20-16921

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ARMSTRONG, et al.,

Plaintiffs-Appellees,

v.

G. NEWSOM, et al.,

Defendants-Appellants.

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

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

DEFENDANTS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

The *Armstrong* class action concerns removing structural barriers and giving disabled inmates access to prison programs and services. The district court's decades-old requirements on Defendants to address those ADA issues are long, burdensome, and intrusive.

But the appealed order went too far. It did not satisfy the Prison Litigation Reform Act's (PLRA) needs, narrowness, and intrusiveness requirements, and it was based on claims neither pled nor class-certified. Despite Plaintiffs' allegations of retaliation and excessive force by staff at the Richard J. Donovan (RJD) correctional facility, the data shows that the alleged misconduct had no material impact on disabled inmates accessing prison areas and programs and services, including the grievance process. The record also shows that CDCR independently took concerted actions to address the alleged misconduct, and those actions worked.

Nonetheless, under the guise of remedying structural barriers and program access, the court resolved Plaintiffs' newly-added First Amendment retaliation and Eighth Amendment excessive-force claims against Defendants by mandating widespread camera installation and use, overtaking personnel decisions, revising prison policies, and monitoring uses of force. If the district court can impose such remedies under the circumstances here, then there is nothing left of the principle

that courts should not micromanage prison operations. Plaintiffs' overarching response to the court's overreach—that there is no "too-violent-to-remedy" defense to disability discrimination—misconstrues this litigation and diverts attention from the unwarranted intrusiveness of the injunction and the unprecedented expansion of this case.

Although Plaintiffs made serious allegations of excessive force and retaliation by RJD staff, these claims have no nexus to the claims in the complaint and class-certified by the court, and are fundamentally different from the original claims. Remedying alleged acts of excessive force or retaliation would not, for instance, improve the structural layout of a housing unit or ensure that disabled inmates receive hearing aids or interpreters. Nor does the data show that the alleged misconduct caused the prison and its programs and services to be less accessible to disabled inmates. Ultimately, by issuing relief in the remedial phase based on newly-added claims with no nexus to the original claims, the court violated the basic tenets of jurisdiction, class-action litigation, and the PLRA.

In any case, the alleged misconduct did not go unaddressed: CDCR's concerted efforts improved staff culture at RJD. And vacating the injunction does not mean class members would be unprotected, or that the already-installed surveillance cameras would disappear. Rather, CDCR will continue with the strategy it developed before the injunction: take corrective actions, use cameras to

deter staff misconduct or false allegations of it, monitor grievances, and impose other necessary reforms. But none of the alleged staff misconduct is within the scope of *Armstrong*.

For example, before Plaintiffs sought judicial intervention in 2020, CDCR changed critical leadership positions; mandated additional training to all staff to improve staff culture, accountability, and inmate interactions; and recruited experienced personnel to enforce departmental expectations, update local operational procedures, and provide mentorship and guidance. CDCR also made operational changes to reduce staff misconduct, better monitor interactions, and promote accountability. These changes included altering staffing assignments and inmate movements to provide a greater supervisory presence and scrutiny, restricting access to blind spots, and instituting impartial grievance collection procedures and an electronic system to track investigations and outcomes.

The marked improvements show that court intervention was unnecessary. Plaintiffs' own expert conceded that achieving tangible change in a large prison system takes time because staff culture does "not…change[] quickly or easily." (1-ER-20.) CDCR's strategy—new management, training, mentorship, and promoting accountability—is the same strategy Plaintiffs' own expert recognized as a return to "basic fundamentals" that is "highly effective" in implementing change. (6-

SER-1622.) The expert detailed his success using such a strategy—all without cameras, blanket sergeant assignments, and other reforms mandated here. (*Id.*)

Plaintiffs' own assessment confirmed that, after CDCR's concerted reforms began in late 2018, the number of incidents involving force decreased (4-ER-695; AOB 42-43), even while the *Armstrong* population increased (*id.*; 4-ER-770). While the briefing below highlighted examples showing success on Facility C (where the Bishop Report was focused), CDCR demonstrated improvements prison-wide. Before Plaintiffs sought relief, RJD already experienced a per capita drop of over 30% in use-of-force incidents.

The data also shows that class members were not deterred from filing grievances. *Armstrong* members filed over 40% of the staff complaints, despite making up only about 25% of the population. (4-ER-770-771.) Thus, the administrative process was available to *Armstrong* members, who, on average, used it twice as often as non-class members.

Even assuming judicial intervention was necessary (which it wasn't), the cumulative remedies ordered were redundant of each other and the remedial efforts already underway, contravened the PLRA's needs-narrowness-intrusiveness mandate, and needlessly micro-managed matters of prison administration.

This Court should reverse the order imposing injunctive relief at RJD.

ARGUMENT

I. THE COURT EXCEEDED ITS JURISDICTION BY GRANTING INJUNCTIVE RELIEF BASED ON CLAIMS NOT RAISED IN THE COMPLAINT

The Court exceeded its jurisdiction. The 2007 and 2012 orders do not justify the expansion of this litigation beyond the class structural-barrier and program-access claims, which are categorically distinct from the alleged instances of excessive force and retaliation. Plaintiffs failed to demonstrate a sufficient nexus to *Armstrong* members' use of the grievance process, and *Sheehan* also cannot bring the asserted staff misconduct within the purview of the class claims. Further, the district court exceeded its jurisdiction by granting injunctive relief on claims that were never class-certified.

A. The 2007 and 2012 Orders Are Insufficient to Justify the Court's Extension of Equitable Relief beyond the Claims Initially Recognized

The district court exceeded its jurisdiction by remedying alleged First Amendment retaliation and Eighth Amendment excessive force violations that are categorically distinct from the Americans with Disabilities Act (ADA) claims about disability-accommodation policies and structural-accessibility features. (1-ER-2-79; 2-ER-115, 325-341, 347-348.) The alleged retaliatory and abusive conduct was not pled in the complaint, addressed in the parties' agreement on a Stipulation and Order for Procedures to Determine Liability and Remedy, or covered by the Remedial Plan or prior injunctions. (2-ER-213-378.)

Perhaps recognizing that deficiency, Plaintiffs assert that subsequent orders, namely those issued in 2007 and 2012, expanded the action to hold nonparty officers accountable for ADA violations related to programming and structural accessibility. (AB 8-9, 41.) But this litigation was never so broad as to encompass every act of staff misconduct directed at a class member; it always has been limited to the provision of disability accommodations, program access, and effective communications necessary to achieve compliance with the ADA "in [the] specific areas…litigated by the parties." (2-ER-243-245, 342-357.) The 2007 and 2012 orders are no different.

The 2007 order addressed four areas of deficiency: housing accommodations, sign-language interpreters, confiscation of prescribed assistive devices, and "some" prisons' responses to disability-accommodation requests. (2-ER-243-245.) The court found that "some" prisons' responses were "chronically late" while others stopped processing grievances, lacked sufficient staffing to process them, or failed to retrieve them from drop boxes. (*Id.*) The court determined that an inadequate disability-tracking system caused these deficiencies and directed CDCR to develop a system "for holding wardens and prison medical administrators accountable" by documenting who violated the outlined requirements, and referring repeat offenders to the Office of Internal Affairs for investigation and discipline. (2-ER-227, 243-245, 248.)

The 2012 order rejected Plaintiffs' motion for contempt and instead modified the 2007 order to clarify the accountability reforms. (2-ER-233-234.) Those reforms aimed to remedy institutional deficiencies and create internal oversight over disability-accommodation requests to enable CDCR to "ensure that grievances are addressed," monitor compliance, find patterns, and "hold wardens and medical administrators accountable." (2-ER-227-228.)

In 2014, the court again modified the 2007 order to improve allegation tracking, investigations, and corrective actions. (2-ER-213-215.)

These reforms all sought to address structural-accessibility features and disability-accommodation policies, and create institutional accountability. (*See id.*) Plaintiffs' disability discrimination claims have never encompassed incidents of force or retaliation. The myriad other orders Plaintiffs cite—which concern discovery motions, protective orders, and accommodations directed at other prisons and county jails—do not establish otherwise. (5-ER-1125-1172, 1185-1256, 1287-1403.)

The 2007 and 2012 orders, which Plaintiffs dubbed the "backbone" of the RJD injunction (AB 40), cannot justify expanding the litigation. The alleged staff misconduct here is distinct from the class claims and prior orders, which address structural barriers, program access, and providing an institutional process for seeking disability accommodations.

Plaintiffs' repeated assertions that the RJD order differs only because it involves "active violence rather than mere neglect" (AB 36) or violations that are "more extreme" (AB 42) are incorrect; all prior orders focused squarely on removing structural barriers and ensuring program access. Incidents of retaliation and excessive force are not more extreme versions of failing to provide sign-language interpretation or wheelchair ramps, or widen doors; it is an entirely different issue that, although not part of this action, Defendants take seriously.

Plaintiffs' attempt to use prior injunctive orders to expand the litigation is untenable and would encourage unnecessary appeals. (AB 8-9, 40.) Under that approach, to guard against the improper expansion of litigation, defendants would have to appeal every remedial order and address claims not yet raised. Otherwise, a plaintiff could later use the order to smuggle additional claims into the litigation without meeting established jurisdictional requirements.

Instead, as *Pacific Radiation Oncology v. Queen's Medical Center* explains, a sufficient nexus must exist between the injunctive relief imposed "and the conduct asserted in the underlying complaint." 810 F.3d 631, 636 (9th Cir. 2015). Thus, a court cannot "devise[] a remedy to accomplish indirectly what it…lacks the remedial authority to mandate directly." *Missouri v. Jenkins*, 515 U.S. 70, 92-93 (1995). This Court's recent decision in *LA Alliance for Human Rights v. County of Los Angeles*, 14 F.4th 947 (9th Cir. 2021) (AB 46-47), bolsters this conclusion.

There, this Court confirmed that the district court lacked jurisdiction to grant relief based on new claims because courts "do[] not have the authority to issue an injunction based on claims not pled in the complaint." *Id*. *Rights,* 14 F.4th at 957 (internal markings omitted), citing *Pacific Radiation*, 810 F.3d at 633).)

Reversal is warranted here because the court impermissibly imposed remedies based on new claims not pled in the complaint.

B. The Alleged Instances of Excessive Force and Retaliation Are Categorically Distinct from the Complaint's Allegations and Claims Litigated

The ADA's anti-discrimination and access provision, 42 U.S.C. § 12132, is a general obey-the-law provision that does not authorize the expansion of this action to include claims of retaliation or excessive force. To the extent the court held Defendants waived this argument, it was mistaken (1-ER-65-67) and so are Plaintiffs (AB 47). Defendants specifically argued, both in their opposition and at the hearing below, that Plaintiffs' injunctive request to overtake RJD's security operations was beyond the litigation's scope. (1-SER-189-190; 2-ER-113-117.) Challenges generally are preserved if, as here, the argument is raised sufficiently for the trial court to rule on it. *Ruiz v. Affinity Logistics Corp.,* 667 F.3d 1318, 1322 (9th Cir. 2012). Further, "parties are not limited to the precise arguments…made below;" once an issue or claim is properly before this Court, the Court retains

"independent power to identify and apply the proper construction of governing law…." *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013).

The ADA's anti-interference provision, 42 U.S.C. § 12203(b), was never incorporated into the Remedial Plan and the class claims never encompassed retaliatory or abusive conduct. It is not enough that the operative complaint might assert violations of the same statute (AOB 39, 49); a courts' remedial powers are limited by the nature and extent of the violation initially found to have existed. *Freeman v. Pitts*, 503 U.S. 467, 489 (1992) ("A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial…violation.").[1]

Defendants' stipulation to operate institutional programs and facilities in accordance with the ADA also does not bridge the gap between the class institutional accessibility claims and the injunctive-relief claims based on allegations of excessive force and retaliation. (AB 49 (citing 2-ER-358).) First, the stipulation was designated "For Settlement Purposes Only." (2-ER-364.) And second, the agreement to operate programs and facilities in accordance with the ADA does not encompass instances of retaliatory or abusive staff misconduct. (2-ER-325-341.)

[1] Unable to distinguish *Freeman* and *Missouri* (cited above) and two other cases cited at AOB 29-33, Plaintiffs relegated their response to a footnote calling the cases "irrelevant or unpersuasive." (AB 46 fn.7.) But each case is persuasive authority for the proposition cited.

The new claims are "the same rights under the same laws," as the Plaintiffs assert (AB 46), only at the highest level of generality. Even assuming the newly alleged misconduct was actionable, the court lacked jurisdiction to issue injunctive relief absent a sufficient nexus to the claims initially plead. *See Pacific Radiation*, 810 F.3d at 636.

Plaintiffs contend that the jurisdictional limitations applicable to preliminary injunctions do not apply here because the RJD injunction is permanent, unlike the preliminary injunction cases on which Defendants relied. (AB 45.) But the "standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987). Thus, Plaintiffs' effort to avoid the jurisdictional limitations applicable to both preliminary and permanent injunctions fails. *See id*.

Moreover, a court's "authority to modify an injunction is more limited than its authority to formulate an injunction in the first instance." *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1097-98 (9th Cir. 2021). Modifications are permissible only when a changed condition makes compliance with the existing decree more onerous, unworkable, or detrimental to the public interest. *Id*. And, regardless, the court did not modify a prior order—it issued new injunctive relief. (1-ER-2-79.)

C. The Record Does Not Demonstrate a Sufficient Nexus Between *Armstrong* Members' Use of the Administrative Process and the Asserted Retaliatory and Abusive Conduct

Class members' asserted unwillingness to use the grievance process also does not provide the missing nexus between the ADA institutional-accessibility claims and the First Amendment retaliation and Eighth Amendment excessive-force allegations the court sought to remedy. *Pacific Radiation*, 810 F.3d at 636. While the district court found that inmates feared using the grievance process, it cited no significant change (e.g., a class-wide drop in *Armstrong* grievance submissions) that could justify imposing entirely new relief. (1-ER-19, 22, 43.) *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1073 (9th Cir. 2010) (requiring deference to district court's determination that system-wide relief is required "'[s]o long as [its] conclusion is based upon adequate findings supported by substantial evidence in the record.'"). Nor did the court find that *Armstrong* members used the administrative process less than their non-class member counterparts. *See Am. Unites*, 985 F.3d at 1097-98 (requiring a changed condition negatively effecting compliance with the existing decree), *Fisher v. Vassar College*, 66 F.3d 379, 402, 405 (2d Cir. 1995) (finding clear error where court drew "meaningless" conclusions based on college's treatment of women without a "sex-to-sex" comparison showing differential treatment from men), republished as amended at

70 F.3d 1420, 1446 (1996) (same), en banc decision at 114 F.3d 1332 (1997).[2] Any such conclusion would be untenable because *Armstrong* members used the staff complaint process nearly twice as much as the rest of RJD's inmate population. (4-ER-770-771.)

The court cited statements[3] equivalent to just 3% of RJD's 2019 *Armstrong* population. (1-ER-24, 35, 43; AOB 15.) But these statements were not a random or otherwise statistically representative sampling from which reliable conclusions about the *Armstrong* class could be extrapolated. *Fraihat v. U.S. Immigr. & Customs Enf't*, 16 F.4th 613, 645 (9th Cir. 2021) (court must "tailor a remedy commensurate with the specific violations at issue…and it errs where it imposes a systemwide remedy going beyond the scope of those violations.") (internal markings omitted). The statements instead evinced only a handful of inmates who purportedly feared using the grievance process, while at least half used the process

[2] The en banc decision was abrogated on other grounds in *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 149 (2000), which overruled circuit precedent concerning the burdens of production and presentation of proof in age-discrimination cases.

[3] Only half of the statements were "sworn" (AB 4); the remainder were unsigned by the inmate, contravening 28 U.S.C. § 1746. (6-SER-1426, 1430, 1667 (3 statements); 7-SER-1672 (attaching 12 statements); 10-SER-2435 (attaching 19 statements).) Plaintiffs submitted attorney declarations retelling out-of-court statements, and the court accepted them as true. (*Id.*; 1-ER-31; FER-3-7.)

to address the misconduct alleged in their statements.[4] These inmates pursued 1,100 accommodation requests and grievances and, from 2017 through 2019, submitted progressively more grievances each year. (4-ER-770-846.)

This record demonstrates no widespread fear of using administrative processes to request accommodations.

D. *Sheehan* Also Is Insufficient to Bring the Asserted Retaliatory and Abusive Conduct within the District Court's Purview

Sheehan v. City & County of San Francisco, 743 F.3d 1211 (9th Cir. 2014), also fails to bridge the gap between the relief imposed here and the claims initially raised.[5] (CR 1 (original complaint); 5-SER-1402 (class-certification order); 2-ER-325-41 (operative complaint).)

Plaintiffs misconstrue the Opening Brief to assert that Defendants contested the court's application of *Sheehan* solely because the case "was about arrests, not prisons." (AB 47.) This is inaccurate. Defendants also explained that, even if using force without regard to an inmate's mental illness can constitute disability discrimination, it does not follow that every use of force against an *Armstrong*

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[4] *See* 7-SER-1746-1748, 1766-1767, 1772; 10-SER-2464, 2458-2466, 2502, 2504, 2509, 2513, 2530, 2563; 11-SER-2862, 2888, 2896, 2910-2911, 2954, 2967; 12-SER-3003, 3021-3022, 3046, 3085; 13-SER-3219, 3103, 3116, 3191, 3233, 3294, 3299, 3300, 3314-3315, 3341, 3355, 3404, 3475-3476; 14-SER-3551, 3563, 3574, 3595, 3536; *see also* 9-SER-2368, 2397, 2400.

[5] Plaintiffs concede there are just a few instances grounded only in allegations of excessive force against a disabled person. (AB 49 n. 9.)

member implicates the ADA, or that jurisdiction existed for the court here to consider such a claim. (AOB 37-39.) After all, this action does not concern excessive force, much less using force on disabled inmates without accounting for their mental illnesses. (CR 1; CR 27; 2-ER-325-341.) Mental illness is not even among the disabilities certified for class inclusion. (CR 27.) So *Sheehan* does not support the district court's rationale.

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

E. The District Court Exceeded Its Jurisdiction by Granting Injunctive Relief on New and Categorically Different Claims That Never Were Certified for Class Inclusion

The district court exceeded its jurisdiction by granting injunctive relief on new claims that never were certified to proceed in this class action, and therefore bypassed the required assessment for commonality, typicality, and adequacy. *WalMart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

Plaintiffs erroneously assert that class certification is unnecessary because other cases have affirmed post-judgment orders without certification. (AB 50; 1-ER-190.) None of the cited cases concern the post-judgment incorporation of new claims accompanied by properly raised objections. *See Armstrong v. Brown,* 768

F.3d 975 (9th Cir. 2014) (clarifying obligation under existing remedial plan to investigate and log allegations of noncompliance); *Armstrong*, 622 F.3d 1058 (addressing existing obligations to classmembers housed in county jails; finding Plaintiffs' evidence insufficient to support class-wide relief); *Coleman v. Brown*, 756 F. App'x 677 (9th Cir. 2018) (addressing existing obligation to transfer inmates to a certain level of mental-health care within 24 hours; determining order concerning when the 24-hour clock started was not a new injunction).

Likewise, the compliance order in *Parsons v. Ryan* did not impose relief "in response to new violations," but remedied "the same constitutional violations" on which the parties' stipulation rested. 912 F.3d 486, 501 (9th Cir. 2018). *Parsons* also held that the district court erred by "essentially rewr[iting] the subclass definition" because courts lack authority "to revise, modify, alter, extend, or remake a contract to include terms not agreed upon by the parties." *Id*. at 503 (internal markings omitted).

The district court lacked jurisdiction to impose relief post-judgement to remedy new violations not initially raised.

II. THE INJUNCTION EXCEEDS THE PLRA'S LIMITATIONS

A. Judicial Intervention Was Unnecessary Because CDCR Already Had Undertaken Concerted Corrective Measures and Achieved Substantial Improvements

Plaintiffs misconstrue the record, asserting that "overwhelming" evidence showed a violation of prior court orders and Defendants' staff and experts conceded that only the cited laundry list of remedies could achieve improvements. (AB 3, 29.) Neither is true. Plaintiffs' citations reference the conditions "in late 2018," which was around the time CDCR deployed concerted, self-directed reforms and well before Plaintiffs sought judicial intervention. (*Id*.) The cited testimony stated only that "a problem" existed in Facility C, CDCR voluntarily expended resources to address the problem, and use-of-force incidents decreased "dramatically." (*Id*. (citing 4-SER-931-932).)

1. CDCR implemented significant changes.

Plaintiffs claim CDCR made only "minor" changes in response to the Bishop Report. (AB 5, 13, 50; *but see* 16-SER-4013 (conceding "that's a big list" when just a portion of CDCR's self-directed reforms were described).) The record belies Plaintiffs' claims.

The Bishop Report acknowledged that when the strike team investigated, "numerous positive changes ha[d] already been implemented," including "a complete change in numerous leadership positions." (11-SER-2770-2771; 16-ER-4011-4013.) CDCR also relocated the Associate Warden and Captain's offices to

Facility C, providing direct line-of-sight supervision to the yard and gym and increased interaction with the inmate population. (*Id.*) CDCR monitored staff-complaint allegations and assigned additional staff to clear the backlog, including all allegations of excessive force. (*Id.*) The Bishop Report documented improvements in staff attitude and "evidence of a changing culture." (*Id.*)

CDCR has now installed cameras, and—before Plaintiffs' motion was filed—had taken action to secure funding and placed RJD first on the installation list. (16-SER-4013, 4017-4018; 11-SER-2754 (reactivation of existing cameras); 2-ER-171 (pandemic-caused delay).) CDCR also implemented numerous other changes consistent with the Bishop recommendations. Additional follow-up investigations and interviews were conducted, at least eight staff members were reassigned to the mailroom, and other employees were terminated. (16-SER-4029-4031; 11-SER-2754.)

Notably, the Bishop Report did not call for "increasing the number of sergeants," as Plaintiffs claim. (AB 13.) The report recommended an "[i]ncreased supervisory and managerial presence on Facility C" and that the Program Support Unit "*determine whether staffing supplementation is indicated.*" (11-SER-2771 (underline added).) CDCR followed this recommendation and the Program Support Unit determined no additional staffing was needed. (16-SER-4035-4038.) Despite the Bishop Report's focus on Facility C and deference to the Program Support

Unit's determination, the district court construed that recommendation as a license to mandate additional sergeants on all RJD facilities. (1-ER-58-59.)

The record contravenes the district court's finding that managerial presence was not increased. (1-ER-17.) CDCR recruited over a dozen experienced leaders and subject-matter experts to mentor, train, and assist staff, eliminate staff misconduct, and promote accountability. (2-ER-201-203, 207-209; 16-SER-4012-4015, 4035 ("providing training and extra supervision"); 4-SER-910-915, 999.) The ADA Coordinator and a use-of-force analyst also received specialized assistance. (*Id.*)

Cultural leadership training was provided to managers and key supervisors, and the Reception Center Associate Director separately met with the Chief Deputy Warden, Associate Wardens, and Captains to discuss the need for cultural understanding and professionalism. (2-ER-199.) Ombudsmen were directed to address specific areas of concern and report back to the director. (16-ER-4012.) CDCR also adjusted staff assignments and programming to stagger inmate releases and create a greater supervisory presence during mass movements and meals. (2-ER-199-200, 206-07.)

Substantial training was provided. (4-ER-731-732; 2-ER-186-188, 199, 207-209; 16-SER-4012-4013, 4043-4046.) CDCR trained managers and staff, monitored uses of force, and addressed the staff-complaint backlog and all

allegations of excessive force. (16-SER-4012-4013.) Expectations were conveyed to managers in writing. (16-ER-4012.) Weekly or bi-weekly meetings were implemented to improve communication and provide additional training and guidance. (*Id.;* 16-SER-4043-4046; 2-ER-186-188, 209.)

An electronic Case Management System was implemented to provide a real-time repository and data-entry system to track and maintain investigation requests, results, and outcomes. (2-ER-202-203.) Significant changes were made to Facility C's grievance-collection process, changing out the lockboxes and using independent staff to collect grievances. (2-ER-207; 16-ER-4046.) CDCR also restricted access to blind spots in the facility. (16-SER-4035-4038.)

Changing Facility A to a non-designated facility reduced victimization violence by inmates. (16-ER-4015.) And RJD continued its existing staff-uniform enforcement, aided by regular staff meetings. (16-SER-4040-4043; *see also* 11-SER-2765 (Bishop Report: observing no improper uniforms).)

CDCR implemented substantial changes to address RJD's staff culture. (6-ER-1474.) Officer dismissals more than quadrupled, referrals for criminal prosecution tripled, and disciplinary suspensions increased. (2-ER-205-206; 1-SER-27.) Although some failures are always expected during periods of change, CDCR achieved substantial and ongoing improvements. (6-ER-1583.)

Citing the district court's finding that the Allegation Inquiry Management Section (AIMS) was "unlikely to be a panacea" because it did not encompass all reasonable-accommodation and discrimination complaints, Plaintiffs argue that AIMS is ineffective. (AB 30-31.) AIMS comprised just a sliver of CDCR's investigative process. Grievances alleging misconduct sufficient to warrant an adverse action or a criminal filing were referred to the Office of Internal Affairs for investigation. (2-ER-181.) If the reviewing authority lacked even a reasonable belief that misconduct had occurred, AIMS would take a second look at the grievance. (2-ER-181; 4-ER-757-760.)

Although California's Office of the Inspector General (OIG) identified multiple areas for improvement of the AIMS process (AB 31), such a finding does not necessitate judicial intervention. (*See* AOB 59.) AIMS was implemented in 2020 amid the global pandemic. (4-ER-757.) As with any new process, refinements are ongoing—and the OIG's feedback is an integral part of California's internal oversight process. Cal. Pen. Code §§ 6125-41.

2. The district court clearly erred by using statistical calculations that cannot support the conclusions drawn.

The district court clearly erred by employing calculations that were not probative to the conclusions drawn about the use-of-force trends or the effectiveness of CDCR's concerted reforms. (1-ER-450-1.) *Fisher*, 66 F.3d at 402-05 (finding clear error where analysis relied on statistical fallacies and failed to

conduct apples-to-apples comparison). Using the proper analysis to make a like-to-like comparison, the data shows that incidents involving force decreased prison-wide. (AOB 40-42.) But the court instead relied on Plaintiffs' faulty analysis, which improperly discounted the period following CDCR's implementation of concerted remedial efforts in the fall of 2018, and ignored significant population increases.[6] (1-ER-45; 2-ER-694-695.) Plaintiffs do not reasonably contest either deficiency. (AB 51-52.)

Despite the demonstrated decrease in incidents (AOB 40-42), the court nonetheless credited Plaintiffs' assertion that Facilities A and D experienced 15% and 50% increases in use-of-force incidents. (1-ER-45.)

Had the court made per capita calculations (which provide an apples-to-apples comparison of the number of incidents in relation to the number of inmates) following CDCR's concerted reforms, it would have found that the number of incidents involving force actually decreased on every facility. (AOB 40-43 (showing per capita decreases on Facilities A and D—the two facilities cited as having increased incidents); 4-ER-694-695 (showing 9 fewer incidents on Facility

[6] The *Armstrong* population increased, and came to comprise a greater portion of the RJD population, during this period. (4-ER-770 (*Armstrong* population increased from 1,882 to 1,977).)

A in 2019), 770; 1-SER-186-7.)[7] The court nonetheless concluded that CDCR's reform efforts on Facilities A and D were ineffective and judicial intervention was needed. This use of statistics was misleading and improper.

Plaintiffs' defense of the district court's findings falls short: the bare reiteration of the court's statistical analysis misses the mark, as do their assertions that Defendants failed to show clear error, made statistical calculation errors, and waived the argument below. (AB 51-52.) A minor labeling error in two Opening Brief footnotes explaining the calculations (which inadvertently called Facility A

[7] Had Defendants sought to present calculations anew, as Plaintiffs argue (AB 52), data specific to *Armstrong* members would have been used, which show even greater decreases:

TABLE B: USE-OF-FORCE INCIDENTS INVOLVING *ARMSTRONG* MEMBERS				
	Column A	Column B	Column C	Column D
	RJD *Armstrong* Population	Incidents involving *Armstrong* members	Incidents Relative to Class Size $[\frac{Column\ B}{Column\ A}]$	Per Capita Percent Change $[\frac{Column\ C_{(2019)} - Column\ C_{(year\ x)}}{\lvert Column\ C_{(year\ x)} \rvert}]$
2017	1,661	82	.0494	[*baseline*]
2018	1,882	80	.0425	[*baseline*]
Fall 2018-corrective measures implemented				
2019	1,977 • *19% increase from 2017.* • *5% increase from 2018.*	50	.0250	• **50% per capita decrease from 2017.** • **41% per capita decrease from 2018.**

(4-ER-770 (data Columns A and B).)

and D populations "class members" instead of inmates (AOB 42 fns. 9-10)), affected neither the calculations nor analysis. Defendants' analysis was sound and it appropriately added the population data missing from Plaintiffs' analysis:

> Facility A had 53 reports with 716 ~~class members~~ *inmates* in 2018 (a rate of 0.0740) and 44 reports with 694 ~~class members~~ *inmates* in 2019 (a rate of 0.0634). This represents a 14% decrease (or $\frac{0.0634-0.0740}{|0.0740|}$).
>
> Facility D had 20 reports with 831 ~~class members~~ *inmates* in 2018 (a rate of 0.02406) and 21 reports with 876 ~~class members~~ *inmates* in 2019 (a rate of 0.02397). This represents a 0.37% decrease (or $\frac{0.02397-0.02406}{|0.02406|}$).

(AOB 42 (strikethrough indicates corrections), 4-ER-694-695, 726.)

The Answering Brief reiterates Plaintiffs' flawed statistical analysis and accuses Defendants of not presenting "their data" in the same manner below. (AB 51-52.) No waiver occurred. Plaintiffs first presented their flawed statistical analysis with their reply below (4-ER-694-695), and Defendants properly objected. (4-ER-146-147, 224; 1-SER-7-15; FER-3-7). Defendants also told the court to focus on the period following CDCR's concerted reforms and objected to Plaintiffs' misleading analysis. (4-ER-694-95, 770; *see also* 2-ER-119 (objecting that CDCR effected improvements prison-wide), 119-120 (acknowledging "reductions of numbers" of complaints and use-of-force incidents), 121-122 (objecting that Plaintiffs' "misleading" analysis ignored that "use of force incidents did decrease," citing specific examples).)

While the court allowed supplemental briefing, it severely limited what Defendants could raise. (1-ER-160 ("I don't need to hear anymore argument about legal issues.").) Although Defendants did not receive a fair chance to address Plaintiffs' faulty calculations, their arguments are not new because Defendants properly objected below. *See Ruiz,* 667 F.3d at 1322. Defendants did not have to correct Plaintiffs' calculations to illustrate their errors: Defendants' burden was met by objecting to Plaintiffs' late evidence and faulty analysis. *Ruiz,* 667 F.3d at 1322; *Thompson*, 705 F.3d at 1098.

Defendants did not artificially "inflate" their calculations by counting actual inmates instead of using daily averages. (AB 52.) First, Plaintiffs fail to show why counting each inmate might constitute error. And second, because per capita calculations essentially compare ratios, using actual numbers does not improperly "inflate" the calculations.

CDCR's reforms decreased the number of use-of-force incidents by well over 30%. (4-ER-695, 770; AOB 40-42.) This change is significant: Plaintiffs' own expert cited a 30% drop in use-of-force incidents at a problem facility as an indicator of success. (6-ER-1622-1623; 4-ER-849; 2-ER-122.) The district court clearly misinterpreted the data and failed to acknowledge the significant improvements that CDCR achieved.

Had the court accounted for the increasing inmate population, its calculations would have shown that incidents involving force decreased across the board. (AOB 40-42.) Even if the district court was correct in finding that uses of force in Facilities A and D actually increased, then the court clearly erred by not tailoring its reforms to these facilities and instead imposing prison-wide relief. (1-ER-45.)

B. The Injunction Did Not Meet the PLRA's Needs-Narrowness-Intrusiveness Requirements

The district court clearly erred by undertaking a broad judicial takeover after CDCR already had acknowledged the misconduct, taken action, and made substantial and ongoing progress in returning RJD to a healthy staff culture.

The district court's broad and cumulative reforms failed to meet the PLRA's needs-narrowness-intrusiveness mandate. 18 U.S.C. § 3626. Plaintiffs disregard this standard by focusing on evidence post-dating this appeal and arguing that some of the court-ordered reforms are now successfully implemented. For example, Plaintiffs argue that cameras, particularly body-worn cameras, have an "extensive ability" to capture interactions and the court expert "noted their efficacy in improving interactions between incarcerated people and officers." (AB 57-58.) Whether the parties, stakeholders, or the court's expert appreciate the cameras is not at issue; as explained, CDCR was planning to install fixed cameras but for the pandemic's disruption to the state budgetary process. (16-SER-4013, 4017-4018; *see also* 11-SER-2754; 2-ER-171.)

Plaintiffs' assertion that the court-appointed expert found that the reforms "reduced disability discrimination" is not supported by the record.[8] (AB 35 (citing RJN, Ex. D).) The expert merely commented about camera use, noting anecdotal hearsay evidence from an unidentified number of class members who opined that incidents involving force had decreased, staff became less concerned about false accusations of misconduct, and the "tenor of communications" improved. (*Id.*) None of the cited findings concern "disability discrimination" or purport to address the structural-barrier and program-accessibility claims properly before the court. (*Id.,* Ex. D, pp. 3-4 ("This…report is…somewhat anecdotal.").)

The issue here is whether the district court could mandate cameras and numerous other detailed requirements. Critically, none of the supplemental data proves that *Armstrong* members achieved increased access to programs and services. (*See generally* AB; *see also* 2-ER-116-117.) To the extent these court-imposed remedies reduced incidents of excessive force—which has not been shown—Plaintiffs still failed to show that the reforms were necessary to remedy their structural-barrier and program-access claims, as this ADA suit originally intended. 18 U.S.C. § 3626(a)(1)(A). Thus, none of Plaintiffs' after-the-fact

[8] Defendants' objection that this evidence is not properly considered here, remains pending. (ECF No. 35.)

assertions support the order challenged here.[9] (AB 57-59, 61.) Rather, the injunction aimed to remedy alleged incidents involving force and retaliation that are fundamentally different from the class allegations about systemic deficiencies in operating programs, activities, services, and facilities under the ADA.

As explained in the Opening Brief and Argument Section II.A above, broad judicial intervention was unnecessary. Preventing misconduct, promoting accountability, evidence gathering, and enforcement (AB 56), did not require the extensive remedies imposed. (*Id.*; 6-SER-1622-1623.) This is because CDCR's self-directed reforms achieved substantial improvements (AOB 40-43), and the route to effecting change is not limited to a single path. (6-ER-1585; 4-ER-911-916.)

Plaintiffs' own expert opined that "basic and fundamental" changes can be "highly effective." (6-SER-1622-1623; 4-ER-849.) He described a system of mentoring, training, and promoting accountability that did not include the cameras and other extensive reforms ordered here—which he touted as extremely successful means of implementing change. (*Id.*) CDCR's concerted self-directed

[9] Plaintiffs assert that cameras were "so successful that Defendants have since stated that they plan to roll out cameras to all prisons." (AB 14.) But CDCR already had committed to installing cameras in prisons across the state. (CR 3110, p.15; CR 3170-1, pp. 123, 129-130, 164-165.) This was not, as Plaintiffs assert, a "vague intention." (AB 57.) Before Plaintiffs sought relief, CDCR sought funding and placed RJD first on the installation list, only to be delayed by a global pandemic. (16-SER-4013, 4017-4018; *see also* 11-SER-2754; 2-ER-171.)

reforms mirrored this approach and achieved substantial improvement. (*See* Argument, Sections I, II.A; 4-ER-730-732, 741-742.)

The court-imposed remedies were not narrowly tailored. *See Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) ("an injunction must be narrowly tailored to give only the relief to which plaintiffs are entitled"). The court piled on remedy after remedy—both fixed and body-worn cameras; pepper-spray policy reforms; duplicative training requirements; blanket staffing mandates; changes to investigation, discipline, and staff-complaint processes; and oversight and information sharing—all aimed to correct the same purported violation (individual acts of staff misconduct) by increasing accountability. (1-ER-13, 20-21, 38, 51-55, 58-60, 71; AB 4, 61.)

Plaintiffs simultaneously fault Defendants for evaluating the court-imposed reforms individually and object to their comprehensive analysis concerning the reforms' cumulative effects. (AB 34, 64.) Both objections lack merit. While courts must evaluate injunctive relief as a whole, there is no bar against also considering each individual remedy's fit within the statutory needs-narrowness-intrusiveness mandate. For good reason: each item on the laundry list of court-imposed remedies informs the analysis of whether the injunctive relief as a whole was necessary, overbroad, or intrusive. Plaintiffs acknowledge as much by separately defending each remedy. (*See* AB 57-63.)

Defendants explained below that the court-ordered reforms contravened the PLRA and overlapped with CDCR's existing procedures and concerted reforms, which already had improved RJD's staff culture (1-ER-197-206; 2-ER-119-121). This was just another way of saying that the remedies were cumulative and unnecessary. (*Id.*) In any event, once an issue or claim is properly before the Court, the Court is not limited to the exact legal theories advanced below. *Thompson*, 705 F.3d at 1098. Defendants did not forfeit their ability to comprehensively assess the reforms simply because they did not use the word "cumulative" below. (AB 36.)

The cumulative court-imposed reforms aim to address the same root cause: establishing accountability for staff misconduct. (1-ER-73; AB 4.) Plaintiffs erroneously assert these remedies are acceptable because they address different aspects of the "root cause," to include gathering different types of evidence, holding officers accountable, preventing misconduct through staffing and training, and ensuring the remedies are effectively implemented. (AB 56.) But court-ordered reforms are limited to that which is necessary to correct a particular federal violation, is narrowly drawn, and is the least intrusive means necessary. 18 U.S.C. § 3626(a)(1)(A).

Plaintiffs' reliance on *Plata's* multifaceted approach (AB 56), also is misplaced. *Plata* likened the violation to "a spider web, in which the tension of the various strands is determined by the relationship among all the parts of the web, so

that if one pulls on a single strand, the tension of the entire web is redistributed in a new and complex pattern." *Brown v. Plata*, 563 U.S. 493, 525 (2011) (internal markings omitted). No such finding was made here. (*See* 1-ER-73 (attributing the misconduct to "a persistent failure to adequately supervise and hold RJD staff accountable").)

The remedies are cumulative. For example, fixed cameras, body-worn cameras, training mandates, and increased supervision all aimed to deter staff misconduct. (9-SER-2305; 6-SER-1653; 1-ER-42, 51-53, 57, 73; AB 56.) Likewise, fixed cameras, body-worn cameras, investigative reforms, and training mandates all aimed to document evidence and promote thorough investigations and accountability. (1-ER-20, 42, 45, 51-53, 55-56, 73; AB 32-34, 53, 56.) These disruptive, intrusive, cumulative, and non-deferential remedies contravene the PLRA.

If some remedy were necessary—which Defendants do not concede—the injunction should have started and ended with monitoring CDCR's ongoing efforts, or installing only stationary cameras. (9-SER-2305 (estimating security footage would definitively aid over 75% of investigations).) Instead, by imposing cumulative reforms—several which CDCR had already independently employed or committed to adopt—the court needlessly interfered with prison administration and

extended relief far beyond the "least intrusive means necessary." 18 U.S.C. § 3626. (1-SER-197-198.)

Plaintiffs baldly assert that the court did not micromanage prison operations because "substantial leeway" remained for Defendants to design and implement the remedial plan. (AB 54.) They are mistaken. *Armstrong*, 622 F.3d at 1070 (mandating that court-directed reforms have "the minimal impact possible" on defendants' discretion over policies and procedures). The court impermissibly dictated the minutia of prison management, requiring, for example:

- Fixed cameras covering "*all areas*…to which class members have access";
- Body-worn cameras "for all officers…who *may* have *any* interactions with class members";
- *Indefinite* retention of *all* video footage involving class members that contains *any* use of force or triggering event, without exception, and without regard to whether a putative federal violation involving a class member occurred;[10]
- Reassignment of officers merely *accused* of serial violations, regardless of whether misconduct actually occurred;
- Investigation reforms directing how often Defendants must interview inmates and which questionnaire be used;
- Extensive training requirements without regard to the training already provided; and

[10] Regardless of any party negotiations, the indefinite-retention order is not moot: it still stands and the district court may find it lacks jurisdiction to substantively modify the injunction pending appeal.

- Blanket supervisory staffing requirements including posting additional sergeants on all yards prison-wide, during all shifts.

(1-ER-4-6 (emphases added), 58-59.)

Were injunctive relief necessary, it could be achieved with less court involvement. *Armstrong*, 622 F.3d at 1070. That CDCR already had committed to installing fixed cameras, and remained committed to installing them after an initial delay caused by the pandemic (16-SER-4013, 4017-4018; 2-ER-171), shows that judicial intervention requiring installation on a shorter schedule was unnecessarily intrusive.

The reforms here cannot be justified simply by asserting that Defendants were "not yet in compliance" despite prior "attempted various iterations of remedial measures that are narrower and less intrusive than the ones now ordered." (1-ER-75; AB 54.) Staff misconduct incidents of excessive force and retaliation never were previously pled, raised, or litigated in this action. Moreover, CDCR's self-directed reforms, undertaken before Plaintiffs sought judicial relief, achieved more than a 30% drop in use-of-force incidents—a result Plaintiffs' own expert deemed a success when it occurred under his watch. (6-ER-1622-1623; 4-ER-849; 2-ER-122.) The district court clearly erred in deeming CDCR's efforts a "wait-and-see" approach and failing to acknowledge the substantial improvements already achieved and, if more was necessary, failing to at least implement graduated reforms. (1-ER-48.)

III. PLAINTIFFS' FOOTNOTED REQUEST FOR CONSOLIDATION IS IMPROPER

Answering Brief footnote 15 references *Armstrong v. Newsom* (9th Cir. No. 21-15614) and improperly requests that "the two appeals be heard as one." Consolidation should be requested via a properly noticed motion, not in a conclusory footnote. *See, e.g., Rodriguez v. Airborne Express*, 265 F.3d 890, 894 n.2 (9th Cir. 2001) (footnote was insufficient to raise argument). Moreover, consolidation would not serve judicial economy here. The two appeals concern different prisons, raise distinct legal arguments, and are grounded in different record evidence. Defendants oppose consolidation.

CONCLUSION

This Court should reverse the order imposing injunctive relief at RJD. The court exceeded its jurisdiction when imposing relief based on claims never pled or certified to proceed in this class action. Alternatively, the district court erroneously undertook a broad judicial takeover after CDCR already acknowledged the misconduct, took action, and achieved significant and ongoing progress in improving staff culture. Reversal also is appropriate because the unnecessary, cumulative, and overly intrusive reforms contravene the PLRA's needs-narrowness-intrusiveness mandate.

Dated: December 17, 2021

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