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April 8, 2022

Via CM/ECF

Molly Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

RE: *Plata, et al. v. Newsom, et al.*
United States Court of Appeals for the Ninth Circuit, Case No. 21-16696
Response to Letter (ECF No. 68)

Dear Ms. Dwyer:

The Court should disregard Appellee's post-argument letter (ECF No. 68) as an improper sur-rebuttal. In the event the Court construes the letter as filed under Federal Rule of Appellate Procedure 28(j), Appellants provide this brief response.

During argument, the panel asked, "Did the district court or the Receiver quantify how much more effective the vaccine mandate would be to curb the spread of COVID in prison than the measures that are currently in place?" (Hr'g at 24:07-20.) The plain answer is "No." The study cited in Appellee's letter did not address the State's multi-faceted measures, including its robust, nation-leading vaccination program, increased sanitation protocols, improved ventilation, prisoner releases, masking requirements, and vaccinate-or-test mandates. (*See* Opening Br. at 8–16.) Nor did it address the extent to which a broader vaccination mandate would improve those measures' effectiveness in protecting class members. Also, Appellee's letter disregards the cited study's finding that fully vaccinated persons who develop COVID-19 are similarly likely as unvaccinated persons to infect others in their household (an infection rate of 25% and 23%, respectively). (2-ER-36, 45.) And the study reflects research performed before the Mu, Omicron, or BA-2 variants emerged. (*See* 2-ER-36–45.) This "underscor[es] the difficulties with issuing injunctive relief...in the midst of a fast-moving pandemic." *Fraihat v. U.S. Immigr. & Customs Enf't*, 16 F.4th 613, 644 (9th Cir. 2021).

Appellee's letter also points to an increase in inmate case rates during the Omicron wave (ECF No. 68 at 2), but ignores that hospitalization rates among CDCR inmates remained low during that same time. (2-ER-107; 1-FER-5 (three COVID-related hospitalizations in October 2021 and in January 2022, despite an increase in cases).) Medical experts recognize hospitalization rates are a more relevant metric than case rates. (Reply Br. at 18–20.)

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Regardless, the record establishes the State's aggressive, multi-faceted, and innovative measures are the antithesis of "a reckless disregard of the very health risks [the State] forthrightly identified and directly sought to mitigate." *Fraihat*, 16 F.4th at 638.

Sincerely,

/s/ Martha Ehlenbach

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For ROB BONTA
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