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18 **UNITED STATES DISTRICT COURT**
19 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
20

21 YONNEDIL CARROR TORRES,
22 et al.,

23 Plaintiff-Petitioners,

24 vs.

25 LOUIS MILUSNIC, in his capacity as
26 Warden of Lompoc, et al.,

27 Defendant-Respondents.
28

CASE NO. 2:20-cv-04450-CBM-PVCx

**PETITIONERS' OPPOSITION TO
RESPONDENTS' MOTION TO
DISSOLVE PRELIMINARY
INJUNCTION**

Hearing Date: June 29, 2021
Time: 10:00 a.m.
Courtroom: 8B

Honorable Consuelo B. Marshall

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1 **I. INTRODUCTION**

2 Nowhere is Respondents’ resistance to judicial oversight clearer than in its
 3 consistent opposition to the preliminary injunction entered in this action on July
 4 2020 (the “Preliminary Injunction). Respondents have repeatedly tested its limits,
 5 denying home confinement to as many inmates as possible and delaying transfer to
 6 those approved. This Court and Magistrate Castillo have found that in doing so,
 7 Respondents have breached it in a multitude of ways. (Dkt. Nos. 105, 229.) Despite
 8 *never* having been in compliance with the Preliminary Injunction, Respondents now
 9 seek to dissolve it. There is no basis for doing so.

10 As is set out in Petitioners’ contemporaneous opposition to Respondents’
 11 Motion for Summary Judgment, inmates at Lompoc remain in substantial danger of
 12 harm from COVID-19 a full year after a huge outbreak that infected over 1,000
 13 inmates and claimed at least four lives. (Dkt. No. 257.) Respondents have failed to
 14 enact basic testing programs, maintain a “grossly inadequate system of health care,”
 15 and have enacted a woefully deficient vaccination program that fails to provide the
 16 minimal information inmates need to make an informed decision as to whether to
 17 get vaccinated. (*See id.* at 7-12.) Lompoc still houses a “pool of extremely high-
 18 risk, unvaccinated patients,” who remain at increased risk in a setting where social
 19 distancing is impossible. (*Id.* at 15.) Respondents’ refusal to comply with the
 20 Preliminary Injunction and to reduce the risk to the incarcerated population
 21 demonstrates that the ongoing threat is the result of their own deliberate
 22 indifference. (*Id.* at 21-24.) While there are no longer hundreds of cases of
 23 COVID-19 at Lompoc, the constitution requires Respondents to take reasonable
 24 measures to *prevent* future outbreaks. *Helling v. McKinney*, 509 U.S. 25, 33 (1993)
 25 (“It would be odd to deny an injunction to inmates who plainly proved an unsafe,
 26 life threatening condition in their prison on the ground that nothing yet had
 27 happened to them.”). Given that hundreds of those incarcerated remain unvaccinated
 28 and the continued uncertainty regarding the duration of immunity and protection

1 from variants, there is no significant change in circumstances that would warrant the
2 dissolution of the Preliminary Injunction.

3 The BOP's own guidance supports the necessity of the Preliminary Injunction
4 to ensure home confinement continues. As recently as April 13, 2021, the BOP
5 stated that "*it is imperative to continue reviewing at-risk inmates for placement on*
6 *home confinement in accordance with the CARES Act and guidance from the*
7 *Attorney General.*" Declaration of Oliver Rocos ("Rocos Decl.") Ex. 1 at 1. As
8 this Court is aware, the Attorney General's guidance was that the BOP "maximize
9 appropriate transfers to home confinement of all appropriate inmates." *Id.*, Ex. 2 at
10 1. Since the BOP is clear that home confinement remains a cornerstone of its
11 response to the pandemic, Respondents' assertion that judicial oversight of its home
12 confinement process is no longer required should be disregarded.

13 Respondents' motion is simply the culmination of their ongoing efforts to
14 thwart the Court's order that they fulfill their obligations to protect the inmates in
15 their care. Having consistently violated the Preliminary Injunction, Respondents
16 hope through this motion to avoid ever having to comply with it. That attempt at an
17 end run around their violations should be denied.

18 **II. FACTUAL BACKGROUND¹**

19 **A. Procedural History**

20 On July 14, 2020, the Court granted Petitioners' motion for a preliminary
21 injunction to require Respondents to make "full and speedy use of their authority
22 under the CARES Act and evaluate each class member's eligibility for home
23 confinement which gives substantial weight to the inmate's risk factors for severe
24 illness and death from COVID-19 based on age (over 50) or Underlying Health
25
26

27 ¹ Although the Court is familiar with the background, Petitioners repeat the
28 essential facts for ease of reference and refer to further facts as necessary below.

1 Conditions.”² (Dkt. No. 45 at 49 (the “Preliminary Injunction”).) The Court also
 2 provisionally certified a class of individuals comprising “all current and future
 3 people in post-conviction custody at FCI Lompoc and USP Lompoc over the age of
 4 50, and all current and future people in post-conviction custody at FCI Lompoc and
 5 USP Lompoc of any age” with certain underlying health conditions. (*Id.* at 48.)

6 Following the Preliminary Injunction, Respondents began identifying class
 7 members using SENTRY records and reviewing class members for home
 8 confinement. (*See generally* Dkt. Nos. 50-51.) The decisions regarding home
 9 confinement with respect to each class member are documented in review
 10 worksheets (the “Review Worksheets”) that Respondents filed for each class
 11 member denied home confinement. (*See, e.g.*, Dkt. No. 78 at Exs. A-B.)

12 On September 10, 2020, Petitioners filed a motion to enforce compliance with
 13 the preliminary injunction, including on the basis Respondents were not promptly
 14 transferring those granted home confinement. (Dkt. No. 93.) The Court granted
 15 that motion on October 8, 2020. (Dkt. No. 105.) Nevertheless, the parties continued
 16 to dispute additional issues regarding Respondents’ compliance with the Preliminary
 17 Injunction. On December 29, 2020, following the November 24, 2020 Status
 18 Conference, the Court referred the parties’ disputes to the Honorable Pedro V.
 19 Castillo, the assigned magistrate judge on the matter. (Dkt. No. 151).

20 The parties briefed the matter and a hearing was held on March 19, 2021,
 21 following which the parties were ordered to submit supplemental briefing. (Dkt.
 22 Nos. 163, 174, 180, 188.) The parties submitted that supplemental briefing by April
 23 5, 2021. (Dkt. Nos. 188, 201-202, 205-207.)

24 In support of Petitioners’ supplemental briefing, Petitioners submitted under
 25 seal a series of excel spreadsheets that summarized the Review Worksheets for 285
 26

27 ² Petitioners’ *Ex Parte* Application for a Temporary Restraining Order was
 28 converted into an expedited motion for a preliminary injunction. (Dkt. Nos. 41, 42.)

1 inmates denied home confinement, together with citations to the respective Review
 2 Worksheets. (Dkt. No. 202.)³ Among many other issues, the evidence showed that
 3 Respondents were failing to comply with the Preliminary Injunction by denying
 4 home confinement on the basis inmates had not served “enough” time or had spent
 5 convictions for violent crimes committed decades ago. (Dkt. No. 201 at 1-2.) Even
 6 more concerning was the fact that class members were being denied home
 7 confinement in whole or in part on the basis they were not old enough or did not
 8 have enough “COVID Risk Factors” or “No Underlying Health Conditions” even
 9 though, by virtue of being members of the provisional class, *this Court already had*
 10 *found them to be at risk of severe harm or death from COVID-19.*⁴ (Dkt. No. 201 at
 11 3-4.) One inmate was denied solely on the basis Respondents contend he has “No
 12 COVID Risk Factors” (Dkt. No. 201 at 4), notwithstanding that this Court already
 13 determined that his age, 51, means that he is vulnerable to suffering a severe illness
 14 or even death from COVID-19. (Dkt. No. 45 at 48.)

15 On April 29, 2021, Magistrate Judge Castillo issued a Report and
 16 Recommendation (the “Recommendation”). (Dkt. No. 229.) Magistrate Judge
 17 Castillo determined that Respondents were not complying with the Preliminary
 18 Injunction and recommended this Court issue a further order requiring Respondents
 19 to take specific steps in order to bring their home confinement process into
 20 alignment with the applicable guidance—something they should have been doing all
 21 along. (*Id.*) Respondents objected to the Recommendation and Petitioners opposed
 22 that objection, seeking that it be entered in full. (Dkt. Nos. 245, 253.) The

23 _____
 24 ³ Petitioners identified the 285 individuals in their filings out of the many
 25 hundreds denied home confinement because they did not have any demerits in the
 26 majority of categories of information in the Review Worksheets. (Dkt. No. 201 at
 27 1.) They are identified for illustrative purposes only, and do not reflect the full
 28 range of issues identified in Respondents’ home confinement review process. (*Id.*)

⁴ The full range of Respondents’ violations are identified in Petitioners’ briefing
 regarding the motion to enforce. (*See* Dkt. Nos. 169, 180, and 201-202.)

1 Recommendation remains pending.

2 **B. Home Confinement Guidance**

3 As this Court is aware, home confinement was recognized at the outset of the
 4 pandemic as a valuable tool in protecting the health and lives of inmates. As early
 5 as March 26, 2020, then Attorney General William Barr issued a memorandum (the
 6 “March 26 Memo”) directing the BOP to prioritize the use of “various statutory
 7 authorities to grant home confinement for prisoners seeking transfer in connection
 8 with the COVID-19 pandemic.” Rocos Decl., Ex. 3 at 1. Congress passed the
 9 CARES Act the following day, and in so doing authorized the Attorney General to
 10 lengthen the maximum amount of time a prisoner may be placed on home
 11 confinement pursuant to § 3624(c)(2) upon finding “emergency conditions will
 12 materially affect the functioning of the [BOP].” CARES Act, Pub. L. No. 116-136,
 13 § 12003(b)(2).

14 In an April 3, 2020 memorandum (the “April 3 Memo”), then Attorney
 15 General Barr exercised his power under the CARES Act and declared that
 16 “emergency conditions are materially affecting the functioning of the BOP.” Rocos
 17 Decl., Ex. 2. That memorandum further directed the BOP to continue processing
 18 inmates eligible for home confinement under pre-CARES Act standards, to “expand
 19 the cohort of inmates who can be considered for home release . . . to the most
 20 vulnerable inmates at the most affected facilities,” and to “immediately review all
 21 inmates who have COVID-19 risk factors, as established by the CDC.” *Id.* at 1.
 22 The BOP was ordered to “***immediately maximize appropriate transfers to home***
 23 ***confinement of all appropriate inmates***”. *Id.* (emphasis added).

24 Various guidance has been issued since that date regarding the criteria the
 25 BOP should consider when conducting home confinement reviews, including
 26 memoranda on April 22, 2020, May 8, 2020, and November 16, 2020. (Dkt. No.
 27 169-1, Exs. 4-6.) Crucially, however, the Attorney General’s April 3 Memo has
 28 never been withdrawn and home confinement continues to be a critical tool the BOP

1 must use to protect inmates.

2 As recently as April 13, 2021, the BOP reaffirmed that COVID-19 presents a
 3 life-threatening risk to vulnerable inmates in prison and restated that as a part of its
 4 “*ongoing effort to protect the health and safety of staff and inmates during the*
 5 *COVID-19 pandemic, it is imperative to continue reviewing at-risk inmates for*
 6 *placement on home confinement in accordance with the CARES Act and*
 7 *guidance from the Attorney General*” (the “April 13 Memo”). Rocos Decl., Ex. 1
 8 at 1 (emphasis added). That guidance identified factors the BOP should consider for
 9 home confinement. *Id.* It does not, however, refer to vaccinations at all, much less
 10 state that inmates who have been vaccinated or offered the vaccine are not eligible
 11 for home confinement. *Id.*

12 C. Inmates Remain At Serious Risk Of Harm From COVID-19

13 As set out in the contemporaneously filed Opposition to Respondents’ Motion
 14 for Summary Judgment, while COVID-19 cases at Lompoc have remained low for
 15 some time inmates remain at a substantial risk of severe illness or death from a
 16 further outbreak in the facility and widespread additional harm. (*See generally* Dkt.
 17 No. 257.) Since the outset of the pandemic more than a year ago, Respondents have
 18 failed to take the basic steps necessary to prevent the spread of COVID-19 and there
 19 is every chance that another severe and deadly outbreak could occur at any time.

20 III. LEGAL STANDARD

21 A party seeking to modify or dissolve a preliminary injunction bears the
 22 burden of establishing “a significant change in facts” justifying that relief. *Karnoski*
 23 *v. Trump*, 926 F.3d 1180, 1198 (9th Cir. 2019). District courts must “take all the
 24 circumstances into account in determining whether to modify or vacate a prior
 25 injunction or consent decree.” *Bellevue Manor Associates v. United States*, 165
 26 F.3d 1249, 1256 (9th Cir.1999). In particular, courts must determine “whether the .
 27 . . injunction has outlived its purpose and usefulness—in other words, whether
 28 evolving circumstances have resolved the underlying problems, thereby rendering

1 the injunction unnecessary.” *Orantes-Hernandez v. Gonzales*, 504 F. Supp. 2d 825,
2 830–31 (C.D. Cal. 2007), *aff’d sub nom. Orantes-Hernandez v. Holder*, 321 F.
3 App’x 625 (9th Cir. 2009).

4 **IV. THE PRELIMINARY INJUNCTION SHOULD REMAIN IN PLACE**

5 **A. The Preliminary Injunction Is Necessary To Protect Inmates From**
6 **The Unconstitutional Risk Of Harm At Lompoc**

7 As set forth in detail in Petitioners’ contemporary Opposition to Respondents’
8 Motion for Summary Judgment, inmates at Lompoc remain at serious risk of harm
9 from COVID-19. (Dkt. No. 257.) Even now, after more than 1,000 inmates
10 contracted COVID-19 and at least four died from it, Lompoc’s testing, medical care,
11 and hygiene processes all remain far below the minimum necessary to provide a safe
12 environment. (*Id.* at 7-12.) Respondents’ deliberate indifference is manifest not
13 only from their repeated failures to comply with the Preliminary Injunction, but
14 from their refusal to implement those necessary changes. (*Id.* at 21-24.)

15 In particular, while Respondents tout their vaccination program, 41.4% of
16 inmates remain unvaccinated and Respondents have failed to provide a vaccination
17 program that offers the minimum necessary vaccine education. (*Id.* at 15-19.)
18 Many of those who are unvaccinated are vaccine hesitant due to their serious
19 underlying conditions—the exact same conditions that put them at a high risk of
20 severe illness or death from COVID-19. Yet, Respondents have refused to offer
21 them the education and medical assurance they need in order to make an informed
22 decision. (*Id.*) Dr. Venters, the Court-appointed expert, has concluded that
23 Respondents’ vaccination program has resulted in a “pool of extremely high-risk,
24 unvaccinated patients,” who remain at a very substantial risk of severe harm from
25 COVID-19. (*Id.* at 15.)

26 Respondents’ citations to cases concerning the denial of compassionate
27 release to inmates who received or were offered the vaccine are inapposite and serve
28 merely to highlight the flaws in their vaccination program. Mot. at 5-6. Petitioners

1 are not seeking compassionate release, merely relief that would ensure their
2 confinement is constitutional. Even so, not one of the authorities Respondents cite
3 state that an individual can be denied home confinement where they refuse a vaccine
4 *even when they have not been provided with sufficient information to make an*
5 *informed vaccination decision. See United States v. Jackson*, 2021 WL 806366, at
6 *1 (D. Minn. Mar. 3, 2021) (“The record does not bear out Jackson’s claim that he
7 was not provided with sufficient information about the vaccine”); *United States v.*
8 *Figueroa*, 2021 WL 1122590 at *4-5 (E.D. Cal. Mar. 24, 2021) (noting defendant
9 had failed to show how the advice he did receive justified his refusal to accept the
10 vaccine); *United States v. Austin*, 2021 WL 1137987, at *2 & n.1 (E.D. Mich. Mar.
11 25, 2021) (noting defendant refused the vaccine without justification without stating
12 what information he received).

13 The Preliminary Injunction was imposed precisely because Respondents were
14 failing to take steps to protect those who were most at risk of harm from COVID-19.
15 Since the evidence is clear that Respondents are still failing to protect those
16 individuals who remain at risk, there is no “significant change in facts” that would
17 justify the dissolution of the Preliminary Injunction.

18 **B. Home Confinement Remains A Critical Part Of The BOP’s**
19 **Response To The COVID-19 Pandemic**

20 Further supporting the ongoing necessity of the Preliminary Injunction is the
21 fact that despite a year having passed since the pandemic began, the BOP’s April 13
22 Memo is clear that home confinement remains a cornerstone of the BOP’s response.
23 Far from home confinement being obsolete in light of developing facts, the BOP
24 states that “*it is imperative to continue reviewing at-risk inmates for placement on*
25 *home confinement in accordance with the CARES Act and guidance from the*
26 *Attorney General.*” Rocos Decl., Ex. 1 at 1. The Attorney General’s exhortation to
27 the BOP that it “maximize appropriate transfers to home confinement of all
28 appropriate inmates” remains controlling guidance. *Id.*, Ex. 2 at 1. According to the

1 BOP itself, home confinement is just as crucial to protecting inmates from COVID-
2 19 as it ever was. Respondents are under a clear obligation to continue to review at
3 risk inmates for home confinement and to grant it where appropriate. In the absence
4 of any change in that fact, the Preliminary Injunction should be maintained.

5 **C. Respondents’ Motion Is Simply Another Effort To Circumvent Its**
6 **Home Confinement Obligations**

7 Finally, the fact that Respondents filed this motion to dissolve the Preliminary
8 Injunction without having actually complied with it demonstrates their contempt for
9 it and home confinement as a whole and their determination to deny this life-saving
10 measure to as many inmates as possible.

11 As set forth in Petitioners’ multiple motions to enforce the Preliminary
12 Injunction, Respondents have so far denied home confinement on a broad range of
13 apparently baseless reasons, including that inmates: have not served enough time;
14 have stale, prior convictions for violent crimes; have a PATTERN score above
15 minimum; are not old enough; do not have enough underlying conditions; have a
16 “serious” current offense, albeit not violent or sexual in nature; have an alleged gang
17 affiliation; or any other basis they can identify such as a concern it would “diminish
18 the seriousness of the offense” or because the inmate “had close ties to Mexico.”⁵
19 (See Dkt. No. 201.) Even when Respondents have granted home confinement, they
20 have repeatedly delayed inmates’ transfer for months. (See, e.g., Dkt. No. 159, Ex.
21 A (noting inmate was still incarcerated at Lompoc despite having been granted
22 home confinement five months earlier).) Respondents’ tactics in minimizing home
23 confinement, rather than “maximizing” it as they are required to do, have been
24 highly effective. Although 2,083 medically vulnerable inmates have been reviewed
25 for home confinement, only 141—less than 7%—were granted it. Mot. at 3.

26
27 ⁵ Full details of those improper bases for denying home confinement are contained
28 in Petitioners’ prior filings. (Dkt. Nos. 93, 169, 180, 201-202, 253.)

1 This Court has found that Respondents violated the Preliminary Injunction in
2 delaying transfer of inmates, (Dkt. No. 105), yet that tactic still continues today.
3 (See Dkt. No. 243 ¶ 12 (home confinement reviews for two inmates are “paused”
4 while they await “relocation approval”).) Magistrate Judge Castillo also found *just*
5 *weeks ago* that Respondents have violated the Preliminary Injunction in multiple
6 ways by improperly considering irrelevant factors and information. (Dkt. No. 229.)

7 Properly understood, Respondents’ motion is simply yet another attempt to
8 evade the requirements of the Preliminary Injunction by reading into it an exception
9 for inmates who have been vaccinated or who have even been offered the
10 vaccination. *But there is no basis for that argument.* Respondents do not point to a
11 single piece of guidance anywhere that says vaccinations are even relevant to home
12 confinement decisions, let alone any guidance sufficient to counteract the clear
13 mandate of the Attorney General and the BOP itself that home confinement must be
14 ongoing. No such guidance exists.

15 In sum, dissolving the Preliminary Injunction now would merely allow
16 Respondents to escape their repeated, widespread violations of the Preliminary
17 Injunction and to continue to flout their obligation to consider home confinement for
18 suitable individuals. Respondents should not be permitted to make an end run
19 around this Court’s orders.

20 **V. CONCLUSION**

21 For the above reasons, Petitioners respectfully request the Court deny
22 Respondents’ motion.
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1 DATED: June 8, 2021

Respectfully submitted,

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