

1 Terry W. Bird – Bar No. 49038
tbird@birdmarella.com
2 Dorothy Wolpert – Bar No. 73213
dwolpert@birdmarella.com
3 Shoshana E. Bannett – Bar No. 241977
sbannett@birdmarella.com
4 Kate S. Shin – Bar No. 279867
kshin@birdmarella.com
5 Oliver Rocos – Bar No. 319059
orocos@birdmarella.com
6 Christopher J. Lee – Bar No. 322140
clee@birdmarella.com
7 BIRD, MARELLA, BOXER, WOLPERT,
NESSIM, DROOKS, LINCENBERG &
8 RHOW, P.C.
1875 Century Park East, 23rd Floor
9 Los Angeles, California 90067-2561
Telephone: (310) 201-2100
10 Facsimile: (310) 201-2110
11 Naeun Rim – Bar No. 263558
nrin@manatt.com
12 David Boyadzhyan – Bar No. 311386
dboyadzhyan@manatt.com
13 MANATT, PHELPS & PHILLIPS, LLP
2049 Century Park East, Suite 1700
14 Los Angeles, California 90067
Telephone: (310) 312-4000
15 Facsimile: (310) 312-4224
16 Attorneys for Plaintiff-Petitioners Richard
Garries and Andrew Ybarra
17
18
19

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 J. 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

C. Ryan Fisher – Bar No. 312864
cfisher@manatt.com
MANATT, PHELPS & PHILLIPS,
LLP
695 Town Center Drive, 14th Floor
Costa Mesa, CA 92626
Tele: (714) 371-2500
Facsimile (714) 371-2550

20 **UNITED STATES DISTRICT COURT**

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

22 RICHARD GARRIES; ANDREW
YBARRA, individually and on
23 behalf of all others similarly
situated,

24 Plaintiff-Petitioners,

25 vs.

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

27 Defendant-Respondents.
28

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

**JOINT NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL
OF CLASS ACTION SETTLEMENT
AND ATTORNEYS' FEES**

*[Concurrently filed with Decl. of Naeun
Rim and Decl. of Charlynn Weber]*

Date; October 4, 2022

Time: 9:00 a.m.

Hon. Consuelo B. Marshall, Courtroom
8D

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiff-Petitioners (“Petitioners”) Richard Garries and Andrew Ybarra, and on behalf of all others similarly situated, and Defendant-Respondents (“Respondents”) Bryan Birkholz, in his official capacity as Warden of FCI Lompoc and USP Lompoc, and Colette Peters, in her official capacity as Director of the Bureau of Prison,¹ will jointly move and hereby do seek an order pursuant to Federal Rule of Civil Procedure (“Rule”) 23(e) and (h) granting final approval of the Settlement Agreement that was preliminarily approved by this Court, Dkt. 444, and granting Class Counsel’s Unopposed Motion for Attorney Fees following that approval, Dkt. Nos. 439, 529, 530, 531, 567.

This motion is based upon this Notice, the Memorandum of Points and Authorities, the Declarations of Naeun Rim and Charlynn Weber, all accompanying

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

¹ Bryan Birkholz is a successor of named defendant Louis Milusnic in the official capacity of warden of FCC Lompoc, and Colette Peters is a successor of named defendant Michael J. Carvajal in his official capacity as the Director of the Bureau of Prisons.

1 exhibits, the filings in this action, the Proposed Order, and any and all evidence,
2 argument, or other matters that may be presented at the hearing.

3 *Local Rule 5-4.3.4(a)(2)(i) Compliance: Filer attests that all other*
4 *signatories listed concur in the filing's content and have authorized this filing.*

5 DATED: August 30, 2022

Respectfully submitted,

6 Naeun Rim
7 David Boyadzhyan
8 C. Ryan Fisher
9 Manatt, Phelps & Phillips, LLP

10 By: /s/ Naeun Rim

Naeun Rim

11 Attorneys for Plaintiff-Petitioners

12 DATED: August 30, 2022

13 Terry W. Bird
14 Dorothy Wolpert
15 Shoshana E. Bennett
16 Kate S. Shin
17 Oliver Rocos
18 Christopher J. Lee
19 Bird, Marella, Boxer, Wolpert, Nessim,
20 Dooks, Lincenberg & Rhow, P.C.

21 By: /s/ Oliver Rocos

Oliver Rocos

22 Attorneys for Plaintiff-Petitioners

23 DATED: August 30, 2022

24 Donald Specter
25 Sara Norman
26 Sophie Hart
27 Patrick Booth
28 Prison Law Office

By: /s/ Don Specter

Don Specter

Attorneys for Plaintiff-Petitioners

1 DATED: August 30, 2022

Peter Eliasberg
Peter Bibring
ACLU FOUNDATION OF SOUTHERN
CALIFORNIA

4 By: /s/ Peter Bibring
5 Peter Bibring
6 Attorneys for Plaintiff-Petitioners
7

8 DATED: August 30, 2022

STEPHANIE S. CHRISTENSEN
Acting United States Attorney
DAVID M. HARRIS
Assistant United States Attorney
Chief, Civil Division
JOANNE S. OSINOFF
Assistant United States Attorney
Chief, General Civil Section

14 By: /s/ Daniel A. Beck
15 CHUNG H. HAN
16 DANIEL A. BECK
17 JASMIN YANG
18 PAUL B. GREEN
19 Assistant United States Attorneys
20 Attorneys for Defendants-Respondents
21
22
23
24
25
26
27
28

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>
I. INTRODUCTION	7
II. BACKGROUND	9
A. Complaint	9
B. Preliminary Injunction	10
C. Discovery, Mediation and Settlement	12
D. Summary of Key Settlement Agreement Terms	12
III. ANALYSIS	14
A. The class notice met the requirements of due process	14
B. The Settlement Agreement is fair, reasonable, and adequate	15
C. None of the Comments refute the presumption that the Settlement Agreement is fair, reasonable, and adequate	17
1. 2241 Petitions	18
2. Amendments to 2241 Petitions	20
3. Objections	21
4. Other Comments	23
D. Petitioners’ Unopposed Motion for Attorneys’ Fees and Expenses should be granted	24
IV. CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

<i>Class Plaintiffs v. City of Seattle</i> , 955 F.2d 1268 (9th Cir. 1992)	15
<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994)	17
<i>Hanlon v. Chrysler Corp.</i> , 150 F.3d 1011 (9th Cir. 1998)	16
<i>Harris v. Vector Mktg. Corp.</i> , No. C-08–5198 EMC, 2011 WL 1627973 (N.D. Cal. Apr. 29, 2011)	15, 16
<i>In re Oracle Sec. Litig.</i> , 829 F. Supp. 1176 (N.D. Cal. 1993)	16
<i>In re Syncor ERISA Litig.</i> , 516 F.3d 1095 (9th Cir. 2008)	15
<i>Lane v. Facebook, Inc.</i> , 696 F.3d 811 (9th Cir. 2012)	15
<i>Officers for Justice v. Civil Serv. Comm’n</i> , 688 F.2d 615 (9th Cir. 1982)	15, 16
<i>Pride v. Correa</i> , 719 F.3d 1130 (9th Cir. 2013)	19

STATUTES

28 U.S.C. § 2241	passim
CARES Act	passim
National Emergencies Act (50 U.S.C. 1601 et seq.)	8, 14

OTHER AUTHORITIES

Eighth Amendment to the United States Constitution	10
--	----

RULES

Fed. R. Civ. P. 23	15, 23
Fed. R. Civ. P. 23(e)(2)	17
Fed. R. Civ. P. 23(h)	14
Fed. R. Civ. P. 25(d)	9
Rule 706	12

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In May 2022, after engaging in more than two years of litigation, the parties entered into a Settlement Agreement to settle class claims for injunctive relief in this suit. The parties now jointly respond to class-member objections and comments and request final approval of the Settlement Agreement. If the Court grants final approval, the Settlement Agreement will dispose of all class claims in the case.

The Court should grant final approval of the Settlement Agreement because it is the product of arm's-length, serious, informed, and non-collusive negotiations between experienced and knowledgeable counsel who have actively prosecuted and defended this litigation. *See* Dkt. Nos. 443, 443-1. The Court also should grant the unopposed motion for attorneys' fees, which is contingent upon approval of the Settlement Agreement. *See* Dkt. Nos. 439, 529, 530, 531, 567.

The Settlement Agreement adequately addresses the class claims for injunctive relief. Class Counsel brought this action more than two years ago, at the height of the pandemic, seeking improvements in Lompoc's implementation of its own policies and procedures related to (1) the Bureau of Prison's ("BOP") home confinement authority under the CARES Act, and (2) conditions addressing the detection, prevention, and treatment of COVID-19. The Settlement Agreement accomplishes many of the equitable requests for relief sought in both the original complaint and the operative First Amended Complaint while mitigating the uncertainties inherent in continued litigation, particularly in the context of an ever-evolving factual and legal landscape when it comes to COVID-19. The Settlement Agreement requires Lompoc to continue applying the criteria and process for home confinement reviews established by the preliminary injunction. *See* Dkt. Nos. 45, 443-1. It requires Respondents to complete "all steps necessary to finalize the transfer to home confinement of class members within one month of the decision" to grant individuals to home confinement. Dkt. No. 443-1. It further requires Lompoc

1 officials to take appropriate measures to protect people incarcerated there against
2 COVID-19 by requiring compliance with Lompoc’s own testing, screening,
3 isolating, and quarantining procedures. These requirements will be in place until (a)
4 December 17, 2022; (b) the day the national emergency declaration with respect to
5 COVID–19 under the National Emergencies Act (50 U.S.C. 1601 et seq.)
6 terminates; or (c) the day the Attorney General determines that emergency
7 conditions no longer materially affect the functioning of the BOP, whichever is
8 earlier. *Id.* The agreed-upon time frame ensures that Lompoc will comply with the
9 Court’s preliminary injunction order, including its clarifications of what constitutes
10 “full and speedy use” of Lompoc’s CARES Act authority, for at least two and a half
11 years since the date it was issued. The relief afforded under the Settlement
12 Agreement would only extinguish earlier if the United States government
13 determines that COVID-19 no longer poses a health crisis of the magnitude that
14 would warrant the BOP utilizing its expanded home confinement authority under the
15 CARES Act.

16 The Court and Class Counsel have received numerous objections, petitions,
17 and correspondence (“Comments”) regarding the Settlement Agreement. The parties
18 have addressed these Comments in more specific detail below. Many of the
19 Comments allege personal struggles with COVID-19 that, if true, would only
20 support the need to settle this case under the terms of the Settlement Agreement,
21 which sets forth requirements that will assist Respondents in addressing the ongoing
22 concerns of the COVID-19 pandemic more effectively and expeditiously. Others
23 object to the Settlement Agreement because it does not award that particular
24 individual home confinement, because it does not address general prison conditions
25 that are not specific to COVID-19, or because the objector seeks remedies that are
26 beyond the scope of this lawsuit. None of the Comments show that the Settlement
27 Agreement is not the product of good-faith negotiations conducted at arm’s-length
28 or otherwise justify denial of this motion.

1 There is no evidence that the Settlement Agreement will fail to achieve the
2 primary objectives of the class claims for injunctive relief, nor is there any evidence
3 that Class Counsel will not vigorously enforce the Settlement Agreement's terms.
4 Indeed, Class Counsel has recently gathered the Review Worksheets of class
5 members who were denied home confinement where Class Counsel cannot
6 determine good cause for the denial. *See Ex. C.* Class Counsel has informed counsel
7 for Respondents that they will be requesting re-review of home confinement for
8 these class members once the Settlement Agreement is approved, and will repeat
9 this process for the duration of the Settlement Agreement term. The Court should
10 therefore grant final approval of the Settlement Agreement and the pending motion
11 for attorneys' fees.

12 **II. BACKGROUND**

13 As explained in the Motion for Preliminary Approval of Settlement
14 Agreement, Petitioners are incarcerated individuals at FCI Lompoc and USP
15 Lompoc either over the age of 50 or individuals who have certain underlying
16 conditions. Dkt. No. 443. Respondents are Bryan Birkholz in his official capacity as
17 the current Warden of the Federal Correctional Complex located in Lompoc,
18 California, and Colette Peters in her official capacity as Director of the Bureau of
19 Prisons.² *Id.*

20 **A. Complaint**

21 This action was filed May 16, 2020. Dkt. No. 1. A Corrected Complaint was
22 filed June 1, 2020. Dkt. No. 16. Petitioners filed the First Amended Complaint on
23 May 31, 2022. Dkt. No. 421.
24

25 ² Bryan Birkholz is a successor of named defendant Louis Milusnic in the official
26 capacity of warden of FCC Lompoc, and Colette Peters is a successor of named
27 defendant Michael J. Carvajal in his official capacity as the Director of the Bureau
28 of Prisons. *See* Fed. R. Civ. P. 25(d) (public officer's successor automatically
substituted as a party).

1 The First Amended Complaint alleges that conditions at FCC Lompoc violate
2 the constitutional rights of people in the prison, under the Eighth Amendment to the
3 United States Constitution. *Id.* The FAC seeks declaratory and injunctive relief in
4 the form of a highly expedited process to review medically-vulnerable residents of
5 Lompoc for home confinement and an injunction requiring Respondents to
6 implement certain measures at Lompoc to guard against COVID-19 and its
7 continued spread. *Id.*

8 **B. Preliminary Injunction**

9 On July 8, 2020, Petitioners moved for a preliminary injunction³ to require
10 Lompoc officials to implement a “structured, court-supervised process for
11 individualized consideration of each prisoner’s suitability for release on an
12 accelerated schedule.” Dkt. No. 18.

13 On July 14, 2020, the Court granted Petitioners’ motion for preliminary
14 injunction. Dkt. No. 45. The Court’s Order required Respondents to make “full and
15 speedy use of their authority under the CARES Act and evaluate each class
16 member’s eligibility for home confinement which gives substantial weight to the
17 inmate’s risk factors for severe illness and death from COVID-19 based on age
18 (over 50) or Underlying Health Conditions.” *Id.* Additionally, the Court
19 provisionally certified a class of individuals incarcerated at FCC Lompoc who are
20 medically vulnerable to COVID-19, either because they are over 50 or have a
21 specified underlying condition. *Id.*

22 Enforcement of the injunction has been actively litigated by the parties. In
23 September 2020, Petitioners moved to enforce compliance with the Preliminary
24 Injunction alleging that Respondents failed to make “full and speedy use of their
25

26 ³ The parties agreed to convert Petitioners’ *Ex Parte* Application for a Temporary
27 Restraining Order into an expedited motion for a preliminary injunction. Dkt. Nos.
28 41, 42.

1 authority under the CARES Act.” Specifically, Petitioners argued that Respondents
2 had failed to timely release class members approved for home confinement and that
3 they had denied home confinement release to eligible individuals and instead sent
4 them to halfway houses. Dkt. Nos. 93, 93-1.

5 The Court granted Petitioners’ motion for compliance and ordered
6 Respondents to “file a declaration under seal confirming that all class members who
7 were identified as having been approved for home confinement . . . have been
8 released to home confinement, including the date of each inmate’s release to home
9 confinement,” “to file a declaration under seal identifying Lompoc inmates who
10 were denied home confinement and instead designated to a Residential Re-entry
11 Center” who met certain criteria, and “to file a declaration under seal identifying
12 each RRC Class Member who was denied home confinement but has a viable
13 release plan” by October 16, 2020. Dkt. No. 105.

14 In January 2021, Petitioners filed a motion alleging non-compliance with the
15 Preliminary Injunction on the basis that Respondents were using improper
16 “categorical” barriers to home confinement, such as the amount of time served. Dkt.
17 No. 169. Magistrate Judge Pedro V. Castillo issued a report and recommendation on
18 April 30, 2021 and then issued an amended report and recommendation on July 2,
19 2021, which accepted some of the arguments of Petitioners’ motion while denying
20 others, agreeing instead with the Respondents on certain factors that are properly
21 considered when denying home confinement. Dkt. Nos. 229, 276. The Court
22 accepted the conclusions and recommendations of the Magistrate Judge and ordered
23 Respondents to re-evaluate class members who had been denied home confinement
24 where the only reason given for the denial was a prior offense or the amount of time
25 served or percentage of sentence served, or some other variation of a time
26 component, as well as ordering Respondents to release individuals within one month
27 of approving them for home confinement. Dkt. No. 290.

28 In May 2021, Respondents moved to dissolve the preliminary injunction and

1 for summary judgment. Dkt. Nos. 250, 251. Petitioners also moved for class
2 certification. Dkt. No. 345. Petitioners and Respondents have engaged in extensive
3 briefing on these motions. *See, e.g.*, Dkt. Nos. 257, 258, 266, 302, 305, 325, 327,
4 336, 337, 345, 354, 356, 357, 408, 413. These motions are still pending before the
5 Court. *See* Dkt. No. 425.

6 **C. Discovery, Mediation and Settlement**

7 From 2020 to 2022, the parties conducted extensive discovery, which
8 included conducting depositions of prison officials, prison leadership, and experts,
9 and the production of thousands of pages of documents.

10 In August 2020, the Court appointed Dr. Homer Venters as a Rule 706
11 Expert. Dkt. No. 69. Dr. Venters conducted three site visits and produced three
12 reports documenting his visits in September 2020, April 2021, and February 2022.
13 Dkt. Nos. 74, 191, 239-1, 355.

14 The parties engaged in mediation from December 2020-March 2021, but were
15 not successful in resolving their disputes. Settlement negotiations resumed this year,
16 and on June 10, 2022, Petitioners and Respondents jointly filed a motion for
17 preliminary approval of the Settlement Agreement. Dkt. Nos. 426, 443. The Court
18 granted preliminary approval of the Settlement Agreement on June 28, 2022. Dkt.
19 No. 444.

20 **D. Summary of Key Settlement Agreement Terms**

21 **Home Confinement.** The Settlement Agreement largely tracks the
22 Preliminary Injunction and the Court's additional enforcement orders (hereafter
23 "Home Confinement Orders"). *See* Dkt. Nos. 45, 105, and 290. Specifically, it
24 requires Respondents to comply with Attorney General Barr's March 26 and April
25 3, 2020 memoranda ("Barr memos"), the current BOP guidance at the time of each
26 review, and the standards set forth in this Court's Home Confinement Orders when
27 making decisions about a request for home confinement. Among other things, the
28 Settlement Agreement requires Respondents to do the following:

- Make full and speedy use of BOP's CARES Act authority to review members of the Settlement Class for transfer to home confinement;
- Assign substantial weight to the class member's risk factors for severe illness and death from COVID-19 based on age (over 50) or Underlying Health Conditions;
- Refrain from denying a class member home confinement under the CARES Act on the sole basis of the amount of time served or some other variation of a time component without other good cause;
- Refrain from denying a class member home confinement under the CARES Act on the sole basis of a prior offense without other good cause;
- If home confinement is denied, provide a declaration to counsel for Plaintiff-Petitioners explaining in detail why the reasons for denial substantially outweigh the class member's risk factors for severe illness and death from COVID-19.

Conditions. The Settlement Agreement requires Respondents to demonstrate compliance with specific portions of BOP's COVID-19 policies, including:

- Testing for COVID-19 systematically, including re-testing of close contacts of positive patients during widespread institution transmissions.
- Performing daily symptoms checks for COVID-19 for all people who have been placed in quarantine.
- Screening workers assigned to health services units for symptoms of COVID-19.
- Making medical isolation in the SHU for COVID-19 "operationally distinct" from disciplinary or restricted housing by providing daily medical visits, access to mental health services, efforts to provide similar access to radio, clock/watch, reading materials, personal property, and commissary as in regular housing units, and consider increased telephone privileges to maintain mental health and connection during isolation.

Reporting. The Settlement Agreement requires Respondents to provide monthly reports on home confinement reviews and the conditions issues listed above to Class Counsel.

Termination. The Settlement Agreement will terminate on the earliest of the following dates: a) December 17, 2022; b) the day the national emergency

1 declaration with respect to the Coronavirus Disease 2019 (COVID–19) under the
2 National Emergencies Act (50 U.S.C. 1601 et seq.) terminates; or c) the day the
3 Attorney General determines that emergency conditions no longer materially affect
4 the functioning of the Bureau of Prisons.

5 **Attorney Fees.** Pursuant to Federal Rule of Civil Procedure 23(h), the parties
6 have separately moved the Court for an order awarding attorneys’ fees and costs.
7 Dkt. No. 439. Subject to Court approval of the Settlement Agreement, the Parties
8 have reached a compromise and Respondents have agreed to pay Plaintiffs’ counsel
9 \$375,000 for reasonable fees and expenses already incurred in litigating this case.

10 *Id.*

11 **III. ANALYSIS**

12 **A. The class notice met the requirements of due process.**

13 By July 5, 2022, Respondents posted an electronic version of the Court-
14 approved Class Notice, the Settlement Agreement, and the Motion for Attorneys’
15 Fees on the Electronic Bulletin Board (“EBB”) of TRULINCS, a computer system
16 available to all persons incarcerated at Lompoc.⁴ (Declaration of Charlynn Weber ¶
17 3.) Respondents also placed paper copies of these documents at Lompoc’s law
18 library and posted a paper copy of the Class Notice in all housing units where class
19 members reside. (*Id.* ¶¶ 4-5.) Finally, the Class Notice instructed class members
20 who could not access the Settlement Agreement to request a copy from Class
21 Counsel. (*Id.* ¶ 5.) Where class members requested a copy of the settlement
22 documents, Class Counsel caused such copies to be sent to them by mail.
23 (Declaration of Naeun Rim (“Rim Decl.”) ¶ 3.) Thus, the parties fully complied with
24 the Court’s order regarding the provision of notice to the class. Dkt. No. 444.

25
26 _____
27 ⁴ While the electronic mail messaging function of TRULINCS is not available to a
28 small subset of people (usually those convicted of computer-related crimes), the
EBB function is available to everyone incarcerated at Lompoc. (*Id.* ¶ 3.)

1 The posting of the Class Notice was well-calculated to alert all interested
2 class members to the existence of the lawsuit, the nature of the allegations and
3 claims, the terms of the proposed settlement, and their opportunity to file comments
4 concerning the Settlement Agreement with the Court. Class members had 28 days—
5 from July 5, 2022, through August 1, 2022—to file comments with the Court, and
6 over 200 did so. (Rim Decl. ¶ 7.)

7 **B. The Settlement Agreement is fair, reasonable, and adequate.**

8 The Ninth Circuit maintains a “strong judicial policy” that favors the
9 settlement of class actions. *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir.
10 2008); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). The
11 Ninth Circuit has repeatedly recognized that “voluntary conciliation and settlement
12 are the preferred means of dispute resolution,” especially in the context of “complex
13 class action litigation.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615,
14 625 (9th Cir. 1982); *see also In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th
15 Cir. 2008).

16 In reviewing proposed class-action settlement agreements, there is an initial
17 presumption of fairness when a proposed class settlement was negotiated at arm’s
18 length by counsel for the class. *Harris v. Vector Mktg. Corp.*, No. C-08–5198 EMC,
19 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011). “Although Rule 23 imposes
20 strict procedural requirements on the approval of a class settlement, a district court’s
21 only role in reviewing the substance of that settlement is to ensure that it is ‘fair,
22 adequate, and free from collusion.’” *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th
23 Cir. 2012) (citation omitted).

24 Other factors courts consider in assessing a settlement proposal include: “[1]
25 the strength of the plaintiffs’ case; [2] the risk, expense, complexity, and likely
26 duration of further litigation; [3] the risk of maintaining class action status
27 throughout the trial; [4] the amount offered in settlement; [5] the extent of discovery
28 completed and the stage of the proceedings; [6] the experience and views of

1 counsel; [7] the presence of a governmental participant; and [8] the reaction of the
2 class members to the proposed settlement.” *Hanlon v. Chrysler Corp.*, 150 F.3d
3 1011, 1026 (9th Cir. 1998); see also *In re Oracle Sec. Litig.*, 829 F. Supp. 1176,
4 1179 (N.D. Cal. 1993). The district court must explore these factors
5 comprehensively to satisfy appellate review, but “the decision to approve or reject a
6 settlement is committed to the sound discretion of the trial judge.” *Hanlon*, 150 F.3d
7 at 1026.

8 “[T]he court’s intrusion upon what is otherwise a private consensual
9 agreement negotiated between the parties to a lawsuit must be limited to the extent
10 necessary to reach a reasoned judgment that the agreement is not the product of
11 fraud or overreaching by, or collusion between, the negotiating parties, and that the
12 settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”
13 *Hanlon*, 150 F.3d at 1027 (citing *Officers for Justice*, 688 F.2d at 625). Thus, a
14 district court’s decision to approve a class-action settlement may be reversed “only
15 upon a strong showing that the district court’s decision was a clear abuse of
16 discretion.” *Id.* (citation omitted).

17 Here, the Court already preliminarily approved the Settlement Agreement.
18 Dkt. No. 444. Thus, the Settlement Agreement is entitled to a presumption of
19 fairness. *Harris*, 2011 WL 1627973, at *8.

20 The Court should grant final approval of the settlement because it provides
21 substantial equitable relief to class members. Respondents have agreed to settlement
22 terms that directly address the class claims in this case, including an expedited
23 process for home confinement reviews, compliance with the BOP’s COVID-19-
24 related testing, screening, isolation, and quarantine practices, and monitoring of
25 Respondents’ compliance by Class Counsel. The settlement was reached after
26 significant litigation and negotiations between the parties, who were zealously
27 represented by their experienced counsel throughout this litigation. Dkt. No. 531.
28 The settlement was also reached after a Court-appointed expert repeatedly inspected

1 Respondents' prison facilities and issued multiple expert reports on the adequacy of
2 Respondents' practices concerning COVID-19. Moreover, as stated above, the
3 parties engaged in extensive discovery, including conducting depositions of prison
4 officials, prison leadership, and experts, and the production of thousands of pages of
5 documents.

6 Further, the outcome of the litigation and the extent of any relief that the class
7 might be awarded if the case went to trial is uncertain. In light of the caselaw
8 requiring final injunctive relief to be based on conditions current as of the date of
9 trial, *see Farmer v. Brennan*, 511 U.S. 825, 845 (1994), Petitioners face significant
10 hurdles in demonstrating ongoing constitutional violations on a facility-wide basis.
11 The facts and caselaw related to COVID-19 are constantly changing, making the
12 likelihood of success based on the facts that would be current at the time of trial
13 difficult to predict. Proceeding through pre-trial motions, trial, and probable appeal
14 would impose risks, costs, and a substantial delay in the implementation of any
15 remedy in this matter. Given the relief achieved and the risks and costs involved in
16 further litigation, the settlement represents a fundamentally "fair, reasonable, and
17 adequate" resolution of the disputed issues and should be given final approval. *See*
18 Fed. R. Civ. P. 23(e)(2).

19 C. **None of the Comments refute the presumption that the Settlement**
20 **Agreement is fair, reasonable, and adequate.**

21 Class members submitted Comments to the Settlement Agreement by making
22 filings with the Court and sending correspondence to Class Counsel by email and
23 mail. The Comments took various forms, which Class Counsel have sorted into the
24 following categories: (a) emergency motions for immediate release pursuant to 28
25 U.S.C. § 2241 ("2241 Petitions"), (b) motions to amend 2241 Petitions
26 ("Amendments to 2241 Petitions"), and (c) objections and other responses
27 ("Objections and Other") (includes miscellaneous Comments such as letters, emails,
28 and "Amicus Briefs"). The parties have attached additional Objections and Other

1 that were received by Class Counsel but not filed with the Court as **Exhibit A**.⁵
2 (Declaration of Naeun Rim (“Rim Decl.”) ¶¶ 4, Ex. A.)

3 Included in Paragraph 7 of the Declaration of Naeun Rim is a chart of all
4 people who submitted a Comment that was filed with the Court or received by Class
5 Counsel. This chart does not include Comments submitted after August 23, 2022,
6 which is three weeks after the Court-imposed deadline for submitting an objection.
7 Dkt. No. 444. To provide the Court with full information, the parties have submitted
8 as **Exhibit B** the Review Worksheets of every person who submitted a Comment.⁶
9 The Review Worksheets have been organized in alphabetical order by first name.

10 Many of the Comments repeat the same boilerplate arguments. Class Counsel
11 has summarized and responded to the arguments in each category below.

12 **1. 2241 Petitions**

13 In the 2241 Petitions, class members argue that the Settlement Agreement
14 benefits only a “small fraction of the class” and that the “merits of the complaint”
15 will “never come to fruition if the section 2241 process is halted.” *See, e.g.* Dkt. No.
16 447-1, 448-1, 449-1. The 2241 Petitions then recite some of the procedural history
17 of the case and repeat arguments that Class Counsel have previously made to this
18 Court. Each 2241 Petition seeks immediate release for the individual filer. *Id.*

19 This case was brought as a class action seeking a process-based remedy that
20 would improve Lompoc’s implementation of COVID-19 policies on a system-wide
21 basis. The Settlement Agreement accomplishes just that. It requires Respondents to
22 continue complying with the Court’s Home Confinement Orders, which require
23

24 _____
25 ⁵ Because many of these documents contain sensitive personal identifying and
26 health information, they have been filed under seal.

27 ⁶ Review Worksheets could not be found for some Commenters. Those Commenters
28 who were missing Review Worksheets have been noted with an asterisk by their
name in the chart. (Rim Decl. ¶ 7.)

1 Respondents to swiftly evaluate those who are over the age of 50 or have underlying
2 health conditions for home confinement, impose deadlines by which approved class
3 members must be transferred to their homes, prohibit Respondents from transferring
4 those eligible for home confinement to halfway houses, and prohibit Respondents
5 from denying class members home confinement based on time served or prior
6 offenses alone. Dkt. Nos. 45, 105, and 290. The Settlement Agreement also requires
7 Respondents to attest to Class Counsel that Lompoc is in compliance with BOP's
8 testing, screening, isolation, and quarantine policies. These clarified home
9 confinement procedures and COVID-19 condition requirements apply to the class as
10 a whole, not to any one individual.

11 Contrary to the claim that the Settlement Agreement benefits only a "small
12 fraction of the class," the agreed-upon relief provided applies to the entire class. The
13 Settlement Agreement ensures that the Court's Home Confinement Orders will
14 remain in place through the rest of the year, which benefits the entire class by
15 maximizing those who are approved for home confinement in accordance with the
16 directives in the original Barr memos. This benefits not only those who are placed in
17 their homes but also those who remain in Lompoc by reducing the number of people
18 inside the facility who can transmit COVID-19. Indeed, as of July 7, 2022, 241
19 people have been transferred to home confinement since the Court's preliminary
20 injunction was granted. Dkt. No. 622. In addition, the Settlement Agreement
21 requires Respondents to demonstrate their compliance with BOP's testing,
22 screening, isolation, and quarantine procedures and expressly requires them to make
23 medical isolation in the SHU operationally distinct from those who are sent to the
24 SHU for punishment.

25 The chief complaint in each 2241 Petition is that the Settlement Agreement
26 does not grant the individual filer home confinement. Individual requests for home
27 confinement under the CARES Act and Section 2241 are beyond the scope of this
28 lawsuit, which was brought as a class action seeking class-wide relief. *See Pride v.*

1 *Correa*, 719 F.3d 1130, 1137 (9th Cir. 2013) (“Individual claims for injunctive relief
2 related to medical treatment are discrete from the claims for systemic reform”). For
3 the duration of the Settlement Agreement, Class Counsel will continue to identify
4 systemic patterns of denials that are contrary to the home confinement orders and
5 confer with Respondents about re-reviewing certain categories of people before
6 considering the Settlement Agreement’s dispute resolution procedures.⁷ In general,
7 the terms of the Settlement Agreement ensure that class members will be promptly
8 reviewed for home confinement under the Court’s Home Confinement Orders for
9 the duration of the Settlement Agreement term, which makes it more likely that
10 those who are eligible will be approved.

11 2. Amendments to 2241 Petitions

12 Some class members submitted “Amendments” to their 2241 Petitions. These
13 Amendments make clear that the filer is seeking relief as an “individual and on
14 behalf of myself” as opposed to the class. They also argue that they have been
15 abandoned by Class Counsel who failed to object to unspecified unfavorable terms
16 and conditions, complain that the BOP would not release any “high risk” offenders
17 to home confinement without a legislative and statutory overhaul, argue that the
18 Settlement Agreement violates their constitutional rights, and allege that they have
19 individually suffered physical and mental harm. *See, e.g.*, Dkt. Nos. 713, 714,
20 788,795.

21 As stated in Part III.C.1, *supra*, this lawsuit was brought as a class action. The
22 individual relief requested in the Amendments to 2241 Petitions go beyond the
23 scope of this action. As to the argument that Class Counsel have abandoned the
24 class members, to the contrary, Class Counsel vigorously litigated this case, brought
25 multiple motions to enforce the original preliminary injunction, sought thousands of
26

27 ⁷ Indeed, Class Counsel have already collected Review Worksheets of denials that
28 require further inquiry for Respondents’ review. (Rim Decl. ¶ 6, Ex. C.)

1 pages of document discovery, conducted multiple depositions, and zealously
2 negotiated a Settlement Agreement on terms that provide immediate benefits to the
3 class while mitigating the extensive risks of taking this case to trial.

4 3. Objections

5 Some class members submitted objections, many of which were drafted on
6 templates containing boilerplate arguments. One such objection template objects to
7 Paragraph 6, which lists the information Respondents are required to put on Review
8 Worksheets, such as the offense of conviction, projected release date, security level,
9 and so on. *See, e.g.,* 571, 572, 573. The information listed in the Review Worksheets
10 is what has allowed the Court and Class Counsel to understand the basis for
11 Respondents' home confinement decisions—they are not “criteria” for home
12 confinement, as the objectors appear to believe. Many of these objectors argue that
13 Respondents should not be permitted to consider their offense of conviction when
14 making home confinement decisions, particularly because they have been in
15 Lompoc “facing COVID-19 SARS” since 2019. *Id.* The requested relief goes
16 beyond the scope of this lawsuit, which was brought to enforce the CARES Act and
17 the directives in the Barr memos, both of which permit Respondents to consider the
18 offense of conviction.

19 Another objection template opposes the BOP retaining ultimate authority to
20 make home confinement decisions, objects to home confinement decisions being
21 made on any basis other than a class member's PATTERN score, objects to BOP
22 being able to transfer class members to other facilities, argues that Class Counsel
23 has abandoned the class and are ineffective, claims that the newly-appointed class
24 representatives only represent a small minority of the class, complains that
25 TRULINCS email messaging is not available to all class members and is not
26 confidential, and generally argues that the Settlement Agreement violates their
27 constitutional rights. These templates ask the Court to declare the custody of the
28 class unconstitutional, stay the settlement agreement, cancel all Court dates until the

1 objection is ruled upon, order counsel to provide an accurate and complete
2 explanation in laymen's terms of the Settlement Agreement, order that the only
3 basis for denying home confinement is a high PATTERN score, order a vote among
4 all class members, and prohibit BOP from transferring any class members to other
5 facilities. *See, e.g.*, Dkt. 582, 583, 584.

6 None of these objections are sufficient to defeat the presumption that the
7 Settlement Agreement is adequate and fair. The parties have already addressed the
8 argument pertaining to the adequacy of Class Counsel's representation Section
9 III.C.2, *supra*. The parties also summarized the Settlement Agreement in simplified
10 language in the Court-approved Class Notice and made the full set of settlement-
11 related documents available to class members in several ways. The remaining parts
12 of the Objections do not actually oppose specific terms of the Settlement
13 Agreement—rather they generally seek relief beyond what the Settlement
14 Agreement offers.⁸ That is not a basis to deny class members the immediate benefits
15 that the Settlement Agreement *does* offer. That certain class members might wish to
16 pursue new additional theories is not a basis for the Court to reject the Settlement
17 Agreement, which was negotiated based on the claims for relief that were litigated
18 in *this* case.

19 As to the adequacy of the newly-appointed class representatives, the Court
20 already considered this issue and determined that Richard Garries and Andrew
21 Ybarra were adequate representatives of the Settlement Class. Dkt. No. 420. Other
22 than conclusory allegations, the objectors do not identify any specific facts that
23 would warrant reconsideration of that finding.⁹ Since being appointed class
24

25 ⁸ Class Counsel have concurrently filed a supplemental brief in support of final
26 approval that briefly addresses this point.

27 ⁹ While not made clear in the objection template, it appears from other objections
28 that this is in reference to the fact that the named Plaintiffs are not sex offenders.
See, e.g., Dkt. No. 665. But the class certified by the Court does not differentiate

1 representatives, Mr. Garries and Mr. Ybarra have done nothing but represent the
2 claims of the class vigorously throughout the settlement approval process.

3 Finally, the objectors' demand that all class members be permitted to vote on
4 the Settlement Agreement is not supported by or consistent with class action law.
5 Federal Rule of Civil Procedure 23 sets forth the procedures that are to be followed
6 in class actions, which are designed to allow a large number of people who suffered
7 a similar harm to obtain relief efficiently through court-appointed class
8 representatives. *See* Fed. R. Civ. P. 23. The parties have complied with the
9 procedures required by Rule 23 for certification of a Settlement Class and final
10 approval of the Settlement Agreement.

11 4. Other Comments

12 Many class members submitted miscellaneous objections, letters, emails, or
13 briefs commenting on the Settlement Agreement and describing their personal
14 experiences and circumstances. *See*, e.g., Dkt. No. 636, Ex. A. Some describe poor
15 testing, isolation, and quarantine practices, while others described inadequate
16 medical treatment for COVID-19. Even if these Comments were assumed to be true,
17 such allegations only support the need for the remedies provided for in the
18 Settlement Agreement.

19 Some of the Comments complain of conditions at Lompoc that are not related
20 to COVID-19, such as complaints about medical treatment generally, or
21 complaining about the unfairness of their conviction and sentence. These issues
22 were not the subject of this lawsuit and have no bearing on the fairness of the
23 Settlement Agreement.

24
25 _____
26 between people based on the type of conviction—the class definition includes all
27 people incarcerated at Lompoc who are either over the age of 50 or have one of the
28 specified underlying health conditions. Dkt. No. 444. Both named Plaintiffs are
sufficient to represent all class members who fall under this definition.

D. Petitioners’ Unopposed Motion for Attorneys’ Fees and Expenses should be granted.

The basis for Class Counsel’s attorneys’ fees motion is more fully briefed in the Motion for Attorney Fees. *See* Dkt. No. 439. Respondents have agreed to pay Petitioners attorneys’ fees in the amount of \$375,000, subject to Court approval of the Settlement Agreement. This amount—which reimburses Class Counsel for a fraction of their actual hours spent and out-of-pocket expenses—is fair and reasonable in light of the difficult disputes that have been addressed in this litigation, the lengthy and detailed settlement negotiations, and the difficulty and complexity of the issues involved.

While few of the Comments object to the proposed attorneys’ fees and expenses, at least one class member objects that Class Counsel entered into the Settlement Agreement out of “self-interest” to obtain fees. *See, e.g.*, Dkt. No. 641. To the contrary, the fees were negotiated in a separate mediation only after the substantive terms of the Settlement Agreement were resolved. (Rim Decl. ¶ 2.) The requested fees do not even cover half of the thousands of hours devoted by Class Counsel to this case. If only the lodestar method were used, Class Counsel would be seeking a total of at least \$830,740 in attorneys’ fees and over \$22,000 in costs, using EAJA rates alone. Had reasonable market rates been applied, that amount would have exceeded \$1 million. Class Counsel agreed to a substantially reduced amount after weighing the risks of continuing with the litigation and determining that the certainty afforded by the Settlement Agreement would most benefit the class.

For these reasons and all of the reasons set forth in the unopposed motion for attorneys’ fees, the Court should grant Petitioners’ motion for fees and expenses, pursuant to Federal Rule of Civil Procedures 23(h). *See* Dkt. Nos. 439, 529, 530, 531, 567.

///

1 **IV. CONCLUSION**

2 The Settlement Agreement is the product of arm's-length, serious, informed,
3 and non-collusive negotiations between experienced and knowledgeable counsel
4 who have actively prosecuted and defended this litigation. Thus, it is entitled to a
5 presumption of fairness. Further, the Comments by class members fail to
6 demonstrate that the Settlement Agreement does not fairly, reasonably, and
7 adequately resolve the class's claims for injunctive relief. Accordingly, the parties
8 request that the Court grant final approval of the Settlement Agreement and grant
9 Petitioners' Unopposed Motion for Attorneys' Fees.

10 *Local Rule 5-4.3.4(a)(2)(i) Compliance: Filer attests that all other*
11 *signatories listed concur in the filing's content and have authorized this filing.*

12
13 DATED: August 30, 2022

Respectfully submitted,

14 Naeun Rim
15 David Boyadzhyan
16 C. Ryan Fisher
17 Manatt, Phelps & Phillips, LLP

18 By: /s/ Naeun Rim

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

1 DATED: August 30, 2022

Terry W. Bird
Dorothy Wolpert
Shoshana E. Bannett
Kate S. Shin
Oliver Rocos
Christopher J. Lee
Bird, Marella, Boxer, Wolpert, Nessim,
Drooks, Lincenberg & Rhow, P.C.

7 By: /s/ Oliver Rocos
8 Oliver Rocos
9 Attorneys for Plaintiff-Petitioners

10 DATED: August 30, 2022

Donald Specter
Sara Norman
Sophie Hart
Patrick Booth
Prison Law Office

14 By: /s/ Don Specter
15 Don Specter
16 Attorneys for Plaintiff-Petitioners

18 DATED: August 30, 2022

Peter Eliasberg
Peter Bibring
ACLU FOUNDATION OF SOUTHERN
CALIFORNIA

21 By: /s/ Peter Bibring
22 Peter Bibring
23 Attorneys for Plaintiff-Petitioners

1 DATED: August 30, 2022

Respectfully submitted,

2 STEPHANIE S. CHRISTENSEN
Acting United States Attorney

3 DAVID M. HARRIS
Assistant United States Attorney

4 Chief, Civil Division

JOANNE S. OSINOFF

5 Assistant United States Attorney

6 Chief, General Civil Section

7 /s/ Daniel A. Beck

8 CHUNG H. HAN

DANIEL A. BECK

9 JASMIN YANG

PAUL B. GREEN

10 Assistant United States Attorney

11 Attorneys for Defendants-Respondents