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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARCIANO PLATA, et al.,
Plaintiffs,
v.
GAVIN NEWSOM, et al.,
Defendants.

Case No. 01-cv-01351-JST

**ORDER RE: MANDATORY
VACCINATIONS**

Re: ECF No. 3647

Since the COVID-19 pandemic began, over 50,000 incarcerated persons in California’s state prisons have been infected by the SARS-CoV-2 virus. At least 240 have died from the disease, many more have been hospitalized, and some of those who have survived continue to suffer long-term effects. Defendants have undertaken significant measures to combat the virus, including the provision of masks, physical distancing, disinfection, testing, quarantine and isolation protocols, restrictions on transfers, reducing the population, and making vaccines available to both incarcerated persons and staff on a voluntary basis. But the virus continues to infect the prison population, including incarcerated persons who have accepted the vaccine – one of whom recently died from the disease – and outbreaks create significant risks of harm beyond the risk of infection. Once the virus enters a facility, it is very difficult to contain, and the dominant route by which it enters a prison is through infected staff.

Facing these facts, the Receiver has recommended, based on his review of the medical and public health science, that a mandatory COVID-19 vaccination policy be implemented for workers entering CDCR institutions and incarcerated persons who choose to work outside of an institution or accept in-person visitation. Now before the Court is an order to show cause as to why the Receiver’s recommendations should not be adopted. ECF No. 3647.

1 The question of mandatory vaccines is complex. In this case, however, the relevant facts
2 are undisputed. No one challenges the serious risks that COVID-19 poses to incarcerated persons.
3 No one disputes that it is difficult to control the virus once it has been introduced into a prison
4 setting. No one contests that staff are the primary vector for introduction. And no one argues that
5 testing, even if done on a daily basis, is an adequate proxy for vaccination to reduce the risk of
6 introduction. While Defendants point to the minority of incarcerated persons who have not yet
7 accepted the vaccine and argue that the best way to protect such individuals is for them to become
8 vaccinated, no one disputes that the risks to the incarcerated population extend to the vaccinated as
9 well as the unvaccinated. All agree that a mandatory staff vaccination policy would lower the risk
10 of preventable death and serious medical consequences among incarcerated persons. And no one
11 has identified any remedy that will produce anything close to the same benefit.

12 Framed in terms of the Eighth Amendment, under which this case arises, Defendants are
13 aware of a substantial risk of serious harm to incarcerated persons, and, although they have taken
14 many commendable steps during the course of this pandemic, they have nonetheless failed to
15 reasonably abate that risk because they refuse to do what the undisputed evidence requires.
16 Accordingly, the Court will grant the Receiver's request for an order to implement his
17 recommended vaccine mandates.

18 **I. BACKGROUND**

19 Since 2005, the California prison medical care system has been under receivership.
20 COVID-19 is a medical issue that falls within the Receiver's authority, and the Receiver has
21 appropriately taken a leadership role in guiding Defendants' pandemic response. Until the dispute
22 over mandatory vaccination, Defendants have followed the Receiver's recommendations. For
23 example, early in the pandemic, Defendants agreed to implement the Receiver's cohorting
24 guidelines for achieving and maintaining social distancing. Defendants have also implemented
25 many other measures in conjunction with the Receiver or, where appropriate, exercising their own
26 authority. These measures include several early release programs designed to reduce population
27 density, temporary suspension of both intake and visitation, masking and distancing requirements,
28 advanced cleaning protocols, efforts to improve ventilation, and the development of a centralized

1 command center and multi-disciplinary teams to oversee response efforts to outbreaks.

2 This is not the first time that this Court, or a companion court, has considered whether to
3 order Defendants to take particular measures in response to the COVID-19 pandemic. Shortly
4 after the pandemic began, Plaintiffs asked the three-judge court convened in this case and
5 *Coleman v. Newsom*, Case No. 2:90-cv-0520 KJM DB (E.D. Cal.), to order a further population
6 reduction in light of the dangers posed by COVID-19. ECF No. 3219. That court concluded that
7 Plaintiffs' request was not properly before the three-judge court and denied Plaintiffs' motion.
8 *Coleman v. Newsom*, 455 F. Supp. 3d 926 (E.D. Cal./N.D. Cal. 2020). Days after the three-judge
9 court denied relief, Plaintiffs moved this Court for:

10 an order directing that the population density in the California prison
11 system be reduced so that (1) class members at high risk of serious
12 illness or death from COVID-19 due to their age and/or underlying
13 health conditions are safely housed, and (2) the system can respond
14 to those who become sick and require hospitalization without
15 overloading community health care systems.

16 ECF No. 3266 at 9. On April 17, 2020, the Court denied Plaintiffs' motion after considering
17 Defendants' early response to the pandemic and concluding that Plaintiffs had not demonstrated
18 an Eighth Amendment violation. *Plata v. Newsom*, 445 F. Supp. 3d 557, 561-69 (N.D. Cal. 2020).
19 The Court also determined that portions of Plaintiffs' relief could only be ordered by a three-judge
20 court. *Id.* at 569-71.

21 Beginning in April 2020, the Court has conducted regular case management conferences –
22 starting approximately weekly, then biweekly, and then monthly – focused almost exclusively on
23 pandemic management and attended by the parties as well as the California Correctional Peace
24 Officers Association (“CCPOA”). Defendants have continued to cooperate with the Receiver,
25 including by implementing a movement transfer matrix to reduce the risk of transmission caused
26 by movement of incarcerated persons into or within the system, and revising that matrix based on
27 updated information regarding how the virus spreads. Defendants have also complied with orders
28 of this Court. *E.g.*, ECF No. 3353 (regarding staff testing); ECF No. 3455 (setting deadlines to set
aside isolation and quarantine space).

Once vaccines became available, Defendants supported efforts to provide the vaccine to

1 both staff and incarcerated persons – including before many jurisdictions were prioritizing
2 incarcerated persons to receive vaccines. Nearly every incarcerated person has now been offered
3 the vaccine, and those who have not have either been away from the institutions for court
4 proceedings or have newly entered the system. Most recently, Defendants have offered third
5 doses of the vaccine to immunocompromised incarcerated persons in accordance with updated
6 health guidance. Defendants have also been offering the vaccine to staff on-site and have
7 undertaken multiple efforts to encourage both staff and incarcerated persons to be vaccinated.
8 Approximately 75% of both incarcerated persons and health care staff, and approximately 42% of
9 custody staff, have been fully vaccinated to date. Notwithstanding concerted efforts by the
10 Receiver, Defendants, the CCPOA, and many other persons and groups, the overall staff
11 vaccination rate is approximately 55% statewide, with rates in the 30% range at several
12 institutions and a correctional staff rate as low as 18% at one institution.

13 In February 2021, the Receiver convened a group of experts and decided not to
14 recommend a staff vaccine mandate at that time. However, mandatory vaccination continued to be
15 a topic of conversation, including at the Court’s case management conferences. At the July 29,
16 2021 case management conference, the Receiver reported his conclusion that “all of our efforts to
17 date have been insufficient to achieve the very high rate of staff vaccination that is necessary to
18 further significantly reduce the risk that COVID will be introduced into our prisons,” in part due to
19 the threat posed by the more infectious Delta variant. ECF No. 3641 at 18-19. The Receiver
20 recommended “that access by workers to CDCR institutions be limited to those workers who
21 establish proof of vaccination or a religious or medical exemption to vaccination,” and that
22 “incarcerated persons who desire to work outside of the institution, for example, fire camps, or to
23 have in-person visitation must be vaccinated or establish a religious or medical exemption.” *Id.* at
24 21. He noted that his discussions with counsel indicated likely opposition to his
25 recommendations, and the Court discussed with the parties and CCPOA a process to resolve the
26 issue.

27 On August 4, the Receiver filed a report setting forth the public health basis for his
28 recommendations, ECF No. 3638, and the Court subsequently issued an order to show cause as to

1 why it should not order that those recommendations be implemented, ECF No. 3647. The matter
2 was fully briefed by the parties, the Receiver, and potential intervenor CCPOA,¹ and the Court
3 accepted amicus briefs from the Service Employees International Union, Local 1000 (“SEIU”) and
4 a group of mental health professionals. The Court heard argument on September 24, 2021.

5 Separate from the Receiver’s and the Court’s consideration of a mandatory vaccination
6 policy, the California Department of Public Health (“CDPH”) issued several related orders. First,
7 on July 26, CDPH issued an order requiring full vaccination or testing, either weekly or twice
8 weekly, of staff who work in hospitals, skilled nursing facilities, other health care settings, and
9 high-risk congregate settings, including correctional facilities and homeless centers. CDPH,
10 *Order of the State Public Health Officer re: Health Care Worker Protections in High-Risk*
11 *Settings* (July 26, 2021), [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Unvaccinated-Workers-In-High-Risk-Settings.aspx)
12 [of-the-State-Public-Health-Officer-Unvaccinated-Workers-In-High-Risk-Settings.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Unvaccinated-Workers-In-High-Risk-Settings.aspx). Under
13 this order, CDCR staff must either be fully vaccinated or tested at least once weekly. *Id.*
14 Individuals are considered fully vaccinated “two weeks or more after they have received the
15 second dose in a 2-dose series (Pfizer-BioNTech or Moderna or vaccine authorized by the World
16 Health Organization), or two weeks or more after they have received a single-dose vaccine
17 (Johnson and Johnson [J&J]/Janssen).” *Id.*

18 CDPH issued another order on August 5 that eliminated the option of testing for workers in
19 certain healthcare settings. ECF No. 3663-1 at 260-63. CDPH concluded that, “[a]s we respond
20 to the dramatic increase in cases, all health care workers must be vaccinated to reduce the chance
21 of transmission to vulnerable populations.” *Id.* at 261. The order requires all workers who
22 “provide services or work in” a specified list of health care facilities to “have their first dose of a
23 one-dose regimen or their second dose of a two-dose regimen by September 30, 2021.” *Id.* The
24 order defined “worker” as including “all paid and unpaid individuals who work in indoor settings
25 where (1) care is provided to patients, or (2) patients have access for any purpose,” and
26 specifically included “security” personnel. *Id.* at 262. CDPH clarified the following day that the

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28 ¹ CCPOA’s motion to intervene, ECF No. 3665, is noticed for hearing in October and remains pending.

1 order did not apply to healthcare settings within correctional facilities and that further guidance
2 would be forthcoming.

3 On August 19, CDPH issued its further guidance in an order that requires the following
4 persons to “have their first dose of a one-dose regimen or their second dose of a two-dose regimen
5 by October 14, 2021”: “All paid and unpaid individuals who are regularly assigned to provide
6 health care or health care services to inmates, prisoners, or detainees,” and “[a]ll paid and unpaid
7 individuals who are regularly assigned to work within hospitals, skilled nursing facilities,
8 intermediate care facilities, or the equivalent that are integrated into the correctional facility or
9 detention center in areas where health care is provided.” ECF No. 3663-1 at 270-71. The latter
10 group “includes workers providing health care to inmates, prisoners, and detainees, as well as
11 persons not directly involved in delivering health care, but who could be exposed to infectious
12 agents that can be transmitted in the health care setting.” *Id.* at 271.

13 Defendants are implementing the August 19 CDPH order by requiring the following
14 individuals to be vaccinated: “all staff at California Health Care Facility (CHCF), California
15 Medical Facility (CMF), and the Skilled Nursing Facility at Central California Women’s Facility
16 (CCWF),” and all workers “regularly assigned to work” in certain healthcare areas systemwide,
17 including clinic treatment areas, Correctional Treatment Centers and other licensed beds, hospice
18 beds, and dialysis units. ECF No. 3662-3 at 2-3. The vaccine requirement does “not apply to non-
19 regularly assigned staff, such as relief staff, voluntary overtime, mandatory overtime, swaps, or
20 those who do not work in the area regularly, such as staff making pick-ups or deliveries,
21 conducting maintenance repairs, conducting tours, etc. Additionally, this will not apply to any
22 staff responding to emergencies.” *Id.* at 3. “[W]orkers in correctional settings who are not fully
23 vaccinated or who cannot show proof of vaccination [must] submit to twice-weekly testing,”
24 which exceeds the requirement in the July 26 CDPH order that such workers be tested weekly.
25 ECF No. 3662 ¶ 18.

26 **II. LEGAL STANDARD**

27 The Prison Litigation Reform Act (“PLRA”) allows prospective relief only if it “extend[s]
28 no further than necessary to correct the violation of the Federal right of a particular plaintiff or

1 plaintiffs.” 18 U.S.C. § 3626(a)(1)(A). The federal right at issue in this case is whether
 2 Defendants’ response to the threat posed by COVID-19 violates the Eighth Amendment. The
 3 parties and CCPOA agree on the relevant legal standard. As the Court previously explained:

4 To establish an Eighth Amendment violation “based on a failure to
 5 prevent harm, the inmate must [first] show that he is incarcerated
 6 under conditions posing a substantial risk of serious harm.” *Farmer*
 7 *v. Brennan*, 511 U.S. 825, 834 (1994). The Court need not analyze
 8 this issue in detail because Defendants have already stated before the
 9 Three-Judge Court that they “do not dispute the risk of harm that
 10 COVID-19 poses to inmates, as well as the community at large. Nor
 11 do Defendants dispute that those who are incarcerated may be at a
 12 higher risk for contracting COVID-19 given the circumstances of
 13 incarceration, including closer living quarters.” ECF No. 3235 at 17.
 14 Defendants do not attempt to relitigate the issue here, and the Court
 15 finds that this element has been established.²

16 The Court therefore turns to the second prong of the Eighth
 17 Amendment analysis: whether Plaintiffs have demonstrated that
 18 Defendants “have a ‘sufficiently culpable state of mind,’” which in
 19 this case requires “‘deliberate indifference’ to inmate health or
 20 safety.” *Farmer*, 511 U.S. at 834 (quoting *Wilson v. Seiter*, 501 U.S.
 21 294, 297, 302-03 (1991)). Under this standard, a prison official must
 22 “know[] that inmates face a substantial risk of serious harm and
 23 disregard[] that risk by failing to take reasonable measures to abate
 24 it.” *Id.* at 847. “A prison official’s duty under the Eighth Amendment
 25 is to ensure reasonable safety,” and “prison officials who act
 26 reasonably cannot be found liable under the Cruel and Unusual
 27 Punishments Clause.” *Id.* at 844-45 (internal quotation marks and
 28 citations omitted). There is no Eighth Amendment violation, for
 29 example, where prison officials “did not know of the underlying facts
 30 indicating a sufficiently substantial danger and . . . were therefore
 31 unaware of a danger,” or where “they knew the underlying facts but
 32 believed (albeit unsoundly) that the risk to which the facts gave rise
 33 was insubstantial or nonexistent.” *Id.* at 844. Likewise, “prison
 34 officials who actually knew of a substantial risk to inmate health or
 35 safety may be found free from liability if they responded reasonably
 36 to the risk, even if the harm ultimately was not averted.” *Id.* In
 37 determining whether officials have been deliberately indifferent,
 38 courts must give “due regard for prison officials’ ‘unenviable task of
 39 keeping dangerous men in safe custody under humane conditions,’”
 40 *id.* at 845 (quoting *Spain v. Procunier*, 600 F.2d 189, 193 (9th Cir.
 41 1979)), and “consider arguments regarding the realities of prison
 42 administration,” *Helling v. McKinney*, 509 U.S. 25, 37 (1993).

43 *Plata*, 445 F. Supp. 3d at 562 (footnote added).

44 If the Court finds the violation of a federal right, it may not, under the PLRA, “grant or

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 46 ² Defendants continue to acknowledge that “the COVID-19 pandemic presents a substantial risk of
 47 serious harm.” ECF No. 3660 at 9.

1 approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no
 2 further than necessary to correct the violation of the Federal right, and is the least intrusive means
 3 necessary to correct the violation of the Federal right.” 18 U.S.C. § 3626(a)(1)(A). “Narrow
 4 tailoring requires a fit between the remedy’s ends and the means chosen to accomplish those ends.
 5 The scope of the remedy must be proportional to the scope of the violation, and the order must
 6 extend no further than necessary to remedy the violation.” *Brown v. Plata*, 563 U.S. 493, 531
 7 (2011) (quotation marks, alterations, and citations omitted). “But the precedents do not suggest
 8 that a narrow and otherwise proper remedy for a constitutional violation is invalid simply because
 9 it will have collateral effects.” *Id.* Instead, the PLRA’s restrictions on injunctive relief mean
 10 “only that the scope of the order must be determined with reference to the constitutional violations
 11 established by the specific plaintiffs before the court.” *Id.*

12 **III. DISCUSSION**

13 There has been no objection to the Receiver’s recommendation “that incarcerated persons
 14 who desire to work outside of the institution (e.g., fire camps) or to have in-person visitation must
 15 be vaccinated (or establish a religious or medical exemption).” ECF No. 3638 at 27.

16 Accordingly, the Court focuses below on the contested recommendation “that access by workers
 17 to CDCR institutions be limited to those workers who establish proof of vaccination (or who have
 18 established a religious or medical exemption to vaccination).” *Id.* In particular, the Court
 19 examines whether ordering implementation of the Receiver’s recommendation is necessary, and is
 20 the least restrictive means, to remedy a violation of Plaintiffs’ Eighth Amendment rights.

21 **A. Deliberate Indifference**

22 Defendants first argue that a finding of deliberate indifference is precluded by the fact that
 23 a portion of the incarcerated population has refused to accept the vaccine they have been offered.
 24 However, the cases they rely on are cases seeking individual injunctive relief, rather than the type
 25 of systemic relief sought here.³ *See Pride v. Correa*, 719 F.3d 1130, 1137 (9th Cir. 2013)

26
 27 ³ *Davis v. Allison*, on which Defendants seek to rely for its conclusion that the plaintiff was
 28 unlikely to succeed on the merits of his COVID-related deliberate indifference claim, is
 distinguishable for the same reason. No. 1:21-cv-00494-HBK, 2021 WL 3761216 (E.D. Cal.
 Aug. 25, 2021), *report and recommendation adopted*, 2021 WL 4262400 (E.D. Cal. Sept. 20,

1 (“Individual claims for injunctive relief related to medical treatment are discrete from the claims
 2 for systemic reform addressed in *Plata*.”). More significantly, Defendants fail to consider that it is
 3 not only the unvaccinated population that is at substantial risk of serious harm from COVID-19,
 4 and that such risk would be present even if the entire incarcerated population were vaccinated.
 5 The un rebutted evidence⁴ is that, “although vaccination greatly reduces the risk of harm, the Delta
 6 variant presents a substantial risk of serious harm even to fully vaccinated patients.” ECF No.
 7 3652 ¶ 5. This is because “some fully vaccinated individuals will contract COVID-19. When a
 8 fully-vaccinated patient becomes infected this is referred to as a ‘breakthrough’ infection.
 9 Although the exact rate of breakthrough infections is not yet clear, the Delta variant causes
 10 breakthrough infections significantly more often than prior COVID-19 variants.” *Id.* ¶ 3. The
 11 most recent data in the record is that:

12 Through September 1, 2021, 385 fully vaccinated patients in CDCR
 13 custody have suffered COVID-19 breakthrough infections, and 94 of
 14 those patients had a COVID risk score of 3 or higher, indicating a
 15 high risk of severe disease. One patient who CCHCS [California
 16 Correctional Health Care Services] believes was fully vaccinated has
 17 died of COVID-19. Other patients with breakthrough infections have
 18 also experienced serious symptoms and there are early indications
 19 that some may have long-term symptoms.

20 ECF No. 3670-1 ¶ 9 (footnotes omitted). Long-term effects of COVID-19 can include “fever,
 21 chest pains, shortness of breath, diarrhea, vomiting, sudden onset diabetes and hypertension, mood
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23 _____
 24 2021) (denying motion for preliminary injunction). In addition, *Davis* is not persuasive because
 25 the plaintiff did not raise the issues that are currently before this Court. Instead, *Davis* more
 26 narrowly complained about circumstances in which incarcerated persons are released from
 27 quarantine housing and the lack of adequate cleaning supplies. *Id.* at *1. The court determined
 28 that “[t]he only disputed fact on this record concerns the inmates’ respective access to cleaning
 supplies for their respective cells,” but that the record demonstrated that “inmates *do* have access
 to cleaning supplies” and that *Davis* did not “allege that he asked for cleaning supplies for his cell
 and was denied any supplies.” *Id.* at *6 (emphasis in original). The court also noted that *Davis*
 had chosen to receive the vaccine and concluded that his “claims of threatened harm are
 speculative at best.” *Id.* at *4. In this case, however, the Receiver and Plaintiffs have presented
 evidence – un rebutted by Defendants – that the harms faced by vaccinated incarcerated persons
 are substantial and not speculative, as explained in more detail below.

⁴ Aside from the Declaration of James Watt, discussed further below, no medical or public health
 evidence was submitted in opposition to the Receiver’s recommendations. Indeed, Defendants
 explicitly stated that they “agree with the public health findings regarding the COVID-19 vaccine
 cited in the Receiver’s report.” ECF No. 3660 at 24.

1 disorders, and nervous system disorders. Such long-term symptoms are sometimes experienced
2 by patients who had mild COVID-19 symptoms and the impact may be life-long.” ECF No. 3638
3 at 6-7 (footnotes omitted). Moreover, although much of the recent focus has been on the Delta
4 variant, which “is more than twice as transmissible as the Wuhan strain,” the risk is not limited to
5 that variant; instead, “[t]he virus is likely to continue to mutate, potentially creating even more
6 transmissible strains than Delta.” ECF No. 3638-1 ¶¶ 29, 33.

7 In addition, COVID-19 outbreaks pose other serious risks to incarcerated persons beyond
8 the direct impacts of COVID-19 infection. For example, during an outbreak, “non-essential
9 medical services are postponed. Only after 14 days without a new infection in that institution can
10 medium priority healthcare services like preventative care and screenings resume. Routine
11 clinical operations are suspended until 28 days without a new infection.” ECF No. 3638 at 18
12 (footnotes omitted). “An outbreak is defined as three or more related COVID-19 incarcerated
13 person cases within a facility, as determined by a contact investigation, in the past 14 days.” ECF
14 No. 3673-1 ¶ 15. “During outbreaks, a large number of people are on quarantine due to exposure.
15 When quarantined for exposure, incarcerated persons experience restricted movement and
16 therefore have limited access to routine healthcare and screenings because they cannot go to the
17 clinic.” ECF No. 3652 ¶ 7. And for those incarcerated persons who are able to attend clinic
18 because they are not themselves on quarantine, appointment availability is limited because
19 quarantines “divert clinical staff resources to performing mass testing, medication administration,
20 and rounds on COVID-19 patients rather than providing routine medical care.” *Id.* Delays in
21 clinical care are also caused by the “large number of staff in quarantine” – approximately 5,500 in
22 total over the past year – either because they have themselves contracted COVID-19 or because
23 they “are identified as close contacts of an infected individual.” *Id.* ¶ 9. The pandemic has led to
24 significant increases in backlog appointments for both primary and specialty care, and the increase
25 in cases due to the Delta variant is expected to lead to further delays. *Id.* ¶¶ 10-11. As of July
26 2021, there were approximately 5,000 backlogged primary care appointments and 8,000
27 backlogged specialty appointments. *Id.* at 31, 33. Although mental health care is the subject of
28 the *Coleman* case, the Court notes the undisputed evidence that outbreaks cause “a significant

1 impediment to the delivery of group therapy” and “complicate the movement of patients for higher
 2 level mental health care.” ECF No. 3638-1 ¶¶ 9-10; *see also* ECF No. 3658 (brief of amici mental
 3 health professionals). In short, “[a]dditional program modifications and the renewed diversion of
 4 healthcare resources to address COVID-19 cases from Delta variant outbreaks put patients at a
 5 substantial risk of serious harm.” ECF No. 3652 ¶ 8.

6 Defendants also argue that the Court cannot find them deliberately indifferent in light of
 7 their multi-faceted response to the COVID-19 pandemic and the Court’s April 2020 determination
 8 that Defendants were not deliberately indifferent at that time. This argument is unpersuasive.
 9 Deliberate indifference “should be determined in light of the prison authorities’ *current* attitudes
 10 and conduct.” *Helling*, 509 U.S. at 36 (emphasis added). While the Court concluded seventeen
 11 months ago that Defendants’ initial response to the pandemic was not deliberately indifferent, it
 12 cannot reach that same conclusion based on the current record. In its prior ruling, the Court
 13 explained:

14 No bright line divides a reasonable response from one that is
 15 deliberately indifferent in violation of the Eighth Amendment. In this
 16 case, however, the Court concludes without difficulty that
 17 Defendants’ response has been reasonable. Plaintiffs identify other
 18 steps Defendants might take to provide for greater physical
 distancing, but they cite no authority for the proposition that
 Defendants’ failure to consider or adopt these potential alternatives
 constitutes deliberate indifference within the meaning of the Eighth
 Amendment.

19 *Plata*, 445 F. Supp. 3d at 568. The Court reached this conclusion in part because Defendants had
 20 already implemented measures to increase physical distancing; Plaintiffs failed to articulate any
 21 “standard by which to determine how much physical distance is required to ensure reasonable
 22 safety”; Defendants had recently agreed to comply with a cohorting directive from the Receiver
 23 designed to increase physical distancing; and “Plaintiffs [did] not argue that housing in
 24 compliance with the Receiver’s directive would be constitutionally inadequate.” *Id.* at 564-68
 25 (quotation marks and citation omitted). As discussed below, such considerations are not present
 26 here. At the time of the Court’s prior ruling, no vaccine was available. A finding that Defendants
 27 were not deliberately indifferent based on a toolbox without a vaccine has little relevance when
 28 the same toolbox now includes a vaccine that everyone agrees is one of the most important tools,

1 if not the most important one, in the fight against COVID-19.

2 Defendants do not dispute any of the relevant facts, nor do they present any evidence
 3 suggesting it would be reasonable not to adopt the Receiver’s recommendations. The closest they
 4 come is the declaration of Dr. James Watt, a CDPH official, who states that other “measures, when
 5 considered in conjunction with the relatively high rate of vaccination among the incarcerated
 6 population, will significantly mitigate the spread of the virus,” and that “[t]he best way for patients
 7 in correctional settings to reduce their risk of severe illness – regardless of location – would be to
 8 get vaccinated.”⁵ ECF No. 3661 ¶¶ 17, 18. But Watt stops short of saying that vaccination, even
 9 when in combination with other measures, offers incarcerated persons sufficient protection from
 10 COVID-19. Nor could such a conclusion be reconciled with the uncontested evidence regarding
 11 the dangers COVID-19 presents to vaccinated incarcerated persons. Likewise, even if other
 12 measures “significantly mitigate” the spread of the virus, Watt does not say that they are sufficient
 13 to protect Plaintiffs from those harms. Defendants have pointed to no measure or combination of
 14 measures that offers the incarcerated population the same level of protection as the vaccine
 15 mandates recommended by the Receiver. They do not refute the studies cited by the Receiver that
 16 conclude that “COVID-19 spreads far more rapidly inside jails and prisons than in other
 17 environments,” in part because individuals who live in congregate settings like prisons “have
 18 intense, long-duration, close contact.” ECF No. 3638 at 10-16. Nor do Defendants dispute the
 19 Receiver’s conclusion that “[l]imiting the introduction of COVID-19 into prisons is critical to
 20 protecting the health of incarcerated people” because:

21 prison systems, even those that take important mitigation measures
 22 such as masking and social distancing, are not designed and operated
 23 to prevent the transmission of a highly contagious virus and cannot be
 24 redesigned to do so effectively in the near term. The conditions of
 25 confinement and the manner in which the prisons are operated deprive
 26 incarcerated people of the same opportunities to protect themselves
 27 through social distancing and limiting contact that are available to the
 28 public at large.

⁵ Defendants also attempt to rely on the December 9, 2020 declaration of Dr. Anne Spaulding. ECF No. 3505. However, Spaulding was opining on Defendants’ efforts at that time, prior to the availability of a vaccine, and Defendants have not offered her opinion on the reasonableness of Defendants’ efforts under current circumstances.

1 *Id.* at 16.

2 It is also uncontested that “[i]nstitutional staff are primary vectors for introducing
3 COVID-19 into CDCR facilities,” *id.* at 7, and that “[i]nstitutions with low staff vaccination rates
4 experience larger and more frequent COVID-19 outbreaks,” ECF No. 3652 ¶ 9. For example, half
5 of the 14 outbreaks between May and July 2021 have been traced to staff, and that number could
6 still grow because analysis of the remaining outbreaks is ongoing. ECF No. 3638-1 ¶ 17 & at
7 9-12. Between July 31 and September 10, 2021, a staggering 48 outbreaks “have been traced back
8 to institutional staff.” ECF No. 3670-1 ¶ 6. The record does not include the number of outbreaks
9 overall that occurred during this latter period, but the number of outbreaks traced back to staff
10 alone, over a shorter period of time, indicates that the introduction of the virus into CDCR
11 institutions by staff is increasing. By contrast, “[i]ncarcerated persons who neither work outside
12 of CDCR institutions nor participate in in-person visitation do not present a significant risk of
13 introducing SARS-CoV-2 into CDCR institutions.” ECF No. 3638-1 ¶ 13. “Because COVID-19
14 spreads so easily within prisons and is so disruptive to prison operations once outbreaks begin, it is
15 particularly important that all people going between the community and institutions without
16 quarantining are fully vaccinated to prevent the introduction of COVID-19 to institutions.” ECF
17 No. 3670-1 ¶ 4. Defendants themselves acknowledge that “[v]accination in the largest possible
18 numbers, including all incarcerated people, is clearly one of the best available protections against
19 COVID-19.” ECF No. 3660 at 25.

20 Defendants also do not contest the Receiver’s analysis regarding the insufficiency of
21 testing as an alternative to vaccination:

22 Frequent testing is insufficient to prevent institutional staff who are
23 unaware that they have COVID-19 from spreading the virus. . . .
24 CDCR has indicated that . . . it will test unvaccinated employees twice
25 per week. Tests can detect a positive case only where a certain viral
26 load is present, so a recently infected individual may not test positive
27 for several days after exposure. Results of COVID-19 tests are also
28 typically available only after a wait of a day or longer. An infected
staff member might work two or three days before being tested; a
newly infected staff member may test negative, continue working and
reach a viral load sufficient to transmit the virus before being tested
again and finally receiving a positive test result.

1 Because as much as 40 percent of transmission is pre-symptomatic,
 2 individuals who receive false negative test results or who test too
 3 early may be unaware they are contagious throughout this period. As
 4 a result, the twice-per-week testing regimen does not effectively
 prevent asymptomatic staff from introducing COVID-19 to CDCR
 institutions. Indeed, even daily testing would not do so. Testing is an
 essential component of any plan, but it is not a substitute for
 vaccination.

5 ECF No. 3638 at 8-9 (footnotes omitted). “CDCR staff are vaccinated at far too low a rate to
 6 reduce the risk of mass outbreaks in CDCR institutions.” ECF No. 3638-1 ¶ 37.

7 Even in light of all of the above, Defendants argue that their implementation plan for the
 8 July 26 and August 19 CDPH orders is sufficient.⁶ The uncontradicted public health record before
 9 the Court says otherwise. Defendants’ plan mandates vaccination at only two institutions in their
 10 entirety, and only for staff who are regularly assigned to work in certain designated healthcare
 11 settings at the remaining institutions. This partial vaccination requirement is an unreasonable
 12 attempt to address the risk of harm to Plaintiffs for several reasons. First, the incarcerated
 13 population is not at risk only, and may not even be at the highest risk, in areas that Defendants
 14 have designated as healthcare settings. For example, Defendants do not dispute that incarcerated
 15 persons do not wear masks when eating or sleeping, and that this increases the chance of
 16 transmission.⁷ ECF No. 3638 at 13-14. Nor do Defendants dispute the myriad ways in which
 17 incarcerated persons come into close contact with staff outside of healthcare settings. *E.g.*, ECF
 18 No. 3638-2 ¶ 3 (“Corrections officers have frequent, daily, close contact with incarcerated
 19 persons.”); ECF No. 3663-2 ¶¶ 12-16 (describing close contact between staff and incarcerated
 20 persons with physical disabilities); ECF No. 3663-3 ¶¶ 5-6 (describing close contact between staff
 21

22 ⁶ Defendants raise this argument in the context of narrow tailoring, but the issue is properly
 23 considered as part of the deliberate indifference analysis because it goes towards the
 reasonableness of Defendants’ response to the risk of harm to Plaintiffs.

24 ⁷ Defendants present evidence that there are fewer occupied beds in dormitories now than there
 25 were at the beginning of the pandemic. ECF No. 3673-1 ¶ 12. While this might increase the
 26 distance between incarcerated persons while they are sleeping, it does not remove the danger of
 27 transmission “because the air in any given room is shared with each individual in that room and
 the length of exposure is so long.” ECF No. 3638-3 ¶ 15. Public health experts have concluded,
 28 without rebuttal, that “to minimize COVID-19 risk, dorms with a capacity of fifty people should
 house only three people, and that small dorms with the capacity of six people and cells with
 capacity of two people should both house only a single person.” ECF No. 3638 at 14 (emphasis
 omitted). Defendants do not contend that they have reduced capacity to such levels.

1 and incarcerated persons with developmental disabilities). Even healthcare itself can be provided
 2 outside designated healthcare settings; for example, during quarantines, “[u]rgent care is provided
 3 to patients in their cells or dormitories.” ECF No. 3652 ¶ 7. Put most simply, “[i]ncarcerated
 4 persons spend the vast majority of their time outside of healthcare settings, where staff with whom
 5 they come into contact are vaccinated at much lower rates.” ECF No. 3670-1 ¶ 5. Given recent
 6 outbreaks, there is no doubt that the limited vaccine requirements adopted by Defendants are
 7 insufficient “to ensure reasonable safety.” *Farmer*, 511 U.S. at 844 (quotation marks and citation
 8 omitted). Of the 48 outbreaks traceable to staff since July 31, only 14, or 29%, were “traced back
 9 to a person that the August 19 CDPH order would require to be vaccinated.” ECF No. 3670-1 ¶ 6.

10 Second, and relatedly, requiring vaccination only for workers assigned to designated
 11 healthcare settings does not protect vulnerable persons who do not reside in those settings.
 12 Defendants acknowledge that patients with COVID-19 risk scores greater than 3 are classified as
 13 “medically high-risk.”⁸ ECF No. 3662 ¶ 5. Throughout the prison system, 17,886 patients have
 14 such a score. ECF No. 3670-1 ¶ 8. Of those, “15,246 (85%) live in a space not covered by the
 15 August 19 CDPH order,” and another “313 live in a medical facility located within an institution
 16 that is not fully covered by the order. The August 19 CDPH order does not provide significant
 17 protection from outbreaks for either of these two groups,” which constitute the overwhelmingly
 18 majority of high-risk patients housed in CDCR institutions. *Id.* These patients are housed
 19 throughout all of CDCR’s adult institutions. ECF No. 3674-1 ¶ 2. In response to the Court’s
 20 request for information regarding “whether there is any reason for concluding that these
 21 individuals are at lower risk than the high-risk individuals housed in the covered institutions or
 22 areas,” ECF No. 3653 at 3, Defendants offered only that such persons “are likely to have widely
 23 variable levels of risk, depending on the institution and the location within the institution of an

24
 25 ⁸ “The COVID Weighted Risk Score Factors and their weights in parentheses include:
 26 Age 65+ (4), Advanced Liver Disease (2), Persistent Asthma (1), High Risk Cancer (2), Chronic
 27 Kidney Disease (CKD) (1), Stage 5 CKD or receiving dialysis (1), Chronic Lung Disease
 28 (including Cystic Fibrosis, Pneumoconiosis, or Pulmonary Fibrosis) (1), COPD (2), Diabetes (1),
 High Risk Diabetes (1), Heart Disease (1), High Risk Heart Disease (1), Hemoglobin Disorder (1),
 HIV/AIDS (1), Poorly Controlled HIV/AIDS (1), Hypertension (1), Immunocompromised (2),
 Neurologic Conditions (1), Obesity (1), Other High Risk Chronic Conditions (1), and
 Pregnancy (1).” ECF No. 3663-1 at 42.

1 exposure.” ECF No. 3661 ¶ 18. The Court cannot conclude from that submission that at-risk
2 patients who reside outside of designated healthcare areas are any less vulnerable than those
3 individuals who live in designated healthcare areas. Defendants also assert that the August 19
4 order “targets employees who work closely with *particularly* vulnerable patients,” ECF No. 3660
5 at 21 (emphasis in original), but they fail to explain why those patients merit protection only while
6 present in a designated healthcare setting.

7 Third, transmission of the virus cannot be controlled by requiring vaccination only for staff
8 in limited areas of an institution. Defendants do not dispute that “[p]rison operations require
9 people from throughout the prison to come into contact with each other, making it difficult to
10 isolate an outbreak to only one housing unit or yard.” ECF No. 3638 at 13. “Medical facilities
11 and yards often share facilities with the entire institution, such as cafeterias, yards, and
12 programming spaces,” which means that incarcerated persons who reside in those areas “have
13 contact with staff and incarcerated persons from other yards.” ECF No. 3670-2 ¶ 5. As a
14 consequence, the same person can cause multiple areas to be placed in quarantine, as happened
15 recently when a single staff member exposed four housing units to the virus. ECF No. 3674-1 at
16 90.

17 Fourth and finally, even if Defendants had presented evidence that only healthcare areas
18 need be covered by a vaccine requirement, the limitation to only workers who are regularly
19 assigned to such areas would render the requirement ineffective. Defendants have themselves
20 characterized “the flexibility to send custody staff to locations where they are needed, which can
21 change from day to day due to staff illness, leave, emergencies, changes in programming, staffing
22 shortages, promotions, and transfers, among other reasons” as necessary and “even more essential
23 during the current pandemic.” ECF No. 3314 at 5-6. “Every day, across all CDCR institutions,
24 there are hundreds of employees working in areas to which they are not regularly assigned,”
25 including “relief officers with no permanent post who fill different vacancies from day to day,”
26 and “[s]taff are often temporarily assigned to medical facilities.” ECF No. 3670-2 ¶¶ 2-3.
27 “Officers working their ordinary shifts are often reassigned to cover higher-need vacant positions.
28 For example, a gym officer may be reassigned for the day to guard a clinic in order to keep the

1 clinic operating.” ECF No. 3638-2 ¶ 4. Thus, workers who are not subject to Defendants’ current
 2 vaccination requirement regularly work in designated healthcare settings despite not being
 3 regularly assigned to those areas. In other words, Defendants plan to regularly send unvaccinated
 4 staff into areas they concede are in need of greater protection. For all of the above reasons,
 5 Defendants’ implementation of the August 19 CDPH order does not constitute a reasonable
 6 response to Plaintiffs’ risk of harm.

7 The August 5 CDPH order that applies to non-correctional healthcare settings underscores
 8 the unreasonableness of Defendants’ position. One of the purposes of that order was “to protect
 9 particularly vulnerable populations.” ECF No. 3663-1 at 260. It applied to hospitals, skilled
 10 nursing facilities, and other healthcare facilities because those facilities were determined to be
 11 “particularly high-risk settings where COVID-19 outbreaks can have severe consequences for
 12 vulnerable populations including hospitalization, severe illness, and death.” *Id.* These settings
 13 were also described as “shar[ing] several features. There is frequent exposure to staff and highly
 14 vulnerable patients, including elderly, chronically ill, critically ill, medically fragile, and disabled
 15 patients. In many of these settings, the patients are at high risk of severe COVID-19 disease due
 16 to underlying health conditions, advanced age, or both.” *Id.*

17 These same descriptors concededly apply to California’s prisons as a whole, and not only
 18 to designated healthcare facilities within those prisons. *See, e.g.*, ECF No. 3638 at 16-18 (noting
 19 that incarcerated persons infected with COVID-19 “have worse health outcomes on average than
 20 the population as whole,” “in part because they have risk factors for COVID-19 at a
 21 disproportionate rate compared to the general public” and “are often considered effectively ten
 22 years older, physiologically, than their chronological age”). In fact, the July 26 CDPH order
 23 described correctional facilities as “residential facilities where the residents have little ability to
 24 control the persons with whom they interact. There is frequent exposure to staff and other
 25 residents. In many of these settings, the residents are at high risk of severe COVID-19 disease due
 26 to underlying health conditions, advanced age, or both.” [https://www.cdph.ca.gov/Programs/
 27 CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Unvaccinated-Workers-
 28 In-High-Risk-Settings.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Unvaccinated-Workers-In-High-Risk-Settings.aspx). Moreover, one basis for the August 5 order was that “[r]ecent

1 outbreaks in health care settings have frequently been traced to unvaccinated staff members,”
2 which led CDPH to concluded that “all health care workers must be vaccinated to reduce the
3 chance of transmission to vulnerable populations.” ECF No. 3663-1 at 261. As discussed above,
4 recent outbreaks in prisons – not only in designated healthcare areas within prisons – have also
5 been traced to staff. Defendants do not explain why it would be reasonable to refuse a similar
6 vaccination requirement to reduce the chance of transmission to the vulnerable population that
7 resides in CDCR’s facilities.

8 Defendants assert that “CDCR has made every effort to implement COVID-19 safety
9 measures based on the latest public health guidance and available resources.” ECF No. 3673 at 4.
10 However, to the extent that assertion might have been true before, it is no longer supported by the
11 record. Neither Defendants nor CCPOA disputes that COVID-19 continues to pose a substantial
12 risk of serious harm – including death – to incarcerated persons, regardless of their vaccination
13 status; that, even with mitigation measures in place, the virus spreads quickly in a prison setting;
14 that limiting the introduction of the virus is therefore critical to protecting the health of
15 incarcerated persons; that staff are the primary vector of introducing the virus into a prison; or that
16 testing is ineffective at controlling that vector. In the absence of any evidence suggesting that
17 Defendants’ existing mitigation measures reasonably address this risk, the issue is not whether
18 mandatory vaccines are merely a further step Defendants could take, but whether it would be
19 unreasonable not to take it. *See Plata*, 445 F. Supp. 3d at 568 (“[T]he question before the Court is
20 not what it thinks is the best possible solution. Rather, the question is whether Defendants’
21 actions to date are reasonable.”). Defendants have disregarded a substantial risk of serious harm
22 “by failing to take reasonable measures to abate it” and are therefore violating Plaintiffs’ Eighth
23 Amendment rights.⁹ *Farmer*, 511 U.S. at 847.

24
25 ⁹ Defendants state that they “are not aware of any other prison system in the country that has been
26 as innovative or proactive in responding to the COVID-19 pandemic and protecting the health and
27 safety of inmates during these unprecedented times.” ECF No. 3660 at 17. While that may be
28 true in some respects, Defendants are not leaders on the question of protecting incarcerated
persons against the introduction of the virus by staff, whom Defendants concede are the primary
sources of exposure. Unlike California, multiple other jurisdictions – including the Federal
Bureau of Prisons; the states of Oregon, Washington, Colorado, Illinois and Massachusetts; and
several counties within California, including Orange, San Francisco, Los Angeles, Contra Costa,

B. Narrow Tailoring

Having found an Eighth Amendment violation, the Court now considers whether the Receiver's recommendations present a narrowly tailored remedy. Defendants and CCPOA make several arguments as to why they do not, all of which are unavailing.

First, Defendants suggest that a mandatory staff vaccination policy is not narrowly tailored because the best protection for incarcerated persons would come from a mandatory vaccination policy for incarcerated persons. CCPOA also raises this argument, but with respect to deliberate indifference rather than narrow tailoring. No one has disputed that getting vaccinated provides one of the most effective protections against COVID-19. However, neither the Receiver nor any party has recommended that vaccination be required for all incarcerated persons, and so that question is not before the Court. More importantly, as discussed above, Defendants and CCPOA 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. A policy directed towards vaccination of the incarcerated population, aside from those persons covered by the Receiver's uncontested recommendation regarding persons who work outside the institution or receive in-person visitation, would not address these issues and therefore would provide no remedy for the identified harm. Nonetheless, because no one disputes the effectiveness of vaccination as a protective measure, the Court directs the Receiver to consider additional efforts to increase the vaccination rate among the incarcerated population, including whether a mandatory vaccination policy should be implemented.

Second, Defendants and CCPOA argue that Defendants' implementation of the August 19 CDPH order is a lesser intrusive remedy. For the reasons already discussed, that plan is too limited to reasonably address the substantial risks faced by Plaintiffs. By Defendants' own admission, the CDPH order was not intended to address the risk of introduction of the virus by staff into the institutions or even to protect the incarcerated population in anything other than healthcare settings. Instead, the order was intended "to protect particularly vulnerable populations

and Santa Clara – have adopted mandatory vaccination requirements applicable to correctional staff. ECF No. 3663-1 at 362-431; ECF No. 3674-1 at 256-60.

1 receiving care in health care settings, and ensure a sufficient, consistent supply of workers in high-
 2 risk health care settings.” ECF No. 3661 ¶ 12. Thus, although the CDPH order is more narrow
 3 and would be less intrusive than the Receiver’s recommendation, it was not intended to and does
 4 not reasonably abate the risk of serious harm to Plaintiffs.

5 Third, Defendants and CCPOA argue that existing efforts to increase vaccination among
 6 staff are sufficient. However, these efforts “have had minimal success, with the rate of
 7 vaccination increasing by just 1% in July (from 52% to 53%) and 2% in August 2021 (from 53%
 8 to 55%).” ECF No. 3670-1 ¶ 11. Included as part of the August efforts “was a program of
 9 mandatory one-on-one vaccine counseling” through which “5,135 staff members attended a
 10 counseling appointment” but only 262 – approximately 5% – agreed to be vaccinated, with 4,385
 11 signing “a formal declination, refusing to become vaccinated.” *Id.* That program “has been halted
 12 to redirect resources to complying with the August 19 CDPH order.” *Id.* Neither Defendants nor
 13 CCPOA offer any evidence suggesting that further voluntary efforts will be any more successful,
 14 nor do they contest that “CDCR staff are vaccinated at far too low a rate to reduce the risk of mass
 15 outbreaks in CDCR institutions.” ECF No. 3638-1 ¶ 37.

16 In short, none of the alternatives suggested by Defendants or CCPOA would correct the
 17 violation of Plaintiffs’ Eighth Amendment rights identified in this order, and the Court concludes
 18 that the Receiver’s recommendation “is narrowly drawn, extends no further than necessary to
 19 correct the violation of the Federal right, and is the least intrusive means necessary to correct the
 20 violation of the Federal right.” 18 U.S.C. § 3626(a)(1)(A).

21 C. Other Considerations

22 Three other considerations warrant discussion. First, Plaintiffs argued in their initial
 23 response that workers who are unvaccinated due to their religious beliefs should not be allowed to
 24 enter the prisons. They do not raise this argument in their reply brief, and it is not clear whether
 25 they continue to request this relief. In any event, the request is premature, as the manner in which
 26 a vaccine mandate might be implemented has not yet been determined – and is something that the
 27 Court leaves to the discretion of the Receiver and Defendants in the first instance. Nor does
 28 Plaintiffs’ brief discussion of the issue establish that the requested relief is proper under the PLRA.

1 Additionally, the Receiver shall consider efforts to increase the vaccination rate among the
2 incarcerated population, including whether a mandatory vaccination policy should be
3 implemented.

4 **IT IS SO ORDERED.**

5 Dated: September 27, 2021

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8 JON S. TIGAR
9 United States District Judge
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United States District Court
Northern District of California