UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CESAR FERNANDEZ-RODRIGUEZ, ROBER GALVEZ-CHIMBO, SHARON HATCHER, JONATHAN MEDINA, and JAMES WOODSON, individually and on behalf of all others similarly situated, Petitioners, v. MARTI LICON-VITALE, in her official capacity as Warden of the Metropolitan Correctional Center, Respondent.	No. 20 Civ. 3315 (ER)

REPLY MEMORANDUM OF LAW
IN SUPPORT OF RESPONDENT'S PARTIAL MOTION TO DISMISS

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PRELIMINARY STATEMENT

Respondent Marti Licon-Vitale ("Respondent"), in her official capacity as Warden of the Metropolitan Correctional Center ("MCC"), by her attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, respectfully submits this reply memorandum of law in further support of her partial motion to dismiss ("Mot.") (ECF No. 46) the Class Action Petition Seeking Writs of Habeas Corpus (the "Petition" or "Pet.") (ECF No. 1), and in response to petitioners' opposition thereto ("Opp.") (ECF No. 57). For the reasons stated herein and in Respondent's motion, this Court should dismiss the claims requesting the release of inmates from the MCC.

First, Section 3626 of the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626, precludes such claims. That section forbids this Court from issuing a "prisoner release order" unless, per 18 U.S.C. § 3626(g)(2), the sole available remedy for the claimed constitutional violation is release from incarceration—which it is not here, by petitioners' own admission. Indeed, petitioners seek several types of relief from this Court in addition to their release.

Second, petitioners' claims that seek the transfer of inmates to other BOP facilities or to out-of-prison placements, such as home confinement, are also precluded by 18 U.S.C. § 3621. As petitioners concede, Section 3621 prohibits judicial review of BOP's decisions regarding where inmates serve their sentences. While petitioners argue that this section does not apply because the Court may entertain their constitutional claims, they confuse the Court's jurisdiction to hear their claims with its authority to grant the particular type of relief they are seeking.

Finally, principles of comity call for dismissal of petitioners' release claims. Petitioners fail to offer a good reason why this Court should consider issuing orders that are inconsistent with those of the other district court judges that denied the motions for release filed by Petitioners Hatcher and Woodson or denied bail to Petitioner Fernandez-Rodriguez.

Accordingly, petitioners' release claims must be dismissed.

ARGUMENT

I. Section 3626 of the PLRA Precludes Petitioners' Release Claims

Section 3626 precludes this Court from ordering prisoner release. Contrary to petitioners' assertions, challenges only to conditions of confinement are not exempt from Section 3626, and the Petition seeks a prisoner release order. Section 3626 therefore precludes this Court from granting Petitioners' release claims.

A. Section 3626 Applies to Petitioners' Release Claims

Section 3626 states in relevant part that "[i]n any civil action with respect to prison conditions, no court shall enter a prisoner release order unless—(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders." 18 U.S.C. § 3626(a)(3)(A). The statute exempts from its scope "habeas corpus proceedings challenging the fact or duration of confinement in prison." *Id.* § 3626(g)(2). However, district courts have consistently held that this statutory exception applies only when a petition challenges the conditions of confinement and claims that release from incarceration is the sole viable remedy. Here, because petitioners seek a variety of forms of relief in addition to release, *see* Pet., Prayer for Relief ¶¶ iii.a-c. (seeking relief relating to prison conditions, the provision of medical care, and more), and do not assert that these alternative remedies cannot resolve their claims, the exception is inapplicable.

Courts have thus allowed habeas petitions challenging conditions of confinement to proceed when petitioners have alleged that "nothing short of an order ending their confinement[] will alleviate th[e] [constitutional] violation." *Martinez-Brooks v. Easter*, No. 3:20-cv-00569 (MPS), 2020 WL 2405350, at *16 (D. Conn. May 12, 2020); *see also Wilson v. Williams*, No.

20-3447, slip op. at 3 (6th Cir. filed May 4, 2020) (ECF No. 23-2) (unpublished) ("Where a petitioner claims no set of conditions would be constitutionally sufficient, we construe the petitioner's claim as challenging the fact of confinement."); *Baez v. Moniz*, Civ. No. 20-10753-LTS, 2020 WL 2527865, at *2 (D. Mass. May 18, 2020) (petitioner claimed that "[i]n these circumstances, *release is the only means of protecting Petitioner*" (emphasis in original)). The district court decisions on which petitioners rely all concluded that challenges to prison conditions could proceed under Section 3626(g)(2) because the petitioners had "challeng[ed] the fact—or 'existence'—of their confinement," by claiming that "the Eighth Amendment violation inheres in their incarceration . . . and cannot be remedied unless they are removed from that setting." *Martinez-Brooks*, 2020 WL 2405350, at *16.

Here, by contrast, petitioners are challenging prison conditions that they concede are capable of remedy without court-ordered release from incarceration. Opp. at 6 ("Petitioners challenge the conditions of their confinement as well as the 'fact' of their confinement."). They cite no authority that permits them to proceed with a release claim in that circumstance. Instead, they mistakenly attempt to characterize the petitions in the cases they cite as not having alleged constitutional violations that could not be resolved absent release. *See* Opp. at 6-7. The petition in this case instead resembles the one in *Alvarez v. Larose*, 20-CV-782 (DMS) (AHG), 2020 WL 2315807 (S.D. Cal. May 9, 2020). In that case, the district court held that Section 3626 precluded a habeas action where, as here, the petitioners "fail[ed] to argue there are no set of conditions of confinement that would be constitutionally sufficient." *Id.* at *3.

This Court should also reject petitioners' invitation to rely on unsubstantiated dicta in *Martinez-Brooks* to exempt habeas proceedings, like this one, that challenge both conditions of confinement and the fact or duration of confinement. Opp. at 5 (citing *Martinez-Brooks*, 2020 WL

2405350, at *17). The cited statement misconstrues Second Circuit precedent relating to challenges to criminal convictions and sentences. *See id.* at *17 n.17 (citing *Jones v. Smith*, 720 F.3d 142, 145 n.3 (2d Cir. 2013)). In a footnote describing its earlier decision in *Reyes v. Keane*, 90 F.3d 676, 678 (2d Cir. 1996), *overruled on other grounds by Lindh* v. *Murphy*, 521 U.S. 320 (1997), the Second Circuit stated that the court in *Reyes* decided that habeas petitions "that challenge criminal convictions and sentences, and not petitions, sometimes brought under 28 U.S.C. § 2241, that complain of conditions of confinement," are "not civil actions covered by the PLRA." *Jones*, 720 F.3d at 145 n.3. Contrary to petitioners' suggestion, this statement—that challenges to criminal convictions and sentences are not covered by the PLRA—does not support their construction of Section 3626(g)(2), and thus their release claims are governed by Section 3626.

B. The Petition Seeks a Prisoner Release Order

Section 3626 makes clear that a "prisoner release order" —like the one sought by petitioners here—may be issued only upon the occurrence of certain preconditions, which have not been met in this case. 18 U.S.C. § 3626(a)(3)(A). The PLRA defines a prisoner release order as "any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison." *Id.* § 3626 (g)(4). Section 3626(a)(3)(A) commands that such an order may be issued only if : "(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders." *Id.* In addition, a prisoner release order may only be issued by a three-judge court, and only if certain requirements are met. *Id.* § 3626(a)(3)(B), (E).

Here, petitioners have not shown (and cannot show) that a previous order was entered for less intrusive relief that has failed to remedy the deprivation of the federal right and that Respondent has had a reasonable amount of time to comply with the prior court order. 18 U.S.C. § 3626(a)(3)(A). Accordingly, their claims are barred by the plain language of the statute. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (The "proper starting point" of statutory interpretation is "a careful examination of the ordinary meaning and structure of the law itself . . . . Where, as here, that examination yields a clear answer, judges must stop.").

While petitioners cite snippets of legislative history in favor of the construction that this provision limits only claims against state prison administrators for conditions caused by overcapacity alone, *see* Opp. at 8-10, this interpretation is hard to square with the unambiguous language Congress ultimately enacted. *See Food Mktg. Inst.*, 139 S. Ct. at 2364 (courts should "never allow," "consult[ing] legislative history . . . to be used to 'muddy' the meaning of 'clear statutory language'"); *see also Conboy v. AT&T Corp.*, 241 F.3d 242, 255 (2d Cir. 2001) ("Congress restricts a court's equitable power when a statute limits that power in so many words, or by a necessary and inescapable inference." (internal quotation marks omitted)).

Nor does petitioners' proposed construction make sense. As an initial matter, claims by federal prisoners are plainly subject to the PLRA (of which Section 3626 is a part), as the Second Circuit and district courts have long applied the PLRA's administrative exhaustion requirements to federal inmates asserting *Bivens* claims. *See Burgos v. Craig*, 307 F. App'x 469, 470 (2d Cir. 2000) (holding that the PLRA's exhaustion requirement extends to federal prisoners asserting *Bivens* actions); *Robinson v. Knibbs*, No. 16-cv-03826 (NSR), 2019 WL 2578240, at *4 (S.D.N.Y. June 24, 2019) ("Under the PLRA, an inmate is required to exhaust his available remedies before filing a *Bivens* suit in federal court."); *Lowman v. Baird*, 16-CV-6518 (VSB),

2017 WL 6403519, at *5 (S.D.N.Y. Dec. 14, 2017) ("Under the PLRA, a prisoner pursuing a federal lawsuit, including a *Bivens* action, is required to exhaust the available administrative remedies before a court may hear his case."). Given that the PLRA plainly limits the manner in which federal inmates may assert constitutional claims—and that petitioners cite no decisions holding that Section 3626 or any other PLRA provision are limited to state inmates—there is no reason not to apply Section 3626 to petitioners' claims.

Moreover, neither *Reaves v. Department of Correction*, 404 F. Supp. 3d 520 (D. Mass. 2019), nor *Plata v. Brown*, 427 F. Supp. 3d 1211 (N.D. Cal. 2013), support petitioners' proposed understanding of "prisoner release order." Neither of those cases addressed allegations where the constitutional violations, like those at issue in this case, stemmed from crowding, and the facts of both cases are clearly distinguishable. *Reaves* involved the transfer of a single prisoner. 404 F. Supp. 3d at 523-525. Following a bench trial in which the Court held that prison officials had failed to provide constitutionally adequate medical care for the quadriplegic plaintiff, the court in *Reaves* ordered defendants to transfer the plaintiff to another facility that could meet his needs. Defendants filed a motion to stay, arguing that the transfer order constituted a prisoner release order, and the court denied the motion. *See Reaves*, 404 F. Supp. 3d at 525. *Plata* involved a California prison seeking to reject the policy recommendation of a court-appointed receiver. 427 F. Supp. 3d at 1213-1214. The receiver had recommended that defendants transfer inmates at-risk for developing cocci disease, a non-contagious respiratory disease caused by exposure to fungal spores, out of a facility with undisputed severe cocci infection rates. *Id.* at 1214. Defendants argued that an order adopting the receiver's policy recommendation should be considered a prisoner release order, *id.* at 1222, and the Court rejected the argument. *Id.* 1223-1224.

Because petitioners' release claims seek a "prisoner release order," without awaiting any of the preconditions required for issuing such relief, Section 3626 requires the dismissal of these claims.

II. Section 3621 Precludes Petitioners' Claims Seeking Inmate Transfers

In addition, Section 3621 prohibits this Court from directing MCC to transfer inmates or release them to community placements, such as home confinement. As petitioners concede, "the Bureau of Prisons is tasked with designating 'the place of the prisoner's imprisonment,' which 'is not reviewable by any court.'" Opp. at 11 (quoting 18 U.S.C. § 3621(b)). BOP's authority over placement decisions extends to its "discretion over whether to release an inmate to home confinement pursuant to 18 U.S.C. § 3624(c) and the CARES Act." *Id.* (citing *McFaden v. United States*, No. 00-cr-671 (AKH), 2020 WL 1322833, at *1 (S.D.N.Y. Mar. 20, 2020)); *see also Livas v. Myers*, No. 2:20-V-00422, 2020 WL 1939583 (W.D. La. Apr. 22, 2020) (noting in a challenge to COVID-19 conditions at a federal prison that "[b]oth placement in a Residential Reentry Center ('RRC') (more commonly known as a halfway house) and on home confinement are within the BOP's discretion"). Given BOP's undisputed authority over facility designation, including the decision whether to place an inmate in the community, the Court should dismiss petitioners' release claims which seek "release of inmates to home confinement where reasonable," Opp. at 14, or the "prompt transfer from the MCC to another BOP facility," Pet., Prayer for Relief, ¶ (iii)(e).

Petitioners erroneously argue that Section 3621 does not preclude their claims because they fall within the Court's authority to review constitutional violations, *see* Opp. at 12-13—thus failing to distinguish between the Court's ability to hear their claims and the statutory restrictions on the relief the Court may order if the claims succeed. Respondent has not argued that Section 3621 interferes with the Court's jurisdiction to entertain Petitioner's constitutional challenge to

conditions at the MCC. Rather, Respondent has demonstrated that Section 3621 precludes the Court from ordering the transfer of MCC inmates to other BOP facilities or community-based placements even if it finds that petitioners' constitutional claims have merit. Put simply, because Section 3621 expressly prevents the Court from reviewing BOP's decision whether to transfer inmates or place them in community settings, the Court cannot consider claims that ask it to effectively overturn those decisions.

The cases on which petitioners rely are not to the contrary as they are all inapposite or taken out of context, and do not override the plain meaning of Section 3621. *See* Opp. at 12. For example, *Fermin-Rodriuez v. Westchester County Jail Med. Pers.*, 191 F. Supp. 2d 358, 362 n.3 (S.D.N.Y. 2002), in dicta that Section 3621 may not preclude judicial review of inmate transfers made in violation of constitutional rights, such as transfers "in retaliation for exercising constitutionally protected rights," or transfers in violation of state statutes or regulations that create protected liberty interests. Another out-of-district case held that BOP's classification of an inmate as a "terrorist inmate" was not a placement decision protected from judicial review by Section 3621. *Royer v. BOP*, 933 F. Supp. 2d 170, 181 (D.D.C. 2013). Yet another concluded that Section 3621 did not preclude judicial review of an inmate's claims that prison officials failed to protect him from attacks by other inmates, though it then found that he was not entitled to injunctive relief. *Moles v. Lappin*, No. 08-cv-594-F, 2010 WL 796756, at *5 n.4 (W.D. Okla. Feb. 26, 2010). And the last, discussed above, held that Section 3621 is "not an obstacle" to the issuance of a temporary restraining order where inmates alleged that release from incarceration was the only relief that could remedy the alleged constitutional violations they had suffered. *Martinez-Brooks*, 2020 WL 2405350 at *15. None of these cases stands for the proposition that inmates whose constitutional claims were allegedly violated by prison conditions—which

admittedly could be remedied by court-ordered remedies—may seek a court order overturning BOP's decision not to release them to home confinement or halfway houses.

The Court accordingly should dismiss petitioners' release claims to the extent they seek such relief.

III. The Court Should Dismiss the Release Claims Because They Constitute Improper Collateral Attacks on Individualized Rulings and Risk Inconsistent Decisions

Finally, principles of comity and estoppel weigh in favor of dismissal of petitioners' release claims because they constitute improper collateral attacks on decisions rendered in inmates' individual criminal cases, and entertaining risks inconsistent rulings. "Courts already heavily burdened with litigation with which they must of necessity deal should . . . not be called upon to duplicate each other's work in cases involving the same issues and the same parties." *United States v. Am. Radiator & Standard Sanitary Corp.*, 388 F.2d 201, 204 (3d Cir. 1967) (internal quotation marks omitted). Federal courts have long recognized the importance of judicial comity amongst themselves. *See id.* ("Within a single circuit where decisions of all district courts are reviewed by a single court of appeals, there is rarely need or justification for action by one district court interfering with the course of litigation pending in another."); *Zambrana v. Califano*, 651 F.2d 842, 844 (2d Cir. 1981) ("Generally, principles of comity and judicial economy make courts reluctant to exercise jurisdiction over claims involving the orders of coordinate courts."); *Brittingham v. Comm'r*, 451 F.2d 315, 318 (5th Cir. 1971) ("comity dictates that courts of coordinate jurisdiction not review, enjoin or otherwise interfere with one another's jurisdiction"); *Burrows v. Interactive AIDS Counseling Servs., Inc. v. Reno*, 93 Civ. 1795 (PKL), 1993 WL 213017, at * 3 (S.D.N.Y. June 17, 1993) ("[P]rinciples of comity require this Court to defer to the rulings of the court in the Eastern District under these circumstances and, thus, the action before this Court is dismissed."); *see also Bergh v. Washington*, 535 F.2d

505, 507 (9th Cir. 1976) ("When an injunction sought in one federal proceeding would interfere with another federal proceeding, considerations of comity require more than the usual measure of restraint, and such injunctions should be granted only in the most unusual cases."); *Arthur Kahn Co., Inc. v. Switzer Bros., Inc.*, 201 F.2d 55, 55 (6th Cir. 1952) ("The United States Court of Appeals for the Sixth Circuit, upon the plainest principles of judicial comity, should not and will not attempt to interfere with an action now pending on appeal in the United States Court of Appeals for the Fifth Circuit."). The purpose of judicial comity is simple—to avoid duplicative litigation and conflicting decisions relating to the same parties and issues.

In this case, principles of comity clearly call for dismissal of petitioners' release claims. Judges in this District presiding over the respective criminal cases have denied the individualized release applications made by Petitioners Fernandez-Rodriguez, Hatcher, or Woodson. *See* Mot. at 4-9. Clearly, a decision of this Court directing BOP to release these inmates to home confinement would be inconsistent with such decisions.

Indeed, in the cases of Petitioners Hatcher and Woodson, the sentencing judges specifically did not recommend that BOP place them in the community. *See United States v. Woodson*, No. 18 Cr. 845 (PKC), 2020 WL 2114770, at *4 (S.D.N.Y. May 4, 2020) (holding that placing Woodson on confinement would overly tax the resources of the Office of Probation); *United States v. Hatcher*, 18 Cr. 454 (KPF), Apr. 16, 2020, Hearing Transcript at 18:15-21 (ECF No. 234) (declining to recommend that BOP consider furlough for Hatcher "because I don't know what the plan is for Ms. Hatcher's release"). As for Petitioner Fernandez-Rodriguez, for whom the presiding district judge denied bail pending his trial, *see* Order, Apr. 7, 2020, *United States v. Fernandez-Rodriguez*, 20 Crim. 43 (GBD) (ECF No. 27), petitioners' claim would constitute an improper end-run around the governing bail standard. *See Reese v. Warden, Phila.*

FDC, 904 F.3d 244, 247 (3d Cir. 2018) ("[F]ederal defendants who seek pretrial release should do so through the means authorized by the Bail Reform Act, not through a separate § 2241 action."); *Williams v. Hackman*, 364 F. App'x 268 (7th Cir. 2010) ("[A] federal pretrial detainee cannot use § 2241 to preempt the judge presiding over the criminal case.").

Moreover, while principles of comity call for dismissal of both the Petition's release claims that have been litigated as well as those that have not, collateral estoppel requires dismissal of release claims, like those of Petitioners Fernandez-Rodriguez, Hatcher and Woodson, that have been rejected by judges in the criminal proceedings. "Collateral estoppel, or issue preclusion, prevents parties or their privies from relitigating in a subsequent action an issue of fact or law that was fully and fairly litigated in a prior proceeding." *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 288 (2d Cir. 2002). Here, there can be no dispute that Petitioners Fernandez-Rodriguez, Hatcher and Woodson previously litigated the same issues surrounding their release. Petitioners raised in motions in their criminal cases the same arguments regarding risks to their health, the alleged conditions within the MCC, and why the potential dangers outweighed the flight and security concerns posed by their release. *See* Mot. at 4-9. Accordingly, relitigation of these claims is barred by collateral estoppel.

Petitioners' argument that the COVID-19 pandemic should justify overriding comity concerns, particularly given that this civil case provides an opportunity for discovery absent from criminal proceedings, *see* Opp. at 16, is mistaken as it fails to appreciate the differing burdens of proof between a civil case alleging constitutional violations and the relevant forms of release available in criminal proceedings. To prevail in this case, petitioners must demonstrate that, in allegedly exposing them to risk of communicable disease, prison officials acted in a manner "contrary to current standards of decency for anyone to be so exposed." *Helling v. McKinney*,

509 U.S. 25, 35 (1993). In contrast, on a motion for bail pending trial, the Government must first "establish by a preponderance of the evidence that the defendant, if released, presents an actual risk of flight." *United States v. Browning*, No. 20 Cr. 02, 2020 WL 2306566 (S.D.N.Y. May 7, 2020) (citing *United States v. Berrios-Berrios*, 791 F.2d 246, 250 (2d Cir. 1986)). If the Government satisfies that burden, it must then demonstrate, also by a preponderance of the evidence, that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." *Id.* (citing *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985)). On a motion for bail pending sentencing, the defendant must establish by "clear and convincing evidence that he is not a risk of flight or a danger to any person or the community." *United States v. Abuhamra*, 389 F.3d 309, 319 (2d Cir. 2004). And on a motion for compassionate release, the defendant must show that "extraordinary and compelling reasons warrant" a sentence reduction, and that the "reduction is consistent with applicable policy statements issued by the Sentencing Commission." *United States v. Ebbers*, __F. Supp. 3d__, 2020 WL 91399, at *4 (S.D.N.Y. Jan. 8, 2020) (citing 18 U.S.C. § 3582(c)(1)).

Thus, for either a motion for compassionate release or a motion for bail pending sentencing, the court's inquiry focuses on the defendant's individual circumstances, and not on the state of mind or actions of prison officials. It is thus far from clear why civil discovery on that issue is relevant to an individual release motion.

Moreover, since district court judges presiding over criminal proceedings are just as aware of the COVID-19 pandemic as this Court, there is no reason why this Court should afford these inmates another opportunity to raise these claims. For example, Judge Castel, who considered Petitioner Woodson's motion for compassionate release, assumed that he was "at a

greater risk of exposure to the virus than he would be if he were at liberty or on home confinement," but nonetheless denied the motion. *Woodson*, 2020 WL 2114770, at *2. Petitioners offer no reason why he is entitled to a second bite at the apple from this Court, which would be less familiar with the inmates' personal circumstances and their criminal cases, under a different legal standard.

CONCLUSION

For the foregoing reasons, the Court should dismiss petitioners' claims seeking the release or transfer of MCC inmates.

Dated: New York, New York
June 1, 2020

Respectfully submitted,

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