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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ROBERT MITCHELL, et al.,

Plaintiffs,

v.

MATTHEW CATE, et al.,

Defendants.

Case No. 2:08-cv-01196-TLN-EFB

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

Preliminary Statement

The United States submits this Statement of Interest to address an issue of great constitutional importance: Whether a correctional institution's policy and practice of locking down prisoners because they share the same race as other prisoners involved in a violent incident offends the Equal Protection Clause of the Fourteenth Amendment. We recognize the importance of prison discipline and order. Based on the evidence of record and the availability of effective alternative methods to keep prisoners safe, Defendants' race-based lockdown policy cannot survive strict scrutiny under the Fourteenth Amendment because it is not a narrowly tailored use of racial classification.

Interest of the United States

The United States files this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General "to attend to the interests of the United States" in any case pending in federal court.[1] The Plaintiffs in this case allege that prisoners within prisons administered by the California Department of Corrections and Rehabilitation (CDCR) suffer racial discrimination from CDCR's "policy and practice of implementing lockdowns based upon race." Pls.' Second Am. Compl. ¶ 6 (ECF No. 84). The United States, acting through the Civil Rights Division of the U.S. Department of Justice, has an interest in this case because it implicates the application of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997a (CRIPA). CRIPA authorizes the Attorney General to investigate conditions of confinement in correctional facilities and bring a civil action against a State or local government that, pursuant to a "pattern or practice" of conduct, "is subjecting persons residing in or confined to an institution . . . to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." The United States files this Statement of Interest to clarify for the Court the proper scope of the Equal Protection Clause of the Fourteenth Amendment and its application to prisons. In filing this Statement of Interest, the United States acknowledges the serious dangers posed by prison gangs and the compelling governmental interest of ensuring the safety and security of both prisoners and staff.

Factual and Procedural Background

On May 30, 2008, Plaintiff Robert Mitchell filed a pro se complaint against the High Desert State Prison Warden and several other CDCR officials alleging that he was confined in lockdown under the

[1] The full text of 28 U.S.C. § 517 is as follows: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

prison's "race segregation lockdown policy." Pls.' Compl. ¶ 24 (ECF No. 1).[2] During this racially segregated lockdown, "plaintiff and the entire African American inmate population remained on full lockdown status, confined to their cells, not permitted to receive fresh air, exercise or participate in other programming or activities." *Id.* The Court appointed counsel for Mr. Mitchell. (ECF No. 60). With the assistance of counsel, Mr. Mitchell and three additional plaintiffs filed a Second Amended Complaint on behalf of themselves and all similarly situated prisoners in CDCR's custody challenging the "explicit and invidious racial discrimination in California prisons" caused by CDCR's "racially discriminatory lockdown policy." Pls.' Second Am. Compl. ¶¶ 1, 3 (ECF No. 84). The Plaintiffs requested that this Court certify a class of all prisoners "who are now or will in the future be subject to CDCR's policy and practice of implementing race-based lockdowns." *Id.* ¶ 25.

Plaintiffs allege that "[i]t is the official policy of the [CDCR] to respond to potential security threats by locking down all members of the involved prisoner's race, regardless of whether all the prisoners in that racial group have any involvement in the incident." Pls.' Second Am. Compl. ¶ 2 (ECF No. 84). CDCR categorizes all prisoners as belonging to one of the following four racial categories: "Black," "White," "Hispanic," and "Other." Defs.' Resp. to Req. for Admis. 3 (ECF No. 158-15). Plaintiffs allege that to help implement race-based lockdowns, CDCR officials "post[] a *color-coded sign* outside each prison cell to show the race of the prisoners housed therein." Pls.' Second Am. Compl. ¶ 32 (ECF No. 84); *see also* Pls.' Opp'n to Mot. for Summ. J. 18 (ECF No. 280) (showing photographs of the color-coded signs). Plaintiffs further allege that "Defendants do not make individualized determinations of risk when imposing blanket race-based lockdowns." Pls.' Second Am. Compl. ¶ 37 (ECF No. 84).

[2] California regulations recently defined the term "lockdown" to refer to the cell restriction of all prisoners in a facility and "modified program" to refer to the restriction of certain subsets of the prison population to their cells. Because both Plaintiffs' and Defendants' witnesses used the terms "lockdown" and "modified program" interchangeably, for ease of reading the United States uses the term "lockdown" to refer to the restriction of certain subsets of the prison population to their cells. *See* Pls.' Mot. for Prelim. Inj. 3 n.2 (ECF No. 156); *see also In re Haro*, No. FCR282399, slip op. at 3 n.3 (Super Ct. Solano Cnty. Jan. 18, 2013).

Consequently, "Defendants impose the lockdowns and attendant deprivations on those prisoners who they do *not* suspect of being involved in the incident giving rise to the lockdown." *Id.* ¶ 45.

Defendants have maintained that "CDCR policy is that when there is an incident involving any race, all inmates of that race are locked up." Decl. of D. Foston in Supp. of Mot. to Dismiss, Exs. A, B (ECF Nos. 93-1 at 2, 93-2 at 2). Defendants argue that the policy does not violate the Equal Protection Clause because it does not allow prison officials to "target a specific racial or ethnic group unless it is necessary and narrowly tailored to further a compelling government interest." Defs.' Opp'n to Mot. for Prelim. Inj. 26 (ECF No. 214) (quoting Department Operations Manual ("DOM"), § 55015.5 (2007)). CDCR claims that race-based lockdowns are necessary to address violence by security threat groups ("STGs" or "gangs") because "STGs in the general population are race-based." *Id.* at 16. It supports this policy and practice as being "narrowly tailored" primarily *because* the lockdown affects those of the race(s) of the group(s) involved in the violent incident, rather than the housing unit or area in which the violence occurred. "If Wardens did not have the discretion to lock down racial groups after such a race-based incident, they would either have to lock down all inmates in the affected area, or risk further violence by inmates associated with the involved inmates." Decl. of Kelly Harrington ¶ 47 (ECF No. 238).

CDCR acknowledges that under its policy there are prisoners who are locked down because of their race even though they were not involved in the violent incident giving rise to the lockdown and are neither gang members nor affiliates. *See, e.g.*, Excerpted Dep. of Scott Shannon 19 (ECF No. 158-6) (stating that Plaintiff Mitchell "would have been placed on a modified program based on his – him also being of the ethniticity [sic] of black" even though "there's no indication that Mr. Mitchell was involved in the incident" and that the same was true for 590 other black prisoners); Excerpted Dep. of Richard Anti 17 (ECF No. 158-5) (testifying that "locking down the entire Hispanic population in response to these incidents initially is necessary" although "that means holding large numbers of Hispanics responsible for

the actions of a few"); Excerpted Dep. of Rick Hill 15 (ECF No. 158-7) ("[D]uring a modified program, inmates who don't have a history of violence can be affected by the lockdown or modified program."). While freely admitting that "sometimes prisoners who aren't involved in a gang or disruptive group and also don't have any history of violence may be affected by their racial group," Excerpted Dep. of Scott Shannon 21–22 (ECF No. 158-6), CDCR rejects as "short sighted" a policy or practice of locking down only those prisoners who were involved in the violent act. Defs.' Opp'n to Mot. for Prelim. Inj. 16 (ECF No. 214) (explaining that "it would be a very short-sighted and dangerous policy to place only those inmates immediately identifiable as participants in a violent disturbance on modified program"). CDCR further maintains that "[t]here is nothing racist about using color-coded placards during a program modification caused by racial conflict." *Id.* at 38. "The purpose of these color-coded placards is to provide building officers a visual aid to quickly identify which inmates are subject to a modified program." *Id.*

Discussion

I. CDCR's Race-based Lockdown Policy Violates the Equal Protection Clause of the Fourteenth Amendment

Race-based discrimination in CDCR's prisons and jails is subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Johnson v. California*, 543 U.S. 499 (2005). To satisfy the strict scrutiny test, government officials must demonstrate that their use of race is "necessary to further a compelling government interest" and that the means chosen are "narrowly tailored" to achieving that end. *Id.* at 514 (internal quotation marks omitted). "When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers." *Id.* at 511. CDCR's race-based lockdown policy/practice does not pass strict scrutiny because it is not narrowly tailored to curb race-based violence.

A. CDCR's Race-Based Policy Triggers the Strict Scrutiny Standard of Review

"There is no iron curtain drawn between the Constitution and the prisons of this country. . . . Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race." *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974) (citing *Lee* v. *Washington*, 390 U. S. 333 (1968)). Racial discrimination in prisons violates the Fourteenth Amendment, except for "'the necessities of prison security and discipline.'" *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (per curiam) (quoting *Lee v. Washington*, 390 U.S. at 334). The Supreme Court has noted: "In the prison context, when the government's power is at its apex, we think that searching judicial review of racial classifications is necessary to guard against invidious discrimination. Granting the [California prison system] an exemption from the rule that strict scrutiny applies to all racial classifications would undermine our 'unceasing efforts to eradicate racial prejudice from our criminal justice system.'" *Johnson v. California*, 543 U.S. at 519 (quoting *McCleskey* v. *Kemp*, 481 U.S. 279, 309 (1987)).

Impermissible discrimination may arise from an explicit classification or from a facially neutral policy or practice that is implemented or administered with discriminatory intent. *See United States v. Armstrong*, 517 U.S. 456, 476 (1996); *Washington v. Davis*, 426 U.S. 229, 239–41 (1976). Since it explicitly factors in race, CDCR's lockdown policy automatically triggers strict scrutiny under the Fourteenth Amendment. *Johnson v. California*, 543 U.S. at 514.

CDCR argues that a "critical inquiry" under the Fourteenth Amendment analysis is "whether Defendants' actions were driven by the purpose or intent to discriminate, rather than out of concern for inmate safety and prison security." Defs.' Mot. for Summ J. 63 (ECF No. 254). CDCR takes the position that "when Defendants' actions are motivated by concerns for safety and security, the Equal Protection Clause is not violated merely because those actions have a racially disproportionate impact." *Id.*

Defendants' position, however, runs contrary to Supreme Court and Ninth Circuit precedent. Where, as here, the State admits to considering race as a factor in implementing a policy or practice,

discriminatory *intent* is presumed, and the plaintiff also need not prove discriminatory impact. *See Walker v. Gomez*, 370 F.3d 969, 974 (9th Cir. 2004) ("Plaintiff was not required to prove discriminatory intent because "[t]he state admit[ted] considering race when it assign[ed] inmates their cell mate.") (alterations in original) (quoting *Johnson v. California*, 321 F.3d 791, 796 n.4); *see also Johnson*, 543 U.S. at 505 (explaining that the Supreme Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications").

B. CDCR's Blanket Race-Based Lockdown Policy is Not Narrowly Tailored to Curb Gang Violence

While we recognize that the State has a compelling governmental interest in reducing prison violence and keeping prisoners safe, under the strict scrutiny standard, CDCR must do more than point to racial violence to justify its race-based policy. It must show that this race-based lockdown policy is narrowly tailored to achieve a compelling government interest. To meet this test, CDCR must "ensure[] that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

CDCR has not shown that its use of race-based lockdowns is a narrowly tailored response to prison gang violence, prison security or discipline. *Cruz v. Beto*, 405 U.S. at 321. CDCR claims that it must use race as a lockdown factor because STGs or prison gangs are race-based. In other words, because STGs or prison gangs allow only persons of a particular race to join their ranks, CDCR presumes that *all* prisoners of a particular race are or might become involved in a prison gang's violence simply by virtue of their race. This presumption is evident in CDCR's claim that "a situation might occur when a group of a certain race requires everybody of that race, whether they are in the STG or not, to assault everyone else of another race." Defs.' Opp'n to Mot. for Prelim. Inj. 20 (ECF No. 214). CDCR's argument *essentially uses race as a proxy* for assuming that a particular prisoner will join a gang or engage in violence.

Prison officials are not permitted to assume that race alone controls prisoners' behavior or creates a risk of violence. *See Richardson v. Runnels*, 594 F.3d 666, 671 (9th Cir. 2010) (denying defendants' motion for summary judgment) ("The defendants apparently believe that without showing any linkage between the perpetrators and the prisoners subjected to the lockdown, it was enough to assume that race alone tied [them] together . . . An assumption of this kind is grounded on race."); *United States v. Wyandotte Cnty. Kan.*, 480 F.2d 969, 971 (10th Cir. 1973) (per curiam) (rejecting the "vague fear" that desegregation of the jail's housing units would lead to increased racial tension and violence). Merely stating that STGs or prison gangs are race-based is insufficient to show that CDCR's explicit use of race to lockdown all prisoners of a particular race is a narrowly tailored response under the strict scrutiny standard. *See Richardson*, 594 F.3d at 671–72 (concluding that the state failed to carry its burden on plaintiff's equal protection claim because it "made no evidentiary showing at all concerning the basis for regarding all African-Americans as a security risk when one or a few African-American inmates were responsible for an assault"). In fact, as the Supreme Court has recognized, racial classifications in prisons, rather than prevent racial violence, may in fact promote it. *Johnson*, 543 U.S. at 416 (alterations in original) (internal quotation marks omitted) ("Indeed, by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions. By perpetuating the notion that race matters most, racial segregation of inmates may exacerbate the very patterns of [violence that it is] said to counteract.")

CDCR argues that its policy and practice is "narrowly tailored" primarily *because* the lockdown affects persons of the race(s) of the group(s) involved in the violent incident, rather than the housing unit or area in which the violence occurred. *See* Decl. of Kelly Harrington ¶ 47 (ECF No. 238). This argument misses the mark of the strict scrutiny standard's narrowly tailored analysis.

When a state uses a race-based classification, as CDCR does here, it must demonstrate that it considered "race-neutral means" that could just as well achieve the compelling government interest. *See*

City of Richmond, 488 U.S. at 507. Narrow tailoring "require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve [the compelling government interest]." *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). In addition, programs that are "less problematic from an equal protection standpoint" incorporate *individualized assessments*, "rather than mak[e] the color of [a person's] skin the sole relevant consideration." *City of Richmond*, 488 U.S. at 508. Thus, racial classifications in prison housing assignments have widely been held unconstitutional. *See Sockwell v. Phelps*, 20 F.3d 187 (5th Cir.1994) (holding that assignment of cellmates on the basis of race unconstitutional); *United States v. Wyandotte County*, 480 F.2d at 971 (holding assignment of inmates to housing units by race unconstitutional); *McClelland v. Sigler*, 456 F.2d 1266 (8th Cir. 1972) (holding segregated housing units unconstitutional). CDCR's categorical treatment of prisoners by race and failure to make an individualized determination of risk is not narrowly tailored to the interest of reducing prison violence.

CDCR has race-neutral alternatives to its race-based lockdown policy to address prison gang violence. CDCR could lock down the specific prisoners involved or suspected, based on criteria other than race, to be involved in race-based gang violence after a violent race-based incident occurs. CDCR could facilitate this process by collecting accurate threat assessment information on its prisoners to determine who is likely to be involved in race-based violence. In the alternative, if CDCR cannot immediately determine exactly which prisoners are involved or suspected in the violent act, it could temporarily lock down the entire housing unit or area where the incident occurred during the investigation. These and other race-neutral alternatives are not only less restrictive, but they also are more effective than CDCR's current policy of placing every prisoner of a given race in lockdown, most of whom have no involvement with the incident at issue. *See generally* Rick Ruddell, et al., *Gang Interventions in Jails: A National Analysis*, 31 Crim. Just. Rev. 33 (2006), *available at* http://cjr.sagepub.com/content/31/1/33.full.pdf+html. (analyzing the use and efficacy of ten non-racial

intervention strategies to control prison gangs, including collecting information from informants, transferring gang leaders to other institutions, and prosecuting gang activity).

Moreover, before any violence erupts, CDCR could use sound correctional practices during the intake process to collect information about a prisoner's involvement in a STG or gang and his or her propensity to engage in race-based violence. Then, using specific information about a prisoner's security threat, CDCR could make classification and housing decisions that promote security without resorting to the use of racial categories. Indeed, "gathering intelligence and disseminating this information within the facility" has been considered "foremost" among strategies to combat disruptive behavior by gang members. Rick Ruddell, et al., *supra*, at 43.

C. The Federal Bureau of Prisons' Use of Race-Neutral Practices Demonstrates that CDCR's Practices are Not Narrowly Tailored to Achieve Order and Discipline

CDCR's race-based lockdown practices are inconsistent with those of the Federal Bureau of Prisons, which also is charged with ensuring prison security and protection from violence by STGs or gangs. The alternatives used by the Bureau of Prisons demonstrate that the practices of CDCR are not narrowly tailored.

The BOP recognizes the serious problem of racial violence in the prison context, but it properly rejects the generalized assumption underlying CDCR's policy and practice: that *all* prisoners belonging to a racial or ethnic group are *presumed* to belong to a STG or gang or be prone to engage in racial violence. Rather, BOP uses accepted classification instruments to conduct individualized risk assessments that factor in a prisoner's STG or gang involvement and history of committing violent acts. This is a race-neutral alternative and sound correctional practice. *See* Rick Ruddell, et al., *supra*, at 43.

In responding to particularized concerns about racial violence, the BOP employs narrowly tailored

alternatives that focus on prisoner behavior—not race. *See* 28 C.F.R. § 551.90;[3] *see also* Bureau of Prison Program Statement P5100.08, Ch. 5, p. 10 (Inmate Security Designation and Custody Classification; Public Safety Factors) (explaining that a "male . . . inmate who was involved in a serious incident of violence within the institution and was found guilty of the prohibited act(s) of Engaging, Encouraging a Riot, or acting in furtherance of such . . . . will be housed in at least a HIGH security level institution"). If a prisoner is disruptive to particular prisoners, he is removed and placed in a higher security environment to remove the threat posed to others. If racial violence involves multiple prisoners in rapidly evolving circumstances that make it difficult to immediately remove only the prisoners directly involved, then the housing unit or area where the violence occurred is immediately locked down to contain the violence and maintain security.

The existence of numerous race-neutral alternatives to addressing prison gang violence demonstrates that CDCR has failed to meet its burden of proving how race-based lockdowns are a "close fit," to achieving the compelling government need. All in all, the record evidence—including CDCR's own admissions and statements—shows that CDCR uses a race-based lockdown policy that is not narrowly tailored to achieve the goal of curbing race-based prison gang violence, in violation of the Fourteenth Amendment. *See In re Haro*, No. FCR282399, slip op. at 2 (Super Ct. Solano Cnty. Jan. 18, 2013) (finding, after a full evidentiary hearing, that "CDCR does indeed use race as a principal, if not primary, means of classifying inmates as part of its "modified program" and that "[a]pplying the strict scrutiny standard . . . [CDCR] failed to demonstrate a constitutionally-acceptable justification for its

[3] In addition to the Constitution, federal regulations expressly forbid racial discrimination in the federal prison system. The governing regulation, "Non-Discrimination Towards Inmates," prohibits discriminating against inmates based on "race, religion, national origin, sex, disability, or political belief." 28 C.F.R. § 551.90. The prohibitions apply to "the making of administrative decisions and providing access to work, housing and programs." *Id.*

practice of using racial criteria in this manner").[4]

Conclusion

The United States recognizes CDCR's compelling interest in curbing race-based gang violence. Yet, based on the evidence of record, CDCR's race-based lockdown policy is not based on any individual analysis of prisoner behavior, but rather on generalized fears of racial violence. Indeed, the policy affects hundreds of prisoners throughout the CDCR system who the State acknowledges have absolutely no gang ties or history of violence. These consequences are not merely an "unfortunate" result. Rather, they are evidence that CDCR's race-based lockdown policy is not narrowly tailored to meet its compelling interest. Race-neutral alternatives BOP employs to address gang violence further demonstrate that CDCR's policy is not narrowly tailored. For these reasons, CDCR's consideration of race fails to meet the searching test of strict scrutiny and is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

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[4] In their brief in opposition to Plaintiffs' motion for preliminary injunction, Defendants assert that "[a]pplying the strict-scrutiny test, the Ninth Circuit, several district courts in California, and at least one other circuit court have found that [its race-based lockdowns] comply with the Equal Protection Clause." Defs.' Opp'n to Mot. for Prelim. Inj. 18–19 (ECF No. 214). As Plaintiffs' note, in all but one of these unpublished cases, the case was litigated by a pro se prisoner who in almost every case developed a poor factual record. The only case in which the plaintiff was represented by counsel did not involve an Equal Protection Claim and therefore did not analyze CDCR's lockdown policy under the strict scrutiny standard. *See* Pls. Reply in Supp. of Mot. for Prelim. Inj. 7 n.2 (ECF No. 270).

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DATED: October 18, 2013
Washington, District of Columbia

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Statement of Interest was filed electronically on this 18th day of October 2013, with the Clerk of Court for the Eastern District of California using the CM/ECF System, which will send a notice of such filing to all registered parties.

s/Laura L. Coon
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