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15 UNITED STATES DISTRICT COURT  
 16 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
 17 WESTERN DIVISION

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

20 Plaintiff-Petitioners,

21 v.

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

25 Defendant-Respondents.  
 26

No. CV 20-4451-MWF-MRW

**RESPONDENTS' NOTICE OF  
 MOTION AND MOTION TO DISMISS  
 UNDER FED. R. CIV. P. 12(b)(1) AND  
 12(b)(6); MEMORANDUM OF POINTS  
 AND AUTHORITIES; AND  
 [PROPOSED] ORDER**

Hearing Date: July 27, 2020  
 Hearing Time: 10:00 a.m.  
 Ctrm: 5A

Honorable Michael W. Fitzgerald  
 United States District Judge

27  
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1 **NOTICE OF MOTION AND MOTION TO DISMISS**

2 PLEASE TAKE NOTICE that on July 27, 2020, or as soon as thereafter the matter  
3 may be heard, Respondents Felicia Ponce, in her official capacity as Warden of FCI  
4 Terminal Island, and Michael Carvajal, in his official capacity as Director of the Bureau  
5 of Prisons (the “BOP”) (collectively, “Respondents”) will, and do hereby, move the  
6 Court to dismiss Lance Aaron Wilson, Maurice Smith, and Edgar Vazquez’ (the  
7 “Petitioners”) Complaint – Class Action for Declaratory and Injunctive Relief and  
8 Petition for Writ of Habeas Corpus (the “Complaint”) in its entirety for lack of  
9 jurisdiction and for failure to state a claim, pursuant to Federal Rules of Civil Procedure  
10 12(b)(1) and 12(b)(6). This motion will be made before the Honorable Michael  
11 Fitzgerald, United States District Judge, in the First Street Courthouse located at 350  
12 West 1<sup>st</sup> Street, Courtroom 5A, Los Angeles, CA 90012.

13 Respondents bring this motion on the following grounds:

- 14 1) The Court lacks jurisdiction over Petitioners’ habeas claims;  
15 2) Petitioners failed to exhaust their habeas claims;  
16 3) Petitioners’ requested habeas relief runs afoul of the BOP’s authority to make  
17 inmate placement decisions;  
18 4) Petitioners Eighth Amendment conditions-of-confinement claim should be  
19 dismissed because Petitioners fail to state a claim under the Eighth Amendment  
20 for deliberate indifference; and  
21 5) Petitioners’ Eighth Amendment conditions-of-confinement claim is barred by  
22 their failure to exhaust required administrative remedies under the Prison  
23 Litigation Reform Act (“PLRA”).

24 This motion is made upon this Notice, the attached Memorandum of Points and  
25 Authorities, and all pleadings, records, and other documents on file with the Court in this  
26 action, and upon such oral argument as may be presented at the hearing of this motion.

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1 This motion is made following the conference of counsel pursuant to L.R. 7-3  
2 which took place on June 17, 2020.

3 Dated: June 29, 2020

Respectfully submitted,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Petitioners' Complaint brings two claims: (1) a habeas claim under 28 U.S.C.  
4 § 2241 and 28 U.S.C. § 2243; and (2) a conditions-of-confinement claim for injunctive  
5 relief under 28 U.S.C. § 1331 and 5 U.S.C. § 702. As to the habeas claim, Petitioners  
6 aver that "the fact of their confinement in prison itself amounts to an Eighth Amendment  
7 violation under these circumstances, and nothing short of an order ending their  
8 confinement at Terminal Island will alleviate that violation." Dkt. No. 1 ("Compl."  
9 ¶ 119). As to the conditions-of-confinement claim, Petitioners state that they were not  
10 "seek[ing] the release of any members of the Class," but instead to "enjoin constitutional  
11 violations," maintaining that they were unable to "take steps to protect themselves—such  
12 as social distancing, hand-washing hygiene, or self-quarantining—and the government  
13 has not provided adequate protections." *Id.* ¶¶ 128-129. Petitioners contend that short of  
14 releasing prisoners "to allow for social distancing, there are no steps that Respondents  
15 can take that will adequately protect Terminal Island inmates from COVID-19." Dkt.  
16 No. 30 ("TRO Reply") at 23:1-6.

17 Respondents now move to dismiss both claims. As the Court has already found, it  
18 lacks subject matter jurisdiction over Petitioners' habeas claim; Respondents therefore  
19 respectfully request that the Court dismiss Petitioners' habeas claim. Respondents also  
20 respectfully request that the Court dismiss Petitioners' conditions-of-confinement claim  
21 because the Court does not have jurisdiction to order a prisoner release, even if couched  
22 in terms of home confinement or "enlargement." Further, numerous courts, including the  
23 Sixth Circuit Court of Appeals decision in *Wilson v. Williams*, which overturned the  
24 decision on which Petitioners primarily relied, the Fifth and Eleventh Circuit Court of  
25 Appeals, and the overwhelming majority of district courts that have considered this issue  
26 in circumstances indistinguishable from those present here, have found no Eighth  
27 Amendment violation. Dismissal is also proper because Petitioners admittedly have not  
28 exhausted their administrative remedies under the PLRA.

1 For the reasons stated herein, and in prior filings, Respondents respectfully request  
2 that the Court grant this motion.

## 3 **II. RELEVANT PROCEDURAL BACKGROUND**

4 On May 16, 2020, Petitioners filed the Complaint. Dkt. No. 1. On May 22, 2020,  
5 Petitioners moved *ex parte* for a temporary restraining order (“TRO”) requesting what  
6 they described as a “process-based remedy for enlargement” of release of prisoners  
7 under the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), and the  
8 Attorney General’s March 26 and April 3, 2020 memoranda. Dkt. No. 10. Respondents  
9 opposed the TRO application on May 27, 2020, and Petitioners replied on June 1, 2020.  
10 Dkt. Nos. 24-28, 30.<sup>1</sup>

11 On June 8, 2020, the Court denied Petitioners’ TRO application because the  
12 “PLRA forbids the relief that Petitioners seek in the TRO Application because the relief  
13 sought is not legally cognizable in a habeas claim.” Dkt. No. 36 at 2. The Court,  
14 however, opined that “[w]ere it not for its legal determination, the Court would grant as a  
15 TRO much of the equitable relief that is sought immediately and grant an OSC as to the  
16 rest.” *Id.* On June 10, 2020, the Court amended its June 8 Order, seemingly to correct  
17 one sentence: “[T]he Court would order Respondents to implement an immediate  
18 evaluation of the prisoners for potential release or enlargement, similar to that in *Wilson*  
19 *v. Williams*, but not order enlargement yet.” Dkt. No. 41 (“TRO Order”) at 2. The Court  
20 certified its decision for appeal, noting the different conclusions reached by the Sixth  
21 Circuit and other district courts. *See id.* at 2, 21. The case to which the Court referred,  
22 *Wilson v. Williams*, however, ordering enlargement was reversed by the Sixth Circuit  
23

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24  
25 <sup>1</sup> Petitioners also moved *ex parte* to certify a provisional class consisting of “[a]ll  
26 current and future people in post-conviction custody at Terminal Island.” Dkt. No. 22 at  
27 2:8-9 (emphasis omitted). Respondents opposed this application on June 1, 2020, and  
28 Petitioners replied on June 3, 2020. Dkt. Nos. 31, 33. On May 27, 2020, Petitioners  
moved *ex parte* to expedite discovery. Dkt. No. 29. Respondents opposed the application  
on June 1, 2020. Dkt. No. 32. Petitioners did not file a reply. The Court has not ruled on  
these *ex parte* applications.

1 Court of Appeals on June 9, 2020.<sup>2</sup> *Wilson v. Williams*, --F. 3d--, 2020 WL 3056217 (6th  
2 Cir. Jun. 9, 2020) (“*Williams*”).

3 Petitioners requested permission to file a supplemental memorandum in support of  
4 their TRO application to include their conditions-of-confinement claim, which the Court  
5 granted. *See* Dkt. No. 48. Petitioners filed their supplemental memorandum on June 22,  
6 2020. Dkt. No. 49. Respondents filed their response to the supplemental memorandum  
7 on June 25, 2020. Dkt. Nos. 50, 51.

### 8 **III. PETITIONERS’ ALLEGATIONS**

#### 9 **A. Steps Taken at FCI Terminal Island to Address COVID-19**

10 Petitioners admit that “emergency measures” have been taken at FCI Terminal  
11 Island in response to COVID-19 (Compl. ¶ 47), including that the entire population has  
12 been tested for COVID-19; inmates and staff were provided with personal protective  
13 equipment (“PPE”); inmates were provided with sanitation and cleaning supplies;  
14 inmates testing positive have been separated from those testing negative; and inmates  
15 have been released:

- 16 - **Testing:** FCI Terminal Island began “to test its entire prisoner population on or  
17 around April 28[,] 2020” (Compl. ¶ 61); *id.* at 69 (Wilson wrote: “They tested  
18 everyone here at Terminal Island for the COVID-19 virus.”).
- 19 - **PPE:** Inmates were issued masks at the “end of April,” which they were to use  
20 “for at least a week” (Compl. ¶ 11); masks were distributed “to prisoner workers  
21 and correctional officers on April 2, 2020 (*id.* ¶ 77); *id.* at 57 (Wilson received  
22 masks and guards wear masks) (Wilson Decl. ¶ 12); *id.* at 87 (nurses received  
23 masks and face shields in mid-March and change gowns between seeing patients)  
24 (Rines Decl. ¶ 9); Dkt. No. 10 (“TRO App.”) at 26:13-16 (inmates were given two  
25 masks which were laundered once a week).

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26  
27  
28 <sup>2</sup> Respondents filed a Notice of Supplemental Authority attaching the *Williams*  
decision on June 10, 2020. Dkt. No. 40.

- 1 - **Sanitation and Cleaning Supplies:** On March 26, 2020, “the BOP Director  
2 issued a statement that ‘all cleaning, sanitation, and medical supplies have been  
3 inventoried. Ample supplies are on hand and ready to be distributed or moved to  
4 any facility as deemed necessary’” (Compl. ¶ 75, n. 100); disinfectant was  
5 provided to inmates (*id.* ¶ 48); and hand sanitizer was made available to inmates in  
6 late-April 2020 (*id.* at 95 (Samra Decl. ¶ 13)).
- 7 - **Separation:** FCI Terminal Island has separated inmates “by setting up temporary  
8 living spaces: some inmates have been placed in field tents, and others in at least  
9 one converted warehouse” (Compl. ¶ 55); FCI Terminal Island “have resorted to  
10 cohort-style segregation” and if “a prisoner is determined to have contracted the  
11 disease, he is removed from the unit”) (*id.* ¶ 62); on April 25, 2020, FCI Terminal  
12 Island stopped housing inmates together who had returned from the hospital (*id.*  
13 ¶ 63); FCI Terminal Island provided a “unit designated as ‘clean[,]’ or reserved for  
14 persons who have tested negative for COVID-19.” *Id.* ¶ 64.
- 15 - **Release:** On April 30, 2020, Warden Ponce told Congresswoman Barragan that  
16 she was “considering permitting home confinement for only 46 vulnerable  
17 individuals.”<sup>3</sup> Compl. ¶ 71.

18 These measures appear to be working as there have been relatively few new  
19 positive COVID-19 cases since the filing of the Complaint. FCI Terminal Island

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21 <sup>3</sup> Respondents have offered evidence on the extensive efforts they have taken to  
22 address COVID-19 within the BOP and at FCI Terminal Island, including suspending  
23 movement across BOP facilities; testing; enacting screening, isolation, quarantine, and  
24 social distancing measures; conducting daily temperature checks; supplying inmates with  
25 masks, soap, and hygiene supplies; and screening staff for symptoms and requiring them  
26 to use PPE. *See* Dkt. No. 28 (“Prioleau Decl.” ¶¶ 8, 34-64). Currently, FCI Terminal  
27 Island is in Phase 7 of the BOP’s COVID-19 Action Plan, which requires that inmates  
28 spend the majority of their time in their housing units, have their meals delivered to their  
housing units, and are only permitted outside in small groups at prearranged times to  
exercise and access telephones and computers. *Id.* ¶ 20, Exs. C & E. FCI Terminal Island  
has also repeatedly ran searches of inmates suitable for home confinement. *See* Dkt. No.  
51 (Javernick Decl. ¶¶ 9-23). Between March 23, 2020 and June 23, 2020, 110 inmates  
were furlough transferred out of FCI Terminal Island to home confinement or a  
residential reentry center. *Id.* ¶ 27. As of June 22, 2020, six inmates have a home  
confinement placement date and are awaiting placement, and 28 inmates have been  
referred for home confinement and are awaiting approval. *Id.* ¶ 26.

1 currently has six inmate and three staff cases of COVID-19 cases. *See*  
2 <https://www.bop.gov/coronavirus/> (last accessed June 29, 2020). Moreover, FCI  
3 Terminal Island’s population has decreased and currently houses 977 inmates. *See*  
4 <https://www.bop.gov/locations/institutions/trm/> (last accessed June 29, 2020).

5 **B. Petitioners Have Not Complied with the PLRA Grievance Process**

6 Petitioners admit that none of them have completed any step of the PLRA  
7 administrative-grievance process. TRO App. at 52:25-57:7.

8 **IV. LEGAL STANDARDS UNDER FED. R. CIV. P. 12(b)(1) AND 12(b)(6)**

9 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life Ins.*  
10 *Co.*, 511 U.S. 375, 377, (1994). “A federal court is presumed to lack jurisdiction in a  
11 particular case unless the contrary affirmatively appears.” *Stock W., Inc. v. Confederated*  
12 *Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). A party may  
13 seek dismissal of an action for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) “either  
14 on the face of the pleadings or by presenting extrinsic evidence.” *Warren v. Fox Family*  
15 *Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). Where the party asserts a factual  
16 challenge, the court may consider extrinsic evidence demonstrating or refuting  
17 the existence of jurisdiction without converting the motion to dismiss into a motion for  
18 summary judgment. *Id.* The party asserting subject matter jurisdiction has the burden of  
19 persuasion for establishing it. *Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2010).

20 A motion under Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the  
21 complaint. Dismissal is appropriate where the complaint lacks a cognizable legal theory  
22 or sufficient facts to support a cognizable legal theory. *See Balistreri v. Pacifica Police*  
23 *Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint may survive a motion to dismiss  
24 only if, taking all well-pleaded factual allegations as true, it contains enough facts to  
25 “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
26 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim  
27 has facial plausibility when the plaintiff pleads factual content that allows the court to  
28 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

1 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
2 statements, do not suffice.” *Id.* Although the scope of review is limited to the contents of  
3 the complaint, the Court may consider exhibits submitted with the complaint. *Hal Roach*  
4 *Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.9 (9th Cir. 1990).

## 5 **V. ARGUMENT**

### 6 **A. The Court Lacks Jurisdiction Over Petitioners’ Habeas Claims**

7 As the Court has already recognized, Petitioners’ habeas claims are  
8 jurisdictionally barred. *See* TRO Order at 15-19. The Sixth Circuit carved out a narrow  
9 exception in the habeas statute where “[t]o the extent petitioners argue the alleged  
10 unconstitutional conditions of their confinement can be remedied only by release, 28  
11 U.S.C. § 2241 conferred upon the district court jurisdiction to consider the petition.”  
12 *Williams*, 2020 WL 3056217, at \*5. *Williams*, however, held that “because the district  
13 court erred in concluding that petitioners have shown a likelihood of success on the  
14 merits of their Eighth Amendment claim . . . the district court abused its discretion in  
15 granting the preliminary injunction,” and vacated the injunction. *Id.* at \*1.

16 Other courts, however, as the Court noted, including *Alvarez v. Larose*, 2020 WL  
17 2315807, at \*3 (S.D. Cal. May 9, 2020) and *Wragg v. Ortiz*, 2020 WL 2745247, at \*18  
18 (D.N.J. May 27, 2020), found that the inmate-petitioners “were not raising cognizable  
19 habeas claim because their claims were ultimately premised on the conditions of  
20 confinement.” TRO Order at 18. Respondents also cited other district court cases in  
21 addition to *Alvarez* and *Wragg* finding lack of jurisdiction within the COVID-19 prison  
22 context. *See* Dkt. No. 24 at 26, citing *Money v. Pritzker*, 2020 WL 1820660, at \*14 (N.D.  
23 Ill. Apr. 10, 2020); *Plata v. Newsom*, 2020 WL 1908776, at \*1, 9-11 (N.D. Cal. Apr. 17,  
24 2020); *Livas v. Myers*, 2020 WL 1939583, at \*9 (W.D. La. Apr. 22, 2020). These cases  
25 were correctly decided because Petitioners’ complaints relating to the conditions of  
26 confinement are outside of the scope of a writ for habeas corpus. *See Crawford v. Bell*,  
27 599 F.2d 890, 891–892 (9th Cir. 1979) (“the writ of habeas corpus is limited to attacks  
28 upon the legality or duration of confinement”); *Badea v. Cox*, 931 F.2d 573, 574 (9th

1 Cir. 1991) (“Habeas corpus proceedings are the proper mechanism for a prisoner to  
2 challenge the ‘legality or duration’ of confinement,” but not to “challeng[e] ‘conditions  
3 of . . . confinement’”) (citations omitted).

4 1. Petitioners Have Failed to Satisfy the Habeas Exhaustion  
5 Requirements

6 The Court previously stated that it was “satisfied that exhaustion is met or excused  
7 here, for the reasons argued by Petitioners.” TRO Order at 19-20, citing TRO Reply at  
8 14-17. Petitioners’ argument, however, rested on Respondents’ alleged lack of evidence  
9 that administrative remedies have been made “effectively unavailable” for prisoners  
10 during the COVID-19 crisis; and that this lack of evidence “warrants the opposite  
11 inference” that administrative complaints were not being considered. *See id.*  
12 Respondents respectfully submit that the Court should not give such credence to  
13 Petitioners’ arguments because Petitioners admit that they did not even attempt to  
14 exhaust their administrative remedies. TRO Application at 52:25-57:7. Therefore, there  
15 is no reason for the Respondents to submit evidence on an undisputed fact.

16 Regardless, federal inmates are required to exhaust their administrative remedies  
17 prior to bringing a petition for a writ of habeas corpus in federal court. *Martinez v.*  
18 *Roberts*, 804 F.2d 570, 571 (9th Cir. 1986). As noted, federal courts “require as a  
19 prudential matter, that habeas petitioners exhaust available judicial and administrative  
20 remedies before seeking relief under § 2241. . . . Prudential limits, like jurisdictional  
21 limits and limits on venue, are ordinarily not optional.” *Castro–Cortez v. INS*, 239 F.3d  
22 1037, 1047 (9th Cir. 2001), *abrogated on another ground by Fernandez–Vargas v.*  
23 *Gonzales*, 548 U.S. 30 (2006). Thus, while “courts have discretion to waive the  
24 exhaustion requirement when prudentially required, this discretion is not unfettered.”  
25 *Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004).

1                   2.     Petitioners’ Habeas Claims Run Afoul of the BOP’s Judicially  
2                             Unreviewable Authority to Make Inmate Placement Decisions

3             As Respondents explained in their supplemental memorandum in opposition to  
4     Petitioners’ TRO application, Petitioners’ request to order “Respondents to fully utilize  
5     their authority to transfer non-violent prisoners with viable home confinement plans and  
6     to evaluate quickly compassionate release requests so that they may be escalated to the  
7     courts as appropriate” is not subject to judicial review. *See* Dkt. No. 50 at 12:1-14:6.  
8     Nothing in the CARES Act limits or proscribes the BOP’s sole discretion as to inmate  
9     placement decisions, nor does anything in the CARES Act require that the BOP release  
10    Petitioners. To the contrary, in passing the CARES Act, Congress preserved the  
11    Director’s authority to use it “as the Director deems appropriate.” CARES Act, PL 116-  
12    136, 134 Stat 281 § 12003(b) (Mar. 27, 2020). 18 U.S.C. §§ 3621(b) and 3625 prohibit a  
13    court from reviewing the BOP’s decision of where to place an inmate. *Reeb v. Thomas*,  
14    636 F.3d 1224, 1226-28 (9th Cir. 2011) (courts lack jurisdiction to review BOP’s  
15    placement decisions under 18 U.S.C. §§ 3621-24); *United States v. Ceballos*, 671 F.3d  
16    852, 855 (9th Cir. 2011) (“[T]he court has no jurisdiction to select the place where the  
17    sentence will be served. Authority to determine place of confinement resides in the  
18    executive branch of government and is delegated to the Bureau of Prisons.”).

19            The BOP’s decision whether to transfer an inmate to a different facility or to home  
20    confinement falls within its unreviewable authority to designate an inmate’s place of  
21    imprisonment. 18 U.S.C. § 3621(b) (the BOP “shall designate the place of the prisoner’s  
22    imprisonment,” and that this designation is “not reviewable by any court”). The Supreme  
23    Court has acknowledged that “[i]t is well settled that the decision where to house  
24    inmates is at the core of prison administrators’ expertise.” *McKune v. Lile*, 536 U.S. 24,  
25    39 (2002). Although the statute does not define “place of imprisonment,” a district court  
26    presiding over a challenge to COVID-19 conditions at a federal prison recently noted  
27    that “[b]oth placement at a Residential Reentry Center (‘RRC’) (more commonly known  
28    as a halfway house) and on home confinement are within the BOP’s discretion” under

1 this provision. *Livas*, 2020 WL 1939583 at \*6; *cf. United States v. Yates*, 2019 WL  
2 1779773 at \*4 (D. Kan. Apr. 23, 2019) (“[I]t is BOP – not the courts – who decides  
3 whether home detention is appropriate.”); *Crum v. Blanckensee*, 2020 WL 3057799, at  
4 \*3 (C.D. Cal. Jun. 8, 2020) (Hon. David O. Carter) (dismissing an inmate’s habeas  
5 petition requesting transfer to home confinement in light of the COVID-19 pandemic  
6 and the conditions at FCI Lompoc given § 3621’s express prohibition against judicial  
7 review); *Brown v. Sanders*, 2011 WL 4899919, at \*2 n.3 (C.D. Cal. Sept. 1, 2011) (place  
8 of detention “immaterial” under § 3621), *aff’d sub. nom Brown v. Ives*, 543 F. App’x  
9 636 (9th Cir. 2013). Given Section 3621’s express prohibition against judicial review  
10 and the clear precedent supporting home confinement as a “place of imprisonment,” the  
11 Court should dismiss Petitioners’ habeas claim for this additional reason.

12 **B. Petitioners’ Non-Habeas Eighth Amendment Conditions-of-**  
13 **Confinement Claim Should Be Dismissed**

14 1. Petitioners’ Allegations Do Not Support a Finding of Deliberate  
15 Indifference

16 a. *Standard for Deliberate Indifference*

17 In a conditions-of-confinement case, a prison official violates the prohibition  
18 against “cruel and unusual punishments,” U.S. Const. Amend. VIII, “only when two  
19 requirements”—one objective, the other subjective—“are met.” *Farmer*, 511 U.S. 825,  
20 834, 846 (1994). To satisfy the Eighth Amendment standards, prison officials must  
21 ensure that inmates receive adequate food, clothing, shelter, and medical care, and must  
22 “take reasonable measures to guarantee the safety of the inmates.” *Id.* at 832 (citations  
23 omitted). Inmates alleging Eighth Amendment violations based on unsafe prison  
24 conditions must demonstrate that prison officials were deliberately indifferent to their  
25 health or safety by subjecting them to a substantial risk of harm. *Id.* at 834. Prison  
26 officials display a deliberate indifference to an inmate’s well-being when they  
27 consciously disregard an excessive risk of harm to the inmate’s health or safety. *Id.* at  
28 838-40. It is “only ‘the unnecessary and wanton infliction of pain’ ... [which] constitutes

1 cruel and unusual punishment forbidden by the Eighth Amendment. *Whitley v. Albers*,  
2 475 U.S. 612, 619 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)).

3 “[I]f a particular condition or restriction ... is reasonably related to a legitimate  
4 governmental objective, it does not, without more, amount to ‘punishment.’” *Bell v.*  
5 *Wolfish*, 441 U.S. 520, 539 (1979). “[T]he effective management of a detention facility  
6 ... is a valid objective that may justify the imposition of conditions” that are  
7 discomfoting and restrictive, without the indifference that such restrictions are intended  
8 as punishment. *Id.* at 450. Moreover, “it is obduracy and wantonness, not inadvertence or  
9 error in good faith, that characterize the conduct prohibited by the Cruel and Unusual  
10 Punishments Clause, whether that conduct occurs in connection with establishing  
11 conditions of confinement, supplying medical needs, or restoring official control over a  
12 tumultuous cellblock.” *Wilson v. Seiter*, 501 U.S. 294, 299 (1991).

13 “[A] prison official violates the Eighth Amendment only when two requirements  
14 are met” – both an objective and subjective component. *See Farmer*, 511 U.S. at 834.  
15 The objective component of an Eighth Amendment claim requires that the deprivation  
16 must be “sufficiently serious.” *Id.* at 833. “[O]nly those deprivations denying ‘the  
17 minimal civilized measure of life’s necessities’ ... are sufficiently grave to form the  
18 basis of an Eighth Amendment violation.” *Wilson*, 501 U.S. at 298. The inmate must  
19 show that he is incarcerated under conditions posing a substantial risk of harm. *See*  
20 *Farmer*, 511 U.S. at 837.

21 The subjective component relates to the defendant’s state of mind, and requires  
22 deliberate indifference. *See Farmer*, 511 U.S. at 834. To satisfy this requirement,  
23 Petitioners must show that Respondents “kn[ew] of and disregard[ed] an excessive risk  
24 to inmate health or safety.” *Id.* at 837. To satisfy this standard, the prison official must  
25 have a “sufficiently culpable state of mind.” *Id.* at 833. This test is subjective, meaning  
26 “the official must both be aware of facts from which the inference could be drawn that a  
27 substantial risk of serious harm exists, and he must also draw the inference.” *Id.*

28

1                   ***b. Petitioners Cannot Demonstrate that They Are Subject to an***  
2                   ***Unreasonable Risk of Harm***

3           The “objective prong” of the Eighth Amendment requires a showing that an  
4 inmate has been deprived “of the minimal civilized measure of life’s necessities.”  
5 *Farmer*, 511 U.S. at 834. When this deprivation involves a risk of harm, this prong  
6 requires the inmate to show that “society considers the risk that the prisoner complains  
7 of to be so grave that it violates contemporary standards of decency to expose anyone  
8 unwillingly to such a risk. In other words, the prisoner must show that the risk of which  
9 he complains is not one that today’s society chooses to tolerate.” *Helling v. McKinney*,  
10 509 U.S. 25, 36 (1993).

11           Petitioners cannot show that the BOP is depriving them of the “minimal civilized  
12 measure of life’s necessities” or “violating contemporary standards of decency” in  
13 addressing the risk of harm to inmates that COVID-19 presents. “A prison official’s duty  
14 under the Eighth Amendment is to ensure reasonable safety.” *Farmer*, 511 U.S. at 844.  
15 The current state of the COVID-19 pandemic exposes everyone—prisoner and non-  
16 prisoner alike—to the risk of falling ill. The Complaint acknowledges in several places  
17 that FCI Terminal Island has tested every single inmate, has provided medical care and  
18 medication to prisoners, has taken steps to increase the ability for inmates to practice  
19 social distancing, has provided inmates with masks and cleaning supplies, has distributed  
20 masks to staff, have taken cohorting and quarantine measures, and has considered  
21 inmates for home confinement under the CARES Act and has in fact placed inmates on  
22 home confinement. *See* § III.A. *supra*. That these measures have not been done to  
23 Petitioners’ satisfaction or that they have issues with how those measures were  
24 undertaken is insufficient to show deliberate indifference as the Fifth Circuit held in  
25 *Valentine v. Collier*, 956 F.3d 797, 801-02 (5th Cir. 2020) (compliance with CDC  
26 recommendations, including “access to soap, tissues, gloves, masks, regular cleaning,  
27 signage and education, quarantine of new prisoners, and social distancing during  
28 transport” satisfies the Eighth Amendment). *See also Chunn v. Edge*, 2020 WL 3055669,

1 at \*24 (E.D.N.Y. Jun. 9, 2020) (petitioners could not meet the objective component of  
2 the Eighth Amendment test “given the measures that prison officials have instituted to  
3 address COVID-19 and the best available evidence regarding those measures’ results”);  
4 *Grinis v. Spaulding*, 2020 WL 2300313, at \*3 (May 8, 2020 D. Mass.) (“These  
5 affirmative steps may or may not be the best possible response to the threat of COVID-  
6 19 within the institution, but they undermine an argument that the respondents have been  
7 actionably deliberately indifferent to the health risks of inmates.”).

8 *c. Petitioners Cannot Satisfy the Subjective Test for Deliberate*  
9 *Indifference*

10 Petitioners also fail to satisfy the subjective prong of their Eighth Amendment  
11 claim, which requires them to show that Respondents “kn[ew] of and disregard[ed] an  
12 excessive risk to inmate health or safety.” *Farmer*, 511 U.S. at 837. This test is  
13 subjective, meaning “the official must both be aware of facts from which the inference  
14 could be drawn that a substantial risk of serious harm exists, and he must also draw the  
15 inference.” *Id.* The Eighth Amendment does not require perfect results. *See id.* at 844  
16 (“prison officials who actually knew of a substantial risk to inmate health or safety may  
17 be found free from liability if they responded reasonably to the risk, even if the harm  
18 ultimately was not averted”).

19 To establish an entitlement to injunctive relief, Petitioners must show that BOP  
20 officials currently are acting with deliberate indifference. Where a prisoner “seeks  
21 injunctive relief to prevent a substantial risk of serious injury from ripening into actual  
22 harm, the subjective factor . . . should be determined in light of the prison authorities’  
23 current attitudes and conduct[.]” *Id.* at 845 (internal quotation marks omitted). Thus,  
24 Petitioners must show that today, Respondents are recklessly disregarding an excessive  
25 risk to Petitioners’ safety, and that they will continue to do so “into the future.” *Id.* The  
26 Fifth, Sixth and Eleventh Circuits found no Eighth Amendment violations in  
27 substantially similar circumstances as to those here involving COVID-19 at correctional  
28 facilities.

1 In *Swain v. Junior*, –F.3d–, 2020 WL 3167628, at \*6 (11th Cir. Jun. 15, 2020), the  
2 district court issued an injunction finding that prison officials were deliberately  
3 indifferent because it was not possible for inmates to be at least six feet apart at all times  
4 and because the rate of COVID-19 infections had increased. The Eleventh Circuit  
5 overturned the district court, noting that, with respect to the infection rate at the facility,  
6 resulting harm cannot alone establish a culpable state of mind. *Id.* at \*7. It found no  
7 Eighth Amendment liability if prison officials respond reasonably to a risk to inmate  
8 health, “*even if the harm ultimately was not averted.*” *Id.* (quoting *Farmer*, 511 U.S. at  
9 844) (emphasis in original). The Eleventh Circuit found that where prison officials “took  
10 numerous *other* measures—besides social distancing—to mitigate the spread of the  
11 virus,” including requiring the use of face masks, screening of staff into the facility, daily  
12 temperature screening, suspending outside visitation, and providing disinfecting and  
13 hygiene supplies to all inmates, prison officials could not be found liable because they  
14 could not meet the subjective component under the Eighth Amendment. *Id.* at \*8  
15 (emphasis in original).

16 In *Williams*, the Sixth Circuit also vacated the district court’s injunction and held  
17 that petitioners could not satisfy the subjective prong of an Eighth Amendment violation  
18 where BOP had responded reasonably to the risk of COVID-19 at FCI Elkton by  
19 implementing screening, testing, isolation, and hygiene measures, limiting inmate  
20 movement, and providing inmates and staff with masks and PPE. 2020 WL 3056217, at  
21 \*7-8. *Williams* noted that the Fifth and Eleventh Circuits had already found similar  
22 measures to constitute a reasonable response to COVID-19 such that there was no  
23 tenable Eighth Amendment claim. *Id.* at \*9 (citing *Swain* (per curiam); *Valentine* (per  
24 curiam); *Marlowe v. LeBlanc*, 2020 WL 2043425 (5th Cir. Apr. 27, 2020) (per curiam)).

25 Recently, the Eastern District of New York also found that petitioners could not  
26 meet the subjective component of the Eighth Amendment test because the BOP has  
27 “imposed dozens of measures, such as (i) enhancing intake screening procedures for all  
28 inmates and staff, (ii) providing soap and other cleaning products to inmates at no cost,

1 (iii) increasing cleaning of common areas and shared items, (iv) isolating symptomatic  
2 inmates, (v) broadly distributing and using PPE to prevent transmission of the virus, and  
3 (vi) modifying operations throughout the facility to facilitate social distancing to the  
4 greatest extent possible and abate the risk of spread . . . belie any suggestion that prison  
5 officials ‘have turned the kind of blind eye and deaf ear to a known problem that would  
6 indicate’ deliberate indifference.” *Chunn*, 2020 WL 3055669, at \*26 (quoting *Money*,  
7 2020 WL 1820660, at \*18; *Swain*, 958 F.3d at 1090)).

8 Similarly, Petitioners here cannot satisfy the subjective requirement of an Eighth  
9 Amendment conditions-of-confinement claim. BOP officials have not acted with  
10 deliberate indifference to the risk that COVID-19 poses to inmate populations; rather,  
11 they have taken aggressive and appropriate measures to abate that risk at FCI Terminal  
12 Island. In the Complaint, Petitioners acknowledge that mass testing has been done, that  
13 inmates are provided with masks and disinfectant, and that FCI Terminal Island has  
14 taken steps to cohort inmates and to provide them with more space. Although Petitioners  
15 may have concerns about the implementation about these measures (e.g., they allege that  
16 they are only receiving masks every two weeks instead of once a week or that the  
17 disinfectant FCI Terminal Island provided them is “watered-down”), it does not rise to  
18 the level of deliberate indifference. *See Wragg*, 2020 WL 2745247, at \*21 (no Eighth  
19 Amendment violation because there is “no evidence of Respondents’ liable state of  
20 mind” and noting “physical distancing is not possible in a prison setting, as Petitioners  
21 urge, does not an Eighth Amendment claim make and, as such, Petitioners are not likely  
22 to succeed on the merits”); *Nellson v. Barnhart*, 2020 WL 1890670, at \*6 (D. Col. Apr.  
23 6, 2020) (“Assuming that the objective component [of deliberate indifference] is met,  
24 and that prison officials know of the risk of COVID-19, plaintiff has not demonstrated  
25 that defendants have disregarded that risk.”); *Money*, 2020 WL 1820660, at \*18  
26 (prisoner petitioners have “no chance of success” as to deliberate indifference because of  
27 the measures taken by the Illinois Department of Corrections).

28

1 As such, Petitioners cannot succeed on their Eighth Amendment claim given the  
2 actions taken by the BOP at FCI Terminal Island. *See Farmer*, 511 U.S. at 845  
3 (“[P]rison officials who act reasonably cannot be found liable under the Cruel and  
4 Unusual Punishments Clause.”). Here, Respondents acted with a high degree of care, and  
5 certainly were not acting with deliberate indifference that would transform conditions at  
6 FCI Terminal Island into an Eighth Amendment “punishment.” *See Wilson v. Seiter*, 501  
7 U.S. at 298, 300.

8 2. Petitioners Have Failed to Satisfy the PLRA’s Exhaustion  
9 Requirements

10 As Respondents previously explained, Petitioners’ conditions-of-confinement  
11 claim should be denied because they have failed to exhaust the PLRA’s exhaustion  
12 requirements. *See* Dkt. No. 50 at 6:8-8:5. For purposes of this motion, it is undisputed  
13 that Petitioners did not even attempt to exhaust. Thus, if Petitioners are given leave to  
14 amend, they must state facts supporting their arguments that: (1) there was no  
15 administrative procedure to be considered for home confinement under the CARES Act;  
16 (2) exhaustion would be “futile due to the urgency of the COVID-19 pandemic”; and (3)  
17 administrative remedies have been made “effectively unavailable at this time” (*see* TRO  
18 Reply at 14:23-15:2) in order to satisfy *Iqbal*’s pleading requirements. *Iqbal*, 556 U.S. at  
19 678; *see also Valentine*, 956 F.3d at 804 (suit “premature” where inmates did not utilize  
20 the administrative process when they were “required to exhaust”); *Swain*, 2020 WL  
21 3167628, at \*11 (“There is no question that exhaustion is mandatory under the PLRA  
22 and that unexhausted claims cannot be brought in court.”) (quoting *Jones v. Bock*, 549  
23 U.S. 199, 211 (2007)); *Wragg v. Ortiz*, 2020 WL 3074026, at \*2 (D.N.J. Jun. 10, 2020)  
24 (“the Court takes this opportunity once again to reiterate its view that a vulnerable  
25 inmate who is truly at risk is able to pursue the statutory avenues of relief available to  
26 him”). Because Petitioners admittedly failed to exhaust administrative remedies under  
27 the PLRA, their conditions-of-confinement claim must be dismissed.

1 **VI. CONCLUSION**

2 For the foregoing reasons, the Respondents respectfully request that the Court  
3 dismiss Petitioners' Complaint.

4 Dated: June 29, 2020

Respectfully submitted,

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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

**[PROPOSED] ORDER GRANTING  
RESPONDENTS' MOTION TO  
DISMISS UNDER FED. R. CIV. P.  
12(b)(1) AND 12(b)(6)**

Hearing Date: July 27, 2020  
Hearing Time: 10:00 a.m.  
Ctrm: 5A

Honorable Michael W. Fitzgerald  
United States District Judge

1           Petitioners’ Complaint brings two claims: (1) a habeas claim under 28 U.S.C.  
2 § 2241 and 28 U.S.C. § 2243; and (2) a conditions-of-confinement claim for injunctive  
3 relief under 28 U.S.C. § 1331 and 5 U.S.C. § 702. As to the habeas claim, Petitioners  
4 aver that “the fact of their confinement in prison itself amounts to an Eighth Amendment  
5 violation under these circumstances, and nothing short of an order ending their  
6 confinement at Terminal Island will alleviate that violation.” Dkt. No. 1 (“Compl.”  
7 ¶ 119). As to the conditions-of-confinement claim, Petitioners state that they were not  
8 “seek[ing] the release of any members of the Class,” but instead to “enjoin constitutional  
9 violations,” maintaining that they were unable to “take steps to protect themselves—such  
10 as social distancing, hand-washing hygiene, or self-quarantining—and the government  
11 has not provided adequate protections.” *Id.* ¶¶ 128-129. Petitioners contend that short of  
12 releasing prisoners “to allow for social distancing, there are no steps that Respondents  
13 can take that will adequately protect Terminal Island inmates from COVID-19.” Dkt.  
14 No. 30 (“TRO Reply”) at 23:1-6.

15           Respondents now move to dismiss both claims. As the Court has already found, it  
16 lacks subject matter jurisdiction over Petitioners’ habeas claim. Dkt. No. 41. The Court  
17 hereby dismisses Petitioners’ habeas claim for the reasons previously stated. The Court  
18 also dismisses Petitioners’ conditions-of-confinement claim because the Court does not  
19 have jurisdiction to order a prisoner release, even if couched in terms of home  
20 confinement or “enlargement.” Further, numerous courts, including the Sixth Circuit  
21 Court of Appeals decision in *Wilson v. Williams*, which overturned the decision on  
22 which Petitioners primarily relied, the Fifth and Eleventh Circuit Court of Appeals, and  
23 the overwhelming majority of district courts that have considered this issue in  
24 circumstances indistinguishable from those present here, have found no Eighth  
25 Amendment violation. Dismissal is also proper because Petitioners admittedly have not  
26 exhausted their administrative remedies under the PLRA.

27           For these reasons, the Court grants Respondents’ motion to dismiss.  
28

1 **I. RELEVANT PROCEDURAL BACKGROUND**

2 On May 16, 2020, Petitioners filed the Complaint. Dkt. No. 1. On May 22, 2020,  
3 Petitioners moved *ex parte* for a temporary restraining order (“TRO”) requesting what  
4 they described as a “process-based remedy for enlargement” of release of prisoners  
5 under the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), and the  
6 Attorney General’s March 26 and April 3, 2020 memoranda. Dkt. No. 10. Respondents  
7 opposed the TRO application on May 27, 2020, and Petitioners replied on June 1, 2020.  
8 Dkt. Nos. 24-28, 30.<sup>1</sup>

9 On June 8, 2020, the Court denied Petitioners’ TRO application because the  
10 “PLRA forbids the relief that Petitioners seek in the TRO Application because the relief  
11 sought is not legally cognizable in a habeas claim.” Dkt. No. 36 at 2. The Court,  
12 however, opined that “[w]ere it not for its legal determination, the Court would grant as a  
13 TRO much of the equitable relief that is sought immediately and grant an OSC as to the  
14 rest.” *Id.* On June 10, 2020, the Court amended its June 8 Order, to correct one sentence:  
15 “[T]he Court would order Respondents to implement an immediate evaluation of the  
16 prisoners for potential release or enlargement, similar to that in *Wilson v. Williams*, but  
17 not order enlargement yet.” Dkt. No. 41 (“TRO Order”) at 2. The Court certified its  
18 decision for appeal, noting the different conclusions reached by the Sixth Circuit and  
19 other district courts. *See id.* at 2, 21. The case to which the Court referred, *Wilson v.*  
20 *Williams*, however, ordering enlargement was reversed by the Sixth Circuit Court of  
21 Appeals on June 9, 2020.<sup>2</sup> *Wilson v. Williams*, --F. 3d--, 2020 WL 3056217 (6th Cir. Jun.  
22 9, 2020) (“*Williams*”).

23 \_\_\_\_\_  
24 <sup>1</sup> Petitioners also moved *ex parte* to certify a provisional class consisting of “[a]ll  
25 current and future people in post-conviction custody at Terminal Island.” Dkt. No. 22 at  
26 2:8-9 (emphasis omitted). Respondents opposed this application on June 1, 2020, and  
27 Petitioners replied on June 3, 2020. Dkt. Nos. 31, 33. On May 27, 2020, Petitioners  
moved *ex parte* to expedite discovery. Dkt. No. 29. Respondents opposed the application  
on June 1, 2020. Dkt. No. 32. Petitioners did not file a reply. The Court has not ruled on  
these *ex parte* applications.

28 <sup>2</sup> Respondents filed a Notice of Supplemental Authority attaching the *Williams*  
decision on June 10, 2020. Dkt. No. 40.

1           Petitioners requested permission to file a supplemental memorandum in support of  
2 their TRO application to include their conditions-of-confinement claim, which the Court  
3 granted. *See* Dkt. No. 48. Petitioners filed their supplemental memorandum on June 22,  
4 2020. Dkt. No. 49. Respondents filed their response to the supplemental memorandum  
5 on June 25, 2020. Dkt. Nos. 50, 51.

6           Respondents moved to dismiss Petitioners’ Complaint on June 29, 2020. Dkt. No.  
7 55.

## 8 **II. PETITIONERS’ ALLEGATIONS**

### 9 **A. Steps Taken at FCI Terminal Island to Address COVID-19**

10           Petitioners admit that “emergency measures” have been taken at FCI Terminal  
11 Island in response to COVID-19 (Compl. ¶ 47), including that the entire population has  
12 been tested for COVID-19; inmates and staff were provided with personal protective  
13 equipment (“PPE”); inmates were provided with sanitation and cleaning supplies;  
14 inmates testing positive have been separated from those testing negative; and inmates  
15 have been released:

- 16       - **Testing:** FCI Terminal Island began “to test its entire prisoner population on or  
17 around April 28[,] 2020” (Compl. ¶ 61); *id.* at 69 (Wilson wrote: “They tested  
18 everyone here at Terminal Island for the COVID-19 virus.”).
- 19       - **PPE:** Inmates were issued masks at the “end of April,” which they were to use  
20 “for at least a week” (Compl. ¶ 11); masks were distributed “to prisoner workers  
21 and correctional officers on April 2, 2020 (*id.* ¶ 77); *id.* at 57 (Wilson received  
22 masks and guards wear masks) (Wilson Decl. ¶ 12); *id.* at 87 (nurses received  
23 masks and face shields in mid-March and change gowns between seeing patients)  
24 (Rines Decl. ¶ 9); Dkt. No. 10 (“TRO App.”) at 26:13-16 (inmates were given two  
25 masks which were laundered once a week).
- 26       - **Sanitation and Cleaning Supplies:** On March 26, 2020, “the BOP Director  
27 issued a statement that ‘all cleaning, sanitation, and medical supplies have been  
28 inventoried. Ample supplies are on hand and ready to be distributed or moved to

1 any facility as deemed necessary” (Compl. ¶ 75, n. 100); disinfectant was  
2 provided to inmates (*id.* ¶ 48); and hand sanitizer was made available to inmates in  
3 late-April 2020 (*id.* at 95 (Samra Decl. ¶ 13)).

4 - **Separation:** FCI Terminal Island has separated inmates “by setting up temporary  
5 living spaces: some inmates have been placed in field tents, and others in at least  
6 one converted warehouse” (Compl. ¶ 55); FCI Terminal Island “have resorted to  
7 cohort-style segregation” and if “a prisoner is determined to have contracted the  
8 disease, he is removed from the unit”) (*id.* ¶ 62); on April 25, 2020, FCI Terminal  
9 Island stopped housing inmates together who had returned from the hospital (*id.*  
10 ¶ 63); FCI Terminal Island provided a “unit designated as ‘clean[,]’ or reserved for  
11 persons who have tested negative for COVID-19.” *Id.* ¶ 64.

12 - **Release:** On April 30, 2020, Warden Ponce told Congresswoman Barragan that  
13 she was “considering permitting home confinement for only 46 vulnerable  
14 individuals.”<sup>3</sup> Compl. ¶ 71.

15 These measures appear to be working as there have been relatively few new  
16 positive COVID-19 cases since the filing of the Complaint. FCI Terminal Island  
17 currently has six inmate and three staff cases of COVID-19 cases. *See*  
18 <https://www.bop.gov/coronavirus/> (last accessed June 29, 2020). Moreover, FCI

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21 <sup>3</sup> Respondents have offered evidence on the extensive efforts they have taken to  
22 address COVID-19 within the BOP and at FCI Terminal Island, including suspending  
23 movement across BOP facilities; testing; enacting screening, isolation, quarantine, and  
24 social distancing measures; conducting daily temperature checks; supplying inmates with  
25 masks, soap, and hygiene supplies; and screening staff for symptoms and requiring them  
26 to use PPE. *See* Dkt. No. 28 (“Prioleau Decl.” ¶¶ 8, 34-64). Currently, FCI Terminal  
27 Island is in Phase 7 of the BOP’s COVID-19 Action Plan, which requires that inmates  
28 spend the majority of their time in their housing units, have their meals delivered to their  
housing units, and are only permitted outside in small groups at prearranged times to  
exercise and access telephones and computers. *Id.* ¶ 20, Exs. C & E. FCI Terminal Island  
has also repeatedly ran searches of inmates suitable for home confinement. *See* Dkt. No.  
51 (Javernick Decl. ¶¶ 9-23). Between March 23, 2020 and June 23, 2020, 110 inmates  
were furlough transferred out of FCI Terminal Island to home confinement or a  
residential reentry center. *Id.* ¶ 27. As of June 22, 2020, six inmates have a home  
confinement placement date and are awaiting placement, and 28 inmates have been  
referred for home confinement and are awaiting approval. *Id.* ¶ 26.

1 Terminal Island’s population has decreased and currently houses 977 inmates. *See*  
2 <https://www.bop.gov/locations/institutions/trm/> (last accessed June 29, 2020).

3 **B. Petitioners Have Not Complied with the PLRA Grievance Process**

4 Petitioners admit that none of them have completed any step of the PLRA  
5 administrative-grievance process. TRO App. at 52:25-57:7.

6 **III. LEGAL STANDARDS UNDER FED. R. CIV. P. 12(b)(1) AND 12(b)(6)**

7 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life Ins.*  
8 *Co.*, 511 U.S. 375, 377, (1994). “A federal court is presumed to lack jurisdiction in a  
9 particular case unless the contrary affirmatively appears.” *Stock W., Inc. v. Confederated*  
10 *Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). A party may  
11 seek dismissal of an action for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) “either  
12 on the face of the pleadings or by presenting extrinsic evidence.” *Warren v. Fox Family*  
13 *Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). Where the party asserts a factual  
14 challenge, the court may consider extrinsic evidence demonstrating or refuting  
15 the existence of jurisdiction without converting the motion to dismiss into a motion for  
16 summary judgment. *Id.* The party asserting subject matter jurisdiction has the burden of  
17 persuasion for establishing it. *Hertz Corp. v. Friend*, 559 U.S. 77, 96 (2010).

18 A motion under Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the  
19 complaint. Dismissal is appropriate where the complaint lacks a cognizable legal theory  
20 or sufficient facts to support a cognizable legal theory. *See Balistreri v. Pacifica Police*  
21 *Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint may survive a motion to dismiss  
22 only if, taking all well-pleaded factual allegations as true, it contains enough facts to  
23 “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
24 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim  
25 has facial plausibility when the plaintiff pleads factual content that allows the court to  
26 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*  
27 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
28 statements, do not suffice.” *Id.* Although the scope of review is limited to the contents of

1 the complaint, the Court may consider exhibits submitted with the complaint. *Hal Roach*  
2 *Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.9 (9th Cir. 1990).

#### 3 **IV. DISCUSSION**

##### 4 **A. The Court Lacks Jurisdiction Over Petitioners’ Habeas Claims**

5 As the Court has already recognized, Petitioners’ habeas claims are  
6 jurisdictionally barred. *See* TRO Order at 15-19. The Sixth Circuit carved out a narrow  
7 exception in the habeas statute where “[t]o the extent petitioners argue the alleged  
8 unconstitutional conditions of their confinement can be remedied only be release, 28  
9 U.S.C. § 2241 conferred upon the district court jurisdiction to consider the petition.”  
10 *Williams*, 2020 WL 3056217, at \*5. *Williams*, however, held that “because the district  
11 court erred in concluding that petitioners have shown a likelihood of success on the  
12 merits of their Eighth Amendment claim . . . the district court abused its discretion in  
13 granting the preliminary injunction,” and vacated the injunction. *Id.* at \*1.

14 Other courts, however, as the Court noted, including *Alvarez v. Larose*, 2020 WL  
15 2315807, at \*3 (S.D. Cal. May 9, 2020) and *Wragg v. Ortiz*, 2020 WL 2745247, at \*18  
16 (D.N.J. May 27, 2020), found that the inmate-petitioners “were not raising cognizable  
17 habeas claim because their claims were ultimately premised on the conditions of  
18 confinement.” TRO Order at 18. Respondents also cited other district court cases in  
19 addition to *Alvarez* and *Wragg* finding lack of jurisdiction within the COVID-19 prison  
20 context. *See* Dkt. No. 24 at 26, citing *Money v. Pritzker*, 2020 WL 1820660, at \*14 (N.D.  
21 Ill. Apr. 10, 2020); *Plata v. Newsom*, 2020 WL 1908776, at \*1, 9-11 (N.D. Cal. Apr. 17,  
22 2020); *Livas v. Myers*, 2020 WL 1939583, at \*9 (W.D. La. Apr. 22, 2020). These cases  
23 were correctly decided because Petitioners’ complaints relating to the conditions of  
24 confinement are outside of the scope of a writ for habeas corpus. *See Crawford v. Bell*,  
25 599 F.2d 890, 891–892 (9th Cir. 1979) (“the writ of habeas corpus is limited to attacks  
26 upon the legality or duration of confinement”); *Badea v. Cox*, 931 F.2d 573, 574 (9th  
27 Cir. 1991) (“Habeas corpus proceedings are the proper mechanism for a prisoner to  
28

1 challenge the ‘legality or duration’ of confinement,” but not to “challeng[e] ‘conditions  
2 of . . . confinement’”) (citations omitted).

3 1. Petitioners Have Failed to Satisfy the Habeas Exhaustion  
4 Requirements

5 The Court previously stated that it was “satisfied that exhaustion is met or excused  
6 here, for the reasons argued by Petitioners.” TRO Order at 19-20, citing TRO Reply at  
7 14-17. Petitioners’ argument, however, rested on Respondents’ alleged lack of evidence  
8 that administrative remedies have been made “effectively unavailable” for prisoners  
9 during the COVID-19 crisis; and that this lack of evidence “warrants the opposite  
10 inference” that administrative complaints were not being considered. *See id.* The Court  
11 agrees with Respondents that it should not give such credence to Petitioners’ arguments  
12 because Petitioners admit that they did not even attempt to exhaust their administrative  
13 remedies. TRO Application at 52:25-57:7. Therefore, there was no reason for the  
14 Respondents to submit evidence on an undisputed fact.

15 Regardless, federal inmates are required to exhaust their administrative remedies  
16 prior to bringing a petition for a writ of habeas corpus in federal court. *Martinez v.*  
17 *Roberts*, 804 F.2d 570, 571 (9th Cir. 1986). As noted, federal courts “require as a  
18 prudential matter, that habeas petitioners exhaust available judicial and administrative  
19 remedies before seeking relief under § 2241. . . . Prudential limits, like jurisdictional  
20 limits and limits on venue, are ordinarily not optional.” *Castro–Cortez v. INS*, 239 F.3d  
21 1037, 1047 (9th Cir. 2001), *abrogated on another ground by Fernandez–Vargas v.*  
22 *Gonzales*, 548 U.S. 30 (2006). Thus, while “courts have discretion to waive the  
23 exhaustion requirement when prudentially required, this discretion is not unfettered.”  
24 *Laing v. Ashcroft*, 370 F.3d 994, 998 (9th Cir. 2004). Because Petitioners did not exhaust  
25 their administrative remedies, their habeas claim is properly dismissed.

2. Petitioners’ Habeas Claims Run Afoul of the BOP’s Judicially Unreviewable Authority to Make Inmate Placement Decisions

As Respondents explained in their supplemental memorandum in opposition to Petitioners’ TRO application, Petitioners’ request to order “Respondents to fully utilize their authority to transfer non-violent prisoners with viable home confinement plans and to evaluate quickly compassionate release requests so that they may be escalated to the courts as appropriate” is not subject to judicial review. *See* Dkt. No. 50 at 12:1-14:6. Nothing in the CARES Act limits or proscribes the BOP’s sole discretion as to inmate placement decisions, nor does anything in the CARES Act require that the BOP release Petitioners. To the contrary, in passing the CARES Act, Congress preserved the Director’s authority to use it “as the Director deems appropriate.” CARES Act, PL 116-136, 134 Stat 281 § 12003(b) (Mar. 27, 2020). 18 U.S.C. §§ 3621(b) and 3625 prohibit a court from reviewing the BOP’s decision of where to place an inmate. *Reeb v. Thomas*, 636 F.3d 1224, 1226-28 (9th Cir. 2011) (courts lack jurisdiction to review BOP’s placement decisions under 18 U.S.C. §§ 3621-24); *United States v. Ceballos*, 671 F.3d 852, 855 (9th Cir. 2011) (“[T]he court has no jurisdiction to select the place where the sentence will be served. Authority to determine place of confinement resides in the executive branch of government and is delegated to the Bureau of Prisons.”).

The BOP’s decision whether to transfer an inmate to a different facility or to home confinement falls within its unreviewable authority to designate an inmate’s place of imprisonment. 18 U.S.C. § 3621(b) (the BOP “shall designate the place of the prisoner’s imprisonment,” and that this designation is “not reviewable by any court”). The Supreme Court has acknowledged that “[i]t is well settled that the decision where to house inmates is at the core of prison administrators’ expertise.” *McKune v. Lile*, 536 U.S. 24, 39 (2002). Although the statute does not define “place of imprisonment,” a district court presiding over a challenge to COVID-19 conditions at a federal prison recently noted that “[b]oth placement at a Residential Reentry Center (‘RRC’) (more commonly known as a halfway house) and on home confinement are within the BOP’s discretion” under

1 this provision. *Livas*, 2020 WL 1939583 at \*6; *cf. United States v. Yates*, 2019 WL  
2 1779773 at \*4 (D. Kan. Apr. 23, 2019) (“[I]t is BOP – not the courts – who decides  
3 whether home detention is appropriate.”); *Crum v. Blanckensee*, 2020 WL 3057799, at  
4 \*3 (C.D. Cal. Jun. 8, 2020) (Hon. David O. Carter) (dismissing an inmate’s habeas  
5 petition requesting transfer to home confinement in light of the COVID-19 pandemic  
6 and the conditions at FCI Lompoc given § 3621’s express prohibition against judicial  
7 review); *Brown v. Sanders*, 2011 WL 4899919, at \*2 n.3 (C.D. Cal. Sept. 1, 2011) (place  
8 of detention “immaterial” under § 3621), *aff’d sub. nom Brown v. Ives*, 543 F. App’x  
9 636 (9th Cir. 2013). Given Section 3621’s express prohibition against judicial review  
10 and the clear precedent supporting home confinement as a “place of imprisonment,” the  
11 Court should dismiss Petitioners’ habeas claim for this additional reason.

12 **B. Petitioners’ Non-Habeas Eighth Amendment Conditions-of-**  
13 **Confinement Claim Are Dismissed**

14 1. Petitioners’ Allegations Do Not Support a Finding of Deliberate  
15 Indifference

16 a. *Standard for Deliberate Indifference*

17 In a conditions-of-confinement case, a prison official violates the prohibition  
18 against “cruel and unusual punishments,” U.S. Const. Amend. VIII, “only when two  
19 requirements”—one objective, the other subjective—“are met.” *Farmer*, 511 U.S. 825,  
20 834, 846 (1994). To satisfy the Eighth Amendment standards, prison officials must  
21 ensure that inmates receive adequate food, clothing, shelter, and medical care, and must  
22 “take reasonable measures to guarantee the safety of the inmates.” *Id.* at 832 (citations  
23 omitted). Inmates alleging Eighth Amendment violations based on unsafe prison  
24 conditions must demonstrate that prison officials were deliberately indifferent to their  
25 health or safety by subjecting them to a substantial risk of harm. *Id.* at 834. Prison  
26 officials display a deliberate indifference to an inmate’s well-being when they  
27 consciously disregard an excessive risk of harm to the inmate’s health or safety. *Id.* at  
28 838-40. It is “only ‘the unnecessary and wanton infliction of pain’ ... [which] constitutes

1 cruel and unusual punishment forbidden by the Eighth Amendment. *Whitley v. Albers*,  
2 475 U.S. 612, 619 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)).

3 “[I]f a particular condition or restriction ... is reasonably related to a legitimate  
4 governmental objective, it does not, without more, amount to ‘punishment.’” *Bell v.*  
5 *Wolfish*, 441 U.S. 520, 539 (1979). “[T]he effective management of a detention facility  
6 ... is a valid objective that may justify the imposition of conditions” that are  
7 discomfoting and restrictive, without the indifference that such restrictions are intended  
8 as punishment. *Id.* at 450. Moreover, “it is obduracy and wantonness, not inadvertence or  
9 error in good faith, that characterize the conduct prohibited by the Cruel and Unusual  
10 Punishments Clause, whether that conduct occurs in connection with establishing  
11 conditions of confinement, supplying medical needs, or restoring official control over a  
12 tumultuous cellblock.” *Wilson v. Seiter*, 501 U.S. 294, 299 (1991).

13 “[A] prison official violates the Eighth Amendment only when two requirements  
14 are met” – both an objective and subjective component. *See Farmer*, 511 U.S. at 834.  
15 The objective component of an Eighth Amendment claim requires that the deprivation  
16 must be “sufficiently serious.” *Id.* at 833. “[O]nly those deprivations denying ‘the  
17 minimal civilized measure of life’s necessities’ ... are sufficiently grave to form the  
18 basis of an Eighth Amendment violation.” *Wilson*, 501 U.S. at 298. The inmate must  
19 show that he is incarcerated under conditions posing a substantial risk of harm. *See*  
20 *Farmer*, 511 U.S. at 837.

21 The subjective component relates to the defendant’s state of mind, and requires  
22 deliberate indifference. *See Farmer*, 511 U.S. at 834. To satisfy this requirement,  
23 Petitioners must show that Respondents “kn[ew] of and disregard[ed] an excessive risk  
24 to inmate health or safety.” *Id.* at 837. To satisfy this standard, the prison official must  
25 have a “sufficiently culpable state of mind.” *Id.* at 833. This test is subjective, meaning  
26 “the official must both be aware of facts from which the inference could be drawn that a  
27 substantial risk of serious harm exists, and he must also draw the inference.” *Id.*

1                   ***b. Petitioners Cannot Demonstrate that They Are Subject to an***  
2                   ***Unreasonable Risk of Harm***

3           The “objective prong” of the Eighth Amendment requires a showing that an  
4 inmate has been deprived “of the minimal civilized measure of life’s necessities.”  
5 *Farmer*, 511 U.S. at 834. When this deprivation involves a risk of harm, this prong  
6 requires the inmate to show that “society considers the risk that the prisoner complains  
7 of to be so grave that it violates contemporary standards of decency to expose anyone  
8 unwillingly to such a risk. In other words, the prisoner must show that the risk of which  
9 he complains is not one that today’s society chooses to tolerate.” *Helling v. McKinney*,  
10 509 U.S. 25, 36 (1993).

11           Petitioners cannot show that the BOP is depriving them of the “minimal civilized  
12 measure of life’s necessities” or “violating contemporary standards of decency” in  
13 addressing the risk of harm to inmates that COVID-19 presents. “A prison official’s duty  
14 under the Eighth Amendment is to ensure reasonable safety.” *Farmer*, 511 U.S. at 844.  
15 The current state of the COVID-19 pandemic exposes everyone—prisoner and non-  
16 prisoner alike—to the risk of falling ill. The Complaint acknowledges in several places  
17 that FCI Terminal Island has tested every single inmate, has provided medical care and  
18 medication to prisoners, has taken steps to increase the ability for inmates to practice  
19 social distancing, has provided inmates with masks and cleaning supplies, has distributed  
20 masks to staff, have taken cohorting and quarantine measures, and has considered  
21 inmates for home confinement under the CARES Act and has in fact placed inmates on  
22 home confinement. *See* § III.A. *supra*. That these measures have not been done to  
23 Petitioners’ satisfaction or that they have issues with how those measures were  
24 undertaken is insufficient to show deliberate indifference as the Fifth Circuit held in  
25 *Valentine v. Collier*, 956 F.3d 797, 801-02 (5th Cir. 2020) (compliance with CDC  
26 recommendations, including “access to soap, tissues, gloves, masks, regular cleaning,  
27 signage and education, quarantine of new prisoners, and social distancing during  
28 transport” satisfies the Eighth Amendment). *See also Chunn v. Edge*, 2020 WL 3055669,

1 at \*24 (E.D.N.Y. Jun. 9, 2020) (petitioners could not meet the objective component of  
2 the Eighth Amendment test “given the measures that prison officials have instituted to  
3 address COVID-19 and the best available evidence regarding those measures’ results”);  
4 *Grinis v. Spaulding*, 2020 WL 2300313, at \*3 (May 8, 2020 D. Mass.) (“These  
5 affirmative steps may or may not be the best possible response to the threat of COVID-  
6 19 within the institution, but they undermine an argument that the respondents have been  
7 actionably deliberately indifferent to the health risks of inmates.”).

8 *c. Petitioners Cannot Satisfy the Subjective Test for Deliberate*  
9 *Indifference*

10 Petitioners also fail to satisfy the subjective prong of their Eighth Amendment  
11 claim, which requires them to show that Respondents “kn[ew] of and disregard[ed] an  
12 excessive risk to inmate health or safety.” *Farmer*, 511 U.S. at 837. This test is  
13 subjective, meaning “the official must both be aware of facts from which the inference  
14 could be drawn that a substantial risk of serious harm exists, and he must also draw the  
15 inference.” *Id.* The Eighth Amendment does not require perfect results. *See id.* at 844  
16 (“prison officials who actually knew of a substantial risk to inmate health or safety may  
17 be found free from liability if they responded reasonably to the risk, even if the harm  
18 ultimately was not averted”).

19 To establish an entitlement to injunctive relief, Petitioners must show that BOP  
20 officials currently are acting with deliberate indifference. Where a prisoner “seeks  
21 injunctive relief to prevent a substantial risk of serious injury from ripening into actual  
22 harm, the subjective factor . . . should be determined in light of the prison authorities’  
23 current attitudes and conduct[.]” *Id.* at 845 (internal quotation marks omitted). Thus,  
24 Petitioners must show that today, Respondents are recklessly disregarding an excessive  
25 risk to Petitioners’ safety, and that they will continue to do so “into the future.” *Id.* The  
26 Fifth, Sixth and Eleventh Circuits found no Eighth Amendment violations in  
27 substantially similar circumstances as to those here involving COVID-19 at correctional  
28 facilities.

1 In *Swain v. Junior*, –F.3d–, 2020 WL 3167628, at \*6 (11th Cir. Jun. 15, 2020), the  
2 district court issued an injunction finding that prison officials were deliberately  
3 indifferent because it was not possible for inmates to be at least six feet apart at all times  
4 and because the rate of COVID-19 infections had increased. The Eleventh Circuit  
5 overturned the district court, noting that, with respect to the infection rate at the facility,  
6 resulting harm cannot alone establish a culpable state of mind. *Id.* at \*7. It found no  
7 Eighth Amendment liability if prison officials respond reasonably to a risk to inmate  
8 health, “*even if the harm ultimately was not averted.*” *Id.* (quoting *Farmer*, 511 U.S. at  
9 844) (emphasis in original). The Eleventh Circuit found that where prison officials “took  
10 numerous *other* measures—besides social distancing—to mitigate the spread of the  
11 virus,” including requiring the use of face masks, screening of staff into the facility, daily  
12 temperature screening, suspending outside visitation, and providing disinfecting and  
13 hygiene supplies to all inmates, prison officials could not be found liable because they  
14 could not meet the subjective component under the Eighth Amendment. *Id.* at \*8  
15 (emphasis in original).

16 In *Williams*, the Sixth Circuit also vacated the district court’s injunction and held  
17 that petitioners could not satisfy the subjective prong of an Eighth Amendment violation  
18 where BOP had responded reasonably to the risk of COVID-19 at FCI Elkton by  
19 implementing screening, testing, isolation, and hygiene measures, limiting inmate  
20 movement, and providing inmates and staff with masks and PPE. 2020 WL 3056217, at  
21 \*7-8. *Williams* noted that the Fifth and Eleventh Circuits had already found similar  
22 measures to constitute a reasonable response to COVID-19 such that there was no  
23 tenable Eighth Amendment claim. *Id.* at \*9 (citing *Swain* (per curiam); *Valentine* (per  
24 curiam); *Marlowe v. LeBlanc*, 2020 WL 2043425 (5th Cir. Apr. 27, 2020) (per curiam)).

25 Recently, the Eastern District of New York also found that petitioners could not  
26 meet the subjective component of the Eighth Amendment test because the BOP has  
27 “imposed dozens of measures, such as (i) enhancing intake screening procedures for all  
28 inmates and staff, (ii) providing soap and other cleaning products to inmates at no cost,

1 (iii) increasing cleaning of common areas and shared items, (iv) isolating symptomatic  
2 inmates, (v) broadly distributing and using PPE to prevent transmission of the virus, and  
3 (vi) modifying operations throughout the facility to facilitate social distancing to the  
4 greatest extent possible and abate the risk of spread . . . belie any suggestion that prison  
5 officials ‘have turned the kind of blind eye and deaf ear to a known problem that would  
6 indicate’ deliberate indifference.” *Chunn*, 2020 WL 3055669, at \*26 (quoting *Money*,  
7 2020 WL 1820660, at \*18; *Swain*, 958 F.3d at 1090)).

8 Similarly, Petitioners here cannot satisfy the subjective requirement of an Eighth  
9 Amendment conditions-of-confinement claim. BOP officials have not acted with  
10 deliberate indifference to the risk that COVID-19 poses to inmate populations; rather,  
11 they have taken aggressive and appropriate measures to abate that risk at FCI Terminal  
12 Island. In the Complaint, Petitioners acknowledge that mass testing has been done, that  
13 inmates are provided with masks and disinfectant, and that FCI Terminal Island has  
14 taken steps to cohort inmates and to provide them with more space. Although Petitioners  
15 may have concerns about the implementation about these measures (e.g., they allege that  
16 they are only receiving masks every two weeks instead of once a week or that the  
17 disinfectant FCI Terminal Island provided them is “watered-down”), it does not rise to  
18 the level of deliberate indifference. *See Wragg*, 2020 WL 2745247, at \*21 (no Eighth  
19 Amendment violation because there is “no evidence of Respondents’ liable state of  
20 mind” and noting “physical distancing is not possible in a prison setting, as Petitioners  
21 urge, does not an Eighth Amendment claim make and, as such, Petitioners are not likely  
22 to succeed on the merits”); *Nellson v. Barnhart*, 2020 WL 1890670, at \*6 (D. Col. Apr.  
23 6, 2020) (“Assuming that the objective component [of deliberate indifference] is met,  
24 and that prison officials know of the risk of COVID-19, plaintiff has not demonstrated  
25 that defendants have disregarded that risk.”); *Money*, 2020 WL 1820660, at \*18  
26 (prisoner petitioners have “no chance of success” as to deliberate indifference because of  
27 the measures taken by the Illinois Department of Corrections).

1 As such, Petitioners cannot succeed on their Eighth Amendment claim given the  
2 actions taken by the BOP at FCI Terminal Island. *See Farmer*, 511 U.S. at 845  
3 (“[P]rison officials who act reasonably cannot be found liable under the Cruel and  
4 Unusual Punishments Clause.”). Here, Respondents acted with a high degree of care, and  
5 certainly were not acting with deliberate indifference that would transform conditions at  
6 FCI Terminal Island into an Eighth Amendment “punishment.” *See Wilson v. Seiter*, 501  
7 U.S. at 298, 300.

8 **V. CONCLUSION**

9 For these reasons, Respondents’ motion to dismiss is **GRANTED**.

10  
11 IT IS SO ORDERED.

12  
13 Dated: \_\_\_\_\_, 2020

14  
15 HONORABLE MICHAEL F. FITZGERALD  
16 UNITED STATES DISTRICT JUDGE  
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