19-15224, 19-15359

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TODD ASHKER, et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

G. NEWSOM, et al.,

Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of California

No. 4:09-cv-05796-CW (RMI)
The Honorable Robert M. Illman, Magistrate Judge

DEFENDANTS-APPELLANTS' THIRD CROSS-APPEAL BRIEF

XAVIER BECERRA
Attorney General of California
MONICA N. ANDERSON
Senior Assistant Attorney General
NEAH HUYNH
Supervising Deputy Attorney General
JEFFREY T. FISHER
Deputy Attorney General
State Bar No. 303712
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3568
Fax: (415) 703-5843
Email: Jeffrey.Fisher@doj.ca.gov
Attorneys for Defendants-Appellants Cate, Chaus, Lewis, and Newsom

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INTRODUCTION

Paragraph 41 of the Settlement Agreement that resolved this 10-year-old class action controls the outcome of this appeal. Paragraph 41 states the Agreement and the district court's jurisdiction over the case automatically terminate after two years of supervision unless Plaintiffs prove a "systemic" due-process or Eighth Amendment violation "as alleged in" the operative complaints or "as a result of" the California Department of Corrections and Rehabilitation's (CDCR's) reforms to its Step Down Program or Security Housing Unit (SHU) policies. Any other claims must be raised in a separate action. Plaintiffs did not meet that burden.

To begin with, the Court has jurisdiction over this appeal. Plaintiffs argue the magistrate judge was not "specially designated" under 28 U.S.C. § 636(c). But § 636(c)'s statutory language and legislative history show that "specially designated" is not a case-specific requirement; it is merely a finding that the magistrate judge is competent to exercise civil jurisdiction. All magistrate judges in the Northern District of California are "specially designated" by local rule, and Plaintiffs do not challenge the magistrate judge's competency to issue the order from which both parties appealed. Rather, their argument is best characterized as raising a defect in the referral process, and case law holds that referral defects are not jurisdictional.

On the merits, none of the claims Plaintiffs raise justify extending this class action. Plaintiffs' prior statements that parole policies are not part of this case judicially estop them from relying on their parole-related claim, which argues that CDCR informing the Board of Parole Hearings of gang validations violates due process. But, even if they were not estopped, the operative complaints claim no such violation, and Plaintiffs cannot plausibly argue it is "a result of" any of the reforms to CDCR's Step Down Program or SHU policies. Moreover, the claim fails on its merits: the evidence does not show that validations systemically impact parole, and no court has ever recognized the tenuous, third-party systemic-bias theory Plaintiffs put forth.

Plaintiffs' misuse claim fares no better. Plaintiffs contend that CDCR staff violate due process by misusing confidential information in disciplinary proceedings. But, like the parole-related claim, the misuse claim is nowhere in the operative complaints. Nor is it "a result of" any of the Agreement's reforms to the Step Down Program or SHU policies. The only parts of the Agreement that discuss confidential information are not reforms, and certainly not reforms to CDCR's Step Down Program or SHU policies.

And Plaintiffs' claim relating to the Restricted Custody General Population (RCGP) unit also fails. Plaintiffs allege that CDCR violates due process by failing to provide RCGP inmates with "meaningful" periodic

reviews of their RCGP placement. That is wrong. The evidence shows that, at these reviews, an Institutional Classification Committee carefully reviews the inmate's record, focusing on evidence that the inmate's life may be in danger if he is moved to general-population housing. If the record shows a substantial risk and the committee is not confident it has abated, the inmate stays in the RCGP until the next periodic review. This satisfies due process.

The Agreement has served its purpose. CDCR has made the substantive reforms the parties agreed to, and Plaintiffs and the district court supervised those reforms for the agreed-upon two-year period. As Plaintiffs have failed to satisfy their burden of proof to extend the Agreement any further, the Court should reverse and order that this class action be allowed to terminate.

BACKGROUND

Paragraph 41 provides that the Agreement, and court supervision, will automatically terminate 24 months after preliminary approval. (CD 424-2 (Agreement) ¶¶ 37 & 41.) Plaintiffs may extend the Agreement only by proving, by a preponderance of the evidence:

> that current and ongoing systemic violations of the Eighth Amendment or the Due Process Clause … exist as alleged in Plaintiffs' [complaints] or as a result of CDCR's reforms to its Step Down Program or the SHU policies contemplated by this Agreement.

(*Id.* ¶ 41; *see also id.* ¶ 43.)

Plaintiffs moved to extend supervision based on three purported due-process violations (the Extension Motion). (CD 898-3, ER 209–10.) They argued that CDCR violates due process by informing the Board of Parole Hearings about gang validations (the parole-related claim). (*Id.*, ER 212–13.) They argued that CDCR violates due process by misusing confidential information in disciplinary proceedings (the misuse claim). (*Id.*, ER 211.) And they argued CDCR's procedures for RCGP placement and retention violate due process (the RCGP claim). (*Id.*, ER 211–12.) The magistrate judge granted the motion as to the first two claims and denied it as to the third. (CD 1122, ER 65–68 (the Extension Order).)

Both parties consented to the magistrate judge issuing the Extension Order, and believed the district judge had referred it to him for that purpose. The Motion and an administrative motion to extend the briefing scheduling were both filed before the district judge. (CD 905, 918.) But the magistrate judge ruled on the administrative motion and put a hearing on the Extension Motion on his calendar. (CD 922.) The parties thereafter filed all Extension-Motion briefing before the magistrate judge. (CD 985, 1002, 1018, 1027, 1051, 1078, 1084.) The district court vacated the hearing on the district judge's calendar, and confirmed the hearing on the magistrate judge's calendar. (ER 599 (unnumbered entry between 961 and 962).)

While the Extension Motion was pending, Defendants appealed, to this Court, two prior orders unrelated to the extension. (CD 1053 (Case No. 18-16427).) The magistrate judge asked the parties to file a statement about whether the Extension Motion would overlap with any issues in that appeal. (CD 1095, ER 617.) The parties jointly informed the magistrate judge that "he could 'rule on Plaintiffs' Extension Motion in its entirety.'" (CD 1129, ER 158 (quoting CD 1101).)

The magistrate judge granted the Extension Motion without argument, extending the Agreement for 12 months. (CD 1122, ER 69.) The Extension Order appears final and does not contemplate district-court review. (*Id.*) Defendants appealed the order, believing it was final. (CD 1126, ER 158.)

Plaintiffs shared Defendants' belief. The parties filed a joint statement memorializing their understanding that the Extension Order was a "final order subject to appellate review." (CD 1129, ER 157.) The parties made clear that, although there was no explicit referral, they believed the district judge had intended to refer the Extension Motion to the magistrate judge, and that both parties had consented to that referral. (*See id.*; ECF No. 39-2 ¶ 7.) Based on that understanding, both parties appealed parts of the Extension Order. (CD 1126, 1130, 1131.) Plaintiffs also began demanding

information and documents to continue monitoring, consistent with what the Order required. (CD 1132-1, Further Excerpts of Record (FER) 3–12.)

In June 2019, in an order denying a stay, the district judge stated she did not, in fact, refer the Extension Motion to the magistrate judge. (CD 1198, ER 17 n.5.) Six weeks later, after Defendants filed their first brief (ECF No. 24 ("1st Br.")), Plaintiffs moved to dismiss the appeal for lack of jurisdiction (though they did not dismiss their cross-appeal). (ECF No. 39-1.) This Court denied the motion without prejudice. (ECF No. 45.)

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THIS APPEAL.

A magistrate judge may exercise case-dispositive jurisdiction if he is specially designated to do so, and the parties consent. Both requirements were satisfied in this case. Plaintiffs consented to the magistrate judge, and initially agreed the district judge had referred the Extension Motion to him. *See* pp. 4–6, *supra*. But Plaintiffs now argue the magistrate judge was not "specially designated" and therefore lacked jurisdiction to issue the Extension Order. (ECF No. 61 ("2d Br.") 4–7.)

Plaintiffs conflate the "specially designated" requirement of 28 U.S.C. § 636(c)(1) with referral of a matter to a magistrate judge under § 636(c)(2), and wrongly insist that a defect in referral is jurisdictional. (*Id.*) Moreover,

Plaintiffs' own actions contradict their position. They cross-appealed the Extension Order, but have not voluntarily dismissed their cross-appeal for lack of jurisdiction. And they continue to demand Defendants comply with the Extension Order as if it is final. Plaintiffs appear disingenuous by insisting the referral defect is jurisdictional as to Defendants' appeal, but not as to their cross-appeal or the proceedings below.

The district judge has also treated the Order as final. Despite her post-appeal footnote stating there was no referral, she has taken no further action on the Order. To the contrary, she also insists Defendants comply with it. (CD 1198, ER 33–34.) She did not treat the Order as a recommendation, or take the case back from the magistrate judge under 28 U.S.C. § 636(c)(4). By doing neither, she confirmed that the referral defect was inconsequential.

A. A Specially Designated Magistrate Judge May Exercise Case-Dispositive Jurisdiction If the Parties Consent.

The powers of United States magistrate judges are laid out in 28 U.S.C. § 636. Section 636(b) allows a "judge" of a district court to "designate" a magistrate judge to perform certain non-dispositive tasks, such as resolving certain pre-trial matters, issuing recommendations on dispositive matters, or serving as a special master or factfinder. *See Estate of Conners by Meredith v. O'Connor*, 6 F.3d 656, 658 (9th Cir. 1993). The magistrate judge may not

issue case-dispositive orders under § 636(b); it may only issue recommendations, which are not final until the district judge adopts them. The parties agree that § 636(b) is not at play here. They instead focus on § 636(c) and its "specially designated" requirement.

Section 636(c) authorizes a magistrate judge to exercise full jurisdiction in a civil matter, including issuing final judgment, without direct district-court oversight. *See Roell v. Withrow*, 538 U.S. 580, 585 (2003). Under § 636(c)(1), a magistrate judge may exercise case-dispositive jurisdiction "[u]pon the consent of the parties, … when specially designated to exercise such jurisdiction by the district court or courts he serves." Orders issued under this authority are appealable to this Court "in the same manner as an appeal from any other judgment of a district court." *Roell at* 585 (quoting 28 U.S.C. § 636(c)(3)). The consent requirement is jurisdictional; absent consent, any dispositive order the magistrate judge issues is a nullity. *Allen v. Meyer*, 755 F.3d 866, 868 (9th Cir. 2014).

Where at least one magistrate judge is specially designated, and the parties consent, a case or motion may be referred to that magistrate judge. *See* 28 U.S.C. § 636(c)(2); Fed R. Civ. P. 73(b). Unlike consent, however, "a defect in the referral to a full-time magistrate judge under § 636(c)(2) does not eliminate that magistrate judge's 'civil jurisdiction' under § 636(c)(1) so

long as the parties have in fact voluntarily consented." *Wilhelm v. Rotman*, 680 F.3d 1113, 1119 (9th Cir. 2012) (quoting *Roell*, 583 U.S. at 587).

B. Under the Relevant Local Rules, All Magistrate Judges in the Northern District Are "Specially Designated."

Contrary to Plaintiffs' insistence, the magistrate judge in this case was specially designated under § 636(c). Section 636 does not define "specially designated," but its language, structure, and legislative history reveal that "specially designated" under § 636(c)(1) is a broad competency requirement, separate from the referral of a particular matter to the magistrate judge under § 636(c)(2). And, by local rule, every magistrate judge in the Northern District of California is "specially designated," likely because the district court hires only qualified and competent magistrate judges.

A magistrate judge must be specially designated "by the district court or courts he serves." Special designation is thus bestowed by the district court at large, not by a particular judge in a particular case. Paragraph (c)(1)'s last sentence confirms this: "designation under this paragraph shall be by the concurrence of a majority of all judges of such district court, and when there is no such concurrence, then by the chief judge." Moreover, special designation must occur before the parties are given an opportunity to consent. *Cf.* Fed. R. Civ. P. 73(c)(1) ("When a magistrate judge has been

designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. § 636(c).”). “Special” designation under § 636(c)(1) is thus distinct from a “designation” under § 636(b), which is made by an individual “judge” in an particular case.

The legislative history of the Federal Magistrate Act of 1979, which added subparagraph (c), confirms this interpretation. The Senate Judiciary Committee’s report explained that the “specially designated” requirement would allow a court to “assure itself that an individual magistrate is *fully qualified to try such cases* and that the magistrate’s performance of his other duties will not be unduly impeded.” S. Rep. No. 96-74, at 13 (1979) (emphasis added). The House Judiciary Committee echoed this rationale, noting that the district court “retains the authority to grant or withhold the general designation to try civil cases.” H.R. Rep. No. 96-287, at 11 (1979). It noted that “[i]f a magistrate is competent to handle any case-dispositive jurisdiction, he should be fully competent to handle all case-dispositive jurisdiction,” so courts may not “limit references of cases by specifying only particular types of lawsuits to be tried before a magistrate.” *Id.*; *see also* 123 Cong. Rec. H. 8724 (Congressman Kastenmeier stating that “the magistrate must be designated by the district court or courts he serves as competent”).

Some judicial districts make § 636(c) special designations by local rule. *See Columbia Record Prods. v. Hot Wax Records, Inc.*, 966 F.2d 515, 517 (9th Cir. 1992) (recognizing "the possibility of designation under the local rules"). The Northern District of California has done this. Under its local rules, every magistrate judge is deemed competent to execute power under 636(c): "Each Magistrate Judge appointed by the Court is authorized to exercise all powers and perform all duties conferred upon Magistrate Judges by 28 U.S.C. § 636." N.D. Cal. Civ. L.R. 72-1. The magistrate judge in this case was thus "specially designated" under § 636(c) by local rule.

Even if Local Rule 72-1 did not specially designate all duly appointed magistrate judges, this Court has held that an ambiguous referral is sufficient to allow it to "assume" that a special designation has occurred. *See Alaniz v. Cal. Processors, Inc.*, 690 F.2d 717 (9th Cir. 1982), *overruled on other grounds by Roell v. Withrow*, *supra*. In *Alaniz*, a post-settlement case, a dispositive issue was referred to the magistrate judge, though it was not clear whether the referral was under § 636(c). *Id.* at 718–19. The magistrate judge issued a final judgment, and the plaintiffs appealed. *Id.* The Court noted that § 636(c) required consent and special designation, and also noted that the parties had not provided evidence of special designation. *Id.* at 720. Rather than dismiss the appeal on that basis (as would be required if it were a

jurisdictional issue), the Court *assumed* the designation had been made. *Id.* at 720. The Court then dismissed the appeal because, at that time, it required § 636(c) consent to appear on the record explicitly—a legal rule that was later overruled in *Roell v. Withrow*, *supra*.

Whether based on Local Rule 72-1, or because it can be assumed, the "specially designated" element of § 636(c) was satisfied in this case.

C. Referral Defects Are Not Jurisdictional.

Plaintiffs' issue is not with special designation, but with referral. (*See* 2d Br. 4–7.) The question is therefore whether the district judge's post-appeal footnoted statement, that she did not refer the Extension Motion to the magistrate judge under § 636(c), defeats jurisdiction. It does not.

The Supreme Court has noted that courts—itself included—have been too quick to call procedural rules "jurisdictional." *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510–11 (2006). Jurisdictional rules go to a court's power to adjudicate disputes. Failure to satisfy them can be raised at any time, even after trial, and cannot be waived; and courts have an affirmative duty to raise and resolve jurisdictional issues *sua sponte*, even if no party insists on it. *See Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434–35 (2011). By contrast, a party can waive or forfeit non-jurisdictional

rules. *See id.* Jurisdictional rules can therefore be highly wasteful, and are susceptible to gamesmanship that may unfairly prejudice litigants. *Id.* at 434.

The Supreme Court has thus asked courts to be more discerning before calling a procedural rule "jurisdictional." *See Arbaugh*, 546 U.S. at 511–12 (noting "drive-by jurisdictional rulings" which "should be accorded 'no precedential effect' on the question whether the federal court had" jurisdiction); *Henderson*, 562 U.S. at 435 (distinguishing jurisdictional rules from rules that, "even if important and mandatory, … should not be given the jurisdictional brand"). Courts should conclude that a procedural rule is jurisdiction only when there is a "clear" indication that Congress intended it to be. *Henderson*, 562 U.S. at 435–36.

Consistent with that guidance, the absence of a § 636(c)(2) referral, at least in the circumstances of this case, is not jurisdictional. Section 636(c)(1) lays out its explicit requirements: the parties' consent and a magistrate judge that is "specially designated to exercise such jurisdiction." It does not even mention a reference requirement, which first appears in paragraph (c)(2). Congress did not indicate that the step of referring cases or motions to a magistrate judge under § 636(c)(2) is jurisdictional. Rather, it left most details about referral procedure to be fleshed out in local rules. *See* 28 U.S.C. § 636(c)(2) ("Rules of court for the reference of civil matters to

magistrate judges shall include procedures to protect the voluntariness of the parties' consent."). And, under the Northern District of California's local rules, parties can consent to a magistrate judge at any time, and referring the case to one is a ministerial task once the parties consent. *See* Civ. L.R. 73-1.

Moreover, this Court and the Supreme Court have both held that defects in the referral process are not jurisdictional. *See Roell*, 583 U.S. at 587; *Wilhelm*, 680 F.3d at 1119. That rule can, and should, be extended to the circumstances of this case, in which the sequence of events led both parties—and, it appears, the magistrate judge—to believe that a § 636(c)(2) referral had occurred. (ECF No. 39-1 at 3–6); *see also* pp. 4–6, *supra*. And in which the district court (CD 1198, ER 33–34) and both parties (CD 1130, 1131) have treated the order as final, enforceable, and appealable.

Plaintiffs' best authority for a contrary outcome is a pair of cases—*Parsons v. Ryan*, 912 F.3d 486 (9th Cir. 2018), and *Columbia Record Products v. Hot Wax Records, Inc.*, *supra*—that state, conclusorily, that there are "two requirements" for magistrate judges to "properly exercise civil jurisdiction": consent and special designation. (*See* 2d Br. 5–6.) In *Parsons*, the Court noted the two-part test and found both parts satisfied; and, in *Hot Wax Records*, the Court noted the two-part test and found neither part satisfied. *See Parsons*, 912 F.3d at 495–96; *Hot Wax Records*, 966 F.2d

at 516–17. Neither case analyzed the jurisdiction issue before this Court, where both parties consented, and then learned—after appeal—that there had been no referral. Neither case considered the meaning of "specially designated," or resolved whether referral rules are jurisdictional. The cases are therefore inapposite.[1]

D. Gamesmanship Concerns Weigh in Favor of Finding the Referral Defect in This Case Is Not Jurisdictional.

As noted above, *see* pp. 12–15, *supra*, courts should be cautious with labeling procedural rules "jurisdictional" because jurisdictional rules can be highly wasteful and are susceptible to gamesmanship. *See Henderson*, 562 U.S. at 434. Plaintiffs' posturing here suggests such gamesmanship, and this Court should find Plaintiffs forfeited the referral issue.

After they filed this appeal, Defendants moved before the magistrate judge for a stay pending appeal. (CD 1132.) The magistrate judge denied the motion as moot, holding that the court was divested of jurisdiction. (CD 1174, ER 42.) On de novo review, the district judge found that it had jurisdiction, denied the stay, and ordered Defendants to "forthwith" continue

[1] These cases use the term "specially designated," but appear to be discussing referral to a magistrate judge under § 636(c)(2). If they are truly discussing special designation under § 636(c)(1), they are distinguishable based on the Northern District of California's local rule. *See* p. 11, *infra*.

producing documents under the Agreement. (CD 1198, ER 33–34.) And, in a footnote, four months after both parties had appealed the Extension Order, the district judge indicated she had not referred the Extension Motion to the magistrate judge and that this appeal may be defective. (*Id.*, ER 17 n.5.)

Three weeks later, Defendants filed their initial brief in this appeal. Then, six weeks after the district court's footnote and three weeks after receiving Defendants' initial brief, Plaintiffs took the position that the magistrate judge lacked jurisdiction to issue the Extension Order. (ECF No. 43.2 & Exh. 1.) Plaintiffs moved to dismiss this appeal on August 16, 2019 (ECF No. 39), yet never voluntarily dismissed their cross-appeal.

The parties were thus on notice of the district court's position in late June 2019. Plaintiffs stayed silent for six weeks, perpetuating Defendants' belief that no party questioned the magistrate judge's jurisdiction. Plaintiffs only raised the issue after they reviewed Defendants' Opening Brief. Then, with knowledge of Defendants' legal arguments and strategy, Plaintiffs sought to move the case back to the district court, where they could seek a more favorable order and alter the record before any subsequent appeal.

These facts evince gamesmanship. Given that the referral requirement is not jurisdictional, a party can waive or forfeit a defect in it. Plaintiffs have done so. They admit they believed there was a referral, and admit they

consented to the magistrate judge. They continue to treat the Extension Order as final, demanding documents so that they can continue monitoring CDCR under the Agreement. And they filed a cross-appeal, which they continue to stand by as of today.

This Court has jurisdiction to review the Extension Order.

II. PLAINTIFFS ARE JUDICIALLY ESTOPPED FROM RELYING ON THE PAROLE-RELATED CLAIM TO EXTEND THE AGREEMENT.

Judicial estoppel bars Plaintiffs from relying on the parole-related claim they raised in the Extension Motion. (1st Br. 22–27.) Plaintiffs make two arguments in response: that Defendants waived the issue by not raising it below, and that Plaintiffs' past position is not "clearly inconsistent" with their current one. (2d Br. 85–88.) Both arguments lack merit.

To begin with, Plaintiffs admit their position has changed since they sought the district court's approval of the Agreement, which they try to justify by insisting they "believed" something at that time that "turned out to be incorrect." (2d Br. 87–88.) But this after-the-fact rationalization does not make Plaintiffs' new position less inconsistent. Plaintiffs also admit they disclaimed any change to parole policy when seeking approval of the Agreement. (2d Br. 88.) Now, though framed as challenging CDCR's "transmittal" of information, Plaintiffs effectively challenge whether the

Board of Parole Hearings (BPH) may consider past gang validations. (*Id.*) And Plaintiffs admit the parties rejected a proposal that the Agreement would exonerate past validations, finding it sufficient that old validations "no longer dictate prisoners' housing placements." (*Id.* at 87.) But until Defendants noted Plaintiffs' inconsistency (CD 985-3, ER 173–74), Plaintiffs sought an order to "expunge all past validations … which may be used in the consideration of class members applying for parole"—the very change they disclaimed. (CD 898-3, ER 221.)

Plaintiffs have since walked back their demand, saying it would be enough if CDCR provided a "directive" to BPH that validations are "not reliable" and "should not be given consideration." (2d Br. 88.) But their decision to seek something less than full exoneration does not change that their past and present positions are inconsistent. It is also unclear what effect such a "directive" would have. It would not be binding on BPH, whose commissioners may consider any information they find relevant to an inmate's parole suitability (*see* 1st Br. 46–47), making that remedy illusory.

Finally, Defendants did not waive this issue. Below, Defendants argued that "Plaintiffs cannot walk back on representations they made to the Court to secure the settlement's approval to now pursue further litigation based on a purported due-process violation." (985-3, ER 173.) That is the essence of

judicial estoppel, lacking only the moniker, and is sufficient to preserve the issue for review. *See Cornhusker Cas. Ins. Co. v. Kachman*, 553 F.3d 1187, 1191–92 (9th Cir. 2009) (no waiver where argument below, though not identical to that on appeal, informed the court of the argument's substance); *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 64–65 (9th Cir. 1994) (no waiver where plaintiff did not assert claims "by name" but raised the relevant facts). Moreover, judicial estoppel is not just about the parties; it is about maintaining "the orderly administration of justice" and the "dignity of judicial proceedings," and to "protect against a litigant playing fast and loose with the courts." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). The Court should not ignore Plaintiff's prior statements disclaiming an issue they then raised in the Extension Motion.[2]

III. THE PURPORTED DUE-PROCESS VIOLATIONS ARE NOT "ALLEGED IN" THE COMPLAINTS OR "A RESULT OF" RELEVANT REFORMS.

Paragraph 41 states that the Agreement may only be extended based on Eighth Amendment or due-process violations that are "as alleged in" the operative complaints or "as a result of CDCR's reforms to its Step Down Program or [] SHU policies." (Agreement ¶ 41; *see also* 1st Br. 28–31.)

[2] The Court should also reject Plaintiffs' unsupported request for a "plain error" standard of review. (*See* 2d Br. 86–87; 1st Br. 23.)

Constitutional violations that do not fit in one of these two categories must be raised in a separate lawsuit.

The two violations on which the district court granted the Extension Motion—the effect of past gang validations on parole, and purported misuse of confidential information—were not "alleged in" the complaints or "a result of" the relevant reforms. They cannot warrant extending this action.

A. The Court Should Reject Plaintiffs' Constructions of "Violation … as Alleged in" and "Result of."

Plaintiffs rely on unreasonably broad interpretations of two phrases in paragraph 41: (1) "violations … as alleged in" and (2) "result of." (2d Br. 62–70, 83–85.) Their interpretations are inconsistent with the phrases' plain meaning, and this Court should reject them. *See Parsons v. Bristol Dev. Co.*, 62 Cal. 2d 861, 865–66 (1965) (de novo standard of review).

First, Plaintiffs implicitly ask the Court to interpret the term "violations … as alleged in" the complaints to mean "violations … [based on any facts] alleged in" the complaints. As explained below, *see* pp. 23–30, *infra*, Plaintiffs insist that certain violations were "alleged in" the complaint when, although Plaintiffs alleged some of the relevant facts, they did not allege any constitutional violations arising out of those facts. (2d Br. 69–70, 84.) Plaintiffs cite no authority or evidence that would make it appropriate to

read such words into the Agreement, particularly where it alters the scope of paragraph 41. *Cf.* Cal. Civ. Code § 1639 ("the intention of the parties is to be ascertained from the writing alone, if possible").

Plaintiffs' complaints explicitly alleged that certain conduct violated due process or violated the Eighth Amendment. (*E.g.*, CD 136, ER 430-432, ¶¶ 195, 202.) Those are the "violations … alleged in" the complaints. But the complaints spanned 266 paragraphs and presumably included every fact Plaintiffs believed would help provide context. (CD 388, ER 284–343; CD 136, ER 387–434.) The complaints did not suggest that every fact alleged was a constitutional violation. And many of the facts were included for other purposes, such as establishing legal predicates. (CD 388, ER 335–36, ¶ 246.)

The parties thus understood "violations … as alleged in" the complaints to refer to the specific conduct that plaintiffs alleged to be a constitutional violation, and not to refer to any later-asserted violation based on any *fact* that was pled in Plaintiffs' complaints. The Court should reject such an overly broad construction.

The Court should likewise reject Plaintiffs' construction of "as a result of," which they insist can be satisfied by a "minimal causal connection or incidental relationship" and does not require "strict causation." (2d Br. 68–69.) The cases Plaintiffs rely on construe insurance contracts, which involve

unique presumptions, rules, and burdens that do not apply to other contracts. *See Barrera v. State Farm Mut. Auto. Ins. Co.*, 71 Cal. 2d 659 (1969) (interpreting insurance contracts cannot be done "solely on the basis of rules pertaining to private contracts"); *20th Century Ins. Co. v. Super. Ct.*, 90 Cal. App. 4th 1247, 1266 (2001); *cf. Scribner v. Worldcom, Inc.*, 249 F.3d 902, 910 (9th Cir. 2001) (declining to rely on cases that "involve the unique context of insurance contracts, in which the insurer may have heightened duties to the insured"). Indeed, the cases Plaintiffs cite explicitly note the uniqueness of the insurance context. *See Travelers Prop. Cas. Co. v. Actavis, Inc.*, 16 Cal. App. 5th 1026, 1044–45 (2017); *Pension Tr. Fund Operating Eng'rs Ins. Co.*, 307 F.3d 944 (9th Cir. 2002); *Cont'l Cas. Co. v. Richmond*, 763 F.2d 1076, 1079–80 (9th Cir. 1985).

This case, by contrast, deals with the automatic-termination provision of a settlement agreement in a *prisoner* case. The parties settled this case in the context of the Prison Litigation Reform Act, which dictates that a "court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *See* 18 U.S.C. § 3626(a)(1)(A).

This statutory language further undermines Plaintiffs' argument that the term "as a result of" should have a uniquely broad meaning in this case.

The Court should instead give the term its plain and ordinary meaning. *See* Cal. Civ. Code § 1644. And the California Supreme Court has already explained that meaning: "'as a result of' in its plain and ordinary sense means 'caused by' and requires a showing of a causal connection." *Kwikset Corp. v. Super. Ct.*, 51 Cal. 4th 310, 326 (2011) (construing the Unfair Competition Law and False Advertising Law); *see also Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487, 490 (9th Cir. 1995) (expenses are not incurred "as a result of" removal under 28 U.S.C. § 1447 if they "related only tenuously" to removal or have a more direct, proximate cause). The Court should apply this plain-meaning construction.

B. The Parole-Related Claim Is Not "Alleged in" the Complaint or "a Result of" Relevant Reforms.

Plaintiffs' complaints assert three constitutional violations. Two are Eighth Amendment violations arising from SHU conditions and the duration of class members' confinement there. (CD 388, ER 331–35; *id.*, ER 338–40.) The third is a due-process violation arising from CDCR's former policy of relying on gang validations to house inmates in the SHU indefinitely

without "meaningful" periodic reviews. (*Id.*, ER 335–37.) Plaintiffs' parole-related claim is unlike any of them.

Contrary to what Plaintiffs imply (2d Br. 84), they did not claim that the effect of SHU confinement on parole violated due process. Their sole due-process claim was that CDCR "den[ied inmates] meaningful and timely periodic review of their" SHU confinement "and meaningful notice of what they must do to earn release." (CD 136, ER 430–32.) What they now allege, *i.e.*, that CDCR's transmittal of old gang validations to BPH violates due process, is not a "violation … alleged in" the complaints. (Agreement ¶ 41.)

Plaintiffs did allege, as an underlying fact, an "unwritten policy" of denying parole to inmates housed in the SHU. But Plaintiffs did not allege that policy violated due process. Rather, they alleged the policy's existence as one of several factors showing that SHU confinement "constitute[d] an atypical and significant hardship" (CD 136, ER 430–31, ¶¶ 196, 199), which is a predicate to finding a due-process liberty interest. As discussed above, *see* pp. 20–23, *supra*, the Court should not construe "violation … as alleged in" so broadly as to find that any fact referenced in the complaint counts as a "violation … alleged in" the complaints.

Nor is Plaintiffs' parole-related claim a "result of" the Agreement's reforms to the Step Down Program or SHU policies. (2d Br. 85.) Examined

closely, Plaintiffs' argument is not that the reforms *caused* the parole-related claim, but that the reforms caused them to discover how BPH treats gang validations and that CDCR's "unqualified transmission" of those validations violates due process. (*Id.*) But Plaintiffs have not shown that any of the Agreement's reforms caused that transmission. Both before and after the Agreement, BPH can access each inmates' entire file, including gang-validation information, and make its parole decision based on any facts it considers relevant. (*See* 1st Br. 46–47.) The parties agreed not to change parole policies, so the process did not change; and they agreed not to exonerate past gang validations, so the validations did not change. *See* pp. 17–19, *supra*. Plaintiffs' disappointment in BPH's treatment of those validations does not make such treatment "a result of" the Agreement's reforms. There is simply no causal nexus between the parole-related claim and the Agreement's Step-Down-Program or SHU-policy reforms.

C. Plaintiffs' Other Parole Issue Is Also Not "Alleged in" the Complaints or "a Result of" the Reforms.

In footnote 15, Plaintiffs mention a second parole-related claim, but the Court should reject it as well. According to Plaintiffs, "CDCR has used the old validations to find *Ashker* class members categorically ineligible for relief under Proposition 57, which provides non-violent offenders an

opportunity to parole." (2d Br. 71–72 n.15.) Proposition 57 went into effect in 2017, nearly two years after the parties executed the Agreement, making it clear that this issue is not "alleged in" the complaints or "a result of" the Agreement's reforms to CDCR's Step Down Program or SHU policies. (Agreement ¶ 41.)

As to the merits, because Plaintiffs relegated the issue to a footnote, cited no legal authority to support it, and did not include the record materials the Court would need to rule on it, Plaintiffs waived any reliance on it. *See Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1164 n.4 (9th Cir. 2014); *Rodriguez v. Airborne Express*, 265 F.3d 890, 894 n.2 (9th Cir. 2001).

D. The Alleged Misuse of Confidential Information Is Not "Alleged in" the Complaints or a "Result of" Relevant Reforms.

The Court should also reject Plaintiffs' argument that the misuse-of-confidential-information claim is "alleged in" the complaints. (2d Br. 69–70.) First, Plaintiffs tacitly admit that none of the claims in the complaints relate to the misuse of confidential information. (*Id.*) Second, contrary to what they now represent, Plaintiffs did not "offer[] general allegations of CDCR's use of unreliable confidential information." (*Id.*) The complaints note that CDCR sometimes used confidential information. (1st Br. 34–35.) But there is no allegation featuring any of the misuse or reliability issues on

which the Extension Order is based. (*Id.*) And the two references in the complaints to "reliable" evidence do not relate to confidential information. (CD 388, ER 310, 337.) Instead, they are directed to the true subject of Plaintiffs' lawsuit: that, prior to CDCR's reforms, it placed inmates in SHU based on evidence of gang association, not evidence (reliable or otherwise) of gang-related misconduct. (*Id.*) Finally, Plaintiffs' reference to paragraphs 34 and 37 of the Agreement (2d Br. 70) is irrelevant. What is contained in the Agreement does not augment what was alleged in the complaints.

Finally, the Court should reject Plaintiffs' arguments that the misuse of confidential information is "a result of" CDCR's reforms to its Step Down Program or SHU policies. (*See* 2d Br. 64–70.) Plaintiffs first argue that, if not for the reforms that limited SHU and Step-Down-Program placement to inmates found guilty of gang-related rules violations, the disciplinary hearings they presented evidence of would not have occurred, and so the purported misuse of confidential information in those hearings would not have occurred; thus, they posit, the misuse of confidential information is "a result of" the SHU and Step-Down-Program reforms. (*See* 2d Br. 64–67.) But construing "as a result of" so broadly would effectively permit any constitutional violation to satisfy paragraph 41, which is inconsistent with the parties' intent and basic contract law.

Such construction would effectively nullify express contract language, which courts should avoid. *See In re Tobacco Cases I*, 186 Cal. App. 4th 42, 49 (2010) ("We must give significance to every word of a contract, when possible, and avoid an interpretation that renders a word surplusage."); Cal. Civ. Code § 1641. The parties expressly limited extensions of the Agreement to constitutional violations that were "a result of" two types of reforms: reforms to the "Step Down Program," and reforms to the "SHU policies." (Agreement ¶ 41.) An expansive, but-for interpretation would effectively nullify that limitation. Practically any violation that might befall a class member after release from the SHU would arguably not have occurred if CDCR had not reformed its SHU policies and thereby released him from the SHU. Under Plaintiffs' expansive interpretation, if they presented evidence of systemic use of excessive force by staff in the general population, or systemic denial of adequate medical care, it would be "a result of" the reforms to the SHU policies. The parties did not intend paragraph 41 to reach such tenuously related violations.

Applying the common meaning of "as a result of," it is apparent that the alleged misuse of confidential information is not "a result of" reforms to CDCR's Step Down Program or SHU policies. None of the reforms to the Step Down Program or SHU policies changed how CDCR used confidential

information. (*See* 1st Br. 36–38.) Nor is there evidence that the alleged misuse occurs only in the hearings noted in the Agreement, and not in the other contexts in which CDCR uses confidential information. Moreover, the rules-violation hearings Plaintiffs cite have an independent, intervening cause: the inmate's misconduct.[3] There is no basis to conclude that the alleged misuse is "a result of" the relevant reforms.

The Court should also reject Plaintiffs' assertion that paragraphs 34 and 37 constitute "reforms to CDCR's … SHU policies" simply because they are part of the Agreement. (2d Br. 66–68.) The parties chose to specify *which* of the Agreement's reforms could trigger paragraph 41: those to the Step Down Program and those to SHU policies. Paragraphs 34 and 37 are neither.

Paragraph 34 provided that CDCR would comply with its existing regulations, and develop and implement training on the use of confidential information. These are not "reforms"; and, even if they were, they would not be reforms to the Step Down Program or SHU policies. (1st Br. 37–38.) CDCR uses confidential information in contexts other than SHU-eligible rules-violation hearings (lesser rules violations, internal investigations, etc.), so policies relating to it are not fairly described as "SHU policies." (*See id.*)

[3] Plaintiffs have stated that they are "not seeking to challenge disciplinary decisions." (CD 1002, FER 14.)

Similarly, paragraph 37 only required CDCR to give Plaintiffs certain documents to aid them in monitoring compliance. It was not a reform to the Step Down Program or SHU policy. And the monitoring was of the entire Agreement, not merely of those specific reforms, so it does not follow that Plaintiffs could seek an extension on any basis they were entitled to monitor. If the parties had intended paragraph 41 to be so broad, they could have written it to mirror the enforcement provisions. (*See* Agreement ¶¶ 52–53.) Instead, they agreed on the more limited language in paragraph 41. The Court should not adopt a strained interpretation of paragraph 41 because Plaintiffs now wish they had struck a different deal. *See Walnut Creek Pipe Distribs., Inc. v. Gates Rubber Co. Sales Div.*, 228 Cal. App. 2d 810, 815 (1964) ("The courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably.").

IV. PLAINTIFFS' PAROLE-RELATED CLAIM IS UNSUPPORTED LEGALLY AND FACTUALLY.

As to the merits of their parole claim, Plaintiffs tacitly admit that class members who have received parole hearings have received the protections outlined in *Greenholtz v. Inmates of Nebraska Panel & Correctional Complex*, 442 U.S. 1 (1979), and *Swarthout v. Cooke*, 562 U.S. 216 (2011).

(*See* 1st Br. 42–48 & nn.9–10.) They explicitly waive any claim based on BPH's "decision-making process," and "do not challenge [BPH] procedures or decisions." (2d Br. 72–73.) In order to raise a claim against CDCR arising from a decision made by BPH, they now allege that that the simple act of informing BPH of a gang validation, without some disclaimer, violates due process. (*See id.* at 71–73.)

Plaintiffs' theory is highly attenuated and should be rejected. First, they assert that the old gang-validation procedures violated due process because, in certain cases, gang validations were based on questionable evidence, or solely on confidential evidence.[4] (2d Br. 73–75.) Then they insist that BPH gives validations undue weight, resulting in an "irrebuttable presumption of actual gang activity or affiliation." (*Id.* at 79–80.) They thus claim that the validations "rig" the parole hearing against the inmate, denying him a "meaningful" opportunity to be heard. (*Id.* at 82.) Based on that, Plaintiffs say that CDCR had a constitutional duty to provide a disclaimer to BPH,

[4] Defendants do not "concede" that CDCR's prior gang-validation process is unconstitutional. (*See* 2d Br. 75; 1st Br. 47–48). And that issue should not be resolved in this case. Plaintiffs settled this case knowing that the Agreement would leave gang validations undisturbed. (CD 486, ER 239–40.) They thus accepted, as part of the settlement, that they would not get to litigate whether the old validation process was constitutionally sound. The Court should reject their attempt now to challenge the constitutionality of the old gang validations by embedding it within this issue.

stating that the validations are not reliable indicators of gang activity, and CDCR's failure to give that disclaimer violates due process. (2d Br. 77–83.)

Plaintiffs provide no authority recognizing such a legal theory. The authority they cite (2d Br. 80–81) is distinguishable. Each decision was made on the pleadings and found, based on inferences from distinguishable case law, that "systemic bias" claims are cognizable. More importantly, each decision involved claims directly against BPH and its officials for their actions, not claims awkwardly structured to attribute blame to a third party for providing BPH with "unqualified" information.

Plaintiffs' primary authority, *Johnson v. Shaffer*, No. 2:12-cv-1059-KJM-AC, 2014 WL 6834019 (N.D. Cal. Dec. 3, 2014), involved claims against BPH[5] for adopting a psychological assessment protocol it allegedly knew was biased in favor of finding inmates unsuitable for parole. *Id.* at **2–4. Deciding a motion for judgment on the pleadings, the magistrate judge found the claim cognizable, though she recognized the theory was novel. *See id.* at *9 & n.9. The judge emphasized plaintiff's allegation—which she was required to accept as true—that the protocol was *designed* to

[5] The claims in *Johnson v. Shaffer* were also alleged against CDCR officials and the governor, *see id.* at *1, but the decision is based on alleged intentional misconduct by BPH personnel, *see id.* **1–4.

be biased, and that BPH adopted it *knowing* of that bias. *See id.* at **13–14 ("This sufficiently alleges a failure of due process, inasmuch as plaintiffs allege that this 'knowing' reliance on invalid instruments that overstate inmates' risks of future violence, deprives them of a fair and unbiased hearing."); *see also Johnson v. Shaffer*, No. 2:12-cv-1059-GGH, 2012 WL 5187779 (E.D. Cal. Oct. 18, 2012) (noting the plaintiff might state a viable claim if he alleged "the psychological assessments were *purposely contrived* to be deficient" (emphasis added)).

Here, the district court did not find that Defendants (or BPH) knew the validation process was "constitutionally infirm" or otherwise biased. (CD 1122, ER 63–65.) And, more importantly, *Johnson* does not address whether a similar claim could be made against a third party solely on the basis of providing information to BPH, even if the third party knew the information was unreliable. *Johnson*, therefore, gives no support for recognizing such a third-party claim in this case.

The other cases on which Plaintiffs rely—*Brown v. Shaffer*, No. 1:18-cv-470-JDP, 2019 WL 2089500 (E.D. Cal. May 13, 2019), and *Gilman v. Brown*, No. Civ. S-05-830-LKK, 2012 WL 1969200 (E.D. Cal. May 31, 2012)—are similarly distinguishable. The *Brown* plaintiff brought two systemic-bias claims against BPH officials, one alleging failure to comply

with a remedial order and one alleging that BPH knowingly disregarded errors in his psychological evaluations. 2012 WL 1969200, **2–4. Relying on *Johnson v. Shaffer*, *supra*, the magistrate judge found the claims cognizable. *Id.* at **6–7.

And, in *Gilman v. Brown*, the district court found the plaintiffs stated a claim where they alleged that BPH and the governor made parole decisions based on "biases" and "static factors," such as believing inmates should serve a certain number of years in prison, rather than on the appropriate public-safety criteria. 2012 WL 1969200, at *3. Plaintiffs here make no such allegation—rather, they allege that BPH (here, a non-party) gives too much weight to gang validations when assessing the appropriate public-safety criteria, and CDCR therefore had a duty to provide a disclaimer to those validations. (*See* 2d Br. 71–88.) Neither case supports Plaintiffs' theory.

The Supreme Court established what due process requires in the parole-hearing context. (1st Br. 41–45.) Class members receive those protections, and more. (*Id.* at 45–46 & nn.9–10.) Plaintiffs now ask the Court to delve into the evidence on which BPH makes parole decisions and hold that CDCR giving BPH a particular piece of evidence renders all the procedures meaningless. At best, that is an issue of state law and not a component of due process. *See Swarthout*, 562 U.S. at 220–22 ("responsibility for ensuring

that the constitutionally adequate procedures governing California's parole system are properly applied rests with California courts, and is no part of the Ninth Circuit's business"). Moreover, an independent decision-maker (*i.e.*, BPH) sits between the old validations and each parole decision. Even if the Court were inclined to recognize Plaintiffs' novel systemic-bias theory, it should not do so for the first time in this settled class action; rather, it should wait for a case in which the theory is raised against the decision-maker.

Finally, Plaintiffs' evidence undermines a key fact the theory relies on. Plaintiffs suggest BPH inevitably concludes an inmate is a gang associate based solely on the gang validation. (*See* 2d Br. 79.) But the transcripts Plaintiffs cite, while they show commissioners appearing skeptical when the inmates deny gang association, also show that the commissioners cite further evidence, beyond the validation itself, supporting their skepticism. (SEALED SER 1810–13 (noting number of confidential memoranda in inmate's file and inquiring why so many people think he is a gang member); *id.* at 1847–49 (noting the commitment offense was gang-related and file included "overwhelming" evidence supporting validation); *id.* at 1645 ("we looked at the documents presented of why you were revalidated in 2009"); *id.* at 1666 (explaining documents and reasoning for doubting inmate's denial of gang affiliation); *see also id.* at 1760 (risk assessment notes the

validation, and that the inmates' "crimes and series of 115s seem to support that he has been involved in gang activity").) The evidence does not support Plaintiffs' assertion that the mere existence of a gang validation "infect[s] the parole process with a systemic bias." (2d Br. 79.)

The Court should reject Plaintiffs' novel third-party systemic-bias theory, as it is based on unpersuasive authority and insufficient evidence.

V. DEFENDANTS WITHDRAW THEIR CHALLENGE TO THE DISTRICT COURT'S RULING ON THE MERITS OF THE MISUSE CLAIM.

As discussed above, *see* pp. 19–30, *supra*, the Court should vacate the Extension Order because neither of the grounds on which it was issued are within paragraph 41's scope, and those issues should not be resolved as part of this narrow class action. In asserting their misuse claim, Plaintiffs put forth thousands of pages of heavily redacted documents. Rather than piling on more documents to dispute the claim, Defendants argued that the claim is beyond the scope of the Agreement. The district court disagreed and, in finding for Plaintiffs, made certain factual findings on the misuse claim.

After reviewing Plaintiffs' answering brief, coupled with the relevant clear-error standard of review, Defendants withdraw their challenge to the district court's merits finding on Plaintiffs' misuse claim. Defendants do not "fabricate" or otherwise misuse confidential information, and their use of

confidential information in disciplinary proceedings does not systemically violate due process. Nonetheless, accurate disclosure of confidential information is an issue of importance, and CDCR will continue its efforts to improve its disclosure practices regardless of the outcome of this appeal.[6]

VI. THE DISTRICT COURT CORRECTLY FOUND NO DUE-PROCESS VIOLATION AS TO INMATES' RCGP PLACEMENT OR RETENTION.

Separate from the issues above, Plaintiffs cross-appealed the Extension Order to challenge one aspect of the holding that RCGP procedures do not violate due process. (2d Br. 89–104.) Plaintiffs insist that CDCR's retention of inmates in the RCGP violates due process because the periodic reviews of RCGP placement are not "meaningful." (2d Br. 97–104.)

The district court addressed these contentions and, while it found Plaintiffs had a liberty interest in avoiding RCGP placement, it otherwise found their arguments "unpersuasive." (CD 1122, ER 67.) The district court considered Plaintiffs' evidence and found it rested on little more than class members "deny[ing] that there is any risk to their safety." (*Id.*) The district court determined the evidence was "insufficient to demonstrate a systemic due process violation," largely because "CDCR is far better situated than

[6] Withdrawal of this issue obviates the arguments presented by the amici. (*See* ECF Nos. 59, 67.)

any single prisoner to determine whether or not there is a risk to a prisoner's safety in one or another institution or unit." (*See id.*)

The district court erred in holding that RCGP placement implicates a liberty interest. (1st Br. 57–61.) The RCGP houses inmates with unique safety concerns and provides them with abundant opportunities for social interaction and programming—factors that distinguish the RCGP from other restrictive housing units, such as administrative segregation. (*See id.* at 10–15, 57–61.) And even administrative segregation does not necessarily raise a liberty interest. *See May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997) ("the Ninth Circuit explicitly has found that administrative segregation falls within the terms of confinement ordinarily contemplated by a sentence"); *Windham v. Cal. Dep't of Corr.*, 385 F. App'x 657, 658 (9th Cir. 2010); *Eccleston v. Oregon ex rel. Or. Dep't of Corr.*, 168 F. App'x 760, 761 (9th Cir. 2006). The district court was correct, however, that CDCR's periodic reviews comport with due process. (CD 1122, ER 67–68.)

A. The Court Should Give Deference to Factual Findings, But Not to Descriptions of Plaintiffs' Evidence.

As an initial matter, the Court should reject Plaintiffs' sweeping assertions about what facts the district court found, and to what the Court should give deference. (*See* 2d Br. 91–94, 97–98.) The Extension Order has

multiple sections. Near the beginning, the court describes the evidence that was submitted and the arguments each party made (CD 1122, ER 53–55), and at the end it describes its findings, analyses, and legal conclusions (*id.*, ER 67–68). Nowhere does the district court accept all of Plaintiffs' factual assertions or agree that Plaintiffs' evidence proves every fact Plaintiffs put forth. Rather, the court explicitly said it would "evaluate Plaintiffs' evidence in light of Defendants' arguments." (*Id.*, ER 61–62.)

The district court then, in its legal analysis, explained what evidence it credited. (*See id.*, ER 67–68.) Defendants agree those findings are subject to clear-error review. But Plaintiffs push too far, implying that the Court should defer to the district court's descriptions of Plaintiffs' evidence, and even to Plaintiffs' own descriptions of their evidence. (2d Br. 91–94.) It should not. *See Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1371 (9th Cir. 1990) (in reversing stay order, noting the lack of factual findings on an issue made it unclear whether a particular factor weighed in favor of a stay). And given that the district court ruled on the Extension Motion on a paper record, this Court should resolve any remaining factual disputes.

B. The Factors the Magistrate Judge Identified Do Not Warrant Finding a Liberty Interest.

As to the presence of a liberty interest, Defendants do not dispute most of the district court's factual findings.[7] (*See* CD 1122, ER 67.) Defendants primarily challenge the court's application of those findings to the relevant legal standard. (1st Br. 57–61.) Such mixed questions of law and fact are reviewed de novo. *See Hispanic Taco Vendors v. City of Pasco*, 994 F.2d 676, 678 (9th Cir. 1993).

In determining whether an inmate has a liberty interest in avoiding a particular type of housing, courts consider whether that housing imposes an "atypical and significant hardship" relative to "the ordinary incidents of prison life," such that the conditions are "a dramatic departure from the basic conditions" of the inmate's sentence. *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005). No particular circumstance is dispositive in the analysis. *See id.* Here, the evidence does not support finding that RCGP's conditions are a dramatic departure from ordinary maximum-security incarceration. In fact, because the Agreement mandates special confinement conditions for RCGP inmates (who cannot be housed with general-population inmates because of

[7] But Defendants dispute Plaintiffs' attempt to convert the district court's discussion of the parties' evidence and arguments into factual findings. (*See* 2d Br. 94–95, 97–98.)

grave safety concerns), those conditions are, by the parties' agreement, the "ordinary incidents of prison life" for those inmates. And that is the benchmark the district court should have used in determining whether a deprivation imposes an atypical and significant hardship on RCGP inmates, and not other factors such as parole eligibility and stigma.

The record shows what the "ordinary incidents of prison life" look like, as negotiated by the parties, for RCGP inmates with unique security needs. RCGP inmates have opportunities for exercise, social interaction, and education that are comparable to—though, admittedly, different from—those of inmates in other high-security housing units. (1st Br. 58–61 (citing CD 985-5 and CD 927-8).) Many of Plaintiffs' complaints are that, while these opportunities *are* available, they are not as prevalent as they are in the general population, and they complain RCGP inmates on walk-alone status are not programming in groups. (*See* 2d Br. 91–93.) The court did not find these differences contributed to the presence of a liberty interest. (CD 1122, ER 67.) The court found the "RCGP is sufficiently different from general population" to create a liberty interest, but it specified what factors weighed in that direction: "*i.e.*, RCGP limits prisoners' parole eligibility, is singular, remotely located, prolonged, and stigmatizing." (CD 1122, ER 67.)

The district court improperly weighed those factors and reached a conclusion at odds with the record. (1st Br. 57–61.) First, the court found that RCGP placement "limits parole eligibility," which it found to favor a liberty interest. (CD 1122, ER 67.) This was an improper consideration, and an unreasonable conclusion given Plaintiffs' scant evidence.

In *Sandlin v. Conner*, the Supreme Court considered whether a form of disciplinary segregation implicated due process. *See* 515 U.S. 472, 485–87 (1995). The Court explicitly declined to weigh the impact segregation might have on parole when analyzing whether there is a liberty interest in avoiding it. *Id.* It found that, because disciplinary segregation did not foreclose parole under the relevant regulations, and the inmate had an opportunity to explain his conduct at his parole hearing, segregation did not "inevitably" affect the duration of confinement, and thus did not weigh in favor of finding a liberty interest. *See id.* The same is true here. Under the relevant regulations, BPH considers anything it finds relevant to whether the inmate, if released, may endanger the community. (*See* 1st Br. 46–47.) And no regulation prohibits granting parole to inmates in the RCGP, so the effect on parole does not favor finding a liberty interest.

The cases Plaintiffs cite provide no support here. (2d Br. 95.) *Keenan v. Hall* does not address conditions that impact parole prospects or the length

of confinement. *See* 83 F.3d 1083, 1089–92 (9th Cir. 1996). And *Wilkinson* dealt with inmates held indefinitely in the state's "supermax" facility, where inmates were *ineligible* for parole, so the impact on parole was unassailable. *See* 545 U.S. at 214–15.

Moreover, Plaintiffs' evidence does not show that RCGP placement inevitably—or even likely—affects parole. (*See* 2d Br. 91, 95.) Plaintiffs cite an attorney declaration stating that four inmates who had been housed in the RCGP were denied parole (SEALED ER 1376 ¶ 5), and a parole hearing transcript showing one parole commissioner who appears to give too much weight to an inmate's presence in the RCGP (*see* SEALED SER 1269–81). The attorney declaration is not evidence; but, even if it were, it proves little. The RCGP population is overwhelmingly level IV inmates, which is CDCR's highest security classification. *See* Cal. Code Regs. tit. 15 §§ 3375.1(a), 3377, 3377.1. It is not surprising that four such inmates would be denied parole, regardless of their housing unit. And while the transcript might show an issue with one inmate's parole denial, it does not show that RCGP housing extends the duration of confinement, or that it even extended the duration of confinement in that one case. The commissioners cited numerous factors supporting the denial of parole, such as the severity of the crime, the inmate's failure to take responsibility, and the apparent lack of

remorse. (SEALED SER 1273–79.) Whatever "limits" the district court may have found RCGP placement has on "parole eligibility," it does not extend the length of confinement, and does not support finding a liberty interest.

Nor should the district court have weighed the fact that the RCGP is "singular" or "remotely located." (CD 1122, ER 67.)[8] The RCGP exists at Pelican Bay State Prison, an institution that has been part of California's prison system for decades. Conditions at Pelican Bay are "within the normal limits or range of custody which the conviction has authorized the State to impose." *See Meachum v. Fano*, 427 U.S. 215, 225 (1976). Conditions of the RCGP that are identical to conditions at Pelican Bay should not contribute to finding the RCGP constitutes an "atypical and significant hardship." The remote location is such a circumstance. Regardless of housing unit, Pelican Bay is just as singular and remotely located. And while one of Plaintiffs' declarations also complains about the dates on which RCGP inmates may receive visitors (SEALED SER 1088), Plaintiffs have no right to visitation on a particular day. And it should go without saying that CDCR cannot

[8] Plaintiffs imply that, when the district court said "singular," it meant that RCGP placement is "highly unusual." (2d Br. 91.) The Court should not assume the district court misused the word "singular," when it was clearly referring to the fact that there is only one RCGP unit. (*See* CD 1122, ER 53.)

feasibly allow RCGP inmates to have visitation alongside the same inmates that they are, for their own safety, being separated from.

The duration of an inmate's stay in a highly restrictive environment could implicate a liberty interest if the duration is unjustified. But, given the opportunities inmates receive for exercise, social interaction, and education (*see* 1st Br. 58–61), the RCGP is not such an environment. Moreover, Plaintiffs have not shown that CDCR keeps class members in the RCGP longer than necessary to ensure their safety, and CDCR reviews class members' placement at least every 180 days. (1st Br. 11–12.) This factor provides little or no support.

And, finally, the Court should reject the purported stigma that Plaintiffs insist RCGP inmates endure, *i.e.*, that they "are assumed to have broken [a prison gang] rule of conduct." (2d Br. 97; *see also* SEALED ER 1380–94.) The stigmas that the Supreme Court and Courts of Appeal have recognized as contributing to a liberty interest are based on the mores of society at large. In *Vitek v. Jones*, the Supreme Court found that "transfer to a mental hospital for involuntary psychiatric treatment" was stigmatizing. *See* 445 U.S. 480, 494 (1980). In *Neal v. Shimoda*—the case Plaintiffs rely on—this Court noted the "the stigmatizing consequences of being labeled a sex offender." 131 F.3d 818, 829 (9th Cir. 1997). Other cases recognize stigmas associated

with being fired for unprofessional conduct and dishonesty, or being diagnosed (in the 1980s) with AIDS. *See Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1111–12 (D.C. Cir. 1985); *Muhammad v. Carlson*, 845 F.2d 175, 178 (8th Cir. 1988). Here, Plaintiffs would have the Court hold—for the first time—that a liberty interest may spring from a stigma vis-à-vis the social mores of prison gangs. (SEALED ER 1380–94.) Free society would, in general, find no stigma attaches to a person's failure to comply with prison-gang rules of conduct, or from needing protection from a gang. It is therefore not a stigma the Court should recognize, and it should not weigh in favor of finding a liberty interest in this case.

C. Even If Plaintiffs Had a Liberty Interest, CDCR's RCGP Procedures Do Not Systemically Violate Due Process.

If the Court finds that the RCGP is sufficiently restrictive that inmates have a liberty interest in avoiding it, due process would require only that CDCR provide inmates with a notice of the reason for their placement, an opportunity to be heard, and meaningful periodic review. (*See* 2d Br. 98–99 (citing *Wilkinson, supra*).) Plaintiffs challenge only the third requirement: they insist CDCR does not provide "meaningful" periodic reviews of RCGP

placement. (2d Br. 89–104.)[9] They further contend that CDCR officials misled class members by telling them they could return to the general population if they remained incident-free in RCGP for six months, but then keeping them in the RCGP. (*See* 2d Br. 98–100 (citing declarations and letters).) (The district court did not find that Plaintiffs' evidence established that CDCR officials actually made such statements. *See* pp. 38–39, *supra*.)

At its heart, Plaintiffs complain that, notwithstanding taking CDCR's advice and showing they can live in the RCGP without incident, inmates are not allowed to leave, even when no *new* evidence of threats to their safety is uncovered between reviews. (*See* 2d Br. 97–100.) They complain that there is nothing they can do to *earn* release from the RCGP. (*Id.*) That argument, however, ignores why they were placed in the RCGP, which was to keep them safe from documented threats. (*See* 1st Br. 10–15; Agreement ¶ 28.)

[9] Plaintiffs also complain some inmates are transferred to RCGP "at least in part" because "release to general population would pose a threat to the institution." (2d Br. 97.) Even if true, that is irrelevant. The constitution only requires there be a reason for the segregation, *see Kelly v. Brewer*, 525 F.2d 394, 400 (8th Cir. 1975), and the district court found the Agreement did not address what reasons allow RCGP placement (CD 1122, ER 67). And, in all but one of Plaintiffs' examples, the Institutional Classification Committee cited substantial evidence that the inmate would be in danger if placed in the general population; the Departmental Review Board found that conclusion reasonable; and it *also* found that moving the inmate to the general population would threaten institutional security. (*See* SEALED SER 1113, 1122, 1131, 1142–43, 1156, 1163, 1168, 1194, 1208–09, 1214.)

The argument also ignores that these safety issues are not within CDCR's (or the class member's) control. CDCR is uniquely positioned to know whether a gang wants to harm an inmate, as the district court found (CD 1122, ER 67), and courts should defer to CDCR's judgment on such issues, *see Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010) ("It is well established that judges and juries must defer to prison officials' expert judgments."). But CDCR cannot change whether a gang wants to harm an inmate. All it can do is foresee the threat and try to keep the inmate safe until the threat has subsided. Remaining incident-free and demonstrating livability or compatibility with other inmates give the inmate the best chance of such release, but it does not guarantee it.

If, however, CDCR released the inmate to the general population while aware the threat still existed, it would be breaching its constitutional duty to protect inmates in its care. *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (noting prison officials' duty "to protect prisoners from violence at the hands of other prisoners"); *Griffin v. Gomez*, 741 F.3d 10, 20–22 (9th Cir. 2014). And CDCR could be liable if the inmate, or nearby inmates or staff, was injured in an incident it foresaw. It would be irresponsible and unlawful for CDCR to release an inmate to the general population if it believed there was still a credible threat to that inmate's safety in that environment.

1. Plaintiffs' Authority Does Not Resemble This Case.

This case is unlike the sparse authority Plaintiffs cite. (2d Br. 99.) Each of Plaintiffs' cases deal with true administrative segregation, where inmates are isolated for extended periods of time. *See* pp. 49–51, *infra*. By contrast, RCGP inmates—even those on walk-alone status—have many opportunities for social interaction, education, and exercise. (*See* 1st Br. 14–15.) So, even if the Court finds that inmates have a liberty interest in avoiding RCGP placement, it does not follow that periodic reviews of RCGP placement must be the same as periodic reviews of other forms of administrative segregation.

Moreover, Plaintiffs' cases either involve segregation for reasons that the inmate could control, or periodic reviews that were truly meaningless, neither of which are true here. In *Williams v. Hobbs*, 662 F.3d 994 (8th Cir. 2011), the plaintiff was placed in administrative segregation, for his own protection, after being attacked by another inmate. *Id.* at 997. Regulations required review of inmates' administrative-segregation placement every 60 days. *Id.* at 999. Yet, for 14 years, prison officials denied him release to the general population by stating, with minimal explanation, that it would pose a threat to institutional security. *See id.* at 997–1009.

The *Williams* court received testimony showing the reviews were entirely pro forma. One warden testified that, in most cases, an inmate who

is "once a threat to security is always a threat to security," and stated he would vote to keep an inmate in segregation even if the inmate had "been the perfect model citizen." *Id.* at 1003. Another warden was unable to testify to a single incident or fact that would have supported keeping the plaintiff in segregation. *See id.* at 1004. And yet another gave inconsistent testimony as to when, or if, staff was able to review the inmate's file when making administrative-segregation decisions. *See id.* at 1002.

The reviews in this case, by contrast, are substantive and focus on whether there exist safety threats justifying the inmate's placement in the RCGP. (*See* 1st Br. 11–12.) Plaintiffs' own evidence shows that the Institutional Classification Committee (ICC) thoroughly considers all the information in an inmate's file, including evidence of safety threats, and makes a reasoned recommendation based on their experience. *See* pp. 52–56, *infra*. That is all a "meaningful" review should require in this context.

Kelly v. Brewer, 525 F.2d 394 (8th Cir. 1975), involved a system in which the warden had unfettered discretion whether to release inmates from administrative segregation, and violated due process by making decisions that were improperly weighted by punitive considerations. *See id.* at 399–400. CDCR, by contrast, has placed the decision-making authority in the ICC and Departmental Review Board (*see* 1st Br. 10–12), and there is no

evidence that CDCR keeps inmates in the RCGP based on any punitive consideration.

Toevs v. Reid, 685 F.3d 903 (10th Cir. 2012), is distinguishable for a different reason. *Toevs* involved an inmate who was put in segregation as part of a multi-step behavior-modification program. *See id.* at 907–09. Under that program, the inmate was to earn his release to the general population by showing appropriate behavior, but his periodic reviews failed to inform him how he should change his behavior. *See id.* at 912–13. The Tenth Circuit held that, where segregation is part of a program intended to improve inmate behavior, periodic reviews are only "meaningful" if they inform the inmate how to improve their behavior and thereby obtain release. *Id.* at 913–14.

Similarly, the inmates in *Wilkinson v. Austin*, *supra*, were challenging their confinement in Ohio's "Supermax facilities," which were "maximum-security prisons with highly restrictive conditions, designed to segregate the most dangerous prisoners from the general prison population." 545 U.S. at 213. In that situation, like in *Toevs*, one purpose of segregation was to incentivize better behavior, so the Supreme Court found periodic reviews in that context should provide "a guide for future behavior." *See id.* at 226.

It makes no sense to apply the rationale in *Toevs* and *Wilkinson* to this case. The purpose of the RCGP is not to incentivize good behavior; it is to

keep inmates from being assaulted or killed by other inmates. (1st Br. 10–15.) Neither CDCR nor the inmate can fix such safety issues. There is no guidance CDCR can give an RCGP inmate that will necessarily make other inmates not want to hurt or kill him. Often, the best advice CDCR can give is for the inmate to remain incident-free. But that will not guarantee the threat will abate. The Court should find that due process does not require CDCR to provide a fool-proof "guide to future behavior" that will result in the inmate's release from the RCGP, as that is not always possible.

2. Plaintiffs' Evidence Reveals That CDCR's Periodic Reviews of RCGP Placement Are Meaningful.

The Court should also hold that CDCR's RCGP procedures do not violate due process for another reason: Plaintiffs' evidence affirmatively shows that CDCR's periodic reviews are meaningful.

Plaintiffs imply that the safety concerns that motivate RCGP placement are ancient history, and that it is unreasonable for CDCR to rely on them to keep inmates in the RCGP's protective environment. But the record tells a different story. In each example case, the safety issues persisted for years, generally right up to when the inmate moved from the SHU to the RCGP, and it would have been reckless for the ICC to release the inmate to general population only because it found no evidence of new or different threats.

Prisoner A's RCGP placement was based, in part, on a 1994 assault on the yard, and on statements from confidential sources. (2d Br. 100.) But the evidence as a whole reflects a decades-long prison-gang power struggle. (SEALED SER 1217–18.) In addition to the assault, investigators found a note by a validated gang associate indicating that two gang members wanted **Prisoner A**—also a member—assaulted. (SEALED SER 1217–18.) In 2009, a source told investigators that **Prisoner A** owed money to another member (though that member is apparently no longer in good standing). (*Id.*) In 2013, investigators learned that **Prisoner A** had been stripped of authority within the gang and targeted for assault. (*Id.*) That was reinforced by a confidential source who, in 2015, stated that **Prisoner A** was a target and would likely be killed if moved into the general population. (*Id.*) Then, in 2016, a debriefing inmate was asked if he knew of any inmates currently targeted by his gang. He gave two names, one of whom was **Prisoner A**. (*Id.*) In light of this multi-decade history, the ICC concluded that, even though there was "no new demonstrated threat" to **Prisoner A**, it would keep him in RCGP for another six months based on the known threats. (*Id.*)

Plaintiffs' description of **Prisoner B**'s RCGP review is similarly lacking. (2d. Br. 102.) **Prisoner B** was placed in the RCGP based on an assault in 2011, a drug debt from 2013 (which, his record indicates, is still

unpaid), an active order from a gang "shot caller" to assault or kill **Prisoner B**, and observations by CDCR staff of how other gang members treated **Prisoner B** on the yard, all of which supported the conclusion that **Prisoner B** would be endangered if housed in the general population. (SEALED SER 1164–68.) **Prisoner B**'s first periodic review notes that the drug debt had not been resolved, and that he gave vague answers when an investigator asked about his safety issues. (SEALED SER 1235.) The ICC found it could not confidently say that the safety issues had resolved. (SEALED SER 1236.) At his next periodic review, though the ICC noted no *new* threats to **Prisoner B**'s safety, it also noted **Prisoner B**'s unresolved drug-debt issue, expressed concern about the "scope and volume of the documented information" about **Prisoner B**'s safety issues, and decided it needed more time before it could find his safety issues were resolved. (SEALED SER 1237–38.)

Plaintiffs similarly misrepresent **Prisoner C**'s circumstances. (2d Br. 102.) They imply the threat to his safety was an isolated incident from over 20 years ago. (*See id.*) But the record describes a "*continuing* power struggle *originating*" in the mid-1990s. (SEALED SER 1191–93 (emphasis added).) As a result, **Prisoner C**'s name appeared on the gang's "bad news lists" or "hit lists" (*i.e.*, lists of persons the gang would like assaulted or killed) as recently as 2015. (*Id.*) And confidential sources, through at least 2011,

confirmed that **Prisoner C** was targeted for assault or murder. (*Id.*) In 2015, **Prisoner C** admitted he could not safely live in the general population (*Id.*) Then, at his RCGP periodic review, he expressed uncertainty about whether he would be safe in the general population, but was confident he would be safe in the RCGP. (SEALED SER 1245.) Because no new information ameliorated the lethal threats to **Prisoner C**'s safety if he were released to general population, the ICC retained him in RCGP until his next periodic review. (*See id.*)

And **Prisoner D**'s situation is similar. (2d Br. 103.) Some of **Prisoner D**'s safety issues originated with "his decision to step down from a prison gang a decade ago" (*id.*), but that oversimplifies the situation. The record indicates he had an unpaid fine of $1,000 owed to the gang, in addition to his decision to drop out (which would itself cause him to be targeted for assault or murder). (SEALED SER 1171.) In 2008, **Prisoner D** told the ICC that, due to dropping out, he could not safely house with anyone in the gang. (*See id.*) In 2011, he told investigators that he still had safety concerns due to his decision to drop out, and that he was targeted for assault. (*See id.*) He reiterated the concern in 2012. (SEALED SER 1172.) And, in 2015, CDCR obtained new confidential information that **Prisoner D** was targeted by the gang and **Prisoner D** confirmed he had safety concerns. (SEALED SER

1173.) At both his DRB hearing (in 2015) and his first periodic review (in 2016), **Prisoner D** was noncommittal about whether he would be safe if moved to the general population. (SEALED SER 1173–75, 1239.) Given that his history of safety concerns reached back over a decade, the ICC elected to retain **Prisoner D** for another review period. (*See id.*)

While these reviews do not provide class members with their "keys to release" from the RCGP (2d Br. 103), that is because CDCR cannot always provide such keys. CDCR cannot diffuse the threat of a prison gang deciding that an inmate should be targeted for assault or murder. And CDCR cannot ignore such threats when they are reasonably foreseeable, lest it violate its constitutional duty to protect inmates in its care. *See Farmer*, 511 U.S. at 833; *Griffin*, 741 F.3d at 20–22. But the record shows that CDCR's periodic reviews of RCGP placement are meaningful. The examples show the scope and extent of safety issues many RCGP inmates face, and show that CDCR approaches these reviews with an eye toward ensuring that inmates remain safe from foreseeable threats. The Constitution does not require more.

CONCLUSION

The Agreement has served its purpose and it is time for this class action to end. CDCR made the substantive reforms the parties agreed to, and those reforms have been supervised by Plaintiffs and the district court for the

agreed two-year period. Plaintiffs have not met their burden under paragraph 41 to extend monitoring under the Agreement. The parole-related claim is not alleged in the complaint, not a result of the reforms, lacks merit, and is barred by judicial estoppel. The misuse claim is not alleged in the complaint and is not a result of any relevant reforms. And the RCGP issue lacks merit. The Court should reverse and instruct the district court that the Agreement, and the district court's jurisdiction over the action, must terminate pursuant to paragraph 41.

Dated: April 8, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
MONICA N. ANDERSON
Senior Assistant Attorney General
NEAH HUYNH
Supervising Deputy Attorney General

s/ Jeffrey T. Fisher
JEFFREY T. FISHER
Deputy Attorney General
Attorneys for Defendants-Appellants

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FOR THE NINTH CIRCUIT

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