the present case on notice that they were violating [the plaintiff]'s rights by enforcing the policy at issue.").

The Ninth Circuit's holding also cannot be reconciled with *Bailey*, 828 F.2d 651, where the Tenth Circuit held that a state prisoner's constitutional rights were not violated when he was given access of *one hour per week* to an outdoor exercise facility. *Id.* at 653. In direct contrast with the decision below, the Tenth Circuit held that "[a]lthough this amount of exposure to exercise and fresh air is still restrictive,

we cannot say, *without more*, that it fails to satisfy the demands of the Eighth Amendment." *Id.* (emphasis added); *see also*, *Henderson v. Lane*, 979 F.2d 466, 469 (7th Cir. 1997) (granting prison officials qualified immunity because there was no clearly established right to more than one hour of exercise per week).[3]

These cases can be fairly considered to have formed a *potential* conflict with those cases where providing inmates with *greater* access to outdoor exercise has been held to be constitutional. *See*, *e.g.*, *Peterkin v. Jeffes*, 855 F.2d 1021, 1031-1032 (3d Cir. 1988) (holding that two hours per day of outdoor exercise is not cruel or unusual); *Ruiz v. Estelle,* 679

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[3] Moreover, the requirement that lack of exercise claims must be substantiated by proof of injury to the inmate's health is inherently inconsistent with the Ninth Circuit's holding – which does not contain any suggestion that actual injury is required to establish an Eighth Amendment violation. (App. 47-49.) The proof of injury requirement has been adopted by the Seventh, Eighth, and D.C. Circuits. *See*, *French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985), *cert. denied*, 479 U.S. 817 (1986) (lack of exercise may rise to a constitutional violation "where movement is denied and muscles are allowed to atrophy [and] the health of the individual is threatened"); *Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir. 1996) (citing *Wishon v. Gammon*); *Women Prisoners of District of Columbia Dept. of Corrections v. District of Columbia*, 93 F.3d 910, 927, 320 (D.C. Cir. 1996) (an inmate's limited right to exercise is violated "only if 'movement is denied and muscles allowed to atrophy, [or] the health of the individual is threatened.'") (quoting *French v. Owens*). Here, Plaintiffs did not attempt to make any showing that they suffered injuries to their health as a result of the alleged insufficient access to outdoor exercise. (Ct. App. AER 9543-9547:4 (Vol. 34) [Plaintiffs' Closing Trial Brief]).

F.2d 1115, 1152 (5th Cir. 1982) (one hour of exercise per day upheld as not violating the Eighth Amendment); *Davenport v. DeRobertis,* 844 F.2d 1310, 1316 (7th Cir. 1988) (upholding determination that inmates in segregation should be given five hours of exercise time per week); *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979) (affirming requirement that inmates be accorded one hour of outdoor exercise, five days per week).[4]

While these cases demonstrate that similar weekly exercise restrictions survive constitutional scrutiny, they also *could* be characterized as establishing a minimum constitutional requirement. However, these Courts and others – including the Ninth Circuit – have been careful about not announcing any per se rule as to the amount of exercise that is constitutionally required. *See*, *Davenport*, 844 F.2d at 1316 ("[w]e do not suggest that this is always and everywhere the constitutional minimum" for the amount of outdoor exercise); *Rodgers*, 43 F.3d at 1087 (explaining that in its prior cases where the right to exercise had been addressed, it had "stopped short of endorsing that amount, or indeed *any* amount, as a constitutional requirement"); *Spain*, 600 F.2d at 199 ("we do not consider it necessary to decide whether deprivation of outdoor exercise is a per se violation of the eighth amendment").

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[4] The plaintiff in *Rodgers* proffered this argument in support of his Eighth Amendment claim – which was dismissed on qualified immunity grounds. *Rodgers*, 43 F.3d at 1087-1088.

In the decision below, the Ninth Circuit did not exercise similar caution. After concluding that "pretrial detainees in administrative segregation and other restrictive classifications, such as protective custody, are typically afforded, at best, only ninety minutes weekly in a space equipped for exercise," the Ninth Circuit summarily held that this amount of weekly exercise time "does not give meaningful protection of this basic human necessity" and "*constitutes punishment* for purposes of § 1983." (App. 47, 48, 49; emphasis added.) The Ninth Circuit reinstated the subject *Stewart* injunction "to correct a current and ongoing violation of [a] Federal right." (App. 49, quoting 18 U.S.C. § 3626(b)(3).)

The declaration that 90 minutes of weekly exercise constitutes cruel and unusual punishment has brought to an intense boil what up to now might have only been a simmering circuit conflict. Public entities throughout the Ninth Circuit (and perhaps the country) can now anticipate inmates to rely on the decision below to pursue 42 U.S.C. § 1983 actions based on the theory that they were subjected to cruel and unusual punishment because they were provided with exercise time inconsistent with the decision below.

Such claims would not be discouraged by the Ninth Circuit's statement that "we need not hold that there is a specific minimum amount of weekly exercise that must be afforded to detainees who spend the bulk of their time inside their cells," because the holding that was actually reached – that 90 minutes

of exercise per week constitutes cruel and unusual punishment – does precisely that. (App. 47-48.) This holding, therefore, establishes a bright-line rule regarding exercise access, while also creating a sharp rift with those circuits that have upheld the constitutionality of similar time limitations. The Ninth Circuit's proclamation of this bright-line standard, therefore, breeds immediate confusion and crystallizes a substantial circuit conflict that necessitates immediate review.

II. THE DISTRICT COURT'S FACTUAL FINDINGS WERE NOT AFFORDED THE DUE DEFERENCE MANDATED BY THIS COURT IN *ANDERSON v. CITY OF BESSEMER CITY*.

Plaintiffs went to trial on their 42 U.S.C. § 1983 and ADA claims, and after an exhaustive six-day bench trial, the District Court found in favor of the County. The District Court's factual findings were based on the testimony of 26 witnesses, including opposing expert witness testimony, the deposition testimony of many additional witnesses, and extensive pre-trial and post-trial briefing. (App. 88; Ct. App. AER 6202 (Vol. 23) – 7615 (Vol. 25), 7278 (Vol. 26) – 7615 (Vol. 27), 7907-7974 (Vol. 29).) In reversing several of these factual findings as clearly erroneous, the Ninth Circuit failed to follow longstanding and controlling precedent regarding the significant deference that must be afforded a district court's factual findings. The lack of adherence to these principles of

review leads to disruptive consequences, as evidenced by the instant case.

A. Differences Of Opinion Do Not Justify The Reversal Of A District Court's Factual Findings.

A court of appeals' misapplication of the "clearly erroneous" standard of review to a district court's factual findings has often served as the basis for certiorari review.[5] *See, e.g., Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504 (1985); *Amadeo v. Zant*, 486 U.S. 214, 223, 108 S.Ct. 1771 (1988) (certiorari granted to review the Court of Appeals' failure to identify the standard of review applied to the district court's factual findings which are subject to a deferential clearly erroneous standard of review); *Sprint/United Management Co. v. Mendelsohn*, ___ U.S. ___, 128 S.Ct. 1140 (2008).[6]

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[5] The "clearly erroneous" standard of review is codified in Federal Rules of Civil Procedure, Rule 52 ("Rule 52").

[6] Courts of appeal have also often addressed, on rehearing, erroneous applications of the subject standard of review. *See, Guam v. Yang*, 850 F.2d 507 (9th Cir. 1988) (en banc), overruled on other grounds, *United States v. Keys*, 133 F.2d 1282 (9th Cir. 1988) (en banc) (rehearing granted, in part, to determine the correct standard of review for interpretation of Guam law); *Ledoux v. District of Columbia*, 833 F.2d 368 (D.C. Cir. 1987) (rehearing *en banc* granted in part to determine "[w]hat deference" is owed "to the findings of the District Court under Title VII and the Constitution"); *United States v. Cousins*, 455 F.3d 1116 (10th Cir. 2006) (rehearing granted to determine the

(Continued on following page)

In *Anderson*, 470 U.S. 564, this Court closely examined the nature and extent of the deference that must be afforded to a district court's factual findings, pursuant to Rule 52(a), which provided at that time: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Id.* at 573. This explanation was set forth in conjunction with the determination of whether the Court of Appeals had erred "in holding the District Court's finding of discrimination to be clearly erroneous." *Id.*

In *Anderson*, the plaintiff was the only woman of eight applicants for the city's recreation director. *Id.* at 567. Believing that she was not hired for discriminatory reasons, the plaintiff filed a Title VII action, and after a two-day bench trial, the district court "issued a brief memorandum of decision" explaining its finding that the plaintiff had not been hired "on account of her sex." *Id.* at 568. The district court subsequently issued its findings of fact and conclusions of law, including the conclusion that the plaintiff "had been better qualified than [the male applicant who had been hired] to perform the range of duties demanded by the position." *Id.* The district court reached this conclusion by considering the applicants' educational and professional backgrounds

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correct standard of review for a district court's Fourth Amendment analysis).

and the plaintiff's "greater breadth of experience [that] made her better qualified for the position." *Id.* at 569. The district court also found that the male members of the hiring committee were biased against the plaintiff because she was a woman, as evidenced by the testimony of one of the committee members and the questioning of the plaintiff about her family's reaction. *Id.* at 569-570. On appeal, the Fourth Circuit reversed the finding of discrimination by finding that the district court had clearly erred in reaching three findings: (1) that the plaintiff was the most qualified; (2) that the plaintiff had been asked questions that other applicants were not; and (3) that the male committee members were biased against hiring women. *Id.* at 571.

Certiorari was granted to review the Court of Appeals' failure to afford proper deference to the district court's factual findings. In reversing the Fourth Circuit, this Court explained:

> . . . [C]ertain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles . . . is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). This standard plainly does *not* entitle a reviewing court to

> reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. *The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court.* "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo.*" *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.* [Citations omitted.]

Anderson, 470 U.S. at 573-574 (emphasis added).

This Court explained further that these principles of appellate review govern district courts' findings based on "physical or documentary evidence or inferences from other facts" and that Rule 52's limitations are not limited to credibility determinations. *Id.* at 574 (citing *Pullman-Standard v. Swint,* 456 U.S. 273, 287, 102 S.Ct. 1781, 1789 (1982) (Rule 52(a) "does not make exceptions or purport to exclude

certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous.")).

Further judicial guidance was provided: "[d]uplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much." *Anderson*, 470 U.S. at 574-575; *see also*, *Mickens v. Taylor*, 535 U.S. 162, 177, 122 S.Ct. 1237, 1246 (2002) ("Our role is to defer to the District Court's factual findings unless we can conclude they are clearly erroneous."); *Sprint/United Management Co.*, 128 S.Ct. at 1144-1145 ("[In] deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters, *courts of appeals afford broad discretion to a district court's evidentiary rulings*.") (emphasis added).

In applying these principles of review, this Court held that the Fourth Circuit had "improperly conducted what amounted to a *de novo* weighing of the evidence in the record." *Anderson*, 470 U.S. at 576. Comparing the two diverse interpretations of the record, this Court explained that "we cannot say that either interpretation of the facts is illogical or implausible. Each has support in inferences that may be

drawn from the facts in the record; and if either interpretation had been drawn by a district court on the record before us, we would not be inclined to find it clearly erroneous. . . . When the record is examined in light of the *appropriately deferential standard*, it is apparent that it contains nothing that mandates a finding that the District Court's conclusion was clearly erroneous." *Id.* at 577 (emphasis added). This Court concluded its examination by articulating the dimensions of a common judicial reality:

> Even the trial judge, who has heard the witnesses directly and who is more closely in touch than the appeals court with the milieu of which the controversy before him arises, cannot always be confident that he "knows" what happened. Often, he can only determine whether the plaintiff has succeeded in presenting an account of the facts that is more likely to be true than not. *Our task – and the task of appellate tribunals generally – is more limited still*: we must determine whether the trial judge's conclusions are clearly erroneous.

Id. at 580-581 (emphasis added).

Accordingly, appellate courts have consistently recognized and applied this deferential standard for reviewing a district court's factual findings. For example, in *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983), the Ninth Circuit held that a district judge's findings "made in reliance on *controverted expert testimony*, will not be disturbed

unless clearly erroneous" and noted its "narrow scope of review when we review a factual determination of a district court that does not evince any misapprehension of relevant legal standards." *Id.* at 857 (emphasis added) (citing *Inglewood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 102 S.Ct. 2182, 2188 (1982)); *see also*, *Tractebel Energy Marketing, Inc. v. AEP Power Marketing, Inc.*, 487 F.3d 89, 99 (2d Cir. 2007) ("We may not set aside the district judge's findings of fact during a bench trial unless they are clearly erroneous."); *Cook v. City of Chicago*, 192 F.3d 693, 697 (7th Cir. 1999) ("reasonable doubts should be resolved in favor of the district judge's ruling in light of his greater immersion in the case"); *Ambassador Hotel Co., Ltd. v. Wei-Chuan Investment*, 189 F.3d 1017, 1024 (9th Cir. 1999) ("Review under the clearly erroneous standard requires *considerable deference*. . . . The appellate court *may not substitute its judgment* for that of the district court.") (emphasis added); *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1350 (11th Cir. 2005) ("Clear error is a highly deferential standard of review."); *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5, 7 (2006) (citing Rule 52 in explaining that the Ninth Circuit owed deference to the district court's ultimate findings).

These clearly-defined rules regarding the requisite level of deference closely parallel the language and requirements of Rule 52(a)(1)(6), which provides that the "[f]indings of fact, whether based on oral or other evidence, *must not be set aside unless clearly erroneous*, and the reviewing court must give *due*

regard to the trial court's opportunity to judge the witnesses' credibility." (Emphasis added.)[7] The reversal below conformed with neither these statutory requirements, nor with this Court's pronouncements in *Anderson* and the attendant case law.

B. The District Court's Factual Findings, Based On Its Deliberations Of The Relevant And Competing Evidence Presented At Trial, Should Not Have Been Disturbed.

In reversing the District Court's factual findings for clear error, the Ninth Circuit transgressed far beyond the longstanding boundaries of review and engaged in inappropriate second-guessing. The District Court's findings had necessarily been the product of its overall assessment, as the trier-of-fact, of the competing evidence and conflicting witness testimony presented throughout the bench trial. Therefore, even if the Court below concluded that

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[7] The Advisory Committee Notes to Rule 52 explained the argument for a "more searching appellate review" of a district court's findings is "outweighed by the public interest in the stability and judicial economy that would be promoted by *recognizing that the trial court, not the appellate tribunal, should be the finder of the facts*. To permit courts of appeals to share more actively in the fact-finding function would tend to *undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority*." (Emphasis added.)

they would have ruled differently had they been in the District Court's position, such a difference of opinion does not warrant the reversal of these findings.

That the District Court's findings should have been insulated from such heavy-handed review is evident from the substance of the subject ruling:

> In summary[,] concerning access to programs, there was an inadequate showing of the "reasonableness" of requiring modifications. The *facts taken as a whole* show the County is acting in a reasonable manner, *making programs readily accessible and usable, with due regard to legitimate penological interests*. . . . Programs, activities, and facilities are *readily accessible* and usable without "mainstreaming." (App. 101; emphasis added.)

These findings were invariably based on the District Court's consideration of competing evidence, such as the testimony of Captain Board who testified that physically disabled inmates have access to rehabilitation, work and educational programs (such as high school equivalency and computer classes) at the Central Jail and explained the security and safety concerns associated with housing physically disabled inmates. (App. Ct. App. SER 13204-13206, 13211:7-25 (Vol. 44).)[8] The District Court found that "this

[8] Specifically, Captain Board testified that housing wheelchair-bound inmates with general population inmates would be

(Continued on following page)

legitimate penological interest was not rebutted." (App. 101.)

Despite the presentation of substantial evidence to support the District Court's findings related to the availability of programs and services at the Central Jail, the Ninth Circuit reversed and found that the evidence below had actually established the exact opposite scenario – a violation of the ADA and the need for further fact-finding upon remand. Usurping the District Court's factual determinations in this manner constitutes a blatant disregard of this Court's instructions in *Anderson* and also cannot be reconciled with the application of the clearly erroneous standard of review in the myriad of cases since *Anderson*.

The Ninth Circuit's failure to adhere to these principles of review was not limited to the District Court's finding regarding access to jail programs but also the District Court's finding as to the "physical barrier" component of Plaintiffs' ADA claim. In finding against Plaintiffs on this part of their ADA claim, the District Court held that the testimony of inmate witnesses and Plaintiffs' expert witness, Peter Robertson (regarding certain architectural barriers

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dangerous because the wheelchair-bound inmates would have "a limited ability to protect themselves from the other inmates." (Ct. App. SER 13204:23-13206:4 (Vol. 44).) Captain Board also testified that disabled inmates are not excluded from the Community Work Program. (Ct. App. SER 13209:15-13210 (Vol. 44).)

and features) did not justify declaratory or injunctive action because there was no analysis, cost study, or proposal about how effective modifications could be made. (App. 99-100.) Mr. Robertson's testimony was also found to have been "broad conclusory statements," and his testimony therefore, was of "limited value." (App. 100.)

Moreover, the District Court ruled:

> Where structural corrections were not yet accomplished, *there was no significant Plaintiffs' showing that other methods were ineffective in achieving compliance*, while there was significant defense evidence that other curative methods were effective. *The evidence shows certain areas of ADA noncompliance are within the reasonable requirements of effective prison administration.* (App. 100; emphasis added.)

Thus, the District Court's ruling was unquestionably based on its assessment of the limited probative value of Plaintiffs' evidentiary showing. In concluding that this ruling was clearly erroneous, the Ninth Circuit relied almost exclusively on the testimony of the same expert witness whose testimony the District Court found to be ineffective and limited. (*See*, App. 61-62, 65-66.) The fact that the Ninth Circuit would have afforded more weight to this testimony or found the testimony to have been more compelling than did the District Court does not justify reversing the District Court on the ground that its findings were not supported by the record.

The District Court weighed this testimony against the other relevant evidence and concluded that the testimony did not allow Plaintiffs to meet their burden of proof at trial.

The District Court's factual findings, therefore, should not have been disturbed on appeal where such findings must be afforded significant deference and where mere disagreement about what the evidence showed does not warrant reversal of the trier-of-fact's factual findings.

III. REQUIRING INMATE PROGRAMS OFFERED AT EVERY OTHER JAIL FACILITY TO BE OFFERED TO PHYSICALLY DISABLED INMATES HOUSED AT ONE FACILITY WILL INVARIABLY CAUSE THE DRASTIC REDUCTION OR OUTRIGHT ELIMINATION OF SUCH PROGRAMS.

Review is also necessary to determine whether a public entity should be required under the ADA to provide disabled inmates with access to its entire array of jail programs and services – including those programs and services available at facilities where disabled inmates are *not* housed. The Ninth Circuit's holding and analysis can and will almost assuredly be interpreted to mean that a public entity violates the ADA if its detention and correctional facilities do not provide disabled inmates access to programs and benefits offered at *every one of its facilities* – even if disabled inmates, for legitimate reasons, are housed

in a *single facility*. If left alone, the decision below will compel public entities that operate more than one jail or prison facility to drastically reduce or eliminate valuable inmate programs and activities just to avoid ADA claims arising from facilities where every inmate program or activity cannot be offered.

The Ninth Circuit recognized that there were legitimate reasons for housing physically disabled detainees in a central location (due in part to their specific medical and security needs), and that the "ADA does not require perfect parity among programs offered by various facilities that are operated by the same umbrella institution." (App. 70.) Yet, the Ninth Circuit also concluded that the County "may not shunt the disabled into facilities where there is no possibility of access to those programs [available at the other facilities]." (App. 70.) The Ninth Circuit reached this conclusion, while at the same time, acknowledging that "[t]here is *no clear case authority on this precise point* – whether the ADA permits an umbrella organization to exclude the disabled from particular facilities with superior programs and services, *so long as there is one accessible facility with inferior programs*." (App. 70; emphasis added.)

Without controlling case law on the question of whether the same programs and activities must be made available at every facility operated by an umbrella organization, the Ninth Circuit held that the ADA does not permit any lack of uniformity, thereby setting the stage for ADA claims based on any such

program-related disparities. Blanket uniformity, however, should not be mandated under the ADA.

In the instant case, there was no dispute that inmates (whether disabled or not) were offered programs and activities at the Central Jail. The fact that the spectrum of these programs and activities did not exactly mirror the spectrum of programs and activities at the other two facilities where disabled inmates are not housed, should not subject public entities to ADA liability. Such a cumbersome application of the ADA – especially where detention facilities are involved – is wholly unsupported by "clear case authority" and will undoubtedly have a severe impact on custody facilities unable to offer ADA-governed programs in an across-the-board fashion. Indeed, physically disabled inmates at the Central Jail are not denied access to programs and activities *because* of their disabilities but because they cannot be housed anywhere but the Central Jail. Thus, the circumstances in the instant case do not implicate the direct causal nexus necessary for relief under 42 U.S.C. § 12132. *See, e.g., Brown v. City of Los Angeles*, 521 F.3d 1238, 1241 (9th Cir. 2008) (to prevail under Title II of the ADA, the plaintiff must show that the challenged policy "discriminates 'by reason of' their disabilities").

In a remarkably analogous setting, the D.C. Circuit in *Women Prisoners of the D.C. Dep't of Corrections v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996) ("*Women Prisoners*"), addressed the implications of requiring jail administrators to implement

inmate programs equally across multiple facilities. The D.C. Circuit recognized that as opposed to fostering benefits to the inmates as a whole, such an approach will force jail administrators to choose between all or nothing, and realistically, the choice of nothing will invariably prevail. *Id.* at 927.

The plaintiffs in this class action were female inmates at three separate facilities operated by the District of Columbia, and the women at two of these facilities alleged, among other things, "discrimination in access to academic, vocational, work, recreational, and religious programs." *Id.* at 913. After a three-week bench trial, the district court found multiple violations of federal and local law and issued an opinion with many findings, such as that the male inmates at two facilities "had greater recreational opportunities" than did the women. *Id.* at 914, 916. The District Court ordered the District of Columbia to "ensure that the women have access to the same opportunities and programs that are available to similarly situated men at other prisons." *Id.* at 917.

The D.C. Circuit prefaced its analysis by stating that "federal courts must *move with caution* when called upon to deal with even serious violations of law by local prison officials." *Id.* at 919 (emphasis added) (citing *Missouri v. Jenkins*, 495 U.S. 33, 51, 110 S.Ct. 1651, 1663 (1990) ("one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions.")).

The D.C. Circuit exercised such caution in reviewing the defendants' challenge to the district court's order that they "upgrade the work, recreational, and religious programs available to female inmates" – an order that was based on the finding that the disparities in these programs violated the female inmates' equal protection rights. *Id.* at 924. The D.C. Circuit held that the equal protection claim could not be based on the fact that more programs were available to men at another facility because "[it] is hardly surprising, let alone evidence of discrimination, that the smaller correctional facility *offered fewer programs than the larger one*." *Id.* at 925 (emphasis added). Further, the D.C. Circuit recognized that the District of Columbia "could, entirely consistent with the Constitution, deprive male and female inmates of virtually *all programs they now enjoy*[,]" and "[i]f federal courts could find equal protection liability whenever male and female inmates have access to different sets of programs, *budget-strapped prison administrators may well respond by reducing, to a constitutional minimum, the number of programs offered to all inmates*." *Id.* (emphasis added).

This analysis is just as apt in the instant case since such an unfortunate result is precisely what might await detainees and inmates in the County's custody – specifically, the vast reduction or elimination of programs offered to all detainees and inmates to avoid ADA liability arising from the housing of physically disabled detainees and inmates at the Central Jail. The County operates two detention facilities in

addition to the Central Jail, and it is true that certain programs and services are available at these facilities that are not available at the Central Jail. In order to avoid suits alleging ADA claims, those programs and activities made available to inmates at the other two facilities face wholesale elimination. Moreover, this dynamic will be magnified by the fact that the County's jail facilities house mostly pretrial detainees, and as opposed to prisons, house individuals for short periods of time. The impetus will therefore be that much stronger to eliminate inmate programs and activities to avoid ADA claims based on any disparity in the programs offered at the County's jail facilities.[9]

Consequently, the net effect of the Ninth Circuit's ADA analysis, with respect to programs and services, is that public umbrella organizations throughout the Ninth Circuit (and invariably throughout the country) will be faced with the bureaucratic and logistical quandary of having to juggle and revamp their programs and services to insulate themselves from ADA claims based on disparities that may exist from facility to facility.

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[9] State-wide prison systems certainly would not be immune from the practical effects of the Ninth Circuit's application of the ADA. A physically disabled inmate at one prison would have a colorable ADA claim if he or she were to allege that physically disabled inmates at another facility are afforded access to a certain program, service, or activity that is not made available to him or her.

Review, therefore, is necessary to address the propriety of such a counter-productive and counter-intuitive application of the ADA – which if left unchecked, will force many more public entities to choose between defending themselves against an overwhelming stream of ADA claims or eliminating worthwhile programs and services to protect themselves from such claims.

IV. CONCLUSION

The petition for writ of certiorari should therefore be granted.

Respectfully submitted,

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