Case No. 20-16921

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

This appeal and a related appeal pending before the Court concern the most violent and harmful chapter in Appellants-Defendants' ("Defendants") decades-long history of discriminating against a certified class of people with disabilities incarcerated in the California Department of Corrections and Rehabilitation ("CDCR").

The undisputed record here shows that—in violation of multiple prior orders of the district court enforcing the Americans with Disabilities Act ("ADA") and Rehabilitation Act ("RA")—correctional officers at R.J. Donovan Correctional Facility ("RJD") in San Diego, California have been engaged in a pervasive campaign of discrimination and abuse against class members. Officers have thrown people out of wheelchairs, punched a deaf person who could not hear a spoken order, attacked people when they ask to be handcuffed in front of their bodies so they can use their walkers, beat a person who requested help carrying a heavy package, and intentionally closed cell doors on people who walk slowly. The record is replete with broken bones, shattered teeth, and bloodied faces. Officers, through their violence and retaliation against those who complain about this abuse, have created such a fearful environment that class members often refrain from requesting essential disability accommodations—for example, pen and

paper for a deaf person to communicate or a shower after a disability-related incontinence incident.

Plaintiffs-Appellants ("Plaintiffs") began informing Defendants of this crisis at RJD in 2016. In 2018, Defendants' own senior officials repeatedly sounded the alarm, reporting that officers were targeting people with disabilities for abuse and engaging in "gang-like activity." The Chief Ombudsman, who works directly for the CDCR Secretary, wrote in December 2018 that she had "never heard such despair, hopelessness and fear from inmates." These senior officials insisted Defendants immediately investigate the dozens of specific misconduct allegations, install surveillance cameras, and increase the number of sergeants at RJD.

Defendants did none of those things. Officers at RJD continued to discriminate against, abuse, and terrorize class members with impunity.

Confronted with Defendants' inaction, Plaintiffs filed a motion to enforce and modify the district court's prior orders. Relevant here, as remedies for Defendants' serious violations of the ADA, the court had previously ordered Defendants to refrain from discriminating against the class (in 1996 and 2007), provide a disability grievance process (in 1996, 2001, and 2007), and hold correctional officers accountable for violating class members' ADA rights (in 2007 and 2012). The court also retained jurisdiction to enforce Defendants' plan for ADA compliance, the *Armstrong* Remedial Plan ("ARP"). As this Court noted in

2014, these multiple orders aimed at remedying the same egregious violations were necessary because Defendants had "resisted complying with [their] federal obligations at every turn." *Armstrong v. Brown*, 768 F.3d 975, 986 (9th Cir. 2014) (quotation marks and citation omitted).

After carefully weighing the largely-undisputed evidence, the district court issued a 72-page order finding that Defendants were still violating each of those clear, court-ordered obligations. The record overwhelmingly supports all of the court's findings. Defendants' own staff, person-most-knowledgeable, and expert all admitted that there were serious violations of class members' rights at RJD. The district court also relied on unrebutted declarations from Plaintiffs' well-respected correctional experts, who confirmed that officers at RJD were targeting people with disabilities for misconduct and were causing injuries far outside the norm; that Defendants' system for holding officers accountable was broken; and that Defendants disciplined officers only in the rare circumstances where misconduct was corroborated by video evidence or staff reports. Eighty-seven graphic declarations from incarcerated people describe over one hundred incidents where officers at RJD violently discriminated and retaliated against people with disabilities. The declarants also describe the many disability accommodations they were denied, were afraid to request, and suffered without to avoid retaliation from officers at RJD. Defendants did not submit a scintilla of evidence to challenge

even one of the declarations, which are, in many instances, corroborated by sworn witness statements, medical records showing horrific injuries caused by the officers, and video evidence. The district court rightly found the declarations to be credible.

As a remedy for Defendants' noncompliance, the court ordered Defendants to develop a plan to address what the court identified as the "root cause" of the violations at RJD: Defendants' longstanding and systematic failure to hold officers accountable for violating class members' rights. The court instructed Defendants that their plan should include certain measures—including fixed surveillance and body-worn cameras, reforms to the staff investigation and discipline process, and increased supervisory staffing at RJD—that the court found necessary and narrowly tailored to address Defendants' ongoing violations.

In the face of this evidence, Defendants present three arguments on appeal, none of which warrants reversal of the district court's careful, well-supported orders. First, Defendants assert that the court had no power to address Defendants' use of excessive force and retaliation to deprive class members of their rights, because (according to Defendants) those issues are outside the scope of this case. Not so. As the district court correctly recognized, the orders here address issues at the heart of the operative complaint, the ARP, and every prior order in this case: Defendants' ongoing discrimination against and failures to accommodate people

with disabilities. There is no "too-violent-to-remedy" defense available. Defendants cannot plausibly claim that the district court had authority to prevent them from denying class members accommodations gently but not from doing so violently. The court acted within its authority in issuing the orders on appeal to address Defendants' failures to comply with the ADA and the court's previous remedial orders.

Second, the district court did not err in finding that the minor changes Defendants implemented at RJD were insufficient to remedy the ongoing violations. The court considered those marginal reforms and gave Defendants every opportunity to show that they were sufficient. It found, however, that Defendants' limited efforts were inadequate based on voluminous evidence, including admissions from Defendants of the ongoing problems at RJD and declarations describing numerous violations in 2020 (after Defendants had implemented their purported reforms). In addition, in July 2020, the court found that officers' retaliation against two declarants at RJD was so severe as to require a preliminary injunction transferring them to different facilities for their safety. Defendants' assertion that the court misunderstood statistics showing ongoing violations at RJD is incorrect and insufficient to show clear error.

Third, the relief granted by the district court fully complies with the Prison Litigation Reform Act ("PLRA"). The court made detailed findings justifying the

various measures that it required Defendants to include in their plan and allowed Defendants to craft the specific shape of the reforms. Many of Defendants' challenges to those measures are forfeited, and all are meritless. The remedial provisions that the court adopted are necessary to effectuate the ADA and the court's prior orders, and will have minimal impact on Defendants' operations. That is why Defendants never sought a stay of the orders, and have now finalized and implemented most of their plan to comply—including fixed-surveillance cameras, body-worn cameras, additional sergeants, and other measures at RJD that they object to here. The Court Expert in this case reports that these changes have reduced violations of class members' rights at RJD.

The Court should reject Defendants' challenges and affirm.

JURISDICTIONAL STATEMENT

Plaintiffs agree with Defendants' jurisdictional statement.

STATEMENT OF THE CASE

I. DEFENDANTS HAVE REPEATEDLY FAILED TO MEET THEIR OBLIGATIONS UNDER PRIOR COURT ORDERS, THE ARP, AND THE ADA

Plaintiffs filed this case in 1994 on behalf of "a class of all present and future California state prison inmates and parolees with certain disabilities." *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1063 (9th Cir. 2010). The operative Third Amended Complaint alleges that Defendants were violating the ADA, 42 U.S.C. §§ 12131 *et seq.*, and Section 504 of the RA, 29 U.S.C. § 794, by failing to

accommodate and discriminating against people with disabilities.[1] *See, e.g.*, 2-ER-326, 335-41 (alleging Defendants "discriminate against plaintiffs … by reason of their disability" and "do not … reasonably accommodate individuals with disabilities").

In 1996, the parties stipulated to facts establishing that Defendants were violating the ADA, so long as the district court determined that the ADA applied to Defendants. 2-ER-354 to 3-ER-383. Thereafter, the district court held, in a decision affirmed by this Court (and with which the Supreme Court later agreed), that the ADA applies to state prisons. 2-ER-342-45 ("1996 Order"); *see Armstrong v. Wilson*, 942 F. Supp. 1252 (N.D. Cal. 1996), *aff'd*, 124 F.3d 1019 (9th Cir. 1997); *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206 (1998). The court then ordered Defendants to develop plans to ensure that they complied with the ADA and retained jurisdiction for enforcement. 2-ER-346-53.

Defendants developed the *Armstrong* Remedial Plan ("ARP") to comply with the court's orders. 2-ER-260-324. The ARP incorporates the ADA's anti-discrimination and access provision, 42 U.S.C. § 12132, 2-ER-266; provides that Defendants' policies are intended "to assure nondiscrimination against

[1] "The [ADA and RA] provide identical remedies, procedures and rights." *Vos v. City of Newport Beach*, 892 F.3d 1024, 1036 (9th Cir. 2018) (quotation marks omitted). Plaintiffs refer in this brief only to the ADA.

inmates/parolees with disabilities," 2-ER-266; requires Defendants to provide reasonable accommodations to class members, 2-ER-272; and establishes a disability grievance process, 2-ER-301-06. The court issued an order requiring Defendants to comply with the ARP, and again retained jurisdiction for enforcement. 5-SER-1397-99.

In 2001, the district 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. 2-ER-253-59.

Despite the court's clear guidance, Defendants failed to meet their obligations under the 1996 Order, 2001 Order, and ARP. In 2006, Plaintiffs presented evidence that Defendants were failing to provide wheelchair users accessible bathrooms; clustering class members in overcrowded and cockroach-infested dormitories; assigning people who cannot climb stairs to cells on upper tiers; denying deaf people sign language interpreters for important hearings and medical appointments; confiscating canes and walkers without justification; and failing to provide prompt and equitable responses to disability-related grievances. 5-SER-1269-73, 1277-78, 1282-85.

To remedy Defendants' ongoing noncompliance, the district court issued another injunction ("2007 Order") mandating, *inter alia*, that Defendants "develop a system for holding [staff] accountable for compliance with the [ARP] and the

orders of this Court." 2-ER-248. The system had to "track the record … of individual staff members who are not complying with" prior orders and the ARP. *Id.* The court mandated that "Defendants … refer individuals with repeated instances of non-compliance to the Office of Internal Affairs for investigation and discipline, if appropriate." *Id.* The court also required Defendants to provide sufficient staff to ensure timely responses to disability-related grievances. 2-ER-249. Lastly, the court ordered Defendants to comply with various sections of the ARP, including Section I (incorporating 42 U.S.C. § 12132), Section II.F (requiring provision of reasonable accommodations), and Section IV.I.23 (providing for a disability grievance process). 2-ER-250.

In 2012, Plaintiffs moved to hold Defendants in contempt of the 2007 Order based on undisputed evidence of Defendants' abject and ongoing failures to comply with their obligation to hold their staff accountable. 5-SER-1174. Plaintiffs presented evidence that Defendants failed to adequately investigate and discipline staff for housing class members with mobility disabilities in unsafe housing; seized hearing aids and failed to provide sign language interpreters; and forced people with disability-related incontinence to sit in soiled diapers and clothing. 5-SER-1177-82; 2-ER-228-30.

The district court concluded that Defendants' "accountability system, with which they do not dispute they have failed to comply, has not been effective." 2-

ER-232-33. "[I]n an abundance of caution," the court refrained from holding Defendants in contempt, and instead modified the 2007 Order to clarify Defendants' obligations. 2-ER-233. The court required, *inter alia*, that Defendants log all allegations of noncompliance, initiate investigations within 10 days of discovery, track prior allegations of noncompliance against staff, provide Plaintiffs with documents underlying investigations, and discipline staff who engage in misconduct. 2-ER-237-39. 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." 2-ER-228. This Court affirmed the district court's order with the exception of one provision not relevant here. *See Armstrong v. Brown*, 768 F.3d 975 (9th Cir. 2014).[2]

II. DEFENDANTS HAVE KNOWN SINCE 2016 THAT RJD OFFICERS WERE VIOLATING PRIOR COURT ORDERS, THE ARP, AND THE ADA

Beginning in 2016, Plaintiffs started notifying Defendants of reports that officers at RJD were violating prior court orders, the ARP, and the ADA by

[2] The district court has issued other enforcement orders in this case, all intended to cure Defendants' violations of the ADA and ARP. *See, e.g.*, 5-SER-1287-1394 (discrimination against parolee class members, including class members being forced to crawl up stairs to parole hearing); 5-SER-1233-47, 1185-1227 (inaccessible housing of parolees in county jails); 5-SER-1228-32, 1147-71 (failures to provide sign language interpreters and accessible housing).

engaging in serious and violent discrimination against *Armstrong* class members. 1-ER-13 (citing 15-SER-3794-95, 3801-08, 3824-27, 3836-40).[3]

In August 2018, Plaintiffs' counsel and auditors from Defendants' Office of Audits and Court Compliance ("OACC") conducted a joint tour at RJD to review Defendants' compliance with the ARP. 1-ER-13-14 (citing 4-SER-816-17, 847-48). After the tour, OACC reported to high-ranking CDCR administrators that class members made consistent allegations of "staff members forcefully removing some inmates from wheelchairs; staff members assaulting inmates that were already secured with restraint equipment; and inmates being accused of assaulting officers when … it was the staff member who had assaulted the inmate." 1-ER-14 (quoting 4-SER-847). OACC instructed Defendants to investigate the allegations of misconduct, develop a "Corrective Action Plan," and "promptly take all reasonable actions to ensure that these incidents do not occur in the future." *Id*.

[3] The Office of the Inspector General ("OIG") had been reporting similar abuses at other prisons. Following a 2015 OIG report detailing staff misconduct at High Desert State Prison ("HDSP"), Plaintiffs filed a motion to compel the OIG to produce information related to its report, resulting in the issuance of a stipulated protective order. *See* 4-SER-835, 1037-53; 5-SER-1135-41. Defendants ultimately implemented remedial measures at HDSP, including surveillance cameras, which were shown to improve conditions. *See* 4-SER-1055-57; 5-SER-1121-22. The OIG also issued a 2019 report outlining Defendants' biased investigations of class member allegations of discrimination and abuse at Salinas Valley State Prison. 4-SER-1059-69.

Defendants never drafted a Corrective Action Plan. 1-ER-14-15 (citing 4-SER-900).

In December 2018, Defendants sent a strike team to investigate the reports from OACC. 1-ER-15 (citing 11-SER-2760-62). Associate Warden Bishop, who led the team, wrote a report ("Bishop Report") summarizing their findings generated primarily from interviewing 102 incarcerated people on Facility C, one of the five yards at RJD.[4] *Id*. Interviewees consistently reported that RJD staff specifically targeted for abuse people with disabilities or other vulnerabilities. 1-ER-15 (citing 11-SER-2763-68). They further reported that RJD staff engaged in widespread "gang-like behavior." *Id.*; *see also* 11-SER-2760 (reporting "gang-like activity"). Interviewees also reported that officers hired incarcerated people to assault other incarcerated people and retaliated against those who reported misconduct by further abusing them or by making false allegations against them so they were subject to discipline. 1-ER-15 (citing 11-SER-2763-68).

The Bishop Report recommended prompt investigation into 48 "actionable" allegations of misconduct reported by incarcerated people. 1-ER-15 (citing 11-SER-2773-76); *see also* 11-SER-2771. The Bishop Report also recommended remedial actions, including immediately installing surveillance cameras,

[4] Defendants did not produce the Bishop Report to Plaintiffs until January 2020 and only then in response to Plaintiffs' formal discovery requests. 1-ER-18.

conducting an investigation into the existence of criminal officer gangs, and increasing the number of sergeants. 1-ER-17 (citing 11-SER-2771-72). Defendants did not follow any of the recommendations. 1-ER-16-17 (citing 4-SER-913-14; 16-SER-4029-30, 4035); *see* 16-SER-4036.

The Chief Ombudsman for CDCR was part of the strike team. She wrote in an email to high-level CDCR administrators:

> [W]hat we heard was overwhelming accusations of abuse … with [supervisors] looking in the other direction. *I have never heard accusations like these in all my years…. This is a very serious situation and needs immediate attention. If there is any means of installing cameras immediately I would strongly suggest it ….*

1-ER-16 (citing 4-SER-850-53) (emphasis added). The Chief Ombudsman added the next day that she had "never heard such despair, hopelessness and fear from inmates." 4-SER-851-52.

In January and February 2019, investigators conducted interviews with some of the incarcerated people who reported "actionable" allegations to the strike team. 1-ER-18 (citing 11-SER-2778-95). The investigators concluded that the majority of allegations of misconduct were being made by "wheelchair designated inmates" or people with severe mental illness and that such allegations were "brought up in numerous interviews by different inmates." 1-ER-18 (quoting 11-SER-2785, 2794). The investigators recommended remedial measures, including installing additional cameras. *Id.*

From 2017 to 2020, Plaintiffs sent nearly twenty letters to Defendants requesting investigations into specific allegations of disability-related staff misconduct at RJD. 1-ER-18-19 (citing 4-SER-816-17). The OIG found that Defendants' response to the letters evinced a "pervasive lack of timely follow through," and that Defendants "ignored" many allegations and failed to refer information for investigation. 1-ER-19 (quoting 4-SER-860); *see also* 4-SER-860-85. Plaintiffs kept the Court apprised of ongoing problems at RJD and other prisons. *See, e.g.*, 4-SER-1097 to 5-SER-1124.

Plaintiffs made a final, but unsuccessful, effort in November 2019 to avoid further litigation, demanding that Defendants take certain steps to put an end to the violations at RJD. 11-SER-2746-58. In February 2020, Plaintiffs filed a motion to enforce the court's prior orders ("Motion"), which included evidence that officers were violently discriminating against class members not only at RJD but also at other prisons throughout the state. CR 2922. Plaintiffs then filed a motion in June 2020 focusing on similar violations at seven additional prisons ("Statewide Motion"). CR 2948. The district court consolidated the RJD Motion and Statewide Motion, 1-SER-223, but later granted Defendants' motion to first resolve the RJD Motion, 1-SER-219-22.[5]

[5] Defendants' second pending appeal, *Armstrong v. Newsom* (9th Cir. No. 21-15614), addresses the district court's subsequent orders regarding Defendants'

III. THE DISTRICT COURT FOUND DEFENDANTS WERE VIOLATING PRIOR COURT ORDERS, THE ARP, AND THE ADA AND ORDERED ADDITIONAL RELIEF

On September 8, 2020, after an August 11, 2020 hearing and supplemental briefing by the parties, the district court issued a 72-page decision and accompanying order (collectively, "Orders") granting Plaintiffs' Motion in part. 1-ER-8-79, 2-7.

A. The District Court Found that Officers at RJD Failed to Accommodate and Otherwise Discriminated Against Class Members

The district court found that correctional officers at RJD were discriminating against people with disabilities and denying them necessary accommodations, in violation of Section I of the ARP (which incorporates 42 U.S.C. § 12132), Section II.F of the ARP (requiring reasonable accommodations), and the 2007 Order. 1-ER-11, 24-34, 63-67. These findings were supported by substantial and almost-entirely-undisputed evidence.

Sixty-six incarcerated people submitted 87 declarations describing the violent and shocking ADA violations they experienced or witnessed at RJD. *See* 1-ER-24-25; 6-SER-1666-67; 7-SER-1704-73; 10-SER-2451-64, 2482-567; 11-SER-2847 to 14-SER-3643; 16-SER-4241-43. As the district court noted, "the

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violations at additional prisons. Plaintiffs request that the two appeals be heard as one for argument.

declarants' version of the incidents is … uncontroverted" because Defendants did not submit any evidence to challenge any of the factual assertions in the declarations. 1-ER-24-25, 32.

For example, an officer refused a class member's request for help carrying a heavy package. After the class member stated that he would complain using the court-ordered grievance system, the officer called the person a "crippled motherfucker," pepper sprayed him in the face, hit him in the face with the pepper-spray canister, and kicked him. 1-ER-28 (citing 12-SER-3031-33).

A deaf person gestured to request that an officer communicate with him in writing. Instead of accommodating this request, the officer punched him in the head. Ever since, this class member has been afraid of asking staff for writing supplies with which to communicate. 1-ER-25-26 (citing 11-SER-2855-62).

A class member requested that he be handcuffed in front of his body instead of behind his back so that he could use his cane while walking. The officer responded by body-slamming the class member to the floor, knocking him unconscious, then kneeing him in the face. 1-ER-26 (citing 11-SER-2891-93). Other class members were similarly attacked for requesting to be handcuffed in front of their body. 1-ER-26, 29-30 (citing 10-SER-2518-19, 2560-61; 11-SER-2847-48, 2865-69; 12-SER-3113-16; 13-SER-3401-05); *see also* 4-ER-859-60, 870; 7-SER-1747; 10-SER-2550-51; 13-SER-3215.

When a class member asked to speak to a sergeant to complain that an officer was exacerbating his vision disability by shining a flashlight in his face, another officer punched the class member, knocking him unconscious. 1-ER-28 (citing 12-SER-3080-82).

Officers trashed a wheelchair-dependent class member's cell, forcing him to sleep on the floor, then refused his request to clean the cell, and, when he filed a complaint, trashed his cell again. 1-ER-27 (citing 14-SER-3549-51).

Officers threw people out of wheelchairs and walkers without any justification, sometimes on video.[6] 1-ER-28, 31 (citing 7-SER-1906-13 (videos of two incidents); 12-SER-3122; 13-SER-3277); *see* 16-SER-4245-49 (video of another incident). Officers forced class members to stand or walk without their canes and walkers. 1-ER-27 (citing 11-SER-2907-11). Officers denied requests from class members for help pushing their wheelchairs to access locations at the prison. 1-ER-27 (citing 11-SER-2850-51; 13-SER-3243-45); *see also* 12-SER-3104-05; 13-SER-3221; 14-SER-3516-17. Officers intentionally closed dangerous, mechanical cell doors on class members who use wheelchairs, walkers, or who otherwise move slowly because of their disabilities. 1-ER-27-28, 30 (citing

[6] Plaintiffs have moved for leave to transmit some of these videos to the Court. *See* Plaintiffs-Appellees' Unopposed Motion for Leave to Transmit Exhibits Not Available on the Electronic District Court Docket, filed herewith.

10-SER-2514-15, 2566-67; 11-SER-2897, 2911; 12-SER-2994-96, 3101-04; 13-SER-3299; 14-SER-3567-69); *see also* 11-SER-2952-53; 13-SER-3253-55. Officers frequently refused to provide showers and clean linens after incontinence accidents. 1-ER-27 (citing 11-SER-2850-51, 2954); *see also* 10-SER-2500; 13-SER-3210, 3244, 3468; 14-SER-3255.

Many of the declarants testified, based on their experiences and observations, that RJD staff targeted people with disabilities because they are more vulnerable and less likely to fight back and because officers found their requests for accommodations to be a nuisance. 1-ER-30 (citing 10-SER-2516; 11-SER-2891-93, 2915; 12-SER-3086-87, 3101-04, 3117; 13-SER-3277; 14-SER-3569); *see also, e.g.*, 7-SER-1761; 10-SER-2502, 2516, 2527, 2553, 2889; 11-SER-2889, 2897, 2937-38, 2944, 2956; 12-SER-2968, 2969-70, 2988, 2996, 3022-23, 3032, 3051, 3106, 3123, 3141, 3151-56, 3162-63; 13-SER-3222, 3234, 3254, 3295, 3312-15, 3357, 3392-96, 3398-99, 3406, 3425, 3431, 3478; 14-SER-3487-91, 3493, 3516-17, 3547, 3565, 3577.

The district court found the uncontroverted "descriptions of the incidents in the declarations submitted by Plaintiffs to be credible." 1-ER-31. On top of the fact that Defendants did not submit any countervailing evidence, the court explained that the declarations "paint[ed] a very consistent picture"; were corroborated in many cases by medical records documenting the serious injuries

caused by officers; were "highly consistent" with information gathered by OACC, the strike team, and subsequent investigations; were bolstered in some cases by witness declarations; and, in a few instances, were supported by video footage. 1-ER-31-32.

The court also relied on Plaintiffs' two experts' findings that RJD staff were discriminating against people with disabilities. Eldon Vail, who served as Secretary of the Washington Department of Corrections and has 35 years of correctional experience, concluded (as summarized by the district court) that "there is a pattern of violence against class members at RJD and that staff at RJD routinely use force against class members after failing to recognize and reasonably accommodate inmates' disabilities." 1-ER-21-22 (citing 4-ER-849, 852-53, 862-63, 866). Plaintiffs' other expert, Jeffrey Schwartz, who has assisted prisons for over twenty years in applying national correctional standards to their operations and is an expert on use of force and staff misconduct investigations, concluded that the crisis at RJD was "horrifying," and that there is "substantial evidence that these vulnerable inmates are targeted and preyed upon by a significant number of staff at RJD." 1-ER-19 (quoting 9-SER-2291-92). The court adopted the experts' opinions, which Defendants had not presented any evidence to challenge. 1-ER-19-23.

Additional evidence supported the finding that officers were specifically targeting people with disabilities for abuse and retaliation and treating people with disabilities worse than others. As described above, Defendants' own officials—including OACC, the strike team, and the investigators—recognized for years that officers were choosing to abuse people with disabilities. 1-ER-13, 18; *see supra* pp. 10-15. Defendants' data showed that, taking into account the fact that "class members do not pose as much of a threat … as other inmates who are not disabled," officers used force against class members at a disproportionately high rate. 1-ER-47; *see* 6-SER-1603; 9-SER-2310-11. The court further found that some incidents of misconduct could "only be committed because the victim was disabled, such as throwing him out of a wheelchair or closing a cell door on a person who walks slowly with a walker." 1-ER-33. Evidence of officers accusing class members of faking their disabilities and using derogatory slurs about disabilities further supports that officers singled out people with disabilities for abuse. 7-SER-1717; 10-SER-2535-36; 11-SER-2895, 2957; 12-SER-3032, 3086-87; 13-SER-3244, 3261; 14-SER-3493.

In addition, the court—relying on *Sheehan v. City and County of San Francisco*, 743 F.3d 1211 (9th Cir. 2014), *rev'd in part on other grounds*, 575 U.S. 600 (2015), and *Vos v. City of Newport Beach*, 892 F.3d 1024 (9th Cir. 2018)—found that staff failed to provide reasonable accommodations by using excessive or

unnecessary force, when no force or lesser force would have, in light of individuals' disabilities, addressed the situation. 1-ER-64-67. The court explained that officers should take into account a person's disability in choosing how to respond, rather than "throwing class members out of wheelchairs, punching them, kicking them, or using pepper spray where the undisputed evidence shows that the class members posed no threat to RJD staff that would warrant the use of such force." 1-ER-66.

The court concluded that the evidence established that these denials of accommodations and other discrimination occurred "due to" the individuals' disabilities, and that "it is a part of the staff culture at RJD to target inmates with disabilities for mistreatment, abuse, retaliation, and other improper behavior." 1-ER-33, 66-67. 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." 1-ER-67.

B. The District Court Found that Pervasive Misconduct at RJD Interfered with the Court-Ordered Disability Grievance System

The district court next found that "RJD staff have threatened, intimidated, or coerced [people with disabilities] when they have requested reasonable accommodations or have filed or stated they would file ADA-related grievances, and that this has caused them to refrain from requesting accommodations or filing ADA grievances, or to experience severe emotional distress." 1-ER-34. As the

court explained, "when RJD staff frustrate the effectiveness of … [the grievance] system by threatening, coercing, or intimidating class members into foregoing their rights to request reasonable accommodations or file ADA-related grievances, that constitutes a violation of the ARP and the Court's prior orders and injunctions regarding the same." 1-ER-68.

For example, a class member who uses a walker withdrew a grievance complaining that an officer repeatedly closed his cell door on him after another officer threatened him about the grievance, then did not file a grievance when the same thing happened again. Because of the intimidation, he has not asked for an extra shower or linens after an incontinence incident, choosing to sit in soiled clothes rather than risk retaliation. 1-ER-34-35 (citing 13-SER-3252-55).

Another class member filed a complaint after an officer, in response to the class member's request for someone to help push his wheelchair, called the class member a "piece of shit" and told him to "[g]et the fuck out of here, you don't need a wheelchair." The class member dropped the complaint after being pressured by an officer, because he knew that the officer could make his life "far worse if [he] continued to speak out." 1-ER-37 (citing 13-SER-3243-45).

A hard-of-hearing class member did not request replacement hearing aid batteries for two months, until he transferred from RJD, because he was afraid of staff who had previously assaulted him. 13-SER-3430.

The declarations describe many other instances of incarcerated people with disabilities refraining from asking for accommodations because they feared retaliation from staff. Incarcerated people refrained from requesting wheelchair pushers, 11-SER-2850, 12-SER-3105, 13-SER-3221; wheelchair repairs, 13-SER-3468-69; assistance cleaning their cells, 11-SER-2937, 13-SER-3424; showers or new linens after incontinence accidents, 11-SER-2850, 2956, 13-SER-3210, 3255; and even toilet paper, 11-SER-2915, 13-SER-3357, 3425, 14-SER-3576.

Incarcerated people with disabilities had good reason to fear officers. As Mr. Vail, Plaintiffs' expert concluded, "[w]hat is startling … is the frequency of broken bones and stitches required for class members after a use of force incident at RJD." 4-ER-852; *see also* 1-ER-22 (quoting *id.* in describing that the injuries caused by officers are "far beyond the norm found in other institutions or jurisdictions"). As confirmed in medical records, staff and incarcerated people working at staff's behest broke victims' arms, wrists, ribs, legs, orbital sockets, teeth, feet, fingers, and jaws. 4-ER-852-53, 856-60, 863-64, 884-87; 9-SER-2317-25, 2357, 2386-90; 10-SER-2544-47, 2561-62; 12-SER-3018-19, 3025-29, 3155, 3182-83; 13-SER-3219, 3224-29, 3355-56, 3363-68, 3433-36; 14-SER-3492, 3552-53, 3572-73, 3579-82, 3593, 3609-16. Officers knocked victims unconscious and caused lacerations requiring stitches and other gruesome injuries. 7-SER-1757; 10-SER-2560-61; 11-SER-2866-67, 2875, 2893-94, 2935-36, 2942, 2946-

49; 12-SER-2965-66, 3001-02, 3009, 3081-82, 3155, 3187-89, 3196-200; 13-SER-3221, 3231-33, 3277, 3315, 3318-19, 3429, 3433-36. Many people required trips to the hospital, all of which were funded by taxpayers. 4-ER-864, 874, 884-85, 908; 9-SER-2343, 2387, 2390; 10-SER-2561-62; 11-SER-2867, 2879, 2895, 2901-02, 2942, 2946-49; 12-SER-2966, 2972-74, 3019, 3025-29, 3155-56, 3182-83; 13-SER-3224-29, 3275, 3280, 3315, 3318-19, 3355, 3363-68, 3429, 3433-36; 14-SER-3573, 3579-82.

Officers assaulted people in public places—exercise yards, dayrooms in housing units, and dining halls—to send a clear message of the consequences of asking for help or complaining. 7-SER-1751-53, 1758-59, 1770-71; 10-SER-2512-13, 2518-19, 2526, 2534-35, 2539-40, 2544-46, 2560-61; 11-SER-2912-15; 12-SER-2988, 3017-19, 3081-83, 3139-40, 3146-48, 3152-53, 3165-66; 13-SER-3220-21; 14-SER-3488-91, 3556-61, 3602-10, 3678-81, 3686-711. The strike team found that officers were even working with and hired incarcerated people to assault other incarcerated people. 1-ER-15 (citing 11-SER-2763-68). Officers also frequently charged their victims with false disciplinary violations, called Rules Violation Reports ("RVRs"), to cover up their misconduct, resulting in longer prison terms and loss of privileges, such as telephone calls, visits, or outdoor exercise. 1-ER-15, 28-29, 36; *see also* 6-SER-1594-96, 1603; 7-SER-1706; 10-SER-2507-08, 2531, 2535, 2540, 2562; 11-SER-2861, 2895-96; 12-SER-3021,

3032, 3115; 13-SER-3219, 3404, 3430; 14-SER-3490, 3553, 3574; 4-ER-853, 891-93. Plaintiffs' experts found and the class member declarations showed that officers excessively used pepper spray against people with disabilities. *See, e.g.*, 4-ER-910; 6-SER-1618-19; 9-SER-2337-42, 2365-67, 2368-69, 2372-73, 2376-77, 2386-87, 2390, 2392-95; *see also* 7-SER-1753, 1759; 10-SER-2519, 2560-61; 12-SER-3032, 3082, 3145; 13-SER-3209, 3219, 3428, 3553; 14-SER-3561.

As the district court noted, Defendants did "not submit[] any evidence, such as declarations by the officers who allegedly engaged in intimidation, threats, or coercion, to dispute the occurrence of these incidents and similar incidents described in the declarations that Plaintiffs submitted." 1-ER-37.

Plaintiffs' experts recognized that retaliation at RJD deterred people from requesting accommodations and reporting misconduct. Mr. Schwartz concluded that, because of the "'dysfunctional staff culture'" at RJD, incarcerated people "'are afraid to file grievances/complaints and afraid to provide testimony during investigations. Pressure to withdraw complaints and other forms of intimidation are common.'" 1-ER-19-20 (quoting 9-SER-2297, 2304). Similarly, Mr. Vail opined that there was a pattern of retaliation against class members who report misconduct, and widespread fear of reporting such allegations as a result. 1-ER-22 (citing 4-SER-853, 879-84, 904-05).

The pattern of retaliation at RJD continued even in response to this litigation—and became severe enough to require emergency judicial intervention. In July 2020, the district court found that officers had engaged in such extreme retaliation against two declarants for participating in Plaintiffs' Motion that the class members had to be transferred out of RJD 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 of the declarants out of his wheelchair while saying, "This is for my homeboy [officer's name]"—referring to an officer about whom the incarcerated person had previously submitted a declaration describing misconduct—and, "Explain that to the lawyers you talk to." *Id.* at 1047-50. As to the other person, the court found that officers assaulted her, placed her at risk by calling her a "snitch" over the loudspeaker, and used other incarcerated people to threaten her. *Id.* at 1052-55. This brazen retaliation occurred even after Defendants stipulated to an order in March 2020 intended to protect declarants from reprisals. 3-SER-780-84.

Officers' efforts to enforce a code of silence reached beyond incarcerated people. For example, officers retaliated against a staff psychologist—who previously reported that an officer used excessive force—by entering her locked office and spreading contents from her desk, including her personal sanitary supplies, on the floor. 16-SER-4183-85, 4189.

C. The District Court Found Defendants Were Not Complying with Orders Mandating that Defendants Hold Officers Accountable

The district court next found that Defendants were not complying with the 2007 and 2012 Orders requiring Defendants to investigate and hold accountable officers accused of violating the rights of class members. 1-ER-42-43, 69-70.

As the court noted, Defendants' own expert admitted that "there have been breakdowns and failures in the … [investigation and disciplinary] processes that have resulted in inappropriate outcomes." 1-ER-20 (quoting 4-ER-729-30). Defendants admitted the same in their Opening Brief ("OB"). OB 21, 59.

Plaintiffs' experts wholeheartedly agreed. Based on a comprehensive review of dozens of investigation files, Mr. Schwartz concluded that investigations "at RJD are incomplete, unprofessional, and biased against incarcerated [people]," whose testimony was almost always "discounted or ignored." 1-ER-19-20 (citing 9-SER-2304, 2294-95, 2302, 2336, 2337-38, 2374-75, 2394). Defendants disciplined officers only in rare circumstances where there was video evidence or other staff reported the misconduct; where neither was present, no one was disciplined. 1-ER-20 (citing 9-SER-2296, 2313-14, 2333, 2351-52, 2355). RJD also had a pervasive "code of silence," where officers cover up for each other by failing to report misconduct they observe. 1-ER-19-20; 9-SER-2301, 2342, 2355, 2375, 2378-79. Mr. Vail also concluded the "'investigations [of misconduct], or lack thereof, [were] shocking' and … 'demonstrate[d] flawed investigative

techniques and bias against incarcerated people.'" 1-ER-22 (quoting 6-SER-1607-10). Defendants did not proffer any evidence to dispute Plaintiffs' experts' conclusions, which the court adopted. 1-ER-20.

The court found that the broken accountability process unsurprisingly resulted in a near-total absence of discipline of officers at RJD. 1-ER-20-21. According to Defendants themselves, since 2017, they attempted to terminate only nine officers for misconduct involving incarcerated victims (each of whom had a disability) and only two terminations were final. 1-ER-20-21 (citing 2-ER-205-06). That number of terminations is shockingly low given that the declarations submitted by Plaintiffs identified by name more than one hundred officers involved in misconduct and Defendants' own records showed nearly 1,000 complaints against staff from 2017 to 2019. 4-ER-696, 745. During that same time period, not a single officer was criminally charged, let alone convicted, for abusing an incarcerated person. 4-SER-945-46. Out of the 48 allegations raised in the Bishop Report, only two resulted in any discipline. 1-ER-20 (citing 7-SER-1935-45).

In addition, Defendants did not dispute that they failed to even log and investigate many allegations of ADA noncompliance. 1-ER-70 (citing 11-SER-2737-38); *see* 2-ER-237-38.

D. The District Court Found that, Notwithstanding Minor Changes Defendants Made at RJD, Violations of Class Members' Rights Were Ongoing

The district court next found that, notwithstanding minor changes Defendants made at RJD, Defendants remained in violation of prior orders, the ARP, and the ADA, necessitating further remedial orders from the court. 1-ER-42-50, 70-71.

The evidence supporting the court's finding on this issue is overwhelming. Defendants and their expert admitted repeatedly that there were serious problems at RJD in late 2018. *See, e.g.*, 1-ER-23 (citing 1-SER-167, 184; 4-ER-762). Defendants' person-most-knowledgeable admitted that staff misconduct was an ongoing problem at RJD. 1-ER-48 (citing 4-SER-931). Defendants make the same admissions on appeal. OB 10-11. Yet Defendants failed to act on their staff's and expert's recommendations that Defendants could only solve the problems at RJD by installing cameras, increasing supervisory staffing, investigating allegations of misconduct and officers' "gang-like behavior," and producing a corrective action plan. 1-ER-17, 43-44.

The credible, uncontested declarations from class members describe disability-related misconduct occurring as late as July 2020. 1-ER-29-30. Most notably and as is discussed above, retaliation in mid-2020 against two declarants was so severe that it required the court to issue a preliminary injunction to transfer

the two class members from RJD for their safety. 1-ER-45; 1-SER-13-66. That these horrific incidents occurred even after Plaintiffs filed their Motion demonstrates that whatever steps Defendants had taken voluntarily were inadequate. 1-ER-29-30, 48.

Plaintiffs' experts also concluded that conditions were not improving in the wake of Defendants' reforms. Mr. Vail concluded in his reply declaration that "[n]othing … I have reviewed indicates that anything has changed at RJD." 6-SER-1596. Mr. Schwartz similarly determined that Defendants' process for investigating and disciplining officers as it operated in 2020, after Defendants' changes, still routinely failed to hold officers accountable. 1-ER-19-20.

Instead of responding meaningfully to the crisis at RJD, Defendants took a small number of insufficient steps. Defendants' primary effort was the implementation of the Allegation Inquiry Management Section ("AIMS"), a new arm of CDCR's Office of Internal Affairs. 1-ER-44. AIMS was intended to improve accountability by having investigators from outside of the prison, rather than staff who work at the prison, conduct initial investigations into allegations of misconduct raised by incarcerated people. 1-ER-44. The court found, however, that AIMS was "unlikely to be a panacea" because it would not investigate all complaints of denials of reasonable accommodations or discrimination. 1-ER-48. Moreover, the court found that even once AIMS was in place, staff continued to

violate class members' rights. *Id.* Consistent with the court's findings, the OIG issued a blistering report in which it found that AIMS has been a near-total failure—or as Defendants euphemistically put it, the OIG "identified numerous areas for improvement," OB 19. *See* Request for Judicial Notice ("RJN"), filed herewith; Declaration of Michael Freedman ("Freedman Declaration"), filed herewith, Ex. E. The OIG concluded "that the lack of independence [found] years ago still persists, even in this new process." Freedman Decl., Ex. E, at 1.

Defendants' other minimal reforms at RJD have been equally ineffective. They added a few staff to investigate the more than one hundred allegations raised by Plaintiffs and the strike team, but some investigations were never completed, most did not occur until late-2019 or early-2020, and the investigations that were conducted, which resulted in termination of only two officers, were biased, incomplete, and generally of dismal quality. 1-ER-18-19, 21-23 (citing 4-SER-860; 6-SER-1607-10; 7-SER-1936-45); *see also* 4-SER-917-18, 925-26; 16-SER-4013-14. Defendants slightly shifted the locations at which existing sergeants were placed on one of RJD's five yards, 4-SER-917; eliminated staff access to a hidden area behind a gym where officers took incarcerated people to assault them, 16-SER-4038-40; and moved the Facility C Associate Warden's and Captain's offices onto that yard, 16-SER-4011. None of these measures prevented officers from continuing to discriminate against class members.

Defendants also made a few perfunctory attempts to address the culture at RJD, including occasionally sending an Ombudsman to visit RJD, 4-SER-915-16; providing some training and mentorship to officers and the Warden, 4-SER-911-12, 16-SER-4011-14; temporarily placing two additional sergeants at the prison, 16-SER-4013; filling some vacant manager positions, 4-SER-921-23; and requiring captains to hold meetings with officers and a council of incarcerated people, 2-ER-209. As the district court found, those measures were inadequate to address the severe problems at RJD.

As discussed in more detail below, *see infra*, pp. 50-53, the court also rejected Defendants' argument that historical data regarding uses of force at RJD demonstrated that conditions had improved to the point where court-ordered relief was unnecessary. 1-ER-44-46.

E. The District Court Ordered Narrowly-Tailored Remedies Designed to Cure Defendants' Flagrant Violations of Prior Orders, the ARP, and the ADA

Having found Defendants in violation of prior orders, the ARP, and the ADA, the district court diagnosed the "root cause" of the violations: "[T]he systemic and long-term failure by CDCR to effectively investigate and discipline violations of the ARP and class members' ADA rights by RJD staff." 1-ER-42. This is the same failure the court had previously attempted to address in its 2007 and 2012 Orders regarding accountability.

The court explained that the ongoing violations were the consequence of two factors: (1) a "deeply ingrained staff culture at RJD of looking the other way … whenever staff misconduct occurs or is alleged by an inmate, … enforced through retaliatory acts by staff … and by CDCR's failure to conduct prompt and effective investigations of allegations of misconduct"; and (2) "the reluctance of inmates and staff at RJD to assist with the documentation and investigation of acts of misconduct by staff for fear of retaliation." 1-ER-42-43.

Accordingly, the district court "f[ou]nd[] that requiring Defendants to implement additional remedial measures is both necessary and warranted." 1-ER-49. The court ordered "Defendants to design, and ultimately implement, a plan" consisting of

> certain … remedial measures … intended and tailored to improve policies and procedures for supervising RJD staff's interactions with inmates, investigating RJD staff misconduct, and disciplining RJD 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 class members' ADA rights.

1-ER-49-50.

The court adopted most, but not all, of the remedial measures requested by Plaintiffs, many of which Defendants' own high-ranking officials and expert had previously recommended. *Compare* 1-ER-2-7, *with* 1-SER-67-88 (district court did not order Defendants to implement an early-warning system, review RVRs issued against class members, or staff housing units with non-uniformed

supervisors). Those measures included fixed-surveillance cameras in all areas of RJD accessible to class members; body-worn cameras for all officers at RJD who interact with class members; reforms to ensure that investigations at RJD are unbiased and comprehensive, that discipline is appropriate and consistent, and that employees who engage in criminal misconduct are appropriately investigated and referred for prosecution; appointment of the pre-existing Court Expert to monitor Defendants' implementation of reforms; information-sharing with Plaintiffs' counsel and the Court Expert; additional sergeants on all watches on all yards at RJD; development of additional training; modification of Defendants' pepper spray policies; and anti-retaliation measures. 1-ER-2-7, 50-61. All of the relief was limited to class members at RJD. And all of the details of implementation were left to Defendants.

The court made clear that the measures should be "considered as a whole" and "constitute an incremental expansion of processes and systems that are already in place pursuant to the Court's prior orders and injunctions." 1-ER-50.

Finally, as is discussed more below, the district court held that the injunctive relief complied with the PLRA. *See infra* pp. 53-65.

IV. DEFENDANTS HAVE NOW IMPLEMENTED MOST OF THE REMEDIES ORDERED BY THE COURT, WHICH HAVE REDUCED VIOLATIONS OF CLASS MEMBERS' RIGHTS

Defendants did not seek a stay of the Orders in either the district court or this Court. While this appeal has been pending Defendants have implemented most of the court-ordered remedies. Additional sergeants began working in December 2020, body-worn cameras went live in January 2021, and installation of fixed-surveillance cameras followed in April 2021. *See* RJN; Freedman Decl., Ex. A, at 13.

The Court Expert has found that these and other measures, which were adopted by Defendants only because they were ordered to do so, have reduced disability discrimination at RJD. RJN; Freedman Decl., Ex. D. Defendants themselves, in a September 2021 case management statement, stated that they have been "impressed by the camera technology." RJN; Freedman Decl., Ex. A, at 13. Because of the success at RJD, Defendants now plan to implement fixed-surveillance cameras at all institutions by 2024. *Id.* at 14.

On March 11, 2021, the district court granted in part Plaintiffs' Statewide Motion, finding the same types of violations of prior orders, the ARP, and the ADA that were occurring at RJD were also occurring at five other prisons. RJN; Freedman Decl., Exs. B & C. The court ordered Defendants to develop a plan for

those prisons that includes virtually the same remedial measures it ordered at RJD. RJN; Freedman Decl., Ex. C.

SUMMARY OF ARGUMENT

1. The district court acted well within its authority by entering the Orders, which seek to 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 discrimination on account of their disabilities and to obtain reasonable accommodations. Defendants' actions to deprive class members of those rights through force, violence, and retaliation violated the ADA and the court's prior remedial orders in this case. The court had jurisdiction to enforce its prior orders and to put an end to the violations. That power did not somehow disappear simply because Defendants have chosen to violate class members' rights under the ADA through active violence rather than mere neglect.

2. The district court correctly determined that Defendants' minimal efforts at reform were inadequate to stop the ongoing violations of class members' rights under prior court orders and federal law. As the court explained, credible declarations from class members showed that serious violations were still occurring in 2020 after Defendants' purported reforms had taken effect. Indeed, in July 2020, the court ordered Defendants to transfer two declarants to different facilities to protect them from retaliation by RJD officers for participating in

Plaintiffs' Motion. Defendants' assertion that the court misunderstood the statistical evidence is incorrect and, in any event, does not outweigh the substantial evidence that Defendants' voluntary measures were inadequate to address the ongoing violations at RJD.

3. The district court correctly determined that the remedial relief it ordered was consistent with the PLRA, and in particular that the Orders were necessary, narrowly tailored, and the least intrusive means available to correct the proven and persistent violations of class members' rights. Defendants' contention that the measures that the court ordered were overbroad and redundant ignores the record, and many of their challenges were never raised below. The court did not abuse its discretion in finding that a combination of tailored remedies, all aimed at holding officers accountable for violating class members' rights, was necessary and appropriate under the PLRA to stop Defendants' persistent noncompliance with prior court orders and federal law.

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, and the injunction's scope for abuse of discretion." *Armstrong*, 768 F.3d at 979. 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 ACTED WELL WITHIN ITS AUTHORITY TO ENFORCE AND MODIFY ITS PRIOR ORDERS IN THIS POST-JUDGMENT, ADA REMEDIAL CLASS ACTION

A. The District Court Correctly Determined that It Had the Power to Enter the Orders

Defendants' primary argument on appeal—that the district court exceeded its authority by seeking to prevent Defendants from using violence and retaliation to deprive class members of their rights under the ADA and the court's prior orders, OB 29-39—fails several times over. The court correctly found that it had jurisdiction to address Defendants' continued violations of class members' rights.

Defendants premise their argument on the assertion that this litigation is only about "institutional disability accommodation policies and structural accessibility features," and so (Defendants contend) the district court lacked power to address any other way in which Defendants may have denied class members accommodations or discriminated against them in violation of the ADA. OB 33. As the court recognized, however, every iteration of the complaint in this case has alleged that Defendants violated the ADA by discriminating against class members by reason of their disability. 1-ER-63 n.15; *see* 2-ER-325-41. That is precisely what Plaintiffs assert and the court found here: Defendants have denied class members reasonable accommodations and discriminated against them because of their disabilities. *See* 1-ER-63 n.15 (recognizing that the "instances of discrimination against class members by reason of their disability" raised in the Motion are "well within the scope of this action"). The statutory rights at issue here are the same ones that Plaintiffs raised in their original complaint. The fact that Defendants have violated those rights violently does not deprive the district court of jurisdiction to remedy Defendants' ongoing violations.

Moreover, the district court had jurisdiction here not only to remedy the harms alleged in Plaintiffs' original complaint, but also to enforce the remedial orders it issued in this case. *See* 2-ER-350 (retaining jurisdiction for enforcement); *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 432 (2004) (remedial orders "may be

enforced"); *Loc. No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) ("[I]n addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree."); Fed. R. Civ. P. 15(b)(2).

The argument section of Defendants' brief does not include a single citation to or discussion of the 2007 or 2012 Orders. *See* OB 29-61. Yet those important injunctions form the backbone of the Orders on appeal, fall within the four corners of the complaint, are law of the case, and were intended to remedy Defendants' noncompliance with the 1996 Order, subsequent orders, the ARP, and the ADA. *See supra* pp. 6-10. The violent violations at issue in this appeal are the direct consequence of Defendants' failures to comply with the 2007 and 2012 Orders by holding officers accountable for violating class members' rights. The court had jurisdiction to remedy Defendants' continued failure to comply with those prior orders.

Based on largely undisputed and substantial evidence, the court found that the extreme conduct of RJD officers violated several of Defendants' specific obligations under prior orders. First, the district court found that Defendants were failing to provide reasonable accommodations to and otherwise discriminating against class members in violation of the 2007 Order, Sections I and II.F of the ARP, and 42 U.S.C. § 12132. 1-ER-11, 24-34, 39, 63-67. Defendants violated

these provisions by, *inter alia*, improperly refusing requests for alternative methods of communication and handcuffing, denying additional time for people with mobility disabilities to safely enter and exit cells, failing to communicate effectively with deaf class members, failing to accommodate people with disabilities during uses of force, and targeting people with disabilities for abuse, assault, and retaliation because they have disabilities. *Id.*; *see supra* pp. 15-21.

Second, the court found that Defendants were interfering with class members' right to request disability accommodations, in violation of the 2001 Order, the 2007 Order, Sections II.F and IV.I.23 of the ARP, and 42 U.S.C. § 12203(b). 1-ER-34-38, 67-69. RJD officers violated those provisions by, *inter alia*, threatening, intimidating, and retaliating against class members when they filed or stated that they would file a disability grievance, which caused many class members to refrain from requesting accommodations out of fear of retaliation. *Id.*; *see supra* pp. 21-27.

Finally, the court found that Defendants were violating the 2007 and 2012 Orders by failing to log and investigate allegations of officers' noncompliance and failing to impose discipline when such allegations were sustained. *See* 1-ER-38-43, 49-50, 62-63. Instead, the evidence showed a systemic and long-term failure to hold officers accountable for disability-related misconduct. *Id.*; *see supra* pp. 27-29.

The Orders on appeal are not some "new" or "wholly different" departure from the original claims in this case. OB 27, 33, 34. They address the same problems Plaintiffs have alleged and proved for decades: Defendants' continued discrimination against and failure to provide reasonable accommodations to class members. The ADA, after all, was designed to address discrimination and abuse of disabled people based on stereotypes, fear, and prejudice—precisely the type of behavior at issue here. *See* 42 U.S.C. § 12101.

To be sure, the Orders address violations that are more extreme and that have caused more serious injuries than anything else ever previously confronted in this case. But that difference increases, rather than diminishes, the district court's authority to act. If, as Defendants must concede, the court may remedy a failure to provide a reasonable accommodation—for example, an officer refusing to handcuff an incarcerated person in front of his body so he can use his cane to ambulate while restrained—the court must also be able to act if that officer, in response to the request for a handcuffing accommodation, slams the person to the ground so hard that he loses consciousness. *See* 1-ER-26 (citing 11-SER-2891-2895, 2899). It cannot be that doing something gently violates the ADA, but doing the same thing violently does not. Nor can it be that a court that has enjoined a defendant from doing the former has no power to amend its injunction to also prohibit the latter. A district court's initial remedial orders need not anticipate

every possible way in which a defendant might evade compliance. Any other holding would render district courts powerless to prevent defendants from violating injunctions so long as those new violations are more extreme than the harm that justified the order in the first instance. That is not and cannot be the law.

In fact, the rule is practically the opposite. Once a case enters its remedial phase, "[t]he power of a court … to modify a decree of injunctive relief is long-established, broad, and flexible." *Brown v. Plata*, 563 U.S. 493, 542 (2011) (quotation marks and citation omitted). Courts may modify prior orders to bring a recalcitrant defendant into compliance. *See, e.g.*, *Frew*, 540 U.S. at 440 ("[C]ourts are not reduced to … hoping for compliance."); *Parsons v. Ryan*, 912 F.3d 486, 499-500 (9th Cir. 2018). Courts may clarify the parties' obligations under an injunction. *See, e.g.*, *Keith v. Volpe*, 784 F.2d 1457, 1460-61 (9th Cir. 1986). Courts may order new measures when the initial relief has proved inadequate. *See, e.g.*, *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000); *Morales Feliciano v. Rullan*, 378 F.3d 42, 54 (1st Cir. 2004). And courts may order additional remedies when new circumstances require it. *See, e.g.*, *Plata*, 563 U.S. at 507-09, 541; *United States v. U.S. Mach. Corp.*, 391 U.S. 244, 248-49 (1968); *Gates v. Gomez*, 60 F.3d 525, 528 (9th Cir. 1995); *Keith*, 784 F.2d at 1460.

"[T]he test to be applied" to determine if a court abused its discretion in modifying previously-issued injunctive relief "is whether the change 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) (explaining that "the nature of the … remedy is to be determined by the nature and scope of the … violation" and "must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct'" (quoting *Milliken v. Bradley*, 418 U.S. 717, 746 (1974)).

This Court has followed these same principles in evaluating past orders in this case. In 2014, for example, the Court affirmed in relevant part the district court's 2012 Order modifying the portions of the 2007 Order regarding accountability. *Armstrong*, 768 F.3d at 984. The Court held that the new remedies were justified "[b]ecause the district court has previously tried to correct the deficiencies … through less intrusive means, and those attempts have failed." *Id.* at 986; *see also, e.g.*, *Armstrong v. Brown*, 732 F.3d 955, 957 (9th Cir. 2013); *Armstrong*, 622 F.3d 1058; *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001); *Armstrong*, 124 F.3d 1019.

So too here. As the district court explained in its detailed Orders, the largely undisputed evidence showed that Defendants were in violation of the court's prior remedial orders, the ARP, and the ADA. *See supra* pp. 15-29. Under these circumstances, the court had jurisdiction to modify its prior orders to bring

Defendants into compliance, effectuate the intent of those prior orders, and protect class members against Defendants' ongoing violations of their judicially-recognized rights.

B. Defendants' Reliance on *Pacific Radiation* and *Devose* Is Misplaced

The main cases upon which Defendants rely for their contrary view—*Pacific Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631 (9th Cir. 2015), and *Devose v. Herrington*, 42 F.3d 470 (8th Cir. 1994) (per curiam)—are inapposite. Those cases espouse the principle that a preliminary injunction must have a "relationship or nexus" with the final relief sought in the case. *See Pac. Radiation*, 810 F.3d at 636; *Devose*, 42 F.3d at 471. Both cases thus properly concluded that a district court could deny pre-judgment preliminary injunction motions because the claims for the preliminary injunction had "nothing to do" with the claims in the underlying complaint. *See Pac. Radiation*, 810 F.3d at 637; *Devose*, 42 F.3d at 471.

Pacific Radiation and *Devose* have no application here. Most obviously, those cases involved *preliminary injunction* motions, which are designed to ensure that a plaintiff can obtain meaningful relief if she succeeds on the claims in her complaint (and so must be limited to preserving those claims). Here, Plaintiffs have already succeeded on the claims in their complaint and obtained *permanent injunctions*. Plaintiffs seek further relief now only because Defendants have

continued to violate those already-existing permanent injunctions, which the district court retained jurisdiction to enforce. 2-ER-350; *see supra* pp. 6-10. Nothing in *Pacific Radiation* or *Devose* establishes limits on remedies for violations of prior court orders.

In addition, unlike in *Pacific Radiation* and *Devose*, the Orders here enforce the same rights under the same laws that have been at the core of this case since the beginning: rights under the ADA to reasonable accommodations and to be free from disability discrimination. *Pacific Radiation* and *Devose* therefore provide Defendants no support.[7] And the Court's recent decision in *LA Alliance for Human Rights v. County of Los Angeles*—where the Court concluded the district court abused its discretion in granting a preliminary injunction based on claims, arguments, and extra-record evidence which the plaintiffs themselves did not

[7] The other cases cited by Defendants are either irrelevant or unpersuasive. *See* OB 29-30, 33. Some cases *upheld* a district court's discretion to determine an injunction's scope. *See Freeman v. Pitts*, 503 U.S. 467, 471 (1992) (court has authority to withdraw supervision as to some aspects of a desegregation plan where district "achieved compliance"); *Lamb-Weston, Inc. v. McCain Foods Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (enjoining defendant from selling product worldwide was not an abuse of discretion). The remaining cases reversed orders where, unlike here, remedial measures were not tailored to the nature and scope of the violations. *See Missouri v. Jenkins*, 515 U.S. 70, 97 (1995) (improper to order school desegregation 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) (court cannot remedy issue about *public* schools because decree only applied to *private* schools).

assert—is likewise inapposite. *See* No. 21-55395, 2021 WL 4314791, at *3 (9th Cir. Sept. 23, 2021).

C. The District Court Correctly Applied *Sheehan* and *Vos* to Uses of Force Against Incarcerated People with Disabilities

Defendants also argue for the first time on appeal that 42 U.S.C. § 12132 does not apply *at all* to uses of force in prison. OB 36-39. Defendants never made that argument below and so it is forfeited. *See* 1-ER-65 (district court noting this issue was undisputed); *Raich v. Gonzales*, 500 F.3d 850, 868 (9th Cir. 2007).

Even if Defendants had preserved the argument, it is unavailing. The district court correctly concluded that § 12132 requires reasonable accommodations during uses of force in prison. As this Court has held, and the district court correctly explained, § 12132 prohibits a public entity from failing to reasonably accommodate a person with a disability in the course of law enforcement activities, including uses of force. *See Vos*, 892 F.3d at 1037; *Sheehan*, 743 F.3d at 1232-33.

Defendants' only response is to assert that *Sheehan* was about arrests, not prisons. OB 37. But the Supreme Court has already held that Title II, including § 12132, applies to prisons. *Yeskey*, 524 U.S. at 209. Defendants cite no support for their view that Title II requires reasonable accommodations in all other

circumstances, but contains an unwritten categorical exception for correctional officers' use of force.[8]

Not every use of force against a person with a disability in a prison setting gives rise to an ADA claim. Instead, as this Court recognized in *Sheehan*, exigent circumstances and relevant penological interests must be considered in determining whether any reasonable accommodation was available, and if so, whether § 12132 was violated by denying the proposed accommodation. The district court's opinion was consistent with those limitations, which apply here. Contrary to Defendants' claim that the allegations here were not proven or pervasive, OB 38, Defendants had ample opportunity to dispute the evidence Plaintiffs presented, including the 87 declarations of incarcerated witnesses. The record shows that Defendants did indeed deny class members reasonable accommodations in uses of force, resulting in avoidable or more violent uses of force—*e.g.*, assaulting, rather than establishing effective communication with, a deaf person who could not hear an order; throwing someone out of a wheelchair when less force could have, in light of the person's mobility disability, controlled the situation; or failing to

[8] As the district court noted, CDCR's current policies already require officers to consider a person's disability, i.e. their "mental health status and medical concerns (if known)[,]" before using force. 1-ER-65 n.17 (citing 8-SER-2207).

handcuff someone in front of their body so they can use a walker. *See supra* pp. 15-21.[9]

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

Defendants' other arguments are equally baseless. First, the court did not err in holding that the Orders were also warranted to prevent Defendants from violating the ADA's anti-interference provision, 42 U.S.C. § 12203(b). 1-ER-67-69. This provision prohibits conduct that has a chilling effect on individuals' exercise of their ADA rights. *See Brown v. City of Tucson*, 336 F.3d 1181, 1190-92 (9th Cir. 2003).

Defendants stipulated at the outset of the remedial phase of this case "to operate [their] programs … and facilities … in accordance with the [ADA]." 2-ER-358. The district court correctly determined that stipulation extended to requiring compliance with § 12203(b) as a critical part of the ADA. 1-ER-41-42; 2-ER-358; *see Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, 589 F.3d 1027, 1031 (9th Cir. 2009) ("stipulated order is certainly judicially enforceable"); *Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008) (complaint does not have to cite every section of a statute on which a claim is based).

[9] In any event, there are only a few instances in this record where the *only* violation was a failure to accommodate because the officer "could have used less force or no force … with respect to a disabled person." 1-ER-65.

Regardless of § 12203(b), the misconduct the court found violated § 12203(b) also violated the court's prior orders by denying class members access to reasonable accommodations and the court-ordered disability grievance process. 1-ER-34-38, 67-69. The district court thus had the authority to prevent Defendants from interfering with those rights, whether or not that relief was also justified by Defendants' failure to comply with § 12203(b).

Second, Defendants briefly suggest that the district court somehow erred by entering the Orders on a classwide basis without conducting a new Rule 23 class certification analysis. *See* OB 34-35. Defendants do not cite any authority that such an inquiry is required at this stage of the case, when the class was certified long ago. 5-SER-1401-04. This Court has affirmed post-judgment orders in an identical posture as the Orders here with no mention of Rule 23. *See generally, e.g.*, *Parsons*, 912 F.3d 486, *Coleman v. Brown*, 756 F. App'x 677 (9th Cir. 2018); *Armstrong*, 768 F.3d 975; *Armstrong*, 622 F.3d 1058.

II. THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT CONDITIONS AT RJD HAD NOT MEANINGFULLY IMPROVED DESPITE DEFENDANTS' MINOR CHANGES

The district court was correct—and certainly did not clearly err—in finding that the minor changes Defendants made to their policies and practices in late 2018 were insufficient to prevent ongoing violations of the court's prior orders, the ARP, and the ADA. *See supra* pp. 29-32.

On appeal, Defendants raise only one argument to challenge the district court's well-supported findings on this topic, asserting that the court misunderstood historical data regarding uses of force at RJD. OB 39-43. Before the district court, Defendants cited data showing that uses of force on Facility C, one of the five facilities at RJD, had decreased from 2017 to 2019 and 2018 to 2019. 1-SER-186-87. They argued that these decreases showed that Defendants' responsive measures had been effective, rendering an injunction unnecessary. *Id*.

The court concluded, however, that "reliable inferences about whether conditions for class members at RJD have improved cannot be drawn from Defendants' data." 1-ER-45. The court noted that from 2017 to 2019, the data showed that uses of force *increased* on two other yards at RJD, Facilities A and D, by 16 percent and 50 percent respectively. 1-ER-45 (citing 7-SER-1690-91). The court also explained that Defendants' data underrepresented the true number of incidents, as their data captured only *reported* uses of force and the evidence showed a significant number of uses of force were *unreported*. 1-ER-45-46. And the July 2020 preliminary injunction and credible declarations from incarcerated people who were the victims of officers' discrimination showed that serious violations were still occurring in 2020. 1-ER-45, 48; *see* 1-SER-13-66.

Defendants do not and cannot argue that any of these findings were clearly erroneous. Instead, Defendants contend that the court erred because it did not

analyze the use-of-force data on a "per capita" basis and "focus on the time period following CDCR's implementation of concerted corrective measures in the fall of 2018." OB 39. But Defendants did not present their data to the court in this manner, and never argued below that the court should review the data in this way. *See* 1-ER-44-47; 2-ER-118-22; 1-SER-186-87. Defendants cannot fault the court for failing to analyze data in ways that Defendants never suggested below. *See Raich*, 500 F.3d at 868 (waiver).

It is unclear whether Defendants' newly-repackaged data, which is rife with errors, even says what Defendants suggest it does. For example, columns A and B of Defendants' Table A appear to use the inflated figures of everyone who passed through RJD in a year (including those who stayed for only a few days), rather than the more accurate (and lower) average daily population. *See* OB 40. Defendants also present new statistics that they say are calculated by dividing the number of reported uses of force by the number of "class members" on Facilities A and D, OB 42 nn. 9-10, but the denominators Defendants used are actually the total, not class member, populations on those facilities, *see* 4-ER-726.

Even assuming that the rate of violations had decreased slightly (which cannot be found based on Defendants' data), the record contains voluminous evidence that the rate of violations was still impermissibly high. *See supra* pp. 29-32; *Barcia v. Sitkin*, 367 F.3d 87, 103 (2d Cir. 2004) (notwithstanding decrease in

violations, rate of violations was too high to find public entity was in compliance); *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1458-59 (9th Cir. 1983) (harmless error). The court reasonably analyzed the data that Defendants actually presented, along with substantial evidence of persistent misconduct, and did not clearly err in refusing to conclude that Defendants' minimal voluntary reforms had solved the admitted problems at RJD.

III. THE ORDERS COMPLY WITH THE PLRA

The Orders comply with the PLRA's requirement that prospective relief regarding conditions in correctional institutions must 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); *see* 1-ER-7, 49-61, 72-78. Once again, Defendants' challenges cannot disturb the district court's meticulous analysis.

The Orders focus on the "root cause" of Defendants' ongoing violations, "the systemic and long-term failure by CDCR to effectively investigate and discipline violations of the ARP and class members' ADA rights by RJD staff," 1-ER-42, as well as Defendants' "persistent failure to adequately supervise and hold RJD staff accountable for violations of class members' ARP and ADA rights," 1-ER-73. The court ordered Defendants to develop their own plan to ensure that they would finally begin to hold officers accountable when they violate the rights of class

members, and instructed Defendants to include certain common-sense measures in that plan, leaving the exact specifications to Defendants. 1-ER-49-61, 74-78.

The court found that the remedies it ordered were necessary and narrowly tailored to address ongoing violations reflected in the record and were "the least that can be done to protect class members at RJD from further violations of their rights under the ARP and ADA." 1-ER-73; *see also* 1-ER-74. The court also found that the remedies were not more intrusive than necessary because they do not micromanage Defendants' operations and give Defendants substantial leeway to design and implement their own remedial plan. 1-ER-49-50, 74-78; *see Armstrong*, 622 F.3d at 1071 ("Allowing defendants to develop policies and procedures … is precisely the type of process that the Supreme Court has indicated is appropriate for devising a suitable remedial plan in a prison litigation case.").

To the extent the district court did require Defendants' plan to include certain measures, it found those measures to be necessary because Defendants were "not yet in compliance … even though the parties and the Court have attempted various iterations of remedial measures that are narrower and less intrusive than the ones now ordered." 1-ER-75.

These remedies are well within the bounds imposed by the PLRA. As this Court has recognized, a court "may … provide specific instructions to the State without running afoul of the PLRA," especially where "'the district court has

attempted narrower, less intrusive alternatives—and those alternatives have failed.'" *Armstrong*, 768 F.3d at 986 (quoting *Morales Feliciano*, 378 F.3d at 55). Where, as here, the district court has overseen the case for many years, determinations regarding remedies are entitled to "special deference." *Sharp*, 233 F.3d at 1173-74; *see also Armstrong*, 768 F.3d at 986. And even where the court issued more specific remedies—e.g., body-worn cameras—the court left the details of implementation to Defendants. For these reason, the relief here is nothing like the disapproved remedies in *Lewis v. Casey*, 518 U.S. 343 (1996), *see* OB 51-52, which were far more intrusive and specific and were not supported by the same evidence of widespread, systematic violations as is present here.

Notably, as the court observed, Defendants also did not "advance[] any viable alternative means to protect class members at RJD that are narrower or less intrusive." 1-ER-75. The court rejected Defendants' only proposal—"to wait and see whether the steps they have taken in the last few years eventually will end the ongoing violations"—"because the record shows that the rights of class members are likely to continue to be violated under the current policies and procedures." *Id.*; *see Plata*, 563 U.S. at 516 (court "not required to wait to see whether … recent efforts would yield equal disappointment"); *Armstrong*, 622 F.3d at 1071 (lack of viable alternative is a relevant consideration).

Defendants now contend, for the first time, that some of the measures that the district court required are cumulative. OB 46, 48, 58, 60-61. Defendants do not cite any authority for their position that cumulative remedies run afoul of the PLRA, nor could they. To the contrary, 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 ("Only a multifaceted approach … will yield a solution."). Moreover, the elements of relief here are not cumulative. The measures—cameras, reforms to accountability processes, additional supervisors, training, and third-party monitoring—are aimed at different parts of the "root cause" of those violations, including gathering different types of evidence of misconduct, holding officers accountable, preventing misconduct through staffing and training, and ensuring the remedies are effectively implemented.

Furthermore, Defendants' approach of objecting to measures one at a time, *see* OB 45-61, contravenes this Court's guidance that the PLRA does not require "a provision-by-provision explanation of a district court's findings." *Armstrong*, 622 F.3d at 1070. Instead, "[w]hen 'determining the appropriateness of the relief ordered,' appellate 'courts must do what they have always done': 'consider the order as a whole.'" *Edmo v. Corizon, Inc.*, 935 F.3d 757, 782 (9th Cir. 2019) (per curiam) (quoting *Armstrong*, 622 F.3d at 1070). Properly applying the law, the

district court explained both the need for the relief "considered as a whole," 1-ER-50, and the need for each individual component of that relief.

A. Fixed-Surveillance Cameras

The district court instructed Defendants to install fixed-surveillance cameras in all areas to which class members have access, leaving the details of implementation to Defendants. 1-ER-4, 50-52. Defendants complied with that instruction in April 2021. RJN; Freedman Decl., Ex. A, at 13. The system has been so successful that Defendants have since stated that they plan to roll out cameras to all prisons by 2024. *Id.* at 14.

Defendants nevertheless argue the district court erred in requiring this remedy because CDCR had previously expressed a vague intention to install fixed-surveillance cameras at some unstated time in the future. OB 45-48; *see* 2-ER-182. However, that Defendants themselves previously considered fixed-surveillance cameras appropriate only underscores that ordering the remedy was both necessary and appropriate. The Governor initially requested funding for surveillance cameras at RJD in his January 2020 proposed budget, but withdrew the request in May 2020, 1-ER-17 n.7. Unsurprisingly, Defendants cite no authority whatsoever for their view that a defendant can forestall a court from ordering a remedy under the PLRA by suggesting that it might voluntarily adopt that remedy at some unspecified future point.

Moreover, Defendants' staff, the parties, and their experts all agreed that installation of cameras at RJD was necessary. 1-ER-16-17, 50-52 (citing 4-ER-748, 899, 907-08; 1-SER-179; 4-SER-850-53; 9-SER-2303-05; 11-SER-2771-72). On appeal, Defendants concede video surveillance "is expected to drastically reduce acts of staff misconduct" and "has been effective in supporting termination decisions." OB 60.

B. Body-Worn Cameras

The district court also required that all officers who interact with class members wear body-worn cameras. 1-ER-4, 52-54. Defendants rolled out body-worn cameras at RJD in January 2021. RJN; Freedman Decl., Ex. A, at 13. The Court Expert has since noted their efficacy in improving interactions between incarcerated people and officers. RJN; Freedman Decl., Ex. D, 3-4. Defendants explained in a September 2021 statement to the district court that body-worn cameras have an "extensive ability to capture video and audio interactions between staff and inmates" and that they were "encouraged by the anticipated positive impact on staff and inmate relations." RJN; Freedman Decl., Ex. A, at 13.

Still, Defendants contend that body-worn cameras are unnecessary because they provide the same footage as fixed-surveillance cameras. OB 46. Defendants are wrong. The district court did not err in relying on the unrebutted conclusion of Mr. Vail that both fixed and body-worn cameras were necessary for accountability

because body-worn cameras capture footage from areas not covered by fixed-surveillance cameras—including inside cells—and capture sound. 1-ER-53-54 (citing 6-SER-1615-16); *see* 4-ER-908; 6-SER-1614-18; 9-SER-2304.

Defendants emphasize that the court stated that body-worn cameras were "likely," rather than certain, to improve investigations and reduce violations. OB 47. But in the very next sentence, the court specifically found that body-worn cameras were "necessary and should be deployed at RJD as soon as possible" to curb Defendants' violations. *See* 1-ER-4, 52-55; *see also* 2-ER-105-07 (hearing transcript). The district court was not required to assert perfect certainty that body-worn cameras would reduce Defendants' violations to zero for that remedy to be appropriate under the PLRA.

C. Investigation and Discipline Reforms

The district court also ordered Defendants to "develop measures to reform the staff complaint, investigation, and discipline process." 1-ER-4. The court provided Defendants with wide latitude to determine the appropriate reforms. 1-ER-5. Though the parties are still negotiating these reforms, once finalized, Defendants intend to implement them at all of their prisons. RJN; Freedman Decl., Ex. A, at 12-14.

Defendants argue that these measures were unnecessary because Defendants had already created AIMS. OB 59. But the court considered significant evidence

of AIMS' flaws and found that AIMS would not adequately address Defendants' ongoing accountability violations. 1-ER-47-48; *see supra* pp. 30.-31

Defendants also contend that oversight is not needed because the OIG already monitors CDCR's investigations and imposition of discipline. OB 59-60. The OIG's longstanding monitoring did nothing to stop or even slow the violations. *See supra* pp. 15-29. To the contrary, the OIG recognized Defendants' repeated noncompliance and the failure of AIMS to hold officers accountable. *See, e.g.*, RJN; Freedman Decl., Ex. E; 3-SER-616-21; 4-SER-859-85, 1037-53, 1059-69, 1082-83; 6-SER-1432-37; 8-SER-2222-37. The record strongly supports the court's findings that the existing systems for accountability did not work, and that the lack of accountability was the "root cause" of the violations at RJD. 1-ER-42, 55-57.

Defendants also suggest that the requirement for quarterly interviews of class members is overly intrusive. OB 59. That methodology, however, was borrowed from Defendants' own strike team, which took the approach in 2018 to attempt to diagnose the problems at RJD. 1-ER-5, 55. The court did not err in finding that such interviews were a necessary barometer to assess whether violations persist. 1-ER-55-57.

Finally, Defendants argue for the first time on appeal that reforms to their investigations and discipline processes are cumulative because installing fixed

surveillance cameras should prevent future violations. OB 60. But as the record shows, even when officers were caught committing misconduct on video, they were not always punished appropriately under Defendants' system. 9-SER-2307-14; 7-SER-1683, 1909-13 (videos). The court properly concluded that fixed-surveillance cameras alone would not prevent further violations if the culture of impunity at RJD remained unaddressed.

D. Adding Supervisory Staffing

The district court ordered Defendants to "significantly increase supervisory staff by posting additional sergeants on all watches and all yards at RJD." 1-ER-6, 58. Defendants complied with this measure in December 2020. RJN; Freedman Decl., Ex. A, at 13.

Defendants do not argue that the staffing requirement is burdensome (nor can they, given that the Bishop Report and Defendants' own expert both recommended additional staffing, *see* 1-ER-58). Instead, Defendants assert that this remedy is improper because it does not take into account the purported effect of the remedial measures Defendants adopted on their own. OB 57. But, again, the court's conclusion that Defendants' voluntary measures were inadequate is well-supported in the record. *See* 1-ER-58-59; *see supra* pp. 29-32. Notably, the court declined to order the more significant remedy requested by Plaintiffs, which

would have required Defendants to hire non-uniformed supervisory staff as well as additional sergeants. 1-ER-58.

Defendants also wrongly assert, for the first time on appeal, that the additional sergeants are cumulative of surveillance cameras. OB 58. Cameras and sergeants serve different roles; cameras cannot train, mentor, deescalate, or intervene to stop misconduct as it is happening.

E. Improved Pepper Spray Policy

The district court also ordered Defendants to "modify [their] policies to more effectively monitor and control the use of pepper spray by RJD staff with respect to class members," leaving the details to Defendants. 1-ER-7, *see* 1-ER-61; *Armstrong*, 622 F.3d at 1071.

Defendants assert that "the record does not demonstrate any pervasive use of pepper spray on class members." OB 53. Again, Defendants are incorrect. Though the court explicitly recounted only two incidents, the record contains extensive evidence of officers' misuse of pepper spray against people with disabilities. *See supra* p. 25. Mr. Vail also concluded that "[t]here is frequently … a great discrepancy in the accounts of the officers who report using a few second burst of pepper spray and the class member accounts that [the bursts last] significantly longer than a few seconds." 4-ER-910. Any argument about the intrusiveness of this relief is undermined by the fact Defendants intend to roll out

to all their prisons the revised pepper-spray policy they developed to comply with the court's Orders. RJN; Freedman Decl., Ex. A, at 14.

F. Retention of Video Footage

Defendants assert that the district court erred by requiring Defendants to indefinitely retain video footage of use-of-force incidents and other triggering events involving class members. OB 49-50. Plaintiffs have already agreed to limit the length of video retention to five years, mooting this argument. *See* Motion to Supplement the Record, filed herewith; Freedman Decl., ¶¶ 8-12 & Ex. H. In addition, Defendants forfeited any challenge to this part of the Orders by failing to raise it below.

G. Training Requirements

The district court ordered Defendants to "develop and implement training intended to eliminate violations of the ARP and ADA at RJD." 1-ER-7; *see* 1-ER-59-60. Defendants began delivering the court-ordered training in April 2021. Defendants assert that this part of the order violates the PLRA because conditions were improving at RJD even without additional training, and because Defendants already provided some training to officers. OB 53-57. But, as discussed above, the district court did not clearly err in finding that "the measures that CDCR has implemented to date, including providing staff with additional training, have proven to be ineffective at stopping violations of the ARP and class members'

ADA rights." 1-ER-60; *see supra* pp. 29-32. Most of the trainings preexisted and were not specifically designed to address the crisis at RJD; the few that were targeted were temporary and, as evidenced by the ongoing violations into mid-2020, were inadequate. *See* OB 53-57. The record also contains Mr. Vail's expert opinion that Defendants' trainings were insufficient. 4-ER-914-15. The court therefore did not err, much less clearly err, in crediting that evidence and finding that additional training was necessary and narrowly tailored.

H. Monitoring Reforms

Finally, the district court ordered that the Court Expert should oversee Defendants' implementation of the necessary reforms, and that Defendants must share relevant information with the Court Expert and Plaintiffs. 1-ER-5-6, 57-58. The Court Expert has since visited RJD and provided a report about the effect of the cameras there and is also overseeing the parties' ongoing negotiations regarding Defendants' discipline, investigation, and anti-bias reforms. RJN; Freedman Decl., Ex. D.

Defendants assert that the Court Expert's supervision and information-sharing are unnecessary in light of the other remedial measures. OB 60-61. Defendants forfeited that argument because they did not raise it below or even object at all to these measures. *See* 1-ER-57-58. In any event it is meritless, since adequate oversight is critical to ensuring that the remedial Orders will succeed.

Defendants also argue that some of the documents they must share may be subject to "applicable privileges," without identifying the privileges or acknowledging the existing protective orders in this case. OB 61; 5-SER-1248-54. Defendants have already produced documents since the Orders without encountering any apparent privilege issues, and nothing prevents Defendants from raising such an issue if and when it arises.

CONCLUSION

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

DATED: October 7, 2021

Respectfully submitted,

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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. 21-15614).

DATED: October 7, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points and contains 13,990 words.

DATED: October 7, 2021

Respectfully submitted,

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