Nos. 21-55175 & 21-55759

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEREMY VAUGHN PINSON AND BRUCE R. SANDS, JR.,
Petitioners-Appellants,

v.

MICHAEL CARVAJAL AND UNITED STATES OF AMERICA,
Respondents-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT NOS. CV 20-2599-PSG; CV 21-1114-JVS

GOVERNMENT'S CONSOLIDATED ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

DESCRIPTION **PAGE**

TABLE OF CONTENTS (continued)

DESCRIPTION **PAGE**

TABLE OF AUTHORITIES

DESCRIPTION **PAGE(S)**

Federal Cases

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

Federal Statutes

Federal Rules

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

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I

INTRODUCTION

Petitioners Jeremy Pinson and Bruce Sands are federal prisoners who sought habeas relief pursuant to 28 U.S.C. § 2241 based on prison conditions arising from the COVID-19 pandemic. Because petitioners' claims do not address the validity of their convictions or the duration of

their sentences, the district courts correctly dismissed their petitions for lack of jurisdiction.

Petitioners also claim that as federal prisoners, they may challenge conditions of confinement even where, as here, such challenges fall outside the core of habeas corpus. However, this Court has already precluded state prisoners from bringing such claims in habeas, and the statutes and caselaw favor applying the same standards to federal prisoners.

Alternatively, Pinson's transfer to another facility before the district court's ruling posed an independent basis to dismiss her petition for lack of jurisdiction on mootness grounds.

Finally, the district courts did not plainly err or abuse their discretion in any way. The courts were not required to construe petitioners' § 2241 habeas petitions as civil rights actions, and the district court in Pinson's case properly exercised its summary dismissal power to adjudicate her emergency application.

The Court should affirm.

II

ISSUES PRESENTED

A. Whether petitioners, as federal inmates, may rely on 28 U.S.C. § 2241 to challenge conditions of confinement relating to the COVID-19 pandemic when those challenges do not attack the validity of their underlying convictions or the length of their sentences.

B. Whether Pinson's transfer to another facility posed an alternative basis for the district court to dismiss her petition for lack of jurisdiction on mootness grounds.

C. Whether either district court plainly erred by failing to sua sponte convert the petitioner's habeas petition to a civil rights action.

D. Whether the district court abused its discretion when it dismissed Pinson's habeas petition under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254.

III

STATEMENT OF THE CASE

A. Jurisdiction, Timeliness, and Bail Status

Each district court in these consolidated cases had "jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002). This Court has "jurisdiction to review the district court's dismissal for lack of subject matter jurisdiction under 28 U.S.C. § 1291." *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 820 (9th Cir. 2005).

In Pinson's case, the district court entered judgment on December 18, 2020, dismissing her pro se petition for a writ of habeas corpus under 28 U.S.C. § 2241. (ER-4–9.)[1] The government does not dispute that Pinson filed a timely notice of appeal because she mailed her filing in an envelope postmarked February 9, 2021. (ER-15.) *See* Fed. R. App. P. 4(a)(1)(B)(i), (c)(1)(A)(ii). She is in custody.

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[1] "ER" refers to petitioners' Excerpts of Record. "AOB" refers to Petitioners-Appellants' Opening Brief and is followed by applicable page numbers. "PSR" refers to the Presentence Investigation Reports the government is concurrently filing under seal. Each PSR is designated by the applicable petitioner and page number of the government's filing, along with applicable paragraph references. "CR" refers to the Clerk's Record in the district court and is preceded by the applicable petitioner and is followed by the docket number.

In Sands's case, the district court entered judgment on July 6, 2021, dismissing his pro se petition for a writ of habeas corpus under 28 U.S.C. § 2241. (ER-19–21.) Sands filed a timely notice of appeal on July 15, 2021. (ER-84–85.) *See* Fed. R. App. P. 4(a)(1)(B)(i). He also is in custody.

B. Statement of Facts and Procedural History

1. Pinson's appeal

a. Pinson threatens a former president, makes false statements to a judge, and threatens a juror

Nearly 20 years ago, Pinson pleaded guilty to embezzling over $30,000 from her employer. (Pinson PSR 11–12 ¶ 45.) While in state custody for that offense, she sent a letter to then President George W. Bush threatening to kill him. (Pinson PSR 23 ¶¶ 1, 3–5.) Consequently, she was charged in the Western District of Oklahoma with making threats against the President, in violation of 18 U.S.C. § 871(a), and a jury convicted her for that crime. (*Id.* ¶ 1.)

While awaiting sentencing, Pinson committed two more federal crimes. She first sent a letter to a federal district judge that claimed another inmate planned to stab the judge at a future court appearance. (Pinson PSR 3 ¶ 5.) A later investigation revealed that Pinson

fabricated the threat in hopes of a lighter sentence. (*Id.* 3–4 ¶¶ 7–8.) She then sent another letter to a federal district judge in which she threatened a juror who had convicted her. (*Id.* 4 ¶ 9.) For her actions, she was charged with making a false statement, in violation of 18 U.S.C. § 1001(a)(2), and making a threat to a juror, in violation of 18 U.S.C. § 876(c). (*Id.* 3 ¶¶ 1–2.) She pleaded guilty to both counts. (*Id.* 3–4 ¶¶ 3, 10.)

b. The Western District of Oklahoma sentences Pinson, and she repeatedly tries to overturn her convictions

After a consolidated sentencing hearing, the district court sentenced Pinson to the statutory maximum on all counts, resulting in a total sentence of 240 months' imprisonment. *United States v. Pinson*, 542 F.3d 822, 829 (10th Cir. 2008). The Tenth Circuit affirmed. *Id.*[2]

As of seven years ago, Pinson already had "filed more than a hundred civil complaints and § 2241 applications in various federal

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[2] Pinson was subsequently charged and pleaded guilty to one count of unlawfully making a threat against a federal law enforcement officer in the Southern District of Texas. *See United States v. Pinson*, 594 F. App'x 517, 518 (10th Cir. 2014). The court sentenced her to 24 months' imprisonment to be served consecutively to the total sentence imposed in the Western District of Oklahoma action. *Id.*

courts throughout the country." *Pinson v. Oliver*, 601 F. App'x 679, 683 (10th Cir. 2015) (providing a partial history of Pinson's filings). Based on her filing history, she is subject to sanctions under the three-strikes provision of the Prison Litigation Reform Act ("PLRA") in this Circuit, the Tenth Circuit and the D.C. Circuit. *Id.* at 684 n.5; *see also Pinson v. United States*, 834 F. App'x 426, 427 (9th Cir. 2021) (affirming dismissal of Pinson's pro se civil rights action because she had "filed three prior actions that were dismissed as frivolous, malicious, or for failure to state a claim"); *Pinson v. Samuels*, 761 F.3d 1, 4 (D.C. Cir. 2014), *aff'd sub nom. Bruce v. Samuels*, 577 U.S. 82 (2016). As a result, she cannot initiate or appeal a civil rights action without prepaying filing fees unless she is in imminent danger of serious physical injury.

In this Circuit, Pinson has filed at least half a dozen civil rights actions and § 2241 petitions. *See, e.g.*, *Pinson*, 834 F. App'x at 426; *Pinson v. Estrada*, 812 F. App'x 701, 702 (9th Cir. 2020) (affirming dismissal of Pinson's pro se civil rights action); *Pinson v. Ivey*, 801 F. App'x 591, 592 (9th Cir. 2020) (denying Eighth Amendment and Federal Tort Claims Act claims for failing to exhaust administrative remedies); *Pinson v. Unknown Party*, 754 F. App'x 668, 668 (9th Cir. 2019)

(affirming dismissal of § 2241 petition for failing to comply with order to file amended petition); *Pinson v. Norwood*, 2008 WL 2323895, at *4 (C.D. Cal. June 4, 2008) (denying emergency application for writ of mandamus or writ of habeas corpus where Pinson challenged conditions of confinement).

Pinson also has moved for compassionate release in the sentencing court. *United States v. Pinson*, 835 F. App'x 390, 394–95 (10th Cir. 2020). The sentencing court denied her motion after finding that she remains a danger to the community, citing her propensity for violence, as reflected in the underlying charges and her disciplinary infractions while incarcerated. *Id.* at 395. The Tenth Circuit affirmed. *Id.*

c. Pinson files an emergency application for writ of habeas corpus under 28 U.S.C. § 2241

In this case, Pinson filed an emergency application for a writ of habeas corpus under 28 U.S.C. § 2241. (ER-10–11.) She claimed that she lacked "screening" for COVID-19, "PPE (i.e. mask, gloves, face shield, etc.)," and "the means to wash her hands, use hand sanitizer, or engage in social distancing." (ER-11.) She further alleged that her life was in "grave danger" based on her "multiple comorbidities." (ER-11.)

Pinson sought "release or home confinement to protect her from COVID-19" and an injunction ordering the Warden of Federal Correctional Institute Victorville "to take measures to protect . . . inmates from COVID-19," including those measures listed in Pinson's habeas petition. (ER-11.)

d. The district court dismisses Pinson's § 2241 habeas petition

Under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254 ("Habeas Rules"), the district court dismissed Pinson's emergency application on December 18, 2020.[3] (ER-5–8.) The court observed that habeas "is the appropriate remedy for a prisoner challenging the 'fact or duration' of his or her physical imprisonment," but not "the traditional vehicle to challenge conditions of confinement." (ER-7.) Because Pinson's claims challenged "what she believes are unconstitutional conditions of

[3] As noted in the government's Motion to Supplement the Record, filed concurrently herewith, Pinson was only incarcerated at the Victorville prison for 10 days and was transferred out on December 14, 2020, the same day she filed her § 2241 petition. (*See* Motion to Supplement, Declaration of Steven Lam ("Lam Decl.") ¶ 3; AOB 9.)

confinement," as opposed to contesting "the legality of her conviction or sentence," her claims were not cognizable in habeas. (ER-8.)

The district court acknowledged that neither this Court nor the Supreme Court has squarely answered whether a federal prisoner may challenge conditions of confinement under § 2241. (ER-7.) However, the court observed that the "majority" of the district courts in this Circuit " have determined such challenges to be outside the scope of federal habeas relief." (ER-7 (citing cases).)

Accordingly, the court held that it lacked jurisdiction under § 2241 to grant release and dismissed the petition without prejudice to petitioner's right to file a civil rights action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), after exhausting her administrative remedies. (ER-8.)

2. Sands's appeal

a. Sands defrauds investors

From 2007 to 2010, Sands engaged in a scheme to defraud investors, inducing over 300 victims to invest and lose approximately $11 million. (Sands PSR 12 ¶ 34.)

To execute his scheme, Sands formed two companies to sell precious metals to investors via two transactions: "straight-coin purchase transactions" and "IRA investment transactions." (*Id.* 7–8 ¶¶ 12–14, 16.) For the "straight-coin transactions," Sands induced victims to purchase collectable coins instead of precious metals. (*Id.* ¶¶ 13, 16.) However, he would not use the victims' money to purchase the coins and often failed to deliver any coins to the victims. (*Id.* 8 ¶ 16.) For the "IRA investment transactions," Sands tricked victims into depositing money into self-directed IRAs to purchase precious metals. (*Id.* ¶¶ 14, 16.) The funds in the IRAs would be transferred to his companies to then purchase precious metals and deliver them to a depository. (*Id.*) But Sands either did not deliver the metals to the depositories or delivered only a small portion. (*Id.* 8 ¶ 16.)

In both iterations of the scheme, victims lost most or all of their investments. (*Id.* 8, 12–13 ¶¶ 16, 35 (a), (b), 36.)

b. Sands pleads guilty and challenges his sentence in post-conviction proceedings

Sands pleaded guilty to three counts of mail fraud, in violation of 18 U.S.C. § 1341, five counts of wire fraud, in violation of 18 U.S.C.

§ 1343, and two counts of money laundering, in violation of 18 U.S.C. § 1957. (Sands PSR 5–7 ¶¶ 3–8.)

The district court sentenced Sands to 135 months' imprisonment and ordered him to pay over $11 million in restitution. (Sands CR No. 83.) This Court affirmed, finding "no arguable grounds for relief on direct appeal" based on an "independent review of the record." *United States v. Sands*, 719 F. App'x 634, 635 (9th Cir. 2018).

Since then, Sands has unsuccessfully sought post-conviction relief. He has moved for compassionate release twice and filed a habeas petition under 28 U.S.C. § 2241. (Sands CR Nos. 127, 139.)

c. Sands files his petition under 28 U.S.C. § 2241, and the government moves to dismiss

Sands filed a petition for a writ of habeas corpus seeking "immediate release from custody" pursuant to 28 U.S.C. § 2241. (ER-76; *see also* ER-23–30.) He lodged several complaints against his facility of incarceration including that it supposedly failed to: (i) provide him with medical care; (ii) "implement [Bureau of Prison ("BOP")] policies and CDC guidelines," such as "screening staff for COVID-19," "providing face masks to inmates," and "forcing inmates to remain locked in overcrowded and poorly ventilated housing units for prolonged

periods of time;" (iii) reduce the inmate population, risking "serious damage to [his] future health from COVID-19"; and (iv) "isolate and repeatedly test" petitioner following an "indeterminate COVID-19 test result." (ER-77–78, 80.)

The government moved to dismiss, explaining that a federal prisoner may challenge the manner, location, or conditions of a sentence's execution in a § 2241 habeas petition but not conditions of confinement. (ER-53 (citing cases).) Because Sands challenged his facility's "ability to take certain precautions in response to the COVID-19 pandemic," the government explained, he challenged his conditions of confinement and thereby sought relief outside the scope of § 2241. (ER-53–54.)

d. The district court dismisses Sands's § 2241 habeas petition

The district court adopted the magistrate judge's report and recommendation and dismissed Sands's § 2241 petition with prejudice. (ER-33–37; *see also* ER-19–21.) The court determined that it could not exercise jurisdiction over the petition because § 2241 may not be deployed to challenge "conditions of confinement." (ER-34–35.) By challenging his facility's alleged failure to take certain precautions, the

court reasoned, Sands was not challenging "the manner, location, or conditions of a sentence's execution." (ER-34 (citing *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th Cir. 2000).)

In addition, the court declined to "exercise its discretion" to construe Sands's habeas petition as a civil rights complaint. (ER-35.)

IV

SUMMARY OF ARGUMENT

The district courts correctly dismissed petitioners' § 2241 petitions challenging conditions of their confinement for lack of jurisdiction. Federal law provides two separate avenues for prisoners to challenge confinement. First, prisoners may raise constitutional errors relating to the validity of their confinement or the particulars affecting its duration through habeas petitions. Such petitions fall within the "core of habeas corpus," and if successful, warrant habeas corpus's exclusive and defining remedy: release.

By contrast, the second avenue for federal prisoners is a civil rights action for damages under *Bivens* or injunctive relief under the Administrative Procedure Act, 5 U.S.C. § 702, or the PLRA, 18 U.S.C. § 3626(a)(2). Civil rights actions address matters that differ from the

validity of a conviction or duration of a sentence and that involve a myriad of remedies other than release. Here, petitioners challenge prison conditions relating to the pandemic. Their claims do not attack constitutional errors in their convictions or sentences, and thereby fall outside the core of habeas corpus. Petitioners' claims, therefore, needed to be raised in civil rights actions.

Although petitioners contend that habeas review is appropriate because only the traditional remedy of release will suffice, they are mistaken. Petitioners' challenges to their conditions of confinement—such as allegations that prisons did not provide face masks or enforce social distancing—could be remedied by changes to those conditions. A judicial order mandating internal reforms would plainly provide petitioners with relief.

Petitioners' alternate claim that they may challenge prison conditions under § 2241 when those challenges fall outside the core of habeas corpus lacks merit. Although the outer boundaries of the writ under § 2241 may not be precisely defined in controlling precedent, decisions from this Circuit and six others contravene petitioners' position. Indeed, if the Court is inclined to define the outer limits of

habeas corpus, the Court should look no further than *Nettles v. Grounds*, 830 F.3d 922 (9th Cir. 2016) (en banc), where the en banc Court ruled that habeas is only available for state prisoners asserting claims that fall within the core of habeas. The habeas statutes, the PLRA, and alternative remedies afforded to federal prisoners support applying *Nettles* to federal prisoners.

Even if this Court finds that petitioners may raise their conditions-of-confinement claims in habeas, Pinson's § 2241 petition should be dismissed based on mootness grounds. Pinson's transfer from Victorville four days before the district court ruled on her petition rendered her claims challenging the conditions at Victorville moot.

Finally, the district courts did not plainly err or abuse their discretion in any way. The courts were not required to sua sponte recharacterize petitioners' § 2241 habeas petitions as civil rights actions. Neither petition was clearly or obviously subject to conversion, and, in fact, conversion would have been futile. The district court in Pinson's case also did not abuse its discretion in exercising its summary dismissal power under Habeas Rule 4 to resolve a purely legal issue presented by her emergency application.

V

ARGUMENT

A. Section 2241 is Not the Proper Vehicle to Remedy Petitioners' Conditions-of-Confinement Claims

1. Standard of review

This Court "review[s] de novo a district court's determination that it does not have jurisdiction over a habeas corpus petition." *Nettles*, 830 F.3d at 927. The district court's decision may be affirmed "on any ground supported by the record." *Holley v. Yarborough*, 568 F.3d 1091, 1098 (9th Cir. 2009).

2. The district courts correctly determined that they lacked jurisdiction over petitioners' claims

a. Petitioners' conditions-of-confinement claims fall outside the core of habeas corpus

Petitioners are not entitled to invoke federal courts' habeas jurisdiction to challenge conditions of confinement. Federal law offers "two main avenues of relief" for prisoners to assert complaints regarding imprisonment: a habeas petition and a civil rights complaint. *See Muhammad v. Close*, 540 U.S. 749, 750 (2004) (per curiam).

Habeas petitions enable prisoners to challenge "the validity of any confinement or [the] particulars affecting its duration." *Id.*; *see also*

Preiser v. Rodriguez, 411 U.S. 475, 500 (1973) (when a "prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release . . . his sole remedy is a writ of habeas corpus"); *Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991) (habeas provides a "mechanism for a prisoner to challenge the 'legality or duration' of confinement").

In contrast, a civil rights action "is the proper method of challenging 'conditions of . . . confinement.'" *Badea*, 931 F.2d at 574; *see also Muhammad*, 540 U.S. at 750 ("[R]equests for relief turning on circumstances of confinement may be presented in a § 1983 action."). This Court has "long held that prisoners may not challenge mere conditions of confinement in habeas." *Nettles*, 830 F.3d at 933 (citing *Crawford v. Bell*, 599 F.2d 890, 891–92 (9th Cir. 1979)); *see also Ramirez v. Galaza*, 334 F.3d 850, 859 (9th Cir. 2003) ("habeas jurisdiction is absent, and a § 1983 action proper, where a successful challenge to a prison condition will not necessarily shorten the prisoner's sentence").

In *Crawford v. Bell*, 599 F.2d 890 (9th Cir. 1979), for example, the Court affirmed dismissal of a federal inmate's habeas petition because

it did "not challenge the legality of his imprisonment" but instead challenged the "terms and conditions of his incarceration." 559 F.2d at 891–92. The Court reasoned that the "appropriate remedy for such constitutional violations, if proven would be a judicially mandated change in conditions and/or an award of damages, but not release from confinement." *Id.*

The subsequent en banc decision in *Nettles* reinforced *Crawford's* reasoning and clarified how to determine what claims sound in habeas. In *Nettles*, a state prisoner filed a federal habeas petition under 28 U.S.C. § 2254 challenging a prison disciplinary action that delayed his parole hearing and constituted grounds for future denial of parole. 830 F.3d at 925–26. To determine whether this claim sounded in habeas, the Court reviewed Supreme Court decisions distinguishing between claims that fall within the so-called "core of habeas corpus" and claims that fall outside that core. *Id.* at 927–31. The Court observed that a prisoner's claim lies at the core of habeas when it "result[s] in immediate release if successful." *Id.* at 928 (citing *Preiser*, 411 U.S. at 498). In contrast, a prisoner's claim falls outside the core of habeas "where the relief sought would neither terminate custody, accelerate the

future date of release from custody, nor reduce the level of custody." *Id.* at 930 (cleaned up).

The Court then adopted an administrable bright-line rule: "[I]f a state prisoner's claim does not lie at the core of habeas corpus, it may not be brought in habeas corpus but must be brought, if at all, under § 1983." *Id.* at 931 (cleaned up). Applying that rule, the Court held that the claim in *Nettles* fell outside the core of habeas corpus because even if the petitioner was successful, it "would not necessarily lead to his immediate or earlier release from confinement." *Id.* at 935.

Here, by the same token, petitioners' claims fall outside the core of the writ and thus do not lie in habeas. The substance of both petitions reveals that Pinson and Sands do not seek to invalidate their underlying convictions or sentences. Pinson alleges that while incarcerated in Victorville, she lacked "PPE (i.e. mask, gloves, face shield, etc.)" and a "means to wash her hands, use hand sanitizer, or engage in social distancing." (ER-11.) Similarly, Sands identifies COVID-19 practices that his facility purportedly failed to implement, such as screening staff for COVID-19, enforcing social distancing, supplying face masks, and providing him with certain medical

treatment. (ER-80.) The remedy for those alleged violations would not be release but "a judicially mandated change in conditions." *Crawford*, 599 F.2d at 892. If petitioners proved their allegations—which, of course, the government does not concede to be true—a court could order their facilities of incarceration to provide Pinson with PPE and a means to wash her hands and to implement the measures Sands requested. Put simply, remedies short of release exist.

To be sure, this Court has not squarely addressed whether a federal prisoner may challenge conditions of confinement through a habeas petition in the COVID-19 context. *See Roman v. Wolf*, 977 F.3d 935, 941–42 (9th Cir. 2020). But petitioners' challenges to prison conditions relating to the pandemic are still challenges to "conditions of confinement" that may not be brought via habeas. *See Nettles*, 830 F.3d at 933.

Nor can petitioners circumvent the habeas bar merely by asking for "immediate release" (ER-76) or "release" from custody and placement in "home confinement" (ER-11). The label slapped on a habeas petition is never outcome-determinative, and the fact that petitioners claim release was the only possible remedy does not make it

so. *See Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005) (explaining how a pleading, labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly). Otherwise, any prisoner alleging any constitutional violation could proceed in habeas merely by asserting that nothing short of release would suffice.

The Fifth Circuit's analysis in *Rice v. Gonzalez*, 985 F.3d 1069 (5th Cir. 2020), is on point. There, an inmate sought "release from pretrial custody," claiming that "no conditions at the jail were sufficient to protect his constitutional rights in the midst of the COVID-19 crisis." *Id.* at 1069. The inmate "contend[ed] that he should be released from custody" due to the combination of his "health problems" and "jail conditions" not conducive to "proper hygiene and social distancing." *Id.* Those claims, the Fifth Circuit held, could not be litigated via § 2241. *Id.* at 1070. The court explained that the inmate's claim that he might be exposed to COVID-19 and may have certain underlying conditions did not "impugn the underlying legal basis for the fact or duration of his confinement" and was therefore not a cognizable habeas claim. *See id.*

Petitioners ignore *Rice* and instead rely principally on the Sixth Circuit's decision in *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020).

(*See* AOB 26–29.) In that case, the court held that a medically vulnerable subclass of federal prisoners stated a cognizable habeas claim under § 2241 because they alleged no remedy short of release would cure the constitutional violation resulting from conditions in April 2020. *Wilson*, 961 F.3d at 832–33. This conclusion, however, is flawed in several respects.

First, the inmates' claims in *Wilson*, like petitioners' claims here, cannot "under any good faith calculus . . . be characterized as a 'habeas corpus proceeding challenging the fact or duration of confinement in prison.'" *Alvarez v. Lopez*, 445 F. Supp. 3d 861, 866 (S.D. Cal. 2020) (cleaned up). Such claims would not exist *but for* the conditions inside their facilities during the COVID-19 pandemic. Indeed, this reality emerges in the Sixth Circuit's reasoning that inmates who did not belong to the medically vulnerable subclass and who did not seek release failed to state a valid habeas claim. *Wilson*, 961 F.3d at 837. The court ruled that those petitioners' "conditions of confinement claims" could *not* proceed under § 2241. *Id.* Because the Sixth Circuit improperly conflated the nature of relief sought by the medically

vulnerable inmates with the substance of their claim, this Court should decline to follow its reasoning. *See id.*

Second, to the extent that *Wilson* gives determinative weight to a prisoner's prayer for release, that standard is unworkable. As noted above, permitting a litigant's request for release to dictate whether a cause of action sounds in habeas runs afoul of the Supreme Court's teachings and permits any type of claim to proceed via § 2241 so long as the prisoner merely claims she is seeking release. This is particularly problematic "in the COVID-19 situation" because "release is not the only method by which this contagious disease may be remedied." *Harrison v. Broomfield*, 2020 WL 5797871, at *2 (E.D. Cal. Sept. 29, 2020); *Martinez Franco v. Jennings*, 456 F. Supp. 2d 1193, 1200 (N.D. Cal. 2020) (where the lack of social distancing violates the Constitution, the appropriate remedy is an injunction ordering social distancing, "not releasing detainees").

In this regard, petitioners' own claims are telling. They both identify COVID-19 protocols that if implemented and/or enforced would rectify the problems they allege. (ER-11, 80.) Moreover, transfer to another facility would be an alternative remedy. *See Frohlich v. United*

States, 2021 WL 2531188, at *2 (D. Minn. June 21, 2021) ("A court must therefore examine a § 2241 petition carefully to make certain that the petitioner is in fact claiming that the United States government cannot lawfully confine him at *any* facility, and thus that he must be released from confinement altogether") (emphasis in original). In short, there are remedies far short of release. That alone brings these types of claims outside the core of habeas corpus. *See Acevedo v. Capra*, 545 F. Supp. 3d 107, 116 (S.D.N.Y. 2021) (to assess whether a conditions-of-confinement claim sounds in habeas, the "logical" approach is for the "precise nature of the violation" to "dictate the range of possible remedies").

Third, the Sixth Circuit's approach conflicts with Congress's decision in the PLRA, discussed further below, to impose requirements on prisoners challenging conditions of confinement. As this Court observed in *Nettles*, "[i]t would wholly frustrate explicit congressional intent to hold that prisoners could evade the requirements of the PLRA by the simple expedient of putting a different label on their pleadings." 830 F.3d at 932. The PLRA makes release available as a remedy for unconstitutional prison conditions only as a last resort—after other

measures have failed, and a three-judge court has determined by clear and convincing evidence that no other remedy will succeed. *See* 18 U.S.C. § 3626(a)(3). The Sixth Circuit's approach would allow inmates to bypass those procedures by claiming at the outset that only release can suffice.

The Court should therefore decline to follow *Wilson* and should instead analyze the substance of petitioners' claims in accordance with *Nettles*. Because petitioners do not challenge the reasons for their confinement, the validity of their convictions, or the length of their sentences, their conditions-of-confinement claims fall outside the core of habeas corpus, and the district courts correctly dismissed their petitions for lack of jurisdiction.

b. Petitioners' out-of-circuit authorities are also distinguishable

In addition to being wrong, *Wilson* is also distinguishable. The medically-vulnerable petitioners in that case were unequivocal in alleging that "no mitigation efforts" and "no conditions of confinement" would suffice "to prevent irreparable constitutional injury." 961 F.3d at 837–38. The Sixth Circuit permitted their claim to proceed via § 2241

only because they claimed "that no set of conditions would be constitutionally sufficient." *Id.* at 838.

Petitioners here were not nearly so unequivocal. Pinson alleged that she was denied personal protective equipment, and although she sought "release or home confinement," she also requested an "[i]njunction ordering the Respondent to take measures to protect USP Victorville inmates from COVID-19 to include the measures" she claimed had not been taken. (ER-11.) Sands noted that "no set of conditions under the present circumstances could be constitutional" and said he was seeking "[i]mmediate release from custody" (ER-76) but proceeded to enumerate a 13-item list of measures that his prison had purportedly "failed to implement" (ER-80). Neither petitioner made the unqualified claim that mitigation was impossible. They were therefore not situated in the same position as the medically vulnerable inmates in *Wilson* but more akin to the inmates in that case who sought improvement in prison conditions and therefore could not litigate their claims under § 2241. *See Wilson*, 961 F.3d at 838.

In fact, the Sixth Circuit has itself declined to apply *Wilson* to inmates like petitioners here. In *Mescall v. Hemingway*, 2021 WL

4025646 (6th Cir. 2021) (unpublished), the petitioner sought "placement in home confinement or on furlough in light of the COVID-19 pandemic and an order requiring the testing of all staff and inmates." *Id.* at *1. But because the petitioner had not alleged that "no set of conditions" would remedy the risks of COVID-19, "the district court properly concluded that [his] claims are not cognizable under § 2241." *Id.* So too here. Even if a petitioner could expand the core of habeas by unequivocally alleging the absence of any possible remedy short of release, petitioners here did not make that unequivocal allegation.[4]

Petitioners' reliance on *Hope v. Warden*, 972 F.3d 310 (3d Cir. 2020), is also misplaced. (*See* AOB 26.) That case involved federal immigration detainees who do not have the same statutory or regulatory avenues for relief as federal or state prisoners. In concluding that "non-prisoner detainees" could resort to habeas "to challenge conditions that render [their] continued detention unconstitutional," the

[4] The rule that pro se pleadings must be "liberally construed" (AOB 29) has nothing to do with the type of relief petitioners sought below and does not permit the Court to rewrite petitioners' filings to excise the various mitigation measures that Pinson requested and that Sands enumerated.

Third Circuit specifically distinguished "the vast majority of habeas cases" that "involve challenges to criminal judgments." *Hope*, 972 F.3d at 324. Here, where petitioners are convicted criminals, they have other avenues to pursue their COVID-related claims. Indeed, Pinson has filed more than a hundred civil complaints and § 2241 applications in various federal courts throughout the country, and has pursued compassionate release. Similarly Sands sought compassionate release twice and previously filed a § 2241 petition.

Furthermore, as in *Wilson*, the petitioners in *Hope* made the unqualified claim that "risk mitigation [was] impossible," asserting that "only release [would] rectify their unconstitutional confinement." *Id.* at 318; *see also id.* at 323 (petitioners reiterated on appeal that they did not "seek to *modify* their conditions of confinement and the only relief sought by Petitioners—the only adequate relief for the constitutional claims—is release" (cleaned up)). Again, petitioners here did not make that unequivocal claim. Pinson sought alternative relief requiring her prison to implement mitigation measures, and Sands detailed a host of mitigation measures his prison purportedly failed to implement. Their

claims fell outside the core of habeas, and their § 2241 petitions were thus properly dismissed.

c. The outer limits of habeas do not encompass petitioners' conditions-of-confinement claims

Petitioners alternatively argue that as federal prisoners, they can bring conditions-of-confinement claims even if they fall outside the core of habeas corpus. (AOB 21.) However, this Circuit and six others have concluded that claims challenging conditions of confinement that fall outside the core of habeas corpus do not lie in habeas. *See Nettles*, 830 F.3d at 933 ("habeas is available only for actions in the 'core of habeas'"); *Spencer v. Haynes*, 774 F.3d 467, 469–70 (8th Cir. 2014) (conditions-of-confinement claims may not be brought via habeas); *Cardona v. Bledsoe*, 681 F.3d 533, 537 (3d Cir. 2012) (same); *Davis v. Fechtel*, 150 F.3d 486, 490 (5th Cir. 1998) (same); *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811–12 (10th Cir. 1997) (same); *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991) (same); *Martin v. Overton*, 391 F.3d 710, 714 (6th Cir. 2004) (same). *But see Aamer v. Obama*, 742 F.3d 1023, 1036 (D.C. Cir. 2014) (holding that prisoners can challenge the form of detention under habeas); *Jiminian v. Nash*, 245 F.3d 144,

146–47 (2d Cir. 2001) (similar); *Miller v. United States*, 564 F.2d 103, 105 (1st Cir. 1977) (similar).

Petitioners claim that *Hernandez v. Campbell* is "controlling" and permits them to raise conditions of confinement claims that fall outside the core of habeas corpus. (AOB 18, 24.) But *Hernandez* does not support this view. There, a federal prisoner filed a § 2241 petition claiming he should be resentenced based on a decision reversing his co-defendants' sentences and remanding their cases for resentencing in accordance with a new amendment of the Sentencing Guidelines. 204 F.3d at 863–64. In assessing jurisdiction, the Court delineated the differences between 28 U.S.C. § 2255 and 28 U.S.C. § 2241, and explained that "motions to contest the legality of a sentence must be filed under § 2255 in the sentencing court, while petitions that challenge the manner, location, or conditions of a sentence's execution must be brought pursuant to § 2241 in the custodial court." *Id.* at 864; *see also Doganiere v. United States*, 914 F.2d 165, 169 (9th Cir. 1990) (explaining that § 2255 concerns the imposition of a sentence, and § 2241 concerns the execution of a sentence).

Ultimately, the Court remanded the § 2241 habeas petition for the district court to consider whether the petitioner could invoke the savings clause under § 2255 to test the legality of his detention. *Id.* at 864–66. As a result, all *Hernandez* stands for is the unremarkable proposition that a federal prisoner may challenge "the legality of his detention" under § 2241 so long as he satisfies the savings clause. That is no different than saying a federal prisoner may raise a claim that falls within the core of habeas corpus under § 2241. Critically, *Hernandez* says nothing about whether a federal prisoner may challenge conditions of confinement under § 2241 when such challenges fall outside the core of habeas.

In fact, *Hernandez* undermines, rather than supports, petitioners' view that federal prisoners can bring such claims under § 2241. As the Court explained, "Congress enacted § 2255 primarily to ease the administrative burden imposed by the jurisdictional requirement that all habeas corpus petitions be heard in the district of incarceration," but in doing so, "Congress did not intend for the remedy provided to differ in scope from the traditional habeas remedy under § 2241." *Hernandez*, 204 F.3d at 864. Rather, § 2255 "was meant to 'afford[ ] the

same rights in another and more convenient forum.'" *Id.* (quoting *United States v. Hayman*, 342 U.S. 205, 219 (1952)). Petitioners' position, however, would afford federal prisoners broader remedies under § 2241 than § 2255 by allowing them to challenge conditions of their confinement even if the remedy does not spell speedier release. That outcome conflicts with *Hernandez*.

Petitioners nonetheless latch onto *Hernandez*'s general statement that prisoners must litigate challenges to the "manner, location, or conditions of a sentence's execution" under § 2241 to claim that challenges to the "execution" of a sentence include challenges to "conditions of confinement." (AOB 1, 15, 22.) But this Court has never defined the "execution" of a sentence to encompass "conditions of confinement," and petitioners' cases do not suggest otherwise. (AOB 21.) As observed in *Nettles*, *Rodriguez v. Copenhaver*, 823 F.3d 1238 (9th Cir. 2016), *Close v. Thomas*, 653 F.3d 970 (9th Cir. 2011), and *Crickon v. Thomas*, 579 F.3d 978 (9th Cir. 2009), do not "address[] the scope of habeas relief available to federal prisoners under § 2241." 830 F.3d at 931. Thus, these cases shed no light on whether the petitioners

in this case may assert conditions of confinement claims under § 2241 when those claims fall outside the core of habeas corpus.

In any event, these cases support the conclusion that the "execution of a sentence" remains tethered to claims that fall *within* the core of the writ. For example, in *Rodriguez*, this Court entertained a § 2241 habeas petition challenging BOP's discretionary denial of a designation that would have shortened the prisoner's federal sentence. 823 F.3d at 1242. Similarly, *Crickon* involved a challenge to BOP's determination regarding eligibility for an early release incentive through BOP's Residential Drug Abuse Program ("RDAP"), 579 F.3d at 982, and *Close* challenged the BOP's ranking system for placing eligible inmates on the RDAP waitlist, which the petitioners argued improperly failed to maximize their opportunity for a one-year sentence reduction, 653 F.3d at 974.

Petitioners' reliance on decisions from the Second and Third Circuit is also misplaced. While in *Jiminian*, the Second Circuit stated that "a motion pursuant to § 2241 generally challenges the execution of a federal prisoner's sentence, including . . . prison conditions," that case was about whether § 2255 was an inadequate or ineffective remedy for

a prisoner who attempted to use § 2241 to raise claims that had been rejected in his first § 2255 motion. 245 F.3d at 145–46. Moreover, the court cited *Chambers v. United States*, 106 F.3d 472, 474–75 (2d Cir. 1997), as authority for its list of appropriate uses of a § 2241 petition, and *Chambers* itself only lists examples of § 2241 habeas petitions challenging the calculation or length of sentences.

Woodall v. Federal Bureau of Prisons, 432 F.3d 235, 242 (3d Cir. 2005), is further afield. There, the Third Circuit held that to challenge the "execution of a sentence," a prisoner must allege that the prison's conduct was inconsistent with a command or recommendation in the sentencing judgment, that is, that BOP was not properly putting into effect or carrying out the directives of the sentencing judgment. *Id.* at 242–43 (3d Cir. 2005); *see also Brandon v. Sepanek*, 2014 WL 12972195, at *1 (6th Cir. 2014) (unpublished) (same). *Woodall* does not support a conclusion that federal prisoners may challenge prison conditions under § 2241.

In sum, petitioners' claim that federal prisoners may challenge conditions of confinement under § 2241 even when those claims do not fall within the core of habeas corpus is unsupported by this Court's

caselaw and petitioners' own cases. Without binding authority, the Court should not expand habeas in such an extraordinary way.

d. Federal prisoners should not enjoy broader rights than state prisoners to challenge conditions of confinement via habeas

If the Court defines the outer limits of federal habeas, it should extend the bright-line rule set forth in *Nettles*, precluding state prisoners from challenging conditions of confinement under § 2254, to federal prisoners raising the same claims under § 2241.

First, canons of statutory interpretation recommend consistent application of habeas jurisdiction to federal and state prisoners. Section 2254 provides that state prisoners may bring habeas petitions alleging they are "in custody in violation of the Constitution or laws or treaties of the United States." Similarly, Section 2241 enables both federal and state prisoners to seek habeas relief, and Section 2241(c)(3) affords relief to those "in custody in violation of the Constitution or laws or treaties of the United States." Petitioners identify no statutory language authorizing federal inmates to bring a far more expansive category of habeas claims than state inmates.

Second, the PLRA evinces Congress's intent that conditions-of-confinement claims should not be brought via habeas. *See Porter v. Nussle*, 534 U.S. 516, 527 (2002). The PLRA imposed several "constraints designed to prevent sportive filings in federal court." *Skinner v. Switzer*, 562 U.S. 521, 535–36 (2011). For example, the PLRA requires prisoners to exhaust their administrative remedies before challenging "prison conditions" under 42 U.S.C. § 1983 or "any other Federal law." 42 U.S.C. § 1997e(a). In addition, the PLRA includes a "three strikes" provision that prevents inmates from proceeding *in forma pauperis* if they previously filed three or more actions challenging prison conditions that were dismissed as frivolous or malicious, or for failure to state a claim. 28 U.S.C. § 1915(g). And the PLRA permits release as a remedy only when less intrusive means have already failed, and a three-judge panel finds by clear and convincing evidence that no other remedy will satisfactorily alleviate a constitutional violation. *See* 18 U.S.C. § 3626(a)(3)(C)-(E).

The PLRA, therefore, was designed to restrict litigation over prison conditions. On the front end, the exhaustion and three-strikes provisions made frivolous prison-conditions litigation a costly

proposition for repeat filers, and on the back end, Congress restricted the ability of prisoner litigants to obtain the remedy of release. With those legislative goals in mind, the PLRA defined "civil action with respect to prison conditions" as "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 specifically excepted "habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2).

Because the PLRA's requirements do not apply to habeas petitions, petitioners' position—that they may challenge conditions of confinement in habeas—would enable them to "evade the requirements of the PLRA by the simple expedient of putting a different label on their pleadings." *Nettles*, 830 F.3d at 932 (quotation marks omitted). That would eviscerate the will of Congress.

Pinson's filing history proves this point. She is subject to the PLRA's three-strikes provision requiring her to pre-pay any filing fees before filing a civil rights action. *See supra* p. 7. Broadening § 2241 to include conditions-of-confinement claims would effectively allow her to

bypass the three strikes provision and pay the de minimis $5 to bring her claims under § 2241. *See* 28 U.S.C. § 1914(a).

Third, petitioners' claim that federal prisoners need broader habeas relief because they do not have the statutory equivalent of § 1983 lacks merit. (AOB 23.) Federal prisoners may challenge constitutional violations by federal officials under *Bivens*, which parallels the standard for civil rights claims under § 1983. *See, e.g.*, *Martin v. Sias*, 88 F.3d 774, 775 (9th Cir. 1996) ("Actions under § 1983 and those under *Bivens* are identical save for the replacement of a state actor under § 1983 by a federal actor under *Bivens*").

That *Bivens* does not permit injunctive relief is of no moment. In *Solida v. McKelvey*, 820 F.3d 1090, 1096 (9th Cir. 2016), upon which petitioners rely, this Court held that equitable relief under *Bivens* is unavailable because it is unnecessary: the Administrative Procedure Act waives sovereign immunity for equitable claims. *Id.* (citing 5 U.S.C. § 702); *see also* 18 U.S.C. § 3626(a)(2); *see also Zavala v. Rios*, 721 F. App'x 720, 721–22 (9th Cir. 2018) ("injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally") (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61,

74, (2001)); *see also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017). In addition, federal prisoners may pursue claims under the Federal Tort Claims Act, which is unavailable to state prisoners. Petitioners, therefore, ignore the range of remedies available to federal prisoners who seek to challenge prison conditions.

Treating federal and state prisoners alike has the benefits of fairness, clarity, and administrability, while comporting with this Court's caselaw and the PLRA. Accordingly, if this Court defines the outer limits of habeas, it should extend the standard set forth in *Nettles* to federal prisoners.

* * *

In sum, the district courts properly determined that they lacked jurisdiction to hear petitioners' conditions-of-confinement claims under § 2241.

B. Alternatively, Pinson's Transfer to Another Prison Divested the District Court of Jurisdiction

The district court lacked jurisdiction over Pinson's § 2241 petition for a second, independent reason: Pinson was transferred to another prison before the district court ruled on her § 2241 petition. (Lam Decl., ¶ 3.) A prisoner's challenge to a facility's conditions becomes moot upon

his or her transfer to another facility. *See, e.g.*, *Green v. Jenkins*, 859 F. App'x 186, 187 (9th Cir. 2021) (holding prisoner's § 2241 petition challenging conditions of confinement was moot because he was transferred to another facility after filing a motion for reconsideration); *Munoz v. Rowland*, 104 F.3d 1096, 1097-98 (9th Cir. 1997) (habeas challenge to conditions of confinement in SHU were moot after inmate's release to general population); *Pinson v. Othon*, 2020 WL 7404587, at *3 (D. Ariz. Dec. 17, 2020), *appeal dismissed*, 2021 WL 1978888 (9th Cir. Apr. 20, 2021) (Pinson's claims challenging COVID-19 conditions at USP Tucson became moot after her transfer to another facility); *see also Dilley v. Gunn*, 64 F.3d 1365, 1368 (9th Cir. 1995) (finding § 1983 action moot when prisoner had been transferred to another prison); *Johnson v. Moore*, 948 F.2d 517, 519 (9th Cir. 1991) (same). An exception applies only when a petitioner shows: "(1) the challenged action is too short in duration to be fully litigated prior to its expiration, and (2) there is a reasonable expectation that the injury will occur again." *Dilley*, 64 F.3d at 1369.

Here, the district court lacked jurisdiction over Pinson's § 2241 petition based on mootness grounds. Pinson filed her petition

challenging the conditions at Victorville on December 14, 2020. (ER-17.) That same day, she was transported to the Federal Transfer City in Oklahoma, City and then on to the United States Penitentiary in Atlanta, Georgia. (Lam Decl. ¶ 3.) That transfer rendered Pinson's challenges to Victorville's conditions moot. That is, the alleged shortcomings at Victorville no longer affected her, and there was "no present controversy as to which effective relief could be granted." *Sekerke v. Gore*, 2021 WL 5299851, at *2 (S.D. Cal. Oct. 8, 2021) (prisoner's transfer to another facility renders moot his challenges to the conditions of his previous facility). Nor does any exception to mootness apply here, as there is no reasonable expectation that Pinson will be subject to COVID-19-related conditions at Victorville in the foreseeable future.

Pinson's reliance on Federal Rule of Appellate Procedure 23(a) is misplaced. (AOB 9 n.3.) Rule 23(a) prohibits unauthorized transferring of a prisoner to another facility "*pending review* of a decision in a habeas corpus proceeding." Fed. R. App. P. 23(a) (emphasis added); *Shabazz v. Carroll*, 814 F.2d 1321, 1324 (9th Cir.), *opinion vacated in part on reh'g*, 833 F.2d 149 (9th Cir. 1987) (this Court may retain

jurisdiction if prisoner was transferred "pending review" of a district court's decision). Pinson was transferred before the district court ruled, not while the district court's decision was "pending review" in this Court. As a result, Rule 23(a) and Pinson's authority are inapplicable.

Accordingly, Pinson's transfer from Victorville to another prison is an alternative basis to affirm the district court's dismissal of her petition for lack of jurisdiction.

C. The District Courts Did Not Plainly Err By Failing to Recharacterize the § 2241 Habeas Petitions Sua Sponte

1. Standard of review

A party preserves a claim by informing the district court "of the action the party wishes the court to take," Fed. R. Crim. P. 51, and an unpreserved claim is reviewed for plain error, Fed. R. Crim. P. 52. That is why this Court consistently reviews a district court's failure to act sua sponte for plain error only. *See, e.g.*, *United States v. Turner*, 897 F.3d 1084, 1107 (9th Cir. 2018) (failure to hold a competency hearing sua sponte); *United States v. Sierra Pacific Indus., Inc.*, 862 F.3d 1157, 1167 (9th Cir. 2017) (failure to recuse sua sponte); *United States v. Smith*, 831 F.3d 1207, 1216 (9th Cir. 2016) (failure to instruct sua sponte); *United States v. Gadson*, 763 F.3d 1189, 1205 (9th Cir. 2014)

(failure to exclude evidence sua sponte). There is no basis to depart from that standard in evaluating petitioners' claim that the district courts erred by failing to sua sponte recharacterize their petitions as civil rights complaints. *See, e.g.*, *Crosby v. Admax*, 2022 WL 971872, at *2 (10th Cir. 2022) (unpublished) (reviewing failure to sua sponte convert § 2241 petition into a *Bivens* action for plain error).

2. The district courts did not plainly err by failing to sua sponte recharacterize the § 2241 habeas petitions

The district courts did not err at all. A court "may" recharacterize a habeas petition to plead a civil rights action but only after notifying and obtaining consent from the prisoner. *Nettles*, 830 F.3d at 936. A court is never *required* to recharacterize a petition. *See Crosby*, 2022 WL 971872, at *2. Indeed, recharacterization risks disadvantaging a petitioner by triggering "the PLRA's three-strikes rule and different exhaustion requirements, as well as requiring the complaint to name a different defendant." *Nettles*, 830 F.3d at 936. District courts must be careful to "*avoid* a recharacterization that disadvantage[s] a petitioner." *Nettles*, 830 F.3d at 936 (emphasis added). A district court does not plainly err, let alone abuse its discretion, in avoiding a result that risks putting a petitioner in a worse position.

To the extent courts "must" consider recharacterization of improperly styled habeas petitions—a proposition petitioners glean only from an unpublished disposition, *Richardson v. Board of Prison Hearings*, 785 F. App'x 433, 434 (9th Cir. 2019) (AOB 31–32)—the district courts here did. The court dismissed Pinson's § 2241 petition "without prejudice to [her] right to file a civil rights action raising her challenge to the conditions of confinement under [*Bivens*], after first exhausting her administrative remedies." (ER-8.) And in Sands's case, the court dismissed the action with prejudice only after declining to "exercise its discretion to construe" his petition as a civil rights complaint "[t]o the extent that [p]etitioner's allegations . . . sound in civil rights, not in habeas." (ER-35 (citing cases).) Both district courts thus recognized their discretion under the applicable law and declined to exercise it.

The district courts' decisions were supported by the record. Specifically, neither habeas petition is amenable to conversion on its face. For example, it is not clear whether petitioners also seek monetary damages. And if petitioners do, their § 2241 habeas petitions

fail to name the individual officers responsible for the alleged violations. *See Ziglar*, 137 S. Ct. at 1860.

In addition, recharacterizing the petitions as civil rights actions would have been futile. In Pinson's case, the district court recognized that conversion would be impossible unless and until she "exhaust[ed] her administrative remedies" under the PLRA. (ER-8.) Moreover, as noted above, Pinson is subject to the three-strikes provision; thus, conversion would require her to prepay the filing fee before initiating a civil rights action. Similarly, and although the district court did not say so explicitly, Sands would have to exhaust his administrative remedies before proceeding by way of a civil rights complaint. Thus, construing petitioners' claims as civil rights actions would have subjected them to dismissal for failure to exhaust administrative remedies. *See, e.g.*, *Ivey*, 801 F. App'x at 592 (denying Pinson's Eighth Amendment and Federal Tort Claims Act claims for failure to exhaust administrative remedies).

Petitioners' arguments are unpersuasive. Pinson faults the district court for failing to explain the "advantages" of filing a civil rights action, and Sands argues that the court did not provide a justification that demonstrated consideration of the pros and cons of

conversion. (AOB 31–32.) But petitioners' misapprehend what the law requires. *Nettles* explained that "if the complaint is amenable to conversion on its face . . . the court *may* recharacterize the petition so long as [the court] warns the *pro se* litigant of the consequences of the conversion and provides an opportunity to withdraw or amend his or her complaint." 830 F.3d at 936. That standard neither mandates conversion nor a balancing of advantages and disadvantages. Nor must courts "act as counsel or paralegal to *pro se* litigants." *Pliler v. Ford*, 542 U.S. 225, 231 (2004); *see also Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) ("courts should not have to serve as advocates for *pro se* litigants").

In sum, the district courts did not plainly err, and in fact acted well within their discretion, in declining to sua sponte reclassify petitioners' § 2241 habeas petitions as civil rights actions.

D. The District Court Properly Dismissed Pinson's Habeas Petition

1. Standard of review

The Court reviews a district court's dismissal of a habeas petition under Habeas Rule 4 for an abuse of discretion. *See Boyd v. Thompson*,

147 F.3d 1124, 1127–28 (9th Cir. 1998) (finding district court "properly exercised its discretion" to use its "summary dismissal power").

2. The district court did not abuse its discretion by dismissing Pinson's habeas petition

Habeas Rule 1(b) permits this Court to "apply any or all of these rules" to any habeas petition, even if the petition is not filed pursuant to § 2254. Rule 4 requires a district court to dismiss a petition without ordering a responsive pleading where "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief." Habeas Rule 4. Further, the Advisory Committee Notes to Habeas Rule 4 provide "it is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer," particularly where the petition does not state facts "that point to a real possibility of constitutional error." Habeas Rule 4, Advisory Committee Notes (1976 Adoption).

To be sure, a district court's summary dismissal power is limited in certain circumstances. In *Boyd v. Thompson*, for example, this Court instructed lower courts to "give a petitioner notice of [] procedural default and an opportunity to respond to the argument for dismissal"

before summarily dismissing a petition for procedural default. 147 F.3d 1124, 1127–28 (9th Cir. 1998). That same rule applies to petitions where "untimeliness is obvious on the face of the petition." *Herbst v. Cook*, 260 F.3d 1039, 1042 (9th Cir. 2001). The requirement to afford notice and an opportunity to respond makes sense in those circumstances, because a petitioner may be able to "plead facts" to prevent default or application of the statute of limitations. *Herbst*, 260 F.3d at 1043 (finding "serious factual issues" requiring "appropriate development of the record" when petitioner alleged "he did not have access to legal materials describing or setting forth the provisions of AEDPA" and thereby did not have "actual knowledge" of its one-year limitations).

That is not the case here. Pinson's petition raised a purely legal jurisdictional issue—whether she can challenge conditions of confinement under § 2241—that did not require further development of the record or input from petitioner. Moreover, it makes a difference that the district court's dismissal turned on its own jurisdiction, rather than procedural default or statute of limitations. (AOB 36.) The Habeas Rules do not explicitly or even implicitly circumscribe a court's

inherent authority to assess its own jurisdiction simply because petitioners raise an open legal question. Rather, federal courts are "always under an independent obligation to examine their own jurisdiction," and "a federal court may not entertain an action over which it has no jurisdiction." *Hernandez*, 204 F.3d at 865; *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Nor was the district court required to give Pinson notice or the opportunity to respond before "adverse judicial action [was] taken against" her. *Acosta v. Artuz*, 221 F.3d 117, 121 (2d Cir. 2000). This general rule does not apply to *any* adverse judicial action. Indeed, the Second Circuit recognized its limits, explaining that a habeas petition can be dismissed without notice or an opportunity to be heard if it is "unmistakably clear form the facts alleged in the petition" that its untimely or "if all facts necessary for th[e] determination" of the statute of limitations "appear in [the] petition." *Id.* at 125. Reading the rule as Pinson suggests would render the district court's summary dismissal power meaningless.

Here, the district court did not need any further facts, arguments, or caselaw from Pinson to render a decision on a purely legal issue. The district court reviewed the applicable caselaw, including cases in Pinson's favor that were not presented in her petition, and declined to follow them. Declining to provide Pinson with another bite at the apple on a purely legal issue was not an abuse of discretion, but a proper exercise of the court's summary dismissal power.

Finally, any possible error in the district court's summary disposition of Pinson's petition was harmless because dismissal was the right result. Pinson was not entitled to challenge her conditions of confinement via § 2241, and even if such a challenge were ever permissible, Pinson's challenge was mooted by her transfer out of the prison to which her challenge pertained. Because the district court correctly determined that it lacked jurisdiction, it makes no difference that the court reached that conclusion expeditiously.

VI

CONCLUSION

For the reasons set forth above, the district court's decisions dismissing petitioners' § 2241 habeas petitions for lack of jurisdiction should be affirmed.

DATED: June 17, 2022

Respectfully submitted,

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STATEMENT OF RELATED CASES

The government states, pursuant to Ninth Circuit Rule 28-2.6, that the following appeals raise the same issue as this appeal, namely, whether a federal inmate may seek immediate release under 28 U.S.C. § 2241 on the basis of COVID-19 conditions in prison:

- *Camillo-Amisano v. Ponce*, C.A. 21-55877
- *Miller v. Ponce*, C.A. 22-55374

CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because the brief contains 9,710 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

2. 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 it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word 2016.

DATED: June 17, 2022

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