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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

MARCIANO PLATA, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

CASE NO. 01-1351 JST

PLAINTIFFS' RESPONSE TO ORDER TO SHOW CAUSE RE: RECEIVER'S RECOMMENDATION ON MANDATORY VACCINATION (ECF No. 3647)

Date: September 24, 2021
Time: 9:30 am
Crtrm.: 6, 2nd Floor
Judge: Hon. Jon S. Tigar

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INTRODUCTION

Over the last eighteen months, a tragedy has played out behind state prison walls. The novel coronavirus found fertile breeding ground in the congested and poorly ventilated prisons. It has infected and replicated in the bodies of over 49,834 incarcerated people, and killed at least 238. Most patients who died were particularly vulnerable to the disease, including the elderly, medically fragile, and people with disabilities. Those who survived have endured blossoming outbreaks, severe lockdowns, and suspension of the most basic of prison programs, services, and activities, including mental health programs, rehabilitation, education, and visitation. They have worn masks, tried to physically distance, and washed their hands. But these measures have proved no match for the virus, which we now know spreads through the air and is evolving to become more transmissible.

At long last, safe and effective vaccines are widely available and can stanch the deadly flow of the virus into the prisons. But far too few staff have elected to receive them, notwithstanding priority access, convenient locations, and generous incentives. In fact, only 40% of custody staff statewide are fully vaccinated; at some prisons, the percentage is much lower. Only **16%** of custody staff at High Desert State Prison are fully vaccinated, **21%** at Pelican Bay State Prison, **25%** at the California Correctional Center, **28%** at the California Correctional Institution, and **29%** at Pleasant Valley State Prison.

In the meantime, staff infections are rising steeply, and the Plaintiff class continues to be infected, hospitalized, and killed by the virus. Just two weeks ago, an 81-year-old man in a wheelchair died from pneumonia, respiratory failure, and COVID-19.

Notwithstanding the substantial and proven risk of serious harm, this public health issue appears to have become a political one. On August 5, 2021, the State issued a vaccine mandate for workers in healthcare settings, on the basis that "statewide facility-directed measures are necessary to protect particularly vulnerable populations," but then exempted prisons. The rationale underlying the State's order, however, applies equally (if not more so) to prisons. There is no legitimate public health basis to exclude the almost 100,000 vulnerable and disenfranchised patients in prison, over whom the State has

complete control, from the order's protections. Almost 75% are Black or Latinx, and tens of thousands are highly vulnerable due to advanced age or underlying medical conditions.

On August 19, 2021, the State issued a watered-down version of the mandate for its prisons. That order applies only to a small subset of workers in certain healthcare settings. There is no public health basis for limiting mandatory vaccines to those workers. First, over 15,000 highly vulnerable patients are housed outside designated healthcare settings. Second, even in designated settings, the order covers only "regularly assigned" workers. That ignores operational constraints and realities in the day-to-day management of the California Department of Corrections and Rehabilitation, where staff often are reassigned to different posts, including in healthcare areas. Finally, the order fails entirely to address the core public health basis for the Receiver's recommendation—limiting the flow of the virus into the prisons as a whole. As such, the order evidences continued deliberate indifference to the health and safety of the Plaintiff class.

Put simply, we are not so far removed from when Judge Henderson found, fifteen years ago, "a lack of leadership and a prison culture that devalues the lives of its wards." *Plata v. Schwarzenegger*, No. C01-1351 TEH, 2005 WL 2932253, at *15 (N.D. Cal. Oct. 3, 2005). In the face of deliberate inaction, it falls to the Court to protect the constitutional rights and lives of the Plaintiff class. Plaintiffs agree with the public health conclusions in the Receiver's report, strongly support the vaccination mandate recommended by the Receiver, and ask that the Court order that the mandate be implemented without further delay. *See id.* at *29 (granting relief where "current leaders of the prison system have failed to take the bold measures necessary to protect the lives of prisoners").

STATEMENT OF THE ISSUES

I. Whether the Court should order 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) and that incarcerated persons who desire to work outside of the institution (e.g., fire camps) or to have in-person visitation must be vaccinated (or establish a religious or medical exemption).

II. Whether the rationale behind the California Department of Public Health Order of August 5, 2021, applies to some or all of CDCR's employees.

III. Whether there is any public health basis for limiting mandatory vaccines to all staff identified in Defendants' memorandum dated August 23, 2021, implementing the California Department of Public Health Order of August 19, 2021.

RELEVANT FACTS

I. The Plaintiff Class Is Particularly Vulnerable to COVID-19.

"The effects of COVID-19 are particularly significant for people over the age of 50, and those of any age with underlying health problems such as—but not limited to—cancer, obesity, weakened immune systems, serious heart conditions, chronic kidney disease, COPD, and diabetes." ECF No. 3638-3, Declaration of Dr. Tara Vijayan ("Vijayan Decl.") at 2 ¶ 5. State prisons hold tens of thousands of such patients—27,281 over the age of 50, and 17,860 with a COVID Weighted Risk Score of 3 or higher.[1] *See* Declaration of Sophie Hart, filed herewith ("Hart Decl."), at 1-4 ¶¶ 3, 5.

In addition, "African Americans, Latino/a Americans, and Native Americans suffer complications and death at much higher and disproportionate rates to their population." Vijayan Decl. at 2 ¶ 6. Those populations are significantly overrepresented in state prisons, where Black and Latinx people represent 29% and 45% of the incarcerated population, respectively. *See* Hart Decl., Ex. 16.

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[1] "The COVID Weighted Risk Score Factors and their weights in parentheses include: Age 65+ (4), Advanced Liver Disease (2), Persistent Asthma (1), High Risk Cancer (2), Chronic Kidney Disease (CKD) (1), Stage 5 CKD or receiving dialysis (1), Chronic Lung Disease (including Cystic Fibrosis, Pneumoconiosis, or Pulmonary Fibrosis) (1), COPD (2), Diabetes (1), High Risk Diabetes (1), Heart Disease (1), High Risk Heart Disease (1), Hemoglobin Disorder (1), HIV/AIDS (1), Poorly Controlled HIV/AIDS (1), Hypertension (1), Immunocompromised (2), Neurologic Conditions (1), Obesity (1), Other High Risk Chronic Conditions (1), and Pregnancy (1)." Hart Decl. at 3 ¶ 4.

II. Physical Distancing Is Impossible in State Prisons, Where Patients Are Exposed to a Higher Viral Inoculum.

Some of these vulnerable patients are housed in specialized healthcare locations. *See* Hart Decl. at 4 ¶ 6. The vast majority, however, are housed in cramped and poorly ventilated dorms and cellblocks. "It is not possible to consistently maintain physical distancing" in that environment. ECF No. 3638-1, Declaration of Dr. Joseph Bick at 5 ¶ 25 ("Bick Decl."). Most patients "are housed in dormitories that are too crowded to allow for social distancing," as can be seen in the photographs below of such housing during the pandemic. *See* ECF No. 3638-2, Declaration of Tammatha Foss ("Foss Decl.") at 2 ¶ 5; Declaration of Rita Lomio, filed herewith ("Lomio Decl."), Ex. F (SATF); Hart Decl., Ex. 26 (CIM, CVSP, NKSP, SVSP). "These accommodations typically have one hundred to two hundred bunk beds per room in close proximity to one another." Foss Decl. at 2 ¶ 5. The remainder of the Plaintiff class, who live in cells, often "have perforated doors or bars rather than solid doors." *Id.* at 2 ¶ 6. Patients frequently and unavoidably come in close contact with each other at communal toilets and showers, medication distribution, mental health programs, meals, and work assignments. *Id.* at 2-3 ¶¶ 7-11. They share a "large number of high-touch objects and surfaces." *Id.* at 3 ¶ 11. As a result, "incarcerated persons are much more likely to be exposed to the virus more frequently and for longer periods of time," Bick Decl. at 4 ¶ 22, increasing the risk of severe disease due to "exposure to a higher viral inoculum." Vijayan Decl. at 3 ¶ 8.

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CALIFORNIA INSTITUTION FOR MEN

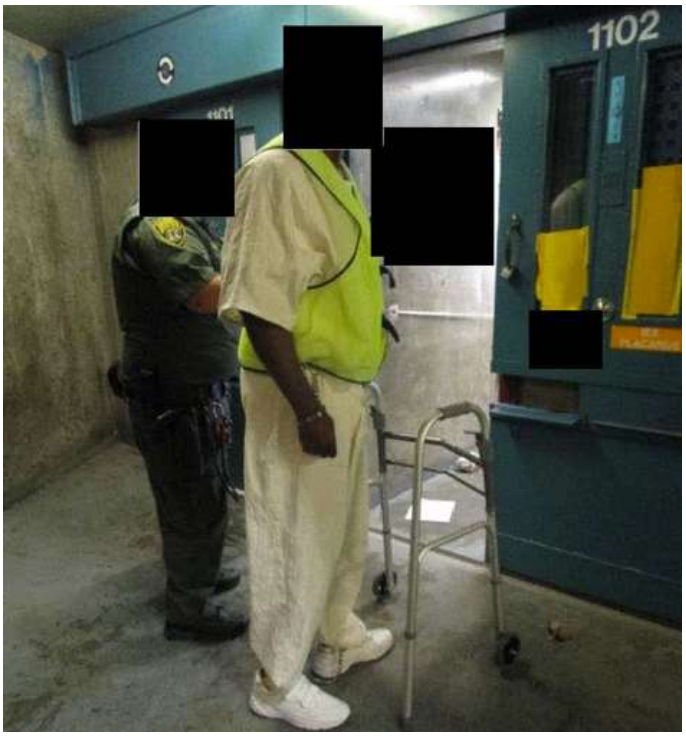
CHUCKAWALLA VALLEY STATE PRISON

NORTH KERN STATE PRISON

SALINAS VALLEY STATE PRISON

III. Staff Come Into Frequent, Close Contact with the Plaintiff Class.

"Healthcare staff have close contact with patients when providing treatment." Bick Decl. at 4 ¶ 21. Custody staff also "have frequent, daily, close contact with" patients. Foss Decl. at 1 ¶ 3. This includes during pat-down body searches prior to yard release; direct-contact escorts, including to medical appointments and transports; and, within housing units, delivery of meals and safety checks. *Id.* It simply "is not possible for corrections officers to perform their jobs with social distancing precautions." *Id.*



CALIFORNIA STATE PRISON, SACRAMENTO (JULY 2021)

See Lomio Decl., Ex. E.

Patients with developmental and physical disabilities are housed in every prison and largely depend on staff for disability-related help. *See* Lomio Decl. at 2-5 ¶¶ 5-16 (physical disabilities); Declaration of Sara Norman, filed herewith ("Norman Decl."), at 1-3 ¶¶ 2-7 (developmental disabilities). Among other things, staff must provide effective communication of announcements so D/deaf and hard-of-hearing people do not miss out on appointments and programs, which may involve speaking loudly and clearly while in close proximity to the patient. Lomio Decl. at 4 ¶ 13. Staff serve as sighted guides to blind

patients, must offer to provide a guided walk-through of a housing unit whenever a blind person is moved there for the first time, and must help with reading and writing. *Id.* at 4-5 ¶¶ 14-15 & Ex. C. Particularly in quarantine and isolation units, staff may be called on to perform a number of other support functions, including carrying food trays, pushing wheelchairs, and cleaning cell and bed areas. *Id.* at 5 ¶ 16 & Ex. D. Many of these tasks cannot be accomplished without extended periods of close contact. *Id.* at 4 ¶ 12.

Staff also provide support to patients with developmental disabilities, whose needs "range from activities of daily living (prompt people to shower, brush their teeth, attend appointments, and take medication) to behavior (monitor for isolation and acting out) to communication (simplify, deescalate, remind)." Norman Decl. at 2-3 ¶ 5. Patients "often need help understanding the rules and reading and writing forms like sick call slips and grievances. Many need to be monitored to protect them from theft or verbal or physical abuse." *Id.* This requires direct interaction, often of lengthy duration. *Id.* at 3 ¶ 6.

IV. Staff Are a Primary Vector for Transmission of COVID-19 Into the Prisons, and, Once Introduced, It Is Virtually Impossible to Stop the Spread.

"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." Bick Decl. at 3 ¶¶ 16-17. This is unsurprising. "Because corrections officers and other staff go daily between the institutions in which they work and the communities in which they live, where they may be subject to community transmission of SARS-CoV2, there is a high risk of staff members unknowingly introducing SARS CoV2 to an institution." Vijayan Decl. at 6 ¶ 16. Indeed, two prisons with extremely low vaccination rates for custody and healthcare staff, High Desert State Prison (16% and 52%, respectively) and California Correctional Center (25% and 65%), are located in Lassen County, where only 20.4% of the community is fully vaccinated. *See* Bick Decl. at 14 (Ex. B); Hart Decl., Ex. 25 at 6.

"Because many staff members move throughout an institution in the course of performing their daily duties, a staff member infected with COVID-19 can come into contact with many inmates and staff, including inmates and staff from multiple housing

units and yards, potentially spreading SARS-CoV-2 throughout the institution." Bick Decl. at 4 ¶ 21. And "once introduced, it is extraordinarily difficult to prevent the spread of COVID-19, which could lead to large-scale outbreaks." *Id.* at 5-6 ¶ 32. To date, at least 49,834 patients have been infected, including 2,043 at High Desert State Prison and 1,405 at California Correctional Center, and 238 have died. *See* Hart Decl. at 12 ¶ 23 & Ex. 27.

V. COVID-19 Infections Impede Delivery of Medical Care Statewide.

"Frequent program modifications . . . have been necessary during the COVID-19 pandemic, either to slow the spread of the virus during an outbreak or in response to reduced staffing when high numbers of staff are quarantined for exposure." ECF No. 3652, Supplementary Declaration of Dr. Joseph Bick ("Bick Suppl. Decl.") at 4 ¶ 8. "These program modifications often prevent or limit routine, specialty, and screening appointments." *Id.*; *see also* Bick Decl. at 2 ¶ 7. For example, during the height of the pandemic, there were over 17,868 overdue specialty care appointments. Bick Suppl. Decl. at 5-6 ¶ 11 (noting importance in identifying cancer and alleviating pain). Just last month, as seen in the table below, there remained significant backlogs of PCP appointments, RN appointments, specialty care appointments, and laboratory orders—all steep increases from before the pandemic. *See* Hart Decl. at 9 ¶ 10; *see also id.* at 10 ¶ 12 (as of June 15, 2021, 544 PCP appointments were more than 90 days overdue). This includes overdue cancer screening ultrasounds for 876 patients with end-stage liver disease. *See id.* at 10 ¶ 13. And growing case rates likely will only increase these delays. Bick Suppl. Decl. at 5 ¶¶ 10-11.

TABLE 1: PENDING, OVERDUE MEDICAL APPOINTMENTS AND ORDERS

	January 2020	July 2021	+/-
PCP Appointments	2,749	4,814	+175%
RN Appointments	693	3,073	+443%
Specialty Care Appointments	3,674	7,950	+216%
Laboratory Orders	759	6,874	+905%

Outbreaks also have "created a significant impediment to the delivery of group therapy." Bick Decl. at 2 ¶ 9. And "patients who are on quarantine due to exposure to an infected staff member are unable to attend programming during the period of their quarantine." *Id.* On August 19, 2021, 2,412 patients were in quarantine due to exposure. Hart Decl. at 11 ¶ 16. Six prisons had more than 100 patients in exposure quarantine. *Id.*

TABLE 2: PATIENTS IN QUARANTINE DUE TO COVID-19 EXPOSURE (AS OF AUGUST 19, 2021)

CHCF	HDSP	SCC	CCWF	CCC	COR
811	270	263	242	186	104

More generally, "[t]he prolonged COVID pandemic has placed a great strain upon the CDCR and CCHCS workforce. Employees have seen an increased workload and more involuntary overtime." Bick Decl. at 2 ¶ 12. "Staff have been impacted emotionally by the constant stream of COVID-related illness and death in their patients, their coworkers, and family members. These factors have contributed to the challenge of maintaining sufficient staff to provide medical care to our patients." *Id.*

VI. Staff Vaccination Rates Remain Dangerously Low, While Staff Infection Rates Increase Steeply and the Novel Coronavirus Continues to Mutate.

"CDCR staff are vaccinated at far too low a rate to reduce the risk of mass outbreaks in CDCR institutions." Bick Decl. at 6 ¶ 37. Only 53% of staff statewide are partially or fully vaccinated. *Id.* at 14 (Ex. B). At many prisons, the vaccination rate for custody staff is much lower; at four prisons, it is between 17% and 29%, and at ten prisons it is between 30% and 39%. *Id.* at 14-15. "Institutions with low staff vaccination rates experience larger and more frequent COVID-19 outbreaks." Bick Suppl. Decl. at 4 ¶ 9.

The danger is ever increasing. "The Delta variant, now the most common variant in California, is 2-3 times more transmissible than the original wild-type SARS-CoV2." Vijayan Decl. at 5 ¶ 12; *see also* Bick Decl. at 5 ¶ 29 ("[A] patient infected with the Delta variant sheds 1,000 times more virus than an average patient with an earlier strain."). "In recent weeks, the number of people infected in California has grown at an extremely rapid

rate." Vijayan Decl. at 2 ¶ 3; *see also* Hart Decl., Ex. 20, Cal. Dep't of Public Health, Health Care Worker Vaccine Requirement at 1 (Aug. 5, 2021) ("California is currently experiencing the fastest increase in COVID-19 cases during the entire pandemic").

"Case rates have increased more than 500% among staff members in recent weeks, most of whom are infected with the Delta variant." Bick Decl. at 5 ¶ 30. In the last two months alone, "1,398 CDCR employees have been diagnosed with COVID-19." Bick Suppl. Decl. at 3 ¶ 2. To date, at least 19,359 staff have been infected, and at least 29 have died from COVID-19. *See* Hart Decl. at 12 ¶ 24. Unfortunately, "natural immunity from infection with an earlier strain of COVID-19 may be ineffective at preventing infection with the Delta variant." Vijayan Decl. at 5-6 ¶ 12; *see also* Bick Decl. at 5 ¶ 31. And although vaccines significantly reduce the risk of transmission, they do not provide complete protection. "Despite being fully vaccinated, to date 292 patients in CDCR custody have had a COVID-19 breakthrough infection," a quarter of whom "are at high risk of serious disease." Bick Suppl. Decl. at 3 ¶¶ 3-4. Two fully vaccinated patients already have died from the disease. *Id.* at 3 ¶ 4; *see also* Hart Decl. at 9 ¶ 9.

And there may be something worse than the Delta variant on the horizon. "The virus is likely to continue to mutate, potentially creating even more transmissible strains than Delta, as it has done repeatedly in the past. These strains may be even more difficult to constrain using basic public health precautions like masking, social distancing, and frequent cleaning of high touch surfaces." Bick Decl. at 6 ¶ 33. "Future variants may prove more resistant to the vaccine." *Id.* at 6 ¶ 35.

VII. The Receiver Concluded that COVID-19 Vaccination of Workers Who Travel Outside the Prisons Is Necessary to Protect the Plaintiff Class.

On August 4, 2021, Receiver J. Clark Kelso issued a report and recommendation "based on the advice of medical and public health professionals, including Dr. Joseph Bick," who has led the response to COVID-19 in California prisons for the last year. ECF No. 3638 at 3, 5 ("Receiver's Report"); Bick Decl. at 1 ¶ 1. The Receiver found that "[o]nce COVID-19 infection has been introduced into a prison, it is virtually impossible to

contain, and staff are indisputably a primary vector for introducing into the prison the infection now spreading rapidly in the larger community." Receiver's Report at 5. He concluded that "**mandatory COVID-19 vaccination for institutional staff is necessary to provide adequate health protection for incarcerated persons**." *Id.* (emphasis added). He later explained that "[e]ach week is critical" and, given urgency of the issue, the Court should not delay "decision of this matter until October." ECF No. 3645, Receiver's Proposed Briefing Schedule at 2.

Since the Receiver filed his report, "COVID infection rates have continued to increase nationwide, in California, and in CDCR institutions." Bick Suppl. Decl. at 3 ¶ 2. The Delta variant has "driven COVID cases within CDCR to their highest levels since March 2021." *Id.* at 3 ¶ 6. "As of August 16, 2021, there were 536 cases of active COVID among staff," and "an even greater percentage increase in cases of active COVID among patients." *Id.* at 3 ¶ 2. "Major outbreaks of COVID are occurring at four institutions," and "thirty-four facilities are currently on restricted operations due to a current or recent outbreak of COVID-19." *Id.* at 4 ¶ 6 (parenthetical omitted). "As of August 18, 2021, there were 2,345 incarcerated persons quarantined for exposure to someone with COVID-19." *Id.* And, "[i]n just the first 17 days of August, hundreds of staff members have been instructed to isolate after contracting COVID-19 and hundreds more to quarantine based upon contact with people infected with COVID-19." *Id.* at 4-5 ¶ 9.

ARGUMENT

I. The Court Should Order that the Receiver's Recommended Vaccination Mandate Be Implemented.

As the Three Judge Court in this action observed last year, "the Eighth Amendment requires Defendants to take adequate steps to curb the spread of disease within the prison system." *Coleman v. Newsom*, 455 F. Supp. 3d 926, 932 (E.D. Cal./N.D. Cal. 2020); *see also Helling v. McKinney*, 509 U.S. 25, 33 (1993) (recognizing that officials must not be "deliberately indifferent to the exposure of inmates to a serious, communicable disease"); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) ("[C]orrectional officials have an

affirmative obligation to protect inmates from infectious disease."). Defendants' failure to require that workers who enter CDCR institutions be vaccinated constitutes "'deliberate indifference' to a substantial risk of serious harm" to the Plaintiff class and therefore violates the Eighth Amendment. *See Farmer v. Brennan*, 511 U.S. 825, 828 (1994).

A. COVID-19 Presents a Substantial Risk of Serious Harm.

The first element of the Eighth Amendment analysis—the existence of a substantial risk of serious harm—already has been established. *See Plata v. Newsom*, 445 F. Supp. 3d 557, 562 (N.D. Cal. 2020) (noting that Defendants do not dispute "the risk of harm that COVID-19 poses to inmates" or "that those who are incarcerated may be at a higher risk for contracting COVID-19 given the circumstances of incarceration") (quotation marks and citation omitted); *Coleman*, 455 F. Supp. 3d at 933 ("Defendants themselves acknowledge that the virus presents a 'substantial risk of serious harm' and that the Eighth Amendment therefore requires them to take reasonable measures to abate that risk.").

"The effects of COVID-19 can be very severe, and can include severe respiratory illness, major organ damage, blood clots (in the lungs as well as strokes), multisystem inflammatory syndrome, and death." Vijayan Decl. at 2 ¶ 4; *see Plata v. Brown*, 427 F. Supp. 3d 1211, 1225 (N.D. Cal. 2013) (Henderson, J.) ("[I]t would be impossible to conclude that a disease that, in its severe form, could lead to death does not present a risk of serious harm."). This is true even for patients who are fully vaccinated. *See* Bick Suppl. Decl. at 3-4 ¶¶ 5-6 ("[T]he Delta variant presents a substantial risk of harm even to fully vaccinated patients . . . [and] is causing new infections, reinfections, breakthrough infections, illness, hospitalizations, and death"). "Patients who recover from COVID-19 often suffer lasting and serious complications, including long term effects on the central and peripheral nervous systems resulting in dizziness, dysautonomia, headaches and strokes." Vijayan Decl. at 2 ¶ 4; *see also* Bick Decl. at 1 ¶ 5; Bick Suppl. Decl. at 3 ¶ 4.

The Plaintiff class is particularly vulnerable. "Incarcerated persons experience worse health outcomes in part because they have risk factors for COVID-19 at a disproportionate rate compared to the general public." Receiver's Report at 17; *see* page 3,

above. They also are at higher risk because of the particular danger "of respiratory transmission in congregate environments, like prisons." *See* Vijayan Decl. at 5 ¶ 12; *see also id.* at 3 ¶ 8 (observing that an incarcerated person "is, by the nature of the living arrangements and density of people, exposed to these multiple modalities of transmission and high viral inoculum," and "[t]he risk of severe disease also increases with exposure to a higher viral inoculum"). "Incarcerated persons are five times as likely to be infected in outbreaks and nearly three times more likely to die." Receiver's Report at 6.

In addition, COVID-19 significantly disrupts medical care delivery in the prison system, as can be seen in the large backlogs in appointments, specialty care, and laboratory orders. *See* page 8, above. "[T]hese delays cannot continue indefinitely without negatively affecting patient care." Bick Suppl. Decl. at 4 ¶ 8. "Since the beginning of the pandemic, there have been hundreds of program modification orders at CDCR institutions, some of which lasted for months or even more than a year, and many of which are ongoing." *Id.* Frequent lockdowns "impede the effective delivery of care." *Brown v. Plata*, 563 U.S. 493, 521 (2011). "[S]taff must either escort prisoners to medical facilities or bring medical staff to the prisoners. Either procedure puts additional strain on already overburdened medical and custodial staff." *Id.*; *see* Health Care Dep't Operations Manual ("HCDOM") § 3.1.5(c)(3)(D)(2) (rev. Apr. 2019).

Infections among staff attributable to the Delta variant likely will result in continued and increasing staff shortages. *See* Bick Suppl. Decl. at 5 ¶ 9 ("The large number of staff in quarantine has contributed to delays in clinical care."); Bick Decl. at 5 ¶ 30. And it is not just shortages of healthcare staff that impede delivery of medical care. Custody staff also are essential to the delivery of medical care in prison. *See Plata*, 2005 WL 2932253 at *15. Custody staff provide security that permits medical care delivery in specialized units, including Correctional Treatment Centers, Outpatient Housing Units, Psychiatric Inpatient Programs, and Mental Health Crisis Beds, as well as the Transitional Care Unit and Skilled Nursing Facility at CCWF, and the hospice at CMF. Custody staff perform similar functions in housing units that house patients known or suspected to be infected by the

novel coronavirus. In addition, custody staff at all prisons are responsible for escort, transport, and delivering ducats (scheduling slips) for medical appointments. *See* HCDOM §§ 3.1.2(b)(3)(D)(3) (rev. Mar. 2017), 3.1.3(b)(3)(A)(14)-(15) (rev. Dec. 2020), 3.1.5(c)(3)(C) (rev. Apr. 2019), 3.1.11(b)(3)(A)(9) (rev. July 2020). They also supervise and facilitate medication administration, *see, e.g.*, *id.* § 3.2.4(c)(2)(C), (c)(3)(A), (c)(5)(A)(2)(e) (rev. Jan. 2016); inspect Durable Medical Equipment and medical supplies, *see id.* §§ 3.6.1(e)(9)(E) (rev. Sept. 2018), 3.1.9(c)(3)(E)(5) (rev. Apr. 2019); and provide life support during medical emergencies, *see id.* § 3.7.1(g)(2)(B)(1) (rev. July 2012).

B. The Mitigation Measures Taken To Date Are Inadequate Now That Safe and Effective Vaccines Are Available.

The second element of the Eighth Amendment analysis also is met here. By failing to require vaccination of all workers who travel into the prisons, Defendants have failed "to take reasonable measures" to abate the risk posed by COVID-19. *See Farmer*, 511 U.S. at 847. It is true that the Court sixteen months ago found Defendants' mitigation efforts to be reasonable. *See Plata*, 445 F. Supp. 3d at 568. But the analysis is different today in light of what we have learned about the transmission of the virus and now that safe and effective vaccines are widely available. *See id.* at 569 (noting that decision "does not preclude a finding of deliberate indifference at a later time"); *Plata*, 427 F. Supp. 3d at 1225 n.13 ("[T]he relevant question is not what Defendants have done in the past; only Defendants' 'current attitudes and conduct' are at issue.") (quoting *Farmer*, 511 U.S. at 845-46). Indeed, California has fallen far short of other jurisdictions, which already have mandated that all correctional workers be vaccinated. *See* Hart Decl. at 15-18 ¶ 34.

Put differently, although other mitigation strategies implemented by Defendants are "substantial efforts," they do not on their own satisfy constitutional requirements based on the tools available today. *See Jones v. City & County of San Francisco*, 976 F. Supp. 896, 908 (N.D. Cal. 1997) (although defendants had undertaken measures to improve fire safety, they "continued to abdicate their constitutional responsibility" by failing to implement two other measures); *see also Plata*, 427 F. Supp. 3d at 1227 (Defendants may

not "deal with this public health emergency by relying on measures which either have not worked in the past or which are unsubstantiated mitigating strategies") (internal quotation marks and citation omitted); *Coleman v. Wilson*, 912 F. Supp. 1282, 1319 (E.D. Cal. 1995) ("Given the nature and extent of the crisis and its duration, it is not possible to credit arguments that defendants entertain a good faith belief that such efforts were sufficient."); Bick Suppl. Decl. at 6 ¶ 12 ("Safe and effective vaccines are now widely available. COVID related outbreaks, the resulting lockdowns and quarantines, hospitalizations, and deaths are largely avoidable through very high levels of vaccination . . . .").

Existing measures have not stanched the flow of the virus into the prison system. "The Delta variant has already driven COVID cases within CDCR to their highest levels since March 2021." Bick Suppl. Decl. at 3 ¶ 6. Dr. Bick, who has led the COVID-19 response in the prisons, has concluded that, "in the absence of high rates of vaccination, routine public health measures such as physical distancing and environmental cleaning are insufficient to prevent spread of SARS-CoV-2." Bick Decl. at 1, 4 ¶¶ 1, 23. Dr. Vijayan also has concluded that "a very high vaccination rate, particularly among those with contact with the outside community who may introduce SARS-CoV2 into a CDCR institution, is the most effective means of preventing outbreaks in CDCR institutions." *Id.* at 7 ¶ 18; *see also id.* at 6-7 ¶ 17. Plaintiffs agree with those conclusions.

1. Physical Distancing Mandate

Defendants require "staff and all inmate-patients [to] adhere to . . . six-foot physical distancing." *See* Hart Decl., Ex. 17 at 2. But such distancing "cannot be effectively imposed in current present conditions," and, "even if it could, it is far less effective . . . than vaccination" in stopping the spread of infection. Receiver's Report at 22. First, "[a] majority of incarcerated persons in CDCR custody are housed in dormitories that are too crowded to allow for social distancing."[2] Foss Decl. at 2 ¶ 5.

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[2] We also now know that respiratory droplets containing the virus can build up over time and travel six to eight **meters** away. *See* Vijayan Decl. at 3-5 ¶¶ 8-11; Receiver's Report at 22 & n.107.

Second, "it is not possible for corrections officers to perform their jobs with social distancing precautions." *Id.* at 1 ¶ 3; *see also* Bick Decl. at 5 ¶ 25. Staff fulfill essential duties that require close contact. *See* Foss Decl. at 1-2 ¶¶ 3-4. Patients with developmental and/or physical disabilities in particular often require frequent, close interactions. For example, over 10,000 patients with documented physical disabilities are housed across all prisons, many of whom depend on staff to provide a wide range of disability-related help, including serving as a sighted guide and pushing wheelchairs to and from appointments. Lomio Decl. at 2-5 ¶¶ 6, 12-16. And the approximately 1,300 patients with documented developmental disabilities also come into frequent, close contact with staff to support activities of daily living, fill out sick call slips, and monitor them for verbal and physical abuse and theft, among other things. Norman Decl. at 2-3 ¶¶ 2, 4-5.

2. Face Covering Mandate

Defendants require "adherence to the universal use of face masks" by all staff and patients. Hart Decl., Ex. 17 at 2. But, as we have learned from experience, "[w]hile compliance with mask guidance helps slow the spread of COVID-19 in CDCR institutions, it alone cannot prevent transmission." Bick Decl. at 5 ¶ 26. "In addition, incarcerated persons cannot wear a mask while eating or sleeping, yet there is a very significant risk of transmission during those times." *Id.*; *see also* Receiver's Report at 13.

3. Testing Mandate

Defendants require COVID-19 testing by staff. But even if all 55,584 staff who work in the prisons were tested daily (which they are not), that would "not effectively prevent asymptomatic staff from introducing COVID-19 to CDCR institutions." Receiver's Report at 9; Hart Decl., Ex. 12 at 5. Indeed, "testing is universally recognized as a far imperfect substitute for vaccination." Receiver's Report at 8. Staff may be "asymptomatic but infectious, spreading COVID" in the institutions before receiving their test results and "learning they are infected." Bick Decl. at 3 ¶ 20; *see also* Receiver's Report at 8-9 ("Tests can detect a positive case only where a certain viral load is present, so a recently infected individual may not test positive for several days after exposure.").

4. Hand Hygiene Mandate

Defendants require "frequent hand hygiene" by all staff and patients. Hart Decl., Ex. 17 at 2. But "the predominant mode of transmission of SARS-CoV-2 is via respiratory droplets." Vijayan Decl. at 3 ¶ 8. And given the volume of "high-touch," communal objects and surfaces, *see* Foss Decl. at 3 ¶ 11, including telephones, stair handrails, sinks, tables, chairs, door handles, water fountains, and showers, it simply is unreasonable to think that hand hygiene alone will prevent all or most infections.

5. Voluntary Vaccination Program

"Voluntary efforts [to encourage staff vaccination] have not produced acceptable results, and continuation with a voluntary approach that yields such results must be acknowledged for what it has proven to be—an unacceptable half-way measure." Receiver's Report at 23; *see also id.* at 24 (noting "widely advertised vaccine clinics for all staff during all shifts, at all facilities in May; offers of up to 80 hours of supplemental paid sick leave; and peer education through the COVID Mitigation Action Program"). "Voluntary efforts to increase the rate of vaccination have made very little progress over the four weeks between June 30, 2021 and July 29, 2021. In that period, the total number of full vaccinated and partially vaccinated staff each increased by just 1%." Bick Decl. at 6-7 ¶ 37. Assuming that rate remains constant and applies equally to all prisons, which is unlikely, it would take around **seven years** for all custody staff at High Desert State Prison to be fully vaccinated. *See id.* at 14. (This also assumes that staff voluntarily and timely take any necessary additional vaccine doses or booster shots.) That simply is too long. "Delaying a mandatory vaccination policy until the next wave is upon us will not produce results until it is too late and the worst of the wave is over." Receiver's Report at 26.

C. The Proposed Vaccination Mandate Meets the Requirements of the Prison Litigation Reform Act.

The Receiver's proposed mandate satisfies the needs-narrowness-intrusiveness requirements of the Prison Litigation Reform Act. *See* 18 U.S.C. § 3626(a)(1)(A). The proposed mandate is narrowly drawn—it extends only to those who travel between the

outside community and a prison (or who have similar close contact with the community through in-person visitation), the group known to be "a primary vector for transmission of COVID-19 into CDCR institutions." Bick Decl. at 3 ¶ 16. It focuses on the need "to limit the introduction of COVID into CDCR institutions because, once introduced, it is extraordinarily difficult to prevent the spread of COVID-19, which could lead to large-scale outbreaks." *Id.* at 5-6 ¶ 32; Vijayan Decl. at 6 ¶ 16.

"There is no other equally effective method." Receiver's Report at 10; *see also id.* at 5 ("[T]he only method to ensure adequate protection and care for incarcerated persons is vaccination of all persons who can bring infections into the prison."). As explained above, no other measures—alone or in combination—will correct the constitutional violation.[3] *Cf. Plata*, 2005 WL 2932253, at *24 ("[T]he Court is not required to restrict its powers to those means that have proven inadequate, or that show no promise of being fruitful.").

II. The Rationale Behind the Department of Public Health Order of August 5, 2021, Applies to All CDCR Employees Who Enter the Prisons.

The rationale behind the California Department of Public Health Order of August 5, 2021, applies to all CDCR employees who enter the prisons. *See* Hart Decl., Ex. 20 ("August 5, 2021 CDPH Order").

First, state prisons "are particularly high-risk settings where COVID-19 outbreaks can have severe consequences for vulnerable populations including hospitalization, severe illness, and death." *See* August 5, 2021 CDPH Order at 1. There has been a "staggeringly high incidence of COVID-19" in the state prisons "because of the design of facilities, the manner in which they must be operated, population density, and the transmission characteristics of the virus." Receiver's Report at 10-11.

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[3] There are, of course, **more** intrusive measures. Staff could "tak[e] up residence in the prisons and never travel[] beyond the walls for the duration of the pandemic." Receiver's Report at 7. Or Defendants could dramatically reduce the prison population, something they steadfastly have refused to do. *See, e.g.*, *id.* at 16 ("[M]edical and public health experts . . . visited [SATF] and concluded that, in order to minimize COVID-19 risk, dorms with a capacity of fifty people should house only three people, and that small dorms with a capacity of six people and cells with capacity of two people should both house only a single person.").

Second, "patients are at high risk of severe COVID-19 disease due to underlying health conditions, advanced age, or both." *See* August 5, 2021 CDPH Order at 1. There are 27,281 patients over 50 years of age in the state prisons, and 17,860 patients with a COVID Weighted Risk Score of 3 or higher, who suffer from high-risk chronic conditions like advanced liver disease, cancer, COPD, heart disease, HIV/AIDS, and obesity. *See* Hart Decl. at 1-4 ¶¶ 3-5. In fact, 95% of those who died from COVID-19 while in Defendants' custody were in one or both of those categories. *See* Bick Suppl. Decl. at 3, 21-25 (Ex. B).

Third, "[t]here is frequent exposure to staff and highly vulnerable patients, including elderly, chronically ill, critically ill, medically fragile, and disabled patients." *See* August 5, 2021 CDPH Order at 1. That is the very definition of a prison system, where tens of thousands of patients depend entirely on others to support their ability to care for themselves and keep them safe. *See Plata*, 563 U.S. at 510 ("To incarcerate, society takes from prisoners the means to provide for their own needs."). This includes not only patients in hospice care or other specialized units, but also the many chronically ill patients housed throughout the prison system and the thousands of patients with developmental and physical disabilities who depend on staff for basic supports every day. *See* Norman Decl. at 1-3 ¶¶ 2, 4-6 (developmental); Lomio Decl. at 2-3, 4-5 ¶¶ 6, 12-16 (physical). It simply is not possible for staff to perform their essential duties in the prison system without frequent, sustained contact with high-risk patients. *See, e.g.*, Foss Decl. at 1 ¶ 3.

The reasoning and plain language of the August 5, 2021 order, then, applies to state prisons. And it extends to all CDCR employees who enter the prisons. This is because each prison has a healthcare clinic, and any employee may be assigned there or to other areas accessible to patients. *See* August 5, 2021 CDPH Order at 3 (order applies to "individuals who work in indoor settings where (1) care is provided to patients, or (2) patients have access for any purpose," including where the worker provides security); Cal. Code Regs. tit. 15, § 3397 ("in an emergency any employee must perform any service, including custodial functions, if so directed by the warden, regional administrator or his or her delegate."). This is explained in more detail in Section III.B, below.

III. There Is No Public Health Basis for Limiting Mandatory Vaccines to Staff "Regularly Assigned" to Certain Healthcare Settings Based on the Department of Public Health's August 19, 2021 Order.

The California Department of Public Health's order dated August 19, 2021, and Defendants' implementation of it, represents an ineffective half-measure that fails to adequately protect the Plaintiff class and fails to address the urgent public health basis for the Receiver's recommendation—limiting the introduction of the virus into the prisons.

A. High-Risk Patients Are Housed Throughout the Prison System.

The August 19, 2021 order applies only to certain healthcare settings within the prisons. *See* Hart Decl., Ex. 22 at 1-2 ("August 19, 2021 CDPH Order"). But the vast majority of patients at higher risk of severe illness or death from COVID-19 are housed outside of those areas. *Id.* at 4-8 ¶ 6.

TABLE 3: HOUSING OF PATIENTS WITH COVID RISK SCORE OF 3 OR HIGHER (AS OF AUGUST 26, 2021)

Prison	Total	Covered by CDPH Order	Not Covered by CDPH Order	Prison	Total	Covered by CDPH Order	Not Covered by CDPH Order
ASP	165	3	**162**	HDSP	239	10	**229**
CAC	108	0	**108**	ISP	163	0	**163**
CAL	94	9	**85**	KVSP	299	4	**295**
CCC	83	1	**82**	LAC	741	4	**737**
CCI	278	3	**275**	MCSP	1,646	2	**1,644**
CCWF	447	22	**425**	NKSP	213	3	**210**
CEN	152	6	**146**	PBSP	212	0	**212**
CHCF	1,419	1,419	**0**	PVSP	53	0	**53**
CIM	1,134	43	**1,091**	RJD	1,261	15	**1,246**
CIW	275	11	**264**	SAC	344	3	**341**
CMC	926	29	**897**	SATF	800	14	**786**
CMF	900	900	**0**	SCC	167	0	**167**
COR	515	38	**477**	SOL	911	6	**905**
CRC	253	4	**249**	SQ	1,047	15	**1,032**
CTF	950	8	**942**	SVSP	455	57	**398**
CVSP	300	2	**298**	VSP	698	14	**684**
FSP	421	0	**421**	WSP	191	2	**189**
TOTAL	17,860	2,647	**15,213**				

Patients are not housed in the covered settings **because** they have underlying chronic conditions or disabilities that make them particularly vulnerable to COVID-19, but rather may be housed there for other reasons, including the stress of imprisonment and

disruption of coping abilities or because they require palliative care. *See* Hart Decl., Ex. 24 at 3; HCDOM § 1.2.14, App. 1(a). And sometimes people who should be housed in such settings cannot be immediately moved there. *See* Hart Decl., Ex. 15 at 1.

The current vaccination policy makes unprincipled distinctions. Patients, including those with disabilities, may be protected from unvaccinated staff for the relatively brief time they are in a clinic, but not when interacting with staff in their unit every day. Patients who require dialysis may be protected from unvaccinated staff while receiving dialysis, but not in their housing units and program areas. *See* Hart Decl. at 8 ¶ 8. And Defendants' decision not to require that staff in quarantine and isolation units be vaccinated is particularly perplexing. Those workers are more likely to be exposed to the virus, and may spread it throughout the prison. *See* Lomio Decl. at 5 ¶ 16 & Ex. D; Bick Decl. at 4 ¶ 21.

This does not appear to have been the original intention of the Department of Public Health. A previous, published version of the August 19 order also applied to staff in areas "'*to which inmate patients have access for any purpose*,'" mirroring language in the August 5 order that applies to non-prison settings. *See* ECF No. 3653, Order Modifying Schedule at 2 n.1 (emphasis by Court). The *post hoc* deletion of that provision has no legitimate public health basis, leads to dangerous risks and absurd results, and seems to evidence nothing more than continued discrimination against incarcerated patients.

B. The August 19, 2021 Order Covers Only a Small Fraction of Workers Who Travel Daily Between the Community and Prisons.

The August 19, 2021 order also limits its application to people "regularly assigned" to work in healthcare facilities. *See* Hart Decl., Ex. 22 at 2. That limitation is entirely inappropriate. First, those workers represent only a small fraction of the hundreds and thousands of workers who travel into each prison daily, and thus the order fails to address the public health basis of the Receiver's recommendation—the need to reduce opportunities for workers to "introduc[e] into the prison the infection now spreading rapidly in the larger community" because once a "COVID-19 infection has been introduced into a prison, it is virtually impossible to contain." *See* Receiver's Report at 5.

Second, the order does not take reasonable measures to mitigate risk even in limited healthcare settings. In particular, it ignores the day-to-day operational realities of managing a large and complex prison system. As Director Foss explained, "[o]fficers working their ordinary shifts are often reassigned to cover high-need vacant positions. For example, a gym officer may be reassigned for the day to guard a clinic in order to keep the clinic operating. . . . Corrections officers also frequently work overtime in housing units and yards to which they are not ordinarily assigned, based on availability and need of the institution."[4] Foss Decl. at 1-2 ¶ 4. In fact, Defendants already have informed the Court that they can**not** make staff assignments "permanent and completely static because the prisons need to have the flexibility to send custody staff to locations where they are needed, which can change from day to day due to staff illness, leave, emergencies, changes in programming, staffing shortages, promotions, and transfers, among other reasons."[5] *See* ECF No. 3314, Defendants' Response to the Court's April 29, 2020 Questions Concerning Dorms at 5-6 (May 1, 2020) (characterizing flexibility as "essential" during the pandemic).

Defendants' own directive implementing the August 19, 2021 order lists the many

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[4] Such movement, of course, may spread the virus throughout a prison. *See* Hart Decl., Ex. 23, Amend & Berkeley Public Health, Urgent Memo, COVID-19 Outbreak: San Quentin Prison, at 7 (June 13, 2020) ("At present work shift plans are inadequate from a public health perspective. For example, we learned about staff who were working in the Medical Isolation Unit (Adjustment Center) during the shift and were scheduled to work the next shift in the dorms. This is an enormous risk for the spread of COVID-19 between housing units.").

[5] *See also Hastings v. Dep't of Corrections*, 2 Cal. Rptr. 3d 329, 331 (Ct. App. 2003) ("The correctional officer is expected to have the ability to work 24 hours at any post or any particular assignment or watch. . . . [A]ny correctional officer may be called upon to respond immediately to any emergency situation, at any time, in the correctional facilities."); *Furtado v. State Personnel Bd.*, 151 Cal. Rptr. 3d 292, 299, 310 (Ct. App. 2013) ("a correctional lieutenant assigned to one post may be required to report to another area because there is a greater need in the other area," including because of modified programming or lockdowns, and may need to escort patients to "medical offices" or be "involved in the transportation" of patients to "outside medical care") (internal quotation marks omitted); CDCR Department Operations Manual § 51040.5.1 (rev. Jan. 1, 2021) ("'All peace officers have the responsibility to take appropriate action during an emergency and to work assignments as necessitated.'") (parenthetical omitted).

people who may work in healthcare settings but will **not** be required to be vaccinated, including "relief staff, voluntary overtime, mandatory overtime, swaps, . . . staff making pick-ups or deliveries, conducting maintenance repairs, conducting tours, etc.," as well as "staff responding to emergencies."[6] ECF No. 3657-1 at 6. These exceptions create a substantial risk of serious harm to incarcerated people and are unacceptable. Custody staff perform direct-contact care for patients in healthcare settings. For example, custodial personnel in Correctional Treatment Centers are responsible for serving meals, "[a]mbulating (exercising) independent, ambulatory inmate-patients," "[h]olding or immobilizing a patient during a treatment or diagnostic procedure," and providing "[c]ardiopulmonary resuscitation and first aid." Cal. Code Regs. tit. 22, § 79813.

Staff shortages during the pandemic already have resulted in significant disruption to "regular" staff assignments. For example, at the end of last year, a 28% staff vacancy rate at the Correctional Training Facility necessitated major assignment modifications:

> CTF had been using its staff contingency plan as of [December 29, 2020,] and continues to do so. CTF had also instituted a rolling blackout to try and cover a temporary spike in vacant posts. This temporary spike is a result of twenty-one (21) patients being sent to hospitals in the area, requiring 126 posts, twenty-nine (29) of CTF's own staff being quarantined/ isolated (Monterey County has been very high rate of infection, 25 percent infection rate being reported) and the numerous alternate housing areas requiring housing staff and fire watch. **CTF is also using sergeants and lieutenants to cover officer posts, however, the high volume of vacancies within those ranks meant there were no volunteers. CCs are now being offered the overtime to cover office[r]s posts** and that is helping but during the time period being discussed, that had not been authorized and was pending. **All means to fully staff the prison were used and continue to be used**.

See Hart Decl., Ex. 13 at 7 (emphasis added).

In July 2021, Richard J. Donovan Correctional Facility "experienced abnormally high staff vacancies," which "resulted in extreme program closures" that affected "all

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[6] Defendants' exclusion of people who conduct maintenance repairs appears at odds with the August 19, 2021 order, which expressly includes "facilities maintenance staff." *See* Hart Decl., Ex. 22 at 2.

areas," including "the Enhanced Out Patient programming areas." *Id.*, Ex. 14 at 3. And just this month, there were 73.2 vacant custody officer positions at California State Prison, Sacramento, including nineteen officers out due to a positive COVID test, one officer out due to COVID-19 exposure, and two officers on long-term medical due to COVID-19. *Id.*, Ex. 28 at 1. There also were 46 healthcare staff vacancies. *Id.* at 2. To "cover vacant posts," the prison "is utilizing services of Registry/Contractors through Management solutions" and the "VOR [Voluntary Overtime Roster] process to cover vacancies **on a daily basis**." *Id.* (emphasis added). And at least 50 officers from other prisons were reassigned to the prison. *See id.*, Ex. 10 at 7.

C. Workers Who Are Unvaccinated Due to Religious Beliefs Should Not Be Allowed Entry Into the Prisons.

Finally, the August 19, 2021 order has a carve-out for any worker who signs a form stating that they are "declining vaccination based on religious beliefs." Hart Decl., Ex. 22 at 2. Those workers may continue to work in healthcare settings but must be tested regularly. *Id.* Such a sweeping exemption has no basis in state or federal law, which require only that employees with sincerely held religious beliefs be provided reasonable accommodations if they do not impose an undue hardship. *See* Cal. Gov't Code § 12940(l); 42 U.S.C. § 2000e(j); *Cook v. Lindsay Olive Growers*, 911 F.2d 233, 241 (9th Cir. 1990). The "undue hardship" standard is not a high bar; it is met "whenever that accommodation results in 'more than a *de minimis* cost' to the employer." *Soldinger v. Nw. Airlines, Inc.*, 58 Cal. Rptr. 2d 747, 762 (Ct. App. 1996) (quoting *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986)). Defendants' implementing directive properly limits eligibility to those with sincerely held religious beliefs, but does not explain how requests will be evaluated. *See* ECF No. 3657-1 at 6.

Even assuming that a worker has such a belief, any blanket "accommodation" that involves continued entry into the prisons almost certainly would be unreasonable in light

of the serious threat posed to the worker, their colleagues, and the Plaintiff class.[7] *See Robinson v. Children's Hospital Boston*, No. 14-10263 DJC, 2016 WL 1337255, at *9 (D. Mass. Apr. 5, 2016) (holding that exemption of nurse from mandatory flu vaccine policy "would have been an undue hardship because it would have increased the risk of transmitting influenza to its already vulnerable patient population"); *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1383, 1384 (9th Cir. 1984) (undue hardship where machinist would not shave his facial hair and thus could not achieve a gas-tight face seal when wearing a respirator); *Kalsi v. N.Y. City Transit Auth.*, 62 F. Supp. 2d 745, 760 (E.D.N.Y. 1998), *aff'd*, 189 F.3d 461 (2d Cir. 1999) (undue hardship where inspector refused to wear a hard hat). For example, nurses in Correctional Treatment Centers are responsible for, among other things, "[c]hanging position of bedfast and chairfast patients," "[m]aintaining proper body alignment and joint movement to prevent contractures and deformities," and "[p]roviding care to maintain clean, dry skin free from feces and urine." Cal. Code Regs. tit. 22, § 79637. The CDPH's accommodation requires at most twice-a-week testing of nurses performing those duties, which the Receiver explained "does not effectively prevent asymptomatic staff from introducing COVID-19 to CDCR institutions" and does not adequately protect vulnerable patients from infected staff. *See* Receiver's Report at 9.

CONCLUSION

The Court should order that the Receiver's recommendation be implemented without further delay.

DATED: August 30, 2021

PRISON LAW OFFICE

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[7] It is well settled that "certain anti-vaccination beliefs are not religious." *Fallon v. Mercy Cath. Med. Ctr. of Se. Pennsylvania*, 877 F.3d 487, 492 (3d Cir. 2017) (employee was not entitled to exemption from flu vaccination); *see also Friedman v. S. Cal. Permanente Med. Grp.*, 125 Cal. Rptr. 2d 663 (Ct. App. 2002) (employee was not entitled to exemption from mumps vaccination due to veganism).