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12
13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **OAKLAND DIVISION**

16 MARCIANO PLATA, et al.,

17 *Plaintiffs,*

18 v.

19 GAVIN NEWSOM, et al.,

20 *Defendants.*

Case No. 01-1351 JST

**PLAINTIFFS' REPLY RE
EMERGENCY MOTION
REGARDING PREVENTION AND
MANAGEMENT OF COVID-19**

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INTRODUCTION

1
2 In denying Plaintiffs' emergency motion before the Three Judge Panel the Court
3 stated, "Thus far, the only way to stop [the] spread [of Covid-19] is through preventive
4 measures—principal among them maintaining physical distancing sufficient to hinder
5 airborne person-to-person transmission." Order Denying Motion, Doc. 3261 at 8.
6 Referring to Defendants' obligation to protect the people living in California prisons, the
7 Court urged Defendants "to leave no stone unturned." *Id.*, at 13. Defendants' Opposition
8 to the motion before this Court demonstrates that they have failed to heed that direction.
9 Even at this late date they have not taken reasonable steps to minimize the serious risk of
10 transmission of COVID-19 by creating sufficient space to maintain physical distancing for
11 the general prison population or even for those who are most vulnerable to serious illness
12 or death from this deadly virus.

13 California's Attorney General has personally recognized the grave threat that
14 correctional facilities pose to those who are detained in a letter to the Department of
15 Homeland Security calling for "urgent action" to prevent "countless deaths." He urged the
16 Department "to decrease the detainee population as much as possible ... [because COVID-
17 19] will not only harm civil immigration detainees, but will overwhelm community
18 hospitals to which those detainees will necessarily be transferred for treatment."
19 Supplemental Declaration of Patrick Booth, Exh. I.

20 Defendants fail to show the same sense of urgency here. Defendants say that they
21 are "working" with the Receiver to "assess the feasibility" of creating 8-person housing
22 cohorts. There is no plan for establishing those cohorts, nor is there a plan to protect the
23 vulnerable due to age or medical condition. Defendants have thus far moved only a small
24 fraction of people out of overcrowded dormitories. And while they claim to be
25 investigating whether gymnasiums can house people, they conspicuously fail to mention
26 how many people those gyms will hold and who will be transferred.

27 In light of these continuing failures and the fact that there is now an exponential
28

1 increase in the number of people (both staff and those incarcerated) who have tested
 2 positive, Plaintiffs seek a simple and narrow remedy—an order from this Court requiring
 3 Defendants to immediately develop and implement an adequate plan to maintain “physical
 4 distancing sufficient to hinder airborne person-to-person transmission” and to do so
 5 consistent with the vulnerability of many of the patients and the CDC guidelines.

6 To oppose this motion, Defendants rely on the tired strategy of creating a straw man
 7 to knock down. In this case, the straw man they knock down is a prisoner release order.
 8 Plaintiffs do not seek an order from this Court seeking the release of anyone, much less the
 9 release of thousands at a time. Rather, they present credible evidence that there are
 10 practical and safe alternatives for Defendants to use in developing an effective plan in the
 11 event that adequate physical distancing cannot be provided in CDCR’s overcrowded 35
 12 prisons.

13 The global threat posed by this pandemic is unprecedented in modern times. The
 14 measures taken by local, state and federal agencies to prevent transmission through shelter-
 15 in-place orders also are unprecedented, as is the effect on the entire economy. Those
 16 measures, however, do not protect people in the custody of CDCR. In this emergency the
 17 minimal steps taken to date by CDCR to prevent transmission are simply not a reasonable
 18 response to the magnitude of the crisis. The Court must intervene to force Defendants to
 19 turn over every stone to prevent further transmission of COVID-19 in our state prisons.

20 **I. THE REQUESTED RELIEF IS CONSISTENT WITH THE PRISON**
 21 **LITIGATION REFORM ACT**

22 **A. The Relief Meets the Needs-Narrowness-Intrusive Test.**

23 Plaintiffs have requested that the Court order Defendants to immediately develop
 24 and implement a plan to achieve sufficient physical distancing in CDCR’s overcrowded
 25 dorms, and to ensure that medically vulnerable people will be safely housed. ECF 3266-4;
 26 *see also* ECF 3266 at 9-10. This requested relief is narrowly drawn, no broader than
 27 necessary, and the least intrusive means to correct the violations. 18 U.S.C § 3626(a)(1).

28 It is “proportional to the scope of the violation”²—indeed, it is directly targeted to halt the

1 rapid spread of this virus in the dorms and to protect those most at risk of falling severely
2 ill or dying if they contract COVID-19. *See Brown v. Plata*, 563 U.S. 493, 531 (2011).
3 And, it grants Defendants maximal discretion to choose the “the means ... to accomplish
4 those ends.” *See id.* “Allowing defendants to develop policies and procedures to meet
5 [their legal] requirements is precisely the type of process that the Supreme Court has
6 indicated is appropriate for devising a suitable remedial plan in a prison litigation case.”
7 *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1071 (9th Cir. 2010); *see also Pierce v. Cty.*
8 *of Orange*, 761 F. Supp. 2d 915, 954 (C.D. Cal. 2011) (explaining that “the least intrusive
9 means to compel the County to remedy the [deficiencies identified in the case] is to allow
10 the County to draft a proposed plan”).

11 **B. The Requested Relief is Not a Prisoner Release Order.**

12 Contrary to Defendants’ assertions, ECF 3273 at 4-7, the PLRA does not prohibit
13 this Court from ordering Defendants to develop a plan to meet physical distancing
14 requirements and safely house the medically vulnerable people in its custody. Plaintiffs
15 have requested only that the Court order Defendants to develop a plan to achieve these
16 goals. *See* ECF 3266-4; *see also* ECF 3266 at 9-10. Defendants would have complete
17 discretion in developing this plan.

18 As described in Plaintiffs’ motion, Defendants may be able to achieve these goals
19 by moving people to appropriate areas within the prisons. ECF 3266 at 9; ECF 2661 at
20 *13-14 (transfer order is not a release order). Or, if existing spaces within the prisons are
21 insufficient, Defendants could exercise their emergency powers to move people to “other
22 locations *while remaining in CDCR custody.*” ECF 3266 at 9 (emphasis added). For
23 example, CDCR might choose to house people in other secure facilities, or to transfer
24 people to temporary home confinement, either of which could be done while keeping
25 people in CDCR custody. *See* Cal. Govt. Code § 8658; Cal. Pen. Code § 2690; *see, e.g.,*
26 *Reaves v. Dep’t of Correction*, 404 F. Supp. 3d 520, 522 (D. Mass. 2019) (finding that
27 order to transfer plaintiff to hospital was not a release order under the PLRA because “this
28

1 Court did not release Mr. Reaves from incarceration, it transferred him”).

2 **II. DEFENDANTS’ COVID-19 RESPONSE IS NOT ADEQUATE**

3 There is no dispute that “the Eighth Amendment requires Defendants to take
4 adequate steps to curb the spread of disease within the prison system.” ECF 3261, at 8.
5 The sole issue in dispute is whether Defendants’ response to the COVID-19 pandemic is
6 reasonable. It is not, as set forth below.

7 **A. Defendants Fail to Establish that They Have Implemented Adequate
8 Measures in Response to COVID-19**

9 Defendants claim that they have implemented reasonable and aggressive measures
10 in response to COVID-19. ECF 3273 at 7-11. Referring to the U.S. Centers for Disease
11 Control and Prevention’s (CDC) *Interim Guidance on Management of Coronavirus*
12 *Disease 2019 in Correctional and Detention Facilities*, Defendants assert that they have
13 complied with “nearly every single CDC recommendation” regarding the management of
14 COVID-19 in correctional facilities. ECF 3273 at 8.

15 In support of this broad contention, they cite Secretary Ralph Diaz’s declaration and
16 a table he states was prepared by the Receiver that Secretary Diaz testifies “accurately
17 reflects all measures that CDCR and CCHCS have taken to date in response to COVID-19,
18 and demonstrates that CDCR and CCHCS have complied with almost all of the CDC’s
19 numerous suggested guidelines for correctional facilities.” ECF 3274, ¶ 3 and 3274-1
20 (Exh. A). The table, however, is hearsay offered to prove the truth of the matter asserted.
21 Defendants offer no hearsay exception, thus the table is not admissible. FRE 802.
22 Defendants have enacted some measures to address the epidemic, but they have failed to
23 demonstrate that they have followed nearly all of the CDC’s recommendations.

24 **B. Defendants Do Not Have a Plan to Limit Physical Distancing.**

25 Even if Secretary Diaz’s assertions are correct, and Defendants have complied with
26 almost all of the CDC recommendations, Defendants’ management plan has a gaping and
27 obvious hole: the lack of a plan to facilitate physical distancing. This, despite the fact that
28

1 the *CDC Interim Guidance* describes distancing as a “cornerstone of reducing” COVID-
2 19. ECF 3221-1 at 110. And in the absence of a plan to facilitate distancing, tens of
3 thousands of people remain housed in CDCR’s crowded dormitories, sleeping in bunk
4 beds and, in some cases, within three feet of each other. Without this critical cornerstone,
5 defendants’ plan is plainly insufficient.

6 Plaintiffs acknowledge that the Defendants have taken some steps to reduce
7 population density in some of the prisons. As Plaintiffs demonstrated in the Emergency
8 Motion, Defendants have failed to establish, however, that the limited steps they have
9 taken to permit adequate physical distancing can be practiced in the dormitories under
10 current conditions or that they have ensured that those particularly vulnerable to
11 complications from COVID-19 have been removed from dangerous living situations. ECF
12 3266, pp. 4-6.

13 As indicated above, the Receiver has very recently recommended to the Defendants
14 that they create eight-person housing cohorts for people housed in dorm settings, with
15 “each cohort... separated from the others by a distance of at least six feet in all directions,”
16 to achieve necessary social distancing. ECF 3274 at 5, and ECF 3276-6. Defendants
17 indicate that they are “evaluating the feasibility of creating social distancing cohorts in the
18 dorms that would each be separated from other pods.” ECF 3273 at 12. They further state
19 that they are in the process of converting gymnasium space into alternative temporary
20 housing, and “considering converting other areas as well.” *Id.* They have not, however,
21 taken significant action to relieve the crowding in the dormitories, nor have they identified
22 any measures to ensure that at least those people most at risk of serious complications from
23 COVID-19 are safely housed.

24 Without an effective distancing plan in place, the number of COVID-19 cases
25 among incarcerated people and CDCR staff has increased dramatically, even since
26 Plaintiffs filed the first emergency motion. Three weeks ago, just one incarcerated person
27 had tested positive for COVID-19 in all 35 state prisons, at California State Prison, Los
28

1 Angeles (LAC), and seven staff members at four prisons reported positive tests. ECF
 2 3221, at ¶ 47, & 3221-2 at 149. Since then, the number of infected incarcerated people has
 3 risen to 57, with 78 staff now reporting they have the virus. *See*,
 4 <https://www.cdcr.ca.gov/covid19/population-status-tracking/> and
 5 <https://www.cdcr.ca.gov/covid19/cdcr-cchcs-covid-19-status/>. (Both last accessed April
 6 14, 2020.)

7 Significantly, the largest outbreak is centered in several dormitories at the
 8 California Institution for Men (CIM), where 38 incarcerated people have tested positive.¹
 9 *Id.* Review of the housing for these people shows that at least 33 of them lived in
 10 dormitories on CIM's Facility D immediately prior to testing positive. Declaration of
 11 Steven Fama, filed herewith, at 2.

- 12 • Twenty-two people were housed in a single dormitory, Alder Hall;
- 13 • Six people were housed in Spruce Hall;
- 14 • Five people were housed in Cedar Hall.

15 *Id.* at 2. As of April 7, 2020, all three of these housing units remained at over 100%
 16 capacity. *Id.* at ¶¶ 5-7. And although Defendants did transfer approximately 638 people
 17 from dorms last week in order to create space and allow for distancing, none of those
 18 transfers involved CIM's crowded dormitories. ECF 3275, at 5. Additional transfers are
 19 scheduled for this week – but again, these do not impact CIM, where many of the dorms
 20 are at over 100% of capacity, and some are at over 160%. *See* Fama Decl, ¶ 8, Exh. C at
 21 18-19.

22 Defendants' measures to prevent the spread of the virus are not effective, and there
 23 are reasonable steps they could take to further protect Plaintiffs, as set forth below.
 24
 25

26 _____
 27 ¹ In addition to CIM, the outbreak at LAC has also grown, with 15 incarcerated people
 28 testing positive, and eleven staff. *Id.*

1 **III. DEFENDANTS HAVE NUMEROUS OPTIONS FOR SAFELY REDUCING**
2 **POPULATION DENSITY AND REHOUSING THE MEDICALLY**
3 **VULNERABLE.**

4 Defendants assert that Plaintiffs seek relief that is unsafe. Again, they are wrong.
5 Prison and jail systems around the country and, indeed, the world have been facing
6 decisions about how to protect the health of the incarcerated people, staff and the public
7 during this pandemic. Many leaders have recognized that, in this emergency, strong action
8 is required and that, in light of the pandemic, reducing density in prisons is vital for public
9 health.

10 One of those leaders is Defendants' own counsel, California Attorney General
11 Xavier Becerra, who wrote, in a letter to the Acting Secretary of Homeland Security, that
12 "[s]ignificant steps are needed to avoid COVID-19-related catastrophe in our immigration
13 detention facilities and their surrounding communities." Suppl. Booth Decl., Exh. I. The
14 conditions he described in California immigration detention facilities mirror those in
15 California prisons: physical plants that "do not allow for social distancing"; "crowded
16 dorms with up to 99 other people, with no physical partitions" (far fewer than many dorms
17 in CDCR); "dining halls built for 50 or more people, at communal tables"; and too-few
18 medical isolation rooms, resulting in the need to "deal[] with outbreaks by cohorting an
19 entire 64-person housing unit." Id. at 1, 2, 3 (parenthetical omitted); compare with ECF
20 3266-3 ¶ 5 & Exh. C (128 people in CIM dorm); ECF 3266-3, Exh. D at 25 (CCHCS
21 cohorting guidance).

22 The dire consequences that will flow from the conditions in immigration detention
23 facilities will flow from the same conditions in state prison: "countless unnecessary
24 deaths," "increase[ed] ... risk of infection to the public at large and overwhelming local
25 health care providers," "community health resources being less available for community
26 members," "a shortage of medical equipment," and limited ability for medical staff in the
27 prisons to treat people with chronic illness "due to potential significant diversion of
28 healthcare staff and resources to treat COVID-19 patients." See Suppl. Booth Decl., Ex. I

1 at 1, 2, 3-4.

2 And the “urgent action” the Attorney General demands of the Department of
3 Homeland Security is the same that should be applied to the state prison system:
4 “maximum use of supervised release options” and immediate reduction of the incarcerated
5 population, “prioritizing those that are in fragile health.” Suppl. Booth Decl., Ex. I at 2, 4;
6 see also *id.* at 4 (“Unless DHS takes immediate steps to reduce the population of
7 detainees . . . , detainees, detention facility staff, and members of the neighboring
8 communities will face increased risk of death”).

9 Nowhere in the Attorney General’s letter does he say, as he does in the present case
10 (*see Opp.* at 14), that a reduction in the population is unsafe for medical reasons. That is
11 not surprising since the evidence Defendants rely on here consists of the declaration of Dr.
12 Bick, who parrots the Receiver’s position that inter-institution and intra-institution
13 transfers should occur only for health related emergencies. ECF 3278. at ¶ 7. At this
14 point, there can be no question that the risk of infection is much higher in Defendants’
15 crowded dormitories than in the free community.

16 Plaintiffs described many measures correctional systems have taken to reduce
17 population density in the first Emergency Motion, including the temporary release of
18 85,000 people from Iran’s prisons and policies initiated in major U.S. cities from delaying
19 arrests to releasing people held for drug offenses. ECF 3219 at 13. Since then, many more
20 systems have acted decisively to develop and implement effective steps to reduce virus
21 transmission in their facilities. For example, U.S. Attorney General William Barr directed
22 the U.S. Department of Justice to prioritize home confinement over imprisonment, noting
23 that “some at-risk inmates . . . might be safer serving their sentences in home confinement
24 rather than BOP facilities.” Suppl. Decl. of Patrick Booth, ¶¶ 3-4, Exh. A. The Governor of
25 Colorado signed an executive order suspending caps on earned credits, thereby expediting
26 releases. *Id.*, at ¶¶ 5-6, Exh. B. The Governor of Kentucky commuted the prison
27 sentences of people in prison “identified as at higher risk for severe illness or death due to
28

1 their medical conditions per guidelines” issued by the CDC and plans to commute the
 2 sentences of people with six months or less on their sentences. *Id.* at ¶¶ 7-9, Exh. C. In
 3 Illinois, the Governor significantly expanded the availability and length of medical
 4 furloughs, explaining that the “vast majority” of 36,000 people in custody “because of
 5 their close proximity and contact with each other in housing units and dining halls, are
 6 especially vulnerable to contracting and spreading COVID-19.” *Id.* at ¶¶ 12, ECF 3266-3
 7 at 176. The Governor of Pennsylvania ordered the expedited release of people within nine
 8 months of their release dates, as well as medically vulnerable people. *Id.* at ¶¶ 13-14, Exh.
 9 F. And here in California, the Judicial Council approved an emergency rule that sets bail
 10 statewide at \$0 for misdemeanors and lower-level felonies in order to limit the jail
 11 populations in the state. *Id.*, ¶ 15, Exh. G.

12 **A. Early Releases Can Be Done Safely**

13 In developing their plan, Defendants may choose the option of releasing some
 14 people from prison, and this can be done safely. Defendants have already released 3,500
 15 people who were within 60 days of their release date in the space of a few weeks. They do
 16 not contend or offer evidence that people within 180 days of release would be less of a risk
 17 to recidivate. Their only argument is that this group may have “little or no assistance with
 18 housing and few or no supportive community services.” ECF 3273 at 20. But 70% of this
 19 population has a place to go on parole, and 50-60% has stable housing. *See* Supplemental
 20 Declaration of Thomas Hoffman, (“Hoffman Decl.”), filed herewith, ¶ 9. Defendants do
 21 not explain why these people cannot be promptly and safely released.

22 Using data provided by Defendants, Plaintiffs’ expert identified 3,182 people who
 23 (1) are at high risk of complications or death from COVID-19, (2) have low or moderate
 24 risk of recidivism, (3) are within six months of release. Declaration of James Austin,
 25 Ph.D. (“Austin Decl.”) ¶ 13. Of these 3,182 people, a subgroup of 1,520 people have been
 26 classified by Defendants as having low levels of housing instability. *Id.* ¶ 20. They could
 27 target this group for release. *Id.* ¶¶ 12-28.

28

1 Defendants assert that people are safer in the prisons because if they get seriously
 2 ill, they can be flown to hospitals around the State. A review of the data demonstrates the
 3 opposite – it is the prison environment that places people at risk. A large proportion of
 4 people within 180 days of release who are low or moderate risk to reoffend and over 50
 5 years old live in dormitories. Austin Decl. ¶ 15 and Table 1. The “high proportion housed
 6 in dorms speaks to 1) their low security levels which reflects good prison conduct and 2)
 7 their risk of COVID-19 infection due to an inability to maintain social distancing.” *Id.*, see
 8 also ECF 3219-4 at ¶ 9. The people who would be safest to release also stand the most to
 9 gain from being removed from the congregate living environment.

10 Pregnant women are another high-risk group who may be safely released: they are
 11 vulnerable to COVID-19 complications, and 11 of the 33 pregnant women in CDCR
 12 custody have release dates in 2020 and are low or moderate risk to reoffend. Austin Decl.
 13 ¶ 11. In Dr. Austin’s opinion, these women could and should be safely released from
 14 prison now. *Id.*

15 **B. Pre-Release Planning Can Be Streamlined**

16 Defendants argue that large numbers cannot be released quickly because each
 17 person must undergo a lengthy pre-release planning process by the Division of Adult
 18 Parole Operations (“DAPO”). *See* ECF 3273 at 15-16 and ECF 3269 at 7-13. There is no
 19 reason the process cannot be significantly shortened during the current state of emergency;
 20 indeed, Defendants’ argument “assumes that CDCR and DAPO must complete every step
 21 of the pre-release process thoroughly and perfectly, something it has never done up to until
 22 now. [...] To my knowledge, the pre-release process has never been so perfect in the past,
 23 and it is not realistic or prudent to expect perfection during this emergency. [...] Rather
 24 than pointing to the ideal pre-release and supervision processes as an obstacle, CDCR and
 25 DAPO should be changing the process to fit the emergency.” Hoffman Decl. ¶¶ 10, 13,
 26 14; *see also* Plfs’ Reply Brief Before Three-Judge Panel, ECF 3248 at 9-10, and
 27 declarations cited therein.

1 Mr. Hoffman notes that many of the steps in the pre-release process “can be
2 addressed later when the crisis is abated.” Hoffman Decl. ¶ 15. He also describes the
3 simple steps that DAPO and county probation departments could take to manage any
4 uptick in recently-released parolees. *Id.* ¶¶ 16-18.

5 **C. Defendants Can Temporarily Relocate People to Off-Site Facilities**

6 Defendants offer no evidence that the temporary relocation of class members to off-
7 site facilities is impractical. There are numerous options available to the State to transfer
8 people to other locations in order to allow for physical distancing to lower the risk of
9 deadly disease transmission.² For example, in *Coleman v. Newsom*, Defendants reported a
10 plan to move 46 women to McFarland Female Community Reentry Facility and an
11 unspecified number of men to another outside facility with which CDCR already has a
12 contract. *See* Declaration of Michael Bien in Support of Plaintiffs’ Emergency Motion at ¶
13 4.). Moreover, Defendants have the power to temporarily transfer medically vulnerable
14 people to safe locations where the risk of contracting COVID-19 is substantially reduced
15 pursuant to the Governor’s power to grant a reprieve from sentence under Article V,
16 Section 8(a) of the California Constitution Cal. Const. Art. V, § 8(a) and. California
17 Government Code § 8658:

18 In any case in which an emergency endangering the lives of inmates of a
19 state, county, or city penal or correctional institution has occurred or is
20 imminent, the person in charge of the institution may remove the inmates
21 from the institution. He shall, if possible, remove them to a safe and
convenient place and there confine them as long as may be necessary to
avoid the danger, or, if that is not possible, may release them.

22 Defendants have already invoked § 8658 as authority for their limited releases.³

23 ² Plaintiffs’ counsel have repeatedly—to no avail—encouraged Defendants to identify
24 facilities outside of the CDCR prison system to safely house class members and reduce the
density of overcrowded prisons. Bien Decl., ¶¶ 5-6, Exhs. 2 and 3.

25 ³ In addition, Sections 62010.3.1 and 62010.3.2 of CDCR’s Department Operations
26 Manual (“DOM”) authorizes Headquarters staff, Wardens, Chief Deputy Wardens to “sign
27 orders for removal of inmates in time of specified disasters and/or temporary community
release.” *See* [https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2019/07/
Ch_6_2019_DOM.pdf](https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2019/07/Ch_6_2019_DOM.pdf) (last visited Apr. 8, 2020).

1 Such transfers can be made, for example to some of the hotels or other facilities that
2 the Governor has commandeered for this emergency. Bien Decl. ¶ 2 & Exh. 1. Since the
3 population of the prisons will be reduced, correctional officer positions could be redirected
4 to these facilities. Should more custody staff be needed, Governor Newsom could activate
5 the California National Guard to assist, pursuant to recent federal action authorizing the
6 National Guard to support California’s response efforts to COVID-19, with the federal
7 government covering the full costs of eligible activities. *Id.* at ¶¶ 7-8 & Exh. 5.

8 The State knows how to do this. For example, in February, the State engaged in a
9 search for available vacant spaces appropriate to house vulnerable persons who may have
10 been exposed to or contracted COVID-19 on cruise ships. According to a declaration filed
11 in federal court by Dr. Mark Ghaly, the Secretary of California’s Health and Human
12 Services Agency, on February 23, 2020, his agency considered several facilities around the
13 state including “Sonoma Developmental Center, Army National Guard Camp Roberts and
14 closed youth correctional facilities.” *See* Bien Decl. ¶ 8 & Exh. 5. “Any facility selected
15 needed to meet the very strict CDC sheltering criteria, which includes individual rooms
16 and bathrooms for each patient.” *Id.* at Exh. 12. The location ultimately identified for use
17 was the Fairview Development Center in Orange County that was very recently closed by
18 the State, “with the last patient moving out on February 24, 2020.” *Id.* Fairview
19 Developmental Center has housed more than 900 patients and was licensed as a hospital
20 and skilled nursing facility, operated by the State for decades for people with profound
21 developmental disabilities. Bien Decl. ¶ 8 (citing [https://www.dds.ca.gov/services/state-
22 facilities/fairview-dc/](https://www.dds.ca.gov/services/state-facilities/fairview-dc/)). There are many other available State or federally-owned properties
23 in California, including other sparsely occupied and decommissioned Developmental
24 Centers, closed Department of Juvenile Justice facilities, hospitals, and closed military
25 bases. *Id.* at ¶¶ 11-14.

26 Defendants have not indicated why they cannot release to parole and electronic
27 ankle monitoring the low-risk prisoners who have been working every day in the
28

1 community while living in CDCR’s Male Community Reentry Program (with six locations
2 across the state), Custody to Community Transitional Reentry Program (409 available
3 beds), Alternative Custody Program, and Conservation Camp program, in order to then
4 free up those bed spaces for people from the 35 prisons. *Id.* at ¶ 9, *see also* CDCR, Male
5 Community Reentry Program, available at <https://www.cdcr.ca.gov/rehabilitation/mcrp/>
6 (last accessed April 14, 2020); CDCR, Custody to Community Transition Reentry Program
7 at [https://www.cdcr.ca.gov/adult-operations/custody-to-community-transitional-reentry-](https://www.cdcr.ca.gov/adult-operations/custody-to-community-transitional-reentry-program/)
8 [program/](https://www.cdcr.ca.gov/adult-operations/custody-to-community-transitional-reentry-program/) (last accessed April 14, 2020); CDCR, List of Conservation Camps, at
9 <https://www.cdcr.ca.gov/facility-locator/conservation-camps/camps/> (last accessed April
10 14, 2020).

11 Defendants also have contracts with multiple Modified Community Correctional
12 Facilities (MCCFs), including but not limited to: Golden State MCCF (700 beds), Desert
13 View MCCF (700 beds), Shafter MCCF (640 beds), Taft MCCF (600 beds), Delano
14 MCCF (578 beds), and McFarland Female MCCF (300 beds). Bien Decl. ¶ 10. Again,
15 Defendants’ opposition brief is silent as to what—if any—efforts they have made to
16 optimize their use of these beds.

17 CONCLUSION

18 For the reasons stated above, Plaintiffs ask that this Court order Defendants to
19 immediately develop and implement a plan to reduce the density in the 35 state prisons,
20 and to ensure that medically vulnerable patients are safely housed.

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DATED: April 14, 2020

Respectfully submitted,

PRISON LAW OFFICE

By: /s/ Alison Hardy

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND**

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

Case No. C01-1351 JST

**DECLARATION OF MICHAEL W. BIEN
IN SUPPORT OF PLAINTIFFS'
EMERGENCY MOTION [ECF 3266]**

1 I, Michael W. Bien, declare:

2 1. I am an attorney duly admitted to practice before this Court. I am a partner
3 in the law firm of Rosen Bien Galvan & Grunfeld LLP, counsel of record for Plaintiffs in
4 *Coleman v. Newsom*, No. 90-0520 KJM DB (E.D. Cal.). I have personal knowledge of
5 the facts set forth herein, and if called as a witness, I could competently so testify. I
6 make this declaration in support of the Plaintiffs' emergency motion in *Plata v. Newsom*
7 regarding prevention and management of COVID-19 in California prisons [ECF
8 No. 3266].

9 2. The Governor, in Executive Order N-25-20, issued on March 12, 2020,
10 invoked emergency powers to "commandeer property-hotels and other places of
11 temporary residence, medical facilities as necessary for quarantining, isolating or treating
12 individuals who test positive for COVID-19 or who have had a high-risk exposure and
13 are thought to be in the incubation period." *Id.* ¶ 8. A true and correct copy of the
14 Executive Order is attached hereto as **Exhibit 1** and available at
15 [https://www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-](https://www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-19.pdf)
16 [19.pdf](https://www.gov.ca.gov/wp-content/uploads/2020/03/3.12.20-EO-N-25-20-COVID-19.pdf) (last accessed Apr. 14, 2020). As shown on the California Department of General
17 Services' webpage identifying and describing all types of state-owned property, there are
18 numerous available properties in California that the State may be able to use to
19 temporarily house class members. See <https://spigis.apps.dgs.ca.gov/> (last accessed Apr.
20 14, 2020).

21 3. On April 8, 2020, I participated in a telephonic meet and confer with
22 counsel for CDCR in *Coleman* related to COVID-19 planning. Defendants stated that
23 their current plan did not specifically prioritize moving *Coleman* patients with risk factors
24 for COVID-19 out of densely populated areas. Defendants also stated they were still in
25 the process of gathering information to allow calculation of the physical distancing
26 currently possible for each set of class members at each institution and level of care.
While they were able to provide the total square footage of *buildings* that contained

1 dorms within CDCR's facilities, that information included all communal areas, control
2 booths, guard towers, solid walls, etc. Defendants did not provide square footage
3 information specific to the bed space of each dorm, and did not have any further update
4 regarding when they would have that information. In response to questions posed by
5 Plaintiffs' counsel during the meet and confer, Defendants stated that they did not have a
6 specific methodology for calculating the number of people each dorm could house to
7 achieve the requisite physical distancing. Defendants were not able to provide a date by
8 which they will achieve appropriate physical distancing for the *Coleman* class.

9 4. Also during the April 8, 2020 meet and confer, Defendants stated that other
10 than moving 46 female inmates from Folsom Women's Facility (FWF) to McFarland
11 Female Community Reentry Facility, and an unspecified number of male inmates to a
12 second outside facility with which CDCR already has a contract, Defendants did not
13 currently have a concrete plan to temporarily house additional inmates in facilities
14 outside of its 35 institutions. Defendants stated they did not currently have a sense of the
15 total number of inmates that they would need to move from occupied to unoccupied
16 spaces within the 35 prisons in order to feel comfortable with the level of physical
17 distancing in all the various housing settings.

18 5. I have personally encouraged Defendants to identify and secure facilities
19 outside of the prison system to safely house class members and to reduce the density of
20 the overcrowded prisons. Attached hereto as **Exhibit 2** is a true and correct copy of an
21 email dated March 20, 2020, that I sent to Kelli Evans, Chief Deputy Legal Affairs
22 Secretary in the Office of the Governor, and a memorandum I attached to that email
23 published by the Community Oriented Correctional Health Services entitled "Addressing
24 the Needs of Justice-Involved People During the COVID-19 Pandemic: An 1135 Waiver
25 Approach." I sent this memorandum to Ms. Evans in order to provide her with
26 information on how States can request that the Health and Human Services Secretary,
pursuant to Section 1135 of the Social Security Act, waive certain Medicare, Medicaid

1 and CHIP requirements to ensure availability of health care services for Medicaid
2 beneficiaries. By requesting Section 1135 waivers, the State could allow for emergency
3 medical and mental health facilities to be created to specifically serve individuals from
4 correctional institutions.

5 6. Attached hereto as **Exhibit 3** is a true and correct copy of an email dated
6 March 24, 2020, that I sent to Ms. Evans, identifying several available adult, skilled
7 nursing and hospital facilities in California that Defendants could use to house class
8 members. The facilities identified in my email include: St Vincent’s Hospital in Los
9 Angeles (500 beds), Sonoma Developmental Center in Sonoma County, St. Louise
10 Hospital near Gilroy (150 beds), Castle Air Force Base in Atwater, McClellan Air force
11 Base in Sacramento, Alameda Naval Station, Fort Ord, and Camp Roberts near Paso
12 Robles. My email also provided publicly available information about closed military
13 bases in California. See http://www.formerbases.com/california_northern.htm.

14 7. Attached hereto as **Exhibit 4** is a true and correct copy of a webpage dated
15 April 8, 2020 published by the Legislative Analyst’s Office entitled, “COVID-19 and the
16 National Guard,” *available at*
17 [https://lao.ca.gov/Publications/Report/4218?utm_source=laowww&utm_medium=email](https://lao.ca.gov/Publications/Report/4218?utm_source=laowww&utm_medium=email&utm_campaign=4218)
18 [&utm_campaign=4218](https://lao.ca.gov/Publications/Report/4218?utm_source=laowww&utm_medium=email&utm_campaign=4218). As described therein, on March 22, 2020, President Trump
19 authorized the National Guard in California to serve under Title 32 of the U.S. Code in
20 order the support the State’s COVID-19 response efforts.

21 8. In February 2020, Defendants engaged in a search for available vacant
22 spaces appropriate to house vulnerable persons who may have been exposed to or
23 contracted COVID-19 on cruise ships and were then repatriated by the federal
24 government and housed at Travis Air Force Base. According to a declaration filed in
25 federal court by Dr. Mark Ghaly, the Secretary of the California’s Health and Human
26 Services Agency (CHHS), on February 23, 2020, his agency considered several facilities
around the state including “Sonoma Developmental Center, Army National Guard Camp

1 Roberts and closed youth correctional facilities.” Ghaly Decl. ¶ 12. A true and correct
2 copy of Dr. Ghaly’s declaration and the associated pleadings in the matter *City of Costa*
3 *Mesa v. United States*, Case No. 8:20-cv-00368-JLS (JDE) (S.D. Cal.), is attached hereto
4 as **Exhibit 5**. Dr. Ghaly declared that “[a]ny facility selected needed to meet the very
5 strict CDC sheltering criteria, which includes individual rooms and bathrooms for each
6 patient.” Ghaly Decl. ¶ 12. The safe and appropriate location identified was the Fairview
7 Developmental Center in Orange County that was very recently closed by the State, “with
8 the last patient moving out on February 24, 2020.” Ghaly Decl. ¶ 14. Based on my
9 review of publicly available information, it is my understanding that Fairview
10 Developmental Center has housed more than 900 patients and was licensed as a hospital
11 and skilled nursing facility. See [https://www.dds.ca.gov/services/state-facilities/fairview-
13 dc/](https://www.dds.ca.gov/services/state-facilities/fairview-
12 dc/) (last accessed Apr. 14, 2020). Other Developmental Centers, which provide inpatient
14 care and treatment to people with intellectual disabilities, could be used to temporarily
15 house class members. It is my understanding that the State has closed four large
16 Developmental Centers and one state-operated community facility, but continues to
17 operate one Developmental Center, one community facility, and two acute crisis homes.
18 See <https://www.dds.ca.gov/services/state-facilities/> (last accessed Apr. 14, 2020).

16 9. Attached hereto as **Exhibit 6** is a true and correct copy of CDCR’s
17 COVID-19 Preparedness webpage, last updated on April 13, 2020 and available at
18 <https://www.cdcr.ca.gov/covid19/>. According to this web posting, CDCR has suspended
19 transfers of inmates into the Male Community Reentry Program (MCRP), the Custody to
20 Community Transitional Reentry Program (CCTRP), the Alternative Custody Program
21 (ACP), and to the Conservation Camp program until further notice. It is my
22 understanding that *Coleman* class members at the EOP and CCCMS levels of care are
23 eligible to participate in the MCRP.

23 10. Defendants should investigate other options for housing inmates outside its
24 35 institutions. For example, it is my understanding that Defendants currently have

1 contracts with the following Modified Community Correctional Facilities: Golden State
2 Modified Community Golden State Modified Community Correctional Facility (700
3 beds); Desert View Modified Community Correctional Facility (700 beds); Shafter
4 Modified Community Correctional Facility (640 beds); Taft Modified Community
5 Correctional Facility (600 beds); Delano Modified Community Correctional Facility (578
6 beds); and McFarland Female Community Reentry Facility (300 beds). Alex Gourse, an
7 associate employed at my firm working under my direction and supervision, obtained this
8 publically available information via the following webpages:

9 <https://www.cdcr.ca.gov/adult-operations/reentry-services/> (last accessed Apr. 14, 2020);

10 <https://www.cdcr.ca.gov/facility-locator/community-correctional-facilities/> (last accessed

11 Apr. 14, 2020). I also understand that Defendants previously had contracts with the

12 following private facilities: Central Valley Modified Community Correctional Facility in

13 La Palma, Arizona; North Lake Correctional Facility in Michigan; North Fork

14 Correctional Center in Oklahoma; Florence Correctional Facility in Arizona; and

15 Tallahatchie Correctional Facility in Mississippi. Mr. Gourse provided me with this

16 information, which is publicly available. *See*

17 [https://www.cdcr.ca.gov/news/2019/09/27/california-department-of-corrections-and-](https://www.cdcr.ca.gov/news/2019/09/27/california-department-of-corrections-and-rehabilitation-ends-contract-with-private-prison/)

18 [rehabilitation-ends-contract-with-private-prison/](https://www.cdcr.ca.gov/news/2019/09/27/california-department-of-corrections-and-rehabilitation-ends-contract-with-private-prison/) (last accessed Apr. 14, 2020);

19 [https://www.bakersfield.com/news/cdcr-to-stop-using--bed-private-prison-in-](https://www.bakersfield.com/news/cdcr-to-stop-using--bed-private-prison-in-mcfarland/article_37bffd4-a4f4-11e9-b8c2-cf04c887b93c.html)

20 [mcfarland/article_37bffd4-a4f4-11e9-b8c2-cf04c887b93c.html](https://www.bakersfield.com/news/cdcr-to-stop-using--bed-private-prison-in-mcfarland/article_37bffd4-a4f4-11e9-b8c2-cf04c887b93c.html);

21 [https://www.cdcr.ca.gov/news/2019/09/27/california-department-of-corrections-and-](https://www.cdcr.ca.gov/news/2019/09/27/california-department-of-corrections-and-rehabilitation-ends-contract-with-private-prison/)

22 [rehabilitation-ends-contract-with-private-prison/](https://www.cdcr.ca.gov/news/2019/09/27/california-department-of-corrections-and-rehabilitation-ends-contract-with-private-prison/) (last accessed Apr. 14, 2020);

23 [https://www.privateprisonnews.org/media/publications/cdcr_termination_letter_and_cont](https://www.privateprisonnews.org/media/publications/cdcr_termination_letter_and_contract_geo_group_sept_2011.pdf)

24 [ract_geo_group_sept_2011.pdf](https://www.privateprisonnews.org/media/publications/cdcr_termination_letter_and_contract_geo_group_sept_2011.pdf) (last accessed Apr. 14, 2020).

25 11. Based on my review of publicly available information, it is my
26 understanding that Porterville Developmental Center (PDC), located at 26501 Avenue
140, Porterville, CA 93257, is on about 670 acres in the Sierra Nevada foothills of Tulare

1 County, outside the town of Porterville. PDC housed more than 2,600 people at its peak
2 in 1958. It has two components, the General Treatment Area (“GTA”) and the Secure
3 Treatment Program (“STP”). I understand that it had 203 people between the two
4 programs as of February 26, 2020, but historical data from September 1999 showed 849
5 people living there. I learned this by accessing the following website on April 9, 2020:
6 <https://www.dds.ca.gov/Porterville/PortervillePop.cfm>. That link, unfortunately, no
7 longer works. The GTA provides 24-hour residential services for individuals 18 years or
8 older who have serious medical and/or behavioral problems for which appropriate
9 services are not currently available through community resources. PDC has medical
10 facilities licensed by the CDPH to provide general acute medical services, skilled nursing
11 services, and intermediate care services. *See* [https://www.dds.ca.gov/services/state-
facilities/porterville-dc/](https://www.dds.ca.gov/services/state-facilities/porterville-dc/).

12 12. Another Developmental Center that could be used to temporarily house
13 incarcerated people is Canyon Springs Community Facility. Based on my review of
14 publicly available information, it is my understanding that this facility is located at 69-
15 696 Ramon Road, Cathedral City, CA 92234, in Riverside County. Canyon Springs
16 opened in 2000, and is a 57,000 square foot community facility that is privately owned
17 and leased by the California Department of Developmental Services (CDDS) to provide
18 residential services, treatment, and training for up to 55 adults. I understand that the
19 facility originally operated as a private inpatient mental health treatment center. *See*
20 <https://www.dds.ca.gov/services/state-facilities/canyon-springs/> (last accessed Apr. 14,
2020).

21 13. Another available Developmental Center is the Sonoma Developmental
22 Center. Based on my review of publicly available information, it is my understanding
23 that this facility closed in December 2018. It is located at 15000 Arnold Drive, Eldridge,
24 CA 95431, between the City of Sonoma and Santa Rosa, on more than 800 acres of land.
It has a multitude of cottages on both sides of Arnold Drive that housed people with

1 developmental disabilities. I understand that its highest reported population in the past 25
2 years was 1,164, in December 1994. I learned this from accessing the following website
3 on April 9, 2020: <https://www.dds.ca.gov/Porterville/PortervillePop.cfm>. That link,
4 unfortunately, no longer works.

5 14. Based on my review of publicly available information, it is my
6 understanding that in addition to temporarily transferring inmates to the aforementioned
7 Developmental Centers, Defendants could house class members in Division of Juvenile
8 Justice (DJJ) facilities, which I understand are currently at less than 40% capacity. See
9 <https://lao.ca.gov/Publications/Report/3998> (last accessed Apr. 14, 2020).

10 I declare under penalty of perjury under the laws of the United States of America
11 that the foregoing is true and correct, and that this declaration is executed at San
12 Francisco, California this 14th day of April, 2020.

13 */s/ Michael W. Bien*

14 Michael W. Bien

EXHIBIT 1

EXECUTIVE DEPARTMENT
STATE OF CALIFORNIA

EXECUTIVE ORDER N-25-20

WHEREAS on March 4, 2020, I proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19; and

WHEREAS despite sustained efforts, the virus remains a threat, and further efforts to control the spread of the virus to reduce and minimize the risk of infection are needed; and

WHEREAS state and local public health officials may, as they deem necessary in the interest of public health, issue guidance limiting or recommending limitations upon attendance at public assemblies, conferences, or other mass events, which could cause the cancellation of such gatherings through no fault or responsibility of the parties involved, thereby constituting a force majeure; and

WHEREAS the Department of Public Health is maintaining up-to-date guidance relating to COVID-19, available to the public at <http://cdph.ca.gov/covid19>; and

WHEREAS the State of California and local governments, in collaboration with the Federal government, continue sustained efforts to minimize the spread and mitigate the effects of COVID-19; and

WHEREAS there is a need to secure numerous facilities to accommodate quarantine, isolation, or medical treatment of individuals testing positive for or exposed to COVID-19; and

WHEREAS, many individuals who have developmental disabilities and receive services through regional centers funded by the Department of Developmental Services also have chronic medical conditions that make them more susceptible to serious symptoms of COVID-19, and it is critical that they continue to receive their services while also protecting their own health and the general public health; and

WHEREAS individuals exposed to COVID-19 may be temporarily unable to report to work due to illness caused by COVID-19 or quarantines related to COVID-19 and individuals directly affected by COVID-19 may experience potential loss of income, health care and medical coverage, and ability to pay for housing and basic needs, thereby placing increased demands on already strained regional and local health and safety resources such as shelters and food banks; and

WHEREAS in the interest of public health and safety, it is necessary to exercise my authority under the Emergency Services Act, specifically Government Code section 8572, to ensure adequate facilities exist to address the impacts of COVID-19; and

WHEREAS under the provisions of Government Code section 8571, I find that strict compliance with various statutes and regulations specified in this order would prevent, hinder, or delay appropriate actions to prevent and mitigate the effects of the COVID-19 pandemic.

NOW, THEREFORE, I, GAVIN NEWSOM, Governor of the State of California, in accordance with the authority vested in me by the State Constitution and statutes of the State of California, and in particular, Government Code sections 8567, 8571 and 8572, do hereby issue the following order to become effective immediately:

IT IS HEREBY ORDERED THAT:

1. All residents are to heed any orders and guidance of state and local public health officials, including but not limited to the imposition of social distancing measures, to control the spread of COVID-19.
2. For the period that began January 24, 2020 through the duration of this emergency, the Employment Development Department shall have the discretion to waive the one-week waiting period in Unemployment Insurance Code section 2627(b)(1) for disability insurance applicants who are unemployed and disabled as a result of the COVID-19, and who are otherwise eligible for disability insurance benefits.
3. For the period that began January 24, 2020 through the duration of this emergency, the Employment Development Department shall have the discretion to waive the one-week waiting period in Unemployment Insurance Code section 1253(d) for unemployment insurance applicants who are unemployed as a result of the COVID-19, and who are otherwise eligible for unemployment insurance benefits.
4. Notwithstanding Health and Safety Code section 1797.172(b), during the course of this emergency, the Director of the Emergency Medical Services Authority shall have the authority to implement additions to local optional scopes of practice without first consulting with a committee of local EMS medical directors named by the EMS Medical Directors Association of California.
5. In order to quickly provide relief from interest and penalties, the provisions of the Revenue and Taxation Code that apply to the taxes and fees administered by the Department of Tax and Fee Administration, requiring the filing of a statement under penalty of perjury setting forth the facts for a claim for relief, are suspended for a period of 60 days after the date of this Order for any individuals or businesses who are unable to file a timely tax return or make a timely payment as a result of complying with a state or local public health official's imposition or recommendation of social distancing measures related to COVID-19.
6. The Franchise Tax Board, the Board of Equalization, the Department of Tax and Fee Administration, and the Office of Tax Appeals shall use their administrative powers where appropriate to provide those individuals and businesses impacted by complying with a state or local public health official's imposition or recommendation of social

distancing measures related to COVID-19 with the extensions for filing, payment, audits, billing, notices, assessments, claims for refund, and relief from subsequent penalties and interest.

7. The Governor's Office of Emergency Services shall ensure adequate state staffing during this emergency. Consistent with applicable federal law, work hour limitations for retired annuitants, permanent and intermittent personnel, and state management and senior supervisors, are suspended. Furthermore, reinstatement and work hour limitations in Government Code sections 21220, 21224(a), and 7522.56(b), (d), (f), and (g), and the time limitations in Government Code section 19888.1 and California Code of Regulations, title 2, sections 300-303 are suspended. The Director of the California Department of Human Resources must be notified of any individual employed pursuant to these waivers.
8. The California Health and Human Services Agency and the Office of Emergency Services shall identify, and shall otherwise be prepared to make available—including through the execution of any necessary contracts or other agreements and, if necessary, through the exercise of the State's power to commandeer property – hotels and other places of temporary residence, medical facilities, and other facilities that are suitable for use as places of temporary residence or medical facilities as necessary for quarantining, isolating, or treating individuals who test positive for COVID-19 or who have had a high-risk exposure and are thought to be in the incubation period.
9. The certification and licensure requirements of California Code of Regulations, Title 17, section 1079 and Business and Professions Code section 1206.5 are suspended as to all persons who meet the requirements under the Clinical Laboratory Improvement Amendments of section 353 of the Public Health Service Act for high complexity testing and who are performing analysis of samples to test for SARS-CoV-2, the virus that causes COVID-19, in any certified public health laboratory or licensed clinical laboratory.
10. To ensure that individuals with developmental disabilities continue to receive the services and supports mandated by their individual program plans threatened by disruptions caused by COVID-19, the Director of the Department of Developmental Services may issue directives waiving any provision or requirement of the Lanterman Developmental Disabilities Services Act, the California Early Intervention Services Act, and the accompanying regulations of Title 17, Division 2 of the California Code of Regulations. A directive may delegate to the regional centers any authority granted to the Department by law where the Director believes such delegation is necessary to ensure services to individuals with developmental disabilities. The Director shall describe the need justifying the waiver granted in each directive and articulate how the waiver is necessary to protect the public health or safety from the threat of COVID-19 or necessary to ensure that services to individuals with developmental disabilities are not disrupted. Any waiver granted by a directive shall expire 30 days from the date of its issuance. The Director may grant one or more 30-day extensions if the waiver continues to be necessary

to protect health or safety or to ensure delivery of services. The Director shall rescind a waiver once it is no longer necessary to protect public health or safety or ensure delivery of services. Any waivers and extensions granted pursuant to this paragraph shall be posted on the Department's website.

- i1. Notwithstanding any other provision of state or local law, including the Bagley-Keene Act or the Brown Act, a local legislative body or state body is authorized to hold public meetings via teleconferencing and to make public meetings accessible telephonically or otherwise electronically to all members of the public seeking to attend and to address the local legislative body or state body, during the period in which state or local public officials impose or recommend measures to promote social distancing, including but not limited to limitations on public events. All requirements in both the Bagley-Keene Act and the Brown Act expressly or impliedly requiring the physical presence of members, the clerk or other personnel of the body, or of the public as a condition of participation in or quorum for a public meeting are hereby waived.

In particular, any otherwise-applicable requirements that

- (i) state and local bodies notice each teleconference location from which a member will be participating in a public meeting;
- (ii) each teleconference location be accessible to the public;
- (iii) members of the public may address the body at each teleconference conference location;
- (iv) state and local bodies post agendas at all teleconference locations;
- (v) at least one member of the state body be physically present at the location specified in the notice of the meeting; and
- (vi) during teleconference meetings, a least a quorum of the members of the local body participate from locations within the boundaries of the territory over which the local body exercises jurisdiction

are hereby suspended, on the conditions that:

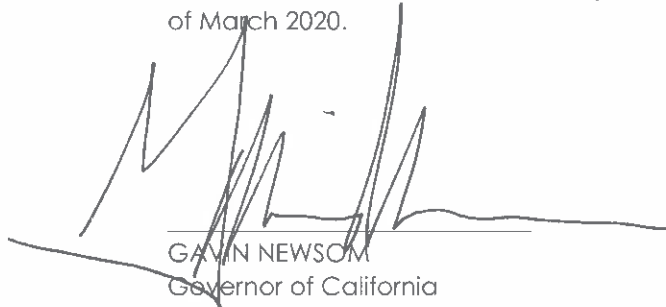
- (i) each state or local body must give advance notice of each public meeting, according to the timeframe otherwise prescribed by the Bagley-Keene Act or the Brown Act, and using the means otherwise prescribed by the Bagley-Keene Act or the Brown Act, as applicable; and
- (ii) consistent with the notice requirement in paragraph (i), each state or local body must notice at least one publicly accessible location from which members of the public shall have the right to observe and offer public comment at the public meeting, consistent with the public's rights of access and public comment otherwise provided for by the Bagley-Keene Act and the Brown Act, as applicable (including, but not limited to, the requirement that such rights of access and public comment be made available in a manner consistent with the Americans with Disabilities Act).

In addition to the mandatory conditions set forth above, all state and local bodies are urged to use sound discretion and to make reasonable efforts to adhere as closely as reasonably possible to the provisions of the Bagley-Keene Act and the Brown Act, and other applicable local laws regulating the conduct of public meetings, in order to maximize transparency and provide the public access to their meetings.

IT IS FURTHER ORDERED that as soon as hereafter possible, this Order be filed in the Office of the Secretary of State and that widespread publicity and notice be given of this Order.

This Order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the State of California, its agencies, departments, entities, officers, employees, or any other person.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 12th day of March 2020.



A handwritten signature in black ink, appearing to read 'Gavin Newsom', is written over a horizontal line. The signature is stylized and somewhat illegible.

GAVIN NEWSOM
Governor of California

ATTEST:

ALEX PADILLA
Secretary of State

EXHIBIT 2

From: Michael W. Bien
Sent: Friday, March 20, 2020 7:14 AM
To: Kelli Evans
Subject: Hospital access
Attachments: COVID-19-Justicie-Involved-1135-Waiver.pdf; ATT00001.txt

<https://cochs.org/files/medicaid/COVID-19-Justicie-Involved-1135-Waiver.pdf>



Addressing the Needs of Justice-Involved People During the COVID-19 Pandemic: An 1135 Waiver Approach

Daniel Mistak, MS, MA, JD

dmistak@cochs.org

COVID19 represents a grave and disproportionate threat to incarcerated people. The COVID19 pandemic is laying bare an essential truth of our health care system: The health of justice-involved individuals is deeply intertwined with the health of the broader community. Circulation of the virus in jails and prisons will drive the overall epidemic curve upwards and have catastrophic consequences on justice-involved individuals and broader population health. The needs of justice-involved people and the urgency of reducing the growth of the pandemic will require addressing barriers to care inside and outside the walls. Correctional facilities across the country are identifying ways to reduce the number of incarcerated individuals in order to avoid the coming tsunami. These practices are essential to good management of the health of the entire population. As state health and corrections officials act swiftly to mitigate the spread of COVID19, however, 1135 Medicaid waivers could provide an opportunity to address the needs of the justice-involved population and promote public health.

Hospitals and corrections face daunting challenges during this crisis

Approaches are needed that promote public health and reduce burdens on health care providers and correctional systems. Few, if any, correctional facilities are capable of handling the volume of individuals with COVID19-related symptoms. Correctional facilities typically send high-acuity patients to local hospitals, where Medicaid pays for in-patient hospitalizations for low-income inmates. Hospital capacity is widely expected to be extremely strained, and these pressures are raising concerns that as providers confront allocating limited resources among extremely ill patients, justice-involved people may be disadvantaged. Before this crisis, correctional staff were required to accompany the patient during their stay at the hospital. Following such protocols now would will quickly overburden justice

¹ <https://www.nytimes.com/interactive/2020/03/17/upshot/hospital-bed-shortages-coronavirus.html>

and health staff. In order to alleviate the pressure on the hospital system and the correctional staff, a solution is required that will simultaneously reduce the pressures on both systems. Emergency actions taken by state and local governments must contemplate how to plan for high acuity needs of incarcerated patients who become ill, and the staffing resources to care for those who remain incarcerated. 1135 Medicaid waivers, which during emergencies enable providers not to comply with some federal regulatory requirements, provide a mechanism for addressing some of these challenges.

Medicaid guidance describes limits on possible solutions

By law, Medicaid does not finance services for people who are incarcerated, with the exception of inpatient hospital stays that exceed twenty-four hours. However, federal guidance places limits on the institutions that qualify for Medicaid coverage of these services. The rationale from CMS was to ensure that our health system did not blindly import the punitive and isolating features of incarceration. To avoid creation of hospitals, nursing facilities or other medical institutions operated primarily or exclusively to serve inmates in 2016 CMS provided guidance that classified these institutions as ‘correctional institutions,’ thus excluding them from Medicaid coverage.² While CMS’ rationale is appropriate for creating a health-centered care system, locked facilities that serve justice-involved individuals in this time of crisis would reduce the burden on hospital staff and remove the need for one-to-one correctional officer support. Further, these facilities would be able to operate in close relationship to health care systems and improve the standard of care for justice-involved individuals.

Additionally, federal guidance aims to avoid creating prison units within the hospital systems. To that end, the federal guidance aims to ensure that “[f]or hospitals, the individuals are admitted to specific medical units based not on their status as inmates of a correctional institution, but rather based on their treatment needs and plan of care and generally are placed in units also serving other individuals with similar treatment needs and plans of care[.]”³ In addition, when justice-involved individuals are served in skilled nursing facilities, intermediate care facilities for individuals with intellectual disabilities, an individual must retain the right to privacy, the right to choose visitors, right to move freely, and many other rights that would negate the opportunity to bill Medicaid for life-saving services.⁴

² <https://www.medicaid.gov/sites/default/files/Federal-Policy-Guidance/Downloads/sho16007.pdf>

³ <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-16-21.pdf>

⁴ *Id.*

These aims protect the rights of Medicaid beneficiaries as consumers; however, in times of crisis, these aims will lead to negative health outcomes in the face of an over-burdened health system. By allowing facilities to aggregate justice-involved individuals in specialized units the burden on correctional staff can be reduced by lowering the necessary correctional-staff-to-patient ratio.

By disallowing facilities that serve only justice-involved individuals and disallowing units that aggregate individuals based on justice status, States will not be able to create justice-involved-specific facilities that are responsive to the growing needs of justice-involved individuals who will need care. Suspending these requirements during the emergency, will empower States and local jurisdictions to work with their local health systems to create a facilities that meet the standards of care requirements of the Medicaid program while serving justice-involved individuals in units created to meet this unique moment.

Using 1135 waivers, states can develop specific approaches to health care services for people who are involved in the justice system

Policymakers have specific tools available to them during a National Emergency declared by the president. Under section 1135 of the Social Security Act, the Health and Human Services Secretary may temporarily waive certain Medicare, Medicaid and CHIP requirements at the request of states including conditions of participation and certification requirements, licensure requirements, within certain parameters; as well as preapproval and timeliness requirements. These unique, temporary measures are taken to ensure the availability of health care services for Medicaid beneficiaries and to enable providers that do not comply with some programmatic requirements to get paid for services that are provided in good faith. States are developing 1135 waivers now; the Centers for Medicare & Medicaid Services approved the first state 1135 request this week.⁵

COCHS suggests that as states contemplate requesting 1135 waivers that the state request waiving guidance offered in SHO #16-007 and S&C 16-21-ALL. Specifically:

- Allowing for facilities to be created that specifically serve individuals from correctional institutions at the same standard of care of other Medicaid beneficiaries;
- Allowing for aggregation of individuals in units designed specifically for individuals based upon their justice involvement.

⁵ <https://www.medicaid.gov/state-resource-center/downloads/fl-section-1135-appvl.pdf>

By waiving these and other portions of the guidance, emergency facilities could be created that would serve justice involved individuals whose care needs exceed the ability of correctional facilities --thereby, reducing the burden on local budgets, reducing the need for one-to-one correctional staff management, and creating avenues for novel deployment of local, state, and federal resources.

Beyond the opportunities available through 1135 waivers, states should continue to identify opportunities for meeting the needs of justice-involved individuals through 1115 waivers and legislative actions that respond to this unique time in our nation's history. As always, COCHS will continue to identify novel policy approaches to support justice-involved communities and the agencies that serve them.

EXHIBIT 3

[REDACTED]

From: Michael W. Bien
Sent: Tuesday, March 24, 2020 9:44 AM
To: [REDACTED]@gov.ca.gov
Cc: Pomeranz, Bill
Subject: FW: Some Ideas for Housing Older Prisoners [IWOV-DMS.FID6429]

Kelli

Bill is a good friend in the business of building/financing older adult, skilled nursing facilities around the country. I asked him for info on vacant/available properties. See below.

Jim Moloney, [REDACTED], is the contact for St. Vincent and St. Louise hospitals, and perhaps other properties.

Michael Bien

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From: "Pomeranz, Bill" <[REDACTED]@cainbrothers.com>
Date: March 23, 2020 at 10:00:10 AM PDT
To: "Michael W. Bien" <MBien@rbgg.com>
Subject: Some Ideas for Housing Older Prisoners

St. Vincent's Hospital in Los Angeles (500 beds) (recently closed)

Sonoma Developmental Center in Glen Elyn Sonoma (very large and intact)

St. Louise Hospital near Gilroy (150 beds)

Castle Air Force Base in Atwater Ca (moth-balled)

McClellan Air force Base in Sacramento (moth-balled) (very intact)

Alameda Naval Station (moth-balled) (very intact)

Fort Ord (very intact)

Camp Roberts (moth-balled) near Paso Robles/San Miguel Ca

Mike see this list of former military bases - many properties are still standing

http://www.formerbases.com/california_northern.htm

Sent from my iPad

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EXHIBIT 4

Budget and Policy Post

April 8, 2020

COVID-19

COVID-19 and the National Guard

As a result of the emergence of the coronavirus disease 2019 (COVID-19), the federal government is providing various types of assistance to support states as they engage in response efforts, as well as mitigate some of the associated economic impacts to businesses, local communities, and individuals. In this post, we discuss the assistance the federal government is providing to states through the National Guard.

National Guard Plays Key Role in Meeting Various Critical State and National Needs.

The National Guard includes soldiers and airmen (guardsmembers) that typically serve part time. However, the Governor or President can call on these guardsmembers to provide full-time assistance when domestic or international needs arise. For example, guardsmembers may assist with fighting wildland fires, counterdrug activities, and combat missions abroad. Typically, when the Governor calls guardsmembers, they are on state active duty. In these cases, the state is generally responsible for the costs of activating these personnel who work under the direction of the Governor. (In some cases, the federal government may reimburse the state for a portion of these costs, such as when the state receives a federal disaster declaration.) In contrast, when the President calls on guardsmembers, they are on federal active duty, and the federal government is responsible for the costs. In most cases, the President calls on guardsmembers under Title 10 of the U.S. Code. When this occurs, the guardsmembers work under the direction of the President.

National Guard Authorized Under Title 32 in Response to COVID-19. On March 22, 2020, President Trump authorized the National Guard in California to serve under Title 32 of the U.S. Code in order to support the state's COVID-19 response efforts. (Other states have also received this authorization.) From the perspective of the state, this authorization means that the federal government will cover the full cost of eligible activities performed

by the guardsmembers. We also note that unlike authorizations made under Title 10, guardsmembers serve under the direction of the Governor under Title 32—giving the state greater control over how the guardsmembers are employed.

Recent Federal Legislation Provided Additional Funding for National Guard Activities.

On March 27, 2020, Congress passed and the President signed the Coronavirus Aid, Relief, and Economic Security (CARES) Act (H.R. 748). Among other things, this legislation provides about \$1.4 billion to support the National Guard’s response to COVID-19 nationwide. At the time this post was prepared, the Secretary of Defense authorized California to receive \$48 million of this amount to support the equivalent of 3,000 soldiers for 30 days on Title 32 status for COVID-19 related activities. However, should the state begin to deplete this funding, it can request an increase from the federal government. Accordingly, the amount of resources that will ultimately be provided to California could increase in the future depending on the state’s needs.

National Guard Engaged in Various COVID-19 Activities, Which Could Expand. At the time this post was prepared, roughly 1,000 guardsmembers were engaged in the state’s COVID-19 response efforts—specifically for a few key tasks, such as distributing of food at foodbanks, providing COVID-19 testing support, and transporting patients to medical facilities. As the state’s COVID-19 response progresses, the state will likely increase the number of guardsmembers who are supporting the state’s efforts to respond to COVID-19 and may task guardsmembers with additional responsibilities to help ensure the health and safety of the public.

EXHIBIT 5

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California Department of General Services

11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 13 SOUTHERN DIVISION

15 **CITY OF COSTA MESA, et al.,**
 16
 Plaintiffs,
 17
 v.
 18 **UNITED STATES OF AMERICA, et**
 19 **al.,**
 20
 Defendants.

Case No. 8:20-cv-00368-JLS (JDE)

**CALIFORNIA DEFENDANTS'
 OPPOSITION TO PLAINTIFFS'
 MOTION FOR TEMPORARY
 RESTRAINING ORDER AND
 ORDER TO SHOW CAUSE**

Date: February 24, 2020
 Time: 2:00 p.m.
 Courtroom: 10A
 Judge: Hon. Josephine L. Staton

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INTRODUCTION

California’s quarantine laws enable it to nimbly and quickly protect the public health in response to threats posed by infectious disease. Concerning the current COVID-19 outbreak, this authority includes the ability to identify State property where California residents under federal quarantine may be safely housed and treated by federal authorities—in strict compliance with Center for Disease Control and Prevention standards and under federal authorities’ provision of security measures to protect the community.

Here, local authorities seek to impede the State’s ability to assist with the federal quarantine designed specifically to protect public health, simply based on speculation of risk to the surrounding community—which speculation, as it happens, is not only incorrect but contrary to public health protection for the very community involved as well as for the rest of the State. But that conjecture is inadequate to meet the showing required for injunctive relief. The Fairview facility has been thoroughly assessed by federal officials. And the State has conditioned its use on the federal government’s provision of security and safety measures. The need for prompt action, exercised in careful compliance with established healthcare standards and for the benefit of the public at large, legally is not, as it must not be, subjected to local veto. Here, Plaintiffs have not met their heavy burden to justify a temporary restraining order, and their request must be denied.

Plaintiffs request for relief suffers from other legal defects as well. Eleventh Amendment immunity plainly bars relief against the State and state agencies as its instrumentalities. In addition, Plaintiffs lack standing. Not only do they fail to show a concrete and particularized injury, but Ninth Circuit precedent clearly prohibits a local government from bringing constitutional claims against the State. Further, Plaintiffs fail to demonstrate any denial of procedural or substantive due process. And their late-added nuisance claim cannot stand, in light of specific

1 statutory authority for state action under California’s Communicable Disease
2 Prevention and Control Act and Emergency Services Act.

3 Ultimately, California’s public health hangs in the balance on resolution of
4 this specious, actually frivolous, litigation. California has been acting, and must
5 continue to act, in support of federal quarantine authority to best preserve public
6 health both for affected persons and to prevent further exposure. It is the State’s
7 authority and it is in all Californians’ health and safety interest, for California to
8 exercise public health and safety expertise to identify and implement the safest
9 locations to treat and support exposed or affected persons and to prevent further risk
10 of exposure within the State.

11 STATEMENT OF THE CASE

12 I. CALIFORNIA AGENCIES HAVE COORDINATED WITH FEDERAL AND 13 LOCAL GOVERNMENTS TO ADDRESS THE GLOBAL HEALTH RISK AND CONTAIN THE COVID-19 OUTBREAK

14 Since the outbreak of the novel coronavirus known as COVID-19, California
15 state agencies and departments have mobilized state resources in multi-agency
16 efforts to address the global health risk that the outbreak poses to the health, safety,
17 and well-being of Californians. Of those state agencies, the California Health and
18 Human Services Agency (CHHS) and the California Department of Public Health’s
19 (CDPH) Center for Infectious Diseases have worked with federal and local
20 governments to contain COVID-19 statewide and protect the public health of
21 California communities. Decl. of Mark Ghaly (Ghaly Decl.) ¶¶ 3-5. CDPH’s
22 Center for Infectious Diseases is responsible for protecting Californians from
23 infectious diseases and ensuring that individuals who have an infectious disease
24 receive appropriate treatment and that the health and well-being of the general
25 public are protected. *Id.* ¶ 3. In addition, the California Governor’s Office of
26 Emergency Services (Cal OES) has coordinated with CHHS in its response to the
27 COVID-19 outbreak by tasking or coordinating with other California state agencies
28 to support CHHS operations. Decl. of Eric Lamoureux (Lamoureux Decl.) ¶¶ 6, 10.

1 Throughout the COVID-19 outbreak, CHHS and CDPH have closely
2 communicated with officials at the federal Department of Health and Human
3 Services (USHHS) and Centers for Disease Control and Prevention (CDC), as well
4 as county public health officials in California Ghaly Decl. ¶ 3.

5 Since January 29, 2020, the federal government has repatriated more than 800
6 individuals from China and Japan to California because of the COVID-19 outbreak.
7 Ghaly Decl. ¶ 4. In response, CHHS, along with CDPH and Cal OES, established
8 the Medical and Health Coordination Center (MHCC) to coordinate activities
9 among local, state, and federal governments. *Id.* The MHCC has hosted regular
10 conference calls with local health departments and health care providers to ensure
11 they received the most updated information as it became available from the federal
12 government. *Id.*

13 The California Emergency Medical Services Authority (EMSA) issued
14 interim guidance to local emergency services agencies regarding the treatment of
15 patients infected with COVID-19; this guidance addressed status, screening,
16 transport, and infection control, including specific personal protective equipment
17 (PPE) requirements for the handling of infected patients. Ghaly Decl. ¶ 4. In
18 addition, CDPH has issued guidance and information regarding COVID-19 to
19 licensed health care facilities, schools, school districts, universities and colleges,
20 and childcare facilities. *Id.* Specifically, CDPH has issued All Facilities Letters to
21 licensed health care facilities in order to ensure facilities had the appropriate
22 resources and protocols to address the outbreak, such as criteria for evaluating
23 potential cases of COVID-10 and recommendations for reporting, specimen
24 collection, and testing. *Id.*

25 Throughout the COVID-19 outbreak, CHHS and CDPH have regularly
26 coordinated with federal and local governments in order to protect the health of
27 travelers returning to California and to protect public health in California
28 communities. CHHS and CDPH have provided guidance and communication to

1 local health officials on screening and monitoring of returned travelers from
2 commercial flights, assisted local health officials in identifying and testing
3 suspected cases of COVID-19 in returned travelers, and collaborated with local
4 health officials in jurisdictions where military bases have received repatriation
5 flights. Ghaly Decl. ¶ 5. Additionally, CHHS and CDPH are actively collaborating
6 across state and local sectors to ensure California's public health and healthcare
7 delivery systems are prepared for additional cases of COVID-19, including a
8 potential pandemic. *Id.*

9 **II. STATE AGENCIES AND DEPARTMENTS HAVE REGULARLY**
10 **COORDINATED WITH FEDERAL AND LOCAL GOVERNMENTS IN**
11 **MANAGEMENT OF THE IMPACTS RELATED TO THE FEDERALLY IMPOSED**
12 **QUARANTINED POPULATIONS**

13 Cal OES coordinated with multiple state agencies to mobilize state resources
14 to assist CHHS in its response to contain COVID-19 and manage the effects of
15 federally imposed quarantined populations spread across California at federal
16 military bases. Lamoureux Decl. ¶ 7. This multi-agency effort included identifying
17 state-owned facilities that could augment federal efforts to quarantine both
18 symptomatic and asymptomatic populations. *Id.* To accomplish this, Cal OES
19 tasked the Department of General Services (DGS) to conduct property inventory
20 surveys; tasked the California National Guard (CNG) to identify CNG facilities for
21 potential use (which included Camp Roberts); and led assessment teams of Cal
22 OES logisticians and California Department of Social Services staff in assessing
23 state facilities to determine if the facilities would satisfy the clinical requirements
24 for quarantine. *Id.* Cal OES also tasked DGS to establish transportation contracts
25 to safely move travelers from federal points of entry to quarantine sites statewide
26 and conduct cleaning services at the Fairview Developmental Center, a location
27 identified as possible quarantine site. *Id.*

28 Since the first repatriation flight of United States citizens, permanent
residents, and their immediate family members arrived in California in late January

1 2020, Cal OES has regularly worked with local and county governments in its
2 efforts to support CHHS in complying with the federally imposed quarantine
3 requirements. Lamoureux Decl. ¶ 9. Cal OES provided a critical information and
4 coordination link to local emergency managers in counties where the federal
5 government was quarantining at military installations and with local emergency
6 managers and public safety officials in counties where travelers from China were
7 arriving. Lamoureux Decl. ¶ 10. Cal OES also worked with counties where the
8 CDC eventually determined that a potential site did not meet clinical requirements
9 for quarantine, such as the site at Ontario Airport in San Bernardino County.
10 Lamoureux Decl. ¶ 9.

11 Regarding the use of State facilities, before any operations have taken place,
12 Cal OES has facilitated communications with local government officials in the
13 jurisdiction where those facilities were identified. Lamoureux Decl. ¶ 11. In
14 addition to communications concerning Fairview, this included discussions with
15 San Luis Obispo County and Monterey County when Camp Roberts was being
16 considered as a potential quarantine site and with Los Angeles, San Mateo, and San
17 Francisco counties, where travelers were arriving through Los Angeles and San
18 Francisco international airports. Lamoureux Decl. ¶ 11. Cal OES also coordinated
19 between its Law Enforcement Branch and the United States Marshall Service to
20 ensure for proper security at relevant sites, including state facilities that have been
21 considered as potential quarantine sites. Lamoureux Decl. ¶ 8.

22 **III. THE FEDERAL GOVERNMENT'S RELOCATION OUT OF STATE OF**
23 **REPATRIATED CITIZENS WHO HAVE TESTED POSITIVE FOR COVID-19**
24 **POSES A HEALTH RISK TO COVID-19 PATIENTS WHO ARE**
25 **CALIFORNIAN RESIDENTS**

26 On February 17, 2020, the federal government repatriated United States
27 citizens who had previously been passengers on the Diamond Princess cruise ship
28 in Yokohoma, Japan and had experienced significant exposure to other individuals
who tested positive for COVID-19. Ghaly Decl. ¶ 6. Repatriated individuals are

1 quarantined under the CDC's authority to quarantine individuals entering the
2 United States from abroad when there is reason to believe they have been exposed
3 to an infectious disease. *Id.* Individuals from the cruise ship pose a great public
4 health risk if they are released back into their communities without any isolation or
5 observation, as such events would be substantially likely to lead to a major
6 domestic outbreak of a highly contagious disease. *Id.* ¶ 7. Upon their return, some
7 of the United States passengers were taken to Travis Air Force Base (Travis), in
8 Fairfield, Solano County, California, for quarantine, testing, and observation. *Id.* at
9 ¶ 8.

10 On or about February 18, 2020, USHHS informed CHHS that the U.S.
11 Department of Defense (DoD) would not allow repatriated individuals who have
12 tested positive or are symptomatic for COVID-19 to remain on military
13 installations for isolation and supportive care. Ghaly Decl. ¶ 9. Based on what is
14 currently known about COVID-19, it may take up to 30 days for an infected
15 individual to no longer be contagious to others. *Id.* Thus, individuals who have
16 tested positive may need to be isolated from others for approximately a month. *Id.*

17 USHHS further informed CHHS that individuals quarantined at Travis who
18 test positive for COVID-19 would be relocated to the Federal Emergency
19 Management Agency Center for Domestic Preparedness in Anniston, Alabama.
20 The forced relocation of these Californian residents from California to Alabama for
21 the duration of their isolation period, after having already undergone quarantine for
22 weeks on a cruise ship, poses health risks to these repatriated individuals, many of
23 whom are over the age of 65 and have chronic underlying health conditions. Ghaly
24 Decl. ¶ 10. CHHS determined that it would be disruptive to their health if they
25 were transferred to Alabama. *Id.* Additionally, approximately seventy of the
26 individuals repatriated to Travis are California residents, and remaining in state to
27 complete their quarantine would facilitate and ease their return home. *Id.*

28

1 **IV. FAIRVIEW DEVELOPMENTAL CENTER HAS MET CDC'S SHELTERING**
2 **CRITERIA AND FEDERAL REQUIREMENTS AS A QUARANTINE SITE FOR**
3 **THE COVID-19 PATIENTS**

4 To maintain observation and isolation of the individuals from the cruise who
5 tested positive for COVID-19 and mitigate further risks to their health, CHHS
6 assessed state-owned and operated facilities within California where these
7 individuals could be treated and housed until they are no longer contagious. Ghaly
8 Decl. ¶ 11. CHHS considered several facilities around the state, including Sonoma
9 Developmental Center, Army National Guard Camp Roberts, and closed youth
10 correctional facilities. *Id.* ¶ 12. The federal government has ultimate authority over
11 the conditions in which repatriated individuals subject to the federal quarantine
12 order are housed, and the CDC is responsible for enforcing federal quarantine
13 orders. *Id.* ¶ 15. Any facility selected as a quarantine site was required to comply
14 with CDC's strict sheltering criteria, meet CDC's clinical requirements for
15 quarantine, and be consistent with other federal operational constraints. *Id.* ¶ 12;
16 Lamoureux Decl. ¶ 8.

17 On February 20, 2020, CHHS informed USHHS that it would offer Fairview
18 Developmental Center (Fairview) in Orange County for the federal government's
19 use as a location where California residents who test positive for COVID-19 but do
20 not require hospitalization could remain in isolation until CDC determines they
21 may return home, if USHHS met certain conditions. Ghaly Decl. ¶ 13.

22 In addition to Fairview having to meet the federal quarantine order and CDC's
23 sheltering criteria, CHHS imposed additional conditions on the federal
24 government's use of Fairview for isolation and care of Californians testing positive
25 for COVID-19. Ghaly Decl. ¶ 16. Among these conditions were that USHHS
26 would transfer qualifying patients to Fairview via air or ground ambulance with
27 appropriate protective equipment; that, once the patients arrive at Fairview, USHHS
28 would be responsible for security and fencing to protect the surrounding
community, all medical care not requiring hospitalization, any wrap-around

1 services, feeding, cleaning and sanitation, and case management and logistics for
2 departure; and that any patients requiring hospitalization would be transported via
3 air or ground ambulance to a local facility able to care for them in Orange County
4 or surrounding areas. *Id.*

5 Before CHHS's offer to USHHS to allow California residents at Travis who
6 have tested positive for COVID-19 remain isolated at Fairview, on February 20,
7 2020, state officials engaged with local partners to discuss that possibility. Ghaly
8 Decl. ¶ 17. In particular, Department of Social Services Director Kim Johnson
9 reached out to her counterpart at the Orange County Social Services Agency. *Id.*
10 CDPH Director and State Public Health Officer Dr. Sonia Angell reached out to the
11 Orange County Health Officer. *Id.* Similar to how Cal OES had previously
12 communicated with local government officials in jurisdictions where facilities were
13 identified as potential quarantine sites, Cal OES staff reached out to the Orange
14 County and City of Costa Mesa Emergency Managers, Orange County Fire Chief,
15 and Orange County Sheriff. Lamoureux Decl. ¶ 9; Ghaly Decl. ¶ 17. During this
16 time, Cal OES tasked DGS to conduct cleaning services at Fairview, while state
17 agencies awaited the federal government's final decision regarding whether
18 Fairview facility would be utilized to house travelers requiring quarantine.
19 Lamoureux Decl. ¶ 7.

20
21 **V. COVID-19 PATIENTS SHOULD BE QUARANTINED AT FAIRVIEW TO**
22 **PREVENT PUBLIC HEALTH RISKS TO THESE PATIENTS AND TO**
23 **CALIFORNIA COMMUNITIES, INCLUDING THE LOCAL COMMUNITY**

24 CHHS offered Fairview to USHHS because CHHS determined that allowing
25 CDC to have Californians who test positive for COVID-19 complete their isolation
26 at Fairview would be the best means to safeguard public health in California.
27 Ghaly Decl. ¶ 18. Upon CHHS's review and assessment, Fairview met CDC's
28 stringent sheltering criteria and is the only appropriate and suitable state-owned site
identified to date in the state for this purpose. *Id.* There is no clinical indication

1 that the health of the community in Costa Mesa would be jeopardized by housing
2 and treating COVID-19 patients at Fairview. *Id.* As of February 24, 2020,
3 Fairview will be empty of other patients. *Id.* ¶ 19. The potential risk of
4 transmission to the community in Costa Mesa from housing COVID-19 patients
5 there is negligible, as Fairview is secure and the patients housed there would be
6 restricted from interacting with the surrounding community. *Id.*

7 By contrast, not housing COVID-19 patients at Fairview would pose
8 substantial public health risks in California and substantially burden the local
9 authorities where Travis is located. If the DoD expels these individuals from Travis
10 and they are not transported to a suitable quarantine site, such as Fairview, local
11 authorities in Solano County and surrounding counties would be charged with
12 arranging for these individuals' isolation and required to house infected patients in
13 hospitals and hotels. Ghaly Decl. ¶ 20. Hospitalizing COVID-19 patients who are
14 not seriously ill would strain the ability of hospitals in Travis and different facilities
15 around the state to respond to other health needs. *Id.* ¶¶ 20-21. If Solano County
16 and surrounding counties are required to hospitalize the repatriated individuals from
17 Travis, that would seriously burden their health care delivery systems and deprive
18 them of the tools to address a potential COVID-19 outbreak there. *Id.* ¶ 21.
19 Additionally, hospitalizing patients who are infected with COVID-19 but do not
20 require hospitalization poses an avoidable public health risk that the illness could be
21 transmitted to other hospitalized patients.

22 The remaining alternative available to CHHS presents very serious risks to the
23 COVID-19 patients themselves. If the patients from Travis are not housed at
24 Fairview, and if they are not subject to local quarantine in hotels and hospitals in
25 Solano County and surrounding counties, the remaining alternative would be for
26 these patients to be transported to Alabama. Ghaly Decl. ¶ 22. Requiring these
27 patients—primarily elderly Californians who are positive for COVID-19, and who
28 also in many cases suffer from serious underlying health conditions—to travel to

1 Alabama, after having been quarantined for several weeks on a cruise ship offshore
2 and evacuated halfway across the world, could cause serious harm to their physical
3 and mental health. It would also threaten significant disruption to their health. *Id.*

4
5 **VI. BACKGROUND OF THE CURRENT CASE**

6 On February 21, 2020 at 3:30 p.m., counsel for the City of Costa Mesa
7 provided notice by e-mail informing the Defendants of its *ex parte* application and
8 Judge Josephine L. Staton’s granting of a temporary restraining order regarding the
9 transportation of persons infected with or exposed to COVID-19 to any place
10 within Costa Mesa, California. (Dkt. 4, 9.) Plaintiffs have not filed a complaint,
11 and their *ex parte* application does not clearly specify the basis of their claims
12 against each of the several federal and state defendants. Presumably, however, the
13 due process claims at most would apply against the State Defendants. The other
14 claims—under the Administrative Procedure Act and Tenth Amendment—could
15 only be applied against the federal defendants.

16 The same day, the Court granted a temporary restraining order and ordered
17 Defendants to file any opposition no later than Sunday, February 23, 2020 at 12:00
18 p.m. The Court also set an expedited hearing for Monday, February 24, 2020, at
19 2:00 p.m. in Courtroom 10 A. (Dkt. 9.)

20 On Saturday night, at 9:42 p.m., without leave of the Court, Plaintiffs filed a
21 “Further Statement Re Nuisance Claim,” asserting entitlement to relief under a
22 nuisance theory. The Court has not yet issued any order concerning this filing.

23
24 **LEGAL STANDARD**

25 Plaintiffs’ request for a temporary restraining order is governed by the same
26 general standards that govern a request for a preliminary injunction. *See New*
27 *Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2, (1977). And a
28 “preliminary injunction is an ‘extraordinary and drastic remedy’ ... never awarded

1 as of right,” and that is not to be routinely granted. *Munaf v. Geren*, 553 U.S. 674,
2 689-90 (2008) (internal citations omitted); *Intel Corp. v. ULSI Sys. Tech., Inc.*, 995
3 F.2d 1566, 1568 (Fed. Cir. 1993). Plaintiffs must establish that they are likely to
4 succeed on the merits, that they are likely to suffer irreparable harm in the absence
5 of preliminary relief, that the balance of equities tips in their favor, and that an
6 injunction would be in the public interest. *Winter v. Nat’l Res. Defense Council,*
7 *Inc.*, 555 U.S. 7, 20 (2008). Injunctive relief is “an extraordinary remedy that may
8 only be awarded upon a clear showing that the plaintiff is entitled to such relief.”
9 *Id.* at 22. Here, as described below, Plaintiffs have failed to make this showing.

10 11 ARGUMENT

12 I. SOVEREIGN IMMUNITY BARS THE CLAIMS AGAINST THE 13 STATE DEFENDANTS

14 Principles of Eleventh Amendment sovereign immunity bar Plaintiffs’ claims,
15 so that they cannot show likelihood of success on the merits. The Eleventh
16 Amendment prohibits suit against a state or its instrumentalities for legal or
17 equitable relief, in the absence of consent by the state or an abrogation of that
18 immunity by Congress. *Papasan v. Allain*, 478 U.S. 265, 276-77 (1986); *Pennhurst*
19 *State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Section 1983 did not
20 abrogate a state’s Eleventh Amendment immunity, *Quern v. Jordan*, 440 U.S. 332,
21 341 (1979), and the State of California has not waived that immunity regarding
22 claims brought under section 1983 in federal court, *Atascadero State Hosp. v.*
23 *Scanlon*, 473 U.S. 234, 241 (1985). Here, Plaintiffs seek relief against the State of
24 California itself, as well as its direct instrumentalities—the Governor’s Office of
25 Emergency Services and the Department of General Services—which are immune
26 under the Eleventh Amendment.
27
28

1 Even if Plaintiffs had instead named state officials, the “Eleventh Amendment
2 bars a suit against state officials when the state is the real, substantial party in
3 interest.” *Pennhurst*, 465 U.S. at 101 (citation and internal quotation marks
4 omitted). The “general rule is that relief sought nominally against an officer is in
5 fact against the sovereign if the decree would operate against the latter.” *Id.*
6 (citation omitted). “[A]s when the State itself is named as the defendant, a suit
7 against state officials that is in fact a suit against a State is barred regardless of
8 whether it seeks damages or injunctive relief.” *Id.* at 101-02 (citation omitted).
9 And here, there is no doubt that Plaintiffs seek relief against the State, which they
10 named directly and sought relief against. Am. & Updated Notice Ex Parte Appl.
11 TRO 1 (contending that “the state and federal governments” have inadequately
12 consulted with local officials and seeking to stop “the state and federal
13 government” from allegedly “acting under the cover of darkness”).

14 While the Supreme Court recognized a limited exception to Eleventh
15 Amendment immunity in *Ex parte Young*, 209 U.S. 123 (1908), it does not apply
16 here. The *Ex parte Young* exception allows “actions for prospective declaratory or
17 injunctive relief against state officers in their official capacities for their alleged
18 violations of federal law.” *Coal. to Defend Affirmative Action*, 674 F.3d 1128,
19 1134 (9th Cir. 2012). Again, Plaintiffs have named no officials. But regardless, this
20 exception applies only where “it is plain that such officer must have some
21 connection with the enforcement of the act, or else it is merely making him a party
22 as a representative of the State, and thereby attempting to make the State a party.”
23 *Snoeck v. Brussa*, 153 F.3d 984, 986 (9th Cir. 1998) (quoting *Ex parte Young*, 209
24 U.S. at 157). “This connection must be fairly direct; a generalized duty to enforce
25 state law or general supervisory power over the persons responsible for enforcing
26 the challenged provision will not subject an official to suit.” *L.A. County Bar Ass’n*
27 *v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992) (citations omitted). If a state official
28 “lacks the power” to address the purported violation of federal law, this indicates

1 that the plaintiff intends to use that official “as a surrogate for the state, and thereby
2 to evade the state’s Eleventh Amendment immunity.” *L.A. Branch NAACP v. L.A.*
3 *Unified Sch. Dist.*, 714 F.2d 946, 953 (9th Cir. 1983).

4 Here, Plaintiffs have identified no state official who has authority to remedy
5 their fears that the Fairview facility may be insufficient to protect the Costa Mesa
6 community. Because this is a federal quarantine, it is the federal government’s
7 responsibility to provide security and safety precautions for housing of quarantined
8 patients at the Fairview facility. See 42 U.S.C. § 264; 42 C.F.R. §§ 70.2, 70.14. Indeed,
9 the State’s provision of the Fairview property for federal use was conditioned on
10 the federal authorities providing appropriate protective equipment in patient
11 transportation to and from Fairview, the installation of fencing around the facility,
12 and the provision of security, all for the protection of the surrounding community.
13 Decl. Ghaly ¶¶ 4, 12. If there were any failure of the federal government to meet
14 these requirements—which Plaintiffs have not demonstrated and the State does not
15 anticipate—then any remedy would be against the federal government, not the
16 State. For these reasons, the State Defendants are entitled to Eleventh Amendment
17 immunity, and no relief may be granted against them.

18

19 **II. PLAINTIFFS CANNOT ESTABLISH STANDING**

20 Even if the State Defendants were proper parties, Plaintiffs could not establish
21 standing, thereby precluding them from obtaining injunctive relief. *Townley v.*
22 *Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013). Plaintiffs cannot show that: (1) they
23 suffered an injury in fact, meaning “an invasion of a legally protected interest that is
24 (a) concrete and particularized, and (b) actual or imminent, not conjectural or
25 hypothetical”; (2) there is a causal connection between the injury and the
26 challenged conduct, “such that the injury is fairly traceable to the challenged
27 action”; and (3) the injury will likely be redressed by a favorable decision. *Id.*

1 Because this action is in a “very preliminary stage,” Plaintiffs “may rely on the
2 allegations in their Complaint and whatever other evidence they submitted in
3 support of their TRO motion to meet their burden.” *Washington v. Trump*, 847 F.3d
4 1151, 1159 (9th Cir. 2017). Here, Plaintiffs have yet to file a complaint, so
5 standing must be determined based on the claims in their application for injunctive
6 relief. And the allegations in their application confirm that Plaintiffs cannot meet
7 their burden of establishing each or any of these three elements.

8 The City does not have standing to challenge the actions of the State
9 Defendants on due process grounds as a matter of law. The Ninth Circuit has
10 “consistently held that political subdivisions lack standing to challenge state law,”
11 including the administrative implementation of state law, “on constitutional
12 grounds in federal court.” *City of San Juan Capistrano v. Cal. Pub. Utilities*
13 *Comm’n*, 937 F.3d 1278, 1280 (9th Cir. 2019). This rule is absolute, and depends
14 “only on the identity of the parties, not the procedural context in which those claims
15 are raised.” *Id.* at 1281.

16 Even if *City of San Juan Capistrano* did not bar the City’s claims (it does), the
17 city still would not be able to establish standing. The gravamen of the City’s
18 complaint appears to be that the State, rather than it, made the decision to offer
19 Fairview as a location to house the patients. Pls.’ Am. Notice, ECF no. 4, at 1:18-
20 20. However, this grievance does not constitute a concrete, particularized harm,
21 traceable to the conduct of the State Defendants and subject to redress by this court.
22 The Fairview complex belongs to the State, not the City. (Decl. of Mark Ghaly
23 (“Ghaly Decl.”), ¶ __.) Under California’s Emergency Services Act, the State, not
24 the City, has the absolute statutory authority to determine the proper facility for
25 housing the patients. See Cal. Gov’t. Code, § 8570, subs. (c), (j) (West 2020)
26 (empowering the state to “[s]e and employ any of the property, services, and
27 resources of the state as necessary” to combat declared emergencies). Notably,
28 declared emergencies within the scope of the Emergency Services Act include

1 “disease.” (*Id.*, § 8558, subd. (b).) In other words, because California law makes
2 clear that it is within the purview of the State, not the City, to determine the
3 appropriate location to house the patients, the City does not allege a violation
4 sufficient to grant it standing to sue the State Defendants.

5 Plaintiff Foley appears to allege she has standing simply because she is a
6 resident of Costa Mesa. Pls.’ Am. Notice, ECF no. 4, at 7:9-10. She therefore
7 identifies no harm that distinguishes her from anyone else. Critically, a “plaintiff
8 raising only a generally available grievance about government—claiming only
9 harm to his and every citizen's interest in proper application of the Constitution and
10 laws, and seeking relief that no more directly and tangibly benefits him than it does
11 the public at large—does not state an Article III case or controversy.” *Lujan v.*
12 *Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992). Because Foley does not assert
13 a distinct, individualized harm, she does not allege facts sufficient to establish her
14 standing to challenge Defendants’ actions.

15 Additionally, Plaintiffs do not appear to allege that the State Defendants would
16 likely have reached any different decision as to the appropriate housing for the
17 patients based on further consultation with the City before deciding to house the
18 patients at Fairview. Therefore, Plaintiffs do not allege facts sufficient to establish
19 that a favorable decision would be “likely” to redress any injury they may have
20 suffered. *Lujan*, 504 U.S. at 561.

21 Because Plaintiffs do not have standing, the Court lacks subject-matter
22 jurisdiction over their claims. *See Pershing Park Villas Homeowners Ass’n v.*
23 *United Pac. Ins. Co.*, 219 F.3d 895, 899 (9th Cir. 2000) (stating that standing is a
24 jurisdictional issue).

25
26 **III. PLAINTIFFS FAIL TO IDENTIFY A PROTECTED LIBERTY OR PROPERTY**
27 **INTEREST TO SUPPORT THEIR PROCEDURAL DUE PROCESS CLAIM**
28

1 Even if their allegations were sufficient to establish standing, Plaintiffs’
2 procedural due process claims would fail because they do not identify a liberty or
3 property interest threatened by the proposed use of the Fairview facility.

4 As set forth above, Fairview is owned by the State. Ghaly Decl., ¶ __. The
5 State has plenary authority over the use of its own property; in the absence of
6 contrary state law (which is not present here), that property is not subject to local
7 regulation or control. *See, e.g., Del Norte Disposal, Inc. v. Dep’t of Corrs.*, 26 Cal.
8 App. 4th 1009, 1012–13 (1994). Accordingly, Plaintiffs cannot allege any property
9 interest regarding the Fairview facility itself. Additionally, and notably, “all circuit
10 courts and the Supreme Court bar due process claims” by political subdivisions
11 against their states. *City of San Juan Capistrano*, 937 F.3d at 183 (R. Nelson, J.,
12 concurring). This rule is at least 97 years old, stemming from the Supreme Court’s
13 recognition that “[t]he power of the State, unrestrained by the contract clause or the
14 Fourteenth Amendment, over the rights and property of cities held and used for
15 ‘governmental purposes’ cannot be questioned.” *City of Trenton v. New Jersey*,
16 262 U.S. 182, 188 (1923).

17 In any event, neither Foley nor the City will be able to establish that the
18 actions of the State Defendants threaten their liberty or property interests. As set
19 forth above, the State has plenary authority over quarantines under state law.
20 Specifically, the Office of Emergency Services is “responsible for the state’s
21 emergency and disaster response services for natural, technological, or manmade
22 disasters and emergencies, including responsibility for activities necessary to
23 prevent, respond to, recover from, and mitigate the effects of emergencies and
24 disasters to people and property.” (Cal. Gov’t Code § 8585, subd. (e) (West 2020).)
25 Emergencies include “duly proclaimed existence of conditions of disaster or of
26 extreme peril to the safety of persons and property within the state caused by
27 conditions such as ... disease.” (*Id.* § 8558, subd. (b).) Plaintiffs cannot identify a
28

1 liberty or property right that supersedes the State’s clear authority to house the
2 patients at the Fairview facility. To hold otherwise would effectively allow every
3 political subdivision within the state to forbid the housing of quarantined patients,
4 crippling the State’s ability to act in the face of a public health emergency.

5
6 **IV. PLAINTIFF’S SUBSTANTIVE DUE PROCESS CLAIM IS UNLIKELY TO**
7 **SUCCEED BECAUSE THE STATE’S DECISION TO PARTNER WITH**
8 **FEDERAL AUTHORITIES TO ESTABLISH A SECURE ISOLATION FACILITY**
9 **IS SUPPORTED BY AMPLE JUSTIFICATION**

10 “[S]tate action which ‘neither utilizes a suspect classification nor draws
11 distinctions among individuals that implicate fundamental rights’ will violate
12 substantive due process only if the action is ‘not rationally related to a legitimate
13 governmental purpose.’” *Matsuda v. City and County of Honolulu*, 512 F.3d 1148,
14 1156 (9th Cir. 2008) (quoting *Munoz v. Sullivan*, 930 F.2d 1400, 1404 (9th
15 Cir.1991)). “The burden this places on the plaintiff is ‘extremely high.’” *Id.*
16 (quoting *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1162 (9th Cir.
17 1997)).

18 Because Plaintiffs have filed no complaint as yet, it is unclear what right they
19 seek to vindicate in their substantive due process claim. But to qualify as a
20 “fundamental right” subject to strict scrutiny, the asserted right must be “deeply
21 rooted in this Nation’s history and tradition, and implicit in the concept of ordered
22 liberty, such that neither liberty nor justice would exist if they were sacrificed.”
23 *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted).
24 Moreover, the party asserting a fundamental right must provide a “‘careful
25 description’ of the asserted fundamental liberty interest.” *Id.* at 721.

26 Plaintiffs provide no such description in relation to the State Defendants,
27 contending only that without an injunction, “the federal government will have
28 violated [Plaintiffs’] substantive and procedural due process rights.” Am. &
Updated Notice & Ex Parte Appl. TRO 8:20-22. To the extent that other

1 allegations may connect to a substantive due process claim against the state, it
2 would presumably relate to the Plaintiffs' dissatisfaction with the level of
3 communication about the security measures put in place. *See id.* at 1 (seeking "to
4 ensure that all necessary steps are taken" and that the state and federal government
5 stop allegedly "acting under the cover of darkness"). Setting aside the fact that
6 there has been communication with local officials—even if not to their
7 satisfaction—this articulation does not implicate the concept of ordered liberty such
8 that neither liberty nor justice would exist if it were sacrificed; nor does it fit within
9 the enumeration of fundamental rights already articulated by the courts.¹ Thus, the
10 plaintiffs have not asserted a fundamental liberty interest. "Where a fundamental
11 right is not implicated, as in this case, governmental action need only have a
12 rational basis to be upheld against a substantive due process attack." *Kim v. United*
13 *States*, 121 F.3d 1269, 1273-74 (9th Cir. 1997). Thus, plaintiffs' substantive due
14 process challenge only requires rational basis review. And plaintiffs appear to have
15 acknowledged that their challenge only merits rational basis review because the
16 case that they cited, *Patel v. Penman*, 103 F.3d 868, 874 (9th Cir. 1996) applied the
17 rational basis test.²

18 Under the rational basis test, Plaintiffs' challenge does not even meet the
19 lower standard of raising serious questions of validity, much less establish a
20 likelihood of prevailing on the merits. The burden to meet the arbitrary and
21 irrational standard "is extremely high," and courts do not require that the challenged
22 action actually advances its stated purposes, "but instead look to whether 'the
23 governmental body could have had no legitimate reason for its decision.'"

24
25 ¹ *Glucksberg* identified fundamental rights as including the rights to marry, to
26 have children, to direct the education and upbringing of one's children, to marital
27 privacy, to use contraception, to bodily integrity, and to abortion. *Glucksberg*, 521
28 U.S. at 720.

27 ² *Patel's* status as good law in this circuit is questionable. Numerous cases
28 have noted it has been overruled on some grounds. *See, e.g., Easter v. CDC*, 694 F.
Supp. 2d 1177, 1187 (S.D.Cal. 2010).

1 *Richardson*, 124 F.3d at 1162 (citation omitted). And in the context of executive
2 actions, the rational basis test only prohibits conduct that “amount[s] to an ‘abuse of
3 power’ lacking any ‘reasonable justification in the service of a legitimate
4 governmental objective.’” *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 584
5 F.3d 1232, 1236 (9th Cir. 2009). Plaintiffs cannot meet this standard.

6 California has elected to centralize control over responses to infectious
7 diseases in the Department of Public Health. Cal. Health & Safety Code § 10125 et
8 seq.; Decl. Dr. Mark Ghaly 1-2, ¶3. California has further provided that when the
9 Department invokes its power to control and prevent the spread of infectious
10 disease, local county and city officials are required to carry out the Department’s
11 orders. *See* Cal. Gov. Code § 11158 and Cal. Health & Safety Code §§ 120155,
12 120195, 120220. Deciding to centralize authority to respond to infectious disease is
13 the very definition of a legitimate governmental purpose.

14 Furthermore, the specific actions taken by the State Defendants are rationally
15 related to that goal. As the Declaration of CHHS Secretary Mark Ghaly articulates,
16 in response to the COVID-19 outbreak in China, CDPH coordinated with their
17 federal partners on how to respond. Ghaly Decl. ¶¶ 3-4. CDPH and other state
18 agencies issued several rounds of guidance on COVID-19 to both healthcare
19 facilities and other entities (like schools and child care facilities) that might need to
20 deal with any outbreak. *Id.* at ¶ 4.

21 Beginning on or about February 17, 2020, the repatriation of United States
22 citizens infected with COVID-19, and the federal government’s subsequent
23 decision that infected patients could no longer be treated at Travis Air Force Base,
24 forced California to confront the question of how to accommodate the needs of
25 California residents who had been infected, while protecting the public. Ghaly
26 Decl. ¶¶ 5-7. Because of the age and fragile state of the infected California
27 residents, the State Defendants chose not to have its residents sent to Alabama but
28 instead worked to locate suitable state-owned facilities in which to treat and

1 quarantine those residents within California. *Id.* at ¶ 8. That decision was both
2 entirely legitimate and amply supported by reasonable justification.

3 The State Defendants chose to execute that decision by: (1) assessing various
4 state-owned facilities to determine which was most suitable; (2) partnering with the
5 federal government, which would transport the affected patients to Fairview, secure
6 Fairview, and provide isolation for the affected patients; and (3) coordinating the
7 transfer with certain local officials, including the Orange County Health Officer.
8 Ghaly Decl. ¶¶ 9-13.

9 The State Defendants' choice of how to treat California residents infected with
10 COVID-19 is both legitimate and supported by ample justification. The State
11 Defendants elected to use Fairview because it determined that allowing CDC to
12 have Californians who test positive for COVID-19 complete their isolation at
13 Fairview would be to the benefit of public health. Ghaly Decl. ¶ 14. The State
14 Defendants used their experience and knowledge in infectious diseases, together
15 with important conditions placed on use of Fairview from the federal government to
16 ensure safety and public health, to conclude that the potential risk of transmission to
17 the community in Costa Mesa from housing COVID-19 patients at Fairview is
18 negligible as compared to the serious potential public health consequences of
19 quarantining and treating such patients in hospitals or hotels near Travis, , which
20 could in fact have cascading impacts that would detrimentally affect public health
21 in Costa Mesa among other California communities. *Id.* And the State Defendants
22 have backed that decision up with medical evidence. *Id.* at ¶¶ 15-18.].

23 The rational basis test limits the scope of this Court's review to identifying the
24 legitimate governmental interest in treating California residents who have
25 contracted COVID-19 and noting that the means selected by the State Defendants is
26 rationally related to that goal. But even if the Court were to go deeper and examine
27 whether the selection of Fairview and decision to quarantine and treat the COVID-
28

1 19 patients there was an exercise of reasonable judgment,³ the evidence
2 demonstrates that the State Defendants’ decision was grounded in sound medical
3 judgment that the State Defendants have the discretion to make.

4 Moreover, to the extent that the plaintiffs are asserting that their rights were
5 violated because the State Defendants did not contemporaneously reveal their
6 decision making process, Ninth Circuit case law establishes that any such failure
7 does not support a due process violation: “[t]he government need not state its
8 purposes at the time it acts. It is sufficient that the government could have had a
9 legitimate reason for acting as it did.” *Kim*, 121 F.3d at 1274.

10 Accordingly, plaintiffs’ substantive due process claim fails entirely. Plaintiffs
11 cannot establish a likelihood of success on the merits or even a substantial question
12 of validity.

13
14 **V. PLAINTIFFS FAIL TO PROVIDE COMPELLING REASONS TO PREVENT THE**
15 **HOUSING OF CALIFORNIANS UNDER FEDERAL QUARANTINE AT**
16 **FAIRVIEW**

17 States must be free to respond to public health crises swiftly and decisively, as
18 historically they have been throughout the history of our republic. This need for
19 swift and decisive action cannot accommodate local vetoes over the operations of
20 state government; even the possibility of a local veto would threaten to paralyze the
21 public-health response. Here, Plaintiffs cannot meet their heavy burden to justify a
22 temporary restraining order : if Plaintiffs had otherwise met their burden to show a
23 likelihood of success on the merits (which they have not), the public interest and the
24 balance of the equities favor the State.

25
26
27 ³ Again, rational basis review does not permit this Court to determine
28 whether the State Defendants actually advanced their stated purposes, but instead
this Court should only look to whether “the governmental body could have had no
legitimate reason for its decision.” *Richardson*, 124 F.3d at 1162.

1 The Department of Public Health (Department) is the state agency expressly
2 authorized under California law to protect California from infectious diseases and
3 to ensure that individuals who have an infectious disease receive appropriate
4 medical attention. Decl. Ghaly 1-2, ¶ 3. Under California’s Communicable
5 Disease Prevention and Control Act, the Department is the state agency expressly
6 authorized under California law to “establish and maintain places of quarantine or
7 isolation.” Cal. Health & Safety Code § 120135. Likewise, the Department is the
8 state agency tasked by statute to “take measures as are necessary to ascertain the
9 nature of the disease and prevent its spread,” including taking “possession or
10 control of the body of any living person.” *Id.* § 120140.

11 When the Department acts under its statutory capacity to control and prevent
12 the spread of infectious disease, local county and city officials are subservient to
13 and must carry out the orders of the Department. See Cal. Gov. Code § 11158 and
14 Cal. Health & Safety Code § 120155. “Each health officer shall enforce all orders,
15 rules, and regulations concerning quarantine or isolation prescribed or directed by
16 the department.” *Id.* § 120195. This includes the Department’s decision to
17 establish places of quarantine. “Each health officer, whenever required by the
18 department, *shall establish and maintain places of quarantine or isolation that shall*
19 *be subject to the special directions of the department.*” *Id.* § 120200 (emphasis
20 added); *see also id.* § 120210, subd. (a). “When quarantine or isolation, either strict
21 or modified, is established by a health officer, all persons shall obey his or her
22 rules, orders, and regulations.” *Id.* § 120220.

23 This statutory scheme recognizes the need for swift and nimble state authority.
24 If necessary, local officials could even be required under state law to comply with
25 the quarantine directives of the Department. To allow the possibility of a local veto
26 — and to delay the state’s response to this public-health crisis while that potential
27 local veto is litigated—would fly in the face of the compelling need for a
28

1 centralized state authority to control and manage communicable disease outbreaks
2 in an expeditious manner for the benefit of all Californians.

3 Here, there are California residents under federal quarantine who have
4 completed hospital treatment and may not be returned to Travis Air Force Base for
5 the remainder of their quarantine. Many are over the age of 65 with chronic health
6 conditions unrelated to the COVID-19 virus. See Decl. Ghaly 2-3, ¶¶ 4-8. But for
7 the availability of the Fairview facility, overseen by federal authorities, those
8 California residents face relocation to the Federal Emergency Management Agency
9 Center for Domestic Preparedness in Anniston, Alabama, and cross-country transfer
10 to that location would be highly detrimental to their overall health and recovery, as
11 compared to maintaining isolation at a suitable location in California. *Id.* at 3 [¶8].
12 The Department properly assessed multiple alternative quarantine sites and
13 determined that Fairview Developmental Center (Fairview) in Orange County was
14 the best and most feasible location meeting federal standards, where California
15 residents who test positive for COVID-19 could complete their federal quarantine,
16 and where the USHHS would meet certain conditions—including proper security
17 and preventive measures to protect the Costa Mesa community. *Id.* at 4, ¶¶ 9-12.

18 The conditions imposed by the Department for the use of Fairview as a
19 temporary quarantine facility negate Plaintiffs' speculative fears that the
20 neighboring community might come into contact with any individuals who may be
21 housed there. Those conditions include the use of appropriate protective equipment
22 in patient transportation to and from Fairview, the installation of fencing around the
23 facility, and the provision of security, all for the protection of the surrounding
24 community. *Id.* at 4, ¶ 12. In addition, the location itself provides a protective zone
25 because Fairview is surrounded on three sides by a golf course. With this buffer
26 zone, the fencing, and security measures that the federal authorities must implement
27 and maintain, it is highly unlikely that nearby residents will inadvertently wander
28 onto the Fairview premises and come in sufficiently close proximity to quarantined

1 individuals to present even a minimal of risk of contracting the disease. *See* ECF
2 17, Centers for Disease Control and Prevention How COVID 19 Spreads [“between
3 people who are in close contact with one another (within about 6 feet)”].

4 Critically, California’s public health focus recognizes that a major domestic
5 outbreak of a highly contagious disease could follow from failure to ensure
6 effective isolation and observation. Ghaly Decl. paragraph 7. The alternatives to
7 use of the Fairview site – either (1) subjecting Californians to serious health risk by
8 transfer to out of state while in vulnerable health or (2) hospitalizing affected
9 persons, thereby increasing exposure risk to others including hospital employees
10 and at-risk patients who could transmit the disease further and exponentially
11 increase the public health risk in the state – are simply not viable from either public
12 health or humanitarian perspectives. *Id.* at paragraphs 20, 22. The City’s position
13 in this litigation is that it should risk its own residents’ health as well as that of all
14 other Californians because it does not or does not want to understand the significant
15 public health safeguards in place for use of Fairview and the exponentially higher
16 safety protection that follows from its use.

17 Maintaining the temporary restraining order or the imposition of any
18 preliminary injunction would thwart the Department’s statutory power and
19 obligation to provide for federal authorities places of quarantine for state residents
20 and to respond to the current healthcare crisis. It exposes those in quarantine to
21 severe health risks if the Department is impeded from identifying the most
22 appropriate place where federal authorities can care for those in quarantine. The
23 Court should deny the City’s request to constrain the Department’s ability to
24 quickly and nimbly respond to quarantine needs, for the health and protection of all
25 Californians. Plaintiffs’ request is based on mere conjecture of risk, and the harm
26 to California and the Department clearly outweighs the plaintiff’s speculative fear.

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28

1 **VI. CALIFORNIA’S SPECIFIC LAWS PERMITTING THE PATIENTS TO BE**
2 **QUARANTINED DEFEAT PLAINTIFFS’ NUISANCE CLAIMS**

3 Plaintiffs’ recently asserted state nuisance claim against the State Defendants
4 also fails to support their claim for injunctive relief. Even if Plaintiffs had
5 otherwise met their burden to produce evidence establishing a likelihood of success
6 on their nuisance claim (which they have not), as a factual matter that claim would
7 fail as a matter of law.

8 Under California law, “[n]othing which is done or maintained under the
9 express authority of a statute can be deemed a nuisance.” Cal. Civil Code § 3482
10 (West 2020). This express rule defeats Plaintiffs’ claim that the State Defendants’
11 actions would constitute a nuisance. Specifically, California’s Communicable
12 Disease Prevention and Control Act expressly vests the Department of Public
13 Health with authority to “establish and maintain places of quarantine or isolation.”
14 Cal. Health & Safety Code § 120135. Under that authority, the Department may
15 “take measures as are necessary to ascertain the nature of the disease and prevent its
16 spread,” including taking “possession or control of the body of any living person.”
17 *Id.* § 120140. Further, “each health officer, whenever required by the department,
18 shall establish and maintain places of quarantine or isolation that shall be subject to
19 the special directions of the department.” *Id.* § 120200 (emphasis added); *see also*
20 *id.* § 120210(a). Thus, California law expressly vests the State with the power to
21 order that the patients be housed at Fairview. Because quarantine sites are the
22 chosen form to abate a public health care crisis caused by communicable diseases,
23 they cannot be a nuisance, as a matter of law. *See Avedon v. State of California*,
24 186 Cal. App. 4th 1336, 1345 (2010) (holding that operation of park by the state
25 Department of Parks and Recreation, fell squarely within its statutory authority
26 such that state had statutory immunity from nuisance action by owners of homes
27 destroyed by wildfire that began as a bonfire at state park)
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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CITY OF COSTA MESA, et al.,
Plaintiffs,
v.
**UNITED STATES OF AMERICA, et
al.,**
Defendants.

Case No. 8:20-cv-00368-JLS (JDE)
**DECLARATION OF DR.
MARK GHALY IN SUPPORT
OF STATE OF CALIFORNIA
DEFENDANTS' OPPOSITION
TO PLAINTIFFS' MOTION
FOR TEMPORARY
RESTRAINING ORDER AND
ORDER TO SHOW CAUSE**

1 I, Mark Ghaly, declare:

2 1. I am a resident of the State of California. I am over the age of 18 and
3 have personal knowledge of all the facts stated herein. If called as a witness, I could
4 and would testify competently to all the matters set forth below.

5 2. I am the Secretary of the California Health and Human Services
6 Agency (CHHS). I was appointed Secretary of CHHS by Governor Gavin Newsom
7 in April 2019. I am a Secretary in Governor Newsom's cabinet. My duties as
8 Secretary of CHHS include supervising CHHS departments and offices in
9 administering and overseeing state programs for health care and social services. I
10 am also a pediatrician by training, and I have earned a Master's degree in Public
11 Health.

12 3. CHHS departments have been instrumental in addressing the outbreak
13 of the novel coronavirus thought to have originated in Wuhan City within the Hubei
14 Province of China. The virus is now known as COVID-19. In particular, the
15 California Department of Public Health's (CDPH) Center for Infectious Diseases is
16 responsible for protecting Californians from infectious diseases and ensuring that
17 individuals who have an infectious disease receive appropriate supportive care and
18 that the health and well-being of the general public are protected. Since the
19 COVID-19 outbreak began, CHHS and CDPH have kept in close contact with
20 federal officials at the U.S. Department of Health and Human Services (USHHS)
21 and Centers for Disease Control and Prevention (CDC), as well as county public
22 health officials in California. In particular, CHHS and CDPH have kept in close
23 contact with federal and county health officials as United States citizens have been
24 repatriated from China, and the shores of Japan, to California.

25 4. Since January 29, 2020, the federal government has repatriated over
26 800 individuals from China and Japan to California because of the COVID-19
27 outbreak. In response, CHHS, along with CDPH and the Governor's Office of
28 Emergency Services (CalOES), established the Medical and Health Coordination

1 Center (MHCC) to coordinate activities among local, state, and federal
2 governments. The MHCC has hosted regular conference calls with local health
3 departments and health care providers to ensure they were kept abreast of updated
4 information as it became available from the federal government. CDPH issued an
5 All Facilities Letter (AFL) on January 23, 2020 to licensed health care facilities to
6 provide information on COVID-19 including infection control guidance, criteria for
7 evaluation of Patients Under Investigation (PUIs), and recommendations for
8 reporting, specimen collection, and testing. Subsequently, CDPH issued AFLs on
9 January 31, 2020, February 10, 2020, and February 19, 2020 to ensure all licensed
10 health care facilities have the appropriate resources and protocols.¹ Additionally,
11 the California Emergency Medical Services Authority (EMSA), issued interim
12 guidance to local emergency services agencies on the status, screening, transport,
13 and infection control including specific personal protective equipment (PPE)
14 requirements for handling of patients with COVID-19. Finally, on February 7,
15 2020, CDPH issued guidance to schools, school districts, universities and colleges;
16 and on February 11, 2020 to child care facilities.

17 5. To protect the health of travelers returning to California, and to protect
18 public health in California communities, CHHS and CDPH have supported federal
19 operations in the following ways: providing guidance and communication to local
20 health officials on screening and monitoring of returned travelers from commercial
21 flights, through the Los Angeles International Airport and San Francisco
22 International Airport, assisting local health officials in identifying and testing
23 suspected cases of COVID-19 in returned travelers, and collaborating with local
24 health officials in jurisdictions where military installations have received
25 repatriation flights. Additionally, CHHS and CDPH are actively collaborating
26 across state and local sectors to ensure California's public health and healthcare

27
28 ¹ These AFLs are available at this link:
<https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/LNCAFL20.aspx>

1 delivery systems are prepared for additional cases of COVID-19, including a
2 potential pandemic. These activities include surveillance, laboratory testing,
3 monitoring for community spread, infection prevention guidance, healthcare facility
4 readiness, and capacity for airborne isolation of potential cases.

5 6. On February 17, 2020, the federal government repatriated United
6 States citizens who had previously been passengers on the Diamond Princess cruise
7 ship in Yokohama, Japan. Repatriated individuals are quarantined under the federal
8 government's authority to quarantine individuals entering the United States from
9 abroad when there is reason to believe they have been exposed to an infectious
10 disease. As part of the broader repatriation missions due to this global outbreak,
11 CDC instituted federal quarantine orders—the first federal quarantine in nearly
12 sixty years—because of serious public health concerns.

13 7. Individuals coming from the cruise ship had significant exposure to
14 other individuals who tested positive for COVID-19. Allowing individuals who
15 may have been exposed to COVID-19 to return to their communities without any
16 isolation and observation would be substantially likely to lead to a major domestic
17 outbreak of a highly contagious disease. Given this public health risk, it is of
18 paramount importance that state and federal public health officials work together to
19 ensure that individuals who have been exposed to and test positive for COVID-19
20 be subject to isolation and observation in an environment suitable for that purpose,
21 and that otherwise meets state and federal health officials' operational needs.

22 8. Some of the United States citizen passengers were returned to Travis
23 Air Force Base (Travis), in Fairfield, Solano County, California, for quarantine,
24 testing, and observation. Other passengers were returned to Lackland Air Force
25 Base in Austin, Texas.

26 9. On or about February 18, 2020, USHHS informed CHHS that the U.S.
27 Department of Defense (DoD) would not allow repatriated individuals who have
28 tested positive or are symptomatic for COVID-19 to remain on military

1 installations for isolation and supportive care. Based on what is known so far about
2 COVID-19, it may take up to 30 days for an infected individual to no longer be
3 contagious to others. This means those who test positive may need to be isolated
4 from others for approximately a month or until they have two negative tests with
5 one day apart.

6 10. USHHS further informed CHHS that individuals quarantined at Travis
7 who test positive for COVID-19 and can be discharged from a healthcare facility
8 because their symptoms do not warrant hospitalization would be relocated to the
9 Federal Emergency Management Agency Center for Domestic Preparedness in
10 Anniston, Alabama. Because so many of the repatriated individuals are over age 65
11 and have multiple chronic health conditions, CHHS was and is concerned about the
12 health risks of forcing these California residents to relocate from California to
13 Alabama for the duration of their isolation period. These individuals had already
14 suffered greatly by being quarantined on a cruise ship for weeks, during a major
15 outbreak of a novel disease, and then hurriedly repatriated to the United States.
16 CHHS determined that it would be disruptive to their physical and mental health if
17 they were transferred to Alabama. Additionally, approximately seventy of the
18 individuals repatriated to Travis from the Diamond Princess ship are California
19 residents, and it would be easier for them to travel back to their homes in California
20 after completing their isolation if they remain in state.

21 11. To maintain observation and isolation of these individuals while also
22 mitigating further risks to their health, CHHS began assessing state-owned and
23 operated facilities within California where individuals who test positive for
24 COVID-19 could be housed until they are no longer capable of transmitting
25 COVID-19 to other people.

26 12. CHHS considered several facilities around the state, including Sonoma
27 Developmental Center, Army National Guard Camp Roberts, and closed youth
28 correctional facilities. Any facility selected needed to meet the very strict CDC

1 sheltering criteria, which includes individual rooms and bathrooms for reach
2 patient. It also needed to be consistent with other operational constraints, such as
3 not being a military installation operated by the U.S. Department of Defense.

4 13. After deliberation, on February 20, 2020, by means of an email
5 communication from CHHS Deputy Secretary Marko Mijic to Deputy Assistant
6 Secretary Jonathan Greene of USHHS, CHHS informed USHHS that it would offer
7 Fairview Developmental Center (Fairview) in Orange County for the federal
8 government's use as a location where California residents who test positive for
9 COVID-19 but do not require hospitalization could remain in isolation until CDC
10 determines they may return home, if USHHS met certain conditions. A true and
11 accurate copy of this email is attached as Exhibit A.

12 14. Fairview is a state developmental center where, until recently, the
13 California Department of Developmental Services (DDS) provided residential and
14 community-based services and support to individuals with developmental
15 disabilities in accordance with the Lanterman Developmental Disabilities Services
16 Act (Cal. Welf. & Inst. Code §§ 4500 et seq.). DDS has begun shifting away from
17 providing these types of services and support in institutional settings and towards
18 providing services in the community. In line with this new approach, Fairview is
19 closing, with the last patient moving out, after months of preparation and planning,
20 on Monday, February 24, 2020.

21 15. Because the individuals repatriated from the Diamond Princess are
22 subject to a federal quarantine order, issued pursuant to federal law, the federal
23 government has ultimate authority over the conditions in which they are housed.
24 CDC is responsible for enforcing federal quarantine orders.

25 16. In addition to requirements imposed and enforced by the federal
26 government in its quarantine order, CHHS imposed additional conditions on the
27 federal government's use of Fairview for isolation and care of Californians testing
28 positive for COVID-19. Among these conditions were that USHHS would transfer

1 qualifying patients to Fairview via air or ground ambulance with appropriate
2 protective equipment; that, once the patients arrive at Fairview, USHHS would be
3 responsible for security to protect the surrounding community, all medical care not
4 requiring hospitalization, any wrap-around services, feeding, cleaning and
5 sanitation, and case management and logistics for departure; and that any patients
6 requiring hospitalization would be transported via air or ground ambulance to a
7 local facility able to care for them in Orange County or surrounding areas.

8 17. Consistent with their statutory mandates, CHHS and CDPH value
9 input from and engagement with their local partners. Prior to CHHS's offer to
10 USHHS to allow California residents at Travis who have tested positive for
11 COVID-19 remain isolated at Fairview, on February 20, 2020, state officials
12 engaged with local partners to discuss that possibility. In particular, California
13 Department of Social Services Director Kim Johnson reached out to her counterpart
14 at the Orange County Social Services Agency. CDPH Director and State Public
15 Health Officer Dr. Sonia Angell reached out to the Orange County Health Officer.
16 And CalOES staff reached out to the Orange County and City of Costa Mesa
17 Emergency Managers, Orange County Fire Chief, and Orange County Sheriff.

18 18. CHHS offered Fairview to USHHS because CHHS determined that
19 allowing CDC to have Californians who test positive for COVID-19 complete their
20 isolation at Fairview would be the best means to safeguard public health in
21 California. Fairview is the only appropriate and suitable state-owned site identified
22 to date in the state for this purpose.

23 19. From our experience so far managing COVID-19 cases, there is no
24 clinical indication that the health of the community in Costa Mesa would be
25 jeopardized by housing COVID-19 patients at Fairview. Rather, the potential risk
26 of transmission to the community in Costa Mesa from housing COVID-19 patients
27 at Fairview is negligible. Fairview will be empty of other patients as of February
28 24, 2020. CHHS believes that Fairview meets CDC's stringent sheltering criteria.

1 USHHS will transport individuals from Travis to Fairview in a secure way, using
2 CDC-approved personal protective equipment, and do so without making stops in
3 any California community between the points of Travis and Fairview. Furthermore,
4 Fairview is secure, and patients housed there would be restricted from interacting
5 with the surrounding community.

6 20. On the other hand, not housing COVID-19 patients at Fairview would
7 pose substantial public health risks. If the U.S. Department of Defense expelled or
8 did not readmit individuals who had tested positive for COVID-19 from Travis, and
9 if those individuals were not transported to Fairview or another suitable state-
10 owned site (which, to date, has not been identified in the state), local authorities in
11 Solano County and the surrounding counties would be compelled to arrange for
12 their isolation, and to otherwise prevent further spread of COVID-19. Based on
13 CHHS's and CDPH's conversations with county partners, I believe that some of
14 these patients would be hospitalized unnecessarily.

15 21. Hospitalizing COVID-19 patients who do not need hospitalization
16 creates unnecessary additional risk of exposure and infection for hospital healthcare
17 workers and other hospitalized patients. Hospital-based transmission of COVID-19
18 from individuals who test positive but do not require hospitalization to other
19 patients who are hospitalized for acute, life-threatening conditions, creates an
20 avoidable public health risk for California. Hospital isolation rooms need to be used
21 for those truly needing them; keeping those rooms open and available protects the
22 community and preserves access. It is vitally important that we maintain access to
23 critical care during flu season. If we were to hospitalize every patient with COVID-
24 19, we could run the risk of overcrowding our hospitals, interfering with other
25 patients who need care, and overusing needed supplies that will contribute further
26 to shortages. This would be particularly true if all of the California residents who
27 test positive for COVID-19 were to be hospitalized unnecessarily in the area of
28 Travis, overwhelming and paralyzing the healthcare delivery system of Solano

1 County, and thereby putting the whole community at risk. Supporting and
2 collaborating with our local partners in containing infectious diseases is a primary
3 concern for CHHS, and it is critical for us to ensure that they have the tools they
4 need to address the COVID-19 outbreak appropriately.

5 22. Based on conversations with federal partners at the CDC, I understand
6 that the federal government is considering the public health factors related to home
7 isolation. While sometimes appropriate or necessary, home isolation is not an ideal
8 solution for all persons testing positive for COVID-19, as some individuals who
9 may need to be isolated have other vulnerable individuals in the home (such as
10 small children, pregnant women, or individuals with weakened immune systems) or
11 live in group facilities with communal spaces (such as retirement communities),
12 making home isolation a non-viable option for them. Transporting non-hospitalized
13 individuals at Travis who test positive for COVID-19 to Fairview would help ease
14 the strain on the healthcare delivery system around Travis and allow these
15 individuals to complete their isolation in a setting where it is less likely that
16 additional transmission will take place.

17 23. If these individuals are not transported to Fairview or another
18 appropriate facility in the state to fulfill their isolation, communities around the
19 state could face similar public health concerns as Solano County. Once hospitals
20 around Travis reach capacity, the two options for fulfilling the remaining isolation
21 term would be for individuals who test positive to be sent to home isolation or to
22 hospitals in other counties. To the extent that the individuals need to be hospitalized
23 in other counties, those counties also would face strains on their healthcare delivery
24 systems, potentially leading to a shortage of hospital beds around the state.
25 Moreover, as stated above, hospitalizing COVID-19 patients who do not need
26 hospitalization carries a risk of additional exposure and infection to hospital
27 healthcare workers and other hospitalized patients, unnecessarily increasing the risk
28 of the further spread of the infection.

1 24. The remaining alternative available to CHHS also presents very
2 serious risks. If the patients from Travis are not housed at Fairview, and if they are
3 not subject to local quarantine in hospitals in Solano County and neighboring
4 counties, the remaining alternative that has been presented to CHHS is that these
5 patients will be transported to Alabama. Requiring these patients—primarily elderly
6 Californians who are positive for COVID-19, and who also in many cases suffer
7 from serious underlying chronic conditions—to travel to Alabama, after having
8 been quarantined for several weeks on a cruise ship offshore and evacuated halfway
9 across the world, could cause serious harm to their physical and mental health. It
10 would also threaten significant disruption to their recovery.

11 25. For all these reasons, as a physician, a public health professional, and
12 Secretary of CHHS, I believe that housing these patients at Fairview is the best way
13 to safeguard their health and the health of other Californians.

14 I declare under penalty of perjury under the laws of the United States and the
15 State of California that the foregoing is true and correct to the best of my
16 knowledge.

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Executed on February 23, 2020 in South Pasadena, California.



Mark Ghaly, MD, MPH
Secretary
California Health & Human Services
Agency

From: Mijic, Marko@CHHS
To: Ravel, Gabriel (CHHS)
Subject: Fwd: CA Alternative Option
Date: Saturday, February 22, 2020 9:36:37 AM

See below.

-Marko

Begin forwarded message:

From: "Mijic, Marko@CHHS" <Marko.Mijic@chhs.ca.gov>
Date: February 21, 2020 at 6:36:00 AM PST
To: "Greene, Jonathan (OS/ASPR/EMMO)" <Jonathan.Greene@hhs.gov>
Subject: CA Alternative Option

Jonathan,

Per our conversation, below is a alternative. In summary, we would propose to move those individuals who are California residents, and who test positive, to Fairview Developmental Center in Orange County to complete the remainder of their federal quarantine order. This way these individuals don't have to be transported all the way to Alabama. Details below.

Fairview Developmental Center is located at 2501 Harbor Blvd, Costa Mesa, CA 92626. I can have folks meet your logistics point of contact there this morning or later today.

Best,
Marko

--

Protocol for Symptomatic Persons

While at Travis Air Force Base, under a federal quarantine order, HHS medical staff will evaluate and provide medical care. If an individual presents with Novel Coronavirus symptoms the following protocol would be implemented.

<!--[if !supportLists]-->• <!--[endif]-->Individual would be transported by local ambulance provider to a nearby health care facility where they would be evaluated and tested for Novel Coronavirus.

<!--[if !supportLists]-->• <!--[endif]-->If test is positive, the person would be provided supportive care. They would not return to Travis Air Force Base, instead they would be transferred either to Fairview Developmental Center (California residents) or

Alabama (non-California residents).

<!--[if !supportLists]-->• <!--[endif]-->If test is negative, the person would be discharged and sent back via ambulance to Travis Air Force Base to finish out the remainder of their quarantine order.

Sheltering for Confirmed Positive Persons

-
Those individuals who test positive, once they have been provided supportive care and are able to be discharged:

<!--[if !supportLists]-->• <!--[endif]-->Federal HHS would transport any individual tested positive, who is a California resident, and once provided supportive care and stabilized, to Fairview Developmental Center via air ambulance.

<!--[if !supportLists]-->• <!--[endif]-->Non-California residents would be transferred by federal HHS to Alabama.

Fairview Developmental Center Operational Logistics

<!--[if !supportLists]-->• <!--[endif]-->Planning assumption that we would expect 30-50 individuals.

-
<!--[if !supportLists]-->• <!--[endif]-->Need support from Federal HHS on the following:

<!--[if !supportLists]-->• <!--[endif]-->Security and potential fencing

<!--[if !supportLists]-->• <!--[endif]-->Onsite medical care including primary care, mental health, and supportive care

<!--[if !supportLists]-->• <!--[endif]-->Wrap-around Services

<!--[if !supportLists]-->• <!--[endif]-->Feeding

<!--[if !supportLists]-->• <!--[endif]-->Cleaning and sanitation

<!--[if !supportLists]-->• <!--[endif]-->Case management and logistics for departure

<!--[if !supportLists]-->• <!--[endif]-->Individuals who would require hospitalization would be transported via ambulance to a local health care facility in Orange County.

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
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CITY OF COSTA MESA, et al.,
Plaintiffs,
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Defendants.

Case No. 8:20-cv-00368-JLS (JDE)
**DECLARATION OF ERIC
LAMOUREUX IN SUPPORT
OF STATE OF CALIFORNIA
DEFENDANTS' OPPOSITION
TO PLAINTIFFS' MOTION
FOR TEMPORARY
RESTRAINING ORDER AND
ORDER TO SHOW CAUSE**

1 I, Eric Lamoureux, declare:

2 1. I am a resident of the State of California. I am over the age of 18 and
3 have personal knowledge of all the facts stated herein. If called as a witness, I could
4 and would testify competently to all the matters set forth below.

5 2. I am the Acting Deputy Director of Response Operations for the
6 California Governor's Office of Emergency Services (Cal OES). I have been
7 serving in this capacity since November 2017. My duties as Acting Deputy Director
8 of Response Operations include overseeing the State Warning Center, State
9 Operations Center, Cal OES Law Enforcement and Fire and Rescue Branches, Cal
10 OES Regional Operations, and overall Response Operations, which includes
11 coordinating with federal, state, and local partners in advance of and response to
12 emergencies throughout California, and tasking state agencies for the same.

13 3. Cal OES operates under the authority of the California Emergency
14 Services Act (Government Code section 8550, et seq.). Pursuant to the Emergency
15 Services Act, Cal OES is responsible for the state's emergency and disaster
16 response services for natural, technological, or manmade disasters and emergencies,
17 including responsibility for activities necessary to prevent, respond to, recover
18 from, and mitigate the effects of emergencies and disasters to people and property.

19 4. Additionally, Cal OES serves in a coordination role with respect to the
20 functions of other state agencies and departments as they relate to an emergency,
21 both in advance of and subsequent to that emergency.

22 5. In my role as Acting Deputy Director of Response Operations, I
23 oversee these coordination and response activities.

24 6. With respect to the novel coronavirus that emerged as a global health
25 risk in early 2020, COVID-19, Cal OES serves in a support role to the California
26 Health and Human Services Agency (CHHS) in its response to contain COVID-19
27 statewide. This has included assisting CHHS in managing operational demands
28 associated with the federally-imposed quarantine of individuals who have arrived in

1 California through the federal government’s two ports of entry for travelers from
2 China, as well as those individuals who have arrived through the federal
3 government’s repatriation efforts.

4 7. Cal OES has coordinated the mobilization of state resources to support
5 CHHS’ efforts to manage the impacts of quarantined populations spread across
6 California at Federal military bases. This includes Cal OES facilitating a multi-
7 agency coordination effort to identify state-owned facilities that could augment
8 federal efforts to quarantine both symptomatic and asymptomatic populations. To
9 accomplish this, Cal OES tasked the Department of General Services (DGS) to
10 conduct property inventory surveys; tasked the California National Guard (CNG) to
11 identify CNG facilities for potential use (which included Camp Roberts); led
12 assessment teams of Cal OES logisticians and California Department of Social
13 Services staff in assessing state facilities to determine if the facilities would satisfy
14 the clinical requirements for quarantine; and most recently tasked DGS to conduct
15 cleaning services at the Fairview Developmental Center site, while the State
16 awaited the federal government’s final decision regarding whether the Fairview
17 facility would be utilized to house travelers requiring quarantine. Cal OES has
18 tasked DGS to establish transportation contracts to safely move travelers from
19 federal points of entry to quarantine sites statewide. Cal OES has delivered
20 thousands of N95 masks from State stockpiles to local government agencies that
21 have been supporting federal quarantine efforts.

22 8. Cal OES also coordinated between its Law Enforcement Branch and
23 the United States Marshall Service to ensure for proper security at relevant sites,
24 including state facilities that have been considered as potential quarantine sites.

25 9. Cal OES’ efforts have been taking place ever since the first
26 repatriation flight of United States Citizens arrived in California in late January
27 2020. That coordination effort initially included working with San Bernardino
28 County to standup a congregate quarantine site at Ontario Airport, which the Center

1 for Disease Control determined would not meet the clinical requirements for
2 quarantine.

3 10. In addition to tasking or coordinating with other California state
4 agencies to support CHHS operations, Cal OES has provided a critical information
5 and coordination link to local emergency managers in counties where the federal
6 government was quarantining at military installations, including Riverside, San
7 Diego, and Solano counties, and with local emergency managers and public safety
8 officials in counties where travelers from China were arriving (i.e. Los Angeles for
9 Los Angeles International Airport and San Mateo and San Francisco for San
10 Francisco International Airport).

11 11. With regard to the use of State facilities, Cal OES has facilitated
12 communications prior to any operations taking place with local government
13 officials in the jurisdiction where those facilities were identified. This included
14 communications with San Luis Obispo County and Monterey County when Camp
15 Roberts was being considered as a potential quarantine site; with Los Angeles, San
16 Mateo, and San Francisco counties, where travelers were arriving through Los
17 Angeles and San Francisco international airports; and most recently with Orange
18 County and the City of Costa Mesa, after the Fairview facility had been identified
19 as a potentially viable quarantine location, but prior to the federal government
20 making a full assessment to determine if it would appropriately support the
21 operational demands associated with the federal government's potential use of the
22 site to maintain a federally-imposed quarantine.

23 12. On Thursday night, February 20, 2020, I held a conference call with
24 emergency managers from both Orange County and the City of Costa Mesa
25 regarding the potential use of the Fairview facility

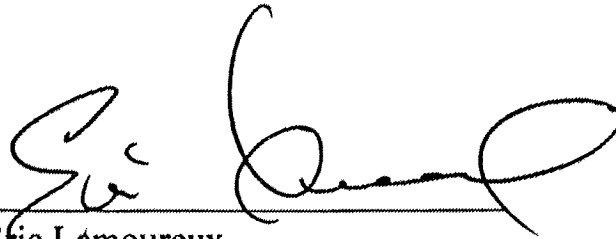
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1 I declare under penalty of perjury under the laws of the United States and the
2 State of California that the foregoing is true and correct to the best of my
3 knowledge.

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5 Executed on February 23, 2020, in Placerville, California.

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11 Eric Lamoureux
12 Deputy Director of Response Operations (Acting)
13 CA Governor's Office of Emergency Services
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 Services, and the California Department of
 10 General Services

11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 13 SOUTHERN DIVISION
 14

15
 16 **CITY OF COSTA MESA, et al.,**
 Plaintiffs,
 17 v.
 18 **UNITED STATES OF AMERICA, et**
 al.,
 19 Defendants.

Case No. 8:20-cv-00368-JLS (JDE)
**DECLARATION OF DANIEL
 C. KIM IN SUPPORT OF
 STATE OF CALIFORNIA
 DEFENDANTS' OPPOSITION
 TO PLAINTIFFS' MOTION
 FOR TEMPORARY
 RESTRAINING ORDER AND
 ORDER TO SHOW CAUSE**

1 I, Daniel C. Kim, declare:

2 1. I am a resident of the State of California. I am over the age of 18 and
3 have personal knowledge of all the facts stated herein. If called as a witness, I could
4 and would testify competently to all the matters set forth below.

5 2. I am the Director of the California Department of General Services
6 (DGS). I have been serving in this capacity since June 2015. As Director, I serve
7 as the state's business operations manager, and my duties include overseeing all
8 divisions and offices within DGS, including the Real Estate Services Division,
9 Procurement Division, Facilities Management Division, Division of the State
10 Architect Office of Administrative Hearings, Interagency Support Division, and
11 Administrative Division.

12 3. Among the several functions under DGS's authority, DGS provides a
13 wide array of real estate services to state agencies, including management of all
14 state-owned and leased facilities. DGS maintains an inventory of these properties
15 and leases in the Statewide Property Inventory.

16 4. Pursuant to its authority under the California Emergency Act, the
17 California Governor's Office of Emergency Services (CAL OES) tasked DGS to
18 perform certain activities with respect to the Novell Coronavirus that emerged as a
19 global health risk in 2020, COVID (2019). CAL OES tasked DGS to conduct
20 property inventory surveys to identify underutilized state properties for potential
21 use as quarantine locations. DGS identified the Fairview Developmental Center as
22 a potential site as a quarantine location.

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1 5. In addition, on February 21, 2020, DGS received a task from CAL
2 OES to clean two residence halls at the Center in the event they would need to be
3 occupied. This cleaning included minor maintenance and repairs and was largely
4 completed on February 22, 2020.

5 I declare under penalty of perjury under the laws of the United States and the
6 State of California that the foregoing is true and correct to the best of my
7 knowledge.

8 Executed on February 23, 2020, in Sawarntz, California.



Daniel C. Kim
Director of the California Department of General
Services

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EXHIBIT 6

COVID-19 Preparedness

April 13, 2020 update:

Please see today's update on CDCR and CCHCS COVID-19 preparedness and response.

- *As of April 13, 2020, there are 55 incarcerated persons who have tested positive for COVID-19. See the CDCR and CCHCS Patient Testing Tracker (<https://www.cdcr.ca.gov/covid19/population-status-tracking/>) for the latest testing and case information for the incarcerated population.*
- *There are currently 78 CDCR/CCHCS employees who have tested positive for COVID-19. See the CDCR/CCHCS COVID-19 Employee Status webpage (<https://www.cdcr.ca.gov/covid19/cdcr-cchcs-covid-19-status/>) for a breakdown by location.*
- *Since March 25, CDCR has reduced its state prison population by 6,758 inmates, allowing for more space and flexibility in housing inmates statewide. The reduction was achieved through CDCR's expedited release plan (<https://www.cdcr.ca.gov/news/2020/03/31/cdcr-announces-plan-to-further-protect-staff-and-inmates-from-the-spread-of-covid-19-in-state-prisons/>) and the suspension of intake of incarcerated persons from county jails through a March 24 Executive Order (<https://www.gov.ca.gov/2020/03/24/governor-newsom-issues-executive-order-on-state-prisons-and-juvenile-facilities-in-response-to-the-covid-19-outbreak/>). CDCR has also transferred approximately 500 inmates from dorm settings into vacant spaces to allow for greater physical distancing. Transfers were completed with personal protective equipment provided to both staff and the incarcerated population where physical distancing could not be achieved.*
- *CDCR and CCHCS have provided information to health care staff about Governor Newsom's Non-Congregate Sheltering for California Health Care Workers Program (<https://www.gov.ca.gov/2020/04/09/governor-newsom-announces-new-program-to-provide-front-line-health-care-workers-with-hotel-rooms/>), which assists health care workers with hotel accommodations to allow for self-isolation or quarantine to help keep workers' families safe. The program will prioritize health care workers who come in contact with or are suspected of having direct contact with COVID-19 patients, or who test positive for COVID-19 but do not require hospitalization. Health care workers who believe they are eligible based on self-certification questions outlined in this memo (https://www.cdcr.ca.gov/covid19/wp-content/uploads/sites/197/2020/04/R_Healthcare-Worker-Hotel-Program-Memo-4-11-2020-004.pdf) should contact the CalTravelStore.*

(para español, haga clic aquí (<https://www.cdcr.ca.gov/covid19/preparacion-covid-19/>)). Las traducciones al español se proporcionan dentro de las 24 horas de una actualización)

Executives and staff at CDCR and CCHCS are working closely with infectious disease control experts to minimize the impact of COVID-19 on our operations. To ensure we are ready to immediately respond to any COVID-19 related incident, CDCR and CCHCS activated the Department Operations Center (DOC) in order to be fully prepared to respond to any departmental impacts resulting from COVID-19.

CDCR and CCHCS are dedicated to the safety of everyone who lives in, works in, and visits our state prisons. We have longstanding outbreak management plans in place to address communicable disease outbreaks such as influenza, measles, mumps, norovirus, and varicella, as well as preparedness procedures to address a variety of medical emergencies and natural disasters.

Public safety is a top priority for CDCR, as is the health of our community. The department has been diligent in implementing proactive efforts to ensure health and safety, including recent actions to limit the risks and spread of COVID-19. Examples include limiting all non-essential or emergency transportations between CDCR facilities; screening all who enter the prisons; and suspending visits by the public. As a further protective measure, Governor Newsom issued an executive order (<https://www.gov.ca.gov/2020/03/24/governor-newsom-issues-executive-order-on-state-prisons-and-juvenile-facilities-in-response-to-the-covid-19->

outbreak/) recently directing CDCR to temporarily halt the intake of inmates and youth into the state's 35 prisons and four youth correctional facilities. We are continuously evaluating and implementing proactive measures to help prevent the spread of COVID-19 and keep our CDCR population and the community-at-large safe.

BELOW IS AN OVERVIEW OF STEPS WE ARE TAKING REGARDING COVID-19

Modified Program

Effective April 8, 2020, all CDCR adult institutions will implement a mandatory 14-day modified program (<https://www.cdcr.ca.gov/covid19/wp-content/uploads/sites/197/2020/04/COVID19-Modified-Program.pdf?label=Mandatory%2014-day%20Modified%20Program&from=https://www.cdcr.ca.gov/covid19/memos-guidelines-messaging/>). While movement has been limited throughout institutions already, CDCR has implemented these mandatory restrictions statewide for two weeks in order to further reduce staff and inmate exposure to COVID-19.

"This is a time where we are all truly in this together, we are all experiencing changes in our daily lives in an effort to do what's for the greater good of us all," CDCR Secretary Ralph Diaz said. "For the next 14 days there are going to be a lot of changes within our institutions, but we do it with the overall health and safety of all those who live and work in them, and the health and safety of the public, at the forefront. We will continue to seek ways for the incarcerated population to stay in touch with their support systems, retrieve items from canteen services, and have out-of-cell time that we know is important for overall physical and mental health. We ask for patience and an understanding that we are doing everything we can to create better physical distancing within our institutions, staff and inmates—we are all Californians in this effort."

While these restrictive measures are mandatory, the incarcerated population will still have access to medication, health care services, yard time, canteen, packages, and cell-front religious programming while allowing for physical distancing and proper cleaning/disinfecting. Showers and telephones will be disinfected between each use.

Meals will be served in cells or housing units. Recreation/yard time will be allowed; however, schedules will be staggered by housing unit to increase physical distancing. If canteen cannot be accommodated during yard time, staff will facilitate delivery to housing units. Only inmates classified as critical workers will be permitted to report to work.

Community Resource Managers and education staff will provide program materials, games, books, etc., to housing units. Staff will conduct additional rounds to ensure the safety and well-being of those on modified program.

Expedited release and plan to increase space within institutions

On March 31, CDCR announced its plan to further protect staff and inmates (<https://www.cdcr.ca.gov/news/2020/03/31/cdcr-announces-plan-to-further-protect-staff-and-inmates-from-the-spread-of-covid-19-in-state-prisons/>) from the spread of COVID-19 in state prisons.

CDCR has expedited the transition to parole for eligible inmates who have 60 days or less to serve on their sentences and are not currently serving time for a violent crime as defined by