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

18 YONNEDIL CARROR TORRES;
 VINCENT REED; FELIX SAMUEL
 19 GARCIA; ANDRÉ BROWN; and
 SHAWN L. FEARS, individually and
 20 on behalf of all others similarly
 situated,

21 Plaintiff-Petitioners,

22 v.

23 LOUIS MILUSNIC, in his capacity as
 24 Warden of Lompoc; and MICHAEL
 CARVAJAL, in his capacity as
 25 Director of the Bureau of Prisons,

26 Defendant-Respondents.

No. CV 20-4450-CBM-PVCx

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

[Declarations of James Engleman,
 Lawrence Cross, and Melissa Arnold, filed
 concurrently herewith]

Honorable Consuelo B. Marshall
 United States District Judge

27
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Yonnedil Carror-Torres, Vincent Reed, Felix Samuel Garcia, Andre Brown, and
4 Shawn L. Fears (collectively, “Petitioners”) have been convicted of various federal
5 crimes (carjacking and serious bodily injury for sexual assault; armed bank robbery and
6 armed carjacking; possession of methamphetamine with intent to distribute; conspiracy
7 to manufacture, distribute, and possess with intent to distribute phencyclidine (PCP); and
8 conspiracy to possess with intent to distribute 15 kilograms of cocaine, respectively) and
9 are in the custody of the Federal Bureau of Prisons (“BOP”) for terms ranging from
10 approximately 2.5 to 25 years. They are currently housed within various facilities at the
11 Federal Correctional Complex in Lompoc, California (“FCC Lompoc”).

12 Petitioners move the Court *ex parte* to order Respondents, officials of the Federal
13 Bureau of Prisons (“BOP”), to release more prisoners to home confinement under the
14 Coronavirus, Aid, Relief, and Economic Security Act (“CARES Act”). Petitioners,
15 however, admit that the BOP has been doing just that. *See* ECF No. 18 at 16:5-6 (59
16 prisoners have been considered for release). Petitioners also cite the Attorney General’s
17 April 3, 2020, memorandum, which executed the provision of the CARES Act
18 expanding the BOP’s authority to designate an inmate to home confinement under 18
19 U.S.C. § 3624, arguing that more prisoners should be transferred to home confinement.
20 Petitioners, however, ignore that the Attorney General contemplated that the BOP
21 balance its obligation to protect those in its charge and the public:

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

28 ECF No. 18-1 (“Rim Decl.”), Ex. A at 9. In an earlier, March 26, 2020, memorandum,
the Attorney General directed certain criteria on what the BOP should consider in

1 “assessing which inmates should be granted home confinement,” specifically stating that
2 “[s]ome offenses, such as sex offenses, will render an inmate ineligible for home
3 detention.” *See id.*, Ex. C at 39-40. Thus, under the Attorney General’s direction,
4 Petitioners are ineligible for home confinement based on the nature of their offenses, and
5 their petitions are moot in addition to other jurisdictional bars. Brown and Fears’ request
6 is further moot because the BOP has already considered the proper place of confinement
7 for them and they are slated to be transferred to a different facility.

8 Other unnamed petitioners, even if eligible for transfer to home confinement under
9 the Attorney General’s memoranda, could not be ordered to home confinement by the
10 Court as the Court has no jurisdiction to designate an inmate’s place of confinement. *See*
11 *Reeb v. Thomas*, 636 F.3d 1224, 1226 (9th Cir. 2011) (holding that 18 U.S.C. § 3625
12 bars judicial review of any substantive “‘determination, decision or order’ made pursuant
13 to 18 U.S.C. §§ 3621-3624”); *Reynolds v. Thomas*, 603 F.3d 1144, 1150 (9th Cir. 2010)
14 (under 18 U.S.C. § 3621(b), it is the BOP’s responsibility “to identify the facility in
15 which a federal prisoner will serve out the sentence imposed by the district court”);
16 *Grayson v. Rison*, 945 F.2d 1064, 1067 (9th Cir. 1991) (prisoners have “no right to be at
17 any particular prison” within the federal system); *Neal v. Shimoda*, 131 F.3d 818, 828
18 (9th Cir. 1997) (same).

19 As Petitioners do not challenge the fact or duration of confinement, but merely
20 seek to challenge the conditions of their confinement, this Court could not order their
21 release from custody because the Prison Litigation Reform Act (“PLRA”) places
22 limitations on a district court’s ability to order the release of inmates, and expressly
23 precludes a single district judge from ordering such a release. 18 U.S.C. § 3626(a)(3)(B).
24 Thus, this Court is statutorily precluded from granting the very remedy Petitioners seek.

25 As for the prisoners remaining at FCC Lompoc, Petitioners seek a Court order
26 requiring Respondents to “provide the minimally adequate medical care required by the
27 Eighth Amendment.” ECF No. 18 at 16:19-20. As a preliminary matter, the Court lacks
28 jurisdiction over conditions-of-confinement claims in a *habeas* action. Even if the Court

1 had jurisdiction, Petitioners cannot present an Eighth Amendment violation because the
2 BOP has been adapting and applying the Centers for Disease Control (“CDC”) “Interim
3 Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional
4 and Detention Facilities” throughout the agency, including at FCC Lompoc.
5 Respondents have provided the relief Petitioners seek; thus, their conditions-of-
6 confinement claim is moot as well as being unable to demonstrate either prong of the
7 Eighth Amendment test: that the alleged deprivation was “‘objectively’ sufficiently
8 serious” or that prison officials acted with “‘deliberate difference’ to inmate health or
9 safety.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

10 Respondents recognize and regret that inmates have died as a result of COVID-19,
11 and are among the 108,920 Americans who have died from this novel virus, including
12 the thousands who have died in Southern California.¹ The Eighth Amendment, however,
13 does not hold prison officials liable under the Eighth Amendment “even if the harm
14 ultimately was not averted.” *Farmer*, 511 U.S. at 844-45. A loss of life is always tragic,
15 but an Eighth Amendment violation does not arise because the BOP facilities were not
16 immune from the ravages caused by COVID-19, just as it has not spared the lives of too
17 many other Americans.

18 Petitioners’ Eighth Amendment claims are also not subject to judicial review
19 because they have not exhausted their available administrative remedies as required
20 under the PLRA. 42 U.S.C. § 1997e(a). Petitioners admit they have not exhausted, or
21 even attempted to exhaust, their administrative remedies under the PLRA, and their
22 arguments why they should be excused from the exhaustion requirement lack merit.
23 Moreover, in addition to the traditional grievance process, Petitioners have other avenues
24 of redress. They can move for immediate release under 18 U.S.C. § 3582(c)(1)(A) with
25 their sentencing court. They could request compassionate release or a reduction in
26

27 ¹ *Coronavirus Resource Center: COVID-19 Dashboard*, John Hopkins Univ. &
28 Med., <https://coronavirus.jhu.edu/map.html> (last accessed June 5, 2020);
<http://publichealth.lacounty.gov/media/coronavirus/> (last updated June 3, 2020).

1 sentence under 18 U.S.C. §§ 3582 and 4205(g). They could request that the Warden
2 respond to an emergency request within three calendar days under 28 C.F.R. § 542.18.
3 Petitioners’ blanket contention that exhaustion is “effectively unavailable” is therefore
4 speculative and untrue.

5 In short, Petitioners are asking the Court to release or transfer to home
6 confinement convicted criminals and to oversee the running of FCC Lompoc, or as one
7 district court phrased it, to act as “a de facto ‘super’ warden.” *Livas v. Myers*, 2020 WL
8 1939583, at *8 (W.D. La. Apr. 22, 2020). As with *Livas*, and the majority of district
9 courts that have addressed similar petitions stemming from the COVID-19 pandemic,
10 this Court should reject Petitioners’ request to usurp executive functions entrusted to the
11 BOP by Congress.² *Turner v. Safley*, 482 U.S. 78, 84-85 (1987) (“Running a prison is an
12 inordinately difficult undertaking that requires expertise, planning, and the commitment
13 of resources, all of which are peculiarly within the province of the legislative and
14 executive branches of government.”); *id.* at 85 (“counsel[ing] a policy of judicial
15 restraint” in cases involving prison administration); *Farmer*, 511 U.S. at 846-47 (courts
16 should not become “enmeshed in the minutiae of prison operations”) (internal quotation
17 marks and citation omitted).

18 For all these reasons, Petitioners’ application fails because they cannot establish
19 the first prong of the TRO/preliminary injunction test, that they are “likely to succeed on
20 the merits.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008)
21 (“injunctive relief is an extraordinary remedy that may only be awarded upon a clear
22
23

24 ² In addition to *Livas*, district courts throughout the country have denied similar
25 TRO applications. See *Nellson v. Barnhart*, 2020 WL 3000961 (D. Colo. Jun. 4, 2020);
26 *Lucero-Gonzalez v. Kline*, 2020 WL 2987002 (D. Ariz. Jun. 2, 2020); *Maney v. Brown*,
27 2020 WL 2839423 (D. Ore. Jun. 1, 2020) *Wragg v. Ortiz*, 2020 WL 2745247 (D.N.J.
28 May 27, 2020); *Jones v. Bergami*, 2020 WL 2575566 (W.D. Tex. May 21, 2020);
Alvarez v. Larose, 2020 WL 2315807 (S.D. Cal. May 9, 2020); *Grinis v. Spaulding*,
2020 WL 2300313 (D. Mass. May 8, 2020); *Furando v. Ortiz*, 2020 WL 1922357
(D.N.J. Apr. 21, 2020); *Plata v. Newsom*, 2020 WL 1908776 (N.D. Cal. Apr. 17, 2020);
Nellson v. Barnhart, 2020 WL 1890670 (D. Col. Apr. 16, 2020); *Money v. Pritzker*,
2020 WL 1820660 (N.D. Ill. Apr. 10, 2020).

1 showing that the plaintiff is entitled to such relief”) (citing *Mazurek v. Armstrong*, 520
2 U.S. 968, 972 (1997) (*per curiam*)).

3 The irreparable harm and public interest factors also weigh against Petitioners. *Id.*
4 at 24 (“In exercising their sound discretion, courts of equity should pay particular regard
5 for the public consequences in employing the extraordinary remedy of injunction.”)
6 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). To grant
7 Petitioners’ requests would unfairly intrude on the operation and functioning of FCC
8 Lompoc. Further, although Petitioners contend that they can safely quarantine outside of
9 FCC Lompoc, there is no guarantee that the immediate release of Petitioners, or of a
10 class of inmates, who may lack viable housing and may be deprived of access to food,
11 means of personal hygiene, and medical care if released, would not endanger the public.
12 The public, moreover, must be protected from Petitioners themselves who have been
13 convicted of serious crimes and sentenced to lengthy incarceration terms.

14 Respondents respectfully request that the Court deny Petitioners’ TRO
15 Application.

16 **II. FACTUAL BACKGROUND**

17 **A. FCC Lompoc’s Structure and Population**

18 FCC Lompoc is a federal prison complex located approximately 150 miles north
19 of Los Angeles and 53 miles north of Santa Barbara. Declaration of James Engleman
20 (“Engleman Decl.”), filed concurrently herewith, ¶ 5. FCC Lompoc houses male inmates
21 at: (1) a United States Penitentiary (“USP Lompoc” or “USP”) which operates as a
22 medium security institution that has a minimum security satellite camp (“USP Lompoc
23 Camp” or “Camp”); and (2) a Federal Correctional Institution (“FCI Lompoc” or “FCI”)
24 which operates as a low security institution. *Id.* The inmates at FCC Lompoc are serving
25 sentences ranging from a few months to life imprisonment, range in age from 19-80, and
26 have been convicted for a wide variety of offenses including, but not limited to, drug-
27 related charges, sex offenses, weapons charges, fraud/bribery charges, and homicide. *Id.*

1 USP Lompoc has units that are physically divided into 2-man cells with walls and
2 cell doors and some of the units have grills for doors. *Id.* ¶ 6. Each cell has a sink/water
3 fountain and toilet. *Id.* The Camp is separate and apart from the FCI and USP and has no
4 fences or perimeter-based barriers of any kind. Declaration of Lawrence Cross (“Cross
5 Decl.”), filed concurrently herewith, ¶ 4. FCI Lompoc and all three buildings that
6 comprise the USP Lompoc’s Camp facilities are structured as dormitories. Engleman
7 Decl. ¶ 6. Some areas have open configurations, whereas others have smaller 8 to 10-
8 man rooms. *Id.* These facilities have community restrooms with sinks, toilet facilities,
9 and showers. *Id.*

10 As of June 3, 2020, FCC Lompoc has a population of 2,599 inmates. *Id.* ¶ 7. USP
11 Lompoc’s current population consists of 1,124 inmates. *Id.* ¶ 7.a. Of these, 250 are
12 inmates from the FCI that are housed at the USP temporarily. *Id.* The population of USP
13 inmates is 874. *Id.* There are 474 inmates at USP Lompoc Camp, with 323 inmates at
14 South Camp and 151 inmates at North Camp. *Id.* Of the population, 33 inmates at USP
15 Lompoc (including the 250 FCI inmates), or 2.9%, are over age 65. *Id.* USP Lompoc’s
16 population has steadily been decreasing from 1,058 in January to 1,012 in February to
17 980 in March, and to 986 in April. *Id.* FCI Lompoc’s population as of June 3, 2020 was
18 1,000 inmates (exclusive of the 250 inmates housed at USP Lompoc). *Id.* ¶ 7.b. At FCI
19 Lompoc, there are 62 inmates, or 6.2% of the population, who are age 65 or older. *Id.*
20 FCI Lompoc’s population has decreased steadily decreased in recent months with 1,339
21 inmates in January to 1,314 in February, to 1,293 in March, and to 1,240 in April.

22 The health services department at FCC Lompoc has 28 clinical medical staff,
23 including three physicians, three mid-level practitioners, four paramedics, one quality
24 improvement/infection control nurse, and several dental, pharmacy, and clerical staff.
25 Cross Decl. ¶ 5. In addition to the BOP staff, there is one Public Health Services
26 employee who works with the medical team at FCC Lompoc on a regular basis. *Id.* FCC
27 Lompoc also utilizes local community hospitals and contract providers to meet the
28 emergent and specialized medical needs of the inmate population. *Id.* As discussed

1 below, as part of the FCC Lompoc response to COVID-19, the BOP contracted for
2 numerous providers to man the Hospital Care Unit (HCU) that was constructed in
3 response to the COVID-10 pandemic. *Id.*

4 **B. Efforts Taken by the BOP and FCC Lompoc To Address COVID-19**

5 In responding to the COVID-19 pandemic, the BOP quickly developed and began
6 implementing a multiphase action plan, following guidance and directives from the CDC
7 and World Health Organization (“WHO”). Cross Decl. ¶ 15; Engleman Decl. ¶ 54. As
8 discussed more fully below, the BOP has undertaken significant efforts to educate
9 inmates and staff, health-screen all individuals on site, to screen new arrivals, to provide
10 surgical and cloth masks to inmates, and to increase sanitation measures and the
11 quantities of cleaning supplies in common areas and living quarters. Cross Decl. ¶¶ 19,
12 26, 28, 30; Engleman Decl. ¶¶ 56, 65-86. Every single inmate at FCI Lompoc has been
13 tested for COVID-19. Cross Decl. ¶ 28; Engleman Decl. ¶ 78. Although this testing has
14 increased the number of positive cases identified on the BOP website, the data from this
15 testing has enabled the BOP to implement cohorting, isolation, and quarantine measures.
16 Cross Decl. ¶ 28. FCC Lompoc medical staff regularly screen inmates through
17 temperature and symptom checks. *Id.* ¶¶ 30, 33. All staff and contractors, and essential
18 volunteers must undergo a health screening before they may enter the facility. *Id.* ¶¶ 15,
19 19.c, 24. FCC Lompoc continues to update its procedures and practices in accordance
20 with the evolving information and guidance concerning this pandemic. *Id.* ¶¶ 26-33.

21 The BOP has had a Pandemic Influenza Plan in place since 2012. That protocol is
22 lengthy and detailed, establishing a six-phase framework requiring BOP facilities to
23 begin preparations when there is first a “[s]uspected human outbreak overseas.”³ The
24 plan addresses social distancing, hygienic and cleaning protocols, and the quarantining
25 and treatment of symptomatic inmates.

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27
28 ³ BOP Health Services Division, Pandemic Influenza Plan-Module 1: Surveillance
and Infection Control (Oct. 2012), available at
https://www.bop.gov/resources/pdfs/pan_flu_module_1.pdf

1 1. The BOP and FCC Lompoc’s Phased Action Plan to Respond to COVID-19

2 In January 2020, the BOP became aware of the first identified COVID-19 case in
3 the United States and quickly took steps to address its introduction and spread in BOP
4 institutions. Engleman Decl. ¶ 51. The BOP and FCC Lompoc has had infectious disease
5 control and prevention as part of its Annual Training for staff for at least ten years. *Id.*

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

8 During Phase I, the BOP established a task force to begin strategic planning for
9 COVID-19 Bureau-wide, led by the BOP’s Medical Director, Dr. Jeffery Allen, who
10 worked in conjunction with subject matter experts from the WHO and the CDC, which
11 issued guidance to the field and helped in the development of screening protocols for
12 staff, visitors, and inmates. Engleman Decl. ¶ 54.

13 The BOP began distributing information about COVID-19 to the inmate
14 population as early as February 5, 2020. *Id.* Guidance was issued to FCC Lompoc staff
15 on March 10, 2020 explaining how the BOP’s screening and leave procedures would
16 operate. *Id.* On March 12, 2020, FCC Lompoc posted CDC posters on how to stop the
17 spread of respiratory diseases for the inmate population. *Id.*

18 b. *Phase II – Health Screening of Inmates and Staff and Social*
19 *Distancing Measures*

20 On March 13, 2020, the BOP implemented Phase II of its Action Plan. Engleman
21 Decl. ¶ 55. Phase II required each facility to assess its inventories and assess adequate
22 supplies, update their pandemic plans, and establish quarantine areas in their facilities.
23 *Id.* Phase II put into place a number of restrictions across all BOP facilities over a 30-day
24 period, to be reevaluated upon the conclusion of that time period. *Id.* Specifically, the
25 BOP suspended the following activities for 30 days, with certain limited exceptions:
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1 social visits⁴, legal visits, inmate facility transfers, official staff travel, staff training,
2 contractor access, volunteer visits, and tours. *Id.* ¶ 55.a. Phase II also provided for the
3 screening of staff and inmates for known COVID-19 symptoms. *Id.* On March 13, 2020,
4 the Acting Warden sent a notice to the inmate population concerning the BOP’s COVID-
5 19 Protective measures. *Id.* As of that date, there were no inmates testing positive for
6 COVID-19 in the BOP. *Id.*

7 On March 16, 2020, a staff screening site was established at the FCC Lompoc
8 Training Center for all staff, essential contractors, and volunteers to be screened before
9 entering the facility. *Id.* ¶ 56. Staff were instructed not to come to work if they are sick,
10 that personal protective equipment (“PPE”) was available for their use, screening and
11 leave guidance, information about COVID-19, the importance of handwashing, and
12 stopping the spread of germs. *Id.* FCC Lompoc canceled most training with the
13 exception of fit testing, Introduction to Correctional Techniques (the initial training for
14 new employees), and training for non-health care providers to enable them to perform
15 screening. *Id.*

16 On March 25, 2020, FCC Lompoc posted CDC posters about how to stop the
17 spread of germs for the inmate population. *Id.* ¶ 58. FCC Lompoc also created a
18 Quarantine Unit and sent guidance to staff on its operation. *Id.* FCC Lompoc made
19 efforts to keep inmates within their housing units to better contain the potential spread of
20 COVID-19 and emphasized extra sanitation of phones and keyboards, mask-wearing and
21 social distancing, increased personal and area cleanliness. *Id.* ¶ 55.b. On March 27, 2020,
22 FCC Lompoc modified commissary schedules to help limit inmate group contact. *Id.*

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27 ⁴ Contrary to Petitioners’ claims that they were unable to access telephones, the
28 BOP increased inmates’ telephone allotment to 500 minutes per month (from 300
minutes per month) to help ensure that inmates maintained social ties during this time.
Engleman Decl. ¶ 55.a.

1 c. *Phase III – Maximizing Telework and Inventorying Sanitation and*
2 *Medical Supplies*

3 On March 18, 2020, Phase III guidance was issued addressing non-institutional
4 changes, which were inapplicable to the day-to-day operations of FCC Lompoc.
5 Engleman Decl. ¶ 57.

6 d. *Phase IV – Further Mitigation Efforts*

7 On March 26, 2020, the BOP implemented Phase IV of its Action Plan adding
8 additional preventative measures for quarantine and isolation and the use of PPE by
9 screening staff at all institutions. Engleman Decl. ¶ 59, Ex. BB. This guidance was
10 updated as to quarantine and isolation on March 28, 2020. *Id.*, Ex. CC.

11 At USP Lompoc, the cells allow the BOP to better manage the spread of COVID-
12 19 and the BOP has taken steps to minimize inmate activity that might increase the risk
13 of spreading COVID-19. *Id.* ¶ 60. During Phase IV, each housing unit was permitted to
14 go outside to the yard or to Education for one hour, every other day. *Id.* They were
15 provided showers and phone/computer access every other day. *Id.* For quarantined units,
16 inmates may still come out to use the shower, phone, or computers every other day. *Id.*

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

18 Phase V of the COVID-19 Action Plan took effect on April 1, 2020. Engleman
19 Decl. ¶ 61, Ex. DD. As part of this phase, the following measures were implemented at
20 FCC Lompoc:

- 21 A. For a 14-day period, inmates in every institution would be *secured in their*
22 *assigned cells/quarters* to decrease the spread of the virus.
- 23 B. During this time, to the extent practicable, inmates should still have access to
24 programs and services that are offered under normal operating procedures, such as
25 mental health treatment and education.
- 26 C. The BOP would coordinate with the United States Marshals Service (“USMS”) to
27 significantly decrease incoming movement.
- 28 D. After 14 days, this decision would be reevaluated and a decision made as to

1 whether or not to return to modified operations.

2 E. Limited group gathering would be afforded to the extent practical to facilitate
3 commissary, laundry, showers, telephone, and Trust Fund Limited Computer
4 System (TRULINCS⁵) access.

5 *Id.* ¶ 61.⁶

6 During this phase, all inmates at FCC Lompoc were confined to their cells for the
7 majority of the day. *Id.* ¶ 62. Meals were delivered directly to inmates' cells, as well as a
8 limited number of commissary items. *Id.* Inmates were permitted to leave their cells in
9 small groups on a rotating basis at designated times in order to engage in activities such
10 as telephone use, TRULINCS, showers, and exercise. *Id.* Inmates were permitted to be
11 outside their cells in these small groups for approximately 2.5-3 hours per day,
12 depending on the day of the week and with appropriate physical distancing. *Id.*

13 On April 3, 2020, the CDC amended its guidance to recommend the use of face
14 masks to reduce the spread of COVID-19. *Id.* at ¶ 64. On April 6, 2020, the BOP issued
15 guidance to all CEO's directing them to immediately implement CDC guidelines and to
16 issue masks to inmates. *Id.* Surgical masks were issued to all inmates and staff and was
17 later followed by distribution of three washable cloth masks for each inmate. *Id.*

18 (A) Sanitation Procedures

19 The primary disinfectant used to clean at FCC Lompoc is called hdq®C2, which is
20 listed on the Environmental Protection Agency's List N, Disinfectants for Use Against
21 SARS-Co-V-2. Engleman Decl. ¶ 63. This product comes to the facility concentrated, so
22 hdq®C2 is diluted with 2 ounces per gallon of water. *Id.* According to product
23 information, at this concentration, it demonstrates effective disinfectant activity against a
24 number of bacteria, including Methicillin resistant staphylococcus aureus (MRSA), and
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26 ⁵ TRULINCS is the internal BOP computer and electronic message platform that
27 inmates use to communicate with staff in the institutions and individuals in the
28 community. Through this platform, inmates receive updates, notices, and can read
inmate bulletins posted on the system by BOP staff. *See* Engleman Decl. ¶ 61.

⁶ *See* https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp.

1 numbers strains of staphylococcus and viruses like HIV-1, HIV-2, Hepatitis B, Hepatitis
2 C, and more. *Id.* FCC Lompoc has recently received 240 quarts of AVISTAT-D™
3 Ready to Use Spray Disinfectant Cleaner, which is also listed on the EPA’s List N. *Id.*
4 This product is ready to use and is not diluted. *Id.*

5 On April 7, 2020, a reminder for the need for daily sanitation was emailed to all
6 staff emphasizing the continued need for social distancing, using PPE as instructed, and
7 keeping all frequently touched areas clean and disinfected. *Id.* ¶ 65. Enhanced sanitation
8 efforts were undertaken at all facilities. *Id.*

9 At USP Lompoc, all inmates in general population are issued hygiene items,
10 including soap on a weekly basis. *Id.* ¶ 65.a. Hand sanitizer is not available to inmates at
11 the medium security facility, but the commissary allows for the purchase of soap. *Id.*
12 Chemical sanitizer is available for all inmates in general population on a daily basis. *Id.*
13 Cleaning supplies are also distributed to all units on a weekly basis and available to
14 inmates daily. *Id.* Inmates in the Special Housing Unit (“SHU”) are distributed seven
15 packs of multi-soap shampoo on Tuesdays and Thursdays. *Id.* Anytime an inmate uses
16 the SHU Law Library, the area is disinfected after each use. *Id.*

17 At the Camp, there are two dispensers each at Camp South and Camp North with
18 antibacterial foam hand wash. *Id.* ¶ 65.b. Every Friday, inmates are issued hygiene items,
19 including soap. *Id.* Computer keyboards are covered with plastic bags for individual use.
20 *Id.* Indigent inmates are issued hygiene items, including soap weekly. *Id.* Cleaning
21 supplies are distributed to all units on a weekly basis and are available to inmates daily.
22 *Id.*

23 At FCI Lompoc, inmates were not provided hand sanitizer for their personal
24 possession, but staff were administering sanitizer before and after using computer
25 keyboards or phones. *Id.* at ¶ 65.c. Saran wrap was placed on keyboards prior to each
26 inmate’s use and phones were disinfected between each use. *Id.* Liquid antibacterial soap
27 is dispensed in all unit bathrooms. *Id.* Cleaning supplies are distributed to all units on a
28

1 weekly basis and are available to inmates daily. *Id.* Indigent inmates are issued hygiene
2 items, including soap on a weekly basis. *Id.*

3 (B) Further Inmate Education

4 On April 8, 2020, the BOP Director posted a memorandum to the inmate
5 population addressing the COVID-19 pandemic. Engleman Decl. ¶ 67, Ex. X at 7-12.
6 This communication advised that the BOP had its first positive confirmed COVID-19
7 case on March 21, 2020 and the first positive staff case the next day. *Id.* at 7. FCC
8 Lompoc sent staff information on COVID-19 and steps to take to stay healthy and to
9 stop the spread of the virus. *Id.* While COVID-19 testing was not readily available to
10 asymptomatic individuals in the community, FCC Lompoc was able to obtain the
11 assistance of the Lompoc Health Care Center to provide FCC Lompoc staff COVID-19
12 testing and later at another facility. *Id.*

13 Information on the proper use of face coverings was posted for the inmate
14 population on April 13, 2020. *Id.* ¶ 68, Ex. EE at 13. FCC Lompoc staff also posted
15 relevant signs and guidance through the Housing Unit areas. *Id.*

16 *f. Phase VI – Continuation of Secure In Place and Social Distancing*
17 *Measures, Testing, and Construction of Hospital Unit*

18 Phase VI of the COVID-19 Action Plan took effect from April 13, 2020 to May
19 18, 2020. Engleman Decl. ¶ 69. As part of this phase, the Assistant Directors ordered
20 that inmates in every institution continue to be secured in their assigned cells/quarters,
21 limited group gathering would be afforded to the extent practical to facilitate telephone,
22 TRULINCS, commissary, laundry, and showers. *Id.* This plan reiterated efforts to
23 mitigate movement of staff and inmates, outlined criteria for quarantine and isolation of
24 inmates, minimized outside contacts, and addressed logistical needs and continued use of
25 PPE. *Id.*, Ex. FF. In distributing the Phase VI guidance to staff, the FCC Lompoc Acting
26 Warden reemphasized the importance of PPE and ensuring staff and inmates have this
27 equipment. *Id.* The Attorney General issued guidance on April 14, 2020, directing DOJ
28 employees to wear face coverings in public settings. *Id.*, Exhibit YY.

1 On April 16, 2020, FCC Lompoc cancelled all staff scheduled leave and posted
2 notices to the inmate population on handwashing and information regarding COVID-19.
3 *Id.* ¶ 70, Ex. X at 14-16.

4 (C) Enhanced Mitigation Measures

5 On April 17, 2020, FCC Lompoc took enhanced mitigation measures due to the
6 spread of COVID-19 at FCC Lompoc. Engleman Decl. ¶ 71. These enhanced modified
7 operations were generally described in a memoranda issued to staff on April 17, 2020,
8 and individualized notice was provided to inmates at the USP, FCI and the Camp. *Id.*,
9 Ex. GG. Specifically, these measures mandated the use of masks and cleanliness by the
10 inmate population and began restricting inmates to their housing units and cells. *Id.*
11 During this time, FCC Lompoc restricted inmate use of phone and TRULINCS in order
12 to prevent inmates from transferring COVID. *Id.*

13 At USP Lompoc, inmates were required to wear a mask at all times. *Id.* Every
14 inmate had already been issued surgical and cloth masks and replacements were
15 available upon request. *Id.* ¶ 71.a. Every inmate received disinfectant and paper towels to
16 keep their housing area clean and were advised they will be held accountable if they fail
17 to maintain sanitation. *Id.* Hygiene items were issued weekly and laundry exchange
18 occurred weekly. *Id.* Inmate's mail services were unaffected so they could send and
19 receive mail. *Id.* Legal calls were made available as needed. *Id.*

20 Camp inmates had similar conditions required. *Id.* ¶ 71.b. They were required to
21 wear a mask at all times. *Id.* Every inmate had already been issued surgical and cloth
22 masks and replacements were available upon request. *Id.*, Ex. NN at 63. Every inmate
23 received disinfectant and paper towels to keep their housing area clean and were advised
24 they will be held accountable if they fail to maintain sanitation. *Id.* Commissary, Food
25 Services, Medical Services and Laundry Services were not affected by the changes at
26 this time. *Id.* Inmate's mail services were unaffected so they could send and receive mail.
27 *Id.* Legal calls were made available as needed. *Id.*

28 At FCI Lompoc, movement was even more restricted as it was limited to the use

1 of the restroom or communicating with staff. *Id.* ¶ 71.c. Inmates were required to wear a
2 mask at all times. *Id.* Every inmate had already been issued surgical and cloth masks and
3 replacements were available upon request. *Id.* Every inmate received disinfectant and
4 paper towels to keep their housing area clean and were advised they will be held
5 accountable if they fail to maintain sanitation. *Id.* Hygiene items were issued weekly and
6 laundry exchange occurred weekly. *Id.* Inmate's mail services were unaffected so they
7 could send and receive mail. *Id.* Legal calls were made available as needed. *Id.*
8 Commissary was suspended but Food Services, Medical Services and Laundry Services
9 were not affected. *Id.*

10 After all inmates received masks and FCC Lompoc increased its educational
11 efforts, its COVID-19 numbers were still rising and FCC Lompoc believed it needed
12 more aggressive measures and implemented 14 days of enhanced mitigation measures
13 starting April 17, 2020. *Id.* ¶ 72. These included suspending all phone and computer
14 access due to the fear of the spread of COVID-19 through surfaces. *Id.* Depending on the
15 level of security at the facility, various restrictions were implemented: (1) at USP
16 Lompoc, movements were limited to cells so that there was no access to showers,
17 although a weekly laundry exchange was performed and inmates were allowed to have
18 commissary for up to \$50; (2) at FCI Lompoc, only commissary services were
19 suspended; and (3) at the Camp, inmates were permitted to have commissary services as
20 usual. *Id.*

21 In a Press Release on April 20, 2020, FCC Lompoc announced it was negotiating
22 a contract for an on-site mobile hospital equipped with hospital beds and medical
23 personnel. *Id.* ¶ 73, Ex. HH. Staff were apprised of the Complex's efforts through an
24 email sent that same day. *Id.* Through this communication, the Warden took the
25 opportunity to ask staff to wear their masks even when in the community. *Id.*

26 On April 29, 2020, a document addressing Frequently Asked Questions for FCC
27 Lompoc was distributed to the inmate population to address some of the more pressing
28

1 questions being raised. *Id.* ¶ 74, Ex. II.⁷

2 On Friday, May 1, 2020, staff were advised that effective Monday, May 4, 2020,
3 enhanced modified operations at USP Lompoc and the Camp would go into effect. *Id.*
4 ¶ 75. These modified operations were being implemented after the 14-day quarantine
5 period passed. *Id.* These modified enhanced operations involved allowing inmates to use
6 showers one at a time with the area being disinfected after each use, brief phone and
7 email access was allowed with stringent standards of sanitation and disinfecting in place,
8 and surgical masks were required at all time. *Id.* The plan was to do this for a week and
9 for those areas completing the quarantine period, the modified operations would change
10 to allow for inmates to be allowed out for a period of time to shower and use the phones
11 or computers. *Id.* This guidance advised that any positive test could require regression of
12 the process to an earlier phase. *Id.*

13 A May 4, 2020 Press Release announced the finalized construction of a Hospital
14 Care Unit (HCU) inside the confines of USP Lompoc at the medium-security component
15 of the Complex which includes ten (10) double-occupancy, acute care treatment rooms
16 with negative pressure, Patient Intake Room, Nurses Station, Pharmacy, Linen Exchange
17 Room, Biohazard Room, and Medical Supply & Storage. *Id.* ¶ 76. Additionally, FCC
18 Lompoc announced it negotiated a contract for medical personnel, including Doctors,
19 Registered Nurses, Paramedics, Pharmacist, Physician Assistants, Nurse Assistants, and
20 a Clinical Manager, who will work in conjunction with FCC Lompoc Health Services
21 staff. *Id.*, Exhibit JJ.

22 FCC Lompoc began gradually retreating from enhanced mitigation measures
23 starting on May 4, 2020 to allow the Associate Wardens to increase services in an
24 orderly manner. *Id.* ¶ 77. At the USP, inmates were first allowed access to showers,
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27 ⁷ This April 29, 2020 FAQ notes that FCC Lompoc staff focused on reviewing all
28 inmates who meet the criteria for home confinement provided by the Attorney General,
and that as of the date of the FAQ, 61 inmates at FCC Lompoc had been found suitable
for home confinement and that due to new guidance proceed on April 24, 2020, the
review of inmates for home confinement was ongoing. Engleman Decl. ¶ 74, Ex. II

1 phones, and emails on a rotating, take-turns basis. *Id.* After a week of carefully
2 monitored rotations, the Associate Wardens or their designees would increase inmate
3 access by allowing a small number of inmates out of their cells to use their choices of
4 services, such as showers, phone, and emails. *Id.* These two phases were referred to as
5 Phase II/Phase III. *Id.* On May 14, 2020, FCC Lompoc accounted Phase III/IV where
6 inmates were permitted to be out in groups of no more than 10 for a period of one hour
7 to use showers, phones, and computers. *Id.* Phase IV permitted inmates to access the
8 outdoor track for walking and to use the law library through a sign-up sheet to ensure
9 appropriate social distancing. *Id.*

10 (D) Testing of All Inmates at FCI Lompoc and Cohorting

11 On May 5, 2020, FCC Lompoc announced it was testing 100% of the inmate
12 population for COVID-19 starting at the FCI. Engleman Decl. ¶ 78. FCC Lompoc
13 acknowledged that as a result of doing so, it may significantly increase the number of
14 COVID-19 positive cases at the facility despite only a small percentage experiencing
15 acute or chronic illness. *Id.* This measure was taken to further assist in mitigation efforts.
16 *Id.* Additional information was posted in inmate housing units as it became available. *Id.*,
17 Ex. EE at 8 (identifying symptoms) and 12 (reflecting changes in CDC guidance about
18 symptoms).

19 On May 8, 2020, the Acting Warden updated staff on the recent happenings at the
20 Complex. *Id.* ¶ 79. Specifically, 182 COVID-negative inmates were moved from the FCI
21 to the USP into a quarantine unit dedicated solely for those inmates in order to reduce
22 the population of the FCI and “providing them the space they need to accomplish their
23 social distancing goals.” *Id.* The update also announced the anticipated arrival of a 100
24 square foot tent to further enhance social distancing opportunities, and that 20 contract
25 workers for the Hospital Care Unit had commenced their orientation to the facility. *Id.*
26 The update reminded staff the facility was “continuously reviewing inmates for
27 Residential Reentry Centers, Home Confinement placements, furlough eligibility prior to
28 placement in RRC/HC’s, to further allow us to create the environment needed in a

1 correctional setting to counter COVID-19. *Id.* The practice of staff being assigned to
2 specific areas and facilities and not being assigned to multiple areas across the complex
3 was continued to minimize the potential cross transmission on the complex by staff. *Id.*
4 Emails were sent to staff imploring them to follow guidance regarding social distancing
5 and the wearing of masks while in public, donning PPE particularly when responding to
6 situations in a quarantine or isolation area and reminding staff of the critical importance
7 of social distancing and use of PPE. *Id.*

8 FCC Lompoc announced to staff on May 12, 2020, that the Hospital Care Unit
9 (“HCU”) was activated over the previous weekend and that inmates with less severe
10 COVID-19 symptoms currently being managed at the local hospital would be returned to
11 the facility to reduce community pressures by returning those inmates and announced the
12 impending installation of a BLU-Med Hospital Tent at the FCI. *Id.* ¶ 80.

13 On May 14, 2020, FCC Lompoc issued further guidance on enhanced modified
14 operations at Units C, J, and L at USP Lompoc to be effective on May 18, 2020. *Id.* ¶ 81.
15 This guidance still required social distancing, use of masks, and stringent standards of
16 sanitation. *Id.* However, for these units, a small number of inmates, of no more than 10
17 inmates at a time, would be allowed in the common area (a.k.a. the flats) for a one-hour
18 period during which they could shower and use the phones and computers. *Id.* It
19 announced the next phase would include inmate access to outside recreation on the track
20 and to the Law Library in the Education Department, while cautioning that any medical
21 or social distancing concerns would cause regression to prior practices. *Id.* In
22 summarizing the week’s accomplishments through an email to staff on May 15, 2015,
23 the Acting Warden commented on the addition of a clean transition area for staff
24 working directly with symptomatic inmates, the establishment of the satellite HCU
25 Pharmacy, and creation of the HCU medical supply storage and well as the erection of a
26 hospital tent at the FCI. *Id.*

1 g. *Phase VII – Current Operations*

2 On May 18, 2020, the relevant Assistant Directors of the Bureau issued guidance
3 on the implementation of Phase VII of the BOP’s COVID-19 Action Plan, which took
4 effect on May 18, 2020. Engleman Decl. ¶ 82, Ex. KK. It extended the Phase VI Action
5 Plan through June 30, 2020. *Id.* Among other measures, it added testing of inmates new
6 to the BOP, and directed that whenever possible, inmates should be permitted access to
7 the Electronic Law Library consistent with social distancing protocols and safe
8 institution operations. *Id.* At FCC Lompoc, the improving conditions at the facility
9 enabled management to restore a number of non-custody staff to the normal duties. *Id.*

10 Pursuant to Phase VII (which took effect on May 18, 2020), all inmates at FCC
11 Lompoc are confined to their cells for the majority of the day. *Id.* ¶ 83. Meals are
12 delivered directly to the housing units. *Id.* However, inmates are permitted to leave their
13 cells in small groups on a rotating basis at designated times in order to engage in
14 activities such as using the phones, TRULINCS, showers, and exercise. *Id.* FCC Lompoc
15 announced it will “begin organizing and preparing for our new normal inside the Low
16 and Camps while continuing to battle in the USP to eradicate this disease . . . [balanced
17 against the] additional pressure . . . to get visitation and other programming restarted.”
18 *Id.* FCC Lompoc management announced it would be “strategically reactivating certain
19 programs for the inmate populations to slowly establish a more recognizable operation”
20 safely. *Id.* The Acting Warden distributed plans for the next phase of the Camp’s
21 modified operations which included adding Law Library access and expanding time for
22 phones, emails, and the track (outside recreation). *Id.* These measures were contingent
23 upon the use of masks, social distancing and stringent standards of sanitation being
24 maintained. *Id.*

25 Another Frequently Asked Questions for FCC Lompoc document was generated
26 and provided to inmates on May 11, 2020, which explained quarantine procedure and
27 CARES Act consideration for home confinement. *Id.* ¶ 84, Ex. LL.

1 On June 1, 2020, a third iteration of the Frequently Asked Questions for FCC
 2 Lompoc was issued to staff and inmates. *Id.* ¶ 86, Exhibit MM. This version explains the
 3 process for pre-release or transfer quarantine procedures both at the facility and if need
 4 be, in the community. *Id.*

5 Unrelated to the spread of COVID-19, on June 1, 2020, the BOP locked down all
 6 of its facilities nation-wide due to wide spread unrest and rioting across the country. *Id.*
 7 ¶ 87. All inmates are therefore presently restricted to their living areas. *Id.*

8 *h. Access to Legal Calls*

9 Given the public health emergency, FCC Lompoc staff feel it is necessary to
 10 minimize movement that could put both staff and inmates at risk, and focused on
 11 managing inmates and increased sanitation efforts. Engleman Decl. ¶ 85. Since April 1,
 12 2020, however, FCC Lompoc has accommodated urgent legal calls by request. *Id.* In
 13 order to arrange a legal call, BOP staff must take an inmate out of a quarantine or
 14 isolation unit/cell and into a staff office with an unmonitored line. *Id.* When provided
 15 with a legal call, inmates had been limited to a 15 minute call. *Id.* This time limitation
 16 was to ensure that all inmates were provided legal calls and that staff are able to
 17 adequately disinfect the equipment and area between calls. *Id.* Given the limitations on
 18 inmate movement within the institution, the limited number of phones available for legal
 19 calls, and the sheer volume of requests being received, inmates may not have been able
 20 to complete legal calls as quickly as requested.

21 2. FCC Lompoc's Medical Response to COVID-19⁸

22 *a. Implementation of Screening Procedures*

23 Even prior to the first reported case of COVID-19 in late March 2020, the BOP
 24 and FCC Lompoc had made efforts to follow the CDC guidance related to COVID-19.

26 ⁸ As of June 5, 2020, the BOP's public COVID-19 webpage
 27 (<https://www.bop.gov/coronavirus/>) reports there are 15 confirmed inmate cases of
 28 COVID-19 at USP Lompoc (which includes the Camp) and one confirmed inmate case
 of COVID-19 at FCI Lompoc. To date, 157 inmates at USP Lompoc recovered while
 two passed away and 893 inmates at FCI Lompoc recovered while two passed away.

1 Cross Decl. ¶ 15.a., Ex A, Memo re: Guidance on 2019 Novel Coronavirus Infection for
2 Staff Screening dated 2020-01-31 and Memo re: Guidance on 2019 Novel Coronavirus
3 Infection for Inmate Screening and Management dated 2002-01-31. Medical screenings
4 of all staff and visitors to FCC Lompoc started on March 16, 2020. *Id.* ¶ 24. As CDC
5 guidance changed regarding symptoms of the virus, the BOP modified its screening
6 tools. *Id.* A copy of the current screening tools used by the BOP and at FCC Lompoc as
7 of June 1, 2020, is attached to the Cross Decl. as Ex. E at 3-6.

8 Outside medical and dental trips were prioritized and reduced to the extent
9 possible to minimize the risk of infection or spreading within the facility. *Id.* ¶ 15.b., Ex.
10 B, BOP Guidance for Prioritizing Outside Medical and Dental Trips During the COVID-
11 19 Pandemic. Clinical guidance on screening inmates was provided to clinical medical
12 providers on or about March 20, 2020. *Id.* ¶ 15.c, Ex. C at 1-2. Clinical information on
13 medical quarantine and isolation procedures was distributed to medical providers on or
14 about March 22, 2020. *Id.* ¶ 15.d, Ex. D at 1-2.

15 *b. As of March 30, 2020, No Sick Call Co-Pays Have Been Charged*

16 On March 23, 2020, the CDC issued Interim Guidance on Management of
17 Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities. Cross
18 Decl. ¶ 16. On March 30, 2020, BOP announced no sick call co-pay will be charged to
19 any inmate presenting for COVID-like symptoms. *Id.* ¶ 17.

20 *c. Masks, Education, and Mass Testing*

21 The first confirmed case of COVID-19 at FCC Lompoc was at the USP on March
22 30, 2020. Cross Decl. ¶ 18. The virus spread despite considerable efforts to control the
23 spread. *Id.* The hardest hit facility was the FCI. *Id.* Upon mass testing and identifying a
24 significant number of asymptomatic positive inmates at the FCI, the determination was
25 made to remove the COVID-19 negative inmates from the facility to their own dedicated
26 unit in the USP where there had been no confirmed cases at that time with the goal of
27 preventing the further transmission of the disease. *Id.*

1 In April 2020, FCC Lompoc established a comprehensive infection prevention
2 program which included a wide variety of activities. On April 6, 2020, FCC distributed
3 multiple masks to inmates and staff and provided education on the proper donning and
4 doffing of the masks. *Id.* ¶ 19.a. Signs were posted in locations appropriate to educate
5 inmate and staff about cleaning surfaces, personal hygiene, social distancing, and
6 coughing practices. *Id.* ¶ 19.b. FCC Lompoc set up an off-site health screening site for
7 staff which staff are required to successfully pass before being allowed to enter into their
8 work/duty station. *Id.* ¶ 19.c. Every inmate had access to cleaning supplies and were
9 encouraged to frequently clean and disinfect their own areas. *Id.* ¶ 19.d. Additionally,
10 FCC Lompoc initiated regular symptom and temperature checks of every inmate by
11 medical staff. *Id.* ¶ 19.e.

12 BOP medical personnel assisting both FCI Terminal Island and FCC Lompoc
13 reached out to the Public Health departments in Los Angeles and Santa Barbara County
14 to coordinate responses and seek guidance. *Id.* ¶ 20. The decision to mass test was made
15 after collaboration with the LA County Public Health Department. *Id.* BOP's initial
16 response to the outbreak at FCI Terminal Island and at FCC Lompoc was in accordance
17 with current CDC guidance which called for the facility to identify/test and isolate the
18 symptomatic immediately. *Id.* ¶ 20.b. As the number of symptomatic cases grew, the
19 decision was made to conduct mass testing at FCC Lompoc. *Id.* ¶ 20.d. Santa Barbara
20 County public health officials made no specific recommendations and gave no access to
21 testing unlike Los Angeles County for FCI Terminal Island which provided guidance;
22 FCC Lompoc therefore initiated its own contract with WestPac and used the same
23 procedure for testing and isolation as recommended by the Los Angeles County public
24 health department for FCI Terminal Island. *Id.* ¶ 20.e.

25 *d. FCC Lompoc Has Sufficient Cleaning Supplies and PPE*

26 In addition to these steps, FCC Lompoc was on the BOP priority list for all
27 necessary resources, which allowed it to maintain its inventory of PPE and other supplies
28 like masks and cleaning products. Cross Decl. ¶ 21. FCC Lompoc received dozens of

1 staff deployed temporarily (TDY) from other BOP locations which helped it supplement
2 its staffing, and to date, it still has supplemental staffing from other BOP locations. *Id.*

3 *e. Isolation and Cohorting*

4 The BOP uses the same language as the CDC to discuss pertinent issues like social
5 distancing, quarantine, medical isolation, cohorting, and recovery. Cross Decl. ¶ 22.
6 The CDC defines social distancing as the “practice of increasing the space between
7 individuals and decreasing the frequency of contact to reduce the risk of spreading a
8 disease (ideally to maintain at least 6 feet between all individuals, even those who are
9 asymptomatic). *Id.* ¶ 22.a. Social distancing strategies can be applied on an individual
10 level (e.g., avoiding physical contact), a group level (e.g., canceling group activities
11 where individuals will be in close contact), and an operational level (e.g., rearranging
12 chairs in the dining hall to increase distance between them).” *Id.*, Ex. E at 4. “Quarantine
13 refers to the practice of confining individuals who have had close contact with a
14 COVID-19 case to determine whether they develop symptoms of the disease. *Id.* ¶ 22.b.
15 Quarantine for COVID-19 should last for a period of 14 days. *Id.* Ideally, each
16 quarantined individual would be quarantined in a single cell with solid walls and a solid
17 door that closes. *Id.* If symptoms develop during the 14-day period, the individual should
18 be placed under medical isolation and evaluated for COVID-19. *Id.* If symptoms do not
19 develop, movement restrictions can be lifted, and the individual can return to their
20 previous residency status within the facility.” *Id.*, Ex. E at 4. “Medical isolation refers to
21 confining a confirmed or suspected COVID-19 case (ideally to a single cell with solid
22 walls and a solid door that closes), to prevent contact with others and to reduce the risk
23 of transmission. Medical isolation ends when the individual meets pre-established
24 clinical and/or testing criteria for release from isolation, in consultation with clinical
25 providers and public health officials (detailed in guidance below).” *Id.* ¶ 22.c, Ex. E at 4.
26 “Cohorting refers to the practice of isolating multiple laboratory-confirmed COVID-19
27 cases together as a group, or quarantining close contacts of a particular case together as a
28 group.” *Id.* ¶ 22.d, Ex. E at 3. “Recovery is defined as resolution of fever without the use

1 of fever-reducing medications with progressive improvement or resolution of other
2 symptoms.” *Id.* ¶ 22.e., Ex. G at 2.

3 FCC Lompoc has worked with infectious disease experts from the BOP and
4 executive staff to implement various quarantine and isolation procedures, which included
5 developing an Isolation Unit inside the USP for any symptomatic inmates from any of
6 the institutions at FCC Lompoc. *Id.* ¶ 23. The Isolation Unit has a capacity of just over
7 200 inmates, is comprised of cells that are walled-off on all sides except for the open-
8 barred entryway. *Id.* As of the date of this declaration, there are approximately just over
9 30 inmates in the Isolation Unit. *Id.* Inmates are usually single-celled, unless it is
10 clinically acceptable to house two specific inmates together. *Id.* All BOP staff who work
11 in the Isolation Unit are mandated to wear appropriate PPE, which allows them to work
12 safely and effectively to monitor the inmates in the Isolation Unit, and to seek medical
13 assistance if necessary. *Id.* As long as these symptomatic inmates who tested positive for
14 COVID-19 do not need hospitalized care, they will be treated by BOP medical staff until
15 they recover, pursuant to CDC guidelines. *Id.* All inmates in the Isolation Unit are
16 symptom and temperature checked daily by BOP medical staff. *Id.*

17 *f. FCC Lompoc Continues to Evolve Its Response to COVID-19*
18 *According to Updated Guidance and Testing*

19 FCC Lompoc’s response to COVID-19 has continued to evolve as CDC Guidance
20 has been updated throughout the course of this pandemic. Cross Decl. ¶ 26. For example,
21 in mid-April 2020, FCC Lompoc initiated 14 days of enhanced mitigation measures
22 which greatly limited inmate activity and movement, and mandated inmates to wear
23 masks and maintain hygiene/cleanliness. *Id.* ¶ 26.a. Staff were assigned to work one area
24 (USP, FCI or Camp) and all of their assignments were to be at that facility to prevent
25 staff going between facilities and possibly spreading the virus that way. *Id.* ¶ 26.b.
26 Inmates were cohorted by the structure of the institution. *Id.* At FCI Lompoc, separate
27 floors were cohorted so that inmates would not intermingle throughout the housing unit.
28 *Id.* ¶ 26.c. At the USP, inmates were cohorted by housing unit. *Id.* At the Camp, inmates

1 have been cohorted by their assigned building. *Id.* FCC Lompoc also separated inmates
2 by job assignment, such as food service and farm employees and cohorted them in non-
3 traditional areas to maximize social distancing. *Id.*

4 (A) Universal Testing at FCI Lompoc and Isolation and Quarantine
5 Procedures

6 In early May, the staff at FCC Lompoc began pursuing a strategy that would lead
7 to the testing of all inmates at the FCI, regardless of symptomology in order to address
8 the spread of COVID-19. Cross Decl. ¶ 28. FCI Lompoc purchased the test kits to be
9 administered by Health Services staff and contracted with a private company to complete
10 the lab work. *Id.* Prior to universal testing, all symptomatic inmates at FCI Lompoc were
11 placed in isolation. *Id.* ¶ 28.a. As the majority of FCI Lompoc inmates tested positive
12 through the mass testing, if any asymptomatic inmates developed some mild symptoms
13 after universal testing, they remained at FCI Lompoc in their respective housing unit. *Id.*
14 ¶ 28.b. All of these inmates were still subject to daily symptom screening and
15 temperature checks and any positive inmate who had worsening symptoms could be
16 assessed by medical staff for further medical care as needed. *Id.* After the universal
17 testing at FCI Lompoc was completed in early May, inmates testing negative were
18 moved into M Unit inside the USP, which was designated a “clean” housing unit to
19 better insulate them from infection from COVID-19. *Id.* ¶ 28.c. Cohort testing of M-Unit
20 continued to be conducted. *Id.*

21 During the week of May 11, 2020, FCC Lompoc decided to retest all of the
22 negative inmates who were being housed in M Unit given the probability there could be
23 some false negatives, and because even highly reliable testing methods might not detect
24 COVID-19 if it had not yet developed sufficiently for testing to detect it. *Id.* ¶ 28.d. As a
25 result of this retesting process, 87 inmates tested positive or indeterminate for COVID-
26 19 on May 13, 2020, and they were immediately moved across the hall into the Isolation
27 Unit at USP Lompoc or back into their housing unit at FCI Lompoc. *Id.* ¶ 28.e. FCC
28 Lompoc staff believed placement of asymptomatic inmates who test positive for

1 COVID-19 into the Isolation Unit would be the best way to prevent the further spread of
2 COVID-19. *Id.* While there are symptomatic inmates with COVID-19 in the Isolation
3 Unit, there is no evidence to suggest further spread/infection as both groups are already
4 positive with COVID-19. *Id.* Inmates in the Isolation Unit are symptom and temperature
5 checked daily, and if any inmate's symptoms worsen, medical staff can decide on
6 whether more advanced care is needed, like transfer to the HCU or to a local hospital. *Id.*

7 Pursuant to the CDC protocols and BOP guidelines that follow CDC protocols
8 regarding COVID-19 and prisons, an individual who tests positive may be deemed
9 recovered after 14 days of improved symptoms, with the last three days being fever-free.
10 *Id.* ¶ 29.⁹ Accordingly, the BOP had adopted this guidance and implemented a 14-day
11 quarantine period. *Id.*

12 (B) Medical Care

13 FCC Lompoc currently have medical staff performing temperature testing and
14 symptom screening daily in every quarantine and isolation housing unit, and if an inmate
15 is identified as symptomatic, the inmate to the Isolation Unit inside the USP, or to a local
16 hospital as needed for further evaluation, testing, and/or treatment. Cross Decl. ¶ 30.
17 Testing for COVID-19 can currently be performed locally through an on-site Abbott ID
18 testing machine, by sending it to a referral contract laboratory, or by whichever means
19 the local hospital chooses to use. *Id.*

20 FCC Lompoc created an on-site HCU as another measure to address COVID-19,
21 and to alleviate any burden on community hospital resources that might exist. *Id.* ¶ 31.
22 Although FCC Lompoc has been using up to three local hospitals to care for COVID-19
23 patients, it developed the HCU to provide another medical resource for FCC Lompoc. *Id.*
24 Inmates who need intensive-care level medical services, like a ventilator, will continue
25 to be sent to a local hospital, but, inmates who can be managed with on-site 24/7
26

27 _____
28 ⁹ See <https://www.cdc.gov/coronavirus/2019-ncov/community/strategy-discontinue-isolation.html>.

1 contracted medical staff, will be cared for in the HCU. *Id.* As of June 3, 2020, FCC
2 Lompoc has nine patients currently in the HCU. *Id.*

3 Additionally, FCC Lompoc erected a BLU-MED: Negative Pressure Isolation
4 System. *Id.* ¶ 32. It was initially erected for use to enhance social distancing
5 opportunities and used as a separate isolation unit for inmates with mild respiratory
6 symptoms. *Id.* There are currently no inmates housed in this area, but it is available
7 should it become needed in the future. *Id.*

8 As of June 5, 2020, the entire population of FCI Lompoc is considered recovered
9 from COVID-19. *Id.* ¶ 33. Inmates will continue to be monitored by Health Services. *Id.*
10 Sick call and medication distribution occurs daily in the housing units. *Id.* USP Lompoc
11 Unit M is the quarantine unit for inmates from FCI Lompoc. *Id.* L Unit is on quarantine
12 and Camp South B are on quarantine. *Id.* Inmates on quarantine will continue to have
13 daily symptom screening and temperature checks. *Id.* The entire complex is on lockdown
14 as part of the nationwide response to rioting throughout the country, so medical staff
15 conduct twice daily pill lines throughout the entire complex. *Id.* Sick call requests are
16 passed out and collected by Unit Officers daily and are addressed by Health Services as
17 needed. *Id.*

18 **C. Administrative Grievance Requirements**

19 Upon arrival at FCI Lompoc, every inmate is provided an Admission and
20 Orientation handbook with information on the BOP's Administrative Remedy Program.
21 Engleman Decl. ¶ 43. One of the class lectures during each inmate's orientation is about
22 the Administrative Remedy Program and every inmate is advised how to participate in
23 the administrative remedy process. *Id.* The BOP has a four-tiered administrative remedy
24 process for inmates challenging issues related to their imprisonment codified in the Code
25 of Federal Regulations. *Id.* ¶ 44; 28 C.F.R. §§ 542.10, *et. seq.* Additionally, the BOP has
26 issued Program Statement 1330.18, *Administrative Remedy Program* (January 6, 2014),
27 which includes the regulations and the Bureau's implementing language. *Id.*, Ex. U.
28

1 First, the inmate can seek informal resolution of the issue of concern at his
2 institution of confinement (via a BP-8 form). 28 C.F.R. § 542.13; Ex. U at 4. If informal
3 resolution is not successful, the inmate may file a formal request with the Warden (via a
4 BP-9 form). 28 C.F.R. § 542.14; Ex. U at 4-6. “The deadline for completion of informal
5 resolution and submission of a formal written Administrative Remedy Request, on the
6 appropriate form (BP-9), is 20 calendar days following the date on which the basis for
7 the Request occurred.” *Id.* There is an exception in policy that allows an inmate to seek
8 relief directly at the Regional level when the issue is “sensitive.” 28 C.F.R. § 542.14(d);
9 Ex. U at 6. Such requests are only appropriate if the inmate “reasonably believes the
10 issue is sensitive and the inmate’s safety or well-being would be placed in danger if the
11 Request became known at the institution.” *Id.* If the inmate is unsatisfied with the
12 response or no response is timely received, the inmate may appeal to the Regional
13 Director, within 20 days of receiving the Warden’s response (via a BP-10 form).

14 If the inmate is unsatisfied with the response or no response is timely received
15 from the Region, then he may pursue a final appeal to the Inmate Appeal Administrator
16 in the office of General Counsel in Washington, D.C. (via a BP-11 form). 28 C.F.R.
17 § 542.15. Pursuant to 28 C.F.R. § 542.15(a), an “[a]ppel to the General Counsel is the
18 final administrative appeal.” Thus, the administrative process is not complete until the
19 Office of the General Counsel (“OGC”) replies, on the merits, to the inmate’s appeal, or
20 if the response by OGC is not forthcoming within the time allotted for reply. *See* 28
21 C.F.R. § 542.18.

22 Based on a review of FCC Lompoc records, none of the Petitioners have
23 submitted or exhausted administrative remedies regarding conditions of confinement at
24 FCC Lompoc. *Id.* ¶ 46.

25 **D. Reduction in Sentence/Compassionate Release Procedures**

26 In addition to the PLRA-mandated administrative grievance process, Petitioners
27 may avail themselves of the Compassionate Release/Reduction in Sentence Procedures
28

1 for Implementation of 18 U.S.C. §§ 3582 at 4205(g) (“PS 5050.50”).¹⁰ Previously, only
2 the director of the BOP was authorized to file compassionate release/reduction in
3 sentence motions on behalf of an inmate. Declaration of Melissa Arnold (“Arnold
4 Decl.”), filed concurrently herewith, ¶ 3. However, the current statute permits inmates to
5 file such motions themselves after having “fully exhausted all administrative rights to
6 appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or
7 the lapse of 30 days from the receipt of such a request by the warden of the defendant’s
8 facility, whichever is earlier.” 18 U.S.C. § 3582(c)(1)(A); Arnold Decl. ¶ 3.

9 Under this process, an inmate first submits an initial request for a reduction in
10 sentence to the institution’s warden. *Id.* ¶ 4; PS 5050.50 at 3. The request must set forth
11 the “extraordinary and compelling circumstances” justifying the request and the inmate’s
12 proposed release plans, including where they will reside, how they will support
13 themselves, and, if applicable, where he or she will obtain medical treatment and how it
14 will be paid for. *Id.* Upon receipt, the Reduction in Sentence coordinator forwards the
15 request to the institution’s Health Services Department for Review. *Id.* The request is
16 then reviewed to determine whether the inmate’s request qualifies under the BOP’s
17 criteria identified policy. *Id.*

18 Upon receipt of the pertinent information, the Warden will determine whether the
19 request warrants approval. *Id.* ¶ 5. If the Warden approves the request, the Warden refers
20 the request to the BOP’s Office of General Counsel for further processing. *Id.* If the
21 Warden determines the request does not warrant referral, the Warden provides the
22 inmate with written notice of the decision and the basis for that decision. *Id.* The inmate
23 can appeal that denial through the BOP’s administrative remedy process. *Id.*

24 Here, BOP records indicate that Carrer-Torres’s sister, Kiara Carrer, made a
25 reduction in sentence request on his behalf on May 14, 2020. *Id.* ¶ 6.a. This request is
26 being reviewed to determine whether he qualifies for the BOP’s criteria for
27

28 ¹⁰ Available at: https://www.bop.gov/policy/progstat/5050_050_EN.pdf

1 compassionate release. *Id.* Reed’s counsel filed a request for compassionate release on
2 January 7, 2020. *Id.* ¶ 6.b. Reed’s request was denied on April 29, 2020. *Id.* Garcia
3 submitted a request for a reduction in sentence, which was received by the Warden on
4 May 20, 2020. *Id.* ¶ 6.c. This request seeks home confinement under the CARES Act and
5 asks to be “released earlier.” *Id.* This request is being reviewed by the institution’s staff
6 to determine whether he qualifies under the agency’s criteria for compassionate release.
7 *Id.* Brown’s counsel sent request for compassionate release for Brown on May 13, 2020.
8 *Id.* ¶ 6.d. This request is being reviewed by the staff to determine whether he qualifies
9 under the agency’s criteria for compassionate release. *Id.* No request for a reduction of
10 sentence for Fears has been received. *Id.* ¶ 6.e.

11 Once BOP staff complete their review of the outstanding requests for Carrer-
12 Torres, Garcia, and Brown, they will make a recommendation. *Id.* ¶ 7. The Warden will
13 consider that recommendation and either forward the application to the BOP’s Office of
14 General Counsel for further processing or will deny the application and inform the
15 inmate in writing. *Id.* In the event of a denial, the Petitioners have the opportunity to
16 appeal that denial through the administrative remedy process. *Id.*

17 **E. Home Confinement under the CARES Act**

18 The CARES Act, PL 116-136, 134 Stat 281 (Mar. 27, 2020), expanded BOP’s
19 home confinement authority under limited conditions. Specifically, as to Home
20 Confinement, § 12003(b)(2) provides that during a “covered emergency period” (CEP),
21 if the Attorney General finds that “emergency conditions will materially affect the
22 functioning of the Bureau,” the BOP Director may lengthen the maximum amount of
23 time a prisoner spends in home confinement “under the first sentence of section
24 3624(c)(2),” as the Director “determines appropriate.” Through a letter dated April 3,
25 2020, the Attorney General made such a determination as to “FCI Oakdale, FCI
26 Danbury, FCI Elkton, and at other similar situated BOP facilities where COVID-19 is
27 materially affecting operations” and instructed BOP to maximize appropriate transfers of
28

1 “all inmates whom you deem suitable candidates for home confinement.” Rim Decl., Ex.
2 A at 8-9.

3 The Attorney General directed that in assessing which inmates would qualify for
4 home confinement, the BOP was to consider the “totality of the circumstances,” and a
5 list of non-exhaustive discretionary factors:

- 6 • The age and vulnerability of the inmate to COVID-19 in accordance with CDC
7 guidelines;
- 8 • The security level of the facility currently holding the inmate, with priority given
9 to inmates residing in low and minimum security facilities;
- 10 • The inmate’s conduct in prison, with inmates who have engaged in violent or
11 gang-related activity in prison or who have incurred a BOP violation within the
12 last year not receiving priority treatment;
- 13 • The inmate’s score under PATTERN [Prisoner Assessment Tool Targeting
14 Estimated Risk and Need], with inmates who have anything above a minimum
15 score not receiving priority treatment;
- 16 • Whether the inmate has demonstrated and verifiable re-entry plan that will prevent
17 recidivism and maximize public safety, including verification that the conditions
18 under which the inmate would be confined upon release would present a lower
19 risk of contracting COVID-19 than the inmate would face in the BOP facility; and
- 20 • The inmate’s crime of conviction, and assessment of the danger posed by the
21 inmate to the community. Some offenses, such as sex offenses, will render an
22 inmate ineligible for home detention. Other serious offenses should weigh more
23 heavily against consideration of home detention.

24 *Id.*, Ex. D at 39-40.

25 Included among the factors that must be assessed is whether “the inmate’s primary
26 offense is not violent, a sex offense or terrorism related,” among other factors. Engleman
27 Decl. ¶ 48, Ex. LL at 1, 4. The phrase “offense is not violent” is not defined in the
28

1 memorandum, but the BOP has issued Program Statement 5162.05, *Categorization of*
2 *Offenses* (March 16, 2009), that assists staff in “implementation of various Federal
3 Bureau of Prisons policies and programs” that call for the identification of violent
4 offenses. *Id.*, Ex. NN at 1. The BOP’s list of offenses that constitute a crime of violence
5 in all cases include 18 U.S.C. §§ “2113(d),(e) bank robbery and incidental crimes” and
6 “2119 crimes involving motor vehicles.” *Id.* ¶ 49.a. Additionally, violations of 18 U.S.C.
7 § 924, penalties for firearms violations may be violent depending on the underlying
8 offense. *Id.*

9 The Assistant Directors’ guidance memoranda implementing the Attorney
10 General’s instructions to determine suitability for home confinement was issued on April
11 22, 2020, rescinded, and re-issued on May 8, 2020. Engleman Decl. ¶ 48, Ex. V. In
12 implementing this guidance, the BOP conducted individualized evaluations of each
13 inmate at FCC Lompoc. *Id.* None of the Petitioners fell within the class of individuals to
14 be prioritized and none of them have been formally considered for home confinement.
15 *Id.* ¶¶ 49-50.

16 **F. Petitioners’ Criminal Convictions**

17 Respondents provide an overview of each Petitioner’s most recent criminal
18 history. This is important because, as the Attorney General recently explained, while the
19 government has a “solemn obligation to protect the people in BOP custody,” it also has
20 “an obligation to protect the public. That means we cannot simply release prison
21 populations en masse onto the streets. Doing so would pose profound risks to the public
22 from released prisoners engaging in additional criminal activity, potentially including
23 violence or heinous sex offenses.” *See* Rim Decl., Ex. A at 9. Notably, in filing their
24 action, Petitioners failed to identify the factual basis for their detention. *See* 28 U.S.C.
25 § 2242 (writs of habeas corpus “*shall* allege the facts concerning the applicant’s
26 commitment or detention, the name of the person who has custody over him and by
27 virtue of what claim or authority”) (emphasis provided). Respondents have certified the
28 cause of detention for each of the named Petitioners. As their detention is lawful and

1 certified copies of judgments demonstrating imposed terms of incarceration have been
2 provided as part of this response, there is no bases for granting a writ of habeas corpus.
3 28 U.S.C. § 2249.

4 1. Carror-Torres Was Convicted for Carjacking with Serious Bodily Injury
5 (Sexual Assault) and Aiding and Abetting a Violent Crime by Carrying a
6 Firearm, and Sentenced to 20 Years Imprisonment

7 The district court for the District of Puerto Rico sentenced Carror-Torres to 240
8 months (20 years) imprisonment for convictions of carjacking involving serious bodily
9 injury in violation of 18 U.S.C. § 2119, and aiding and abetting that violent crime
10 through the carrying of a firearm in violation of 18 U.S.C. § 924(c)(1)(a)(ii). Engleman
11 Decl. ¶ 8, Ex. A. In committing these crimes, Carror-Torres pointed a handgun at the
12 victim and demanded that she undress, and then he sexually fondled her and forced her
13 to orally copulate him. *Id.* If Carror-Torres earns all remaining good conduct time, his
14 projected release date is August 7, 2023. *Id.* ¶ 9, Ex. A. Carror-Torres does not qualify
15 for priority placement home confinement under the Attorney General’s memoranda of on
16 March 26 and April 3, 2020, because his offense is both violent and a sex offense. *Id.*
17 ¶¶ 49.a.-b.

18 2. Reed Was Convicted of Armed Bank Robbery, Armed Carjacking, and
19 Destroying Property, and Sentenced to 25 Years Imprisonment

20 The district court for the District of Columbia sentenced Reed to 300 months (25
21 years) imprisonment following his convictions for armed bank robbery in violation of 18
22 U.S.C. § 2113(a) and (d), armed carjacking in violation of D.C. Code §§ 2803(a)(1) and
23 (b)(1), and destroying property in violation of D.C. Code § 303. Engleman Decl. ¶ 14,
24 Ex. D. These charges arose out of a bank robbery where Reed pointed a gun at a teller
25 and demanded money and then, during his escape, he carjacked a truck after pointing a
26 gun at the driver. *Id.* Assuming Reed earns all remaining good conduct time, his
27 projected release date is August 5, 2025. *Id.* ¶ 16. Reed does not qualify for priority
28

1 placement on home confinement under the Attorney General’s memoranda because his
2 offense is violent. *Id.* ¶ 49.a.

3 3. Garcia Was Convicted of Possession of Methamphetamine with Intent to
4 Distribute and Sentenced to Seven Years Imprisonment

5 The district court for the Southern District of California sentenced Garcia to 87
6 months (seven years and three months) imprisonment following his conviction for
7 possession of methamphetamine with intent to distribute in violation of 21 U.S.C.
8 § 841(a)(1). Engleman Decl. ¶ 21, Ex. G. Assuming he earns all remaining good conduct
9 time, and successfully completes the community portion of the drug treatment program,
10 his projected release date is November 6, 2020. *Id.* ¶ 23. Garcia does not qualify for
11 priority placement on home confinement under the Attorney General’s memoranda
12 because he has a low risk of recidivism PATTERN score. *Id.* ¶ 27. Garcia is close to
13 release and has been considered for prerelease confinement and has a tentative
14 residential reentry center transfer date of July 9, 2020. *Id.* ¶ 28.

15 4. Brown Was Convicted of Conspiracy to Manufacture, Distribute, and
16 Possess with Intent to Distribute Phencyclidine (PCP), and Illegally Possess
17 a Listed Chemical and Distribution and Possession with Intent to Distribute
18 PCP, and Sentenced to 12.5 Years Imprisonment

19 The district court for the Central District of California sentenced Brown to 150
20 months (12.5 years) imprisonment following his convictions for conspiracy to
21 manufacture, distribute, and possess with intent to distribute PCP, and illegally possess a
22 listed chemical and distribution and possession with intent to distribute PCP, in violation
23 of 21 U.S.C. §§ 841(a)(1),(b)(1)(B)(iv) & 846. Engleman Decl. ¶ 29, Ex. J. Assuming he
24 earns all remaining good conduct time, his projected release date is October 6, 2024. *Id.*
25 ¶ 31. The BOP has had decided to transfer Brown to a different facility, to be effective
26 on March 5, 2020, but did not take place because the BOP stopped all routine movement
27 in March. *Id.* ¶ 30. It is anticipated that the move will occur once the BOP resumes
28 inmate movement. *Id.* Brown does not qualify for priority placement on home

1 confinement under the Attorney General’s memoranda because of his low risk of
2 recidivism PATTERN score. *Id.* ¶¶ 35, 49.a.

3 5. Fears Was Convicted of Conspiracy to Possess with Intent to Distribute 15
4 Kilograms of Cocaine and, After Violating the Terms of His Supervised
5 Release, Sentenced to 32 Months Imprisonment

6 The district court for the Northern District of Ohio sentenced Fears to 32 months
7 (two years and eight months) imprisonment following his violation of the terms of his
8 supervised release relating to an underlying conviction for conspiracy to possess with
9 intent to distribute 15 kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1) & 846.
10 Engleman Decl. ¶ 36, Ex. M. Assuming he earns all remaining good conduct time, his
11 projected release date is August 19, 2021. *Id.* ¶ 38. The BOP has already decided to
12 transfer Fears to a different facility, and he also does not qualify for priority placement
13 on home confinement under the Attorney General’s memoranda because of his risk of
14 recidivism. *Id.* ¶ 50.

15 **G. Petitioners’ Health Histories**

16 1. Carror-Torres Has Received Adequate Medical Care and Has Not Reported
17 Any COVID-19 Symptoms to Medical Staff

18 Carror-Torres is 24 years old, and has a history of asthma and depression. Cross
19 Decl. ¶ 7. He is assigned to USP Lompoc. *Id.* He was issued a surgical mask on April 6,
20 2020 and three washable cloth masks on April 14, 2020. *Id.* ¶ 7.a. On April 23, 2020, he
21 was seen in Health Services for sick call complaining of a throbbing headache and a dry
22 cough. *Id.* ¶ 7.b. He was suspected of having COVID-19 and moved to a different
23 housing unit for isolation and testing. *Id.* Upon entering his new housing unit, he was
24 provided with new surgical masks. *Id.* at the time of his examination, his respiration was
25 found to be “even and unlabored ... without wheezes, rails, or rhonchi” and he was
26 observed to get on and off the exam table without voicing complaints and having a
27 normal gait. *Id.* Labs were drawn and a chest x-ray was taken and he was advised to
28 report any worsening or new symptoms immediately. *Id.* He was examined, his

1 temperature was taken, pulse taken, oxygen saturation was measured and his symptoms
2 were evaluated from April 23-May 7. *Id.* ¶ 7.b.i. At no point during this period did he
3 have a fever. *Id.* On April 25, 2020, Torres' COVID-19 test results came back negative.
4 *Id.* ¶ 7.b.ii.

5 On May 6, 2020, Carror-Torres was examined and was found to have mild
6 exercise induced tachycardia after he had been running in place for many minutes for his
7 own exercise. *Id.* ¶ 7.c. Because his COVID-19 test results were negative, he was
8 returned to general population in his regularly assigned unit on May 7, 2020. *Id.*

9 There is no evidence in Carror-Torres' medical records to support his claims that
10 he fell seriously ill and experienced COVID-19 symptoms of fever, diarrhea, and body
11 aches, that he asked for medical assistance for five days but was ignored, that he went
12 into acute respiratory shock and collapsed in his cell, that he tested positive for COVID-
13 19, or that he had to be put into a medically induced coma, intubated, or put on a
14 ventilator. *Id.* ¶ 8.

15 2. Reed Has Recovered from COVID-19 and Received Medical Care

16 Reed is 54 years old and has a history of hypertension, psychiatric disease
17 (depression and schizophrenia), and chronic pain. *Id.* ¶ 9. Reed is assigned to USP
18 Lompoc. *Id.* Reed was issued a surgical mask on April 6, 2020 and three washable cloth
19 masks on April 14, 2020. *Id.* ¶ 9.a. On March 6, 2020, Reed was examined for a chronic
20 care follow up and his hypertension was found to be well-controlled. *Id.* ¶ 9.

21 On March 30, 2020, Reed presented to sick call with flu-like symptoms including
22 cough, fever, and body aches. *Id.* ¶ 9.b. Labs were drawn, chest x-rays were taken, and
23 he was moved to isolation. *Id.* He was tested for COVID-19 on March 30, 2020 and the
24 result was returned as positive on March 31, 2020. *Id.* Reed's temperature and pulse
25 were taken, his oxygen saturation was measured, and his symptoms were evaluated from
26 March 30-April 17 and from May 28-29. *Id.* ¶ 9.c. He was examined by a physician on
27 March 31, 2020 at which time he reported feeling better. *Id.* ¶ 9.d. He was examined by a
28 physician on April 7, 2020 after having a fever, at which time his pain medication was

1 changed to acetaminophen. *Id.* ¶ 9.e. He was examined on April 14, 2020, at which time
2 he had no complaints and denied having difficulty breathing, diarrhea, shortness of
3 breath, or any other symptoms of COVID-19. *Id.* ¶ 9.f.

4 On May 26, 2020, Petitioner spoke to a psychologist and expressed concerns
5 about potentially still having COVID-19 and wanting a full physical examination and re-
6 testing. *Id.* 9.g. On May 27, 2020, Reed complained of dizziness and being light headed,
7 but denied having fever, chills, cough, sore throat, body aches, or loss of taste or smell,
8 or other symptoms of COVID-19, but asked to be retested. *Id.* ¶ 9.h. On May 29, 2020,
9 Reed was seen for a follow up with a physician for his dizziness complaint and stated he
10 had been suffering from dizziness for two months off and on. *Id.* ¶ 9.i. The physician
11 noted that Reed was anxious about COVID-19 and considered his current complaint as
12 psychogenic in origin. *Id.* On May 30, 2020, Reed complained of constipation and was
13 prescribed medication to assist. *Id.* ¶ 9.j.

14 Contrary to Reed’s claims that he was “left to languish in solitary confinement,”
15 Reed was seen regularly by medical personnel and psychology staff. *Id.* ¶ 10.

16 3. Garcia Has Tested Negative Three Times, Is Asymptomatic, and Did Not
17 Exhibit Any COVID-19 Symptoms

18 Garcia is 35 years old with a history of dermatitis and vision problems. *Id.* ¶ 11.
19 Garcia is assigned to FCI Lompoc. *Id.* Garcia has not presented any COVID-19 related
20 concerns to FCC Lompoc’s medical staff. *Id.* ¶ 11. Garcia was issued a surgical mask on
21 April 6, 2020 and three washable masks on April 14, 2020. *Id.* ¶ 11.a. His temperature
22 was taken by medical staff from April 29-30, and May 5 and 7, with no fevers. *Id.* ¶
23 11.b. Although Garcia was asymptomatic, he was tested for COVID-19 on May 4, 2020
24 as part of the mass testing conducted at FCC Lompoc. *Id.* ¶ 11.c. His test results came
25 back negative on May 6, 2020. *Id.* Garcia was among a number of COVID-19 negative
26 inmates moved to quarantine at USP Lompoc. *Id.* ¶ 11.d. Garcia was re-tested as part of
27 mass-screening on May 13, 2020 and a negative test result was reported on May 14,
28

1 2020. *Id.* ¶ 11.e. Although he has always been asymptomatic, he was ordered to be tested
2 again on May 26, 2020 and was reported negative on May 31, 2020. *Id.* ¶ 11.f.

3 4. Brown Tested Negative, Was Asymptomatic, and Did Not Exhibit Any
4 COVID-19 Symptoms

5 Brown is a 54 year old male with a history of hypertension, asthma and
6 adenocarcinoma of prostate (a common form of prostate cancer), sleep apnea (for which
7 he uses a CPAP machine), and gastroesophageal reflux. *Id.* ¶ 12. Brown is assigned to
8 USP Lompoc. *Id.* Brown was issued a surgical mask on April 6, 2020 and three cloth
9 masks on April 14, 2020. *Id.* ¶ 12.a. Brown was tested for COVID-19 on May 27, 2020
10 and his test results were returned on June 1, 2020 as negative. *Id.* ¶ 12.b. Brown's
11 temperature was taken by medical staff on April 24-May 6 and at no point did he have a
12 fever. *Id.* ¶ 12.c. Brown has been in the Special Housing Unit at USP Lompoc for non-
13 medical reasons since February 2, 2020. *Id.* ¶ 12.d.

14 5. Fears Is Asymptomatic and Did Not Exhibit COVID-19 Symptoms

15 Fears is a 50-year old male with a history of blindness in one eye, cataracts, and
16 benign neoplasm of the epididymis. *Id.* ¶ 13. Fears is assigned to USP Lompoc Camp.
17 *Id.* Fears was issued three washable cloth masks on April 14, 2020. *Id.* ¶ 13.a. Fears lives
18 in Unit A at the Camp and was placed in quarantine with the rest of the facility on March
19 31, 2020. *Id.* ¶ 13.b. He has not presented to medical with any complaints and his
20 temperature was taken March 30, May 1-8, with no fevers. *Id.* ¶ 13.c.

21 **III. TRO/PRELIMINARY INJUNCTION LEGAL STANDARD**

22 The purpose of a TRO is to preserve the status quo before a preliminary injunction
23 hearing may be held; its provisional remedial nature is designed merely to prevent
24 irreparable loss of rights prior to judgment. *Granny Goose Foods, Inc. v. Brotherhood of*
25 *Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974). The standard for issuing a
26 TRO is identical to the standard for issuing a preliminary injunction. *Lockheed Missile &*
27 *Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995).
28 Injunctive relief is an “extraordinary remedy that may only be awarded upon a clear

1 showing that the plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 22. To meet that
2 showing, the moving party must make “a clear showing” that “he is likely to succeed on
3 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
4 that the balance of equities tips in his favor, and that an injunction is in the public
5 interest.” *Id.* Where the government is a party, the balance of hardships and the public
6 interest factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

7 “A preliminary injunction can take two forms.” *Marlyn Nutraceuticals v. Mucos*
8 *Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009). “A prohibitory injunction
9 prohibits a party from taking action and ‘preserves the status quo pending a
10 determination of the action on the merits.’” *Id.* (quoting *Chalk v. U.S. Dist. Court*, 840
11 F.2d 701, 704 (9th Cir. 1988)). In contrast, a “mandatory injunction ‘orders a responsible
12 party to take action.’” *Id.* at 879 (quoting *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484
13 (1996)). “A mandatory injunction ‘goes well beyond simply maintaining the status quo
14 [p]endente lite [and] is particularly disfavored.’” *Id.* (quoting *Anderson v. United States*,
15 612 F.2d 1112, 1114 (9th Cir. 1980)). “In general, mandatory injunctions ‘are not
16 granted unless extreme or very serious damage will result and are not issued in doubtful
17 cases[.]’” *Id.* (quoting *Anderson*, 612 F.2d at 1115); accord *Stanley v. Univ. of S. Cal.*,
18 13 F.3d 1313, 1320 (9th Cir. 1994) (a mandatory injunction “is particularly disfavored
19 and a district court should deny such relief unless the facts and law clearly favor the
20 moving party”). Furthermore, in addition to these requirements, because the case
21 concerns the conditions at a prison, the Court cannot issue any prospective relief,
22 including preliminary relief, without first making the findings required under 18 U.S.C.
23 § 3626(a) and (b).

24 Petitioners cannot meet their burden for mandatory relief, in which this Court
25 would essentially be forced, on a time-compressed basis, to grant Petitioners all the relief
26 they ultimately seek. *Marlyn Nutraceuticals*, 571 F.3d at 878; see also *Univ. of Tex. v.*
27 *Camenisch*, 451 U.S. 390, 395 (1981) (“[I]t is generally inappropriate for a federal court
28 at the preliminary-injunction stage to give a final judgment on the merits”). It should not

1 be utilized here given the jurisdictional and statutory hurdles described below, and
 2 because it runs counter to legislative mandates, and intrudes the upon BOP's executive
 3 function of running its prisons.

4 **IV. ARGUMENT**

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

6 1. The CARES Act Does Not Permit District Courts to Mandate Home 7 Confinement, and These Petitioners' Claims Are Moot

8 Petitioners urge the Court to order the BOP to release prisoners under the CARES
 9 Act, but the CARES Act provides authority for the Attorney General, not district courts,
 10 to make a finding that emergency conditions exist which then authorizes the BOP to
 11 expand the placement of prisoners on home confinement. *See Jones*, 2020 WL 2575566,
 12 at *3 (“While the CARES Act gives the BOP broad discretion to expand the use of home
 13 confinement during the COVID-19 pandemic, it does not grant the courts the authority to
 14 order the placement of prisoners on home confinement.”) (citing *United States v.*
 15 *McCann*, 2020 WL 1907089, at *3 (E.D. Ky. Apr. 17, 2020); *United States v. Read-*
 16 *Forbes*, 2020 WL 1888856, at *5 (D. Kan. Apr. 16, 2020) (“the Court lacks jurisdiction
 17 to order home detention under this provision); *United States v. Doshi*, 2020 WL
 18 1527186, at *1 (E.D. Mich. Mar. 21, 2020) (“the authority to make this determination is
 19 squarely allocated to the Attorney General, under whose authority is the Bureau of
 20 Prisons”)); *Maney*, 2020 WL 2839423, at *2 (“[t]he law is clear that this Court cannot
 21 order the release of categories of individuals, or even a single individual, nor may it
 22 order transfers to underutilized or unused facilities to spread out the numbers, in
 23 response to Plaintiffs’ claims”); *Money*, 2020 WL 1820660, at *17 (only the “executive
 24 branch has the discretion to decide whether to end incarceration early”).

25 Specifically, as to Home Confinement, § 12003(b)(2) provides that during a
 26 “covered emergency period,” if the Attorney General finds that “emergency conditions
 27 will materially affect the functioning of the Bureau,” the BOP Director may lengthen the
 28 maximum amount of time a prisoner spends in home confinement “under the first

1 sentence of section 3624(c)(2),” as the Director “determines appropriate.” District courts
2 lack authority to order a prisoner’s placement in home confinement under the CARES
3 Act. *Money*, 2020 WL 1820660, at *17 (“executive branch has the discretion to decide
4 whether to end incarceration early”). This is because all placement determinations,
5 including placement on home confinement, are ultimately made under 18 U.S.C.
6 § 3621(b). *See* 18 U.S.C. § 3624(c)(6)(A); *see also Sacora v. Thomas*, 628 F.3d 1059,
7 1062 (9th Cir. 2010). As part of the First Step Act (“FSA”), Congress made it clear that
8 “[n]otwithstanding any other provision of law, a designat18 USC § 3621(b).ion of a
9 place of imprisonment under this subsection is not reviewable by any court.”

10 Indeed, even before the passage of the FSA, the 9th Circuit had ruled that a Court
11 may not review or second-guess the BOP’s discretionary placement decisions made
12 pursuant to either 18 USC §§ 3621 and 3624. *Reeb*, 636 F.3d at 1226-28 (reviewing
13 BOP’s individualized placement decisions in a habeas petition would be contrary to the
14 “plain language” of § 3625 exempting such placement decisions from judicial review);
15 *see also Brown v. Sanders*, 2011 WL 4899919, at *2 n.3 (C.D. Cal. Sept. 1, 2011), *aff’d*
16 *sub. nom Brown v. Ives*, 543 F. App’x 636 (9th Cir. 2013).

17 Although a court may recommend placement in a specific facility, the
18 determination of if and when a prisoner should serve the remainder of a sentence in
19 home confinement is best left to the discretion, experience, and expertise of the BOP.
20 *McKune v. Lile*, 536 U.S. 24, 39 (2002) (“The BOP has plenary control, subject to
21 statutory constraints, over ‘the place of the prisoner's imprisonment.’ . . . A sentencing
22 court can recommend that the BOP place an offender in a particular facility or program.
23 But decision-making authority rests with the BOP.”) (citation omitted); *Tapia v. United*
24 *States*, 564 U.S. 319, 331 (2011); *United States v. Ceballos*, 671 F.3d 852, 855 (9th Cir.
25 2011) (the BOP has sole statutory authority to choose the location where a prisoner
26 serves his sentence.). “[A]ny approach that puts the judicial branch in charge of
27 designating the place of confinement for a federal prisoner—no matter how well justified
28 on humanitarian grounds—collides with 18 U.S.C. § 4082(b) which gives the Attorney

1 General unfettered discretion to decide where to house federal prisoners.” *In re Gee*, 815
2 F.2d 41, 42 (7th Cir. 1987).

3 For these Petitioners’ claims under the CARES Act are moot. The BOP’s
4 guidance implementing the Attorney General memoranda, on which Petitioners rely,
5 specifically state that those prisoners who have been convicted of violent and/or sex
6 crimes are not currently suitable for consideration for home confinement. Rim Decl., Ex.
7 A at 9 (April 3, 2020 memorandum) (Prisoners cannot be released “en masse” because to
8 do so would “pose profound risks to the public from released prisoners engaging in
9 additional criminal activity, potentially including violence or heinous sex offenses”); *id.*,
10 Ex. D at 40 (March 26, 2020 memorandum) (“Some offenses, such as sex offenses, will
11 render an inmate ineligible for home detention.”).

12 Here, Carror-Torres was convicted of a violent crime (carjacking and pointing a
13 handgun at the victim) and a sex crime (demanding that the victim undress at gunpoint
14 while he sexually fondled her and forced her to orally copulate him). Engleman Decl.
15 ¶ 8. Reed was convicted of a violent crime for armed bank robbery and armed
16 carjacking. *Id.* ¶ 14. Reed pointed a gun at a teller demanding money and then, during
17 his escape, he carjacked a truck after pointing a gun at the driver. *Id.* Garcia is unsuitable
18 as it would prohibit him from completing his judicially recommended drug treatment
19 program and result in his having to serve a longer portion of his sentence. *Id.* ¶ 49.b.
20 Brown and Fears are not suitable at this time because they have an unacceptable risk of
21 recidivism. *Id.* ¶ 50. Thus, Petitioners do not qualify for priority placement home
22 confinement under the Attorney General’s memoranda. *Id.* ¶¶ 49.a.-b.; 50. Thus,
23 Petitioners’ request for injunctive relief as to release should be denied because they
24 “have not shown that it is likely that they would qualify for transfer from incarceration to
25 home confinement under the current BOP eligibility requirement, and therefore they
26 have not shown that they personally have a likelihood of success in obtaining the relief
27 prayed for in their petition.” *Grinis v. Spaulding*, 2020 WL 2300313, at *3 (D. Mass.
28 May 8, 2020).

1 These Petitioners’ request for consideration for release under the CARES Act is
2 therefore moot, and the Court lacks subject matter jurisdiction to consider it under the
3 U.S. Const. Art. III § 2. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (“The
4 doctrine[] of mootness . . . originate[s] in Article III’s ‘case’ or ‘controversy’ language,
5 no less than standing does.”); *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477 (1990)
6 (“Under Article II of the Constitution, federal courts may adjudicate only actual, ongoing
7 cases or controversies.). A case or controversy exists if the litigant suffered an actual or
8 imminent injury traceable to the defendant that is likely to “be redressed by [favorable]
9 judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

10 The key inquiry is whether the court can grant any meaningful relief. *West v.*
11 *Secretary of Dept. of Transp.*, 206 F.3d 920, 925 (9th Cir. 2000). If there cannot be
12 effective relief, “any opinion as to the legality of the challenged action would be
13 advisory” and the case is moot. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287 (2000);
14 *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (“a federal court[’s . . .] judgments must
15 resolve a real and substantial controversy admitting of specific relief through a decree of
16 a conclusive character, as distinguished from an opinion advising that the law would be
17 upon a hypothetical state of facts.”); *McQuillion v. Schwarzenegger*, 369 F.3d 1091,
18 1095 (9th Cir. 2004) (request for declaratory judgment moot; advisory opinions
19 prohibited by the Constitution.

20 Because these Petitioners would not be entitled to release under the Attorney
21 General’s memoranda, their request for release under this authority fails to state a claim.
22 Further, to the extent Petitioner’s ask this court to stand in the place of the BOP and
23 designate the Petitioners’ place of confinement as their home, the court lacks jurisdiction
24 to do so and even if it had such jurisdiction, the Petitioners are not suitable for such a
25 placement thus the request is moot. These Petitioners, moreover, are not entitled to the
26 limited exception to the mootness doctrine where an issue is “capable of repetition, yet
27 evading review” because “(1) the challenged action was in its duration too short to be
28 fully litigated prior to its cessation or expiration, and (2) there was a reasonable

1 expectation that the same complaining party would be subjected to the same action
2 again.” *Murphy v. Hunt*, 445 U.S. 478, 482 (1982). Petitioners cannot fit into this limited
3 exception because they cannot change their criminal histories.

4 Petitioners Brown and Fears further do not fit into this limited exception because
5 it is well established that prison inmate challenges to the conditions of their confinement
6 that seek purely injunctive or declaratory relief become moot when the inmate is released
7 or transferred to another facility because the inmate no longer has a legally cognizable
8 interest in the outcome. *Dilley v. Gunn*, 64 F.3d 1365, 1372 (9th Cir. 1995) (“claims that
9 [a prisoner] may be transferred back to Calipatria some time in the future [was] too
10 speculative to prevent mootness”) (internal quotation marks and citation omitted); *see*
11 *also Jackson v. Hughes*, 2010 WL 1737130 (C.D. Cal. Mar. 29, 2010) (J. Walsh)
12 (inmate’s request for injunctive and declaratory relief were moot when he was moved
13 from facility which would no longer house certain inmates); *Perez v. Beltran*, 2010 WL
14 760395 (C.D. Cal. Feb. 25, 2010) (C.J. Carney) (inmate’s injunctive relief claim moot
15 because he was no longer incarcerated where named defendants worked).¹¹

16 As explained below, *infra* § 3.c., the BOP is already providing Petitioners
17 COVID-19 measures consistent with CDC guidelines which is essentially the relief they
18 are requesting; thus, their conditions-of-confinement claim is also moot.

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22
23 ¹¹ Petitioners have moved for class certification (ECF No. 22), but any attempt
24 now to represent all inmates at FCC Lompoc is premature absent an order permitting a
25 class. As to the merits, Respondents will explain in their opposition that a class
26 certification is allowable in a *habeas* action. Petitioners, moreover, will be unable to
27 demonstrate compliance with Fed. R. Civ. P. 23(a) and (b) because of their “different
28 crimes, sentences, outdates, disciplinary histories, age, medical history, places of
incarceration, proximity to infected inmates, availability of a home landing spot,
likelihood of transmitting the virus to someone at home detention, likelihood of violation
or recidivism, and danger to the community.” *Money*, 2020 WL 1820660, at *14-15.
These Petitioners, moreover, are not adequate class representatives given their
ineligibility for home confinement under the Attorney General’s memoranda.

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

3 Petitioners’ two claims, both of which seek to change their conditions of
4 confinement under the Eighth Amendment, are precluded by the PLRA. *See* ECF No. 16
5 (Corrected Compl.) at ¶¶ 105-122; 18 U.S.C. § 3626(a)(3)(A) (the PLRA applies to “any
6 civil action in federal court with respect to prison conditions”); *Nettles v. Grounds*, 830
7 F.3d 922, 934 (9th Cir. 2016) (prisoners must comply with the PLRA if a claim
8 challenges “any aspect of prison life” other than the “fact or duration of the conviction or
9 sentence”).

10 The PLRA also places strict limits on a district court’s ability to order the release
11 of inmates “in any civil action with respect to prison conditions,” and expressly
12 precludes a single district judge from doing so. 18 U.S.C. § 3626(a)(3)(B). That
13 prohibition applies to “any civil proceeding arising under Federal law with respect to the
14 *conditions of confinement* or the effects of actions by government officials on the lives of
15 persons confined in prison, but does not include habeas corpus proceedings challenging
16 the fact or duration of confinement in prison[.]” *Id.* at § 3626(g)(2) (emphasis provided).
17 Under the PLRA, a “prisoner release order” – which “includes any order, including a
18 temporary restraining order or preliminary injunctive relief, that has the purpose or effect
19 of reducing or limiting the prison population, or that directs the release from or
20 nonadmission of prisoners to a prison,” *id.* at § 3626(g)(4) – may “be entered only by a
21 three-judge court,” *Id.* at § 3626(a)(3)(B), and then only if certain conditions have been
22 met. Among other requirements, “no court shall enter a prisoner release order unless – (i)
23 a court has previously entered an order for less intrusive relief that has failed to remedy
24 the deprivation of the Federal right sought to be remedied through the prisoner release
25 order; and (ii) the defendant has had a reasonable amount of time to comply with the
26 previous court orders.” *Id.* at § 3626(a)(3)(A). Prior to entering a prisoner release order,
27 the three-judge panel must find, by clear and convincing evidence, “(i) crowding is the
28

1 primary cause of the violation of a Federal right; and (ii) no other relief will remedy the
2 violation of the Federal right.” *Id.* at § 3626(a)(3)(E).

3 Congress enacted the PLRA to “revive the hands-off doctrine,” which was “a rule
4 of judicial quiescence derived from federalism and separation of powers concerns[,]” in
5 order to remove the federal judiciary from day-to-day prison management. *Gilmore v.*
6 *California*, 220 F.3d 987, 991, 996-97 (9th Cir. 2000) (referencing 141 Cong. Rec.
7 S14418, at S14418-19 (1995); H.R. Rep. No. 104-378, at 166 (1995); H.R. Rep. No.
8 104-21, at 24 n.2 (1995)). Section 3626 thus “restrict[s] the equity jurisdiction of federal
9 courts,” *Gilmore*, 220 F.3d at 999, and, “[b]y its terms . . . restricts the circumstances in
10 which a court may enter an order ‘that has the purpose or effect of reducing or limiting
11 the prison population,’” *Brown v. Plata*, 563 U.S. 493, 511 (2011). The PLRA’s
12 “requirements ensure that the ‘last remedy’ of a population limit is not imposed ‘as a
13 first step.’” *Id.* at 514 (quoting *Inmates of Occoquan v. Barry*, 844 F.2d 828, 843 (D.C.
14 Cir. 1988)). As noted by the Supreme Court, the “release of prisoners in large numbers
15 . . . is a matter of undoubted, grave concern.” *Id.* at 501. The PLRA requires courts to
16 give “substantial weight to any adverse impact on public safety or the operation of a
17 criminal justice system caused by” the release of prisoners. 18 U.S.C. § 3626(a)(1).

18 Petitioners’ claims cannot be characterized as a “habeas corpus proceeding[]
19 challenging the fact or duration of confinement in prison.” 18 U.S.C. § 3626(g)(2).
20 Petitioners do not challenge the reason for their confinement, their convictions, the
21 length of their sentences, or a release based on good time credits. *See Preiser v.*
22 *Rodriguez*, 411 U.S. 475, 487 (1973) (describing such claims as “the core of habeas
23 corpus”). Rather, their claims are based on their conditions of confinement, alleging that
24 the BOP has not taken proper measures to counteract the COVID-19 pandemic at FCC
25 Lompoc. This case thus falls squarely within the PLRA as it is not a habeas proceeding
26 challenging the fact or duration of confinement. Accordingly, the PLRA does not permit
27 the district court to grant the relief Petitioners seek. *See Money v. Pritzker*, 2020 WL
28 1820660, at *14 (N.D. Ill. Apr. 10, 2020) (PLRA prevents courts from granting release

1 of inmates based on prison conditions and COVID-19); *Plata v. Newsom*, 2020 WL
2 1908776, at *1, 9-11 (N.D. Cal. Apr. 17, 2020) (similar); *Alvarez v. Larose*, 2020 WL
3 2315807, at *4 (S.D. Cal. May 9, 2020) (denying TRO finding that COVID-19
4 conditions of confinement claims seek “prisoner release orders” under the PLRA which
5 prevents the district court from granting the relief sought); *Livas*, 2020 WL 1939583, at
6 *9 (dismissing COVID-19 habeas petition for lack of jurisdiction and noting that
7 amending future pleadings to assert claims for injunctive or prospective relief would be
8 futile in light of lack of factual allegations concerning exhaustion of remedies or that
9 other requirements for release of prisoners have been satisfied); *Wragg v. Ortiz*, No. 20-
10 5496, slip op. at 50-51 (D.N.J. May 27, 2020) (“Petitioners seek early release from
11 prison, but they do not do so on the basis that their convictions or sentences are invalid.
12 Instead, they seek injunctive relief based on unconstitutional conditions of confinement,
13 a type of challenge that neither the Supreme Court nor the Third Circuit has yet
14 recognized as a cognizable habeas claim.”); *Maney*, 2020 WL 2839423, at *11-12
15 (PLRA prohibited district courts from ordering the release of inmates to reduce the
16 prison population, and that the court “does not have the authority to order any relief that
17 would directly or indirectly require ODOC to reduce its prison population”).

18 Petitioners cite two cases that reached a contrary conclusion: *Wilson v. Williams*,
19 2020 WL 1940882 (N.D. Ohio Apr. 22, 2020) and *Martinez-Brooks v. Easter*, 2020
20 WL2405350 (D. Conn. May 12, 2020).¹² See ECF No. 18 at 60. These cases are
21 distinguishable because in those cases, petitioners had argued that no set of conditions of
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24 ¹² On May 26, 2020, the Supreme Court denied the Department of Justice’s
25 application for stay of the April 22, 2020, preliminary injunction order on largely
26 procedural grounds and without prejudice, noting that the district court had since entered
27 an order on May 19, 2020 imposing additional measures, and that the Government had
28 not sought review of that order in the Sixth Circuit. See Order, *Williams v. Wilson*, No.
19A1047 (U.S. May 26, 2020). In response to a new application filed by the Government
earlier this week, last night, on June 4, 2020, the Supreme Court granted the
Government’s request and stayed both the April 22 and May 19 orders “pending the
disposition of the Government’s appeal in the United States Court of Appeals for the
Sixth Circuit and further order of the undersigned or of the Court.” Order, *Williams v.*
Wilson, No. 19A1047 (U.S. Jun. 4, 2020).

1 confinement would be constitutionally sufficient to protect them from COVID-19,
2 arguably transmuting their PLRA-barred conditions of confinement claims into habeas
3 claims challenging the fact of their detention. *See Wilson*, 2020 WL 1940882, at *3;
4 *Martinez-Brooks*, 2020 WL2405350, at *16.

5 Here, Petitioners are not arguing that no set of conditions would be
6 constitutionally sufficient, as they are seeking not only the implementation of release
7 procedures, but specific relief to improve their conditions, such as increased cleaning
8 supplies, hourly cleaning of surfaces, and for prison staff to wear personal protective
9 equipment. *See* ECF No. 18-3, [Proposed] Order Granting TRO at 5-7. As noted in
10 *Alvarez*, the fact that Petitioners are not arguing that it would be impossible to provide
11 constitutionally sufficient conditions places their claim squarely within the purview of
12 the PLRA. *Alvarez*, 2020 WL 2315807, at *3-4. Another important factual difference is
13 that in *Wilson*, the court based its decision, in large part, on the inadequate degree of
14 COVID-19 testing that had been performed at FCI Elkton, noting that FCI Elkton had
15 only 75 tests on hand for 2400 inmates. *Wilson*, 2020 WL 1940882, at *2. In contrast, at
16 FCI Lompoc, every inmate has been tested for COVID-19, and cohort as well as
17 individual testing continues through the USP, including the Camp.¹³ Cross Decl. ¶ 28.
18 Thus, these cases are factually distinguishable and lack persuasive value.

19 Also notable is the Ninth Circuit's recent decision in *United States v. Dade*, 2020
20 WL 2570354, at *1 (9th Cir. May 21, 2020), denying an inmate's release on bail pending
21 his appeal of the district court's denial of his motion to vacate his sentence because of
22 COVID-19. The Ninth Circuit noted that under 18 U.S.C. § 3143(b), "release pending
23 appeal requires both a substantial showing on the merits *and* a showing that the
24 defendant is not likely to flee or pose a danger to the safety of any person or the
25 community." *Id.* at *2 (emphasis in original, internal quotation marks omitted). The
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28 ¹³ As of June 5, 2020, over at 1,000 inmates had been tested at FCC Lompoc and
of those inmates, over 1,000 inmates who had previously tested positive for COVID-19
were deemed recovered. <https://www.bop.gov/coronavirus/index.jsp>.

1 same is true here. Although Petitioners are using a civil vehicle to obtain release, they
2 are in the same position as the *Dade* defendant and requesting the same relief. Their
3 request should also be denied because “whether or not [the inmate] faces a risk from
4 COVID-19 in prison has no bearing on whether he will be a danger to the community if
5 released.” *Id. Dade*’s reasoning applies here, and is another reason to deny Petitioners’
6 TRO application.

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

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

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

23 Petitioners seek relief based on their conditions of confinement, but this falls
24 outside the jurisdictional basis for the Complaint under the habeas statute. *See* Corrected
25 Compl. ¶¶ 21, 105-122. “Habeas is at its core a remedy for unlawful executive
26 detention,” and the “typical remedy for such detention is, of course, release.” *Munaf v.*
27 *Geren*, 553 U.S. 674, 693 (2008); *see also INS v. St. Cyr*, 533 U.S. 289, 301 (2001). *See*
28 *Allen v. McCurry*, 449 U.S. 90, 104 (1980) (“[T]he purpose of [the writ of habeas

1 corpus] is not to redress civil injury, but to release the applicant from unlawful physical
2 confinement.”).

3 Courts uniformly recognize that a non-habeas civil action is the proper method of
4 challenging “conditions of confinement.” *Preiser*, 411 U.S. at 484-99. Indeed, the Ninth
5 Circuit has repeatedly held that claims addressing conditions of confinement are outside
6 the scope of the writ. *See Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991) (“Habeas
7 corpus proceedings are the proper mechanism for a prisoner to challenge the ‘legality or
8 duration’ of confinement,” but not to “challeng[e] ‘conditions of . . . confinement’”);
9 *Crawford v. Bell*, 599 F.2d 890, 891 (9th Cir. 1979) (“[T]he writ of habeas corpus is
10 limited to attacks upon the legality or duration of confinement.”); *Nettles v. Grounds*,
11 830 F. 3d 922, 934 n.11 (9th Cir. 2016) (habeas relief limited to claims challenging the
12 fact or duration of a prisoner’s conviction or sentence or would result in speedier release
13 from custody); *Shook v. Apker*, 472 F. App’x 702, 702-03 (9th Cir. 2012) (affirming
14 dismissal of petition raising claims of inadequate medical care under habeas).

15 Here, because Petitioners challenge their conditions of confinement—not the fact
16 or duration of their confinement—there is no jurisdiction to consider their claims under
17 the writ of habeas corpus. Petitioners bear the burden of asserting jurisdiction, but they
18 have not set forth how habeas corpus, “the traditional function of [which] is to secure
19 release from illegal custody[,]” entitles them to release from *lawful* custody.
20 *DaimlerChrysler*, 547 U.S. at 342 n.3 (2006); *Preiser*, 411 U.S. at 484-99; ECF No. 16
21 (Corrected Compl.) ¶¶ 21, 105-122. Though filed in the context of a public health crisis,
22 the Complaint requires application of the longstanding view that challenges to conditions
23 of confinement must be sought and exhausted in an administrative or civil rights action,
24 not in a habeas action. Petitioners’ two claims are explicitly titled “Unconstitutional
25 Conditions of Confinement in Violation of the Eighth Amendment to the U.S.
26 Constitution.” (ECF No. 16, ¶ 105, 117.) Such condition-of-confinement claims are not
27 cognizable in habeas, and therefore, Petitioners are not likely to succeed on the merits of
28 their Complaint.

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

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

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

13 Petitioners cannot show that the BOP is depriving them of the “minimal civilized
14 measure of life’s necessities” or “violating contemporary standards of decency” in
15 addressing the risk of harm to inmates that COVID-19 presents. “A prison official’s duty
16 under the Eighth Amendment is to ensure reasonable safety.” *Farmer*, 511 U.S. at 844.
17 The current state of the COVID-19 pandemic exposes everyone—prisoner and non-
18 prisoner alike—to the risk of falling ill, and even death. FCC Lompoc’s response is
19 aligned with official guidance from leading world health authorities for mitigating the
20 risks associated with the pandemic. *See* Cross Decl. ¶¶ 15-16, 23-25, 29. Indeed,
21 Respondent Carvajal, the Director of the BOP, testified before a U.S. Senate committee
22 on June 2, 2020 that the BOP consults “on an almost daily basis with the CDC to ensure
23 we are implementing best practices based on science and sound judgment, as the
24 knowledge about and response to the pandemic continues to evolve.”¹⁴ Mr. Carvajal
25 further testified, “We have invited the CDC into our facilities and had them evaluate our
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 ¹⁴ *See* <https://www.judiciary.senate.gov/download/carvajal-allen-joint-testimony>
(last accessed on June 3, 2020).

1 work, which has been met with praise for our planning and implementation in the wake
2 of a very vexing virus.”

3 Petitioners argue that Respondents did not take reasonable steps to protect
4 prisoners at FCC Lompoc from the harm of COVID-19, but they ignore the evidence of
5 the numerous steps the BOP has taken in response to COVID-19. FCC Lompoc began
6 implementing risk-reduction practices before the Attorney General’s April 3, 2020
7 memorandum. *See* Engleman Decl. ¶¶ 54-63. FCC Lompoc has implemented the same
8 risk-reduction practices among the inmates and staff that are recommended for the
9 community at-large: physical distancing, limited movement, screening mechanisms,
10 providing soap for hand washing, frequently disinfecting high-touch areas, mask-
11 wearing, and quarantining or isolating individuals as appropriate. *See id.* ¶¶ 54-83. These
12 practices are the same measures that society deems capable of reducing the risk of
13 COVID-19 transmission, and thus reflect the manner in which “today’s society chooses
14 to tolerate” that risk. *Helling*, 509 U.S. at 36; *Grinis*, 2020 WL 2300313, at *3 (“These
15 affirmative steps may or may not be the best possible response to the threat of COVID-
16 19 within the institution, but they undermine an argument that the respondents have been
17 actionably deliberately indifferent to the health risks of inmates.”); *Nellson*, 2020 WL
18 3000961, at *8 (finding no likelihood of success on merits of Eighth Amendment
19 conditions-of-confinement claim due to COVID-19 and noting that “[c]ompliance with
20 CDC protocols does not demonstrate that defendants are disregarding a substantial risk
21 to inmate health or failing to respond reasonably to the risks of COVID-19”).

22 Notably, Petitioners have not shown that FCC Lompoc’s practices raises the risk
23 of death from COVID-19 at Lompoc substantially over the risk in the community at
24 large. *See Hines v. Yousef*, 2015 WL 164215, at *4 (E.D. Cal. Jan. 13, 2015) (“Unless
25 there is something about a prisoner’s conditions of confinement that raises the risk of
26 exposure substantially above the risk experienced by the surrounding communities, it
27 cannot be reasoned that the prisoner is involuntarily exposed to a risk the society would
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1 not tolerate.”). The death rate among infected individuals at FCC Lompoc is drastically
2 lower than the death rate with Los Angeles County, as of June 3, 2020.¹⁵

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

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

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

20 To establish an entitlement to injunctive relief, Petitioners must show that BOP
21 officials currently are acting with deliberate indifference. “Deliberate indifference is a
22 high legal standard.” *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004). Where a
23 prisoner “seeks injunctive relief to prevent a substantial risk of serious injury from
24 ripening into actual harm, the subjective factor . . . should be determined in light of the

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28 ¹⁵ The death rate among inmates at FCC Lompoc was 0.37% (4 deaths for 1,070 cases), compared with the Los Angeles County death rate of 4.24% (2,531 deaths for 59,650 cases), as of June 4, 2020. *Cf.* BOP website (<https://www.bop.gov/coronavirus/index.jsp>) with L.A. County website (<http://publichealth.lacounty.gov/media/coronavirus/>).

1 prison authorities' current attitudes and conduct[.]” *Id.* at 845 (internal quotation marks
2 omitted). “A difference of opinion does not amount to deliberate indifference to [a
3 plaintiff’s] serious medical needs.” *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).
4 Deliberate indifference is not shown if the defendant has based his actions on a medical
5 judgment that either of two alternative courses of treatment would be medically
6 acceptable under the circumstances. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir.
7 1996). Thus, Petitioners must show that today, Respondents are recklessly disregarding
8 an excessive risk to Petitioners’ safety, and that they will continue to do so “into the
9 future.” *Farmer*, 511 U.S. at 845.

10 Petitioners cannot make this showing. BOP officials have not acted with deliberate
11 indifference to the risk that COVID-19 poses to inmate populations; rather, they have
12 taken aggressive and appropriate measures to abate that risk. The record shows that the
13 BOP responded quickly to the evolving pandemic, designed a series of measures to
14 combat the disease, and continues to closely monitor the spread of the virus in order to
15 adjust to changing circumstances as the situation evolves. *See Engelman Decl.* ¶¶ 54-83.
16 In coordinating their response, BOP officials have relied on guidance provided by
17 leading health authorities regarding sanitation, physical distancing, testing, and other
18 preventative measures, and have taken actions consistent with those guidelines. *Cross*
19 *Decl.* ¶¶ 7-33. *See Wragg*, 2020 WL 2745247, at *21 (no Eighth Amendment violation
20 because there is “no evidence of Respondents’ liable state of mind”); *Nellson*, 2020 WL
21 1890670, at *6 (“Assuming that the objective component [of deliberate indifference] is
22 met, and that prison officials know of the risk of COVID-19, plaintiff has not
23 demonstrated that defendants have disregarded that risk.”); *Money*, 2020 WL 1820660,
24 at *18 (prisoner petitioners have “no chance of success” as to deliberate indifference
25 because of the measures taken by the Illinois Department of Corrections).

26 In fact, Petitioners’ own pleadings recount the numerous steps FCC Lompoc has
27 taken to combat COVID-19: conducted testing of hundreds of inmates (*see* ECF No. 16
28 at ¶¶ 2-3,); issued masks (ECF No. 16 at ¶ 54, ECF No. 18 at 29:8-12, 49:2-4); locked

1 down the facility (ECF No. 16 at ¶¶ 47, 49,); and isolated individuals with positive test
2 results for COVID-19 (ECF No. 16 at ¶¶ 47, 51). The existence of these facts, which
3 Petitioners acknowledge were taken, undercuts their bald assertions that FCC Lompoc
4 showed deliberate indifference to the threat to inmate health posed by COVID-19.
5 Respondents respectfully submit that the Court should reach the same conclusion as the
6 district court for New Jersey, in *Wragg*: “In the end, the ugly picture Petitioners paint of
7 FCI Fort Dix is not really [a] fair one. Petitioners’ bold statement that the mitigated
8 health risk at FCI Fort Dix is so grave that it violates ‘standards of decency for anyone to
9 be so exposed’ ignores almost the entire record before this Court.” *Wragg*, 2020 WL
10 2745247, at *22. *See also id.* (“That physical distancing is not possible in a prison
11 setting, as Petitioners urge, does not an Eighth Amendment claim make and, as such,
12 Petitioners are not likely to succeed on the merits.”).

13 To the contrary, these steps, in the face of this global pandemic, demonstrate an
14 extremely high degree of care. Petitioners thus cannot show that BOP officials are acting
15 with deliberate indifference, and cannot succeed on their Eighth Amendment claim. *See*
16 *Farmer*, 511 U.S. at 845 (“[P]rison officials who act reasonably cannot be found liable
17 under the Cruel and Unusual Punishments Clause.”); *Lucero-Gonzalez v. Kris Kline*,
18 No. CV-20-901, slip op. (D. Az. June 2, 2020) (“The very fact that Defendants have
19 enacted [] policies [in response to the risks posed by COVID-19] supports that they have
20 not been subjectively indifferent to the risks posed by COVID-19.”). In total, the
21 evidence demonstrates that Respondents acted with an extremely high degree of care,
22 and certainly were not acting with deliberate indifference that would transform
23 conditions at FCC Lompoc into an Eighth Amendment “punishment.” *See Wilson v.*
24 *Seiter*, 501 U.S. 294, 298, 300 (1991).

25 4. Petitioners Have Failed to Exhaust Administrative Remedies

26 The PLRA mandates that “[n]o action shall be brought with respect to prison
27 conditions under . . . any . . . Federal law, by a prisoner confined in any jail, prison, or
28 other correctional facility until such administrative remedies as are available are

1 exhausted.” 42 U.S.C. § 1997e(a); *Maronyan v. Toyota Motor Sales, USA, Inc.*, 658 F.3d
2 1038, 1041-42 (9th Cir. 2011) (PLRA exhaustion “requirement”). The PLRA’s
3 mandatory exhaustion requirement applies to “all inmate suits about prison life,” *Porter*
4 *v. Nussle*, 534 U.S. 516, 532 (2002), and “unexhausted claims cannot be brought in
5 court.” *Jones v. Bock*, 549 U.S. 199, 211 (2007); *Woodford v. Ngo*, 548 U.S. 81, 85
6 (2006) (“Exhaustion is no longer left to the discretion of the district court, but is
7 mandatory.”). This exhaustion requirement applies when a prisoner seeks injunctive
8 relief. *Farmer*, 511 U.S. at 847 (in cases seeking injunctive relief to address “current”
9 prison conditions, inmates are not “free to bypass adequate internal prison procedures
10 and bring their health and safety concerns directly to court”).

11 Here, FCC Lompoc follows a specific grievance process. *See* 28 C.F.R.
12 §§ 542.10-542.19. None of the Petitioners, however, has exhausted that process.
13 Engleman Decl. ¶ 11, Ex. B; ¶ 17, Ex. E; ¶ 24, Ex. H; ¶ 32, Ex. K; ¶ 39, Ex. N. And
14 because of their failure to exhaust, the Petition challenging the conditions of their
15 confinement should be denied.

16 Petitioners acknowledge that they have failed to exhaust administrative remedies
17 but argue that the exhaustion requirement should be “waived.” ECF No. 18 at 55-56.
18 Failure to exhaust, however, may be excused only an administrative grievance process is
19 not available. *Ross v. Blake*, 136 S. Ct. 1858 (2016). Under the PLRA, the Court has
20 recognized a remedy may not be available (1) where the remedy “operates as a simple
21 dead end—with officers unable or consistently unwilling to provide any relief to
22 aggrieved inmates;” (2) where the administrative scheme is “so opaque that it becomes,
23 practically speaking, incapable of use;” or (3) where “prison administrators thwart
24 inmates from taking advantage of a grievance process through machination,
25 misrepresentation, or intimidation.” *Id.* at 1853-54, 1859-60. None of those three narrow
26 exceptions apply here. *See id.* at 1856-67 (holding that the exhaustion requirement
27 “suggests no limits on an inmate’s obligation to exhaust—irrespective of any ‘special
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1 circumstances” and the “mandatory language means a court may not excuse a failure to
2 exhaust, even to take such circumstances into account”).

3 To be sure, COVID-19 presents unusual circumstances, in which decisions
4 regarding prisoner grievances should be made expeditiously (as provided in FCC
5 Lompoc’s grievance procedures). But permitting prisoners to ignore the PLRA’s
6 mandatory exhaustion requirement, even in these unusual circumstances, would frustrate
7 Congress’s objective in the PLRA to “eliminate unwarranted federal-court interference
8 with the administration of prisons,” and “reduce the quantity and improve the quality of
9 prisoner suits.” *Woodford*, 548 U.S. at 93 (quoting *Porter*, 534 U.S. at 524). More
10 problematically, permitting prisoners to ignore the PLRA’s mandatory exhaustion
11 requirement would deprive prisons of “a fair opportunity to correct their own errors,” *id.*,
12 as Petitioners have done here by filing this lawsuit. As described above, the BOP’s
13 response to the pandemic has evolved. *See* Engleman Decl. ¶¶ 54-83. The rapidly
14 changing nature of this pandemic thus favors adherence to the administrative framework.

15 This was the conclusion reached in *Nellson v. Barnhart*, 2020 WL 1890670, at *4
16 (D. Col. Apr. 16, 2020). *Nellson* rejected the petitioner’s “dead-end argument” that he
17 was excused from exhaustion because “the grievance process can offer no possible relief
18 in time to prevent the imminent danger.” *Id.* (internal quotation marks omitted). *Nellson*,
19 however, found that “28 C.F.R. § 542.18 offers inmates an emergency procedure where,
20 ‘[i]f the Request is determined to be of an emergency nature which threatens the
21 inmate’s immediate health or welfare, the Warden shall respond no later than the third
22 calendar day after filing.” *Id.* Petitioners do not plead that they made any such request or
23 gave FCC Lompoc any chance to address their complaints before seeking relief before
24 this Court. Engleman Decl. ¶ 11, Ex. B (Carror-Torres); ¶ 17, Ex. E (Reed); ¶ 24, Ex. H
25 (Garcia); ¶ 32, Ex. K (Brown); ¶ 39, Ex. N (Fears).

26 Additionally, the Supreme Court defines availability as some relief, not all relief,
27 which an inmate seeks. *See Ross*, 136 S. Ct. at 1859. Because Petitioners have not even
28 attempted to utilize the administrative process, it is improper to argue here that the

1 administrative remedy is “effectively unavailable.” *See* ECF No. 18 at 57. Petitioners’
2 contention that FCC Lompoc “is not currently allowing access to the grievance process”
3 is not supported by any evidence. *See id.* at 57:17 (emphasis omitted). To the contrary,
4 Respondents have submitted evidence that FCC Lompoc is providing the relief
5 Petitioners purportedly seek. *See* Engleman Decl. at ¶¶ 54-83 (robust health screening
6 measures for all inmates, staff, and visitors, cohorting and quarantine procedures,
7 increased sanitation and cleaning measures and supplies, and masks). Respondents
8 respectfully submit that the Court should not alter the mandatory requirements of the
9 PLRA for COVID-19 or any other special circumstances. *See Ross*, 136 S. Ct. at 1856-
10 57 (“[A] court may not excuse a failure to exhaust, even to take [special] circumstances
11 into account.”).¹⁶

12 Finally, each and every inmate at FCC Lompoc is able to file a motion for
13 immediate release under 18 U.S.C. § 3582(c)(1)(A) with his sentencing court. *See*
14 Arnold Decl. ¶¶ 2-3.¹⁷ Given that Petitioners can utilize the compassionate release
15 process, it is disingenuous to argue that they should be excused from the exhaustion
16 requirement under the PLRA. This is especially true because they do not contend that
17 they even attempted to utilize the BOP administrative process, including requesting
18 emergency relief under 28 C.F.R. § 542.18.

22
23 ¹⁶ Respondents respectfully submit that the Court should find that Petitioners’
24 failure to exhaust weigh against Petitioner’s ability to succeed on the merits.
25 Respondents acknowledge that the district court cases cited cases by Petitioners reached
a contrary conclusion (TRO Application at 53:20-54:25), but the Court should reject
these findings based on the statutory framework, Supreme Court and Ninth Circuit
precedent, and the current conditions at FCC Lompoc.

26 ¹⁷ Petitioners’ citations to *U.S. v. Connell*, 2020 WL 231858 (N.D. Cal., May 8,
27 2020) and *United States v. Pippen*, 2020 WL 2602140 (W.D. Wash. May 20, 2020)
28 illustrate that Petitioners could have filed a motion with their sentencing court for
compassionate release (as *Connell* and *Pippen* did) but have chosen not to do so and are
instead seeking inappropriate habeas relief in this action.

1 Because Petitioners failed to exhaust their administrative remedies as required by
2 the PLRA, and because none of the exceptions to the exhaustion requirement applies in
3 this case, the Petition should be denied.¹⁸

4 **B. Petitioners Fail to Show Irreparable Harm**

5 In addition to not showing a likelihood of success on the merits, Petitioners fail to
6 demonstrate irreparable harm absent injunctive relief. Petitioners claim they face
7 irreparable harm unless immediately released based on the assumption that continued
8 imprisonment increases their risk of contracting COVID-19 and ultimately their risk of
9 death or serious injury. Yet an irreparable-harm finding requires much more than
10 assumptions.¹⁹ *Winter*, 555 U.S. at 22 (agreeing that the Ninth Circuit’s “possibility” of
11 irreparable harm was “too lenient”; the moving party must “demonstrate that irreparable
12 injury is *likely* in the absence of an injunction”) (emphasis in original, citations omitted).

13 Petitioners offer no concrete proof—just speculation—that release would redress
14 their complained-of harms. For instance, they seemingly take it as a given that release
15 would substantially reduce their chances of contracting COVID-19—this is despite the
16 fact that California and many other areas remain in a state of emergency. They also
17 suggest that, even if they contract COVID-19, they will have a better outcome outside of
18 FCC Lompoc. Petitioners have access to healthcare while incarcerated, and they have
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21 ¹⁸ Petitioners also cannot find relief under Declaratory Judgment Act, 28 U.S.C.
22 § 2201, because “Congress plainly intended declaratory relief to act as an alternative to
23 the strong medicine of the injunction.” *Steffel v. Thompson*, 415 U.S. 452, 466, 471
24 (1974). The Administrative Procedures Act, 18 U.S.C. § 3625, is also inapplicable
25 because it does not apply “to the making of any determination, decision or order” under
26 18 U.S.C. § 3621 (Place of Imprisonment). *See, e.g., Boumediene v. Bush*, 553 U.S. 723,
724 (2008). Finally, Article 1, § 9, cl. 2 of the Constitution, which refers to the
27 Suspension Clause, does not apply. The Suspension Clause provides that “[t]he Privilege
28 of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion
or Invasion the public Safety may require it.” U.S. Constitution, Art. I, § 9, cl. 2. There is
no allegation and no indication the writ has been suspended.

¹⁹ To the extent the Court finds that the BOP has already instituted all (or the most
important aspects) of the relief Petitioners request, that further undercuts their ability to
show irreparable harm. Stated differently, the lack of injunctive relief cannot harm
Petitioners if the requested relief does not go beyond the BOP’s current screening,
testing, and isolation procedures.

1 not proven they will have access to medical care if released. While Petitioners may
2 speculate about their future healthcare options and a host of other issues, at this point one
3 of the few certainties is that release ensures no more guaranteed healthcare. Without
4 proof that they have access to healthcare, ordering their release could present a greater
5 risk to the Petitioners themselves of serious complications should they contract COVID-
6 19, as well as to those in their local communities who they could potentially infect if
7 they contract COVID-19.

8 Further, FCC Lompoc is employing the types of measures Petitioners purportedly
9 seek. Petitioners admit that the BOP is releasing inmates under the CARES Act. ECF
10 No. 18 at 16. Petitioners may disagree with the BOP's determination in terms of the
11 number of inmates released, but the BOP should not be compelled to change its policies
12 to Petitioners' liking. Further, FCC Lompoc has been taking an active measure in
13 addressing the COVID-19 pandemic. FCC Lompoc provides inmates with surgical and
14 cloth masks that they are required to wear. Cross Decl. ¶ 19.a; Engleman Decl. ¶ 71.a;
15 ECF 18 at 29 & 49. Staff are provided with surgical and cloth masks. *Id.* Soap is
16 provided at no cost to every inmate and inmates have access to sinks, water, and soap at
17 all times. Engleman Decl. ¶¶ 65.a-c, 71.a-c. Frequently touched surfaces are frequently
18 cleaned throughout the day with a designated disinfectant that kills human coronavirus.
19 Engleman Decl. ¶¶ 63, 65; ECF 18 at 26 & 29. This disinfectant is available to inmates
20 so that they can clean their cells on a regular basis. Cross Decl. ¶ 19.d.; Engleman Decl.
21 ¶ 71.a-c; ECF 18 at 26 & 29. Each housing unit has been stocked with cleaning supplies
22 inmates can use to clean their cells. *Id.* Staff have also been provided personal protective
23 equipment to be used in appropriate locations such as quarantined areas, isolation units,
24 and screening sites. Cross Decl. ¶¶ 19.a., 23. FCC Lompoc has sufficient PPE on hand,
25 including N-95 masks, surgical masks, and rubber gloves, on hand to meet its current
26 and anticipated needs, and can order more. Cross Decl. ¶ 21. For example, Petitioners
27 request that the Court order the BOP to provide inmates with masks and to instruct
28 inmates on their use (ECF No. 18-3 at 6-7), but the BOP has already appropriately

1 implemented this measure. Cross Decl. ¶ 19.a. Petitioners thus have not demonstrated
2 how entering their requested injunction would provide any additional protection against
3 COVID-19, much less that they would suffer irreparable injury without such an
4 injunction.

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

7 The last two TRO factors—focusing on the balance of equities and where the
8 public interest lies—tip sharply in Respondents’ favor. Notably, because injunctive relief
9 is being sought against the government, these remaining factors “merge” for analytical
10 purposes. *Nken*, 556 U.S. at 435; *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092
11 (9th Cir. 2014). In broad strokes, Petitioners want this Court to order the immediate
12 release of a substantial yet indefinite number of federal prisoners—ostensibly until the
13 COVID-19 risk dissipates, whenever that may be. They paint an exaggerated, bleak
14 picture of their current prison conditions and COVID-19 risk, but avoid key details about
15 what life will look like for them if they are released. For instance, Petitioners do not
16 prove they have viable housing options, for themselves or the putative class, or show that
17 housing is actually available, much less show that housing is available somewhere with a
18 lower COVID-19 risk. Similarly, Petitioners provide no proof showing they or the class
19 members—if released—will have sufficient access to food, medical care, personal-
20 hygiene products, and the many other things necessary for daily living. *See Alvarez*,
21 2020 WL 2315807 at *5 (“the public interest does not favor the immediate release of a
22 class of inmates who may lack viable housing outside of [the federal facility] and may be
23 deprived of access to food, means of personal hygiene, and medical care if released, all
24 at once, from the facility”).

25 The public interest, moreover, does not favor releasing criminals onto the streets
26 during a pandemic if they cannot prove they have the means to support themselves and
27 avoid making the pandemic worse in local communities. Instead, the government and the
28 public have a significant interest in keeping Petitioners (and other inmates like them)

1 imprisoned during the pandemic—that is, unless and until the CDC changes its guidance
2 or the government chooses to voluntarily release an inmate (e.g., compassionate release).
3 *See* 18 U.S.C. § 3626(a)(2) (requiring courts to consider the “impact on public safety”
4 before granting preliminary injunctive relief to a prisoner); *Money*, 2020 WL 1820660,
5 at *20 (“Compelling a process to potentially release thousands of inmates on an
6 expedited basis could pose a serious threat to public safety and welfare. The risk of
7 recidivism comes into play, as do concerns about victims’ rights. The question is not
8 simply what is best for the inmates—the public has vital interests at stake, too.”); *Wragg*,
9 2020 WL 274547, at *23 (“Conspicuously absent in Petitioners’ analysis is any
10 meaningful discussion of the risk associated with a large scale release of inmates. What
11 would be the plan that addresses the safety and security of the communities to which
12 they are released? Is the proper supervision even available given that the current
13 COVID-19 crisis is just as real to the law enforcement officers in charge of safety and
14 supervision?”).

15 Petitioners here have been convicted of serious crimes. Carrer-Torres was
16 sentenced to 20 years imprisonment for carjacking involving sexual assault and carrying
17 a firearm in the commission of that violent crime. Engleman Decl. ¶ 8. Reed was
18 sentenced to 25 years imprisonment for armed bank robbery and armed carjacking. *Id.*
19 ¶ 14. Garcia was sentenced to 87 months imprisonment for possession of
20 methamphetamine with intent to distribute. *Id.* ¶ 21. Brown was sentenced to 12.5 years
21 imprisonment for conspiracy to manufacture and distribute PCP. *Id.* ¶ 29. Fears was
22 sentenced to 32 months imprisonment for violating his supervised release after being
23 convicted of conspiracy to possess with intent to distribute 15 kilograms of cocaine. *Id.*
24 ¶ 36. These Petitioners have thus been convicted of serious crimes. Their criminal
25 convictions distinguish their situation from *Roman v. Wolf*, 2020 WL 1952656 (C.D.
26 Cal. Apr. 23, 2020), which concerned civil immigration detainees. *See* ECF No. 10 at
27 38:11-15. As the Southern District of California court found, prisoners must be treated
28

1 differently from civil immigration detainees, and their release may not be ordered under
2 the PLRA. *Alvarez*, 2020 WL 2315807 at *1.²⁰

3 In formulating the policies and procedures in place at USP Lompoc discussed
4 above, the BOP relied on its expertise in running prisons and the guidance of health
5 experts—the objective being to combat the spread of the virus *and* take into account
6 critical safety concerns. As the guidance from the CDC and others has changed as more
7 is learned about COVID-19, so too has the BOP’s response. The BOP needs to maintain
8 that flexibility during the pandemic so that it may continue to protect all of its
9 constituents. *Turner*, 482 U.S. at 84 (“courts are ill equipped to deal with the
10 increasingly urgent problems of prison administration”); *Alvarez*, 2020 WL 2315807, at
11 *5 (issuing injunctive relief would “unfairly intrud[e] on Defendants’ operation of the
12 prison system and defy[] Congress’s clear policy determinations regarding challenges to
13 prison conditions and prisoner release orders”). In sum, the public interest factors weigh
14 against granting Petitioners’ application.

15 **D. The Requested Relief Does Not Satisfy the Requirements of 18 U.S.C.**
16 **§ 3626 (a) and (b)**

17 Finally, even if the petitioners could otherwise satisfy the requirements for
18 prospective relief, they cannot make the heightened showing necessary to obtain relief
19 under 18 U.S.C. § 3626(a) and (b). This statute reads, in relevant part:

20 **(a) Requirements for relief.--**

21 **(1) Prospective relief.--**(A) Prospective relief in any civil action with
22 respect to prison conditions shall extend no further than necessary to correct
23 the violation of the Federal right of a particular plaintiff or plaintiffs. The
24 court shall not grant or approve any prospective relief unless the court finds
25 that such relief is narrowly drawn, extends no further than necessary to
26 correct the violation of the Federal right, and is the least intrusive means
27 necessary to correct the violation of the Federal right. The court shall give
substantial weight to any adverse impact on public safety or the operation of
a criminal justice system caused by the relief.

...

28 ²⁰ In fact, the Honorable Terry Hatter, who is adjudicating the *Roman* case,
rejected Petitioners’ attempt to have this action transferred to his court. ECF No. 8.

1 **(2) Preliminary injunctive relief.**--In any civil action with respect to
2 prison conditions, to the extent otherwise authorized by law, the court may
3 enter a temporary restraining order or an order for preliminary injunctive
4 relief. Preliminary injunctive relief must be narrowly drawn, extend no
5 further than necessary to correct the harm the court finds requires
6 preliminary relief, and be the least intrusive means necessary to correct that
7 harm. The court shall give substantial weight to any adverse impact on
8 public safety or the operation of a criminal justice system caused by the
9 preliminary relief . . . Preliminary injunctive relief shall automatically expire
10 on the date that is 90 days after its entry, unless the court makes the findings
11 required under subsection (a)(1) for the entry of prospective relief and makes
12 the order final before the expiration of the 90-day period.

13 “Section 3626(a) ... operates simultaneously to restrict the equity jurisdiction of
14 federal courts and to protect the bargaining power of prison administrators—no longer
15 may courts grant or approve relief that binds prison administrators to do more than the
16 constitutional minimum.” *Gilmore v. People of the State of California*, 220 F.3d 987,
17 1005 (9th Cir. 2000). Indeed, the statute mandates that the scope of preliminary
18 injunctive relief “heel close to the identified [constitutional] violation.” *Id.*

19 Here, the Petitioners have not even acknowledged, much less satisfied these
20 statutory requirements. They have made no effort to explain why any of the measures,
21 whether for home confinement consideration or for the various measure they want
22 implemented at the facilities, “are narrowly drawn, exten[d] no further than necessary to
23 correct the violation of the Federal right, and [are] the least intrusive means necessary to
24 correct the violation of the Federal right.” Nor do they demonstrate why any of these
25 measures are “necessary to correct the violation of the Federal right of a particular
26 plaintiff or plaintiffs.”

27 As demonstrated above, Petitioners cannot demonstrate a violation of the Eighth
28 Amendment in these circumstances and thus, they necessarily cannot demonstrate that
29 any of the relief they have requested satisfies the heightened requirements for
30 prospective relief. Similarly, Petitioners’ preference for a set of measures to address the
31 COVID-19 pandemic at FCC Lompoc above and beyond the measures recommended by

1 the CDC can neither establish a violation of the Eighth Amendment nor satisfy the
2 statutory requirements for the issuance of preliminary relief.

3 **V. CONCLUSION**

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

6
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Respectfully submitted,

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