No. 18-16427

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TODD ASHKER, et al.,

Plaintiffs-Appellees,

v.

GAVIN NEWSOM, et al.,

Defendants-Appellants.

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

Case No. 4:09-cv-05796-CW (RMI)
The Honorable Claudia Wilken

PLAINTIFFS-APPELLEES' PETITION FOR REHEARING *EN BANC*

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I. INTRODUCTION

Prolonged solitary confinement is, as Justice Kennedy wrote, a "terror" and "horror" that "exacts a terrible price."[1] The prisoners in the *Ashker* class were held in solitary for over a decade, without disciplinary grounds, and settled the class-action challenge to their confinement based on a promise this torture would end. For many, it has not, due to the panel's unsound interpretation of the settlement agreement in patent conflict with Ninth Circuit precedent. For this reason, *en banc* review is necessary.

Plaintiffs instituted this class action lawsuit in 2012 to establish that confinement of prisoners in prolonged solitary—locked in their cells for over 22 hours per day for more than ten years with virtually no programming—denied their basic human needs and violated the Eighth Amendment to the Constitution. In 2015, the State settled this lawsuit and Plaintiffs' Eighth Amendment claims with a promise to release over 1,500 prisoners from the Security Housing Unit (SHU) and transfer them to General Population. The California Department of Corrections and Rehabilitation (CDCR) claims it has fulfilled this promise, yet it continues to confine a substantial number of these class members in conditions where they get *less* out-of-cell time than when they were in the SHU, and where some are completely physically isolated.

[1] *Davis v. Ayala*, 576 U.S. 257, 286-90 (2015) (Kennedy, concurring).

Plaintiffs raised two separate challenges to this policy and practice. In the first, Plaintiffs proved that many class members are being held in Level IV prisons denominated as "General Population," but where the prisoners are held in their cells all day long for days on end, cruelly according them even less out-of-cell time than they had in the SHU, for no disciplinary reasons. The Ninth Circuit panel recognized the fact of continued severe isolation, which constitutes restricted housing by the standards of California law, the U.S. Department of Justice, the American Correctional Association, and *amici curiae* comprising leading correctional directors and experts from across the country. Nevertheless, the panel ruled that CDCR's only obligation under the plain meaning of the settlement was to transfer class members from SHU to any "different facility." The panel did not follow Ninth Circuit precedent requiring evaluation of the full context of the Agreement and the purpose of the settlement where the operative term is subject to conflicting meanings. The panel thus held that the specific inclusion of the term "General Population" imposed no requirement on CDCR to cure the constitutional violation alleged in the complaint, thereby effectively deleting this operative term from the Agreement.

In the second challenge, Plaintiffs proved CDCR continued the severe isolation of another group of class members who had been transferred from the SHU to the Restricted Custody General Population (RCGP) unit, which is designed

for prisoners whose safety is at risk. This unit requires somewhat more restrictive conditions than typical general population, but placement is non-disciplinary. To remedy the Eighth Amendment violation, the Settlement Agreement accords these class members the right to participate in "group yards" and "activity groups." Nonetheless, CDCR placed half of these prisoners on "Walk-Alone" status, completely barring them from any group activities. Here, the operative term "group" *is* subject to plain meaning on its face, since it is a single word used in its ordinary sense. Yet the panel held that "group" can mean a single individual, thus absurdly deviating from the common dictionary definition of the term as "two or more figures forming a complete unit," and creating precedent for allowing ordinary words to be used in the converse of their common meaning.

These two forms of continued severe isolation for individuals who already have suffered over a decade of torturous confinement in the SHU, both rationalized solely by a faulty application of the plain meaning rule that conflicts with Ninth Circuit authority, present issues of exceptional importance that require *en banc* consideration. Indeed, these issues of torture, governmental abuse, and "plain meaning" interpretation are precisely the types of issues the Ninth Circuit has found appropriate for *en banc* review.

II. BACKGROUND

A. The Nature of the Case

Since 1989, California has held thousands of prisoners in extremely prolonged solitary confinement in their infamous SHU facilities at Pelican Bay and other prisons based solely upon gang validations that were made in violation of due process, as the District Court has held.[2] Many of these prisoners were in the SHU for more than twenty years straight. (Court Docket (CD) 388, Defendants-Appellants' Excerpts of Record (ER) 477 ¶ 2). Prisoners in the SHU spent "22 ½ to 24 hours per day in their cell," were persistently denied the normal human contact necessary for mental and physical well-being, and suffered predictable psychological deterioration . (*Id.* ¶¶ 3-4; CD 993-4, SER 60).

The parties came to a Settlement Agreement in 2015, memorializing that the basic purpose included remedying Plaintiffs' claims about "the conditions of confinement in the [SHU]." (CD 424-2, ER 446). Notably, the former CDCR Secretary stated publicly that the Department's past solitary confinement policy was a "mistake." *See* https://www.cbsnews.com/news/60-minutes-reforming-solitary-confinement-at-an-infamous-california-prison/.

[2] The District Court's order holding in part that the past gang validations were made in violation of due process was appealed, and that appeal was dismissed for lack of jurisdiction. (Case Nos. 19-15224 [Dkt. 91-1], 19-15359 [Dkt. No. 89-1]).

B. CDCR Transferred Class Members to Units Falsely Labeled "General Population"

The Settlement Agreement resulted in the release of roughly 1,500 class members from SHU. The Agreement mandated that they would be "transferred to a *General Population* level IV 180-design facility, or other *general population* institution consistent with [their] case factors." (CD 424-2, ER 450 ¶ 25) (emphasis added).[3] Prisoners in General Population are legally entitled to well over ten hours out of their cells each week. Cal. Code Regs., Title 15 §§ 3044(d)(2)(E), 3343(h) (Supplemental Addendum (S-ADD) 14, 20). (CD 617, ER 411 at 53:24 (CDCR counsel's representation to District Court that general population prisoners receive "a minimum of ten hours' yard time" weekly)). However, undisputed declarations, survey responses, and expert testimony establish that class members are still being locked in their cells over 22 hours per day. (CD 993-1, Supplemental Excerpts of Record (SER) 39-40 ¶¶ 4-5; CD 930-2, ER 313-50). In fact, the evidence shows that 80% of the survey respondents were given under 1.5 hours of yard time per day (i.e., the SHU minimum), and 35% had less than half an hour of yard. (CD 930-2, ER 306-50). Total out-of-cell time for half of these prisoners was under two hours per day, and for over half of those individuals it was less than one hour per day. (*Id.*; CD 930-3, ER 363 ¶ 49).

[3] General Population consists of four security levels, with Level IV being the highest. (CD 930-3, ER 359 n. 8).

Nine former state corrections directors and experts submitted a brief as *amici curiae*, explaining that General Population is a commonly used correctional term where less than two hours out of cell each day is unacceptable. (Dkt. No. 48 at 7-8). The U.S. Department of Justice and the American Correctional Association apply the same definition. (CD 993-2, SER 47; CD 930-3, ER 356 ¶ 23). Plaintiffs' expert witness, the former Secretary of the Washington State Department of Corrections, provided uncontradicted testimony that class members were not being housed in "General Population and would not be considered as such in the corrections community nationally," and that general population prisoners in other states receive 6 to 14 hours out-of-cell daily. (CD 930-3, ER 359-67) ("This is the lowest amount of out-of-cell time for general population prisoners that I have ever seen in my career as a corrections administrator and as a consultant/expert witness.").

C. CDCR Refused to Place RCGP Class Members in Groups

The Settlement Agreement created a new housing unit for prisoners whose safety may be threatened in General Population—the RCGP. (CD 424-2, ER 452 ¶ 28). This is a *non-disciplinary* placement intended to afford General Population privileges. The Settlement Agreement entitles RCGP prisoners to:

> … increased opportunities for positive social interaction with other prisoners and staff, *including* but not limited to … yard/out of cell time commensurate with Level IV GP in *small group yards*, in *groups* as determined by the Institution Classification Committee; … and leisure time *activity groups*.

(*Id.* [emphasis added]).

Nevertheless, CDCR admits that half these prisoners (thirty out of sixty) receive no group experience, but instead are on "Walk-Alone" status. (CD 985-5, ER 111–12, ¶¶ 6–8; CD 927-8, ER 370 ¶¶ 3-4). For one-third of the RCGP prisoners, Walk-Alone status is indeterminate and will continue indefinitely. (*Id.*). Purported "yard time" is spent inside twenty-by-ten foot cages —which Defendants euphemistically call "fenced individual exercise yards" —where prisoners have no physical contact with others. (CD 927-8, ER 371 ¶ 6). These are the *same* kind of cages used in CDCR segregation units, even though the RCGP is *not* intended for discipline. (CD 424-2, ER 452-53 ¶ 28; CD 1005-1, SER 19). Walk-Alone prisoners have no group activities, such as classes, informal discussion groups, work projects, or sports. (CD 844, ER 384).

D. Plaintiffs' Enforcement Motions

The District Court held that the continued isolation of prisoners already subjected to ten or more continuous years in SHU violates the Settlement Agreement. The Court found that "many Plaintiffs spend an average of less than an hour of out-of-cell time each day, which is similar to the conditions they endured in the SHU," that this is not "consistent with the CDCR's regulations and practices with respect to Level IV General Population inmates," and "is substantially less than the amount of time a General Population inmate spends out-

of-cell, which Defendants represented was a minimum of ten hours a week." (CD 1113, ER 8; CD 1028, ER 21-22). The Court ruled that class members "must receive more out-of-cell time than they received in the Pelican Bay SHU." (CD 1028, ER 21).

The District Court also found that placing RCGP prisoners on Walk-Alone status does "not permit[] [them] to exercise in small group yards or engage in group leisure activities," thus violating the Agreement. (CD 1029, ER 19-20).

E. The Appeal

Defendants appealed, and the panel issued its Opinion on August 3, 2020 reversing both orders. (Dkt. No. 76-1 [Opinion]).

III. ARGUMENT

Rehearing *en banc* is necessary because the continued torment of California prisoners in severe isolation, for no disciplinary reasons whatsoever, presents questions of exceptional importance, where the panel Opinion conflicts with the authoritative decisions of the Ninth Circuit. Fed. R. App. P. 35(a)(1)-(2). This Court has recognized in past *en banc* decisions that issues of torture, and prison and other governmental officials' abuse of discretion, are exceptionally important and warrant further review. *See, e.g., Henriquez-Rivas v. Holder*, 707 F.3d 1081 (2013) (*en banc* review granted where issue pertained to persecution based on asylum applicant's membership in social group); *Mauro v. Arpaio*, 188 F.3d 1054,

1058 (9th Cir. 1999) (*en banc* review of prisoner's First Amendment rights to receive publications); *Devereaux v. Abbey*, 263 F.3d 1070 (9th Cir. 2001) (*en banc* review concerning use of false evidence deliberately fabricated by the government). The Court further has recognized that incorrect application of the plain meaning rule in contract interpretation, with significant consequences on incarceration, is an appropriate subject for *en banc* review. *See Buckley v. Terhune*, 441 F.3d 688 (2006) (*en banc* review granted to interpret ambiguous contractual language of plea agreement, reversing panel's determination that the meaning of the agreement was plain on its face).

A. This Case Raises a Question of Exceptional Importance Concerning Non-Disciplinary Severe Isolation of Prisoners

Plaintiffs have proved that many class members are being held in prisons denominated as "General Population" but where the prisoners are held in their cells all day long for days on end, with no justification. The District Court found these facts to be true, and held that this *de facto* continuation of solitary confinement violated the Settlement Agreement. (CD 1028, ER 21). The panel did not disturb the factual finding, but reversed the District Court's ruling on a faulty application of the "plain meaning" rule. (Opinion at 10-12). The panel held that the plain meaning of the settlement is that CDCR's only obligation was to transfer class members from SHU to any "different facility," and that the specific inclusion of

the term "General Population" imposed no requirement whatsoever on CDCR to allow these prisoners even a modicum of out-of-cell time. (*Id.* at 11).

The panel Opinion condones the State's semantic sleight-of-hand whereby facilities called "General Population" function as segregation units, or worse. Just as placement in SHU cells within a Level IV facility would blatantly violate the Settlement Agreement, so too does placement in so-called "General Population" cells that, in the most critical regard, are just like SHU.

The panel's application of the plain language rule conflicts with the authoritative decisions of the Ninth Circuit, such that consideration by an *en banc* panel is necessary to secure and maintain uniformity of the Court's decisions. The rule of the Ninth Circuit is that where a contract uses a common term that is subject to a uniform definition, that meaning may be ascribed to the term without further reference to the context or intent of the parties; however, "where contract language is susceptible to multiple interpretations, courts attempt to discern which interpretation the parties intended." *Navarro v. Mukasey*, 518 F.3d 729, 734 (9th Cir. 2008); *Buckley*, 441 F.3d at 698 (the "inquiry considers the disputed or ambiguous language in the context of the contract as a whole and of the relevant surrounding circumstances"); *Caliber One Indem. Co. v. Wade Cook Fin. Corp.*, 491 F.3d 1079, 1084 (9th Cir. 2007) (evidence of intent is necessary where "text's plain, ordinary and popular meaning is not evident"); *In re Safeguard Self-Storage*

Tr., 2 F.3d 967, 970 (9th Cir. 1993) (where meaning of contractual term is disputed, court should evaluate substance of agreement to "determine whether an animal which looks like a duck, walks like a duck, and quacks like a duck, is in fact a duck"). The Ninth Circuit's approach to the interpretation of contract language parallels its approach to statutory construction, where "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *United States v. O'Donnell*, 608 F.3d 546, 549 (9th Cir. 2010), *quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also King v. Burwell*, 576 U.S. 473, 497 (2015) (phrase that "may seem plain 'when viewed in isolation' … turns out to be 'untenable in light of the statute as a whole.'") (citation omitted)*; United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (selecting meaning of disputed term that "produces a substantive effect that is compatible" with overall purpose).

"General Population" is a term of art specific to the prison context, and is not subject to general definition; the term is not found in Black's, Oxford English, Merriam-Webster, or other general dictionaries. *See Caliber One*, 491 F.3d 1085 (term "deductible" is not "unambiguous on its face" where "[d]ictionaries do not 'uniformly' define" it). Hence, Plaintiffs extensively briefed the meaning of this operative term according to California regulations and caselaw, and other federal

and professional standards. In particular, Title 15 of the California Code of Regulations provides that General Population prisoners are to be afforded "[a]ccess to yard, recreation and entertainment activities during the inmate's non-working/training hours and limited only by security needs." Cal. Code Regs., Title 15 § 3044(d)(2)(E) (S-ADD 14);[4] *see also* Title 15 § 3341(a) (differentiating segregated units from General Population) (S-ADD 18); Title 15 § 3343(h) (prisoners in SHU and other restricted housing are held in their cell 22 hours a day or more) (S-ADD 20); CD 930-3, ER 356 ¶ 23 (American Correctional Association defines restricted housing as "a placement that requires an inmate to be confined to a cell at least 22 hours per day"); CD 993-2, SER 48 (United States Department of Justice defines "isolation" or "solitary confinement" as "being confined to one's cell for approximately 22 hours per day or more"). Plaintiffs thus showed that the contractual term "General Population" gains meaning from the context and overall purpose of the Agreement, whereby the parties mutually intended to reduce the isolation of these prisoners who had been held in extreme long-term segregation. (CD 424-2, ER 463 ("[T]he language in all parts of this agreement shall be construed as a whole, according to its fair meaning.")). *See Robinson,* 519 U.S. at

[4] California regulations, including Title 15, have the force and effect of law. *See Santa Rosa Band of Indians v. Kings Cty*., 532 F.2d 655, 668 (9th Cir. 1975); *Denegal v. Farrell*, No. 115CV01251DADMJSPC, 2017 WL 2363699, at *6 (E.D. Cal. May 31, 2017), citing *California Teachers Ass'n v. California Comm'n on Teacher Credentialing*, 111 Cal. App. 4th 1001, 1008 (2003).

341-46 (term "employees" in Title VII appears plain "[a]t first blush," but the "initial impression [] does not withstand scrutiny in context" and in consideration of "primary purpose of the provision"). Additionally, *amici curiae* (nine former state corrections directors and experts) explained that the term "general population" is "consistently used and understood in the corrections field" to include "substantial out-of-cell time," and that "[c]onditions in which prisoners receive less than two hours out of cell each day, therefore, do not meet any generally accepted definition of 'general population.'" (Dkt. No. 48 at 5-8).

It is simply inconceivable that Plaintiffs would have settled their Eighth Amendment claim for a promise that could allow CDCR to transfer them to conditions *more isolating* than the torturous conditions of the SHU. The District Court properly recognized this common sense understanding of the parties' bargain, which the panel overturned.

The panel condoned *increasing* Plaintiffs' isolation by refusing to define the term "General Population," effectively erasing it from the Agreement. But, for the Agreement to serve its most fundamental purpose, even the most basic definition of "General Population" must be that it is housing less restrictive than SHU. As the District Court held, class members in General Population "must receive more out-of-cell time than they received in the Pelican Bay SHU," but the panel did not even make that distinction. (CD 1028, ER 21); *see Parsons v. Ryan*, 912 F.3d 486,

505 (9th Cir. 2018) (distinction between restricted housing and general population is defined by "the amount of time confined in a cell"); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996), *opinion amended on denial of reh'g,* 135 F.3d 1318 (9th Cir. 1998) (recognizing a "major difference between the conditions for the general prison population and the segregated population"). Instead, the panel allows the illogical and absurd conclusion that CDCR can confine prisoners in General Population cells for *more* time than in SHU. *See King*, 576 U.S. at 498 ("interpreting legislation "to avoid the type of calamitous result that Congress plainly meant to avoid"). This is no mere hypothetical problem, as the undisputed evidence shows that CDCR frequently confines class members in General Population to their cells 24 hours per day for many days straight, for no security reasons, and to their continuing physical and psychological harm.[5] *See* Human Rights in Trauma Mental Health Lab, Stanford University, *Mental Health*

[5] The panel also explains that the parties specified out-of-cell time for the few prisoners in Administrative SHU and therefore should have done the same for General Population. (Opinion at 12). However, Administrative SHU is restrictive housing, which by regulation is limited to 1.5 hours yard time per day. Title 15 § 3343(h) (S-ADD 20). The parties recognized the Agreement would have to explicitly abrogate this standard to ensure some alleviation from the trauma of over ten years in SHU. In contrast, class members transferred to General Population would *not* be subject to the regulation limiting restricted housing yard time. The Agreement ensured that they would have greater quantitative and qualitative time out-of-cell by explicating that their housing would be General Population, which by regulation and defense counsel's representation requires greater out-of-cell time than SHU. (Title 15 § 3044(d)(2)(E) (S-ADD 14); CD 617, ER 411 at 53:24).

Consequences Following Release from Long-Term Solitary Confinement in California (CD 993-4, SER 60) (concluding that prisoners experienced "psychological symptoms during their time in SHU [] which have persisted or even worsened while in GP … [where] prisoners spend almost all of their day in their cell with little productive activity… The most commonly reported symptoms included hypersensitivity to stimuli, anger/irritability, anxiety, insomnia, paranoia, emotional numbing and/or dysregulation, obsessive compulsive thoughts and behaviors, and problems with concentration, attention, and memory.").

Not only does the Opinion result in devastating harm to the class, but it also sows confusion with Ninth Circuit precedent by creating an alternate way of analyzing plain meaning that excludes the most reasonable interpretation of contracts and settlement agreements. This Opinion creates leeway to ignore intent and context, and to apply unintended meaning, where terms are not plain on their face. Thus, the panel Opinion raises a question of exceptional importance as to the continued isolation of prisoners in purported General Population, and presents a conflict with Ninth Circuit authority on contract interpretation, requiring *en banc* consideration.

B. This Case Raises a Question of Exceptional Importance Concerning the Non-Disciplinary Total Physical Isolation of Restricted Custody Prisoners

It is undisputed that half of the prisoners in the Restricted Custody General Population (RCGP) unit are on "walk-alone" status, whereby they are completely barred from any group activities, even though the Agreement entitles them to participation in "group yards" and "activity groups." (CD 424-2, ER 452-53 ¶ 28; CD 424-3, ER 469; CD 927-8, ER 370 ¶ 3). The panel did not challenge this fact, recognizing that the prisoners' "yard-time was in fenced yards that are limited to one inmate per unit." (Opinion at 12-14). But the panel reversed the District Court by holding that the plain meaning of "group" can be a single individual. (*Id*. at 13). This conclusion is contrary to all definitions. *See, e.g.,* Merriam-Webster Dictionary (defining group as: "two or more figures forming a complete unit in a composition"); Black's Law Dictionary (2nd ed.) ("Two or more of something with some type of commonality…").

Where an operative contractual term is so basic and common that there is no need to examine context or intent (in contrast to the interpretation of the prison-specific term General Population), it must be given its ordinary dictionary meaning. *See Caliber One Indem. Co. v. Wade Cook Fin. Corp.,* 491 F.3d 1079, 1084 (9th Cir. 2007) (dictionaries' uniform definition of word provides persuasive evidence of its meaning); *Satterfield v. Simon & Schuster, Inc.,* 569 F.3d 946, 955

(9th Cir.2009) (determining plain meaning of corporate "affiliate" by referencing *Black's* and *Webster's* Dictionary). But the panel expressed concern that the Agreement "does not say how many, or if any, other prisoners need be in the same group yard." (Opinion at 13). It is unreasonable to hold that the parties needed to specify that a group could not consist of only one prisoner, since this is tautological. The use of the word "group" provides all the direction necessary to mandate that CDCR create yards and activities with at least two prisoners, just as the District Court held. (CD 1115, ER 1) (holding "[a] group is defined as more than one person" and directing CDCR to create "groups of two, if necessary."). As a result of the panel's deviance from Ninth Circuit authority, many prisoners who were subjected to over a decade of SHU confinement continue to experience total physical isolation and its injurious impact. (CD 993-4, SER 60).

To have this Opinion stand as precedent for allowing ordinary words to be used contrary to their common meaning would create uncertainty for parties seeking to comply with contracts and legislation, and would wreak havoc for litigants and courts seeking to interpret those documents. Furthermore, to require that every plain and common term of a contract or statute must be specifically defined would make settlements, contracts, legislation, and regulation-making

unworkably cumbersome and overwrought.[6] Thus, the panel Opinion raises a question of exceptional importance as to the continued isolation of prisoners, and presents a conflict with Ninth Circuit authority as to the plain meaning of ordinary terms, requiring *en banc* consideration.

IV. CONCLUSION

For the reasons set forth herein, Plaintiffs request *en banc* review of the panel's Opinion.

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[6] The panel sought to minimize this issue by stating that CDCR's total denial of group activity is only a "minor deviation[]" of the settlement terms. (Opinion at 14). However, placement in groups is the lynchpin of this provision, since groups are the means to remediate the physical isolation these prisoners experienced in years of SHU confinement, and the term appears repeatedly in the provision. (CD 424-2, ER 452-53 ¶ 28). The Agreement *mandates* group yard and group activities.

Dated: August 31, 2020

Respectfully submitted,

s/ Samuel Miller

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TODD LEWIS ASHKER; DANNY TROXELL; GEORGE RUIZ; JEFFREY ANTHONY FRANKLIN; GEORGE FRANCO; GABRIEL RALPH REYES; RICHARD K. JOHNSON; PAUL A. REDD, JR.; LUIS ESQUIVEL; RONNIE N. DEWBERRY, *Plaintiffs-Appellees*, v. GAVIN NEWSOM,* Governor of the State of California; MATTHEW CATE; ANTHONY CHAUS, Chief, Office of Correctional Safety, CDCR; GREG LEWIS, Warden, *Defendants-Appellants.*	No. 18-16427 D.C. No. 4:09-cv-05796-CW OPINION

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted May 12, 2020
San Francisco, California

* Gavin Newsom is substituted for his predecessor, Edmund G. Brown, Jr., as Governor of the State of California. Fed. R. App. P. 43(c)(2).

Filed August 3, 2020

Before: J. Clifford Wallace and Ryan D. Nelson, Circuit Judges, and James S. Gwin,** District Judge.

Opinion by Judge Gwin

SUMMARY***

Prisoner Civil Rights

The panel reversed the district court's ruling that the California Department of Corrections and Rehabilitation violated a settlement agreement, vacated the district court's remedial orders, and remanded for further proceedings in a prison conditions civil rights class action.

Prior to the settlement agreement, California Department of Corrections and Rehabilitation ("California") housed the Plaintiff Prisoners in solitary confinement based only upon their gang affiliation. In this action, the Prisoners alleged that California breached the settlement agreement when it transferred some prisoners from Security Housing (a type of solitary confinement) to the General Population but did not give those prisoners increased out-of-cell time. The Prisoners also alleged that California breached the

** The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

*** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

settlement agreement when it limited another inmate group's direct physical contact during yard time.

The panel held that California did not violate the settlement agreement. The panel determined that Paragraph 25 of the agreement only required that California transfer inmates out of Security Housing to a different facility. Paragraph 25 did not limit California's discretion regarding out-of-cell time for the inmates removed from Security Housing to General Population.

The panel rejected the Prisoners' assertion that Paragraph 28 of the settlement agreement required California to provide Restricted Custody inmates who, for their own safety, could not be safely housed in the general population, with small group yard-time and other group activities. The panel held that Paragraph 28 did not require California to do more than it already had for inmates in Restricted Custody. But even if it did, the breach would not be actionable because California had substantially complied with Paragraph 28's requirements.

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OPINION

GWIN, District Judge:

This appeal stems from a prison conditions civil rights class action settlement. Earlier, the Defendant California Department of Corrections and Rehabilitation ("California") housed the Plaintiff Prisoners (the "Prisoners") in solitary confinement based only upon their gang affiliation. California settled the case, agreeing to several reforms as memorialized in a settlement agreement ("Settlement Agreement").

The Prisoners argue that California did not comply with the Settlement Agreement. The Settlement Agreement required California to move class members from solitary confinement to a General Population level IV facility.

California did this. Even so, the inmates say there was an implied requirement that the prison give these inmates greater out-of-cell time.

The Settlement Agreement also made special provisions for inmates leaving solitary confinement who would not be safe in the general population. The Settlement Agreement allowed these inmates to be placed in small groups housed in a separate unit that would be given privileges commensurate with General Population level IV privileges. For some of these inmates, California was unable to find a group that would accept the inmates without conflict. These inmates received yard-time, but their yard-time was in fenced yards that are limited to one inmate per unit. The Prisoners say this practice also violated the Settlement Agreement.

The Prisoners moved to enforce the Settlement Agreement. They contended that California breached the Settlement Agreement when it transferred some prisoners from Security Housing to General Population but did not give those prisoners increased out-of-cell time. The Prisoners also said that California broke the Settlement Agreement when it limited another inmate group's direct physical contact during yard time.

The district court granted the Prisoners' motions to enforce. California appealed. We hold that California did not violate the Settlement Agreement and reverse.

I.

A.

For many years, California housed gang members and associates in Security Housing Units ("Security Housing"),

a type of solitary confinement. In many cases, California based this Security Housing placement solely on the prisoner's gang affiliation.[1]

In December 2009, Plaintiff Prisoners sued in a prisoner civil rights action challenging this policy and the conditions in the Pelican Bay Security Housing Unit. In September 2012, the Prisoners filed a second amended complaint raising class claims on behalf of other inmates at Pelican Bay.

In August 2015, the parties settled the case. While the Settlement Agreement included many reforms, only two substantive sections of the Settlement Agreement are relevant to this case.

First, in Paragraph 25, California agreed to review the cases of inmates in Security Housing and transfer these inmates from solitary confinement to "a General Population level IV 180-design facility."

Second, in Paragraph 28, the parties agreed to a new type of housing: Restricted Custody General Population ("Restricted Custody"). The parties intended Restricted Custody to house inmates who, for their own safety, could not be safely housed in the general population.

In the Settlement Agreement, California agreed to provide these Restricted Custody inmates "increased opportunities for positive social interaction . . . including . . . yard/out of cell time commensurate with Level IV [General

[1] *See Griffin v. Gomez*, 741 F.3d 10, 12 (9th Cir. 2014) (describing California's housing policy for gang-affiliated inmates).

Population] in small group yards, in groups as determined by the Institution Classification Committee."

The district court approved the Settlement Agreement in January 2016.

B.

After the Settlement Agreement, California began implementing the Settlement Agreement's policy reforms. California moved most Security Housing gang members to general population.

For threatened inmates, California created the Restricted Custody housing units and instituted new security policies for that unit. When an inmate arrives at Restricted Custody, California places them on "walk-alone" status to observe their interaction with other Restricted Custody inmates. After staff observation and evaluation, staff reach out to groups within Restricted Custody to ask if those groups would accept the new inmate and would commit to avoid trouble with the new inmate. If both the inmate and the group agree to avoid problems, the prison places the inmate with the compatible group. But some inmates remain on walk-alone status indefinitely because no compatible group has agreed to accept the inmate.

Inmates on walk-alone status have more restricted opportunities for physical contact with other inmates when on yard time. Walk-alone status inmates go to fenced individual yards that are twenty-feet long by ten-feet wide. Other yards adjoin the walk-alone yards and walk-alone inmates can interact with other walk-alone inmates or groups through the fences.

Walk-alone inmates also have more restricted access to leisure-time activities and social interaction. While in the day room, walk-alone status inmates can speak with inmates in front of their cells but cannot be released into the group. However, walk-alone inmates do have regular access to phones, visitors, and educational programming.

C.

In October 2017, the Prisoners filed two motions to enforce the Settlement Agreement.

In the first motion, the Prisoners claimed California violated Paragraph 25 of the Settlement Agreement. The Prisoners argued that some of the individuals transferred from Security Housing to the General Population were "spending the same or *more* time isolated in their cells." The Prisoners contended that the Settlement Agreement required transfer to "General Population" conditions and claimed the Settlement Agreement required Defendant "to . . . provide sufficient yard, day room, programming, jobs, and other means of social interaction and environmental stimulation to meet the obligation of housing these class members in actual general population conditions."

In the second motion, the Prisoners argued that California violated Paragraph 28 of the Settlement Agreement. The Prisoners reasoned that prisoners on walk-alone status do not receive access to increased opportunities for positive social interaction even compared to the former Security Housing. The Prisoners argued that the walk-alone conditions differ from those suggested in the Settlement Agreement and that California breached the settlement agreement.

The district court referred both motions to a magistrate judge under 28 U.S.C. § 636(b)(1)(B). In March 2018, the magistrate judge recommended that both motions be denied. About two weeks later, the Prisoners moved for the district judge to review the motions' recommended denials.

In July 2018, the district court rejected the magistrate judge's recommendations and granted Plaintiffs' two motions to enforce the Agreement. California then timely appealed both orders.

In December 2018, the district court adopted remedial plans, but stayed enforcement of the plans pending this appeal. California then amended its appeal to include the district court's orders adopting the remedial plans. On appeal, California argues that it breached neither Paragraph 25 nor 28.[2]

II.

Under California law,[3] "[a] settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts."[4]

[2] California also argues the district court committed error when adopting the remedial plans. But because we hold that California did not breach the Settlement Agreement and vacate the remedial orders, California's arguments are now moot.

[3] The Settlement Agreement includes a choice-of-law clause requiring application of California law.

[4] *Monster Energy Co. v. Schechter*, 444 P.3d 97, 102 (Cal. 2019) (internal quotation marks and citation omitted).

We review the interpretation of a settlement contract de novo.[5] "We defer to any factual findings made by the district court in interpreting the settlement agreement unless they are clearly erroneous."[6]

"We review the district court's enforcement of a settlement agreement for abuse of discretion."[7] Under this standard, "we will reverse only if the district court made an error of law, or reached a result that was illogical, implausible, or without support in the record."[8]

III.

A.

The Prisoners argue that California violated Paragraph 25 of the Settlement Agreement by placing some class members into housing where they receive less out-of-cell time than they received in Security Housing.

California does not contest the district court's finding that some inmates receive limited out-of-cell time. Instead, California argues that Paragraph 25 requires inmate transfer from Security Housing to General Population but does not control General Population conditions. We agree.

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[5] *Parsons v. Ryan*, 912 F.3d 486, 495 (9th Cir. 2018) (citation omitted).

[6] *Id*. (quoting *City of Emeryville v. Robinson*, 621 F.3d 1251, 1261 (9th Cir. 2010)).

[7] *Id*. (citing *Wilcox v. Arpaio*, 753 F.3d 872, 875 (9th Cir. 2014)).

[8] *Id*. (citing *United States v. Hinkson*, 585 F.3d 1247, 1261–63 (9th Cir. 2009)).

"The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties."[9] "[I]n the absence of fraud or mistake, the intention of the parties as expressed in the agreement is controlling, and courts are not empowered under the guise of construction or explanation to depart from the plain meaning of the writing and insert a term or limitation not found therein."[10]

The plain meaning of the Settlement Agreement controls here. Paragraph 25 provides that certain eligible inmates "shall be released from [Security Housing] and transferred to a General Population level IV 180-design facility, or other general population institution consistent with his case factors."

Paragraph 25 only requires that California transfer inmates out of Security Housing to a different facility. Paragraph 25 does not limit California's discretion regarding out-of-cell time for the inmates removed from Security Housing to General Population.

With this action, the Prisoners principally challenged their continued solitary confinement in Security Housing based only on gang affiliation. Having negotiated their solitary confinement release, the Prisoners do not point to any settlement language requiring any specific out-of-cell time. California made no agreement regarding the out-of-cell conditions for inmates leaving Security Housing for General Population under the settlement.

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[9] *State of California v. Cont'l Ins. Co.*, 281 P.3d 1000, 1004 (Cal. 2012) (internal quotation marks and citations omitted).

[10] *Tanner v. Title Ins. & Trust Co.*, 129 P.2d 383, 389 (Cal. 1942) (citation omitted).

Elsewhere in the Settlement Agreement, the parties showed that they knew how to negotiate conditions. Paragraph 29 requires 20 hours of out-of-cell time for inmates remaining in Security Housing after the Settlement Agreement. The parties failed to include any similar Paragraph 25 out-of-cell requirement for inmates transferred from Security Housing to the general population.

We therefore conclude that California has complied with Paragraph 25's requirements.

B.

1.

The Prisoners argue that Paragraph 28 of the Settlement Agreement requires California to provide Restricted Custody inmates on walk-alone status with small group yard-time and other group activities.

Paragraph 28 states:

> Programming for those inmates transferred to or retained in the Restricted Custody Group will be designed to provide increased opportunities for positive social interaction with other prisoners and staff, including but not limited to: Alternative Education Program and/or small group education opportunities; yard/out of cell time commensurate with Level IV GP in small group yards, in groups as determined by the Institution Classification Committee; . . . and leisure time activity groups.

Two aspects of Paragraph 28 undercut the Prisoners' argument. First, the paragraph strikes an aspirational tone by stating that the programming "will be designed to provide increased opportunities for positive social interaction." This is not, as the Prisoners contend, a strict requirement that there will be more social interaction, but instead a programming goal.

Second, Paragraph 28 refers to "small group yards" but does not say how many, or if any, other prisoners need be in the same group yard. Further, the paragraph gives the Institutional Classification Committee power to determine the groups. The plain meaning of this clause suggests the parties intended to give the Institutional Classification Committee discretion to limit the number of inmates in a small group yard. The Prisoners cannot now complain about how the Institutional Classification Committee has exercised that discretion.

2.

Paragraph 28 does not require California to do more than it already has for inmates in Restricted Custody. But even if it did, the breach would not be actionable because California has substantially complied with Paragraph 28's requirements.

As relevant here, the Prisoners argue that California failed to "substantially compl[y]" and that the breach is therefore actionable under Paragraph 53 of the Settlement Agreement. We disagree.

A party's substantial compliance with a contract "depends primarily on whether [that party] has realized the

contemplated benefits from [the contract]."[11] "[I]n California a party is deemed to have substantially complied with an obligation only where any deviation is 'unintentional and so minor or trivial as not substantially to defeat the object which the parties intend to accomplish.'"[12]

Most inmates in Restricted Custody have access to the activities enumerated in Paragraph 28. They can also have meetings with teachers (through cell doors), job assignments, phone calls, and contact and no-contact visits. And although those inmates on walk-alone status may have limited physical contact with other inmates while in group activities or in the yard, they are still able to interact. Given the institution's safety concerns, these limitations are only minor deviations from Paragraph 28's requirements.

IV.

For these reasons, we reverse the district court's ruling that California violated the Settlement Agreement, vacate the district court's remedial orders, and remand for further proceedings consistent with this opinion.

REVERSED, VACATED, AND REMANDED. **THE PARTIES SHALL BEAR THEIR OWN COSTS.**

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[11] *Cline v. Yamaga*, 158 Cal. Rptr. 598, 603 (Ct. App. 1979).

[12] *Rouser v. White*, 825 F.3d 1076, 1082 (9th Cir. 2016) (quoting *Wells Benz, Inc. v. United States*, 333 F.2d 89, 92 (9th Cir. 1964)). "The determination[] of whether there was a breach of contract . . . [is a] question[] of fact," *Ash v. N. Am. Title Co.*, 168 Cal. Rptr. 3d 499, 506 (Ct. App. 2014), which we review for clear error. *Jeff D. v. Otter*, 643 F.3d 278, 283 (9th Cir. 2011).

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