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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

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

Plaintiff-Petitioners,

vs.

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.

CASE NO. 2:20-cv-04451-MWF-MRWx

PLAINTIFF-PETITIONERS' OPPOSITION TO 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.
Courtroom: 5A

Assigned to Hon. Michael W. Fitzgerald
Courtroom 5

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I. INTRODUCTION

To be incarcerated at FCI Terminal Island during this pandemic is to be exposed to a substantial and potentially fatal risk of contracting COVID-19. On June 10, 2020, this Court stated that when it comes to the safety of prisoners at Terminal Island, "the numbers of the infected and dead speak for themselves." (Dkt. 41 at 20.) This Court further stated that Respondents' actions to address the COVID-19 pandemic raging through FCI Terminal Island amounted to nothing more than a "bandage on a gaping wound." (*Id.*) Respondents' motion is clearly misguided and their refusal even to accept that COVID-19 poses a substantial risk of harm to prisoners at Terminal Island demonstrates that they still do not view the COVID-19 outbreak as the critical crisis it is. The very filing of this motion, not to mention Respondents' conduct to date, evidences not only their deliberate indifference to Petitioners' suffering, but a clear intent to avoid allowing this Court to examine evidence of their misconduct.[1]

Through this action, Petitioners seek judicial assistance under the Eighth Amendment to compel Respondents to address the unconstitutional conditions in which they are imprisoned through two claims: i) a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241, and ii) a claim for injunctive relief. In its June 10 ruling on Petitioners' application for a Temporary Restraining Order ("TRO"), this Court held that Petitioners' first claim does not encompass the relief Petitioners seek. (*Id.* at 21.) Recognizing that the ruling did not change Petitioners' suffering, alter Respondents' deliberate indifference, or obviate Petitioners' need for that constitutional violation to be remedied, the Court certified that issue for immediate

[1] While Respondents have found time to file this repetitive motion, they have been unresponsive to Petitioners' request to continue meeting and conferring on discovery and moving forward on a site visit. Respondents' strategy of delay only serves to prolong the ongoing constitutional violations and should be rejected.

appeal under 28 U.S.C. § 1292(b).[2]

When, as this Court has found here, the government has failed to provide adequate care for prisoners, "*the courts have a responsibility* to remedy the resulting Eighth Amendment violation." *Brown v. Plata*, 563 U.S. 493, 511 (2011) (emphasis added). Petitioners have adequately pleaded that they are subject to a substantial risk of harm, that Respondents are deliberately indifferent to that risk, and that Respondents have cut their access to administrative remedies that are, in any event, not equal to the challenge. Respondents' motion to dismiss Petitioners' remaining claim must be denied not only because Petitioners have properly pleaded their claim, but also for the simple reason that Petitioners cannot be left without a remedy for the unconstitutional conditions in which they are imprisoned.

II. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). The complaint must be "plausible on its face" such that the Court can "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In considering a motion to dismiss, the court must accept all non-conclusory allegations in the complaint as true and draw all reasonable inferences in plaintiff's favor. *Id.* The court also must consider those facts contained in "documents incorporated into the complaint by reference," as well as matters of which a court may take judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see also U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (a court may consider "documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice" when deciding a motion to dismiss).

[2] Petitioners have since supplemented their application for a TRO based on their second claim, and that issue is still pending before the Court. (Dkt. 49-50.)

In contrast to a motion under Rule 12(b)(6), a motion to dismiss for lack of jurisdiction under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic evidence. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Where, however, jurisdiction is dependent upon the merits, a court must "assume the truth of allegations in a complaint or habeas petition, unless controverted by undisputed facts in the record." *Roberts v. Corrothers,* 812 F.2d 1173, 1177 (9th Cir. 1987).

III. ARGUMENT

A. The Court Already Has Denied Petitioners' Habeas Claim And Certified It For "Immediate" Appeal

The issue of whether Petitioners can obtain relief from constitutional violations occurring at Terminal Island through a habeas claim was the subject of full briefing by both parties during their initial briefing for a TRO. (Dkt. 10, 24, 30.) In its June 10, 2020 ruling, the Court held that Petitioners cannot obtain the relief they seek through a habeas claim. (Dkt. 41 at 21 [denying TRO application "on the sole ground that a writ of habeas corpus, the only asserted ground for the TRO Application, does not encompass the requested relief"].) The Court certified that issue for immediate appeal pursuant to 28 U.S.C. § 1292(b) on the basis that "there is substantial ground for difference of opinion, to say the least, and an immediate appeal may materially advance the ultimate termination of the litigation." (*Id.*)[3]

Since the parties already have fully briefed this issue and the Court already has ruled on it and certified it for appeal, Petitioners do not repeat those same arguments here. Petitioners do, however, incorporate by reference their prior

[3] Petitioners note that although the Court ultimately ruled against Petitioners, the Court ruled that Petitioners had shown that they had exhausted their administrative remedies. (*Id.* at 19-20 ["The Court is satisfied that exhaustion is met or excused here, for the reasons argued by Petitioners."].)

arguments and expressly do not waive any of them.

While Petitioners accept this Court's ruling, they do not agree with it and intend to pursue an appeal at the appropriate time to obtain the relief of which they are in dire need. Meanwhile, Petitioners are continuing to press ahead for relief under their second cause of action and the parties have filed supplemental briefing on that issue. (Dkt. 49-50.) Respondents' position remains that even if they are committing constitutional violations, this Court is powerless to provide the swift relief necessary to correct Respondents' constitutional violations. (*See* Dkt. 50 [Respondents' Supp. Opp. to TRO] at 8-14 [arguing the PLRA prohibits this Court from granting relief from the alleged constitutional violations].) Given the constitutional mandate that requires courts to intervene to correct constitutional violations, Respondents' position cannot be correct. *See Brown*, 563 U.S. at 511 (2011) (where the government fails to provide adequate care for prisoners, "the courts have a responsibility to remedy the resulting Eighth Amendment violation").

B. Petitioners Have Properly Alleged A Direct Claim For Injunctive And Declaratory Relief Under The Eighth Amendment

The arguments Respondents make in this motion are materially identical to their unsuccessful arguments made in opposition to Petitioners' TRO application. First, Respondents argue Petitioners have failed to show deliberate indifference because, according to Respondents, i) Petitioners are not subject to a substantial risk of serious harm, and ii) Respondents have taken at least some actions in response to the pandemic. (Dkt. 24 at 35-41; Dkt. 55 at 9-15.) Second, Respondents argue that Petitioners have not exhausted their administrative remedies. (Dkt. 24 at 30-34; Dkt. 55 at 15.) In its June 10, 2020 opinion (Dkt. No. 41), the Court reviewed and rejected each of those arguments.

With respect to Respondents' argument regarding deliberate indifference, the Court first found that Petitioners' accounts of the conditions at Terminal Island—which included the death of a prisoner Respondents had designated as

"recovered"—showed that prisoners "face significant risk at Terminal Island." (*Id.* at 5.) The Court further found that Respondents were deliberately indifferent to that risk, since their actions in trying to control COVID-19 amounted to nothing more than a "bandage on a gaping wound." (*Id.* at 20.) Illustrating the absurdity of Respondents' position, the Court noted that "if a tsunami were inundating the prison, Respondents would talk about how they were trying to move the prisoners to higher ground and give them life preservers instead of boats." (*Id.*) Finally, with respect to exhaustion the Court held that "[t]his Court is satisfied that exhaustion is met or excused here, for the reasons argued by Petitioners." (*Id.* at 19-20.) Although that motion concerned Petitioners' habeas claim, those findings apply equally to Petitioners' non-habeas claim since the exact same facts and allegations underlie both claims.[4] For the sake of completeness, however, Petitioners respond substantively to those argument as follows.

1. Petitioners Have Sufficiently Alleged Respondents' Deliberate Indifference

In prohibiting "cruel and unusual punishments," the Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). It is against those standards that conditions of confinement are evaluated, and it is those standards that impose upon prison officials a constitutional obligation to protect the incarcerated from, and not be deliberately indifferent to, conditions of confinement that are "very likely to cause serious illness and needless suffering." *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (impermissible for prison officials to be "deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms").

[4] As this motion to dismiss stage, Respondents cannot—and do not—offer any evidence that could warrant a different result.

There are two factors courts must consider to determine whether a prison official's failure to protect prisoners from harm rises to the level of an Eighth Amendment violation. The first factor is objective: the conditions of confinement must have put prisoners at "substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 834 (1970). The second is subjective: the prison official must have acted with "deliberate indifference" to inmate health or safety. *Id.* Petitioners' Complaint meets both of those requirements.

a. Petitioners Have Alleged They Are Subject To An Objective, Substantial Risk Of Serious Harm

To show substantial risk of serious harm, Petitioners must 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*, 509 U.S. at 36. Courts have routinely found that exposure to disease or health issues constitutes a serious harm. *See, e.g., id.* at 33 (finding that the reach of the Eighth Amendment includes "exposure of inmates to a serious, communicable disease"); *Jeffries v. Block*, 940 F. Supp. 1509, 1514 (C.D. Cal. 1996) (agreeing that "tuberculosis is a serious contagious disease, which presents a serious risk to inmate health"); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) ("[C]orrectional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease.").

COVID-19 is a global pandemic that has uprooted every aspect of daily life throughout the world. To combat that pandemic, state and local officials across the country, including here in California, have implemented innumerable restrictions on businesses, schools, and places of worship so that social distancing can be promoted and people are not forced to come into contact with potential COVID-19 carriers. (Dkt. 1 [Compl.] at ¶¶ 34-35.) With millions unemployed, the economy in freefall,

and tens of thousands dead, it should require no more to establish that COVID-19 is a "serious" disease that poses a substantial risk of severe harm to everyone. But although the "standards of decency" in the broader society have led to laws that impose social distancing, those standards and laws are being flaunted at Terminal Island. While society has chosen to implement protective rules to prevent the spread of COVID-19, prisoners are forced to live in conditions that dramatically increase not only their risk of contracting a COVID-19 infection, but also their risk of dying from a COVID-19 infection. (*Id.* at ¶ 11, 37 ["Correctional facilities increase the risk of rapid spread of an infectious disease, like COVID-19, because of the high numbers of people with chronic, often untreated, illnesses housed in a setting with minimal levels of sanitation, limited access to personal hygiene, limited access to medical care, and no possibility of staying at a distance from others."].)

Even among federal prisons, Terminal Island is uniquely vulnerable to a COVID-19 outbreak for three reasons: (1) it confines a large number of prisoners, with 1,042 prisoners occupying a prison with a rated capacity of 779 (*id.* at ¶ 47); (2) virtually all of those prisoners are housed in open, communal housing areas (*id.* at ¶ 48); and (3) it is a Care Level 3 medical facility, specifically designed to house prisoners with long-term medical conditions which makes them especially vulnerable to COVID-19 (*id.* at ¶ 49).

While Respondents claim that they have taken steps to reduce the risk of infection, those actions fall woefully short of eliminating, or even substantially reducing, Petitioners' risk of illness and death. To the contrary, those steps have, in some cases, seemingly increased that risk. Among other things, Respondents:

- Attempted to "solve" the overcrowding and communal housing issues by placing prisoners in hastily-converted and unsanitary warehouses infested by rodents and without sanitary products, drinking water, hot running water, or heating, with up to 60 prisoners sharing just four toilets, four sinks, and four showers. (*Id.* at ¶ 57.) These "remedies" required

Petitioner Smith to live in even more deplorable conditions than his previous housing, while doing nothing to further protect him from COVID-19. (*Id.*)

- Failed to provide masks or hand sanitizer to prisoners until late April, when the COVID-19 outbreak was already out of control. (*Id.* at ¶ 58.)
- Refused to test asymptomatic prisoners until April 28, and failed to test "recovered" COVID-19 patients before they are returned to the general population. (*Id.* ¶ 61.)
- Failed to trace and test close contacts of prisoners who have tested positive for COVID-19, and failed to quarantine individuals as appropriate. (*Id.* at ¶ 62.)
- Placed symptomatic prisoners who had not yet received COVID-19 test results in the medical facility's short-stay unit, potentially exposing scores of medically-vulnerable prisoners undergoing other treatment in the facility to COVID-19. (*Id.* at ¶ 63.)
- Denied treatment to symptomatic prisoners until their condition deteriorated to the point that emergency hospitalization was required, and denied treatment for chronic medical conditions unrelated to COVID-19. (*Id.* at ¶ 66-68.)
- Despite repeated guidance from the Attorney General to the contrary, refused to even consider home confinement for the vast majority of prisoners. (*Id.* at ¶ 71.)[5]

[5] As of the time of filing of the Complaint, Respondents had represented to a Congresswoman that they had only considered 46 prisoners for home confinement. (*Id.*) Since then, Respondents represent that 110 prisoners have been transferred from Terminal Island and 28 additional prisoners are being reviewed. (Dkt. 55 ("Mtn.") at 4:17 n.3.) However, Respondents continue to deny consideration to the vast majority of Terminal Island's population, including: (1) any prisoner with a disciplinary record in the past 12 months other than 300 or 400 series incidents; (2)

- Repeatedly ignored CDC-issued guidance regarding managing COVID-19 in correction facilities. (*Id.* at ¶ 76.)

The result has been an unmitigated catastrophe. As of May 11, 2020, Terminal Island reported over 700 positive cases, and nine prisoners had lost their lives. (*Id.* ¶ 6.) Starting on May 15, 2020, the BOP begin categorizing certain prisoners who had tested positive as "recovered," and the reported number of infected mysteriously dropped to 129 in a single day. (*Id.*) Respondents argue that the drop in reported numbers is evidence that their response is "working." (Dkt. 55 [Mot.] at 4:18-19.) But the threat of COVID-19 cannot be alleviated merely by changing labels. On May 24, 2020, Adrian Solarzano, a prisoner at Terminal Island, died from coronavirus related causes *despite Respondents having classified him as recovered.*[6]

Numerous courts, both across the country and in the Ninth Circuit, have found that COVID-19 outbreaks at prisons—like the one in Terminal Island—present an objective risk of serious harm to incarcerated or detained persons. *See, e.g.*, *Martinez-Brooks v. Easter*, 2020 WL 2405350, at *20–21 (D. Conn. May 12, 2020); *Fraihat v. U.S. Immigration and Customs Enforcement*, 2020 WL 1932570, at *23 (C.D. Cal. April 20, 2020); *Basank v. Decker*, 2020 WL 1481503, at *3, 5 (S.D.N.Y. Mar. 26, 2020). Indeed, even courts that ultimately found that the *subjective* factor for an Eighth Amendment violation at a particular prison was not satisfied have still found the objective factor was satisfied. *See e.g., Swain v.*

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any prisoner without a verifiable release plan; (3) any prisoner whose primary offense is violent, a sex offense, or terrorism related, regardless of how long ago the offense was or whether the details actually involved violence; (4) any prisoner with a current detainer; and (5) any prisoner with a PATTERN risk score above "Minimum." (Dkt. No. 10-1, Ex. F at 1-2.)

[6] Richard Winton, *Inmate Recovering from Coronavirus Dies at Terminal Island*, LOS ANGELES TIMES, a*vailable at* https://www.latimes.com/california/story/2020-05-28/ninth-inmate-dies-coronavirus-terminal-island-prison.

Junior, 2020 WL 3167628, at *5 (11th Cir. Jun. 15, 2020) ("[t]he defendants seem to agree—wisely, we think—that the risk of COVID-19 satisfies this requirement."). That view is one that is shared by the Attorney General, who acknowledged more than three months ago the "dangers that COVID-19 poses to our vulnerable inmates" and the "emergency conditions [that] are materially affecting the functioning of the Bureau of Prisons." (Dkt. 1 [Compl.] at ¶¶ 84-85.)

In sum, Petitioners undoubtedly have alleged sufficient facts to meet this first condition.

b. Respondents' Response To The Outbreak Demonstrates Their Subjective Deliberate Indifference

Prison officials are deemed to be deliberately indifferent with regards to dangerous conditions when they are "aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists," yet "disregard that risk by failing to take reasonable measures to abate it." *Farmer*, 511 U.S. at 837, 839-40 (describing the standard for deliberate indifference as being similar to "subjective recklessness as used in the criminal law"). Respondents do not and cannot dispute that they were aware of the risk COVID-19 posed to prisoners in Terminal Island from the start of the outbreak here in the United States. Their response, or rather the lack of it, demonstrates a callous and reckless disregard of the very substantial risk COVID-19 poses to those prisoners it was obligated to protect.

As early as March 4, 2020, state and local officials began to take steps to address the COVID-19 pandemic. (Dkt. 1 [Compl.] at ¶ 34-35.) The Bureau of Prisons reported the first positive COVID-19 case among its incarcerated population on March 21, 2020. (*Id.* at ¶ 8.) On March 26, 2020, and again on April 3, 2020, Attorney General Barr issued urgent memoranda to the Bureau of Prisons regarding COVID-19 and how the Bureau of Prisons should respond to it, noting the "significant levels of infection at several of our facilities" and the "dangers that COVID-19 poses to our vulnerable inmates." (*Id.* at ¶¶ 84-85.) Had Respondents

taken steps to address and alleviate the threat COVID-19 posed to prisoners when those warning signs and directives were issued, the catastrophe at Terminal Island may have been avoided. Instead, as described *supra* in section III.B.1.a, they adopted a series of facially unreasonable, insufficient, counter-productive, and self-defeating measures that succeeded only in fanning the flames of the outbreak, while refusing to even consider maximizing the number of prisoners who would temporarily be placed on home confinement, as Attorney General Barr had directed. Even the inadequate measures Respondents actually took were implemented far too late: asymptomatic prisoners were not tested for many weeks, masks and hand sanitizer were not provided until after hundreds had already been infected, individuals were not appropriately quarantined, sick prisoners were not treated, and social distancing was impossible. (*Id.* at ¶¶ 55-77.)

That Respondents have taken *some* steps in response to COVID-19 does not, alone, demonstrate the absence of deliberate indifference, particularly when those steps did not align with some of the most basic guidance issued from the CDC and the Attorney General. *See, e.g.*, *Hernandez v. County of Monterey*, 110 F. Supp. 3d 929, 943 (N.D. Cal. 2015) ("known noncompliance with generally accepted guidelines for inmate health strongly indicates deliberate indifference"); *Cameron v. Bouchard*, 2020 WL 1929876, at *2 (April 17, 2020), *modified on other grounds on motion for reconsideration*, 2020 WL 1952836, (Apr. 23, 2020) (preliminarily finding deliberate indifference in violation of the Eight Amendment when jail "has not imposed even the most basic safety measures recommended by health experts, the Centers for Disease Control and Prevention, and Michigan's Governor to reduce the spread of COVID-19 in detention facilities"). Respondents' repeated argument that prisoners must exhaust administrative remedies before they can seek the relief from a court only confirms their deliberate indifference *given that they have made those remedies unavailable*. *See* section III.B.2., *infra*.

Respondents' citations to instances where other courts found wardens not to

have been deliberately indifferent do not assist them here. (Dkt. 55 [Mot.] at 13-14.) Terminal Island is not like other prisons, since it has one of the largest COVID-19 outbreaks in any federal prison (Dkt. 1 [Compl.] at ¶ 46), houses virtually all prisoners in communal housing areas (*id.* at ¶ 48), and is a Care Level 3 medical facility, specifically designed to house prisoners with long-term medical conditions which makes them especially vulnerable to COVID-19 (*id* at ¶ 49). These unique features, and Respondents' failure to implement even basic guidance from the CDC, distinguish this matter from those case cited by Respondents. *See, e.g.*, *Valentine v. Collier*, 956 F.3d 797, 802 (5th Cir. 2020) (no deliberate indifference since prison officials had complied with CDC guidelines, continuously updating their policy and procedures as CDC guidelines changed); *Chunn v. Edge*, 2020 WL 3055669, at *15-16 (E.D.N.Y. June 9, 2020) (infection rate within the facility was not substantially higher than society at large); *Grinis v. Spaulding*, 2020 WL 2300313, at *3 (D. Mass. May 8, 2020) (at time of decision, only one prisoner out of approximately 1,000 had been diagnosed with COVID-19).

Moreover, Respondents knew the unique features of Terminal Island exposed the prisoners there to a greater risk of harm from COVID-19 than those in other prisons, which in turn obligated Respondents to take better, stronger, quicker, measures to curb that risk. Their failure to do so has resulted in Terminal Island suffering one of the worst COVID-19 public health failures anywhere in the United States. As this Court has noted, Terminal Island's outbreak far outstrips that of California state prisons or other federal prisons, including the Metropolitan Detention Center – Los Angeles, the other federal prison in Los Angeles County. (Dkt. 41 at 20.)

Terminal Island's dire situation is not the result of COVID-19 being unstoppable, but of Respondents being deliberately indifferent to the risk it poses to the prisoners under their protection. As this Court noted in its June 10 Order, "the numbers of the infected and dead speak for themselves." (*Id.* at 20.)

2. Petitioners Have Sufficiently Pled Exhaustion Of Administrative Remedies

Respondents have thwarted any and all efforts by Petitioners to obtain their requested relief through administrative procedures. Having disenfranchised Petitioners in this way, Respondents' argument that Petitioners' Eighth Amendment claim should be dismissed for failure to exhaust administrative remedies rings particularly hollow.

Although 42 U.S.C. § 1997e(a) requires prisoners to exhaust those "administrative remedies as are available" before filing suit to challenge unconstitutional conditions, the exhaustion requirement is met, or excused, if administrative remedies are effectively unavailable. *Sapp v. Kimbrell*, 623 F.3d 813, 822 (9th Cir. 2010) ("We have recognized that the PLRA therefore does not require exhaustion when circumstances render administrative remedies 'effectively unavailable.'") (*quoting Nunez v. Duncan*, 591 F.3d 1217, 1226 (9th Cir. 2010)), *superseded by statute on other grounds as stated in Avery v. Paramo*, No. 13-cv-2261 BTM, 2015 WL 4923820, at *14 (S.D. Cal. Aug. 18, 2015). The Supreme Court has held that an administrative process that exists on paper will be unavailable if it "operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates" or if "prison administrators thwart inmates from taking advantage of a grievance process." *Ross v. Blake*, 136 S. Ct. 1850, 1859–60 (2016). Even where prison administrators do not thwart an administrative process, it will nonetheless be deemed unavailable if it is insufficient to address the harm being suffered. As Justice Sotomayor recently stated in the context of the COVID-19 pandemic itself, "if a plaintiff has established that the prison grievance procedures at issue are utterly incapable of responding to a rapidly spreading pandemic like Covid-19, the procedures may be 'unavailable' to meet the plaintiff's purposes, much in the same way they would be if prison officials ignored the grievances entirely. . . in these unprecedented circumstances, where an inmate

faces an imminent risk of harm that the grievance process cannot or does not answer, the PLRA's textual exception could open the courthouse doors where they would otherwise stay closed." *Valentine v. Collier*, 140 S. Ct. 1598, 1601 (2020) (Mem). In sum, where the administrative procedures in place are practically unavailable to plaintiffs, they are not required to exhaust them before bringing suit in court.

As a threshold matter, because "failure to exhaust [administrative remedies] is an affirmative defense under the PLRA . . . prisoners *are not required to specially plead or demonstrate exhaustion in their complaints*." *Jones v. Bock*, 549 U.S. 199, 216 (2007) (emphasis added). Accordingly, even had Petitioners failed to plead they had exhausted, or should be excused from exhausting, administrative remedies, that failure would not constitute a ground for dismissing their second claim.

Contrary to Respondents' assertions, however, Petitioners *have* pleaded that administrative remedies are unavailable to them. *First*, the Bureau of Prisons has affirmatively discouraged prisoners from applying for home confinement under the CARES Act, and has confirmed there is no process for them to do so. (Dkt. 10-1 [Rim Decl.], Ex. R ("Inmates do NOT need to apply or request to be considered for the CARES ACT.").[7] *Second*, Petitioners have alleged that Respondents are not even allowing prisoners to access the forms prisoners need to submit a grievance. (Dkt. 1 [Compl.] Ex. 1, Ex. B: "They are not even letting us get forms to write the staff up"; Exh. E: "They are not responding to any of the cop outs to case managers. They are keeping us from the grievance process and will not give us any grievance forms."].). *Third*, Petitioners have pled that although they have repeatedly tried to submit medical complaints to case managers, they have not received responses. (*Id.*

[7] While not alleged in the Complaint, this fact is judicially noticeable under Federal Rule of Evidence 201 since it is not subject to reasonable dispute and can be accurately and readily determined from the Bureau of Prison's own document.

Ex. 1 at ¶ 24.) *Fourth*, staff at Terminal Island have stated that they will not address or respond to administrative requests because they are too busy with COVID-19 to do so. (*Id.*) *Fifth*, Petitioner Wilson submitted an administrative request in the form of an application for Compassionate Release and/or Home Confinement to Respondent Ponce on April 27, 2020, but had not heard back weeks later. (*Id.* at ¶ 16.) *Sixth*, the Complaint makes it clear that COVID-19 is spreading like wildfire through a facility that predominantly houses medically vulnerable prisoners. (*Id.* at ¶ 46 ["The remarkable size and speed of the Terminal Island outbreak is due to the vulnerability caused by a unique combination of three separate aggravating factors: overcrowding, communal living spaces, and vulnerability of the inmate population."].) The administrative processes that are available are simply too slow to address or respond to such exigent circumstances. *Valentine*, 140 S. Ct. at 1600-1601. With a life-threatening illness flooding through Terminal Island, justice delayed is unquestionably justice denied.

Even if Respondents were not thwarting Petitioners' access to administrative remedies, those administrative remedies are simply no match for the intensity of COVID-19's spread throughout Terminal Island and the threat it poses to Petitioners. Since administrative remedies are "effectively unavailable," Respondents' motion to dismiss on this basis should be denied.[8]

[8] To the extent Respondents' position is that those allegations must be in the Complaint itself rather than in documents attached to the Complaint, that argument misunderstands the law. In ruling on a motion to dismiss, the court must consider not only those facts alleged in the complaint but also those in "documents incorporated into the complaint by reference," as well as matters of which a court may take judicial notice. *Tellabs, Inc*, 551 U.S. at 322; *see also Ritchie*, 342 F.3d at 908 (a court may consider "documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice" when deciding a motion to dismiss). That plainly includes declarations attached to the Complaint. *See Employers Teamsters Local Nos. 175 and 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1133-34 (9th Cir. 2004) (considering declarations

IV. CONCLUSION

For the foregoing reasons, Respondents' motion to dismiss Petitioners' second cause of action should be denied.

DATED: July 6, 2020

Respectfully submitted,

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attached to the complaint when ruling on motion to dismiss); *Wiley v. Pliler*, 2006 WL 1686607, at *1-2 (E.D. Cal. June 19, 2006) (denying motion to dismiss 1983 petition on basis of facts contained in declaration attached to complaint); *see also Stanley v. Bob Const., Inc.*, 2014 WL 1400957, *2 (E.D. Cal., Apr. 10, 2014) (declaration not considered on motion to dismiss because it was not attached to the complaint).

CERTIFICATE OF AUTHORIZATION

TO SIGN ELECTRONIC SIGNATURE

Pursuant to Local Rule 5-4.3.4(a)(2)(i) of the Signatures Procedures for the United States District Court for the Central District of California, filer attests that all other signatories listed concur in the filing's content and have authorized this filing.

DATED: July 6, 2020

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