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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

RODNEY CULLORS, et al.,
Plaintiffs,
vs.
COUNTY OF LOS ANGELES, et al;
Defendants.

CASE NO.: 2:20-cv- 03760-RGK-PLA

Hon. Gary Klausner

**DEFENDANTS’ OPPOSITION TO
PLAINTIFFS’ EX PARTE
APPLICATION FOR
TEMPORARY RESTRAINING
ORDER**

[Declarations of Chief Brendan J. Corbett, Commander Daniel J. Dyer, Assistant Sheriff Bruce Chase, Mark Allen, and Jackie Clark, R.N. attached hereto and filed concurrently herewith]

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1 **I. INTRODUCTION**

2 It has just come to Defendants’ attention that on April 24, 2020 — the same date
3 that this action and Plaintiffs’ ex parte application was filed — an emergency petition
4 for writ of mandate was filed with the California Supreme Court covering much of the
5 same ground as does the present case. Among the plaintiffs in the Supreme Court
6 proceeding, *National Association of Criminal Defense Lawyers, et al. v. Gavin*
7 *Newsom, et al.*, Case No. S261827 (“the Supreme Court Proceeding”), is the Youth
8 Justice Coalition, which is also a named plaintiff in this case. The ACLU, attorneys
9 for Plaintiffs in this case, are also plaintiffs for the petitioners in the Supreme Court
10 Proceeding. None of this was disclosed in the papers filed by Plaintiffs with this
11 Court.

12 The Supreme Court Proceeding requests a peremptory writ of mandate in the
13 first instance, to be issued no later than May 4, 2020, directing the release “of people
14 incarcerated and detained in California’s county jails and juvenile facilities by
15 releasing sufficient persons to ensure that all remaining person are held under
16 conditions consistent with CDC and public health guidance to prevent the spread of
17 COVID-19, including appropriate social distancing.” Petition ¶¶80. The petition
18 specifically mentions the conditions in Los Angeles County, noting that it “is
19 cooperating” in reducing its jail population but asserts that there are “unacceptable
20 implementation delays.” Petition ¶¶40.

21 The California Supreme Court has already taken action in the case pending
22 before it. It has requested an informal response to the petition on or before 5:00 p.m.
23 tomorrow, April 28, 2020. Petitioners may then serve and file a reply to the informal
24 response on or before noon on Thursday, April 30, 2020. No requests for extension
25 of time are contemplated or will be granted.

26 In view of these developments, Plaintiffs in the present case respectfully
27 request that this Court deny Plaintiffs’ application for a TRO until the California
28 Supreme Court has acted on the matter before it or, in the alternative, set the matter

1 for a noticed hearing and provide Defendants with additional time to provide more a
2 more substantive response.

3 This is necessary not merely because of the Supreme Court Proceeding (which
4 Plaintiffs herein did not disclose either to Defendants or to the Court) but also because
5 of the nature of the TRO itself. For the reasons set forth in Defendants' application
6 for an extension and briefing schedule, filed with the Court over the weekend,
7 Defendants request additional time to respond to Plaintiffs' *Ex Parte* Application for
8 Temporary Restraining Order (the "TRO"). That filing, as the Court is by now well
9 aware, massive. It raises myriad claims, makes numerous legal and factual
10 arguments, consists of dozens of documents and totals hundreds of pages — and was
11 served on Defendants late on Friday, April 24, 2020. When Defendants asked
12 Plaintiffs for a reasonable extension of time in which to respond, Plaintiffs refused,
13 citing the "urgency" of the situation. Yet as Plaintiffs' papers reveal, and Defendants'
14 extension request details, Plaintiffs have been working on their papers for weeks,
15 undermining the notion of an urgency so great that even the smallest pause would be
16 irreparable.

17 Plaintiffs' Opposition to Defendants' *Ex Parte* Application for an Order Setting
18 a Briefing Schedule (Dkt. 26) asserts that Defendants had nine days since Plaintiffs
19 sent the pre-litigation letter. While the pre-litigation letter provides some authority
20 and factual basis that is contained in Plaintiffs' Complaint and TRO application, the
21 nine-page letter is utterly dwarfed by the 42-page TRO and more than 450 pages of
22 declarations and evidence.

23 Moreover, Plaintiffs' pre-litigation letter is dated April 16, 2020. To put that in
24 perspective, *five* Plaintiffs had already signed their declarations. These declarations
25 were, of course, not provided to Defendants until Friday, April 24, 2020, when the
26 TRO was filed. As a result, Plaintiffs' gamesmanship prevented Defendants from
27 assessing the specific, individualized assertions made by Plaintiffs until the TRO was
28 filed.

1 Moreover, Defendants have not had adequate time to review and respond to all
2 of the matters in Plaintiffs' TRO, which is *essential* because Plaintiffs have failed to
3 identify subsequent orders that affect the cases that they rely upon.¹ Plaintiffs cite to
4 *Cameron v. Bouchard*, Docket No. 2:20-cv-10949 (E.D. Mich.) regarding the
5 issuance of a TRO. Briefing Schedule Opp., Dkt. 26 at 5:10-13. However, Plaintiffs
6 omit that this order was *modified on rehearing*, and part of the plaintiffs' TRO was
7 subsequently denied. *Cameron v. Bouchard*, No. 20-10949, 2020 WL 1952836 (E.D.
8 Mich. Apr. 23, 2020). Plaintiffs also failed to cite a Fifth Circuit decision staying one
9 of the orders discussed in Plaintiffs' TRO because the Fifth Circuit determined that
10 the government was likely to prevail on the merits. *Valentine v. Collier*, 2020 WL
11 1934431 (5th Cir. Apr. 22, 2020).

12 Plaintiffs also cite to a number of cases to show that courts have issued similar
13 relief with a much shorter briefing schedule. However, there is no indication that
14 these plaintiffs engaged in the same tactics as plaintiffs—Plaintiffs gathering
15 declarations nearly two weeks before filing the TRO, omitting pertinent subsequent
16 history on cases cited, and submitting nearly 500 pages of documents (in addition to
17 their Complaint) in support of the TRO.² Due to the numerous fundamental issues at
18 stake, Defendants deserve an opportunity to fully and fairly respond to Plaintiffs'
19 inaccurate portrayal of the jails.

20 Absent that additional time, Defendants wish to make it clear that while these
21 papers have not addressed and every argument and assertion made by Plaintiffs in
22

23 ¹ Defendants are not accusing Plaintiffs or their counsel of any malfeasance. On the
24 contrary, these issues illustrate why the adversary process is fundamental, particularly
when the parties must hastily brief such an important request.

25 ² See, e.g. *Swain v. Junior*, Dkt. 1:20-cv-21457, 2020 WL 1692668 (S.D. Fla. Apr. 7,
26 2020) (no indication that any of the aforementioned issues were present); *Savino v.*
Hodgson, No. 20-cv-10617, Dkt. 161 (D. Mass.) (TRO filing totals only 196 pages,
27 not over 400, and no indication that other issues were present); *Williams v. Federal*
Bureau of Prisons, 1:20-cv-00890, Dkt. 5 (D. D.C. Apr. 2, 2020) (TRO memorandum
28 and declarations total 61 pages); *Costa v. Bazron*, 1:19-cv-03185, Dkt. 39 (D. D.C.
Apr. 18, 2020) (TRO application and declarations total 104 pages).

1 their voluminous filing, Defendants' failure to do so is not a concession of the merit
2 of any of Plaintiffs' positions but merely a reflection of the extraordinarily limited
3 time which they were given to prepare a response.

4 **II. SUMMARY OF ARGUMENT**

5 It is particularly essential that Defendants have an adequate opportunity to
6 provide the response necessary for the Court to make an informed decision on
7 Plaintiffs' application because despite the undoubted importance of the issues raised,
8 Plaintiffs are simply not entitled to the sweeping relief they request. The application
9 is procedurally defective and substantively without merit. For example, before
10 Plaintiffs can bring a challenge in this Court to the jail conditions they complain of,
11 they are required to exhaust their administrative or state court remedies, neither of
12 which they have done. Thus, Plaintiffs will not even be able to survive a motion to
13 dismiss under Fed.R.Civ.P. 12(b)(6), let alone demonstrate the likelihood of success
14 on the merits required for a TRO.

15 Even assuming *arguendo* that Plaintiffs could somehow surmount the
16 procedural bars to these claims, which Defendants vigorously dispute, they are not
17 entitled to the relief they seek. Their constitutional challenge to the jail conditions
18 requires a showing, *inter alia*, that Defendants are guilty of "deliberate indifference"
19 to the risks of COVID-19 within the jail setting. Defendants are not. As set forth in
20 the accompanying declarations, in response to the COVID-19 crisis, Defendants have
21 already reduced the jail population by 30% since February 28, 2020 to reduce
22 overcrowding and improve physical distancing, quarantine, and isolation. They have
23 implemented widely accepted best practices such as increased disinfecting, masks for
24 both staff and inmates, and physical distancing. They have implemented rigorous
25 screening and testing procedures, reduced transfers and intakes, provided information
26 to both inmates and staff on measures to reduce the spread of infection, and limited
27 visitation and group activities by the inmates.

28 These measures are working. As of the morning of April 26, 2020, there was

1 not a single COVID-19 inmate death at the jail, 41 patients with positive tests, and 27
 2 who were previously positive but who have recovered in the jails. Declaration of
 3 Jackie Clark, R.N. (“Clark Dec.”), ¶9. The additional relief Plaintiffs request, such as
 4 cohorting new inmates by day, each for 14 days, is infeasible and/or outright
 5 dangerous to both staff and inmates, since appropriate classification on the basis of
 6 factors such as gang affiliation and not the day of intake, is essential.

7 Plaintiffs’ most extreme request — for mass, unconditional, and unsupervised
 8 release of inmates with preexisting medical conditions — has no basis in law, the
 9 facts, or common sense. The inmates remaining in the jails (including the named
 10 plaintiffs) are largely violent offenders who represent a serious public safety risk, and
 11 who will almost surely have no outside medical care for those high risk health
 12 conditions and no housing (except that which Plaintiffs want Defendants to plan,
 13 organize, and pay for). In addition to presenting a risk to the general public, Plaintiffs
 14 themselves are at risk of infection from the general population where the infection
 15 and death rates are far higher than in the jails.

16 The law does not require Defendants to make the jails into a COVID-free zone,
 17 though that is their goal. The law only requires Defendants to take reasonable
 18 measures to protect the inmates’ health, and that is precisely what they have done and
 19 are continuing to do. Plaintiffs are not entitled to the relief they seek. The TRO
 20 should be denied.³

21 **III. STATEMENT OF THE FACTS**

22 Plaintiffs grossly mischaracterize the facts, especially but not limited to their
 23 total failure to mention the numerous procedures and practices implemented by the
 24 Los Angeles County Sheriff’s Department (“LASD”) to protect the inmates in Los
 25

26 ³Defendants recognize that these opposing points and authorities exceed even the 40+
 27 page points and authorities filed by Plaintiffs. Unfortunately, it takes more space to
 28 explain why arguments have no merit than it does to make the meritless arguments in
 the first place, especially when Plaintiffs have had weeks to prepare their papers and
 Defendants had a single weekend.

1 Angeles County jails from being infected by COVID-19. LASD has taken extreme
2 measures in the last few months to combat the spread of this virus among the new
3 arrestees, jail staff and inmates throughout their jail facilities. In fact, LASD was at
4 the forefront of preparing and instituting targeted measures to protect the inmate
5 population from COVID-19 – beginning on February 10, 2020 – even before the first
6 known case of community transmission was recorded in Los Angeles County. Clark
7 Dec., ¶ 4.

8 The true facts are as follows:

9 **A. The Plaintiffs**

10 Like the majority of the inmates remaining in Los Angeles County Jail, most of
11 the Plaintiffs are charged with or convicted of serious, violent felonies, and by their
12 bail setting, have been deemed a substantial threat to public safety. For example,
13 Plaintiff Rodney Cullors is charged with multiple felony counts, including assault
14 with a deadly weapon with great bodily injury, for which he was denied bail. Allen
15 Dec. ¶ 5. Plaintiff Mark Avila is charged with felony conspiracy as part of Federal
16 Task Force investigation dealing with assault, extortion, distribution of narcotics and
17 gang conspiracy, and has a high bail of \$1,425,000.00. *Id.* Plaintiff Victor Gutierrez
18 is charged with felony domestic violence. Plaintiff Carole Dunham was convicted
19 and sentenced to 1095 days for possession of cocaine base for sale. *Id.* Plaintiff
20 Rany Oung is convicted of felony burglary, and has a no bail hold from San
21 Bernadino County for grand theft. *Id.* Plaintiff Leandrew Lewis is charged with
22 felony kidnapping and Plaintiff Jeremiah Farmer with human
23 trafficking. *Id.* Plaintiff Deneal Young is a court ordered returnee serving a sentence
24 at Soledad State Prison. *Id.*

25 Similarly, the majority of putative class members providing declarations in
26 support of Plaintiff’s TRO are also in jail for violent crimes. Declarants Holly
27 Davidson, Albert Kirk Jones, and Benito Venegas are all charged with
28

1 murder. *Id.* Declarants Catrina Balderrama and Andrew Fuentes have been
2 released. *Id.*

3 Plaintiffs misstate other facts. For example, Plaintiff Jeffrey Livotto alleges
4 “was taken to court for a probation hearing on or around March 26, 2020. He was
5 transported on Defendants’ bus along with dozens of other prisoners.” Complaint
6 ¶83. In fact, Mr. Livotto was not even transferred from LAPD custody until March
7 27, 2020, and when he was transported to and from Court for his hearing there were
8 only 2-3 prisoners with him. Declaration of Commander Daniel J. Dyer (“Dyer
9 Dec.”) ¶4.

10 Similarly, Plaintiff Rodney Cullors claims that in early April he was
11 “transported by Defendants to a medical facility for a MRI. There were three people
12 chained to the wheelchair van, all of whom were over the age of 50.” Complaint ¶ 85.
13 In fact, the custody wheelchair vans can only accommodate two wheelchairs at a
14 time; Cullors was transported to his medical appointment with only one other
15 wheelchair inmate in the car, and he was returned to jail in the van by himself. Dyer
16 Dec. ¶5.

17 **B. Release Of Thousands Of Inmates From Los Angeles County Jails**

18 LASD and Correctional Health Services (“CHS”), a division of Los Angeles
19 County Department of Health Services (“DHS”), knew that a critical measure in
20 preventing the spread of COVID-19 among the inmates was to promote social
21 distancing in the jail facilities. As a result, in early February 2020, LASD began
22 working with CHS, the Los Angeles County District Attorney, the Los Angeles
23 County Public Defender, as well as the Presiding Judge of the Los Angeles Superior
24 Court – the Honorable Kevin Brazile – to reduce the inmate population in Los
25 Angeles County jails. Clark Dec., ¶ 48; Declaration of Bruce Chase (“Chase Dec.”),
26 ¶ 7. As a result of the unprecedented steps taken by LASD to reduce the inmate
27 population in an expedient manner, almost 4,000 inmates have been released from the
28

1 jail facilities since February 28, 2020 – the largest depopulation of any jail system in
 2 the United States during the COVID-19 pandemic. Clark Dec., ¶ 48; Chase Dec., ¶8;
 3 Declaration of Chief Brendan J. Corbett (“Corbett Dec.”) ¶ 2. The 30% reduction of
 4 the inmate population in Los Angeles County jails has been conducted by LASD in a
 5 careful and methodical manner to ensure both the safety of the released inmates and
 6 community at large. Clark Dec., ¶¶ 48-50; Chase Dec., ¶ 8; Corbett Dec., ¶¶ 2-10.

7 LASD has prioritized, and continues to prioritize, those inmates eligible for
 8 release based on any relevant medical vulnerabilities, and CHS has provided LASD
 9 with a list identifying such high-risk inmates, which is continually updated to account
 10 for recent arrestees and other new inmates. Clark Dec., ¶ 49. Fewer than 12,000
 11 inmates are housed at LA County jail facilities now. Clark Dec., ¶ 2; Chase Dec., ¶ 8.
 12 In addition, LASD significantly reduced the number of arrestees who would be
 13 admitted to Los Angeles County jails by, among other things, increasing the
 14 minimum bail amount by 100% – from \$25,000 to more than \$50,000 – and
 15 temporarily refusing to accept people arrested on out-of-state warrants. Chase Dec., ¶
 16 9; Corbett Dec., ¶¶ 11-12.

17 In short, LASD and CHS have made depopulating the jail facilities one of their
 18 top priorities to combat the spread of COVID-19 in order to promote social distancing
 19 among the inmates. The plaintiffs who submitted declarations in support of the TRO
 20 have been determined to be unsuitable for release based on – in most cases – the
 21 seriousness of their associated crimes (i.e., murder and assault with a deadly weapon).
 22 *See* Allen Dec., ¶5.

23 **C. Screening Practices To Segregate New Arrestees Who May Have** 24 **Been Exposed To COVID-19**

25 LASD and CHS have also implemented robust screening practices to identify
 26 and isolate arrestees potentially infected by COVID-19 during the booking process
 27 before these individuals enter the jails. Clark Dec., ¶ 12. By way of example and not
 28 limitation (Clark Dec., ¶¶ 12-20; Chase Dec., ¶¶ 11-14), on February 10, 2020, CHS

1 modified the Arrestee Medical Screening Form to identify arrestees who are
 2 potentially infected by asking whether they have COVID-19 symptoms – in addition
 3 to the standard questions to detect individuals with infectious diseases. Clark Dec., ¶¶
 4 13, 15; Chase Dec., ¶ 12. Tents have also been erected in the parking lots outside of
 5 the Inmate Reception Center and the Century Regional Detention Facility where CHS
 6 registered nurses conduct clinical assessments of arrestees for COVID-19 before
 7 transporting them to a jail facility. Clark Dec., ¶ 14; Chase Dec., ¶¶ 11, 13.

8 In addition, LASD and CHS plan to begin testing all new arrestees (male and
 9 female) for COVID-19 on or before May 1, 2020. Clark Dec., ¶ 20.

10 **D. Measures To Limit The Spread Of COVID-19 Among The Inmate**
 11 **Population**

12 LASD and CHS have also implemented detailed procedures to isolate housed
 13 inmates and staff with positive results for COVID-19 and Persons Under
 14 Investigation for COVID-19 (“PUI’s”), as well as to quarantine those who have been
 15 in contact with these individuals.⁴ Clark Dec., ¶¶ 10, 24-30; Chase Dec., ¶¶ 26-28.
 16 CHS will make available testing to a large portion of inmates who have medical
 17 conditions which make them susceptible to COVID-19, including those with serious
 18 mental illnesses. Clark Dec., ¶ 34.

19 In addition, LASD continually informs inmates about COVID-19 prevention
 20 techniques, through videos displayed at intake and in each housing unit,
 21 demonstrative posters, and town hall meetings set up by CHS to educate inmates.⁵
 22 Clark Dec., ¶ 21. During the COVID-19 crisis, all inmate group activities, non-
 23 essential medical appointments, and access by non-essential visitors have been
 24

25 ⁴ Isolation is the placement of a PUI or one who has tested positive for COVID-19
 26 into their own space and separating them from persons who are not ill. Clark Dec., ¶
 27 27; Chase Dec., ¶ 26. Quarantine is the procedure of separating and restricting the
 28 movement of a person who has been exposed to a PUI, but who is not exhibiting any
 symptoms related to COVID-19. Clark Dec., ¶ 25; Chase Dec., ¶ 26.

⁵ Defendants will provide copies of these posters and videos upon the Court’s request.

1 suspended to promote social distancing practices in the jail facilities. Clark Dec., ¶¶
2 23, 31. Custody staff initially provided inmates in with cloth face masks on April 14,
3 2020. *Id.* CHS also provides face masks to all inmates in quarantine and isolation.
4 Clark Dec., ¶¶ 26-27.

5 LASD has also taken extra steps to keep inmate and staff areas at the jail
6 facilities clean. Chase Dec., ¶ 15. Even before COVID-19, LASD had rigorous
7 protocols to enhance sanitary conditions for inmates in the jails, including, but not
8 limited to, providing inmates with clean clothes, bedding, showers and personal
9 hygiene products. *Id.* Inmates are also issued personal kits when they first arrive at
10 the jails that contain hygiene items, including clean linen and either a bar of soap or
11 liquid soap. Chase Dec., ¶ 18. All staff have been instructed to provide inmates with
12 bars of soap upon request. Clark Dec., ¶ 22; Chase Dec., ¶ 19.

13 Moreover, since the pandemic began, jail staff has provided inmates with
14 cleaning supplies and solution after every meal, and those supplies are available to
15 inmates at any time. Chase Dec., ¶ 16. Incarcerated individuals have also been
16 provided supplies to clean their own living space multiple times each day. *Id.*
17 Inmates are provided with CitriCide and Turbo Kill to clean their housing areas,
18 which have been rated by the federal Environmental Protection Agency to kill
19 COVID-19. Chase Dec., ¶ 18. Jail staff checks the supplies daily to ensure that they
20 are adequate and to deliver mops to each housing area upon request by an inmate. *Id.*
21 Since at least mid-March 2020, jail staff has assigned inmates to work eight hours
22 each weekday as part of “COVID-19 Clean-Up Crews.” *Id.* at ¶ 16. “COVID-19
23 Clean-Up Crews” clean high traffic areas to routinely and effectively disinfect all
24 frequently touched surfaces and objects. Chase Dec., ¶ 17.

25 **E. Practices To Prevent Infection Of Jail Employees**

26 CHS supplies all of their personnel with N95 or surgical masks, which are
27 available at jail facility entrances at the beginning of each shift. Clark Dec., ¶ 35.
28 Face shields and gowns are provided to staff working directly with PUI’s and patients

1 who have tested positive for COVID-19. *Id.* CHS also instructed their staff to take
 2 their temperature every day once in the morning and at night. *Id.* at ¶ 38; Chase Dec.,
 3 ¶ 30.

4 Signs are posted at all jail facility entrances notifying jail employees that they
 5 may not enter the facility unless they have taken their temperature, if they have
 6 COVID-19 symptoms, or have had contact with a COVID-19 positive person in the
 7 past 14 days. Clark Dec., ¶ 38; Chase Dec., ¶ 30. As of April 9, 2020, all jail staff
 8 are required to wear a mask while in a jail facility. Chase Dec., ¶ 22.

9 **F. Minimal Infection Rates Of COVID-19 At Los Angeles County Jails**

10 As a result of the LASD's and CHS' comprehensive and aggressive approach
 11 to limit the spread of COVID-19, only a small number of inmates have contracted the
 12 virus. As of April 26, 2020, there has not been a single COVID-19 related inmate
 13 death. Clark Dec., ¶9. By comparison, Riker's Island jail in New York City (inmate
 14 population of approximately 10,000) has 304 inmates and 518 staff who have tested
 15 positive for the virus. Chase Dec., ¶ 29. Cook County Jail in Chicago, Illinois
 16 (inmate population of approximately 3,200) has 461 inmates and 363 staff members
 17 who have tested positive for the virus. *Id.*

18 **IV. PLAINTIFFS HAVE NOT DEMONSTRATED THAT THEY ARE** 19 **LIKELY TO PREVAIL ON THE MERITS**

20 To obtain a temporary restraining order, the moving party must demonstrate (1)
 21 that it is likely to prevail on the merits of its claim, (2) that it will suffer irreparable
 22 harm in the absence of extraordinary relief, (3) that the balance of equities is in its
 23 favor, and (4) that an injunction is in the public interest. *Beaty v. Brewer*, 649 F.3d
 24 1071, 1072 (9th Cir. 2011) (preliminary injunction); *Lockheed Missile & Space Co.,*
 25 *Inc. v. Hughes Aircraft Co.*, 887 F.Supp. 1320, 1323 (N.D.Ca. 1995) (standards for
 26 TRO are same as for preliminary injunction).

27 As the moving parties, Plaintiffs have the burden of proof on each element.
 28 *Baca v. Moreno Valley Unified School District*, 936 F.Supp. 719, 726 (C.D.Ca. 1996)

1 (preliminary injunction); *Big Sky Scientific LLC v. Idaho State Police*, 2019 WL
2 438336 at *4 (D.Idaho Feb. 2, 2019) (burden of proof for TRO is same as for
3 preliminary injunction).

4 “A temporary restraining order is an extraordinary and drastic remedy and
5 should not be granted unless the movant, by a clear showing, carries the burden of
6 persuasion.” *Klein v. City of Laguna Beach*, 594 F.Supp.2d 1020, 1024 (C.D.Ca.
7 2009); *see also In Defense of Animals v. U.S. Dept. of Interior*, 737 F.Supp.2d 1125,
8 1131 (E.D.Ca. 2010) (“The issuance of . . . preliminary injunctive relief is an
9 extraordinary remedy, and Plaintiffs have the burden of proving the propriety of such
10 a remedy by clear and convincing evidence.”)

11 Plaintiffs’ burden is even heavier than the already weighty burden imposed in
12 most cases because the purpose of a temporary restraining order is to preserve the
13 status quo (*Bronco Wine Co. v U.S. Dept. of Treasury*, 997 F.Supp. 1309, 1231
14 (E.D.Ca. 1996)), while Plaintiffs are seeking relief which would drastically alter it.
15 *See 3570 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F.Supp. 1257, 1260 (C.D.
16 Ca. 1995) (since primary purpose of preliminary injunction is to preserve the status
17 quo, those which change it are “viewed with hesitancy and carry a *heavy burden of*
18 *persuasion.*”) (Emphasis in original)

19 Plaintiffs fall woefully short of this standard, especially given that virtually
20 every material fact they assert is contradicted by Defendants. *Ohio Casualty Ins. Co.*
21 *v. L.H. Engineering Co., Inc.*, 2014 WL 12569352 at *2 (C.D.Ca. April 24, 2014)
22 (denying TRO “on the basis of unproven and contradicted facts); *Knudsen Corp. v.*
23 *Ever-Fresh Foods, Inc.*, 336 F.Supp. 241, 248 (C.D.Ca. 1971) (denying preliminary
24 injunction; “The case at bar presents material disputed issues of fact which casts
25 reasonable doubt upon the certainty of plaintiff’s prevailing at a trial on the merits.”)

26 Plaintiffs’ claims also fail as a matter of law, as Defendants now show.

27 **A. Plaintiffs Have Not Exhausted Their Administrative Remedies As**
28

Required By the Prison Litigation Reform Act, 42 U.S.C. §1997e(a)

1
2 Plaintiffs challenge conditions in the County jails under 42 U.S.C. §1983.
3 Complaint, ¶¶174-212. Under the Prison Litigation Reform Act of 1995 (“PLRA”),
4 “[n]o action shall be brought with respect to prison conditions under section 1983 of
5 this title, or any other Federal law, by a prisoner confined in any jail, prison, or other
6 correctional facility until such administrative remedies as are available are
7 exhausted.” 42 U.S.C. §1997e(a). A “prisoner” includes both pretrial detainees as
8 well as those convicted of a crime. 42 U.S.C. §1997e(h); *Matapuutuli v. Sessions*,
9 714 Fed.Appx. 730, 731 (9th Cir. 2018). The PLRA applies to local jails (18 U.S.C.
10 §1326(g)(5); *Maiden v. LA County Sheriff’s Dept. Men’s Central Jail*, 334 Fed.Appx.
11 76 (9th Cir. 2009) (affirming dismissal of prisoner’s §1883 claims for failure to
12 exhaust administrative remedies as required by the PLRA).

13 Section 1997e makes exhaustion of administrative remedies mandatory. *Porter*
14 *v. Nussle*, 534 U.S. 516, 524 (2002). “The PLRA’s exhaustion requirement applies to
15 all inmate suits about prison life, whether they involve general circumstances or
16 particular episodes, and whether they allege excessive force or some other wrong.”
17 *Id.* at 532. They apply to claims over prison conditions during the COVID-19 crisis.
18 *Valentine v. Collier*, 2020 WL 1934431 at **5-7 (5th Cir. April 22, 2020). There are
19 no futility or other judicially created exceptions to the statutory exhaustion
20 requirements. *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001); *Valentine*, 2020 WL
21 1934431 at **5-7 (reversing district court finding that failure to exhaust
22 administrative remedies would be “too lengthy” in view of COVID-19 crisis; no such
23 exception to exhaustion requirement exists).

24 Defendants have a lengthy Custody Division Manual, with an entire volume
25 entitled “Inmate Grievance Manual” (the “Manual”). Ex. A to Corbett Dec. The
26 Manual contains detailed procedures for inmate grievances, including “Emergency
27 Grievances” (§8-03/010.00) and “Health Care Grievances” (§8-03/020.00). There is
28 also an entire process for appeals (§8-04/030.00), including but not limited to

1 “Appeals of Emergency Grievances” (§8-04/030.15).

2 Plaintiffs did not satisfy the administrative remedies available to them, either in
3 the Manual or otherwise. Of the 15 inmates who provided declarations in support of
4 the TRO, ten do not claim that they even filed a written request or grievance, which is
5 the first step under the Manual. §8-01/005.00. Of the remaining five, three filed (or
6 asked to file) grievances in which they requested masks. Davidson Dec., ¶9; Young
7 Dec., ¶14; Avila Dec., ¶9. These were provided. Davidson Dec., ¶9; Young Dec.,
8 ¶15; Avila Dec., ¶11. One inmate asked to see medical staff (twice), and was given
9 the opportunity to do so both times. Haviland Dec., ¶¶12, 15. In other cases, the
10 declarants claimed that their grievances were denied or there was no response. Avila
11 Dec., ¶9; Balderrama Dec., ¶7; Young Dec., ¶16. But those instances do not
12 constitute exhaustion of administrative remedies, because the Manual expressly
13 provides for appeals if the inmate is not satisfied with the disposition of their
14 grievance or if the inmate receives no response (§8-04/030.00). This evidence is not
15 remotely adequate to constitute exhaustion of administrative remedies.

16 Plaintiffs cannot evade the exhaustion of administrative remedies requirement
17 by seeking relief on grounds other than §1983. The Ninth Circuit does not recognize
18 a cause of action directly under the federal constitution: “a litigant complaining of a
19 violation of a constitutional right must utilize 42 U.S.C. §1983.” *Azul-Pacifico, Inc.*
20 *v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) (emphasis added). And
21 Plaintiffs cannot proceed under the Americans with Disabilities Act (Complaint,
22 ¶¶213-233) or the Rehabilitation Act 1 (Complaint, ¶¶234- 253) because §1997e(a)
23 requires exhaustion of administrative remedies not only for claims under §1983 but
24 also those brought under “any other Federal law.” §1997e(a); *O’Guinn v. Lovelock*
25 *Correctional Center*, 502 F.3d 1056, 1058, 1060 (9th Cir. 2007) (affirming dismissal
26 of prisoner’s claims under ADA and Rehabilitation Act for failure to exhaust
27
28

1 administrative remedies as required by §1997e(a)).⁶

2 Plaintiffs’ failure to exhaust their administrative remedies likewise bars relief
3 under their state law claims. Complaint, ¶¶254-264 (Gov.Code §11135); ¶¶265-273
4 (Civ.Code §51(f)); ¶¶265-273 (Civ.Code §54(c)). *See, e.g., J.E.L. v. San Francisco*
5 *Unified School District*, 185 F.Supp.3d 1196, 1201 (N.D.Ca. 2016) (dismissing
6 §11135 claim by disabled student for failure to exhaust administrative remedies as
7 required by 22 Cal.CodeRegs. §98003).

8 **B. Plaintiffs Have Not Exhausted Their Administrative Remedies As**
9 **Required By the Prison Litigation Reform Act, 42 U.S.C. §1997e(a)**

10 Trying to evade the requirements of §1997e, which they cannot meet, Plaintiffs
11 also characterize their challenge to jail conditions as claims for habeas corpus under
12 28 U.S.C. §2241. Complaint, ¶¶174- 212. They are not.

13 Habeas corpus is the remedy “to attack the legality of the conviction or
14 sentence.” *Nettles v. Grounds*, 830 F.3d 992, 933 (9th Cir. 2016) (en banc). But
15 Congress’ enactment of the Prison Litigation Reform Act “indicated an intent to make
16 §1983 the exclusive remedy for ‘all inmate suits about prison life.’” *Id.* at 932. This
17 complaint is a suit about prison life, not the legality of Plaintiffs’ convictions or
18 sentences — indeed, many of them have not yet been convicted or sentenced
19 (Complaint, ¶159) — and thus is not a case of habeas corpus.

20 Other district courts presented with similar COVID-19 prisoner cases have
21 reached the same conclusion. *See, e.g., Phea v. Pfeiffer*, 2020 WL 1892427, at *1
22 (E.D.Ca. April 16, 2020) (denying state prisoner’s habeas petition based on COVID-
23 19 because it related to “the conditions of petitioner’s confinement” rather than “the
24 duration or legality of his confinement” and thus was a §1983 claim); *Petersen v.*
25 *Diaz*, 2020 WL 4740538, at **1-2 (E.D. Ca. April 2, 2020) (same).

26
27
28 ⁶Notably, the Manual has an entire section devoted to ADA grievances and their
appeals (§8-03/030 .00). No plaintiff claims to have used it.

1 Because this case is one under §1983, no matter how Plaintiffs style it,⁷
 2 Plaintiffs are required by §1997e to exhaust their administrative remedies. Since they
 3 have not done so, they cannot show the likelihood of success on the merits required
 4 for a TRO: indeed, their claims will not survive a motion to dismiss under F.R.C.P.
 5 12(b)(6).

6 Labeling their claims as ones for habeas corpus is not only incorrect as a matter
 7 of law, it is pointless because habeas corpus claims have their own exhaustion
 8 requirements which Plaintiffs do not satisfy, either. Habeas petitions involving state
 9 prisoners take two forms: those brought under 28 U.S.C. §2241 and those under
 10 §2254. Section 2254(a) applies to those persons “in custody pursuant to the judgment
 11 of a State court,” *i.e.*, those who have already been convicted. A writ cannot be
 12 granted under §2254 unless the applicant has exhausted the remedies of the state
 13 courts. §2254(b)(1)(A). There is no allegation, and no evidence, that any of the post-
 14 conviction plaintiffs has exhausted his/her state court remedies — a requirement even
 15 during the present health emergency.⁸

16 Undoubtedly for this reason, Plaintiffs assert that they are proceeding under
 17 §2241 for both pretrial and post-conviction inmates. Complaint, 50: 20-24, 54:2-6,
 18 56:7-11. They cannot do so. Pretrial detainees may proceed under §2241 because
 19 they are not “in custody pursuant to the judgment of a State court.” *Stow v.*
 20 *Murashige*, 389 F.3d 880, 885 (9th Cir. 2004). But for post-conviction inmates, their
 21 remedy lies solely under §2254. *White v. Lambert*, 370 F.3d 1002, 1009-1010 (9th
 22 Cir. 2004), *overruled on other grounds*, *Hayward v. Marshall*, 603 F.3d 546 (9th Cir.

24 ⁷“The label that a plaintiff places on his pleadings, however, does not determine the
 25 nature of his cause of action.” *Rains v. Criterion Systems, Inc.*, 80 F.3d 339, 343 n.2
 (9th Cir. 1996).

26 ⁸*See, e.g., Riggs v. Louisiana*, 2020 WL 1939168, at *2 (W.D.La. April 22, 2020)
 27 (denying habeas petition by convicted state prisoner on COVID-19 grounds for
 28 failure to exhaust state court remedies; “While the Court is well aware of the effects
 of the Covid-19 pandemic and is concerned about its effect on those persons in the
 prison system, Riggs has not stated a claim for relief at this time.”)

1 2010) (§2254 “is the exclusive vehicle for a habeas petition by a state prisoner in
 2 custody pursuant to a state court judgment, even when the petitioner is not
 3 challenging his underlying state court conviction.”); *see also Dominguez v. Kernan*,
 4 906 F.3d 1127, 1135 (9th Cir. 2018) (same). The post-conviction plaintiffs must
 5 comply with §2254, and they have failed to do so.⁹

6 The plaintiffs who are pretrial detainees fare no better. While they may
 7 proceed under §2241, those claims are also subject to an exhaustion requirement.
 8 *Dominguez*, 906 F.3d at 1135 n.9. That requirement was largely imposed in the
 9 interests of comity, “to prevent federal interference with state adjudication, especially
 10 state criminal trials” which, in the case of pretrial detainees, of course have not even
 11 occurred yet. *Carden v. State of Montana*, 626 F.2d 82, 83 (9th Cir. 1980); *Williams*
 12 *v. Los Angeles Superior Court*, 2014 WL 2533804, at *3 (C.D.Ca. June 4, 20014)
 13 (denying release under §2241 for failure to exhaust judicial remedies; state pretrial
 14 detainee had failed “to seek *any* relief” in state appellate courts) (emphasis in
 15 original). There is no evidence that any of the Plaintiffs has sought any relief in any
 16 state court, let alone that such relief been denied, and that requirement does not
 17 disappear even in the present public health crisis.¹⁰

18 **C. Plaintiffs Have Not Demonstrated Defendants’ Deliberate**
 19 **Indifference To The Impact Of COVID-19 On Jail Conditions.**

20 Plaintiffs seek relief on behalf of two distinct groups: those inmates who have
 21 been convicted of a crime (Complaint, ¶¶160, 197-212) and those who are pretrial
 22 detainees (Complaint ¶¶159, 174-196).

23 ⁹Plaintiffs cite a Tenth Circuit case, *Montez v. McKinna*, 208 F.3d 862, 865 (10th Cir.
 24 2000), for the proposition that post-conviction prisoners may also proceed under
 25 §2241. TRO 36 at n.22. That is not the law in the Ninth Circuit, which has explicitly
 26 considered both the analysis and conclusion in *Montez*, and rejected them as a
 minority view unsupported by both statutory and U.S. Supreme Court authority.
White, 370 F.3d at 1009-1010.

27 ¹⁰*See, e.g., Cuevas v. Commonwealth of Pa.*, 2020 WL 1911511, at *3 (M.D.Pa. April
 28 20, 2020) (denying habeas petition by pretrial detainee in county jail on COVID-19
 grounds for failure to exhaust state judicial remedies: “To exhaust a claim, a
 petitioner must ‘fairly present’ it to each level of the state courts.”)

1 **1. The Pretrial Detainees Have Not Shown Deliberate**
2 **Indifference.**

3 “Inmates who sue prison officials for injuries suffered while in custody may do
4 so under the Eighth Amendment’s Cruel and Unusual Punishment Clause or, if not
5 convicted, under the Fourteenth Amendment’s Due Process Clause.” *Castro v.*
6 *County of Los Angeles*, 833 F.3d 1060, 1067-68 (9th Cir. 2016) (en banc) *citing Bell*
7 *v. Wolfish*, 441 U.S. 520, 535 (1979). “Under both clauses, the plaintiff must show
8 that the prison officials acted with ‘deliberate indifference.’” *Id.* at 1068.

9 When a pretrial detainee sues a governmental entity under the Fourteenth
10 Amendment, “the deliberate indifference standard for municipalities is always an
11 objective inquiry.” *Id.* at 1076. The objective standard for deliberate indifference for
12 Fourteenth Amendment claims brought by pretrial detainees applies to a failure to
13 address medical needs, as well as a failure to protect pretrial detainees. *Gordon v.*
14 *County of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018).

15 The objective standard is satisfied when a “plaintiff [] establish[es] that the
16 facts available to [entity] policymakers put them on actual or constructive notice that
17 the particular omission is substantially certain to result in violation of the
18 constitutional rights of their citizens.” *Castro*, 833 F.3d at 1076.

19 The elements for a pretrial detainee’s claim are:

20 “(i) the defendant made an intentional decision with
21 respect to the conditions under which the plaintiff was
22 confined; (ii) those conditions put the plaintiff at
23 substantial risk of suffering serious harm; (iii) the
24 defendant did not take reasonable available measures to
25 abate that risk, even though a reasonable official in the
26 circumstances would have appreciated the high degree of
27 risk involved—making the consequences of the
28 defendant's conduct obvious; and (iv) by not taking such

1 measures, the defendant caused the plaintiff's injuries.”

2 *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1125 (9th Cir.
3 2018).

4 The defendant's conduct under the third element must be objectively
5 unreasonable, and it is “more than negligence but less than subjective intent—
6 something akin to reckless disregard.” *Id.*

7 Defendants have not acted with deliberate disregard of COVID-19 under the
8 objective standard. Defendants have undertaken a number of actions to minimize the
9 threat of COVID-19 at the jails. Among other things, Defendants have implemented
10 and revised policies that require, among other things, multiple levels of screening of
11 incoming inmates for COVID-19 symptoms; isolating and providing masks to those
12 showing symptoms; providing town hall meetings, demonstrative posters, and videos
13 to educate the detainees about COVID-19; testing for COVID-19; symptom tracking
14 of medical and prison staff; providing hand sanitizer for all staff; providing enhanced
15 cleaning of cells and common areas; and decreasing the jail population by 30%.
16 Here, too, the CDC Guidance is the basis for Defendants' policies. Clark Dec., ¶¶11,
17 47.

18 Courts have held that far less remedial measures were sufficient in the face of
19 deliberate indifference challenges. *Habibi v. Barr*, No. 20-cv-00618-BAS-RBB, 2020
20 WL 1864642, at *5 (S.D. Cal. Apr. 14, 2020) (plaintiff did not show inadequate
21 measure by government to prevent spread of COVID-19 due to the following
22 measures: detainees, vendors, and staff are screened for fever, illness, and contact
23 with positive cases; detainees are tested and isolated if they show symptoms; the
24 facility has increased in disinfectant spray, hand sanitizer, soap, and cleaning of the
25 housing units; all social visitations have been suspended and counsel visitations are
26 non-contact; and “cohorting” any detainees that were exposed).

27 Defendants have implemented the vast majority of these measures, and more,
28

1 including multiple screenings of all incoming inmates for symptoms; isolating and
 2 providing masks, enhanced cleaning; symptom-tracking of medical staff; providing
 3 sufficient hand sanitizer to staff; educating the inmates through posters, videos, and
 4 meetings; and decreasing the jail population by 30%. *See* Section III, *supra*.

5 Defendants have also not been recklessly disregarding the risk of COVID-19
 6 because they been modifying and improving policies to comply with changing
 7 guidelines and recommendations.¹¹ Defendants have been modifying and improving
 8 their policies to comply with the ever-changing guidance from the local, state, and
 9 federal officials. For instance, Los Angeles first issued *non-binding guidance* that the
 10 public should use masks to prevent the spread of COVID-19 on April 1, 2020.¹² At
 11 that time, the federal government maintained that the masks were *not* recommended.¹³
 12 The CDC did not recommend that people should wear cloth or fabric face coverings
 13 until April 3, 2020.¹⁴ The City of Los Angeles mandated masks for the general
 14 population in public spaces, such as grocery stores, effective April 10, 2020.¹⁵ Many
 15 Plaintiffs concede that masks were provided shortly after the mask guidance was
 16 issued, and on or around the date that masks were required by the City of Los

17
 18
 19 ¹¹ *Cf. Valentine v. Collier*, -- F.3d ---, 2020 WL 1934431, at *5 (5th Cir. Apr. 22, 2020) (without injunction, Texas state prison officials could quickly adopt new procedures based on changes to CDC guidelines).

20 ¹² Kailyn Brown et al. *Should You Wear a Mask at the Grocery Store? Coronavirus Advice Keeps Changing* L.A. Times Apr 1 2020
 21 <https://www.latimes.com/california/story/2020-04-01/should-you-wear-a-face-mask-at-the-grocery-store-ccoronavirus-advice-keeps-changing> (last accessed Apr. 26, 2020).

22
 23 ¹³ *Id.*

24 ¹⁴ *See* Colin Dwyer and Allison Aubrey *CDC Now Recommends Americans Consider Wearing Cloth Face Coverings In Public* NPR, Apr. 3, 2020,
 25 <https://www.npr.org/sections/coronavirus-live-updates/2020/04/03/826219824/nresident-trump-says-cdc-now-recommends-americans-wear-cloth-masks-in-public> (last accessed Apr. 26, 2020).

26 ¹⁵ Public Order Under City of Los Angeles Emergency Authority, Worker Protection Order Apr 7 2020 (rev Apr 16 2020)
 27 <https://www.lamavor.org/sites/g/files/wnh446/f/naoe/file/20200416MayorPublicOrderWorkerProtectionRevised041620.pdf> (last accessed Apr. 26, 2020).

1 Angeles. *See, e.g.*, Avila Dec. at ¶ 11 (received a mask on April 10); Balderrama Dec.
2 at ¶¶ 13, 19 (received a mask, lost it, and received another mask on April 11); Cullors
3 Dec. at ¶ 12 (received a mask on April 10); Davidson Dec. ¶ 9 (received a mask on
4 April 11); Dunham Dec. at ¶ 8 (obtained a cloth mask on unspecified date); Farmer
5 Dec. ¶ 5 (received a mask on April 15); Haviland Dec. at ¶ 16 (received a mask on
6 April 11). Public health officials were far from universal in their guidance regarding
7 masks until mid-April. Defendants’ failure to provide masks before early April is not
8 deliberate indifference because health officials’ guidance supported their actions then.

9 Plaintiffs state that “[o]ther federal courts have acted quickly to grant
10 extraordinary COVID-19 relief to people in detention, including TROs similar to the
11 one requested here.” TRO at 26:6-12 (footnote citing cases). None of these cases are
12 controlling, and none of these cases ordered the release of state prisoners. *Banks v.*
13 *Booth*, 1:20-cv-00849-CKK, 2020 WL 1914896, at *13 (D.D.C. Apr. 19, 2020) (court
14 not ordering release of prisoners); *Cameron v. Bouchard*, No. 2:20-cv-10949-LVP-
15 MJH, Dkt. No. 40, 2020 WL 1929876 E.D. Mich. Apr. 17, 2020), *as modified on*
16 *reh’ing* 2020 WL 1952836, at *2 (E.D. Mich. Apr. 23, 2020) (no release of inmates
17 ordered, and on rehearing, court reverse its prior order to provide names of subclass
18 members subject to release because court has not determined it has the authority to
19 release inmates); *Roman v. Wolf*, 5:20-cv-00768-TJH, 2020 WL 1952656 (C.D. Cal.
20 Apr. 23, 2020) (immigrants held a federal facility, not state inmates); *Valentine v.*
21 *Collier*, No. 4:20-CV-1115, 2020 WL 1899274 (S.D. Tex. Apr. 16, 2020), *injunction*
22 *stayed pending appeal*, *Valentine v. Collier*, 2020 WL 1934431 (5th Cir. Apr. 22,
23 2020) (no releases); *Gray v. Cty. of Riverside*, 5:13-cv-0444-VAP-OPx, Dkt. No. 191
24 (C.D. Cal. Apr. 14, 2020) (same); *Swain v. Junior*, No. 1:20-cv-21457-KMW, 2020
25 WL 1692668, at *2 (S.D. Fla. Apr. 7, 2020) (same, and ordering that jail provide
26 adequate spacing “to the maximum extent possible considering ... current population
27 levels”). Plaintiffs also provide a string cite of cases in footnote 13 for the principle
28 that “courts have also granted other extraordinary relief including habeas corpus,

1 reversing decisions to detain individuals found to be a safety risk pretrial, and
 2 compassionate release.” TRO at 26:13-15 n.13. *None* of these cases pertained to a
 3 federal court ordering the release of state prisoners or detainees, held on state matters
 4 (*i.e.*, not under federal immigration law).

5 Requests for federal courts to release state, rather than federal, inmates “raise[]
 6 serious concerns under core principles of federalism and the separation of powers,
 7 especially given their request for sweeping relief in the form of a mandatory
 8 injunction.” *Money v. Pritzker*, 2020 WL 1820660 at *15 (N.D. Ill. Apr. 10, 2020)
 9 (citing *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990)) (apply Eighth Amendment).
 10 “The Supreme Court repeatedly has cautioned that federal courts must tread lightly
 11 when it comes to questions of managing prisons, particularly state prisons.” *Id.*
 12 (citing cases). “It is no accident that the federal judiciary only rarely intrudes into the
 13 management of state prisons, and only once in history has actually ordered the release
 14 of prisoners on a scale anywhere near what Plaintiffs hope to accomplish through this
 15 litigation.” *Id.*

16 Moreover, Plaintiffs fail to identify adverse authority.¹⁶ In the most extreme
 17 example, Plaintiffs cite to the District Court’s injunction in *Valentine*, but *fail to*
 18 *disclose that the injunction is stayed pending appeal*. Two days before the TRO was
 19 filed, the Fifth Circuit stayed the injunction in *Valentine*, concluding that Plaintiffs
 20 “have not shown a ‘substantial risk of serious harm’ that amounts to ‘cruel and
 21

22
 23 ¹⁶ Other District Courts have rejected similar requests for injunctive relief or release
 24 from confinement. *See, e.g., Plata v. Newsom*, No. 01-cv-01351-JST, 2020 WL
 25 1908776 (N.D. Cal. Apr. 17, 2020) (denying California state prisoners’ injunction to
 26 order state to “develop a plan to manage and prevent the further spread of COVID-19
 27 in California state prisons,” including reducing population of prison where state’s
 28 response to COVID-19 was adequate (see *infra*)); *Coleman v. Newsom*, No. 2:90-cv-
 0520 KJM DBP, 2020 WL 1675775 (E.D. Cal. Apr. 4, 2020) (three-judge panel
 convened under PLRA denied request to release California state prisoners due to
 COVID-19 where state’s response to COVID-19 was adequate (see *infra*)); *Money v.*
Pritzker, 2020 WL 1820660 (N.D. Ill. Apr. 10, 2020) (denying injunctive relief to
 release medically at-risk class of state prisoners in light of COVID-19 where state’s
 response to COVID-19 was adequate).

1 unusual punishment” in light of the jail’s efforts to undertake protective measures,
2 and the District Court improperly applied Supreme Court precedent regarding the
3 Eighth Amendment. 2020 WL 1934431, at *3. The Fifth Circuit noted that the
4 injunction interferes with the ability of the state to implement its “rapidly changing
5 and flexible system-wide approach” in light of a number of guidance changes from
6 the CDC. *Id.* at *5.

7 Furthermore, the unfortunate reality is that all the remedial measures in the
8 world will not reduce the risk of infection if the inmates refuse to cooperate or even
9 actively sabotage Defendants’ best efforts, which has in fact been happening. That
10 does not, however, entitle Plaintiffs to a TRO. *Mission Power Engineering Co. v.*
11 *Continental Cas. Co.*, 883 F.Supp. 488, 492 (C.D.Ca. 1995) (“It must be established
12 that the moving party is without fault in creating the crisis that requires ex parte
13 relief.”)

14 Defendants have been working tirelessly to adopt policies and protocols that
15 protect the detainees and prisoners, and the Court should defer to Defendants’
16 judgment. *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010). Defendants took
17 “reasonable available measures,” *Gordon*, 888 F.3d at 1125, and therefore there is no
18 deliberate indifference under the Fourteenth Amendment.

19 **2. The Convicted Inmates Have Not Shown Deliberate** 20 **Indifference**

21 The convicted inmates must make an objective *and* subjective showing of
22 deliberate indifference under the Eighth Amendment. *Castro v. Cty. of Los Angeles*,
23 833 F.3d 1060, 1067-68 (9th Cir. 2016) (en banc). The danger to the prisoner must be,
24 objectively, sufficiently serious. *Farmer v. Brennan*, 511 U.S. 825, 834
25 (1994). Then, the official must “know of and disregard an excessive risk to inmate
26 health or safety.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). “A prison official
27 cannot be found liable under the Eighth Amendment for denying an inmate humane
28 conditions of confinement unless the official knows of and disregards an excessive

1 risk to inmate health or safety.” *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043,
2 1050 (9th Cir. 2002) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). Prison
3 officials only must “take reasonable measures to mitigate the [known] substantial
4 risk[s]’ to a prisoner.” *Wilk v. Neven*, No. 17-17355, 2020 WL 1949281, at *4 (9th
5 Cir. Apr. 23, 2020) (quoting *Castro*, 833 F.3d at 1067).

6 When a prisoner’s Eighth Amendment claim is based on “involuntary exposure
7 to environmental hazards,” the prisoner must make a two-part showing. Under the
8 objective prong, the plaintiff must show “that it is contrary to current standards of
9 decency for anyone to be exposed against his will to the hazard.” *Hines v. Youseff*,
10 914 F.3d 1219, 1229 (9th Cir. 2019) (quoting *Helling v. McKinney*, 509 U.S. 25, 35
11 (1993) (internal quotations omitted). “A prison official may be held liable under the
12 Eighth Amendment for denying humane conditions of confinement *only* if he knows
13 that inmates face a substantial risk of serious harm *and disregards that risk by failing*
14 *to take reasonable measures to abate it.*” *Farmer v. Brennan*, 511 U.S. 825, 847
15 (1994) (emphasis added).

16 Plaintiffs cannot show that the conditions at the jails are “contrary to current
17 standards of decency for anyone to be exposed against his will.” *Hines*, 914 F.3d at
18 1229. Other courts have found that lesser or equal remedial measures to those
19 implemented by Defendants here were satisfactory. *Coleman v. Newsom*, No. 2:90-
20 cv-0520, 2020 WL 1675775, at *3-4 (E.D. Cal. Apr. 4, 2020) (like Defendants’
21 policies here, California state prisons’ policies were adequate where they canceled
22 visiting statewide, distributing fact sheets and posters, additional hand-sanitizing
23 dispenser stations, transferred approximately 500 inmates out of dorm housing,
24 suspended transfers between facilities, and conducted temperature checks and
25 symptom screenings of all individuals entering the prisons); *Plata v. Newsom*, No. 01-
26 cv-01351, 2020 WL 1908776, at *4 (E.D. Cal. Apr. 17, 2020) (California state
27 prisons’ policies were adequate where produced cloth masks for distribution at
28 prisons, implemented a program that restricts movement and increases sanitation, in

1 addition to matters in *Coleman*).

2 The Fifth Circuit also considered this matter in relation to COVID-19. In
 3 *Valentine*, the court stayed an injunction in another COVID-19 state prisoner case
 4 because the defendants demonstrated a likelihood of success on the merits. The Fifth
 5 Circuit noted that the defendants had already provided a number of protective
 6 measures recommended by the CDC, including “access to soap, tissues, gloves,
 7 masks, regular cleaning, signage and education, quarantine of new prisoners, and
 8 social distancing during transport.” *Valentine v. Collier*, No. 20-20207, 2020 WL
 9 1934431, at *3-4 (5th Cir. Apr. 22, 2020). The injunction would go beyond the CDC
 10 guidelines, and the Fifth Circuit concluded that the plaintiffs “have cited no precedent
 11 holding that the CDC’s recommendations are insufficient to satisfy the Eighth
 12 Amendment.” *Id.* Here, too, the CDC Guidance is the basis for Defendants’ policies.
 13 Clark Dec., ¶¶10, 12-15, 26, 35-36.

14 Even if the objective standard were satisfied, Plaintiffs have not demonstrated
 15 that Defendants’ acts were deliberately indifferent under the subjective prong.
 16 Plaintiffs must show that Defendants were subjectively indifferent, which only exists
 17 “if he knows that inmates face a substantial risk of serious harm and disregards that
 18 risk by failing to take reasonable measures to abate it.” *Hines v. Youseff*, 914 F.3d
 19 1219, 1229 (9th Cir. 2019) (quoting *Farmer v. Brennan*, 511 U.S. 825, 847
 20 (1994)). To show deliberate indifference under the subjective standard in the
 21 COVID-19 context, there must be evidence that the defendants “subjectively believe
 22 the measures they are taking are inadequate.” *Valentine*, 2020 WL 1934431, at *4
 23 (no deliberate indifference under the subjective standard where prison officials had
 24 taken measures “informed by guidance from the CDC and medical professionals—to
 25 abate and control the spread of the virus.”)¹⁷

26
 27 ¹⁷ The Fifth Circuit held that the district court erred by “treating inadequate measures
 28 as dispositive of the Defendants’ mental state. Such an approach resembles the
 standard for civil negligence, which *Farmer* explicitly rejected.” *Id.* at *4.

1 Like in *Valentine*, Plaintiffs here present *no evidence* that Defendants
2 believed—much less knew—that their remedial measures were inadequate. On the
3 contrary, Defendants’ efforts demonstrate that they believe that their responses are
4 adequate. Correctional Health Services (“CHS”) and the LASD began preparing for
5 COVID-19 on February 10, 2020. CHS, which has been assigned a full-time
6 physician who specializes in infectious diseases to provide guidance and clinical
7 oversight, meets daily with LASD leaders to discuss operational matters and discuss
8 best practices to regarding COVID-19 in the jails. Due to the dynamic nature of this
9 pandemic, Defendants have made many additions and improvements to this plan as
10 the health care community’s knowledge of the virus developed. Defendants have also
11 taken remedial actions to alleviate the threat of COVID-19 in the jails, including
12 reducing the prison population by 30%; screening all incoming inmates for
13 symptoms, and isolating those showing symptoms; enhanced cleaning of cells and
14 public areas; and a number of other measures.

15 Plaintiffs boldly claim that while “courts give latitude and deference to jail and
16 prison officials’ decision,” that does not apply to COVID-19, and Defendants are
17 “knowingly expos[ing] Plaintiffs, guards, jail staff, and the public to extreme risk.”
18 TRO at 30:11-14. Not only is this unsupported by any authority in the TRO, it is
19 contrary to well-established law. *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir.
20 2010) (“It is well established that judges and juries must defer to prison officials’
21 expert judgments.”); *see also Coleman v. Newsom*, No. 2:90-cv-0520, 2020 WL
22 1675775, at *8 (E.D. Cal. Apr. 4, 2020) (“We emphasize that Defendants have broad
23 authority to voluntarily take steps that may prevent the life-threatening spread
24 of COVID-19 within their prisons, and we recognize the deference that is due
25 to prison authorities to determine which additional measures must be taken to avoid
26 catastrophic results”); *Money v. Pritzker*, No. 20-cv-2093, 2020 WL 1820660, at *22
27 (N.D. Ill. Apr. 10, 2020) (deference owed to state prison officials relating to handling
28 COVID-19).

1 In *Norwood*, the Ninth Circuit concluded that a trial court’s refusal to provide a
2 jury instruction regarding deference was erroneous in a conditions of confinement
3 case. *Norwood v. Vance*, 591 F.3d 1062, 1067 (9th Cir. 2010). “Prison officials are
4 entitled to deference whether a prisoner challenges excessive force or conditions of
5 confinement.” *Norwood v. Vance*, 591 F.3d 1062, 1067 (9th Cir. 2010). While
6 deference does not apply in cases where there is “unnecessary, unjustified, or
7 exaggerated response to the need for prison security,” *Shorter v. Baca*, 895 F.3d 1176,
8 (9th Cir. 2018), Plaintiffs do not make that assertion here. In fact, Plaintiffs fail to
9 weigh the need for security at *all* when discussing deference.

10 As a result, the convicted inmates cannot demonstrate that defendants acted
11 with deliberate indifference under either prong of the Eighth Amendment.

12 **3. Defendants’ Release Of Thousands Of Prisoners (But Not**
13 **Plaintiffs) Is Evidence That Defendants Are *Not* Deliberately**
14 **Indifferent To The COVID-19 Crisis.**

15 Plaintiffs contend that Defendants have the authority to release prisoners under
16 state law and their failure to do so is evidence of deliberate indifference. TRO 29:3-
17 11. They are wrong.

18 First of all, Defendants have gone to extraordinary lengths and used every
19 available statutory tool and previous court order to rapidly release over 5,200 inmates
20 accused or sentenced on non-violent, non-serious, or non-sexual crimes since
21 February 28, 2020. This constitutes a reduction of over 30% of the inmate population
22 in a six week period—the largest population reduction due to the COVID pandemic in
23 a jail or prison system nationwide. This was accomplished expressly for the purpose
24 of permitting increased physical distancing and to facilitate other measures to reduce
25 the risk of infection among the inmate population, while still keeping the community
26 safe. *See* Clark Dec. ¶ 10; Corbett Dec. ¶ 2.

27 For pre-trial inmates, LASD has historically released on a citation most inmates
28 accused of misdemeanor crimes when permitted to do so by California law. LASD,

1 however, does not have that discretion to release those accused of felonies, as those
2 release must be authorized by a Superior Court judge. Corbett Dec. ¶ 3. For those
3 arrested on felonies, arraigned and awaiting trial, the LASD's authority to release is
4 restricted by Penal Code §853.85, and must be authorized by the order of a superior
5 court judge.

6 Due to the COVID pandemic, to facilitate the releases of inmates accused of
7 felonies, LASD worked diligently with the Superior Court and their justice partners to
8 create a system for bail deviation hearings so that pre-trial inmates being held on non-
9 serious, non-violent, non-sexual felony charges could be released with a notice to
10 appear at a later date. *Id.* ¶ 4. LASD delivered lists of qualified inmates, i.e., those
11 who were not charged with a serious or violent felony as those terms are defined
12 under Penal Code §§ 667.5 and 1192.7 to the District Attorney's Office and the
13 Public Defender's Office for vetting and bail deviation hearings. *Id.*

14 As the CDC and DPH had at that time identified those 65 and older as being at
15 greater risk should they be infected with COVID, LASD identified qualified inmates
16 60 or older on the first list it sent. *Id.* ¶ 5. The LASD delivered its first list on March
17 20, 2020. *Id.* Since then, these lists have grown to over 2,400 people, and the
18 Superior Court has either approved of release stipulations or held hearings with the
19 Public Defender's Office/Alternate Public Defender's Office and District Attorney's
20 Office prior to issuing release orders. LASD then processed these releases, providing
21 the inmate with a notice to appear more than 60 days out in deference to state and
22 local Stay-at-Home orders. *Id.*

23 On April 13, 2020, a statewide emergency bail schedule went into effect
24 effectively reducing bail to \$0 for all inmates except those arrested for crimes
25 specifically excluded on the schedule, e.g., serious, violent, or sex offenses. Ex. A to
26 Corbett Dec. ¶ 7. In response, as the LASD had the authority to re-set bail to \$0 for
27 those accused of qualifying crimes but who had not yet been arraigned, the LASD
28 scoured its records in an attempt to locate any such inmates, but did not find any.

1 Corbett Dec. ¶ 15. Simultaneously, LASD began working with the Superior Court
2 and its justice partners to identify those accused of qualifying crimes who had already
3 been arraigned so that the Court in its own discretion could re-set the bail to \$0. *Id.*

4 For convicted and sentenced inmates, LASD has employed its authority under a
5 District Court order issued in 1988 in *Rutherford v. Block*, which permits the Sheriff
6 to release certain convicted inmates early, prior to completing their full sentence, to
7 address unconstitutional overcrowding, with express priority given to those with short
8 remaining sentences or non-violent criminal offenses. Corbett Dec. ¶ 8.

9 In fact, for the first time, in response to the COVID-19 crisis, LASD has
10 expanded its application of its *Rutherford* authority to release inmates in custody for
11 AB109 crimes. Corbett Dec. ¶ 9. AB109 is the California Public Safety Realignment
12 Act of 2011, which resulted in people serving their time in the County jail for non-
13 serious/non-violent felonies where they previously would have done their time in
14 state prison. *Id.* In response to the COVID-19 crisis, eligible AB109 inmates are
15 completing only 70% of their sentences instead of 100%. *Id.*

16 To radically reduce the number of new inmates received by the County jail
17 system during the COVID pandemic, LASD also issued new booking requirements,
18 re-setting the minimum bail amount for booking of those accused of misdemeanors
19 or arrested on misdemeanor warrants from \$25,000 to \$50,000, except for domestic
20 violence crimes. *Id.* ¶ 11. These new requirements were issued to law enforcement
21 agencies countywide rapidly via the Justice Data Interface Controller System
22 (“JDIC”). *Id.* LASD has also imposed a temporary moratorium on all but the most
23 critical transfers to the Los Angeles County jails from the California Department of
24 Corrections and Rehabilitation and from outside law enforcement agencies who have
25 arrested people on Los Angeles County warrants. *Id.*

26 Plaintiffs’ real complaint, of course, is that Defendants have not
27 released them. The truth is that the only inmates who remain in county jail are there
28

1 for a reason – namely, they pose an unacceptable threat to public safety. They were
2 either charged with or convicted of serious, violent, or sex crimes (*e.g.*, Pen.Code §§
3 290(c), 667.5, 1192.7); are state prisoners that the LASD is not authorized to release;
4 or were arraigned and granted no bail by a Los Angeles Superior Court
5 Judge. *See* Section III(A) above, and Allen Dec. ¶5.

6 Moreover, neither of the statutes cited by Plaintiffs require Defendants to
7 release them. Penal Code §4012 permits removal of prisoners in cases of infectious
8 disease only after a physician certifies that the disease is liable to endanger the
9 prisoners' health and a county judge issues an order authorizing the sheriff to remove
10 the prisoners. §4012. Even then, the statute only permits removal of the prisoners to
11 “a safe and convenient place in the county, or the jail in a continuous county, as their
12 place of confinement . . . until they can be safely returned to the jail from which they
13 were taken.” *Id.* It does not allow the release of any prisoners, even pursuant to a
14 state court order, let alone on the sheriff's own authority.

15 Gov. Code §8658 does not require Defendants to release prisoners, either. It
16 provides that the person in charge of the penal institution “may” remove inmates from
17 the institution in the event of an emergency endangering the lives of the inmates.
18 Even then, however, the statute requires the person in charge of the institution to
19 remove the inmates “to a safe and convenient place and there confine them as long as
20 may be necessary to avoid the danger.” §8658. Only when that is “not possible” may
21 the person in charge of the institution release the inmates. *Id.* Plaintiffs have made
22 no showing that the only way to protect inmates from COVID-19 is to release them
23 into the general population, and that is plainly an unsupportable conclusion. The
24 general population is also at risk for COVID-19 and there are remedial measures well
25 short of mass prisoner releases which Defendants have already implemented. Indeed,
26 the kind of mass transfers to another institution which are contemplated by §8658
27 would only increase, not reduce, the risk of infection. *Plata*, 2020 WL 1908776, at
28 *6.

1 Far from requiring the mass release of prisoners on the whim of a sheriff
 2 without a court order or other proper process, California law actually (and
 3 unsurprisingly) prohibits it. Cal. Penal Code §4004 provides that prisoners confined
 4 in a county jail must remain there “until legally discharged, and if the prisoner is
 5 permitted to go at large out of the jail, except by virtue of a legal order or process, it is
 6 an escape.”¹⁸ In fact, a sheriff who releases a prisoner “of his own motion” and
 7 without the requisite court order is actually aiding and abetting an escape. *Pedersen*
 8 *v. Superior Court*, 149 Cal. 389, 391 (1906) (decided under predecessor statute to
 9 §4004).

10 Given the LASD’s massive multi-pronged efforts to reduce the County jail
 11 inmate population by unprecedented numbers in response to COVID, and the serious
 12 public safety considerations and limitations on the LASD’s authority that have kept
 13 the remaining inmates in custody, Plaintiffs have not shown, and cannot possibly,
 14 show that the failure to release Plaintiffs constitutes deliberate indifference.

15 In short, Defendants’ tireless efforts to implement policies to curb the threat of
 16 COVID-19 in the face of the ever-changing situation proves that Defendants were not
 17 deliberately indifferent. Thus, Plaintiffs cannot show any Eighth Amendment or
 18 Fourteenth Amendment violations.

19 **4. Plaintiffs Have Not Established A Likelihood Of Prevailing On**
 20 **Their Disability Claims.**

21 Plaintiffs give short shrift to their disability claims (TRO 31:3-11), which is
 22 understandable. They are barred as a matter of law because Plaintiffs failed to
 23 exhaust their administrative remedies. *See* Section IV(A), *supra* .

24 The claims are defective for other reasons as well. For example, the California
 25 Disabled Persons Act (Complaint, ¶¶274-283) is “concerned solely with *physical*

26 _____
 27 ¹⁸An exception is made “during the pendency of a criminal proceeding,” when “the
 28 court before which said proceeding is pending may make a legal order, good cause
 appearing therefor, for the removal of the prisoner from the county jail in custody of
 the sheriff.” §4004.

1 access to public spaces.” *Wilkins-Jones v. City of Alameda*, 859 F.Supp.2d 1039,
2 1054-1055 (N.D.Ca. 2012) (emphasis in original). Thus a jail prisoner can maintain a
3 claim under this statute only for denial of physical access such as the ability to access
4 toilets or walkways, *id.*, none of which Plaintiffs allege. They allege the denial of
5 services and accommodations (Complaint, ¶278), to which the statute does not apply.
6 *Id.* And the Bane Act (Complaint, ¶¶284-290) requires Plaintiffs to show that
7 Defendants acted with “deliberate indifference” to their medical needs (*M.H. v.*
8 *County of Alameda*, 90 F.Supp.3d 889, 897-899 (N.D.Ca. 2013)), a standard Plaintiffs
9 cannot meet for the reasons already stated. *See* Section IV(C)(1)-(2), *supra*.

10 More broadly, Plaintiff cannot prevail on their disability claims because the
11 federal and state statutes they invoke require a showing that the alleged discrimination
12 was due to their disabilities. *See, e.g., Martin v. California Department of Veteran*
13 *Affairs*, 560 F.3d 1042, 1048 (9th Cir. 2009) (no ADA claim because plaintiff did not
14 show that defendant discriminated against her “by reason of” her disability); *id.* at
15 1049 (same; Rehabilitation Act is even stricter than ADA, requiring showing of
16 denial of service “solely by reason of” her disability); *M.S. v. County of Ventura*,
17 2016 WL 11506613, at *16 (C.D.Ca. Oct. 24, 2016) (no §11135 claim because no
18 showing plaintiff s were discriminated against on the basis of their disability); *id.* at
19 *16 (no Unruh Act claim because no showing that alleged discrimination was due to
20 plaintiffs’ disability).

21 Plaintiffs do not allege, and cannot show, that Defendants discriminated against
22 them because of their medical condition or other disability. There is no allegation, let
23 alone evidence, that Defendants treated Plaintiffs differently than any other group of
24 inmates — for example, giving masks to young and healthy prisoners while
25 withholding them from those who had medical conditions — let alone that any
26 disparate treatment was specifically and solely because of Plaintiffs’ medical
27 conditions. Plaintiffs have not shown, and cannot show, a likelihood of success on
28 any of their disability claims.

1 **D. Plaintiffs Have Not Met The Other Requirements For A TRO.**

2 Because Plaintiffs have not shown that they are likely to prevail on the merits,
3 it is unnecessary for the Court to consider further the other requirements for issuance
4 of a temporary restraining order. *Garcia v. Google*, 786 F.3d 733, 740 (9th Cir.
5 2015). Even if the Court did so, however, it would find that Plaintiffs have not
6 satisfied these, either.

7 **1. Plaintiffs Have Not Established That The Requested Relief Is**
8 **Necessary To Prevent The Irreparable Harm They Assert.**

9 Plaintiffs argue that COVID-19 is a serious disease and the risk of contracting
10 it is heightened by their underlying medical conditions. TRO 32. That may be true,
11 but it is not the question here. The question is whether Plaintiffs have shown that
12 they are likely to contract COVID-19 absent a mass unsupervised prisoner release and
13 the other relief they request. *Sato v. U.S. Bank*, 2014 WL 12571041, at *2 (C.D.Ca.
14 Jan. 21, 2014) (plaintiff seeking TRO must demonstrate that irreparable injury is
15 likely absent the requested relief); *Valentine v. Collier*, 2020 WL 1934431, at *5 (5th
16 Cir. April 22, 2020) (“the question is whether Plaintiffs have shown that they will
17 suffer irreparable injuries even after accounting for the protective measures” already
18 implemented in prisons; since evidence did not satisfy that standard, preliminary
19 injunction in COVID-19 case stayed on appeal).

20 Plaintiffs have not remotely approached the required showing. Far from such
21 drastic relief being necessary, the measures already taken and being taken by
22 Defendants has ensured there has not been a single inmate death in the jails and only a
23 handful of positive cases, all of which have recovered or are recovering. Clark Dec.,
24 ¶9; Chase Dec. ¶29. Indeed, it is arguable that the very relief Plaintiffs seek — such as
25 release into the general population and would actually increase the risk of infection
26 rather than reduce it.

27 **2. Plaintiffs Have Not Established That The Equities Favor**
28 **Them Or That An Injunction Is In The Public Interest.**

1 Nor can Plaintiffs show that the balance of equities favor them or that an
 2 injunction is in the public interest.¹⁹ Plaintiffs assert that without the TRO, they “face
 3 severe health risks, including death,” while Defendants only face “financial
 4 concerns.” TRO at 33:2-8. Plaintiffs vastly understate Defendants’ interests while
 5 overstating their own risks.

6 Defendants’ interests are not merely financial, though those are certainly
 7 great.²⁰ Far more important are Defendants’ interests, and thus those of the general
 8 public, in the orderly administration of the jails and in maintaining public safety. *See*
 9 *Woodford v. Ngo*, 548 U.S. 81, 94 (2006) (“It is ‘difficult to image an activity in
 10 which a State has a stronger interest, or one that is more intricately bound up with
 11 state laws, regulations, and procedures, than the administrations of its prisons.’”)
 12 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973)); *Valentine v. Collier*,
 13 No. 20-20207, 2020 WL 1934431, at *5 (5th Cir. Apr. 22, 2020) (staying district
 14 court’s injunction mandating extensive protocols at prisons due to COVID-19 because
 15 state has strong interest in enacting prison policies). *See also* §35626(a) (in issuing
 16 any prospective relief under PLRA, the court must give “substantial weight to any
 17 adverse impact on public safety or the operation of a criminal justice system caused
 18 by the relief.”)

19 Thus, the appellate court in *Valentine v. Collier*, 2020 WL 1934431, at *1 (5th
 20 Cir. Apr. 22, 2020) stayed a preliminary injunction issued by the district court which
 21 (like the proposed order Plaintiffs seek) would have micromanaged conditions in the

22 _____
 23 ¹⁹These factors merge when the government is the defendant. *Nken v. Holder*, 556
 U.S. 418, 435 (2009).

24 ²⁰Jaclyn Cosgrove, *Los Angeles County Could See \$1-Billion Decline in Sales Tax*
 25 *Revenue Due to Coronavirus*, L.A. Times, Apr. 15, 2020,
 26 <https://www.latimes.com/california/story/2020-04-15/los-angeles-county-could-see-1-billion-decline-in-sales-tax-revenue-due-to-coronavirus> (last accessed
 27 Apr. 27, 2020) (County could face \$1-billion decline in sales tax revenue by June 30,
 2020 and \$2-billion decline by end of fiscal 2021. “““These are significant losses
 28 which unfortunately will have a major effect on programs that the county administers
 on behalf of our 10 million residents,” [Los Angeles County Chief Executive Officer
 Sachi A.] Hamai said.””).

1 prisons. “Among these is a plan within three days to test all . . . inmates for COVID-
 2 19, as a well as a new plan to quarantine those who test positive, distribute physical
 3 handouts with COVID-19 information to the inmates, clean common surfaces every
 4 thirty minutes for fifteen hours each and every day, and to provide masks to all
 5 inmates and staff members.” *Id.* at *5.

6 “As we’ve said before about such intrusive orders, this one
 7 creates ‘an administrative hightmare’ for [defendant] ‘to
 8 comply with the district court’s quotas and deadlines.’
 9 [Citation.] ‘[T]he burden upon [defendant] in terms of
 10 time, expense, and administrative red tape is too great’
 11 while it must respond in other ways to the crisis.” *Id.*

12 The same is true here. Defendants have already responded to the crisis. They
 13 have implemented numerous health and safety protocols. *See* Clark Dec., ¶¶12-20;
 14 Chase Dec., ¶¶11-14 (robust screening for new arrestees); Clark Dec., ¶¶21-31, Chase
 15 Dec., ¶¶21-22, 26-29 (comprehensive isolation, quarantine, and social distancing
 16 methods for inmate population); Clark Dec., ¶¶35-45, Chase Dec., ¶¶30-31 (measures
 17 to prevent infection spread to and from jail staff); Clark Dec., ¶¶46-47, Chase Dec.,
 18 ¶¶15-20 (thorough sanitation practices for jail facilities).

19 In addition, to reduce overcrowding and permit ease of physical distancing,
 20 quarantine, and isolation, they have already released 30% of the jail population.
 21 Corbett Dec., ¶ 2. Those who remain in custody are largely violent offenders [Corbett
 22 Dec., ¶ 6. Their unsupervised release²¹ would certainly present a threat to the general
 23 public, not only because of the inmates’ criminal history but also because these
 24 inmates (who by Plaintiffs’ own account have serious health issues) will likely lack
 25 appropriate outside medical care and housing, increasing threat of infection to the

26 _____
 27 ²¹Plaintiffs assert that conditions “that would require interaction with other people,
 28 such as check-ins, should not be imposed” due to the risk of infection *to the former inmates*. TRO 42, n.29. Plaintiffs express no concern about the risk of infection to the general public.

1 general public (as well as to the inmates themselves.)²² Indeed, these inmates could
 2 well wind up in another congregate or institutional setting, such as a skilled nursing
 3 home, where the infection and death rates is vastly greater than in the jails.²³

4 (Plaintiffs' solution to the released inmates' likely lack of housing is to make
 5 Defendants find and pay for that housing. Proposed Order, ¶1(g). Not only is this
 6 wildly impractical, especially under the current conditions, it would certainly cost a
 7 great deal more the "hygiene products" and "cleaning agents" which Plaintiffs seem
 8 to think would be Defendants' sole out of pocket expense. TRO 33:3-8).

9 Plaintiffs lamely suggest that their plans to release inmates and redesign the
 10 jails would actually "benefit the jail staff" by decreasing the staff's own risk of
 11 infection. TRO 33:16-19. Plaintiffs' altruism is commendable, but Defendants have
 12 already implemented procedures to accomplish these goals, such as screening of
 13 staff's symptoms, providing hand sanitizer to staff, using tents outside facilities for
 14 evaluation of symptoms, and providing face shields and masks to personnel working
 15 directly with possible or confirmed COVID-19 inmates. Clark Dec. at ¶ 35.
 16 While ignoring or minimizing the public safety, criminal justice administration, and
 17 even financial harms to Defendants from their requested relief, Plaintiffs overstate the
 18

19 ²²See *Plata v. Newsom*, 2020 WL 1908776 at *8 n.9 (N.D.Ca. 4/17/20) (denying
 20 emergency relief, including prisoner releases, from state prisons: "Plaintiffs also do
 21 not appear to have considered questions surrounding the potential impact on public
 22 health if inmates who might have been exposed to the virus while incarcerated are
 23 released without any testing or quarantine measures in place, or whether such
 24 measures are feasible. Nor do Plaintiffs appear to have considered whether
 individuals whom they contend should be released would have at least the same
 access to health care services that they do in prison.") See also *Habibi v. Barr* at *6
 (denying TRO for prisoner release based on COVID-19; "Petitioner 's release would
 needlessly put the public at risk by allowing him to potentially expose others outside
 the facility to the virus.")

25 ²³Matt Hamilton et al *As Death Toll Mounts at Nursing Homes, California Gets*
 26 *Help From the National Guard. Adds Rules* L.A Times Apr. 24, 2020 3:10pm
 (undated 7:28pm) [https://www.law.georgetown.edu/wn-](https://www.law.georgetown.edu/wn-content/uploads/2018/07/Rule-18-Handout-1-Secara-1-ndf)
 27 [content/uploads/2018/07/Rule-18-Handout-1-Secara-1-ndf](https://www.law.georgetown.edu/wn-content/uploads/2018/07/Rule-18-Handout-1-Secara-1-ndf) (last accessed Apr 27
 2020) ("In terms of the vulnerable populations, the first priority has to be the skilled
 28 nursing facilities," said Dr. Christina Ghaly, health services director for L.A. County.
 "That's where the majority of the outbreaks have occurred.")

1 harm to themselves. TRO 33:3-4 (without requested relief, Plaintiffs face “severe
2 health risks, including death.”) While COVID-19 is unquestionably a serious public
3 health danger, it is far from an automatic death sentence. In fact, not one jail inmate
4 has died from COVID-19. Clark Dec. ¶ 9.

5 And while there is a risk of infection at the jails, that risk is not significantly
6 abated in the general public. As of the morning of April 26, 2020, there were 41
7 patients with positive tests and 27 who were previously positive but who have
8 recovered in the jails. Clark Dec. ¶ 19. Los Angeles County alone has well over
9 40,000 confirmed cases of COVID-19. In fact, a recent USC/Los Angeles
10 Department of Health antibody test concluded that up to **440,000** people in Los
11 Angeles County may have been infected with COVID-19.²⁴

12 Plaintiffs’ cited cases (TRO 33-34) are inapposite. Not one involves public
13 health or safety, jail administration, or inmate releases. The COVID-19 cases that do
14 consider these issues strike a balance very different than the one Plaintiffs urge on the
15 Court. *Plata*, 2020 WL 1908776 at *8 n.9 (N.D.Ca. 4/17/20) (denying emergency
16 relief, including prisoner releases, from state prisons); *Habibi v. Barr* at *6 (same);
17 *Money v. Pritzker*, 2020 WL 1820660, at *19 (N.D. Ill. Apr. 10, 2020) (same). As the
18 latter court observed in denying a TRO for prisoner releases on COVID-19 grounds:

19 “[E]very release order carries with it some risk to the rest
20 of the community. Has the inmate been exposed to the
21 virus while in custody? Does another vulnerable person—
22 perhaps an 80-year old mother with emphysema—live at
23 the residence where the inmate will be released? Does the
24 inmate have a history of mental instability or domestic
25 violence? Are there adequate safeguards—monitoring or

26 _____
27 ²⁴leigh Honner *Early Antibody Testing Suggests COVID-10 Infections in L.A.*
28 *County Greatly Exceed Documented Cases* USC News Apr 20 2020
<https://news.usc.edu/168987/antibody-testing-results-covid-19-infections-los-angeles-county> (last accessed Apr. 26, 2020).

1 supervision—for releasees who are both vulnerable and
 2 dangerous? How does the increased activity associated
 3 with release orders in the quantities sought by Plaintiffs
 4 comport with the mandate for social distancing?” *Id.*

5 Plaintiffs provide no answers to any of these questions, and their cited cases are
 6 inapposite.²⁵ Furthermore, questions about inmate health are far from the only ones
 7 which must be considered, as *Money* recognized:

8 “Other compelling public interest considerations come
 9 into play too. . . . Many of [the prisoners] are violent
 10 offenders. Compelling a process to potentially release
 11 thousands of inmates on an expedited basis could pose a
 12 serious threat to public safety and welfare. The risk of
 13 recidivism comes into play, as do concerns about victims’
 14 rights. The question is not simply what is best for the
 15 inmates — the public has vital interests at stake, too.” *Id.*
 16 at *20.

17 The balance should be struck in favor of those vital public interests, especially
 18 at the stage of a TRO being heard on little notice and no adequate opportunity for
 19

20 ²⁵By way of example and not limitation, Plaintiffs’ reliance on *Wilson v. Williams*,
 21 No. 4:20-cv-00794, 2020 WL 1940882 (N.D. Ohio Apr. 22, 2020) is misplaced. That
 22 case pertained to the release of federal prisoners, so it did not face the same
 23 federalism concerns as this case. *Money*, 2020 WL 1820660 at *15. Nor did
 24 the federal prisoners have to exhaust state court remedies, which Plaintiffs failed to
 25 do. Additionally, Plaintiffs cite to *Cameron v. Bouchard* for the premise that the
 26 district court required the production of a list of possible class and subclass
 27 members. TRO at 30:1-11. However, this part of the TRO was reversed on
 28 rehearing. Because Plaintiffs are not entitled to a release order, there is no purpose in
 requiring Defendants to provide a list of class and subclass members. *See*
Cameron v. Bouchard, No. 20-10949, 2020 WL 1952836, at *2 (E.D. Mich. Apr. 23,
 2020) (not requiring production of similar type of list until court determines it has the
 power to release inmates).

1 Defendants to respond.

2 **V. PLAINTIFFS ARE NOT ENTITLED TO THE REQUESTED**
3 **PRISONER RELEASES**

4 As with the question of a bond, it is unnecessary for the Court to consider
5 Plaintiffs' request for a mass prisoner release because Plaintiffs have not shown that
6 they are entitled to a TRO in the first place. However, Plaintiffs' request is so
7 extraordinary, and so utterly without merit, that Defendants are compelled to point out
8 the innumerable additional reasons why it cannot be granted.

9 First, although Plaintiffs claim that their release request is brought pursuant to
10 §2241 (TRO 35:19-21, 39:11-14), in fact their challenge to jail conditions is a claim
11 under §1983. *See* Section IV(A), *infra*. A §1983 claim is not only subject to the
12 exhaustion of administrative remedies requirement (which Plaintiffs do not meet, as
13 shown in Section IV(A), *supra*), as a "civil action with respect to prison conditions" it
14 is further limited by the PLRA's restrictions on prospective and injunctive relief. 18
15 U.S.C. §3626(a)(1)(A); *see Johnson v. Breeden*, 280 F.3d 1308, 1324 (11th Cir. 2002)
16 (§1983 action is a "civil action with respect to prison conditions" within the meaning
17 of the PLRA); *Wolf v. Beauclair*, 2015 WL 5768386, at *8 (D.Idaho Sept. 30, 2015)
18 (§3626 limits the prospective relief available in §1983 lawsuits on prison conditions).

19 Under the PLRA, prospective relief "shall extend no further than necessary" to
20 correct the (alleged) violation of federal rights and no prospective or injunctive relief
21 shall be granted unless the relief "is narrowly drawn, extends no further than
22 necessary to correct the violation of the Federal right, and is the least intrusive means
23 necessary to correct the violation." §§3626(a)(1), (2).

24 Additionally, a prisoner cannot be released, including by TRO, unless there has
25 been a previous less intrusive order to remedy the violation of federal rights, and the
26 defendant has had time to comply with that prior order. §3626(a)(3)(A). Even when
27 those conditions have been met, a prisoner release order still can be issued only by a
28 three judge panel (§3626(a)(3)(B)) and only if that panel finds by clear and

1 convincing evidence that (1) overcrowding was the “primary cause” of the violation
2 of a federal right and (2) no other relief will remedy the situation. §3626(a)(3)(E). It
3 scarcely needs to be said that not a single one of the requirements has been met.

4 Plaintiffs’ request for a mass prisoner release is not only legally defective but
5 lacks any factual support. Their request rests on the false premise that a “high risk”
6 medical condition by itself justifies release. It does not. *United States v. Boone*, 2020
7 WL 1865202, at *3 (E.D.Ca. April 14, 2020) (denying release for COVID-19 reasons
8 of prisoner who had high risk medical conditions but did not prove she was not a
9 flight risk; “Without more, the fact that Defendant is 57 years old and has high blood
10 pressure does not justify release”); *United States v. McCurin*, 2020 WL 1700030, at
11 *2 (E.D.Ca. April 8, 2020) (same; denying release to prisoner who had high risk
12 medical conditions but had serious criminal history and presented substantial danger
13 to the community; “Without more, the facts that Defendant is aging and has diabetes
14 do not justify release.”)

15 A second false premise is these prisoners would be much safer, and their health
16 better protected, outside the jails than in them. This too is untrue. The community at
17 large is hardly a COVID-free zone, especially for those with high risk medical
18 conditions. There is no showing that these prisoners have access to outside skilled
19 medical care or any other kind of supportive services necessary to safeguard either
20 their health or that of the general community.

21 These realities have caused numerous courts to deny release on COVID-19
22 grounds even if the prisoner suffers from high risk medical conditions. As the court
23 observed in *United States v. Ryan*, 2020 WL 1861662, at *3 (C.D.Ca. April 14, 2020),
24 the “mere fact” that the defendant pretrial detainee suffered from asthma, which
25 admittedly placed him “in a clinical population at greater risk of coronavirus
26 infection,” did not warrant release because “even with asthma, Defendant is no
27 different from the subset of the public who must also reckon with asthma in the face
28 of potential COVID-19 exposure — a risk as prevalent outside prison as it inside.”

1 Indeed, some courts have found that the risk to a medically vulnerable prisoner
2 may actually be greater in the general population than in prison. For example, the
3 court in *Phea v. Pfeiffer*, 2020 WL 1892427, at *2 (E.D.Ca. April 16, 2020) stated in
4 denying the release on COVID grounds of a convicted state prisoner who suffered
5 from diabetes, high blood pressure, asthma, and heart disease:

6 “[P]rison authorities may be able to isolate highly at-risk
7 prisoners, such as petitioner, more easily than isolation or
8 ‘social distancing’ is achieved in the general population,
9 e.g., housing in administrative segregation, partial
10 lockdowns or transfers. Prisons are certainly able to order
11 their afflicted employees to stay at home, and can
12 probably, more easily find testing opportunities for their
13 essential employees than is yet possible for the general
14 population. Finally, prison and state officials are more
15 likely to know who may be best subject to compassionate
16 release under state laws than is the [Court].”

17 Plaintiffs also ask the Court to release prisoners notwithstanding any bail
18 previously set by the state courts, the facts supporting those bail decisions, or the
19 safety of the public. TRO 39:15-42:4, Proposed Order ¶1(b). Plaintiffs are not
20 entitled to a mass prisoner release, especially without bail. Plaintiffs assert that the
21 setting of any bail is evidence that “the individual could be released on bond without
22 presenting an undue public safety risk.” Proposed Order ¶1(b).

23 That has not been the law in California for decades. “Before legislative
24 amendments to the Penal Code in 1987, the only permissible purpose of bail was to
25 ensure the defendant’s presence in court.” *Gray v. Superior Court*, 125 Cal.App.4th
26 629, 642 (2005). “Now, ‘public safety . . . is the primary factor for the court to
27 consider in the setting of bail.’” *Id.*; see Cal. Penal Code §1275(a)(1) (“The public
28 safety shall be the primary consideration” in “setting, reducing, or denying bail.”)

1 Thus a very high bail, such as the \$1.4 million bail set for plaintiff Avila, indicates
2 that the state court believed he/she was a very great public safety risk.

3 Indeed, during this health crisis, the California Judicial Council has reinforced
4 the principle that setting or retaining bail does indicate a public safety risk. Under
5 Emergency Rule 4, adopted April 6, 2020, all prisoners detained on bail have had
6 their bail reduced to zero — except that bail is retained for those whose release is
7 deemed to present an undue risk to public safety because of the seriousness of the
8 crimes with which they are charged.²⁶ Plaintiffs completely ignore this statutory
9 structure. They seek the release of all pretrial detainees who are allegedly medically
10 vulnerable, without limiting either the class or subclass to non-violent offenders.
11 Complaint, ¶¶158-161.

12 All pretrial detainees who qualify under Emergency Rule 4 have already had
13 their bail reduced to zero. The pretrial detainees who remain in custody with bail are
14 those whom California has already deemed to present the very kind of threat to public
15 safety which Plaintiffs airily assert, without authority or proof, does not exist. The
16 Court should not ignore, much less override, California's determination.

17 **VI. CONCLUSION**

18 For the reasons set forth above, Plaintiffs cannot show that they meet any of the
19 requirements for issuance of a temporary restraining order. The *ex parte* application
20 should be denied in its entirety.

21 Alternatively, in the event that the Court is inclined to grant any of the
22 requested relief, Defendants respectfully request that before the Court rules, the Court
23 grant Defendants' application for an extension of time to respond more fully for the
24 reasons set forth therein.

25
26
27 ²⁶Examples include unlawful possession of a firearm, threatening death or great
28 bodily injury, violation of protective orders, domestic abuse, stalking, and enumerated
sex offenses, and DUIs. *See* Emergency Rule 4(c)(1)-(13).

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DATED: April 27, 2020

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