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,

J. CLARK KELSO,

Receiver-Appellee.

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

No. 4:01-cv-01351-JST
The Honorable Jon S. Tigar, District Judge

DEFENDANTS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

Few, if any, state correctional systems have taken the threat posed by COVID-19 as seriously as California's. As detailed in the State's Opening Brief, California has responded to the COVID-19 pandemic with extraordinary measures that meet the moment: releasing tens of thousands of inmates (reducing the incarcerated population to levels not seen for decades), temporarily closing the prison system to new inmates, requiring all prison workers to be vaccinated or submit to testing twice weekly and wear masks, and implementing a nation-leading vaccination program that has fully vaccinated 81% of inmates and 71% of staff.[1] As recently as June 2021, the federal Receiver affirmed that "[r]esponding to the COVID-19 pandemic remains a high priority for both CDCR and California Correctional Health Care Services (CCHCS)." (2-ER-280.)

Moreover, California's innovative and multi-faceted approach includes aggressive measures that exceed what most other state correctional systems in the country are doing. The best example is California's focused vaccination mandate targeting staff working in correctional health-care

[1] CDCR, *Population COVID-19 Tracking*, https://www.cdcr.ca.gov/covid19/population-status-tracking/ (last visited Feb. 3, 2022).

settings. According to the Prison Policy Institute, only one state's correctional system has responded as well or better to the COVID-19 pandemic as California's.[2]

As the Opening Brief established, this is not "the stuff of deliberate indifference." *Fraihat v. U.S. Immigr. & Customs Enf't*, 16 F.4th 613, 638 (9th Cir. 2021). An absence of deliberate indifference, in turn, is fatal to the district court's unprecedented across-the-board mandate. So Appellees respond with legal and factual obfuscation.

First, like the district court, Appellees dismiss California's proactive efforts to protect inmates from COVID-19 as either "past actions," or actions taken before the vaccine's availability, and thus of no relevance to the Eighth Amendment analysis. But the record belies Appellees' argument. Since the vaccine became available and through the present, California has implemented aggressive measures like limiting intake of new incarcerated persons, requiring correctional staff in health-care settings to be vaccinated, requiring other staff to vaccinate or test twice weekly and wear masks, and working tirelessly to increase the number of inmates and personnel who are

[2] *See* Prison Policy Initiative, *States of emergency: the failure of prison system responses to COVID-19* (Sept. 1, 2021), https://www.prisonpolicy.org/reports/states_of_emergency.html.

vaccinated. Indeed, thanks to the State's actions, virtually all inmates eligible for a booster have been offered one (and over 76% have accepted). [3] And the percentage of prison staff who have received at least one dose of a COVID-19 vaccine has climbed from below 53% to 71% over the last six months, proving the district court's assessment that the State's measures on their own could not move the needle was significantly off the mark.

Second, Appellees try to diminish California's proactive efforts to protect inmates from COVID-19 by suggesting—inaccurately—that the State's extraordinarily aggressive actions were only taken at the behest, or at the direction, of the Receiver and the district court. In fact, while the Receiver and the district court have both been important partners during the pandemic, they played limited or no roles in some of the State's most aggressive measures, such as the early release of tens of thousands of inmates or the issuance of public health orders for staff to vaccinate or test or for staff in health-care settings to vaccinate. In addition, the Receiver himself has acknowledged the active partnership of CDCR in June 2021, noting that "CDCR and CCHCS continue to move forward with an

[3] *See* https://www.cdcr.ca.gov/covid19/population-status-tracking/. Booster shots continue to be available to the incarcerated population, and as of January 19, 2022, over 76% of the 71,747 inmates who were eligible had accepted one. (1-FER-15.)

ambitious vaccine administration schedule, inoculating as many individuals as possible," and that "CDCR and CCHCS worked collaboratively to quickly establish a system for identifying and managing COVID-19 outbreaks." (2-ER-281.)

Third, Appellees contend the State has "conceded" the factual premises supporting a finding of deliberate indifference. Not true. California recognizes that COVID-19 poses a threat to incarcerated persons in correctional environments, and *for that reason* has taken aggressive actions to require vaccination and implement numerous testing, masking, social distancing, and other protocols. These actions—the legal significance of which the district court's analysis ignored—have greatly diminished the threat posed by COVID-19. Underscoring the diminished risk, infections during the surge associated with the Delta variant spread at a rate eight times higher in the community than within CDCR's walls. (AOB 27–28.)

At bottom, the district court and Appellees have a dispute with California over *policy*, and have tried to cloak that dispute in Eighth Amendment garb. They believe the State's staff-vaccination mandate should apply to *every* prison worker, not just those in healthcare settings. But it is the State that is entrusted with keeping inmates safe from COVID-19, while also maintaining prison security and ensuring inmate access to

medical and mental health care services and educational and rehabilitative programming. *See Woodford v. Ngo*, 548 U.S. 81, 94 (2006) (noting it is "difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons"). Simply because California disagrees about the appropriate scope of a staff-vaccination mandate, or the court thinks California's policy "need[s] improvement," does not mean California "reckless[ly] disregard[ed] . . . the very health risks it forthrightly identified and directly sought to mitigate." *Fraihat*, 16 F.4th at 638. Indeed, most state correctional systems across the country lack *any* similar mandate. So even if California's narrow mandate (which nonetheless applies to thousands of workers) makes the State deliberately indifferent, then Appellees' position ineluctably means that *every* prison system in the country without a universal staff-vaccination mandate is violating the Eighth Amendment—an argument without support in the precedents of the Supreme Court or this Court. Significantly, no federal court has imposed an equivalent mandate before or since the district court's order.

Even if the Court were to disagree with California regarding deliberate indifference, Appellees have not shown that the sweeping mandate imposed

here complies with the Prison Litigation Reform Act's (PLRA) requirements that any prospective relief be "narrowly drawn" and the "least intrusive" means of rectifying the constitutional harm. 18 U.S.C. § 3626(a)(1)(A). Narrower means of remedying any purported constitutional harm plainly exist: the district court could have required CDCR to vaccinate all class members, or required only staff who interact with inmates to be vaccinated. And Appellees' attempts to diminish the operational harms that the mandate would impose are flawed: the record shows that staff shortages would severely impact prison operations, which would in turn endanger prison staff, the public, and the incarcerated population.

The district court's mandate far exceeds its authority under the Eighth Amendment and PLRA and represents extraordinary judicial interference with core state operations and responsibilities. It should be vacated.

ARGUMENT

I. THIS COURT REVIEWS THE DISTRICT COURT'S EIGHTH AMENDMENT CONCLUSIONS *DE NOVO*.

As a threshold matter, Appellees' argument that the district court's ruling should be reviewed only for clear error (P.AB 35; R.AB 34–36)[4] is

[4] P.AB and R.AB refer to the Plaintiffs' Answering Brief and Receiver's Answering Brief, respectively. AOB refers to Appellants' Opening Brief.

incorrect. The district court failed to correctly apply the relevant legal standard to the facts of this case. (AOB 21–26.) In particular, the district court erred by analyzing the risk of COVID-19 in the abstract, and disregarding the many ways CDCR mitigated COVID-19 risks through population-reduction measures, quarantine-isolation policies, increased cleaning, distancing requirements, ventilation upgrades, frequent testing, required masking, staff-vaccination incentives, targeted staff-vaccination mandates, and successful inmate-vaccination programs. Each of these measures mitigated the objective risk of severe illness and death and negate any assertion of subjective indifference. (*See* AOB 21–26.) This legal error implicates de novo review. *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 653 (9th Cir. 2002).

II. THE DISTRICT COURT COMMITTED LEGAL ERROR CONCERNING THE EIGHTH AMENDMENT'S OBJECTIVE PRONG.

A. Any Objective Risk of Harm Must Be Viewed in Light of the State's Extensive Mitigation Measures.

The deliberate-indifference inquiry asks whether the official "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Here, from the beginning, State officials undertook aggressive measures to protect inmates, including many measures

recommended by the Receiver. (*See* R.AB 11–14.) These measures significantly reduced the objective risk of severe harm to the incarcerated population from COVID-19. (2-ER-200–02; 3-ER-328–38, 343–45.) The district court erred by ignoring this, viewing the objective risk of COVID-19 writ large, as if the State had done nothing, as opposed to the significantly mitigated risk of severe disease existing at the time of its order. *See Hudson v. McMillian*, 503 U.S. 1, 8 (1992) ("The objective component of an Eighth Amendment claim is… contextual and responsive to 'contemporary standards of decency.'") (*citing Estelle v. Gamble*, 429 U.S. 97, (1976)).

Appellees are incorrect that California waived argument regarding the Eighth Amendment's objective prong by agreeing that COVID-19 presents a substantial risk of serious harm. (R-AB-40; P.AB 37.) In the district court and on appeal, the State maintained that a narrow focus on the risks of the virus, without acknowledging its mitigation efforts, was the wrong lens for viewing the constitutional question. (2-RSER-359–67; AOB 22–25.) Plaintiffs' statement that California "never disputed" the issue (P.AB 37) is particularly misleading. In the cited filing, the State explained it had not disputed "the objective prong of the deliberate indifference standard" insofar as the issue was "whether COVID-19 creates the substantial risk of serious harm." (2-PSER-143.) But the State always maintained that its testing,

masking, and vaccination policies, along with other measures to stop the spread of the disease, significantly mitigated that risk, and that the district court's analysis was incorrect. (2-PSER-135.)[5]

California thus preserved its argument regarding the district court's flawed Eighth Amendment analysis. *See Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013) ("parties are not limited to the precise arguments they made below") (citation omitted); *see also United States v. Williams*, 846 F.3d 303, 311 (9th Cir. 2016) (when a party raised an issue in the district court, it "was not circumscribed from advancing a more specific argument in support of its theory.").

[5] Even if this Court finds waiver, it should exercise its discretion to consider this argument because it presents a question of law. *See Bastidas v. Chappell*, 791 F.3d 1155, 1161 (9th Cir. 2015) (appellate courts may consider waived legal questions when the record is appropriately developed). Contrary to the Receiver's assertion (R.AB 40), California does not seek to re-litigate whether COVID-19 can pose a serious risk of harm to inmates. Instead, California argues that the district court erred in concluding that CDCR's policies for combating COVID-19 violated the Constitution. The importance of the issue weighs in favor of considering the argument on appeal.

B. Exposure to an Unvaccinated Worker Who Has Tested Negative for the Virus and Wears a Mask Does Not Violate Contemporary Standards of Decency.

Relevant to the objective element of the deliberate-indifference test, Plaintiffs have not established that the "risk that the[y] … complain of" is "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly" to that risk. *Helling v. McKinney*, 509 U.S. 25, 36 (1993). To hold the objective standard was met would be to conclude that allowing an inmate to interact with an unvaccinated staff member who is wearing an N95 or KN95[6] mask, follows social distancing protocols, and has recently tested negative for COVID-19,[7] is cruel and unusual punishment under the Eighth Amendment—an extraordinary result no other court has reached.

The Receiver mistakenly contends that incarcerated persons face a greater risk from the virus than does the general population. (R.AB 43.) But

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[6] Effective January 24, 2022, N95 masks are required for workers who enter quarantine and isolation areas, and KN95 masks are required for all workers while on prison grounds. *See* CDCR, *Updated: Required COVID-19 facial coverings for all institutional and facility staff* (Jan. 24, 2022), https://www.cdcr.ca.gov/covid19/updated-required-covid-19-facial-coverings-for-all-institutional-and-facility-staff/.

[7] Employees are not allowed to enter any CDCR prison if they have active COVID-19 or have tested positive within the past 10 days. (1-FER-13.)

the opposite has been true for much of the last year. For example, near the time California initiated this appeal, there were 187 active cases and 3 patient hospitalizations out of a prison population of approximately 99,300, a lower hospitalization rate than the Bay Area.[8] (2-ER-107.) Also, over 72% of infections and 90% of deaths among incarcerated persons occurred *before* June 1, 2021—by then, 71% of inmates were vaccinated.[9] (4-PSER-889.) Just as the risk of severe disease is lowered for all vaccinated Californians, so too has vaccination lowered the risk of severe disease and death for inmates—which the Receiver acknowledged by lauding the State's "robust" vaccination efforts as recently as June 2021. (2-ER-280.)

Similarly flawed is Plaintiffs' assertion that individuals outside the prison context can "decide… the level of COVID-19 risk they are prepared to tolerate and adjust their behavior and environment accordingly." (P.AB 38.) Many individuals cannot fully adjust their environments to meet their

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[8] *See* Los Angeles Times, *With Hospitals Full, Central California Pleading to Send COVID-19 Patients to L.A.* (Nov. 23, 2021, 5 AM), https://www.latimes.com/california/story/2021-11-23/central-california-pleading-to-send-covid-19-patients-to-l-a-as-hospital-fill-up.

[9] *Compare* 2-ER-280 (noting, as of May 28, 2021, 49,254 confirmed COVID-19 patient cases and 224 deaths) *with* https://www.cdcr.ca.gov/covid19/population-status-tracking/ (showing 68,068 total confirmed cases and 248 deaths).)

preferred level of risk. Indeed, an individual entering a prison would be roughly as likely to encounter an unvaccinated staff member as they would be to encounter an unvaccinated person in a house of worship or a grocery store.[10] Thus, "today's society" tolerates the risk of encountering a masked, unvaccinated person, especially one who tests twice weekly. *Helling*, 509 U.S. at 36.

This Court rejected an argument analogous to Plaintiffs' in *Hines v. Youseff*, 914 F.3d 1218 (9th Cir. 2019). In *Hines*, the evidence showed that inmates in certain prisons were more likely to contract Valley Fever than citizens of the surrounding county. *Id*. at 1225–26. Still, the Court found no evidence that "either the heightened risk inside the prison or the lower risk outside" violated current standards of decency—especially where many people "work in the same prisons where the inmates live, exposed to the same fungal spores as the inmates." *Id.* at 1231–32. That reasoning holds true here. Rates of infection and hospitalization among the incarcerated population have been lower than in the Bay Area. (AOB 13.) Moreover,

[10] As of this filing, 71% of prison staff and 73.3% of eligible Californians are fully vaccinated. *See* https://www.cdcr.ca.gov/covid19/population-status-tracking/; *see also* COVID19.CA.GOV, *Statewide Vaccination Data* https://covid19.ca.gov/vaccination-progress-data/ (last visited Feb. 3, 2022).

California's testing, masking, and vaccination policies are precisely the types of measures recommended by the U.S. Occupational Safety and Health Administration and widely accepted as reasonable measures to mitigate the risk of COVID-19. (*See* AOB 24 (citing to the federal workplace vaccinate-or-test mandate[11]).) Appellees fail to identify any other case where a court has found that a similar vaccinate-or-test policy amounts to cruel and unusual punishment.

Appellees' attempts to distinguish *Hines* are unpersuasive. Plaintiffs point out that in *Hines*, the Court found it "especially significant" to the qualified-immunity analysis that officials followed orders from the federal Receiver when they acted. (P.AB 40.) But that was a separate basis for the holding, and *Hines's* discussion of contemporary societal standards as an Eighth Amendment benchmark is most relevant here. The *Hines* court distinguished between the Receiver's "recommendations"—which we have here—and "binding orders," and concluded that an alleged failure to

[11] The Supreme Court recently stayed the workplace mandate. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022). The same day, the Court allowed a healthcare worker mandate to stand. *Biden v. Missouri*, 142 S. Ct. 647, 653 (2022). This latter mandate is consistent with California's public health order concerning vaccination of workers in correctional health-care settings. (2-ER-176–77, 198–200, 205–07.)

"promptly follow recommendations" was not a clearly established constitutional violation. *Hines*, 914 F.3d at 1231.

The existence of one federal Bureau of Prisons mandate and five state mandates does not undermine the conclusion that CDCR's policies are generally accepted. California's targeted staff vaccination mandate and vaccinate-or test-policies cannot fall below societal standards when forty-five states have not adopted *any* type of vaccination mandate. And while jurisdictions can make the public policy choice they think are best for the institutions they run, courts' ability to intrude on core executive functions is not so broad. *See Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974) ("[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.").

California's testing, masking, vaccination, and other policies are widely accepted as appropriate to mitigate the risk of COVID-19. Thus, the district court's analysis of the Eighth Amendment's objective prong was legal error.

III. THE DISTRICT COURT ERRED IN ITS APPLICATION OF THE EIGHTH AMENDMENT'S SUBJECTIVE PRONG.

A. The State Responded Reasonably to the Risk of Harm to the Incarcerated Population.

The State did not "disregard" the health risks posed by COVID-19 because it "responded reasonably to the risk." *Farmer*, 511 U.S. at 837, 844; *see also Estelle*, 429 U.S. at 104–06 (deliberate indifference is the "unnecessary and wanton infliction of pain"). The evidence below established that the State greatly lowered the risks to inmates by reducing the prison population, implementing successful vaccination programs, providing the best possible treatments to patients who contract COVID-19, upgrading ventilation systems, and employing many other measures that are widely recommended by public health officials. (2-ER-104–08, 196–202, 205–07, 280, 326–77.) In particular, the district court committed legal error when it failed to take into account the extent to which the State's "robust vaccination program" protects inmates from the worst effects of the virus. (2-ER-280.) Partly due to the State's targeted mandate and vaccinate-or-test

policies, over 71% of staff members are vaccinated, a significant achievement.[12]

Appellees' contention that California's efforts were constitutionally deficient lacks merit.

First, Appellees are incorrect that all of the measures California implemented over the past two years are irrelevant to the deliberate-indifference analysis. (R.AB 55.) Measures like social distancing, population reduction, limits on inmate intake and movement, and improvements to ventilation systems are *ongoing* and remain an important part of CDCR's pandemic response. (2-ER-85–88, 104–08, 171–79.) That the district court previously acknowledged their effectiveness underscores the extraordinary error of its later decision to ignore them in its deliberate-indifference analysis. *See Plata v. Newsom*, 445 F. Supp. 3d 557, 566–67 (N.D. Cal. 2020) (noting, with approval, that Defendants had "taken steps to reduce the prison population and implemented a number of practices and policies that comply with the CDC's recommendations"). Once vaccines became available, Defendants promptly promoted vaccination for both staff

[12] The American College of Correctional Physicians cites a study finding that states with "high vaccination rates" of over 70% have experienced "lower numbers of vaccine breakthrough cases." (ECF No. 52-1, Amicus Brief at 19.) CDCR has reached this benchmark.

and inmates. Far from "bank[ing] credit for past actions," as the Receiver claims (R.AB 55), Defendants' *continuing* efforts negate any finding of reckless disregard. Any analysis of what is a "reasonable response" to the pandemic under the Eighth Amendment must take the full picture of Defendants' ongoing efforts into account.[13]

Second, Appellees misconstrue expert testimony presented in the state-court action *Davis v. Cal. Dep't Pub. Health, et al*. (R.AB 51, *citing* 1-R.SER-94; P.AB 45–46.) Appellees ignore that Dr. Reingold's statement regarding employee vaccination was specifically made in defense of the CDPH order that applies only to health-care settings. (1-R.SER-82–94.)[14] Dr. Reingold simply never addressed the wisdom of the district court's more expansive mandate or whether the Eighth Amendment requires it. (*Id*.)

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[13] A position paper by the American College of Correctional Physicians reinforces these points. It states that vaccines should be offered to incarcerated persons "early," and measures such as population reduction, masking, testing, and ventilation management should be undertaken to reduce the risks of COVID-19 in correctional settings—all measures CDCR has implemented. *See* American College of Correctional Physicians, *Management of the SARS-Cov-2 Pandemic in Correctional Settings*, https://accpmed.org/docs/PREPARATION_AND_MANAGEMENT_OF_RESPIRATORY_EPIDEMICS2-FINAL.pdf (last visited Feb. 3, 2022). The paper does not advocate for mandatory vaccination of all prison workers. *Id*.

[14] The State's successful defense of its targeted staff vaccination mandate against litigation further undercuts the notion that the State has been deliberately indifferent to the threat posed by COVID-19.

Appellees' focus on statements made in defense of a challenge to executive action, where the constitutional question was not addressed, is thus misplaced.

Third, that cases were rising in CDCR prisons (R.AB 65–66) does not undercut Defendants' showing that their efforts to mitigate the risks of the virus satisfy the Constitution. California, like the rest of the nation, is facing a surge in COVID-19 cases driven by the Omicron variant, and cases are increasing among the vaccinated and unvaccinated alike. The Centers for Disease Control and Prevention (CDC) expects vaccines to protect against severe illness, hospitalizations, and deaths due to Omicron infections, but also expects breakthrough infections among fully vaccinated people.[15] The CDC advises that "anyone with Omicron infection can spread the virus to others, even if they are vaccinated or don't have symptoms."[16] And experts have explained that, while case counts continue to be an important

[15] *See* Centers for Disease Control & Prevention, *Omicron Variant: What You Need to Know* https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html (last visited Feb. 3, 2022).

[16] *Id*.

barometer, "it is much more relevant to focus on the hospitalizations as opposed to the total number of cases."[17]

A recent snapshot[18] of CDCR's incarcerated population shows only a small handful of hospitalizations. Also, California Health Care Facility (CHCF), which has the highest staff vaccination rate of any prison (85%),[19] has the highest number of currently-active staff cases, and High Desert State Prison, with the second-lowest staff vaccination rate (49%), has the lowest number of active inmate cases[20]—showing that, while vaccines remain important to protect individuals from severe illness, increased staff vaccination does not necessarily correlate with decreased infections or

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[17] Newsweek, *COVID Hospitalization Data Should Be Focus Rather Than Daily Case Counts*: *Experts* (Jan. 4, 2022, 4:49 PM), https://www.newsweek.com/covid-hospitalization-data-should-focus-rather-daily-case-counts-experts-1665543 (quoting Dr. Anthony Fauci).

[18] As of January 19, 2022, there were 4,975 active COVID-19 cases and three hospitalizations among the incarcerated population. (1-FER-5.) There are currently 4,867 active cases. *See* https://www.cdcr.ca.gov/covid19/population-status-tracking/.

[19] *See* https://www.cdcr.ca.gov/covid19/population-status-tracking/.

[20] As of this filing, there were 7 active cases among the inmate population at High Desert and 105 cases among staff. *See* https://www.cdcr.ca.gov/covid19/population-status-tracking/; *CDCR/CCHCS COVID-19 Employee Status*, https://www.cdcr.ca.gov/covid19/cdcr-cchcs-covid-19-status/ (last visited Feb. 3, 2022).

outbreaks.[21] Thus, expert conclusions, and the CDC's guidance, supports the reasonably calibrated approach Defendants implemented.

The Receiver also mistakenly contends Defendants' vaccination mandate for workers in health-care settings is a "concession" that the district court's sweeping mandate was necessary. (R.AB 51–52.) Not so. The targeted mandate, which applies in specific medical settings, is a reasonable measure to protect the health of particularly vulnerable inmates. (2-ER-176–77, 198–200, 205–07.) Also, the Receiver's argument ignores that an important distinction exists between State officials' broad discretion to enact policies they find appropriate to promote public health, and a court's determination that a specific policy is required under the Eighth Amendment. There are myriad reasons—such as concerns about staffing, operational needs, or other matters—why executive officials concluded a more targeted policy is appropriate.[22] Officials must have the leeway to make such decisions when facing a "complex problem" like the pandemic,

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[21] While the Receiver asserts that there were 48 outbreaks traced back to institutional staff (R.AB 53), the Receiver does not address whether those outbreaks were traced to *vaccinated* staff with breakthrough infections.

[22] The Receiver points to a portion of the high-risk population that the CDPH order does not reach (AOB 51–52), but the overwhelming majority of medically vulnerable incarcerated persons—for example, 93% of those over age 65—are protected by vaccination. (2-ER-175, 200–01.)

particularly in the correctional context. *Fraihat*, 16 F.4th at 639; *Turner v. Safley*, 482 U.S. 78, 84–85 (1987).

Eradicating COVID-19 from the prisons is not the benchmark for evaluating whether CDCR responded reasonably to the pandemic. The recent Seventh Circuit opinion *Rasho v. Jeffrey*s, 22 F.4th 703, 2022 WL 108568 (7th Cir. 2022) is instructive on this point. There, the district court entered an injunction to rectify what it believed was "systematically inadequate" mental-health care for prisoners. *Id*. at *5. The Seventh Circuit reversed, concluding that, though officials had not met the personnel targets established in their staffing plan, the evidence showed they had made "reasonable efforts" to address understaffing. *Id*. at *6. Considering their efforts, the Seventh Circuit concluded that the officials' "commitment to addressing the problem" was "the antithesis of the callous disregard required to make out an Eighth Amendment claim." *Id*.

So too here, the State officials have shown a determined commitment to addressing the problems of a pandemic. The Receiver's own evidence shows that Defendants' vaccination policies provided class members with access to the greatest protection possible against the risks posed by the virus—refuting Plaintiffs' assertion that officials took "steps that they knew were insufficient to prevent the harm." (P.AB 48 (*quoting Rasho*, 2022 WL

108568, at *6).) This Court should conclude, as a matter of law, that California's COVID-19 response in prisons is the antithesis of disregard, and thus no Eighth Amendment violation exists.

B. The District Court's Order Conflicts with *Fraihat*.

Appellees attempt to distinguish *Fraihat*, but their arguments are unpersuasive and ignore its central holdings.

Fraihat is instructive not because it analyzes identical facts, but because it illustrates the high bar for deliberate indifference and the discretion courts must afford to executive branch officials who employ "reasonable measures" to address the risks posed by COVID-19. *Fraihat*, 16 F.4th at 636. Applying *Fraihat*, the question here is not whether Defendants' policies could have gone further, or even whether staff vaccination will "effectively prevent the spread of COVID-19 in prisons." (P.AB 48.) Rather, the issue is whether Defendants' policies show "reckless disregard" for the health risks they "directly sought to mitigate." *Fraihat*, 16 F.4th at 638. They do not, for the reasons addressed above and in the Opening Brief.

The Receiver mistakenly contends that, under *Fraihat*, it was appropriate to afford deference to the Receiver's recommendation, rather than to executive branch officials. (R.AB 58–59.) But this misreads

Fraihat. The Receiver acts "as the Court's officer" (3-ER-422), and his authority is limited to the "prison medical health care system" (3-ER-415), and does not extend to all personnel in every facility in the entire correctional system. *Fraihat* speaks of deference to the "Executive Branch," 16 F.4th at 638, not to a judicial officer whose purview is expressly constrained. (3-ER-413, 415 (addressing the Receiver's authority over workers who "perform services related to the delivery of medical health care to class members").) Executive branch officials, not the Receiver, are best able to judge "how best to operate a detention facility" while keeping staff and inmates safe. *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).

Fraihat does not establish that additional deference was due to the Receiver, and supports California's position that its extensive efforts to prevent severe disease and death among the incarcerated population do not evince deliberate indifference.

IV. THE VACCINE MANDATE DOES NOT SATISFY THE PLRA.

Even if a constitutional violation could be found, the relief ordered by the district court did not comport with the PLRA's needs, narrowness, and intrusiveness requirements. 18 U.S.C. § 3626(a)(1)(A).

Appellees brush aside Defendants' success in reducing COVID-related harms and vaccinating a large majority of inmates and staff, which

demonstrates no injunction was needed. Appellees have not refuted that vaccination of all class members, rather than prison workers, is the most effective means to protect inmates against severe illness and death. *See Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1071 (9th Cir. 2010) (asking whether "the same vindication of federal rights could have been achieved with less involvement by the court in directing the details of defendants' operations"). In addition, the district court erred in discounting the operational concerns attendant with its sweeping mandate.

A. Judicial Intervention Was Unnecessary.

As discussed above, State officials did not violate the Eighth Amendment. They mitigated the objective risk of harm and their reasonable response to the pandemic precludes any finding of reckless disregard. Moreover, in claiming that nothing short of the district court's mandate is sufficient (P.AB 50), Plaintiffs do not acknowledge the extent to which California's measures substantially increased vaccination rates among prison staff. Thanks to California's efforts, including the CDPH vaccine mandate for workers in health-care settings and incentivizing vaccination for all staff, the Receiver's data shows that CDCR's staff vaccination rates jumped from

below 53% to 71%[23] over the last six months.[24] (R.AB 63 (discussing vaccination data).) Such progress directly refutes Appellees' claims that Defendants' vaccination efforts have been ineffective (P.AB 50; R.AB 63). Their arguments also ignore the effectiveness of California's comprehensive, nation-leading response to the risk of COVID-19, including twice-weekly testing and the requirement that all workers wear masks.

Plaintiffs again wrongly rely on the declaration of Defendants' public-health expert, Dr. Reingold, to support their claim that the district court's mandate was necessary. (P.AB 51.) As stated above, Dr. Reingold defended an executive-agency mandate specific to health-care settings and did not address whether Defendants' multi-pronged policies satisfy the Eighth Amendment. (1-PSER-47–59.) Nor did Dr. Reingold address the PLRA's limitations on a court's ability to impose prospective relief. Dr.

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[23] *See* https://www.cdcr.ca.gov/covid19/population-status-tracking/.

[24] Plaintiffs maintain that this Court should not review recent vaccination and case data, yet support their own argument with recent data. (P.AB 53.) Regardless, the district court-record alone establishes that a mandate was not needed. In particular, when the district court acted, the impact of the mandate for workers in health-care settings had not yet been fully felt across CDCR institutions. The Receiver discusses data for the July to September 2021 period, which encompasses when the CDPH order first issued, but before the deadline for workers in health-care settings to be vaccinated. (2-ER-50.) At the very least, the district court should have assessed the effectiveness of Defendants' more narrow vaccine mandate before instituting its own improperly broad one.

Reingold also stated that, as of July 2021, 97% of COVID-19 hospitalizations in the United States were among the unvaccinated, underscoring the wisdom of Defendants' early and ongoing vaccination campaign, beginning in December 2020. (1-PSER-54.)

The district court lacked authority under the PLRA to replace the expert judgment of prison executives with its own judgment that vaccination of all workers is constitutionally required. *See Byrd v. Maricopa Cty. Sheriff's Dep't*, 629 F.3d 1135, 1149 (9th Cir. 2011) ("It is axiomatic that prison officials know better than a panel of judges how to run a prison."). The district court's legal error, if permitted to stand, would set a novel and troubling precedent.

B. The District Court's Order Is Overbroad Because It Applies to All Workers, at Every Institution Systemwide, Regardless of Whether They Interact with Class Members.

While the Receiver has broad authority over the "medical delivery component of the CDCR" and workers who "perform services related to the delivery of medical health care to class members" (3-ER-413, 415), his reach does not extend to every worker at every prison. In another case concerning a COVID-related injunction, this Court noted that a preliminary injunction "seemed to mandate that [prison] staff must wear a mask even

when working alone in an office, far away from detainees. We see no evidence in the current record that suggests wearing a mask in this specific situation would reduce COVID-19 transmission." *Roman v. Wolf*, 977 F.3d 935, 946 (9th Cir. 2020) (per curiam). So too here, there is no evidence in the record that suggests vaccinating categories of workers who have no interaction with the incarcerated population (but who regularly test to confirm they are negative for COVID-19 and must wear masks) would protect class members. This is merely one example of how the district court's mandate fails the PLRA's narrowness test.

C. The District Court Failed to Consider a Narrower Vaccination Requirement for Incarcerated Persons.

Vaccinating all class members, rather than all prison workers, would be a more narrowly tailored remedy to correct any supposed Eighth Amendment violation and achieve the Receiver's stated goal of protecting the inmate population. The Receiver told the district court in November 2021 that he would "submit a plan" to vaccinate all class members, subject to religious and medical exemptions. (2-ER-82–83.) But no such plan has been submitted to the court.

The Receiver now claims that a policy of vaccinating incarcerated persons would be unduly intrusive because they do not have the option to

"leave their jobs instead of getting vaccinated" (R.AB 69), but that focus is misplaced. "Intrusiveness" under the PLRA is not defined by its impact on individual incarcerated persons, but on the operation of the prison system. 18 U.S.C. § 3626(a)(1)(A); *see Armstrong v. Schwarzenegger*, 622 F.3d at 1071 (the PLRA requires that the relief ordered have the "minimal impact possible" on officials' discretion over prison operations). A vaccinate-all-workers mandate—regardless of job responsibility or work location—indisputably intrudes more heavily on prison operations than a policy of vaccinating the less than twenty percent of class members who, despite having been offered vaccinations, choose to remain unvaccinated.

The Receiver also cites the rise in Omicron infections to suggest that the district court's mandate was necessary (R.AB 65), but fails to identify any evidence in the record showing the extent to which the mandate would eliminate the risk of outbreaks. Indeed, he agrees that Omicron infections appear "even more likely to cause breakthrough infections than Delta" (R.AB 68)—suggesting a broader mandate might not be significantly more effective than the measures Defendants have implemented to prevent the spread of the virus. The Receiver refuses to acknowledge that the measures the State has already taken—such as reducing the prison population, masking and social-distancing mandates, enhanced cleaning measures,

quarantine/isolation protocols, patient screening, movement restrictions, testing mandates, and in particular, widespread vaccination of the incarcerated population—have largely done what they were designed to do: reduce the risk of serious illness and hospitalization due to COVID-19. The prisons' relatively low hospitalization rate, despite the Delta surge and significant rise in Omicron cases, proves this point. (1-FER-8.)

Finally, the record does not support the Receiver's position that a constitutional vaccination policy "would need to include all workers who enter CDCR institutions where incarcerated persons are present." (R.AB 66–67.) The Receiver does not explain how, for instance, an office assistant who has tested negative for COVID-19 and wears a mask, but has no direct contact with inmates, poses a significant risk to class members.[25] Yet the district court's mandate would require vaccination in this case, depriving officials of the authority to tailor their policies to specific circumstances and changing conditions. *Cf. Fraihat*, 16 F.4th at 637 (noting the "inevitable differences in the medical vulnerabilities of individual detainees and the material differences across the approximately 250 detention facilities nationwide").

[25] SEIU, the union that represents clerical staff, has filed an amicus brief in support of the State officials. (ECF No. 18.)

By failing to adhere to the PLRA's command to narrowly tailor injunctive relief to the least intrusive means necessary to address class members' rights, the district court committed legal error.

D. The District Court Improperly Discounted the Operational Harms that Would Result from Enforcing Its Mandate.

The district court's mandate improperly interferes with core state interests, and Appellees' attempts to diminish the operational harms that would flow from the mandate are flawed. The record shows that implementing the broad judicial-vaccine mandate risks causing serious staffing shortages at CDCR institutions that would severely impact prison operations and endanger prison staff, the public, and the incarcerated population. Defendants' concerns regarding its impact are grounded in reasonable judgments from those with expertise in prison administration.[26] (2-ER-97–103.)

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[26] Plaintiffs suggest, in a footnote, that Defendants forfeited this argument. (P.AB 56.) Plaintiffs ignore the record. At the hearing on the order to show cause, the State's counsel specifically referenced "the unintended consequences" of a sweeping mandate, and later warned of the State's "serious reservations" about its implementation due to the impact on staffing and operations. (2-ER-122, 124; 2-PSER-205.) In any event, Plaintiffs' footnote is insufficient to raise the argument. *See Rodriguez v. Airborne Express*, 265 F.3d 890, 894 n.2 (9th Cir. 2001). And, if it finds forfeiture, this Court should exercise its discretion to consider the issue

This Court should reject the argument that California's analysis of the harms was "speculative." (P.AB 56; R.AB 71.) Analyzing the likely impact of a mandate such as this is, by its nature, a "'probabilistic' endeavor." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1015 (9th Cir. 2020). Thus, it was necessary to make predictive judgments regarding the likelihood of a particular risk.

The State's predictions regarding staffing shortages were appropriately supported. The Director of CDCR's Division of Adult Institutions testified that the vaccine mandate was expected to cause a substantial increase in staff vacancy rates across California's prisons that could adversely impact safety and the availability of programming for the incarcerated population. (2-ER-97–100.) A noncompliance rate of even five percent would have a "substantial adverse impact" on prison operations and would "preclude a number of prisons from offering regular programming." (2-ER-52; *see* 2-ER-100–01.) There is no basis in law for the district court to substitute its own judgment regarding the risk of operational harm for that of this official, who has decades of expertise in the field of prison administration. (2-ER-51–54, 97–103.) Also, while Appellees state that an annual turnover rate of

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because it presents a legal question and the record is fully developed. *Bastidas*, 791 F.3d at 1161.

five percent can be expected among correctional officer positions (P.AB 57, R.AB 73), they fail to acknowledge that attrition due to the vaccine mandate would likely play out over mere months. And vacancies because of the mandate would add to the regular rate of attrition that CDCR has "absorbed in the past." (R.AB 73.) The impact would be felt even more acutely because the number of cadets graduating from the academy is lower than in years past. (2-ER-102.) Increased attrition due to vaccination hesitancy would only compound an already challenging staffing situation.

Plaintiffs mistakenly argue no harm will occur because the progressive discipline process will encourage compliance. (P.AB 57.) As explained in the Opening Brief (AOB 39–40), aversion to vaccination at some staffing-challenged prisons will likely be particularly high. Also, while the process is incremental by design, the assumption that unvaccinated staff will continue to work indefinitely during the progressive discipline process is incorrect. Progressive discipline includes pay reductions, unpaid suspension, and ultimately termination. (2-ER-51–53.) When staff are suspended without pay, staffing levels are impacted. (*Id*.) Further, it is likely that, as in Washington (2-ER-52), some percentage of staff will simply choose to separate from CDCR, rather than wait to be terminated.

The Receiver points to high compliance rates in other jurisdictions to suggest that vacancies are unlikely (R.AB 73–74), but he has not submitted any evidence showing that an accurate comparison may be drawn between CDCR and those workforces. Nor has the Receiver addressed the related concerns that hundreds of unvaccinated correctional officers may choose to retire rather than be vaccinated, and that the mandate will further reduce the number of correctional academy graduates who are eligible to fill their positions. (2-ER-102.) And no party has suggested that operating the prison system with severe staffing shortages is viable long-term.

Finally, Appellees argue that the mandate would be more beneficial than harmful because it would significantly reduce quarantine-related staffing shortages (P-AB 58–59; R.AB 74–75), but this contention is unsupported. Because vaccinated staff can nonetheless transmit infection, the mandate will not eliminate virus transmission among prison workers. (2-ER-36–40.) Recent information regarding the Omicron variant confirms this fact. (R.AB 68.) Prison workers are experiencing a rise in infection rates even though they are vaccinated at a higher rate than before—a rate that should result in "lower numbers of vaccine breakthrough cases." (ECF No. 52-1, Amicus Brief at 19.) And the facility with the highest staff vaccination

rate also has the highest staff infection rate.[27] Thus, this Court should reject the Receiver's implication that vaccination of those workers who initially declined the vaccine—a minority of CDCR's workforce—would eliminate staffing issues. Indeed, contrary to the Receiver's suggestion, current staffing shortages suggest that an exodus of workers due to a mandatory-vaccination requirement would be felt even more acutely.

Given these facts and concerns, the district court's sweeping vaccine mandate is overly broad and does not comply with the PLRA's restrictions on prospective injunctive relief.

V. THIS COURT SHOULD CONTINUE THE STAY.

The record establishes that the district court's mandate was based on an erroneous finding of deliberate indifference and was an abuse of discretion under the PLRA. The mandate would also cause irreparable operational harms, as detailed in the State's emergency stay motion. This Court should therefore continue its stay.

[27] *See* https://www.cdcr.ca.gov/covid19/population-status-tracking/ (reflecting that 85% of staff members at CHCF are fully vaccinated); https://www.cdcr.ca.gov/covid19/cdcr-cchcs-covid-19-status/ (reflecting 183 current active cases among CHCF staff).

CONCLUSION

This Court should vacate the district court's vaccine-mandate orders.

Dated: February 3, 2022

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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