

1 Terry W. Bird – Bar No. 49038
tbird@birdmarella.com
2 Dorothy Wolpert – Bar No. 73213
dwolpert@birdmarella.com
3 *Naeun Rim – Bar No. 263558
nrim@birdmarella.com
4 Shoshana E. Bannett – Bar No. 241977
sbannett@birdmarella.com
5 Kate S. Shin – Bar No. 279867
kshin@birdmarella.com
6 Oliver Rocos – Bar No. 319059
orocos@birdmarella.com
7 Christopher J. Lee – Bar No. 322140
clee@birdmarella.com
8 Jimmy Threatt – Bar No. 325317
jthreatt@birdmarella.com
9 BIRD, MARELLA, BOXER,
WOLPERT, NESSIM, DROOKS,
10 LINCENBERG & RHOW, P.C.
1875 Century Park East, 23rd Floor
11 Los Angeles, California 90067-2561
Telephone: (310) 201-2100
12 Facsimile: (310) 201-2110

13 Attorneys for Plaintiff-Petitioners

Peter J. Eliasberg – Bar No. 189110
peliasberg@aclusocal.org
Peter Bibring – Bar No. 223981
pbibring@aclusocal.org
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA
1313 West 8th Street
Los Angeles, CA 90017
Telephone: (213) 977-9500
Facsimile: (213) 977-5297

Donald Specter – Bar No. 83925
dspecter@prisonlaw.com
Sara Norman – Bar No. 189536
snorman@prisonlaw.com
PRISON LAW OFFICE
1917 Fifth Street
Berkeley, California 94710
Telephone: (510) 280-2621
Facsimile: (510) 280-2704

14
15 **UNITED STATES DISTRICT COURT**

16 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

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

20 Plaintiff-Petitioners,

21 vs.

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

24 Defendant-Respondents.
25
26
27
28

CASE NO. 2:20-cv-04451-MWF-MRWx

**PLAINTIFF-PETITIONERS'
SUPPLEMENTAL MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF *EX PARTE*
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND
ORDER TO SHOW CAUSE RE:
PRELIMINARY INJUNCTION**

Assigned to Hon. Michael W. Fitzgerald
Courtroom 5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
MEMORANDUM OF POINTS AND AUTHORITIES.....	5
I. INTRODUCTION	5
II. PETITIONERS’ CLAIMS AND RELIEF SOUGHT.....	6
III. ARGUMENT	8
A. The Court Has The Authority Under The Eighth Amendment To Grant The Relief Petitioners Seek.....	8
B. The PLRA Does Not Bar Petitioners’ Relief.....	11
1. Petitioners’ Requested Relief Is Not A Prisoner Release Order Under The PLRA.....	112
2. The Relief Petitioners Seek Is the Bare Minimum Necessary To Correct The Constitutional Violation	117
IV. CONCLUSION	18

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Alvarez v. Larose</i>	
2020 WL 3053193 (S.D. Cal. Jun. 7, 2020)	16
<i>Armstrong v. Exceptional Child Center, Inc.</i>	
575 U.S. 320 (2015)	8
<i>Armstrong v. Schwarzenegger</i>	
622 F.3d 1058 (9th Cir. 2010)	18
<i>Brown v. Plata</i>	
563 U.S. 493 (2011)	<i>passim</i>
<i>Cameron v. Bouchard</i>	
2020 WL 2569868 (E.D. Mich. May 21, 2020)	9, 14, 15, 16
<i>Coleman v. Brown</i>	
28 F. Supp. 3d 1068 (E.D. Cal. 2014)	9
<i>Cruz v. Beto</i>	
405 U.S. 319 (1972)	6
<i>Edmo v. Corizon</i>	
935 F.3d 757 (9th Cir. 2019)	9
<i>Estelle v. Gamble</i>	
429 U.S. 97 (1976)	6, 8
<i>Gilmore v. California</i>	
220 F.3d 987 (9th Cir. 2000)	6, 13, 14
<i>Gomez v. Vernon</i>	
255 F.3d 1118 (9th Cir. 2001)	17
<i>Martinez-Brooks v. Easter</i>	
2020 WL 2405350 (D. Conn., May 12, 2020)	10, 11
<i>Plata v. Brown</i>	
427 F.Supp.3d 1211 (N.D. Cal. 2013)	13, 14

1	<i>Plata v. Newsom</i>	
2	2020 WL 1908776 (N.D. Cal. Apr. 17, 2020).....	17
3	Statutes	
4	18 U.S.C. § 3626.....	<i>passim</i>
5	28 U.S.C. § 2241.....	6
6	42 U.S.C. § 1997e(a)	12
7	CARES Act.....	7, 11, 17
8	Prison Litigation Reform Act (PLRA)	<i>passim</i>
9	Other Authorities	
10	Eighth Amendment.....	<i>passim</i>

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In the Court’s amended order denying Plaintiff-Petitioners’ *ex parte* application for a TRO, the Court found that although the evidence showed Respondents have failed to discharge their constitutional obligations “to preserve the health and lives of the prisoners” at Terminal Island during the COVID-19 pandemic, the writ of habeas corpus did not encompass the relief Petitioners seek. (Dkt. 41 at 20-21.) Through this application, Plaintiff-Petitioners, individually and on behalf of all others similarly situated, ask this Court to issue a Temporary Restraining Order (“TRO”) and Order to Show Cause (“OSC”) as to why a preliminary injunction should not issue pursuant to Petitioners’ Second Claim for Relief to correct those constitutional violations. Through that Eighth Amendment claim, Petitioners seek the same relief sought in their first application, as well as an order requiring improved conditions.

Recognizing the extreme threat that this once-in-a-century pandemic poses to the health and lives of those incarcerated in detention centers, the Legislative and the Executive acted in concert to direct the Bureau of Prisons (“BOP”) to “maximize appropriate transfers to home confinement.”¹ Had Respondents followed that directive, the 9 Terminal Island prisoners who have died of COVID-19 related causes might still be alive today. Where the government fails to provide adequate care for prisoners, “the courts have a responsibility to remedy the resulting Eighth Amendment violation.” *Brown v. Plata*, 563 U.S. 493, 511 (2011). This Court’s constitutional obligations mean it simply cannot be impotent in the face of such a callous disregard for the rights of prisoners that Respondents are charged to protect. If the Court cannot remedy Respondents’ constitutional violation by way of a habeas writ, then it must be able to do so pursuant to its inherent authority to fashion

¹ Dkt. 10-1 (Rim Decl.), Ex. A at 1.

1 equitable relief under the Eighth Amendment. *Id.* (Courts “*must not shrink* from
 2 their obligation to enforce the constitutional rights of all persons, including
 3 prisoners.”) (emphasis added, internal quotations omitted) (citing *Cruz v. Beto*, 405
 4 U.S. 319, 321 (1972)).

5 The Prison Litigation Reform Act (“PLRA”) does not bar Petitioners from
 6 obtaining the relief they seek. The PLRA was designed to, and does, apply where
 7 crowding is the “primary cause of the violation” of prisoners’ rights, not where
 8 prisoners’ rights are violated by Respondents’ inability to provide any adequate
 9 protection from the risk of severe harm or even death from a uniquely contagious
 10 and dangerous disease. The PLRA must be construed in a manner that permits this
 11 Court to grant swift relief from the ongoing constitutional violation, or it must be
 12 struck down. *Gilmore v. California*, 220 F.3d 987, 997 (9th Cir. 2000) (“[W]here a
 13 statute is susceptible of two constructions, by one of which grave and doubtful
 14 constitutional questions arise and by the other of which such questions are avoided,
 15 our duty is to adopt the latter.”) (citations omitted).

16 “The [Eighth] Amendment embodies broad and idealistic concepts of dignity,
 17 civilized standards, humanity, and decency” for prisoners. *Estelle v. Gamble*,
 18 429 U.S. 97, 102 (1976) (quotation omitted). Respondents are violating each of
 19 these concepts, and this Court must act to ensure that violation ends.

20 **II. PETITIONERS’ CLAIMS AND RELIEF SOUGHT**

21 Petitioners’ Class Action Complaint for Declaratory and Injunctive Relief and
 22 Petition for Writ of Habeas Corpus (the “Complaint”) asserts two separate claims
 23 based on the inhumane conditions at FCC Terminal Island created by Respondents’
 24 mismanagement of the COVID-19 outbreak at that facility: (1) a Petition for Writ of
 25 Habeas Corpus under 28 U.S.C. § 2241 (“Section 2241”), which challenges the fact
 26 or duration of confinement; and (2) a claim for declaratory and injunctive relief,
 27
 28

1 which challenges the conditions of confinement.² This particular application
2 concerns only the second of those two claims.

3 Petitioners' second claim is rooted in the Eighth Amendment and it seeks to
4 correct the constitutional violations of prisoners' conditions of confinement. In
5 particular, through this claim Petitioners seek declaratory and injunctive relief in
6 two forms. First, Petitioners seek an order that Respondents improve conditions for
7 all prisoners at Terminal Island in the form of social distancing, provision of
8 sanitary products and personal protective equipment (PPE), improved sanitary
9 practices, adequate testing, contact tracing, and isolation measures.³ Second,
10 because the other requested measures cannot be effective unless Respondents
11 transfer or release enough prisoners that allows for effective social distancing during
12 this pandemic, Petitioners also seek an order requiring Respondents to fully utilize
13 their authority to transfer non-violent prisoners with viable home confinement plans
14 and to evaluate quickly compassionate release requests so that they may be escalated
15 to the courts as appropriate. Petitioners seek both of these forms of relief through
16 this application.

17 With respect to the second form of relief, it is important to note that
18 Petitioners do not ask the Court to grant home confinement or compassionate release
19 of the named petitioners, or request that the Court evaluate every individual prisoner
20 at Terminal Island for such relief. Rather, Petitioners ask the Court to put in place a
21 process that ensures that Respondents will act in compliance with the Eighth
22 Amendment—specifically, to order *Respondents* to exercise authority they already
23 have under the CARES Act to “maximize” transfers to home confinement based
24 primarily on public health and safety factors, as directed by the Attorney General’s
25 April 3, 2020 Memorandum (the “April 3 Memo”) and to accelerate compassionate

26 ² Dkt. 1 at 47-50.

27 ³ *Id.* at 51:16-53:26.

1 release decisions.⁴ Since Respondents have shown they are unwilling to correct
 2 these constitutional violations themselves, Petitioners seek an order supervising that
 3 process.

4 **III. ARGUMENT**

5 **A. The Court Has The Authority Under The Eighth Amendment To** 6 **Grant The Relief Petitioners Seek.**

7 “The [Eighth] Amendment embodies broad and idealistic concepts of dignity,
 8 civilized standards, humanity, and decency” for prisoners. *Estelle*, 429 U.S. at
 9 102 (quotation omitted). Courts not only have the power to grant equitable relief to
 10 Petitioners suffering from conditions that fall short of that standard, but also have
 11 the responsibility to do so.

12 While the BOP is entitled some deference in its management of prisons,
 13 including its home confinement or compassionate release decisions, that deference
 14 does not extend to full immunity from judicial correction of its constitutional
 15 violations. To the contrary, the Supreme Court has directed that where the
 16 “government fails to fulfill [its] obligation [to provide adequate medical care], *the*
 17 *courts have a responsibility to remedy the resulting Eighth Amendment violation.*”
 18 *Brown*, 563 U.S. at 511 (emphasis added). Courts should be sensitive to separation
 19 of powers and federalism principles, but “nevertheless must not shrink from their
 20 obligation to enforce the constitutional rights of all persons, including prisoners.”⁵
 21 *Id.* (quotations, citations omitted). In short, courts “may not allow constitutional
 22 violations to continue simply because a remedy would involve intrusion into the
 23 realm of prison administration.” *Id.* (quotations, citations omitted); *see also*
 24 *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 326-27 (2015) (relief
 25

26 ⁴ Dkt. 10 at 68:12-24

27 ⁵ Indeed, as this Court noted in the Order, there is even a Ninth Circuit Model Jury
 28 Instruction on this issue. 9th Cir. Civ. Jury Instr. 9.27 (2007).

1 may be given in court of equity to prevent violations of federal law by federal
2 officials). Recognizing that constitutional violations can take many forms, the
3 Supreme Court has advised that “[c]ourts faced with the sensitive task of remedying
4 unconstitutional prison conditions must consider a range of available options.”
5 *Brown*, 563 U.S. at 511. Thus, courts have shaped the equitable and other relief
6 granted in claims made under the Eighth Amendment to ensure that the injured
7 party’s constitutional rights are respected. *See, e.g., Edmo v. Corizon*, 935 F.3d 757,
8 803 (9th Cir. 2019) (affirming grant of mandatory injunction requiring provision of
9 surgery to treat prisoner’s gender dysphoria); *Coleman v. Brown*, 28 F. Supp. 3d
10 1068, 1108-09 (E.D. Cal. 2014) (entering mandatory injunction instituting
11 supervised process to determine appropriate protocol for administrative segregation
12 decisions). Indeed, one court recently held that it had the power under the Eighth
13 Amendment to grant substantially similar relief to that Petitioners seek here.
14 *Cameron v. Bouchard*, 2020 WL 2569868 at *27 (E.D. Mich. May 21, 2020) (court
15 had authority under both a habeas claim and an Eighth Amendment conditions of
16 confinement claim to grant preliminary injunction ordering Oakland County Jail to
17 release medically vulnerable prisoners, subject to accelerated individual review of
18 suitability for release).

19 This Court already has found that, at this preliminary stage, the dire
20 circumstances of Terminal Island violate Petitioners’ constitutional rights. (Dkt. 41
21 at 20.) The Eighth Amendment places on this Court the responsibility to correct that
22 violation, and the Court can do so at this stage through the grant of a TRO as a
23 provisional remedy.

24 The form of relief Petitioners request will correct that constitutional violation.
25 *First*, the injunction requiring Respondents to improve conditions for all prisoners at
26 Terminal Island in the form of social distancing, provision of sanitary products and
27 personal protective equipment (PPE), improved sanitary practices, adequate testing,
28 contact tracing, and isolation measures, will ensure that COVID-19 cannot continue

1 to spread through Terminal Island. *Second*, Respondents’ review of all prisoners for
 2 home confinement, without putting up artificial barriers that have prevented non-
 3 violent prisoners with a viable home confinement plan from being considered, and
 4 the expedited review of all compassionate release requests will ensure that
 5 Respondents make appropriate transfer or release decisions so that the measures
 6 taken to stop the spread of COVID-19 can be effective.

7 Court supervision of that relief is necessary because Respondents have
 8 demonstrated that no matter how many prisoners succumb to the unbridled spread of
 9 COVID-19 at Terminal Island, they will not exercise their authority to take all steps
 10 required under the constitution to stop it. On June 2, 2020, Respondent Michael
 11 Carvajal appeared at a Senate hearing regarding his department’s response to the
 12 COVID-19 crisis. Even though Senators had been asking since March 5, 2020 for
 13 data regarding the less-than-two percent of prisoners the BOP had placed on home
 14 confinement during the pandemic, Respondent Carvajal testified he had no such data
 15 to share.⁶ Respondent Carvajal even testified that he was “not familiar with”
 16 *Martinez-Brooks v. Easter*, 2020 WL 2405350 at *14 (D. Conn., May 12, 2020), the
 17 case in which a federal court in Connecticut entered a temporary restraining order
 18 granting emergency relief to medically vulnerable prisoners at FCI Danbury, similar
 19 to the relief requested by Petitioners here.⁷ This continued flagrant disregard for
 20 prisoners’ welfare outraged Senator Richard Blumenthal (D-CT), who remarked:
 21 “The court found that your practices at Danbury, which reflect practices around the
 22 country, ‘amount to deliberate indifference to a substantial risk of serious harm to
 23 inmates in violation of the eighth amendment.’ And you’re coming here and saying
 24 you don’t know whether you’re complying with the court order? I think that’s

25
 26 ⁶ <https://www.rev.com/blog/transcripts/senate-judiciary-hearing-transcript-on-incarceration-during-covid-19>

27 ⁷ *Id.*
 28

1 unacceptable.”⁸ Congressman Fred Keller (R-PA) was similarly critical, as he
 2 commented that “Bureau of Prisons Director Michael Carvajal continued to be
 3 unresponsive to members of Congress, passed blame on to other agencies, and
 4 outlined a disturbing lack of awareness in how the Bureau has failed to take
 5 proactive steps to stop the spread of COVID-19.”⁹

6 Respondent Carvajal’s continued refusal to provide home confinement data
 7 and his ignorance of the *Martinez-Brooks* order, nearly three weeks after it was
 8 entered, is more than “unacceptable.” It is indisputable evidence that without Court
 9 supervision, Respondents will continue to disregard the CARES Act and the
 10 Attorney General’s directives and erect unnecessary barriers that prevent 99% of
 11 prisoners from even being considered for home confinement, and delay
 12 compassionate release decisions, all while prisoners continue to get sick and die. It
 13 is clear that Respondents believe they answer to no one—not to Congress, not to the
 14 Attorney General, and not to the courts. It is up to this Court to hold Respondents
 15 accountable to the law and to enforce the constitution to end their heinous violation
 16 of prisoners’ rights.

17 **B. The PLRA Does Not Bar Petitioners’ Relief.**

18 To a prison system that has long creaked under the strain of everyday
 19 concerns, the COVID-19 pandemic presents an extraordinary and unprecedented
 20 challenge. To attempt to meet that challenge, and recognizing that detention centers
 21 are inherently ill-equipped to handle this once-in-a-century emergency, the
 22 Legislative branch, through the CARES Act, and the Executive branch, through the
 23 Attorney General’s memoranda, have acted in concert to require Respondents to use
 24 their powers of transferring prisoners to home confinement in order to alleviate that
 25

26 ⁸ *Id.*

27 ⁹ See [https://keller.house.gov/media/press-releases/congressman-fred-keller-](https://keller.house.gov/media/press-releases/congressman-fred-keller-comments-bureau-prisons-testimony-senate-judiciary)
 28 [comments-bureau-prisons-testimony-senate-judiciary](https://keller.house.gov/media/press-releases/congressman-fred-keller-comments-bureau-prisons-testimony-senate-judiciary)

1 additional strain and ensure prisoners' Eighth Amendment rights are not violated.
 2 Respondents have refused to comply. Rather than "maximiz[ing]" home
 3 confinement at Terminal Island, only 46 of the more than 1,000 prisoners have even
 4 been considered for home confinement and just 5 have been transferred. (Dkt. 41 at
 5 3.) In the unique circumstances present here, the PLRA does not bar the relief
 6 Petitioners seek.

7 As relevant here, the PLRA contains two requirements. *First*, the PLRA
 8 places procedural limitations on a court's ability to grant a prisoner release order. In
 9 particular, "[i]n any civil action with respect to prison conditions, no court shall
 10 enter a prisoner release order unless" less intrusive relief already has been granted
 11 that has failed to remedy the violation and a three-judge court has found that
 12 "crowding is the primary cause of the violation of a Federal right" and that "no other
 13 relief will remedy the violation of the Federal right." 18 U.S.C. § 3626(a)(3).
 14 *Second*, the PLRA requires that "[p]rospective relief in any civil action with respect
 15 to prison conditions shall extend no further than necessary to correct the violation of
 16 the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1).
 17 Neither of those requirements bars Petitioners' relief here.¹⁰

18 **1. Petitioners' Requested Relief Is Not A Prisoner Release** 19 **Order Under The PLRA**

20 The PLRA defines a prisoner release order as "any order . . . that has the
 21 purpose or effect of reducing or limiting the prison population, or that directs the
 22 release from or nonadmission of prisoners to a prison." 18 U.S.C. § 3626(g)(4).
 23

24 ¹⁰ Petitioners also are obligated to exhaustion of administrative remedies under 42
 25 U.S.C. § 1997e(a). Petitioners briefed exhaustion under the PLRA extensively in
 26 the initial TRO and incorporate those arguments herein by reference. (Dkt. 10 at
 27 55:8-57:7; Dkt. 30 at 14:21-17:2.) Just as this Court found "that exhaustion is met
 28 or excused here, for those reasons argued by Petitioners" with respect to their habeas
 claim, so too should exhaustion be deemed met or excused with respect to their
 Eighth Amendment claim. (Dkt. 41 at 19-20.)

1 While seemingly broad at first glance, that definition does not include the relief
 2 Petitioners seek and so Petitioners do not need to satisfy the procedural requirements
 3 of 18 U.S.C. § 3626(a)(3).

4 The PLRA was enacted to address Congress’s concerns “with courts setting
 5 ‘population caps’ and ordering the release of inmates as a sanction for prison
 6 administrators’ failure to comply with the terms of consent decrees designed to
 7 eliminate overcrowding.” *Gilmore*, 220 F.3d at 998 n.14. With that goal in mind,
 8 Congress placed strict procedural limits on the ability of a court to reduce or limit
 9 the prison population where overcrowding violated prisoners’ rights, including
 10 requiring a three-judge court to determine by clear and convincing evidence that
 11 “crowding is the primary cause of the violation of a Federal right.” *See* 18 U.S.C. §
 12 3626(a)(3). By specifying the rules applicable to prisoner release orders where
 13 “crowding is the primary cause” of unconstitutional conditions, the PLRA left
 14 unchanged the rules applicable to prisoner release orders where the primary cause of
 15 the violation is *not* overcrowding.

16 As the district court in *Plata v. Brown* discussed at length, interpreting
 17 “prisoner release order” to cover all orders that have the purpose or effect of
 18 reducing the prison population, not just those resulting from overcrowding, would
 19 lead to absurd and unconstitutional results. 427 F.Supp.3d 1211, 1223 (N.D. Cal.
 20 2013). For example, a prisoner’s Eighth Amendment rights could be violated if
 21 specialized medical care was unavailable at a prison and the prison refused to
 22 transfer the prisoner elsewhere. An order transferring that prisoner would
 23 necessarily have the “purpose or effect of reducing . . . the prison population.” But
 24 that prisoner *could never meet* the requirements of 18 U.S.C. § 3626(a)(3) because
 25 they would be unable to prove that “crowding [was] the primary cause of th[at]
 26 violation.” *Id.* at 1223-24 (discussing additional scenarios). Thus, the PLRA’s
 27 definition of “prisoner release order” cannot include orders that “correct the
 28 violation of a constitutional right *caused by something other than crowding.*” *Id.*

(despite seeking transfer of prisoner from a prison, plaintiff did not seek a “prisoner release order” because the constitutional violation was not caused by overcrowding); *see also Cameron*, 2020 WL 2569868 at *28 (“[I]f a prison were in the path of rising flood waters, a tornado, or a highly contagious and deadly viral pandemic . . . and their jailors were not responding adequately to protect them from serious harm, surely a single judge should possess the authority to quickly remedy the situation rather than proceeding through the procedural requirements of § 3626(a)(3).”). To hold otherwise would be to deny prisoners the ability to seek relief from violations of their Eighth Amendment rights, which cannot be the law. *Gilmore*, 220 F.3d at 1002-1003 (“Congress is free to alter the standard that determines the scope of prospective relief for unconstitutional prison conditions so long as the restrictions on the remedy do not prevent vindication of the right.”) (citations omitted). The district court in *Plata* further held that an order *transferring* prisoners from places of custody, rather than *releasing* prisoners from custody, did not constitute a prisoner release order. *Plata*, 427 F.Supp.3d at 1222 (citing 18 U.S.C. § 3626(a)(3)(E)(i)) (prisoners’ requested relief “does not require consideration by a three-judge court” because it concerned only transfer and not release).

In the instant case, the first relief Petitioners seek in this application—the improvement of conditions for all prisoners at Terminal Island to prevent the spread of COVID-19—does not constitute a prisoner release order. Accordingly, the procedural requirements of the 18 U.S.C. § 3626(a)(3) do not apply.

Petitioners’ second relief also does not constitute a prisoner release order under the PLRA. As an initial matter Petitioners do not seek a “release” from custody, only an order requiring Respondents exercise authority they already have to “maximize” *transfers* to home confinement. Accordingly, that relief does not constitute a prisoner release order. *Plata*, 427 F.Supp.3d at 1222 (transfers, as opposed to releases, “do[] not require consideration by a three-judge court”).

Further, although Petitioners are asking the Court to enforce the rules

governing Respondents’ use of home confinement and to accelerate compassionate release decisions, that relief also is not a prisoner release order because crowding is not the “primary cause of the violation of [Petitioners’] Federal right.” Instead, the primary cause of the violation of Petitioners’ rights is the serious threat to their health and safety caused by Respondents’ refusal to deploy and execute sufficient measures to stem the tsunami of COVID-19 flooding through Terminal Island. (Dkt. 41 at 20 (noting COVID-19 has “established itself in the prison,” unlike elsewhere).) The relief Petitioners seek is that which is necessary to address that health and safety threat. Importantly, that is the exact same concern that led the Attorney General to direct the BOP to “maximize” its use of home confinement to combat COVID-19.¹¹ Petitioners do not argue that the crowding in Terminal Island is unconstitutional without the threat of COVID-19. Although Terminal Island does suffer from a crowding problem, as Petitioners have indicated in prior briefs, Respondents’ refusal to address it has been offered as evidence of the deliberate indifference displayed by Respondents in refusing to make use of the home confinement as directed, not as the constitutional violation itself.

Even if Terminal Island were at less than its full capacity, its communal dorms, which have bunkbeds close together, and communal bathrooms would still make social distancing impossible.¹² *See also Cameron*, 2020 WL 2569868 at *28 (“The inability to socially distance in the jail setting has nothing to do with the capacity of the facility.”). Respondents’ efforts to promote social distancing without

¹¹ *See* Dkt. 10-1 (Rim Decl.), Ex. D at (March 26 Memo) at 1 (discussing “Transfer of inmates to home confinement where appropriate to *decrease the risks to their health*”) (emphasis added); *see also* Dkt. 10-1 (Rim Decl.), Ex. A (April 3 Memo) at 1 (expanding access to home confinement due to BOP’s “*profound obligation to protect the health and safety of all inmates*”) (emphasis added).

¹² *See* Dkt. 10 at 21:15-22:1 (citing Dkt. 10-2 (Threatt Decl.), ¶ 5; Dkt. 10-1 (Rim Decl.), Ex. T (Declaration of Carlos Zuniga) ¶ 4; Dkt. 10-1 (Rim Decl.), Ex. I (Declaration of Jackeline Vasquez) ¶ 7).

1 transferring a significant number of prisoners to home confinement have only
 2 increased the threat to prisoners' health and safety.¹³ Many prisoners now are
 3 incarcerated in a warehouse where the bunks remain close together, the space is
 4 overrun by rodents and other creatures, and there is an absence of potable water, hot
 5 water, and heating.¹⁴ As a result, notwithstanding that the effect of the order may be
 6 a temporary transfer of prisoners outside of the prison in order to promote the ability
 7 to social distance, the relief sought is not a prisoner release order that attracts the
 8 procedural hurdles of the PLRA because crowding is not the primary violation of
 9 Petitioners' rights.

10 The court in *Cameron* considered a similar situation with respect to
 11 Michigan's Oakland County Jail. 2020 WL 2569868 at *27-28. The prison at issue
 12 in that case was far below capacity, but prisoners still were unable to socially
 13 distance. *Id.* Holding that "crowding" related to the prison's design capacity
 14 compared to the number of inmates and not the inability to social distance, which
 15 was the cause of the violation of prisoners' rights, the court determined that the
 16 requested relief was not a "prisoner release order" and the requirements of 18 U.S.C.
 17 § 3626(a)(3) did not apply.¹⁵ *Id.*

18 _____
 19 ¹³ Overcrowding and social distancing requirements are distinct issues. Whereas
 20 overcrowding concerns the presence of more prisoners in a prison than the prison
 21 was designed to accommodate, social distancing concerns the ability of individuals
 22 to space themselves apart. So, for example, the City of Los Angeles has allowed
 23 movie theaters to re-open but at 25% of theater capacity or a maximum of 100
 24 attendees, whichever is lower. <https://www.latimes.com/california/story/2020-06-08/california-to-allow-movie-theaters-to-reopen-in-most-counties>. A movie theater
 at 30% of theater capacity is not overcrowded, but still does not allow for sufficient
 social distancing to prevent the spread of COVID-19.

25 ¹⁴ See Dkt. 10 at 22:2-12 (citing Dkt. 10-1 (Rim Decl.), Ex. G ¶ 7; Dkt. 10-1 (Rim
 26 Decl.), Ex. B).

27 ¹⁵ Two California courts have found that relief similar, but not identical, to that
 28 which Petitioners seek here did fall within the PLRA's definition of a prisoner relief
 order. See *Alvarez v. Larose*, 2020 WL 3053193 at *5 (S.D. Cal. Jun. 7, 2020);

1 The passage of the CARES Act and the Attorney General’s memoranda
 2 further support that the requirements of 18 U.S.C. § 3626(a)(3) do not apply to the
 3 relief Petitioners seek. The PLRA was enacted to address constitutional violations
 4 caused by traditional overcrowding, where more people are crammed into a space
 5 than that space was designed to hold. It was not directed to address situations where
 6 keeping prisoners in conditions where they cannot socially distance ensures the
 7 rapid spread of a catastrophic, once-in-a-century virus. Recognizing that the
 8 existing statutory framework did not sufficiently equip Respondents to act
 9 constitutionally in response to the urgent COVID-19 crisis, Congress enacted the
 10 CARES Act, and the Attorney General issued the April 3 Memo. Having identified
 11 “home confinement as a tool for combatting the dangers that COVID-19 poses to
 12 our vulnerable inmates,” the BOP was directed to review prisoners for transfer to
 13 home confinement and transfer them, so that it could promote social distancing and
 14 other preventative measures.¹⁶ Following the passage of legislation and the issuance
 15 of executive directives that required Respondents to provide Petitioners with the
 16 relief they seek through this petition and TRO application, Respondents should not
 17 be permitted to claim that the PLRA prohibits that relief from being enforceable.

18 **2. The Relief Petitioners Seek Is the Bare Minimum Necessary**
 19 **To Correct The Constitutional Violation.**

20 The relief Petitioners seek is the bare minimum necessary to alleviate the
 21 appalling, inhumane, unconstitutional conditions at Terminal Island.¹⁷

22 _____
 23 *Plata v. Newsom*, 2020 WL 1908776 at *10 (N.D. Cal. Apr. 17, 2020). Neither
 24 decision is binding here and both are unpersuasive, as they did not consider the
 limits to that definition discussed at length in *Plata*, 427 F.Supp.3d at 1223.

25 ¹⁶ Dkt. 10-1 (Rim Decl.), Ex. A at 1

26 ¹⁷ As the Ninth Circuit has explained, the PLRA “has not substantially changed the
 27 threshold findings and standards required to justify an injunction.” *Gomez v.*
 28 *Vernon*, 255 F.3d 1118, 1129 (9th Cir. 2001). When “determining the
 appropriateness of the relief ordered,” appellate “courts must do what they have

Petitioners do not ask that the Court release any class of prisoners or even any individual prisoner. Rather, Petitioners are asking the Court to fashion narrowly-tailored equitable relief that requires *Respondents* to improve the conditions at Terminal Island and to use the full extent of their statutory obligation to maximize home confinement efforts during the pandemic. *See Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1069-71 (9th Cir. 2010) (sustaining injunction ordered by single judge court to rectify violated federal right that limited government’s exercise of their discretion in managing prisons, which the government argued would result in the transfer of prisoners). Indeed, the relief Petitioners request regarding the home confinement review process is no more than Congress and the Attorney General already have directed.¹⁸

The home confinement review process and the other injunctive relief Petitioners request under the Eighth Amendment will ensure improved, constitutional conditions for all prisoners who remain at Terminal Island after the transfer of prisoners to home confinement, in the form of social distancing, provision of sanitary products and personal protective equipment (PPE), improved sanitary practices, adequate testing, contact tracing, and isolation measures. That is the least intrusive relief that could be granted to correct the constitutional violation, and thus comports with 18 U.S.C. § 3626(a)(1).

IV. CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court grant the Temporary Restraining Order and impose a supervised process-based remedy for an expedited, individualized review for enlargement of custody. Petitioners further request that the Court order Respondents to adhere to CDC guidance regarding the

always done [and] consider the order as a whole.” *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1070 (9th Cir. 2010).

¹⁸ *See* Dkt. 10-1 (Rim Decl.), Ex. A (April 3 Memo) and Ex. D (March 26 Memo).

1 prevention and treatment of COVID-19.

2 DATED: June 22, 2020

Respectfully submitted,

3 Bird, Marella, Boxer, Wolpert, Nessim,
4 Dooks, Lincenberg & Rhow, P.C.

5 By: /s/ Naeun Rim

6 Naeun Rim

7 Attorneys for Plaintiff-Petitioners

8 DATED: June 22, 2020

Peter J. Eliasberg
9 Peter Bibring
10 ACLU Foundation of Southern California

11 By: /s/ Peter Bibring

12 Peter Bibring

13 Attorneys for Plaintiff-Petitioners

14 DATED: June 22, 2020

Donald Specter
15 Sara Norman
16 Prison Law Office

17 By: /s/ Donald Specter

18 Donald Specter

19 Attorneys for Plaintiff-Petitioners
20
21
22
23
24
25
26
27
28

CERTIFICATE OF AUTHORIZATION
TO SIGN ELECTRONIC SIGNATURE

Pursuant to Local Rule 5-4.3.4(a)(2)(i) of the Signatures Procedures for the United States District Court for the Central District of California, filer attests that all other signatories listed concur in the filing's content and have authorized this filing.

DATED: June 22, 2020

Bird, Marella, Boxer, Wolpert, Nessim,
Drooks, Lincenberg & Rhow, P.C.

By: /s/ Naeun Rim

Naeun Rim
Attorneys for Plaintiff-Petitioners