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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

REPLY BRIEF OF APPELLANTS MICHAEL MILCHIN AND KENNETH PELLETIER

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This Court has at least two easy paths to reversing the district court. The first is, quite simply, to recognize that the district court misread a 28 U.S.C. § 2241 petition seeking home confinement or "[a]ny further relief that the court deems necessary," AA17,[1] to seek *only* home confinement. And it doubled down on that misreading when it ignored subsequent clarification from the *pro se* plaintiffs that they sought, *inter alia*, "an order fort [sic] the BOP to remedy the unconstitutional conditions of confinement" or "an order of release." AA80. Correcting that simple error resolves this appeal.

The second is to instruct the district court that—even if it was correct to comb the *pro se* petition for a misstep and to ignore the subsequent clarification—it mistakenly transformed the PLRA's remedial limitation into a pleading requirement. This path, too, resolves the appeal.

The government, meanwhile, attempts to convert a straightforward appeal about a misread habeas petition into a vehicle for this Court to reach a host of broad legal issues that have little or no bearing on the outcome of this case. For example, the government urges this Court to make broad pronouncements about the applicability of the PLRA, writ large, to this case and to habeas corpus claims

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

generally. Appellee's Br. at 22, 23. In doing so, the government ignores that only a very narrow part of that Act is at issue in this case, and asks this Court to both undermine long-established precedent and reject a line of cases not on appeal here. The government also requests that this Court weigh in on whether the judiciary lacks authority to order home confinement, Appellee's Br. at 37, even though Petitioners long ago conceded that their requests for home confinement are barred by a previous settlement. The opinions the government seeks are, at best, overly broad and, at worst, advisory. This Court should decline its invitation.

I. The District Court Erred By Ruling Petitioners Sought Only Home Confinement And Dismissing On That Ground.

As the opening brief explained, the district court erred when it misread the petition to insist on one form of relief to the exclusion of all others, and it erred again when it dismissed the petition because it believed the petition failed to recite an obtainable form of relief. These errors—and these errors alone, independent of any question of the PLRA's applicability—caused the dismissal. *See* AA151-53 (recognizing that "[t]he Respondent c[ould] be ordered to provide appropriate medical care" but dismissing "on this basis alone" because "Petitioners seek no such relief").

The government hardly attempts to defend the district court's reading of the petition; it doesn't address that narrow reading—the central question on appeal—

until page 43 of its brief. Once the government gets around to it, it offers uniformly weak defenses.

A. The Government Ignores The Rules Governing Unrepresented Pleadings.

The petition in this case made quite clear the relief it sought: home confinement or "[a]ny further relief that the court deems necessary." AA17. And a subsequent filing with the court clarified once more that the petition "should be construed as seeking an order fort [sic] the BOP to remedy the unconstitutional conditions of confinement and, if it cannot remedy the conditions, an order of [outright] release." AA80.[2] Only by ignoring both requests could the district court conclude that the Petitioners sought "only" home confinement. AA143.[3]

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[2] The government relies on *Wright v. Ernst & Young*, 152 F.3d 169 (2d Cir. 1998) for the proposition that Petitioners' clarification should be ignored. But *Wright* stands for the unremarkable proposition that new claims can only be brought via an amended complaint. Petitioners did not seek to bring any new claims; their claims have remained consistent throughout the litigation. The follow-up filing at issue in this case simply clarified the relief Petitioners sought for the same claim. *See* AA80.

Throughout its brief, the government's refusal to acknowledge Petitioners' requests for additional relief borders on misleading. For example, it writes that "Petitioners do not even claim that they should be released from custody." Appellee's Br. at 24. A cursory review of the filings below and opening brief on appeal belies this assertion. *See* AA80; *see also* Opening Br. at 7-8; 10 (stating that Petitioners were "seeking other remedies, including injunctive relief and outright release"); 12-16 (elaborating on Petitioners' requests for outright release and other remedies); 31-32 (noting that outright release may be the only effective remedy).

[3] For clarity's sake, we note that Petitioners no longer seek home confinement, having conceded that the *Whitted* settlement bars it. AA80; Opening Br. at 8.

Even if the district court would be justified in treating counseled pleadings this way (it would not have been), it erred in treating *pro se* pleadings this way.[4] The court had an obligation treat *pro se* pleadings "liberally," *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008), and refuse to impose "overly technical and stringent" pleading requirements, *Williams v. Kullman*, 722 F.2d 1048, 1050-51 (2d Cir. 1983).

The government suggests that Petitioners do not deserve the leniency generally afforded *pro se* plaintiffs because they "had no trouble articulating their allegations and requesting medical records, class certification, and home confinement." Appellee's Br. at 48-49. This statement is self-evidently wrong—if they did not have trouble articulating their allegations, we would not be before this Court today. In fact, two of the requests the government says Petitioners had "no trouble" articulating, class certification and home confinement, were later conceded as inappropriately requested, and dropped.[5]

Petitioners continue—as they have throughout this litigation—to seek outright release or injunctive relief requiring the BOP to provide lifesaving medical care.

[4] The follow-up filing also reminded the district court that the matter was being litigated "by pro se petitioners with no legal education." AA80.

[5] The government ignores that Petitioners are no longer asking for home confinement or class certification. Because these requests have been dropped, arguments regarding these points are moot, and this Court should not consider them. *See Hall v. Beals*, 396 U.S. 45, 48 (1969) (mootness doctrine derives from case or controversy requirement under Article III, Section 2, of the United States Constitution and prohibits federal courts from issuing advisory opinions on issues that do not require resolution).

The government's point seems to be that *pro se* leniency only applies to complaints that are poorly written. That is not the rule. This Court has held, for instance, that the withdrawal of *pro se* solicitude even from a litigant who offered "exceptionally good" filings complete with "affidavits, exhibits[,] and memoranda of law" constituted an abuse of discretion. *Tracy v. Freshwater*, 623 F.3d 90, 103-04 (2d Cir. 2010). Moreover, this Court construes pleadings complaining of civil rights violations—like this one—with "particular generosity." *Davis v. Goord*, 320 F.3d 346, 350 (2d Cir. 2003) (citing *Morales v. Mackalm*, 278 F.3d 126, 131 (2d Cir. 2002)). And plaintiffs "who are incarcerated also receive certain special solicitude." *Tracy*, 623 F.3d at 102 (citing *Houston v. Lack*, 487 U.S. 266, 270-72 (1988)).

B. The Government's Argument That The Treatment of *Pro Se* Plaintiffs Changes In The Habeas Context Is Unavailing.

The liberal construction rule remains true in the habeas context, notwithstanding the government's protestations about Habeas Rule 2(c). *See Thompson*, 525 F.3d at 209 (treating *pro se* habeas petitioner's pleadings "liberally" and concluding that "the court should have treated [his] claims as properly pleaded" "if the facts alleged entitled him to relief" even if he sought relief under an improper source of law); *Williams*, 722 F.2d at 1050-51 ("[C]ourts should review [*pro se*] habeas petitions with a lenient eye."). A "liberal" construction of the request for "any further relief that the court deems necessary," and of the even clearer subsequent clarification seeking "an order for the BOP to remedy the unconstitutional conditions

of confinement" or "an order of release" plainly encompasses forms of relief other than home confinement. *See* Opening Br. at 14-15 (citing examples of courts reading *pro se* language in this way).

The government bases this argument on Habeas Rule 2(c), which neither it nor the district court mentioned below. The government falters from the outset when it argues that "federal courts have no . . . discretion to disregard [a Habeas] Rule's mandate." Appellee's Br. at 48. That may be true as to habeas petitions brought under sections 2254 and 2255, but it is plainly wrong under Section 2241; the Rules themselves provide that a "district court may," if the court wishes, "apply any or all of these rules to a habeas corpus petition" brought under Section 2241. *See* Habeas Rule 1(b). Nonetheless, the government asserts that the "district court's interpretation of the petition can be upheld on this basis alone," Appellee's Br. at 48—even though the district court gave no indication that it was invoking its discretion to apply the Habeas Rules.

Even assuming that the Habeas Rules apply to this Section 2241 action, they tell us little. Habeas Rule 2(c) does not displace this Court's "well-worn precedent" instructing district courts "to liberally construe *pro se* submissions," *McCleod v. Jewish Guild for the Blind*, 864 F.3d 154, 158 (2d Cir. 2017); *see also Thompson*, 525 F.3d at 209 (treating *pro se* Section 2241 petitioner's pleadings "liberally"), or to treat allegations of civil rights violations with "particular generosity," *Davis*, 320

F.3d at 350. And the government offers no reason why the Habeas Rules might differ from the Federal Rules of Civil Procedure in the relevant respect. The government presents only a generalized assertion that habeas petitions must meet a "more demanding" standard than complaints under Fed. R. Civ. P. 8, *see* Appellee's Br. at 45—but fails to explain why that standard would override the Federal Rules' more specific instruction that courts "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); *see also Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 269-70 (1978) (Federal Rules of Civil Procedure govern habeas proceedings unless contradicted by statute); Habeas Rule 12 (allowing courts to apply the Federal Rules of Civil Procedure to habeas proceedings).

The government makes hay of Habeas Rule 2(c)(3)'s instruction that a habeas petition shall "state the relief requested." But this instruction can't support the departure from everyday civil practice that Appellee urges, because the Federal Rules of Civil Procedure demand the same thing: A "pleading . . . must contain . . . a demand for the relief sought." Fed. R. Civ. P. 8(a)(3). In support of its argument, the government cites only an unpublished out-of-circuit case affirming the dismissal of a petition that "did not satisfy even the notice pleading standard" of Fed. R. Civ. P. 8, *see* Appellee's Br. at 45 (citing *Crosby v. True*, No. 21-1003, 2021 WL 5647770 (10th Cir. 2021) (not precedential))—hardly a resounding endorsement of the theory

that the Habeas Rules demand a perfect statement of the relief sought where the Federal Rules do not.

C. Even If The Petition Could Be Read As Only Requesting Home Confinement, That Is Not Grounds For Dismissal.

The government takes the uncontroversial rule that a petition should be dismissed if it shows "the plaintiff is not entitled to relief," and pretends the rule instead reads that a petition should be dismissed if it shows "the plaintiff is not entitled to *the exact relief sought*." *See* Appellee's Br. at 29 (quoting *Jones v. Bock*, 549 U.S. 199, 215 (2007)); *id*. at 32 (noting "the court's duty to determine whether allegations 'plausibly suggest an entitlement to relief'") (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009)). The government is wrong. As long as there is some plausible relief available to Petitioners—whether or not it is the relief they actually request in their pleadings—they have met their pleading obligation.

The district court's error is apparent even in the wording of the dismissal: It dismissed the petition for failure "to state a claim for which *the relief sought* may be granted," AA153 (emphasis added), rather than the normal dismissal for failure to state a claim for "which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6). A Westlaw search indicates that the district court in this case is the only federal court ever to use that phrase. Yet the government gloms onto this novel terminology—and incorrect resulting standard—in defending the dismissal. *See* Appellee's Br. at 29.

As noted in the opening brief, the Federal Rules of Civil Procedure separate remedy from pleading, providing 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); *see* Opening Br. at 13-14. For that reason, it is common for a court to award less than the requested relief. *See* Opening Br. at 21-22 (citing examples).

The government's own case explications reinforce this point. As the government puts it, the court in *Henderson v. Thomas*, 891 F. Supp. 2d 1296 (M.D. Ala. 2012), found that "the complaint stated a plausible entitlement to some relief" and "correctly refused to engage in [PLRA] tailoring at the motion to dismiss stage" because "'a complaint is judged 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." Appellee's Br. at 30 (quoting *Henderson*, 891 F. Supp. 2d at 1312). Quite right.

D. Petitioners Have No Obligation To Re-Request The Same Relief Sought In The Instant Case.

The government makes offhand comments about Petitioners' decision not to refile additional habeas petitions seeking only injunctive relief, as if the availability of another action dooms this one. *See* Appellee's Br. at 53-54. But a refiling would further clog crowded dockets simply to re-request relief already requested; as explained above, there's no need for a new action because *this* action seeks

injunctive relief. Of course, this action also seeks other forms of relief—relief that the government and the district court both concede might be appropriate.[6] *See* Appellee's Br. at 32 ("'[I]njunctive relief tailored to their individual medical needs' could be available to Petitioners"); *id*. ("Petitioners also could be transferred to a higher-level care BOP facility or other medical facility, among other . . . possibilities."); AA151 ("The Respondent can be ordered to provide appropriate medical care . . . .").

The need for other forms of relief, like transfer or release, has only grown more urgent since Petitioners filed their opening brief, as FCI Danbury continues to fall tragically—and constitutionally—short vis-à-vis Petitioners' medical care. Mr. Milchin *still* has not had surgery to remove his now-advanced skin cancer; it has spread deeper into his facial tissue and is becoming increasingly difficult to treat. And, although Mr. Pelletier was directed to receive radioactive iodine treatment on April 7 as a follow-up to the surgeries removing his thyroid cancer, as of this filing—

[6] The government does not dispute that the district court has authority to grant release to Petitioners. Nor could it; this Court made as much clear in *Mapp v. Reno*, 241 F.3d 221 (2d Cir. 2001), on which courts in this circuit have relied in releasing prisoners at significant risk of harm from COVID-19. *See* Opening Br. at 31-32. *Mapp* held that federal courts have "inherent authority" to release habeas petitioners on bail. *Mapp*, 241 F.3d at 231; *see also Ostrer v. United States*, 584 F.2d 594, 597 n.1 (2d Cir. 1978) ("The district court has inherent power to enter an order affecting the custody of a habeas petitioner who is properly before it contesting the legality of his custody.").

seven months later—the BOP has not provided this care. *See United States v. Pelletier*, No. 2:12-cr-00119-GZS, Motion for Reconsideration of Denial of Compassionate Release, ECF No. 92-1; *see also Id.*, ECF No. 92-4 ("[I]nmate will now need radioactive iodine therapy. There is an ablation protocol that must be followed."). Mr. Pelletier has also found another bump like the one that turned out to be thyroid cancer, this time in his wrist. Alarmingly (but unsurprisingly), this new tumor-like growth has not yet been examined by medical professionals.

FCI Danbury admitted during a "review of the treatment plan" that "logistics is a major issue within this correctional environment." *Id.*, ECF No. 92-7. It attempted to transfer Mr. Pelletier to a medical facility, FCI Butner, explaining that "radiation and frequency of trips [to an outside provider] are unable to be accomplished here," *id*., ECF No. 92-4 at 1, but learned that FCI Butner "no longer does [the necessary treatment] in-house." *Id*., ECF 92-5. In short, as the BOP scratches its head, Mr. Pelletier and Mr. Milchin—low-security, non-violent offenders—could die or be permanently disfigured.

The government's argument amounts to a demand that Petitioners hamstring themselves from the outset by requesting only a subset of the relief they seek. *See* Appellee's Br. at 54 (suggesting that Petitioners should refile to seek medical care "divorced from the prospect" of alternative relief). Even worse, the relief to which the government wants Petitioners to limit themselves is unlikely to be effective,

given FCI Danbury's repeated admissions that it is unable to provide the care necessary. Petitioners have no obligation to file a new action.

II. The Court Erred By Considering The PLRA's Prospective Relief Provisions At The Motion To Dismiss Stage.

A correct reading of the petition resolves this appeal. The government seems to recognize that; it doesn't attempt to argue that the district court was correct to grant the motion to dismiss if the petition sought an injunction for proper medical care. But if this Court sees fit, it should clarify that the PLRA's remedial restrictions are just that: They restrict the remedies a court can award. They don't impose additional pleading requirements on plaintiffs. *See* Opening Br. at 16-22.

A. The Government Relies On Twisted Pleading Principles To Defend The District Court's Application Of The PLRA's Remedial Provisions To The Motion To Dismiss Phase.

The government calls the settled principle that remedial restrictions apply at the remedial stage "made up" and then makes up a rule of its own: that a petition is subject to dismissal if a plaintiff is not entitled to the precise relief they seek. *See* Appellee's Br. at 29, 32. The government's argument on this point resurrects the same novel standard addressed above in Section I.C. The government imports its standard into *Iqbal*'s plausibility requirement, protesting that Petitioners don't "explain how their allegations plausibly suggest home confinement is necessary." Appellee's Br. at 32. The government takes uncontroversial language establishing that a petition should be dismissed if it "show[s] the plaintiff is not entitled to relief,"

id. at 29 (citing *Jones*, 549 U.S. at 215), or if it fails to "plausibly suggest an entitlement to relief," *id*. at 32 (citing *Iqbal*, 556 U.S. at 681), and pretend that it reads "the relief he seeks." It does not.

Iqbal says nothing about the plausibility of obtaining the specific form of relief requested. *Iqbal* addressed only the factual plausibility of the alleged misconduct. It held that "a complaint must contain sufficient factual matter" to "state a claim to relief that is plausible"—where "plausibility" entails sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In *Iqbal*, the complaint raised no plausible "entitle[ment] to relief" not because of any off-the-wall remedial demands but because "the well-pleaded facts d[id] not permit the court to infer more than the mere possibility of misconduct." *Id*. at 679. No similar concern about factual sufficiency exists here, where the district court noted that Petitioners' "specific" and "particularized" allegations "paint a compelling and concerning picture regarding the timeliness and adequacy of the health care being provided to inmates" and urged Respondent to provide "proper redress." AA142 n.1, n.2, AA144.

In any event, none of this misstatement of basic pleading requirements even attempts to rehabilitate the district court's erroneous interpretation of the PLRA. As the opening brief explained, the PLRA's prospective relief provisions don't attach

until the remedial stage; where "the district court has yet to fashion any prospective relief, . . . the provisions of the [PLRA] have yet to be triggered." *Williams v. Edwards*, 87 F.3d 126, 133 (5th Cir. 1996). Accordingly, courts permit actions under the PLRA to proceed even if the complaint requests relief that the PLRA bars—and give effect to the prospective relief provisions at the appropriate stage. *See, e.g.*, *Goode v. Bruno*, No. 3:10CV1734(SRU), 2013 WL 5448442, at *7 (D. Conn. Sept. 30, 2013); Opening Br. at 17-20 (listing cases).

This case illustrates why remedies follow merits and not the other way around. *See* Opening Br. at 21-22. Petitioners here just want constitutionally adequate health care to treat their life-threatening or permanently disfiguring conditions—nothing more and nothing less. They turned to federal court in pursuit of that care, unsure exactly how it could be achieved. *See* AA10 (requesting "[a]ny further relief that the court deems necessary"). If the court determined that an injunction instructing FCI Danbury to provide adequate care would bring Respondents into constitutional compliance, that would have satisfied them—provided the BOP actually provided the necessary care on the urgent timeline required. *See* AA80 (requesting "an order fort [sic] the BOP to remedy the unconstitutional conditions of confinement"). If the court determined that FCI Danbury was unable to provide timely, adequate care and issued an injunction instructing it to transfer them to a facility that could do so, that too would have satisfied them. If the court found a BOP-wide inability to meet

constitutional requirements such that only release would remedy the violation, that, too, would have satisfied them. *See id.* (asking for "an order of release" "if [the BOP] cannot remedy the conditions"). Discovery and briefing would have aided that determination. But it never got a chance; the district court cut the action off at the knees when it performed the last step first.[7]

III. The Government Asks This Court To Opine On Questions Not At Issue In This Case.

A. The Government Requests An Advisory Opinion That Courts Have No Authority To Grant Home Confinement.

Perhaps the most glaring example of the government's invitation to this Court to overreach comes in its argument that the Bureau of Prisons enjoys exclusive authority over home confinement decisions, and federal courts none. Appellee's Br. at 37-42. Home confinement is no longer at issue in this case; Petitioners long ago conceded that the *Whitted* settlement bars an order of home confinement here. *See* AA80; Opening Br. at 8. The district court didn't consider the issue and the government briefed it below only in opposing class habeas treatment—another request the Petitioners dropped.

[7] Even if the district court was correct to apply the PLRA's prospective relief provisions to this action, those provisions don't bar any of the requested relief here. As the opening brief explained, an order releasing individual prisoners to remedy unconstitutional conditions—as opposed to the population caps and anti-overcrowding measures at which the PLRA aimed—is not a "prisoner release order" within the PLRA's meaning. *See* Opening Br. at 23-27.

This Court and the Supreme Court have repeatedly warned against settling legal issues in the "unreliable" setting where an issue "lacks the 'concrete adverseness . . . upon which the court so largely depends for illumination.'" *Horne v. Coughlin*, 191 F.3d 244, 247 (2d Cir. 1999) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). And while it is of course true that this Court may affirm the district court on grounds upon which the district court didn't rely, that authority rests on and incorporates the doctrine of judicial restraint. It instructs appellate courts not to enter a "troublesome thicket" where it "need not" venture because it is unnecessary to the case at hand. *Headley v. Tilghman*, 53 F.3d 472, 476 (2d Cir. 1995); *Whitehouse v. Ill. Cent. R. Co.*, 349 U.S. 366, 372-73 (1955) (declining to reach "perplexing questions" where "the wise limitations" of the function of an appellate court "confine[s it] to deciding only what is necessary to the disposition of the immediate case").

This Court should decline to issue the advisory opinion the government seeks.[8]

[8] Anyway, the government is wrong on the merits. This Court considered a nearly identical question in *Mapp*, 241 F.3d 221—on which courts in this circuit have relied in releasing prisoners at significant risk of harm from COVID-19. *See* Opening Br. at 31-32. *Mapp* asked whether federal courts have "inherent authority" to bail habeas petitioners detained by the Immigration and Naturalization Service. *Mapp*, 241 F.3d at 223. The statute at issue committed bail discretion to the Attorney General in much the same way the CARES Act commits home confinement discretion to the BOP: It instructed that "[t]he Attorney General may release an alien . . . only if the

B. The Government Attempts To Use This Appeal As A Vehicle For PLRA Questions Inapplicable Here.

The government goes on to seek a general pronouncement that the Prison Litigation Reform Act, writ large, governs habeas actions challenging the conditions of confinement. Appellee's Br. at 15. This request, too, far exceeds what is necessary to resolve this appeal. Nonetheless, even if the district court was right (a) to read requested forms of relief out of the action and (b) to transport remedial restrictions to the pleading stage, it erred when it applied those remedial restrictions to this action.

1. The Government's Request That This Court Rule On The Applicability of The PLRA, Writ Large, Should Be Rejected.

Attorney General decides" that release is necessary. *Id.* at 228 (quoting 8 U.S.C. § 1226(c)). And the immigration context gave the Court an additional reason to hesitate because "federal judicial power is singularly constrained" in that arena. *Id.* at 227. Nonetheless, the Court insisted that only "specific statutory provisions" can divest federal courts of their "inherent" powers." *Id.* at 229. Thus, the Court concluded, federal courts "have the same inherent authority to admit to bail habeas petitioners who challenge INS detention . . . as they do to release 'criminal' habeas petitioners." *Id.* at 231; *see also Ostrer*, 584 F.2d at 597 n.1 ("The district court has inherent power to enter an order affecting the custody of a habeas petitioner who is properly before it contesting the legality of his custody."). Where "the grant of bail [is] necessary to make the habeas remedy effective," courts may order it. *Mapp*, 241 F.3d at 230.

Just so here. Nothing in 18 U.S.C. § 3624 or the CARES Act divests federal courts of their authority to order home confinement where necessary, for instance by granting bail with home confinement as a condition of release.

As an initial matter, it would be a mistake to accept the government's suggestion to determine the applicability of "the PLRA," writ large, to Section 2241 petitions. *See, e.g.*, Appellee's Br. at 15, 16, 18, 19, 22. The language at issue here—if the Court reaches it—is "civil proceeding arising under Federal law with respect to the conditions of confinement . . . but . . . not . . . habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2). That language determines only whether the PLRA's prospective relief provisions apply. The PLRA comprises numerous provisions scattered across the U.S. Code, with different language triggering different provisions. For instance, the screening provision governs "a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). The physical injury provision governs "Federal civil action[s] brought by a prisoner . . . for mental or emotional injury." 42 U.S.C. 1997e(e). A pronouncement that "the PLRA"—as opposed to its prospective relief provisions—applies or does not apply to conditions (or, like the petition at issue here, mixed conditions-and-fact of confinement) habeas actions under Section 2241 would be unwise given variation in the statutory text.

For that reason, this Court rejects attempts to "expansively declare[]" the applicability of the PLRA and instead instructs courts to consider the "certain provision[]" of the Act at issue. *Salahuddin v. Mead*, 174 F.3d 271, 276 (2d Cir.

1999). Accordingly, this Court analyzes the PLRA provision-by-provision—deciding, for instance, in *Reyes v. Keane* that the PLRA's filing fee provisions, which govern "civil actions" brought by prisoners, do not apply to habeas petitions. 90 F.3d 676, 678 (2d Cir. 1996).

2. The Procedural Posture Of This Case Makes It An Inappropriate Vehicle For A Ruling On The PLRA's Remedial Restrictions.

Even if the Court were inclined to rule that the PLRA's remedial provisions apply to Section 2241, the procedural posture of this case makes it a uniquely poor candidate for such a pronouncement. This case comes to this Court on appeal from the grant of a motion to dismiss. As explained in the opening brief and above, the remedial restrictions restrict remedies—and so they apply at the remedy phase.

3. The PLRA's Prospective Relief Provisions Do Not Govern This Section 2241 Habeas Petition Because It Challenges Both The Fact And Conditions Of Confinement.

Finally, Petitioners here challenged both the fact and conditions of their confinement. Therefore, should this case move to the remedies phase, the prospective relief provisions of the PLRA would not apply. The government's attempt to, first, cast this as a pure conditions case, and second, urge this Court to reject *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411 (D. Conn. 2020), and other cases holding that Section 2241 claims challenging both the fact and conditions of

confinement are not subject to the PLRA's restrictions on prospective relief, are unavailing.

The government first tries and fails to remove this case from the ambit of *Martinez-Brooks v. Easter*. It argues that, unlike the *Martinez-Brooks* petitioners, Petitioners here "do[] not state a plausible fact of confinement challenge" because the unconstitutional conduct can be remedied within the prison. Appellee's Br. at 20. Had the district court allowed this action to run its proper course, it may well have decided, after discovery and briefing, that an injunction would suffice. But, as the opening brief explained, petitioners raise more than enough doubts about FCI Danbury's ability to provide constitutionally adequate medical care to support an inference that only release or transfer will remedy the violations. Opening Br. at 31-32. And those doubts have only mounted in the three months since that brief was filed, as outlined above in Section I.D. So the instant petition is nearly identical to that in *Martinez-Brooks*: "The Petitioners . . . are challenging the conditions of their confinement but they are also challenging the 'fact . . . of confinement[.]'" *Martinez-Brooks*, 459 F. Supp. 3d at 415.

After failing to distinguish this case from *Martinez-Brooks*, the government resorts to arguing against *Martinez-Brooks* itself. Its argument on this front undermines scores of this Court's cases.

The government urges that the PLRA's exclusion of "habeas corpus proceedings challenging the fact or duration of confinement in prison" is "limited to those [challenges] that imply the invalidity of convictions or sentences." Appellee's Br. at 22, 23. The government appears to pull this rule from *Wilkinson v. Dotson*, 544 U.S. 74 (2005)—that's the only case it cites to illustrate this supposed "tradition," Appellee's Br. at 23—but the government inverts *Wilkinson* to arrive at its rule. *Wilkinson* held that a challenge to state parole procedures was cognizable under 42 U.S.C. § 1983. *Id*. at 76. In so holding, it noted the settled principle that § 1983 is an inappropriate vehicle for claims that "necessarily imply the invalidity of . . . convictions or sentences," and that such claims must proceed in habeas. *Id*. at 81-82. But the fact that actions that imply the invalidity of a conviction or sentence must proceed in habeas does not mean that habeas proceedings—or the subset of habeas proceedings challenging the fact or duration of confinement—must imply the invalidity of a conviction or sentence. One does not follow from the other.

The government's creative reading of *Wilkinson* would imply the invalidity of something else: Decades of this Court's case law, pre- and post-dating *Wilkinson*. Consider the consequences of the government's view. First, it says that there are two "categories of [habeas] petitions: (1) those challenging the fact or duration of confinement itself; and (2) those challenging the conditions of confinement." Appellee's Br. at 23. Next, it argues that "'fact or duration' challenges are limited to

those in which the prisoners' success would 'necessarily imply the invalidity of their convictions or sentences,'" *id*. at 22, 23-24. On this view, habeas would provide no mechanism for those in the middle: petitioners challenging the fact or duration of confinement but not the validity of their convictions or sentences.

That can't be right; this Court has long held that habeas provides an avenue to challenge "the execution"—not merely "the imposition"—of a sentence. *See, e.g.*, *Dhinsa v. Krueger*, 917 F.3d 70, 80-81 (2d Cir. 2019); *Gonzalez v. United States*, 792 F.3d 232, 238 n.31 (2d Cir. 2015); *Thompson*, 525 F.3d at 209-10; *Cook v. N.Y. State Div. of Parole*, 321 F.3d 274, 278 (2d Cir. 2003); *Roccisano v. Menifee*, 293 F.3d 51, 57 (2d Cir. 2002); *Jiminian v. Nash*, 245 F.3d 144, 146-47 (2d Cir. 2001); *Chambers v. United States*, 106 F.3d 472, 474 (2d Cir. 1997). "Execution" claims encompass but extend beyond "conditions" claims. And the whole function of Section 2241 is to provide a mechanism for non-invalidating but nonetheless sentence-shortening claims: While federal prisoners seeking to "vacate, set aside, or correct the initial sentence" must proceed under Section 2255, actions by federal prisoners challenging "the length, appropriateness or conditions of confinement are properly brought under 28 U.S.C. § 2241." *Kingsley v. Bureau of Prisons*, 937 F.2d 26, 30 n.5 (2d Cir. 1991); *see also McPherson v. Lamont*, 457 F. Supp. 3d 67, 74-75 (D. Conn. 2020). Such challenges often seek release or transfer—and therefore implicate the fact or duration of confinement—but not invalidation. They include

challenges to things like the "computation of [a] sentence by parole officials, . . . prison transfers," *Jiminian*, 245 F.3d at 146, and "the loss of good time credits." *Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 632 (2d Cir. 2001).

In the end, the government's own rhetoric demonstrates the implausibility of its position. The government describes challenges to "a release determination based on good time credits" as "traditional fact or duration of confinement habeas challenges" that lie at "the core of habeas corpus." Appellee's Br. at 24, 25. But this Court has held that actions challenging good time credit determinations do not "challenge the legality of [a] sentence, but challenge[] instead its execution." *Carmona*, 243 F.3d at 632. The government can't square its theory that all fact or duration challenges imply the invalidity of a sentence with this Court's holding that one of the government's proffered "traditional fact or duration" challenges does no such thing.

Clearly, then, this Court contemplates habeas claims that go to the "fact or duration of confinement in prison" but that do not "imply the invalidity of convictions or sentences."[9] No surprise that the only two cases the government offers

[9] This Court's jurisprudence permitting mixed fact-and-conditions of confinement cases to proceed in habeas—and the *Martinez-Brooks* court's recognition that the PLRA does not apply to such actions—is also judicially efficient. The government's position would incentivize a petitioner (like Petitioners here) seeking medical care or release as alternative remedies to file two concurrent actions: one under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) for

as having adopted the "better interpretation" are lower court decisions from courts outside of this circuit. *See* Appellee's Br. at 26. And no surprise, either, that district courts within this circuit have declined to apply the PLRA's remedial restrictions to mixed habeas petitions under Section 2241 challenging both the fact and conditions of confinement. *See, e.g.*, *Bonner v. Superintendent, Five Points Corr. Facility*, No. 20-CV-6906-FPG, 2021 WL 1946703, at *4 (W.D.N.Y. May 14, 2021). This Court should do the same here.

CONCLUSION

For these reasons and those in the opening brief, the Court should reverse and remand for further proceedings.

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medical care (which the PLRA would govern) and one in habeas for release (which it would not). Considerations of accuracy and efficiency discourage such a rule.

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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 6,101 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 2019.

Date: November 1, 2022

s/ Kathrina Szymborski
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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 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: November 1, 2022

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