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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OTIS THOMAS,)	No. C 06-3581 MMC (PR)
Plaintiff,)	ORDER GRANTING DEFENDANTS’ MOTIONS FOR SUMMARY JUDGMENT; DENYING PLAINTIFF’S MOTIONS FOR JUDICIAL NOTICE
v.)	
M.S. EVANS, Warden, et al.,)	
Defendants.)	(Docket Nos. 22, 43, 55 & 56)

On June 5, 2006, plaintiff, a California prisoner currently incarcerated at Centinela State Prison and proceeding pro se, filed the above-titled civil rights action under 42 U.S.C. § 1983, alleging the violation of his constitutional rights by prison officials at Salinas Valley State Prison (“SVSP”). On July 5, 2006, plaintiff filed an Amended Complaint (“AC”), which is the operative pleading herein. In response to the AC, defendants have filed two dispositive motions: (1) on April 11, 2007, defendants filed a motion for summary judgment on plaintiff’s First Amendment and Equal Protection claims (“Motion for Summary Judgment I”), and (2) on August 7, 2008, defendants filed a motion for summary judgment on plaintiff’s Eighth Amendment claim (“Motion for Summary Judgment II”). Plaintiff has filed opposition to each of defendants’ motions,¹ and defendants have filed a reply.

¹As noted by defendants in their reply, the opposition filed by plaintiff on December 17, 2008, in response to defendants’ Motion for Summary Judgment II, encompasses all of the arguments presented by plaintiff in his earlier opposition, filed February 13, 2008, to

1 **FACTUAL BACKGROUND²**

2 The events underlying plaintiff’s claims occurred in 2005-2006 in Facility C, a level
3 IV maximum security housing unit at SVSP. At all relevant times herein, plaintiff was a
4 level IV prisoner housed in Facility C, defendant G. Ponder (“Ponder”) was the captain of
5 Facility C, defendant M. Kircher (“Kircher”) was a correctional officer in Facility C, and
6 defendant M.S. Evans (“Evans”) was the warden at SVSP. (AC at 2.)

7 A. Modified Program For Facility C Inmates

8 Inmates are housed in Facility C for various reasons, including a history of assaultive
9 behavior and disciplinary actions, gang-related convictions, and lengthy or life sentences.
10 (Decl. Def. Ponder Supp. Defs.’ Mot. Summ. J. I (“Ponder Decl.”) ¶ 4.) On July 14, 2005, in
11 Facility C, an inmate using a homemade knife stabbed and almost killed two correctional
12 officers. (Id. ¶ 18; Decl. Lt. Celaya Supp. Defs.’ Mot. Summ. J. II (“Celaya Decl.”) ¶ 3.) As
13 a result of the incident, SVSP was placed on lockdown. (Ponder Decl. ¶ 15; Celaya Decl. ¶
14 3.) Eventually, the lockdown was lifted for all housing units with the exception of Facility C
15 which, before the incident, had been in the process of returning to a normal program after a
16 previous violent incident. (Ponder Decl. ¶¶ 14-15.) Facility C remained on lockdown until
17 September 9, 2005, when it transitioned from lockdown to a “modified program.” (Id. ¶ 15.)

18 During a modified program, Facility C inmates are affected as follows: they are
19 restricted to and fed in their cells; certain privileges or activities such as quarterly packages,
20 visitations, and outdoor recreation are restricted, curtailed or modified; and the movement of
21 all inmates is in restraints and under escort. (Id. ¶ 6.) During the relevant period herein, the
22 modified program allowed non-contact visits only, suspended quarterly packages, and
23 curtailed outdoor recreation. (Id.)

24 _____
25 defendants’ Motion for Summary Judgment I. (Reply at 2:1-9.) Consequently, defendants,
26 in their reply, refer only to the December 17, 2008 opposition. As that opposition
27 comprehensively addresses the arguments made by defendants in both of their motions for
summary judgment, the Court likewise will rely on the December 17, 2008 opposition in
ruling on defendants’ motions.

28 ²Unless otherwise noted, the facts set forth in the following section are undisputed.

1 The primary objective of a prison lockdown and modified program is to provide a
2 secure and safe environment for both staff and other inmates. After the disturbance or
3 emergency that led to the lockdown and modified program is isolated and contained, an
4 investigation is conducted to collect evidence and gather information. The investigation may
5 involve: inmate interviews; searches of cells, common areas, yards, and buildings;
6 monitoring of incoming and outgoing mail; and other means of collecting information. At
7 the conclusion of the investigation phase, the facility captain is responsible for formulating a
8 plan to return the affected facility to a normal program. (Id. ¶ 17.)

9 B. Plan to Return Facility C to Normal Program

10 At the conclusion of the investigation phase following the July 14, 2005 stabbing
11 incident, defendant Ponder, the captain of Facility C, formulated and implemented a plan to
12 return Facility C inmates from a modified program to a normal program. (Id. ¶¶ 7 & 16.) On
13 October 17, 2005, Ponder sent a memorandum to Facility C inmates, updating them on the
14 program status of Facility C and explaining what they would be required to do to be returned
15 to a normal program. The memorandum explained that the following steps were being taken
16 in response to a recent history of ongoing violence in Facility C:

17 Prior to the attempted murder of the two Correctional Officers, the facility was
18 operating under four separate modified programs. Over the last few years C
19 Facility has operated on continuing modification due to the violence within the
20 facility. The motives of each disturbance have varied, however the singular
21 driving force behind each incident has been level IV inmate's [sic] politics
22 which are predominately gang related. The inmate population succumbs to this
23 peer pressure and condones this violence as acceptable in a level IV 180
24 general population setting. The attitude and violence has continued over a
25 substantial period of time. During meetings with various inmates on the
26 facility during classification and tours of the units, inmates repeatedly have
27 confirmed this verbally as well as by their actions to staff. This is
28 unacceptable. This jeopardizes the safety and welfare of every person who
lives and works on the facility.

24 Although incarcerated, each inmate is expected to be a law abiding citizen, the
25 choice to program and rehabilitate oneself falls directly on each individual
inmate.

26 I am developing a process to help the facility work towards providing inmates
27 that want to program without violence an opportunity to do so. The choice to
28 program will be in the hands of each individual inmate. The first step in this
process will be interviews. The next step will be your commitment to program
without violence and verification of this commitment by signing that fact. The

1 next process will involve Correctional Officers identifying inmates that have
2 shown willingness to program and providing a list of those inmates to
supervisory staff.

3 Inmates that fail to act in accordance with Departmental rules and Institution
4 procedures will result in housing and program changes. Inmates are advised
5 that their privileges and access to programs will be curtailed until you as an
individual successfully comply with this process.

6 In closing, your program is in your own hands. Program is available to any and
7 all general population inmates. All you need is the willingness and
commitment to program without violence.

8 (Decl. Csl. (Neah Huynh) Supp. Defs.’ Mot. Summ. Jud. II (“Huynh Decl.”) Ex. 2 Part 1
9 (Def. Ponder’s Resp. Pl.’s Req. Produc. Docs.) RPD 0003.)

10 Ponder’s plan included interviewing each inmate at least two times in order to gather
11 intelligence and identify those inmates who were willing to program without violence.

12 (Ponder Decl. ¶ 16; Celaya Decl. ¶ 4.) At each interview, the inmate would be asked to sign
13 a CDC-128-B “pledge”³ as evidence of his willingness to follow the program without
14 violence. (Id.) The CDC-128-B pledge stated:

15 I am currently housed within Facility ‘C’ Salinas Valley State Prison. I am
16 also aware that this facility is on modified program status based upon several
acts of violence having occurred within the past 15 months.

17 By signing this document, I am advising staff that I want to participate in the
18 program review process being implemented at this time. I am also stipulating
that I want to “do my own time” and will program by not participating in gang
violence.

19 I have been advised that my failure to act in accordance with institutional rules
20 and procedures may result in program and housing changes. I am aware that
during the time I participate in the program review process, I will retain my
21 established work/privilege group.

22 I am aware, if I am unassigned and I participate in the program review process
23 that my participation does not constitute a credit earning assignment. Further, I
understand that my privileges and access to programs will be curtailed until I
24 successfully complete this program and am returned to normal general
population program status.

25 I have been advised that the program review process is ongoing and that I will

26 ³“CDC-128-B” is the form number used by the California Department of Corrections
27 and Rehabilitation (“CDCR”) to identify departmental memoranda, but not the contents
28 thereof. Consequently, for the purpose of clarity, the Court refers to the CDC-128-B
attached as Exhibit 1 to defendant Ponder’s declaration, and constitutes the basis for much of
the dispute herein, as the “CDC-128-B pledge.”

1 be expected to maintain compliance with regulations to participate. During the
2 program review process I will be required to interact with other inmates of all
3 races and ethnicity during all out of cell activities. The process and my
4 participation in it, is on-going and monitored. [sic] During this period I
5 understand that my progress and suitability to remain in the program will be
6 monitored and evaluated by staff.

(Ponder Decl. Ex. 1.)

7 The inmates who were found willing to program without violence typically were
8 returned immediately to normal programming following the initial interview or signing of the
9 CDC-128-B pledge. (Ponder Decl. ¶ 8; Celaya Decl. ¶ 4.) Inmates who did not
10 “meaningfully” participate in the interview process, such as those inmates who refused to
11 sign the CDC-128-B pledge or declined interviews, were identified either as failing to
12 successfully complete the interview process or interviewing in such a fashion that staff could
13 not determine the threat posed by those inmates to other inmates or staff. (Celaya Decl. ¶ 5.)
14 Such inmates were retained on modified program status, (Ponder Decl. ¶ 9), and received
15 closer scrutiny and further assessment of their risk and threat to prison staff and other
16 inmates, including close review of their central files for gang and disciplinary histories.
17 (Celaya Decl. ¶ 5.) Each inmate who refused to sign the CDC-128-B pledge would continue
18 to be interviewed either until all inmates in the affected facility signed the pledge or until the
19 facility captain deemed it safe to return the facility to a normal program based on intelligence
20 received during the investigation. (Ponder Decl. ¶ 10.)

21 C. Plaintiff’s Refusal To Sign the CDC-128-B Pledge

22 Following defendant Ponder’s implementation of the above plan to return Facility C to
23 a normal program, plaintiff was interviewed several times between August 2005 and June
24 2006. (See Huynh Decl. Ex. 1 Part 1 (Pl.s’ Depo.) at 141:25, 142:1-4, 147:4-8, 148:21-24,
25 152:6-9, 195:9-14.) Plaintiff does not remember if he was asked to sign the CDC-128-B
26 pledge at each of the interviews, but states that at each interview he either refused to sign the
27 pledge or, if prison officials had asked him to sign the pledge, he would have refused. (See
28 id. & Pl.’s Depo. at 151:11-14, 152:2-5.)

In particular, the record shows that during plaintiff’s November 2, 2005 interview he

1 was asked to sign the CDC-128-B pledge but refused to do so. (Ponder Decl. ¶ 17.)
2 Subsequently, on November 4, 2005, Ponder sent a memorandum to plaintiff, informing him
3 that he had failed to complete the interview process or had interviewed in such a manner that
4 prison staff could not determine the level of threat he posed to staff or inmates. (Id. ¶ 18 &
5 Ex. 3.) As a result, plaintiff was informed:

6 [Y]ou will remain on modified program status to include **personal hygiene**
7 **canteen draw only, no quarterly packages, no special purchase.** Also due
8 to your refusal/failure to comply with the interview process and administrations
[sic] inability to ascertain your threat status you will be placed on **non-contact**
visiting. These modifications will remain in effect until further notice.

9 (Ponder Decl. Ex. 3.) Further, plaintiff was informed he would be placed at the bottom of the
10 interview list to be reviewed for program potential. (Id.)

11 Prison officials deemed plaintiff an unknown risk and threat to prison staff and other
12 inmates not only because he refused to sign the CDC-128-B pledge, but also because he had
13 a history of disciplinary problems and was suspected of gang involvement. (Celaya Decl. ¶
14 5, Huynh Decl. Ex. 2 Part 1 (Def. Ponder's Resp. Pl.'s Req. Produc. Docs.) RPD 0004.)

15 Plaintiff remained on modified program status until August 31, 2006, when he signed
16 the CDC-128-B pledge and was returned to a normal program. (Ponder Decl. ¶ 18.) As a
17 result of being on modified program status, plaintiff was denied outdoor exercise for
18 approximately thirteen months.

19 D. Plaintiff's Claims

20 Based on the above, plaintiff asserts the following claims for relief: (1) defendants
21 violated his First Amendment rights by requiring him to sign the CDC-128-B pledge in order
22 to be returned to a normal program, (2) defendants violated plaintiff's right to equal
23 protection by denying him access to privileges afforded other inmates who also had refused
24 to sign the CDC-128-B pledge, and (3) defendants violated plaintiff's Eighth Amendment
25 rights by depriving him of outdoor exercise for thirteen months while he was on modified
26 program status.

1 evidence with respect to a disputed material fact. See T.W. Elec. Serv. v. Pacific Elec.
2 Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987).

3 B. First Amendment Claim

4 Plaintiff claims that requiring him to sign the CDC-128-B pledge in order to be
5 returned to a normal program violated his First Amendment “right to political beliefs,”
6 because the pledge provides for “endless punishment” or “unspecified discipline” and asks
7 “questions about other inmates.” (AC at 2:24-27, 4:1-3, 4:26-28, 5:1-2.) Further, plaintiff
8 maintains, his First Amendment rights were violated because he was forced to choose
9 between signing the pledge or being punished, specifically, being retained on modified
10 program status. (Opp. at 15-16.)

11 Prisoners retain those First Amendment rights not inconsistent with their status as
12 prison inmates or with legitimate penological objectives of the corrections system. Turner v.
13 Safley, 482 U.S. 78, 95 (1987). Thus, when a prison regulation impinges on a prisoner’s
14 First Amendment rights, the regulation nonetheless is valid, and no constitutional violation
15 occurs, if the regulation is reasonably related to legitimate penological objectives. Id. at 89.

16 As an initial matter, defendants argue that requiring plaintiff to sign the CDC-128-B
17 pledge as a prerequisite to returning to a normal program did not unconstitutionally abridge
18 plaintiff’s First Amendment right to express his political beliefs because, contrary to
19 plaintiff’s assertions, the pledge does not impose “endless punishment” or “unspecified
20 discipline” on those who sign it, nor does it ask questions about other inmates. The Court
21 agrees. The language of the pledge requires only that the inmate document his intent to
22 program without violence and acknowledge that the program-review process is ongoing. See
23 supra at 4:14-5:3.

24 Defendants further assert that plaintiff has not produced evidence showing he was
25 forced, in violation of his First Amendment rights, to choose between signing the pledge or
26 being punished. In particular, defendants point out that for many months plaintiff chose not
27 to sign the pledge but was never subjected to punishment as a result. Rather, he simply was
28 maintained on modified program status. The Court agrees that plaintiff’s assertions of

1 punishment are unsupported; the undisputed evidence shows the modified program was
2 implemented as a security measure and not as a form of punishment, and that inmates were
3 not forced to sign the pledge merely because they were offered the incentive of returning to a
4 normal program if they did so.

5 For the foregoing reasons, the Court finds plaintiff has not created a triable issue with
6 respect to whether the pledge requirement impinged upon his First Amendment rights. Even
7 if there was such an impingement, however, the Court further finds, as discussed below, that
8 no constitutional violation occurred, because the pledge requirement was reasonably related
9 to legitimate penological objectives.

10 1. The Turner Test

11 In Turner v. Safley, the Supreme Court identified four factors for courts to consider
12 when determining whether a regulation is reasonably related to legitimate penological
13 interests: (1) whether there is a “valid, rational connection between the prison regulation and
14 the legitimate governmental interest put forward to justify it”; (2) “whether there are
15 alternative means of exercising the right that remain open to prison inmates”; (3) “the impact
16 accommodation of the asserted constitutional right will have on guards and other inmates and
17 on the allocation of prison resources generally”; and (4) the “absence of ready alternatives,”
18 or, in other words, whether the rule at issue is an “exaggerated response to prison concerns.”
19 Turner, 482 U.S. at 89-90.

20 The task in considering the Turner factors is not to balance the four factors, but to
21 determine whether the state shows a reasonable, rather than simply logical, relationship
22 between the policy and legitimate penological objectives. Beard v. Banks, 548 U.S. 521, 533
23 (2006). While all justifiable inferences must be drawn in the prisoner’s favor with respect to
24 matters of disputed fact, in disputed matters of professional judgment the court’s inferences
25 must accord deference to the views of prison authorities. Id. at 529. Unless a prisoner can
26 point to evidence showing the policy is not reasonably related to legitimate penological
27 objectives, sufficient to allow him to prevail on the merits, he cannot prevail at the summary
28 judgment stage. Id. at 530.

1 a. First Turner Factor

2 With respect to the first Turner factor, the initial burden is on defendants to put forth a
3 “common-sense” connection between their policy and a legitimate penological interest. See
4 Frost v. Symington, 197 F.3d 348, 357 (9th Cir. 1999). If defendants do so, plaintiff must
5 present evidence that refutes the connection. Id. Defendants must then present enough
6 counter-evidence to show that the connection is not “so remote as to render the policy
7 arbitrary or irrational.” Id.

8 Here, defendants argue that their policy of requiring inmates to interview and sign the
9 CDC-128-B pledge before returning to a normal program bears a common-sense connection
10 to the legitimate penological interest of maintaining prison security. It is undisputed that
11 prison security is a legitimate penological interest. See Turner, 482 U.S. at 91; Mauro v.
12 Arpaio, 188 F.3d 1054, 1059 (9th Cir. 1999) (en banc), cert. denied, 529 U.S. 1018 (2000)
13 (“It is beyond question that both jail security and rehabilitation are legitimate penological
14 interests.”). Additionally, the Court finds, for the following reasons, that the undisputed
15 evidence produced herein shows the pledge requirement had a valid, rational connection to
16 institutional security.

17 As evidenced by the declarations of defendant Ponder and Lt. Celaya, prison officials
18 used interviews to investigate the July 14, 2005 stabbing, as well as to identify inmates
19 showing a willingness to participate in normal programming without violence. Additionally,
20 prison officials believed that inmates who agreed to sign the pledge were signaling their
21 willingness to program positively and not engage in violence, as well as their willingness to
22 participate in the program-review process. Inmates with unsuccessful interviews and those
23 who refused to sign the pledge were not considered eligible to return to a normal program
24 because prison officials either considered them a threat or could not assess what threat they
25 posed to other inmates or staff.

26 Further, the pledge requirement was not put in place simply as a routine matter in a
27 prison facility with no history of violence; instead, it was a considered response to a history
28 of violence at SVSP, and in particular in Facility C, that had led to lockdowns and modified

1 programming for a number of years. As set forth in Ponder’s October 17, 2005
2 memorandum to Facility C inmates, the July 14, 2005 stabbing event was just the latest in a
3 string of violent incidents in Facility C. Moreover, the undisputed evidence shows that
4 following the stabbing incident and through June 2006, there were several other documented
5 threats and assaults that took place at SVSP, and in Facility C, which further threatened the
6 safety and security of the institution and hindered the ability of staff to return Facility C to
7 normal programming. (Celaya Decl. ¶¶ 7-13 (listing occurrences).)

8 Ponder’s October 17, 2005 memorandum also reflects the belief of prison officials that
9 the ongoing violence at SVSP was being tolerated by inmates due to gang politics and peer
10 pressure within the inmate population. As a result, prison officials determined they would
11 have to try to break that tolerance and, in so doing, the inmates’ acceptance of prison
12 violence. Consequently, the pledge requirement was used to differentiate between those
13 inmates who were willing to commit to programming non-violently and those who were not.

14 Although plaintiff claims the pledge requirement was used to punish him and,
15 therefore, was not rationally connected to legitimate penological objectives, he does not
16 dispute the following: (1) the pledge assisted prison officials in documenting and separating
17 inmates who were willing to program without violence; (2) even after he refused to sign the
18 pledge he was placed on a list for further administrative review of his programming potential;
19 and (3) in addition to refusing to sign the pledge, plaintiff had a disciplinary history of
20 disobeying orders and threatening inmates and staff, and of interacting with gang members
21 on the yard. (Pl.s’ Depo. at 129:21-23 (acknowledging he was accused of threatening
22 inmates), 131:22-124 (acknowledging fighting with inmate), 205:3-15 (acknowledging
23 “hanging out” with gang members on prison yard), 235:2-23 (acknowledging refusal to
24 work); 237:10-21 (acknowledging rules violation report and loss of credits for threatening
25 staff), 244:8-246:8 (acknowledging refusal to comply with direct order from staff), 249:21-
26 250:3 (acknowledging refusal to work), 252:11-20, 259:18-261:6 (acknowledging refusal to
27 participate in mandatory DNA testing), 261:9-262:2 (acknowledging battery on inmate),
28 264:2-22 (acknowledging he was found guilty of obstructing a peace officer).) Based on

1 these undisputed facts, prison officials could rationally conclude, in the interest of
2 institutional security, that plaintiff should not be returned to a normal program until he signed
3 the pledge.

4 According deference to the views of prison authorities, see Beards, 548 U.S. at 530,
5 the Court finds the decision by prison officials to place inmates, such as plaintiff, who would
6 not sign the CDC-128-B pledge and had a disciplinary history of violations involving threats
7 and disobeying orders, at the bottom of the list for consideration to be returned to a normal
8 program, was a common-sense approach to addressing the systemic problem of unsafe prison
9 conditions in Facility C. As plaintiff does not present evidence that refutes a common-sense
10 connection between the pledge requirement and the legitimate penological objective of
11 institutional security, the first Turner factor weighs in favor of upholding the pledge
12 requirement.

13 b. Second Turner Factor

14 The second factor identified by Turner for purposes of determining the reasonableness
15 of a restriction “is whether there are alternative means of exercising the right that remain
16 open to the prison inmates.” Turner, 482 U.S. at 90. If such alternative means remain open,
17 the court should be particularly conscious of the measure of judicial deference owed to
18 corrections officials. Id.

19 Defendants argue that asking plaintiff to sign the CDC-128-B pledge as an indication
20 of his willingness to program without violence did not foreclose plaintiff from alternative
21 means of exercising his First Amendment right to express his political beliefs. In particular,
22 defendants point out that plaintiff remained free to refuse to sign the pledge and did so,
23 thereby exercising his First Amendment rights. Further, defendants argue, there is no
24 evidence that the pledge required plaintiff to adopt a position not already required by prison
25 rules and regulations, or that plaintiff was prohibited from complaining, officially or to other
26 inmates, about his objection to the pledge requirement.

27 In response, plaintiff asserts that the pledge foreclosed his ability to express his
28 political beliefs because his attempts to pursue administrative grievances and complaints

1 about the pledge were rejected, he was threatened with discipline if he continued to pursue
2 the grievances, and the pledge itself required that he waive his First Amendment rights or be
3 punished.

4 Plaintiff has not produced evidence that creates a triable issue with respect to his claim
5 that the pledge foreclosed him from alternative means of exercising his First Amendment
6 rights. As noted, the language of the pledge itself neither requires an inmate to waive First
7 Amendment rights nor imposes punishment without a hearing. Rather, it merely requires the
8 inmate to pledge his intent to follow prison rules and regulations, not commit violence, and
9 acknowledge that the program-review process was ongoing. Further, while plaintiff's
10 administrative appeals and complaints were rejected, it was not because he refused to sign
11 the pledge. The undisputed evidence produced by plaintiff shows his grievances either were
12 reviewed and rejected on the merits, or were rejected for procedural reasons, with plaintiff
13 being warned that if he did not follow proper procedures in the future he would face the
14 possibility of disciplinary action. (Opp. Exs. D & E.)

15 Accordingly, because the pledge did not foreclose plaintiff from exercising his First
16 Amendment right to express his political beliefs, the second Turner factor weighs in favor of
17 upholding the pledge requirement.

18 c. Third Turner Factor

19 The third Turner factor requires the Court to consider "the impact accommodation of
20 the asserted constitutional right will have on guards and other inmates and on the allocation
21 of prison resources generally." Turner, 482 U.S. at 91. Defendants argue that
22 accommodating plaintiff's asserted First Amendment right to refuse to sign the pledge and
23 still be returned to a normal program would negatively impact prison staff and other inmates
24 by interfering with defendants' efforts to return Facility C to a normal program and maintain
25 the safety and security of the institution. Specifically, defendants assert that allowing an
26 inmate who refused to sign the pledge to return to a normal program would have made the
27 programming plan ineffective, as there would have been no incentive for any inmate to
28 interview or sign the pledge. Consequently, prison officials would not be able to obtain their

1 goal of turning Facility C into a safer and more secure facility by identifying those inmates
2 who were willing to commit to programming without violence.

3 In response, plaintiff argues that allowing him to return to a normal program despite
4 his refusal to sign the pledge would not have adversely impacted prison officials' attempts to
5 create a safe environment in Facility C, because other inmates who did not sign the pledge
6 were allowed to return to a normal program. In support of his contention, plaintiff submits
7 declarations from four inmates who state they were returned to normal programming without
8 being required to sign the pledge. (Opp. at 22-23 & Ex. H (Decls. of Clarke, Frazier, Dotton
9 and Brown).) Defendants contend these declarations are insufficient to create a triable issue
10 because they provide no information with respect to those inmates' disciplinary histories,
11 propensities for violence, threat levels, or programming capabilities. By contrast, as noted
12 above, plaintiff has an undisputed disciplinary history of disobeying staff orders, making
13 threats, and committing violence in prison. Thus, defendants argue, in light of plaintiff's
14 refusal to sign the pledge and his disciplinary history, it was reasonable for prison officials to
15 classify him as an unknown risk to prison staff and other inmates, and subject him to further
16 administrative review before he could be returned to a normal program.

17 The Court finds plaintiff has failed to produce evidence that creates a triable issue
18 with respect to plaintiff's claim that accommodating his asserted First Amendment right to be
19 returned to a normal program without signing the pledge would not have adversely affected
20 prison officials' attempts to return Facility C to a safe and secure facility. Accordingly, the
21 third Turner factor weighs in favor of upholding the pledge requirement.

22 d. Fourth Turner Factor

23 The fourth Turner factor requires the court to consider whether there is an absence of
24 ready alternatives to the prison regulation. The burden is on the prisoner challenging the
25 regulation, not on prison officials, to show there are obvious, easy alternatives to the
26 regulation. Turner, 482 U.S. at 91. "This is not a 'least restrictive alternative' test: prison
27 officials do not have to set up and then shoot down every conceivable alternative method of
28 accommodating the claimant's constitutional complaint." Id. Instead, the proper inquiry is

1 “whether the prisoner has pointed to some obvious regulatory alternative that fully
2 accommodates the asserted right while not imposing more than a *de minimis* cost to the valid
3 penological goal.” Overton v. Bazzetta, 539 U. S. 126, 135-36 (2003); see Mauro v. Arpaio,
4 188 F.3d 1054, 1063 (9th Cir. 1999) (finding in favor of defendants on fourth Turner factor
5 where plaintiff failed to point to alternative that accommodated his rights at *de minimis* cost
6 to security interests).

7 Plaintiff asserts the CDC-128-B pledge was an exaggerated response to institutional
8 security concerns because signing the pledge cannot prevent future violence. As an
9 alternative, plaintiff suggests that “an obvious and easy way” for prison officials to achieve
10 institutional security is to retain “dedicated” staff of “skilled” employees who have a “high
11 degree of morale.” (Opp. at 24-25.)

12 Defendants acknowledge the pledge was not a panacea for preventing prison violence;
13 they argue, however, that it was a reasonable means of attempting to create a safer and more
14 secure environment in Facility C, because it assisted prison officials in assessing an inmate’s
15 willingness to program without violence. Defendants further argue that plaintiff has not
16 shown an easy alternative to the pledge requirement because his suggested alternative does
17 not directly assist prison officials either with assessing which inmates have programming
18 potential or with returning the affected facilities to normal programming. Moreover,
19 defendants assert, plaintiff’s suggestion is not an “alternative” at all, because maintaining the
20 type of staff suggested by plaintiff has always been the policy of the CDCR. See Cal. Code
21 Regs., tit. 15, §§ 3391-3416 (governing employee conduct and hiring practices).

22 The Court finds plaintiff has not put forth a ready alternative to the pledge
23 requirement that would accommodate his First Amendment rights at a *de minimis* cost to
24 prison officials’ legitimate security concerns. Accordingly, the fourth Turner factor weighs
25 in favor of upholding the pledge requirement.

26 2. Conclusion

27 For the reasons discussed above, the Court concludes plaintiff has not created a
28 genuine issue of material fact with respect to his claim that defendants violated his First

1 Amendment rights by requiring that he sign the CDC-128-B pledge before being returned to
2 a normal program. In particular, plaintiff has not produced evidence that creates a triable
3 issue with respect to whether the pledge requirement infringed plaintiff's right to express his
4 political beliefs. Moreover, defendants have shown that the pledge requirement is reasonably
5 related to legitimate penological objectives. Accordingly, defendants are entitled to summary
6 judgment on plaintiff's First Amendment claim.

7 C. Fourteenth Amendment Claim

8 Plaintiff claims his right to equal protection under the Fourteenth Amendment was
9 violated when prison officials treated him differently than similarly situated inmates by
10 retaining him on modified program status when he refused to sign the CDC-128-B pledge.

11 "The Equal Protection Clause of the Fourteenth Amendment commands that no State
12 shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is
13 essentially a direction that all persons similarly situated should be treated alike." City of
14 Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). Where a prisoner claims his
15 right to equal protection has been violated, the proper question for this Court's determination
16 is that set forth in Turner v. Safley, *supra*, specifically, whether the regulation or practice
17 claimed to violate the prisoner's right to equal protection is reasonably related to legitimate
18 penological interests. See Washington v. Harper, 494 U.S. 210, 223-25 (1990); *see, e.g.*,
19 Shakur v. Schriro, 514 F.3d 878, 891 (9th Cir. 2008) (holding Turner standard must be
20 applied to prisoner's claim of disparate treatment based on religion).⁴ To succeed on an
21 equal protection claim, a prisoner must show that officials intentionally acted in a
22 discriminatory manner. See More v. Farrier, 984 F.2d 269, 271-72 (8th Cir. 1993) (holding
23 that absent evidence of invidious discrimination federal courts should defer to judgment of
24 prison officials).

25
26 ⁴The one exception to application of the Turner standard to a prisoner's equal
27 protection claims is implicated where a prisoner alleges the violation of his right to racial
28 equality; prison officials must demonstrate that race-based classifications are narrowly
tailored to serve a compelling state interest. Johnson v. California, 543 U.S. 499, 511-13
(2005). No race-based classification is alleged herein.

1 Thus, to defeat summary judgment on his equal protection claim, plaintiff must set
2 forth specific facts showing there is a triable issue as to whether (1) he was treated differently
3 from similarly situated inmates; (2) such unequal treatment was not reasonably related to a
4 legitimate penological objective; and (3) such unequal treatment was the result of invidious
5 discrimination against plaintiff.

6 As an initial matter, plaintiff asserts he was treated differently than similarly situated
7 inmates who did not sign the CDC-128-B pledge but nevertheless were allowed to return to
8 normal programming. In support of this contention, plaintiff has submitted the declarations
9 of inmates Clarke and Frazier. (Opp. at 26 & Ex. H.) The declaration of Clarke, however,
10 cannot create a triable issue with respect to plaintiff's claim because it is irrelevant thereto.
11 Specifically, as defendants point out, Clarke's declaration pertains to his refusal, in 2001, to
12 interview or sign a pledge concerning the 2001 murder of an inmate in the Facility A dining
13 room at SVSP. (See Ex. H Clarke Decl.) The declaration thus has no bearing on prison
14 officials' use of the pledge requirement with respect to the 2005 stabbing of two correctional
15 officers by an inmate in Facility C. Additionally, Frazier's declaration is insufficient to
16 create a triable issue as to plaintiff's claim of differential treatment because it provides no
17 information concerning Frazier's disciplinary history or propensity for violence. As noted,
18 plaintiff had a history of disciplinary problems, which prison officials relied upon in addition
19 to plaintiff's refusal to sign the CDC-128-B pledge when deciding to retain him on modified
20 program status.

21 Further, as discussed above in detail, plaintiff has not produced evidence that creates a
22 triable issue with respect to the legitimate penological objectives put forth by defendants to
23 justify the pledge requirement. In particular, the Court has found the decision herein at issue
24 was a common-sense approach to addressing the systemic problem of unsafe prison
25 conditions in Facility C, specifically, the decision by prison officials to place at the bottom of
26 the list for consideration to be returned to a normal program those inmates, such as plaintiff,
27 who would not sign the CDC-128-B pledge and had a disciplinary history of violations
28 involving threats and disobeying orders.

1 Finally, plaintiff's argument that prison officials acted with discriminatory intent
2 because they allegedly failed to prevent the 2005 stabbing incident is without merit. Not
3 only is the assertion factually unsupported, it is irrelevant to plaintiff's equal protection claim
4 because it has no bearing on defendants' state of mind when they decided to retain plaintiff
5 on modified program status for refusing to sign the pledge.

6 In sum, plaintiff has failed to present evidence that creates a triable issue with respect
7 to his claim that he was treated differently from similarly situated inmates in violation of the
8 Fourteenth Amendment. Accordingly, defendants are entitled to summary judgment on
9 plaintiff's equal protection claim.

10 D. Eighth Amendment Claim

11 As noted, plaintiff was denied outdoor exercise during the time he was on modified
12 program status, a period of approximately thirteen months. Plaintiff claims such denial
13 violated his rights under the Eighth Amendment.

14 The Constitution does not mandate comfortable prisons, but neither does it permit
15 inhumane ones. Farmer v. Brennan, 511 U.S. 825, 832 (1994). The treatment a prisoner
16 receives in prison and the conditions under which he is confined are subject to scrutiny under
17 the Eighth Amendment. Helling v. McKinney, 509 U.S. 25, 31 (1993). Exercise is one of
18 the basic human necessities protected by the Eighth Amendment. LeMaire v. Maass, 12 F.3d
19 1444, 1457 (9th Cir. 1993).

20 A prison official violates the Eighth Amendment when two requirements are met:
21 (1) the deprivation alleged is, objectively, sufficiently serious, and (2) the prison official
22 possesses a sufficiently culpable state of mind. Farmer, 511 U.S. at 834.

23 1. Sufficiently Serious Deprivation

24 In determining whether a deprivation of a basic necessity is sufficiently serious to
25 satisfy the objective component of an Eighth Amendment claim, a court must consider the
26 circumstances, nature, and duration of the deprivation. The Ninth Circuit has continuously
27 held that the long-term deprivation of outdoor exercise for prisoners constitutes a sufficiently
28 serious deprivation under the Eighth Amendment. See LeMaire, 12 F.3d at 1458 (holding

1 deprivation of outdoor exercise for “considerable periods of time” during five-year period of
2 incarceration meets objective requirement of Eighth Amendment claim); Lopez v. Smith, 203
3 F.3d 1122, 1132-33 (9th Cir. 2000) (en banc) (holding denial of outdoor exercise for six and
4 one-half weeks meets objective prong of Eighth Amendment deliberate indifference claim);
5 Allen v. Sakai, 48 F.3d 1082, 1087-88 (9th Cir. 1994) (holding denial of outdoor exercise for
6 six weeks to prisoner in indefinite segregation sufficient to satisfy objective requirement of
7 Eighth Amendment analysis), cert. denied, 514 U.S. 1065 (1995); Toussaint v. Yockey, 722
8 F.2d 1490, 1493 (9th Cir. 1984) (holding denial of outdoor exercise for over one year to
9 prisoners assigned to administrative segregation raised “substantial constitutional question”).

10 Defendants argue that the denial of outdoor exercise to plaintiff for more than a year
11 was not a sufficiently serious deprivation within the meaning of the Eighth Amendment
12 because the denial resulted from plaintiff’s choosing not to sign the CDC-128-B pledge.
13 Specifically, defendants maintain, plaintiff was “the master of his own fate” and, therefore,
14 by his declining numerous opportunities to gain access to outdoor exercise by signing the
15 pledge, “it is logical to conclude that exercise must not have been necessary for him between
16 July 14, 2005 and August 31, 2006 (the period at issue).” (Reply at 4:27-5:2.)
17 Consequently, defendants reason, the deprivation could not have been sufficiently serious to
18 satisfy the objective component of an Eighth Amendment violation.

19 Under the facts alleged by plaintiff, and viewing them in the light most favorable to
20 him, the Court finds defendants’ argument unpersuasive. The Ninth Circuit has recently
21 made clear that a sufficiently serious deprivation may be established even when such
22 deprivation has resulted from an inmate’s refusal to abide by a prison policy that serves
23 legitimate penological interests. See Foster v. Runnels, No. 06-15719, 2009 WL 260972, at
24 *5 (9th Cir. Feb. 5, 2009) (finding prisoner established sufficiently serious deprivation under
25 objective prong of Eighth Amendment inquiry where he repeatedly was denied food due to
26 his refusal to comply with legitimate prison policy prohibiting inmates from covering cell
27 windows).

28 Accordingly, based on the undisputed fact that plaintiff was denied outdoor exercise

1 for the thirteen months he was on modified program status, the Court finds plaintiff has met
2 the objective requirement of the Eighth Amendment inquiry.

3 2. Sufficiently Culpable State of Mind

4 A prison official cannot be held liable under the Eighth Amendment for denying an
5 inmate humane conditions of confinement unless the standard for criminal recklessness is
6 met, i.e., the official knows of and disregards an excessive risk to inmate health or safety.
7 See Farmer, 511 U.S. at 837. The official must both be aware of facts from which the
8 inference could be drawn that a substantial risk of serious harm exists, and he must also draw
9 the inference. See id. Prison officials who lacked knowledge of a risk, however, cannot be
10 said to have inflicted punishment. Id. at 844. Consequently, prison officials can prove they
11 were unaware even of an obvious risk to inmate health or safety by showing, for example,
12 “that they did not know of the underlying facts indicating a sufficiently substantial danger
13 and that they were therefore unaware of a danger, or that they knew the underlying facts but
14 believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or
15 nonexistent.” Id.

16 Additionally, prison officials who actually knew of a substantial risk to inmate health
17 or safety may be found not to have acted with deliberate indifference if they responded
18 reasonably to the risk, even if the harm ultimately was not averted. Id. “A prison official’s
19 duty under the Eighth Amendment is to ensure reasonable safety, a standard that incorporates
20 due regard for prison officials’ unenviable task of keeping dangerous men in safe custody
21 under humane conditions.” Id. at 844-45 (internal quotations and citations omitted).
22 Consequently, prison officials who act reasonably cannot be found liable for an Eighth
23 Amendment violation. Id. at 845.

24 Defendants first argue they did not know of and disregard an excessive risk to
25 plaintiff’s health and safety by denying him outdoor exercise because plaintiff could have
26 availed himself of exercise at any time by signing the CDC-128-B pledge and his refusal to
27 do so thus indicated he was not suffering serious harm from the deprivation. In response,
28 plaintiff asserts only that he was “excessively confined” to his cell for thirteen months.

1 (Opp. at 8.) Plaintiff, however, has not produced evidence showing that, other than prison
2 officials' awareness of plaintiff's general objection to the denial of exercise, such officials
3 had reason to believe plaintiff faced a substantial danger to his health from the lack of
4 exercise. Thus, even though prison officials knew plaintiff was being denied access to
5 outdoor exercise because of his refusal to sign the pledge, the undisputed evidence shows
6 they believed the risk of harm to plaintiff was "insubstantial or nonexistent," Farmer, 511 at
7 844, because plaintiff could have signed the pledge at any time and gained immediate access
8 to outdoor exercise.

9 Defendants further argue they did not act with deliberate indifference because they
10 acted reasonably by denying plaintiff access to exercise based on legitimate security concerns
11 in Facility C. Prison officials may limit or deny exercise for security reasons. See LeMaire,
12 12 F.3d at 1458 (upholding long-term denial of outdoor exercise to prisoner who represented
13 "grave security risk" because of history of extensive serious misconduct); Hayward v.
14 Procurier, 629 F.2d 599, 603 (9th Cir. 1980) (upholding five-month deprivation of outdoor
15 exercise following lockdown initiated in response to "genuine emergency"), cert. denied, 451
16 U.S. 937 (1981); cf. Spain, 600 F.2d at 199 (upholding right of inmates in indefinite
17 segregation to outdoor exercise "one hour per day, five days a week unless inclement
18 weather, *unusual circumstances*, or *disciplinary needs* made that impossible.") (emphasis
19 added). Here, defendants have produced uncontradicted evidence of the following: (1)
20 Facility C was placed on lockdown and then modified program in response to a "genuine
21 emergency," (2) there was a rational connection between requiring inmates to sign the CDC-
22 128-B pledge and restoring institutional security, (3) plaintiff repeatedly refused to sign the
23 pledge, (4) plaintiff had a lengthy disciplinary history, which included refusing to obey staff
24 orders and threatening staff and other inmates, and (5) as a result of plaintiff's refusal to sign
25 the pledge and his disciplinary history, defendants were unable to assess the level of threat
26 plaintiff posed to staff and other inmates should he be returned to a normal program. Further,
27 it is undisputed that for almost a year after the July 14, 2005 stabbing incident, through June
28 2006, there were several other documented threats and assaults that took place at SVSP and

1 in Facility C that threatened the safety and security of the institution and hindered the ability
2 of staff to return Facility C to normal programming. (Celaya Decl. ¶¶ 7-13 (listing
3 occurrences).)

4 When restricting exercise privileges of inmates who pose security concerns, “prison
5 officials are authorized and indeed required to take appropriate measures to maintain prison
6 order and discipline and protect staff and other prisoners . . .” LeMaire, 12 F.3d at 1458. For
7 the reasons discussed above, the Court finds plaintiff has failed to create a triable issue with
8 respect to whether defendants subjectively acted with deliberate indifference when they
9 denied plaintiff access to outdoor exercise while he was on modified program status.
10 Accordingly, defendants are entitled to summary judgment on plaintiff’s Eighth Amendment
11 claim.⁵

12 E. Plaintiff’s Motions for Judicial Notice

13 Plaintiff has filed a motion asking the Court to take notice of portions of his
14 deposition transcript, which portions he asserts are not “true and correct” because they have
15 been tampered with by defendants. Plaintiff has not, however, specifically identified the
16 relevant portions or attached them to his motion, nor does he state that defendants have in
17 any way relied on such material in support of their summary judgment motions.

18 The Court previously explained to plaintiff, in response to a prior motion filed by
19 plaintiff in which he asked the Court to review the deposition transcript for errors, that if
20 plaintiff objects to defendants’ characterization of statements made by plaintiff at his
21 deposition, or their characterization of exhibits submitted by plaintiff at his deposition, and
22 such objections are relevant to plaintiff’s opposition to defendants’ motion for summary
23 judgment, plaintiff must raise his objections in his opposition and attach thereto a copy of
24 those portions of the deposition transcript or exhibits. (Order, filed Oct. 30, 2008, at 2:13-

25
26 ⁵In light of the Court’s determination that defendants did not violate plaintiff’s
27 constitutional rights under the First, Fourteenth or Eighth Amendments, the Court does not
28 reach defendants’ argument that they are entitled to qualified immunity on plaintiff’s claims.
Saucier v. Katz, 533 U.S. 194, 201 (2001) (“If no constitutional right would have been
violated were the allegations established, there is no necessity for further inquiries
concerning qualified immunity.”)

1 17.)

2 As noted, however, plaintiff has not identified those portions of the deposition
3 transcript to which he objects and, more importantly, has not shown that defendants have
4 relied on such portions in support of their motions for summary judgment. Consequently, he
5 has not shown the alleged errors have any bearing on this Court's determination of the merits
6 of defendants' motions. Accordingly, plaintiff's motion will be denied.

7 In addition to the above-described motion, plaintiff has filed a separate motion asking
8 the Court to take judicial notice, under Rule 201 of the Federal Rules of Evidence, of various
9 documents he filed in support of his December 17, 2008 opposition to defendants' summary
10 judgment motions. As an initial matter, the Court notes that there is no need for the Court to
11 take judicial notice of the various sections of the California Code of Regulations submitted
12 by plaintiff, or the first page of the Court's Order of Service in this matter, as they are not
13 "adjudicative facts" within the meaning of Rule 201.

14 With respect to the other documents submitted by plaintiff, which appear to be inmate
15 appeals or complaints submitted to prison officials after the instant action was filed, the
16 Court agrees with defendants that such documents do not meet the requirements for judicial
17 notice as the allegations therein are not facts that are "not subject to reasonable dispute." See
18 Fed. R. Evid. 201(b). Further, many of the documents appear to be duplicative of documents
19 filed by plaintiff in support of his opposition to defendants' motions for summary judgment.
20 Finally, to the extent plaintiff seeks judicial notice of documents concerning events that
21 occurred after this action was filed, plaintiff makes no showing as to their relevance to the
22 Court's disposition of the claims raised by plaintiff herein. Accordingly, plaintiff's motion
23 will be denied.

24 CONCLUSION

25 For the foregoing reasons, the Court orders as follows:

- 26 1. Defendants motions for summary judgment are hereby GRANTED and judgment
27 shall be entered in favor of each of the defendants. (Docket Nos. 22 & 43.)
- 28 2. Plaintiff's motions for judicial notice are hereby DENIED. (Docket Nos. 55 & 56.)

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This order terminates Docket Nos. 22, 43, 55 and 56.

The Clerk shall close the file.

IT IS SO ORDERED.

DATED: February 24, 2009


MAXINE M. CHESNEY
United States District Judge