IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIMOTHY BROWN, MYLES HANNIGAN, and ANTHONY HALL, Petitioners, v. SEAN MARLER, Respondent.	No. 2:20-cv-01914

Respondent's Brief in Support of
Motion to Dismiss the Petition and Class Action Complaint

TABLE OF CONTENTS

I. Introduction

This effort by criminal defendants to seek release from prison through a civil action, and to direct the management of a prison, is inappropriate and impermissible for numerous legal reasons, which will be explored in depth. But first, at this moment of great national peril, both this Court and the public deserve to know and can be reassured that federal prison officials are taking all steps in their power to fulfill their duty both to protect the public and to preserve the health and safety of the inmates in their charge. So we begin with an overview of the extraordinary actions the Bureau of Prisons has taken in recent months. They bear no relation to the uninformed allegations of the petitioners' complaint.

The complaint begins with the assertion that the Federal Detention Center in Philadelphia "has been slow—dangerously slow—to adopt the basic life-saving precautions that have become familiar parts of life beyond its walls. As of this filing, conditions in the FDC remain appallingly hospitable to the spread of COVID-19." Complaint at 1. This is a wholly inaccurate statement. BOP has in fact taken exhaustive measures at the FDC to protect inmates and staff against COVID-19, with marked success to date. We appreciate that COVID-19 is an insidious infectious disease, and that it may enter the prison and indeed any facility at any time. But it is fair at this point, six weeks into the crisis, to pause to recognize and commend the work that BOP has done. As of this writing, there are 9,214 documented cases of COVID-19 in the City of Philadelphia, with, sadly, 365 deaths. As there are approximately 1.6 million residents of the city; that is an incidence rate of approximately 1 of every 173 residents. At the same time, the FDC has 1,017 inmates and 229 staff members, and not one of them has been diagnosed with COVID-19 as of this time. *See* Declaration of Sean Marler ("Marler

Decl.") ¶ 4. That cannot and did not happen by accident. It happened because of the rigorous and unprecedented steps that will be described in this brief.

BOP, through strenuous efforts, has achieved similar success elsewhere, in the face of enormous challenges. As of April 19, there were 495 known infections (and tragically, 22 inmate deaths), in a national inmate population of 154,000. Close to two-thirds of the 144 BOP institutions and residential reentry centers, like FDC Philadelphia, have yet to report a single case. All of this is the product of a sustained, all-hands-on-deck campaign to prevent disease in the most challenging time prison officials have faced in our lifetime.

Fortunately, the concerns expressed by this Court at the outset of the pandemic—that BOP might soon lose control of its institutions in relation to the disease, *see United States v. Rodriguez*, 2020 WL 1627331, at *8-10 (E.D. Pa. Apr. 1, 2020)—have not come to fruition. While there have been outbreaks at a number of BOP institutions, it is now apparent, additional weeks into the crisis, that BOP is succeeding at the moment in protecting most of its facilities; in rapidly responding to and suppressing outbreaks where they occur (as in Oakdale, Louisiana, where the first outbreak emerged but the situation has been stabilized for weeks); and in general maintaining both an incidence rate and growth rate well below that observed in the nation at large and particularly in hard-hit areas. It may be that well-run prisons, with the ability to take extraordinary measures and isolate from the outside world, provide a firmer barrier against this horrible disease.[1]

[1] In New York City, addressing the situation at MDC Brooklyn, Judge Loretta A. Preska made similar observations last week, stating:

To repeat, we are not Pollyannas; we know the situation can change. But if that happens, it will be despite the dedication of the tens of thousands of BOP employees who are fighting this battle. Based on the efforts BOP has made, and the clear results so far over a sustained time period, there is no basis whatsoever for the allegations in the petition, for the wholesale release of criminal offenders, or for relieving federal prison officials of their necessary liberty to make real-time decisions regarding prison management. Not surprisingly, these remedies are barred in this action as a matter of law, such that the petition should be dismissed.

> The Defendant has offered no evidence to suggest the MDC and the BOP more broadly are not taking seriously the pandemic or his own personal medical history. To the contrary, as set out in the Government's papers, the BOP has made significant efforts to respond, and these measures have provided quite successful so far. As of April 7, the MDC – where Rodriguez is housed – reported a total two inmates who tested positive for COVID-19. The MDC houses 1,734 total inmates. . . . That means that approximately 0.12% of MDC inmates have been confirmed to have COVID-19. By way of contrast, New York City had an estimated population of 8,398,748 as of July 2018. . . . As of today 76,876 cases of COVID-19 had been diagnosed in New York City. . . . That means that 0.91% of the New York City population has been diagnosed with COVID-19.
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> All of these steps belie any suggestion that the BOP is failing meaningfully to address the risks posed by COVID-19 or take seriously the threat the pandemic poses to current inmates. To the contrary, it shows that the BOP has taken the threat very seriously, and has mitigated it to an extraordinary degree.

United States v. Rodriguez, 2020 WL 1866040, at *3 (S.D.N.Y. Apr. 14, 2020).

Judge Preska's statement, and the information presented below in this brief, make clear the complete inaccuracy of the assertions that appear throughout the petition. *See, e.g.*, Pet. ¶ 49 ("The Bureau of Prisons (BOP) has failed in every respect to respond appropriately to the ongoing COVID-19 pandemic. The BOP failed to anticipate and prepare for the magnitude of the threat that COVID-19 poses to its own staff and the people it holds; it then failed to respond in any meaningful way to initial signs of uncontrolled outbreaks at several of its facilities across the country; and it has continued to fail to implement even the baseline measures that would assure the safety of its own staff, of Petitioners and their fellow class members and others incarcerated by the BOP, and of the communities into which staff and others travel on a daily basis.").

Chief Judge Smith's words in the compassionate release context apply with equal force here: "We do not mean to minimize the risks that COVID-19 poses in the federal prison system, particularly for inmates like Raia. But the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering BOP's statutory role, and its extensive and professional efforts to curtail the virus's spread." *United States v. Raia*, -- F.3d --, 2020 WL 1647922, at *2 (3d Cir. Apr. 2, 2020). The same is true of the petitioners' bid for release, and their assertion that this Court, and even a Special Master, should intervene in prison operations. No such measures are justified or allowed.

With respect to release, that matter is governed exclusively by criminal law. No inmate may obtain release from custody on the basis of a challenge brought under 28 U.S.C. § 2241 to prison conditions. Rather, petitioners Brown and Hall may challenge the pretrial detention orders under which they are held, under the Bail Reform Act. Hall, indeed, has done so, and in an order earlier today, Judge Beetlestone denied relief. As will be discussed, she rejected precisely the same Eighth Amendment argument on which his petition here is based. *See* Ex. B. Indeed, Hall is a convicted murderer with numerous felony drug convictions and at least two violations of parole, who has been convicted in this Court and faces a guideline range sentence of 360 to 960 months. Brown likely also will not succeed if he petitions the trial court. He faces a mandatory minimum sentence of 10 years' imprisonment if convicted, and he was a fugitive in a county case at the time of his arrest. There are obvious reasons these men are detained under the Bail Reform Act, notwithstanding the current health crisis. As for petitioner Hannigan, who is a sentenced prisoner, he may seek an administrative remedy of

transfer to home confinement, an action committed by statute exclusively to the authority of BOP; or he may ask first BOP and then his sentencing judge (Judge Kenney) for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). His prospects are not good, either. Hannigan is only two months into a 52-month sentence, and there are strong reasons, provided to this Court under seal, for his continued custody. The U.S. Attorney's Office stands prepared to promptly address the status of any FDC inmate, but it must be done under the requirements of criminal law.

As for the request for review of prison management, that may be sought only in a civil rights action, which would be subject to the Prison Litigation Reform Act, and demands exhaustion of administrative remedies that the plaintiffs have entirely bypassed.

For all of these reasons and the further reasons explained below, the petition should be dismissed.

II. Standard of Review

This motion to dismiss is made pursuant to rule 12(b)(1) of the Federal Rules of Civil Procedure. At issue in a Rule 12(b)(1) motion to dismiss is the trial court's jurisdiction, its very power to hear the case. *See Norman v. United States*, 1996 WL 377136, at *1 (E.D. Pa. July 3, 1996) (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884 (3d Cir. 1977)). Because the Court's jurisdiction is itself in dispute, "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Morris v. Gonzales*, 2007 WL 2740438, *2 (E.D. Pa. Sept. 19, 2007). Thus, the Court "'is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction.'" *Id.* (citing *Cestonaro v. United States*, 211 F.3d 749, 752 (3d Cir. 2000)). The petitioner bears the

burden of proving that jurisdiction does in fact exist. *See id*. (citing *Mortensen*, 549 F.2d at 891); *Kehr Packages Inc. v. Fidelcor Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991).

In the alternative, this motion is made pursuant to Rule 12(b)(6). Under Rule 12(b)(6), the Court must accept all factual allegations as true, construe the petition in the light most favorable to the petitioner, and determine whether, under any reasonable reading of the petition, the petitioner may be entitled to relief. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (citation omitted). A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556). "[L]abels and conclusions" are not enough, and a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (citation omitted).

III. Background: The BOP's Response to the COVID-19 Pandemic.

The Federal Bureau of Prisons ("BOP") has been monitoring and tracking the spread of COVID-19 since January 2020 when the first cases of the illness caused by the novel coronavirus appeared in the United States. Marler Decl. ¶ 16. Recognizing the threat that this virus could pose to its inmate population, the BOP organized its national pandemic response into a multiphase "Action Plan," implementing a variety of protocols in response to the rapidly shifting landscape of this pandemic across the United States. *Id*. ¶¶ 14-31. Among other things, the BOP has, on a nationwide basis: implemented screening requirements for inmates and staff; temporarily suspended social visits, legal visits, inmate transfers, official travel, and contractor access; updated its quarantine and

isolation procedures; and instituted a "modified operations" plan, which directs BOP facilities to adjust their daily operations in a manner that permits inmates to engage in physical distancing while in common areas, such as during mealtimes and recreation. *Id.*; *see also id.* ¶¶ 5-13.

The BOP's response, detailed below, has occurred over six distinct "phases" to date, which are set out in the attached declaration of FDC Warden Sean Marler. *See generally id.* ¶ 15-31. The BOP will continue to modify and adjust its response as circumstances change, and at the guidance and direction of health authorities.

1. Action Plan for COVID-19 – Phase One

In January 2020, the BOP began Phase One of its Action Plan for COVID-19.[2] Phase One activities included, among other things, seeking guidance from the BOP's Health Services Division regarding COVID-19 and its symptoms, where in the United States infections were occurring, and the best practices to mitigate its transmission. In addition, an agency task force was established to begin strategic planning for COVID-19 BOP-wide. This strategic planning included building on the BOP's existing procedures for pandemics, such as implementing its pre-approved Pandemic Influenza Plan. From

[2] *See* https://www.bop.gov/resources/news/20200313_covid-19.jsp. The BOP has explained that "[m]aintaining safety and security of BOP institutions is [the BOP's] highest priority." BOP, Updates to BOP COVID-19 Action Plan: Inmate Movement (Mar. 19, 2020), available at https://www.bop.gov/resources/news/20200319_covid19_update.jsp. Indeed, BOP has had a Pandemic Influenza Plan in place since 2012. *Id.*; BOP Health Services Division, Pandemic Influenza Plan-Module 1: Surveillance and Infection Control (Oct. 2012), available at https://www.bop.gov/resources/pdfs/pan_flu_module_1.pdf. That protocol is lengthy and detailed, establishing a framework requiring BOP facilities to begin preparations when there is first a "suspected human outbreak overseas." *Id.* at i. The plan addresses social distancing, hygienic and cleaning protocols, and the quarantining and treatment of symptomatic inmates. It guided BOP's initial response.

January 2020 through the present, the BOP has been coordinating its COVID-19 efforts with subject-matter experts both inside and outside of the agency, including implementing guidance and directives from the World Health Organization ("WHO"), the Centers for Disease Control and Prevention ("CDC"), the Office of Personnel Management ("OPM"), the Department of Justice ("DOJ"), and the Office of the Vice President.

2. Action Plan for COVID-19 – Phase Two

On March 13, 2020, the BOP implemented "Phase Two" of its Action Plan.[3] Phase Two put into place a number of restrictions across all BOP facilities over a 30-day period, to be reevaluated upon the conclusion of that time period. Specifically, the BOP suspended the following activities for a period of 30 days, with certain limited exceptions: social visits; legal visits; inmate facility transfers; official staff travel; staff training; contractor access; volunteer visits; and tours. To help ensure inmates maintained social ties, the BOP increased the telephone allotment to 500 minutes per month.

At that time, the FDC implemented procedures to allow necessary legal visitation and increased legal calls so that inmates could maintain contact with their counsel. The Legal Department is the point of contact for legal visitation. An attorney may contact Staff Attorney Alisha Gallagher, who will review the request to determine urgency and the need for an in-person visit. Warden Marler has the final authority to approve visits. The Unit Managers continue to review requests for legal calls and their staff provide the

[3] *See* https://www.bop.gov/resources/news/20200313_covid-19.jsp.

calls. There has been no change to the mail procedures and inmates continue to receive mail and can contact their attorneys via email and monitored phone line.

In addition, during Phase Two, inmates were subjected to new screening requirements. Specifically, all newly arriving BOP inmates were screened for COVID-19 symptoms and "exposure risk factors," including, for example, if the inmate had traveled from or through any high-risk COVID-19 locations (as determined by the CDC), or had close contact with anyone testing positive for COVID-19. Asymptomatic inmates with exposure risk factors were quarantined, and symptomatic inmates with exposure risk factors were isolated and evaluated for possible COVID-19 testing by local BOP medical providers.

Staff were also subjected to enhanced health screening in areas of "sustained community transmission," as determined by the CDC. Pennsylvania was designated a "sustained community transmission" state on March 19, 2020, and the FDC implemented this enhanced screening for staff and contractors at that time. The enhanced screening measures required all staff to self-report any symptoms consistent with COVID-19, as well as any known or suspected COVID-19 exposure, and further required all staff to have their temperature taken upon entry into any BOP facility.

Finally, in addition to the measures listed above, the BOP implemented national "modified operations" in order to maximize social distancing within BOP facilities. These modifications included staggered meal times and staggered recreation times, for example, in order to limit congregate gatherings. Additionally, the BOP established a set of quarantine and isolation procedures for known or potential cases of COVID-19.

3. Action Plan for COVID-19 – Phase Three

On March 18, 2020, the BOP implemented Phase Three of the COVID-19 Action Plan for BOP locations that perform administrative services (*i.e.*, non-prison locations), which followed DOJ, Office of Management and Budget, and OPM guidance for maximizing telework.[4] In this phase, individuals who had the ability to telework and whose job functions did not require them to be physically present were directed to begin teleworking. Because of the mission of the FDC, teleworking is not an option for its staff.

Additionally, as part of this phase, and in accordance with the Pandemic Influenza contingency plan, BOP inventoried all cleaning, sanitation, and medical supplies.[5]

4. Action Plan for COVID-19 – Phase Four

On March 26, 2020, the BOP implemented Phase Four of its Action Plan.[6] In Phase Four, the BOP revised its preventative measures for all institutions. Specifically, the agency updated its quarantine and isolation procedures to require all newly admitted inmates to the BOP, whether in areas of sustained community transmission or not, to be assessed using a screening tool and temperature check. This screening tool and temperature check applied to all new intakes, detainees, commitments, prisoners returned on writ from judicial proceedings, and parole violators, regardless of their method of arrival. Thus, all new arrivals to any BOP institution—even those who were

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[4] https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf.

[5] https://www.bop.gov/resources/news/pdfs/20200324_bop_press_release_covid19_update.pdf.

[6] https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp.

asymptomatic—were placed in quarantine for a minimum of 14 days or until cleared by medical staff. Symptomatic inmates were placed in isolation until they tested negative for COVID-19 or were cleared by medical staff as meeting CDC criteria for release from isolation.

At the FDC, an empty housing unit ("7 North") was opened as a quarantine unit. Guidance was provided to staff on the proper personal protective equipment to be utilized while on this housing unit and interacting with inmates. The unit is restricted to those staff necessary to provide the mission of the unit. Inmates on this unit are restricted to their cell except when escorted by a staff member for showers, phone calls, or video court proceedings. Inmates are monitored twice a day by health services staff for symptoms of COVID-19. After 14 days, if the inmate has not developed symptoms, he/she is then placed into the general population.

5. Action Plan for COVID-19 – Phase Five

On March 31, 2020, the BOP Director ordered the implementation of Phase 5 of its COVID-19 Action Plan, which took effect on April 1, 2020.[7] Specifically, the Director ordered the following steps to be taken:

1. For a 14-day period, inmates in every institution will be secured in their assigned cells/quarters to decrease the spread of the virus.

2. During this time, to the extent practicable, inmates should still have access to programs and services that are offered under normal operating procedures, such as mental health treatment and education.

3. In addition, the BOP is coordinating with the United States Marshals Service ("USMS") to significantly decrease incoming movement during this time.

4. After 14 days, this decision will be reevaluated and a decision made as to whether or not to return to modified operations.

[7] https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp

5. Limited group gathering will be afforded to the extent practical to facilitate commissary, laundry, showers, telephone, and Trust Fund Limited Computer System ("TRULINCS"[8]) access.

Phase Five was implemented at the FDC on April 1, 2020, and remains in effect. Thus, all inmates at the FDC are confined to their cells for the majority of each day. Inmates are permitted to leave their cells in small groups on a rotating basis at designated times in order to engage in activities such as showers, phones, and TRULINCS. For meals, inmates are released in small groups to retrieve their meals and then return to their cells.

This modification to the BOP's action plan is based on health concerns, not disruptive inmate behavior. Inmates may be outside their cells in these small groups for approximately an hour per day. During these time periods, inmates have been directed to maintain appropriate physical distancing.

On April 6, 2020, additional social distancing measures were implemented in all facilities. All staff members and inmates were issued surgical masks to be used in interaction with persons when social distancing was not possible. Masks were issued to staff members and inmates on April 6, 2020, and are reissued weekly.

6. Action Plan for COVID-19 – Phase Six

On April 13, 2020, the BOP Director ordered implementation of Phase 6 of its COVID-19 Action Plan.[9] Specifically, the Bureau continued its nationwide action as

[8] TRULINCS is the internal Bureau computer and electronic message platform that inmates use to communicate with staff in the institutions and individuals in the community. Through this platform, inmates receive updates and notices, and can read inmate bulletins posted on the system by Bureau staff.

[9] https://www.bop.gov/resources/news/pdfs/20200414_press_release_action_plan_6.pdf.

described in the Phase 5 Action Plan until May 18, 2020. Additionally, the suspension of visitation was extended until May 18, 2020. All staff training and official travel was suspended until May 31, 2020. All staff and inmates will continue to be issued face masks and strongly encouraged to wear an appropriate face covering when in public areas when social distancing cannot be achieved.

In addition to all of these measures, the independent Inspector General of the Department of Justice has been and will continue to engage in inspections of BOP facilities to assure compliance with necessary steps.

IV. Petitioners may not challenge their custody through a § 2241 action challenging prison conditions.

In their pleading, which is presented as a habeas claim under 28 U.S.C. § 2241, the petitioners seek two remedies: (1) the immediate release to home confinement of all persons vulnerable to adverse outcomes from COVID-19; and (2) intervention in prison management to compel the respondent "to mitigate the serious risk of illness, death, and harm from COVID-19 to those who remain confined at the FDC." Pet. at 39-40. Neither remedy may be achieved in this action as a matter of law. We begin with the first.

A. Detainees Brown and Hall may only seek release under the Bail Reform Act.

The absence of jurisdiction under § 2241 to achieve release of a detainee is indisputable: Under binding Third Circuit precedent, "a federal detainee's request for release pending trial can only be considered under the Bail Reform Act and not under a § 2241 petition for habeas relief." *Reese v. Warden Philadelphia FDC,* 904 F.3d 244, 245 (3d Cir. 2018) (affirming dismissal of § 2241 petition). Section 2241 confers authority on district courts to entertain applications for a writ of habeas corpus filed by prisoners claiming to be in custody in violation of the Constitution or laws or treaties of

the United States. *Id.* at 246. But, "even in cases where the habeas court has the authority to grant relief, it must consider whether this be a case in which that power ought to be exercised." *Id.* (quotations omitted).

"Courts have consistently refused to exercise their habeas authority in cases where federal prisoners have sought relief before standing trial." *Id.* Instead, "Courts have long stressed that defendants should pursue the remedies available within the criminal action." *Id.*

Here, the Bail Reform Act applies equally to Brown, a pretrial detainee, and Hall, a post-trial detainee awaiting sentencing. *See* 18 U.S.C. § 3141(a) and (b). Although the Third Circuit has never found such circumstances to be present, a showing of "delay, harassment, bad faith or other intentional activity" on the part of the state can potentially constitute an "exceptional circumstance" rendering habeas relief available to a pretrial detainee. *Id.* at 246 n.2. There is no such allegation here. And while the current COVID-19 pandemic is certainly extraordinary in its impact on society, it has not precluded the ability of detainees to invoke the procedures of the Bail Reform Act. Indeed, Hall has filed such a motion under the Bail Reform Act with Judge Beetlestone. *See* Doc. 982, No. 15-CR-00496-WB-9. Judge Beetlestone, who presided over Hall's two criminal trials, has great familiarity with Hall and his conduct and was best positioned to consider his request for release. The motion was filed, responded to, and denied in a thoughtful opinion, all within a matter of days. Indeed, the filing of this duplicative, procedurally improper habeas petition by all petitioners amounts to little more than improper judge-shopping.

The Bail Reform Act permits detention before trial if "the judicial officer finds 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." 18 U.S.C. § 3142(e)(1). The issue is laser-focused on the facts of the individual case, which is why the class action proposed here is so inconceivable under the law. The court must consider, among other factors, the nature and circumstances of the offense charged, the weight of the evidence against the person, and the history and characteristics of the person (including her "character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings"). 18 U.S.C. § 3142(f).

The standard is more stringent after conviction, and before sentencing, at which time the court may only release a person upon "clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community," § 3143(a)(1), and the release of some offenders is barred entirely unless the court also finds that "there is a substantial likelihood that a motion for acquittal or new trial will be granted; or . . . an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person," § 3142(a)(2), which are rare circumstances indeed.

The latter provision applies to petitioner Hall. On November 5, 2019, after a jury trial, he was convicted of conspiracy to distribute a mixture and substance containing phencyclidine, in violation of 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(A), and two counts of possession with intent to distribute phencyclidine, in violation of 21 U.S.C. § 841(a)(1). As the government explained to Judge Beetlestone, these crimes – controlled substance offenses for which a maximum term of imprisonment of ten years

or more is prescribed – carry a presumption of detention under § 3142(f)(1)(C) and (D) and therefore essentially require detention after conviction under § 3143(a)(2).

For good measure, Hall is a convicted murderer with numerous felony drug convictions and at least two violations of parole. He appears to have shot someone in his house during the course of the wiretap used in the investigation underlying his current criminal proceedings. (This conduct has not been charged, but the United States intends to present such testimony and evidence at Hall's sentencing hearing.) Moreover, the advisory guideline range in Hall's case is 360 to 960 months. He obviously presents both a risk of flight and a danger to the community. Hall sought release to home confinement on the ground that he is vulnerable to COVID-19 due to alleged renal failure and hypertension. The government opposed his motion for release for the reasons stated here, *see* Doc. 982, No. 15-CR-00496-WB-9, and earlier today, Judge Beetlestone denied it, *see* Ex. B. As she has presided over his case for four years, including two jury trials, she was uniquely well-suited to consider his request for relief.

As for petitioner Brown, he is awaiting trial before Judge Jones. Brown was indicted in March 2019 and charged with distribution of methamphetamine (two counts) and possession with intent to distribute methamphetamine, all in violation of 21 U.S.C. § 841(a)(1); and aiding and abetting, in violation of 18 U.S.C. § 2. At the time of his arrest, he had two prior federal convictions and was a fugitive from Lehigh County on charges of possession with intent to distribute a controlled substance. *See* Doc. 7, No. 19-cr-155. The United States therefore moved to detain him pending trial because he is both a danger to the community and a flight risk; Brown stipulated to pretrial detention and Judge Strawbridge ordered it. If convicted of all charges, he faces a mandatory minimum of 10 years' imprisonment and a maximum of life in prison. Without regard to

whether he presents a danger to the community or presents a flight risk, he now seeks release to home confinement based on alleged coronary artery disease, latent tuberculosis, asthma, obesity, and a history of drug addiction. He has not filed a motion under the Bail Reform Act for release with Judge Jones, who presides over Brown's criminal proceeding and is the judicial officer with the greatest familiarity with his case.

If Brown or any other detainee moves for release in light of COVID-19, the government will respond, taking all circumstances into account, and each assigned judge will rule. Judge DuBois' recent, thorough opinion denying one such motion, in *United States v. Stevens*, 2020 WL 1888968 (E.D. Pa. Apr. 16, 2020), is another illustration, like Hall's case, of the required approach and assessment. (There, the court denied release pending sentencing of an FDC inmate who was convicted of violent offenses, notwithstanding his possible vulnerability to COVID-19 as a result of his age and diabetic condition.)

The Attorney General has recently issued guidance to federal prosecutors concerning "Litigating Pre-Trial Detention Issues During the COVID-19 Pandemic." *See* Memorandum, at 1 (Apr. 6, 2020), attached as Exhibit A. That guidance makes clear that "the current COVID-19 pandemic requires that [prosecutors] ensure [they] are giving appropriate weight to the potential risks facing certain individuals from being remanded to . . . custody." *Id.* Thus, although the Department's "paramount obligation" is to "[p]rotect[ ] the public," prosecutors must also "consider the medical risks associated with individuals being remanded into . . . custody during the COVID-19 pandemic." *Id.* at 1-2. Prosecutors "should consider not seeking detention to the same degree [they] would under normal circumstances," and must weigh "the risk of flight and seriousness of the offense . . . against the defendant's vulnerability to COVID-19."

Id. at 2. Likewise, "these same considerations should govern [prosecutors'] litigation of motions filed by detained defendants seeking release in light of the pandemic." *Id.* Such a defendant's "risk from COVID-19 should be a significant factor in [each prosecutor's] analysis[.]" *Id.*

Heeding this guidance, this office has already responded, each time in a matter of days, to dozens of motions for release filed by FDC detainees on the basis of the threat of COVID-19, and will continue to do so. There is a plain available remedy for all such claims. This § 2241 action provides this Court with no jurisdiction to supplant it.

B. Hannigan may not challenge the conditions of his confinement under § 2241.

Petitioner Hannigan is differently situated from Hall and Brown in that he has been sentenced. In his situation, Third Circuit caselaw is equally clear that he may not challenge the conditions of confinement through a § 2241 action.

Hannigan wishes to change the terms of his sentence to home confinement in light of the pandemic, and the fact that he purportedly suffers from heart disease, diabetes, high blood pressure, high cholesterol, and sleep apnea.

However, "'a judgment of conviction that includes [a sentence of imprisonment] constitutes a final judgment' and may not be modified by a district court except in limited circumstances." *Dillon v. United States*, 560 U.S. 817, 825 (2010). As the Supreme Court has recognized, finality is an important attribute of criminal judgments, and one "essential to the operation of our criminal justice system." *Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality opinion). Accordingly, it is well established that once a district court has pronounced sentence and the sentence becomes final, the court has no inherent authority to reconsider or alter that sentence. Rather, it may do so only

pursuant to statutory authorization. *See, e.g.*, *United States v. Addonizio*, 442 U.S. 178, 189 & n.16 (1979). The Third Circuit has made emphatically clear that a court has jurisdiction to alter a sentence only as specifically permitted by statute. *United States v. Washington*, 549 F.3d 905, 917 (3d Cir. 2008).

Consistent with that principle of finality, 18 U.S.C. § 3582(c) provides that a court generally "may not modify a term of imprisonment once it has been imposed," except in three circumstances: (1) upon a motion for reduction in sentence under 18 U.S.C. § 3582(c)(1)(A); (2) "to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure," 18 U.S.C. § 3582(c)(1)(B); and (3) where the defendant was sentenced "based on" a retroactively lowered sentencing range, 18 U.S.C. § 3582(c)(2).

Hannigan's challenge to his conditions of confinement does not fall into any of these categories, nor may it be presented via a § 2241 petition. Such a petition is available only to challenge the execution of a sentence, for instance, whether BOP is faithfully applying the time period of incarceration decreed by the sentencing court. Thus, in *Cardona v. Bledsoe*, 681 F.3d 533, 537 (3d Cir. 2012), the Third Circuit affirmed the dismissal of a § 2241 petition challenging conditions of confinement for lack of subject matter jurisdiction.

As an initial matter, Hannigan's request to be released to home confinement is not a request for release from custody, for even while serving home confinement he would remain in BOP custody. *See, e.g.*, 18 U.S.C. § 3624(c) (defining "home confinement" as a form of prerelease custody). Instead, it is a request for a modification to the conditions of his confinement akin to placement in the Special Housing Unit or transfer to a different institution. *Cf. Bronson v. Demming*, 56 F. App'x 551, 553–54 (3d

Cir. 2002) (holding habeas relief unavailable to inmate seeking release from disciplinary segregation); *Schmura v. Unites States Bureau of Prisons*, 2018 WL 3873238 (D.N.J. August 15, 2018) (because challenge to custody classification does not affect fact or length of sentence, court lacks jurisdiction over § 2241 petition).

The petitioners erroneously rely on *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 241 (3d Cir. 2005), to contend that they may challenge under § 2241 detention conditions allegedly threatening their medical wellbeing. But *Cardona* clarifies that *Woodall*'s holding turned on the fact that, in that case, the challenged BOP conduct "conflicted with express statements in the applicable sentencing judgments." *Cardona*, 681 F.3d at 536. The Third Circuit declared: "In order to challenge the execution of his sentence under § 2241, Cardona would need to allege that BOP's conduct was somehow inconsistent with a command or recommendation in the sentencing judgment." *Cardona*, 681 F.3d at 537.

Here, no "command or recommendation in the sentencing judgment" requires that Hannigan be released to home confinement. *Id.*; *see also Share v. Krueger*, 553 F. App'x 207, 209 (3d Cir. 2014) (following *Cardona* and holding that challenge to denial of request for release to home confinement was not cognizable under § 2241 because it did not conflict with sentencing judgment). To the contrary, as recently as February 14, 2020, over objection from his experienced defense counsel, Judge Kenney ordered Hannigan immediately remanded to BOP custody. *See* Doc. 26, No. 19-cr-373.

Hannigan may only seek a different designation as explicitly permitted by law. First, as noted above, a court may revise a sentence under 18 U.S.C. § 3582(c)(1)(A)(i), known as the compassionate release statute. Under that statute, the sentencing judge may reduce a sentence on the basis of "extraordinary and compelling circumstances,"

most often severe medical conditions. As in the case of the bail decisions discussed above, these determinations are necessarily made on an individual basis. The court is required to assess, in part, all 18 U.S.C. § 3553(a) sentencing factors, and assure that "the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)." U.S.S.G. § 1B1.13.[10] The request for compassionate release must be presented first to the warden, and then may be presented in court, either after exhaustion of administrative remedies, or the passage of 30 days, whichever occurs first. As of the date of this filing, the FDC's warden has received approximately 52 requests based on COVID-19, including one from petitioner Hannigan.

Separately, Hannigan may also ask the Bureau of Prisons to transfer him to home confinement. That is an administrative decision, and again, this Court has no jurisdiction to address it. Section 3621(b) makes clear that BOP will designate the place of imprisonment, and "[n]otwithstanding any other provision of law, a designation of a place of imprisonment under this subsection is not reviewable by any court." For this

[10] The need for an individual assessment is reflected in this Court's recent opinion in *Rodriguez*, 2020 WL 1627331, where the Court determined that compassionate release was warranted based on these considerations: "First, he suffers from underlying health conditions that render him especially vulnerable to COVID-19. Second, prison is a particularly dangerous place for Mr. Rodriguez at this moment. Third, he has served almost all of his sentence and has shown commendable rehabilitation while in prison. None of these reasons *alone* is extraordinary and compelling. Taken together, however, they constitute reasons for reducing his sentence . . . ." *Id.* at *7 (emphasis in original). That statement defeats the petitioners' proposition that anyone who is vulnerable to the disease must be released to his home. So does the Third Circuit's decision in *Raia*, 2020 WL 1647922, at *2 ("the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release").

reason as well, the petitioners' civil action seeking release to home confinement must be dismissed.[11]

For the information of the Court, BOP is actively considering transfers to home confinement as part of its remedial efforts to combat COVID-19. *See generally* Marler Decl. ¶¶ 32-48. Ordinarily, such an action is limited to the last six months or 10% of a sentence, whichever is less. 18 U.S.C. § 3624(c). (There is also authority under 34 U.S.C. § 60541(g) to transfer specified elderly and terminally ill offenders to home confinement for longer periods.) In response to the COVID-19 pandemic, however, the Attorney General, under the authority of the coronavirus relief bill (the "CARES Act") waived the limitations of § 3624(c). *See* Memorandum (Mar. 26, 2020, Marler Decl. Ex. 3 ("March 26 Memo"); Memorandum (Apr. 3, 2020), Marler Decl. Ex. 4 ("April 3 Memo"). BOP is now actively considering inmates for transfer, focusing on nonviolent offenders who present low risk for recidivism. The particular factors are described in the Marler Declaration. *See id*. ¶¶ 34-35. As of April 19, under the guidance of these memoranda, BOP has transferred 1,252 inmates to home confinement. *Id*. ¶ 44.

Hannigan has made a request to BOP for consideration, but it will likely be denied. He was just sentenced in February by Judge Kenney to serve a 52-month

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[11] Recent cases confirming this rule include: *United States v. Read-Forbes*, 2020 WL 1888856 (D. Kan. Apr. 16, 2020); *United States v. McCann*, 2020 WL 1901089 (E.D. Ky. Apr. 17, 2020); *Miller v. United States*, 2020 U.S. Dist. LEXIS 62421, at *4-5 (E.D. Mich. Apr. 9, 2020); *United States v. Carden*, 2020 WL 1873951 (D. Md. Apr. 15, 2020); *United States v. Mabe*, 2020 U.S. Dist. LEXIS 66269, at *1 (E.D. Tenn. Apr. 15, 2020) ("the CARES Act [provision expanding home confinement authority] places decision making authority solely within the discretion of the Attorney General and the Director of the Bureau of Prisons. . . . This Court therefore does not have power to grant relief under Section 12003 of the CARES Act."); *United States v. Skaff*, 2020 WL 1666469 (S.D.W. Va. Apr. 3, 2020).

sentence for tax-related offenses that resulted in a multi-million dollar tax loss to more than 35 different victims. *See* Doc. 24, No. 19-cr-373. After serving approximately two months of his 52-month sentence (and before being designated to a particular facility to serve his sentence), he filed a request for compassionate release and home confinement with the BOP. Hannigan has a history of convictions for driving under the influence, and has not lived at his family residence for some time, and for various reasons should not be confined there. Further details—which were provided under seal to Judge Kenney in connection with Hannigan's sentencing—will be provided in a separate under-seal filing in this case. The matter is committed to BOP's discretion at this time, and ultimately to Judge Kenney, if a compassionate release motion is filed. Hannigan, like every sentenced prisoner, may not obtain this relief under § 2241 on the basis of possible exposure to COVID-19.

C. No "outside the box" process can avoid the individualized review mechanisms described above.

During a telephone conference on April 17, 2020, the Court directed AUSA Zauzmer to confer with petitioners' counsel on any "outside the box" means of addressing the concerns of all FDC detainees. During the conference with petitioners' counsel that followed that afternoon, Zauzmer stated the government's position, consistent with the analysis above, as follows:

Every inmate has a right at any time to seek judicial review of detention status. That review must take place consistent with the Bail Reform Act, which sets forth the clear standards that have to be evaluated in each case when deciding detention issues, focusing on the particular facts of each case and the risk of danger and/or flight. The law does not simply allow us or the court to say, "everyone with a heart condition gets

released," nor would that make any sense as a matter of public policy anyway, given the nature of the crimes that many of these offenders have allegedly committed.

If every FDC detainee seeks judicial review at this time—not just those who have proactively sought relief on their own behalf already—our office will never pose an impediment, and we can act as quickly as necessary. We have 100 AUSAs at our disposal, and we can instantly set up a system for AUSA assessment and supervisory review in which we can state our position in each case in 48 hours. We imagine that the court as well has sufficient resources, as there are 32 judges in the district among whom the work would be spread.[12]

The defense bar may face problems of coordination. First, with the exception of a handful of detainees who may have chosen to proceed pro se, by definition every detainee is already represented by counsel. So either all of those counsel have to be prepared to make their pitches to us and to the court; or the petitioners have to come up with a way to replace those attorneys with a single group for present purposes, with the consent of all of those lawyers and defendants.

The U.S. Attorney's Office stands by to process every case without delay, within days, though we question whether a systematic effort to review every detainee would be productive, in contrast to the current situation in which each counsel evaluates whether a challenge to detention is warranted. The FDC is different from an ordinary federal institution, in that the vast majority of inmates are pretrial or presentencing detainees. This means that, in virtually every instance regarding those offenders, a judicial officer

[12] Of the 1,017 inmates at the FDC, approximately 600 are pretrial/presentencing detainees, with approximately ¾ of those from this district (others are from the Districts of New Jersey and Delaware). The remaining inmates include sentenced inmates and designees to other institutions.

has made a finding that the defendant presents a risk of danger to the community and/or presents a risk of flight. Accordingly, the number of nonviolent, white-collar offenders is the FDC is much less than the ordinary proportion seen in a federal prison. Rather, the inmates at the FDC are by and large particularly dangerous offenders who present a significant risk of harm to the community. And that is unquestionably why, as dozens of these detainees have sought release in light of the COVID-19 pandemic, almost none has obtained judicial relief. With the exception of Judge Strawbridge's decision in the case of Gongda Xue (which is an unusual case, currently under appeal to the district court, that focused on the risk of flight of an otherwise non-violent foreign national), no judge has approved release in one of these cases.

Notably, FDC legal staff participate in weekly telephone calls with the United States District Court for the Eastern District of Pennsylvania and other stakeholders, including the federal public defender's office. Unlike the petitioners here, the public defender has not advocated for release of large numbers of inmates. Instead, we understand that the office has individually reviewed its clients' circumstances and is filing the necessary individualized motions. We were not surprised to be informed that the federal defender currently estimates seeking release in fewer than 40 cases. *See* Marler Decl. ¶ 53.

The petitioners' suggestion during recent conferences, that this Court appoint a Special Master to essentially mediate the detention status of all FDC detainees, is baseless. That kind of review of over 500 cases would drastically stall, not expedite, the process, and it would also distract government officials from what at present is an overwhelming amount of work related to the current crisis. Further, a Special Master has no ability to replace the judicial judgment that is required by law. There is one

expeditious way to obtain further review of detention decisions, if defendants seek that, and that is through the set procedure of the Bail Reform Act. And in any event, that is all the law permits; this Court does not have jurisdiction through a civil matter to intervene.

V. Petitioners' challenge to prison conditions may not proceed absent presentation of an appropriate claim and exhaustion of administrative remedies.

Turning to the petitioners' request for a remedy pertinent to management of the prison, as explained above, this action, premised only on § 2241, is impermissible, as that statute, under *Cardona*, does not permit a challenge to conditions of confinement, only to the execution of a sentence. Such a claim must be brought in a civil rights action, and there, the Prison Litigation Reform Act, 42 U.S.C. § 1997e, comes into play. The petitioners have made no effort either to present a civil rights claim or comply with the PLRA, and the petition must be dismissed.

A. Courts are ill-equipped to administer prisons and Congress has substantially limited their authority in this arena.

A first principle of prison litigation is, of course, that "federal courts must take cognizance of the valid constitutional claims of prison inmates." *Turner v. Safley*, 482 U.S. 78, 84 (1987). But the second principle is that federal courts must recognize that they are "ill equipped" to deal with problems of prison administration. *Id.* (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989)). "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been

committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint." *Id.* at 84-85.

Consistent with the recognition that prison administration is not the federal judiciary's job, Congress enacted the PLRA "to oust the federal judiciary from day-to-day prison management." *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 655 (1st Cir. 1997); *see also Benjamin v. Jacobson*, 172 F.3d 144, 182 (2d Cir. 1999) (en banc) (Calabresi, J., concurring) ("The in banc majority argues at length that Congress meant to get the federal courts out of the business of running jails, and it cites any number of congressional statements to that effect. I agree."); *accord Imprisoned Citizens Union v. Shapp*, 11 F. Supp. 2d 586, 603 (E.D. Pa. 1998) ("The legislative history thus more than adequately demonstrates at least one legitimate goal: the desire to limit federal court oversight of state prisons."), *aff'd sub nom Imprisoned Citizens Union v. Ridge*, 169 F.3d 178 (3d Cir. 1999). "Congress intended the PLRA to revive the hands-off doctrine," which was "a rule of judicial quiescence derived from federalism and separation of powers concerns." *Gilmore v. California*, 220 F.3d 987, 991, 997 (9th Cir. 2000). Among other things, the PLRA thus "restrict[s] the equity jurisdiction of federal courts," *id.* at 999, and, "[b]y its terms . . . restricts the circumstances in which a court may enter an order 'that has the purpose or effect of reducing or limiting the prison population,'" *Brown v. Plata*, 563 U.S. 493, 511 (2011) (quoting 18 U.S.C. § 3626(g)(4)). Moreover, the PLRA requires any injunctive relief relating to prison conditions to be "narrowly drawn, extend no further than necessary to correct the harm

the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." *Id.* § 3626(a)(2).[13]

B. Petitioners have not exhausted the available administrative remedies.

Even if petitioners' challenge to their conditions of confinement could be considered by this Court, the petitioners have not exhausted the available administrative remedies, and for that independent reason, their petition must be dismissed. *Nellson v. Barnhart*, 2020 WL 1890670, at *5 (D. Colo. Apr. 16, 2020) ("The Court finds that plaintiff has failed to exhaust his administrative remedies before seeking judicial relief. In reaching this conclusion, the Court does not overlook the risks of COVID-19 at [the BOP facility at issue] or in the prison system generally. But the Court may not alter the mandatory requirements of the PLRA for COVID-19 or any other special circumstance.") (citing *Ross v. Blake*, 136 S. Ct. 1850, 1856-57 (2016)).

The PLRA requires an inmate filing a prison-conditions lawsuit to have exhausted all available administrative remedies. 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility

[13] This limitation on the scope of injunctive relief is consistent with the judiciary's limited scope of review of prison regulations. As described in *Turner*, courts evaluating prison regulations that allegedly burden fundamental rights ask only if the regulation is "reasonably related to legitimate penological interests." 482 U.S. at 89. "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand." *See Ridge*, 169 F.3d at 188 ("[T]he PLRA amounts to little more than a codification of already-existing rules governing judicial interference with prisons.").

until such administrative remedies as are available are exhausted."). The Supreme Court has made clear that the exhaustion requirement applies to all suits regarding prison life, *Porter v. Nussle*, 534 U.S. 516, 532 (2002), including when a prisoner seeks injunctive relief, *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (in cases seeking injunctive relief to address "current" prison conditions, inmates are not "free to bypass adequate internal prison procedures and bring their health and safety concerns directly to court"). And, it is explicitly mandatory. *See Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016); *see also Bock*, 549 U.S. at 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA.").[14]

The statute provides no exception for special circumstances. *See Ross*, 136 S. Ct. at 1856-57 (2016) (holding that the exhaustion requirement "suggests no limits on an inmate's obligation to exhaust—irrespective of any 'special circumstances'" and the "mandatory language means a court may not excuse a failure to exhaust, even to take such circumstances into account"). In fact, the only exception to the exhaustion requirement is when the administrative remedy process is "unavailable." *Id.* at 1858. In *Ross*, the Supreme Court outlined just three situations in which a prisoner can show that the administrative remedy process is "unavailable": (1) "when (despite what regulations

[14] As described above, the history of the PLRA demonstrates that it intended to allow the BOP wide latitude to manage and supervise prisons. The Supreme Court has noted that "the history of the PLRA underscores the mandatory nature of its exhaustion regime." *Ross*, 136 S. Ct. at 1857. "In enacting the PLRA, Congress thus substituted an 'invigorated' exhaustion provision. . . . [T]he new § 1997e(a) removed the conditions that administrative remedies be 'plain, speedy, and effective' and that they satisfy minimum standards. Still more, the PLRA prevented a court from deciding that exhaustion would be unjust or inappropriate in a given case. As described earlier, all inmates must now exhaust all available remedies: Exhaustion is no longer left to the discretion of the district court." *Id.* at 1858 (internal citations and quotations omitted).

or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates," such as in the hypothetical situation in which "a prison handbook directs inmates to submit their grievances to a particular administrative office—but in practice that office disclaims the capacity to consider those petitions"; (2) when "some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it"; and (3) "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 1859-60.

Petitioners have not alleged that an administrative process is not available. Instead, they assert only the sort of "special circumstances" that *Ross* foreclosed. In doing so, they ignore entirely that the BOP regulations provide for an expedited response to administrative requests "determined to be of an emergency nature which threatens the inmate's immediate health or welfare." 28 C.F.R. § 542.18. In these circumstances, the warden "shall respond not later than the third calendar day after filing." *Id.* Petitioners do not allege that they attempted to use the procedure, and in fact they did not. Nor do they allege that, in the words of *Ross*, the administrative procedure is a dead end.

Additionally, the petitioners ignore that the Supreme Court defines "available" relief through the administrative process as *some*—not all—relief that the inmate seeks. Total and immediate relief is not the standard for exhaustion; "the possibility of some relief" is. *Ross*, 136 S. Ct. at 1859. Petitioners assert that they cannot obtain home confinement through the administrative grievance process. Pet. ¶ 18.[15] But they do not

[15] In fact, Petitioners could seek a change in their placement through the procedures

assert that the process could not potentially provide any relevant relief whatsoever. *See generally id.* ¶¶ 16-19. Their claims are thus barred because of their failure to administratively exhaust them. *See generally* Declaration of Dawn Nechupas (confirming that none of the petitioners has filed any administrative remedy request or appeal).

The three Third Circuit cases on which the petitioners rely all predate the Supreme Court's analysis of the mandatory nature of the exhaustion requirement in *Ross*, in 2016. *See Cerverizzo v. Yost*, 380 F. App'x 115 (3d Cir. 2010) (not precedential) (petitioner had administratively challenged BOP policy and its application to him, but appealed only to the warden); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005) (petitioner challenged the *validity* of BOP guidelines, not their application); *Lyons v. U.S. Marshals*, 840 F.2d 202 (3d Cir. 1988) (finding genuine issue of material fact as to whether administrative process was actually available).

The two district court cases on which the petitioners rely are not even PLRA cases. *Carling v. Peters*, 2000 WL 1022959 (E.D. Pa. July 10, 2000), addresses exhaustion in the context of determining the validity of a military enlistment contract. And *United States v. Colvin*, 2020 WL 1613943, at *2 (D. Conn. Apr. 2, 2020), analyzes exhaustion under the compassionate release statute, 18 U.S.C. § 3582(c)(1)(A), not the PLRA. The Connecticut district court's waiver of the exhaustion requirement is directly contrary to the Third Circuit's recent holding in *Raia* that, even during the COVID-19

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outlined earlier. *See United States v. Morales-Morales*, 985 F. Supp. 229, 231 (D.P.R. 1997) (rejecting request for home confinement on basis that the place of confinement is within the BOP's discretion, and the petitioner had not administratively requested it).

pandemic, prisoners must permit the BOP 30 days to evaluate compassionate-release requests.

In short, this Court "may not engraft an unwritten 'special circumstances' exception onto the PLRA's exhaustion requirement." *Ross*, 136 S. Ct. at 1862. Thus, even if the petitioners had presented a civil rights claim, it must be dismissed for failure to exhaust administrative remedies. And for the same reason, discovery may not proceed.

VI. Petitioners cannot establish any violation of their Fifth or Eighth Amendment rights.

For purposes of completeness, we explain that the petitioners fail to state a claim even absent the failure to exhaust administrative remedies.

A. The constitutional violations alleged require deliberate indifference.

Petitioners allege that their continued incarceration at the FDC violates their Fifth and Eighth Amendment rights because of "conditions where it is virtually impossible to take steps to prevent transmission of an infectious disease that may prove deadly because of Petitioners' vulnerable conditions." Pet. ¶ 98.

The Eighth Amendment protects inmates convicted of crimes from the infliction of "cruel and unusual punishments." U.S. Const. Amend. VIII. The Supreme Court's cases "have held that a prison official violates the Eighth Amendment only when two requirements are met." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). "First, the deprivation alleged must be, objectively, 'sufficiently serious.'" *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)). Accordingly, "a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities." *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). A petitioner alleging a failure to prevent

harm "must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Id.*

Second, "'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.'" *Id.* (quoting *Wilson*, 501 U.S. at 297). Accordingly, for there to be an Eighth Amendment violation, "a prison official must have a 'sufficiently culpable state of mind.'" *Id.* (quoting *Wilson*, 501 U.S. at 297). As the Supreme Court explained: "In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety." *Id.* (quoting *Wilson*, 501 U.S. at 302-03). That is, the inmate must show that the prison official "knows of *and disregards* an excessive risk to inmate health or safety." *Id.* at 837 (emphasis added).

Similarly, for pretrial detainees, the Fifth Amendment prohibits deliberate indifference to health or safety. *Harvey v. Chertoff*, 263 F. App'x 188, 191 (3d Cir. 2008) (not precedential). The Third Circuit "previously . . . found it constitutionally adequate to analyze pretrial detainees' claims of inadequate medical care under the familiar deliberate indifference standard." *Id.* (citing *Natale v. Camden County Correctional Facility*, 318 F.3d 575, 581-82 (3d Cir. 2003)). Under the Fifth Amendment, as under the Eighth Amendment, "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Id.* (quoting *Farmer*, 511 U.S. at 844).[16]

Petitioners here cannot establish a constitutional violation.

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[16] Petitioners themselves view any distinction between the Fifth and Eighth Amendment standards as "immaterial." Pet. ¶ 100.

B. Petitioners are not subject to an unreasonable risk of harm at the FDC.

Petitioners cannot establish that they have suffered a "sufficiently serious" deprivation. *See Wilson*, 501 U.S. at 297. To be sure, the spread of COVID-19 within the United States puts everyone at some degree of risk of getting sick, but the BOP has taken exhaustive steps to mitigate those risks throughout its inmate population, including with respect to the inmate population at the FDC. Those measures, which are outlined in detail in the Marler Declaration, include strict limitations on inmate movement within the FDC, suspension of most visits to the FDC, enhanced screening of staff and inmates, and the implementation of the BOP's "modified operations" plan. *See* Marler Decl. ¶¶ 5-14. And these measures have, thus far, been highly successful at preventing the transmission of COVID-19 into the FDC. To date, there are no confirmed positive cases, inmate or staff, of COVID-19. No inmate has required testing and no inmate appears to be exhibiting symptoms. *Id.* ¶ 4.

One of the petitioners' primary arguments is that inmates cannot effectively "socially distance" within the FDC. *E.g.* Pet. ¶¶ 106-08, 128. What they fail to appreciate is that this situation is also true of many unincarcerated members of the community who live with roommates or family members or who work in public-facing essential occupations. *See Hines v. Youssef*, 2015 WL 164215, at *4 (E.D. Cal. Jan. 13, 2015) ("Unless there is something about a prisoner's conditions of confinement that raises the risk of exposure substantially above the risk experienced by the surrounding communities, it cannot be reasoned that the prisoner is involuntarily exposed to a risk the society would not tolerate."). As described in the Marler Declaration, movement in and out of the FDC, and movement within the facility, has been minimized as much as

possible. Marler Decl. ¶¶ 5-7, 11-13. Each cell has been provided with cleaning supplies sufficient to kill the virus. *Id.* ¶ 14. And all inmates and staff have been provided masks to wear when social distancing is not possible." *Id.* Accordingly, the petitioners are not subject to an unreasonable risk of harm.[17]

C. The BOP has not shown deliberate indifference and has taken appropriate measures to protect the health of inmates at the FDC and the public.

The petitioners likewise cannot satisfy the subjective element of the constitutional analysis, which requires them to prove that the official "knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. The test is subjective, meaning "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he [or she] must also draw the inference." *Id.* In order to support a claim for deliberate indifference to *future* health problems, the condition of confinement complained about must be "sure or very likely to cause serious illness." *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (regarding exposure to environmental tobacco smoke).[18]

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[17] Petitioners assert that the Second Circuit "acknowledged the 'grave and enduring' risk posed by COVID-19 in the correctional context in *Fed. Defenders of New York, Inc. v. Federal Bureau of Prisons*, 954 F.3d 118, 135 (2d Cir. 2020). Pet. ¶ 104. They fail to explain, however, that in that case, the Federal Defenders sued the BOP and Metropolitan Detention Center-Brooklyn warden *not* because of prison conditions allegedly affecting the inmates' health or safety, but because of the BOP's cancellation of inmate-attorney visits in 2019, long before the COVID-19 pandemic. *Id.* at 122-23. In *dicta* encouraging the parties to engage in "cooperative institutional discussions," the Second Circuit focused not on the risk of COVID-19 to inmates' health and safety, but on the "impact" of the situation on all stakeholders, including inmates, defense counsel, prosecutors, and the BOP. *Id.* at 135.

[18] In *Helling*, 509 U.S. at 33, the plaintiff inmate was in fact exposed to tobacco smoke from another inmate. And, in *Plummer v. United States*, 580 F.2d 72 (3rd Cir. 1978), also cited by the petitioners, Pet. ¶ 103, the inmate was in fact exposed to the

What BOP has done in recent months is the very opposite of deliberate indifference—from profoundly changing prison operations to transferring over a thousand inmates to home confinement.

Accordingly, the petitioners cannot establish that the conditions at the FDC, in light of the precautions being taken, are "sure or very likely" to lead to serious or fatal COVID-19 cases or that the facility has been deliberately indifferent to the risk of exposure. The district court for the Northern District of Illinois reached the same conclusion, even though in that case, the virus had already spread among inmates and staff at the facilities at issue. *Money v. Pritzker*, -- F. Supp. 3d --, 2020 WL 1820660, at *3, 18 (N.D. Ill. Apr. 10, 2020). The court found that prison officials came forward "with a lengthy list of the actions they have taken to protect [the facility's] inmates," and recognized that prison officials there (like BOP staff here) "are trying, very hard, to protect inmates against the virus and to treat those who have contracted it." *Id.* at 18. There was no evidence to "support any suggestion that [prison officials] have turned a kind of blind eye and deaf ear to a known problem that would indicate 'total unconcern' for the inmates' welfare." *Id.* (quoting *Rosario v. Brown*, 670 F.3d 816, 821 (7th Cir. 2012)). Accordingly, the actions of prison officials were not deliberately indifferent but, instead, "easily pass constitutional muster." *Id.* This Court should find likewise, and should dismiss the petition.[19]

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active tuberculosis of a fellow inmate. At the FDC, to the contrary, the BOP is unaware of any inmate or staff with COVID-19, and no inmate is exhibiting symptoms. Marler Decl. ¶ 4.

[19] While the petitioners may ultimately disagree whether the measures taken by the BOP are sufficient to protect and treat inmate health and safety (while also carrying out its mission to effectuate detention and criminal sentences), a difference of medical

Earlier today, Judge Beetlestone, acting on a motion filed by petitioner Hall in his criminal case for release to home confinement, rejected precisely the same constitutional claim he attempts to advance here. She wrote, in part:

> As of the filing of Hall's motion, there have been no reported cases of COVID-19 in the FDC, see https://www.bop.gov/coronavirus/, and the Bureau of Prisons ("BOP") has instituted strict containment measures, such as mandatory quarantine, regular health checks, limits on inmate movement, and limitations on entry by outside individuals, see https://www.bop.gov/resources/news/20200313_covid-19.jsp. In light of these measures, and in light of the fact that the City of Philadelphia to which Hall requests he be released has over 9,214 confirmed cases of COVID-19 and 365 deaths of COVID patients and rising as of the writing of this opinion, *see* https://www.phila.gov/programs/coronavirus-disease-2019-covid-19/, Hall has not shown that the BOP's efforts have been deliberately indifferent, or even that he "has a higher risk of contracting COVID-19 in custody than when released," *United States v. McDonald*, 2020 WL 1659937, at *3 (D. Nev. Apr. 3, 2020). Hall has also not shown that "the [FDC] would be unable to render treatment to [him] if he were to become infected," *United States v. Michael Calvert*, 2020 WL 1847754, at *5 (D. Kan. Apr. 13, 2020), or that he has been otherwise "denied the minimal civilized measures of life's necessities," [*Fuentes v. Wagner*, 206 F.3d 335, 344 (3d Cir. 2000)]. Consequently, Hall has not demonstrated that his continued detention at the FDC constitutes cruel and unusual punishment in violation of the Eighth Amendment. *See* [*United States v.*] *Price*, 2020 WL

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judgment cannot support deliberate indifference. *See Scott v. Benson*, 742 F.3d 335, 340 (8th Cir. 2014) (holding that a "mere difference of opinion over matters of expert medical judgment or a course of medical treatment fail[s] to rise to the level of a constitutional violation"). Further, public health officials are entitled to heightened deference when exercising science-based public health judgment during a public health emergency. *See, e.g., United States ex rel. Siegel v. Shinnick*, 219 F. Supp. 789, 791 (E.D.N.Y. 1963) (explaining in a habeas matter that "the judgment required is that of a public health officer and not of a lawyer used to insisting on positive evidence to support action; their task is to measure risk to the public . . . ."); *Hickox v. Christie*, 205 F. Supp. 3d 579, 594 (D.N.J. 2016) ("To permit these constitutional claims to go forward . . . would be a judicial second-guessing of the discretionary judgments of public health officials acting within the scope of their (and not my) expertise.").

> 1694347, at *2 n.3 [(D. Md. Apr. 7, 2020)] (denying sentence reduction pursuant to the Eighth Amendment where there was "no reason . . . to believe that the facility where [defendant was] incarcerated [was] not taking reasonable precautions to prevent spread within the facility . . . nor . . . that [defendant] would not be provided with appropriate medical care if she were unfortunate enough to join the hundreds of thousands of people who have been inflicted with this virus"); *United States v. Gray*, 2020 WL 1554392 (D. Md. Apr. 1, 2020) (same); *Calvert*, 2020 WL 1847754, at *5 (rejecting Eighth Amendment for temporary pretrial release where there were "no known cases of COVID-19 at [defendant's facility]; and there was no evidence that the facility would be unable to render treatment to [defendant] if he were to become infected"); *McDonald*, 2020 WL 1659937, at *3 (rejecting Eighth Amendment for temporary pretrial release where there was "no evidence that [prison was] unable to provide sufficient medical treatment to Defendant in light of him contracting COVID-19 in custody . . . [or] that Defendant has a higher risk of contracting COVID-19 in custody than when released").

Ex. B. The petitioners' complaint fails for exactly the same reasons. (Further, Judge Beetlestone's ruling at least stands as res judicata barring a claim here of Hall.)

VII. Even if Petitioners could establish constitutional violations, the PLRA bars the broad relief that Petitioners seek.

As described in more detail above, *see supra* Part V.A, Congress enacted the PLRA "to oust the federal judiciary from day-to-day prison management." *Inmates of Suffolk Cty. Jail*, 129 F.3d at 655. Consistent with its goal of taking the federal judiciary out of the business of managing prisons, the PLRA: (a) precludes any single district court judge from ordering the release of prisoners because of prison conditions (and sharply limits the ability of three-judge panels to do so); and (b) narrowly circumscribes the permissible scope of other injunctive relief aimed at addressing unconstitutional prison conditions. These limitations also bar Petitioners' requested relief, as explained below.

A. The PLRA precludes a single district court judge from ordering release of a prisoner based on prison conditions.

As explained earlier, this action may not proceed under § 2241 to gain release of an inmate. And that remedy is not available in a civil rights action, either, in most circumstances. As also explained above, petitioners have made no effort to present a civil rights action. But even if they had, the Court could not grant the relief that petitioners seek.

The PLRA places strict limits on courts' ability to order the release of inmates "in any civil action in Federal court with respect to prison conditions" and precludes a single district judge from doing so. 18 U.S.C. § 3626(a)(3)(B).

Under the PLRA, a "prisoner release order"—which "includes 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)—may "be entered only by a three-judge court," *id.* § 3626(a)(3)(B), and then only if certain conditions have been met. *See also Bowers v. City of Philadelphia*, 2006 WL 2601604, at *7 (E.D. Pa. Sept. 8, 2006) (construing "prisoner release order" broadly to encompass an order addressing prison overcrowding). Among other requirements, "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." *Id.* § 3626(a)(3)(A).

Section 3626 thus "restrict[s] the equity jurisdiction of federal courts," *Gilmore*, 220 F.3d at 999, and, "[b]y its terms . . . restricts the circumstances in which a court may enter an order 'that has the purpose or effect of reducing or limiting the prison population.'" *Plata*, 563 U.S. at 511 (quoting 18 U.S.C. § 3626(g)(4)). The PLRA's "requirements ensure that the 'last remedy' of a population limit is not imposed 'as a first step.'" *Id.* at 514 (quoting *Inmates of Occoquan v. Barry*, 844 F.2d 828, 843 (D.C. Cir. 1988)). "The release of prisoners in large numbers . . . is a matter of undoubted, grave concern." *Id.* at 501.

The primary relief sought by the petitioners here is precisely the mass release of individuals held at the FDC as a remedy for allegedly unconstitutional conditions at the FDC. *See* Pet. at 1 ("This class action raises an urgent challenge to the confinement of more than one thousand pretrial detainees and sentenced inmates . . . at the Federal Detention Center of Philadelphia . . . ."); *id.* ¶¶ 124-34 (claim alleging violations of Fifth and Eighth Amendments based on alleged conditions at the FDC); *id.* at 39-40 (requesting "immediate release of vulnerable persons to home confinement"). Petitioners' lawsuit is thus undisputedly a "civil action with respect to prison conditions" governed by the PLRA. 18 U.S.C. § 3626(g)(2). Accordingly, the PLRA precludes the Court from releasing inmates as requested by the petitioners. 18 U.S.C. § 3626(a)(3)(B).

The district court for the Northern District of Illinois recently reached this conclusion in a similar case seeking mass release of state inmates. In *Money*, 2020 WL 1820660, at *2, "[p]laintiffs argue[d] that the prison setting makes them (and other purported class members) especially vulnerable to COVID-19, that the state government's responses to the danger are insufficient or not fast enough or both, and that the only way to solve the problem is moving prisoners out of prisons." The court

concluded that the relief sought—even if reframed as a "process" for an "expedited, individualized review and relocation" of inmates, rather than as the ordering of mass release—was indeed a "prisoner release order" subject to the PLRA. *Id.* at *13-14. The court therefore held that the PLRA prevented it from entering the relief requested by the petitioners for the release of inmates. *Id.* at *13-14. The same is true here, and the PLRA prohibits this Court from ordering the release of FDC detainees, whether by ordering directly, through a process of its own, or through a Special Master's process.

B. More broadly, the PLRA precludes district courts from ordering broad injunctive relief or supervision.

In addition to sharply limiting judges' ability to order the release of prisoners, the PLRA established a comprehensive set of standards to govern prospective relief in prison conditions cases. Section 3626(a)(1) provides that prospective relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1). Thus, a district court faced with a prison conditions suit may not grant or approve prospective relief "unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Id.*

Petitioners' broad request that the Court order the FDC "to mitigate the serious risk of illness, death, and harm from COVID-19 to those who remain confined at the FDC"—with or without the aid of a Special Master—is neither narrowly drawn nor "the least intrusive means" to ensuring that the BOP is making every effort to protect detainees from the COVID-19 risk. As courts in this district have already concluded, BOP's precautionary measures to mitigate the spread of COVID-19 at the FDC justify the

continued detention of individuals there, including those with medical conditions that might make them more susceptible to the dangers posed by COVID-19.

As part of their requested prospective relief, petitioners specifically ask the Court to appoint a Special Master to"[c]hair a Coronavirus Release Committee to evaluate Vulnerable Persons and make recommendations for ameliorative action for other persons at the FDC," Pet. at 40. This is not permitted under the PLRA.

The PLRA limits appointments of special masters to two specific contexts: to "conduct hearings on the record and prepare proposed findings of fact," and, "during the remedial phase of the action," to assist if the "remedial phase will be sufficiently complex to warrant the appointment." 18 U.S.C. § 3626(f)(1)(A)-(B); *see also Webb v. Goord*, 340 F.3d 105, 111 (2d Cir. 2003) (affirming rejection of request to appoint a special master in prisoner litigation alleging violations of Eighth Amendment as inappropriate under 18 U.S.C. § 3626(a)(1)(A)). Appointing a Special Master to chair petitioners' requested "release committee" is outside what the PLRA allows.

Moreover, appointing a Special Master to chair a "release committee" would usurp the role of each detainee's detention or sentencing judge, and completely offend the criminal law provisions described earlier, such as the Bail Reform Act. If the processes provided for release from detention and reductions of sentences had been followed, that judge (and not this Court) would have received a motion under the Bail Reform Act or a motion for compassionate release from an FDC inmate. *See Prudential Ins. Co. of Am. v. U.S. Gypsum Co.*, 991 F.2d 1080, 1086 (3d Cir. 1993) (analyzing high standard for appointment of special master under "exceptional condition" prong of Fed. R. Civ. P. 53 and noting that "[a] district court has no discretion to delegate its

adjudicatory responsibility in favor of a decision maker who has not been appointed by the President and confirmed by the Senate.").

Petitioners' broad requests for injunctive relief and a Special Master are inconsistent with the PLRA and must be dismissed.

VIII. The Court should strike petitioners' class allegations.

In addition to seeking their own release, and some vague review of prison operations, petitioners seek to represent a class "consisting of all current and future pretrial detainees, presentenced detainees, and sentenced inmates in custody at the FDC during the course of the COVID-19 pandemic." Pet. ¶ 115. They request immediate release to home confinement for themselves and an amorphous subset of the putative class: "all others confined at the FDC whom Respondent has identified as medically vulnerable by virtue of their underlying health conditions or age." *Id.* at 39 ¶ A.

When it is clear from the pleading itself that the requirements for maintaining a class action cannot be met, a defendant may move to strike class allegations before a motion for class certification is filed. *See, e.g., Zarichny v. Complete Payment Recovery Servs., Inc.*, 80 F. Supp. 3d 610, 624 (E.D. Pa. 2015). For a class to be certified under Federal Rule of Civil Procedure 23, a plaintiff must show that the proposed class satisfies all four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. Here, there is no commonality or typicality because petitioners' proposed class would combine pretrial, post-conviction, and post-sentencing inmates with different charges, convicted crimes, imposed sentences, remaining sentences, disciplinary histories, ages, medical histories, availabilities of homes outside of prison, likelihoods of violation or recidivism, and dangers to the

community. Moreover, class members likely have different means to provide for themselves upon release and different access to medical care upon release.

In short, petitioners' putative class does not account for any of the myriad factors that are left to the discretion of both judicial officers and the BOP in making determinations that are central to a reasoned decision of whether a particular detainee or inmate should or should not be released to home confinement. *See Walmart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (to satisfy Rule 23(a)(2) each class member's claim must depend upon a common contention "of such a nature that it is capable of classwide resolution—which means that the 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").

The petitioners' unique circumstances illustrate this point. Hall is a convicted murderer with multiple felony convictions, facing a Sentencing Guidelines range of 30 years to life in prison. He is a clear danger to the community and a flight risk. Answering whether it violates the Constitution to continue to detain him, in light of risks from COVID-19, does not answer the same question for differently situated detainees. Indeed, absent class members might well be prejudiced if their claims were to succeed or fail based on Hall's circumstances. Likewise, Brown's detention raises special considerations. Among other things, Brown was a fugitive at the time of his arrest on federal charges and therefore has a demonstrated history of flight from justice. And, finally, Hannigan raises unique concerns because he was sentenced to 52 months in prison only two months ago, has not yet been designated to an institution, and there are other grave reasons, discussed separately under seal, why he should not be placed in home confinement.

Petitioners cannot show adequacy of representation because they demand a dramatic remedy that would have a profound effect on members of the class without considering the impact on the class members. Petitioners purport to request an immediate order of home confinement for a significant number of detainees. Some detainees, if released, would be homeless and without access to food, shelter, or medical care in the midst of a grave pandemic that is having a substantial impact on the nation. Petitioners' failure to consider or account for such concerns in the immediate and sweeping relief that they seek demonstrates that they are not fit to represent the members of their proposed class.

IX. No institution-wide or agency-wide discovery is appropriate here.

The government has already provided to petitioners' counsel the BOP medical records of all three petitioners, Hannigan's presentence investigation report, and other documents relating to Hannigan's circumstances.[20] In addition, the BOP's website, which petitioners evidently disregarded in crafting their petition, is remarkably detailed and transparent regarding its efforts to respond to the COVID-19 pandemic. *See* https://www.bop.gov/coronavirus/. The website addresses many of petitioners' questions and concerns, without further burdening agency staff in the midst of their full-time efforts to protect the health of BOP inmates and staff.

With respect to other discovery, the government awaits petitioners' submission in order to evaluate their requests. However, in light of the numerous and profound inadequacies in the petitioners' substantive and class allegations, described at length

[20] We also have advised petitioners that BOP does not possess a list of FDC inmates with special vulnerability to COVID-19, as petitioners had requested. Further, any disclosure of medical information regarding other inmates raises significant privacy issues.

above, the government is highly skeptical that any further discovery would be appropriate and will take appropriate action if presented with improper discovery requests. *See Bracy v. Gramley*, 520 U.S. 899, 904 (1997) ("A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course."). The BOP is currently consumed with its response to the COVID-19 pandemic. Making arrangements for a judicial visit to or inspection of the FDC, the deposition of the FDC warden or any other BOP official, or other burdensome discovery, would not benefit the FDC inmates and staff, and may unnecessarily put them (or others) at risk, all in pursuit of claims that are clearly barred by law.

X. Conclusion

The Court should dismiss petitioners' complaint in its entirety for lack of subject matter jurisdiction under 28 U.S.C. § 2241. Petitioners, on behalf of themselves only, can raise their requests for release to the BOP or the appropriate trial or sentencing judge for individualized determinations. Further, a petitioner may if he chooses present a civil rights action, but only after exhausting administrative remedies and complying in all other respects with the PLRA and any other applicable law.

Respectfully submitted,

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