

1 Terry W. Bird – Bar No. 49038
 2 tbird@birdmarella.com
 3 Dorothy Wolpert – Bar No. 73213
 4 dwolpert@birdmarella.com
 5 Shoshana E. Bannett – Bar No. 241977
 6 sbannett@birdmarella.com
 7 Kate S. Shin – Bar No. 279867
 8 kshin@birdmarella.com
 9 Oliver Rocos – Bar No. 319059
 10 orocos@birdmarella.com
 11 Christopher J. Lee – Bar No. 322140
 12 clee@birdmarella.com
 13 BIRD, MARELLA, BOXER, WOLPERT,
 14 NESSIM, DROOKS, LINCENBERG &
 15 RHOW, P.C.
 16 1875 Century Park East, 23rd Floor
 17 Los Angeles, California 90067-2561
 18 Telephone: (310) 201-2100
 19 Facsimile: (310) 201-2110
 20 Naeun Rim – Bar No. 263558
 21 nrin@manatt.com
 22 Ima Nsien – Bar No. 304096
 23 insien@manatt.com
 24 MANATT, PHELPS & PHILLIPS, LLP
 25 2049 Century Park East, Suite 1700
 26 Los Angeles, California 90067
 27 Telephone: (310) 312-4000
 28 Facsimile: (310) 312-4224
 Attorneys for Plaintiff-Petitioners Lance
 Aaron Wilson, Maurice Smith, and Edgar
 Vasquez

Donald Specter – Bar No. 83925
 dspecter@prisonlaw.com
 Sara Norman – Bar No. 189536
 snorman@prisonlaw.com
 Sophie Hart – Bar No. 321663
 sophieh@prisonlaw.com
 Patrick Booth – Bar No. 328783
 patrick@prisonlaw.com
 Jacob Hutt – MJP No. 804428
 jacob@prisonlaw.com
 PRISON LAW OFFICE
 1917 Fifth Street
 Berkeley, California 94710
 Telephone: (510) 280-2621
 Facsimile: (510) 280-2704
 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

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

LANCE AARON WILSON, et al,
 Plaintiff-Petitioners,
 vs.

FELICIA L. PONCE, in her capacity as
 Warden of Terminal Island, et al.,
 Defendant-Respondents.

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

**PLAINTIFF-PETITIONERS'
 RESPONSE TO DEFENDANTS-
 RESPONDENTS' STATEMENT OF
 UNCONTROVERTED FACTS AND
 CONCLUSIONS OF LAW IN
 SUPPORT OF MOTION FOR
 SUMMARY JUDGMENT**

Honorable Michael Fitzgerald

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

Pursuant to Central District of California Local Rule 56-1, Plaintiffs-Petitioners Lance Aaron Wilson, Maurice Smith, and Edgar Vasquez (“Petitioners”) submit this Response to Defendant-Respondents Felicia L. Ponce and Michael L. Carvajal’s (“Respondents”) Statement of Uncontroverted Facts and Conclusions of Law in support of their Motion for Summary Judgment.

I.

PETITIONERS’ RESPONSE TO RESPONDENTS’ STATEMENT OF UNCONTROVERTED FACTS

STATEMENT OF GENUINE DISPUTES OF MATERIAL FACT (“DF”)

DEFENDANT-RESPONDENTS’ PROPOSED FACT:	PLAINTIFFS’-PETITIONERS’ RESPONSES
1. 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.	DISPUTED. Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts upon which Ms. Morrison and Mr. Prioleau’s belief is based. Respondents have violated, and continue to violate, CDC recommendations for correctional facilities in a number of ways, including by failing to conduct surveillance testing (<i>see infra</i> DF 27), failing to appropriately screen staff for symptoms of COVID-19, <i>see infra</i> Petitioners’ Additional Uncontroverted Facts (“AUF”) 9-11, failing to require staff exposed to COVID-19 to quarantine or undergo testing for COVID-19, AUF 10, and failing to ensure conditions in quarantine/isolation units are non-punitive, AUF 20.

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
<p>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.</p>	<p>NOT DISPUTED.</p>
<p>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) and those modules are updated from time to time in accordance with guidance from the CDC, WHO, and DOJ.</p>	<p>DISPUTED. The BOP's COVID-19 Pandemic Response Plan is not consistent with CDC guidance regarding testing of staff and incarcerated workers. <i>See</i> DF 1.</p>
<p>4. Victoria Morrison, the Quality Improvement/Infection Prevention & Control Consultant at FCI Terminal Island, believes that FCI Terminal Island has been operating in compliance with the CDC's guidance and with the BOP's COVID-19 Pandemic Response Plan.</p>	<p>DISPUTED. Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts upon which Ms. Morrison's belief is based. <i>See</i> DF 1.</p>
<p>5. Victoria Morrison, the Quality Improvement/Infection Prevention & Control Consultant at FCI Terminal Island, believes that FCI Terminal Island has prevented further COVID-19</p>	<p>DISPUTED. Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts upon which Ms. Morrison's belief is based. <i>See</i> DF 1.</p>

**DEFENDANT-RESPONDENTS’
PROPOSED FACT:**

**PLAINTIFFS’-PETITIONERS’
RESPONSES**

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 cohorting and isolation procedures enacted after testing every inmate).

6. Dr. Jeffrey Beard believes that FCI Terminal Island has been operating in compliance with the CDC’s guidance and the BOP’s Response Plan.

DISPUTED. Respondents have proposed an opinion, not a fact. Petitioners dispute the facts upon which Dr. Beard’s opinion is based. *See* DF 1.

Additionally, Petitioners dispute that Dr. Beard is qualified to offer that opinion. Dr. Beard is a psychologist with no medical or epidemiological training, who is not licensed to provide clinical care, and has not provided any clinical care in over 40 years. Rim Decl., Ex. 2 at 3-4 (Deposition of J. Beard (“Beard Depo.”) 8:8-25; 9:1-12.) He acknowledges that he is not an expert in medical care delivery in prisons or in infection control within prisons. *Id.* at 4 (Beard Depo. at 9:13-16); Beard Decl. ¶ 8 (Dkt. 138-5.)

Finally, Dr. Beard lacks the foundation to offer these opinions. In his latest inspection of Terminal Island, Dr. Beard did not speak to a single incarcerated person about medical care delivery or COVID-19. Rim Decl., Ex.

**DEFENDANT-RESPONDENTS'
PROPOSED FACT:**

**PLAINTIFFS'-PETITIONERS'
RESPONSES**

2 at 5 (Beard Depo. 22:16-25). Dr. Beard's numerous citations to information from other individuals demonstrate his lack of first-hand knowledge. Beard Decl. ¶¶ 41-52 (Dkt. 138-5).

7. Epidemiologist Asma Tekbali believes FCI Terminal Island has been following CDC guidelines and the BOP's Pandemic Response Plan.

DISPUTED. Respondents have proposed an opinion, not a fact. Further, Petitioners dispute the facts upon which Ms. Tekbali's belief is based. *See* DF 1.

Additionally, Petitioners dispute that Ms. Tekbali has the proper foundation to offer that opinion. Ms. Tekbali has no firsthand knowledge of Terminal Island's COVID-19 response practices. She took few, if any, steps to corroborate the information that she included in either of her two reports, information which she received from the BOP's other expert, Dr. Beard, or from one member of prison leadership. *See* Declaration of Asma Tekbali ("Tekbali Decl.") ¶¶ 13, 15 (Dkt. No. 138-4). She did not speak with anyone incarcerated at Terminal Island, did not interview staff assigned to work in the housing units, did not review anyone's individual healthcare records, and did not review any contact tracing worksheets. Rim Decl., Ex. 3 at 6-8 (Deposition of Asma Tekbali ("Tekbali Depo.") 13:6-21, 14:24-15:16).

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
	<p>Finally, Petitioners dispute that Ms. Tekbali is qualified to offer that opinion. Ms. Tekbali has never held a position in a correctional facility, has no experience in correctional healthcare delivery, and has never been past the administrative area in any federal, state, county, or municipal correctional institution. <i>Id.</i> at 4-6 (Tekbali Depo. 10:19-21, 12:4-13:3). She is also not a medical doctor. <i>Id.</i> at 4 (Tekbali Depo. 10:16-18. She graduated from her Masters Program in 2019 and has since only had one position in the field of infection prevention, which she began in August 2019. <i>Id.</i> at 3 (Tekbali Depo. 9:19-25); Tekbali Decl. ¶ 2 (Dkt. No. 138-4).</p>
8. COVID-19 infection rates increased throughout California from November 2020 through February 2021.	NOT DISPUTED.
9. Los Angeles County experienced over 1.2 million confirmed COVID-19 cases to date.	NOT DISPUTED.
10. California has had over 3.7 million total confirmed positives to date.	NOT DISPUTED.
11. Respondents retained epidemiologist Asma Tekbali to opine as an expert on FCI Terminal Island's	DISPUTED. Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts

<p>DEFENDANT-RESPONDENTS’ PROPOSED FACT:</p>	<p>PLAINTIFFS’-PETITIONERS’ RESPONSES</p>
<p>infection control and testing procedures.</p>	<p>upon which Ms. Tekbali’s belief is based and dispute that Ms. Tekbali is qualified to opine as an expert on Terminal Island’s infection control practices. <i>See</i> DF 7.</p>
<p>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.</p>	<p>DISPUTED. Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts upon which Ms. Tekbali’s belief is based and dispute that Ms. Tekbali is qualified to opine as an expert on Terminal Island’s infection control practices. <i>See</i> DF 7. Moreover, there is no way to accurately determine whether COVID-19 cases were truly “well controlled” during this time period. Several class members sought medical care for flu-like symptoms in November of 2020 but were denied a COVID test, suggesting that Respondents artificially suppressed the number of positive cases by refusing to test symptomatic patients. Declaration of Maurice Smith (“Smith Decl.”) ¶ 4; Declaration of Daniel Chavez (“Chavez Decl.”) ¶ 4.</p>
<p>13. Epidemiologist Asma Tekbali believes that no major outbreak emerged within FCI Terminal Island in early 2021, and nothing comparable to the rates of infection that experienced in Southern California over that period.</p>	<p>DISPUTED. Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts upon which Ms. Tekbali’s belief is based and dispute that Ms. Tekbali is qualified to opine as an expert on Terminal Island’s infection control</p>

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
	practices. <i>See</i> DF 7.
<p>14. Epidemiologist Asma Tekbali believes that the lack of a major outbreak at FCI Terminal Island in December 2020-January 2021 despite the uncontrolled cases outside the facility in California during that period provides further proof that the infection control measures FCI Terminal Island implemented have been effective and proper.</p>	<p>DISPUTED. Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts upon which Ms. Tekbali's belief is based and dispute that Ms. Tekbali is qualified to opine as an expert on Terminal Island's infection control practices. <i>See</i> DF 7.</p>
<p>15. FCI Terminal Island began screening inmates for COVID-19 symptoms beginning in March 2020.</p>	<p>DISPUTED. Respondents have not consistently conducted contact investigations, isolated patients, or screened and tested positive contacts. A report published by the Office of the Inspector General (OIG) in January 2021 detailed the failures of Terminal Island's early pandemic response.</p> <p>The OIG noted that after ignoring the flu-like symptoms of many of those incarcerated for weeks, Respondents conducted an institution-wide testing only after "nearly half of the inmate population was already infected." Declaration of Naeun Rim ("Rim Decl.") Ex. 15 at 4 (OIG Report p. ii). The OIG further noted that even after Respondents received test results, they still housed over 100 people with negative COVID-19 tests alongside over 100 more who had positive</p>

**DEFENDANT-RESPONDENTS’
PROPOSED FACT:**

**PLAINTIFFS’-PETITIONERS’
RESPONSES**

COVID-19 tests. *Id.*

Problems with symptom screening continue to the present day. Recently, class members housed in A-Unit asked to be tested for COVID-19 after experiencing flu-like symptoms, but they were turned away and refused a test because their fevers were not high enough. Smith Decl. ¶ 7; Declaration of Marcus Tsingine (“Tsingine Decl.”) ¶¶ 4-7; Chavez Decl. ¶ 7; Declaration of Christopher Miller (“Miller Decl.”) ¶¶ 3-6.

Failures to test are ongoing as well. Due to lack of space in the quarantine unit, some new arrivals have told witnesses they were moved to the general population without being tested. Declaration of Thomas Bentley (“Bentley Decl.”) ¶¶ 8, 9. Class members report that tests are delayed or are not provided unless patients have a fever. Declaration of Claud Koerber (“Koerber Decl.”) ¶ 19; Chavez Decl. ¶¶ 4, 7; Smith Decl. ¶ 7.

Several class members report that a group of men from the A-Unit were recently denied a COVID test despite exhibiting COVID-symptoms. Chavez Decl. ¶ 7; Smith Decl. ¶ 7. Days after some of those men were transferred to the D-Unit, the D-Unit began reporting positive cases and was put on lockdown. Chavez Decl. ¶ 7; Smith

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
	Decl. ¶ 7.
16. The first confirmed case of COVID-19 at FCI Terminal Island was on April 10, 2020.	DISPUTED. The first confirmed case of COVID-19 at FCI Terminal Island amongst staff was on April 5, 2020. The first confirmed case of COVID-19 at FCI Terminal Island amongst incarcerated people was April 10, 2020. <i>See</i> Rim Decl. Ex. 15 at 5 (OIG Report at iii).
17. In April 2020, it was difficult for any institution to obtain COVID-19 tests, let alone in large numbers.	NOT DISPUTED.
18. With the assistance of the Los Angeles County Department of Public Health (LACDPH"), FCI Terminal Island tested all inmates for COVID-19 starting on April 23, 2020.	DISPUTED. Respondents have not consistently conducted contact investigations, isolated patients, or screened and tested positive contacts. <i>See</i> DF 15.
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.	NOT DISPUTED.
20. After the results of the initial round of tests were received from LACDPH, inmates testing positive were separated from those who tested positive and the positive inmates were isolated.	DISPUTED. Respondents have not consistently conducted contact investigations, isolated patients, or screened and tested positive contacts. <i>See</i> DF 15.

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
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.	DISPUTED. Respondents have not consistently conducted contact investigations, isolated patients, or screened and tested positive contacts. <i>See</i> DF 15.
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-10 Pandemic Response Plan Module 3, <i>Screening and Testing</i> .	DISPUTED. Respondents have not consistently conducted contact investigations, isolated patients, or screened and tested positive contacts. <i>See</i> DF 15.
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.	NOT DISPUTED.
24. 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.	NOT DISPUTED.
25. FCI Terminal Island continues to conduct testing in accordance with the BOP's testing protocols, which include testing all incoming and outgoing	DISPUTED Respondents have not consistently conducted testing for incoming incarcerated people. <i>See</i> DF 15. At least one new arrival has told a

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
inmates in accordance with BOP Pandemic Response Plan Module 4, Inmate Isolation and Quarantine.	class member attests that they were moved to the general population without being tested. Bentley Decl. ¶¶ 8, 9.
26. FCI Terminal Island also has protocols to determine when to test inmates within the institution's general population because of contact investigation.	NOT DISPUTED.
27. The testing of all inmates releasing or transferring out of FCI Terminal Island serves as random surveillance testing of the institution's general population.	DISPUTED. Terminal Island does not conduct surveillance testing, which the BOP defines as "testing all inmates at an institution without any known COVID-19 cases." Morrison Decl., Ex. 1 (Dkt. No. 138-2) (BOP's COVID-19 Pandemic Response Plan Module 3, Screening and Testing, at page 7); <i>see also</i> Dkt. No. 74-1 (Report of Dr. Michael Rowe) (Court Expert opining that surveillance testing is not being done at Terminal Island).
28. As part of intake procedures, all inmates who entered FCI Terminal Island after the initial outbreak entered quarantine units and were tested as determined by existing BOP testing protocols.	DISPUTED. Respondents have not consistently conducted testing and quarantining for incoming incarcerated people. <i>See</i> DFs 15, 25.
29. After the spring outbreak, when inmate movement resumed, FCI Terminal Island tested all incoming inmates, isolated positive inmates,	DISPUTED. Respondents have not consistently conducted testing and quarantining for incoming incarcerated

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
quarantined negative inmates, and re-tested quarantined inmates on or after the 14th day of their quarantine period.	people. <i>See</i> DF 15.
30. 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.	DISPUTED. Respondents have not consistently conducted testing and quarantining for incoming incarcerated people. <i>See</i> DF 15.
31. Incoming inmates have no contact with inmates in the institution's general population until they clear quarantine or isolation.	DISPUTED. Respondents have not consistently conducted testing and quarantining for incoming incarcerated people. <i>See</i> DFs 15, 25.
32. As of July 26, 2021, FCI Terminal Island has conducted over 2,704 COVID-19 tests on the 705 inmates at Terminal Island. These results do not include testing that was conducted at outside facilities.	NOT DISPUTED.
33. All ten of the FCI Terminal Island inmates who died of COVID-related illness contacted [sic] the disease during the April-May 2020 outbreak at FCI Terminal Island.	NOT DISPUTED.
34. FCI Terminal Island has not had an inmate hospitalized for COVID-related illness since August 20, 2020.	NOT DISPUTED.

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
35. From January 2021 through July 19, 2021, FCI Terminal Island did not have a single lab confirmed COVID-19 case in its general population.	NOT DISPUTED. Terminal Island's testing practices are inadequate, however. <i>See</i> DF 15.
36. Victoria Morrison believes that FCI Terminal Island has prevented further COVID-19 deaths, hospitalization, and large scale outbreaks, like the one that occurred in the Spring of 2020, by implementing a host of measures, including broad-based testing and adherence to evolving CDC guidelines for infection prevention and control (such as cohorting and isolation procedures enacted after testing all inmates).	DISPUTED. Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts upon which Ms. Morrison's belief is based. <i>See</i> DF 1.
37. There are currently 13 inmate positive cases at FCI Terminal Island, which were detected after three inmates in one housing unit were promptly tested after reporting symptoms.	DISPUTED that testing was prompt. Petitioners have cause to believe Respondents' testing practices are inadequate. <i>See</i> DF 15. Several class members testify that they were refused a test despite reporting COVID-19 symptoms. Smith ¶ 4; Chavez ¶ 4.
38. Even though five inmates were symptomatic, after successive rounds of testing their entire housing unit, FCI Terminal Island identified eight asymptomatic cases.	NOT DISPUTED.
39. All of these inmates have been isolated and are receiving daily	NOT DISPUTED.

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
symptom screenings.	
40. None of these inmates with newly identified COVID-19 cases has been hospitalized.	NOT DISPUTED.
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.	NOT DISPUTED.
42. After repeated testing, FCI Terminal Island has verified that the cases have been contained within a single housing unit.	DISPUTED. Class members testify that multiple housing units are now on quarantine. Decl. Smith ¶ 6; Decl. Chavez ¶¶ 7-8; Koerber Decl. ¶ 11. Petitioners have cause to believe Respondents' testing practices are inadequate. <i>See</i> DF 15.
43. FCI Terminal Island has two current staff cases, one involving an individual who had had [sic] not been to the institution since July 1 and tested positive on July 13, and another involving a correctional officer.	DISPUTED. According to the BOP's website, 6 FCI Terminal Island staff members were positive for COVID-19 as of August 9, 2021. <i>See</i> https://www.bop.gov/coronavirus/ .
44. After the entire housing unit that officer had worked in was tested, there were no positive cases in that housing unit.	NOT DISPUTED.
45. The BOP's COVID-19 Pandemic Response Plan, Module 11, Employee	NOT DISPUTED.

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
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.	
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.	NOT DISPUTED.
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.	NOT DISPUTED.
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 FCI Terminal Island, via self-swab collection kits.	NOT DISPUTED.

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
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.	NOT DISPUTED.
50. Staff at FCI Terminal Island have access to their test results through a secure online portal provided by Quest Diagnostics.	NOT DISPUTED.
51. Quest Diagnostics provides immediate notification to the staff member in the event of a positive test via a telephone call and overnight mail.	NOT DISPUTED.
52. FCI Terminal Island employees are obligated to report positive test results and are directed not to report to work.	NOT DISPUTED.
53. Quest Diagnostics also provides a nightly aggregate report of staff results to the BOP.	NOT DISPUTED.
54. COVID-19 testing provided by Quest Diagnostics is available at no charge to BOP staff.	NOT DISPUTED.
55. Furthermore, as individuals working in a prison, all FCI Terminal Island staff have access to COVID-19	NOT DISPUTED.

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
testing free of charge from dozens of other locations in the community, including Rite-Aid and CVS pharmacies and testing sites operated by the LACDPH.	
56. FCI Terminal Island administered its first doses of the Pfizer COVID-19 vaccine to inmates on December 28, 2020.	NOT DISPUTED.
57. Pursuant to the BOP's COVID-19 Vaccine Guidance dated December 28, 2020, vaccinations were offered to FCI Terminal Island staff first to decrease the possible introduction of COVID-19 into the institution, and any remaining vaccinations were offered to FCI Terminal Island inmates.	NOT DISPUTED.
58. As there were not enough remaining doses to vaccinate all of the facility's inmates in December 2020, the institution's medical staff offered vaccinations to inmates as set forth in the BOP's national guidance.	NOT DISPUTED.
59. 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	NOT DISPUTED.

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
being at increased risk for severe illness from 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.	NOT DISPUTED.
61. Second doses were administered from January 18-22, 2021 and two inmates that had received the first dose refused the second dose.	NOT DISPUTED.
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.	NOT DISPUTED.
63. FCI Terminal Island received another 120 doses of vaccine and administered it from April 19-23, 2021.	NOT DISPUTED.
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.	DISPUTED. At least one class member, Maurice Smith, testifies that he has never been offered the vaccine. Smith Decl. ¶ 8.
65. All incoming inmates are offered the COVID-19 vaccine at their intake	NOT DISPUTED.

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
to the facility upon arrival.	
66. Additionally, any inmates who previously refused the vaccine can change their mind and elect to receive it.	DISPUTED. Respondents' educational process is inadequate and people do not have access to personalized medical advice regarding the vaccine, rendering such a choice not meaningfully available. <i>See</i> DF 68.
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.	NOT DISPUTED.
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 throughout the institution; (5) conducting vaccine education during chronic case 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)	DISPUTED. Class members are not offered one-on-one sessions to educate them regarding the vaccine; they are instead simply asked if they want the vaccine or not. <i>See</i> Smith Decl. ¶¶ 8-9; Koerber Decl. ¶ 6; Miller Decl. ¶ 7. The emails provided by Respondents give only "generalized information on the COVID vaccine, information taken from the CDC." (Decl. Rim, Ex. 1 at 5-6 (Morrison Depo. 28:8-29:2.) The posters provide "small blurbs on the COVID vaccine." (<i>Id.</i> 29:22-24.) There are no confidential settings to allow people to ask questions about their concerns with the vaccine. Leseman Decl. ¶ 10; Miller Decl. ¶ 10; Smith Decl. ¶¶ 8-9; Declaration of Edgar Vasquez ("Vasquez Decl.") ¶ 6; Declaration of Eric Pulido-Muzquiz

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
conducting one-on-one sessions with the two visually impaired inmates at FCI Terminal Island.	("Pulido-Muzquiz Decl.") ¶ 9; Koerber Decl. ¶¶ 5, 7. Some people with long COVID symptoms have not had an opportunity to speak with medical staff about the vaccine. <i>See</i> Smith Decl. ¶ 9; Koerber Decl. ¶¶ 5, 16. Still others have stated that they have specific health concerns that make them worried about getting the vaccine in the absence of specific medical advice that is unavailable to them. <i>See</i> Chavez Decl. ¶ 18; Koerber Decl., ¶¶ 5, 7; Pulido-Muzquiz Decl. ¶¶ 8, 9.
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.	NOT DISPUTED.
70. Each time an inmate is offered the vaccine, he has the opportunity to ask questions about the vaccine.	DISPUTED. <i>See</i> DF 68.
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.	NOT DISPUTED. But this measure has either not been communicated to patients or has proved inadequate in practice. <i>See</i> DF 68.
72. As a result of FCI Terminal Island's vaccine engagement efforts,	NOT DISPUTED.

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
approximately 53 inmates have reconsidered their prior vaccine refusals and have been vaccinated.	
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.	NOT DISPUTED.
74. As of July 26, 2021, FCI Terminal Island has fully vaccinated 409/705 (58%) of the inmates and 192/285 (72%) of the staff. These figures do not include inmates or staff who received the vaccine elsewhere.	NOT DISPUTED.
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.	NOT DISPUTED.
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.	NOT DISPUTED.

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
77. Overall, 259 inmates have refused the vaccine.	NOT DISPUTED.
78. FCI Terminal Island has reduced its population by 522 inmates since March 2020.	DISPUTED. Between May 15, 2020 and August 9, 2021, Terminal Island's population has fallen by only 295—from 1,042 to 747. <i>See</i> AUF 19.
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.	DISPUTED. Terminal Island's population has not decreased as much as Respondents claim. <i>See</i> DF 78.
80. The BOP set temporary population targets for low and minimum-security institutions with open bay housing and is adhering to those targets. FCI Terminal Island's current population of 704 inmates is below the revised COVID-19 target population set by the BOP.	DISPUTED. The current population is 747. <i>See</i> AUF 19.
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.	NOT DISPUTED.
82. Dr. Beard determined and opined that on September 10, 2020 and again	DISPUTED. The evidence shows Terminal Island is not in compliance

**DEFENDANT-RESPONDENTS’
PROPOSED FACT:**

**PLAINTIFFS’-PETITIONERS’
RESPONSES**

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.

with mask-wearing policies, namely that staff only wear masks during inspections and around higher level officials. *See* Court Expert Report, Dkt. No. 74-1 at 46 (“During my tour of the institution, there was general staff compliance with wearing cloth face coverings, however there were a number of instances when staff were observed by me to be clustered closely in a small group of 2-4 individuals and not all were wearing their masks over their mouth and nose. Typically, when they realized they were being observed, they would pull their masks back up into position. This was not observed when they were in proximity to residents”) (“Several members of the incarcerated population mentioned unprompted during their interviews that, aside from the period of my visit, there is frequent noncompliance with masking by staff though this could not be corroborated.”); *see also* Decl. Koerber ¶ 13.

Moreover, Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts upon which Dr. Beard’s belief is based, that he is qualified to offer this opinion, and that he has an adequate foundation to offer it. *See* DF 6.

83. Dr. Beard determined and opined that FCI Terminal Island continues to

DISPUTED. Respondents have proposed an opinion, not a fact.

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
evolve its practices regarding COVID mitigation as the CDC and the BOP's policies and guidelines are revised.	Moreover, Petitioners dispute the facts upon which Dr. Beard's belief is based, that he is qualified to offer this opinion, and that he has an adequate foundation to offer it. <i>See</i> DF 6.
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 and staff had been offered the vaccine at the time of his visit.	DISPUTED. Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts upon which Dr. Beard's belief is based, that he is qualified to offer this opinion, and that he has an adequate foundation to offer it. <i>See</i> DF 6.
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 staff rates were higher than other systems.	DISPUTED. Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts upon which Dr. Beard's belief is based, that he is qualified to offer this opinion, and that he has an adequate foundation to offer it. <i>See</i> DF 6.
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.	DISPUTED. Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts upon which Dr. Beard's belief is based, that he is qualified to offer this opinion, and that he has an adequate foundation to offer it. <i>See</i> DF 6.
87. Ms. Tekbali bore the lead responsibility as an Infection Preventionist at Lenox Hill Hospital-Northwell Health and her hospital was	NOT DISPUTED.

DEFENDANT-RESPONDENTS' PROPOSED FACT:	PLAINTIFFS'-PETITIONERS' RESPONSES
at the center of dealing with New York City's COVID-19 crisis.	
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."	DISPUTED. Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts upon which Ms. Tekbali's belief is based and dispute that Ms. Tekbali is qualified to opine as an expert on Terminal Island's infection control practices. <i>See</i> DF 7.
89. Ms. Tekbali determined and opined that "the steps that the BOP took to respond to, and control FCI Terminal Island's outbreak went beyond CDC and BOP guidance and the effectiveness of these actions are reflected today in the lack of major outbreaks at the facility."	DISPUTED. Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts upon which Ms. Tekbali's belief is based and dispute that Ms. Tekbali is qualified to opine as an expert on Terminal Island's infection control practices. <i>See</i> DF 7.
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."	DISPUTED. Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts upon which Ms. Tekbali's belief is based and dispute that Ms. Tekbali is qualified to opine as an expert on Terminal Island's infection control practices. <i>See</i> DF 7.
91. Ms. Tekbali determined and opined that notes that [sic] the fact that 80% of FCI Terminal Island's inmate population is either COVID-recovered or vaccinated provides a great	DISPUTED. Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts upon which Ms. Tekbali's belief is based and dispute that Ms. Tekbali is

**DEFENDANT-RESPONDENTS’
PROPOSED FACT:**

**PLAINTIFFS’-PETITIONERS’
RESPONSES**

foundation for herd immunity.

qualified to opine as an expert on Terminal Island’s infection control practices. *See* DF 7.

92. Ms. Tekbali determined and opined that “A new mass outbreak at the facility is highly unlikely.”

DISPUTED. Respondents have proposed an opinion, not a fact. Moreover, Petitioners dispute the facts upon which Ms. Tekbali’s belief is based and dispute that Ms. Tekbali is qualified to opine as an expert on Terminal Island’s infection control practices. *See* DF 7.

II.

PETITIONERS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE

A. Office of the Inspector General (OIG) Review

PETITIONERS' ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE ("AUF")	SUPPORTING EVIDENCE
<p>1. In January 2021, the Office of the Inspector General published a report with its findings from a remote inspection that had been undertaken between May 6 and June 25, 2020, "to understand how the COVID-19 pandemic affected [Terminal Island] and to assess the steps Terminal Island officials took to prepare for, prevent, and manage COVID-19 transmission within the facility."</p>	<p>Rim Decl. Ex. 15 at 3 (OIG Report at i).</p>
<p>2. According to the January 2021 OIG Report, Terminal Island tested its entire inmate population for COVID-19 in April 2020, by which time "nearly half of its population was already infected."</p>	<p>Rim Decl. Ex. 15 at 4 (OIG Report at ii).</p>
<p>3. The OIG found that although Terminal Island staff said they were testing the inmate population so that they could isolate COVID-19 positive inmates from COVID-19 negative inmates, "107 negative inmates in 2 housing units remained housed with 129 positive inmates in those units for between 4 and 5 days after the institution received their test results."</p>	<p>Rim Decl. Ex. 15 at 4 (OIG Report at ii).</p>

///

///

B. Screening and Testing

PETITIONERS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE	SUPPORTING EVIDENCE
4. On May 11 2020, more than 700 people at Terminal Island (693 prisoners and 15 staff) had tested positive for COVID-19.	Plaintiff-Petitioners' Complaint ¶ 6 (Dkt. No. 1); Respondents' Answer to Complaint ¶ 6 (Dkt. No. 98).
5. By June 21, 2020, at least ten incarcerated people at Terminal Island had died of COVID-19.	Rim Decl. Ex. 15 at 5 (OIG Report at iii).
6. In his report, the Court Expert warned that "[m]erely testing symptomatic staff and known close contacts is <u>completely inadequate</u> for identifying sources of infection which place the resident population at risk."	Court Expert Report at 40 (Dkt. No. 74-1).
7. In his report, the Court Expert reported that multiple staff members had been allowed to work for as many as six days following the onset of COVID-19 symptoms, and made a series of recommendations to address this issue.	Court Expert Report at 14, 45, 28 (Dkt. No. 74-1).
8. Symptom screenings may not detect staff with asymptomatic infections.	Rim Decl., Ex. 22 at 6 (CDC, <i>Interim Guidance for SARS-CoV-2 Testing in Correctional and Detention Facilities</i> at 5) ("Symptom screenings cannot identify persons with COVID-19 who may be asymptomatic or pre-symptomatic, and therefore will not prevent all persons with COVID-19 from entering the facility").

PETITIONERS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE	SUPPORTING EVIDENCE
<p>9. Respondents do not ask staff during the screening process if they have recently been in close contact with a person known to be infected with COVID-19.</p>	<p>Rim Decl., Ex. 1 at 9 (Morrison Depo. at 83:2-5); Morrison Decl. Ex 1, App. V (Dkt. 138-2 at 163) (BOP Screening Tool for Staff).</p>
<p>10. Respondents do not require staff identified as close contacts of people infected with COVID-19 to undergo COVID-19 testing, even if that staff member is unvaccinated.</p>	<p>Rim Decl., Ex. 1 at 11 (Morrison Depo. at 101:5-8) (“Q. If a staff person is identified as a close contact [of a COVID-19 infected individual], are they required to stay home and not report to work for any period of time? A. No.”); <i>Id.</i> at 11 (Morrison Depo. at 101:9-11) (same policy even if the staff person is unvaccinated); <i>Id.</i> at 10 (Morrison Depo. at 100:18-25) (stating that those staff members known to be close contacts of infected individuals are not tested); <i>Id.</i> at 11 (Morrison Depo. at 101:1-11) (even unvaccinated staff members who are close contacts of infected individuals do not need to be tested)); Morrison Decl. Ex. 1 (Dkt. No. 138-2 at 116) (stating under “Guidance for Staff with Potential Exposure to COVID-19” that “[a] negative COVID-19 test is not required for staff to return to work”).</p>
<p>11. Respondents do not ask staff during screening whether they have been vaccinated.</p>	<p>Rim Decl., Ex. 1 at 9 (Morrison Depo. at 83:6-8)</p>
<p>12. A person’s exposure to another who is</p>	<p>Rim Decl., Ex. 3 at 10 (Tekbali</p>

PETITIONERS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE	SUPPORTING EVIDENCE
<p>known to be infected with COVID-19 is clinical indication of the need for that person to be tested for COVID-19.</p>	<p>Depo. 19:16-17.)</p>

C. Healthcare and Mortality Reviews

PETITIONERS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE	SUPPORTING EVIDENCE
<p>13. In his report, the Court Expert found that Terminal Island had eight healthcare vacancies.</p>	<p>Court Expert Report at 10 (Dkt. No. 74-1).</p>
<p>14. In his report, the Court Expert identified failures to track medical appointments and to track chronic conditions.</p>	<p>Court Expert Report at 21-22 (Dkt. No. 74-1).</p>
<p>15. In his report, the Court Expert concluded that at least one of the ten COVID-19 related deaths was "avoidable," after a nurse's request for a swallow test was ignored for days.</p>	<p>Court Expert Report at 69-70 (Dkt. No. 74-1).</p>
<p>16. The Court Expert noted that there was poor understanding of, and compliance with, social distancing and face covering practices.</p>	<p>Court Expert Report at 12 (Dkt. No. 74-1).</p>
<p>17. The Court expert noted that there was an inadequate "process for obtaining replacement face coverings despite evidence for plentiful supplies."</p>	<p>Court Expert Report at 12 (Dkt. No. 74-1).</p>

PETITIONERS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE	SUPPORTING EVIDENCE
<p>18. The Court Expert concluded that despite “the appearance of calm,” “huge risks remain” and “the potential for a devastating return of the outbreak remains.”</p>	<p>Court Expert Report at 11 (Dkt. No. 74-1).</p>

D. Quarantine and Isolation

PETITIONERS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE	SUPPORTING EVIDENCE
<p>19. Between July 26, 2021, and August 9, 2021, Terminal Island’s inmate population increased by 42.</p>	<p>https://www.bop.gov/locations/institutions/trm/ (reporting a population of 747 as of August 9, 2021)</p>
<p>20. The CDC Guidance for correctional facilities states that facilities should “[e]nsure that medical isolation for COVID-19 is distinct from punitive solitary confinement of incarcerated/detained individuals, both in name and in practice.” Respondents fail to comply with this recommendation by handcuffing class members who report positive cases and sending them to solitary confinement, as well as taking away phone and television privileges from units placed under quarantine.</p>	<p>Rim Decl., Ex. 14 at 16 (CDC, <i>Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities</i> at 15); Koerber Decl. ¶ 22; Chavez Decl. ¶ 11-12; Bentley Decl. ¶¶ 10, 11.</p>

E. Immunity and Risk

PETITIONERS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE	SUPPORTING EVIDENCE
<p>21. Public health experts do not know</p>	<p>See Rim Decl., Ex. 20 (Andreano</p>

PETITIONERS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE	SUPPORTING EVIDENCE
<p>how long natural immunity from COVID-19 infection lasts.</p>	<p>& Rappuoli, <i>SARS-CoV-2 escaped natural immunity, raising questions about vaccines and therapies</i>)</p>
<p>22. Public health experts do not know what degree of protection, if any, natural immunity from COVID-19 infection provides against new variants of the coronavirus.</p>	<p>See Rim Decl., Exs. 20 (Andreano & Rappuoli, <i>SARS-CoV-2 escaped natural immunity, raising questions about vaccines and therapies</i>) and 21 (Karim & de Oliveira, <i>New SARS-CoV-2 Variants - Clinical, Public Health, and Vaccine Implications</i>).</p>

F. Centers for Disease Control and Prevention (“CDC”) Guidelines

PETITIONERS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE	SUPPORTING EVIDENCE
<p>23. The CDC has consistently recommended prisons “actively encourage staff not to report to work when sick,” and screen staff for symptoms upon entry into the prison.</p>	<p>Rim Decl., Ex. 14 at 6 (CDC, <i>Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities</i> at 5).</p>
<p>24. The CDC “recommends verbal screening and temperature checks for . . . staff . . . who enter correctional and detention facilities,” and states the verbal screening should include the following question: “[i]n the past 14 days, have you had close contact with a person known to be infected with the novel coronavirus (COVID-19)?”</p>	<p>Rim Decl., Ex. 14 at 26 (CDC, <i>Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities</i> at 25).</p>

PETITIONERS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE	SUPPORTING EVIDENCE
25. The CDC recommends correctional facilities test "[a]ll persons with known or suspected exposure to someone with COVID-19, regardless of their COVID-19 vaccination status."	Rim Decl., Ex. 22 at 6 (CDC, <i>Interim Guidance for SARS-CoV-2 Testing in Correctional and Detention Facilities</i> at 5).
26. The CDC advises that "the risk of severe illness and death from COVID-19 far outweighs any benefits of natural immunity."	Rim Decl., Ex. 19 at 3 (CDC, <i>Answering Patients' Questions About COVID-19 Vaccine and Vaccination</i> at 2).
27. The CDC recommends "increasing incarcerated/detained persons' telephone privileges to promote mental health..."	Rim Decl., Ex. 14 at 13 (CDC, <i>Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities</i> at 12).

G. Additional Facts

PETITIONERS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE	SUPPORTING EVIDENCE
28. The 7-day average of daily COVID-19 infections across the United States has risen from 12,183 on July 1, 2021 to 110,360 on August 8, 2021.	https://www.nytimes.com/interactive/2021/us/covid-cases.html , as of August 9, 2021.
29. The 7-day average of daily COVID-19 infections in California has risen from 1,064 on July 1, 2021, to 13,366 on August 8, 2021.	https://www.nytimes.com/interactive/2021/us/covid-cases.html , as of August 9, 2021.
30. According to the CDC, Los Angeles	Rim Decl., Ex. 18 at 2-3 (CDC,

PETITIONERS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE	SUPPORTING EVIDENCE
<p>County currently has “high” community transmission—the most severe category.</p>	<p><i>COVID Data Tracker, COVID-19 Integrated County View</i> at 1-2).</p>
<p>31. The federal Receiver in charge of medical care in California’s state prison system confirms that staff vaccination is a necessary measure to reduce risk of harm to incarcerated people: he has recommended all staff who work at the prisons be vaccinated (with appropriate medical and religious exemptions).</p>	<p>Rim Decl., Ex. 13 at 6 (Report of J. Clark Kelso, Receiver, at 3, ECF p. 6).</p>
<p>32. Based on science, data, and his experience to date of battling the pandemic, the Receiver has determined that staff, the primary vectors of infection, must be vaccinated to prevent the spread of the Delta variant in the prisons and consequent risk of severe illness and death to incarcerated people.</p>	<p>Rim Decl., Ex. 13 at 8-11 (Report of J. Clark Kelso, Receiver, at 5-8, ECF pp. 7-10); Rim Decl., Ex. 12 at 4 (Declaration of Dr. Joseph Bick (“Bick Decl.”) ¶¶ 16-17).</p>
<p>33. The federal Receiver concluded that “[w]ith the rate of vaccination unacceptably low, the voluntary means of raising it ineffective and insufficient, and an urgent need to increase the vaccination rate in the face of the Delta variant, a mandatory vaccination policy is urgently required.”</p>	<p>Rim Decl., Ex. 13 at 27 (Report of J. Clark Kelso, Receiver, at 24, ECF p. 26); <i>see also</i> Rim Decl., Ex. 12 at 7 (Bick Decl. ¶ 37).</p>
<p>34. Unvaccinated institutional staff at the California Department of Corrections and Rehabilitation are tested weekly for COVID-19.</p>	<p>Rim Decl., Ex. 12 at 4 (Bick Decl. ¶ 19).</p>
<p>35. The Delta variant of SARS-CoV-2 is more than twice as transmissible as the Wuhan strain. On average, a patient infected with the Delta variant sheds 1,000 times</p>	<p>Rim Decl. Ex. 13 at 20, Report of J. Clark Kelso, Receiver at 17; Rim Decl. Ex. 12 at 6, Bick Decl. ¶ 29; Rim Decl. Ex 16.</p>

PETITIONERS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE	SUPPORTING EVIDENCE
<p>more virus than an average patient with an earlier strain. It has caused outbreaks even among populations with relatively high rates of vaccination.</p>	
<p>36. Contact tracing worksheets produced by Respondents continue to document staff members working for multiple days after becoming symptomatic.</p>	<p>Rim Decl., Exs. 4-11 (FCI Terminal Island Contact Tracing Worksheets: Ex. 7, BOP 8180-8184 (symptom onset 11/25, last day of work 11/27); Ex. 8, BOP 8199-8206 (symptom onset 12/10, last day of work 12/14); Ex. 9, BOP 8222-8227 (symptom onset 12/8, last day of work 12/14); Ex. 4, BOP 8118-8124 (symptom onset 12/28, last day of work 1/1); Ex. 5, BOP 8140-8145 (symptom onset 12/12, last day of work 12/14)).</p>
<p>37. Terminal Island is a Care Level Three facility that houses prisoners who need long-term medical or mental health care, meaning the population at Terminal Island tends to be older and sicker than the average prison population.</p>	<p>Rim Decl. Ex. 1 at 3 (Morrison Depo. at 15:13-18).</p>
<p>38. Respondent's expert Tekbali believes staff who show any symptoms of COVID should report their symptoms and get a COVID test before reporting to work.</p>	<p>Rim Decl., Ex. 3 at 9-10 (Tekbali Depo. 18:19-19:06).</p>
<p>39. Based on data from the BOP, OIG estimated that as of April 12, 2020, 585 class members were potentially eligible for home confinement under existing authorities and BOP guidance. As of June 1, 2020, only 23 had been transferred to home confinement.</p>	<p>Rim Decl., Ex. 15 at 36, 38 (OIG Report at 29, 31).</p>

PETITIONERS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE	SUPPORTING EVIDENCE
<p>40. Between March 1 and June 1, 2020, Respondents received 244 compassionate release requests. As of March 1, the warden recommend only 5 be approved. Between March 1 and June 1, the courts granted 13 petitions for compassionate release.</p>	<p>Rim Decl., Ex. 15 at 39 (OIG Report at 32).</p>
<p>41. Requests for medical care by class members frequently go unanswered.</p>	<p>Chavez Decl. ¶¶ 6, 13, 15-17; Koerber Decl. ¶¶ 8, 16; Leseman Decl. ¶ 10; Vasquez Decl. ¶ 6; Smith Decl. ¶¶ 3, 10.</p>
<p>42. Full or partial quarantine lockdowns remain a consistent and repeated problem within Terminal Island due to Respondents' failure to adequately control the spread of the virus, depriving class members of even minimal programming opportunities.</p>	<p>Bentley Decl. ¶¶ 6-8; Chavez Decl. ¶¶ 3, 8-9; Koerber Decl. ¶¶ 11, 17; Miller Decl. ¶ 6; Smith Decl. ¶ 6.</p>
<p>43. Because "California is currently experiencing the fastest increase in COVID-19 cases during the entire pandemic," the California Department of Public Health ("CDPH") now requires that all California workers in health care settings be vaccinated.</p>	<p>Rim Decl., Ex. 23 at 2 (CDPH Order of August 5, 2021).</p>
<p>44. California has determined that "[v]accination against COVID-19 is the most effective means of preventing infection with the COVID-19 virus, and subsequent transmission and outbreaks. As we respond to the dramatic increase in cases, all health care workers must be vaccinated to reduce the chance of transmission to vulnerable</p>	<p>Rim Decl., Ex. 23 at 2 (CDPH Order of August 5, 2021).</p>

PETITIONERS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS AND SUPPORTING EVIDENCE	SUPPORTING EVIDENCE
<p>populations.”</p>	
<p>45. According to the CDPH, there is significant need to protect people in “[p]articularly high-risk settings where COVID-19 outbreaks can have severe consequences for vulnerable populations including hospitalization, severe illness, and death,” which are characterized by “frequent exposure to staff and highly vulnerable patients, including elderly, chronically ill, critically ill, medically fragile, and disabled patients” and where “patients are at high risk of severe COVID-19 disease due to underlying health conditions, advanced age, or both.”</p>	<p>Rim Decl., Ex. 23 at 2 (CDPH Order of August 5, 2021).</p>
<p>46. According to the CDPH, “workers” who must be vaccinated include “persons not directly involved in patient care, but who could be exposed to infectious agents that can be transmitted in the health care setting.”</p>	<p>Rim Decl., Ex. 23 at 3 (CDPH Order of August 5, 2021).</p>
<p>47. On August 5, 2021, California required that “all health care workers must be vaccinated to reduce the chance of transmission to vulnerable population.”</p>	<p>Rim Decl., Ex. 23 at 2 (CDPH Order of August 5, 2021).</p>
<p>48. California requires those in high risk congregate living settings to verify each staff person’s vaccination status and then implement mandatory COVID-19 testing at least weekly of all unvaccinated or incompletely vaccinated staff.</p>	<p>Rim Decl., Ex. 24 at 5 (CDPH Order of July 26, 2021).</p>

III.
PETITIONERS' RESPONSE TO RESPONDENTS' 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).

CONTESTED.

Summary judgment is appropriate only when there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Any fact that “might affect the outcome of the suit under the governing law” is material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party on summary judgment bears the initial burden of “identifying those portions of the pleadings and discovery responses which demonstrate the absence of a genuine issue of material fact.” *Cunningham v. City of Los Angeles*, 2004 WL 502309, at *2 (C.D. Cal. Feb. 18, 2004) (citations omitted). In order to defeat a motion for summary judgment, the non-moving party need only demonstrate that there is any specific fact that presents “a genuine issue for trial.” *Anderson*, 477 U.S. at 250. In weighing the facts propounded by the respective parties, “the Court does not make credibility determinations or weigh conflicting evidence and draws all inferences in the light most favorable to the nonmoving party.” *Cunningham*, 2004 WL 502309, at *2 (citing *T.W. Elec. Svc., Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630–31 (9th Cir. 1987)).

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

1 imposed by COVID-19 was “ultimately not averted.” *Wilson v. Williams*, 961 F.3d
2 829, 840 (6th Cir. 2020) (quoting *Farmer*, 511 U.S. at 844); *Valentine v. Collier*,
3 956 F.3d 797, 801 (5th Cir. 2020); *Swain v. Junior*, 961 F.3d 1276, 1286 (11th Cir.
4 2020); *Cameron v. Bouchard*, 815 Fed. Appx. 978, 986 (6th Cir. 2020) (rejecting
5 plaintiffs’ attempts to distinguish *Williams* because their “argument at most shows
6 that defendants’ response was imperfect”).

7 **CONTESTED.**

8 In *Valentine v. Collier*, 993 F.3d 270 (5th Cir. 2021), the Fifth Circuit
9 declined to find prison officials deliberately indifferent because the court’s orders
10 had “motivat[ed] the prison officials into action” and they had corrected the prison’s
11 violations by the time of trial. *Id.* at 289 (footnote omitted). In *Wilson v. Williams*,
12 961 F.3d 829 (6th Cir. 2020), the Sixth Circuit determined that the BOP responded
13 reasonably to the outbreak at one prison through measures such as testing “in
14 accordance with CDC guidance” and “continuous access to sinks, water, and soap.”
15 *Id.* at 840-41. In *Swain v. Junior*, 961 F.3d 1276 (11th Cir. 2020), the district court
16 order under review “relied overwhelmingly—if not exclusively” on two factors: the
17 ongoing spread of COVID-19 and the impossibility of physical distancing at the jail.
18 *Id.* at 1286. The Court of Appeals reversed because (1) the spread of COVID alone
19 does not show a culpable state of mind, and (2) jail officials cannot be deliberately
20 indifferent for failing to do the impossible. *Id.* at 1287. Each of these cases is
21 distinguishable given the factual situation at Terminal Island.

22
23 3. Broad latitude must be given to the local officials entrusted with
24 protecting the health and safety of its citizens. *Calvary Chapel Dayton Valley v.*
25 *Sisolak*, No. 19A1070, 2020 WL 4251360 (U.S. July 24, 2020); *South Bay United*
26 *Pentecostal Church v. Newsom*, 140 S.Ct. 1613-1614 (May 29, 2020) (officials’
27 decisions “should not be subject to second-guessing by an unelected federal
28

1 judiciary, which lacks the background, competence, and expertise to assess public
2 health and is not accountable to the people.”)

3 **CONTESTED.**

4 The Eighth Amendment protects those in detention against conditions of
5 confinement that are “very likely to cause serious illness and needless suffering.”
6 *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (“It would be odd to deny an
7 injunction to inmates who plainly proved an unsafe, life threatening condition in
8 their prison on the ground that nothing yet had happened to them.”). When prison
9 authorities “strip [prisoners] of virtually every means of self-protection and
10 foreclose[] their access to outside aid, [they] are not free to let the state of nature
11 take its course.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

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

17 **NOT CONTESTED.**

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

22 **NOT CONTESTED.**

23
24 6. Inmates alleging Eighth Amendment violations based on unsafe prison
25 conditions must demonstrate that prison officials were deliberately indifferent to
26 their health or safety by subjecting them to a substantial risk of harm. *Id.* at 834.

27 **NOT CONTESTED.**

1
2 7. Prison officials display a deliberate indifference to an inmate's well-
3 being when they consciously disregard an excessive risk of harm to the inmate's
4 health or safety. *Id.* at 838-40.

5 **NOT CONTESTED.**

6
7 8. It is "only 'the unnecessary and wanton infliction of pain' ... [which]
8 constitutes cruel and unusual punishment forbidden by the Eighth Amendment.
9 *Whitley v. Albers*, 475 U.S. 612, 619 (1986) (quoting *Ingraham v. Wright*, 430 U.S.
10 651, 670 28 (1977)).

11 **NOT CONTESTED.**

12
13 9. To obtain injunctive relief, Petitioners must demonstrate that "prison
14 authorities' current attitudes and conduct" meet the "high legal standard" of
15 deliberate indifference, and will continue to do so in the future. *Toguchi v. Chung*,
16 391 F.3d 1051, 1060 (9th Cir. 2004) (emphasis added); *Farmer*, 511 U.S. at 845.

17 **NOT CONTESTED.**

18
19 10. The "objective prong" of the Eighth Amendment requires a showing
20 that an inmate has been deprived "of the minimal civilized measure of life's
21 necessities.'" *Farmer*, 511 U.S. at 834.

22 **NOT CONTESTED.**

23
24 11. Petitioners cannot show that the BOP is depriving them of the
25 "minimal civilized measure of life's necessities" or "violating contemporary
26 standards of decency" in addressing the risk of harm to inmates that COVID-19
27 presents.

1 **CONTESTED.**

2 This is not a statement of law, but is instead a conclusory assertion about the
3 facts of this action that remains in dispute. Petitioners’ opposition to Respondents’
4 motion sets out the reasons why this statement is false.

5
6 12. “A prison official’s duty under the Eighth Amendment is to ensure
7 reasonable safety.” *Farmer*, 511 U.S. at 844.

8 **NOT CONTESTED.**

9
10 13. Petitioners cannot meet the objective prong of the deliberate
11 indifference standard because FCI Terminal Island’s response is aligned with
12 official guidance from leading world health authorities for mitigating the risks
13 associated with the pandemic. FCI Terminal Island has vastly decreased any risk of
14 outbreak by adhering to the CDC guidelines. Measures including staff screening,
15 mask wearing, and testing and quarantine procedures for newly arriving inmates
16 have kept new COVID-19 cases at bay.

17 **CONTESTED.**

18 This is not a statement of law, but is instead a conclusory assertion about the
19 facts of this action that remains in dispute. Petitioners’ opposition to Respondents’
20 motion sets out the reasons why this statement is false.

21
22 14. FCI Terminal Island’s COVID-19 practices are the same measures that
23 society deems capable of reducing the risk of COVID-19 transmission, and thus
24 reflect the manner in which “today’s society chooses to tolerate” that risk. *Helling*,
25 509 U.S. at 36; *Grinis*, 2020 WL 2300313, at *3 (“These affirmative steps may or
26 may not be the best possible response to the threat of COVID-19 within the
27 institution, but they undermine an argument that the respondents have been
28

1 actionably deliberately indifferent to the health risks of inmates.”); *Nellson*, 2020
2 WL 3000961, at *8 (finding no likelihood of success on merits of Eighth
3 Amendment conditions-of-confinement claim due to COVID-19 and noting that
4 “[c]ompliance with CDC protocols does not demonstrate that defendants are
5 disregarding a substantial risk to inmate health or failing to respond reasonably to
6 the risks of COVID-19”).

7 **CONTESTED.**

8 This is not a statement of law, but is instead a conclusory assertion about the
9 facts of this action that remains in dispute. Petitioners’ opposition to Respondents’
10 motion sets out the reasons why this statement is false.

11
12 15. “[A] mere difference of medical opinion is insufficient, as a matter of
13 law, to establish deliberate indifference.” *Toguchi v. Chung*, 391 F.3d 1051, 1058
14 (9th Cir. 2004) (internal quotations marks and citation omitted)).

15 **NOT CONTESTED.**

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

22 **CONTESTED.**

23 This is not a statement of law, but is instead a conclusory assertion about the
24 facts of this action that remains in dispute. Petitioners’ opposition to Respondents’
25 motion sets out the reasons why this statement is false.

26
27 17. Petitioners also fail to satisfy the subjective prong of their Eighth
28

1 Amendment claim, which requires them to show that Respondents “kn[ew] of and
2 disregard[ed] an excessive risk to inmate health or safety.” *Farmer*, 511 U.S. at 837.

3 **CONTESTED.**

4 This is not a statement of law, but is instead a conclusory assertion about the
5 facts of this action that remains in dispute. Petitioners’ opposition to Respondents’
6 motion sets out the reasons why this statement is false.

7
8 18. The subjective prong requires that “the official must both be aware of
9 facts from which the inference could be drawn that a substantial risk of serious harm
10 exists, and he must also draw the inference.” *Id.*

11 **NOT CONTESTED.**

12
13 19. The Eighth Amendment does not require perfect results. *See id.* at 844
14 (“prison officials who actually knew of a substantial risk to inmate health or safety
15 may be found free from liability if they responded reasonably to the risk, even if the
16 harm ultimately was not averted”).

17 **NOT CONTESTED.**

18
19 20. Petitioners cannot demonstrate that BOP officials currently are acting
20 with deliberate indifference and cannot show that today, Respondents are recklessly
21 disregarding an excessive risk to Petitioners’ safety, and that they will continue to
22 do so “into the future.” *Id.* at 845.

23 **CONTESTED.**

24 This is not a statement of law, but is instead a conclusory assertion about the
25 facts of this action that remains in dispute. Petitioners’ opposition to Respondents’
26 motion sets out the reasons why this statement is false.

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).

NOT CONTESTED.

21.¹ 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 FCI Terminal Island.

CONTESTED.

This is not a statement of law, but is instead a conclusory assertion about the facts of this action that remains in dispute. Petitioners’ opposition to Respondents’ motion sets out the reasons why this statement is false.

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).

¹ Respondents’ Proposed Conclusions Of Law contained two entries numbered 21. *See* Dkt. No. 251-1 at 26-27.

1 **CONTESTED.**

2 This is not a statement of law, but is instead a conclusory assertion about the
3 facts of this action that remains in dispute. Petitioners' opposition to Respondents'
4 motion sets out the reasons why this statement is false.

5
6 23. Petitioners cannot succeed on their Eighth Amendment claim given the
7 actions taken by the BOP at FCI Terminal Island. *See Farmer*, 511 U.S. at 845
8 ("[P]rison officials who act reasonably cannot be found liable under the Cruel and
9 Unusual Punishments Clause."). There is no dispute of material fact that
10 Respondents acted with a high degree of care, and were not acting with deliberate
11 indifference that would transform conditions at FCI Terminal Island into an Eighth
12 Amendment "punishment."

13 **CONTESTED.**

14 This is not a statement of law, but is instead a conclusory assertion about the
15 facts of this action that remains in dispute. Petitioners' opposition to Respondents'
16 motion sets out the reasons why this statement is false.

17
18 24. The evidence demonstrates that Respondents acted with an extremely
19 high degree of care, and certainly were not acting with deliberate indifference that
20 would transform conditions at FCI Terminal Island into an Eighth Amendment
21 "punishment." *See Wilson v. Seiter*, 501 U.S. 294, 298, 300 (1991).

22 **CONTESTED.**

23 This is not a statement of law, but is instead a conclusory assertion about the
24 facts of this action that remains in dispute. Petitioners' opposition to Respondents'
25 motion sets out the reasons why this statement is false.

26
27 25. Petitioners have failed to exhaust administrative remedies and may not
28

1 bring suit for further injunctive relief regarding FCI Terminal Island’s response to
2 COVID-19 until they have fulfilled the PLRA’s exhaustion requirements. *Maronyan*
3 *v. Toyota Motor Sales, USA, Inc.*, 658 F.3d 1038, 1041-42 (9th Cir. 2011).

4 **CONTESTED.**

5 As this Court has stated, the “PLRA does not require exhaustion when
6 circumstances render administrative remedies ‘unavailable.’” (Dkt. 58 at 10.) The
7 PLRA requires only exhaustion of administrative remedies “as are available.” *Sapp*
8 *v. Kimbrell*, 623 F.3d 813, 822 (9th Cir. 2010), *superseded by statute on other*
9 *grounds as stated in Avery v. Paramo*, No. 13-cv-2261 BTM, 2015 WL 4923820, at
10 *14 (S.D. Cal. Aug. 18, 2015). The Supreme Court explained that the circumstances
11 in which an administrative remedy is unavailable include “when (despite what
12 regulations or guidance may promise) it operates as a simple dead end—with
13 officers unable or consistently unwilling to provide any relief to aggrieved inmates”
14 or “when prison administrators thwart inmates from taking advantage of a grievance
15 process.” *Ross v. Blake*, 136 S. Ct 1850, 1859–60 (2016).

16 This Court previously determined that Petitioners “were thwarted” from
17 pursuing administrative remedies based on similar evidence that prison staff were
18 “not accepting grievance forms” and “not addressing [Petitioners’] complaints.”
19 (Dkt. 58 at 11.) There is no basis to disturb that finding now. The evidence shows
20 prison administrators at Terminal Island are still not responding to grievances,
21 which renders administrative remedies effectively unavailable to Petitioners. Thus,
22 exhaustion of administrative remedies is not required by the PLRA given the facts
23 of this case, and Petitioners are not precluded from obtaining relief.

24
25 26. Respondents are entitled to summary judgment as to all of Petitioners’
26 claims.

27 **CONTESTED.**

1 This is not a statement of law, but is instead a conclusory assertion about the
2 facts of this action that remains in dispute. Petitioners' opposition to Respondents'
3 motion sets out the reasons why this statement is false.

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

7 **TAUTOLOGICAL AND IRRELEVANT.**

1 DATED: August 9, 2021

Respectfully submitted,

2 Naeun Rim
3 Ima Nsien
4 Manatt, Phelps & Phillips, LLP

5 By: /s/ Naeun Rim
6 Naeun Rim
7 Attorneys for Plaintiff-Petitioners

8 DATED: August 9, 2021

Donald Specter
9 Sara Norman
10 Sophie Hart
11 Patrick Booth
12 Prison Law Office

13 By: /s/ Sara Norman
14 Sara Norman
15 Attorneys for Plaintiff-Petitioners

16 DATED: August 9, 2021

17 Terry W. Bird
18 Dorothy Wolpert
19 Shoshana E. Bannett
20 Kate S. Shin
21 Oliver Rocos
22 Christopher J. Lee
23 Bird, Marella, Boxer, Wolpert, Nessim,
24 Drooks, Lincenberg & Rhow, P.C.

25 By: /s/ Oliver Rocos
26 Oliver Rocos
27 Attorneys for Plaintiff-Petitioners