No. 21-16696

In the United States Court of Appeals for the Ninth Circuit

MARCIANO PLATA, et al.,
Plaintiffs-Appellees,

v.

GAVIN NEWSOM, et al.,
Defendants-Appellants,

J. CLARK KELSO,
Receiver-Appellee.

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

BRIEF OF PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

A decade ago the Supreme Court said this about the State of California's treatment of people incarcerated in its prisons: "For years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs. Needless suffering and death have been the well-documented result." *Brown v. Plata*, 563 U.S. 493, 501 (2011).

The COVID-19 pandemic has tested the State's current commitment to its patients' basic medical needs. Again, the State has failed to meet those needs, and again patients are at risk of needless suffering and death.

The record in this case reveals that the district court has been closely monitoring the State's response to the pandemic. Early on, it denied Plaintiffs' motion to reduce the prison population, finding that the State was not deliberately indifferent because it had then taken some measures in response to COVID-19. *See Plata v. Newsom*, 445 F. Supp. 3d 557, 571 (N.D. Cal. 2020). Since then the district court has observed the ineffectiveness of these measures and the toll that COVID-19 has taken on the prison population. In the face of continued infections, hospitalizations, and deaths of incarcerated patients, as well as lockdowns, substantial staff shortages, and the resulting disruption to the medical care delivery system, the Receiver, appointed by the district court to operate the prison medical

care system, determined that limiting entry into the state prisons to vaccinated workers was the only way to adequately protect patients.

The State, however, refused to implement the Receiver's recommendation. The district court found that because this refusal was unreasonable, the State acted with deliberate indifference. This finding is not clearly erroneous. It is based on undisputed data and scientific evidence, and is consistent with the view of the State's own expert, who opined that it is "highly unlikely [that the State will] be able to prevent or control outbreaks of COVID-19 solely through the application of non-pharmaceutical interventions." 1-SER-59. Under these circumstances it was not an abuse of discretion for the district court to issue an injunction that it expressly found was narrowly tailored and the least intrusive measure necessary to safeguard the health of people incarcerated in California's prisons.

In the face of this formidable record, the appellants try to escape liability by asking this Court to defer to the State's judgment about which mitigation measures to employ. First, they claim that the State is due more credit for its pre-vaccine actions. But that argument fails because the circumstances changed dramatically when the vaccine became available. The district court properly found that "a toolbox without a vaccine has little relevance when the same toolbox now includes a vaccine that everyone agrees is one of the most important tools, if not the most important one, in the fight against COVID-19." 1-ER-15-16.

Second, the appellants argue that the injunction violates the Prison Litigation Reform Act because there are other less intrusive alternatives and they speculate about the consequences the injunction would have on prison operations. But a narrow and otherwise proper remedy for a constitutional violation is not "invalid simply because it will have collateral effects." *Plata*, 563 U.S. at 531. Moreover, the district court discussed each proposed alternative at length and found that none would resolve the constitutional violation. In short, the record makes clear that the court did not abuse its discretion by crafting an injunction that carefully balances the competing interests.

This Court should affirm.

STATEMENT OF THE ISSUES

1. Did the district court err in concluding that the State failed to take reasonable measures to protect incarcerated people from the substantial risk of serious harm posed by COVID-19 by refusing to implement the Receiver's recommended staff-vaccination policy—even though the undisputed record showed that this policy was the only measure that would effectively prevent and control the spread of COVID-19 in California's prisons?

2. Did the district court's order adopting the Receiver's recommended staff-vaccination policy satisfy the Prison Litigation Reform Act's requirements,

where the appellants' alternative measures were both less narrow and unlikely to mitigate the substantial risk of serious harm posed by COVID-19?

PERTINENT STATUTES

18 U.S.C. § 3626(a)(1)(A): Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

STATEMENT OF THE CASE

A. The Court-Appointed Receiver Has Managed Delivery of Medical Care in the California State Prison System For the Past 15 Years.

The State has a long history of constitutionally deficient medical care in its prison system. Plaintiffs filed this class action lawsuit in 2001, alleging that the State was providing unconstitutional medical care to people in state prisons in violation of the Eighth Amendment. 3-ER-443; 6-SER-1547-48.[1] In 2002, the district court

[1] This brief's citations to "ER" without any other indication refer to the State's excerpts of record filed in the lead appeal (No. 21-16696). All citations to "SER" likewise refer to the supplemental excerpts of record that the plaintiffs-appellees filed in the lead appeal (No. 21-16696). Any citations to the Union's excerpts of

approved the parties' stipulation for injunctive relief, found that the stipulation met the requirements of the Prison Litigation Reform Act, and retained jurisdiction to enforce its terms. 6-SER-1560, 1564.

In 2005, the district court found that the State had failed "to bring its prison medical system up to constitutional standards."[2] 6-SER-1494, 1546. The district court found stark failures in all areas of the medical care delivery system. 6-SER-1497-1520, 1531. Although recognizing that the State faced a complex, polycentric problem, the district court highlighted state leadership's longstanding failure to resolve the "over-prioritization of custody interests even in the face of pressing medical needs" and "a prison culture that devalues the lives of its wards." 6-SER-1515, 1537; *see also* 6-SER-1541-42.

The district court appointed a Receiver to "provide leadership and executive management of the California prison medical health care delivery system." 3-ER-413. The Receiver was assigned "all powers vested by law in the Secretary of the CDCR as they relate to the administration, control, management, operation, and financing of the California prison medical health care system." 3-ER-415. In

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record filed in the companion case (No. 21-16816) are expressly indicated as follows: "Union X-ER-XXX."

[2] For the reader's convenience, this brief refers to the state defendants—the Governor of the State of California and the Secretary of the California Department of Corrections and Rehabilitation—collectively as "the State," and to the intervenor California Correctional Peace Officers' Association as "the Union."

addition to managing day-to-day operations, the Receiver was directed to identify any "state action or inaction" that served as a barrier to the provision of constitutional medical care. 3-ER-416. The district court ordered that the receivership continue until "Defendants have the will, capacity, and leadership to maintain a system of providing constitutionally adequate medical health care services to class members." 3-ER-418.

In 2011, the Supreme Court found that "serious constitutional violations in California's prison system" "have persisted for years" and "remain uncorrected." *Plata*, 563 U.S. at 499. Relying in part on a report prepared by the Receiver, the Supreme Court upheld an order for substantial reduction of the state prison population and found, among other things, that crowding and lockdowns "impede the effective delivery of care" by putting "additional strain on already overburdened medical and custodial staff." *Id.* at 520-21, 529.

B. The Receiver Has Guided the State's Response to the COVID-19 Pandemic Within the California Prison System.

The Receiver has led the response to the COVID-19 pandemic in the state prison system since the beginning of the pandemic. *See, e.g.*, 1-SER-295. The Receiver and California Correctional Health Care Services ("CCHCS") developed public health guidelines for, among other things, providing general medical care to patients during the pandemic, treating patients with COVID-19, and mitigating the

spread of COVID-19 within the prison system.[3] The State "made efforts to implement each of the Receiver's COVID-19 safety protocols" (4-SER-1002), including related to physical distancing in the prisons (5-SER-1398-99; 6-SER-1478-79), movement of incarcerated people between prisons (5-SER-1343-45, 1398; 6-SER-1478-79; Union 2-ER-303), screening and testing staff for COVID-19 (5-SER-1286-87, 1309, 1397; 6-SER-1471-73), quarantine and isolation of patients (5-SER-1397; 6-SER-1426-439), testing patients for COVID-19 (5-SER-1397; 6-SER-1410-15, 1437, 1439), and use of personal protective equipment (5-SER-1398; 6-SER-1474-76).

In developing and modifying these protocols, the Receiver closely monitored developing scientific and medical consensus and considered data from the prison system and evaluations from public health experts. *See, e.g.*, 1-SER-80-122; 1-SER-295; 4-SER-999-1003; 5-SER-1370-72. Notwithstanding these efforts, the virus infected tens of thousands throughout the prison system. In early 2021, the Receiver testified before the state legislature that: "If the coronavirus were designing its ideal home, it would build a prison." *See* Hearing before the Budget Subcomm. No. 5 on Public Safety of the Cal. State Assem., 2021–22 Leg. Sess. (Feb. 8, 2021),

[3] CCHCS is a "department under federal receivership responsible for providing constitutionally adequate medical care to patient-inmates of the CDCR within a delivery system the state can successfully manage and sustain." CDCR, Operations Manual § 41010.3 (Jan. 2021), https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2021/05/DOM_2021_ADA.pdf.

https://www.assembly.ca.gov/media/budget-subcommittee-5-public-safety-20210208/video [at 1:38:34 *et seq.*]; Union 2-ER-198.

C. The District Court Has Closely Monitored Correctional Healthcare During the Pandemic and Efforts to Protect the Plaintiff Class.

The district court also has closely monitored efforts to minimize risk of harm to the plaintiff class during the pandemic. "Beginning in April 2020, the Court has conducted regular case management conferences—starting approximately weekly, then biweekly, and then monthly—focused almost exclusively on pandemic management and attended by the parties as well as the [Union]." 1-ER-7. The district court also visited prisons to view conditions firsthand and speak with medical leadership. 5-SER-1317, 1321.

The district court has been clear throughout the pandemic that its role is not to impose mitigation measures it would adopt "if it were solely responsible for prison health care." Union 3-ER-326 (denying the plaintiffs' motion for additional physical distancing measures). The district court also has recognized, however, that the "pandemic presents an ongoing public health emergency, and the virus's presence within the prisons requires continuous, evolving efforts by Defendants, as well as ongoing monitoring by the Court." Union 3-ER-326-27.

At times, when the State failed to act with sufficient urgency, the district court issued limited orders to guide it. For example, after the State failed to implement the

Receiver's staff testing recommendation, and after a failure to safely transfer medically high-risk patients who subsequently tested positive at the receiving institutions, the district court ordered immediate testing of certain staff, including those who had contact with the patients during the transfer process, and ordered the State to develop a staff testing plan. 5-SER-1380-81.

In addition, the district court visited the California Medical Facility in June 2020, and found "gravely concerning" and "unimaginable" conditions, with vulnerable people, including elderly patients with disabilities, "living on top of each other." 5-SER-1330. The district court also noted that at the California Institution for Men, an institution with over a thousand elderly and medically high-risk patients, 2-SER-480, 484, "a group of more than 20 patients newly diagnosed with COVID … remain[ed] in the same dorm as patients who have tested negative because the prison has no appropriate housing available for either group," 5-SER-1333. The district court then ordered the State to confer with the Receiver and "set aside sufficient space at each institution to allow the institution to follow public health guidance on isolating and quarantining patients in the event of a COVID-19 outbreak." Union 2-ER-282-83.

And, following a report by the Office of the Inspector General finding that "in practice staff frequently failed to adhere to [face covering and physical distancing]

requirements," the district court ordered Defendants to submit reports regarding staff noncompliance at each institution. 5-SER-1219-222.

Even with the district court's encouragement and guidance, however, the State's pandemic response efforts continued to be reactive and plagued by delays. For example, at the end of 2020, the virus appeared to spread rapidly because of the higher amount of recirculated air used to heat the housing units during the winter months. 4-SER-989, 999-1003; 1-SER-92, 115. Although the State, in December 2020, recognized this risk and directed all prisons to install higher-efficiency, MERV-13 filters to "assist in the reduction of airborne viruses," over eight months later, 11 institutions had not yet done so. 1-SER-289.

D. Non-Pharmaceutical Mitigation Measures Proved Ineffective.

Notwithstanding the efforts of the State, Receiver, and district court, non-pharmaceutical measures proved ineffective. Several were discontinued, either because they had been only temporary, stop-gap measures, or because experience and evolving understanding of the novel coronavirus had demonstrated their ineffectiveness. *See, e.g.*, 3-SER-811-12 & 5-SER-1224-230 (intake from county jails); 1-SER-232, 295-97 & 4-SER-901-03 (physical distancing dormitory cohorts); 4-SER-978 (in-person visitation); 3-SER-859-860 (COVID-specific population reduction efforts).

The State also claimed victory too early. In October 2020, for example, the State asserted that the "effectiveness of [its] policies" resulted in the "lowest positivity rate CDCR has experienced since May." 5-SER-1250-51. But several weeks later, at the end of 2020, more than 10,300 incarcerated people had active infections, and over 100 were hospitalized. 2-ER-309. There were substantial outbreaks at more than two dozen prisons, including five of the six prisons that house the largest numbers of medically vulnerable patients. *Id.* At that time, the State acknowledged that they were "in the grips of another severe COVID-19 outbreak," "[d]espite the myriad of protective measures put in place by CDCR and CCHCS." *Id.* This was in part due to, as CDCR Secretary Kathleen Allison acknowledged, the fact that California state prisons' "large population and physical layout make [the state prisons] particularly susceptible to the spread of COVID-19." 5-SER-1195.

E. After Vaccines Became Available in December 2020, the State Failed to Address Dangerously Low Staff Vaccination Rates.

Safe and effective vaccines became available in December 2020. On December 10, 2020, the district court emphasized the importance of vaccinating staff and incarcerated people "as soon as possible": "The biggest benefit of vaccines is not to the person who got the vaccine, especially in a prison setting. The biggest benefit is to everybody else." 5-SER-1192-93. The State received its first doses of the Pfizer vaccine on December 21, and placed staff who "regularly work with patients" "among the first 'tier' of individuals to receive the vaccine." 5-SER-1188.

In January 2021, the Union requested that its members "be given the highest priority in receiving vaccinations." 4-SER-1154. The Union wrote: "The immediate vaccination of a large number of staff and inmates can help slow the spread of the virus in the institutions significantly and protect the surrounding communities. A reduction in infection in the institutions will also help lessen the strain on medical resources inside the institutions and, more importantly, in the surrounding medical facilities that serve the institutions." 4-SER-1154.

As early as January 14, 2021, the Receiver reported concerns that "we are beginning to get close to exhausting the number of staff members who are going to voluntarily . . . take the vaccines." 4-SER-1080. As a result, in January and February 2021, the State said they were monitoring "workplace policies" and "ongoing scientific studies" regarding vaccine efficacy to decide whether to require staff vaccination. 4-SER-1028.

Beginning in January 2021, the parties, along with the Receiver and the Union, began efforts to encourage staff to accept the vaccine voluntarily. Notwithstanding priority access and tailored education and outreach (Union 2-ER-187-88, 196-97, 199-200; 4-SER-1060), among other things, staff vaccination rates remained dangerously low, with just 42% of staff statewide having received at least one dose of the vaccine as of March 22, 2021. 4-SER-985.

During status conferences in March, April, and May 2021, the district court voiced concern with the "distressingly low" rate of vaccine acceptance by people who worked in the state prisons. 4-SER-937; *see* 4-SER-1009-010; 3-SER-878. The Union and the State announced additional outreach programs (4-ER-981-82), financial incentives (3-SER-878-89), and on-site clinics (Union 2-ER-182) to encourage staff vaccination. The district court shared the "hope" that the State's efforts to improve staff vaccination rates would be successful, but cautioned that it had "a broad obligation to protect the health of the incarcerated population and staff." 4-SER-959. In April and May 2021, the Union said existing incentives "should be given a little bit more time" to increase vaccination rates. 4-SER-958; *see also* 3-SER-884-85; 4-SER-907-13, 924-25. In May 2021, the State said it was "hopeful" that the various incentives would work and also assured the district court that it "continu[ed] to discuss the possibility that the COVID-19 vaccine should be required as a condition of employment." Union 2-ER-152-53.

On June 15, 2021, only 52% of all staff and 36% of correctional officers statewide had been vaccinated. Union 2-ER-142. At some prisons, the vaccination rate for officers was far lower; for example, only 16% of officers at High Desert State Prison were vaccinated. *Id.* The State, however, again said it was "premature" to require that staff be vaccinated and that they wanted "to do everything reasonably

possible to educate and encourage voluntary vaccine acceptance by staff" first. Union 2-ER-144.

On June 30, 2021, the district court asked the Receiver to make a recommendation on whether "all CDCR employees or a subset of them [should] be required to accept the vaccine as a condition of continued employment." Union 2-ER-136. The district court noted that this was "not a simple task" and that "there are numerous considerations that go into the development of such a policy and a determination whether there should even be such a policy." Union 2-ER-137-38. The district court therefore directed the Receiver to "do whatever . . . he deems necessary to make an informed and well-founded recommendation." Union 2-ER-138.

F. The Receiver's Report and Recommendation

On July 29, 2021, the Receiver recommended that entry into state prisons be limited to workers—both staff and incarcerated people—who are vaccinated or have an established medical or religious exemption.[4] 2-ER-232. At that time, 49,580 (or 50% of) people housed in a California state prison already had had a confirmed case of COVID-19, and 232 had died. 2-ER-252. That meant that incarcerated people were "five times as likely to be infected in outbreaks and nearly three times more

[4] The Receiver also recommended that incarcerated persons who wish "to have in-person visitation must be vaccinated or establish a religious or medical exemption." 2-ER-232. That recommendation is not the subject of this appeal.

likely to die" compared with people in the outside community. *Id.* Nonetheless, by the end of July 2021, only 40% of custody staff statewide were fully vaccinated, and the percentages at a number of prisons remained much lower, with five prisons under 30%. 3-SER-827-28.

The Receiver submitted a detailed report in support of his recommendation. 2-ER-247-73. His recommendation was based on, among other things, the opinions of public health and state correctional professionals. The Receiver submitted declarations from Dr. Joseph Bick, Director, Healthcare Services at CCHCS, who led the response to COVID-19 in the state prison system (3-SER-771-76; 3-SER-814-20; 2-ER-138-40), Tammatha Foss, Director, Corrections Services at CCHCS (2-SER-444-45; 3-SER-831-33), and Dr. Tara Vijayan, Associate Professor of Medicine in the Division of Infectious Diseases at the UCLA David Geffen School of Medicine (3-SER-834-851).

The Receiver also based his recommendation on data from the prison system itself, including an analysis of the source of outbreaks through contact tracing and genomic sequencing (3-SER-822-25); and detailed data on staff vaccination rates (3-SER-827-30), break-through infections and COVID-19-related deaths among incarcerated persons (3-SER-778-789, 791-95), and primary care provider staffing and backlogs and specialty care backlogs throughout the pandemic (3-SER-797-803).

1. The Receiver Found That Low Staff Vaccination Rates Placed Patients at Substantial Risk of Serious Harm.

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." 2-ER-251. The Receiver concluded that "mandatory COVID-19 vaccination for institutional staff is necessary to provide adequate health protection for incarcerated persons," and that "[e]fforts short of a mandatory vaccination requirement" will not sufficiently prevent "new outbreaks, increased hospitalizations, and deaths." *Id.* The Receiver concluded that staff vaccination was necessary to mitigate two types of harm.

First, the Receiver concluded that patients could be harmed through infection with the novel coronavirus as a result of workers bringing the virus into the prison system. 2-ER-252-53. COVID-19 can result in "severe respiratory illness, major organ damage, blood clots (in the lungs as well as strokes), multisystem inflammatory syndrome, and death." 3-SER-835. And the plaintiff class faces a higher risk of contracting COVID-19 because of exposure to a higher viral inoculum in the congregate prison environment, where most incarcerated persons "are housed

in dormitories that are too crowded to allow for social distancing."[5] 3-SER-832, 836; *see also* 2-ER-258; 3-SER-617-18, 714-16, 836-39. "These accommodations typically have one hundred to two hundred bunk beds per room in close proximity to one another." 3-SER-382.

CALIFORNIA INSTITUTION FOR MEN
2-SER-492; 3-SER-617-18

Compared to the general public, the majority of people in the state prison system are at a higher risk of suffering complications and death if infected due to their advanced age, underlying health problems, and/or ethnicity. 2-SER-479-82; 3-SER-814-15; 2-ER-263. Moreover, even those 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." 3-SER-835; *see also* 3-SER-773.

[5] As of August 25, 2021, many housing units across the prison system remained substantially over capacity, with some units filled as high as 188% of capacity. 2-SER-510-58.

At the time of the Receiver's recommendation, the Delta variant was spreading rapidly throughout the state. 2-ER-251. Dr. Bick concluded that that variant "presents a substantial risk of serious harm even to fully vaccinated patients" and "is causing new infections, reinfections, breakthrough infections, illness, hospitalizations, and death." 3-SER-773-74. As of September 2021, at least 385 fully vaccinated patients had suffered a breakthrough infection, a number had already "experienced serious symptoms," and one person—an 81-year-old man who used a wheelchair—had died. 2-ER-139; 3-SER-773-74; *see* 2-SER-487.

The risk of harm was not limited to the Delta variant; Dr. Bick observed that "[t]he virus is likely to continue to mutate, potentially creating even more transmissible strains than Delta." 3-SER-819. The Receiver counseled that the prison system "cannot afford to be lulled by the decline in infections in CDCR," 2-ER-265, and found that "[d]elaying 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," 2-ER-272.

In addition, the Receiver relied on evidence that incarcerated people "have frequent, daily, close contact with" custody staff; it "is not possible for corrections officers to perform their jobs with social distancing precautions."[6] 3-SER-831. These

[6] Moreover, over 10,000 people with disabilities are housed throughout the prison system and often depend on regular, direct interaction with custody staff to stay safe; among other things, staff serve as sighted guides to blind people, push

frequent and unavoidable interactions increase incarcerated people's chances of contracting COVID-19.

As to the second form of harm, the Receiver cited evidence that frequent lockdowns "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." 3-SER-774; *see* 3-SER-775 ("The large number of staff in quarantine has contributed to delays in clinical care."). In fact, "[s]ince 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." 3-SER-774.

The Receiver and Dr. Bick found that this staffing shortage has substantially disrupted the operation of the medical care delivery system, including by creating significant delays in preventative care, specialty care, and laboratory orders. 2-ER-264-65; 3-SER-774-76, 815; *see also* 2-SER-488 (noting overdue cancer screening ultrasounds for 876 patients with end-stage liver disease). The evidence further showed that the delays will only increase with growing case rates, and that "these delays cannot continue indefinitely without negatively affecting patient care." 3-SER-774-76.

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those in wheelchairs, and monitor people with severe cognitive disabilities for physical abuse and prompt them to conduct necessary hygiene tasks, including brushing their teeth and showering. 3-SER-709-712, 717-19.

2. The Receiver Found That No Other Measures Would Adequately Mitigate the Risk of Harm.

The Receiver found that other measures, alone or in combination, were inadequate to mitigate the risk of harm to patients given conditions in the state prison system, which "deprive incarcerated people of the same opportunities to protect themselves through social distancing and limiting contact that are available to the public at large." 2-ER-262; *see also* 2-ER-268 ("Even if it were possible in prisons to apply all other methods to reduce transmission, these methods are less effective than vaccination.").

The Receiver, for example, found that although testing "is an essential component of any plan," even daily testing would be insufficient because of false negative test results, the fact that "COVID-19 is often not detectible by test in its early incubation period," and delays in receiving test results. 2-ER-254-55; *see also* 3-SER-816-18. The Receiver found that mask wearing is "less effective in congregate facilities because incarcerated persons and staff cannot wear masks at all times," and because they do not completely block transmission of virus droplets and aerosols. 2-ER-259, 269; *see* 3-SER-818. The Receiver found that installation of new air filters is "only a small step toward reducing the high risks of infection through repeated and continuous exposure in congregate conditions," a problem "exacerbated by the lack of openable windows" in the state prisons. 2-ER-261. And, as noted above, the Receiver found that "the crowded nature of CDCR institutions

leaves insufficient space to make distancing possible." 2-ER-258; *see also* 2-ER-261-62 (noting that the design of CDCR facilities made compliance with recommendations by the U.S. Centers for Disease Control and Prevention regarding quarantine impossible).

The Receiver also found that efforts to encourage voluntary vaccination by staff "have not produced acceptable results." 2-ER-269-270. Between June 30, 2021, and July 29, 2021, there had been "very little progress"—"the total number of fully vaccinated and partially vaccinated staff each increased by just 1%." 3-SER-820. Similarly low increases continued in July and August 2021, even with one-on-one vaccine counseling. 2-ER-140. At that rate, it would take seven years for all custody staff at High Desert State Prison to be fully vaccinated. *See* 3-SER-827.

G. The Court's Order to Show Cause

On August 9, 2021, the district court issued an order to show cause as to why it should not order that the Receiver's recommendation be implemented. 2-ER-210. The district court ordered that the parties specifically address "whether they agree or disagree with the public health conclusions described in the Receiver's report" and, "[i]f they disagree, they shall support their position by declarations." *Id.*

The district court also noted that, on August 5, the California Department of Public Health ("CDPH") mandated vaccination of workers in all healthcare facilities *except those in correctional settings*. 1-ER-9; *see also* 2-SER-592. The district court

observed that the stated rationale of the August 5 CDPH order "would appear to apply equally to CDCR prisons, all of which include clinics, and some of which include other health care facilities specifically identified in the order." 2-ER-209. The district court therefore ordered that the parties "state their position, supported by argument or admissible evidence as appropriate, on whether the rationale behind the State Public Health Officer Order of August 5, 2021, applies to some or all of CDCR's employees." 2-ER-210-11. The district court set the hearing for September 16, 2021, but noted that the date might change if, based on the parties' submissions, an evidentiary hearing was necessary. 2-ER-211.

On August 19, 2021, the State Public Health Officer ordered that a small fraction of workers in state prisons be vaccinated by October 14, 2021. 3-SER-602-605. The order limited its application to those workers "who are regularly assigned" to provide healthcare services or who are "regularly assigned" to work in healthcare facilities "that are integrated into the correctional facility." 3-SER-602-03. That meant that the order applied to all workers at two prisons (the California Health Care Facility and the California Medical Facility), and all workers "regularly assigned" to healthcare settings integrated into all other prisons. 3-SER-756-57. The order did not cover other people who worked in those settings, including "relief staff, voluntary overtime, mandatory overtime, swaps, . . . staff making pick-ups or

deliveries, conducting maintenance repairs, conducting tours," or "staff responding to emergencies." 3-SER-757.

On August 20, 2021, the district court extended the briefing schedule and directed the parties to "state their position, supported by argument or admissible evidence as appropriate, on whether there is any public health basis for limiting mandatory vaccines" as set forth in the August 19 CDPH order. 3-SER-770.

H. The Appellants Did Not Dispute the Public Health Basis for the Receiver's Recommendation.

In response to the order to show cause, neither the State nor the Union disputed the Receiver's public health findings. In fact, the State expressly "agree[d] with the public health findings regarding the COVID-19 vaccine cited in the Receiver's report." 3-SER-746. The State acknowledged that vaccination is "one of the most powerful safety measures available," and that "[v]accination in the *largest possible numbers* . . . is clearly one of the best available protections against COVID-19." 3-SER-747 (emphasis added).

The Union refused to answer whether there was any public health basis for limiting mandatory vaccines to workers covered by the August 19 CDPH order and instead declared "that the issue at hand is not the soundness of the medical bases underlying the Receiver's Recommendations," but rather whether the district court has "legal authority" to act on those recommendations. 2-SER-476-77.

The Receiver filed a brief and responded to the district court's question about the August 19 CDPH order. The Receiver concluded that the August 19 order "is inadequate to address the substantial risk of harm posed by COVID-19 within CDCR institutions." 2-SER-432. The Receiver found that COVID-19 precautions "cannot be effective if applied only to a portion of an institution," that the August 19 order required vaccination for "only a fraction of individuals who move daily between the community and institutions," and that most incarcerated persons, including 15,246 who are high risk of serious disease, "do not live or spend most of their time in areas covered by the order." *Id.* (citing 2-ER-138-39). The order's application only to those "regularly assigned" to work in the limited settings covered by the order also was unrealistic in a prison system where "[o]fficers working their ordinary shifts are often reassigned to cover high-need vacant positions," including in medical clinics, and "also frequently work overtime in housing units and yards to which they are not ordinarily assigned." 3-SER-831-32.

Neither the State nor the Union suggested any adverse outcomes from implementing the Receiver's recommendation in their response briefs. The Union, at the end of its reply brief, stated, without citation or support, that "some employees will refuse to be vaccinated" and "[o]thers will wait until the last possible moment to be vaccinated." 2-SER-457. The Union argued that if the district court were to

limit entry into the prisons to vaccinated workers, "a minimum period of six weeks should be contemplated before any mandate takes effect." 2-SER-455-56.

At argument, the State's counsel did not dispute that the record showed increased risk to vaccinated people from being around unvaccinated staff, again said that the State did not contest the Receiver's public health findings, and explained that the State disputed only the legal conclusion of deliberate indifference. *See* 1-SER-200-05. Counsel for the Union would not answer whether "mandatory vaccination of staff would reduce the risk of preventable death in the incarcerated population." 1-SER-195-97.

I. The District Court's Order

On September 27, 2021, the district court ordered that entry into the state prisons be limited to vaccinated workers or those with an established medical or religious exemption. 1-ER-25. The district court found that the relevant facts were undisputed:

> Neither Defendants nor CCPOA disputes that COVID-19 continues to pose a substantial risk of serious harm—including death—to incarcerated persons, regardless of their vaccination status; that, even with mitigation measures in place, the virus spreads quickly in a prison setting; that limiting the introduction of the virus is therefore critical to protecting the health of incarcerated persons; that staff are the primary vector of introducing the virus into a prison; or that testing is ineffective at controlling that vector.

1-ER-22.

The district court also found that "outbreaks create significant risks of harm beyond the risk of infection." 1-ER-5. This included postponement of medical services during outbreaks, including preventative care, specialty care, and screenings, as well as diversion of clinical staff resources to "'mass testing, medication administration, and rounds on COVID-19 patients.'" 1-ER-14 (quoting 3-SER-774).

The district court then examined the reasonableness of the State's refusal to implement the Receiver's recommendation. The district court found that there was no evidence that any alternative measure or combination of measures "offers the incarcerated population the same level of protection as the vaccine mandates recommended by the Receiver." 1-ER-16. This included the "partial vaccination requirement" set forth in the August 19 CDPH order, which the district court found was "an unreasonable attempt to address the risk of harm to Plaintiffs." 1-ER-18.

Although the plaintiffs had asked that the district court set a date for full compliance as the CDPH had done in its orders, 1-SER-225, the district court chose to allow the State and the Receiver to develop an implementation plan and determine the "deadline by which all covered persons must be vaccinated." 1-ER-25.

J. The State Refused to Comply With Its Own Implementation Plan.

On October 12, 2021, the State and the Receiver filed a Joint Implementation Plan, which required that all workers covered by the district court's order "be fully

vaccinated before November 29, 2021." 2-ER-125. After the State failed to implement that plan, on October 27, 2021, the district court ordered that "full vaccination of the persons covered by the September 27, 2021 order occur no later than January 12, 2022." 1-ER-3; 2-ER-119; *see also* 1-SER-191-93. The district court noted that the order was supported by "the compelling public health considerations underlying the vaccination order, as well as the significant passage of time—thirty days since the Court issued its order—without any apparent action aside from the October 12 joint filing of an implementation plan." 1-ER-3.

K. The District Court Denied the Appellants' Motions to Stay.

Twenty-eight days after the district court's September 27, 2021 order, the State filed a motion to stay the order, and the Union filed a similar motion two days later. 1-SER-65, 123. For the first time, the State asserted that some unknown number of "correctional officers and other classifications of prison workers" might refuse to comply with the district court's order. 1-SER-131. The State complained that "unions representing correctional officers and other staff . . . have vigorously pushed back on the CDPH mandate for healthcare settings at every step," 1-SER-149, and used anticipated noncompliance with the August 19 CDPH order as a "barometer for staff compliance system-wide," 1-SER-36.

The district court denied the motions. 2-ER-30. It found no reason to reconsider its previous ruling and found that "Defendants' and CCPOA's dire

predictions of what might happen in the absence of a stay are speculative." 2-ER-32. The district court noted that the State's prediction of irreparable harm based on implementation of the August 19 CDPH order was difficult to understand because, "in contrast to their position in this case—they persist in implementing that order, including defending it against [the Union]'s legal challenges." 2-ER-32.

The district court noted that, in state court litigation challenging the CDPH order, the State's own expert "has now concluded that 'COVID-19 vaccination of all employees or the CDCR without a valid contra-indication or exemption is the single most effective intervention available to prevent cases and outbreaks of COVID-19, both among those who are vaccinated and those who cannot be vaccinated,'" and that "prisons 'are highly unlikely to be able to prevent or control outbreaks of COVID-19 solely through the application of non-pharmaceutical interventions[.]'" 2-ER-30 (quoting 1-SER-59).

The State and the Union appealed the district court's September 27 and October 27, 2021 orders, and moved in this Court for a stay. The motions panel stayed the orders pending resolution of these appeals. Doc. 28 at 2 (No. 21-16696).

SUMMARY OF ARGUMENT

I. The district court correctly determined, based on this case's specific record and unique history, that the State's refusal to implement the Receiver's recommended staff-vaccination policy constituted deliberate indifference, and

therefore violated the Eighth Amendment. The appellants do not contend that the district court applied the wrong legal standard, nor do they argue that the district court's findings are clearly erroneous. Instead, ignoring the deferential standard of review that applies here, they urge this Court to disregard those findings and review the record de novo. That invitation should be rejected.

A. The district court's finding that COVID-19 poses a substantial risk of serious harm to incarcerated people is not clearly erroneous. Indeed, the district court based this finding on "unrebutted evidence," and the State did not dispute below that the Eighth Amendment's objective requirement is met here. Nevertheless, the State argues for the first time on appeal that this risk is constitutionally permissible because it is similar to the risk posed by COVID-19 to *non*-incarcerated people in California. This argument is not only forfeited—it is wrong. The undisputed record shows that incarcerated people face heightened risks of illness, hospitalization, and death once COVID-19 enters a prison. And the record also shows that the spread of the virus results in broader disruptions to the prison healthcare delivery system.

B. Nor did the district court err in finding that the State refused to take "reasonable measures" to protect incarcerated people from COVID-19. *See Farmer v. Brennan*, 511 U.S. 825, 825 (1994). The undisputed record shows that measures short of staff vaccination would not adequately mitigate the harm posed to incarcerated people. Indeed, the appellants offered *no* contrary evidence below, and

they have always agreed that because staff are a primary vector for introducing the virus into the prison environment, vaccination is the most effective tool for controlling its spread.

Casting aside the record and the district court's findings, the appellants argue that the State reasonably responded to the risk of COVID-19 by taking other mitigation measures. The argument is meritless. The district court properly held that its decision in April 2020 regarding the adequacy of the State's pre-vaccine measures was irrelevant to the reasonableness of the State's refusal to adopt the staff-vaccination policy now—the only measure, according to the undisputed evidence, that could effectively prevent the introduction and spread of COVID-19 in prison. And the district court did not clearly err in finding that other measures, like the "partial vaccination" requirement imposed by the August 19 CDPH order, would not reasonably mitigate the risk posed by COVID-19. This Court should also reject the appellants' repeated requests for deference. To the extent deference is warranted, it should be afforded to the Receiver, given his experience and expertise as overseer of California's prison-wide healthcare system.

II. The district court did not abuse its discretion in ordering prospective relief. Because the district court's order is necessary and narrowly drawn to correct the State's constitutional violation, it satisfies the PLRA's requirements.

A. The district court properly concluded that the Receiver's recommendation was necessary to mitigate the risks posed by COVID-19. And it did not clearly err in finding that the State's voluntary-vaccination efforts were unlikely to succeed. The appellants attempt to introduce new evidence for the first time on appeal to show that a mandatory staff-vaccination policy is no longer necessary. That is impermissible. Regardless, none of this evidence—much of which is flawed or already out of date—disturbs the district court's finding. And the State's argument cannot even be squared with its *own* expert evidence, which concluded that it is "highly unlikely" that COVID-19 can be sufficiently controlled without staff vaccination. The changing facts on the ground only highlight why the district court and the Receiver—not this Court—are best equipped to resolve the evidence and arguments in this complex institutional reform litigation.

B. The district court correctly found that none of the alternative measures offered by the appellants would correct the constitutional harm here. Adopting a mandatory vaccination policy for incarcerated people, as they urge, would not address the primary risk established by the record—the introduction of COVID-19 into prisons by unvaccinated staff. And given that prison staff routinely assume duties and work in areas to which they are not regularly assigned, limiting the vaccination policy to certain categories of staff would be similarly ineffective.

C. The district court's order will not unduly burden prison operations. The appellants' argument about staff shortages is forfeited and lacks support in the record. And they fail to reconcile their speculation with the actual record evidence showing that COVID-19 has resulted in—and, in the absence of a staff-vaccination mandate, will continue to result in—significant staff shortages and substantial disruptions to the prison's healthcare delivery system. The district court did not abuse its discretion in finding that the Receiver's recommendation was the least intrusive means necessary to sufficiently address the risks posed by COVID-19 to incarcerated people. This Court should affirm the district court's and the Receiver's well-supported findings.

STANDARD OF REVIEW

This Court "review[s] for abuse of discretion the district court's decision to grant a permanent injunction." *Edmo v. Corizon, Inc.*, 935 F.3d 757, 784 (9th Cir. 2019).[7] And it "review[s] any determination underlying the grant of an injunction by the standard that applies to that determination." *Id.* Accordingly, "the district court's factual findings on [the plaintiffs'] Eighth Amendment claim are reviewed for clear error." *Id.* "Clear error exists if the finding is illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Id*. at 784-85.

[7] Unless otherwise indicated, all internal quotations, citations, and alterations are omitted.

This Court "review[s] de novo the district court's conclusion that the facts . . . demonstrate an Eighth Amendment violation." *Id*. at 785.

"The abuse of discretion standard is deferential, and properly so, since the district court needs the authority to manage the cases before it efficiently and effectively." *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052, 1060 (9th Cir. 2005). "If the district court identified and applied the correct legal rule to the relief requested," this Court "will reverse only if the court's decision resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Herb Reed Enters., LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1247 (9th Cir. 2013). In other words, "[a]s long as the district court got the law right, it will not be reversed simply because [this Court] would have arrived at a different result if [it] had applied the law to the facts of the case" in the first instance. *A & M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1096 (9th Cir. 2002).

ARGUMENT

I. The District Court Properly Determined That, by Failing to Implement the Receiver's Recommendation, the State Was Deliberately Indifferent to a Substantial Risk of Serious Harm.

The State's longstanding failure to provide constitutional medical care to people in its custody has resulted in "[n]eedless suffering and death." *Plata*, 563 U.S. at 501. Fifteen years ago, the district court instituted a remedy unique to the

California state prisons: a court-appointed Receiver who has "complete authority over the prison health care system." *Blantz v. Cal. Dep't of Corr. & Rehab.,* 727 F.3d 917, 926 (9th Cir. 2013). Since that time, multiple courts, including the Supreme Court, have followed the Receiver's recommendations regarding what actions are necessary to improve correctional healthcare to the constitutional minimum.[8]

Seventeen months into the pandemic, after half the incarcerated population had been infected with the novel coronavirus, hundreds had died, and the prison medical care delivery system as a whole had suffered pervasive and substantial disruptions, the Receiver concluded that entry into the state prisons must be limited to vaccinated workers. The Receiver did not make that decision lightly; he consulted with public health experts and medical professionals, and he reviewed data and studies evaluating the effects of COVID-19 and the efficacy of non-pharmaceutical mitigation measures in the state prison system.

[8] For example, in its landmark decision holding that overcrowding in the California prison system violated the Eighth Amendment, the Supreme Court relied on the Receiver's findings. *Plata*, 563 U.S. at 509 (crediting the Receiver's findings that "[o]vercrowding had increased the incidence of infectious disease, and had led to … greater reliance by custodial staff on lockdowns, which 'inhibit the delivery of medical care and increase the staffing necessary for such care'"). So did the Three-Judge Court that issued the population reduction order. *See Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 888 (E.D. Cal./N.D. Cal. 2009). In addition, the district court previously ordered that the State implement the Receiver's recommendation on how to protect the plaintiff class from Valley Fever. *See Plata v. Brown*, 427 F. Supp. 3d 1211, 1214 (N.D. Cal. 2013).

As explained below, the district court properly found that the State's failure to implement the Receiver's recommendation violated the Eighth Amendment, which prohibits "deliberate indifference" by prison officials "to a substantial risk of serious harm." *Farmer*, 511 U.S. at 828; *see also Coleman v. Newsom*, 455 F. Supp. 3d 926, 932 (E.D. Cal./N.D. Cal. 2020) (holding that Eighth Amendment requires prison officials "to take adequate steps to curb the spread of disease within the prison system").

The district court's decision should be affirmed. This Court has made clear that, "[a]s long as the district court got the law right, it will not be reversed simply because we would have arrived at a different result if we had applied the law to the facts of the case." *Napster*, 284 F.3d at 1096. The appellants do not dispute that the district court "applied the correct legal rule," nor do they contend that the district court's findings are "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Herb Reed*, 736 F.3d at 1247. Instead, they simply reargue the facts. That is impermissible.

Before turning to the Eighth Amendment analysis, we note that deliberate indifference claims "require[] a fact-specific analysis of the record (as construed by the district court) in each case." *Edmo*, 935 F.3d at 794. For that reason, the State's assertion (at 3, 20) that an order affirming the district court in this case would require similar mandates in "every prison system in the country" is misplaced. *See id.* at 767

(noting that district court's conclusion that the Eighth Amendment was violated "rests on the record in this case," and declining "to project whether individuals in other cases will meet the threshold to establish an Eighth Amendment violation").[9] The district court here based its decision on a well-developed factual record based on the California state prison system.

A. The District Court Properly Found That COVID-19 Presents a Substantial Risk of Serious Harm to the Plaintiff Class.

The district court found that COVID-19 presents a substantial risk of serious harm to the plaintiff class, and therefore the objective component of the Eighth Amendment analysis is met. 1-ER-13-14. In particular, the district court found that COVID-19 presents a substantial risk of illness, hospitalization, and death, even to fully vaccinated patients. *Id.* That finding was not "illogical, implausible, or without support." *Herb Reed*, 736 F.3d at 1247. To the contrary, it was supported by "unrebutted evidence," including declarations from Dr. Bick, the doctor in charge of healthcare in the California state prisons, and Dr. Vijayan, a professor of infectious

[9] The Union's lengthy summary (at 37-44) of other courts' decisions relating to the COVID-19 pandemic is irrelevant for the same reason. Those cases all evaluated whether the challenged injunction was supported by the specific record before the district court. In none of them did the district court adopt, as it did here, the expert recommendation of a court-appointed receiver who oversees and operates the entire prison healthcare system. Nor did the defendants in any of those cases choose, as they did here, not to dispute any of the record evidence. In none of those cases did the defendants' own expert agree that the district court's order was necessary. What's more, all of the circuit-court decisions that the Union cites were issued *before* COVID-19 vaccines were even developed and authorized.

diseases, as well as data regarding break-through infections, hospitalizations, and deaths. 1-ER-13 & n.4; *see* Statement § F, *supra*. The district court also found that COVID-19 outbreaks and related staff shortages cause substantial disruptions to the medical care delivery system as a whole. 1-ER-14. That finding also was supported by unrebutted evidence, including relevant policies, data regarding operation of the medical delivery system during the pandemic, and the declaration of Dr. Bick. 1-ER-14-15; *see* Statement § F.1, *supra*.

The State now argues (at 23-26) that the district court impermissibly considered risk "in the abstract" and that the risk to those in prison is no different than that "generally accepted by members of society" when they "shop for food" or "otherwise go about their daily lives."[10] As an initial matter, the State waived that argument by failing to make it in the district court. *See O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1063 n.3 (9th Cir. 2007). Indeed, in the district court, the State said that it has "never disputed, in this litigation," that the plaintiffs have met "the objective prong of the deliberate indifference standard." 1-SER-143.

Regardless, the State is wrong on the facts and the law, and its argument only provides further evidence of its deliberate indifference to the dangerous conditions in its prisons. First, the Supreme Court has recognized that, through incarceration,

[10] The Union does not challenge the district court's finding that COVID-19 poses a substantial risk of serious harm to the plaintiff class.

the State "renders [a person] unable to care for himself" and may not expose the person to substantial risks "against [his] will." *Helling v. McKinney*, 509 U.S. 25, 32, 35 (1993). People who are not incarcerated can decide for themselves the level of COVID-19 risk they are prepared to tolerate and adjust their behavior and environment accordingly—by, for example, choosing whether, when, and how to leave their home and interact with other people inside or outside their homes.

Incarcerated people cannot. As the Receiver explained, and the district court found, "[t]he conditions of confinement and the manner in which the prisons are operated deprive incarcerated people of the same opportunities to protect themselves through social distancing and limiting contact that are available to the public at large." 1-ER-16; 2-ER-262. They have no choice but to frequently interact, in close quarters, with unvaccinated staff, including for pat-down body searches, direct-contact escorts, delivery of meals, and safety checks. 1-ER-16; 3-SER-831. They are forced to eat and sleep in crowded dormitories with other unmasked individuals—sometimes hundreds of others. 1-ER-18; 3-SER-832.

Second, once COVID-19 enters the prisons, incarcerated people are subjected to a far graver risk than people who live outside prison. Indeed, the Receiver found that COVID-19's "transmission rate in prisons is far higher" than outside prison—"more than 5 times the highest reproduction rate experienced in California and its major metropolitan counties." 2-ER-256. There are a number of reasons why

COVID-19 spreads so rapidly in prison, including "the design of the facilities," "extreme population density," and sustained, unavoidable close contact with others. 2-ER-257; *see also* 2-ER-258-262; 1-ER-11, 17. And an incarcerated person who is infected is far more likely to suffer severe health outcomes. 2-ER-252 (noting that incarcerated people are "nearly three times more likely to die" than those in the community). This is both because incarcerated people have disproportionately higher rates of risk factors for serious illness and death from COVID-19 and because the physical plant and operations of state prisons expose incarcerated people to higher levels of viral inoculum. 2-ER-262-63.

The record is clear: "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." 3-SER-835. This is true even for patients who are fully vaccinated, who already have suffered "breakthrough infections, illness, hospitalizations, and death" in the state prison system. *See* 3-SER-773-74. "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." 3-SER-835; *see also* 3-SER-773, 814.

The State's attempt to equate the risks within prison to those outside of prison therefore is absurd.[11] And its reliance on *Hines v. Youseff*, 914 F.3d 1218 (9th Cir. 2019), is misplaced. State Br. 24-26. Initially, that decision—which involved a section 1983 action for damages—analyzed only the "clearly established" test for qualified immunity. *See* 914 F.3d at 1227. More importantly, in *Hines*, the key reason this Court held that the defendants could have reasonably believed they had not violated the Eighth Amendment by exposing incarcerated people to the risk of Valley Fever was they had "complied with the orders from the Receiver and the *Plata* court." *Id.* at 1231 (describing this fact as "especially significant"). That's exactly the opposite of the situation here: The State has refused, against all the evidence, to follow the *Plata* court's order and the Receiver's recommendation. And, unlike in *Hines*, the crowded conditions in prison *exacerbate* the severe risk of harm posed by COVID-19 to incarcerated people. *See id.* at 1226 (noting that it was "especially important" to the Court's analysis "that Valley Fever is not contagious").

[11] The State's argument also ignores the fact that the district court found an independent harm "beyond the direct impacts of COVID-19 infection" based on substantial disruption of preventive care, specialty care, and screenings within the prison medical care delivery system. 1-ER-14; *see also* 3-SER-774-75.

B. The District Court Properly Concluded That the State Had Not Taken Reasonable Measures to Mitigate the Spread of COVID-19 in the California Prison System.

Next, the district court concluded that the State, by failing to limit entry into the state prisons to vaccinated workers, had not taken "reasonable measures" to mitigate the spread of COVID-19 within the prison system, and therefore the subjective component of the Eighth Amendment was met. 1-ER-15-22; *see Farmer*, 511 U.S. at 847. In so ruling, the district court found that non-pharmaceutical measures were insufficient and that the Receiver's proposal was the only way to adequately mitigate harm to the plaintiff class. 1-ER-17-22. Those findings were not clearly erroneous. They again were based on the undisputed public health findings of the Receiver and evaluation of the efficacy of such non-pharmaceutical mitigation measures by public health and corrections experts. *See* 1-ER-15-22. This Court therefore must affirm. *See Hallet v. Morgan*, 296 F.3d 732, 747 (9th Cir. 2002) (affirming district court's conclusion as to reasonableness because "[t]he district court's findings are supported by the record and its conclusions are therefore permissible").

On appeal, the appellants simply recite different mitigation measures and assert they are sufficient. State Br. 26-28; Union Br. 31-32. That is not enough. *See Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013) (holding that, under the Eighth Amendment, prison officials "need not have intended any

harm to befall the inmate" and may have tried, to some extent, to prevent that harm); *Edmo*, 935 F.3d at 793 (holding that "[t]he provision of some medical treatment, even extensive treatment over a period of years, does not immunize officials from the Eighth Amendment's requirements"); *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). The appellants must explain why the district court's factual findings regarding the efficacy of those measures are "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Herb Reed*, 736 F.3d at 1247.[12]

That they cannot do. The Receiver found that non-pharmaceutical measures, alone or in combination, were unlikely to adequately prevent the introduction and spread of COVID-19 in the state prison system. 2-ER-268-69. The appellants did not dispute this finding in the district court and offered no contrary evidence. 1-ER-

[12] Although the State contends that the federal government's requirement "that large employers adopt a vaccinate-or-test policy" is "powerful evidence" of the reasonableness of the State's refusal to mandate staff vaccinations, the State ignores the fact that the Federal Bureau of Prisons has mandated vaccination of all staff. 1-ER-22-23 n.9; *see also* 2-SER-425-27. The district court also noted that "other jurisdictions—including . . . the states of Oregon, Washington, Colorado, Illinois and Massachusetts; and several counties within California, including Orange, San Francisco, Los Angeles, Contra Costa, and Santa Clara—have adopted mandatory vaccination requirements applicable to correctional staff." 1-ER-22-23 n.9 (citing 2-SER-425-27, 3-SER-638-707).

16. Nor did the appellants contest the predicate factual findings—that "staff are indisputably a primary vector" for introduction of COVID-19 into the prisons; that "institutions with low staff vaccination rates experience larger and more frequent COVID-19 outbreaks"; that, once introduced, the virus spreads rapidly and is difficult to control; that existing mitigation measures, including masking, testing, efforts to increase voluntary vaccination, cleaning protocols, and ventilation improvements, failed to adequately mitigate the harm; and that mandatory staff vaccination was necessary. 1-ER-17; 2-ER-251, 253-260. Indeed, in its response to the district court's order to show cause, the State expressly "agree[d] with the public health findings" in the Receiver's report. 3-SER-746. And the State likewise agreed that "[v]accination in the largest possible numbers . . . is clearly one of the best available protections against COVID-19." 3-SER-747.

The appellants' reliance on the August 19 CDPH order also cannot withstand clear-error review. *See* State Br. 28; Union Br. 32. The district court found that the CDPH order's "partial vaccination requirement" was "an unreasonable attempt to address the risk of harm to Plaintiffs." 1-ER-18. The appellants do not even try to argue that this finding was clearly erroneous. Nor could they. The finding is clearly supported by the record.

First, the district court found that incarcerated persons, including those with physical and developmental disabilities, spend the "vast majority of their time"

outside of healthcare settings, and have "frequent, daily, close contact" with custody staff outside of healthcare settings. 1-ER-18-19 (quoting 3-SER-831-32). The district court found that "[o]f the 48 outbreaks traceable to staff since July 31, only 14, or 29%, were 'traced back to a person that the August 19 CDPH order would require to be vaccinated.'" 1-ER-19 (quoting 2-ER-138-39). *Second*, the district court found that "the overwhelming [] majority of high-risk patients housed in CDCR institutions" are housed outside healthcare settings. 1-ER-19. *Third*, the district court found that the CDPH order failed to address the practical realities of the California prison system, where incarcerated people and staff frequently move throughout the prison. 1-ER-20. The district court found that "'[e]very day, across all CDCR institutions, there are hundreds of employees working in areas to which they are not regularly assigned,'" and that a single staff person recently exposed four separate housing units to the virus. *Id.* (quoting 2-SER-444).

In fact, the State previously represented that it cannot 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."[13] 5-SER-1392-93. And,

[13] The record showed, for example, that approximately twenty custody officers at Chuckawalla Valley State Prison were absent on September 1, 2021, with vacancies "filled either through overtime or . . . a plan for program adjustment due

in August 2021 alone, over a hundred shifts in medical clinics at Ironwood State Prison and California State Prison, Solano were covered by corrections officers not regularly assigned to them.[14] *See* 2-SER-444 (193 and 116 shifts, respectively).

The State's only "medical or public health evidence" in response to the order to show cause was a declaration from Dr. James Watt, which largely concerned the CDPH's August 5 and August 19 orders. 1-ER-13; *see* 2-ER-196-202. Although Dr. Watt, who appears to have no corrections experience, 2-ER-196-197, briefly referenced the State's non-vaccination mitigation measures, 2-ER-201, he did "not say that [those measures] are sufficient to protect Plaintiffs from th[e] harms" posed by COVID-19. 1-ER-16. And the district court's findings are consistent with the opinion of the State's primary public health expert in state court litigation defending the August 19 CDPH order, Dr. Arthur Reingold, who testified that it is "highly unlikely" that correctional facilities will "be able to prevent or control outbreaks of

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to vacant posts caused by staff shortages." 1-SER-268. And over a dozen officers at California State Prison, Corcoran, were absent for COVID-related reasons. 1-SER-255. "Custody staffing resources" at Pelican Bay State Prison "have been reduced due to positive cases and mandated quarantine." 1-SER-281. And there were four staff outbreaks identified in various areas of Mule Creek State Prison between August 31, 2021, and September 10, 2021. 1-SER-287.

[14] Custody staff may 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 a diagnostic procedure," and providing "[c]ardiopulmonary resuscitation and first aid." Cal. Code Regs. tit. 22, § 79813.

COVID-19 solely through the application of non-pharmaceutical interventions," and that "COVID-19 vaccination of *all* employees of the [CDCR] without a valid contra-indication or exemption is the single most effective intervention available to prevent cases and outbreaks of COVID-19, both among those who are vaccinated and those who cannot be vaccinated." 1-SER-59 (emphasis added). In any event, the district court did not commit clear error by crediting the well-reasoned analyses of the Receiver, Dr. Bick, and Dr. Vijayan.

In an attempt to side-step the standard of review, the appellants suggest that the district court may not find the State's current efforts unreasonable because it found them reasonable almost two years ago, in April 2020. *See, e.g.*, State Br. 28; Union Br. 33. But the district court properly rejected that argument: The reasonableness of the State's initial response "based on a toolbox without a vaccine has little relevance," the district court explained, "when the same toolbox now includes a vaccine that everyone agrees is one of the most important tools, if not the most important one, in the fight against COVID-19." 1-ER-15-16.

Deliberate indifference "must be examined 'in light of the prison authorities' *current* attitudes and conduct.'" *Plata*, 563 U.S. at 567 (quoting *Helling*, 509 U.S. at 36) (emphasis added). That is why the district court, in its April 2020 order, expressly cautioned that its ruling "does not preclude a finding of deliberate indifference at a later time." *Plata*, 445 F. Supp. 3d at 569. The State's response, in other words, must

be assessed in light of our evolving understanding of COVID-19 and the development of safe and effective COVID-19 vaccines, which the undisputed record establishes are the only way to adequately mitigate the spread of the virus in the state prisons.

In a final attempt to avoid clear-error review, the appellants contend that the district court should have deferred to "executive branch officials" as to what is reasonable. *See* State Br. 30; Union Br. 35. But the Receiver serves as "the chief executive officer of the medical division of [the state prison system]." *Med. Dev. Int'l v. Cal. Dep't of Corr. & Rehab.*, 585 F.3d 1211, 1217 (9th Cir. 2009); *see* 3-ER-415. In any event, just as the Supreme Court found a decade ago in this case, the "State's desire to avoid [court-ordered relief], justified as according respect to state authority, creates a certain and unacceptable risk of continuing violations of the rights of" the plaintiff class. *Plata*, 563 U.S. at 533-34. "The Constitution does not permit this wrong." *Id.* at 534.

The appellants' reliance on *Fraihat v. U.S. Immigration and Customs Enforcement*, 16 F.4th 613 (9th Cir. 2021), is unavailing. The district court's order here did not reflect its own "idea of how best to operate a detention facility." *Id.* at 642 (citing *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)). Unlike the preliminary injunction in *Fraihat*—in which the district court formulated on its own a "detailed set of directives" and "imposed a broad range of obligations" on the federal

government, *id.* at 618, 631—the district court here expressly recognized that it could not order relief based on "what it thinks is the best possible solution," *Plata*, 445 F. Supp. 3d at 568. Instead, the district court adopted a recommendation from the state official who manages the prison's medical care delivery system, and who is best positioned to balance the needs of that system and to evaluate the relevant public health evidence, and directed the State to develop an implementation plan.[15] 1-ER-25.

The district court in this case applied the correct legal standard and then properly found, based on this record, that the State's refusal to adopt the

[15] The appellants' heavy reliance on *Fraihat* is misplaced for several other key reasons. *See* State Br. 29-31; Union Br. 29-31, 35-36. That case involved an injunction in April 2020—just one month into the pandemic—that "effectively place[d] this country's network of immigration detention facilities under the direction of a single federal district court." 16 F.4th at 618. Here, of course, the district court appointed the Receiver precisely to direct the prison healthcare system. And it provided the State with significant time—many months—to try to address the pandemic's impact before it tasked the Receiver to recommend a solution. Moreover, in *Fraihat*, this Court stressed that the federal government had undertaken various measures "in the face of scientific uncertainty and a constantly developing understanding of COVID-19." *Id.* at 619. But the Receiver's recommendation here reflects scientific consensus—all of the evidence, including the State's own expert testimony, indicates that staff vaccination is the only measure that will effectively prevent the spread of COVID-19 in prisons. For that same reason, this case is also distinguishable from the Seventh Circuit's recent decision in *Rasho v. Jeffreys*, --- F.4th ----, 2022 WL 108568 (7th Cir. Jan. 12, 2022), which the court expressly recognized was *not* "a case in which the prison officials persisted in taking steps that they knew were insufficient to prevent the harm." *Id*. at *6; *see also id*. at *5 (noting that "persistence in a course of action known to be ineffective can" support an inference of deliberate indifference).

recommendation from the state official in charge of prison healthcare constituted deliberate indifference.

II. The District Court Did Not Abuse Its Discretion in Ordering Prospective Relief.

The district court's order also satisfied the requirements of the Prison Litigation Reform Act ("PLRA"). The PLRA requires that prospective relief be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). The PLRA permits "courts to fashion practical remedies when confronted with complex and intractable constitutional violations." *Plata*, 563 U.S. at 526.

The district court adopted the Receiver's recommendation because it found that a staff vaccination policy was necessary and that no other remedy would be effective. 1-ER-6; *see Graves v. Arpaio*, 623 F.3d 1043, 1050 (9th Cir. 2010) (noting that PLRA "authorizes relief that is necessary to correct the ongoing constitutional violation found by the district court"). The appellants' arguments to the contrary are meritless. The staff vaccination policy remains necessary despite changing case counts and a slight uptick in staff vaccination rates, which remain far too low to effectively remedy the substantial risks of serious harm. And although the appellants assert that vaccination of all incarcerated people would be a narrower remedy, that measure would be entirely ineffective at remedying the constitutional harm at issue

here. Finally, the district court properly found that the order was not unduly intrusive and that any claims about possible staff shortages were speculative and unsupported by the record.

A. The District Court's Finding That the Staff Vaccination Policy Was Necessary Is Not Clearly Erroneous.

The appellants first contend that the district court's order is not necessary and that the district court erred in finding that the State's efforts to encourage voluntary vaccination by prison workers "will be unsuccessful." State Br. 34; Union Br. 47-48. But, contrary to the State's assertion, the district court did not "discount[]" the State's efforts. State Br. 34. The district court carefully evaluated the only evidence in the record regarding the efficacy of the voluntary vaccination program and found that it had "had minimal success." 1-ER-24. That finding was not clearly erroneous. In fact, as the district court noted, the appellants did not "offer any evidence suggesting that further voluntary efforts will be any more successful, nor d[id] they contest that CDCR staff are vaccinated at far too low a rate to reduce the risk of mass outbreaks in CDCR institutions." 1-ER-24.

The same is true now. Indeed, the Union simply reverts to the same empty refrain it has used since at least May 2021. *Compare* Union Br. 47-48 (contending that voluntary vaccination program "should be given more time to work"), *with* 4-SER-925 (asking the district court to give the program "more time"); 4-SER-958 (asserting that the program "should be given a little bit of time").

The appellants attempt to bridge the evidentiary gap by asserting that staff vaccination rates have increased since the time they filed their appeal. State Br. 34; Union Br. 13. That, of course, is improper. It is the district court, not this Court, that should examine such evidence in the first instance. *See Vargas v. Howell*, 949 F.3d 1188, 1198 (9th Cir. 2020) ("documents not filed with the district court cannot be made part of the record on appeal"); Fed. R. App. Proc. 10(a). In any event, this argument ignores the fact that thousands of prison workers now are required to be vaccinated pursuant to the August 19 CDPH order.

In addition, the appellants nowhere contend that even their current staff vaccination rates are sufficient. Nor could they. Their own public health expert, Dr. Reingold, testified that "COVID-19 vaccination of *all* employees of the [CDCR] without a valid contra-indication or exemption is the single most effective intervention available to prevent cases and outbreaks of COVID-19, both among those who are vaccinated and those who cannot be vaccinated." 1-SER-59 (emphasis added). That only further demonstrates the necessity of the district court's order within the meaning of the PLRA.

The State also contends that the district court's order was not necessary because it has other mitigation measures in place. State Br. 33-34 (discussing biweekly testing, masks, and mandatory vaccination of healthcare workers). To argue the efficacy of those measures, the appellants attempt to fashion a new record

on appeal with point-in-time data regarding infections of incarcerated people. State Br. 34; Union Br. 18-19. But this only shows why it is the district court, not this Court, that is best positioned in the first instance to evaluate new evidence or claims of changed circumstances. *See Nuclear Info. & Res. Serv. v. Nuclear Regul. Comm'n*, 457 F.3d 941, 953 n.4 (9th Cir. 2006) (holding that the district court, and not the court of appeals, "may properly consider extra-record evidence" and conduct evidentiary hearings).

That is because the number of active infections in the prison system is an imperfect and incomplete metric; case rates have risen and fallen throughout the pandemic in response to new variants. Indeed, the Receiver took that into consideration in developing his recommendation. *See, e.g.*, 3-SER-819 (finding that "[t]he virus is likely to continue to mutate, potentially creating even more transmissible strains than Delta"); 2-ER-267 ("Absent very high levels of vaccination, the Delta variant and other future variants will become more common in California."); 2-ER-272 (cautioning that "[d]elaying 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").

Analysis of the efficacy of mitigation measures is complex and fact intensive, and may include consideration of, among other things, staff infections and related quarantines. *See* CDCR, *CDCR/CCHCS COVID-19 Employee Status* (last visited

Jan. 13, 2022), https://www.cdcr.ca.gov/covid19/cdcr-cchcs-covid-19-status/ (listing 4,210 active staff cases as of January 12, 2022). In any event, the appellants' case-infection data already is wildly out of date, demonstrating the unreasonableness of the appellants' sweeping conclusions. The Union, for example, states that there were "only" 125 infections among the plaintiff class when it filed its brief a month ago. Union Br. 14 (touting the State's "successful[]" efforts). Since then, the number has jumped to 3,519. *See* CDCR, *Population COVID-19 Tracking, CDCR Patients: COVID-19 Cases and Outcomes* (last visited Jan. 13, 2022), https://www.cdcr.ca.gov/covid19/population-status-tracking/.

The district court, not this Court, is best positioned to consider the constantly changing information and situate it within the relevant legal framework.

B. The District Court Properly Found That the Alternatives Offered by the Appellants Would Not Correct the Constitutional Harm.

Next, the district court properly found that "none of the alternatives suggested by [the appellants] would correct the violation of Plaintiffs' Eighth Amendment rights identified in this order." 1-ER-24. The appellants assert that mandatory vaccination of "the small minority" of the plaintiff class who have not yet been vaccinated would be "more narrowly tailored" than the relief ordered by the district court. State Br. 37; *see* Union Br. 46-47. But the PLRA's "narrowly tailored" requirement "requires a 'fit' between the remedy's ends and the means chosen to accomplish those ends." *Plata*, 563 U.S. at 531. As the district court explained, the

appellants "do not contest the continued risk of harm to *vaccinated* incarcerated persons, nor do they present any evidence that it would be reasonable not to address the introduction of the virus into the prisons." 1-ER-23. As a result, the appellants' suggestion "would provide no remedy for the identified harm."[16] *Id.*; *see also Plata*, 563 U.S. at 534 (holding that federal courts have an obligation to "achiev[e] an effective remedy of the constitutional violation").

And the district court's conclusion was amply supported by the record, which establishes that (1) staff, not incarcerated people, are "primary vector[s] for introducing COVID-19 into CDCR institutions," 3-SER-816, and (2) it is critical "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"; infections, hospitalizations, and death, even among fully vaccinated people; and substantial disruption to the medical care delivery system.[17] 3-SER-818-19; *see also* 3-SER-773.

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[16] The State mischaracterizes the district court's decision when it suggests that the district court "believed this question [of mandatory vaccination of incarcerated people] was not before it." State Br. 37. The district court properly determined that such a policy would not address the harm identified by the Receiver. 1-ER-23.

[17] Mandatory vaccination of all incarcerated people, which the State has never tried to implement, would also be more intrusive and have serious adverse consequences. Unlike staff, incarcerated people do not have the option to seek other employment if they do not want to be vaccinated. The forcible, involuntary vaccination of incarcerated people not only would be unprecedented, it also, in

Nor is the district court's order overly broad because it applies to all staff who enter the state prisons, instead of being constrained to certain categories of staff based on things like work location. *See* State Br. 35, 38. Simply because something is narrower does not mean it is narrowly tailored. "Narrow relief can be completely ineffectual." *Morales Feliciano v. Rullan*, 378 F.3d 42, 56 (1st Cir. 2004). As explained previously (*see* Argument § I.B, *supra*), the district court properly found, on the undisputed record (and by the State's own admission), that staff often work "'in areas to which they are not regularly assigned,'" and that such flexibility is "'essential'" during the pandemic. 1-ER-20 (quoting 2-SER-444; 5-SER-1392-93). In addition, even staff who may not directly interact with incarcerated people as part of their regularly assigned duties do interact with (and therefore can infect) other staff, which can result in staff shortages and the infection of incarcerated people. Therefore, the district court properly limited its order to all workers who enter the prisons, because they can introduce the virus into the prison system.

C. The District Court's Order Would Not Unduly Burden Prison Operations.

Finally, the appellants attempt to fearmonger their way into a reversal by contending that the district court's order threatens prison safety and security because

Dr. Bick's informed view, "could irreparably damage the doctor-patient relationship." 2-ER-140.

it may result in staff shortages.[18] *See* State Br. 4, 39-42; Union Br. 36, 45-46. But as the Supreme Court already has made clear:

> This inquiry necessarily involves difficult predictive judgments regarding the likely effects of court orders. Although these judgments are normally made by state officials, they necessarily must be made by courts when those courts fashion injunctive relief to remedy serious constitutional violations in the prisons. These questions are difficult and sensitive, but they are factual questions and should be treated as such.

Plata, 563 U.S. at 535; *see also id.* at 538 (observing that courts "have substantial flexibility" when making judgments as to what relief is necessary, including when "the inquiry involves uncertain predictions regarding the effects" of prospective relief).

Here, in the context of evaluating the appellants' claims of irreparable harm in their motions to stay (the first time they raised this argument), the district court properly found that their predictions of harm were speculative. 2-ER-32. That was amply supported by the record—a record the appellants simply ignore on appeal.

For example, Tammatha Foss, the Director of Corrections Services for CCHCS, who has extensive experience in corrections over 24 years, including as warden and Associate Director in CDCR, explained that the appellants' assertions

[18] The appellants did not raise this argument or provide evidence in support of it until after the district court had issued its order. The argument therefore has been forfeited.

of expected noncompliance "are highly speculative." 2-ER-77; *see Plata*, 563 U.S. at 535 (holding that court, in evaluating the public safety consequences of prospective relief, properly relied on testimony of prison officials that was based on "empirical evidence and extensive experience in the field of prison administration"). Ms. Foss explained that even if high numbers of staff were noncompliant at the deadline, "the progressive discipline process is effective in encouraging compliance."[19] 2-ER-77. Ms. Foss further explained that the "ordinary annual rate of attrition" is 5% for correctional officer positions, and that more could be done to hire additional correctional officers. 2-ER-79.

And the results of the CDPH order fatally undermine the appellants' predictions of noncompliance. At the two prisons where all workers must be vaccinated pursuant to the August 19 CDPH order, the California Health Care Facility ("CHCF") and the California Medical Facility ("CMF"), compliance with the vaccine requirement has been extremely high. The deadline for correctional staff subject to that order to demonstrate full vaccination was November 24, 2021. 2-ER-61. As of two weeks prior to that deadline, 95% of staff at CHCF and 98% of staff at CMF had either been vaccinated or requested an exemption, and that does not

[19] Ms. Foss explained that the progressive discipline process is "usually lengthy." 2-ER-77. That process begins with the issuance of a non-adverse corrective action Letter of Instruction. 2-ER-61. An employee who does not comply "is unlikely to be excluded from the workplace, if at all, until at least three to four months (or more) after issuance of a letter of instruction." 2-ER-77.

factor in higher compliance rates that would be expected through the progressive discipline process. *See* 2-ER-77.

Moreover, even if staffing shortages do occur, "a narrow and otherwise proper remedy for a constitutional violation" is not invalid "simply because it will have collateral effects." *Plata*, 563 U.S. at 531. The district court properly considered the record before it and determined that limiting entry into the state prisons to vaccinated workers was necessary and no other alternative would suffice. In fact, the undisputed record before the district court demonstrated that, in the *absence* of mandatory staff vaccination, pervasive staff shortages substantially disrupted programming and the provision of medical care.

In particular, the district court found that "[d]elays in clinical care are also caused by the large number of staff in quarantine—approximately 5,500 in total over the past year—either because they have themselves contracted COVID-19 or because 'they are identified as close contacts of an infected individual."[20] 1-ER-14;

[20] Custody staff are essential to the delivery of medical care in prison. Among other things, custody staff at all prisons are responsible for escort, transport, and delivering ducats (scheduling slips) for medical appointments; supervising and facilitating medication administration; inspecting Durable Medical Equipment and medical supplies; and providing life support during medical emergencies. 1-SER-234-242; 2-SER-299-423; *see also Plata*, 563 U.S. at 521 (noting that frequent lockdowns "impede the effective delivery of care" and "staff 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.").

see 3-SER-774-75. Indeed, "[i]n just the first 17 days of August [2021], 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." 3-SER-774-75; *see also* 2-SER-576; 2-SER-584. The prospective relief ordered by the district court therefore would *improve* the only staffing shortage properly documented in the record below.

* * *

In sum, the appellants ask this Court to second-guess the thoughtful, well-reasoned decision of the district court, which "has been overseeing [this] complex institutional reform litigation for a long period of time," has closely monitored the State's efforts since the beginning the pandemic, and is best positioned to make predictive judgments as to whether and when prospective relief is necessary. *See Jeff D. v. Kempthorne*, 365 F.3d 844, 850 (9th Cir. 2004) (discussing when "[d]eference to the district court's use of discretion is heightened").

The district court gave the State every opportunity to implement the Receiver's recommendation or present evidence as to why it should not. The State chose to do neither. After tens of thousands of infections, hundreds of deaths, and unending outbreaks and lockdowns, the district court had no choice but to fulfill its obligation to remedy the constitutional violation. *See Plata*, 563 U.S. at 510-11.

III. This Court Should Vacate Its Stay Immediately.

The record in this case establishes that the district court's orders are well within the bounds of its discretion and the Eighth Amendment. It also establishes that the current dangers are grave and that delay puts lives in the balance. Under these circumstances, this Court should vacate its stay at its earliest opportunity.

CONCLUSION

This Court should affirm the district court's order and vacate the stay.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,979 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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January 13, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

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The undersigned attorney or self-represented party states the following:

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Signature /s/ Rita Lomio **Date** 01/13/2022

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