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8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **IN AND FOR THE COUNTY OF SAN DIEGO**

10  
11 TERRY LEROY JONES and GABRIEL  
CAMPOS on behalf of themselves and all  
12 others similarly situated;

13 Plaintiffs,

14 v.

15 WILLIAM D. GORE, in his official capacity as  
Sheriff of San Diego County, California,

16 Defendant.  
17  
18  
19  
20

) Case No. 37-2021-00010648-CU-MC-CTL  
) Action Filed: March 10, 2021  
)

) **MEMORANDUM OF POINTS AND**  
) **AUTHORITIES IN SUPPORT OF**  
) **DEMURRER TO FIRST AMENDED**  
) **PETITION FOR WRITS OF MANDATE**  
) **AND HABEAS CORPUS AND**  
) **COMPLAINT FOR INJUNCTIVE AND**  
) **DECLARATORY RELIEF**

) Date: July 16, 2021  
) Time: 9:00 a.m.  
) Judge: Hon. Joel R. Wohlfeil  
) Dept.: 73  
) Trial Date: None set  
)

) **[IMAGED FILE]**  
)

21  
22 Defendant WILLIAM D. GORE, in his official capacity as Sheriff of San Diego County  
23 (“Defendant”), hereby submits the following memorandum of points and authorities in support  
24 of his demurrer to Plaintiffs’ First Amended Petition for Writs of Mandate and Habeas Corpus  
25 and Complaint for Injunctive and Declaratory Relief (“Petition”).  
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1 **I. INTRODUCTION**

2 Plaintiffs claim that Defendant is disregarding the health and safety risks posed by the  
3 COVID-19 pandemic and not providing adequate medical care to inmates. Contrary to Plaintiffs’  
4 contention, the mountain of information that is publicly available, and of which this Court may take  
5 judicial notice, shows the opposite. Defendant has taken dramatic steps to substantially reduce the  
6 jail population, implement appropriate safety and hygiene practices, provide COVID-19 tests, and  
7 offer the vaccine to every inmate under his care. The results are obvious: there are currently only  
8 five cases of COVID-19 in San Diego County jails and there has been only one death in San Diego  
9 County jails from COVID-19 out of 1,288 positive tests, a rate of 0.08%. By comparison, the  
10 County-wide rate of deaths from COVID-19 (3,756 deaths out of 280,253 positive tests) is 1.3%,  
11 more than 16 times higher than the COVID-19 death rate in the jails.

12 Thus, contrary to Plaintiffs’ allegations, the undisputed judicially-noticeable facts show that  
13 Defendant has implemented effective measures to mitigate the spread of COVID-19 in the jails and  
14 is providing adequate medical care to inmates. No matter how artfully Plaintiffs attempt to plead  
15 their claims, they cannot escape these facts. Accordingly, the Court should sustain the County’s  
16 demurrer without leave to amend.

17 **II. FACTS**

18 When the COVID-19 pandemic hit, Defendant promptly took steps to protect jail inmates.  
19 Just prior to the pandemic, there were approximately 5,600 inmates in County jails. When the  
20 pandemic hit, Defendant implemented an emergency bail schedule, reduced bail for misdemeanor  
21 offenses to \$0, requested a court order allowing the release of inmates up to 60 days early, and  
22 implemented state orders to release certain inmates early. Consequently, by July 2, 2020, the inmate  
23 population was reduced to approximately 3,400. (See Request for Judicial Notice (“RJN”), Exs. 1-7,  
24 9.) As of May 29, 2021, the population stands at 3,781, a reduction of nearly 33% from just prior to  
25 the pandemic. (RJN, Ex. 18.) The emergency bail schedule remains in place today, and Defendant  
26 continues to release inmates up to 60 days early. (RJN, Exs. 3-4.) As of March 11, 2021, Defendant  
27 had released 5,354 inmates. (RJN, Ex. 15.)

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1 In addition to taking steps to reduce the jails' population, Defendant implemented and  
2 continues to implement protocols to protect the health and safety of inmates and staff. These  
3 include:

- 4 • Education and training of inmates and staff regarding COVID-19;
- 5 • Temperature checks for everyone entering jail facilities;
- 6 • Daily temperature checks of all inmates;
- 7 • Increased cleaning and disinfecting in all facilities;
- 8 • Appropriate personal protective equipment (PPE) for inmates and staff, including  
9 cloth masks and N95 masks when appropriate;
- 10 • Limiting movement in jails;
- 11 • Increased health screenings of all new inmates during intake;
- 12 • Testing all new inmates during intake;
- 13 • Quarantining all new inmates for seven days;
- 14 • Isolating inmates that test positive for COVID-19 or have been in close contact with  
15 someone that has tested positive
- 16 • Offering COVID-19 vaccines to all inmates in custody;
- 17 • Offering COVID-19 vaccines to all new inmates during their 7-day quarantine.

18 (RJN, Exs. 15-17, 6-14, 22-29.)

19 Defendant has offered COVID-19 vaccines to every inmate, and offers the vaccine to every  
20 new inmate during their seven-day quarantine. To date, Defendant has vaccinated 2,521 inmates.  
21 (RJN, Ex. 21.) Because of the health and safety protocols implemented by Defendant, there are  
22 currently only five active cases of COVID-19 in the jails. (RJN, Ex. 19.) **Only one inmate has died**  
23 **of COVID-19** since the onset of the pandemic, a rate of 0.08% (number of deaths from COVID-19  
24 out of the number of people that have tested positive). (RJN, Ex. 20.) By contrast, the rate of deaths  
25 from COVID-19 for all of San Diego County is 1.3% (RJN, Ex. 30),<sup>1</sup> which is **more than 16 times**  
26 **higher than the rate for jail inmates.**

27 \_\_\_\_\_  
28 <sup>1</sup> [https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community\\_epidemiology/dc/2019-nCoV/status.html](https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epidemiology/dc/2019-nCoV/status.html)

1 **III. ARGUMENT**

2 **A. Legal Standard for Demurrer**

3 A demurrer is used to test the sufficiency of the factual allegations to state a cause of  
4 action in a complaint or petition. Code Civ. Proc. § 430.10(e). A demurrer admits “all material  
5 facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. [Citation.]  
6 We also consider matters which may be judicially noticed. [Citation]. Further, we give the  
7 complaint a reasonable interpretation, ... [and when] it is sustained without leave to amend, we  
8 decide whether there is a reasonable possibility that the defect can be cured by amendment: if it  
9 can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of  
10 discretion and we affirm. [Citation]. The burden of proving such reasonable possibility is  
11 squarely on the plaintiff.” *Zelig v. County of Los Angeles*, 27 Cal. 4th 1112, 1126 (2002); *Blank*  
12 *v. Kirwan*, 39 Cal. 3d 311, 318 (1985).

13 **B. Plaintiffs’ First and Second Causes of Action Should be Dismissed**

14 “Deliberate indifference to serious medical needs of prisoners entails unnecessary and  
15 wanton infliction of pain. Mere negligence is insufficient to meet this standard which describes a  
16 state of mind more blameworthy.” *Lucas v. Cty. of L.A.*, 47 Cal. App. 4th 277, 287 (1996)  
17 (internal citations and quotations omitted). “[E]ven if prison officials actually knew of a  
18 substantial risk to inmate health or safety, they may be found free from liability if they  
19 responded reasonably to the risk, even though the harm ultimately was not averted.” *Ibid*. This  
20 standard applies whether analyzed under Article I, Sec. 7 of the California Constitution or  
21 Article I, Sec. 17. *See Ochoa v. Superior Court*, 39 Cal. 3d 159, 174 (1985).

22 As one federal district court recently stated,

23 To state a claim under the Eighth Amendment, inmates must plausibly allege that  
24 they are incarcerated under conditions posing a substantial risk of serious harm, or  
25 that they have been deprived of the minimal civilized measure of life’s necessities  
26 as a result of the defendants’ actions. An Eighth Amendment claim requires the  
27 plaintiff to satisfy both (1) an objective standard, that the deprivation was serious  
28 enough to constitute cruel and unusual punishment, and (2) a subjective standard,  
that the defendant acted with “deliberate indifference.”

1 The Eighth Amendment includes the right to adequate medical and mental health  
2 treatment in prison. Jail and prison officials or medical providers can be held liable  
3 if their acts or omissions [were] sufficiently harmful to evidence deliberate  
4 indifference to serious medical needs.

5 Regarding the objective standard for prisoners' medical care claims, society does  
6 not expect that prisoners will have unqualified access to health care. Therefore,  
7 deliberate indifference to medical needs amounts to an Eighth Amendment  
8 violation only if those needs are serious. The Ninth Circuit has defined a "serious  
9 medical need" in the following ways:

10 failure to treat a prisoner's condition [that] could result in further  
11 significant injury or the unnecessary and wanton infliction of pain[;] ...  
12 [t]he existence of an injury that a reasonable doctor or patient would find  
13 important and worthy of comment or treatment; the presence of a medical  
14 condition that significantly affects an individual's daily activities; or the  
15 existence of chronic and substantial pain ....

16 *McGuckin v. Smith*, 974 F. 2d 1050, 1059-60 (9th Cir. 1992) (internal citations  
17 omitted), *overruled on other grounds*, *WMX Techs., Inc. v. Miller*, 104 F. 3d 1133  
18 (9th Cir. 1997) (en banc).

19 As to the subjective standard, deliberate indifference entails something more than  
20 mere negligence, [but] is satisfied by something less than acts or omissions for the  
21 very purpose of causing harm or with knowledge that harm will result. A prison  
22 official or prison medical provider acts with deliberate indifference only if the  
23 [prison official or provider] knows of and disregards an excessive risk to inmate  
24 health and safety. Under this standard, the prison official must not only be aware  
25 of facts from which the inference could be drawn that a substantial risk of serious  
26 harm exists, but that person 'must also draw the inference.

27 \* \* \*

28 If a [prison official] should have been aware of the risk, but was not, then the  
[official] has not violated the Eighth Amendment, no matter how severe the  
risk. Moreover, even prison officials or medical providers who *did* actually know  
of a substantial risk to inmate health will not be liable under § 1983 if they  
responded reasonably to the risk, even if the harm ultimately was not averted. If  
medical personnel have been consistently responsive to [the inmate's] medical  
needs, and the plaintiff has not shown that the medical personnel had subjective  
knowledge and conscious disregard of a substantial risk of serious injury, there has  
been no Eighth Amendment violation.

Differences in judgment as to appropriate medical diagnosis and treatment  
between an inmate and prison medical providers—or, for that matter, between  
medical providers—are not enough to establish a deliberate indifference claim.  
[T]o prevail on a claim involving choices between alternative courses of treatment,  
a prisoner must show that the chosen course of treatment was medically  
unacceptable under the circumstances, and was chosen in conscious disregard of  
an excessive risk to the prisoner's health. Stated another way, a plaintiff must  
plausibly allege that medical providers chose one treatment over the plaintiff's  
preferred treatment even though they knew [the plaintiff's preferred treatment] to  
be medically necessary based on [the plaintiff's] records and prevailing medical  
standards.

1 Non-medical personnel generally are entitled to rely on the opinions of medical  
2 professionals with respect to the medical treatment of an inmate. However, if a  
3 reasonable person would likely determine [the medical treatment] to be inferior,  
the fact that an official is not medically trained will not shield that official from  
liability for deliberate indifference.

4 *Harmon v. City of Twin Falls*, No. 1:20-cv-00525-BLW, 2021 U.S. Dist. LEXIS 3908, at \*6 (D.  
5 Idaho Jan. 6, 2021) (internal citations and quotations omitted).

6 As demonstrated above and in the exhibits attached to the County’s request for judicial  
7 notice, Plaintiffs cannot show that Defendant acted with deliberate indifference. In response to  
8 the COVID-19 pandemic, Defendant instituted numerous measures to mitigate the spread of  
9 COVID-19. This includes releasing over 5,000 inmates. Today, the jail population is  
10 significantly lower than it was just before the pandemic. Defendant continues to quarantine new  
11 inmates, medically assess all inmates, conduct temperature checks of all inmates, quarantine any  
12 inmates that test positive for COVID-19 and their close contacts, and vaccinate as many inmates  
13 as possible. These actions are a reasonable response to the pandemic, and their effectiveness is  
14 demonstrated by the fact that there are **only five active cases of COVID-19 and there has been**  
15 **only one death from COVID-19 in the jails**, a rate 16 times lower than the rate of COVID-19  
16 deaths for San Diego County.

17 Accordingly, the Court should sustain Defendant’s demurrer to Plaintiffs’ first and  
18 second causes of action.

19 **C. Plaintiffs’ Third Cause of Action Claiming a Violation of Government**  
20 **Code Section 8658 Fails as a Matter of Law**

21 Plaintiffs’ Third Cause of Action alleges Defendant is violating Government Code section  
22 8658 (“Section 8658”) by not releasing even more inmates. As explained herein, Plaintiffs’ third  
23 cause of action fails as a matter of law because Defendant is immune from suit for an alleged  
24 violation of Section 8658.

25 Section 8658 states:

26 In any case in which an emergency endangering the lives of inmates of a state,  
27 county, or city penal or correctional institution has occurred or is imminent, the  
28 person in charge of the institution **may** remove the inmates from the institution. He  
shall, if possible, remove them to a safe and convenient place and there confine them

1 as long as may be necessary to avoid the danger, or, if that is not possible, may  
2 release them. Such person shall not be held liable, civilly or criminally, for acts  
performed pursuant to this section.

3 (Emphasis added.)

4 Mandamus “may be employed to compel the performance of a duty which is purely  
5 ministerial in character; it cannot be applied to control discretion as to a matter lawfully entrusted to  
6 [Defendant].” *State v. Superior Court*, 12 Cal. 3d 237, 247 (1974); see *Faulkner v. Cal. Toll Bridge*  
7 *Auth.*, 40 Cal. 2d 317, 326 (1953).

8 The express wording of Section 8658 shows that releasing inmates from jail is not a  
9 ministerial act; it is a discretionary act. Defendant is not required to release inmates from the jails.  
10 Plaintiffs cannot use this action to force Defendant to exercise its discretion to release inmates.  
11 Particularly here where Plaintiffs cannot demonstrate that Defendant is acting with deliberate  
12 indifference. Therefore, Defendant’s demurrer to Plaintiffs third cause of action should be sustained  
13 without leave to amend.

14 **D. Plaintiffs’ Fourth Cause of Action for an Alleged Violation of**  
15 **Government Code Section 11135 Fails**

16 Plaintiffs claim that Defendant’s actions place the “Disability Class” “at heightened risk of  
17 severe illness and death,” and therefore the “Disability Class” is entitled to release. (Petition, ¶¶ 197-  
18 198.) Plaintiffs do not allege that Defendant’s policies are discriminatory on their face; rather,  
19 Plaintiffs’ contend that the “Disability Class” is impacted by Defendant’s neutral policies. Plaintiffs’  
20 fourth cause of action fails.

21 “The basis for a successful disparate impact claim involves a comparison between two  
22 groups—those affected and those unaffected by the facially neutral policy. We must analyze the  
23 impact of the plan on minorities in the population base affected ... by the facially neutral policy.  
24 The appropriate inquiry is into the impact on the total group to which a policy or decision applies.”  
25 *Cty. Inmate Tel. Serv. Cases*, 48 Cal. App. 5th 354, 368 (2020) (internal citations and quotations  
26 omitted).

27 Plaintiffs do not allege that there are two groups – those affected and those unaffected – by  
28 Defendant’s neutral policies. Indeed, as alleged in the Petition, the entire jail population is

1 supposedly affected by Defendant's policies. Further, Plaintiffs do not allege that plaintiff Jones, the  
2 purported class representative for the "Disability Class," suffered "severe illness" or died as a result  
3 of Defendant's policies. Plaintiffs also do not allege that any other member of the "Disability Class"  
4 has suffered severe illness from COVID-19 as a result of Defendant's actions. Plaintiffs have not  
5 even alleged the bare minimum elements for their claim.


6 Further, the facts show that Defendant has provided extra protection to medically high-risk  
7 inmates. Defendant has obtained stipulated orders to release medically high-risk inmates. (RJN,  
8 Ex. 7.) For those medically high-risk inmates that could not be released, Defendant has separated  
9 them from the rest of the jail population to protect them from COVID-19. (RJN, Ex. 6.) Defendant  
10 also provided COVID-19 vaccines to medically high-risk inmates before the rest of the jail  
11 population. (RJN, Exs. 15-16.) In short, contrary to Plaintiffs' contention, Defendant is protecting  
12 medically high-risk inmates from severe illness and death. Finally, if Defendant were not adequately  
13 protecting medically high-risk inmates, there would have been more than one death from COVID-  
14 19. Therefore, Plaintiffs' fourth cause of action should be dismissed.

15 **IV. THE COURT SHOULD NOT GRANT PLAINTIFFS LEAVE TO AMEND**

16 While Plaintiffs will seek leave to amend, the Court should not grant it. Plaintiffs cannot  
17 dispute that there are only five cases of COVID-19 in the jails and there has been **only one death in**  
18 **the jails from COVID-19**. If Defendant's actions were as irresponsible and reckless as Plaintiffs'  
19 claim, these numbers would be significantly higher. That they are not shows that Defendant is  
20 taking reasonable steps to prevent the spread of COVID-19 in the jails. Accordingly, the Court  
21 should sustain Defendant's demurrer without leave to amend.

22  
23 DATED: June 2, 2021

OFFICE OF COUNTY COUNSEL,  
SAN DIEGO COUNTY

24  
25 By:   
26 JOSHUA M. HEINLEIN, Senior Deputy  
27 Attorneys for Defendant William D. Gore, in his  
28 official capacity as Sheriff of San Diego County