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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

TERRY LEROY JONES and GABRIEL CAMPOS, on behalf of themselves and all others similarly situated;

Petitioners/Plaintiffs,

vs.

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

Respondent/Defendant.

CASE NO: 37-2021-00010648-CU-MC-CTL
Action Filed: March 10, 2021

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S DEMURRER TO FIRST AMENDED PETITION FOR WRITS OF MANDATE AND HABEAS CORPUS AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

/ / /

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Table of Contents

Page

INTRODUCTION 6

I. LEGAL STANDARD FOR DECIDING DEMURRER 8

II. ARGUMENT 9

A. Plaintiffs Allege Facts Establishing that Defendant is Deliberately Indifferent to COVID-19 Risk in Violation of the California Constitution......... 9

B. A Writ of Mandate May Compel Defendant to Remedy Constitutionally Deficient Conditions By Exercising His Statutory Authority Under Section 8658......... 15

C. Defendant's Practices Violate Section 11135 Because He Has Failed to Make Reasonable Modifications to Protect People With Disabilities Who Face a Higher Risk of Severe Illness or Death Due to COVID-19 and Because He Employs Methods of Administration that Discriminate Against People With Disabilities by Placing them at Substantially Greater Risk than the General Incarcerated Population......... 17

III. CONCLUSION 20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Table of Authorities

Cases:

Page

Adelman v. Associated Int'l Ins. Co.,

90 Cal. App. 4th 352, 359 (2001)....8

Bell v. Wolfish,

441 U.S. 520, 535 fn. 16 (1979)....10

C.A. v. William S. Hart Union High Sch. Dist.,

53 Cal. 4th 861, 872 (2012)....9

Campbell v. Barnes,

Case No. 30-2020-1141117 at 23....18

Common Cause v. Bd. of Supervisors,

49 Cal. 3d 432, 442 (1989)....15

Comm. for Green Foothills v. Santa Clara Cty. Bd. of Supervisors,

48 Cal. 4th 32, 42 (2010)....9

Darensburg v. Metro. Transp. Comm'n,

636 F.3d 511 (9th Cir. 2011)....19

DeShaney v. Winnebago Cty. Dept. of Soc. Servs.,

489 U.S. 189, 199–200 (1989)....10

Edward W. v. Lamkins,

99 Cal. App. 4th 516, 529 (2002)....16

Farmer v. Brennan,

511 U.S. 825, 834 (1994)....14

Fry v. Saenz,

98 Cal. App. 4th 256, 268 (2002)....18

Giraldo v. Dept. of Corr. & Rehab.,

168 Cal. App. 4th 231, 250 (2008)....................10

Gordon v. Cty. of Orange,

888 F.3d 1118, 1125 (9th Cir. 2018)....................10

Inmate Tel. Serv. Cases,

48 Cal. App. 5th 354, 368 (2020)....................***1***

Ion Equip. Corp. v. Nelson,,

110 Cal. App. 3d 868, 881 (1980)....................9

JKC3H8 v. Colton,

221 Cal. App. 4th 468, 477 (2013)....................8

Jolicoeur v. Mihaly,

5 Cal. 3d 565, 570 (1971)....................16

Landsborough v. Kelly,

1 Cal. 2d 739, 744 (1934)....................15

*Maney v. Brow*n,

No. 6:20-cv-00570-SB, 2021 WL 354384, at *12 (D. Or. Feb. 2, 2021)....................11

Marriage of Forrest & Eaddy,

144 Cal. App. 4th 1202, 1209 (2006)....................9

Marshall v. Superior Ct.,

No. S263043 (July 15, 2020)....................15

Mittenhuber v. City of Redondo Beach,

142 Cal. App. 3d 1, 5 (1983)....................11

Molar v. Gates,

98 Cal. App. 3d 1, 25 (1979)....................16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NACDL v. Newsom,

No. S251827 at 3 (2020) 15

Nat'l Ass'n of Criminal Defense Lawyers v. Newsom,

No. S261827 (May 4, 2020) 7

People v. Sandoval,

41 Cal. 4th 825, 847–48 (2007) 16

Santa Clara Cty. Counsel Attys. Assn. v. Woodside,

7 Cal. 4th 525, 539 (1994) 15

Sheehan v. San Francisco 49ers,

45 Cal. 4th 992, 998 (2009) 9

Sundance v. Mun. Court,

42 Cal. 3d 1101, 1123 fn. 12 (1986) 10

Swaner v. City of Santa Monica,

150 Cal. App. 3d 789, 810 (1984) 11

Torres v. Milusnic,

No. 20-cv-4450-CBM-PVC(x), 2020 WL 4197285, at *9 (C.D. Cal. July 14, 2020) 11

Villafana v. Cty. of San Diego,

57 Cal. App. 5th 1012, 1017-18 (2020) 19

Wilson v. Eu,

54 Cal. 3d 471, 473–75 (1991) 16

INTRODUCTION

The demurrer amounts to a request to have the Court resolve contested questions of material fact in Defendant's favor by relying on purported evidence outside the complaint. But a demurrer is not an appropriate vehicle for raising such disputes because the Court must accept the facts pleaded as true. Defendant attempts to circumvent this fundamental principle by asking the Court to take judicial notice of disputed facts, contending his supposedly "dramatic steps" which have not yet been subject to the scrutiny of discovery warrant the extraordinary step of dismissing this case with prejudice. Defendant's self-congratulatory assertions and their disputed impact in mitigating the risks from COVID-19 in carceral settings may not be accepted at this stage, particularly given the grave stakes for Plaintiffs and the class they seek to represent at this pivotal moment in the pandemic.

The widespread availability of COVID-19 vaccines and better understandings of how to mitigate the spread of the virus have erased any question that there are reasonable methods of protecting the most vulnerable people in our community from further ravages of the deadly novel coronavirus. The obligation to provide this protection is particularly pronounced when it comes to people who are incarcerated in San Diego County jails, because they are forced to remain behind bars in a congregate setting—living, eating, and sleeping in close proximity to each other, unable to take many of the precautions our elected leaders and public health officials regularly tell us are essential. The need to avoid letting our guard down has become especially stark in recent months as news of ever more virulent and potentially deadly variants of the virus that causes COVID-19 has emerged. As it was when the pandemic first hit, congregate settings like jails will be the first to absorb the brunt of any new outbreaks, for the precise reason that the people inside are vulnerable, crowded, and prevented from exercising the free choices to protect themselves that people on the outside enjoy. In this context, half-hearted measures are insufficient to provide necessary protection and mitigate the risk of severe illness or death, even if those measures include some attempt at vaccine distribution, the reasonableness and diligence of which remains staunchly in dispute.

The California Supreme Court has recognized the urgent need to address COVID-19 in county jails and repeatedly directed the superior courts to utilize the procedural tools at their disposal, including mandamus, to "achieve prompt and effective resolution" of cases such as the

instant matter. *Nat'l Ass'n of Criminal Defense Lawyers v. Newsom*, No. S261827, p. 2-3 (May 4, 2020) ("*NACDL v. Newsom*"); *Marshall v. Superior Ct*., No. S263043 (July 15, 2020). Defendant should not be permitted to avoid this kind of judicial scrutiny by relying on purported facts outside the complaint and on erroneous interpretations of relevant state law.

Plaintiffs bring this action to prevent avoidable illness and death from COVID-19 among people incarcerated in the San Diego County Jails. Despite public health guidance underscoring the importance of social distancing, Plaintiffs allege Defendant continues to confine people in dormitory style barracks and multiple-person cells with bunk beds stacked three high, with nearly every bunk occupied, where people sleep in close proximity, forced to breathe each other's air. Plaintiffs allege that Defendant routinely transfers incarcerated people between the facilities under Defendant's control without adequate testing, widening the circles of potential outbreak and exposure. Plaintiffs allege that Defendant relies on incarcerated people to perform jobs that require frequent movement through the jails. These conditions create an intolerably high risk of COVID-19 transmission and have led to numerous large-scale outbreaks throughout the San Diego County jails.

Against this backdrop and as alleged in the complaint, Defendant has failed to take the precautions necessary to protect incarcerated people from the risk of serious illness or death due to COVID-19. He has, for example, steadfastly refused to exercise his statutory authority under Government Code section 8658 to release individuals he has placed at risk, and he has permitted the jail population to grow to the point where several facilities are at or near full capacity. Defendant's categorical failure to consider even temporary release for large swathes of the incarcerated population, together with his failure to provide safe conditions of confinement, constitute deliberate indifference in violation of the California Constitution and violate California statutes. Defendant ignores these facts in his demurrer, yet he urges the Court to reject Plaintiffs' claims based on purported facts that are outside of the verified petition and complaint, and that the Court may not properly consider on demurrer. Defendant also misinterprets key provisions of California law in his request to dismiss Plaintiffs' statutory claims.

Plaintiffs object to Defendant's Request for Judicial Notice to the extent that the Request asks this Court to judicially notice the alleged truth of the matters addressed in Defendant's exhibits.

See, generally, Opposition to Request for Judicial Notice ("Opp. RJN"), filed concurrently with this brief. But even if the Court were to grant the Request for Judicial Notice in its entirety, there would still be outstanding material factual disputes requiring exploration that cannot be resolved on demurrer. Judicial notice of Defendant's exhibits cannot, for example, resolve the questions of:

- Whether a sufficient percentage of people incarcerated in the San Diego County jails have been vaccinated to make herd immunity possible, or at least to significantly reduce the risk of transmission;
- Whether Defendant has taken all reasonably necessary measures to increase vaccination rates;
- Whether Defendant has taken all reasonably necessary precautions to ensure the safety of the incarcerated population until widespread vaccination has been achieved; and
- Whether any overall reduction in the population of incarcerated people in the San Diego County jail system writ large has led to a corresponding reduction in the population of each individual facility or barracks, or instead whether people in certain facilities are still packed in and forced to live and sleep in conditions that make adequate social distancing impossible.

Thus, with or without accepting the veracity of the purported information contained in Defendant's exhibits, there are live disputes and significant questions of fact as to whether Defendant has met his obligations to protect the lives he is responsible for. The Court cannot dispose of these disputes or answer these questions on a closed record. The Court should therefore overrule Defendant's demurrer and resolve the important issues presented by this action on the merits at a later date, after the parties have an opportunity to engage in discovery.

I. LEGAL STANDARD FOR DECIDING DEMURRER

In evaluating a demurrer, courts examine only whether the complaint states facts sufficient to state a cause of action under any legal theory. Code Civ. Proc. § 430.10(e); *Adelman v. Associated Int'l Ins. Co.*, 90 Cal. App. 4th 352, 359 (2001). The First Amended Petition and Complaint ("FAC") supersedes the original complaint. *JKC3H8 v. Colton*, 221 Cal. App. 4th 468, 477 (2013). The Court must take the facts pleaded as true and read the FAC as a whole in the light most favorable to

plaintiffs to determine if it states a cause of action. *C.A. v. William S. Hart Union High Sch. Dist.*, 53 Cal. 4th 861, 872 (2012); *Sheehan v. San Francisco 49ers, Ltd.*, 45 Cal. 4th 992, 998 (2009). Courts "treat the demurrer as admitting all material facts properly pleaded," *Adelman*, 90 Cal. App. 4th at 359, and construe the complaint liberally in favor of the plaintiff. *See* Code Civ. Proc. § 452 (pleading "must be liberally construed, with a view to substantial justice between the parties"). "The purpose of a general demurrer is to determine the sufficiency of the complaint and the court should only rule on matters disclosed in that pleading." *Ion Equip. Corp. v. Nelson*, 110 Cal. App. 3d 868, 881 (1980). When the demurrer raises a bar to a cause of action, "the defect must clearly and affirmatively appear on the face of the complaint," exhibits to the pleading, or matters subject to judicial notice. *Comm. for Green Foothills v. Santa Clara Cty. Bd. of Supervisors*, 48 Cal. 4th 32, 42 (2010).

II. ARGUMENT

A. Plaintiffs Allege Facts Establishing that Defendant is Deliberately Indifferent to COVID-19 Risk in Violation of the California Constitution.

Ignoring the limited scope of the demurrer inquiry, Defendant asks the Court to resolve Plaintiffs' claims under the California Constitution on the merits by taking judicial notice of purported facts outside of the Complaint to conclude that Defendant's COVID-19 response is constitutionally sufficient. Demurrer at 6:6-9. But, as explained in the Opp. RJN, it would be inappropriate for the Court to rely on these purported facts because, as a general principle, "matters of which judicial notice is taken are considered only for their existence, not for the truth of the matters asserted in them …" *In re Marriage of Forrest & Eaddy*, 144 Cal. App. 4th 1202, 1209 (2006). *See generally*, Opp. RJN.

Defendant's argument must fail because there is no "defect … [that] clearly and affirmatively appear[s] on the face of the complaint," or in any "matters [properly] subject to judicial notice" for their truth. *Comm. for Green Foothills*, 48 Cal. 4th at 42. The bases for Defendant's claims of a constitutionally sufficient response to the COVID-19 pandemic do not appear on the face of the FAC and thus cannot support a demurrer to Plaintiffs' claims. *See Ion Equip. Corp. v.*

Nelson, 110 Cal. App. 3d 868, 881 (1980) (holding that it was error for court to consider facts asserted in memorandum supporting demurrer).

Instead, the FAC states claims for constitutional violations because it alleges facts establishing that conditions in the San Diego County Jails present an intolerably high risk of COVID-19 infection, and that Defendant has unreasonably refused even to consider taking the necessary steps to protect people incarcerated in the facilities he oversees. "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189, 199–200 (1989); *cf. Giraldo v. Dept. of Corr. & Rehab.,* 168 Cal. App. 4th 231, 250 (2008) (California recognizes that the special relationship between jailer and prisoner imposes a duty of care). An official's "deliberate indifference" to a substantial risk of serious harm from disease violates article I, sections 15 and 17 of the California Constitution. For people detained pretrial, deliberate indifference violates article I, sections 7 and 15. *See Bell v. Wolfish*, 441 U.S. 520, 535 fn. 16 (1979); *Sundance v. Mun. Court*, 42 Cal. 3d 1101, 1123 fn. 12 (1986).

> To state a deliberate indifference claim, an incarcerated person must allege:
> (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries.

Gordon v. Cty. of Orange, 888 F.3d 1118, 1125 (9th Cir. 2018).[1]

[1] California courts apply "the same basic test" for assessing state constitutional deliberate indifference claims as federal courts, but "the questions of federalism which exist when federal courts review the operations of state institutions are not present" in state constitutional suits. *Inmates of the Riverside Cty. Jail v. Clark*, 144 Cal. App. 3d 850, 859 (1983). The cited test governs claims on behalf of pretrial detainees, whose claims "arise under the due process clause of the Fourteenth Amendment," *Gordon*, 888 F.3d at 1122, or its corollary due process clause in article I, section 7 of the California Constitution. Claims on behalf of people who are being held post-conviction arise under the Eighth Amendment or its corollary in article I, section 17 of the California Constitution and generally require an additional showing that the public official was "subjectively aware of the risk involved" but nonetheless "acted with deliberate indifference to" safety. *Cortez v. Skol*, 776 F.3d 1046, 1052 (9th Cir. 2015). Here, the distinction is immaterial, because the FAC alleges facts sufficient to show Defendant is subjectively aware of the need for additional protective measures. FAC ¶¶ 68, 108-09, 171. This is sufficient to overrule Defendants' demurrer with respect to Plaintiffs' second Cause of Action, for people in post-conviction custody. Moreover, it is impossible

By their nature, conditions of confinement claims turn on contextual questions concerning, among other things, the severity of the risks facing the incarcerated person, the public official's knowledge of the risks, and the reasonableness of the official's abatement efforts. These are quintessential fact questions, which cannot be resolved against Plaintiffs on demurrer unless "reasonable minds can come to but one conclusion." *Mittenhuber v. City of Redondo Beach*, 142 Cal. App. 3d 1, 5 (1983); *Swaner v. City of Santa Monica*, 150 Cal. App. 3d 789, 810 (1984) ("[T]he question of the reasonableness of a public entity's action in any particular situation is one of fact for a jury. It ordinarily cannot be decided on a demurrer.").

Here, the facts alleged in the FAC state a claim that Defendant has acted with deliberate indifference by operating the jails in a dangerous manner and refusing to consider reasonable measures necessary to protect the incarcerated population from COVID-19. To begin, COVID-19 clearly poses a serious health risk. COVID-19 is a dangerous disease with no cure that is transmitted through respiratory droplets, close contact, and contaminated surfaces, and it spreads quickly in congregate settings like jails. *Id.* ¶¶ 28, 32-33, 52. COVID-19 is particularly dangerous to people who are older or have underlying health conditions, like Plaintiff Jones. *Id.* ¶¶ 14, 37-39, 48-49,. Unsurprisingly, courts routinely find that COVID-19 presents a substantial risk of harm to such populations. *See, e.g.*, *Torres v. Milusnic*, No. 20-cv-4450-CBM-PVC(x), 2020 WL 4197285, at *9 (C.D. Cal. July 14, 2020) ("Petitioners show they are at substantial risk of exposure to COVID-19, which is inconsistent with contemporary standards of human decency."); *Maney v. Brow*n, No. 6:20-cv-00570-SB, 2020 WL 2839423, at *13 (D. Or. June 1, 2020) (finding that the plaintiffs were confined under conditions posing a risk of objectively serious harm where, because of their health conditions, they are at serious risk for severe illness or death from COVID-19). This remains true even after vaccines have become more available to the general public. *See Maney*, 2021 WL 354384, at *12 (D. Or. Feb. 2, 2021). Further, Plaintiffs allege facts establishing that Defendant has failed to take reasonable actions to mitigate the risks to plaintiffs and other putative class members, leaving

for the Court to order separate relief for pretrial and post-trial detainees. Defendant's policies and practices on social distancing, transfers, vaccination, and other issues affect pretrial and post-trial detainees equally, regardless of the status of their respective criminal cases. The Court should therefore evaluate all Constitutional claims in this case under the more protective test for pretrial detainees.

them detained in unsafe conditions where they are at unreasonable risk of serious illness and death. FAC ¶¶ 68, 81-92, 96-109.

Although Defendant argues in his demurrer that COVID-19 is under control, he has failed to anticipate or prevent widespread outbreaks in the past, and "[r]ecent history illustrates that the ongoing outbreak can flare up again at any time. On March 9, 2021, Defendant issued a press release stating that the outbreak had spiked once again. According to the press release, 106 people incarcerated in the Jails were tested for COVID-19 after potential contact with an inmate who was hospitalized after developing symptoms consistent with COVID-19 on February 27. Forty-six of those individuals then tested positive for COVID-19." *Id*. ¶ 71.

In a December, 2020 letter to Defendant, attorney Bardis Vakili warned that Defendant had allowed the population levels in the jails to swell to the point that social distancing was impossible. *Id*. ¶ 7. The letter further informed Defendant that there had been a dramatic increase in reported cumulative COVID-19 cases in the jails in recent months, that Defendant's policies of transferring incarcerated individuals between facilities likely violated CDC recommendation against transfers during the pandemic, and that Defendant's apparent failures to regularly test incarcerated individuals or staff members could have catastrophic consequences. *Id*. The letter also reminded Defendant of his statutory duty under Government Code Section 8658 to remove incarcerated individuals "to a safe and convenient place … to avoid the danger" of an emergency that threatens their lives, or to "release them" if that is not possible. *Id*.

Despite his awareness that vaccination and social distancing are crucially important for reducing the transmission of COVID-19," *Id*. ¶ 34,, Defendant has failed to provide a timeline for when enough incarcerated individuals will have been offered and accepted the vaccine to make herd immunity possible. *Id*. ¶ 122. Even if the Court were to grant Defendant's request for judicial notice, it would see no evidence Defendant has developed a plan to ensure widespread vaccination. And, despite the lack of widespread vaccination, Defendant continues to confine people in close physical proximity in packed facilities, despite the authority to release. While the population of the San Diego County jails was reduced early in the pandemic, Defendant has permitted the population to swell again in recent months, once again surpassing 4,000 in February, 2021. *Id*. ¶ 82. This increase and

the resulting crowding contributed to the most recent outbreak and exacerbated its spread. Defendants' failure to decrease the population after the outbreak began caused it to persist far longer than it might have otherwise. *Id*.

But the system-wide population numbers only hint at the real danger in the jails. The risk can only be fully assessed by considering the capacity of individual facilities. By fall 2020 four of the seven facilities were at greater than 85% capacity. *Id*. ¶ 83. The FAC alleges that as of March 8, 2021, nearly four months after a major outbreak began, several facilities were still filled nearly to capacity. For example: San Diego Central Jail was at nearly 95% capacity; Vista Detention Facility was at more than 80% capacity; and the George Bailey Detention Facility and South Bay Detention Facility were both at more than 99% capacity. *Id*. At these population levels, detained individuals, who have no ability to self-isolate, are incapable of maintaining anything approaching safe social distance. While Defendant's request for judicial notice is improper for the reasons stated above and in the Opp. RJN, it is notable that Defendant does not offer any current data indicating he reduced these population numbers since the FAC was filed.

The impossibility of social distancing is best illustrated by considering housing conditions and daily life of people incarcerated in San Diego County jails. Defendant houses people in dormitory style barracks or multiple-person cells with bunked beds stacked three high, with nearly every bunk occupied, where individuals are forced to sleep within arm's reach of each other. and share each other's air. *Id.* ¶ 54. Incarcerated people congregate in communal day rooms with no space to distance physically, have to line up to share phones, and also share communal shower spaces. Many must also share communal toilets. *Id.* ¶ 94. Defendant relies on incarcerated people to perform jobs throughout the jails, including laundry, cleaning, and food distribution across various jail facilities, creating avenues for transmission. *Id.* ¶ 96.

Defendant also fails to take basic precautions when it comes to COVID-19 testing. Individuals who travel between facilities and housing units on a daily basis for their jobs are permitted to do so without being tested at all, even if they work in units holding people confirmed positive with COVID-19. *Id*. ¶ 97. Defendant does not require a negative COVID-19 test before placing incarcerated individuals on buses, transferring them between jail facilities, transporting

them to and from offsite hospital visits, or introducing them into the general population. *Id*. ¶¶ 100, 106. Indeed, Defendant has casually dismissed the need for caution during transfer, emphasizing that the "seven jail facilities work collectively as one system" where inmates "may be moved fluidly within the system as their individual housing needs dictate." *Id*. ¶ 8. Staff do not administer mass testing to the incarcerated population. *Id*.

Defendant's indifference extends to medical care as well. *Id*. ¶ 104. Even when incarcerated individuals have complained about symptoms consistent with COVID-19, staff have continued to confine them in their housing units without isolating or quarantining them. *Id*. At times, incarcerated workers have even continued to serve meals to other inmates after complaining of symptoms consistent with COVID-19 and being tested for the virus, before test results have been returned. *Id*. Jails staff regularly ignore or fail to respond to medical requests, including requests concerning COVID-19. *Id*. ¶ 105.

Defendant has clear authority to resolve these issues and protect everyone in his custody but has arbitrarily refused to act. California's Emergency Services Act expressly permits the release of incarcerated people when, as here, emergency circumstances "endanger the lives of inmates of a state, county, or city penal or correctional institution." Gov't Code § 8658. Although Defendant took some measures to reduce the population of the jails in the early stages of the pandemic, he has steadfastly refused to exercise his authority to release people under section 8658. FAC ¶8. His continued unreasonable refusal to suspend transfers or take even the most basic steps to limit their risks has caused COVID-19 outbreaks to spread more quickly throughout the jails, unnecessarily placing lives at risk. FAC ¶¶ 91-92. His continued failure to implement reasonable testing protocols denies reasonable protective measures to protect the bulk of the incarcerated population. FAC ¶¶ 91, 97, 100, 104. These failures are textbook deliberate indifference, as is Defendant's refusal to improve potentially deadly conditions of confinement.

In sum, the FAC establishes that Plaintiffs are "incarcerated under conditions posing a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The FAC also establishes that Defendant has refused even to consider remediating this harm by exercising his authority under the Emergency Services Act or improving conditions. Accepting these allegations

as true—as the Court must on demurrer—Plaintiffs have stated claims for deliberate indifference in violation of the California Constitution under their first and second causes of action. At the very least, the FAC raises fact questions about Defendant's operation of the San Diego County Jails that cannot be resolved at this stage of the litigation.

B. A Writ of Mandate May Compel Defendant to Remedy Constitutionally Deficient Conditions By Exercising His Statutory Authority Under Section 8658.

Defendant argues that Plaintiffs' third cause of action fails because mandamus is unavailable to control Defendant's discretion under Government Code Section 8658. Demurrer at 7:4-6. He also asserts that "Defendant is immune from suit for an alleged violation of Section 8658." *Id*. at 6:22-24. Defendant is wrong on both counts.

A writ of mandate will lie to correct Defendant's unconstitutional correctional practices and ensure that Defendant provides incarcerated people the reasonable protections against COVID-19 that the California Constitution requires. The California Supreme Court has said as much in a statewide mandamus class action raising similar claims, noting that petitioners could file "similar claims" in individual counties. *See NACDL v. Newsom*, No. S251827 at 3 (2020); *Marshall v. Superior Ct*., No. S263043 (2020) (directing superior court to "immediately" lift the stays of habeas and mandamus petitions for prisoners from the Sacramento County Jail and to use procedural tools to expedite the proceedings). This is because a writ of mandate may be issued "by any court to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station." Code Civ. Proc. ¶ 1085(a). Although a writ of mandate is "usually" issued to compel a public official to perform a ministerial duty, *Santa Clara Cty. Counsel Attys. Assn. v. Woodside*, 7 Cal. 4th 525, 539 (1994) (superseded by statute on other grounds), California courts also issue mandamus to correct an abuse of discretion by public officials, regardless of "whether the action being compelled or corrected can itself be characterized as 'ministerial'…" *Id.* at 540; *see Common Cause v. Bd. of Supervisors*, 49 Cal. 3d 432, 442 (1989) ("Mandamus will lie to correct an abuse of discretion by an official acting in an administrative capacity."); *Landsborough v. Kelly*, 1 Cal. 2d 739, 744 (1934) (explaining that

mandamus "will lie to correct an abuse of discretion"); 8 Witkin, Cal. Procedure, Writs § 95 (5th ed. 2020) (discussing the use of mandamus to compel abuse of discretion).

California courts have repeatedly held that official acts or omissions that violate constitutional rights constitute an abuse of discretion, which may be corrected by a writ of mandate. *See, e.g.*, *Wilson v. Eu*, 54 Cal. 3d 471, 473–75 (1991) (issuing alternative writ of mandate appointing special masters to hold hearings and recommend reapportionment plan, if necessary, in advance of the 1992 election because writ was needed to "ensure the electorate equal protection of the laws"); *Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 570 (1971) ("Mandamus is . . . appropriate for challenging the constitutionality or validity of statutes or official acts."); *Edward W. v. Lamkins*, 99 Cal. App. 4th 516, 529 (2002) ("If appellant is correct that respondent's practices violate the constitutional guarantees of due process and/or equal protection of the laws, relief by means of writ of mandate would be appropriate."). Here, the FAC alleges practices that establish Defendant's deliberate indifference to the Plaintiffs' risk of serious injury or death from COVID-19, in violation of the California Constitution. *See* Gov. Code § 26605 (the sheriff is the "sole and exclusive authority to keep the county jail and the prisoners in it"). Accepting the FAC's allegations as true, as the Court must on demurrer, Plaintiffs have established their entitlement to a writ of mandate.

Defendant's argument that the law vests him with discretion to release inmates misses the point. No public official has discretion to violate the Constitution. When an official performs a public function in a way that violates constitutional guarantees, mandamus will lie to "correct [that] abuse of discretion." *Common Cause*, 49 Cal. 3d at 442; *see also Molar v. Gates*, 98 Cal. App. 3d 1, 25 (1979) ("Plaintiff has a clear right to the enjoyment of the equal protection."). Furthermore, a "failure to exercise discretion also may constitute an abuse of discretion." *People v. Sandoval*, 41 Cal. 4th 825, 847–48 (2007). As Plaintiffs allege, Defendant has "expressly declined" to exercise his "authority under Government Code [Section] 8658." FAC § 108. Mandamus is available to compel him to do so, without dictating how he exercises his discretion in any particular case.

Defendant's claim of immunity from suit under Government Code section 8658 is equally misguided. Demurrer at 6. Section 8658 provides that "the person in charge of [a correctional institution] "shall not be held liable, civilly or criminally, for acts performed pursuant to this

section," namely removing incarcerated people from the institution or releasing them to ensure their safety when there are emergency conditions threatening their lives. Gov. Code § 8658. But Plaintiffs do not seek to hold Defendant civilly or criminally liable for taking action pursuant to section 8658—and they certainly do not seek to impose liability on Defendant for *releasing* people from the San Diego County jails. Plaintiffs merely ask the Court to compel Defendant perform his duty to maintain the San Diego County jails in a manner that respects incarcerated peoples' constitutional rights, specifically the right to reasonable protections from COVID-19, including release. A writ of mandate is an appropriate vehicle for such relief.

C. Defendant's Practices Violate Section 11135 Because He Has Failed to Make Reasonable Modifications to Protect People With Disabilities Who Face a Higher Risk of Severe Illness or Death Due to COVID-19 and Because He Employs Methods of Administration that Discriminate Against People With Disabilities by Placing them at Substantially Greater Risk than the General Incarcerated Population

Defendant argues that Plaintiffs fail to state a claim under Government Code Section 11135 because Plaintiffs do not allege facially discriminatory policies and have failed to identify an appropriate comparison population for a disparate impact discrimination claim. Defendant fails to acknowledge that Plaintiffs have alleged more than disparate impact discrimination – they have also alleged Defendant violated Section 11135 by "failing to make the reasonable modifications necessary to ensure equal access to adjudication, jail services, and release for people with disabilities who face high risk of complications or death in the event of COVID-19 infection." FAC ¶197. The demurrer is completely silent about the failure to accommodate claim. This silence alone should suffice to overrule the demurrer. Moreover, Defendant's argument about the disparate impact discrimination must fail too, because Plaintiffs have alleged Defendant employs methods of administration that place people with qualifying disabilities at substantially greater risk for serious illness or death than the general incarcerated population.

1. Defendant Has Failed to Provide Reasonable Modifications Necessary to Protect the Safety of People With Disabilities.

Under Section 11135, state funded programs must "meet the protections and prohibitions contained in Section 202 of the federal Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof, except that if the

laws of this state prescribe stronger protections and prohibitions, the programs and activities subject to subdivision (a) shall be subject to the stronger protections and prohibitions." Gov't Code § 11135(b). Under the ADA's implementing regulations, public entities are required to make "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the services, program, or activity." 28 C.F.R. § 35.130(b)(7)(i). *See Fry v. Saenz*, 98 Cal. App. 4th 256, 268 (2002). Defendant does not contest Plaintiffs' allegation that "[t]he San Diego County Sheriff's Department and County Jails receive financial assistance from the state within the meaning of Section 11135." FAC ¶ 193. Defendant is, therefore, required to make reasonable modifications necessary to avoid discriminating against incarcerated people who are disabled, unless he can demonstrate why this would require fundamental alteration of his practices. Defendant has made no such showing.

Conditions in the San Diego County jails place members of the Disability Class at substantially greater risk for severe illness or death due to COVID-19 because of their disabilities. Defendant's failure to make reasonable modifications to his practices that would ensure their safety constitutes disability discrimination in violation of Section 11135. "As the uncontroverted evidence here shows, many people who are medically vulnerable to COVID-19 are vulnerable because of chronic health conditions that are also disabilities. People with these conditions—including lung conditions, asthma, diabetes, HIV, cancer treatment, kidney disease, liver disease—are people with disabilities protected by the California Constitution and also by California disability rights laws." *Campbell v. Barnes*, Case No. 30-2020-1141117, Order on Writ of Habeas Corpus and Writ of Mandate, 23 (Dec. 11, 2020); FAC ¶¶ 37-39, 47-48. Defendant's "failure to provide reasonable accommodations to [incarcerated individuals] who have disabilities that make them medically vulnerable to serious harm from COVID-19 infection violates their rights under Government Code section 11135." *Campbell v. Barnes*, Case No. 30-2020-1141117 at 23. Defendant's demurrer does not assert otherwise, and therefore must fail with respect to Plaintiffs' fourth cause of action.

2. Defendant's Practices Disproportionately Impact Disability Class Members.

1 As pleaded in the FAC, the harms caused by Defendant's policies or methods of
2 administration cause a disproportionate adverse impact on incarcerated people with disabilities
3 because they place people with disabilities at a much higher risk of severe illness or death than the
4 general incarcerated population.

5 Under Section 11135, a plaintiff establishes a prima facie case of disparate impact
6 discrimination "if the defendant's facially neutral practice causes a disproportionate adverse impact
7 on a protected class … To make out a prima facie case of disparate impact, a plaintiff must employ
8 an appropriate comparative measure." *Villafana v. Cty. of San Diego*, 57 Cal. App. 5th 1012, 1017-
9 18 (2020), review denied (Mar. 17, 2021) (citation and quotation marks omitted). Contrary to
10 Defendant's assertion, it is not necessary to compare groups that are "affected" by the facially
11 neutral policy with those who are "unaffected" by the policy. Demurrer at 7:27-28 (citing *Cty.*
12 *Inmate Tel. Serv. Cases*, 48 Cal. App. 5th 354, 368 (2020). While this sort of comparison is
13 permissible, it is not the only form of permissible comparison, and the Court of Appeal has
14 interpreted *Inmate Tel. Serv.* to hold that "the appropriate comparison is between groups to whom
15 the facially neutral policy *has been* or can be applied." *Villafana*, 57 Cal. App. 5th at 1018 (emphasis
16 added) (citing *Inmate Tel. Serv.*, 48 Cal. App. 5th at 368; *Darensburg v. Metro. Transp. Comm'n*
17 636 F.3d 511 (9th Cir. 2011). Here, the FAC compares two groups that have both been subjected to
18 Defendant's policies and methods of administration: incarcerated individuals who have disabilities,
19 and incarcerated individuals without disabilities.

20 The FAC alleges Defendant's policies and methods of administration cause people who are
21 incarcerated and who have disabilities to "suffer harsher impacts than other groups" who are
22 incarcerated because he has placed them at greater risk for severe illness or death than the general
23 incarcerated population. *Villafana*, 57 Cal. App. 5th at 1020; FAC ¶¶ 37-38, 47-48, 196. Plaintiffs
24 have therefore identified an appropriate comparison and alleged disproportionate adverse impact.

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III. CONCLUSION

For the foregoing reasons, Defendant's demurrer should be overruled.

DATED: July 1, 2021

ACLU FOUNDATION OF SAN DIEGO &
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