

1 Terry W. Bird – Bar No. 49038
 tbird@birdmarella.com
 2 Dorothy Wolpert – Bar No. 73213
 dwolpert@birdmarella.com
 3 *Naeun Rim – Bar No. 263558
 nrिम@birdmarella.com
 4 Shoshana E. Bannett – Bar No. 241977
 sbannett@birdmarella.com
 5 Christopher J. Lee – Bar No. 322140
 clee@birdmarella.com
 6 Jimmy Threatt – Bar No. 325317
 jthreatt@birdmarella.com
 7 BIRD, MARELLA, BOXER,
 WOLPERT, NESSIM, DROOKS,
 8 LINCENBERG & RHOW, P.C.
 1875 Century Park East, 23rd Floor
 9 Los Angeles, California 90067-2561
 Telephone: (310) 201-2100
 10 Facsimile: (310) 201-2110

11 Peter J. Eliasberg – Bar No. 189110
 peliasberg@aclusocal.org
 12 Peter Bibring – Bar No. 223981
 pbibring@aclusocal.org
 13 ACLU FOUNDATION OF
 SOUTHERN CALIFORNIA
 14 1313 West 8th Street
 Los Angeles, CA 90017
 15 Telephone: (213) 977-9500
 Facsimile: (213) 977-5297

Donald Specter – Bar No. 83925
 dspecter@prisonlaw.com
 Sara Norman – Bar No. 189536
 snorman@prisonlaw.com
 PRISON LAW OFFICE
 1917 Fifth Street
 Berkeley, California 94710
 Telephone: (510) 280-2621
 Facsimile: (510) 280-2704

16 Attorneys for Plaintiff-Petitioners

18 **UNITED STATES DISTRICT COURT**

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

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

22 Plaintiff-Petitioners,

23 vs.

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

27 Defendant-Respondents.
 28

CASE NO. 2:20-cv-04451-MWF-MRWx

**PLAINTIFF-PETITIONERS’
 REPLY SUPPORTING *EX PARTE*
 APPLICATION FOR
 PROVISIONAL CLASS
 CERTIFICATION**

Assigned to Hon. Michael W. Fitzgerald
 Courtroom 5A

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. ARGUMENT**

3 Defendant-Respondents (“Respondents”) muddy a straightforward class
4 certification analysis by ignoring controlling Ninth Circuit law and
5 mischaracterizing the relief sought by Plaintiff-Petitioners (“Petitioners”).
6 Petitioners seek relief in the form of policy changes that would apply uniformly to
7 all class members. Petitioners do not seek money damages or ask the Court to make
8 individualized determinations of home confinement or compassionate release. The
9 requested relief, which is injunctive and declaratory in nature, does not require the
10 Court to engage in the complicated, fact-intensive inquiries described by
11 Respondents throughout their opposition. As explained below, with this action
12 properly construed, Petitioners easily meet the requirements of Rule 23.¹

13 **A. The Proposed Class Meets the Requirements of Rule 23(a).**²

14 **1. Commonality**

15 “A clear line of precedent . . . firmly establishes that when inmates provide
16 sufficient evidence of systemic and centralized policies or practices in a prison
17 system that allegedly expose all inmates in that system to a substantial risk of
18 serious future harm, Rule 23(a)(2) is satisfied.” *Parsons v. Ryan*, 754 F.3d 657, 684
19 (9th Cir. 2014). That is what Petitioners have done here: Petitioners have provided
20 evidence that Respondents’ policies and practices fail to adequately prevent,
21

22 ¹ Respondents’ argument that class certification is inappropriate in habeas
23 proceedings is tied to their Rule 23 analysis and, for that reason, Petitioners will not
24 address it separately. (Dkt. 31 at 9.) Respondents also briefly raise jurisdictional
25 questions and attempt to “incorporate by reference in full the arguments made in
26 their TRO Opposition at ECF No. 24 at 24:16-35:10.” (*Id.* at 10.) Petitioners’
response to those arguments can be found in their TRO briefing, which they also
incorporate by reference. (Dkt. 10; Dkt. 30.)

27 ² Respondents “do not contest” that the Proposed Class satisfies the numerosity
28 requirement. (Dkt. 31 at 11.)

1 manage, and treat COVID-19 in the prison, including by failing to reduce the prison
2 population and failing to institute social distancing; appropriate sanitation and
3 hygiene measures; and adequate testing, tracing, quarantining, and isolating. That
4 should be the end of the inquiry. *B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 969
5 (9th Cir. 2019) (“the statewide policies and practices are the ‘glue’ that holds the
6 class together”) (quoting *Parsons*, 754 F.3d at 678).

7 Respondents contend, however, that the commonality requirement is not met
8 because each putative class member “has different medical needs, some more
9 serious than others,” and “differing risk profiles.” (Dkt. 31 at 13-14.) But the Ninth
10 Circuit already has foreclosed that argument: “although a presently existing risk
11 may ultimately result in different future harm for different inmates—ranging from
12 no harm at all to death—every inmate suffers exactly the same constitutional injury
13 when he is exposed to a single . . . policy or practice that creates a substantial risk of
14 serious harm.” *Parsons*, 754 F.3d at 678; *see also id.* at 680 n.23 (“The defendants’
15 insistence that commonality is defeated by individual variations in preexisting
16 conditions, demand for medical care, and response to treatment is incorrect.”).³

17
18 ³ Respondents’ suggestion that the putative class is overbroad because it extends
19 beyond the “medically vulnerable” (Dkt. 31 at 15-17) also fails because, as
20 explained in Petitioners’ application, even healthier people who contract COVID-19
21 are susceptible to severe strokes, and preliminary evidence suggests that the disease
22 may render lasting organ damage in even minimally symptomatic or completely
23 asymptomatic patients. (Dkt. 22 at 4.) Respondents do not respond to this argument.
24 (Dkt. 31 at 11-17.) Respondents assert without citation that “not all risk profiles
25 necessitate the same precautions.” (*Id.* at 14.) But “either each of the policies and
26 practices is unlawful as to every inmate or it is not. That inquiry does not require
27 [the Court] to determine the effect of those policies and practices upon any
28 individual class member (or class members) or to undertake any other kind of
individualized determination.” *Parsons*, 754 F.3d at 678. Indeed, the Interim
Guidance on Management of Coronavirus Disease (COVID-19) in Correctional and
Detention Facilities issued by the Centers for Disease Control and Prevention is not
limited only to those deemed “medically vulnerable.” (Dkt. 10-1 at 18-43.)

1 The district court’s decision in *Ahlman v. Barnes*, No. 20-835, 2020 WL
2 2754938 (C.D. Cal. May 26, 2020) (appeal pending), is instructive. There, the
3 district court granted provisional certification of, among other things, a class of
4 “[a]ll current and future post-conviction prisoners incarcerated at the Orange County
5 Jail from the present until the COVID-19 pandemic has abated.” *Id.* at *6. The
6 district court rejected defendants’ argument “that commonality is not satisfied
7 because ‘[e]ach individual has a specific medical profile.’” *Id.* at *7 (internal
8 citation omitted); *see also Fraihat v. U.S. Immigration and Customs Enforcement*,
9 No. 19-1546, 2020 WL 1932570, at *18 (C.D. Cal. Apr. 20, 2020) (rejecting
10 defendants’ argument “that the proposed classes ‘flunk’ the commonality
11 requirement due to the factual variation . . . between the degree of COVID-19 threat
12 to each individual”). The district court instead concluded: “Plaintiffs challenge
13 Defendants’ institution-wide response and seek institution-wide injunctive relief.
14 Accordingly, the relevant questions such as deliberate indifference will be decided
15 on a classwide, rather than individual, basis.” *Ahlman*, 2020 WL 2754938, at *7
16 (citing *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (“Commonality is
17 satisfied where the lawsuit challenges a system-wide practice or policy that affects
18 all of the putative class members.”)).

19 In arguing against commonality, Respondents mischaracterize the relief
20 sought here. (Dkt. 31 at 20-21.) Petitioners do not ask the Court to decide or review
21 whether each putative class member is in fact eligible for enlargement of custody.
22 Petitioners ask only that the Court put in place an expedited process—one that
23 would apply to all class members—for Respondents to make those decisions.
24 Respondents’ individual determinations could be challenged on an individual basis,
25 not through the class vehicle. *See Pride v. Correa*, 719 F.3d 1130, 1137 (9th Cir.
26 2013) (“Individual claims for injunctive relief related to medical treatment are
27 discrete from the claims for systemic reform addressed in [an existing class action].
28 Consequently, where an inmate brings an independent claim for injunctive relief

1 solely on his own behalf for medical care that relates to him alone, there is no
2 duplication of claims or concurrent litigation.”). The Court’s oversight over the
3 process would be limited to allegations of a pattern or practice of making such
4 decisions improperly.

5 Petitioners also seek improved conditions that would be applied to all class
6 members, in the form of policies that would effectively allow for social distancing;
7 provision of sanitary and personal protective equipment; improved sanitation
8 practices; and adequate testing, contact tracing, and isolation measures. (Dkt. 1 at
9 51-53.) To deny class relief would weigh down the court system with over a
10 thousand individual lawsuits, with judges being asked to (re-)adjudicate what public
11 health measures are constitutionally required in the prison and then to order them on
12 a building-by-building (or, in some cases, cell-by-cell) basis.

13 Even assuming the requested relief involved the Court’s consideration of
14 individual medical and custody risk factors (which it does not), under Ninth Circuit
15 precedent, Petitioners “need not show . . . that every question in the case, or even a
16 preponderance of questions, is capable of class wide resolution. So long as there is
17 ‘even a single common question,’ a would-be class can satisfy the commonality
18 requirement of Rule 23(a)(2).” *See Parsons*, 754 F.3d at 675 (internal quotation
19 marks and citation omitted). This is true when there “is a common core of salient
20 facts coupled with disparate legal remedies within the class.” *Meyer v. Portfolio*
21 *Recovery Assocs., LLC*, 707 F.3d 1036, 1041 (9th Cir. 2012) (quotation marks and
22 citation omitted).

23
24
25
26
27
28

1 **2. Typicality**

2 Defendants’ typicality argument rests on the same flawed reasoning as their
3 commonality argument. (Dkt. 31 at 17-18.) And, for the same reasons, it also must
4 be rejected. The Ninth Circuit’s decision in *Parsons* again provides the appropriate
5 framework:

6 Where the challenged conduct is a policy or practice that
7 affects all class members, the underlying issue presented
8 with respect to typicality is similar to that presented with
9 respect to commonality, although the emphasis may be
10 different. In such a case, because the cause of the injury is
11 the same . . . the typicality inquiry involves comparing the
12 injury asserted in the claims raised by the named plaintiffs
with those of the rest of the class. We do not insist that the
named plaintiffs’ injuries be identical with those of the
other class members, only that the unnamed class
members have injuries similar to those of the named
plaintiffs and that the injuries result from the same,
injurious course of conduct.

13 754 F.3d at 685 (quotation marks and citation omitted).

14 Respondents again reference “each inmate’s unique factors,” including “the
15 severity of his offense, his age, and his health conditions.” (Dkt. 31 at 18.) But “[i]t
16 does not matter that the named plaintiffs may have in the past suffered varying
17 injuries or that they may currently have different health care needs; Rule 23(a)(3)
18 requires only that their claims be ‘typical’ of the class, not that they be identically
19 positioned to each other or to every class member.” *Parsons*, 754 F.3d at 686. It is
20 enough that “[e]ach declares that he or she is being exposed, like all other members
21 of the putative class, to a substantial risk of serious harm by the challenged . . .
22 policies and practices.” *Id.* at 685. Similarly, although criminal history likely will be
23 relevant to determination of whether a putative class member is eligible for release,
24 it has no bearing on the typicality analysis. *See Rodriguez v. Hayes*, 591 F.3d 1105,
25 1124 (9th Cir. 2010) (“Petitioner’s aggravated felon status is similarly of no
26 significance to the typicality analysis. The claims of Petitioner and the class on the
27 whole are that they are entitled to a bond hearing in which dangerousness and risk of
28 flight are evaluated. While Petitioner’s criminal history . . . will almost certainly be

1 relevant to any bond hearing determination, the determination of whether Petitioner
2 is *entitled* to a bond hearing will rest largely on interpretation of the statute
3 authorizing his detention.”) (emphasis added).

4 Respondents observe that “[o]ther federal inmates throughout the country
5 have filed individual actions seeking release based upon COVID-19,” with “some”
6 obtaining release, and that Petitioner Wilson has filed a motion seeking
7 compassionate release. (Dkt. 31 at 18.) But Respondents do not explain the
8 relevance of these observations to a typicality inquiry. Nor could they. As the
9 district court in *Fraihat* explained, “the fact that some detainees have started down
10 one avenue [of separate actions] should not prevent [defendant] from exploring
11 more expeditious paths to relief. In addition, some of those individuals have been or
12 will be denied relief, and will still require safe conditions of confinement.” 2020
13 WL 1932570, at *28 (internal citation omitted).

14 3. Adequacy of Representation

15 Respondents contend that Petitioners will not be adequate class
16 representatives. (Dkt. 31 at 19-20.) In support of this argument, Respondents state
17 that “release is not possible for all inmates,” and that Petitioners do not “appear to
18 be eligible for release.” (*Id.* at 19.) On that basis alone, Respondents suggest that the
19 interests of Petitioners “are adverse to those putative class members who may be
20 released to home confinement.” (*Id.* at 19.) That is a peculiar argument. This is not a
21 zero-sum game. Petitioners (and their counsel, whom Respondents do not object to)
22 have every incentive to prosecute this case vigorously and to argue for, among other
23 things, a robust and expedited process for enlargement of custody; regardless of
24 whether Petitioners themselves are released, reduction of the prison population
25 allows for increased social distancing, fewer opportunities for transmission of
26 COVID-19, and improved access to prison resources and services.

27 Respondents’ next argument—that some putative class members may prefer
28 to remain in prison or may have “other avenues of release available to them”—also

1 is meritless. (*See* Dkt. 31 at 19-20.) “The fact that some members of the class may
2 be personally satisfied with the existing system and may prefer to leave the violation
3 of their rights unremedied is simply not dispositive of a determination under Rule
4 23(a).” *Wilder v. Bernstein*, 499 F. Supp. 980, 993 (S.D.N.Y. 1980); *see Morgan v.*
5 *United States Soccer Fed’n, Inc.*, No. 19-1717, 2019 WL 7166978, at *8 (C.D. Cal.
6 Nov. 8, 2019) (rejecting defendants’ argument that “the proposed class
7 representatives are inadequate because there might be a conflict between those
8 members of the putative class who prefer the . . . current compensation model and
9 those who prefer to adopt [a different] compensation model”) (citing *Wilder*).

10 And, as the Ninth Circuit has long held, “[m]ere speculation as to conflicts
11 that may develop at the remedy stage is insufficient to support denial of initial class
12 certification.” *Soc. Servs. Union, Local 535, Serv. Employees Int’l Union, AFL-CIO*
13 *v. Santa Clara Cty.*, 609 F.2d 944, 948 (9th Cir. 1979); *see also Cummings v.*
14 *Connell*, 316 F.3d 886, 896 (9th Cir. 2003) (“this circuit does not favor denial of
15 class certification on the basis of speculative conflicts”); *Blackie v. Barrack*, 524
16 F.2d 891, 909 (9th Cir. 1975) (“courts have generally declined to consider conflicts
17 . . . sufficient to defeat class action status at the outset unless the conflict is apparent,
18 imminent, and on an issue at the very heart of the suit”).

19 **B. The Proposed Class Meets the Requirements of Rule 23(b)(2).**

20 Respondents contend that the Proposed Class does not meet the requirements
21 of Rule 23(b)(2). Again, Respondents ignore controlling Ninth Circuit law and
22 grossly mischaracterize the relief sought by Petitioners. (Dkt. 31 at 20-21.) As the
23 Ninth Circuit explained in *Parsons*, the requirements of Rule 23(b)(2) “are
24 unquestionably satisfied when members of a putative class seek uniform injunctive
25 or declaratory relief from policies or practices that are generally applicable to the
26 class as a whole.” 754 F.3d at 688 (citing *Rodriguez v. Hayes*, 591 F.3d 1105, 1125
27 (9th Cir. 2010)). That is what Petitioners seek here.

28 Respondents continue their chorus of “different criminal histories” and

1 “different medical conditions.” (Dkt. 31 at 21.) *Parsons* again provides the response:
2 “Contrary to the defendants’ assertion that each inmate’s alleged injury is amenable
3 only to individualized remedy, every inmate in the proposed class is allegedly
4 suffering the same (or at least a similar) injury and that injury can be alleviated for
5 every class member by uniform changes in . . . [defendants’] policy and practice.”
6 754 F.3d at 689. The relief Petitioners seek here—improved conditions in the prison
7 and an expedited process to review eligibility for enlargement of custody—applies
8 to all putative class members.

9 It is true, of course, that not all putative class members ultimately will be
10 found eligible for release. But that is not relevant here, as the Ninth Circuit
11 explained in *Rodriguez*. There, the petitioner sought “a writ of habeas corpus on
12 behalf of himself and a class of aliens detained in the Central District of California
13 for more than six months without a bond hearing while engaged in immigration
14 proceedings.” 591 F.3d at 1111. The petitioner requested “injunctive and declaratory
15 relief providing individual bond hearings to all members of the class.” *Id.*
16 Respondents challenged certification under Rule 23(b)(2), noting that putative class
17 members were “detained pursuant to different statutes.” *Id.* at 1125. The Ninth
18 Circuit noted that this argument “miss[es] the point of Rule 23(b)(2).” *Id.* The Court
19 held that although “[t]he particular statutes controlling class members’ detention
20 may impact the viability of their individual claims for relief,” that did “not alter the
21 fact that relief from a single practice is requested by all class members.” *Id.*

22 Respondents do not try to distinguish (or even cite) *Parsons* or *Rodriguez*.
23 (Dkt. 31 at 20-21.) Instead, Respondents rely on two decisions from other circuits.
24 The first decision is inapposite because it did not involve Rule 23(b)(2); instead, it
25 focused entirely on Rule 23(b)(3), which is not relevant here. *See Wragg v. Ortiz*,
26 No. 20-5496, 2020 WL 2745247, at *29-30 (D.N.J. May 27, 2020). The second
27 decision is inapposite because it turned entirely on the fact that plaintiffs sought
28 money damages, which Petitioners do not seek here. *See Lemon v. Int’l Union of*

1 *Operating Engineers, Local No. 139, AFL-CIO*, 216 F.3d 577, 581 (7th Cir. 2000).⁴

2 **II. CONCLUSION**

3 For the foregoing reasons, Petitioners respectfully request that the Court
4 provisionally certify the Proposed Class.

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

8 DATED: June 3, 2020 Bird, Marella, Boxer, Wolpert, Nessim,
9 Drooks, Lincenberg & Rhow, P.C.

10 By: /s/ Naeun Rim
11 Naeun Rim
12 Attorneys for Plaintiff-Petitioners

13 DATED: June 3, 2020 Peter J. Eliasberg
14 Peter Bibring
15 ACLU Foundation of Southern California

16 By: /s/ Peter Bibring
17 Peter Bibring
18 Attorneys for Plaintiff-Petitioners

19 DATED: June 3, 2020 Donald Specter
20 Sara Norman
21 Prison Law Office

22 By: /s/ Donald Specter
23 Donald Specter
24 Attorneys for Plaintiff-Petitioners

25
26
27 ⁴ Respondents may have cited *Lemon* in error. The language in their opposition
28 that is attributed to *Lemon* does not in fact appear in that decision. (Dkt. 31 at 21.)