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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **OAKLAND DIVISION**
13

14 MARCIANO PLATA, et al.,

15 Plaintiffs,

16 v.

17 GAVIN NEWSOM, et al.,

18 Defendants.

CASE NO. 01-1351 JST

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' EMERGENCY MOTION
REGARDING PREVENTION AND
MANAGEMENT OF COVID-19**

Date: April 16, 2020

Time: 2:00 P.M.

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INTRODUCTION

Defendants have worked tirelessly in close coordination with the longtime federal Receiver who oversees healthcare in the California Department of Corrections and Rehabilitation's (CDCR) 35 institutions to prevent and slow the spread of COVID-19. CDCR has quickly implemented extensive, thoughtful, and unprecedented measures in response to a rapidly-fluctuating and novel pandemic, including nearly all of the Centers for Disease Control and Prevention's (CDC) recommended measures for correctional facilities, many of which were implemented before the CDC's recommendations were even released.

Nonetheless, Plaintiffs yet again ignore well-established principles of law, attempt to interfere with state officials and experts' sound discretion, and attempt to side-step procedural safeguards in their haste to compel the State to further reduce its prison population in response to the COVID-19 pandemic. Both the Prison Litigation Reform Act ("PLRA") and the three-judge court's recent Order Denying Plaintiffs' Emergency Motion to Modify Population Reduction Order make clear that before a prisoner release order may be issued, Plaintiffs must first seek an interim order from this single-judge court requiring Defendants "to take steps short of release necessary to remedy that violation," and Defendants must be afforded a sufficient opportunity to comply with that order. ECF 3261 at 13:1-2. Only after that less-intrusive relief proves inadequate may Plaintiffs then request that a three-judge court be convened to make the ultimate determination of whether a prisoner release order is appropriate under the circumstances. Rather than follow those mandatory steps, Plaintiffs instead ask this court to usurp the authority of the three-judge court and issue an order "to reduce population levels to safe and sustainable levels in light of the COVID-19 pandemic." (Pltfs.' Emergency Motion Regarding Prevention and Management of COVID-19 ("Motion") at 1:17-18.) This court lacks the authority to grant this form of relief and Plaintiffs' motion must be denied on this basis alone.

Even if Plaintiffs had complied with the PLRA's jurisdictional prerequisites and this court had the authority to issue a prisoner release order, Plaintiffs nonetheless would not be entitled to the relief they request because they have not shown, and cannot show, that Defendants are acting with deliberate indifference in response to the COVID-19 pandemic. To the contrary, Defendants

1 have taken swift, decisive, and unprecedented action in response to this novel global pandemic. In
 2 just the thirteen days since Defendants filed their Opposition to Plaintiffs' Emergency Motion to
 3 Modify Population Reduction Order, Defendants have taken the following *additional* steps
 4 (described in detail, *infra*) in response to this constantly evolving pandemic:

- 5 • Under the authority granted by the Governor's March 24, 2020 executive order,
 6 Secretary Diaz is extending the suspension of new-inmate intake for an
 7 additional 30 days, resulting in an additional approximately 2,500-3,000 fewer
 8 inmates entering the prison system;
- 9 • Defendants have transferred approximately 630 inmates out of dorms and into
 10 vacant, low-population density housing and anticipate transferring another
 11 approximately 640 inmates in the coming days in coordination with the
 12 Receiver;
- 13 • Defendants have released approximately 3,418 inmates from custody to date as
 14 a result of the Secretary's directive to transition certain inmates to early parole;
- 15 • Defendants implemented a mandatory 14-day modified program across all
 16 institutions to further restrict physical contact and ensure more frequent
 17 cleaning and disinfection practices;
- 18 • Defendants have been working closely and cooperatively with the Receiver and
 19 his staff to assess the feasibility of creating 8-person housing cohorts for
 20 inmates housed in dorm settings; and
- 21 • Defendants have implemented virtually every applicable CDC guideline for
 22 correctional facilities in collaboration with the Receiver.

23 Finally, the relief Plaintiffs request is unsafe. At a time when all California residents have
 24 been ordered to shelter in place, Plaintiffs would have this court order the transfer or release of
 25 tens of thousands of medically high-risk individuals around the state. This is an irresponsible
 26 request that would not only place these inmates at even higher risk of contracting the novel virus
 27 and not getting the care they need, but also directly undercut the comprehensive strategy that
 28 Defendants and the Receiver have adopted to reduce the spread of COVID-19 within CDCR.

Moreover, immediately providing early release to a large group of medically high-risk inmates could risk leaving many with no valid identification documents, few employment prospects, little supervision, little or no assistance without housing, few or no supportive community services, and reduced access to needed healthcare services.

Plaintiffs' requested relief is procedurally improper, unnecessary, and unsafe, and must be denied.

ARGUMENT

I. ABRIDGED PROCEDURAL HISTORY

On November 13, 2006, Plaintiffs in *Plata* and *Coleman* simultaneously requested to convene a three-judge court under 18 U.S.C. § 3626(a)(3) to consider whether overcrowding was the primary cause of the unconstitutional delivery of medical and mental health care in CDCR's prisons. ECF 561. The *Plata* and *Coleman* courts granted Plaintiffs' motions to convene on July 23, 2007. ECF 780. On August 4, 2009, following trial, the three-judge court found that crowding was the "primary cause" of the alleged Eighth Amendment violations and that no other relief would remedy those violations. *Coleman v. Schwarzenegger/Plata v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal., N.D. Cal. Aug. 4, 2009). The order capped the State's prison population at 137.5% of design capacity and gave the State two years to reach that benchmark. ECF 962. The Supreme Court affirmed the three-judge court's prisoner release order, the imposition of the 137.5% cap, and the two-year period for implementing the cap. *Brown v. Plata*, 563 U.S. 493, 529-544 (2011). The State subsequently requested an extension of time to meet the final benchmark and ultimately reduced its population below the cap in February 2015. ECF 2766, 2838. The State has remained below the cap since that time, over five years ago.

On March 25, 2020, Plaintiffs filed an Emergency Motion to Modify Population Reduction Order ("Motion to Modify") in the three-judge court matter, seeking a further prisoner reduction to prevent the risk of severe illness or death from COVID-19. ECF 3219. In denying without prejudice Plaintiffs' Motion to Modify, the three-judge court explained that the motion was not properly before the court because "the impetus for the release order Plaintiffs seek is different from the overarching structural violations underlying the 2009 population reduction order." ECF

3261 at 8:14-15. The three-judge court properly noted that the prior prisoner reduction order “was never intended to prepare Defendants to confront this unprecedented pandemic.” *Id.* at 9:14. The three-judge court instructed that “if [Plaintiffs] believe that [Defendants’] response [to COVID-19] violates Plaintiffs’ right to adequate medical care, they may seek relief before the individual *Plata* court.” *Id.* at 12:25-26. The three-judge court further explained that “[i]f a single-judge court finds a constitutional violation, it may order Defendants to take steps short of release necessary to remedy that violation. And if that less intrusive relief proves inadequate, Plaintiffs may request, or the district court may order sua sponte, the convening of a three-judge court to determine whether a release order is appropriate.” *Id.* at 12:28-13:4.

Four days later, Plaintiffs filed this instant Motion “seek[ing] an order from this Court to reduce population levels to safe and sustainable levels in light of the COVID-19 pandemic.” (Motion at 1:16-18.)

II. THIS COURT LACKS AUTHORITY UNDER THE PRISON LITIGATION REFORM ACT TO GRANT PLAINTIFFS’ REQUESTED RELIEF.

In enacting the PLRA, Congress established the procedural framework all litigants must follow in seeking a prisoner release order. Those steps are clear and mandatory. As the *Plata/Coleman* three-judge court recently observed, it may only consider whether a prisoner release order is appropriate after a single-judge court finds a constitutional violation, issues an order to address that violation short of a release order, and affords Defendants adequate time to comply with that order. ECF 3261 at 6:23-7:1, 12:28-13:4; 18 U.S.C. § 3626(a)(3). Only after those steps have been taken may Plaintiffs then request that a three-judge court be convened to determine whether a prisoner release order is appropriate. ECF 3261 at 13:2-4; 18 U.S.C. § 3626(a)(3)(B). Disregarding this mandatory process, Plaintiffs seek a prisoner release order from this single-judge court instead. Plaintiffs’ attempt to circumvent the PLRA is particularly egregious and perplexing given the three-judge court’s clear instruction on this subject just barely one week ago. ECF 3261 at 12:20-13:4

Through their motion, Plaintiffs request an order requiring Defendants “to downsize the population to the lowest number possible at each prison by release or transfer to a safer

1 alternative.” (Motion at 8:23-24.) No such release or transfer order may issue unless each of the
 2 PLRA’s prerequisites are satisfied, and even then, only a three-judge court possesses the authority
 3 to issue such an order. 18 U.S.C. §§ 3626(a)(3)(A), (B). Here, no prior order has been issued by
 4 this court requiring Defendants to take action in response to the COVID-19 pandemic. ECF 3261
 5 at 7:5-8 (“Plaintiffs likely cannot satisfy the prior order requirement at this point because there
 6 have not yet been any orders requiring Defendants to take measures short of release to address the
 7 threat of the virus; nor have Defendants had a reasonable time in which to comply.”). And
 8 certainly, this court alone cannot require Defendants to release or transfer inmates outside of
 9 CDCR’s custody. 18 U.S.C. § 3626(a)(3)(B); *Brown v. Plata*, 563 U.S. 493, 527 (“requiring out-
 10 of-state transfers itself qualifies as a population limit under the PLRA ... The same is true of
 11 transfers to county facilities. Transfers provide a means to reduce the prison population in
 12 compliance with the three-judge court’s order. They are not a less restrictive alternative to that
 13 order.”). This court therefore lacks jurisdiction to consider Plaintiffs’ request for inmate transfers
 14 or early releases.

15 Further, even if this court could issue an order to release or transfer inmates outside of the
 16 system, Plaintiffs barely try to explain why such an order would meet the PLRA’s additional
 17 needs-narrowness-intrusiveness requirements. 18 U.S.C. § 3626(a)(2). Plaintiffs must show that
 18 the relief they seek is “narrowly drawn, extend[s] no further than necessary to correct the harm the
 19 court finds requires preliminary relief, and [is] the least intrusive means to correct that harm.” *Id.*
 20 Plaintiffs fail to address this standard, merely stating in conclusory fashion that “an order reducing
 21 population density in the prison system would be tailored directly to the constitutional violations
 22 at issue” and that “[i]n light of the case history, the order sought would be narrowly drawn, extend
 23 no further than necessary to remedy ongoing constitutional violations, and constitute the least
 24 intrusive means to that end.” (Motion at 10:4-7.) Plaintiffs offer no analysis here and fail to
 25 address the myriad measures Defendants and the Receiver have taken in response to the COVID-
 26 19 pandemic or offer any explanation as to why these measures fall short of constitutional
 27 compliance.

28 Plaintiffs also appear to suggest that the PLRA is not implicated by their request at all, and

1 cite to this court's 2013 Valley Fever order, calling it "law of the case." (Motion at 10:12-21.)
 2 The "law of the case" doctrine is "a judicial invention designed to aid in the efficient operation of
 3 court affairs." *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990)
 4 (citing *Lockett v. U.S. Dept. of Labor*, 867 F.2d 513, 518 (9th Cir. 1989)). Under this discretionary
 5 doctrine, "a court is generally precluded from reconsidering an issue previously decided by the
 6 same court, or a higher court in the identical case." *Id.*; see also, *U.S. v. Houser*, 804 F.2d 565, 567
 7 (9th Cir. 1986) ("in order to maintain consistency during the course of a single lawsuit,
 8 reconsideration of legal questions previously decided should be avoided."). Critically, the "law of
 9 the case" doctrine only applies to issues actually considered and decided by the first court. *U.S. v.*
 10 *Cote*, 51 F.3d 178, 181 (9th Cir. 1995) ("Although the doctrine applies to a court's 'explicit
 11 decisions as well as those issues decided by necessary implication,' [citation], it 'clearly does not
 12 extend to issues [the first] court did not address.'"); see also, *Lil' Man in the Boat, Inc. v. City and*
 13 *County of San Francisco*, 2018 WL 4207620, at *3 (N.D. Cal. Sep. 4, 2018) (holding law of the
 14 case doctrine did not bar defendant's motion for judgment on the pleadings since the arguments
 15 raised were "not the same issues considered and decided by the Court" in the defendant's prior
 16 motion to dismiss.) This court's 2013 Valley Fever order did not pertain to the issues currently
 17 before this court, and is therefore inapplicable here for two reasons.

18 First, this court determined that the PLRA was not implicated by its Valley Fever decision
 19 because "Plaintiffs' requested relief ... concerns only [intra-system] transfer and not release [and]
 20 therefore does not require consideration by a three-judge court." ECF 2661 at 14:5-7. Indeed, as a
 21 result of the Valley Fever order, Defendants were ordered to transfer certain inmates from Pleasant
 22 Valley and Avenal State Prisons to other CDCR institutions. *Id.* at 25:1-3. No inmates were
 23 ordered released or transferred outside of CDCR custody as a result of the Valley Fever order. *Id.*
 24 By contrast, here Plaintiffs are requesting an order for Defendants to "downsize the population"
 25 through release, which is strictly governed by the PLRA. See 18 U.S.C. § 3626(a)(3); Motion at
 26 8:9-11, 19-24.

27 Second, Plaintiffs did not assert that crowding was the primary cause of the constitutional
 28 violation in the Valley Fever litigation, and therefore, the court determined that the PLRA did not

1 apply. ECF 2661 at 14:20-16:11. Here, however, Plaintiffs argue that it is because of
 2 overcrowding that they face an unconstitutional risk of harm. (*See, e.g.*, Motion at 1:5-6, 2:3-4,
 3 4:7-9.) Thus, this court’s prior determination pertaining to Valley Fever has no bearing on
 4 Plaintiffs’ requested relief currently pending before this court.

5 Finally, to the extent Plaintiffs request that this court issue an order requiring the Receiver,
 6 “with the full cooperation of Defendants, [to] exercise his authority and develop a plan to
 7 minimize the spread of the COVID-19 virus,” such a request is moot. (*See* Proposed Order
 8 Granting Plaintiffs’ Emergency Motion Regarding Prevention and Management of COVID-19,
 9 ECF 3266-4 at 1:24-26.) The Receiver’s April 10 and April 12, 2020 memoranda, discussed more
 10 fully below, set forth a plan to further “mitigate the risks associated with transmission of the
 11 COVID-19 coronavirus.” (Declaration of Secretary Ralph Diaz (“Decl. Diaz”), Exs. M & N;
 12 Declaration of Joseph Bick, M.D. (“Decl. Bick”), Exs. A & B.) Defendants have been working
 13 closely and cooperatively with the Receiver in addressing this pandemic and will continue to do
 14 so. (Decl. Diaz ¶¶ 4, 20.) Indeed, Secretary Diaz intends to comply with the April 10 and 12
 15 directives, and has already been collaborating with the Receiver on how to implement this plan.
 16 (*Id.* at ¶ 20.) No order should issue requiring Defendants to do that which they are already doing,
 17 particularly when a prior court order already mandates their cooperation. ECF 473 (Order
 18 Appointing Receiver) at 8:9-13.

19 Plaintiffs may not circumvent the PLRA in their attempt to reduce the State’s prison
 20 population particularly given the aggressive, effective, and narrowly-tailored actions Defendants
 21 and the Receiver are taking in response to this novel pandemic, described further below.
 22 Plaintiffs’ Motion must therefore be denied.

23 **III. DEFENDANTS HAVE IMPLEMENTED REASONABLE AND AGGRESSIVE**
 24 **MEASURES IN RESPONSE TO COVID-19 AND ARE THEREFORE NOT**
DELIBERATELY INDIFFERENT.

25 While Plaintiffs make references to “safe housing” and “adequate physical distancing” in
 26 their brief, the true relief they seek is a prisoner release order. (Motion at 4:3, 6:5; Proposed Order
 27 (ECF 3266-4) at 2:11-15.) This form of relief is premised upon Plaintiffs’ belief that no other
 28 measure or combination of measures can adequately address the COVID-19 pandemic. Plaintiffs’

1 myopic focus on population reduction as a panacea for preventing the spread of COVID-19 is
 2 misguided and shortsighted. While physical distancing is certainly one effective precaution,
 3 population reduction is not the only means of achieving physical distancing. Moreover, the
 4 Centers for Disease Control and Prevention (CDC) has recommended numerous other measures,
 5 including reinforced hygiene practices, intensifying cleaning and disinfection efforts, screening of
 6 new intakes, visitors and staff, medical isolation and care of inmates with symptoms, and—
 7 directly contrary to Plaintiffs’ position—“*restricting movement in and out of the facility.*”
 8 (Declaration of Samantha Wolff Supp. Defs.’ Opposition to Pltfs.’ Emergency Motion Re:
 9 Prevention and Management of COVID-19 (“Decl. Wolff”), Ex. A at 5, emphasis added.) In
 10 coordination with the Receiver and his team, Defendants have complied with nearly every single
 11 CDC recommendation. (Decl. Diaz ¶ 3 & Ex. A.) There can be no finding of deliberate
 12 indifference in this context.

13 In addition to the significant and unprecedented measures initially taken by the State in
 14 response to the COVID-19 pandemic, which were previously described in Defendants’ Opposition
 15 to Plaintiffs’ Emergency Motion to Modify Population Reduction Order and are incorporated
 16 herein (ECF 3235), Defendants continue to devise and implement further strategies as the
 17 pandemic evolves to ensure the health and safety of inmates and staff, including the following:

- 18 • Governor Newsom issued Executive Order N-36-20 on March 24, 2020,
 19 suspending intake of all incarcerated persons into state facilities for 30 days. Under
 20 the authority granted to him by the executive order, Secretary Diaz is extending the
 21 suspension of new-inmate intake for an additional 30-day period. (Decl. Diaz ¶ 6.)
- 22 • As of April 11, 2020, CDCR had transferred over 630 inmates out of dorms and
 23 into vacant low-population density housing. (Decl. Gipson ¶ 6.) The transfer of
 24 approximately 640 additional inmates should be completed by Thursday, April 16.
 25 (Decl. Gipson ¶ 7.) CDCR will coordinate these remaining transfers with the
 26 Receiver in accordance with his April 10, 2020 memorandum. (*Id.* at ¶ 4(e).)
- 27 • Inmate transfers have been sharply reduced to only allow essential movement in
 28 and out of the institutions. This has occurred with coordination between the

1 Division of Adult Institutions, the Statewide Mental Health Program, and
 2 California Correctional Health Care Services. Any transfers that are required are
 3 conducted in a manner that maintains social distancing for both staff and inmates.
 4 (Decl. Gipson ¶ 4(d).)

- 5 • On April 7, 2020, the Director of the Division of Adult Institutions, Connie Gipson,
 6 issued a memorandum detailing a mandatory 14-day modified program across all
 7 institutions. Effective April 8, 2020:

- 8 o All institutions must ensure that movement is conducted via escort with
 9 increased social distancing where possible, and without comingling inmates
 10 from different housing units;
- 11 o Inmates will be fed in cells or in the dining hall, one housing unit at a time
 12 with inmates practicing social distancing and tables disinfected between
 13 each use;
- 14 o Showers must be disinfected between each use;
- 15 o Wardens must work with CEOs to establish a process for medication
 16 distribution, including either within each housing unit or on the yard if
 17 controlled feeding in the dining halls is permitted;
- 18 o Reducing the number of inmates allowed in dayrooms, and possibly
 19 curtailing dayroom use entirely if the institution is unable to maintain social
 20 distancing numbers to also accommodate showers and phone use;
- 21 o Only one housing unit or dorm may participate in recreation at a time;
- 22 o Phones must be disinfected between each use;
- 23 o Religious programs must be conducted cell front or materials delivered
 24 directly to the inmates in their housing unit, dorm, or cell; and
- 25 o Consider placement of six-foot markers on the ground as reminders for
 26 inmates and staff to maintain social distancing.

27 (Decl. Gipson ¶ 4(b) & Ex. B.)

- 28 • On April 10, 2020, the *Plata* Receiver, Mr. Kelso, issued “CCHCS Guidelines for

1 Achieving and Maintaining Social Distancing in California Prisons”

2 (“Guidelines”), recommending that CDCR implement the following measures to
3 further mitigate the risks of COVID-19:

- 4 o CDCR should not authorize or undertake any further movement of inmates
5 between institutions to achieve necessary social distancing without prior
6 approval and consultation with CCHCS because such “[i]nter-institution
7 moves risk carrying the virus from one institution to another.”
- 8 o CDCR should create 8-person housing cohorts for inmates housed in dorm
9 settings, with each cohort separate from the others by a distance of at least
10 six feet in all directions.
- 11 o Transfers out of the dorms for purposes of achieving social distancing
12 require coordination with CCHCS to ensure that “such movement does not
13 cause, contribute to or exacerbate the potential spread of the disease.”

14 (Decl. Diaz ¶ 20 & Ex. M.) Defendants intend to comply with the Receiver’s well-
15 reasoned guidance. (*Id.* at ¶ 20.)

- 16 • On April 12, 2020, the Receiver issued a supplemental memorandum clarifying that
17 his April 10, 2020 memorandum is not intended to affect any inter-institution
18 transfers that are to address either medical, mental health, or dental treatment needs
19 that are not available at the sending institution, such as to provide a higher level of
20 care or to reduce or prevent morbidity or mortality, or a safety or security issue that
21 cannot be managed by the sending institution. (Decl. Diaz ¶ 21 & Ex. N.)
- 22 • Consistent with the Receiver’s guidance, CDCR is currently assessing whether
23 there is additional space within the institutions that may be used to house inmates,
24 such as gymnasiums. Those spaces must first be approved by the State Fire
25 Marshal to be used as housing. Further, cots must be purchased and the staffing
26 needs for each location must be assessed so that the Division of Adult Institutions
27 can ensure that safety and security will be maintained and that inmates’ essential
28 needs can be met. At this time, nineteen potential sites have been identified and

about 600 cots have already been procured. To date, the State Fire Marshal has approved occupancy for twelve gymnasiums and two visiting rooms located at Mule Creek State Prison, Central California Women’s Facility, Pleasant Valley State Prison, Salinas Valley State Prison, San Quentin State Prison, California State Prison – Solano, and California State Prison – Los Angeles County. CDCR is continuing to determine how these spaces might be used to improve physical distancing. (Decl. Gipson ¶ 4(f).)

- The Receiver’s April 10 memorandum also suggested creating eight-person housing cohorts in dorms to achieve greater social distancing. CDCR is evaluating the feasibility of eight-person pods in the dorms. As the Receiver’s memorandum noted, these “social-distancing cohorts” would be analogous to family units in communities. (Decl. Gipson, ¶ 9.)
- All early transitions to parole or Post Release Community Supervision for certain specified inmates within 60 days of their release date will be completed by April 13, 2020. (Decl. Gipson, ¶ 4(a).) As of the end of the day on April 12, 2020, a total of 3,418 inmates have been released pursuant to the Secretary’s directive. (*Id.*)

Plaintiffs’ assertion that Defendants have deliberately ignored the risk this virus poses to their health and safety simply cannot be reconciled with the constellation of measures that CDCR and CCHCS have taken to mitigate the impact of COVID-19 in the prisons.¹ The measures taken by Defendants to date in response to this novel threat have been decisive, aggressive, and thoughtful. These measures are consistent with CDC recommendations and in many instances

¹ In addition to those measures described above and in the supporting declarations of Secretary Diaz, Director Gipson, and Dr. Bick filed herewith, numerous high-level CDCR staff have also collectively dedicated hundreds of hours of time in 11 COVID task force meetings to date that have been convened by the *Coleman* Special Master and have included Plaintiffs. (Decl. Diaz ¶ 8.) Numerous additional sub-group meetings have occurred on this topic as well with the involvement of high-level CDCR staff.

1 were already underway when the CDC issued its Interim Guidance on Management of
 2 Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities on March 23,
 3 2020. (Decl. Diaz ¶ 3 & Ex. A.) As CDC recommendations and the Receiver's Guidelines
 4 demonstrate, population reduction is not the only method to achieve physical distancing. Indeed,
 5 Defendants are converting alternative space in gymnasiums into temporary housing to provide
 6 additional space in dorms, and are considering converting other areas as well. (Decl. Gipson ¶
 7 4(f).) Further, CDCR is evaluating the feasibility of creating social-distancing cohorts in the
 8 dorms that would each be separated from other pods. (Decl. Gipson ¶ 9.) As the Receiver's
 9 memorandum noted, these "social-distancing cohorts" would be analogous to family units in
 10 communities. (*Id.*) These measures comply with CDC guidance, which also recognizes that
 11 "[n]ot all strategies will be feasible in all facilities" and accordingly, "[s]trategies will need to be
 12 tailored to the individual space in the facility and the needs of the population and staff." (Decl.
 13 Wolff, Ex. A at 11.) And while Plaintiffs might prefer mass early release to these measures, the
 14 Court should give deference to the path that the State's officials and experts have chosen because
 15 "running a prison is an inordinately difficult undertaking that requires expertise, planning, and the
 16 commitment of resources, all of which are peculiarly *within the province of the legislature and*
 17 *executive branches of government.*" *Turner v. Safley*, 482 U.S. 78, 84-85 (1987), emphasis added.

18 Defendants continue to work tirelessly and collaboratively with the Receiver and CCHCS
 19 to identify and implement all feasible strategies to slow the spread of COVID-19. (Decl. Diaz ¶¶
 20 4, 20.) That Defendants, through their coordination with the Receiver and CCHCS, have
 21 implemented nearly all CDC recommendations demonstrates that they have acted to "ensure
 22 reasonable safety." *Farmer v. Brennan*, 511 U.S. 825, 844 (1994) (*quoting Helling v. McKinney*,
 23 509 U.S. 25, 33 (1993)); *see also* Decl. Diaz ¶ 3 & Ex. A. Defendants are entitled to deference
 24 and neither this court nor Plaintiffs may substitute their judgment for that of state experts and
 25 officials. *Id.*; *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 30 (1905) ("It is no part
 26 of the function of a court or a jury to determine which one of two modes was likely to be the most
 27 effective for the protection of the public against disease"). Indeed, courts lack "judicial power to
 28 second-guess the state's policy choices in crafting emergency public health measures." *In re:*

1 *Abbott*, No. 20-50264, 2020 WL 1685929, *12 (5th Cir. April 7, 2020). Plaintiffs’ attempts to
 2 interfere with Defendants’ efforts, to repeatedly resort to wasteful litigation tactics during this time
 3 of crisis, and to substitute their judgment for that of the State’s experts and officials, has only
 4 served to distract officials from doing the important work required to protect inmates and staff.

5 **IV. PLAINTIFFS’ FORM OF REQUESTED RELIEF IS UNSAFE.**

6 The PLRA mandates that courts give “substantial weight to any adverse impact on public
 7 safety” in deciding whether to issue prospective relief. 18 U.S.C. § 3626(a)(1)(A). One such
 8 consideration must include whether Plaintiffs’ form of requested relief would unnecessarily
 9 expose inmates to the very harm the parties seek to avoid. *See id.* at § 3626(a)(1)(A) (relief must
 10 be the “least intrusive means necessary to correct the violation of the Federal Right”). Here,
 11 because Plaintiffs’ requested relief in the form of transfers and releases of inmates (including those
 12 who are medically high-risk) would enhance their risk of contracting the virus. (*See Decl. Bick*, ¶
 13 7 & Ex. A.) Further, aside from these medical risks, such a large early release would leave these
 14 parolees without access to the numerous critical resources and services new parolees need to be
 15 successful upon release, including housing, proper identification, benefits and medical care. (*See*
 16 ECF 3269 at 7-11.) Plaintiffs’ requested relief must be denied.

17 **A. The Release And Transfer Of Medically High-Risk Inmates Places Their**
 18 **Health At Unnecessary Risk.**

19 Plaintiffs’ medical expert, Dr. Stern, makes only three recommendations to “mitigate the
 20 impact of this pandemic in the prisons,” each of which advocates for the release of inmates: (1)
 21 release high-risk inmates or “ensure that they are safely situated,”; (2) make “immediate and
 22 concerned efforts to downsize the population to the lowest number possible at each prison”; and
 23 (2) “begin planning now to downsize further as conditions change.” (*Decl. Stern*, ECF 3266-1, at
 24 5:5-7, 10-11, 18.) These recommendations focus solely on population reductions, fail to
 25 acknowledge less-intrusive alternatives promoted by public health experts and officials, and ignore
 26
 27
 28

1 serious concerns relating to the movement of at-risk individuals.²

2 Indeed, Dr. Stern's recommendations and Plaintiffs' requested relief directly contradict
3 serious warnings issued by the CDC and the Receiver, among others, that transfers and movement
4 create significant risk of exposure and should be avoided. (Decl. Wolff, Ex. A at 9; Decl. Diaz ¶¶
5 20, 21 & Exs. M & N.) The CDC recommends "restricting movement in and out of the facility"
6 as a means of managing confirmed and suspected COVID-19 cases inside the facility and
7 preventing further transmission. (Decl. Wolff, Ex. A at 5.) The Receiver acknowledges this very
8 real risk in his Guidelines, stating that "CDCR should not authorize or undertake any further
9 movements of inmates between institutions to achieve necessary social distancing" without prior
10 approval and consultation with CCHCS because such moves "risk carrying the virus from one
11 situation to another." (Decl. Diaz, Ex. M at 1.) Similarly, Dr. Bick, CDCR's Director of Health
12 Care Services, agrees "that patient transfer should be limited to either that which is essential to
13 address significant mental health or medical emergencies, or movement of patients from dorms to
14 single or double occupancy housing for improved physical distancing. (Bick Decl., ¶ 8.) Subject

15 _____
16 ² Plaintiffs assert that "[c]ourts across the country have ordered relief when conditions in detention
17 facilities did not allow for safe distancing," and cite a number of cases in support of this
18 proposition. (Motion at 5, fn. 2.) Notably, all but one case cited by Plaintiffs order the release of
19 *pre-trial* detainees, which involves a different framework and standard for courts to consider in
20 granting a release. *See Castillo v. Barr*, CV2000605TJHAFMX, 2020 WL 1502864, at *5 (C.D.
21 Cal. Mar. 27, 2020); *Basank v. Decker*, No. 20-cv-2518, 2020 WL 1481503 (S.D.N.Y. Mar. 26,
22 2020); *U.S. v. Davis*, No. 1:20-cr-9-ELH, Dkt. No. 21 (D. Md. Mar. 30, 2020). These factors
23 include: the risk of harm due to COVID-19, "further complicated by the fact that pretrial detention
24 facilities see a daily flow of people entering and leaving the facility who could be carrying the
25 virus by asymptomatic" (*Davis* at *7); the detention facility's ability to protect detainees; the
26 seriousness of the charges; the criminal history; the danger to the community if released; a civil
27 immigration detainee's entitlement to more considerate treatment; and the detainee's risk of re-
28 offending and/or fleeing. Thus, the facility's ability to allow for physical distancing is just one of
many factors that courts consider. Plaintiffs' citation to *U.S. v. Colvin* is similarly unavailing
where a diabetic inmate was granted compassionate release. No. 3:19cr179 (JBA), 2020 WL
1613943 (D. Conn. Apr. 2, 2020). There, the inmate had had two weeks left on her sentence for a
non-violent offense (mail fraud), would be home-confined for seven months, had a medical care
team in the community managing her diabetes, and otherwise presented no danger. *Id.* Indeed,
had this inmate been confined to CDCR's custody, she would have been included among those
transitioned to early parole in accordance with Secretary Diaz's directive. (*See* Decl. Diaz, ECF
3241 at ¶ 5.)

1 to these very limited exceptions (including to address significant mental health or medical
 2 emergencies), the risks associated with inmate transfers during this pandemic “must be avoided to
 3 ensure the health and safety of our inmate-patients, staff and the community.” (*Id.* at Exs. A at 1
 4 & B.) Yet, neither Plaintiffs nor Dr. Stern make any allowance for this very real risk.

5 Plaintiffs also argue that inmates should be released because the “rural or semirural
 6 community hospitals that serve the prisons will quickly become overwhelmed with a high
 7 concentration of very sick and possibly dying people who require intensive care.” (Supp. Stern
 8 Decl. ¶ 5-6 (ECF 3251); Motion at 6:23-26.) Plaintiffs contend that “[w]ithout access to necessary
 9 medical treatment, class members ‘will die unnecessarily.’” (Motion at 7:1-2, quoting Stern Decl.
 10 ¶ 7 (ECF 3219-4).) However, CDCR and CCHCS have access to hospitals around the State and
 11 can transport inmate-patients to those hospitals by any means necessary, including by ambulance
 12 or helicopter. (Decl. Diaz ¶ 22; Decl. Bick ¶ 10.) CDCR would employ all necessary means to
 13 ensure inmate-patient health, including transferring inmate-patients in need of hospitalization who
 14 are located in rural or semi-rural areas. (Decl. Diaz ¶ 22; Decl. Bick ¶ 10.)

15 **B. A Further Release Would Leave Inmates Ill-Prepared To Transition To**
 16 **Society And Leave Them At Risk.**

17 Before an inmate is released to parole or community supervision, CDCR’s Division of
 18 Adult Parole Operations (DAPO) staff work to coordinate and connect inmates with the numerous
 19 services, transportation, transitional housing, and programs that are essential to the health, safety,
 20 and success of released offenders. (ECF 3269 at 7:23-26.) This planning process starts 180 days
 21 prior to release, when inmates are screened for eligibility for Social Security benefits, state-
 22 sponsored Medi-Cal, and Veteran’s benefits, among other services and benefits. (Declaration of
 23 Jeffrey Green In Support of Defendants’ Opposition to Plaintiffs’ Emergency Motion to Modify
 24 Population Reduction Order (“Decl. Green”) ECF 3239 at ¶ 17.) DAPO staff conduct this
 25 screening and submit applications for those who qualify. (*Id.*) DAPO staff also assist eligible
 26 inmates to complete an application for a California Identification Card, which enables parolees to
 27 access federal and state benefits without the stigma of an inmate identification card. (*Id.* at ¶¶ 35-
 28 36.) DAPO staff also work to connect parolees with substance abuse services, medical care, and

1 housing, if needed. (*Id.* at ¶¶ 41, 42.) These services are limited and it takes time to arrange
 2 placements and eligibility. (*Id.* at ¶ 45.) This prerelease process is important because it provides
 3 offenders with much needed benefits upon their release and avoids a delay in the provision of
 4 those benefits. (*Id.* at ¶ 20.) This, in turn, helps improve their post-release stability, prevents
 5 indigence and homelessness, and improves their opportunity for successful reintegration. (*Id.*)

6 Approximately sixty percent of the cohort of offenders currently being transitioned to early
 7 parole and community supervision will be supervised by the counties, and there are already reports
 8 of problems with providing these early releasees with the services they need. (ECF 3269 at 8:14-
 9 16.) For example, there have been reports that some of the current early-release cohort did not
 10 acquire California Identification Cards before their releases, which made them ineligible for
 11 transitional housing and will make it difficult to access other services and benefits. (*Id.* at 8:17-
 12 19.) If CDCR releases thousands of additional offenders at one time to county supervision, as
 13 Plaintiffs request, it will likely deplete most available county resources for providing housing and
 14 other critical support services. Similarly, by the time the current expedited releases are complete,
 15 CDCR expects that available community housing and services provided by contractors for inmates
 16 supervised by DAPO will also be nearly exhausted. The availability of these community
 17 resources is not something that CDCR or the counties control. Most transitional housing
 18 resources, and the wrap-around services that are sometimes included with them, are provided
 19 through community contractors. (*Id.* at 8:26-9:6.)

20 In light of these facts, immediately providing expedited release to another large group of
 21 inmates could risk leaving many with little or no assistance with housing and few or no supportive
 22 community services.

23 CONCLUSION

24 The *Plata/Coleman* three-judge court provided Plaintiffs with clear instructions and
 25 guidance to seek an order in this court requiring Defendants “to take steps short of release” if
 26 Plaintiffs believe Defendants’ COVID-19 response violates their right to adequate medical care.
 27 Rather than follow this roadmap and its attendant PLRA prerequisites, Plaintiffs now request the
 28 ultimate relief—a prisoner release order—from this single-judge court. The PLRA prohibits the

1 type of relief Plaintiffs seek by way of their Motion. Further, even if Plaintiffs' request were not
 2 jurisdictionally flawed, Defendants' response to the COVID-19 pandemic has been decisive,
 3 thorough, unprecedented, and effective. Plaintiffs have not, and cannot, establish deliberate
 4 indifference under these circumstances. Finally, the relief Plaintiffs seek is irresponsible and
 5 dangerous, and conflicts with the recommendations of numerous public health officials and
 6 experts, including the CDC and the Receiver. For these reasons, Defendants respectfully request
 7 that this court deny Plaintiffs' Motion.

8 DATED: April 13, 2020

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