

1 PRISON LAW OFFICE
DONALD SPECTER (83925)
2 STEVEN FAMA (99641)
ALISON HARDY (135966)
3 SARA NORMAN (189536)
RITA LOMIO (254501)
4 RANA ANABTAWI (267073)
SOPHIE HART (321663)
5 LAURA BIXBY (301148)
1917 Fifth Street
6 Berkeley, California 94710
Telephone: (510) 280-2621
7 Fax: (510) 280-2704
lbixby@prisonlaw.com

8 *Attorneys for Plaintiffs*
9

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11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**
13

14 MARCIANO PLATA, et al.,

15 Plaintiffs,

16 v.

17 GAVIN NEWSOM, et al.,

18 Defendants.
19
20
21

CASE NO. 01-1351 JST

**PLAINTIFFS' OPPOSITION TO
MOTION TO INTERVENE BY
CALIFORNIA CORRECTIONAL
PEACE OFFICERS' ASSOCIATION**

Date: October 14, 2021

Time: 2:00 pm

Crtrm.: 6, 2nd Floor

Judge: Hon. Jon S. Tigar

1 **INTRODUCTION**

2 Since the start of the COVID-19 pandemic, the world has been waiting for effective
 3 vaccines to halt the spread of the disease. Unfortunately, even after the vaccines became
 4 available, far too few of CCPOA’s members have chosen to become vaccinated. After
 5 months of opportunities to receive the vaccine, only 42% of correctional officers have
 6 received at least one dose of a COVID-19 vaccine. ECF No. 3638-1, Declaration of Dr.
 7 Joseph Bick at 6 ¶¶ 37, Ex. B. This low rate of vaccination creates an unreasonable risk of
 8 illness and death for all those incarcerated in California prisons, and the only way to truly
 9 mitigate that risk is to mandate staff vaccination—a public health conclusion that CCPOA
 10 does not and cannot dispute. *See* ECF No. 3664, CCPOA’s Response to Order to Show
 11 Cause (“CCPOA Response”) at 18-19.

12 Despite conceding the medical and public health bases underlying the Receiver’s
 13 recommendation, CCPOA nonetheless seeks to intervene at this late stage of the case,
 14 attempting to muddy the waters with state labor law claims and potentially delaying this
 15 Court’s urgently-needed response to the COVID-19 crisis. CCPOA’s motion is untimely,
 16 as it has been aware of—and has even participated in—discussions about mandating staff
 17 vaccination for months. And CCPOA’s interests are already adequately represented by
 18 Defendants, with the possible exception of claims related to California labor law over
 19 which this Court has no jurisdiction. CCPOA cannot meet the requirements for
 20 intervention as of right, and this Court should likewise deny its application for permissive
 21 intervention. If this Court decides to permit CCPOA to intervene, however, it should limit
 22 the scope of intervention to only issues related to staff vaccination to avoid unnecessarily
 23 complicating all the other important issues in this case.

24 **ARGUMENT**

25 **I. CCPOA Is Not Entitled to Intervention as of Right Because Its Motion Is**
 26 **Untimely and Because Defendants Adequately Represent Its Protectable**
 27 **Interests**

28 CCPOA’s motion to intervene fails to meet several requirements for mandatory

1 intervention pursuant to Rule 24. There are four requirements for intervention as of right
2 pursuant to Rule 24(a)(2), all of which must be met:

3 (1) [T]he [applicant's] motion must be timely; (2) the applicant must have a
4 significantly protectable interest relating to the property or transaction which
5 is the subject of the action; (3) the applicant must be so situated that the
6 disposition of the action may as a practical matter impair or impede its ability
to protect that interest; and (4) the applicant's interest must be inadequately
represented by the parties to the action.

7 *California ex rel. Lockyer v. United States*, 450 F.3d 436, 440 (9th Cir. 2006) (internal
8 quotation marks and citation omitted). CCPOA cannot meet this standard. Specifically,
9 CCPOA's motion is untimely. And of the two arguments it makes in opposition to
10 mandatory staff vaccination, one is already adequately represented by Defendants, and the
11 other is not cognizable before this Court.

12 CCPOA has waited to move to intervene until the last possible minute, despite
13 being aware for months that the Court and the Receiver have been contemplating
14 mandating staff vaccination. To determine whether a motion to intervene is timely, courts
15 look at "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the
16 prejudice to other parties; and (3) the reason for and length of the delay." *Smith v. Los*
17 *Angeles Unified Sch. Dist.*, 830 F.3d 843, 854 (9th Cir. 2016). Here, the *Plata* case has of
18 course been ongoing for many years. And the Court and the parties have been discussing
19 staff vaccination and COVID-19 since at least December of last year, with CCPOA
20 attending many Case Management Conferences where the issue was discussed. *See, e.g.*,
21 ECF No. 3520, December 22, 2020 Joint CMC Statement at 21-23; ECF No. 3521 (noting
22 that counsel for CCPOA was present at December 23, 2020 Case Management
23 Conference). The more specific issue of mandating staff vaccination has been continuously
24 discussed since February of this year. *See* ECF No. 3548, February 12, 2021 Joint CMC
25 Statement at 4-5. CCPOA was therefore on notice for months that the Court was
26 considering a possible mandate regarding staff vaccination, yet it did not move to intervene
27 until the Court already stood on the precipice of adopting the Receiver's recommendation
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1 to mandate vaccination. Moreover, CCPOA’s intervention at this stage would prejudice the
2 parties, “complicat[ing] the issues and prolong[ing] the litigation,” *United States v.*
3 *Washington*, 86 F.3d 1499, 1504 (9th Cir. 1996). CCPOA’s arguments related to the
4 Eighth Amendment are duplicative of those raised by Defendants, while its arguments
5 related to its collective bargaining agreement concern matters not part of this litigation and
6 not properly in federal court. *See Retiree Support Grp. of Contra Costa Cty. v. Contra*
7 *Costa Cty.*, 315 F.R.D. 318, 323 (N.D. Cal. 2016) (denying unions’ motion to intervene as
8 untimely where their objections concerned “agreements in MOUs and Side Letters that are
9 not part of the litigation before the Court”). This Court should deny CCPOA’s motion to
10 intervene, as it comes months too late and would unnecessarily complicate the issue before
11 the Court, at a time when swift action is essential to prevent further illness and death from
12 COVID-19.

13 CCPOA also cannot demonstrate that it has a significantly protectable interest
14 relating to the Receiver’s proposed vaccination mandate. To meet the requirement of a
15 significantly protectable interest, CCPOA must show that “the interest is protectable under
16 some law” and “there is a relationship between the legally protected interest and the claims
17 at issue.” *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003). The rights CCPOA
18 claims would be impaired by a vaccination mandate are all based in state labor law—
19 specifically, the Dills Act, Cal. Govt. Code §§ 3512-3524. Those interests have little
20 relationship to considerations of whether unvaccinated staff create unconstitutional
21 conditions of confinement.

22 Additionally, CCPOA seems to acknowledge that adoption of the Receiver’s
23 recommendation would not violate any collective bargaining requirements, as those
24 requirements only apply to the implementation details of such a policy. *See* ECF No. 3665,
25 CCPOA Notice of Motion and Motion to Intervene (“CCPOA Mot. Intervene”) at 10.
26 CCPOA relies heavily on *Regents of the University of California*, a decision by
27 California’s Public Employment Relations Board that held that adoption of a mandatory
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1 vaccination policy did not require union negotiations—as opposed to the actual
2 implementation details of such a policy. PERB Dec. No. 2783-H, pp. 24-25 (2021).
3 Because CCPOA cannot claim any protectable interest that would be impaired by
4 **adoption** of the Receiver’s recommendation, they cannot meet the requirements for
5 intervention under Rule 24(a)(2). Moreover, even if CCPOA did have a colorable claim
6 that adoption of the policy was prohibited by the Dills Act, the Public Employment
7 Relations Board has exclusive jurisdiction over all such claims. Cal. Govt. Code § 3514.5;
8 *Gabriele v. Servs. Emps. Int’l Union, Loc. 1000*, 466 F. Supp. 3d 1095, 1101 (E.D. Cal.
9 2020). Thus, such a claimed interest is not protectable by this court.

10 CCPOA’s attempt to intervene at this advanced stage of the *Plata* case lessens its
11 possible interest, unlike the police union that was permitted to intervene in *United States v.*
12 *Los Angeles, Cal.*, 288 F.3d 391 (9th Cir. 2002). In that case, the union sought to be heard
13 regarding a pending consent decree that contained several provisions related to
14 implementation, including provisions that altered the collective bargaining process for the
15 union. *Id.* at 401. This is distinct from the present situation, where the Court has long ago
16 implemented reforms, including appointing a Receiver. Furthermore, the Court’s adoption
17 of the Receiver’s recommendation would not alter CCPOA’s ability to engage in the
18 collective bargaining process over implementation of the mandate. *See Floyd v. City of*
19 *New York*, 770 F.3d 1051, 1062 (2d Cir. 2014) (denying police union’s motion to intervene
20 where “no provision in the [settlement] agreement prevents the unions from collective
21 bargaining”). Indeed, CCPOA notes that it is already engaging in the meet-and-confer
22 process regarding the impacts of the California Department of Public Health’s mandatory
23 vaccination order. *See* ECF No. 3669, CCPOA Reply to Response to OSC at 7. CCPOA
24 will be equally able to meet and confer if this Court adopts the Receiver’s
25 recommendation.

26 In addition, CCPOA’s interests are already adequately represented by Defendants.
27 The Ninth Circuit looks at three factors to determine whether a proposed intervenor’s
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1 interest is adequately represented by existing parties: “(1) the interest of a present party is
2 such that it will undoubtedly make all the intervenor’s arguments; (2) the present party is
3 capable and willing to make such arguments; and (3) the proposed intervenor would offer
4 any necessary elements to the proceeding that other parties would neglect.” *Nw. Forest*
5 *Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996). Here, the Defendants and
6 CCPOA have made substantially similar arguments regarding the PLRA in their respective
7 responses to this Court’s Order to Show Cause. *Compare* ECF No. 3660, Defendants’
8 Response to Order to Show Cause *with* ECF No. 3664, CCPOA’s Response.

9 The CCPOA’s interests and Defendants’ interests are aligned. They both oppose the
10 Receiver’s recommended vaccine mandate, creating a presumption that Defendants will
11 adequately represent CCPOA’s interests. *See Glickman*, 82 F.3d at 838 (“Where an
12 applicant for intervention and an existing party have the same ultimate objective, a
13 presumption of adequacy of representation arises.”) (internal quotation marks and citation
14 omitted); *see also Ashker v. Governor of State of California*, No. 09-5796, 2014 WL
15 2465191, at *8 (N.D. Cal. June 2, 2014) (denying CCPOA motion to intervene where
16 “CCPOA has not explained why Defendants cannot adequately protect the . . . interests of
17 CDCR officers in this litigation”); *In re New York City Policing During Summer 2020*
18 *Demonstrations*, No. 20-8924, 2021 WL 1666860, at *5 (S.D.N.Y. Apr. 28, 2021)
19 (denying police union motion to intervene where they failed to explain “why the City is
20 not perfectly capable of arguing that its policies are not, in fact, unconstitutional”). The
21 respective positions of CCPOA and Defendants are unlike, for example, those of the police
22 union and the City of Los Angeles in *City of Los Angeles*, 288 F.3d 391. In that case, the
23 city was actively negotiating a consent decree and “past dealing of the parties indicate[d] a
24 marked divergence of positions concerning key elements of the decree and underlying
25 theories of liability.” *Id.* at 402. No such divergence of positions between Defendants and
26 CCPOA exists regarding the issue of mandatory staff vaccination. Defendants are already
27 adequately protecting CCPOA’s interests, and CCPOA is therefore not entitled to
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1 intervention as of right.

2 **II. This Court Should Deny CCPOA Permission to Intervene Because CCPOA**
 3 **Attempts to Raise State Law Claims Over Which This Court Lacks**
 4 **Jurisdiction**

5 This Court should also deny CCPOA’s motion for permissive intervention, because
 6 CCPOA is attempting to raise new state law claims over which this Court lacks
 7 jurisdiction. A party applying for permissive intervention must show that “(1) it shares a
 8 common question of law or fact with the main action; (2) its motion is timely; and (3) the
 9 court has an independent basis for jurisdiction over the applicant’s claims.” *Donnelly v.*
 10 *Glickman*, 159 F.3d 405, 412 (9th Cir. 1998). The jurisdictional requirement “prevents the
 11 enlargement of federal jurisdiction . . . where a proposed intervenor seeks to bring new
 12 state-law claims.” *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th
 13 Cir. 2011). CCPOA claims that it seeks to raise no new state-law claims while
 14 simultaneously arguing that a vaccine mandate would violate “collective bargaining
 15 principles enshrined in California labor laws.” *See* CCPOA Mot. Intervene at 14. Not only
 16 does CCPOA seek to raise new state-law claims, but those claims are ones that may be
 17 heard only in front of the California Public Employment Relations Board. Because this
 18 Court lacks jurisdiction to hear such claims, it should deny CCPOA’s motion for
 19 permissive intervention.

20 **III. If This Court Grants CCPOA’s Motion to Intervene, It Should Limit the**
 21 **Scope of Intervention**

22 If this Court is inclined to grant CCPOA’s motion for intervention, it should limit
 23 CCPOA’s scope of intervention to only the issue of mandatory staff vaccination. The
 24 Court’s authority “to grant or deny an application for permissive intervention includes
 25 discretion to limit intervention to particular issues.” *Dep’t of Fair Employment & Hous. v.*
 26 *Lucent Techs., Inc.*, 642 F.3d 728, 741 (9th Cir. 2011) (citations omitted). Limiting
 27 CCPOA’s intervention to the particular issue of staff vaccination would promote judicial
 28 efficiency, given the lengthy and complicated history of this case and the many issues that

1 have been raised therein over the years. It would also prevent CCPOA from interfering in
2 issues such as healthcare delivery where CCPOA has no relevant expertise.

3 **CONCLUSION**

4 For the reasons set forth above, the Court should deny CCPOA's untimely motion
5 to intervene both as of right and on a permissive basis. If the Court decides to permit
6 CCPOA to intervene, it should limit CCPOA's intervention to only the issues related to
7 staff vaccination.

8 Respectfully submitted,

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10 DATED: September 13, 2021

PRISON LAW OFFICE

11 By: /s/ Laura Bixby

12 Donald Specter
13 Steven Fama
14 Alison Hardy
15 Sara Norman
16 Rana Anabtawi
17 Rita Lomio
18 Sophie Hart
19 Laura Bixby

20 Attorneys for Plaintiffs
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23
24
25
26
27
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