APPENDIX

TABLE OF CONTENTS

Page

Appendix A – *Polanco* court of appeals opinion (Aug. 7, 2023) 1a

Appendix B – *Polanco* district court decision (Mar. 3, 2022) 34a

Appendix C – *Polanco* court of appeals order denying rehearing (Nov. 16, 2023) 76a

Appendix D – *Hampton* court of appeals opinion (Oct. 3, 2023) 78a

Appendix E – *Hampton* court of appeals memorandum (Oct. 3, 2023) 111a

Appendix F – *Hampton* district court amended decision (Mar. 20, 2022) 114a

Appendix G – *Hampton* district court order denying reconsideration (Mar. 20, 2022) 149a

Appendix H – *Hampton* district court decision (Jan. 21, 2021) 152a

Appendix I – *Cooper* and *Harris* memorandum (Oct. 13, 2023) 181a

Appendix J – *Cooper* district court decision (July 15, 2022) 187a

Appendix K – *Harris* district court decision (May 18, 2022) 213a

Appendix L – Constitutional and statutory provisions:

U.S. Const. amend. VIII 237a

U.S. Const. amend. XIV, § 1 .... 237a

42 U.S.C. § 1983 .... 237a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-15496

D.C. No. 3:21-cv-06516-CRB

PATRICIA POLANCO; VINCENT POLANCO; SELENA POLANCO; GILBERT POLANCO, Deceased,
Plaintiffs-Appellees,

v.

RALPH DIAZ; ESTATE OF ROBERT S. THARRATT; RONALD DAVIS, Warden; RONALD BROOMFIELD; CLARENCE CRYER; ALISON PACHYNSKI, MD; SHANNON GARRIGAN, MD,
Defendants-Appellants,

and

STATE OF CALIFORNIA; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; SAN QUENTIN STATE PRISON; LOUIE ESCOBELL, RN; MUHAMMAD FAROOQ, MD; KIRK A TORRES, MD,
Defendants.

Appeal from the United States District Court for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted March 8, 2023
San Francisco, California

Filed August 7, 2023

Before: Michelle T. Friedland and Ryan D. Nelson, Circuit Judges, and Kathleen Cardone,* District Judge.

Opinion by Judge Friedland;
Dissent by Judge R. Nelson

OPINION

FRIEDLAND, Circuit Judge:

A few months into the COVID-19 pandemic, high-level officials in the California prison system transferred 122 inmates from the California Institution for Men, where there was a widespread COVID-19 outbreak, to San Quentin State Prison, where there were no known cases of the virus. The transfer sparked an outbreak of COVID-19 at San Quentin that ultimately killed one prison guard and over twenty-five inmates. The guard's family members sued the prison officials, claiming that the officials violated the guard's due process rights. The officials moved to dismiss, arguing that they were entitled to qualified immunity. The district court denied the motion with respect to some of the officials, who then filed this interlocutory appeal. We affirm.

* The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

I.

A.

On March 4, 2020, California Governor Gavin Newsom proclaimed a State of Emergency due to COVID-19.[1] The declaration was quickly followed by other emergency measures at the state and local levels, including shelter-in-place orders and mask mandates. Later that month, Governor Newsom issued an executive order suspending the intake of inmates into all state correctional facilities. Around the same time, California Correctional Health Care Services adopted a policy opposing the transfer of inmates between prisons, reasoning that transfers would "carr[y] [a] significant risk of spreading transmission of the disease between institutions."

Defendants—a group of high-level officials at San Quentin and the California Department of Corrections and Rehabilitation ("CDCR")—were aware of the risks that COVID-19 posed in a prison setting. All had been briefed about the dangers of COVID-19, the highly transmissible nature of the virus, and the necessity of taking precautions (such as social distancing, mask-wearing, and testing) to prevent its spread. Defendants were also aware that containing an outbreak at San Quentin would be particularly difficult due to its tight quarters, antiquated design, and poor ventilation. As of late May 2020, though, San Quentin appeared to be weathering the storm with no known cases of COVID-19. Other prisons were not so fortunate. The California Institution for Men ("CIM")

---

[1] In an appeal of a denial of qualified immunity at the motion to dismiss stage, we accept as true all well-pleaded allegations in the Complaint. *See Padilla v. Yoo*, 678 F.3d 748, 757 (9th Cir. 2012).

suffered a severe outbreak, which by late May had killed at least nine inmates and infected over six hundred.

In an attempt to prevent further harm to CIM inmates, on May 30, Defendants transferred 122 CIM inmates with high-risk medical conditions to San Quentin. The transfer did not go well. Most of the men who were transferred had not been tested for COVID-19 for over three weeks, and none of the transferred inmates were properly screened for symptoms before being "packed" onto buses to San Quentin "in numbers far exceeding COVID-capacity limits that CDCR had mandated for inmate safety." Although some inmates exhibited symptoms while on the bus, Defendants did not quarantine the newly arriving inmates. They placed nearly all the transferred inmates in a housing unit with grated doors (allowing air to flow in and out of the cells) and had them use the same showers and eat in the same mess hall as other inmates.

Two days after the inmates arrived at San Quentin, the Marin County Public Health Officer learned of the transfer and scheduled an immediate conference call with some Defendants. On the call, the Public Health Officer recommended that the transferred inmates be completely sequestered from the original San Quentin population, that all exposed inmates and staff be required to wear masks, and that staff movement be restricted between different housing units to prevent the spread of COVID-19. Despite being timely informed of the Public Health Officer's recommendations, Defendants did not heed his advice. Instead, they ordered that the Public Health Officer be informed that he lacked the authority to mandate measures in a state-run prison.

COVID-19 soon began to sweep through San Quentin. Within days of the transfer, twenty-five of the transferred inmates had tested positive. Over a three-week period, San Quentin went from zero confirmed cases of COVID-19 to nearly five hundred.

In mid-June, a court-appointed medical monitor of California prisons (the "Receiver")[2] requested that a group of health experts investigate the outbreak at San Quentin. The health experts wrote an "Urgent Memo" warning that the COVID-19 outbreak at San Quentin could escalate into a "full-blown local epidemic and health care crisis in the prison and surrounding communities" if not contained. The memo criticized many practices at San Quentin, noting, for instance, that personal protective equipment and masks were not provided to staff and inmates despite being readily available. Even when staff had masks, many wore them improperly or failed to wear them at all. The prison's testing protocol, too, was inadequate, suffering from what the memo considered "completely unacceptable" delays. Defendants were informed of the memo but did not adopt its recommendations. Indeed, when two research labs offered to provide COVID-19 testing at the prison, Defendants refused the offers, even though one offered to do so for free.

The outbreak continued to spread. By July, more than 1,300 inmates and 184 staff had tested positive.

---

[2] In response to a class action, the United States District Court for the Northern District of California held in 2005 that the medical services in California prisons failed to meet the constitutional minimum. *See Plata v. Schwarzenegger*, No. C01-1351, 2005 WL 2932253, at *1 (N.D. Cal. Oct. 3, 2005). It accordingly appointed a receiver tasked with establishing a constitutionally adequate medical system. *See id.*

Two months later, those numbers had ballooned to more than 2,100 inmates and 270 staff. As of early September, approximately twenty-six inmates and one guard had died of COVID-19.

B.

That one guard was Sergeant Gilbert Polanco. At the time of the transfer, Polanco was fifty-five years old and had worked at San Quentin for more than two decades. Polanco had multiple health conditions that put him at high risk of mortality if he were to contract COVID-19, including obesity, diabetes, and hypertension. During the pandemic, one of his duties was to drive sick inmates—including those with COVID-19—to local hospitals. On those trips, Defendants refused to provide Polanco (or the inmates he was driving) with personal protective equipment.

In late June, Polanco contracted COVID-19. By July, his condition had worsened, and he was admitted to the hospital. He died of complications caused by COVID-19 in August.

C.

Polanco's wife and children (collectively, "Plaintiffs") sued Defendants under 42 U.S.C. § 1983 in the United States District Court for the Northern District of California. Their Complaint alleges that Defendants violated Polanco's substantive due process rights by affirmatively, and with deliberate indifference, placing him in danger. It also alleges that Defendants violated Plaintiffs' substantive due process rights to familial association.[3]

---

[3] The Complaint also alleges various statutory and common law claims that are not at issue in this appeal.

Defendants moved to dismiss, arguing, among other things, that they are entitled to qualified immunity on Plaintiffs' constitutional claims. The district court rejected that argument, holding that Defendants are not entitled to qualified immunity on the face of the Complaint.[4] Defendants timely appealed the district court's denial of qualified immunity.

II.

We have jurisdiction under the collateral order doctrine to review a district court's rejection of a qualified immunity defense at the motion to dismiss stage, *Ashcroft v. Iqbal*, 556 U.S. 662, 671–72 (2009), and we review such a denial de novo, *Hernandez v. City of San Jose*, 897 F.3d 1125, 1131–32 (9th Cir. 2018). When engaging in such review, we "accept[] as true all well-pleaded allegations" and "construe[] them in the light most favorable to the non-moving party." *Id.* at 1132 (quoting *Padilla v. Yoo*, 678 F.3d 748, 757 (9th Cir. 2012)).

III.

We must affirm the district court's denial of qualified immunity if, accepting all of Plaintiffs' allegations as true, Defendants' conduct "(1) violated a constitutional right that (2) was clearly established at the time of the violation." *Ballou v. McElvain*, 29 F.4th 413, 421 (9th Cir. 2022). At the motion to dismiss stage, "dismissal is not appropriate unless we can determine, based on the complaint itself, that qualified immunity applies." *O'Brien v. Welty*, 818

---

[4] Plaintiffs also asserted claims against some high-level officials from CIM. The district court granted the motion to dismiss with respect to those defendants. That aspect of the district court's order is not at issue in this appeal.

F.3d 920, 936 (9th Cir. 2016) (quoting *Groten v. California*, 251 F.3d 844, 851 (9th Cir. 2001)). Based on the Complaint here, we hold that Defendants are not entitled to qualified immunity.

A.

Plaintiffs sufficiently allege a violation of Polanco's due process right to be free from a state-created danger.

The Fourteenth Amendment's mandate that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law" confers both procedural and substantive rights. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 194–95 (1989) (alterations in original) (quoting U.S. Const. amend. XIV). The substantive component of that clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The Due Process Clause does not "impose an affirmative obligation on the State" to protect a person's life, liberty, or property; it acts as a "limitation on the State's power to act" rather than a "guarantee of certain minimal levels of safety and security." *DeShaney*, 489 U.S. at 195. The "general rule," then, is that "a state actor is not liable under the Due Process Clause 'for its omissions.'" *Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016) (quoting *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000)).

But there are exceptions to this general rule. *See id.* As relevant here, under the state-created-danger doctrine, state actors may be liable "for their roles in

creating or exposing individuals to danger they otherwise would not have faced." *Id.* (quoting *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2006)). In the context of public employment, although state employers have no constitutional duty to provide their employees with a safe working environment, *see Collins*, 503 U.S. at 126, the state-created-danger doctrine holds them liable when they affirmatively, and with deliberate indifference, create or expose their employees to a dangerous working environment. We have recognized, for instance, that a state employer can be liable under the state-created-danger doctrine for knowingly assigning an employee to work in a building infected with toxic mold, *see Pauluk*, 836 F.3d at 1125, or for requiring a prison employee to work alone with an inmate likely to cause her serious harm, *see L.W. v. Grubbs*, 974 F.2d 119, 123 (9th Cir. 1992).

To state a due process claim under the state-created-danger doctrine, a plaintiff must first allege "affirmative conduct on the part of the state," *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 974 (9th Cir. 2011) (quoting *Munger*, 227 F.3d at 1086), that exposed him to "an actual, particularized danger that [he] would not otherwise have faced," *Martinez v. City of Clovis*, 943 F.3d 1260, 1271 (9th Cir. 2019). Second, a plaintiff must allege that the state official acted with "deliberate indifference" to that "known or obvious danger." *Id.* (quoting *Patel*, 648 F.3d at 971–72).

1.

Plaintiffs' allegations satisfy the first requirement, which has several components. The state must have taken actions that placed the plaintiff in a "worse position" than he would have been in "had [the state] not acted at all." *Pauluk*, 836 F.3d at 1124 (alteration in original) (quoting *Johnson v. City of Seattle*, 474

F.3d 634, 641 (9th Cir. 2007)). The act must have exposed the plaintiff to an "actual, particularized danger," and the resulting harm must have been foreseeable. *Id.* at 1125 (quoting *Kennedy*, 439 F.3d at 1063).

The transfer of 122 inmates from CIM to San Quentin was plainly affirmative conduct, as was the decision to house the transferred inmates in open-air cells and have them share facilities with the general San Quentin population. And the transfer placed Polanco in a much more dangerous position than he was in before. Prior to the transfer, there were no known cases of COVID-19 at San Quentin; after the transfer, there were many. That harm was foreseeable, because Defendants transferred inmates from a prison experiencing an active COVID-19 outbreak to a prison that had managed to avoid such an outbreak—and did so without properly testing or screening the transferred inmates for COVID-19, revising the plan when inmates fell ill on the buses, or quarantining the inmates upon their arrival. The allegations paint a clear picture: San Quentin had managed to keep COVID-19 out, but Defendants brought it in.[5]

So too was the danger "particularized." Affirmative state action that exposes a broad swath of the public to "generalized dangers" cannot support a state-created-danger claim. *See Sinclair v. City of Seattle*, 61 F.4th 674, 676, 683 (9th Cir. 2023) (holding that the plaintiff had not alleged a state-created-

[5] As alleged in the Complaint, each Defendant was involved in the administrative decisions underlying the due process claim. We accordingly reject Defendants' argument that some Defendants are entitled to qualified immunity because of their status as "medical officials."

danger claim because "the City-created danger was a generalized danger experienced by all those members of the public who chose to visit" a certain part of the city). But a danger can be "particularized" even if it is directed toward a group rather than an individual. *See Hernandez*, 897 F.3d at 1133 (holding that the danger to which the state exposed a group of protesters was sufficiently particularized to support a state-created-danger claim). The danger here falls into the latter category because the transfer exposed a "discrete and identifiable group"—prison guards and inmates at San Quentin—to the dangers of COVID-19. *See Sinclair*, 61 F.4th at 683.

Finally, the danger to which Polanco was exposed was sufficiently severe to raise constitutional concerns. Although our precedent has not elaborated on the level of harm required to sustain a state-created-danger claim, it has been implicit in our cases that not any risk will do—the harm must be severe enough to constitute a "danger." *See, e.g.*, *Grubbs*, 974 F.2d at 120 (assault, battery, kidnapping, and rape); *Kennedy*, 439 F.3d at 1058 (murder); *Pauluk*, 836 F.3d at 1120 (serious illness leading to death); *Hernandez*, 897 F.3d at 1130 (assault and battery resulting in serious injuries); *Martinez*, 943 F.3d at 1269 (physical and sexual violence). We do not attempt to delimit here the range of harms that count, but we are confident that exposure to COVID-19, at least in a pre-vaccine world, does.

Defendants respond that they cannot be held responsible for Polanco's death, because "[g]uards are free to refuse to work in a prison." In Defendants' view, Polanco assumed the risk of COVID-19 exposure by accepting—and not quitting—his job as a corrections officer. But that argument runs headlong

into *Pauluk*, in which we held that a public employer's deliberately indifferent transfer of an employee to an office building infected with toxic mold would be a constitutional violation even if the employee was aware of the mold and presumably could have quit his job when he learned of the transfer. *See* 836 F.3d at 1125. If the employee's ability to leave his post did not defeat the constitutional claim in *Pauluk*, it cannot defeat the claim here.[6]

2.

Plaintiffs' allegations also satisfy the "deliberate indifference" requirement. In the context of a state-created-danger claim, deliberate indifference is a subjective standard that requires a plaintiff to allege facts supporting an inference that the official "recognized an unreasonable risk and actually intended to expose the plaintiff to such risk." *Herrera v. L.A. Unified Sch. Dist.*, 18 F.4th 1156, 1160–61 (9th Cir. 2021).[7]

---

[6] Defendants rely on a Third Circuit case that suggested in dicta that public employees' freedom to leave their jobs may limit the scenarios in which employees can bring claims under the state-created-danger doctrine to those involving "deliberate misrepresentations" by their public employer about the level of danger. *See Kaucher v. County of Bucks*, 455 F.3d 418, 430 (3d Cir. 2006). But the Third Circuit has since refrained from embracing that dicta, describing *Kaucher* as standing for the proposition that "a government employee may bring a substantive due process claim against his employer if the state compelled the employee to be exposed to a risk of harm not inherent in the workplace." *Kedra v. Schroeter*, 876 F.3d 424, 436 n.6 (3d Cir. 2017). That description of the state-created-danger doctrine aligns with the doctrine in our circuit.

[7] In a different context, we held that the requisite mental state for a Fourteenth Amendment due process claim is an objective

The Complaint alleges that Defendants were aware of the danger that transferring potentially COVID-positive inmates to San Quentin would pose to San Quentin's employees. By the time of the transfer, state and local governments had enacted a range of emergency health measures designed to prevent the spread of COVID-19, including requirements to mask when interacting with individuals outside one's household. As Plaintiffs allege, by May 2020, anyone in California "vaguely paying attention" to the news would have understood that COVID-19 was "highly contagious" and "potentially deadly" and would have been aware of the basic rules to prevent its spread, such as limiting contact with people outside one's household, social-distancing, wearing masks, quarantining after exposure, and testing. In addition, California Correctional Health Care Services had opposed transfers between prisons because of the "significant risk" of transmitting the disease between institutions. Plaintiffs also allege that Defendants understood that San Quentin's construction posed unique challenges to containing a potential outbreak due to its tight quarters, shared spaces, and poor ventilation.

Despite that knowledge, Defendants went ahead with the transfer. That allegation, alone, does not compel an inference that Defendants were deliberately indifferent—for example, had Defendants

form of deliberate indifference. *See Castro v. County of Los Angeles*, 833 F.3d 1060, 1069–70 (9th Cir. 2016) (en banc). But we have continued to apply a purely subjective test to state-created-danger claims. *See Herrera*, 18 F.4th at 1160–61 (recognizing a tension between the requisite mental states in *Castro* and post-*Castro* state-created-danger cases but holding that it was bound by the latter cases).

acted to mitigate the risks inherent in a transfer, those efforts could show that Defendants had not intended to expose prison employees to an unreasonable risk. *See Patel*, 648 F.3d at 976 (holding that a teacher's "lapse in judgment" did not rise to the level of deliberate indifference because she was "fairly active" in attempting to protect the plaintiff); *Herrera*, 18 F.4th at 1163–64 (holding that a school aid was not deliberately indifferent to the dangers a student faced because the aid neither "abandoned" the student nor "left him completely without protection").

But according to the Complaint, Defendants did not attempt to mitigate the risk. Despite their knowledge of the dangers of COVID-19 and of the basic measures to prevent its spread, Defendants did not take precautions to avoid transferring COVID-positive inmates to San Quentin or to decrease the likelihood that COVID-19 would spread from transferred inmates to San Quentin employees. They moved ahead with the transfer while knowing that the inmates' test results were woefully out of date. They failed to properly screen the inmates for symptoms before the transfer; many inmates were screened too early to determine whether they had symptoms before boarding crowded buses. And Defendants increased the risk that COVID-19 would spread throughout the prison by placing the transferred inmates in cells with grated rather than solid doors, having transferred inmates use the same showers and mess hall as the other inmates, and failing to provide masks or testing to inmates and staff.

Defendants protest that the outbreak at CIM necessitated a rapid transfer. But even if we were to assume that the transfer itself could not have been done more carefully, Defendants disregarded the

safety of San Quentin employees after the transfer, repeatedly ignoring express warnings that their COVID-19 policies were insufficient and dangerous. Two days after the transfer, the Marin County Public Health Officer recommended that all transferred inmates be completely sequestered from the original San Quentin population and that all exposed inmates and staff be required to wear masks. Rather than adopt the Health Officer's recommendations, Defendants ordered that the Officer be informed that he lacked the authority to mandate measures in their prison. Further warnings came a few weeks later, when a group of health experts prepared an "Urgent Memo" for Defendants. Those experts cautioned that San Quentin was at high risk of a "catastrophic super-spreader event" due to its inadequate testing and "grave lack of personal protective equipment and masks." Defendants did not follow those experts' recommendations to adopt masking and testing requirements either, despite the availability of both masks and tests.

Taking the allegations in the Complaint as true, this is a textbook case of deliberate indifference: Defendants were repeatedly admonished by experts that their COVID-19 policies were inadequate, yet they chose to disregard those warnings. *See Hernandez*, 897 F.3d at 1136 (holding that allegations rose to the level of subjective deliberate indifference because defendants were "aware of the danger to the plaintiffs" and yet "continued" their problematic course of conduct).

In their briefs on appeal, Defendants offer a different telling of the facts. In their view, the allegations do not rise to the level of deliberate indifference because Defendants faced an impossible

tradeoff: the welfare of high-risk CIM inmates on the one hand and the safety of San Quentin employees on the other. The Constitution, Defendants argue, cannot require prison officials to place the safety of their staff above the safety of the inmates entrusted to their care.

We are sympathetic to the competing priorities that public officials had to navigate during the early days of the COVID-19 pandemic. But the specific tradeoff that Defendants invoke here is incompatible with the Complaint. Taking Plaintiffs' allegations as true and drawing reasonable inferences in their favor, as we must at this stage of the proceedings, properly testing and screening the inmates before the transfer would have made the transfer safer for both San Quentin employees and the transferred inmates. Quarantining the transferred inmates, too, would have benefitted all parties. And when it comes to masks and tests, the Complaint expressly alleges that there was *no* such tradeoff, asserting that masks and other personal protective equipment were "easily obtainable" and highlighting two separate occasions on which Defendants turned down labs' offers to provide COVID-19 testing at San Quentin, at least one of which offered to do so for free. On the face of the Complaint, there is no room for Defendants' version of the events. We therefore hold that Plaintiffs have sufficiently alleged that Defendants acted with deliberate indifference toward the health and safety of San Quentin employees, including Polanco, satisfying the second prong of the state-created-danger claim.

B.

Not only has Polanco alleged a violation of his due process right to be free from a state-created danger, but that right was also "clearly established at the time

of the violation." *Pauluk*, 836 F.3d at 1125 (quoting *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 532 (9th Cir. 2010)).

For the unlawfulness of an officer's conduct to be "clearly established," it must be the case that, "at the time of the officer's conduct, the law was 'sufficiently clear that every reasonable official would understand that what he [wa]s doing' [wa]s unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). "In other words, existing law must have placed the [un]constitutionality of the officer's conduct 'beyond debate.'" *Id.* (quoting *al-Kidd*, 563 U.S. at 741).

Plaintiffs have met that demanding standard because the unlawfulness of Defendants' alleged actions was clearly established by the combination of two of our precedents: *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), and *Pauluk v. Savage*, 836 F.3d 1117 (9th Cir. 2016).[8]

In *Grubbs*, we recognized a state-created-danger claim arising out of a prison's disregard for the safety of one of its employees. The plaintiff, a nurse working

---

[8] We routinely rely on the intersection of multiple cases when holding that a constitutional right has been clearly established. *See, e.g.*, *Ioane v. Hodges*, 939 F.3d 945, 957 (9th Cir. 2018) ("Taken together, the holdings from [four prior cases] put the unlawfulness of [the officer's] conduct beyond debate."); *Gordon v. County of Orange*, 6 F.4th 961, 971 (9th Cir. 2021) (holding that the relevant right was clearly established by the "principles drawn from" three cases); *Ballou v. McElvain*, 29 F.4th 413, 426-27 (9th Cir. 2022) (holding that a right was clearly established by the intersection of two cases). This approach is required by the Supreme Court's instruction that qualified immunity is improper where "a legal principle [has] a sufficiently clear foundation in then-existing precedent." *Wesby*, 138 S. Ct. at 589.

in an Oregon correctional institution, was raped by an inmate. 974 F.2d at 120. She sued her supervisors under § 1983, claiming that they had violated her due process rights by requiring her to work alone with a "violent sex offender" who the officers knew was "very likely to commit a violent crime if placed alone with a female." *Id.* We denied the state's motion to dismiss because the nurse alleged that her supervisors "took affirmative steps to place her at significant risk" and "knew of the risks." *Id.* at 122.

Grubbs presents a close analogy to this case. There, as here, a public employee was harmed due to her employer's deliberately indifferent conduct. And there, as here, the employee worked in a correctional institution and was harmed in the process of carrying out her job duties. Yet there are also differences; the danger in *Grubbs* stemmed from a violent inmate, whereas Polanco was harmed by a disease that he contracted at his workplace. If *Grubbs* were the only relevant precedent, whether Polanco's due process right was clearly established might be a close question.

But *Grubbs* does not stand alone. In *Pauluk*, we again recognized a claim under the state-created-danger doctrine, this time arising from an employer's deliberate indifference to workplace conditions posing serious health risks. A state employee there alleged that his employer violated his due process rights by transferring him to an office building that the employer knew was infested with toxic mold that the employee would foreseeably breathe. 836 F.3d at 1119; *see also id.* at 1134 (Noonan, J., dissenting) ("Pauluk . . . died from inhaling poisonous air in the workplace."). We held that the plaintiff had produced sufficient evidence from which a reasonable jury could

find a constitutional violation by concluding that the state employer affirmatively transferred the employee to the infested building—placing him in a "worse position" than he had been in before—and that the employer acted with deliberate indifference in exposing the employee to the dangerous mold. *Id.* at 1125.

Together, *Grubbs* and *Pauluk* put public officials on notice that they may be liable under the state-created-danger doctrine in a scenario where:

(1) the harmed party is their employee (*Grubbs* and *Pauluk*);

(2) the harmed party encountered the relevant danger in the course of carrying out employment duties in a correctional facility (*Grubbs*);

(3) the danger was created by requiring the employee to work in close proximity to people who posed a risk (*Grubbs*);

(4) the physical conditions of the workplace contributed to the danger (*Pauluk*); and

(5) the danger was a potentially fatal illness caused by breathing contaminated air (*Pauluk*).

Defendants argue that this case is nonetheless unique because it involves a (novel) viral outbreak. But after *Pauluk*, officers were on notice that they could be held liable for affirmatively exposing their employees to workplace conditions that they knew were likely to cause serious illness, including dangers invisible in the air. And taking Plaintiffs' allegations as true—again, as we must do at this stage of the

proceedings—Defendants knew just that.[9] The fact that the illness here was a newly discovered communicable disease rather than a toxin would not have led a reasonable official to conclude that the danger could be ignored.[10] *See al-Kidd*, 563 U.S. at 741 ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate."). COVID-19 may have been unprecedented, but the legal theory that Plaintiffs assert is not.

C.

Defendants raise three additional arguments for why they are entitled to qualified immunity. None succeed.

1.

Defendants urge us to take judicial notice of testimony that the Receiver gave before the California

---

[9] Underpinning much of the dissent is the premise that conditions were simply too uncertain in the spring of 2020 to hold government officials liable for their responses to COVID-19. But at the motion to dismiss stage, we must take all of Plaintiffs' allegations as true, and Plaintiffs have plausibly alleged that Defendants knew of, and consciously disregarded, the risk that COVID-19 posed to San Quentin employees. *See supra* Section III.A.2. If Defendants can show that they in fact lacked such awareness, they may be entitled to qualified immunity at a later stage of this litigation.

[10] In other contexts, we have rejected the argument that the novelty of a particular means of causing harm should, in and of itself, insulate officials from liability. *See, e.g.*, *Nelson v. City of Davis*, 685 F.3d 867, 884 (9th Cir. 2012) ("An officer is not entitled to qualified immunity on the ground that the law is not clearly established every time a novel method is used to inflict injury." (cleaned up) (quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1286 (9th Cir. 2001))).

State Senate, which they argue shows that they were just following orders.

A court may take judicial notice of facts that are "not subject to reasonable dispute" because they are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The fact that the Receiver testified before the California Senate is judicially noticeable under that standard, but that does not mean we can consider the testimony for its truth. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) ("Just because [a] document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth."). Considering the Receiver's version of the events would transform Defendants' motion to dismiss into a motion for summary judgment without offering Plaintiffs an opportunity to depose the Receiver and further develop the record. *See* Fed. R. Civ. P. 12(d). The district court did not abuse its discretion in declining Defendants' request to take judicial notice of the Receiver's testimony.[11]

And even if the testimony could be considered for its truth, Defendants would still not be entitled to immunity. In his testimony before the California Senate, the Receiver suggested that he was involved

---

[11] We also reject Defendants' argument that the Complaint's mention of the Receiver's testimony incorporated the full testimony into the Complaint by reference. *See Orellana v. Mayorkas*, 6 F.4th 1034, 1043 (9th Cir. 2021) (holding that the "mere mention" of a document "is insufficient to incorporate" its contents into a complaint (quoting *Tunac v. United States*, 897 F.3d 1197, 1207 n.8 (9th Cir. 2018))).

in the decision to transfer inmates *out* of CIM, but he did not indicate that he directed Defendants to transfer inmates *to* San Quentin. The testimony also does not suggest that the Receiver directed Defendants' post-transfer protocols.

This case is therefore unlike *Hines v. Youseff*, 914 F.3d 1218 (9th Cir. 2019), or *Rico v. Ducart*, 980 F.3d 1292 (9th Cir. 2020), on which Defendants rely. In both of those cases, the plaintiffs' claims arose from actions state officials took while following the express orders of a federal receiver or an overseeing district court. *See Hines*, 914 F.3d at 1225, 1231; *Rico*, 980 F.3d at 1299–300. Even if we were to consider the Receiver's testimony alongside the Complaint, that is not what the allegations and testimony suggest happened here.

2.

Defendants next invoke a statute that they argue would have led reasonable prison officials to believe that they could handle the COVID-19 outbreak however they saw fit, without a risk of liability. We reject that argument because the statute does not affect the scope or clarity of the underlying constitutional right, which is all that qualified immunity considers.

The Public Readiness and Emergency Preparedness ("PREP") Act, 42 U.S.C. § 247d-6d, "provides immunity from federal and state law claims relating to the administration of certain medical countermeasures during a declared public health emergency." *Cannon v. Watermark Ret. Cmtys., Inc.*, 45 F.4th 137, 138 (D.C. Cir. 2022). Congress passed the Act in 2005 to encourage during times of crisis the "development and deployment of medical

countermeasures" (such as diagnostics, treatments, and vaccines) by limiting legal liability relating to their administration. *Id.* at 139 (citation omitted).

The district court held that the PREP Act does not confer immunity here, and Defendants did not appeal (and do not attempt to dispute here) that aspect of the district court's order. But Defendants nonetheless assert that they are entitled to qualified immunity because of the Act's existence, which Defendants argue would have led a reasonable officer to believe that he would be immune from liability for any actions even arguably within the Act's scope.

Defendants' argument conflates the existence of a constitutional right with the availability of a remedy for a violation of that right. Qualified immunity turns on the existence and clarity of the underlying right; an officer is entitled to constitutional immunity from a civil damages suit only if his conduct "does not violate clearly established statutory or constitutional *rights* of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (emphasis added) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The PREP Act, however, limits remedies, not rights. *See* 42 U.S.C. § 247d-6d(a)(1) (providing that "a covered person *shall be immune from suit and liability* under Federal and State law" with respect to certain claims (emphasis added)). The statute does not (and could not) narrow the scope of a person's constitutional rights; rather, it limits an injured person's ability to secure a remedy in some circumstances.

3.

Lastly, Defendants urge us to consider the policy consequences of permitting this lawsuit to proceed.

They warn that allowing Plaintiffs to further pursue their due process claims will cause officials to "delay or abandon necessary inmate healthcare decisions" in the future. But the qualified immunity inquiry already takes policy concerns of that sort into account. *See Harlow*, 457 U.S. at 814 (describing qualified immunity as the "best attainable accommodation of [the] competing values" of permitting "vindication of constitutional guarantees" on the one hand and avoiding "social costs," such as "the diversion of official energy from pressing public issues," on the other). It is not for us to upset the careful balance that the Supreme Court has struck in crafting qualified immunity doctrine.[12]

IV.

For the foregoing reasons, we **AFFIRM.**

---

[12] Plaintiffs also allege that Defendants violated their due process right to familial association with Polanco. On appeal, Defendants respond by arguing only that the familial association claims are "derivative" of the state-created-danger claim asserted on Polanco's behalf and that they are therefore entitled to qualified immunity on all claims for the same reasons. Defendants have accordingly forfeited any other argument that they are entitled to qualified immunity on the familial association claims. *See AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 638 (9th Cir. 2012) (holding that a party forfeited an argument by failing to "'specifically and distinctly' argue the issue in his opening brief" (quoting *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992))). We therefore affirm the district court's denial of qualified immunity with respect to the familial association claims as well.

R. NELSON, dissenting:

Because the law is not clearly established, I conclude that the Defendants are entitled to qualified immunity. As such, I would reverse and therefore dissent.[1]

I

The conduct at issue begins in the earliest days of the COVID-19 pandemic. In May 2020, the science on the virus was far from settled, including best practices for combatting the virus. Prison officials at San Quentin State Prison and the California Department of Corrections and Rehabilitation faced a difficult task—managing prison affairs amid global chaos.

If Defendants here tried to do their best, it is safe to say that they either failed or need to reassess. The facts alleged are troubling and tragic. These allegations, which must be taken as true at this stage, are sufficient for a negligence claim—perhaps even gross negligence. But mere negligence does not establish a violation of the Constitution. *Tabares v. City of Huntington Beach*, 988 F.3d 1119, 1122 (9th Cir. 2021). Even if the complaint alleges a constitutional violation, as the majority holds, it is not one that was clearly established at the time—a time which, it bears repeating, was during one of the most novel and disruptive pandemics in a century.

---

[1] Because I find that the law is not clearly established here, I would not analyze the underlying constitutional violation. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

Hindsight is 20/20, and we cannot view the clearly established inquiry through the lens of what we know or believe to be true now. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."). The COVID-19 pandemic was unprecedented. Therefore, to say that the law was clearly established in my view disregards the exacting legal standard to overcome a qualified immunity defense.

The standard for clearly established law is "demanding" and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). The right must be so clear "that every 'reasonable official would [have understood] that what he is doing violates that right.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). And "[a] rule is too general if the unlawfulness of the officer's conduct 'does not follow immediately from the conclusion that [the rule] was firmly established.'" *Wesby*, 138 S. Ct. at 590 (quoting *Anderson*, 483 U.S. at 641).

The Supreme Court has repeatedly told the Ninth Circuit in particular "not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015)); *see also Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8–9 (2021) (per curiam); *City of Escondido v. Emmons*, 139 S. Ct. 500, 503–04 (2019) (per curiam);

al-Kidd, 563 U.S. at 742; *Brosseau v. Haugen*, 543 U.S. 194, 197–201 (2004) (per curiam). This is because "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam) (quoting *al-Kidd*, 563 U.S. at 742).

As is not uncommon in our circuit, the majority regrettably fails to heed this guidance. Making matters worse, in employing the high level of generality that the Supreme Court has chastised us for, the majority concludes that clearly established means "close enough." That is not the law.

II

The majority identifies two cases that, in its view, clearly establish the constitutional violation: (1) *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), and (2) *Pauluk v. Savage*, 836 F.3d 1117 (9th Cir. 2016). Maj. at 19–20. Both cases fail to meet the high burden that the Supreme Court requires.

The majority claims that *Grubbs* "presents a close analogy to this case." Maj. at 20. But "close," by definition, fails to satisfy the standard for clearly established. In *Grubbs*, a nurse was hired to work in an institution's medical clinic and was specifically led to believe that she would not have to work alone with violent sex offenders. 974 F.2d at 120. She was then attacked when she was left alone with a known violent sex offender who had failed all treatment programs at the institution and who "was considered very likely to commit a violent crime if placed alone with a female." *Id.* Unfortunately, the offender assaulted, battered, kidnapped, and raped the nurse. *See id.*

The facts of *Grubbs* deeply contrast with those here too much to clearly establish the law. The majority

suggests that because "there, as here, the employee worked in a correctional institution and was harmed in the process of carrying out her job duties," Maj. at 20, that this supports a finding of clearly established law. But this falls directly into the "too high of a level of generality" conundrum that we have repeatedly been warned against applying. *See al-Kidd*, 563 U.S. at 742 ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." (cleaned up)). Working in the same type of facility and suffering harm as an employee cannot place everything unconstitutional "beyond debate." *See id.* at 741. Such a holding would strip the clearly established standard of all its teeth.

The majority all but concedes that the clearly established standard cannot be met. As it recognizes, "there are also differences; the danger in *Grubbs* stemmed from a violent inmate, whereas Polanco was harmed by a disease that he contracted at his workplace." Maj. at 20. The majority explains why *Grubbs* cannot clearly establish the law here. For a facility to directly place a violent person alone with an employee does nothing to clearly establish the law for the constitutional standards of an invisible, non-human, and novel global virus wafting through the air. Respectfully, there is no question that the conduct at issue in *Grubbs* fails to have put the officials here "on notice" that their behavior relating to their response to COVID-19 was unconstitutional. *See, e.g.*, *Wesby*, 138 S. Ct. at 589.

The majority seemingly agrees: "[i]f *Grubbs* were the only relevant precedent, whether Polanco's due process right was clearly established might be a close question." Maj. at 20. But the majority then asserts

that the law is clearly established because "*Grubbs* does not stand alone," and relies on *Pauluk*, 836 F.3d 1117, as well.

But *Pauluk* is not dispositive either. There, an employee died from complications from toxic mold in his workplace. *Id.* at 1119; Maj. 20-21. But again, the differences here are distinguishable enough that they cannot support a holding of clearly established law.

To begin, the law was not previously established before *Pauluk*. *Id.* at 1121 (granting qualified immunity because it found the law was not clearly established). And even though the *Pauluk* court noted that the danger at issue was due to physical conditions in the workplace, *id.* at 1119, this still cannot have put the officers on notice that their conduct in handling COVID-19 would be unconstitutional. The state-created danger in *Pauluk* was both open and notorious: There was a years-long history of mold; Pauluk repeatedly reported the presence of mold in the building and near his office desk; and Pauluk was exposed to said mold for over five years before the decline of his health and eventual passing. *See id.* Pauluk also repeatedly requested a transfer to a new workplace because of the mold but was denied by his superiors, who were fully aware of the mold infestation. *See id.* Therefore, the officials in *Pauluk* were not only aware the danger existed, but they also fully understood the risks of mold exposure and refused to remedy the problem or permit Pauluk to remedy it himself by transferring workplaces for years. *See id.*

None of that exists here. *Pauluk*, like *Grubbs*, contrasts with the rapidly evolving nature of COVID-19. During the initial months of the pandemic, guidance was uncertain, developing, and consistently

changing.[2] The same cannot be said about toxic mold. The exposure of COVID-19 alleged here did not persist over a matter of years in which the subject brought the danger to the attention of any official, let alone Defendants. Even if the complaint alleges that Defendants knew or should have appreciated the risks to Polanco, there is no allegation that Polanco raised the official's COVID-19 response as an issue or requested a transfer. Rather than request transfer or reassignment, Polanco volunteered to take on more

---

[2] The majority counters that Plaintiffs' have alleged that Defendants knew of, and consciously disregarded, the risk that COVID-19 posed to San Quentin employees. Maj. at 22 n.9. But this is not dispositive. We have held that "a reasonable prison official understanding that he cannot recklessly disregard a substantial risk of serious harm, could know all of the facts yet mistakenly, but reasonably, perceive that the exposure in any given situation was not that high." *Sandoval v. County of San Diego*, 985 F.3d 657, 672 (9th Cir. 2021), *cert. denied sub nom. San Diego County v. Sandoval*, 142 S. Ct. 711 (2021) (cleaned up). Thus, the 'dispositive inquiry in the clearly established analysis is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted, based on the law at the time." *Id.* Even accepting the allegation that Defendants knew about the risks of COVID-19 does not change the novelty of the pandemic—or that *Pauluk* and *Grubbs* do not clearly establish the law based on the facts alleged by plaintiffs.

That Defendants may be entitled to qualified immunity on summary judgment, Maj. at 22 n.9, is cold comfort. The "'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials [will] be resolved prior to discovery." *Pearson*, 555 U.S. at 231 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987) (cleaned up)). Accordingly, the Supreme Court has repeatedly stressed the "importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam).

(continued…)

shifts. The facts as alleged also do not indicate that Polanco was prohibited from taking any COVID-19 precautions he saw fit, such as wearing a mask or bringing in his own personal protective equipment. These are meaningful distinctions from *Pauluk*.

The majority concludes that the differences between toxic mold and COVID-19 are a distinction without a difference. Maj. at 21-22. I disagree. COVID-19 presented prison officials with a rapidly emerging and evolving challenge that is simply different in kind from the problems facing employers receiving continuing complaints over years about mold. This does not satisfy the high threshold the court's caselaw commands for law to be clearly established.[3]

The majority cites no other case law that would clearly establish the law here. Instead, the majority combines what it perceives to be the most compelling attributes of *Grubbs* and *Pauluk* together to show that the law is clearly established.[4] But this mishmash of those cases still examines the law at too high of a level of generality. Denial of qualified immunity requires a

---

[3] The majority relies on our decision in *Nelson v. City of Davis*, 685 F.3d 867, 884 (9th Cir. 2012), for the proposition that "[a]n officer is not entitled to qualified immunity on the ground that the law is not clearly established every time a novel method is used to inflict injury." Maj. at 22 n.8 (quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1286 (9th Cir. 2001)). Even so, our case law must clearly establish the constitutional violation. Here, no such law exists.

[4] Even combined, Maj. at 20 n.8, *Grubbs* and *Pauluk* do not establish the law. Indeed, *Grubbs* can hardly add much when *Pauluk* held that the law was not clearly established in 2016. And *Pauluk* does not clearly establish the law here with sufficient specificity.

factual case on point, even if not perfect, that places the Defendants on notice that their conduct was unconstitutional beyond debate. *al-Kidd*, 563 U.S. at 741. It is therefore no answer to say that "COVID-19 may have been unprecedented, but the legal theory that Plaintiffs assert is not." Maj. at 22. That holding is far more dangerous to our future precedent, as it disregards the clearly established inquiry we must assess here. And a shared legal theory does not clearly establish the law because it "does not necessarily follow immediately from the conclusion that [the rule] was firmly established." *Wesby*, 138 S. Ct. at 590 (quoting *Anderson*, 483 U.S. at 641). This reflects the same logical flaw as the discussion of *Grubbs*: some similarity is not enough.

It is also telling that plaintiffs cite no other binding authority that clearly establishes the law beyond *Grubbs* and *Pauluk*. I would thus also find that plaintiffs have not met their burden of proof to foreclose qualified immunity. *See, e.g.*, *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991) ("The plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct."); *see also Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017). To show a clearly established right, plaintiffs must demonstrate the right was clear "in light of the specific context of the case, not as a broad general proposition." *Keates v. Koile*, 883 F.3d 1228, 1239 (9th Cir. 2018) (quoting *Mullenix*, 577 U.S. at 12). In the specific context of this case, they have not done so.

III

No clearly established law placed the Defendants on notice that their alleged mismanagement of the COVID-19 pandemic at San Quentin prison was

unconstitutional such that every "reasonable official would [have understood] that what he is doing violates that right." *al-Kidd*, 563 U.S. at 742 (citation omitted). As such, Defendants are properly entitled to qualified immunity. I would reverse and therefore respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR
THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 3:21-cv-06516-CRB

PATRICIA POLANCO, et al.,
Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,
Defendants

Filed March 3, 2022

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

On May 30, 2020, high-level officials at certain California agencies—including the California Department of Corrections and Rehabilitation (CDCR) and San Quentin State Prison—ordered the transfer of 122 inmates at high risk of COVID-19 from the California Institution for Men (CIM), where there were 600 confirmed COVID-19 cases, to San Quentin, where there were none. The inmates were transported on overcrowded buses without having been tested for COVID-19 or properly screened. At San Quentin, they were housed in open-air cells and mingled with the local prison population.

The ensuing COVID-19 outbreak in San Quentin killed 26 inmates and one correctional officer. That officer was Sergeant Gilbert Polanco, a 55-year-old man with high-risk factors. For several weeks in June, Polanco's duties included (among other things) transporting inmates to the hospital in unsanitized vehicles and without personal protective equipment (PPE). He contracted COVID-19 in late June and died on August 9.

Plaintiffs Patricia, Vincent, and Selena Polanco bring this lawsuit against various state agencies and ten high-level officials at CDCR, San Quentin, and CIM. Plaintiffs argue that Defendants are liable under 42 U.S.C. § 1983 for violating Polanco's and their own constitutional rights by failing to protect Polanco from a state-created danger. They also contend that Defendants violated the Rehabilitation Act and California's Bane Act, and negligently inflicted emotional distress on Plaintiffs. Defendants move to dismiss.

The Court GRANTS the motion to dismiss with respect to (1) the Section 1983 claims against the CIM Defendants; (2) the Bane Act claim; and (3) the negligent infliction of emotional distress claim. The Court DENIES the motion as to (1) the Section 1983 claims against the CDCR/San Quentin Defendants; and (2) the Rehabilitation Act claim. The Court grants Plaintiffs leave to amend.

I. BACKGROUND

A. Parties

Gilbert Polanco died of complications from COVID-19 on August 9, 2020 at the age of 55. Compl. (dkt. 1) ¶ 26. He was a Sergeant at San Quentin, where he had

begun his career as a corrections officer at the age of 21. *Id.*

Plaintiffs are Patricia Polanco, the wife of Gilbert Polanco, and Vincent and Selena Polanco, his two children. Compl. ¶ 4. All are his successors-in-interest pursuant to California law. *Id.*; *see* Cal. Civ. Proc. Code § 377.11. They bring these claims individually and as his successors-in-interest. Compl. ¶ 4.

The Institutional Defendants are the State of California, CDCR, and San Quentin. (Plaintiffs are suing the Institutional Defendants for their Rehabilitation Act claim only.) CDCR is a state agency. *Id.* ¶ 7. San Quentin is a state prison under CDCR. *Id.* ¶ 8.

Plaintiffs have sued ten named Individual Defendants and twenty Does, all in their individual capacities. *See id.* ¶¶ 9-18, 19, 20. The Court will group the ten named Individual Defendants in two groups based on their alleged duties and their placement in the CDCR/San Quentin hierarchy.

The first group is CDCR/San Quentin Defendants. This group includes Ralph Diaz, the "Secretary, and highest policymaking official, of CDCR," *id.* ¶ 9; Estate of Dr. Robert S. Tharratt, who was the "Medical Director and a policymaking official of CDCR," *id.* ¶ 10; Ronald Davis, the "Warden of San Quentin," *id.* ¶ 11; Ronald Broomfield, the "Acting Warden of San Quentin," *id.* ¶ 12; Clarence Cryer, the "Chief Executive Officer for Health Care [] of San Quentin," *id.* ¶ 13; Dr. Alison Pachynski, the "Chief Medical Executive of San Quentin," *id.* ¶ 14; and Dr. Shannon Garrigan, the "Chief Physician and Surgeon of San Quentin," *id.* ¶ 15.

The second group is CIM Defendants. This group includes Louie Escobell, R.N., the "Chief Executive Officer for Health Care" of CIM, *id.* ¶ 16; Dr. Muhammad Farooq, the "Chief Medical Executive of CIM," *id.* ¶ 17; and Dr. Kirk Torres, the "Chief Physician and Surgeon of CIM," *id.* ¶ 18.

Further allegations as to the responsibilities of each of these individuals are not reproduced here. Where relevant, they will be discussed in the following sections.

B. The Inmate Transfer

In light of the COVID-19 pandemic, on March 4, 2020, California Governor Gavin Newsom proclaimed a State of Emergency in California. *Id.* ¶ 28. Around this time, Defendants were "briefed and warned about the grave danger to health and life posed by the COVID-19 outbreak, including the highly transmissible nature of the virus and the necessity for precautions" such as "quarantine of those known or suspected to have been exposed to the virus, the need for cleanliness, social distancing, and personal protective equipment, and the need to regularly test for virus carriers." *Id.* A county shelter-in-place order was enacted on March 16, followed by a statewide order on March 19. *Id.* ¶¶ 29, 31. On March 18, the Interim Executive Director of the Habeas Corpus Resource Center, the State Public Defender, Mary McComb, and others responsible for representing people on death row sent a letter to Broomfield and Dr. Pachynski. *Id.* ¶ 30. The letter implored San Quentin to provide inmates with PPE and cleaning supplies, to allow for social distancing, and to enact other policies to protect the health of inmates and staff. *Id.*

On March 24, Governor Newsom issued Executive Order N-36-20, suspending intake of inmates into all state facilities for 30 days. *Id.* ¶ 32. On information and belief, it was extended a further 30 days. *Id.* "[U]ntil late May, 2020, California Correctional Health Care Services (CCHCS) had opposed transfers of inmates between prisons, saying that 'mass movement of high-risk inmates between institutions without outbreaks is ill-advised and potentially dangerous' and noting that it 'carries significant risk of spreading transmission of the disease between institutions.'" *Id.*

Nonetheless, on May 30, 2020, Defendants ordered the transfer to San Quentin of 122 inmates from the California Institution for Men (CIM), a state prison under CDCR that is located in Chino, California. *Id.* ¶ 34. At the time, San Quentin had no COVID-19 cases; CIM, however, was "struggling with a severe outbreak of COVID-19, which by then had reportedly infected over 600 inmates and killed 9 of them." *Id.* "Most or all of the men who were transferred had not been tested for COVID-19 for at least approximately three or four weeks." *Id.* "The transferred inmates also were not properly screened for current symptoms immediately before being placed on a bus." *Id.* In fact, a report by the California Office of the Inspector General (OIG) later found that "a [CIM] health care executive explicitly ordered that the incarcerated persons not be retested the day before the transfers began, and multiple CCHCS and departmental executives were aware of the outdated nature of the tests before the transfers occurred." *Id.* ¶ 50. The inmates were "packed onto buses in numbers far exceeding COVID-capacity limits that CDCR had mandated for inmate safety." *Id.* ¶ 34; *see id.* ¶¶ 50-51 (California OIG report's description of the decision to

increase the number of people on the buses as "inexplicable" and "not simply an oversight, but a conscious decision made by prison and CCHCS executives").

Defendants placed the new inmates in the "Badger housing unit, where tiers of open-air cells open into a shared atrium." *Id.* ¶ 35. They "used the same showers and ate in the same mess hall as the other inmates." *Id.* Several of the transferred inmates tested positive or displayed symptoms soon after arrival. *Id.* ¶ 35; *cf. id.* ¶ 50 (stating that testing did not occur until they had already been housed in San Quentin for six days).

On June 1, 2020, upon learning of the transfer, Marin County Public Health (MCPH) Officer Dr. Matthew Willis immediately recommended to Defendants, including Acting Warden Broomfield, that transferred inmates be sequestered from the native San Quentin population, that all exposed inmates be required to wear masks, and that staff movement be restricted between different housing units. *Id.* ¶ 38. Defendants did not adopt any of these policies. *Id.*

As noted, at the time of the transfer on May 30, San Quentin had no reported cases. *Id.* ¶ 34. Within days, 25 of the transferred inmates tested positive for COVID-19. *Id.* ¶ 35. "Over three weeks, the prison went from having no cases to 499 confirmed cases." *Id.* At the time, testing delays in San Quentin were 5-6 days. *Id.* ¶ 39. Both the Innovating Genomics Institute at Berkeley and a research laboratory with the UCSF Medical Center offered to provide free COVID-19 testing for San Quentin, but Defendants rejected the officer. *Id.* ¶ 42.

On June 13, a group of health experts toured San Quentin at the request of the federal court-appointed medical monitor and CCHCS Director Clark Kelso. *Id.* ¶ 39. On June 15, the experts circulated an "Urgent Memo" warning that the outbreak could develop into a "full-blown local epidemic and health care crisis in the prison and surrounding communities," and that the overcrowding and other factors created high risk for a "catastrophic super-spreader event." *Id.*

By July 7, 2020, more than 1,300 inmates and 184 staff members had tested positive. *Id.* ¶ 44. The number of infected inmates had increased to 2,181 by July 30. *Id.* By September 2, twenty-six inmates had died. *Id.*

California State Senators have called the inmate transfer a "fiasco, "abhorrent," and "completely avoidable," and a California Assembly member called it the "worst prison health screw up in state history." *Id.* ¶ 43. CDCR Medical Director Dr. Tharratt was removed from his position. *Id.* Secretary Diaz announced his retirement in August. *Id.* ¶ 46. A California Court of Appeal later found that the outbreak was the "worst epidemiological disaster in California correctional history" and that the San Quentin Warden and CDCR "acted with deliberate indifference" to the rights and safety of San Quentin prisoners. *Id.* ¶ 47 (quoting *In re Von Staich*, 56 Cal. App. 5th 53 (2020)). California's OIG released a three-report series assessing CDCR's policies, guidance, and directives regarding COVID-19. *See id.* ¶ 48-50. Cal-OSHA cited the CDCR and San Quentin with 14 violations, including five groups of violations that were "Serious" and four that were "willful-serious." *Id.* ¶ 52.

C. Polanco's Infection

As of June 2020, Polanco had "multiple high-risk factors for COVID-19," including obesity, diabetes, hypertension, diabetic nephropathy, hyperlipidemia, thrombocytopenia, and age (he was 55). *Id.* ¶ 53. His obesity was "obvious." *Id.* San Quentin knew of another disability too: in 2008, Polanco had been "laid off due to a gout-related foot injury": he had difficulty using the stairs, and officials had "refused to accommodate his disability." *Id.* ¶ 54. In 2013, he "won on appeal" and returned to work. *Id.*

When San Quentin faced staffing shortages during the pandemic—in part because corrections officers "call[ed] in sick" or "out of fear"—Polanco "work[ed] additional hours, double shifts, and often [came] home to San Jose to sleep for a scant few hours before making the trip back up." *Id.* ¶ 55. He "worked as the Active Lieutenant on Duty," for which the San Quentin and CDCR Defendants required him "to transport sick inmates in need of care, including inmates sick with COVID-19, to local hospitals and refused to provide employees or inmates with appropriately sanitized vehicles and equipment, or with legally required N-95 respirators or other PPE, even though appropriate PPE was available to Defendants." *Id.* ¶ 56. Prison staff, including Gilbert Polanco, "were pleading for proper personal protective equipment." *Id.* ¶ 42. But they were told that "to the extent San Quentin had such PPE, it was reserved for medical professionals and not front-line correctional officers and supervisors." *Id.* Correctional officers were relegated to wearing inmate-made masks or masks sewn at home by loved ones. *Id.*

Polanco became infected with COVID-19 around June 21, 2020. *Id.* ¶ 58. On June 26, he began

experiencing symptoms, including a severe cough, shortness of breath, and chest pain. *Id.* On June 28, he had a drive-thru test and was informed on June 30 that it came back positive. *Id.* Plaintiffs Patricia and Selena Polanco also each became "severely ill." *Id.* By July 3, Polanco's condition had worsened, and he was admitted to Kaiser Permanente San Jose Medical Center. *Id.* ¶ 59. Polanco "fought a hard, up-and-down battle for over one month, several times defying doctors' expectations that he was close to passing." *Id.* Plaintiffs were restricted to short Facetime virtual visits, and even those were limited, as Polanco struggle to breathe and to talk. *Id.* On August 9, he died of complications caused by COVID-19. *Id.* ¶ 60. Of the five San Quentin corrections officers that required hospitalization, he was the only not to make it through alive. *Id.*

D. Procedural History

On August 24, 2021, Plaintiffs filed this action in federal district court. *See generally* Compl. On December 2, Defendants moved to dismiss. *See* Mot. (dkt. 22); Opp. (dkt. 28); Reply (dkt. 31).

II. LEGAL STANDARD

Under Rule 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) applies when a complaint lacks either "a cognizable legal theory" or "sufficient facts alleged" under such a theory. *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019). Whether a complaint contains sufficient factual allegations depends on whether it pleads enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v.*

Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. When evaluating a motion to dismiss, the Court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

If a court dismisses a complaint for failure to state a claim, it should "freely give leave" to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). A court has discretion to deny leave to amend due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008).

III. DISCUSSION

Plaintiffs raise Section 1983 claims against the CDCR/San Quentin Defendants and CIM Defendants on both direct and supervisory liability theories, and a Rehabilitation Act claim against the Institutional Defendants. Of these, the Court dismisses only the Section 1983 claim as to the CIM Defendants.

Plaintiffs also raise state claims under the Bane Act and negligent infliction of emotional distress (NIED). The Court dismisses both claims because Plaintiffs fail to plead the required elements.

A. Judicial Notice

As a preliminary issue, Defendants request judicial notice and/or incorporation by reference as to: case management statements from May and June 2020 in *Plata v. Newsom*, No. 4:10-cv-01351-JST, a longstanding case overseeing CDCR's provision of healthcare, RJN (dkt. 23) Ex A-D; an order in another CDCR deliberate indifference case asking for further briefing on qualified immunity in light of *Plata*, Ex E; testimony by CCHCS Director Kelso before the California State Senate, Ex F; early guidance documents from the CDC on coronavirus, Ex G-I; and declarations by the Department of Health and Human Services (HHS) relating to the Public Readiness and Emergency Preparedness (PREP) Act, Ex J-K. Plaintiffs object to Exhibits A-I. Objection (dkt. 29).

Courts may judicially notice an adjudicative fact that is "not subject to reasonable dispute" if it is "generally known," or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1)–(2). But "[j]ust because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth," and "a court cannot take judicial notice of disputed facts contained in [matters of] public record[]." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018). Thus, a court must consider what facts are being proposed—i.e., "the purpose for which [the document is] offered." *Id.* at 1000. And though a document extensively relied upon

in Plaintiffs' complaint may be incorporated by reference, "the mere mention of the existence of a document is insufficient to incorporate the contents of a document." *Id.* at 1002; *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). "[I]f the document merely creates a defense to the well-pled allegations in the complaint, then that document did not necessarily form the basis of the complaint." *Khoja*, 899 F.3d at 1002.

The Court finds that the HHS declarations (Ex J-K) are judicially noticeable because they are in the Federal Register. *See* 44 U.S.C. § 1507; Fed. R. Evid. 201. But the Court agrees with Plaintiffs that none of the other documents may be judicially noticed or incorporated by reference. Defendants appear to want this Court to take as true factual representations made in the *Plata* case management statements in Ex A-D and to draw related inferences, but the Court cannot do so because they go to the heart of the Plaintiffs' allegations. *Khoja*, 899 F.3d at 999. The other documents are not sufficiently relevant to this motion to be judicially noticed, and cannot be incorporated by reference because Plaintiffs do not extensively rely on them (and in some cases do not even mention them). *See id.* at 1002.

B. The PREP Act

Defendants first argue that they are immune to all claims under the PREP Act. This argument fails.

The PREP Act provides immunity for injuries "caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration [by the HHS Secretary] has been issued with respect to such countermeasure." 42 U.S.C. § 247d-6d(a)(1). Under

the statute, covered countermeasures include "qualified pandemic . . . product[s]" and "respiratory protective device[s] . . . that the Secretary determines to be a priority for use." 42 U.S.C. § 247d- 6d(i)(1)(A), (C), (D).

The Secretary issued a declaration in light of COVID-19. Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15,198, 15,198 (Mar. 17, 2020). It has been amended several times during the pandemic. A "covered countermeasure" may include "any antiviral, any other drug, any biologic, any diagnostic, any other device, any respiratory protective device, or any vaccine, used . . . to treat, diagnose, cure, prevent, mitigate or limit the harm from COVID-19." Fourth Amendment to the Declaration, 85 Fed. Reg. 79,190, 79,196 (Dec. 9, 2020). The Secretary has also declared that failure to institute a covered countermeasure may sometimes give rise to immunity:

> Where there are limited Covered Countermeasures, not administering a Covered Countermeasure to one individual in order to administer it to another individual can constitute "relating to . . . the administration to . . . an individual" under 42 U.S.C. 247d-6d. For example, consider a situation where there is only one dose of a COVID-19 vaccine, and a person in a vulnerable population and a person in a less vulnerable population both request it from a healthcare professional. In that situation, the healthcare professional administers the one dose to the person who is more vulnerable to COVID-19. In that circumstance, the failure to

> administer the COVID-19 vaccine to the person in a less-vulnerable population "relat[es] to . . . the administration to" the person in a vulnerable population. The person in the vulnerable population was able to receive the vaccine only because it was not administered to the person in the less-vulnerable population.

Id. at 79,197. Thus, courts have concluded that immunity for "inaction claims" only lies when the defendant's failure to administer a covered countermeasure to one individual has "a close causal relationship" to the administration of that covered countermeasure to another individual. *Lyons v. Cucumber Holdings, LLC*, 520 F. Supp. 3d 1277, 1285–86 (C.D. Cal. 2021) (citation omitted).

As pleaded, Defendants' alleged failures to administer covered countermeasures to Polanco do not bear a "close causal relationship" to their administration of covered countermeasures to some other individual. And many of the allegedly tortious acts described in the complaint do not relate to a covered countermeasure at all. The Court therefore cannot conclude that any of the Defendants have immunity under the PREP Act. The vast majority of other courts to confront similar arguments have reached the same conclusion. *See, e.g.*, *Dupervil v. All. Health Operations, LCC*, 516 F. Supp. 3d 238, 255 (E.D.N.Y. 2021) (PREP Act does not immunize a nursing home for its alleged failure to take steps "such as separating residents [and] enforcing social distancing among residents and staff"); *Smith v. Colonial Care Ctr., Inc.*, 2021 WL 1087284, at *4 (C.D. Cal. Mar. 19, 2021) (PREP Act does not provide immunity where a complaint mainly concerns the

defendant's "policies and a failure to protect, not [] any covered countermeasure"); *Padilla v. Brookfield Healthcare Ctr.*, 2021 WL 1549689, at *5 (C.D. Cal. Apr. 19, 2021) (similar).

C. Qualified Immunity

"Qualified immunity protects government officers from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Hernandez v. City of San Jose*, 897 F.3d 1125, 1132 (9th Cir. 2018) (quotation and citation omitted). "To determine whether an officer is entitled to qualified immunity, [courts] ask, in the order [they] choose, (1) whether the alleged misconduct violated a right and (2) whether the right was clearly established at the time of the alleged misconduct." *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1082 (9th Cir. 2013) (citing *Pearson v. Callahan*, 555 U.S. 223, 232, 236 (2009)).

If there was a violation, the "salient question" is whether the law at the time gave the defendants "fair warning" that their conduct was unconstitutional. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). Courts should not define clearly established law "at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (citation omitted). On the other hand, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)); *accord White v. Pauly*, 137 S. Ct. 548, 551 (2017).

In analyzing Plaintiffs' Section 1983 claims, the Court first considers whether Plaintiffs have pleaded

constitutional violations against each group of Defendants and then asks whether that law was clearly established.

1. Due Process

Section 1983 creates a cause of action against a "person who, under color of any [state law], subjects, or causes to be subjected, any [person] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. A plaintiff must allege facts from which it may be inferred that: (1) he was deprived of a federal right; and (2) the person who committed the alleged violation acted under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). A Section 1983 claim may be brought only by the person whose rights were violated—or, if that person is deceased, by a representative authorized by state law as to survival actions. 42 U.S.C. § 1988; *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 369 (9th Cir. 1998); *see* Cal. Civ. Proc. Code § 377.30 (authorizing successors-in-interest to bring survival actions).

The Fourteenth Amendment prohibits a state from depriving a person of "life, liberty or property, without due process of law." U.S. Const. amend. XIV. But the Constitution does not confer a general affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property. *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989). The "general rule" is that a state actor is not liable under the Due Process Clause "for its omissions." *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000). Yet a state actor's failure to protect "may give rise to a § 1983 claim under the state-created danger exception 'when the state [actor] affirmatively places the plaintiff in

danger by acting with deliberate indifference to a known or obvious danger.'" *Herrera v. Los Angeles Unified Sch. Dist.*, 18 F.4th 1156, 1158 (9th Cir. 2021) (quoting *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971–72 (9th Cir. 2011)). The state-created danger doctrine holds state actors liable "for their roles in creating or exposing individuals to danger they otherwise would not have faced." *Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016) (citing *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2006)).

The Ninth Circuit long ago found that a state actor may be liable for a state-created danger in a workplace setting. *See L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992) (*Grubbs I*) (defendants were plausibly liable where they required a female nurse to be alone with a young man with a history of sexually assaulting women, without any sort of warning). More recently, it has explained that such a claim must satisfy two prongs:

> First, a plaintiff must show that the state engaged in "affirmative conduct" that placed him or her in danger. This "affirmative conduct" requirement has several components. A plaintiff must show not only that the defendant acted "affirmatively," but also that the affirmative conduct placed him in a "worse position than that in which he would have been had [the state] not acted at all." The affirmative act must have exposed the plaintiff to "an actual, particularized danger," and the resulting harm must have been foreseeable. Second, the state actor must have acted with "deliberate indifference" to a "known or obvious danger." "Deliberate

> indifference" requires a "culpable mental state" more than "gross negligence."

Pauluk, 836 F.3d at 1124–25 (citations omitted). The Ninth Circuit recently reaffirmed that, in failure-to-protect claims that arise outside of detention settings, the deliberate indifference test is a "purely subjective" one. *Herrera*, 18 F.4th at 1161.[1]

The analysis in *Pauluk* is instructive. Daniel Pauluk, an environmental health specialist for a county health district, was transferred – over his strong objection – to a facility where he had previously been stationed and that had a known "proliferation of toxic mold." 836 F.3d at 1119. For that reason, Pauluk asked his superiors to be transferred away, but the requests were denied. *Id.* He began to experience serious symptoms that multiple doctors later testified were the result of "toxic mold exposure." *Id.* at 1119-20. His poor health led to his departure from his job two years later and his death from "mixed mold mycotoxicosis." *Id.* at 1120. In a Section 1983 case brought by Pauluk's successors-in-interest against his superiors, the district court denied the defendants' motion for summary judgment, holding that a jury could find that they failed to protect him from a state-created danger in the workplace.

On appeal, the *Pauluk* court agreed that, viewed in the light most favorable to the plaintiffs, the

---

[1] In their opposition, Plaintiffs state that they agree with the *Herrera* panel that "an objective deliberate indifference standard should apply to Sergeant Polanco's state-created danger claims." Opp. at 11-12 n.8. Yet although *Herrera* muses that, "[a]bsent our precedent," "we may have been inclined to" employ the objective test, it plainly holds that the correct test is a subjective one, and this Court is of course bound by that decision. 18 F.4th at 1160-61.

defendants had violated the Due Process Clause by failing to protect Pauluk from a state-created danger. First, there was sufficient evidence to conclude that, in transferring Pauluk, they engaged in "affirmative" conduct that placed him in a "worse position" and that the harm was foreseeable. *Id.* at 1125. Second, it held that they acted with deliberate indifference because they were aware of the "pervasive mold problems," were "on notice of the potential health problems associated" with them, and some evidence indicated they "actively tried to conceal the amount of, and danger posed by, the mold." *Id.* Nevertheless, the court granted the defendants qualified immunity: although *Grubbs I* had "clearly established" that the state-created danger doctrine applied in the workplace where a "human actor [] posed a known threat," it had not "clearly established" that the doctrine could apply where the danger was a "physical condition in the workplace." *Id.* at 1126.

Plaintiffs also argue that the Individual Defendants are liable under a supervisory theory. A supervisor is only liable under Section 1983 for violations of subordinates "if he or she was personally involved in the constitutional deprivation or a sufficient causal connection exists between the supervisor's unlawful conduct and the constitutional violation." *Lemire v. California Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1074-75 (9th Cir. 2013) (quoting *Lolli v. Cnty. of Orange*, 351 F.3d 410, 418 (9th Cir. 2003)). "The requisite causal connection can be established by setting in motion a series of acts by others, or by knowingly refusing to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury." *Starr v. Baca*, 652 F.3d 1202, 1207–08 (9th Cir. 2011) (citations omitted)

(cleaned up). A supervisor can be liable "for own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others." *Id.* at 1208 (quoting *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998)).

a. CDCR/San Quentin Defendants

The Court finds that Plaintiffs have pleaded a Section 1983 claim against the CDCR/San Quentin Defendants (Diaz, Estate of Dr. Tharratt, Davis, Broomfield, Cryer, Dr. Pachynski, and Dr. Garrigan).

First, Plaintiffs have sufficiently pleaded that Secretary Diaz and Dr. Tharratt, top officials at CDCR, were deliberately indifferent to the state-created COVID-19 outbreak at San Quentin. Plaintiffs allege that Secretary Diaz is the "highest policymaking official" of CDCR and was "personally involved in the decision(s) to send CIM inmates to San Quentin in May, 2020." *See* Compl. ¶ 9. Dr. Tharratt "was the Medical Director and a policymaking official of CDCR who . . . was responsible for medical-related oversight" and was similarly "personally involved" in that same decision. *Id.* ¶ 10. Diaz and Dr. Tharratt may not have been "personally involved" in subsequent decisions as to exactly how the inmates were housed once they arrived at San Quentin. But Plaintiffs plausibly allege that the decision to transfer inmates was (1) affirmative conduct that placed Polanco in "actual, particularized danger" that led to the foreseeable harm; and (2) that they were deliberately indifferent to a "known or obvious danger" to Polanco and other San Quentin guards similarly situated. *See Pauluk*, 836 F.3d at 1124–25.

(Although the Plaintiffs do not allege that Diaz and Dr. Tharratt knew of a risk specific to Polanco, they adequately allege that they knew of the obvious risk to guards at San Quentin.) The plausibility of this claim is further bolstered by the allegation that many other actors—from state courts to state legislators to state agencies—have ascribed deliberate indifference (or something close) to the CDCR and its leaders with respect to the inmate transfer. *See generally* Compl. ¶ 43-52.

In their reply brief, Defendants present a new argument that they insist originates in *Pauluk*: that a state-created workplace danger must be caused by affirmative conduct that "increased workplace danger to that particular employee." Reply at 1. "Polanco fails to articulate how he faced a known, heightened danger compared to other custody staff at the prison, all of whom were at the front lines during the early days of the pandemic." *Id.* The Court need not consider arguments not in the initial brief. But in any case, the Court does not read *Pauluk* or any other case to require that. To be sure, affirmative state conduct that puts employees at risk of hypothetical and generalized dangers does not violate the Due Process Clause. Postal employees face a known risk of harm in a vehicle collision while delivering mail, but that is not a sufficiently "actual" or "particularized" danger because all who drive vehicles face this danger. No cited case states that the "particularized danger" requirement requires that the danger be unique to one employee vis-à-vis another. The toxic mold in *Pauluk* was not uniquely toxic to Pauluk.[2] Defendants here

---

[2] It may well be that Pauluk had preexisting conditions that put him at higher risk of mold-related disease than other employees,

were plausibly deliberately indifferent to the higher risk posed to Polanco and those similarly situated.

Plaintiffs have also pleaded that Diaz and Estate of Dr. Tharratt are liable on a supervisory theory because they "set[] in motion a series of acts by others"—including officials at both San Quentin and CIM—and/or "knowingly refus[ed] to terminate a series of acts by others, which [they] knew or reasonably should have known would cause others to inflict a constitutional injury." *Starr*, 652 F.3d at 1207–08. In setting in motion the acts by their underlings that led to the increased danger to Polanco, the decision to undertake the inmate transfer was "a sufficient causal connection [] between the supervisor's unlawful conduct and the constitutional violation." *See Lemire*, 726 F.3d at 1074-75.

Plaintiffs have also plausibly alleged that Warden Davis and Acting Warden Broomfield of San Quentin were deliberately indifferent to the danger posed by the COVID-19 outbreak. Plaintiffs plead that Davis "was the highest policymaking official of San Quentin, responsible for the oversight, management, hiring, decisions, policies, procedures, provision of services, and supervision of all employees and agents of San Quentin." Compl. ¶ 11. They allege that "he was personally involved in the decision(s) to send CIM inmates to San Quentin in May, 2020, the manner in which that was done, the manner and location of housing assignments for inmates at San Quentin" and that he was responsible for "requiring [corrections officers] to work and putting them at high risk for

---

but it does not follow that other employees harmed by the mold lacked claims, if they were put in harm's way by deliberately indifferent superiors.

contracting COVID-19 without proper or adequate training, safety or disease, and without legally required protection." *Id.* Acting Warden Broomfield was also in charge of the prison for some of the relevant events (Plaintiffs do not allege the precise dates of his tenure as Acting Warden). *Id.* ¶ 12. Even if Davis and Broomfield were not involved in all decisions, they were involved with those made after the infected inmates arrived in San Quentin. Broomfield and other Defendants were on the June 1 conference call in which the county public health officer explained the grave risks and recommended practices such as quarantines, mask-wearing, and restricting staff movement between different housing units. Compl. ¶ 38. Nonetheless, Davis and Broomfield chose not to pursue any of these policies. *See id.* ¶ 35 (inmates were housed in "open-air cells open into a shared atrium" and they "used the same showers and ate in the same mess hall as the other inmates"). Davis and Broomfield therefore engaged in various instances of "affirmative conduct" that exposed Polanco and similarly-situated guards to an "actual, particularized danger" that was "foreseeable" in light of common knowledge from state authorities as to the COVID- 19 risks at that time. *See Pauluk*, 836 F.3d at 1124–25. Plaintiffs also sufficiently allege that Davis and Broomfield were deliberately indifferent. *See id.*

The Court also finds that Plaintiffs plausibly allege supervisory liability for Davis and Broomfield insofar as they failed to control their subordinates who made some of the above decisions and/or acquiesced in the constitutional deprivation. *See Starr*, 652 F.3d at 1208; Compl. ¶ 42 (prison staff, including Polanco, were "pleading" for PPE but it was denied them); *see, e.g., id.* ¶ 76(i) (alleging that Defendants "refuse[d] to train inmates and prison staff about public health and

proper precautions to protect themselves and prevent the spread of COVID-19 at San Quentin"); *id.* ¶ 77 (similar).

Plaintiffs have also plausibly alleged that Cryer, Dr. Pachynski, and Dr. Garrigan were deliberately indifferent to the danger to Polanco from San Quentin's COVID-19 outbreak. Cryer is the CEO of Health Care for San Quentin and was "a policy-making official concerning medical care and health" who "served as a principal advisor in institution-specific application of health care policies and procedures." Compl. ¶ 13. They allege that he was "responsible for: planning, organizing, and coordinating the implementation of the health care delivery system at San Quentin; [and] supervising health care program managers responsible for administrative services within healthcare." *Id.* Dr. Pachynski was "Chief Medical Executive of San Quentin," "a policy-making official concerning medical care and health" who was "responsible for medical-related oversight, management, policies, procedures, provision of services, supervision of all medical employees and agents, and preventing and handling contagious disease outbreaks at San Quentin." *Id.* ¶ 14. Dr. Pachynski received the letter on March 18, 2020 from public defenders requesting PPE, cleaning supplies, and social distancing procedures for inmates and staff, but neither she nor other Defendants took action then or later. *See id.* ¶ 30. As "Chief Physician and Surgeon of San Quentin," Dr. Garrigan was also a "policy-making official . . . responsible for" many of the same issues as Dr. Pachynski. *Id.* ¶ 15.

Plaintiffs do not precisely plead the scope of the duties of these medical officials. Some decisions were likely beyond the scope of their duties. For example,

these medical officials were presumably not responsible for the initial decision to transfer the inmates from CIM to San Quentin, the lack of testing before they got on the buses in CIM, or the crowded conditions on the buses. However, many decisions at San Quentin—including the failure to test or quarantine infected inmates and the failure to provide adequate PPE to corrections officers—plausibly were made by Cryer, Dr. Pachynski, and/or Dr. Garrigan. Plaintiffs allege that the Innovative Genomics Institute and UCSF volunteered to provide free testing, but the San Quentin Defendants (likely including these medical officials) refused. *Id.* ¶ 42. As such, Plaintiffs plausibly allege that they engaged in multiple instances of "affirmative conduct" that exposed Polanco to an "actual, particularized danger" that was "foreseeable" in light of their knowledge of the obvious COVID-19 risks at that time. *See Pauluk*, 836 F.3d at 1124–25. Even if these officials did not know of the risk to Polanco, they surely knew of the risk to San Quentin guards in his position (and who have various comorbidities). Further, to the extent that some of these actions were not directly taken by these officials, Plaintiffs plausibly allege a "requisite causal connection" by "setting in motion a series of acts by others, or by knowingly refusing to terminate a series of acts by others." *See Starr*, 652 F.3d at 1207–08; *see, e.g.*, Compl. ¶ 42 (prison staff were "pleading" for PPE but it was denied them).

At least at this stage of litigation, the Court concludes that Plaintiffs have plausibly alleged that the CDCR/San Quentin Defendants, both on their own behalf and on a supervisory theory, violated the Due Process Clause by failing to protect Polanco from the state-created danger of a COVID-19 outbreak at San Quentin.

b. CIM Defendants

However, the Court concludes that Plaintiffs do not plausibly allege that the CIM Defendants (Escobell, Dr. Farooq, and Dr. Torres) violated the Due Process Clause.

Plaintiffs allege that Louie Escobell, R.N., was the "Chief Executive Officer for Health Care" of CIM and therefore the "policy-making official concerning medical care and health at CIM" and was therefore "personally involved in the decision(s) to send CIM inmates to San Quentin in May, 2020, and the manner in which that inmate transfer was done." *Id.* ¶ 16. Dr. Farooq was the "Chief Medical Executive of CIM," about whom Plaintiffs make similar allegations. *See* id. ¶ 17. Plaintiffs also make similar allegations about Dr. Torres, the "Chief Physician and Surgeon of CIM." *Id.* ¶ 18. While there are relatively few specific allegations as to exactly who made various decisions, the complaint cites a report by the California OIG that found that "a [CIM] health care executive explicitly ordered that the incarcerated persons not be retested the day before the transfers began." *Id.* ¶ 50.

As Defendants note, the defendants in *Pauluk* and *Grubbs* "intentionally directed employees into dangerous job conditions <u>knowing</u> the danger entailed." Reply at 4. In contrast, the CIM Defendants "worked at a separate prison and took no action directing Polanco's work assignments." *Id.* In response to this argument, Plaintiffs go up the ladder of abstraction. They argue that the CIM Defendants satisfy *Pauluk* because (1) they engaged in "affirmative conduct" that endangered Polanco—packing inmates onto a crowded bus without testing them—that caused foreseeable, actual, and particularized harm of the expected type, and (2) they

were deliberately indifferent to Polanco and other corrections officers similarly situated. Yet the facts remain an uneasy fit. Unlike the CDCR/San Quentin Defendants, the CIM Defendants were not Polanco's superiors, not at San Quentin, and/or had little to do with him. Although Plaintiffs allege that the CIM Defendants were aware that the manner of transfer might endanger people, it is difficult to infer that they had knowledge of any danger particularized to Polanco.

Relatedly, although this issue was not briefed, proximate causation appears tenuous. CIM Defendants may have taken affirmative (and deliberately indifferent) actions in the manner of the transfer—e.g., crowding them on buses without masks and without testing them—and that was likely to put San Quentin guards in a worse position and that led to harm. But the manner of transfer has a somewhat attenuated causal relationship to the harm to Polanco. First, Plaintiffs make only a conclusory allegation that CIM Defendants (who make decisions at CIM, not all of CDCR) were responsible for the actual decision to initiate the inmate transfer. (Even supposing that they lobbied to transfer inmates out of CIM, it presumably was not their decision to send them to San Quentin). Thus, even if the CIM Defendants are responsible for the manner of transfer, they do not have responsibility for the decision to transfer to San Quentin, so it is difficult to ascribe the entire chain of events to them. Second, several weeks of actions by the CDCR/San Quentin Defendants occurred between CIM Defendants' actions (on May 30) and Polanco's infection (June 21). Compl. ¶¶ 34, 58. These actions seem analogous to "intervening causes." While injury of guards at the other prison was a plausible result of mismanaging the transfer, it is less foreseeable in

light of the more limited scope of the CIM Defendants' duties (i.e., to inmates and guards in CIM, but not to Polanco) and in light of weeks of subsequent events that weaken the chain of causation.

Ultimately, the Court cannot conclude that the relatively conclusory allegations about the CIM Defendants' decisions at a prison in Southern California—even if reckless or shocking—plausibly make them liable for failing to protect a corrections officer at a prison in Northern California. The Court therefore concludes that Plaintiffs have failed to plead sufficient "factual content [to] allow[] the court to draw the reasonable inference that the [CIM Defendants are] liable for the misconduct alleged." *See Iqbal*, 556 U.S. at 678.[3]

c. Individual Capacity Claims

In addition to bringing Section 1983 claims in their capacity as Polanco's successors-in-interest, Plaintiffs bring claims in their individual capacities as Polanco's children. A plaintiff's "interest in her relationship with a parent is sufficiently weighty by itself to

[3] The Court notes, however, that the CDCR Defendants (Diaz and Estate of Dr. Tharratt) may be liable for the actions of the CIM Defendants on a supervisory theory. That is, even if the medical officials at CIM did not owe a duty to guards at San Quentin, and even if the chain of causation is broken by intervening events, the same is not true of the CDCR Defendants, whose duties presumably did stretch to San Quentin guards and who may bear responsibility for those intervening events because of the CDCR Defendants' role in initiating and overseeing the transfer. *See Starr*, 652 F.3d at 1207–08 (noting that the "requisite causal connection" for supervisory liability "can be established by setting in motion a series of acts by others, or by knowingly refusing to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury").

constitute a cognizable liberty interest" under the Fourteenth Amendment. *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991).

A governmental officer's behavior violates substantive due process only when it is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998) (citation and quotation omitted). Where "actual deliberation is practical," action taken with deliberate indifference may shock the conscience. *Id.* at 851; *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010). But where decisions must be made "in haste, under pressure, and frequently without the luxury of a second chance"—as in a prison riot or a high-speed police chase—an official must have "purpose to cause harm." *Lewis*, 523 U.S. at 853, 854; *accord Wilkinson*, 610 F.3d at 554 (purpose to harm is necessary when an official makes a "snap judgment" because of an escalating situation).

While the COVID-19 pandemic was of course an "emergency," *see* Opp. at 16, Compl. ¶ 28 (Governor Newsom's emergency declaration), that does not mean "actual deliberation [was not] practical." There is no allegation in the complaint that there was some exigent reason that the CDCR/San Quentin Defendants <u>had</u> to immediately make the decision to transfer CIM inmates to San Quentin on May 30, 2020, particularly after 60 days of no inmate transfers. Compl. ¶ 32. Nor were the CDCR/San Quentin Defendants precluded from "actual deliberation" as to whether to pack infected inmates on crowded buses without masks and then immediately house them in a crowded open-air prison. On the facts pleaded, the CDCR/San Quentin Defendants had sufficient time to deliberate before making these decisions. (And some

non-defendants did in fact deliberate: nurses at CIM questioned the packing of untested inmates on buses, asking in emails: "What about Patient [sic] safety? What about COVID precautions?" Compl. ¶ 51.)

Because it was "practical" for CDCR/San Quentin Defendants to deliberate, deliberate indifference is the appropriate intent standard to determine whether their action "shocks the conscience" and violated Plaintiffs' individual due process rights. For the reasons described above, the Court concludes that Plaintiffs have plausibly alleged that the CDCR/San Quentin Defendants acted with deliberate indifference and violated their individual constitutional rights. (Plaintiffs' personal constitutional claims against the CIM Defendants fail for the same reason that their claims as successors-in-interest fail.)

2. Clearly Established Law

Having concluded that the CDCR/San Quentin Defendants violated Polanco's and Plaintiff's constitutional rights, the Court now turns to whether these rights were "clearly established at the time of the alleged misconduct." *Maxwell*, 708 F.3d at 1082. As noted, there need not be a case precisely on point, as "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Taylor*, 141 S. Ct. at 53-54. Though a court must not define a right at a high level of generality, *see Kisela*, 138 S. Ct. at 1152, an official's "legal duty need not be litigated and then established disease by disease or injury by injury," *Est. of Clark v. Walker*, 865 F.3d 544, 553 (7th Cir. 2017); *cf. Maney v. Brown*, 2020 WL 7364977, at *6 (D. Or. Dec. 15, 2020) (denying qualified immunity to prison officials because inmates had "a clearly

established constitutional right to protection from a heightened exposure to COVID-19, despite the novelty of the virus").

Cases in this circuit over more than three decades have established that a state actor may violate the Due Process Clause for failing to protect a person from a state-created danger. *See, e.g., Kennedy*, 439 F.3d at 1062; *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). And it is well-established that this doctrine applies to state employees who work in a prison. *See Grubbs I*, 974 F.2d at 121 (state plausibly failed to protect a nurse from sexual assault at a medium-security custodial institution); *see also L.W. v. Grubbs*, 93 F.3d 894, 900 (9th Cir. 1996) (*Grubbs II*) (reiterating the deliberate indifference standard in that context). It is also well-established that this doctrine applies in workplace settings where the threat comes not from a dangerous person but from a physical condition in the workplace that causes disease. *See Pauluk*, 836 F.3d at 1126. These cases, all of which predate the events at issue here, gave the CDCR/San Quentin Defendants "fair warning" that it violates the Constitution to (1) engage in "affirmative conduct" that exposes an employee to a "foreseeable," "actual, [and] particularized danger" from disease, while (2) being "deliberately indifferent" to that danger. *See id.* As currently pleaded, this general rule applied "with obvious clarity" to the CDCR/San Quentin Defendants' decision to transfer 122 inmates from a prison afflicted by a disease outbreak (that had infected 600 and killed nine) in crowded buses to open-air conditions in another prison among thousands of uninfected inmates and guards. Compl. ¶¶ 32-34.

Arguing to the contrary, CDCR/San Quentin Defendants repeatedly remind the Court that the

COVID-19 pandemic was "novel" and "unprecedented" and that "the law was not clearly established regarding prison employee rights in the context of managing an inmate health crisis." *See, e.g.*, Reply at 7. They also contend that best practices at the time were unclear. *See* Opp. at 14 (noting that the health inspectors who visited on June 13 argued that quarantining in cells usually used for punishment "may thwart efforts for outbreak containment" but that Plaintiffs alleged that placing inmates in "open-air cells" exacerbated the outbreak (citing Compl. ¶¶ 41, 35)).

While these two statements are not contradictory, CDCR/San Quentin Defendants are undoubtedly correct that May 2020 was a novel situation. At a later point, the Court may well conclude that, in light of the undisputed facts, a constitutional violation was not clearly established because (for example) Defendants made their decisions in the attempt to comply with other guidance or law. *See* Fed. R. Civ. P. 56. The Court may conclude that the case law did not clearly establish any duty in the unique context of some of the facts. Or the Court may conclude that, after CDCR officials made the decision to transfer the infected inmates, certain of the San Quentin Defendants were not able to comply with the clearly established requirements in the case law. The Defendants' request for judicial notice appears to be an attempt to adduce facts outside the complaint necessary to make these and similar arguments.[4] But as noted above, the

---

[4] In requesting judicial notice as to materials in *Plata*, the Defendants seem to be gesturing at this argument—that they undertook the inmate transfer in part because they reasonably thought that they should do so, based on the progress of other

Court cannot consider any of this material at this stage in the litigation.

For the purposes of this motion, the Plaintiffs have pleaded violations of clearly established law. The CDCR/San Quentin Defendants plausibly had "fair warning" that deliberate indifference to the safety of San Quentin corrections officers such as Polanco was unconstitutional. *See Tolan*, 572 U.S. at 656. The Court therefore declines to dismiss the Section 1983 claims against the CDCR/San Quentin Defendants.

D. Rehabilitation Act

Plaintiffs next argue that California, CDCR, and San Quentin violated the Rehabilitation Act by not providing Polanco with reasonable accommodation for his disabilities. The Court holds that Plaintiffs plausibly pleaded this claim.

The Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program." 29 U.S.C. § 794(a). Under the Rehabilitation Act, institutional defendants are liable for the vicarious acts of their employees. *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1141 (9th Cir. 2001).

"The standards used to determine whether an act of discrimination violated the Rehabilitation Act are the same standards applied under the Americans with

---

litigation. *See* RJN Ex A-D. The inclusion of various seemingly contradictory CDC guidelines appears to be intended to do the same. *See* RJN Ex G-I. These documents are not properly before the Court at this time. *See Khoja*, 899 F.3d at 999.

Disabilities Act (ADA)." *Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 884 (9th Cir. 2004) (quoting 29 U.S.C. § 794(d)); *see, e.g., Zukle v. Regents of Univ. of California*, 166 F.3d 1041, 1045-47 & n.11 (9th Cir. 1999) (applying reasonable accommodations analysis to a discrimination claim under the Rehabilitation Act). The Rehabilitation Act therefore incorporates the ADA's requirement that an employer make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" unless the employer "can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A).

A plaintiff alleging a failure-to-accommodate discrimination claim under the Rehabilitation Act must show: (1) that he had a disability within the meaning of the Rehabilitation Act; (2) that the employer had notice of his disability; (3) that he could perform the essential functions of his job with a reasonable accommodation; and (4) that the employer refused to provide a reasonable accommodation. *See Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2002). After an employee has shown that he requires an accommodation, the employer engages in an interactive process with the employee to determine an appropriate accommodation. *See Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1089 (9th Cir. 2002).

To recover monetary damages, a plaintiff "must prove intentional discrimination." *Duvall*, 260 F.3d at 1138 (emphasis added). This higher intent standard is satisfied by deliberate indifference, which in this context "requires both [1] knowledge that a harm to a federally protected right is substantially likely, and [2] a failure to act upon that the likelihood." *Id.* at 1139.

The first element is met where the plaintiff "has alerted the public entity to the need for an accommodation (or where the need for accommodation is obvious, or required by statute or regulation)." *Id.*; *cf. Ludovico v. Kaiser Permanente*, 57 F. Supp. 3d 1176, 1198–99 (N.D. Cal. 2014) ("Implicit in these statutory duties is that the employer actually know of the alleged disability in question."). The failure-to-act element "must be a result of conduct that is more than negligent, and involves an element of deliberateness." *Duvall*, 260 F.3d at 1139.

Plaintiffs satisfy the four threshold requirements. First, Plantiffs allege that Polanco had "a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment." 29 U.S.C. § 705(20)(A)(i). Plaintiffs plead that Polanco had six "physical impairments": obesity, diabetes, hypertension, hyperlipidemia, thrombocytopenia, and diabetic nephropathy. Compl. ¶ 91. These impairments plausibly resulted in a "substantial impediment to employment" insofar as they put him at higher risk of contracting COVID-19 and negatively impacting his employment either through illness or death. Second, Plaintiffs allege that the Institutional Defendants and their delegees had notice of these impairments. Plaintiffs do not allege that Polanco notified his superiors or asked for an accommodation. *See* Opp. at 23. Yet Defendants knew of his disabilities because his "obesity was obvious," he had submitted Verification of Treatment letters to excuse his medical absences from work, and he previously went through an arbitration proceeding to win his job back after he was laid off in 2008 when San Quentin officials "refused to accommodate his disability" after he had difficulty using the stairs. Compl. ¶¶ 53-54, 91. This satisfies the "notice"

element. Third, Plaintiffs allege that he performed the functions of his job well. *See id.* ¶ 25 (noting that Polanco was "beloved as [a] corrections officer," that San Quentin inmates "collectively demanded his funeral be live-streamed throughout the prison, and that Governor Newsom ordered the flag be flown at half-staff on the day of Polanco's death), ¶ 55 (noting that he worked additional hours when the prison was short-staffed), ¶ 56 (noting that he worked as the "Active Lieutenant on Duty" and had duties "including transferring sick inmates to local hospitals"). Fourth, Plaintiffs allege that the Defendants "took no steps to protect their own medically vulnerable staff members, including Gilbert Polanco, from exposure to COVID-19" during the transfer. *Id.* ¶ 42. Defendants provided no accommodation. Plaintiffs have pleaded the four required elements.

The failure to accommodate Polanco's disabilities also rises to the level of deliberate indifference, although that appears to be a closer question. While Defendants had knowledge of Polanco's disabilities from prior events, Defendants need to have deliberately considered his disabilities in the timeframe at issue. A state actor that is deliberately indifferent to the danger of COVID-19 to San Quentin guards such as Polanco may not necessarily exhibit deliberate indifference to the danger of COVID-19 to Polanco's disability as such. The Court also notes that the Rehabilitation Act has a more stringent causation standard than the ADA and than most civil rights laws: it forbids discrimination "solely by reason of . . . disability." 29 U.S.C. § 794(a); *see, e.g.*, *Martin v. California Dep't of Veterans Affs.*, 560 F.3d 1042, 1049 (9th Cir. 2009) (rejecting the plaintiff's Rehabilitation Act and ADA claims because she "was denied admission because none of the facilities had adequate

resources to be able to care for her properly, not because of her disability").

Nonetheless, the Court holds that Plaintiffs have plausibly pleaded that Defendants considered the obvious risks to disabled guards in the process of making the alleged series of decisions at issue here. They therefore have pleaded deliberate indifference. The Court denies Defendants' motion to dismiss the Rehabilitation Act claim.

E. State Claims

The Court dismisses both of the state claims as insufficiently pleaded.

1. Statutory Immunity

First, Defendants argue that California statutory provisions bar state-law challenges to discretionary decisions and failures to provision needed equipment or personnel. At this time, the Court declines to dismiss the claims on these bases.

Under California Government Code § 820.2, "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of discretion vested in him, whether or not such discretion was abused." The California Supreme Court has distinguished between "planning" functions of government, which cannot give rise to liability, and "operational" ones, which can. *Johnson v. State*, 69 Cal.2d 782, 794 (1968). A planning function involves a "basic policy decision," not a merely "ministerial" one to implement a policy already formulated. *Caldwell v. Montoya*, 10 Cal. 4th 972, 981 (1995).

Importantly, "an employee's normal job duties are not determinative; the burden rests with government

defendants to demonstrate that they are entitled" to immunity. *AE ex rel. Hernandez v. Cty. of Tulare*, 666 F.3d 631, 640 (9th Cir. 2012); *see Johnson*, 69 Cal.2d at 794 n.8 ("[T]o be entitled to immunity[,] the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place."). Thus, it is an "odd" case in which discretionary act immunity can be found at the motion-to-dismiss phase. *AE*, 666 F.3d at 640.

The Court therefore does not dismiss these claims on this basis. Although some of the CDCR/San Quentin Defendants' decisions may turn out to be "policy" decisions, the state has not made a showing that (1) policy discretion was vested in each of these individual defendants; and (2) each of the defendants' challenged actions resulted from exercise of that policy discretion. *See* Cal. Gov't. Code § 820.2.

The Court also declines to dismiss these claims under Government Code § 845.2, which immunizes public entities and employees from liability "for failure to provide [to a prison] sufficient equipment, personnel, or facilities." This provision ensures that "essentially budgetary decisions . . . [are not] subject to judicial review in tort litigation." *Zelig v. Cty. of Los Angeles,* 27 Cal. 4th 1112, 1142 (2002). Although Plaintiffs allege that Defendants had inadequate equipment and personnel, they do not allege that these decisions were caused by budgetary issues. As with § 820.2, this argument is premature at this stage in litigation.

2. The Bane Act

Section 52.1 of the Bane Act "provides a cause of action for [1] violations of a plaintiff's state or federal civil rights [2] committed by 'threats, intimidation, or

coercion.'" *Chaudhry v. City of Los Angeles*, 751 F.3d 1096, 1105 (9th Cir. 2014) (quoting Cal. Civ. Code § 52.1). The Bane Act also requires "specific intent" to violate the victim's rights, for which "a reckless disregard for a person's constitutional rights" may be "evidence." *Reese v. Cty. of Sacramento*, 888 F.3d 1030, 1045 (9th Cir. 2018); *accord Cornell v. City & Cty. of San Francisco*, 17 Cal. App. 5th 766, 803, 804 (2017) (where the constitutional right is "clearly delineated and plainly applicable," "[r]eckless disregard of the 'right at issue' is all that [is] necessary"). The "threat, intimidation, or coercion" element of the Bane Act need not be independent from the underlying constitutional violation. *See Reese*, 888 F.3d at 1043-44.

Plaintiffs plausibly plead that the CDCR/San Quentin Defendants violated Polanco's constitutional rights, and they likely sufficiently plead specific intent. But they do not plead that any Defendant used a "threat, intimidation, or coercion." Plaintiffs seem to assume they have done so simply by pleading a Section 1983 claim. *See* Opp. at 17-18. But where courts hold that facts underlying a Section 1983 violation necessarily give rise to a Bane Act claim, they do so in the context of excessive force or wrongful arrest, where "threat, intimidation, or coercion" are invariably present. *See, e.g., Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 801–02 (9th Cir. 2018) (excessive force); *Reese*, 888 F.3d at 1035–36 (same); *cf. Cameron v. Craig*, 713 F.3d 1012, 1022 (9th Cir. 2013) (stating, a bit imprecisely, that "the elements of [an] excessive force claim under § 52.1 are the same as under § 1983"). In rejecting a Bane Act claim, a California Court of Appeal recently distinguished the excessive force/wrongful arrest cases on the same ground, emphasizing that "[a]ny arrest without

probable cause involves coercion." *Schmid v. City & Cty. of San Francisco,* 60 Cal. App. 5th 470, 483 (2021). Unlike an excessive force claim, a failure-to-protect claim does not automatically encompass "threat, intimidation, or coercion." Of course, in some broad sense, "coercion" is implicated any time that an employer asks an employee to do his job. *Cf.* Compl. ¶ 84 (seeming to allege that the work conditions constituted "threat, intimidation, or coercion"). But as currently pleaded, Plaintiffs do not come very close to suggesting that the "coercion" attendant with Polanco's employers instructing him to do his job during the COVID-19 outbreak at San Quentin was a "threat, intimidation, or coercion" within the scope of the Bane Act.

Plaintiffs' various other arguments in their opposition are largely beside the point. They make various correct statements about the Bane Act: it does not require violence, it does not require discriminatory intent, it applies beyond hate crimes, "reckless disregard" may satisfy the "specific intent" element, and the "threat, intimidation, or coercion" element need not be separate from the core constitutional violation. *See* Opp. at 17-18; *Reese*, 888 F.3d at 1043. But Plaintiffs fail to cite cases with analogous types of "threat, intimidation, or coercion" nor plead specific actions by Defendants that rise to the level of the excessive force cases they cite.

As such, the Court dismisses the Bane Act claim with leave to amend.

3. Negligent Infliction of Emotional Distress

Finally, Plaintiffs' NIED claim fails because Plaintiffs do not allege that they witnessed the actions

or inactions by Defendants that caused the injury. In general, California law "limit[s] the right to recover for negligently caused emotional distress to plaintiffs who personally and contemporaneously perceive the injury-producing event and its traumatic consequences." *Thing v. La Chusa*, 48 Cal. 3d 644, 666 (1989). The tortious event need not necessarily be a "sudden occurrence." *Ochoa v. Superior Ct.*, 39 Cal. 3d 159, 168 (1985). For example, in *Ochoa*, the plaintiff stated an NIED claim based on witnessing, repeatedly over several days, doctors' negligent care of her son that led to his death. Recovery was permitted because "there [was] observation of the defendant's conduct and the [] injury and contemporaneous awareness the defendant's conduct or lack thereof [was] causing harm." *See id.* at 169–70.

Plaintiffs do not allege that they observed the Defendants' conduct. They allege that they observed Polanco before and after his work shift, as well as in telephone calls during his shifts, during which he would describe the circumstances of his work. Compl. ¶ 101. They also witnessed the onset and worsening of his condition after he contracted COVID-19. *Id.* ¶¶ 58, 59, 101. But although they were aware of the conduct of the Defendants that caused harm, they do not allege that they witnessed the conduct. Because that is insufficient under California law, the Court dismisses this claim with leave to amend.[5]

---

[5] Defendants also argue that this claim is barred by the workers' compensation exclusivity rule. Because Plaintiffs' claim fails because they did not witness Defendants' conduct, the Court need not address this alternative argument at this time.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS the motion to dismiss with respect to (1) the Section 1983 claims against the CIM Defendants; (2) the Bane Act claim; and (3) the negligent infliction of emotional distress claim. The Court DENIES the motion to dismiss as to (1) the Section 1983 claims against the CDCR/San Quentin Defendants; and (2) the Rehabilitation Act claim. The Court grants leave to amend. Plaintiffs may file an amended complaint within 30 days of this order.

IT IS SO ORDERED.

Dated: March 3, 2022

/s/ CHARLES R. BREYER
CHARLES R. BREYER
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-15496

D.C. No. 3:21-cv-06516-CRB
Northern District of California, San Francisco

PATRICIA POLANCO; VINCENT POLANCO; SELENA POLANCO; GILBERT POLANCO, Deceased,
Plaintiffs-Appellees,

v.

RALPH DIAZ; ESTATE OF ROBERT S. THARRATT; RONALD DAVIS, Warden; RONALD BROOMFIELD; CLARENCE CRYER; ALISON PACHYNSKI, MD; SHANNON GARRIGAN, MD,
Defendants-Appellants,

and

STATE OF CALIFORNIA; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; SAN QUENTIN STATE PRISON; LOUIE ESCOBELL, RN; MUHAMMAD FAROOQ, MD; KIRK A TORRES, MD,
Defendants.

Filed November 16, 2023

ORDER

Before: FRIEDLAND and R. NELSON, Circuit Judges, and CARDONE*,* District Judge.

Judge Friedland has voted to deny the petition for rehearing en banc, and Judge Cardone so recommends. Judge Nelson has voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

* The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-15481

D.C. No. 3:21-cv-03058-LB

MICHAEL HAMPTON; JACQUELINE HAMPTON,
Plaintiffs-Appellees,

v.

STATE OF CALIFORNIA; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; SAN QUENTIN STATE PRISON; RALPH DIAZ; RONALD DAVIS, Warden; RONALD BROOMFIELD; CLARENCE CRYER; ALISON PACHYNSKI; SHANNON GARRIGAN; LOUIE ESCOBELL; MUHAMMAD FAROOQ; KIRK A TORRES; ESTATE OF ROBERT S. THARRATT,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
Laurel D. Beeler, Magistrate Judge, Presiding

Argued and Submitted May 10, 2023
San Francisco, California

Filed October 3, 2023

Before: Michelle T. Friedland and Mark J. Bennett, Circuit Judges, and Richard D. Bennett,* District Judge.

Opinion by Judge Friedland

OPINION

FRIEDLAND, Circuit Judge:

Early in the COVID-19 pandemic, the California Institution for Men ("CIM") suffered a severe COVID-19 outbreak. In an attempt to protect CIM inmates, high-level officials in the California prison system transferred 122 inmates from CIM to San Quentin State Prison, where there were no known cases of the virus. The transfer sparked an outbreak of COVID-19 at San Quentin that infected over two-thousand inmates and ultimately killed over twenty-five inmates and one prison guard.

The wife of one of the deceased inmates sued, claiming that the prison officials had violated her husband's constitutional and statutory rights. The officials moved to dismiss, asserting that the claims were barred by various federal and state immunities, including immunity under the Public Readiness and Emergency Preparedness Act and qualified immunity. The district court held that the officials were not entitled to immunity at this stage of the proceedings, and the officials filed this interlocutory appeal. We

* The Honorable Richard D. Bennett, United States Senior District Judge for the District of Maryland, sitting by designation.

affirm the district court's conclusion that the officials are not entitled to immunity under federal law for the claimed violations of her husband's rights,[1] and we lack jurisdiction to consider whether the officials are entitled to immunity under state law.

I.

We recently considered an appeal arising out of virtually identical allegations, but in a case alleging a violation of the deceased prison guard's due process rights. *See Polanco v. Diaz*, 76 F.4th 918 (9th Cir. 2023). We redescribe the allegations here, taking all of them as true at this stage of the proceedings. *See Padilla v. Yoo*, 678 F.3d 748, 757 (9th Cir. 2012).

A.

On March 4, 2020, California Governor Gavin Newsom proclaimed a state of emergency due to COVID-19. The declaration was quickly followed by other emergency measures at the state and local levels, including shelter-in-place orders and mask mandates. Later that month, Governor Newsom issued an executive order suspending the intake of inmates into all state correctional facilities. Around the same time, California Correctional Health Care Services adopted a policy opposing the transfer of inmates between prisons, reasoning that transfers could "carr[y] [a] significant risk of spreading transmission of the disease between institutions."

---

[1] Plaintiff also asserted a due process claim for violation of her own right to familial association with Hampton. In a memorandum disposition accompanying this opinion, we reverse the district court's decision to deny qualified immunity on that claim.

Defendants—a group of high-level officials at CIM, San Quentin, and the California Department of Corrections and Rehabilitation ("CDCR")—were aware of the risks that COVID-19 posed in a prison setting. All had been briefed on the dangers of COVID-19, the highly transmissible nature of the disease, and the necessity of taking precautions (such as social distancing, mask-wearing, and testing) to prevent its spread. Defendants were also aware that containing an outbreak at San Quentin would be particularly difficult due to its tight quarters, antiquated design, and poor ventilation. As of late May 2020, though, San Quentin appeared to be weathering the storm with no known cases of COVID-19. Other prisons were not so fortunate. CIM suffered a severe outbreak, which by late May had killed at least nine inmates and infected over six hundred.

In an attempt to prevent further harm to CIM inmates, on May 30, Defendants transferred 122 CIM inmates with high-risk medical conditions to San Quentin. The transfer did not go well. Most of the men who were transferred had not been tested for COVID-19 for over three weeks, and none of the transferred inmates were properly screened for symptoms before being "packed" onto buses to San Quentin "in numbers far exceeding" the COVID-capacity limits that CDCR had established for inmate safety. Although some inmates began experiencing symptoms while on the buses, the buses did not turn back. And instead of quarantining the inmates upon their arrival at San Quentin, Defendants placed them in a housing unit with grated doors (allowing air to flow in and out of the cells) and had them use the same showers and eat in the same mess hall as other inmates.

Two days later, the Marin County Public Health Officer learned of the transfer and scheduled an immediate conference call with some Defendants. On the call, he recommended that the transferred inmates be completely sequestered from the original San Quentin population, that all exposed inmates and staff be required to wear masks, and that staff movement be restricted between different housing units to prevent the spread of COVID-19. Despite being timely informed of the Public Health Officer's recommendations, Defendants did not heed his advice. Rather, they ordered that the Public Health Officer be informed that he lacked the authority to mandate measures in a state-run prison.

COVID-19 soon began to sweep through San Quentin. Within days of the transfer, twenty-five of the transferred inmates had tested positive. Over a three-week period, San Quentin went from zero confirmed cases of COVID-19 to nearly five hundred.

In mid-June, a court-appointed medical monitor of California prisons (the "Receiver")[2] requested that a group of health experts investigate the outbreak at San Quentin. The health experts wrote an "urgent memo" warning that the COVID-19 outbreak at San Quentin could escalate into a "full-blown local epidemic and health care crisis in the prison and surrounding communities" if not contained. The

---

[2] "In response to a class action, the United States District Court for the Northern District of California held in 2005 that the medical services in California prisons failed to meet the constitutional minimum. It accordingly appointed a receiver tasked with establishing a constitutionally adequate medical system." *Polanco*, 76 F.4th at 924 n.2 (citation omitted); *see Plata v. Schwarzenegger*, No. C01-1351, 2005 WL 2932253, at *1 (N.D. Cal. Oct. 3, 2005).

memo criticized many practices at San Quentin, noting, for instance, that personal protective equipment and masks were not provided to staff or inmates. Even when inmates and staff had masks, many wore them improperly or failed to wear them at all. The prison's testing protocol, too, was inadequate, suffering from what the memo considered "completely unacceptable" delays. The memo also warned that quarantining inmates with COVID-19 in cells usually used for punishment could backfire by making inmates reluctant to report their symptoms.

Defendants were informed of the memo but did not adopt its recommendations. For one, Defendants placed sick inmates in solitary confinement, which discouraged inmates from reporting their symptoms—just as the experts had warned would occur. Prison staff were not regularly tested for COVID-19 or trained on COVID-19 safety protocols. And when two research labs offered to provide COVID-19 testing at the prison, Defendants refused the offers, even though one lab offered the testing for free.

The outbreak continued to spread. By July, more than 1,300 inmates had tested positive. In August, the infection count exceeded 2,000—approximately two-thirds of the San Quentin inmate population. By early September, twenty-six inmates and one correctional officer had died of COVID-19.

B.

At the time of the transfer, Michael Hampton was a sixty-two-year-old inmate at San Quentin. Hampton had multiple health conditions, including obesity, hypertension, and pre-diabetes, that put him at high risk of death if he were to contract COVID-19. In early June, he started experiencing symptoms consistent

with COVID-19, including a persistent cough. His condition worsened, and he was transferred to the hospital in late June.

At the hospital, Hampton was diagnosed with "COVID-19 pneumonia." He was placed on a ventilator in early August. In mid-September, he was moved to "comfort care." He died on September 25, 2020.

C.

Hampton's wife ("Plaintiff") initiated this lawsuit in the United States District Court for the Northern District of California, asserting an Eighth Amendment claim under 42 U.S.C. § 1983 as Hampton's successor in interest, as well as various federal and state statutory claims and a state law negligence claim. Defendants moved to dismiss for failure to state a claim, asserting that all of Plaintiff's claims were barred by Public Readiness and Emergency Preparedness Act immunity. In the alternative, Defendants argued that they were entitled to qualified immunity on Plaintiff's Eighth Amendment claim and that Plaintiff's state law claims were barred by various state law immunities. The district court rejected all of Defendants' claims to immunity. Defendants timely appealed.

II.

"We review de novo a district court's decision to deny a motion to dismiss under Rule 12(b)(6)." *Dunn v. Castro*, 621 F.3d 1196, 1198 (9th Cir. 2010). When engaging in such review, we "accept[] as true all well-pleaded allegations" and "construe[] them in the light most favorable to the non-moving party." *Hernandez v. City of San Jose*, 897 F.3d 1125, 1132 (9th Cir. 2018)

(quoting *Padilla v. Yoo*, 678 F.3d 748, 757 (9th Cir. 2012)).

III.

Defendants assert that all of Plaintiff's claims are barred by the Public Readiness and Emergency Preparedness ("PREP") Act, 42 U.S.C. § 247d-6d, which "provides immunity from federal and state law claims relating to the administration of certain medical countermeasures during a declared public health emergency." *Polanco v. Diaz*, 76 F.4th 918, 932 (9th Cir. 2023) (quoting *Cannon v. Watermark Ret. Cmtys., Inc.*, 45 F.4th 137, 138 (D.C. Cir. 2022)). Defendants argue that Plaintiff's claims relate to the administration of COVID-19 tests and that we should therefore reverse the district court's conclusion that the PREP Act does not confer immunity.

A.

Before we can turn to the merits of Defendants' argument, we must determine whether, under the collateral order doctrine, we can consider an immediate appeal of the denial of immunity under the PREP Act, or whether such an appeal must await final judgment. "Federal circuit courts have jurisdiction over appeals from 'final decisions' of district courts." *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 723 (9th Cir. 2017) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009)). "Although 'final decisions' typically are ones that trigger the entry of judgment, they also include a small set of prejudgment orders that are 'collateral to' the merits of an action and 'too important' to be denied immediate review." *Mohawk Indus., Inc.*, 558 U.S. at 103 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546

(1949)). "That small category includes only decisions" that (1) "are conclusive," (2) "resolve important questions separate from the merits," and (3) "are effectively unreviewable on appeal from the final judgment in the underlying action." *Id.* at 106 (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995)). Denials of Eleventh Amendment immunity, absolute immunity, qualified immunity, foreign sovereign immunity, and tribal sovereign immunity all satisfy these criteria and thus are immediately appealable. *See SolarCity Corp.*, 859 F.3d at 725.

A denial of PREP Act immunity also satisfies the collateral order doctrine's requirements. First, denial of PREP Act immunity is conclusive because the PREP Act confers complete immunity from suit. *See* 42 U.S.C. § 247d-6d(a)(1) ("[A] covered person shall be *immune from suit and liability*[.]" (emphasis added)). An order denying PREP Act immunity thus "purport[s] to be [a] conclusive determination[]" that Defendants "have no right not to be sued." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993). Second, a denial of PREP Act immunity resolves an important question separate from the merits. Whether PREP Act immunity applies turns on whether the claim for which immunity is asserted relates to the defendant's use of certain medical countermeasures, a determination that "generally will have no bearing on the merits of the underlying action." *Id.* And we defer to Congress's judgment that such a determination is "too important to be denied review." *Will v. Hallock*, 546 U.S. 345, 349 (2006) (quoting *Cohen*, 337 U.S. at 546); *see also Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994) ("When a policy is embodied in a constitutional or statutory provision entitling a party

to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its 'importance.'"). Third and finally, as an immunity from suit, the benefit of PREP Act immunity "is effectively lost" if a party is erroneously required to "face the . . . burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Because a denial of PREP Act immunity is an appealable collateral order, we have jurisdiction to consider the merits of Defendants' argument that Plaintiff's claims fall within the Act's scope.

B.

Defendants are not entitled to immunity under the PREP Act on the face of the Complaint.

1.

"Congress passed the [PREP] Act in 2005 to encourage during times of crisis the 'development and deployment of medical countermeasures' (such as diagnostics, treatments, and vaccines) by limiting legal liability relating to their administration." *Polanco*, 76 F.4th at 932 (quoting *Cannon*, 45 F.4th at 139). The statute offers "covered person[s]" immunity "from suit and liability" for claims "caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure." 42 U.S.C. § 247d-6d(a)(1). That immunity "applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure." § 247d-6d(a)(2)(B).

The Act's immunity lies dormant until the Secretary of Health and Human Services "makes a determination that a disease . . . constitutes a public health emergency" and "make[s] a declaration,

through publication in the Federal Register," that the Act's immunity "is in effect." § 247d-6d(b)(1). On March 17, 2020, the Secretary did just that, declaring that COVID-19 "constitutes a public health emergency" and that "immunity as prescribed in the PREP Act" was "in effect" for the "manufacture, testing, development, distribution, administration, and use of" covered countermeasures. Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198, 15201 (Mar. 17, 2020). The Secretary went on to define "covered countermeasures" about as broadly as the Act permits, encompassing "any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19." *Id.* at 15202; *see* § 247d-6d(i)(1).

2.

Plaintiff does not dispute that Defendants are "covered person[s]" under the Act. And all agree that COVID tests are "covered countermeasures." Whether Defendants are immune under the PREP Act thus turns on whether Plaintiff's claims are for loss "caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure." § 247d-6d(a)(1).

Defendants first argue that Plaintiff's claims meet that standard because Plaintiff alleges that Hampton's death was caused (at least in part) by Defendants' failure to administer COVID tests to CIM inmates in the days prior to the inmates' transfer to San Quentin. But the PREP Act provides immunity only from claims that relate to "the administration to or the use by an individual of" a covered countermeasure—not such a measure's *non-*

administration or *non*-use. *Id.* This reading is reinforced by other sections of the Act, which continually refer to that underlying "administration" or "use" of a countermeasure. For example, under the Act, immunity applies "only if" a few conditions are met: The countermeasure must have been "administered or used during the effective period of the declaration," and the use must have been "for the category . . . of diseases . . . specified in the [Secretary's] declaration." § 247d-6d(a)(3)(A), (B). Those conditions cannot be satisfied if no countermeasure was administered or used.

Defendants invoke an advisory opinion prepared by the Department of Health and Human Services, which they argue provides support for the position that the Act covers claims arising out of a failure to administer a covered countermeasure. *See* Dep't of Health & Human Servs., Advisory Opinion 21-01 on the Public Readiness and Emergency Preparedness Act Scope of Preemption Provision (Jan. 8, 2021), https://perma.cc/5K3Y-A9JQ. But the advisory opinion is irrelevant to this case. The advisory opinion relies on the following hypothetical:

> [C]onsider a situation where there is only one dose of a COVID-19 vaccine, and a person in a vulnerable population and a person in a less vulnerable population both request it from a healthcare professional. In that situation, the healthcare professional administers the one dose to the person who is more vulnerable to COVID-19. In that circumstance, the failure to administer the COVID-19 vaccine to the person in a less-vulnerable population "relat[es] to . . . the administration to" the person in a vulnerable population.

Id. at 3 (footnote omitted) (second alteration in original). This hypothetical illustrates the fact that, for a countermeasure with limited availability, administering the countermeasure to one person could mean withholding it from another. But that is not what Plaintiff alleges happened here. The Complaint nowhere suggests (and Defendants do not argue) that tests were in short supply and that Defendants saved the limited tests for others. Rather, the Complaint suggests the opposite: Prior to the transfer, Defendants rejected a lab's offer to provide free COVID-19 testing at San Quentin.

Defendants argue in the alternative that Plaintiff's claims do, in fact, "relate to" the use or administration of a covered countermeasure—namely, the decision to test the transferred inmates twice, once roughly three weeks prior to the transfer, and again after the transfer. We cannot accept that argument at the pleading stage either.

Although the PREP Act's immunity encompasses claims for loss "relating to" the administration of a countermeasure, the Supreme Court has "singled out" the term "relate to" as "particularly sensitive to context." *Dubin v. United States*, 143 S. Ct. 1557, 1565-66 (2023). The Court has explained that "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes there would be no limits, as really, universally, relations stop nowhere." *Id.* at 1566 (cleaned up) (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). "That the phrase refers to a relationship or nexus of some kind is clear . . . . Yet the kind of relationship required, its nature and strength, will be informed by context." *Id.*

Considered in its context in the PREP Act, "relating to" takes on a more targeted meaning. *See McDonnell v. United States*, 579 U.S. 550, 568-69 (2016) ("[A] word is known by the company it keeps." (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961))). The surrounding verbal phrases—"caused by," "arising out of," and "resulting from," § 247d-6d(a)(1)—all connote some type of causal relationship. At the very least, then, for PREP Act immunity to apply, the underlying use or administration of a covered countermeasure must have played some role in bringing about or contributing to the plaintiff's injury.[3] It is not enough that some countermeasure's use could be described as relating to the events underpinning the claim in some broad sense.

As described in the Complaint, the testing that took place did not play a role in bringing about or contributing to Hampton's death. Beginning with the testing that occurred prior to the transfer, Plaintiff alleges that Defendants were aware that the test results they had were so outdated as to be essentially irrelevant. If Defendants were willing to transfer

[3] Under the canon against surplusage, we do our best, "if possible, to give effect to each word and clause in a statute." *United States v. Lopez*, 998 F.3d 431, 440 (9th Cir. 2021). But that canon "assists only where a competing interpretation gives effect to every clause and word of a statute." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013) (quoting *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011)). No such competing interpretation could be adopted here; there is hardly any daylight, for example, between the phrases "caused by" and "resulting from." § 247d-6d(a)(1). "In light of this redundancy, we are not overly concerned" that interpreting "relates to" as requiring some type of causal relationship "may be redundant as well." *Marx*, 568 U.S. at 385.

inmates with such outdated results, it is plausible to infer that the existence of those results did not contribute to the decision to transfer the inmates—and, accordingly, did not contribute to Hampton's death. And by the time the transferred inmates were tested upon their arrival at San Quentin, the damage had been done. Plaintiff alleges that when the post-transfer results came back, many of the transferred inmates who tested positive had already been housed in the same unit as the other transferred inmates and had been using the same showers and mess hall as non-transferred inmates for at least six days. Because the allegations do not describe a causal relationship between the administration of either of the tests and Hampton's death, Plaintiff's claims are not precluded by the PREP Act.[4]

IV.

We next consider whether Defendants are entitled to qualified immunity on Plaintiff's Eighth Amendment claim.[5] We hold that they are not.

---

[4] Defendants suggest that we should consider the pre- and post-transfer tests as a single plan when deciding whether Plaintiff's claims fall within the scope of the PREP Act. But even if evaluating the testing collectively could somehow help Defendants, the Complaint does not clarify when the decision to test post transfer was made. From the face of the Complaint, we therefore cannot infer that Defendants intended from the start to test the inmates once before the transfer and once after—they may have instead decided to administer post-transfer tests only once staff noticed that some inmates exhibited symptoms consistent with COVID-19.

[5]As noted above, we have jurisdiction under the collateral order doctrine to review a district court's rejection of a qualified immunity defense at the motion to dismiss stage. *See Ashcroft v. Iqbal*, 556 U.S. 662, 671-72 (2009).

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). To be entitled to qualified immunity at the motion to dismiss stage, an officer must show that the allegations in the complaint do not make out a violation of a constitutional right or that any such right was not clearly established at the time of the alleged misconduct. *See Pearson*, 555 U.S. at 232-36. "[D]ismissal is not appropriate unless we can determine, based on the complaint itself, that qualified immunity applies." *Polanco v. Diaz,* 76 F.4th 918, 925 (9th Cir. 2023) (quoting *O'Brien v. Welty*, 818 F.3d 920, 936 (9th Cir. 2016)).

A.

We first hold that Plaintiff has alleged a violation of Hampton's Eighth Amendment rights.

The Eighth Amendment's prohibition against "cruel and unusual punishments" imposes duties on prison officials to provide "humane conditions of confinement." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).[6] This duty stems from the relationship between the State and those in its custody. As the Supreme Court has explained:

> [W]hen the State takes a person into its custody and holds him there against his will,

[6] The cruel-and-unusual-punishments clause is incorporated against the states by the Due Process Clause of the Fourteenth Amendment. *See McDonald v. City of Chicago*, 561 U.S. 742, 764 n.12 (2010) (citing *Robinson v. California*, 370 U.S. 660, 666 (1962)).

> the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment.

Helling v. McKinney, 509 U.S. 25, 32 (1993) (alterations in original) (quoting *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989)). Under the Eighth Amendment, then, "prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'" *Farmer*, 511 U.S. at 832 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)). The Amendment's protections extend to "condition[s] of confinement that [are] sure or very likely to cause serious illness and needless suffering" in the future. *Helling*, 509 U.S. at 33. For instance, the Supreme Court has held that involuntarily exposing an inmate to secondhand tobacco smoke by requiring him to bunk with a cellmate who smokes continuously can form the basis of an Eighth Amendment claim. *See id.* at 35. So too can exposing inmates to "infectious maladies" such as hepatitis. *See id.* at 33 (citing *Hutto v. Finney*, 437 U.S. 678, 682 (1978)).

In such circumstances, it is a "prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate" that violates the Eighth Amendment. *Farmer*, 511 U.S. at 828. This type of Eighth Amendment claim has an objective component and a subjective component. An inmate must allege that the deprivation was, objectively, "sufficiently serious." *Id.* at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). The inmate must also allege that the defendant official acted, subjectively, with "deliberate indifference" to inmate health or safety. *Id.* (quoting *Wilson*, 501 U.S. at 302-03).

1.

The objective component of this claim requires a plaintiff to plausibly allege that it is "contrary to current standards of decency for anyone to be . . . exposed against his will" to the relevant hazard. *Helling*, 509 U.S. at 35. In other words, the resulting risk must not be one that "society chooses to tolerate." *Id.* at 36.

In *Hines v. Youseff*, 914 F.3d 1218 (9th Cir. 2019), we rejected an Eighth Amendment claim based on a risk that we held society *had* chosen to tolerate: Valley Fever. *Id.* at 1231. We noted that millions of people were voluntarily living and working in the Central Valley of California, even though doing so put them at a heightened risk of contracting Valley Fever from the presence of certain fungal spores there. *Id.* We also noted that there was "no evidence in the record that 'society's attitude had evolved to the point that involuntary exposure'" to Valley Fever "violated current standards of decency." *Id.* at 1232 (quoting *Helling*, 509 U.S. at 29).

The differences between society's responses to Valley Fever and to COVID-19 in the relevant time periods are plain. The Complaint describes the drastic steps that state and local governments took to prevent anyone from being involuntarily exposed to COVID-19, including shelter-in-place orders and mask mandates whose violations were punishable as misdemeanors. It also alleges that Marin County (where San Quentin is located) explained that the purpose of its shelter-in-place order was "to slow virus transmission as much as possible." Plaintiff has thus sufficiently alleged that a "societal consensus" had emerged by May 2020 that the risk of contracting COVID-19 was "intolerably grave" such that involuntarily exposing inmates to the disease violated then-current standards of decency. *Id*.

2.

The subjective component of this Eighth Amendment claim requires a plaintiff to allege that officials "kn[ew] of and disregard[ed] an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. That is, the officials must have been "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and must have actually "draw[n] the inference." *Id.* Even so, "an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* at 842.

In *Polanco*, we considered whether many of the same officials who are defendants here were deliberately indifferent toward the health and safety of a San Quentin employee. *See* 76 F.4th at 927-29. We held that the allegations in *Polanco* described a

"textbook case of deliberate indifference: Defendants were repeatedly admonished by experts that their COVID-19 policies were inadequate, yet they chose to disregard those warnings." *Id.* at 929.[7]

Polanco controls here. Plaintiff's allegations regarding Defendants' mental states mirror nearly word-for-word the allegations in *Polanco*. And although we recognize two differences between this case and *Polanco*, neither changes our conclusion that the allegations describe deliberate indifference.

The first difference is about whose safety Defendants allegedly disregarded: Here, it is a San Quentin *inmate*, whereas in *Polanco* it was a San Quentin *employee*. This difference is immaterial. The fact that Defendants "did not take precautions to avoid transferring COVID-positive inmates to San Quentin or to decrease the likelihood that COVID-19 would spread" once the inmates arrived, *id.* at 928, shows a conscious disregard to the health and safety of San Quentin employees and inmates alike.

The second difference is that, although the complaints in both cases allege that prison officials failed to provide masks and other personal protective equipment to prison inmates and staff, only the *Polanco* complaint additionally alleges that masks and protective equipment were "easily obtainable." *Id.* at 929. The absence of that allegation here does not undermine Plaintiff's claim of deliberate indifference. If masks and personal protective

---

[7] *Polanco* involved a claim under the state-created-danger doctrine, which is rooted in the Fourteenth Amendment. *See* 76 F.4th at 925-26. Such a claim requires the plaintiff to allege that the defendants acted with subjective deliberate indifference, *see id.* at 928 & n.7—the same mental state required here.

equipment were not available, Defendants would have understood that it was particularly important to avoid transferring COVID-positive inmates to San Quentin, where the architecture would make difficult isolating inmates to prevent COVID's spread. The absence of masks also would have made even clearer the importance of properly testing and screening inmates prior to any transfer. On the other hand, if masks and protective equipment were available, the choice not to use them would reflect disregard for prisoner safety. Accordingly, whether masks were available or not, Plaintiff has plausibly alleged that Defendants acted with knowing disregard for the health and safety of San Quentin inmates.

Defendants contend that we should nonetheless conclude that they were not deliberately indifferent because a report prepared by California's Office of the Inspector General ("OIG Report" or "Report") shows that they took reasonable steps to mitigate the risks from the transfer. *See Farmer*, 511 U.S. at 845 ("[P]rison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause."); Office of the Inspector General, COVID-19 Review Series Part 3 (Feb. 2021) [hereinafter OIG Report], https://perma.cc/5W6G-27N3. We disagree.[8]

The OIG Report was prepared at the request of the California Assembly and analyzes the "decision to transfer medically vulnerable incarcerated persons" from CIM to San Quentin. OIG Report at i. Although

---

[8] Defendants argue that the OIG Report was incorporated into the Complaint by reference. Plaintiff does not object to our consideration of the Report. Because we hold that Plaintiff prevails whether or not we consider the Report, we need not decide whether it was incorporated into the Complaint by reference.

Defendants argue that the Report supports their position that they were not deliberately indifferent, the Report in fact strengthens Plaintiff's case.

The Report's description of the transfer is very similar to the allegations in the Complaint. *See id.* at 1-5. But the Report contains additional details that bolster Plaintiff's assertion that prison executives[9] were aware of, yet consciously disregarded, the risks associated with the transfer. For instance, as documented in the Report, a CIM employee emailed a CDCR Manager three days before the transfer expressing concerns about the speed with which the transfer was taking place: "It's difficult to get things right when there is a rush. We have a lot to consider with this whole COVID issue. I'm surprised HQ wants to move our inmates right now. But we have to make sure we are not infecting another institution." *Id.* at 19. The email went on to draw from an experience in which CIM had moved 120 inmates from one part of the prison to another, noting that "many of those guys came up positive two weeks later," "contaminat[ing]" a new section of the prison. *Id.* And in response to the decision to place inmates on buses in numbers exceeding CDCR's COVID-capacity limits, a supervising nurse asked a prison executive: "What about Patient safety? What about COVID precautions?" *Id.* at 20.

[9] The OIG Report does not refer to prison executives by name, instead using generic titles such as "California Institution for Men Medical Executive" and "[California Correctional Health Care Services] Director." OIG Report at 2. We therefore cannot be sure that the executives referenced in the Report are among the named Defendants. Still, the Report bolsters Plaintiff's claim by showing that at least some prison executives were aware of the risks associated with the transfer.

Other emails documented in the OIG Report demonstrate that prison staff were aware that soon-to-be-transferred inmates' test results were dangerously out of date. Just days before the transfer, a supervising nurse at CIM emailed a CIM medical executive alerting the executive to the fact that some of the inmates set to be transferred had not been tested for COVID-19 for nearly a month. The nurse asked if the inmates would be "re-swabb[ed]" before the transfer. *Id.* at 21. Eleven minutes later, the medical executive responded with an email that said only: "No reswab[b]ing." *Id.* Another nurse emailed an executive cautioning that "the risk of transferring patients tested almost one month ago is high for poss[ible] covid spread" and that they should "slow down a little and do it right." *Id.*

Such details in the OIG Report reinforce Plaintiff's allegations by showing how prison executives brushed away repeated warnings that they were proceeding in an unsafe manner. Whether or not we consider the Report, Plaintiff has adequately alleged that Defendants acted with deliberate indifference toward the health and safety of San Quentin inmates, including Hampton.

B.

The Eighth Amendment right at issue here was also "clearly established at the time of the violation." *Stewart v. Aranas*, 32 F.4th 1192, 1195 (9th Cir. 2022).

For the unlawfulness of an officer's conduct to be "clearly established," it must be true that, "at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quotation marks

omitted). The Supreme Court has emphasized that determining whether the law was clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *abrogated on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). For this reason, "it is not sufficient that *Farmer* clearly states the general rule that prison officials cannot deliberately disregard a substantial risk of serious harm to an inmate." *Est. of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1050-51 (9th Cir. 2002). To be clearly established, the relevant right must have been defined more narrowly.

Still, applying this doctrine here, Plaintiff is not required to point to a prior case holding that prison officials can violate the Eighth Amendment by transferring inmates from one prison to another during a global pandemic. Binding case law "need not catalogue every way in which" prison conditions can be constitutionally inadequate "for us to conclude that a reasonable official would understand that his actions violated" an inmate's rights. *Castro v. County of Los Angeles*, 833 F.3d 1060, 1067 (9th Cir. 2016) (en banc). Rather, "a right is clearly established when the 'contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (alteration in original) (quoting *Serrano v. Francis*, 345 F.3d 1071, 1077 (9th Cir. 2003)).

Castro serves as a useful guide for articulating the right at issue here at the proper level of generality. There, an inmate asserted an Eighth Amendment claim after being severely beaten by his cellmate. Sitting en banc, we described the "contours" of the relevant Eighth Amendment right in that case as the

inmate's "right to be free from violence at the hands of other inmates." *Id.* Articulated at that same level of generality, the right at issue here is an inmate's right to be free from exposure to a serious disease. That right has been clearly established since at least 1993, when the Supreme Court decided *Helling v. McKinney*, 509 U.S. 25 (1993).

In *Helling*, an inmate alleged that he was assigned a cellmate who smoked five packs of cigarettes a day, exposing the inmate to dangerous chemicals and the risk of future health problems. *Id.* at 28. The Supreme Court held that the inmate had stated an Eighth Amendment claim by alleging that prison officials had, "with deliberate indifference, exposed [the inmate] to levels of" secondhand tobacco smoke "that pose[d] an unreasonable risk of serious damage to his future health." *Id.* at 35. In reaching that holding, the Court analogized to other fact patterns that it treated as obvious violations of the Eighth Amendment. "[A] prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery," the Court reasoned. *Id.* at 33. So too would it be an Eighth Amendment violation for "prison officials [to be] deliberately indifferent to the exposure of inmates to a serious, communicable disease." *Id.*[10] *Helling* sent a clear message to prison officials: The Eighth Amendment requires them to reasonably protect inmates from exposure to serious diseases.

---

[10] *Helling* also cited with approval a Fifth Circuit decision that had recognized an Eighth Amendment violation based in part on the fact that a prison permitted "inmates with serious contagious diseases . . . to mingle with the general prison population." *Gates v. Collier*, 501 F.2d 1291, 1300 (5th Cir. 1974); *see Helling*, 509 U.S. at 34 (citing *Gates*).

Our circuit's precedent reinforces the conclusion that this right was clearly established in the spring of 2020, when the events at issue here occurred. In *Hoptowit v. Spellman*, 753 F.2d 779 (9th Cir. 1985), we held that a "lack of adequate ventilation and air flow undermin[ing] the health of inmates and the sanitation of" a prison violated the Eighth Amendment. *Id.* at 784; *see also Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996) (citing *Hoptowit* for the principle that "[i]nadequate 'ventilation and air flow' violates the Eighth Amendment if it 'undermines the health of inmates and the sanitation of the penitentiary'"). In *Wallis v. Baldwin*, 70 F.3d 1074 (9th Cir. 1995), we held that an inmate stated an Eighth Amendment claim after being assigned prison work that exposed him to asbestos without being provided sufficient protective gear. *Id.* at 1077. And in *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014), we held that a prison's failure to "provide prisoners with . . . protection from infectious diseases" (among other deficiencies) was "firmly established in our constitutional law." *Id.* at 664, 676 (citing *Helling*, 509 U.S. at 33).

In light of these cases, all reasonable prison officials would have been on notice in 2020 that they could be held liable for exposing inmates to a serious disease, including a serious communicable disease. Although "COVID-19 may have been unprecedented, . . . the legal theory that Plaintiff[] assert[s] is not." *Polanco*, 76 F.4th at 931.

C.

Defendants advance two further arguments in support of their position that they are entitled to qualified immunity at this stage of the proceedings, neither of which is persuasive.

1.

Defendants first argue that they faced an impossible choice: keep high-risk CIM inmates at a prison experiencing an active COVID-19 outbreak or transfer the inmates out of that prison. Either way, they argue, they would have placed some set of inmates in danger and risked liability for doing so. Defendants contend that it would be inconsistent with the spirit of the qualified immunity doctrine to deny them immunity in a situation in which they had no good options.

Defendants' argument fails because it rests on a premise contrary to the Complaint's allegations. Plaintiff does not challenge Defendants' decision to transfer inmates out of CIM. Rather, Plaintiff challenges decisions that Defendants made in carrying out the transfer that increased the risk to San Quentin inmates without decreasing the risk to the transferred inmates. Those decisions include: (1) transferring inmates to San Quentin, as opposed to a prison with architecture more conducive to quarantining a large group of inmates; (2) transferring inmates without proper testing or screening; (3) exceeding CDCR's COVID-capacity limits on the buses; and (4) failing to enact post-transfer safety protocols such as mandatory masking. In other words, as alleged, a good option did exist; the Complaint suggests that, had Defendants tried, they could have moved the CIM inmates without exposing

other inmates to an unreasonable risk. *See Polanco*, 76 F.4th at 929.

2.

Defendants next contend that they were just following orders: The court-appointed Receiver's involvement in the decisions surrounding the transfer, they say, absolves them of any responsibility for the transfer's consequences.

For this argument, Defendants rely on the OIG Report.[11] But that Report does not show that the Receiver was responsible for the relevant decisions. The OIG Report does suggest that the Receiver was involved in some relevant decision-making. *See* OIG Report at 9 (noting that "[t]he decision to transfer incarcerated persons between prisons was driven by a collaboration between executives from [California Correctional Health Care Services] and from [CDCR]," and thereby implying that the Receiver—who oversees California Correctional Health Care Services— likely played some role); *id. at* 30 (reproducing emails that suggest that prison officials felt pressure from the Receiver to move quickly to protect high-risk CIM inmates). But the Report does not indicate that the Receiver was involved in—let alone that he directed or approved—the decision to transfer the inmates to San Quentin as opposed to somewhere else. Nor does the Report suggest that the Receiver was aware of the outdated test results, the decision to house the

[11] Defendants also point to testimony that the Receiver gave before the California State Senate, which they argue was incorporated into the Complaint by reference. Because Defendants' assertion of immunity would fail with or without consideration of that testimony, *see Polanco*, 76 F.4th at 931-32, we need not decide whether the testimony was incorporated into the Complaint by reference.

transferred inmates in open-air cells, or the other post-transfer decisions that allegedly contributed to the outbreak at San Quentin.

In discovery, the parties will have the opportunity to explore the scope of the Receiver's involvement in the transfer. If discovery reveals that Defendants were complying with orders from the Receiver in all relevant actions underlying Plaintiff's claims, then Defendants may be entitled to qualified immunity. *See Hines*, 914 F.3d at 1231 (holding that "state officials could have reasonably believed that their actions were constitutional so long as they complied with the orders" from a federal receiver and overseeing court). But at this early stage in the proceedings, we cannot reach that conclusion.

V.

Finally, Defendants argue that the district court should have dismissed Plaintiff's state law claims because Defendants are entitled to certain immunities under California law. Once again, we must first determine whether we can consider this argument immediately under the collateral order doctrine, or whether it must await an appeal from a final judgment.

"For claims of immunity under state law, 'the availability of an [interlocutory] appeal depends on whether, under *state* law, the immunity functions as an immunity from suit or only as a defense to liability.'" *Tuuamalemalo v. Greene*, 946 F.3d 471, 476 (9th Cir. 2019) (quoting *Liberal v. Estrada*, 632 F.3d 1064, 1074 (9th Cir. 2011)). Although the former may be immediately appealable, the latter is not. *See id.*

Defendants argue that Plaintiff's state law claims are barred by six immunities under California law.[12] Four of the immunities apply to government employees and are codified in the Government Claims Act. *See* Cal. Gov. Code §§ 810-998.3. The other two apply to correctional and emergency-service professionals and are codified in the California Emergency Services Act. *See* Cal. Gov. Code §§ 8550-8669.7. We previously held that one of the immunities in the Government Claims Act, Cal. Gov. Code § 820.2, was an immunity from suit. *See Liberal*, 632 F.3d at 1076.

A recent decision by the California Supreme Court makes us revisit that holding. In *Quigley v. Garden Valley Fire Protection District*, 7 Cal. 5th 798 (2019), the California Supreme Court considered a question similar to the one we now confront: whether an immunity provision in the Government Claims Act "serves as a limitation on the fundamental jurisdiction of the courts" or rather "operates as an affirmative defense to liability." *Id.* at 802-03. To answer that question, the court recounted the history of California immunity doctrine. "At common law," the court explained, "the doctrine of sovereign immunity had two strands: a procedural immunity from suit without the government's consent and a substantive immunity from liability for the conduct of government." *Id.* at 811. The procedural immunity from suit was largely eliminated by the legislature in 1885. *See id.* But, the court explained, the substantive immunity—immunity from *liability*—lived on in the state's common law. *Id.* at 811-12. In the 1960s, California abolished that common law immunity in favor of a statutory approach that eventually became the

---

[12] *See* Cal. Gov. Code §§ 820.2, 820.8, 845.2, 855.4, 8658, 8659.

Government Claims Act. *Id.* at 803, 812. Reasoning from history, the California Supreme Court concluded that the Government Claims Act's immunity provisions were "addressed to questions of substantive liability." *Id.* at 813. The analysis in *Quigley* dictates that the Government Claims Act immunities on which Defendants rely are defenses to liability, not immunities from suit.[13] Our prior holding that section 820.2 is an immunity from suit has thus been "undercut" by "an intervening decision from a state court of last resort . . . 'in such a way that the cases are clearly irreconcilable,'" making that holding effectively overruled by the California Supreme Court. *Scafidi v. Las Vegas Metro. Police Dep't*, 966 F.3d 960, 963 (9th Cir. 2020) (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)).[14]

---

[13] That conclusion is supported by the statutes themselves, which provide that public employees are not "liable" for some class of injuries. *See* Cal. Gov. Code § 820.2 ("[A] public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him."); § 820.8 ("[A] public employee is not liable for an injury caused by the act or omission of another person."); § 845.2 ("[N]either a public entity nor a public employee is liable for failure to provide a prison, jail or penal or correctional facility . . . sufficient equipment, personnel or facilities."); § 855.4 ("Neither a public entity nor a public employee is liable for an injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease.").

[14] Both parties note that, prior to its decision in *Quigley*, the California Supreme Court once referred to the immunity conferred by section 820.2 as "immunity from suit." *Caldwell v. Montoya*, 10 Cal. 4th 972, 976 (1996) ("[Section 820.2] generally affords a public employee personal *immunity from suit* when the act or omission for which recovery is soughtresulted from 'the exercise of the discretion vested in him.'" (emphasis added)

The immunities defined in the California Emergency Services Act function the same way as those in the Government Claims Act. Those provisions are also phrased as immunities from liability, just as the Government Claims Act immunities are.[15] It would be odd for California to assign similarly worded immunities different effects, and we see no reason to interpret the statutes as doing so.

Because the state law immunities on which Defendants rely here are immunities from liability, not from suit, Defendants cannot invoke the collateral order doctrine to immediately appeal the district court's rejection of those state law defenses. *See Tuuamalemalo*, 946 F.3d at 476. We thus lack jurisdiction to review that part of Defendants' appeal.

(quoting Cal. Gov. Code § 820.2)). But *Caldwell* concerned only "a narrow" issue about the scope of section 820.2, not whether the provision serves as an immunity from suit or from liability. *See id.* at 975-76. And elsewhere in the opinion, the court described the immunities in the Government Claims Act as immunities "from liability." *See id.* at 980 ("[The Government Claims Act] establishes the basic rules that public entities are immune from liability except as provided by statute." (emphasis omitted)). We therefore think that *Caldwell*'s passing reference to section 820.2 as an "immunity from suit" was merely imprecise wording in a case where the court had no reason to distinguish between an immunity from suit and a defense to liability.

[15] *Compare* Cal. Gov. Code § 8658 ("Such person shall not be held liable, civilly or criminally, for acts performed pursuant to this section."), and § 8659(a) ("Any physician or surgeon . . . who renders services during . . . a state of emergency . . . at the express or implied request of any responsible state or local official or agency shall have no liability for any injury sustained by any person by reason of those services."), *with supra* note 13.

VI.

For the foregoing reasons, we **AFFIRM in part, REVERSE in part,[16] and DISMISS in part.**

[16] *See supra* note 1.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-15481

D.C. No. 3:21-cv-03058-LB

MICHAEL HAMPTON; JACQUELINE HAMPTON,
Plaintiffs-Appellees,

v.

STATE OF CALIFORNIA; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; SAN QUENTIN STATE PRISON; RALPH DIAZ; RONALD DAVIS, Warden; RONALD BROOMFIELD; CLARENCE CRYER; ALISON PACHYNSKI; SHANNON GARRIGAN; LOUIE ESCOBELL; MUHAMMAD FAROOQ; KIRK A TORRES; ESTATE OF ROBERT S. THARRATT,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
Laurel D. Beeler, Magistrate Judge, Presiding

Argued and Submitted May 10, 2023
San Francisco, California

Filed October 3, 2023

MEMORANDUM*

Before: FRIEDLAND and BENNETT, Circuit Judges, and R. BENNETT, ** District Judge.

High-level officials within the California prison system ("Defendants") appeal from the district court's order denying in part their motion to dismiss. We address most of the arguments presented in this appeal in a published opinion filed concurrently with this memorandum disposition. Here, we address their familial-association claim and their requests for judicial notice.

1. This case involves a familial-association claim asserted by a spouse, rather than a parent or child. "We have not previously held whether a substantive due process right exists in that context, and other courts of appeals have reached conflicting conclusions." *Peck v. Montoya*, 51 F.4th 877, 893 (9th Cir. 2022). Plaintiff's due process right to familial association with her husband is therefore not "clearly established," *id.* at 887 (quotation marks omitted), and Defendants are entitled to qualified immunity on the familial-association claim. *Cf. Villanueva v. California*, 986 F.3d 1158, 1165 n.5 (9th Cir. 2021) (holding that whether a party had "Fourth Amendment standing" was part of the merits of the

---

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Richard D. Bennett, United States Senior District Judge for the District of Maryland, sitting by designation.

constitutional claim and accordingly must be clearly established "to overcome qualified immunity").

2. Defendants ask us to take judicial notice of three categories of documents: (1) news articles describing COVID-19 guidance as it existed in the spring and early summer of 2020; (2) publications and data about COVID-19 from governmental agencies; and (3) court transcripts from *Plata v. Newsom*, N.D. Cal. No. 01-cv-1351. Defendants seek to use the news articles and COVID-19 data to support their position that their actions were reasonable, considering their knowledge at the time. Similarly, Defendants rely on the court transcripts in support of their argument that the Federal Receiver directed or oversaw the challenged actions. Defendants' knowledge and the Receiver's involvement are key factual disputes in this case, and it would be inappropriate for us to take judicial notice of such disputed facts. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001) ("[A] court may not take judicial notice of a fact that is 'subject to reasonable dispute.'" (quoting Fed. R. Evid. 201(b))). To the extent Defendants rely on the documents for other reasons, we deny the request to take judicial notice because the documents are "not relevant to the disposition of this appeal." *Cuellar v. Joyce*, 596 F.3d 505, 512 (9th Cir. 2010). Defendants' request for judicial notice is accordingly denied.

REVERSED IN PART.

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

Case No. 3:21-cv-03058-LB

Re: ECF No. 27

MICHAEL HAMPTON, et al.,
Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,
Defendants.

Filed March 20, 2022

AMENDED ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

INTRODUCTION

Michael Hampton, a prisoner housed at San Quentin State Prison, died on September 25, 2020, after contracting COVID-19. His widow sued the State of California, the California Department of Corrections and Rehabilitation (CDCR), the prison, and ten officials (including the Secretary of the CDCR, the San Quentin warden, and officials responsible for medical-care policy), alleging that they knew the risks that led to a large-scale outbreak of COVID-19 at San Quentin and — through a botched transfer of at-risk

inmates from the California Institute for Men (CIM) to San Quentin and a failure to use basic safety measures — caused Mr. Hampton's death. She claims (1) inhumane prison conditions in violation of the First, Eighth, and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983, (2) supervisory liability under § 1983, (3) a violation of California's Bane Act, (4) a violation of Title II of the Americans with Disabilities Act (ADA) and § 504 of the Rehabilitation Act of 1973, and (5) negligence. The defendants moved to dismiss on the grounds that (1) they have qualified immunity because the plaintiffs did not plead facts establishing a constitutional violation by the individual defendants or show that the law was clearly established, (2) they otherwise have immunity under the Public Readiness and Emergency (PREP) Act, 42 U.S.C. § 247d-6d(a)(2) & (b), for their decisions about using countermeasures to COVID- 19, (3) the plaintiffs did not plausibly plead a claim under the ADA or the Rehabilitation Act, and (4) statutory immunities bar the state claims. The court dismisses the ADA/Rehabilitation Act claim without prejudice and otherwise denies the motion to dismiss because the plaintiff plausibly pleaded the claims, and the immunities do not bar the claims at the pleadings stage.

STATEMENT

1. Allegations in the Operative Complaint about the COVID-19 Outbreak at San Quentin

The genesis of the COVID-19 outbreak at San Quentin was the transfer of 122 inmates from CIM to San Quentin on May 30, 2020. At the time, CIM had 600 COVID-19 cases and nine deaths, and San Quentin had no reported COVID-19 cases. The

transferred inmates allegedly were at high risk medically to contract COVID-19, had not been screened for COVID-19 for weeks, and were packed onto buses in numbers that exceeded the capacity limits set by the CDCR. Some fell ill before they arrived at San Quentin.[1] When they arrived at San Quentin, the former CIM inmates were housed in the Badger housing unit, which allegedly had open-air cells open to a shared atrium, with common showers and a mess hall.[2] Allegedly, the seven individual defendants from CDCR and San Quentin approved the transfer of the CIM inmates and their housing at Badger: Secretary of the CDCR Ralph Diaz; CDCR Medical Director R. Steven Tharratt, M.D.; San Quentin Warden Ronald Davis; San Quentin Acting Warden Ronald Bloomfield; San Quentin CEO of Healthcare Charles Cryer; San Quentin Chief Medical Officer Alison Pachynski, M.D.; and San Quentin Chief Physician and Surgeon Shannon Garrigan, M.D.[3] The three remaining defendants are at CIM and allegedly approved the transfer decision too: CEO Louie Escobell, RN; Chief Medical Officer Muhammad Farooq; and Chief Physician and Surgeon Kirk Torres, M.D.[4] The complaint names the State of California,

---

[1] First Am. Compl. (FAC) – ECF No. 22 at 11 (¶ 34). Citations refer to material in the Electronic Case File (ECF); pinpoint citations are to the ECF-generated page numbers at the top of documents.

[2] *Id.* at 11–12 (¶ 35).

[3] *Id.* at 11–12 (¶ 35), 27–28 (¶ 72).

[4] *Id.* at 27–28 (¶ 72).

the CDCR, and San Quentin as defendants in the ADA and Rehabilitation Act claim.[5]

Within days of the transfer, 25 transferees tested positive, leading to an outbreak of COVID-19 at San Quentin and 499 confirmed cases.[6] By July 7, 2020, over 1,300 inmates and 184 staff tested positive for COVID-19.[7] By July 30, 2021, 2,181 inmates (roughly two-thirds of the prison population) tested positive.[8] By September 2, 2020, 26 inmates and one correctional officer died of COVID-19, deaths that (according to the plaintiffs) were preventable.[9]

The plaintiffs' claims are predicated on the botched transfer of infected prisoners from CIM and the defendants' refusal to implement basic safety measures to reduce the spread of COVID-19, which caused Mr. Hampton's death. At the time of the transfer, the defendants knew the risks of COVID-19. For example, (1) county shelter-in-place orders were in effect by March 16, 2020, (2) a state shelter-in-place order was in effect on March 19, 2020, (3) the governor declared a state of emergency on March 4, 2020, and, on March 24, 2020, suspended the intake of inmates into all state facilities for 30 days, and (4) statewide mask mandates were in place by April 17, 2020.[10] Until late May 2020, the California Correctional

---

[5] *Id.* at 33.

[6] *Id.* at 11–12 (¶ 35).

[7] *Id.* at 15 (¶ 45).

[8] *Id.*

[9] *Id.*

[10] *Id.* at 8–10 (¶¶ 28–29, 31–33).

Health Care Services (CCHCS) opposed the transfer of inmates between prisons and said that transfer "carries significant risk of spreading transmission of the disease between institutions."[11] On March 18, 2020, the Habeas Corpus Resource Center wrote a letter to defendants San Quentin Warden Ron Davis and San Quentin's Chief Medical Officer Alison Pachynski asking San Quentin to give inmates personal-protective equipment and cleaning supplies, allow for social distancing, and avoid quarantining inmates testing positive for COVID-19 in solitary-confinement cells normally used for punitive measures.[12]

On June 1, 2020, in a conference call with "Defendants, including Defendant Broomfield" (the acting warden), Marin County Public Health Officer Matthew Willis, M.D., recommended that San Quentin sequester the transferred inmates from the existing San Quentin population. Instead, San Quentin housed the transferred inmates in a shared unit with existing San Quentin inmates. Dr. Willis recommended masks for exposed inmates and correctional staff and restricting staff movement between different housing units. The defendants (presumably not the CIM defendants) knew about the recommendations, did not adopt them, and "agreed . . . [to] inform[]" Dr. Willis that local health authorities had no authority to mandate measures in the prisons. On June 3, Dr. Willis recommended that San Quentin appoint an incident commander with expertise in outbreak management. The defendants

---

[11] *Id.* at 10 (¶ 32).

[12] *Id.* at 10 (¶ 30).

appointed one on July 3, but only after the Marin County Board of Supervisors appealed directly to Governor Newsom.[13]

CCHCS Director J. Clark Kelso is the federal receiver for California's prison medical-care system. On June 13, 2020, at his request, medical experts toured San Quentin. In a June 15, 2020, "Urgent Memo," they warned that the COVID-19 outbreak at San Quentin could become a "full-blown epidemic and health care crisis in the prison and surrounding communities" and that overcrowding and the risk factors at San Quentin created a high risk for a "catastrophic super-spreader event." There was a "grave lack of personal protective equipment and masks" for inmates, and the defendants "refused to provide adequate masks and personal protective equipment" to inmates or prison staff. Inmates had to make inadequate masks out of cloth, and both inmates and staff regularly wore no masks or wore them improperly. The defendants knew about and tolerated these problems. The experts warned that-virus testing delays (five to six days) were too long and intolerable.[14] They said that quarantine strategies of using cells otherwise used for punishment might (1) thwart containment because inmates would be reluctant to report symptoms and (2) pose health risks to sick inmates because they would be out of the sight of medical staff and face barriers to communicating with them.[15] The experts — who met with inmates over the age of 60 with only weeks left on their

---

[13] *Id.* at 12–13 (¶ 38).

[14] *Id.* at 13 (¶ 39).

[15] *Id.* at 13–14 (¶ 40).

sentences — reported that "[i]t is inconceivable that they are still in this dangerous environment."[16] They recommended measures to be implemented immediately, including large-scale release of inmates. The defendants knew about and chose to disregard the recommendations and — rather than release significant numbers of high-risk inmates — ordered inmates transferred to punitive housing assignments at San Quentin, including solitary confinement.[17] As a result, inmates refused to report symptoms and test so that they could avoid punitive incarceration.[18]

In March and June 2020, the defendants knew about and refused two offers by the Innovative Genomics Institute in Berkeley, California, to provide free COVID-19 testing at San Quentin, and they refused two similar offers by UCSF Medical Center in May and June 2020. Mr. Kelso, the federal receiver, testified that San Quentin and the CDCR lacked testing resources in March and April 2020 and were still unable to provide timely testing results by July 2020. Prison staff were "begging" for personal-protective equipment but "were told that to the extent San Quentin had such PPE, it was reserved for medical professionals and not frontline correctional officers and supervisors." Officers "were relegated to wearing" inmate-made or homemade masks, were not tested for COVID-19, and were not trained about or required to follow safety protocols. The defendants knew about, and actually or tacitly approved, these conditions and practices.[19]

---

[16] *Id.* at 14 (¶ 41).

[17] *Id.* at 10 (¶ 30), 14 (¶ 41).

[18] *Id.* at 14 (¶ 41).

[19] *Id.* at 14–15 (¶ 42).

On July 1, 2020, at a meeting held by the California Senate Commission on Public Safety, state senators called the May 2020 transfer from CIM to San Quentin "a horribly botched transfer" that reflected a "failure of leadership" that was "abhorrent," a "fiasco," and "completely avoidable." Mr. Kelso testified that "what we've done to date still is not enough," and Dr. Mark Ghaly, who heads California's Health and Human Services Agency, said "[t]here is no dispute that more could be and should be done."[20]

On July 6, 2020, Mr. Kelso fired defendant R. Steven Tharratt, M.D., the CDCR Medical Director.[21] In August 2020, defendant Ralph Diaz, the Secretary of the CDCR, announced his retirement.[22]

On October 20, 2020, the California Court of Appeal issued its opinion in *In re Von Staich*. 56 Cal. App. 5th 53 (2020); *review granted and request for depublication denied sub nom.*, *Von Staich on H.C.*, 477 P. 3d 537 (Cal. 2020) (Court of Appeal must vacate its decision and consider whether disputes of facts require an evidentiary hearing before it pronounces judgment). The Court of Appeal's holdings were as follows: (1) the warden and the CDCR acted with deliberate indifference to the rights and safety of San Quentin prisoners; (2) public-health experts endorsed conclusions that inmates could be protected only if the prison released substantial numbers of inmates; (3) CDCR did not implement the fifty-percent reduction "deemed essential by the Urgent Memo solicited in its behalf by the federal receiver;" (4) the respondents "concede actual knowledge of the substantial risk of

---

[20] *Id.* at 15 (¶ 43).

[21] *Id.* (¶ 44).

[22] *Id.* (¶ 46).

serious harm to San Quentin inmates;" (5) the failure to reduce the population was not reasonable; and (6) the continued use of congregate living spaces and double cells was reckless (not merely negligent) (given the prison's poor ventilation and inadequate sanitation) and was aggravated by the respondents' failure to consider the expedited release of prisoners who were vulnerable to COVID-19 and not likely to recidivate. *Id.* at 58, 63–64, 78–79 (cleaned up).[23]

On August 17, 2020, the Office of the Inspector General (OIG) issued the first of three reports responding to a request by the Speaker of the California Assembly for an assessment of the CDCR's COVID-19 policies. It found problems such as poor screening for COVID-19 and inadequate training. (Forty-seven percent of the screeners at San Quentin had received no training.[24]) In the second report on October 26, 2020, it concluded that lax enforcement by CDCR supervisors and managers likely contributed to noncompliance by staff members and inmates with protocols governing face coverings and social distancing.[25]

On February 1, 2021, the OIG released its third report, titled *California Correctional Health Care Services and the California Department of Corrections and Rehabilitation Caused a Public Health Disaster at San Quentin State Prison When They Transferred Medically Vulnerable Incarcerated Persons from the California Institution for Men Without Taking Proper Safeguards*. The OIG characterized the efforts to prepare for the transfers as "deeply flawed and risked

---

[23] *Id.* at 15–18 (¶ 47).

[24] *Id.* at 18 (¶ 48).

[25] *Id.* at 18–19 (¶ 49).

the health and lives of thousands of incarcerated persons and staff." CCHCS insisted on a tight transfer deadline, resulting in the CIM's ignoring the healthcare staff's concerns and transferring medically vulnerable persons who had not been tested for COVID-19. According to emails, a CIM healthcare executive ordered that incarcerated persons not be retested the day before the transfers, and "multiple CCHCS and departmental executives were aware of the outdated nature of the tests before the transfers occurred." The risks were exacerbated by the "inexplicable decision" to increase the numbers of persons on the buses. When inmates arrived at San Quentin, two were symptomatic for COVID-19, but all were housed in one unit with air circulation that flowed throughout the unit. By the time the prison tested them, the inmates had been housed together for at least six days, and the virus had spread quickly among them. The prison could not quarantine them, leading to the spread of the virus throughout the prison.[26] Given that CIM nurses questioned the transfer on grounds of patient safety and the lack of COVID-19 precautions, the OIG concluded that "[t]he decision to transfer the medically vulnerable incarcerated persons despite such outdated test results was not simply an oversight, but a conscious decision made by prison and CCHCS executives."[27]

Also on February 1, 2021, Cal-OSHA cited the CDCR and San Quentin with fourteen violations (including five serious violations and four "willful-serious" violations), including a lack of training, testing, proper personal-protection equipment, legally

---

[26] *Id.* at 19–20 (¶ 50).

[27] *Id.* at 19–21 (¶¶ 50–51).

required respirators at least as effective as N95 respirators, soap in an employee restroom, policies to prevent airborne transmission and other decontamination policies, and appropriate transfer and housing policies to address the risk (whether within or outside of the facility).[28]

As discussed above, seven defendants (at the CDCR and San Quentin) allegedly personally approved the transfer of the CIM inmates and their housing at the Badger housing unit, and the remaining three medical defendants at CIM allegedly approved the transfer too. All allegedly knew about the risks surrounding the transfer and outbreak.[29] Again, as discussed above, on March 18, 2020, San Quentin Warden Ron Bloomfield and Chief Medical Officer Alison Pachynski, M.D., received letters about personal-protection equipment, cleaning supplies, and social distancing.[30]

2. CDCR Submissions About its Response to the Pandemic

In 2006, in *Plata v. Newsom,* No. 01-cv-01351-JST, a Northern District judge appointed a federal receiver to administer the CDCR to ensure compliance with the Eighth Amendment's standards for medical care. *Hines v. Youseff*, 914 F.3d 1218, 1223 (9th Cir. 2019). According to the receiver's testimony at the July 1, 2020, hearing held by the California Senate Commission on Public Safety (referenced in the complaint and summarized in part above), the CDCR

---

[28] *Id*. at 21–22 (¶ 52).

[29] *See, e.g.*, *id*. at 3–7 (¶¶ 6–19).

[30] *Id*. at 10 (¶ 30).

began planning its response to the pandemic in February 2020 and took preventative measures by March 11, 2020, but COVID-19 numbers spiked anyway by May 2020. The CDCR spent weeks considering whether it could move CIM patients safely to the prisons at Corcoran and San Quentin. It had a screening-and-testing matrix for patient movement that required a negative test (but did not specify the timing of the test, which meant that some tests were two, three, and four weeks old, meaning, too old to be reliable). The prison at Corcoran managed the outbreak pretty well, but San Quentin did not, in part based on serious resource deficiencies in the physical plant, COVID-19 support, and testing, which contributed to the rapid spread of the virus.[31] In a May 27, 2020, joint case-management statement submitted by the CDCR and the *Plata* plaintiffs, the CDCR said that "the Receiver, in conjunction with the Secretary [of the CDCR], has directed that high-risk inmates who test negative for COVID-19 be transferred to institutions that remain COVID-free."[32]

---

[31] Kelso Test., Ex. E to Request for Judicial Notice – ECF No. 27-2 at 140–45 (pp. 58–63). The court judicially notices the testimony referenced in this order for completeness and under the incorporation- by-reference doctrine. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

[32] J. Case-Management Statement, *Plata v. Newsom*, No. 01-cv-01351-JST (May 27, 2020), Ex. C to *id.* – ECF No. 27-2 at 54 (p. 14). The court judicially notices the public-record statement (but not disputed facts in it) and recounts the statement for the fact that it was said, not for the truth of disputed facts. *Lee v. Cnty. of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001).

3. Mr. Hampton's Death

The CDCR refused to provide Mr. Hampton's custody records, which have information about his COVID-19 infection and medical treatment, and thus some information in the complaint about his medical condition is based on knowledge and belief.[33] (At the hearing on its motion to dismiss, the CDCR agreed to provide the records.)

The defendants had to have known about Mr. Hampton's high-risk factors for COVID-19 including age (62), obesity, hypertension, hyperlipidemia, prediabetes, and sleep apnea.[34] By early June 2020, Mr. Hampton had symptoms consistent with COVID-19. On June 24, 2020, he submitted a Healthcare Services Request Form, writing, "I've had a constant cough for a couple of weeks now all night long — it doesn't stop — could you give me something for this cough please." By June 26, his symptoms had worsened, and he complained of a cough, a loss of his senses of taste and smell, a loss of appetite, and shortness of breath, and he told San Quentin medical staff that he had not eaten in three days due to vomiting. (He spoke on the phone with his wife (the plaintiff) around this time and was coughing badly.) Shortly after the call, the prison transferred him out of the Main Block housing unit and into the Badger unit, where San Quentin housed inmates with COVID-19 symptoms. Two days later, Mr. Hampton's wife learned through a phone call with another inmate that Mr. Hampton had been moved for treatment. She believes that he spent the two days without medical attention. She did not hear from anyone for about a

---

[33] FAC – ECF No. 22 at 22 (¶¶ 53–54).

[34] *Id.* at 26 (¶ 63).

week and a half, when she finally reached a liaison, who told her that Mr. Hampton had been transferred to a hospital but would not provide additional information.[35]

On June 27, 2020, prison staff moved Mr. Hampton to Seton Medical Center in Daly City. He arrived with COVID-19 and pneumonia, and he was in acute hypoxic respiratory distress. The defendants did not tell the plaintiff about his transfer until June 30. His health continued to deteriorate. Prison staff did not allow Mr. Hampton's wife to communicate with him until his condition worsened several weeks later, and he was moved to the ICU. There, she had daily video calls with him, where he told her that his fever was so high at San Quentin that he had to lie on the floor to cool off. He was placed on a ventilator on August 6, 2020, and remained there for one month, requiring a tracheostomy and a change of medication before the hospital weaned him off the ventilator. By this time, he had significant scarring on his lungs and multiple pulmonary embolisms. On September 15, 2020, he transitioned to comfort care, and on September 22, 2020, he was transferred to Kentfield Hospital for ongoing comfort care. He died three days later.[36]

Mr. Hampton was a model inmate and was eligible for release under Proposition 57, "having served 22 years for burglary, a [non-violent] crime with a maximum sentence of 6 years." His parole hearing was set in August 2020.[37]

---

[35] *Id.* at 22–23 (¶ 55–56).

[36] *Id.*

[37] *Id.* at 8 (¶ 26), 22 (¶ 56).

4. Other Relevant Procedural History

Mr. Hampton's widow sued the State of California, the CDCR, San Quentin the prison, and ten officials for causing Mr. Hampton's death.[38] The complaint has five claims:

Claim One: deliberate indifference in violation of the First, Eighth, and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983 based on (a) inhumane and unsafe conditions of confinement that caused Mr. Hampton to contract COVID-19 (against the ten individual defendants) and (b) interference with the plaintiff's right to familial association when Mr. Hampton was hospitalized (against defendants Ralph Diaz, the estate of Dr. Tharratt, Wardens Davis and Broomfield, and medical officials Pachynski and Garrigan);

Claim Two: supervisory liability under § 1983 (against the ten individual defendants) for the alleged botched transfer and subsequent actions at San Quentin;

Claim Three: a violation of California's Bane Act, Cal. Gov't Code § 52.1(b) (against the ten individual defendants), for deprivation of U.S. Constitutional rights (based on the deliberate indifference and interference with familial relations), denial of timely medical information to the family in violation of Cal. Penal Code § 5022 and Cal. Prob. Code §§ 4701 and 4717, and a denial of rights secured by the California Constitution, Art. 1, § 1;

Claim Four: a violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and § 504 of the Rehabilitation Act of 1973,

[38] *Id.* at 3–7 (¶¶ 6–19).

28 U.S.C. § 794 (against the state of California, the CDCR, and San Quentin); and

Claim Five: negligence (against the ten individual defendants).[39]

The court held a hearing on the defendants' motion to dismiss on November 4, 2021. All parties consented to magistrate-judge jurisdiction under 28 U.S.C. § 636.[40]

5. Other Cases

There are other Northern District cases that the parties cited that involve San Quentin's handling of the pandemic: (1) *Plata*, No. 01-cv-01351-JST (see above); (2) *Ruiz v. California*, No. 21-cv-01832-JD (deceased inmate; represented by *Hampton* counsel; motion to dismiss pending); (3) *Legg v. CDCR*, No. 21-cv-01963-HSG (deceased inmate; represented by different counsel; partial motion to dismiss pending); (4) *Love v. California*, No. 21-cv-04095-JD (deceased inmate; represented by *Hampton* counsel; motion to dismiss filed); (5) *Polanco v. California*, No. 21-cv-06516-CRB (deceased correctional officer; represented by *Hampton* counsel; motion to dismiss filed; order issued); and (6) *Warner v. California*, No. 21-cv-08154-JD (deceased inmate; represented by *Hampton* counsel; motion to dismiss filed). At least twenty-six cases in the Northern District involve claims of exposure to COVID-19 related to the May 2020 transfer of inmates from CIM to San Quentin. The twenty-six cases (but not *Plata*, *Polanco*, or this case) have been reassigned for limited purposes to U.S.

---

[39] *Id.* at 25–37 (¶¶ 61–103).

[40] Consents – ECF Nos. 9, 25, 29, 30, 39.

District Judge William H. Orrick to determine whether (1) Clark Kelso has quasi-judicial immunity or some other defense, (2) the defendants have immunity under the PREP Act, (3) the defendants have qualified immunity, and (4) the complaints filed by unrepresented plaintiffs state a claim. *E.g., Ruiz*, No. 21-cv-01832-JD, Order – ECF No. 70.

STANDARD OF REVIEW

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief" to give the defendant "fair notice" of what the claims are and the grounds on which they rest. Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint does not need detailed factual allegations, but "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (cleaned up).

To survive a motion to dismiss, a complaint must contain sufficient factual allegations, which when accepted as true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *NorthBay Healthcare Grp., Inc. v. Kaiser Found. Health Plan, Inc.*, 838 F. App'x 231, 234 (9th Cir. 2020). "[O]nly the *claim* needs to be plausible, and not the facts themselves." *NorthBay*, 838 F. App'x at 234 (citing *Iqbal*, 556 U.S. at 696). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct

alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (cleaned up). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (cleaned up).

If a court dismisses a complaint, it must give leave to amend unless "the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).

ANALYSIS

The plaintiffs alleged that the botched transfer caused Mr. Hampton's death and claim violations of the U.S. Constitution, the ADA and Rehabilitation Act, California's Bane Act, and common-law negligence. The defendants counter that (1) they are entitled to qualified or statutory immunity because at most they made difficult decisions about how to address the virus and (2) they are immune under the PREP Act for their administration of interventions designed to address the pandemic.[41]

Preliminarily, the plaintiffs' argument — articulated at the hearing — is that the nature of the decisions involving the transfer meant that the defendants necessarily (given their jobs) had the requisite knowledge about the decisions. The allegations at the pleadings stage establish that point for the decisionmakers affiliated with the relevant

[41] Reply – ECF No. 43 at 7 (summarizing issues).

institutions (San Quentin and CIM), including Secretary of the CDCR Ralph Diaz, who allegedly was personally involved in the transfer. *Polanco v. State of California*, No. 21-cv-06156-CRB, 2022 WL 625076, at *9 (N.D. Cal. Mar. 3, 2022) (reaching similar decision). The court dismisses the ADA/Rehabilitation Act claim without prejudice and otherwise denies the motion to dismiss.

1. Constitutional Claims: Deliberate Indifference and Supervisory Liability

Deliberate indifference to a prisoner's serious medical needs amounts to the cruel and unusual punishment prohibited by the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A prison official violates the Eighth Amendment when two requirements are met: (1) the deprivation alleged is, objectively, sufficiently serious, and (2) the official is, subjectively, deliberately indifferent to the inmate's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

For the objective prong of the deliberate-indifference test in a medical-care claim, the plaintiffs "must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012) (cleaned up). For the subjective, or "deliberate indifference" prong, the plaintiffs must show "(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." *Id.* (cleaned up); *cf. Farmer*, 511 U.S. at 837 (deliberate-indifference prong requires that "the official must both

be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference”).

“A defendant may be held liable as a supervisor under § 1983 if there exists either (1) [the supervisor’s] personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violation.” *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (cleaned up); *see Cunningham v. Gates*, 229 F.3d 1271, 1292 (9th Cir. 2000) (supervisors can be liable for “1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous indifference to the rights of others”).

The plaintiffs plausibly allege that the defendants (affiliated with San Quentin or CIM) knew about the risks related to the transfer and ignored them when they authorized and executed the transfer in an obviously unsafe way. The defendants contest the facts, but that is an issue for summary judgment. Moreover, as the plaintiffs point out, there is an asymmetry of information: the defendants have the decedent’s custody file and possess information about the transfer decisions. Rule 8(a) does not require more under circumstances like these. In sum, the plaintiffs plausibly plead that the defendants were personally involved, failed to act, and acquiesced in the constitutional deprivation.

As to the second theory of the deliberate-indifference claim (the alleged interference with the plaintiff’s right to familial association when Mr.

Hampton was hospitalized), the claim sufficiently alleges the loss of familial association based on Mr. Hampton's death and illness. To the extent the plaintiffs alleged a separate theory of liability for the time that she had no information about Mr. Hampton's medical condition, she cites no cases or facts that support that theory. (That context may be relevant to damages.)

The defendants also assert qualified immunity. Disputed facts preclude qualified immunity.

"[T]he doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (en banc) (cleaned up) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Qualified immunity is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mueller v. Auker*, 576 F.3d 979, 992 (9th Cir. 2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). "Under qualified immunity, an officer will be protected from suit when he or she 'makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances.'" *Id*. (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)).

"[Q]ualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). "The doctrine of qualified immunity gives officials breathing room to make reasonable but mistaken judgments about open legal questions." *Id*. at 1866 (cleaned up). "[I]f a reasonable officer might not have

known for certain that the conduct was unlawful[,] then the officer is immune from liability." *Id.* at 1867.

In determining whether an officer is entitled to qualified immunity, courts consider (1) whether the officer violated a constitutional right of the plaintiff and (2) whether that constitutional right was "clearly established in light of the specific context of the case" at the time of the events in question. *Mattos*, 661 F.3d at 440. Courts may exercise their sound discretion in deciding which of these two prongs should be addressed first. *Id.* (citing *Pearson*, 555 U.S. at 235).

Regarding the second prong, "clearly established law should not be defined at a high level of generality," but instead "must be particularized to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (cleaned up). Although case law "does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018).

The defendants' main argument is that the plaintiffs' claim — the Eighth Amendment gives inmates protection from communicable diseases, including COVID-19 — is not sufficient to establish a clearly established constitutional right. Also, they contend that the federal receiver authorized the transfer.[42]

The facts surrounding the federal receiver's involvement are disputed. At most, the record supports the conclusion that the federal receiver was involved in the decision to transfer and is silent on his

---

[42] Reply – ECF No. 43 at 9–10 (citing the *Plata* case-management statement referenced above, which references the decision generally but not the circumstances surrounding it).

involvement on the allegedly botched transfer. Thus, qualified immunity is not warranted on this ground (though the issue may be dispositive at summary judgment).

Given the court's determination that the defendants violated the Eighth Amendment by not protecting Mr. Hampton from heightened exposure to a serious communicable disease, the next issue is whether the right was clearly established at the time of the events in the complaint. The court concludes that it was: the weight of authority establishes that the unlawfulness of the defendants' conduct was beyond debate.

There are many cases that hold that an Eighth Amendment claim is established when prison officials are deliberately indifferent to exposing inmates to serious communicable diseases. *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (possible future effects of exposure to cigarette smoke); *Hutto v. Finney*, 437 U.S. 678, 682 (1978) (inmates in punitive isolation were crowded into cells with inmates with infectious diseases such as hepatitis and venereal disease); *Andrews v. Cervantes*, 493 F.3d 1047, 1050 (9th Cir. 2007) (recognizing a claim under the Eighth Amendment based on a prison's lack of a policy to screen inmates for infectious diseases (HIV, Hepatitis C, and Heliobacter pylori) and for housing contagious and healthy inmates during an "epidemic of hepatis C"); *Treviso v. Webster*, No. CV 17-5868-MWF (KS), 2018 WL 5917858, at *4 (C.D. Cal. Sept. 6, 2018) (an inmate has an Eighth Amendment claim premised on the failure of correctional officers to remedy a condition of confinement that poses a substantial risk of harm to an inmate's future health; "[i]t is well accepted that such 'substantial risks of harm' include

'exposure of inmates to a serious, communicable disease'") (quoting *Helling*, 509 U.S. at 33); *Loftin v. Dalessandri*, 3 F. App'x 658, 663 (10th Cir. 2001) (recognizing Eighth Amendment claim for housing inmate in cell with other inmates who tested positive for TB). Other courts have reached similar conclusions. *Maney v. Brown*, 516 F. Supp. 3d 1161, 1179–82 (D. Or. 2021) (denying qualified immunity to prison officials under the Eighth Amendment for exposing inmates to COVID-19 and collecting cases allowing Eighth Amendment claims for prison officials' deliberate indifference to the risk of infecting inmates with contagious diseases); *Polanco*, 2022 WL 625076, at *13 (denying qualified immunity to prison officials on a due-process claim for failure to protect a prison employee from COVID 19 and collecting cases that gave the CDCR/San Quentin defendants "fair warning" that it violates the Constitution to (1) engage in affirmative conduct that exposes an employee to foreseeable, actual, and particularized danger from disease while (2) being deliberately indifferent to that danger).[43]

The defendants nonetheless contend that the precedent is not "particularized to the facts of this case," particularly with regard to their response to a rapidly evolving pathogen. They assert that "no persuasive authority would have put every reasonable official on notice, in May and June 2020, that a particular COVID-19 response violated the Eighth Amendment." To support that argument, they cite *Hines v. Yousef* as an "analogous" case.[44]

---

[43] *See also* Opp'n – ECF No. 40 at 18 (collecting cases); Opp'n – ECF No. 68 at 5–7 (same).

[44] Mot.– ECF No. 27-1 at 16–17; Mot. – ECF No. 69 at 2.

Hines is not analogous. It involved exposure to Valley Fever, a disease caused by inhaling fungal spores commonly found in the southwestern United States. 914 F.3d at 1224–26, 1229, 1232. The court found qualified immunity because no evidence suggested that involuntary exposure to the spores violated "current standards of decency" (which was relevant to the deliberate-indifference standard). *Id.* at 1231. The opinion turned in part on the accepted exposure to Valley Fever by the millions of people who live in the Central Valley, suggesting a tolerance to the risk that defeated the claim of a constitutionally impermissible risk. *Id.* at 1232. Also, Valley Fever was not communicable. *Id.* at 1224, 1229, 1232.

By contrast, the allegations here are about a deliberately indifferent response to a known risk of a communicable disease (not, as the defendants assert, the lack of a "particular COVID-19 response in 2020").[45] The defendants are of course correct: the pandemic was a novel situation. And it may be that later, the court will conclude that in light of undisputed facts, the defendants are entitled to qualified immunity because they made their decisions under other guidelines. Or it may be that the undisputed facts will show that they could not do more than they did. *Polanco*, 2022 WL 625076, at *14 (making similar points). But at the pleadings stage, the plaintiffs have pleaded violations of clearly established law in the form of the prison officials' deliberate indifference to heightened exposure of inmates to a serious communicable disease.

[45] Reply – ECF No. at 10.

2. PREP Act Immunity

The defendants contend that they are immune under the PREP Act for their administration of covered countermeasures to a health emergency (the COVID-19 pandemic).[46]

The PREP Act immunizes a "covered person" from "suit and liability" for claims for loss "caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure" if the Secretary of the U.S. Department of Health and Human Services has made a determination that a public-health condition or threat is (or credibly risks) a public-health emergency. 42 U.S.C. § 247d-6d(a)(1) & (b).

The term "covered countermeasure" means (A) a qualified pandemic or epidemic product (defined elsewhere in the statute); (B) a security countermeasure (same); (C) drugs, biological products, and devices (as the terms are defined in the Federal Food, Drug, and Cosmetic Act) that are authorized for emergency use under that Act; or (D) "a respirator protective device that is approved by the National Institute for Occupational Safety and Health under [the applicable] . . . Code of Federal Regulations (or any successor regulations), and that the Secretary determines to be a priority for use during a public health emergency declared under section 247d of this title." *Id.* § 247d-6d(i)(1). "The term 'covered person', when used with respect to the administration or use of a covered countermeasure, means . . . a person or entity that is— (i) a manufacturer of such countermeasure; (ii) a distributor of such

---

[46] *Id.* at 10–12 (referencing earlier arguments in the underlying motion).

countermeasure; (iii) a program planner of such countermeasure; (iv) a qualified person who prescribed, administered, or dispensed such countermeasure; or (v) an official, agent, or employee of a person or entity described in clause (i), (ii), (iii), or (iv)." *Id.* § 247d-6d(i)(2) (formatting altered).

As the defendants acknowledge, no courts have applied the PREP Act to prisons.[47] In any event, claims based on a failure to act, as opposed to purposefully allocating countermeasures, can fall outside the PREP Act protections. *See, e.g.*, *Estate of Heim v. 1495 Cameron Ave.*, No. 21-cv-6221-PA (ADSx), 2021 WL 3630374, at *1–4 (C.D. Cal. Aug. 17, 2021) (claims "based on alleged inaction on the part of Defendants" were not necessarily barred by the PREP Act); *Stone v. Long Beach Healthcare Ctr., LLC*, No. CV 21-326-JFW, 2021 WL 1163572, at *4 (C.D. Cal. March 26, 2021) ("There is only immunity for inaction claims when the failure to administer a covered countermeasure to one individual has a close causal relationship to the administration of that covered countermeasure to another individual.") (cleaned up).[48]

At the pleadings stage, the plaintiffs plausibly plead that Mr. Hampton died because the defendants botched his transfer and did not use basic safety measures (including many that are not covered countermeasures) to reduce the risk of COVID-19.[49]

[47] Mot. – ECF No. 27-1 at 18.

[48] *See also* Opp'n – ECF No. 40 at 24–25 (collecting and analyzing cases).

[49] *Id.* at 22 (citing the complaint's listing of safety measures that are not covered countermeasures).

Also, the plaintiffs' allegations that reference covered countermeasures generally are about a failure or refusal to use them.[50] Finally, the facts are disputed about whether the defendants purposely allocated countermeasures or failed to act. The court denies the motion to dismiss.

3. ADA and Rehabilitation Act Claim

Mr. Hampton suffered from sleep apnea, obesity, hypertension, hyperlipidemia, and prediabetes, and he had medical issues (such as a constant cough) that — he contends — sleep apnea may have exacerbated.[51] The defendants assert that the plaintiffs did not plead that Mr. Hampton's sleep apnea substantially limited major life functions or that he put the prison officials on notice of his need for accommodation.[52] Given that the defendants did not produce Mr. Hampton's custody file (and the resulting asymmetry of information), the plaintiffs sufficiently pleaded his disability, and the fact issues about whether it substantially limited a major life function are better resolved at summary judgment. But the court dismisses the claim because the plaintiffs did not plausibly plead that the defendants intentionally discriminated against Mr. Hampton.

Under Title II of the ADA, "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or

---

[50] *Id.* at 23 (citing the complaint's listing of failures to use available, and sometimes free, countermeasures).

[51] *Id.* at 26 (citing Compl. – ECF No. 22 at 22 (¶¶ 54–55).

[52] Reply – ECF No. 43 at 12.

activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The ADA prohibits public entities from discriminating against the disabled and also prohibits public entities from excluding the disabled from participating in or benefitting from a public program, activity, or service "solely by reason of disability." *Lee v. City of Los Angeles*, 250 F.3d 668, 690–691 (9th Cir. 2001). "Discrimination includes a failure to reasonably accommodate a person's disability." *Sheehan v. City & Cnty. of San Francisco,* 743 F.3d 1211, 1231 (9th Cir. 2014).

"To recover monetary damages under Title II of the ADA, a plaintiff must prove intentional discrimination on the part of the defendant." *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001). To prove intentional discrimination, the plaintiffs must show defendants acted with "deliberate indifference," which "requires both some form of notice . . . and the opportunity to conform to [statutory] dictates." *Id*. at 1139 (quoting *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (O'Connor, J., concurring)). The plaintiffs must identify "specific reasonable" and "necessary" accommodations that the defendant failed to provide. *Id*. "When the plaintiff has alerted the public entity to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the public entity is on notice that an accommodation is required, and the plaintiff has satisfied the first element of the deliberate indifference test." *Id*.

"[D]eliberate indifference does not occur where a duty to act may simply have been overlooked." *Id*. "Rather, in order to meet the second element of the deliberate indifference test, a failure to act must be a

result of conduct that is more than negligent, and involves an element of deliberateness." *Id*.

The two issues are whether the plaintiffs plausibly pleaded Mr. Hampton's disability and the defendants' intentional discrimination.

First, they plausibly pleaded his disability. An impairment (such as sleep apnea) that substantially limits one or more major life activities (such as sleeping) can be a qualifying disability. 42 U.S.C. § 12102(1)(A) & (2)(A).[53] Relevant authority suggests that the issue in this case is better addressed at summary judgment because the substantial limitation of a major life activity turns on facts. *Phillips v. PacifiCorp*, 304 F. App'x 527, 529 (2008) (affirming summary judgment in a wrongful-termination case in favor of the employer when the former employee's diagnosed disabilities — sleep apnea and chronic-obstructive pulmonary disease — were impairments that were mitigated by her later use of a CPAP machine and oxygen; thus, during the relevant time period, she did not have an impairment that substantially limited the major life activity of sleeping).

Second, the plaintiffs did not plausibly plead that the defendants intentionally discriminated against Mr. Hampton. The complaint has no facts about notice to the defendants about the disability and necessary accommodations. *Duvall*, 260 F.3d at 1138. The court dismisses the claim with leave to amend. The court does not set a deadline to amend because the forthcoming custody file and medical records likely are necessary to plead a claim plausibly.

---

[53] Opp'n – ECF No. 40 at 26 (collecting and analyzing authorities).

4. State-Law Statutory Immunities

The state claims are the Bane Act claim and common-law negligence. The defendants contend that they are immune from liability under five state statutes: (1) Cal. Gov't Code § 855.4 (for their decisions to prevent the spread of COVID-19); (2) Cal. Gov't Code § 845.2 (for the failure to provide sufficient equipment, personnel, or facilities); (3) Cal. Gov't Code § 8658 (for transferring the inmates from CIM to San Quentin); (4) Cal. Gov't Code § 820.2 (for their discretionary acts in weighing safety concerns and making decisions to ensure inmate safety); and (5) Cal. Gov't Code § 8659(a) (for providing medical services during an emergency).[54] The immunities do not bar the state claims, at least at the pleadings stage.

4.1 Cal Gov't Code § 855.4 — Decisions to Prevent Spread of COVID-19

Under § 855.4(a), public entities and employees are immunized from liability "for an injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community if the decision whether the act was or was not to be performed was

---

[54] Mot. – ECF No. 27-1 at 27-1 at 27-30 (also raising immunity under Cal. Gov't Code § 820.8 (because the plaintiffs did not plead any facts connecting the defendants to Mr. Hampton's contracting COVID-19); Reply – ECF No. 43 at 14–17 (omitting the § 820.8 argument). For the reasons that the plaintiffs plausibly pleaded the defendants' personal participation in the conduct giving rise to the § 1983 claim, the defendants' § 820.8 argument fails.

the result of the exercise of discretion vested in the public entity or the public employee, whether or not such discretion be abused." Under § 855.4(b), public entities and employees are not "liable for an injury caused by an act or omission in carrying out with due care a decision described in subdivision (a)."

Here, even under a heightened pleading standard, the plaintiffs pleaded sufficient facts to overcome the statutory immunity at the pleadings stage. *Cf. Ayala v. City of S. San Francisco*, No. C 06-02061 WHA, 2006 WL 2482292, at *4) (declining to apply a heightened pleading standard in federal court). The plaintiffs are not challenging the defendants' decision to transfer and instead challenge their acts surrounding the transfer as deliberately indifferent to the rights and safety of inmates and staff. The defendants respond that the plaintiffs have not connected any acts or omissions to particular defendants.[55] But as the court held above, at the pleadings stage, the plaintiffs have alleged sufficiently the defendants' individual involvement in the challenged acts.

4.2 Cal. Gov't Code § 845.2 — Failure to Provide Sufficient Personnel or Facilities

Under § 845.2, public entities and employees are immunized from liability "for failure to provide sufficient equipment, personnel, or facilities." It ensures that "essentially budgetary decisions . . . [are not] subject to judicial review in tort litigation." *Zelig v. Cnty. of Los Angeles*, 27 Cal. 4th 1112, 1142 (2002). Here, the plaintiffs do not suggest that the decisions were caused by budgetary issues. The immunity does not apply here.

---

[55] Mot. – ECF No. 27-1 at 27.

4.3 Cal. Gov't Code § 8658 — Transfer of Inmates

Under § 8658, "the person in charge" of a prison can remove an inmate from an institution "[i]n any case in which an emergency endangering the lives of inmates . . . has occurred or is imminent. Such person shall not be held liable, civilly or criminally, for acts performed pursuant to this section." The defendants contend only that CDCR Secretary Ralph Diaz is immune.[56] If he is the decisionmaker, then that may be correct. But if someone else made the decision, then he may not be immune (as the plaintiffs posit).[57] The plaintiffs pleaded plausibly that each defendant knew about the risks of outbreak at San Quentin and, in the exercise of their ministerial authority, were deliberately indifferent during the transfer and subsequent housing of the inmates. The immunity does not apply at the pleadings stage.

4.4 Cal. Gov't Code § 820.2 — Discretionary Decisions

Under § 820.2, "a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of discretion vested in him, whether or not such discretion was abused." This immunity applies to decisions at the planning level, not the operational level. *Johnson v. State*, 69 Cal. 2d 782, 794 (1968); *Taylor v. Buff,* 172 Cal. App. 3d 384, 387 (1984). A planning function involves a basic policy decision, not merely a ministerial decision to implement a policy

---

[56] *Id.* at 26.

[57] Opp'n – ECF No. 40 at 31.

that is already formulated. *Caldwell v. Montoya*, 10 Cal. 4th 972, 981 (1995).

Here, as discussed in the Eighth Amendment analysis, the plaintiffs plausibly pleaded deliberatively indifferent acts regarding the transfer of inmates and their subsequent housing at San Quentin, all involving the inmates' exposure to a serious communicable disease. The allegations plausibly establish that the state-law claims are not subject to § 820.2 immunity. It might be that as a matter of fact, some decisions — like the decision to transfer CIM inmates to San Quentin — were discretionary decisions that could trigger immunity under § 820.2. But other decisions — such as the transfer on overcrowded buses without appropriate testing and screening and subsequent housing decisions that did not involve quarantining — are ministerial decisions that are not immune. "It is these ministerial decisions, the deliberately indifferent manner in which the Defendants exposed Mr. Hampton to harm, that form the crux of Plaintiffs' claims."[58] The immunity does not bar the state claims at the pleadings stage.

4.5 Cal. Gov't Code § 8659(a) — Provision of Medical Services During an Emergency

Under § 8659(a), medical professionals who "render services during . . . any state of emergency at the express or implied request of any responsible state . . . official or agency" are immune from liability for "any injury sustained byany persons by reason of [their] services, regardless of how or under what circumstances or by what cause those injuries are sustained." The immunity does not "apply in the event

[58] *Id.* at 29.

of a willful act or omission." The defendants contend only that the plaintiffs did not connect any act to any particular defendant.[59] Again, the court has held that the plaintiffs plausibly pleaded the individual defendants' involvement.

* * *

The immunity issues do not preclude the state claims at the pleadings stage.

CONCLUSION

The court dismisses the ADA/Rehabilitation claim against all defendants without prejudice. The court otherwise denies the motion to dismiss. Because Mr. Hampton's custody file had not been produced, the court previously thought it best to defer the deadline to amend until after some discovery. But the parties' case-management filings suggested that they might want to settle the pleadings. They must confer within one week and provide their joint view on their preferred process. Any new complaint must have as an attachment a blackline of the amended complaint against the current complaint.

IT IS SO ORDERED.

Dated: March 20, 2022

/s/ LAUREL BEELER
LAUREL BEELER
United States Magistrate Judge

---

[59] Mot. – ECF No. 27-1 at 28.

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 3:21-cv-03058-LB

Re: ECF No. 66

MICHAEL HAMPTON, et al.,
Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,
Defendants.

Filed March 20, 2022

ORDER DENYING MOTION FOR RECONSIDERATION

The defendants moved under Federal Rule of Civil Procedure 59(e) for reconsideration of the court's order denying the defendants' motion to dismiss. They raise two grounds for reconsideration: (1) the court did not hold the plaintiffs to their burden of establishing a clearly established constitutional when it analyzed qualified immunity, and (2) it did not consider whether the plaintiffs alleged sufficient facts to show that the defendants' conduct was not immune under

state law.[1] The court can decide the motion for reconsideration without oral argument. Civ. L. R. 7-1(b). The court denies the motion generally because there was no error. The court also amends its earlier dismissal order to expand its analysis.[2]

The court can reconsider its order under Rule 59(e). "Rule 59(e) amendments are appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Dixon v. Wallowa Cnty.*, 336 F.3d 1013, 1022 (9th Cir. 2003) (cleaned up). A motion for reconsideration "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008). The sole exception is when the court has committed "clear" or "manifest" error. Mere disagreement with a court's order does not provide a basis for reconsideration. *McDowell v. Calderon*, 197 F.3d 1253, 1255 fn.1 (9th Cir. 1999).

The court denies the motion for reconsideration and amends its earlier order for the following reasons.

First, the defendants are mistaken that the court shifted the burden to the defendants to define whether an inmate has a clearly established right under the Eighth Amendment to be free from heightened exposure to a serious communicable disease. The

---

[1] Mot. – ECF No. 66 at 1–4. Citations refer to material in the Electronic Case File (ECF); pinpoint citations are to the ECF-generated page numbers at the top of documents.

[2] Order – ECF No. 57.

earlier order cited the main case and incorporated by reference the plaintiff's recounting of the relevant cases.[3] Also, the court distinguished *Hines v. Yousef*, 914 F.3d 1218 (9th Cir. 2019), because the defendants raised it as "analogous" case that entitled them to immunity.[4] The court thus denies the motion for reconsideration of the court's earlier order denying qualified immunity. To avoid any misunderstanding of the earlier analysis, the amended order has a fuller account of the relevant cases establishing a clearly established constitutional right.

Second, the opportunity to reconsider the earlier order has resulted in the court's reconsideration of its dismissal of Secretary of the CDCR Ralph Diaz.[5] The amended order reflects this. (All orders are interlocutory until they are not.)

Third, the court expands its analysis of the state-law immunities in the amended order and denies the motion for reconsideration

IT IS SO ORDERED.

Dated: March 20, 2022

/s/ LAUREL BEELER
LAUREL BEELER
United States Magistrate Judge

---

[3] *Id.* at 16 & n.43 (citing Opp'n – ECF No. 40 at 18 (collecting cases)); *see* Opp'n – ECF No. 40 at 17– 20 (collecting and analyzing cases); Opp'n – ECF No. 68 at 5–6 (same).

[4] Mot. – ECF No. 27-1 at 16–17; Order – ECF No. 57 at 16.

[5] Order – ECF No. 68 at 13

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

Case No. 3:21-cv-03058-LB

Re: ECF No. 27

MICHAEL HAMPTON, et al.,
Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,
Defendants.

Filed January 21, 2022

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

INTRODUCTION

Michael Hampton, a prisoner housed at San Quentin State Prison, died on September 25, 2020, after contracting COVID-19. His widow sued the State of California, the California Department of Corrections and Rehabilitation (CDCR), the prison, and ten officials (including the Secretary of the CDCR, the San Quentin warden, and officials responsible for medical-care policy), alleging that they knew the risks that led to a large-scale outbreak of COVID-19 at San Quentin and — through a botched transfer of at-risk

inmates from the California Institute for Men (CIM) to San Quentin and a failure to use basic safety measures — caused Mr. Hampton's death. She claims (1) inhumane prison conditions in violation of the First, Eighth, and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983, (2) supervisory liability under § 1983, (3) a violation of California's Bane Act, (4) a violation of Title II of the Americans with Disabilities Act (ADA) and § 504 of the Rehabilitation Act of 1973, and (5) negligence. The defendants moved to dismiss on the grounds that (1) they have qualified immunity because the plaintiffs did not plead facts establishing a constitutional violation by the individual defendants or show that the law was clearly established, (2) they otherwise have immunity under the Public Readiness and Emergency (PREP) Act, 42 U.S.C. § 247d-6d(a)(2) & (b), for their decisions about using countermeasures to COVID- 19, (3) the plaintiffs did not plausibly plead a claim under the ADA or the Rehabilitation Act, and (4) statutory immunities bar the state claims. The court dismisses the claims against Ralph Diaz and the ADA/Rehabilitation Act claim without prejudice and otherwise denies the motion to dismiss because the plaintiff plausibly pleaded the claims, and fact disputes preclude finding immunity.

STATEMENT

1. Allegations in the Operative Complaint about the COVID-19 Outbreak at San Quentin

The genesis of the COVID-19 outbreak at San Quentin was the transfer of 122 inmates from CIM to San Quentin on May 30, 2020. At the time, CIM had 600 COVID-19 cases and nine deaths, and San Quentin had no reported COVID-19 cases. The

transferred inmates allegedly were at high risk medically to contract COVID-19, had not been screened for COVID-19 for weeks, and were packed onto buses in numbers that exceeded the capacity limits set by the CDCR. Some fell ill before they arrived at San Quentin.[1] When they arrived at San Quentin, the former CIM inmates were housed in the Badger housing unit, which allegedly had open-air cells open to a shared atrium, with common showers and a mess hall.[2] Allegedly, the seven individual defendants from CDCR and San Quentin approved the transfer of the CIM inmates and their housing at Badger: Secretary of the CDCR Ralph Diaz; CDCR Medical Director R. Steven Tharratt, M.D.; San Quentin Warden Ronald Davis; San Quentin Acting Warden Ronald Bloomfield; San Quentin CEO of Healthcare Charles Cryer; San Quentin Chief Medical Officer Alison Pachynski, M.D.; and San Quentin Chief Physician and Surgeon Shannon Garrigan, M.D.[3] The three remaining defendants are at CIM and allegedly approved the transfer decision too: CEO Louie Escobell, RN; Chief Medical Officer Muhammad Farooq; and Chief Physician and Surgeon Kirk Torres, M.D.[4] The complaint names the State of California,

---

[1] First Am. Compl. (FAC) – ECF No. 22 at 11 (¶ 34). Citations refer to material in the Electronic Case File (ECF); pinpoint citations are to the ECF-generated page numbers at the top of documents.

[2] *Id.* at 12 (¶ 35).

[3] *Id.* at 11 (¶ 35), 27–28 (¶ 72).

[4] *Id.* at 27–28 (¶ 72).

the CDCR, and San Quentin as defendants in the ADA and Rehabilitation Act claim.[5]

Within days of the transfer, 25 transferees tested positive, leading to an outbreak of COVID-19 at San Quentin and 499 confirmed cases.[6] By July 7, 2020, over 1,300 inmates and 184 staff tested positive for COVID-19.[7] By July 30, 2021, 2,181 inmates (roughly two-thirds of the prison population) tested positive.[8] By September 2, 2020, 26 inmates and one correctional officer died of COVID-19, deaths that (according to the plaintiff) were preventable.[9]

The plaintiff's claims are predicated on the botched transfer of infected prisoners from CIM and the defendants' refusal to implement basic safety measures to reduce the spread of COVID-19, which caused Mr. Hampton's death. At the time of the transfer, the defendants knew the risks of COVID-19. For example, (1) county shelter-in-place orders were in effect by March 16, 2020, (2) a state shelter-in-place order was in effect on March 19, 2020, (3) the governor declared a state of emergency on March 4, 2020, and, on March 24, 2020, suspended the intake of inmates into all state facilities for 30 days, and (4) statewide mask mandates were in place by April 17, 2020.[10] Until late May 2020, the California Correctional

---

[5] *Id.* at 33.

[6] *Id.* (¶ 35).

[7] *Id.* at 15 (¶ 45).

[8] *Id.*

[9] *Id.*

[10] *Id.* at 8–10 (¶¶ 28–29, 31–33).

Health Care Services (CCHCS) opposed the transfer of inmates between prisons and said that transfer "carries significant risk of spreading transmission of the disease between institutions."[11] On March 18, 2020, the Habeas Corpus Resource Center wrote a letter to defendants San Quentin Warden Ron Davis and San Quentin's Chief Medical Officer Alison Pachynski asking San Quentin to give inmates personal-protective equipment and cleaning supplies, allow for social distancing, and avoid quarantining inmates testing positive for COVID-19 in solitary-confinement cells normally used for punitive measures.[12]

On June 1, 2020, in a conference call with "Defendants, including Defendant Broomfield" (the acting warden), Marin County Public Health Officer Matthew Willis, M.D., recommended that San Quentin sequester the transferred inmates from the existing San Quentin population. Instead, San Quentin housed the transferred inmates in a shared unit with existing San Quentin inmates. Dr. Willis recommended masks for exposed inmates and correctional staff and restricting staff movement between different housing units. The defendants (presumably not the CIM defendants) knew about the recommendations, did not adopt them, and "agreed . . . [to] inform[]" Dr. Willis that local health authorities had no authority to mandate measures in the prisons. On June 3, Dr. Willis recommended that San Quentin appoint an incident commander with expertise in outbreak management. The defendants

---

[11] *Id.* at 10 (¶ 32).

[12] *Id.* at 10 (¶ 30).

appointed one on July 3, but only after the Marin County Board of Supervisors appealed directly to Governor Newsom.[13]

CCHCS Director J. Clark Kelso is the federal receiver for California's prison medical-care system. On June 13, 2020, at his request, medical experts toured San Quentin. In a June 15, 2020, "Urgent Memo," they warned that the COVID-19 outbreak at San Quentin could become a "full- blown epidemic and health care crisis in the prison and surrounding communities" and that overcrowding and the risk factors at San Quentin created a high risk for a "catastrophic super-spreader event." There was a "grave lack of personal protective equipment and masks" for inmates, and the defendants "refused to provide adequate masks and personal protective equipment" to inmates or prison staff. Inmates had to make inadequate masks out of cloth, and both inmates and staff regularly wore no masks or wore them improperly. The defendants knew about and tolerated these problems. The experts warned that-virus testing delays (five to six days) were too long and intolerable.[14] They said that quarantine strategies of using cells otherwise used for punishment might (1) thwart containment because inmates would be reluctant to report symptoms and (2) pose health risks to sick inmates because they would be out of the sight of medical staff and face barriers to communicating with them.[15] The experts — who met with inmates over the age of 60 with only weeks left on their

---

[13] *Id.* at 12–13 (¶ 38).

[14] *Id.* at 13 (¶ 39).

[15] *Id.* at 13–14 (¶ 40).

sentences — reported that "[i]t is inconceivable that they are still in this dangerous environment."[16] They recommended measures to be implemented immediately, including large-scale release of inmates. The defendants knew about and chose to disregard the recommendations and — rather than release significant numbers of high-risk inmates — ordered inmates transferred to punitive housing assignments at San Quentin, including solitary confinement.[17] As a result, inmates refused to report symptoms and test so that they could avoid punitive incarceration.[18]

In March and June 2020, the defendants knew about and refused two offers by the Innovative Genomics Institute in Berkeley, California, to provide free COVID-19 testing at San Quentin, and they refused two similar offers by UCSF Medical Center in May and June 2020. Mr. Kelso, the federal receiver, testified that San Quentin and the CDCR lacked testing resources in March and April 2020 and were still unable to provide timely testing results by July 2020. Prison staff were "begging" for personal-protective equipment but "were told that to the extent San Quentin had such PPE, it was reserved for medical professionals and not frontline correctional officers and supervisors." Officers "were relegated to wearing" inmate-made or homemade masks, were not tested for COVID-19, and were not trained about or required to follow safety protocols. The defendants knew about, and actually or tacitly approved, these conditions and practices.[19]

---

[16] *Id.* at 14 (¶ 41).

[17] *Id.* at 10 (¶ 30), 14 (¶ 41).

[18] *Id.* at 14 (¶ 41).

[19] *Id.* at 14–15 (¶ 42).

On July 1, 2020, at a meeting held by the California Senate Commission on Public Safety, state senators called the May 2020 transfer from CIM to San Quentin "a horribly botched transfer" that reflected a "failure of leadership" that was "abhorrent," a "fiasco," and "completely avoidable." Mr. Kelso testified that "what we've done to date still is not enough," and Dr. Mark Ghaly, who heads California's Health and Human Services Agency, said "[t]here is no dispute that more could be and should be done."[20]

On July 6, 2020, Mr. Kelso fired defendant R. Steven Tharratt, M.D., the CDCR Medical Director.[21] In August 2020, defendant Ralph Diaz, the Secretary of the CDCR, announced his retirement.[22]

On October 20, 2020, the California Court of Appeal issued its opinion in *In re Von Staich*. 56 Cal. App. 5th 53 (2020); *review granted and request for depublication denied sub nom.*, *Von Staich on H.C.*, 477 P. 3d 537 (Cal. 2020) (Court of Appeal must vacate its decision and consider whether disputes of facts require an evidentiary hearing before it pronounces judgment). The Court of Appeal's holdings were as follows: (1) the warden and the CDCR acted with deliberate indifference to the rights and safety of San Quentin prisoners; (2) public-health experts endorsed conclusions that inmates could be protected only if the prison released substantial numbers of inmates; (3) CDCR did not implement the fifty-percent reduction "deemed essential by the Urgent Memo solicited in its behalf by the federal receiver;" (4) the respondents "concede actual knowledge of the substantial risk of

[20] *Id.* at 15 (¶ 43).

[21] *Id.* (¶ 44).

[22] *Id.* (¶ 46).

serious harm to San Quentin inmates;" (5) the failure to reduce the population was not reasonable; and (6) the continued use of congregate living spaces and double cells was reckless (not merely negligent) (given the prison's poor ventilation and inadequate sanitation) and was aggravated by the respondents' failure to consider the expedited release of prisoners who were vulnerable to COVID-19 and not likely to recidivate. *Id.* at 58, 63–64, 78–79 (cleaned up).[23]

On August 17, 2020, the Office of the Inspector General (OIG) issued the first of three reports responding to a request by the Speaker of the California Assembly for an assessment of the CDCR's COVID-19 policies. It found problems such as poor screening for COVID-19 and inadequate training. (Forty-seven percent of the screeners at San Quentin had received no training.[24]) In the second report on October 26, 2020, it concluded that lax enforcement by CDCR supervisors and managers likely contributed to noncompliance by staff members and inmates with protocols governing face coverings and social distancing.[25]

On February 1, 2021, the OIG released its third report, titled *California Correctional Health Care Services and the California Department of Corrections and Rehabilitation Caused a Public Health Disaster at San Quentin State Prison When They Transferred Medically Vulnerable Incarcerated Persons from the California Institution for Men Without Taking Proper Safeguards*. The OIG characterized the efforts to prepare for the transfers as "deeply flawed and risked

---

[23] *Id.* at 15–18 (¶ 47).

[24] *Id.* at 18 (¶ 48).

[25] *Id.* at 18–19 (¶ 49).

the health and lives of thousands of incarcerated persons and staff." CCHCS insisted on a tight transfer deadline, resulting in the CIM's ignoring the healthcare staff's concerns and transferring medically vulnerable persons who had not been tested for COVID-19. According to emails, a CIM healthcare executive ordered that incarcerated persons not be retested the day before the transfers, and "multiple CCHCS and departmental executives were aware of the outdated nature of the tests before the transfers occurred." The risks were exacerbated by the "inexplicable decision" to increase the numbers of persons on the buses. When inmates arrived at San Quentin, two were symptomatic for COVID-19, but all were housed in one unit with air circulation that flowed throughout the unit. By the time the prison tested them, the inmates had been housed together for at least six days, and the virus had spread quickly among them. The prison could not quarantine them, leading to the spread of the virus throughout the prison.[26] Given that CIM nurses questioned the transfer on grounds of patient safety and the lack of COVID-19 precautions, the OIG concluded that "[t]he decision to transfer the medically vulnerable incarcerated persons despite such outdated test results was not simply an oversight, but a conscious decision made by prison and CCHCS executives."[27]

Also on February 1, 2021, Cal-OSHA cited the CDCR and San Quentin with fourteen violations (including five serious violations and four "willful-serious" violations), including a lack of training, testing, proper personal-protection equipment, legally

---

[26] *Id.* at 19–20 (¶ 50).

[27] *Id.* at 19–21 (¶¶ 50–51.)

required respirators at least as effective as N95 respirators, soap in an employee restroom, policies to prevent airborne transmission and other decontamination policies, and appropriate transfer and housing policies to address the risk (whether within or outside of the facility).[28]

As discussed above, seven defendants (at the CDCR and San Quentin) allegedly personally approved the transfer of the CIM inmates and their housing at the Badger housing unit, and the remaining three medical defendants at CIM allegedly approved the transfer too. All allegedly knew about the risks surrounding the transfer and outbreak.[29] Again, as discussed above, on March 18, 2020, San Quentin Warden Ron Bloomfield and Chief Medical Officer Alison Pachynski, M.D., received letters about personal-protection equipment, cleaning supplies, and social distancing.[30]

2. CDCR Submissions About its Response to the Pandemic

In 2006, in *Plata v. Newsom,* No. 01-cv-01351-JST, a Northern District judge appointed a federal receiver to administer the CDCR to ensure compliance with the Eighth Amendment's standards for medical care. *Hines v. Youseff*, 914 F.3d 1218, 1223 (9th Cir. 2019). According to the receiver's testimony at the July 1, 2020, hearing held by the California Senate Commission on Public Safety (referenced in the complaint and summarized in part above), the CDCR

---

[28] *Id*. at 21–22 (¶ 52).

[29] *See, e.g.*, *id*. at 3–7 (¶¶ 6–19).

[30] *Id*. at 10 (¶ 30).

began planning its response to the pandemic in February 2020 and took preventative measures by March 11, 2020, but COVID-19 numbers spiked anyway by May 2020. The CDCR spent weeks considering whether it could move CIM patients safely to the prisons at Corcoran and San Quentin. It had a screening-and-testing matrix for patient movement that required a negative test (but did not specify the timing of the test, which meant that some tests were two, three, and four weeks old, meaning, too old to be reliable). The prison at Corcoran managed the outbreak pretty well, but San Quentin did not, in part based on serious resource deficiencies in the physical plant, COVID-19 support, and testing, which contributed to the rapid spread of the virus.[31] In a May 27, 2020, joint case-management statement submitted by the CDCR and the *Plata* plaintiffs, the CDCR said that "the Receiver, in conjunction with the Secretary [of the CDCR], has directed that high-risk inmates who test negative for COVID-19 be transferred to institutions that remain COVID-free."[32]

---

[31] Kelso Test., Ex. E to Request for Judicial Notice – ECF No. 27-2 at 140–45 (pp. 58–63). The court judicially notices the testimony referenced in this order for completeness and under the incorporation-by-reference doctrine. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

[32] J. Case-Management Statement, *Plata v. Newsom*, No. 01-cv-01351-JST (May 27, 2020), Ex. C to *id.* – ECF No. 27-2 at 54 (p. 14). The court judicially notices the public-record statement (but not disputed facts in it) and recounts the statement for the fact that it was said, not for the truth of disputed facts. *Lee v. Cty. of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001).

3. Mr. Hampton's Death

The CDCR refused to provide Mr. Hampton's custody records, which have information about his COVID-19 infection and medical treatment, and thus some information in the complaint about his medical condition is based on knowledge and belief.[33] (At the hearing on its motion to dismiss, the CDCR agreed to provide the records.)

The defendants had to have known about Mr. Hampton's high-risk factors for COVID-19 including age (62), obesity, hypertension, hyperlipidemia, prediabetes, and sleep apnea.[34] By early June 2020, Mr. Hampton had symptoms consistent with COVID-19. On June 24, 2020, he submitted a Healthcare Services Request Form, writing, "I've had a constant cough for a couple of weeks now all night long — it doesn't stop — could you give me something for this cough please." By June 26, his symptoms had worsened, and he complained of a cough, a loss of his senses of taste and smell, a loss of appetite, and shortness of breath, and he told San Quentin medical staff that he had not eaten in three days due to vomiting. (He spoke on the phone with his wife (the plaintiff) around this time and was coughing badly.) Shortly after the call, the prison transferred him out of the Main Block housing unit and into the Badger unit, where San Quentin housed inmates with COVID-19 symptoms. Two days later, the plaintiff learned through a phone call with another inmate that Mr. Hampton had been moved for treatment. She believes that he spent the two days without medical attention. She did not hear from anyone for about a

---

[33] FAC – ECF No. 22 at 22 (¶¶ 53–54).

[34] *Id.* at 26 (¶ 63).

week and a half, when she finally reached a liaison, who told her that Mr. Hampton had been transferred to a hospital but would not provide additional information.[35]

On June 27, 2020, prison staff moved Mr. Hampton to Seton Medical Center in Daly City. He arrived with COVID-19 and pneumonia, and he was in acute hypoxic respiratory distress. The defendants did not tell the plaintiff about his transfer until June 30. His health continued to deteriorate. Prison staff did not allow the plaintiff to communicate with Mr. Hampton until his condition worsened several weeks later, and he was moved to the ICU. There, she had daily video calls with him, where he told her that his fever was so high at San Quentin that he had to lie on the floor to cool off. He was placed on a ventilator on August 6, 2020, and remained there for one month, requiring a tracheostomy and a change of medication before the hospital weaned him off the ventilator. By this time, he had significant scarring on his lungs and multiple pulmonary embolisms. On September 15, 2020, he transitioned to comfort care, and on September 22, 2020, he was transferred to Kentfield Hospital for ongoing comfort care. He died three days later.[36]

Mr. Hampton was a model inmate and was eligible for release under Proposition 57, "having served 22 years for burglary, a [non-violent] crime with a maximum sentence of 6 years." His parole hearing was set in August 2020.[37]

---

[35] *Id.* at 22–23 (¶ 55–56).

[36] *Id.*

[37] *Id.* at 8 (¶ 26), 22 (¶ 56).

4. Other Relevant Procedural History

Mr. Hampton's widow sued the State of California, the CDCR, San Quentin the prison, and ten officials for causing Mr. Hampton's death.[38] The complaint has five claims:

Claim One: deliberate indifference in violation of the First, Eighth, and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983 based on (a) inhumane and unsafe conditions of confinement that caused Mr. Hampton to contract COVID-19 (against the ten individual defendants) and (b) interference with the plaintiff's right to familial association when Mr. Hampton was hospitalized (against defendants Ralph Diaz, the estate of Dr. Tharratt, Wardens Davis and Broomfield, and medical officials Pachynski and Garrigan);

Claim Two: supervisory liability under § 1983 (against the ten individual defendants) for the alleged botched transfer and subsequent actions at San Quentin;

Claim Three: a violation of California's Bane Act, Cal. Gov't Code § 52.1(b) (against the ten individual defendants), for deprivation of U.S. Constitutional rights (based on the deliberate indifference and interference with familial relations), denial of timely medical information to the family in violation of Cal. Penal Code § 5022 and Cal. Prob. Code §§ 4701 and 4717, and a denial of rights secured by the California Constitution, Art. 1, § 1;

Claim Four: a violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and § 504 of the Rehabilitation Act of 1973,

---

[38] *Id.* at 3–7 (¶¶ 6–19).

28 U.S.C. § 794 (against the state of California, the CDCR, and San Quentin); and

Claim Five: negligence (against the ten individual defendants).[39]

The court held a hearing on the defendants' motion to dismiss on November 4, 2021. All parties consented to magistrate-judge jurisdiction under 28 U.S.C. § 636.[40]

5. Other Cases

There are six other Northern District cases that involve San Quentin's handling of the pandemic: (1) *Plata*, No. 01-cv-01351-JST (see above); (2) *Ruiz v. California*, No. 21-cv-01832-JD (deceased inmate; represented by *Hampton* counsel; motion to dismiss pending); (3) *Legg v. CDCR*, No. 21-cv-01963-HSG (deceased inmate; represented by different counsel; partial motion to dismiss pending); (4) *Love v. California*, No. 21-cv-04095-JD (deceased inmate; represented by *Hampton* counsel; motion to dismiss filed); (5) *Polanco v. California*, No. 21-cv-06516-CRB (deceased correctional officer; represented by *Hampton* counsel; motion to dismiss filed); and (6) *Warner v. California*, No. 21-cv-08154-JD (deceased inmate; represented by *Hampton* counsel; motion to dismiss filed).

---

[39] *Id.* at 25–37 (¶¶ 61–103).

[40] Consents – ECF Nos. 9, 25, 29, 30, 39.

STANDARD OF REVIEW

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief" to give the defendant "fair notice" of what the claims are and the grounds on which they rest. Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint does not need detailed factual allegations, but "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 (cleaned up).

To survive a motion to dismiss, a complaint must contain sufficient factual allegations, which when accepted as true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *NorthBay Healthcare Grp., Inc. v. Kaiser Found. Health Plan, Inc.*, 838 F. App'x 231, 234 (9th Cir. 2020). "[O]nly the *claim* needs to be plausible, and not the facts themselves." *NorthBay*, 838 F. App'x at 234 (citing *Iqbal*, 556 U.S. at 696). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (cleaned up). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (cleaned up).

If a court dismisses a complaint, it must give leave to amend unless "the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).

ANALYSIS

The plaintiff alleges that the botched transfer defendants caused Mr. Hampton's death and claims violations of the U.S. Constitution, California's Bane Act, the ADA and Rehabilitation Act, and common-law negligence. The defendants counter that (1) they are entitled to qualified or statutory immunity because at most they made difficult decisions about how to address the virus and (2) they are immune under the PREP Act for their administration of interventions designed to address the pandemic.[41]

Preliminarily, the plaintiff's argument — articulated at the hearing — is that the nature of the decisions involving the transfer meant that the defendants necessarily (given their jobs) had the requisite knowledge about the decisions. The allegations at the pleadings stage establish that point for the decisionmakers affiliated with the relevant institutions (San Quentin and CIM). But there are no fact allegations about the personal knowledge of the Secretary of the CDCR Ralph Diaz. The court dismisses the claims against him without prejudice. The court also dismisses the ADA/Rehabilitation Act claim without prejudice and otherwise denies the motion to dismiss.

---

[41] Reply – ECF No. 43 at 7 (summarizing issues).

1. Constitutional Claims: Deliberate Indifference and Supervisory Liability

Deliberate indifference to a prisoner's serious medical needs amounts to the cruel and unusual punishment prohibited by the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A prison official violates the Eighth Amendment when two requirements are met: (1) the deprivation alleged is, objectively, sufficiently serious, and (2) the official is, subjectively, deliberately indifferent to the inmate's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

For the objective prong of the deliberate-indifference test in a medical-care claim, the plaintiff "must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012) (cleaned up). For the subjective, or "deliberate indifference" prong, the plaintiff must show "(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." *Id.* (cleaned up); *cf. Farmer*, 511 U.S. at 837 (deliberate-indifference prong requires that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference").

"A defendant may be held liable as a supervisor under § 1983 if there exists either (1) [the supervisor's] personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (cleaned up); *see*

Cunningham v. Gates, 229 F.3d 1271, 1292 (9th Cir. 2000) (supervisors can be liable for "1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous indifference to the rights of others").

The plaintiffs allege sufficiently that the remaining defendants (affiliated with San Quentin or CIM) knew about the risks related to the transfer and ignored them when they authorized and executed the transfer in an obviously unsafe way. The defendants contest the facts, but that is an issue for summary judgment. Moreover, as the plaintiff points out, there is an asymmetry of information: the defendants have the decedent's custody file and possess information about the transfer decisions. Rule 8(a) does not require more under circumstances like these. In sum, the plaintiff plausibly pleads that the defendants were personally involved, failed to act, and acquiesced in the constitutional deprivation.

As to the second theory of the deliberate-indifference claim (the alleged interference with the plaintiff's right to familial association when Mr. Hampton was hospitalized), the claim sufficiently alleges the loss of familial association based on Mr. Hampton's death and illness. To the extent the plaintiff alleged a separate theory of liability for the time that she had no information about Mr. Hampton's medical condition, she cites no cases or facts that support that theory. (That context may be relevant to damages.)

The defendants also assert qualified immunity. Disputed facts preclude qualified immunity.

"[T]he doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (en banc) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)) (cleaned up). Qualified immunity is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mueller v. Auker*, 576 F.3d 979, 992 (9th Cir. 2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). "Under qualified immunity, an officer will be protected from suit when he or she 'makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances.'" *Id*. (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)).

"[Q]ualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). "The doctrine of qualified immunity gives officials breathing room to make reasonable but mistaken judgments about open legal questions." *Id*. at 1866 (cleaned up). "[I]f a reasonable officer might not have known for certain that the conduct was unlawful[,] then the officer is immune from liability." *Id*. at 1867.

In determining whether an officer is entitled to qualified immunity, courts consider (1) whether the officer violated a constitutional right of the plaintiff and (2) whether that constitutional right was "clearly established in light of the specific context of the case" at the time of the events in question. *Mattos*, 661 F.3d at 440. Courts may exercise their sound discretion in

deciding which of these two prongs should be addressed first. *Id*. (citing *Pearson*, 555 U.S. at 235).

Regarding the second prong, "clearly established law should not be defined at a high level of generality," but instead "must be particularized to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (cleaned up). Although case law "does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018).

The defendants' main argument is that the plaintiff's claim — the Eighth Amendment gives inmates protection from communicable diseases, including the COVID-19 pandemic — is not sufficient to establish a clearly established constitutional right. Also, they contend that the federal receiver authorized the transfer.[42]

The facts surrounding the federal receiver's involvement are disputed. At most, the record supports the conclusion that the federal receiver was involved in the decision to transfer and is silent on his involvement on the allegedly botched transfer. Thus, qualified immunity is not warranted (though the issue may be dispositive at summary judgment).

The fact disputes also preclude the court's granting qualified immunity at the pleadings stage for the CDCR's response to COVID-19. The complaint alleges known risks from a serious communicable disease.

---

[42] Reply – ECF No. 43 at 9–10 (citing the *Plata* case-management statement referenced above, which references the decision generally but not the circumstances surrounding it).

Prison officials cannot be deliberately indifferent to inmates' exposure to serious communicable diseases. *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (summarizing examples and cases).[43] *Hines v. Yousef* is distinguishable. It involved exposure to Valley Fever, a disease caused by inhaling fungal spores commonly found in the southwestern United States. 914 F.3d at 1224–26, 1229, 1232. The court found qualified immunity because no evidence suggested that involuntary exposure to the spores violated "current standards of decency" (which was relevant to the deliberate-indifference standard). *Id.* at 1231. The opinion turned in part on the accepted exposure to Valley Fever by the millions of people who live in the Central Valley, suggesting a tolerance to the risk that defeated the claim of a constitutionally impermissible risk. *Id.* at 1232. Also, Valley Fever was not communicable. *Id.* at 1224, 1229, 1232. By contrast, the allegations here are about a deliberately indifferent response to a known risk of a communicable disease (not, as the defendants assert, the lack of a "particular COVID-19 response in 2020").[44]

2. PREP Act Immunity

The defendants contend that they are immune under the PREP Act for their administration of covered countermeasures to a health emergency (the COVID-19 pandemic).[45]

---

[43] Opp'n – ECF No. 40 at 18 (collecting cases).

[44] Reply – ECF No. at 10.

[45] *Id.* at 10–12 (referencing earlier arguments in the underlying motion).

The PREP Act immunizes a “covered person” from “suit and liability” for claims for loss “caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure” if the Secretary of the U.S. Department of Health and Human Services has made a determination that a public-health condition or threat is (or credibly risks) a public-health emergency. 42 U.S.C. § 247d-6d(a)(1) & (b).

The term “covered countermeasure” means (A) a qualified pandemic or epidemic product (defined elsewhere in the statute); (B) a security countermeasure (same); (C) drugs, biological products, and devices (as the terms are defined in the Federal Food, Drug, and Cosmetic Act) that are authorized for emergency use under that Act; or (D) “a respirator protective device that is approved by the National Institute for Occupational Safety and Health under [the applicable] . . . Code of Federal Regulations (or any successor regulations), and that the Secretary determines to be a priority for use during a public health emergency declared under section 247d of this title.” *Id.* § 247d-6d(i)(1). “The term ‘covered person’, when used with respect to the administration or use of a covered countermeasure, means . . . a person or entity that is— (i) a manufacturer of such countermeasure; (ii) a distributor of such countermeasure; (iii) a program planner of such countermeasure; (iv) a qualified person who prescribed, administered, or dispensed such countermeasure; or (v) an official, agent, or employee of a person or entity described in clause (i), (ii), (iii), or (iv).” *Id.* § 247d-6d(i)(2) (formatting altered).

As the defendants acknowledge, no courts have applied the PREP Act to prisons.[46] In any event, claims based on a failure to act, as opposed to purposefully allocating countermeasures, can fall outside the PREP Act protections. *See, e.g.*, *Estate of Heim v. 1495 Cameron Ave.*, No. 21-cv-6221-PA (ADSx), 2021 WL 3630374, at *1–4 (C.D. Cal. Aug. 17, 2021) (claims "based on alleged inaction on the part of Defendants" were not necessarily barred by the PREP Act); *Stone v. Long Beach Healthcare Ctr., LLC*, No. CV 21-326-JFW, 2021 WL 1163572, at *4 (C.D. Cal. March 26, 2021) ("There is only immunity for inaction claims when the failure to administer a covered countermeasure to one individual has a close causal relationship to the administration of that covered countermeasure to another individual.") (cleaned up).[47]

At the pleadings stage, the plaintiff plausibly pleads that Mr. Hampton died because the defendants botched his transfer and did not use basic safety measures (including many that are not covered countermeasures) to reduce the risk of COVID-19.[48] Also, the plaintiff's allegations that reference covered countermeasures generally are about a failure or refusal to use them.[49] Finally, the facts are disputed about whether the defendants purposely allocated

[46] Mot. – ECF No. 27-1 at 18.

[47] *See also* Opp'n – ECF No. 40 at 24–25 (collecting and analyzing cases).

[48] *Id.* at 22 (citing the complaint's listing of safety measures that are not covered countermeasures).

[49] *Id.* at 23 (citing the complaint's listing of failures to use available, and sometimes free, countermeasures).

countermeasures or failed to act. The court denies the motion to dismiss.

3. ADA and Rehabilitation Act Claim

Mr. Hampton suffered from sleep apnea, obesity, hypertension, hyperlipidemia, and prediabetes, and he had medical issues (such as a constant cough) that — he contends — sleep apnea may have exacerbated.[50] The defendants assert that the plaintiff did not plead that Mr. Hampton's sleep apnea substantially limited major life functions or that he put the prison officials on notice of his need for accommodation.[51] Given that the defendants did not produce Mr. Hampton's custody file (and the resulting asymmetry of information), the plaintiff sufficiently pleaded his disability, and the fact issues about whether it substantially limited a major life function are better resolved at summary judgment. But the court dismisses the claim because the plaintiff did not plausibly plead that the defendants intentionally discriminated against Mr. Hampton.

Under Title II of the ADA, "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The ADA prohibits public entities from discriminating against the disabled and also prohibits public entities from excluding the disabled from participating in or benefitting from a public program, activity, or service

---

[50] *Id.* at 26 (citing Compl. – ECF No. 22 at 22 (¶¶ 54–55).

[51] Reply – ECF No. 43 at 12.

"solely by reason of disability." *Lee v. City of Los Angeles*, 250 F.3d 668, 690–691 (9th Cir. 2001). "Discrimination includes a failure to reasonably accommodate a person's disability." *Sheehan v. City & Cty. of San Francisco,* 743 F.3d 1211, 1231 (9th Cir. 2014).

"To recover monetary damages under Title II of the ADA, a plaintiff must prove intentional discrimination on the part of the defendant." *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001). To prove intentional discrimination, the plaintiff must show defendants acted with "deliberate indifference," which "requires both some form of notice . . . and the opportunity to conform to [statutory] dictates." *Id*. at 1139 (quoting *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (O'Connor, J., concurring)). The plaintiff must identify "specific reasonable" and "necessary" accommodations that the defendant failed to provide. *Id*. "When the plaintiff has alerted the public entity to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the public entity is on notice that an accommodation is required, and the plaintiff has satisfied the first element of the deliberate indifference test." *Id*.

"[D]eliberate indifference does not occur where a duty to act may simply have been overlooked." *Id*. "Rather, in order to meet the second element of the deliberate indifference test, a failure to act must be a result of conduct that is more than negligent, and involves an element of deliberateness." *Id*.

The two issues are whether the plaintiff plausibly pleaded Mr. Hampton's disability and the defendants' intentional discrimination.

First, she plausibly pleaded his disability. An impairment (such as sleep apnea) that substantially limits one or more major life activities (such as sleeping) can be a qualifying disability. 42 U.S.C. § 12102(1)(A) & (2)(A).[52] Relevant authority suggests that the issue in this case is better addressed at summary judgment because the substantial limitation of a major life activity turns on facts. *Phillips v. PacifiCorp*, 304 F. App'x 527, 529 (2008) (affirming summary judgment in a wrongful-termination case in favor of the employer when the former employee's diagnosed disabilities — sleep apnea and chronic-obstructive pulmonary disease — were impairments that were mitigated by her later use of a CPAP machine and oxygen; thus, during the relevant time period, she did not have an impairment that substantially limited the major life activity of sleeping).

Second, the plaintiff did not plausibly plead that the defendants intentionally discriminated against Mr. Hampton. The complaint has no facts about notice to the defendants about the disability and necessary accommodations. *Duvall*, 260 F.3d at 1138. The court dismisses the claim with leave to amend. The court does not set a deadline to amend because the forthcoming custody file and medical records likely are necessary to plead a claim plausibly. The issue of the timing of any amendment can be addressed at the initial case-management conference.

4. State-Law Statutory Immunities

---

[52] Opp'n – ECF No. 40 at 26 (collecting and analyzing authorities).

The state claims are the Bane Act and negligence. Because facts are disputed, the immunity issues (such as whether acts were discretionary) are not resolvable at the pleadings stage.

CONCLUSION

The court dismisses the claims against Ralph Diaz and the ADA/Rehabilitation claim against all defendants without prejudice. The deadline to amend will be addressed at the initial case-management conference). The court otherwise denies the motion to dismiss.

IT IS SO ORDERED.

Dated: January 21, 2022

/s/ LAUREL BEELER
LAUREL BEELER
United States Magistrate Judge

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22-15921

D.C. No. 3:20-cv-09393-CRB

DONTE LEE HARRIS,
Plaintiff-Appellee,

v.

KATHLEEN ALLISON, Director of the Department of Corrections & Rehabilitation; RALPH DIAZ, Secretary of the Department of Corrections & Rehabilitation; RON DAVIS, Associate Director of Reception Center Transfers; RONALD BROOMFIELD, Warden; A. PACHYNSKI, Dr.; Chief Medical Officer at San Quentin State Prison; L. ESCOBELL, Dr.; Chief Medical Officer at San Quentin State Prison; DEAN BORDERS, Warden, Warden at CSP; JOSEPH BICK, Director of California Corrections Health Care Services; CLARENCE CRYER,
Defendants-Appellants,

and

J. ARNOLD, Captain, CDCR; M. BLOISE, Lieutenant, CDCR; B. HAUB, Lieutenant, CDCR; B. DUTTON, Sergeant, CDCR; N. AVILA, Associate Warden; K. FRANCE, Sergeant, CDCR; T. R. TEIXERIA, Lieutenant, CDCR; GAVIN NEWSOM, Governor of the State of California; STEVEN THARRATT, Dr.,
Defendants.

Appeal from the United States District Court for the Northern District of California
Charles R. Breyer, District Judge, Presiding

No. 22-16088

D.C. No. 3:22-mc-80066-WHO

In re: CIM-SQ TRANSFER CASES

KENNETH ALLAN COOPER; MATTHEW K. QUALE, Jr.; KAREN LEGG; MICHELLE LEGG, individually and successors in interest to David Reed, deceased; TYRONE LOVE; JOAQUIN DIAZ, (deceased); HILDA DIAZ; YADIRA MENCHU; BLANCA DIAZ HOULE; DANIEL RUIZ, Deceased, by and through his co-successors in interest; SANTOS RUIZ; FERNANDO VERA; VANESSA ROBINSON; DANIEL RUIZ, Jr.; ANGELINA CHAVEZ; ERIC WARNER, (deceased); HENRY WARNER; REGINALD THORPE,
Plaintiffs-Appellees,

v.

KATHLEEN ALLISON; RONALD BROOMFIELD; STATE OF CALIFORNIA; RALPH DIAZ; RON DAVIS; ALISON PACHYNSKI; LOUIE ESCOBELL; CLARENCE CRYER; DEAN BORDERS, Warden; JOSEPH BICK; R. STEVEN THARRATT; CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; SHANNON GARRIGAN; MUHAMMAD FAROOQ; KIRK A TORRES; SAN QUENTIN STATE PRISON; MONA D. HOUSTON;

CALIFORNIA INSTITUTION FOR MEN,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick, District Judge, Presiding

Argued and Submitted May 10, 2023
San Francisco, California

Filed October 13, 2023

MEMORANDUM*

Before: FRIEDLAND and BENNETT, Circuit Judges, and R. BENNETT,** District Judge.

A few months into the COVID-19 pandemic, high-level officials in the California prison system transferred 22 inmates from California Institution for Men ("CIM") to San Quentin. The transfer sparked an outbreak of COVID-19 at San Quentin that ultimately killed over twenty-five inmates. Many lawsuits have been filed challenging the state officials' decisions surrounding the transfer. At issue here are two appeals from consolidated cases involving nine underlying Complaints. In each case, the district court denied state officials' motions to dismiss, holding

---

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Richard D. Bennett, United States Senior District Judge for the District of Maryland, sitting by designation.

that the officials were not entitled to statutory immunity or qualified immunity on the face of the Complaints. We affirm.

1. We have jurisdiction under the collateral order doctrine to review a district court's rejection of immunity under the Public Readiness and Emergency Preparedness ("PREP") Act, 42 U.S.C. § 247d-6d, at the motion to dismiss stage. *See Hampton v. California*, --- F.4th ---, 2023 WL 6406760, at *4-5 (9th Cir. 2023). The PREP Act offers "covered person[s]" immunity "from suit and liability" for "claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure . . . ." § 247d-6d(a)(1). Plaintiffs' claims relate to Defendants' *failure* to use a covered countermeasure—not to any use or administration of a covered countermeasure. *See Hampton*, 2023 WL 6406760, at *5-7. Defendants are therefore not entitled to immunity under the Act, at least at the motion-to-dismiss stage. *See id.*

2. We have jurisdiction under the collateral order doctrine to review a district court's rejection of a qualified immunity defense at the motion to dismiss stage. *See Ashcroft v. Iqbal*, 556 U.S. 662, 671-72 (2009). When considered together with the OIG Report,[1] each Complaint at issue here states an Eighth Amendment claim that was clearly established at the time of the underlying events. *See Hampton*, 2023 WL 6406760, at *10-11. Defendants are

[1] Defendants ask us to consider the OIG Report as incorporated into the Complaints by reference, and Plaintiffs do not object. To the extent Plaintiff Legg objects, he waived any such objection by consenting to the district court's consideration of the Report. We accordingly consider the OIG report as if incorporated into all of the Complaints at issue here.

therefore not entitled to qualified immunity on the face of the Complaints. *See Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009).

3. Defendants ask us to take judicial notice of three categories of documents: (1) news articles describing the state of COVID-19 guidance in the spring and early summer of 2020; (2) publications and data about COVID-19 from governmental agencies; and (3) court transcripts from *Plata v. Newsom*, N.D. Cal. No. 01-cv-1351. Defendants seek to use the news articles and COVID-19 data to support their position that their actions were reasonable, considering their knowledge at the time. Similarly, Defendants rely on the court transcripts to support their argument that the Federal Receiver directed or oversaw the challenged actions. Defendants' knowledge and the Receiver's involvement are key factual disputes in this case. It would be inappropriate for us to take judicial notice of such disputed facts. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) ("[A] court may not take judicial notice of a fact that is 'subject to reasonable dispute.'" (quoting Fed. R. Evid. 201(b)). To the extent Defendants rely on the documents for other reasons, we deny the request to take judicial notice because the documents are "not relevant to the disposition of this appeal." *Cuellar v. Joyce*, 596 F.3d 505, 512 (9th Cir. 2010). Defendants' requests for judicial notice are accordingly denied.

4. Plaintiff Diaz requests that we take judicial notice of supplemental COVID-19 data if we take judicial notice of the COVID-19 data that Defendants requested us to consider. Because we denied Defendants' request for judicial notice, we deny Diaz's too.

5. We also deny Plaintiff Thorpe's request that we take judicial notice of certain state court filings because Thorpe attempts to rely on those filings for the truth of their contents. *See Lee*, 250 F.3d at 690 ("[W]hen a court takes judicial notice of another court's opinion, it may do so 'not for the truth of the facts recited therein, but for the existence of the opinion" (quoting *S. Cross Overseas Agencies v. Wah Kwong Shipping Grp.*, 181 F.3d 410, 426 (3d Cir. 1999))). The remaining documents in Thorpe's request are "not relevant to the disposition of this appeal." *Cuellar*, 596 F.3d at 512.

AFFIRMED.

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 3:22-mc-80066-WHO

In re CIM-SQ Transfer Cases

Re Case Nos.: 20-cv-09415-BLF, 21- cv-00708-EJD, 21-cv-01832-JD, 21-cv-01963-HSG, 21-cv-04095-JD, 21-cv-04604-JD, 21-cv-06960-WHO, 21- cv-08154-JD.

Filed July 15, 2022

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS REPRESENTED PLAINTIFFS' COMPLAINTS

INTRODUCTION

Plaintiffs in the cases identified above ("the Represented Cases") allege that various California Department of Corrections and Rehabilitation (CDCR) defendants[1] violated their constitutional and, in some

[1] The entity defendants named in the Represented Cases are the State of California, CDCR, California Correctional Health Care Services (CCHCS), SQSP, and CIM. Individuals named as defendants in the Represented Cases are: Ralph Diaz (the retired

cases, state-law rights by transferring prisoners from the California Institution for Men (CIM), which was experiencing a COVID-19 outbreak, to San Quentin State Prison (SQSP) in May 2020. Defendants filed motions to dismiss raising similar defenses. In light of the numerous cases based on the same or similar facts, and the motions to dismiss based on the same or similar defenses, the Chief Judge of the Northern District of California assigned the cases identified above to me for the following limited purpose:

1. Deciding whether the federal receiver for CCHS, Clark Kelso (the "Receiver"), has quasi-judicial immunity, and if not, some other defenses he has raised such as whether he is a state actor who can be sued under section 1983;

2. Determining whether the defendants have immunity under the Public Readiness And Emergency Preparedness (PREP) Act;

Secretary of CDCR), the Estate of R. Steven Tharatt (the former and now deceased Medical Director for CCHCS), Ronald Davis (the Warden of SQSP from approximately 2014 until February 4, 2020, and then the Associate Director of the Division of Adult Institutions at CDCR), Ronald Broomfield (Acting Warden of SQSP since February 4, 2020), Clarence Cryer (the Chief Executive Officer for Health Care at SQSP), Alison Pachynski (the Chief Medical Executive at SQSP), Shannon Garrigan (Chief Physician and Surgeon at SQSP), Mona Houston (Warden of CIM from approximately August 2019 until January 4, 2021), Louis Escobell (Chief Executive Officer for Health Care at CIM), Muhammad Farooq (Chief Medical Executive at CIM) and Kirk Torres (Chief Physician and Surgeon at CIM). Not every one of these defendants is named in each Represented Case, but all defendants are represented by counsel from the California Attorney General's office.

3. Determining whether the defendants are entitled to qualified immunity as a matter of law at the motion to dismiss stage;
4. Determining whether the complaints filed by unrepresented plaintiffs allege adequate detail to state a claim upon which relief can be granted.

See Dkt. Nos. 1 (Order of Limited Assignment), 7, 51 ("Assigned Issues").[2] In order to resolve the Assigned Issues identified in the Order of Limited Assignment, I set a briefing schedule and held a hearing on motions to dismiss filed in the cases identified above where plaintiffs were represented by counsel (Represented Cases).[3]

---

[2] There are several represented cases raising similar claims that have not been assigned to me for resolution of common issues. In *Hampton v. California*, 21-3058-LB, another court in this District found, in relevant part, that disputed facts precluded qualified immunity for defendants and that defendants were not entitled to immunity under the PREP Act (*see* Dkt. No. 72). This order is pending appeal with USCA number 22-15481. In *Polanco v. California*, 21-06516-CRB, and *Harris v. Allison*, 20-9393-CRB, a different court in this District similarly denied defendants' motions to dismiss based on qualified immunity and PREP Act immunity (*see* Dkt. Nos. 38 and 30, respectively). These orders are pending appeal with USCA number 22-15496 and number 22-15921, respectively.

[3] Other represented cases have been assigned to me for resolution of the Assigned Issues: 20-6326-EJD, 21-103-HSG, 21-1094-EJD, 21-5351-HSG, 21-5805-BLF, 21-9386-BLF, 21-9581-BLF, 22-150-WHO, 22-186-EJD, 22-465-EJD. These cases were not covered by my prior order setting a briefing schedule and hearing for motions to dismiss on the Assigned Issues. They also name some additional defendants, including the Receiver. A separate order will set the Assigned Issues for resolution in these

I held a hearing on the motions to dismiss on April 29, 2022, where counsel for all defendants and counsel for each represented plaintiff appeared.[4] For the reasons explained below, I conclude that defendants are not entitled to immunity under the PREP Act or qualified immunity, resolving the second and third questions. Accordingly, I deny the motions to dismiss those issues in the Represented Cases.[5]

---

additional represented cases.

[4] All plaintiffs' counsel in the Represented Cases identified above appeared, coordinating and delegating argument time to specific counsel.

[5] In the motions to dismiss filed in the Represented Cases, defendants raise a number of arguments in support of dismissal, including: (1) failure to state facts regarding each defendant sufficient to state the Section 1983 claim; (2) defendants are protected by qualified immunity; (3) defendants are immune under the PREP Act; (4) failure to allege fact sufficient to state a claim under the Americans with Disabilities Act or Rehabilitation Acts; (5) failure to exhaust claims against State defendants; and (6) the defendants are protected by various California state statutory immunity provisions. The Order of Limited Assignment, and this Order, address only Assigned Issues (2) and (3). Defendants' arguments with respect to the other issues are preserved and may be raised before the judges assigned to the underlying case.

FACTUAL BACKGROUND[6]

As generally alleged in the Represented Cases, on March 4, 2020, California Governor Gavin Newsom proclaimed a State of Emergency in California because of the impacts of the COVID-19 pandemic. Plaintiffs contend that all defendants were aware by this time that the virus was highly transmissible and that precautions necessary to mitigate its spread included quarantining people exposed to the virus, rigorous cleaning and sanitation practices, social distancing, use of masks and other personal protective equipment, and regular testing. They assert that defendants were aware that many of these precautions could not be effectively practiced at SQSP because of its infrastructure, including mostly open-air cells and poor ventilation.

A shelter-in-place order was enacted on March 16 in Marin County, where SQSP is located, followed by a statewide order on March 19. On March 18, the Interim Executive Director of the Habeas Corpus Resource Center, the State Public Defender, Mary McComb, and others responsible for representing people on death row sent a letter to defendants Broomfield and Pachynski. The letter implored SQSP to provide inmates with PPE and cleaning supplies and to allow for social distancing, and to enact other policies to protect the health of inmates and staff.

On March 24, Governor Newsom issued Executive Order N-36-20, suspending intake of inmates into all state facilities for 30 days, which he subsequently extended. Yet in May 2020, defendants decided to transfer 122 prisoners from CIM, where there was a

---

[6] The facts relevant to the Assigned Issues alleged in the Represented Cases are substantially similar.

COVID-19 outbreak, to SQSP, which had no COVID-19 cases at the time.

Plaintiffs allege that California Correctional Health Care Services (CCHCS) and CDCR executives did not inform CIM staff of the transfer until the day before the transfers began. Most of the transferred prisoners were not tested within the two weeks before the transfer—a decision by a top healthcare executive at CIM of which other defendants were aware. Prisoners were not screened for symptoms before boarding the transfer buses. On May 30, 2020, defendants filled the buses with prisoners without providing space for distancing. Immediately after the transfer, 15 transferred prisoners tested positive for COVID-19. Defendants housed the transferred prisoners in the open-air Badger housing unit at SQSP; the transferred prisoners used the same showers and dining area as other prisoners.

Although the Marin County Public Health Officer spoke with some defendants on June 1, 2020, and recommended that transferred prisoners be immediately sequestered from the rest of the population, masking be enforced, and movement of staff be limited, defendants failed to follow his recommendations. Defendants only heeded his recommendation to appoint an incident commander with expertise in outbreak management on July 3, after the Marin County Board of Supervisors became involved.

Within three weeks of transfer, SQSP had a COVID-19 outbreak: It had more than 499 confirmed cases.

On June 13, 2020, a group of health experts toured San Quentin at the request of the Receiver. Plaintiffs

allege that the experts circulated an "Urgent Memo" on June 15, 2020, of which defendants were aware, warning of the scale that the COVID-19 outbreak at San Quentin could reach and warning that testing delays of 5-6 days were unacceptable. The experts also advised against using punishment-like quarantine conditions, which could result in under-reporting of symptoms, and recommended a release or transfer of prisoners. Defendants disregarded these recommendations.

California legislators, the Office of the Inspector General (OIG), and the Division of Occupational Safety and Health (Cal-OSHA) criticized CDCR's conduct in causing or failing to mitigate the outbreak. One California Assembly member criticized the transfer as the "worst prison health screw up in state history." On July 6, 2020, Governor Newsom said the prisoners "should not have been transferred." The OIG found that CDCR and CCHCS caused a public health disaster. Cal-OSHA cited CDCR and SQSP with 14 violations related to the outbreak.

Plaintiffs allege that, as a result of the outbreak, they became ill and some died from COVID-19. Plaintiffs bring various federal and state claims.[7]

---

[7] The federal and state claims alleged in the Representative Cases are: violation of Eight Amendment rights under 42 U.S.C. § 1983; violation of substantive due process familiar relations rights in violation of First and Fourteenth Amendment rights under section 1983; violation of Americans with Disabilities Act (Title II), 42 U.S.C. § 12101, *et seq.*; violation of the Rehabilitation Act, 29 U.S.C. § 794; violation of Bane Act, California Civil Code § 52.1; Negligence (Survival Action); Negligent Supervision, Training, Hiring, and Retention (Survival Action); Failure to Furnish / Summon Medical Care (Survival Action); Wrongful Death – California Code Civ. Proc. § 377.60. Not all claims are

LEGAL STANDARD

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief" to give the defendant "fair notice" of what the claims are and the grounds on which they rest. Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint may be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 556. A claim is facially plausible when the plaintiff pleads facts that "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There must be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 570.

In deciding whether the plaintiff has stated a claim upon which relief can be granted, the Court accepts the plaintiff's allegations as true and draws all reasonable inferences in favor of the plaintiff. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir.

---

alleged in every Represented Case. In addition, the sole claim asserted in *Thorp v. Diaz*, Case No. 21-cv-6960 is an Eighth Amendment violation alleged on behalf of a class defined as: "All current and former inmates at San Quentin State Prison who (1) have been diagnosed with COVID-19 and (2) for whom the transfer of inmates from Chino Institute for Men to San Quentin State Prison between May 28, 2020 and May 30, 2020, was a substantial factor in their diagnosis." Dkt. No. 1

1987). However, the court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

DISCUSSION

I. JUDICIAL NOTICE

There are two exceptions to the rule that a court must consider only the complaint, on its face, when deciding a motion to dismiss: a court may also consider material that is incorporated into the complaint and material that is judicially noticeable. *Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001). Documents may be incorporated by reference into the complaint where a plaintiff relies on them extensively and they "form the basis" of some of his claims. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018).

Courts may judicially notice an adjudicative fact that is "not subject to reasonable dispute" if it is "generally known," or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1)–(2). But "[j]ust because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth," and "a court cannot take judicial notice of disputed facts contained in [matters of] public record[]." *Khoja*, 899 F.3d at 999. Thus, a court must consider what facts are being proposed—i.e., "the purpose for which [the document is] offered." *Id.* at 1000.

Defendants ask the Court to take judicial notice and/or incorporate by reference a number of

documents with respect to their claims of immunity, including:

- Various filings from *Plata v. Newsom*, Case No. 01-CV-01351-JST (N.D. Cal.), a longstanding case overseeing CDCR's provision of healthcare;
- Testimony of the Receiver before the California State Senate's Public Safety Committee Hearing;
- Executive Orders by the California Governor related to COVID-19;
- United States Centers for Disease Control and Prevention (CDC) guidance related to COVID-19;
- Advisory opinions by the Department of Health and Human Services (HHS) relating to the Public Readiness and Emergency Preparedness (PREP) Act; and
- California Correctional Health Care Services (CCHCS) Executive Organizational Chart.

Plaintiffs ask the Court to take judicial notice and/or incorporate by reference many of the same documents as Defendants, as well as the following documents:

- Marin County Health Officer orders;
- The California Governor's proclamation of a state of emergency;

- An order from the state court case *In re Von Staich*;[8]
- CCHCS and California Department of Corrections and Rehabilitation (CDCR) memoranda;
- The February 2021 California Office of the Inspector General (OIG) report regarding the transfer of prisoners from CIM to SQSP.[9]

I take judicial notice of the fact that HHS issued several advisory opinions relating to the PREP Act: Advisory Opinion 20-03 on the Public Readiness and Emergency Preparedness Act and the Secretary's Declaration under the Act October 22, 2020, as Modified on October 23, 2020;[10] and Advisory Opinion 21-01 on the Public Readiness and Emergency Preparedness Act Scope of Preemption Provision, January 8, 2021.[11] *See Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001).

I will not take judicial notice of the *Plata* filings nor the Receiver's testimony; defendants appear to want me to take as true factual representations made in the *Plata* case and the Receiver's testimony and to draw related inferences, but I cannot do so because they go to the heart of the plaintiffs' allegations. *Khoja*, 899

---

[8] *See* Dkt. No. 27-1 at 54.

[9] *See, e.g.,* Dkt. No. 32 at 5.

[10] Published at https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/AO3.1.2_Updated_FINAL_SIGNED_10.23.20_0.pdf

[11] Published at https://www.hhs.gov/guidance/sites/default/files/hhs-guidance- documents/2101081078-jo-advisory-opinion-prep-act-complete-preemption-01-08-2021- final-hhs-web.pdf.

F.3d at 999. Nor will I take notice of the *In re Von Staich* order; plaintiffs similarly appear to request that I rely on factual findings made in that opinion. But plaintiffs need not prove their allegations at the pleadings stage.

I take judicial notice of parts of the OIG report, as incorporated by reference by the operative complaints in most of the Represented Cases, for the purpose of acknowledging the OIG's investigation and report. It supports the plausibility of some of plaintiffs' allegations. I do not take notice of it for the truth of the report's findings of facts and conclusions.

The remaining documents are not necessary or relevant to my determination of the PREP Act and qualified immunity issues. The requests for judicial notice of those documents are denied for purposes of this order.

II. PREP ACT IMMUNITY

The PREP Act provides immunity for injuries "caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration [by the HHS Secretary] has been issued with respect to such countermeasure." 42 U.S.C. § 247d-6d(a)(1). Under the statute, covered countermeasures include "qualified pandemic . . . product[s]" and "respiratory protective device[s] . . . that the Secretary determines to be a priority for use." 42 U.S.C. § 247d- 6d(i)(1)(A), (C), (D).

The Secretary issued a declaration in light of COVID-19. Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15,198, 15,198 (Mar. 17, 2020) ("Declaration"). It has

been amended several times during the pandemic. A "covered countermeasure" may include "any antiviral, any other drug, any biologic, any diagnostic, any other device, any respiratory protective device, or any vaccine, used . . . to treat, diagnose, cure, prevent, mitigate or limit the harm from COVID-19." Fourth Amendment to the Declaration, 85 Fed. Reg. 79,190, 79,196 (Dec. 9, 2020).

The Secretary has also declared that failure to institute a covered countermeasure may sometimes give rise to immunity:

> Where there are limited Covered Countermeasures, not administering a Covered Countermeasure to one individual in order to administer it to another individual can constitute "relating to . . . the administration to . . . an individual" under 42 U.S.C. 247d-6d. For example, consider a situation where there is only one dose of a COVID-19 vaccine, and a person in a vulnerable population and a person in a less vulnerable population both request it from a healthcare professional. In that situation, the healthcare professional administers the one dose to the person who is more vulnerable to COVID-19. In that circumstance, the failure to administer the COVID-19 vaccine to the person in a less vulnerable population "relat[es] to . . . the administration to" the person in a vulnerable population. The person in the vulnerable population was able to receive the vaccine only because it was not administered to the person in the less-vulnerable population.

Id. at 79, 197. The January 8, 2021 HHS Advisory Opinion differentiates between "allocation which results in non-use by some individuals," which allows for immunity, and "nonfeasance . . . that also results in non-use," which does not. Advisory Opinion 21-01 at 4. Thus, courts have concluded that immunity for "inaction claims" only lies when the defendant's failure to administer a covered countermeasure to one individual has "a close causal relationship" to the administration of that covered countermeasure to another individual. *Lyons v. Cucumber Holdings*, LLC, 520 F. Supp. 3d 1277, 1285–86 (C.D. Cal. 2021) (citation omitted).

Plaintiffs generally allege that defendants put them at increased risk of contracting COVID by transferring prisoners from CIM to SQSP, failing to implement appropriate testing and distancing before and during the transfer, and failing to implement appropriate quarantine measures after the transfer. Those allegations are plausible. Defendants' arguments that the PREP Act confers immunity to all of those claims fail.

To start, the transfer of prisoners is not a covered countermeasure under the PREP Act. While the failure to test could be considered a failure to administer a covered countermeasure, the facts as alleged bear no indication that the failure to test the transferring prisoners had any relationship to the testing of other prisoners. And the allegations are of non-use resulting from non-feasance rather than allocations. Defendants do not even suggest that the reliance on old COVID tests was the result of a limited number of tests and a choice to use the tests on a different population. To the extent any plaintiffs claim that mask distribution contributed to their

contracting COVID, defendants could ultimately demonstrate entitlement to PREP Act immunity for decisions on how to allocate limited masks. But the mere mention of countermeasures in the complaints does not confer immunity. *See Rachelle Crupi, v. The Heights of Summerlin, LLC, et al.*, No. 221CV00954GMNDJA, 2022 WL 489857, at *6 (D. Nev. Feb. 17, 2022) ("the fact that the Complaint mentions some covered countermeasures as examples of defendants' failure to enact a COVID-19 response policy, does not rise to the level of alleging that [decedent]'s death was specifically caused by defendants' use (or misuse) of covered countermeasures"). I cannot conclude that any of the defendants have immunity under the PREP Act.

To the extent that any defendant asserts that the challenged conduct in this case involves the "management and operation of countermeasure programs, or management and operation of locations for the purpose of distributing and dispensing countermeasures," this also fails. Declaration, 85 Fed. Reg. at 15202.[12] Prisons are not countermeasure

---

[12] The Declaration further provides:

> [T]he Act precludes a liability claim relating to the management and operation of a countermeasure distribution program or site, such as a slip-and-fall injury or vehicle collision by a recipient receiving a countermeasure at a retail store serving as an administration or dispensing location that alleges, for example, lax security or chaotic crowd control. However, a liability claim alleging an injury occurring at the site that was not directly related to the countermeasure activities is not covered, such as a slip and fall with no direct connection to the countermeasure's administration or use. In each case,

programs, nor are they locations for the purpose of distributing countermeasures. While the Act may confer immunity for the administration of countermeasures within a prison context, it does not serve to convert all prison operations into countermeasure programs or locations such that any COVID-related conduct or decisions made within that context are immune.

My finding that none of the defendants is entitled to immunity under the PREP Act is consistent with decisions by other district courts within the Ninth Circuit. *See Smith v. Colonial Care Ctr., Inc.*, No. 2:21-CV-00494-RGK-PD, 2021 WL 1087284, at *4 (C.D. Cal. Mar. 19, 2021), appeal filed, No. 21-55377 (9th Cir. Apr. 19, 2021) ("failure to 'implement an effective policy for isolating proven or suspected carriers of the coronavirus, and protecting [nursing home] residents from exposure to COVID-19[]'" not covered by the PREP Act); *Hampton v. California*, No. 21-CV-03058-LB, 2022 WL 838122, at *10-11 (N.D. Cal. Mar. 20, 2022). Because the PREP Act does not apply, I need not reach defendants' argument that I lack jurisdiction to reach claims involving "[t]he sole exception to the PREP Act's broad immunity."

III. QUALIFIED IMMUNITY

"Qualified immunity protects government officers from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Hernandez v. City of San Jose,* 897 F.3d 1125, 1132 (9th Cir. 2018) (quotation and

---

> whether immunity is applicable will depend on the particular facts and circumstances.

Declaration, 85 Fed. Reg. at 15200.

citation omitted). "To determine whether an officer is entitled to qualified immunity, [courts] ask, in the order [they] choose, (1) whether the alleged misconduct violated a right and (2) whether the right was clearly established at the time of the alleged misconduct." *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1082 (9th Cir. 2013) (citing *Pearson v. Callahan*, 555 U.S. 223, 232, 236 (2009)).

If there was a violation, the "salient question" is whether the law at the time gave the defendants "fair warning" that their conduct was unconstitutional. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). Courts should not define clearly established law "at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (citation omitted). On the other hand, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)); accord *White v. Pauly*, 137 S. Ct. 548, 551 (2017).

Defendants' argument that they have qualified immunity from plaintiffs' lawsuit fails at this stage of the litigation. Deliberate indifference to a prisoner's serious medical needs violates the Eighth Amendment's proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Plaintiff have plausibly alleged that the conduct described in the complaint violated their constitutional rights.

A prison official is deliberately indifferent if he knows that a prisoner faces a substantial risk of serious harm and disregards that risk by failing to take reasonable steps to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (equating the standard with

that of criminal recklessness). The prison official must not only "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," but "must also draw the inference." *Id.* Consequently, in order for deliberate indifference to be established, there must exist both a purposeful act or failure to act on the part of the defendant and harm resulting therefrom. *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992) (overruled on other grounds, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc)).

"A defendant may be held liable as a supervisor under § 1983 if there exists either (1) [the supervisor's] personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (cleaned up); *see Cunningham v. Gates*, 229 F.3d 1271, 1292 (9th Cir. 2000) (supervisors can be liable for "1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous indifference to the rights of others").

Plaintiffs have plausibly alleged that each of the defendants named in their various complaints participated, as supervisor or otherwise, in one or more of the decisions to transfer prisoners, regarding the process for transferring prisoners, and regarding the housing of prisoners after the transfer, in a manner that exposed plaintiffs to heightened risk of contracting COVID-19. These alleged actions are

sufficient to constitute unconstitutional conduct. *See Helling v. McKinney*, 509 U.S. 25, 33, 34 (1993) ("the exposure of inmates to a serious, communicable disease," including by the "mingling of inmates with serious contagious diseases with other prison inmates," violates the Eighth Amendment).

The plausibility of plaintiffs' claims that defendants were deliberately indifferent to the risk of exposure associated with the transfer, the transfer protocol, and the containment strategy or lack thereof upon receiving the prisoners at San Quentin, is bolstered by the allegations contained in the incorporated OIG report. The report noted:

> Our review found that the department's efforts to prepare for and execute the transfers of 67 medically vulnerable incarcerated persons to Corcoran and 122 to San Quentin were deeply flawed and risked the health and lives of the medically vulnerable incarcerated persons whom the department was attempting to protect . . . . In an effort to remove the medically vulnerable incarcerated persons from the prison's outbreak, CCHCS and departmental executives locked themselves into a tight deadline for beginning the transfers by the end of May 2020 . . . . Faced with this self-imposed deadline, CCHCS executives and management at the department's headquarters pressured staff at the California Institution for Men to take whatever action was necessary to execute the transfers within this time frame.
>
> The deadline and resulting pressure from executives to meet the deadline created apprehension among prison staff, causing

> some to question the safety of the transfers. Numerous email messages the OIG reviewed illustrate these concerns.
>
> . . .
>
> The insistence on beginning the transfers by the end of May 2020 resulted in the California Institution for Men transferring medically vulnerable incarcerated persons despite knowing that weeks had passed since many of them had been tested for COVID-19 . . . .
>
> The decision to transfer the medically vulnerable incarcerated persons despite such outdated test results was not simply an oversight; instead, it was a conscious decision made by prison and CCHCS executives.

Dkt. No. 32-5 at 17-18.

The report also found that SQSP had inadequate infrastructure for controlling the spread of the virus: "Given the clearly antiquated design of San Quentin's housing units as well as the prisons' history [of influenza outbreaks], the decision by CCHCS and the department to transfer 122 medically vulnerable incarcerated persons to San Quentin is especially puzzling." *Id.* at 47. It also found that "San Quentin took inadequate precautions to limit the spread of COVID-19 throughout the prison" by failing to limit the movement of staff and enforce masking. *Id.* at 49-49.

Further, the law at the time of the events of which plaintiffs complain gave defendants fair warning that the alleged conduct, exposing plaintiffs to greater risk of contracting a communicable disease, was unconstitutional. *See Helling*, 509 U.S. at 35 (exposure to inhalants that pose an "unreasonable risk

of serious damage to [a prisoner's] future health" was an Eighth Amendment violation when done with deliberate indifference); *Hutto v. Finney*, 437 U.S. 678, 682 (1978) ("jumbl[ing] together" of mattresses used by prisoners with infectious diseases with other prisoners contributed to Eighth Amendment violating punitive isolation conditions); *Parsons v. Ryan*, 754 F.3d 657, 677 (9th Cir. 2014) ("Since *Helling* and *Farmer*, we have repeatedly recognized that prison officials are constitutionally prohibited from being deliberately indifferent to policies and practices that expose inmates to a substantial risk of serious harm"); *Andrews v. Cervantes*, 493 F.3d 1047, 1055 (9th Cir. 2007) (prisoner stated Eighth Amendment claim based on failure to screen for infectious diseases or isolate those with infections).

Defendants' claims of qualified immunity rely on too narrow a definition of the clearly established right at issue. Though a court must not define a right at a high level of generality, *see Kisela*, 138 S. Ct. at 1152, an official's "legal duty need not be litigated and then established disease by disease or injury by injury," *Est. of Clark v. Walker*, 865 F.3d 544, 553 (7th Cir. 2017); *Maney v. Brown*, 2020 WL 7364977, at *6 (D. Or. Dec. 15, 2020) (denying qualified immunity to prison officials because inmates had "a clearly established constitutional right to protection from a heightened exposure to COVID-19, despite the novelty of the virus"). At the motion to dismiss stage, I cannot agree that defendants were not on notice that their conduct might violate the Constitution.

Nor is qualified immunity appropriate at this stage based on defendants' claims that CDCR followed the Receiver's orders. That the Receiver ordered the transfer does not on its own shield defendants from

liability. What the Receiver directed defendants to do entails a fact-specific inquiry; I cannot determine at this time whether defendants are entitled to immunity on that basis.[13]

Hines v. Youseff, 914 F.3d 1218 (9th Cir. 2019), does not compel a different result. There, the Ninth Circuit upheld a finding of qualified immunity for CDCR officials at the summary judgment stage from claims of exposing plaintiffs to Valley Fever. The court found it "especially significant that state officials could have reasonably believed that they were not violating the inmates' Eighth Amendment rights because the officials reported to the federal Receiver." *Id*. at 1231. Here, in contrast, I lack adequate information for now to determine whether state officials made decisions independent from the instructions of the Receiver that failed to meet a constitutional level of care.

The *Hines* court noted that millions of people choose to live in the Central Valley despite the risk of Valley Fever exposure and that "there is no evidence in the record that 'society's attitude had evolved to the point that involuntary exposure' to either the heightened risk inside prison or the lower risk outside prison 'violated current standards of decency'." *Id.* at

---

[13] Disputed facts necessary for determining qualified immunity preclude such a finding at a motion to dismiss or motion for summary judgment stage. *See, e.g., Est. of Adams*, 133 F.3d 926 (9th Cir. 1998); *Atencio v. Arpaio*, 674 F. App'x 623, 625 (9th Cir. 2016). *See also Morales v. Fry*, 873 F.3d 817, 823 (9th Cir. 2017) ("'whether a constitutional right was violated . . . is a question of fact' for the jury, while 'whether the right was clearly established . . . is a question of law' for the judge") (quoting *Tortu v. Las Vegas Metro. Police Dep't*, 556 F.3d 1075, 1085 (9th Cir. 2009).

1232. Here, in contrast, the "standards of decency" regarding COVID-19 exposure in May 2020 is a matter requiring further factual development. At first glance, the seriousness of COVID-19 and the national and global response to the pandemic by April and May of 2020 suggest a very different picture from what was in front of the *Hines* court.

Neither does *Rico v. Ducart*, 980 F.3d 1292, 1299 (9th Cir. 2020), also cited by defendants, confer immunity on defendants. In *Rico*, the Ninth Circuit found that correctional officers had qualified immunity from a claim that they violated prisoners' constitutional rights by making excessive noise and depriving them of sleep while carrying out welfare checks ordered as part of the ongoing *Coleman v. Newsom* class action. The existence of the court order directing the checks was not dispositive; rather, the court looked to precedent regarding whether it was clearly established that excessive noise was unconstitutional. Here, as previously discussed, the precedent does clearly establish that exposure to an infectious disease is unconstitutional.

My finding that defendants are not presently entitled to qualified immunity is consistent with decisions by other district courts within the Ninth Circuit. *See, e.g., Hampton*, 2022 WL 838122 at *8 (disputed facts preclude qualified immunity for claims arising from the May 2020 transfer of prisoners from CIM to SQSP); *Maney*, 2020 WL 7364977; *Jones v. Sherman*, No. 121CV01093DADEPGPC, 2022 WL 783452, at *10 (E.D. Cal. Mar. 11, 2022) ("the law is clearly established that individuals in government custody have a constitutional right to be protected against a heightened exposure to serious, easily communicable diseases, and the Court finds that this

clearly established right extends to protection from COVID-19"); *Jones v. Pollard*, No. 21-CV-162-MMA (RBM), 2022 WL 706926, at *9-10 (S.D. Cal. Mar. 9, 2022) (denying qualified immunity at the motion to dismiss stage and noting "[t]he issue of whether Defendant's decision was made under the supervision of the federal Receiver, and if so, whether that supervision impacts the reasonableness of the belief that the conduct was lawful thus triggering qualified immunity should be more appropriately addressed at a later stage").[14]

CONCLUSION

For the foregoing reasons, the claims of PREP Act immunity and qualified immunity at the pleadings stage are denied, and the motions to dismiss are DENIED on those bases, in the following Represented Cases:

- 20-cv-09415-BLF *Cooper v. Allison et al.*
- 21-cv-00708-EJD *Quale v. Allison et al.*
- 21-cv-01832-JD *Ruiz et al v. State of California et al.*

[14] The out-of-circuit authority defendants cite simply holds that a correctional institution's failure to achieve social distancing and failure to prevent the spread of COVID does not amount to recklessness where the institution took "numerous measures to combat the virus." *Swain v. Junior*, 961 F.3d 1276, 1287 (11th Cir. 2020). *See also Wilson v. Williams*, 961 F.3d 829, 841 (6th Cir. 2020) (Bureau of Prisons officials generally "responded reasonably to the risk posed by COVID-19" even though the virus spread). Here, the allegation is not that defendants simply failed to prevent the spread of the virus or achieve measures not possible in a correctional setting; it is that they actively and knowingly made specific affirmative decisions that created greater risk that plaintiffs would contract COVID.

- 21-cv-01963-HSG *Legg et al v. Calif. Department of Corrections and Rehabilitation et al.*
- 21-cv-04095-JD *Love v. State of California et al.*
- 21-cv-04604-JD *Diaz et al v. State of California et al.*
- 21-cv-06960-WHO *Thorpe v. Diaz et al.*
- 21-cv-08154-JD *Warner et al v. State of California et al.*

This Order terminates Docket Nos. 9, 13, 15, and 17-21 in 22-mc-80066, and terminates as moot the motions to dismissed filed in the underlying dockets. *See* Case Nos. 20-cv-09415-BLF (Dkt. No. 37), 21-cv-00708-EJD (Dkt. No. 18), 21-cv-01832-JD (Dkt. No. 31), 21-cv-01963-HSG (Dkt. No. 38), 21-cv-04095-JD (Dkt. Nos. 24, 39), 21-cv-04604-JD (Dkt. No. 49), 21-cv-06960-WHO (Dkt. No. 23). Any motions for reconsideration or for interlocutory appeal of the issues decided herein for the Represented Cases should be directed to the undersigned. Otherwise, the STAY on substantive proceedings put in place for the Represented Cases covered by this Order is lifted, I have completed my work with respect to the Assigned Issues in the Represented Cases, and litigation may proceed with the originally assigned judge.

This Order does not preclude any defendant in the underlying cases from filing a renewed motion to dismiss raising arguments not covered by the Assigned Issues identified in the Order of Limited Assignment.

IT IS SO ORDERED.

Dated: July 15, 2022

/s/ WILLIAM H. ORRICK
William H. Orrick
United States District Judge

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Case No. 20-cv-09393-CRB

DONTE LEE HARRIS,
Plaintiff

v.

KATHLEEN ALLISON, et al.,
Defendants.

Filed May 18, 2022

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING DEFENDANTS' MOTION TO DISMISS

I. BACKGROUND

Plaintiff Donte Lee Harris, a California Department of Corrections and Rehabilitation (CDCR) prisoner incarcerated at San Quentin State Prison (SQSP), filed a *pro se* complaint in December 2020 pursuant to 42 U.S.C. § 1983. He filed a First Amendment Complaint (FAC) on April 9, 2021, alleging that defendants violated his constitutional rights by transferring prisoners from the California Institution for Men (CIM), which was experiencing a

COVID-19 outbreak, to SQSP in May 2020 and causing an outbreak at the latter, during which he contracted the disease. *See generally* Dkt. No. 9. The Court ordered the FAC served on Defendant federal receiver Clark Kelso and CDCR Defendants Kathleen Allison, Ralph Diaz, Ron Davis, Ron Broomfield, Dr. A. Pachynski, Dr. L. Escobell, Dr. R. Steven Tharratt.[1] Clarence Cryer, Dean Borders, and Dr. Joseph Bick. Dkt. No. 11.

The CDCR Defendants filed a motion to dismiss plaintiff's FAC on November 9, 2021. Dkt. 16. Plaintiff did not file an opposition. Plaintiff became represented by counsel on May 3, 2022. Dkt. No. 29.

Plaintiff's FAC alleges that Defendants were involved in the decision to transfer over 100 inmates, some of whom were infected with COVID-19, from CIM to SQSP in May 2020. Dkt. No. 9 at 9. He alleges that Defendants failed to take adequate safety precautions before, during, and after the transfer, including failing to test the transferring prisoners or screen them for symptoms at the appropriate times, failing to implement distancing measures on the transfer busses, and failing to test and isolate the transferred prisoners upon arrival. *Id.* at 9-14. Because of the transfer and manner in which it occurred, Plaintiff alleges an outbreak resulted at SQSP, during which Plaintiff tested positive for COVID-19 on June 29, 2020. *Id.* at 14.

Plaintiff alleges that named Defendants were deliberately indifferent to the risk to his health of transferring the prisoners from CIM and failing to quarantine them. *Id.* at 16-17. He alleges that

---

[1] The Court subsequently dismissed defendant Tharratt, who was deceased prior to the filing of suit. Dkt. No. 24.

Defendants Diaz, Allison, and Davis approved of the transfer; that Defendant Bick was "responsible for all transfer and testing protoc[o]ls"; that Defendant Escobell failed to ensure that prisoners were tested before the transfer; that Defendant Borders was also aware that prisoners had not been tested and approved of transferring them without adequate testing; and that SQSP defendants Broomfield, Cryer, and Pachynski failed to isolate the transferred prisoners and "chose not to implement . . . basic safety measures." *Id.* at 9-13. He also alleges that Defendant Davis, with the approval of Defendants Diaz, Allison, and Bick, failed to socially distance the transferring prisoners by placing more than 19 prisoners on each bus. *Id.* at 12. He also alleges that Defendants Diaz and Allison failed to reduce the prison population, exacerbating the impact of the outbreak. *Id.* at 16. Plaintiff seeks declaratory relief, injunctive relief, compensatory and punitive damages, and costs. *Id.* at 17-18.

Because Defendants are not entitled to qualified immunity or immunity under the PREP Act at this stage of the case, and because Plaintiff has adequately pleaded his claim for violation of the Eighth Amendment, the motion to dismiss Plaintiff's FAC will be denied as to Plaintiff's federal constitutional claims. Because the California constitution does not provide a private right of action for damages for violations of the cruel and unusual punishment clause, Plaintiff's state-law claim will be dismissed.

II. LEGAL STANDARD

Under Rule 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) applies when a complaint lacks either "a cognizable legal

theory" or "sufficient facts alleged" under such a theory. *Godecke v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019).

Whether a complaint contains sufficient factual allegations depends on whether it pleads enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. When evaluating a motion to dismiss, the Court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

If a court dismisses a complaint for failure to state a claim, it should "freely give leave" to amend "when justice so requires." Fed. R. Civ. P. 15(a)(2). A court has discretion to deny leave to amend due to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008).

III. DISCUSSION

A. Judicial Notice and Incorporation

There are two exceptions to the rule that a court must consider only the complaint, on its face, when deciding a motion to dismiss: a court may also consider material that is incorporated into the complaint and material that is judicially noticeable. *Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001). Plaintiff attaches and incorporates by reference the February 2021 California Office of the Inspector General (OIG) report regarding the transfer of prisoners from CIM to SQSP. *See* Dkt. No. 9 at 8, Dkt. No. 9-1 at 29.

Defendants ask that the following documents also be incorporated by reference: July 1, 2020, testimony of Federal Receiver Clark Kelso before the California State Senate's Public Safety Committee Hearing (RJN Ex E); the California Governor's March 4, 2020 Executive Order (RJN Ex F); the California Governor's March 24, 2020 Executive Order N-36-20 (RJN Ex G); and a news article regarding the Centers for Disease Control and Prevention's (CDC's) guidance on aerosol spread of coronavirus (RJN Ex H). These documents are not incorporated by reference because plaintiff did not attach them or rely on them extensively, nor did they "form the basis" of any of his claims. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018).

Defendants request that the Court take judicial notice of the following: four joint case management statements from *Plata v. Newsom*, Case No. 01-CV-01351-JST (N.D. Cal.), a longstanding case overseeing CDCR's provision of healthcare, RJN (Dkt. No. 16- 2) Ex A-D. Courts may judicially notice an adjudicative fact that is "not subject to reasonable dispute" if it is

"generally known," or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1)–(2). But "[j]ust because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth," and "a court cannot take judicial notice of disputed facts contained in [matters of] public record[]." *Khoja*, 899 F.3d at 999. Thus, a court must consider what facts are being proposed—i.e., "the purpose for which [the document is] offered." *Id.* at 1000.

The *Plata* case management statements are not appropriate for judicial notice. Defendants appear to want this Court to take as true factual representations made within them to draw related inferences, but the Court cannot do so because they go to the heart of the Plaintiff's allegations. *Khoja*, 899 F.3d at 999.

The Court does take judicial notice of two advisory opinions by the Department of Health and Human Services (HHS) relating to the Public Readiness and Emergency Preparedness (PREP) Act: Advisory Opinion 20-03 on the Public Readiness and Emergency Preparedness Act and the Secretary's Declaration under the Act October 22, 2020, as Modified on October 23, 2020;[2] and Advisory Opinion 21-01 on the Public Readiness and Emergency Preparedness Act Scope of Preemption Provision, January 8, 2021.[3] These are government documents

---

[2] Published at https://www.hhs.gov/guidance/sites/default/files /hhs-guidance-documents/AO3.1.2_Updated_FINAL_SIGNED_ 10.23.20_0.pdf.

[3] Published at https://www.hhs.gov/guidance/sites/default/files

in the public record, the authenticity of which are not in dispute. *See Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001).

B. Failure to State a Claim

Defendants argue that Plaintiff has failed to state a deliberate indifference claim because his FAC "contains only conclusory allegations of causation." Dkt. No. 16-1 at 12. Plaintiff's allegations regarding each Defendant's decisions regarding the transfer and the transfer protocols, or knowledge of the flawed protocols and failure to take actions to mitigate the risk they presented, identify acts or omissions by each Defendant that, if proven true, could constitute conscious disregard for his health. Plaintiff need not allege facts demonstrating that Defendants were aware of the risk to him specifically; it is enough that Plaintiff alleges Defendants were aware of the risk to all San Quentin prisoners. *See, e.g., Parsons*, 754 F.3d at 678 ("courts . . . have recognized that many inmates can simultaneously be endangered by a single policy"); *Graves v. Arpaio*, 623 F.3d 1043, 1050 (9th Cir. 2010) (defendant violated constitutional rights of jail detainees housed in high temperature locations and taking psychotropic medications impacting the body's ability to regulate heat, even though defendant was not specifically aware of which detainees were taking those medications).

Defendants argue that Plaintiff's identification of Defendant Borders as the warden of CIM and "speculation" that Borders approved of the transfer fails to constitute a plausible claim. Dkt. No. 16-1 at 13. The Court disagrees. Plaintiff specifically alleges

---

/hhs-guidance- documents/2101081078-jo-advisory-opinion-prep-act-complete-preemption-01-08-2021- final-hhs-web.pdf.

that "[o]ne manager integral to the transfer process alerted CIM Warden Dean Borders of the need to discuss challenges in preparing for the transfers," and that Borders, among others, made a "conscious decision" to continue with the transfer despite knowledge of outdated test results. Dkt. No. 9 at 10-11. It is plausible, given Borders's role as warden and the OIG Report's description of the way the transfer decision and process unfolded, that Defendant Borders was aware of the risks and took no action to mitigate them. *See, e.g., Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (complaint adequately pleaded deliberate indifference by county sheriff towards jail violence by alleging that he "was given notice . . . of systematic problems in the county jails under his supervision that . . . resulted in . . . deaths and injuries" and he "did not take action to protect inmates under his care despite the dangers, created by the actions of his subordinates, of which he had been made aware").

Defendants also argue that there were intervening causes that break the chain of causation as to some of Plaintiff's claims. Dkt. No. 16-1 at 13. "[T]raditional tort law principles of causation" apply to section 1983 claims, *see Galen v. Cty. of Los Angeles*, 477 F.3d 652, 663 (9th Cir. 2007), including that intervening causes may supersede prior causes and subsume partial or total liability. *See* Restatement (Second) of Torts § 441 (1965). Here, Plaintiff has adequately alleged causation of his COVID infection by all the named Defendants. Determining the truth of the allegations as to each Defendant's conduct and whether it contributed to or caused the conditions that resulted in Plaintiff's infection is a matter for discovery and perhaps ultimately trial. Factual questions as to causation preclude granting the motion to dismiss. *See, e.g., Beck v. City of Upland*, 527 F.3d 853, 870 (9th

Cir. 2008) (summary judgment not appropriate where a rational jury could determine that the prosecutor's conduct in filing charges was not an independent intervening cause to shield police officers from liability for false arrest).

Defendants claim that "there are no factual allegations showing Plaintiff was ever housed or came into contact with any CIM inmates while he was at San Quentin," and therefore "there are no alleged facts connecting any of these Defendants' actions or inactions with Plaintiff's contracting COVID-19." Dkt. No. 16-1 at 14. The FAC alleges that transferees tested positive after having been "housed in the unit for at least six days," rather than in any sort of quarantine, after which "[t]he virus then spread quickly through the housing units and to multiple areas of the prison," due to "[t]he prison's inability to properly quarantine and isolate [inmates] exposed to or infected with COVID-19" and "the practice of allowing staff to work throughout the prison during shifts or on different days." Dkt. No. 9 at 13-14. Plaintiff alleges this "likely caused the virus to spread to multiple areas of the prison." *Id*. at 14. Plaintiff need not specifically allege that he came into contact with transferred prisoners from CIM. Plaintiff plausibly alleges that the transfer caused an outbreak throughout the entire prison, during which he became infected. *See* id. Plaintiff has adequately alleged causation connecting Defendants' actions or inaction to his contracting the virus.

Defendants also argue that Plaintiff does not adequately plead the knowledge of each supervisory Defendant. Dkt. No. 16-1 at 14. Again, the Court disagrees. Plaintiff has adequately pleaded, at the motion to dismiss stage, that Defendants in

supervisory roles were aware of the risks involved in the transfer. The OIG report bolsters this claim by documenting communications involving institution medical executives and CCHCS medical executives demonstrating their knowledge of and involvement in the details of transfer, although it does not identify CDCR participants by name. *See, e.g.*, Dkt. No. 9-1 at 35, Dkt. 9-2 at 7. Defendants' argument as to supervisory Defendants' knowledge or lack thereof is better suited to a later stage of this case.

C. Plaintiff's Claim Under Article I, Section 17 of the California Constitution

The California Court of Appeal has held that "[t]here [i]s [n]o [p]rivate [r]ight [o]f [a]ction [f]or [d]amages [a]rising [o]ut [o]f [a]n [a]lleged [v]iolation [o]f [t]he [c]ruel [o]r [u]nusual [p]unishment [c]lause [o]f [t]he California Constitution." *Giraldo v. Dep't of Corr. & Rehab.*, 168 Cal. App. 4th 231, 253 (2008). Plaintiff's claim under the California constitution's cruel or unusual punishment clause will therefore be dismissed. See *Asberry v. Relevante*, No. 116CV01741LJOJDP, 2018 WL 4191863, at *7 (E.D. Cal. Aug. 31, 2018), *report and recommendation adopted*, No. 116CV01741LJOJDPPC, 2018 WL 4616383 (E.D. Cal. Sept. 24, 2018) (plaintiff could not proceed with damages claim under Article I, section 17); *McDaniel v. Diaz*, No. 120CV00856NONESAB, 2021 WL 147125, at *20 (E.D. Cal. Jan. 15, 2021), *report and recommendation adopted*, No. 120CV00856NONESAB, 2021 WL 806346 (E.D. Cal. Mar. 3, 2021) (dismissing plaintiff's section 17 claim).

D. Qualified Immunity

Defendants claim that they have qualified immunity from Plaintiff's lawsuit. This argument fails.

"Qualified immunity protects government officers from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Hernandez v. City of San Jose*, 897 F.3d 1125, 1132 (9th Cir. 2018) (quotation and citation omitted). "To determine whether an officer is entitled to qualified immunity, [courts] ask, in the order [they] choose, (1) whether the alleged misconduct violated a right and (2) whether the right was clearly established at the time of the alleged misconduct." *Maxwell v. Cty. of San Diego*, 708 F.3d 1075, 1082 (9th Cir. 2013) (citing *Pearson v. Callahan*, 555 U.S. 223, 232, 236 (2009)).

If there was a violation, the "salient question" is whether the law at the time gave the defendants "fair warning" that their conduct was unconstitutional. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). Courts should not define clearly established law "at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (citation omitted). On the other hand, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)); accord *White v. Pauly*, 137 S. Ct. 548, 551 (2017).

Here, Plaintiff has plausibly alleged that the conduct described in the complaint violated his constitutional rights. Deliberate indifference to a

prisoner's serious medical needs violates the Eighth Amendment's proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A prison official is deliberately indifferent if he knows that a prisoner faces a substantial risk of serious harm and disregards that risk by failing to take reasonable steps to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (equating the standard with that of criminal recklessness). The prison official must not only "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists," but "must also draw the inference." *Id*. Consequently, in order for deliberate indifference to be established, there must exist both a purposeful act or failure to act on the part of the defendant and harm resulting therefrom. *McGuckin v. Smith*, 974 F.2d 1050, 1060 (9th Cir. 1992) (overruled on other grounds, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc)).

"A defendant may be held liable as a supervisor under § 1983 if there exists either (1) [the supervisor's] personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (cleaned up); *see Cunningham v. Gates*, 229 F.3d 1271, 1292 (9th Cir. 2000) (supervisors can be liable for "1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous indifference to the rights of others").

Plaintiff has plausibly alleged that each Defendant participated, as supervisor or otherwise, in one or more of the decisions to transfer prisoners, regarding the process for transferring prisoners, and regarding the housing of prisoners after the transfer, in a manner that exposed him to heightened risk of contracting COVID-19. These alleged actions are sufficient to constitute unconstitutional conduct. *See Helling v. McKinney*, 509 U.S. 25, 33, 34 (1993) ("the exposure of inmates to a serious, communicable disease," including by the "mingling of inmates with serious contagious diseases with other prison inmates," violates the Eighth Amendment). The plausibility of Plaintiff's claim that Defendants were deliberately indifferent to the risk of exposure associated with the transfer, the transfer protocol, and the containment strategy or lack thereof upon receiving the prisoners at San Quentin, is bolstered by the allegations contained in the incorporated OIG report. The report noted:

> Our review found that the department's efforts to prepare for and execute the transfers of 67 medically vulnerable incarcerated persons to Corcoran and 122 to San Quentin were deeply flawed and risked the health and lives of the medically vulnerable incarcerated persons whom the department was attempting to protect . . . . In an effort to remove the medically vulnerable incarcerated persons from the prison's outbreak, CCHCS and departmental executives locked themselves into a tight deadline for beginning the transfers by the end of May 2020 . . . . Faced with this self-imposed deadline, CCHCS executives and management at the department's headquarters pressured staff at

> the California Institution for Men to take whatever action was necessary to execute the transfers within this time frame.
>
> The deadline and resulting pressure from executives to meet the deadline created apprehension among prison staff, causing some to question the safety of the transfers. Numerous email messages the OIG reviewed illustrate these concerns.
>
> . . .
>
> The insistence on beginning the transfers by the end of May 2020 resulted in the California Institution for Men transferring medically vulnerable incarcerated persons despite knowing that weeks had passed since many of them had been tested for COVID-19 . . . .
>
> The decision to transfer the medically vulnerable incarcerated persons despite such outdated test results was not simply an oversight; instead, it was a conscious decision made by prison and CCHCS executives.

Dkt. No. 9-1 at 33-34.

The report also found that SQSP had inadequate infrastructure for controlling the spread of the virus: "Given the clearly antiquated design of San Quentin's housing units as well as the prisons' history [of influenza outbreaks], the decision by CCHCS and the department to transfer 122 medically vulnerable incarcerated persons to San Quentin is especially puzzling." *Id.* at 26. It also found that "San Quentin took inadequate precautions to limit the spread of COVID-19 throughout the prison" by failing to limit the movement of staff and enforce masking. *Id.* at 28-29.

Further, the law at the time of the events of which Plaintiff complains gave Defendants fair warning that the alleged conduct, exposing Plaintiff to greater risk of contracting a communicable disease, was unconstitutional. *See Helling*, 509 U.S. at 35 (exposure to inhalants that pose an "unreasonable risk of serious damage to [a prisoner's] future health" was an Eighth Amendment violation when done with deliberate indifference); *Hutto v. Finney*, 437 U.S. 678, 682 (1978) ("jumbl[ing] together" of mattresses used by prisoners with infectious diseases with other prisoners contributed to Eighth Amendment violating punitive isolation conditions); *Parsons v. Ryan*, 754 F.3d 657, 677 (9th Cir. 2014) ("Since *Helling* and *Farmer*, we have repeatedly recognized that prison officials are constitutionally prohibited from being deliberately indifferent to policies and practices that expose inmates to a substantial risk of serious harm"); *Andrews v. Cervantes*, 493 F.3d 1047, 1055 (9th Cir. 2007) (prisoner stated Eighth Amendment claim based on failure to screen for infectious diseases or isolate those with infections).

Defendants' claim of qualified immunity relies on too narrow a definition of the clearly established right at issue. Though a court must not define a right at a high level of generality, *see Kisela*, 138 S. Ct. at 1152, an official's "legal duty need not be litigated and then established disease by disease or injury by injury," *Est. of Clark v. Walker*, 865 F.3d 544, 553 (7th Cir. 2017); *Maney v. Brown*, 2020 WL 7364977, at *6 (D. Or. Dec. 15, 2020) (denying qualified immunity to prison officials because inmates had "a clearly established constitutional right to protection from a heightened exposure to COVID-19, despite the novelty of the virus"). At the motion to dismiss stage the Court

cannot agree that Defendants were not on notice that their conduct might violate the Constitution.

Nor is qualified immunity appropriate at this stage based on Defendants' claim that their "CDCR followed the Receiver's orders." Dkt. 16-1 at 17. That the receiver ordered the transfer does not on its own shield Defendants from liability. What the Receiver directed Defendants to do is a fact-specific inquiry and the Court cannot determine at this time whether Defendants are entitled to immunity on that basis.[4] For example, the OIG Report notes that "the federal receiver and a CCHCS director intended to proceed with the transfers of incarcerated persons between prisons by the end of May 2020." Dkt. 9-1 at 37. The report documents "communications among prison and CCHCS staff," most of them unnamed, about concerns about the transfer, but notes that "departmental management and CCHCS executives" decided to proceed anyway. Dkt. No. 9-2 at 1, 4. The report notes that a CCHCS director told CIM officials that testing should be done within 4-6 days of the transfer, but CCHCS did not leave CIM enough time to adequately conduct such testing. Dkt. No. 9-1 at 34, see Dkt. No. 9 at 10. The report concludes that "[f]ailures by the prison to conduct timely testing of the transferring incarcerated persons was . . . an overt decision made

---

[4] Disputed facts necessary for determining qualified immunity preclude such a finding at a motion to dismiss or motion for summary judgment stage. *See, e.g., Est. of Adams*, 133 F.3d 926 (9th Cir. 1998); *Atencio v. Arpaio*, 674 F. App'x 623, 625 (9th Cir. 2016). *See also Morales v. Fry*, 873 F.3d 817, 823 (9th Cir. 2017) ("'whether a constitutional right was violated . . . is a question of fact' for the jury, while 'whether the right was clearly established . . . is a question of law' for the judge") (quoting *Tortu v. Las Vegas Metro. Police Dep't*, 556 F.3d 1075, 1085 (9th Cir. 2009).

by the California Institution for Men's top health care executive." Dkt. No. 9-2 at 6. It is not clear from the allegations in the FAC and incorporated report exactly what the receiver directed, what decisions were made by other headquarters staff independent of the receiver's directions, and what decisions were made by institution staff. Defendants' note, for example, that "the Receiver's guidance did not mandate how far in advance of a transfer an inmate needed to be tested," suggesting that a different Defendant may have been responsible for that decision. Dkt. No. 16-1 at 10.

Hines v. Youseff, 914 F.3d 1218 (9th Cir. 2019), does not compel a different result. There, the Ninth Circuit upheld a finding of qualified immunity for CDCR officials at the summary judgment stage from claims of exposing plaintiffs to Valley Fever. The court found it "especially significant that state officials could have reasonably believed that they were not violating the inmates' Eighth Amendment rights because the officials reported to the federal Receiver." *Id.* at 1231. Here, in contrast, the Court lacks adequate information at this stage to determine whether state officials made decisions independent from the instructions of the receiver that failed to meet a constitutional level of care.

Further, the *Hines* court noted that millions of people choose to live in the Central Valley despite the risk of Valley Fever exposure, and that "there is no evidence in the record that 'society's attitude had evolved to the point that involuntary exposure' to either the heightened risk inside prison or the lower risk outside prison 'violated current standards of decency'." *Id.* at 1232. Here, in contrast, the "standards of decency" regarding COVID-19 exposure in May 2020 is a matter requiring further factual

development. At first glance, the seriousness of COVID-19 and the national and global response to the pandemic by April and May of 2020 suggest a very different picture from what was in front of the *Hines* court.

Neither does *Rico v. Ducart*, 980 F.3d 1292, 1299 (9th Cir. 2020), also cited by Defendants, confer immunity on Defendants. In *Rico*, the Ninth Circuit found that correctional officers had qualified immunity from a claim that they violated prisoners' constitutional rights by making excessive noise and depriving them of sleep while carrying out welfare checks ordered as part of the ongoing *Coleman v. Newsom* class action. The existence of the court order directing the checks was not dispositive; rather, the court looked to precedent regarding whether it was clearly established that excessive noise was unconstitutional. Here, as previously discussed, the precedent does clearly establish that exposure to an infectious disease is unconstitutional.

This Court's finding that Defendants are not presently entitled to qualified immunity is consistent with decisions by other district courts within the Ninth Circuit. *See, e.g., Hampton v. California*, No. 21-CV-03058-LB, 2022 WL 838122, at *8 (N.D. Cal. Mar. 20, 2022) (disputed facts preclude qualified immunity for claims arising from the May 2020 transfer of prisoners from CIM to SQSP); *Maney*, 2020 WL 7364977; *Jones v. Sherman*, No. 121CV01093DADEPGPC, 2022 WL 783452, at *10 (E.D. Cal. Mar. 11, 2022) ("the law is clearly established that individuals in government custody have a constitutional right to be protected against a heightened exposure to serious, easily communicable diseases, and the Court finds that this clearly

established right extends to protection from COVID-19"); *Jones v. Pollard*, No. 21-CV-162-MMA (RBM), 2022 WL 706926, at *9-10 (S.D. Cal. Mar. 9, 2022) (denying qualified immunity at the motion to dismiss stage and noting "[t]he issue of whether Defendant's decision was made under the supervision of the federal Receiver, and if so, whether that supervision impacts the reasonableness of the belief that the conduct was lawful thus triggering qualified immunity should be more appropriately addressed at a later stage").[5]

E. The PREP Act

Defendants also argue that the PREP Act confers immunity to all of Plaintiff's claims. This argument fails.

The PREP Act provides immunity for injuries "caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration [by the HHS Secretary] has been issued with respect to such countermeasure." 42 U.S.C. § 247d-6d(a)(1). Under the statute, covered countermeasures include "qualified pandemic . . . product[s]" and "respiratory

---

[5] The out-of-circuit authority Defendant cites simply holds that a correctional institution's failure to achieve social distancing, and failure to prevent the spread of COVID, does not amount to recklessness where the institution took "numerous measures to combat the virus." *Swain v. Junior*, 961 F.3d 1276, 1287 (11th Cir. 2020). *See also Wilson v. Williams*, 961 F.3d 829, 841 (6th Cir. 2020) (Bureau of Prisons officials generally "responded reasonably to the risk posed by COVID-19" even though the virus spread). Here, Plaintiff has not claimed that Defendants simply failed to prevent the spread of the virus or achieve measures not possible in a correctional setting, but that Defendants actively and knowingly made specific affirmative decisions that created greater risk that he would contract COVID.

protective device[s] . . . that the Secretary determines to be a priority for use." 42 U.S.C. § 247d-6d(i)(1)(A), (C), (D).

The Secretary issued a declaration in light of COVID-19. Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15,198, 15,198 (Mar. 17, 2020) ("Declaration"). It has been amended several times during the pandemic. A "covered countermeasure" may include "any antiviral, any other drug, any biologic, any diagnostic, any other device, any respiratory protective device, or any vaccine, used . . . to treat, diagnose, cure, prevent, mitigate or limit the harm from COVID-19." Fourth Amendment to the Declaration, 85 Fed. Reg. 79,190, 79,196 (Dec. 9, 2020). The Secretary has also declared that failure to institute a covered countermeasure may sometimes give rise to immunity:

> Where there are limited Covered Countermeasures, not administering a Covered Countermeasure to one individual in order to administer it to another individual can constitute "relating to . . . the administration to . . . an individual" under 42 U.S.C. 247d-6d. For example, consider a situation where there is only one dose of a COVID-19 vaccine, and a person in a vulnerable population and a person in a less vulnerable population both request it from a healthcare professional. In that situation, the healthcare professional administers the one dose to the person who is more vulnerable to COVID-19. In that circumstance, the failure to administer the COVID-19 vaccine to the person in a less vulnerable population

> "relat[es] to . . . the administration to" the person in a vulnerable population. The person in the vulnerable population was able to receive the vaccine only because it was not administered to the person in the less-vulnerable population.

Id. at 79,197. The January 8, 2021 HHS Advisory Opinion differentiates between "allocation which results in non-use by some individuals," which allows for immunity, and "nonfeasance . . . that also results in non-use," which does not. Advisory Opinion 21-01 at 4. Thus, courts have concluded that immunity for "inaction claims" only lies when the defendant's failure to administer a covered countermeasure to one individual has "a close causal relationship" to the administration of that covered countermeasure to another individual. *Lyons v. Cucumber Holdings*, LLC, 520 F. Supp. 3d 1277, 1285–86 (C.D. Cal. 2021) (citation omitted).

Plaintiff alleges that Defendants put him at increased risk of contracting COVID by transferring prisoners from CIM to San Quentin, failing to implement appropriate testing and distancing before and during the transfer, and failing to implement appropriate quarantine measures after the transfer. The transfer of prisoners is not a covered countermeasure under the PREP Act. While the failure to test could be considered a failure to administer a covered countermeasure, the facts as alleged bear no indication that the failure to test the transferring prisoners had any relationship to the testing of other prisoners. The allegations are of non-use resulting from non-feasance rather than allocations. Defendants do not even suggest that the reliance on old COVID tests was the result of a limited

number of tests and a choice to use the tests on a different population. To the extent Plaintiff claims that mask distribution contributed to his contracting COVID, Defendants could ultimately demonstrate entitlement to PREP Act immunity for decisions on how to allocate limited masks. But Plaintiff's lone allegation about mask usage in the FAC, that Defendants Broomfield, Cryer, and Pachynski failed to provide personal protective equipment until late April 2020, *see* Dkt. No. 9 at 8, has no real bearing on his constitutional claims regarding the prisoner transfer that took place in May 2020. The OIG Report makes minimal references to mask usage, and at most it would only constitute one part of the story of the transfer and the resulting outbreak. The mere mention of countermeasures in the complaint does not confer immunity. *See Rachelle Crupi, v. The Heights of Summerlin, LLC, et al.*, No. 221CV00954GMNDJA, 2022 WL 489857, at *6 (D. Nev. Feb. 17, 2022) ("the fact that the Complaint mentions some covered countermeasures as examples of Defendants' failure to enact a COVID-19 response policy, does not rise to the level of alleging that [decedent]'s death was specifically caused by Defendants' use (or misuse) of covered countermeasures") The Court therefore cannot conclude that any of the Defendants have immunity under the PREP Act.

Defendants argue that the challenged conduct in this case involves the "management and operation of countermeasure programs, or management and operation of locations for the purpose of distributing and dispensing countermeasures." Declaration, 85

Fed. Reg. at 15202.[6] But prisons are not countermeasure programs, nor are they locations for the purpose of distributing countermeasures. While the Act may confer immunity for the administration of countermeasures within a prison context, it does not serve to convert all prison operations into countermeasure programs or locations such that any COVID- related conduct or decisions made within that context are immune.

The Court's finding that Defendants are not entitled to immunity under the PREP Act is consistent with decisions by other district courts within the Ninth Circuit. *See Smith v. Colonial Care Ctr., Inc.*, No. 2:21-CV-00494-RGK-PD, 2021 WL 1087284, at *4 (C.D. Cal. Mar. 19, 2021), appeal filed, No. 21-55377 (9th Cir. Apr. 19, 2021) ("failure to 'implement an effective policy for isolating proven or suspected carriers of the coronavirus, and protecting [nursing home] residents from exposure to COVID-19[]'" not

---

[6] The Declaration further provides:

> [T]he Act precludes a liability claim relating to the management and operation of a countermeasure distribution program or site, such as a slip-and-fall injury or vehicle collision by a recipient receiving a countermeasure at a retail store serving as an administration or dispensing location that alleges, for example, lax security or chaotic crowd control. However, a liability claim alleging an injury occurring at the site that was not directly related to the countermeasure activities is not covered, such as a slip and fall with no direct connection to the countermeasure's administration or use. In each case, whether immunity is applicable will depend on the particular facts and circumstances.

Declaration, 85 Fed. Reg. at 15200.

covered by the PREP Act); *Hampton*, 2022 WL 838122, at *10-11.

Because the PREP Act does not apply, the Court need not reach Defendants' argument that this Court lacks jurisdiction to reach claims involving "[t]he sole exception to the PREP Act's broad immunity." Dkt. No. 43-1 at 18.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the complaint is GRANTED with respect to the claim under the California Constitution, Article I, section 17, and DENIED in all other regards.

This Order terminates Docket No. 16.

IT IS SO ORDERED.

Dated: May 18, 2022

/s/ CHARLES R. BREYER
CHARLES R. BREYER
United States District Judge

APPENDIX L

1. U.S. Const. amend. VIII provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. U.S. Const. amend. XIV, § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any

Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.