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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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

Plaintiff-Petitioners,

v.

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

Defendant-Respondents.

No. CV 20-4451-MWF-MRW

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

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

Honorable Michael W. Fitzgerald
United States District Judge

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NOTICE OF MOTION AND MOTION TO DISMISS

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

Respondents bring this motion on the following grounds:

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

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

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

Dated: June 29, 2020

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

II. RELEVANT PROCEDURAL BACKGROUND

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

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

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

Court of Appeals on June 9, 2020.[2] *Wilson v. Williams*, --F. 3d--, 2020 WL 3056217 (6th Cir. Jun. 9, 2020) ("*Williams*").

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

III. PETITIONERS' ALLEGATIONS

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

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

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

[2] Respondents filed a Notice of Supplemental Authority attaching the *Williams* decision on June 10, 2020. Dkt. No. 40.

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

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

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

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

B. Petitioners Have Not Complied with the PLRA Grievance Process

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

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

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

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

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

V. ARGUMENT

A. The Court Lacks Jurisdiction Over Petitioners' Habeas Claims

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

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

Cir. 1991) ("Habeas corpus proceedings are the proper mechanism for a prisoner to challenge the 'legality or duration' of confinement," but not to "challeng[e] 'conditions of . . . confinement'") (citations omitted).

1. Petitioners Have Failed to Satisfy the Habeas Exhaustion Requirements

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

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

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

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

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

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

B. Petitioners' Non-Habeas Eighth Amendment Conditions-of-Confinement Claim Should Be Dismissed

1. Petitioners' Allegations Do Not Support a Finding of Deliberate Indifference

a. Standard for Deliberate Indifference

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

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

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

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

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

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

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

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

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

c. Petitioners Cannot Satisfy the Subjective Test for Deliberate Indifference

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

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

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

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

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

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

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

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

2. Petitioners Have Failed to Satisfy the PLRA's Exhaustion Requirements

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

VI. CONCLUSION

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

Dated: June 29, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

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

Plaintiff-Petitioners,

v.

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

Defendant-Respondents.

No. CV 20-4451-MWF-MRW

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

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

Honorable Michael W. Fitzgerald
United States District Judge

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

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

For these reasons, the Court grants Respondents' motion to dismiss.

I. RELEVANT PROCEDURAL BACKGROUND

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

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

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

[2] Respondents filed a Notice of Supplemental Authority attaching the *Williams* decision on June 10, 2020. Dkt. No. 40.

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

Respondents moved to dismiss Petitioners' Complaint on June 29, 2020. Dkt. No. 55.

II. PETITIONERS' ALLEGATIONS

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

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

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

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

- **Separation**: FCI Terminal Island has separated inmates "by setting up temporary living spaces: some inmates have been placed in field tents, and others in at least one converted warehouse" (Compl. ¶ 55); FCI Terminal Island "have resorted to cohort-style segregation" and if "a prisoner is determined to have contracted the disease, he is removed from the unit") (*id.* ¶ 62); on April 25, 2020, FCI Terminal Island stopped housing inmates together who had returned from the hospital (*id.* ¶ 63); FCI Terminal Island provided a "unit designated as 'clean[,]' or reserved for persons who have tested negative for COVID-19." *Id*. ¶ 64.
- **Release:** On April 30, 2020, Warden Ponce told Congresswoman Barragan that she was "considering permitting home confinement for only 46 vulnerable individuals."[3] Compl. ¶ 71.

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

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

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

B. Petitioners Have Not Complied with the PLRA Grievance Process

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

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

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

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

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

IV. DISCUSSION

A. The Court Lacks Jurisdiction Over Petitioners' Habeas Claims

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

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

challenge the 'legality or duration' of confinement," but not to "challeng[e] 'conditions of . . . confinement'") (citations omitted).

1. Petitioners Have Failed to Satisfy the Habeas Exhaustion Requirements

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

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

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

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

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

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

B. Petitioners' Non-Habeas Eighth Amendment Conditions-of-Confinement Claim Are Dismissed

1. Petitioners' Allegations Do Not Support a Finding of Deliberate Indifference

a. Standard for Deliberate Indifference

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

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

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

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

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

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

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

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

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

c. Petitioners Cannot Satisfy the Subjective Test for Deliberate Indifference

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

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

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

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

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

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

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

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

V. CONCLUSION

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

IT IS SO ORDERED.

Dated:_____, 2020

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HONORABLE MICHAEL F. FITZGERALD
UNITED STATES DISTRICT JUDGE