NO. 11-10339

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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**UNITED STATES,**

Plaintiff-Appellee,

v.

**JARED LEE LOUGHNER,**

Defendant-Appellant.

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Appeal from the United States District Court
for the District of Arizona
Honorable Larry A. Burns, District Judge Presiding by Designation

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**EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 & FRAP 8(a)**

# EMERGENCY MOTION FOR IMMEDIATE CESSATION OF INVOLUNTARY MEDICATION AND TEMPORARY INJUNCTION PENDING APPEAL

JUDY CLARKE
Clarke and Rice, APC
1010 2nd Avenue, Suite 1800
San Diego, CA 92101
(619) 308-8484
Attorney for Petitioner-Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>JARED LEE LOUGHNER,<br><br>Defendant-Appellant. | ) | U.S.C.A. No. 11-10339<br>U.S.D.C. No. 11CR187-TUC (LAB)<br><br>(Appeal, Emergency Motion) |

**CIRCUIT RULE 27-3 CERTIFICATE OF COUNSEL**

**(i) <u>The Telephone Numbers and Office Addresses of the Attorneys for the Parties</u>:**

<u>Counsel for Plaintiff-Appellee, United States of America</u>:

Dennis K. Burke, United States Attorney
Wallace H. Kleindienst, Beverly K. Anderson, Christina M. Cabanillas, Mary Sue Feldmeier, Assistant United States Attorneys
405 W. Congress St., Suite 4800
Tucson, AZ 85701
Telephone: (520) 620-7300

<u>Counsel for Defendant-Appellant, Jared Lee Loughner</u>
Judy Clarke
Clarke and Rice, APC
1010 2nd Avenue, Suite 1800
San Diego, CA 92101
(619) 308-8484

Mark Fleming
Law Office of Mark Fleming

1350 Columbia Street, #600
San Diego, CA 92101
(619) 794-0220

Reuben Camper Cahn
Ellis Johnston
Janet Tung
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101
(619) 234-8467

**(ii) Facts Showing the Existence and Nature of the Claimed Emergency**

The above-captioned case concerns the government's administration of psychotropic medication to Mr. Loughner against his will, which commenced pursuant to an administrative finding made by the Bureau of Prisons (BOP) on June 14, 2011. After learning of these actions, defense counsel filed a motion with the district court to enjoin the government from involuntarily medicating Mr. Loughner.[1] The district court denied relief in an oral ruling on June 29, finding that the government's actions did not violate Mr. Loughner's due process rights. Mr. Loughner appeals from the district court's ruling.[2]

The matter is an emergency because the government has already begun subjecting Mr. Loughner to a regimen of involuntary administration of mind-altering

[1] The district court motion is attached hereto as Exhibit 1.

[2] The relevant factual and procedural background is laid out in greater detail below in the body of the instant motion.

psychotropic drugs. The government apparently began administering these medications on June 21. As far as defense counsel is aware, the government is continuing to involuntarily medicate Mr. Loughner on an ongoing basis.

This motion seeks immediate cessation of the forced medication until the resolution of the above-captioned appeal. Emergency action is needed because Mr. Loughner's fundamental right to bodily integrity is being violated on an ongoing, daily basis. If Mr. Loughner's arguments prevail on appeal, each time the government forcibly administers psychotropic medications—which has now been going on for ten days—it is engaging in a serious violation of his constitutional rights. The drugs Mr. Loughner seeks to avoid are designed to "alter the chemical balance in a patient's brain" and bring about "changes . . . in his or her cognitive processes." *Riggins v. Nevada*, 504 U.S. 127, 134 (1992). Each additional day of involuntary medication not only intensifies the brain-altering changes Mr. Loughner does not desire, but also increases the risk that Mr. Loughner will develop serious, and sometimes irreversible, physiological side effects. *See id.* (identifying some of the "serious, even fatal, side effects" of antipsychotic drugs, including acute dystonia, akathesia, neuroleptic malignant syndrome, and tardive dyskinesia).

The need for emergency relief is further aggravated by what appears to be the government's plan to increase dosage levels of the psychotropic medications (it has

already increased his twice daily dose of Risperidone from 0.5 to 1.0 mg), as well as its decision to administer an antipsychotic and antidepressant in tandem, which is likely to result in unintended and potentially harmful drug interactions.[3]

Under civil procedures, the emergency administration of psychotropic medications is generally limited, with the committing authority responsible to bring the need for medication to a court for review (e.g., California's 5150 law). Without this emergency motion, Mr. Loughner faces the most severe type of governmental intrusion against his bodily integrity, without review and with a high risk of irreparable injury.

**(iii) When and How Counsel for the Other Parties Were Notified and Whether They Have Been Served with the Motion; Or, If Not Notified and Served, Why That Was Not Done:**

Counsel for Mr. Loughner have notified counsel for the government via email that the instant emergency motion would be filed. Counsel for the government will be presented with this motion by electronic mail.

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[3] *See* WebMD, *Drug and Medications Center – Risperdal Oral*, http://www.webmd.com/drugs/index-drugs.aspx (drug information on risperidone, one of the drugs being forced on Mr. Loughner, stating that fluoxetine, which is also being forcibly administered, may "slow down how quickly your liver processes risperidone," and thus "the amount of risperidone in your blood may increase . . . [and] cause you to have more side effects from your medicine").

**(iv) Relief Requested:**

Mr. Loughner requests that this Court enter an order enjoining the government from involuntarily administering psychotropic medications to Mr. Loughner pending the resolution of the instant appeal. A temporary order of this nature is necessary to prevent further irreparable harm from being perpetrated on Mr. Loughner.

An order would not prejudice the government because it can demonstrate no urgency in forcibly medicating Mr. Loughner. The balance of hardships tips sharply in Mr. Loughner's favor because the harm he is suffering in the absence of the requested order cannot be undone—that is, the harm is irreparable—whereas the government's ability to medicate would simply be delayed by the requested temporary stay should Mr. Loughner's appeal ultimately prove unsuccessful.

**(v) Whether All Grounds of Relief Were Submitted to the District Court:**

The substantive issues have been submitted to the district court. On June 24, 2011, the defense filed with the district court an emergency motion to enjoin forcible medication. The legal arguments and relief sought by the motion were substantially the same as those in the instant motion.

**(vi) Bail Status**

Mr. Loughner is presently in custody at the federal Medical Referral Center (MRC) Springfield pursuant to commitment for a competency restorability

determination under 18 U.S.C. § 4241(d). MRC Springfield is located at 1900 W. Sunshine St., Springfield, Missouri 65807 (Tel.: 417-837-1717).

Respectfully submitted,

*/s/ Judy Clarke*

DATED: July 1, 2011

Judy Clarke
Clarke and Rice, APC
1010 2nd Avenue, Suite 1800
San Diego, CA 92101
(619) 308-8484

Mark Fleming
Law Office of Mark Fleming
1350 Columbia Street, #600
San Diego, CA 92101
(619) 794-0220

Reuben Camper Cahn
Ellis Johnston
Janet Tung
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
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JUDY CLARKE
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1010 2nd Avenue, Suite 1800
San Diego, CA 92101
(619) 308-8484
Attorneys for Petitioner-Appellant

# STATEMENT OF FACTS AND MEMORANDUM OF LAW AND POINTS AND AUTHORITIES IN SUPPORT OF EMERGENCY MOTION FOR IMMEDIATE CESSATION OF INVOLUNTARY MEDICATION AND TEMPORARY INJUNCTION PENDING APPEAL

## I.

## STATEMENT OF FACTS

### A. Background

This matter arises out of Mr. Loughner's temporary commitment to a BOP medical facility to determine his restorability to competency. On May 25, 2011, the district court found Mr. Loughner incompetent to stand trial and ordered him into the custody of the Attorney General under 18 U.S.C. § 4241(d) for the purpose of determining whether he could be restored to competency. Mr. Loughner arrived at the United States Medical Center for Federal Prisoners, Springfield, Missouri, ("MRC Springfield") two days later. Six days after his arrival, Mr. Loughner was notified that the prison intended to conduct an administrative proceeding to determine not whether he could be restored to competency but instead whether to forcibly medicate him with psychotropic drugs against his will on dangerousness grounds. *See* Motion, Exhibit A [Notice of Medication Hearing and Advisement of Rights at 560].[4]

[4] Filed as Exhibit 1 to this Motion is the motion filed in district which includes Exhibits A (Notice of Medication Hearing and Advisement of Rights), D (Report re Administrative Detention by Dr. Pietz), and F(Declaration of Trent Evans, PhD.). Exhibits B (Staff Representative Statement), C (Involuntary Medication Report), and E (Due Process Hearing Appeal Response) were filed in the district court under seal.

**B. The Alleged Basis for Administrative Forced Medication Proceedings**

There were three incidents used as the basis for the prison's decision to hold a forced medication hearing against Mr. Loughner, two instances of Mr. Loughner throwing a plastic chair at the door and wall of his cell and one instance where he spat at his lawyer. According to the hearing report, on March 28, Mr. Loughner threw a plastic chair against the closed metal grill door while he was being interviewed by prison psychologist Christina Pietz. On April 4, Mr. Loughner spat at his attorney. Finally, in early June, after he was brought back to Springfield for a second time, Mr. Loughner threw a plastic chair against the back wall of his cell. *See* Motion, Exhibit C at 5557.

**C. The Administrative Proceedings**

The administrative hearing took place on June 14. Proceeding under 28 C.F.R. § 549.43, MRC Springfield assigned Mr. Loughner a staff representative to assist him in this involuntary medication review proceeding, a prison social worker named John Getchell. Motion, Exhibit B [Staff Representative Statement at 555]. When asked if he wanted any witnesses present, Mr. Loughner told his staff representative that he wanted his attorney present. The staff representative then advised the doctors conducting the proceeding, Doctors Christina Pietz and Carlos Tomelleri, that Mr.

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We request that they be filed under seal here as well.

Loughner wished to have his attorney present. *Id.* The proceeding was conducted five minutes later on the same day, June 14th. Motion, Exhibit C [Involuntary Medication Report by Dr. Carlos Tomelleri at 553]. Mr. Loughner's attorneys were not given prior notice of the hearing and were not present at the hearing. Had Mr. Loughner been allowed to call his attorney as a witness on his behalf at the hearing, she would have testified Mr. Loughner did not "lunge" at her on April 4, 2011, as he was accused of doing, and that she never felt any fear or at risk in any way. *See* Transcript of June 29, 2011 Hearing at 63.[5] It does not appear that Mr. Loughner's representative offered any evidence or testimony on Mr. Loughner's behalf.

The timing of the § 549.43 "dangerousness" hearing was curious. For nearly six months since his arrest on January 8, 2011, Mr. Loughner has remained in isolation because of the nature of the case. Until his recent arrival at Springfield in late May 2011, the Bureau of Prisons made no claim that Mr. Loughner should be forcibly medicated because of danger to himself or others. Yet, almost immediately upon his arrival at Springfield for purposes of competency restoration and only after he declined to take psychotropic medications voluntarily, Mr. Loughner was notified of the prison's intent to forcibly medicate him on the grounds that he was a danger to others. At the June 14 hearing, Dr. Tomelleri concluded that Mr. Loughner would

[5] The transcript is attached hereto as Exhibit 2.

be forcibly medicated with psychotropic medications "on the basis of a diagnosis of mental illness and of actions on his part [sic] dangerousness to others within the correctional setting . . . ." Motion, Exhibit C at 558. Specifically, Dr. Tomelleri cited three isolated instances of conduct during Mr. Loughner's five-plus months in custody as justification for his conclusion. Id. at 557. Two of these involved throwing a plastic chair inside the isolated confines of his closed and locked cell, one of which occurred three months ago; the third involved spitting at counsel, also more than two months ago.

The forced medication report concludes that "psychotropic medication is universally accepted as the choice for conditions such as Mr. Loughner's." *Id.* at 558. It does not clarify whether the "conditions" it is referring to is Mr. Loughner's mental illness or his perceived dangerousness. But in the next sentence, it states that "[o]ther measures, such as psychotherapy, are not practicable and do not address the fundamental problem," *id.*, clearly in reference to his underlying mental illness. There is no evidence that any efforts were made to educate Mr. Loughner about the consequences of his behavior before seeking to forcibly medicate him with psychotropic drugs. The report briefly mentions that minor tranquilizers such as benzodiazepines "are useful in reducing agitation, but have no direct effect on the core manifestations of the mental disease." *Id.* But it does not state why such

tranquilizers or other non-mind altering drugs would not be sufficient to address concerns of any perceived dangerousness. Likewise, the report states that "[s]eclusion and restraints are merely temporary protective measures with no direct effect on mental disease." *Id.* But it does not explain why these measures are not sufficient for the brief duration of Mr. Loughner's commitment to Springfield, which terminates on September 21 pursuant to the district court's commitment order. Nor does the report mention that Mr. Loughner is, has been, and will remain in administrative segregation for reasons unrelated to dangerousness, specifically "because of the nature of this case." *See, e.g.*, Motion, Exhibit D [Report by Dr. Christina Pietz dated 3-30-2011] (explaining why Mr. Loughner has been isolated in administration segregation upon his arrival at Springfield for competency evaluation).

Finally, the Warden upheld the finding, specifically concluding "[w]ithout psychiatric medication, you are dangerous to others by engaging in conduct, like throwing chairs, that is either intended or reasonably likely to cause physical harm to another or cause significant property damage." *See* Motion, Exhibit E [Due Process Hearing Appeal Response dated 6-20-2011].

**D. The Motion to Enjoin Forcible Medication**

Defense counsel became aware of the unilateral decision to involuntarily and forcibly medicate Mr. Loughner on June 21, 2011, upon receipt of BOP records which were disclosed as part of a regular discovery production. Counsel had sought to no avail to obtain information about Mr. Loughner's condition, to visit with him cell side, and to have a medical expert visit with him cell side since his return to Springfield on May 27, 2011. At that time, counsel did not know whether the prison had already begun to forcibly medicate Mr. Loughner. Still in the dark about Mr. Loughner's medication status, defense counsel filed with the district court a motion to enjoin forcible medication on June 24.[6] It was not until four days later, on June 28, that defense counsel learned (again through a regularly scheduled records production) that the BOP had already started administering psychotropic medications to Mr. Loughner—and in fact that it had been doing so since June 21.

In its motion to enjoin forcible medication, the defense argued that the prison's decision to forcibly medicate Mr. Loughner solely on the basis of the administrative proceedings it held was a violation of his due process rights. The motion raised four arguments: (1) the prison's reliance on a "treatment" rationale for deciding to administer psychotropic medications and rejecting less intrusive (albeit effective)

[6] *See* Exhibit 1, attached hereto.

alternatives was insufficient justification and excessive in relation to its purported "dangerousness" rationale; (2) the forcible-medication decision violated the due process framework delineated by *Washington v. Harper*, *Riggins v. Nevada*, and *Sell v. United States* because the fair trial concerns implicated by Mr. Loughner's pretrial status and the dual motivations of prison doctors charged with both restoring competency and maintaining safety and security of the facility required a judicial determination as a prerequisite to forcible medication; (3) the administrative proceeding was procedurally defective because the prison denied Mr. Loughner's request for a witness in violation of its own rules and (4) because it failed to specify the medication(s) and maximum dosages under consideration.

On June 29, the district court held a hearing on the motion, at which it considered the arguments of both sides. In support of its substantive due process argument (the first argument enumerated above), defense counsel proffered the testimony of a forensic psychiatrist experienced in prison administration and forced medication decisions and a former BOP official, and requested an opportunity to present evidence at a full hearing. Transcript at 41-42, 63. These witnesses would have testified that the forced medication decision was inappropriate and excessive in light of the circumstances, based on their experience in prison administration. The former BOP official would have testified that the Bureau of Prisons has more than

adequate means to restrain and mitigate any danger arising out of exactly the sort of behavior allegedly exhibited by Mr. Loughner and that such behavior is a commonplace daily occurrence in prisons.

The district court denied both the motion and the request for an evidentiary hearing, *id.* at 60, giving rise to this appeal. In its oral ruling on June 29, the district court indicated that it would issue a written order that would be no different from its oral ruling. As of yet , the written order has not been entered.

## II.

## THE COURT SHOULD TEMPORARILY ENJOIN FORCED MEDICATION PENDING APPELLATE REVIEW

When deciding whether to issue an injunction pending appeal, this Court considers 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." *California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 850 (9th Cir. 2009). In this Circuit, a sliding scale approach is applied to the first and third elements. That is, in lieu of showing a "likelihood of success on the merits" and lack of substantial injury to other interested parties, the party is entitled to an injunction if "serious questions going to the merits were raised" and "the balance of hardships

tips sharply in the [moving party's] favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-35 (9th Cir. 2011); *see also Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011) (defining likelihood of success as a showing of a "fair prospect" of success or "a substantial case for relief on the merits").

A temporary injunction pending appeal should be granted here because Mr. Loughner can satisfy either formulation of the preliminary injunction standard. He is likely to succeed on the merits of his appellate arguments, will suffer irreparable harm without such an injunction, and the public interest lies in his favor. The government, by contrast, will not be prejudiced because it will remain free to resume its forcible medication activity should the appeal be denied. Applying the "serious questions" standard, Mr. Loughner easily meets the requirements for an injunction to issue. The arguments he raises are substantial, warrant deliberate consideration, and the balance of hardships tips sharply in his favor.

## A. This Court Has Appellate Jurisdiction

As a threshold matter, this Court has jurisdiction over this appeal from the district court's nonfinal order of June 29. Jurisdiction is proper under the collateral order doctrine, which permits appeal from nonfinal orders that conclusively determine the disputed question, resolve an important issue separate from the merits of the action, and are effectively unreviewable on appeal. *See United States v. Godinez-*

*Ortiz*, 563 F.3d 1022, 1026 (9th Cir. 2009). The Supreme Court has squarely resolved the appellate jurisdiction question in the context presented here, where appeal is taken from a district court order permitting involuntary medication to proceed. *See Sell v. United States*, 539 U.S. 166, 175-77 (2003). *Sell* unequivocally held that such an order is "an appealable collateral order." *Id.* at 177 (quotation marks omitted).

**B. The Appeal Is Likely to Succeed on the Merits**

To make a showing of likely success, a party "need not demonstrate that it is more likely than not that they will win on the merits." *Leiva-Perez*, 640 F.3d at 966. This prong is met so long as Mr. Loughner can show a "fair prospect" of success or "that []he has a substantial case for relief on the merits. *Id.* at 967-68. This element is easily satisfied here.

The district court's decision was erroneous on all grounds presented. The district court applied the incorrect legal standard on the substantive due process issue because it conflated the separate questions of substantive and procedural due process. On the procedural issues, the district court misinterpreted controlling Supreme Court law by failing to take into consideration the effect of *Sell* and *Riggins* on the analysis of *Harper*, relied on a clearly erroneous factual finding to reject the denial-of-witness argument, and misinterpreted controlling Ninth Circuit authority in upholding the

administrative action despite its total failure to specify the type and maximum dosage of medication authorized.

**1. Forcible Medication Violates Mr. Loughner's Substantive Due Process Rights.**

Mr. Loughner is likely to succeed in his appeal on the substantive question of "what factual circumstances must exist before the [government] may administer antipsychotic drugs to [him] against his will." *Washington v. Harper*, 494 U.S. 210, 221 (1990). This is a question governed ultimately by the reasonable relationship test set forth in *Turner v. Safley*, 482, U.S. 78, 89 (1987), which, in an as-applied challenge such as the one posed here, must be analyzed in light of the circumstances presented. *See Harper*, 494 U.S. at 223-24 (applying the *Turner* standard to the substantive due process question). The district court, however, not only altogether failed to conduct the proper legal analysis but also unfairly denied defense counsel the opportunity to present its proffered evidence at an evidentiary hearing.

Specifically, the defense argued that the government's factual showing was substantively inadequate to justify involuntary medication for its stated goal of mitigating danger to others. *See* Motion at 6-12. This error took two forms. First, the prison's admitted goal in forcibly administering medication was to "treat" Mr. Loughner's underlying mental illness, a goal that does not match the claimed government interest in neutralizing danger to others. Indeed, in light of the ready

availability of less intrusive alternatives such as tranquilizers, which directly address the straightforward dangerousness concerns, the prison's treatment rationale failed *Turner*'s reasonable relationship test (sometimes described as "rational basis with a bite"). *See* Motion at 6-9.

Second, the evidence demonstrated that the prison never adequately considered the available less-intrusive alternatives. The prison's own administrative report concedes that minor tranquilizers—which do not have the same potential as psychotropics for debilitating, and even fatal, side effects and the permanent changing of Mr. Loughner's mental faculties, *see Harper*, 494 U.S. at 229-30—"are useful in reducing agitation," but rejects their use because they "have no direct effect on the core manifestations of the mental disease." Motion, Exhibit C at 558. But nowhere does the report explain why this alternative is not effective to lessen dangerousness. *Accord Jones v. Caruso*, 569 F.3d 258, 273-74 (6th Cir. 2009) (prison regulation was likely an "exaggerated response" where other rules already in place appeared to fully address the stated concerns). Additionally, the evidence showed that the BOP had refused to attempt involuntary psychotropic medication in other, more aggravated cases, including one where the detainee had a history of assaulting other inmates and prison staff. *See* Motion, Exhibit F (declaration of staff psychologist in *United States*

*v. Espinoza-Pareda* finding assaultive detainee not to pose a danger in the custodial setting).

Had the district court properly considered these arguments, it would have been difficult to avoid the conclusion that the involuntary medication decision was dramatically out of proportion to the government's claimed need to mitigate the risk of danger to others. The district court, however, utterly failed to consider these specific "factual circumstances" under the proper legal standard applicable to this substantive due process challenge. Instead, it treated this argument as a *procedural* challenge and ruled that it had been resolved by *Harper*—without acknowledging that the Supreme Court in *Harper* simply did not (and could not) decide an as-applied challenge on a set of facts that was never before it. Transcript at 53-59.

**2. *Sell* and *Riggins* Require Judicial Review of Decisions to Involuntarily Medication Pretrial Detainees**

Next, Mr. Loughner is also likely to succeed on his procedural due process argument that a judicial proceeding is a prerequisite to an involuntary medication decisions under the Supreme Court's decisions in *Riggins* and *Sell*. *See* Motion at 12-13. As defense counsel explained to the district court, though *Harper* held that no judicial proceeding was necessary before involuntarily medicating an inmate who had already been convicted and sentenced, the Supreme Court's later decisions in *Riggins*

and *Sell* made clear that the due process calculus is different for pretrial detainees. *See id.*; Transcript at 10-13, 17-18.

This is true because the interests of both the individual and the government balance out in a different way in the pretrial setting. A pretrial detainee has a more robust set of constitutionally protected interests than a convicted inmate, including most significantly the interest in maintaining his right to a fair trial. *See Riggins*, 504 U.S. at 137-38 (antipsychotic medication "may well have impaired [Riggins's] protected trial rights" by affecting his outward appearance, the content of his testimony, and his ability to follow the proceedings). The government's interests are also different with respect to pretrial detainees, whom they detain on average for much shorter periods, and whose competency they typically desire to restore. In addition, in the pretrial context, the government also shares the defendant's interest in securing a fair trial, which psychotropic medications may defeat. The government's interests in medication of pretrial detainees thus pull it in both directions—both for and against administration of psychotropics—a shift that fundamentally alters the due process balance. *See* Transcript at 17.

The Supreme Court acknowledged the distinction between pretrial detainees and convicted inmates in *Riggins* and *Sell*—both cases where an administrative decision to involuntarily medicate a pretrial detainee was based in part on

dangerousness grounds. *Contra Harper*, 494 U.S. at 210 (considering only legal issues pertaining to convicted inmates). In *Sell*, moreover, the Supreme Court recognized that trial fairness—an interest shared by Mr. Loughner as well as all other pretrial detainees—is a "quintessentially legal question[]" best suited to decision by a court. 539 U.S. at 182.

Instead of reconciling the Supreme Court's analysis in *Riggins* and *Sell*, the district court simply deemed those cases irrelevant because neither opinion contained an express repudiation of *Harper*. *See* Transcript at 51 ("There was certainly an opportunity in either of those cases to repudiate *Harper*. . . ."). This reasoning is unlikely to withstand appellate review. The district court never explained why the Supreme Court would have to "repudiate" a rule applicable to *postconviction inmates* in the course of considering the constitutional rights of pretrial detainees. There is no such reason; indeed, the contrary is generally true. The Supreme Court (and federal circuit courts) is often in the habit of rendering narrow decisions rather than reaching out beyond the case presented.

Moreover, the caselaw simply favors Mr. Loughner's position. The government and the district court rely on the fact that *Sell* urged that a forced-medication determination on dangerousness be made before considering the trial-competency justification. This is correct; *Sell* does contain language to this effect.

*See* 539 U.S. at 182-83. However, what neither the government nor the district court have acknowledged is that in the course of discussing the advantages of starting with a dangerousness evaluation, *Sell* refers to "a court" as the decision maker in this context no less than four times. *See id.* at 182 ("There are often strong reasons for *a court* to determine whether forced administration of drugs can be justified on these alternative grounds [of dangerousness] before turning to the trial competence question.") (emphasis altered); *id.* (discussing how "courts" frequently consider dangerousness-based forced medication issues in civil proceedings); *id.* at 183 ("If *a court* authorizes medication on these alternative grounds. . . .") (emphasis added); *id.* ("Even if *a court* decides medication not to be authorized on the alternative [dangerousness] grounds . . . .") (emphasis added).

In sum, it is impossible to read this discussion in *Sell* without concluding that the Supreme Court clearly contemplated that "a court"—not just an administrative entity—would have to authorize (or not) a decision to forcibly medicate a pretrial detainee, even if the stated rationale were the "alternative grounds" of dangerousness. *See id.* at 182-83. The district court entirely overlooked this portion of the *Sell* opinion and relied instead on *United States v. Morgan*, 173 F.3d 252 (4th Cir. 1999), a Fourth Circuit case decided four years before the Supreme Court issued its decision

in *Sell* and which contained no discussion of the different interests at play in the pretrial setting.

**3. The Prison's Violation of Mr. Loughner's Right to Present Witnesses**

Third, the defense is likely to succeed on the question of the prison's violation of Mr. Loughner's right to call witnesses of his choice to testify at his administrative hearing. That right was one guaranteed by the regulation governing the proceedings, 28 C.F.R. § 549.43(a)(2), and it is undisputed that an "agency's failure to afford an individual procedural safeguards required by its own regulations" requires reversal so long as the regulation is designed for the benefit of the complaining individual and the violation prejudiced his interests. *Morgan*, 193 F.3d at 266-67. This was the case here. The regulation granting the inmate the right to call witnesses is clearly intended for his benefit. Its violation prejudiced him because he was denied the opportunity to present direct, eyewitness evidence of the inaccuracy of one of the accusations against him.

The district court relied on a finding that Mr. Loughner did not, in fact, request his attorney—a percipient witness and alleged victim of one of the three incidents forming the basis of Mr. Loughner's purported dangerousness to others in the custodial setting. *See* Transcript at 62 ("I didn't read the 'just my attorney' as a request for an attorney as a witness. I read [his request] as an assertion of the right

to have an attorney representing him at the *Harper* hearing."). This finding was clearly erroneous.[7]

The record plainly demonstrates that Mr. Loughner requested his attorney *as a witness*, not just as an advocate. Specifically, the prison staff member assigned to assist Mr. Loughner in the administrative hearing reported that:

> I met again with Mr. Loughner on Tuesday, June 14 on Unit 10-D, just prior to the involuntary medication review proceeding. I asked him again if he desired any witnesses to be present for the hearing. He told me "Just my attorney."

Motion, Exhibit C at 555. As this clearly shows, Mr. Loughner's response to being asked whether he wanted "any witnesses"—not whether he wanted an attorney to represent him—was to request his "attorney."

It is, moreover, quite obvious why Mr. Loughner might request his attorney to be a witness, rather than just a representative, at the hearing. His attorney was a percipient witness to one of the three incidents allegedly demonstrating "dangerousness" that Mr. Loughner was accused at the hearing of engaging in. *Id.* at 557 (finding that "Mr. Loughner spat at his attorney, lunged at her, and had to be

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[7] Indeed, accepting *arguendo* the district court's interpretation, Mr. Loughner's request for an attorney representative casts even graver doubt on the integrity of the administrative proceeding because it demonstrates his inability to understand his rights and participate meaningfully in the hearing. The record certainly bears out such concerns. Mr. Loughner was found by the district court in its competency ruling not only to be unable to assist in his defense but also to lack a rational understanding of the trial proceedings.

restrained by staff"). And had Mr. Loughner been allowed to present his attorney's testimony, which he was not, she would have testified that the she was never lunged at and never felt that she was at risk in any way. *See* Transcript at 63. The district court's reading simply does not withstand examination of the record, which is set forth in black and white. Its erroneous reading of the record is entitled to no deference because the usual reasons for deferring to factual findings below do not apply.

**4. The Prison's Failure to Identify the Specific Medication and Maximum Dosages Authorized to Neutralize the Alleged Danger**

Finally, the appeal is also likely to succeed on the merits as to the argument that Mr. Loughner's procedural rights were violated by the administrative proceeding's blanket authorization of treatment with "psychotropic medication" without limitation as to the specific type of medication or the maximum dosages authorized. The blanket authorization violated this Court's decision in *United States v. Hernandez-Vasquez*, 513 F.3d 908, 916 (9th Cir. 2008), which requires authorization for forcible medication to specify "the specific medication or range of medications" and "maximum dosages" authorized in order to satisfy the medical-appropriateness requirement applicable to involuntary medication, whether it be forced medication for dangerousness or trial competence. *See* Motion at 15-17.

The government's response to this point was to rely on a medication order for specific drugs entered *after* the administrative authorization was already issued and to claim that "medical appropriateness" is somehow different in the dangerousness context, a claim that lacks any basis in the law. The district court rejected this argument without analysis. The defense position is likely to succeed on appeal because it is soundly grounded in this Circuit's and the Supreme Court law. Indeed, *Sell* itself makes clear that the "medical appropriateness" requirement—out of which the *Hernandez-Vasquez*'s procedural requirement arises—is identical whether the rationale offered for forcible medication is dangerousness or restoration to competency. *See Sell*, 539 U.S. at 181 (importing, without change, the *Harper*/*Riggins* medical appropriateness into the competency-restoration context).

**C. All Factors Weigh in Favor of Granting the Stay**

Finally, it is clear that the balance of hardships tips sharply in favor of issuance of the injunction pending appeal. Mr. Loughner will suffer the irreparable harm of being involuntarily and forcibly medicated in violation of his constitutional rights unless the injunction issues. This is an ongoing and significant harm that cannot be undone; the prison has already commenced a regimen of administering antipsychotic and antidepressant medications that apparently involves increasing dosage levels over time. No thought appears to have been given to the risk of drug interactions between

the medications the prison has chosen to administer.[8] Allowing the forcible medication to continue also increases the chances that Mr. Loughner will suffer from additional and potentially irreversible side effects. *See Riggins*, 504 U.S. at 134 (some of the "serious, even fatal, side effects" of antipsychotic drugs include acute dystonia, akathesia, neuroleptic malignant syndrome, and tardive dyskinesia).

The government will suffer no prejudice from a temporary stay. Its ability to force medication on Mr. Loughner will merely be delayed for a short period should it prevail on appeal. The prison's own actions demonstrate that a few months of delay is of no moment to the government's interests. The incidents forming the basis of the prison's decision to medicate occurred in March and April, during Mr. Loughner's first stint at MRC Springfield.[9] The prison took no action then. Instead, it chose to wait over two months, until he was readmitted for restoration in June, to commence administrative proceedings.

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[8] *See* WebMD, *Drug and Medications Center – Risperdal Oral*, http://www.webmd.com/drugs/index-drugs.aspx (drug information on risperidone, one of the drugs being forced on Mr. Loughner, stating that fluoxetine, which is also being forcibly administered, may "slow down how quickly your liver processes risperidone," and thus "the amount of risperidone in your blood may increase . . . [and] cause you to have more side effects from your medicine").

[9] The third incident, throwing a plastic chair at the wall, occurred days after the prison gave notice of its intent to move forward with involuntary medication.

In sum, the public interest strongly favors issuance of the injunction. Mr. Loughner has a strong chance of prevailing on appeal and will be irreparably injured on at least a twice daily basis unless the government is required to cease forcing brain-altering and perhaps permanently disabling drugs upon him. The government will not suffer from a short delay. The public has a strong interest in having the constitutional questions resolved by this Court in a deliberate and reasoned manner *before* the government is permitted to proceed with a regimen of forcible administration of potentially dangerous psychotropic drugs. All four prongs of the preliminary injunction standard are met here. The temporary injunction should issue. *See Alliance for the Wild Rockies*, 632 F.3d at 1135-38.

## III.

## CONCLUSION

For the reasons stated above, the Court issue an order temporarily enjoining the government from forcibly medicating Mr. Loughner pending resolution of this appeal.

Respectfully submitted,

*/s/ Judy Clarke*

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Judy Clarke
Clarke and Rice, APC
1010 2nd Avenue, Suite 1800
San Diego, CA 92101
(619) 308-8484

Mark Fleming
Law Office of Mark Fleming
1350 Columbia Street, #600
San Diego, CA 92101
(619) 794-0220

Reuben Camper Cahn
Ellis Johnston
Janet Tung
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, CA 92101
(619) 234-8467
Attorneys for Defendant-Appellant