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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' REPLY IN SUPPORT  
 OF THEIR RESPONSE TO THE ORDER  
 TO SHOW CAUSE REGARDING THE  
 RECEIVER'S MANDATORY COVID-19  
 VACCINE POLICY**

Date: September 24, 2021  
 Time: 9:30 a.m.  
 Courtroom: 6, 2nd Floor  
 Judge: The Honorable Jon S. Tigar  
 Action Filed: April 5, 2001

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## INTRODUCTION

1  
2 Plaintiffs attempt to rewrite history as a means to their desired end, and in so doing,  
3 wrongly assert that Defendants have acted with deliberate indifference to incarcerated people's  
4 safety during this unprecedented pandemic. The only way Plaintiffs can take such a position is by  
5 ignoring the extensive, layered safety measures Defendants have implemented and adjusted  
6 consistent with public health guidance since the beginning of the pandemic.

7 Indeed, Plaintiffs completely overlook Defendants' most effective COVID-19 safety  
8 measure to date—a nation-leading COVID-19 vaccination program for CDCR's incarcerated  
9 population that Plaintiffs have praised since its inception—and undisputed public health guidance  
10 that *being* vaccinated best protects a person from a serious COVID-19 infection. Instead,  
11 Plaintiffs focus on a small handful of safety measures CDCR implemented early in the pandemic  
12 while it was in the process of developing other safety measures in place today, and before  
13 vaccines even became available. Despite Plaintiffs' mischaracterizations of CDCR's efforts, the  
14 record over the past year and a half speaks for itself: CDCR has made every effort to implement  
15 COVID-19 safety measures based on the latest public health guidance and available resources.  
16 And because CDCR has done this for the past year and a half, and continues to work tirelessly to  
17 reduce risk to its incarcerated population, no court could find on this record that CDCR recklessly  
18 disregarded its incarcerated population's safety in its response to COVID-19.

19 Defendants' layered approach involving multiple safety measures, including vaccination, is  
20 consistent with the recommendations of the Centers for Disease Control and Prevention (CDCR)  
21 and the California Department of Public Health (CDPH) regarding how to effectively respond to  
22 COVID-19. Defendants also agree that vaccination against COVID-19 drastically reduces the  
23 risk of serious illness or death from infection, and can greatly reduce, but not eliminate,  
24 transmission of the virus. This is precisely why CDCR has undertaken an unprecedented,  
25 layered, and evolving response to the pandemic, now including third vaccine doses for its  
26 immunocompromised incarcerated population, consistent with the most cutting-edge public  
27 health guidance. Plaintiffs' comment that conditions have not changed within CDCR since Judge  
28 Henderson's 16-year-old finding is out of touch with reality.

1 Because Defendants' response to the pandemic does not violate the Eighth Amendment, the  
 2 Court need not reach the question of whether an order requiring CDCR to implement the  
 3 Receiver's vaccination policy satisfies the Prison Litigation Reform Act's (PLRA) needs-  
 4 narrowness-intrusiveness requirement. But in any event, because the stated goal of the Receiver's  
 5 policy is to protect the incarcerated population, an order targeting staff who work near  
 6 incarcerated people instead of incarcerated people themselves would not be narrowly tailored or  
 7 the least intrusive means to accomplish the stated goal of the policy, and would extend further  
 8 than necessary to accomplish the stated goal.

9 Accordingly, this Court lacks the authority to order CDCR to implement the Receiver's  
 10 policy.

### 11 **RESPONSE TO PLAINTIFFS' FACTUAL ASSERTIONS**

#### 12 **I. PLAINTIFFS MISREPRESENT DEFENDANTS' COVID-19 RESPONSE EFFORTS BY** 13 **SELECTIVELY PRESENTING OUTDATED INFORMATION AND WHOLLY IGNORING** 14 **DEFENDANTS' EFFORTS TO VACCINATE THE INCARCERATED POPULATION.**

15 Plaintiffs discuss the following efforts implemented by CDCR in response to the pandemic:  
 16 physical distancing, face covering, COVID-19 testing, hand hygiene, and the voluntary  
 17 vaccination program for staff. (ECF No. 3663 at 20-22.) Plaintiffs completely omit any mention  
 18 of the myriad other safety measures CDCR implemented in response to COVID-19, including  
 19 those listed in Defendants' response brief (ECF No. 3660 at 12:25-16:9, 22:8-23:11) and  
 20 discussed in the 32 case management conference statements filed since March 2020.<sup>1</sup>

21 Most notably absent from Plaintiffs' response is mention of Defendants' nation-leading  
 22 program for vaccinating incarcerated people. Defendants started offering vaccines to incarcerated  
 23 people in December 2020, before nearly the entire population of the United States became  
 24 eligible. (ECF No 3520 at 23; *see also* ECF No. 3662, Declaration of Diana Toche, DDS (Decl.  
 25 Toche) at ¶ 8.) Ironically, vaccination of incarcerated people and praise for Defendants' efforts to  
 26 vaccinate them were Plaintiffs' primary topics of discussion in at least seven case management  
 27 conference statements preceding Plaintiffs' August 30, 2021 response to the August 9 and 20

28 <sup>1</sup> *See* ECF Nos. 3269, 3294, 3304, 3316, 3322, 3328, 3332, 3345, 3356, 3370, 3389, 3405,  
 3417, 3427, 3436, 3449, 3460, 3469, 3477, 3487, 3501, 3520, 3530, 3539, 3548, 3558, 3566,  
 3579, 3592, 3605, and 3623.

1 orders. (*See* ECF Nos. 3539, 3548, 3558, 3566, 3579, 3592, 3623.)

2 **II. CDCR IMPLEMENTED EXTRA PRECAUTIONS FOR MEDICALLY HIGH-RISK CLASS**  
 3 **MEMBERS.**

4 Based on a rubric the Receiver developed, incarcerated people are assigned a COVID-19  
 5 risk score indicating their risk of experiencing complications if they contract COVID-19. (Decl.  
 6 Toche at ¶ 5.) In October 2020, the Receiver determined a score of 3 to be the lowest score at  
 7 which a person can be considered medically high-risk. (Declaration of Connie Gipson (Decl.  
 8 Gipson) at ¶ 6.) The highest-risk incarcerated people are considered to be those with COVID-19  
 9 risk scores of 6 and above. (*Id.*) Plaintiffs are correct that approximately 17,860 incarcerated  
 10 people currently have a COVID-19 risk score of 3 and above. (*Id.* at ¶ 9; ECF No. 3663 at 25.)  
 11 Approximately 3,770 of people in this category are housed in areas covered by the August 19,  
 12 2021 public health order that requires certain health care employees to be vaccinated. (*See* ECF  
 13 No. 3657; Decl. Gipson at ¶ 10.) Approximately 14,095 are not housed in areas covered by the  
 14 August 19 order, 12,474 of whom are vaccinated. (*Id.*) Recognizing the increased risk of  
 15 complications for incarcerated people with a COVID-19 risk score of 3 and above, CDCR  
 16 implemented an added layer of protection for them: no unvaccinated incarcerated person with a  
 17 COVID-19 risk score of 3 or above may be housed in a dormitory setting. (Decl. Gipson at ¶ 7,  
 18 fn. 4.)

19 **III. PLAINTIFFS' DATA SHOWS CERTAIN MEDICALLY HIGH-RISK CLASS MEMBERS**  
 20 **CONTINUE TO REFUSE VACCINATION AGAINST COVID-19.**

21 Plaintiffs correctly state that public health guidance identifies certain racial and ethnic  
 22 groups, including Black, Latinx, and Native American people, as experiencing complications and  
 23 death from COVID-19 at higher rates than others. (ECF No. 3663 at 8.) But Plaintiffs fail to  
 24 address their own evidence, which shows that a substantial number of incarcerated people in two  
 25 of these groups are not vaccinated, even though nearly every incarcerated person has been offered  
 26 the vaccine at least once:<sup>2</sup> 39% of Black patients, and 25% of Latinx patients remain

27 <sup>2</sup> Only approximately one percent of the incarcerated population has not yet been offered a  
 28 COVID-19 vaccine. Those people are either away from CDCR institutions for court-related

1 unvaccinated. (ECF No. 3663-1 at 245; *see generally* ECF No. 3663.) As Plaintiffs  
 2 acknowledge, CDCR and CCHCS’s efforts “to re-offer vaccine to patients” who declined it,  
 3 which are ongoing and aimed at addressing hesitance to taking the vaccine. (ECF No. 3623 at 3.)

4 **IV. PLAINTIFFS REPORT INCOMPLETE DATA REGARDING THE REACH OF THE AUGUST**  
 5 **19, 2021 PUBLIC HEALTH ORDER USING THEIR OWN CALCULATIONS.**

6 Plaintiffs present a misleading analysis using selective data regarding the application of the  
 7 August 19, 2021 public health order. (ECF No. 3663 at 20-21; ECF No. 3663-1 at 4-9, ¶ 6.)  
 8 Plaintiffs fail to identify how many incarcerated people housed in areas not covered by the  
 9 August 19 public health order are vaccinated, and are therefore all but guaranteed protection  
 10 against a serious COVID-19 infection. (*See* ECF No. 3638, Report of J. Clark Kelso, Receiver  
 11 (Receiver’s Report) at 22 (currently available vaccines prevent hospitalization and death among  
 12 those who are vaccinated with an efficacy of up to 94 percent).) Notably, approximately 1,621 of  
 13 these incarcerated people, or approximately 1.7% of CDCR’s entire population, are unvaccinated  
 14 and not subject to the August 19, 2021 public health order. (Decl. Gipson at ¶ 9.) And because  
 15 99 percent of incarcerated people with a COVID-19 risk score of 3 and above have been offered  
 16 the vaccine, most, if not all of the 1,621 are likely unvaccinated by choice. (ECF No. 3623 at 2.)  
 17 As discussed in Argument section II below, Plaintiffs fail to show how relief that compels the  
 18 vaccination of approximately 29,000 workers for the benefit of 1,621 medically vulnerable  
 19 patients who choose not to be vaccinated satisfies the PLRA’s needs-narrowness-intrusiveness  
 20 requirement.

21 **V. CCHCS RECENTLY CORRECTED THE MORTALITY RATE DATA PLAINTIFFS CITE.**

22 Plaintiffs report that “[t]wo fully vaccinated patients already have died from the disease.”  
 23 (ECF No. 3663 at 15 (citing ECF No. 3652, Supplemental Declaration of Dr. Joseph Bick  
 24 (Supplemental Decl. Bick) at ¶¶ 3-4 and ECF No. 3663-1, Declaration of Sophie Hart (Hart  
 25 Decl.) at ¶ 9).) On September 7, 2021, CCHCS provided additional information to clarify the  
 26 circumstances surrounding COVID-19-related deaths among incarcerated people in CDCR  
 27 \_\_\_\_\_  
 28 reasons, or are new arrivals in CDCR’s institutions and will be offered a vaccine as a matter of  
 course after completing mandatory post-transfer quarantine. (Decl. Toche at ¶ 11.)

1 custody. (Decl. Gipson at ¶ 11.) According to CCHCS data, one breakthrough COVID-19 case  
 2 has tragically resulted in death among the incarcerated population. (*Id.*) This decedent had a  
 3 COVID-19 risk score of 12 (*id.*), and Plaintiffs correctly describe him as “an 81-year-old man in a  
 4 wheelchair [who] died from pneumonia, respiratory failure, and COVID-19[.]” (ECF No. 3663 at  
 5 6). Also according to CCHCS data, two additional incarcerated people were fully vaccinated at  
 6 the time of death, but had contracted COVID-19 before being vaccinated. (Decl. Gipson at ¶ 11.)

## 7 ARGUMENT

### 8 **I. PLAINTIFFS’ ANALYSIS OF THE SECOND PRONG OF THE DELIBERATE INDIFFERENCE** 9 **STANDARD IS FLAWED AND INCOMPLETE.**

10 In support of their deliberate-indifference argument, Plaintiffs represent Defendants’  
 11 pandemic response efforts as being limited merely to physical distancing, face coverings, testing,  
 12 hand hygiene, and voluntary vaccination of staff—a version of events that is not consistent with  
 13 reality. (ECF No. 3663 at 19-23.) In so arguing, Plaintiffs omit the numerous, multilayered  
 14 safety measures Defendants implemented throughout the pandemic to reduce the risk of COVID-  
 15 19 to CDCR’s incarcerated population, measures that are in place today and continue to evolve as  
 16 public health experts learn more about this novel virus. But as is clear from the robust record of  
 17 CDCR and CCHCS’s efforts over the past year and a half, Plaintiffs’ selective and outdated  
 18 narrative cannot satisfy their high burden of proving that Defendants recklessly disregarded the  
 19 risk COVID-19 poses to CDCR’s incarcerated population. *Farmer v. Brennan*, 511 U.S. 825,  
 20 839 (1994).

#### 21 **A. Plaintiffs Completely Ignore the State’s Most Effective COVID-19** 22 **Mitigation Measure—Vaccination of the Incarcerated Population.**

23 Most notably absent from Plaintiffs’ argument—in fact, their entire response—is the  
 24 nation-leading patient vaccination program that CDCR partnered with CCHCS to implement.  
 25 (*See* ECF No. 3663; *see also* ECF No. 3660 at 5, 17 and Decl. Toche at ¶¶ 8-12.) Until now,  
 26 Plaintiffs agreed that “CCHCS has so far shown that it can administer the vaccine more  
 27 efficiently than the community as a whole” (ECF No. 3530 at 4) and “[t]he vaccination numbers  
 28 as reported by Defendants and CCHCS are indeed impressive, and very welcome” (ECF No.



1 3548 at 2). Plaintiffs similarly praised the state’s efforts “to re-offer vaccine to patients” who  
 2 declined the vaccine, which are ongoing. (ECF No 3623 at 3.) As a result of the state’s early and  
 3 continued efforts, 78 percent of CDCR’s incarcerated population is vaccinated against COVID-  
 4 19, including the vast majority of the medically high-risk and those over the age of 65. (Decl.  
 5 Toche at ¶ 12.)

6 **B. Defendants’ COVID-19 Response Demonstrates Their Extensive Efforts to**  
 7 **Mitigate the Virus’ Serious Health Risk to Incarcerated People.**

8 As recently as two weeks ago, the Eastern District of California noted that “[o]ther federal  
 9 courts have found similar measures by correctional officials in comparable circumstances<sup>3</sup> to be  
 10 reasonable and not violative of the Eighth Amendment.” *Davis v. Allison*, No. 1:21-cv-00494-  
 11 HBK, 2021 WL 3761216 at \*5 (E.D. Cal. Aug. 25, 2021) (citing *Wilson v. Williams*, 961 F.3d  
 12 829 (6th Cir. 2020) (finding measures implemented by the federal bureau of prisons to reduce the  
 13 spread of COVID-19 virus reasonable and not in violation of the Eighth Amendment) and *Easley*  
 14 *v. Wetzel*, 2021 WL 1200214 \*1 (W.D. Pa. Feb. 26, 2021) (citing *Massey v. Wetzel*, 2020 WL  
 15 5526688 \*1 (W.D. Pa. Sept. 15, 2020)). The *Easley* court found that “prison officials are taking  
 16 reasonable measures to prevent the spread of COVID-19” by requiring nurses and staff to wear  
 17 masks and other personal protective equipment, quarantining incarcerated people suspected of  
 18 exposure to COVID-19, and isolating incarcerated people who test positive for COVID-19.  
 19 *Easley*, 2021 WL 1200214 at \*6 (W.D. Pa. Sept. 15, 2020). And earlier this year, a federal court  
 20 in Michigan found that a prison system’s steps<sup>4</sup> to address the risks of COVID-19 to incarcerated

21 <sup>3</sup> In this case, the measures included socially distanced cohorts in double-cell housing,  
 22 mask-wearing requirements, making PPE available to incarcerated people upon request, making  
 23 cleaning supplied available to incarcerated people upon request, weekly COVID-19 testing for  
 24 incarcerated people, immediately rehousing incarcerated people who test positive for COVID-19  
 25 for up to 14 days or longer if symptoms persist, monitoring incarcerated people in quarantine with  
 26 body temperature and oxygen-level checks, requiring a health care provider to “clear” an  
 27 incarcerated person before releasing him from isolation, and permitting an incarcerated person  
 28 who no longer shows COVID-19 symptoms to be released from quarantine earlier than 14 days.  
*Davis v. Allison*, No. 1:21-cv-00494-HBK, 2021 WL 3761216 at \*5 (E.D. Cal. Aug. 25, 2021).

<sup>4</sup> The opinion includes a long list of COVID-19 mitigation measures that prison officials  
 implemented in Michigan’s prisons, including personal protective equipment and mask-wearing  
 policies, the availability of cleaning supplies and protocols to sanitize common areas and phones,  
 modified movement in the prisons, testing of the incarcerated population, publicly available data  
 on the prison system’s COVID-19 response efforts, suspended in-person visitation, reduced

1 people statewide “demonstrate the opposite of a disregard to a serious health risk.” *Wilson v.*  
 2 *Washington*, No. 2:21-cv-2021, WL 911964 at \*10 (W.D. Mich. Mar. 10, 2021) (citing *Wilson*,  
 3 961 F.3d at 841 (6th Cir. 2020)).

4 The state’s efforts to respond to COVID-19 extend far beyond vaccination to include nearly  
 5 all measures considered by other courts that concluded prison officials responded reasonably to  
 6 the risk posed by the pandemic. (*See, e.g.*, ECF No. 3660 at 13-17, 22-23.) Even before COVID-  
 7 19 vaccines became available, Dr. Spaulding, an expert in public health in correctional settings,  
 8 concluded in December 2020 that CDCR’s practices comply with public health guidance and that  
 9 CDCR was “making reasonable efforts to satisfy the CDC’s public health guidelines for  
 10 correctional institutions and CCHCS’s healthcare policy.” (ECF No. 3505, Declaration of Anne  
 11 Spaulding, MD, MPH in Support of Defendants’ Position on Quarantine and Isolation Space  
 12 (Decl. Spaulding) at ¶¶ 8, 47.) Similarly, Plaintiffs acknowledged that:

13 [v]accinations have clearly had a very positive impact on the number of COVID  
 14 cases in the prisons, and the number who suffer serious complications or die. So too  
 15 has the decrease in COVID-19 in California generally, and the continuing virus-  
 16 reduction measures such as resident and staff testing, the use of quarantine and  
 17 isolation, and the wearing of face-coverings. Due to these factors, the number of  
 reported active COVID cases has steadily decreased in recent months, particularly in  
 March and April. The number of COVID-related hospitalizations and deaths have  
 also dropped substantially.

18 (ECF No. 3579 at 4.)

19 It is difficult to square Plaintiffs’ current assertions that Defendants “deal with this public  
 20 health emergency by relying on measures which either have not worked in the past or which are  
 21 unsubstantiated mitigation strategies” (ECF No. 3663 at 14 (citations omitted)) and that  
 22 “mitigation measures taken to date are inadequate now that safe and effective vaccines are  
 23 available” (*id.* at 19) with the recent opinions of courts, public health experts, and even their own  
 24 statements over the past year and as recently as last month. It is similarly difficult to square  
 25 Plaintiffs’ conclusion—that no measures “alone or in combination” other than mandatory staff

26 \_\_\_\_\_  
 27 phone call prices while visitation was suspended, implementation of video visitation, modified  
 28 education programs, reduced and strict monitoring of inter-prison transfers, quarantine and  
 isolation protocols, health care and medical checks during quarantine and isolation periods,  
 screening protocols at prison entrances, weekly testing of prison staff, among other measures.

1 vaccination will protect the incarcerated population (ECF No. 3663 at 23)—with public health  
2 guidance that implementing multiple evidence-based strategies are necessary to reduce the risk of  
3 harm. *See, e.g.*, Ctrs. Disease Control & Prevention, *Guidance for Implementing COVID-19*  
4 *Prevention Strategies in the Context of Varying Community Transmission Levels and Vaccine*  
5 *Coverage* (July 27, 2021) <https://www.cdc.gov/mmwr/volumes/70/wr/mm7030e2.htm> and Decl.  
6 Spaulding at ¶ 7. While vaccination against COVID-19 is the most effective safety measure, it is  
7 one of many that must be implemented together to effectively combat the risks of COVID-19.  
8 And this is exactly what CDCR has been doing since the moment vaccines became available.

9 **C. Plaintiffs’ Outdated and Incomplete Information Fails to Satisfy Their**  
10 **High Burden of Proof.**

11 Consistent with their current theme of arguing an Eighth Amendment violation based on  
12 selective and outdated information, Plaintiffs assert that most incarcerated people “are housed in  
13 dormitories that are too crowded to allow for social distancing[.]” and attempt to illustrate their  
14 point with old photos of dorms taken at the *beginning* of the pandemic. (ECF No. 3663 at 9-10;  
15 *see* ECF Nos. 3663-1 at ¶ 31, 3663-2 at ¶ 18.) Since then, 82 percent of CDCR’s incarcerated  
16 population living in dorm beds been vaccinated and, to add context to Plaintiffs’ incomplete data,  
17 of the approximately 17,860 incarcerated people with COVID-19 risk scores of 3 and above,  
18 approximately 1,621 have chosen not to be vaccinated. Moreover, approximately 11,655  
19 incarcerated people have been released early since the start of the pandemic and CDCR’s  
20 population and CDCR’s population fell below 100,000 for the first time in three decades. (Decl.  
21 Gipson at ¶¶ 4, 5.) At the same time, CDCR drastically reduced the number of people it accepted  
22 in its institutions from county jails, including closures on intake, and implemented stringent  
23 movement protocols consistent with the movement matrix, which the Receiver and CDCR  
24 periodically modify consistent with evolving public health guidelines.<sup>5</sup> And when CDCR  
25 resumed intake, institutions still declined intake from county jails that did not follow CDCR’s

26 <sup>5</sup> CDCR was closed to intake from county jails from March 24, 2020 to May 25, 2020  
27 (ECF No. 3405 at 4:18-19), CDCR resumed limited intake in late May, and later closed all intake  
28 from the counties on June 29, 2020 (*id.* at 4:19-22). Intake resumed the week of August 24, 2020  
(ECF No. 3436 at 10:2), then later closed to intake from November 26, 2020 through January 10,  
2021 (ECF No. 3530 at 13:13-16).

1 movement matrix protocols. (*See, e.g.*, ECF No. 3469 at 10:10-17.) Prison officials who act  
2 reasonably in response to a substantial risk to incarcerated people’s health or safety do not violate  
3 the Eighth Amendment. *Farmer*, 511 U.S. at 845. These are merely a few examples of CDCR’s  
4 reasonable, progressive, and proactive efforts to limit the introduction of COVID-19 into its  
5 institutions—efforts that have been successful, as no outbreaks have been traced to movements  
6 made consistent with CDCR and CCHCS policy since the movement matrix was first  
7 implemented. (ECF No. 3623 at 11:3-5.) On this record, the Court cannot conclude that CDCR’s  
8 efforts to limit the spread of COVID-19 in its institutions violate the Eighth Amendment.

9 **D. CDCR’s Efforts to Limit the Introduction Of COVID-19 in its Institutions**  
10 **Go Beyond the August 19, 2021 Public Health Order.**

11 The Receiver’s data illustrates that staff are “a primary vector” for introducing COVID-19  
12 into CDCR’s institutions, largely because workers entering and leaving CDCR’s institutions have  
13 the most contact with the outside community. (ECF No. 3638 at 7.) Plaintiffs equate the August  
14 19, 2021 public health order as the only safety measure in place for staff and argue that it is an  
15 “ineffective half-measure that fails to . . . limit[] the introduction of the virus into the prisons.”  
16 (ECF No. 3663 at 25.) Consistent with its practice of implementing layered safety measures  
17 reflective of current public health guidance, CDCR implemented the August 19, 2021 public  
18 health order by requiring the workers it covers to receive a final dose of a COVID-19 vaccine by  
19 October 14, 2021. (ECF No. 3657-1 at 5.) And as Plaintiffs are aware, CDPH issued a public  
20 health order on July 26, 2021, requiring all state workers to either show proof of vaccination or  
21 submit to COVID-19 testing at least once a week. (Decl. Toche at ¶ 18.) Consistent with the July  
22 26 public health order, all CDCR workers not covered by the August 19 public health order must  
23 either show proof of vaccination or submit to *twice*-weekly COVID-19 testing. *Id.* CDCR’s  
24 workers have been subject to regular COVID-19 testing long before this public health order was  
25 issued, including once-weekly surveillance testing, and at least twice-weekly testing during  
26 outbreaks. (ECF No. 3660 at 15.) Additionally, all workers must pass a COVID-19 screening  
27 each time they enter a CDCR institution, and all workers are subject to quarantine and isolation  
28 protocols in the event of an exposure to COVID-19. (*Id.* at 13.)

1 It is not possible to completely “stanch the flow of the virus into the prisons[,]” as Plaintiffs  
 2 contend, just like the outside community continues to struggle with the spread of COVID-19 and  
 3 its variants. (ECF No. 3663 at 6.) Plaintiffs’ position is not supported by public health guidance  
 4 or Plaintiffs’ own statement that “although vaccines significantly reduce the risk of transmission,  
 5 they do not provide complete protection.” (*Id.* at 15.) Plaintiffs cite no examples of correctional  
 6 systems—or any other entity, for that matter—that has “stanch[ed]” the flow of the virus, or cases  
 7 that establish this as the standard for deliberate indifference. (*See generally* ECF No. 3663.)  
 8 Defendants’ layered and continually-evolving response to the pandemic, however, is consistent  
 9 with public health guidance and relevant case law.

10 **E. The California Department of Public Health’s August 19, 2021 Order**  
 11 **Appropriately Protects the Most Vulnerable Population.**

12 Plaintiffs step into the role of CDPH officials, and attempt to guess the intent of that order,  
 13 based on language CDPH edited shortly after posting its order online. (ECF No. 3663 at 26.)  
 14 According to CDPH, the goals of the August 5 and 19, 2021 public health orders are the same:  
 15 “to protect particularly vulnerable populations *receiving care in health care settings*, and ensure a  
 16 sufficient, consistent supply of workers in high-risk health care settings[.]” (ECF No. 3661,  
 17 Declaration of James Watt, MD, MPH (Decl. Watt) at ¶¶ 9, 12 (emphasis added).)

18 The August 19 order was issued in recognition of the significant differences between  
 19 community health care settings and health care settings in correctional facilities. (*Id.* at ¶ 14.)  
 20 For example, entry to correctional health care settings is far more controlled than community  
 21 health care settings, where the public is largely free to enter and leave. (Decl. Watt at ¶ 14.) One  
 22 must have prior approval or pass a security check before entering CDCR’s institutions, and must  
 23 comply with COVID-19 screening, testing, vaccination, and PPE requirements. (*Id.*) In contrast,  
 24 community health care facilities are typically open to the public and visitors, resulting in much  
 25 more traffic on a daily basis. (*Id.*)

26 Plaintiffs speculate that CDPH changed its “original intention” when the first version of the  
 27 order posted on its website applied to staff in areas “to which inmate patients have access for any  
 28 purpose,” and a second version omitted this language. (ECF No. 3663 at 26 (emphasis omitted).)

1 Plaintiffs further state that “[t]he post hoc deletion of that provision has no legitimate public  
 2 health basis, leads to dangerous risks and absurd results, and seems to evidence nothing more than  
 3 continued discrimination against incarcerated patients.” (*Id.* (emphasis omitted).) Plaintiffs have  
 4 no basis to speculate about CDPH’s intent. As Dr. Watt explains, including this language would  
 5 have expanded the scope of the August 19 public health order beyond its intended reach, i.e.,  
 6 “health care settings where medically high-risk patients are likely to be concentrated[,]” and not  
 7 other settings like “housing, recreation, and education areas.” (Decl. Watt at ¶ 15.) And focusing  
 8 concentration on this vulnerable population cannot constitute deliberate indifference.

9 Plaintiffs fail to demonstrate that Defendants are deliberately indifferent in their response to  
 10 the COVID-19 pandemic.

11 **II. PLAINTIFFS’ PROPOSED RELIEF IS EVEN BROADER THAN WHAT THE RECEIVER**  
 12 **PROPOSES, AND CANNOT SATISFY THE PLRA’S RESTRICTIONS ON PROSPECTIVE**  
 13 **RELIEF.**

14 Any prospective relief ordered under the PLRA must be necessary to correct a  
 15 constitutional violation. 18 U.S.C. § 3626(a)(1)(A). Because Defendants’ swift, comprehensive,  
 16 and ongoing response to COVID-19 does not violate the Eighth Amendment, the Court need not  
 17 reach the question of whether the Receiver’s proposed policy satisfies the PLRA’s restrictions on  
 18 prospective relief and, indeed, cannot order such relief. But as discussed in Defendants’ August  
 19 30, 2021 response, even if a violation existed, the contemplated relief could not satisfy the  
 20 PLRA’s requirement that it be narrowly drawn, extend no further than necessary to correct the  
 21 violation, and be the least intrusive means to correct the violation. (ECF No. 3660 at 17-24.)

21 **A. Plaintiffs Give Short Shrift to the PLRA’s Needs-Narrowness-**  
 22 **Intrusiveness Requirement, Stating That a Mandatory Vaccination Order**  
 23 **is Narrowly Drawn Because it “Extends Only to Those Who Travel**  
 24 **Between the Outside Community and a Prison[.]”**

25 Plaintiffs devote all of 15 lines of their 25-page brief to address the crucial question of  
 26 whether the Receiver’s recommended mandatory vaccination policy satisfies the PLRA’s  
 27 restrictions on prospective relief. (ECF No. 3663 at 22-23.) But their assertion that the  
 28 Receiver’s policy satisfies the PLRA’s needs-narrowness-intrusiveness requirement because “it  
 extends only to those [workers] who travel between the outside community and a prison”

1 misunderstands the PLRA, because an order that would apply broadly to virtually every CDCR  
2 worker is not narrowly drawn, as it must be. (*Id.*) And Plaintiffs' assertion that virtually CDCR's  
3 entire workforce should be vaccinated to protect approximately 1,600 unvaccinated high-risk  
4 incarcerated people (approximately just 1.7 percent of CDCR's entire population), virtually all of  
5 whom had the choice to be vaccinated, is also not narrowly drawn. (ECF No. 3663 at 20-21.)  
6 Plaintiffs rely on their flawed and incomplete analysis of only a handful of Defendants'  
7 mitigation measures to conclude that aside from vaccinating virtually every CDCR worker, no  
8 other safety measure will correct the purported violation of Plaintiffs' rights—a violation  
9 Plaintiffs have failed to establish, as discussed above. To the extent Plaintiffs argue that  
10 Defendants' current measures are insufficient, they fail to consider a much more effective,  
11 narrowly tailored alternative in the form of a requirement that all incarcerated people be  
12 vaccinated, a measure strongly supported by the public health guidance Plaintiffs cite, and not  
13 merely that people who *work* near incarcerated people be vaccinated.

14 **B. Plaintiffs Fail to Consider More Narrowly Drawn Relief to Protect the**  
15 **Incarcerated Population from COVID-19—Requiring Unvaccinated**  
16 **Incarcerated People to Take the Vaccine.**

17 Plaintiffs purportedly seek to protect class members, roughly 23,000 of whom remain  
18 unvaccinated. (ECF No. 3638 at 5; Decl. Toche at ¶ 14.) But Plaintiffs do not seek an order  
19 requiring all class members to be vaccinated to ensure class members' own protection and  
20 drastically reduce their risk of serious illness and infection. Instead, Plaintiffs seek an order  
21 requiring much broader relief—the vaccination of those who work near class members. (ECF  
22 No. 3663.) Plaintiffs largely rely on the Receiver's report regarding a mandatory COVID-19  
23 vaccine policy and its supporting declarations as their source of public health information. (*See*  
24 ECF No. 3663.) But the public health findings cited in the Receiver's report fail to support  
25 Plaintiffs' position that vaccinating *staff* is the *only* way to keep the incarcerated population safe  
26 from the threat of COVID-19. (ECF No. 3638 at 5 (emphasis added); ECF No. 3663 at 15-16.)  
27 Furthermore, Plaintiffs' position ignores not only the numerous layered safety measures that  
28 CDCR has implemented and enforces, but also the most direct means available of ensuring  
adequate safety of the incarcerated population—vaccinating all incarcerated people\.

1           The Receiver’s report explains that COVID-19 causes “great harm[,] including death[.]”  
2 (*Id.* at 5-6.) The report also explains that available COVID-19 vaccines control the Delta variant  
3 of COVID-19 well, in that they prevent symptomatic disease among those who are vaccinated  
4 with an efficacy rate of up to 88 percent, and prevent hospitalization and death among those who  
5 are vaccinated with an efficacy rate of up to 94 percent. (*Id.* at 22 (citations omitted).) Further,  
6 the report explains that the “Delta variant is twice as transmissible as the original Wuhan strain”  
7 of COVID-19. (*Id.* at 19 (citations omitted).) A declaration supporting the Receiver’s report  
8 states that COVID-19 “is easily transmitted from person to person” (Declaration of Dr. Tara  
9 Vijayan (Decl. Vijayan) at 3, ¶ 7) and “individuals who are vaccinated are substantially less likely  
10 to get COVID-19, and therefore transmit it to others” (*id.* at 7, ¶ 17). Public health findings like  
11 these are precisely why the state prioritized those who live and work in correctional settings to  
12 receive the vaccine as early as possible in December 2020, and CDCR and CCHCS have since  
13 focused their efforts on encouraging and incentivizing all workers and incarcerated people to be  
14 vaccinated, including those who refused offers to be vaccinated. (*See, e.g.*, ECF No. 3623 at 3.)

15           Because vaccination against COVID-19 reduces the spread of COVID-19, being vaccinated  
16 is the best protection from the risk of severe illness and death. But Plaintiffs and the Receiver  
17 reach a different conclusion on the same facts—incarcerated people, even if unvaccinated and  
18 therefore at a greater risk of severe illness or death from the virus, would be safest if those who  
19 work near them are vaccinated instead, despite the fact that vaccinated workers can still transmit  
20 the virus to them. (*See* ECF Nos. 3638 and 3663.) Neither Plaintiffs nor the Receiver cite any  
21 public health guidance that identifies or supports such a strategy as providing more protection  
22 than the vaccination of all incarcerated people.

23           As Defendants discussed in their August 30 response, Plaintiffs’ and the Receiver’s logic of  
24 vaccinating those in close proximity to those who are vulnerable makes sense in the context of  
25 schools, where children under the age of 12 are not yet eligible for vaccination against COVID-  
26 19. (ECF No. 3660 at 20.) In that scenario, the next-best alternative to vaccination of the  
27 vulnerable cohort is to vaccinate those who may come near those who are vulnerable as part of a  
28 multilayered set of safety measures that also includes face coverings, physical distancing, and



1 proper hygiene, among other measures. Ctrs. Disease Control & Prevention, *K-12 Schools*,  
2 <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>  
3 (last visited Sept. 8, 2021). But here, Plaintiffs and the Receiver do not explain their leap in logic  
4 or preference for a next-best alternative to the measure their own public health guidance supports  
5 as the most effective. The logic that supports the implementation of a next-best alternative for  
6 children under the age of 12 simply does not apply to class members in this matter, all of whom  
7 are age-eligible to take the vaccine, but roughly 23,000 of whom have chosen not to. ECF No.  
8 3662, Decl. Toche at ¶¶ 11, 14. Plaintiffs' conclusion is particularly odd in light of public health  
9 guidance they cite that says *being* vaccinated is the strongest protection against serious illness and  
10 death from COVID-19 (despite going to great lengths to explain why incarcerated people are  
11 generally at a higher risk of complications from COVID-19, and stating that roughly 23,000  
12 incarcerated people remain unvaccinated). (ECF No. 3663 at 3, 17-19; Decl. Toche at ¶ 14.)

13 Based on the public health guidance on which Plaintiffs rely, the stated goal of the  
14 Receiver's policy—ensuring adequate protection of the incarcerated population—would best be  
15 achieved by vaccinating all incarcerated people. The policy Plaintiffs advocate for is neither  
16 narrowly tailored nor the least intrusive means to achieve the stated goal of the policy, and  
17 extends much further than necessary insofar as it does not require the vaccination of the people it  
18 seeks to protect, but rather, seeks to mandate vaccination of those near them. Notably, Plaintiffs  
19 cite no public health guidance stating that such a strategy would better protect the roughly 23,000  
20 unvaccinated incarcerated people. Accordingly, this Court lacks the authority under the PLRA to  
21 order CDCR to implement this policy.

## 22 CONCLUSION

23 Plaintiffs fail to establish that Defendants' response to the COVID-19 pandemic—one that  
24 is consistent with public health guidance, state public health orders, and the developing line of  
25 case law on this topic—violates the Eighth Amendment. And because Defendants' response to  
26 the pandemic has not violated Plaintiffs' rights, the PLRA precludes an order for prospective  
27 relief. The contemplated relief further fails to satisfy the PLRA's needs-narrowness-intrusiveness  
28 requirement. Accordingly, this Court lacks the authority to order CDCR to implement the

1 Receiver's proposed mandatory vaccination policy.

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Dated: September 10, 2021

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 12 OAKLAND DIVISION

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

15 Plaintiffs,

16 v.

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

19 Defendants.

Case No.: 01-cv-01351-JST

**DEFENDANTS' OBJECTIONS TO THE  
 DECLARATION OF SOPHIE HART IN  
 SUPPORT OF PLAINTIFFS' RESPONSE  
 TO ORDER TO SHOW CAUSE RE:  
 RECEIVER'S RECOMMENDATION ON  
 MANDATORY VACCINATION [ECF No.  
 3663-1]**

Date: September 16, 2021  
 Time: 2:00 p.m.  
 Crtrm: 6, 2nd Floor  
 Judge: The Honorable Jon S. Tigar  
 Action Filed: April 5, 2001

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**OBJECTIONS TO THE HART DECLARATION**

Defendants submit the following objections to the Declaration of Sophie Hart in Support of Plaintiffs’ Response to Order to Show Cause Re: Receiver’s Recommendation on Mandatory Vaccination (hereafter the “Hart Declaration”). ECF No. 3663-1.

The Court should disregard and/or exclude the nine photographs of CDCR dormitories included in the Hart Declaration at Exhibit 26, four of which are reproduced in Plaintiffs’ Response to Order to Show Cause Re: Receiver’s Recommendation on Mandatory Vaccination (ECF No. 3663 at 10), because whatever slight probative value they may have is substantially outweighed by a danger of unfair prejudice and misleading the Court. “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice . . . misleading the [fact finder].” Fed. R. Evid. 403.

Proffering outdated photographs create a danger of confusion in the fact finder’s mind and must be excluded. *See Boucher v. CVS/Pharmacy, Inc.*, 822 F.Supp.2d 98, 102-03 (D.N.H. 2011), *citing BNSF Ry Co. v. LaFarge Sw., Inc.*, No. 06-1076, 2009 WL 4279862, \*2 (D.N.M. Feb. 15, 2009) (holding that photographs that misrepresented the appearance of the scene of an accident were inadmissible “because whatever minimal probative value can be obtained from such distorted images is substantially outweighed by the danger of misleading or confusing the jury”); *Minter v. Prime Equip. Co.*, No. CIV-02-132-KEW, 2007 WL 2703093, \*4 (E.D.Okla. Sept. 14, 2007) (“[W]here photographs are represented to portray the condition of a thing, in order to be relevant and admissible, [the proponent] will bear the burden of demonstrating the photographs taken subsequent to the accident represent the condition of the [thing] at the time of the accident.”). Furthermore, evidence is unfairly prejudicial if it provokes the fact finder’s instinct to punish. *See United States v. Thompson*, 359 F.3d 470, 470 (7th Cir. 2004).

Here, Plaintiffs are proffering outdated photographs of CDCR dormitories to support their arguments that “[m]ost patients ‘are housed in dormitories that are too crowded to allow for social distancing,’” and that “physical distancing is impossible in state prisons” to ultimately conclude that the Court should adopt the Receiver’s vaccine mandate recommendation. ECF No. 3663 at

1 9:7-9, 9:1-2 (sentence case capitalization omitted). The problem with these photographs is that  
 2 they are outdated, yet ostensibly being proffered as current dormitory conditions. *Id.* at 9:8-9 (“as  
 3 can be seen in the photographs below of such housing during the pandemic”). The only way to  
 4 decipher when these photographs were taken is by poring through the 631-page Hart Declaration.  
 5 ECF No. 3663-1. Only then is it revealed that the pictures are over 15-months old. *See*  
 6 Declaration of Connie Gipson in Support of Defendants’ Reply to Responses to Order to Show  
 7 Cause Re: Receiver’s Recommendation on Mandatory Vaccination (“Gipson Dec.”) filed  
 8 concurrently herewith at 5, ¶ 8. As the court observed in *Minter*, where photographs are  
 9 represented to portray the condition of a thing, in order to be relevant and admissible, the  
 10 proponent bears the burden of demonstrating that the photographs represent the condition of the  
 11 thing now—here, when the Court is considering adopting the Receiver’s mandatory vaccine  
 12 recommendation based on *current* conditions. *Minter*, 2007 WL 2703093 at \*4. Plaintiffs have  
 13 not met their burden.

14 Without conceding any burden shift onto Defendants, CDCR observes that much changed  
 15 in the dorms after the photographs in the Hart Declaration were taken. Gipson Dec. at 5, ¶ 8. For  
 16 example, on May 11, 2020, Defendants issued a memorandum requiring institutions to, among  
 17 other things, implement cohorts of eight inmates separated by six feet of space. *Id.* But the  
 18 photographs at issue do not reflect that policy change because they were taken before and shortly  
 19 after the May 2020 memorandum was issued and fully implemented. *Id.*

20 Furthermore, CDCR has taken aggressive measures to reduce the incarcerated population in  
 21 response to the COVID-19 pandemic since the photographs were taken. For example, at the end  
 22 of June 2020, CDCR implemented a new plan—consisting of several discretionary measures—to  
 23 further safely reduce the prison population under California Government Code section 8658.<sup>1</sup>  
 24 Between July and October, CDCR released 9,933 people as a result of the plan.<sup>2</sup> Defendants’ act  
 25 of reducing the incarcerated population allowed for greater flexibility in housing arrangements at  
 26 a time when numerous other COVID-19 safety measures were being developed and implemented.

27 \_\_\_\_\_  
 28 <sup>1</sup> See <https://www.cdcr.ca.gov/3-judge-court-update/> (last accessed Sept. 6, 2021).

<sup>2</sup> See fn. 1, *supra*.

1 These include Defendants’ ongoing, nation-leading efforts to vaccinate the incarcerated  
2 population, 78 percent of which is now vaccinated. *See* ECF No. 3662 at 4-5, ¶¶ 8-12.

3 It appears that Plaintiffs have included these photographs to provoke a visceral reaction and  
4 unsupported conclusion regarding the housing of incarcerated persons in a dormitory setting.  
5 However, Plaintiffs have proffered no evidence to suggest that such dormitory conditions  
6 currently exist and their reliance on outdated photographs is misleading and prejudicial in the  
7 absence of such evidence. To the extent these photographs have any probative value (which  
8 Defendants contend there is none), it is substantially outweighed by the unfair prejudice to  
9 Defendants and likelihood that the photographs will mislead the Court and the public.  
10 Accordingly, the Court should disregard and/or exclude the nine photographs of CDCR  
11 dormitories included in the Hart Declaration at Exhibit 26 and the identical photographs  
12 appearing in the Plaintiffs’ merits brief, ECF No. 3663 at 10.

13 Dated: September 10, 2021

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

15 Plaintiffs,

16 v.

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

19 Defendants.

Case No.: 01-cv-01351-JST

**DEFENDANTS' OBJECTIONS TO THE  
 DECLARATION OF SARA NORMAN IN  
 SUPPORT OF PLAINTIFFS' RESPONSE  
 TO ORDER TO SHOW CAUSE RE:  
 RECEIVER'S RECOMMENDATION ON  
 MANDATORY VACCINATION [ECF No.  
 3663-3]**

Date: September 16, 2021  
 Time: 2:00 p.m.  
 Crtrm: 6, 2nd Floor  
 Judge: The Honorable Jon S. Tigar  
 Action Filed: April 5, 2001

1 **OBJECTION TO THE NORMAN DECLARATION**

2 Defendants submit the following objection to the Declaration of Sara Norman in Support of  
3 Plaintiffs' Response to Order to Show Cause Re: Receiver's Recommendation on Mandatory  
4 Vaccination (hereafter the "Norman Declaration"). ECF No. 3663-3.

5 The Court should disregard and/or exclude the opinion in paragraph 7 of the Norman  
6 Declaration because it is being offered as an expert opinion on a technical subject without  
7 satisfying the requirements of Federal Rules of Evidence 701(c). "If a witness is not testifying as  
8 an expert, testimony in the form of an opinion is limited to one that is: . . . (c) not based on  
9 scientific, technical or other specialized knowledge within the scope of Rule 702." Fed. R. Evid.  
10 701(c). In turn, Rule 702 provides that a witness who is qualified as an expert by knowledge,  
11 skill, experience, training, or education may testify in the form of an opinion if certain factors are  
12 met, including that the testimony is based on sufficient facts or data, the testimony is the product  
13 of reliable principles and methods, and the expert has reliably applied the principles and methods  
14 to the facts of the case. Fed. R. Evid. 702. "Subsection (c) of Rule 701 was added to 'eliminate  
15 the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple  
16 expedient of proffering an expert in lay witness clothing." *Hirst v. Iverness Hotel Corp.*, 544 F.3d  
17 221, 227 (3rd Cir. 2008).

18 Here, after describing her extensive involvement *in litigation* involving CDCR's  
19 Developmental Disability Program (DDP), Ms. Norman provides the court with the following  
20 expert opinion: "In sum, it is impossible to meet the basic needs of people in the DDP without  
21 frequent close contact with custody and other staff." ECF No. 3663-3 at 3 ¶ 7. However, whether  
22 it is *impossible* to meet the basic needs of people in the DDP in any setting necessarily requires  
23 specialized knowledge—a specialized knowledge that has not been demonstrated by merely  
24 showing counsel's involvement in years of litigation that orbits CDCR's DDP.

25 Ms. Norman's position as an attorney in litigation is irrelevant to the analysis under the  
26 Rules of Evidence. "As the advisory Committee Note to rule 701 makes clear, a party simply may  
27 not use Rule 701 as an end-run around the reliability requirements of Rule 702 and the [expert]  
28



1 disclosure requirements of the Rules of Procedure. Preventing such attempts is the very purpose  
2 of subsection (c).” *Hirst*, 544 F.3d at 227-28. She has not shown that she has expert knowledge to  
3 reach any conclusion on the impossibility of meeting the basic needs of people in the DDP  
4 without frequent close contact with custody and other staff.

5 As such, the Court should disregard and/or exclude the lay opinion in paragraph 7 of the  
6 Norman Declaration because it runs afoul of Federal Rule of Evidence 701(c).

7 Dated: September 10, 2021

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