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16 UNITED STATES DISTRICT COURT
17
18 FOR THE CENTRAL DISTRICT OF CALIFORNIA
19
20 WESTERN DIVISION

20 LANCE AARON WILSON, *et al.*,
21 Plaintiff-Petitioners,
22 v.
23 FELICIA L. PONCE, *et al.*,
24 Defendant-Respondents.

No. CV 20-4451-MWF-MRW

**DEFENDANTS-RESPONDENTS'
[PROPOSED] STATEMENT OF
UNCONTROVERTED FACTS AND
CONCLUSIONS OF LAW IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Hearing Date: August 30, 2021
Time: 10:00 a.m.
Courtroom: 5A

Honorable Michael W. Fitzgerald
United States District Judge

Defendants-Respondents Felicia Ponce and Michael L. Carvajal (“Respondents”) submit the following proposed Separate Statement of Uncontroverted Facts and Conclusions of Law in support of Respondents’ Motion for Summary Judgment.

STATEMENT OF UNCONTROVERTED FACTS (“UF”)

<u>UF</u>	UNDISPUTED FACT	SUPPORTING EVIDENCE
1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16.	Victoria Morrison, the Quality Improvement/Infection Prevention & Control Consultant at FCI Terminal Island, and Ronell Prioleau, the Associate Warden at FCI Terminal Island, believe that the BOP has followed guidance and directives from the CDC, World Health Organization (WHO), the Office of Personnel Management (OPM), the Department of Justice (DOJ), and the White House in responding to the COVID-19 pandemic.	Declaration of Victoria Morrison filed concurrently herewith (“Morrison Decl.”) ¶ 5, Ex. 1; Declaration of Ronell Prioleau filed at Dkt. No. 25-1 at ¶ 7; Declaration of Jeffery Beard filed concurrently herewith (“Beard Decl.”) ¶ 22.
17. 18. 19. 20. 21. 22. 23.	2. On August 31, 2020, the BOP released a COVID-19 Pandemic Response Plan that compiles previous guidance, including all phases of its Action Plan, and provides a comprehensive document with specific guidance for limiting the spread of COVID-19 at BOP institutions.	Morrison Decl. ¶ 5, Ex. 1; www.bop.gov/foia/docs/overview_of_COVID_Pandemic_Response_Plan_08312020.pdf
24. 25. 26. 27. 28.	3. The COVID-19 Pandemic Response Plan contains eleven modules incorporating guidance from the Centers for Disease Control (CDC), World Health Organization	Morrison Decl. ¶ 5, Ex. 1; www.bop.gov/foia/docs/overview_of_COVID_Pandemic_Response_Plan_08312020.pdf

1	(WHO), and the Department of Justice	
2	(DOJ) and those modules are updated from	
3	time to time in accordance with guidance	
4	from the CDC, WHO, and DOJ.	
5	4. Victoria Morrison, the Quality	Morrison Decl. ¶ 5.
6	Improvement/Infection Prevention &	
7	Control Consultant at FCI Terminal Island,	
8	believes that FCI Terminal Island has been	
9	operating in compliance with the CDC's	
10	guidance and with the BOP's COVID-19	
11	Pandemic Response Plan.	
12	5. Victoria Morrison, the Quality	Morrison Decl. ¶ 20.
13	Improvement/Infection Prevention &	
14	Control Consultant responsible for FCI	
15	Terminal Island, believes that FCI Terminal	
16	Island has prevented further COVID-19	
17	deaths, hospitalizations, and large scale	
18	outbreaks, like the one that occurred in the	
19	spring of 2020, by implementing a host of	
20	measures, including broad-based testing and	
21	adherence to evolving CDC guidelines for	
22	infection prevention and control (such as	
23	cohorting and isolation procedures enacted	
24	after testing every inmate).	
25	6. Dr. Jeffery Beard believes that FCI	Beard Decl. ¶¶ 26, 52, 61, 125
26	Terminal Island has been operating in	and 131.

	compliance with the CDC's guidance and the BOP's Pandemic Response Plan.	
7.	Epidemiologist Asma Tekbali believes FCI Terminal Island has been following CDC guidelines and the BOP's Pandemic Response Plan.	Declaration of Asma Tekbali filed concurrently herewith ("Tekbali Decl.") ¶ 45.
8.	COVID-19 infection rates increased throughout California from November 2020 through February 2021.	California Department of Public Health website: https://covid19.ca.gov/state-dashboard
9.	Los Angeles County experienced over 1.2 million confirmed COVID-19 cases to date.	https://coronavirus.jhu.edu/us-map
10.	California has had over 3.7 million total confirmed positives to date.	https://covid19.ca.gov/
11.	Respondents retained epidemiologist Asma Tekbali to opine as an expert on FCI Terminal Island's infection control and testing procedures.	Tekbali Decl. ¶ 5.
12.	Epidemiologist Asma Tekbali believes that in contrast to the uncontrolled winter spread of COVID-19 in California, COVID-19 cases were well controlled over the December-January period at FCI Terminal Island as no major outbreak emerged.	Tekbali Decl. ¶ 11.
13.	Epidemiologist Asma Tekbali believes that no major outbreak emerged within FCI	Tekbali Decl. ¶ 11.

1		Terminal Island in early 2021, and nothing	
2		comparable to the rates of infection that	
3		experienced in Southern California over that	
4		period.	
5	14.	Epidemiologist Asma Tekbali believes that	Tekbali Decl. ¶ 11
6		the lack of a major outbreak at FCI	
7		Terminal Island in December 2020-January	
8		2021 despite the uncontrolled cases outside	
9		the facility in California during that period	
10		provides further proof that the infection	
11		control measures FCI Terminal Island	
12		implemented have been effective and	
13		proper.	
14	15.	FCI Terminal Island began screening	Prioleau Decl. ¶¶ 9, 35-49;
15		inmates for COVID-19 symptoms beginning	Morrison Decl. ¶ 8.
16		in March 2020.	
17	16.	The first confirmed inmate case of COVID-	Morrison Decl. ¶ 8;
18		19 at FCI Terminal Island was on April 10,	
19		2020.	
20	17.	In April 2020, it was difficult for any	Morrison Decl. ¶ 8.
21		institution to obtain COVID-19 tests, let	
22		alone in large numbers.	
23	18.	With the assistance of the Los Angeles	Morrison Decl. ¶ 8; Prioleau
24		County Department of Public Health	Decl. ¶ 54.
25		("LACDPH"), FCI Terminal Island tested	
26		all inmates for COVID-19 starting on April	
27		23, 2020	
28			

19.	The LACDPH provided the BOP with the testing kits and nasal swabs needed to conduct these mass tests and the LACDPH laboratory processed all of the tests.	Morrison Decl. ¶ 8.
20.	After the results of the initial round of tests were received from the LACDPH, inmates testing negative were separated from those who tested positive and the positive inmates were isolated.	Morrison Decl. ¶ 8.
21.	The BOP repeatedly re-tested the negative inmates repeatedly from May-July 2020, until, in consultation with the LACDPH, it was determined that these regular re-tests were no longer necessary.	Morrison Decl. ¶ 8.
22.	Since the mass testing in April and May of 2020, inmate testing at FCI Terminal Island has been conducted in accordance with the BOP's COVID-19 Pandemic Response Plan Module 3, <i>Screening and Testing</i> .	Morrison Decl. ¶ 9.
23.	Section 2 of Module 3 of the COVID-19 Pandemic Response Plan requires that symptomatic inmates be isolated and tested expeditiously and asymptomatic inmates with known or suspected contact with a COVID-19 case be quarantined and tested expeditiously.	Morrison Decl. ¶ 9, Ex. 1 at page ¹ 51.

¹ References to page numbers are to the numbers at the bottom right of each page of the exhibits to Ms. Morrison's Declaration.

1	24.	Section 2 of Module 3 of the COVID-19	Morrison Decl. ¶ 9, Ex. 1 at page
2		Pandemic Response Plan provides that	52 (“expanded testing of all
3		expanded testing of all inmates in an entire	inmates in an entire housing unit
4		open bay housing unit should be considered	should be considered – especially
5		as part of a robust contact tracing.	if the unit has open sleeping areas
6			(rather than cells with solid walls
7			and doors”).
8	25.	FCI Terminal Island continues to conduct	Morrison Decl. ¶ 10, Ex. 1 at
9		testing in accordance with the BOP’s testing	page 58 (chart showing testing
10		protocols, which include testing all	required for community returns,
11		incoming and outgoing inmates in	intakes, and inmates leaving a
12		accordance with BOP Pandemic Response	BOP facility); Ex. 1 at page 72
13		Plan Module 4, Inmate Isolation and	(“All BOP quarantine categories
14		Quarantine.	utilize a test-in/test-out strategy
15			with a quarantine duration of at
16			least 14 days (the incubation
17			period of the SARS-CoV2
18			virus.”)
19	26.	FCI Terminal Island also has protocols to	Morrison Decl. ¶ 10, Ex. 1 at
20		determine when to test inmates within the	pages 51-52.
21		institution’s general population because of	
22		contact investigation.	
23	27.	The testing of all inmates releasing or	Morrison Decl. ¶ 10.
24		transferring out of FCI Terminal Island	
25		serves as random surveillance testing of the	
26		institution’s general population.	
27			
28			

1	28.	As part of intake procedures, all inmates	Morrison Decl. ¶ 11, Ex. 1 at
2		who entered FCI Terminal Island after the	pages 58 (chart showing testing
3		initial outbreak entered quarantine units and	required for community returns,
4		were tested as determined by existing BOP	intakes, and inmates leaving a
5		testing protocols.	BOP facility), 72-73, and 84-85.
6	29.	After the spring 2020 outbreak, when	Morrison Decl. ¶ 11.
7		inmate movement resumed, FCI Terminal	
8		Island tested all incoming inmates, isolated	
9		positive inmates, quarantined negative	
10		inmates, and re-tested quarantined inmates	
11		on or after the 14th day of their quarantine	
12		period.	
13	30.	These inmates were transferred into the	Morrison Decl. ¶ 11, Ex. 1 at
14		institution's general population only if they	pages 84-85.
15		either had cleared quarantine by having a	
16		repeated negative test result or, if positive,	
17		after completing the isolation period and	
18		being cleared by medical staff.	
19	31.	Incoming inmates have no contact with	Morrison Decl. ¶ 11.
20		inmates in the institution's general	
21		population until they clear quarantine or	
22		isolation.	
23	32.	As of July 26, 2021, FCI Terminal Island	Morrison Decl. ¶ 12.
24		has conducted over 2,704 COVID-19 tests	
25		on the 705 inmates at FCI Terminal Island.	
26		These results do not include testing that was	
27		conducted at outside facilities.	
28			

1	33.	All ten of the FCI Terminal Island inmates	Morrison Decl. ¶ 13.
2		who died of COVID-related illness	
3		contacted the disease during the April-May	
4		2020 outbreak at FCI Terminal Island.	
5	34.	FCI Terminal Island has not had an inmate	Morrison Decl. ¶ 14.
6		hospitalized for COVID-related illness since	
7		May, 2020.	
8	35.	From January 2021 through July 19, 2021,	Morrison Decl. ¶¶ 15, 19.
9		FCI Terminal Island did not have a single	
10		lab confirmed COVID-19 case in its general	
11		population.	
12	36.	Victoria Morrison believes that FCI	Morrison Decl. ¶ 20.
13		Terminal Island has prevented further	
14		COVID-19 deaths, hospitalizations, and	
15		large scale outbreaks, like the one that	
16		occurred in the Spring of 2020, by	
17		implementing a host of measures, including	
18		broad-based testing and adherence to	
19		evolving CDC guidelines for infection	
20		prevention and control (such as cohorting	
21		and isolation procedures enacted after	
22		testing all inmates).	
23	37.	There are currently 13 inmate positive cases	Morrison Decl. ¶ 17.
24		at FCI Terminal Island, which were detected	
25		after three inmates in one housing unit were	
26		promptly tested after reporting symptoms.	

38.	Even though five inmates were symptomatic, after successive rounds of testing their entire housing unit, FCI Terminal Island identified eight asymptomatic cases.	Morrison Decl. ¶ 17.
39.	All of these inmates have been isolated and are receiving daily symptom screenings.	Morrison Decl. ¶ 17.
40.	None of these inmates with newly identified COVID-19 cases has been hospitalized.	Morrison Decl. ¶ 18.
41.	Of the thirteen inmates who are positive, seven had refused the vaccine, two were identified as COVID-recovered and refused vaccination, and four were vaccinated.	Morrison Decl. ¶ 18.
42.	After repeated testing, FCI Terminal Island has verified that the cases have been contained within a single housing unit.	Morrison Decl. ¶ 17.
43.	FCI Terminal Island has two current staff cases, one involving an individual who had had not been at the institution since July 1 and testing positive on July 13, and another involving a correctional officer.	Morrison Decl. ¶ 16
44.	After the entire housing unit that officer had worked in was tested, there were no positive cases in that housing unit.	Morrison Decl. ¶ 16.
45.	The BOP's COVID-19 Pandemic Response Plan, Module 11, Employee Management, provides guidance for staff testing,	Morrison Decl., ¶ 21, Ex. 1 at pages 122-123.

	including the identification of testing sites in the local community, requiring staff who test positive to report their diagnosis to the BOP, and indications and priorities for testing.	
46.	The BOP's Pandemic Response Plan requires staff to report positive test results, requires asymptomatic staff who test positive to wait at least 10 days before reporting to work, and sets forth an algorithm for when symptomatic staff may return to work (with staff who have been hospitalized being required to wait at least 20 days since the appearance of symptoms before they return to work.	Morrison Decl., ¶ 21, Ex. Pages 119-123 ("Asymptomatic staff who test positive for COVID-19 may return to work after 10 days have passed since first positive COVID-19 test") and 121 (Algorithm for Symptomatic BOP Staff).
47.	The BOP's procedures do not permit staff with positive test results to report to work until the appropriate CDC time-based guidance permits them to return.	Morrison Decl., ¶ 21, Ex. 1 at 119-121("Asymptomatic staff who test positive for COVID-19 may return to work after 10 days have passed since first positive COVID-19 test) and Algorithm for Symptomatic BOP Staff.
48.	As set forth in Section E of Module 11 of the Pandemic Response Plan, the BOP has established a nationwide contract with Quest Diagnostics to facilitate COVID-19 testing for all BOP employees, including those at	Morrison Decl. ¶ 22, Exhibit 1 at page 123.

	FCI Terminal Island, via self-swab collection kits.	
49.	Staff members that meet indications for testing specified in Module 11 can obtain a collection kit from the institution, complete the test, and return it via Federal Express to the Quest Diagnostics labs for processing.	Morrison Decl. ¶ 22, Exhibit 1 at page 123.
50.	Staff at FCI Terminal Island have access to their test results through a secure online portal provided by Quest Diagnostics.	Morrison Decl. ¶ 22, Exhibit 1 at page 123.
51.	Quest Diagnostics provides immediate notification to the staff member in the event of a positive test via a telephone call and overnight mail.	Morrison Decl. ¶ 22, Exhibit 1 at page 123.
52.	FCI Terminal Island employees are obligated to report positive test results and are directed not to report to work.	Morrison Decl. ¶ 21, Exhibit 1 at page 123.
53.	Quest Diagnostics also provides a nightly aggregate report of staff results to the BOP.	Morrison Decl. ¶ 22, Exhibit 1 at page 123.
54.	COVID-19 testing provided by Quest Diagnostics is available at no charge to BOP staff.	Morrison Decl. ¶ 22, Exhibit 1 at page 123.
55.	Furthermore, as individuals working in a prison, all FCI Terminal Island staff have access to COVID-19 testing free of charge from dozens of other locations in the community, including Rite-Aid and CVS	Morrison Decl. ¶ 23.

1		pharmacies and testing sites operated by the	
2		LACDPH.	
3	56.	FCI Terminal Island began administering	Morrison Decl. ¶ 24.
4		the Pfizer COVID-19 vaccine to inmates on	
5		December 28, 2020.	
6	57.	Pursuant to the BOP's COVID-19 Vaccine	Morrison Decl. ¶ 24, Ex. 4 at
7		Guidance, vaccinations were offered to FCI	page 238.
8		Terminal Island staff first to decrease the	
9		possible introduction of COVID-19 into the	
10		institution, and any remaining vaccinations	
11		were offered to FCI Terminal Island	
12		inmates.	
13	58.	As there were not enough remaining doses	Morrison Decl. ¶ 24, Ex. 4.
14		to vaccinate all of the facility's inmates in	
15		December 2020, the institution's medical	
16		staff offered vaccinations to inmates as set	
17		forth in the BOP's national guidance.	
18	59.	Priority for vaccination is based upon the	Morrison Decl. ¶ 24.
19		nature of the housing (prioritizing open bay	
20		over celled housing) and the inmate's	
21		individual priority levels (1 – 4) which take	
22		into account whether inmates are health	
23		service unit workers, their age, and whether	
24		they meet the CDC criteria for being at	
25		increased risk for severe illness from	
26		COVID-19.	

60.	In offering vaccines to staff and inmates in December 2020, FCI Terminal Island vaccinated 136 out of 285 staff and 131 inmates.	Morrison Decl. ¶ 25.
61.	Second doses were administered from January 18-22, 2021 and two inmates that had received the first dose refused the second dose.	Morrison Decl. ¶ 25.
62.	FCI Terminal Island received another 200 doses of the vaccine in February and administered it between February 16-19, 2021 to 19 additional staff members and 167 inmates. Second doses were administered the week of March 15, 2021.	Morrison Decl. ¶ 25.
63.	FCI Terminal Island received another 120 doses of vaccine and administered it from April 19-23, 2021.	Morrison Decl. ¶ 25.
64.	As of April 20, 2021, FCI Terminal Island had offered the vaccine to all inmates. FCI Terminal Island administered second doses from this shipment on or around May 1, 2021.	Morrison Decl. ¶ 25.
65.	All incoming inmates are offered the COVID-19 vaccine at their intake to the facility upon arrival.	Morrison Decl. ¶ 25.

66.	In addition, any inmates who previously refused the vaccine can change their mind and elect to receive it.	Morrison Decl. ¶ 25.
67.	Since late May 2021, FCI Terminal Island has been ordering vaccine doses as needed through an on-demand system that provides doses within 24 hours.	Morrison Decl. ¶ 25.
68.	FCI Terminal Island has taken robust measures to educate inmates about the COVID-19 vaccine. These measures include: (1) posters and flyers posted throughout the facility in English and Spanish; (2) vaccine information on FCI Terminal Island's computer system used by inmates; (3) town hall meetings about the vaccine; (4) a 24-hour period where the only program inmates could watch on televisions was a vaccine education video broadcast through the institution; (5) conducting vaccine education during chronic care encounters, urgent care encounters, annual exams, and other healthcare visits; (6) conducting one-on-one vaccine engagement with all inmates who refused the vaccine; and (7) conducting one-on-one sessions with the two visually impaired inmates at FCI Terminal Island.	Morrison Decl. ¶ 26.

69.	FCI Terminal Island has the ability to translate vaccine education materials into any language that is needed and one of the Infectious Disease Nurses at FCI Terminal Island speaks Spanish.	Morrison Decl. ¶ 27.
70.	Each time an inmate is offered the vaccine, he has the opportunity to ask questions about the vaccine.	Morrison Decl. ¶ 27.
71.	FCI Terminal Island has created a form that inmates may fill out to ask questions about the vaccine or to request the vaccine. The form goes directly to FCI Terminal Island's Infectious Disease Nurses for follow up.	Morrison Decl. ¶ 28.
72.	As a result of FCI Terminal Island's vaccine engagement efforts, approximately 53 inmates have reconsidered their prior vaccine refusals and have been vaccinated.	Morrison Decl. ¶ 29.
73.	FCI Terminal Island has also conducted extensive vaccine education for its staff, including emails, posters, screensavers, materials on the BOP's intranet site available to employees, talks by the executive staff, videos, and talks given by the Warden in conjunction with union leadership.	Morrison Decl. ¶ 30.
74.	As of July 26, 2021, FCI Terminal Island has fully vaccinated 409/705 (58%) of the	Morrison Decl. ¶¶ 30-31, Ex. 5.

	inmates and 192/285 (72%) of the staff. These figures do not include inmates or staff who received the vaccine elsewhere.	
75.	Of the 705 inmates housed at FCI Terminal Island as of July 26, 2021, 563 (i.e., 80.1%) have either received at least one dose of a COVID-19 vaccine, have recovered from COVID-19 per CDC Guidelines, or both.	Morrison Decl. ¶ 31.
76.	Of the 300 inmates at FCI Terminal Island who have never tested positive for COVID-19, 152 have been fully vaccinated, 8 have received their first dose of vaccine and are pending their second, 125 have refused, and 15 are scheduled for their first dose.	Morrison Decl., Ex. 5.
77.	Overall, 259 inmates have refused the vaccine.	Morrison Decl., Ex. 5.
78.	FCI Terminal Island has reduced its population by 522 inmates since March 2020.	Declaration of Maricela Bugarin filed concurrently herewith (“Bugarin Decl.”) ¶ 4.
79.	Of those, 78 were transferred to home confinement, 71 were granted compassionate release, 291 were transferred to residential re-entry centers, and 82 were released.	Bugarin Decl. ¶ 4.
80.	The BOP set temporary population targets for low and minimum-security institutions with open bay housing and is adhering to	Bugarin Decl. ¶¶ 5-6.

	those targets. FCI Terminal Island's current population of 704 inmates is below the revised COVID-19 target population set by the BOP.	
81.	Respondents' expert Dr. Jeffrey Beard visited and inspected FCI Terminal Island on September 10, 2020. Dr. Beard then visited and inspected the facility again on June 23, 2021, to assess its current operations and procedures.	Beard Decl. ¶¶ 53, 92.
82.	Dr. Beard determined and opined that on September 10, 2020 and again in June 2021, FCI Terminal Island was in compliance with the BOP's Pandemic Response Plan and CDC Guidance for Correctional and Detention facilities, including enacting quarantine protocol, mask wearing, and providing adequate soap.	Beard Decl. ¶¶ 44, 48-49, 52, 125, 131
83.	Dr. Beard determined and opined that FCI Terminal Island continues to evolve its practices regarding COVID mitigation as the CDC and the BOP's policies and guidelines are revised.	Beard Decl. ¶ 133.
84.	Dr. Beard determined and opined that FCI Terminal Island has an effective vaccination program in that 436 inmates and 189 staff have received the vaccine and all inmates	Beard Decl. ¶ 78.

	and staff had been offered the vaccine at the time of his visit.	
85.	Dr. Beard determined and opined that FCI Terminal Island’s vaccination rates are not unlike what has been observed across the country and that the staff rates were higher than other systems.	Beard Decl. ¶ 78.
86.	Dr Beard determined and opined that throughout multiple inspections by several different inspectors (LACDPH, Dr. Rowe, and two visits by Dr. Beard) from April 24, 2020 through June 23, 2021, FCI Terminal Island has been found to be in compliance with CDC Guidelines.	Beard Decl. ¶ 133.
87.	Ms. Tekbali bore the lead responsibility as an Infection Preventionist at Lenox Hill Hospital-Northwell Health and her hospital was at the center of dealing with New York City’s COVID-19 crisis	Tekbali Decl. ¶ 3.
88.	Ms. Tekbali determined and opined that “FCI Terminal Island has continuously followed guidance from the BOP and CDC for managing COVID-19 in correctional facilities.”	Tekbali Decl. ¶ 45.
89.	Ms. Tekbali determined and opined that “the steps that the BOP took to respond to, and control FCI Terminal Island’s outbreak went	Tekbali Decl. ¶ 48.

	beyond CDC and BOP guidance and the effectiveness of these actions are reflected today in the lack of major outbreaks at the facility.”	
90.	Ms. Tekbali determined and opined that “the recent small cluster of infections appears to not have spread beyond the unit, indicating the current measures to reduce transmission have been effective.”	Tekbali Decl. ¶ 48.
91.	Ms. Tekbali determined and opined that notes that the fact that 80% of FCI Terminal Island’s inmate population is either COVID-recovered or vaccinated provides a great foundation for herd immunity.	Tekbali Decl. ¶ 44.
92.	Ms. Tekbali determined and opined that “A new mass outbreak at the facility is highly unlikely.”	Tekbali Decl. ¶ 48.

[PROPOSED] CONCLUSIONS OF LAW

1. Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A plaintiff must adduce evidence “sufficient to support a verdict in [his] favor on every element of [his] claim for which [he] will carry the burden of proof.” *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989).

2. Reasonable efforts taken to reduce COVID-19 risk cannot rise to an Eighth Amendment violation even where those efforts were imperfect and the harm imposed by COVID-19 was “ultimately not averted.” *Wilson v. Williams*, 961 F.3d 829, 840 (6th Cir. 2020) (quoting *Farmer*, 511 U.S. at 844); *Valentine v. Collier*, 956 F.3d 797, 801 (5th

1 Cir. 2020); *Swain v. Junior*, 961 F.3d 1276, 1286 (11th Cir. 2020); *Cameron v.*
2 *Bouchard*, 815 Fed. Appx. 978, 986 (6th Cir. 2020) (rejecting plaintiffs’ attempts to
3 distinguish *Williams* because their “argument at most shows that defendants’ response
4 was imperfect”)

5 3. Broad latitude must be given to the local officials entrusted with protecting
6 the health and safety of its citizens. *Calvary Chapel Dayton Valley v. Sisolak*, No.
7 19A1070, 2020 WL 4251360 (U.S. July 24, 2020); *South Bay United Pentecostal*
8 *Church v. Newsom*, 140 S.Ct. 1613-1614 (May 29, 2020) (officials’ decisions “should
9 not be subject to second-guessing by an unelected federal judiciary, which lacks the
10 background, competence, and expertise to assess public health and is not accountable to
11 the people.”).

12 4. In a conditions-of-confinement case, a prison official violates the
13 prohibition against “cruel and unusual punishments,” U.S. Const. Amend. VIII, “only
14 when two requirements”—one objective, the other subjective—“are met.” *Farmer v.*
15 *Brennan*, 511 U.S. 825, 834, 846 (1994).

16 5. To satisfy the Eighth Amendment standards, prison officials must ensure
17 that inmates receive adequate food, clothing, shelter, and medical care, and must “take
18 reasonable measures to guarantee the safety of the inmates.” *Id.* at 832.

19 6. Inmates alleging Eighth Amendment violations based on unsafe prison
20 conditions must demonstrate that prison officials were deliberately indifferent to their
21 health or safety by subjecting them to a substantial risk of harm. *Id.* at 834.

22 7. Prison officials display a deliberate indifference to an inmate’s well-being
23 when they consciously disregard an excessive risk of harm to the inmate’s health or
24 safety. *Id.* at 838-40.

25 8. It is “only ‘the unnecessary and wanton infliction of pain’ ... [which]
26 constitutes cruel and unusual punishment forbidden by the Eighth Amendment. *Whitley*
27 *v. Albers*, 475 U.S. 612, 619 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670
28 (1977)).

1 9. To obtain injunctive relief, Petitioners must demonstrate that “prison
2 authorities’ *current* attitudes and conduct” meet the “high legal standard” of deliberate
3 indifference, and will continue to do so in the future. *Toguchi v. Chung*, 391 F.3d 1051,
4 1060 (9th Cir. 2004) (emphasis added); *Farmer*, 511 U.S. at 845.

5 10. The “objective prong” of the Eighth Amendment requires a showing that an
6 inmate has been deprived “of the minimal civilized measure of life’s necessities.”
7 *Farmer*, 511 U.S. at 834.

8 11. Petitioners cannot show that the BOP is depriving them of the “minimal
9 civilized measure of life’s necessities” or “violating contemporary standards of decency”
10 in addressing the risk of harm to inmates that COVID-19 presents.

11 12. “A prison official’s duty under the Eighth Amendment is to ensure
12 reasonable safety.” *Farmer*, 511 U.S. at 844.

13 13. Petitioners cannot meet the objective prong of the deliberate indifference
14 standard because FCI Terminal Island’s response is aligned with official guidance from
15 leading world health authorities for mitigating the risks associated with the pandemic.
16 FCI Terminal Island has vastly decreased any risk of outbreak by adhering to the CDC
17 guidelines. Measures including staff screening, mask wearing, and testing and quarantine
18 procedures for newly arriving inmates have kept new COVID-19 cases at bay.

19 14. FCI Terminal Island’s COVID-19 practices are the same measures that
20 society deems capable of reducing the risk of COVID-19 transmission, and thus reflect
21 the manner in which “today’s society chooses to tolerate” that risk. *Helling*, 509 U.S. at
22 36; *Grinis*, 2020 WL 2300313, at *3 (“These affirmative steps may or may not be the
23 best possible response to the threat of COVID-19 within the institution, but they
24 undermine an argument that the respondents have been actionably deliberately
25 indifferent to the health risks of inmates.”); *Nellson*, 2020 WL 3000961, at *8 (finding
26 no likelihood of success on merits of Eighth Amendment conditions-of-confinement
27 claim due to COVID-19 and noting that “[c]ompliance with CDC protocols does not
28

1 demonstrate that defendants are disregarding a substantial risk to inmate health or failing
2 to respond reasonably to the risks of COVID-19”).

3 15. “[A] mere difference of medical opinion is insufficient, as a matter of law,
4 to establish deliberate indifference.” *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir.
5 2004) (internal quotations marks and citation omitted)).

6 16. An inmate who the BOP offers “the ability and opportunity to take
7 measures to markedly reduce [their] risk of severe illness or death from COVID-19
8 while incarcerated,” but who rejects such measures, cannot reasonably continue to
9 accuse the BOP of being indifferent to their COVID-19 risk, to the point of violating the
10 Eighth Amendment by inflicting cruel and unusual punishment on them.

11 17. Petitioners also fail to satisfy the subjective prong of their Eighth
12 Amendment claim, which requires them to show that Respondents “kn[ew] of and
13 disregard[ed] an excessive risk to inmate health or safety.” *Farmer*, 511 U.S. at 837.

14 18. The subjective prong requires that “the official must both be aware of facts
15 from which the inference could be drawn that a substantial risk of serious harm exists,
16 and he must also draw the inference.” *Id.*

17 19. The Eighth Amendment does not require perfect results. *See id.* at 844
18 (“prison officials who actually knew of a substantial risk to inmate health or safety may
19 be found free from liability if they responded reasonably to the risk, even if the harm
20 ultimately was not averted”).

21 20. Petitioners cannot demonstrate that BOP officials *currently* are acting with
22 deliberate indifference and cannot show that today, Respondents are recklessly
23 disregarding an excessive risk to Petitioners’ safety, and that they will continue to do so
24 “into the future.” *Id.* at 845.

25 21. Where a prisoner “seeks injunctive relief to prevent a substantial risk of
26 serious injury from ripening into actual harm, the subjective factor . . . should be
27 determined in light of the prison authorities’ current attitudes and conduct[.]” *Id.* at 845
28 (internal quotation marks omitted).

1 21. BOP officials have not acted with deliberate indifference to the risk that
2 COVID-19 poses to inmate populations; rather, they have taken aggressive and
3 appropriate measures to abate that risk at FCI Terminal Island.

4 22. Although Petitioners and Respondents have minor fact disputes over the
5 implementation about these measures, even if Petitioners' allegations are true, it does not
6 rise to the level of deliberate indifference. *See Wragg*, 2020 WL 2745247, at *21 (no
7 Eighth Amendment violation because there is "no evidence of Respondents' liable state
8 of mind" and noting "physical distancing is not possible in a prison setting, as Petitioners
9 urge, does not an Eighth Amendment claim make and, as such, Petitioners are not likely
10 to succeed on the merits"); *Money v. Pritzker*, 453 F.Supp.3d at 1131 (prisoner
11 petitioners have "no chance of success" as to deliberate indifference because of the
12 measures taken by the Illinois Department of Corrections).

13 23. Petitioners cannot succeed on their Eighth Amendment claim given the
14 actions taken by the BOP at FCI Terminal Island. *See Farmer*, 511 U.S. at 845
15 ("[P]rison officials who act reasonably cannot be found liable under the Cruel and
16 Unusual Punishments Clause."). There is no dispute of material fact that Respondents
17 acted with a high degree of care, and were not acting with deliberate indifference that
18 would transform conditions at FCI Terminal Island into an Eighth Amendment
19 "punishment."

20 24. The evidence demonstrates that Respondents acted with an extremely high
21 degree of care, and certainly were not acting with deliberate indifference that would
22 transform conditions at FCI Terminal Island into an Eighth Amendment "punishment."
23 *See Wilson v. Seiter*, 501 U.S. 294, 298, 300 (1991).

24 25. Petitioners have failed to exhaust administrative remedies and may not
25 bring suit for further injunctive relief regarding FCI Terminal Island's response to
26 COVID-19 until they have fulfilled the PLRA's exhaustion requirements. *Maronyan v.*
27 *Toyota Motor Sales, USA, Inc.*, 658 F.3d 1038, 1041-42 (9th Cir. 2011).

1 26. Respondents are entitled to summary judgment as to all of Petitioners'
2 claims.

3 27. Any Undisputed Fact which is deemed a Conclusion of Law shall be
4 considered a Conclusion of Law.

5
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Respectfully submitted,

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