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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

MARCIANO PLATA, et al., Plaintiffs, v. GAVIN NEWSOM, et al., Defendants.	Case No. 4:01-cv-01351-JST **AMICUS CURIAE CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION'S PRELIMINARY SUBMISSION REGARDING MANDATORY VACCINATIONS** The Hon. Jon S. Tigar

I. INTRODUCTION

Minimizing or even eliminating COVID-19 infections in the State's prison system remains of primary import to Amicus Curiae California Correctional Peace Officers' Association ("CCPOA" or "Union"). A labor union carries no higher obligation than keeping its members safe, and, in this case, alive. The Union's aggressive efforts to date show the depth of its commitment to waging this righteous battle alongside the Receiver, the parties, and this Court.

Uniquely amongst state employee unions, CCPOA has repeatedly and consistently

supported vaccinations, masks and other personal protective equipment ("PPE"), and other COVID-19-tackling safety rules and practices:

- The Union's Board of Directors voiced support for vaccines in January, 2021, and its Executive Leadership allowed themselves to be filmed being vaccinated for a public service video encouraging all employees to get vaccinated (*See* CCPOA's Status Update Regarding Mask Wearing and Custody Staff filed on January 27, 2021, pp. 1:26 – 2:6);

- President Glen Stailey lobbied Governor Newsom to prioritize vaccination of prison staff and inmates;

- CCPOA continues to collaborate with the Goldman School of Public Policy and The People Lab to employ workplace behavioral science strategies to encourage union members to get vaccinated (*See id.* at, p. 2:7 – 16; Update from CCPOA on COVID-19 Mitigation Efforts filed on March 2, 2021, p. 2:6 – 19; Update from CCPOA on COVID-19 Mitigation Efforts filed on April 27, 2021, p. 2:7 – 15); and

- It has collaborated with CDCR and the Receiver's Office to establish the COVID Mitigation Advocate Program to use workgroups at each institution to train staff on mitigating COVID-19 and deploy them as peer-to-peer ambassadors to encourage coworkers to embrace COVID-19 safety measures. (*See* Memorandum from the Director of CCHS Corrections Services, Tammy Foss, the Director of CDCR Division of Adult Institutions, Connie Gipson, and CCPOA President, Glen Stailey to the Wardens, Chief Executives, and Union Representatives of Each Institution Regarding the COVID Mitigation Advocate Program ("COVID Mitigation Advocate Program Memo"), a copy of which is attached hereto as *Exhibit A*.)

The Union has also discussed with UCSF professionals bringing doctors to its convention to set up a booth and offer union-supported vaccinations. And, as discussed below, CCPOA continues to explore other ideas, internally, with experts and with the parties, to help increase the vaccination rate

All of these efforts are premised upon encouraging employees to *voluntarily* get vaccinated.

Mandating universal vaccination of staff, on the other hand, at this point in time, seems at odds with the dramatic reduction in COVID-19 infection rates within the prisons, and throughout the State generally, in recent months. Infections in the past six weeks have been at their lowest rate since the pandemic began. According to CDCR's website, the average rate of confirmed new inmate cases in the prison system, on a weekly basis, has been five since the week of March 21, 2021. (*See* CDCR Population COVID-19 Tracking, p. 5 (CDCR Patients: COVID-19 Trends),

https://www.cdcr.ca.gov/covid19/population-status-tracking/ (last visited May 20, 2021.)[1] These numbers are extraordinarily better than the distressing rates at the end of 2020, which peaked at 5,659 in the week of December 6, 2020. (*See id.*)

More than 60% of CDCR employees working in prisons state-wide have either been vaccinated or have contracted COVID-19.[2] (*See* Joint CMC Statement filed on February 12, 2021, p. 2:14-17.) Additionally, approximately 68.5% of incarcerated people are fully vaccinated (as of May 20, 2021), with another 2.7% partially vaccinated, i.e., have received one dose of a two-dose regimen. (*See* CDCR Population COVID-19 Tracking, *supra*, p. 2 (CDCR Patients: Confirmed COVID-19 and Outcomes).) The most vulnerable inmates have an even higher rate of vaccinations: nearly 90% of inmates age 65 or older are either fully vaccinated or soon will be fully vaccinated. (*See* Joint CMC Statement, 2/12/21, at p. 2:9-11.)

CDCR's success in reducing infections reflects wider success in California. Governor Newsom has announced that he intends to "fully open the economy" state-wide on June 15, 2021 if there are a sufficient number of vaccine doses available for Californians who are 16 years and older and who wish to be inoculated, and the State's hospitalization rates are "stable and low." (Office of Governor Newsom, Governor Newsom Outlines the State's Next Step in the COVID-19 Pandemic Recovery, Moving Beyond the Blueprint, https://www.gov.ca.gov/2021/04/06/governor-newsom-outlines-the-states-next-step-in-the-covid-19-pandemic-recovery-moving-beyond-the-blueprint/ (last visited May 20, 2021).) The Los Angeles Times recently reported that the State recorded its lowest hospitalization rate since the first few weeks of the pandemic. (*See* Rong-Gong Lin II, *L.A. County expected to hit COVID-19 herd immunity by end of July*, Los

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[1] Page number references in the CDCR Population COVID-19 Tracking citation refer to the "page" numbers of the Microsoft Power BI application within the above listed web page. The Microsoft Power BI application includes 9 "pages" of various tables and graphs displaying different statistics for each prison. Each page has its own sub-title, which is listed in the parenthetical of the citation, after the page number.

[2] CDCR and CCHCS believe that the reported numbers for staff vaccinations, at least 44%, may be low because employees are not reporting their vaccinations outside of the prison system. (*See* Joint CMC Statement filed on April 27, 2021 at p. 8:20 – 23.) Accordingly, CCHCS is working to identify these individuals to update its data. (*See id.* at p. 8:23 – 25.)

ANGELES TIMES, May 10, 2021, https://www.latimes.com/california/story/2021-05-10/l-a-county-expected-covid-19-herd-immunity-by-end-of-july.) Indeed, public health authorities anticipate that Los Angeles County and some parts of the Bay Area will reach herd immunity as early as July 2021. (*See id.*) The Governor has stated that he does not believe that mandatory vaccines for staff are warranted at this time. (*See* Byrhonda Lyons, *Newsom Won't Require COVID Vaccines For Prison Staff*, CALMATTERS, May 14, 2021, https://www.msn.com/en-us/news/us/newsom-wont-require-covid-vaccines-for-prison-staff/ar-BB1gLPg1.)

Despite these positive trends, the Union remains vigilant and continues to advocate for vaccinations and other mitigation efforts to prevent the further spread of COVID-19. Yet, it believes that an order from this Court imposing a mandatory vaccination program under the threat of termination, will be difficult to implement, will negatively impact the State and its employees by detracting from other mitigation efforts, and may undermine progress already made.

Additionally, we note that at a recent hearing in *Coleman v. Newsom*, while discussing CDCR's Roadmap to Reopening, state representatives appeared to indicate that, upon the resumption of inmate transfers from county jails, which appears imminent, if it has not already started, inmates will be offered the opportunity to be vaccinated but will **not** be required to do so. A vaccine mandated that would require staff to be vaccinated in order to protect inmates, but does not require current inmates or new inmates coming into the system to be vaccinated, sends a very mixed message.

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The Union's position, *at this point in time*, and as explained in more detail below, is that the Court should resist Plaintiffs' request that staff be subject to a mandatory vaccination order. More time should be given to the extensive efforts geared towards voluntarily improving vaccination rates. And CDCR and the parties should determine how, if one becomes necessary, a mandatory vaccination order would be implemented.

We file this brief ahead of the submission time for the parties' Joint Case Management Conference Statement in order to give them opportunity to opine upon it in their Statement or at Thursday's hearing.

CCPOA received the Receiver's email of Friday, May 21, 2021, regarding his consideration of seeking a vaccination order akin to that issued by the University of California system, as this brief was being finalized. The Receiver sharing his thinking is appreciated. CCPOA may separately submit an initial response to it before the Case Management Conference.

II.

EXISTING MITIGATION EFFORTS TO CURB COVID-19 INFECTION RATES SHOULD BE GIVEN MORE TIME TO WORK

Before mandating vaccination for employees, the Court should allow more time for existing measures, which have produced positive results in reducing COVID-19 through voluntary means, to raise employee vaccination levels.

A. Existing Efforts to Increase Staff Vaccination Rates, Some of Which Have Been Only Recently Initiated, Should Be Given Time to Work

CDCR, the Receiver, and CCPOA have all implemented further steps in recent weeks to increase vaccination rates amongst staff. These measures, together with changes in state law, will likely increase vaccination rates among staff members.

The COVID Mitigation Advocate Program has recently been finalized. Each institution will identify COVID Mitigation Agents to form a local COVID Mitigation Team, which will act as peer-to-peer resources for educating staff about COVID-19 precautions, emphasizing their benefits, and facilitating compliance. (COVID Mitigation Advocate Program Memo, p. 1 ["the delivery of the message is critical to the program's success"].) The program is designed to find members who will be the right fit to convey an "enthusiastic" message about the program's purpose and who will serve in different positions throughout the system. (*Id.* at p. 1 – 2.) A diverse team will more successfully convey this important message among the prisons' diverse workforce. The Union believes that peer-to-peer interactions can produce more positive results, including increased vaccinations, in comparison to any top-down approach, which could appear to be heavy-handed or just another rule coming down from management.

CDCR and CCHCS also recently announced that staff members who are fully vaccinated will no longer be subject to routine COVID-19 tests. (*See* Memorandum from the Director of

CDCR Division of Adult Institutions, Connie Gipson, and the Director of Health Care Services, CCHCS, Joseph Bick, M.D. to All CDCR and CCHCS Staff Dated May 1, 2021), a copy of which is attached hereto as *Exhibit B*.) This means freedom from recurring nasal swabs, which ought to offer some incentive – although, currently, this moratorium on testing is planned for the month of May only.

Further, CDCR and CCHCS are opening vaccine clinics at each institution, covering all shifts, for a minimum of five days during the month of May. (*See* Joint CMC Statement filed on April 27, 2021, p. 7:18 – 22.) Previously, vaccines were offered only through staff appointments via email. (*See id.* at p. 7:22 – 24.) If employees have taken advantage of this program by showing up to be vaccinated, CCHCS and CDCR should continue it.

The Union also has documented its own initiatives to influence its members to vaccinate, which complement management's efforts. These efforts continue.

Furthermore, on March 19, 2021, the State legislature enacted Senate Bill 95, which permits eligible employees to receive 80 hours of COVID-19 supplemental paid sick leave for, among other things, time spent obtaining a vaccine dose or experiencing symptoms related to the vaccine. (*See* Labor Code § 248.2(b)(1)(C), (D) as amended by Senate Bill 95, Session 2020 – 2021 (2021) (enacted).) This change may make a difference to those staff members who have been discouraged from getting the vaccine due to the common side effect of being knocked out by the vaccine for a day or more and thus losing paid sick leave from being unable to go to work. The State is "hopeful that this program, along with other measures, will encourage more institution-based employees to accept the vaccine." (Joint CMC Statement 4/27/21, p. 8:8-10.)

B. Existing Measures May Continue to Reduce Infection Rates

CDCR and CCHCS continue to improve and supplement existing safety measures to further reduce the rate of infections. For example, rules requiring the wearing of masks, other PPE, and social distancing continue in effect, and have clearly helped reduce infections. As CCPOA has raised before, better quality masks would help, too. CCPOA understands that CDCR has a large quantity of lesser quality N95 masks because it was unable to secure adequate supplies of better quality N95. Better quality masks will be especially important in the hot summer months

if officers are to be asked to continue wearing masks for long shifts

The historic reduction in the size of the State prison population in response to the pandemic has played a part. So, too, have efforts to set aside space devoted to quarantine and isolation and develop a movement matrix that sets forth strict testing and quarantine protocols. Due to a significant and sustained decline in the number of active COVID-19 cases among incarcerated persons, the majority of CDCR's reserved quarantine spaces, including large numbers of cells with solid doors, is now empty. (*See id.* at p. 13:17 – 23.)

Furthermore, CDCR has improved its ventilation systems in various prisons in response to the pandemic. This includes purchasing new equipment that is more efficient at filtering out small particles and contaminants than existing equipment and increasing the percentage of outside air that certain institutions use to filter out contaminants. (*See* Joint CMC Statement filed on March 24, 2021, p. 19:9-14.) CDCR continues to inspect and evaluate these systems at different facilities state-wide in accordance with best practices set forth by the Centers for Disease Control and Prevention, to identify any additional steps that can be taken to minimize COVID-19 transmission. (*See id.* at p. 20:2 – 12.)

III.

ADDITIONAL MEASURES TO INCREASE VACCINATION RATES SHOULD BE SERIOUSLY CONSIDERED

Although CCPOA believes that the existing measures described above will produce results, other types of incentives should be considered to increase staff vaccination rates. If successful, these incentives will help the State avoid the pitfalls identified below that will likely result from forcing vaccinations.

A. Incentives to Staff for Getting Vaccinated Should be Considered

Historically, incentives have been used to accomplish some of the goals mandated by this Court. For example, in 2006, Judge Henderson granted the request of the former Receiver to waive California state law to unilaterally adjust salary ranges for a broad spectrum of prison health care staff, including doctors and nurses. (*See Judge Grants Receiver's Request to Raise Salaries for Prison Medical Staff* (California Prison Health Care Receivership Corp., San Francisco, CA),

October 17, 2006, at 1, https://cchcs.ca.gov/wp-content/uploads/sites/60/2017/08/pr_101706.pdf.)

With respect to the current pandemic, a number of private employers around the country have moved forward with financial incentives to encourage employees to vaccinate voluntarily. For example, the Colorado Department of Corrections offered employees a $500 cash incentive to be vaccinated. (*See* Marshall Zelinger, *Colorado offering prison staff $500 to get COVID vaccine*, KSUA-TV 9NEWS, March 30, 2021, https://www.9news.com/article/news/local/colorado-prison-doc-staff-500-dollar-incentive-covid-vaccine/73-210cf987-86b4-426e-8c1f-402ac6ee35e1.) Others employers have provided free, comprehensive Covid-19 medical coverage to their employees. (*See* Ramishah Maruf, *These companies are paying their employees to receive the Covid-19 vaccine*, CNN BUSINESS, March 25, 2021, https://www.cnn.com/2021/03/24/business/covid-vaccine-incentives-companies/index.html.)

A similar one-time bonus offered to prison staff may encourage them to get vaccinations. Leave credits are another option. One easy common-sense incentive is to exempt staff members, who get sick due to the temporary side effects from the vaccine, from the so-called "flattening overtime" rule. Under this rule, sick leave does not count as time worked for overtime purposes. (Memorandum of Understanding between CCPOA and the State of California Effective July 3, 2020 to July 22, 2022, Art. XI, §§ 11.07.B, 11.10.C.) Specifically, an employee cannot use sick leaves hours to satisfy the prerequisite under the MOU that an employee must work 41 regular hours in a work week before receiving overtime pay. (*Id.* at Art. XI, §§ 11.07.C, 11.10.C.) This causes employees, who suffer from the vaccine's side effects and thus are forced to call in sick, to lose overtime pay if they work additional shifts in the workweek.

Though the cost of financial incentives to such a large workforce are not insignificant, a mandatory vaccination program would not be without its costs, including implementing new procedures, holding due process hearings, and potentially defending against litigation. Furthermore, the State appears to have the ability to afford new incentives given Governor Newsom's recent announcement that the State has $75.7 billion budget surplus. (, *See Newsom Unveils State's COVID Recovery Plan; $75B Budget Surplus To Provide For Direct Payments*,

CBS SF BAY AREA, May 10, 2021, https://sanfrancisco.cbslocal.com/2021/05/10/california-newsom-tax-rebates-budget-surplus-covid-economy/.

The Union has approached Defendants about their position on vaccines.

B. The Idea of Mandating a One-on-One Meeting with a Medical Professional for all Unvaccinated Staff Should Be Considered and Rolled Out

One other idea that CCPOA has discussed in recent days with experts is the idea of mandating that all staff who have not been vaccinated go through a mandatory, on duty, one-on-one meeting, perhaps 30 minutes long, with a medical professional. The medical professional would educate the individual about the vaccine and its benefits, and give the individual the ability to be immediately vaccinated—all confidentially.

The idea is based on behavioral science and is designed to combat the current group think that has consumed much of the vaccination debate. Experts believe that if given an opportunity to be educated on a one-on-one level, with the opportunity to be vaccinated right then and there, while retaining the ability to deny that they have been vaccinated, individuals may be more willing to agree to be vaccinated.

The Union has raised this idea informally with the parties and the Receiver's Office.

One concern raised about the idea is the sheer time commitment that would be needed to cover the thousands of CDCR employees who have yet to be vaccinated. It is a legitimate concern. One approach is to consider using medical professionals outside CDCR, perhaps others employed by the State, or the UC system or at a county level. Another approach would be to develop a pilot program targeting certain institutions—perhaps those most focused on healthcare—and gauge the success of the program.

IV.

THE CORRELATION BETWEEN VACCINATIONS AND INFECTION PREVENTION APPEARS TO BE MORE STRONGLY TIED TO INMATE VACCINATION THAN TO STAFF VACCINATION

There is evidence in CDCR's COVID-19 tracking that suggests improving inmate vaccination rates are more important than staff vaccinations for lowering COVID-19 rates amongst the inmate population.

- At Pelican Bay State Prison (PBSP), there have been **zero infections** in the past 14 days. (CDCR Population COVID-19 Tracking, *supra*, at p. 1 (CDCR Patients: Confirmed COVID-19 and Outcomes).) Of the inmate population, **65% are fully vaccinated**. (*Id.* at p. 3 (CDCR Vaccination Tracker).) Meanwhile, **24% of staff members** are fully vaccinated. (*Id*.)

- Avenal State Prison (ASP) has similar figures as shown by the following: **no new infections** during the same time period, **84% of inmates** are fully vaccinated, and **39% of staff** members are vaccinated. (CDCR Population COVID-19 Tracking, *supra,* at pp. 1, 3.)

- Chuckawalla Valley State Prison (CVSP) has seen **no new infections** in the past 2 weeks. Its vaccination rates are **79% for inmates** and **43% for staff.** (*Id.*)

- The Substance Abuse Treatment Facility and State Prison (SATF) has **zero infections** in the same time period, and its vaccination rates are **71% for inmates** and **37% for staff**. (*Id.*)

- The Correctional Training Facility or Soledad State Prison (CTF) has **one new infection** in the same time period. Its vaccination rates are **87% for inmates** and **59% for staff**. (*Id.*)

The infection rates at these prisons are low; yet it is notable that CTF, the institution with the highest staff vaccination rate, has a new inmate infection whereas the other institutions with lower staff vaccination rates do not. This is hardly a scientific analysis, though it does highlight inconsistencies. Indeed, a comparison of the prison staff's current vaccination levels to those of the incarcerated population, which is considerably higher, suggests that mandatory vaccinations of inmates will likely have a greater effect on lowering inmate infection rates than will forcing employees to vaccinate. One reason for the apparent strong correlation between low infection rates and inmate vaccinations may be the fact that inmates who share cells and other living spaces interact more closely with one another than they do with correctional officers, who, except for time spent entering and exiting the facilities, are typically spread further apart than inmates. Yet, despite these factors, whereas the Plaintiffs advocate for mandatory vaccinations of staff, they are silent on the same measure applying to inmates. This contradiction is further highlighted by the news from the *Coleman* case that new inmates coming into the system from the county jails will not be required to be vaccinated.

We live in a world where instant gratification is expected—yet COVID-19 defies instant gratification. It is complex. The best medical minds on the planet have performed wonders in the past 16 months. But there is much they have gotten wrong, and much that they simply do not

know or understand. Rushing to force employees to be vaccinated, on the pain of losing the ability to provide for their families, seems unfair while so much is unknown. It is also unnecessary given the current success CDCR is enjoying in containing the spread of infections.

V.

REQUIRING MANDATORY VACCINATIONS WILL HAVE MAJOR IMPACTS ON THE STATE AND ITS EMPLOYEES THAT WILL DETRACT FROM OTHER EFFORTS TO TACKLE COVID-19

A mandatory vaccination order will trigger a cascade of effects that will take significant resources to address. Plaintiffs first encouraged, and now urge, the Court to order mandatory vaccinations of staff. But nobody has set forth any plan about how a mandatory vaccination order would be implemented.

A. Labor Rights: Impact Bargaining Under the Collective Bargaining Agreement

If CDCR decides to implement a mandatory vaccination program, either voluntarily or because it is ordered to do so by this Court, CCPOA and other state unions will be entitled to negotiate over the impacts of that decision pursuant to the Ralph C. Dills Act ("The Dills Act"), Cal. Gov't Code sections 3512 *et seq.* (*See Service Employees International Union v. Los Robles Regional Medical Center*, 2009 WL 3872138, *3 (N.D. Cal., November 17, 2009) [ordering hospital to resolve dispute with union regarding implementation of new vaccination policy pursuant to the collective bargaining agreement]; *Virginia Mason Hospital v. Washington State Nurses Association*, 2006 WL 27203 (W.D. Wash., Jan. 5, 2006) [hospital may not unilaterally require unionized nurses to accept mandatory flu vaccine as condition of employment]); Daria Koscielniak, *Broadening Healthcare Personnel's Exemptions to Vaccination: Will Patients Pay the Ultimate Price?*, Temple Political & Civil Rights Law Review, 25 Temp. Pol. & Civ. Rts. L. Rev. 171, 188 (2016) ["Under the National Labor Relations Act, a flu vaccination policy is a mandatory subject of bargaining."].)

Depending on the nature of any mandatory vaccination order, particularly how it is implemented in 35 different prisons, the meet and confer process between CDCR and employee unions could take several months. Bargaining couldn't begin until CDCR determined how it would implement a mandatory vaccine order, which itself could take time.

The Dills Act permits the State to act first and bargain later in a bona fide emergency. (*See* Gov't Code § 3516.5.) Whether or not the current situation still constitutes an emergency is arguable; nonetheless, in the Union's view, issues like medical and religious exemptions and accommodations, consistency of application of rules across institutions, etc., counsel against rushing to impose a mandatory vaccination order without subjecting the policy to vigorous oversight through the meet and confer process.

B. Procedures to Assess Claims of Exemption Based on Religious or Health Grounds

Another challenge for CDCR will be to develop a process to handle employees who decline to vaccinate based on claims of religious belief or health reasons, pursuant to their rights under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, respectively. (*See* 42 U.S.C. § 2000e-2(a); 42 U.S. Code § 12112). The employer will need to establish procedures to assess such claims, including (i) determining whether they are bona fide, (ii) even if they are legitimate, determining whether there are grounds to override the exemption based on undue hardship to the employer or that person being a direct threat to other workers, and (iii) if the exemption applies, determining how the employee's job should change to reasonably accommodate his or her religious beliefs or health condition. CDCR will also be obligated, if it has not already, to establish rules that protect the confidentiality of vaccine information with respect to employees.

These rules would also be subject to the meet and confer process. Time-consuming litigation will also likely result as individual employees or groups of employees may dispute CDCR's determination that their claims of exemption are invalid.

C. Employees' Negative Reactions to Forced Vaccinations

A forced vaccination program will inevitably diminish staff morale. Employees who have so far not been vaccinated may choose to separate from CDCR if forced to vaccinate, either through terminations, early retirements or resignations. CCPOA tends to think few employees not near retirement will resign; however, with a hiring crisis in law enforcement, and local law enforcement agencies generally not requiring vaccinations, custody staff may have other

employment options. The likeliest group of employees to leave will be those at or near retirement age, who, facing a mandate, may simply pack it in early.

Forced vaccinations will lower morale amongst those who have been vaccinated but who do not believe that anyone should be forced to get the vaccine. Recruitment of new hires may also be negatively affected for the same reasons.

It is not clear whether CDCR has a staffing plan to address the potentiality for large numbers of simultaneous resignations and terminations.

D. Rulemaking Procedures and Due Process Hearings

The decision to implement a vaccine mandate will require the State to devise a set of procedures to make vaccinations compulsory. The most efficient way to do this would likely be through the California State Personnel Board, which has the authority to change the Minimum Qualifications (MQs) for those positions subject to the vaccination program to permit termination for failure to vaccinate. (*See* Gov't Code § 18931 ("The board shall establish minimum qualifications for determining the fitness and qualifications of employees for each class of position…").) This will allow for one set of rules to govern how the mandatory vaccination program may be enforced, but it could be a lengthy process. The State Personnel Board must draft specific rules and follow the rulemaking procedures of Government Code § 18214, which include separate time periods for (i) notification to the Governor's cabinet, department heads, unions, and the public in general, (ii) written commentary to the board, and (iii) oral commentary to the board.

A potential alternative would be an order from this Court directing the State to enforce a mandatory vaccination program immediately, without the application of the rulemaking process. To our knowledge, no such order has been issued from a court, and there is no precedent or State rules to provide guidance, let alone a mandated framework, regarding how such an order should be implemented. For example, Cal/OSHA has specific regulations requiring CDCR to offer the flu vaccine to employees, which they may decline. (California Code of Regulations, Title 8, § 5199(h)(1)).

Implementing a court order that is not subject to a rulemaking process would arguably cause a haphazard approach whereby each institution within the prison system might design its

own rules to govern the vaccination program. A mandatory order would likely increase litigation and result in confusion about how the vaccination program should operate. For example, there have been many complaints about existing vaccination programs, e.g., flu, which do not cover all shifts. Employees complain that the hours of operation are too short and never occur during First Watch.

Under both scenarios, employees who fail to vaccinate would be entitled to due process before CDCR can terminate or otherwise discipline them. This would allow an employee to present to a fact-finder arguments to retain their job, which may include, for example, their inability to vaccinate due to vacation, sick leave, or some other type of absence.

All of this would be time-consuming and inefficient.

VI.

THE LAW IS UNSETTLED OVER THE COURT'S AUTHORITY TO ORDER MANDATORY VACCINATION WHERE VACCINES ARE NOT FULLY FDA-APPROVED.

A. Several Commentators Argue That Employers Cannot Mandate Vaccinations That Are Approved Under an Emergency Use Authorization

An Emergency Use Authorization ("EUA") permits the Food and Drug Administration ("FDA") to approve a vaccine on an emergency basis, that is under a timeline that is more abbreviated than that of a fully approved product. (*See* U.S. Food and Drug Administration, Fact Sheet for Recipients and Caregivers, Emergency Use Authorization (EUA) of the Pfizer-BioNtech COVID-19 Vaccine To Prevent Coronavirus Disease 2019 ("FDA Pfizer Vaccine Fact Sheet"), https://www.fda.gov/media/144414/download (last visited on May 17, 2021).) This means that the vaccine has not undergone the same type of review as a fully FDA-approved product. (*See id.*) Thus, the drug manufacturer and FDA know less than what they would otherwise know with a fully-approved product. FDA may issue an EUA when certain criteria are met, "which includes that there are no adequate, approved, available alternatives." (*Id.*) Furthermore, FDA's decision to issue the EUA is based on evidence that the known benefits of the product outweigh its known risks. (*See id.*)

The federal statute authorizing FDA to issue an EUA is 21 U.S. Code § 360bbb-3.

Subsection (e)(1)(A)(ii) of the statute provides as follows:

> Appropriate conditions designed to ensure that individuals to whom the product is administered are informed—(I) that the Secretary has authorized the emergency use of the product; (II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and **(III) of the option to accept or refuse administration of the product**, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

(Emphasis added.) The bold language supports the view that individuals who are to receive the vaccine should be informed that they may refuse to take it.

FDA emphasizes this point in its own description of what an EUA means. Its website states:

> How will vaccine recipients be informed about the benefits and risks of any vaccine that receives an EUA? FDA must ensure that recipients of the vaccine under an EUA are informed, to the extent practicable given the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, **that they have the option to accept or refuse the vaccine**, and of any available alternatives to the product. Typically, this information is communicated in a patient "fact sheet."

(See U.S. Food and Drug Administration, Emergency Use Authorizations for Vaccinations Explained, https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained (last visited May 20, 2021) [emphasis added].) In the fact sheet about the Pfizer vaccine for recipients and caregivers, for example, FDA further states, "It is **your choice** to receive the Pfizer-BioNTech COVID-19 Vaccine." (FDA Pfizer Vaccine Fact Sheet, *supra* [emphasis added].) FDA makes it plain that the Pfizer vaccine is an "unapproved vaccine" and that "[t]here is no FDA-approved vaccine to prevent COVID-19." (*Id.*) It further acknowledges that there are important details that remain unknown as the "[v]accine is still being studied in clinical trials." (*Id.*). These include the duration of its efficacy and the potential risks of taking the vaccine, which could be serious. (*Id.*)

FDA's fact sheets for the two other EUA-approved vaccines, the Moderna and Janssen (or

Johnson & Johnson) vaccines, provide similar explanations. (*See* U.S. Food and Drug Administration, Fact Sheet for Recipients and Caregivers, Emergency Use Authorization (EUA) of the Moderna COVID-19 Vaccine To Prevent Coronavirus Disease 2019, https://www.fda.gov/media/144638/download; Fact Sheet for Recipients and Caregivers, Emergency Use Authorization (EUA) of the Janssen COVID-19 Vaccine To Prevent Coronavirus Disease 2019, https://www.fda.gov/media/146305/download (last visited on May 17, 2021).)

Beyond the legal argument, there is a credible public policy argument against making these emergency-approved vaccines mandatory. FDA has never before granted an EUA for a vaccine for the entire population. (Dorothy R. Reiss, et al., "Authorization status is a red herring when it comes to mandating Covid-19 vaccination," Stat, www.statnews.com/2021/04/05/ authorization-status-covid-19-vaccine-red-herring-mandating -vaccination.) Furthermore, as explained by Joshua Sharfstein, the former principal deputy commissioner of FDA and now vice dean of Public Health Practice at the Johns Hopkins Bloomberg School of Public Health, the EUA is a relatively new tool for FDA, as its first use for the civilian population occurred in 2009. (Joshua Sharfstein, MD, *What is Emergency Use Authorization*, JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH (2020), https://www.jhsph.edu/covid-19/articles/what-is-emergency-use-authorization.html.) Because the standards for granting an EUA are lower than those for full FDA approval, the main three COVID-19 vaccines should be considered "experimental."

Simply put, while many of us have taken the opportunity to get vaccinated, including most CCPOA attorneys, and much of its Executive Leadership, not enough is known about potential side effects of the vaccines. As such, there is the potential that dangers regarding these vaccines may be discovered later that may alter the risk analysis. For example, the EUA issued during the pandemic for hydroxychloroquine, which was intended to treat COVID-19, is an infamous case in point. Dr. Sharfstein explained that despite the issuance of the EUA, there was little information to support the drug's use at the time. (*Id.*) "Later, when it became clear that this treatment posed a risk but did not offer [sic] benefit, FDA retracted the EUA." (*Id.*) Accordingly, it is unreasonable to make a vaccine approved only under an EUA compulsory on employees.

B. Commentators Supporting Mandatory Vaccinations Focus on the Unique Nature of the Pandemic and the Special Characteristics of the COVID-19 Vaccinations

Per Peter Marks, the director of FDA's Center for Biologics Evaluation and Research, which is responsible for ensuring the safety and effectiveness of vaccines, FDA's approval process for the Pfizer, Moderna, and Johnson & Johnson vaccines "was more of an 'EUA-plus' than a typical EUA." (Zachary Brennan, *Can employers mandate Covid-19 vaccines under emergency authorizations? It's complicated*, ENDPOINTS NEWS, April 6, 2021, https://endpts.com/can-employers-mandate-covid-19-vaccines-under-emergency-authorizations-its-complicated/.) In other words, FDA's review of these vaccines was held to a higher standard than the reviews of other EUA-approved vaccines.

From both a practical standpoint and a legal perspective, however, this fact still does not necessarily support a vaccination mandate. It makes sense that under the severe conditions of this pandemic, FDA would take extra precaution in granting EUAs to these three vaccines; yet the so-called "EUA-plus" is not full FDA approval. It is something less. Thus, a vaccine mandate at a minimum should require the complete level of testing required for a full license. And if, as many anticipate, full approval by FDA is imminent,[3] then there is strong argument for waiting until that occurs—especially given the current negligible infection rate and the promise of more employees choosing to vaccinate through the new programs and initiatives described above.[4] If FDA gives full approval for at least one of the vaccines, these legal issues would likely largely dissipate.

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[3] It is reported that Pfizer and its vaccine partner, BioNTech, have started an application to request full FDA approval for their COVID-19 vaccine. Emma Bowman, *Pfizer Seeks Full FDA Approval For COVID-19 Vaccine*, NPR, May 7, 2021, https://www.npr.org/sections/coronavirus-live-updates/2021/05/07/994839927/pfizer-seeks-full-fda-approval-for-covid-19-vaccine.

[4] The recently proposed COVID-19 policy for the UC system supports this position. In early May 2021, UC proposed a vaccination mandate for all students who may access UC facilities or programs in person starting in Fall 2021; however, the policy is contingent on full approval of a COVID-19 vaccine by FDA and reasonable access to vaccine doses. (University of California COVID-19 Draft Policy Student Frequently Asked Questions, Updated May 4, 2021, https://universityofcalifornia.edu/sites/default/files/student-faqs-for-university-of-california-proposed-covid-19-vaccination-policy-4-22-21.pdf. (last visited on May 17, 2021.)

VII.

THE UNION SHOULD BE ALLOWED TO MOVE TO INTERVENE IF THE COURT WERE TO ALLOW THE PARTIES TO FULLY BRIEF THIS ISSUE

The Court clarified CCPOA's intervention status last year (intervener in the Three Judge proceedings but not in the underlying *Coleman* and *Plata* cases) but has nevertheless been generous in permitting the Union's participation in Case Management Conferences as a friend of the Court. However, *if* the Court does intend to move forward with considering a mandatory vaccination order, the Union should be given an opportunity to seek intervention in the case pursuant to Federal Rule of Civil Procedure 24 for the limited purpose of representing its members with regard to any mandatory vaccination order. Intervention status, as opposed to amicus curiae, seems appropriate where the relief sought by Plaintiffs so directly affects CCPOA members' privacy, property and due process interests.

CCPOA has solicited the position of the plaintiffs and defendants on whether they would be willing to stipulate to CCPOA's limited intervention as described. Defendants indicated that they would not oppose such a motion, and the Plaintiffs indicated they would consider signing a stipulation allowing the Union to intervene if more formal proceedings become necessary.

VIII.

CONCLUSION

Mandating that anyone be vaccinated raises serious issues. In an ideal world, COVID-19 vaccines would be fully researched, tested and approved, and medical, not political, considerations would predominate. Even then, legitimate concerns would remain.

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We haven't yet reached such a utopia. Accordingly, the Union urges the Court not to order mandatory vaccination of staff at this time. CCPOA suggests that the Court direct the parties to use the next several months, if infections remain low, to give current programs and efforts more time, and to consider implementing new initiatives. It could also encourage the parties to use that time to provide a plan on how a mandatory staff vaccination program would be implemented, if and when an order becomes necessary. This would create the best opportunity to minimize many of the potential challenges described above.

Dated: May 24, 2021

MESSING ADAM & JASMINE LLP

By 

Gregg McLean Adam
Attorneys for Amicus Curiae California Correctional Peace Officers' Association

Exhibit A

CALIFORNIA CORRECTIONAL
HEALTH CARE SERVICES

MEMORANDUM

Date:	April 21, 2021
To:	WARDENS CHIEF EXECUTIVE OFFICERS UNION REPRESENTATIVES
From:	TAMMY FOSS, DIRECTOR Corrections Services, CCHCS CONNIE GIPSON, DIRECTOR Division of Adult Institutions, CDCR GLEN STAILEY, STATE PRESIDENT California Correctional Peace Officers Association
Subject:	**COVID MITIGATION ADVOCATE PROGRAM**

California Department of Corrections and Rehabilitation (CDCR) and California Correctional Health Care Services (CCHCS) have implemented numerous COVID-19 protocols to keep our staff, population and community safe. With the ongoing COVID-19 mitigation efforts and launch of the vaccination program, we have seen some relief but it is imperative we stay engaged and vigilant to end this pandemic.

In an effort to keep the momentum going, each institution shall form a COVID Mitigation Team (COMit). The goal of the COMit is to provide ongoing education to staff, at the peer level, on the importance of COVID compliance, to provide updates to staff on the latest CDCR/CCHCS COVID-19 policies, the importance of mask wearing, physical/social distancing, precautions outside of work, testing, and the vaccination program.

The COMit will be comprised of an unlimited number of staff volunteers who will be identified as COMit Advocates. COMit Advocates should be enthusiastic and support the mission of the COMit, as the delivery of the messages is critical to the program's success. Once COMit Advocates are identified, training will be provided. Training will include COVID education, current death rates, mask compliance, vaccination information, best practices, innovation strategies and the various communication methods available.

The efforts of the COMit is crucial to support the Department's recovery from the COVID pandemic as they gently remind staff about COVID precautions and safety measures. The diversity of the workforce to include the various disciplines should be considered to maximize the effectiveness of the communication. The COMit Advocates' efforts will contribute to a healthy environment and successes should be shared with their respective institutions.

MEMORANDUM

Wardens and Chief Executive Officers (CEOs) shall work with their state labor organizations to identify staff to fill these roles of COMit Advocates.

PROGRAM NEEDS

- Volunteers – Substantial amount of volunteers across all disciplines
- Support from Hiring Authorities, Supervisory staff and Labor organziations
- Planning and Organization of program structure and expectations
- Adequate time for COMit Advocates to provide peer training and education
- Library of resources (website, intranet, SharePoint, etc.), printed material

IMPLEMENTATION

- Each institution shall work in collaboration with state-level labor organizations to designate volunteer COMit Advocates.
    - Unlimited number of staff, to include staff from all disciplines; however, there will need to be several advocates per watch for each facility, if possible.
    - SharePoint site to track COMit Advocates and provide updated information.
    - Training will be provided by the COVID Support Team (CST) on updated information related to COVID; resources will be provided to each COMit Advocate.
    - Each institution shall ensure access to a computer and training location.
    - COMit Advocates and their respective supervisors shall work together to allow for COMit activity as needed.
    - Monthly Microsoft Teams meetings will be scheduled with the statewide COMits to get feedback and answer questions.

NEXT STEPS

- Complete the attached spreadsheet with the following information: Name (Last, First), Classification, Work Hours, Work Days, Phone Number, Email address.
- Forward spreadsheet to the CST
    - Joshua Leon Guerrero, Captain, Joshua.LeonGuerrero@cdcr.ca.gov
    - Sircoya Williams, Associate Warden, Sircoya.Williams@cdcr.ca.gov

Should you have any questions or concerns, please contact the CST.

Exhibit B

CALIFORNIA CORRECTIONAL HEALTH CARE SERVICES

MEMORANDUM

Date:	May 1, 2021
To:	California Department of Corrections & Rehabilitation (CDCR) All Staff California Correctional Health Care Services (CCHCS) All Staff
From:	Connie Gipson DocuSigned by: Connie Gipson 60F75B6E86804F7... Director, Division of Adult Institutions CDCR Joseph Bick, M.D. DocuSigned by: Joseph Bick 347167202A8A404... Director, Health Care Services CCHCS
Subject:	**MAY 2021 – NO ROUTINE COVID TESTING IN MAY FOR THOSE WHO ARE FULLY VACCINATED**

So you've been vaccinated. Congratulations! You are one of almost 28,000 CDCR/CCHCS staff members who have taken advantage of vaccine availability. Vaccination is one of the most important steps in ending this pandemic. Because you're vaccinated:

- You have reduced your chances of spreading the disease to family and friends
- You have reduced your chances of being hospitalized and/or dying if you do contract COVID-19
- You can gather indoors (outside of work) with other immunized people without a mask
- You can exercise outside without a mask as long as you maintain 6 feet of distance

Another great benefit: per the Centers for Disease Control and Prevention guidelines, fully vaccinated individuals – those who received their last dose two or more weeks ago – should not need to be tested for COVID-19 unless they either have symptoms of COVID-19 or are identified as a close contact to an active case.

In that spirit, all fully vaccinated staff and inmates are being excused from routine surveillance COVID-19 testing during the month of May. That means your weekly or bi-weekly nasal swabs will not be required the whole month of May! During this time, CCHCS will be closely monitoring the health of our staff and residents to determine if routine testing can be stopped altogether for fully vaccinated persons. Testing will continue for inmates and employees who are identified as close contacts of active cases. Testing for inmates will also continue as described in the movement matrix as well as prior to dental encounters.

If you were vaccinated outside of CDCR, please bring in verification of vaccination to the Employee Health Program so that your information can be updated in the BIS system.