22-244

22-652

IN THE

United States Court of Appeals for the Second Circuit

MICHAEL MILCHIN AND KENNETH PELLETIER,
Petitioners-Appellants,

KEVIN DIMARTINO, STEVEN PAGARTANIS, JOHN NATERA, AND EUGENE CASTELLE,
Petitioners

v.

ACTING WARDEN JESSICA SAGE,
Respondent-Appellee,

D. EASTER, WARDEN FCI DANBURY, ACTING WARDEN OF FCI DANBURY, AND CURRENT UNKNOWN,
Respondents

On Appeal from the U.S. District Court
for the District of Connecticut, No. 21-cv-498

BRIEF OF APPELLANTS MICHAEL MILCHIN AND KENNETH PELLETIER

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JURISDICTIONAL STATEMENT

Kenneth Pelletier and Michael Milchin brought a habeas corpus petition under 28 U.S.C. § 2241. The District Court had jurisdiction under 28 U.S.C. § 1331. The District Court dismissed their petitions, finding them barred by the prospective relief provisions of the Prison Litigation Reform Act (PLRA). AA 149 (citing 18 U.S.C. § 3626).[1] It entered a final judgment on January 13, 2022. Mr. Milchin and Mr. Pelletier timely appealed on February 4, 2022 and March 8, 2022, respectively. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

A. Factual Background

Mr. Milchin and Mr. Pelletier both live with cancer, making them medically vulnerable, especially amid the COVID-19 pandemic.[2] Both are incarcerated at FCI Danbury, a federal prison in Connecticut. The District Court acknowledged that their petition presented a "compelling and concerning picture regarding the timeliness and

[1] Appellants' Appendix is cited in this brief as "AA." Appellants' Sealed Appendix is cited as "SAA."

[2] The case was initially filed as a putative class action under § 2241 on behalf of six men incarcerated at FCI Danbury. They all proceeded pro se. The case has narrowed on appeal to the two individuals appealing the District Court's judgment, Messrs. Milchin and Peletier. Because no motion for class certification was made or ruled on in the District Court, this appeal does not present any class-action-related issues. Accordingly, the facts outlined below focus on the two appellants prosecuting this appeal.

adequacy of health care being provided to inmates, especially those with serious diagnoses and identified needs." AA 142 n. 2.

Mr. Milchin and Mr. Pelletier allege that they "do not receive sufficient follow-up, monitoring, specialty referrals or proper care" at Danbury. AA 17. They "have no faith or trust in the policy/procedures or staff at FCI Danbury with regards to their medical care." AA 20. Mr. Milchin and Mr. Pelletier allege that FCI Danbury is particularly dangerous during the COVID-19 pandemic for people with serious preexisting conditions and co-morbidities like cancer. *Id.* at 1. People "with multiple CDC risk factors and serious medical issues have languished in the facility not receiving proper medical care." AA 17. "Given this track record of disregard and non-compliance to policies, procedures, and [judicial] orders," Mr. Pelletier and Mr. Milchin fear for their health, safety, and very lives. AA 18.

Mr. Pelletier and Mr. Milchin alleged that these inadequacies in receiving medical care are systemic at FCI Danbury. AA 16. Prison officials "maintain[] and run[] a healthcare system that lacks basic elements necessary to provide constitutional care and fails to diagnose serious conditions, provide timely care, administer appropriate medication, employ adequate staff, and identify and correct its own failings." AA 17. The prison fails to provide care—especially specialty and follow-up care—in a timely manner, which has particularly catastrophic implications for people who are medically vulnerable. *See id*.

Months after a mass developed on Mr. Pelletier's neck, he received an order for a biopsy on August 2, 2019. SAA 93, 96. *Seven months later*, the biopsy was finally taken on March 2, 2020. SAA 95. A doctor then recommended an MRI, followed by surgical consult if it revealed "nodular enhancing complement to this lesion." SAA 97. The MRI revealed just that—a "large cystic mass" was found, and it showed "nodular enhancement." SAA 99-100. A doctor then recommended a surgical consult. *Id.*

On August 27, 2020, another doctor recommended a surgical evaluation, noting "possible concern for malignant component on MRI." SAA 95. On October 6, 2020, yet another doctor entered a request for surgical consultation, noting a "suspicious mass 5 x 6 cm on the right side of [Mr. Pelletier's] neck." SAA 100. The doctor specified a target date of January 8, 2021. *Id*. She wrote that this was "urgent" and "verging on emergent." As of May 10, 2021, Mr. Pelletier had not yet had the surgical evaluation.[3] SAA 93.

On December 30, 2020, Mr. Milchin requested an appointment with a specialist because of a growth on the left side of the bridge of his nose. SAA 14. A

[3] Finally, surgery to remove the cancer (thyroid carcinoma) began in February 2022. By that time, the cancer had grown to the point that Mr. Pelletier required a second surgery in March to remove more of the cancer, as well as the thyroid itself. These developments are not in the record because they occurred after the District Court dismissed the case.

specialist took a biopsy on February 3, 2021. SAA 24. But then medical staff lost the biopsy report. SAA 8.

Mr. Milchin expressed his dismay with this situation – melanoma is prevalent on both sides of his family, and he had been waiting for testing for a long time. *Id*. On March 23, 2021, BOP Health Services made a "high priority" lab request to test the biopsy "Today or Stat." SAA 9.

From then, a full week passed until a doctor reviewed the biopsy report. SAA 6-7. The report "demonstrate[ed] evidence of basal cell carcinoma," causing a doctor to send an "urgent" consultation request to dermatology for Mr. Milchin, with a scheduled target date of April 7th, 2021. SAA 6. A Health Services Administrative Note described this request as "emergent." SAA 7.

The consultation with a dermatologist did not occur until July 23, 2021. SAA 106-107. At the surgery consultation, Mr. Milchin began a round of Imiquimod, a cream he would apply to the growth five times a week. *Id*. Along with this interim treatment, Dr. Timerman emphasized the importance of closely following the growth, and instructed Mr. Milchin to come back for a follow-up appointment in three weeks to set a date for surgery—he twice noted and underlined the need for a close follow-up appointment in three weeks. *Id*. Nonetheless, by the middle of October Mr. Milchin had not yet been scheduled for that appointment. *Id*.

Defendants' delays in diagnosing and treating Mr. Pelletier and Mr. Milchin's cancers could be a death sentence for these men. Speedy treatment is crucial to successfully treating cancer—delay can substantially raise the risk of death.[4]

Mr. Pelletier and Mr. Milchin's concerns about their untreated cancers are magnified by the ongoing COVID-19 pandemic. People with cancer have an elevated risk of death from COVID-19. AA 18. "Based on the current evidence, a person with any of the conditions listed below [including cancer] is more likely to get very sick from COVID-19. This means that a person with one or more of these conditions who gets very sick from COVID-19 (has severe illness from COVID-19) is more likely to: [b]e hospitalized[,] [n]eed intensive care, [r]equire a ventilator to help them breathe, [d]ie." [5] Compounding the danger, over 50% of prison staff at FCI Danbury have refused to be vaccinated. AA 18.

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[4] Ontario Institute for Cancer Research, Study finds that every month delay in cancer treatment can raise risk of death by around 10 percent, November 5, 2020. *Available at* https://oicr.on.ca/study-finds-that-every-month-delay-in-cancer-treatment-can-raise-risk-of-death-by-around-10-per-cent/

[5] CDC, People with Certain Medical Conditions (last visited July 11, 2022) https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html. *See also* Cancer Network, Patients with Cancer at Significantly Increased Risk for COVID-19, Worse Outcomes (last visited July 11, 2022) *available at* https://www.cancernetwork.com/view/patients-with-cancer-at-significantly-increased-risk-for-covid-19-worse-outcomes; Penn Medicine News, Patients in Cancer Remission at High Risk for Severe COVID-19 Illness (last visited July 11, 2022), ("[There is] an increased risk of severe disease and death for sick or hospitalized cancer patients with COVID-19 compared to patients without cancer."), *available at* https://www.pennmedicine.org/news/news-releases/2021/january/patients-in-cancer-remission-at-high-risk-for-severe-covid19-illness; National

B. Procedural History

Petitioners filed their habeas petition on April 9, 2021 and an amended petition on April 28, 2021. As relief, they requested "transfer to home confinement for those class members that have serious medical concerns that are not being addressed at FCI Danbury," as well as "[a]ny further relief that the court deems necessary." AA 17.

Respondent (the acting warden of Danbury) moved to dismiss the amended petition under Federal Rule of Civil Procedure 12(b)(6), advancing four arguments. First, respondent argued that the suit was barred at the outset by 18 U.S.C. § 3626, a provision of the Prison Litigation Reform Act that explicitly applies to "prospective relief," *i.e.*, the remedial stage of a case. AA 29-33. Second, respondent contended that petitioners did not plead that they exhausted administrative remedies under a separate provision of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). AA 33-35. Third, respondent maintained that the petition was barred by the settlement agreement in an injunctive class action case, *Whitted v. Easter*, 3:20-cv-00569 (D. Conn.), to the extent the petition sought release to home confinement.

Cancer Institute, COVID-19: What People with Cancer Should Know (last visited July 11, 2022), ("People with certain cancers and those who are receiving treatment that suppresses the immune system may have a weaker response to COVID-19 vaccines than people whose immune systems are not compromised."), *available at* https://www.cancer.gov/about-cancer/coronavirus/coronavirus-cancer-patient-information#if-i-have-cancer-now-or-had-it-in-the-past-am-i-at-higher-risk-of-severe-covid-19.

AA 35-37. Finally, respondent argued that class action habeas litigation, *see supra* n.2, would be inappropriate in this case. AA 37-39.

Petitioners countered that the case should not be dismissed on such grounds, and they requested appointment of counsel. They argued that "there has to be accountability for [the prison's] mistreatment of inmates; dismissal based on gatekeeping concerns would be inappropriate." AA 65.

Petitioners also clarified the relief they ultimately sought and explained in more detail the amended complaint's request for "any further relief that the court deems necessary." AA 17. They argued that the petition, "brought by *pro se* petitioners with no legal education, should be construed as seeking an order for the BOP to remedy the unconstitutional conditions of confinement and, if it cannot remedy the conditions, an order of [outright] release." AA 80. They explained that the *Whitted* settlement agreement "plainly does not preclude an action to the extent that it seeks the provision of adequate medical care at FCI Danbury." *Id.* They also explained that the *Whitted* litigation was no bar to outright release: "[A] petition seeking an order of release from Court if the conditions cannot be remedied (rather than an order requiring the BOP to effectuate a transfer to home confinement) is also not precluded by the Agreement." *Id.*

The *Whitted* class, represented by counsel, filed an amicus brief in support of petitioners to amplify these points. The amici demonstrated that the *pro se* petition

in this case should be read to encompass not only release to home confinement as a remedy but also injunctive orders to improve petitioners' medical care while in prison, orders transferring petitioners to other federal facilities where they could receive adequate care, and release from prison outright. AA 88. The class demonstrated that while the *Whitted* settlement agreement might bar release to home confinement for petitioners here, it did not bar other possible forms of relief. AA 89. The amicus brief also documented the deplorable state of medical care at FCI Danbury. AA 89-94.

The District Court dismissed the petition. The Court made it clear that the dismissal had nothing to do with the state of medical care at Danbury, acknowledging that "[t]he Petitioners and *Amicus* paint a compelling and concerning picture regarding the timeliness and adequacy of health care being provided to inmates, especially those with serious diagnoses and identified needs." AA 142 n. 2.

Instead, the District Court dismissed the case for procedural reasons related to ultimate remedies. First, the District Court presumed that petitioners sought release to home confinement as their sole potential remedy. The Court acknowledged that, if petitioners sought other injunctive remedies, "[t]he Respondent c[ould] be ordered to provide appropriate medical care, on both an individual and systemic basis." AA 151. The Court believed, however, that "Petitioners seek no such relief." AA 152. Parsing petitioners' use of the term "further relief" in the amended petition, the Court

concluded that it could not possibly be read to include "narrowly tailored injunctive relief to address [petitioners'] medical needs" because "they seek an order granting them home confinement or 'any *further* relief' the Court deems necessary." AA 152 (emphasis in original). The Court also ignored both the *pro se* petitioners' and *amici*'s repeated assertions that injunctive orders for life-saving care were indeed on the table as possible relief.

Having construed the requested relief in this narrow fashion, the District Court dismissed the case based on provisions of the PLRA that apply at the remedy stage, not the pleading stage. *See* 18 U.S.C. § 3626(a). The Court first decided that these requirements of the PLRA extended to the habeas petition. The Court then opined that petitioners failed to meet these requirements, and dismissed the petition.

SUMMARY OF THE ARGUMENT

The District Court erred in this case because it took a set of rules that apply to the very end of an injunctive case—the remedy stage—and applied them to the very beginning—the motion to dismiss stage. First, the District Court adopted an overly restrictive reading of the relief the *pro se* petitioners sought, incorrectly concluding that they sought release to home confinement to the exclusion of every other potential remedy. Second, the District Court decided, on a motion to dismiss, that if petitioners ultimately proved constitutional violations, they would not qualify for

release to home confinement because they could not satisfy provisions of the Prison Litigation Reform Act that apply to remedial orders at the end of an injunctive case.

What the District Court should have done—and should do on remand—is properly interpret the scope of requested relief, and then consider what relief to award if petitioners prove constitutional violations.

A. This Court's standard of review in this case is *de novo*.

B. The District Court first erred by taking an extremely narrow view of the relief requested in the petition. The petition sought release to home confinement and "any further relief that the court deems necessary." AA 17. The *pro se* petitioners clarified in a later filing that they were seeking both injunctive orders regarding their medical care and outright release as remedies beyond release to home confinement. An amicus brief underscored this very point—the *pro se* litigants were seeking other remedies, including injunctive relief and outright release, and such remedies would be cognizable under § 2241 if petitioners ultimately proved constitutional violations. The District Court nonetheless decided that petitioners sought no relief other than home confinement.

The Court erred in this crabbed construction of potential remedies. *Pro se* pleadings are to be construed liberally, not doomed by hyper-literal distinctions, especially once the plaintiffs (with *amicus* support) diligently clarified the relief sought.

C. Having narrowed the relief sought to home confinement alone, the District Court then fast-forwarded to the remedial stage of the case and considered requirements that the PLRA imposes on the remedy phase of an injunctive case. The District Court treated these requirements for granting injunctive relief (typically after an evidentiary hearing) as if they were pleading requirements

The statute relied on by the District Court—18 U.S.C. § 3626, a provision of the PLRA—plainly states that it applies to remedial *orders* once constitutional violations are established, not threshold considerations on a motion to dismiss. A legion of cases says the same thing: These are provisions governing relief, not pleading requirements, so they have no relevance at the motion-to-dismiss stage. The District Court plainly misapplied the law when it dismissed the case at the pleading phase based on rules that govern the remedy phase.

D. By skipping to the remedy stage, the District Court opined on two remedy-stage issues. This Court need not address these issues because they are not relevant at this stage of the litigation and will become relevant only if petitioners prove constitutional violations and the District Court then considers particular remedies.

In any event, the District Court reached the wrong conclusions on these points. First, the District Court posited that petitioners were ultimately seeking a "prisoner release order" as that term is defined by the PLRA. *See* 18 U.S.C. § 3626. Not so.

The release of a two medically vulnerable individuals who show that they cannot receive constitutionally adequate medical care while incarcerated at a facility would not amount to a "prisoner release order" under the PLRA.

E. The District Court also resolved a second, and even broader, question: Whether the PLRA's prospective relief provisions apply at the remedial phase of a § 2241 action seeking release based on inadequate medical care. The District Court said "yes." The correct answer is "no" because the plain language of the statute states that the prospective relief provisions do *not* apply to "habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2). But here again, this Court need not resolve this remedy-phase question should it choose not to. It is enough to remand the case for consideration of remedies if and when the litigation proceeds to the remedy phase.

ARGUMENT

I. The District Court Erred By Dismissing Mr. Pelletier and Mr. Milchin's Habeas Petitions.

A. Standard of Review.

This Court reviews dismissal of habeas petitions under 28 U.S.C. § 2241 *de novo*. *Cephas v. Nash*, 328 F.3d 98, 103 (2d Cir. 2003). This Court must accept all factual allegations in the Complaint as true and draw all inferences in Mr. Pelletier and Mr. Milchin's favor. *See Menaker v. Hofstra Univ.*, 935 F.3d 20, 30 (2d Cir. 2019). Because Mr. Pelletier and Mr. Milchin were *pro se* below, their pleadings

must be construed liberally. *See Thompson v. Choinski*, 525 F.3d 205, 209-10 (2d Cir. 2008); *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006). A court should interpret the *pro se* party's papers "to raise the strongest arguments suggested therein." *See Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994).

B. Contrary To The District Court, Petitioners Did Not Only Seek Release To Home Confinement But Also Other Remedies.

The District Court incorrectly construed the *pro se* petition to seek only release to home confinement. The Court should have recognized that petitioners also sought injunctive orders regarding decent medical care and alternate forms of release from Danbury (whether by transfer to another facility, transfer to home confinement, or outright release from prison).

The District Court acknowledged, as it had to under this Court's precedent, that such remedies were fully cognizable in a § 2241 proceeding. *See* AA 151 (citing *Thompson v. Choinski,* 525 F.3d 205, 209 (2d Cir. 2008); *Jiminian v. Nash*, 245 F.3d 144, 146 (2d Cir. 2001)); *Todaro v. Ward,* 565 F.2d 48, 53-54 (2d Cir. 1977); *Ziglar v. Abassi,* 137 S. Ct. 1843, 1849 (2017). And it recognized that "[t]he Respondent c[ould] be ordered to provide appropriate medical care, on both an individual and systemic basis." AA 151. But the District Court believed that "Petitioners seek no such relief." AA 152.

This was error. For starters, the Federal Rules of Civil Procedure provide that "[e]very [non-default] final judgment should grant the relief to which each party is

entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c). In other words, a district court must decide the proper relief at the end of the case, independent of the parties' demands. *See Daniels v. Tolson*, No. 113CV00202AWISKOPC, 2015 WL 7007984, *4 (E.D. Cal. Nov. 12, 2015) (citing Rule 54(c) and noting "litigants are not confined to their pleadings with respect to the relief sought").

Moreover, the petition sought not only release to home confinement but also "any further relief that the court deems necessary." AA 17. This Court's "well-worn precedent" recognizes "a district court's obligation to liberally construe *pro se* submissions." *McCleod v. Jewish Guild for the Blind*, 864 F.3d 154, 158 (2d Cir. 2017); *see also Bertin v. United States,* 478 F.3d 489, 491 (2d Cir. 2007) ("We liberally construe pleadings and briefs submitted by *pro se* litigants . . ."). "[I]mplicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training." *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007).

Consistent with this principle, courts construe a *pro se* litigant's request for "other relief," "further relief," or the like, to include a broad request for remedies. For example, in *Smith v. Hundley*, the Eighth Circuit construed a *pro se* prisoner's request for relief broadly: "We find that even if some ambiguity can be found in the

complaint, its request for 'such other and further relief as the Court may deem just and proper' coupled with the fact that it is a *pro se* complaint permits us, under a liberal construction of the pleadings, to preliminarily consider this issue." 190 F.3d 852, 854 n. 7 (8th Cir. 1999) (citations omitted). Similarly, the court in *Gowins v. Greiner* interpreted a *pro se* prisoner's complaint for "such further relief as the court deems necessary" to include a request for "injunctive relief to the extent that any such relief may be available." No. 01 CIV. 6933 (GEL), 2002 WL 1770772 at *2, *8 (S.D.N.Y. Jul. 31, 2002); *see also Ostrofsky v. Sauer*, No. 207CV-00987MCE KJNPS, 2010 WL 891263 at *2 (E.D. Cal. Mar. 8, 2010) (construing a request for "such other relief as this Court deem[s] just, proper and equitable" to include injunctive relief)*; Littlejohn v. Core Civic*, No. 3:22-CV-00109, 2022 WL 1124855, at *4 (M.D. Tenn. Apr. 14, 2022) (interpreting a request for "[s]uch other and further relief as the Court deems just and proper" to seek "prospective injunctive relief.").

Thus, even if petitioners had stood on the remedy language they used in the petition without further clarification, the District Court would have erred in construing their request for relief so narrowly. The error is all the more glaring because petitioners diligently explained the relief they sought in subsequent filings. They wrote that the petition "brought by *pro se* petitioners with no legal education, should be construed as seeking an order for the BOP to remedy the unconstitutional conditions of confinement and, if it cannot remedy the conditions, an order of

[outright] release." AA 80. An amicus brief underscored this very point—the *pro se* litigants were seeking other remedies (including injunctive relief, transfer to another facility, and outright release) and such remedies would be available under § 2241 if petitioners ultimately proved constitutional violations. AA 87-88.

Thus, the District Court erred because it misinterpreted the petition's request for relief and then brushed aside the petitioners' diligent efforts to explain the remedies they actually sought.

C. The District Court Erred By Treating The Prospective Relief Provisions Of The Prison Litigation Reform Act As Pleading Standards.

Having erroneously narrowed the relief petitioners requested, the District Court then fast-forwarded to the remedial stage of the case—it converted rules governing the remedy phase into pleading requirements. The restrictions on which the District Court based its dismissal—namely, the prospective relief provisions of 18 U.S.C. § 3626—speak only to the fashioning of relief once a violation has been proven, typically after discovery and a hearing. By their plain meaning, these provisions do not apply at the outset of a case. Requiring petitioners to satisfy these requirements in their complaint, as the District Court did here, amounts to establishing a new pleading standard. This interpretation runs afoul of the plain language of the PLRA and the Federal Rules of Civil Procedure.

The District Court focused its dismissal on two aspects of the PLRA's prospective relief provisions: the general requirement that relief be narrowly drawn, and the limitation on the circumstances under which a court can enter a release order. 18 U.S.C. § 3626(a)(1)(A); 18 U.S.C. § 3626(a)(3). The plain language of the PLRA makes clear that neither applies at this phase of litigation.

The PLRA explains that "[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626 (a)(1)(A). "The court shall not ***grant or approve*** any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." *Id*. (emphasis added). A "prisoner release order" is just one form of such prospective relief. *See* 18 U.S.C. § 3626(a)(3).

But where—as here—"the district court has yet to fashion any prospective relief, . . . the provisions of the [Prison Litigation Reform Act] have yet to be triggered." *Williams v. Edwards*, 87 F.3d 126, 133 (5th Cir. 1996). "In the future, however, if the district court should undertake this examination and if it should find a violation of a 'Federal right,' then any remedy it might fashion must conform to

the standards set forth in the Act." *Id*. "But for now, the Act does not affect this case." *Id.*[6]

[6] Accordingly, district courts in this circuit and throughout the country routinely wait until after liability has been assessed before considering 18 U.S.C. § 3626. *Goode v. Bruno*, No. 3:10CV1734(SRU), 2013 WL 5448442, *7 (D. Conn. Sept. 30, 2013) (declining to strike injunctive demand and noting that "[i]f [plaintiff] were to prevail in this action, the court would be constrained by the requirements set forth in 18 U.S.C. § 3626 in awarding injunctive relief against the defendant."); *Johns v. Messer*, No. 7:19-cv-00207, 2020 WL 265232, *4 (W.D. Va. Jan. 17, 2020) (declining to dismiss request for possibly inappropriate injunctive relief where plaintiff also sought "any additional relief deemed just by this court"); *G.H. by & through Henry v. Marstiller*, 424 F. Supp. 3d 1109, 1114 (N.D. Fla. 2019) (holding defendants' arguments about remedy "premature" on motion to dismiss); *Griggs v. Holt*, No. CV 117-089, 2018 WL 5283448, *10 (S.D. Ga. Oct. 24, 2018) (denying motion to dismiss and noting that "[i]f the Court later concludes that injunctive relief is appropriate, the Court will then rely on § 3626(a)(1) to craft that relief"); *Walker v. Smokes*, No. 6:15-cv-57, 2018 WL 3241926, *12 (S.D. Ga. July 3, 2018) (stating court cannot assess on a motion to dismiss whether relief sought is the least intrusive necessary without a more developed record); *Archuleta v. Archuleta*, No. 15–cv–02664–RBJ–KMT, 2017 WL 1067781, *8 (D. Colo. Feb. 27, 2017) (stating "concerns that [the] relief [sought] might not be narrowly drawn in compliance with [§ 3626(a)] is not a basis to dismiss Plaintiff's request at this time"); *Fratus v. Mazyck*, No. 2:16-cv-0076-KJM-EFB P, 2017 WL 531842, *4 (E.D. Cal. Feb. 7, 2017) (holding "dismissal of plaintiff's injunctive relief request by way of a 12(b)(6) motion is premature. . . . The merits of plaintiff's requested injunctive relief will be determined at a later stage in the litigation."); *Williams v. Cutler*, No. 1:14–cv–539–NT, 2016 WL 1314630, *7 (D. Me. Mar. 11, 2016) (declining to consider argument that § 3626(a)(1)(A) bars punitive damages on a motion to dismiss because "[i]t is too early to evaluate how [the § 3626] standard will apply in this case, and certainly too early to say that I would be unable to grant or approve relief that meets § 3626(a)(1)(A)'s requirements."); *McCoy v. Chatman*, No: 5:15-cv-00175 (MTT), 2016 WL 7741737, 10 (M.D. Ga. July 6, 2016) (holding motion to dismiss "is too early to determine whether or not injunctive relief might be authorized" and noting that "it may be possible to fashion an injunctive remedy that would be narrowly tailored to the [alleged violation]"); *Thomas v. Hutcheson*, No. 6:14–cv–16, 2015 WL 4378278, *15 (S.D. Ga. July 15, 2015) (denying summary judgment as to plaintiff's injunctive claim; though the requested transfer to a lower security prison

By its plain terms, the statute imposes limitations on what a district court can "grant or approve" as ultimate relief—it does not apply to threshold matters to be adjudicated before the merits. Had Congress intended for this provision to provide a basis for dismissal before the remedy stage, it would have said so—just as it did elsewhere in the PLRA. For example, the PLRA is clear that "[n]o action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997(a). Similarly, it declares that "[n]o Federal civil action may be brought . . . without a prior showing of physical injury or the commission of a sexual act." 42 U.S.C. § 1997(e). Section 3626, by contrast, is silent as to what a plaintiff must or may do at the preliminary stages of litigation; it limits only the relief that a court may grant.

Section 3626 goes on to explain that a court must support any relief it eventually grants by a finding that such relief is tailored to the violation—confirming that it is not a pleading requirement. Naturally, a district court cannot articulate

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is unlikely to be the least intrusive remedy, "it would be imprudent to foreclose the Court from providing any injunctive remedy at all" if a violation is found); *Ashker v. Governor of State of Cal.*, No. C 09–5796 CW, 2014 WL 2465191, *8 (N.D. Cal. June 2, 2014) (holding 18 U.S.C. § 3626(a)(1) "governs the scope of injunctive relief that a federal court may issue in a 'prison conditions' case after liability has been assessed"); *Royer v. Fed. Bureau of Prisons*, 934 F.Supp.2d 92, 95 (D.D.C. 2013) (on motion to dismiss or for summary judgment, holding argument based on § 3626(a)(1) "is premature given the status of this case and the Court will not consider it now."); *Henderson v. Thomas*, 891 F. Supp. 2d 1296, 1312 (M.D. Ala. 2012) (holding that PLRA's restrictions on prospective relief are not "triggered" until the court is fashioning prospective relief).

findings to support a grant of relief until it has found a violation, developed a record that might illuminate how best the violation can be corrected, and granted the relief.

Other circuits have explained this point with clarity in holding that § 3626(a) is inapplicable where no prospective relief has yet been granted—including at the motion to dismiss stage. *See Edmo v. Corizon, Inc*., 935 F.3d 757, 783 (9th Cir. 2019); *Williams*, 87 F.3d at 133. All this provision means, the Fifth Circuit has written, is that "when a district court fashions prospective relief in prison litigation, . . . the relief must meet the standards set forth in the Act." *Williams*, 87 F.3d at 133. Put differently, § 3626(a)(1)(A) directs district courts to "make . . . findings sufficient to allow a clear understanding of the ruling" and "explain[] how the relief being ordered . . . corrects the violations [found] based on the unique facts and circumstances" of the case. *Edmo*, 935 F.3d at 783 ("[W]hat the PLRA requires, is a finding that the set of reforms being ordered—the relief—corrects the violations of prisoners' rights with the minimal impact possible on defendants' discretion over their policies and procedures.") (internal quotations omitted); *Henderson v. Thomas*, 891 F. Supp. 2d 1296, 1312 (M.D. Ala. 2012) (explaining that the PLRA's prospective relief provisions are "not a heightened-pleading requirement imposed on the plaintiffs," but "a limitation on judicial authority over prisons at the remedial stage." (citations omitted).

The District Court's interpretation of the prospective relief provisions is also at odds with the Federal Rules of Civil Procedure. Rule 8 requires simply a "short and plain statement of the claim" in a complaint. Fed. R. Civ. P. 8. At the motion-to-dismiss stage, the complaint is judged only by whether it presents "enough facts to state a claim to relief that is plausible on its face, . . . not whether the relief requested will be granted in full." *Henderson*, 891 F. Supp. 2d at 1312. The Supreme Court has confirmed that this standard remains unchanged by the PLRA. *See Jones v. Bock*, 549 U.S. 199, 216-17 (2007) (citing *Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993)). In holding that another provision of the PLRA did not create a pleading burden for plaintiffs, the Supreme Court noted that pleading requirements "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Id*.

Lastly, interpreting § 3626(a) as guidance to courts fashioning relief rather than a pleading requirement is, simply, logical. At the outset of a case, without a developed record, it is impossible to know what relief might be appropriate to remedy a violation of a prisoner's constitutional rights—if there was one. In a typical case seeking prospective relief, a district court would hold a hearing and consider evidence before finding a constitutional violation. If the Court found a constitutional violation, the parties would then weigh in on the proper relief, taking the PLRA's requirements into effect.

Of course, it is not uncommon for courts to ultimately grant relief that is narrower or less intrusive than the petitioners' remedial demand, after developing a record and carefully considering the individual circumstances of a violation. *See, e.g.*, *Fernandez v. Nevada*, No. 3:06–CV–00628–LRH (RAM), 2010 WL 5678693, *7 (D. Nev. Oct. 28, 2010) (rejecting request to remove sex offender classification and deem plaintiff immediately parole-eligible as not narrowly tailored; recommending preliminary injunction to providing hearing before psychological board necessary for parole eligibility); *Perez v. Cate*, No. C 05–05241 JSW, 2009 WL 440508, *4-5 (N.D. Cal. Feb. 23, 2009) (rejecting request in dental care case to prohibit out-of-state transfers as too broad and intrusive; directing development of a pre-transfer screening process).

Here, after deciding the PLRA applied, the District Court found that the PLRA required dismissal—reasoning that the relief requested in the complaint did not comport with the PLRA's prospective relief provisions contained in 18 U.S.C. § 3626. But the relief requested in the complaint need not comport with § 3626. Because the Court never got to the remedial phase of litigation, the provisions of § 3626 were never triggered. In holding otherwise, the District Court manifestly erred by misinterpreting the PLRA, straying from the Federal Rules of Civil Procedure, and impermissibly created a heightened pleading requirement. The District Court's plain and unmistakable error requires reversal.

* * *

That much should resolve the appeal. The District Court incorrectly narrowed the relief requested to one and only one remedy—release to home confinement. Then the Court dismissed the case because it applied remedial-stage burdens to a pleading-stage issue. A reversal is required due to these errors; on remand, the District Court's consideration of remedial issues should await the remedial phase.

By jumping the gun in this manner, the District Court also decided broader issues, ones this Court need not reach. We brief those broader issues below out of an abundance of caution.

D. Petitioners Did Not Seek A "Prisoner Release Order" Under The Meaning Of The PLRA.

Even assuming for the sake of argument that the District Court did *not* err in converting the PLRA's prospective relief requirements into rules of initial pleading, the Court still misinterpreted the meaning of the term "prisoner release order" under § 3626. Should the Court consider a hypothetical scenario—one in which Mr. Milchin and Mr. Pelletier prove constitutional violations on the merits and *then* move for their release as the remedy—such a request would not amount to a "prisoner release order" under the PLRA. The term is limited to orders regarding overcrowding, but the gravamen of this case is not that Danbury is overcrowded, or that its failures in medical care result from overpopulation at the prison. Rather, two men seek release as a *future* remedy in this case because they are medically

vulnerable and at risk of death because the prison consistently fails to provide remotely decent care.

While the PLRA is strict about the circumstances under which a court may grant a "prisoner release order," it is also quite specific about what it means by that term. *See* 18 U.S.C. § 3626(a)(3). The statute defines "prisoner release order" as "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." 18 U.S.C. § 3626(g)(4). The PLRA's restrictions on prisoner release orders are, therefore, expressly tied to controlling prison populations: An order is not a prisoner release order under the PLRA unless it is connected to a reduction in population.

The legislative history of the PLRA confirms the view that the prisoner release provisions were intended to target population limits and variations on them. For example, the House Committee report noted that "population caps are a primary cause of revolving door justice." Violent Criminal Incarceration Act of 1995, H.R. 667, 104th Cong. tit. IV (Enhancing Protection Against Incarcerated Criminals) (Jan. 25, 1995). Senator Orrin Hatch confirmed Congress's concern with population caps during the only Senate hearing on the PLRA that "[p]rison population caps, which result in revolving door justice and the commission of untold numbers of preventable crimes, should be the absolute last resort." Prison Reform: Enhancing the

Effectiveness of Incarceration: Hearing on S. 3, S. 38, S. 400, S. 866, S. 930, and H.R. 667 Before the S. Comm. on the Judiciary, 104th Cong. 3 (1995) (statement of Sen. Orrin G. Hatch). When speaking in support of the PLRA, and specifically the prison release order provisions, Congressman Charles Canady expressed that "imposing a prison or jail population cap should absolutely be a last resort and that the court should take into account the import such caps will have on the public safety." 141 Cong. Rec. H1480 (daily ed. Feb. 9, 1995) (Statement of Rep. Charles Canady). When passing the PLRA, Congress was evidently concerned with orders that reduced prison populations.

Analyzing this history, Professor Margo Schlanger has found that orders aimed at keeping vulnerable populations, such as individuals with severe medical conditions, out of jail and prison, do not constitute prison release orders under the PLRA. Margo Schlanger, *Anti-Incarcerative Remedies for Illegal Conditions of Confinement*, 6 U. Miami Race & Soc. Just. L. Rev. 1, 26 (2016). Textually, a protection-oriented order "clearly lacks the purpose of reducing or limiting the prison population" and is beyond the scope of a traditional prisoner release order. *Id.* As Professor Schlanger explains:

> The prisoner release order provision was mentioned quite a few times—throughout that one hearing, in the only committee report, and on the floor of the House and Senate. Each and every time, both the bill's supporters and its opponents make clear that the targets of the provision were jail and prison population caps and orders—for example, requirements to hold vacant a particular percentage of cells—

> functioned, like population caps, to compel the release or non-admission of prisoners. . . . Congress's skepticism about population caps explains the PLRA's "purpose or effect" language, too. That language is necessary to keep parties or judges from evading the statutory hurdles by entering an order, like a per-prisoner space requirement or an order requiring a percentage of empty cells, that functions like—but isn't quite—a population cap. *Id.* at 27-28.

Courts have interpreted the provision accordingly—especially in cases like this one that are not related to over-crowding. For example, an order directing transfer of an ill prisoner to a civilian medical facility because the court concluded his care was so inadequate in prison that he would die if left there was held not to be a prisoner release order. *Reaves v. Dep't of Corr.*, 404 F.Supp.3d 520, 522-23 (D. Mass. 2019). In coming to this decision, the court noted that the order involved only a single prisoner and was not primarily intended to relieve crowding. *Id*. An order removing prisoners at elevated risk of contracting a particular disease from prisons located where that disease was prevalent was also held not to be a prisoner release order. *Plata v. Brown*, 427 F. Supp. 3d 1211, 1222 (N.D. Cal. 2013). The court found that, viewing the definition of "prisoner release order" in the context of the PLRA as a whole, it was clear that the provision was not directed at transfers intended to remedy constitutional problems unrelated to overcrowding. *Id*. Even the prison conceded that "an order to transfer any single inmate out of a prison to correct the violation of a constitutional right caused by something other than crowding—for example, because transfer was necessary for the inmate to obtain appropriate

medical care—would not be a 'prisoner release order.'" *Id*. But the court went even further, holding that even if Congress had intended to limit courts' ability to order transfers under 18 U.S.C. § 3626(a)(3)(B) to remedy non-crowding-related violations, the court would still be barred from adopting that interpretation because "[a]lthough 'Congress is free to alter the standard that determines the scope of prospective relief for unconstitutional prison conditions,' it can do so only "'so long as the restrictions on the remedy do not prevent vindication of the right.'" *Id.* at 1223 (citing *Gilmore v. California*, 220 F.3d 987, 1002-03 (9th Cir. 2000). "It is easy to imagine circumstances—not caused by crowding—where a transfer would be necessary to protect inmates' constitutional rights: for example, if specialized medical care were not available at a particular prison." *Id*.

Here, Mr. Pelletier and Mr. Milchin are seeking exactly the type of protection-based release that does not constitute a "prisoner release order" under the PLRA. The intent and effect of the requested release is to provide petitioners with proper medical care. Mr. Pelletier and Mr. Milchin therefore do not seek a "prisoner release order."[7]

[7] The fact that petitioners filed the case as a putative class action does not turn the relief that hypothetically could be requested in a "prisoner release order." Even assuming (1) petitioners moved for class certification on remand, (2) the District Court granted class certification, and (3) the District Court found systemic constitutional violations that would warrant a release for a larger number of prisoners, the basis for any release as a potential remedy would be the combination of deficient medical care and a given individual's medical vulnerability.

E. Petitioners Challenge The "Fact or Duration" Of Their Confinement, So The PLRA's Prospective Relief Provisions Do Not Apply.

An even broader question is whether the prospective relief provisions of the PLRA would apply at all to the remedy stage of this case, assuming the plaintiffs ultimately prove constitutional violations in the course of the litigation. By effectively skipping to the remedy stage, the District Court opined on this issue as well—and reached the wrong answer. The Court need not decide this issue, but should it do so the answer is clear: The prospective relief provisions of the PLRA do not apply to this case.

It is settled law that where a habeas petition challenges the fact or duration of confinement, the PLRA's prospective relief provisions do not apply. Those provisions only apply to "civil action[s] with respect to prison conditions," a term that "means 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*." § 3626(g)(2) (emphasis added). The applicability of the PLRA's prospective relief provisions is not dependent on the specific statutory provision a habeas petition is brought under. Whether brought under 28 U.S. §§ 2254, 2255, or 2241, the provisions do not apply so long as the petition challenges the fact or duration of confinement. *See Reyes v.*

Keane, 90 F.3d 676, 678 (2d Cir. 1996), *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L.Ed.2d 481 (1997) (no habeas petition under 28 U.S. §§ 2254 and 2255 is subject to the special fee requirements of the PLRA because such petitions are not civil actions for purposes of the PLRA); *see also Jones v. Smith*, 720 F.3d 142, 145 n.3 (2d Cir. 2013) ("The logic of our opinion in *Reyes* was to distinguish between civil actions covered by the PLRA and others *based on the type of relief sought*, rather than the statute under which relief was sought.") (emphasis added).

This is true even if a petition challenges conditions in addition to seeking relief. As a result, district courts in this circuit have decided that § 2241 petitions seeking bail or transfer to home confinement during the COVID-19 pandemic were not "civil actions." For example, in *Martinez-Brooks v. Easter*, the court considered a case in which petitioners brought a § 2241 petition "contend[ing] that their medical histories and the outbreak at FCI Danbury combine to place them in grave danger from COVID-19," and seeking, among other relief, release to home confinement. 459 F. Supp. 3d 411, 433 (D. Conn. 2020). The court first recited the rule that none of the provisions of § 3626 apply unless the proceeding is a civil action with respect to prison conditions rather than a habeas corpus petition challenging the fact or duration of confinement. *Id*. (citing § 3626(g)(2)). The court then decided that petitioners were challenging *both* the conditions and the fact of their confinement.

Id. The court explained, "[b]ecause Petitioners contend that the Eighth Amendment violation inheres in their incarceration at Danbury FCI and cannot be remedied unless they are removed from that setting, petitioners are challenging the fact—or 'existence'—of their confinement." *Id*. at 434. In short, petitioners were in danger *because* they were confined. Section 3626 was thus inapplicable. *Id*. at 433.

In reaching the conclusion that a case that challenges both conditions and the fact or duration of confinement is exempt from the definition of "civil actions" for PLRA purposes, the court in *Martinez-Brooks* followed a well-established canon of statutory construction in which it accorded meaning to all parts of the definition of "civil action with respect to prison conditions." *Id.* at 434-35 (citing *U.S. v. Bernier*, 954 F.2d 818, 819-20 (2d Cir. 1992) ("[C]ourts must give effect to every word of a statute where possible."). "Because the first part of the definition already limits its scope to proceedings 'with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison,' habeas petitions unrelated to conditions of confinement—such as challenges to the validity of a conviction or the length of the sentence imposed by the court—are already excluded from the scope of the PLRA." *Martinez-Brooks*, 459 F. Supp. 3d at 435. "Thus, to interpret the habeas clause of the definition to refer only to these types of petitions would make the clause superfluous." *Id*. "By contrast, interpreting the clause to refer to a subset of habeas petitions 'with respect to the conditions of

confinement . . . '—namely, those that challenge the 'fact or duration of confinement' by claiming, for example, that no constitutional conditions of confinement are possible under the circumstances—gives effect to all parts of the definition." *Id.* Put differently, read as a whole, . . . the definition in subsection (g)(2) strongly suggests that there are habeas proceedings that challenge both the conditions of confinement and the 'fact or duration of confinement,' and that such petitions are exempt from the statute." *Id*. (citing *U.S. v. Lockhart*, 749 F.3d 148, 154 (2d Cir. 2014) ("[I]t is well established that statutory phrases should not be construed in isolation; we read statutes as a whole.") (internal quotation marks and citations omitted)). Petitioners here brought exactly this kind of habeas petition: A challenge to conditions so poor and intractable that they can truly be remedied only by release.

Mr. Pelletier and Mr. Milchin's petition is a request to be physically moved to remedy constitutional violations—the heart of habeas, and a clear challenge to the fact of their confinement. Moreover, their allegations support an inference that transfer out of Danbury—whether to home confinement, another prison or outright release—may be the only effective remedy. This Court has held that in determining a petitioner's "fitness for bail" pending adjudication of a habeas petition, it must inquire into "whether extraordinary circumstances exist that make the grant of bail necessary to make the habeas remedy effective." *Mapp v. Reno*, 241 F.3d 221, 226

(2d Cir. 2001). Based on this precedent, the Southern District of New York recently held that "[r]elease is . . . necessary [for petitioners who suffer from certain medical conditions] to make the habeas remedy effective" because "[i]f Petitioners were to remain detained, they would face a significant risk that they would contract COVID-19—the very outcome they seek to avoid." *Coronel v. Decker*, 449 F.Supp.3d 274, 288-89 (S.D.N.Y. Mar. 27, 2020).

Here, petitioners allege that they have serious medical problems; in fact, since bringing suit, their worst fears have been confirmed: They both have been diagnosed with cancer. There is a years-long backlog of sick requests, and a medical care system at the prison beset by lengthy, dangerous delay. Release from prison—and access to their own, attentive doctors—may prove to be the only remedy available to spare their health. Their petition thus challenges the fact of their confinement and is not a "civil action with respect to prison conditions" for PLRA purposes. The District Court erred in deciding otherwise.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that this Brief complies with the type-volume limitation of L.R. 32.1(a)(4)(A) because this brief contains 8,238 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the Brief has been prepared in the proportionally spaced typeface Times New Roman, 14-point font, using Microsoft Word 2016.

Date: July 11, 2022 *s/ David Shapiro*

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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Date: July 11, 2022 *s/ David Shapiro*