Case No. 21-15614

United States Court of Appeals for the Ninth Circuit

JOHN ARMSTRONG, ET AL.,

Plaintiffs and Appellees,

v.

GAVIN NEWSOM, ET AL.

Defendants and Appellants.

On Appeal from the United States District Court
for the Northern District of California
Case No. 4:94-cv-02307-CW
Honorable Claudia Wilken

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INTRODUCTION

In this post-judgment class action seeking to bring California's prison system into compliance with the Americans with Disabilities Act ("ADA"), the district court issued relief at five prisons: CSP-Los Angeles County ("LAC"), CSP-Corcoran ("COR"), Substance Abuse Treatment Facility ("SATF"); California Institute for Women ("CIW"), and Kern Valley State Prison ("KVSP") (collectively, "Five Prisons"). As in the related appeal regarding a sixth prison, R.J. Donovan Correctional Facility ("RJD"), the measures were necessary because Appellants-Defendants ("Defendants")—the Governor, the Secretary of the California Department of Corrections and Rehabilitation ("CDCR"), and others charged with operating California's 34 prisons—continued to violate multiple prior orders in this case, the *Armstrong* Remedial Plan ("ARP"), and the ADA.

Based on substantial evidence, the district court found that Defendants were discriminating against class members (incarcerated people with mobility, hearing, vision, speech, learning, and kidney disabilities) at the Five Prisons, interfering with their ability to request disability accommodations, and failing to hold staff accountable for violating prior orders, the ARP, and the ADA. Defendants' correctional officers were "throwing disabled inmates out of wheelchairs, punching them, kicking them, or using pepper spray where the undisputed evidence shows that the disabled inmates posed no threat to staff that would warrant the use of such

force." 1-ER-69. These violations, which were "widespread in every sense of the word," 1-ER-74, persisted even after years of iterative remedial measures aimed at bringing Defendants into compliance. The evidence supporting these findings was overwhelming and included reports from Plaintiffs-Appellants' ("Plaintiffs") experts and the California Office of the Inspector General ("OIG"), Defendants' own data and admissions, and 179 declarations from incarcerated people.

To address Defendants' violations, the court issued a well-reasoned order and accompanying injunction (collectively, the "Orders"). The court found that the "root cause" of the ongoing violations was "the ineffectiveness of the current system for investigating and disciplining violations … and the resulting staff culture that condones abuse and retaliation against disabled inmates." 1-ER-77. The court required Defendants to develop a plan that included common-sense measures designed to improve accountability at the Five Prisons.

Defendants did not seek a stay of the Orders. In fact, Defendants have implemented their remedial plan to comply with the Orders at the Five Prisons, including rolling out fixed-surveillance cameras, body-worn cameras, additional sergeants, reforms to their investigation and discipline process, and more. Defendants, seeing the utility of these reforms, intend to voluntarily implement many of them at prisons not covered by the Orders.

Nevertheless, Defendants ask this Court to reverse the district court's

meticulously-reasoned decision on four grounds. None is remotely persuasive.

First, Defendants wrongly assert the court exceeded its jurisdiction by issuing "new injunctions" to address First and Eighth Amendment violations. In reality, the Orders remedy continuing violations of specific, clear obligations enumerated in prior orders—including an order affirmed by this Court in 2014—that established class members' rights to be free from disability discrimination and obtain reasonable accommodations, and created an accountability system to incentivize compliance. The Orders modified those prior orders to improve accountability and reduce interference with class members' rights. Just as the court unquestionably has the authority to stop Defendants from discriminating against people with disabilities through neglect, it likewise has the authority to curb disability discrimination perpetrated through force and retaliation.

Second, the court properly considered declarations from people with disabilities at the Five Prisons, including from people whom Defendants do not consider class members. As Defendants concede, more than a third of the Five Prisons declarants are class members. And many of the purported non-class-member declarants are in fact class members because they have *Armstrong* disabilities that Defendants have failed to recognize. The remaining declarants suffer from serious mental illness (and so are members of the class in a related case, *Coleman v. Newsom*). The *Coleman* declarants are, like *Armstrong* class

members, dependent on staff for assistance and many are disabled pursuant to the definition of disability in the ARP and ADA. The court properly concluded that these declarations are probative of Defendants' pattern of discrimination against *Armstrong* class members. And contrary to what Defendants assert, the court did not hold that *Coleman* class members are *Armstrong* class members and did not bestow on them any special privileges.

Third, the record before the court was more than sufficient to support the relief granted, which fully complies with the Prison Litigation Reform Act ("PLRA"). Relying on thousands of pages of evidence, the court made detailed factual findings of widespread violations at the Five Prisons. The court further concluded that a combination of measures aimed at increasing transparency and accountability was necessary, narrowly-tailored, and the least-intrusive means to curb Defendants' violations. The court gave Defendants discretion to design and implement the reforms. Defendants failed to raise many of their challenges to those reforms below, and all are meritless.

Finally, Defendants' laundry list of purported procedural defects misstates the proceedings below. The court's discovery rulings—which were litigated in 2020 while COVID-19 ravaged the prisons—were fair and gave Defendants ample opportunity to be heard. Defendants nevertheless engaged in unreasonable delays and failed to pursue discovery diligently. Defendants do not establish any actual

prejudice from the court's procedural and discovery rulings.

This Court should affirm.

JURISDICTIONAL STATEMENT

Plaintiffs agree with Defendants' jurisdictional statement.

ISSUE STATEMENT

1. Did the district court abuse its discretion in modifying prior orders to bring Defendants into compliance with those prior orders, the ARP, and the ADA?

2. Did the court properly consider declarations from incarcerated people whom Defendants have not identified as *Armstrong* class members, including those with serious mental illness, in evaluating Defendants' discrimination against and interference with the ADA rights of *Armstrong* class members?

3. Do the remedies ordered by the court aimed at increasing transparency and accountability, which incrementally build on its prior accountability orders and leave the implementation details to Defendants, comply with the PLRA's need-narrowness-intrusiveness requirement?

4. Did the court abuse its discretion or violate due process in making discovery and procedural rulings, where Defendants had ample opportunities to address all of Plaintiffs' evidence and arguments but did not diligently pursue them?

5. Is Plaintiffs' evidence—including several expert reports; OIG reports

and data; Defendants' own data, accountability logs, reports, interrogatory responses, and admissions; and 179 declarations describing disability discrimination and retaliation—sufficient to support the court's factual findings and remedial measures?

STATEMENT OF THE CASE

I. DEFENDANTS HAVE REPEATEDLY VIOLATED COURT ORDERS INTENDED TO BRING THEM INTO COMPLIANCE WITH THE ADA

Plaintiffs filed this case in 1994 on behalf of CDCR prisoners and parolees with mobility, hearing, vision, speech, learning, and kidney disabilities. The operative complaint alleges that Defendants were violating the ADA, 42 U.S.C. §§12131 *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. §794, by failing to accommodate and discriminating against people with disabilities.[1] *See, e.g.*, 5-ER-1116-17, 1125-31. In 1995, the district court certified the class based, *inter alia*, on the common question of "whether defendants impermissibly discriminate against plaintiffs." 3-SER-660; 3-SER-639-41.

In 1996, after Defendants stipulated to facts establishing they were violating the ADA, the court ordered Defendants to develop plans to ensure that they comply with the ADA and retained jurisdiction for enforcement ("1996 Order").

[1] Plaintiffs refer herein only to the ADA. *See Vos v. City of Newport Beach*, 892 F.3d 1024, 1036 (9th Cir. 2018) (ADA and Rehabilitation Act provide identical rights).

See 5-ER-1141-48; 5-ER-1137-40; 5-ER-1149-78.

Defendants accordingly developed the *Armstrong* Remedial Plan ("ARP"), their plan to comply with the ADA. 5-ER-1050-114. The ARP addresses far more than just structural barriers and program access. The ARP, *inter alia*, specifies that Defendants' policies are "to assure nondiscrimination against inmates/parolees with disabilities," 5-ER-1056; requires Defendants to provide reasonable accommodations to "known physical or mental disabilities of qualified inmates/parolees," 5-ER-1062; and establishes a process for people to request accommodations and complain about discrimination, 5-ER-1091-96. The court issued an order requiring Defendants to comply with the ARP and again retained jurisdiction for enforcement. 3-SER-633-38.

Since then, Defendants have repeatedly failed to comply with the ARP and ADA. The court, in a series of orders, patiently iterated on narrowly-tailored remedies to protect class members' rights.

In 2001, the court found Defendants were still violating the ADA and, as one of the remedies, ordered Defendants to respond to disability-related grievances within 30 days ("2001 Order"). 5-ER-1043-49.

In 2006, Plaintiffs moved to enforce the 1996 Order, 2001 Order, and ARP based on evidence Defendants were discriminating against people by, for example, failing to provide wheelchair users accessible bathrooms, denying deaf people sign

language interpreters, and failing to provide prompt and equitable responses to disability-related grievances. 3-SER-615-31.

Because of Defendants' persistent noncompliance, the court issued another injunction ("2007 Order"), 5-ER-1032-42, mandating that Defendants "develop a system for holding [staff] accountable for compliance with the [ARP] and the orders of this Court." 5-ER-1038. The court required Defendants investigate and discipline officers who violate prior orders and the ARP and track the results of the investigations. *Id.* The court also ordered Defendants to comply with sections of the ARP prohibiting disability discrimination, requiring reasonable accommodations, and providing for a disability grievance process. 5-ER-1040. The court then appointed an expert to assist with compliance and represent the *Armstrong* case in coordinated proceedings with the related *Coleman* case.[2] 3-SER-580-85.

In 2012, the court found that Defendants' "accountability system, with which they do not dispute they have failed to comply, has not been effective." 5-ER-1022-23. The court declined Plaintiffs' request to hold Defendants in

[2] *Coleman v. Newsom*, No. 90-cv-00529 (E.D. Cal.), is a class action on behalf of incarcerated people in Defendants' prisons with serious mental illness. In 2006, the *Armstrong* court granted the *Coleman* plaintiff class's motion to intervene to modify the protective order to allow full information-sharing and coordination between the *Armstrong* and *Coleman* cases. 3-SER-595-600. Defendants have frequently acknowledged their duties to accommodate mentally ill people. *See, e.g.*, 2-SER-486-578.

contempt, and instead modified the 2007 Order to clarify Defendants' obligations ("2012 Order"). 5-ER-1008-31. The court required Defendants to, *inter alia*, log, track, and timely investigate all allegations of noncompliance with prior orders and the ARP, provide Plaintiffs with documents underlying investigations, and discipline staff for misconduct. 5-ER-1027-29. The court emphasized that "investigations … are necessary to ensure that grievances are addressed and to identify staff error or misconduct and institutional deficiencies that violate class members' rights." 5-ER-1018. This Court affirmed the 2012 Order with the exception of one provision not relevant here. *See Armstrong v. Brown*, 768 F.3d 975 (9th Cir. 2014).

II. THE DISTRICT COURT FOUND DEFENDANTS WERE CONTINUING TO VIOLATE PRIOR ORDERS, THE ARP, AND THE ADA AT RJD

In 2016, Plaintiffs began notifying Defendants of continued accountability failures, including that officers were discriminating against class members with impunity through violence and retaliation. 1-SER-134. Issues arose at High Desert State Prison and Salinas Valley State Prison ("SVSP") and later at RJD, about which Plaintiffs filed a motion in February 2020 ("RJD Motion"). 2-SER-473-74; 2-SER-437-53, 459-69. In September 2020, the court granted the RJD Motion in part. 1-SER-123-200. The court found that—in violation of the 1996, 2007, and 2012 Orders, ARP, and ADA—Defendants were discriminating against

people with disabilities by targeting them for abuse, interfering with their right to request accommodations, and failing to hold officers accountable for violating class members' rights. *Id.*

Defendants' appeal of the RJD orders is fully briefed. *See Armstrong v. Newsom*, 9th Cir. 20-16921.[3]

III. PLAINTIFFS MOVED TO ENFORCE PRIOR ORDERS AT SEVEN ADDITIONAL PRISONS

RJD was not the only prison where Defendants failed to meet their obligations in this case. Over the years, Plaintiffs reported dozens of disability-related staff misconduct incidents against class members at other prisons. *See* 32-ER-9097-113; 7-SER-1690-769; 23-ER-6515 to 24-ER-6568; 24-ER-6626-29; 24-ER-6637-39; 24-ER-6688; 15-ER-4073-79; 15-ER-4089-91; 15-ER-4097-100; 16-ER-4186-91; 16-ER-4201-41; 1-ER-344. Defendants failed to meaningfully respond to many of the allegations or log many of them in their court-ordered accountability tracking system. 1-ER-43-47; 32-ER-9097-113.

On June 3, 2020, Plaintiffs filed a motion ("Motion") seeking relief at seven prisons: the Five Prisons, SVSP, and California Correctional Institution ("CCI"). 2-SER-326-54. Plaintiffs' counsel selected the seven prisons based on several factors including the number of class members, high incidences of use of force and

[3] Plaintiffs respectfully request the two appeals be heard together for argument.

retaliation, and documented failures to comply with the ARP and court orders. 2-SER-334-35, 338. The Motion incorporated evidence submitted to support the RJD Motion. 2-SER-330, 334.

The court initially consolidated the Motion and RJD Motion, but then separated them at Defendants' request. 2-SER-321-25. The court provided Defendants with 100 days to file their opposition, which they filed in September 2020. 1-SER-94-122, 201-04 (83- and 3-day extensions to 14-day deadline). Plaintiffs filed their reply in September 2020. 1-SER-66-83. The court conducted a hearing in October 2020, during which it granted Defendants 28 days to conduct discovery regarding evidence Plaintiffs submitted on reply and 42 days to file a surreply. 2-ER-333-70. Defendants filed a surreply, and Plaintiffs filed a surrebuttal. 1-SER-33-55; 1-SER-14-32. The court conducted another hearing in December 2020. 2-ER-292-332. The parties filed additional briefs in 2021. 1-SER-2-6; CR 3214. The court repeatedly gave Defendants ample time and many opportunities to respond to Plaintiffs' evidence and arguments. *See infra*, pp.65-71. Throughout the proceedings, Defendants never requested an evidentiary hearing.

IV. THE DISTRICT COURT FOUND DEFENDANTS WERE VIOLATING PRIOR ORDERS, THE ARP, AND THE ADA AND ORDERED ADDITIONAL RELIEF AT THE FIVE PRISONS

On March 11, 2021, in a 71-page decision and accompanying order

(collectively, "Orders"), the court granted the Motion in part, found that Defendants had not complied with prior orders, the ARP, and the ADA, and ordered relief at five of the seven prisons. 1-ER-2-79.

A. The Court Found that Defendants Were, in Violation of the 2007 and 2012 Orders, Failing to Hold Staff Accountable

The court found "that Defendants have failed to implement an effective system for investigating and disciplining violations of the ARP and ADA," in violation of the 2007 and 2012 Orders regarding accountability. 1-ER-42-43; *see also* 1-ER-29-51. The court concluded that Defendants' investigation system "is flawed and that the results of investigations … are unreliable." 1-ER-30.

The evidence supporting the court's findings, much of which was uncontested, is overwhelming.

First, the court found "credible and reliable" Plaintiffs' experts' well-supported conclusions that Defendants' investigation and discipline system is broken. 1-ER-34; *see* 1-ER-30-34. Jeffrey Schwartz, who has assisted prisons and jails for over 20 years in applying national correctional standards to their operations and investigations, reviewed dozens of investigation and discipline files and wrote detailed analyses of 25 cases. *See* 32-ER-8948-52, 8970-9064; 27-ER-7419-23, 7436-523. In his two lengthy reports, he identified problems at every step of Defendants' process, including "overwhelming bias against inmates, incomplete investigations, incompetent investigators, inadequate or non-existent

discipline, staff preying upon physically and/or psychiatrically disabled inmates, unjustified conclusions, retaliation, pressure to not file or withdraw complaints and lack of timeliness." 27-ER-7431; *see* 1-ER-34 (citing 32-ER-8948; 27-ER-7420). Schwartz concluded these problems—the product of statewide policies and practices—existed throughout Defendants' system. 27-ER-7420, 7431-32; 32-ER-8965-66. Defendants chose not to depose Schwartz and weakly challenged only two of his 25 case reviews. *See* 10-ER-2629-32.

Plaintiffs' other expert, Eldon Vail, served as Secretary of the Washington Department of Corrections, has 35 years of correctional experience, and knows CDCR's culture of discrimination and abuse well, having previously testified as an expert regarding excessive use of force in Defendants' prisons. 25-ER-6818-19. As summarized by the Court, Vail similarly concluded that "Defendants' investigations … were systematically inadequate, as investigators 'overlooked or intentionally ignored' evidence that supports the inmate-declarants' version of the events and that undermines officer statements." 1-ER-31 (quoting 25-ER-6829); *see also* 1-ER-30-33; 25-ER-6831-60 (additional findings of problems). Defendants chose not to depose Vail.

Second, Defendants' interrogatory responses and investigation files showed that the disciplinary process systemically discounted the reports of incarcerated people. Officers faced discipline only where evidence other than testimony from

incarcerated people existed, such as video footage or reports from staff. 33-ER-9457-59; 27-ER-7427, 7513, 7519; *see also* 27-ER-7431-32, 7435-523; 27-ER-7474 (files revealing efforts to discount incarcerated people's testimony and exonerate staff rather than determine what happened).

Third, two reports from the OIG—California's independent monitor of CDCR, Cal. Pen. Code §§6125-6141—identified serious problems with Defendants' accountability system. In a January 2019 report, the OIG found misconduct investigations at SVSP were biased against incarcerated people and rarely resulted in discipline (only 3% of cases). 1-ER-36 (citing 2-SER-461-65). The OIG recommended Defendants "consider a complete overhaul" of the statewide process for conducting investigations. 1-ER-36-37 (quoting 2-SER-468). In a February 2021 report, the OIG found that the Allegation Inquiry Management Section ("AIMS"), which Defendants created in response to the SVSP report, was a failure. 1-ER-37-41 (citing 2-ER-201-91). AIMS was intended to improve accountability by having investigators from outside the prisons conduct initial investigations into some allegations of misconduct. 1-ER-37-38. The OIG found, however, that biased local investigators continued to conduct investigations and that AIMS was not resulting in increased accountability. 1-ER-38-41 (citing 2-ER-219-22); 2-ER-266 (after AIMS implemented, policy violations found in only 1.7% of cases). Defendants did not

dispute any of the OIG's findings. 1-ER-40.

Fourth, OIG data showed that, for investigations into allegations of misconduct directed at incarcerated people, Defendants performance was "poor" in 24% of cases and made errors "in determining its findings for alleged misconduct and processing the case" in 38% of cases. 1-ER-35 (citing 21-ER-5706-08; 20-ER-5413-35).[4] Defendants conceded this data was accurate. 2-ER-298-99.

Fifth, Defendants' broken accountability system resulted in little discipline against officers—including just 12 attempted terminations at LAC, COR, CCI, and KVSP from 2017 to 2020, a small number given the many allegations of misconduct at those prisons. *See* 1-ER-49; 7-ER-1467-80; 8-ER-1758-880; 16-ER-4374 to 17-ER-4471. In all 12 cases, the victims were people with disabilities. 7-ER-1479-80; *see* 1-ER-49-50.

Lastly, the court rejected the opinion of Defendants' expert, former CDCR Secretary Matthew Cate, that Defendants' investigation system was adequate. 1-ER-41-42, 57. Cate and Defendants' two other experts admitted that many of the small number of investigations they reviewed suffered from deficiencies. 1-ER-41. The court also noted that Cate's opinion was inconsistent with the OIG's 2019

[4] The court gave "little weight" to other data from the OIG, relied upon by Defendants, because that data did not specifically address investigations involving misconduct directed at incarcerated people. 1-ER-35 n.21.

and 2021 reports. 1-ER-42, 57.

In addition to finding that Defendants' investigation system was broken, the court found, based on largely undisputed evidence, that Defendants were not complying with other requirements of the 2007 and 2012 Orders. Defendants failed to log and conduct timely investigations, provide Plaintiffs with the results of investigations and underlying evidence, and track staff who were repeat violators. 1-ER-43-47. As the court described, "[Defendants] lack[] the ability to produce reports that are capable of identifying the names of all staff accused of misconduct or … who were found to have violated policy as well as several other types of critical information." 1-ER-47 (quoting 2-ER-212).

B. The Court Found that Defendants Continued to Discriminate Against Class Members at the Five Prisons

The court also concluded that Defendants were discriminating against class members at the Five Prisons, in violation of Sections I and II.F of the ARP, the 2007 Order, and 42 U.S.C. §12132. 1-ER-14-24, 66-69. The court found that Defendants' failure to hold officers accountable for disability-related misconduct was the "root cause" of these violations. 1-ER-77. These findings were supported by overwhelming evidence—including 179 declarations from people with disabilities (many of which are undisputed) describing violations of the ARP and ADA they experienced or witnessed, Vail's analysis of the declarations, and other

evidence.[5]

Vail concluded that the declarations and corroborating evidence—including medical records, declarations from witnesses, and incident and investigation reports—reflected "a pattern and practice of physical violence against people with disabilities across CDCR." 25-ER-6821-22; *see* 25-ER-6819-20 ("CDCR is failing to accommodate people with disabilities resulting in unnecessary and excessive force incidents …."). In many cases, "the nexus between the misconduct and disability was rooted in class members' requests for accommodation; when the declarants requested accommodations or help for their disabilities, these requests were met with violence by custody staff." 25-ER-6821. Vail also found that "staff

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[5] 75 declarations described incidents at the Five Prisons: 42 from LAC, 20 from COR, 3 from SATF, 10 from KVSP, and 3 from CIW. 33-ER-9444; 21-ER-5665-56. The sum of declarations by prison exceeds the total number of declarations because some declarants described misconduct at more than one prison. 104 additional declarations describe abuse at other prisons, including 87 uncontested declarations from RJD. 21-ER-5654; 1-SER-145.

29 of the 75 Five Prison declarants were identified by Defendants as class members. 21-ER-5657-6670; 33-ER-9450-56. Many other declarants have *Armstrong* disabilities Defendants' failed to identify and thus are also class members. *See*, *e.g.*, 15-ER-4012 (mobility; incontinence); 21-ER-5854 (learning); 21-ER-5894 (learning); 22-ER-6114 (mobility); 24-ER-6770 (learning); 25-ER-6830 (mobility); 27-ER-7463 (mobility); 34-ER-9731 (mobility); 34-ER-9617 (mobility); 35-ER-9821 (mobility); 35-ER-9845 (mobility); 35-ER-9884 (mobility; upper extremity). *Coleman* class members submitted the remaining declarations, which the court concluded were relevant because, as people with serious mental illness, the declarants are people with disabilities under the ADA and ARP, and Defendants' treatment of them reflected the systemic problems *Armstrong* class members face. 1-ER-20-23, 64-66; *see infra*, pp.42-47.

do not take seriously the needs of people with disabilities and worse have apparent disdain for them. This problem is widespread, deeply-rooted and generally recognized by incarcerated people with disabilities throughout CDCR." 25-ER-6822. Because incidents from multiple prisons were so similar, Vail concluded that "class members across CDCR are being denied disability accommodations and being harmed by custody staff as a result." *Id*. The court found Vail's conclusions to be "credible and reliable." 1-ER-34, 48.

Schwartz similarly concluded that "there is substantial evidence that [people with disabilities] are targeted and preyed upon by a significant number of staff." 27-ER-7424. The court also found Schwartz's conclusions to be "credible and reliable." 1-ER-34.

The incidents described in the declarations, which were all properly attested to, *see infra*, pp.65-66, amply support the court's Orders and Vail and Schwartz's conclusions. **All of the facts discussed below are undisputed.**[6]

[6] For many declarations, Defendants failed to submit any countervailing evidence, even though they had been served with declarations before Plaintiffs filed their Motion. *See* 33-ER-9445. For others, Defendants submitted evidence disputing only some, but not all, of the incidents the declarants describe. *See, e.g.*, 1-ER-16 ns.5-7. And for some declarations submitted with the original Motion in June 2020, Defendants submitted only untimely evidence with their surreply, in direct violation of an order limiting surreply evidence to responding to Plaintiffs' reply evidence. *See* 1-SER-56. In the Orders, the court treated as undisputed the few incidents challenged only by improper surreply evidence. *See*, *e.g.*, 1-ER-17 (discussing declaration (35-ER-9811-19) as undisputed, though Defendants

An officer at LAC body-slammed a class member who just had back surgery, worsening his disability such that he now relies on a wheelchair, and then issued him a false disciplinary violation, called a Rules Violation Report ("RVR"), to cover up the misconduct. 34-ER-9760-63. Defendants' expert conceded that Defendants' investigation into this incident was deficient. 28-ER-7887; *see also* 27-ER-7487-97.

An officer at COR kicked a class members' legs during a search when he could not spread them because of his disability, causing excruciating pain. *See* 1-ER-26 & n.13; 23-ER-6432-35.

Officers at CIW pushed a transgender person with a mobility disability to the ground after he requested that officers honor his doctor-prescribed accommodation to be handcuffed in front of his body, then left him handcuffed behind his back for two hours. 1-ER-18-19 & n.9; 24-ER-6594-96. Other people also experienced denials of cuffing accommodations. *See, e.g.*, 34-ER-9805-06; 24-ER-6620-21.

Officers at SATF denied a hard-of-hearing class member access to a special telephone for people with hearing disabilities, and then, when he complained,

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submitted surreply evidence to challenge it (14-ER-3631-35)). Plaintiffs identify below the few incidents improperly challenged by Defendants in this manner as "untimely challenged."

endangered him by announcing that he was responsible for an entire housing unit losing privileges. 1-ER-18 & n.8; 16-ER-4167-73.

Officers at LAC picked a class member up out of his wheelchair, forced him into an inaccessible housing placement, punched him when he raised accessibility concerns, and then closed the heavy mechanical cell door on his arm. 21-ER-5789-90.

Officers denied class members access to incontinence supplies and showers following disability-related toileting accidents, *see, e.g.*, 1-ER-16 (citing 34-ER-9679-9681); 34-ER-9763-64; blocked people from accessible paths of travel, *see, e.g.*, 34-ER-9681; refused to provide accessible transportation, *see, e.g.*, 1-ER-16 (citing 21-ER-5811-12); and mocked people with disabilities by calling them "retarded" and "gorilla," *see, e.g.*, 23-ER-6427-28; 34-ER-9768-70; 24-ER-6744.

The record is also filled with undisputed incidents where officers used unnecessary and excessive force against people with disabilities,[7] intentionally

[7] *See, e.g.*, 1-ER-16-17 (citing 34-ER-9630, 34) (LAC: pepper sprayed and beat person with mental illness; untimely challenged); 1-ER-17 (citing 35-ER-9811-14, 9817) (LAC: slammed handcuffed class member with mobility disability face first into ground, then punched him; untimely challenged); 22-ER-6215-22 (COR: punched person in face, stomped on hands (fracturing hand and causing permanent nerve damage), pepper sprayed, and pointed gun at him); 35-ER-9836-40 (LAC: intentionally stomped on person's post-operative bladder for requesting medical records; untimely challenged); 22-ER-6205-06 (COR: kicked handcuffed person in head); 34-ER-9685-88 (LAC: assaulted person for refusing to remove religious head-covering, causing shoulder disability); 34-ER-9689-90 & 24-ER-9708-09

endangered them,[8] or assaulted, mocked, or ignored people in mental health crisis.[9]

Many declarants testified that, based on their experiences and observations, staff at the Five Prisons target people with disabilities because they are more vulnerable and less likely to fight back and because officers found their requests for assistance to be a nuisance.[10]

(LAC: assaulted person, causing vision problems); 21-ER-5807-08 (LAC: slammed handcuffed and leg-restrained person and denied medical attention); 22-ER-6117-18 (COR: intentionally slammed cell door on person's arm); 22-ER-6148-49 (COR: threw cuffed person to ground, then pepper sprayed and beat him); 24-ER-6604-06 (CIW: non-custody-staff raped mentally ill person multiple times); 15-ER-4056 (KVSP: sliced person's leg with knife and threatened to kill him); 34-ER-9724-26, 34-ER-9701, & 34-ER-9666-67 **(**LAC: assaulted restrained person; untimely challenged); 34-ER-9695-98 & 34-ER-9713 (LAC: assaulted person, fracturing shoulder; untimely challenged); 34-ER-9778-82 & 21-ER-5790 (LAC: assaulted person for refusing to house with COVID-positive person; untimely challenged); 21-ER-5785; 21-ER-5827; 22-ER-5978; 34-ER-9639 & 34-ER-9771-72; 34-ER-9710-11; 34-ER-9726-27; 34-ER-9731-39; 34-ER-9747-50; 34-ER-9769-70; 34-ER-9783; 35-ER-9890.

[8] *See, e.g.*, 34-ER-9639-40 (LAC: officers conspired with incarcerated people to assault mentally-ill person); 34-ER-9702 (LAC: person assaulted by cellmate after officers ignored safety concerns); 21-ER-5787-88 (LAC: officers intentionally housed person with COVID-positive person); 21-ER-5804 (LAC: officers publicized person's HIV-status and called him a "faggot"); 22-ER-6118 (COR: officers failed to stop orchestrated assault).

[9] *See, e.g.*, 23-ER-6459-61 & 23-ER-6486-87 (COR: left person restrained and naked in cage and jabbed him with keys as punishment for requesting mental healthcare); 1-ER-17 (citing 35-ER-9812-13; untimely challenged); 1-ER-17 (citing 34-ER-9695-96; untimely challenged); 1-ER-18 (citing 22-ER-6118-20); 22-ER-6208; 23-ER-6263-64; 23-ER-6369-74; 24-ER-6741-43; 34-ER-9587-90; 34-ER-9652-54; 34-ER-9657-58; 34-ER-9663-65; 34-ER-9701; 34-ER-9773-74.

[10] *See*, *e.g.*, 15-ER-4057; 16-ER-4176-78; 21-ER-5812; 21-ER-5904; 22-ER-5979-80; 23-ER-6429-30; 23-ER-6464; 24-ER-6222; 24-ER-6598; 24-ER-6609; 24-ER-

The court found that the declarants' testimony regarding these uncontested incidents was "credible" because it was "uncontroverted" and described "remarkably consistent" staff misbehavior, and because the declarants—who stood to gain nothing and risked retaliation for their involvement in this litigation—"appear to lack any incentive to fabricate the incidents they describe with such great detail." 1-ER-19-20.

The court concluded that this evidence established that Defendants were systematically discriminating against and failing to accommodate class members at the Five Prisons, in violation of 42 U.S.C. §12132 (the ADA's anti-discrimination and access provision) and Sections I and II.F of the ARP (which incorporate §12132 and with which the court ordered Defendants to comply in the 2007 Order). 1-ER-66-69. The court reached this conclusion in part by holding that officers failed to provide required accommodations when they used force in circumstances where—in light of individuals' disabilities—no force or less force would have addressed the situation. 1-ER-66-67. The court explained that officers should have taken into account a person's disability, rather than "throwing disabled inmates out of wheelchairs, punching them, kicking them, or using pepper spray where the undisputed evidence shows that the disabled inmates posed no threat to

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6750; 34-ER-9659; 34-ER-9667; 34-ER-9682-83; 34-ER-9704; 34-ER-9784-85; 35-ER-9842-43; 35-ER-9910; 35-ER-9925.

staff that would warrant the use of such force." 1-ER-69.

Lastly, the court concluded, based on the "totality of the allegations," that this discrimination occurred due to the individuals' disabilities, and that "it is part of the staff culture at [the Five Prisons] to target inmates with disabilities for mistreatment, abuse, retaliation, and other improper behavior." 1-ER-23-24. The court found relevant that Defendants did "not proffer[] any evidence from which the Court could infer an alternative cause for the incidents …, such as a legitimate penological interest or the lack of a reasonable accommodation that staff could have provided to disabled inmates." 1-ER-69.

C. The Court Found that Defendants' Pervasive Retaliation and Misconduct Interfered with Class Members' Access to the Court-Ordered System to Request Accommodations

The court next found that staff violated prior orders, the ARP, and the ADA's anti-interference provision, 42 U.S.C. §12203(b), by "frustrat[ing] the effectiveness of th[e court-ordered grievance] system by threatening, coercing, or intimidating disabled inmates into foregoing their rights to request reasonable accommodations or file ADA-related grievances." 1-ER-70-71; *see also* 1-ER-24-29.

Undisputed evidence strongly supports this finding. Officers routinely threatened, assaulted, or otherwise retaliated against people with disabilities who

asked for help or reported misconduct.[11]

For example, after the person at COR complained about the improper search discussed above where an officer kicked his legs, two officers threatened him and told him to drop his complaint. 1-ER-26 (citing 23-ER-6436-38).[12]

Officers at LAC recruited a person with mental illness to attack a class

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[11] *See, e.g.*, 34-ER-9699-700 (LAC: threatened to plant contraband on person in retaliation for staff complaint); 34-ER-9726-27 (LAC: denied person food, threatened him, then choked him in retaliation for staff complaint); 34-ER-9731-38 (LAC: assaulted person for staff complaints, fracturing ribs); 34-ER-9747-50 (LAC: threw person to ground for protesting excessive use of force, then labeled him a "child molester" and threatened him); 35-ER-9841 (LAC: mocked person about injuries from use of force and threatened to deny him access to pens to prevent him from filing grievances); 35-ER-9903-04 (KVSP: called person "rat" and ignored safety concerns in retaliation for staff complaint); 23-ER-6370-73 (COR: mocked and ignored suicidal person, who then attempted suicide; then threatened to plant contraband on him after he filed staff complaints); 21-ER-5919-20 (LAC: destroyed person's television for protesting use of force); 22-ER-6150 (COR: threatened, pepper sprayed, and denied food to person for filing staff complaint); 24-ER-6620 (CIW: punched restrained person in face for complaining about property); 24-ER-6621 (CIW: closed tray slot onto person's arm for requesting food); 24-ER-6774-77 (KVSP: assaulted person for protesting use of force); 34-ER-9724-26, 34-ER-9701, & 34-ER-9666-67 (LAC: assaulted restrained person in retaliation for lawsuits and requesting special diet; untimely challenged); 34-ER-9613-14 (KVSP: threatened to "whup [person's] ass" in retaliation for incident at LAC); 23-ER-6484-85 (COR: called person n-word); 15-ER-4051-52 (KVSP: called person who requested accommodation a "little fag ass punk motherfucker"); 24-ER-6690-702 (KVSP: issued false RVR to cover up retaliatory assault and ignored safety concerns in retaliation for staff complaint); 21-ER-5809; 21-ER-5858-59; 21-ER-5894, 5897-98; 22-ER-5946-47; 22-ER-5976-77; 22-ER-6121-22; 22-ER-6148-49; 23-ER-6388; 34-ER-9646; 34-ER-9746-47.

[12] Defendants submitted evidence accusing the person of a verbal outburst, 14-ER-3677-83, but submitted no evidence disputing that officers threatened him to withdraw the complaint.

member who is blind and has a mobility disability to retaliate against him for filing staff complaints and accommodation requests. When the person refused to go through with the attack, the officers called him a "rat" and conspired to place him in restrictive housing. 21-ER-5821-27; 21-ER-5803-06.

Officers threatened multiple people with disabilities for speaking with Plaintiffs' counsel about misconduct. Officers called one a "snitch" and that "asshole that wrote a declaration," 22-ER-6005-06, and told another he should not speak with Plaintiffs' counsel if he wanted to "make it home," 22-ER-5977.

The pervasive misconduct and retaliation created an environment in which people with disabilities were so afraid of staff that they no longer asked for help with their disabilities.[13] People with disabilities also refrained from filing staff complaints or other grievances[14] and from requesting help with mental health

[13] *See, e.g.*, 1-ER-24-27 (citing examples including 34-ER-9679-82 (afraid to request shower, necessitating tearing up bedsheets to clean self because of inadequate incontinence supplies), 24-ER-6621 (hearing aid batteries), 21-ER-5806-07, 5812 (assistance with disabilities), 35-ER-9811-14, 9817 (assistance with disabilities)); 15-ER-4021 (incontinence supplies); 15-ER-4176 (hearing disability accommodation); 22-ER-5949 (assistance with cognitive disability); 23-ER-6224-25 (writing accommodations); 23-ER-6390 (special mattress); 24-ER-6703 (requesting officers repeat themselves when he cannot hear them); 34-ER-9613 (incontinence supplies, showers); 34-ER-9764-65 (incontinence showers, ADA workers); 35-ER-9851 (transfer to be closer to medication line as accommodation for mobility disability); 35-ER-9925 (mobility accommodations).

[14] *See, e.g.*, 21-ER-5756-58; 23-ER-6464; 24-ER-6779; 34-ER-9613; 34-ER-9713-14: 34-ER-9720; 34-ER-9741; 34-ER-9756-57; 34-ER-9774; 35-ER-9817; 35-ER-9850-51; 35-ER-9890.

issues.[15]

Class members had good reason to fear officers. Officers assaulted people in public places—like dayrooms, exercise yards, and dining halls—to send a message regarding the consequences of asking for help or complaining.[16] As Vail concluded, "[t]he severity of the force and the seriousness of the resulting injuries to class members is far beyond the norm found in other jurisdictions of which I am aware" and "does not match the age, disability, or behavior of the class members." 25-ER-6821. Staff and incarcerated people working at staff's behest caused broken bones, lacerations requiring stitches, loss of consciousness, concussions, other brain injuries, and the worsening of pre-existing and the creation of new disabilities, as well as many taxpayer-funded hospitalizations.[17] Officers also frequently charged their victims with false disciplinary infractions (RVRs) to cover

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[15] *See, e.g.*, 1-ER-25, 27 (citing 34-ER-9695-96, 9698-700, 9703; 22-ER-6203-07); 15-ER-4021; 15-ER-4056; 21-ER-5791; 21-ER-5828; 22-ER-5978-79; 23-ER-6224-25; 23-ER-6264; 23-ER-6371-72; 23-ER-6487; 24-ER-6607-08; 24-ER-6749; 34-ER-9592-93; 34-ER-9666; 34-ER-9702-03; 34-ER-9714; 34-ER-9773-74; 35-ER-9833; 35-ER-9841; 35-ER-9891.

[16] *See, e.g.*, 21-ER-5785; 21-ER-5807-08; 21-ER-5810; 21-ER-5827; 22-ER-5978; 22-ER-6117-17; 22-ER-6205-06; 24-ER-6620; 34-ER-9587-90; 34-ER-9639 & 34-ER-9771-72; 34-ER-9689-90 & 34-ER-9708-09; 34-ER-9701; 34-ER-9724-26, 34-ER-9701; 34-ER-9747-48; 34-ER-9783.

[17] *See*, *e.g.*, 22-ER-6215 to 23-ER-6225; 24-ER-6692-94; 24-ER-6774-76; 34-ER-9652-54; 34-ER-9685-88; 34-ER-9689-90 & 34-ER-9708-09; 34-ER-9761-63; 34-ER-9733-36; 34-ER-9629-31 (untimely challenged); 34-ER-9724-26, 34-ER-9701, & 34-ER-9666-67 (untimely challenged); 34-ER-9695-98 & 34-ER-9713 (untimely challenged).

up their misconduct, resulting in longer prison terms and loss of privileges, such as telephone calls, visits, or outdoor exercise.[18] Plaintiffs' experts found,[19] Defendants' expert admitted,[20] and the declarations from people with disabilities showed[21] that officers excessively pepper sprayed people with disabilities—an ongoing CDCR problem Vail had provided expert testimony about over the years, 5-SER-1100.

In July 2020, the court transferred two class members who filed declarations in support of the RJD Motion to different prisons for their own safety. *See Armstrong v. Newsom*, 475 F. Supp. 3d 1038 (N.D. Cal. 2020). The court found that an officer threw one declarant out of his wheelchair and said, "This is for my homeboy [officer's name], motherfucker"—referring to an officer about whom the incarcerated person had previously submitted a declaration—and, "Explain that to the lawyers you talk to." *Id.* at 1047-50. As to the other declarant, the court found that officers assaulted her, placed her at risk by repeatedly calling her a "snitch,"

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[18] *See*, *e.g.*, 1-SER-206-09; 22-ER-6215-22; 24-ER-6773-77; 34-ER-9652-55; 34-ER-9685-89; 34-ER-9731-37; 34-ER-9747-50; 34-ER-9769.

[19] *See, e.g.*, 25-ER-6821, 6835-37, 6854-58, 6888; 27-ER-7447.

[20] *See* 17-ER-4682-83 ("there are staff who use [pepper spray] more often than others," and "it's a training … [and] supervisory issue").

[21] *See* 22-ER-6148-50; 22-ER-6217; 23-ER-6315-16; 35-ER-9902; 35-ER-9918-19; 24-ER-6745-46; 24-ER-6771-72; 34-ER-9614; 34-ER-9630-31; 34-ER-9663-64; 34-ER-9696, 9701, 9703; 34-ER-9713; 34-ER-9769; 35-ER-9818; 21-ER-5785-86; 21-ER-5838-39; 21-ER-5877; 35-ER-9933.

and used other incarcerated people to threaten her. *Id.* at 1052-55.

The court also found "credible and consistent with other evidence" Vail's common-sense conclusion that "if inmates and staff know that nothing will happen to staff who abuse inmates, then incarcerated people become reluctant to report misconduct and staff become less likely to stop the pattern of abuse." 1-ER-48 (citing 25-ER-6819-20). Vail's opinion was "consistent with the OIG's finding that 'an inadequately functioning staff complaint process that lacks independence fosters distrust among inmates.'" 1-ER-48 (quoting 2-SER-461). Vail explained that "[t]he impact [of pervasive misconduct] on people with disabilities is glaring – CDCR staff are failing to accommodate people with disabilities, people with disabilities are afraid or unable to speak up and get help in this environment, the behavior goes unchecked, and the cycle continues and worsens as the reality of the situation is witnessed by many." 25-ER-6820; *see also* 25-ER-6821-26. Schwartz agreed, concluding that "[i]nmates are afraid to file grievances/complaints and afraid to provide testimony during investigations" and that "staff retaliation for using the [grievance] system is rampant." 27-ER-7428.

D. The Court Ordered Narrowly-Tailored Remedies Designed to Cure Defendants' Violations

Having found the violations discussed above, the court ordered Defendants to develop a plan for the Five Prisons "to improve the effectiveness of the system for investigating and disciplining violations … and to end the ongoing violations of

the ARP and ADA." 1-ER-51. The Orders required that Defendants' plan include certain measures designed "to improve policies and procedures for supervising staff's interactions with inmates, investigating staff misconduct, and disciplining staff by enhancing the process for gathering and reviewing evidence that can be used to hold staff accountable for any violations of the ARP and [ADA]." 1-ER-53. The court focused on transparency and accountability measures because "the root cause of the ongoing violations" was "the ineffectiveness of the current system for investigating and disciplining violations of the ARP and ADA and the resulting staff culture that condones abuse and retaliation against disabled inmates." 1-ER-77.

The measures included fixed-surveillance cameras in all areas accessible to people with disabilities; body-worn cameras for officers who interact with people with disabilities; reforms to the staff misconduct investigation and discipline process; appointment of the pre-existing Court Expert to monitor Defendants' implementation of those reforms; information-sharing with Plaintiffs' counsel and the Court Expert; additional sergeants; improved training; modification of pepper-spray policies; and anti-retaliation measures. 1-ER-4-8, 51-62. The court limited the relief to the Five Prisons and did not grant all of the remedies sought by Plaintiffs. 1-ER-74; *see* 1-ER-59. The implementation details were left to Defendants. 1-ER-76-77.

Finally, the court found that the relief complied with the PLRA. *See* 1-ER-73-79; *infra*, pp.55-65.

V. DEFENDANTS HAVE ALREADY IMPLEMENTED THE REMEDIES AND VOLUNTARILY EXTENDED REFORMS TO ADDITIONAL PRISONS ACROSS THE STATE

Defendants did not seek a stay of the Orders in either the district court or this Court. While this appeal has been pending, Defendants—working closely with Plaintiffs and the Court Expert—have finalized nearly all of the provisions of their plan to comply with the Orders ("Five Prisons Remedial Plan") and implemented nearly all of the court-ordered remedies. *See* Motion to Take Judicial Notice & Declaration of Michael Freedman in Support ("MJN"), filed herewith, Ex. A, at 7-9. Body-worn cameras went live and fixed-surveillance cameras were installed at all Five Prisons as of December 2021. *Id.*, at 8. Additional sergeants have been trained and deployed. *Id.*

Defendants voluntarily decided to extend many of the reforms to prisons not covered by the Orders. Defendants' reforms to their investigation and discipline process will be implemented statewide by mid-2023. *See id.*, Ex. B, at 2, 8-19. Defendants will install fixed-surveillance cameras at additional prisons not covered by the Orders no later than mid-2022, have sought funding to install fixed-surveillance cameras at ten more prisons by mid-2023, and plan to install fixed-surveillance cameras at all prisons by 2024. *Id.*, Ex. A, at 11-12. Their proposed

budget for 2022-23 also includes funding for body-worn cameras at four prisons not covered by the Orders. *Id.* at 12.

SUMMARY OF ARGUMENT

The district court acted well within its authority in entering the Orders, which remedy violations of the same rights that have been at the core of this case since its inception: class members' rights under the ADA to be free from disability discrimination and obtain reasonable accommodations through a functioning grievance process. Defendants' failures to hold officers accountable for violations of class members' rights through force and retaliation violated the court's prior orders, especially the 2007 and 2012 Orders regarding accountability. The court may enforce compliance with its prior orders, and that power did not disappear simply because Defendants violated class members' rights violently rather than through mere neglect.

The district court also properly considered declarations from people with disabilities in evaluating Defendants' noncompliance with prior orders, the ARP, and the ADA. Many of the so-called non-*Armstrong* declarants Defendants complain about actually are class members—they have *Armstrong* disabilities that Defendants' inadequate identification system failed to identify. The court also correctly determined that testimony about the treatment of *Coleman* class members, who have serious mental illnesses, was probative of the staff culture

towards people with disabilities and the systemic discrimination *Armstrong* class members face. The court neither turned *Coleman* class members into *Armstrong* class members nor bestowed on them special privileges. The court also put Defendants on clear notice that it was evaluating whether to consider *Coleman* class members' testimony.

The Orders were supported by significant evidence and fully comply with the PLRA. The court made detailed factual findings based on several expert reports; OIG reports criticizing Defendants' broken accountability system; OIG data; Defendants' own data, accountability logs, reports, and interrogatory responses; and 179 declarations describing disability discrimination and retaliation. The court did not abuse its discretion in finding that a combination of measures, aimed at transparency and accountability, was consistent with the PLRA because it was necessary, narrowly-tailored, and the least-intrusive means to address the "root cause" of Defendants' ongoing violations—the ineffectiveness of the current investigation and discipline systems and the resulting staff culture that condones abuse of class members.

Finally, the court's discovery and procedural rulings, which occurred during the COVID-19 pandemic, were fair to Defendants and not an abuse of discretion. Defendants' laundry list of alleged procedural defects misstates the proceedings below. All declarations were properly attested to, and the court gave Defendants

opportunities to be heard at every turn. The court provided Defendants with ample time to respond to Plaintiffs' reply evidence—but Defendants did not take the full number of depositions the court allotted, request from the court more depositions, or pursue basic discovery. Defendants also had opportunity to respond to the few pieces of surrebuttal evidence upon which the court relied, which was information Defendants produced late and confirmed was accurate. There is no error and certainly no showing of actual and substantial prejudice.

This Court should affirm.

STANDARD OF REVIEW

This Court "review[s] the district court's legal conclusions de novo, the factual findings underlying its decision for clear error, … the injunction's scope for abuse of discretion," *Armstrong*, 768 F.3d at 979, and discovery rulings for abuse of discretion, *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002). In reviewing for clear error, "this [C]ourt will not reverse if the district court's findings are plausible in light of the record viewed in its entirety … even if it is convinced it would have found differently." *Katie A., ex rel. Ludin v. L.A. Cty.*, 481 F.3d 1150, 1155 (9th Cir. 2007) (quotation marks omitted). In reviewing for abuse of discretion, the Court may not reverse "unless [it] ha[s] a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors." *S.E.C. v. Coldicutt*, 258

F.3d 939, 941 (9th Cir. 2001).

Moreover, "[d]eference to the district court's use of discretion is heightened where," as here, "the court has been overseeing complex institutional reform litigation for a long period of time." *Jeff D. v. Kempthorne*, 365 F.3d 844, 850 (9th Cir. 2004).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE DISCRIMINATION, RETALIATION, AND LACK OF ACCOUNTABILITY RAISED IN THE MOTION FELL WITHIN THIS CASE AND VIOLATED PRIOR ORDERS

A. The Court Correctly Determined Defendants Were Not Complying with Their Obligations Under Prior Orders

The court carefully considered the voluminous evidence before it and did not abuse its discretion in concluding that staff at the Five Prisons persistently deprived class members of their rights under the court's prior orders, ARP, and ADA. *See Sharp v. Weston*, 233 F.3d 1166, 1173 (9th Cir. 2000) (court's exercise of discretion "entitled to special deference" because of its "years of experience" with the case) (quoting *Hutto v. Finney*, 437 U.S. 678, 688 (1978)).

Defendants mischaracterize the Orders as "new injunctions" outside the scope of this action, which Defendants assert is only about disability accommodations and structural accessibility. Br.1, 39-48. But since its inception, this case has also been about putting an end to Defendants' disability discrimination against class members. *See supra*, pp.6-9. And the injunctions are hardly "new," as they

enforce prior orders by modifying them in an effort to bring Defendants into compliance with their ADA obligations, which they have failed to satisfy for years. *Id.* In light of Defendants' repeated noncompliance with the 1996 Order, subsequent orders, and the ARP, the court issued the 2007 and 2012 Orders to ensure Defendants hold officers accountable for violating class members' rights. *Id.* There can be no question that the court had jurisdiction to enforce these orders, which form the backbone of the Orders on appeal and which Defendants barely acknowledge. *See* 5-ER-1145; 5-ER-1046-47; 3-SER-633-38; *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440 (2004); *see also* Fed. R. Civ. P. 15(b)(2).

The conduct at issue here violated three categories of Defendants' obligations under prior orders, the ARP, and the ADA.

First, the court found Defendants violated the 2007 Order, ARP Sections I and II.F, and 42 U.S.C. §12132, by targeting class members at the Five Prisons for abuse because they have disabilities and failing to provide basic disability accommodations. 1-ER-14-24, 66-69; *see supra*, pp.16-23.

Second, the court found Defendants violated the 2001 and 2007 Orders, ARP Sections II.F and IV.I.23, and 42 U.S.C. §12203(b) by interfering with class members' right to request reasonable accommodations. Officers threatened those who complained about disability discrimination, causing them to become so afraid of staff that they refrained from requesting accommodations or filing disability-

related grievances. 1-ER-24-29, 70-72; *see supra*, pp.23-28.

Third, the court found Defendants violated the 2007 and 2012 Orders by failing to log allegations of officers' violations, timely initiate or complete unbiased investigations into allegations, track repeat violators, and hold officers accountable for disability-related misconduct. 1-ER-29-49, 72; *see supra*, pp.12-16. The court found that the systemic discrimination was the direct consequence of Defendants' noncompliance with these requirements—as officers were not properly investigated or disciplined, and a culture of targeting people with disabilities flourished. 1-ER-72-73.

To be sure, the Orders address violations of Defendants' obligations that are more violent than those previously at issue in this case. But the court did not, as Defendants assert, grant relief on "claims of First Amendment retaliation and Eighth Amendment excessive force." Br.47. While Defendants' conduct implicates the First and Eighth Amendments, the court granted relief based on Defendants' ongoing disability discrimination that violated prior orders, the ARP, and the ADA. It cannot be that the court has the power to remedy ADA violations perpetrated gently or through neglect, but lacks the authority to address violations committed through intentional violence, intimidation, and retaliation.

B. The Court Properly Exercised Its Authority to Modify Its Prior Orders to Bring Defendants Into Compliance

Notwithstanding Defendants' contentions to the contrary, Br.39, the court

had "wide discretion" to modify its prior injunctions, 1-ER-62 (quoting *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 647 (1961)). "It is well established that the district court has the inherent authority to enforce compliance with a consent decree … and to modify a decree." *Nehmer v. U.S. Dep't of Veterans Affs.*, 494 F.3d 846, 860 (9th Cir. 2007); *see also Brown v. Plata*, 563 U.S. 493, 542 (2011).

The test to determine if a court abused its discretion in modifying injunctive relief is whether the modification "served to effectuate or to thwart the basic purpose of the original [injunction]." *Chrysler Corp. v. United States*, 316 U.S. 556, 562 (1942); *see also Milliken v. Bradley*, 433 U.S. 267, 280 (1977). Courts may modify prior orders to, for example, bring recalcitrant defendants into compliance, *see, e.g.*, *Frew*, 540 U.S. at 440; *Parsons v. Ryan*, 912 F.3d 486, 499-500 (9th Cir. 2018); clarify parties' obligations under an injunction, *see, e.g.*, *Keith v. Volpe*, 784 F.2d 1457, 1460-61 (9th Cir. 1986); order new measures where the initial relief proved inadequate, *see, e.g.*, *Sharp*, 233 F.3d at 1172; and address new circumstances, *see, e.g.*, *Plata*, 563 U.S. at 507-09, 541-42; *Gates v. Gomez*, 60 F.3d 525, 530 (9th Cir. 1995).

This Court followed these principles in affirming in relevant part the 2012 Order, concluding the new accountability measures were justified because the "court has previously tried to correct the deficiencies … through less intrusive means, and those attempts have failed." *Armstrong*, 768 F.3d at 986. So too here.

Defendants ignore these principles and instead rely primarily on two inapposite cases, *Pacific Radiation Oncology, LLC v. Queen's Medical Center*, 810 F.3d 631 (9th Cir. 2015), and *America Unites for Kids v. Rousseau*, 985 F.3d 1075 (9th Cir. 2021). *See* Br.39-40, 47-48.

Defendants cite *Pacific Radiation* to argue there must be a "nexus" between the class claims and the remedies. Br.39-41. In that case, the Court held that a *preliminary injunction* will not lie on claims that have "nothing to do" with the claims underlying the complaint. 810 F.3d at 637. But unlike in *Pacific Radiation*, Plaintiffs' claims have a clear nexus to the same rights under the same laws that have always been the core of this case: ADA rights to reasonable accommodations and to be free from disability discrimination. Moreover, Plaintiffs here already succeeded on their complaint and obtained *permanent injunctions*, which relate to their complaint, which Defendants continue to violate, and which Plaintiffs sought to enforce.

Defendants rely on *America Unites* to argue injunctions may be modified "only" where changed conditions hinder Defendants' ability to comply. Br.39; *see id.* 47-48. But *America Unites* illustrates just one circumstance where modification is appropriate: when continuing to enforce an injunction "is no longer equitable." 985 F.3d at 1097-99 (quoting Fed. R. Civ. P. 60(b)(5)) (no abuse of discretion to modify injunction requiring buildings undergo hazard remediation when

subsequent bond measure would result in buildings' demolition). The Court did not hold this was the exclusive scenario in which modification may occur. *See id.* As discussed above, a court's power to modify injunctions applies to many other circumstances, especially where, as here, Defendants persistently fail to comply.[22]

C. Defendants' Remaining Arguments Regarding the Court's Authority to Issue the Orders Fail

First, the court correctly held that the Orders were warranted to curb Defendants' violations of the ADA's anti-interference provision, 42 U.S.C. §12203(b).[23] 1-ER-24-29, 70-72; *see* Br.42-43. Defendants previously stipulated "to operate … in accordance with the [ADA]," and §12203(b) is a critical part of the ADA. 5-ER-1153-54; *see* 1-ER-70-71; *Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d 1027, 1031 (9th Cir. 2009) (stipulated order judicially enforceable). And aside from §12203(b), the court found the misconduct

[22] Defendants' other cases are also unpersuasive. *See* Br.40, 43. One case *upheld* a court's discretion to determine an injunction's scope. *See Freeman v. Pitts*, 503 U.S. 467, 471 (1992). Other cases reversed aspects of injunctions that, unlike here, reached beyond the boundaries of the entities found to be in violation of decrees. *See Missouri v. Jenkins*, 515 U.S. 70, 97 (1995) (improper remedy with *inter*district purpose based only on *intra*district violation); *Brumfield v. La. State Bd. of Educ.*, 806 F.3d 289, 298-300 (5th Cir. 2015) (improper remedy addressing *public* schools where decree only applied to *private* schools). Another case warned of the dangers of nationwide injunctions, *California v. Azar*, 911 F.3d 558, 582-84 (9th Cir. 2018), but the Orders here do not provide systemwide relief and are supported by ample evidence as to the Five Prisons, *see infra*, pp.48-55.

[23] Defendants incorrectly state §12203(b) is in Title III of the ADA. Br.42. It appears in Title IV and applies to Title II. *See* 42 U.S.C. §12203(c).

independently violated prior orders by denying court-ordered access to accommodations and the disability grievance process. 1-ER-24-29, 70-72.

Second, Defendants' argument that the court erred by relying on *Sheehan v. City & County of San Francisco*, 743 F.3d 1211 (9th Cir. 2014), *rev'd in part on other grounds*, 575 U.S. 600 (2015), amounts to an untenable claim that 42 U.S.C. §12132 does not apply *at all* to uses of force in prison. *See* Br.44-46. Defendants forfeited this argument by not raising it below. 1-ER-68. And it is meritless. As this Court held in *Sheehan*, 743 F.3d at 1232-33, and affirmed in *Vos*, 892 F.3d at 1036-37, the text of §12132 prohibits an entity from failing to reasonably accommodate a person with a disability in the course of law enforcement activities, including uses of force. Defendants' only response is to assert *Sheehan* was about arrests, not prisons. Br.45. But Title II, including §12132, has long applied to prisons. *See Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 209 (1998). Defendants cite no support for their view that §12132 contains an unwritten categorical exception for correctional officers' use of force.

Of course, not every use of force against a disabled incarcerated person gives rise to an ADA claim. *See* Br.46. Exigent circumstances and penological interests must be considered in determining the reasonableness of accommodations. *Sheehan*, 743 F.3d at 1232. The Orders are consistent with those limitations. The record shows much of the force used on class members was

wholly unnecessary and unreasonable. *See supra*, pp.16-28.

Third, Defendants suggest that the court erred by not conducting a new class certification analysis. Br.46-47. This argument rests on the erroneous premise that the Orders reach violations not already part of this certified class action. As discussed above, the Orders address Defendants' noncompliance with specific ADA obligations set forth in prior orders that enforce class members' rights that have been at the core of this case since the very beginning. Defendants do not cite any authority that such an inquiry is required at this stage, when the class was certified long ago, and Defendants never made this argument below, much less moved to de-certify the class. This Court has affirmed post-judgment orders in identical postures with no mention of Rule 23, *see generally Coleman v. Brown*, 756 F. App'x 677 (9th Cir. 2018), including when other ADA accommodation issues arose in this case, *see generally Armstrong*, 768 F.3d 975; *Armstrong v. Schwarzenegger*, 622 F.3d 1058 (9th Cir. 2010).

Finally, Defendants' cursory references to data purportedly showing that class members continue to submit disability-related grievances are unpersuasive. *See, e.g.*, Br.47. The court correctly afforded Defendants' data little weight because it "does not take into account requests or grievances that disabled inmates did *not* make or submit, nor do they take into account requests and grievances that disabled inmates withdrew, because of threats, coercion, or intimidation." 1-ER-

28-29 & n.18; *see also* 1-ER-49-50 (finding other data from Defendants supports "that a staff culture exists in which staff target disabled inmates for abuse"). Defendants also ignore the obvious point that people with disabilities are more likely than other incarcerated people to seek assistance through grievance processes.

II. THE DISTRICT COURT PROPERLY CONSIDERED DECLARATIONS FROM PEOPLE WITH DISABILITIES

A. The Court Correctly Considered Testimony from People Whom Defendants Have Not Identified as Class Members

The court did not abuse its discretion in considering declarations from people whom Defendants have not identified as class members. *See* Br.48-55.

As the court recognized, Defendants failed to identify as *Armstrong* class members a number of declarants who have disabilities that meet the class definition. *See supra*, p.17 n.5 (listing declarants); 2-ER-359-60 (court discussing declarant Defendants had not identified as class member but "who wore a [mobility-disability] vest, had a walker, had a cane"). Defendants' system for identifying class members is plagued with problems. *See, e.g.*, 2-SER-477-78; MJN, Ex. A, at 13-16. Because these declarants are *Armstrong* class members, the court properly considered their declarations.

The court also did not err in concluding that declarations from *Coleman* class members were relevant "to the extent that they contain evidence of violations

of *Armstrong* class members' rights … and contain evidence that is probative of the conditions that disabled inmates experience." 1-ER-23. Defendants do not address this conclusion by the court. The *Coleman* class includes all CDCR "inmates with serious mental disorders." *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 898 n.11 (E.D. Cal. 2009) (citation and quotation marks omitted). *Coleman* and *Armstrong* class members both require assistance and accommodations from Defendants and are vulnerable because of their disabilities. Defendants' mistreatment of *Coleman* class members—including Defendants' practice of responding to requests for accommodations and assistance with unnecessary force and retaliation—speaks to a pattern of how Defendants mistreat *Armstrong* class members. *See, e.g.*, 1-ER-14-29, 66-72, 355, 359, 363; *see also* Fed. R. Evid. 401, 402; *Heyne v. Caruso*, 69 F.3d 1475, 1479 (9th Cir. 1995) (conduct demonstrating "hostility towards a certain group" is relevant); *Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n*, 985 F.3d 327, 333 n.8 (4th Cir. 2021); *cf. Henry v. Cty. of Shasta*, 132 F.3d 512, 518-20 (9th Cir. 1997), *amended* 137 F.3d 1372 (9th Cir. 1998) (treatment of two non-plaintiffs may show plaintiff's treatment was pursuant to custom).

Considering declarations from *Coleman* class members with relatively serious mental illnesses—those at the Enhanced Outpatient Program ("EOP") level of care—was especially appropriate because, as the court held, they meet the

definition of people with disabilities under the ADA and the plain language of the ARP. 1-ER-20-23, 64-66; *see Nehmer*, 494 F.3d at 855, 861 (plain language interpretation entitled to deference where "reasonable" and court had "longstanding … oversight" of decree); *United States v. Asarco Inc.*, 430 F.3d 972, 980 (9th Cir. 2005) (decree interpreted like contract). The ARP defines a "qualified inmate/parolee" as "one with a permanent physical or *mental impairment* which substantially limits the inmate/parolee's ability to perform a major life activity," a definition of disability effectively identical to the ADA's. 1-ER-1056 (emphasis added); *see* 42 U.S.C. §12102(1)(A); 28 C.F.R. §35.108. The court correctly concluded this definition encompassed *Coleman* EOP class members because they have permanent "mental impairment[s]" that substantially limit their ability to perform major life activities, as they require extensive treatment and special housing apart from the general population. 1-ER-22-23; *see* 1-ER-65-66.

Even if the court erred in holding that *Coleman* EOP class members meet the ARP's definition of disability, that error was harmless. *Heyne*, 69 F.3d at 1478. As discussed above, the court also correctly considered these declarations as relevant evidence of problems *Armstrong* class members face, a conclusion Defendants have not seemed to challenge.

The court did not, as Defendants contend, Br.48-53, expand or modify the

certified class, but instead interpreted the ARP—the parties' agreement to achieve Defendants' ADA compliance—to conclude that *Coleman* evidence is relevant here. Defendants wrongly focus on the PLRA's "particular plaintiff" language. *See* Br.48-49 (quoting 18 U.S.C. §3626(a)(1)(A)). The term "particular plaintiff" "means only that the scope of the order must be determined with reference to the … violations established by the specific plaintiffs before the court," and does not mean that a remedy "fail[s] narrow tailoring simply because it will have positive effects beyond the plaintiff class." *Plata*, 563 U.S. at 531. Here, the court carefully so tailored its remedies to the violations of Plaintiffs' rights, namely Defendants' violations of prior orders, the ARP, and the ADA. *See infra*, pp.55-65.

Defendants' attempt to conflate rules governing the PLRA and Rule 23 class actions also fails. "[S]ection 3626(a)(1)(A) plainly says nothing at all about class actions or the requirements for class certification." *Yates v. Collier*, 868 F.3d 354, 369 (5th Cir. 2017). Critically, there is no dispute that parties may enter into remedial agreements that grant relief beyond the class. *See* Br.52 ("a remedial plan may benefit non-class members"); *Plata*, 563 U.S. at 530-31; *Loc. No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986); *Clement v. Cal. Dep't of Corr.*, 364 F.3d 1148, 1152-53 (9th Cir. 2004) (per curiam).

The Orders do not bestow on non-class members any special privileges. *See*

1-ER-2-8; *infra*, pp.55-65. The surveillance cameras, body-worn cameras, video retention, quarterly interviews of people with disabilities, third-party monitoring, and information-sharing with Plaintiffs and the Court Expert are for transparency into Defendants' compliance with the Orders and the ARP, and provide no affirmative rights to *Coleman* class members. The cameras, additional sergeants, and reforms to training and pepper-spray policies are necessary throughout the Five Prisons because *Armstrong* class members are on every yard; there is no practical way to craft those remedies to apply only to class members. And Defendants have voluntarily agreed to extend fixed-surveillance cameras, reforms to the investigation and discipline process, and new pepper-spray policies statewide—for all incarcerated people at all prisons—mooting any argument that the Orders improperly benefit *Coleman* class members. *See* MJN, Ex. A, at 9, 11-12; *id.*, Ex. D, at 39-42.

Such transparency and accountability measures are consistent, not in "conflict," Br.52, with the *Coleman* case. While Defendants' treatment of vulnerable people has long been divided into two class actions, *Coleman* and *Armstrong*, the two cases are related and closely coordinated. The counsel in the cases are the same on both sides. And since the *Coleman* plaintiffs' permissive intervention in this case, *see supra*, p.8 n.2, the cases share a protective order and regularly exchange confidential information. *See* 3-SER-595-600. The *Armstrong*

Court Expert regularly meets with the *Coleman* Special Master and shares reports of those meetings with both courts. *See* 2-SER-580-83. Consistent with this history, the court here ordered that all remedial plans be shown to counsel in both cases. 1-ER-3 n.1.

In sum, the court did not err in considering the declarations from all people with disabilities, who were willing to speak out notwithstanding the risk of retaliation. *See supra*, pp.23-28.

B. Defendants Had Notice and Opportunity to Be Heard Regarding the Consideration of Testimony from *Coleman* Declarants

The court did not, as Defendants contend, consider evidence from *Coleman* class members without notice. Br.53-55. The court issued an order (not included in Defendants' ER) instructing the parties to "be prepared to discuss" at the October 2020 hearing "[t]he question of whether members of the class[] in *Coleman v. Newsom* … are members of the class in this action or otherwise are entitled to reasonable accommodations under the ARP." 1-SER-57-58. At the hearing, the parties and the court discussed the issue at length. *See* 2-ER-354-63. The court then permitted the parties to address the issue in supplemental filings. 1-SER-56. Yet Defendants' 20-page surreply does not address the question or even mention "*Coleman*." *See* 1-SER-33-55. And Defendants could have raised the issue at the December 2020 hearing, but chose not to. 2-ER-292-332; *see* *Armstrong*, 768 F.3d at 980 (dismissing lack-of-notice argument because court

permitted oral response at hearing and supplemental written submission).

Defendants also contend that the court unfairly criticized their experts for not addressing declarations from *Coleman* class members. Br.35-36, 55, 70. But Plaintiffs argued throughout that *Coleman* class members were people with disabilities and thus their declarations were relevant to whether Defendants were violating the rights of *Armstrong* class members. 1-SER-30; 1-SER-69-70; 2-SER-334; 2-SER-474. Defendants' experts erroneously chose not to consider these individuals as "disabled inmates." And the court properly found the experts' opinions lacking for this failure. 1-ER-50; *see also Hoffman ex rel. N.L.R.B. v. Beer Drivers & Salesmen's Loc. Union No. 888*, 536 F.2d 1268, 1273 (9th Cir. 1976) (no "insufficient notice" where parties were aware of issue). Moreover, 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. *See* 1-ER-28-29, 35 n.21, 50-52, 56-58, 77.

III. THE ORDERS WERE SUPPORTED BY AMPLE EVIDENCE AND FULLY COMPLY WITH THE PLRA

A. Plaintiffs' Evidence Was More Than Sufficient to Support the Orders

As discussed above, the record contains ample evidence to support the court's findings and remedial measures, including Vail's three expert reports

explaining how the incidents constitute disability discrimination, and criticizing Defendants' accountability system and culture of abuse; Schwartz's two comprehensive declarations in which he found that Defendants' accountability system is broken;[24] the OIG's data and multiple reports about Defendants' accountability system; testimony from CDCR officials; Defendants' own data, accountability logs, and interrogatory responses showing their failures to discipline staff; 179 declarations describing officers' abuse of people with disabilities, 75 of which address discrimination at the Five Prisons; and other evidence demonstrating Defendants' noncompliance with court-ordered obligations.

This mountain of evidence is far different from the record this Court reviewed in its 2010 decision in this case. *See* Br.52, 54-58. In 2010, this Court affirmed the district court's central holding that Defendants are responsible for providing accommodations to their disabled prisoners and parolees housed in county jails, but vacated as to the "precise relief ordered." *Armstrong*, 622 F.3d at 1063. Although it was a "close" call, the Court held that the record—which consisted of only a "few pieces of evidence"—was insufficient to support "system-

[24] Defendants erroneously claim that Schwartz "essentially did no investigation," Br.9, and attempt to fault him for not touring prisons, Br.11. Schwartz's review of Defendants' system, which he based on Defendants' own investigation and discipline files, was robust, methodologically sound, and did not require touring prisons. *See supra*, pp.12-13.

wide" relief. *Id.* at 1073. The Court observed that some of Plaintiffs' evidence "related to individuals who were not necessarily *Armstrong* class members," but did not, as Defendants suggest, hold that it was improper for the court to consider that evidence. *Id.*; *see* Br.52, 54-55. The Court explained that on remand "not much more evidence than that already provided may be required to approve the current order." *Id.* at 1074. On remand, Plaintiffs submitted additional evidence, and the district court granted the motion and issued statewide relief, which this Court affirmed. *See Armstrong v. Brown*, 732 F.3d 955 (9th Cir. 2013).

In contrast, the court here did not grant systemwide relief, mandating relief at only five of the seven prisons at issue in Plaintiffs' Motion, and did not grant all remedies Plaintiffs sought. 1-ER-14 & n.2, 59, 74, 76; *see also* CR 2948-6. And as described above, Plaintiffs' evidence is substantial—far more than a "few pieces of evidence." *Armstrong*, 622 F.3d 1073. That evidence strongly supports the court's finding that violations of class members' rights were not "isolated incidents," but instead "were widespread in every sense of the word; they affected inmates who suffer from a wide range of disabilities; they were caused or observed by many identified staff members; and they took place at a variety of locations at a variety of prisons." 1-ER-74-75; *see supra*, pp.12-28. The evidence here is not "thin and flawed," Br.4, but robust, detailed, and consistent.

Despite Defendants' protestations, Br.77-82, the disability "nexus" is

obvious: Staff denied class members reasonable accommodations, assaulted them for asking for help, and made them too terrified to request accommodations they need. *See supra*, pp.16-28. The declarations, which describe similar incidents occurring throughout the Five Prisons, supported these findings. Vail, who reviewed nearly every declaration, concluded that the disability nexus was unmistakable. 25-ER-6819-23. The court did not clearly err in making these findings. *See Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010) (per curiam).

To be certain, Plaintiffs presented more declarations from people with disabilities at some prisons (LAC, COR, KVSP) than at others (CIW, SATF). And though the majority of declarants at the Five Prisons were class members, *see supra*, p.17 n.5, some were not. Defendants devote much of their brief to quantifying the declarations on these axes. But the declarations—gathered during the COVID-19 pandemic when prisons were closed—do not stand alone. They are tied together by Plaintiffs' other evidence, which Defendants essentially ignore on appeal, that establishes Defendants were violating prior orders, the ARP, and the ADA at all Five Prisons. These violations flow from Defendants' broken investigation and discipline system and failure to comply with the 2007 and 2012 Orders regarding accountability. 1-ER-77.

The record here is more than adequate to support the court's findings of institution-wide patterns of violations and targeted remedies. *See, e.g.*, *Sharp*, 233

F.3d at 1170-74 (remedial measures supported by expert testimony, third-party information, residents' testimony, and defendants' admissions); *Plata*, 563 U.S. at 522-23 (findings of ongoing violations supported by experts reports, receiver/special master reports, and defendants' data and admissions); *Henry*, 132 F.3d at 518-21 (three similar incidents involving multiple staff sufficient to establish illegal practice); *Larez v. City of L.A.*, 946 F.2d 630, 647 (9th Cir. 1991) (finding that officers could "get away with anything" supported by expert testimony about department's inadequate "disciplinary and complaint process").

In fact, though Plaintiffs sought relief only at seven prisons and the court granted it only at five, the evidence below was sufficient to support systemwide relief. Defendants operate one unified system in which officers and incarcerated people regularly transfer among prisons. The court previously ordered Defendants to have a process to hold officers accountable for violating class members' rights. The court found, based on undisputed evidence, that Defendants lack an adequate process. And the evidence showed Defendants' process is the same throughout the state. *See, e.g.*, *Plata*, 563 U.S. at 532 (systemwide relief warranted where "program is run at a systemwide level"); *Oregon Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1122 n.13 (9th Cir. 2003) (statewide injunction proper based on evidence covering jails in seven of 36 counties because of "sufficiently pervasive, systemic and consistent pattern").

Defendants' weak challenges to the credibility of a handful of declarants do not present any grounds for reversal. *See* Br.19-32, 72-73, 78-82. At best, Defendants' evidence suggests disputes of fact as to those particular declarations that could have been resolved if Defendants had sought an evidentiary hearing. But even setting aside those declarations, undisputed evidence easily supports the court's decision. Indeed, the court explicitly refrained from discussing or relying upon incidents for which Defendants properly submitted countervailing evidence. 1-ER-16. Moreover, Defendants' recitations of the facts in a number of cases are inaccurate, misleading, or incomplete and therefore present no justification for disturbing the court's finding that the undisputed declarations from incarcerated people were "credible." 1-ER-19.

For example, a declarant Defendants identify as LAC-2 described how officers broke his finger, elbow, arm, and rib when they beat him after a verbal dispute. 34-ER-9754-58. Defendants respond by citing a declaration from an officer in which he claims the force was justified. Br.30; 29-ER-8060-64. But Schwartz found that LAC-2's version of events was more credible than the officer's because Defendants' declarant's and other officers' incident reports were plagiarized, multiple witnesses corroborated LAC-2's report of misconduct, *see* 34-ER-9640-41, 9772-73, and LAC-2's injuries were consistent with his testimony, but not with officers' accounts (who reported that the only force was

two punches to the person's face), 27-ER-7504-13. Defendants did not address any of Schwartz's findings below and do not discuss them here.

A declarant Defendants identify as COR-4 described a host of misconduct, including that officers harassed him because of his mobility and mental health disabilities; cuffed him on his bleeding wrists following a suicide attempt; threatened to plant contraband on him and to "light [him] up" after he complained about their abuses; and ignored his suicide attempt, leaving him bleeding and helpless for hours. 23-ER-6369-77. Defendants' sole response is to seize on one sentence of COR-4's declaration, where he states that "most staff at [COR] are good," while ignoring the following sentence, which states "certain bad apples at COR cause a lot of misconduct." Br.28; 23-ER-6376.

A declarant Defendants identify as KVSP-1 reported that officers unnecessarily punched him in the face, breaking his nose, when he told staff that he was unable to get down on the ground due to his disability. 35-ER-9918-20. Defendants contend that they submitted evidence to "refute[]" this incident. Br.24 (citing 28-ER-7849-50; 29-ER-8074-78). Vail found, however, that KVSP-1's documented injury (broken nose) and an officer's injury (a broken hand) were consistent with KVSP-1's testimony and not with the officers' (denying they punched KVSP-1 in the face). 25-ER-6880-81. The officers' incident reports also lacked credibility for other reasons. 25-ER-6881-82. Meanwhile, Defendants'

expert asserted that the incident did not relate to KVSP-1's disability, even though staff used force against KVSP-1 when he was unable to get down because of his mobility disability. 25-ER-6882.

As explained by Plaintiffs' experts, Defendants' attacks on other declarants suffer from similar problems. *Compare* Br.13 (LAC-10), *with* 25-ER-6851-54; *compare* Br.12 (LAC-6), *with* 25-ER-6831-34; *compare* Br.30 (LAC-1), *with* 25-ER-6849-50; *compare* Br.32 n.12 (LAC-12), *with* 25-ER-6874-75; *compare* Br.32 n.12 (LAC-13), *with* 25-ER-6839-45. In sum, the court did not clearly err in crediting Plaintiffs' evidence of widespread abuses at the Five Prisons rather than Defendants' limited and unpersuasive contrary evidence.

B. The Orders Comply with the PLRA

The Orders also comply with the PLRA's requirement that prospective relief be "narrowly drawn, extend[] no further than necessary … , and [be] the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. §3626(a)(1)(A).

The court ordered Defendants to develop their own plan to increase transparency and accountability—instructing Defendants to include certain common-sense measures, but leaving the implementation details to Defendants. 1-ER-2-8; 1-ER-76-77. The court "found that the additional remedial measures are necessary to ensure Defendants' compliance with the ARP and ADA"; are

narrowly tailored because they required action only at the Five Prisons and "are the least that can be done to protect disabled inmates from further violations of their rights"; and are not impermissibly intrusive because "they do not micromanage Defendants' operations" and gave "Defendants discretion to craft policies and procedures to implement the additional remedial measures." 1-ER-74, 76, 78-79; *see also* 1-ER-76 (finding scope of the relief "commensurate" and "tailored to" the violations of the ARP and ADA).

The specificity of the relief is consistent with the PLRA, especially because Defendants were "not yet in compliance … even though … the Court ha[s] attempted various iterations of remedial measures that are narrower and less intrusive." 1-ER-77; *see Armstrong*, 768 F.3d at 986; *Sharp*, 233 F.3d at 1173-74. The measures were "an incremental expansion of processes and systems … already in place pursuant to the Court's prior orders." 1-ER-53.

In concluding "that no viable less restrictive alternative exists," the court had little difficulty rejecting Defendants' proposed alternatives. 1-ER-51-52, 77, 79. Defendants' expert opined that violations could be cured if people simply had better access to forms for accommodation requests. 1-ER-77 (citing 10-ER-2625). The court dispensed with this proposal, as "the root cause of the ongoing violations … is not the lack of access to forms," but rather "the ineffectiveness of the current system for investigating and disciplining violations … and the resulting

staff culture that condones abuse and retaliation against disabled inmates." 1-ER-77.

Defendants contend that some measures are "cumulative." Br.2-3, 38, 59-60, 67, 83. They forfeited this argument by not raising it below. Regardless, the remedies here are not cumulative, and the PLRA permits relief "composed of multiple elements that work together to redress violations of the law." *Armstrong*, 622 F.3d at 1070; *see also Plata*, 563 U.S. at 525-26. The various elements address different parts of the "root cause" of Defendants' violations—including gathering different types of evidence, holding officers accountable, preventing misconduct through better staffing and training, and increasing transparency. The court was not required to just take Defendants' word that surveillance cameras alone would solve the problem. *See* Br.60; *Gomez v. Vernon*, 255 F.3d 1118, 1129 (9th Cir. 2001) (not enough to claim retaliation will not reoccur where record showed threat of ongoing violations).

Defendants object to each measure in isolation, Br.60-69, but the PLRA does not require a provision-by-provision explanation, *see Edmo v. Corizon, Inc.*, 935 F.3d 757, 782-83 (9th Cir. 2019) (per curiam). Nonetheless, even when viewed individually, each measure clearly satisfies the PLRA.

1. Fixed-Surveillance Cameras

Defendants have fully implemented the court's requirement to install

surveillance cameras at the Five Prisons. *See* 1-ER-4, 53-55; MJN, Ex. A, at 8. Defendants now plan to roll out cameras statewide, to all prisons by 2024. MJN, Ex. A, at 11-12. Defendants nonetheless argue that ordering cameras violates the PLRA because they previously expressed a vague intent to install cameras sometime in the future. Br.60; *see* 2-ER-182. Defendants cannot, however, forestall a necessary remedy by suggesting it might voluntarily adopt that remedy. *See, e.g.*, 7-ER-1585, 1591, 1628 (Defendants admitting no timeline for cameras). This was especially true given that the Governor had initially requested funding for cameras at one of the Five Prisons (CIW), but later withdrew the request. 3-ER-398-99; 4-ER-722.

The parties and their experts all agreed cameras were necessary, and the court did not err in ordering that relief. 1-ER-53-55 (citing 28-ER-7898); 28-ER-7852; 20-ER-5613-16 (Defendants' expert testifying that COR and CIW Wardens wanted cameras); 18-ER-4889-90, 4917-18 (Defendants' expert testifying cameras would have been helpful in addressing disputed claims raised in declarations); 17-ER-4509-4510; 1-SER-172; 2-SER-0308-09; 1-SER-87-88; 1-SER-113-14.

2. Body-Worn Cameras

Defendants also, in August 2021, rolled out body-worn cameras at the Five Prisons. *See* 1-ER-4, 55-56; MJN, Ex. A, at 8. Defendants are currently seeking funding for body-worn cameras for four additional prisons not covered by the

Orders, and admit that body-worn cameras will improve officer accountability. *See* MJN, Ex. A, at 12, 19, 21-23.

Body-worn cameras are necessary even where there are fixed-surveillance cameras. The court did not err in finding—based on substantial evidence, including Vail's conclusions ("which Defendants have not meaningfully rebutted")—that body-worn cameras were necessary because they capture footage from areas not covered by fixed-surveillance cameras, including inside cells, and also capture sound. 1-ER-55-56 (citing 4-SER-801-02); *see also* 4-SER-803-04. Defendants jump on the court's statement that body-worn cameras are "likely," rather than certain, to reduce violations. Br.61 (quoting 1-ER-55). But in the very next sentence, the court specifically found body-worn cameras were "necessary and should be deployed at [the Five Prisons] as soon as possible." 1-ER-55.[25]

The Court Expert agreed that body-worn cameras have reduced disability discrimination at RJD. *See* MJN, Ex. C, at 3-4.

[25] The court did not, as Defendants assert, order body-worn cameras based on "a YouTube video." Br.61. Vail did view a video-recorded seminar titled "Body-Worn Cameras in Correctional Settings," as one basis for his opinions regarding body-worn cameras. 4-SER-800-03. The seminar was organized by the U.S. Justice Department's Bureau of Justice Assistance and featured leaders from jails and prisons extolling the virtues of body-worn cameras for correctional accountability. *Id.* Vail's consideration of the seminar was appropriate, and Defendants did not object to it below.

3. Camera Footage Retention

Defendants' challenge to the requirement to indefinitely retain footage of use-of-force incidents and other triggering events involving people with disabilities, Br.61-62, is moot. The parties have agreed to limit the retention period to five years. *See* MJN, Ex. D, at 23-24.

4. Pepper-Spray Policies

Defendants misrepresent the record in asserting that evidence of pepper-spray abuse was too "thin" to support the order to more effectively monitor and control the use of pepper spray at the Five Prisons. *See* Br.62-63; 1-ER-8, 61-62. Eighteen declarants reported experiencing or witnessing staff use pepper spray. *See supra*, p.27 n.21. It is not true that "none" of the incidents at KVSP involved class members, Br.62, as two individuals sprayed had *Armstrong* disabilities. *See* 24-ER-6770-72; 24-ER-6741-42, 6745-46. It is also not true that Plaintiffs presented three pepper-spray *incidents* at COR, Br.62, as three *declarations* describe at least five incidents. *See* 22-ER-6217; 22-ER-6148-50; 23-ER-6315. As for LAC, while the Orders expressly discuss three incidents, 1-ER-16-17, nine individuals came forward to describe pepper-spray abuse. *See* 34-ER-9630-31; 34-ER-9663-64; 34-ER-9696, 9701, 9703; 34-ER-9713; 34-ER-9769; 35-ER-9818; 21-ER-5785-86; 21-ER-5838-39; 21-ER-5877.

While there were no declarations from CIW and one declaration from SATF

specifically about pepper spray, there was ample evidence of systemic pepper-spray abuse from Plaintiffs' experts and Defendants' data. *See, e.g.*, 25-ER-6911-13, 6821, 6835-38, 6854-56, 6888, 6903-6904; 27-ER-7447; 21-ER-5696; 19-ER-5037, 5245-48. Defendants' own expert conceded "there are staff who use [spray] more often than others." 17-ER-4682-83. Defendants intend to roll out their new policy to all prisons, undermining any argument that applying the revised pepper-spray policy at these two prisons would be intrusive. MJN, Ex. D, at 39-42; *id.*, Ex. A, at 11.

5. Improved Training

The court ordered Defendants to "develop and implement training intended to eliminate violations" at the Five Prisons. 1-ER-8, 60. Defendants already implemented this training as of October 2021.

Defendants assert that the court erroneously assumed their prior trainings were deficient. Br.63-64. But the court did not clearly err in finding, based on evidence it previously discussed, that "the training that CDCR currently provides … ha[s] proven to be ineffective at stopping violations of the ARP." 1-ER-60. Most of the trainings were not "tailored to achiev[e] staff compliance with the ARP and the ADA," and the few that were so tailored were temporary and, as evidenced by ongoing violations, inadequate. 1-ER-60; *see supra*, pp.12-28; *see also, e.g.*, 5-SER-1104-05; 25-ER-6914; 20-ER-5603; 18-ER-4775-78.

6. Additional Sergeants

Defendants, in August 2021, also complied with the instruction to increase supervisory staff by posting additional sergeants at the Five Prisons. *See* 1-ER-7, 59; MJN, Ex. A, at 8. Defendants assert for the first time on appeal that additional sergeants are cumulative of surveillance cameras. Br.65. But cameras cannot train, mentor, deescalate, or intervene to stop misconduct. The need to increase supervisory staff is supported by the record, and the court did not clearly err in finding that "current level of staffing has not been effective at stopping the ongoing violations" and that the problems were widespread throughout the Five Prisons. 1-ER-7, 59; *see also* 5-SER-1100, 1103.

Moreover, Defendants' opposition to the instruction that staff be increased "on all watches on all yards," Br.64 (quoting 1-ER-7, 59), is moot because the parties have agreed to less staffing (not all watches and not all yards), MJN, Ex. D, at 36-37.

7. Reforms to Investigation and Discipline Process

The court ordered Defendants to "develop measures to reform the staff misconduct complaint, investigation, and discipline process" at the Five Prisons, leaving the details of those reforms to Defendants. 1-ER-5-7, 56-57. Defendants voluntarily plan to implement their chosen reforms systemwide. MJN, Ex. A, at 11; *id.*, Ex. B, at 8-18.

Defendants argue these reforms are unnecessary because the OIG already monitors CDCR's investigations and discipline, and Defendants already created the AIMS process. Br.65-67. But the OIG's longstanding monitoring did nothing to stop or slow the violations. *See supra*, pp.12-28. In fact, the OIG reported on Defendants' repeated noncompliance and AIMS' serious flaws. *See, e.g.*, 2-ER-201-91; 21-ER-5706-11; 2-SER-410-53, 459-72; 1-SER-216-21;[26] 5-SER-1018-36; 4-ER-851-883; 4-ER-895 to 5-ER-988. The court did not clearly err in finding, based on the OIG report and other evidence, that AIMS was not sufficient to hold staff accountable. 1-ER-38-43, 57; *see supra*, pp.12-16.

Defendants also argue that requiring quarterly interviews of class members is intrusive, Br.65, but the court simply borrowed the "methodology and interview questionnaire utilized by" Defendants themselves when they previously investigated misconduct, 1-ER-6, 57. And Defendants' challenge to mandated reassignment of officers accused of serial misconduct, Br.66-67, is moot. The remedial plan to which the parties agreed does not make reassignment mandatory and provides Defendants with substantial discretion in reassignment decisions. MJN, Ex. D, at 32-33.

[26] This OIG report highlights an incident where officers received only minor discipline despite being caught on video assaulting an incarcerated person. Plaintiffs have moved for leave to transmit videos of the incident to the Court, as well as others showing the limits of fixed surveillance cameras.

8. Data Collection & Early-Warning System

Defendants argue the requirement to develop a system to track staff misconduct and disability discrimination is cumulative because AIMS and cameras would capture patterns of misconduct. Br.67-68; *see* 1-ER-6-7, 60-61. But again, the court did not clearly err in finding that AIMS was a failure. *See supra*, pp.12-16. And Defendants do not explain how raw camera footage alone can possibly be enough to reveal patterns. At a hearing, Defendants failed to identify any effective early-warning system, which is unsurprising given the OIG found the current systems "deficient and incapable of generating reports that could help Defendants identify critical information necessary to track past staff misconduct incidents and prevent future ones." 1-ER-61 (summarizing 2-ER-212); *see also* 2-ER-271-77.

9. Information-Sharing

Finally, Defendants oppose information-sharing with Plaintiffs' counsel and the Court Expert. Br.68; *see* 1-ER-7, 58-59. Defendants waived this argument by not raising it below. 1-ER-59. It is also meritless. Adequate oversight is critical to ensuring the Orders' success. Defendants suggest some documents may be subject to "applicable privileges," but do not identify the privileges or acknowledge the existing protective orders in this case. Br.68; *see, e.g.*, 3-SER-586-92. Nothing prevents Defendants from raising any privilege issue if and when it arises.

IV. THE PROCEEDINGS BELOW WERE FAIR TO DEFENDANTS

Defendants wrongly assert that procedural and discovery decisions made by the court warrant reversal of the Orders. Br.69-82. Even during an unprecedented pandemic, Defendants had every opportunity to present evidence and respond to Plaintiffs' arguments and evidence. Defendants either failed to object to the purported procedural errors or suffered self-inflicted injuries through their lack of diligence. Defendants complain of not having an evidentiary hearing, Br.77, but never requested one. *See Maynard v. City of San Jose*, 37 F.3d 1396, 1401 (9th Cir. 1994) (waiver of evidentiary hearing).

A. The Declarations from Incarcerated People Were Properly Attested

Defendants misstate that Plaintiffs submitted "179" unsigned "hearsay" declarations. Br.6, 16, 38, 56, 69, 70-71, 76, 78. Fifty-five of 179 declarations were signed by the declarants; the remaining 124 declarations were—during COVID-19-related prison closures—properly signed by Plaintiffs' counsel on behalf of the declarants, along with an attestation[27] by Plaintiffs' counsel. *See* 6-

[27] "On [date], due to the closure of [CDCR prison] in light of the COVID-19 pandemic and ongoing concerns that officers might retaliate against witnesses in support of Plaintiffs' motion, including ongoing concerns about the confidentiality of the legal mail system at [CDCR prison], I read the contents of this declaration, verbatim, to [declarant] by telephone. [Declarant] orally confirmed that the contents of the declaration were true and correct. [Declarant] also orally granted me permission to affix [his/her] signature to the declaration and to file the declaration in this manner." *See, e.g.*, 24-ER-6622.

SER-1249 to 7-SER-1630; 7-SER-1773; 23-ER-6512; 33-ER-9444-45; 21-ER-5656; *see also, e.g.*, *Criswell v. Boudreaux*, No. 120-CV-01048DADSAB, 2020 WL 5235675, at *2 n.1 (E.D. Cal. Sept. 2, 2020) (similar attestation for incarcerated client during pandemic).

In any event, Defendants forfeited any objections to the attested declarations by failing to raise them below.[28] *See Cody v. Hillard*, 139 F.3d 1197, 1199 n.1 (8th Cir. 1998) (waiver of 28 U.S.C. §1746 objection); *Nicholson v. Hyannis Air Serv., Inc.*, 580 F.3d 1116, 1127 n.4 (9th Cir. 2009) (waiver of hearsay objection); Fed. R. Evid. 103. Had Defendants objected, Plaintiffs might have been able to obtain declarants' signatures, albeit at great expense and potential risk of COVID-19 exposure to the declarants, Plaintiffs' counsel, and others who lived and worked at the prisons.

B. Defendants Had a Fair Opportunity to Respond to All Evidence Plaintiffs Submitted on Reply

The court did not err by considering evidence Plaintiffs submitted on reply, *see* Br.69-71, 73-74, because the court "allowed Defendants additional time and an opportunity to respond." 1-ER-9 n.1; *see Dutta v. State Farm Mut. Auto. Ins. Co.*,

[28] Below, Defendants made hearsay objections only to statements by declarants that someone else (e.g., staff) said something. *See* 1-SER-120-121. Defendants did not object to admitting the declarations, and argued only that the lack of personal signature was a reason why depositions were possibly needed. *See* 1-ER-340.

895 F.3d 1166, 1172 (9th Cir. 2018). The court gave Defendants 42 days to file a 20-page surreply. 1-SER-56; 1-ER-81-83. Notably, Defendants have not identified a single piece of rebuttal evidence that they were prevented from submitting because of time or page restrictions. Moreover, Defendants did not pursue obvious rebuttal evidence, such as document requests, interrogatories, or depositions of Plaintiffs' two experts.

The court did not abuse its discretion by initially limiting Defendants to 10 depositions of people who submitted declarations on reply and requiring that Defendants present an "articulable reason" for the depositions, such as an internal inconsistency. *See* Br.71-75; 2-ER-345 (after 10 depositions, parties and court would "stop and consider how useful of an exercise it is"); *Hallett*, 296 F.3d at 751 (court's "broad discretion" over discovery "will not be disturbed except upon the clearest showing … [of] actual and substantial prejudice").

The "articulable reason" requirement was justified because of concerns that the depositions might contribute to the spread of COVID-19 in the prisons, the reality that many declarants "appear to be [in a] pretty fragile mental health state," and the risk of retaliation against the declarants. 1-ER-368; *see Armstrong*, 475 F. Supp. 3d 1038; *supra*, pp.23-28. The bar for Defendants was low—something other than Defendants "hoping to simply get the inmate to confess they were lying." 1-ER-338, 368. Defendants, after all, had full access to considerable

evidence—medical records, witnesses, investigations, and the relevant officers. 1-ER-343. And despite Defendants' contention, Br.74, counter-evidence was not even necessary, as the court made clear that pointing to an "internal inconsistency" in the declaration would suffice. 2-ER-368. Defendants also have not identified any actual prejudice suffered.[29]

Defendants also cannot complain about the initial 10-deposition limit because they ultimately chose to take only four depositions. *See* Fed. R. Civ. P. 30(a)(2)(A)(i) (10-deposition limit); *Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994) (litigant must have "diligently pursued its *previous* discovery opportunities" and "show how allowing *additional* discovery would have [changed outcome]"). Though Defendants failed to articulate an adequate reason for any of the 10 depositions they initially proposed, Plaintiffs agreed to five of the depositions and Defendants then only took four. 7-ER-1483; 8-ER-1898-913.[30] Thereafter, Defendants just gave up. They never requested that

[29] As their only potential example, Defendants claim they were prevented from deposing a declarant who reported officers ignored him when he was suicidal, but who did not, according to Defendants, include the officers' names. Br.74. But the declarant did provide the names of several staff involved. 22-ER-6121. Moreover, Defendants' purported inability to identify the involved staff was not one of the reasons Defendants presented to Plaintiffs for deposing the declarant. 8-ER-1906 (item 4). Defendants never requested that the court permit them to take this deposition.

[30] Defendants complain that three of the four deponents invoked their Fifth

Plaintiffs agree to additional depositions; proposed additional deponents; asked the court to hold that any proposed depositions met the court's criteria or should otherwise be permitted; or requested that the court permit more than 10 depositions.

In sum, Defendants cross-examined some witnesses and could have cross-examined more but chose not to. Their lack of diligence in pursuing the depositions and other discovery renders inapposite their citations to grandiose principles regarding cross-examination and fairness.[31] There is plainly no due process violation here where Defendants had, at every turn, "the opportunity to be heard at a meaningful time and in a meaningful manner." *S. Cal. Edison Co. v.*

Amendment right to refuse to answer some questions. Br.70. But the court held that these questions were collateral to the matters at issue and, in an abundance of caution, did not rely on those declarations. 1-ER-15 n.4.

[31] Defendants' cases are not analogous to what the court did here. *See, e.g.*, *Jenkins v. McKeithen*, 395 U.S. 411, 428-29 (1969) (state criminal procedure limiting who may cross-examine witnesses and requiring preapproval of cross-examination questions); *Greene v. McElroy*, 360 U.S. 474, 475, 508 (1959) (security clearance revoked without opportunity to question persons who made statements against him); *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (prohibiting in-person appearance for public-assistance termination proceedings); *N.L.R.B. v. Doral Bldg. Servs., Inc.*, 666 F.2d 432, 433 (9th Cir.), *supplemented*, 680 F.2d 647 (9th Cir. 1982) (barring cross-examination using unofficial English translations of affidavits without continuing hearing until official translation could be prepared); *Alford v. United States*, 282 U.S. 687, 694 (1931) (cutting off all cross-examination on subject that might show witness's bias against criminal defendant); *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 54 (1987) (no due process violation where defendant denied access to information necessary to prepare his defense).

Lynch, 307 F.3d 794, 807 (9th Cir. 2002) (quotation marks omitted).

Defendants argue that the court was "mistaken[]" to cite *California Department of Social Services. v. Leavitt*, 523 F.3d 1025 (9th Cir. 2008), in a discovery order denying Defendants' efforts to depose individuals who submitted declarations with Plaintiffs' moving papers.[32] Br.76. Though Defendants do not appear to challenge this ruling, the court's citation to *Leavitt* was appropriate. In *Leavitt*, this Court emphasized that district courts have broad discretion to manage discovery in post-judgment enforcement matters, but found the district court erred by effectively denying, in its entirety, a party's timely discovery request that "might have generated information that could raise significant questions concerning compliance." 523 F.3d at 1034-35. Unlike in *Leavitt*, the court here thoroughly engaged in the parties' arguments, issued well-reasoned orders, and permitted reasonable discovery. *See, e.g.*, 1-ER-88-91.

C. The Court Did Not Abuse Its Discretion in Considering Evidence Submitted with Plaintiffs' Surrebuttal

The Orders cite only three pieces of Plaintiffs' surrebuttal evidence, all of

[32] Defendants served deposition notices regarding some of these declarants only five days before Defendants' opposition deadline (which the court had already extended 86 days). 1-ER-89. The court denied Defendants' request for a further extension to take the depositions because Defendants were not "diligent in seeking the extension or in seeking the discovery that they claim justifies their last-minute request for an extension [and] do not explain why they waited months … to seek to depose these inmates." 1-SER-202.

which Defendants produced late after the Federal Rules' deadline and after Plaintiffs filed their reply. 1-ER-46 (spreadsheet showing Defendants failed to investigate all allegations in Plaintiffs' declarations); *id.* (spreadsheet showing Defendants failed to produce information about investigations to Plaintiffs); 1-ER-49-50 (interrogatory responses showing little discipline); *see* 7-ER-1467; 21-ER-5675-76. At the December 2020 hearing, under questioning from the court, Defendants conceded that the information was accurate. 2-ER-229-30, 322-23. Defendants thus had a meaningful opportunity to respond to the evidence and failed to challenge it. *See Dutta*, 895 F.3d at 1172. Regardless, even if the court abused its discretion, Defendants have not made "the clearest showing of actual and substantial prejudice." *Martel v. Cty. of Los Angeles*, 56 F.3d 993, 995 (9th Cir. 1995) (en banc).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court affirm the Orders.

DATED: February 14, 2022

Respectfully submitted,

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By: */s/ Gay Crosthwait Grunfeld*
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Attorneys for Plaintiffs-Appellees

STATEMENT OF RELATED CASES

The following related case is pending before the Court: *Armstrong v. Newsom* (9th Cir. No. 20-16921).

DATED: February 14, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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