

1 DONALD SPECTER – 083925
RITA K. LOMIO – 254501
2 MARGOT MENDELSON – 268583
PRISON LAW OFFICE
3 1917 Fifth Street
Berkeley, California 94710-1916
4 Telephone: (510) 280-2621
Facsimile: (510) 280-2704
5

MICHAEL W. BIEN – 096891
6 GAY C. GRUNFELD – 121944
THOMAS NOLAN – 169692
7 PENNY GODBOLD – 226925
MICHAEL FREEDMAN – 262850
8 ROSEN BIEN
GALVAN & GRUNFELD LLP
9 101 Mission Street, Sixth Floor
San Francisco, California 94105-1738
10 Telephone: (415) 433-6830
Facsimile: (415) 433-7104
11

LINDA D. KILB – 136101
12 DISABILITY RIGHTS EDUCATION &
DEFENSE FUND, INC.
13 3075 Adeline Street, Suite 201
Berkeley, California 94703
14 Telephone: (510) 644-2555
Facsimile: (510) 841-8645
15

Attorneys for Plaintiffs
16

17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19

20 JOHN ARMSTRONG, et al.,

21 Plaintiffs,

22 v.

23 GAVIN NEWSOM, et al.,

24 Defendants.
25
26
27
28

Case No. C94 2307 CW

**SUR-REBUTTAL IN SUPPORT OF
PLAINTIFFS’ MOTION TO STOP
DEFENDANTS FROM ASSAULTING,
ABUSING, AND RETALIATING
AGAINST PEOPLE WITH DISABILITIES**

Judge: Claudia Wilken
Date: December 8, 2020
Time: 2:30 p.m.
Crtrm.: Remote

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1 At the October 6, 2020 hearing on Plaintiffs’ Motion to Stop Defendants from Assaulting,
2 Abusing and Retaliating Against People with Disabilities (“Statewide Motion”), the Court
3 correctly observed that “this case is about systems.” Dkt. 3131 at 17:24. To this end, the Court
4 counseled the parties that the Statewide Motion will not turn on “how many incidents [in the
5 declarations from people with disabilities] are ... sustained or not sustained.” *Id.* at 17:25-18:6.

6 In violation of the Court’s instructions, Defendants use their Sur-reply primarily to
7 challenge some of the fifty-one reply declarations from incarcerated people that describe horrific,
8 disability-related abuses at many of Defendants’ prisons. Most of Defendants’ evidence misses
9 the mark and none of it proves that the awful incidents did not occur. Defendants also fail to
10 submit evidence to challenge many of the reports of misconduct. And Defendants have not
11 identified a single consequential inconsistency between the testimony of the four declarants who
12 Defendants deposed and the deponent’s declarations. Relatedly, the Court should reject
13 Defendants’ request to strike the declarations for the three deponents who asserted their Fifth
14 Amendment right in response to questions collateral to the central issues in this case.

15 Meanwhile, Defendants’ Sur-reply does nothing to disturb Plaintiffs’ overwhelming
16 evidence already in the record that shows that Defendants’ statewide systems—for ensuring
17 compliance with and holding officers accountable for violations of the Americans with Disabilities
18 Act (“ADA”) and *Armstrong* Remedial Plan (“ARP”)—are broken. Defendants barely respond to
19 the second expert reports from Jeffrey Schwartz and Eldon Vail. Interrogatory responses, a
20 person-most-knowledgeable deposition, and other information produced by Defendants since the
21 October 6 hearing confirm the existence of the deficiencies that cause the violations: lack of
22 cameras, profound bias against reports by incarcerated people, and inadequate accountability.

23 Confronted with evidence of the brutality, misery, and violations of federal law caused by
24 their failed system, Defendants have taken the position that none of it happened and they do not
25 need to do anything to fix it. Defendants’ position is not credible. As in 2012, so too now
26 Defendants have failed to track or investigate “numerous ... incidents” of violations of the ARP
27 and Court orders. Accountability Order, Dkt. 2180, at 12. And “Defendants’ accountability
28 system ... has not been effective.” *Id.* at 15-16. So that *Armstrong* class members no longer need

1 to live in constant fear of abuse and interference with their rights, Plaintiffs respectfully request
 2 that the Court order Defendants to develop a plan to remedy their widespread violations of the
 3 ADA, ARP, and this Court’s Accountability Orders.

4 **I. DEFENDANTS DO NOT MEANINGFULLY CHALLENGE THE SECOND**
 5 **SCHWARTZ REPORT, ALL BUT CONCEDED THAT DEFENDANTS’ ENTIRE**
 6 **INVESTIGATION AND DISCIPLINE SYSTEM IS BROKEN**

7 In his second report, Plaintiffs’ expert Jeffrey Schwartz concluded that all of the problems
 8 he identified with investigations and discipline at R.J. Donovan Correctional Facility (“RJD”)—
 9 lack of video surveillance, incomplete, inadequate, delayed, and biased inquiries and
 10 investigations, discipline only where video evidence or staff reports establish misconduct,
 11 improper exercise of Warden’s discretion to make findings of misconduct and to impose
 12 discipline, no criminal prosecutions of staff—were equally present at CSP – Los Angeles County
 13 (“LAC”). *See* Schwartz Statewide Reply Decl., Dkt. 3106-5, ¶¶ 5-6, 32. Mr. Schwartz opined
 14 that Defendants’ entire system for holding officers accountable is broken based on his review of
 15 cases from RJD and LAC—which showed that the same deficiencies spanned two separate
 16 institutions and that many of the problems exist in parts of the process that are statewide in
 17 nature—of Eldon Vail’s declarations, and of reports from the Office of the Inspector General
 18 (“OIG”) showing similar problems. *See id.*, ¶¶ 5-6, 78-81; *see also* Grunfeld RJD Decl., Dkt.
 19 2922-1, Ex. GG, at 89; Grunfeld Statewide Reply Decl., Dkt. 3110-4, at ECF 1070 (CDCR
 20 Director admitting to Defendants’ expert that problem with system “likely existed” throughout
 21 state).

22 Defendants’ brief does not so much as mention, let alone challenge, any of Mr. Schwartz’s
 23 conclusions. And Matthew Cate’s shallow and incomplete criticisms of Mr. Schwartz’s opinions,
 24 in a portion of his Sur-reply declaration not cited by Defendants, miss the mark. Mr. Cate
 25 wrongly suggests that the nine cases reviewed by Mr. Schwartz (seven LAC cases referred to the
 26 Office of Internal Affairs (“OIA”), one resolved at LAC without referral, and one review of an
 27 OIG Sentinel Report) represent too small of a sample size for Mr. Schwartz to offer opinions
 28 about the statewide system. Cate Sur-reply Decl., Dkt. 3160-60, ¶ 14; *see* Schwartz Statewide
 Reply Decl., Dkt. 3106-5, ¶¶ 111-305 (case reviews). Mr. Cate, however, ignores entirely that

1 Mr. Schwartz (1) critiqued 7 of the 12 cases from 2017 to 2020 at LAC that were referred to OIA,
2 Grunfeld Statewide Reply Decl., Dkt. 3109-1, Ex. 94, at 2-4; (2) also based his opinions on the 25
3 cases he reviewed from RJD, his review of which Defendants have not challenged at all, Schwartz
4 Statewide Reply Decl., Dkt. 3106-5, ¶¶ 5-6; Schwartz RJD Decl., Dkt. 2947-9, ¶¶ 108-351; (3)
5 found that the problems with the LAC cases were consistent with the problems with the RJD
6 cases, Schwartz Statewide Reply Decl., Dkt. 3106-5, ¶¶ 5-6, 32. and (4) found that the cases
7 revealed problems with many of the components of Defendants’ system that function the same
8 throughout the state, *id.*, ¶¶ 6, 14, 32-81. Mr. Cate also fails to acknowledge that the problems
9 Mr. Schwartz identified with cases at LAC are so serious that the existence of even one of them,
10 let alone all of them, provides strong evidence to condemn Defendants’ entire system.

11 Mr. Cate takes no issue with seven of Mr. Schwartz’s nine case reviews, but does claim
12 that Mr. Schwartz was wrong to critique two of the cases, which, according to Mr. Cate,
13 demonstrated “solid police work.” Cate Sur-reply Decl., Dkt. 3160-60, ¶ 21. But Mr. Cate admits
14 that one of the investigations—which Mr. Schwartz described as possibly the worst cases he
15 reviewed at RJD and LAC, Schwartz Statewide Reply Decl., Dkt. 3106-5, ¶¶ 111, 141—was an
16 inadequate investigation that reflected “poor performance on the part of certain individual
17 [investigative] employees.” Cate Sur-reply Decl., Dkt. 3160-60, ¶¶ 19-20. For the other case, in
18 which an officer-witness reported that another officer threw an incarcerated person to the ground
19 for no reason, Mr. Cate claims that “the department took every appropriate action to hold an
20 officer accountable,” even though Defendants inexplicably negotiated down the officer’s
21 punishment from a Level 2 penalty under the Employee Disciplinary Matrix (“Matrix”) to a Level
22 1 penalty (Letter of Reprimand). *Id.*, ¶ 27; Grunfeld Sur-rebuttal Decl., Ex. 94, Ex. A (S-LAC-
23 015-19-A). For both cases, Mr. Cate applauds Defendants for conducting an investigation and
24 imposing some discipline, rather than insisting that Defendants conduct thorough, complete, and
25 unbiased investigations and impose appropriate discipline. *See* Cate Sur-reply Decl., Dkt. 3106-5,
26 ¶ 20 (“The matter went through multiple layers of review and on each occasion the individuals
27 acted as the system intended by moving the case forward for investigation and discipline.”); *id.*,
28 ¶ 25 (“Dr. Schwartz focuses primarily on what he believes was inadequate punishment. By doing

1 so, he missed the point that the investigation process worked here.”). It is no wonder that
 2 Defendants’ system is so ineffective when CDCR’s former Secretary endorses a “check-the-box”
 3 approach to investigations and discipline, rather than insisting on quality.¹

4 Standing alone, Mr. Schwartz’s two, all-but-unchallenged declarations establish Plaintiffs’
 5 entitlement to relief. This Court’s Accountability Orders mandate that Defendants promptly
 6 investigate allegations of non-compliance with the ADA and ARP and, if warranted, impose
 7 progressive discipline pursuant to the Employee Disciplinary Matrix. *See* Dkt. 2180, at 18.
 8 Without a functioning investigation and discipline system, the Accountability Orders are worth
 9 nothing more than the paper on which they are written. And, as everyone in this case agrees, no
 10 investigation and discipline system can work without at least fixed surveillance cameras, if not
 11 body-worn cameras. *See* Statewide Reply, Dkt. 3110, at 13. Accordingly, anything less than the
 12 relief sought by Plaintiffs would nullify the Court’s Accountability Orders, ensure that officers
 13 continue to violate class members’ rights without consequences, and undermine the Court’s efforts
 14 to set Defendants on a path toward self-sufficient compliance with the ADA.

15 **II. OTHER INFORMATION NEWLY-PRODUCED BY DEFENDANTS**
 16 **DEMONSTRATES THAT ADA VIOLATIONS ARE WIDESPREAD, THAT THE**
 17 **INVESTIGATION AND DISCIPLINE PROCESS FAILS TO HOLD OFFICERS**
 18 **ACCOUNTABLE, AND THAT DEFENDANTS HAVE NO PLANS TO REMEDY**
 19 **THESE PROBLEMS**

20 Since the October 6, 2020 hearing, Defendants have produced additional, long-overdue
 21 information in discovery that confirms the systemic problems at the center of the Statewide
 22 Motion. First, on November 19, 2020, Jared Lozano, CDCR’s Associate Director for the High
 23 Security Mission, finally appeared as Defendants’ person most knowledgeable on topics relating
 24 to LAC, CSP – Corcoran (“COR”), California Correctional Institution (“CCI”), and Kern Valley
 25 State Prison (“KVSP”), in response to a deposition notice served on August 6, 2020. Grunfeld
 26 Sur-rebuttal Decl., ¶¶ 4, 8. Mr. Lozano testified that (1) he does not believe any of those prisons

26 ¹ In two paragraphs, Mr. Cate attempts to contest Mr. Vail’s well-supported and reasoned opinions
 27 regarding the evidence of abuse against and failures to accommodate incarcerated people with
 28 disabilities. *Compare* Cate Sur-reply Decl., Dkt. 3160-60 ¶¶ 4, 11 *with* Vail Statewide Reply
 Decl., Dkt. 3106-7, ¶¶ 8-17. Mr. Cate’s opinion cannot be squared with the evidence before the
 Court.

1 have staff misconduct or culture problems, *id.*, Ex. 5, at 192-97; (2) Defendants have not taken and
2 have no plans to take any special steps to address staff misconduct at any of those prisons, *id.* at
3 132-42, 143-53, 172, 176, 179-87;² (3) the vast majority of the areas at those prisons, including
4 nearly all housing units and exercise yards, do not have any surveillance camera coverage, *id.* at
5 68-82, 94-101, 106-112, 115-121; (4) no staff at those prisons wear body-worn cameras, *id.*; and
6 (5) Defendants have no concrete plans to install additional cameras or require the use of body-
7 worn cameras at any of the prisons, *id.*

8 Second, Defendants' responses to interrogatories—served by Plaintiffs on August 6, 2020
9 but not fully responded to until October 21, 2020—show that officers at four of the Statewide
10 prisons are targeting people with disabilities for abuse. Grunfeld Sur-rebuttal Decl., ¶¶ 10-12 &
11 Exs. 7-8; Grunfeld Statewide Reply Decl., Dkt. 3109-1, Exs. 94-95. At LAC, COR, CCI, and
12 KVSP from 2017 to 2020, 45 of 58 (78%) staff misconduct incidents in which Defendants
13 imposed adverse action and all 12 such incidents where an officer was terminated involved a
14 victim who was an *Armstrong* class member, a *Coleman* class member, or both. See Grunfeld
15 Sur-rebuttal Decl., ¶¶ 17-18, 21-22. The interrogatory responses also demonstrate that even when
16 Defendants find that an officer engaged in misconduct, Defendants frequently negotiate down the
17 penalty imposed by Wardens. In 30 of 102 (29.4%) disciplinary actions imposed from 2017 to
18 2020, Defendants settled for a penalty at least one Matrix-level below the level selected by the
19 Warden. *Id.*, ¶¶ 19-20. Lastly, the interrogatory responses show that from 2017 to 2020 those
20 same institutions only referred two cases for criminal prosecution, neither of which were accepted
21 by a district attorney. *Id.*, ¶ 23.

22 Third, in response to Plaintiffs' August 6, 2020 30(b)(6) deposition notice, Defendants
23 agreed to produce written information about investigations into and discipline for the claims of
24

25 ² The only change to policy or practice intended to address staff misconduct was the prior
26 placement of five staff members on temporary special assignments at LAC to assist with
27 investigations into allegations of misconduct. Grunfeld Sur-rebuttal Decl., Ex. 5, 132:17-
28 134:7. As far as Plaintiffs can discern, all those staff members did was determine that none of the
misconduct raised in Plaintiffs' numerous advocacy letters and tour reports occurred. See
Grunfeld Statewide Reply Decl., Dkt. 3108-1, ¶¶ 27-29 & Ex. 19.

1 misconduct contained in the declarations that accompany the Statewide Motion. *See* Grunfeld
 2 Sur-rebuttal Decl., ¶¶ 4-7. The incomplete information Defendants produced on November 13,
 3 2020 is damning. *Id.*, ¶ 6. For the 98 claims of misconduct for which Defendants provided
 4 information, Defendants referred only 4 to OIA for investigation, opened only 2 OIA
 5 investigations, found only a single officer to have engaged in misconduct, punished that officer
 6 with only a Level 2 penalty under the Matrix, and failed entirely to investigate 7 cases. *Id.*, ¶ 7.
 7 Defendants provided no information for the other 70 claims of misconduct in the declarations. *Id.*

8 Collectively, this evidence, which was not available at the time of Plaintiffs' Reply,
 9 reconfirms that Defendants' repeated statements that they take staff misconduct "seriously" are
 10 nothing more than empty platitudes. This new information supplements the substantial evidence
 11 already in the record for the Statewide and RJD Motions regarding Defendants' failed system:
 12 *inter alia*, 179 declarations from incarcerated people describing abuse at twelve prisons;
 13 Mr. Schwartz's two expert reports; Eldon Vail's two expert reports; the OIG's discipline reports,
 14 Sentinel Reports, and reports regarding High Desert State Prison ("HDSP") and Salinas Valley
 15 State Prison ("SVSP"); testimony from PMKs about OIA and the Allegation Inquiry Management
 16 Section ("AIMS"); evidence of Defendants' repeated failures to respond to and investigate reports
 17 of misconduct raised by Plaintiffs' counsel; Defendants' withdrawn Budget Change Proposal
 18 ("BCP") for cameras at SVSP, California Institution for Women ("CIW"), and RJD; the RJD
 19 Strike Team Report and follow-up memoranda; emails from the Chief Ombudsman admitting to
 20 problems at RJD and CIW; Defendants' non-compliant accountability logs; and testimony from
 21 Defendants' own experts about the need for cameras throughout the system.

22 **III. DEFENDANTS' EVIDENCE CHALLENGING SOME OF THE DECLARATIONS**
 23 **FROM INCARCERATED WITNESSES FAILS TO UNDERMINE THE**
 24 **SHOCKING TESTIMONY FROM PEOPLE WITH DISABILITIES**

25 With their Reply, Plaintiffs submitted fifty-one declarations from incarcerated people with
 26 disabilities regarding abuses they experienced or witnessed at eleven different prisons.
 27 Notwithstanding the fact that Plaintiffs shared these declarations with Defendants starting in July
 28 2020 and they had six weeks to file their Sur-reply, Defendants fail to submit any evidence

1 challenging many dozens of the reports of abuse contained in the fifty-one declarations.³ The

2
 3 ³ Defendants have not submitted any evidence to challenge seven declarations. *See* Grunfeld
 Statewide Reply Decl., Dkts. 3108-1, 3109-1, Exs. 2-3, 9, 24, 43, 82-83.

4 For three other declarations, Defendants' evidence is irrelevant. *Compare id.*, Ex. 42 with Dkt.
 3160-2, ¶ 2 (attempting to refute claim staff member raped incarcerated person multiple times with
 5 declaration that investigation is ongoing and that declarant refused interview); *compare* Grunfeld
 Statewide Reply Decl., Dkt. 3108-1, Ex. 30 with Dkt. 3160-21 (attempting to rebut claims that
 6 staff mocked and ignored declarant in mental health crisis by attaching grievance requesting new
 primary care provider); *compare* Grunfeld Statewide Reply Decl., Dkt. 3108-1, Ex. 8 with Dkts.
 7 3157-4, 3157-5, 3157-8 (attempting to rebut reports class member was told officers were setting
 him up to be assaulted with three officer declarations about an entirely unrelated incident).

8 For many of Plaintiffs' declarations that contain multiple reports of misconduct, Defendants do
 not produce evidence to contest all of the claims. *Compare* Grunfeld Statewide Reply Decl.,
 9 Ex. 54, ¶¶ 9-50, with Dkts. 3160-6, 3160-16 (no evidence to rebut that declarant was assaulted by
 staff on July 22, 2019, charged with a false RVR, and threatened with assault again); *compare*
 10 Grunfeld Statewide Reply Decl., Ex. 55, ¶¶ 8-12 with Dkt. 3160-1 (no evidence to rebut that
 officers assaulted declarant on March 2, 2020, after he reported feeling suicidal); *compare*
 11 Grunfeld Statewide Reply Decl., Ex. 16, ¶¶ 25-29 with Dkts. 3158-7, 3158-8, 3160-33, 3160-35
 (no evidence to rebut that officers shoved declarant to the ground and punched him while he was
 12 having a seizure); *compare* Grunfeld Statewide Reply Decl., Ex. 34, ¶¶ 16-21 with Dkts. 3160-8,
 3160-13 (no evidence to rebut that declarant was left for hours nearly naked in cage with painful
 13 triangle device as punishment); *compare* Grunfeld Statewide Reply Decl., Ex. 36, ¶¶ 6-10 with
 Dkts. 3160-10, 3160-53 (no evidence to rebut that officers punched declarant); *compare* Grunfeld
 14 Statewide Reply Decl., Ex. 12 ¶¶ 7-10 with Dkt. 3160-51 (no evidence to rebut that officers called
 declarant a "snitch" and a "crybaby," and threatened to "take him down" for filing staff
 15 complaint); *compare* Grunfeld Statewide Reply Decl., Ex. 52, ¶¶ 8-13 with Dkt. 3160-59, Exs. A,
 E (no evidence to rebut incident where staff rounded up black people, called them the N-Word,
 16 and kept them in the dining hall in zip ties, without masks for over five hours); *compare* Grunfeld
 Statewide Reply Decl., Ex. 69, ¶¶ 10-13, 25 with Dkt. 3160-56, (no evidence to rebut that officers
 17 beat another incarcerated person and then charged declarant with false RVR for reporting the
 assault); *compare* Grunfeld Statewide Reply Decl., Ex. 70, ¶¶ 24-37 with Dkt. 3160-47 (no
 18 evidence to rebut that officer blamed "guy with the hearing aids" for incarcerated people losing
 privileges); *compare* Grunfeld Statewide Reply Decl., Ex. 21, ¶ 11 with Dkts. 3159-1, 3160 (no
 19 evidence to rebut that, after declarant complained about staff misconduct, staff denied him food,
 threatened him, and pepper-sprayed him); *compare* Grunfeld Statewide Reply Decl., Ex. 10, ¶¶ 9-
 20 13 with Dkts. 3160-9, 3160-12 (no evidence to rebut that staff said they did not "give a f—" about
 declarant's safety concerns); *compare* Grunfeld Statewide Reply Decl., Ex. 51, ¶¶ 7-12 with Dkt.
 21 3160-18 (no evidence to rebut that staff sexually harassed declarant, threatened him for filing staff
 complaint, and pushed him to ground in his cell); *compare* Grunfeld Statewide Reply Decl.,
 22 Ex. 14, ¶¶ 20-27 with Dkt. 3160-38, 3160-40 (no evidence to rebut that staff prevented declarant
 from reporting misconduct and denied him medical attention following use of force); *compare*
 23 Grunfeld Statewide Reply Decl., Ex. 28, ¶¶ 9-19 with Dkts. 3160-31, 3160-32 (no evidence to
 rebut that staff threatened to kill declarant for helping another incarcerated person report
 24 misconduct); *compare* Grunfeld Statewide Reply Decl., Ex. 68, ¶¶ 23-24, 26 with Dkts. 3157-6,
 3157-7, 3157-10, 3157-11, 3157-12, 3157-14, 3158, 3158-3, 3158-4, 3160-57 (no evidence to
 25 rebut report that staff mocked declarant's developmental disabilities and slammed him to the
 ground); *compare* Grunfeld Statewide Reply Decl., Ex. 22 ¶¶ 21-28 with Dkt. 3160-53 (no
 26 evidence to rebut report that staff kicked compliant incarcerated person in the head); *compare*
 Grunfeld Statewide Reply Decl., Ex. 32, ¶ 20 with Dkts. 3160-15, 3160-20 (no evidence to rebut
 27 report that staff made racist and ableist comments); *compare* Grunfeld Statewide Reply Decl., Ex.
 28 7, ¶¶ 16-28 with Dkts. 3160-9, 3160-12 (no evidence to rebut reports that staff intentionally placed

1 undisputed claims include: officers at COR stomped on and broke a mentally-ill person's hand
 2 after a verbal dispute, *see* Grunfeld Statewide Reply Decl., Dkt. 3108-1, Ex. 24, ¶¶ 6-19, 24; an
 3 incarcerated person at CIW, who staff failed to accommodate with special cuffing, now refrains
 4 from requesting accommodations for her hearing disability because she is afraid of how officers
 5 will respond, *id.*, Ex. 43, ¶¶ 10-12; officers at CSP - Sacramento threw to the ground and battered a
 6 cognitively disabled person having a seizure, and then issued him a false RVR, *id.*, Ex. 16, ¶¶ 24-
 7 27; and officers spread rumors about a Deaf person at SATF to incite other incarcerated people to
 8 harm him because he complained about inaccessible telecommunication devices. *Id.*, Ex. 70, ¶¶
 9 21, 24-27. Between the Statewide and RJD Motions, the Court now has before it dozens and
 10 dozens of uncontested reports of abuses and failures of accommodation from incarcerated people.
 11 These uncontested reports show statewide violations of the ADA and ARP and are sufficient,
 12 standing alone, for the Court to grant relief.

13 Defendants present some countervailing evidence—namely declarations from officers
 14 adopting the Rules Violation Reports (“RVRs”) and Incident Reports they drafted about incidents
 15 in which they were involved—for the remaining declarations. But Defendants have not presented
 16 evidence to conclusively disprove a single allegation in any of the declarations, even though they
 17 control everything within their prisons and have access to all documents and medical and mental
 18 health records for the declarants and to their entire workforce. That Defendants cannot prove
 19 these incidents did not occur is revealing. It strongly supports that the declarations, individually
 20 and collectively, are credible. And it further shows that changes to the system, especially fixed
 21 surveillance and body-worn cameras, are urgently needed so that serious abuses do not remain
 22 shrouded in uncertainty. *Cf.* Grunfeld RJD Decl., Dkt. 2922-1, Ex. Y, at ECF 374 (explaining, in
 23 Defendants’ now-withdrawn BCP, that “[h]igh quality visual recordings of incidents will serve as
 24 irrefutable evidence in investigations, and in administrative, civil, or criminal proceedings”).

25 Even for the contested incidents, the equities and common sense strongly suggest that the
 26 incarcerated victims are more credible than Defendants’ employees. The incarcerated witnesses

27

28 _____
 declarant into cell with COVID-19 patient; declarant ultimately tested positive).

1 have come forward to report abuses at great risk to their safety and without any expectation of
 2 direct or indirect benefits for their testimony. Their declarations exude truthfulness, containing
 3 details of incidents that seem impossible to fabricate. In contrast, Defendants and their officers
 4 face risks from being found to have violated the rights of people with disabilities. Some of
 5 Defendants' evidence contains concerning indicia of unreliability.⁴ And the officers' formulaic
 6 and terse reports, which utilize the same rote language,⁵ reek of cover-ups. Defendants'
 7 position—that none of the challenged incidents occurred as reported by Plaintiffs' witnesses—is
 8 simply not believable. In ruling on the Preliminary Injunction, this Court already found that the
 9 testimony from incarcerated people was more reliable than Defendants' evidence. *See* Preliminary
 10 Inj. Order, Dkt. 3025, at 14-21, 26-30. The Court should do the same here.

11 **IV. THE FOUR DECLARANTS WHOM DEFENDANTS HAVE DEPOSED**
 12 **TESTIFIED CONSISTENT WITH THEIR DECLARATIONS; THE COURT**
 13 **SHOULD NOT STRIKE OR DISREGARD THE DECLARATIONS FOR THE**
 14 **THREE DEONENTS WHO INVOKED THE FIFTH AMENDMENT**

14 Though the Court granted Defendants the opportunity to depose up to ten declarants who
 15 submitted declarations in support of Plaintiffs' Reply, Defendants chose to depose only four
 16 people. *See* Grunfeld Sur-rebuttal Decl., ¶¶ 28-34. As discussed below, the four deponents'
 17 testimony was consistent with their declarations in all meaningful respects. Under cross-
 18 examination, they proved themselves to be credible witnesses.

20 ⁴ *See, e.g.*, Dkts. 3158, 3157-10, 3158-3 (three incident reports with identical misspellings of
 21 phrase "clined fists"); Dkt. 3159-4 (AIMS inquiry where investigator failed to identify potential
 22 witnesses); Dkt. 3160-18 (inquiry report discounting as "untrustworthy" the three incarcerated
 23 witnesses); *see also* Dkt. 3115, at 5-6 (questioning reliability of Defendants' evidence, *see* Dkts.
 24 3102-10, 3102-12, 3102-13, which purportedly contested Grunfeld Statewide Reply Decl., Dkt.
 25 3108-1, 3109-1, Exs. 18 & 19); *see also* Vail Reply Decl., Dkt. 3106-7, ¶¶ 80-99 (finding that
 Defendants' expert's analysis at Dkt. 3083-6, ¶¶ 31-33, failed to identify serious deficiencies in
 investigation into Grunfeld Statewide Reply Decl., Dkt. 3108-1, Ex. 56); *see also* Vail Reply
 Decl., Dkt. 3106-7, ¶¶ 171-183 (finding that investigative report and expert analysis, *see* Dkts.
 3079 & 3083-4, ¶ 48, failed to undermine Grunfeld Statewide Reply Decl., Dkt. 3108-1, Ex. 32).

26 ⁵ For reports where officers describe an incarcerated person with "clenched fists," *see* Dkts. 3157-
 27 10, Ex. A; 3157-12, Ex. A; 3158, Ex. A; 3158-3, Ex. A; 3158-9, Ex. A; 3160-15, Ex. A; 3160-3,
 Ex. A; 3160-20, Ex. A. For reports where officers describe an incarcerated person making a
 28 movement "without warning or provocation," or words to that effect, *see* Dkts. 3158-1, Ex. A;
 3158-9, Ex. A; 3159-2, Ex. A; 3160-6, Ex. A; 3160-14, Ex. A; 3160-15, Ex. A; 3160-16, Ex. A;
 3160-19, Ex. A; 3160-33, Ex. A; 3160-34, Ex. A; 3160-38, Ex. A; 3160-41, Ex. A.

1 Three of the deponents invoked the Fifth Amendment to refuse to answer a small number
2 of irrelevant questions. Their assertions of their constitutional right provide no grounds for
3 striking or disregarding any part of their declarations, as the questions they refused to answer were
4 “collateral” to these proceedings and their refusal to answer did not prejudice Defendants. *United*
5 *States v. \$133,420.00 in U.S. Currency*, 672 F.3d 629, 641 (9th Cir. 2012) (citing *United States v.*
6 *Seifart*, 648 F.2d 557, 561 (9th Cir. 1980)) (internal quotations omitted) (holding that court should
7 only strike testimony if “invocation of the [Fifth Amendment] privilege blocks inquiry into
8 matters which are direct and not merely collateral to the proceeding”). Given Defendants’
9 consistent pattern of imposing RVRs against and referring incarcerated people for prosecution,
10 these witnesses—who volunteered to help the *Armstrong* class in a federal injunctive
11 proceeding—appropriately invoked their constitutional rights in the depositions.

12 Deponent #1 – In his declaration, this deponent describes three incidents: (1) an officer at
13 Substance Abuse Treatment Facility (“SATF”) ignored his request for assistance when he was
14 having chest pains and felt suicidal, resulting in a suicide attempt that caused him to go into
15 cardiac arrest; (2) officers at COR assaulted him on an exercise yard; and (3) officers at COR
16 ignored and then punished another incarcerated person who was seeking medical attention.
17 Grunfeld Statewide Reply Decl., Dkt. 3108-1, Ex. 27. Defendants only asked the deponent about
18 the first two incidents. *See generally* Grunfeld Sur-rebuttal Decl., Ex. 17. Moreover, defense
19 counsel did not even mark the declaration as an exhibit in the deposition. *Id.* Defendants have not
20 identified any inconsistencies between his testimony and his declaration. Sur-reply at 17.

21 Regarding the second and third incidents, Defendants have not produced any counter-
22 vailing evidence nor even argued that the deponent’s description of events lacks credibility.
23 Regarding the first incident, Defendants point to medical records and grievances that Defendants
24 claim establish that he was not suicidal. *Id.* Defendants ignore, however, records in their
25 possession that show the deponent told mental health clinicians about his suicide attempt and,
26 shortly after the incident, was placed in an inpatient psychiatric unit for two months. Grunfeld
27 Sur-rebuttal Decl., Ex. 21; Grunfeld Statewide Reply Decl., Ex. 3108-1, Ex. 27, ¶ 4. Defendants
28 also attempt to argue that the deponent lied about taking illicit drugs, but omit records showing

1 that he tested negative. Grunfeld Sur-rebuttal Decl., Ex. 21, at 2.

2 The Court should reject Defendants' request to strike the deponent's entire declaration
3 because he refused to answer questions regarding "how, when, or from whom he *obtained* the
4 pills" he used to attempt suicide at SATF. Sur-reply at 17. That topic is "collateral" to the thrust
5 of his declaration. No answer he could give would make it more or less likely that he told an
6 officer he felt suicidal, was denied help, took pills, and went into cardiac arrest. And even if the
7 source of the pills were central to his declaration, his refusal to answer questions about the pills
8 would provide no grounds for striking his testimony regarding the two other incidents of
9 misconduct. *See Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 911 (9th Cir. 2008) (holding
10 order to strike testimony based on invocation of the Fifth Amendment must be narrowly tailored to
11 impose only that detriment necessary to prevent unfair prejudice to the opposing party).

12 Deponent #2 – In his declaration, this deponent describes how officers retaliated against
13 him after he reported officers for abusing another incarcerated person. As retaliation, the officers
14 placed the deponent handcuffed in a cell with another incarcerated person, then ordered the other
15 incarcerated person to attack the deponent. The other incarcerated person punched the deponent
16 twice, but then refused to continue the assault. Officers then pepper-sprayed both of them and
17 began beating the deponent, causing him serious injuries including two chipped teeth. Grunfeld
18 Statewide Reply Decl., Dkt. 3108-1, Ex. 28. Defendants have not identified a single inconsistency
19 between his deposition testimony and declaration. Sur-reply at 16.

20 Defendants do argue that the Court should exclude the deponent's declaration because he
21 refused to answer whether he and the other incarcerated person had been fighting prior to the
22 officers pepper-spraying and then assaulting the deponent. Sur-reply at 16. Defendants were not,
23 however, prejudiced by the deponent's assertion of the Fifth Amendment because elsewhere in his
24 deposition he clearly testified that he had not been fighting with his cell mate. Grunfeld Sur-reply
25 Decl., Ex. 18, at Howell Depo. at 38:5-18, 39:2-20. The other questions for which the deponent
26 invoked his Fifth Amendment right—which related to whether the deponent had threatened staff
27 on dates stretching as far back as 2012—are clearly "collateral" to the incident described in his
28 declaration and therefore present no grounds for striking his declaration. Sur-reply at 16.

1 Deponent #3 – In his declaration, this deponent, who suffers from debilitating mental
 2 illness, describes how after officers claim he “gassed” them, officers assaulted him, then escorted
 3 him to a gym where they further assaulted him. The deponent suffered multiple facial fractures
 4 and a laceration requiring nine stitches. Grunfeld Statewide Reply Decl., Dkt. 3108-1, Ex. 10. A
 5 witness also submitted a declaration about the incident. *Id.*, Ex. 7, ¶ 12. Defendants identify only
 6 a single, inconsequential inconsistency in the deponent’s testimony: at the deposition he
 7 acknowledged that he had received a response to his grievance about the incident, which he
 8 asserted in his declaration he had not. Sur-reply at 14. Defendants also submit two declarations
 9 from officers, authenticating incident reports, which describe the incident differently. Dkts. 3160-
 10 9, 3160-12. Mr. Schwartz found “clear evidence of collusion” and plagiarism in one of the
 11 incident reports submitted by Defendants. Schwartz Reply Decl., ¶ 140. Defendants do not offer
 12 a declaration from the officer who was allegedly gassed and initiated the force.

13 The Court should reject Defendants’ request to strike the deponent’s entire declaration
 14 because the deponent asserted his Fifth Amendment right not to answer repeated questions about
 15 whether he threw feces on an officer prior to the assault. Sur-reply at 18. The answer is clearly
 16 “collateral” to whether the officers unlawfully assaulted the deponent. As this Court found in the
 17 Preliminary Injunction order, “[e]ven if he had thrown the liquid, that would not justify the force
 18 th[e] Officer ... used against him.” Preliminary Inj. Order, Dkt. 3025, at 17.

19 Deponent #4 – In his declaration, this deponent described how officers, without
 20 justification, threw him to the ground, escorted him to the program office, assaulted him further,
 21 and interfered with his efforts to have his serious injuries documented. Grunfeld Statewide Reply
 22 Decl., Dkt 3109-1, Ex. 58. Defendants do not identify any inconsistencies between his deposition
 23 testimony and his declaration. *See* Sur-reply at 8-9. Evidence submitted by Defendants that the
 24 deponent sent legal mail and filed grievances are irrelevant to his claims. *See* Sur-reply at 8-9.

25 **V. THE COURT SHOULD NOT CONSIDER ANY OF THE EVIDENCE**
 26 **DEFENDANTS HAVE SUBMITTED TO CHALLENGE DECLARATIONS**
PLAINTIFFS FILED ON JUNE 3, 2020

27 The Court should disregard the declarations Defendants have submitted to challenge
 28 declarations filed by incarcerated people on June 3, 2020. *See* Dkts. 3158-9, 3159, 3160-22, 3160-

1 23, 3160-24, 3160-25, 3160-26, 3160-27, 3160-28, 3160-29, 3160-52. At the October 6 hearing,
 2 the Court specified that Defendants' Sur-reply should only address evidence submitted by
 3 Plaintiffs on reply. Dkt. 3131 at 37. Defendants missed their opportunity to challenge the June 3
 4 declarations when they filed their opposition to the Statewide Motion.

5 **VI. DEFENDANTS' OTHER ARGUMENTS FAIL**

6 Defendants wrongly assert that, because Plaintiffs have presented fewer declarations about
 7 misconduct at certain prisons, the Court cannot grant relief at all seven prisons that are the subject
 8 of the Statewide Motion. The question is not, however, how many declarants there are in a prison
 9 of 3000 incarcerated people, as Defendants would have this Court believe, but rather how many
 10 brave individuals with disabilities are willing to testify about Defendants' abuse and retaliation.
 11 The declarations from across Defendants' system and particularly from Defendants' high-security
 12 prisons, paint a shockingly consistent picture: of officers brutalizing people with disabilities and
 13 other vulnerable people, of retaliation against anyone with the temerity to complain, of false RVRs
 14 to cover up abuses, of astonishingly bad investigations, and of a near-total lack of accountability.
 15 These declarations, combined with Plaintiffs' other evidence, show that Defendants' entire system
 16 is broken. CDCR is a dangerous place, especially for class members.⁶ An *Armstrong* class
 17 member placed at any of CDCR's thirty-five prisons is at serious risk of officers violating their
 18 ADA rights because Defendants essentially never hold officers accountable for such violations.
 19 Plaintiffs could have sought relief at all of CDCR's institutions. Instead, Plaintiffs focused this
 20 Motion on seven prisons for which Plaintiffs have either presented declarations documenting
 21 instances of misconduct or for which there exists other compelling evidence of violations or both.

22 Defendants' suggestion that the Court cannot draw any inferences from the now-
 23 withdrawn BCP is absurd. Defendants chose to include SVSP and CIW in the BCP based, at least
 24 in part, on an evaluation that cameras were most needed at those institutions to curb misconduct.
 25

26 _____
 27 ⁶ For example, since June 2019, six incarcerated people, including three hard-of-hearing class
 28 members, have been killed by other incarcerated people at SATF. Grunfeld Statewide Reply
 Decl., 3109-1, Exs. 75, 102, 103. Defendants' own use-of-force data show that the prisons are
 getting more dangerous. Grunfeld Sur-rebuttal Decl., Exs. 12-14.

1 That inference is bolstered by other evidence in the record regarding those two prisons, namely the
 2 Chief Ombudsman’s comments regarding “very bad” conditions at CIW, Grunfeld RJD Decl.,
 3 Dkt. 2922-1, Ex. H, at DOJ00013200-201, and the OIG’s 2019 report regarding the terrible quality
 4 of investigations at SVSP, *id.*, Ex. GG. Moreover, the OIG has been calling for fixed surveillance
 5 and body-worn cameras in CDCR since 2015. Grunfeld RJD Decl., Dkt. 2922-1, Ex. EE, at 36-
 6 38. And the State’s other women’s prison already has cameras installed. Grunfeld RJD Decl.,
 7 Dkt. 2922-1, Ex. Y, at ECF 375. Defendants have admitted their discipline and investigation
 8 systems are the same across their system. Grunfeld Sur-rebuttal Decl., Ex. E, at 154:16-20. Thus,
 9 though the quantity of declarations for the prisons differs, the record is more than adequate to
 10 support full relief at all seven prisons that are the subject of the Statewide Motion.

11 Though not all of Plaintiffs’ declarants are designated by Defendants as class members, all
 12 of the declarants are people with disabilities, as every single declarant is either an *Armstrong* or
 13 *Coleman* class member. All of their experiences are therefore probative of how Defendants treat
 14 class members. Though not all of the declarations describe disability-related misconduct, many
 15 do. And all of the declarations demonstrate, at a minimum, problems with Defendants’ system for
 16 holding officers accountable when they abuse incarcerated people.

17 **VII. THE OIG DATA SUPPORTS RELIEF HERE**

18 At the October 6, 2020 hearing, the Court stated:

19 I’m having a problem in the briefs with the OIG reports. It seemed in the
 20 defendants’ brief ... they were ... saying the OIG says 99 percent of what we did
 21 were all right. And then I read plaintiffs’ reply ... and they say 24 percent of them
 are inadequate I can’t figure out why we are getting such a wildly disparate
 view of what these OIG reports say.

22 Dkt. 3131, at 19:21-20:5. The contrasting figures are apples and oranges, as they come from
 23 different sources of information published by the OIG. Plaintiffs’ figure—that the OIG rated
 24 Defendants’ overall performance as poor in 24.1% of disciplinary cases in which staff were
 25 accused of harming incarcerated people—comes from a detailed review of information published
 26 on the OIG’s website as part of its disciplinary monitoring reports. *See* Grunfeld Statewide Reply
 27 Decl., Dkt. 3108-1, ¶¶ 227-231. The OIG issues a summary of every disciplinary case it reviews;
 28 from January 1, 2019 to June 30, 2020, there were 481 such cases. *Id.*, ¶ 231. Plaintiffs’ counsel

1 reviewed those summaries and excluded all but the 116 cases that involved harm to incarcerated
2 people. *Id.* Analysis of the 116 cases showed that in 24.1% of cases the OIG rated Defendants’
3 overall performance as poor and in 62.9% of cases the OIG rated as poor at least one of the six
4 indicators it monitors. *Id.*, ¶ 232. Defendants accuse Plaintiffs of “cherry-picking” this data, Sur-
5 reply at 19, but do not challenge any of the 116 cases Plaintiffs included. *See* Grunfeld Statewide
6 Reply Decl., ¶¶ 230-231 & Ex. 127. Plaintiffs’ methodology and conclusions are sound.

7 The figures cited by Defendants are the OIG’s findings, published in the OIG’s use of
8 force reports, that very few uses of force were excessive or unnecessary. Sur-reply at 19. These
9 findings of the OIG have limited relevance here. First, the OIG only reviews the paper incident
10 packages from uses of force, which consist of written reports from the officers who used or
11 observed the force and are unlikely to contain admissions that force was excessive or unjustified.
12 *See* Schwartz Statewide Reply Decl., ¶ 255. Because the OIG does not interview the people
13 against whom force was used and video footage is almost never available, the OIG cannot actually
14 review the appropriateness of force. The limits of the OIG’s review are apparent from its truly
15 incredible finding in its July 2020 report that only 1 out of every 500 uses of force was excessive
16 or unnecessary. Grunfeld Statewide Reply Decl., 3109-1, Ex. 138, at 28, 37. Second, Defendants
17 gloss over the OIG’s findings that CDCR’s internal process for reviewing uses of force often
18 fails. *See* Grunfeld Statewide Reply Decl., Ex. 138, at 78-80. Third, the record here contains
19 numerous allegations regarding unreported uses of force, which are not captured in the OIG’s use-
20 of-force reports. *See, e.g.*, Freedman RJD Decl., Exs. 10, 49, 51, 57; Freedman Statewide Decl.,
21 Exs. 13, 50. Fourth, this Motion is also about misconduct not related to use of force.

22 **CONCLUSION**

23 For the aforementioned reasons, Plaintiffs respectfully request that the Court grant the
24 Statewide Motion and issue Plaintiffs’ Proposed Order.

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DATED: November 24, 2020

Respectfully submitted,

ROSEN BIEN GALVAN & GRUNFELD LLP

By: /s/ Michael Freedman

Michael Freedman

Attorneys for Plaintiffs