

1 ROB BONTA
Attorney General of California
2 MONICA N. ANDERSON
Senior Assistant Attorney General
3 DAMON G. MCCLAIN
Supervising Deputy Attorney General
4 IRAM HASAN
Deputy Attorney General
5 State Bar No. 320802
455 Golden Gate Avenue, Suite 11000
6 San Francisco, CA 94102-7004
Telephone: (415) 510-3793
7 Fax: (415) 703-5480
E-mail: Iram.Hasan@doj.ca.gov

HANSON BRIDGETT LLP
PAUL B. MELLO - 179755
SAMANTHA D. WOLFF – 240280
LAUREL O’CONNOR – 305478
DAVID CASARRUBIAS – 321994
425 Market Street, 26th Floor
San Francisco, CA 94015
Telephone: (415) 777-3200
Facsimile: (415) 541-9366
E-mail: pmello@hansonbridgett.com

Attorneys for Defendants

8
9 *Attorneys for Defendants*

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

14 **MARCIANO PLATA, et al.,**

15 Plaintiffs,

16 v.

18 **GAVIN NEWSOM, et al.,**

19 Defendants.

01-cv-01351-JST

**DEFENDANTS’ NOTICE OF MOTION
AND MOTION TO STAY ORDER RE
MANDATORY VACCINATIONS (ECF
NO. 3684) PENDING APPEAL**

Date: December 9, 2021
Time: 2:00 p.m.
Courtroom: 6, 2nd Floor
Judge: The Honorable Jon S. Tigar
Action Filed: April 5, 2001

21
22 **TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:**

23 **PLEASE TAKE NOTICE** that on December 9, 2021 at 2:00 p.m., before the Honorable
24 Jon S. Tigar, in the Oakland Courthouse, located at 1301 Clay Street, Oakland, California, or on
25 another date or at another location convenient to the Court and the parties, Defendants will move
26 under Federal Rule of Civil Procedure 62 and Northern District Civil Local Rule 7 for a stay of
27 the Court’s September 27, 2021 order mandating vaccinations for certain workers and
28

1 incarcerated persons in the California Department of Corrections and Rehabilitation's prisons.
2 (ECF No. 3684.)

3 Defendants' motion is based on this notice of motion, Defendants' supporting
4 memorandum of points and authorities, declarations of Connie Gipson and Diana Toche,
5 Defendants' Request for Judicial Notice, the pleadings, records and files in this action, and such
6 other matters as the Court may consider.

7
8 Dated: October 25, 2021

HANSON BRIDGETT LLP

9
10 By: /s/ Paul B. Mello

11 PAUL B. MELLO
12 SAMANTHA D. WOLFF
13 LAUREL O'CONNOR
14 DAVID C. CASARRUBIAS
15 Attorneys for Defendants

16
17 Dated: October 25, 2021

18 ROB BONTA
19 Attorney General of California

20 By: /s/ Damon McClain

21 DAMON MCCLAIN
22 Supervising Deputy Attorney General
23 IRAM HASAN
24 Deputy Attorneys General
25 Attorneys for Defendants

26
27
28 CA2001CS0001
42936458.docx

CERTIFICATE OF SERVICE

Case Name: Plata, et al. v. Newsom, et al.

No. 01-cv-01351-JST

I hereby certify that on October 25, 2021, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- 1. DEFENDANTS' NOTICE OF MOTION AND MOTION TO STAY ORDER RE MANDATORY VACCINATIONS (ECF NO. 3684) PENDING APPEAL**
- 2. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO STAY ORDER RE MANDATORY VACCINATIONS (ECF NO. 3684) PENDING APPEAL**
- 3. DECLARATION OF DIANA TOCHE, DDS, IN SUPPORT OF DEFENDANTS' MOTION TO STAY ORDER RE: MANDATORY COVID-19 VACCINATIONS (ECF NO. 3684) PENDING APPEAL**
- 4. DECLARATION OF CONNIE GIPSON IN SUPPORT OF DEFENDANTS' MOTION TO STAY ORDER RE: MANDATORY COVID-19 VACCINATIONS (ECF NO. 3684) PENDING APPEAL**
- 5. REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEFENDANTS' MOTION TO STAY ORDER RE: MANDATORY VACCINATIONS (ECF NO. 3684) PENDING APPEAL (w/ Exhibit A)**
- 6. [PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO STAY ORDER RE MANDATORY VACCINATIONS (ECF NO. 3684) PENDING APPEAL**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on October 25, 2021, at San Francisco, California.

N. Codling
Declarant

/s/ N. Codling
Signature

1 ROB BONTA
Attorney General of California
2 MONICA N. ANDERSON
Senior Assistant Attorney General
3 DAMON G. MCCLAIN
Supervising Deputy Attorney General
4 IRAM HASAN
Deputy Attorney General
5 State Bar No. 320802
455 Golden Gate Avenue, Suite 11000
6 San Francisco, CA 94102-7004
Telephone: (415) 510-3793
7 Fax: (415) 703-5480
E-mail: Iram.Hasan@doj.ca.gov

HANSON BRIDGETT LLP
PAUL B. MELLO - 179755
SAMANTHA D. WOLFF – 240280
LAUREL O’CONNOR – 305478
DAVID CASARRUBIAS – 321994
425 Market Street, 26th Floor
San Francisco, CA 94015
Telephone: (415) 777-3200
Facsimile: (415) 541-9366
E-mail: pmello@hansonbridgett.com

Attorneys for Defendants

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

MARCIANO PLATA, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

01-cv-01351-JST

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS’ MOTION TO STAY
ORDER RE MANDATORY
VACCINATIONS (ECF NO. 3684)
PENDING APPEAL**

Date: December 9, 2021
Time: 2:00 p.m.
Courtroom: 6, 2nd Floor
Judge: The Honorable Jon S. Tigar
Action Filed: April 5, 2001

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
Introduction	1
Updated Factual Background	3
Relevant Procedural Background	4
Argument	5
I. Defendants Are Likely to Succeed on the Merits of Their Appeal.	5
A. Defendants Are Likely to Succeed on the Merits of the Eighth Amendment Question.....	5
1. The Court Incorrectly Framed the Eighth Amendment Question and Heightened the Standard Defendants Must Satisfy.	6
2. The Court Disregarded Defendants’ Numerous Ongoing Mitigation Efforts to Reduce the Risk of COVID-19.....	10
3. The Court’s Ruling Disregarded Analogous Cases Defendants Cited and Misinterpreted the Scope of Defendants’ Safety Measures.....	13
4. The Court’s Unreasonableness Finding Disregards the Success of Defendants’ Efforts.	15
B. The Court Erred in Finding That the Receiver’s Proposed Mandatory Vaccination Policy Does Not Satisfy the PLRA’s Needs, Narrowness, Intrusiveness Requirement.....	16
II. Defendants Face Irreparable Harm.	19
III. The Balance of Equities Tips in Favor of a Stay.....	23
Conclusion.....	25

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

Abbassi v. INS
143 F.3d 513 (9th Cir.1998)..... 6

Bell v. Wolfish
441 U.S. 548 (1979)..... 9

Brown v. Plata
563 U.S. 493 (2011)..... 13, 17

Davis v. Allison
No. 1:21-cv-00494-HBK, 2021 U.S. Dist. WL 178740 (E.D. Cal. Sep. 18,
2021) 14

Davis v. Allison
No. 1:21-cv-00494-HBK, 2021 WL 3761216 (E.D. Cal. Aug. 25, 2021)..... 13, 14

Estelle v. Gamble
429 U.S. 97 (1976)..... 6, 13

Farmer v. Brennan
511 U.S. 825 (1994).....6, 7, 10, 12

Fraihat v. U.S. Immigration and Customs Enforcement
20-55634, 2021 WL 4890884 (9th Cir. Oct. 20, 2021) *passim*

Golden Gate Rest. Ass’n v. City of San Francisco
512 F.3d 1112 (9th Cir. 2008)..... 5

Helling v. McKinney
509 U.S. 25 (1993)..... 14

Hilton v. Braunskill
481 U.S. 770 (1987)..... 5, 6

Hollingsworth v. Perry
558 U.S. 183 (2010)..... 6

Leiva-Perez v. Holder
640 F.3d 962 (9th Cir. 2011)..... 5, 6

Nken v. Holder
556 U.S. 418 (2009)..... 23

TABLE OF AUTHORITIES

(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

Pell v. Proconier
417 U.S. 817 (1974)..... 9

Pride v. Correa
719 F.3d 1130 (9th Cir. 2013)..... 13

Tyler v. Murphy
135 F.3d 594 (8th Cir. 1998)..... 16

Wilson v. Seiter
501 U.S. 294 (1991)..... 14

Woodford v. Ngo
548 U.S. 81 (2006)..... 19

Zatko v. Rowland
835 F. Supp. 1174 (N.D. Cal. 1993)..... 13

STATUTES

United States Code, Title 18
§ 3626(a)(1)(A)..... 16

COURT RULES

Federal Rules of Civil Procedure
Rule 62(d)..... 5

OTHER AUTHORITIES

Cal. Corr. Health Care Services, *COVID-19 Screening and Testing Matrix for Patient Movement*, <https://cchcs.ca.gov/wp-content/uploads/sites/60/COVID19/Appendix13-PatientMovement.pdf> 12

Cal. Dep’t. Corr. & Rehabilitation, *Updates*, <https://www.cdcr.ca.gov/covid19/updates/> 11

INTRODUCTION

1
2 California has led the nation in responding to the COVID-19 pandemic. To this day, the
3 State's efforts to vaccinate all residents, implement stringent safety measures, and take calibrated,
4 but aggressive evidence-based actions to stem the spread of COVID-19 are a model for other
5 jurisdictions. With respect to the state prison system, Defendants have led the nation in
6 implementing strict masking and social distancing protocols, significantly decreasing the prison
7 population, and prioritizing the early vaccination of incarcerated people with the most effective
8 COVID-19 vaccines in the world. Unlike other state prison systems that de-prioritized their
9 incarcerated population for vaccination when vaccines were scarce, Defendants started these
10 efforts at the earliest possible time after the vaccine became available and continue to encourage
11 those who initially refused the vaccine to accept it. Nonetheless, even after Defendants
12 successfully vaccinated three-quarters of the incarcerated population (the percentage who have
13 accepted at least one dose now stands at seventy-nine percent), offered virtually every
14 incarcerated person vaccines, and went beyond most other states in mandating that workers in
15 correctional healthcare settings be vaccinated, this Court determined on September 27, 2021, that
16 Defendants are "deliberately indifferent" to the risks posed to inmates by COVID-19. Further,
17 the Court issued an unprecedented order mandating that Defendants vaccinate all correctional
18 workers (subject to medical and religious exemptions). Underscoring the unprecedented nature of
19 this order, no other prison system in the country is subject to such an order, and no federal court
20 has issued a similar order, before or since.

21 The Court's September 27 vaccine-mandate order far exceeds the Court's authority under
22 the Prison Litigation Reform Act (PLRA). Furthermore, this unprecedented intrusion into state
23 operations and responsibilities is likely to irreparably harm the administration of the state prison
24 system. As evidenced by the substantial level of staff resistance to the California Department of
25 Public Health's (CDPH) order mandating vaccination for a limited portion of workers in the
26 prisons (including a lawsuit filed in state court by correctional officers' labor representative, in
27 which CDPH and California Department of Corrections and Rehabilitation (CDCR) successfully
28

1 defended a preliminary injunction just last week), noncompliance with the court-ordered
2 statewide vaccination mandate is unfortunately inevitable. And while the CDCR and California
3 Correctional Health Care Services (CCHCS) both have contracts with outside healthcare service
4 providers to fill vacancies in healthcare positions that may arise because of people deciding to
5 quit or retire rather than comply with a vaccine mandate, there are no similar contracts for
6 correctional officers. Resulting shortages of correctional officers and other classifications of
7 prison workers that are likely to occur under the system-wide September 27 order will hurt
8 CDCR's ability to ensure safety and security in its prisons. The order is also likely to prove
9 harmful to class members because some prisons will likely need to reduce programming so that
10 the limited remaining staff can focus on providing essential and constitutionally mandated
11 services.

12 These irreparable harms cannot be justified by current circumstances or the record. The
13 current status of active cases and serious illness among class members shows that Defendants,
14 through their successful vaccine programs and myriad other measures to prevent the spread of
15 COVID-19, and through their efforts to provide the best possible treatments for patients who
16 contract it, have already greatly reduced the risks to class members. The level of active cases in
17 the prisons has remained relatively low since March 2021, recently hovering around 200 active
18 cases as compared to about 10,600 active cases in December 2020. And the number of serious
19 COVID-19 related illnesses that require hospitalization have remained especially low. Out of
20 about 99,000 class members, three are currently hospitalized because of a COVID-19 related
21 illness, as compared to 143 in January 2021. Out of the State's thirty-four operating prisons,
22 eighteen prisons currently have no active cases. And thanks to policies already in place, the
23 proportion of prison staff with at least one dose of vaccine is consistently increasing, jumping
24 from fifty-three percent to sixty-two percent just since August 9, 2021. In other words,
25 Defendants' current efforts to prevent the spread and reduce the risks of serious illness have been
26 working, and the court-ordered vaccine mandate is neither necessary nor proper at this time under
27 the law. Under these facts and a fair balancing of the various interests and rights at stake, the
28 Court should stay the vaccine-mandate order pending appeal.

UPDATED FACTUAL BACKGROUND

1
2 COVID-19 vaccines first became available in December 2020. Since that time, and without
3 a court order mandating that they do so, Defendants have vaccinated over 78,000 class members
4 and over 34,000 prison staff. (Decl. Toche Supp. Mot. Stay Defs.' Mot. Stay Mandatory Vaccine
5 Order (Decl. Toche Supp. Stay) ¶ 3.) Since the Court issued the August 9, 2021 order to show
6 cause, staff vaccinations have continued. In fact, well over 10,000 doses of vaccine were
7 administered to prison staff from August 9 through October 21. (*Id.*) The number of staff who
8 have received at least one dose of vaccine increased from about fifty-three percent on August 6,
9 2021, to about sixty-two percent on October 15, 2021. (*Id.*) Broken down by classification,
10 healthcare staff who are fully vaccinated increased from seventy-two percent on August 6, 2021,
11 to eighty-two percent on October 14, 2021; custody staff who are fully vaccinated increased from
12 forty-one percent on August 6, 2021, to fifty-one percent on October 14, 2021; and
13 administrative, maintenance, and operations staff who are fully vaccinated increased from sixty-
14 one percent on August 6, 2021, to sixty-seven percent on October 14, 2021. (*Id.*)

15 The full vaccination rate for the incarcerated population has also risen to about seventy-
16 seven percent as of October 15, 2021, compared to approximately seventy-six percent when the
17 Court issued the order to show cause on August 9. (*Id.* ¶ 5.) And consistent with the most
18 current public health guidance, CCHCS issued a policy on August 20, 2021 regarding third
19 booster doses of vaccine—shortly after the Centers for Disease Control and Prevention released
20 its recommendation for administering booster shots—and promptly started offering booster shots
21 to eligible immunocompromised patients and staff. (*Id.*) Over 700 eligible immunocompromised
22 patients had accepted a booster shot when Defendants filed their response to the Court's order to
23 show cause on August 30. (*Id.*) Since then, CCHCS has expanded booster-shot-eligibility
24 criteria to include all non-immunocompromised patients who have received two doses of the
25 Pfizer vaccine. (*Id.*) As of October 15, 5,540 currently eligible patients have been offered a
26 booster shot, and 4,996 have accepted it. (*Id.*) CCHCS continues to offer booster shots to
27 currently eligible patients. (*Id.*)
28

1 To reduce the risk of serious illness and hospitalizations, CCHCS has also provided
2 infected patients with the newest and most effective therapies where indicated. (*Id.* ¶ 6.) For
3 example, as of October 14, 2021, CCHCS had administered monoclonal antibody treatments to
4 483 patients. (*Id.* ¶ 7.)

5 Defendants' vaccination programs and other efforts have greatly reduced the risks of
6 infection among class members and as a result, the rates of serious illness are low. (*Id.* ¶ 6.) As
7 of October 24, 2021, out of a prison population of about 99,300, CCHCS reported three patient
8 hospitalizations and about 187 active cases, and that number has hovered around 200 active
9 COVID-19 cases for the past week. (*Id.*) Active-infection rates have remained relatively low
10 since March 2021. (*Id.*) By contrast, when vaccines first became available in December 2020,
11 there were over 10,000 active cases in the incarcerated population and there were 143 patient
12 hospitalizations. Since that time, CCHCS's efforts to vaccinate class members and staff,
13 combined with myriad other safety measures, have greatly reduced the number of active cases
14 and kept the rate of infection relatively low for months. (*Id.*)

15 RELEVANT PROCEDURAL BACKGROUND

16 On August 4, 2021, the Receiver filed a recommendation that (1) access by workers to
17 CDCR institutions be limited to those workers who establish proof of full COVID-19 vaccination
18 or establish a religious or medical exemption to vaccination, and (2) incarcerated persons who
19 desire to work outside of the institution or to have in-person visitation must be fully vaccinated
20 against COVID-19 or establish a religious or medical exemption. (ECF No. 3638.) On August 9,
21 2021, the Court issued an order to show cause why it should not order Defendants to implement
22 the Receiver's recommendation and ordered briefing by the parties. (ECF No. 3647.)
23 Defendants, Plaintiffs, and intervener California Correctional Peace Officers Association filed
24 responsive briefs on August 30, 2021 (ECF Nos. 3660, 3663, 3664) and reply briefs on
25 September 10, 2021 (ECF Nos. 3673, 3674, 3669.) The Receiver also filed a reply brief on
26 September 10, 2021. (ECF No. 3670.)

27 The Court heard oral argument regarding the order to show cause on September 24, 2021,
28 and filed an order on September 27, 2021, requiring Defendants to implement the Receiver's

1 recommendation and to work with the Receiver to submit an implementation plan within fourteen
2 days. (ECF No. 3684.) On October 12, Defendants and the Receiver submitted an
3 implementation plan to comply with the Court’s order, but Defendants specifically noted that they
4 did not agree with the timeline presented in the plan, “continue[d] to have serious reservations
5 about implementing the Receiver’s broad mandatory vaccine recommendation due to the impact
6 of implementing this plan on staffing and operations statewide,” and were also considering filing
7 a motion to stay implementation of the September 27 order. (ECF No. 3694 at 2, 5.)

8 ARGUMENT

9 This Court is authorized under Federal Rule of Civil Procedure 62 to stay its vaccine-
10 mandate order to ensure that Defendants’ rights are secured pending appeal. Fed. R. Civ. P.
11 62(d). In considering motions for stays pending appeal, the Ninth Circuit has adopted the factors
12 enumerated in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987): “(1) whether the stay applicant has
13 made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be
14 irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the
15 other parties interested in the proceeding; and (4) where the public interest lies.” *Golden Gate*
16 *Rest. Ass’n v. City of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008) (quoting *Hilton*, 481
17 U.S. at 776) (internal quotations omitted).

18 This Court analyzes the first two factors on a “sliding scale in which the required degree of
19 irreparable harm increases as the probability of success decreases.” *Golden Gate*, 512 F.3d at
20 1116. A party may also establish the first two *Hilton* factors by showing (1) that there are serious
21 legal questions regarding the merits, and (2) the balance of hardships tips sharply in the moving
22 party’s favor. *Id.* at 1115–16.

23 I. DEFENDANTS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR APPEAL.

24 A. Defendants Are Likely to Succeed on the Merits of the Eighth Amendment 25 Question.

26 For the purposes of a stay motion, the success-on-the-merits standard requires a “reasonable
27 probability” of success, a “fair prospect” of success, a showing of a “substantial case on the
28 merits,” or a showing that “serious legal questions are raised.” *Leiva-Perez v. Holder*, 640 F.3d

1 962, 967-68 (9th Cir. 2011) (quoting *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *Hilton*,
 2 481 U.S. at 778; and *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir.1998). Each of these
 3 formulations of the standard is interchangeable. (*Id.*)

4 Defendants satisfy this standard because they have more than shown that they have a “fair
 5 prospect” of success on appeal and that they have raised “serious legal questions.” *Leiva-Perez*,
 6 640 F.3d at 967-98 (citations omitted). Despite acknowledging Defendants’ robust, multilayered
 7 efforts to protect the incarcerated population in its September 27, 2021 order (*see* ECF No. 3684
 8 at 2:21-3:1, 3:22-4:9), the Court’s ruling largely did not factor those efforts into the analysis that
 9 followed. And the Ninth Circuit’s recent decision in *Fraihat v. U.S. Immigration and Customs*
 10 *Enforcement*, 20-55634, 2021 WL 4890884, at *1 (9th Cir. Oct. 20, 2021), helps to highlight the
 11 defects in the Court’s Eighth Amendment analysis.

12
 13 **1. The Court Incorrectly Framed the Eighth Amendment Question and
 Heightened the Standard Defendants Must Satisfy.**

14 Under the subjective prong of the deliberate indifference analysis, prison officials must
 15 know of and disregard “an excessive risk to inmate health or safety” for the court to find a
 16 violation of a federal right. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The state of mind
 17 required for deliberate indifference equates to the *mens rea* element for criminal recklessness. *Id.*
 18 at 839-40. Accordingly, courts must “focus[] on what a defendant’s mental attitude actually was
 19 (or is), rather than what it should have been (or should be).” *Id.* at 839. This standard is exacting,
 20 and courts have rejected attempts to dilute it. *See Estelle v. Gamble*, 429 U.S. 97, 106-08 (1976)
 21 (“insufficient treatment, malpractice, or negligence does not amount to a constitutional
 22 violation.”). When officials respond reasonably to a risk of harm, there is no Eighth Amendment
 23 violation even if the harm is not averted. *Farmer*, 511 U.S. at 844.

24 The Court failed to correctly apply this well-established standard. According to the Court,
 25 “the issue is not whether mandatory vaccinations are merely a further step Defendants could take,
 26 but whether it would be unreasonable not to take it.” (ECF No. 3684 at 18:17-18.) But by
 27 focusing solely on Defendants’ decision *not* to implement the Receiver’s recommended
 28 vaccination policy—which the Court appears to think is the best policy choice—instead of

1 determining whether all the measures Defendants *are* implementing (including CCHCS’s own
2 vaccination policies)—ensure “reasonable safety” of the incarcerated population under the Eighth
3 Amendment, the Court improperly heightened the standard Defendants must meet to satisfy the
4 Eighth Amendment. *Farmer*, 511 U.S. at 844. Focusing only on the potential benefits of
5 mandatory vaccinations for staff and some inmates, the Court simply disregarded all of the
6 mitigation measures that Defendants implemented earlier in the pandemic and continue to
7 implement today, and therefore failed to assess the evidence of Defendants’ actual mental
8 attitudes, as required by *Farmer*. These measures include taking aggressive steps to vaccinate the
9 incarcerated population and staff starting as early as vaccines became available in December 2020
10 (Decl. Toche Supp. Defs.’ Response to Order to Show Cause, ECF No. 3662 at ¶ 8), offering
11 incentives to increase acceptance among both the incarcerated population and staff (ECF No.
12 3660 at 17-18), offering booster shots in accordance with recent public health guidance (Decl.
13 Toche Supp. Defs.’ Response to Order to Show Cause, ECF No. 3662 at ¶ 3), requiring all
14 correctional staff to verify that they are vaccinated or submit to bi-weekly testing consistent with
15 CDPH’s July 26 public health order, and implementing a vaccine mandate for staff assigned to
16 licensed health care settings within correctional institutions pursuant to CDPH’s August 19, 2021
17 order (ECF Nos. 3657, 3657-1).

18 The Eighth Amendment requires prison officials to *reasonably* abate the risk, not to
19 completely eliminate it. *Farmer*, 511 U.S. at 844. Defendants have more than adequately
20 demonstrated reasonable efforts to abate the risk of COVID-19, and these efforts are ongoing and
21 evolving.

22 The Ninth Circuit reiterated the correct deliberate-indifference standard in *Fraihat*, 20-
23 55634, 2021 WL 4890884, at *1, in an opinion published this month. *Fraihat* was brought by
24 detainees in the custody of the United States Immigration and Customs Enforcement (ICE), and
25 asserted deliberate indifference to the risks of COVID-19 in ICE’s detention facilities. After the
26 district court found that the plaintiffs had shown a likelihood of success on the merits and issued a
27 preliminary injunction covering all ICE detention facilities, ICE appealed the district court’s
28 ruling. The Ninth Circuit, after exhaustively assessing *all* of ICE’s many efforts to respond to the

1 risks from the virus, concluded that the district court had not correctly applied the deliberate
2 indifference standard. *Id.* at *5-*12, *19-*25.

3 In reaching that conclusion, the Court made several points that are instructive here. First, a
4 finding of deliberate-indifference must satisfy the “formidable” reckless-disregard standard. *Id.*
5 at *19. That standard reflects “the core principle, grounded in the separation of powers, that far-
6 reaching intrusion in matters initially committed to a coordinate Branch requires a
7 commensurately high showing sufficient to warrant such a significant exercise of judicial power.”
8 *Id.* at *4. Here, that high standard would require a finding that Defendants, despite all of their
9 efforts throughout the pandemic, including their extensive vaccination of class members and
10 prison staff, have acted with reckless disregard to the safety of class members.

11 Although it was far from a complete list, the Court recognized, that the record demonstrates
12 Defendants implemented the following measures and programs during the course of the pandemic
13 to reduce the risk of harm: (1) significant population reduction measures; (2) temporary
14 suspensions of county intake; (3) temporary suspensions of visiting; (4) masking mandates; (5)
15 distancing mandates; (6) enhanced cleaning protocols; (7) quarantine and isolation protocols; (8)
16 measures to assess and improve ventilation systems; (9) specialized teams and command centers
17 to manage outbreak-response efforts; (10) patient screening, testing, and movement protocols;
18 (11) staff testing mandates; (12) patient and staff vaccination programs; and (13) incentive
19 measures to increase vaccination rates. (ECF No. 3684 at 1-3.) The Court further found that
20 Defendants supported efforts to offer vaccines to class members before many jurisdictions
21 followed suit. (*Id.* at 4.) This record simply does not support a ruling that Defendants acted with
22 reckless disregard toward the risks of COVID-19 to the incarcerated population.

23 Second, *Fraihat* correctly recognized that the “constitutional line” cannot be drawn based
24 on “a court’s idea of how best to operate a detention facility.” 20-55634, 2021 WL 4890884, at
25 *24. With that principle in mind, *Fraihat* concluded that, regardless of whether the district court
26 considered ICE’s own policy “as strong, fair, needing improvement, or something else, it simply
27 cannot be described . . . as a reckless disregard of the very health risks it forthrightly identified
28 and directly sought to mitigate.” *Id.* at *21. This is precisely the sort of policy second-guessing

1 the Court engaged in with this ruling. Among myriad other COVID-19 prevention measures,
2 Defendants implemented vaccination policies that have resulted in tens of thousands of class
3 member and staff vaccinations throughout a large and complex prison system. Yet the Court did
4 not frame the issue as whether, despite implementing these extensive prevention and vaccination
5 policies, Defendants acted with reckless disregard to the safety of class members. Instead, the
6 Court evaluated whether Defendants' vaccination policy "neede[ed] improvement," *id.*, and
7 concluded that Defendants are deliberately indifferent because their existing vaccination policies
8 could have gone further. But as *Fraihat* explained, the fact that a court might believe that a
9 policy could have been stronger or that a modified policy could have done a better job of
10 mitigating risks does not convert a party's conduct into deliberate indifference. *Id.*

11 Third, *Fraihat* reiterated that the deliberate indifference standard is informed by important
12 principles of deference to the political branches of government in cases concerning detention and
13 correctional facilities, especially when facing "a public health crisis unlike any that we have
14 encountered in our time." *Fraihat* at *21; *see also Bell v. Wolfish*, 441 U.S. 548, 520, 531 (1979)
15 ("[T]he operation of our correctional facilities is peculiarly the province of the Legislature and
16 Executive Branches of our Government, not the Judicial," and "courts are ill equipped to deal
17 with the increasingly urgent problems of prison administration,' . . . it would 'not [be] wise for
18 [it] to second-guess the expert administrators on matters on which they are better informed.'" (quoting *Pell v. Procunier*, 417 U.S. 817 (1974))). "When combined with the exigencies of a
19 global pandemic, these core principles, grounded in the Constitution's separation of powers, must
20 in this context necessarily inform the deliberate indifference standard and the scope of appropriate
21 injunctive relief." *Fraihat* at *25.

22
23 The Ninth Circuit was particularly troubled by the fact that as "ICE was in the middle of
24 confronting an unprecedented and evolving public health problem, it found its nationwide policies
25 almost immediately subject to judicial revision." *Fraihat* at *4. This is precisely Defendants'
26 predicament. In the middle of combatting a pandemic with evolving measures and policies,
27 including evolving policies on vaccinations, the Court's ruling usurped the political branch's
28 ability to make its own informed decisions on how to proceed, including the best way to keep

1 inmates safe from COVID-19, while also maintaining security within the prisons and ensuring
2 inmate access to medical and mental health care services and educational and rehabilitative
3 programming. As *Fraihat* stated, the deliberate-indifference standard recognizes that the
4 executive “must have some discretion in addressing a complex problem like the one before us.”
5 *Id.* at 24.

6 The Court’s application of incorrect legal standards raises a substantial case for relief on the
7 merits on appeal.

8 **2. The Court Disregarded Defendants’ Numerous Ongoing Mitigation**
9 **Efforts to Reduce the Risk of COVID-19.**

10 The Court summarized a number of the safety measures Defendants implemented during
11 the course of the pandemic at the beginning of its order where it found that Defendants
12 implemented several early release programs (resulting in the early release of approximately
13 11,655 inmates since the start of the pandemic), a temporary suspension of county jail intake and
14 visitation, masking and distancing requirements, advanced cleaning protocols, ventilation
15 improvement efforts, centralized command centers and multidisciplinary teams to oversee
16 response efforts to outbreaks, movement protocols to reduce the risk of virus transmission, staff
17 testing procedures, quarantine and isolation procedures, programs to vaccinate all staff and
18 incarcerated people, incentive measures to increase vaccine acceptance, and the provision of
19 additional vaccine doses for immunocompromised incarcerated people in accordance with
20 updated public health guidance. (*See* ECF No. 3684 at 2:21-3:1, 3:22-4:9.)

21 But the Court then stated that it was unpersuaded by past efforts because under the
22 deliberate-indifference standard, it need only consider Defendants’ current attitude and conduct.
23 (*Id.* at 11.) The Court’s reasoning misses the fact that many of these efforts are ongoing, and
24 therefore do reflect Defendants’ current attitudes and current conduct. Had the Court considered
25 Defendants’ numerous efforts to reduce the risks of COVID-19 that are ongoing, it could not have
26 found a violation given the Eighth Amendment’s exacting standards: to violate the Eighth
27 Amendment, prison officials must know of a substantial risk of serious harm to an incarcerated
28 person’s health or safety, and disregard it. *Farmer*, 511 U.S. at 837.

1 That the Court ignored Defendants’ extensive and ongoing COVID-19 prevention policies
2 is illustrated by the Court’s assertion that Defendants did not “present any evidence that it would
3 be reasonable not to address the introduction of the virus into the prisons.” (ECF No. 3684 at
4 19:12-13.) This statement seems to assume that Defendants are currently making no efforts to
5 address the introduction of the virus into the prisons, which is incorrect. Defendants *are*
6 addressing the introduction of the virus into the prisons through a multilayered approach, because
7 no single measure is enough to combat the risks of COVID-19. (ECF No. 3660 at 11:10-16.) For
8 example, Defendants require workers entering the prisons to present proof of vaccination. (*Id.* at
9 16:18-20.) Workers who cannot show proof of vaccination must be tested for COVID-19 twice
10 per week. (*Id.*) And regardless of vaccination status, each person entering the prisons must wear
11 a procedure, N95, or KN95 mask at all times. (Decl. Toche Sup. Defs’ Response to Order to
12 Show Cause at ¶ 18, ECF No. 3662 at 7:5-10.) Additionally, Defendants’ stringent movement
13 protocols, which include testing and quarantining incarcerated people arriving from county jails,
14 are also designed to prevent the introduction of COVID-19 into the prisons. (ECF No. 3660 at
15 8:23, 8:26, 9:24-10:6.)¹ CDCR and CCHCS’s implementation of the CDPH’s vaccine-mandate
16 requirements for healthcare settings and ongoing efforts to increase staff-vaccination rates
17 generally should also have been considered, along with the recent implementation of a booster
18 vaccine policy for eligible patients. Any conclusion that Defendants have not exhibited *current*
19 *conduct* taking aggressive action to prevent the introduction of the virus into the prisons cannot be
20 reconciled with these facts.

21 Furthermore, the measure of Defendants’ current attitudes and conduct should not be
22 limited to their efforts to prevent the introduction of the virus. Thus, the Court should also have
23 considered that if the virus does enter a prison, Defendants’ policies require that the affected
24 prison activate an incident command post staffed by both healthcare and custody staff to
25 coordinate and manage all operational activities related to outbreak response efforts designed to
26 mitigate the risk. (*Id.* at 10:25-27.) These efforts include the implementation of quarantine and

27 ¹ See ECF Nos. 3660, 3662, and 3673-1 for more information regarding CDCR’s COVID-
28 19 response efforts to date. See also Cal. Dep’t. Corr. & Rehabilitation, *Updates*,
<https://www.cdcr.ca.gov/covid19/updates/> (last visited Oct. 21, 2021).

1 isolation procedures and testing of incarcerated people and staff at a higher frequency until the
2 outbreak abates. (*Id.* at 15:7-9.) Prisons experiencing outbreaks also do not accept intake and,
3 with very limited exception, do not transfer incarcerated people to other locations until the
4 outbreak has resolved. (*See, e.g., id.* at 8:15, 10:15-16; *see also* Cal. Corr. Health Care Services,
5 *COVID-19 Screening and Testing Matrix for Patient Movement*, [https://cchcs.ca.gov/wp-](https://cchcs.ca.gov/wp-content/uploads/sites/60/COVID19/Appendix13-PatientMovement.pdf)
6 [content/uploads/sites/60/COVID19/Appendix13-PatientMovement.pdf](https://cchcs.ca.gov/wp-content/uploads/sites/60/COVID19/Appendix13-PatientMovement.pdf) (last updated Sept. 22,
7 2021.) Heightened cleaning procedures continue at the same time. (ECF No. 3660 at 8:21-22.)

8 The Court erred in concluding that Defendants’ multilayered response to the pandemic,
9 which includes robust vaccination programs, is deliberately indifferent. (ECF No. 3684 at 11:9-
10 10.) Indeed, although Defendants implemented many of these measures before vaccines became
11 available, these measures are continuing because they help limit the introduction of COVID-19
12 into CDCR’s prisons and help abate the risk of COVID-19 if it is introduced into a prison. These
13 measures are relevant to an analysis of Defendants’ *current* attitudes and conduct because these
14 efforts are currently ongoing. The Eighth Amendment demands *reasonableness* in the face of a
15 substantial risk of serious harm, not a complete elimination of the risk. *See Farmer*, 511 U.S. at
16 822-23. And here, Defendants’ proactive approach to outbreak prevention and management is
17 reasonable. But even if complete elimination of the risk were the correct standard, no record
18 evidence supports the conclusion that the remedy the Court ordered would actually effectuate that
19 goal.

20 The Court further rejected Defendants’ argument regarding unvaccinated incarcerated
21 people, concluding that it “fail[s] to consider that it is not only the unvaccinated population that is
22 at substantial risk of serious harm from COVID-19, and that such risk would be present even if
23 the entire incarcerated population were vaccinated.” (ECF No. 3684 at 9:2-4.) But the record
24 makes clear that Defendants take risks to the vaccinated population extremely seriously. As
25 discussed above and in Defendants’ response to the Court’s order to show cause (*see* ECF No.
26 3660 at 7:25-11:9, 17:6-18:11), Defendants continue to implement numerous safety measures
27 applicable to the vaccinated and unvaccinated alike, in addition to ongoing efforts to increase
28 class member vaccinations. (*Id.*) Because Defendants implement safety measures to address the

1 risk of COVID-19 to both vaccinated and unvaccinated incarcerated people, the Court erred in
2 finding that they disregard the risk the virus poses to vaccinated people.

3
4 **3. The Court’s Ruling Disregarded Analogous Cases Defendants Cited
and Misinterpreted the Scope of Defendants’ Safety Measures.**

5 Defendants supported their position regarding the Court’s order to show cause with recently
6 decided cases that analyzed prison officials’ COVID-19 response efforts and compliance with the
7 Eighth Amendment. (ECF No. 3660 at 5:3-15; ECF No. 3673 at 6:8-7:3.) For example,
8 Defendants argued that unvaccinated people are most vulnerable to the harmful effects of
9 COVID-19, and prison officials do not violate the Eighth Amendment if incarcerated people
10 refuse to accept the vaccine. *See, e.g., Zatko v. Rowland*, 835 F. Supp. 1174, 1178 (N.D. Cal.
11 1993) (incarcerated person’s refusal to accept medical care did not amount to a denial or delay of
12 medical care or harm by prison officials) (citing *Estelle*, 429 U.S. at 104-05 (1977)). The Court,
13 however, dismissed these cases with a cursory citation to *Pride v. Correa*, 719 F.3d 1130, 1132
14 (9th Cir. 2013), finding that the cases Defendants relied on sought “individual injunctive relief,
15 rather than the type of systemic relief sought here.” (ECF No. 3684 at 8:24-9:2.)

16 But in *Pride*, the Ninth Circuit drew the distinction between individual and systemic claims
17 to reject prison officials’ argument that relief for the plaintiff’s individual medical claim was
18 already being provided in the *Plata* class action. 719 F.3d at 1132. The Ninth Circuit reversed
19 the district court’s dismissal of the plaintiff’s individual claim, holding that “*Plata* does not bar
20 the prisoner’s claim for injunctive relief.” *Id.* at 1137. The Ninth Circuit reasoned that because
21 the plaintiff’s “claim for injunctive relief concerns only his individual medical care, his claim is
22 not already encompassed in the *Plata* litigation, which seeks systemic reform of medical care in
23 California prisons.” *Id.* *Pride* neither finds nor suggests that analyses in individual cases are
24 irrelevant to issues in matters seeking “systemic relief.” Accordingly, the Court erred in
25 disregarding most of the cases Defendants cited on this issue.

26 Defendants also cited a recent decision in an Eighth Amendment case brought by an
27 individual incarcerated person, in which the Eastern District held the plaintiff was unlikely to
28 succeed on the merits of his Eighth Amendment claim. *Davis v. Allison*, No. 1:21-cv-00494-

1 HBK, 2021 WL 3761216 at *6 (E.D. Cal. Aug. 25, 2021), *report and recommendation adopted*,
2 2021 WL 4262400 (E.D. Cal. Sept. 20, 2021) (denying motion for preliminary injunction) (citing
3 *Helling v. McKinney*, 509 U.S. 25, 32 (1993) and *Wilson v. Seiter*, 501 U.S. 294, 304 (1991)). The
4 Court rejected this case as unpersuasive because Defendants did not rebut the Receiver’s and
5 Plaintiffs’ evidence “that the harms faced by vaccinated incarcerated persons are substantial and
6 not speculative,” whereas in *Davis*, the Eastern District found that the harm the plaintiff alleged
7 was speculative at best. ECF No. 3684 at 8-9 n.3. However, the Court overlooked the Eastern
8 District’s analysis of CDCR’s pandemic response efforts, which formed the basis of its
9 conclusion that the plaintiff failed to satisfy the subjective prong of the deliberate indifference
10 standard regarding “whether three COVID-19 protocols in place at Pleasant Valley subject
11 Plaintiff to unconstitutional conditions of confinement under the Eighth Amendment.” *See Davis*,
12 2021 WL 3761216 at *4.

13 The Eastern District’s analysis included consideration of a number of CDCR’s pandemic
14 response efforts, including social distancing, mask-wearing, the availability of N95 masks and
15 cleaning supplies, COVID-19 testing, and quarantine and isolation protocols that include
16 immediately rehousing incarcerated people who test positive and medical checks of incarcerated
17 people in quarantine and isolation. *Id.* at *5-6. The Eastern District further noted that “other
18 federal courts have found similar measures by correctional officials in comparable circumstances
19 to be reasonable and not violative of the Eighth Amendment.” *Id.* at *6 (citations omitted).
20 Taking into consideration the additional fact that the plaintiff “received the [COVID-19] vaccine
21 as requested[,]” the Eastern District concluded “[t]he protocols challenged by Plaintiff fall far
22 short of denying him his basic human needs.” *Id.*

23 Despite much discussion regarding the objective prong of the deliberate indifference
24 standard and whether COVID-19 creates the substantial risk of serious harm—a fact Defendants
25 have never disputed, in this litigation or throughout the pandemic—that is not the dispositive
26 issue. In this matter, the subjective prong is dispositive: that is, whether Defendants *reasonably*
27 address the risk presented by COVID-19. The Eastern District’s analysis, published in August
28 2021 in the midst of the parties’ briefing in response to the Court’s order to show cause, is clearly

1 applicable to the issue of whether Defendants’ pandemic response efforts violate the Eighth
2 Amendment and should not have been disregarded.

3 Accordingly, a substantial case on the merits exists, warranting a stay of the Court’s
4 September 27, 2021 order.

5 **4. The Court’s Unreasonableness Finding Disregards the Success of**
6 **Defendants’ Efforts.**

7 The Court also supported its deliberate indifference by arguing that the scope of the
8 California Department of Public Health’s (CDPH) August 19 public health order, which
9 mandated vaccination for certain healthcare workers in correctional settings, was inadequate. The
10 Court analyzed public health science and the logic of CDPH’s policy decision, and found that
11 “[g]iven recent outbreaks, there is no doubt that the limited vaccine requirements adopted by
12 Defendants are insufficient ‘to ensure reasonable safety.’” (ECF No. 3684 at 15:5-7.) The Court
13 erred in reaching this conclusion for two reasons.

14 First, the Court’s order does not acknowledge the drastic reduction in COVID-19 cases
15 since Defendants introduced vaccines into their arsenal of mitigation measures. In assessing the
16 risk CDCR’s incarcerated population faces from the virus, the Court examined the number of
17 outbreaks in the months preceding its order (*id.* at 13:4-8), but it considered neither the magnitude
18 nor the outcomes of those outbreaks, and did not differentiate the magnitude or outcomes of
19 outbreaks that occurred before CCHCS successfully vaccinated upwards of seventy-nine percent
20 of the incarcerated population with at least one dose of vaccine. This data was included in
21 Defendants’ briefing: the number of COVID-19 cases among CDCR’s incarcerated population
22 peaked at 10,617 on December 22, 2020, when vaccines first became available, and declined to
23 101 positive cases by September 9, 2021, when approximately seventy-nine percent of the
24 incarcerated population was at least partially vaccinated. (*See* Declaration of Connie Gipson,
25 ECF No 3673-1 at 2, ¶ 3; Decl. Toche Supp. Mot. Stay ¶ 6.) Additionally, as of October 24,
26 2021, three out of approximately 99,300 incarcerated people were hospitalized for COVID-19-
27 related reasons, compared to 143 hospitalizations on January 5, 2021. (Decl. Toche Supp. Mot.
28 Stay ¶ 6.)

1 Second, contrary to the Court’s finding that “[n]either Defendants nor CCPOA offer any
2 evidence suggesting that further voluntary efforts will be any more successful,” (ECF No. 3684 at
3 20:12-13), Defendants submitted evidence that staff vaccine acceptance rates increased by five
4 percent during months when incentives were offered (ECF No. 3660 at 18:14-20). On this basis,
5 Defendants urged the Court to allow recently introduced policies, including public health orders
6 designed, in part, to increase staff vaccination rates, to be fully implemented. (*Id.* at 17:8-9,
7 17:14-22, 18:26-24:2.) And as Defendants predicted, staff vaccination rates have continued to
8 rise. Well over 10,000 doses of vaccine were administered to prison staff after the Court issued
9 the order to show cause on August 9 through October 21, 2021. (Decl. Toche Supp. Mot. Stay ¶
10 3.) The number of staff who have received at least one dose of vaccine increased from about
11 fifty-three percent on August 6, 2021, to about sixty-three percent by October 14, 2021. (*Id.*)
12 And the vaccination rates among custody staff have increased from about forty-one percent to
13 fifty-one percent in the same period. (*Id.*)

14 Additionally, the number of positive COVID-19 cases across CDCR’s institutions has
15 remained relatively low in recent months. As of October 25, CCHCS reported 187 active cases
16 among CDCR’s population of approximately 99,300, and cases have recently hovered around
17 200. (Decl. Toch Supp. Mot. Stay ¶ 6)

18 Accordingly, the Court erred in concluding that Defendants are deliberately indifferent by
19 failing to consider Defendants’ success in mitigating the risks and increasing vaccinations
20 through their current efforts and policies.

21 **B. The Court Erred in Finding That the Receiver’s Proposed Mandatory**
22 **Vaccination Policy Does Not Satisfy the PLRA’s Needs, Narrowness,**
23 **Intrusiveness Requirement.**

24 A Court may not grant prospective relief under the Prison Litigation Reform Act (PLRA)
25 unless that “relief is narrowly drawn, extends no further than necessary to correct the violation of
26 the Federal right, and is the least intrusive means necessary to correct the violation of the Federal
27 right.” 18 U.S.C. ¶ 3626(a)(1)(A). The Court lacks the authority to order prospective relief
28 because, as discussed above, Defendants’ response to the COVID-19 pandemic does not violate
the Eighth Amendment. *See Tyler v. Murphy*, 135 F.3d 594, 596 (8th Cir. 1998) (“The PLRA

1 limits remedies to those necessary to remedy the proven violation of federal rights”) (quotation
2 marks and citations omitted). But even if there were a violation, the Court erred in finding that
3 the Receiver’s proposal satisfied the PLRA’s restrictions on prospective relief.

4 The goal of the Receiver’s policy is to ensure the safety of the incarcerated population, and
5 the Receiver’s own data demonstrates that *being* vaccinated is the single safest way to protect
6 one’s self from a serious COVID-19 infection. (ECF No. 3638 at 5, 22.) Because “narrow
7 tailoring requires a fit between the [remedy’s] ends and the means chosen to accomplish those
8 ends,” a more narrowly tailored solution would be to vaccinate all class members before
9 evaluating the necessity for a vaccine mandate addressing everyone else. *Brown v. Plata*, 563
10 U.S. 493, 531 (2011) (quotation marks and citations omitted).

11 The Court dismissed Defendants’ argument that vaccinating the roughly 20,000
12 unvaccinated class members is a far more narrowly tailored plan than mandating vaccination for
13 virtually all CDCR prison workers instead, stating that “neither the Receiver nor any party has
14 recommended that vaccination be required for all incarcerated persons, and so that question is not
15 before the Court.” (ECF No. 3684 at 19:9-11.) This was clear error because the availability of
16 that option is indisputably relevant to whether the Receiver’s recommendation meets the PLRA’s
17 standards, regardless of whether any party formally recommended it.

18 However, now the Receiver *has* indicated an intention to mandate vaccination for all class
19 members. The very last sentence of the Court’s vaccine-mandate order requested that the
20 Receiver “consider efforts to increase the vaccination rate among the incarcerated population,
21 including whether a mandatory vaccine policy should be implemented.” And at the October 14,
22 2021 intervention hearing, the Receiver’s counsel stated: “Your Honor, you asked the receiver to
23 consider efforts to increase the vaccination rate among the incarcerated population. We are
24 considering that, and we are developing a plan that we think effectively will read that all
25 incarcerated persons becoming vaccinated, subject to religious and -- and medical exemptions.
26 That plan is still in development, but we will submit a plan to the court.” Tr. Intervention Hr’g,
27 15-16, Oct. 14, 2021. This demonstrates that the Receiver is working on a more narrowly tailored
28

1 plan that should be implemented and evaluated before the Court requires the extreme measure of
2 mandatory vaccinations for all prison staff.

3 The Court also found flaw in Defendants' argument because they "do not contest the
4 continued risk of harm to *vaccinated* incarcerated persons," but omitted evidence in the record of
5 Defendants' extensive efforts to reduce the risk posed by COVID-19 to those vaccinated people.
6 (*Id.* at 19:11-12.) As noted above, this argument is based on an assumption, which is flatly
7 contradicted by the record, that vaccinated incarcerated persons can be completely protected from
8 COVID-19—using the Court's own logic that vaccinated persons may still contract COVID-19,
9 the risk of exposure remains even if every worker were vaccinated because they likewise can still
10 contract and transmit the disease (as can workers granted exemptions under the Receiver's
11 recommendation). Moreover, the Court did not reach the ultimate conclusion clearly supported
12 by the record that no safety measure will protect unvaccinated incarcerated people as well as if
13 they themselves are vaccinated—not even the Receiver's proposal to require the vaccination of
14 those who work near them (while allowing exemptions for religious beliefs and medical reasons).
15 Indeed, the Court overlooked Defendants' argument that, unlike school-age children under age 12
16 who are ineligible for vaccination based on their age, no class member is age-barred from
17 receiving the vaccine. (ECF No. 3660 at 14-15.)

18 Additionally, the Court conceded that CDPH's August 19, 2021 public health order
19 requiring certain healthcare staff to be vaccinated "is more narrow and would be less intrusive
20 than the Receiver's recommendation," but nonetheless rejected it because it "was not intended to
21 address the risk of introduction of the virus by staff into the institutions or even to protect the
22 incarcerated population in anything other than healthcare settings." (ECF No. 3684 at 20:2-4,
23 20:24-26.) As discussed above, that plan had not been fully implemented at the time the Court
24 ruled, and the Court simply speculated that it would not adequately protect Plaintiffs. Indeed,
25 contrary to the Court's conclusion that no "evidence suggest[ed] that further voluntary efforts will
26 be any more successful" (*id.* at 20:12-13), staff vaccination rates have increased from fifty-three
27 to sixty-three percent since the Court issued its order to show cause, and COVID-19 infection
28

1 rates among the incarcerated population remain exponentially lower than in December 2020 when
2 vaccines first became available. (Decl. Toche Supp. Defs.’ Mot. Stay at ¶¶ 3-6.)

3 The Court erred in selectively applying evidence in the record to conclude that “none of the
4 alternatives suggested by Defendants . . . would correct the violation of Plaintiffs’ Eighth
5 Amendment rights identified in this order,” and that the Receiver’s recommendation complies
6 with the PLRA’s restrictions on prospective relief. Defendants are likely to succeed on the merits
7 of their appeal for the reasons discussed above.

8 **II. DEFENDANTS FACE IRREPARABLE HARM.**

9 It is “difficult to imagine an activity in which a State has a stronger interest, or one that is
10 more intricately bound up with state laws, regulations, and procedures, than the administration of
11 its prisons.” *Woodford v. Ngo*, 548 U.S. 81, 94 (2006). The Court’s unprecedented vaccine-
12 mandate order irreparably injures Defendants by interfering with the operations and
13 responsibilities of the State. And by interfering with the State’s ability to properly staff and run
14 its prison system, the vaccine-mandate order threatens to significantly impede the State’s ability
15 to fulfill its responsibilities under state and federal law. This unprecedented intrusion into state
16 policymaking, outside the confines of the PLRA, alone suffices to establish irreparable harm.

17 Recent experience at two of CDCR’s prisons—California Medical Facility (CMF) in
18 Vacaville and California Health Care Facility (CHCF) in Stockton—also confirm Defendants’
19 concerns about the irreparable operational harms that the requirement to vaccinate all correctional
20 officers with no testing option will likely cause. (Decl. Gipson Supp. Defs.’ Motion Stay ¶ 8.)
21 As medical prisons, CMF and CHCF are subject to the order issued by CDPH in August 2021
22 mandating that all staff at CMF and CHCF, including all correctional officers, be vaccinated by
23 October 14, 2021. (*Id.*) As of October 25, 2021—eleven days past the deadline for mandatory
24 compliance with CDPH’s order—78 (8.26%) of CHCF correctional officers, and 72 (10.14%) of
25 CMF correctional officers had neither complied by taking the vaccine nor sought a medical or
26 religious exemption. (*Id.*) The high levels of noncompliance indicate that substantial numbers of
27 officers are refusing to comply with the CDPH order. (*Id.*) The staggering number of religious
28 accommodation requests that CDCR has received from across the state’s prisons in response to

1 the CDPH order further indicate that staff resistance to the vaccine-mandate order will be
2 substantial. (*Id.* ¶ 11.) As of October 15, 2021, CDCR has received 1,738 religious
3 accommodation requests in response to the CDPH order across multiple classifications of prison
4 workers. (*Id.*) About 1,160 of those requests are from essential custody staff, including
5 correctional captains, lieutenants, sergeants, officers and counselors. (*Id.*)

6 Moreover, unions representing correctional officers and other staff at affected institutions
7 have vigorously pushed back on the CDPH vaccinate mandate for healthcare settings at every
8 step. (Decl. Gipson Supp. Defs.’ Motion Stay ¶ 9; Decl. Toche Supp. Mot. Stay ¶ 9.) The
9 California Correctional Peace Officers Association has sued CDCR and CDPH in Kern County to
10 block the implementation of the CDPH order; the American Federation of State, County, and
11 Municipal Employees has issued a letter to CDCR and CCHCS on behalf of psychiatric
12 technicians who work in CDCR’s prisons, demanding that CDCR and CCHCS cease and desist
13 from enforcing the CDPH order; and the Service Employees International Union has filed an
14 unfair labor practice charge with California’s Public Employment Relations Board against CDCR
15 and CCHCS for implementing the CDPH order. (*Id.*)

16 There is no reason to think that resistance at CMF and CHCF is not an accurate barometer
17 for what will happen when all correctional officers at all prisons are required to accept the
18 vaccine as a condition of employment under the vaccine-mandate order. (Decl. Gipson Supp.
19 Mot. Stay ¶ 12.) Indeed, these recent developments confirm the operational concerns of CDCR
20 leadership about implementing a vaccine mandate for all correctional workers at this time (*Id.* ¶¶
21 8-16.) And if correctional officers at other institutions exhibit similar rates of noncompliance
22 when the vaccine-mandate order is implemented, and are therefore not permitted to enter the
23 prisons as the vaccine-mandate order requires, CDCR’s prisons are likely to experience a
24 substantial increase in staff vacancy rates.² (*Id.* 12.) Increased officer vacancy rates, in turn,
25 will likely result in the following significant, irreparable impacts:

26 ² Events in another West Coast jurisdiction also forecast that California’s prisons will
27 likely experience a significant adverse impact on staffing if the vaccine-mandate order is not
28 stayed. (Decl. Gipson Supp. Mot. Stay ¶ 10; Request Judicial Notice, Ex. A.) The Seattle Times
reported on October 19, 2021, that as a consequence of Washington’s vaccine mandate for state

- 1 • Extremely high correctional officer vacancy rates create challenges for prisons to maintain
2 safety, security, and order, and the risk of security breaches and violence rises. (*Id.* ¶ 7.)
3 Correctional officers—who are sworn peace officers—are responsible for maintaining
4 safety, security, and order in the prisons, among many other important duties. (*Id.* ¶ 3.)
5 There are currently about 28,248 correction officers working in CDCR’s prisons. (*Id.*)
6 Sufficient officer staffing levels are required to maintain safety, security, and order
7 throughout the prisons. (*Id.*) Without sufficient numbers of correctional officers, prisons
8 cannot operate safely. (*Id.*) This is because there may be insufficient staff on hand to
9 adequately respond to serious security breaches and to maintain order. (*Id.* ¶¶ 3, 7.)
10 Violent security breaches can lead to physical injuries to incarcerated people and staff, and
11 result in workers compensation claims and lawsuits. (*Id.* ¶ 7.)
- 12 • Essential prison operations are supported by not only correctional officers but also
13 noncustodial workers throughout the prisons, such as culinary staff, electricians, plumbers,
14 carpenters, maintenance mechanics, warehouse workers, and administrative staff. (*Id.* ¶ 5.)
15 There are currently about 8,558 noncustodial workers throughout CDCR’s prisons who
16 support the basic functions of each prison. (*Id.*) If CMF and CHCF’s noncompliance rates
17 are consistent across other classifications of workers besides correctional officers, the
18 detrimental impact on administration and operations could be serious. (*Id.* ¶ 12.) If
19 culinary positions are insufficiently staffed, it becomes challenging to provide meals to the
20 prison population. (*Id.*) If electrician, plumber, and maintenance mechanic positions are
21 insufficiently staffed, work orders for various critical repairs throughout the prisons cannot
22 be timely completed. (*Id.*) And if there are insufficient administrative personnel, important
23 administrative functions that keep the prisons running cannot be timely carried out. (*Id.*)
- 24 • High correctional officer vacancies can also have severe impacts on prison operations,
25 requiring reductions in programming for the incarcerated population, including recreation,

26 _____
27 workers, the Department of Corrections lost about 4.5 percent of its prison staff. (*Id.*) Although
28 the article stated that a spokesperson for the department asserted that Washington’s prisons were
still sufficiently staffed to operate, if CDCR were to lose 4.5 percent of its prison staff across the
state, the impact on prison operations would be severe in some places, and normal operations
would not be possible in all of CDCR’s prisons. (*Id.*)

1 day room, rehabilitation, education, and work programs, and even the curtailment of basic
2 services, such as phone calls and daily showers for the incarcerated population. (*Id.* ¶ 6.)
3 Limiting or suspending these programs allows the prison to redirect correctional officers to
4 help ensure the delivery of essential services, such as medical care and meals for the
5 incarcerated population. (*Id.*) If the number of vacancies rises to the level suggested by the
6 preliminary data and widespread resistance to the vaccine mandate orders experienced to
7 date and discussed above, all programming may need to be suspended, and the incarcerated
8 population might be required to remain in cells or dorms for extended periods. (*Id.*)

- 9 • Situations where correctional officer vacancies become extremely high require officers to
10 work extensive overtime and place a great deal of stress on officers, leading to officer
11 fatigue, burn out, and injuries. (*Id.* ¶ 6.) As a result, more officers request extended periods
12 of leave, which can further exacerbate staffing challenges. (*Id.*)
- 13 • If the vaccine-mandate order is implemented, there is a serious risk that a substantial
14 number of highly experienced and skilled correctional officers who are currently eligible
15 for retirement benefits will simply choose to retire rather than be vaccinated. (*Id.* ¶ 13.)
16 Approximately 1,898 correctional officers have been employed for over twenty years and
17 are over age 50. (*Id.*) This means that they could retire at any time. (*Id.*) CDCR normally
18 relies heavily on incoming cadets to help fill positions of officers who have retired, but as
19 discussed below, the number of available cadets has been insufficient to allow CDCR to
20 immediately back-fill in the case of substantial retirements or departures. (*Id.*)
21 Consequently, if a significant portion of these officers were to retire in lieu of taking the
22 vaccine, the impact to CDCR's operations would be severe. (*Id.*)

23 The likely impact of the vaccine-mandate order will come at a time when CDCR's staffing
24 levels have already been significantly impacted by the COVID-19 pandemic. (*Id.* ¶ 14.) For
25 example, CDCR's Correctional Officer Academy has been generating fewer cadets during the
26 pandemic than in previous years. (*Id.*) Before the pandemic, in fiscal year 2018/19, the Academy
27 graduated 1,608 cadets; in 2019/20, there were 1,316 cadet graduates; and in 2020/21 there were
28 only 892 cadet graduates. (*Id.*) So far, only 461 cadets have graduated in fiscal year 2021/22.

1 (*Id.*) With fewer cadets graduating, it is difficult for CDCR to timely replace officers who quit or
2 retire. (*Id.*) Additionally, significant numbers of current cadets in the academy have not been
3 vaccinated, and the vaccine mandate is likely to further reduce the number of graduating cadets
4 who will take positions in CDCR's prisons. (*Id.*) Of the cadets graduated on October 22, 2021,
5 only twenty-four percent are currently vaccinated. (*Id.*)

6 In its September 27 vaccine-mandate order, the Court relied upon the August 19 CDPH
7 public health order requiring vaccination of workers in correctional healthcare settings to argue
8 that a similar mandate should be applied to all correctional staff. However, the Court's order
9 ignores significant differences between the settings and ability to respond to any staffing impacts
10 caused by a vaccine mandate. CDPH has entered into contracts with outside healthcare services
11 providers that state agencies—including CDCR—can use to satisfy short term medical staffing
12 needs during the pandemic. (Decl. Toche Supp. Mot. Stay ¶ 8.) And CCHCS also has its own
13 contracts with healthcare services providers. (*Id.*) Thus, through its own contracts and through
14 the CDPH's contracts, CCHCS has the means to fill vacancies in various healthcare positions that
15 may arise because of people deciding to quit or retire rather than comply with a vaccine mandate.
16 (*Id.*) Indeed, just in the last 10 months, these contracts have resulted in over 400 clinician
17 deployments to fill vacancies in healthcare positions. (*Id.*) But there are no similar contracts for
18 correctional officers, who are now all subject to the Court's vaccine-mandate order. (Decl.
19 Gipson Supp. Mot. Stay ¶ 16.) Therefore, there is no simple or quick way to address severe
20 shortages of correctional officers, and it could take months or years to fully recover from a
21 substantial loss of prison staff resulting from the vaccine-mandate order. (*Id.*)

22 The irreparable harm that will likely befall CDCR's prisons, the staff who work in the
23 prisons, and the incarcerated people who live in the prisons requires a stay of the vaccine-
24 mandate order pending Defendants' appeal to the Ninth Circuit.

25 **III. THE BALANCE OF EQUITIES TIPS IN FAVOR OF A STAY.**

26 The final two factors for considering motions for stays pending appeal—the balance of
27 equities and the public interest—merge where the State is a party. *See Nken v. Holder*, 556 U.S.
28 418, 435 (2009). Here, the public interest would be best served by a stay of the vaccine-mandate

1 order in order to avoid the serious risk that the order will negatively affect operations at CDCR's
2 prisons that could potentially impact safety, security, and order for both staff and the incarcerated
3 population. A stay would further serve the public interest by helping avoid disruptions to
4 rehabilitative programming for the incarcerated population. And a stay would serve the public
5 interest by helping to ensure sufficient prison staff to provide the incarcerated population with
6 essential and constitutionally mandated services, such as medical care and mental healthcare.

7 It is indisputable that Defendants have already worked diligently and successfully to reduce
8 the risks of COVID-19 to the incarcerated population through their vaccination programs, which
9 have achieved:

- 10 • The vaccination of 78,788 class members with at least one dose (about seventy-nine
11 percent);
- 12 • The vaccination of 35,238 prison staff member (about sixty-three percent);
- 13 • A drop in active cases from over 10,000 in December 2020 to about 187 cases as of
14 October 24, 2021; and
- 15 • A drop from 143 class-member hospitalizations in January 2021 to three class-member
16 hospitalizations as of October 24, 2021. (Decl. Toche Supp. Mot. Stay ¶¶ 3-6.)

17 These same vaccination policies are also resulting in rising staff vaccination rates. Since
18 August 2021, the rate of staff who have had at least one dose of vaccine has risen from fifty-three
19 percent to sixty-three percent. (*Id.* ¶ 3.)

20 As a result of CDCR's and CCHCS's many efforts, and without the intervention of this
21 Court, the number of active cases has remained relatively low since March 2021. (*Id.* ¶ 6.) But
22 the world remains in the grip of this devastating pandemic, and there is no way to achieve perfect
23 safety for anyone. Across the country, people continue to contract COVID-19, and the science
24 has confirmed that even vaccinated individuals can contract and spread the virus. Thus, no one is
25 completely safe.

26 The currently ordered course will cause serious adverse impacts and harms, both to
27 CDCR's ability to safely and effectively operate the prisons, and to the incarcerated people who
28 reside in them. Because CDCR's ongoing efforts have already been successful at greatly curbing

1 the serious risks associated with the virus, the hardships associated with losing substantial
2 numbers of mission-critical prison staff tilts the scales in favor of a stay pending appeal.

3 **CONCLUSION**

4 For the above reasons, Defendants respectfully request that the Court stay the vaccine-
5 mandate order pending Defendants' appeal.

6 Dated: October 25, 2021

HANSON BRIDGETT LLP

7 */s/ Paul B. Mello*

8 PAUL B. MELLO
9 SAMANTHA D. WOLFF
10 LAUREL O'CONNOR
11 DAVID CASARRUBIAS
Attorneys for Defendants

12 Dated: October 25, 2021

ROB BONTA
Attorney General of California

13 */s/ DAMON G. MCCLAIN*

14 DAMON G. MCCLAIN
15 Supervising Deputy Attorney General
16 IRAM HASAN
17 Deputy Attorney General
Attorneys for Defendants

18
19
20 CA2001CS0001
21 42936471.docx

1 ROB BONTA
Attorney General of California
2 MONICA N. ANDERSON
Senior Assistant Attorney General
3 DAMON G. MCCLAIN
Supervising Deputy Attorney General
4 IRAM HASAN
Deputy Attorney General
5 State Bar No. 320802
455 Golden Gate Avenue, Suite 11000
6 San Francisco, CA 94102-7004
Telephone: (415) 510-3793
7 Fax: (415) 703-5480
E-mail: Iram.Hasan@doj.ca.gov

HANSON BRIDGETT LLP
PAUL B. MELLO - 179755
SAMANTHA D. WOLFF – 240280
LAUREL O’CONNOR – 305478
DAVID CASARRUBIAS – 321994
425 Market Street, 26th Floor
San Francisco, CA 94015
Telephone: (415) 777-3200
Facsimile: (415) 541-9366
E-mail: pmello@hansonbridgett.com

Attorneys for Defendants

8 *Attorneys for Defendants*

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

14 **MARCIANO PLATA, et al.,**
15
16 Plaintiffs,
17
18 **GAVIN NEWSOM, et al.,**
19 Defendants.

01-cv-01351-JST

DECLARATION OF DIANA TOCHE, DDS, IN SUPPORT OF DEFENDANTS’ MOTION TO STAY ORDER RE: MANDATORY COVID-19 VACCINATIONS (ECF NO. 3684) PENDING APPEAL

Date: December 9, 2021
Time: 2:00 p.m.
Courtroom: 6, 2nd Floor
Judge: The Honorable Jon S. Tigar
Action Filed: April 5, 2001

23 I, Diana Toche, DDS, declare:

24 1. I have personal knowledge regarding the matters stated in this declaration, except for
25 those statements made on information and belief. I am competent to testify to the matters set
26 forth in this declaration and would do so if called upon to testify. I submit this declaration in
27 support of Defendants’ motion to stay this Court’s September 27, 2021 order regarding
28 mandatory COVID-19 vaccinations pending appeal.

1 2. I am the Undersecretary of Health Care Services for the California Department of
2 Corrections and Rehabilitation (CDCR). I have served in this role since 2014. I advise the
3 Secretary of CDCR on major policy, program, and organizational issues related to the
4 administration and delivery of health care to CDCR's incarcerated population. I determine and
5 execute health care priorities, plans, policies, and programs consistent with the direction of
6 CDCR, and develop and direct the implementation of initiatives that will be sustainable and
7 improve the efficacy of CDCR's health care system. I formulate and oversee the implementation
8 of priority initiatives that cut across division and program areas including health care,
9 rehabilitative programs, and re-entry. In my current role, I work closely with the court-appointed
10 Receiver who oversees the delivery of medical care to CDCR's incarcerated population. By way
11 of distinction, my role includes oversight of other forms of health care, including mental and
12 dental health care. I have been employed by CDCR since 2009, and previously served as Acting
13 Undersecretary of Administration and Offender Services, Acting Director of the Division of
14 Health Care Services, and Statewide Dental Director. I worked in private practice from 1989 to
15 2008 before joining CDCR.

16 3. COVID-19 vaccines first became available in late December 2020. Since that time
17 California Correctional Health Care Services (CCHCS) has provided over 152,500 doses of
18 vaccine to the incarcerated population and over 66,800 doses of vaccine to prison staff. Of
19 CDCR's current incarcerated population (over 99,300 patients), 78,788—about seventy-nine
20 percent—have accepted at least one dose of vaccine. Since the Court issued the order to show
21 cause on August 9, 2021, prison staff vaccination rates have continued to rise. Well over 10,000
22 doses of vaccine were administered to prison staff from August 9 through October 21, 2021. The
23 number of staff who have received at least one dose of vaccine increased from about fifty-three
24 percent on August 6, 2021, to about sixty-three percent by October 14, 2021. As of October 21,
25 2021, 35,238 staff had been vaccinated. Broken down by classification, healthcare staff who are
26 fully vaccinated increased from seventy-two percent on August 6, 2021, to eighty-two percent on
27 October 14, 2021; custody staff who are fully vaccinated increased from forty-one percent on
28 August 6, 2021, to fifty-one percent on October 14 2021; and administrative, maintenance, and

1 operations staff who are fully vaccinated increased from sixty-one percent on August 6, 2021, to
2 sixty-seven percent on October 14, 2021.

3 4. All unvaccinated prison staff must test for COVID-19 twice weekly, and all prison
4 staff, regardless of vaccination status, must wear either an N95, KN95, or procedure masks,
5 depending on where they are within a prison.

6 5. As of October 22, 2021, about seventy-nine percent of the incarcerated population has
7 accepted at least one dose of vaccine, compared to approximately seventy-seven percent on
8 August 6, 2021, just before the Court issued the order to show cause. By comparison, as of
9 October 24, 2021, the Centers for Disease Control reports that approximately sixty-six percent of
10 the general public has accepted at least one dose of vaccine ([https://covid.cdc.gov/covid-data-
11 tracker/ - vaccinations_vacc-total-admin-rate-total](https://covid.cdc.gov/covid-data-tracker/-vaccinations_vacc-total-admin-rate-total)). And consistent with the most current public
12 health guidance, CCHCS issued a policy on August 20, 2021, regarding third booster doses of
13 vaccine—shortly after the Centers for Disease Control and Prevention released its
14 recommendation for administering booster shots—and promptly started offering booster shots to
15 eligible immunocompromised patients. As of October 22, 2021, 7,195 currently eligible patients
16 had already been offered booster shots, and 6,412 had already accepted them. CCHCS continues
17 to offer booster shots to eligible patients.

18
19 ///

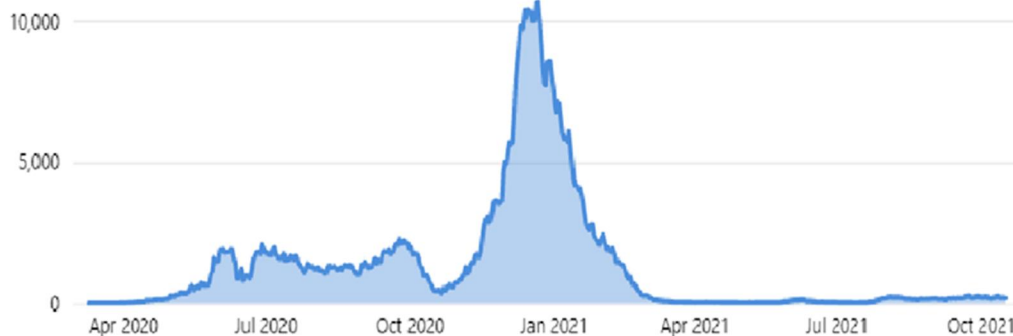
20
21 ///

22
23 ///

24
25 ///

1 6. CCHCS’s current vaccination program and other efforts have been very successful at
 2 reducing active cases of COVID-19, and have been especially successful at reducing the number
 3 of serious illnesses requiring hospitalization. As of October 24, 2021, out of a prison population
 4 exceeding 99,300, California Correctional Health Care Services (CCHCS) reported three
 5 hospitalization due to serious COVID-19 related illness. By comparison, on January 5, 2021,
 6 there were 143 COVID-19 related hospitalizations. As demonstrated by the below graph
 7 prepared by CCHCS, around the time when vaccines first became available in late December
 8 2020, there were over 10,000 active cases in the incarcerated population. But since then,
 9 CCHCS’s efforts to vaccinate the class members, combined with myriad other safety measures
 10 implemented by CDCR, have greatly reduced the number of active cases and kept the rate of
 11 infection relatively low since March 2021. As of October 24, 2021, CCHCS reported about 187
 12 active cases among a population of over 99,300, and that number has hovered around 200 active
 13 cases for the past week.

NEW CASES IN THE LAST 14 DAYS OVER TIME



*New case count may be delayed 2-3 days while awaiting test results.

23 7. To reduce the risk of serious illness and hospitalizations, CCHCS has also provided
 24 infected patients with the newest and most effective therapies where indicated. For example, as
 25 of October 14, 2021, CCHCS had administered monoclonal antibody treatments to 483 patients.

26 8. During the pandemic, the California Department of Public Health (CDPH) entered
 27 into contracts with outside healthcare services providers that state agencies—including CCHCS—
 28

1 can use to satisfy short term medical staffing needs. And CCHCS also has its own contracts with
2 healthcare services providers. Thus, through its own contracts and through the CDPH's contracts,
3 CCHCS has the means to fill vacancies in various healthcare positions that may arise because of
4 people deciding to quit or retire rather than comply with a vaccine mandate. For example, for the
5 period between January 1, 2021 and October 15, 2021 alone, CCHCS deployed clinicians—
6 primarily nurses—from CDPH's contracts 395 times and had 23 additional requests for clinicians
7 pending.

8 9. The American Federation of State, County, and Municipal Employees has issued a
9 letter to CDCR and CCHCS on behalf of therapists, pharmacists, psychologists, licensed clinical
10 social workers, and physicians assistants who work in CDCR's prisons, demanding that CDCR
11 and CCHCS cease and desist from enforcing the CDPH order.

12 I declare under penalty of perjury that I have read this document, and its contents are true
13 and correct to the best of my knowledge. Executed on October 25, 2021, in Sacramento,
14 California.

15 /s/ DIANA TOCHE

16 _____
17 DIANA TOCHE, DDS
18 Undersecretary of Health Care Services
19 California Department of Corrections and
20 Rehabilitation

19 CA2001CS0001
20 42936468.docx

1 ROB BONTA
Attorney General of California
2 MONICA N. ANDERSON
Senior Assistant Attorney General
3 DAMON G. MCCLAIN
Supervising Deputy Attorney General
4 IRAM HASAN
Deputy Attorney General
5 State Bar No. 320802
455 Golden Gate Avenue, Suite 11000
6 San Francisco, CA 94102-7004
Telephone: (415) 510-3793
7 Fax: (415) 703-5480
E-mail: Iram.Hasan@doj.ca.gov

HANSON BRIDGETT LLP
PAUL B. MELLO - 179755
SAMANTHA D. WOLFF – 240280
LAUREL O’CONNOR – 305478
DAVID CASARRUBIAS – 321994
425 Market Street, 26th Floor
San Francisco, CA 94015
Telephone: (415) 777-3200
Facsimile: (415) 541-9366
E-mail: pmello@hansonbridgett.com

Attorneys for Defendants

8
9 *Attorneys for Defendants*

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13
14 **MARCIANO PLATA, et al.,**
15
16 Plaintiffs,
17
18 **GAVIN NEWSOM, et al.,**
19 Defendants.

01-cv-01351-JST

**DECLARATION OF CONNIE GIPSON
IN SUPPORT OF DEFENDANTS’
MOTION TO STAY ORDER RE:
MANDATORY COVID-19
VACCINATIONS (ECF NO. 3684)
PENDING APPEAL**

Date: December 9, 2021
Time: 2:00 p.m.
Courtroom: 6, 2nd Floor
Judge: The Honorable Jon S. Tigar
Action Filed: April 5, 2001

22
23 I, Connie Gipson, declare:

24 1. I have personal knowledge regarding the matters stated in this declaration, except for
25 those statements made on information and belief. I am competent to testify to the matters set
26 forth in this declaration and would do so if called upon to testify. I submit this declaration in
27 support of Defendants’ motion to stay this Court’s September 27, 2021 order regarding
28 mandatory COVID-19 vaccinations (ECF No. 3684) pending appeal.

1 2. I have thirty-three years of experience working for the California Department of
2 Corrections and Rehabilitation (CDCR) and I am currently the Director of CDCR's Division of
3 Adult Institutions. I started my career at CDCR as a medical technical assistant at the California
4 Institution for Women, where I worked from 1988 to 1997. From 1997 to 2008, I held several
5 positions at Wasco State Prison, including captain, business manager and health program
6 coordinator. From 2008 to 2010, I was the Associate Warden at North Kern State Prison. From
7 2010 to 2013, I served in multiple positions at California State Prison, Corcoran, including as
8 Warden, Acting Warden and Chief Deputy Warden. From 2013 to 2016, I served as the
9 Associate Director of general population male offenders at CDCR's Division of Adult
10 Institutions. From 2016 to 2019, I served as deputy director of facility operations at the Division
11 of Adult Institutions. In 2019, I was promoted to the Acting Director of the Division of Adult
12 Institutions, and was appointed to my current position as the Director in April 2019. I am
13 competent to testify to the matters set forth in this declaration and, if called upon by this Court,
14 would do so. I submit this declaration in support of Defendants' motion to stay the Court's
15 vaccine-mandate order.

16 3. As the Director of Adult Institutions, I am responsible for monitoring and managing
17 staffing levels of correctional officers in CDCR's prisons. Correctional officers are sworn peace
18 officers responsible for, among many other things, maintaining safety, security, and order in the
19 prisons. Programming for the incarcerated population is not possible without sufficient numbers
20 of correctional officers. I currently oversee about 28,248 correctional officers, sergeants,
21 lieutenants, captains, and counselors. This part of my job is extremely important because
22 sufficient officer staffing levels are required to maintain safety, security, and order throughout the
23 prisons. Prisons cannot operate safely without sufficient numbers of correctional officers. And
24 sufficient officer staffing levels are also required to provide the incarcerated population with
25 essential services—such as medical care and meals—and recreational and rehabilitative
26 programming—such as yard, day room, education, self-improvement, and work programs.

27 4. My team and I closely track staffing levels and strive continuously to ensure
28 sufficient staffing levels throughout the prisons. My staff regularly prepare detailed projections

1 of correctional officer staffing levels for each prison. These projections account for incoming
2 cadets, lateral transfers into and out of each prison, planned retirements, and estimated attrition.
3 We use these projections to plan for potential staffing shortages and to manage staffing issues.

4 5. As the Director of Adult Institutions, I am also responsible for monitoring and
5 managing staffing levels of essential noncustodial workers throughout the prisons, such as
6 culinary staff, electricians, plumbers, carpenters, maintenance mechanics, warehouse workers,
7 and administrative staff. I currently oversee about 8,558 noncustodial workers throughout
8 CDCR's prisons. These workers are also critical to prison operations. If culinary positions are
9 insufficiently staffed it becomes challenging to provide meals for the prison population. If
10 electrician, plumber, and maintenance mechanic positions are insufficiently staffed, work orders
11 for various critical repairs throughout the prisons cannot be timely completed. And if there are
12 insufficient administrative personnel, critical administrative functions that keep the prisons
13 running cannot be timely carried out. The basic functions of each prison depend on these worker
14 classifications.

15 6. Although different prisons may be impacted differently by officer vacancies, lower
16 levels of officer vacancies usually result in increased voluntary overtime, occasional involuntary
17 overtime for officers, and little to no impact to programs for the incarcerated population.
18 However, as officer vacancies increase, significant operational impacts are likely, including more
19 extensive involuntary overtime for correctional officers and reductions in programming for the
20 incarcerated population, including recreation, day room, rehabilitation, education, and work
21 programs. Officer fatigue, burn out, and injuries tend to increase when vacancies are higher, and
22 continue to increase as vacancy levels rise. High officer vacancies can also have severe impacts
23 on prison operations and security, require drastic cuts in programming, and even basic services,
24 such as phone calls and daily showers for the incarcerated population must be curtailed. Limiting
25 or suspending these programs allows the prison to redirect correctional officers to help ensure the
26 delivery of essential services, such as medical care and meals for the incarcerated population.
27 High vacancy levels also place a high level of stress on correctional officers, who are required to
28 work extensive overtime. As a result, more officers request extended periods of leave, which can

1 further exacerbate staffing shortages. If the number of vacancies continues to increase, all
2 programming may need to be suspended, and the incarcerated population might be required to
3 remain in cells or dorms for extended periods.

4 7. Extremely high vacancy rates also create challenges for prisons to maintain safety,
5 security, and order, and the risk of security breaches and violence rises. This is because there
6 may be insufficient staff on hand to adequately respond to serious security breaches and to
7 maintain order. Violent security breaches can lead to physical injuries to staff and incarcerated
8 people, and result in workers compensation claims and lawsuits.

9 8. What has recently happened at two of CDCR's prisons—California Medical Facility
10 (CMF) in Vacaville and California Health Care Facility (CHCF) in Stockton—affirmed and
11 greatly increased my concerns that a requirement to vaccinate all correctional officers with no
12 testing option will cause a substantial increase in correctional-officer vacancies above current
13 projections. Because CMF and CHCF are both medical prisons, an order issued by the California
14 Department of Public Health (CDPH) in August 2021 already mandates that all staff at CMF and
15 CHCF, including all correctional officers, be vaccinated. The deadline for compliance with that
16 CDPH order was October 14, 2021. I have been closely watching what is happening at CMF and
17 CHCF because they can serve as a barometer for what will happen when all correctional officers
18 at all prisons are required to accept the vaccine as a condition of employment under the vaccine-
19 mandate order. As of October 25, 2021—eleven days past the deadline for mandatory
20 compliance with CDPH's order—78 (8.26%) of CHCF correctional officers, and 72 (10.14%) of
21 CMF correctional officers had neither complied by taking the vaccine nor sought a medical or
22 religious exemption. Although Kern County Superior Court issued a temporary restraining order
23 from the bench in the afternoon on October 13, 2021, prohibiting CDCR from enforcing
24 mandatory vaccinations against the correctional officers covered by the CDPH order, that court
25 ultimately denied the union's request for a preliminary injunction and lifted the temporary
26 restraining order on October 22, 2021. The high levels of noncompliance up through October 25,
27 2021, indicate that substantial numbers of officers are simply refusing to comply with the CDPH
28 order. If correctional officers at other institutions exhibit similar rates of noncompliance when

1 the vaccine-mandate order is implemented, the statewide impact will be devastating to CDCR's
2 prison operations.

3 9. The vigorous pushback from the unions on the CDPH vaccine mandate for healthcare
4 settings is also concerning. The California Correctional Peace Officers Association has sued
5 CDCR in Kern County to block the implementation of the CDPH order; the American Federation
6 of State, County, and Municipal Employees has issued a letter to CDCR and California
7 Correctional Health Care Services (CCHCS) on behalf of psychiatric technicians who work in
8 CDCR's prisons, demanding that CDCR and CCHCS cease and desist from enforcing the CDPH
9 order; and the Service Employees International Union has filed an unfair labor practice charge
10 with California's Public Employment Relations Board against CDCR and CCHCS for
11 implementing the CDPH order.

12 10. Furthermore, events in another West Coast jurisdiction also forecast that California's
13 prisons will likely experience a significant adverse impact on staffing if the vaccine-mandate
14 order is not stayed. The Seattle Times reported on October 19, 2021, that as a consequence of
15 Washington's vaccine mandate for state workers, the Department of Corrections lost about 4.5%
16 of its prison staff. Although the article stated that a spokesperson for the department asserted that
17 Washington's prisons were still sufficiently staffed to operate, if CDCR were to lose 4.5% of its
18 prison staff across the state, the impact on prison operations would be severe, and normal
19 operations would not be possible in all of CDCR's prisons.

20 11. It is also noteworthy that as of October 15, 2021, CDCR has received 1,738 religious
21 accommodation requests across multiple classifications of prison workers. About 1,160 of those
22 requests were from custody staff, who are comprised of correctional captains, correctional
23 lieutenants, correctional sergeants, correctional officers and correctional counselors. This too
24 seems to indicate that staff resistance to the vaccine-mandate order will be substantial.

25 12. If CMF and CHCF's noncompliance rates are consistent across other classifications
26 of workers besides correctional officers throughout the prisons, the impact on operations will be
27 crippling. Prisons simply cannot function without sufficient culinary staff to prepare meals,
28

1 sufficient maintenance workers to make critical repairs to electrical, plumbing, and ventilation
2 systems as problems arise, or sufficient administrative staff.

3 13. If the vaccine-mandate order is implemented, there is also a high risk that a
4 substantial number of highly experienced and skilled officers will simply choose to retire rather
5 than be vaccinated. Difficult and stressful pandemic conditions in the prisons have already
6 resulted in a higher number of retirements than is usual. The resulting staff shortages on top of
7 pandemic conditions required extensive involuntary overtime at some prisons during the
8 pandemic, which resulted in officer injuries, burn out, and increased requests for extended periods
9 of leave. Approximately 729 unvaccinated correctional officers have been employed for over
10 twenty years and are over age 50. This means that they could retire at any time. CDCR normally
11 relies heavily on incoming cadets to help fill positions of officers who have retired, but as
12 discussed below, the cadet resource has been deficient. Consequently, if a significant portion of
13 these officers were to retire in lieu of taking the vaccine, the impact to CDCR's staffing levels
14 and operations would be severe.

15 14. The likely impact of the vaccine-mandate order will come at a time when CDCR's
16 staffing levels have already been significantly impacted by the COVID-19 pandemic. That is
17 why I was very concerned about the Receiver's recommendation to vaccinate all CDCR staff.
18 Since the pandemic began, staffing levels across the prison system have fallen for a number of
19 reasons, one of which is fewer graduating cadets. CDCR's Correctional Officer Academy has
20 been generating fewer cadets during the pandemic than in previous years. For example, before
21 the pandemic, in fiscal year 2018/19, the Academy graduated 1,608 cadets; in 2019/20, there
22 were 1,316 cadet graduates; and in 2020/21 there were only 892 cadet graduates. So far, only 461
23 cadets have graduated in fiscal year 2021/22. With fewer cadets graduating, it is difficult for
24 CDCR to timely replace officers who quit or retire. Additionally, significant numbers of current
25 cadets in the academy have not been vaccinated, and I have serious concerns that the vaccine
26 mandate is likely to further reduce the number of graduating cadets who will take positions in
27 CDCR's prisons. Of the cadets that are due to graduate on October 22, 2021, only twenty-four
28 percent are currently vaccinated.

1 ROB BONTA
 Attorney General of California
 2 MONICA N. ANDERSON
 Senior Assistant Attorney General
 3 DAMON G. MCCLAIN
 Supervising Deputy Attorney General
 4 State Bar No. 209508
 IRAM HASAN
 5 Deputy Attorney General
 State Bar No. 320802
 6 455 Golden Gate Avenue, Suite 11000
 San Francisco, CA 94102-7004
 7 Telephone: (415) 510-3793
 Fax: (415) 703-5480
 8 E-mail: Iram.Hasan@doj.ca.gov

HANSON BRIDGETT LLP
 PAUL B. MELLO - 179755
 SAMANTHA D. WOLFF – 240280
 LAUREL O’CONNOR – 305478
 DAVID CASARRUBIAS – 321994
 425 Market Street, 26th Floor
 San Francisco, CA 94015
 Telephone: (415) 777-3200
 Facsimile: (415) 541-9366
 E-mail: pmello@hansonbridgett.com

Attorneys for Defendants

Attorneys for Defendants

10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12 OAKLAND DIVISION

MARCIANO PLATA, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

01-cv-01351-JST

**REQUEST FOR JUDICIAL NOTICE IN
 SUPPORT OF DEFENDANTS’ MOTION
 TO STAY ORDER RE: MANDATORY
 VACCINATIONS (ECF NO. 3684)
 PENDING APPEAL**

Date: December 9, 2021
 Time: 2:00 p.m.
 Courtroom: 6, 2nd Floor
 Judge: The Honorable Jon S. Tigar
 Action Filed: April 5, 2001

23 Defendants request that the Court, under Federal Rule of Evidence 201, take judicial notice
 24 of the document attached as Exhibit A. Judicial notice is appropriate where the fact at issue is
 25 “not subject to reasonable dispute” because it “can be accurately and readily determined from
 26 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). A court
 27 must take judicial notice “if a party requests it and the court is supplied with the necessary
 28

1 information.” Fed. R. Evid. 201(c)(2). A court may take judicial notice of undisputed matters of
2 public record. *See Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006)
3 (“We may take judicial notice of court filings and other matters of public record.”).

4 Defendants attach a true and correct copy of a news article published in the Seattle Times
5 titled “Nearly 1,900 Washington state workers quit or are fired over COVID vaccine mandate” as
6 Exhibit A. This article shows an example of prison-staff attrition resulting from a COVID-19
7 vaccine mandate, as discussed in Defendants’ stay motion.

8 Dated: October 25, 2021

HANSON BRIDGETT LLP

9 /s/ *Paul B. Mello*

10 PAUL B. MELLO
11 SAMANTHA D. WOLFF
12 LAUREL O’CONNOR
13 DAVID CASARRUBIAS
Attorneys for Defendants

14 Dated: October 25, 2021

ROB BONTA
Attorney General of California

15 /s/ *DAMON G. MCCLAIN*

16 DAMON G. MCCLAIN
17 Supervising Deputy Attorney General
18 IRAM HASAN
19 Deputy Attorney General
Attorneys for Defendants

20 CA2001CS0001
21 42936460.docx

EXHIBIT A

Local Politics
The Seattle Times

Nearly 1,900 Washington state workers quit or are fired over COVID vaccine mandate

Oct. 19, 2021 at 8:01 pm | Updated Oct. 20, 2021 at 4:06 am



A Washington State Patrol trooper stands near a bust of President George Washington in the Legislative Building at the Capitol in Olympia. Nearly 1,900 state workers have left their... (Ted S. Warren / AP) **More** ✓

By Joseph O'Sullivan 🐦 and Christine Clarridge 🐦
Seattle Times staff reporters

OLYMPIA — About 3% of the 63,000 Washington state workers subject to Gov. Jay Inslee's COVID-19 vaccine mandate have left their jobs or were terminated as this week's deadline passed.

So far, 1,887 state employees were terminated or left their positions over the mandate that they be fully vaccinated by Oct. 18 or lose their jobs, according to the Office of Financial Management.

Another roughly 3%, or 1,927 workers, received an accommodation that allows them to work in a less-public role without being vaccinated.

An additional 4.6% of state workers — nearly 2,900 — are still in a state of flux, according to a

statement by OFM Tuesday afternoon.

That means they may have more time to get the vaccine or could be retiring, according to OFM.

Others in that group could still be waiting to see if they get an accommodation — and if not, could

still lose their jobs. Those outcomes will be determined in the weeks to come.

Of the state workers still employed, more than 92% are verified as vaccinated.

“The high number of state employees who have gotten vaccinated is good news,” wrote Inslee spokesperson Tara Lee in an email. “Good for the workers, their colleagues and the people they serve.

“While we are sorry to see that 3% go and we wish them well, we are pleased that it is not higher,” she added.

The vaccination push came as a fifth COVID-19 wave slammed into the state. It struck the unvaccinated particularly hard, causing a spike in deaths and hospitalizations across rural Washington, where vaccination rates have lagged behind urban areas.

In August, the governor put in place some of the strictest mandates in the nation, requiring state and school employees — as well as hundreds of thousands of health care workers — to get the jabs or lose their jobs.

But with the deep division and politicization over the pandemic and public health measures to curb it, Inslee’s mandates spurred protests, lawsuits and fierce backlash from conservatives.

In a statement Tuesday, conservative Republicans slammed the departure of workers and again decried Inslee’s use of emergency powers since the pandemic began.

“But I don’t think any of us realized it would come to this, and I think many in the state Legislature are having second thoughts today,” said Sen. Jeff Wilson, R-Longview, in prepared remarks. “Other states are requiring vaccinations, but none of them have taken it to the level of mass terminations. When one person makes all the decisions, there can be no question who is at fault.”

As workers protested the mandate, there were concerns that an exodus could hurt the government’s ability to provide services, from prisons and highway patrols to child-abuse investigations.

The high vaccination rates, however, have dampened some of those concerns.

At the Department of Corrections, about 350 workers — roughly 4.5% of the agency workforce — are leaving. But those numbers are spread out across 12 prisons, plus the administrative headquarters and other offices.

“All facilities have adequate staffing for operations,” wrote DOC spokesperson Rachel Ericson in an email.

The employees leaving state service range from a custodian at the Capitol campus to Washington State Patrol troopers around the state and Washington State University football coach — and highest-paid public employee — Nick Rolovich.

Numbers at other large agencies in recent days, according to their spokespeople, included:

- At the Department of Social and Health Services, 92% of 15,670 workers have been verified as vaccinated. About 3% have received an accommodation that allows them to keep working without the vaccine. Another 2% — or roughly 313 workers — have been let go. The remaining workers have a request for accommodation pending or have started the vaccination process.
- At the Washington Department of Transportation, 402 employees are leaving over the mandate, according to that agency. That includes about 130 workers in the ferries division, which alone employs roughly 2,000.
- At the Department of Fish and Wildlife, about 38 staff — or 2% of the agency’s workforce — lost their jobs over the mandate.
- At the Washington State Patrol, 127 individuals had left over the mandate, or nearly 6% of the agency workforce.

Those departures included, according to WSP, 53 civil servants and 74 commissioned officers: 67 troopers, 6 sergeants, and 1 captain.

“We will miss every one of them,” said Chief John R. Batiste in a statement Tuesday morning. “I truly wish that you were staying with us. You have my utmost appreciation for the hard and successful work that you have provided during your valued WSP careers. You will forever have our respect for your courage and your commitment in all you have done on behalf of the agency.”

Later on Tuesday morning, the Spokane County Sheriff's Office — which does not have a vaccine mandate in place — was posting recruiting notices on social media.

In a tweet, the office called out to troopers and other law enforcement subject to mandates.

“Looking for a place where you are appreciated & wanted?” read the tweet, which included a recruitment video featuring Sheriff Ozzie Knezovich. “Please contact a member of our Recruitment Team today.”

Staff reporter Mike Lindblom contributed to this report.

More on the COVID-19 pandemic

- Live updates from Seattle, Washington state and the world, Oct. 20
- Nearly 1,900 Washington state workers quit or are fired over COVID vaccine mandate
- Oregon approved state employee religious exemptions at twice the rate Washington did
- White House details plan to vaccinate children age 5-11
- Proof of vaccination will soon be required; here's what you need to know
- Hawaii welcomes travelers again as COVID counts drops
- Full coverage of the coronavirus here and around the world

Joseph O'Sullivan: 360-236-8268 or josullivan@seattletimes.com; on Twitter: [@OlympiaJoe](https://twitter.com/OlympiaJoe). *Seattle Times* staff reporter Joseph O'Sullivan covers state government and the Legislature.

Christine Clarridge: 206-464-8983 or cclarridge@seattletimes.com; on Twitter: [@c_clarridge](https://twitter.com/c_clarridge).

 [View 168 Comments](#)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARCIANO PLATA, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

Case No. 01-cv-01351-JST

**[PROPOSED] ORDER GRANTING
DEFENDANTS’ MOTION TO STAY
ORDER RE MANDATORY
VACCINATIONS (ECF NO. 3684)
PENDING APPEAL**

On August 4, 2021, the Receiver filed a recommendation that (1) access by workers to CDCR institutions be limited to those workers who establish proof of full COVID-19 vaccination or establish a religious or medical exemption to vaccination, and (2) incarcerated persons who desire to work outside of the institution or to have in-person visitation must be fully vaccinated against COVID-19 or establish a religious or medical exemption. (ECF No. 3638.) On August 9, 2021, the Court issued an order to show cause why it should not order Defendants to implement the Receiver’s recommendation and ordered briefing by the parties. (ECF No. 3647.) Defendants, Plaintiffs, and intervener California Correctional Peace Officers Association filed responsive briefs on August 30, 2021 (ECF Nos. 3660, 3663, 3664) and reply briefs on September 10, 2021 (ECF Nos. 3673, 3674, 3669.) The Receiver also filed a reply brief on September 10, 2021. (ECF No. 3670.)

1 The Court heard oral argument regarding the order to show cause on September 24, 2021.
2 On September 27, 2021, the Court issued an order finding that Defendants violated the Eighth
3 Amendment by “disregard[ing] a substantial risk of serious harm ‘by failing to take reasonable
4 measure to abate it[,]’” primarily as a result of their decision not to implement a mandatory
5 COVID-19 vaccination policy for CDCR’s employees. (ECF No. 3684 at 18.) The Court further
6 found that “the Receiver’s recommendation ‘is narrowly drawn, extends no further than necessary
7 to correct the violation of the Federal right, and is the least intrusive means necessary to correct
8 the violation of the Federal right’” because “none of the alternatives suggested by Defendants or
9 CCPOA would correct the violation of Plaintiffs’ Eighth Amendment rights identified in this
10 order.” (*Id.* at 20) (citing 18 U.S.C. § 3626(a)(1)(A)). The Court ordered the Receiver and
11 Defendants to file a plan implementing the Receiver’s mandatory vaccination policy. (*Id.* at 21.)

12 Defendants and the Receiver jointly filed an implementation plan on October 12, 2021
13 (ECF No. 3694) and Defendants filed a notice of appeal of this Court’s September 27 order the
14 same day (ECF No. 3693). On October 25, Defendants filed a motion to stay the September 27
15 order pending the outcome of its appeal. For the reasons discussed below, the Court **GRANTS**
16 Defendants’ stay motion.

17 **UPDATED FACTUAL BACKGROUND**

18 COVID-19 vaccines first became available in December 2020. Since that time, and
19 without a court order mandating that they do so, Defendants have vaccinated over 78,000 class
20 members and over 34,000 prison staff. (Decl. Toche Supp. Mot. Stay Defs.’ Mot. Stay
21 Mandatory Vaccine Order (Decl. Toche Supp. Stay) ¶ 3.) Since the Court issued the August 9,
22 2021 order to show cause, staff vaccinations have continued. In fact, well over 10,000 doses of
23 vaccine were administered to prison staff from August 9 through October 21. (*Id.*) The number
24 of staff who have received at least one dose of vaccine increased from about fifty-three percent on
25 August 6, 2021, to about sixty-two percent on October 15, 2021. (*Id.*) Broken down by
26 classification, healthcare staff who are fully vaccinated increased from seventy-two percent on
27 August 6, 2021, to eighty-two percent on October 14, 2021; custody staff who are fully
28 vaccinated increased from forty-one percent on August 6, 2021, to fifty-one percent on October

1 14, 2021; and administrative, maintenance, and operations staff who are fully vaccinated
2 increased from sixty-one percent on August 6, 2021, to sixty-seven percent on October 14, 2021.
3 (*Id.*)

4 The full vaccination rate for the incarcerated population has also risen to about seventy-
5 seven percent as of October 15, 2021, compared to approximately seventy-six percent when the
6 Court issued the order to show cause on August 9. (*Id.* ¶ 5.) And consistent with the most
7 current public health guidance, CCHCS issued a policy on August 20, 2021 regarding third
8 booster doses of vaccine—shortly after the Centers for Disease Control and Prevention released
9 its recommendation for administering booster shots—and promptly started offering booster shots
10 to eligible immunocompromised patients and staff. (*Id.*) Over 700 eligible immunocompromised
11 patients had accepted a booster shot when Defendants filed their response to the Court’s order to
12 show cause on August 30. (*Id.*) Since then, CCHCS has expanded booster-shot-eligibility
13 criteria to include all non-immunocompromised patients who have received two doses of the
14 Pfizer vaccine. (*Id.*) As of October 15, 5,540 currently eligible patients have been offered a
15 booster shot, and 4,996 have accepted it. (*Id.*) CCHCS continues to offer booster shots to
16 currently eligible patients. (*Id.*)

17 To reduce the risk of serious illness and hospitalizations, CCHCS has also provided
18 infected patients with the newest and most effective therapies where indicated. (*Id.* ¶ 6.) For
19 example, as of October 14, 2021, CCHCS had administered monoclonal antibody treatments to
20 483 patients. (*Id.* ¶ 7.)

21 Defendants’ vaccination programs and other efforts have greatly reduced the risks of
22 infection among class members and as a result, the rates of serious illness are low. (*Id.* ¶ 6.) As
23 of October 24, 2021, out of a prison population of about 99,300, CCHCS reported three patient
24 hospitalizations and about 187 active cases, and that number has hovered around 200 active
25 COVID-19 cases for the past week. (*Id.*) Active-infection rates have remained relatively low
26 since March 2021. (*Id.*) By contrast, when vaccines first became available in December 2020,
27 there were over 10,000 active cases in the incarcerated population and there were 143 patient
28 hospitalizations. Since that time, CCHCS’s efforts to vaccinate class members and staff,

1 combined with myriad other safety measures, have greatly reduced the number of active cases
2 and kept the rate of infection relatively low for months. (*Id.*)

3 DISCUSSION

4 I. LEGAL STANDARD

5 This Court is authorized under Federal Rule of Civil Procedure 62 to stay its vaccine-
6 mandate order to ensure that Defendants' rights are secured pending appeal. Fed. R. Civ. P.
7 62(d). In considering motions for stays pending appeal, the Ninth Circuit has adopted the factors
8 enumerated in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987): "(1) whether the stay applicant has
9 made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be
10 irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the
11 other parties interested in the proceeding; and (4) where the public interest lies." *Golden Gate*
12 *Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008) (quoting *Hilton*, 481
13 U.S. at 776) (internal quotations omitted).

14 This Court analyzes the first two factors on a "sliding scale in which the required degree of
15 irreparable harm increases as the probability of success decreases." *Golden Gate*, 512 F.3d at
16 1116. A party may also establish the first two *Hilton* factors by showing (1) that there are serious
17 legal questions regarding the merits, and (2) the balance of hardships tips sharply in the moving
18 party's favor. *Golden Gate*, 512 F.3d at 1115–16.

19 II. LIKELIHOOD OF SUCCESS ON THE MERITS

20 A. Defendants Are Likely to Succeed on the Merits of the Eighth Amendment 21 Question.

22 For the purposes of a stay motion, the success-on-the-merits standard requires a "reasonable
23 probability" of success, a "fair prospect" of success, a showing of a "substantial case on the
24 merits," or a showing that "serious legal questions are raised." *Leiva-Perez v. Holder*, 640 F.3d
25 962, 967-68 (9th Cir. 2011) (quoting *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *Hilton*,
26 481 U.S. at 778; and *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir.1998). Each of these
27 formulations of the standard is interchangeable. (*Id.*)
28

1 Defendants satisfy this standard because they have more than shown that they have a “fair
2 prospect” of success on appeal and that they have raised “serious legal questions.” *Leiva-Perez*,
3 640 F.3d at 967-98 (citations omitted). Despite acknowledging Defendants’ robust, multilayered
4 efforts to protect the incarcerated population in its September 27, 2021 order (*see* ECF No. 3684
5 at 2:21-3:1, 3:22-4:9), the Court’s ruling largely did not factor those efforts into the analysis that
6 followed. And the Ninth Circuit’s recent decision in *Fraihat v. U.S. Immigration and Customs*
7 *Enforcement*, 20-55634, 2021 WL 4890884, at *1 (9th Cir. Oct. 20, 2021), helps to highlight the
8 defects in the Court’s Eighth Amendment analysis.

9
10 **1. The Court Incorrectly Framed the Eighth Amendment Question and Heightened the Standard Defendants Must Satisfy.**

11 Under the subjective prong of the deliberate indifference analysis, prison officials must
12 know of and disregard “an excessive risk to inmate health or safety” for the court to find a
13 violation of a federal right. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The state of mind
14 required for deliberate indifference equates to the *mens rea* element for criminal recklessness. *Id.*
15 at 839-40. Accordingly, courts must “focus[] on what a defendant’s mental attitude actually was
16 (or is), rather than what it should have been (or should be).” *Id.* at 839. This standard is exacting,
17 and courts have rejected attempts to dilute it. *See Estelle v. Gamble*, 429 U.S. 97, 106-08 (1976)
18 (“insufficient treatment, malpractice, or negligence does not amount to a constitutional
19 violation.”). When officials respond reasonably to a risk of harm, there is no Eighth Amendment
20 violation even if the harm is not averted. *Farmer*, 511 U.S. at 844.

21 Defendants argue that the Court failed to correctly apply this well-established standard.
22 The Court previously stated that “the issue is not whether mandatory vaccinations are merely a
23 further step Defendants could take, but whether it would be unreasonable not to take it.” (ECF
24 No. 3684 at 18:17-18.) But by focusing solely on Defendants’ decision *not* to implement the
25 Receiver’s recommended vaccination policy—which the Court appears to think is the best policy
26 choice—instead of determining whether all the measures Defendants *are* implementing
27 (including CCHCS’s own vaccination policies)—ensure “reasonable safety” of the incarcerated
28 population under the Eighth Amendment, the Court improperly heightened the standard

1 Defendants must meet to satisfy the Eighth Amendment. *Farmer*, 511 U.S. at 844. Focusing
2 only on the potential benefits of mandatory vaccinations for staff and some inmates, the Court
3 simply disregarded all of the mitigation measures that Defendants implemented earlier in the
4 pandemic and continue to implement today, and therefore failed to assess the evidence of
5 Defendants' actual mental attitudes, as required by *Farmer*. These measures include taking
6 aggressive steps to vaccinate the incarcerated population and staff starting as early as vaccines
7 became available in December 2020 (Decl. Toche Supp. Defs.' Response to Order to Show
8 Cause, ECF No. 3662 at ¶ 8), offering incentives to increase acceptance among both the
9 incarcerated population and staff (ECF No. 3660 at 17-18), offering booster shots in accordance
10 with recent public health guidance (Decl. Toche Supp. Defs.' Response to Order to Show Cause,
11 ECF No. 3662 at ¶ 3), requiring all correctional staff to verify that they are vaccinated or submit
12 to bi-weekly testing consistent with CDPH's July 26 public health order, and implementing a
13 vaccine mandate for staff assigned to licensed health care settings within correctional institutions
14 pursuant to CDPH's August 19, 2021 order (ECF Nos. 3657, 3657-1).

15 The Eighth Amendment requires prison officials to *reasonably* abate the risk, not to
16 completely eliminate it. *Farmer*, 511 U.S. at 844. Defendants argue that they have more than
17 adequately demonstrated reasonable efforts to abate the risk of COVID-19, and these efforts are
18 ongoing and evolving.

19 The Ninth Circuit reiterated the correct deliberate-indifference standard in *Frailhat*, 20-
20 55634, 2021 WL 4890884, at *1, in an opinion published this month. *Frailhat* was brought by
21 detainees in the custody of the United States Immigration and Customs Enforcement (ICE), and
22 asserted deliberate indifference to the risks of COVID-19 in ICE's detention facilities. After the
23 district court found that the plaintiffs had shown a likelihood of success on the merits and issued a
24 preliminary injunction covering all ICE detention facilities, ICE appealed the district court's
25 ruling. The Ninth Circuit, after exhaustively assessing *all* of ICE's many efforts to respond to the
26 risks from the virus, concluded that the district court had not correctly applied the deliberate
27 indifference standard. *Id.* at *5-*12, *19-*25.

28 In reaching that conclusion, the Court made several points that are instructive here. First, a

1 finding of deliberate-indifference must satisfy the “formidable” reckless-disregard standard. *Id.*
2 at *19. That standard reflects “the core principle, grounded in the separation of powers, that far-
3 reaching intrusion in matters initially committed to a coordinate Branch requires a
4 commensurately high showing sufficient to warrant such a significant exercise of judicial power.”
5 *Id.* at *4. Here, that high standard would require a finding that Defendants, despite all of their
6 efforts throughout the pandemic, including their extensive vaccination of class members and
7 prison staff, have acted with reckless disregard to the safety of class members.

8 Although it was far from a complete list, the Court recognized, that the record demonstrates
9 Defendants implemented the following measures and programs during the course of the pandemic
10 to reduce the risk of harm: (1) significant population reduction measures; (2) temporary
11 suspensions of county intake; (3) temporary suspensions of visiting; (4) masking mandates; (5)
12 distancing mandates; (6) enhanced cleaning protocols; (7) quarantine and isolation protocols; (8)
13 measures to assess and improve ventilation systems; (9) specialized teams and command centers
14 to manage outbreak-response efforts; (10) patient screening, testing, and movement protocols;
15 (11) staff testing mandates; (12) patient and staff vaccination programs; and (13) incentive
16 measures to increase vaccination rates. (ECF No. 3684 at 1-3.) The Court further found that
17 Defendants supported efforts to offer vaccines to class members before many jurisdictions
18 followed suit. (*Id.* at 4.) This record simply does not support a ruling that Defendants acted with
19 reckless disregard toward the risks of COVID-19 to the incarcerated population.

20 Second, *Fraihat* correctly recognized that the “constitutional line” cannot be drawn based
21 on “a court’s idea of how best to operate a detention facility.” 20-55634, 2021 WL 4890884, at
22 *24. With that principle in mind, *Fraihat* concluded that, regardless of whether the district court
23 considered ICE’s own policy “as strong, fair, needing improvement, or something else, it simply
24 cannot be described . . . as a reckless disregard of the very health risks it forthrightly identified
25 and directly sought to mitigate.” *Id.* at *21. This is precisely the sort of policy second-guessing
26 the Court engaged in with this ruling. Among myriad other COVID-19 prevention measures,
27 Defendants implemented vaccination policies that have resulted in tens of thousands of class
28 member and staff vaccinations throughout a large and complex prison system. Yet the Court did

1 not frame the issue as whether, despite implementing these extensive prevention and vaccination
2 policies, Defendants acted with reckless disregard to the safety of class members. Instead, the
3 Court evaluated whether Defendants' vaccination policy "neede[ed] improvement," *id.*, and
4 concluded that Defendants are deliberately indifferent because their existing vaccination policies
5 could have gone further. But as *Fraihat* explained, the fact that a court might believe that a
6 policy could have been stronger or that a modified policy could have done a better job of
7 mitigating risks does not convert a party's conduct into deliberate indifference. *Id.*

8 Third, *Fraihat* reiterated that the deliberate indifference standard is informed by important
9 principles of deference to the political branches of government in cases concerning detention and
10 correctional facilities, especially when facing "a public health crisis unlike any that we have
11 encountered in our time." *Fraihat* at *21; *see also Bell v. Wolfish*, 441 U.S. 548, 520, 531 (1979)
12 ("[T]he operation of our correctional facilities is peculiarly the province of the Legislature and
13 Executive Branches of our Government, not the Judicial," and "courts are ill equipped to deal
14 with the increasingly urgent problems of prison administration,' . . . it would 'not [be] wise for
15 [it] to second-guess the expert administrators on matters on which they are better informed.'" (quoting *Pell v. Procunier*, 417 U.S. 817 (1974))). "When combined with the exigencies of a
16 global pandemic, these core principles, grounded in the Constitution's separation of powers, must
17 in this context necessarily inform the deliberate indifference standard and the scope of appropriate
18 injunctive relief." *Fraihat* at *25.

20 The Ninth Circuit was particularly troubled by the fact that as "ICE was in the middle of
21 confronting an unprecedented and evolving public health problem, it found its nationwide policies
22 almost immediately subject to judicial revision." *Fraihat* at *4. This is precisely Defendants'
23 predicament. In the middle of combatting a pandemic with evolving measures and policies,
24 including evolving policies on vaccinations, the Court's ruling usurped the political branch's
25 ability to make its own informed decisions on how to proceed, including the best way to keep
26 inmates safe from COVID-19, while also maintaining security within the prisons and ensuring
27 inmate access to medical and mental health care services and educational and rehabilitative
28 programming. As *Fraihat* stated, the deliberate-indifference standard recognizes that the

1 executive “must have some discretion in addressing a complex problem like the one before us.”

2 *Id.* at 24.

3 The Court’s application of incorrect legal standards raises a substantial case for relief on the
4 merits on appeal.

5 **2. The Court Disregarded Defendants’ Numerous Ongoing Mitigation**
6 **Efforts to Reduce the Risk of COVID-19.**

7 The Court summarized a number of the safety measures Defendants implemented during
8 the course of the pandemic at the beginning of its order where it found that Defendants
9 implemented several early release programs (resulting in the early release of approximately
10 11,655 inmates since the start of the pandemic), a temporary suspension of county jail intake and
11 visitation, masking and distancing requirements, advanced cleaning protocols, ventilation
12 improvement efforts, centralized command centers and multidisciplinary teams to oversee
13 response efforts to outbreaks, movement protocols to reduce the risk of virus transmission, staff
14 testing procedures, quarantine and isolation procedures, programs to vaccinate all staff and
15 incarcerated people, incentive measures to increase vaccine acceptance, and the provision of
16 additional vaccine doses for immunocompromised incarcerated people in accordance with
17 updated public health guidance. (*See* ECF No. 3684 at 2:21-3:1, 3:22-4:9.)

18 But, Defendants argue, the Court then stated that it was unpersuaded by past efforts because
19 under the deliberate-indifference standard, it need only consider Defendants’ current attitude and
20 conduct. (*Id.* at 11.) The Court’s reasoning misses the fact that many of these efforts are
21 ongoing, and therefore do reflect Defendants’ current attitudes and current conduct. Defendants
22 argue that had the Court considered their numerous efforts to reduce the risks of COVID-19 that
23 are ongoing, it could not have found a violation given the Eighth Amendment’s exacting
24 standards: to violate the Eighth Amendment, prison officials must know of a substantial risk of
25 serious harm to an incarcerated person’s health or safety, and disregard it. *Farmer*, 511 U.S. at
26 837.

27 According to Defendants, that the Court ignored Defendants’ extensive and ongoing
28 COVID-19 prevention policies is illustrated by the Court’s assertion that Defendants did not

1 “present any evidence that it would be reasonable not to address the introduction of the virus into
2 the prisons.” (ECF No. 3684 at 19:12-13.) This statement seems to assume that Defendants are
3 currently making no efforts to address the introduction of the virus into the prisons, which is
4 incorrect. Defendants *are* addressing the introduction of the virus into the prisons through a
5 multilayered approach, because no single measure is enough to combat the risks of COVID-19.
6 (ECF No. 3660 at 11:10-16.) For example, Defendants require workers entering the prisons to
7 present proof of vaccination. (*Id.* at 16:18-20.) Workers who cannot show proof of vaccination
8 must be tested for COVID-19 twice per week. (*Id.*) And regardless of vaccination status, each
9 person entering the prisons must wear a procedure, N95, or KN95 mask at all times. (Decl.
10 Toche Sup. Defs’ Response to Order to Show Cause at ¶ 18, ECF No. 3662 at 7:5-10.)
11 Additionally, Defendants’ stringent movement protocols, which include testing and quarantining
12 incarcerated people arriving from county jails, are also designed to prevent the introduction of
13 COVID-19 into the prisons. (ECF No. 3660 at 8:23, 8:26, 9:24-10:6.)¹ CDCR and CCHCS’s
14 implementation of the CDPH’s vaccine-mandate requirements for healthcare settings and ongoing
15 efforts to increase staff-vaccination rates generally should also have been considered, along with
16 the recent implementation of a booster vaccine policy for eligible patients. Any conclusion that
17 Defendants’ *current conduct* is not indicative of aggressive action to prevent the introduction of
18 the virus into the prisons cannot be reconciled with these facts.

19 Furthermore, Defendants argue, the measure of their current attitudes and conduct should
20 not be limited to their efforts to prevent the introduction of the virus. Thus, the Court should also
21 have considered that if the virus does enter a prison, Defendants’ policies require that the affected
22 prison activate an incident command post staffed by both healthcare and custody staff to
23 coordinate and manage all operational activities related to outbreak response efforts designed to
24 mitigate the risk. (*Id.* at 10:25-27.) These efforts include the implementation of quarantine and
25 isolation procedures and testing of incarcerated people and staff at a higher frequency until the
26 outbreak abates. (*Id.* at 15:7-9.) Prisons experiencing outbreaks also do not accept intake and,

27 ¹ See ECF Nos. 3660, 3662, and 3673-1 for more information regarding CDCR’s COVID-
28 19 response efforts to date. See also Cal. Dep’t. Corr. & Rehabilitation, *Updates*,
<https://www.cdcr.ca.gov/covid19/updates/> (last visited Oct. 21, 2021).

1 with very limited exception, do not transfer incarcerated people to other locations until the
2 outbreak has resolved. (*See, e.g., id.* at 8:15, 10:15-16; *see also* Cal. Corr. Health Care Services,
3 *COVID-19 Screening and Testing Matrix for Patient Movement*, [https://cchcs.ca.gov/wp-](https://cchcs.ca.gov/wp-content/uploads/sites/60/COVID19/Appendix13-PatientMovement.pdf)
4 [content/uploads/sites/60/COVID19/Appendix13-PatientMovement.pdf](https://cchcs.ca.gov/wp-content/uploads/sites/60/COVID19/Appendix13-PatientMovement.pdf) (last updated Sept. 22,
5 2021.) Heightened cleaning procedures continue at the same time. (ECF No. 3660 at 8:21-22.)

6 The Court erred in concluding that Defendants’ multilayered response to the pandemic,
7 which includes robust vaccination programs, is deliberately indifferent. (ECF No. 3684 at 11:9-
8 10.) Indeed, although Defendants implemented many of these measures before vaccines became
9 available, these measures are continuing because they help limit the introduction of COVID-19
10 into CDCR’s prisons and help abate the risk of COVID-19 if it is introduced into a prison. These
11 measures are relevant to an analysis of Defendants’ *current* attitudes and conduct because these
12 efforts are currently ongoing. The Eighth Amendment demands *reasonableness* in the face of a
13 substantial risk of serious harm, not a complete elimination of the risk. *See Farmer*, 511 U.S. at
14 822-23. And here, Defendants’ proactive approach to outbreak prevention and management is
15 reasonable. But even if complete elimination of the risk were the correct standard, no record
16 evidence supports the conclusion that the remedy the Court ordered would actually effectuate that
17 goal.

18 The Court further rejected Defendants’ argument regarding unvaccinated incarcerated
19 people, concluding that it “fail[s] to consider that it is not only the unvaccinated population that is
20 at substantial risk of serious harm from COVID-19, and that such risk would be present even if
21 the entire incarcerated population were vaccinated.” (ECF No. 3684 at 9:2-4.) But, as
22 Defendants point out, the record makes clear that Defendants take risks to the vaccinated
23 population extremely seriously. As discussed above and in Defendants’ response to the Court’s
24 order to show cause (*see* ECF No. 3660 at 7:25-11:9, 17:6-18:11), Defendants continue to
25 implement numerous safety measures applicable to the vaccinated and unvaccinated alike, in
26 addition to ongoing efforts to increase class member vaccinations. (*Id.*) Because Defendants
27 implement safety measures to address the risk of COVID-19 to both vaccinated and unvaccinated
28

1 incarcerated people, and because the Court found that they disregard the risk the virus poses to
2 vaccinated people, Defendants are likely to succeed on the merits of their appeal.

3 **3. The Court’s Ruling Disregarded Analogous Cases Defendants Cited**
4 **and Misinterpreted the Scope of Defendants’ Safety Measures.**

5 Defendants supported their position regarding the Court’s order to show cause with recently
6 decided cases that analyzed prison officials’ COVID-19 response efforts and compliance with the
7 Eighth Amendment. (ECF No. 3660 at 5:3-15; ECF No. 3673 at 6:8-7:3.) For example,
8 Defendants argued that unvaccinated people are most vulnerable to the harmful effects of
9 COVID-19, and prison officials do not violate the Eighth Amendment if incarcerated people
10 refuse to accept the vaccine. *See, e.g., Zatko v. Rowland*, 835 F. Supp. 1174, 1178 (N.D. Cal.
11 1993) (incarcerated person’s refusal to accept medical care did not amount to a denial or delay of
12 medical care or harm by prison officials) (citing *Estelle*, 429 U.S. at 104-05 (1977)). The Court,
13 however, dismissed these cases with a cursory citation to *Pride v. Correa*, 719 F.3d 1130, 1132
14 (9th Cir. 2013), finding that the cases Defendants relied on sought “individual injunctive relief,
15 rather than the type of systemic relief sought here.” (ECF No. 3684 at 8:24-9:2.)

16 But in *Pride*, Defendants argue, the Ninth Circuit drew the distinction between individual
17 and systemic claims to reject prison officials’ argument that relief for the plaintiff’s individual
18 medical claim was already being provided in the *Plata* class action. 719 F.3d at 1132. The Ninth
19 Circuit reversed the district court’s dismissal of the plaintiff’s individual claim, holding that
20 “*Plata* does not bar the prisoner’s claim for injunctive relief.” *Id.* at 1137. The Ninth Circuit
21 reasoned that because the plaintiff’s “claim for injunctive relief concerns only his individual
22 medical care, his claim is not already encompassed in the *Plata* litigation, which seeks systemic
23 reform of medical care in California prisons.” *Id.* *Pride* neither finds nor suggests that analyses
24 in individual cases are irrelevant to issues in matters seeking “systemic relief.” Accordingly, the
25 Court erred in disregarding most of the cases Defendants cited on this issue.

26 Defendants also cited a recent decision in an Eighth Amendment case brought by an
27 individual incarcerated person, in which the Eastern District held the plaintiff was unlikely to
28 succeed on the merits of his Eighth Amendment claim. *Davis v. Allison*, No. 1:21-cv-00494-

1 HBK, 2021 WL 3761216 at *6 (E.D. Cal. Aug. 25, 2021), *report and recommendation adopted*,
2 2021 WL 4262400 (E.D. Cal. Sept. 20, 2021) (denying motion for preliminary injunction) (citing
3 *Helling v. McKinney*, 509 U.S. 25, 32 (1993) and *Wilson v. Seiter*, 501 U.S. 294, 304 (1991)). The
4 Court rejected this case as unpersuasive because Defendants did not rebut the Receiver’s and
5 Plaintiffs’ evidence “that the harms faced by vaccinated incarcerated persons are substantial and
6 not speculative,” whereas in *Davis*, the Eastern District found that the harm the plaintiff alleged
7 was speculative at best. ECF No. 3684 at 8-9 n.3. However, the Court overlooked the Eastern
8 District’s analysis of CDCR’s pandemic response efforts, which formed the basis of its
9 conclusion that the plaintiff failed to satisfy the subjective prong of the deliberate indifference
10 standard regarding “whether three COVID-19 protocols in place at Pleasant Valley subject
11 Plaintiff to unconstitutional conditions of confinement under the Eighth Amendment.” *See Davis*,
12 2021 WL 3761216 at *4.

13 The Eastern District’s analysis included consideration of a number of CDCR’s pandemic
14 response efforts, including social distancing, mask-wearing, the availability of N95 masks and
15 cleaning supplies, COVID-19 testing, and quarantine and isolation protocols that include
16 immediately rehousing incarcerated people who test positive and medical checks of incarcerated
17 people in quarantine and isolation. *Id.* at *5-6. The Eastern District further noted that “other
18 federal courts have found similar measures by correctional officials in comparable circumstances
19 to be reasonable and not violative of the Eighth Amendment.” *Id.* at *6 (citations omitted).
20 Taking into consideration the additional fact that the plaintiff “received the [COVID-19] vaccine
21 as requested[,]” the Eastern District concluded “[t]he protocols challenged by Plaintiff fall far
22 short of denying him his basic human needs.” *Id.*

23 Despite much discussion regarding the objective prong of the deliberate indifference
24 standard and whether COVID-19 creates the substantial risk of serious harm—a fact Defendants
25 have never disputed, in this litigation or throughout the pandemic—that is not the dispositive
26 issue. In this matter, the subjective prong is dispositive: that is, whether Defendants *reasonably*
27 address the risk presented by COVID-19. The Eastern District’s analysis, published in August
28 2021 in the midst of the parties’ briefing in response to the Court’s order to show cause, is clearly

1 applicable to the issue of whether Defendants’ pandemic response efforts violate the Eighth
2 Amendment and should not have been disregarded.

3 Accordingly, a substantial case on the merits exists, warranting a stay of the Court’s
4 September 27, 2021 order.

5 **4. The Court’s Unreasonableness Finding Disregarded the Success of**
6 **Defendants’ Efforts.**

7 The Court also supported its deliberate indifference by arguing that the scope of the
8 California Department of Public Health’s (CDPH) August 19 public health order, which
9 mandated vaccination for certain healthcare workers in correctional settings, was inadequate. The
10 Court analyzed public health science and the logic of CDPH’s policy decision, and found that
11 “[g]iven recent outbreaks, there is no doubt that the limited vaccine requirements adopted by
12 Defendants are insufficient ‘to ensure reasonable safety.’” (ECF No. 3684 at 15:5-7.)
13 Defendants argue that the Court erred in reaching this conclusion for two reasons.

14 First, the Court’s order does not acknowledge the drastic reduction in COVID-19 cases
15 since Defendants introduced vaccines into their arsenal of mitigation measures. In assessing the
16 risk CDCR’s incarcerated population faces from the virus, the Court examined the number of
17 outbreaks in the months preceding its order (*id.* at 13:4-8), but, as Defendants argue, it considered
18 neither the magnitude nor the outcomes of those outbreaks, and did not differentiate the
19 magnitude or outcomes of outbreaks that occurred before CCHCS successfully vaccinated
20 upwards of seventy-nine percent of the incarcerated population with at least one dose of vaccine.
21 This data was included in Defendants’ briefing: the number of COVID-19 cases among CDCR’s
22 incarcerated population peaked at 10,617 on December 22, 2020, when vaccines first became
23 available, and declined to 101 positive cases by September 9, 2021, when approximately seventy-
24 nine percent of the incarcerated population was at least partially vaccinated. (*See* Declaration of
25 Connie Gipson, ECF No 3673-1 at 2, ¶ 3; Decl. Toche Supp. Mot. Stay ¶ 6.) Additionally, as of
26 October 24, 2021, three out of approximately 99,300 incarcerated people were hospitalized for
27 COVID-19-related reasons, compared to 143 hospitalizations on January 5, 2021. (Decl. Toche
28 Supp. Mot. Stay ¶ 6.)

1 Second, contrary to the Court’s finding that “[n]either Defendants nor CCPOA offer any
2 evidence suggesting that further voluntary efforts will be any more successful,” (ECF No. 3684 at
3 20:12-13), Defendants point out that they submitted evidence that staff vaccine acceptance rates
4 increased by five percent during months when incentives were offered (ECF No. 3660 at 18:14-
5 20). On this basis, Defendants urged the Court to allow recently introduced policies, including
6 public health orders designed, in part, to increase staff vaccination rates, to be fully implemented.
7 (*Id.* at 17:8-9, 17:14-22, 18:26-24:2.) And as Defendants predicted, staff vaccination rates have
8 continued to rise. Well over 10,000 doses of vaccine were administered to prison staff after the
9 Court issued the order to show cause on August 9 through October 21, 2021. (Decl. Toche Supp.
10 Mot. Stay ¶ 3.) The number of staff who have received at least one dose of vaccine increased
11 from about fifty-three percent on August 6, 2021, to about sixty-three percent by October 14,
12 2021. (*Id.*) And the vaccination rates among custody staff have increased from about forty-one
13 percent to fifty-one percent in the same period. (*Id.*)

14 Additionally, the number of positive COVID-19 cases across CDCR’s institutions has
15 remained relatively low in recent months. As of October 25, CCHCS reported 187 active cases
16 among CDCR’s population of approximately 99,300, and cases have recently hovered around
17 200. (Decl. Toch Supp. Mot. Stay ¶ 6)

18 Accordingly, Defendants argue, the Court erred in concluding that Defendants are
19 deliberately indifferent by failing to consider their success in mitigating the risks and increasing
20 vaccinations through their current efforts and policies. Defendants are likely to succeed on the
21 merits of their appeal.

22 **B. The Court Erred in Finding That the Receiver’s Proposed Mandatory**
23 **Vaccination Policy Does Not Satisfy the PLRA’s Needs, Narrowness,**
24 **Intrusiveness Requirement.**

25 A Court may not grant prospective relief under the Prison Litigation Reform Act (PLRA)
26 unless that “relief is narrowly drawn, extends no further than necessary to correct the violation of
27 the Federal right, and is the least intrusive means necessary to correct the violation of the Federal
28 right.” 18 U.S.C. ¶ 3626(a)(1)(A). The Court lacks the authority to order prospective relief
because, as discussed above, Defendants’ response to the COVID-19 pandemic does not violate

1 the Eighth Amendment. *See Tyler v. Murphy*, 135 F.3d 594, 596 (8th Cir. 1998) (“The PLRA
2 limits remedies to those necessary to remedy the proven violation of federal rights”) (quotation
3 marks and citations omitted). But even if there were a violation, the Court erred in finding that
4 the Receiver’s proposal satisfied the PLRA’s restrictions on prospective relief.

5 The goal of the Receiver’s policy is to ensure the safety of the incarcerated population, and
6 the Receiver’s own data demonstrates that *being* vaccinated is the single safest way to protect
7 one’s self from a serious COVID-19 infection. (ECF No. 3638 at 5, 22.) Because “narrow
8 tailoring requires a fit between the [remedy’s] ends and the means chosen to accomplish those
9 ends,” a more narrowly tailored solution would be to vaccinate all class members before
10 evaluating the necessity for a vaccine mandate addressing everyone else. *Brown v. Plata*, 563
11 U.S. 493, 531 (2011) (quotation marks and citations omitted).

12 According to Defendants, the Court dismissed their argument that vaccinating the roughly
13 20,000 unvaccinated class members is a far more narrowly tailored plan than mandating
14 vaccination for virtually all CDCR prison workers instead, stating that “neither the Receiver nor
15 any party has recommended that vaccination be required for all incarcerated persons, and so that
16 question is not before the Court.” (ECF No. 3684 at 19:9-11.) This was clear error because the
17 availability of that option is indisputably relevant to whether the Receiver’s recommendation
18 meets the PLRA’s standards, regardless of whether any party formally recommended it.

19 However, now the Receiver *has* indicated an intention to mandate vaccination for all class
20 members. The very last sentence of the September 27 vaccine-mandate order directed the
21 Receiver to “consider efforts to increase the vaccination rate among the incarcerated population,
22 including whether a mandatory vaccine policy should be implemented.” And at the October 14,
23 2021 intervention hearing, the Receiver’s counsel stated: “Your Honor, you asked the receiver to
24 consider efforts to increase the vaccination rate among the incarcerated population. We are
25 considering that, and we are developing a plan that we think effectively will read that all
26 incarcerated persons becoming vaccinated, subject to religious and -- and medical exemptions.
27 That plan is still in development, but we will submit a plan to the court.” Tr. Intervention Hr’g,
28 15-16, Oct. 14, 2021. This demonstrates that the Receiver is working on a more narrowly tailored

1 plan that should be implemented and evaluated before the Court requires the extreme measure of
2 mandatory vaccinations for all prison staff.

3 The Court also found flaw in Defendants’ argument because they “do not contest the
4 continued risk of harm to *vaccinated* incarcerated persons,” but omitted evidence in the record of
5 Defendants’ extensive efforts to reduce the risk posed by COVID-19 to those vaccinated people.
6 (*Id.* at 19:11-12.) According to Defendants, this argument is based on an assumption, which is
7 flatly contradicted by the record, that vaccinated incarcerated persons can be completely protected
8 from COVID-19—using the Court’s own logic that vaccinated persons may still contract
9 COVID-19, the risk of exposure remains even if every worker were vaccinated because they
10 likewise can still contract and transmit the disease (as can workers granted exemptions under the
11 Receiver’s recommendation). Moreover, the Court did not reach the ultimate conclusion clearly
12 supported by the record that no safety measure will protect unvaccinated incarcerated people as
13 well as if they themselves are vaccinated—not even the Receiver’s proposal to require the
14 vaccination of those who work near them (while allowing exemptions for religious beliefs and
15 medical reasons). Indeed, the Court overlooked Defendants’ argument that, unlike school-age
16 children under age 12 who are ineligible for vaccination based on their age, no class member is
17 age-barred from receiving the vaccine. (ECF No. 3660 at 14-15.)

18 Additionally, the Court conceded that CDPH’s August 19, 2021 public health order
19 requiring certain healthcare staff to be vaccinated “is more narrow and would be less intrusive
20 than the Receiver’s recommendation,” but nonetheless rejected it because it “was not intended to
21 address the risk of introduction of the virus by staff into the institutions or even to protect the
22 incarcerated population in anything other than healthcare settings.” (ECF No. 3684 at 20:2-4,
23 20:24-26.) Defendants point out that that plan had not been fully implemented at the time the
24 Court ruled, and the Court simply speculated that it would not adequately protect Plaintiffs.
25 Indeed, contrary to the Court’s conclusion that no “evidence suggest[ed] that further voluntary
26 efforts will be any more successful” (*id.* at 20:12-13), staff vaccination rates have increased from
27 fifty-three to sixty-three percent since the Court issued its order to show cause, and COVID-19
28

1 infection rates among the incarcerated population remain exponentially lower than in December
2 2020 when vaccines first became available. (Decl. Toche Supp. Defs.’ Mot. Stay at ¶¶ 3-6.)

3 As a result Defendants argue, the Court erred in selectively applying evidence in the record
4 to conclude that “none of the alternatives suggested by Defendants . . . would correct the violation
5 of Plaintiffs’ Eighth Amendment rights identified in this order,” and that the Receiver’s
6 recommendation complies with the PLRA’s restrictions on prospective relief.

7 Defendants are likely to succeed on the merits of their appeal for the reasons discussed
8 above.

9 **III. LIKELIHOOD OF IRREPARABLE HARM**

10 It is “difficult to imagine an activity in which a State has a stronger interest, or one that is
11 more intricately bound up with state laws, regulations, and procedures, than the administration of
12 its prisons.” *Woodford v. Ngo*, 548 U.S. 81, 94 (2006). Defendants argue that the Court’s
13 September 27, 2021 vaccine-mandate order is unprecedented and irreparably injures Defendants
14 by interfering with the operations and responsibilities of the State. Defendants further argue that
15 by interfering with the State’s ability to properly staff and run its prison system, the vaccine-
16 mandate order threatens to significantly impede the State’s ability to fulfill its responsibilities
17 under state and federal law. Such an unprecedented intrusion into state policymaking, outside the
18 confines of the PLRA, alone suffices to establish irreparable harm.

19 Recent experience at two of CDCR’s prisons—California Medical Facility (CMF) in
20 Vacaville and California Health Care Facility (CHCF) in Stockton—also confirm Defendants’
21 concerns about the irreparable operational harms that the requirement to vaccinate all correctional
22 officers with no testing option will likely cause. (Decl. Gipson Supp. Defs.’ Motion Stay ¶ 8.)
23 As medical prisons, CMF and CHCF are subject to the order issued by CDPH in August 2021
24 mandating that all staff at CMF and CHCF, including all correctional officers, be vaccinated by
25 October 14, 2021. (*Id.*) As of October 25, 2021—eleven days past the deadline for mandatory
26 compliance with CDPH’s order—78 (8.26%) of CHCF correctional officers, and 72 (10.14%) of
27 CMF correctional officers had neither complied by taking the vaccine nor sought a medical or
28 religious exemption. (*Id.*) The high levels of noncompliance indicate that substantial numbers of

1 officers are refusing to comply with the CDPH order. (*Id.*) The staggering number of religious
2 accommodation requests that CDCR has received from across the state's prisons in response to
3 the CDPH order further indicate that staff resistance to the vaccine-mandate order will be
4 substantial. (*Id.* ¶ 11.) As of October 15, 2021, CDCR has received 1,738 religious
5 accommodation requests in response to the CDPH order across multiple classifications of prison
6 workers. (*Id.*) About 1,160 of those requests are from essential custody staff, including
7 correctional captains, lieutenants, sergeants, officers and counselors. (*Id.*)

8 Moreover, Defendants argue, unions representing correctional officers and other staff at
9 affected institutions have vigorously pushed back on the CDPH vaccinate mandate for healthcare
10 settings at every step. (Decl. Gipson Supp. Defs.' Motion Stay ¶ 9; Decl. Toche Supp. Mot. Stay
11 ¶ 9.) The California Correctional Peace Officers Association has sued CDCR and CDPH in Kern
12 County to block the implementation of the CDPH order; the American Federation of State,
13 County, and Municipal Employees has issued a letter to CDCR and CCHCS on behalf of
14 psychiatric technicians who work in CDCR's prisons, demanding that CDCR and CCHCS cease
15 and desist from enforcing the CDPH order; and the Service Employees International Union has
16 filed an unfair labor practice charge with California's Public Employment Relations Board
17 against CDCR and CCHCS for implementing the CDPH order. (*Id.*)

18 Defendants argue that there is no reason to think that resistance at CMF and CHCF is not an
19 accurate barometer for what will happen when all correctional officers at all prisons are required
20 to accept the vaccine as a condition of employment under the vaccine-mandate order. (Decl.
21 Gipson Supp. Mot. Stay ¶ 12.) Indeed, these recent developments confirm the operational
22 concerns of CDCR leadership about implementing a vaccine mandate for all correctional workers
23 at this time (*Id.* ¶¶ 8-16.) And if correctional officers at other institutions exhibit similar rates of
24 noncompliance when the vaccine-mandate order is implemented, and are therefore not permitted
25 to enter the prisons as the vaccine-mandate order requires, CDCR's prisons are likely to
26 experience a substantial increase in staff vacancy rates.² (*Id.* 12.) Defendants present evidence

27 ² Events in another West Coast jurisdiction also forecast that California's prisons will
28 likely experience a significant adverse impact on staffing if the vaccine-mandate order is not

1 that increased officer vacancy rates, in turn, will likely result in the following significant,
2 irreparable impacts:

- 3 • Extremely high correctional officer vacancy rates create challenges for prisons to maintain
4 safety, security, and order, and the risk of security breaches and violence rises. (*Id.* ¶ 7.)
5 Correctional officers—who are sworn peace officers—are responsible for maintaining
6 safety, security, and order in the prisons, among many other important duties. (*Id.* ¶ 3.)
7 There are currently about 28,248 correction officers working in CDCR’s prisons. (*Id.*)
8 Sufficient officer staffing levels are required to maintain safety, security, and order
9 throughout the prisons. (*Id.*) Without sufficient numbers of correctional officers, prisons
10 cannot operate safely. (*Id.*) This is because there may be insufficient staff on hand to
11 adequately respond to serious security breaches and to maintain order. (*Id.* ¶¶ 3, 7.)
12 Violent security breaches can lead to physical injuries to incarcerated people and staff, and
13 result in workers compensation claims and lawsuits. (*Id.* ¶ 7.)
- 14 • Essential prison operations are supported by not only correctional officers but also
15 noncustodial workers throughout the prisons, such as culinary staff, electricians, plumbers,
16 carpenters, maintenance mechanics, warehouse workers, and administrative staff. (*Id.* ¶ 5.)
17 There are currently about 8,558 noncustodial workers throughout CDCR’s prisons who
18 support the basic functions of each prison. (*Id.*) If CMF and CHCF’s noncompliance rates
19 are consistent across other classifications of workers besides correctional officers, the
20 detrimental impact on administration and operations could be serious. (*Id.* ¶ 12.) If
21 culinary positions are insufficiently staffed, it becomes challenging to provide meals to the
22 prison population. (*Id.*) If electrician, plumber, and maintenance mechanic positions are
23 insufficiently staffed, work orders for various critical repairs throughout the prisons cannot

24
25 _____
26 stayed. (Decl. Gipson Supp. Mot. Stay ¶ 10; Request Judicial Notice, Ex. A.) The Seattle Times
27 reported on October 19, 2021, that as a consequence of Washington’s vaccine mandate for state
28 workers, the Department of Corrections lost about 4.5 percent of its prison staff. (*Id.*) Although
the article stated that a spokesperson for the department asserted that Washington’s prisons were
still sufficiently staffed to operate, if CDCR were to lose 4.5 percent of its prison staff across the
state, the impact on prison operations would be severe in some places, and normal operations
would not be possible in all of CDCR’s prisons. (*Id.*)

1 be timely completed. (*Id.*) And if there are insufficient administrative personnel, important
2 administrative functions that keep the prisons running cannot be timely carried out. (*Id.*)

- 3 • High correctional officer vacancies can also have severe impacts on prison operations,
4 requiring reductions in programming for the incarcerated population, including recreation,
5 day room, rehabilitation, education, and work programs, and even the curtailment of basic
6 services, such as phone calls and daily showers for the incarcerated population. (*Id.* ¶ 6.)
7 Limiting or suspending these programs allows the prison to redirect correctional officers to
8 help ensure the delivery of essential services, such as medical care and meals for the
9 incarcerated population. (*Id.*) If the number of vacancies rises to the level suggested by the
10 preliminary data and widespread resistance to the vaccine mandate orders experienced to
11 date and discussed above, all programming may need to be suspended, and the incarcerated
12 population might be required to remain in cells or dorms for extended periods. (*Id.*)
- 13 • Situations where correctional officer vacancies become extremely high require officers to
14 work extensive overtime and place a great deal of stress on officers, leading to officer
15 fatigue, burn out, and injuries. (*Id.* ¶ 6.) As a result, more officers request extended periods
16 of leave, which can further exacerbate staffing challenges. (*Id.*)
- 17 • If the vaccine-mandate order is implemented, there is a serious risk that a substantial
18 number of highly experienced and skilled correctional officers who are currently eligible
19 for retirement benefits will simply choose to retire rather than be vaccinated. (*Id.* ¶ 13.)
20 Approximately 1,898 correctional officers have been employed for over twenty years and
21 are over age 50. (*Id.*) This means that they could retire at any time. (*Id.*) CDCR normally
22 relies heavily on incoming cadets to help fill positions of officers who have retired, but as
23 discussed below, the number of available cadets has been insufficient to allow CDCR to
24 immediately back-fill in the case of substantial retirements or departures. (*Id.*)
25 Consequently, if a significant portion of these officers were to retire in lieu of taking the
26 vaccine, the impact to CDCR's operations would be severe. (*Id.*)

27 The likely impact of the vaccine-mandate order will come at a time when CDCR's staffing
28 levels have already been significantly impacted by the COVID-19 pandemic. (*Id.* ¶ 14.) For

1 example, Defendants present evidence that CDCR's Correctional Officer Academy has been
2 generating fewer cadets during the pandemic than in previous years. (*Id.*) Before the pandemic,
3 in fiscal year 2018/19, the Academy graduated 1,608 cadets; in 2019/20, there were 1,316 cadet
4 graduates; and in 2020/21 there were only 892 cadet graduates. (*Id.*) So far, only 461 cadets
5 have graduated in fiscal year 2021/22. (*Id.*) With fewer cadets graduating, it is difficult for
6 CDCR to timely replace officers who quit or retire. (*Id.*) Additionally, significant numbers of
7 current cadets in the academy have not been vaccinated, and the vaccine mandate is likely to
8 further reduce the number of graduating cadets who will take positions in CDCR's prisons. (*Id.*)
9 Of the cadets graduated on October 22, 2021, only twenty-four percent are currently vaccinated.
10 (*Id.*)

11 In its September 27 vaccine-mandate order, the Court relied upon the August 19 CDPH
12 public health order requiring vaccination of workers in correctional healthcare settings to argue
13 that a similar mandate should be applied to all correctional staff. However, Defendants argue, the
14 Court's order ignores significant differences between the settings and ability to respond to any
15 staffing impacts caused by a vaccine mandate. CDPH has entered into contracts with outside
16 healthcare services providers that state agencies—including CDCR—can use to satisfy short term
17 medical staffing needs during the pandemic. (Decl. Toche Supp. Mot. Stay ¶ 8.) And CCHCS
18 also has its own contracts with healthcare services providers. (*Id.*) Thus, through its own
19 contracts and through the CDPH's contracts, CCHCS has the means to fill vacancies in various
20 healthcare positions that may arise because of people deciding to quit or retire rather than comply
21 with a vaccine mandate. (*Id.*) Indeed, just in the last 10 months, these contracts have resulted in
22 over 400 clinician deployments to fill vacancies in healthcare positions. (*Id.*) But there are no
23 similar contracts for correctional officers, who are now all subject to the Court's vaccine-mandate
24 order. (Decl. Gipson Supp. Mot. Stay ¶ 16.) Therefore, there is no simple or quick way to
25 address severe shortages of correctional officers, and it could take months or years to fully
26 recover from a substantial loss of prison staff resulting from the vaccine-mandate order. (*Id.*)
27
28

1 The irreparable harm that will likely befall CDCR’s prisons, the staff who work in the
2 prisons, and the incarcerated people who live in the prisons requires a stay of the vaccine-
3 mandate order pending Defendants’ appeal to the Ninth Circuit.

4 **IV. THE BALANCE OF EQUITIES TIPS IN FAVOR OF A STAY.**

5 The final two factors for considering motions for stays pending appeal—the balance of
6 equities and the public interest—merge where the State is a party. *See Nken v. Holder*, 556 U.S.
7 418, 435 (2009). Here, the public interest would be best served by a stay of the vaccine-mandate
8 order in order to avoid the serious risk that the order will negatively affect operations at CDCR’s
9 prisons that could potentially impact safety, security, and order for both staff and the incarcerated
10 population. A stay would further serve the public interest by helping avoid disruptions to
11 rehabilitative programming for the incarcerated population. And a stay would serve the public
12 interest by helping to ensure sufficient prison staff to provide the incarcerated population with
13 essential and constitutionally mandated services, such as medical care and mental healthcare.

14 It is indisputable, Defendants argue, that they have already worked diligently and
15 successfully to reduce the risks of COVID-19 to the incarcerated population through their
16 vaccination programs, which have achieved:

- 17 • The vaccination of 78,788 class members with at least one dose (about seventy-nine
18 percent);
- 19 • The vaccination of 35,238 prison staff member (about sixty-three percent);
- 20 • A drop in active cases from over 10,000 in December 2020 to about 187 cases as of
21 October 24, 2021; and
- 22 • A drop from 143 class-member hospitalizations in January 2021 to three class-member
23 hospitalizations as of October 24, 2021. (Decl. Toche Supp. Mot. Stay ¶¶ 3-6.)

24 These same vaccination policies are also resulting in rising staff vaccination rates. Since
25 August 2021, the rate of staff who have had at least one dose of vaccine has risen from fifty-three
26 percent to sixty-three percent. (*Id.* ¶ 3.)

27 As a result of CDCR’s and CCHCS’s many efforts, and without the intervention of this
28 Court, the number of active cases has remained relatively low since March 2021. (*Id.* ¶ 6.) But

1 the world remains in the grip of this devastating pandemic, and there is no way to achieve perfect
2 safety for anyone. Across the country, people continue to contract COVID-19, and the science
3 has confirmed that even vaccinated individuals can contract and spread the virus. Thus, no one is
4 completely safe.

5 The currently ordered course will cause serious adverse impacts and harms, both to
6 CDCR's ability to safely and effectively operate the prisons, and to the incarcerated people who
7 reside in them. Because CDCR's ongoing efforts have already been successful at greatly curbing
8 the serious risks associated with the virus, the hardships associated with losing substantial
9 numbers of mission-critical prison staff tilts the scales in favor of a stay pending appeal.

10 **CONCLUSION**

11 For the reasons discussed above, the Court **GRANTS** Defendants' motion to stay the
12 September 27, 2021 order pending the outcome of its appeal.

13 It is so **ORDERED**.

14
15
16 Dated: _____

17 The Honorable Jon S. Tigar
18 United States District Judge
19
20
21
22
23
24
25
26
27
28