



1 On January 13, 2017, Carmichael, proceeding pro se and *in forma pauperis*, filed  
2 a complaint asserting claims based on 42 U.S.C. § 1983. (ECF No. 1.) Shortly thereafter,  
3 he filed an Emergency Motion for a Temporary Restraining Order and Preliminary  
4 Injunction (“PI Motion”). (ECF Nos. 4, 5.)<sup>1</sup> The complaint was screened pursuant to 28  
5 U.S.C. 1915A, and Carmichael was allowed to move forward with the claims he listed in  
6 Counts I, II, and IV, which alleged deliberate indifference to his serious medical needs in  
7 violation of the Eight Amendment. (ECF No. 5.) Count I addresses Carmichael’s prostate  
8 condition and Counts II and IV deal with a spinal condition.

9 The details of Carmichael’s claims, which are summarized here, are spelled out in  
10 greater detail in the R&R.<sup>2</sup> Carmichael’s PI Motion is based on the allegations in Counts  
11 II and IV against Defendants Koehn, Wickham, Sablica, Famy, Weber, and Baca. In  
12 general, Carmichael alleges that he has serious neck and pack pain stemming from  
13 degenerative disc disease and advanced spinal stenosis — conditions with which he  
14 was diagnosed in 2013 and 2016 respectively. He alleges that Defendants have ignored  
15 a number of his requests for accommodation and treatment, and that their actions have  
16 caused him a great deal of pain and risked further deterioration of health. Carmichael  
17 asks the Court for an order barring Defendants from transporting him to another facility  
18 until a medical professional can determine whether transport would cause further harm  
19 to his back. He also asks for Defendants to arrange an examination by a qualified  
20 neurologist or orthopedic surgeon.

21 After reviewing the parties’ briefs and ordering supplemental briefing, the  
22 Magistrate Judge held a hearing on March 27, 2017. (ECF No. 40.) Based on the record  
23 and the arguments presented at the hearing, the Magistrate Judge determined that  
24 Carmichael had demonstrated a likelihood of success on the merits of his Eight  
25 Amendment deliberate indifference claim related to his spinal condition. The Magistrate

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27 <sup>1</sup>ECF No. 4 and ECF No. 5 are identical documents.

28 <sup>2</sup>Defendants have not objected to the Magistrate Judge’s summary of the claims  
and evidence presented, and the Court adopts those portions of the R&R in full.

1 Judge further determined that the rest of the preliminary injunction analysis weighed in  
2 Carmichael's favor and recommends granting Carmichael's request by issuing an order:  
3 (1) precluding Defendants from requiring Carmichael to lift anything greater than 10  
4 pounds, consistent with the current "lay-in order" in place, until and unless it is medically  
5 determined otherwise; and (2) require consultation with Carmichael's medical care  
6 providers regarding safe transport if Carmichael is transferred to another NDOC facility.  
7 (ECF No. 43 at 19-20.)

8 Defendants have objected to the Magistrate Judge's recommendation, and argue  
9 that he erred at each step of the preliminary injunction analysis. (ECF No. 46.)

### 10 **III. LEGAL STANDARD**

11 This Court "may accept, reject, or modify, in whole or in part, the findings or  
12 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party  
13 timely objects to a magistrate judge's report and recommendation, then the court is  
14 required to "make a *de novo* determination of those portions of the [report and  
15 recommendation] to which objection is made." 28 U.S.C. § 636(b)(1). In light of  
16 Defendants' objections, the Court has engaged in a *de novo* review to determine  
17 whether to adopt Magistrate Judge Cobb's recommendations.

18 "An injunction is a matter of equitable discretion' and is 'an extraordinary remedy  
19 that may only be awarded upon a clear showing that the plaintiff is entitled to such  
20 relief.'" *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (quoting *Winter v.*  
21 *Nat. Res. Def. Council*, 555 U.S. 7, 22, 32 (2008)). To qualify for a preliminary injunction,  
22 a plaintiff must demonstrate: (1) a likelihood of success on the merits; (2) a likelihood of  
23 irreparable harm; (3) that the balance of equities favors the plaintiff; and (4) that the  
24 injunction is in the public interest. *Winter*, 555 U.S. at 20.

25 Alternatively, in the Ninth Circuit, an injunction may issue under a "sliding scale"  
26 approach if there are serious questions going to the merits and the balance of equities  
27 tips sharply in the plaintiff's favor. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127,  
28 1134-35 (9th Cir. 2011). The plaintiff, however, must still show a likelihood of irreparable

1 harm and that an injunction is in the public interest. *Id.* at 1135. “[S]erious questions are  
2 those ‘which cannot be resolved one way or the other at the hearing on the injunction.’”  
3 *Bernhardt v. Los Angeles Cty.*, 339 F.3d 920, 926-27 (9th Cir. 2003) (quoting *Republic of*  
4 *the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988)). They “need not promise  
5 a certainty of success, nor even present a probability of success, but must involve a ‘fair  
6 chance of success on the merits.’” *Marcos*, 862 F.2d at 1362 (quoting *Nat’l Wildlife Fed’n*  
7 *v. Coston*, 773 F.2d 1513, 1517 (9th Cir. 1985)).

8 Furthermore, under the Prison Litigation Reform Act (“PLRA”), preliminary  
9 injunctive relief must be “narrowly drawn,” must “extend no further than necessary to  
10 correct the harm,” and must be “the least intrusive means necessary to correct the  
11 harm.” 18 U.S.C. § 3626(a)(2).

#### 12 **IV. DISCUSSION**

13 Defendants argue that the Magistrate Judge erred in concluding that Carmichael  
14 has established a likelihood of success on the merits, that irreparable injury would occur  
15 absent an injunction, that the balance of hardships tipped in his favor, and lastly that an  
16 injunction would further the public interest.

##### 17 **A. Likelihood of Success on the Merits**

##### 18 **1. Deliberate Indifference Standard**

19 Although prisoners may be deprived of some of their rights fundamental to liberty,  
20 they “retain the essence of human dignity inherent in all persons.” *Brown v. Plata*, 131  
21 S. Ct. 1910, 1928 (2011). The Eighth Amendment protects this dignity in its prohibition  
22 against cruel and unusual punishment. Because society takes from prisoners their liberty  
23 to provide for themselves, they become dependent on the state for shelter, food,  
24 clothing, and medical care. “A prison that deprives prisoners of basic sustenance,  
25 including adequate medical care, is incompatible with the concept of human dignity and  
26 has no place in civilized society.” *Id.*

27 “[T]he government has an obligation to provide medical care for those whom it  
28 punishes by incarceration,” *Hutchinson v. United States*, 838 F.2d 390, 392 (9th Cir.

1 1988), and cannot be deliberately indifferent to the medical needs of its prisoners. See  
2 *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). “[T]he appropriate inquiry when an inmate  
3 alleges that prison officials failed to attend to serious medical needs is whether the  
4 officials exhibited deliberate indifference.” *Hudson v. McMillian*, 503 U.S. 1, 5 (1992).

5 Deliberate indifference to a prisoner’s serious medical needs violates the Eighth  
6 Amendment. *Estelle*, 429 U.S. at 104. Prison doctors, medical staff, or prison guards  
7 can all be liable for Eighth Amendment violations. *Id.* The Supreme Court has identified  
8 two forms of deliberate indifference: when prison officials deny, delay or intentionally  
9 interfere with medical treatment, or by the way in which prison physicians provide  
10 medical care. See *Hutchinson* 838 F.2d at 394 (citing *Estelle*, 429 U.S. at 104-05).

11 In the Ninth Circuit, the test for deliberate indifference consists of two parts.  
12 *McGuckin v. Smith*, 974 F.2d 1050 (9th Cir. 1991), *overruled on other grounds by WMX*  
13 *Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc). First, the plaintiff must  
14 show a “serious medical need” by demonstrating that failure to treat her or his condition  
15 could result in further significant injury or the unnecessary and wanton infliction of pain.  
16 *Id.* A serious injury is not the type of “routine discomfort [that] is ‘part of the penalty that  
17 criminal offenders pay for their offenses against society.’” *Hudson*, 503 U.S. at 9 (quoting  
18 *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). “The existence of an injury that a  
19 reasonable doctor or patient would find important and worthy of comment or treatment;  
20 the presence of a medical condition that significantly affects an individual’s daily  
21 activities; or the existence of chronic and substantial pain are examples of indications  
22 that a prisoner has a ‘serious’ need for medical treatment.” *McGuckin*, 974 F.2d at 1059-  
23 60 (citations omitted).

24 Second, the plaintiff must demonstrate that the defendant’s response to the need  
25 was deliberately indifferent by showing (a) a purposeful act or failure to respond to a  
26 prisoner’s pain or possible medical need and (b) harm caused by the indifference. *Jett v.*  
27 *Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal quotations and citations omitted).  
28 The requirement of a purposeful act/failure to respond is intended to preclude a finding

1 of deliberate indifference for accidents or inadvertent failures to provide adequate  
2 medical care. *Estelle*, 429 U.S. at 105. Mere negligence does not rise to an Eighth  
3 Amendment violation. *Hutchinson*, 838 F.2d at 394. In order to demonstrate harm  
4 caused by the indifference, a prisoner need not show that the harm was substantial, but  
5 such a showing would provide additional support for the inmate’s claim of deliberate  
6 indifference. *McGuckin*, 974 F.2d at 1060.

7       Once these requirements are met, the factfinder must determine whether the  
8 defendant was deliberately indifferent to the prisoner’s medical needs. *McGuckin*, 974  
9 F.2d at 1060. “[T]he more serious the medical needs of the prisoner, . . . the more likely  
10 it is that a plaintiff has established ‘deliberate indifference’ on the part of the defendant.”  
11 *Id.* at 1061. A finding that the defendant’s neglect was isolated weighs against a finding  
12 of deliberate indifference, while a repeated failure to treat an inmate or a single  
13 egregious failure supports such a finding. *Id.* at 1060-61.

## 14                   2.       **Analysis**

15       The R&R recounts Carmichael’s medical history in great detail. (ECF No. 43 at 7-  
16 15.) The Magistrate Judge concluded that inconsistencies and gaps in treatment  
17 supported a finding that Carmichael will likely succeed on the merits of his Eight  
18 Amendment claim as it related to his spinal condition. The Magistrate Judge specially  
19 pointed to several examples of behavior that he believed demonstrated deliberate  
20 indifference, including a seven-month delay between the recommendation for an MRI  
21 and the actual performance, failure to follow doctors’ recommendations for pain  
22 management, and inexplicable classification as being “medically stable” and requiring  
23 “minimal or no periodic health care” despite a lengthy documented history of pain and a  
24 deteriorating condition. (*Id.* at 15-16.)

25       Defendants argue that the Magistrate Judge’s conclusion lacked a clear factual  
26 basis because Carmichael’s “voluminous” medical records show “a pattern of multiple  
27 complaints followed by continuing medical treatment and care.” (ECF No. 46 at 4.) In  
28 other words, Defendants seem to believe that simply because Carmichael was receiving

1 treatment, and indeed more treatment than the average inmate, it is impossible to  
2 conclude that they were indifferent to his medical needs. But providing some treatment  
3 does not inoculate Defendants from any Eight Amendment violations. Carmichael has  
4 shown several instances that seem to show, at this early stage of the litigation, that  
5 Defendants, who were aware of his condition, failed to adequately respond to his pain  
6 and medical needs. The Court agrees with the Magistrate Judge's assessment of the  
7 medical records. While they show that Carmichael received relatively regular attention,  
8 they also seem to show lapses that likely rise above negligence. Therefore, the Court  
9 finds that Carmichael has shown a likelihood of success on his Eight Amendment claim  
10 of deliberate indifference, specifically as it relates to his back condition.

11 **B. Irreparable Injury**

12 Defendants argue that Carmichael is currently under a "lay-in order" which  
13 prevents him from lifting more than 10 pounds, and that there are no plans to relocate  
14 Carmichael from NNCC. Therefore, according to the Defendants, the injuries addressed  
15 by the preliminary injunction are speculative. They argue that the preliminary injunction  
16 merely enforces the status quo, and there is no immediate threat of any harm. (ECF No.  
17 46 at 5.)

18 That the injunction enforces the status quo is of no consequence because, of  
19 course, that is what most preliminary injunctions do. *See Regents of Univ. of California v.*  
20 *Am. Broad. Companies, Inc.*, 747 F.2d 511, 514 (9th Cir. 1984) ("[T] the function of a  
21 preliminary injunction is to preserve the status quo *ante litem*."). Carmichael has shown  
22 (and Defendants do not contend otherwise) that he would suffer pain and perhaps a  
23 worsening of his condition if required to travel by bus or lift heavy loads. As the  
24 Magistrate Judge correctly noted, though there are no current plans to transfer  
25 Carmichael, he could be transferred at any time for disciplinary or medical reasons.  
26 Furthermore, the record contains inconsistencies in regards to the specifics of  
27 Carmichael's "lay-in order" — providing little assurance that the "lay-in order" is sufficient  
28 to prevent Carmichael from being required to carry more than 10 pounds.

1 The Court agrees with the Magistrate Judge's conclusion that Carmichael has  
2 shown a likelihood of irreparable harm.

3 **C. Balance of Hardships**

4 Defendants, appropriately, cite the heightened requirements imposed by 18 U.S.C. §  
5 3626 when considering preliminary injunctive relieve with respect to prison conditions.  
6 Defendants then repeat their assertion that Carmichael does not face any immediate  
7 harms and has not established a likelihood of success on the merits of his claim. They  
8 go on to argue that issuing a preliminary injunction (mandating conditions that they have  
9 acknowledged simply enforce the status quo) somehow significantly interferes with  
10 NDOC operations by "allow[ing] an inmate to ignore the well-established administrative  
11 regulations and prevent the NDOC from addressing this issue before outside  
12 involvement is warranted." (ECF No. 46 at 6.)

13 The Court agrees with the Magistrate Judge that the balance of harms clearly  
14 weighs in Carmichael's favor. The only burden placed on Defendants are the  
15 requirements that medical professionals be consulted before Carmichael is moved and  
16 that they comply with their own 10-pound weight limit identified in the "lay-in order." On  
17 the other side of the scale, Carmichael faces substantial pain and possible complication  
18 of his back condition. The Court further finds that the preliminary relief complies with the  
19 heightened statutory requirements for addressing prison conditions. The relief is  
20 "narrowly drawn, ... extend[s] no further than necessary to correct the harm," and is "the  
21 least intrusive means necessary to correct that harm." 18 U.S.C. § 3626(a)(2).

22 **D. Public Interest**

23 Defendants argue that an injunction does not serve the public interest because  
24 Carmichael has not shown a likelihood of success on his claim. The Court disagrees, for  
25 the reasons discussed above, and reiterates that "it is always in the public interest to  
26 prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d  
27 990, 1002 (9th Cir. 2012).

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1 **V. CONCLUSION**

2 It is therefore ordered, adjudged and decreed that the Report and  
3 Recommendation of Magistrate Judge William G. Cobb (ECF No. 43) be accepted and  
4 adopted in full. Plaintiff's Emergency Motion for Temporary Restraining  
5 Order/Preliminary Injunction (ECF Nos. 3, 4) is granted as follows:

6 (1) Plaintiff is precluded from lifting anything greater than ten pounds, consistent  
7 with the current "lay-in" order in place, until and unless it is medically determined  
8 otherwise.

9 (2) If Plaintiff is to be transferred to another NDOC facility, his medical care  
10 providers, including any specialists, shall be consulted to determine a mechanism for  
11 safe transport in light of his medical conditions before he is transported.

12 (3) This preliminary injunction applies to the Defendants named in this action and  
13 their officers, agents, servants, employees and attorneys. Fed. R. Civ. P. 65(d)(2)(A),  
14 (B).

15 (4) The preliminary injunction shall remain in place pending a full determination of  
16 Plaintiff's claims upon the merits or upon further order of the court.

17 DATED THIS 2nd day of May 2017.

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20 MIRANDA M. DU  
21 UNITED STATES DISTRICT JUDGE  
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