

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 *Torres et al.*,
12 Plaintiff-Petitioners,
13 v.
14 *Milusnic et al.*,
15 Defendant-Respondents.
16

Case No.: CV 20-4450-CBM-PVC(x)

**ORDER RE: RESPONDENTS’
MOTION TO DISMISS UNDER
FED. R. CIV. P. 12(B)(1) AND
12(B)(6) [36]**

17 The matter before the Court is: Respondents’ Motion to Dismiss Under
18 Fed. R. Civ. P. 12(b)(1) and 12(b)(6). (Dkt. No. 36.) The matter is fully briefed.

19 **I. BACKGROUND**

20 This action is brought on behalf of inmates at FCI Lompoc and USP
21 Lompoc (collectively, “Lompoc”) challenging the Director of the Bureau of
22 Prisons (“BOP”) and Warden of Lompoc’s response during the COVID-19
23 pandemic. The Complaint asserts two causes of action: (1) Unconstitutional
24 Conditions of Confinement in Violation of the Eighth Amendment to the U.S.
25 Constitution pursuant to 28 U.S.C. §§ 2241, 2243; (2) and Unconstitutional
26 Conditions of Confinement in Violation of the Eighth Amendment to the U.S.
27 Constitution pursuant to U.S. Const, Amend. VIII; 28 U.S.C. § 1331; 5 U.S.C. §
28 702, “Injunctive Relief Only.”

On July 14, 2020, the Court granted Petitioners' motion for a preliminary injunction¹ to expedite review and determination of eligibility of Lompoc inmates for home confinement and compassionate release giving substantial weight to the inmate's risk factors for severe illness or death from COVID-19 based on age or underlying health conditions. (Dkt. No. 45 (the "Preliminary Injunction Order").) The Court denied Petitioners' motion for a preliminary injunction regarding improved conditions for inmates remaining at Lompoc in light of COVID-19 based on disputed facts as to the safety measures implemented at Lompoc and because Petitioners did not establish Respondents have the necessary state of mind to satisfy the subjective deliberate indifference prong as to the safety measures implemented to protect inmates from COVID-19. (*Id.*) Respondents now move to dismiss Petitioners' claims for lack of jurisdiction and failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

II. STATEMENT OF THE LAW

A. Federal Rule of Civil Procedure 12(b)(1)

On a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the party asserting jurisdiction bears the burden of proof jurisdiction exists. *Sopak v. Northern Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir. 1995). A motion under Rule 12(b)(1) may challenge the court's jurisdiction facially, based on the legal sufficiency of the claim, or factually, based on the legal sufficiency of the jurisdictional facts. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). If the court determines at any time that it lacks subject-matter jurisdiction, it must dismiss the action. Fed. R. Civ. P. 12(h)(3).

B. Federal Rule of Civil Procedure 12(b)(6)

A court may dismiss a complaint for "failure to state a claim upon which

¹ The parties agreed to convert Petitioners' *Ex Parte* Application for Temporary Restraining Order to an expedited motion for preliminary injunction. (Dkt. Nos. 41, 42.)

1 relief can be granted” pursuant to Federal Rule of Civil Procedure 12(b)(6). To
2 survive a motion to dismiss pursuant to Rule 12(b)(6), the Complaint “must
3 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is
4 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell*
5 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A formulaic recitation of
6 the elements of a cause of action will not suffice. *Twombly*, 550 U.S. at 555.

7 **III. DISCUSSION**

8 **A. Law of the Case**

9 As a preliminary matter, Petitioners contend Respondents’ instant Motion
10 raises substantively identical arguments raised by Respondents in opposition to
11 Petitioners’ motion for preliminary injunction, which was granted by this Court,
12 and therefore Respondents’ Motion to Dismiss should be denied under the law of
13 the case doctrine. To the extent Respondents raise identical arguments on pure
14 issues of law previously ruled on by the Court in its Preliminary Injunction Order,
15 the law of the case doctrine applies. *See Ranchers Cattlemen Action Legal Fund*
16 *United Stockgrowers of Am. v. U.S. Dep’t of Agr.*, 499 F.3d 1108, 1114 (9th Cir.
17 2007) (While the general rule is that “decisions at the preliminary injunction phase
18 do not constitute the law of the case,” “conclusions on pure issues of law . . . are
19 binding.”). The Court has identified pure legal issues where the law of the case
20 doctrine applies. (*See infra.*)

21 **B. Habeas Claim (First Cause of Action)**

22 Respondents move to dismiss Petitioners’ habeas claim pursuant to 28
23 U.S.C. § 2241 for alleged violation of the Eighth Amendment on the ground this
24 Court lacks subject matter jurisdiction over that claim.

25 Respondents contend Petitioners do not assert a cognizable habeas claim.
26 The Court’s finding in its Preliminary Injunction Order that Petitioners assert a
27 proper habeas claim challenging the fact of their confinement constitutes binding
28 law of the case. (*See* Dkt. No. 45.) *Ranchers Cattlemen*, 499 F.3d at 1114. A

1 writ of habeas corpus extends to a prisoner “in custody in violation of the
2 Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241. The sole
3 federal remedy for a prisoner challenging the “fact or duration” of imprisonment is
4 a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973). Here,
5 Petitioners challenge the fact of their confinement because they assert there are no
6 set of conditions of confinement that could be constitutional. Therefore,
7 consistent with the Court’s Preliminary Injunction Order, the Court finds
8 Petitioners assert a proper habeas claim pursuant to 28 U.S.C. § 2241 challenging
9 the fact of their confinement. (See Dkt. No. 45.)²

10 Having found Petitioners assert a proper habeas claim pursuant to § 2241
11 challenging the fact of their confinement, Petitioner’s habeas claim is not
12 foreclosed by the PLRA. See 18 U.S.C. § 3626(g)(2); *Wilson v. Williams*, 2020
13 WL 3056217, at *6 (“Because petitioners’ claims are properly brought under §
14 2241, the BOP’s argument that the claims are foreclosed by the PLRA fails. The
15 PLRA does not apply in habeas proceedings.”).

16 Respondents also argue this Court does not have the authority to place an
17 inmate on home confinement because the BOP has sole discretion over inmate
18 placement discretions. However, Petitioners seek an order requiring Respondents
19

20 ² See *Wilson v. Williams*, 961 F.3d 829, 838 (6th Cir. 2020) (petitioners’ claims
21 were properly brought under § 2241 where they alleged there are no conditions of
22 confinement sufficient to prevent irreparable constitutional); *Martinez-Brooks v.*
23 *Easter*, 2020 WL 2405350, at *16 (D. Conn. May 12, 2020) (petitioners’ claim
24 was a proper habeas claim because they “contend[ed] that the fact of their
25 confinement in prison itself amounts to an Eighth Amendment violation under
26 these circumstances, and nothing short of an order ending their confinement at
27 FCI Danbury will alleviate that violation.”); *Malam v. Adducci*, 2020 WL
28 1672662, at *3 (E.D. Mich. Apr. 5, 2020), *as amended* (Apr. 6, 2020) (noting
“where a petitioner claims no set of conditions would be sufficient to protect her
constitutional rights, her claim should be construed as challenging the fact, not
conditions, of her confinement and is therefore cognizable in habeas,” and finding
because petitioner claimed “no matter what steps are taken, due to her underlying
serious health conditions, there is no communal holding facility where she could
be incarcerated during the Covid-19 pandemic that would be constitutional[,]”
Petitioner’s claim must therefore be considered as a challenge to the continued
validity of confinement itself”).

1 to expedite review and determination of eligibility of Lompoc inmates for home
2 confinement and compassionate release which gives substantial weight to the
3 inmate's risk factors for severe illness or death from COVID-19. Petitioners do
4 not seek an order from this Court placing inmates on home confinement or
5 granting compassionate release.

6 Accordingly, the Court denies Respondents' motion to dismiss Plaintiff's
7 habeas claim.

8 **C. Non-Habeas Eighth Amendment Claim (Second Cause of Action)**

9 Respondents move to dismiss Petitioners' non-habeas Eighth Amendment
10 conditions of confinement claim on the ground: (1) Petitioners cannot
11 demonstrate they are subject to an unreasonable risk of harm; and (2) the
12 Complaint's allegations do not support a finding of deliberate indifference.

13 "[T]he Eighth Amendment applies to conditions of confinement that are
14 not formally imposed as a sentence for a crime." *Helling v. McKinney*, 509 U.S.
15 25, 29 (1993). The Supreme Court has recognized that the Eighth Amendment
16 "requires that inmates be furnished with the basic human needs, one of which is
17 'reasonable safety,'" and "[i]t is 'cruel and unusual punishment to hold convicted
18 criminals in unsafe conditions.'" *Id.* at 33 (citations omitted). Such Eighth
19 Amendment claims are analyzed through a two-pronged inquiry. *Id.* at 35-37.
20 Under the objective prong, the prisoner must establish "society considers the risk
21 that the prisoner complains of to be so grave that it violates contemporary
22 standards of decency to expose *anyone* unwillingly to such a risk. In other words,
23 the prisoner must show that the risk of which he complains is not one that today's
24 society chooses to tolerate." *Id.* at 36. The subjective prong "requires an inquiry
25 into the prison officials' state of mind" based on the "deliberate indifference"
26 standard. *Id.* at 32. A prison official is deliberately indifferent if he "knows of
27 and disregards an excessive risk to inmate health or safety; the official must both
28 be aware of facts from which the inference could be drawn that a substantial risk

1 of serious harm exists, and he must also draw the inference.” *Farmer v. Brennan*,
 2 511 U.S. 825, 837 (1994).

3 As to the objective prong, the Complaint alleges:

- 4 1. “[T]he novel coronavirus that causes COVID-19 has led to a
 5 global pandemic”;
- 6 2. National, state and local officials have declared emergencies in
 light of the pandemic;
- 7 3. As of May 15, 2020, there are over 4.3 million reported cases
 8 of COVID-19 and 297,241 related deaths worldwide,
 9 1,412,121 cases and 885,990 deaths in the U.S., and 74,936
 cases and 3,108 deaths in California;
- 10 4. “The virus is known to spread from person to person through
 11 respiratory droplets, close personal contact, and from contact
 with contaminated surfaces and objects”;
- 12 5. “Infected people can spread the virus to others even if they are
 asymptomatic”;
- 13 6. “[P]eople who suffer from certain underlying medical
 14 conditions” and older populations are at increased risk of
 illness or death from COVID-19;
- 15 7. “[T]here is no known medication to prevent or treat infection
 16 from COVID-19,” and “[s]ocial distancing, or remaining
 17 physically separated from known or potentially infected
 18 individuals, and vigilant hygiene, including frequently and
 thoroughly washing hands with soap and water and cleaning
 and disinfecting high-touch surfaces, are the only known
 effective measures for protecting people from COVID-19”;
- 19 8. Persons in confined spaces such as correctional facilities face
 20 increased danger of contracting COVID-19;
- 21 9. More than 1,000 Lompoc inmates have tested positive for
 COVID-19;
- 22 10. Petitioners and other Lompoc inmates are at “high risk of harm
 23 due to their age and health status” if infected with COVID-19
 24 and are likely to be infected with COVID-19 absent immediate
 action to protect inmates and reduce the inmate population; and
- 25 11. Despite the CARES Act, Respondents “are refusing to consider
 26 home confinement for the vast majority of those incarcerated at
 27 Lompoc,” and “have failed to conduct timely testing, provide
 28 adequate PPE, or effectively isolate those who are infected and
 those who have had contact with the infected” with COVID-
 19.

(Compl. ¶¶ 1-80.) Therefore, Petitioners plead sufficient facts to satisfy the objective prong by alleging Petitioners and other Lompoc inmates are at substantial risk of exposure to COVID-19, which is inconsistent with contemporary standards of human decency. *See Helling*, 509 U.S. at 32-35 (inmates could state a claim under the Eighth Amendment regarding exposure to a serious, communicable disease).³

As to the subjective prong, the Complaint alleges: (1) Respondent Louis Milusnic, the Warden at Lompoc, “is aware of and has adopted and enforced policies that leave Petitioners and all those similarly situated exposed to infection, severe illness, and death due to COVID-19,” and has “declined to release people who qualify under BOP and Department of Justice guidance despite having the authority to do so” (Compl. ¶ 15); and (2) Respondent Michael Carvajal, the Director of the Federal Bureau of Prisons, “is aware of and has adopted and enforced policies that leave Petitioners and all those similarly situated exposed to infection, severe illness, and death due to COVID-19” (*id.* ¶ 16). The Complaint also alleges despite the CARES Act which “gave Respondents and the BOP the broad discretion to allow home confinement and reduce crowding at prisons during the COVID-19 emergency period,” and despite “the guidance of Attorney General William Barr urging the BOP to immediately transfer medically ‘at-risk’ prisoners to home confinement, Respondents are refusing to consider home confinement for the vast majority of those incarcerated at Lompoc” and “have failed to conduct timely testing, provide adequate PPE, or effectively isolate those who are infected and those who have had contact with the infected.” (*Id.* ¶ 5.)

³ *See also Wilson v. Williams*, 2020 WL 3056217, at *7 (petitioners demonstrated they are “incarcerated under conditions posing a substantial risk of serious harm” to satisfy objective prong of Eighth Amendment claim, finding “[t]he transmissibility of the COVID-19 virus in conjunction with Elkton’s dormitory-style housing—which places inmates within feet of each other—and the medically-vulnerable subclass’s health risks, presents a substantial risk that petitioners at Elkton will be infected with COVID-19 and have serious health effects as a result, including, and up to, death”).

Therefore, Petitioners plead sufficient facts to satisfy the subjective prong for their non-habeas Eighth Amendment claim by alleging Respondents have ignored, and therefore have been deliberately indifferent, to the known risk of inmates' exposure to infection, severe illness, and death due to COVID-19 based on the conditions at Lompoc, and the known urgency to consider inmates for home confinement, particularly those most vulnerable to severe illness or death if they contract COVID-19, in failing to make prompt and meaningful use of home confinement and disregarding inmates' underlying health conditions in determining eligibility for home confinement.⁴

Accordingly, Respondents' motion to dismiss Petitioners' non-habeas Eighth Amendment claim is denied.

D. Exhaustion of Administrative Remedies

Respondents also contend Petitioners have failed exhaust administrative remedies for their claims. However, the Complaint alleges "since the COVID-19 outbreak in Lompoc, those incarcerated have been denied access to the administrative remedy process," and "[s]taff have not been accepting the forms required to initiate the process, claiming they cannot do so due to the exigency of the COVID-19 pandemic." (Compl. ¶¶ 13, 14.) Therefore, Petitioners plead sufficient facts demonstrating exhaustion is excused because administrative

⁴ See *Farmer*, 511 U.S. at 825 ("A prison official may be held liable under the Eighth Amendment for acting with 'deliberate indifference' to inmate health or safety only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."); see also *Wilson v. Williams*, 2020 WL 3056217, at *14 (Cole, Dissenting) (The BOP's failure to make use of its home confinement authority at Elkton, "constitutes sufficient evidence for the district court to have found that petitioners were likely to succeed on their Eighth Amendment claim"); *Martinez-Brooks*, 2020 WL 2405350, at *23, *26 (noting the "Eighth Amendment requires that [the determination of whether to place an inmate on home confinement] be made promptly," and finding petitioners showed a likelihood of success on the merits on their Eighth Amendment claim with respect to the medically vulnerable subclass because the Danbury Warden "has disregarded a 'substantial risk of serious harm' by 'failing to take reasonable measures to abate it'" by "failing to make meaningful use of her home confinement authority") (quoting *Farmer*, 511 U.S. at 847).

1 remedies are not available. *See Williams v. Paramo*, 775 F.3d 1182, 1191-92 (9th
2 Cir. 2015) (petitioner showed administrative remedies were not available where
3 she tried informing an officer about her claim but “he did not help her” and told
4 her it was “not [his] problem,” and she “attempted to file a grievance and an
5 appeal” with an officer “who rejected the grievance and refused to file the
6 appeal”). Moreover, the “failure to exhaust is an affirmative defense under the
7 PLRA, and . . . inmates are not required to specially plead or demonstrate
8 exhaustion in their complaints.” *Jones v. Bock*, 549 U.S. 199, 216 (2007).

9
10 **IV. CONCLUSION**

11 Accordingly, the Court **DENIES** Respondents’ Petitioners’ Motion to
12 Dismiss Under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

13 **IT IS SO ORDERED.**

14
15 DATED: September 18, 2020.

16 
17 _____
18 CONSUELO B. MARSHALL
19 UNITED STATES DISTRICT JUDGE
20
21
22
23
24
25
26
27
28