NO. 21-16696

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARCIANO PLATA, ET AL.,
Plaintiffs-Appellees,

v.

GAVIN NEWSOM, ET AL.,
Defendants-Appellants.

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

RECEIVER'S RESPONSE TO EMERGENCY MOTION TO STAY UNDER CIRCUIT RULE 27-3; MOTION FOR EXPEDITED BRIEFING

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INTRODUCTION

COVID-19 has taken a heavy toll on California's state prisons and the people who reside in them. The extreme population density, close-quarters contact between incarcerated persons and staff, and inherent design of prisons have enabled (and continue to enable) COVID-19 to spread far more rapidly among the incarcerated population than the general public. The resulting human toll has been enormous: over 51,000 incarcerated persons infected and 242 deaths, with others suffering long-term symptoms and complications. In addition, more than 21,000 staff members have been infected with COVID-19 and 49 have died.

COVID-19 vaccinations have proven to be an extraordinary tool to fight COVID-19 in California's prisons, as they have elsewhere. But the rise of the Delta variant—which is more transmissible than prior COVID-19 strains and infects vaccinated persons significantly more often than prior variants ("breakthrough infections")—has further threatened the health and safety of incarcerated persons. As of this fall, hundreds of fully vaccinated patients have suffered breakthrough infections and at least one of those patients has died. Both vaccinated and unvaccinated

patients alike have experienced serious, potentially long-term COVID-19 symptoms.

Critically, the primary vector for these outbreaks has been unvaccinated institutional staff, who unlike most incarcerated persons move regularly between their communities and the prisons. Defendants have themselves acknowledged this fact in court filings, and their own medical expert declared that "COVID-19 vaccination of all employees of the CDCR without a valid contraindication or exemption is the single most effective intervention available to prevent cases and outbreaks of COVID-19." R.App.0058. Voluntary efforts to encourage staff vaccinations have been ineffective: Fewer than 45% of correctional officers were vaccinated prior to the district court's vaccination order. Yet Defendants have consistently refused to mandate vaccinations for CDCR staff, placing the incarcerated population at risk.

In the face of the risk of harm to incarcerated persons caused by COVID-19, and the limited effectiveness of measures such as testing and social distancing, the district court issued an order on September 27, 2021, mandating vaccinations for all staff entering CDCR institutions. In that order, the district court concluded that Defendants had failed to

take reasonable measures to address a known and serious risk of harm to incarcerated persons, in violation of the Eighth Amendment, and that the mandatory vaccination requirement was narrowly tailored to address that violation, consistent with the Prison Litigation Reform Act (PLRA).

It is undisputed that COVID-19 poses a serious risk of harm to incarcerated persons and that vaccination is the "most effective intervention available to prevent cases and outbreaks of COVID-19." R.App.0058. Accordingly, Defendants cannot show a substantial likelihood of success on the merits of their appeal that the district court erred either in finding an Eighth Amendment violation or in crafting a sufficiently narrow remedy. Indeed, the record is replete with uncontested evidence that *none* of Defendants' current or proposed alternative measures adequately addresses the heightened risk of outbreak and serious complications posed by the Delta variant to the incarcerated population.

Because failure to show a substantial likelihood of success on the merits is dispositive, this Court need not address Defendants' irreparable harm arguments, which are in any event highly speculative. By contrast, the harms that will result if this Court stays the district court's

vaccination order are known and concrete: Unvaccinated staff members will continue to introduce COVID-19 into institutions, where it cannot be effectively controlled, threatening the health of the incarcerated population, many of whom are afflicted with chronic illnesses that render them particularly susceptible to COVID-19. For some of these patients, the damage from COVID-19 will be irreversible. But as the Court below found, much of that damage is preventable. The public interest is not served by delaying implementation of the district court's order, which safeguards the constitutional rights of the incarcerated population and the health of the incarcerated and prison staff alike.

That is particularly true here, where Defendants inexplicably waited a full month to ask the district court to stay its order—even though they prematurely and unsuccessfully asked the court to stay any order before one was issued, *see* R.App.0168, and informed the court that they were considering filing a motion weeks before they actually did, *see* R.App.0133. Defendants' delay, which created the asserted need for this emergency motion, undermines their claim of irreparable harm.

This Court should deny Defendants' request for a stay.

BACKGROUND

I. The Receivership

On April 5, 2001, a class of medically vulnerable patients incarcerated in CDCR institutions initiated this action against Defendants, alleging that CDCR's deficient provision of healthcare violated the Eighth Amendment. When stipulated relief proved unable to cure Defendants' constitutional violations, the district court appointed Mr. Kelso's predecessor as Receiver for California's prison medical system. *See Brown v. Plata*, 563 U.S. 493, 507 (2011); APP.200-208. In the intervening years, the Receivership has reformed the management of the healthcare system to great effect.[1] R.App.0456-0466, 0481-0486.

II. The COVID-19 Pandemic

The COVID-19 pandemic reversed this trend of improved health outcomes. Because the prison population disproportionately suffers from chronic illnesses, APP.130, when COVID-19 began spreading through CDCR facilities in early spring of 2020, it struck with devastating effect.

[1] Due to these improvements, the number of likely and possibly preventable deaths has declined substantially, from 18 likely preventable and 48 possibly preventable deaths in 2006—when the Receivership was established—to 0 likely preventable and 35 possibly preventable deaths in 2013. R.App.0497-0498.

All told, more than 51,000 incarcerated persons in CDCR institutions, or approximately half of the current incarcerated population, have contracted COVID-19 and more than 240 have died, including at least one person who was fully vaccinated. R.App.0035; APP.112-115.

A. The District Court Concludes that Defendants' Preventative Measures Early in the Pandemic Were Constitutionally Adequate

During the initial months of the pandemic—before any vaccines were developed and prior to the introduction of the Delta variant—Defendants developed a range of preventative measures aimed at slowing and limiting spread, including suspending transfers between facilities, distributing facial coverings, restricting movement within facilities, and limiting access to programs and services. *See Plata v. Newsom*, 445 F. Supp. 3d 557, 563 (N.D. Cal. 2020) (describing preventative measures). Although Plaintiffs challenged the constitutional adequacy of these measures, the district court concluded on April 17, 2020, that Defendants' measures were "reasonable" at that time. *Id.* at 568-69. As relevant here, the district court cautioned that because "[t]he pandemic presents an ongoing public health emergency," "the virus's presence within the prisons requires continuous, *evolving* efforts by Defendants." *Id.* at 569

(emphasis added). Indeed, the district court expressly stated that "while the Court does not *now* find that Defendants have been deliberately indifferent . . . , *this does not preclude a finding of deliberate indifference at a later time*." *Id.* (emphases added).

B. Defendants' Voluntary Vaccination Efforts

Over the past two years, the district court has held regular case management conferences to monitor the continued response of the Receiver and Defendants to the pandemic. Early on, all parties and the court recognized that staff were the primary vector for introducing COVID-19 to institutions and that addressing this issue was central to avoiding unnecessary deaths, hospitalizations, and serious illnesses for those in custody. *See* R.App.0407 (June 8, 2020); R.App.0401 (June 28, 2020). Because "[v]accination significantly reduces the likelihood that an individual exposed to SARS-CoV-2 will become infected and, therefore, the likelihood that they will expose those around them to the virus," R.App.0174, the parties began discussing the importance of administering vaccines as early as December 2020. R.App.0396-0398.

Notwithstanding these discussions, vaccination rates among CDCR staff remained extraordinarily low. By early February of 2021, only 39%

of institutional staff had received one dose of the vaccine. Concerned by the low rate of staff vaccinations, "a group of experts convened" that same month "to discuss the topic of mandating COVID-19 vaccines for CDCR employees." R.App.0355. Defendants ultimately rejected the idea of mandating vaccinations, opting instead to continue focusing on voluntary vaccination campaigns. R.App.0356.

These campaigns have not succeeded. Efforts to encourage staff vaccination through education, access, and supplemental sick leave for those with symptoms have barely moved the needle on vaccination rates. By July of 2021, just 53% of all CDCR staff had received at least one dose of the vaccine, where it plateaued. *See* R.App.0339; *see also* APP.086 (observing that the rate of vaccinations increased by "just 1% in July (from 52% to 53%) and 2% in August 2021 (from 53% to 55%)"). That number was even lower for CDCR custodial staff, of whom only 42% had received at least one dose of the vaccine. APP.136. This stood in sharp contrast to the incarcerated population, who by then had a vaccination rate of roughly 75%. APP.070.

These staff vaccination rates proved "far too low to safeguard the health of" patients in CDCR's facilities. APP.136. Indeed, from July 31,

2021 to September 10, 2021, California Correctional Health Care Services (CCHCS) traced at least *forty-eight* outbreaks in CDCR facilities to unvaccinated institutional staff. R.App.0178.

C. The Receiver Recommends Mandating Staff Vaccinations

On August 4, 2021, the Receiver issued a report recommending that "access by workers to CDCR institutions be limited to those workers who establish proof of vaccination (or have established a religious or medical exemption to vaccination)." R.App.0335.

Citing the "enormous risks to incarcerated persons and staff and to the ability of the medical system to care for patients" posed by the Delta variant as well as "[t]he best available medical science," the Report concluded that absent mandatory vaccination requirements, "the Delta variant *will* cause new outbreaks, increased hospitalizations, and deaths." APP.118. In support of this conclusion, the Report pointed to several critical public health findings: *first*, that "[i]nstitutional staff are [the] primary vectors for introducing COVID-19 into CDCR facilities" by virtue of their contact with "friends, family, and local service providers in the surrounding community," APP.120; *second*, that "testing is universally recognized as a far imperfect substitution for vaccination"

because "COVID-19 is often not detectible by test in its early incubation period" and because "as much as 40 percent of transmission is pre-symptomatic," APP.121-122; *third*, that social distancing and masking measures in carceral settings are incapable of effectively "prevent[ing] the transmission of a highly contagious virus," APP.129; *fourth*, that research "strongly supports the efficacy of the [COVID-19] vaccines at preventing transmission," APP.135, *fifth*, that the rate of staff vaccinations is too low to safeguard against outbreaks and "voluntary efforts" have proven "ineffective and insufficient," APP.137, APP.139; and *sixth*, that "incarcerated persons with COVID-19 have worse health outcomes than the population at large," APP.129. Notably, Defendants expressly stated that they "agree with the public health findings regarding the COVID-19 vaccine cited in the Receiver's report." R.App.260.

On August 9, 2021, the district court issued an order instructing the parties to "show cause as to why it should not order that the Receiver's recommendation be implemented." APP.114.

D. The District Court Mandates Vaccinations for CDCR Staff and Denies Defendants' Request for a Stay

On September 27, 2021, and following briefing and argument from the parties, the Receiver, and Intervenor California Correctional Peace Officers Association (CCPOA), the district court issued an order adopting the Receiver's recommendation and mandating vaccinations for all CDCR staff. APP.068. The district court concluded that Defendants' failure to mandate vaccinations for its staff violated Plaintiffs' Eighth Amendment rights and that the Receiver's recommendation was narrowly tailored to address that violation under the PLRA. APP.085-086.

With respect to the deliberate indifference prong of the Eighth Amendment test, the district court rejected Defendants' argument that their "multi-faceted response to the COVID-19 pandemic" was a reasonable response to the grave risks posed by the Delta variant to the prison population given the availability of vaccines, and observed that Defendants "have pointed to no measure or combination of measures that offers the incarcerated population the same level of protection as the vaccine mandates recommended by the Receiver." APP.077-078. The district court likewise rejected Defendants' argument that implementing

the California Department of Public Health's (CDPH) orders requiring vaccination of healthcare workers in carceral settings was constitutionally sufficient. Among other issues, the district court pointed out that the CDPH orders would not address "the myriad ways in which incarcerated persons come into close contact with staff outside of healthcare settings," APP.080, and that "[o]f the 48 outbreaks traceable to staff since July 31, only 14, or 29% were 'traced back to a person that the August 19 CDPH order would require to be vaccinated.'" APP.081 (citation omitted).

The district court also rejected Defendants' arguments that mandating vaccinations for incarcerated persons would be a narrower remedy to the constitutional violation. APP.085. Specifically, the district court found that the Delta variant's documented ability to cause breakthrough infections rendered Defendants' suggestion insufficient. APP.085.

On October 25, four weeks after the district court issued its order, Defendants sought a stay pending appeal. The district court denied the motion on November 17, 2021. APP.005-011.

ARGUMENT

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009). It is instead an extraordinary remedy reserved for applicants who can show that they are likely to succeed on the merits, that they will be irreparably injured absent a stay, that issuance of the stay will not substantially injure other interested parties, and that the public interest favors a stay. *Id.* at 434.[2] The first two factors of this standard, likelihood of success on the merits and irreparable harm, are the most critical—and in this Circuit, evaluated on a "sliding scale." *Golden Gate Rest. Ass'n v. City and Cnty. of S.F.*, 512 F.3d 1112, 1116 (9th Cir. 2008). To prevail, the movant must show either "a probability of success on the merits and the possibility of irreparable injury" *or* the existence of a "serious legal question" accompanied by a balance of hardships that tips "sharply" in the movant's

[2] Where, as here, the Government is the opposing party, the third and fourth factors merge. *Nken*, 556 U.S. at 435.

favor. *Id.* at 1115-16 (citations omitted). Defendants cannot meet this demanding standard.

I. Defendants Are Not Likely to Succeed on the Merits of Their Appeal

A. The District Court Correctly Applied the Eighth Amendment Test for Deliberate Indifference

"A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). Under that standard, prison officials who know of a "substantial risk to inmate health" and fail to "respond[] reasonably to the risk" act in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 844-45. The district court correctly held that the undisputed record shows that Defendants have failed to meet this standard of care.

There is no dispute in this case as to whether COVID-19 poses a substantial risk of serious harm to Plaintiffs. As the district court noted: "Neither Defendants nor CCPOA disputes that COVID-19 continues to pose a substantial risk of serious harm–including death–to incarcerated persons, regardless of their vaccination status." APP.084. Instead, the Eighth Amendment question in dispute is whether Defendants were

deliberately indifferent to the substantial risk of serious harm posed by COVID-19.

On this undisputed record, the district court correctly held that Defendants acted with deliberate indifference by "failing to take reasonable measures to abate" the substantial risk of serious harm to incarcerated persons from COVID-19, and that Defendants are not substantially likely to prevail on the merits of their Eighth Amendment argument. *See* APP.084 (quoting *Farmer*, 511 U.S. at 847). It is undisputed that, as the district court held, the primary vector for these infections—one that *none* of Defendants' current or proposed measures adequately address—is CDCR staff, a large percentage of whom remain unvaccinated. APP.070, 079. It is likewise uncontested that stopping COVID-19 from entering institutions is paramount because it is difficult to stop the spread of COVID-19 once it enters an institution. APP.079. And it is uncontested that Defendants' testing strategy is insufficient to address the risk of workers introducing COVID-19 to CDCR institutions. APP.079. Indeed, last month, Defendants' expert in another case attested that "COVID-19 vaccination of all employees of the CDCR without a valid contraindication or exemption is the single most effective

intervention available to prevent cases and outbreaks of COVID-19 . . . ." R.App.0058. Yet, Defendants continue to refuse to take the very action they recognize to be the most effective at preventing large outbreaks of COVID-19 within CDCR facilities. That is textbook deliberate indifference. *See Farmer*, 511 U.S. at 847.

B. Defendants' Contrary Eighth Amendment Arguments Are Meritless

Defendants assert in their motion that the district court erred because exposing incarcerated persons to the risk of COVID-19 cannot, as a matter of law, violate contemporary standards of decency given that "millions of Californians" also risk coming into contact with unvaccinated persons in their everyday lives, Mot. at 14-15. That argument is deeply misguided. Unlike the general population, incarcerated individuals have no choice as to whether they come into contact with unvaccinated individuals and have no means of avoiding such contact—they are exposed to whomever *Defendants* choose to expose them to, through, for example, housing and staffing assignments. Moreover, Defendants have never disputed that while COVID-19 may pose a threat to incarcerated and non-incarcerated persons alike, that threat is particularly acute for the incarcerated, who both suffer from higher rates of chronic illnesses

that render them more vulnerable to COVID-19[3] and live in population-dense settings that enable higher transmission rates and larger outbreaks.[4] *Id.* at 2; APP.126, 130. Indeed, incarcerated persons are far more likely than members of the general population to contract COVID-19 because they "have little ability to control the persons with whom they interact," APP.124, 126.

This is not a situation where incarcerated persons have chosen to "tolerate[] a heightened risk of the disease" that would cut against a finding of deliberate indifference. Mot. at 15 (citing *Hines v. Youseff*, 914 F.3d 1218, 1231-32 (9th Cir. 2019)). Not only have incarcerated individuals gotten vaccinated at higher rates than staff members, but as the court below held, this argument "fail[s] to consider that it is not only the unvaccinated population that is at substantial risk of serious harm

[3] One study cited in the Receiver's Report found that "incarcerated persons were more likely to be admitted to the intensive care unit (26.9% vs. 18.7%), require respirators (24.1% vs 9.9%), and require intubation (25.0% vs. 15.2%). Incarcerated persons were also more likely to die in the hospital (29.6% vs. 20.1%) and more likely to die after 30 days (34.3% vs. 24.6%)." APP.130.

[4] The undisputed record establishes that the "extreme population density" of CDCR's institutions makes it impossible for incarcerated persons to practice social distancing. APP.124, 126.

from COVID-19, and that such risk would be present even if the entire incarcerated population were vaccinated." APP.075.

Nor did the district court err in finding that Defendants failed to act reasonably in responding to the risk posed to incarcerated persons by COVID-19 and the Delta variant, as Defendants assert. *See* Mot. at 15-18. *First*, as the district court correctly observed, the fact that Defendants acted reasonably "based on 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.077-078. Indeed, Defendants have never meaningfully disputed that "[v]accination is far more effective than other measures like masking and social distancing," APP.135, particularly given the "crowded nature of CDCR institutions," APP.125. *See also* R.App.0320, 0321-0322 (Undisputed declaration of Dr. Joseph Bick noting that staff vaccination is imperative and other measures inadequate to prevent the introduction and spread of COVID-19); R.App.0304-0305 (Undisputed declaration of Dr. Tara Vijayan noting the same); R.App.0269-0270 (Undisputed supplementary declaration of

Dr. Bick noting that institutions with lower staff vaccination rates have larger and more frequent COVID-19 outbreaks).

Second, the district court found that merely offering vaccines to CDCR employees on a voluntary basis was insufficient to curb the substantial risk of additional outbreaks given the "minimal success" Defendants have had in increasing staff vaccination rates. APP.086 (noting that the vaccination rate of staff increased by 1% in July and 2% in August). The district court explained that Defendants and CCPOA offered no reason to believe voluntary efforts would have more success going forward, and Defendants have offered none here.

Defendants' reliance (Mot. 17-18) on this Court's recent decision in *Fraihat v. U.S. Immigration and Customs Enforcement*, 16 F.4th 613 (9th Cir. 2021), is misplaced. *Fraihat* simply reinforced the rule that to prevail on a claim of deliberate indifference, "a plaintiff must show that the defendant disregarded an excessive risk to the plaintiff's health and safety by failing to take reasonable and available measures that could have eliminated that risk." *Id.* at 636 (citation and internal quotation marks omitted). The district court correctly applied that standard to the undisputed evidence in this case and found both that Defendants were

subjectively aware of the substantial risk of serious harm to incarcerated persons posed by COVID-19 *and* that Defendants' preventative measures did not reasonably address that risk because they failed adequately to address the primary vectors for introducing infection into CDCR institutions. APP.084.

Unlike in *Fraihat*, the district court here did not issue a "detailed set of directives" based on its "idea of how best to operate a detention facility." 16 F.4th at 631, 642 (citation omitted). To the contrary, the court previously recognized early in the pandemic that it *could not* order relief based on "what it thinks is the best possible solution," *Plata*, 445 F. Supp. 3d at 568, and adopted the Receiver's mandatory vaccination recommendation only when the undisputed record showed that Defendants were indifferent to the substantial risk of serious harm. In addition, *Fraihat*'s warnings that courts should defer "to the government in its operation of immigration detention centers mid-pandemic," 16 F.4th at 640 n.7, have less purchase here, where the district court appointed the Receiver specifically to address Defendants' pattern of constitutional violations.

Because Defendants cannot make a substantial case on the merits of their Eighth Amendment arguments, this issue provides no basis for a stay. *See S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020).

C. The District Court Correctly Determined that its Mandatory Staff Vaccination Order is Narrowly Tailored Under the PLRA

Defendants likewise cannot show a likelihood of success on their argument that the district court's mandatory vaccination order violated the PLRA's narrow tailoring requirements. Mot. at 18. The PLRA authorizes a court to grant prospective relief in prison litigation cases so long as the remedy is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). The district court's mandatory vaccination order accomplishes exactly that. Recognizing that staff members are the primary vectors for infection, and that the undisputed evidence in the record showed that vaccines are highly effective at preventing

transmission,[5] the district court ordered all CDCR institutional staff vaccinated after concluding that none of Defendants' proposed alternative measures would be adequate. APP.079-080, 087.

Contrary to Defendants' assertions, the district court did not ignore Defendants' argument that vaccinating all incarcerated persons was more narrowly tailored than a staff mandate. Mot. at 20. Instead, the district court reasonably and correctly found that vaccinating all patients would *not* address the substantial risk of harm identified by Plaintiffs and the Receiver because the Delta variant has proven more capable than its predecessors at harming "*vaccinated* incarcerated persons." APP.085. The numbers in the record bear this out: hundreds of vaccinated patients have suffered breakthrough infections and at least one has died. R.App.0179. Accordingly, the record reflects that even if all prisoners were forcibly vaccinated as Defendants appear to propose, there would

[5] Relying on a recently published study, Defendants argue that fully vaccinated individuals are just as capable of transmitting infection as unvaccinated individuals. Mot. at 19. That suggestion ignores the study's *principal conclusion* that "[v]accination reduces the risk of delta variant infection." R.App.0006. As CCHCS Director of Health Care Services, Dr. Bick, explained, Defendants' study reinforces the Receiver's recommendation because it indicates that if more CDCR staff were vaccinated against COVID-19, fewer would become infected with, and potentially introduce, COVID-19 into institutions. R.App.0004.

still exist a substantial risk of serious harm to prisoners that is incapable of being redressed by any solution narrower than the one set forth in the district court's vaccination order.[6]

Defendants' argument that the district court's order is overbroad because "COVID-19 cannot be kept out of CDCR prisons entirely" misses the point. Mot. at 20. The question under the Eighth Amendment and the PLRA is not whether Defendants can completely eliminate the risk from COVID-19, but whether Defendants have taken sufficient efforts to *minimize* the substantial risk that incarcerated persons will be seriously harmed by COVID-19. The answer, as discussed in exhaustive detail in the district court's order, *see generally* APP.067-088, is that they have not.

Neither did the district court clearly err in finding that further voluntary vaccination campaigns would be insufficient. As discussed above, *see supra* pp. 7-8, there is simply *no evidence* supporting Defendants' assertion that "there is every reason to expect vaccination

[6] It is telling that although Defendants claim that a vaccine mandate for patients is more narrowly tailored, they did not adopt that policy in place of the CDPH order, and were unable to explain to the district court how such a mandate would operate, and thus whether it would in fact be more narrowly tailored. *See* APP005-011; R.App.0135-0173.

rates will continue to rise" in any meaningful way. Mot. at 21. If anything, the incremental single-percentage point increases over the summer suggest that Defendants have reached the limit for voluntary vaccinations. *See* APP.086.

Defendants' observation that vaccination rates jumped by "ten percentage points, between August and mid-October 2021, and an additional five percentage points since mid-October" is misleading. Mot. at 21. Defendants fail to note that after months of little progress, this sharp increase occurred after *Defendants* implemented *mandatory* vaccinations under two separate CDPH orders for correctional staff working in healthcare settings. *See* APP.057 ("[H]ealthcare staff who are fully vaccinated increased from seventy-two percent on August 6, 2021, to eighty-two percent on October 14, 2021."). Rather than undermine the District Court's order, this rise in vaccination rates only confirms the necessity of the mandate.

Because Defendants cannot show a likelihood of success on the merits of either their Eighth Amendment or PLRA arguments, this Court should deny their request for a stay. *See S. Bay United Pentecostal Church*, 959 F.3d at 939.

II. Defendants Will Not Suffer Irreparable Harm Absent a Stay

Because Defendants have shown neither a probability of success on the merits nor the existence of serious legal questions, this Court need not reach Defendants' arguments on irreparable harm. *See Golden Gate Rest. Ass'n*, 512 F.3d at 1115-16. In any event, Defendants have not shown that they will be irreparably harmed in the absence of a stay.

As an initial matter, Defendants never raised any of these purported harms in their response to the district court's Order to Show Cause. *See generally* R.App.0207-0236. They then waited *nearly a month* to move for a stay of the district court's September 27 vaccination order. *See* R.App.0126-0128 (Oct. 25, 2021).

Defendants' only explanation for their month-long delay in seeking emergency relief is that the district court did not set a deadline for implementation until October 27. *See* Dkt. No. 9-1 at 3. But that argument is a red herring. As Defendants acknowledge, they moved for a stay on October 25, *before* that deadline was imposed, meaning that the October 27 implementation order could not have been the cause of their delay. *Id.* What is more, they (unsuccessfully) asked the district court at the hearing on the order to show cause on September 24 to stay any

order so that defendants could seek appellate review before the order went into effect, *see* R.App.0168, and told the district court on October 12 that they were already considering a motion for a stay, R.App.0133. They offer no reason why that consideration took a month, and there is no plausible reason, as the harms Defendants claim they will suffer if the vaccination order takes effect would occur regardless of the specific implementation deadline. APP.010, n.3. Defendants' substantial delay in seeking relief undermines any claim of irreparable harm. *See Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015) (delay in seeking relief undercuts claim of irreparable harm).

With respect to the substance of Defendants' claimed harms, the district court correctly determined that Defendants' "dire predictions of what might happen in the absence of a stay are speculative" and do not favor issuance of a stay. APP.009. Although Defendants suggest that "[a] non-compliance rate of around five percent would be devastating to CDCR's operations," Mot. at 23, there is no evidence that the non-compliance rate will actually reach that level, for either correctional staff

or noncustodial workers.[7] Staff, including correctional officers, in the California Medical Facility and California Health Care Facility—the two facilities subject to an independent vaccination mandate from CDPH—have an extended deadline, until November 24, 2021, to comply with the mandate. Yet, more than two weeks in advance of that deadline, only "about 5.2 percent of correctional officers at California Health Care Facility had neither complied with the vaccination requirement nor sought an exemption." *Id.* "For officers at California Medical Facility, the rate was about 2 percent." *Id.*

Even after November 24, 2021, staff will begin the process of progressive discipline, which is effective in encouraging compliance with CDCR and CCHCS policies. *See* R.App.0042. As part of that process, employees will likely have months before they are forced to choose between their jobs and complying with the mandate. Defendants'

[7] Defendants hypothesize that "[i]f non-compliance rates observed at the medical prisons are consistent" across noncustodial workers like culinary staff, "there would be a further detrimental impact on prison administration and operations." Mot. at 25. That hypothesis flies in the face of the evidence, which shows that noncustodial workers have higher vaccination rates than corrections officers. R.App.0178-0179.

speculation of substantial noncompliance is therefore wholly unwarranted.

Vaccine mandates of other large workforces paint a similar picture. For example, after unions representing New York City police officers predicted that the city's vaccine mandate would lead to 10,000 officers leaving their posts, just 34 officers out of the city's 35,000-person police force (less than 0.1%) were placed on unpaid leave for noncompliance. *See* Annabelle Timsit, *NYC Police Unions Warned Vaccine Mandates Would Pull 10,000 Officers Off Streets. So Far, The Number is 34*, Washington Post, Nov. 2, 2021, at A1 https://www.washingtonpost.com/nation/2021/11/02/nypd-unpaid-leave-vaccine-mandate/. Other similar cases abound. *See* R.App.0118-0119 (listing examples).

Defendants' doomsday predictions are too speculative to support the type of extraordinary relief they seek. *See Colo. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 849 (9th Cir. 1985) ("We have long since determined that speculative injury does not constitute irreparable injury."). In addition, Defendants' arguments fail to account for the undisputed fact that COVID-19 outbreaks "also result in staff shortages,"

which the Court's order would help alleviate. APP.009. In fact, approximately 5,500 CDCR staff have had to quarantine in the past year for COVID-19-related reasons. APP.076. These staff shortages have not led to the dire consequences Defendants now predict, largely because CDCR has contingency plans for each prison that help to ensure that facilities will continue running even in the face of staff shortages. R.App.0042-0043.

Because Defendants will not be irreparably harmed absent a stay, this factor weighs against staying the district court's order. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1010 (9th Cir. 2020).

III. Neither the Public Interest nor the Balance of Equities Favors a Stay

The third and fourth factors of the *Nken* test—public interest and the balance of the equities—also weigh against issuing a stay. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Am. Beverage Ass'n v. City and Cnty. of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019) (citation omitted). Where, as here, the constitutional violation directly threatens the health and wellbeing of patients in CDCR custody during a deadly pandemic, these factors tilt sharply in favor of allowing the district court's order to proceed. *See City*

and Cnty. of S.F. v. USCIS., 981 F.3d 742, 762 (9th Cir. 2020) ("The public interest in preventing contagion is particularly salient during the current global pandemic.").

Since the district court issued its order, nearly *1,000* incarcerated persons have contracted COVID-19. *See* California Department of Corrections and Rehabilitation, *Population COVID-19 Tracking*, https://www.cdcr.ca.gov/covid19/population-status-tracking/ (accessed on November 21, 2021). Contrary to Defendants' assertion, implementing the district court's order is not a matter of achieving "perfect safety." Mot. at 27. It is a matter of securing Plaintiffs' constitutional right to humane conditions of confinement while in state custody, *Farmer*, 511 U.S. at 847, in this case by taking the undisputed most effective measure to limit introduction and transmission of COVID-19 into CDCR institutions. It is in the public interest to implement the district court's order now.

IV. Expedited Briefing Is Unwarranted

Because Defendants have failed to show they will suffer irreparable harm, they cannot satisfy the requirements set forth in Circuit Rule 27-12 for expedited briefing.

CONCLUSION

The Receiver respectfully asks the Court to deny Defendants' request for a stay and their alternative request for expedited briefing.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and Circuit Rules 27-1(1)(d) and 32-3, because it contains 5587 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the count of Microsoft Word.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

November 23, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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