

1 NICOLA T. HANNA
United States Attorney
2 DAVID M. HARRIS
Assistant United States Attorney
3 Chief, Civil Division
JOANNE S. OSINOFF
4 Assistant United States Attorney
Chief, General Civil Section
5 KEITH M. STAUB (Cal. Bar No. 137909)
CHUNG H. HAN (Cal. Bar No. 191757)
6 JASMIN YANG (Cal. Bar No. 255254)
DAMON A. THAYER (Cal. Bar No. 258821)
7 PAUL B. GREEN (Cal. Bar No. 300847)
Assistant United States Attorney
8 Federal Building, Suite 7516
300 North Los Angeles Street
9 Los Angeles, California 90012
Telephone: (213) 894-7423
10 Facsimile: (213) 894-7819
E-mail: Keith.Staub@usdoj.gov
11 Chung.Han@usdoj.gov
Jasmin.Yang@usdoj.gov
12 Damon.Thayer@usdoj.gov
Paul.Green@usdoj.gov
13

Attorneys for Respondents
14 Felicia L. Ponce and Michael Carvajal

15 UNITED STATES DISTRICT COURT
16 FOR THE CENTRAL DISTRICT OF CALIFORNIA
17 WESTERN DIVISION

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

20 Plaintiff-Petitioners,

21 v.
22

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

25 Defendant-Respondents.
26
27
28

No. CV 20-4451-MWF-MRW

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

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

Honorable Michael W. Fitzgerald
United States District Judge

TABLE OF CONTENTS

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

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

TABLE OF AUTHORITIES

Federal Cases	Page(s)
<u>Aburto v. Verizon Cal., Inc.</u> , 2012 WL 10381 (C.D. Cal. Jan. 3, 2012)	9
<u>Amgen Inc. v. Conn. Ret. Plans & Trust Funds</u> , 568 U.S. 455 (2013)	8
<u>Arnold v. United Artists Theatre Circuit, Inc.</u> , 158 F.R.D. 439 (N.D. Cal. 1994)	10
<u>Bijeol v. Benson</u> , 513 F.2d 965 (7th Cir. 1975)	9
<u>Califano v. Yamasaki</u> , 442 U.S. 682 (1979)	8
<u>Cameron v. Bouchard</u> , 2020 WL 2569868 (E.D. Mich. May 21, 2020)	16
<u>Castillo v. Barr</u> , 2020 WL 1502864 (C.D. Cal. Mar. 27, 2020)	16
<u>Christianson v. Colt Indus. Operating Corp.</u> , 486 U.S. 800 (1988)	2
<u>Comcast Corp. v. Behrend</u> , 569 U.S. 27 (2013)	8
<u>Cox v. McCarthy</u> , 829 F.2d 800 (9th Cir. 1987)	9
<u>Doninger v. Pacific Northwest Bell, Inc.</u> , 564 F.2d 1304 (9th Cir. 1977)	8
<u>Ellis v. Costco Wholesale Corp.</u> , 657 F.3d 970 (9th Cir. 2011)	8, 9
<u>Farmer v. Brennan</u> , 511 U.S. 825 (1994)	13
<u>Gen.Tel.Co. v. Galcon</u> , 457 U.S. 147 (1982)	9
<u>Hanlon v. Chrysler Corp.</u> , 150 F.3d 1011 (9th Cir. 1998)	11
<u>Hanon v. Dataproducts Corp.</u> , 976 F.3d 497 (9th Cir. 1992)	17
<u>Herman Family Revocable Trust v. Teddy Bear</u> , 254 F.3d 802 (9th Cir. 2001)	2
<u>Jennings v. Rodriguez</u> , 138 S. Ct. 830 (2018)	9, 11

1	<u>Lemon v. Int’l Union of Operating Eng’rs, Local No. 139, AFL-CIO,</u>	
2	216 F.3d 577 (7th Cir. 2000)	21
3	<u>Martinez-Brooks v. Easter,</u>	
4	2020 WL 2405350 at *29 (D. Conn. May 12, 2020)	15
5	<u>Mays v. Dart, No.</u>	
6	2020 WL 1987007 (N.D. Ill. Apr. 27, 2020)	9
7	<u>Money v. Priztker,</u>	
8	2020 WL 1980660 (N.D. Ill. Apr. 10, 2020)	2, 3
9	<u>Parsons v. Ryan,</u>	
10	754 F.3d 657 (9th Cir. 2014)	17
11	<u>Sacal-Micha v. Longoria,</u>	
12	2020 WL 1518861 (S.D. Tex. Mar. 27, 2020)	18
13	<u>Schall v. Martin,</u>	
14	467 U.S. 253 (1984)	9
15	<u>Staton v. Boeing Co.,</u>	
16	327 F.3d 938 (9th Cir. 2003)	10
17	<u>Staton v. Boeing,</u>	
18	327 F.2d 938 (9th Cir. 2003)	19
19	<u>Wal-Mart Stores, Inc. v. Dukes,</u>	
20	564 U.S. 338 (2011)	<u>passim</u>
21	<u>Wilson v. Williams,</u>	
22	2020 WL 1940882 (N.D. Ohio Apr. 22 2020)	15
23	<u>Wolin v. Jaguar Land Rover N. Am., LLC,</u>	
24	617 F.3d 1168 (9th Cir. 2010)	17
25	<u>Wragg v. Ortiz,</u>	
26	2020 WL 2745247 (D.N.J. May 27, 2020)	13, 21
27	Federal Statutes	
28	18 U.S.C. § 1201	4
	18 U.S.C. § 1591(A) and (B)	4
	18 U.S.C. §§ 3582 at 4205(g)	6, 7
	21 U.S.C. § 841(A)(1)	3
	21 U.S.C. § 841(B)(1)(C)	3, 4
	21 U.S.C. § 846	3
	Federal Rules	
	Fed. R. Civ. P. 23(a)	1, 8

1	Fed. R. Civ. P. 23(a)(1)	10
2	Fed. R. Civ. P. 23(a)(3)	17
3	Fed. R. Civ. P. 23(a)(4)	19
4	Fed. R. Civ. P. 23(b)(2)	20
5	Rule 23	<u>passim</u>
6	Rule 23(a)	<u>passim</u>
7	Rule 23(a) Fac	10
8	Rule 23(a)(2)	11
9	Rule 23(a)(3)	17
10	Rule 23(b)	8
11	Rule 23(b)(2)	8, 11, 20, 21
12	Rules 23(a)	1, 2
13	Federal Regulations	
14	28 C.F.R. § 0.96b	4, 5, 6

15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

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

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

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

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

II. PROCEDURAL BACKGROUND

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

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

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

III. FACTUAL BACKGROUND

A. Petitioners’ Various Criminal Convictions

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

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

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

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

7 On December 19, 2011, the district court for the Southern District of California
 8 sentenced Smith to three-hundred-sixty (360) months (30 years) imprisonment following
 9 his conviction for sex trafficking of children by force, fraud, and coercion, in violation of
 10 18 U.S.C. § 1591(A) and (B). Roman Decl. ¶ 7.a., Ex. D. Assuming Smith earns all
 11 remaining good conduct time, his projected release date is June 12, 2036. *Id.* ¶ 7.b.
 12 Smith does not qualify for priority placement on home confinement under the Attorney
 13 General's memoranda because his offense is both violent and a sex offense. *Id.* ¶ 8.c.

14 3. Vazquez Was Convicted of Aggravated Kidnapping and Sentenced to
 15 20 Years Imprisonment

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

25 **B. Petitioners' Various Health Histories**

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

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

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

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

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

22 Smith is 50 years old, and has been diagnosed with hypertension, type 2 diabetes,
 23 and chronic kidney disease. Leen Decl. ¶ 7.b. Smith tested positive for COVID-19 on
 24 April 29, 2020, after FCI Terminal Island conducted mass testing on the entire inmate
 25 population. *Id.* His BEMR records shows that medical staff documented his vitals from
 26 April 29 to May 8, 2020, and at no time did he have a temperature over 98.5°F, and
 27 continuously denied having a cough, shortness of breath, muscle pain, fatigue, a sore
 28

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

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

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

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

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

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

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

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

4 The offenses for which proposed class members are presently incarcerated and
 5 their overall criminal histories are likewise disparate. Some pose high risk of recidivism
 6 and would present a threat to their community (notably because Smith was convicted of
 7 sex trafficking of a minor, and Vazquez for a violent offense, under the Attorney
 8 General's memoranda, they would not be eligible for release¹), while others are unlikely
 9 to reoffend and pose little threat if released. Some inmates have homes and families that
 10 could provide support for home confinement, while others would likely become
 11 homeless and alone, without any means of supporting themselves. Some could access
 12 high quality medical treatment if they became ill, while others depend entirely on BOP
 13 and would have no meaningful access to health care if released.

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

21 **IV. CLASS CERTIFICATION STANDARD**

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

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

1 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).
2 To qualify for the exception to individual litigation, the party seeking class certification
3 bears the burden of showing by a preponderance of the evidence that class certification is
4 appropriate and must provide facts sufficient to satisfy the requirements of Fed. R. Civ.
5 P. 23(a) and (b). *Dukes*, 564 U.S. at 351; *Doninger v. Pacific Northwest Bell, Inc.*, 564
6 F.2d 1304, 1308-09 (9th Cir. 1977). “The Rule ‘does not set forth a mere pleading
7 standard.’” *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Dukes*, 264 U.S.
8 at 350). “Rather, a party must not only ‘be prepared to provide that there are *in fact*
9 sufficiently numerous parties, common questions of law or fact,’ typicality of claims and
10 defenses, and adequacy of representation, as required by Rule 23(a). The party must also
11 satisfy through evidentiary proof at least one of the provisions of Rule 23(b).” *Id.*
12 (quoting *Dukes*, 564 U.S. at 350) (internal citation omitted).

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

24 “A court’s class certification analysis must be ‘rigorous’ and may ‘entail some
25 overlap with the merits of the plaintiff’s underlying claim.’” *Amgen Inc. v. Conn. Ret.*
26 *Plans & Trust Funds*, 568 U.S. 455, 465 (2013). The Court considers the merits to the
27 extent that they overlap with the Rule 23 requirements. *Ellis v. Costco Wholesale Corp.*,
28 657 F.3d 970, 983 (9th Cir. 2011). The Court must resolve factual disputes to the extent

1 “necessary to determine whether there was a common pattern and practice that could
 2 affect the class *as a whole*.” *Id.* “When resolving such factual disputes in the context of a
 3 motion for class certification, district courts must consider the ‘persuasiveness of the
 4 evidence presented.’” *Aburto v. Verizon Cal., Inc.*, 2012 WL 10381, at *2 (C.D. Cal. Jan.
 5 3, 2012). Ultimately a district court must exercise its discretion to determine whether a
 6 class should be certified. *Califano*, 422 U.S. at 703. If a court is not fully satisfied that
 7 the requirements of Rule 23(a) and (b) have been met, certification should be refused.
 8 *Gen.Tel.Co. v. Galcon*, 457 U.S. 147, 161 (1982).

9 **V. ARGUMENT**

10 **A. Class Certification Is Inappropriate in Habeas Proceedings**

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

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

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

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

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

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

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

18 Fed. R. Civ. P. 23(a)(1) requires the class to be "so numerous that joinder of all
 19 members is impracticable." *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003). The
 20 plaintiff need not state the exact number of potential class members; nor is a specific
 21 minimum number required. *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D.
 22 439, 488 (N.D. Cal. 1994). Rather, whether joinder is impracticable depends on the facts
 23 and circumstances of each case. *Id.*

24 Petitioners' proposed class is every single current and future inmate at FCI
 25 Terminal Island, which currently consists of 1,002 inmates.² As explained below,
 26 Petitioners' class definition is overbroad and inappropriate for certification because it
 27

28 ² See <https://www.bop.gov/locations/institutions/trm/> (last accessed June 1, 2020).

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

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

6 a. *Petitioners Cannot Meet the Commonality Standard*

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

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

16 *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84
 17 N.Y.U. L. Rev. 97, 132 (2009)). The commonality requirement applies with special force
 18 to a class seeking certification under Rule 23(b)(2). As the Supreme Court recently
 19 noted, “Rule 23(b)(2) applies only when a single injunction or declaratory judgment
 20 would provide relief to each member of the class.” *Jennings v. Rodriguez*, 138 S. Ct.
 21 830, 852 (2018) (quoting *Dukes*, 564 U.S. at 360).

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

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

5 Other courts considering similar class certification requests in the inmate COVID-
6 19 context have found that the proposed classes could not meet the commonality
7 requirement in light of the individualized inquiries that would be required for each
8 inmate. In *Money v. Pritzker*, 2020 WL 1820660, at *14, the court denied class
9 certification in a proposed class action of inmates seeking COVID-19 related medical
10 furlough or home confinement after finding that the proposed class members did not
11 meet the commonality requirement, observing that the release of inmates would require
12 “individualized safety assessments” and “approved homesites”:

13 Indeed, the public interest – which must be taken into account when
14 considering a TRO or preliminary injunction – mandates individualized
15 consideration of any inmate’s suitability for release and on what conditions,
16 for the safety of the inmate, the inmate’s family, and the public at large.
17 From the inmate’s perspective, his or her own health status at the relevant
18 time is paramount. Any inmate who is exhibiting symptoms of infection
19 may be more suitable for quarantine or even transfer to a hospital. From the
20 family perspective, an inmate who has been exposed to someone (inmate or
21 [prison] personnel) who has tested positive may not be suitable for
22 furlough, particularly if the inmate’s proposed destination is a residence
23 already occupied by someone equally or more vulnerable. And from the
24 public’s perspective, it is important to bear in mind that some portion of the
25 incarcerated population has been convicted of the most serious crimes –
26 murder, rape, domestic battery, and so on.

27 ...

28 The imperative of individualized determinations, recognized by both sides
in this case, makes this case inappropriate for class treatment. Each putative
class member comes with a unique situation – different crimes, sentences,
outdates, disciplinary histories, age, medical history, places of incarceration,
proximity to infected inmates, availability of a home landing spot,
likelihood of transmitting the virus to someone at home detention,
likelihood of violation or recidivism, and danger to the community. As
Plaintiffs point out, commonality ‘does not require perfect uniformity.’ But

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

6 *Money*, 2020 WL 1820660 at *14-15.

7 The *Money* court concluded its analysis of the commonality requirement by
 8 stating: “Simply put, there is no way to decide which inmates should stay and which
 9 inmates should go, without diving into an inmate specific inquiry.” *Id.* at *15.³ Similarly,
 10 the district court for the District of New Jersey denied class certification in a proposed
 11 COVID-19 class action at FCI Fort Dix because “the Court would be required to engage
 12 in an intensive, multi-step, individualized inquiry as to whether each prisoner met
 13 criteria for conditional release” *Wragg v. Ortiz*, 2020 WL 2745247, at *28 (D.N.J. May
 14 27, 2020).⁴

15 Petitioners’ proposed class also fails to meet the commonality requirement
 16 because they allege Eighth Amendment violations, which requires proof that (1)
 17 Petitioners have suffered a deprivation that is, “objectively, sufficiently serious,”
 18 “result[ing] in the denial of the minimal civilized measure of life’s necessities,” and (2)
 19 that BOP is acting with “deliberate indifference to inmate health or safety,” “know[ing]
 20 of and disregard[ing] an excessive risk to inmate health or safety.” *Farmer v. Brennan*,
 21 511 U.S. 825, 834, 837 (1994). Here, each putative class member, i.e., each current and
 22

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

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

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

6 As of June 1, 2020, 662 inmates at FCI Terminal Island have recovered from
7 COVID-19.⁵ Indeed, the three named Petitioners alone have differing medical conditions
8 and thus differing risk profiles for COVID-19. Although all of them were and are
9 asymptomatic, Wilson and Smith tested positive and are recovered, whereas Vasquez
10 tested negative. Some inmates are likely at greater risk to contract the virus with serious
11 complications, others less. If all were to bring different Eighth Amendment claims, it
12 would be impossible to resolve the merits “as to all class members simply by virtue of
13 their membership in the class,” as required for certification. *Dukes*, 564 U.S. at 350. To
14 adjudicate Petitioners’ claims, the Court will need to conduct an individualized
15 evaluation of each class member’s condition and needs, as well as prison officials’
16 cognizance of and response thereto – in effect requiring 1,002 separate mini-trials. Such
17 “[d]issimilarities within the proposed class” defeat commonality. *Id.*

18 Even after separately analyzing each class member’s Eighth Amendment claim on
19 the merits, the individualized inquiries would not end. Assuming some Petitioners could
20 prove a constitutional violation, the relief to which they might be entitled would require
21 separate evaluation for each class member, accounting for such factors as age, conviction
22 offense, criminal history, and recidivism risk, to name a few. The “key to the (b)(2) class
23 is the indivisible nature of the injunctive or declaratory remedy warranted—the notion
24 that the conduct is such that it can be enjoined or declared unlawful only as to all of the
25 class members or as to none of them.” *Dukes*, 564 U.S. at 360 (citation omitted). The
26 purported class members, moreover, differ in their ability to secure housing and access to
27

28 ⁵ See <https://www.bop.gov/coronavirus/> (last accessed June 1, 2020).

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

9 *b. Petitioners’ Authority is Not Persuasive*

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

23 Similarly, *Wilson v. Williams*, 2020 WL 1940882, at *6 (N.D. Ohio Apr. 22
24 2020), involved a medically vulnerable subclass, which the court further refined to FCI
25 Elkton inmates who are 65 years or older and those with documented pre-existing
26 medical conditions including heart, lung, kidney, and liver conditions, diabetes,
27 conditions causing a person to be immunocompromised (including, but not limited to
28 cancer treatment, transplants, HIV or AIDS, or the use of immune weakening

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

18 Named Petitioners implicitly admit that they would not fall into a medically
19 vulnerable class such as in *Martinez-Brooks*, *Wilson* and *Cameron*, because they are
20 requesting a provisional class of “[a]ll current and future people in post-conviction
21 custody” at FCI Terminal Island. ECF No. 22 at 2:8-9. Their request, moreover, conflicts
22 with their own experts’ opinions that the “BOP should take immediate steps to
23 dramatically downsize the population at Terminal Island, with priority given to those at
24 high risk of harm due to their age and health status and thus are likely to require a
25 disproportionate amount of medical resources.” ECF No. 1 at ¶ 12 (emphasis omitted),
26

27 ⁶ Petitioners also cite to *Castillo v. Barr*, 2020 WL 1502864 (C.D. Cal. Mar. 27,
28 2020) in support of their commonality argument. ECF No. 22 at 5:26-27. *Castillo*,
however, is not instructive because it is a habeas action brought by two civil immigration
detainees, was not a class action, and made no class certification determination.

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

5 3. Petitioners Fail to Satisfy Typicality Requirement

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

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

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

1 hours whether each inmate is eligible for home confinement or bail pending habeas
2 corpus; (2) to “comply with the Constitution” for any class members who do not receive
3 home confinement; (3) to grant writs of habeas corpus and release inmates to whom the
4 BOP grants home confinement; and (4) to grant injunctive relief ordering the BOP to
5 enact measures (most of which the BOP is already doing⁷) to counteract the spread of
6 COVID-19 such as temperature checks, providing soap, providing masks, cleaning high-
7 touch surfaces. ECF No. 1 at 50:28-53:26. This proposed remedial scheme exposes that
8 the individual decision as to each putative class member will differ based on each
9 inmate’s unique factors (such as the severity of his offense, his age, and his health
10 condition). In short, Petitioners seek a classwide remedy on an individualized basis—a
11 contradiction in terms that in and of itself defeats typicality.

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

27
28 ⁷ See Prioleau Decl., ¶¶ 23-64.

1 4. Petitioners Are Not Adequate Class Representatives

2 Fed. R. Civ. P. 23(a)(4) requires Petitioners to demonstrate that they will fairly
3 and adequately protect the interests of their class. To determine whether Petitioners will
4 be adequate class representatives, the Court must consider “(1) [whether] the
5 representative plaintiffs and their counsel have any conflicts of interest with other class
6 members, and (2) [if] the representative plaintiffs and their counsel [will] prosecute the
7 action vigorously on behalf of the class.” *Staton v. Boeing*, 327 F.2d 938, 957 (9th Cir.
8 2003).

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

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

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

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

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

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

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

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

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

Unless the Court issues an order releasing all inmates “en masse” from FCI Terminal Island, contrary to the Attorney General’s March 26, 2020, memoranda, any other injunctive relief beyond what the BOP is already doing (given that the BOP has already enacted nearly all of what Petitioners have requested in terms of increased sanitation, masks, soap, testing, and daily health screenings for all staff and inmates⁸) must necessarily take into account each inmate’s individual circumstances (such as the

⁸ See Prioleau Decl., ¶¶ 23-64.

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

VI. CONCLUSION

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

Dated: June 1, 2020

Respectfully submitted,

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

/s/ Keith M. Staub

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

Attorneys for Respondents