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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

LANCE AARON WILSON; MAURICE SMITH; EDGAR VASQUEZ, individually and on behalf of all others similarly situated,

Plaintiff-Petitioners,

v.

FELICIA L. PONCE, in her capacity as Warden of Terminal Island; and MICHAEL CARVAJAL, in his capacity as Director of the Bureau of Prisons,

Defendant-Respondents.

No. CV 20-4451-MWF-MRW

RESPONDENTS' OPPOSITION TO *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION

(Proposed Class Action)

[Declarations of Ronell Prioleau, Maricela Bugarin, Joel Roman, and Rosita Leen, filed concurrently herewith]

Honorable Michael W. Fitzgerald
United States District Judge

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Lance Aaron Wilson, Maurice Smith, and Edgar Vazquez ("Petitioners") have been convicted of serious federal crimes (conspiracy to distribute oxycodone and hydrocodone; sex trafficking of children by force, fraud, and coercion; and aggravated kidnapping, respectively) and are in the custody of the Federal Bureau of Prisons ("BOP") for terms ranging from eight to 30 years. They are currently housed at the Federal Correctional Institution in Terminal, California ("FCI Terminal Island"). Petitioners move the Court *ex parte*, on behalf of themselves and all current and future prisoners at FCI Terminal Island, for immediate implementation of comprehensive institutional changes that would result in consideration of each prisoner's suitability for release and a significant reduction of the prison population based on the risks presented by COVID-19. Petitioners bring these putative class claims, even though Wilson and Smith were asymptomatic carriers who have recovered from COVID-19, and Vazquez is 32 years old, has tested negative for COVID-19, and has not been diagnosed with any condition that would place him at a higher risk of complications from COVID-19 outside of the general population.

In short, Petitioners are asking the Court to release convicted criminals and to oversee the running of FCI Terminal Island, or as one district court phrased it, to act as "a de facto 'super' warden." *Livas v. Myers*, 2020 WL 1939583, at *8 (W.D. La. Apr. 22, 2020). As with *Livas*, and other district courts that have addressed similar petitions stemming from the COVID-19 pandemic, this Court should reject Petitioners' request to usurp executive functions entrusted to the BOP by Congress. *Turner v. Safley*, 482 U.S. 78, 84-85 (1987) ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."). The Prison Litigation Reform Act ("PLRA"), in fact, places limitations on a district court's ability to order the release of inmates, and expressly precludes a single district judge from

ordering such a release. 18 U.S.C. § 3626(a)(3)(B). Thus, this Court is statutorily precluded from granting the very remedy Petitioners seek.

Petitioners also cannot find relief under the Coronavirus, Aid, Relief, and Economic Security Act ("CARES Act"). The CARES Act allows the BOP to release inmates and utilize home confinement in certain circumstances, but those determinations are not subject to judicial review. 18 U.S.C. § 3621(b)(5). The Attorney General in the April 3, 2020, memorandum cited by Petitioners directed the BOP to balance "the dangers that COVID-19 poses to our vulnerable inmates, while ensuring we successfully discharge our duty to protect the public." ECF No. 10-1 ("Rim Decl."), Ex. A at 8.[1] That balancing must be made by the BOP on case-by-case basis as directed in the memorandum. *See also Farmer v. Brennan*, 511 U.S. 825, 846-47 (1994) (courts should not become "enmeshed in the minutiae of prison operations") (internal quotation marks and citation omitted); *Turner*, 482 U.S. 78 at 85 ("counsel[ing] a policy of judicial restraint" in cases involving prison administration). Petitioners' requests therefore seek to defy Congress's policy determinations and Supreme Court precedent regarding challenges to prison conditions and prison release orders.

The Attorney General, moreover, contemplated a balance between the BOP's obligation to protect those in its charge and the public:

> While we have a solemn obligation to protect the people in BOP custody, we also have an obligation to protect the public. That means we cannot simply release prison populations en masse onto the streets. Doing so would pose profound risks to the public from released prisoners engaging in additional criminal activity, potentially including violence or heinous sex offenses.

Rim Decl., Ex. A at 9. In an earlier, March 26, 2020, memorandum, the Attorney General specifically stated: "Some offenses, such as sex offenses, will render an inmate ineligible for home detention." Rim Decl., Ex. D at 46. Thus, under the Attorney

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[1] References to documents filed by Petitioners refer to the ECF docket number, and the ECF generated page number.

General's memoranda, Smith and Vazquez would not be eligible for home confinement based on the nature of their offenses. Wilson also does not qualify for home detention because he was assessed at a "Low," rather than at a "Minimum," risk of recidivism.

As to Petitioners' challenge of prison conditions, the Court does not have jurisdiction to review them because Petitioners they have not exhausted their available administrative remedies as required under the PLRA. 42 U.S.C. § 1997e(a). Petitioners admit they have not exhausted, or even attempted to exhaust, their administrative remedies under the PLRA, and their arguments why they should be excused from the exhaustion requirement lack merit. Moreover, in addition to the traditional grievance process, Petitioners have other avenues of redress. They can move for immediate release under 18 U.S.C. § 3582(c)(1)(A) with their sentencing court. They could request compassionate release or a reduction in sentence under 18 U.S.C. §§ 3582 and 4205(g). They could request that the Warden respond to an emergency request under 28 C.F.R. § 542.18. Petitioners' blanket contention that exhaustion is "effectively unavailable" is therefore speculative and untrue.

Petitioners are also unable to establish an Eighth Amendment violation. As a preliminary matter, the Court lacks jurisdiction over conditions-of-confinement claims in a habeas action. Even if the Court had jurisdiction, Petitioners cannot establish an Eighth Amendment violation because FCI Terminal Island has been taking, and is taking, reasonable measures to address COVID-19 consistent with Guidelines by the Centers for Disease Control and Prevention ("CDC"). Contrary to Petitioners' inaccurate portrayal of the BOP's actions, based on hearsay and outdated news reports, the BOP has taken myriad steps to prevent the introduction and spread of COVID-19 at FCI Terminal Island, including some of the steps Petitioners request in their application. Petitioners therefore cannot demonstrate either prong of the Eighth Amendment test: that the alleged deprivation was "'objectively' sufficiently serious" or that prison officials acted with "'deliberate difference' to inmate health or safety." *Farmer*, 511 U.S. at 834.

For all these reasons, Petitioners' application fails because they cannot establish the first prong of the TRO/preliminary injunction test, that they are "likely to succeed on the merits." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008) ("injunctive relief is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief") (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (*per curiam*)).

The irreparable harm and public interest factors also weigh against Petitioners. To grant Petitioners' requests would unfairly intrude on the operation and functioning of FCI Terminal Island. Although Petitioners contend that they can safely quarantine outside of FCI Terminal Island, there is no evidence before the Court that the immediate release of Petitioners, or of a class of inmates, who lack viable housing and may be deprived of access to food, means of personal hygiene, and medical care if released, would not endanger the public.[2] The public, moreover, must be protected from Petitioners themselves who have been convicted of serious crimes and sentenced to lengthy incarceration terms.

Respondents respectfully request that the Court deny Petitioners' application.

II. FACTUAL BACKGROUND

A. Efforts Taken by the BOP and at FCI Terminal Island To Address COVID-19

In responding to the COVID-19 pandemic, the BOP quickly developed and began implementing a multiphase action plan, following guidance and directives from the CDC, World Health Organization ("WHO"), the Office of Personnel Management ("OPM"), the Department of Justice ("DOJ"), and the Office of the Vice President. Declaration of Ronell Prioleau ("Prioleau Decl."), filed concurrently herewith, ¶¶ 5, 7.

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[2] Although Petitioners fashion their TRO application as being on behalf of themselves "and all others similarly situated," any class certification request is premature. Respondents respectfully submit that the Court should consider this application solely on behalf of the named Petitioners because as described herein, an individualized consideration of each inmate's specific situation is required in considering any release to home confinement.

As discussed below, the BOP has undertaken significant efforts to educate inmates and staff, health-screen all individuals on site, to screen new arrivals, to provide surgical and cloth masks to inmates, and to increase sanitation measures and the quantities of cleaning supplies in common areas and living quarters. *Id*. ¶¶ 27-64. Importantly, *every single inmate at FCI Terminal Island has been tested for COVID-19*. *Id*. ¶ 54. Although this testing has increased the number of positive cases identified on the BOP website, the data from this testing has enabled the BOP to implement cohorting, isolation, and quarantine measures. *Id*. ¶¶ 46-49. FCI Terminal Island medical staff screen all inmates at least once a day through temperature and symptom checks. *Id*. ¶ 45. All staff and visitors must undergo a health screening before they may enter the facility. *Id*. ¶ 50. FCI Terminal Island continues to update its procedures and practices in accordance with the evolving information and guidance concerning this pandemic. *Id*. ¶ 67.

1. The BOP's Phased Action Plan to Respond to COVID-19

In January 2020, the BOP became aware of the first identified COVID-19 case in the United States and quickly took steps to address its introduction and spread in BOP institutions. Prioleau Decl. ¶ 5.

a. Phase I – Guidance From Health Authorities and Establishment of Task Force

In January 2020, the BOP began Phase One of its Action Plan for COVID-19. Prioleau Decl. ¶ 7. Phase One activities included seeking guidance from the BOP's Health Services Division regarding the COVID-19 disease and its symptoms, where in the United States infections were occurring, and the best practices to mitigate its transmission.[3] *Id*. The BOP established a task force to begin strategic planning for COVID-19 Bureau-wide. *Id*. This strategic planning included building on the BOP's existing procedures for pandemics, such as implementing its pre-approved Pandemic Influenza Plan. *Id*. From January 2020 through the present, the BOP has been

[3] *See* https://www.bop.gov/resources/news/20200313_covid-19.jsp.

coordinating its COVID-19 efforts with subject-matter experts both internal and external to the agency.[4] *Id*.

b. Phase II – Health Screening and Social Distancing Measures

On March 13, 2020, the BOP implemented Phase Two of its Action Plan. Prioleau Decl. ¶ 8. Phase Two put into place a number of restrictions across all BOP facilities over a 30-day period, to be reevaluated upon the conclusion of that time period. *Id*. Specifically, the BOP suspended the following activities for 30 days, with certain limited exceptions: social visits[5], legal visits, inmate facility transfers, official staff travel, staff training, contractor access, volunteer visits, and tours. *Id*.

During Phase Two, inmates were subjected to new screening requirements. *Id*. ¶ 9. Specifically, all newly arriving BOP inmates were screened for COVID-19 symptoms and "exposure risk factors," including, for example, if the inmate had traveled from or through any high-risk COVID-19 locations (as determined by the CDC), or had had close contact with anyone testing positive for COVID-19. *Id*. Asymptomatic inmates with exposure risk factors were quarantined, and symptomatic inmates with exposure risk factors were isolated and evaluated for possible COVID-19 testing by medical providers.[6] *Id*.

Staff were also subjected to enhanced health screening. *Id*. ¶ 10. FCI Terminal Island implemented enhanced screening for staff and contractors on March 19, 2020. *Id*. The enhanced screening measures required all staff to self-report any symptoms consistent with COVID-19, as well as any known or suspected COVID-19 exposure, and

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[4] *See* https://www.bop.gov/resources/news/20200313 covid-19.jsp.

[5] Contrary to Petitioners' claims that they were unable to access telephones, to help ensure that inmates maintained social ties during this time, the BOP increased inmates' telephone allotment to 500 minutes per month (from 300 minutes per month).

[6] "Isolation" refers to a symptomatic inmate being confined to a single cell within a designated housing unit or medical unit. "Quarantine," on the other hand, refers to asymptomatic inmates who may remain within their assigned housing units, together, but may not interact with staff or inmates outside of these housing units. Prioleau Decl. ¶ 9, fn. 4.

further required all staff to have their temperature taken upon entry into any BOP facility. *Id.*

In addition, the BOP implemented national "modified operations" in order to maximize social distancing within BOP facilities. *Id.* ¶ 11. These modifications included staggered meal times and staggered recreation times, for example, in order to limit congregate gatherings. *Id.* The BOP also established a set of quarantine and isolation procedures for known or potential cases of COVID-19. *Id.*

FCI Terminal Island implemented this "modified operations" directive in a number of ways: (1) instituted "grab and go" breakfasts and dinners for inmates to eat in their housing units; (2) scheduled staggered lunchtimes; and (3) limited the number of inmates who could participate in recreation at one time to enhance social distancing. *Id.* ¶ 12.

c. Phase III Maximizing Telework and Inventory of Supplies

On March 18, 2020, the BOP implemented Phase Three of the COVID-19 Action Plan for BOP locations that perform administrative services (i.e., non-prison locations), which followed DOJ, Office of Management and Budget, and OPM guidance for maximizing telework. Prioleau Decl. ¶ 13. In this phase, individuals who could were directed to begin teleworking. *Id.*

As part of this phase, and in accordance with the Pandemic Influenza contingency plan, all cleaning, sanitation, and medical supplies were inventoried.[7] *Id.* ¶ 14.

d. Phase IV – Health Screening for All Newly Admitted Inmates

On March 26, 2020, the BOP implemented Phase Four of its Action Plan. Prioleau Decl. ¶ 15. The BOP revised its preventative measures for all institutions. *Id.* Specifically, the BOP updated its quarantine and isolation procedures to require *all* newly admitted inmates to the BOP, whether in areas of sustained community

[7] *See* https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf.

transmission or not, to be assessed using a screening tool and temperature check (further explained below). *Id*. This screening tool and temperature check applied to all new intakes, detainees, commitments, prisoners returned on writ from judicial proceedings, and parole violators, regardless of their method of arrival. *Id*. Thus, all new arrivals to any BOP institution—even those who were asymptomatic—were placed in quarantine for a minimum of 14 days or until cleared by medical staff. *Id*. Symptomatic inmates were placed in isolation until they tested negative for COVID-19 or were cleared by medical staff as meeting CDC criteria for release from isolation. *Id*.

e. Phase V – Further Secure In Place and Social Distancing Measures

Phase 5 of the COVID-19 Action Plan took effect on April 1, 2020. Prioleau Decl. ¶ 16. As part of this phase, the BOP Director ordered the following steps to be taken:

A. For a 14-day period, inmates in every institution would be *secured in their assigned cells/quarters* to decrease the spread of the virus.

B. During this time, to the extent practicable, inmates should still have access to programs and services that are offered under normal operating procedures, such as mental health treatment and education.

C. The BOP would coordinate with the United States Marshals Service ("USMS") to significantly decrease incoming movement during this time.

D. After 14 days, this decision would be reevaluated and a decision made as to whether or not to return to modified operations.

E. Limited group gathering would be afforded to the extent practical to facilitate commissary, laundry, showers, telephone[8], and Trust Fund Limited Computer

[8] Contrary to Petitioners' hearsay claims that there is no inmate access to telephones, limited group gathering was still permitted to allow inmates to use telephones. Prioleau Decl. ¶¶ 16(E) 17, 18(F) 20. Moreover, the Declaration of Jimmy Threatt ("Threatt Decl."), ECF No. 10-2, states that Threatt spoke with and had legal calls via telephone with all Petitioners. Threatt Decl., ¶¶ 2-6.

System (TRULINCS[9]) access.

Id. at ¶ 16 (A)-(E).[10]

During Phase Five, all inmates at FCI Terminal Island were confined to their cells for the majority of the day. *Id.* ¶ 17. Meals were delivered directly to inmates' cells, as well as a limited number of commissary items. *Id.* Inmates were permitted to leave their cells in small groups on a rotating basis at designated times in order to engage in activities such as showers, exercise, phones, and TRULINCS. *Id.* When inmates were permitted outside their cells, inmates were directed to maintain appropriate physical distancing. *Id.; see, e.g.*, Ex. A, TRM Movement Schedule.

f. Phase VI Continuation of Secure In Place and Social Distancing Measures

Phase 6 of the COVID-19 Action Plan took effect from April 13, 2020 to May 18, 2020. Prioleau Decl. ¶ 18. As part of this phase, the BOP Director ordered the following steps to be taken:

A. From April 13, 2020 to May 18, 2020, inmates in every institution would continue to be secured in their assigned cells/quarters to decrease the spread of the virus.

B. All inmates in isolation would be placed in a single cell.

C. During this time, to the extent practicable, inmates should still have access to programs and services that are offered under normal operating procedures, such as mental health treatment and education.

D. Secondary Law Enforcement officers located throughout the agency would be deployed to assist with staff shortages in the field.

E. The BOP would continue to coordinate with the USMS to further decrease incoming movement during this time.

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[9] TRULINCS is the internal BOP computer and electronic message platform that inmates use to communicate with staff in the institutions and individuals in the community. Through this platform, inmates receive updates, notices, and can read inmate bulletins posted on the system by BOP staff. *See* Prioleau Decl., ¶ 17(E), fn. 6.

[10] *See* https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp.

F. Limited group gathering would be afforded to the extent practical to facilitate commissary, laundry, showers, telephone, and TRULINCS access.

G. All BOP staff were mandated to comply and participate in the respiratory protection program and be fit tested for N-95 masks.

Id.

g. Phase VII – Continued Secure In Place and Testing

Phase 7 of the COVID-19 Action Plan took effect on May 18, 2020. Prioleau Decl. ¶ 19. Phase 7 is an extension of previously disseminated guidance along with new measures. *Id*. Specifically, the Director ordered the following new measures to be taken until June 30, 2020, at which time the plan would be reevaluated:

A. The BOP will continue to coordinate with the USMS to significantly decrease incoming movement.

B. Internal movement will continue to be suspended. While there are limited exceptions to movement, any exceptions must be routed through the Regional Director for approval by the Assistance Director, Correctional Programs Division.

C. Whenever possible, inmates should be permitted access to the Electronic Law Library at the discretion of the Warden at each facility. *Id*. ¶ 19(A)-(C).

Phase 7 has been implemented at FCI Terminal Island and currently remains in effect. *Id*. ¶ 20. Until June 30, 2020, all inmates at FCI Terminal Island are confined to their cells for the majority of the day. *Id*. Meals are delivered directly to the housing units. *Id*. Inmates are permitted to leave their cells in small groups on a rotating basis at designated times in order to engage in activities such as showers, exercise, phones, and TRULINCS. *Id*.

h. The BOP's Incident Command System

In addition to the BOP's COVID-19 Action Plan, the BOP activated its "Incident Command System," commonly referred to as a "Command Center," in Washington, D.C. on March 11, 2020. Prioleau Decl. ¶ 21. The Incident Command System is a standardized, all-hazard incident management tool that has been used in the past to

address a number of other disruptive incidents, such as fires, human and animal disease outbreaks, and hazardous materials incidents. *Id.* Through the Incident Command System, the BOP's National Command Center, in conjunction with local command centers, works to mitigate the health and safety risks of the COVID-19 pandemic incident by providing accurate information to all BOP institutions, holding BOP institutions accountable for abiding by BOP directives and guidance, and coordinating the BOP's national response. *Id.* ¶ 22.

2. Steps Taken at FCI Terminal Island to Address COVID-19

a. FCI Terminal Island Command Center

On March 18, 2020, FCI Terminal Island activated its local Command Center. Prioleau Decl. ¶ 24. The local Command Center works, in conjunction with the National Command Center, to monitor, plan, and implement national directives and other procedures at FCI Terminal Island. *Id.* The FCI Terminal Island Command Center is currently scheduled to remain active indefinitely. *Id.*

FCI Terminal Island's Command Center, as the Logistics Section Chief, provides for staff that order, account for, and distribute critical medical supplies, oversees management of infectious disease control onsite, and coordinates the Complex's enhanced staff and inmate screening. *Id.* ¶ 25. Command Center Staff also provide ongoing education to staff and inmates regarding steps that should be taken to prevent the introduction and spread of COVID-19 into FCI Terminal Island. *Id.* FCI Terminal Island has taken myriad steps to prevent the introduction and spread of COVID-19 into its facility, including providing inmate and staff education; conducting inmate and staff screening; putting into place testing, quarantine, and isolation procedures; ordering necessary cleaning, testing, and medical supplies; engaging in enhanced cleaning and disinfecting measures; and taking a number of other preventative measures. *Id.* ¶ 26.

b. COVID-19 Testing at Terminal Island

All FCI Terminal Island inmates have been tested for Covid-19 using the Abbott ID NOW instrument for Rapid RNA testing. Prioleau Decl. ¶ 54. The County of Los

Angeles Department of Public Health began COVID-19 testing for all inmates on April 23, 2020. *Id*. Testing 100% of the inmate population has significantly increased the number of COVID-19 positive cases reflected on the BOP's public website. *Id*. FCI Terminal Island has COVID-19 test kits currently in stock, with the ability to request more tests from its vendor on an as-needed basis. *Id*. ¶ 55.

c. Increased Sanitation and Social Distancing Measures to Combat COVID-19

FCI Terminal Island has taken a number of additional measures to combat COVID-19. First, all inmates have access to sinks, water, and soap at all times. Prioleau Decl. ¶ 57. New inmates admitted to FCI Terminal Island automatically receive soap, and all inmates may receive new soap weekly. *Id*. For inmates without sufficient funds to purchase soap in the commissary, soap is provided at no cost to the inmate. *Id*. FCI Terminal Island inmates are able to wash their clothing and linens at least once weekly. *Id*.

Second, all common areas in inmate housing units are cleaned daily, and are typically cleaned by inmate orderlies multiple times throughout the day, with a designated disinfectant that kills human coronavirus. *Id*. ¶ 58. FCI Terminal Island has made this disinfectant available to all inmates so that they may use it to clean their own cells on a regular basis. *Id*. Common areas outside inmate living areas, including the lobby, bathrooms, and cafeteria, are also cleaned with the same disinfectant on a daily basis (and often multiple times per day). *Id*. Each housing unit has been stocked with cleaning supplies for use by inmate orderlies and other inmates to clean both the common areas and their cells on a daily basis. *Id*. ¶ 59.

Correctional staff are required to disinfect all common equipment, such as keys and radios, upon obtaining these items from the supply room and again upon their return. *Id*. ¶ 61. Staff also have regular, consistent access to soap and hand sanitizer. *Id*. Correctional staff have been provided personal protective equipment ("PPE") to be used in appropriate locations throughout FCI Terminal Island such as quarantined areas,

isolation units, and screening sites. *Id.* ¶ 62. FCI Terminal Island has sufficient PPE on hand, including N-95 respirator masks, surgical masks, and rubber gloves, to meet its current and anticipated needs, as well as the ability to order additional PPE should the need arise. *Id.*

Each inmate is provided one surgical mask per week and cloth masks that they are required to wear. *Id.* ¶ 63. All staff are also provided with two surgical masks weekly and cloth masks to wear. *Id.*

FCI Terminal Island has limited the number of in-person meetings scheduled onsite for staff. *Id.* ¶ 60. If such meetings take place, they are limited to 10 people and must be conducted in areas permitting individuals to maintain an appropriate distance from one another. *Id.* FCI Terminal Island utilized telephone and video-conferencing system to replace in-person meetings to the extent practicable. *Id.*

d. Screening for COVID-19 at FCI Terminal Island

Due to the "Stay in Shelter" order implemented on April 1, 2020, inmate movement at FCI Terminal Island is currently highly restricted. Prioleau Decl. ¶ 34. However, the following screening measures for both inmates and staff are currently in place, and will remain in effect even after the "Stay in Shelter" order is lifted, until BOP officials determine that they are no longer necessary to prevent and/or manage the introduction or spread of COVID-19 in FCI Terminal Island. *Id.*

(A) Inmates

As explained above, FCI Terminal Island has been screening inmates for COVID-19 since early March 2020. Prioleau Decl. ¶ 35.

First, FCI Terminal Island screens all inmates arriving at FCI Terminal Island from other institutions or locations immediately upon their arrival. These screening procedures are as follows. *Id.* ¶ 36. Inmates are screened for symptoms of COVID-19 (including fever, cough, and shortness of breath), as well as for "exposure risk factors," including whether the inmate has traveled from, or through, any locations identified by the CDC as increasing epidemiologic risk within the past 14 days, or has had close

contact with anyone diagnosed with COVID-19 in the past 14 days. *Id.* ¶ 37. Following this initial screening, inmates are escorted to an intake/quarantine unit, where they are automatically quarantined for 14 days to ensure that they do not develop any symptoms consistent with COVID-19. *Id.* ¶ 38.

After the expiration of 14 days, and upon medical clearance, inmates may be released into general population. *Id.* ¶ 39. FCI Terminal Island has designated housing areas to serve as isolation units for any inmates that are symptomatic of suspected COVID-19 and/or have tested positive for COVID-19. *Id.* In these quarantine and isolation units, all staff must wear PPE. *Id.*

These screening procedures apply to all incoming FCI Terminal Island inmates. *Id.* ¶ 40. When inmates arrive at the institution, they are met by Health Services medical providers, who conduct this initial screening in a designated area at FCI Terminal Island separate from other staff and inmates. *Id.* Health Services medical providers wear PPE during these interactions. *Id.*

This initial screening procedure at FCI Terminal Island allows for screening to occur in a controlled environment, and further ensures that the rest of the inmate population is not exposed to newly-arrived inmates until they are properly screened and cleared by Health Services Department medical providers. *Id.* ¶ 41.

Second, in addition to screening incoming inmates, FCI Terminal Island is also taking a number of measures to screen its current resident inmate population. *Id.* ¶ 42. On April 6, 2020, the staff at FCI Terminal Island began pursuing a strategy that would lead to the testing of all inmates at FCI Terminal Island, regardless of symptomology in order to address the spread of COVID-19. Declaration of Rosita Leen ("Leen Decl."), filed concurrently herewith, ¶ 6. That strategy, which required the cooperation and agreement of the Los Angeles County Department of Public Health, led to the mass testing of all inmates at FCI Terminal Island starting on April 24, 2020. *Id.* In an abundance of caution, to avoid the spread of the virus, inmates have been sheltered in

place in their housing units. Prioleau Decl. ¶ 43. Inmates are currently not sent out to assigned work details, and are kept cohorted in their housing units. *Id*. ¶ 45.

All inmates are encouraged to self-monitor and to report symptoms of illness to unit staff either orally or via a written request. *Id*. ¶ 44. Medical staff are required to be present in each FCI Terminal Island housing unit at least twice per day in order to conduct sick call and pill line. *Id*. The presence of medical staff affords inmates further opportunity to report any medical concerns. *Id*. In addition, unit staff and other department representatives (including staff from education, commissary, psychology, and recreation) are required to conduct daily rounds in each FCI Terminal Island housing unit that the inmate population remains safe and healthy. *Id*. If an inmate has an issue that he wants to bring to the staff's attention, he can do so via a written request, commonly known as a cop-out, at any time, or during these rounds with staff. *Id*.

All inmates are screened at least daily through temperature and symptom checks. *Id*. ¶ 45. Any inmate who presents with symptoms consistent with COVID-19 will be evaluated by a medical provider in the Health Services Department. *Id*. ¶ 46. Based upon this evaluation, a determination will be made whether isolation and/or testing is appropriate. *Id*. If any inmate is isolated, the inmates housed in the same housing unit with him will be quarantined pending results of a COVID-19 test provided to the inmate, or 14 days, whichever is sooner. *Id*. ¶ 47.

Inmates may also be placed in a quarantine or isolation setting if they are exposed to a person with COVID-19, where they will be monitored daily for a period of at least 14 days. *Id*. ¶ 48. Quarantine or isolation will only be discontinued once 14 days elapse without the inmate(s) developing new symptoms. *Id*. FCI Terminal Island Health Services medical providers are prioritizing immediate medical care for anyone who claims symptoms indicative of a COVID-19 infection. *Id*. ¶ 49.

(B) Staff and Visitors

Since March 2020, all individuals entering FCI Terminal (including staff, delivery drivers, or any other visitors) must undergo a health screening upon entry. Prioleau Decl.

¶ 50. This includes having their temperature taken and being asked a number of questions to evaluate their risk of exposure, as well as whether they have been experiencing any symptoms of illness. *Id.*, Ex. J (Coronavirus Disease 2019 (COVID-19) Staff Screening Tool).

The individuals conducting this health screening at the front entrance of FCI Terminal Island are authorized to deny entry to any individual who has a body temperature of 100.4 degrees Fahrenheit, or above, or reports other symptoms consistent with COVID-19 (although they may consult with FCI Terminal Island medical providers in advance of the decision to deny entry). *Id.* ¶ 51. This screening applies to *all* staff and visitors, including those who leave the grounds of FCI Terminal Island even for a short duration of time, such as to purchase lunch. *Id.* ¶ 52.

FCI Terminal Island employees have also been educated regarding the importance of staying home if they are feeling ill, and are required to self-report any COVID-19 exposure (known or suspected) as well as any positive COVID-19 test. *Id.* ¶ 55. If a staff member is tested for COVID-19, he or she is not permitted to return to work until after receiving the results of the test. *Id.*

e. Inmate Staff and Education Regarding COVID-19

From the outset of the COVID-19 pandemic, FCI Terminal Island officials have provided regular updates to inmates and staff regarding the virus and the BOP's response, and have educated inmates and staff regarding measures that they themselves should take to stay healthy. Prioleau Decl. ¶ 27.

For example, executive staff and medical providers have conducted several town hall meetings with FCI Terminal Island inmates advising them of the symptoms of COVID-19, instructing them to self-monitor for COVID-19 symptoms, and to immediately report such symptoms to sick call. *Id.* ¶ 28, Ex. D (Inmate Town Hall Information (Mar. 10, 2020). *Id.* FCI Terminal Island officials have also explained to both inmates and staff best practices regarding personal hygiene to prevent the spread of COVID-19. *Id.* Information sheets are posted in numerous locations around FCI

Terminal Island, including inmate housing units, the front lobby, on restroom doors, and within all departments. *Id.*, Ex E-F (inmate bulletins and CDC Factsheet).

Wardens and other executive staff members also conduct weekly rounds in the housing units, and are available to answer questions from inmates regarding personal hygiene practices. *Id.* ¶ 29.

On April 1, 2020, Warden Ponce issued an inmate bulletin to all inmates at FCI Terminal Island regarding the new steps being taken at the institution to implement Phase 5 of the BOP's Action Plan described above. *Id.* at ¶ 30, Ex. G, Inmate Town Hall Bulletin (Apr. 1, 2020). In the bulletin, Warden Ponce explained: "In response to COVID-19, the [BOP] has instituted a comprehensive action plan that includes screening, testing, appropriate treatment, prevention, education, and infection control measures." *Id.* Ex. G at 1. The Warden advised the inmates that, beginning April 1, 2020, FCI Terminal Island would be implementing a "Stay in Shelter" for 14 days. *Id.* The April 1, 2020, memo also asked inmates to "continue to increase [their] sanitation and hygiene efforts in the housing units and in [their] cells," and advised inmates that staff have "increased the sanitation efforts throughout the institution." *Id.* Ex. G at 1-2. Likewise, the memo advised inmates that they "are encouraged to avoid touching [their] faces," "wash [their] hands frequently with soap and water," and "[p]ractice social distancing whenever practical." *Id.* The institution modified operations and 'Stay in Shelter' is an effort to be proactive." *Id.*

FCI Terminal Island staff have also been educated regarding the importance of washing their hands, not touching their face, maintaining appropriate social distancing, and cleaning/disinfecting all equipment, including their uniforms. *Id.* ¶ 31. All staff have also been trained regarding how to appropriately don and remove PPE. *Id.* ¶ 33.

B. Petitioners' Criminal Convictions

Respondents next provide an overview of each Petitioner's most recent criminal history. This is important because, as the Attorney General recently explained, while the government has a "solemn obligation to protect the people in BOP custody," it also has

"an obligation to protect the public. That means we cannot simply release prison populations en masse onto the streets. Doing so would pose profound risks to the public from released prisoners engaging in additional criminal activity, potentially including violence or heinous sex offenses." *See* Rim Decl., Ex. A at 9. Although Petitioners contend that those housed at FCI Terminal Island are "some of the most vulnerable, but least dangerous people in the federal prison system" (ECF No. 10 at 15:6-7), they are not among those "least dangerous people." Additionally, in filing their applications, Petitioners have failed to identify the "claim or authority" of their detention. 28 U.S.C. § 2242 (writs of habeas corpus "*shall* allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority") (emphasis provided). This is just another example of why the Petition is not a proper writ for habeas corpus.

1. Wilson Was Convicted for Conspiracy to Distribute Oxycodone and Hydrocodone and Sentenced to Eight Years Imprisonment

On March 19, 2018, the district court for the Eastern District of California sentenced Wilson to ninety-six (96) months (eight years) imprisonment following his conviction for conspiracy to distribute oxycodone and hydrocodone, in violation of 21 U.S.C. § 846, 21 U.S.C. § 841(A)(1), and 21 U.S.C. § 841(B)(1)(C). Declaration of Joel Roman ("Roman Decl."), filed concurrently herewith, ¶ 4.a., Ex. A. If Wilson earns all remaining good conduct time, his projected release date is September 20, 2024. *Id*. ¶ 4.b. Wilson does not qualify for priority placement on home confinement under the Attorney General's memoranda of March 26 and April 3, 2020, because his risk score places him at a "Low," rather than at a "Minimum," risk of recidivism. *Id*. ¶ 5.

2. Smith Was Convicted of Sex Trafficking of Children by Force, Fraud, and Coercion and Sentenced to 30 Years Imprisonment

On December 19, 2011, the district court for the Southern District of California sentenced Smith to three-hundred-sixty (360) months (30 years) imprisonment following his conviction for sex trafficking of children by force, fraud, and coercion, in violation of

18 U.S.C. § 1591(A) and (B). Roman Decl. ¶ 7.a., Ex. D. Assuming Smith earns all remaining good conduct time, his projected release date is June 12, 2036. *Id*. ¶ 7.b. Smith does not qualify for priority placement on home confinement under the Attorney General's memoranda because his offense is both violent and a sex offense. *Id*. ¶ 8.c.

3. Vazquez Was Convicted of Aggravated Kidnapping and Sentenced to 20 Years Imprisonment

On July 18, 2012, the government of Mexico sentenced Vazquez to twenty (20) years imprisonment following his conviction for aggravated kidnapping, in violation of 18 U.S.C. § 1201. Roman Decl. ¶ 10.a, Ex. G. Vazquez, as an American citizen, was permitted to serve his time in the United States as a treaty transfer under 28 C.F.R. § 0.96b. Upon transfer, the United States Parole Commission adjusted his term to 192-month imprisonment (16 years). Roman Decl. ¶ 10.b. Assuming he earns all remaining good conduct time, his projected release date is May 5, 2024. *Id*. ¶ 10.c. Vazquez does not qualify for priority placement on home confinement under the Attorney General's memoranda because he was convicted of a violent offense. *Id*. ¶ 11.c.

C. Petitioners' Health Histories

Although Petitioners highlight the medical histories of other inmates at FCI Terminal Island (*see* ECF No. 10 at 35:21-37:1), Petitioners themselves either tested positive for COVID-19 but were asymptomatic, or, in the case of Vazquez, tested negative for COVID-19. FCI Terminal Island medical staff took Petitioners' vital signs at least once a day, and at no point did Petitioners have a fever and none of them reported any fever, cough, headaches, or chills to the medical staff based on their medical records, and determined that none of them fit the criteria for a "high risk" individual under established CDC criteria. *See* Leen Decl. ¶¶ 7a.-c.

1. Wilson Tested Positive, Was Asymptomatic, and Did Not Report or Exhibit COVID-19 Symptoms

Wilson is 35 years old, and has not been diagnosed with any condition identified by the CDC as placing individuals at a higher risk of serious complications from

COVID-19. Leen Decl. ¶ 7.a. Wilson tested positive for COVID-19 on April 28, 2020, after FCI Terminal Island conducted mass testing on the entire inmate population. *Id*. Wilson was asymptomatic, and did not complain of any symptoms to staff. *Id*. His BOP Electronic Medical Records ("BEMR") shows that medical staff documented his vitals from April 28 to May 8, 2020, and at no time did he have a temperature over 98˚F, and continuously denied having a cough, shortness of breath, muscle pain, fatigue, a sore throat, new loss of taste and smell, headaches and chills. *Id*. He was examined and deemed recovered by medical staff on May 10, 2020. *Id*.

2. Smith Tested Positive, Was Asymptomatic, and Did Not Report or Exhibit COVID-19 Symptoms

Smith is 50 years old, and has been diagnosed with hypertension, type 2 diabetes, and chronic kidney disease. Leen Decl. ¶ 7.b. Smith tested positive for COVID-19 on April 29, 2020, after FCI Terminal Island conducted mass testing on the entire inmate population. *Id*. His BEMR records shows that medical staff documented his vitals from April 29 to May 8, 2020, and at no time did he have a temperature over 98.5˚F, and continuously denied having a cough, shortness of breath, muscle pain, fatigue, a sore throat, new loss of taste and smell, headaches and chills. *Id*. He was examined and deemed recovered by medical staff on May 10, 2020. *Id*.

3. Vasquez Tested Negative, Was Asymptomatic, and Did Not Report or Exhibit COVID-19 Symptoms

Vazquez is 32 years old, and has not been diagnosed with any condition identified by the CDC as placing individuals at a higher risk of serious complications from COVID-19. Leen Decl. ¶ 7.c. Vazquez tested negative for COVID-19 on April 29, 2020. *Id*. His BEMR records shows that medical staff documented his vitals from May 1, 2020 to May 20, 2020, and at no time did he have a temperature over 98˚F, and continuously denied having a cough, shortness of breath, muscle pain, fatigue, a sore throat, new loss of taste and smell, headaches and chills. *Id*.

D. Petitioners Failed to Exhaust PLRA Grievance Requirements

Before any suit challenging "prison conditions" may be brought, the PLRA requires exhaustion of all available administrative remedies. 42 U.S.C. § 1997e(a). The BOP has a four-tiered process for administrative resolution of inmate grievances. 28 C.F.R. §§ 542.10-542.19. First, the inmate may seek informal resolution of any issue (via a BP-8 form). *Id*. § 542.13. If that fails, the inmate may file a formal request with the Warden (via a BP-9 form). *Id*. § 542.14. If the Warden denies a remedy, the inmate may then appeal to the BOP's Regional Director (via a BP-10 form), and then any adverse decision may be further appealed to the BOP's General Counsel in Washington, D.C. (via a BP-11 form). *Id*. § 542.15. The administrative process is not complete—meaning a claim is not exhausted—until the appeal to the General Counsel reaches finality. *Id*. § 542.15(a).

Here, none of the Petitioners has completed any step of the administrative-grievance process. Roman Decl. ¶ 6, Ex. C (Wilson); ¶ 9, Ex. G (Smith); ¶ 12, Ex. I (Vazquez). Indeed, Petitioners admit as much. *See* ECF No. 10 at 52:25-57:7.

E. All But One of the Petitioners Has Failed to Avail Himself of Available Compassionate Release Procedures

In addition to the PLRA-mandated administrative grievance process, Petitioners may also avail themselves of the Compassionate Release/Reduction in Sentence Procedures for Implementation of 18 U.S.C. §§ 3582 at 4205(g) ("PS 5050.50"). Previously, only the director of the BOP was authorized to file compassionate release/reduction in sentence motions on behalf of an inmate. However, the current statute permits inmates to file such motions themselves after having "fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." 18 U.S.C. § 3582(c)(1)(A).

Under this process, an inmate first submits an initial request for a reduction in sentence to the institution's warden. PS 5050.50, p. 3. The request must set forth the

"extraordinary and compelling circumstances" justifying the request and the inmate's proposed release plans, including where they will reside, how they will support themselves, and, if the request is based on the inmate's health, where they will obtain medical treatment and how they will pay for it. *Id*. Upon receipt, the Reduction in Sentence coordinator scans the request to an electronic folder and forwards the request to the institution's Health Services Department for Review. Declaration of Maricela Bugarin ("Bugarin Decl."), filed concurrently herewith, ¶ 3. The request is then reviewed to determine whether the inmate's request qualifies under the criteria listed in the BOP's policy. *Id*. *See e.g.*, PS 5050.50, p. 4 ("REQUESTS BASED ON MEDICAL CIRCUMSTANCES"); and p. 12 (listing other non-exclusive factors, including the inmate's offense, criminal history, comments from victims, institutional adjustment and, disciplinary history.)

Upon receipt of the pertinent information, the Warden will determine whether the request warrants approval. PS 5050.50, p. 13. Once the Warden approves or disapproves the request, the Unit Manager enters the request and its status in the BOP's Reduction in Sentence tracking system. Bugarin Decl. ¶ 3. If the Warden approves the request, the Warden refers the request to the BOP's Office of General Counsel for further processing. PS 5050.50, p. 13. If the Warden determines the request does not warrant referral, the Warden provides the inmate with written notice of the decision and the basis for that decision. PS 5050.50, p. 15. The inmate can appeal that denial through the BOP's administrative remedy process. *Id*.

BOP records indicates that Wilson made a reduction in sentence request on May 8, 2020. Bugarin Decl. ¶ 6, Ex. A. This request has been forwarded to FCI Terminal Island's staff to determine whether he qualifies under the BOP's criteria for compassionate release. *Id*. Once this review is complete, it will be provided to the Warden to make a recommendation to the Regional Director to either grant or deny the request. *Id*. Wilson's request is still pending. *Id*. The BOP has not received a request for

home confinement from Wilson. *Id*. Wilson has not filed any formal administrative remedy requests or appeals during his incarceration. Roman Decl. ¶ 6.

Smith and Vasquez have not filed any reduction in sentence or home confinement requests and have not filed any administrative remedy requests or appeals during their incarceration. Roman Decl. ¶¶ 9, 12; Bulgarin Decl. ¶ 6.

III. TRO/PRELIMINARY INJUNCTION LEGAL STANDARD

The purpose of a TRO is to preserve the status quo before a preliminary injunction hearing may be held; its' provisional remedial nature is designed merely to prevent irreparable loss of rights prior to judgment. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974). The standard for issuing a TRO is identical to the standard for issuing a preliminary injunction. *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). Injunctive relief is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22. To meet that showing, the moving party must make "a clear showing" that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id*. Where the government is a party, the balance of hardships and the public interest factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

"A preliminary injunction can take two forms." *Marlyn Nutraceuticals v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009). "A prohibitory injunction prohibits a party from taking action and 'preserves the status quo pending a determination of the action on the merits.'" *Id*. (quoting *Chalk v. U.S. Dist. Court*, 840 F.2d 701, 704 (9th Cir. 1988)). In contrast, a "mandatory injunction 'orders a responsible party to take action.'" *Id*. at 879 (quoting *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996)). "A mandatory injunction 'goes well beyond simply maintaining the status quo [p]endente lite [and] is particularly disfavored.'" *Id*. (quoting *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1980)). "In general, mandatory injunctions 'are not

granted unless extreme or very serious damage will result and are not issued in doubtful cases[.]'" *Id.* (quoting *Anderson*, 612 F.2d at 1115); *accord Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994) (a mandatory injunction "is particularly disfavored and a district court should deny such relief unless the facts and law clearly favor the moving party").

Petitioners cannot meet their burden for mandatory relief, in which this Court would essentially be forced, on a time-compressed basis, to grant Petitioners all the relief they ultimately seek. *Marlyn Nutraceuticals*, 571 F.3d at 878; *see also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits"). It should not be utilized here given the jurisdictional and statutory hurdles described below, and because it runs counter to legislative mandates, and intrudes upon the BOP's executive function of running its prisons.

IV. ARGUMENT

A. Plaintiff Cannot Show a Likelihood of Success on the Merits

1. Petitioners' Claims Are Not Properly Brought as a Habeas Petition and Are Barred by the Prison Litigation Reform Act

Petitioners' two claims, both of which seek to change their conditions of confinement under the Eighth Amendment, are precluded by the PLRA. *See* ECF No. 1 at ¶¶ 114-131; 18 U.S.C. § 3626(a)(3)(A) (the PLRA applies to "any civil action in federal court with respect to prison conditions"); *Nettles v. Grounds*, 830 F.3d 922, 934 (9th Cir. 2016) (prisoners must comply with the PLRA if a claim challenges "any aspect of prison life" other than the "fact or duration of the conviction or sentence").

The PLRA also places strict limits on a district court's ability to order the release of inmates "in any civil action with respect to prison conditions," and expressly precludes a single district judge from doing so. 18 U.S.C. § 3626(a)(3)(B). That prohibition applies to "any civil proceeding arising under Federal law with respect to the *conditions of confinement* or the effects of actions by government officials on the lives of

persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison[.]" *Id*. at § 3626(g)(2) (emphasis provided). Under the PLRA, a "prisoner release order" – which "includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison," *id*. at § 3626(g)(4) – may "be entered only by a three-judge court," *Id*. at § 3626(a)(3)(B), and then only if certain conditions have been met. Among other requirements, "no court shall enter a prisoner release order unless – (i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders." *Id*. at § 3626(a)(3)(A). Prior to entering a prisoner release order, the three-judge panel must find, by clear and convincing evidence, "(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right." *Id*. at § 3626(a)(3)(E).

Congress enacted the PLRA to "revive the hands-off doctrine," which was "a rule of judicial quiescence derived from federalism and separation of powers concerns[,]" in order to remove the federal judiciary from day-to-day prison management. *Gilmore v. California*, 220 F.3d 987, 991, 996-97 (9th Cir. 2000) (referencing 141 Cong. Rec. S14418, at S14418-19 (1995); H.R. Rep. No. 104-378, at 166 (1995); H.R. Rep. No. 104-21, at 24 n.2 (1995)). Section 3626 thus "restrict[s] the equity jurisdiction of federal courts," *Gilmore*, 220 F.3d at 999, and, "[b]y its terms . . . restricts the circumstances in which a court may enter an order 'that has the purpose or effect of reducing or limiting the prison population,'" *Brown v. Plata*, 563 U.S. 493, 511 (2011). The PLRA's "requirements ensure that the 'last remedy' of a population limit is not imposed 'as a first step.'" *Id*. at 514 (quoting *Inmates of Occoquan v. Barry*, 844 F.2d 828, 843 (D.C. Cir. 1988)). As noted by the Supreme Court, the "release of prisoners in large numbers … is a matter of undoubted, grave concern." *Id*. at 501. The PLRA requires courts to

give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by" the release of prisoners. 18 U.S.C. § 3626(a)(1).

Petitioners' claims cannot be characterized as a "habeas corpus proceeding[] challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2). Petitioners do not challenge the reason for their confinement, their convictions, the length of their sentences, or a release based on good time credits. *See Preiser v. Rodriguez*, 411 U.S. 175, 187 (1973) (describing such claims as "the core of habeas corpus"). Rather, their claims are based on their conditions of confinement, alleging that the BOP has not taken proper measures to counteract the COVID-19 pandemic at FCI Terminal Island. This case thus falls squarely within the PLRA as it is not a habeas proceeding challenging the fact or duration of confinement. Accordingly, the PLRA does not permit the district court to grant the relief Petitioners seek. *See Money v. Pritzker*, 2020 WL 1820660, at *14 (N.D. Ill. Apr. 10, 2020) (PLRA prevents courts from granting release of inmates based on prison conditions and COVID-19); *Plata v. Newsom*, 2020 WL 1908776, at *1, 9-11 (N.D. Cal. Apr. 17, 2020) (similar); *Alvarez v. Larose*, 2020 WL 2315807, at *4 (S.D. Cal. May 9, 2020) (denying TRO finding that COVID-19 conditions of confinement claims seek "prisoner release orders" under the PLRA which prevents the district court from granting the relief sought); *Livas*, 2020 WL 1939583, at *9 (dismissing COVID-19 habeas petition for lack of jurisdiction and noting that amending future pleadings to assert claims for injunctive or prospective relief would be futile in light of lack of factual allegations concerning exhaustion of remedies or that other requirements for release of prisoners have been satisfied); *Wragg v. Ortiz*, No. 20-5496, slip op. at 50-51 (D.N.J. May 27, 2020) ("Petitioners seek early release from prison, but they do not do so on the basis that their convictions or sentences are invalid. Instead, they seek injunctive relief based on unconstitutional conditions of confinement, a type of challenge that neither the Supreme Court nor the Third Circuit has yet recognized as a cognizable habeas claim.").

Petitioners cite two cases that reached a contrary conclusion: *Wilson v. Williams*, 2020 WL 1940882 (N.D. Ohio Apr. 22, 2020) and *Martinez-Brooks v. Easter*, 2020 WL2405350 (D. Conn. May 12, 2020). *See* ECF No. 10 at 58:6-23. These cases are distinguishable because they concerned FCI Elkton and FCI Danbury respectively, two of the facilities addressed in the Attorney General's April 3, 2020, memorandum. Rim Decl. Ex. A at 8. Moreover, in those cases, petitioners had argued that no set of conditions of confinement would be constitutionally sufficient to protect them from COVID-19, arguably transmuting their PLRA-barred conditions of confinement claims into habeas claims challenging the fact of their detention. *See Wilson*, 2020 WL 1940882, at *3; *Martinez-Brooks*, 2020 WL2405350, at *16.

Here, Petitioners are not arguing that no set of conditions would be constitutionally sufficient, as they are seeking not only the implementation of release procedures, but specific relief to improve their conditions, such as increased cleaning supplies, hourly cleaning of surfaces, and for prison staff to wear personal protective equipment. *See* ECF No. 10-3, [Proposed] Order Granting TRO at 5-7. As noted in *Alvarez*, the fact that Petitioners are not arguing that it would be impossible to provide constitutionally sufficient conditions places their claim squarely within the purview of the PLRA. *Alvarez*, 2020 WL 2315807, at *3-4. Another important factual difference is that in *Wilson*, the court based its decision, in large part, on the inadequate degree of COVID-19 testing that had been performed at FCI Elkton, noting that FCI Elkton had only 75 tests on hand for 2400 inmates. *Wilson*, 2020 WL 1940882, at *2. In contrast, at FCI Terminal Island, every inmate has been tested for COVID-19. Leen Decl. ¶ 6. Thus, these cases are factually distinguishable and lack persuasive value.[11]

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[11] On May 26, 2020, the Supreme Court denied the Department of Justice's application for stay of the April 22, 2020, preliminary injunction order on largely procedural grounds, noting that the district court had since entered an order on May 19, 2020, enforcing the preliminary injunction and imposing additional measures, and that the Government had not sought review of that order in the Sixth Circuit. *See Williams v. Wilson*, Sup. Ct. No. 20-3447, The Supreme Court's declination was without prejudice and permitted the "Government [to] seek[] a new stay if circumstances warrant." *Id*. Justices Thomas, Alito, and Gorsuch would have granted the application. *Id*.

Also notable is the Ninth Circuit's recent decision in *United States v. Dade*, 2020 WL 2570354, at *1 (9th Cir. May 21, 2020), denying an inmate's release on bail pending his appeal of the district court's denial of his motion to vacate his sentence because of COVID-19. The Ninth Circuit noted that under 18 U.S.C. § 3143(b), "release pending appeal requires both a substantial showing on the merits *and* a showing that the defendant is not likely to flee or pose a danger to the safety of any person or the community." *Id*. at *2 (emphasis in original, internal quotation marks omitted). The same is true here. Although Petitioners are using a civil vehicle to obtain release, they are in the same position as the *Dade* defendant and requesting the same relief. Their request should also be denied because "whether or not [the inmate] faces a risk from COVID-19 in prison has no bearing on whether he will be a danger to the community if released." *Id*. *Dade*'s reasoning applies here, and is another reason to deny Petitioners' TRO application.

In sum, Respondents respectfully request that the Court find that the PLRA precludes Petitioners' request for release because none of the prerequisites for a prisoner release order have been satisfied. First, no court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of a federal right (nor has the BOP had a reasonable amount of time to comply with any previously entered order) as required under 18 U.S.C. § 3626(a)(3)(A). Second, no three-judge panel has made findings, under the clear and convincing standard, that crowding is the primary cause of the violation of a Federal right and that no other relief will remedy the violation of the Federal right. *Id*. at § 3626(a)(3)(E). Third, this Court does not have the authority to enter a prisoner release order as it is not a three-judge Court. *Id*. at § 3626(a)(3)(B). Petitioners cannot circumvent the procedure mandated under the PLRA under the guise

of a habeas petition when they are seeking to challenge the conditions of their confinement.[12]

2. The CARES Act Does Not Permit District Courts to Mandate Home Confinement.

The CARES Act provides authority for the Attorney General, not district courts, to order the placement of prisoners on home confinement. *See United States v. McCann*, 2020 WL 1907089, at *3 (E.D. Ky. Apr. 17, 2020); *United States v. Read-Forbes*, 2020 WL 1888856, at *5 (D. Kan. Apr. 16, 2020) ("the Court lacks jurisdiction to order home detention under this provision"); *United States v. Doshi*, 2020 WL 1527186, at *1 (E.D. Mich. Mar. 21, 2020) ("the authority to make this determination is squarely allocated to the Attorney General, under whose authority is the Bureau of Prisons"). District courts lack authority to order a prisoner's placement in home confinement under the CARES Act. *Money*, 2020 WL 1820660, at *17 ("executive branch has the discretion to decide whether to end incarceration early"). Although a court may recommend placement in a specific facility, the determination of if and when a prisoner should serve the remainder of a sentence in home confinement is best left to the discretion, experience, and expertise of the BOP. *McKune v. Lile*, 536 U.S. 24, 39 (2002). "[A]ny approach that puts the judicial branch in charge of designating the place of confinement for a federal prisoner—no matter how well justified on humanitarian grounds—collides with 18 U.S.C. § 4082(b) which gives the Attorney General unfettered discretion to decide where to house federal prisoners." *In re Gee*, 815 F.2d 41, 42 (7th Cir. 1987); *see also Grinis v.*

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[12] Petitioners also cannot find relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, because "Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction." *Steffel v. Thompson*, 415 U.S. 452, 466, 471 (1974). The Administrative Procedures Act, 18 U.S.C. § 3625, is also inapplicable because it does not apply "to the making of any determination, decision or order" under 18 U.S.C. § 3621 (Place of Imprisonment). *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 724 (2008). Finally, Article 1, § 9, cl. 2 of the Constitution, which refers to the Suspension Clause, does not apply. The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Constitution, Art. I, § 9, cl. 2. There is no allegation and no indication the writ has been suspended.

Spaulding, 2020 WL 2300313, at *3 (D. Mass. May 8, 2020) (denying injunctive relief because prisoner petitioners "have not shown that it is likely that they would qualify for transfer from incarceration to home confinement under the current BOP eligibility requirement, and therefore they have not shown that they personally have a likelihood of success in obtaining the relief prayed for in their petition").

3. Petitioners Have Failed to Exhaust Administrative Remedies

The PLRA mandates that "[n]o action shall be brought with respect to prison conditions under . . . any . . . Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a); *Maronyan v. Toyota Motor Sales, USA, Inc.*, 658 F.3d 1038, 1041-42 (9th Cir. 2011) (PLRA exhaustion "requirement"). The PLRA's mandatory exhaustion requirement applies to "all inmate suits about prison life," *Porter v. Nussle*, 534 U.S. 516, 532 (2002), and "unexhausted claims cannot be brought in court." *Jones v. Bock*, 549 U.S. 199, 211 (2007); *Woodford v. Ngo*, 548 U.S. 81, 85 (2006) ("Exhaustion is no longer left to the discretion of the district court, but is mandatory."). This exhaustion requirement applies when a prisoner seeks injunctive relief. *Farmer*, 511 U.S. at 847 (in cases seeking injunctive relief to address "current" prison conditions, inmates are not "free to bypass adequate internal prison procedures and bring their health and safety concerns directly to court").

Here, FCI Terminal Island follows a specific grievance process. *See* 28 C.F.R. §§ 542.10-542.19. None of the Petitioners, however, has exhausted that process. Roman Decl. ¶ 6, Ex. C (Wilson); ¶ 9, Ex. G (Smith); ¶ 12, Ex. I (Vazquez). And because of their failure to exhaust, the Petition challenging the conditions of their confinement should be denied.

Petitioners acknowledge that they have failed to exhaust administrative remedies but argue that the exhaustion requirement should be "waived." *See* ECF No. 10 at 52:25-57:7. Failure to exhaust, however, may be excused only (1) where the remedy "operates as a simple dead end—with officers unable or consistently unwilling to provide any

relief to aggrieved inmates;" (2) where the administrative scheme is "so opaque that it becomes, practically speaking, incapable of use;" or (3) where "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross v. Blake*, 136 S. Ct. 1850, 1853-54, 1859-60 (2016). None of those three narrow exceptions apply here. *See id*. at 1856-67 (holding that the exhaustion requirement "suggests no limits on an inmate's obligation to exhaust—irrespective of any 'special circumstances'" and the "mandatory language means a court may not excuse a failure to exhaust, even to take such circumstances into account").

To be sure, COVID-19 presents unusual circumstances, in which decisions regarding prisoner grievances should be made expeditiously (as provided in FCI Terminal Island's grievance procedures). But permitting prisoners to ignore the PLRA's mandatory exhaustion requirement, even in these unusual circumstances, would frustrate Congress's objective in the PLRA to "eliminate unwarranted federal-court interference with the administration of prisons," and "reduce the quantity and improve the quality of prisoner suits." *Woodford*, 548 U.S. at 93 (*quoting Porter*, 534 U.S. at 524). More problematically, permitting prisoners to ignore the PLRA's mandatory exhaustion requirement would deprive prisons of "a fair opportunity to correct their own errors," *id*., as Petitioners have done here by filing this lawsuit. As described above, the BOP's response to the pandemic has evolved. *See* Prioleau Decl. ¶¶ 7-20. The rapidly changing nature of this pandemic thus favors adherence to the administrative framework.

This was the conclusion reached in *Nellson v. Barnhart*, 2020 WL 1890670, at *4 (D. Col. Apr. 16, 2020). *Nellson* rejected the petitioner's "dead-end argument" that he was excused from exhaustion because "the grievance process can offer no possible relief in time to prevent the imminent danger." *Id*. (internal quotation marks omitted). *Nellson*, however, found that "28 C.F.R. § 542.18 offers inmates an emergency procedure where, '[i]f the Request is determined to be of an emergency nature which threatens the inmate's immediate health or welfare, the Warden shall respond no later than the third

calendar day after filing." *Id*. Petitioners do not plead that they made any such request or gave FCI Terminal Island any chance to address their complaints before seeking relief before this Court. Roman Decl. ¶ 6, Ex. C (Wilson); ¶ 9, Ex. G (Smith); ¶ 12, Ex. I (Vazquez).[13]

Additionally, the Supreme Court defines availability as some relief, not all relief, that an inmate seeks. *See Ross*, 136 S. Ct. at 1859. Because Petitioners have not even attempted to utilize the administrative process, it is improper to argue here that the administrative remedy is "effectively unavailable." *See* ECF No. 10 at 55:8-10.

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[13] To the extent Petitioners contend that they were unable to exhaust because they were unable to access telephones, that contention is based on an outdated news report and contradicted by their own counsel's declaration. ECF No. 10 at 30:11-12, Petitioners cite to a May 1, 2020, CBS report (Rim Decl., Ex. C at 13), which, nearly a month later, is outdated, and contradicted by the BOP's direct evidence that inmates' telephone allotment was increased to 500 minutes per month (from 300 minutes per month) at FCI Terminal Island. *See* Prioleau Decl. ¶¶ 8(A) fn. 3, 16(E), 17, 18(F), 20. Petitioners also contend that they were "prohibited [from] using computers and email," but do not cite to any evidence, even outdated hearsay news reports, in support of this contention. ECF No. 10 at 30:12-13. In addition, Petitioners' alleged lack of access to outside communication is contradicted by the detailed declaration submitted by one of their attorneys, Jimmy Threatt. Threatt declared that "[s]ince May 14, 2020, I have spoken by phone with all three of the current class representatives and a fourth class member, all of whom are incarcerated at FCI Terminal Island." Threatt Decl. ¶ 2. Specifically, Threatt averred that he had a "legal call" with Wilson on May 14, 2020, and provided four bullet points from their conversation. *Id*. ¶ 3. Threatt averred that on May 19, 2020, he had a "legal call" with Smith, and provided seven bullet points from their conversation. *Id*. ¶ 4. Threatt averred that he had a "legal call" with William Sutton, Jr. (who is not a named petitioner, and not a member of the "class" because a class has not been certified) on May 19, 2020, and provided four bullet points from their conversation. *Id*. ¶ 5. Finally, Threatt averred that on May 20, 2020, he had a "legal call" with Vasquez, and provided 13 bullet points from their conversation. *Id*. ¶ 6. Thus, the Threatt Decl. directly belies Petitioners' contention that they have been deprived of telephone access.

Respondents, moreover, object to Petitioner's supporting declarations and exhibits filed as ECF Nos. 10-1 & 10-2 as inadmissible evidence, as the declarations are replete with hearsay (FRE 802), lack foundation, are speculative (FRE 602), and are irrelevant. Courts "may rely on affidavits and hearsay materials which would not be admissible evidence ... if the evidence is appropriate given the character and objectives of the injunctive proceeding," *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) (citations omitted). Here, Petitioners' request for a TRO disturbs the status quo and carries with it a heightened burden that can only be satisfied upon a strong showing of facts that are clearly in their favor. *See Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (A party requesting a mandatory injunction must show "that the law and facts clearly favor [its] position, not simply that [it] is likely to succeed."). Hearsay cannot clearly establish Petitioners' allegations.

Petitioners' contention that FCI Terminal Island "is not currently allowing access to the grievance process" is not supported by any evidence. *See id*. at 56:5 (emphasis omitted). To the contrary, Respondents have submitted evidence that FCI Terminal Island is providing the relief Petitioners purportedly seek. *See* Prioleau Decl. at ¶¶ 34-64 (robust health screening measures for all inmates, staff, and visitors, cohorting and quarantine procedures, increased sanitation and cleaning measures and supplies, and masks). Respondents respectfully submit that the Court should not alter the mandatory requirements of the PLRA for COVID-19 or any other special circumstances. *See Ross*, 136 S. Ct. at 1856-57 ("[A] court may not excuse a failure to exhaust, even to take [special] circumstances into account.").[14]

Finally, each and every inmate at FCI Terminal Island is able to file a motion for immediate release under 18 U.S.C. § 3582(c)(1)(A) with his sentencing court. *See* Bulgarin Decl. ¶¶ 2-3. Indeed, Petitioner Wilson filed a motion for compassionate release on May 5, 2020, in the Eastern District of California. *See United States v. Wilson*, No. 1:15-cr-0046-NONE-SKO, ECF No. 242 (E.D. Cal. May 5, 2020). Wilson presented the same reasons for compassionate release to that district court as in the current Petition: "The requested relief is sought on an urgent basis, in light of the exponentially increasing COVID-19 outbreak at Terminal Island FCI (where Mr. Wilson is housed) and Mr. Wilson's hypertension and asthma, which make him uniquely susceptible to severe illness and death from COVID-19." *Id*. at 2:3-6. Given that Petitioners can utilize the compassionate release process, and Wilson has utilized it, it is disingenuous to argue that they should be excused from the exhaustion requirement under the PLRA. This is especially true because they do not contend that they even attempted to utilize the BOP administrative process, including requesting emergency relief under 28 C.F.R. § 542.18.

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[14] Respondents respectfully submit that the Court should find that Petitioners' failure to exhaust weigh against Petitioner's ability to succeed on the merits. Respondents acknowledge that the district court cases cited cases by Petitioners reached a contrary conclusion (ECF No. 10 at 53:20-54:25), but the Court should reject these findings based on the statutory framework, Supreme Court and Ninth Circuit precedent, and the current conditions at FCI Terminal Island.

Because Petitioners failed to exhaust their administrative remedies as required by the PLRA, and because none of the exceptions to the exhaustion requirement applies in this case, the Petition should be denied.

4. Petitioners Are Not Likely to Succeed on Their Eighth Amendment Claims

a. The Court Lacks Jurisdiction over Conditions-of-Confinement Claims in a Habeas Action.

The jurisdictional basis for the Complaint and the relief it seeks is the habeas statute. *See* ECF No. 1 at ¶¶ 21, 114-131. Indeed, "[h]abeas is at its core a remedy for unlawful executive detention," and "[t]he typical remedy for such detention is, of course, release." *Munaf v. Geren*, 553 U.S. 674, 693 (2008); *see also INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."). But Petitioners' requested relief falls far outside a challenge to the fact or duration of confinement. *See Allen v. McCurry*, 449 U.S. 90, 104 (1980) ("[T]he purpose of [the writ of habeas corpus] is not to redress civil injury, but to release the applicant from unlawful physical confinement."). Rather, courts as a general matter have recognized that a non-habeas civil action is the proper method of challenging "conditions of confinement." *Preiser*, 411 U.S. at 484-99. Accordingly, other courts have held that habeas is an inappropriate collateral attack when pretrial detainees can seek release in their pending criminal cases. *See Reese v. Warden Philadelphia FDC*, 904 F.3d 244, 246-48 (3d Cir. 2018); *Medina v. Choate*, 875 F.3d 1025, 1029 (10th Cir. 2017); *Falcon v. U.S. Bureau of Prisons*, 52 F.3d 137, 139 (7th Cir. 1995); *Fassler v. United States*, 858 F.2d 1016, 1017-19 (5th Cir. 1988).

Although Petitioners bear the burden of asserting jurisdiction, they have not set forth how habeas corpus, "the traditional function of [which] is to secure release from illegal custody[,]" entitles them to release from *lawful* custody. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006); *Preiser*, 411 U.S. at 484-99; ECF No. 1 ¶¶ 21,

114-131. Though filed in the universally apprehensive context of a public health crisis, the Complaint requires application of the longstanding view that such challenges must be sought and exhausted in an administrative or civil rights action, not in a habeas action. Consequently, Petitioners are not likely to succeed on the merits of their condition-of-confinement claims that are not cognizable in habeas. Indeed, the majority of circuit courts to consider the issue, including the Ninth Circuit, have recognized that claims addressing conditions of confinement are outside the scope of the writ. *See, e.g.*, *Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991) ("Habeas corpus proceedings are the proper mechanism for a prisoner to challenge the 'legality or duration' of confinement," but not to "challeng[e] 'conditions of . . . confinement'").

b. Petitioners Are Not Subject to an Unreasonable Risk of Harm.

In a conditions-of-confinement case like this, a prison official violates the prohibition against "cruel and unusual punishments," U.S. Const. Amend. VIII, "only when two requirements"—one objective, the other subjective—"are met." *Farmer v. Brennan*, 511 U.S. 825, 834, 846 (1994). Petitioners establish neither.

The "objective prong" of the Eighth Amendment requires a showing that an inmate has been deprived "of the minimal civilized measure of life's necessities.'" *Id*. at 834. When this deprivation involves a risk of harm, this prong requires the inmate to show that "society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate." *Helling v. McKinney*, 509 U.S. 25, 36 (1993).

Petitioners cannot show that the BOP is depriving them of the "minimal civilized measure of life's necessities" or "violating contemporary standards of decency" in addressing the risk of harm to inmates that COVID-19 presents. "A prison official's duty under the Eighth Amendment is to ensure reasonable safety." *Farmer*, 511 U.S. at 844. The current state of the COVID-19 pandemic exposes everyone—prisoner and non-prisoner alike—to the risk of falling ill. FCI Terminal Island's response is aligned with

official guidance from leading world health authorities for mitigating the risks associated with the pandemic. *See* Prioleau Decl. ¶¶ 5-67.

Petitioners argue that Respondents did not take reasonable steps to protect prisoners at FCI Terminal Island from the harm of COVID-19, but they ignore the evidence of the numerous steps the BOP has taken in response to COVID-19. FCI Terminal Island began implementing risk-reduction practices before the Attorney General's April 3, 2020 memorandum. *See id*. ¶¶ 7-17. FCI Terminal Island has implemented the same risk-reduction practices among the inmates and staff that are recommended for the community at-large: physical distancing, limited movement, screening mechanisms, providing soap for hand washing, frequently disinfecting high-touch areas, and quarantining or isolating individuals as appropriate. *See id*. ¶¶ 16-64. These practices are the same measures that society deems capable of reducing the risk of COVID-19 transmission, and thus reflect the manner in which "today's society chooses to tolerate" that risk. *Helling*, 509 U.S. at 36; *Grinis*, 2020 WL 2300313, at *3 ("These affirmative steps may or may not be the best possible response to the threat of COVID-19 within the institution, but they undermine an argument that the respondents have been actionably deliberately indifferent to the health risks of inmates.").

Notably, Petitioners have not shown that the risk posed by FCI Terminal Island's practices raises their risk of exposure substantially over the risk experienced by the outside community. *See Hines v. Youssef*, 2015 WL 164215, at *4 (E.D. Cal. Jan. 13, 2015) ("Unless there is something about a prisoner's conditions of confinement that raises the risk of exposure substantially above the risk experienced by the surrounding communities, it cannot be reasoned that the prisoner is involuntarily exposed to a risk the society would not tolerate.").

Furthermore, the risk of harm to Petitioners Wilson and Smith is objectively low because they were asymptomatic carriers that have recovered from COVID-19. *See* Leen Decl. ¶¶ 7.a. & b. Wilson tested positive for COVID-19 on April 28, 2020, after FCI Terminal Island conducted mass testing of the entire inmate population. *Id*. ¶ 7.a. Wilson

was asymptomatic, and did not complain of any symptoms to staff. *Id*. Wilson's vitals were recorded from April 28, 2020 to May 8, 2020, and at no time did he have a temperature over 98˚F, and continuously denied having a cough, shortness of breath, muscle pain, fatigue, a sore throat, new loss of taste and smell, headaches and chills. *Id*. He was examined and deemed recovered by medical staff on May 10, 2020. *Id*. Similarly, Smith tested positive on April 29, 2020, was monitored until May 8, 2020, at no time had a temperature over 98.5˚F, and continuously denied having a cough, shortness of breath, muscle pain, fatigue, a sore throat, new loss of taste and smell, headaches and chills. *Id*. ¶ 7.b. He was examined and deemed recovered by medical staff on May 10, 2020. *Id*. Vazquez tested negative for COVID-19 on April 29, 2020. *Id*. ¶ 7.c. The medical staff documented his vitals from May 1 to May 20, 2020, and at no time did he have a temperature over 98˚F. *Id*. He repeatedly denied having a cough, shortness of breath, muscle pain, fatigue, a sore throat, new loss of taste and smell, headaches, or chills. *Id*.

While it is impossible to eliminate all risk factors for transmission of COVID-19, the facts Respondents have presented here make clear that any risks faced by those inside FCI Terminal Island are comparable to the general risks faced by everyone. Petitioners thus have not met their burden to show that the BOP has placed them in conditions of confinement subjecting them to an objectively "unreasonable risk" of harm under the Eighth Amendment. *Helling*, 509 U.S. at 36.

c. Petitioners Have Not Shown the BOP is Acting With Deliberate Indifference.

Petitioners also fail to satisfy the subjective prong of their Eighth Amendment claim, which requires them to show that Respondents "kn[ew] of and disregard[ed] an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. This test is subjective, meaning "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id*. The Eighth Amendment does not require perfect results. *See id*. *at* 844

("prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted").

To establish an entitlement to injunctive relief, Petitioners must show that BOP officials currently are acting with deliberate indifference. Where a prisoner "seeks injunctive relief to prevent a substantial risk of serious injury from ripening into actual harm, the subjective factor . . . should be determined in light of the prison authorities' current attitudes and conduct[.]" *Id*. at 845 (internal quotation marks omitted). Thus, Petitioners must show that today, Respondents are recklessly disregarding an excessive risk to Petitioners' safety, and that they will continue to do so "into the future." *Id*.

Petitioners cannot make this showing. BOP officials have not acted with deliberate indifference to the risk that COVID-19 poses to inmate populations; rather, they have taken aggressive and appropriate measures to abate that risk. The record shows that the BOP responded quickly to the evolving pandemic, designed a series of measures to combat the disease, and continues to closely monitor the spread of the virus in order to adjust to changing circumstances as the situation evolves. *See* Prioleau Decl. ¶¶ 7-19. In coordinating their response, BOP officials have relied on guidance provided by leading health authorities regarding sanitation, physical distancing, testing, and other preventative measures, and have taken actions consistent with those guidelines. *Id*. ¶¶ 7-64. *See Wragg*, No. 20-5496, slip op. at 60 (no Eighth Amendment violation because there is "no evidence of Respondents' liable state of mind"); *Nellson*, 2020 WL 1890670, at *6 ("Assuming that the objective component [of deliberate indifference] is met, and that prison officials know of the risk of COVID-19, plaintiff has not demonstrated that defendants have disregarded that risk."); *Money*, 2020 WL 1820660, at *18 (prisoner petitioners have "no chance of success" as to deliberate indifference because of the measures taken by the Illinois Department of Corrections).

In fact, Petitioners' own pleadings recount the numerous steps FCI Terminal Island has taken to combat COVID-19: conducted mass testing (*see* ECF No. 1 at ¶¶ 12,

61); issued masks (*id*. at ¶¶ 11, 58, 77; ECF No. 10 at 26:13-17, 27:1-3, 46:10-12); locked down the facility (ECF No. 1 at ¶ 16); posted information for the inmate population in the units (*id*. at Ex. C (at 67)); and isolated individuals with positive test results for COVID-19 (ECF No. 1 at ¶ 47 ("moved prisoners"); Ex. 5 (Samra Decl. at ¶ 13 (96:10-16)); ECF No. 10 at 21:1 (acknowledging isolation and quarantine procedures exist). The existence of these facts, which Petitioners acknowledge were taken, undercuts their bald assertions that FCI Terminal Island showed deliberate indifference to the threat to inmate health posed by COVID-19. Respondents respectfully submit that the Court should reach the same conclusion as the district court for New Jersey, in *Wragg*, which was decided today: "In the end, the ugly picture Petitioners paint of FCI Fort Dix is not really [a] fair one. Petitioners' bold statement that the mitigated health risk at FCI Fort Dix is so grave that it violates 'standards of decency for anyone to be so exposed' ignores almost the entire record before this Court." *Wragg*, No. 20-5496, slip op. at 64-65. *See also id*. at 65 ("That physical distancing is not possible in a prison setting, as Petitioners urge, does not an Eighth Amendment claim make and, as such, Petitioners are not likely to succeed on the merits.").

To the contrary, these steps, in the face of this global pandemic, demonstrate an extremely high degree of care. Petitioners thus cannot show that BOP officials are acting with deliberate indifference, and cannot succeed on their Eighth Amendment claim. *See Farmer*, 511 U.S. at 845 ("[P]rison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause."). In total, the evidence demonstrates that Respondents acted with an extremely high degree of care, and certainly were not acting with deliberate indifference that would transform conditions at FCI Terminal Island into an Eighth Amendment "punishment." *See Wilson v. Seiter*, 501 U.S. 294, 298, 300 (1991).

B. Petitioners Fail to Show Irreparable Harm

In addition to not showing a likelihood of success on the merits, Petitioners fail to demonstrate irreparable harm absent injunctive relief. Petitioners claim they face

irreparable harm unless immediately released based on the assumption that continued imprisonment increases their risk of contracting COVID-19 and ultimately their risk of death or serious injury. Yet an irreparable-harm finding requires much more than assumptions.[15] *Winter*, 555 U.S. at 22 (agreeing that the Ninth Circuit's "possibility" of irreparable harm was "too lenient"; the moving party must "demonstrate that irreparable injury is *likely* in the absence of an injunction") (emphasis in original, citations omitted).

Petitioners offer no concrete proof—just speculation—that release would redress their complained-of harms. For instance, they seemingly take it as a given that release would substantially reduce their chances of contracting COVID-19—this is despite the fact that California remains in a state of emergency. They also suggest that, even if they contract COVID-19, they will have a better outcome outside of FCI Terminal Island. But Petitioners have access to healthcare while incarcerated, and they have not shown whether they will have any access to medical care if released. While Petitioners may speculate about their future healthcare options and a host of other issues, at this point one of the few certainties is that release ensures no more guaranteed healthcare. Without proof that they have access to healthcare, ordering their release could present a greater risk to the Petitioners themselves of serious complications should they contract COVID-19, as well as to those in their local communities who they could potentially infect if they contract COVID-19.

Further, FCI Terminal Island is employing the types of measures Petitioners purportedly seek. Petitioners admit that the BOP is releasing inmates under the CARES Act. ECF No. 10 at 14, 34-35. Petitioners may disagree with the BOP's determination in terms of the number of inmates released, but the BOP should not be compelled to change its policies to Petitioners' liking. Further, FCI Terminal Island has been taking an active measure in addressing the COVID-19 pandemic. FCI Terminal Island provides inmates

[15] To the extent the Court finds that the BOP has already instituted all (or the most important aspects) of the relief Petitioners request, that further undercuts their ability to show irreparable harm. Stated differently, the lack of injunctive relief cannot harm Petitioners if the requested relief does not go beyond the BOP's current screening, testing, and isolation procedures.

with surgical and cloth masks that they are required to wear. Prioleau Decl. ¶ 63. Staff are provided with surgical and cloth masks. *Id*. Soap is provided at no cost to every inmate and inmates have access to sinks, water, and soap at all times. *Id*. ¶ 57. All common areas (lobby, bathrooms, cafeteria, etc.) are cleaned daily and cleaned throughout the day with a designated disinfectant that kills human coronavirus. *Id*. ¶ 58. This disinfectant is available to inmates so that they can clean their cells on a regular basis. *Id*. Each housing unit has been stocked with cleaning supplies inmates can use to clean their cells. *Id*. ¶ 59. Staff are required to disinfect all common equipment such as keys and radios upon obtaining those items from the supply room and again upon their return. *Id*. ¶ 61. Staff have also been provided personal protective equipment to be used in appropriate locations such as quarantined areas, isolation units, and screening sites. *Id*. ¶ 62. FCI has sufficient PPE on hand, including N-95 masks, surgical masks, and rubber gloves, on hand to meet its current and anticipated needs, and can order more. *Id*. For example, Petitioners request that the Court order the BOP to take the temperature of all inmates, staff, and visitors daily (ECF No. 1 at 52), but the BOP has already implemented this measure. Prioleau Decl. ¶ 45. Petitioners thus have not demonstrated how entering their requested injunction would provide any additional protection against COVID-19, much less that they would suffer irreparable injury without such an injunction.

C. The Balance of Equities and the Public Interest Do Not Favor Petitioners

The last two TRO factors—focusing on the balance of equities and where the public interest lies—tip sharply in Respondents' favor. Notably, because injunctive relief is being sought against the government, these remaining factors "merge" for analytical purposes. *Nken*, 556 U.S. at 435; *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). In broad strokes, Petitioners want this Court to order the immediate release of a substantial yet indefinite number of federal prisoners—ostensibly until the COVID-19 risk dissipates, whenever that may be. They paint an exaggerated, bleak

picture of their current prison conditions and COVID-19 risk, but avoid key details about what life will look like for them if they are released. For instance, Petitioners do not offer any viable housing options, for themselves or the putative class, showing that housing is actually available, much less showing that housing is available somewhere with a lower COVID-19 risk. Similarly, Petitioners provide no information about whether they or the class members—if released—would have sufficient access to food, medical care, personal-hygiene products, and the many other things necessary for daily living. *See Alvarez*, 2020 WL 2315807 at *5 ("the public interest does not favor the immediate release of a class of inmates who may lack viable housing outside of [the federal facility] and may be deprived of access to food, means of personal hygiene, and medical care if released, all at once, from the facility").

The public interest, moreover, does not favor releasing criminals onto the streets during a pandemic if they cannot prove they have the means to support themselves and avoid making the pandemic worse in local communities. Instead, the government and the public have a significant interest in keeping Petitioners (and other inmates like them) imprisoned during the pandemic—that is, unless and until the CDC changes its guidance or the government chooses to voluntarily release an inmate (e.g., compassionate release). *See* 18 U.S.C. § 3626(a)(2) (requiring courts to consider the "impact on public safety" before granting preliminary injunctive relief to a prisoner); *Money*, 2020 WL 1820660, at *20 ("Compelling a process to potentially release thousands of inmates on an expedited basis could pose a serious threat to public safety and welfare. The risk of recidivism comes into play, as do concerns about victims' rights. The question is not simply what is best for the inmates—the public has vital interests at stake, too."); *Wragg*, No. 20-5496, slip op. at 68 ("Conspicuously absent in Petitioners' analysis is any meaningful discussion of the risk associated with a large scale release of inmates. What would be the plan that addresses the safety and security of the communities to which they are released? Is the proper supervision even available given that the current

COVID-19 crisis is just as real to the law enforcement officers in charge of safety and supervision?").

Petitioners here have been convicted of serious crimes. Wilson was convicted on March 19, 2018, and sentenced to 96 months (eight years) imprisonment for conspiracy to distribute oxycodone and hydrocodone. Roman Decl. ¶ 4.a. Smith was convicted on December 19, 2011, and sentenced to 360 months (30 years) imprisonment for sex trafficking of children by force, fraud, and coercion. *Id*. ¶ 7.a. Vazquez was convicted on July 18, 2012, and sentenced to 20 years imprisonment for aggravated kidnapping. *Id*. ¶ 10.a. Thus, contrary to Petitioners' contentions, they are not "some of the most vulnerable—and least dangerous—people serving time caught in the federal prison system." ECF No. 10 at 15:6-7. These Petitioners have been convicted of serious crimes, and it is improper for Petitioners to mischaracterize their predicament to this Court in this manner. Their criminal convictions distinguish their situation from *Roman v. Wolf*, 2020 WL 1952656 (C.D. Cal. Apr. 23, 2020), which concerned civil immigration detainees. *See* ECF No. 10 at 38:11-15. As the Southern District of California court found, prisoners must be treated differently from civil immigration detainees, and their release may not be ordered under the PLRA. *Alvarez*, 2020 WL 2315807 at *1.[16]

In formulating the policies and procedures in place at FCI Terminal Island discussed above, the BOP relied on its expertise in running prisons and the guidance of health experts—the objective being to combat the spread of the virus *and* take into account critical safety concerns. As the guidance from the CDC and others has changed as more is learned about COVID-19, so too has the BOP's response. The BOP needs to maintain that flexibility during the pandemic so that it may continue to protect all of its constituents. *Turner*, 482 U.S. at 84 ("courts are ill equipped to deal with the increasingly urgent problems of prison administration"); *Alvarez*, 2020 WL 2315807, at *5 (issuing injunctive relief would "unfairly intrud[e] on Defendants' operation of the

[16] In fact, the Honorable Terry Hatter, who is adjudicating the *Roman* case, rejected Petitioners' attempt to have this action transferred to his court. ECF No. 8.

prison system and defy[] Congress's clear policy determinations regarding challenges to prison conditions and prisoner release orders"). In sum, the public interest factors weigh against granting Petitioners' application.

V. CONCLUSION

For these reasons, the Respondents respectfully request that the Court deny the TRO application.

Dated: May 27, 2020

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