NICOLA T. HANNA
United States Attorney
DAVID M. HARRIS
Assistant United States Attorney
Chief, Civil Division
JOANNE S. OSINOFF
Assistant United States Attorney
Chief, General Civil Section
KEITH M. STAUB (Cal. Bar No. 137909)
CHUNG H. HAN (Cal. Bar No. 191757)
JASMIN YANG (Cal. Bar No. 255254)
DAMON A. THAYER (Cal. Bar No. 258821)
PAUL B. GREEN (Cal. Bar No. 300847)
Assistant United States Attorney
Federal Building, Suite 7516
300 North Los Angeles Street
Los Angeles, California 90012
Telephone: (213) 894-7423
Facsimile: (213) 894-7819
E-mail: Keith.Staub@usdoj.gov
Chung.Han@usdoj.gov
Jasmin.Yang@usdoj.gov
Damon.Thayer@usdoj.gov
Paul.Green@usdoj.gov

Attorneys for Respondents
Felicia L. Ponce and Michael Carvajal

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

LANCE AARON WILSON; MAURICE SMITH; EDGAR VASQUEZ, individually and on behalf of all others similarly situated,

Plaintiff-Petitioners,

v.

FELICIA L. PONCE, in her capacity as Warden of Terminal Island; and MICHAEL CARVAJAL, in his capacity as Director of the Bureau of Prisons,

Defendant-Respondents.

No. CV 20-4451-MWF-MRW

RESPONDENTS' OPPOSITION TO *EX PARTE* APPLICATION FOR PROVISIONAL CLASS CERTIFICATION [ECF No. 22]

[Fed. R. Civ. P. 23(a) and (b)]

Honorable Michael W. Fitzgerald
United States District Judge

TABLE OF CONTENTS

TABLE OF CONTENTS i
MEMORANDUM OF POINTS AND AUTHORITIES 1
I. INTRODUCTION 1
II. PROCEDURAL BACKGROUND 3
III. FACTUAL BACKGROUND 3
A. Petitioners' Various Criminal Convictions 3
1. Wilson Was Convicted for Conspiracy to Distribute Oxycodone and Hydrocodone and Sentenced to Eight Years Imprisonment 3
2. Smith Was Convicted of Sex Trafficking of Children by Force, Fraud, and Coercion and Sentenced to 30 Years Imprisonment 4
3. Vazquez Was Convicted of Aggravated Kidnapping and Sentenced to 20 Years Imprisonment 4
B. Petitioners' Various Health Histories 4
1. Wilson Tested Positive, Was Asymptomatic, and Did Not Report or Exhibit COVID-19 Symptoms 5
2. Smith Tested Positive, Was Asymptomatic, and Did Not Report or Exhibit COVID-19 Symptoms 5
3. Vasquez Tested Negative, Was Asymptomatic, and Did Not Report or Exhibit COVID-19 Symptoms 6
C. None of the Petitioners Have Complied with the PLRA Grievance Process And Only Wilson Has Applied for Compassionate Release 6
D. Named Petitioners Provide No Information Concerning the Unnamed Class Members 6
IV. CLASS CERTIFICATION STANDARD 7
V. ARGUMENT 9
A. Class Certification Is Inappropriate in Habeas Proceedings 9
B. This Court Lacks Jurisdiction to Consider the Relief Petitioners Seek 9
C. Petitioners Fail to Satisfy the Requirements of Rule 23(a) 10
1. Although Petitioners Likely Meet the Numerosity Requirement, It Is the Only Rule 23(a) Factor That Can be Satisfied 10

2. The Individualized Inquiries that Are Required Preclude Petitioners From Satisfying Commonality 11
3. Petitioners Fail to Satisfy Typicality Requirement 17
4. Petitioners Are Not Adequate Class Representatives 19
D. Petitioners Fail to Satisfy the Requirements of Rule 23(b)(2) 20
VI. CONCLUSION 21

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Aburto v. Verizon Cal., Inc.,
2012 WL 10381 (C.D. Cal. Jan. 3, 2012) 9

Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
568 U.S. 455 (2013) 8

Arnold v. United Artists Theatre Circuit, Inc.,
158 F.R.D. 439 (N.D. Cal. 1994) 10

Bijeol v. Benson,
513 F.2d 965 (7th Cir. 1975) 9

Califano v. Yamasaki,
442 U.S. 682 (1979) 8

Cameron v. Bouchard,
2020 WL 2569868 (E.D. Mich. May 21, 2020) 16

Castillo v. Barr,
2020 WL 1502864 (C.D. Cal. Mar. 27, 2020) 16

Christianson v. Colt Indus. Operating Corp.,
486 U.S. 800 (1988) 2

Comcast Corp. v. Behrend,
569 U.S. 27 (2013) 8

Cox v. McCarthy,
829 F.2d 800 (9th Cir. 1987) 9

Doninger v. Pacific Northwest Bell, Inc.,
564 F.2d 1304 (9th Cir. 1977) 8

Ellis v. Costco Wholesale Corp.,
657 F.3d 970 (9th Cir. 2011) 8, 9

Farmer v. Brennan,
511 U.S. 825 (1994) 13

Gen.Tel.Co. v. Galcon,
457 U.S. 147 (1982) 9

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998) 11

Hanon v. Dataproducts Corp.,
976 F.3d 497 (9th Cir. 1992) 17

Herman Family Revocable Trust v. Teddy Bear,
254 F.3d 802 (9th Cir. 2001) 2

Jennings v. Rodriguez,
138 S. Ct. 830 (2018) 9, 11

Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO,
216 F.3d 577 (7th Cir. 2000) 21

Martinez-Brooks v. Easter,
2020 WL 2405350 at *29 (D. Conn. May 12, 2020) 15

Mays v. Dart, No.
2020 WL 1987007 (N.D. Ill. Apr. 27, 2020) 9

Money v. Priztker,
2020 WL 1980660 (N.D. Ill. Apr. 10, 2020) 2, 3

Parsons v. Ryan,
754 F.3d 657 (9th Cir. 2014) 17

Sacal-Micha v. Longoria,
2020 WL 1518861 (S.D. Tex. Mar. 27, 2020) 18

Schall v. Martin,
467 U.S. 253 (1984) 9

Staton v. Boeing Co.,
327 F.3d 938 (9th Cir. 2003) 10

Staton v. Boeing,
327 F.2d 938 (9th Cir. 2003) 19

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) ..... passim

Wilson v. Williams,
2020 WL 1940882 (N.D. Ohio Apr. 22 2020) 15

Wolin v. Jaguar Land Rover N. Am., LLC,
617 F.3d 1168 (9th Cir. 2010) 17

Wragg v. Ortiz,
2020 WL 2745247 (D.N.J. May 27, 2020) 13, 21

Federal Statutes

18 U.S.C. § 1201 4

18 U.S.C. § 1591(A) and (B) 4

18 U.S.C. §§ 3582 at 4205(g) 6, 7

21 U.S.C. § 841(A)(1) 3

21 U.S.C. § 841(B)(1)(C) 3, 4

21 U.S.C. § 846 3

Federal Rules

Fed. R. Civ. P. 23(a) 1, 8

Fed. R. Civ. P. 23(a)(1) 10
Fed. R. Civ. P. 23(a)(3) 17
Fed. R. Civ. P. 23(a)(4) 19
Fed. R. Civ. P. 23(b)(2) 20
Rule 23 ..... passim
Rule 23(a) ..... passim
Rule 23(a) Fac 10
Rule 23(a)(2) 11
Rule 23(a)(3) 17
Rule 23(b) 8
Rule 23(b)(2) 8, 11, 20, 21
Rules 23(a) 1, 2

Federal Regulations

28 C.F.R. § 0.96b 4, 5, 6

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Lance Aaron Wilson, Maurice Smith, and Edgar Vazquez ("Petitioners" or "Named Petitioners") have each been convicted of serious but different federal crimes (conspiracy to distribute oxycodone and hydrocodone; sex trafficking of children by force, fraud, and coercion; and aggravated kidnapping, respectively). They have been sentenced to different terms (ranging from eight to 30 years); they have different times remaining on their sentences (from four to 16 years); they have different propensities for recidivism; they are of different ages (Vazquez is 32, Wilson is 35, and Smith is 50); they have different health histories, including with COVID-19 (Wilson and Smith tested positive and were asymptomatic and Vazquez tested negative); and different circumstances should they be released, including where they would purportedly have access to housing, and for how long, and whether they have health insurance or access to health insurance. In spite of these differences even amongst themselves, they seek, on an *ex parte* basis, to certify a class defined as: "***All current and future people in post-conviction custody at Terminal Island***." ECF No. 22 at 2:8-9 (emphasis in original). This request is untenable, and Respondents respectfully request that this Court deny Petitioners' application for class certification for failure to meet the requirements of Rules 23(a) and (b) of the Federal Rules of Civil Procedure.

Petitioners' request for a one-size-fits-all order is fundamentally incompatible with classwide adjudication. Each of the Named Petitioners and the proposed class members – numbering more than 1,000 in the class – presents significantly different medical risk factors, criminal histories, and social circumstances requiring individualized analysis, and disqualifying their claims from class treatment. Petitioners fail to present any evidence or analysis about the class members, precluding the rigorous analysis that Rule 23 requires must accompany a class certification ruling. Further, the relief sought by each purported class member will differ based upon a case-by-case assessment of each class member's suitability for particular remedies, as measured by a host of criteria.

Petitioners' request for class certification on an *ex parte* basis is particularly untenable given that they fail to present any authority that class certification is even allowable in a purported habeas action. Similarly, in opposition to Petitioners' TRO Application, Respondents identified several jurisdictional issues that precluded subject matter jurisdiction; the Court, in fact, acknowledged the jurisdictional issues in its May 27, 2020, minute order. ECF No. 23. The Ninth Circuit has warned that where federal courts lack jurisdiction, the action must be dismissed even after extensive litigation. *Herman Family Revocable Trust v. Teddy Bear*, 254 F.3d 802, 807 (9th Cir. 2001) ("Were jurisdiction a matter of equity or discretion, we might well simply decide the case on the merits. But it isn't so. Regrettably, questions of time, cost, and efficiency do not undergird jurisdiction. Nor is jurisdiction a question of equity—a court lacking jurisdiction to hear a case may not reach the merits even if acting "in the interest of justice.") (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988)).

The Named Petitioners' claims also fail under the Rules 23(a) and (b) of the Federal Rules of Civil Procedure because they are not representative of the proposed class given the variety of facts presented by each inmate's individual circumstances, such as their differing criminal backgrounds, myriad underlying medical conditions of varying severity, if any, and home environments available to an inmate if released. As another district court considering a similar application found:

> [T]he permutations here are endless, as rarely, if ever, will any two plaintiffs be alike on the factors that matter at the point of decision. These differences are so vast and fundamental that class treatment, especially in the compressed time frame that would allow for effective relief at the height of the pandemic … is completely unworkable.

Money v. Priztker, 2020 WL 1980660, at *15 (N.D. Ill. Apr. 10, 2020). The same analysis applies here foreclosing Petitioners' application to provisionally certify a class.

Respondents respectfully request that the Court deny Petitioners' *ex parte* application for class certification.

II. PROCEDURAL BACKGROUND

On May 16, 2020, Petitioners filed a complaint entitled "Complaint—Class Action for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus" requesting immediate relief under the Eighth Amendment. ECF No. 1.

On May 22, 2020, Petitioners brought an *ex parte* application for a Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction ("TRO Application"). ECF No. 10. On May 27, 2020, Respondents opposed the TRO Application. ECF Nos. 24-27.

On May 27, 2020, Petitioners brought the instant *ex parte* application to certify a provisional class, and an *ex parte* application to expedite discovery. ECF Nos. 22, 29. Petitioners objected to allowing Respondents any additional time to respond to these two new *ex parte* applications even though they were filed on the same day Respondents' opposition to the TRO Application was due. The Court, however, allowed Respondents until June 1, 2020, to respond to these applications because the "Underlying TRO Application is both factually and legally complex." ECF No. 23. The Court acknowledged that the "health and even lives of federal prisoners is potentially at stake, but the requested equitable relief would – arguably – be beyond either the jurisdiction granted this Court by Congress or, indeed, the constitutional limits on judicial oversight of Article II officers." *Id.*

III. FACTUAL BACKGROUND

A. Petitioners' Various Criminal Convictions

1. Wilson Was Convicted for Conspiracy to Distribute Oxycodone and Hydrocodone and Sentenced to Eight Years Imprisonment

On March 19, 2018, the district court for the Eastern District of California sentenced Wilson to ninety-six (96) months (eight years) imprisonment following his conviction for conspiracy to distribute oxycodone and hydrocodone, in violation of 21 U.S.C. § 846, 21 U.S.C. § 841(A)(1), and 21 U.S.C. § 841(B)(1)(C). Declaration of Joel Roman ("Roman Decl."), filed at ECF No. 26, ¶ 4.a., Ex. A. If Wilson earns all

remaining good conduct time, his projected release date is September 20, 2024. *Id.* ¶ 4.b. Wilson does not qualify for priority placement on home confinement under the Attorney General's memoranda of March 26 and April 3, 2020, because his risk score places him at a "Low," rather than at a "Minimum," risk of recidivism. *Id.* ¶ 5.

2. Smith Was Convicted of Sex Trafficking of Children by Force, Fraud, and Coercion and Sentenced to 30 Years Imprisonment

On December 19, 2011, the district court for the Southern District of California sentenced Smith to three-hundred-sixty (360) months (30 years) imprisonment following his conviction for sex trafficking of children by force, fraud, and coercion, in violation of 18 U.S.C. § 1591(A) and (B). Roman Decl. ¶ 7.a., Ex. D. Assuming Smith earns all remaining good conduct time, his projected release date is June 12, 2036. *Id.* ¶ 7.b. Smith does not qualify for priority placement on home confinement under the Attorney General's memoranda because his offense is both violent and a sex offense. *Id.* ¶ 8.c.

3. Vazquez Was Convicted of Aggravated Kidnapping and Sentenced to 20 Years Imprisonment

On July 18, 2012, the government of Mexico sentenced Vazquez to twenty (20) years imprisonment following his conviction for aggravated kidnapping, in violation of 18 U.S.C. § 1201. Roman Decl. ¶ 10.a, Ex. G. Vazquez, as an American citizen, was permitted to serve his time in the United States as a treaty transfer under 28 C.F.R. § 0.96b. Upon transfer, the United States Parole Commission adjusted his term to 192-month imprisonment (16 years). Roman Decl. ¶ 10.b. Assuming he earns all remaining good conduct time, his projected release date is May 5, 2024. *Id.* ¶ 10.c. Vazquez does not qualify for priority placement on home confinement under the Attorney General's memoranda because he was convicted of a violent offense. *Id.* ¶ 11.c.

B. Petitioners' Various Health Histories

In addition to having differing criminal histories, Named Petitioners have varied health histories, particularly with regard to COVID-19. Every single inmate at FCI Terminal Island has been tested for COVID-19. *See* Declaration of Ronell Prioleau

("Prioleau Decl."), filed at ECF No. 28, ¶ 54. Although all Petitioners were asymptomatic, Wilson and Smith tested positive while Vasquez tested negative. *See* Declaration of Rosita Leen ("Leen Decl."), filed at ECF No. 27, ¶¶ 7a.-c. FCI Terminal Island medical staff took Petitioners' vital signs at least once a day, and at no point did Petitioners have a fever and none of them reported any fever, cough, headaches, or chills to the medical staff based on their medical records, and determined that none of them fit the criteria for a "high risk" individual under established CDC criteria. *Id.*

1. Wilson Tested Positive, Was Asymptomatic, and Did Not Report or Exhibit COVID-19 Symptoms

Wilson is 35 years old, and has not been diagnosed with any condition identified by the CDC as placing individuals at a higher risk of serious complications from COVID-19. Leen Decl. ¶ 7.a. Wilson tested positive for COVID-19 on April 28, 2020, after FCI Terminal Island conducted mass testing on the entire inmate population. *Id.* Wilson was asymptomatic, and did not complain of any symptoms to staff. *Id.* His BOP Electronic Medical Records ("BEMR") shows that medical staff documented his vitals from April 28 to May 8, 2020, and at no time did he have a temperature over 98˚F, and continuously denied having a cough, shortness of breath, muscle pain, fatigue, a sore throat, new loss of taste and smell, headaches and chills. *Id.* He was examined and deemed recovered by medical staff on May 10, 2020. *Id.*

2. Smith Tested Positive, Was Asymptomatic, and Did Not Report or Exhibit COVID-19 Symptoms

Smith is 50 years old, and has been diagnosed with hypertension, type 2 diabetes, and chronic kidney disease. Leen Decl. ¶ 7.b. Smith tested positive for COVID-19 on April 29, 2020, after FCI Terminal Island conducted mass testing on the entire inmate population. *Id.* His BEMR records shows that medical staff documented his vitals from April 29 to May 8, 2020, and at no time did he have a temperature over 98.5˚F, and continuously denied having a cough, shortness of breath, muscle pain, fatigue, a sore

throat, new loss of taste and smell, headaches and chills. *Id.* He was examined and deemed recovered by medical staff on May 10, 2020. *Id.*

3. Vasquez Tested Negative, Was Asymptomatic, and Did Not Report or Exhibit COVID-19 Symptoms

Vazquez is 32 years old, and has not been diagnosed with any condition identified by the CDC as placing individuals at a higher risk of serious complications from COVID-19. Leen Decl. ¶ 7.c. Vazquez tested negative for COVID-19 on April 29, 2020. *Id.* His BEMR records shows that medical staff documented his vitals from May 1, 2020 to May 20, 2020, and at no time did he have a temperature over 98˚F, and continuously denied having a cough, shortness of breath, muscle pain, fatigue, a sore throat, new loss of taste and smell, headaches and chills. *Id.*

C. None of the Petitioners Have Complied with the PLRA Grievance Process And Only Wilson Has Applied for Compassionate Release

None of the Petitioners has completed any step of the Prison Litigation Reform Act ("PLRA") administrative-grievance process, which Petitioners admit. *See* Roman Decl. ¶ 6, Ex. C (Wilson); ¶ 9, Ex. G (Smith); ¶ 12, Ex. I (Vazquez); ECF No. 10 at 52:25-57:7. Only Wilson has utilized the Compassionate Release/Reduction in Sentence Procedures for Implementation of 18 U.S.C. §§ 3582 at 4205(g) ("PS 5050.50") process. Declaration of Maricela Bugarin, filed at ECF No. 25, ¶ 6, Ex. A. This request has been forwarded to FCI Terminal Island's staff to determine whether he qualifies under the BOP's criteria for compassionate release, and is still pending. *Id.*

D. Named Petitioners Provide No Information Concerning the Unnamed Class Members

Named Petitioners provide no information in their application concerning potential class members beyond their incarceration at FCI Terminal Island. Unnamed class members may range in age from young adults to the very elderly; may have health issues that span the spectrum from terminal to non-existent; and may be presently infected with COVID-19 and receiving treatment, healthy and unexposed, or previously-

infected and now recovered with potential immunity. Petitioners do not explain the ways in which those characteristics might affect the merits of their claims or the type of relief for which they are eligible.

The offenses for which proposed class members are presently incarcerated and their overall criminal histories are likewise disparate. Some pose high risk of recidivism and would present a threat to their community (notably because Smith was convicted of sex trafficking of a minor, and Vazquez for a violent offense, under the Attorney General's memoranda, they would not be eligible for release[1]), while others are unlikely to reoffend and pose little threat if released. Some inmates have homes and families that could provide support for home confinement, while others would likely become homeless and alone, without any means of supporting themselves. Some could access high quality medical treatment if they became ill, while others depend entirely on BOP and would have no meaningful access to health care if released.

Measured by these and other potentially relevant data points, each one of the more than 1,000 proposed class members is a unique individual with different circumstances who must be subjected to an individualized evaluation for placement on home confinement (which the BOP has already performed) under the CARES Act. *See* ECF No. 1 at ¶ 117 (describing each potential class member as presenting "uniquely" different circumstances); *id.* at ¶ 13 (acknowledging that the BOP is releasing inmates at FCI Terminal Island but not at the rate Petitioners would like).

IV. CLASS CERTIFICATION STANDARD

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*,

---

[1] "While we have a solemn obligation to protect the people in BOP custody, we also have an obligation to protect the public. That means we cannot simply release prison populations en masse onto the streets. Doing so would pose profound risks to the public from released prisoners engaging in additional criminal activity, potentially including violence or heinous sex offenses." Attorney General March 26, 2020, Memorandum; *see also* Attorney General April 3, 2020 Memorandum ("Some offenses, such as sex offenses, will render an inmate ineligible for home detention."), ECF No. 10-1, Ex. A at 9; ECF No. 10-1, Ex. D at 46.

564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). To qualify for the exception to individual litigation, the party seeking class certification bears the burden of showing by a preponderance of the evidence that class certification is appropriate and must provide facts sufficient to satisfy the requirements of Fed. R. Civ. P. 23(a) and (b). *Dukes*, 564 U.S. at 351; *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1308-09 (9th Cir. 1977). "The Rule 'does not set forth a mere pleading standard.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Dukes*, 264 U.S. at 350). "Rather, a party must not only 'be prepared to provide that there are *in fact* sufficiently numerous parties, common questions of law or fact,' typicality of claims and defenses, and adequacy of representation, as required by Rule 23(a). The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Id.* (quoting *Dukes*, 564 U.S. at 350) (internal citation omitted).

Fed. R. Civ. P. 23(a) sets out four requirements for class certification: numerosity, commonality, typicality, and adequacy of representation. A showing that these requirements are met, however, does not warrant class certification. Petitioners must also show that one of the requirements of Rule 23(b) is met. Rule 23(b)(2) permits class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Because the relief requested in a (b)(2) class is prophylactic, mandatory, enures to the benefit of each class member, and is based on accused conduct that applies uniformly to the class, notice to absent class members and an opportunity to opt out of the class is not required. *See Dukes*, 564 U.S. at 361-62.

"A court's class certification analysis must be 'rigorous' and may 'entail some overlap with the merits of the plaintiff's underlying claim.'" *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 465 (2013). The Court considers the merits to the extent that they overlap with the Rule 23 requirements. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir. 2011). The Court must resolve factual disputes to the extent

"necessary to determine whether there was a common pattern and practice that could affect the class *as a whole*." *Id.* "When resolving such factual disputes in the context of a motion for class certification, district courts must consider the 'persuasiveness of the evidence presented.'" *Aburto v. Verizon Cal., Inc.*, 2012 WL 10381, at *2 (C.D. Cal. Jan. 3, 2012). Ultimately a district court must exercise its discretion to determine whether a class should be certified. *Califano*, 422 U.S. at 703. If a court is not fully satisfied that the requirements of Rule 23(a) and (b) have been met, certification should be refused. *Gen.Tel.Co. v. Galcon*, 457 U.S. 147, 161 (1982).

V. ARGUMENT

A. Class Certification Is Inappropriate in Habeas Proceedings

The Supreme Court "has never addressed whether habeas relief can be pursued in a class action." *Jennings v. Rodriguez*, 138 S. Ct. 830, 858 n.7 (2018) (Thomas, J., concurring) (citing *Schall v. Martin*, 467 U.S. 253, 261 n.10 (1984)) (reserving the question). At least as a technical matter, "Rule 23 does not apply to habeas corpus proceedings." *Mays v. Dart*, No. 2020 WL 1987007, at *16 (N.D. Ill. Apr. 27, 2020) (citing *Bijeol v. Benson*, 513 F.2d 965, 967-68 (7th Cir. 1975)). Even courts that allow class actions pursuing habeas relief generally agree that such proceedings are "ordinarily disfavored." *See Cox v. McCarthy*, 829 F.2d 800, 804 (9th Cir. 1987). For the reasons explained in connection with the Rule 23 analysis below, class action procedures are incompatible with the type of relief for which habeas proceedings are designed. Indeed, the inmate-specific determinations required in this case illustrate why class litigation should not be permitted.

B. This Court Lacks Jurisdiction to Consider the Relief Petitioners Seek

As the Court acknowledged in its May 27, 2020, minute order, the "requested equitable relief would – arguably – be beyond either the jurisdiction granted this Court by Congress or, indeed, the constitutional limits on judicial oversight of Article II officers." ECF No. 23. Respondents respectfully submit that whether jurisdiction exists should be decided first in order to preserve the Court's resources, as well as those of the

BOP, which has been responding vigorously to the demands posed by the COVID-19 crisis (Prioleau Decl. ¶¶ 5-67), including coordination with the World Health Organization, CDC, Office of Personnel Management, DOJ, and the Office of the Vice President. *Id.* ¶ 7.

As stated in the Opposition to the TRO Application, there are multiple jurisdictional barriers to the relief Petitioners seek: (1) Petitioners' claims are not properly brought as a habeas petition and are barred by the PLRA; (2) the CARES Act does not permit a district court to usurp the Attorney General's authority in making home confinement determinations; (3) Petitioners have failed to exhaust required administrative remedies; and (4) the Court lacks jurisdiction over conditions of confinement claims in a habeas action. Respondents incorporate by reference in full the arguments made in their TRO Opposition at ECF No. 24 at 24:16-35:10. However, even if the Court were to overlook these significant jurisdictional barriers, Petitioners fail to satisfy the prerequisites for class certification.

C. Petitioners Fail to Satisfy the Requirements of Rule 23(a)

1. Although Petitioners Likely Meet the Numerosity Requirement, It Is the Only Rule 23(a) Factor That Can be Satisfied

Fed. R. Civ. P. 23(a)(1) requires the class to be "so numerous that joinder of all members is impracticable." *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). The plaintiff need not state the exact number of potential class members; nor is a specific minimum number required. *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 488 (N.D. Cal. 1994). Rather, whether joinder is impracticable depends on the facts and circumstances of each case. *Id.*

Petitioners' proposed class is every single current and future inmate at FCI Terminal Island, which currently consists of 1,002 inmates.[2] As explained below, Petitioners' class definition is overbroad and inappropriate for certification because it

[2] *See* https://www.bop.gov/locations/institutions/trm/ (last accessed June 1, 2020).

fails to satisfy the commonality, typicality, and adequacy requirements of class certification. Respondents, however, do not contest that a class of over 1,000 individuals likely satisfies the numerosity requirement.

2. The Individualized Inquiries that Are Required Preclude Petitioners From Satisfying Commonality

a. Petitioners Cannot Meet the Commonality Standard

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class[.] It is insufficient to merely allege any common question. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Instead, the plaintiff must allege the existence of a "common contention" that is of "such a nature that is capable of classwide resolution[.]" *Dukes*, 564 U.S. at 350. As stated by the Supreme Court:

> What matters to class certification … is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id. (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). The commonality requirement applies with special force to a class seeking certification under Rule 23(b)(2). As the Supreme Court recently noted, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (quoting *Dukes*, 564 U.S. at 360).

For certification under Rule 23(b)(2), Petitioners must show that the challenged conduct is "such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360. Accordingly, Petitioners bear the burden to demonstrate that any factual differences among the proposed class members are unlikely to affect their entitlement to relief. *See id.* Class certification under Rule 23(a) and (b)(2), therefore, requires two steps: (1) the identification of a common legal problem, and (2) a showing that the common legal issue may be resolved as to all

class members simply by virtue of their membership in the class. *Dukes*, 564 U.S. at 350 (concluding that the common legal problem "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.").

Other courts considering similar class certification requests in the inmate COVID-19 context have found that the proposed classes could not meet the commonality requirement in light of the individualized inquiries that would be required for each inmate. In *Money v. Pritzker*, 2020 WL 1820660, at *14, the court denied class certification in a proposed class action of inmates seeking COVID-19 related medical furlough or home confinement after finding that the proposed class members did not meet the commonality requirement, observing that the release of inmates would require "individualized safety assessments" and "approved homesites":

> Indeed, the public interest – which must be taken into account when considering a TRO or preliminary injunction – mandates individualized consideration of any inmate's suitability for release and on what conditions, for the safety of the inmate, the inmate's family, and the public at large. From the inmate's perspective, his or her own health status at the relevant time is paramount. Any inmate who is exhibiting symptoms of infection may be more suitable for quarantine or even transfer to a hospital. From the family perspective, an inmate who has been exposed to someone (inmate or [prison] personnel) who has tested positive may not be suitable for furlough, particularly if the inmate's proposed destination is a residence already occupied by someone equally or more vulnerable. And from the public's perspective, it is important to bear in mind that some portion of the incarcerated population has been convicted of the most serious crimes – murder, rape, domestic battery, and so on.
>
> …
>
> The imperative of individualized determinations, recognized by both sides in this case, makes this case inappropriate for class treatment. Each putative class member comes with a unique situation – different crimes, sentences, outdates, disciplinary histories, age, medical history, places of incarceration, proximity to infected inmates, availability of a home landing spot, likelihood of transmitting the virus to someone at home detention, likelihood of violation or recidivism, and danger to the community. As Plaintiffs point out, commonality 'does not require perfect uniformity.' But

> it does require more uniformity that these Plaintiffs would have on the only matter 'apt to drive the resolution of the litigation (*Wal-Mart*, 564 U.S. at 350) – namely which class members should actually be given a furlough? And any attempt to use the class device even to formulate standards is destined to fail, because those standards largely are governed by the various state statutes authorizing different forms of release, which are then subject to wide discretion in their application.

Money, 2020 WL 1820660 at *14-15.

The *Money* court concluded its analysis of the commonality requirement by stating: "Simply put, there is no way to decide which inmates should stay and which inmates should go, without diving into an inmate specific inquiry." *Id.* at *15.[3] Similarly, the district court for the District of New Jersey denied class certification in a proposed COVID-19 class action at FCI Fort Dix because "the Court would be required to engage in an intensive, multi-step, individualized inquiry as to whether each prisoner met criteria for conditional release" *Wragg v. Ortiz*, 2020 WL 2745247, at *28 (D.N.J. May 27, 2020).[4]

Petitioners' proposed class also fails to meet the commonality requirement because they allege Eighth Amendment violations, which requires proof that (1) Petitioners have suffered a deprivation that is, "objectively, sufficiently serious," "result[ing] in the denial of the minimal civilized measure of life's necessities," and (2) that BOP is acting with "deliberate indifference to inmate health or safety," "know[ing] of and disregard[ing] an excessive risk to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994). Here, each putative class member, i.e., each current and

---

[3] The *Money* petitioners proposed six subclasses of inmates depending on age (those over 55), "serious underlying medical conditions that put them at particular risk of serious harm or death from COVID-19," those eligible for medical furlough, those with "less than one year remaining on their sentences and eligible for home detention," those with lesser class offenses "eligible for home detention," and those "who are scheduled to be released within 180 days and eligible to receive sentencing credit." *See Money*, 2020 WL 1820660, at *6.

[4] The *Wragg* petitioners sought certification of inmates "over the age of 50 **or** who experience medical conditions that make them vulnerable to COVID-19." *Wragg*, 2020 WL 2745247, at *18 (emphasis in original).

future inmate at FCI Terminal Island, has different medical needs, some more serious than others. Each individual presents a different risk profile for COVID-19 based on age, preexisting conditions, and a host of other factors. The proposed class members' differing risk profiles preclude a single, indivisible remedy, because not all risk profiles necessitate the same precautions.

As of June 1, 2020, 662 inmates at FCI Terminal Island have recovered from COVID-19.[5] Indeed, the three named Petitioners alone have differing medical conditions and thus differing risk profiles for COVID-19. Although all of them were and are asymptomatic, Wilson and Smith tested positive and are recovered, whereas Vasquez tested negative. Some inmates are likely at greater risk to contract the virus with serious complications, others less. If all were to bring different Eighth Amendment claims, it would be impossible to resolve the merits "as to all class members simply by virtue of their membership in the class," as required for certification. *Dukes*, 564 U.S. at 350. To adjudicate Petitioners' claims, the Court will need to conduct an individualized evaluation of each class member's condition and needs, as well as prison officials' cognizance of and response thereto – in effect requiring 1,002 separate mini-trials. Such "[d]issimilarities within the proposed class" defeat commonality. *Id*.

Even after separately analyzing each class member's Eighth Amendment claim on the merits, the individualized inquiries would not end. Assuming some Petitioners could prove a constitutional violation, the relief to which they might be entitled would require separate evaluation for each class member, accounting for such factors as age, conviction offense, criminal history, and recidivism risk, to name a few. The "key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (citation omitted). The purported class members, moreover, differ in their ability to secure housing and access to

[5] *See* https://www.bop.gov/coronavirus/ (last accessed June 1, 2020).

healthcare outside of FCI Terminal Island. Even for those who do have access to housing, whether they would be at risk of cohabitating with someone vulnerable to infection is also an individualized inquiry. Petitioners admittedly do not seek a single, indivisible remedy. Instead, they seek varying forms of relief that could result in home confinement or remaining at FCI Terminal Island – all dependent upon a constellation of individualized factors. *See* ECF No. 1 at 50:28-53:26. Thus, as in *Money* and *Wragg*, Petitioners' requested relief illustrates the impossibility of satisfying the commonality requirement and renders class certification inappropriate.

b. Petitioners' Authority is Not Persuasive

The cases cited by Petitioners are inapposite, unpersuasive and distinguishable. *See* ECF No. 22 at 5:15-28. In stark contrast to Petitioners' proposed class of all current and future inmates at FCI Terminal Island, the cases Petitioners cite in which courts granted class certification involved narrowly drawn medically vulnerable subclasses. In *Martinez-Brooks v. Easter*, 2020 WL 2405350 at *29 (D. Conn. May 12, 2020), the district court specifically declined to make a "formal determination as to class certification," conducted no analysis of the Rule 23 requirements, and determined instead that it could grant injunctive relief where "multi-party treatment is *likely* to be appropriate." *Id.* (emphasis added). *Martinez-Brooks*, in fact, granted injunctive relief only to a "medically vulnerable subclass" of inmates at FCI Danbury. *Id.* at *31. In stark contrast to all of the cases with subclasses, Petitioners' proposed class is every current and future inmate at FCI Terminal Island and they have made no attempt whatsoever to account for the differences in the health conditions between these inmates.

Similarly, *Wilson v. Williams*, 2020 WL 1940882, at *6 (N.D. Ohio Apr. 22 2020), involved a medically vulnerable subclass, which the court further refined to FCI Elkton inmates who are 65 years or older and those with documented pre-existing medical conditions including heart, lung, kidney, and liver conditions, diabetes, conditions causing a person to be immunocompromised (including, but not limited to cancer treatment, transplants, HIV or AIDS, or the use of immune weakening

medications), and severe obesity (body mass index of 40). *Cameron v. Bouchard*, 2020 WL 2569868, at *17 (E.D. Mich. May 21, 2020) followed *Wilson* in modifying the plaintiffs' overbroad proposed medically vulnerable subclass to "individuals 60 years of age and older, who, regardless of age, experience any of the following underlying medical conditions: (i) chronic lung disease including chronic obstructive pulmonary disease (e.g., bronchitis or emphysema); (ii) moderate to severe asthma; (iii) serious heart conditions; (iv) immunocompromising conditions including cancer treatment, bone marrow, or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications; (v) severe obesity (body mass index of 40 or higher); (vi) diabetes; (vii) chronic kidney or liver disease; (viii) metabolic disorders; or (ix) current or recent (last two weeks) pregnancy." The differences between the medically vulnerable subclasses certified in *Wilson* and *Cameron* illustrate that forcing courts to decide which inmates are medically vulnerable and subject to release is a fraught exercise that may lead to arbitrary distinctions; such determinations are better suited for the BOP which has the requisite medical, health, and institutional expertise in operating a prison and considering home confinement requests.[6]

Named Petitioners implicitly admit that they would not fall into a medically vulnerable class such as in *Martinez-Brooks*, *Wilson* and *Cameron*, because they are requesting a provisional class of "[a]ll current and future people in post-conviction custody" at FCI Terminal Island. ECF No. 22 at 2:8-9. Their request, moreover, conflicts with their own experts' opinions that the "BOP should take immediate steps to dramatically downsize the population at Terminal Island, with priority given to those at high risk of harm due to their age and health status and thus are likely to require a disproportionate amount of medical resources." ECF No. 1 at ¶ 12 (emphasis omitted),

---

[6] Petitioners also cite to *Castillo v. Barr*, 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020) in support of their commonality argument. ECF No. 22 at 5:26-27. *Castillo*, however, is not instructive because it is a habeas action brought by two civil immigration detainees, was not a class action, and made no class certification determination.

citing Declaration of Shamsher Samar, M.D. ¶ 20; Declaration of Marc Stern, M.D. ¶ 17. Contrary to their own expert's opinions, they are not requesting a class of those potentially more vulnerable because of age or health and is another reason why they fail to meet the commonality requirement.

3. Petitioners Fail to Satisfy Typicality Requirement

Typicality focuses on the relationship of facts and issues between the class and its representatives. Fed. R. Civ. P. 23(a)(3). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.3d 497, 508 (9th Cir. 1992) (internal citations omitted). The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class. *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.*

The typicality requirement will occasionally merge with the commonality requirement. *Parsons v. Ryan*, 754 F.3d 657, 687 (9th Cir. 2014) because "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes*, 564 U.S. at 349 n.5. Just as Petitioners' circumstances and those of other FCI Terminal Island inmates are too varied to satisfy the commonality requirement, Petitioners are also unable to satisfy Rule 23(a)(3)'s typicality requirement. *See id.* (where "individualized assessments are necessary" the class fails on typicality under Rule 23(a)(3)).

The different forms of relief requested demonstrate Petitioners' inability to establish typicality. Petitioners ask the Court to: (1) order that the BOP decide in 48

hours whether each inmate is eligible for home confinement or bail pending habeas corpus; (2) to "comply with the Constitution" for any class members who do not receive home confinement; (3) to grant writs of habeas corpus and release inmates to whom the BOP grants home confinement; and (4) to grant injunctive relief ordering the BOP to enact measures (most of which the BOP is already doing[7]) to counteract the spread of COVID-19 such as temperature checks, providing soap, providing masks, cleaning high-touch surfaces. ECF No. 1 at 50:28-53:26. This proposed remedial scheme exposes that the individual decision as to each putative class member will differ based on each inmate's unique factors (such as the severity of his offense, his age, and his health condition). In short, Petitioners seek a classwide remedy on an individualized basis—a contradiction in terms that in and of itself defeats typicality.

In addition, Petitioners' claims are subject to unique defenses based on the facts and circumstances of each individual class member. *See Sacal-Micha v. Longoria*, 2020 WL 1518861, at *5 (S.D. Tex. Mar. 27, 2020) (noting that decisions from other district courts demonstrate individualized nature of analysis to determine whether release is appropriate). Petitioners effectively request classwide relief through *de facto* individual habeas petitions decided on the facts of each inmate. This relief is wholly inconsistent with the requirement that relief be common across the class. *Dukes*, 564 U.S. at 360. Other federal inmates throughout the country have filed individual actions seeking release based upon COVID-19. Wilson himself has filed a motion with his sentencing court for compassionate release. *See United States v. Wilson*, No. 1:15-cr-0046-NONE-SKO, ECF No. 242 (E.D. Cal. May 5, 2020). That numerous federal inmates are having their cases for release heard on an individualized basis, with some inmates obtaining release (although Respondents argue that such remedy is not appropriate in a conditions of confinement case) and others not, further demonstrates that the impropriety of classwide relief.

[7] *See* Prioleau Decl., ¶¶ 23-64.

4. Petitioners Are Not Adequate Class Representatives

Fed. R. Civ. P. 23(a)(4) requires Petitioners to demonstrate that they will fairly and adequately protect the interests of their class. To determine whether Petitioners will be adequate class representatives, the Court must consider "(1) [whether] the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) [if] the representative plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class." *Staton v. Boeing*, 327 F.2d 938, 957 (9th Cir. 2003).

Whether an inmate is eligible for release depends in part upon whether he presents a danger to the community or a flight risk. Surely inmates eligible for release have different interests than other class members who are not. Given that release is not possible for all inmates, and that some inmates for whom release is possible are less likely to be released than others (because of relative flight risk or danger to the community), the interests of Petitioners – none of whom even appear to be eligible for release – are adverse to those putative class members who may be released to home confinement.

As discussed above, the fact that Petitioners have different medical needs, criminal histories, and recidivism risk ratings (among other things) underscores why they are inadequate class representatives with conflicting interests. Indeed, Smith is not even eligible to be released under the CARES Act because he was convicted of sexual trafficking of minors by force, threat, and fraud. *See* Roman Decl., ¶ 4.a. Vasquez would not qualify for home confinement because he was convicted of a violent offense. *Id.* ¶ 11.c. Wilson does not qualify for priority placement on home confinement under the Attorney General's memoranda of March 26 and April 3, 2020, because his risk score places him at a "Low," rather than at a "Minimum," risk of recidivism. *Id.* ¶ 5.

Furthermore, not all inmates may desire to be a mandatory participant of this class. For example, some inmates may not desire release if they do not have a safe place to live; some may not desire a transfer because their medical needs are being met at FCI

Terminal Island. Others may not want to be mandatory participants in this class if they are suitable for release under the CARES Act, the Attorney General's memoranda, if they have exhausted their administrative remedies, and other avenues of release available to them. Petitioners have not explained how they can adequately represent these widely divergent interests.

Because Petitioners fail to satisfy the commonality, typicality, and adequacy requirements of Rule 23(a), class certification is inappropriate.

D. Petitioners Fail to Satisfy the Requirements of Rule 23(b)(2)

Under Fed. R. Civ. P. 23(b)(2), class certification may be appropriate where a defendant has acted or refused to act in a manner applicable to the class generally, rendering injunctive and declaratory relief appropriate as to the class as a whole. Rule (b)(2) class depends upon:

> [T]he indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant.

Dukes, 564 U.S. at 360 (internal quotation marks and citation omitted; emphasis in original).

Unless the Court issues an order releasing all inmates "en masse" from FCI Terminal Island, contrary to the Attorney General's March 26, 2020, memoranda, any other injunctive relief beyond what the BOP is already doing (given that the BOP has already enacted nearly all of what Petitioners have requested in terms of increased sanitation, masks, soap, testing, and daily health screenings for all staff and inmates[8]) must necessarily take into account each inmate's individual circumstances (such as the

[8] *See* Prioleau Decl., ¶¶ 23-64.

severity and nature of his offense and his health condition). Potential class members have divergent interests requiring adjudication of individualized facts and seeking varied remedies, rendering such a "mandatory" class inappropriate. The class members have different criminal histories, may or may not be eligible for various programs, have different medical conditions which differ in severity, differ in age, as well as recidivism risk classification and the various other factors considered for eligibility and/or transfer under the Attorney General's memoranda. Where, as here, "individual class member[s] would be entitled to a different injunction or declaratory judgment" from each other, Rule 23(b)(2) "does not authorize class certification." *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, AFL-CIO*, 216 F.3d 577, 580 (7th Cir. 2000); *Wragg*, 2020 WL 2745247, at *30 ("as Petitioners are seeking the remedy of home confinement or early release, concentration of these claims seems a grossly inefficient method of processing and evaluating individual prisoners for suitability of release").

VI. CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the Court deny Petitioners' application for provisional class certification.

Dated: June 1, 2020

Respectfully submitted,

NICOLA T. HANNA
United States Attorney
DAVID M. HARRIS
Assistant United States Attorney
Chief, Civil Division
JOANNE S. OSINOFF
Assistant United States Attorney
Chief, General Civil Section

/s/ Keith M. Staub
KEITH M. STAUB
CHUNG H. HAN
JASMIN YANG
DAMON A. THAYER
PAUL B. GREEN
Assistant United States Attorney

Attorneys for Respondents