UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ANTHONY BAEZ, JONATHAN BERMUDEZ, JERMAINE GONSALVES, and DEDRICK LINDSEY on behalf of themselves and all others similarly situated; Plaintiffs-Petitioners, v. ANTONE MONIZ, SUPERINTENDENT OF THE PLYMOUTH COUNTY CORRECTIONAL FACILITY, in his official capacity; Defendant-Respondent.	Case No. 1:20-cv-10753

PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S SECOND MOTION TO DENY PETITIONERS' HABEAS PETITION

Respondent seeks a second bite at the jurisdictional apple in his second motion to deny Petitioners' habeas corpus petition. In his second memorandum, Respondent largely rehashes arguments from his first memorandum that Petitioners cannot bring their challenge to the unsafe and unsanitary conditions at Plymouth County Correctional Facility ("Plymouth") in a habeas corpus petition. *Compare* Resp. Mem. in Supp. of First Mot. to Deny 18, ECF No. 22, *with* Resp. Mem. in Supp. of Second Mot. to Deny ("Resp. Mem. II") 3-5, ECF No. 40. Respondent is still wrong on the law governing conditions of confinement claims.

First, contrary to Respondent's claims, First Circuit courts have repeatedly recognized that detainees may challenge their conditions of confinement in a habeas corpus petition. Second, Respondent wrongly suggests both that petitioners challenging the fact or duration of

confinement must seek release as the exclusive remedy for their constitutional deprivations and that Petitioners have not requested release. He is incorrect on both counts. Respondent's purported exclusivity requirement does not exist and Petitioners allege in their Petition that adherence to the Centers for Disease Control and Prevention's social distancing guidelines is both a necessary remedy and impossible without some of Plymouth's federal detainees receiving release. Pet. ¶¶ 4, 131, ECF No. 1; Pet., Ex. C ¶¶ 6, 22, ECF No. 1-3; Ex. D ¶¶ 19, 21, ECF No. 1-4; Pet., Ex. E ¶ 27, ECF No. 1-5. Third, this Court has authority under the All Writs Act and its inherent equitable jurisdiction to issue relief short of release.

I. CONDITIONS CLAIMS ARE COGNIZABLE IN HABEAS CORPUS PETITIONS

As Petitioners noted in their first opposition brief, "[t]he First Circuit has repeatedly ratified the use of habeas corpus petitions to address constitutional deficiencies in the conditions of detainees' confinement." Pets.' Opp'n 5-8, ECF No. 38 (citing *United States v. DeLeon*, 444 F.3d 41, 59 (1st Cir. 2006); *Miller v. United States*, 564 F.2d 103, 105 (1st Cir. 1977); *Francis v. Maloney*, 798 F.3d 33, 36 (1st Cir. 2015)). Respondent makes no attempt to square his sweeping jurisdictional claims with this First Circuit case law or the Justice Department's own guidance. *Id.* (citing Dep't of Justice, Justice Manual, Federal Habeas Corpus 9-37.000, available at https://www.justice.gov/jm/jm-9-37000-federal-habeas-corpus (last visited Apr. 28, 2020)). Any attempt to do so would prove difficult.

Petitioners have established habeas corpus jurisdiction. First, both the Supreme Court and the First Circuit have acknowledged that detainees may challenge their conditions of confinement in a habeas corpus petition without challenging the fact or duration of confinement. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1863 (2017) (citing *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979); *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973)); *Brennan v. Cunningham*, 813 F.2d 1, 4-

5 (1st Cir. 1987). Second, Petitioners' challenge to the conditions of confinement at Plymouth attacks "the fact or length of confinement" because they request release. *See Brennan*, 813 F.2d at 4-5.

A. Petitioners' Conditions of Confinement Claims Sound in Habeas.

Respondent characterizes *Preiser* as creating a dichotomy between claims challenging "conditions of confinement" and those challenging the "fact or duration" of confinement. Resp. Mem. II at 3. That dichotomy is false. The *Preiser* Court "explicitly left open the possibility that a challenge to prison conditions, cognizable under § 1983, might also be brought as a habeas corpus claim." *Brennan*, 813 F.2d at 4-5 (quoting *Preiser*, 411 U.S. at 499-500).[1] As recently as 2017, the Supreme Court suggested that habeas corpus might be the best vehicle to attack an alleged government policy of holding pretrial detainees in punitive conditions. *See Ziglar*, 137 S. Ct. at 1863.

Furthermore, the First Circuit since *Brennan* has observed that detainees may challenge the conditions of their confinement without reference to the "fact or duration." *See DeLeon*, 444 F.3d at 59 ("If the conditions of incarceration raise Eighth Amendment concerns, habeas corpus is available."); *Miller*, 564 F.2d at 105 (pre-*Brennan* case, observing that "[s]ection 2241 provides a remedy for a federal prisoner who contests the conditions of his confinement"). Respondent is therefore wrong to suggest that "courts in this district have long observed" the purported dichotomy in *Preiser*. Resp. Mem. II at 2-3.

Moreover, the cases upon which Respondent's jurisdictional claim rests are inapposite. They are not cases in which the petitioners alleged that their facilities were unsuitable; instead,

[1] Respondent's citation to *Phea v. Pfeiffer*, No. 220CV00283WBSGGHP, 2020 WL 1892427, at *1 (E.D. Cal. Apr. 16, 2020), is misplaced. Resp. Mem. II at 3. That court interpreted *Preiser* to limit the scope of habeas corpus challenges, but, as limned above, the Supreme Court and First Circuit have noted that *Preiser* imposed no such limitations. *See Ziglar*, 137 S. Ct. at 1863; *Bell*, 441 U.S. at 526 n.6; *Brennan*, 813 F.2d at 4-5.

the petitioners claimed that their facilities' staff violated their rights by taking or failing to take certain actions towards them as individuals. *See Crooker v. Grondolsky*, No. 12-12106, 2013 WL 101588, at *4 (D. Mass. Jan. 4, 2013) (alleging that staff deprived petitioner of cataract surgery); *Kamara v. Farquharson*, 2 F. Supp. 2d 81, 88–89 (D. Mass. 1998) (asserting that staff failed to treat petitioner's hepatitis); *Jenkins v. Spaulding*, No. 19-10078, 2019 WL 1228093, at *1 (D. Mass. Feb. 22, 2019) (Kelley, M.J.) (claiming that staff racially abused petitioner), *appeal dismissed*, No. 19-1307, 2019 WL 4757883 (1st Cir. July 26, 2019). In contrast, Petitioners argue that Plymouth risks a deadly outbreak of COVID-19 so long as social distancing is not possible there. Respondent thus creates an unsafe environment for the whole proposed class of federal detainees in the facility.

In addition, First Circuit courts, including the very cases on which Respondent relies, do not draw a clear bright line separating those cases challenging conditions of confinement from those that are cognizable on habeas. *See* Resp. Mem. II at 2-3. Instead, those courts employ highly qualified language in their analysis: Judge O'Toole noted that "conditions of confinement claims . . . are ***generally*** not cognizable under § 2241." *Crooker*, 2013 WL 101588, at *2 (emphasis added). Similarly, Judge Saris observed that "a claim of inadequate medical treatment while in legal custody is ***ordinarily*** brought as a civil rights suit." *Kamara*, 2 F. Supp. 2d at 89 (emphasis added).[2] While some courts point to civil actions as the "general" or "ordinary" vehicle for routine cases challenging conditions of confinement, they do not hold that that is the exclusive vehicle for such claims. In "both state and federal prisoner cases, there are many

[2] *Kamara* also involved complex jurisdictional questions of immigration law, none of which are relevant here. *See* 2 F. Supp. 2d at 86 (commenting on "jurisdictional thicket" of interplay between immigration law and habeas corpus).

indications that habeas will in fact lie for certain conditions of confinement claims." *Kane v. Winn*, 319 F. Supp. 2d 162, 214 (D. Mass. 2004).

Indeed, Respondent's contention that federal courts may not hear habeas claims concerning prison conditions that render confinement unlawful would not only run counter to Supreme Court and First Circuit precedent, it would also raise serious constitutional concerns about the Suspension Clause. *See* U.S. Const., Art. I, § 9, cl. 2; *Boumediene v. Bush,* 553 U.S. 723, 746 (2008) (opting "not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ"); *INS v. St. Cyr,* 533 U.S. 289, 305 & 301 n.13 (2001) (recognizing "the desirability of avoiding" having to "resolv[e] . . . a serious and difficult constitutional issue" about whether AEDPA and IIRIRA violate the Suspension Clause); *cf. Devitri v. Cronen,* 290 F. Supp. 3d 86, 93 (D. Mass. 2017) (finding jurisdiction under § 2241 and § 1331 in immigration proceedings, because otherwise, "the jurisdictional bar in 8 U.S.C. § 1252(g) . . . would violate the Suspension Clause as applied").

Finally, even courts that deem civil actions under § 1983 or *Bivens* to be the more appropriate vehicle for routine challenges to an inmate's conditions of confinement have recognized that a petitioner may use a habeas corpus petition to challenge his conditions of confinement in "extreme circumstances." *Crooker*, 2013 WL 101588, at *2-3; *see also Crooker v. Grondolsky*, No. CIV.A. 12-12024-RGS, 2012 WL 5416422, at *1 n.2 (D. Mass. Nov. 1, 2012), *aff'd*, No. 12-2393 (1st Cir. July 26, 2013); *Kane*, 319 F. Supp. 2d at 214-15. The worldwide COVID-19 pandemic, which has brought our economy and social interactions to a grinding halt, surely constitutes an extreme circumstance, particularly where Petitioners allege that their conditions of confinement subject them to a serious risk of contracting this deadly

disease. Accordingly, Petitioners state a cognizable habeas corpus claim even without reference to whether they challenge the fact or duration of their confinement.

B. Petitioners Challenge the Fact or Duration of Their Confinement

In any event, Petitioners do attack the fact or duration of their confinement because release is necessary to accomplish adequate social distancing at Plymouth. "[W]here transfer or release are at issue, a habeas petition is warranted." *Fox v. Lappin*, 441 F. Supp. 2d 203, 206 (D. Mass. 2005). Where, as here, petitioners seek "a quantum change in the level of custody," to a "less restrictive" form of custody, such as outright release, enlargement (*i.e.*, bail), or transfer to home confinement, they may properly request that relief in a habeas corpus petition. *See Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 873 (1st Cir. 2010) (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005); *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991)). Habeas corpus petitions are especially suited to challenge detention facility failures to respond to COVID-19 "because COVID-19 can end people's lives unexpectedly and abruptly, [so] COVID-19 claims turn the condition of being incarcerated into a practice that affects the fact or duration of confinement." Decl. of Professor Judith Resnik Regarding Provisional Remedies for Detained Individuals ¶ 26, *Money v. Jeffreys*, No. 20 cv 2094 (N.D. Ill. Apr. 8, 2020), ECF No. 24-3.

Respondent acknowledges that Judge Young disagrees with Respondent's view of the law, but asserts that "none of [Judge Young's] examples is remotely similar to this case." Resp. Mem. II at 3 n.3. Not so. In *Kane*, Judge Young wrote that "challenges to the constitutional adequacy of medical care" are cognizable in habeas "where transfer or release might be a necessary remedy." 319 F. Supp. 2d at 214-15. Judge Young is not alone in this view. Judge Woodlock permitted a detainee to use a habeas corpus petition to ask for a transfer from a detention center that the detainee alleged could not protect his health. *See Garcia v. Spaulding*,

324 F. Supp. 3d 228, 233 (D. Mass. 2018). In the same vein, the New Hampshire federal district court has ruled that a detainee had to bring such a claim in a habeas corpus petition and could not do so in a civil rights action. *See Heath v. Hanks*, No. 18-CV-624-JD, 2019 WL 6954202, at *3 (D.N.H. Dec. 19, 2019).[3]

II. PETITIONERS ADEQUATELY ALLEGE RELEASE MAY BE NECESSARY

Respondent's sole new argument is a request for this Court to fashion a new jurisdictional requirement: that habeas corpus petitions challenging conditions of confinement must seek release as the exclusive remedy for their constitutional deprivations. Resp. Mem. II at 3-4. The Court should reject Respondent's request. At most, Petitioners need only allege that release "***might*** be a necessary remedy," not that it is the ***only*** remedy. *Kane*, 319 F. Supp. 2d at 214-15 (emphasis added). Moreover, even though Petitioners did not have to allege that release is necessary to redress Respondent's constitutional violations, they have colorably done so here. *See* Pet. ¶¶ 4, 131.

A. Petitioners Need Not Seek Release as the Sole Remedy for Their Injuries

Respondent attempts to transform the question of the correct remedy into a question of jurisdiction. Yet those are two separate analyses. At this stage, Petitioners need only plead a colorable entitlement to relief for the Court to have subject matter jurisdiction. *See Lawless v.*

[3] Respondent contends that *Livas v. Myers* supports his position. No. 2:20-CV-00422, 2020 WL 1939583, at *8 (W.D. La. Apr. 22, 2020). It does not. First, it explicitly recognizes that habeas corpus "has routinely been acknowledged as the appropriate vehicle for [pretrial] detainees to challenge their custody." *Id.* at n.12. Second, the court acknowledged that Supreme Court and Fifth Circuit precedent did not control its decision making. *Id.* at *8.

In contrast, Respondent's citation to Eleventh Circuit district court decisions, Resp. Mem. II at 3, are misplaced because that circuit's precedent "does not permit release from prison as a remedy for an unconstitutional condition of confinement." *Gayle v. Meade*, No. 20-21553, 2020 WL 1949737, at *25 (S.D. Fla. Apr. 22, 2020); *see also Benavides v. Gartland*, No. 5:20-CV-46, 2020 WL 1914916, at *5 (S.D. Ga. Apr. 18, 2020) (quoting *Gomez v. United States*, 899 F.2d 1124, 1126 (11th Cir. 1990) ("If these claims are considered in a habeas corpus context, however, this Court has held that even if a prisoner proves an allegation of mistreatment in prison that amounts to cruel and unusual punishment, he is not entitled to release.")). No such precedent binds this Court.

Steward Health Care Sys., LLC, 894 F.3d 9, 18 (1st Cir. 2018) ("[A] court has jurisdiction to decide a case so long as the plaintiff has alleged a colorable federal claim.") (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)); *see also Belbacha v. Bush*, 520 F.3d 452, 456 (D.C. Cir. 2008) (holding that petition colorably pleaded habeas corpus jurisdiction such that district court could grant interim relief under the All Writs Act); *Harris v. Warden*, 425 F.3d 386, 388 (7th Cir. 2005) (concluding that "substantive shortcomings" in habeas corpus petition did not defeat district court's jurisdiction to rule on merits). A colorable claim is merely a claim that is not "so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court], or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89-90 (1998) (quoting *Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 414 U.S. 661, 666 (1974)). Indeed, the *Kane* court observed that habeas corpus serves as the correct vehicle for a conditions of confinement claim where the petition indicates that release "might be a necessary remedy." *Kane*, 319 F. Supp. 2d at 214-15.

B. Petitioners Did Plead that Release Is Necessary to Remedy the Unsafe and Unsanitary Conditions at Plymouth

Petitioners colorably plead that Plymouth needs to release proposed class members to prevent or mitigate an uncontrolled outbreak of COVID-19 at the facility. When a respondent challenges whether the pleadings establish subject matter jurisdiction, courts "construe the complaint liberally, treating all well-pleaded facts as true and indulging all reasonable inferences" in the petitioner's favor. *Aversa v. United States*, 99 F.3d 1200, 1209–10 (1st Cir. 1996). The Petition alleges that "release is the only means of protecting Petitioners and the class they seek to represent from unconstitutional treatment." Pet. ¶ 131. The Petition supports this allegation with affidavits from experts who reviewed (1) affidavits from Plymouth detainees, including Petitioners; (2) Plymouth's leadership's court filings, and (3) public evidence about the

conditions at Plymouth: Dr. Giftos averred that it is "crucial" and Dr. Rich stated that it is "imperative" that Plymouth reduce its detainee population in their affidavits under the penalty of perjury. Ex. C ¶ 22; Ex. E ¶ 27. Drs. LaRocque and Rich opined that Plymouth would not have adequate social distancing unless it eliminated shared cells. Ex. C ¶¶ 6, 22; Ex. D ¶¶ 19, 21. As a consequence, notwithstanding Respondent's protests, Petitioners did in fact argue "that no set of changes could ameliorate the alleged constitutional deprivation." Resp. Mem. II at 3.

These affidavits, at a minimum, create a genuine federal issue for the Court to decide.[4] Petitioners submit that the proper time to decide whether they are entitled to release is at the remedies stage (*i.e.*, after the Court has ruled on jurisdiction and the merits of their claims for provisional and/or permanent relief). *See Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 163 (1st Cir. 2007) (reasoning that courts should not grant motions to dismiss based on subject matter jurisdiction when the same facts are dispositive of both jurisdiction and the merits and are disputed). At the very least, this Court should order jurisdictional discovery because Respondent's arguments turn on the facts regarding Petitioners' claims. *See Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001) (holding that "the court enjoys broad authority to order discovery, consider extrinsic evidence, and hold evidentiary hearings in order to determine its own jurisdiction").

[4] Respondent incorrectly suggests that the court's analysis in *Sacal-Micha v. Longoria*, No. 1:20-CV-37, 2020 WL 1518861, at *4 (S.D. Tex. Mar. 27, 2020) aligns with his. Resp. Mem. II at 3. Not so. There, the court ruled that the petitioner did not sufficiently plead that his detention conditions required release because he relied on "conclusory arguments based on general articles." *Sacal-Micha*, 2020 WL 1518861, at *5. Unlike the petitioner in *Sacal-Micha*, Petitioners submitted detailed expert affidavits that opined on the specific conditions in their facility. Accordingly, Petitioners' claims sound in habeas.

III. THIS COURT HAS THE POWER TO PRESERVE THE STATUS QUO AND FASHION A JUST REMEDY IN EQUITY

With jurisdiction under 28 U.S.C. § 2241, the Court has authority under the All Writs Act and its inherent equitable powers to issue the remedies that Petitioners requested in addition to release. *See* 28 U.S.C. § 1651; *Hecht Co v. Bowles*, 321 U.S. 321, 329 (1944); Fed. R. Civ. P. 65. Furthermore, this Court has "the power to preserve existing conditions while . . . determining its own authority to grant injunctive relief." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 293 (1947); *see also Belbacha*, 520 F.3d at 456 (locating the basis for this authority in the All Writs Act). The All Writs Act authorizes this Court to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Federal Rule of Civil Procedure 65 and this Court's inherent equitable jurisdiction also provide this Court with the power to order interim measures to prevent irreparable harm. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."). Here, the Court should act to protect the status quo – Petitioners' relative health and safety – by entering the relief Petitioners requested in their application for a temporary restraining order and/or a preliminary injunction.

This Court's equitable jurisdiction provides it with discretion to "to do equity and to mould each decree to the necessities of the particular case." *Hecht*, 321 U.S. at 329. As a consequence, this Court could determine, at the remedial stage, that the appropriate remedy includes both (1) releasing some class members and (2) ordering specific improvements in the prison's formulation and implementation of its social distancing, cleaning and disinfecting, hygiene, and personal protective equipment policies. Respondent's attempt to limit this Court's ability to fashion the most just relief – without citing a clear statutory basis for such a limit –

should thus be denied. *See United States v. Mass. Water Res. Auth.*, 256 F.3d 36, 48 (1st Cir. 2001) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

CONCLUSION

Petitioners colorably alleges that relief may be necessary to remedy the unsafe and unsanitary conditions at Plymouth. Having done so, this Court can and should act pursuant to the All Writs Act and its inherent equitable powers to preserve Petitioners' health and remedy Respondent's constitutional violations. This Court thus should deny Respondent's motion to deny Petitioners' habeas corpus petition for lack of subject matter jurisdiction.

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CERTIFICATE OF SERVICE

I, Emily R. Schulman, counsel for Petitioners, hereby certify that this document has been filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/ Emily Schulman
Emily R. Schulman