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15 UNITED STATES DISTRICT COURT  
16 EASTERN DISTRICT OF CALIFORNIA

17 ROBERT MITCHELL, *et al.*,  
18 *Plaintiffs,*

19 v.

20 TOM FELKER, *et al.*,  
21 *Defendants.*

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

**BRIEF OF AMICI CURIAE IN  
SUPPORT OF PLAINTIFFS'  
MOTION FOR A PRELIMINARY  
INJUNCTION**

[Filed Concurrently With Motion for  
Leave to File Amici Curiae Brief]

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- (Amici list, continued)
- ASIAN AMERICANS ADVANCING JUSTICE – ASIAN LAW CAUCUS
- ASIAN AMERICANS ADVANCING JUSTICE – LA
- ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
- ASIAN PRISONER SUPPORT COMMITTEE
- CHINESE FOR AFFIRMATIVE ACTION
- EQUAL RIGHTS ADVOCATES
- IMPACT FUND
- LATINOJUSTICE PRLDEF
- LAWYERS’ COMMITTEE FOR CIVIL RIGHTS OF THE  
SAN FRANCISCO BAY AREA
- NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,  
BAKERSFIELD BRANCH
- NATIONAL CENTER FOR LESBIAN RIGHTS
- PICO NATIONAL NETWORK

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1 **I. CORPORATE DISCLOSURES**

2 Amici are non-profit corporations, operating under § 501(c)(3) of the Internal Revenue  
3 Code. None of the *amici* has a parent corporation or is a publicly held corporation.

4 **II. IDENTITY AND INTEREST OF AMICI CURIAE.**

5 This *amici curiae* brief is filed on behalf of the following organizations:

6 **A. Equal Justice Society (EJS).**

7 EJS is a national legal organization that works to promote equality. Through its law and  
8 public policy advocacy and strategic public communications, EJS builds alliances to combat  
9 discrimination and inequality in America. Race-based lockdown policies — which are based on  
10 implicit bias and structural racism — are a form of contemporary discrimination that have a  
11 disproportionately adverse effect on people of color in the prison system.

12 EJS is committed to promoting governmental policies that are necessary to remedy these  
13 disparities. Since its founding in 2000, EJS has either authored or joined more than 30 amicus  
14 briefs, including in *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013), *Grutter v.*  
15 *Bollinger*, 539 U.S. 306 (2003), *Coalition to Defend v. Regents of Univ. of Mich.*, 701 F.3d 466  
16 (6th Cir. 2012), *Associated Gen. Contractors v. Department of Transp.*, 713 F.3d 1187 (9th Cir.  
17 2013), and *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010).

18 EJS has organized and participated in numerous conferences and panels on implicit bias,  
19 race, and the law. EJS leaders have presented continuing legal education programs on implicit  
20 bias and the law to attorneys, judges, and other community leaders through nonprofit  
21 organizations, the Bar Association of San Francisco, and the ABA. EJS has participated in  
22 numerous statewide campaigns against the death penalty, juvenile incarceration, and  
23 discrimination.

24 The Washington State Supreme Court recently cited a law review article on implicit bias  
25 co-authored in 2008 by EJS President Eva Paterson and former staff members Kimberly Thomas  
26 Rapp and Sara Jackson. *Washington v. Saintcalle*, No. 86257-5, 2013 Wash. LEXIS 617 (Wash.  
27 Aug. 1, 2013) (asserting that the *Batson* procedures for challenging race discrimination in jury  
28

1 selection were not “robust enough,” since “a growing body of evidence shows that racial  
2 discrimination remains rampant in jury selection”).

3 **B. Asian Americans Advancing Justice – Asian Law Caucus**  
4 **(Advancing Justice – ALC).**

5 Founded in 1972, Advancing Justice – ALC is the nation’s first legal and civil rights  
6 organization serving the low-income Asian Pacific American communities. Advancing Justice –  
7 ALC focuses on housing rights, immigration and immigrants’ rights, labor and employment  
8 issues, student advocacy, civil rights and hate violence, national security, and criminal justice  
9 reform. The organization also helps set national policies in affirmative action, voting rights,  
10 Census and language rights.

11 The mission of Advancing Justice – ALC is to promote, advance, and represent the legal  
12 and civil rights of Asian and Pacific Islander communities. Recognizing that social, economic,  
13 political and racial inequalities continue to exist in the United States, Advancing Justice – ALC is  
14 committed to the pursuit of equality and justice for all sectors of our society with a specific focus  
15 directed toward addressing the needs of low-income, immigrant, and underserved Asian and  
16 Pacific Islanders.

17 **C. Asian Americans Advancing Justice - Los Angeles**  
18 **(Advancing Justice - LA)**

19 Advancing Justice – LA is the nation’s largest legal and civil rights organization for Asian  
20 Americans, Native Hawaiians, and Pacific Islanders. Advancing Justice – LA is committed to  
21 challenging racial discrimination and advocating for equal opportunity for women and people of  
22 color. Advancing Justice – LA has successfully litigated cases challenging English-only policies  
23 by cities and employers as well as racially discriminatory employment practices and education  
24 policies.

25 **D. Asian American Legal Defense and Education Fund (AALDEF).**

26 Founded in 1974, AALDEF is a national organization that protects and promotes the civil  
27 rights of Asian Americans. By combining litigation, advocacy, education, and organizing,  
28 AALDEF works with Asian American communities across the country to secure human rights for

1 all. The use of race-based lockdowns threatens the constitutional rights of Asian Americans and  
2 all Americans.

3 **E. Asian Prisoner Support Committee (APSC).**

4 Founded in 2001, APSC provides support to Asian & Pacific Islander (API) prisoners and  
5 seeks to educate the broader community about the growing number of APIs in the U.S. being  
6 imprisoned, detained, and deported. APSC is based in Oakland and works primarily with inmates  
7 at San Quentin and Solano state prisons, as well as the reentry population in San Francisco and  
8 Alameda counties. APSC is part of the Asian Americans for Civil Rights and Equality initiative,  
9 founded by Chinese for Affirmative Action. APSC is one of the only organizations in the nation  
10 with a mission to provide culturally competent services and support for API prisoners and former  
11 prisoners. APSC staff and members have over 30 years of experience working with prisoners and  
12 formerly incarcerated men.

13 **F. Chinese for Affirmative Action (CAA).**

14 CAA was founded in 1969 to protect the civil and political rights of Chinese Americans  
15 and to advance multiracial democracy in the United States. Today, CAA is a progressive voice in  
16 and on behalf of the broader Asian and Pacific American community. CAA advocates for  
17 systemic change that protects immigrant rights, promotes language diversity, and remedies racial  
18 injustice. CAA combats multiple forms of racism and racial hierarchy. This includes speaking  
19 out against harmful stereotypes, identifying and addressing discrimination, and advancing  
20 policies that promote racial and ethnic inclusion and equity.

21 **G. Equal Rights Advocates (ERA).**

22 ERA is a national civil rights advocacy organization dedicated to protecting and  
23 expanding educational access and economic opportunity for women and girls. Since its inception  
24 in 1974, ERA has litigated high-impact cases to establish and enforce civil rights laws and  
25 protections at the state and federal levels, from the trial stage up to and including appeals to the  
26 United States Supreme Court. ERA also promotes equity and economic justice through policy  
27 and legislative advocacy, public education, and community outreach. Through its national, toll-  
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1 free Advice and Counseling service, ERA assists hundreds of women each year facing  
2 discrimination and other legal issues at work and in school.

3 **H. Impact Fund.**

4 Founded in 1992, the mission of the Impact Fund is to provide support for impact  
5 litigation to achieve economic and social justice. The Impact Fund provides grants, technical  
6 support, and training on issues that arise in impact litigation, particularly class action litigation,  
7 and serves as co-counsel and amicus counsel in select class action and impact litigation. The  
8 Impact Fund currently serves as co-counsel in several class actions seeking to end discriminatory  
9 practices based on national origin, gender, and disability. These cases include: *Parra v. Bashas’*  
10 *Inc.*, No. 02-0591-RCB (D. Ariz.) (national origin discrimination in hourly pay); *Ellis v. Costco*  
11 *Wholesale Corp.*, No. 04- 3341 EMC (N.D. Cal.) (gender discrimination in promotions); *Moeller*  
12 *v. Taco Bell Corp.*, No. 02-5849 PJH (N.D. Cal.) (access for mobility impaired customers); and  
13 *Dukes v. Wal-Mart Stores, Inc.*, No. 01-2252 (N.D. Cal.) (gender discrimination in pay and  
14 promotion).

15 **I. LatinoJustice PRLDEF.**

16 LatinoJustice PRLDEF, formerly known as the Puerto Rican Legal Defense & Education  
17 Fund, is a national not-for-profit civil rights organization that has advocated for and defended the  
18 constitutional rights and the equal protection of all Latinos under the law. Since being founded in  
19 1972, LatinoJustice PRLDEF’s continuing mission is to promote the civic participation of the  
20 greater pan-Latino community in the United States, to cultivate new Latino community leaders,  
21 and to engage in and support law reform impact litigation across the country addressing basic  
22 civil rights in the areas of criminal justice, education, employment, fair housing, immigrants’  
23 rights, language rights, redistricting and voting rights. During its 41-year history, LatinoJustice  
24 PRLDEF has litigated numerous cases in both state and federal courts across the United States  
25 challenging multiple forms of discrimination, and has sought to ensure that Latinos are not  
26 unfairly impacted by discriminatory policies and practices.

1           **J.       Lawyers’ Committee for Civil Rights of the**  
2                           **San Francisco Bay Area (the Lawyers’ Committee).**

3           The Lawyers’ Committee is a civil rights and legal services organization, established in  
4           1968 by leading members of the private bar in San Francisco. The Lawyers’ Committee is  
5           dedicated to advancing, protecting and promoting the rights of communities of color, immigrants  
6           and refugees, and other underrepresented persons. The Lawyers’ Committee has successfully  
7           litigated numerous cases challenging governmental policies and practices that are racially  
8           discriminatory in their purpose or effect.

9           **K.       National Association for the Advancement of**  
10                           **Colored People, Bakersfield Branch (NAACP).**

11           The mission of the NAACP is to ensure the political, educational, social, and economic  
12           equality of rights of all persons and to eliminate race-based discrimination. The vision of the  
13           NAACP is to ensure a society in which all individuals have equal rights without discrimination  
14           based on race. For 100 years the NAACP has been both a beacon and a refuge for American  
15           citizens in search of freedom, justice, and equality. In its original call to action, the founders of  
16           the NAACP declared that “Discrimination once permitted cannot be bridled. . . . We call upon all  
17           the believers in democracy to join in a national awareness of present evils, the voicing of protests,  
18           and the renewal of the struggle for civil and political liberty.” Answering the call inspired by  
19           those words is just as vital and necessary to the future of America. Heading into the 21st century,  
20           the NAACP is focused on disparities in economics, health care, education, voter empowerment  
21           and the criminal justice system while continuing its role as legal advocate for civil rights issues.

22           **L.       National Center for Lesbian Rights (NCLR).**

23           NCLR is a national non-profit law firm with headquarters in San Francisco and an office  
24           in Washington, D.C. NCLR seeks legal protection for lesbian, gay, bisexual, and transgender  
25           (LGBT) people, including LGBT prisoners, through impact litigation, public policy advocacy,  
26           public education, direct legal services, and collaboration with other social justice organizations  
27           and activists. Each year, NCLR serves more than 500 people in California, and more than  
28           5,000 people in all 50 states.

1           **M.     PICO National Network (PICO).**

2           PICO is a national network of faith-based community organizations working to create  
3 innovative solutions to problems facing urban, suburban and rural communities. Since 1972,  
4 PICO has successfully worked to increase access to health care, improve public schools, make  
5 neighborhoods safer, build affordable housing, redevelop communities and revitalize democracy.

6           Through its “Lifelines to Healing Campaign,” PICO works to address the causes of  
7 pervasive violence and crime in our communities. PICO believes that the criminalization and  
8 mass incarceration of people of color, coupled with the lack of meaningful and quality  
9 opportunities, have contributed to a state of crisis in our country. “Lifelines to Healing” is  
10 committed to advocating for policies and resources that contribute to the healing of our  
11 communities.

12           **III.     INTRODUCTION.**

13           Plaintiffs seek a preliminary injunction to stop the California Department of Corrections  
14 and Rehabilitation’s use of race-based lockdowns in California prisons. In response to violent  
15 incidents, the Department places entire racial or ethnic groups in lockdowns that can last from a  
16 months to years, rather than identifying individual participants or gang members. (Pls. Mot. at 3,  
17 5.) Because this policy places inmates in lockdown based solely on their race or ethnicity — and  
18 without regard to their actual violence or actual gang membership — the policy is not narrowly  
19 tailored to withstand strict scrutiny.

20           From the 1940’s through the 1960’s, California’s prisons focused on rehabilitation and  
21 correctional goals, serving as a model for other state correctional systems. Joan Petersilia,  
22 *California’s Correctional Paradox of Excess and Deprivation*, 37 *Crime & Just.* 207, 210 (2008).  
23 In the 1970’s, with the advent of mandatory minimum sentences and longer terms, the focus  
24 shifted to punishment. *Id.* Prison population rates skyrocketed. *Id.* at 211.

25           Now, under the guise of controlling violence in overpopulated prisons, the Department  
26 engages in lengthy race-based lockdowns, but as Plaintiffs have shown, the Department’s policy  
27 cannot survive strict scrutiny. Protecting the safety of prisoners and prison employees is certainly  
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1 a compelling state interest, but that fact has nothing to do with the Department's undifferentiated  
2 and sweeping race-based generalizations.

3 For its part, the Department has not suggested that it ever considered race-neutral means  
4 to protect prisoners or prison employees, and it certainly has not shown that race-based  
5 lockdowns are the least restrictive means to reach its goal.<sup>1</sup> The fact that California is the only  
6 state using race-based lockdowns demonstrates that there are other successful ways to control  
7 violent incidents in prison.

8 By demonstrating that race-based segregation within prison systems does not reduce  
9 violence, social science research casts doubt on the assumptions underpinning the Department's  
10 race-based lockdown policy. See Chad Trulson & James W. Marquart, *The Caged Melting Pot:  
11 Toward an Understanding of the Consequences of Desegregation in Prisons*, 36 Law & Soc'y  
12 Rev. 743, 774 (2002). Indeed, the Department's policy perpetuates patterns of invidious and  
13 implicit bias and threatens to harm the criminal justice system as a whole.

#### 14 **IV. ARGUMENT.**

##### 15 **A. Because race-based lockdowns segregate prisoners according 16 to race and ethnicity, they are subject to strict scrutiny.**

17 Racial and ethnic distinctions *of any sort* are inherently suspect, and pass constitutional  
18 muster only when narrowly tailored to further compelling governmental interests. *Regents of  
19 University of Cal. v. Bakke*, 438 U.S. 265, 291 (1978); see also *Adarand Constructors, Inc. v.  
20 Pena*, 515 U.S. 200, 227 (1995); *Shaw v. Reno*, 509 U.S. 630, 650 (1993).

21 In *Johnson v. California*, the United States Supreme Court criticized the Department's  
22 policy of racially segregating prison cells for 60 days when prisoners enter new facilities, and

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23 <sup>1</sup> Nothing has changed since the Supreme Court rejected the Department's arguments in  
24 *Johnson v. California*, 543 U.S. 499 (2005). In *Johnson*, where the Department tried to defend its  
25 policy of race-based segregation for new prisoners, it claimed that policy was necessary because  
26 prison gangs dominate prison culture, fuel prison violence, and operate along racial lines and, as a  
27 result, racial segregation is necessary to prevent violence. Respondent's Brief, *Johnson v.  
28 California*, 2004 U.S. S. Ct. Briefs LEXIS 475, at \*9-15 (2004); compare *Johnson v. California*,  
Respondent's Brief (2004) at \*9-15, with Defs. Opp. at 4-14. Although the Supreme Court  
rejected those arguments, the Department recycles them here. They should again be rejected.

1 remanded the case for a determination of whether the policy was narrowly tailored to satisfy a  
2 compelling governmental need — rejecting outright the Department’s claim that the policy was  
3 necessary to prevent gang-related violence. 543 U.S. 499, 514-15 (2005).

4 To justify the use of racial classifications in response to prison disturbances, prison staff  
5 must show “that reasonable men and women could not differ regarding the necessity of a racial  
6 classification in response to prison disturbances and that the racial classification was the least  
7 restrictive alternative (*i.e.*, that any race-based policies are narrowly tailored to legitimate prison  
8 goals).” *Richardson v. Runnels*, 594 F.3d 666, 671 (9th Cir. 2010).<sup>2</sup>

9 **B. The use of race as a proxy for gang affiliation**  
10 **cannot survive strict scrutiny review.**

11 Policies using race instead of individual assessments do not satisfy strict scrutiny.  
12 *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 313-14 (2003) (permitting programs that engage in a  
13 highly individualized, holistic review of each applicant’s file while denouncing programs that  
14 automatically categorize applicants based on race); *Johnson*, 543 U.S. at 507 (prison officials  
15 have the burden of demonstrating that the policy is narrowly tailored); *Floyd v. City of New York*,  
16 08 Civ. 1034 (SAS), 2013 WL 4046217, at \*2 (S.D.N.Y. Aug. 12, 2013) (requiring  
17 individualized suspicion for stops and frisks because “[e]liminating the threat that blacks and  
18 Hispanics will be targeted . . . is also an important interest”); *Melendres v. Arpaio*, No. PHX-CV-  
19 07-02513-GMS, 2013 WL 2297173, at \*69 (D. Ariz. May 24, 2013) (requiring individualized  
20 suspicion and holding that the Sheriff’s Department violated the Equal Protection Clause by using  
21 Hispanic ancestry or race as a factor in forming reasonable suspicion of violating immigration  
22 laws).

23 The Department offers no evidence to show that race is a viable proxy for gang affiliation.

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24 <sup>2</sup> Although gang membership has a significant impact on an inmate’s propensity for  
25 violence or disruptive behavior, there is no evidence that racial or ethnic identity increases the  
26 likelihood of gang membership or that segregation decreases violence. *See* Mark S. Fleisher, et al.,  
27 *An Overview of the Challenge of Prison Gangs*, 2 Corrections Management Quarterly 1, 6-7  
28 (2001) (gang members were twice as likely to have “more than five rule violations, were more  
likely to violate drug use sanctions, were more likely to fight, and were less likely to be involved  
in treatment programs”).

1 To the contrary, the Department admits it has identified less than 10 percent of its inmate  
2 population as gang-affiliated — but insists it is entitled to rely on race as an identifier because  
3 gangs “primarily form along racial lines.” (Defs. Opp. at 7-8.) This is a blatant admission of  
4 racial stereotyping — a belief that, although only 10 percent of the prison population has a  
5 confirmed gang affiliation, the fact that gangs form along racial lines means that all minority  
6 inmates must have a gang affiliation.

7 The Department relies on an unsubstantiated hypothetical situation where “a group of a  
8 certain race requires everybody of that race, whether they are in the [gang] or not, to assault  
9 everyone else of another race.” (*Id.* at 14.) Using race as a proxy for gang membership is  
10 unsupported by any empirical evidence, constitutionally impermissible, and harmful. *See*  
11 *Johnson*, 543 U.S. at 517-18 (Stevens, J., dissenting) (under the Department’s “policy’s logic, an  
12 inmate’s race is a proxy for gang membership, and gang membership is a proxy for violence,”  
13 notwithstanding that the Department “has offered scant empirical evidence or expert opinion to  
14 justify this use of race”); *see also* Linda S. Beres et al., *Demonizing Youth*, 34 Loy. L.A. L. Rev.  
15 747, 763, 765 (2001) (the close association of gang membership and minority status permits  
16 politicians to play the race card indirectly so that gangs becomes a proxy for race; “[t]he  
17 demonization of . . . young minority males fosters abusive police behavior, reinforces racial  
18 stereotypes and prevents the adoption of cost-effective, nonpunitive methods of reducing crime”).

19 **C. This Court should take an active role in**  
20 **eliminating racism in California’s prisons.**

21 More than fifty years ago, the Supreme Court recognized that “the policy of separating the  
22 races is usually interpreted as denoting the inferiority” of the minority group. *Brown v. Board of*  
23 *Education*, 347 U.S. 483, 494 (1954). Today, almost twenty years after the Supreme Court  
24 acknowledged that the “unhappy persistence of both the practice and lingering effects of racial  
25 discrimination against minority groups in this country is an unfortunate reality,” *Adarand*,  
26 515 U.S. at 237, systemic discrimination continues to contribute to inequities in education,  
27 housing, and other systems forming a web of interrelated barriers perpetuating inequality.

1 See Kirwan Institute for the Study of Race and Ethnicity, *State of the Science Implicit Bias*  
2 *Review 2013* at 3, 47 (describing inequities in housing and healthcare). Nowhere are these  
3 structural barriers more apparent than in prison systems, where the overrepresentation of  
4 minorities contributes to a perception that the criminal justice system unfairly burdens non-white  
5 populations.

6 Despite the Supreme Court’s mandate to continue “unceasing efforts to eradicate racial  
7 prejudice from our criminal justice system,” *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987), racial  
8 disparities persist in the American prison system. See generally David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System*, 1 Conn. Pub. Int’l L. J. 19, 23-25  
9 (2001). Three of every four men in California’s prisons are people of color. Public Policy  
10 Institute of California, *California’s Changing Prison Population* (June 2013); see also Sharon  
11 Dolovich, *Incarceration American Style*, 3 Harv. L. & Pol’y Rev. 237, 256 (2009); Loïc  
12 Wacquant, *The New ‘Peculiar Institution’: On the Prison as Surrogate Ghetto*, 4 Theoretical  
13 Criminology 377, 384 (2000) (today’s “black ghetto,” together with contemporary American  
14 prisons, “constitute a single *carceral continuum* which entraps a redundant population of younger  
15 black men (and increasingly women) who circulate in closed circuit between its two poles in a  
16 self-perpetuating cycle of social and legal marginality with devastating personal and social  
17 consequences”).

18  
19 More “than two-thirds of persons convicted of offenses in federal courts, and nearly three-  
20 quarters of federal prisoners are either black or Hispanic.” American Bar Association, *Criminal*  
21 *Justice System Improvements* 5 (2008). Although African American youth comprise  
22 approximately 15 percent of their age group in the American population, they represent about  
23 40 percent of all incarcerated juveniles. Sandra Graham & Brian S. Lowery, *Priming*  
24 *Unconscious Racial Stereotypes about Adolescent Offenders*, 28 Law & Hum. Behav. 483, 483-  
25 84 (2004). More broadly, although African Americans make up 13 percent of the U.S.  
26 population, almost 40 percent of United States inmates are African American. See U.S. Census  
27 Bureau, State & County QuickFacts, available at <http://quickfacts.census.gov/qfd/states/00000.html>  
28 (last visited Sept. 25, 2013); U.S. Dep’t of Justice, Bureau of Justice Statistics, *Prisoners in*

1 2010, at 26 tbl.12 (Dec. 2011), available at <http://www.bjs.gov/content/pub/pdf/p10.pdf>  
2 (estimating that of 1,550,600 people behind bars in 2010, 561,400 were African American men  
3 and 26,600 were African American women). Latinos are also overrepresented in the American  
4 prison system — although they constitute only 16 percent of the U.S. population, they make up  
5 more than 22 percent of the people behind bars in the United States. See U.S. Census Bureau,  
6 State & County QuickFacts, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Sept.  
7 25, 2013); Bureau of Justice Statistics, *Prisoners in 2010*, at 26 tbl.12 (estimating that of  
8 1,550,600 people incarcerated in 2010, 327,200 were Latino men and 18,700 were Latino  
9 women).<sup>3</sup>

10 These statistics show that minorities serve longer sentences, have higher arrest and  
11 conviction rates, and face higher bail amounts than whites. David Cole, *No Equal Justice*, 1  
12 Conn. Pub. Int'l L. J. at 23; see also Robert J. Smith, et al., *The Impact of Implicit Racial Bias on*  
13 *the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795, 795 (2012); U.S. Sentencing  
14 Commission, *Booker Report 2012 Part E* at 2, available at [http://www.ussc.gov/Legislative\\_and\\_](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_E.pdf)  
15 [Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Booker\\_Reports/2012\\_Booker/Part\\_E.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_E.pdf)  
16 [f#page=1](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_E.pdf) (finding that African American men receive sentences 20 percent longer than white  
17 male defendants who are similarly situated); The Sentencing Project, *The Federal Prison*  
18 *Population: A Statistical Analysis 2*, available at [http://www.sentencingproject.org/Admin/](http://www.sentencingproject.org/Admin/Documents/publications/inc_federalprisonpop.pdf)  
19 [Documents/publications/inc\\_federalprisonpop.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_federalprisonpop.pdf) (“African American drug offenders have a  
20 20% greater chance [than whites] of being sentenced to prison . . . . In 2002, the average prison  
21 term of 105 months for African Americans was 69% longer than the average of 62 months for  
22 whites”).

23 And the disparate impact of the criminal justice system on minorities is increasing.

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25 <sup>3</sup> In California, the racial disparities are similarly stark. In 2010, African Americans made  
26 up 29 percent of the total prison population, and Latinos made up 39.9 percent of the prison  
27 population. Cal. Dep't of Corrections and Rehabilitation, *California Prisoners and Parolees*  
28 *2010*, (2011) at 21, available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2010.pdf)  
[\\_Services\\_Branch/Annual/CalPris/CALPRISd2010.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2010.pdf).

1 See, e.g., Cal. Dep't of Corrections and Rehabilitation, *Historical Trends, 1987-2007*, at 2a,  
2 available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch)  
3 /Annual/HIST2/HIST2d2007.pdf (noting that as of 2007, the Hispanic prison population had  
4 risen by 10.5 percent in the preceding 21 years).

5 **1. Racial discrimination damages the legitimacy**  
6 **and integrity of the criminal justice system.**

7 As *Johnson* explains, “public respect for our system of justice is undermined when the  
8 system discriminates based on race.” *Johnson*, 543 U.S. at 511-12 (“compliance with the  
9 Fourteenth Amendment’s ban on racial discrimination . . . bolsters the legitimacy of the entire  
10 criminal justice system”); see, e.g., Linda S. Beres, et al., *Demonizing Youth*, 34 Loy. L.A. L.  
11 Rev. at 763 (2001) (finding that minorities are twice as likely to believe that police do not treat all  
12 racial and ethnic groups fairly). “When government officials are permitted to use race as a proxy  
13 for gang membership and violence without demonstrating a compelling government interest and  
14 proving that their means are narrowly tailored, society as a whole suffers.” *Johnson*, 543 U.S.  
15 at 511.

16 **2. Race-based lockdowns perpetuate**  
17 **racial stereotypes and biases.**

18 Courts have recognized the harm that can result from the combination of implicit racial  
19 bias and racial segregation. *Georgia v. McCollum*, 505 U.S. 42, 68 (1992) (O’Connor, J.,  
20 dissenting) (“It is by now clear that conscious and unconscious racism can affect the way white  
21 jurors perceive minority defendants and the facts presented at their trials, perhaps determining the  
22 verdict of guilt or innocence . . . [M]inority representation on the jury may help to overcome such  
23 racial bias, for there is substantial reason to believe that the distorting influence of race is  
24 minimized on a racially mixed jury”); *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144,  
25 173 (1977) (Brennan, J., concurring in part) (“an explicit policy of assignment by race may serve  
26 to stimulate our society’s latent race consciousness, suggesting the utility and propriety of basing  
27 decisions on a factor that ideally [*sic*] bears no relationship to an individual’s worth or needs”).  
28

1           Recent social science research demonstrates that unconscious or implicit biases negatively  
2 influence decision-making and perception. *See, e.g.*, Jerry Kang, *Trojan Horses of Race*,  
3 118 Harv. L. Rev. 1489 (2005) (explaining the role of implicit bias in decision-making); Anthony  
4 G. Greenwald, et al., *Understanding and Using the Implicit Association Test*, 85 J. Personality &  
5 Soc. Psychol. 197 (2003). Such biases encourage the unconscious adoption of policies or  
6 behaviors that perpetuate racial and ethnic stereotypes by prompting people to automatically  
7 classify information in racially biased ways. *See* Kang, *Trojan Horses*, 118 Harv. L. Rev. at  
8 1520-21; *see also* Phillip Atiba Goff, et al., *Not Yet Human: Implicit Knowledge, Historical*  
9 *Dehumanization, and Contemporary Consequences*, 94 J. of Personality and Soc. Psychol. 292,  
10 294 (2008) (demonstrating that historical associations “influence[] the extent to which people  
11 condone and justify violence against [non-white] suspects”).

12           Empirical evidence demonstrates that these unconscious negative stereotypes affect all  
13 aspects of the criminal justice system and contribute to racial disparity. *See* Jerry Kang et al.,  
14 *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124, 1135-50 (2012) (documenting how  
15 implicit bias affects decision-makers during all stages of the justice process, including “policing,  
16 charging, bail, plea bargaining, pretrial motions, evidentiary motions, witness credibility, lawyer  
17 persuasiveness, guilt determination, sentencing recommendations, sentencing itself, [and]  
18 appeal”); Sandra Graham & Brian Lowrey, *Priming Unconscious Racial Stereotypes about*  
19 *Adolescent Offenders*, 28 Law & Hum. Behav. 483, 485-87 (2004). Police officers who associate  
20 African Americans with criminal activity are more likely to target unarmed African American  
21 suspects. *See* Jennifer L. Eberhardt, et al., *Seeing Black: Race, Crime, and Visual Processing*,  
22 87 J. of Personality and Soc. Psychol., 876, 889 (2004); Tracey G. Gove, *Implicit Bias and Law*  
23 *Enforcement*, *The Police Chief*, Oct. 2011, at 4. Prosecutors make different charging decisions  
24 and proceed with different pretrial and trial strategies depending on the race of the defendant.  
25 Kirwan Institute for the Study of Race and Ethnicity, *State of the Science Implicit Bias Review*  
26 *2013*, at 44; *see also* American Values Institute, *Transforming Perception: Black Men and Boys*  
27 (2013) at 9; Robert J. Smith et al., *The Impact of Implicit Racial Bias on the Exercise of*  
28 *Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795, 805 (2012). At the conviction phase, the

1 evidence demonstrates that the racial composition of a jury has a significant impact on conviction  
2 rates of minority defendants – in the absence of at least some representation of African Americans  
3 in a jury pool, African American defendants are substantially more likely to be convicted.

4 Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q. J. of Econ. 1017, 1048  
5 (2012). The realities of unconscious and implicit bias cannot be ignored by the justice system.

6 It is against this background — the disparate impact of the criminal justice system on  
7 minorities and the demonstrated effect of implicit bias — that an explicit policy of race-based  
8 lockdowns must be evaluated.

9 **D. California is the only state using race-based lockdowns.**

10 In *Johnson*, the Supreme Court noted that California’s prison system stood alone in  
11 segregating prisoners by race. *Johnson*, 543 U.S. at 509 n.2. The same is true here. (Pls. Reply  
12 at 11-12.) No other prison system in the country (state or federal) has a policy of race-based  
13 lockdowns. (*Id.* at 14; *see also* Declaration of Eldon Vail ¶ 23 [Vail Decl.] [Dkt. 188] [former  
14 Secretary of the Washington Department of Corrections noting that he had “never heard of any  
15 other prison system that imposes race based lockdowns”].)<sup>4</sup> Current and former prison  
16 administrators from prison systems outside of California agree that the practice is “astounding”  
17 and “reprehensible.” (Vail Decl. ¶ 27 [16 non-California current or former prison administrators  
18 consulted found California’s practice “astounding” and “reprehensible”].)

19 **1. The assumption underlying race-based lockdowns — that**  
20 **it is the only way to prevent more interracial violence — is**  
21 **contradicted by the empirical evidence and by the professional**  
22 **judgment of correction officials nationwide.**

23 The Supreme Court has repeatedly rejected unsubstantiated claims that racial  
24 classifications are necessary to serve a compelling governmental interest. For example, in  
25 evaluating a municipal program using racial classifications in the allocation of public contracts,  
26 the Court held that when the government “chooses to employ a suspect classification, it cannot

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27 <sup>4</sup> Declarations referenced in this brief are those submitted by Plaintiffs in support of their  
28 Motion for Preliminary Injunction.

1 rest upon a generalized assertion as to the classification’s relevance to its goals. [It] cannot render  
2 race a legitimate proxy for a particular condition merely by declaring that the condition exists.”  
3 *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500-01 (1989).

4 Amici are aware of no empirical evidence that would support the Department’s assertion  
5 that race-based lockdowns are the only means to address incidents of violence in prisons — and  
6 the Department has cited none. This lack of evidence stands in stark contrast to the Supreme  
7 Court’s observation that the racial segregation of inmates “threaten[s] to stigmatize individuals by  
8 reason of their membership in a racial group and to *incite racial hostility*. . . . [This practice]  
9 breed[s] further hostility among prisoners and reinforce[s] racial and ethnic divisions. By  
10 perpetuating the notion that race matters most, racial segregation of inmates may exacerbate the  
11 very patterns of [violence that it is] said to counteract.” *Johnson*, 543 U.S. at 507. This  
12 conclusion was premised, in part, on an amicus brief filed by six former senior state corrections  
13 officials explaining that California’s policies stemmed from “archaic assumptions about the  
14 relationship between racial integration of cells and interracial violence in prison — assumptions  
15 that are at odds with the latest empirical evidence on the subject and the current professional  
16 judgment of corrections officials nationwide.” Brief of Former State Corrections Officials as  
17 Amici Curiae in Support of Petitioner, *Johnson v. State of California*, No. 03-636, 2004 WL  
18 1261069, at \*1 (June 4, 2004). The same is true of the Department’s race-based lockdown  
19 policies.

20 According to a former state corrections officer, “[t]here is no legitimate penological  
21 reason to impose a lockdown on a racial or ethnic group[,]” and such lockdowns are “likely to  
22 have profound adverse consequences.” (Vail Decl. ¶¶ 23, 27 [Dkt. 188].) Instead of ameliorating  
23 racial tension and violence, race-based lockdowns “add to the culture of separation that breeds  
24 violence and resentment among the population. . . . [and] contribute[] to a subtle acceptance of  
25 the gang culture and empower[] the gangs to continue to influence the general population  
26 facilities in a negative way.” (McGrath Decl. ¶ 19 [Dkt. 190]; *accord* Vail Decl. ¶ 45 [Dkt. 188]  
27 [“the policy of segregating prisoners in cell assignments and imposing racial lockdowns fosters  
28 racial animosity and gang loyalty, laying the groundwork for the very behavior that the

1 lockdowns aim to prevent”]; Declaration of Craig Haney ¶¶ 64-65 [Haney Decl.] [Dkt. 189] [“To  
2 the extent that the heightened sensitivity to race is based in part on concerns over race-based  
3 prison gangs, the institutional investment in and constant use of racial categories is clearly  
4 counterproductive, as it seems to heighten the importance of racial differences and legitimize the  
5 racialized nature of the gangs . . . this kind of heavy-handed treatment actually serves as a  
6 powerful recruiting device for gangs” ]; *see also Johnson*, 543 U.S. at 507 (such policies “breed  
7 further hostility among prisoners and reinforce racial and ethnic divisions.”); *In re Morales*, 212  
8 Cal. App. 4th 1410, 1419 (2013) (finding the lockdown and segregation policies “resulted in a  
9 ‘culture of separation,’ which contributed to inter-racial violence”); Linda S. Beres et al.,  
10 *Demonizing Youth*, 34 Loy. L.A. L. Rev. at 764 (demonizing minorities can create a climate that  
11 fosters misconduct). No empirical evidence suggests such a policy is effective in decreasing gang  
12 violence — in fact, studies have shown just the opposite, that prison desegregation *reduces* prison  
13 violence. *See* Chad Trulson & James W. Margquart, *The Caged Melting Pot: Toward an*  
14 *Understanding of the Consequences of Desegregation in Prisons*, 36 Law & Soc’y Rev. 743, 774  
15 (2002).

16 **2. Race-neutral alternatives are available to ensure prison safety.**

17 The Department’s practices cannot withstand strict scrutiny because race-neutral  
18 alternatives are available to ensure prison safety and security. Individualized assessments are an  
19 available and practical substitute to the constitutionally impermissible (and potentially dangerous)  
20 practice of race-based lockdowns. (McGrath Decl. ¶¶ 25-27 [former Warden of California’s  
21 Pelican Bay State Prison noted that during his tenure as warden individualized assessments were  
22 successfully employed although his successor chose to revert to previous practices without  
23 explanation].) California’s status as the only state engaging in race-based lockdowns  
24 demonstrates that race-neutral alternatives are readily available — and that they work. (*See, e.g.*,  
25 Vail Decl. ¶ 88 [former Secretary of the Washington State Department of Corrections observed  
26 that prison systems should have “risk information on hand before an incident occurs” so that they  
27 can be used to identify inmates that are members of gangs as soon as violence breaks out, thereby  
28 avoiding broad-based lockdowns]); *see also* Christie Thompson, *Are California Prisons*

1 *Punishing Inmates Based on Race*, Pro Publica, Apr. 12, 2013 at 2 (UCLA law professor Sharon  
2 Dolovich has suggested that “identifying the ‘enforcers’ of such gangs would be a more effective  
3 deterrent to violence than locking down entire racial or ethnic groups”).

4 \* \* \*

5 Social science research establishes that implicit biases negatively impact racial minorities,  
6 particularly in the criminal justice system. A broad-based prison policy that segregates based on  
7 race reinforces racial stereotypes and “invidious discrimination.” Prohibiting race-based  
8 lockdowns is a small step on the path to eliminating the disparate impact of the criminal justice  
9 system on minorities.

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**V. CONCLUSION**

For all the foregoing reasons, the Equal Justice Society respectfully submits that the preliminary injunction sought by Plaintiffs should be granted.

Respectfully submitted,

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