FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KENYON NORBERT; MONTRAIL BRACKENS; JOSE POOT; MARSHALL HARRIS; ARMANDO CARLOS; MICHAEL BROWN; TROY MCALLISTER, on behalf of themselves individually and others similarly situated, as a class and Subclass, *Plaintiffs-Appellees/ Cross-Appellants*, v. CITY AND COUNTY OF SAN FRANCISCO, *Defendant-Appellant/ Cross-Appellee*, and SAN FRANCISCO SHERIFF'S DEPARTMENT; VICKI HENNESSY, San Francisco Sheriff; PAUL MIYAMOTO, San Francisco Chief Deputy Sheriff; JASON JACKSON; MCCONNELL, *Defendants.*	Nos. 20-15341 20-15449 D.C. No. 3:19-cv-02724-SK OPINION

Appeal from the United States District Court
for the Northern District of California
Sallie Kim, Magistrate Judge, Presiding

Argued and Submitted March 11, 2021
San Francisco, California

Filed August 26, 2021

Before: M. Margaret McKeown, Sandra S. Ikuta, and Daniel A. Bress, Circuit Judges.

Opinion by Judge Bress

SUMMARY*

Prisoner Civil Rights

The panel (1) dismissed as moot defendants' appeal from the district court's preliminary injunction order; (2) affirmed, on cross-appeal, the district court's denial of plaintiffs' request for more expansive preliminary injunctive relief; and (3) dismissed, for lack of jurisdiction, plaintiffs' appeal from the district court's order dismissing certain defendants in an action brought pursuant to 42 U.S.C. § 1983 by seven inmates at county jails in San Francisco alleging, among other things, violations of the Eighth and Fourteenth Amendments, based on the City's allegedly unconstitutional

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

practice of denying inmates housed in County Jail 5 access to outdoor recreation time and direct sunlight exposure.

Plaintiffs challenged the City's "complete deprivation of access to outdoor recreation and sunshine." They requested that all inmates be given three hours per week of "outdoor recreation time" and one hour per day of out-of-cell time. The district court granted in part and denied in part plaintiffs' motion for a preliminary injunction. The district court found that the evidence was inconclusive as to whether the lack of access to direct sunlight created a medical risk and that plaintiffs had not shown a likelihood of success on their constitutional claims seeking exercise time outdoors. Applying a totality of the circumstances framework, the district court held the City's policy of permitting CJ5's general population inmates to receive between 4.5 and 8 hours of day room time and 30 minutes of gym time per day was constitutionally sufficient. The district court also found, however, that under the Fourteenth Amendment, relevant to pretrial detainees, forcing people to live without direct sunlight for many years was simply punishment. The district court ordered the City to provide one hour per week of direct sunlight (which it defined as light "not filtered through a window") to inmates in CJ5 who had been incarcerated for more than four years. In the same order, the district court dismissed the San Francisco Sheriff's Department as a superfluous defendant and dismissed all the individual defendants based on qualified immunity.

The panel first held that the City's appeal was moot because, under the Prison Litigation Reform Act, the district court's preliminary injunction order expired ninety days after entry, and there was no indication that plaintiffs moved the district court to extend its injunction past the 90-day period. Plaintiffs' cross-appeal, however, was not moot

because plaintiffs were appealing the district court's order to the extent it denied their motion for a preliminary injunction, which sought broader relief than what the district court issued.

The panel held that, in light of this court's precedents and on this record, the district court did not err in denying plaintiffs greater preliminary injunctive relief. Addressing the claim that plaintiffs were entitled to three hours per week of outdoor exercise time, the panel held that the district court correctly explained that there is no bright line test to determine if and when inmates are entitled to outdoor exercise. Outdoor exercise can be required, however, when otherwise meaningful recreation is not available. Here, the district court validly determined that the conditions at CJ5 did not resemble those extreme and degrading circumstances in which outdoor exercise has been required. Most inmates in CJ5 spend eight hours per day out of their cells between free time and programming. They can exercise in both the day rooms and gyms. And they have cell windows that permit in outside natural light, and gyms that allow in both outside light and ambient air. The district court reasonably concluded on this record that inmates were given constitutionally sufficient recreation time.

The panel also rejected plaintiffs' argument that the district court should have imposed a broader preliminary injunction that required three hours of direct sunlight per week for all inmates incarcerated more than six weeks. The panel concluded that on this record, plaintiffs had not shown a likelihood of success on their "direct sunlight" claim given the district court's extensive factual findings, following an evidentiary hearing, that plaintiffs and their expert had not demonstrated a risk of material harm to human health arising from the light exposure in CJ5.

The panel held that it lacked appellate jurisdiction over plaintiffs' cross-appeal as it pertained to the dismissal of the Sheriff's Department and the individual defendants because orders appealing the dismissal of some defendants, but not all, are ordinarily not appealable and the requirements for pendent appellate jurisdiction were not met in this case.

COUNSEL

Kaitlyn Murphy (argued), Sabrina M. Berdux, and Margaret W. Baumgartner, Deputy City Attorneys; Meredith B. Osborn, Chief Trial Attorney; Dennis J. Herrera, City Attorney; Office of the City Attorney, San Francisco, California; for Defendants-Appellants/Cross-Appellees.

Yolanda Huang (argued), Law Offices of Yolanda Huang, Oakland, California, for Plaintiffs-Appellees/Cross-Appellants.

OPINION

BRESS, Circuit Judge:

We consider in this case a constitutional challenge to certain conditions of confinement at a San Francisco jail. The district court enjoined some of the jail's practices, but we principally address the plaintiff inmates' appeal of the district court's order insofar as it denied their request for a broader preliminary injunction, through which plaintiffs sought more outdoor recreation time for a greater number of inmates.

We hold that under our precedents and on this record, the district court did not err to the extent it denied the plaintiffs' request for more expansive preliminary injunctive relief than the district court had already ordered. We further hold that the city's appeal is moot and that we lack jurisdiction to consider plaintiffs' appeal of the district court's order dismissing certain defendants.

I

A

The plaintiffs are seven inmates at county jails in San Francisco. When this case was filed, plaintiffs were incarcerated at either County Jail 4 ("CJ4") or County Jail 5 ("CJ5"). All plaintiffs are pretrial detainees, except for plaintiff Armando Carlos, who has been convicted and is awaiting sentencing. The defendants are the City and County of San Francisco ("City"), which operates the county jails; the San Francisco County Sheriff's Department; Sheriff Vicki Hennessy; Chief Deputy Sheriff Paul Miyamoto; Captain Jason Jackson; and Captain Kevin McConnell.

Plaintiffs' putative class action complaint asserted a broad challenge to various conditions of confinement at CJ4 and CJ5. Relevant to plaintiffs' later request for a preliminary injunction are those claims brought under 42 U.S.C. § 1983 for violations of the Eighth and Fourteenth Amendments, based on the City's allegedly unconstitutional practice of denying inmates access to outdoor recreation time and direct sunlight exposure. The complaint and request for preliminary injunction discuss the conditions at both CJ4 and CJ5, but the City later permanently closed CJ4 and moved all inmates, including plaintiffs, to CJ5.

Accordingly, the parties agree that only the conditions of CJ5 are relevant to this appeal.

CJ5 was opened in 2006. It is a "pod-style" jail that houses male felony inmates, more than 90% of whom are pretrial detainees. It is organized into 16 identical pods, each of which has 24 two-person cells arranged in two tiers. Each cell has a window on the back wall, which looks onto a semi-transparent wall consisting of stripes of clear and frosted panes, which in turn allows into cells natural light from the outside while providing visual access to the outdoors.

The cells in CJ5 all face a central common area, or "day room." Each cell door has clear plastic that allows inmates to see into the day room, but cell doors are kept open during day room time. The day rooms contain phones, a shower, a television, tables, and stools. The district court found that while the day rooms "are not large enough for vigorous exercise," they "do allow some space for some limited exercise."

Connected to each day room is a gym, which is around half the size of a basketball court and is available for inmates to exercise. Each gym has two large grates on the sidewall that allow in fresh air and provide an "occluded sky view" that allows some light to enter the gym. The grates are not covered by glass but are rather open to the ambient air outside. There are 16 gyms total in CJ5.

CJ5 has no secure outdoor space for inmate recreation, so inmate exercise occurs indoors. When CJ5 was built, it replaced the old San Bruno Jail, a "linear-style" jail that did have an outdoor exercise yard. The San Bruno Jail had several security features (like a "cat-walk" and guard tower) that permitted effective oversight of the exercise yard. These features no longer exist in the current facility. The San

Bruno Jail also housed a population of inmates who were considered lower security risks than the current population of CJ5, which made it possible for inmates to use the yard with more minimal safety protocols. The old yard has not been used or maintained for over a decade.

Inmates in CJ5 who are not in disciplinary segregation are generally classified into two groups: general population or administrative segregation. General population consists of inmates with no unique needs who may live safely with the other inmates. Administrative segregation is a non-disciplinary classification for inmates who have psychological or medical needs or who pose a safety risk, including due to the risk that other inmates will harm them. Plaintiffs appear to be a mix of general population and administrative segregation inmates. The City represents that although some inmates' personal circumstances do not typically change, it reviews inmates' classification status every two weeks to determine if an inmate in administrative segregation can be reassigned to general population.

CJ5 inmates in general population have access to the day room for 4.5 hours on weekdays and 8 hours on weekend days, which is organized around other educational and rehabilitative programming. They also are allowed at least 30 minutes in the gym each day, seven days a week.

Inmates in administrative segregation have less recreation time than those in general population; due to safety concerns, they cannot use the common areas as a group. CJ5 instead provides administrative segregation inmates at least 30 minutes of gym time and 30 minutes of common room time each day, seven days per week, generally in groups of two. However, jail administrators try to create larger groups so that recreation time can be extended. In particular, the district court explained that if

the jail could safely accommodate more administrative segregation inmates at once, their exercise time could then increase. Specifically, "[f]or each two inmates added to the total, the exercise time is increased by 30 minutes; *e.g.*, four inmates in the gym together would get one hour of time, six would get one and a half hours, etc."

B

In June 2019, plaintiffs moved for a preliminary injunction challenging the City's "complete deprivation of access to outdoor recreation and sunshine." They requested that all inmates in CJ4 and CJ5 be given three hours per week of "outdoor recreation time" and one hour per day of out-of-cell time.

In support of their motion, several plaintiffs submitted declarations about physical and emotional ailments that they claimed were attributable to a lack of exposure to direct sunlight over a period of years. The plaintiffs have been incarcerated for varying numbers of years, although the district court found it was unclear why plaintiffs who were pretrial detainees had been detained for long periods of time.

In addition, and as relevant here, plaintiffs submitted a three-page expert report from Dr. Jamie Zeitzer, a Stanford psychiatrist who studies the effects of light deprivation but who did not examine or treat any of the plaintiffs or visit their facilities. In his report, Dr. Zeitzer explained that many biological activities rely on a proper circadian clock, which "is dependent on exposure to regular light-dark cycle." He opined that disruption of the circadian clock can lead to health problems and sleep disruption. But the district court recounted that Dr. Zeitzer later testified at an evidentiary hearing that while indoor lighting "'doesn't completely recapitulate what you would get outside' for health

purposes," generally sunlight "filtered through windows" supplies "the proper differential." In addition to taking testimony at the evidentiary hearing, the district court also conducted site visits to both CJ4 and CJ5.

The district court granted in part and denied in part the plaintiffs' motion for preliminary injunction. It first reviewed the evidentiary record and made several relevant findings about plaintiffs' medical evidence and the testimony of Dr. Zeitzer. The district court summarized its findings as follows:

> [T]he total amount of light a person receives is not the important factor for health; instead, the difference between light at night and light during the day is significant for health. In general, the type of light—whether sunlight or artificial light—is not significant. However, exposure to a smaller amount of sunlight each week suffices to reset the Circadian clock because sunlight is usually very bright. Zeitzer's opinions about the conditions of the inmates at County Jails 4 and 5 are based on general knowledge and not on any specific medical data for the individual inmates, and Zeitzer, who is not a medical doctor, has not treated or examined any of the inmates.

From this, the district court found that the "scientific evidence regarding access to light is inconclusive," in that "[t]he evidence in the record at this point is inconclusive as to whether the lack of access to direct sunlight creates a medical risk." (capitalization omitted). Noting the lack of any measurements of the differential between light during

the day and night at CJ4 or CJ5, the district court found that "it is impossible for the Court to determine if Plaintiffs are suffering harm caused by an insufficient difference between light during the day and light during the night."

The district court also found that plaintiffs had not demonstrated harm from a lack of exposure to direct sunlight. The district court noted that plaintiffs in CJ5 (and CJ4) did have exposure to sunlight through cell windows and gym grates. Explaining that "the issue is one of causation," the district court found that "[t]he evidence at this time is not clear, and Plaintiffs do not meet their burden to show that the conditions caused their physical problems because the evidence at this time does not show causation between the lack of direct sunlight and the medical problems."

As the district court concluded:

> To the extent that Plaintiffs claim harm from lack of direct sunlight, as opposed to lack of a sufficient difference between light at night and light during the day, the evidence does not support that claim. Zeitzer opined that the type of light that a person receives generally does not matter, as long as the light source does not filter out certain types of light, and Zeitzer does not know what type of light inmates receive. Thus, Plaintiffs have not met their burden for purposes of this motion for preliminary injunction to show that the amount of light or type of light they receive is harmful to them.

Turning to its legal analysis, the district court first held that plaintiffs had not shown a likelihood of success on their constitutional claims seeking exercise time outdoors.

Surveying case law, the district court reasoned that "outdoor exercise is necessary when inmates or pretrial detainees are held in cells with little opportunity for out-of-cell movement, where the incarceration is lengthy, and where there is no concern about safety that requires elimination of outdoor exercise." But it noted that "access to day rooms or other indoor exercise areas, without a showing of actual harm, can make up for lack of outdoor exercise." The district court explained that "[a]ll of these factors are interrelated, and there is no bright line test to determine if and when inmates are entitled to outdoor exercise—as opposed to 'meaningful recreation.'"

Applying this totality of the circumstances framework, the district court held it was constitutionally sufficient that CJ5's general population inmates received between 4.5 and 8 hours of day room time and 30 minutes of gym time per day. The district court also held that CJ5's policies for administrative segregation inmates passed constitutional muster, although "barely." As noted, these inmates were given at least 30 minutes of gym time and 30 minutes of day room time each day.[1]

The district court applied a different analysis to plaintiffs' Fourteenth Amendment claims, relevant to pretrial detainees, on the issue of direct sunlight exposure. The district court held that under the Fourteenth Amendment, "[e]ven if the evidence shows that access to

[1] The district court found that administrative segregation inmates in CJ4, who were receiving only three hours per week of out-of-cell time, did show a likelihood of success on the merits of their constitutional claims. The court observed that "[t]he issue in County Jail 4 for inmates in administrative segregation *is not the denial of outdoor exercise*, but a denial of outdoor exercise *without a meaningful alternative of out-of-cell time*." (Emphasis added).

direct sunlight is not medically necessary, forcing people to live without direct sunlight for many years is simply punishment," unless the deprivation is "for a short period of time."

Having concluded that the remaining preliminary injunction factors favored the plaintiffs, the district court ordered that those inmates who had been incarcerated for more than four years must be given access to "direct sunlight" at least one hour per week. The court identified the four-year mark as the relevant point in time based on our decision in *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979).

As for the amount of direct sunlight required per week, the court "realize[d] that any injunction draws an arbitrary line." It chose one hour of direct sunlight per week because although Dr. Zeitzer had "recommend[ed] 30 minutes of sunlight per day," the court was "also concerned about the practical ability of the City and County of San Francisco to provide access to direct sunlight." Still, the court acknowledged that "it is unclear if Zeitzer's recommendation would be the same for" inmates who received access to filtered sunlight during the day (the case for inmates in CJ5). The district court's preliminary injunction purports to extend to all covered inmates, even though the court had not certified any class under Federal Rule of Civil Procedure 23.

In response to the City's later request for clarification of the preliminary injunction, the district court issued a further order explaining that "direct sunlight" requires sunlight that "is not filtered through a window." The parties interpret this to mean that the sunlight from cell windows in CJ5 or from the gym grates is insufficient. Because the district court order requiring "direct sunlight" exposure did not indicate that inmates would need to be able to exercise during that

time, we understand the district court's Fourteenth Amendment analysis to be based on an identified right to direct natural light exposure (not filtered through a window), as opposed to a right to physical recreation outdoors. That is consistent with the district court's earlier analysis rejecting plaintiffs' request for outdoor exercise in light of the indoor exercise opportunities made available to them.[2]

In the same order as the preliminary injunction, the district court granted in part the City's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The court dismissed with prejudice the San Francisco Sheriff's Department because it is not a separate entity from the City, cannot be sued in its own name, and was therefore a superfluous defendant. The district court also dismissed with prejudice all the individual defendants based on qualified immunity.

C

The City filed a notice of appeal of the district court's preliminary injunction order and moved in the district court for a stay of the preliminary injunction pending appeal. Before the stay motion could be heard, the parties stipulated to a continuance while they pursued settlement talks. Plaintiffs then filed a notice of cross-appeal. Plaintiffs appeal certain aspects of the district court's denial of preliminary injunctive relief and also purport to appeal the

[2] In addition to the direct sunlight requirement, the district court ordered the City to provide inmates in CJ4's administrative segregation unit with at least one hour of daily exercise. The City complied with that requirement by closing CJ4 and moving all CJ4 inmates to CJ5, which the district court found provided adequate exercise opportunities. CJ5 has since been renamed CJ3, but for ease of reference we will continue to refer to it as CJ5.

Rule 12(b)(6) dismissal of the Sheriff's Department and the individual defendants.

In the meantime, after the parties failed to settle, they completed briefing in the district court on the City's motion to stay the injunction pending appeal. But the district court denied the stay motion as moot, finding that the preliminary injunction had in fact already expired under the Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321–66 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

Under the PLRA, "[p]reliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period." 18 U.S.C. § 3626(a)(2). There is no indication that plaintiffs moved the district court to extend its injunction past the 90-day period. The district court explained that its preliminary injunction had expired automatically under the PLRA because the court had not made the preliminary injunction a final injunction, nor had the court renewed it. The plaintiffs do not challenge this determination on appeal.[3]

[3] Proceedings before the district court have continued during the pendency of this appeal. As relevant here, plaintiffs filed a second motion for preliminary injunction, seeking to renew the relief awarded in the first (expired) injunction, as well as additional relief. The district court denied this request without prejudice, citing this pending appeal and the materially changed circumstances caused by the COVID-19 pandemic. Plaintiffs did not appeal this order. In the meantime, plaintiffs' pending motion for class certification is set for hearing on August 30, 2021.

II

We first address the City's motion to dismiss this appeal. The City argues that because the district court's preliminary injunction has now expired, both the City's appeal and the plaintiffs' cross-appeal of the preliminary injunction order are now moot. The City is correct that its own appeal is moot. *See, e.g.*, *Edmo v. Corizon, Inc.*, 935 F.3d 757, 782 (9th Cir. 2019) ("Generally, the expiration of an injunction challenged on appeal moots the appeal."). We thus grant the City's motion to dismiss its appeal.

Plaintiffs' cross-appeal is not moot. Under 28 U.S.C. § 1292(a)(1), we have jurisdiction over appeals from the denial of preliminary injunctive relief. *See, e.g.*, *Monarch Content Mgmt. LLC v. Ariz. Dep't of Gaming*, 971 F.3d 1021, 1026–27 (9th Cir. 2020) ("We have jurisdiction over this appeal of the district court's denial of a preliminary injunction under 28 U.S.C. § 1292 . . . ."). Plaintiffs are appealing the district court's order to the extent it *denied* their motion for a preliminary injunction, which sought broader relief than what the district court issued. The PLRA does not prevent plaintiffs from appealing the district court's order insofar as it denied plaintiffs relief because what expired after 90 days was only the preliminary injunctive relief that was entered. *See* 18 U.S.C. § 3626(a)(2). To this extent, the City's motion to dismiss this appeal is denied.

We thus turn to plaintiffs' cross-appeal of the preliminary injunction order.

III

A

"We review an order regarding preliminary injunctive relief for abuse of discretion, but review any underlying issues of law de novo." *Karnoski v. Trump*, 926 F.3d 1180, 1198 (9th Cir. 2019) (per curiam). A preliminary injunction is an "extraordinary remedy." *California v. Azar*, 950 F.3d 1067, 1105 (9th Cir. 2020) (citing *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 22 (2008)). It "should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)).

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "Likelihood of success on the merits is 'the most important' factor . . . ." *Azar*, 911 F.3d at 575 (quoting *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017)).

The plaintiffs, as we have noted, are either pretrial detainees or have been convicted and are awaiting sentencing. Under case law, "[t]he status of the detainees determines the appropriate standard for evaluating conditions of confinement." *Vazquez v. County of Kern*, 949 F.3d 1153, 1163 (9th Cir. 2020) (quoting *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987)); *see also Kingsley v. Hendrickson*, 576 U.S. 389, 400 (2015); *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979).

For plaintiff Armando Carlos, who is convicted and awaiting sentencing, the Eighth Amendment supplies the relevant standard. *See Vazquez*, 949 F.3d at 1164. The Eighth Amendment prohibits "cruel and unusual punishments." U.S. Const. amend. VIII. "An Eighth Amendment claim that a prison official has deprived inmates of humane conditions of confinement must meet two requirements, one objective and one subjective." *Allen v. Sakai*, 48 F.3d 1082, 1087 (9th Cir. 1994) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). "Under the objective requirement, the prison official's acts or omissions must deprive an inmate of 'the minimal civilized measure of life's necessities.'" *Id.* (quoting *Farmer*, 511 U.S. at 834). This requires the inmate to demonstrate "conditions posing a substantial risk of serious harm" that present an "excessive risk to [his] health or safety." *Farmer*, 511 U.S. at 834, 837. "The subjective requirement, relating to the defendant's state of mind, requires deliberate indifference." *Allen*, 48 F.3d at 1087.

The claims of the remaining plaintiffs, who are pretrial detainees, "are analyzed under the Fourteenth Amendment Due Process Clause, rather than under the Eighth Amendment." *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998) (citing *Bell*, 441 U.S. at 535 n.16). Precedent teaches that "the Fourteenth Amendment is more protective than the Eighth Amendment 'because the Fourteenth Amendment prohibits *all* punishment of *pretrial detainees*.'" *Vazquez*, 949 F.3d at 1163–64 (quoting *Demery v. Arpaio*, 378 F.3d 1020, 1029 (9th Cir. 2004)). By this standard, "[f]or a particular governmental action to constitute punishment, (1) that action must cause the detainee to suffer some harm or 'disability,' and (2) the purpose of the governmental action must be to punish the detainee." *Demery*, 378 F.3d at 1029. This requires showing at least reckless disregard

for inmates' health or safety. *See Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016).

Plaintiffs argue that the district court's preliminary injunction did not go far enough. Whereas the district court determined that inmates at CJ5 who had been incarcerated more than four years must be given access to "direct sunlight" at least one hour per week, plaintiffs maintain that all inmates who have been incarcerated for more than six weeks should receive three hours of "outdoor exercise" per week. (Before the district court plaintiffs sought this relief for all inmates regardless of their time in jail, but now propose that relief begin at the six-week mark.) Under the district court's (now-expired) injunction, those plaintiffs who had been incarcerated more than four years already received some amount of relief, although they claim they are entitled to more. At least three plaintiffs had been incarcerated less than four years and so received no relief.

What this means is that although the City's appeal is moot and plaintiffs are only challenging the denial of additional preliminary injunctive relief beyond what the district court ordered, to resolve the plaintiffs' cross-appeal we must necessarily consider some of the same legal issues underlying the injunctive relief that the district court did order. Plaintiffs appear to seek class-wide relief, but at the time of the preliminary injunction decision (and now), no class had been certified. It is well-established that "[w]ithout a properly certified class, a court cannot grant relief on a class-wide basis." *Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983). Thus, the plaintiffs' cross-appeal must be limited to the named plaintiffs' claims only.

One of the complexities of this case, however, is the precise nature of those claims. To some extent, plaintiffs argue that they are entitled to three hours per week of

outdoor *exercise* time. But plaintiffs also maintain they are entitled to three hours per week of *exposure* to direct sunlight.

We will analyze plaintiffs' claims both ways. As we now explain, on this record, plaintiffs have not shown a likelihood of success on either theory because, at the very least, plaintiffs have not shown that the district court erred in denying them more expansive relief than what the court already ordered.

B

1

We begin with the outdoor exercise theory. We have recognized that "exercise is 'one of the basic human necessities protected by the Eighth Amendment.'" *May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997) (quoting *LeMaire v. Maass*, 12 F.3d 1444, 1457 (9th Cir. 1993)). We have held the same under the Fourteenth Amendment. *See, e.g.*, *Pierce v. County of Orange*, 526 F.3d 1190, 1211–12 (9th Cir. 2008). Plaintiffs appear to maintain, however, that this right must always encompass the opportunity to exercise *outdoors*.

We think that our cases do not extend quite so far. We have stated that "the long-term denial of *outside* exercise is unconstitutional." *LeMaire*, 12 F.3d at 1458 (emphasis in original). Even so, we have never held that all deprivations of outdoor exercise are per se unconstitutional. *See Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979). Whether under the Eighth or Fourteenth Amendments, we have not imposed a rigid requirement of outdoor exercise regardless of the other opportunities for physical exercise that a correctional institution affords. Instead, we have explained,

"the Constitution requires jail officials to provide outdoor recreation opportunities, *or otherwise meaningful recreation*, to prison inmates." *Shorter v. Baca*, 895 F.3d 1176, 1185 (9th Cir. 2018) (emphasis added). Thus, to vindicate a constitutional right to exercise, outdoor exercise can indeed be required, when "otherwise meaningful recreation" is not available.

While plaintiffs cast *Shorter*'s allowance of otherwise meaningful recreation off as mere dicta, it is an accurate encapsulation of our case law as a whole. And while plaintiffs point out that some of our cases couched the right to "exercise" as one for "outdoor exercise," it is not apparent in those cases that "otherwise meaningful recreation," *id.*, was available. A tour through our cases bears this out.

Our decision in *Spain*, 600 F.2d 189, is the foremost circuit precedent on this issue. In *Spain*, we explained that "[t]here is substantial agreement among the cases in this area that some form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates." *Id.* at 199. But, importantly, we did not "consider it necessary to decide whether deprivation of outdoor exercise is a per se violation of the [E]ighth [A]mendment." *Id.*

That is because "[s]everal factors combined to make outdoor exercise a necessity" on the facts of that case. *Id.*; *see also Toussaint v. Yockey*, 722 F.2d 1490, 1492 (9th Cir. 1984) (explaining that in *Spain*, "we held that, on the facts presented, the denial of outdoor exercise constituted cruel and unusual punishment"); *Wright v. Rushen*, 642 F.2d 1129, 1134 (9th Cir. 1981) (explaining that *Spain*'s approval of an order mandating outdoor exercise was based on "the cumulative effect of related prison conditions"). Specifically, the inmates in *Spain* were held "in continuous

segregation, spending virtually 24 hours every day in their cells with only meager out-of-cell movements and corridor exercise," had "minimal" contact with other persons, and were offered no "affirmative programs of training or rehabilitation." 600 F.2d at 199.

Under these "degrading" conditions, we held "it was cruel and unusual punishment for a prisoner to be confined for a period of years without opportunity to go outside." *Id.* at 199–200. We thus affirmed the district court's order that inmates who were confined for more than four years under these conditions should receive outdoor exercise five days per week for one hour per day. *Id.* at 200.

While we framed our discussion in *Spain* in terms of "outdoor exercise," we did not suggest that indoor recreational opportunities could never satisfy constitutional standards. And importantly, it is apparent that the prison in *Spain* did not have adequate indoor recreation options. Instead, we noted that the indoor recreational opportunities for inmates were nominal at best: the plaintiffs "were permitted to exercise one at a time in a corridor," and "in practice the exercise times were often far shorter than one hour and less frequent than five days a week." *Id.* at 199.

Since *Spain*, we have reaffirmed that the constitutionality of conditions for inmate exercise must be evaluated based on the full extent of the available recreational opportunities. In *Toussaint v. Yockey*, 722 F.2d 1490 (9th Cir. 1984), inmates were held in "administrative segregation" and many "were confined to their cells for as much as 23 ½ hours a day." *Id.* at 1492–93. We concluded that the conditions were "[s]imilar" to those in *Spain* and therefore affirmed a preliminary injunction requiring the state to provide "outdoor exercise." *Id.* at 1493.

Once again, however, our analysis in *Toussaint* demonstrated that we were not imposing a per se requirement that exercise necessarily take place outside. Instead, if anything, we indicated the opposite. We specifically noted the defendants' argument that the state's own regulations permitted indoor exercise. *Id.* But we explained that "Defendants' argument misses the point" because "[t]he district court did not invalidate the state regulation; it merely held that, *given the circumstances of this case*, the denial of outdoor exercise was probably unconstitutional." *Id.* (emphasis added). We then immediately followed this point with a favorable comparison citation of *Spain* to the Fourth Circuit's decision in *Clay v. Miller*, 626 F.2d 345 (4th Cir. 1980) (per curiam), which we described as holding that outdoor exercise was not required "where prisoners had access to [a] dayroom eighteen hours a day." *Id*. The plain import of our citation of *Clay* was that indoor recreation opportunities could be constitutionally sufficient in some circumstances.[4]

Our analysis in *Pierce v. County of Orange*, 526 F.3d 1190 (9th Cir. 2008), a Fourteenth Amendment case

[4] Indeed, the Supreme Court in *Wilson v. Seiter*, 501 U.S. 294 (1991), drew a similar comparison between *Spain* and *Clay*. *Id.* at 304–05. It explained that "[*s*]*ome* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise . . . ." *Id.* at 304. Like *Toussaint*, the Supreme Court then offered this example: "Compare *Spain v. Procunier*, 600 F.2d 189, 199 (CA9 1979) (outdoor exercise required when prisoners otherwise confined in small cells almost 24 hours per day), with *Clay v. Miller*, 626 F.2d 345, 347 (CA4 1980) (outdoor exercise not required when prisoners otherwise had access to dayroom 18 hours per day)." *Id.* at 304–05; *see also Wright*, 642 F.2d at 1133 (drawing the same comparison between *Spain* and *Clay*).

involving pre-trial detainees, is along the same lines. There we considered the "almost complete denial of exercise," *id.* at 1213, which is not comparable to inmates' experiences in CJ5. We held in *Pierce* that as to inmates in administrative segregation who spent twenty-two hours or more in their cells, providing "only ninety minutes of exercise per week—less than thirteen minutes per day—does not comport with constitutional standards." *Id.* at 1208, 1212. We declined to "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," but ordered that the inmates be permitted to exercise at least two times each week for at least two hours per week. *Id.* at 1212–13.

Relevant here, in *Pierce* we once again did not suggest that the physical exercise necessarily had to take place outdoors. To the contrary, we noted that "inmates' access to day rooms . . . is a factor affecting our determination of what constitutes adequate exercise." *Id.* at 1212 n.22. But we concluded that the indoor facilities at issue were inadequate for exercise purposes: the "day rooms [were] not designed for exercise" and did not provide an "exercise opportunity" "given the space constraints and absence of any appropriate equipment." *Id.*

Our decision in *Pierce* thus focused on the combination of conditions related to physical recreation. *Id.* at 1212–13 & n.22. And our analysis indicated that indoor exercise was not incapable of providing that "meaningful vindication of the constitutional right to exercise." *Id.* at 1212 & n.22. Indeed, we cited *Pierce* several years later when noting that "the Constitution requires jail officials to provide outdoor recreation opportunities, *or otherwise meaningful recreation*, to prison inmates." *Shorter*, 895 F.3d at 1185 (emphasis added).

Plaintiffs cite our decision in *LeMaire*, 12 F.3d 1444. But we do not think *LeMaire* can be read as requiring plaintiffs' "outside exercise" rule. In *LeMaire*, we held that the plaintiff inmate had *not* established an Eighth Amendment violation even though he "had been deprived of outside exercise for most of a five-year period of incarceration" due to his serious misconduct in prison. *Id.* at 1457. We noted not only that the plaintiff had incurred this deprivation as a result of his own actions, but that he also had indoor exercise opportunities as well. *Id.* at 1457–58. Specifically, the plaintiff "still can exercise within his cell," including "low and non-impact aerobic exercise." *Id.* at 1458. Our discussion of available indoor exercise options is thus consistent with how we approached this issue in *Spain*, *Toussaint*, and *Pierce*.

Plaintiffs also cite other of our cases referencing "outdoor exercise." *See Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000) (en banc); *May*, 109 F.3d 557; *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996); *Allen*, 48 F.3d 1082. But once again, we did not in these cases suggest that the Eighth or Fourteenth Amendments categorically required exercise to take place outdoors regardless of any indoor recreation options.

These cases also involved deprivations of recreation that were far more severe than what we have here. *See Lopez*, 203 F.3d at 1133 & n.15 (inmate was on "single-cell status" for more than six weeks); *Keenan*, 83 F.3d at 1088, 1089–91 (inmate was denied outdoor exercise during six months of segregation, only permitted recreation in "a 10' by 12' room" for an unspecified amount of time, and was otherwise confined to a cell that was unsanitary and illuminated twenty-four hours per day by fluorescent lighting); *Allen*, 48 F.3d at 1086 n.1, 1087, 1088 n.5 (inmate received only

45 minutes of outdoor exercise in six weeks, was "permitted out of his cell only weekly," and was confined in "the harshest conditions of confinement found" at the prison).

Indeed, in *Norwood v. Vance*, 591 F.3d 1062 (9th Cir. 2010), we noted that one of these cases, *Allen*, "does not hold that a prisoner's right to outdoor exercise is absolute and indefeasible, or that it trumps all other considerations." *Id.* at 1068. That broader statement aligns with our case law overall. Far from treating indoor exercise as constitutionally insufficient as a matter of law, we have treated it as relevant in determining whether a correctional institution is allowing for constitutionally sufficient physical exercise.

In evaluating case references to "outdoor exercise," the Seventh Circuit's assessment of our case law thus coincides with our own:

> [C]ases that purport to recognize a right to *outdoor* exercise, such as *Allen v. Sakai*, 40 F.3d 1001, 1003–04 (1994), amended, 48 F.3d 1082 (9th Cir. 1995), and *Spain v. Procunier* . . . involve special circumstances, such as that the prisoners were confined to their cells almost 24 hours a day and were not offered alternative indoor exercise facilities (*Allen*), or the only alternative offered to the prisoners was exercise in the corridor outside their cells rather than in an indoor exercise facility and the lack of outdoor exercise was merely one of a number of circumstances that in the aggregate constituted the infliction of cruel and unusual punishment [(*Spain*)].

Anderson v. Romero, 72 F.3d 518, 528 (7th Cir. 1995).

Plaintiffs also identify no other circuit that has adopted their ironclad "outdoor" exercise requirement either. In fact, the few analogous cases we have identified have rejected such claims on the facts before them. Most notably, in *Wilkerson v. Maggio*, 703 F.2d 909 (5th Cir. 1983) (per curiam), and as relevant here, the plaintiff, a maximum-security inmate, brought an Eighth Amendment claim for damages based on his confinement for more than seven years without outdoor exercise and sunshine. *Id.* at 911–12.

The Fifth Circuit rejected this claim based on the plaintiff's opportunities for indoor exercise. *Id.* at 912. As the Fifth Circuit explained, "[w]e conclude on this record that one hour a day of exercise provided on the indoor tier satisfied the constitutional minimum in this case." *Id.*; *see also Anderson*, 72 F.3d at 528 (citing *Wilkerson* with approval); *Green v. Ferrell*, 801 F.2d 765, 771–72 (5th Cir. 1986) (setting aside court order requiring jail to provide outdoor exercise or an indoor exercise facility because inmates' ability to exercise in their cells and five hours per day in a day room was sufficient).

Similarly, in *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978), the D.C. Circuit set aside a portion of a district court order requiring a jail to provide at least one hour of outdoor recreation time daily. *See id.* at 544–46. While the court agreed "that the opportunity for some form of recreation is necessary to protect the mental and physical health of all pretrial detainees," it remanded "for a determination of the quality, duration, and location of this recreation." *Id.* at 546. That was because "there was no evidence about the necessity for [o]utdoor recreation." *Id.* at 545. The issue, the court explained, was "the quality and kind of recreation opportunities that must be afforded." *Id.*

In *Smith v. Dart*, 803 F.3d 304 (7th Cir. 2015), the Seventh Circuit also rejected a pretrial detainee's challenge to a lack of outdoor recreation. The Seventh Circuit noted that "[l]ack of exercise may rise to a constitutional violation in extreme and prolonged situations where movement is denied to the point that the inmate's health is threatened." *Id.* at 313 (quotations omitted). But it explained that "there is a significant difference between a lack of outdoor recreation and an inability to exercise." *Id.* Because the plaintiff "d[id] not allege that his movements [were] restricted to the point that he is unable to exercise inside his cell or in jail common areas," the plaintiff "fail[ed] to state a sufficiently serious constitutional deprivation." *Id.*

These precedents from other circuits are consistent with our observation that "the Constitution requires jail officials to provide outdoor recreation opportunities, or otherwise meaningful recreation, to prison inmates." *Shorter*, 895 F.3d at 1185.

2

In light of our precedents, the district court did not err in denying plaintiffs greater preliminary injunctive relief than it already issued. In the context of our review of the denial of a preliminary injunction, "[i]f the district court identifies the correct legal standard, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Doe v. Kelly*, 878 F.3d 710, 719 (9th Cir. 2017) (quotations omitted). "Rather, the court only abuses its discretion when its application of the standard is illogical, implausible, or without support in inferences that may be drawn from the record." *Id.* (quotations omitted). That is not the case here.

After thoroughly reviewing our cases, the district court correctly explained that "there is no bright line test to determine if and when inmates are entitled to outdoor exercise." The district court also validly determined that the conditions at CJ5 do not resemble those extreme and degrading circumstances in which we have required outdoor exercise. Most inmates in CJ5 spend eight hours per day out of their cells between free time and programming. They can exercise in both the day rooms and gyms. And they further have cell windows that permit in outside natural light, and gyms that allow in both outside light and ambient air.

The district court reasonably concluded on this record that inmates were given constitutionally sufficient recreation time. CJ5 inmates in both general population and administrative segregation are all offered at least 30 minutes of exercise time in the gyms seven days a week. And while inmates in administrative segregation can be limited to 30 minutes of day room time each day due to safety concerns, general population inmates can access the day room for 4.5 hours on weekdays and 8 hours on weekend days.

Even excluding the time in the day room, where at least some exercise can still take place, the amount of gym time offered to inmates in CJ5 exceeds the recreation we ordered in *Pierce*, which required—without specifying that the exercise must take place outdoors—that inmates "be permitted exercise at least twice each week for a total of not less than 2 hours per week." 526 F.3d at 1213. Notably, the inmates in *Pierce* were otherwise kept in their cells for twenty-two hours or more each day, *see id.* at 1212, a far more severe restriction of physical mobility than the general population inmates in CJ5 (again, inmates in administrative segregation face greater restrictions due to security concerns

that plaintiffs do not challenge in this appeal). And while the Fourteenth Amendment is generally more protective than the Eighth Amendment, *Vazquez*, 949 F.3d at 1163, our decision in *Pierce*, a Fourteenth Amendment case, *see* 526 F.3d at 1205, shows that on the facts here, plaintiffs have not demonstrated that the result under the Fourteenth Amendment should be different.

We note further that the amount of recreation time provided to inmates at CJ5 also compares favorably to the district order we upheld in *Spain*. There, and when there was no indication of sufficient indoor exercise opportunities, the prison was ordered to provide inmates who had been held for more than four years one hour of outdoor exercise time, five days a week. *Spain*, 600 F.2d at 199–200.

Here, by comparison, all inmates in CJ5—regardless of the duration of their incarceration—are given considerably more recreation opportunities than in *Spain*. Between the day room and the gym, CJ5 administrative segregation inmates receive at least one hour of recreation time seven days a week. And general population inmates are allowed at least 4.5 hours of total recreation time each day during the week, and at least 8 hours on weekends. Moreover, the "degrading" conditions in *Spain*—inmates in "continuous segregation," locked in cells "virtually 24 hours every day" with "minimal" contact with others and no "affirmative programs of training or rehabilitation," 600 F.2d at 199—in no way approximate the conditions in CJ5.

Finally, plaintiffs have not identified any risk of harm, substantial or otherwise, from having their exercise time take place indoors, as opposed to outdoors. *See Farmer*, 511 U.S. at 828 ("cruel and unusual punishment" under the Eighth Amendment requires a showing of "a substantial risk of serious harm"); *Demery*, 378 F.3d at 1030 ("punishment"

under the Fourteenth Amendment requires a showing of "harm or disability" that "significantly" exceeds or is "independent of" the "inherent discomforts of confinement"). Indeed, plaintiffs in the district court did not proffer any apparent evidence showing that indoor exercise caused them harm. That was also not the focus of plaintiffs' expert testimony.

C

We next turn to plaintiffs' second constitutional theory concerning access to direct sunlight. The district court ordered the City to provide one hour per week of direct sunlight (which it defined as light "not filtered through a window") to inmates in CJ5 who had been incarcerated for more than four years. Although the City asserts it lacks the facilities to comply with this requirement, plaintiffs argue that the district court should have gone further and imposed a broader preliminary injunction that required three hours of direct sunlight per week for all inmates incarcerated more than six weeks. Once again, we conclude that on this record, the district court did not err insofar as it denied plaintiffs' request for a more substantial injunction than the one the court entered.

As an initial matter, plaintiffs have not identified authority that establishes a constitutional right to a particular quantum or quality of direct sunlight "not filtered through a window." For its part, the City states in its briefing that it "does not argue that it may constitutionally deny inmates the ability to experience the sunlight over long periods of time." But it maintains it has given inmates sufficient access to sunlight throughout the day based on the windows in their cells and the grates in the gym that also allow in outside air.

We need not and do not consider in this case the contours of any claimed right to direct sunlight not filtered through a window. That is because even assuming such a right is cognizable, the plaintiffs on this record did not come forward with evidence sufficient to demonstrate a causal connection between their claimed constitutional right and claimed harm.

Under the Eighth Amendment, plaintiffs must show "a substantial risk of serious harm" that presents an "excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 834, 837. Such an "objectively intolerable risk of harm," *id.* at 846, requires that "the risk must be 'sure or very likely to cause serious illness and needless suffering.'" *Baze v. Rees*, 553 U.S. 35, 50 (2008) (emphasis omitted) (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993)).

Under the Fourteenth Amendment (and contrary to the district court's apparent suggestion otherwise) to show improper "punishment" plaintiffs must again demonstrate that the challenged conditions produce a "harm or disability." *Vazquez*, 949 F.3d at 1163 (citing *Demery*, 378 F.3d at 1029); *see also Bell*, 441 U.S. at 538–39. That harm "must either significantly exceed, or be independent of, the inherent discomforts of confinement." *Vazquez*, 949 F.3d at 1163 (quoting *Demery*, 378 F.3d at 1030).

Consistent with these requirements, courts have rejected constitutional claims when the plaintiffs did not demonstrate sufficiently serious harm from the allegedly unconstitutional conditions of confinement. For example, in *Rhodes v. Chapman*, 452 U.S. 337 (1981), the Supreme Court considered an Eighth Amendment challenge to a prison's practice of housing two inmates in 63-square feet single cells. While the district court had found this practice unconstitutional, the Supreme Court disagreed because "[i]n view of the District Court's findings of fact, its conclusion

that double celling at [the prison] constitutes cruel and unusual punishment is unsupportable." *Id.* at 347. While acknowledging that many inmates were incarcerated for long periods of time and spent most of their time in their cells, there was no evidence in the record showing that double celling "inflicts unnecessary or wanton pain." *Id.* at 348.

Justice Brennan wrote separately in *Rhodes* to emphasize this same point. *See id.* at 352–68 (Brennan, J., concurring in the judgment). As Justice Brennan explained, "[a] court is under the obligation to examine the *actual effect* of challenged conditions upon the well-being of the prisoners." *Id.* at 367. In *Rhodes*, Justice Brennan went on, the district court "was unable to identify any actual signs that the double celling . . . has seriously harmed the inmates," and "indeed, the court's findings of fact suggest that crowding at the prison has not reached the point of causing serious injury." *Id.* at 367–68.

Consistent with *Rhodes*, various other cases have rejected Eighth Amendment condition of confinement claims when the plaintiffs failed to show that the challenged conditions created harm at the required levels. *See, e.g.*, *LeMaire*, 12 F.3d at 1457 (reversing injunction prohibiting use of restraints when "[t]here is no evidence in the record LeMaire has suffered any serious injury as a result of this practice" or that it "create[d] a sufficiently unsafe condition"); *Williams v. Shah*, 927 F.3d 476, 481 (7th Cir. 2019) (affirming judgment against inmate who failed to show "a substantial risk of serious harm" from the prison's policy of serving two meals per day); *Kelley v. Hicks*, 400 F.3d 1282, 1285 (11th Cir. 2005) (per curiam) (affirming judgment against inmate who "offer[ed] no evidence to show that his headaches were causally linked to

his exposure" to secondhand smoke); *Scott v. District of Columbia*, 139 F.3d 940, 942–43 (D.C. Cir. 1998) (reversing injunction in favor of inmate who "failed to demonstrate a causal relationship between his conditions and an increased risk of harm to him from second-hand smoke"); *Davenport v. DeRobertis*, 844 F.2d 1310, 1316–17 (7th Cir. 1988) (reversing injunction requiring three showers per week in the absence of evidence that one shower per week "endanger[ed] the[] physical or mental health" of inmates).

Applying these principles, we hold that on this record, plaintiffs have not shown a likelihood of success on their "direct sunlight" claim given the district court's extensive factual findings, following an evidentiary hearing, that plaintiffs and their expert had not demonstrated a risk of material harm to human health arising from the light exposure in CJ5. At the preliminary injunction stage, we review the district court's factual findings for clear error. *State v. U.S. Dep't of State*, 996 F.3d 552, 560 (9th Cir. 2021). In this case, the record amply supports the district court's factual determinations about the lack of compelling medical evidence.

After surveying Dr. Zeitzer's opinions and testimony and pointing out his limited base of knowledge—Dr. Zeitzer was not a medical doctor, had not treated or examined the plaintiffs, had not visited their facilities, and did not rely on "any specific medical data" pertaining to them—the district court found that "[t]he evidence in the record at this point is inconclusive as to whether the lack of access to direct sunlight creates a medical risk."

That conclusion was firmly rooted in the evidence. The district court recounted Dr. Zeitzer's testimony that "generally, the source or type of light (sunlight vs. artificial light) did not make a difference," and that "[s]unlight filtered

through windows" typically "supplies sufficient light." The district court noted further that Dr. Zeitzer had "opined that the type of light that a person receives generally does not matter, as long as the light source does not filter out certain types of light, and [Dr.] Zeitzer does not know what type of light inmates receive." What was important, therefore, per Dr. Zeitzer, was the "difference between light at night and light during the day," not "the total amount of light a person receives." And there was no evidence in the record showing the difference between daytime and nighttime light exposure in CJ5.

Between Dr. Zeitzer's opinions and the evidence that inmates in CJ5 did receive natural light exposure through windows in their cells and openings in the gym, the district court reasonably concluded that "[t]o the extent that Plaintiffs claim harm from lack of direct sunlight, as opposed to lack of a sufficient difference between light at night and light during the day, the evidence does not support that claim." And the court likewise reasonably concluded from the record that the plaintiffs "do not meet their burden to show that the conditions caused their physical problems because the evidence at this time does not show causation between the lack of direct sunlight and the medical problems."

As the district court therefore succinctly and permissibly summed up: "The Court finds that there is currently insufficient evidence, even accepting the opinion of Plaintiffs' expert witness, to determine if the amount of light, type of light, and variance between light during the day and night supports Plaintiffs' claim of harm." That finding was soundly based in the evidence and not clearly erroneous.

We express no views on the City's other arguments because the district court's factual findings on the lack of any

demonstrated causal harm provide a sufficient basis for concluding that plaintiffs on this record failed to show a likelihood of success on a "direct sunlight" theory. We hold that plaintiffs at a minimum have not shown that the district court erred in declining to grant plaintiffs broader relief than it did. And for the same reasons, plaintiffs on this record have not demonstrated the required irreparable harm to warrant a preliminary injunction. *Winter*, 555 U.S. at 20.

IV

The remainder of plaintiffs' cross-appeal challenges the district court's Rule 12(b)(6) dismissal of the San Francisco Sheriff's Department as a superfluous defendant and the individual defendants on qualified immunity grounds. Plaintiffs do not argue they could independently appeal the district court's Rule 12(b)(6) order, nor could they. Orders dismissing some defendants or claims, but not all, are ordinarily not immediately appealable. *See Hyan v. Hummer*, 825 F.3d 1043, 1046 (9th Cir. 2016) (per curiam); *Maurer v. L.A. Cnty. Sheriff's Dep't*, 691 F.2d 434, 436 n.1 (9th Cir. 1982). Thus, plaintiffs instead argue we may exercise "pendent appellate jurisdiction" on the theory that the Rule 12(b)(6) dismissals are "inextricably intertwined" with the preliminary injunction order, which we do have jurisdiction to review under 28 U.S.C. 1292(a). Plaintiffs err in relying on the doctrine of pendent appellate jurisdiction.

Pendent appellate jurisdiction permits us to review certain interlocutory orders, not otherwise appealable, if the issues are either "'inextricably intertwined' with or 'necessary to ensure meaningful review of' decisions over which we have jurisdiction." *Meredith v. Oregon*, 321 F.3d 807, 812 (9th Cir. 2003), *amended*, 326 F.3d 1030 (9th Cir. 2003) (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 51 (1995)).

Whether two issues are "inextricably intertwined" is "narrowly construed." *Meredith*, 321 F.3d at 813. We have held that "[t]wo issues are not 'inextricably intertwined' if we must apply different legal standards to each issue." *Id.* at 814 (quoting *Cunningham v. Gates*, 229 F.3d 1271, 1285 (9th Cir. 2000)). Instead, "the legal theories on which the issues advance must either (a) be so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue." *Id.* (quoting *Cunningham*, 321 F.3d at 1285); *see also Puente Arizona v. Arpaio*, 821 F.3d 1098, 1109 (9th Cir. 2016).

The requirements for pendent appellate jurisdiction are not met here. Whether the Sheriff's Department is a separate legal entity has no legal or factual commonalities with the preliminary injunction. Similarly, the legal standard and some of the relevant facts governing qualified immunity are different from the analysis we perform in determining whether plaintiffs are entitled to a preliminary injunction. In neither case do we need to decide these pendent issues to consider plaintiffs' cross-appeal of the preliminary injunction order, nor does our resolution of that cross-appeal necessarily resolve the allegedly pendent issues. *Meredith*, 321 F.3d at 814. It is also not necessary to decide the pendent issues in order meaningfully to review the preliminary injunction order. *Id.*

We therefore lack appellate jurisdiction to consider the merits of the district court's order dismissing the Sheriff's Department and the individual defendants.

* * *

For the foregoing reasons, we dismiss the City's appeal as moot. As to the plaintiffs' cross-appeal, we affirm in part and dismiss in part for lack of jurisdiction. The parties shall bear their own costs on appeal.

AFFIRMED IN PART AND DISMISSED IN PART.