UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

OSCAR SANCHEZ, MARCUS WHITE, TESMOND MCDONALD, MARCELO PEREZ, ROGER MORRISON, KEITH BAKER, PAUL WRIGHT, TERRY MCNICKELS, AND JOSE MUNOZ*; ON THEIR OWN AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS*; *Petitioners/Plaintiffs*, v. DALLAS COUNTY SHERIFF MARIAN BROWN, *IN HER OFFICIAL CAPACITY*; DALLAS COUNTY, TEXAS, *Respondent/Defendant*.	§ § § § § § § § § § § § § § § §	Case No. 3:20-cv-00832

STATE INTERVENORS' (1) MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6); (2) OPPOSITION TO PLAINTIFFS'/PETITIONERS' MOTION FOR A TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND WRIT OF HABEAS CORPUS; AND (3) OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

The State of Texas, Governor of Texas, and Attorney General of Texas ("State Intervenors") move to dismiss Plaintiffs'/Petitioners' ("Plaintiffs") Petition for Writ of Habeas Corpus and Class Action Complaint for Injunctive and Declaratory Relief ("Complaint") (ECF 1) under Fed. R. Civ. P. 12(b)(6) due to Plaintiffs' failure to exhaust their available remedies.

In the alternative, the State Intervenors oppose (1) Plaintiffs' Motion for a Temporary Restraining Order, Preliminary Injunction, and Writ of Habeas Corpus (ECF 2-4), and (2) Plaintiffs' Motion for Class Certification (ECF 17-18). Specifically, State Intervenors oppose all portions of these motions pertaining to the mass release of prisoners from Dallas County Jail.

INTRODUCTION

Plaintiffs' three claims—all brought under 42 U.S.C. § 1983 and 28 U.S.C. § 2241 (the writ of habeas corpus portion of their claims)—revolve around their argument that the conditions in Dallas County Jail violate the U.S. Constitution. The State Intervenors' combined motion to dismiss and oppositions to Plaintiffs' requests for emergency injunctive relief and class certification is limited to Plaintiffs' attempt to depopulate Dallas County Jail via a mass release of prisoners. It is hoped that the Defendants, who are presumptively more knowledgeable about the innerworkings of their facilities, will write separately to respond to the merits of Plaintiffs' action. But, as shown below, the Court need not reach the merits as Plaintiffs' suit is rife with errors and other insurmountable procedural problems.

First, Plaintiffs' § 1983-based request for a prisoner release order is subject to the Prison Litigation Reform Act ("PLRA")'s restrictions. But Plaintiffs did not follow

the PLRA's mandatory procedure for obtaining such relief. Nor has a three-judge court been convened to hear this issue, which is the only court with authority to enter such a prisoner release order under the PLRA.

Second, Plaintiffs must exhaust their available remedies before filing their § 1983 and habeas claims in federal court. Yet Plaintiffs made no meaningful attempt to bring their claims through the Dallas County Jail's grievance procedures. Nor have Plaintiffs attempted to file their claims in Texas state court. Plaintiffs' claims should be dismissed as they failed to exhaust their available remedies, which is a mandatory prerequisite to this suit.

Third, the sole function of a habeas petition is to grant release from imprisonment or custody. Yet Plaintiffs' action, at its core, challenges the allegedly unlawful conditions at Dallas County Jail due to COVID-19. Binding precedent holds that an inmate cannot challenge his or her conditions of confinement via a habeas petition.

Fourth, Plaintiffs' request for class relief in the form of a mass prisoner release inherently hinges on individualized determinations about which prisoners should be released and on what conditions release is appropriate. A person-by-person assessment would be necessary to avoid unleashing thousands of dangerous prisoners—many of whom, according to Plaintiffs, were likely recently exposed to COVID-19—upon Texas' law-abiding citizens. These individualized issues overwhelm any common questions of law or fact and make this action particularly ill-suited to class-wide resolution.

Fifth, three recent federal COVID-19 prisoner cases, *Money v. J.B. Pritzker*, *Socal-Micha v. Longoria*, and *Coleman v. Newsom*, confirm the State Intervenors' position and highlight the fatal flaws in Plaintiffs' action. The Illinois district court's decision in *Money v. J.B. Pritzker* is particularly apt as the court analyzed effectively the exact same action presented here—a joint § 1983 civil complaint and a habeas petition seeking class certification and a mass prisoner release due to allegedly unconstitutional conditions in Illinois prisons brought upon by COVID-19. The Illinois court thoroughly rejected the lawsuit as both procedurally and substantively improper. The same conclusion is warranted here.

Finally, Plaintiffs' request that the Court release all criminals from the jail—including murders, rapists, and gang members—during a time of public crisis endangers public safety. Thus, this request is not in the public interest.

PROCEDURAL BACKGROUND

On April 13, 2020, the State Intervenors filed a motion to intervene in this action on the grounds that this suit impacts the State's interests in, among other things, protecting its citizens from a largescale release of prisoners and protecting the public from the spread of COVID-19.[1] During the next day's telephone conference, the Court authorized the State Intervenors to file response papers by the April 15th deadline previously set for the Defendants,[2] despite the fact that the State Intervenors' motion to intervene would likely still be pending at that time.

[1] *See* ECF 26–27.
[2] ECF 14.

ARGUMENT

I. Plaintiffs § 1983 Claims Should be Dismissed as they are Subject to the PLRA's Restrictions and as Plaintiffs did Not Follow the PLRA's Required Procedure for Obtaining a Prisoner Release Order.

The PLRA significantly limits the issuance of preliminary and permanent injunctive relief for "civil action[s] with respect to prison conditions" like this one.[3] The PLRA states that any award of preliminary or prospective relief must: (1) be narrowly drawn; (2) extend no further than necessary to correct the violation of the Federal right; and (3) be the least intrusive means necessary to correct the violation of the Federal right.[4] Further, before awarding such relief, the court must "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief."[5]

The PLRA also restricts a court's ability to issue a prisoner release order[6] and specifies that the following procedure must be met before such an order is entered:

- *Step #1:* The presiding federal judge must: (1) issue an order for "less intrusive relief"; (2) give the defendant a "reasonable amount of time to comply with the . . . order[]"; and (3) find that this order "failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order."[7]

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[3] *See* 18 U.S.C. § 3626; *id.* at § 3626(g)(2) (defining "civil action with respect to prison conditions" to mean "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison"); *see also Nelson* v. *Campbell*, 541 U.S. 637, 650 (2004).

[4] 18 U.S.C. § 3626(a)(1)–(a)(2).

[5] *Id.*

[6] The PLRA broadly defines a "prisoner release order" to cover "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.*at § 3626(g)(4).

[7] *Id.* at § 3626(a)(3)(A).

- *Step #2:* Once step #1 is met, either the party requesting relief or the presiding judge can request the convening of a three-judge court to determine whether a prisoner release order should be entered.[8]
- *Step #3:* The three-judge court then determines whether a prisoner release order should be entered, based on clear and convincing evidence that "(1) crowding is the primary cause of the violation of a Federal right[,] and (2) no other relief will remedy the violation of the Federal right."[9]

In a federal civil action with respect to prison conditions, only a three-judge court can issue a prisoner release order.[10] As the Supreme Court explained in *Brown* v. *Plata*, "[t]he authority to order release of prisoners . . . is a power reserved to a three-judge district court, not a single-judge district court.[11]

Plaintiffs' motion for injunctive relief seeks the "release [of] all members of a subclass of medically vulnerable individuals" and the "release [of] additional Class Members . . . as needed to ensure that remaining persons incarcerated in the Dallas County Jail are under conditions consistent with CDC and public health guidance to prevent the spread of COVID-19."[12] But, only a three-judge court can award such relief under the PLRA's clear language and binding Supreme Court precedent. Thus, Plaintiffs' request for a mass prisoner release should be denied.

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[8] *Id.* at § 3626(a)(3)(C)–(D).
[9] *Id.*at § 3626(a)(3)(E).
[10] *Id.* at § 3626(a)(3)(B).
[11] 563 U.S. 493, 500 (2011) (citing 18 U.S.C. § 3626(a)); *see also id.* at 511 ("By its terms, the PLRA restricts the circumstances in which a court may enter an order 'that has the purpose or effect of reducing or limiting the prison population.'") (quoting 18 U.S.C. § 3626(g)(4)).
[12] ECF 2, 1–2.

II. Plaintiffs Failed to Exhaust Their Available Remedies As Required By the PLRA and 28 U.S.C. § 2241.

A. Plaintiffs were Required to Exhaust Available Remedies Before Filing Their § 1983 Claims.

Under the PLRA, "no action shall be brought with respect to prison conditions under section 1983 . . . by a prisoner confined in any jail . . . until such administrative remedies as are available are exhausted."[13] "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."[14] Exhaustion is a mandatory prerequisite to filing suit.[15]

The Fifth Circuit requires inmates to fully exhaust the applicable prison grievance procedures before filing a suit in federal court.[16] Courts have no discretion to excuse an inmate's failure to properly exhaust the prison grievance process, even to take "special circumstances" into account.[17]

The Dallas County Jail's Inmate Handbook sets out the grievance procedure applicable to Plaintiffs' claims.[18] Per the Handbook, Inmates have various methods

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[13] 42 U.S.C. § 1997e(a); *Jones v. Bock*, 549 U.S. 199, 202 (2007); *Johnson* v. *Johnson*, 385 F.3d 503, 515 (5th Cir. 2004).
[14] *Porter* v. *Nussle*, 534 U.S. 516, 532 (2002).
[15] *Booth* v. *Churner*, 532 U.S. 731, 739 (2001).
[16] *Gonzalez* v. *Seal*, 702 F.3d 785, 788 (5th Cir. 2012) ("It is irrelevant whether exhaustion is achieved during the federal proceeding. Pre-filing exhaustion is mandatory, and the case must be dismissed if available administrative remedies were not exhausted."); *Dillon* v. *Rogers*, 596 F.3d 260, 268 (5th Cir. 2010) (finding that mere "substantial compliance" with administrative procedures is insufficient exhaustion); *see also Johnson*, 385 F.3d at 515; *Wright* v. *Hollingsworth*, 260 F.3d 357, 358–59 (5th Cir 2001).
[17] *Ross* v. *Blake*, 136 S. Ct. 1850, 1856–57 (2016); *Gonzalez*, 702 F.3d at 788.
[18] Ex. 1 at 12-14. Information about how to submit a grievance can also be found at multiple electronic kiosks located throughout the prison and on channel 3 of Inmate TV. *Id.* at 12.

of submitting a grievance.[19] Once submitted, the Inmate Grievance Board reviews the grievance and provides a status response to the inmate.[20] The Board has 15 days to submit its initial status response and 60 days to submit a final response.[21] An inmate who has not received a timely response from the Board can submit a written request for the response.[22] The Handbook specifies that all emergency grievances "will be handled immediately."[23]

An inmate who disagrees with the Board's response may appeal.[24] The first level of appeal is to the Quality Assurance Commander.[25] The Commander has 15 days to respond.[26] If this does not occur, the inmate can request a response.[27]

If the inmate disagrees with the Commander's response, the inmate can file a second appeal, this time to the Assistant Chief Deputy for the Special Services Bureau.[28] The Assistant Chief Deputy has 30 days to render a decision, which is final.[29] It is only at this point that the grievance process has been fully exhausted.[30] As the Handbook explicitly states:

> **IF YOU DO NOT RECEIVE A RESPONSE TO YOUR GRIEVANCE, FIRST LEVEL APPEAL, AND/OR SECOND LEVEL APPEAL WITHIN THE TIME LIMITS SET FORTH ABOVE, YOU MUST PROCEED TO THE NEXT STEP OF THE GRIEVANCE**

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[19] *Id.* at 12 (noting that a prisoner can submit a grievance: (1) via the jail visitation kiosks located throughout every facility; (2) through a written grievance form provided by jail staff; or (3) by any other written means).
[20] *Id.* at 13.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 13–14.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 14.
[28] *Id.*
[29] *Id.*
[30] *See id.* at 12–14.

PROCESS IN ORDER TO FULLY EXHAUST YOUR ADMINISTRATIVE REMEDIES.[31]

Here, Plaintiffs' declarations confirm that they failed to fully exhaust administrative remedies prior to filing this suit.[32] Plaintiffs Morrison, Baker, Wright, Munoz, and McNickles made no attempt to go through the Dallas County Jail's grievance procedures.[33] And while Plaintiffs Sanchez, White, MacDonald, and Perez possibly began the grievance process, they filed suit before the process concluded and present no evidence suggesting otherwise.[34] Thus, none of the Plaintiffs have shown that they exhausted their administrative remedies as the PLRA requires.[35] This is fatal to their § 1983 claims.[36] And this result should not shock Plaintiffs' counsel from the ACLU whose own PLRA practice guide warns "[i]f you file a lawsuit in federal court before taking your complaints through every step of your prison's grievance procedure, it will almost certainly be dismissed."[37]

B. Plaintiffs were Required to Exhaust Available Remedies Before Filing Their Habeas Petition.

Plaintiffs bring their habeas petition under 28 U.S.C. § 2241.[38] It is well settled that petitioners must exhaust their administrative and state court remedies before filing a federal habeas petition based upon this provision.[39] The exhaustion

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[31] *Id.* at 14.
[32] *See* ECF 1.2–1.11.
[33] *See* ECF 1.6–1.10.
[34] *See* ECF 1.1–1.5.
[35] *See Gonzalez*, 702 F.3d at 788; *Dillon*, 596 F.3d at 268; *Wright*, 260 F.3d at 358–59.
[36] *See id.*
[37] American Civil Liberties Union, *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, *available at* https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf) (last visited Apr. 14, 2020).
[38] ECF 1, ¶ 10.
[39] *Montano* v. *Tex.*, 867 F.3d 540, 542 (5th Cir. 2017) ("[I]it has long been settled that a section 2241 petitioner must exhaust available state court remedies before a federal court will entertain a

requirement is vital to "preserv[ing] the respective roles of state and federal governments and avoid[ing] unnecessary collisions between sovereign powers."[40]

Exceptions to the exhaustion rule apply where (1) "the available administrative remedies either are unavailable or wholly inappropriate to the relief sought" or (2) "the attempt to exhaust such remedies would itself be a patently futile course of action."[41] A petitioner bears the burden of demonstrating that an exception to the exhaustion rule is warranted.[42]

As explained above, Plaintiffs failed to exhaust their administrative remedies.[43] Nor have they attempted to argue that an exception to the exhaustion rule for administrative remedies applies. This is fatal to their habeas petition.[44]

Further, Plaintiffs made no discernable effort to bring their claims in state court.[45] Plaintiffs' sole argument for an exception is that, in their minds, state courts are just too slow to afford a "sufficiently swift resolution of their constitutional

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challenge to state detention."); *Gallegos-Hernandez* v. *United States*, 688 F.3d 190, 194 (5th Cir. 2012) ("We have held that a federal prisoner filing a § 2241 petition must first pursue all available administrative remedies."); *Fuller* v. *Rich*, 11 F.3d 61, 62 (5th Cir. 1994) ("A prisoner. . . is required to exhaust his administrative remedies before seeking habeas relief in federal court under 28 U.S.C. § 2241."); *Dickerson* v. *State of La.*, 816 F.2d 220, 225 (5th Cir. 1987) ("[A]lthough section 2241 establishes jurisdiction in the federal courts to consider pre-trial habeas corpus petitions, federal courts should abstain from the exercise of that jurisdiction if the issues raised in the petition may be resolved either by trial on the merits in the state court or by other state procedures available to the petitioner.").

[40] *Montano*, 867 F.3d at 546; *cf. Picard* v. *Connor*, 404 U.S. 270, 275-76 (1971).

[41] *Hinojosa* v. *Horn*, 896 F.3d 305, 314 (5th Cir. 2018) (per curiam) (quoting *Fuller*, 11 F.3d at 62).

[42] *Fuller,* 11 F.3d at 62 (citing *Gardner* v. *Sch. Bd. Caddo Par.*, 958 F.2d 108, 112 (5th Cir. 1992)).

[43] *Supra*, Part II.A.

[44] *See Gallegos-Hernandez*, 688 F.3d at 194; *Fuller*, 11 F.3d at 62.

[45] For just one example, Art. 11.25 of the Texas Code of Criminal Procedure provides that when a judge, upon investigation, is satisfied "that a person in legal custody is afflicted with a disease which will render a removal necessary for the preservation of life, an order may be made for the removal of the prisoner to some other place where his health will not be likely to suffer; or he may be admitted to bail when it appears that any species of confinement will endanger his life." Plaintiffs have not availed themselves of this, or the many other, state court remedies or procedures at their disposal.

claims."[46] Plaintiffs' sole "evidence" on this point is a declaration from one of Plaintiffs' attorneys in which she states that, prior to COVID-19, a habeas petition may take months to run through the Texas state courts and that some Texas courts are "slowing their operations in response to the COVID-19 pandemic."[47] Yet a state court's adjudication of habeas petition *pre-COVID-19* is not comparable to their adjudication of habeas petitions *post-COVID-19*. The State Intervenors' counsels' experience has been that both federal and state courts have been willing to move heaven and earth to quickly resolve COVID-19 cases such as this one (often at the expense of counsels' sleep schedules).[48]

Plaintiffs were required to exhaust all available remedies before filing a habeas petition in federal court. They failed to do so, and they present no meaningful evidence that an exception to the exhaustion requirement applies. This failure warrants the dismissal of Plaintiffs' § 2241 claims.[49]

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[46] ECF 1, ¶ 86.

[47] ECF 1.11, ¶¶ 3–4.

[48] For example, the rapid pace of *Texas Criminal Defense Lawyers Assoc., et al.* v. *Greg Abbott, et al.*—a Texas state court case in which both the undersigned and Mr. Segura of the ACLU are counsel—clearly displays that state judges are hearing COVID-19 related issues quickly. On April 8, 2020, the plaintiffs filed a petition and motion for retraining order challenging Governor's Abbott's Executive Order GA 13 limiting the release of violent felons during the pandemic. On April 10, 2020, the trial court held an emergency hearing on the motion. Several hours later, the trial court enjoined GA 13. *The very next day*, after an application from the State defendants, the Texas Supreme Court stayed the trial court's restraining order. Another example is *Ex part Luis Arroyo* which was filed on April 14, 2020. In that case, a pre-trial inmate filed a writ of habeas corpus directly before the Court of Criminal Appeals challenging his pretrial release as it related to GA 13 and COVID-19. The Court of Criminal Appeals accepted the application that same day. These examples just highlight that Texas courts are open for business and moving quickly to resolve all claims, especially those related to COVID-19. The State Intervenors can provide exhibits to support this point upon request.

[49] *See, e.g.*, *Barrientos* v. *Dallas Cty. Dist. Attorney's Office*, No. 3:12-CV-4753-O-BN, 2013 WL 1499382, at *1 (N.D. Tex. Jan. 18, 2013) ("A federal habeas petition that contains unexhausted claims must be dismissed in its entirety), *report and recommendation adopted,* No. 3:12-CV-4753-O-BN, 2013 WL 1501623 (N.D. Tex. Apr. 12, 2013) (citing *Thomas* v. *Collins*, 919 F.2d 333, 334 (5th Cir. 1990).

III. Plaintiffs Cannot Challenge the Conditions of Their Confinement Through a Habeas Petition.

In their Petition, Plaintiffs argue that current conditions in the Harris County Jail violate the Eighth and Fourteenth Amendments.[50] But that kind of claim is not cognizable in habeas.[51] The Fifth Circuit held long ago that the appropriate remedy for a condition-of-confinement violation "would be to enjoin continuance of any practices or require correction of any conditions."[52] It "would not . . . entitle[] [a prisoner] to release from prison."[53] Plaintiffs therefore may not work around the PLRA defects described above by dressing up their civil claims (under 42 U.S.C. § 1983) in the garb of habeas corpus relief (under 28 U.S.C. § 2241).[54]

Civil actions and habeas corpus review are two entirely distinct proceedings.[55] A habeas corpus proceeding is neither civil[56] nor criminal.[57] "Essentially, the [habeas] proceeding is unique."[58] A habeas petitioner may not file a habeas petition in a criminal case; he likewise may not file a habeas application in a civil action. Plaintiffs therefore may not circumvent the PLRA's limits on civil actions by manufacturing this "hybrid" action that purports to seek habeas relief.

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[50] *See* ECF 1, ¶¶ 77, 79–80, 82–83, 85, 88–92. 97–101.
[51] *See, e.g.*, *Nettles* v. *Grounds*, 830 F3d 922, 927–34 (9th Cir. 2016) (en banc); *Palma-Salazar* v. *Davis*, 677 F.3d 1031, 1035 (10th Cir. 2012); *Gomez* v. *United States*, 899 F.2d 1124, 1126 (11th Cir. 1990); *Glaus* v. *Anderson*, 408 F.3d 382, 387 (7th Cir. 2005).
[52] *Cook* v. *Hanberry*, 596 F.2d 658, 660 (5th Cir. 1979) (per curiam)
[53] *Id.*
[54] ECF 1, ¶¶ 10, 84–87.
[55] *Hilton* v. *Braunskill*, 481 U.S. 770, 776 n.5 (1987) (noting "the differences between general civil litigation and habeas corpus proceedings").
[56] *Harris* v. *Nelson*, 394 `U.S. 286, 293–94 (1969).
[57] *Ex parte Tom Tong*, 108 U.S. 556, 559 (1883).
[58] *Harris*, 394 U.S. at 293–94.

Federal law makes clear that civil actions and habeas review, despite their similarities, remain different proceedings. Consider, for example, the initial filing that sets a proceeding in motion. Habeas review commences with the filing of an "application."[59] And the federal habeas statute provides specific rules that prescribe what a habeas corpus application must contain.[60] "A civil action," by contrast, "is commenced by filing a complaint."[61] Elsewhere, the federal rules likewise provide specific rules that govern the filing of complaints.[62]

Civil Rule 7, which provides an exhaustive list of authorized pleadings, hammers the point home. "*Only these pleadings* are allowed" in a civil action:

> (1) a complaint;
> (2) an answer to a complaint;
> (3) an answer to a counterclaim designated as a counterclaim;
> (4) an answer to a crossclaim;
> (5) a third-party complaint;
> (6) an answer to a third-party complaint; and
> (7) if the court orders one, a reply to an answer.[63]

Conspicuously absent from this list is a habeas corpus application. In this case, Plaintiffs filed a "Class Action Complaint" under 28 U.S.C. § 1331. Section 1331, in turn, provides district courts with "original jurisdiction of all *civil actions*."[64] Because this is a civil action, a habeas corpus application is not "allowed."

Other provisions confirm what the plain text of Rule 7 suggests. Civil Rule 81 provides that the Federal Rules of Civil Procedure "apply to *proceedings for habeas*

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[59] 28 U.S.C. § 2241(b), (d).
[60] 28 U.S.C. § 2242.
[61] Fed. R. Civ. P. 3.
[62] *See, e.g.*, Fed. R. Civ. P. 8, 10(a), 14.
[63] Fed. R. Civ. P. 7(a) (emphasis added).
[64] ECF 1, ¶ 11 (citing 28 U.S.C. § 1331).

corpus . . . to the extent that the practice in *those proceedings*: (A) is not specified in a federal statute, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Cases; and (B) has previously conformed to the practice in civil actions."[65] And Habeas Rule 12 provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to *a proceeding under these rules*."[66] The only reason a habeas proceeding needs to borrow rules from a civil action is because it is an entirely distinct proceeding. And even then, habeas procedure often diverges from civil procedure.[67]

Supreme Court precedent confirms this view. In *Heck* v. *Humphrey*[68] the Supreme Court established that a proceeding is either a civil action (under § 1983) *or* a habeas proceeding (under § 2241)—not both. The Court recognized that § 1983 and § 2241 are both capacious enough to cover "claims of unconstitutional treatment at the hands of state officials."[69] That meant a creative prisoner who opted to sue under § 1983 could effectively evade requirements unique to habeas corpus review, like the exhaustion rule.[70] To prevent that workaround, the Court held a prisoner who necessarily "call[s] into question the lawfulness of conviction *or confinement*" must

[65] Fed. R. Civ. P. 81(a)(4) (emphases added).
[66] 28 U.S.C. § 2254, Habeas Rule 12 (emphasis added).
[67] *See, e.g.*, *Gonzalez* v. *Crosby*, 545 U.S. 524, 529–31 (2005) (motion for relief from judgment under FRCP 60(b)); *Day* v. *McDonough*, 547 U.S. 198, 207–09 (2006) (forfeiture of limitations defense under FRCP 8(c), 12(b), 15(a)); *Mayle* v. *Felix*, 545 U.S. 644, 654–56 (2005) (notice pleading under FRCP 8(a)); *United States v. Frady*, 456 U.S. 152, 164–66 & n.15 (1982) (plain error review under FRCP 52); *Harris*, 394 U.S. at 294–98 (discovery and interrogatories under FRCP 26(b), 33); *Holiday* v. *Johnson*, 313 U.S. 342, 353 (1941) (reference to a master under FRCP 53).
[68] 512 U.S. 477 (1994).
[69] *Id.* at 480.
[70] *Id.* at 480–81.

proceed in habeas, not in a civil action.[71] Because the prisoner in *Heck* challenged his confinement, the Court held he should have sought relief in habeas.

If Plaintiffs were correct that a civil action like this one could be combined with a habeas proceeding, then the prisoner in *Heck* should have been permitted to amend his pleadings. But that is not what the Supreme Court said. It held that "*dismissal of the action* was correct."[72] Heck could pursue only one route in a given case—either a civil action or a habeas proceeding—and he chose the wrong one.

The Supreme Court has reaffirmed the *Heck* rule countless times.[73] And its principle dividing the world between challenges to custody and challenges to conditions of confinement applies here too. A prisoner cannot use § 1983 to avoid the strictures of the federal habeas statute. A prisoner likewise cannot use the habeas statute to avoid the strictures of the PLRA.[74] Plaintiffs' complaint about "conditions of confinement" in Dallas County Jail is simply not cognizable in habeas corpus. And their § 1983 claims likewise fail. This should be the end of this case.

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[71] *Id.* at 483; *see id.* at 481 ("challenges [to] the fact or duration of his *confinement* and seek[ing] immediate or speedier *release*" (emphases added)), 483 (challenges "call[ing] into question the lawfulness of the plaintiff's *continuing confinement*" (emphasis added)), 486 (challenges that "require the plaintiff to prove the unlawfulness of his conviction *or confinement*" (emphasis added)); *see also Spina* v. *Aaron*, 821 F.2d 1126, 1128 (5th Cir. 1987) ("Congress has chosen habeas corpus as the appropriate avenue to challenge the fact or duration of a prisoner's confinement.").

[72] *Heck,* 512 U.S. at 490.

[73] *See, e.g.*, *Skinner* v. *Switzer*, 562 U.S. 521 (2011); *Hill* v. *McDonough*, 547 U.S. 573 (2006); *Wilkinson* v. *Dotson*, 544 U.S. 74 (2005); *Nelson*, 541 U.S. 637, 637.

[74] *Skinner*, 562 U.S. at 535 (noting that a prisoner whose claim that falls outside of the habeas bucket and into the civil action bucket is subject to the "series of controls on prisoner suits" Congress established in the PLRA); *Nettles*, 830 F3d at 927–34 (same).

IV. Plaintiffs' Motion for Class Certification Should be Denied Because a Mass Prisoner Release Order Inherently Hinges on Individualized Determinations About Which Prisoners Should be Released and on what Conditions Release is Appropriate.

Even setting aside the various procedural defects described above, this Court cannot grant class certification or class-wide relief. No matter how the Court characterizes this Janus-faced suit, class action treatment remains inappropriate.

If the Court treats Plaintiffs' pleadings as a § 1983 action challenging conditions of confinement, Plaintiffs have not satisfied Rule 23's prerequisites. A plaintiff must "affirmatively demonstrate his compliance with" Rule 23,[75] in order to justify a departure from "the usual rule that litigation is conducted by and on behalf of the individual named parties only."[76] Just three weeks ago, the Fifth Circuit "cautioned that a district court must conduct a rigorous analysis of the rule 23 prerequisites before certifying a class."[77]

Under Rule 23(a), Plaintiffs must show:

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.[78]

Two of those requirements are pertinent here—namely, commonality and typicality.

Plaintiffs boast that they have raised common questions, like "[W]hat measures [have] Defendants implemented in the Dallas County Jail in response to

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[75] *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 348–50 (2011).
[76] *Califano* v. *Yamasaki*, 442 U.S. 682, 700–01 (1979).
[77] *Cruson* v. *Jackson Nat'l Life Ins. Co.*, 954 F.3d 240, 2020 WL 1443531, at *7 (5th Cir. Mar. 25, 2020).
[78] Fed. R. Civ. P. 23(a).

the COVID-19 crisis?"[79] They add that the "the most important common question" is "whether Defendants are liable under the Eighth and Fourteenth Amendments for their deliberate indifference to conditions of confinement."[80] In other words, Plaintiffs say they have identified the common question of whether Dallas County has been deliberately indifferent across the board.

The Supreme Court rejected this theory of commonality in *Wal-Mart*, in part based on the recognition that different actors may perpetrate the same violation of law *in different ways*.[81] Considering the underlying "merits contention," Plaintiffs are "unable to show that all [prisoners' deliberate indifference] claims will in fact depend on the answers to common questions."[82] To establish a violation, Plaintiffs must show that "state official[s] knew of and disregarded an excessive risk to the inmate's health or safety."[83] But that kind of violation may befall prisoners in different ways. Some officers are allegedly reusing masks.[84] Some dorm rooms are allegedly unsanitary.[85] Some prisoners have allegedly been kept in shared spaces with prisoners exhibiting symptoms.[86] Some prisoners have been denied testing, while others have had testing delayed.[87] Some prisoners are healthy, while others are not.[88]

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[79] ECF 18, 17.
[80] *Id.* at 18.
[81] *Wal-Mart*, 564 U.S. at 350 (commonality "does not mean merely that they have all suffered a violation of the same provision of law").
[82] *Id.* at 356.
[83] *Gibbs* v. *Grimmette*, 254 F.3d 545, 549 (5th Cir. 2001).
[84] ECF 1, ¶ 54.
[85] *Id.* at ¶ 56.
[86] *Id.* at ¶ 52.
[87] *Id.* at ¶ 51.
[88] *Compare id.* at ¶¶ 17, 19, *with id.* at ¶¶ 13, 16.

These are just a few easy examples. Subjective indifference to the healthy inmate may look different from indifference to an inmate with a respiratory issue. Other circuits have repeatedly rejected putative class-actions pressing deliberate indifference claims for just this reason.[89] To be sure, some courts have found commonality for "systemic indifference." But plaintiffs have not actually presented evidence of "a gross and systemic deficiency that applies to the entire class. Instead, the[y] bring a series of individual claims of deliberate indifference."[90] They cannot point to a set temperature for the entire jail[91] or a memo from Dallas County officials formally setting a policy of making every effort not to provide care for inmates during an unprecedented public health challenge.

There are more than mere "factual variations in some details of" the putative class members' custodial status.[92] The face of Plaintiffs' pleadings shows factual variations in *the way* that prison officials have allegedly been indifferent to the Plaintiffs' health needs.

Separately, the Plaintiffs must also satisfy one of the requirements listed in Rule 23(b). Plaintiffs purport to cram their certification motion into Rule 23(b)(2). But as Plaintiffs themselves admit, "the key to the (b)(2) class is the *indivisible nature* of the injunctive or declaratory remedy warranted—the notion that the conduct is such

[89] *See, e.g.*, *Phillips* v. *Sheriff of Cook Cty.*, 828 F.3d 541 (7th Cir. 2016).
[90] *Phillips*, 828 F.3d at 558.
[91] *Yates* v. *Collier*, 868 F.3d 354 (5th Cir. 2017).
[92] ECF 18, 18.

that it can be enjoined or declared unlawful only as to all of the class members or as to none of them."[93] The relief Plaintiffs seek here is obviously not of that character.

Cases enjoining prison officials to protect prisoners from excessive heat provides a helpful comparator. An injunction ordering prison officials to set prison temperatures at 88º is "indivisible." It automatically benefits every member. But it should be obvious that release is different. A court may choose to release some, but not others. (Indeed, that is why habeas proceedings seeking relief proceed on an individual basis.) Moreover, Plaintiffs seem to recognize that release of some may *obviate* the need to release others. Some of their pleadings note that County officials could possibly address the problem by reducing the jail population and then using newly vacated facilities to space out remaining prisoners.[94]

Accordingly, Plaintiffs must proceed under Rule 23(b)(3), which is "even more demanding."[95] And because they have not identified a common question, they certainly cannot show a non-existent question "predominates" over all others.[96]

If the Court treats Plaintiffs' pleading as a § 2241 application seeking release from custody, class-wide relief ordering release is still inappropriate. For starters, class action relief is simply unavailable in habeas corpus proceedings. No court ever purported to entertain that departure from the historic office of the Great Writ until "the late 1960s."[97] Then, after having its day in the sun, habeas class actions

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[93] *Id.* at 23 (quoting *Wal-Mart*, 564 U.S. at 360) (emphasis added).
[94] ECF 1, ¶ 103(4)-(5).
[95] *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 34 (2013).
[96] *Wal-Mart*, 564 U.S. at 359.
[97] Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 404 (2007) (collecting cases); *Adderly* v. *Wainwright*, 272 F. Supp. 530, 532 (M.D. Fla. 1967).

"vanished."[98] That is due in large part to the Supreme Court's decision in *Calderon v. Ashmus*.[99] There a putative class of death-row inmates brought suit seeking a declaration that California did not qualify for expedited capital habeas review under AEDPA's opt-in provisions.[100] The Supreme Court held the prisoners' challenge to the fact of their confinement "must be brought under the habeas sections of Title 28."[101] And it recognized that each putative class member must first "exhaust state remedies before bringing his claim to a federal court."[102] Naturally, that decision "made habeas corpus class actions impossible."[103]

That jives with what the Supreme Court has said elsewhere. For instance, in *Schall* v. *Martin*, the Court pointed to state habeas procedures "on a case-by-case basis" as the appropriate avenue for challenging pre-trial detention.[104] In *Whitmore* v. *Arkansas*, the Supreme Court rejected one prisoner's attempt to utilize the carefully-circumscribed "next friend" application on behalf of another prisoner.[105] And just last year in *United States* v. *Sanchez-Gomez*, the Supreme Court cautioned that lower courts "may not recognize a common-law kind of class action or create de facto class actions at will" on behalf of pre-trial detainees.[106]

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[98] *Id.* at 408.
[99] 523 U.S. 740 (1998).
[100] 28 U.S.C. §§ 2261–66.
[101] *Ashmus*, 523 U.S. at 747.
[102] *Id.* at 748.
[103] Garrett, 95 CAL. L. REV. at 410. There were also good policy reasons for scrapping the class-action habeas application: A class application, combined with AEDPA's limits on second or successive habeas applications, could have the effect of precluding a prisoner from later seeking habeas relief in an individual application. *See* 28 U.S.C. § 2244.
[104] 467 U.S. 253, 281 (1984).
[105] 495 U.S. 149, 161–66 (1990).
[106] 138 S. Ct. 1532, 1540 (2018).

The class action has no place in habeas corpus proceedings. Accordingly, importing Rule 23 to the habeas context would violate Civil Rule 81. The "practice in [habeas] proceedings" has not "previously conformed to the practice in civil actions" with respect to class action.[107] Habeas Rule 2(e), for example, provides that "[a] petitioner who seeks relief from judgments of more than one state court must file a separate petition covering the judgment or judgments of each court.[108] In other words, the same petitioner is obligated to file a separate action to challenge a different judgment. There is no way *different petitioners* can challenge different judgments in a single case. Unsurprisingly, the handful of federal courts that have explicitly addressed this question agree that habeas petitioners may not seek class-wide habeas relief.[109]

But even if that is wrong, and something like a class action *is* available in habeas proceedings, all of the same problems above would plague the request for class-wide relief. And surely any habeas class action is not *less* demanding than Rule 23. The nature of habeas review, moreover, highlights a plethora of typicality problems: Was this member of the putative class in custody at the time the

[107] Fed. R. Civ. P. 81(a)(4)(B).
[108] 28 U.S.C. § 2254 Rule 2(e).
[109] *See Norton* v. *Parke*, 892 F.2d 476, 478 (6th Cir. 1989); *Rouse* v. *Michigan*, No. 2:17-CV-12276, 2017 WL 3394753, at *1 (E.D. Mich. Aug. 8, 2017) ("It is improper for different petitioners to file a joint habeas petition."); *United States ex rel. Bowe* v. *Skeen*, 107 F. Supp. 879, 881 (N.D. W.Va. 1952) ("Several applicants can not join in a single petition for a writ of habeas corpus."). Perhaps that is why Justice Thomas and Justice Gorsuch took for granted that a class of plaintiffs that (like this one) "seeks a declaration and an injunction that would provide relief for both present and future class members, including future class members not yet detained" "do not seek habeas relief, as understood by our precedents." *Jennings v. Rodriguez*, 138 S. Ct. 830, 858 (2018) (concurring in part and concurring in the judgment).

application was filed?[110] What kind of custody is he in?[111] Is he being held pre-trial? Or on a life sentence for murder? Is he subject to a detainer request from another sovereign government? If he's subject to multiple forms of custody, which one is he challenging?[112] Would his habeas application be timely under AEDPA's statute of limitations?[113] Is he entitled to statutory tolling?[114] What about equitable tolling?[115] Perhaps a miscarriage-of-justice exception?[116] Has he exhausted his state-court remedies?[117] Before trial?[118] After conviction?[119] If not, is there some reason why his failure to exhaust does not matter?[120] Even if he exhausted, is his claim procedurally defaulted?[121] Can he supply cause and prejudice to excuse any default?[122]

Frankly, it's hard to imagine a more dissimilarly situated group of individuals than Plaintiffs' putative class.

V. Three Recent COVID-19-Related Prisoner Cases Highlight the Fatal Flaws in Plaintiffs' Action.

Three recent cases confirm the State Intervenors' position and highlight the fatal flaws in Plaintiffs' action.

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[110] *Carafas* v. *LaVallee*, 391 U.S. 234, 238 (1968); 28 U.S.C. §§ 2241(c)(3), 2254(a).
[111] *Dickerson*, 816 F.2d at 224.
[112] *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973).
[113] 28 U.S.C. § 2244(d)(1).
[114] *Id.* at § 2244(d)(2).
[115] *Holland* v. *Fla.*, 560 U.S. 631 (2010).
[116] *McQuiggin* v. *Perkins*, 569 U.S. 383 (2013).
[117] 28 U.S.C. § 2254(b)(1)(A), (c).
[118] *Ex parte Royall*, 117 U.S. 241, 245 (1886).
[119] *Rose* v. *Lundy*, 455 U.S. 509 (1982).
[120] 28 U.S.C. § 2254(b)(1)(B).
[121] *Murray* v. *Carrier*, 477 U.S. 478, 489–90 (1986).
[122] *Coleman* v. *Thompson*, 501 U.S. 722, 750 (1991).

The Illinois district court's decision in *Money* v. *J.B. Pritzker*,[123] is the most significant of the three cases as it analyzed an action practically identical to this one. In *Money*, ten individuals convicted of a range of felonies and serving sentence in various Illinois Department of Corrections ("IDOC") facilities brought two class action lawsuits "seeking release of prisoners from IDOC facilities in light of the COVID-19 pandemic."[124] One suit was brought under § 1983; the other was a petition for writs of habeas corpus under 28 U.S.C. § 2254.[125] As the court summarized:

> The foundation of each suit is essentially the same: Plaintiffs argue 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.[126]

Plaintiffs claimed that "reducing the prison population is the only meaningful way to prevent the harms posed by COVID-19 in the prison setting."[127] Plaintiffs sought to release at least 12,000 Illinois-based inmates due to COVID-19.[128]

Plaintiffs filed motions for class certification and emergency injunctive relief in both actions.[129] Plaintiffs sought to certify classes consisting of subsets of inmates who were medically vulnerable, convicted of lower-level offenses, or near the end of their prison sentence.[130]

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[123] No. 20-CV-2093, 2020 WL 1820660 (N.D. Ill. Apr. 10, 2020).
[124] *Id.* at *2.
[125] *Id.*
[126] *Id.*
[127] *Id.* at *5.
[128] *Id.* at *1.
[129] *Id.* at *6.
[130] *Id.*

At the outset, the court questioned whether it was "even proper to bring a Section 1983 action and a petition for writ of habeas corpus at the same time on the same facts seeking the same remedy[.]"[131] The court, expressing significant doubt on the issue, assumed the answer was yes and continued its analysis.[132]

The court found that the plaintiffs' § 1983 claims were subject to the PLRA's limitations.[133] The court analyzed whether the plaintiffs were seeking a "prisoner release order" that would need to be decided by a three-judge panel under the PLRA.[134] During the lawsuit, the plaintiffs walked-back their original request for release and claimed they were now only seeking "a process through which subclass members eligible for medical furlough will be identified and evaluated based on a balancing of public safety and public health needs, and transferred accordingly."[135] The court found that even this watered-down request was effectively a request for a prisoner release order as it was intended to further the lawsuits' main purpose—which was to reduce or limit the IDOC's prison population.[136] The court held that, under the PLRA's specific procedures regarding prisoner release orders and due to

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[131] *Id.* at *8.
[132] *Id.* ("As explained below, the answer (though not without doubt) seems to be yes."); *id.* at *9 ("[I]t is abundantly clear that Plaintiffs may proceed on their claims under Section 1983 and at least plausible—though far less certain—that they also have a right to seek habeas relief as well.").
[133] *Id.* at *10-14.
[134] *Id.*
[135] *Id.* at *12 (quotations omitted).
[136] *See, e.g.*, *id.* at *12 ("There is no doubt that Plaintiffs' request—even if couched in terms of a process—would have the purpose and the effect of reducing the population in Illinois prisons."); *id.* at 13 ("Reducing the prison population is not just a die effect of the case—it is the whole point."); *id.* ("[I]n asking that inmates be physically transferred from inside the prison to outside of it on the basis of [living conditions in the prisons,] Plaintiffs plainly are implicating 'crowding' as the primary cause of their concern. If prisons could be reconfigured to permit social distancing and observance of the CDC's hygiene recommendations, Plaintiffs would have no claim.").

the sweeping relief being requested, it could not grant the plaintiffs' § 1983-based request for prisoner release.[137]

The court noted additional problems with the plaintiffs' § 1983 claims. The court found that the plaintiffs could not satisfy Fed. R. Civ. P. 23(a)(2)'s "commonality" requirement due to the individualized determinations inherent in a request for a mass prisoner release order.[138] The court found that, "for the safety of the inmate, the inmate's family, and the public at large," any release order would need to consider the "inmate's suitability for release" and on what conditions the inmate should be released.[139] For instance, "any inmate who is exhibiting symptoms of infection, may be more suitable for quarantine or even transfer to a hospital."[140] For the inmate's family, an inmate may be ill-suited for release if he or she had been recently exposed to someone with COVID-19, "particularly if the inmate's proposed destination is a residence already occupied by someone equally or more vulnerable."[141] And the public has an interest in being protected from the release of inmates convicted of serious crimes and in the significant resources their government would need to expend to safely monitor the released prisoners.[142]

The court aptly summarized the problems with plaintiffs' motion for class certification as follows:

> Each putative class member comes with a unique situation—different crimes, sentences, outdates, disciplinary histories, age, medical history,

[137] *Id.* at *14.
[138] *Id.* at *14–17.
[139] *Id.* at *14.
[140] *Id.*
[141] *Id.*
[142] *Id.*

> places of incarceration, proximity to infected inmates, availability of a home landing spot, likelihood of transmitting the virus to someone at home detention, likelihood of violation or recidivism, and danger to the community. As Plaintiffs point out, commonality "does not require perfect uniformity." But it does require more uniformity that these Plaintiffs would have on the only matter "apt to drive the resolution of the litigation"—namely, which class members should actually be given a furlough? . . . Simply put, there is no way to decide which inmates should stay, and which inmates should go, without diving into an inmate-specific inquiry.[143]

Further, the court found that there were "serious separation of powers concerns" inherent in plaintiffs' actions "because running and overseeing prisons is traditionally the province of the executive and legislative branches."[144] The court explained that the judiciary is "ill-equipped" to manage tens of thousands of inmates, particularly in the context of "an ongoing, fast moving public health emergency."[145]

Finally, turning to the merits of the habeas petition, the court found that the plaintiffs failed to exhaust their remedies as they did not give Illinois state courts a meaningful opportunity to consider their claims before turning to the federal courts for relief.[146] Ultimately, the court denied their habeas petition because "Plaintiffs have not made a satisfactory showing that the state court system was not every bit as available as the federal courts, if not more so."[147]

In *Sacal-Micha* v. *Longoria*, the District Court for the Southern District of Texas found that a writ of habeas corpus was not a proper vehicle for challenging an

[143] *Id.* at *15 (citations omitted).
[144] *Id.* at *16.
[145] *Id.*
[146] *Id.* at *20–22.
[147] *Id.* at *21.

inmate's conditions of confinement due to COVID-19.[148] In *Sacal-Micha*, the petitioner was an "elderly man with serious underlying medical conditions" who filed a habeas petition seeking immediate release from the immigration detention center in which he was being held.[149] The petitioner sought release due to the "possibility of a COVID-19 outbreak within the detention center . . and the Respondents' alleged inability to protect him from contracting the virus or providing him with adequate medical attention."[150] Specifically, the petitioner claimed that the respondents had not implemented sufficient social distancing measures, the universal use of mask and gloves, and various other measures to protect against the spread of COVID-19.[151]

The court noted that the "'sole function' of a habeas petition is to 'grant relief from unlawful imprisonment or custody'"[152] and that "[d]istrict courts have . . . den[ied] habeas relief based solely on alleged inadequate conditions of detention."[153] The court found that the petitioner's lawsuit was "[a]t its core" challenging his conditions of confinement and that habeas relief is unavailable in such a suit.[154] Thus, the court held that the petition should be dismissed under Fed. R. Civ. P. 12(b)(6).[155]

In *Coleman* v. *Newsom*, a three-judge federal court based in California clarified how the PLRA's limits applied to COVID-19-based claims for a prisoner release

[148] No. 1:20-CV-37, 2020 WL 1815691 (S.D. Tex. Apr. 9, 2020).
[149] *Id.* at *1.
[150] *Id.*
[151] *Id.* at *2.
[152] *Id.* at *3 (quoting *Pierre v. United States*, 525 F.2d 933, 935-36 (5th Cir. 1976)).
[153] *Id.*
[154] *Id.* at *4 ("Given that Sacal challenges the conditions of his confinement at PIDC, he cannot rely on a petition for writ of habeas corpus to obtain the relief he requests.").
[155] *Id.* at *6.

order.[156] The presiding three-judge court was established in 2007 under the PLRA to consider whether a prisoner release was warranted due to structural failures in California's prison system.[157] Recently, two classes of inmates incarcerated in California state prisons filed a motion asking the court to order the release of a significant number of prisoners "so that the prison population can be reduced to a level sufficient to allow physical distancing to prevent the spread of COVID-19."[158]

The three-judge court rejected the new plaintiffs' motion.[159] The court noted that the "PLRA places significant restrictions on a federal court's authority to order the release of prisoners as a remedy for a constitutional violation."[160] The court found that the plaintiffs likely could not satisfy the PLRA's requirements "at this point because there have not yet been any orders requiring Defendants to take measures short of release to address the threat of the virus; nor have Defendants had a reasonable time in which to comply."[161]

These three cases, *Money v. J.B. Pritzker*, *Sacal-Micha v. Longoria*, and *Coleman v. Newsom*, confirm the State-Intervenors' position and highlight the reasons why Plaintiffs' request for a prisoner release should be denied.

[156] No. 01-CV-01351-JST, 2020 WL 1675775, (E.D. Cal. Apr. 4, 2020).
[157] *Id.* at *1.
[158] *Id.*
[159] *Id.*
[160] *Id.* at *4.
[161] *Id.*

VI. Releasing Felons During a Time of Crisis Endangers Public Safety and is Not in the Public Interest.

"The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction."[162] Accordingly, federal courts often consider two factors—the balance of the equities and the public interest—together.[163] Public safety is a paramount public interest. And Plaintiffs' requested injunctive relief here—releasing a class of individuals defined as "[e]veryone in the Dallas County Jail"—will imperil public safety.[164]

As explained in detail in the Motion to Intervene, Plaintiffs' attempt to free inmates is not limited to non-violent offenders, but also includes murderers, rapists, and violent gang members.[165] And it even includes Billy Chemirmir, possibly "one of the state's most prolific serial killers."[166]

But the risks posed to the public is not limited to those arrestees with a history for violence. And communities are "being repeatedly victimized by the same offenders who were often released before the paperwork was even filed."[167] Under Plaintiffs' requested relief, burglars and other felons would be free to roam the streets

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[162] *R.R. Comm'n of Tex.* v. *Pullman Co.*, 312 U.S. 496, 500 (1941).
[163] *See, e.g.*, *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 26–31 (2008.
[164] To avoid duplicative briefing, State Intervenors hereby incorporate the arguments included in the Motion to Intervene and accompanying exhibits. *See* Dkt. 27, Exs. 1-15.
[165] *See* ECF No. 27, at 1-2; 7–8.
[166] Antonia Noori Farzan, *A Jewelry Box Led Police to Revisit Hundreds of Deaths. They May Have Found a Serial Killer*, WASH. POST (May 20, 2019), https://wapo.st/2wxTJpJ; Chemirmir's booking information is available at https://www.dallascounty.org/jaillookup/defendant_detail?recno=8701479E-2A8F-4A79-8F26-00343043A503&bookinNumber=18013860&bookinDate=1521653460000&dob=1972-12-08&lastName=CHEMIRMIR&firstName=BILLY&sex=Male&race=Black ; Charles Scudder, *Dallas DA Seeks Death Penalty Against Serial Killer Suspect Billy Chemirmir*, DALLAS MORNING NEWS (July 24, 2019), https://bit.ly/3cbtjcy.
[167] Ex. 15, *Kahan Dec.* ¶ 9; Ex. 14, *Rushin Dec.* ¶ 7.

committing numerous offenses. Releasing such individuals during the coronavirus pandemic presents a "target rich environment" for criminals to exploit as businesses are closed pursuant to governmental mandates and proprietors are encouraged to stay home with a diminished ability to monitor their closed storefronts.[168]

Likewise, released fraudsters will be presented with new opportunities to prey on Texans, especially the elderly, during this pandemic.[169] And habitual DWI offenders certainly endanger the public through intoxicated driving.[170]

Plaintiffs' requested relief would further threaten public safety by placing additional strain on already limited law enforcement resources and divert them from aiding pandemic control efforts.[171] The risk of this harm is compounded by the likelihood that law enforcement officers will contract COVID-19 by having to apprehend recidivists released from a jail population who are alleged to have been likely exposed to the virus. The general population would likewise face a heightened risk of infection by the hasty mass release requested by Plaintiffs. The requested injunction will also disserve the public interest by releasing arrestees without proper consideration of the safety, wellbeing, and legal rights of victims.[172] Just recently, the danger a largescale prisoner release poses to society was a significant factor in a federal court's decision to deny a set of plaintiffs' request for injunctive relief in the form of a mass release of Harris County felony arrestees due to COVID-19 issues.[173]

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[168] *See* Ex. 1, *Acevedo Dec.* ¶ 8.
[169] Zack Friedman, *Beware These Coronavirus Scams*, FORBES (Mar. 20, 2020), https://bit.ly2xzJT6B.
[170] Ex. 1, *Acevedo Dec.* ¶ 12.
[171] *See id.* at ¶ 5; Ex. 3, *Johnson Dec.* ¶ 3; Ex. 4, *Miller Dec.* ¶ 3.
[172] Ex. 11, *Deaver Dec.* ¶ 9.
[173] *Russell* v. *Harris Cty.*, No. H-19-226, 2020 WL 1866835 (S.D. Tex. Apr. 14, 2020) (finding that the public interest and balance of equities weighed in favor of denying plaintiffs' request to release many

In sum, the State Intervenors have grave concerns about the increased risk of harm to the public and the additional burden on already-strained law enforcement resources. This is especially concerning since Dallas saw a dramatic increase in both murder and other violent crime during the past year.[174]

It is no response to say that these "concerns about the preliminary injunction [are] 'speculative.'"[175] As the Supreme Court has noted, this kind of uncertainty in uncharted waters "is almost always the case when a plaintiff seeks injunctive relief to alter a defendant's conduct."[176] Instead, this Court should "defer to [the state] officers' specific, predictive judgments about how the preliminary injunction" would impact public health, public safety, law enforcement, and State's criminal justice system.[177] As a result, the Court should deny the requested injunctive relief.

CONCLUSION

For the reasons discussed above, the State Intervenors respectfully request that the Court dismiss this action under Fed. R. Civ. P. 12(b)(6). In the alternative,

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felony arrestees partly because "[t]here is the threat of releasing on a personal bond those who should not be released because of risks such as not only failure to appear, but also of new offenses").

[174] *See* Troy Closson, *Dallas' sudden spike in homicides has officials perplexed. And not everyone agrees that state troopers are helping*, TEXAS TRIBUNE (Aug. 15, 2019), *available at* https://www.texastribune.org/2019/08/15/Dallas-crime-murder-rate-rises-state-troopers-resident-complaints/ (last visited Apr. 14, 2020); Editorial Board, *What's causing Dallas crime to spike?*, DALLAS MORNING NEWS (Feb. 13, 2020), *available at* https://www.dallasnews.com/opinion/editorials/2020/02/13/is-bail-reform-the-cause-of-dallas-climbing-crime/ (last visited Apr. 14, 2020); *Numbers Show Spike in Dallas Crime in Past Year, DPD Says There's More to the Data,* NBCDFW.COM, *available at* https://www.nbcdfw.com/news/local/numbers-show-spike-in-dallas-crime-in-past-year-dpd-says-theres-more-to-the-data/2239161/) (last visited Apr. 14, 2020).

[175] *Winter**Error! Bookmark not defined.***, 555 U.S. at 27.

[176] *Id.*

[177] *Id.*

with respect to Plaintiffs' requests for emergency injunctive relief and class certification, the State Intervenors respectfully request an order ruling as follows:

1. Denying Plaintiffs' request for an emergency temporary restraining order and writ of habeas corpus requiring Defendants to "identify and release all members of a subclass of medically vulnerable individuals";[178]
2. Denying Plaintiffs' requests for a preliminary/permanent injunction and writ of habeas corpus requiring Defendants to (A) "continue to release all current and future Medically-Vulnerable subclass members," and (B) "release additional Class Members, including those not considered 'Medically-Vulnerable,' as needed to ensure that all remaining persons incarcerated in the Dallas County Jail are under conditions consistent with CDC and public health guidance to prevent the spread of COVID-19, including requiring that all persons be able to maintain six feet or more of space between them";[179]
3. Denying Plaintiffs' request to certify a "Pre-Adjudication Class" and a "Post-Adjudication Class";[180] and
4. Granting State Intervenors such other relief as the Court deems just and proper.

[178] ECF 2, 1.
[179] *Id.* at 1–2.
[180] ECF 17, 1–3.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent by electronic notification through ECF by the United States District Court, Northern District of Texas, Dallas Division, on April 15, 2020 to all counsel of record.

/s/ Adam Arthur Biggs
ADAM ARTHUR BIGGS
Special Litigation Counsel