UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES, Plaintiff-Appellee, v. JARED LEE LOUGHNER, Defendant-Appellant.	)	U.S.C.A. No. 11-10339 U.S.D.C. No. 11CR187-TUC (LAB) DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE TO EMERGENCY MOTION FOR TEMPORARY INJUNCTION PENDING APPEAL

I.

INTRODUCTION

In his emergency motion for temporary relief from forcible medication, Mr. Loughner asked this Court to grant an injunction pending his appeal from the district court's order. On July 1, the Court granted a temporary stay of involuntary medication pending further briefing, and ordered the government to respond to the motion. On July 5, the government filed a response. In his pleadings before the district court, and in his initial motion before this court, Appellant raised four arguments: First, that the decision to medicate him violated substantive due process, including rights recognized by *Washington v. Harper* as well as rights recognized in a different context in *Riggins v. Nevada* and *Sell v. United States*; second, that the

administrative proceeding at which Appellant was ordered medicated denied him procedural due process because his interests are different than those of the convicted inmate in *Harper* and the aims of the prison personnel making the decision to medicate him are conflicted; third, that the prison violated due process even under its own truncated procedural rules when it denied Appellant the right to call his attorney as a witness; and fourth, that the decision cannot even be properly reviewed for compliance with appellant's substantive due process right to be treated appropriately where the prison has not specified any medication regime.

Rather than address the distinct arguments appellant raises and discuss whether these present "a serious legal question" on which he has a "fair prospect" of success, the government has chosen to mischaracterize the arguments and claims that Appellant seeks to graft "*Sell* onto *Harper*" and that *Harper* precludes the possibility of success. The failure of the government, and the district court below, to take seriously the actual arguments raised by appellant elucidate the error committed below.

II.

LEGAL STANDARD APPLICABLE TO THE MOTION FOR PRELIMINARY INJUNCTION

As a threshold matter, the government misunderstands the legal standard applicable to this stage of the case. That standard is the four-pronged preliminary injunction test set forth in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-25 (9th Cir. 2011). As that case and others make clear, the substantive question (Prong 1 of the test) at this stage is not whether the legal arguments on appeal *will necessarily* triumph, but simply whether there exists some likelihood of success—which this Court has defined as a "fair prospect" of success or "substantial case for relief." *See Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011); *see also Alliance for the Wild Rockies*, 632 F.3d at 1131-35 (explaining that "a serious question" on the merits plus the balance of hardships is enough). Mr. Loughner easily satisfies this standard.

The government, however, simply ignores this Court's decisions. Instead of acknowledging the "fair prospect"/ "serious legal question" standard—which is unequivocally the law of this Circuit—the government asserts that Mr. Loughner must "make a 'clear showing' that he would succeed on appeal," *see* Gov Resp. at 12, 13. The government's position is not only incorrect, it has been squarely rejected

by this Court in a published opinion issued just a few months ago. *See Leiva-Perez*, 640 F.3d at 967 (a more stringent requirement than "serious questions going to the merits" would "put every case in which a stay is requested on an expedited schedule" or would require the court "to predict with accuracy the resolution of often-thorny legal issues without adequate briefing and argument"). To paraphrase *Leiva-Perez*, the "whole idea" at this stage is to hold the matter under review in abeyance to give the appellate court sufficient time to decide the merits—*after* full briefing on the appeal. *See id.*

III.

LIKELIHOOD OF SUCCESS ON THE MERITS

Mr. Loughner argued in his motion that he has shown a "likelihood of success" on appeal on the four arguments presented to the district court. *See* Mtn at 11-20 (summarizing the arguments and pointing out flaws in the district court's analysis). He also pointed out that the Supreme Court's decision in *Sell v. United States*, 539 U.S. 166, 175-77 (2003), clearly established this Court's appellate jurisdiction. *See* Mtn at 9-10.

In response, the government halfheartedly contends that this Court lacks jurisdiction. *See* Gov Mtn at 13 n.7. Nowhere in its argument, however, does it address the clearly controlling authority in *Sell*. Instead, the thrust of its argument

appears to be that *Sell* may safely be ignored because "this Court" has never issued a ruling on appealability. This is, to put it mildly, unpersuasive. *Sell* controls. The government's response on the merits, which does little more than rehash its arguments below and misapprehend Mr. Loughner's arguments, is likewise unpersuasive. These are addressed in turn below.

A. Substantive due process violation

A very serious question is posed in this case as to when a criminal defendant may be forcibly medicated pretrial with powerful, mind-altering psychotropic drugs. The question is a legal issue informed by that defendant's "significant liberty interest in avoiding the unwanted administration of anti-psychotic drugs under the Due Process Clause . . . ." *Washington v. Harper*, 494 U.S. 210, 221-22 (1990). And while the government would have this Court believe that the analysis of this "especially grave infringement of liberty," *see United States v. Williams*, 356 F.3d 1045, 1056 (9th Cir. 2004), begins and ends with *Harper*, it does not. Rather, it is a "thrice recognized" liberty interest that the Supreme Court has acknowledged, articulated, and refined not only in *Harper* but also *Riggins v. Nevada*, 504 U.S. 127 (1992), and *Sell v. United States*, 539 U.S. 166 (2003). *See United States v. Ruiz-Gaxiola*, 623 F.3d 684, 691 (quoting *Williams*, 356 F.3d. at 1053). The substantive due process rights identified in *Harper* must be considered in light of *Riggins* and

Sell, *see* Govt Resp. at 13 (claiming that "such a determination would be for the Supreme Court alone to make").

The Supreme Court identified this substantive due process right, and in the context of a dangerousness determination, stated that a regime of forced psychotropic medication is not medically appropriate, and thus violates substantive due process, unless "considering less intrusive alternatives, [the medication regime] is *essential* for the sake of [the inmate's] own safety or the safety of others." *Riggins*, 504 U.S. at 135 (emphasis added). Because both the district court and the government fail to even articulate what the substantive due process standard is, much less apply the appropriate standard, Mr. Loughner has a high likelihood of success on the merits. *See The Lands Council v. McNair*, 537 F.3d 981, 986-87 (9th Cir. 2008) (en banc) ("A district court abuses its discretion in denying a request for a preliminary injunction if it 'base[s] its decision on an erroneous legal standard. . . .'").

Instead of addressing this *substantive* due process standard head on, the government myopically focuses its response on what *procedures* are due to a detainee being forcibly medicated. *See* Govt. Resp. at 13-18. And while it is true that Mr. Loughner advocates for a more robust, and less conflicted, set of procedural protections before a pretrial detainee may be forcibly medicated on dangerousness grounds, *see, e.g.*, Mtn at 13-17, the government puts the cart before the horse when

arguing that defining the substantive right is necessarily precluded by the administrative procedures condoned in *Harper*. Judicial review of what substantive standard is employed is essential in the dangerousness context, even where the decision to forcibly medicate may be initially made administratively. *Harper* itself is clear on this point. *See* 494 U.S. at 235 ("Finally, we note that under state law an inmate may obtain judicial review of the hearing committee's decision by way of a personal restraint petition or petition for an extraordinary writ."); *see also Sell*, 539 U.S. at 182 (it is "for *a court* to determine" *Harper* grounds in the pretrial context) (emphasis added); *see also United States v. Hernandez-Vasquez*, 513 F.3d 908, 914 (9th Cir. 2008) (holding that the district court should "conduct a dangerousness inquiry under *Harper*"). Whether a decision to forcibly medicate on dangerousness grounds is made administratively or judicially, it is both a court's prerogative and duty to review whether the decision is consistent with the appropriate substantive due process standard. No such consideration was given to the issue here.

A proper analysis establishes that the record does not substantively support forcible medication. First, the evidence of dangerousness in the institutional context is itself extraordinarily weak.[1] And appellant proffered evidence that would have

[1] This point has never been seriously challenged by the government. Its only approach (besides ducking the question) has been to take liberties with the record. In its response, in discussing dangerousness, the government suggests that

demonstrated conduct such as his should not have been considered evidence of dangerousness. The proffer included the testimony of former Bureau of Prisons officials and a report of a Bureau of Prisons psychologist concerning another mentally ill defendant. That report considered assaultive conduct far more serious than any Mr. Loughner has exhibited but concluded that inmate was not dangerous in the confines of a psychiatric prison facility with resources identical to those at FMC Springfield.[2]

Second, *Harper* requires that "there must be a 'valid rational connection' between the prison [action] and the legitimate governmental interest put forward to justify it." *Id.* at 224 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). Here, the prison disregarded other means of mitigating danger, not because they wouldn't work, but because they would not treat Mr. Loughner's underlying mental illness. This demonstrates a decoupling of the prison's action from "the legitimate governmental interest put forward to justify it."

Mr. Loughner has been throwing chairs at "doctors present" in his cell and "lunging" at his attorney. *See* Gov Resp. at 23. This is highly misleading. In reality, the chair-throwing incident referenced by the government involved Mr. Loughner throwing a chair at the closed metal door of his cell while being interviewed on camera by a government psychologist who was outside the cell. As for the "lunging," it simply never occurred.

[2] *See* Mtn, Exhibit 1 (Decl. Trent Evans, PhD., Exhibit F to the district court motion).

Similarly, *Harper*, as explained in *Riggins*, does not allow forced medication unless "considering less intrusive alternatives, [it is] essential for the sake of [Mr. Loughner's] own safety or the safety of others." *Riggins*, 504 U.S. at 135 (citing *Harper*, 494 U.S. at 225-26). Again, because the prison justified forcibly medicating Mr. Loughner because it was necessary to treat his mental illness, the findings do not establish that the action was "essential for the sake of [Mr. Loughner's] own safety or the safety of others."

And again, *Harper* and *Riggins* require that the prison have considered less intrusive means of mitigating danger. *Riggins*, 504 U.S. at 135 (citing *Harper*, 494 U.S. at 225-26). Where the prison, as here, rejected these means for illegitimate reasons, namely their inability to treat underlying mental illness, it has not considered those means within the meaning of *Harper*.

Finally, *Harper* and *Riggins* require that treatment be medically appropriate. As this court has explained, medical appropriateness is not some general principal or syllogism. Rather, the medical-appropriateness prong requires consideration of "*all* of the medical consequences of the proposed involuntary medication" and "the length of time the treatment regime must be continued in order to provide the desired medical benefit to the patient." *Ruiz-Gaxiola*, 623 F.3d at 704-05. This is necessary because, as *Ruiz-Gaxiola* held, it is not medically appropriate to "prescribe a

medication regime unless the likelihood and value of its potential benefits outweighed the likelihood and severity of its potential harms over the course of treatment, as opposed to during the period in which the government wishes to conduct a criminal trial." *Id*. at 705. Here, where there was no consideration of the particular drug to be utilized, the doses of that drug, the potential side effects, or its likely effectiveness *in reducing danger*, there can have been no legitimate finding of medical appropriateness.

The government also fails to appreciate (and the district court ignored) the fact that defining the substantive issue at stake "involves a definition of th[e] protected constitutional interest, *as well as identification of the conditions* under which competing state interests might outweigh it." *Harper*, 494 U.S. at 220 (quoting *Mills v. Rogers*, 457 U.S. 291, 299) (emphasis added). In other words, the substantive analysis is context driven. Thus, when a prison is attempting to deal with a convicted felon serving a lengthy sentence, *see, e.g.*, *Harper*, 494 U.S. at 213-15, and who has "a long history of serious, assaultive behavior, evidenced by at least 20 reported incidents of serious assaults on fellow inmates and staff," *see id.* at 227 n.11, it may be true that the state's interests "encompass[] an interest in providing him with medical treatment for his illness" in addition to mitigating the danger posed,

particularly when the alternative is indefinite warehousing of the inmate in secluded isolation with constant physical restraints. *See id.* at 226-27.

But that is not the context here. Mr. Loughner is a pretrial detainee housed in a medical prison for a temporary duration, *see* 18 U.S.C. § 4241(d)(1), housed in segregation for reasons unrelated to any perceived dangerousness,[3] and housed in a facility well-equipped to deal with dangerousness by means less intrusive than forced medication with powerful psychotropic drugs.[4] The record is clear that these effective means were available to the staff at MCFP Springfield,[5] but the district court and the government ignored this context in their myopic focus on *Harper*.

It is not, as the government argues, Mr. Loughner who has tried to "stitch" the context of *Sell* and *Riggins* into the "fabric" of *Harper*. Gov Resp. at 18. *Harper* broadly recognizes these due process rights; *Sell* and *Riggins* delineate them. All three of these cases make clear that context matters. And to the extent that this Court has yet to squarely consider the full scope of this particular substantive issue in the pretrial context, it is an important open question yet to be decided. At a minimum,

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[3] *See* Mtn Exhibit 1 (Report re Administrative Detention by Dr. Pietz, Exhibit D to the motion in the district court),

[4] *See* Mtn Exhibit 1 (Decl. Trent Evans, PhD., Exhibit F to the district court motion).

[5] *See* Mtn Exhibit 1 (Involuntary medication report, Exhibit C to the district court motion).

the failure of the district court and the government to consider the specific circumstances of Mr. Loughner's detention presents a serious question warranting the relief requested pending resolution of this issue.

Moreover, this Court has cautioned that the purposes and requirements of involuntary medication to restore competency should not be collapsed into the analysis of the separate purposes and requirements of involuntary medication to reduce dangerousness. *See Ruiz-Gaxiola*, 623 F.3d at 694 n.6 (citing *Hernandez-Vasquez*, 513 F.3d at 919). But it is not Mr. Loughner who has collapsed the inquiry; it is the prison who rejected effective and less intrusive means to reduce or neutralize dangerousness in favor of means that "treat" Mr. Loughner's mental illness, i.e., means that go beyond mitigation of danger and enter into the restoration of competency.

In the pre-trial dangerousness context, the prison's sole prerogative is to neutralize any danger. Yet, here the prison engaged instead in the error-prone, multi-faceted decision *to treat mental illness* and did so in a truncated, non-adversarial setting when it decided to forcibly medicate Mr. Loughner on the ostensible grounds of addressing dangerousness. Certainly there are cases where alternative measures to address dangerousness are unavailable, too costly, or ineffective, and in those cases the decision to administer psychotropic medications is indeed "more objective and

manageable than the inquiry into whether medication is permissible to render a defendant competent." *See Sell*, 539 U.S. at 182. But this is precisely what the prison did not do in this case. It simply chose psychotropic medications because the prison believes they effectively treat mental illness, without any consideration of the cost, burden, or effectiveness of other alternatives that the record and the doctor's own opinion show are, in fact, effective, existing, and available in Mr. Loughner's case to address dangerousness.

For a mentally ill incompetent defendant to be restored, the underlying mental illness must be addressed. And any decision of how to treat mental illness with medication includes numerous multi-faceted and error-prone decisions such as whether to administer psychotropics, if so, how much, what kind, what duration; if done forcibly, whether that approach confounds the ultimate prognosis for success, as well as numerous other difficult considerations. When coupled with concerns about how medication will affect a pretrial defendant's fair trial rights and ability to assist counsel, these decisions are even further complicated. Thus, *Sell* and its progeny have developed a robust judicial procedure for protecting a defendant's rights when medication is forced on him as a means of treatment. But to permit the prison to make these treatment decisions in the pretrial context without *Sell*'s guidance and protections not only jeopardizes a significant liberty interest, it also

jeopardizes a fair trial, an interest held not just by the defendant but by the government.

It is critical that any dangerousness determination by the prison be decoupled from overarching desires to treat a mental disease. *See Ruiz-Gaxiola*, 623 F.3d at 694 n.6. This is why "medical necessity" in the *Harper* context must be defined differently from treatment in the pretrial context. Medical necessity for purposes of dangerousness pretrial means "*essential* for the sake of [the detainee's] own safety or the safety of others." *See Riggins*, 504 U.S. at 135. And, by definition, it is essential if and only if "less intrusive alternatives" have been considered and deemed ineffective or unavailable to mitigate dangerousness, which they were not in this case. More far-reaching and error-prone treatment concerns are the province of the courts, and must be considered in full and fair judicial proceedings with the guidance of *Sell*. By importing these concerns into the dangerousness context, the prison has usurped the court's province and kept a critical pretrial decision behind closed doors that neither this Court nor the parties can address, flesh out, or consider.

Contrary to the government's assertions, Mr. Loughner is not asking the Court to "substitute its judgment for the judgment of the medical professionals and officials at the prison facility." *See* Gov Resp. at 22. He is asking the Court to confine the decision of what is medically necessary to the purpose for medication consistent with

its and the Supreme Court's precedents. The Court should grant the relief requested in this emergency motion to address the erroneous conflation of purposes for medication that occurred in this case.

B. The procedural necessity of judicial determination of decisions to involuntarily medicate pretrial detainees committed for competency restoration

The government's contentions are equally unpersuasive on the second argument, which concerned the amount of process constitutionally required for the government to forcibly medicate a pretrial detainee on dangerousness grounds who, like Mr. Loughner, is under commitment for competency restoration. *See* Mtn at 13-17. This is a procedural due process question governed ultimately by the *Mathews v. Eldridge* balancing test—a test that recognizes that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *See* 424 U.S. 319, 334-35 (1976). As Mr. Loughner argued below and intends to argue on appeal, such a balancing, properly conducted, would require a judicial determination as a prerequisite to involuntary medication of pretrial detainees committed under 18 U.S.C. § 4241(d). *See* Mtn at 13-17. The district court, however, simply failed to conduct the necessary balancing analysis and refused to reconcile the "particular situation" with the Supreme Court's analysis in *Riggins* and *Sell*. *See Mathews*, 424 U.S. at 334.

In its response here, the government fails to address the points made in the motion. Instead, it rehashes the arguments made in the district court. *See* Gov Mtn at 14-17. These are that (1) *Sell* is different from *Harper*, and only one of those cases (*Harper*) can apply here, Gov Resp at 14-15; (2) that *Harper* has already considered and rejected the argument made here, Gov Resp. at 16; and (3) that the district court's ruling was a "factual finding . . . reviewed for clear error," Gov Resp. at 17. These arguments are unavailing.

First, the government's insistence that "this is *Harper*, not *Sell*" continues to ignore that *Harper* itself was interpreted by the Supreme Court in its later decisions in *Riggins* and *Sell* and cannot be understood properly without reference to those cases. This is a crucial point, as the government's attempt to avoid those cases implicitly acknowledges. Both *Riggins* and *Sell* establish the importance of judicial involvement when it comes to forcible medication of pretrial detainees—a status shared by the defendants in those two cases and Mr. Loughner, but not the inmate in *Harper*—particularly when it comes to fair trial concerns and other questions that are enmeshed in the constitutional inquiry for pretrial detainees.

Second, the government's claim that this case has already been decided by *Harper* is just plain wrong. *Harper*, by necessity, did not conduct the due process balancing test applicable here. This is because *Harper* concerned an already

convicted inmate, not a pretrial detainee. This is an important distinction because, as Mr. Loughner has explained, it results in a different balance of interests. *See* Mtn at 14-15.

Finally, the government is again mistaken in its claim that the district court's procedural due process ruling was a "factual finding" reviewed for clear error. Gov Resp. at 17. Whether a particular procedural protection is required by the Due Process Clause is a question of law reviewed de novo. *See, e.g.*, *Soffer v. City of Costa Mesa*, 798 F.2d 361, 362 (9th Cir. 1986) (conducting "de novo review of th[e] question of law" of whether due process requires a hearing under the *Mathews v. Eldridge* analysis).

In sum, as the government's response shows, Mr. Loughner has posed at least a "serious legal question" as to whether *Sell* and *Riggins* entitle him to a judicial determination on the question of forcible medication.

C. Violation of the right to present witnesses

Mr. Loughner's third argument was that the district court clearly erred in finding that his request for "my attorney" in response to being asked whether he wanted any witnesses was not, in fact, a request that his attorney appear as a witness. *See* Mtn. at 17-19. In response, the government simply asserts without explanation that "[t]he defendant cannot show that this factual finding was clearly erroneous."

Gov Resp. at 22. The government totally fails to address how clear the record is on Mr. Loughner's witness request. As explained in the motion, Mr. Loughner asked for "my attorney" in direct response to being "asked . . . if he desired any witnesses to be present for the hearing"—not in response to some other question. *See* Mtn at 18 (and citation therein). The government also fails to address the fact that Mr. Loughner's request for his attorney *as a witness* made eminent sense in light of the fact that she was a percipient witness to one of the salient events. If anything, the government's non-response demonstrates that Mr. Loughner *has* made a showing of likely success on the merits on this point.

The government also contends that violation of the right to witnesses is doomed on appeal because Ms. Clarke's eyewitness testimony "would not have altered BOP's conclusion under *Harper* that the government was dangerous." Gov Resp. at 22. This contention is curious. First, the government offers no support or rationale for this assertion. One is left to wonder what basis might support such a claim. Is it that the government believes the BOP would place no weight on the testimony of an eyewitness account of one of the key events its "dangerousness" finding was based on? This would be a dim view of the administrative process, and perhaps a tacit admission of its constitutional inadequacy. Or is it that the

government feels confident that, dangerous or not, the BOP would have found a way to order Mr. Loughner to be forcibly medicated?

Again, as with the merits of this argument, the government's response on prejudice actually supports the conclusion that this presents a "serious legal question" with at least a "fair prospect" of ultimate success. *See Leiva-Perez*, 640 F.3d at 967-68.

D. The prison's failure to specify the identity and dosage of the proposed medication

Mr. Loughner's fourth argument was that the failure of the prison hearing to specify the identity and maximum dosages of the medications it was considering as a remedy to dangerousness violated his right to a "medical appropriateness" determination under *Hernandez-Vasquez*. *See* Mtn. at 19-20. In response, the government simply reiterates its position below. It contends first that "medical appropriateness" is different here than in the *Sell* context, Gov Resp. at 27, and second that it, in fact, satisfied the specificity requirement because a prison psychiatrist prescribed a specific medication regimen. *See* Gov. Resp. at 28. Both arguments lack merit.

On its first point, the government offers no support that "medical appropriateness" is different here than in *Sell*. It totally fails to address the fact that

the drug-specificity holding in *Hernandez-Vasquez* was based on the portion of the Supreme Court's analysis in *Sell* where it expressly imported the "medical appropriateness" prong from the dangerousness context—that is, from *Harper* and *Riggins*. It is difficult to imagine stronger evidence that the "medical appropriateness" prong in *Sell* is one and the same as it is in the *Harper*/*Riggins* dangerousness context.

On its second contention, the government completely misses the point. The prescription it relies on was issued *after the conclusion* of the administrative proceedings. *See* Gov Resp. at 28 (relying on a June 21 "administrative note," seven days after the prison held the administrative hearing under 28 C.F.R. § 549.43 and found Mr. Loughner suitable for forcible medication on dangerousness grounds). Obviously, Mr. Loughner had no opportunity at the June 14 proceeding to challenge the medical propriety of the June 21 prescription; the prescription did not exist until a week *after* he could have exercised his procedural rights.

Ruiz-Gaxiola is relevant on this point. As this Court held, the medical-appropriateness prong requires consideration of "*all* of the medical consequences of the proposed involuntary medication" and "the length of time the treatment regime must be continued in order to provide the desired medical benefit to the patient." *Ruiz-Gaxiola*, 623 F.3d at 704-05. This is necessary because, as *Ruiz-Gaxiola* held,

it is not medically appropriate to "prescribe a medication regime unless the likelihood and value of its potential benefits outweighed the likelihood and severity of its potential harms over the course of treatment, as opposed to during the period in which the government wishes to conduct a criminal trial." *Id*. at 705. The Court reversed the district court's medication order because there was insufficient evidence of such a risk-benefit analysis; only the benefits during a short period of time (trial) were considered. *Id.* at 706.

Here, the circumstances are even more aggravated. There is no evidence at all that "the potential benefits outweigh[] the likelihood and severity of its potential harms" because neither the "medication regime" nor its duration was even identified at the dangerousness hearing. *See id.* at 705. In sum, the conclusory findings that were made at the hearing cannot possibly pass muster under *Hernandez-Vasquez* and *Ruiz-Gaxiola*.

IV.

IRREPARABLE HARM AND OTHER FACTORS

A. Irreparable Harm

In the motion, Mr. Loughner explained that absent a stay, he will suffer the irreparable harm to his constitutional right to be free of unwanted psychotropic medication. Mtn at 20-21. That harm was not a remote or distant possibility; it was

an actual and realized injury that the prison was presently perpetrating upon him. In response, the government contends that irreparable harm is only a "speculative" possibility because it is not certain that Mr. Loughner will suffer unintended side effects from the medications. *See* Gov Resp. at 29-30.

The government's focus on side effects misses the point. The irreparable harm is that Mr. Loughner will be forced to take medication when he does not want to—not just that the unwanted medication might also have even more unwanted side effects. That this is a legal harm has been repeatedly recognized by this Court and the Supreme Court. *Ruiz-Gaxiola*, for one, has explained this point:

> 'The Supreme Court has thrice recognized a liberty interest in freedom from unwanted antipsychotic drugs.' Anti-psychotic medications are designed to cause a personality change that, 'if unwanted, interferes with a person's self-autonomy, and can impair his or her ability to function in particular contexts.'

623 F.3d at 691 (citing *Sell*, 539 U.S. 166, *Riggins*, 504 U.S. 127, and *Harper*, 494 U.S. 210). Violation of that liberty interest—that is, the forcible administration of medication—*is* the irreparable harm. The fact that there might *also* be side effects simply aggravates the situation. It does not somehow convert an actual and ongoing injury into a speculative possibility.

B. Lack of substantial injury to the government

Delay to the government's forcible medication program will not result in any substantial injury to the government. *See* Mtn at 21 (explaining that the prison itself delayed for months before acting on the alleged dangerousness). The government itself does not dispute the lack of substantial injury. *See generally* Gov Resp.

C. Public interest

Finally, the government asserts it must be allowed to continue to forcibly medicate Mr. Loughner because the prison employees at Springfield "cannot conduct th[e] restoration assessment *safely* unless the defendant is medicated, as the facility determined under *Harper*." Gov Resp. at 30 (emphasis in original). This contention is flawed for three reasons. First, it lacks support in the record. Nowhere in the administrative findings did the prison indicate that it could not "conduct the restoration assessment safely" without forced medication. *See* Mtn, Exh. 1 (Hearing Report, Exhibit C to the district court motion). Second, the facts suggest the opposite. The facility was quite capable of conducting a competency assessment during Mr. Loughner's first commitment without forcible medication. Third, even if the government's baseless assertion were taken at face value, what it would create is an exception that would swallow the rule. Under the government's rubric, not only would each defendant committed for restoration warrant involuntary medication on

"safety-assurance" grounds, a court would not even be able to push the "pause" button to make sure the forcible medication were proceeding lawfully. The government's position is unpersuasive. The public-interest prong, as well as the other three, militates in favor of granting the temporary stay pending appeal.

V.

CONCLUSION

For the reasons set forth here and in the motion, the Court should grant the temporary injunction pending appeal.

Respectfully submitted,

/s/ Judy Clarke

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