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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

YONNEDIL CARROR TORRES; *et al.*,

Plaintiff-Petitioners,

v.

LOUIS MILUSNIC, *et al.*,

Defendants-Respondents.

No. CV 20-4450- CBM-PVCx

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

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

Honorable Consuelo B. Marshall
United States District Judge

Defendants-Respondents Louis Milusnic 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")

UF	UNDISPUTED FACT	SUPPORTING EVIDENCE
1.	Jessica Figlenski, the Central Office Quality Improvement/Infection Prevention & Control Consultant responsible for the Western Region within the Federal Bureau of Prisons (BOP), Lawrence Cross, the Health Services Administrator at the Federal Correctional Complex in Lompoc, California ("FCC Lompoc"), and James Engleman, the Associate Warden at FCC Lompoc, 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 Jessica Figlenski filed concurrently herewith ("Figlenski Decl.") ¶ 4, Exs. 1-3, 7-14; Declaration of James Engleman filed at Dkt. No. 25-2 at ¶¶ 51-87; Declaration of Lawrence Cross filed at Dkt. No. 25-1 at ¶¶ 15-33.
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	Figlenski Decl. ¶ 4, Exs. 1-3, 7-14; www.bop.gov/foia/docs/overview_of_COVID_Pandemic_Response_Plan_08312020.pdf

	guidance for limiting the spread of COVID-19 at BOP institutions.	
3.	The COVID-19 Pandemic Response Plan contains eleven modules incorporating guidance from the Centers for Disease Control (CDC), World Health Organization (WHO), and the Department of Justice (DOJ).	Figlenski Decl., Exs. 1-3, 7-14; Dkt. No. 25-1 ¶ 54; Dkt. No. 25-2 ¶¶ 15-16, 25.
4.	Jessica Figlenski, the Central Office Quality Improvement/Infection Prevention & Control Consultant responsible for the Western Region within the BOP, believes that FCC Lompoc has been operating in compliance with the CDC's guidance and with the BOP's COVID-19 Pandemic Response Plan.	Figlenski Decl. ¶¶ 4, 9, 27.
5.	Jessica Figlenski, the Central Office Quality Improvement/Infection Prevention & Control Consultant responsible for the Western Region within the BOP, believes that FCC Lompoc has prevented further COVID-19 outbreaks, like the one that occurred in the spring of 2020, and COVID-19 related deaths by implementing a host of measures, including broad-based testing and adherence to evolving CDC guidelines for infection prevention and control (such as	Figlenski Decl. ¶¶ 8-16.

	cohorting and isolation procedures enacted after testing every inmate).	
6.	Epidemiologist Asma Tekbali believes that FCC Lompoc effectively slowed the spread of COVID-19 through its infection control measures by collaborating with local health departments, adapting to and implementing pandemic guidance from the CDC and the BOP, constructing a COVID-19 hospital unit, and providing masks and materials for hand hygiene to inmates, and offering vaccination to essentially all of the inmates and staff.	Declaration of Asma Tekbali filed concurrently herewith ("Tekbali Decl.") ¶ 10, Conclusion ¶ 1.
7.	COVID-19 infection rates increased throughout California from November 2020 through February 2021.	New York Times website: www.nytimes.com/interactive/2020/us/california-coronavirus-cases.html
8.	Los Angeles County experienced over 1.2 million confirmed COVID-19 cases to date.	https://coronavirus.jhu.edu/us-map
9.	California has had over 3.6 million total confirmed positives to date.	https://covid19.ca.gov/
10.	Epidemiologist Asma Tekbali believes that the presence of 0 positive inmate cases at FCC Lompoc as of March 20, 2021 in contrast to the state of the COVID-19 pandemic in California is proof that FCC	Tekbali Decl. ¶ 10.

	Lompoc has effectively slowed the spread of COVID-19 and evidence that the BOP's infection control measures have been successful at FCC Lompoc.	
11.	Epidemiologist Asma Tekbali believes that no major outbreak emerged within FCC Lompoc in early 2021, and nothing comparable to the rates of infection that were experienced by the general populace outside the facility over that period.	Tekbali Decl. Conclusion ¶ 3.
12.	As of May 25, 2021, there are 0 inmate or staff COVID-19 cases at FCC Lompoc.	https://www.bop.gov/coronavirus/
13.	Epidemiologist Asma Tekbali believes that while positive tests occurred at FCC Lompoc earlier in 2021, they were limited to the intake of new inmates, and so did not lead to any new outbreaks in the general population at the facility, despite the large surge in COVID-19 rates during the same period outside the facility, which provides further proof that the infection control measures FCC Lompoc implemented have been effective and proper.	Tekbali Decl. Conclusion ¶ 3
14.	The first confirmed case of COVID-19 at FCC Lompoc was an inmate from USP Lompoc who was swabbed at the local hospital on March 26, 2020 and the positive	Figlenski Decl. ¶ 8.

	results were reported to FCC Lompoc on March 30, 2020.	
15.	After confirmation of the first case of COVID-19 at USP Lompoc, FCC Lompoc took immediate action and began conducting a contact investigation and screening and testing positively identified contacts.	Figlenski Decl. ¶ 8.
16.	Inmates found to test positive were isolated and exposed inmates were quarantined and monitored for symptoms.	Figlenski Decl. ¶ 8.
17.	Mass testing at FCI Lompoc took place on May 5, 2020.	Figlenski Decl. ¶ 9.
18.	COVID-19 negative inmates were cohorted in a dedicated unit at the USP (which has cells instead of open-bay dormitories) to prevent further transmission of the disease among those testing negative.	Figlenski Decl. ¶ 9.
19.	Since the mass testing in May of 2020, inmate testing at FCC Lompoc has been conducted in accordance with the BOP's COVID-19 Pandemic Response Plan Module 3, Screening and Testing.	Figlenski Decl. ¶ 9, Ex. 2.
20.	Section 2 of Module 3 of the COVID-19 Pandemic Response Plan requires that symptomatic inmates be isolated and tested	Figlenski Decl. ¶ 10, Ex. 2 at 29-30[1].

[1] References to page numbers are to the bold numbers at the bottom center of each page of the exhibits to Ms. Figlenski's Declaration.

	expeditiously and asymptomatic inmates with known or suspected contact with a COVID-19 case be quarantined and tested expeditiously.	
21.	Section 2 of Module 3 of the COVID-19 Pandemic Response Plan provides that expanded testing of all inmates in an entire open bay housing unit should be considered as part of a robust contact tracing.	Figlenski Decl. ¶ 10, Ex. 2 at 30 ("expanded testing of all inmates in an entire housing unit should be considered – especially if the unit has open sleeping areas (rather than cells with solid walls and doors)").
22.	FCC Lompoc continues to conduct testing in accordance with the BOP's testing protocols, which include testing all incoming and outgoing inmates in accordance with BOP Pandemic Response Plan Module 4, Inmate Isolation and Quarantine.	Figlenski Decl. ¶ 11, Ex. 2 at 27, 33 (chart showing testing required for community returns, intakes, and inmates leaving a BOP facility); Ex. 3 at 47 ("All BOP quarantine categories utilize a test-in/test-out strategy with a quarantine duration of at least 14 days (the incubation period of the SARS-CoV2 virus.")
23.	FCC Lompoc also has protocols to determine when to test inmates within the institution's general population because of contact investigation.	Figlenski Decl. ¶ 10, Ex. 2 at 29-30.
24.	The testing of all inmates releasing or transferring out of FCC Lompoc serves as	Figlenski Decl. ¶ 11.

	random surveillance testing of the institution's general population.	
25.	As part of intake procedures, all inmates who entered FCC Lompoc after the initial outbreak entered quarantine units and were tested as determined by existing BOP testing protocols.	Figlenski Decl. ¶ 12, Ex. 2 at 30, 36 (chart showing testing required for community returns, intakes, and inmates leaving a BOP facility); Ex. 3 at 50.
26.	No later than August 10, 2020, FCC Lompoc tested all incoming inmates, isolated positive inmates, quarantined negative inmates, and re-tested quarantined inmates on or after the 14th day of their quarantine period.	Figlenski Decl. ¶ 12.
27.	These inmates were transferred into the institution's general population only if they either had cleared quarantine by having a repeated negative test result or, if positive, after completing the isolation period and being cleared by medical staff.	Figlenski Decl. ¶ 12, Ex. 3 at 49-50.
28.	Incoming inmates have no contact with inmates in the institution's general population until they clear quarantine or isolation.	Figlenski Decl. ¶ 12.
29.	As of May 19, 2021, FCC Lompoc has conducted over 5,479 COVID-19 tests on 1,722 inmates.	Figlenski Decl. ¶ 13.

30.	All five of the FCC Lompoc inmates who died of COVID-related illness contacted the disease during the March-May 2020 outbreak at FCC Lompoc.	Figlenski Decl. ¶ 14.
31.	FCC Lompoc has not had an inmate hospitalized for COVID-related illness since August 20, 2020.	Figlenski Decl. ¶ 15.
32.	FCI Lompoc has not had a COVID-19 case in its general population since September 25, 2020.	Figlenski Decl. ¶ 16.
33.	USP Lompoc has not had a COVID-19 case in its general population since December 31, 2020.	Figlenski Decl. ¶ 16.
34.	The last lab-confirmed case of COVID-19 at FCC Lompoc occurred in FCC Lompoc's intake quarantine with a newly arriving inmate on March 26, 2021 and was detected as part of the BOP's intake quarantine process.	Figlenski Decl. ¶ 16.
35.	The BOP's COVID-19 Pandemic Response Plan, Module 11, Employee Management, provides guidance for staff testing, 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.	Figlenski Decl., ¶ 5, Ex. 1.

36.	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.	Figlenski Decl., Ex. 1 at 15 ("Asymptomatic staff who test positive for COVID-19 may return to work after 10 days have passed since first positive COVID-19 test) and 17 (Algorithm for Symptomatic BOP Staff)".)
37.	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.	Figlenski Decl., Ex. 1 at 15 ("Asymptomatic staff who test positive for COVID-19 may return to work after 10 days have passed since first positive COVID-19 test) and 17 (Algorithm for Symptomatic BOP Staff).")
38.	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 FCC Lompoc, via self-swab collection kits.	Figlenski Decl. ¶ 6, Exhibit 1 at page 19.
39.	Staff members that meet indications for testing specified in Module 11 can obtain a collection kit from the institution, complete	Figlenski Decl. ¶ 6, Exhibit 1 at page 19.

	the test, and return it via Federal Express to the Quest Diagnostics labs for processing.	
40.	Staff at FCC Lompoc have access to their test results through a secure online portal provided by Quest Diagnostics.	Figlenski Decl. ¶ 6, Exhibit 1 at page 19.
41.	Quest Diagnostics provides immediate notification to the staff member in the event of a positive test via a telephone call and overnight mail.	Figlenski Decl. ¶ 6, Exhibit 1 at page 19.
42.	FCC Lompoc employees are obligated to report positive test results and are directed not to report to work.	Figlenski Decl. ¶ 6, Exhibit 1 at page 19.
43.	Quest Diagnostics also provides a nightly aggregate report of staff results to the BOP.	Figlenski Decl. ¶ 6, Exhibit 1 at page 19.
44.	COVID-19 testing provided by Quest Diagnostics is available at no charge to BOP staff.	Figlenski Decl. ¶ 6, Exhibit 1 at page 19.
45.	During the initial outbreak at FCC Lompoc in the spring of 2020, the BOP's Infection Prevention staff coordinated a staff testing clinic with the local health department at a nearby local health clinic.	Figlenski Decl. ¶ 7.
46.	Furthermore, as individuals working in a prison, all FCC Lompoc staff have access to COVID-19 testing free of charge from dozens of other locations in the community, including Rite-Aid and CVS pharmacies.	Figlenski Decl. ¶ 7.

47.	FCC Lompoc administered its first doses of the Pfizer COVID-19 vaccine to inmates from December 28, 2020, through December 31, 2020.	Figlenski Decl. ¶ 17.
48.	Pursuant to the BOP's COVID-19 Vaccine Guidance dated December 28, 2020, vaccinations were offered to FCC Lompoc staff first to decrease the possible introduction of COVID-19 into the institution, and any remaining vaccinations were offered to FCC Lompoc inmates.	Figlenski Decl. ¶ 17, Ex. 5 at 61.
49.	As there were not enough remaining doses to vaccinate all of the facility's inmates, the institution's medical staff offered vaccinations to inmates as set forth in the BOP's national guidance.	Figlenski Decl. ¶ 17.
50.	Priority for vaccination is based upon the nature of the housing (prioritizing open bay over celled housing) and the inmate's individual priority levels (1 – 4) which take into account whether inmates are health service unit workers, their age, and whether they meet the CDC criteria for being at increased risk for severe illness from COVID-19.	Figlenski Decl. ¶ 17.
51.	In offering vaccines to inmates in December 2020, FCC Lompoc started offering	Figlenski Decl. ¶ 18.

	vaccines to inmates at the USP Camp and FCI as those living spaces consist of open-bay dorms.	
52.	In December 2020, all inmates at USP North Camp and South Camp were offered the vaccine and inmates at the FCI in J Dorm and K Dorm were officered the vaccine.	Figlenski Decl. ¶ 18.
53.	From December 28 through 31, 2020, medical staff at FCC Lompoc administered 429 doses of the Pfizer-BioNTech COVID-19 Vaccine ("Pfizer vaccine").	Figlenski Decl. ¶ 18.
54.	On March 1, 2021, FCC Lompoc received a second batch of vaccine. This batch of vaccine was the Moderna vaccine. FCC Lompoc received 600 doses.	Figlenski Decl. ¶ 19.
55.	On April 23, 2021, FCC Lompoc received another batch of the Pfizer vaccine. FCC Lompoc received 110 doses.	Figlenski Decl. ¶ 20.
56.	As of April 26, 2021, FCC Lompoc had offered the vaccine to all inmates at FCC Lompoc, with the exception of two inmates who were in pre-release quarantine who were not scheduled to be at FCC Lompoc for the administration of the second dose of vaccine.	Figlenski Decl. ¶ 22(c).

57.	Petitioner Vincent Reed received the first dose of the Moderna vaccine on March 4, 2021, and has tested negative as recently as November 16, 2020, though he previously had a positive lab result on a specimen collected March 30, 2020.	Figlenski Decl. ¶ 21.
58.	Petitioner Yonnedil Carror-Torres was offered the vaccine on April 9, 2021, educated and given the opportunity to ask questions of the infection control nurse at FCC Lompoc and elected to refuse the vaccine.	Figlenski Decl. ¶ 21.
59.	Mr. Carror-Torres has not had a laboratory test confirming he has COVID-19, though he has been tested multiple times, most recently on January 25, 2021, with negative findings each time.	Figlenski Decl. ¶ 21.
60.	As of May 19, 2021, 241 out of 438 staff members have been fully vaccinated through the BOP. This number does not account for staff members who have received vaccinations through community sources.	Figlenski Decl. ¶ 22(a).
61.	As of May 19, 2021, 1091 out of 1,862 inmates have been fully vaccinated.	Figlenski Decl. ¶ 22(b).
62.	As of May 19, 2021, 729 inmates have refused the vaccine.	Figlenski Decl. ¶ 22(b).

63.	As of May 19, 2021, there are no inmates at FCC Lompoc who have not yet been offered the vaccine.	Figlenski Decl. ¶ 23.
64.	FCC Lompoc is offering the vaccine to newly arrived inmates at their intake into the facility upon their arrival.	Figlenski Decl. ¶ 24.
65.	The inmates are then placed in BEMR scheduling and the vaccination is ordered from the BOP's Central Fill and Distribution Center in Pollack, Louisiana. The BOP has shifted from a spoke and wheel allocation system to a system in which FCC Lompoc can order the specific number of vaccine doses needed for newly arrived staff and inmates and any inmates or staff who change their mind and indicate they now wish to receive the vaccine.	Figlenski Decl. ¶ 24.
66.	72.82% of the inmates at FCC Lompoc have either recovered from COVID-19 or are previously COVID-19 naïve inmates who have been fully vaccinated.	Figlenski Decl. ¶ 25, Ex. 6.
67.	When inmates at FCC Lompoc are offered the COVID-19 vaccine, they are provided a form by a medical provider in the event they refuse vaccination and have the opportunity to ask questions about the vaccine.	Figlenski Decl. ¶ 26.

68.	There is abundant signage about the vaccine throughout the institution and educational materials on the TRULINCS system in both Spanish and English to educate inmates about the vaccine. FCC Lompoc has the ability to translate vaccine information into any language that is needed.	Figlenski Decl. ¶ 26.
69.	Additional staff was sent to FCC Lompoc to assist with vaccine administration and vaccine education.	Figlenski Decl. ¶ 26.
70.	FCC Lompoc is continuing to engage with inmates who previously refused the vaccine to provide education and information about the vaccine.	Figlenski Decl. ¶ 26.
71.	To date, between 30 to 40 inmates who initially refused the vaccine changed their minds when it was re-offered.	Figlenski Decl. ¶ 26.
72.	Those inmates who refused the vaccine have received and will continue to receive additional opportunities to be vaccinated. The BOP is evaluating the reasons inmates are hesitant to accept the vaccine. Inmates have the ability to submit a request to medical staff for more information or to ask questions about the vaccine and those in chronic care are being counseled at their chronic care appointments.	Figlenski Decl. ¶ 26.

73.	FCC Lompoc has conducted 2,083 home confinement reviews pursuant to the Court's Preliminary Injunction, with more reviews being conducted as FCC Lompoc runs monthly updates to the class list.	Declaration of Melissa Arnold ("Arnold Decl.") filed at Dkt. No. 243 at ¶ 6.
74.	From these reviews, 129 inmates were preliminarily approved for home confinement and 39 were approved for transfer to a Residential Reentry Center.	Arnold Decl. ¶ 6.
75.	As of May 4, 2021, 141 class members had been placed in home confinement, 215 were transferred to an RRC, 82 were granted compassionate release, 124 were released, and 153 were transferred.	Arnold Decl. ¶ 7.
76.	The BOP has increased the home confinement population by approximately 200% from March 2020 through December 2020 and has transferred over 22,800 inmates to home confinement.	Dkt. No. 133 ¶ 12; https://www.bop.gov/coronavirus/
77.	The BOP set temporary population targets for low and minimum-security institutions with open bay housing. As of May 24, 2021, at FCC Lompoc, the COVID-19 population target for the Camp is 309 inmates (even though there are 412 beds), for the North Camp is 120 inmates (though there are 160	Declaration of Charles Hubbard filed concurrently herewith ("Hubbard Decl."), ¶¶ 4-5, Ex. 1.

	beds), and the FCI is 824 (though there are 1,522 beds).	
78.	FCC Lompoc's current population of 1,891 is a 29% population reduction from the 2,680 population alleged in the Complaint and well below the number of beds in the facility.	Hubbard Decl., ¶ 5; https:///www.bop.gov/locations/institutions/lof; https://www.bop.gov/locations/institutions/lom; Dkt. 16 ¶ 2.
79.	The Court appointed Dr. Homer Venters pursuant to Federal Rule of Evidence 706 to conduct a site visit of FCC Lompoc and prepare a report.	Dkt. No. 69.
80.	Dr. Venters fist visited FCC Lompoc on September 1-2, 2020.	COVID-19 Inspection of BOP Lompoc by Dr. Homer Venters, filed at Dkt. No. 101-1 at ¶ 7.
81.	Dr. Venters' first report was filed with the Court on September 25, 2020.	Dkt. No. 101.
82.	Dr. Venters' first report made recommendations about FCC Lompoc.	Dkt. 101-1 at ¶¶ 37-38.
83.	Dr. Venters conducted a second visit of FCC Lompoc on April 20-21, 2021.	Dkt. 239-1 at ¶ 2.
84.	Dr. Venters' second report was filed with the Court at Dkt. 239-1.	Dkt. 239-1.
85.	Dr. Venters' second report makes recommendations about FCC Lompoc.	Dkt. 239-1 ¶ 29.

86.	Dr. Jeffrey Beard believes that to the extent Dr. Venters' recommendations were not already being implemented by FCC Lompoc, those recommendations were either inconsistent with CDC guidance; or based on claims made by unidentified inmates about problems they were allegedly experiencing.	Declaration of Jeffrey Beard filed concurrently herewith ("Beard Decl.") ¶ 91, 125.
87.	Dr. Jeffrey Beard visited FCI Terminal Island on September 8, 2020 and April 20-21, 2021.	Beard Decl. ¶¶ 1, 51, 129.
88.	Dr. Beard has reviewed Plaintiff's complaint, the actions taken by the BOP and FCC Lompoc in response to COVID-19, and has reviewed Dr. Venters' two reports regarding FCC Lompoc.	Beard Decl. ¶ 1.
89.	Dr. Beard determined and opined that FCC Lompoc is currently managed by a knowledgeable, effective Warden and management team, and the facility is clean and well maintained.	Beard Decl. ¶ 153.
90.	Dr. Beard determined and opined that at the time of his visit, the management team was complying with both BOP direction and CDC guidance relative to managing COVID-19 in a correctional facility.	Beard Decl. ¶¶ 124, 126-127.

91.	FCC Lompoc released 25% of its inmate population from the time of Attorney General Barr's memo on March 26, 2020 to September 4, 2020. Dr. Beard believes that this was a larger proportion than many other state and federal facilities around the country.	Beard Decl. ¶ 113.
92.	Dr. Beard determined and opined that the vaccination program at FCC Lompoc is going very well.	Beard Decl. ¶ 154.
93.	Dr. Beard determined and opined that Dr. Venters relies on unidentified inmates in reaching his conclusions and often makes recommendations not grounded in CDC guidance. He also does not offer scientific standards upon which the recommendations are based.	Beard Decl. ¶¶ 91, 125.
94.	Dr. Beard determined and opined that Dr. Venters' methodology for surveying inmates is not a credible or sound source of unbiased or reliable information. A random sample of inmates would have been a better source of information.	Beard Decl. ¶ 158.
95.	Dr. Beard determined and opined that the BOP continues to update its COVID-19 policies and procedures to follow CDC guidelines.	Beard Decl. ¶ 159.

96.	Respondents retained epidemiologist Asma Tekbali to opine as an expert on FCC Lompoc's infection control and testing procedures.	Tekbali Decl. ¶ 5.
97.	Ms. Tekbali bore the lead responsibility as an Infection Preventionist at Lenox Hill Hospital-Northwell Health	Tekbali Decl. ¶ 1, Ex. A.
98.	Her hospital was at the center of dealing with New York's COVID-19 crisis and is believed to have admitted and cared for the most COVID-19 patients in the world.	Tekbali Decl. ¶ 3.
99.	To prepare her opinion on FCC Lompoc, Ms. Tekbali reviewed the inspection reports by Dr. Venters and Dr. Beard, as well as underlying documentation. She spoke with FCC Lompoc prison governance and infection control officers.	Tekbali Decl. ¶ 5.
100.	Ms. Tekbali explains that the efficacy rate of the Pfizer and Moderna vaccines is 94-95%. The Pfizer vaccine was also shown in clinical trials to be 100% effective at preventing severe disease. Data from Israel show that the Pfizer and Moderna vaccines are highly effective across all age groups at preventing symptomatic and asymptomatic COVID-19 infections, hospitalizations,	Tekbali Decl. ¶ 26.

	severe disease and death, including the B.1.1.7 variant.	
101.	Ms. Tekbali opines that "FCC Lompoc has effectively responded to a significant COVID-19 outbreak by collaborating with local health departments, adapting to and implementing pandemic response guidance from the CDC and BOP, constructing a COVID-19 hospital unit, providing masks and materials for hand hygiene to inmates, and offering vaccination to essentially all of the inmates and staff."	Tekbali Decl. Conclusion ¶ 1.
102.	Ms. Tekbali opines that "In their complaint, petitioners request adequate testing and isolation, PPE, and proper treatment and monitoring of inmates ill with the virus. Based on the materials I have been provided, I have determined that FCC Lompoc has met these requests …"	Tekbali Decl. Conclusion ¶ 2.
103.	Ms. Tekbali observes that "Another indication of the facility's successful effort to stop transmission of the virus is the fact that there are no positive inmates at FCC Lompoc, in contrast to the COVID-19 rates prevailing in California. While positive tests have occurred, they have not led to large new outbreaks at the facility, which	Tekbali Decl. Conclusion ¶ 3.

	provides further proof that the infection control measures have been effective and proper."	
104.	Ms. Tekbali concludes that "The steps the BOP took to respond to and control FCC Lompoc's outbreak went beyond CDC and BOP guidance, and the effectiveness of these actions are reflected today in the lack of any major outbreaks at the facility. Particularly given the recent vaccination efforts, I believe it is unlikely the facility will see a repeat of the spring 2020 outbreak."	Tekbali Decl. Conclusion ¶ 6.
105.	Ms. Tekbali notes that "The near halt of COVID-19 infections within FCC Lompoc after vaccinations began is proof that vaccinations are effective…."	Tekbali Decl. Conclusion ¶ 5.

[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

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

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

4. 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 v. Brennan*, 511 U.S. 825, 834, 846 (1994).

5. 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.

6. 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.

7. 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.

8. 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)).

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

10. 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.

11. 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.

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

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

14. FCC Lompoc's COVID-19 practices are the same measures that society deems capable of reducing the risk of COVID-19 transmission, and thus reflect the manner in which "today's society chooses to tolerate" that risk. *Helling*, 509 U.S. at 36; *Grinis*, 2020 WL 2300313, at *3 ("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."); *Nellson*, 2020 WL 3000961, at *8 (finding no likelihood of success on merits of Eighth Amendment conditions-of-confinement claim due to COVID-19 and noting that "[c]ompliance with CDC protocols does not demonstrate that

defendants are disregarding a substantial risk to inmate health or failing to respond reasonably to the risks of COVID-19").

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

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

17. 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.

18. The subjective prong requires that "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*.

19. 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").

20. Petitioners cannot demonstrate that BOP officials *currently* are acting with deliberate indifference and cannot 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*. at 845.

21. 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).

21. 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 FCC Lompoc.

22. Although Petitioners and Respondents have minor fact disputes over the implementation about these measures, even if Petitioners' allegations are true, 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"); *Money v. Pritzker*, 453 F.Supp.3d at 1131 (prisoner petitioners have "no chance of success" as to deliberate indifference because of the measures taken by the Illinois Department of Corrections).

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

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

25. No further relief is available as Respondents have already complied with the Preliminary Injunction in this case. Any further relief ordering inmates to be transferred to home confinement constitutes a prison release order under the PLRA which may not be enacted by a single district judge, violates 18 U.S.C. § 3621.

26. A district court does not have jurisdiction to challenge the BOP's decisions about places of imprisonment. *See Reeb v. Thomas*, 636 F.3d 1124, 1126-28 (9th Cir.

2011) (courts lack jurisdiction to review BOP placement decisions under 18 U.S.C. §§ 3621-25)

27. Petitioners never moved for class certification beyond certifying the provisional class for purposes of the preliminary injunction and no class is certifiable at this juncture in light of individual inmates electing to refuse offered vaccinations.

28. The Court's Preliminary Injunction has expired under 18 U.S.C. § 2626(a)(2).

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

30. Respondents are entitled to summary judgment as to all of Petitioners' claims.

31. Any Undisputed Fact which is deemed a Conclusion of Law shall be considered a Conclusion of Law.

Dated: May 25, 2021

Respectfully submitted,

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