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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. **JARED LEE LOUGHNER**, Defendant - Appellant.	No. 11-10339 D.C. No. 4:11-cr-00187-LAB-1 **ORDER**

Before: **KOZINSKI**, Chief Judge, **WARDLAW** and **PAEZ**, Circuit Judges.

There is a serious question whether the decision to involuntarily medicate a pre-trial detainee with psychotropic drugs may be made by prison authorities pursuant to Washington v. Harper, 494 U.S. 210, 227 (1990), or by the district court applying the Harper substantive standard, see United States v. Hernandez-Vasquez, 513 F.3d 908, 914, 919 (9th Cir. 2008). That question will be addressed by a merits panel after briefing. The only question before us is whether the district court abused its discretion by denying Loughner's emergency motion for a preliminary injunction enjoining the Federal Medical Center in Springfield, Missouri, from involuntarily medicating him after conducting a Harper administrative hearing and determining that he represents a danger to others. See

Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011). We conclude that it did.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Resources Defense Council, Inc., 129 S. Ct. 365, 374 (2008). "[S]erious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Alliance for the Wild Rockies, 632 F.3d at 1135 (internal quotation marks omitted).

Because Loughner has not been convicted of a crime, he is presumptively innocent and is therefore entitled to greater constitutional protections than a convicted inmate, as in Harper. See Riggins v. Nevada, 504 U.S. 127, 137 (1992) (ordering a remand because "[t]he court did not acknowledge the defendant's liberty interest in freedom from unwanted drugs," which "may well have impaired the constitutionally protected trial rights [defendant] invokes."); see also Demery v. Arpaio, 378 F.3d 1020, 1032 (9th Cir. 2004) (holding that an otherwise

valid governmental interest does not justify violating the rights of pretrial detainees). Whether Harper decisions for pre-trial detainees must be made by district judges or may be made by the Bureau of Prisons is a serious question going to the merits of Loughner's motion.

The Supreme Court has reasoned that "forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." Harper, 494 U.S. at 229. An inmate subjected to such drugs "would immediately face a risk of serious and potentially irreversible side effects." United States v. Ruiz-Gaxiola, 623 F.3d 684, 690 (9th Cir. 2010). The side effects can even be fatal. Harper, 494 U.S. at 229. Being forced to take medication carrying the risk of irreversible, possibly fatal side effects, no doubt amounts to irreparable harm.

For the same reasons, the balance of hardships tips in favor of Loughner. He has a strong personal interest in not being forced to suffer the indignity and risk of bodily injury that results from the administration of powerful drugs. The government's interest is no less serious: It seeks both to protect Loughner and those around him from any danger he might represent, and to evaluate whether he can be restored to competency. The government's interest is, however, less immediate. It has managed to keep Loughner in custody for over six months

without injury to anyone. We are confident it can continue to do so for the short period it will take to resolve this appeal on the merits. And the record shows that Loughner is not a danger to himself.

Finally, there is a strong public interest in preserving the safety and bodily integrity of individuals who are detained prior to trial and thus innocent in the eyes of the law. There is also a public interest in protecting the welfare of those who interact with Loughner while he is in pre-trial detention and in determining whether Loughner can be restored to mental health so he can stand trial for his alleged crimes. While both interests are significant, we conclude that preserving the dignity and bodily integrity of an individual who has not been convicted of a crime is the stronger interest, especially when the government has demonstrated that it is able to prevent that individual from harming himself or others.

Because all four of the applicable factors favor maintaining the status quo by precluding forced medication during the pendency of this appeal, we continue in force the stay we entered on July 1, 2011, enjoining the Bureau of Prisons from forcibly medicating Loughner with psychotropic drugs. See Alliance for the Wild Rockies, 632 F.3d at 1131–1135 (stating standard). This order does not preclude the prison authorities from taking other measures to maintain the safety of prison

personnel, other inmates and Loughner himself, including forced administration of tranquilizers.

The stay shall remain in effect until the appeal is resolved on the merits and the mandate issues, or until this panel or the merits panel issues a superseding order.

Consideration of this appeal is expedited. The clerk shall calendar the case during the week of August 29, 2011 in San Francisco. A briefing schedule will be set by a subsequent clerk's order.