21-15614

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ARMSTRONG, et al.,

Plaintiffs-Appellees,

v.

G. NEWSOM, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

No. 4:94-cv-02307-CW
The Honorable Claudia Wilken, Judge

REPLY BRIEF

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INTRODUCTION

For over three decades, this ADA action focused exclusively on providing structurally accessible prisons and equivalent programming opportunities for *Armstrong* class members. The Five-Prison Order fundamentally and impermissibly altered the nature of this litigation by mandating post-judgment reforms to address allegations not covered by the operative complaint or remedial plan.[1] And the Order was issued even though the undisputed data shows *no* substantial reduction in class members' access to prison facilities or programs.

Plaintiffs defend this judicial overreach by misconstruing previous orders, exaggerating how much evidence the court (improperly) relied on, overstating the record before the court which was patently insufficient to support to broad relief granted, and glossing over a discovery process that failed to provide Defendants' due process.

The court-imposed remedies are unnecessary, intrusive, and cumulative to each other and the remedial efforts already underway, in violation of the Prison Litigation Reform Act (PLRA). These reforms impermissibly expanded the scope

[1] The five prisons are: California Institution for Women (CIW), Substance Abuse Treatment Facility and State Prison (SATF), Kern Valley State Prison (KVSP), California State Prison-Corcoran (COR), and California State Prison-Los Angeles County (LAC).

of this litigation, and have needlessly interfered with and micromanaged matters of prison administration.

This Court should reverse this injunction.

ARGUMENT

I. THE DISTRICT COURT EXCEEDED ITS JURISDICTION BY EXTENDING RELIEF BEYOND THE CLAIMS IN THE COMPLAINT.

The Five-Prison Order exceeded the district court's jurisdiction by extending relief beyond the *Armstrong* class's limited ADA claims about structural barriers and programming opportunities to address categorically distinct claims about officers' uses of force and acts of retaliation. (5-ER-1050-336.) History confirms that these new claims are not covered by this litigation.

A. There Is No Nexus Between the Five-Prison Order and the Conduct Alleged in the Complaint.

The Five-Prison Order has no nexus to the *Armstrong* class claims. (5-ER-148-1007.) As *Pacific Radiation Oncology v. Queen's Medical Center* explains, a sufficient nexus must exist between an injunction and "the conduct asserted in the underlying complaint." 810 F.3d 631, 636 (9th Cir. 2015); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987) (applying same standards to permanent injunctions). A court cannot "devise[] a remedy to accomplish indirectly what it…lacks the remedial authority to mandate directly." *Missouri v. Jenkins*, 515 U.S. 70, 92-93 (1995). "When a plaintiff seeks injunctive relief based on claims not pled in the complaint, the court does not have the authority to issue an injunction."

Pacific Radiation, 810 F.3d at 633; *LA Alliance for Human Rights v. County of Los Angeles*, 14 F.4th 947 (9th Cir. 2021).

Plaintiffs distinguish *Pacific Radiation* by conflating the *broad purpose* of the ADA, which is to ensure reasonable accommodations and protect against disability discrimination, with the *limited claims* asserted in the complaint, as if both are the same. (AB 38.) But statutory goals and claims pled are distinct. As *Pacific Radiation* illustrates, the court's limited power to grant injunctive relief did not extend to privacy violations stemming from confidential discovery records because the relief sought was not "of the same nature" that ultimately could be granted. 810 F.3d 637. Here, too, the extant injunctive relief (monitoring staff for misconduct via cameras and supervisory assignments, investigating and tracking misconduct allegations, and reassigning and disciplining staff) are not of the same nature as the conduct pled in the complaint (structural accessibility and programming deficits). (5-ER-1115–131.) These new reforms do not "serve[] to effectuate…the basic purpose of the original [injunction]." *Chrysler Corp*, 316 U.S. 556, 562 (1942).

The cases Plaintiffs cite are inapposite. (AB 37.) *Gates v. Gomez*, 60 F.3d 525 (9th Cir. 1995), involved a consent decree governing psychiatric treatment. *Gates* approved an injunction conditioning the use of 37-millimeter launchers on mentally ill inmates by requiring staff to first obtain medical clearances. *Id*. at 533. That modest medical requirement is unlike the intrusive requirements of stationary

and body-worn cameras, new training, and new processes for staff complaints, investigations, and discipline. Moreover, *Gates* illustrates when an injunction goes too far. It reversed a provision prohibiting the launcher's use to prevent imminent property damage when no medical contraindication existed because that prohibition had nothing to do with providing appropriate psychiatric treatment. *Id*.

The relief imposed in the remaining cases Plaintiffs cite (AB 37) each furthered the underlying injunction or consent decree's objectives instead of, as here, resolving wholly new claims. *See Parsons v. Ryan*, 912 F.3d 486, 501 (9th Cir. 2018) (remedying "the same constitutional violations" on which the parties' stipulation rested); *Chrysler Corp.*, 316 U.S. at 556 (extending consent decree's duration to preserve its stated intent); *Milliken v. Bradley*, 433 U.S. 267, 269 (1977) (disallowing *inter*district desegregation that exceeded the constitutional violation, but approving remedial programs that remedied past *intra*district segregation); *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440 (2004) (Eleventh Amendment did not bar consent decree's enforcement); *Sharp v. Weston*, 233 F.3d 1166, 1173 (9th Cir. 2000) (authorizing remedies to cure the underlying constitutional violation); *Keith v. Volpe*, 784 F.2d 1457, 1458 (9th Cir. 1986) (establishing procedures for replacing members of advisory committee established by the consent decree); *Brown v. Plata*, 563 U.S. 493, 507-09, 541-42 (2011)

(addressing prison overcrowding that caused constitutionally inadequate medical care).

Plaintiffs cannot establish the required nexus by redefining the claims in the complaint as seeking to vindicate "ADA rights to reasonable accommodations and to be free from disability discrimination." (AB 38.) This requirement does not hinge on claims furthering statutory goals; it demands a nexus between the injunction and "the conduct asserted in the underlying complaint." *Pacific Radiation*, 810 F.3d at 636. Contrary to Plaintiffs' contention, this litigation never encompassed staff misconduct through force or retaliation. (AB 35-36; 5-ER-1003-1194.)

The Five-Prison Order lacks a sufficient nexus to the conduct in the complaint.

B. Neither the Remedial Plan Nor the Original Injunction Justifies Expanding Relief Beyond the Claims Initially Recognized.

The *Armstrong* Remedial Plan and the original injunction also do not encompass acts of excessive force or retaliation. (5-ER-1043-1114.) Rather, they require CDCR to provide accessible reception-center beds and equivalent programming opportunities; address extended reception-center stays resulting from a disability; maintain structural-accessibility features and equipment; and create a separate accommodation-request procedure distinct from the regular grievance and staff-complaint processes. (*Id.*)

Contrary to Plaintiffs' contention (AB 34, 37), the Five-Prison Order does not effectuate the Remedial Plan and original injunction's basic purpose of addressing disability discrimination by removing structural barriers and providing programming opportunities for *Armstrong* members (5-ER-1043-1114). The Order goes far beyond that, reaching new claims of excessive force and retaliation that were never pled, certified for class treatment, or covered by the parties' Stipulation and Order for Procedures to Determine Liability and Remedy or the court's original injunction, Remedial Plan, or prior injunctions. (5-ER-1115-194.)

The Order overhauls CDCR's processes for monitoring staff misconduct (via cameras and supervisory assignments), investigating and tracking allegations, and reassigning and disciplining staff. (1-ER-2-78.) And it restricts pepper-spray use, mandates training, and contains a generic anti-retaliation requirement. (*Id.*) But none of these remedies "would…bring [CDCR's] programs, activities, services, and facilities into compliance with the ADA and the RA" (1-ER-70), as contemplated by the original injunction and Remedial Plan.

C. The 2007 and 2012 Orders Do Not Justify Expanding Relief Beyond the Original Class Claims.

Perhaps recognizing the absence of a nexus between the conduct asserted in the complaint and the allegations underlying the injunctive relief, Plaintiffs assert that subsequent orders, namely those issued in 2007 and 2012, "ensure Defendants hold officers accountable for violating class members' rights." (AB 35.) But the

referenced "rights" are limited to achieving ADA compliance "in [the] specific areas…litigated by the parties," such as providing disability accommodations and improving program access and effective communications, not to remedy any conceivable ADA violation. (5-ER-1033-35, 1138-39.) The 2007 and 2012 orders do not aim to curb physical abuse or prevent retaliation.

The 2007 order addressed four areas of deficiency: housing accommodations, sign-language interpreters, confiscation of assistive devices, and "some" prisons' delayed responses (or non-response) to disability-accommodation requests. (5-ER-1033-39.) Since an inadequate disability-tracking system caused these deficiencies, the court directed CDCR to develop a system for documenting noncompliance with remedial requirements and referring repeat offenders for investigation and discipline. (*Id.*)

The 2012 order clarified the 2007 order to ensure that disability-accommodation requests were addressed, monitored, and tracked, and that "wardens and medical administrators [were] accountable" for noncompliance. (5-ER-1008-09, 1017-18.)

These orders, which Plaintiffs dub the "backbone" of the Five-Prison Order (AB 35), cannot justify expanding the litigation. Establishing a separate system for disability-accommodation requests is wholly distinct from requiring CDCR to monitor staff behavior with cameras and overhaul the staff-complaint and

discipline processes. Plaintiffs' assertion that the Order differs only because it concerns "disability discrimination perpetrated through force and retaliation" (AB 3, 31) is incorrect; all prior orders focused squarely on removing structural barriers and ensuring program access (5-ER-1011-02, 1017-23, 1033-35). Incidents of retaliation and excessive force are not more extreme versions of failing to provide sign-language interpretation, wheelchair ramps, or widen doors; they are entirely different issues that Defendants take seriously but ultimately are not part of this action.

D. Jurisdiction Was Exceeded Because the Alleged Physical Abuse and Retaliation Are Categorically Distinct from the Original Class Claims.

The ADA's anti-discrimination and access provision, 42 U.S.C. § 12132, did not confer jurisdiction on the district court to expand this action. Defendants never claimed that § 12132 contains an unwritten categorical exception for officers' uses of force, so Plaintiffs' sole focus on this argument is unavailing. (AB 40.)

As Defendants have explained (AOB 42), the Remedial Plan's incorporation of § 12132—a general obey-the-law provision that does not address retaliation or excessive force—does not justify expanding decades-old claims about structural barriers and program access (1-ER-66-67) to encompass staff misconduct through force and retaliation. This is because "[t]he authority of the court is invoked at the outset to remedy particular...violations." *Freeman v. Pitts*, 503 U.S. 467, 489

(1992). Thus, court-imposed remedies are justifiable if they advance "the ultimate objective of alleviating the initial...violation." *Id*. This requires a "sufficient nexus" between the remedy imposed and the conduct asserted in the underlying complaint, which, as discussed above, does not exist here. *Pacific Radiation*, 810 F.3d at 633-34, 636.

Incorporating § 12132 merely confirmed that Defendants would remove structural obstacles and programming deficiencies identified in the complaint. That incorporation was never intended to be a wholesale adoption of every ADA provision. To be sure, the Remedial Plan is much narrower than the ADA: : it is limited to structural accessibility and prison-program access for *Armstrong* members.

Plaintiff's argument that the ADA's anti-interference provision, 42 U.S.C. § 12203(b), confers jurisdiction, is misplaced. Plaintiffs say because Defendants stipulated to operating institutional programs and facilities in accordance with the ADA, they necessarily agreed to the anti-interference provision given it is, per Plaintiffs, "a critical part of the ADA." (AB 39 (citing 5-ER-1153-54).) But § 12203 was never incorporated into the Remedial Plan and, therefore, cannot justify expanding this litigation beyond the structural-accessibility and program-access claims initially recognized. *See Freeman v. Pitts*, 503 U.S. 467, 489 (1992) ("A remedy is justifiable only insofar as it advances the ultimate objective of

alleviating the initial…violation.").[2] Defendants' stipulation was limited to removing structural barriers and providing reasonable access to prison programs and services. (5-ER-1151-53, 1160-77.) It did not address excessive force or retaliation.

The district court's finding that accommodation requests were met with force and inmates feared using the grievance process also does not cure the jurisdictional defect, because it is not "supported by substantial evidence in the record." *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1073 (9th Cir. 2010). The court assumed widespread violations existed based on a small fraction of the *Armstrong* population that class counsel cherry-picked from the five prisons—ranging from just 0.1% at SATF to 3% at LAC. (*See* § III.D.3, below.) This limited selection of *Armstrong* statements (comprising 23 statements from LAC, 9 from COR, 6 from KVSP, and just 2 each from CIW and SATF) shaped Plaintiffs' experts' opinions, none of whom toured the prisons or met with inmates and officers. (AB 50-51; 32-ER-8947-9211; 33-ER-9213-442.) The small, non-random group is not a statistically representative sampling from which reliable conclusions about the *Armstrong* class could be extrapolated. *Morita v. Southern California Permanente*

[2] Unable to distinguish *Freeman* and three other cases (*Missouri*, *Brumfield,* and *Azar*) cited at pages 40-43 of Defendants' AOB, Plaintiffs relegate their response to a footnote and call them "irrelevant or unpersuasive." (AB 39 n.22.) But each case is persuasive authority for the proposition cited.

Medical Group, 541 F.2d 217, 220 (9th Cir. 1976) ("statistical evidence derived from an extremely small universe [eight persons]…has little predictive value and must be disregarded").

The undisputed data demonstrates *Armstrong* members' consistently robust use of prison administrative processes exceeds that of non-class members across the board: although they comprise only a fraction of the population, *Armstrong* members filed substantially more grievances, staff complaints, and accommodation requests—often more than double—than other inmates. (28-ER-7800-04, 7758-62, 7807-11, 7816-20, 7831-37.) While Plaintiffs assert this data does not account for requests or grievances withheld or withdrawn out of fear or intimidation (AB 41), any assumption that a significant number of such incidents occurred is speculative and fails to establish a pervasive pattern.

Plaintiffs say evidence of a widespread drop is unnecessary because it is "obvious" that people with disabilities submit more grievances and staff complaints. (AB 38-39, 42.) But Plaintiffs' say-so is not a substitute for evidence. If the alleged abuse of *Armstrong* members is as rampant as Plaintiffs claim, then there should be a widespread drop in the use of administrative processes. The undisputed data belies Plaintiffs' contention, showing *Armstrong* members' substantial, steady, and robust use of administrative processes. (28-ER-7800-04, 7758-62, 7807-11, 7816-20, 7831-37.)

Plaintiffs do not meaningfully distinguish the controlling precedents cited in the Opening Brief. (AB 38-39.) As the Supreme Court held in *Freeman*, a court's remedial power is jurisdictionally limited to the violation initially found. 503 U.S. at 471. And this Court's precedent establishes that the "authority to modify an injunction is more limited than its authority to formulate an injunction in the first instance." *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1097-98 (9th Cir. 2021). A "party requesting modification must show 'a significant change either in factual conditions or in the law warranting modification of the decree.'" *Id*. Plaintiffs assert no change in the law, and the record does not demonstrate a widespread drop in *Armstrong* members' use of administrative processes. (28-ER-7758-62, 7800-04, 7807-11, 7816-20, 7831-37.) Had such a change occurred, the proper remedy would be modification of the Remedial Plan, not new relief.

Plaintiffs acknowledge that "not every use of force against a disabled incarcerated person gives rise to an ADA claim," but assert the court was nonetheless justified in imposing new relief because "much of" the alleged force was "unnecessary and unreasonable." (AB 40.) But excessive uses of force, while concerning, do not transform Eighth Amendment violations into ADA violations merely because the inmate is disabled. The record lacks widespread evidence that force was used *because of* inmates' disabilities. Rather, Plaintiffs merely assert that force was used against a disabled or mentally ill inmate.

Lastly, Plaintiffs erroneously assert that Defendants contested the court's application of *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (9th Cir. 2014) solely because the case "was about arrests, not prisons." (AB 40.) This is inaccurate: Defendants also argued that *Sheehan* fails to bridge the gap between the court-mandated reforms and the claims initially raised. (AOB 45-46.) Even if using force without regard to an inmate's mental illness can constitute disability discrimination under *Sheehan*, it does not follow that every use of force against an *Armstrong* member implicates the ADA or that jurisdiction existed to consider such a claim. 28 C.F.R. § 35.139 (individual posing direct threat to safety of others has no entitlement to benefit from public entity's services, programs, or activities). After all, the class claims do not concern excessive force, much less using force without accounting for an inmate's mental illness. (5-ER-1115-131.) Mental illness is not even among the disabilities certified for class inclusion. (CR 27.) So *Sheehan*, and the similar holding in *Vos v. City of Newport Beach*, 892 F.3d 1024, 1036 (9th Cir. 2018), do not support the district court's rationale.

By granting injunctive relief on new and categorically different claims, the court went beyond making prison buildings accessible or providing programming opportunities; it transformed this ADA action into an ADA plus § 1983 action. Jurisdictional limitations do not permit this result.

/ / /

II. THE DISTRICT COURT IMPROPERLY EXPANDED THE *ARMSTRONG* REMEDIAL PLAN TO COVER NON-CLASS MEMBERS.

A. The Court Improperly Expanded the Remedial Plan to Cover Members of Another Class.

The district court erroneously expanded the *Armstrong* Remedial Plan to encompass *Coleman* members at the Enhanced Outpatient level of mental-health care ("*Coleman*-EOP"), over whom its jurisdiction does not extend. The court deemed statements from mentally ill inmates indicative of *Armstrong* members' experiences, endowed their statements with additional weight, and allowed those statements to drive the injunction. (1-ER-21-22.)[3]

Defendants did not, as Plaintiffs erroneously assert (AB 41), waive this challenge below. (2-ER-319-21, 336, 357-63 (arguing evidence should be limited to certified *Armstrong* members, distinguishing *Coleman* members, and discussing certification requirements); AOB 48-55). *Ruiz v. Affinity Logistics Corp.,* 667 F.3d 1318, 1322 (9th Cir. 2012) (issue need only be "raised sufficiently for the trial court to rule on it."). The court acknowledged:

> Defendants talk a lot about…limited or less, or no, perhaps, credence or evidentiary value to be given to declarations by *Coleman* declarants.

[3] To prevent the court from considering *Coleman*-EOP statements, Plaintiffs suggest that Defendants should have moved to decertify the class. (AB 41.) This suggestion is illogical because *Coleman*-EOP members were not members of the *Armstrong* class.

> …what about declarants who are only *Coleman* class members? What is the justification for considering those declarations?

(2-ER-354-55.)

By expanding the Remedial Plan to encompass mental illness, the court effectively committed the same error in *Parsons* where the district court "essentially rewrote the subclass definition." 912 F.3d at 503. That was improper because courts lack authority "to revise, modify, alter, extend, or remake a contract to include terms not agreed upon by the parties." *Id*. (internal markings omitted). Regardless of whether contract-interpretation principles generally apply (AB 44), the court erred by construing the Remedial Plan to include *Coleman*-EOP members when the operative complaint, class-certification order, and prior filings excluded them. (*See* 5-ER-1117, 1133-34, 1174-76); 18 U.S.C. § 3626 (directing relief "be determined with reference to the…violations established by the specific plaintiffs before the court.").

Plaintiffs argue that class certification is unnecessary because other cases affirmed post-judgment orders without certification. (AB 41; 1-ER-190.) But none of them incorporated new claims in the face of properly raised objections during the litigation's remedial phase. *See Armstrong v. Brown,* 768 F.3d 975, 978-79 (9th Cir. 2014) (clarifying existing remedial plan obligation to investigate and log allegations of noncompliance); *Armstrong*, 622 F.3d at 1058, 1064 (addressing

existing obligations to class members housed in county jails; finding evidence insufficient to support class-wide relief); *Coleman v. Brown*, 756 F. App'x 677, 678-79 (9th Cir. 2018) (determining when the clock starts when addressing obligation to complete mental-health care transfers within 24 hours).

Plaintiffs reframe the *Coleman* statements as "probative," claiming the court did not expressly declare *Coleman* members to be *Armstrong* members or "bestow on them any special privileges." (AB 4, 45.) But by simultaneously expanding the Remedial Plan to encompass *Coleman*-EOP members and giving their statements significant weight, the court improperly treated *Coleman* members as *Armstrong* members. (1-ER-20-22.) In so doing, the court effectively expanded the *Armstrong* class without satisfying class-certification prerequisites, which violates the rules governing class actions. Fed. R. Civ. P 23(c)(1)(C).

Class-certification requirements limit class claims to those fairly encompassed by the named plaintiffs' claims to ensure there are common contentions capable of class-wide resolution, such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (requiring commonality, typicality, and adequacy). Relevant here, the type and extent of disability, its role in any alleged interaction, the extent of accommodation needed and provided, force used, and the institutional response all require

individualized assessments, making staff-misconduct claims inappropriate for class treatment. *Lara v. First Nat'l Ins. Co.*, 25 F.4th 1134, 1138 (9th Cir. 2022) (individualized determinations predominated, barring class treatment, where proof of claim required individualized determinations for each plaintiff).

The court erred by expanding the Remedial Plan beyond the certified class.

B. The Court's Expansion of the Class Did Not Comport with Due Process.

The court's expansion of the Remedial Plan without adequate notice, in the midst of deciding Plaintiffs' motion for injunctive relief, violated due process. 18 U.S.C. § 3626 directs that relief "be determined with reference to the…violations established by the specific plaintiffs before the court." This provision restricts the court from reconstructing the Remedial Plan to encompass persons beyond the certified class. (AB 45.) That *Armstrong* and *Coleman* members are represented by the same counsel does not justify expanding this litigation beyond the certified class and claims. (AB 46-47.) Yet the court improperly incorporated *Coleman*-EOP inmates into the Remedial Plan and gave their statements significant weight without first giving Defendants sufficient notice and a fair opportunity to argue against class expansion. (1-ER-23, 42, 50, 64-66; 2-ER-336.)

The day before hearing Plaintiffs' motion, the court directed the parties to be prepared to discuss whether *Coleman* members were *Armstrong* members. (AB 47;

1-SER-57-58.) By then, Defendants already had submitted their opposition evidence. (CR 3076-86.) At the hearing, the court commented that one of the "problems or weaknesses" with Plaintiffs' motion was its "reliance on *Coleman* declara[nts] who aren't *Armstrong* declarants," signaling that the evidence was insufficient because it was scant and largely comprised statements from non-class members. (2-ER-336-37.) The court then allowed supplemental briefing to address the evidence filed with the reply, but barred Defendants from further addressing the moving evidence. (*Id.*)

After supplemental briefing was complete, the court expanded the Remedial Plan beyond the certified class to include *Coleman*-EOP members, used those statements to justify the injunction (1-ER-23), and faulted Defendants' experts for not considering the statements from the newly-minted *Armstrong* members. (1-ER-42, 50, 64-66). Due process does not countenance such an unfair process; it requires a meaningful opportunity to be heard, "at a meaningful time and in a meaningful manner," which Defendants did not receive. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

Plaintiffs cite *Hoffman ex rel. N.L.R.B. v. Beer Drivers & Salesmen's Loc. Union No. 888*, 536 F.2d 1268, 1273 (9th Cir. 1976) to argue that Defendants had adequate notice of the Remedial Plan's expansion to encompass *Coleman*-EOP members. (AB 48.) *Hoffman* is inapposite because it does not address the situation

here, where the court expanded the scope of the litigation after briefing was complete, depriving Defendants of a fair opportunity to address the newly-expanded claims. Contrary to Plaintiffs' suggestion (AB 48), this error was not harmless. Defendants were denied a meaningful opportunity to address the *Coleman*-only statements because they were not informed the statements would carry significant weight until after briefing.

Plaintiffs claim the court "had other reasons for finding Defendants' experts' opinions unpersuasive, including that they were irreconcilable with data showing that people with disabilities are overrepresented in incidents of staff misconduct that resulted in discipline." (*Id*.) But Plaintiffs ignore the fact that the high-discipline rate almost exclusively concerns *Coleman* members. (AOB 35 n.14.) Moreover, it remains unexplained why a higher staff-discipline rate for accusations levied by inmates represented by class counsel—who regularly monitor operations and prepare advocacy letters—might suggest that disabled inmates were singled out for mistreatment or that CDCR did not appropriately respond. (*Id.*)

The court's eleventh-hour expansion of the Remedial Plan denied Defendants a fair opportunity to oppose Plaintiffs' motion.

III. THE INJUNCTION CONTRAVENED THE PLRA.

A. Plaintiffs Erroneously Rely on Allegations of Misconduct from Other Prisons to Justify the Reforms Imposed.

Plaintiffs contend that any evidentiary deficiency concerning the five prisons can be overlooked because they also have evidence against other prisons and "Defendants' process is the same throughout the state." (AB 51-52.) The district court rightfully rejected that view. (1-ER-14 ("Plaintiffs have not shown that staff violated the rights under the [Remedial Plan] or ADA…at SVSP or CCI.")). Plaintiffs cannot seriously contend that misconduct at one prison could justify an injunction against CDCR's 33 other prisons. *Fraihat v. U.S. Immigr. & Customs Enf't*, 16 F.4th 613, 645 (9th Cir. 2021) (court must "tailor a remedy commensurate with the specific violations at issue…and it errs where it imposes a systemwide remedy going beyond the scope of those violations." (internal markings omitted)).

Plaintiffs erroneously assert that CDCR's statewide system for ensuring officer accountability and the regular transfer of inmates and officers between prisons justify statewide relief. (AB 52.) But grants of prospective relief are limited to the reforms necessary to remedy *federal* violations. 18 U.S.C. § 3626(a)(1). An inadequate process for holding officers accountable does not violate any federal right. Further, the only federal violation properly before the court is the structural

barriers and program access for *Armstrong* members. Thus, reforms cannot extend beyond the federal violations found. *Armstrong*, 622 F.3d at 1073.

Neither the record nor the cases Plaintiffs cite support prison-wide relief at any of the five prisons. (*See* 1-ER-14); *see, e.g., Brown v. Plata*, 563 U.S. 493, 532 (2011) (stipulation for system-wide relief); *Oregon Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1122 (9th Cir. 2003) (requiring sufficiently pervasive, systemic, and consistent pattern of injury to justify state-wide relief).

This Court should focus on the five prisons and disregard Plaintiffs' attempts to bolster the record with arguments, evidence, and pleadings about other prisons. (*See, e.g.,* AB 9-10, 17, 30 n.5, 63; 1-SER-205-320, 2-SER-355-578, 4-ER-775 through 7-SER-1779 (RJD briefing and other filings).)[4] Though Plaintiffs contend there were "87 uncontested declarations from RJD" (AB 11, 17 n.5), the court ordered Defendants "not [to] repeat legal arguments discussed in the [RJD] motion [or] address factual allegations raised [there]" (2-SER-323). The court did not rely on evidence about RJD or other prisons to justify the injunction (*id.*; 1-ER-14), and neither should this Court.

[4] *See also* Pls.' 1st MJN, Ex. C (RJD [CR 3290]), Ex. D(a) (RJD [CR 3336-1]), ECF No. 30-31-2; Pls.' 2nd MJN, Ex. (RJD [OIG Report]), ECF No. 49-49-2; Mot. Transmit Evid., Ex. 1-2 (OIG Sentinel Case 20-04), Exs. 3-8 (RJD), ECF No. 30.)

Likewise, neither CDCR's voluntary extension of reforms to other prisons nor its compliance with court-ordered reforms during this appeal justifies the injunction or renders Defendants' challenges moot.[5] (AB 30, 46, 62.) This evidence does not suggest that the court-mandated reforms remove structural barriers, create programming opportunities, or affect accommodation requests. Nor do such efforts have any bearing on the jurisdictional, class, PLRA, and evidentiary challenges raised here. All this evidence shows is that Defendants are complying with the court's orders, as they are required to do, and taking self-measures to run their prisons as any officials would. The injunction is improper and effective relief remains available from the ongoing compliance and monitoring requirements.

B. The Alleged Abuse against *Armstrong* Members Was Neither Substantial Nor Widespread.

The district court clearly erred by imposing sweeping reforms based on insufficient evidence. The *Armstrong* statements—which contain disputed anecdotes and conclusory statements regarding disability nexus—are speculative, hearsay, and lack adequate foundation.

[5] CDCR already was independently committed to numerous reforms, including installing surveillance cameras statewide, with established plans for a multi-year rollout. (7-ER-1585, 1591-92, 1626-27; CR 3110 at 13.)

Moreover, just 2 *Armstrong* statements at CIW, 2 at SATF, 6 at KVSP, 9 at COR, and 23 at LAC were filed. This non-random spattering represents just 0.1% to 3% of *Armstrong* members at these prisons, and does not demonstrate widespread deficiencies. *Morita*, 541 F.2d at 220 ("statistical evidence derived from an extremely small universe [eight persons]…has little predictive value and must be disregarded").

While *Armstrong* members comprised a small fraction of the inmate population, they filed significantly more administrative grievances, staff complaints, and accommodation requests than other inmates. (28-ER-7758-62, 7800-04, 7807-11, 7816-20, 7831-37; 1-ER-15.) The court erroneously discounted this data based on a handful of anecdotes because "*some* disabled inmates" alleged they withheld submissions due to threats, intimidation, or coercion. (1-ER-20 (emphasis added).) That "some" inmates were deterred does not demonstrate a widespread concern. *See Armstrong,* 622 F.3d at 1073. Since the court's conclusion is not supported by substantial evidence, no deference is owed to it. *Id.*

Unable to demonstrate sufficiently widespread deficiencies, Plaintiffs instead reiterate disputed inmate accounts and fault Defendants for not addressing their experts' findings. (AB 19-27, 53-55.) But Defendants showed that Plaintiffs' experts' conclusions rise and fall with the inmate statements, since they relied heavily on the statements to draw conclusions, accepted inmates' allegations as

true and discounted inconsistencies, and did not meet with the inmates or officers, tour the prisons, or observe staff interactions firsthand. (AOB 9-11; AB 17-18 (citing 25-ER-6821), 50-51.)

Plaintiffs' critique of expert Warner is unfounded. (AB 54-55.) As Warner properly concluded, KVSP-1's claim that he could not "get down because of his mobility disability" does not indicate an ADA violation. (29-ER-8074-78, 8080; 28-ER-7849-50.) Force was used only when KVSP-1 advanced on fighting inmates, disregarded orders, and struck an officer with his cane. (*Id.*); 28 C.F.R. § 35.139 (individuals who directly threaten the safety of others have no entitlement to benefit from public entity's services, programs, or activities). Further, an inmate witness confirmed the force was not excessive. (31-ER-8617-20.)

Defendants also disputed other statements.[6] (AB 55.) While Plaintiffs attempt to minimize one inmate's concession that "most staff at [COR] are good" by noting his assertion that "certain bad apples at COR cause a lot of misconduct" (AB 54), such misconduct does not necessitate prison-wide relief. 18 U.S.C. § 3626(a)(1)

[6] *Compare:*

- LAC-10 *with*; 28-ER-7936-39, 29-ER-8056-59;
- LAC-13 *with* 14-ER-3618-21, 13-ER-3472-76;
- LAC-6 *with* 28-ER-7941-49;
- LAC-12 *with* 28-ER-7993-98;
- LAC-2 *with* 29-ER-8060-64;
- LAC-1 *with* 29-ER-8101-05;
- COR-4 *with* 14-ER-3646-54.

(relief must be narrowly drawn and extend "no further than necessary" to correct the federal violation). If any remedy is warranted, it should be tailored to "certain bad apples."

C. Insofar as the Court Relied on Only Undisputed Evidence, the Evidence Was Too Sparse to Justify Relief.

Plaintiffs contend that the court, in justifying the injunction, "explicitly refrained from discussing or relying upon incidents for which Defendants properly submitted countervailing evidence." (AB 53 (citing 1-ER-16).) But if the court relied only on the statements cited in the Order, then the evidence is far too sparse to support prison-wide relief, because those statements represent just:

- 0.7% (2 of 283) of CIW's *Armstrong* population;
- 0.2% (1 of 434) of KVSP's *Armstrong* population;
- 0.07% (1 of 1,383) of SATF's *Armstrong* population;
- 0.95% (4 of 417) of COR's *Armstrong* population; and
- 0.8% (6 of 712) of LAC's *Armstrong* population.

(*See* 1-ER-2-78); *Armstrong*, 622 F.3d at 1073 (finding insubstantial violations "composed largely of single incidents that could be isolated."); *Morita*, 541 F.2d at 220 (small universe of eight persons provides little predictive value "and must be disregarded").

Further, the court mistakenly concluded that these statements were undisputed. (1-ER-16-17.) For example, a *Coleman* member reported a single incident during four years at LAC, which occurred during an unmedicated manic

episode when the inmate's "perception was somewhat distorted." (34-ER-9628-30.) The court found "undisputed" that a whole can of pepper spray was deployed on the inmate for no good reason, but the officer testified that pepper spray was used only briefly when the inmate charged at a sergeant with clenched fists. (*Id.*; 34-ER-3608-12.)

In another "undisputed" incident, COR-2 alleged that an officer painfully kicked his legs to spread them apart during a search and slammed him to the ground when he turned to inform him of his mobility issues. (1-ER-26; 23-ER-6434.) But the officer countered that his incident report—which did not include kicking the inmate—was accurate, and explained that he acted in self-defense when the inmate turned "abruptly, without provocation" and tried to elbow him in the face. (14-ER-3659-60.)

The incidents cited by the court included material disputes, and were insufficient to show widespread deficiencies.

D. An Injunction Must Be Backed by Substantial Evidence and Satisfy the PLRA's Requirements.

1. The injunction is disruptive, cumulative, intrusive, and non-deferential.

The Five-Prison Order contains a host of reforms that are intrusive, cumulative, and non-deferential, and do not advance the class claims by removing structural barriers or providing disabled inmates access to programs, services, and

activities. Further, the reforms are not narrowly drawn to extend no further than necessary to correct the ADA violations pled and certified here, and do not operate "with the minimal impact possible on defendants' discretion over their policies and procedures." *Armstrong*, 622 F.3d at 1070.

Plaintiffs claim the reforms are acceptable because Defendants were "not yet in compliance…even though…various iterations of remedial measures that are narrower and less intrusive" had been attempted. (AB 56.) But allegations of excessive force and retaliation were never previously litigated in this action. Thus, the court's broad takeover of prison operations cannot fairly be described as "an incremental expansion of processes and systems…already in place." (1-ER-53.) Rather, the court granted broad, new relief unrelated to its prior orders and piled on remedy after remedy—all aimed to correct the same purported violation (individual acts of staff misconduct). (1-ER-2-78); *see Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) ("an injunction must be narrowly tailored to give only the relief to which plaintiffs are entitled").

Plaintiffs fault Defendants for evaluating the reforms individually, then object to their analysis about the reforms' cumulative effects. (AB 57.) These contentions lack merit. While courts must evaluate injunctive relief as a whole, there is no bar against considering each individual remedy's fit within the statutory needs-narrowness-intrusiveness mandate. *See Edmo v. Corizon*, Inc., 935 F.3d 757, 782-

83 (9th Cir. 2019). For good reason: each mandated reform informs the analysis of whether the injunctive relief as a whole was necessary, overbroad, or intrusive. Plaintiffs acknowledge as much by separately defending each remedy. (AB 57-64.)

Contrary to Plaintiffs' contention (AB 57), Defendants did not forfeit the cumulative argument. They explained below that the reforms contravened the PLRA and duplicated CDCR's existing procedures (1-SER-113-119), which is another way of saying that the remedies were cumulative and unnecessary. Regardless, this Court is not limited to the exact legal theories Defendants advanced below. *Thompson v. Runnels,* 705. F.3d 1089, 1098 (9th Cir. 2013).

The reforms are cumulative because they all aim to establish accountability for staff misconduct. (1-ER-73.) Plaintiffs' response—that the reforms address different aspects of this "root cause," such as gathering different types of evidence, holding officers accountable, preventing misconduct through staffing and training, and ensuring the remedies are effectively implemented (AB 4, 57, 62, 64)—confirms their cumulative nature. These reforms are not limited to those necessary to correct the particular federal violation properly before the court (structural accessibility and programming), narrowly drawn, or limited to the least intrusive means necessary. 18 U.S.C. § 3626(a)(1)(A).

2. Plaintiffs implicitly concede that the injunction includes unnecessary and overbroad reforms.

This Court should reverse the court-mandated reforms that Plaintiffs have abandoned or cannot defend. (*See* AB 60 (indefinite-retention period reduced to five years), 62 (supervisory staffing "on all watches on all yards" decreased because Plaintiffs "agreed to less staffing"), 63 (reassignment where serial misconduct is accused not implemented).) Plaintiffs' agreement to narrower relief confirms that the court's injunction was unnecessary or overbroad.

3. The mandated reforms are not supported by substantial evidence of systemic misuse.

The district court erred by imposing reforms across five prisons absent substantial evidence of systemic deficiencies at each prison. *See Armstrong*, 622 F.3d at 1073. Statements from just a small fraction of the *Armstrong* population are hardly substantial evidence justifying system-wide relief.

While Plaintiffs attempt to discredit CDCR's system for identifying class members as under-inclusive, they have not sought to change the classification system. (CR 2948.) Regardless, Plaintiffs' revised class-member classifications (AB 31, 42 (citing p.17 n.5))[7] are immaterial because the *Armstrong* statements still represent:

[7] The record does not show that the ten inmates Plaintiffs identify as having *Armstrong* disabilities qualify as class members. (*E.g.*, 21-ER-6670

- less than 1% of CIW's *Armstrong* population;
- 0.1% of SATF's *Armstrong* population;
- 1% of KVSP's *Armstrong* population;[8]
- 2% of COR's *Armstrong* population;[9] and
- 3% of LAC's *Armstrong* population.[10]

(*See* AOB 57.)

Likewise, the asserted "ample evidence of systemic pepper spray abuse" (AB 61) is nonexistent. The pepper-spray reports span three years, many are disputed, some discuss the same incident, and others do not concern disabled inmates or the five prisons.[11] That 18 inmates reported "experiencing or witnessing" pepper-spray

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(asserting ADHD and learning issues "due to the fact that English is my second language").) Regardless, the Opening Brief already counted six as *Armstrong* members (15-ER-4012 [KVSP-1]; 22-ER-6114 [COR-6]; 35-ER-9730-42 [LAC], 9821 [LAC]; 27-ER-7463, 35-ER-9845 [LAC]; 25-ER-6830, 34-ER-9617–25 [LAC]) and identified the remaining four using Plaintiffs' labels (*See* 21-ER-5854 [LAC], 5894 [LAC], 6670 [KVSP], 35-ER-9884 [COR-9] *and* 21-ER-5658-59, 5668, and 25-ER-6891 (attaching "declaration from *Coleman* class member [name]").)

[8] KVSP (prior): $\frac{5}{434*} = 1.2\% \approx 1\%$; (now): $\frac{6}{434} = 1.38\% \approx 1\%$.
* The AOB inadvertently reported this figure as 417.

[9] COR (prior): $\frac{7}{417*} = 1.67\% \approx 2\%$; (now): $\frac{9}{417} = 2.2\% \approx 2\%$.
* The AOB inadvertently reported this figure as 434.

[10] LAC (prior): $\frac{21}{712} = 2.9\% \approx 3\%$; (now): $\frac{23}{712} = 3.2\% \approx 3\%$.

[11] Plaintiffs' "ample evidence" comprises: 25-ER-6911-13 (LAC), 6939 (LAC, RJD [off-topic]), 6821 (RJD [off-topic]), 6835-38 (SATF), 6854-56 (KVSP), 6888 (LAC [*but see* 14-ER-3608–12 (spray used under imminent threat as inmate charged staff)]); 6903-04 (CCI [off-topic]); 27-ER-7447 (LAC) *but see*

use (AB 60) is unremarkable: they represent just *half a percent* (0.56%) of the 3,200 *Armstrong* members at the five prisons.[12] (AB 27 n.21, 60; 22-ER-7800, 7831, 7816, 7807, 7758.)

As Plaintiffs concede, there was no evidence of pepper-spray misuse from CIW, only one report from SATF, and just two from KVSP. (AB 60-61.) Such evidence is not pervasive. *Morita*, 541 F.2d at 220 (holding statistical evidence derived from a universe fewer than eight people "has little predictive value and must be disregarded"). Yet the court deemed three isolated incidents (two of which are disputed) over a three-year period sufficient to support prison-wide reforms at three prisons.[13]

Similarly, the court imposed reforms at COR based on reports from just three inmates (which Plaintiffs assert describe at least five incidents) over three years. (AB 60.) Defendants dispute that five relevant incidents are fairly reported. All

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27-ER-7444 (discipline); 21-ER-5696 (testimony and citation to 19-ER-5245-48 concern incidents categorized by prison, without regard to disability, population size, or custody level); 19-ER-5037 (CCI [off-topic], SVSP [off-topic]), 5245-48 (addressed above).) All reports concerning the five prisons are addressed in the briefing.

[12] $0.56\% = \frac{18}{3{,}200}$. However, this figure is artificially inflated because *Coleman*-only members are included in the numerator (the count of reporting inmates) but not the denominator (the count of *Armstrong* members).

[13] *See* 28-ER-8000-01 (dispute [SATF]); *See* 24-ER-6389, 6770-80, 35-ER-9901-19, and 14-ER-3787-91 (dispute between reporting inmates' accounts [KVSP]); *see also* 24-ER-6741 ("I am not an *Armstrong* class member" [KVSP]).

three inmates (including the putative *Armstrong* member whose statement the district court excluded) were self-described *Coleman*-only members when the incidents occurred. (1-ER-15 (n.4, excluding [COR-8]); 23-ER-6215-22, 6310; 15-ER-3843-44; 22-ER-6149-50 (also recounting incident involving non-disabled neighbor)).) But, under either tally, these reports represent roughly 1% of COR's 417 *Armstrong* members and fall short of the substantial, systemic deficiency needed to impose prison-wide relief.[14]

The 9 inmates from LAC represent just 3% of the prison's 712 *Armstrong* members. (AB 60; 28-ER-7758.) One inmate's complaints were limited to two officers assigned to a single unit, and therefore did not necessitate prison-wide relief. (34-ER-9769.) The remaining inmates reported just five incidents where pepper spray was used (34-ER-9630-31, 9663-64, 9696, 9701, 9703, 9713; 35-ER-9818, 21-ER-5785-86, 5838-39, 877), but sworn declarations disputed two (34-ER-9662; 14-ER-3608-12, 3641-45), and a third resulted in discipline, undermining any assumption that court intervention was necessary. (27-ER-7444). These isolated incidents—two-thirds of which involved *Coleman*-only members—are not the substantial evidence of a systemic deficiency needed to support prison-wide reforms.

[14] *Compare* $\frac{3}{417*} = 0.7\% \approx 1\%$ *with* $\frac{5}{417} = 1.2\% \approx 1\%$.

Finally, the quote from Defendants' expert does not support the suggested inference of pepper-spray overuse (AB 61) or show systemic abuse:

> **Q.**· Do…you believe that OC spray is overused in CDCR?
> …
> **THE WITNESS**: …I don't have that opinion.
> …
> **Q:** …I just wondered if you had formed any opinion…about its use, and it sounds like you have not; is that correct?
> …
> **THE WITNESS:**· …I didn't see an overuse in those particular cases. I certainly know from my experience that there are staff who use it more often than others. And so, again, it's a training issue, it's a supervisory issue.

(17-ER-4682-83.) Some officers using pepper spray "more often" does not equate to systemic overuse.

4. The reforms contravene the PLRA's needs-narrowness-intrusiveness mandate.

The remaining reforms also contravene the PLRA's needs-narrowness-intrusiveness mandate.

Stationary cameras. The court-mandated camera installation was unjustified. (1-ER-4, 53-54.) Plaintiffs' assertion that Defendants and their experts "all agreed cameras were necessary" misstates the evidence—Defendants determined only that cameras could be a useful management tool. (AB 58.) Moreover, CDCR already had committed to installing cameras, and had established plans for installations as part of a multi-year rollout, with funding efforts for CIW well underway when the

process was interrupted by the pandemic. (7-ER-1585, 1591-92, 1626-28; 4-ER-722; 3-ER-398-99; 1-SER-87-88; CR 3110 at 13.) This independent, preexisting commitment to install cameras statewide was not a "vague intent." (AB 58.)

Body-worn cameras. The court also ordered body-worn cameras (1-ER-4), which are not standard tools in the prison context, much less necessary ones (28-ER-7899). The court ordered them anyway because they "likely" would be helpful. (1-ER-55.) But "likely" does not amount to "necessary," as 18 U.S.C. § 3626(a)(1) requires.

Contrary to Plaintiffs' assertion, the Court Expert did not opine that "body-worn cameras have reduced disability discrimination at RJD." (AB 59 (citing 1st MJN, Ex. C at 3-4).) The expert did not mention disability discrimination at all and he admitted his report is "somewhat anecdotal." (*Id.*) Moreover, since Plaintiffs' experts conceded that stationary cameras would dramatically reduce misconduct and resolve use-of-force inquiries (32-ER-8967-68), body-worn cameras were unnecessary. *Ball v. LeBlanc*, 792 F.3d 584, 599 (7th Cir. 2015) ("[P]laintiffs are not entitled to the most effective available remedy; they are entitled to a remedy that eliminates the constitutional injury.").

Additional training. The court's mandate to "develop and implement training" lacks evidentiary support. (1-ER-8, 60.) Plaintiffs implicitly concede that the court neither assessed the content of CDCR's existing training programs nor

traced any incident to a training deficiency, and instead merely assumed existing training programs were deficient because they did not prevent all violations from occurring. (AB 61.) But "adequately trained officers occasionally make mistakes; the fact that they do says little about the training program." *City of Canton v. Harris*, 489 U.S. 378, 391 (1989).

Whether "most" existing trainings were specifically tailored to the Remedial Plan or the ADA is immaterial. (AB 61.) The undisputed evidence demonstrates that CDCR implemented a robust training program that positively impacted staff-offender interactions, and provided interactive training focused on improving communication, de-escalation techniques, and recognizing signs and symptoms of mental illness and cognitive disabilities. (28-ER-7297, 7926-27.) The court's assumption that training was deficient is not a substitute for meeting the PLRA's needs-narrowness-intrusiveness mandate. Otherwise, the court's circular analysis could justify reforming any prison policy.

Overtaking personnel decisions and mandated interview format. The court improperly ordered Defendants to reform the staff-complaint, investigation, and discipline processes. (1-ER-5-6, 56.) Plaintiffs baldly assert that the details of these reforms were left to Defendants. (AB 62-63.) But, if that were true, then the court could have allowed CDCR to continue with the self-directed refinements already in process. (*See* AOB 65-67.) It did not.

Plaintiffs' assertion that the court "simply borrowed" a questionnaire previously used falls short. (AB 63.) The court needlessly removed all discretion and required a specific interview form be used at specified intervals. (1-ER-5-6, 56.) The court also mandated extensive reforms to the existing staff-complaint process even though CDCR was actively developing and reforming the process without intervention. (*Id.*) The PLRA forbids this type of excessive judicial micromanagement.

Early-warning system and information sharing. Plaintiffs argue that the mandated early-warning system was justified because "raw camera footage alone" cannot reveal patterns of staff misconduct. (AB 64.) But the requirement is cumulative to the other reforms. The court's overbroad requirements also include producing "all documents related to…staff misconduct complaints, with monthly updates and information sharing" (1-ER-6-7, 58), which impinges on the requirement that Defendants be afforded the "widest latitude in the dispatch of its own internal affairs," *Gomez*, 255 F.3d at 1128.

Even if some relief was justified, which Defendants do not concede, the court should have started with stationary cameras before ordering additional remedies. Such a conservative approach would have avoided judicial micromanagement of prisons and heeded the PLRA's needs-narrowness-intrusiveness mandate.

IV. THE COURT RELIED ON INCOMPETENT AND SPARSE EVIDENCE, SEVERELY LIMITED CROSS-EXAMINATION, AND CREDITED PLAINTIFFS' UNTESTED STATEMENTS AS TRUE.

A. The Court's Evidentiary Errors Tainted the Record and Prejudiced Defendants.

The district court's evidentiary rulings trampled Defendants' due-process right to a fair hearing and hindered their defense against the injunction. Plaintiffs' bare assertion that Defendants had "every opportunity to present evidence" is wrong. (AB 65.) The court allowed Plaintiffs to present new evidence at every turn, adding hundreds upon hundreds of pages, and accepted as true 179 hearsay inmate statements (most of which were unsigned), but limited Defendants' ability to investigate by imposing restrictions that precluded them from testing the veracity of all but four by deposition, barring them from mounting an effective defense.[15,16] (*Id.*; 2-ER-338; 1-ER-2-79.) Compounding this error, the court discredited Defendants' experts and oppositions for not sufficiently contesting the statements. (1-ER-42, 50, 64-66.)

[15] Plaintiffs conflate the issues. (AB 65.) The Fourteenth Amendment right to cross-examine can be satisfied by deposition, which the court unduly restricted.

[16] Defendants preserved this objection. (1-SER-37-39, 120-22; 2-ER-340; CR 3104.)

The pandemic does not justify disregarding the rules of evidence or severely limiting discovery. (*See, e.g.,* 34-ER-9541; AB 65.[17]) If other courts applied the rules of evidence and permitted discovery through the pandemic without trampling on a party's due-process rights, *see Highlander Holdings, Inc. v. Fellner*, No. 3:18-CV-1506, 2020 WL 3498174, *9 (S.D. Cal. June 29, 2020) (collecting cases), the court below could have done so, too. Moreover, the court's arbitrary restriction on cross-examination, heightened requirements for inmate depositions, and numerical limitation of those depositions were not narrowly tailored. Safety precautions could have been taken to minimize the risks of Covid-19, such as video depositions, social distancing, and masks. As this Court explained in *United States v. Allen*, No. 21-10060, 2022 WL 1532371, at *7 (9th Cir. May 16, 2022), which involved a criminal defendant's right to a public trial, a court cannot simply prevent public viewing of a trial without offering a "unique reason" for not considering alternatives to courtroom closure if other courts allowed it during the pandemic. As in *Allen*, the court here offered no such "unique reason" to justify its lop-sided restrictions on Defendants' ability right to mount a defense in response to over 100 inmate statements signed exclusively by class counsel.

[17] Plaintiffs' general reference referencing CDCR's general "closure" of its prisons fails to show that their counsel did not qualify for access under established exceptions.

Given the significant interest at stake (further intrusion into state sovereignty), this Court should not countenance a short-circuited, condensed, and unfair process that allowed Plaintiffs to obtain substantial relief that could prolong this litigation for many more decades.

B. The Unsigned Inmate Statements Were Not Properly Attested and Constitute Inadmissible Hearsay.

The district court erroneously accepted inadmissible hearsay statements as evidence. (AB 65 (conceding 124 statements unsigned)[18]); *Pension Benefit Guar. Corp. v. Heppenstall Co.*, 633 F.2d 293, 300 (3d Cir. 1980) (unsigned affidavits are not evidence).

Plaintiffs erroneously assert the statements were "properly signed," but describe an unsanctioned procedure where counsel affixed declarants' signatures after speaking to them by phone. (AB 65.) An actual signature is required. 28 U.S.C. § 1746(2); *Feezor v. Excel Stockton*, No. civ-s-12-0156, 2013 WL 5486831, *4 (E.D. Cal. Sept. 30, 2013) (rejecting declaration where party "directed his attorney to write the declaration, had the declaration read to him...and authorized his attorney to affix his signature" because "the declaration [must] be subscribed by the declarant.").

[18] All but one of the inmate statements (and all of the *Armstrong* statements) regarding the five prisons were unsigned.

Further, verbal authority conveyed by phone cannot qualify as the physical record of concurrence needed to substantiate an electronic signature. (AB 65); 15 U.S.C. § 7001(c)(6) ("oral communication[s]…shall not qualify as an electronic record."); *Valiavicharska v. Celaya*, No. cv-10-4847, 2012 WL 1016138, at *3 (N.D. Cal. Mar. 22, 2012).

Viable options existed. (AB 65.) Plaintiffs could have mailed declarations to their attorneys, reviewed drafts by mail, held socially-distanced meetings[19], or utilized remote depositions. The court disregarded the rules of evidence by accepting the unsigned statements.

C. The Court Erred by Qualifying Defendants' Demand for Depositions as Discretionary Discovery.

Plaintiffs' bald defense of the heightened evidentiary requirement as permitting "reasonable discovery" is unpersuasive. (AB 70.) Having treated Plaintiffs' motion as raising significant questions regarding noncompliance with past orders, it was inappropriate to restrict depositions and limit Defendants' ability to test the statements' veracity. *Cal. Dep't Social Services. v. Leavitt*, 523 F.3d 1025, 1033-35 (9th Cir. 2008) (where significant questions regarding noncompliance are raised, appropriate discovery should be granted).

[19] Such provisions were sufficient for staff who entered the prisons daily. (*See also* CR 3104, p.8 (noting only one confirmed case at KVSP and three at LAC).)

D. The Restrictions on Cross-Examination Violated Due Process.

The court violated Defendants' due-process right to a fair proceeding by impinging their right to cross-examine adverse witnesses by deposition and test the veracity of their statements. *NLRB v. Doral Bldg. Servs., Inc*., 666 F.2d 432, 433, supplemented, 680 F.2d 647 (9th Cir. 1982) (finding prejudicial error where findings were drawn from witness statements without permitting cross-examination).

The Fourteenth Amendment's due-process guarantees ensure fundamental fairness in legal proceedings, and Plaintiffs' attempt to dismiss them as mere "grandiose principles" is unavailing. (AB 69.) Nor can due-process deprivations be disregarded on Plaintiffs' baseless assertion that Defendants were not diligent in meeting a heightened evidentiary standard that never should have been imposed. (*Id*.)

Despite Defendants' diligence, their access to depositions was unfairly limited when they could not meet the heightened evidentiary standard. (1-SER-37-39, 59-62; 2-ER-338, 368.) Defendants were allotted just one week to review the reply evidence, investigate, and make the required showing. (AOB 17; 2-ER-366-67; 15-ER-4010 through 27-ER-7534.) When they could not meet the heightened standard, Plaintiffs objected and allowed only five depositions. (8-ER-1898-922.)

The fifth deposition was canceled through no fault of Defendants. (*Id.*) Defendants did not "give up" or "ch[o]ose to take only four depositions." (AB 67-68.)

That Defendants did not request additional depositions or propose additional deponents is immaterial—they could not even meet the criteria for taking the first ten. (AB 68-69; 8-ER-1899-90 ("Plaintiff*s* will not agree to any depositions taking place after [the deadline]"), 1903, 1906 (refusing five requested depositions).) Neither written discovery nor expert depositions are comparable. (AB 67); *Greene v. McElroy*, 360 U.S. 474, 497 (1959) (recognizing that no safeguard is comparable to that furnished by cross-examination, and admonishing against admitting statements without it).

The ruling critiquing Defendants' diligence is immaterial. (AB 69-70 (citing 1-SER-202-03).) It predated Plaintiffs' massive supplementation of the moving evidence with their reply, which created the need for depositions. (15-ER-4010 through 27-ER-7534.) Defendants responded diligently, seeking depositions at the same hearing that permitted the reply evidence. (2-ER-339-41.) CDCR also identified the evidence they sought and explained its importance. (*Id.*); *Alford v. United* States, 282 U.S. 687, 692 (1931) (since cross-examination "is necessarily exploratory…the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply"). COVID-19 concerns cannot justify the substantial impingement on Defendants' due-process rights. (AB 67.)

Defendants suffered actual prejudice. "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test." *Alford*, 282 U.S. at 692. Plaintiffs' defense of the court's heightened deposition standard is untenable. (AB 65-70.)

E. The Court Erroneously Credited Speculative Out-of-Court Statements to Establish a Disability Nexus.

The court erred when it credited Plaintiffs' conclusory disability nexus statements—drafted and signed by counsel (except one)—as "uncontroverted" and "remarkably consistent." (AB 22, 65.) These statements, which the Plaintiffs' experts and the court heavily relied on, are speculative, hearsay, and lack adequate foundation. *See also Anheuser-Busch. Inc. v. Natural Beverage Distribs*., 69 F.3d 337, 345 (9th Cir. 1995). Moreover, the statements were nearly entirely exempt from cross-examination.

F. The Court Should Have Struck Plaintiffs' Sur-Rebuttal Evidence.

The court also erred by considering Plaintiffs' sur-rebuttal evidence without providing Defendants a fair opportunity to respond. *JG v Douglas Cnty. Sch. Dist.*, 552 F.3d 786, 803 n.14 (9th Cir. 2008). Defendants could not submit counter-evidence because briefing was complete. (AB 70-71; 2-ER-322-25.) And while Defendants challenged Plaintiffs' misinterpretation of data at the hearing, their ability to demonstrate error was limited by the lack of opportunity to respond. (*Id*.)

CONCLUSION

This Court should reverse the Five-Prison Order.

Dated: May 27, 2022

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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