SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

IN THE MATTERS OF Michael Hall (SC212933), et al. Darious Sommons (SC213244), et al. Dontaye Harris (SC213534) and Ivan Von Staich (SC212566), Petitioners, FOR WRIT OF HABEAS CORPUS.	**SAN QUENTIN CONSOLIDATED WRIT PROCEEDING GROUPS 1-3** **TENTATIVE RULING** ***THIS ORDER DOES NOT REFLECT THE FINAL RULING OF THE COURT AND SHALL NOT BE CITED OR REFERENCED AS A RULING OF THE COURT***

I. Introduction

"By all accounts, the COVID-19 outbreak at San Quentin has been the worst epidemiological disaster in California correctional history." (*In re Von Staich* (2020) 56 Cal.App.5th 53, 60, review granted Dec. 23, 2020, S265173, cause transferred *sub nom*. *Staich on H.C.* (2020) 272 Cal.Rptr.3d 813.) That disaster has spawned well in excess of 700 petitions for a writ of habeas corpus filed in this court by San Quentin inmates. The petitions allege that the conditions under which the state has confined petitioners violate the Eighth Amendment to the United States Constitution and Article I, Section 17 of the California Constitution. Those provisions prohibit cruel and unusual (or, in the case of the California Constitution, cruel *or* unusual), punishment.

As summarized below, after consolidating approximately 300 petitions and issuing Orders to Show Cause, pursuant to Penal Code section 1484 and California Rules of Court, rule 4.551(f), the court conducted an evidentiary hearing. Denise Yates, Krista Pollard, John Walters, Michael Lagrama and Andrew Gipson appeared for Respondent Warden of San Quentin State Prison and real party in interest California Department of Corrections and Rehabilitation

("CDCR") (collectively, "Respondent"). Khari Tillery, Jennifer Huber, Kristin Hucek, Sarah Salomon, Taylor Reeves and Nathaniel Brown from Keker, Van Nest & Peters LLP; Thomas Brown from Foley & Lardner LLP; Charles Carbone from the Law Office of Charles A. Carbone; Matthew Siroka from the Law Office of Matthew A. Siroka; Thomas McMahon, Christine O'Hanlon, and Kathleen Boyle from the Office of the Marin County Public Defender; Kwixuan Maloof, Anita Nabha, Kathleen Guneratne from the Office of the San Francisco Public Defender; Stephen Dunkle and Sarah Sanger from Sanger Swysen & Dunkle; and J. Bradley O'Connell and L. Richard Braucher of the First District Appellate Project, appeared for Petitioners.

This order follows.

II. The Parties

A. Petitioners

Petitioners are approximately 270 current and former San Quentin inmates who filed petitions for a writ of habeas corpus between July 7, 2020 and September 2, 2020, or filed in another court and were transferred to this court ("Petitioners"). Several of the original petitioners in this group no longer have active petitions for the court to review. Some moved institutions, rendering their claims moot by prior order of the court. Some withdrew their petitions.

B. The Warden

Ronald Broomfield was, when the petitions were filed and through the evidentiary hearing, the acting Warden of San Quentin State Prison, and a respondent on all petitions. (See Pen. Code § 1477 ["The writ must be directed to the person having custody of or restraining the person on whose behalf the application is made . . ."].)

C. CDCR

The California Department of Corrections and Rehabilitation ("CDCR") has responsibility for the safety and security of all San Quentin (and California) inmates.

The parties now dispute whether CDCR is also a respondent. As the Warden's employer, CDCR is at least a real party in interest. The court directed its Orders to Show Cause to the San Quentin Warden. Respondent now contends that section 1477 limits the respondent in any habeas proceeding to only the warden of the prison housing the petitioner. For several reasons, the court finds that position without merit.

First, CDCR also has custody of all inmates in California prisons. Second, in many situations, only CDCR can discharge the relief ordered by a court. For example, Warden Broomfield testified that he lacks the power to release or transfer inmates out of San Quentin; only higher authorities at CDCR can do that. Yet, Petitioners seek precisely that relief and the court has the power to order it. Third, as exemplified by the Von Staich petition, sometimes a court will continue to consider the issues raised by a petition even after the petitioner no longer resides at the prison. In those situations, the warden no longer has control over the petitioner, yet the court can order relief that only CDCR can satisfy. Finally, despite its protestations now, CDCR appears to understand it operates as a respondent in this proceeding and is estopped from contending otherwise. For example, Petitioners noticed several Person Most Qualified depositions directed to CDCR as respondent. Without objection, CDCR proffered witnesses in response to those deposition notices. As one example, Dr. Jasdeep Bal is the Deputy Medical Executive of California Correctional Healthcare Services ("CCHCS"), overseeing the region that includes San Quentin. (CCHCS has responsibility for providing healthcare to San Quentin and all other California inmates.) Dr. Bal testified as the Person Most Qualified on behalf of CDCR regarding "Respondent's awareness of the risk of harm posed by COVID to the health and safety of prisoners, including Petitioners:"

> Q: Do you understand that you are here to offer testimony on behalf of respondents on this topic?
> A: Yes.
> Q: And do you understand that respondent is CDCR and its employees and agents?
> A: Yes.

(Bal depo., 23:22-24:3.)

This confusion over the actual respondent appears to be both long-standing and insignificant for purposes of ordering relief. For example, in *In re Davis* (1979) 25 Cal.3d 384, 387-389, the California Supreme Court referenced "respondent" in the singular, then three paragraphs later as plural "respondents," then two paragraphs after that again as a singular "respondent." As reflected by CDCR's own lack of objection and response to the deposition notices naming it as a respondent, CDCR obviously well-understands that even when the petition and Order to Show Cause name a single respondent, CDCR stands in as a respondent, subject to the court's jurisdiction for any relief the court might order. The court will refer to the Warden and CDCR collectively as "Respondent."

III. Procedural History

These consolidated petitions have travelled a winding procedural road. As set forth below, throughout the process the court has attempted to balance multiple, sometimes conflicting issues. Those included the need for urgent action on the petitions (particularly in the worst part of the outbreak at San Quentin), judicial economy in the wake of what initially was a closed down courthouse that then reopened with limited courtrooms and staff, and the periodic guidance from higher courts.

A. Consolidation Groups 1-3

By order dated July 14, 2020, the court issued an Order to Show Cause ("OSC") as to an initial group of the petitions from San Quentin inmates. The court consolidated those cases under the lead case of *In re Michael Hall (SC212933)* as Consolidation Group 1. In the OSC, given the urgency of the issues raised in the various petitions and pursuant to California Rules of Court, rule 4.551(h), the court expedited the timeline for filing of the return and traverse. Pursuant to the court's orders, Respondents filed their return on August 4, 2020, as to all but petitioners Eric Moody, Jesse Johnson, III, and Wayne Johnson. Petitioners, other than those same three, filed a combined traverse, along with certain individual, supplemental traverses, on August 13, 2020. By stipulation of the Parties, Respondents joined Moody, Johnson, III, and Wayne Johnson in an amended return on August 24 and those three petitioners filed a traverse

that same day.[1] As inmates at San Quentin continued to file similar petitions, ultimately the court consolidated additional groups of petitions together. Consolidation Groups 1-3 initially accounted for over 300 individual petitions as to which the court issued Orders to Show Cause on a consolidated basis, and as to which the parties filed returns and traverses on an expedited basis. (The court has continued the 60-day response date for over 400 additional consolidated petitions – Consolidation Groups 4-8 – while working with counsel on these first approximately 300 from Consolidation Groups 1-3.)

After reviewing the return and traverses for Consolidation Group 1, the court set a Case Management Conference for August 21, 2020. Following that conference, by order dated August 24, 2020, the court set an evidentiary hearing for September 28, 2020. (Evidentiary Hearing Order, August 24, 2020.) The Evidentiary Hearing Order set forth, among other things, various discovery and disclosure deadlines in advance of the hearing, an expedited process to resolve any discovery disputes, and ground rules for how that hearing would proceed remotely on the Zoom video platform.

The court held weekly case management conferences leading up the evidentiary hearing. The parties submitted either joint or separate statements in advance of each conference. The

[1] These last three cases have related histories. Wayne Johnson originally filed a petition for writ of habeas corpus in Contra Costa County Superior Court. It appears the court denied that petition, resulting in Johnson filing a new petition with the Court of Appeal, First Appellate District. Division One of the Court of Appeal denied the petition without prejudice to it being refiled in this court. The California Supreme Court then granted Johnson's petition for review, directing the Court of Appeal to issue an Order to Show Cause, returnable before this court, and further to direct this court to consolidate Johnson's petition with the already-consolidated *In re Michael Hall* cases. The Court of Appeal did so, stating that it "anticipates the necessity of an evidentiary hearing in the superior court," citing *People v. Duvall* (1995) 9 Cal.4th 464, 475, and directing this court, following those proceedings, to "issue a decision on the petition." (August 4, 2020 Order to Show Cause.) Similarly, Jesse Johnson, III, filed a writ with the Contra Costa Superior Court which that court denied. He then filed a new petition with the Court of Appeal, First Appellate District. Division Three of the Court of Appeal denied the petition without prejudice to refiling it with this court. In an order identically worded to the Wayne Johnson order, the California Supreme Court granted Jesse Johnson's petition for review. It directed the Court of Appeal to issue an Order to Show Cause and order that this court consolidate Johnson's case with the already consolidated *In re Michael Hall* cases. On August 6, 2020, the Court of Appeal issued the Order to Show Case and directed this court to "issue a decision on the petition" after proceedings in this court. (August 6, 2020 Order to Show Cause.) Finally, Eric Moody filed a petition for habeas corpus with the Court of Appeal, First Appellate District, after two denials of petitions filed in this court. Division Four of the Court of Appeal first requested an opposition from Respondents, then ordered letter briefing. In doing so, it took judicial notice of the supplemental petition for writ of habeas corpus filed July 23, 2020, in *In re Von Staich* (A160122). The Court of Appeal then issued an Order to Show cause, returnable before this court, and ordered this court to consolidate the case with the *In re Michael Hall* cases. (August 6, 2020 Order to Show Cause.)

court issued a Case Management Conference Order after each conference addressing various issues raised by the parties and the court. At the parties' request, the court continued the initial evidentiary hearing to October 26, 2020, to permit the completion of certain discovery sought by Petitioners and ordered by the court. Due to the continuance, by stipulation of the parties, the court incorporated the Consolidation Group 2 and Consolidation Group 3 Petitioners, for whom the returns and traverses were filed prior to October 26, 2020, into the evidentiary hearing.

B. The Von Staich Ruling

On October 20, 2020, the First District Court of Appeal, Division Two, issued its ruling in *In re Von Staich* (2020) 56 Cal.App.5th 53, *review granted and cause transferred sub nom. Staich on H.C.* (2020) 272 Cal.Rptr.3d 813 ("October 2020 *In re Von Staich* Order"). At the time of the ruling, the petitioner in that case was 64 years old and suffered respiratory problems resulting from a prior injury. (*In re Von Staich*, 56 Cal.App.5th at p. 57.) He had been granted parole just days before the ruling. (*Id*. at p. 80.)

In its ruling, the *In re Von Staich* court effectively decided the issues this court would have considered during Phases One and Three of the evidentiary hearing. As to Phase One, the *In re Von Staich* court held that the CDCR and the San Quentin Warden violated the petitioner's Eighth Amendment right to be free from cruel and unusual punishment. (*Ibid.*) The court ruled that "CDCR's deliberate indifference to the risk of substantial harm to petitioner necessarily extends to other similarly situated San Quentin inmates." (*Id.* at p. 82.) Central to the Court of Appeal's ruling, and relevant here, at the time of the October 2020 *In re Von Staich* Order, no approved vaccine existed for COVID-19: "Absent a vaccine or an effective treatment, the best way to slow and prevent spread of the virus is through social or physical distancing, which involves avoiding human contact, and staying at least six feet away from others." (*Id.* at p. 58.) The Court of Appeal later characterized Von Staich's claim as one focused on the necessity of decarceration in order to allow greater physical distance between inmates "in the absence of a vaccine." (*Id.* at p. 70.)

As to Phase Three, the *In re Von Staich* court implemented, on a prospective, declaratory basis, a remedy for all San Quentin inmates: "Respondents are also ordered to expedite the

removal from San Quentin State Prison—by means of release on parole or transfer to another correctional facility administered or monitored by CDCR—of the number of prisoners necessary to reduce the population of that prison to no more than 1,775 inmates." (*In re Von Staich,* 56 Cal.App.5th at pp. 84-85.) The *In re Von Staich* court emphasized that this work would be most efficiently done by Respondents themselves, not the courts. (*In re Von Staich*, 56 Cal.App.5th at pp. 83-84.)

This court ordered briefing on the effect of the October 2020 *In re Von Staich* Order. Respondents stated that they did not intend to comply – or even begin the process of formulating a plan to comply – with that order, pending their November 16, 2020, application for review in the California Supreme Court. On December 3, 2020, Respondents requested that the California Supreme Court depublish *In re Von Staich*.

However, while review remained pending, the October 2020 *In re Von Staich* Order remained persuasive authority for this court. As the court observed in its December 7, 2020, Case Management Order, "so long as this court has petitions for a writ of habeas corpus pending before it, particularly by prisoners "similarly situated" to the petitioner in *In re Von Staich*, the court believes it must move forward to rule on those petitions following the guidance set forth in *In re Von Staich.*" Accordingly, as set forth in more detail in that order, the court commenced a process to identify those Petitioners most similarly situated to Mr. Von Staich, and then began granting certain petitions.

C. The California Supreme Court Ruling

On December 23, 2020, the California Supreme Court granted review and transferred the matter to the First District Court of Appeal for further proceedings. (*Staich on H.C.* (2020) 272 Cal.Rptr.3d 813.) In doing so, the Supreme Court found the "questions raised by the petition are undoubtedly substantial" because "[t]he health and welfare of individuals in the state's custody during the pandemic, and the appropriate measures for their protection, are matters of clear statewide importance." (*Ibid*.) In directing the Court of Appeal to "consider whether to order an evidentiary hearing," the Supreme Court observed "there are significant disputes about the efficacy of the measures officials have already taken to abate the risk of serious harm to

petitioner and other prisoners, as well as the appropriate health and safety measures they should take in light of present conditions." (*Ibid*.) The Supreme Court transferred the matter to the Court of Appeal "with directions to vacate its decision" and reconsider the matter. (*Ibid*.)

On December 24, 2020, needing to await further direction from the Court of Appeal in light of the Supreme Court's order, this court stayed all further proceedings for Consolidation Groups 1-3. (December 24, 2020 Order Staying Further Proceedings and Vacating Individual Orders.) In the same Order, the court vacated its twelve just-issued orders granting certain petitions.

D. Further proceedings in the Court of Appeal

After briefing, on February 24, 2021, the Court of Appeal vacated its October 2020 *In re Von Staich* Order. The court determined that this court should conduct an evidentiary hearing addressing the issues delineated in the Supreme Court's order. It further directed that this court should decide (1) whether to consolidate the *In re Von Staich* petition with the others already consolidated before this court; and (2) "what specific questions shall be at issue" in the evidentiary hearing. (February 24, 2021, Order, A160122.)

E. Further proceedings in this court

Upon receipt of the electronic record from the Court of Appeal, this court set a Case Management Conference for March 19, 2021. (March 12, 2021, Order.) Following the March 19, 2021, Case Management Conference, this court lifted the stay previously imposed, consolidated *In re Von Staich* with Consolidation Groups 1-3, and set an evidentiary hearing for May 17, 2021. (March 22, 2021, CMC Order.) Similar to what it had done previously, the court divided the evidentiary hearing into phases: "The first phase will address Petitioners' claimed violations of the Eighth Amendment to the United States Constitution and Article I, Section 17 of the California Constitution, including 'the efficacy of the measures officials have already taken to abate the risk of serious harm to petitioner and other prisoners, as well as the appropriate health and safety measures they should take in light of present conditions.' (December 23, 2020 Order, *In re Von Staich*, S265173.) The outcome of this first phase will determine the necessity of further proceedings addressing remedies." (March 22, 2021, CMC Order.)

The parties immediately recommenced discovery and engaged in regular Case Management Conferences. Among various other disputes that arose, Petitioners contended that the October 2020 Court of Appeal decision remains "binding or precedential," on this court "except to the extent it is inconsistent with" the Supreme Court's December 23 order or has been "disapproved by that court." This court rejected the argument that the Supreme Court, by ordering the Court of Appeal decision vacated, intended to communicate that unspecified portions of it remained binding and precedential on this court. (Case Management Conference Order No. 15, April 5, 2021.) Accordingly, as indicated in the April 5, 2021, Order, "this court does not view the vacated Court of Appeal decision as having binding or precedential effect on this court at this time."

After a brief delay while the parties worked on factual and other stipulations, the evidentiary hearing commenced on May 20, 2021, and lasted for 14 court days. By stipulation of the parties, and pursuant to the Presiding Judge's local order, the parties and witnesses all appeared over Zoom. Pursuant to the court's standing order that all proceedings be remote (except, recently, jury trials), the court found good cause for petitioner witnesses to testify and view the proceedings remotely in lieu of live testimony. (Cal. Rules of Court, rule 4.551(f).)

Petitioners called 34 witnesses, including eight Petitioners: John Mattox, Larry Williams, Travis Vales, Michael Williams, Mark Stanley, Juan Moreno Haines, Derry Anthony Brown, Michael France, Mark Kennedy, Daniel Garcia, Reynaldo Diaz, Kevin Sample, Demetrius McGee, Ellis Hollis, Louis Crawford, Willie Hearod, Miguel Sifuentes, Jesse Johnson and Richard Lathan. Respondents called an additional 12 witnesses. The parties then submitted written closing arguments on a stipulated schedule over the next several weeks. After the court issued its written tentative ruling, the court convened a hearing on the parties' objections and responses.

Having considered the parties' evidence, argument, and briefing, the court now issues the following findings and rulings.

IV. Facts

The court makes the factual findings below based on the evidence submitted by the parties during the evidentiary hearing. That evidence consists of factual stipulations, deposition testimony (the vast majority was stipulated into the record; on a small percentage, the court made various rulings on various objections), witness testimony, and exhibits (the majority of which the parties stipulated into the record). Although the court has included numerous record citations, where no citation appears, that fact came from witness testimony at the hearing.

Two post-hearing matters bear brief mention here. First, Respondent moved to strike 19 factual references from Petitioners' written closing argument. Petitioners responded by submitting, in all but one case, record evidence to support the asserted fact. The court denies the motion as to all disputed facts except No. 16, as to which the court grants the motion. In disputed fact No. 16, Petitioners attempted to introduce evidence outside the evidentiary hearing, long after the fact. The court declines to accept additional facts after the close of evidence. As to the remaining facts, the record supports the factual reference or Petitioners have fairly argued based on inference and/or circumstantial evidence.

Second, nearly four months after the close of evidence, and several weeks after the parties had finished briefing their closing arguments, Petitioners requested judicial notice of a Centers for Disease Control ("CDC") report regarding infection rates among vaccinated inmates in a federal Texas prison. The court denies this request. Due to the evolving nature of the pandemic, advances in scientific understanding, and many other reasons, the facts now may differ from the facts presented at the hearing. These petitions have now been pending for nearly 18 months. If the court starts taking evidence in one area, the process will never end. In addition, the court cannot take judicial notice of the "facts" in the CDC report, only of the existence of the report. (Evid. Code § 452(c); *In re Joseph H.* (2015) 237 Cal.App.4th 517, 541-542.) Moreover, the "facts" recited in the report would require clarification and, undoubtedly, rebuttal. (Resp. Opp. to Request for Judicial Notice at p. 5-6.) The court will decide the issues presented by the petitions on the record from the hearing.

A. The COVID-19 Pandemic

SARS-CoV-2 is an airborne virus that causes the coronavirus disease known as COVID-19 (**CO**rona**VI**rus **D**isease**19**). Symptoms include shortness of breath, coughing, sneezing, fever, dry mouth, loss of taste, diarrhea, malaise or fatigue, and muscle weakness. The virus needs a host to spread. Certain characteristics – individual and behavioral – make a host susceptible. For example, someone in close proximity to others, or with certain identified comorbidities, has more chance of receiving the virus, contracting COVID-19, and having more serious (or fatal) complications. Comorbidities identified by the Centers for Disease Control and Prevention ("CDC") include the elderly and people with underlying serious health conditions such as cancer, diabetes, dementia, heart conditions, liver disease, obesity, and smoking or substance abuse. (Factual Stipulation No. 34.) Environment also impacts transmission. Up to 30 percent of COVID-19 transmission occurs asymptomatically, from a host displaying and feeling no symptoms. The CDC in an October 5, 2020, report stated that COVID-19 is a respiratory disease, primarily spread through exposure to respiratory droplets carrying infectious virus. (Factual Stipulation No. 31.) Infections with respiratory viruses are principally transmitted through contact, droplet, and airborne. (Factual Stipulation No. 31.) The CDC, in an October 5, 2020, report, stated that airborne transmission of SARS-CoV-2 appears to have occurred in enclosed spaces, when there is prolonged exposure to respiratory particles, and in spaces with inadequate ventilation or air handling. (Factual Stipulation No. 32.) The same report stated that interventions to prevent the spread of SARS-CoV-2 include social distancing, use of masks, hand hygiene, surface cleaning and disinfection, and ventilation and avoidance of crowded indoor spaces. (Factual Stipulation No. 33.)

On March 4, 2020, Governor Gavin Newsom declared a state of emergency due to COVID-19. On March 19, the Governor issued Executive Order N-33-20, which required all California residents to stay home, except to facilitate certain authorized activities, and to keep a distance of at least six feet apart at all times. (Factual Stipulation No. 35.)

B. San Quentin the Facility

San Quentin has multiple housing units and infrastructure with differing characteristics relevant to the issues in this case.

1. Housing units

Housing at San Quentin is divided between an "A" facility and a "B" facility. "A" houses the general population, including the buildings known as North Block, South Block, and West Block. East Block houses the condemned population. North Seg is on top of North Block and also houses condemned inmates. "A" also includes the Gym and the four chapels. The "B" facility includes H-Unit.

a) The "Blocks"

Many of the "Blocks" have double-occupancy cells (except the condemned housing in East Block) which measure approximately 11 feet and one inch from the bars to the back of the cell (front to back) and four feet five inches from one side wall to the other (side to side). This equates to approximately 49 square feet. (Exhibit 389 sets forth these dimensions for each housing unit.) Exhibits 370.011 and 370.012 show an illustrative cell with these dimensions, first looking into the cell from the walkway outside it, then looking out to the walkway from the rear of the cell:

EXHIBIT 0370

EXHIBIT 0370.011

EXHIBIT 0370

EXHIBIT 0370.012

From the top bunk mattress to the bottom of the bottom bunk mattress measures between two feet nine inches to three feet two inches, depending on the unit. (Exhibit 389.) From the edge of the bunks to the opposite wall equals 22 inches. From the bars on the tier walkway to the cell-front bars measures between four feet five inches to four feet ten inches, depending on the unit. (*Id.*)

The American Correctional Association standard for a one-person cell is 80 square feet for segregated housing, with at least 35 square feet of unencumbered space per occupant if confinement exceeds ten hours per day. (ACA Standard 4-4141, available at: https://www.aca.org/ACA_Member/Standards___Accreditation/ACA/ACA_Member/Standards_and_Accreditation/SAC.aspx?hkey=7f4cf7bf-2b27-4a6b-b124-36e5bd90b93d.)

West Block has five tiers of 449 open barred cells. (Factual Stipulation Nos. 72, 74.) West Block has pigeons flying around, fecal matter, urine, and dust in the common areas. Mold lives on the plumbing and on the walls. West Block has one shower area for inmates to use. (Factual Stipulation No. 76.) Exhibits 373.001-009 show West Block.

East Block houses condemned inmates in single-occupancy cells.

North Block has five tiers of cells, totaling 414, spaced 18 inches apart. The catwalk is filled with dust, trash, mice, and pigeon droppings. It gets cleaned every other year. At the time of the inmate transfer from California Institute for Men ("CIM"), discussed below, North Block held 750 inmates. Cellmates in North Block cannot socially distance six feet from each other in their cell. (Brockenborough depo., 37:7-12.) Cells have open bars with mesh doors, allowing the transfer of air and droplets between cells. The building is unventilated, with a giant industrial fan blowing the same air around and through the mesh doors. (See Exhibit 372.) It contains one shower area for all inmates. (Factual Stipulation No. 81.)

South Block houses Badger unit. (Factual Stipulation No. 65.) Badger contains five tiers of open barred cells with 48 cells on each tier. (Factual Stipulation No. 66.) Badger contains one shower area with eight shower heads for prisoners to use. (Factual Stipulation No. 67.)

b) H-Unit

H-Unit has dorm style housing in a newer building with better ventilation. H-Unit consists of five dorms. (Factual Stipulation No. 62.) Dorm 1 and Dorm 2 contain single beds. Dorm 3, Dorm 4, and Dorm 5 contain bunk beds designed for two people. (*Id.*) Sometime close to the CIM transfer, San Quentin implemented a six foot distance between beds in the H-Unit dorm housing, alternating head to foot, provided hygiene and sanitation education, and did periodic sanitation audits to make sure restrooms, showers, phones and communal areas received adequate cleaning. (Brockenborough depo., 83:3-19.)

c) The Adjustment Center

The Adjustment Center ("AC") is the only housing unit with solid door cells. The AC has room for 100 inmates. It has no windows. The cells are single occupancy. Exhibits 369.001 and 369.003 show a representative cell in the AC, from the outside looking at the door and then

EXHIBIT 0369

EXHIBIT 0369.001

viewing the cell from the doorway:

As acknowledged by William Stanton, the Sergeant at the AC since April 2020, the AC was designed for solitary confinement. Prior to the COVID-19 pandemic, prison officials used the AC for prisoner discipline. (Factual Stipulation No. 84.) Stanton also acknowledges it is referred to as the "prison within a prison." When working in the AC, staff are locked in and cannot get out unless someone on the outside lets them out. According to Stanton, when housed in the AC, inmates must remain in their cells unless they have yard, mental health programming, or a medical appointment (there is a clinic inside AC). If they have no appointments or yard, inmates may leave the cell only to shower for 15 to 30 minutes. (They may shower three times/week.) Thus, some days inmates may not leave the cell at all; some days they may leave only for 15 to 30 minutes.

2. Other infrastructure

a) Ventilation

The older buildings at San Quentin, including the Facility A housing units built in the early 1900's, have "exceedingly poor ventilation." (Pachynski II, depo, 82:5-18.) They have a passive, rather than forced air, system that does not provide continuous circulation. (Pachynski II depo., 82:25-83:12.) Since June 2020, San Quentin has not made any improvements or renovations to its ventilation system. (Brockenborough depo., 32:18-24.)

Multiple witnesses expressed concerns about the quality of the air inside the housing units. To address these concerns, Respondent called Kyle Cox, the acting Correctional Plant Manager at San Quentin, with responsibility for the ventilation systems. Cox does not have any particular expertise regarding ventilation and had no responsibility for ventilation before September 2020, other than to deliver replacement filters. Cox testified that the "typical" ventilation unit is mounted either on ceiling or in the back of a secured area on the ground floor. Air comes in at ground level, is drawn up to roof "naturally," then blown back down by the fans on the units and exhausted out through the cells with two ceiling exhaust fans.

According to Broomfield, "healthcare" raised a concern about ventilation on June 12, 2020. Broomfield acted between June 18-26, 2020, by forwarding an email to his supervisor Ron Davis and to Dean Borg, who oversees planning, construction, and management. Subsequently, San Quentin staff inspected the ventilation systems to ensure proper operation. Broomfield received a report that the systems were in working order and, based on that, believed that he took the ventilation concerns seriously. In addition, CCHCS leadership hired a third party (Safe Traces) to do ventilation and air flow studies in housing units. Safe Traces used algae DNA to mimic viral (COVID-19) DNA. Safe Traces sprayed the algae DNA in certain housing unit locations, then measured the dissipation of the algae DNA into other parts of the housing unit. Broomfield believed a "majority" of the November 2020 Safe Traces report showed safe levels of dissolution of mock virus.

C. COVID-19 Guidance Related to Correctional Facilities

On March 23, 2020, the CDC issued "Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities." On March 25, 2020, that guidance included:

- "ensur[ing] that sufficient stocks of hygiene supplies, cleaning supplies, PPE and medical supplies (consistent with the healthcare capabilities of the facility) are on hand and available";
- "perform[ing] pre-intake screening and temperature checks for all new entrants";

- "implement[ing] social distancing strategies to increase the physical space between incarcerated/detained persons (ideally 6 feet between all individuals, regardless of the presence of symptoms)";
- "Perform pre-intake screening and temperature checks for all new entrants" which should "take place in the sallyport, before beginning the intake process";
- "suspend[ing] all transfers of incarcerated/detained persons to and from other jurisdictions and facilities (including work release where relevant), unless necessary for medical evaluation, medical isolation/quarantine, care, extenuating security concerns, or to prevent overcrowding"; and
- "If possible, consider quarantining all new intakes for 14 days before they enter the facility's general population (SEPARATELY from other individuals who are quarantined due to contact with a COVID-19 CASE).

(Factual Stipulation No. 39.)

D. Respondent's Knowledge Regarding the Risk of Harm from COVID-19

As of March 2020, and continuing to the present, CDCR understood COVID-19 posed a serious risk to the health and safety of San Quentin inmates. (Gipson depo., 105:22-106:6.) It also knew that San Quentin's architecture, population density, testing protocols, and inability to socially distance inmates exacerbated that risk.

For example, Respondent knew that housing units with open bars and dorm-style housing with a large number of inmates living in proximity to each other – the two housing types at San Quentin – created a higher risk of virus transmission. (Bal depo. 99:8-21.) According to San Quentin's Chief Medical Executive, Dr. Allison Pachynski, inmates at San Quentin live in "extraordinarily close living quarters." (6 RT 535.) In her opinion, the housing units known as the "Blocks" – North Block, West Block, East Block, and South Block – pose the most risk for spread of COVID-19 because they consist of five housing tiers stacked on each other, with open cell fronts, with high capacity, generally poor ventilation, and a population with extensive risk factors.

Respondent also knew that inmates faced a higher risk of morbidity and mortality from COVID-19 compared to the general population. (Bal depo., 141:7-142:9.) Respondent also knew, from April 2020 forward, that COVID could be transmitted by people who were not symptomatic. (Bal depo., 112:13-25.) Multiple CDCR witnesses agree that "COVID poses a substantial risk of serious harm to the health and safety of petitioners," and did so as early as March and April 2020. (Bal depo., 45:22-46:15.) Tammatha Foss, the Person Most Qualified for Respondent on the subject of reducing the San Quentin population due to COVID-19, acknowledged:

> Q: So in March of 2020 were you aware that COVID posed a serious risk to health and safety -- to the health and safety of prisoners in the care and custody of CDCR?
>
> Yes.

(Foss depo., 22:7-11.) In December 2020, that same understanding extended to "high risk" inmates living in dorm-style and open-door cell housing. (Foss depo., 34:21-36:3; 37:7-13.) Thus, as of March 2020, Respondent was aware of the risk of a COVID-19 outbreak. (Brockenborough depo., 76:9-12.) It understood San Quentin inmates faced a higher risk than the general population. (Brockenborough depo., 76:19-25.)

The parties dispute the extent to which, prior to July 2020, Respondent knew or should have known that COVID-19 could transit through aerosolization as opposed to respiratory droplets and contact. However, Respondent concedes it knew by May 30, 2020, that COVID-19 could transmit at least by respiratory droplets. The weight of the evidence suggests that medical and scientific experts employed by or in routine communication with Respondent would have known by May 2020 that COVID-19 also spread by aerosolization. (5 RT 969971; 7 RT 1369-70; 7 RT 1449.)

E. Efforts to Mitigate Known Risk of COVID-19 Prior to the CIM Transfer

Starting in late February 2020, Dr. Pachynski engaged with the Marin Department of Public Health ("MDPH") to have an open line of communication and reached out to the custody staff for education to keep them abreast of COVID-19 developments. She monitored the

literature and reporting. Her team educated the patient population regarding hygiene, primary preventing, isolation, quarantine, and instructions for what to do when feeling ill.

MDPH urged San Quentin to develop a COVID-19 surge plan. San Quentin custody and healthcare officials met with Dr. Mathew Willis, the Director of MDPH, as part of a Marin County healthcare preparedness program. Willis asked all participants, including San Quentin, to develop a surge plan for COVID-19 in the event of a larger outbreak. San Quentin failed to meet the deadlines for presenting its plan. By early May, Willis had grown so concerned about San Quentin's lack of a plan that he enlisted state Assemblyman Marc Levine to intercede with the Governor's office. Willis's concerns centered on the intrinsically dangerous nature of the prison, where the sheer numbers of people and architecture made it almost impossible to isolate and quarantine properly in a major outbreak. Broomfield conceded that San Quentin had no plan even by July 2, 2020, and that the plan developed by the "Unified Command" remains in "draft" form even now. (7 RT 766-767.)

On March 31, 2020, CDCR announced a statewide plan to "Further Protect Staff and prisoners from the Spread of COVID-19 in State Prisons." As part of the plan, CDCR announced that it had "taken several actions to mitigate the spread of COVID-19, including temporarily suspending the intake of new prisoners, cancellation of in-person visiting, practicing social distancing, and providing hand sanitizer across the system." (Factual Stipulation No. 56.)

According to Broomfield, between March and May 30, 2020, San Quentin mandated its staff to wear cloth masks before CDCR issued that requirement. Broomfield testified that San Quentin took extensive early measures, many not mandated by CDCR, to prevent COVID-19 spread at the prison. For example, San Quentin closed its dining halls on March 17, and initiated self-feeding, before CDCR issued that requirement. The prison cancelled all public tours and suspended its volunteer programs before required to do so. Broomfield testified that, by March 17, Hospital Facilities Maintenance established strike teams to clean areas throughout the prison because those teams had been trained to clean to hospital standards. Throughout March and April, healthcare would put housing units on precautionary quarantine if anyone in those units

reported any flu-like symptoms. San Quentin, as required by either or both of CDCR or CCHCS, also published precautionary posters (and displayed them on the San Quentin television station) encouraging masking in English and Spanish, canceled family visiting, closed religious and educational programming, stopped substance abuse disorder treatment programs ("ISUDT"), implemented teleworking for staff, developed social distancing expectations in congregate living areas, closed the Prison Industries Authority ("PIA") (a separate entity from CDCR that employs inmates to produce goods and services for all state agencies), ensured a sufficient inventory of cleaning supplies, standardized its PPE ordering, and distributed PIA-manufactured masks and made them mandatory, and distributed posters.

Despite these extensive and laudable efforts, as of June 3, 2020, in addition to no plan, San Quentin also did not have any single person in charge of decision making regarding how to mitigate the outbreak response. (Pachysnki depo., 64:16-20.)

F. Transfer from California Institute for Men

San Quentin had three staff COVID-19 cases as of May 30, but zero inmate COVID-19 cases. Before May 30, 2020, CIM had 469 COVID positive tests and nine deaths. (Factual Stipulation No. 45.)

1. CDCR policies prior to the CIM transfer

As of March 2020, CDCR policy was to quarantine inmates for 14 days for any transfer between institutions, to conduct temperature screens, and to administer verbal screens to all transferees. By April 2020, upon recommendation of CCHCS, CDCR had adopted social distancing policies for transfer that would limit any bus used for transferring inmates to half capacity – no more than 19 inmates. (Cullen depo., 76:9-25, 77:6-9.) Transfer guidelines also required a COVID-19 test within a week prior to transfer, the results to have come back, clearance by a doctor, then quarantine upon arrival at the destination institution. (Barney-Knox depo., 29:2-30:25.)

As of May 5, 2020, CDCR knew that "Covid-19 is not going away soon." (Exhibit 604.) It knew that all inmate movement involved risk of spread, and it knew that appropriate COVID-

19 screenings should occur pre- and post-transfer. (Exhibit 604.) Indeed, on May 22, 2020, CCHCS issued a memorandum to Wardens and CEOs of CDCR prisons, which stated that "[i]ndividuals who are contacts to a confirmed case of COVID-19 who refuse testing should be placed in medical quarantine for 14 days from the date of last exposure." The memorandum also states that "in general, re-testing an individual is usually not necessary if they have been tested in the previous 7 calendar days." (Factual Stipulation No. 40.)

Dr. Steven Tharratt, who has since passed away, gave the direction to transfer 1,300 high-risk inmates out of CIM in order to minimize their risk of exposure to the outbreak at CIM. (Cullen depo. 54.)

On May 27, three days before the transfer, the medical staff at CIM raised concerns that many of the inmates designated for transfer had not tested in nearly a month. (Cullen depo., 49-54.) Moreover, according to Barney-Knox, the CIM doctors stated they would not retest those inmates prior to transfer. In an email exchange with CDCR officials and CIM doctors, Barney-Knox advocated for following the testing guidelines. (Exhibit 695.) Those tests "should have been done." (Barney-Knox depo., 49:16-22.) A day later, on May 28, those concerns from "a high level" found their way to Vince Cullen, in charge of managing the transfer for CDCR. The failure to test the transferring inmates in compliance with existing policy was "not medically appropriate," according to Dr. Steven Bick, the Director of Healthcare Policy for CCHCS (Tharratt's successor). Cullen understood medical staff's warning that "the risk of transferring patients is high for possible COVID spread even if they're quarantined upon arrival." (Cullen depo., 52:19-53:3.)

Cullen immediately asked Tharratt if they should slow down the transfer to address the concerns. (Cullen depo., 54:11-55:1.) Tharratt told Cullen to "keep going" because "these are urgent transfers." (*Id.*) The message of urgency originated from none other than the Secretary of CDCR at the time, Ralph Diaz. (Barney-Knox depo., 57:1-7, 15-16.) In fact, the transfers had approval from the highest level of both CDCR (Secretary Diaz) and CCHCS (the receiver). (Cullen depo., 85:21-88:14.)

On May 28, 2020, CDCR and CCHCS identified nearly 700 individuals in dorm housing at CIM at potentially high risk for COVID-19 complications and decided to relocate those inmates to other prisons in small cohorts. (Factual Stipulation No. 46.) Two days later, on May 30, 2020, CDCR transferred 122 of these prisoners from CIM to San Quentin State Prison. (Factual Stipulation No. 47.)

The CIM transferees did not quarantine at CIM or anywhere else prior to the transfer. (Cullen depo., 12-18.) Prison officials gave no consideration "to the possibility that the inmates who were transported from CIM might transmit COVID-19 to the population of San Quentin." (Cullen depo., 34:19-35:1.) No one raised a concern that it might prove difficult to quarantine such a large number of people at San Quentin. (Barney-Knox depo., 35:16-20.)

In its haste, CDCR knowingly ignored recommendations from the healthcare staff at CCHCS (and its own policies) when it transferred the CIM inmates to San Quentin. (Barney-Knox depo., 71:23-73:7.) In addition to failing to follow guidelines regarding COVID-19 tests for the CIM transfers, prison officials also did not complete screening questions or test vitals for all transferees, as guidelines required. (Barney-Knox depo., 67:10-15.) According to Cullen, there was a "discussion," undocumented anywhere, that so long as the inmates were quarantined and tested at San Quentin, it would be acceptable to ignore existing policy and omit the required pre-transfer testing. (Cullen depo., 54.) CDCR guidelines also required six feet of distance on the bus (a maximum of 19-20 people), wearing an N95 mask, and testing immediately upon arrival. (Barney-Knox depo., 33:8-34:9; 60:4-8.) It ignored these policies too. In addition, despite a policy in place since the month prior limiting buses to half capacity, CDCR requested an increase in that number for the urgent CIM transfer. (Cullen depo., 79:10-13.)

On July 1, 2020 at a hearing before the California Senate Committee on Public Safety, Clark Kelso, the federal Receiver overseeing prison health care, reported that CDCR relied on negative test results that were two, three, and four weeks old when it moved CIM prisoners to San Quentin. According to Kelso, these test results were "far too old to be a reliable indicator for the absence of COVID." (Factual Stipulation No. 48.)

2. Knowledge regarding the risk posed by the CIM inmates

On March 15, 2020, CDCR set up a Department Operations Center ("DOC"), the goal of which was to provide statewide guidance to all prisons, identify resources and respond to COVID-19 issues. (Gipson depo., 39:5-21.) However, each prison – including San Quentin – was left to "develop their plan as to how would they isolate, quarantine if they had cases." (Gipson depo., 39:18-25.) Other than the DOC, CDCR developed no other policies, procedures, plans, or programs related to releasing prisoners due to COVID-19. (Gipson depo., 44:5-11.)

Broomfield received daily briefings from the DOC starting March 18, 2020. Those briefings included CDCR inmate and staff COVID-19 cases and deaths. By early May 2020, Broomfield knew inmates and staff at various prisons throughout California were dying from COVID-19. The briefings included which institutions had active staff and inmate cases from April through May 30, 2020. Over time, they showed the growth rate at a particular prison. Broomfield had information to show that CIM inmates had started dying from COVID-19 on or near May 7, although he does not recall noting those CIM deaths at the time. By the last week of May, Broomfield knew that CIM had the highest number of COVID-19 cases of any California prison. The specific numbers from that week showed 509 COVID-19 cases and 10 deaths at CIM. Although he had those numbers, Broomfield did not note them because he was "focused on keeping San Quentin safe." (7 RT 692.) However, he did check the CIM numbers at least one week prior to the CIM transfer to San Quentin.

CDCR (and Broomfield specifically) knew the CIM transferees were medically vulnerable and at a higher risk for COVID-19 consequences. Broomfield did not seek information regarding the testing status or timing of testing the CIM transferees prior to transfer because that, according to Broomfield, is a "medical function." However, Broomfield learned about the testing dates three to four days after the transfer (around June 3). By that time, Respondent knew the CIM transferees could have contracted COVID-19 between the testing date of three to four weeks prior, and the date of transfer. Respondent also knew that the CIM transferees had COVID-19 symptoms and had spent over 10 hours on the bus ride together.

Broomfield did not inquire, and did not direct his staff to inquire, of those executing the CIM transfer, whether (1) any manner of social distancing was used during transportation; (2) the transferees wore masks; or (3) they were medically screened before and after transfer and, if so, when.

3. CDCR conduct regarding testing, screening, and quarantine policies upon arrival of the CIM transferees at San Quentin

Dr. Pachynski testified as the Person Most Qualified regarding the transfer from CIM to San Quentin and any efforts to abate the risk of harm resulting from it.[2] She testified that she received the medical charts for the 122 inmates transferring from CIM to San Quentin on Saturday morning, May 30, as the buses transporting the prisoners rolled toward San Quentin for arrival that evening. (Pachynski depo., 22:12-20.) She discovered many prisoners had not had COVID-19 tests in the week prior to the transfer. (Pachynski depo., 23:5-21.) One of the doctors on her staff, Dr. Jonathan Grant, has worked at San Quentin for 15 years. He heard about the CIM transfer on May 28 at a regular staff meeting. At the time, the prison had six confirmed staff cases and no confirmed inmate cases. Grant and others immediately expressed the concern that the CIM inmates would bring COVID-19 with them. He believed the medical staff had inadequate time to prepare for the transfer and asked if the decision could be reversed.

"Each institution was supposed to identify a dorm or a cell block that they were moving this cohort of folks into." (Barney-Knox depo., 42:9-17.) Those guidelines, including testing and isolation upon arrival, "would prohibit transmission as long as they were followed." (Barney-Knox depo., 44:1-13.) "All the wardens were directed to set aside space . . . . Everyone knew what the plan was." (Barney-Knox depo., 44:24-45:10.) San Quentin did not follow the

[2] The precise topic reads: "The screening, testing, moving, transport, or quarantining of PRISONERS transferred from the California Institution of Men ("CIM") to San Quentin State Prison on or around May 30, 2020, both before and after transfer, including any internal meetings or communications related to screening, testing, and quarantining procedures for transferred prisoners, and any and all measures considered and/or taken following the transfer of prisoners from CIM to San Quentin to abate the risk of harm posed by COVID to the health and safety of PRISONERS, including petitioners, or to mitigate the resulting COVID outbreak."

transfer protocol to isolate the arriving inmates from CIM "because of the physical plan and limitations at San Quentin." (Barney-Knox depo., 34:19-23.)

Indeed, according to Broomfield, he had planned to empty the AC to quarantine the incoming CIM transferees. However, the AC has a maximum capacity of 100, 22 cells less than the CIM transferees required. In addition to that logistical obstacle, the plan failed because San Quentin had nowhere to house the condemned inmates serving disciplinary terms in the AC. Prison officials also did not know – and apparently had failed to determine – if they could move certain disabled inmates living there. Broomfield's revised plan involved placing COVID-19-positive CIM inmates in the AC and housing the remainder in Badger. (5 RT 870, 878.)

Broomfield testified that he believed Badger was an appropriate and safe place to quarantine the CIM transferees because he believed COVID-19 could only spread through droplets or contact from hard surfaces, not through aerosolization. Medically vulnerable and disabled CIM transferees could not walk to the upper tiers and so San Quentin officials housed them on the first tier with the native San Quentin inmates. But safety considerations did not drive this decision. San Quentin housed the CIM transferees in Badger because only Badger, with its five tiers of open grill cells, had room for that many people. (Pachynski depo., 24:14-18; 36:9-15.) Based on these capacity issues, Broomfield decided to test all 122 incoming CIM inmates and to house them in the open-barred cells on the fourth and fifth floors of the Badger housing unit pending that testing, after moving the "native" San Quentin inmates out of Tiers 4 and 5 and down to Tiers 1-3. (Pachynski depo., 24:13l; Factual Stipulation Nos. 50, 69-70.) Badger had 100-200 existing native San Quentin inmates already living there when the CIM inmates arrived. (Pachynski depo., 24:19-25.) As a result of temperature checks administered to the arriving CIM transferees, San Quentin officials quarantined three of them who they determined as symptomatic. (Pachynski depo., 25:24-26:11.)

Thus, despite knowing that some substantial number of the CIM transferees had not received COVID-19 tests for a week prior to transfer, and further knowing that some of them arrived symptomatic after spending an 11 hour bus ride with the others, San Quentin housed the

remaining transferees in Badger in open-door cells with a large number of San Quentin inmates. Broomfield referred to this as a "quarantine," but the CIM inmates could walk between tiers in Badger to shower, get in the pill line, call medical, and access the yard.

Although they had planned to test the incoming CIM inmates, San Quentin officials did not actually test them until the following Monday, more than a day after they arrived. Test results did not start arriving until the following Thursday. (Pachynski depo., 27:1-17; 31:10-20; Yumang depo., 72:2-20.).) Some test results took up to two weeks. Upon retesting at San Quentin, 25 of the transferred prisoners tested positive for COVID-19. (Factual Stipulation No. 49.)

Once the first positive test came back, San Quentin officials understood the CIM inmates from that person's bus "had been exposed to a significant risk." (Pachynski depo., 38:18-39:1.) Broomfield attempted to deny this fact at the evidentiary hearing, only to have that testimony impeached with the following testimony from his deposition:

> Q: And because two had already tested positive, you knew at that time, did you not, that a discrete number of the remainder of that population had already been exposed to COVID-19 given that they were transferred with two known cases; correct?
>
> A. Correct.

(Broomfield depo p. 78:16-21.)

On June 1, the MDPH learned about the CIM transfer. The Department immediately sought a meeting with CDCR, including medical and administrative staff, and Broomfield. According to Willis, the purpose of that meeting was to prevent an outbreak and to mitigate one if it occurred. Broomfield expressed interest in help with testing, supplies and practical support. However, San Quentin officials declined recommendations for an outbreak plan and refused even to provide one. They deemed the generic plan developed by the state sufficient. In response, Willis warned prison officials about the dangerous potential for an outbreak and how it would move quickly given San Quentin's population and infrastructure. Willis expressed concern that a large outbreak at the prison could overwhelm local hospitals already dealing with

a surge in the surrounding community. Willis urged San Quentin officials to adopt specific COVID-19 prevention measures, including a "radical sequester" of the CIM transferees due to the lack of testing.

Ignoring Willis's recommendations (and their own policies), prison officials immediately exposed San Quentin inmates to the CIM transferees. Inmates living on the top two tiers of Badger were moved down to lower tiers (some of them double celled to make room), while the CIM transfers moved into the fourth and fifth tiers. One such inmate, Travis Vales, testified that multiple inmates in Badger started complaining of COVID-19 symptoms soon after the CIM inmates occupied the upper tiers. Symptoms included body aches, headaches, vomiting, loss of taste and smell, and others. Inmates became so sick that at times the unit experienced multiple "man down" calls per day (the signal for an inmate who needs immediate medical attention). In response, prison officials began moving COVID-19 negative inmates out of Badger. For example, they moved Vales to the fifth tier of Donner on June 19. Then Vales himself started to feel sick, on June 25, and told staff. Despite reporting symptoms and feeling ill, he was moved into another cell with a new cellmate. The cellmate started having similar symptoms within five days. Other testimony corroborates that COVID-19 positive inmates remained housed in double cells with COVID-19 negative patients. (E.g., Pachynski depo., 39:20-40:14.) Almost half the "native" San Quentin prisoners tested positive after being housed with the CIM transferees: 27 of 70 prisoners tested positive on Tier 2 and 29 of 62 on Tier 1. (11 RT 2160.)

Another inmate, Willie Hearod, had lived in West Block for eight years. On June 2 (the day prison officials tested the CIM inmates but several days before those tests came back), prison officials presented Hearod with a CIM transferee to take as a cellmate. Hearod objected based on his high medical risk. The CIM inmate stood outside Hearod's door for 15 to 20 minutes during the discussion. Hearod received a rules violation for refusing the inmate. Five days later, Hearod fell ill; he got very weak, lost his sense of smell and taste, lost his appetite, had cold sweats, and had muscle aches. He was not tested until July 7.

4. The exemplary case of John Mattox

John Mattox testified that he transferred from CIM to San Quentin on May 29, 2020 – one of the 122 who did. Mattox lived in a dorm at CIM, double-bunked, with bunks three and a half feet apart. Social distancing did not happen in that environment. Mattox tested negative on May 12. He was not tested again prior to his transfer to San Quentin over two weeks later. In the meantime, inmates in his dorm got sick, experiencing coughing, sneezing and high temperatures. Mattox helped one sick inmate pack his belongings, coming into close contact with him in the process. In the days prior to his transfer to San Quentin, Mattox began to experience COVID-19 symptoms. He felt weak, had chills, experienced dizziness, and had a sore throat. When told to prepare for the transfer, Mattox reported not feeling well. Officers told him to pack anyway. In preparation for the transfer, custody staff placed 25 inmates shoulder to shoulder in tight conditions in a holding cell with little or no ventilation for three to five hours. Due to the heat and lack of air, inmates removed their masks in the holding cell. A nurse gave Mattox a temperature check which returned normal. When Mattox again complained of symptoms, the nurse told the guards Mattox had a normal temperature and accused him of faking his illness.

Mattox then spent 11 hours on a bus ride from CIM to San Quentin. On the bus, inmates sat two to a bench, again shoulder to shoulder, with no social distancing and no ventilation. Inmates coughed and took off their masks.

Upon arriving at San Quentin, Mattox was not screened getting off the bus. He was placed into a small room in Badger with four to five others from the bus. He again complained of his symptoms and a guard told him to report to the medical staff. He could not communicate with anyone on the medical staff until over a day later, on Monday (the CIM transfers arrived late Saturday night). The San Quentin medical staff tested him on Monday and isolated him in a dirty isolation cell for 30 days. The cell had open bars. A few days later, the medical staff informed Maddox he had tested positive for COVID-19. They told him he had the distinction of

being San Quentin's first positive inmate case. Mattox testified that he continues to suffer from red eyes, fatigue, and dizziness. Doctors tell him these symptoms may last the rest of his life.

G. The San Quentin Outbreak and CDCR's Response

San Quentin is designed to house 3,082 prisoners. (Factual Stipulation No. 13.) On the virtual eve of the CIM transfer, San Quentin operated at 113.8% capacity. (Factual Stipulation No. 44.) By June 7, 2020, San Quentin had seventeen new positive COVID-19 cases over the previous 14-day period. On June 29, 2020, there were 1,457 positive COVID-19 cases over the previous 14-day period. (Factual Stipulation No. 51.) In the interim, San Quentin officials made a series of mistakes that contributed to the severity of the outbreak. Other issues arose due to the antiquated architecture and population density at the prison.

1. San Quentin failures to keep inmates and staff safe

On June 6, Willis learned about the first positive test results from the CIM transferees and knew that San Quentin now confronted an outbreak. To contain the outbreak, he advised San Quentin officials to (1) not combine the CIM transfers with the existing population (so-called "radical sequestration" (2 RT 347); (2) isolate each cell block (inmates and staff) from the other cell blocks; (3) mandate N95 masks and PPE among staff; and (4) require weekly staff testing. San Quentin officials declined to follow any of these recommendations. They told Willis he could not issue an order requiring these steps because the county public health director had no jurisdiction on the grounds of a state prison. Although the prison took many reasonable, laudable steps to deal with the outbreak after it occurred, multiple witnesses testified to lax enforcement, inadequate testing, or ignoring of COVID-19 symptoms in the population. Several of the categories below overlap but, taken together, they reflect the struggles the prison encountered in following basic safety recommendations and protocols (and their own policies).

a) Isolation and quarantine

According to Dr. Pachynski, before May 31, 2020, anyone suspected of COVID-19 would be placed in isolation. That policy evolved to allow staff to leave a suspected case in place until evaluated. Then a doctor would order tests. Nurses would tell an inmate if that

inmate needed to isolate. Most would agree. However, some refused and were permitted to remain in place (per Pachynski and Broomfield, the medical staff do not dictate housing or movement – custody handles those issues).

By June 16, the AC already had 90 inmates in isolation, with cases continuing to rise. At that point, Broomfield began "exploring" activating the gym and chapel to isolate additional positive cases. He tried to make space in the gym by moving the inmates living there to North Kern. That plan cratered when, on the day the buses arrived, the gym reported a positive case, forcing cancellation of the transfer. The prison then "started" working on tents and chapels, which eventually came online in early July. Once the tents were up, officials moved asymptomatic COVID-19 positive inmates to the tents and symptomatic patients moved to the Alternative Care Site ("ACS") that occupied the PIA building (except condemned inmates, who remained in Badger or Donner).

As cases continued to rise, Broomfield sought assistance from headquarters for staffing shortages. Some staff had fallen ill. Others could not work at the prison because they guarded sick inmates with COVID-19 sent to outside hospitals.

b) Mixing inmates and staff through work (no cohorts)

Until mid-September, San Quentin had no cohorting policy for essential inmate workers from different housing units. San Quentin has refused to institute staff cohorts, despite multiple recommendations to do so.

Kitchen: Until officials closed it down in mid-July 2020, inmates and staff from different housing units mixed in the kitchen to prepare food. For example, according to Broomfield, kitchen workers from West Block and North Block, 30 to 45 from each, would mix in the kitchen. That would happen again for a second shift. One inmate (Michael Burroughs) lived in West Block but would walk through South Block and past the line workers and other kitchen workers (60 to 70 people) to get to his station. Workers could not socially distance in the kitchen; line servers would stand shoulder to shoulder working the grills.

Inmates and staff had COVID-19 symptoms while working in the kitchen. Other inmates, like Burroughs, lived with a COVID-19 positive inmate but continued working in the kitchen absent a positive result. Some staff did not wear masks in the kitchen. Inmates sometimes delivered the food without hairnets or gloves, and often without masks. In August 2020, inmates learned at a training provided by the California Division of Occupational Safety and Health (Cal/OSHA) training that they should not work until fitted with an N95 mask. Burroughs did not have a fitted N95 mask, so he refused to work. He received a disciplinary violation for his refusal.

Reynaldo Diaz lived in North Block in June 2020. His cellmate was Daniel Garcia. Diaz worked in the sandwich room making lunches. He saw Garcia getting sick, with coughing, aching, fatigue, and loss of taste. Even so, Diaz kept going to work in the sandwich room. While there, Diaz worked with 18 people, one foot apart, in a room measuring 10-by-20 feet. At first, the sandwich makers did not wear masks. Then they wore cloth masks. Diaz stopped working only when he tested positive in late June 2020. Even when Garcia went to quarantine in the tents, Diaz remained behind in the cell.

Porters: Another work example involves Larry Williams. Williams lived in South Block in June 2020. He worked as a building porter. He would count lunches, put the lunches on the tiers, and clean the staff areas and showers. He received trainings in April and July 2020 regarding how to clean the common areas. However, he could not comply with the training because he received no new mop buckets or mop heads as required (according to the training). He continued to work for several days after reporting symptoms on June 10, feeling sicker each day. He walked past open-bar cells in South Block passing out food, retrieving trays, and collecting trash. He continued to report symptoms on June 12, June 13, and June 14, but continued to work. By June 13 he was unable to eat, yet still worked as his symptoms continued to worsen.

Another inmate, Mark Stanley, worked as a porter assisting disabled inmates. On June 23 he was asked to help move several elderly ADA patients to quarantine in Badger due to

COVID-19. A sign on the first inmate's cell said Stanley would need certain PPE – a surgical mask, gloves, gown, and eye protection – to move the inmate. When Stanley raised the issue, custody staff told him the full PPE was not available and to do the job anyway (even though, according to Associate Warden Jason Bishop, the prison did have the PPE available). Stanley thought the inmate seemed lethargic. The inmate was out of breath by the time Stanley got him down the stairs. At frequent breaks on the way down, Stanley had to hold the inmate by his arms as the inmate held the railing to steady himself (a violation of the supposed physical distance rule). Stanley then helped three more people in similar fashion. The next inmate also had a mandatory PPE sign posted on his cell. Stanley again had to enter the cell without the required PPE. (The guard supervising the transfer was provided with the full PPE required by the sign and could maintain a 6-foot distance from the infected prisoners. (1 RT 167.).) The next person seemed ill and coughed a lot. Stanley helped him down the stairs after taking his property down. Stanley moved the inmate into a small cell with a cellmate not wearing a mask. Two of the destination Badger cells had no mattress. They had trash on the floor, dirty walls, and feces in the toilet.

Stanley started feeling sick the next day, with chills, coughing, and muscle soreness. He received a test but continued to work with elderly inmates for several more days, until June 28. He continued to shower with 11 other inmates at a time, without social distancing, and without masks. Some coughed and sneezed in the shower. On June 28, 2020, staff informed Stanley he was on a COVID-19 monitoring list. Staff locked him in his cell with his cellmate (who had tested negative). The cellmate yelled at guards that they were locking him up around the clock with a COVID-19 positive inmate who would get him sick. Soon after, the cellmate also started displaying symptoms. While locked in his cell, Stanley went three weeks without a shower. He had no disinfectant and no clean linens for two and one-half months.

On June 10, one native San Quentin inmate was instructed to carry multiple boxes of property from the CIM inmates upstairs to their cells even though he expressed concern about getting infected. The job took 90 minutes. By the end, the inmate's cloth mask had gotten

saturated with moisture from hard breathing going up and down the stairs with the boxes. In the process, the inmate came into direct contact with multiple staff, some of whom had no mask. He subsequently fell ill and tested positive for COVID-19.

Staff: According to Broomfield, although staff come into close contact with inmates and can infect them, prison officials have never mandated staff cohorts. Instead, from the beginning of the pandemic to now, staff may work in one housing unit one day, and then work in another unit the next day. Staff typically work across housing units due to staffing shortages (15-20 percent do this). This happens through "shift swaps," where one staff member will pay another staff member to take their shift. It also happens through the seniority-based "bidding" system in which staff members can bid to work overtime in a different unit. Prison officials expressed uncertainty whether they could end this practice consistent with the prison staff collective bargaining agreement but gave no specifics. Respondent offered no evidence that it made any effort to accomplish staff cohorting.

c) Physical/social distancing

Respondent understood that failing to enforce at least six feet of distance between people would increase the risk of COVID-19 transmission. (Bal depo., 53:2-6.) The witnesses disagree on when the scientific, medical, and correctional communities knew that COVID-19 spread through aerosolization in the air, as opposed to via droplets. According to Bick, in March 2020 CCHCS thought the spread was through contact and large droplets falling to ground. CCHCS and CDCR developed policies based on that understanding which required, among other things, six feet of distance to mitigate the risk of spread. Bick asserts the understanding changed in July 2020, at which point the authorities understood the virus could spread through aerosolization, with the result that mitigation required *more* than six feet. Bick testified that policies changed accordingly, but the evidence failed to support that assertion. As Bick and Bishop both concede, six feet of social distance is not possible at all times at San Quentin. According to Bick, the policy implemented in August 2020, which remains the policy today, requires six feet social distance "to the extent that was achievable."

Even when inmates could socially distance, they were not required to do so during the lockdown in Summer 2020 (and continuing today). Broomfield conceded (consistent with other testimony, including from various Petitioners) that social distancing typically did not occur during the line up on tiers after unlocking cells, on walkways and stairways, waiting for and during showers, in pill lines, chow lines, and yard (and, of course, not in the double-occupancy cells). Broomfield appeared to blame the inmates for these failures, stating that inmates had to choose to socially distance from each other during these times. In fact, however, custody staff simply did not enforce the social distancing policy. Taking the showers as one example, shower heads are just over a foot apart. Even when instructed to use every other shower head, inmates still showered well within six feet of each other (and without masks). Inmates in line for showers – up to 60-150 at a time, depending on the housing unit – could not socially distance because guards locked them in the shower area (as shown in Exhibit 370.007) while waiting their turn.[3] In June 2020, as the outbreak worsened, to get showers done in the allotted time, two to three inmates at a time would share a shower. Phones were similar. Bishop acknowledged that when phone use resumed in late July 2020, some phones were less than six feet from each other. Later, the prison installed barriers between them or blocked off every other one and cleaned them between uses (which does not appear to have happened consistently).

d) Personal Protective Equipment (PPE)

Respondent did not provide cloth masks until late April 2020 and N95 masks until July or August 2020, "after the whole facility had been infected." (2 RT 271; 1 RT 70.) On Willis's July 3 visit to San Quentin, Willis observed the safety precautions taken in H-Unit, but "not a lot of other precautions." He encouraged CDCR to mandate mask wearing but was told CDCR could not mandate masks (changed later by the Unified Command).

[3] Respondent asserts that "San Quentin officials limited shower access to small groups of 10 inmates at a time." (Resp. Opp. at p. 35.) That assertion is, at best, overbroad. It originates from the testimony of Jason Bishop, an Associate Warden at San Quentin who did not start work there until the end of July 2020. In his testimony, he is reading from a policy document dated August 6, 2020. (8 RT 1651-1653.) Respondents offer no evidence to contradict Petitioners' evidence regarding the showers at least up until that date.

Guy Vandenberg is a nurse who volunteered at San Quentin during the worst part of the outbreak. He saw several staff in North Block eating without masks and as close as three feet apart. He returned an hour later to the same area. The staff still lacked masks but had finished eating.

According to Bick, prison officials mandated masks for inmates and staff in August 2020. Mask compliance among inmates and staff varied greatly. Many staff often only wore a mask when near a supervisor. One inmate testified that less than 50 percent of staff wore a mask through February 2021, when he transferred to a different prison. Another testified to noncompliance rates between 80 and 90 percent among staff in May and June 2020, increasing as the outbreak worsened. Although Bishop testified that the prison never ran out of PPE and that staff and inmates received training on wearing proper PPE, he acknowledged that inmates lodged "numerous" complaints about staff not wearing masks. Staff also faced discipline for failing to wear the required PPE in various parts of the prison, including letters of instruction sent to 25 staff based on a picture posted of them not wearing masks or social distancing.

One West Block inmate (Ellis Hollis) lived in a cell right next to the shower entrance. From May 2020 onward, while he could not leave his cell, the shower line ran right past it. Inmates in line continuously coughed and failed to wear masks. He did not see staff ever advise anyone to put masks on. Observing this day after day, Hollis feared for his life because he is asthmatic and uses a CPAP machine, having lost full lung capacity due to Valley Fever. He also feared for the life of his 79 year-old cellmate who also used the CPAP machine.

e) Mixing sick and well inmates

Inmates routinely remained in open door cells not isolated or quarantined after reporting symptoms. In addition to the examples described above regarding the initial housing of the CIM transferees, and the kitchen workers, other inmates described similar situations. For example, Larry Williams reported symptoms on June 10, 2020. A nurse screened him that evening. The nurse denied the symptoms related to COVID-19. He took a test the next day, June 11, and again reported his symptoms. His symptoms continued to worsen. On June 15 staff informed

him that the results of his June 11 test showed he had tested positive for COVID-19. They moved him to the AC, where he remained until July 11. Upon arrival at the AC, he found the mattress, wall, and bed all soaked with some type of chemical. He used his own clothes as a layer so he could sleep on a dry bed. During his stay there, he never received clean linens or laundry; he washed his clothes and sheets in the sink. On July 11, staff ended his isolation in the AC even though he continued to report symptoms and even though they had administered him no new test. He did not receive another test until several weeks after leaving quarantine.

Other inmates told similar stories. As late as early July 2020, some remained in their cells after reporting symptoms. Some continued to remain in their cells even after a positive test, and even when their cellmate simultaneously tested negative. One (Miguel Sifuentes) was forced to house at the ACS with confirmed positive inmates even though he had tested negative twice before moving. Sifuentes slept in a mask at the ACS due to his fear of contracting COVID-19 while housed amongst all the infected inmates there. After 10 days, staff moved him to a new cell in West Block without testing him. Similar issues arose in the chapel, which officials used for additional housing. Vandenberg visited it on rounds and saw some patients in isolation, other patients in quarantine, and yet others in neither isolation nor quarantine, yet all housed together. Willis observed no isolation of positive cases during his July 3 visit, corroborating the testimony of multiple inmates.

f) Testing and screening

Testing Delays: Testing delays posed a "significant concern" because "[i]f you are not getting results back, then you are really throwing darts in the dark." (Bal depo., 40:5-15.) Barbara-Knox conceded that existing staff at San Quentin could not manage the screening and testing demands. By July 4, 2020, she brought in additional staff from the east coast, took over a local hotel, and set up administrative and information technology staff to expedite the onboarding process for the supplemental nursing assistance. Cal/OSHA inspector Sheets found "a lot of falling through the cracks" and "a huge void" in staff testing. "[T]here was nobody who could really order testing or clear [employees] to return to work or thoroughly do the [contact

tracing] investigations for the employees." (8 RT 1548.) According to Broomfield, delays in getting test results "was a big issue" among inmates and staff and took around two months to resolve. For inmates, the turnaround time for testing in June 2020 varied, but took up to five to six days, with at least one as long as 10 days. (3 RT 516.) During that time (first on April 14, 2020, and again on June 8, 2020), a lab affiliated with UC Berkeley offered free testing for San Quentin inmates and staff, scalable up to 1,000 tests each day within two weeks. Despite testing delays contributing to the worsening outbreak, and despite administering only 500 tests per day in early June, San Quentin officials turned down this free assistance. (Ex. 213; 3 RT 526-27; 4 RT 671.) At the time the lab renewed the offer in June 2020, San Quentin still faced delays of four to five days for its COVID-19 tests. Prison officials never accepted the additional testing assistance.

By Fall 2020, the turnaround for test results had dropped to one to three days for PCR tests. It can then take several days more for the inmate to get a letter reporting a negative test after prison gets the test results, making the total turnaround to the inmate up to two weeks.

Inmates: On his visit to San Quentin on July 3, Willis recommended weekly testing of all staff and inmates. That did not happen for several weeks. Inmates also refuse testing for various reasons. Primary among them, inmates fear moving to the AC if determined positive. According to Broomfield, Unified Command developed a relationship with certain doctors who made rounds to persuade inmates to test.

Staff: On June 11, 2020, San Quentin mandated COVID-19 testing for all staff. (Murray Depo, 21:17-21.) However, testing ended on June 15, 2020 and did not resume until June 30, 2020. (Murray depo., 28:6-21; 29:6-12.) This was a critical time as the outbreak expanded exponentially. Moreover, some percentage of staff who did not test between June 11-15 continued to work at the prison. (Murray depo., 31:10-23.) Contact tracing also began in June 2020 as soon as the prison learned about the first positive tests from CIM. (Murray depo., 25:6-9.) According to Bishop, the weekly staff testing was in place when he began work on July 12,

2020, decreased to bi-weekly testing in Fall 2020, then reverted back to weekly testing a month later.

Staff members were directed to report symptoms and sent home if they confirmed symptoms and tested positive. (Murray depo., 26:1-7.) However, at least until late in the summer of 2020, staff who reported symptoms one day could enter the prison the next day by reporting no symptoms then. (11 RT 2181.) The timing of staff test results has varied over time, ranging from one day to a week; staff may continue to work while awaiting test results. (Murray depo., passim.).

g) Inadequate resources

Testimony regarding failures to test, failures to treat, and failures to isolate or quarantine sick inmates, makes sense in light of the apparent gross lack of resources. As testing ended temporarily in mid-June, cases skyrocketed. On June 18, 2020, alone, 170 out of 220 inmates in Badger tested positive. According to Dr. Grant, it was an "overwhelming task to care for that group with limited resources." One inmate (Kevin Sample) testified that he developed COVID-19 symptoms in June but was never tested until mid-July. Another inmate (Demetrius McGee) testified that he had high-level mental health care needs that required him to see a doctor every 90-120 days. However, during lockdown he went from February 2020 to September 2020 without seeing one. During that time, he suffered from fear and anxiety while locked in his cell with his cellmate who tested positive. A relocation request went unheeded. Several days later, he developed symptoms and tested positive. A third inmate (Willie Hearod), has been a Type 1 diabetic since childhood. From April 2020 to August 2020, he could not get the strips he uses to test his blood sugar and adjust it with insulin. During the time without test strips, his blood sugar fluctuated, his eyes became blurry and he could not read. He also did not receive his regular insulin injections on time for several months starting in March 2020.

On July 9, 2020, Warden Broomfield and Clarence Cryer issued a Memorandum to the population of incarcerated persons at San Quentin. In the memorandum, Warden Broomfield and Mr. Cryer stated that "[s]taffing shortages had resulted in restricted movement for the entire

population" and that the pandemic had "affected [the prison's] ability to provide consistent hot food. You and your families have voiced your concerns. We want you to know you have been heard. San Quentin is collaborating with several State agencies to ensure you are provided appropriate medical care, food, and canteen and vendor services."

Bishop conceded that prison authorities lacked adequate resources. According to him, CDCR did not feel the same sense of urgency as the prison executive staff and did not provide the resources requested by staff. If it had, Bishop believes the "outcome might have been quite a lot less severe." (11 RT 1653-54.)

h) Lockdown

To reduce inmate movement, prison officials restricted inmates to their cells. For approximately two months during June and July 2020, inmates had no access to the yard, and could only leave cells for showers (three times per week) or, after July, sometimes to access essential services such as healthcare. Religious, educational, and healthcare appointments were done at the cell. However, a significant amount of programming, including everything provided by volunteers, discontinued for several months. During this time, inmates remained in their cells. When yard privileges resumed toward the end of August 2020, inmates accessed the yard by housing unit as a cohort.

Juan Moreno Haines lived in North Block at the time of the transfer. Haines is a senior editor for the San Quentin news. He has published in several state and national publications. He has reported on the pandemic at San Quentin and, for the last decade, about infectious diseases at San Quentin. He lived in North Block at the time of the CIM transfer. After he tested positive, he moved to a dirty cell with his cellmate but was too weak to clean or unpack. He lost his sense of taste and smell, and his breath. He received no medical care or treatment while suffering COVID-19 symptoms. Haines reported that he, and other inmates, were locked in cells 24 hours per day. They could leave their cells only two to three days per week for an hour and a half each time for showers, phone calls, or exercise (but only one of the three due to the time required for each). Other inmates (and staff) corroborate this testimony and tell similar stories.

Exhibits 370.011 and 370.012, (see, *supra,* Section IV.B.1.a.), show a typical cell in which two inmates would remain for 24 hours every day, for several weeks at a time, with release only two to three days per week for one to two hours each time. These cells have 22 inches between the edge of the bunks and the wall – barely enough room to stand. According to Dr. Terry Kupers, these conditions constitute solitary confinement (see, *infra,* Section IV.I.2.). Exhibits 369.001, 369.002, and 369.003 (see, *supra,* Section IV.B.1.c.) show a typical cell in the AC–actually designed for solitary confinement–where inmates resided in isolation lockdown subject to the same hours, also for several weeks at a time. One inmate (Sifuentes) was not allowed to shower or make phone calls for 13 days while waiting for test results, with no clean clothes or fresh linens during that time.

Medical and mental healthcare delivery suffered during the lockdown but did continue. Dr. Grant testified that medical staff developed virtual cell-front medical services in advance of the lockdown and delivered those services. Regarding mental health, clinicians visited inmates cell to cell during lockdown and resumed group sessions as the restrictions eased.

i) Unified Command

Willis had urged San Quentin to adopt an incident command structure, ultimately enlisting the Marin County Board of Supervisors to again intercede with the Governor (as he had with the unsuccessful effort to have San Quentin develop a surge plan). The state finally mandated the Unified Command, with Willis as part of the team. It began on July 3, 2020, by which time San Quentin already had 1,300 inmate COVID-19 cases.

From July 3, 2020, through August 2020, the Unified Command team coordinated the custody and medical staff response to COVID-19 at the prison. Unified Command met twice per day every weekday. The team included medical, custody, emergency management, and infectious disease experts from CDCR (Broomfield's immediate supervisors, Assistant Secretary Ron Davis for the first thirty days), CCHCS, the Governor's Office of Emergency Services, Emergency Medical Services Authority, the California Department of Public Health, and the Division of Occupational Safety and Health within the California Department of Industrial

Relations. (Factual Stipulation No. 27.) The Unified Command team instituted certain changes. For example, instead of having inmates and staff prepare and distribute food, a contract provider came in to prepare food outside the prison and then distribute it inside. (Brockenborough depo., 67:12-19.) It also mandated N95 masks, set up tents to create more bed space for isolation, quarantine, and social distancing, and converted the chapel and gym to bed space.[4] (Brockenborough depo., 68:2-12; Pachysnki depo., 58:16-59:9; 60:8-16.) A modified program resulted in closing the law library (inmates could request delivery of materials to cells), limiting yard time, closing day rooms, and instituting personal escorts for inmates instead of free movement in groups. In addition, as mentioned above, between July and September 2020, San Quentin repurposed the PIA onsite furniture factory to the ACS isolation and/or quarantine facility, and hired a third-party vendor to operate it. (Factual Stipulation Nos. 27-28; Pachynski depo., 60:8-12.) According to Broomfield, Unified Command also established a "movement task force" that included custody and healthcare. This task force controlled all movement throughout prison and instituted buffering where "resolved" inmates were placed in between COVID-19 naïve inmates to enhance distancing. (8 RT 894.) The prison also started using "resolved" inmates as critical workers, and cohorted critical workers within housing units to avoid mixing them with other workers.

Under the supervision of Unified Command, according to Bishop, critical workers were trained to clean according to high standards and cleaned housing units daily. Unit captains did weekly COVID-19 compliance checks, and officers also toured the units. Although Bishop testified that the units were "very clean," ample credible evidence from both inmates and outside, objective, visitors, refutes that testimony.

[4] The Unified Command, with its external stakeholders, has now ended in favor of an Incident Command Post ("ICP") consisting of internal members focused on COVID-19 mitigation and response. (Brockenborough depo., 71:4-72:16.)

Prison officials rejected certain recommendations made by participants in the Unified Command. For example, according to Broomfield, CDPH requested staff cohorting within the housing units but, as explained above, San Quentin did not follow that recommendation.

2. Population reduction

Respondent knew that overcrowding – operating beyond capacity – would create a heightened risk to the health and safety of inmates regarding COVID-19. (Bal depo., 125:18-21; 139:11-18.) Population density remained a concern throughout 2020 due to the dangerous consequences of transmission in denser prison populations. (Bal depo., 89:10-18; 90:3-6.) Respondent concedes that close quarters in carceral settings leads to a higher risk for contracting COVID-19. (Bal depo., 68:1-10.) San Quentin presented a "complex" set of risk factors: it had people in very close quarters, in a community with increasing cases and decreasing resources. (Bal depo., 33:2-34:13.) Thus, Respondent "recognized the importance of reducing population in order to mitigate the risk that COVID posed." (Bal depo., 81:7-15, 137:8-12; Gipson depo., 111:4-14; Pachynski depo., 53:21-54:2.) Nicole Avila, the Associate Warden in charge of healthcare, asserts that population reduction helped San Quentin manage the spread of COVID-19. To reduce the population and limit transfers, CDCR took certain measures.

First, it halted all intake of new prisoners from county jails from March 24, 2020, to May 24, 2020; from June 19, 2020 to August 23, 2020; and from November 26, 2020, to January 11, 2021. (CDCR and San Quentin resumed limited intake of new prisoners from county jails from May 25, 2020, to June 19, 2020; from August 24, 2020, to November 25, 2020; and from January 11, 2021 to present.) (Factual Stipulation No. 26.)

Second, Warden Broomfield believed that the dorm-style congregate housing at San Quentin would be the most dangerous type of housing prior to the CIM transfer. He was already reducing the dorm population to increase social distancing and mitigate the spread of COVID-19. However, he also had concerns prior to the CIM transfer that cells that lacked solid doors could make inmates in those cells more susceptible to the fast spread of COVID-19. As a result of these efforts, the population was decreased in the two H-Unit buildings by 50 percent in Spring

2020 (from 100 to 64 and 200 to 100). Subsequently, H-Unit experienced only three to five COVID-19 cases through October 2020, compared to over 2,000 in the other units combined. Daryl Dorsey, the Facility Captain for H-Unit, testified that the population has been reduced in H-Unit about 45 percent from its height to its current level. The existing population is about 41 percent of its existing capacity. Dorsey believes this population reduction contributed to the low number of COVID-19 cases, among other factors.

Third, Respondent developed an early release plan that resulted in "around 80 or 90" inmates being released from San Quentin who were within 60 days of their natural release date. (Gipson Depo., 30:21-31:16, 33:2-14.) This was a CDCR plan, not a San Quentin plan. CDCR released a second set of inmates early in July 2020, with expanded criteria to within 365 days of early release (but excluding certain prisoner categories such as domestic violence and sex offenses). (Gipson depo., 115:5-11.)

Despite these efforts, outside experts recommended far more extensive population reduction. On June 13, 2020, at the request of the federal receiver in *Plata v. Newsom* (N.D.Cal., No. 01-cv-01351-JST) and *Coleman v. Newsom* (E.D.Cal., No. 2:90-cv-00520 KJM DB P) (together, "*Plata*"), a team of University of California at Berkeley and University of California at San Francisco ("UCSF") health experts visited San Quentin. According to Dr. David Sears, an infectious disease doctor at UCSF who visited San Quentin with others in response to the receiver's request, these experts work through a group called AMEND, affiliated with UCSF. It focuses on improving the quality of healthcare in prisons, most recently by training prison medical staff in COVID-19 clinical management. The AMEND group has expertise in public health, geriatrics, epidemiology, prison medical care and infectious disease. The June 13 visit arose out of concerns that the outbreak at San Quentin could transform into something much worse.

The AMEND group extensively toured San Quentin on June 13. It met with senior San Quentin staff. Based on this visit, on June 15, 2020, the AMEND group released a report titled "Urgent Memo: COVID-19 Outbreak: San Quentin Prison." ("Urgent Memo") (Factual

Stipulation No. 52.) Dr. Sears wrote portions of the Urgent Memo based on his personal observations. In Badger, he observed double-celled inmates with no sustained physical distancing in the cells. Windows were almost entirely shut, as they were also in North Block. The gymnasium had been converted into dorm housing with beds five to six feet apart. It had few windows, with none open. Dr. Sears expressed the concern that despite the differing bed structure, people were housed in close quarters with very little air exchange from outside to inside. Officers also clustered in certain areas. Dr. Sears also observed the AC, which by then had been converted to house positive test cases and those with symptoms awaiting test results. Dr. Sears expressed concern about using the AC for medical isolation because prison officials historically had used it for solitary confinement. Dr. Sears believed the fear of going to the AC would disincentivize reporting of symptoms (others agree with him, as set forth below). In all areas, he saw extensive lack of compliance with masking and PPE policies.

The Urgent Memo set forth several key recommendations. The authors communicated these recommendations to the receiver. One such recommendation was to reduce the San Quentin inmate population to 50 percent of its then-current capacity.[5] Dr. Sears discussed that recommendation, and the others, directly with the receiver.

According to Brockenborough and Bishop, Unified Command discussed the Urgent Memo, including its various recommendations. Unified Command adopted some recommendations in the Urgent Memo, including the creation of an emergency response team. Unified Command also discussed the Urgent Memo's 50 percent reduction recommendation in July and August 2020. (11 RT 2243, 2246-48.) Unified Command discussed reducing the population through alternative housing, but ultimately it made no specific recommendation in that regard.

[5] Petitioners now contend the Urgent Memo recommended a reduction to 50 percent of design capacity, which would translate to a far more significant reduction. The court does not read the Urgent Memo that way. Neither did the Court of Appeal. (*See* October 2020 *In re Von Staich* Order at p. 61.)

Although Respondent did not adopt the Urgent Memo recommendation regarding population reduction, it did agree that population reduction would help mitigate the risk of COVID-19 and reduced the population according to that understanding. In addition to the other measures it took, it considered, but then cancelled, a transfer of certain inmates considered medically high-risk out of San Quentin to other prisons to prevent the perceived higher risk of exposure at San Quentin. (Gipson depo., 137:12-20.) In December 2020, CDCR also removed a certain number of high-risk inmates from San Quentin to Corcoran to move them from the higher risk dorm and open-door cell housing at San Quentin to solid door cells at Corcoran. (Foss depo., 49:16-50:14.) Through these and other measures, between March 4, 2020, and May 15, 2021, San Quentin reduced its total prisoner population by 1,577 (4,050 – 2,473 = 1,577). (Factual Stipulation No. 12.) As of May 15, 2021, San Quentin was operating with a prisoner population of 80 percent of design capacity (2,473 ÷ 3,082 × 100). (Factual Stipulation No. 12.) This reduction represented approximately a 40 percent reduction from the population level observed by the Urgent Memo authors, in comparison to the 50 percent reduction they recommended. (Ex. 1246, p. 2; Ex. 712, p. 164.)

Nevertheless, as of April 2021, 830 individuals incarcerated at San Quentin resided in double-cells. (Factual Stipulation No. 60; Brockenborough depo., 36:5-8.) Because of the danger this population level poses for future outbreaks, Bick supports reducing the population at this time (and did in March 2020). However, Respondent has no plans to reduce the population density at San Quentin, including through the release or transfer of prisoners, to mitigate the risk of COVID-19 to prisoner health and safety. (Factual Stipulation No. 61; Gipson depo., 83:13-16.). CDCR has no plans to construct additional housing and no plans to increase the number of available solid door cells. Officials could decide to increase the population back to design capacity at any time. In fact, the population has increased since the low of 2,418 in May 2021 as cases have receded and county intake resumes.

H. The Cal/OSHA Investigation and Report

Channing Sheets is a senior safety engineer with the California Occupational Safety and Health Agency ("Cal OSHA"). He has expertise in infectious diseases and safety engineering. He also investigated San Quentin during two prior infectious disease outbreaks – a Legionella outbreak in 2015 and a Norovirus outbreak. As the result of press coverage regarding the uncontrolled COVID-19 outbreak at San Quentin, Sheets began an investigation on June 24, 2020, focused on the communicable disease emergency response at the prison. Over the course of the investigation, Sheets conducted approximately 120 interviews, including of Broomfield and other top management at the prison. Sheets made between 12 and 18 site visits to San Quentin between June and December 2020. He toured all parts of the prison.

After his initial visit, Sheets sent a June 27 email (Exhibit 646) to the director of CDPH because San Quentin obviously could not deal with the outbreak without help from an outside team. In the email, Sheets deemed the COVID-19 outbreak at San Quentin "the worst outbreak in a correctional setting that I have ever seen." The email reported a series of problematic conditions and practices and requested an immediate lockdown. Sheets observed that "COVID positive inmates are walked through the campus to the exercise yard daily and out for group mental health sessions." He observed a failure to cohort sick inmates into designated units. He joined the list of outside experts requesting staff cohorting to prevent the spread of COVID into the three housing units that at that time had no COVID-19 cases. Sheets also reported that employee screening procedures needed revising because employees could report symptoms one day, but then report no symptoms and gain entry the next day. He also reported "contact tracing for employees is poor."

As Sheets's investigation continued, he raised other issues in real time. For example, after a July 10 site visit, he observed a staff member in the employee gym doing cardio exercise with no mask in violation of the state order. He required the prison to discontinue the use of large, industrial fans set up in the PIA because the fans simply recirculated bad air, which could exacerbate virus spread. During the same visit, Sheets could not find someone at the prison

knowledgeable about the ventilation system, including such important metrics as the air exchanges per hour and the filtration quality.

Reflecting the seriousness and severity of violations he observed, prior to concluding the investigation Sheets issued an Order Prohibiting Use. The Order shut down the San Quentin dental clinic due to a "dangerous condition so as to cause an imminent hazard to employees," specifically the "risk of infection due to occupational exposure to SARS-CoV-2." (Exhibit 637 (Amended Order as of September 10, 2020).) The Order found that San Quentin had failed to implement an Aerosol Transmissible Disease (ATD) Exposure Control Plan to control the risk of COVID-19 during aerosol-generating procedures. It further found that the prison failed to provide the required powered air purifying respirators (PAPRs) for custody medical staff present during procedures. Perhaps most significant, the Order determined that San Quentin "did not clearly communicate the infectious status for confirmed SARS-CoV-2 inmate patients to dentists, dental hygienists, and correctional officers exposed to confirmed and suspected COVID-19 cases . . .." (Exhibit 637 at p. 2.) According to Sheets, the Amended Order reflects different rules for compliance than had the original order because San Quentin never could have complied with the original (and standard) rules.

In early February 2021, Sheets's investigation culminated in the issuance of numerous serious citations against San Quentin in a scathing, forty-one page report. (Exhibit 628.) Many of the citations generally are considered "serious," meaning they pose the "realistic possibility of death or serious physical harm." Some fall into the "willful serious" category, the most serious type of violation, which means San Quentin had prior knowledge of, or was working to address, an issue, but did not resolve it. The fines associated with the citations total $421,880. That total reflects the highest penalty amount of any correctional investigation related to COVID-19. Sheets reviewed these citations with Broomfield and others, including lawyers representing the prison. The citations generally corroborate much of the Petitioners' and other witnesses' testimony regarding conditions at San Quentin. Examples include:

- Citation 6, a "willful-serious" violation involving (among many other allegations) the failure to develop and implement an ATD Exposure Control Plan, the plan's PPE requirements "are incomplete, inconsistent, and inadequate," the prison "transferred suspect and confirmed cases between units," and "failed to isolate inmates transferred from CIM in closed door cells."
- Citation 7, another "willful-serious" violation involving (among other allegations) the failure to provide adequate PPE, inadequate screening procedures for employees, failure to implement procedures for physical distancing, failure to ensure compliance with PPE policies (including the haircut example referenced above), running industrial fans in housing units, mixing of infected and non-infected inmates, and the violations in the dental unit.
- Citation 8, another "willful-serious" violation, primarily addressing the failure to have a written plan for respiratory protection and the failure to provide N95 respirators for custody staff or provide proper training for the fit and testing of the respirators. This citation was abated in 2021 after having been first raised in June 2020.
- Citation 9, another "willful-serious" violation, involving the failure to develop and implement an adequate plan for isolating and quarantining patients in the event of a respiratory pathogen such as COVID-19. Examples include the failure to designate a single person for all healthcare concerns, ongoing violations of a federal court order to test all staff, inadequate progress on contact tracing, and improper screening with people who report symptoms one day and not the next. This violation takes on added significance because Sheets had notified the prison regarding the need for this plan in 2015 when investigating the Legionnaires disease outbreak at San Quentin. The prison also had received similar recommendations from the CDPH before the COVID-19 outbreak that it had failed to address.

According to Brockenborough, Respondent has not yet abated four of the citations in the Cal/OSHA report. Chris Curtain, a health program specialist at San Quentin, has been helping to address various issues raised by the citations. Called by Respondent to explain the effort Respondent has undertaken to address the citations, Curtain essentially conceded the validity of most of the citations (including related to the ATD). For example, regarding Citation 6, item 5(b) (ATD plan), Curtain agreed the "original plan was deficient." Regarding Citation 6, item 5(h) (ventilation), Curtain has yet to identify the actual number of air handling units and needs more time to work on that item. Regarding Citation 6, item 5(j) (transferring infected cases to a suitable facility), Curtain agreed the original plan "was kind of inadequate" for a prison and he understood why Cal/OSHA cited it. Curiously, Curtain did not begin his assignment until more than a month after the citations issued. As of the date he testified, the prison still did not have a final plan and had abated only one item. Moreover, the relevant regulations required San Quentin to have a plan as of 2009 – well over a decade of noncompliance on issues critical to managing an infectious disease outbreak.

I. The Experts

Petitioners called three experts. Respondent called one.

1. Dr. Meghan Morris – Petitioners' expert

Dr. Morris is an infectious disease epidemiologist and an associate professor in the Department of Epidemiology and Biostatistics at UCSF. She has a Ph.D. in applied epidemiology with a concentration of infectious disease epidemiology. Whereas most epidemiologists tend to focus only on researching a particular pathogen, Dr. Morris has complementary training as a social epidemiologist. This additional training allows her to "uniquely set up intersection between social epidemiology and infectious disease epidemiology." She looks at "upstream factors or social determinants of health as they relate to health within a population," such as studying the effects of a pandemic on vulnerable populations.

Dr. Morris testified that Sars-Cov-2 spreads predominantly through droplets. The droplets can become aerosolized at less than five micrometers in size. They then can remain

suspended in the air for hours. For this reason, people are more susceptible the closer they are to each other. Also, air circulating in the same space makes people in that space more susceptible. These principles regarding transmission were well-established in the scientific community and general population by the end of April or beginning of May 2020.

COVID-19 symptoms can continue for long periods of time, even after the infected person ceases to be infectious to others. COVID-19 patients with "long COVID syndrome" may experience shortness of breath, severe fatigue, and neurological symptoms like headaches and changes in the brain for months, perhaps longer, and perhaps forever. Scientists do not yet know how these long haul symptoms may affect people with existing medical conditions.

An infected person can contract COVID-19 after the first infection resolves. Scientists do not yet know the extent of any immunity conferred by the first infection.

The three primary tools to prevent the spread of COVID-19 are: (1) reducing population density by spreading people out or reducing numbers, and social distancing (including isolation and quarantine); (2) testing; and (3) sanitation. Regarding social distancing, given the way the virus spreads, inmates should reside only in single cells with an empty cell on either side, if in a cohort of ten or more cells. Regarding testing, as of May 2020, the scientific community generally understood that the same principles generally applicable to an infectious disease response strategy for communicable diseases also applied to COVID-19. These principles include: (1) testing should be done every five to seven days with no mixing of groups in between testing, with isolation and contact tracing for any positive tests; (2) testers ideally would receive results within 24 to 36 hours; and (3) testing must be administered to the asymptomatic population.

Population reduction as a primary tool to protect inmates from COVID-19 was known and endorsed by May 2020. Scientists and medical professionals had evidence from other infectious disease outbreaks, including the 1918 flu pandemic at San Quentin that, without physical distancing, the other tools that prevent spread (e.g., masks, PPE, sanitation), lose their

impact. According to Dr. Morris, the architecture at San Quentin precludes proper social distancing unless officials reduce the population.

Dr. Morris opined that prison officials did not take necessary measures to protect the health and safety of the San Quentin inmates. In particular, CDCR took insufficient precautions during and after the CIM transfer. CDCR had sufficient information about how COVID-19 spread and how to contain it, and they had the resources to do testing and isolation, but they simply chose not to act on that information. Two days provided insufficient time to implement CDCR transfer policies and protocols. Testing did not occur at the point of reception at San Quentin until days later, then test results were further delayed by up to a week. Meanwhile, Respondent knew that the CIM inmates were coming from a prison with a large COVID-19 outbreak. Respondent knew that testing prior to transfer was insufficient. Respondent knew the CIM transfers qualified as a dense population because they sat close together for a long time on the bus, that some lacked masks, and that some had difficulty breathing and other COVID-19 symptoms. Respondent also knew that housing the CIM transfers in Badger was unsafe due to the open-cell doors and the native San Quentin inmate population that remained in Badger. Given those factors, it was reckless to not immediately test and isolate the CIM transfers upon arrival until test results came back. For these reasons, the measures taken by Respondent did not protect inmate health and safety. Further, Respondent demonstrated a lack of value for the lives of the San Quentin inmates, including the CIM transferees.

Dr. Morris further opined that Respondent should have reduced the prison population prior to the CIM transfer and, for several reasons, should still do so now. First, even though cases have remained low since Fall 2020, that is because over 75 percent of the inmates were infected during the outbreak and developed immunity for some (unknown) period. However, this artificial way of reducing the susceptible population may not last. For example, the natural immunity may subside. Or, despite the vaccination rate, variants may cause new outbreaks. Or, inmates without vaccinations may get infected. The low staff vaccination rate exacerbates these

factors. In Dr. Morris's opinion, due to these factors, any population density over 50 percent of design capacity poses an ongoing risk to the health and safety of the San Quentin inmates.

2. Dr. Terry Kupers – Petitioners' expert

Dr. Kupers is a community and forensic psychiatrist with expertise in prison and jail conditions. He studies the psychiatric effect of solitary confinement and the quality of prison mental healthcare behind bars. He investigated the effect of COVID-19 on prisoner mental health generally and on those inmates with existing mental health issues.

Dr. Kupers opined that COVID-19 is a major, life-threatening, critical occurrence. The reaction to it by Respondent was extremely substandard, resulting in continuing damage to inmate mental health. Many measures Respondent employed in its COVID-19 response contradicted public health best practices. For example, the transfer from CIM, in violation of multiple policies, protocols, and known health practices, has caused prisoners to fear and distrust prison officials.

Dr. Kupers focused on the effects of using the open-barred and closed-door housing cells for COVID-19 isolation. The size of open-barred cells (49.5 square feet) falls well below the 80 square foot American Correctional Association standard for ***one*** person. As illustrated by Exhibit 370.11, these cells allow only 22 inches from the side of the two bunks to the wall. The inmates have nowhere to sit or write. Assuming double occupancy, only one inmate could stand at a time, effectively limiting the occupants to the bunks. Social distancing is impossible. In addition, the cells are filthy, impossible to clean, and have no window. Respondent confined two inmates in these cells for long periods of time. Having two people in the cell increases the harm because it reduces the available space. Over long periods of time, the isolation in these cells constituted solitary confinement, with comparable mental health effects. Those effects include significant psychiatric damage even for psychiatrically stable people. Symptoms may include anxiety and panic attacks, insomnia, problems thinking coherently (leading to paranoia), difficulty with concentration and memory, despair (50 percent of prison suicides occur in solitary), and compulsive activity. (Inmate witnesses reported experiencing many of these same

symptoms while locked in their cells.) For people with existing mental illness, the solitary confinement effect will exacerbate their symptoms.

The AC cells have a similar effect, though for slightly different reasons. The AC is notorious in the United States, with a long history. Inmates fear placement there. (Multiple witnesses, including inmates and San Quentin employees confirmed this reputation and its psychological effect on San Quentin inmates.) Inmates even refused COVID-19 tests and vaccinations due to their fear of placement in the AC if they developed symptoms or tested positive. (Rainbow Brockenborough testified that in December 2020 prison officials offered 270 inmates the chance to move from their dorm residence to a solid door cell like the Adjustment Center; 26 accepted.) For these reasons, using the AC for medical isolation is countertherapeutic. It does not prevent, and likely exacerbates, the spread of COVID-19 because the prospect of housing in the AC inhibits testing, symptom reporting, and vaccination. (Dr. Paul Burton, the Chief Psychiatrist at San Quentin, corroborated these concerns. He believes the unpleasantness of the AC is designed to deter further rules violations. When the AC was designated for COVID-19 isolation purposes, Burton had concerns about the mental health of people who would be transferred to the AC for a non-disciplinary purpose. He believed they might need additional mental health support. To facilitate this, his team conducted cell-front consultations with the door locked and the doctor talking through the door with the inmate.)

As reflected in Exhibit 369.003, the AC cells are larger than the open-barred cells in the other housing units and have just a single bed. However, using the AC for COVID-19 isolation causes even more psychological damage than the open-barred cells because the solid door prevents interaction with other people all day, resulting in even more extreme solitary confinement. The cells have no natural light, which increases insomnia. The yard used for recreation is extremely small and limits any interaction because prisoners must remain in individual cages in the yard.

In general, lockdown causes higher anxiety and depression. It increases overcrowding because inmates must stay in the cell instead of leaving. Crowding increases violence, suicide,

and fights. Typically, after lockdowns violence surges, which explains the tenfold increase in fights at San Quentin since the start of the lockdown.

According to Dr. Kupers, current conditions at San Quentin pose an ongoing risk of mental health harm. To abate the risk of harm, prison officials should: (1) reduce population significantly to the point that two inmates do not need to share a cell, which is a major ongoing health hazard; (2) officials should enforce CDC regulations regarding masks, social distance, sanitation and hygiene; (3) prison officials should end the use of solitary confinement, which a lower population would allow them to do; and (4) officials should reinstate visiting and programs (which they largely have done).

3. Dr. Daniel Parker – Petitioners' expert

Dr. Parker is an infectious disease epidemiologist and a professor in public health and epidemiology at UC Irvine. He makes maps of infectious diseases to assess the risk of infection and develop strategies to disrupt transmission. He also looks at human movement to track pathogens across landscapes. He previously served as an expert in the COVID-19 cases relating to the Orange County jails. He testified that the architecture and population density at San Quentin, combined with the healthcare available, made San Quentin primed for a large and rapid COVID-19 outbreak. The failure to prevent the importation of COVID-19 into the inmate population, and the subsequent failure to control the spread, resulted in unnecessary levels of disease and death.

Dr. Parker focused on the conditions that lead to exponential spread. Exponential spread means cases are doubling per unit of time. Once an outbreak hits exponential spread, it is far more difficult to control. He considered a wide array of countermeasures against spread and concluded that population reduction is the only way, given the unique features of San Quentin, to protect inmates from further infections.

First, the high infection rate at San Quentin does not mean those same inmates have immunity, or that herd immunity exists. Reinfection can occur within months of original infection, with some documented cases of more severe infections the second time. Herd

immunity is a public health concept that refers to transmission rate within a closed population from one infected person where people randomly encounter each other. It is possible to calculate the portion of the population who must be vaccinated from this rate, also called the herd immunity threshold. However, these assumptions do not reflect reality because people do not randomly encounter each other. The assumptions get further from reality in a carceral setting because the movement of inmates and staff in and out of the population make it not an enclosed population. This means that contact is more than random. Lots of contact occurs within cells, then within cell blocks, then housing units, and then between housing units. The higher the transmission rate from these contacts, the higher the vaccination rate required to reach herd immunity. Based on the current conditions, Dr. Parker cannot conclude herd immunity exists such that inmates face no future risk of harm from COVID-19.

Second, the prison population in general reflects higher risk factors, including age and the existence of comorbidities.

Third, prisons in general, and San Quentin in particular, are more susceptible to spread. The architecture presents a major problem. The well-known six-foot social distancing rule assumes a horizontal layout. Having cells stacked on top of each other means that infectious droplets can travel much further than six feet (from top to bottom): "Droplets can fall much, much further than six feet because of gravity." (7 RT 1382–83, 1399.) Thus, the housing blocks with stacked tiers presented a serious danger of transmission in May 2020 and still do today. Also, in double-occupancy cells, one person cannot avoid infection if the cellmate has contracted the virus. But the same is true for adjacent cells due to physical proximity and the bars on the cells. If these units are relatively full, COVID-19 would spread quickly. In addition, ventilation systems must turn over air, not just circulate it. Dr. Parker thought the ventilation seemed poor on his visit. He testified that in the upper tiers the air was hot and stuffy, and smelled bad, like body odor. It seemed obvious that he was not breathing outside air. These conditions make it even more likely for COVID-19 to spread. Other architectural features pose similar issues. For

example, in communal spaces, showers and phones are very close to each other – even if some are not used.

Prison officials made several mistakes, considering these conditions, that contributed to the severity of the San Quentin outbreak. Because people movement can affect spread, halting movement within a cell block should stop spread. This method essentially requires every housing unit to become a cohort. San Quentin officials did not effectively cohort. For example, inmates were removed from cells and lined up 150 at a time for testing, creating exposure to all of them. Also, inmate workers wearing only gloves and cloth masks encountered multiple people as part of their jobs. Inmates from different housing units are assigned to work together in close proximity in the kitchen, exposing all of them. Inmates should not prepare food to distribute outside of a cohort. As another example, after close physical contact with COVID-19 positive inmates, the exposed inmate was then housed with a COVID-19 naïve inmate, rather than being quarantined and not mixed. As another example, inmates requested a test because they felt ill, but did not receive one until several days later, did not enter quarantine in the meantime, and remained housed with cellmates who had not tested positive.

Because of these actions, which largely violated CDC guidance, the San Quentin inmate infection curve shows that COVID-19 essentially spread through each housing unit, then paused, then spread to the next housing unit as people travelled between units carrying the virus. In particular, San Quentin officials violated CDC recommendations by: (1) importing the CIM transferees and moving them into a mixed housing area; (2) failing to treat the housing units as cohorts; and (3) failing to sufficiently distance the inmates from each other.

Exhibit 271, the data of infection numbers over time at San Quentin, shows the results of these failures. At various points, the infection curve flattens, only to then accelerate again. Dr. Parker describes this as actually "a series of epidemic curves stacked on top of each other." The infections grew from zero on May 30, 2020, to 49 on June 13, 2020 – the brink of a serious outbreak – then to 774 on June 23, and to 1457 on June 29. This exponential growth would not have happened had prison officials cordoned off the housing units, implemented proper testing,

and implemented proper quarantine and isolation procedures. In fact, the chart would look the same if prison officials engaged in no mitigation at all.

Dr. Parker concedes that much of what prison officials did once confronted with the outbreak was "reasonable." However, mitigation actions – such as suspending intake from county jails, educating the public, distributing written information, mandating masks, providing masks, upgrading masks to N95, providing PPE besides masks, testing, retooling testing policies over time, working with public health officials to formulate a COVID-19 strategy, working with outside officials to form a movement and testing policy, providing weekly testing, reducing population by releasing qualifying high-risk medical inmates, reducing population by giving all inmates a one-time 12-week credit to speed release, suspending in-person educational and vocational programs, limiting attendance at jobs, suspending in-person religious services, and marking off six foot intervals – although reasonable, do not stop COVID-19 from spreading.

Dr. Parker considered the population reduction accomplished by prison officials. The design capacity of San Quentin was 3,082 on June 10, 2020, and its inmate population was 3,551 on that date (representing a population at 115% of capacity). On July 1, 2020, the inmate population stood at 3,452 (112% of capacity), a reduction since June 10 nowhere close to what would impede spread of the virus. In fact, the population did not go below design capacity until September 2020, at which point the outbreak had largely run its course. According to Dr. Parker, maintaining the population above design capacity directly impacted the rate of transmission and overall height of the infection curve. Had prison officials reduced the inmate population to 50 percent of design capacity, they could have spaced out the remaining population so that every other cell – horizontally and vertically – was empty. Doing so prior to mid-June would have lessened the severity of the outbreak and saved lives.

According to Dr. Parker, the dangers that led to the outbreak in the first place remain present today. With a vaccination rate greater than 75 percent for inmates and 51 percent for staff, COVID-19 presents a current danger because the staff have a too-low vaccination rate, inmates remain stacked on top of each other, and even previously infected and/or vaccinated

inmates can still get sick. These conditions also allow room for new variants to emerge or spread.

Finally, any other infectious disease introduced "will spread like wildfire" because the underlying architecture, proximity of inmates and inmate movement has not changed. As reflected by the 1918 flu pandemic, and COVID-19, it is just matter of time before another respiratory disease, or a COVID-19 variant, gets into the prison. Given the static features contributing to the outbreaks, only reducing the population to 50 percent of design capacity will prevent future disease and death.

While compelling, Dr. Parker's testimony suffers from several infirmities. First, as with Dr. Morris, Dr. Parker cannot know the nature of any future pathogen, or its manner of spread within the prison. That testimony is speculative. Second, he cannot explain, and does not account for, the apparent elimination of infections despite the risk factors he identifies that should contribute to further outbreaks, such as low staff vaccinations. Third, he appears to rely on the less than 100 percent vaccination rate among inmates to suppose that inmates can still get sick. However, he presented no data regarding the expected timing, cause, rate or seriousness of that future projected illness. Finally, while he testified regarding recommended depopulation measures, he did not "have enough information" to do a detailed study of the current population or the reduction required to achieve his desired population distribution. (7 RT 1426-1428.) Thus, Dr. Parker did not tether his population reduction recommendation to any detailed architectural study. There is no data-based connection between the two. (*Ibid.*)

4. Dr. Jeffrey Klausner – Respondent's expert

Respondent called only one expert in their case. Dr. Jeffrey Klausner is a professor at the University of Southern California's Keck School of Medicine in the Division of Infectious Diseases. He has advised the CDC and the State of California regarding COVID-19. Among other positions, he has served as an epidemic intelligence officer with the CDC and a principal investigator for infectious diseases with the National Institute of Health. Dr. Klausner has spent

the bulk of his career with the CDC focusing on HIV. He does not claim expertise in epidemiology.

Dr. Klausner asserts that infected persons recovered from COVID-19 have immunity. He did not say for how long that immunity lasts – only that it appeared to last for at least one year. (10 RT 2102-2103.) He estimates the probability of reinfection at 0.01 to 0.5 percent. (10 RT 2101.) The current consensus is that SARS-CoV-2 transmits through respiratory droplets between individuals who have close contact within several feet for 10 to 15 minutes. Depending on the situation, droplets can become aerosolized and spread that way. According to Dr. Klausner, the consensus on May 30, 2020, differed – then, the medical community understood transmission could occur through respiratory droplets within six feet for 15 minutes, but not through the air. The most effective countermeasures to prevent infection include vaccination, contact tracing, quarantine, isolation, increased ventilation, distancing, reduced crowding, and PPE (masks).

Dr. Klausner testified that fully vaccinated inmates have a less than one percent chance of suffering severe disease or death from COVID-19. (10 RT 2102.) Inmates who have received both doses of a vaccine have only a five percent chance of contracting a symptomatic infection. (10 RT 2086, 2102.) No witness disputed this evidence.

Dr. Klausner offered two key opinions. First, in response to a hypothetical question, he opined that the transfer of CIM inmates, and the preparatory measures taken by San Quentin related to that transfer, reflected the "best they [prison officials] could do in those circumstances." However, the hypothetical did not include important known facts, such as that CIM transferees were known to prison officials to have active COVID-19 symptoms, that they had not been tested within six days of the transfer, had not been quarantined before or after arrival, sat next to each other on the bus for 11 hours, were not tested for over a day upon arrival at San Quentin, and other important facts. When presented with just some of these additional facts, Dr. Klausner refused to accept any revised hypothetical or adjust his answer. Moreover, the omitted facts overlapped with the precise interventions Dr. Klausner identified as critical,

such as testing, quarantine, isolation, and PPE, to name a few. When presented with the hypothetical, Dr. Klausner never asked for additional factual information about the interventions he had deemed critical; he simply accepted the hypothetical as offered. Accordingly, the court gives little weight to this testimony.

Dr. Klausner's second opinion involved the current safety of the inmate population due to herd immunity. Herd immunity results from the combination of inmates previously infected with COVID-19, plus those additional inmates who have received the vaccine. The three vaccines (Pfizer, Moderna, and Johnson & Johnson) appear to have proven immunity (at the established efficacy rate of between approximately 85 to 95 percent) for 12 months. (10 RT 2102.) These vaccines also provide almost 100 percent protection against severe disease and death. (*Id.*) Studies also indicate the vaccines protect against known variants. (10 RT 2103.) Breakthrough infections – COVID-19 infections in those fully vaccinated – occur at a rate of 1/10,000.

Dr. Klausner testified that, because 80 percent of the inmate population has immunity (vaccinations plus infections), herd immunity exists such that the remaining population is not at risk of a large outbreak or severe disease (although he conceded that susceptible inmates remain at risk for infection). (11 RT 2175.) However, Dr. Klausner's opinion in response to this hypothetical question suffers from flaws similar to the first. The hypothetical did not include, and Dr. Klausner did not ask about, the characteristics of the prison population (e.g., elderly, higher than average comorbidities), the population density in the prison generally or in specific housing units, and the staff vaccination rate.

In addition, despite the comparatively lower staff vaccination rate, Dr. Klausner deemed that fact irrelevant because he considers the inmates immune. That response suffers from circular logic. The inmates are only immune if infected staff members are not exposing susceptible members of the inmate population. Even Dr. Pachynski agrees that unvaccinated staff members pose a risk of harm to patients. In fact, Dr. Klausner agreed that susceptible inmates remain at risk, and could only state that inmates had immunity for a limited period of time (demonstrated to be up to year). Moreover, Dr. Klausner based his opinion on statistics

from studies not similar to the characteristics of either the San Quentin population or its unique characteristics. He admitted he did not account for those variables in his analysis. Dr. Klausner does not know if staff have prolonged contact with inmates so he cannot say if that fact would alter his conclusion. But he does concede that if the remaining population (unvaccinated) is more susceptible to the virus, then the likelihood of serious disease increases. He also concedes that herd immunity may not capture individual subpopulations in housing units and the transmission characteristics unique or specific to them, such as poor ventilation or comorbidities.

J. Infections, Deaths, Vaccinations, and Immunities

As of May 14, 2021, 2,169 prisoners at San Quentin had tested positive for COVID-19. (Factual Stipulation No. 18.) An additional 28 of them died. (Factual Stipulation No. 19.) The San Quentin COVID-19 deaths amount to 1.27 percent of total positive cases (as of May 14, 2021), compared to a 1.68 mortality rate in California generally (3,661,675 positive cases and 61,417 deaths statewide).[6] (Factual Stipulation Nos. 20-21 & 24.)

When asked whether, considering the thousands of infected inmates and 28 inmate deaths, prison officials adequately had protected San Quentin inmates, Broomfield gave this non-response:

> Q: Let me ask that question again. Given these statistics, do you believe that this reflects adequate protection of the incarcerated population of San Quentin from COVID-19?
>
> A. You're asking for my opinion, yes?
>
> Q. Yes. You're the Warden of the prison.
>
> A. My opinion is pretty complex on that issue. It is obvious to me that the population at San Quentin was horribly impacted by this pandemic. I'm also aware that the neighboring communities were horribly impacted by this pandemic. So my opinion is that anyone in the world where there's dense populations, there's an increased risk of the spread of this pandemic.

[6] These numbers facilitate general comparisons but may not perfectly reflect reality. The parties agree that some number of Californians generally contracted COVID-19 but never took a test. They further agree that the California mortality rate would decrease if the California population tested at the same rate as the San Quentin population. (Factual Stipulation Nos. 22-24.)

The CDCR began a vaccination program on December 21, 2020, for all prisoners and employees. (Factual Stipulation No. 1.) As of May 14, 2021, 1,914 prisoners at San Quentin had been fully vaccinated against COVID-19, representing more than 77 percent of the prisoner population. (Factual Stipulation Nos. 2-3.) One hundred percent of the San Quentin prisoner population – and all Petitioners – have been offered a COVID-19 vaccine. (Factual Stipulation Nos. 4-5.) San Quentin's current percentage of prisoners who are fully vaccinated against COVID-19 exceeds the current percentage of adults in the state of California who are fully vaccinated against COVID-19. (Factual Stipulation No. 11.)

As of May 14, 2021, 1,124 staff members (representing 52 percent of the staff) at San Quentin have been fully vaccinated against COVID-19 and 82 staff members have been partially vaccinated against COVID-19. (Factual Stipulation Nos. 6-8.) The actual number of staff at San Quentin who have been fully vaccinated for COVID-19 may be higher since the reported numbers do not include staff who have been vaccinated by their own medical providers or sources separate from CCHCS. (As of May 13, 2021, these statistics compared to 37.1 percent of all persons in the state of California who had been fully vaccinated against COVID-19.) (Factual Stipulation No. 10.)

Like the community at large, San Quentin has struggled to achieve full vaccination. Inmates express various reasons for refusing the vaccine. Some do not trust prison officials, specifically identifying the botched CIM transfer and its aftermath. Others do not trust the vaccine itself. Several express concern about showing symptoms resulting from the vaccine, fearful of resulting forced relocation to the AC. (One inmate (Kevin Sample) did not tell staff about his norovirus symptoms to avoid the AC.) Others may have medical reasons for refusing, or wanting to defer, vaccination, although Petitioners offered no persuasive evidence to that effect. Some inmates express concern about the vaccine exacerbating ongoing long-haul COVID-19 symptoms they currently experience.

In comparison to the inmates, a far higher percentage of staff appear to have refused the vaccine. Prison officials believe they cannot require staff to take the vaccine, citing vague

concerns regarding the collective bargaining agreement but offering no specifics or evidence of efforts to address that issue. However, prison officials have offered incentives, such as gift cards, to increase the staff vaccination rate.

K. Current Conditions

The recitation above addresses much of the current conditions at San Quentin. Inmates and staff continue to struggle with the aftermath of the outbreak. Multiple inmates continue to suffer long haul COVID-19 physical and psychological symptoms. Some still have trouble breathing. Others have ongoing headaches, fatigue, and soreness. Dr. Grant, who worked 80 hours per week for five to six weeks at the height of the outbreak (compared to his usual 40), has observed weight gain, increased obesity, and higher rates of diabetes, drug abuse, and mental illness since the height of the outbreak. He expressed concern about the impact of the next, similar type of virus.

One inmate testified that his neighbor developed symptoms, including a cough, and sounded like mucus filled his lungs. Increasingly, the neighbor could not breathe well. One day the neighbor said he would take a nap. When staff next came by the cell, the neighbor did not respond. Staff drug him out of the cell and did CPR for almost an hour before declaring him dead. The inmate broke down in tears recounting this episode and the trauma he feels about it.

At the hearing, Respondent placed significant emphasis on the current plans to address any future outbreaks while reopening programs and normal life at the prison. A "Roadmap to Reopening" joint memo from DAI and CCHCS governs prison reopenings statewide. The Roadmap divides reopening into three phases, subject to an individual institution's outbreak status. San Quentin is currently in Phase 3, which means it has gone at least thirty days with no new cases. In Phase 3, inmates may go outside during the day and housing units can mix. In Phase 3, inmates can attend integrated ISUDT (except that program is now on hiatus as being revamped at HQ). Attendance at these programs is limited in order to maintain six feet social distance. Phase 3 also includes other (socially distanced) programs: education, volunteer services, grant funded, religious, and self-help (as sponsors return). In Phase 3, the prison now

allows in-person visits with family and friends, alternating video visits one day and live visits the next (due to social distance volume restrictions). Visitors (who must wear masks) provide evidence of vaccination or evidence of a PCR test within the last three days. Alternatively, the prison provides rapid testing on site. Phase 3 is a permanent state, the "new normal."

As of June 4, 2021, San Quentin housed 2,416 inmates, down from just under 4,000 in March 2020, although that number appears to now be increasing as the prison resumes intake from county jails. The AC now serves as housing for isolation and quarantine. If the AC filled, Broomfield testified he could expand housing into the chapels (within one to three days), the gym (within one day), and could set up tents (within three to six days). The chapel could house 68 inmates in the two large chapels, and 10 each in the two smaller chapels. The gym could house 108. Smaller tents could hold 10 inmates. The large tent held over 100 (though it never was used). The potential overflow capacity for quarantine and isolation of future infected inmates, using the capacity articulated by Broomfield involving the chapels, the gym, new tents, and the PIA, totals 460 beds, or roughly 18 percent of the inmate population. This compares to the 75 percent of the inmate population infected as COVID-19 swept through the prison over the course of several weeks. According to Nicole Avila, the Associate Warden in charge of healthcare, inmates might quarantine in their housing units, in the AC, or in the infirmary. Although quarantined inmates go to the yard and dayroom by themselves, they could reside next to non-quarantined inmates. The nurse checks oxygen and vitals, asks screening questions, and generally confirms the inmate remains stable and remain appropriate for prison medical care. Isolation patients receive more intensive screenings compared to those in quarantine.

Currently, inmates can ask nursing staff directly through a form placed in a request box to request a screening. Nurses pick those forms up every day and review them. If an inmate has listed any COVID-19 symptoms on the form, protocol dictates that the nurse sees the inmate within 24 hours. Although Barbara-Knox testified that a nurse would see an inmate who reported symptoms "immediately," no policy requires that; protocol only requires an appointment within 24 hours.

According to Bishop, inmates get tested serially weekly or biweekly to get through the entire population. Although Bishop testified that an inmate who refused a test would move into isolation, other evidence did not support that contention. The nursing staff tests some inmates every day and tracks the results in the "Electronic Health Record." In the event of a positive test, healthcare would notify custody and take the inmate to the AC for monitoring by healthcare.

Staff must test or face progressive discipline for refusing testing. If someone in a unit is suspected of COVID-19, that unit is placed on precautionary quarantine with twice-per-day symptom checks by nursing. According to Bishop, currently an enforcement team reviews testing data every week to determine staff who have not tested and have no legitimate excuse. An associate warden then follows up and discipline may follow. According to Barbara-Knox, COVID-19 positive inmates in isolation receive rounds from a nurse twice per day.

Policy still requires inmates to wear masks. Exceptions apply if outside and can accomplish six feet social distance, or if in a cell, or if eating. Inmates can receive a new mask whenever they need it. The staff continues to be subject to progressive discipline for non-compliance.

Social distancing is enforced in dorm areas, including the dayrooms, by taping off seats and benches, and putting markers in front of phones. Taping was done in April 2020 in dorms.

Screening is done at the prison gates. Screening consists of questions to determine if staff or visitors can enter. (Temperature checks are no longer done.)

San Quentin has not run out of PPE since March 2020, except for a brief gown shortage. If staff escorts a suspected COVID-19 patient, the staff must wear full PPE. If working in an isolation unit or transporting an inmate, required PPE includes eye protection, gloves, and an N95 mask.

After the Unified Command demobilized in September 2020, an internal group continued as the Incident Command Post ("ICP"), meeting one to two times per day. ICP discusses various COVID-19 topics, including positive and suspected cases, staff testing, quarantine and isolation plans, mobilization and demobilization of support equipment, and inmate movement.

As of now, inmate COVID-19 cases have vanished at San Quentin. From the end of August 2020, to the conclusion of the evidence in this matter, San Quentin recorded five inmate positive tests (as of the hearing, there were three positive staff tests). The last positive inmate test (other than some false positives) was February 1, 2021. Despite this record, Dr. Pachynski cannot say there is no current substantial risk of harm from COVID-19. According to Bick, San Quentin faces an increased risk of outbreak based on what health professionals now know about how COVID-19 (and other respiratory viruses spread). That occurs anytime individuals share an airspace because no one living in a prison can spend all their time in a pod. Brockenborough, one of the top executives at CCHCS, cannot rule out another COVID-19 outbreak. She expressed concern that inmates remain who have no immunity from having contracted COVID-19 but also have received no vaccination. Indeed, Respondent concedes that COVID-19 continues to pose an obvious, serious risk today. (Bal depo., 55:25-56:2; 63:18-64:8; 67:19-25.)

V. Discussion

A. Nature and Purpose of the Writ of Habeas Corpus

"The command of the Eighth Amendment, banning 'cruel and unusual punishments,' stems from the Bill of Rights of 1688." (*Robinson v. California* (1962) 370 U.S. 660, 675, citation omitted.) This court has original jurisdiction in habeas corpus matters. (Cal. Const., art. VI, § 10; *People* v. *Romero* (1994) 8 Cal.4th 728, 737, *as modified on denial of reh'g (Jan. 5, 1995)*.) In adjudicating a petition for habeas corpus, the court "must abide by the procedures set forth in Penal Code sections 1473 through 1508." (*Ibid.*, citing *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 865.)

The writ of habeas corpus was developed under the common law of England " 'as a legal process designed and employed to give summary relief against illegal restraint of personal liberty.' " (*People* v. *Romero, supra,* 8 Cal.4th at pp. 736–737, citations omitted.) Failing to provide for "basic human needs," including medical care and reasonable safety, "transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." (*Id.* at p. 738.) When issued, the writ requires the "person having custody of the petitioner" to

bring that petitioner before the court and to submit a written return "justifying the petitioner's imprisonment or other restraint on the petitioner's liberty." (*Ibid.*, citations omitted.)

That rarely happens anymore. Instead, as occurred in these cases, the court may issue an OSC as an alternative to issuing a writ of habeas corpus. The OSC requires a return by the person having custody of the petitioner, followed by a response (traverse) by the petitioner. "The return, which must allege facts establishing the legality of the petitioner's custody, "becomes the principal pleading." (*People v. Romero, supra,* 8 Cal.4th at pp. 738-739, citations omitted.) "If the written return admits allegations in the petition that, if true, justify the relief sought, the court may grant relief without an evidentiary hearing." (*Id.* at p. 739, citations omitted.) On the other hand, if the return and traverse reveal that petitioner's entitlement to relief hinges on the resolution of factual disputes, then the court should order an evidentiary hearing." (*Id.* at pp. 739-740, citing Pen.Code, § 1484.) "In habeas corpus proceedings, relief is granted not by issuance of a writ, but by an order or judgment directing the petitioner's release from custody or alteration of the conditions of the petitioner's confinement." (*Id.* at p. 743.) In this case, of course, the Court of Appeal ordered the evidentiary hearing in the *In re Von Staich* case and this court proceeded with a consolidated hearing involving that case and Consolidation Groups 1-3, as explained above.

The petitioner has the burden to prove an entitlement to habeas relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.)

B. The Standard for an Eighth Amendment Claim

Petitioners claim their confinement violates the prohibition against cruel and unusual punishment pursuant to the Eighth Amendment to the United States Constitution and Article I, section 17 of the California Constitution. "The same basic test employed in the federal courts is appropriate to assessing conditions of confinement challenged under the California Constitution." (*Inmates of the Riverside County Jail v. Clark* (1983) 144 Cal.App.3d 850, 859.) The "basic test" involves "nothing less than the dignity of" humans, drawing on "evolving standards of decency that mark the progress of maturing society." (*Ibid.*, citing *Trop v. Dulles*

(1958) 356 U.S. 86, 100-101.) However, "California courts should look chiefly to California standards and institutions" in assessing the "standards of decency." (*Id.* at p. 859.)

Although the writ process most traditionally applies to prisoners seeking release from an illegal confinement (e.g., an illegal sentence), a prisoner may also seek relief from illegal *conditions* of confinement. That is because "when the State takes a person into its custody" and holds that person there against that person's will, "the Constitution imposes upon it a corresponding duty to assume some responsibility" for that person's "safety and general well-being." (*DeShaney v. Winnebago County Dept. of Social Services* (1989) 489 U.S. 189, 199–200, citation omitted.) That includes "medical care, and reasonable safety," the deprivation of which "transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." (*Id.* at p. 200.) "A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society." (*Brown v. Plata,* (2011) 563 U.S. 493, 511.)

A prison official violates the Eighth Amendment "only when two requirements are met." (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 (*Farmer*).) First, the official must, if the allegation involves the failure to prevent harm, hold an inmate "under conditions posing a substantial risk of serious harm." (*Ibid.*, citations omitted.) The court must "assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." (*Helling v. McKinney* (1993) 509 U.S. 25, 36 (*Helling*), emphasis in original.) This standard is objective. (*Id.* at p. 36; *Farmer, supra,* at p. 834.)

Second, the official must act with "deliberate indifference." (*Farmer, supra,* 511 U.S. at p. 834; *Estelle v. Gamble* (1976) 429 U.S. 97, 106.) This standard is subjective. Deliberate indifference means that the official "knows of and disregards an excessive risk to inmate health or safety." (*Farmer, supra,* at p. 837.) In doing so, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Ibid.*) Akin to recklessness, an official has the necessary knowledge if that person acted or failed to act despite knowing about a substantial risk of serious

harm. (*Id.* at p. 842.) In assessing the reasonableness of prison officials' response, courts must consider the totality of the circumstances, including any valid penological or public safety considerations. (*Id.* at pp. 844-845.)

A petitioner may prove an official's knowledge "in the usual ways, including inference from circumstantial evidence." (*Farmer, supra,* 511 U.S. at p. 842.) Indeed, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." (*Ibid.*) On the other hand, a prison official may show they lacked knowledge of a risk, or knew the facts underlying the risk "but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent." (*Id.* at p. 844.) In addition, a prison official may evade liability by proving a reasonable response to the risk, even if the response did not avert the harm. (*Ibid.*) A prison official must ensure "reasonable safety," a standard that accounts for prison officials' "unenviable task of keeping dangerous men in safe custody under humane conditions." (*Id. at pp. 844-845, citing Helling, supra,* 509 U.S. at p. 33, other citations omitted.) The second factor "should be determined in light of the prison authorities' current attitudes and conduct." (*Helling, supra*, 509 U.S. at p. 36.) That is, Petitioners may not obtain affirmative relief unless they show that the deliberate indifference occurs now, as well as at the time of filing the petitions.

The court has flexibility to fashion an appropriate remedy: "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." (*Harris v. Nelsen* (1969) 394 U.S. 286, 291.) Thus, once the court has issued a writ of habeas corpus it has the power to dispose of the matter "as the justice of the case may require." (*In re Brindle* (1979) 91 Cal.App.3d 660, 670.) The court need not limit any remedy, merely to release of the petitioner; rather, the court may order injunctive relief altering the "conditions of the petitioner's confinement." (*People v. Romero, supra,* 8 Cal.4th at p. 743.)

C. Respondent's Arguments to Limit the Court's Analysis

Before proceeding with the analysis framework set forth in *Helling* and *Farmer*, the court will address certain arguments raised by Respondent as to why the court should not consider

these petitions at all or, if it does, should limit its analysis just to current conditions. First, Respondent argues that *Plata* precludes the court from making any order directed toward the provision of healthcare to California prison inmates. Relatedly, Respondent also argues that if any deliberate indifference occurred, it occurred within CCHCS, a different California agency (overseen by a federal receiver), not CDCR or the Warden. Second, Respondent contends that even if *Plata* does not preclude the court entirely from undertaking a deliberate indifference analysis, then that analysis must address only current conditions, not past conduct and conditions. Respondent contends any past conduct is moot.

1. Plata does not preclude this court from granting relief

It is useful to remember the context in which these arguments arise.

A century ago, the 1918 flu pandemic ravaged San Quentin. Since then, infectious diseases have spread repeatedly through San Quentin and other California prisons. Those include Valley Fever, Legionnaires Disease, flu, and – as recently as during the evidentiary hearing in this case – a Norovirus outbreak that resulted in a lockdown of at least one housing unit at San Quentin.

Respondent has a long and notorious history of providing constitutionally inadequate medical care to California inmates. A decade ago, the United States Supreme Court observed that "For years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs. (*Brown v. Plata* (2011) 563 U.S. 493, 501.) The Supreme Court identified the cause of that failure as "severe overcrowding in California's prison system." (*Ibid.*) The result of that overcrowding, as determined by the Supreme Court, echoes the concerns voiced by Petitioners here: "Needless suffering and death . . .." (*Ibid.*) In 2006, then-Governor Schwarzenegger "declared a state of emergency in the prisons" to address the "increased, substantial risk for transmission of infectious illness" caused by prison overcrowding. (*Id.* at p. 503, citations omitted.)

The *Plata* case arose out of the appointment, by a federal court, of a receiver to oversee the delivery of medical care to California prisons. That appointment happened after the state violated earlier consent orders to remedy severe deficiencies in that care. In *Plata*, the Supreme Court considered appeals from two class actions: *Plata,* involving delivery of medical care, and *Coleman v. Brown*, involving delivery of mental health services to prisoners with serious mental disorders. The Supreme Court affirmed the decision of a federal three-judge panel – convened pursuant to the Prison Litigation Reform Act of 1995 – ordering the state to reduce its prison population to 137.5 percent of design capacity. *Plata* continues today due to the state's failure still to comply with the original orders over two decades ago.

To give effect to the receiver's authority, healthcare (including mental health care) divorced from CDCR and landed in CCHCS, a new state agency under the receiver's operational authority. CCHCS has responsibility for providing healthcare to San Quentin (and all California) inmates. The federal receiver, currently Clark Kelso, oversees CCHCS. Some witnesses refer to CCHCS as a "sister" agency, or a partner to, CDCR. Barbara Barney-Knox, the Deputy Director of Nursing and the statewide chief nurse executive for CCHCS described CCHCS as "the healthcare arm of CDCR."[7] (Barney-Knox depo., 10:8-9.)

Respondent contends that anything over which CCHCS has authority falls outside the bounds of this habeas proceeding. CCHCS, after all, does not "hold" the prisoner. (Pen. Code, § 1477.) Thus, Respondent essentially argues that because CDCR did so poorly at providing healthcare that it lost authority over it, now no habeas petition can proceed on a healthcare issue because the receiver controls healthcare. As a variation on this argument, Respondent also contends that "CDCR and CCHCS are not in a principal-agent relationship," citing Civil Code section 2295. (Resp. Opp. at p. 16.)

These shell-game arguments fail for several reasons. First, *Plata* does not involve any habeas petition by any Petitioner. It is not a habeas case. A state inmate should (and has the

[7] Throughout its brief, Respondent misleadingly refers to CCHCS employees as "federal officials." CCHCS is a state agency, its employees paid by the State of California.

right to) proceed with a habeas petition first in state court. (*Fay v. Noia* (1963) 372 U.S. 391, 418–419, overruled in part by *Wainwright v. Sykes* (1977) 433 U.S. 72, abrogated by *Coleman v. Thompson* (1991) 501 U.S. 722 [" . . .state courts, under whose process he is held, and which are, equally with the federal courts, charged with the duty of protecting the accused in the enjoyment of his constitutional rights, should be appealed to in the first instance. Should such rights be denied, his remedy in the federal court will remain unimpaired"].) For this reason alone, *Plata's* mere existence does not preclude Petitioners from pursuing habeas relief in state court regarding the conditions of their confinement.

Second, at least one court already has rejected Respondent's argument that the court lacks jurisdiction over the receiver or CCHCS. In *In re Estevez* (2008) 165 Cal.App.4th 1445, as modified on denial of reh'g (Sept. 8, 2008), the court determined that state courts retain jurisdiction over medical care provided to inmates in California prisons. (*In re Estevez, supra*, 165 Cal.App.4th at p. 1461.) In that case, involving the petitioner's post-surgical care, the court added the receiver as a real party in interest. No party here suggested adding the receiver as a real party in interest, though Respondent certainly has disclaimed responsibility (or authority) for management of care related to COVID-19. But Respondent cannot now, having asserted that it and CCHCS work hand-in-glove, assert that simply because CCHCS does not "hold" the prisoner, or is not CDCR's agent, the court cannot fashion appropriate habeas relief. (*Harris v. Nelson* (1969) 394 U.S. 286, 291.)

Third, the issues in this case, while they relate to healthcare delivery in some respects, involve the far more fundamental – and custodial – issue of prison management. Those issues include whether San Quentin prison can ever safely house inmates at its current population level. Although the Receiver and CCHCS have assumed responsibility for the day-to-day provision of health care, they have not relieved CDCR, its Secretary, and the Warden, of their ultimate constitutional responsibilities. Under CDCR's own regulations, "The warden or superintendent of an institution of the department is the chief executive officer of that institution, and is responsible for the custody, *treatment,* training and discipline of all inmates under his or her

charge." (Cal. Code Regs., tit. 15, § 3380(a), emphasis added.) Where treatment directly implicates custodial issues such as population density, CDCR has responsibility because it can move inmates or release them.

Finally, Respondent tries to have it both ways. It put up several CCHCS employees as "persons most qualified" witnesses representing Respondent in discovery – essentially party witnesses. Its opposition brief relies heavily on actions by CCHCS employees to show that it, Respondent, acted reasonably and has rendered the conditions safe for Petitioners. For example, Respondent argues that "the current COVID-19 screening and testing matrix" renders moot complaints about the transfer protocols followed at the time of the CIM transfer, even though Respondent also argues CCHCS handled both exclusively. (Resp. Opp. At p. 21.) As another example, of the 27 items delineated at pages 28-37 of Respondent's opposition that show "prison officials" have acted reasonably and created a safe environment, Respondent simultaneously admits that at least a third of them fall at least in part within CCHCS jurisdiction. (E.g., No. 14: "CCHCS staff have provided medical care and treatment to San Quentin inmates . . ."; No. 15: "Around March or April 2020, CCHCS created a COVID-19 risk assessment . . ..) Indeed, Respondent essentially concedes that CCHCS acts as the partner or "the healthcare arm of CDCR" (Barney-Knox depo., 10:8-9.): "it is undisputed that CCHCS and CDCR officials are implementing the COVID-19 screening and testing matrix . . .." (Resp. Opp. at 21.) Thus, Respondent references CCHCS and itself interchangeably when lauding positive achievements, but argues an impermeable wall separates them for purposes of liability.

The court sees no reason at this time to add the receiver as a real party in interest, CDCR having already designated itself as one. Moreover, "the existence of the orders in *Plata*, and the appointment of the Receiver, do not relieve the state of its constitutional responsibility to determine whether adequate care is in fact being provided, or whether the proposed medical care or actions to facilitate that care are inconsistent with the state's overall constitutional responsibility for public safety and welfare." (*In re Estevez, supra,* 165 Cal.App.4th at p. 1463.)

Accordingly, nothing about the *Plata* case, or CCHCS's responsibilities, prevents the court from proceeding here.

2. The necessity of addressing past conditions and conduct

Respondent also asserts that the court should not assess its past conduct. The court does not accept this suggestion for several reasons.

First, in urging the court to ignore its past conduct, Respondent would have the court ignore the directives from the California Supreme Court that it should examine "the efficacy of the measures officials ***have already taken*** to abate the risk of serious harm to petitioner and other prisoners, as well as the appropriate health and safety measures they should take in light of present conditions." (*Staich on H.C., supra*, 272 Cal.Rptr.3d 813, emphasis added.) The court declines that invitation.

Second, the court cannot assess current conditions and attitudes without examining Respondent's entire course of conduct. *Helling* and *Farmer* provide helpful guidance. Both are federal civil rights cases in which the petitioner-inmates sued for damages and injunctive relief. In *Helling,* the inmate brought claims related to exposure to second-hand smoke. Finding that the inmate could state a claim for future, in addition to current, harm, the Supreme Court focused on the changed circumstances since commencement of the litigation. Since then, the Nevada State Prisons had adopted a "formal smoking policy" which restricted smoking to designated areas, among other things. (*Helling, supra*, 509 U.S. 25, 35-36.) The new policy had implications for both the objective and subjective factors. Regarding the objective factor, administration of the new policy might "minimize the risk" and "make it impossible to prove" exposure to an unreasonable risk regarding "future health or that he is now entitled to an injunction." (*Id.* at p. 36.) Regarding the subjective factor, deliberate indifference "should be determined in light of the prison authorities' current attitudes and conduct, which may have changed considerably." (*Ibid.*) Specifically, the adoption of the smoking policy "will bear heavily on the inquiry into deliberate indifference." (*Ibid.*) Thus, as in *Helling,* the court must compare what Respondent did previously to its conduct and attitudes now (or, at least at the time of evidentiary hearing).

In *Farmer*, the inmate plaintiff alleged that the respondents had transferred the inmate – a preoperative transsexual – to a higher security prison where placement in the general population knowingly subjected the inmate to violence and sexual assault. The respondents initially argued that the petitioner's removal to administrative segregation had eliminated any future risk of harm. (*Farmer, supra,* 511 U.S. 825 at pp. 850-851.) However, when it turned out at oral argument that the respondents had placed the petitioner in a lower security prison, but in the general population, the Supreme Court remanded because whether the petitioner faced "continuing threat of physical injury" turned on facts about the likelihood of future transfers that might put the petitioner at risk of harm. (*Id.* at p. 851.) As in *Helling*, the prospect for injunctive relief turned on whether the respondents had acted reasonably to mitigate or eliminate the threat to the petitioner's health and safety or continued to knowingly or recklessly disregard it. Past conduct that constituted deliberate indifference played a central role in assessing whether the respondents had adjusted their conduct in the present. The Court required the plaintiff to prove the subjective element of deliberate indifference – prison officials' "attitudes and conduct" – "***at the time suit is brought*** and persisting thereafter." (*Farmer, supra*, 511 U.S. 825, 845, emphasis added.) Thus, proving deliberate indifference at the time the petitioner files suit appears insufficient to establish an Eighth Amendment claim because "the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct . . .." (*Helling, supra,* 509 U.S. 25, 36.)[8] But the court must also assess the evidence from a historical perspective.

Third, Respondent contends that Petitioners' claims are moot because they rely "on speculation about a potential future COVID-19 outbreak," citing *Ex Parte Drake* (1951) 38 Cal.2d 195, 198 and *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260. In *Ex Parte Drake*, the petitioner brought a habeas action to challenge a future anticipated extradition proceeding, while

[8] Petitioners contend the court need not follow the *Farmer/Brennan* requirements exactly because the California Constitution requires application of California standards, not federal courts' application of the deliberate indifference standard, in evaluating deliberate indifference claims under Article I, section 17. (*Inmates of Riverside Cty. Jail. v. Clark* (1983), 144 Cal.App.3d 850, 859.) For this purpose, the court does not find that California's "standards of decency" depart so much from what federal case law would require as to warrant separate analysis. (*Id.* at p. 860.)

conceding the legality of his current detention. (*Ex Parte Drake, supra,* at pp. 197-198.) Petitioners here hardly concede a lack of deliberate indifference. While they do challenge the potential for future harm, they do not allege the harmful event has yet to occur. To the contrary, they allege future harm from existing conditions – a combination of the still-dangerous COVID-19 disease and the conditions in which Respondent keeps them vulnerable to that disease. In *Gonzalez,* petitioner sought discovery to determine if his conviction had any connection to an informant corruption scandal that had tainted other cases. However, petitioner offered no specific facts or concrete allegations in support of his petition. (*Gonzalez, supra,* at p. 1260.) By contrast, Petitioners here make specific allegations, past and present, in support of their constitutional claims.

In neither case relied on by Respondent did the petitioner have an actual claim based on actual claimed future harm. An Eighth Amendment claim may lie for possible future harm, not just present harm. (*Helling*, supra, 509 U.S. at pp. 33-34.) In addition to the possible future health effects of second-hand smoke at issue in *Helling*, courts have found deliberate indifference claims proper when petitioners face future harm from dangers such as exposed electrical wiring, deficient firefighting measures, and mingling of inmates with contagious diseases with other inmates (*Gates v. Collier* (5th Cir. 1974) 501 F.2d 1291), potential future assault (*Ramos v. Lamm* (10th Cir. 1980) 639 F.2d 559, 572), fire hazard (in part due to 19th century facilities) and water quality (*Masonoff v. Du Bois* (D. Mass 1995) 899 F. Supp. 782, 799-800.)

This case more resembles *Helling* where Petitioners allegedly face the prospect of future COVID-19 or other disease based on known and present dangers. Thus, while Respondent may succeed in showing that Petitioners have not met their burden, Petitioners' claims are not moot on their face as in the authorities upon which Respondent relies.

Finally, even if it finds the petitions technically moot, the court may still grant relief. The California Supreme Court already has determined, and no party reasonably could dispute, that these petitions involve issues of "clear statewide importance." (*Staich on H.C., supra,* 272 Cal.Rptr.3d 813.) In such cases the court has broad authority to "reject mootness as a bar to the

decision on the merits." (*In re Walters* (1975) 15 Cal.3d 738, 744.) Courts particularly rule on technically moot habeas petitions when they raise "a question of general public interest which is likely to recur." (*In re Stinnette* (1979) 94 Cal.App.3d 800, 804.) The court may also, if it finds violations likely to recur, "grant habeas corpus petitioners 'prospective or class relief' to redress recurring deprivations of rights at correctional facilities." (*In re Morales* (2013) 212 Cal.App.4th 1410, 1430, citations omitted.)

Respondent relies on two additional cases in support of its argument that vaccinations and herd immunity, in addition to other measures Respondent has implemented, render these petitions moot. However, neither case involved the important public issues at the heart of these petitions. In *In re Miranda* (2011) 191 Cal.App.4th 757, the court determined that the proper remedy for a due process violation in considering a parole determination would be a new parole hearing. Since the new parole-suitability hearing already had occurred, the court determined the petition was moot. (*Id.* at p. 763.) In *In re Arroyo* (2019) 37 Cal.App.5th 727, the court found petitioner's claim for early parole consideration pursuant to Proposition 57 moot because the Board of Parole Hearings had adopted new regulations making him eligible for early consideration. Thus, no "actual controversy" existed. (*Id.* at p. 732.) In both *Miranda* and *Arroyo,* no live controversy remained for the court to decide. Unlike here, neither case involved nor discussed issues of "clear statewide importance." The petitioner in each case already had obtained the relief the court would have granted.

Accordingly, the court will proceed to consider whether Respondent was deliberately indifferent to a serious risk of substantial harm during the two time periods in question: (1) the events leading up to and immediately following the COVID-19 outbreak that infected 75 percent of the San Quentin inmates and killed 28 of them; and (2) the "current" time period, defined as the several weeks leading up to, and during, the evidentiary hearing. This latter time period is essentially defined by the cessation of active COVID-19 cases in the inmate population.

D. First Element: Past Conditions Posing Substantial Risk of Serious Harm

Respondent does not dispute that "COVID poses a substantial risk of serious harm to the health and safety of petitioners," and did so as early as March and April 2020. (Bal depo., 45:22-

46:15; Gipson depo., 105:22-106:6.) As Foss testified, Respondent was "aware that COVID posed a serious risk to health and safety -- to the health and safety of prisoners in the care and custody of CDCR" in March 2020. (Foss depo., 22:7-11.) Accordingly, the court easily finds the first element of the deliberate indifference standard satisfied with respect to the risk Petitioners faced prior to and following the introduction of COVID-19 by Respondent into the San Quentin prison population.

E. Second Element: Past Deliberate Indifference

From the start, Respondent understood that COVID-19 posed a serious risk to the health and safety of San Quentin inmates. Respondent knew that COVID-19 could spread through aerosolized droplets. It knew the antiquated prison architecture posed a special risk of enhancing spread, particularly in the multi-level housing where five floors of open-bar cells allowed droplets to travel top to bottom and side to side. Respondent knew the population levels required double-celling in exceedingly tight quarters, making social distancing impossible. Respondent also knew that the population density at the prison exacerbated the risk of spread. As Broomfield conceded, "Anywhere [] there's dense population[], there's an increased risk of transmission of this pandemic." (5 RT 948.) It knew the demographics of the inmate population enhanced the risk that COVID-19 would have serious, perhaps even fatal, consequences for a significant number of inmates if the virus spread through the prison. (Brockenborough depo., 76:19-25; Bal depo. 30-32, 69-70.) Anticipating an outbreak, and a resulting lockdown, prison officials carefully reimagined mental health service delivery. Broomfield also knew, in May 2020, that other prisons, specifically including CIM, faced dire outbreaks and fatalities as COVID-19 spread through the inmate population.

1. Respondent's deliberate indifference caused the COVID-19 outbreak

The decision to transfer 122 CIM inmates to San Quentin, and to ignore virtually every safety measure and policy that existed at the time in doing so, caused the COVID-19 outbreak at San Quentin. Respondent, as discussed above, knew that San Quentin posed a particularly high risk for COVID-19 transmission. Respondent also knew that decreasing the population density would help mitigate the spread of any outbreak. Prior to the CIM transfer, Broomfield had

required a sharp population reduction in the H-Unit dormitory housing because he knew that fewer inmates meant less likelihood of viral spread. But despite demonstrating this understanding that population reduction reduced COVID-19 risk, Respondent took the opposite approach with the CIM transfer.

Apparently determined to reduce the CIM population, Respondent ordered the CIM transfer to San Quentin. Doing so violated its own policy to minimize movement between facilities. In doing so, Respondent knew full well it was taking over one hundred inmates from a prison with one of the worst outbreaks in the prison system and transferring them to the one facility in that system least able to handle an outbreak. Respondent ignored virtually every safety measure in doing so. As multiple witnesses for Respondent testified, no inmate should have left CIM unless tested within seven days prior. (Bal. depo 108, 110-112; Barney-Knox depo. 29-30, 39; Cullen depo. 84-85; 7RT 1318-19, 1322-23.) Despite that policy, Respondent failed to test many of the transferees for weeks prior to the transfer. Respondent ignored repeated warnings about the failure to test; the urgency to complete the transfer, from the highest levels, and overrode any semblance of safety. Respondent crammed these untested transferees together prior to, during, and after the transfer, without social distance. Respondent ignored reports of COVID-19 symptoms among the transferees even before they boarded the bus. It ignored its own policies limiting the number of inmates on the bus. It failed to enforce a mask policy on the bus, where inmates sat shoulder-to-shoulder for hours.

When the CIM transferees then arrived at San Quentin, Respondent failed to follow its own protocols to quarantine them. (Bal depo. 78, 110-112, 114-116.) Respondent knew it should do so and had initially planned to use the AC for that purpose. But the AC could not accommodate the transferees so Respondent placed them in the top tiers of Badger, where Respondent knew their virus-loaded breath droplets could cascade down the tiers to the dozens of San Quentin inmates housed below. (5 RT 970-71.)

Respondent now contends it believed at the time it could safely house the CIM inmates at Badger, where they "would essentially be sequestered from the preexisting inmate population for 14 days." (Resp. Opp. at p. 53.) It argues that Broomfield knew only that COVID-19 could

spread by respiratory droplets. (4 RT 809.) At the hearing, Broomfield also defended this decision by stating he believed San Quentin was receiving a healthy population that was safe for San Quentin to receive and house in Badger.

The evidence does not support these contentions. First, the weight of the evidence is that Respondent knew or should have known that COVID-19 could spread by aerosolization by May 2020. Second, although Respondent contends the CIM transferees would "remain in their own cohort," and referred to the Badger placement as a "quarantine," the CIM transferees would still intermingle with the existing inmates by walking past them for showers, yard, and medical lines. Even using the supposed "respiratory droplet" understanding Respondent professes it had at the time, no reasonable person could regard this situation as a quarantine or cohort. Moreover, multiple witnesses testified that CIM inmates would stand in line for showers, coughing and sneezing, right outside of the cells that led to the showers, and otherwise expose the rest of the inmates. Third, as Respondent must have known, because it is so obvious, the six foot social distance rule applies to people on flat ground. Even under the respiratory droplet understanding, it should be obvious that a person on floor five who coughs and emits respiratory droplets would, by virtue of gravity, infect the person on the floors below. Fourth, Respondent's own actions belie this current rendition of its thinking at the time. It knew enough to depopulate the H-Unit dorm, even in advance of the CIM transfer. It knew enough to initially plan to put the CIM inmates in the AC because it had closed-door, single, cells. The fact that Respondent did not initially choose Badger as the first destination at San Quentin for the CIM transferees suggests Respondent knew the transferees did not belong in Badger for safety reasons. Finally, Respondent knew CIM had a massive outbreak, that the CIM transferees had undergone inadequate testing, that they had travelled together in cramped quarters for hours on a bus, and that several had arrived at San Quentin symptomatic for COVID-19. Respondent could not reasonably have believed the CIM transferees constituted a healthy population. (*Farmer, supra,* 511 U.S. at p. 842 ["a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious"].)

Respondent further failed to follow its own protocols by failing to test the CIM transferees until almost two days after they arrived (not receiving tests back for up to six days after that). (Pachynski depo. at 31-32.) Indeed, by Respondent's own admission, the CIM transferees who arrived on the first bus were not placed in medical isolation until June 5. (5 RT 885.)

The tragic, inevitable, result of this bumbling sequence of events was an exponential COVID-19 outbreak at San Quentin that, to date, has killed 28 people. By June 17, 2020, San Quentin had 17 COVID-19 inmate cases (up from zero prior to the transfer). Three weeks later, the prison reported 1,457 new COVID-19 cases over the prior 14 day period. In effect, COVID-19 swept unchecked throughout the entire prison population, ultimately infecting 75 percent of those it did not kill. Dr. Morris deemed the conduct that led to the outbreak "reckless." (5 RT 982-83.) The court agrees. It more than qualifies as deliberate indifference to a known risk.

2. Respondent's deliberate indifference after the outbreak made it worse

During the heart of the outbreak, Respondent ignored opportunities to slow the spread, knowingly violating CDC and MDPH guidance, and known scientific and medical principles, in the process. These failures had a direct effect on the size and scope of the outbreak and on inmates medical and mental health. Separately and together, Respondent's conduct constituted deliberate indifference throughout the COVID-19 outbreak.

First, as already explained in detail, Respondent made the fateful decision to house the CIM transferees in Badger where they infected the native inmates continuing to reside there.

Second, Respondent allowed inmates and staff from different housing units to mix during work. This policy had particularly dire consequences in the kitchen, where workers would stand, unmasked, shoulder-to-shoulder, to prepare food for other inmates. Inmates displayed symptoms while working in these jobs but were told to keep working. Porters also worked across housing units, exposing themselves and then others to infected inmates. For example, inmate Burroughs reported symptoms on several consecutive days but continued to work passing out food, retrieving trays, and collecting trash on tiers with open-barred cells. Inmate Stanley assisted disabled inmates with symptoms but without the PPE required by the signs on the inmate cells.

Guards told Stanley to proceed with his work, which brought him in close contact with the symptomatic inmates.

Third, Respondent also permitted staff to mix between housing units, a policy that continues today. Staff could work in one unit, exposed to one portion of the inmate population one day, then the next day work in a completely different unit. This mixing contributed to the spread of COVID-19 within the prison. (5 RT 1013.) Respondent has never explained fully its refusal to require staff cohorting. At the hearing, witnesses made vague reference to the collective bargaining agreement, but no witness explained whether officials could or could not actually require cohorting. No witness stated that prison officials made any effort to do so. This shoulder-shrug approach is perplexing and demonstrates a level of indifference to the dire consequences of viral spread. The lack of staff cohorting allowed CDCR staff to become COVID-19 vectors and exposed prisoners throughout the prison to the virus. (5 RT 1013.) The failure apparently to even attempt a staff cohorting policy reflects deliberate indifference to the health and safety of San Quentin inmates.

Fourth, Respondent failed to institute a mask mandate, then did not enforce the one it had. Staff routinely violated the mask policy; inmates did too.

Fifth, prison officials made little effort to enforce social distancing, despite knowing that it could slow the spread of virus. (Bal depo., 53:2-6.) Prison officials readily concede that social distancing did not occur in common areas such as pill lines, chow lines, and the yard, or on walkways and stairways. Even more egregious examples involve the showers, where guards locked dozens of inmates in a space far too small to allow distancing, with too few showers and too little allotted time to permit socially distant showers anyway. (See Exhibit 370.007.)

Sixth, Respondent frequently mixed COVID-19 positive and negative inmates together. Inmates reporting COVID-19 symptoms continued to work in jobs that exposed them to others and continued living with asymptomatic cellmates. Inmates who tested positive remained cellmates with those who tested negative. As one example, inmate Sifuentes was moved to the ACS with confirmed positive inmates despite testing negative. The failure to sequester the CIM

inmates, and then to isolate and quarantine properly infected inmates from non-infected inmates ran contrary to CDC guidance and to Willis's repeated recommendations.

Seventh, Respondent failed to provide proper or timely testing, preventing Respondent from identifying infected inmates and isolating them to deter further spread. As Dr. Bal conceded, "[i]f you are not getting results back, then you are really throwing darts in the dark." (Bal depo., 40:5-15.) Despite that understanding, testing delays persisted throughout June and July 2020, routinely taking five to six days for results to come back, and sometimes as long as ten days. (Bal depo., 38.) Staff testing stopped completely for two weeks at the end of June 2020, right in the heart of the outbreak. (Murray depo., 28:6-21; 29:6-12.) Moreover, throughout Summer 2020, staff could return to work the day after reporting symptoms simply by reporting no symptoms that next day, with no test required. (11 RT 2181.) These lax testing protocols undoubtedly contributed to the rapid spread of COVID-19 among inmates and staff during the worst part of the outbreak in Summer 2020. During that time, Respondent had access to resources that could have solved the testing delays but inexplicably chose not to use those resources. (Ex. 213; 3 RT 526-27; 4 RT 671.)

Eighth, Respondent repeatedly ignored advice and direction from Willis at MDPH. Prior to the outbreak within the prison, Willis requested a surge plan from the prison to deal with a large COVID-19 outbreak. Willis expressed particular concern about the inherently dangerous nature of the prison, where the sheer numbers of people and architecture made it almost impossible to isolate and quarantine properly in a major outbreak. Broomfield refused these requests and conceded that San Quentin had no plan even by July 2, 2020. Willis also urged adoption of a "Unified Command" because, as of June 3, 2020, San Quentin also did not have any single person in charge of decision making regarding how to mitigate the outbreak response. (Pachysnki depo., 64:16-20.) That condition persisted until CDCR finally instituted a Unified Command on July 3, 2020, well after the outbreak had exploded to 1,300 cases within the prison. However, even now, for reasons unstated, the "surge plan" developed by the "Unified Command" remains in "draft" form.

In response to these various criticisms of its handling of the COVID-19 outbreak, Respondent asserts that it acted reasonably under difficult conditions. Respondent identifies a long list of efforts and accomplishments it says reflect its reasonable approach to the prison outbreak. Examples include instituting a mask mandate, retaining an outside vendor to prepare and deliver food to inmates, setting up the Unified Command, creating additional bed space in the gym, in the chapels, in the ACS at PIA, and with tents brought in to the prison grounds. A modified program limited inmate interaction, including between housing units. Physical spaces were marked off with tape and barriers to facilitate more social distancing. Critical workers were trained to clean public spaces. A program was developed to place resolved inmates in between COVID-naïve inmates to further prevent viral spread. Inmate screening was done in the quarantine areas while staff screening was set up at the entry gates. Posters and other education materials were developed and distributed to encourage proper hygiene and PPE use. These are just examples. Respondent should be commended for these various, important measures to address the COVID-19 outbreak once it began. However, for at least three reasons, these efforts cannot absolve Respondent of its deliberate indifference toward Petitioners.

First, taken collectively, even putting aside the issue of depopulation, the failures outlined above constitute a reckless disregard of a serious risk of substantial harm. That Respondent also acted reasonably in *other ways* does not change its unreasonable conduct across a broad range of activities and over an extended time period.

Second, the undisputed evidence shows that none of these measures meaningfully altered the course of the outbreak once the CIM transferees arrived at San Quentin. Moreover, no evidence suggests that Respondent believed those other measures, alone, could have altered the course of the outbreak. To the contrary, Petitioners' experts testified – unrebutted – that the outbreak would have infected 75 percent of the population regardless. (5 RT 1015; 7 RT 1426, 1455-56.)

Third, Respondent knew that one counter-measure, above all – depopulation – could help prevent or mitigate the outbreak. But Respondent refused to deploy that tool in sufficient degree. The court turns to that issue next.

3. Respondent unreasonably ignored the Urgent Memo

Once the outbreak occurred, the federal receiver sent the AMEND team, including Dr. Sears who testified at the hearing, to San Quentin. That visit resulted in the Urgent Memo, the headline recommendation of which was to reduce the prison population by 50 percent of its current capacity. (Exhibit 35.) Respondent has never quarreled with the underlying concept behind the Urgent Memo's population reduction recommendation. To the contrary, Respondent "recognized the importance of reducing population in order to mitigate the risk that COVID posed." (Bal depo., 81:7-15, 137:8-12; Gipson depo., 111:4-14; Pachynski depo., 53:21-54:2.) Even before the CIM transfer, Respondent knew that reducing the population density could help prevent an outbreak. It knew that overcrowding – operating beyond capacity – would create a heightened risk to the health and safety of inmates regarding COVID-19. (Bal depo., 125:18-21; 139:11-18.) Respondent also knew that the antiquated San Quentin architecture posed a particular danger for a viral outbreak. (Bal depo., 33:2-34:13.) Those architectural features included tiny, cramped cells that precluded social distancing, open-bar cells stacked five tiers high permitting vertical viral transmission, and poor ventilation. (7 RT 1381–85; 5 RT 989–91, 995–97; 7 RT 1372-73, 1384.) Indeed, population density remained a concern throughout 2020 due to the dangerous consequences of transmission in denser prison populations. (Bal depo., 89:10-18; 90:3-6.)

Moreover, Respondent did reduce the prison population. For example, Respondent decreased the H-Unit population by approximately half to mitigate the risk of COVID-19 spread. (9RT 1829-30, 1852-53.) Eventually prison officials reduced H-Unit to approximately 43 percent of its design capacity, with the effect that H-Unit had almost no COVID-19 cases while the virus spread through the rest of the prison. Respondent also temporarily halted intake of new inmates from county jails. It developed an early release plan (not specific to San Quentin, but illustrative of the underlying understanding that less dense populations would subject inmates to less risk from COVID-19). (Gipson Depo., 30:21-31:16, 33:2-14.) It attempted to transfer inmates out of the H-Unit to another prison but could not execute on the plan due to a positive test. Overall, Respondent counts in its favor that it reduced capacity by 40 percent from the

4,051 population level in March of 2020. It concedes that it did not realize the full reduction until May 2021, long after the outbreak had passed. (Resp. Opp. at p. 13; Exhibits 1246 at p. 2 and 712 at p. 164.)

Thus, Respondent fully understood the importance of reducing population and cannot contend otherwise. In response to Petitioners' argument that ignoring the Urgent Memo constituted deliberate indifference, Respondent offers a different defense: that it had no knowledge about the Urgent Memo recommendation. The evidence contradicts that argument.

First, according to Brockenborough and Bishop, the Unified Command discussed the Urgent Memo's 50 percent reduction recommendation in July and August 2020. The Unified Command included high level representatives of CDCR and Broomfield.

Second, Connie Gipson, Director of Adult Institutions, was familiar with the Urgent Memo and discussed the 50 percent reduction recommendation in a conference call with other officials. (Gipson Depo. at 47–49.)

Third, despite his testimony to the contrary, Broomfield himself must have known about the Urgent Memo's recommendation. Everyone around him, including the Unified Command (with his immediate supervisor), and his direct report, Bishop, discussed the topic. Indeed, CDCR decided to review the issue and advise San Quentin whether to comply with that recommendation. In addition, Broomfield agrees with the importance of reducing the prison population to mitigate the spread and effects of COVID-19. Yet, Broomfield testified that he never considered the feasibility of reducing the prison population by 50 percent, never considered the desirability of doing so, and has no recollection ever of seeing or reading the Urgent Memo report itself.[9] (7 RT 797.) He claims to have no knowledge that the AMEND group, at the receiver's specific request, was inspecting the prison to report on how to mitigate the outbreak. He had no knowledge the Urgent Memo would issue, and no knowledge that it did – right up until the very day he testified, when Petitioners' counsel showed it to him. Even though his immediate superior (CDCR Associate Director Ron Davis) sat on the Unified

[9] Broomfield also testified that he never explored whether he had authority to release inmates, including pursuant to Government Code section 8658. (4 RT 789-90.)

Command, and even though Broomfield himself sat in strategic meetings with the Unified Command, and even though Bishop does remember discussing that specific aspect of the Urgent Memo, Broomfield had never heard of the Urgent Memo or the population reduction recommendation.

Even more curious, Broomfield *did* know that "UCSF" (the AMEND group) raised concerns about ventilation (a major recommendation in the Urgent Memo). Broomfield testified he acted on the ventilation issue between June 18 and June 26 (beginning three days after the Urgent Memo issued). Thus, Broomfield acknowledges he knew about the ventilation recommendation from the Urgent Memo, but still insists the blockbuster, headline, recommendation in the same report remained hidden from him during discussions about other aspects of the report's recommendations, and also during discussions others around him concede they had about that very recommendation.

The court discounts Broomfield's testimony that he did not discuss and consider (and ultimately reject) the population reduction recommendation from the Urgent Memo. Although Broomfield obviously had an enormous task on his hands and worked extremely hard to deal with the outbreak once it occurred, it defies credulity that in these circumstances he did not discuss or consider the population reduction recommendation. Broomfield must have reviewed and understood the Urgent Memo recommendation regarding population reduction.

Thus, the evidence establishes that Respondent, including high-level CDCR executives, knew about and discussed the Urgent Memo recommendation. Yet Respondent has offered no evidence that it ever considered the feasibility of the total population reduction urgently recommended by the Urgent Memo. It has offered no evidence that it sought an alternative analysis, or some other form of expert advice.

Respondent argues that its failure to reduce the population further does not constitute deliberate indifference because Respondent must "consider the totality of the circumstances, including any valid penological or public safety considerations." (Resp. Opp. at p. 20, *citing Farmer, supra,* 511 U.S. at p. 845.) However, as Petitioners point out, Respondent offered no evidence of "penological or public safety considerations" that would have precluded compliance

with the Urgent Memo. In fact, this failure cuts to the core of Respondent's non-response to the Urgent Memo. Had it considered the Urgent Memo – at all, in some demonstrated way – and weighed the Urgent Memo's recommendations against the considerations it now vaguely references, then perhaps it would have a point. The court does not fault Respondent's failure to immediately reduce the population consistent with the Urgent Memo's recommendation, so much as it does the failure even to address expert advice put forward by specialists at the receiver's request, designed specifically and explicitly to mitigate the then-current COVID-19 outbreak. Respondent has offered no evidence of any considered analysis, no balancing of competing or alternative expert recommendations, no assessment of other considerations, that would have prevented it from adopting the Urgent Memo's recommendations.[10]

Petitioners liken this disregard of the sole expert opinion regarding how best to safeguard the inmate population to the scenario where prison officials ignore medical advice or refuse to provide proscribed treatment. (Pet. Reply at p. 28.) The comparison is apt. Although most of the cases cited by Petitioners involve a different procedural posture (mostly motions to dismiss or for summary judgment in federal courts), the Urgent Memo authors operated similar to a specialist advising prison officials on how to treat the inmates to prevent them from falling ill and dying. (E.g., *Jones v. Simek* (7th Cir. 1999) 193 F.3d 485, 490 [disregard of specialist recommendations]; *Morales Feliciano v. Rosello Gonzalez* (D. Puerto Rico 1998) 13 F.Supp.2d 151, 209 [failure to carry out medical orders or provide proscribed medication, or recommendations for specialized care].) By any definition, Respondent's conduct in ignoring the Urgent Memo without any consideration of any other expertise, without any demonstration whatsoever that it could not reduce the population, at a time when it acknowledged the dangers posed by the overpopulation at the prison, constitutes deliberate indifference.

[10] Petitioners contend that Government Code section 8658, in conjunction with article I, section 17 of the California Constitution, means that California's "standards of decency" dictate that Respondent should have prioritized depopulation post-outbreak over "insistence on completion of their terms." (Pet. Reply at p. 27.) But Respondent did not even have to make that difficult choice. It could have simply moved inmates to better constructed, less dangerous facilities with room for them. Even if failing to outright release more inmates did not constitute deliberate indifference (giving "due regard for prison officials' 'unenviable task of keeping dangerous men in safe custody under human conditions'" (*Farmer, supra,* 511 U.S. at p. 845, citations omitted), failing to reduce the population in other ways did.

4. The failure to depopulate resulted in extreme solitary confinement

The failure to reduce population had another, tragic consequence. It effectively required Respondent to lockdown the prison and lock up the inmates, two to a cell, either in undersized, filthy cells, for months, or in the dreaded AC. The approximately 50 square feet of cell space (encumbered by two stacked bunks) falls well below the American Correctional Association standard of 80 square feet for segregated housing with at least 35 square feet of unencumbered space per occupant if confinement exceeds 10 hours per day (which it did by more than double). During the lockdown, inmates could not leave these cells other than two to three times per week for one to two hours each time for showers, phone, or (when available) yard. (3 RT 598–600; 6 RT 1131; 4 RT 710; Ex. 1264, pp. 71–889.) Put differently, inmates lived together in these cells twenty-four hours per day, seven days per week, for weeks and months on end. Exhibits 370.011 and 370.012, depicted above in Sec. IV.B.1.a., show the typical open-barred cell in North Block (other tiered housing cells are identical) in which inmates spent entire days on end, locked in with a cellmate, for months on end. Exhibits 369.001-003, depicted above in Sec. IV.B.1.c., shows the single occupancy cells in the AC where inmates lived while isolated after testing positive.

As the pictures show more than any words could describe, the lockdown had two primary effects. First, inmates could not socially distance in the cells. If one cellmate got sick, the other inevitably would too. Multiple inmates testified that precise scenario occurred repeatedly. Second, the lockdown effectively amounted to solitary confinement. (6 RT 1206 ["Solitary confinement is defined as housing in a cell for over 22 hours a day with limited activities"].) A "robust body of legal and scientific authority recogniz[es] the devastating mental health consequences caused by long-term isolation in solitary confinement." (*Palakovic v. Wetzel* (3d Cir. 2017) 854 F.3d 209, 225.) Prolonged periods of solitary confinement can cause serious harm, particularly to prisoners with existing mental illness. (See, e.g., *Disability Rights Mont., Inc. v. Batista* (9th Cir. 2019) 930 F.3d 1090, 1099; *Hernandez v. Cnty. of Monterey* (N.D. Cal. 2015) 110 F. Supp. 3d 929, 946 ["While housed in segregation, the mentally ill are especially vulnerable, and their mental health symptoms— including depression, psychosis, and self-

harm—are especially likely to grow more severe"]; see also *Madrid v. Gomez* (N.D. Cal. 1995) 889 F. Supp. 1146, 1265 [placing prisoners with serious mental illness in prolonged solitary confinement, who are because of their mental illness "at a particularly high risk for suffering very serious or severe injury to their mental health" is "the mental equivalent of putting an asthmatic in a place with little air to breathe"]; see also 6 RT 1200–01, 1237–40.)

As Respondent knew, a significant number of the Petitioners suffer from some form of mental illness. Forcing them into solitary confinement increased their symptoms, which included anxiety, insomnia, and despair, and increased the need for psychiatric treatment. Some inmates were afraid to sleep for fear they might not wake up. (1 RT 845; 7 RT 1294; 8 RT 1518-19.) They heard continuous "man down" cries. They watched fellow inmates get sick, worsen, and die. (1 RT 64; 3 RT 605; 8 RT 1517-18.) One inmate tearfully recounted listening to his friend in the adjacent cell get progressively sicker, coughing and wheezing. When he lay down for a nap and did not arise, guards poked at his body "like a sack of meat." (2 RT 274-75.) Inmates locked in these cramped, dingy, cells, and in the AC cells, lost regular contact with the outside world, lost the outlets provided by programming and work, and lost control over their own protection. They simply waited together, with barely room to stand upright, for the invisible virus. One inmate (Sifuentes) could not shower or make phone calls for 13 days while waiting for test results, with no clean clothes or fresh linens during that time.

In any living situation, these circumstances could impair mental and physical health. It is difficult to conceptualize enduring these circumstances while locked all day in the San Quentin cells for days, then weeks, then months, all while COVID-19 spread "like wildfire" through the prison, routinely sending inmates to the hospital and taking lives. Little wonder that, according to Dr. Kupers, long-term solitary confinement, together with anxiety and despair about COVID-19, exacerbates the conditions of those prisoners with a serious mental illness, and can trigger psychiatric crises. (6 RT 1207-11.) Multiple prisoners testified to exactly that occurrence at San Quentin. Without question, this lengthy solitary confinement caused significant psychiatric harm to prisoners. (6 RT 1198–1200.)

Inmates consigned to the AC fared no better. Although isolation in the AC solves two problems discussed above – the cells hold only one person and they are closer in size to approved dimensions – the AC suffers from the additional problem that it strikes fear in inmates as a disciplinary destination, isolated with no natural light. The AC was designed and historically used for actual solitary confinement. The solid doors, while they prevent droplets from entering, also prevent personal interaction and inhibit calls for medical assistance. Most important, as Respondent knows, inmates regard the AC as a "prison within a prison." (9 RT 1818-19.) Using it as an isolation or quarantine facility inhibits reporting of symptoms and accelerates viral spread. (6 RT 1185, 1211; Pachynski 1 at 96–97; 1 RT 144, 146.) According to Dr. Kupers, inmates isolated in the AC experienced severe psychological trauma.

The court has little difficulty finding that forcing inmates into solitary confinement, two to a cell, in the cells used in the "blocks" at San Quentin, with release for only two hours a day, three days a week, violates any relevant community standard of decency. Respondent could have avoided these conditions by reducing the prison population sufficiently to permit, at a minimum, single celling. It has offered no coherent, reasoned basis why it could not do so. Moreover, Respondent clearly knew the effects of these conditions: inmates routinely complained about them, Respondent's own mental health professionals prepared for and warned about them, and the medical and scientific literature (not to mention case law) addressed them.

5. Finding of historic deliberate indifference

In sum, Respondent violated Petitioners' constitutional right to be free of cruel and unusual punishment by (1) violating its own rules and procedures when it transferred the CIM inmates to San Quentin knowing that those inmates posed a risk of introducing COVID-19 into San Quentin; (2) violating its own rules and procedures during the intake and processing of the newly-arrived CIM inmates, in particular by ignoring obvious COVID-19 symptoms, failing to quarantine the transferees, failing adequately to screen them, and failing to test them until after they had already begun to infect the existing San Quentin population; (3) ignoring advice from its own medical professionals and CDC guidance by failing to provide adequate PPE, mixing sick and well inmates, failing to cohort inmates adequately, failing to enforce social distancing,

and failing to provide adequate or timely testing; (4) ignoring MDPH recommendations without basis; and (5) forcing inmates to double-cell in solitary confinement conditions in cells too small even for one person for weeks and months on end.

Respondent contends that Petitioners cannot carry their burden to provide deliberate indifference unless they can prove that a single person knew of each of the risks posed by COVID-19 and recklessly disregarded it in the ways summarized above. (Resp. Opp. at p. 49.) However, the authorities cited by Respondent do not support this proposition. Respondent cites first to *Farmer*, apparently where the Court references a singular "inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." (*Farmer*, supra, 511 U.S. at p. 838, citation omitted.) But nothing in that passage suggests that only a single person must have the requisite state of mind. Indeed, in large penal institutions with staff turnover and division of labor across multiple tasks, it would make little sense to require the congealing of all requisite knowledge in a single mind. Moreover, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." (*Id*. at p. 842.) Thus, circumstantial evidence, including risks "expressly noted by prison officials in the past" may allow a trier of fact to conclude an official had actual knowledge. (*Id*. at pp. 842-843.)

In any event, while the court finds that Respondent engaged in historic deliberate indifference, it does not consider affirmative relief, injunctive or otherwise, unless that conduct, including the subjective state of mind, continues to the present. The court turns to that question next.

F. First element: Current Conditions

The court must consider whether Petitioners have carried their burden to establish a serious risk of substantial current or future harm and Respondent's deliberate indifference to that harm. Moreover, the higher courts have directed this court to consider not just "the efficacy of the measures officials have already taken to abate the risk of serious harm to petitioner and other prisoners," but also "the appropriate health and safety measures they should take in light of present conditions." (*Staich on H.C., supra*, 272 Cal.Rptr.3d 813.) Respondent asserts that only

"current conditions" matter in the deliberate indifference analysis, and that current conditions do not reflect any deliberate indifference. In considering whether current conditions expose Petitioners to an ongoing serious risk of substantial harm, the court must "assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." (*Helling, supra*, 509 U.S. at p. 36, emphasis in original.)

1. The conditions that put Petitioners at ongoing risk of harm

Respondent's witnesses effectively conceded that COVID-19 remains a danger. (E.g., Gipson depo., 105:22-106:6.) According to Dr. Bick, San Quentin faces an increased risk of outbreak based on what health professionals now know about how COVID-19 (and other respiratory viruses) spread. Dr. Bal believes there "absolutely" is "still a serious [risk] to the health and safety" of prisoners. (Bal depo., 55:25-56:2; 63:18-64:8; 67:19-25.) Brockenborough, who sat on the Unified Command, believes inmates who have obtained no immunity from having contracted COVID-19, and have not received a vaccination, remain at risk. (Brockenborough depo., 73.)

Petitioners contend that these concessions, in combination with the other conditions at the prison, require a finding that they continue to face a serious risk of substantial harm.

The question remains whether other conditions, in combination with the remaining risk COVID-19 poses, makes for a serious risk of substantial harm.

Population. Petitioners contend that continued overpopulation puts inmates at heightened risk. As explained above, the population level puts inmates at risk because of the particular housing arrangements combined with the way COVID-19 transmits. Most inmate housing at San Quentin still has five tiers of open-bar cells stacked on top of each other. Those cells still measure less than 50 square feet. As of April 2021, one third of the prison population remained double-celled, most of them in the five tier housing deemed a powerful contributor to COVID-19 spread. (Exhibit 592, at pp. 9, 12.) The population largely still consists of elderly inmates, many of whom have co-morbidities. While Respondent did reduce the prison population from its high of over 120 percent of design capacity at the time of the CIM transfers,

to a low of 40 percent of the population at the time of the Urgent Memo, that population has now begun to increase again due to resuming transfers from county jails and discontinuing the early release programs. (Factual Stipulation No. 26.) The inmate population stood at 2,384 on May 5, 2021 (Exhibit 712, p. 158), but grew to 2,434 less than a month later on June 2, 2021. (11 RT 2229-30.) Respondent has implemented no policy to prevent further population increases back to a level above design capacity. (11 RT 2228.)

Ventilation. Overpopulation is not the only problematic condition currently at the prison. For example, as discussed above, the ventilation system remains an area of dispute. Dr. Pachynski called the ventilation in the antiquated, tiered-housing buildings "exceedingly poor." (Pachynski II, depo, 82:5-18.) Other witnesses, including independent experts, described dusty, stuffy, and foul-smelling air in the housing units.

Staff cohorting. Respondent still refuses to cohort staff or explain why it cannot. This is no minor issue considering the staff's relative refusal to vaccinate. In effect, Respondent will not require its staff to vaccinate but then permits those same unvaccinated staff to mix freely between housing unit populations at the prison. This "population mixing contributed to the spread of COVID-19" previously. (5 RT 1013.) The failure to enforce cohorting on an ongoing basis was "quite concerning" to Dr. Morris, and others, who deem cohorting an essential aspect of any sound mitigation strategy. (5 RT 995.)

Cal/OSHA violations. In addition, Respondent has yet to address or resolve a multitude of "willful" and "serious" Cal/OSHA violations relating directly to containment of COVID-19. Among many other examples, Respondent does not yet have an adequate ATD Exposure Control Plan to address the transfer of suspect and confirmed cases between units. As another example, Cal/OSHA cited San Quentin in 2015 for failing to develop and implement an adequate plan for isolating and quarantining patients in the event of a respiratory pathogen (such as SARS-CoV-2). Between 2015 and 2020, Respondent did not develop the plan. When the COVID-19 outbreak hit the prison, as the experts and other witnesses testified, the failure to have such a plan addressing such critical mitigation strategies as contact tracing, screening, and isolation and quarantine, contributed directly to the severity of the outbreak. Respondent still has not

submitted an appropriate or approved plan. Finally, regarding Citation 6, item 5(j), involving transferring infected cases to a suitable facility, even Respondent's witness conceded the original plan "was kind of inadequate." Equally germane for purposes of this analysis, the relevant regulations required San Quentin to have a plan as of 2009. That represents over a decade of failure to comply with critical regulations directed toward managing an infectious disease outbreak.

2. The effect of vaccinations (and vaccination refusals)

Petitioners have established that they face a continuing risk. No person reasonably can dispute that COVID-19 remains a risk. The other conditions identified by Petitioners enhance that risk. On the other hand, Respondent identifies a laundry list of things it has done to reduce that risk. The court will address those more below, in considering the subjective element. However, in light of the vaccine, and other measures taken by Respondent, including a still-substantial population reduction, Petitioners have the burden to show that they face a risk so grave that it violates contemporary standards of decency.

Petitioners rightly complain that Dr. Klausner's testimony regarding the effect of the vaccines and prior infections in the inmate population did not account for several important foundational facts. Those include the demographics of the inmate population, the impact of a comparatively unvaccinated staff workforce continuously interacting with the inmates, and the population density and design at the prison. The court agrees that Dr. Klausner did not account for these or any other population-specific or site-specific variables in his analysis. He also showed no interest in doing so when asked about them. However, Dr. Klausner did provide objective data generally applicable to vaccinated inmates regarding the efficacy of the vaccines. That evidence tends to show that the vaccines provide excellent protection. Petitioners did not rebut Dr. Klausner's testimony regarding vaccine rates, vaccine efficacy, expected incidence of breakthrough infections, or expected incidence of serious breakthrough infections causing severe health effects or death. [11]

[11] Since the evidentiary hearing in this case, numerous studies have published regarding the efficacy of the various vaccines, the ability of various variants to break through those vaccines, the incidence of severe health effects in

On the other hand, Petitioners' experts warned of future COVID-19 infection, even in the vaccinated population. They also warned about unspecified future disease. However, as Respondent argues, those experts did not testify about the "statistical probability" of a fully vaccinated individual suffering severe disease or death. (Resp. Opp. at p. 25.) That is true – none of Petitioners' experts provided any objective, data-driven analysis of any future harm. Petitioners' experts did not identify with any specificity a risk different from what the general (vaccinated) population faces. They provided no objective evidence to contradict Dr. Klausner's data regarding vaccine efficacy. Indeed, Dr. Parker agreed that vaccines are effective against variants "that we know of and have been able to test so far." (7 RT 1447.) Petitioners also concede "[t]here is no scientific consensus about how effective the COVID-19 vaccines will remain over the long term (*i.e.*, beyond six months) and how effective they will be against future variants of COVID-19." (Pet. Reply at p. 31.)

Thus, no objective data on the current record show the likelihood of any current inmate suffering an infection serious enough to require hospitalization. Nor do any data show that vaccinated inmates currently face a risk greater than the general population. To the contrary, the absence of any infections for several months within the inmate population (and certainly none serious enough to require hospitalization) tends to corroborate Dr. Klausner's testimony. The lack of any significant number of infections for an extended period supports the notion that Petitioners face no risk that exceeds contemporary standards of decency.

Petitioners offer a narrower argument that unvaccinated inmates (who constitute less than a quarter of the current population) remain at heightened risk. Respondent responds to these concerns by asserting that "petitioners who have refused vaccination cannot prevail on a deliberate indifference claim," citing *Thor v. Superior Court* (1993) 5 Cal.4th 725, 746. (Resp. Opp. at p. 23.) In *Thor*, a prison staff physician sought authority to feed and medicate a

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those with vaccinations, and the efficacy of booster shots. As one commentator put it, "COVID-19, like the flu, is here to stay." Unfortunately, none of these more recent (and perhaps relevant) developments, appear in the evidentiary record. Nor do other recent developments, such as the *Plata* Court's order that all staff be vaccinated, which would certainly address a major concern expressed by Petitioners. The court must decide the case based on the facts presented at the hearing, understanding that science, and viruses, continue to evolve but the evidentiary record cannot remain indefinitely open.

quadriplegic inmate. The Court held that inmates who refuse medical treatment generally discharge prison officials of deliberate indifference when the failure to treat does not endanger the public or threaten prison security. (*Id.* at pp. 745-746.) Of course, some refusals may be justified, such as for medical reasons. However, Petitioners presented no evidence that any inmate had such a justification. Only one petitioner, Travis Vales, initially claimed to have refused a vaccine based on medical advice. (1 RT 103.) However, he then admitted that medical staff twice advised him to take the vaccine and he simply refused. (*Ibid.*)

Given the unrebutted efficacy of the vaccine, Petitioners have not established that inmate refusals to vaccinate endanger the public or prison security, the two exceptions set forth in *Thor*. (See *Counterman v. Finley* (M.D. Penn. April 27, 2021) 2021 WL 381164 at p. 9 [inmate cannot refuse COVID-19 vaccine, "a simple measure that could largely ensure his well-being during the current pandemic," and then cite that lack of care as an Eighth Amendment violation]; *United States v. Scaccia* (D. Utah 2021 WL 2875530 at p. 6 [inmate's "arguments about the dangers he faces from COVID-19 are seriously undermined by his refusal of the vaccine"].)

Thus, the extensive vaccinations provided to the inmate population substantially reduce the danger posed by COVID-19 within the prison. That risk, though undoubtedly substantial and serious, may well not exceed contemporary standards of decency. The lack of any infections after Respondent administered the vaccine to all who would accept it suggests that San Quentin inmates do not currently face a risk more serious than the community as a whole. Thus, the court finds Petitioners have failed show that COVID-19 poses a current substantial risk of serious harm. However, even if Petitioners have shown a serious risk of substantial harm, they must still show that Respondent's current attitudes and conduct reflect deliberate indifference to that risk.

G. Second element: Current Attitudes and Conduct

Assuming, for the sake of argument, that Petitioners have met the objective element of the deliberate indifference test, *Helling* instructs the court next to examine Respondent's "current attitudes and conduct." (*Helling v. McKinney*, supra, 509 U.S. 25. 36.) Above, the court focused on four conditions that particularly may expose Petitioners to heightened harm – population,

ventilation, staff cohorting and the Cal/OSHA violations. Respondent has a mixed record on these issues.

1. Conditions other than population

In response to ventilation concerns, Respondent hired a company to test the ventilation system and reported it worked normally. Cox, the person at San Quentin responsible for the ventilation systems in the tiered-housing, described a system in which air comes in at ground level, is drawn up to the top of the building, then blown back down by fans to exhaust vents in the cells. (9 RT 1786 (K. Cox).) Broomfield described a third-party air circulation study he requested. The study resulted in a finding of safe levels of mock virus dissolution. Thus, while Petitioners may be correct that the prison has not made any improvements or renovations to its ventilation system (Brockenborough depo., 32:18-24), Petitioners only have offered anecdotal evidence regarding ventilation. They have identified nothing objective that would carry the heavy burden on them to show a systemic failure of that system or deliberate indifference to it. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) On the other hand, Respondent took affirmative and reasonable steps to investigate the concerns.

Respondent's response to the staff cohorting and Cal/OSHA issues does not meet a similar standard. As explained, Respondent vaguely has referenced labor concerns that may prevent staff cohorting. But it has identified no specific language or provision that would prevent staff cohorting, and described no real efforts to accomplish it. As of the evidentiary hearing, it still had not addressed the numerous serious deficiencies related to COVID-19 in the Cal/OSHA report.

At the same time, as set forth in detail in Section IV.E., *supra*, Respondent has taken numerous, reasonable actions to address COVID-19 within the prison. These include, as examples only, mandating and providing masks, providing PPE besides masks, working with public health officials to refine the COVID-19 strategy, working with outside officials to form a movement and testing policy, providing weekly testing, and marking off six foot intervals in various heavily traveled spaces around the prison.

As explained below, only by considering the vaccination program instituted by Respondent can the court fully address Respondent's "current attitudes and conduct" regarding COVID-19. While the court could laud or criticize Respondent's response on individual issues, it cannot assess Petitioners' primary argument regarding population reduction, or Respondent's response, without considering those issues in the context of the vaccine.

2. Attitudes and conduct regarding population reduction

The crux of Petitioners' argument regarding current conditions, and the relief they seek, focuses on the population reduction opinion set forth by Petitioners' experts. Petitioners contend Respondent's failure to reduce the population level to the level recommended by Petitioners' experts shows a reckless disregard of risk. They ask this court to order Respondent to reduce the prison population to 50 percent of design capacity consistent with their experts' recommendations.

Respondent does not dispute the central thesis of Petitioners' experts. It agrees that population reduction works. Respondent reduced the population by more than half in the H-Unit dorms prior to and during the outbreak. (9 RT 1854-55.) As a result, as Broomfield testified, the dorms reported virtually no cases compared to the multi-tiered, open-bar cells elsewhere in the prison. Respondent even cites "Inmate Population Reduction" as one of its 27 "extraordinary measures" taken to abate the COVID-19 outbreak. (Resp. Opp. at p. 32.) It also points out that by May 2021 it had accomplished an overall 40 percent reduction of the population level that existed at the time of the Urgent Memo (in comparison to the 50 percent reduction recommended by the Urgent Memo). While it took far too long to accomplish, and largely occurred after the virus had run its course within the prison, the 40 percent reduction is significant. It reflects a substantial effort by Respondent, prior to vaccine availability, to address the population density concerns that served as rocket fuel for the 2020 COVID-19 outbreak. Since then, Respondent has allowed the population to grow again, but contends other measures it has taken reasonably maintain adequate safety. Thus, the parties do not dispute the efficacy or necessity of reducing the population in the face of an outbreak; they simply disagree on the degree, and perhaps the permanency, of that remedy.

Respondent makes four arguments as to why its reasonable response means it need not further reduce the prison population now to the level recommended by Petitioners' experts.

a) Housing contingency plans

First, Respondent contends it has developed adequate contingency plans to dilute the housing density should another outbreak occur. Respondent states that if it needed to spread out the inmate population, it would resurrect the strategy of converting the gym, chapels, and PIA to additional housing, and add tents. As Petitioners point out, the additional bed-space created that way would not accomplish the necessary population reductions specified by Petitioners' experts. For example, in August 2020, 1,258 inmates remained double-celled. (Exhibit 592 at p. 11.) In West Block, the population had declined to 720 from a high of 876 in March 2020. North Block had declined to 620 from 771. (Exhibit 592 at p. 8.) Even at that low point – which has since increased – the additional bed space identified by Respondent only provided housing for 185 inmates in August 2020. The capacity identified by Broomfield is significantly more – about 460 additional spaces – perhaps because the large tent installed by Respondent never housed any inmates in Summer 2020. But even at 460, while helpful, the bed-expansion strategy provides nothing close to the spacing identified as necessary by Petitioners' experts. That number is less than the number of unvaccinated inmates and far less than the number of infected inmates in the outbreak in 2020.

b) Reliance on Swain

Next, Respondent cites *Swain v. Junior* (11th Cir. 2020) 961 F.3d 1276 (*Swain*) for the proposition that failing to reduce a population cannot result in a deliberate indifference finding. In *Swain*, the trial court granted injunctive relief requiring prison officials to provide for six-foot spacing between inmates "to the maximum extent possible" along with various hygiene measures. (*Id.* at p. 1281.) The court relied on a report from a court-appointed expert that recommended an "urgent decrease in the population density" because the existing population made it impossible to socially distance. (*Id.* at p. 1282.) In granting the injunction, the district court relied on the continued spread of COVID-19 at the prison, and the assumed impossibility of achieving the social distance. (*Id.* at p. 1286.)

The *Swain* court reversed, finding that the failure to do the "impossible" cannot constitute deliberate indifference. (*Swain,* 961 F.3d at p. 1287.) In addition, the court cited a variety of other efforts defendants made – their "best" according to the independent expert report – to combat the virus. (*Id.* at p. 1288.) Those efforts included marking out distances with tape, requiring masks, screening staff at the facility entrance, suspending outside visitation, providing hygiene supplies, and others. (*Id.* at p. 1289.) Indeed, the defendants had reduced the jail population to less than 70 percent of capacity as part of their mitigation measures. (*Id.* at p. 1291.)

Swain provides limited guidance here for several reasons. First, there is no basis to compare the facility at issue there with San Quentin. Petitioners' experts, and several of Respondent's witnesses, blame the architecture of the housing units as a critical issue in combination with population density and other factors for the outbreak that occurred at San Quentin. *Swain* offers no basis to compare similar features. Second, despite the population reduction achieved by defendants in *Swain*, the court accepted the "impossibility" of further reduction to ensure the six-foot social distance benchmark. Here, Respondent achieved an even greater population reduction (on a percentage of capacity basis) and has not contended that it could not further reduce the population. Indeed, Respondent had the authority to "remove" or "release" inmates in the face of an "imminent" "emergency endangering the[ir] lives." (Gov. Code, § 8658; *California Correctional Peace Officers' Assn. v. Schwarzenegger* (2008) 163 Cal.App.4th 802,819.) Third, Respondent here did not do its "best." It introduced the virus into San Quentin by knowingly failing to follow a variety of its own policies and best practices. Finally, *Swain* is a pre-vaccine case. As discussed below, the vaccine changes the equation when considering what constitutes a reasonable reduction of population because the vaccine allows inmates, at least according to the evidence on this record, safely to live in closer quarters.

Nevertheless, in focusing on current attitudes, *Swain* does stand for the proposition cited by Respondent here: where prison officials act reasonably in the totality of circumstances, "the allegedly nonuniform enforcement of social distancing cannot alone constitute deliberate indifference." (*Swain, supra,* 961 F.3d at p. 1290.)

c) Respondent's "attitude" regarding population reduction

Third, Respondent offers two primary critiques of the current population reduction opinion by Petitioners' experts. Although Respondent misunderstands the nature of Petitioners' experts' opinions, it has a point regarding the usefulness of the opinions about current population reduction.

First, Respondent asserts that Drs. Morris and Parker simply rely on the Urgent Memo, without any independent basis, for their opinion that only a 50 percent population reduction can address the serious ongoing harm posed by COVID-19. (Resp. Opp. at p. 9.) The Urgent Memo recommends a 50 percent reduction of the population as of the time those authors toured the prison. As explained above, Drs. Morris and Parker have a different opinion altogether. They each framed their analysis in terms of *design capacity*, not a population level at any point in time. (5 RT 1019; 7 RT 1425–26 [emphasizing that the appropriate comparison was design capacity, rather than the extent of reduction from an above-capacity level].) This 50 percent reduction of design capacity translates to a recommended population level several hundred less than what the Urgent Memo recommends. San Quentin's design capacity is 3,082. Petitioners' experts therefore recommend a population of 1,541 or lower. Thus, contrary to what Respondent contends, Petitioners' experts recommend a different 50 percent reduction than does the Urgent Memo (50 percent of the 3082 design capacity, not of the 4,051 capacity as of March 2020 used by the Urgent Memo authors).

Second, Respondent contends the 50 percent of design capacity opinion lacks adequate scientific basis. To recap, Drs. Morris, Parker, and Kupers each concluded that, due to the architecture at San Quentin and related factors, only a rapid reduction of the population to 50 percent of design capacity would safely stop viral spread. (5 RT 987, 1015, 1019; 6 RT 1240–41; 7 RT 1411–12, 1426–27.) No lesser reduction will accomplish the necessary (for slowing or stopping a deadly outbreak) goal of eliminating double-celling, providing vertical and horizontal space between occupied cells, and reducing the use of tier-housing. (7 RT 1412, 1427.) No other measures (such as PPE, screening, quarantine, etc.) "would be substitutes for reducing the population." (5 RT 1015; 7 RT 1455–56.) Indeed, without contradiction, Dr. Parker rejected the

notion that a lesser reduction would suffice. (7 RT 1426.) And Dr. Morris explained that case rates eventually fell at the prison in Fall 2020 because so many inmates contracted COVID-19, essentially "an artificial way of reducing the population." (5 RT 1017.) According to these experts, the decrease in cases had nothing to do with any measures Respondent took. (5 RT 1015-17, 7 RT 1453-56, 1411.)

But what about now? Dr. Morris opined that, if the population remains at high levels, new outbreaks of disease will spread through the prison:

> Q. So in light of your concerns about the future spread of COVID-19, what steps do you believe San Quentin should take now in order to protect the health and safety of in- -- the people incarcerated there?
>
> A. Yes, so we just witnessed what occurred for a new or novel coronavirus, COVID-19. And what we are also seeing within the last few months are what can happen when a virus is in circulation in a population for a sustained amount of time, which is variants where -- or genetic mutation, which then produces variants.
>
> And so it is quite possible that we will be experiencing a new normal, where we have to consider different variants in dominant circulation within the population moving forward.
>
> And I am happy to go into the virology of why that's relevant for COVID-19, but I will say at a minimum that the precautions that would be related to preventing the spread of COVID-19 would extend to the shift in virus virulents -- of new variants of the COVID-19 moving forward as well.
>
> Q. So if San Quentin's population density remains at over 50% of design capacity, do you believe that presents an ongoing risk to the health and safety of persons incarcerated there?
>
> A. Yes, I do.

(5 RT 1018-1019.) This testimony, echoed by Dr. Parker, suffers from three problems.

First, although Drs. Morris and Parker did not rely on the Urgent Memo as Respondent argues (Resp. Opp. at p. 35), the precise nature of their 50 percent population reduction proposal remains elusive. Dr. Parker explained that to reduce viral spread the prison must eliminate double-celling in the stacked housing units and space the inmates every other cell, both vertically and horizontally. (7 RT 1427.) However, in reaching that opinion, Drs. Parker and Morris did

not do a detailed (or any) cell capacity study. They did not calculate the number of cells, compare it to the number of inmates, develop a housing plan based on that data, and then derive a proposed population reduction number. Indeed, Dr. Parker conceded he did not have sufficient information to perform such an analysis. (7 RT 1426-1428.) Thus, the experts state a conclusion (the 50 percent reduction) untethered to the stated cell population opinion (every other cell, vertically and horizontally). No analysis connects the two.

Second, the experts did not present or rebut specific vaccine efficacy data as part of the 50 percent reduction opinion. Dr. Klausner offered unrebutted testimony regarding the efficacy of the vaccine and the statistical probability of future inmate infection. Petitioners criticize this opinion (justifiably in some cases, as discussed above), but do not offer any contrary evidence. More important, Petitioners' experts ignore the vaccine efficacy evidence in stating their 50 percent opinion. In effect, Petitioners' experts offer the same 50 percent reduction opinion now, post-vaccine, as they do in opining what Respondent should have done pre-vaccine. The vaccine apparently has no effect whatsoever on their population reduction opinion. Perhaps some scientific basis exists for that lack of change, but Petitioners' experts do not say. They simply do not account for the vaccine in their opinion about current conditions. This failure undermines the reliability of the going-forward 50 percent reduction opinion.

Finally, Respondent argues that the "possibility" articulated by Dr. Morris lacks scientific basis. Indeed, Dr. Morris's testimony seems to assume the future harm Petitioners have the burden to prove. In general, Petitioners' experts focus not on the danger that exists today, but rather on the prospect of future transmission as the virus mutates, or even the introduction of a different virus altogether. Dr. Parker offered similar testimony. He advised that "keep in mind . . . the sheer biomass of virus in the world right now is enormous, and there's plenty of room for new variants to emerge and spread around the world again. . . . "[W]e know that it's just a matter of time before another respiratory disease or another variant of this respiratory disease is introduced into the prison," and when that happens "[i]t's going to spread through like wildfire." (7 RT 1414.)

These predictions are speculative. No data supports them. Neither expert accounted for the vaccine in offering these opinions. Yet, for the only known, existing harm, Respondent has – consistent with community standards – provided the vaccine. The vaccine appears to work against the only currently known harm. The record contained no reliable data to indicate Respondent should take some measure other than providing the vaccine against the known harm (and the other measures they have implemented).

Put differently, Petitioners essentially liken the future risk from COVID-19, or a variant of it, to the future harm from the smoke in *Helling*. There, however, scientific data supported the prospect of future harm from exposure to secondary smoke. If exposed, an inmate might well develop serious health effects, or die. Here, the opposite is true. If COVID-19 is akin to the secondary smoke in *Helling*, Respondent argues it has, instead of removing the harm (because it cannot), inoculated petitioners against that risk with the vaccine. The record offers no basis to criticize this approach, nor does it support the argument that another outbreak will occur among the vaccinated inmates. Indeed, no expert offered any scientific data regarding the length of protection provided by the current vaccines (other than that the efficacy may fade over time, requiring revaccination), the likelihood of infection by any variant, or the likely severity of any such infection.

In conclusion, the court finds that the population reduction achieved to date, in combination with the current data regarding the vaccine, and the other measures taken by Respondent, present a similar scenario to the one in *Helling* where, the Court strongly suggested, prison officials reasonably mitigated the risk of harm. Evidence about a different population level, combined with different data about vaccine efficacy, or evidence about new variant, might result in a different analysis. However, that scenario is not currently before the court. None of Petitioners' experts challenged the scientific findings on the safety and efficacy of the COVID-19 vaccines or provided any testimony on the probability of severe disease and death among fully vaccinated individuals. Although several outbreaks already have occurred with deadly consequences for the inmate population, the vaccine – in combination with the myriad other

measures Respondent has undertaken – has essentially eliminated the more serious threat from COVID-19 to any inmate who accepts the vaccine.

d) Providing the vaccine is a reasonable response

Fourth, Respondent contends its efforts successfully to implement the vaccination program prove it has acted reasonably. The court considered the issue of vaccination above, related to the objective component of the deliberate indifference test. In that context, the court attempted to determine whether a serious risk of substantial harm continues to exist for Petitioners, including those still without vaccines. The question remains whether Petitioners (including unvaccinated inmates) face a serious risk of substantial harm from COVID-19 that exceeds contemporary standards of decency, and whether Respondent unreasonably has ignored that risk. Petitioners do not dispute that Respondent now has made the vaccine available to all Petitioners (and indeed, all inmates at San Quentin). Regardless of the degree of harm that remains, making the vaccine available seems to constitute reasonable conduct by Respondent. Indeed, virtually every court to consider the effect of vaccine availability has concluded that prison officials act reasonably in response to COVID-19 by offering vaccines with proven effectiveness (including against current variants). (See *Mateo v. Warden* (D. New Hampshire May 24, 2021) 2021 WL 2109748 at pp. 3-4; *Smith v. Warden, Belmont Correctional Institution* (S.D. Ohio July 19, 2021) 2021 WL 3033464 at p. 2 [relying on efficacy of Moderna vaccine and CDC, Yale Medicine and Moderna data "that the vaccine likewise effectively protects fully vaccinated individuals from serious illness from variants of the COVID-19 virus]; *David v. Allison* (E.D. Cal. August 25, 2021) 2021 WL 3761216 at p. 4 [having received vaccine and in light of other mitigation measures, plaintiff's claims "of threatened harm are speculative at best" regarding COVID-19 variants].)

Accordingly, even if Petitioners have carried their burden to show the requisite risk of harm as to unvaccinated inmates, they have not similarly carried their burden to prove the subjective element of the deliberate indifference test where Respondent has made the vaccine available to those inmates and they have refused to accept it.

VI. Conclusion

To obtain injunctive relief, Petitioners must establish Respondent's "current attitudes and conduct" constitute deliberate indifference to a substantial risk of serious harm. (*Helling v. McKinney, supra,* 509 U.S. at p. 36.) This they have not done. As explained above, the vaccine changed the game for COVID-19 at San Quentin. With a nearly 80 percent inmate vaccination rate, COVID-19 has all but disappeared from inside the prison. Although COVID-19 remains a risk within San Quentin, it appears at present no more than, and perhaps even less than, the risk faced by the community at large.

But even if COVID-19 continues to pose a substantial risk of serious harm, the combination of substantial population reduction, mitigation measures, and most importantly vaccine rollout, to every inmate in the prison shows that Respondent does not "knowingly and unreasonably" disregard an objectively intolerable risk of harm. By offering the vaccine to all inmates, Respondent has responded reasonably and effectively with the best tool available to mitigate the harm. This situation differs from the scenario presented to the *In re Von Staich* court, where "Absent a vaccine or an effective treatment, the best way to slow and prevent spread of the virus is through social or physical distancing, which involves avoiding human contact, and staying at least six feet away from others." (*In re Von Staich,* 56 Cal.App.5th at p. 58.) Here, the vaccine, combined with other measures, allows less physical distance. Petitioners did not carry their burden to show that Respondent continues to unreasonably disregard a known serious risk by failing to take further measures such as further reducing the prison population.

Accordingly, the court denies the petitions as moot.

That, however, does not end the matter. As discussed above, courts may "reject mootness as a bar" in certain cases. (*In re Walters, supra,* 15 Cal.3d at p. 744.) Courts particularly rule on technically moot habeas petitions when they raise "a question of general public interest which is likely to recur." (*In re Stinnette, supra,* 94 Cal.App.3d at p. 804.) Petitioners may seek a declaration of rights in these circumstances, including where the court may have difficulty ruling on the issue while the controversy is alive, and where it presents important issues of liberty and social interest. (*In re Head* (1983) 147 Cal.App.3d 1125, 1130.)

This case presents just those circumstances. As the *Plata* case and this case demonstrate, Respondent historically does not adequately safeguard inmates' health and safety if left to its own devices. This conduct directly implicates inmates' liberty interests. In addition, as demonstrated by the procedural history of this case, inmates will have difficulty presenting timely claims for resolution if similar circumstances recur. Respondent's actions also have broad public safety implications. Risks to inmates from disease do not always remain within the prison walls. As tragically demonstrated by the COVID-19 outbreak at the prison in 2020, prison staff and others who go in and out of the prison on a daily basis act as vectors into the surrounding community, threatening the nearby schools, homes, businesses, and the everyday life (and the lives) of the nearby residents. In this way, infectious disease at San Quentin can adversely affect the health and safety of the broader community. Willis testified that hospitals pressured him to procure a COVID-19 plan from San Quentin because "our hospitals knew that if there was an outbreak there, the inmates who got sick would have to come into our hospitals, and our hospitals were already seeing surges of COVID-19 cases from the community." (2 RT 346.) Thus, the "justice of the case" goes beyond just the treatment of inmates. (*In re Brindle, supra* 91 Cal.App.3d at p. 670.) In a pandemic, deliberate indifference to their safety also impacts the health and safety of the staff who work at the prison, the various contractors and third parties who go in and out of the prison, and the surrounding community. When hospitals fill with inmates, they cannot treat other community members. Accordingly, the court summarizes here the following findings, by way of declaration, made above:

1. Respondent caused "the worst epidemiological disaster in California correctional history." (October 2020 *In re Von Staich* Order at p. 60.) In doing so, Respondent recklessly ignored what it knew then and concedes now – that COVID-19 posed a "substantial risk of serious harm to the health and safety of petitioners."

2. Respondent's conduct that resulted in 75 percent of the San Quentin inmates contracting COVID-19, and 28 deaths, implicates "matters of clear statewide importance" relating to the "efficacy of the measures officials have already taken to abate the risk of serious

harm to petitioner and other prisoners, as well as the appropriate health and safety measures they should take in light of present conditions." (*Staich on H.C., supra,* 272 Cal.Rptr.3d 813.)

3. During the 2020 COVID-19 outbreak at San Quentin, Respondent violated Petitioners' rights under the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution to be free of cruel and unusual punishment. Respondent exhibited deliberate indifference to the admitted risk posed by COVID-19, by (a) violating its own rules and procedures when it transferred the CIM inmates to San Quentin, knowing that those inmates posed a risk of introducing COVID-19 into San Quentin; (b) violating its own rules and procedures during the intake and processing of the newly-arrived CIM inmates, in particular by ignoring obvious COVID-19 symptoms, failing to quarantine the transferees, failing adequately to screen them, and failing to test them until after they had already begun to infect the existing San Quentin population; (c) ignoring advice from its own medical professionals and CDC guidance by failing to provide adequate PPE, mixing sick and well inmates, failing to cohort inmates adequately, failing to enforce social distancing, and failing to provide adequate or timely testing; and (d) ignoring Willis/MDPH's recommendations without any basis other than that MDPH purportedly had no authority over Respondent.

4. As in *Plata*, "[n]umerous experts testified that crowding is the primary cause of the constitutional violations." (*Brown v. Plata, supra,* 563 U.S. at p. 521.) The evidence shows that compliance with the Urgent Memo's population reduction recommendation in a timely fashion substantially would have reduced the scope and severity of the COVID-19 outbreak at San Quentin. Respondent knew about the Urgent Memo. It further knew that population reduction could effectively combat viral spread (as evidenced by its own population reduction efforts). Respondent failed to comply with the Urgent Memo recommendation or engage any expert of its own. Without adequate investigation or the benefit of any alternative expert opinion, ignoring the Urgent Memo's population reduction recommendation constituted further deliberate indifference. Indeed, Respondent had the means at its disposal quickly to comply with the Urgent Memo's recommendation; instead, it chose to litigate the matter while people died.

Respondent has offered no valid argument why it could not have complied with the Urgent Memo's recommendation. In *Plata,* in addition to the criteria imposed by the PLRA, the state had to consider an order involving the entire California prison system. The state could not comply with that order simply by moving inmates. It had to either release them or build more space. Here, by contrast, the problem involves only one, antiquated prison, with architectural characteristics not shared by many other prisons in the state system. Respondent contends it would violate "contemporary standards of decency" to release Petitioners prior to the end of their sentences. (Respondent Opp. at pp. 23, 57.) But it could have reduced the population through means other than outright release. Indeed, the remedy ordered by the Court of Appeal in the October 2020 *In re Von Staich* Order did not necessarily involve releasing any inmates. (*In re Von Staich, supra,* 56 Cal.App.5th at p. 84 ["To be clear: We do not order the *release* of petitioner or any other inmate"], emphasis in original.) Instead, the Court of Appeal left to Respondent the most efficient and effective means of reducing the population, considering the variety of factors prison officials must consider. (*Ibid.*) While release is certainly one option to reduce the population at San Quentin, prison officials had several other options available to them. For example, they could have transferred inmates to a different prison (following all safety protocols). The failure to do so, or at least to make good faith efforts to do so, unreasonably exposed inmates, staff, and the surrounding community to a substantial risk of serious harm.

5. The failure to reduce the population resulted in other constitutional deprivations of liberty. Because Respondent did not reduce the population as recommended, it effectively consigned hundreds of inmates to unwarranted, unnecessary, solitary confinement. And not just for a day or two. Where Respondent had the ability to move inmates to other facilities or release them, the court can conceive of no argument to support forcing inmates to remain in a cell smaller than 50 square feet, with two bunks, and a cellmate, for virtually 24 hours a day, seven days a week, for months on end. Doing so enhanced the inmates' exposure to COVID-19. For the duration it lasted, it also amounted to solitary confinement in violation of common standards of decency, with all the physical and mental health effects that result. (6 RT 1206-07.) (See

Exhibits 370.011 and 370.012, depicting the solitary confinement cells during lockdown in the "Blocks" at Sec. IV.B.1.a, *supra*.) Respondent knows about these effects. Its mental health team prepared for them, reported them, and treated them. Simply put, confinement for that long, with another person, in a space so small and foul, implicates "nothing less than the dignity of" humans. (*Trop v Dulles*, *supra*, 356 U.S. at pp. 100-101.)

6. Isolating COVID-positive inmates in the AC contributed to the spread of COVID-19 because inmates fear the AC. Using the AC as an isolation unit disincentivizes candid reporting of symptoms, an essential component of any effective COVID-19 mitigation strategy.

* * *

Respondent contends population reduction "involves significant policy questions about public safety and criminal justice" best left to other branches of government. (Resp. Opp. at p. 42.) However, if Respondent insists on continuing to operate an obsolete and dangerous prison that, whenever an airborne pathogen arises, threatens the health and safety of the prison population, not to mention the surrounding community, then Respondent will leave the courts with no choice but to intervene. Moreover, the circular notion that "the operation of our correctional facilities is peculiarly within the province of the Legislative and Executive Branches of Government, not the Judicial" (*Bell v. Wolfish* (1979) 441 U.S. 520, 548), relied upon by Respondent, assumes the lack of a constitutional violation.

No one knows how COVID-19 will behave in the future. No one knows what effect Respondent's efforts to vaccinate the entire inmate population will have in combating any future outbreak. Petitioners have not – at this time – carried their burden to show current deliberate indifference warranting injunctive relief. However, the record raises serious questions about whether Respondent has learned the right lessons from the 2020 COVID-19 debacle at San Quentin. It continues to operate a prison uniquely situated to allow the spread of any airborne pathogen, including COVID-19, in a manner seemingly indifferent to the specific characteristics that resulted in such extensive illness and death just last year. For example, Respondent continues to double cell prisoners in multi-tiered units with open barred doors, a living environment that enhances the risk of disease transmission. Respondent also appears intent on

relying on the same population spread – as opposed to population reduction – strategy it employed in 2020. It plans to lockdown double-celled inmates, when necessary to quarantine them, in the cells measuring 49 square feet that make up the tiered housing units. Depending on the circumstances, including the severity of any future outbreak, the findings above should cast significant doubt on the wisdom of those strategies.

VII. Order

Having made the declarations and findings above, the court hereby DENIES the petitions as moot at this time.

The court will hear any objections or comments to this Tentative Ruling at 1:30 p.m. on Monday, November 8, 2020 in Department D. No further briefing shall be filed without leave of court.

Dated: October 15, 2021

GEOFFREY M. HOWARD
Judge of the Superior Court
County of Marin