IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

21-16696

MARCIANO PLATA, et al.,
Plaintiffs-Appellees,

v.

GAVIN NEWSOM, et al.,
Defendants-Appellants

J. CLARK KELSO,

Receiver-Appellee

On Appeal from the United States District Court for the Northern District of California, Case No. 4:01-cv-01351-JST, The Honorable Jon S. Tigar

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PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY MOTION TO STAY UNDER CIRCUIT RULE 27-3

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INTRODUCTION

Since the start of the pandemic, tens of thousands of people incarcerated in California prisons have been infected with COVID-19. Hundreds have died. And thousands of people who work in the California prison system have similarly been affected by the virus. Given the particularly severe impacts that COVID-19 has on prison populations, since March 2020, the court-appointed Receiver who oversees California's prison healthcare system has worked with the various stakeholders, including the parties here, to prevent and respond to the spread of the virus in the prisons.

Unfortunately, the pandemic continues to rage on, fueled by more transmissible variants. After months of study and consultation with medical and public-health experts, the Receiver determined that the only way to effectively protect the health and safety of incarcerated people was to require COVID-19 vaccination for all workers who enter California prisons. This was not a surprising recommendation: Nearly all experts agree that vaccines are the most effective tool in combatting the virus. Indeed, Defendants' *own* expert has testified that vaccination of prison workers "is the single most effective intervention available to prevent cases and outbreaks of COVID-19, both among those who are vaccinated and those who cannot be vaccinated." APP 7. And the State of California has itself required vaccines for several categories of employees in correctional facilities.

In the orders at issue here, the district court adopted the Receiver's recommendation. As the court explained, "All agree that a mandatory staff vaccination policy would lower the risk of preventable death and serious medical consequences among incarcerated persons. And no one has identified any remedy that will produce anything close to the same benefit." APP 68. In terms of the Eighth Amendment, Defendants are aware that unvaccinated staff pose a substantial risk of serious harm to incarcerated persons, and "although they have taken many commendable steps during the course of this pandemic, they have nonetheless failed to reasonably abate that risk because they refuse to do what the undisputed evidence requires." *Id.*

Defendants offer no reason to doubt—let alone to overturn, in an emergency posture—the court's careful conclusions. Those conclusions, Defendants acknowledge, were based on undisputed evidence about COVID-19's risks and harms in the prison context, as well as undisputed evidence about the efficacy of requiring staff vaccination. And although Defendants suggest that their existing preventative measures and voluntary vaccination incentives are sufficient to protect the health and safety of incarcerated persons, the data shows they are wrong—the staff vaccination rate at some prisons is as low as 38%. Defendants have failed to show that their challenge to the district court's order is likely to succeed on the merits.

Nor have Defendants made any showing that they will suffer irreparable harm absent a stay. All that they have provided is unsupported speculation about the possibility of staff shortages. But the evidence shows that such shortages are highly unlikely to materialize. And even if such staff shortages occur, they would occur months from now, giving the district court more than enough time to consult with the Receiver and the parties—as it has done for the last 18 months—and modify its orders should that become necessary. Indeed, the fact that Defendants waited nearly a month after the district court's initial order to move for a stay is evidence enough that the order poses no imminent irreparable harm.

In contrast, granting a stay of the district court's order would result in severe, immediate harm to incarcerated people throughout California, exposing them—and the communities in which they are located—to increased risk of infection, hospitalization, and death. Numerous courts have held that preventing the spread of COVID-19 is in the public interest. This Court should do the same and deny Defendants' stay motion.

BACKGROUND

I. The CDCR medical care system violates the Eighth Amendment and is directed by a Receiver.

This appeal arises from an order of the district court in a case where the State "conceded that deficiencies in prison medical care violated prisoners' Eighth

Amendment rights . . . [and] stipulated to a remedial injunction." *Brown v. Plata*, 563 U.S. 493, 507 (2011). Because serious deficiencies and preventable deaths continued despite the injunction, the district court appointed a Receiver "to oversee remedial efforts." *Id.* The Receiver was charged with exercising "all powers vested by law in the Secretary of the CDCR as they relate to the administration, control, management, operation, and financing of the California prison medical health care system." APP 203. The current Receiver, J. Clark Kelso, has served in that role since 2008. Dkt. 1063.[1]

While the Receiver has made progress towards providing constitutionally adequate medical care, when the COVID-19 pandemic arrived in California, he and Defendants struggled to contain its spread—with tragic consequences.[2] While Defendants, working with the Receiver, have improved their response to COVID-19 by introducing measures like masking, testing, social distancing, and improved

[1] All docket cites refer to the District Court docket.

[2] *See, e.g.*, Report of the Office of Inspector General, *COVID-19 Review Series, Part Three* (Feb. 2021), https://www.oig.ca.gov/wp-content/uploads/2021/02/OIG-COVID-19-Review-Series-Part-3-%E2%80%93-Transfer-of-Patients-from-CIM.pdf, at 2 (detailing mistakes including San Quentin State Prison's "inability to properly quarantine and isolate incarcerated persons exposed to or infected with COVID-19" and "its practice of allowing staff to work throughout the prison during shifts or on different days," which "likely caused the virus to spread to multiple areas of the prison").

isolation and quarantine policies, these measures have failed to stem continued spread of the disease.

Since the COVID-19 pandemic began, over 50,000 people incarcerated in CDCR have been infected with this disease, and over 240 of them have lost their lives. APP 67. And COVID-19's impact in prison has not been limited to incarcerated people; as of October 29, 2021, 21,559 staff members had been infected with COVID-19, and 48 had died, with 20 of those deaths occurring in the previous four months. Dkt. 3739-1, Ex. 5. Further, COVID-19 is not over in California or in the California prison system. Statewide, case counts are again on the rise.[3]

The risk to the incarcerated from COVID-19 will not abate, and could get worse. As Defendants' own expert explained,

> All of the available evidence strongly suggests that SARS-CoV-2, the virus that causes COVID-19, will continue to circulate and cause infections, illnesses, hospitalizations, and deaths globally, throughout the U.S., and in every county in California for the foreseeable future, including the highly transmissible Delta variant. It is also likely that new variants of SARS-CoV-2 will arise as a result of mutation of the virus, with unpredictable consequences.

Dkt. 3738-1 at 14.

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[3] *See* Aidin Vaziri, *Newsom Warns of Winter COVID Surge with Virus 'Coming Back in Force'*, San Francisco Chronicle (Nov. 17, 2021) https://www.sfchronicle.com/health/article/Gov-Newsom-warns-of-California-winter-surge-16626873.php

II. The district court followed the expert public health recommendation of the Receiver for how best to control the future spread of COVID-19.

It was against this background that the district court received a report from the Receiver, recommending that COVID-19 vaccination be required for all workers entering California prisons. APP 116-140. The report set forth "the public health basis" for adopting the policy, and detailed the Receiver's conclusion, "based on the advice of medical and public health professionals," that a vaccine mandate "is necessary to provide adequate health protection for incarcerated persons." *Id.* at 118. After briefing and oral argument from the parties, the district court ultimately adopted the Receiver's recommendation, though it deferred the details of implementation to Defendants and the Receiver. APP 87. In its order adopting the Receiver's recommendation, the district court found that:

> [T]he relevant facts are undisputed. No one challenges the serious risks that COVID-19 poses to incarcerated persons. No one disputes that it is difficult to control the virus once it has been introduced into a prison setting. No one contests that staff are the primary vector for introduction. . . . [N]o one disputes that the risks to the incarcerated population extend to the vaccinated as well as the unvaccinated. All agree that a mandatory staff vaccination policy would lower the risk of preventable death and serious medical consequences among incarcerated persons. And no one has identified any remedy that will produce anything close to the same benefit.

APP 68.

Based on these undisputed facts, the court found that Defendants were aware of a substantial risk of serious harm to incarcerated people from COVID-19

brought in by unvaccinated staff. APP 68. And it further found that Defendants had failed to reasonably abate that risk because "they refuse to do what the undisputed evidence requires." *Id.*

After Defendants and the Receiver were unable to agree on either the details of implementation or the deadline for implementation, the district court issued a further order setting a deadline of January 12, 2022 for all prison workers to be fully vaccinated. APP 42-44. That deadline does not mean that on January 12, 2022, prison workers who are not vaccinated and have not received an exemption will be fired. Instead, a long series of progressive discipline will begin, starting with a letter of instruction. Dkt. 3739-1, Ex. 1 at 2. No schedule for each step of discipline has been adopted by CDCR.

A month after the court's initial order, Defendants sought a stay, which the court denied after finding that they had not demonstrated a likelihood of success on the merits and that their "dire predictions of what might happen in the absence of a stay are speculative." APP 9. This Court should do the same.

ARGUMENT

I. Defendants fall far short of the showing required to justify a stay.

"A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Virginian Ry. Co. v. U.S.*, 272 U.S. 658, 672 (1926)[4]. Instead, it is "an exercise of judicial discretion" that is "dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009). Over time, courts have reformulated the test for a stay into a continuum. "At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). At the other end, "the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Id.* Relative hardship to the parties is the "critical element" in deciding whether a stay is justified. *Id.* "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken*, 556 U.S. at 433-34.

A. Defendants are unlikely to succeed on the merits.

Defendants have failed to make the "strong showing" of likelihood of success on appeal to justify a stay. *Id.* at 434. They primarily attempt to dispute the

[4] Unless otherwise indicated, all internal citations, quotation marks, and alterations are omitted.

public-health basis underlying the district court's adoption of the Receiver's recommendation—even though their *own* expert testified that prisons cannot control the spread of COVID-19 without staff vaccination. Dkt. 3738-1 at 15. They also rely heavily on *Fraihat v. U.S. Immigration & Customs Enforcement*, 16 F.4th 613 (9th Cir. 2021), a case that exclusively addresses federal immigration authorities' response to the COVID-19 crisis in a pre-vaccine world. None of these arguments support granting a stay.

i. The district court deferred to the expert recommendation of the Receiver that a vaccine mandate is necessary to address the substantial risk of serious harm from unvaccinated staff.

The district court adopted the Receiver's recommendation, based on the undisputed evidence showing that staff vaccine requirements would most effectively stem the risk of COVID-19. For obvious reason, Defendants do not try to dispute that COVID-19 poses a substantial risk of serious harm to incarcerated persons. Instead, they argue that this risk cannot justify finding an Eighth Amendment violation because the risk is one society is prepared to accept. Defs.' Mot. 24-25. But by analogizing to Californians living outside prison, Defendants ignore that the Eighth Amendment prohibits exposing prisoners to substantial risks "against [their] will." *Helling v. McKinney*, 509 U.S. 25, 35 (1993).

Simply put, living in prison is not the same as living in one's own home. Indeed, as the Receiver has testified, "If the coronavirus were designing its ideal home, it would build a prison." *See* Assembly Budget Subcommittee No. 5 on Public Safety, February 8, 2021, available at https://www.assembly.ca.gov/media/budget-subcommittee-5-public-safety-20210208/video [at 1:38:25 *et seq.*]. People who are not incarcerated can decide the level of COVID-19 risk they are prepared to tolerate and adjust their behavior and environment accordingly. They may be able to work remotely, have their groceries delivered, and wear masks around others. They do not have to sleep in a room with dozens of other unmasked individuals, as those housed in prison dormitory settings do. They can prevent unvaccinated individuals from entering their homes. But incarcerated people have no such available options to protect themselves. Once COVID-19 enters the prisons, which it does almost exclusively through staff, incarcerated people are subjected to a far graver risk, against their will, than people who live outside prison. Indeed, as Defendants' own expert testified, "the opportunities for transmission of SARS-CoV-2" in prisons are "substantial" and "it is difficult to control the virus once it has been introduced into a prison setting." Dkt. 3738-1 at 15.

Moreover, unlike in the non-prison setting, COVID-19 creates a substantial risk of serious illness and death for people in prison beyond just the risk of the

disease itself. Repeated outbreaks have led to large numbers of staff and incarcerated people being quarantined, causing delays in clinical care. Dkt. 3652 at 4-5 ¶ 9. Dealing with the pandemic has caused significant backlogs in primary care and specialty appointments. *Id.* at 5-6 ¶¶ 10-11. As CCHCS Director Dr. Joseph Bick, who oversees California prisons' healthcare, attests, "these delays cannot continue indefinitely without negatively affecting patient care." Dkt. 3652 at 4 ¶ 8. Thus, the district court properly found that, without a vaccine mandate for staff, the spread of COVID-19 in California prisons creates a constitutionally intolerable risk of serious harm.

The district court also properly found that Defendants are deliberately indifferent to this substantial risk of serious harm, because "they refuse to do what the undisputed evidence requires." APP 68. Defendants cite the other measures they have taken to excuse their failure to mandate staff vaccination. But by refusing to implement, in their own expert's words, the "single most effective" measure to control the spread of COVID-19, Dkt. 3738-1 at 15, they have failed "to take reasonable measures to abate" this risk. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). As the district court noted, deliberate indifference "should be determined in light of the prison authorities' *current* attitudes and conduct." APP 77 (citing *Helling*, 509 U.S. at 36 (emphasis added)). In determining whether to find deliberate indifference, courts should not "restrict [their] examination to

whether defendants made substantial efforts to improve safety, thereby excluding any consideration of whether the improvements have actually left inmates reasonably safe." *Jones v. City & Cty. of San Francisco*, 976 F. Supp. 896, 908 (N.D. Cal. 1997). Thus, the district court's prior ruling near the onset of the pandemic that Defendants were not deliberately indifferent based on earlier mitigation measures done with "a toolbox without a vaccine has little relevance when the same toolbox now includes a vaccine that everyone agrees is one of the most important tools, if not the most important one, in the fight against COVID-19." APP 77-78.

Indeed, Defendants have acknowledged that other mitigation measures are insufficient by adopting vaccine mandates for other state employees, including some in prison settings. APP 8 (discussing California Department of Public Health (CDPH) vaccine mandate orders). And Defendants' expert has testified that staff vaccination "is the single most effective intervention available to prevent cases and outbreaks of COVID-19, both among those who are vaccinated and those who cannot be vaccinated." Dkt. 3738-1 at 15. Defendants' expert also opined that prisons "are highly unlikely to be able to prevent or control outbreaks of COVID-19 solely through the application of non-pharmaceutical interventions." *Id.* Defendants have acknowledged that their existing measures do not reasonably abate the risk from COVID-19, and they have mandated vaccination for employees

in similar settings. *See* APP 8. Their refusal to do what their own expert deems necessary demonstrates that they are deliberately indifferent to the risk COVID-19 poses to incarcerated people.

To attempt to justify their refusal to adopt the measure even their own expert says is necessary, Defendants point to the recent guidelines issued by the U.S. Occupational Safety and Health Administration that apply to a broad swath of employers. Defs.' Mot. 26. But a far more appropriate comparison is to federal rules regulating staff at congregate facilities, like the federal mandate issued for healthcare workers in nursing homes that receive Medicare and Medicaid. *See* Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg 61555 (proposed Nov. 5, 2021) (to be codified at 42 C.F.R. 416, 418, 441, 460, 482-486, 491, 494). As that mandate outlines, because individuals living in congregate living facilities are at a higher risk for COVID-19 infections, all workers at such facilities must be vaccinated, with no testing alternative. *Id.* The Receiver's report recommending a staff vaccination mandate reached a similar conclusion, citing studies that found that "COVID-19 spreads far more rapidly inside jails and prisons than in other environments," in part because individuals who live in congregate settings like prisons "have intense, long-duration, close contact." APP 123-25. Thus, the risk of being exposed to COVID-19 in a congregate living setting like prison is far different, and far more

substantial, than the risk that exists in other settings. And measures that may be reasonable to stop the spread of COVID-19 in other settings are ineffective—and thus unreasonable—in places such as prison.

Pivoting away from this case's facts and record, Defendants argue that this Court's recent decision in *Fraihat* supports granting a stay. Defs.' Mot. 27-28. But Defendants grossly overread that decision. In *Fraihat*, the district court issued a sweeping injunction imposing a "broad range of obligations" on ICE officials. 16 F.4th at 618. The *Fraihat* court faulted the district court for its finding of an Eighth Amendment violation based on the "court's idea of how best to operate a detention facility." *Id.* at 642 (*quoting Bell v. Wolfish*, 441 U.S. 520, 539 (1979)). Nothing of the sort happened here. Far from developing its own plan, the district court here simply adopted the recommendation of the Receiver, who has been overseeing medical care in the prisons since 2008, and whose recommendation was based on advice from medical and public health professionals.

And while the court in *Fraihat* found that ICE's efforts to respond to COVID-19 were not deliberately indifferent, those efforts were made in a pre-vaccine world. The court noted that ICE was attempting to respond to COVID-19 "in the face of scientific uncertainty about COVID-19," with measures "[u]pdated over time to account for improved understandings of an unprecedented global pandemic." *Fraihat*, 16 F.4th at 638. There is no more scientific uncertainty, at

least as regards the effectiveness of vaccines against COVID-19. While ICE may not have been deliberately indifferent in implementing various mitigation measures in the face of scientific uncertainty in the spring of 2020, Defendants' decision not to implement a vaccine mandate today in the face of scientific consensus—and the testimony of their own expert—is a far different matter.

ii. The court's adoption of the Receiver's recommendation meets the PLRA's requirements.

The district court adopted the Receiver's recommendation of a vaccine mandate based on the Receiver's expert conclusion that "the only method to ensure adequate protection and care for incarcerated persons is vaccination of all persons who can bring infections into the prison." APP 118. Because this is the only remedy that will adequately mitigate the substantial risk of serious harm from COVID-19, it meets the requirements of the PLRA.

Although the PLRA requires that prospective relief be "narrowly drawn, extend[] no further than necessary. . . [and be] the least intrusive means necessary," 18 U.S.C. § 3626(a)(1)(A), the PLRA "should not be interpreted to place undue restrictions on the authority of federal courts to fashion practical remedies when confronted with complex and intractable constitutional violations." *Plata*, 563 U.S. at 526. And while Defendants make much of the possible difficulties in implementing a vaccine mandate, "a narrow and otherwise proper remedy for a

constitutional violation" is not invalid "simply because it will have collateral effects." *Id.* at 531.

Nevertheless, Defendants contend that the district court's order violates the PLRA because there are two alternative remedies they claim are narrower and equally effective against the spread of COVID-19. Defs.' Mot. 29-31. They are wrong.

Defendants' first proposed remedy of mandating vaccination for incarcerated people is both less effective and broader than the one ordered by the district court. It is the staff who are "primary vectors for introducing COVID-19 into CDCR facilities," not the incarcerated people. APP 79; Dkt. 3638-1 at 3 ¶¶ 16-17. Furthermore, even if all incarcerated people were vaccinated, they would still be subjected to a substantial risk of serious harm from breakthrough infections of COVID-19 brought into the prisons by unvaccinated staff. Dkt. 3652 at 1 ¶ 5. Thus, the unwillingness of a few incarcerated people to accept the vaccine cannot be used to justify Defendants' failure to reasonably address the risk from COVID-19 faced by *all* incarcerated people, both vaccinated and unvaccinated. Moreover, this is a constitutionally more intrusive remedy than staff vaccination because, unlike staff, incarcerated people do not have the option to quit their jobs to avoid the vaccine.

Nor is voluntarily encouraging staff to become vaccinated a sufficient alternative remedy. Although this remedy may be narrower, that does not mean it is narrowly tailored. "Narrow relief can be completely ineffectual." *Morales Feliciano v. Rullan*, 378 F.3d 42, 56 (1st Cir. 2004). That is why the Supreme Court in this case reiterated federal courts' obligation to "achiev[e] an *effective* remedy of the constitutional violation." *Plata*, 563 U.S. at 534 (emphasis added). While the percentage of vaccinated staff has increased, the increase in vaccinated staff has been quite small relative to the number who remain unvaccinated. As the district court noted, the rate of staff vaccination increased by just 1% in July and 2% in August. APP 86; Dkt. 3670-1 at 3 ¶ 11. As of October 28, 2021, the statewide vaccination rate for staff was only 62%, with some institutions hovering near 40%. Dkt. 3739-1, Exs. 2, 3. Defendants have produced no evidence that their efforts to encourage voluntary vaccination would achieve anything close to the high rates needed to stop the spread of COVID-19, nor can they contest that voluntary encouragement of vaccination increases vaccination rates at only a very slow pace.

* * * * *

In sum, the district court made a careful finding, based on the recommendation of an experienced Receiver, that a staff vaccine mandate was necessary to remedy the excessive risk to Plaintiffs' health and safety created by

COVID-19. While Defendants attempt to dispute the public health basis underlying the Receiver's recommendation, the testimony of their own expert undercuts their claims that a vaccine mandate is unnecessary. Because Defendants have failed to make the strong showing of likelihood of success on appeal, their stay request should be denied.

B. Defendants cannot demonstrate that irreparable injury would result from denial of a stay.

Nor can Defendants establish irreparable harm. Defendants claim that, in the absence of a stay, CDCR will suffer staff shortages. Defs.' Mot. 32. But none of the arguments Defendants have put forth establishes that irreparable injury is likely if a stay is not granted. Even assuming staff shortages would be a valid reason to grant a stay, Defendants have made no showing that significant staff shortages will actually materialize. There must be more than just "some possibility" of irreparable injury to support a finding of irreparable injury. *Nken*, 556 U.S. at 434 (citation and quotation omitted). Indeed, it must be "the more probable or likely outcome." *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). Defendants' unsupported claims about staff shortages fall far short of the exceptional circumstances required to warrant a stay.

As a threshold matter, any claims of irreparable harm are undercut by the fact that Defendants waited almost 30 days to file for a stay after the district court

issued its initial order. This notable lack of urgency in applying for a stay "vitiates much of the force of their allegations of irreparable harm." *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers); *see Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1318 (1983) (Blackmun, J., in chambers) (applicant's "failure to act with greater dispatch tend[ed] to blunt his claim of urgency and counsel[ed] against the grant of a stay").

Further, the assertion that the vaccine mandate must be delayed because prisons will otherwise face staff shortages is speculative. And this Court has been clear: "Speculative injury does not constitute irreparable injury." *Goldie's Bookstore, Inc. v. Super. Ct. of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984). Defendants argue that the Court should defer to the "predictive judgment" of the Director of CDCR's Division of Adult Institutions. Defs.' Mot. 32. But there is a difference between predictive judgment and speculation. Tammatha Foss, a former warden and current Director of Corrections Services for the Receiver, testified in support of the Receiver's recommendation that based on her experience, "[i]t is too soon to estimate reliably" the number of employees who will fail to comply with vaccination requirements. Dkt. 3738-2 at 1 ¶ 2. She further testified that the estimates of likely noncompliance "are highly speculative." *Id.* Even if high numbers of staff were noncompliant at the deadline, "the progressive discipline process is effective in encouraging compliance," making it likely that many staff

members who are initially noncompliant will ultimately accept vaccination. *See id.* And the progressive discipline process is "usually lengthy." *Id.* at 1 ¶ 4. It begins with the issuance of a non-adverse corrective action Letter of Instruction. Dkt. 3739-1 Ex. 1 at 2. An employee who does not comply "is unlikely to be excluded from the workplace, if at all, until at least three to four months (or more) after issuance of a letter of instruction." Dkt. 3738-2 at 1 ¶ 4. The assertion of substantial staff shortages as a result of the mandate is not only speculative but premature.

Indeed, this prediction is borne out by the results of the CDPH August 19 order mandating vaccination of all staff at two prisons— the California Health Care Facility (CHCF) and the California Medical Facility (CMF). The deadline for correctional staff subject to that order to demonstrate full vaccination is November 24. Dkt. 3739-1, Ex. 1 at 2. As of two weeks prior to that deadline, 95% of staff at CHCF and 98% of staff at CMF had either been vaccinated or requested an exemption. And as Director Foss testified, even higher compliance rates are likely to be achieved at the end of the progressive discipline process. Dkt. 3738-2 at 1 ¶ 2. Far from demonstrating that a vaccine mandate will lead to staff shortages, the experience at these two facilities shows that staff shortages are highly unlikely.

Defendants also claim that employees may suffer "irrevocable" harm from choosing between vaccination, discipline, or resignation. Defs.' Mot. 37. But a

harm that can be remedied if Defendants succeed on appeal is not irrevocable. It is well-settled that, because loss of employment can be compensated with money damages, it does not support a claim of irreparable injury except in "extraordinary" cases. *Sampson v. Murray*, 415 U.S. 61, 91-92 & n.68 (1974).

For this reason, courts across the country have recently and repeatedly found that a vaccine mandate that requires employees to choose between vaccination and termination does not constitute irreparable injury that would justify a stay or injunction of the mandate. *See, e.g.*, *We The Patriots USA, Inc. v. Hochul*, --- F.4th ---, 2021 WL 5121983, at *19 (2d Cir. Nov. 4, 2021); *Valdez v. Grisham*, 2021 WL 4145746, at *12 (D.N.M. Sept. 13, 2021); *Johnson v. Brown*, 2021 WL 4846060, at *21-25 (D. Or. Oct. 18, 2021); *Bauer v. Summey*, 2021 WL 4900922, at *18 (D.S.C. Oct. 21, 2021); *Beckerich v. St. Elizabeth Med. Ctr*, 2021 WL 4398027, at *6-7 (E.D. Ky. Sept. 24, 2021); *Norris v. Stanley*, 2021 WL 4738827, at *4 (W.D. Mich. Oct. 8, 2021).

In addition, this Court should not reward Defendants' threats about what might happen if their employees disobey a court order to justify issuing a stay of that same order. As the district court found, doing so "would appear to give contumacious employees an undue ability to determine when a court can enforce orders that require an employer to comply with the law." APP 9 n.2.

Defendants have fallen far short of demonstrating that irreparable harm is more likely than not in the absence of a stay. Moreover, even if Defendants' speculation about staff shortages comes to pass, Defendants "cannot suffer harm from an injunction that merely ends an unlawful practice," even if they were to "face[] severe logistical difficulties in implementing the order." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145-46 (9th Cir. 2013), *abrogated on other grounds sub. nom Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). Accordingly, Defendants fail to demonstrate irreparable harm warranting the extraordinary remedy of a stay.

C. The public interest weighs heavily against granting a stay.

The balance of the hardships in this case is clear. The almost-certain "physical and emotional suffering" that incarcerated people will suffer if the vaccine mandate is further delayed "is far more compelling than the possibility of some administrative inconvenience or monetary loss to the government." *Lopez*, 713 F.2d at 1437.

The district court found, based on a recommendation from the Receiver informed by public health and medical experts, that unvaccinated staff continuing to enter the prisons creates a substantial risk of serious harm for incarcerated people. APP 74-84. That risk continues with every day that unvaccinated staff are allowed to enter the prison and potentially spark further outbreaks. *See* Dkt. 3638-1 at 3 ¶ 16 ("The data obtained from contact tracing and genomic sequencing

confirm that CDCR staff are a primary vector for transmission of COVID-19 into CDCR institutions."). And because full vaccination takes time to achieve, any additional delay in implementation caused by a stay risks the possibility of a new, more dangerous variant being allowed to run rampant through the prison system, leading to additional preventable illnesses and deaths. *See* Dkt. 3638 at 21 ("Absent very high levels of vaccination, the Delta variant and other future variants will become more common in California, and there almost certainly will be additional large-scale outbreaks in CDCR facilities."). The preventable illness and death is not limited to incarcerated people, of course; there have been 20 staff deaths since the end of July 2021, many of which might have been prevented had all staff members been vaccinated. *See* Dkt. 3739-1 at 3 ¶ 6, Ex. 5. And the hardship suffered by incarcerated people from continued COVID-19 outbreaks is not limited to the effects of actually contracting COVID-19, because medical resources must be diverted to deal with treating COVID-19 cases and containing their spread, leading to significant delays in necessary medical care.

Defendants' unsupported claims about staff shortages, discussed above, pale in the face of these concrete harms that a stay would cause to incarcerated persons. Nor can Defendants rely on the potential economic impact on employees who choose to quit rather than be vaccinated to tip the balance of hardships in their favor. Defs. Mot. 37. As a district court facing a different correctional officers'

union's challenge to a vaccine mandate recently held, "[e]ven considering the economic impact on [correctional officers] if they choose not to be vaccinated, when balancing that harm against the legitimate and critical public interest in preventing the spread of COVID-19 by increasing the vaccination rate, particularly in congregate facilities, . . . the balance weighs in favor of the broader public interests." *Mass. Corr. Officers Federated Union v. Baker*, 2021 WL 4822154, at *8 (D. Mass. Oct. 15, 2021).

In the end, no one can dispute that the public interest is served by preventing needless illness and death from COVID-19. *See S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1151 (9th Cir. 2021) (preventing "more cases, more deaths, and more strains on California's already overburdened healthcare system" serves the public interest); *Tandon v. Newsom*, 517 F. Supp. 3d 922, 981 (N.D. Cal. 2021), *appeal dismissed*, No. 21-15228, 2021 WL 3507736 (9th Cir. July 7, 2021) (preventing "the deaths and serious illnesses that result from COVID-19" is in the public interest); *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 448 (D. Conn. 2020) (noting that, in assessing the balance of equities and the public interest, "Petitioners' interest in avoiding serious illness or death [from COVID-19] must weigh heavily on the scales").

Because the actual and substantial risk of serious harm faced by incarcerated people here trumps the speculative harms raised by Defendants, the balance of hardships and public interest weigh heavily against granting a stay.

II. There is no good cause for expedited briefing.

Defendants have failed to meet the requirements for expedited briefing in Circuit Rule 27-12 because, as discussed above, they have not demonstrated irreparable harm.

CONCLUSION

For all of these reasons, the Court should deny Defendants' motions for a stay and expedited briefing.

Respectfully submitted,

DATED: November 23, 2021

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because this motion contains 5,596 words, excluding the parts exempted by Rule 32(f). This motion complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

November 23, 2021

By: 
Laura Bixby

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2021, I electronically filed the foregoing motion with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants will be served by the CM/ECF system.

November 23, 2021

By: 
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