No. 16-35945

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASSIE CORDELL TRUEBLOOD, next friend of A.B.,
Plaintiffs-Appellees,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
CASE NO. 2:14-cv-01178-MJP
The Honorable Marsha J. Pechman, United States District Court Judge

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, Plaintiff Disability Rights Washington, a Washington non-profit corporation, by and through its attorneys, makes the following disclosures:

The nongovernmental corporate party Disability Rights Washington in the above listed civil action is not a publically owned corporation, does not have any parent corporation, and no publically held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

State Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

Following a trial, Plaintiffs-Appellees succeeded in obtaining a permanent injunction directing Defendants-Appellants to cease violating the rights of class members by subjecting them to prolonged detention in city and county jails while they waited for Defendants-Appellants to provide them court ordered competency services. The injunction covered all aspects of Defendants-Appellants' provision of competency services, including in-jail evaluations, in-hospital evaluations, and in-hospital restoration to competency. Defendants-Appellants appealed a narrow portion of the injunction relating only to the timing of in-jail evaluations and succeeded only to the extent that the injunction now allows seven more days to complete in-jail evaluations.

Despite the narrow appeal, the injunction ordering Defendants-Appellants to reduce wait times for competency services remains in effect. The force of the injunction has caused Defendants-Appellants to invest millions of dollars into improving speed and quality of competency services, to create and fully staff a completely new Office of Forensic Mental Health Services, to hire dozens of new positions in competency services, to develop with the Court Monitor a triage process to admit the most vulnerable class members, and has led to over $15 million in contempt fines, which are being used to fund innovative programs to divert class members from jail and into community-based programs. There can be

no reasonable assessment of Plaintiffs-Appellees' lawsuit that does not recognize its sweeping success.

Two years later, Defendants-Appellants continue to appeal Plaintiffs-Appellees' fees. Before this Court, Defendant-Appellants argue that, despite a sweeping injunction that continues to bring about systemic change to Defendants-Appellants' competency services system, Plaintiffs-Appellees' legal fees should be reduced due to limited success. Alternatively, Defendants-Appellants claim that Plaintiff-Appellee Disability Rights Washington (DRW) is a "prisoner" as defined by the Prison Litigation Reform Act (PLRA), and thus attorneys' fees should be reduced according to that statutory scheme.

Defendants-Appellants arguments are fatally flawed because (1) Plaintiffs-Appellees clearly altered the legal relationship between the parties relating to the constitutional parameters for the timely provision of competency services, including in-jail competency evaluations; and (2) the PLRA does not impose a limit on Plaintiffs-Appellees' attorneys' fees because this action was brought and litigated by non-prisoners and DRW, a federally created and funded protection and advocacy agency with standing to pursue the case in its own right. Even if this court finds that some class members are "prisoners" under the PLRA, the attorneys' fees limitation provision cannot be imposed here because there is no way to separate work performed representing the non-prisoner Plaintiffs-

Appellees' (DRW and next friends) interests from the work performed advocating for incarcerated class members. For these reasons, this Court should reject Defendants-Appellants' argument that the PLRA requires reducing the District Court's award of attorneys' fees in this matter.

II. STATEMENT OF ISSUES

1. Did the District Court correctly affirm its award of attorneys' fees, where Plaintiffs-Appellees successfully challenged the constitutionality of the long standing practice of prolonged pretrial detention arising from Defendants-Appellants' failure to provide timely competency services, and where the Ninth Circuit affirmed the need for an injunction to ensure that Defendants-Appellants did not continue to violate the constitutional rights of Plaintiffs-Appellees?
2. Does the PLRA fee limitation provision apply in litigation where non-prisoners, including the designated protection and advocacy agency, successfully challenged the constitutionality of Defendant-Appellants' failure to provide timely court-ordered competency services, resulting in the prolonged pretrial detention of Plaintiffs-Appellees, whose criminal matters were stayed while they waited?

III. STATEMENT REGARDING ADDENDUM

Pursuant to Ninth Circuit Rule 28-2.7, Plaintiffs-Appellees include with this Brief a separately bound Addendum of federal and Washington State statutes as well as court rules.

IV. STATEMENT OF JURISDICTION

Plaintiffs-Appellees agree with the Statement of Jurisdiction included in Defendants-Appellants' Opening Brief.

V. STATEMENT OF THE CASE

This matter comes before this Court arising from the District Court's finding, twice over, that Plaintiffs-Appellees are entitled to a full award of attorneys' fees and that such fees are not limited by the Prison Litigation Reform Act ("PLRA"), nor subject to any reduction as "Plaintiffs won a major constitutional victory in this litigation." ER 6, 78-81; *see also* ER 84 ("The State of Washington is violating the constitutional rights of some of its most vulnerable citizens."). The fee award at issue in this appeal was initially granted by the District Court on June 22, 2015, in the amount of $1,267,769.10. ER 78-81. Plaintiffs-Appellees moved for, and the District Court awarded, these fees after Plaintiffs-Appellees succeeded in obtaining a far-reaching injunction based on the ruling that the "in-jail wait time experienced by Plaintiffs and class members [was] far beyond any constitutional boundary." SER 70.

A. Procedural Background

This lawsuit was initially filed on August 4, 2014, by the Snohomish County Public Defender Association. ER 169-171, 220. On August 7, 2014, the District Court held a hearing where the parties and the court discussed the Snohomish County Office of Public Defense's lack of organizational standing and ability to bring the lawsuit. *See* ER 218. On September 3, 2014, the District Court granted Plaintiffs' motion to substitute counsel to allow DRW, the ACLU of Washington Foundation, the Public Defender Association, and Carney Gillespie Isitt PLLP to represent Plaintiffs and class members in this matter. ER 218. Accordingly, on September 12, 2014, Plaintiffs submitted their Second Amended Complaint to include Plaintiff DRW and additional individually named plaintiffs. ER 131-147.

B. Identities of Plaintiffs-Appellees

Plaintiffs-Appellees include three individually named plaintiffs, a stipulated class of pretrial detainees who have been court-ordered to receive competency services, and DRW, the Washington State designated protection and advocacy agency. Individually named Plaintiffs-Appellees A.B., K.R., and D.D., and all class members are pretrial detainees who are incarcerated in city and county jails while they wait for Defendants-Appellants to provide court-ordered competency services. *See* ER 85-87. The named Plaintiffs-Appellees' interests are represented

by next friends, who have a significant relationship with each individually named Plaintiff-Appellee and are dedicated to their best interests. ER 97. The next friends' concerns regarding the impact of prolonged incarceration in jails while waiting for competency services caused them to come forward and join this litigation in an effort to protect individually named plaintiffs and class members from experiencing the harms associated with prolonged confinement in jail.

Plaintiff-Appellee DRW "is a private non-profit organization designated by the Governor of the State of Washington as the protection and advocacy system for individuals with mental, physical, sensory, and developmental disabilities in the state of Washington . . ." ER 87. DRW is a protection and advocacy organization created by Congress that is mandated to "protect and advocate [for] the rights of [individuals with mental illness] through activities to ensure the enforcement of the Constitution and Federal and State statutes." 42 U.S.C. § 10801(b)(2)(A). Protection and advocacy organizations like DRW are federally funded to provide an array of advocacy services to people with disabilities in each state in the country. SER 40-42. DRW's status as a protection and advocacy organization means that "[e]ach named Plaintiff and class member is a constituent of [DRW, a]ll fall within DRW's mandate to ensure that the rights of persons with mental

health conditions are protected[, and] DRW's interests are in complete alignment with those of the class members."[1] ER 87.

DRW's standing to bring legal challenges to Defendants-Appellants' decades-long failure to provide timely competency services arises in part from DRW's advocacy efforts towards the decriminalization of mental conditions and its interests in protecting its constituents. SER 107. For nearly a decade, DRW has investigated and advocated to ensure the timely provision of competency evaluation and restoration services. *Id.* To pursue its goal of decriminalizing mental conditions, DRW has devoted considerable resources to investigating and advocating for Defendants-Appellants to provide timely competency services. *Id*. Consistent with this long-standing goal, DRW has reviewed tens of thousands of pages of records, toured jails, and regularly obtained and analyzed the wait lists maintained by Defendants-Appellants. SER 47.

In 2013, DRW issued a report, "Lost and Forgotten: Conditions of Confinement While Waiting for Competency Evaluation and Restoration," which

[1] To fulfill this mandate, Congress gave protection and advocacy agencies like DRW broad access to restricted facilities, confidential or otherwise protected records of facilities, and individuals receiving services in those facilities. SER 42. For example, DRW may enter any jail in Washington, as well as the forensic units at the State's psychiatric hospitals, to review conditions, talk with Plaintiffs-Appellees, interview the staff working there, and access both records of Plaintiffs-Appellees as well as records of the facility necessary for investigation. *Id.* These records include copies of waitlists and policies related to the timeliness of the delivery of competency services. *Id*.

was the culmination of a six-month investigation that began in 2012 in eight county jails (King, Snohomish, Pierce, Clark, Yakima, Benton, Franklin, and Spokane). *Id.* The report described the human toll paid by DRW's constituents waiting in jails for competency services, and was used to educate members of the public, policy makers, and Defendants-Appellants in the instant case. *Id.* To follow up on this report, DRW met with Defendants-Appellants an average of once a month over the course of several years to try to resolve the delays in competency services on behalf of its constituents. *Id.* Because DRW was unable to resolve the constitutional violations of its constituents and its own concerns regarding the prolonged delays in the provision of competency services informally with Defendants-Appellants, it had no other option than to seek judicial relief.

C. Summary Judgment and Trial Result in Permanent Injunction

The District Court subsequently granted Plaintiffs-Appellees' motion for summary judgment, holding that Defendants-Appellants' "failure to provide these court-ordered services within a reasonable amount of time violates the rights guaranteed by the Due Process Clause of the Fourteenth Amendment." SER 71. It further found that the Defendants-Appellants' "failure to provide timely services to [Plaintiff-Class members] caused them to be incarcerated, sometimes for months, in conditions that erode their mental health, causing harm and making it even less likely that they will eventually be able to stand trial." *Id.* Although Defendants-

Appellants conceded that some of the waiting periods were "excessive and indefensible," SER 84, and in violation of substantive due process, Defendants-Appellants vigorously defended this matter. *See generally* SER 82-104.

After a seven day bench trial, the District Court found that both Defendants-Appellants' and Plaintiff-Appellees' interests weighed in favor of requiring Defendants-Appellants to provide competency services within seven days of a court order or to transport them to a state psychiatric hospital. ER 99-103. Although Defendants-Appellants did not challenge Plaintiffs-Appellees' standing, the District Court specifically affirmed that Plaintiff-Appellee DRW and the individually named Plaintiffs-Appellees' next friends had standing to sue. ER 97.

Following a seven-day trial, Plaintiffs-Appellees obtained an injunction requiring Defendants to provide competency services within seven (7) days of issuance of a court order regarding same. ER 103-04. This order applied to both in-jail competency evaluations and admissions for in-patient competency evaluations and restoration treatment. ER 104. Defendants-Appellants were also ordered to "cease violating the constitutional rights of Plaintiffs and class members by reducing wait times as soon as practicable, but no later than nine months from the date of th[e] order." *Id.* Defendants appealed this order only in part: the portion relating to the seven-day timeline for in-jail competency evaluations. Appellants' Opening Br., *Trueblood v. Wash. State Dep't of Soc. & Health Servs.*, No. 15-

35462 (9th Cir. Aug. 26, 2015), ECF No. 13. Defendants did not appeal the remainder of the order relating to both in-hospital competency evaluation and in-hospital restoration services. *Id.* Those portions of the order remain in effect throughout Defendants-Appellants' appeals. *Trueblood v. Wash. State Dep't of Soc. & Health Servs.*, 822 F.3d 1037, 1046 (9th Cir. 2016). The injunction Plaintiffs-Appellees obtained through this litigation has caused Defendants-Appellants to invest millions of dollars into improving speed and quality of competency services. *See* ER 6.

D. Motion for Attorneys' Fees

Plaintiffs-Appellees moved for attorneys' fees on May 1, 2015 pursuant to 42 U.S.C. § 1988. SER 57-69. On June 22, 2015, the District Court granted Plaintiffs-Appellees' Motion for Attorneys' Fees. ER 78-81. In so doing, it rejected Defendants-Appellants' argument that Plaintiffs-Appellees' fee award is subject to the PLRA's attorneys' fees limitation provision. ER 79. The District Court found that DRW is not a "prisoner" as defined by the PLRA because it is an organizational plaintiff, one that "is not a prisoner, is not confined to a correctional facility, and has not been detained as a result of being accused of a crime." *Id.* The District Court further found that even if other Plaintiffs-Appellants in this matter were "prisoners" for the purposes of the PLRA, the attorneys' fees limitation provision still would not apply because "work on [DRW's] behalf cannot be

separated from work on behalf of the named Plaintiffs" and it therefore "would be improper to reduce Plaintiffs' fee petition even if some Plaintiffs were subject to the PLRA's fee cap." *Id.*

E. First Appeal Proceedings

As discussed above, Defendants-Appellants only appealed the portion of the District Court's injunction requiring them to provide in-jail competency evaluations within seven days. The remaining portions of the District Court's injunction were never appealed. Indeed, Defendants-Appellants have never sought nor obtained a stay in the District Court or this Court.

In ruling on Defendants-Appellants' appeal regarding the constitutional boundaries governing the timely performance of in-jail competency evaluations, this Court held that "a permanent injunction remains an appropriate vehicle for monitoring and ensuring that class members' constitutional rights are protected." *Trueblood*, 822 F.3d at 1046. This Court also remanded the "case to the district court to modify the permanent injunction" in a manner consistent with its opinion and included consideration of "Washington's 2015 law," which was enacted on the eve of trial and set out revised state performance targets to timely provide competency services. *Id*. at 1040-41, 1046.

While Defendants-Appellants' appeal of the injunction regarding in-jail competency evaluations was pending, Defendants-Appellants filed a notice of

appeal regarding the District Court's award of attorneys' fees. ER 75-76. This Court set a briefing schedule for No. 15-35601, and both parties submitted briefing. *See generally* Appellants' Opening Br., *Trueblood v. Wash. State Dep't of Soc. & Health Servs.*, No. 15-35601 (9th Cir. Nov. 23, 2015), ECF 6; Plaintiffs-Appellees' Answering Br., *Trueblood v. Wash. State Dep't of Soc. & Health Servs.*, No. 15-35601 (9th Cir. Dec. 23, 2015), ECF 11; Appellants' Reply Br., *Trueblood v. Wash. State Dep't of Soc. & Health Servs.*, No. 15-35601 (9th Cir. Feb. 4, 2016), ECF 20. However, this Court did not hear oral argument on this appeal, nor did this Court issue an opinion regarding the underlying merits of Defendants-Appellants' appeal of the District Court's fee award. Order, *Trueblood v. Wash. State Dep't of Soc. & Health Servs.*, No. 15-35601 (9th Cir. May 6, 2016), ECF 24. Instead, the fee appeal was remanded to the District Court when this Court remanded Defendants-Appellants' appeal of portion of the injunction governing the timely provision of in-jail competency evaluations. *Id.*

F. Defendants-Appellants Are Held in Contempt

During the pendency of Defendants-Appellants' first appeal relating to in-jail competency services, Defendants failed to comply with the unappealed aspects of the District Court's injunction regarding the timely provision of in-hospital competency services and were found in contempt. *See* SER 12-31. Pursuant to the contempt order, Defendants were ordered to pay $500 per day for class members

who "waited more than seven days but fewer than fourteen days" for in-hospital competency services, SER 30, and $1000 per day for those who "waited fourteen days or more" for in-hospital services. *Id.* Defendants thus far have paid $15,751,500.00 in contempt fines. SER 9-11 ($7,486,500); SER 7-8 ($2,173,500); SER 5-6 ($1,741,000); SER 3-4 ($1,883,500); SER 1-2 ($2,467,000).

The District Court accepted Plaintiffs-Appellees' argument that these contempt funds be used to directly benefit class members, and the contempt fines are being used to fund new programs designed to divert potential class members away from incarceration and into services based in the community. SER 13. Defendants-Appellants have not appealed any of the orders relating to contempt.

G. Post Remand Proceedings

On remand of the in-jail evaluation portion of the injunction, after considering the parties' written and oral arguments, the District Court modified its injunction regarding in-jail evaluations. ER 10-43. The modified injunction requires Defendants to "provide in-jail competency evaluations within fourteen days of the signing of a court order calling for an evaluation." ER 41. The modified injunction also incorporated a "good cause" exception which Defendants-Appellants could invoke for delays of in-jail evaluations resulting from "unique medical or psychiatric needs of [a] particular [class member . . . and] non-clinical interests, *i.e.*, where having their defense counsel, an interpreter, or an expert of

their choosing present at the evaluation is not possible to arrange within the fourteen day timeframe." ER 41-42.

The District Court rejected Defendants-Appellants' arguments that the best remedy is adherence to the entire statute, Wash. Rev. Code 10.77.068, which was passed on the eve of trial in 2015. ER 5. Following remand, the District Court declined to adopt the entire statute and instead refused on "constitutional grounds to adopt the extensive list of exceptions written into the state statute." ER 5.

The District Court found that it "cannot accept the legislature's list of exceptions to the fourteen-day requirement because the exceptions swallow the rule, leaving mentally ill persons to languish while allowing DSHS to continue to make excuses, as has been its pattern." ER 12. The District Court rejected other proposed exceptions advocated for by Defendants-Appellants and codified in Wash. Rev. Code 10.77.068, finding that allowing Defendants to utilize many of the exceptions would result in continued constitutional violations because the exception would "alter the duration of confinement without the constitutionally requisite reasonable relation to the purpose of confinement." ER 37-38.[2]

[2] Defendants-Appellants again appealed the modified injunction, but the parties have reached a resolution of that appeal. The agreement will modify the injunction only to allow Defendants-Appellants additional time to perform competency services in the small percentage of cases where orders for competency services are delayed in transmission from trial courts through no fault of Defendants-Appellants.

H. Renewed Motion for Attorneys' Fees

After the District Court modified its injunction, Plaintiffs-Appellees moved again for attorneys' fees. ER 65-74. The Parties briefed the second motion for attorneys' fees. ER 44-74. Subsequently, the District Court found that, even after the injunction was modified, Plaintiffs-Appellees remained the prevailing party and that the PLRA did not apply to the fee award. ER 6. Accordingly, the District Court awarded Plaintiffs-Appellees their full request for attorneys' fees.

1. The District Court rules that Plaintiffs-Appellees are prevailing parties.

In again awarding Plaintiffs-Appellees their request attorneys' fees, the District Court rejected Defendants-Appellants' argument that, "in light of the reversal and remand by the Ninth Circuit Court of Appeals," Plaintiffs only achieved "partial success." ER 5. This rejection was predicated on the District Court's finding that that "[e]ven considering the partial reversal, Plaintiffs[-Appellees] won a major constitutional victory in this litigation and permanently altered their legal relationship with Defendants." ER 6. The District Court noted that Defendants-Appellants had undertaken "a series of actions in response to the Court's order, including a 43% increase in funding (in the amount of $4.67 million) for additional competency evaluators . . . resulting in a decrease in class members' incarceration time from almost two months to less than two weeks." ER 6 (internal citations omitted).

The District Court also clarified that Defendants could not be construed as the prevailing party, as they unsuccessfully argued both at trial and on remand that the District Court should adopt as a whole the unenforceable state statute passed on the eve of trial, which modified performance targets for competency services and promulgating a non-exhaustive list of exceptions. *See* ER 5-7 (citing *Page v. Torrey*, 201 F.3d 1136, 1140 (9th Cir. 2000); *Turner v. Wilkinson*, 92 F. Supp. 2d 697, 704 (S.D. Ohio 1999); *Ala. Disabilities Advoc. Prog. v. Wood*, 584 F. Supp. 2d 1314, 1316 (M.D. Ala. 2008)). Relying on *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), the District Court also "decline[d] Defendants' invitation to somehow segregate out the work of Plaintiffs' counsel on the timing of in-jail evaluations[.]" ER 6. Noting that "even setting aside the infeasibility of separating out the hours devoted to an issue inextricably intertwined with the entirety of Plaintiffs' lawsuit, the Court chooses to focus (as the Supreme Court has advised) on the overall excellent results achieved by Plaintiffs' efforts." *Id.*

Further, in rejecting Defendants-Appellants' argument that Plaintiffs only achieved partial success, the District Court also pointed out that Defendants-Appellants' did not prevail in their arguments for wholesale adoption of Wash. Rev. Code 10.77.068. *See* p. 14, *supra*.

2. The District Court rules the PLRA does not limit fees in this case because Plaintiff-Appellant DRW is not a prisoner.

The District Court also rejected Defendants-Appellants' arguments that the PLRA must limit Plaintiffs-Appellees' fee award. ER 6-7. Instead, the District Court determined that "Plaintiffs[-Appellees'] fee award is not governed by the PLRA." ER 6. The District Court predicated its finding, in part, on the fact that:

> Plaintiff Disability Rights Washington is not a prisoner, is not confined to a correctional facility, and has not been detained as a result of being accused of a crime . . . Disability Rights Washington litigated this suit on behalf of its constituents . . . and work on their behalf cannot be separated from work on behalf of the named Plaintiffs who are also class members.

ER 6-7 (internal citations omitted).

Despite the District Court's careful consideration of the facts and case law from other jurisdictions analyzing similar arguments, Defendants-Appellants ask this Court to overturn the fee award. We respectfully request this Court to reject this argument and hold the PLRA does not apply to DRW.

VI. SUMMARY OF THE ARGUMENT

In ruling on Defendants-Appellants' limited appeal regarding the timely performance of in-jail competency evaluations, this Court affirmed the District Court's finding that Defendants-Appellants' practices were unconstitutional and that an injunction was "an appropriate vehicle for monitoring and ensuring that class members' constitutional rights are protected." *Trueblood*, 822 F.3d at 1046.

Even though this Court affirmed the need for an injunction to keep Defendants-Appellants from violating Plaintiffs-Appellees' constitutional rights, Defendants-Appellants argue that a reduction in fees is appropriate because the District Court modified its injunction regarding the performance of in-jail evaluations and, again argue, that the PLRA limits Plaintiffs-Appellees' ability to recover attorneys' fees. But both arguments fail because (1) Plaintiffs-Appellees are the prevailing party in this matter despite modifications to a portion of the injunction, (2) neither Plaintiff-Appellant DRW nor the next friends are prisoners confined in jail, and (3) unlike the prisoners in PLRA cases, class members are pretrial detainees whose length of confinement is not to serve out a sentence but is instead due to Defendants-Appellees failure to timely provide court ordered competency services in violation of due process protections.

Defendants-Appellants' new attack on the District Court's fee award is based on their partial success from a narrow appeal and attempts to erase the Plaintiffs-Appellees success in enforcing their constitutional rights. However, Defendants-Appellants ignore that the *Trueblood* litigation has resulted in a sweeping change in the legal status between the two parties and that the Plaintiffs-Appellees obtained substantial relief due to the actions taken by Defendants-Appellants to reduce wait times for competency services. *See* ER 6, 23, 103-07.

Defendants-Appellants' argument that the PLRA applies to claims brought on behalf of non-prisoners must fail, as it has twice before the District Court. This is because the plain language of the statute only applies to "prisoners," who were confined at the time the lawsuit was filed, and neither Plaintiff-Appellant DRW nor the next friends are prisoners. As such, advocacy and litigation done on behalf of Plaintiff-Appellant DRW's interests are not limited by the PLRA. Moreover, even if the PLRA attaches to claims brought by incarcerated named plaintiffs, the PLRA's fee award limitation provision does not apply because the fees generated in litigating DRW's claims and interests cannot be severed from the fees generated in litigating the claims and interests of the remaining Plaintiffs-Appellants and class members.

For these reasons, Plaintiffs-Appellees respectfully ask this Court to reject Defendant-Appellants' argument that a reduction in fees is necessary. Plaintiffs-Appellees also request that this Court reject Defendants-Appellants' argument that the PLRA attorneys' fee limitation provision should be expanded to apply to non-prisoners. Instead, we request that this Court affirm the District Court's grant of attorneys' fees in this matter.

VII. ARGUMENT

A. Standard of Review

"Awards of attorney's fees are generally reviewed for an abuse of discretion." *Thomas v. City of Tacoma*, 410 F.3d 644, 647 (9th Cir. 2005) (internal citation omitted). And a district court's findings of fact are reviewed only for clear error. *Rickley v. County of Los Angeles*, 654 F.3d 950, 953 (9th Cir. 2011), *as amended on denial of rehr'g and rehr'g en banc* (Oct. 4, 2011). But "any elements of legal analysis and statutory interpretation which figure in the district court's decision are reviewable de novo." *Hall v. Bolger*, 768 F.2d 1148, 1150 (9th Cir. 1985). However, a district court's fee award does not constitute an abuse of discretion unless it "is based on an inaccurate view of the law or a clearly erroneous finding of fact." *Corder v. Gates*, 947 F.2d 374, 377 (9th Cir. 1991); *see also Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 901 (9th Cir. 1995).

B. Reduction of Fees Is Inappropriate Where Plaintiffs-Appellees Succeeded on all of their Claims and the District Court Issued an Injunction Against Defendants to Protect Plaintiffs-Appellees' Constitutional Rights

Defendants-Appellants argue that this Court's remand regarding the in-jail evaluation portion of the injunction for modification somehow invalidates their liability for attorneys' fees for work Plaintiffs-Appellees did to protect the rights of those waiting in-jail for competency evaluations. *See* Appellants' Opening Br. This argument should be soundly rejected.

In matters where plaintiffs seek attorneys' fee awards, the Supreme Court has provided the following guidance for district courts to determine the extent of the award: "the most critical factor [in determining the amount of attorney's fees to award] is the degree of success obtained." *Hensley*, 461 U.S. at 436. However, *Hensley* warns that attorneys' fee awards should be reduced *only* if the relief obtained "is limited in comparison to the scope of the litigation as a whole." *Id.* at 440 (emphasis added).

The Supreme Court provided further guidance for determining when to segregate fee awards for successful and unsuccessful claims, directing courts to only reduce fee awards "[w]here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims[.]" *Id.* The Supreme Court further explained that "[w]here a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Id.*

To determine whether the claims are related, the district court should determine whether the unsuccessful claims "involve a common core of facts *or* are based on related legal theories," with the successful claims. *Thomas*, 410 F.3d at 649. This is because despite any setbacks, full recovery of fees should be awarded for attorneys who have "obtained excellent results" for their clients. *Hensley*, 461 U.S. at 435. And the narrowing of an injunction following appeal should not

diminish the recognition of this success. *See Church of the Holy Light of the Queen v. Holder*, 584 Fed. App'x 457, 459 (9th Cir. 2014) (mem.) (concluding that "[t]his court's order that the district court narrow the injunction did not detract from [the plaintiffs'] success" and that plaintiffs could recover attorneys' fees).

In *Sorenson v. Mink*, this Court had the opportunity to apply these rules to a fee award in a case that is very similar to this matter. *See generally* 239 F.3d 1140 (9th Cir. 2001). In *Sorenson*, this Court affirmed a district court's award of attorneys' fees for all work done in a case advocating for the improvement of Oregon's disability determination system – even though plaintiffs did not succeed on all of their claims. *Id.* This Court affirmed the district court's rejection of defendants' argument that plaintiffs' attorneys' fees award should be reduced because of "limited success" as all of the claims involved a common core of facts and were based on related legal theories meant to reform Oregon's disability determination system, and because even though plaintiffs had not succeeded on every claim the District Court found that plaintiffs had achieved an "excellent result." *Id.* at 1147.

When reviewed through the aforementioned case law governing the award of attorneys' fees, it is clear that, even if one views the modification of the injunction as a partial litigation loss for Plaintiffs-Appellees, the District Court did not abuse its discretion when it awarded Plaintiffs-Appellees its full request for

attorneys' fees because (1) Plaintiffs-Appellees "won a major constitutional victory in this litigation"; (2) the claims Plaintiffs-Appellees brought are all closely interrelated and inseparable; and (3) Plaintiffs-Appellees have achieved "overall excellent results." ER 6.

1. The District Court did not err when it found Plaintiffs-Appellees' litigation has achieved excellent results.

Plaintiffs-Appellees challenged Defendants' longstanding practice of delaying the provision of competency services and subjecting Plaintiffs-Appellees to prolonged incarceration was an unconstitutional infringement on their liberty interest in violation of the Substantive Due Process Clause. Plaintiffs-Appellees succeeded on this claim at summary judgment, and at trial and the District Court issued an injunction compelling Defendants to change their practices regarding the provision of all competency services, including in-jail evaluation services and in-hospital evaluation and restoration services. SER 70-81; ER 83-107.

This Court remanded the in-jail evaluation portion of the injunction for modification but did not vacate the injunction. Nor did this Court reverse the District Court's finding that Defendants-Appellants' delays were unconstitutional. *Trueblood*, 822 F.3d 1037. Defendants-Appellants' contention that modification of the injunction means that Plaintiffs-Appellees were unsuccessful regarding their constitutional challenges to delays in the performance of in-jail evaluations lacks credibility and should be rejected. While the in-jail evaluation portion of the

injunction was modified, Plaintiffs still remain successful in enforcing their constitutional rights. ER 10-43. As such, Defendants' reliance on *Hensley* as requiring or authorizing a reduction in the fee award is misplaced and the District Court did not abuse its discretion when it award Plaintiffs-Appellees their full attorney fee award and rejected Defendants-Appellants' argument.

2. The District Court did not err when it found Plaintiffs-Appellees' claims arose from a common core of fact and related legal theories.

Plaintiffs-Appellees' claims regarding the provision of all competency services arise from the same facts regarding Defendants' longstanding failure to appropriately staff and fund its forensic mental health system. ER 83-107. These claims also involved the same legal theory: a substantive due process challenge to the infringement of Plaintiffs-Appellees' liberty interests that resulted from Defendants-Appellants' failure to provide timely competency services. SER 70-81; ER 96-103. Indeed, when determining the appropriate award of attorneys' fees, the District Court noted that the claims involving in-jail competency evaluations involve such a common core of facts and are based on related legal theories and found that it would be infeasible to "separat[e] out the hours devoted to an issue inextricably intertwined with the entirety of Plaintiffs' lawsuit." ER 6. As legal theories and facts undergirding Plaintiffs-Appellees' claims are closely related, the District Court did not abuse its discretion when it found that Plaintiffs-Appellees'

claims are so intertwined that parsing attorneys' fees based on work associated with each claim would be inappropriate and inconsistent with this Court's precedence.

3. The District Court did not err when it found time expended by Plaintiffs-Appellees to be reasonable in light of the overall excellent results achieved.

Defendants-Appellants' argument is further flawed as Defendants claim that the District Court abused its discretion because the District Court did not determine "whether the expenditure of counsel's time was reasonable in relation to the success achieved." Opening Br. of Appellants at 19. However, counter to Defendants' assertions, the District Court did determine that the expenditure of time was reasonable – even in light of the modification of the portion of the injunction governing in-jail evaluations. ER 4-8.

In its Order on Plaintiffs' Second Motion for Attorney's Fees and Costs, the District Court emphasized the substantial changes to Defendants-Appellants' practices that were taken pursuant to the injunction – including the portion of the injunction governing in-jail evaluations. ER 6 (noting that Defendants-Appellants "undertook a series of actions in response to the Court's order, including a 43% increase in funding . . . for additional competency evaluators"). The District Court also noted the decrease in class members' incarceration time from almost two months to less than two weeks. ER 6. Based on these considerations, the District

Court found that "the overall excellent results achieved by Plaintiffs' efforts", *id.*, warranted granting Plaintiffs-Appellees' attorneys' fees award in full. ER 7. In light of the District Court's findings regarding the underlying litigation it is clear that the District Court did not abuse its discretion.

C. A Plain Language Reading of the PLRA Confirms that the PLRA Does not Apply to Attorneys' Fees Sought by Plaintiffs-Appellees in this Matter

The District Court did not err when it looked to Ninth Circuit precedence and the plain language and purpose of the PLRA to reject Defendant-Appellants' argument that the PLRA limits Plaintiffs-Appellees' fee award.

1. DRW is not a "prisoner" as defined by the PLRA.

The PLRA defines "prisoner" as "any person incarcerated or detained in any facility." 42 U.S.C. § 1997e(h). This Court has held that the PLRA's limitations on "prisoners" applies only to "individuals who, at the time they seek to file their civil actions, are detained as a result of being accused of, convicted of, or sentenced for criminal offenses." *Page*, 201 F.3d at 1140; *see also Turner*, 92 F. Supp. 2d at 704 (denying application of PLRA to a suit because not all of the plaintiffs were prisoners, and all work conducted by attorneys was undertaken to "address a single remedy"). The Court's holding in *Page* was predicated on this Court's directive that where the "plain language reading of the text produces a plausible result, we need not look further." *Page*, 201 F.3d at 1139-40.

Thus, the PLRA's limitation on fee awards does not apply to claims pursued on behalf of Plaintiff-Appellant DRW because DRW is not a prisoner under any plausible reading of the PLRA. Rather, DRW is a private non-profit organization designated by the Governor of the State of Washington as the protection and advocacy agency for individuals with disabilities for the State. ER 87; *see also* SER 40-41.

Even though it is certain that DRW is neither a person nor incarcerated, Defendants-Appellants argue that "application of the plain meaning of the phrase 'any action brought by a prisoner'" requires this Court to conclude that the PLRA fee limitation applies to claims brought by Plaintiff-Appellee DRW. Opening Br. of Appellants at 8-17.

However, the very purpose of the PLRA precludes application of the PLRA's attorneys' fees provision to organizational plaintiffs: "[I]n analyzing the history and reasons for enactment of the PLRA, it is apparent that these groups . . . were never intended to be seen as 'prisoners' within the meaning of the statute and should not be subject to the statute when bringing a case on behalf an inmate." Deborah Frisch, *Not Behind Bars, not a Prisoner: An Analysis of Guardians, Conservators, and Protection & Advocacy Organizations Under the Prison Litigation Reform Act*, 36 Cardozo L. Rev. 731, 761 (2014). This is because the

rise in frivolous prisoner litigation was the primary motivating factor for enactment of the statute. *Id.*

Suits brought by advocacy groups, guardians, and conservators are not the type of "frivolous" litigation that Congress intended to limit when enacting the PLRA. *Id*. Nowhere is this more true than in regards to the protection and advocacy agencies, like DRW, that "advocate on behalf of mentally ill individuals and are not using limited resources to take 'frivolous' cases." *Id.* A contrary finding will further marginalize members of a vulnerable population that cannot effectively advocate for their own interests. Further, it would disincentivize advocacy organizations from bringing suit to challenge unconstitutional practices by denying them full reimbursement of the fees and costs associated with litigating difficult constitutional claims.

The District Court did not err when it rejected Defendants-Appellants' argument because it is facially inconsistent with the purpose and plain language of the PLRA. Further, Defendants-Appellants' position should fail because it would expand the PLRA well beyond the parameters approved by Congress.

2. Plaintiff DRW has standing to sue on behalf of itself and its constituents.

Courts have consistently found that DRW and such advocacy organizations may bring legal challenges on the behalf of their constituents and on the behalf of their organizations to forward their advocacy efforts. ER 97 (citing *Oregon Advoc.*

Ctr. v. Mink, 322 F.3d 1101, 1112 (9th Cir. 2003); *In re Lamb*, 173 Wash. 2d 173, 196-97 (Wash. 2011) (citing federal law providing DRW with the authority to "pursue legal, administrative, and other appropriate remedies . . . to ensure the protection of, and advocacy for, the rights of persons with . . . disabilities.")).

Defendants-Appellants attempt to recast Plaintiff DRW's role in this litigation, contending that DRW's participation and interest in this litigation are coextensive with the interests of the named plaintiffs, who were incarcerated when this case was brought; therefore, the case should be construed as one in which only prisoner's interests are at play and therefore must be subject to the same PLRA fee limitations applied by the *Montcalm Publishing Corp. v. Commonwealth of Virginia* court. Opening Br. of Appellants at 11-13 (citing 199 F.3d 168 (4th Cir. 1999)). However, Defendants-Appellants' argument is fatally flawed for at least three reasons.

First, DRW is a named plaintiff and not an intervenor.[3] By definition, an intervenor is not a plaintiff nor a party that brought suit to enforce its own rights. This distinction is important to note as the *Montcalm* court's finding that the PLRA's fee award limitation applied hinged on the fact that *Montcalm* "decid[ed] not to bring an independent action but to intervene in the prisoner's action" a year

[3] Intervention is governed by Rule 24, and in order for an entity to participate in a matter as an intervenor that entity must move the court for permission to intervene and have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24 (b)(1)(B).

after the action was initiated. 199 F.3d at 171-72. The *Montcalm* court's reasoning for applying the PLRA fee limitation to Montcalm Publishing Company relied exclusively on its status as an intervenor and is therefore is distinguishable in this present case. Here, the parties stipulated to DRW serving as the organizational plaintiff and DRW has maintained its rule in advocating for its own rights and interests. *See* ER 126.

Second, Defendants-Appellants repeatedly claim throughout their brief, against substantial evidence in the record, that DRW has suffered no injury nor received any relief from the District Court's ruling. Opening Br. of Appellants at 12-13. Defendants-Appellants rely on their unsupported assertion to build their argument that the PLRA fee provision applies because "there is no colorable argument to be made that Disability Rights[] . . . changes the nature of the prisoners' action." *Id.* at 13. However, on its face, the PLRA fee limitation only applies to lawsuit brought by "prisoners." And, contrary to Defendants-Appellants' argument, there is no requirement that a party have to prove that its interests and claims "change[] the nature" of an action brought by prisoners in order to avoid application of PLRA limitations. *See* 42 U.S.C. § 1997e. Instead, the PLRA simply does not apply to a party that is not incarcerated at the time that it files its complaint. *See id.* at (d)(1) (limiting fee awards "[i]n any action brought *by a*

prisoner who is confined to any jail, prison or other correctional facility) (emphasis added).

Third, Defendants-Appellants' argument that DRW's interests are the same as the class is incorrect. Opening Br. of Appellants at 13. DRW's claims and injuries are distinct from the class members' claims. Although Plaintiffs-Appellees are DRW's constituents and their interests are fully aligned, contrary to Defendants-Appellants' assertions, DRW's interests align also include DRW's broader concern and advocacy regarding the decriminalization of mental illness. SER 105-08. Accordingly, for nearly a decade, DRW has investigated and advocated to ensure the timely provision of competency evaluation and restoration services. SER 107. Indeed, to pursue its goal of decriminalizing mental conditions, DRW has devoted considerable resources to investigating and advocating for Defendants-Appellants to provide timely competency services. *Id*.

Because DRW was unable to resolve concerns regarding the criminalization of mental illness and prolonged detention of people waiting for court-ordered competency services informally with Defendants-Appellants, it had no other option than to seek judicial relief. Unlike the plaintiff in *Montcalm Publishing Corporation*, DRW entered this matter on behalf of its constituents. *See* 199 F.3d 168. And like Oregon Advocacy Center in *Mink*, DRW did so because the interests

the lawsuit sought to protect were not just to protect its constituents but were germane to the organization's purpose. SER 105-08; *Mink*, 322 F.3d at 1109-10.

The posture that DRW stands in relation to class members and in this litigation as a plaintiff is unlike the intervenor in *Montcalm Publishing Corporation*. 199 F.3d 168. DRW entered this matter as a named plaintiff to both advocate for class members and to protect its own interests and advocacy work. SER 105-08; SER 40-56. DRW did so as Defendants-Appellants' trampling of class members' constitutional rights directly impacts DRW as "Defendants[-Appellants'] failure to timely serve people with mental conditions … DRW has devoted and must continue to devote considerable resources to investigating and advocating to resolve this critical issue." *See* SER 107.

Based on the above, the District Court twice rejected Defendants' contentions that *Montcalm* requires a finding that the PLRA fee limitation should apply to Plaintiff DRW. Instead, the District Court found that the PLRA does not apply because DRW is not a "prisoner." ER 79; ER 6-7.

At least one other court has similarly concluded that the PLRA does not limit the recovery of fees where suit was brought by a disability advocacy organization on behalf of its interests and the interests of its constituents. *See Wood*, 584 F. Supp. 2d at 1316 (holding that state protection and advocacy agency "is not a 'person' and has neither been incarcerated nor detained"). And other

courts have refused to apply any of the PLRA provisions to organizational plaintiffs because doing so requires construing the PLRA in a manner that runs against the plain language and the intent of the statute. *See, e.g.*, *Dunn v. Dunn*, __F. Supp. 3d __, No. 2:14CV601-MHT, 2016 WL 6949585, at *10–11 (M.D. Ala. Nov. 25, 2016) (rejecting argument that organizational plaintiff has to comply with PLRA exhaustion requirements).

3. Plaintiffs-Appellees are not "prisoners" under the PLRA.

Plaintiffs-Appellees are individuals "(a) who are ordered by a court to receive competency evaluation or restoration services through [DSHS]; (b) who are waiting in jail for those services; and (c) for whom DSHS receives the court order." ER 14. Plaintiffs-Appellees have been charged with a crime in the State of Washington. However, once a state court orders DSHS to provide competency services, their criminal proceedings are stayed and the purpose of their continued detention is for Defendants-Appellants to provide them court-ordered competency services. ER 99. Defendants-Appellants is the only entity that can provide these services to Plaintiffs-Appellees, it has consistently failed to do so in a manner that comports with substantive due process. SER 70-81; ER 83-107. As a result, Plaintiffs-Appellees are routinely left to languish in jail without appropriate mental health treatment or the ability to move their criminal matters forward.

The PLRA does not apply to Plaintiffs-Appellees' fee award because class members, for the period of time at issue, were subjected to unconstitutionally prolonged detention (independent from their stayed criminal matters) because Defendants-Appellants failed to provide timely competency services and not "as a result of being accused of, convicted of, or sentenced for criminal offenses." *Page*, 201 F.3d at 1140. If Defendants-Appellants had provided timely competency services, many of the class members would not have been in jail at all, but rather would be in the therapeutic environment of a state hospital. They are therefore not "'prisoners' within the definition of 42 U.S.C. § 1997e and 28 U.S.C. § 1915." *Id.*

Other courts have similarly rejected Defendants-Appellants' argument that Plaintiffs-Appellees are "prisoners" under the PLRA. Indeed, courts confronted with similar situations have interpreted the PLRA's statutory definition of prisoner as covering only individuals whose *current* detentions serve as punishment for one of the legal violations in the statute. *See Page*, 201 F.3d at 1140 (holding that a plaintiff's claims are not subject to the PLRA if the "current detention is not part of the punishment . . . but rather a civil commitment for non-punitive purposes"). *See also West v. Macht*, 986 F. Supp. 1141, 1143 (W.D. Wis. 1997) (citing *Ojo v. Imm. & Naturalization Serv.*, 106 F.3d 680, 682 (5th Cir. 1997)). In *West*, the court found that the PLRA did not apply to an individual whose "current detention" was not solely predicated on his criminal matter, but instead the result of a judicial

determination that he was in need of mental health treatment. *Id.* C*f. Gibson v. City Mun. of New York*, 692 F.3d 198, 202 (2d Cir. 2012) (per curiam); *Kalinowski v. Bond*, 358 F.3d 978, 978-79 (7th Cir. 2004).

This distinction makes sense. After all, more than half of Plaintiffs-Appellees will be deemed incompetent and transferred to a state psychiatric hospital where they will receive competency restoration treatment to restore them to competency or be determined not restorable, which will result in the termination of their criminal matters. Half of Plaintiffs-Appellees are confined in jail when they should be in a hospital receiving treatment. ER 89. Further, no one can determine *ex ante* which of them will eventually be deemed not restorable, which is why Plaintiffs-Appellees are presumed incompetent while they wait for a judicial determination of their competency.

Once a state court has ordered Plaintiffs-Appellees to receive competency evaluation or restoration services, the period of their detention in jail waiting for services is predicated solely on (1) their need for those services and (2) the State's need to determine whether prosecuting them is permissible in light of the constitutional protections against trying individuals who are not competent to stand trial. While Plaintiffs-Appellees wait for these services, they are effectively removed from the criminal justice system and the purpose for their incarceration is

so that the State can determine whether they are competent to proceed with their criminal matters.

Interpreting the PLRA to limit fee recovery under these circumstances is not only inconsistent with the factual record as developed by the court below, but would also unjustly permit Defendants-Appellants to benefit from Plaintiffs-Appellees prolonged detention in local jails when the only reason for that detention is Defendants-Appellants' unconstitutional failure to provide them with timely court-ordered competency services. This litigation was necessary to remedy the State's continued and egregious flaunting of "[t]he protections afforded by the Constitution . . . [and failure to] treat all individuals fairly, including our most vulnerable citizens[.]" ER 101. Defendants-Appellants should not be permitted to avoid responsibility twice: first by violating Plaintiffs-Appellees' constitutional rights, and again by avoiding reimbursing Plaintiffs-Appellees the full cost of the litigation Defendants-Appellants' actions engendered.

4. Next friends are not "prisoners" as defined by the PLRA.

Next friends also do not fall within the PLRA's definition of "prisoners." *See* 42 U.S.C. § 1997e; *Page*, 201 F.3d at 1140. The next friends in this litigation are the individually named Plaintiffs-Appellees' family members or are closely connected attorneys who have significant relationships with each individually named Plaintiff-Appellee, and who asserted claims on behalf of inmates unable to

litigate such claims themselves due to mental incapacity. *See* ER 97, 133-34. Indeed, here incarcerated class members subjected to prolonged wait times never sought review of their rights in federal court. Instead, people who cared about their wellbeing brought a case on their behalf. None of the next friends were in custody at the time they filed suit, and therefore by the plain language of the statute, the PLRA does not apply.

As such, the PLRA fee limitation should not be applied to claims brought by next friends. This is supported by the findings of multiple courts that have rejected arguments requesting application of PLRA limitations to suits brought on behalf of incarcerated individuals or people harmed while incarcerated by non-incarcerated individuals. *See also Tretter v. Pa. Dep't of Corr.*, 558 Fed. App'x. 155, 157–58 (3d Cir. 2014) (refusing to apply PLRA limitations to administrator of prisoner's estate); *Anderson v. County of Salem*, 09-4178, 2010 WL 3081070, at *2 (D.N.J. Aug. 5, 2010) (Bumb, J.) (refusing to apply PLRA limitations administrator of prisoner's estate); *Torres–Rios v. Pereira Castillo*, 545 F. Supp. 2d 204, 206 (D.P.R. 2007) (Besosa, J.) (refusing to apply PLRA limitations administrator of prisoner's estate); *Rivera–Rodriguez v. Pereira–Castillo*, No. 04-1389, 2005 WL 290160, at *6 (D.P.R. Jan. 31, 2005) (Delgado–Colon, M.J.) (refusing to apply PLRA limitations guardians of minor prisoner).

D. Even if the PLRA Applies to Class Members, Plaintiffs-Appellees' Fees Should not Be Reduced Because Plaintiff-Appellee DRW's Claims Are not Severable from those of Class Members

Contrary to Defendants-Appellants' argument, courts have repeatedly found that the PLRA does not limit the award of attorneys' fees where, as here, the claims were litigated on behalf of multiple parties that are at most a mix of prisoners and non-prisoners. *See Turner*, 92 F. Supp. 2d at 703-04 (holding that in a suit to force the jail to allow a husband to be present when his detained wife gave birth, PLRA fee cap did not apply to claims of husband or wife because "all of the work done was intended to address a single remedy benefitting both"); *Young v. Ky. Dep't of Corr.*, No. 5:11-cv-00396-JMH, 2015 WL 4756529, at *1 (E.D. Ky. Aug. 11, 2015) (holding that when a claim is brought by both a prisoner and a non-prisoner the PLRA does not apply where "there would be no discernable way to separate the attorney's fees expended on behalf of the . . . plaintiffs, [where] all of the work done was performed to obtain a single remedy benefiting both Plaintiffs equally"); *Hunter v. County of Sacramento*, No. 2:06-cv-00457-GEB-EFB, 2013 WL 5597134, at *10-11 (E.D. Cal. Oct. 11, 2013) (rejecting application of the PLRA's attorney fees provision on the basis that "it has not been shown that the PLRA's attorney's fees limitations apply when an action is commenced by a prisoner and non-prisoner" and holding that where there was no logical way to

separate work performed on behalf of each plaintiff, the "PLRA attorney's fee limitation [should] not [be] applied to the fee award.")

Here, time spent by counsel pursuing Plaintiff-Appellee DRW's claims is indistinguishable from time spent pursuing other Plaintiffs-Appellees' claims. All attorney time was spent pursuing the same remedy benefiting all Plaintiffs-Appellees equally: a declaration that Defendants-Appellants violated Plaintiffs-Appellees' due process rights and an injunction restraining Defendants-Appellants from continuing to subject Plaintiffs-Appellees to unconstitutional prolonged detentions in jails while they wait for Defendants-Appellants to provide them with court-ordered competency services.

It should be noted that Defendants-Appellants claim that "multiple circuits have held [that] the PLRA does not allow an exception to be made for prisoner suits joined by an advocacy group that is not incarcerated" is entirely unsupported. Opening Br. of Appellants at 6. Indeed, the cases cited by Defendants, *Montcalm* and *Jackson*, do not involve challenges brought by advocacy groups. *Montcalm Pub. Corp.*, 199 F.3d 168 (applying the PLRA to an intervenor newspaper that brought First Amendment claims on its own behalf); *Jackson v. State Bd. of Pardons and Paroles*, 331 F.3d 790 (11th Cir. 2003) (applying the PLRA to a suit brought by an individual inmate challenging a parole policy). Further, as described

above, *Montcalm* is readily distinguishable from this case. Defendants provide no other case citations to support this assertion. Opening Br. of Appellants at 6.

While this is an issue that has not been squarely decided by a circuit court ruling, the logic of the district court rulings cited above and the plain reading of the PLRA both support Plaintiff-Appellees' argument that the PLRA does not apply to this litigation.

E. If the PLRA Applies to all Plaintiffs, this Court Should Remand this Case so that the District Court Can Consider Plaintiffs' Request for a Fee Enhancement

If this Court finds that the PLRA applies to all Plaintiffs-Appellees, it should remand this case to the District Court to consider whether a fee enhancement is appropriate. Plaintiff-Appellants' requested in both their fee motions that the District Court consider a fee enhancement if it found that the PLRA applied. *See* SER 34, ER 49. This Court has recently affirmed that fee enhancements can be applied even to fees subject to the PLRA. *Kelly v. Wengler*, 822 F.3d 1085 (9th Cir. 2016).

Because the District Court ruled against Defendants-Appellants' request to apply the PLRA and reduce the attorney's fee based on degree of success, it did not reach Plaintiffs-Appellants' request for a fee enhancement. Without remand, applying the PLRA in this case would result in an hourly rate that "does not

adequately measure [counsels'] true market value." *Perdue v. Kenny A.*, 559 U.S. 542, 554-555 (2010).[4]

VIII. CONCLUSION

For the above-discussed reasons this Court should reject Defendants-Appellants arguments and affirm the District Court's grant of Plaintiffs-Appellees' attorneys' fee award.

STATEMENT OF RELATED CASES

Plaintiffs-Appellees certify that *A.B. by and through Cassie Cordell Trueblood, et al. v. Washington State DSHS, et al.*, No. 17-35335 is a related case. It originates from the same district court action, but involves a separate and distinct issue of law.

Respectfully submitted this 24th day of April, 2017.

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[4] The market rate for Plaintiffs' counsel ranges from $300-$450 per hour. *See* SER 57-69. The District Court found this rate reasonable. ER 7; ER 80. In addition, the superior outcomes achieved by Plaintiffs-Appellees, vindicating the constitutional rights of the some of the most vulnerable in our society, justify a fee enhancement.

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CERTIFICATE OF COMPLIANCE

I hereby certify that :

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,034 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Times New Roman, 14 pt. font) using Microsoft Word 2010.

Dated this 24th day of April, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 24, 2017. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 24th day of April, 2017

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