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28UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JESS ELIJIO CARRANZA,
JIMMY CARTER KIM,

Plaintiffs/Petitioners,

v.

WARDEN BRIAN KOEHN,

Defendant/Respondent.

Case No. 2:20-cv-01586-GMN-DJA

ORDER

Plaintiffs/petitioners Jess Elijio Carranza and Jimmy Carter Kim (Plaintiffs), represented by the Federal Public Defender, filed this action asserting that their federal constitutional rights have been violated as a result of inadequate measures at Nevada Southern Detention Center (NSDC) in Pahrump, Nevada to protect them from contracting the COVID-19 disease (ECF No. 1). Plaintiffs have styled their filing as a petition for a writ of habeas corpus under 28 U.S.C. § 2241 and complaint for declaratory and injunctive relief. Defendant-petitioner has filed a motion to dismiss, raising the question whether this action is properly brought, in part, as a habeas action (ECF No. 12). As discussed below, the motion to dismiss is granted in part, and plaintiffs' habeas claims are dismissed. The action will proceed on Plaintiffs' civil rights claims.

On August 26, 2020, Plaintiffs, held in federal criminal pretrial detention at NSDC,¹ filed a "Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 and

¹ NSDC is operated by CoreCivic, which is a private entity (See ECF No. 12, p. 3); see also <https://www.corecivic.com/> (all internet materials as last visited October 14, 2020).

1 Complaint for Declaratory and Injunctive Relief” (complaint) (ECF No. 1). The complaint
2 names NSDC Warden Brian Koehn as defendant in his official capacity as the Plaintiffs’
3 immediate custodian. *Id.* at 4. Defendant appeared and on September 17, 2020, filed a
4 “Motion to Dismiss and Response to Petition for Writ of Habeas Corpus” with supporting
5 declarations (ECF Nos. 9-13). Plaintiffs filed a response (ECF No. 15). Defendant filed
6 a reply and supplemental declarations (ECF No. 18). Plaintiffs filed a supplement to
7 their response (ECF No. 21). They have also sought leave and submitted a surreply
8 (ECF Nos. 22, 22-1).² Defendant argues that Plaintiffs’ claims are not cognizable in a
9 habeas action under 28 U.S.C. § 2241. Thus, he argues that the court lacks subject
10 matter jurisdiction over those claims and cannot grant relief on those claims.

11 Federal Rule of Civil Procedure 12(b)(1) provides for motions to dismiss for lack
12 of subject matter jurisdiction. Federal courts are courts of limited jurisdiction, with the
13 power to hear cases only when authorized by the Constitution and statute. *Kokkonen v.*
14 *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “Dismissal for lack of subject
15 matter jurisdiction is appropriate if the complaint, considered in its entirety, on its face
16 fails to allege facts sufficient to establish subject matter jurisdiction.” *In re Dynamic*
17 *Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981, 984–85 (9th Cir.
18 2008). When subject matter jurisdiction is challenged in a motion to dismiss pursuant to
19 Rule 12(b)(1), the burden of establishing subject matter jurisdiction is on the party
20 invoking the court’s jurisdiction. *See id.* The court presumes lack of subject matter
21 jurisdiction until the plaintiff establishes that it exists. *Kokkonen*, 511 U.S. at 377.

22 Federal Rule of Civil Procedure 12(b)(6) provides for motions to dismiss for
23 failure to state a claim upon which relief can be granted. A Rule 12(b)(6) motion tests
24 the legal sufficiency of the plaintiff’s claims. Dismissal for failure to state a claim is
25 proper only if it is clear the plaintiff cannot prove any set of facts in support of the claim
26 that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir.

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28 ² The court has considered all responses to the motion to dismiss and supporting declarations submitted by both parties.

1 1999). In making this determination, the court takes as true all allegations of material
2 fact stated in the complaint and construes them in the light most favorable to the
3 plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). The court
4 should “begin by identifying pleadings [allegations] that, because they are no more than
5 mere conclusions, are not entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 556
6 U.S. 662, 679 (2009). “While legal conclusions can provide the framework of a
7 complaint, they must be supported with factual allegations.” *Id.*

8 The notice pleading standard applicable in ordinary civil actions does not apply in
9 habeas corpus cases; habeas petitions must meet heightened pleading requirements.
10 See *McFarland v. Scott*, 512 U.S. 849, 856 (1994); see also Rule 4, Rules Governing
11 Section 2254 Cases in the United States District Courts, Advisory Committee Notes
12 (“[N]otice’ pleading is not sufficient, for the petition is expected to state facts that point to
13 a ‘real possibility of constitutional error.” (quoting *Aubut v. State of Maine*, 431 F.2d 688,
14 689 (1st Cir. 1970))).

15 The Centers for Disease Control and Prevention (“CDC”), describes the COVID-
16 19 pandemic, which is caused by a novel coronavirus, SARS-CoV-2, as “a serious
17 global health threat.” <https://www.cdc.gov/coronavirus/2019-nCoV/index.html>;
18 <https://www.cdc.gov/coronavirus/2019-ncov/global-covid-19/index.html>. (all internet
19 materials as last visited October 14, 2020). As of October 14, 2020, the CDC reported
20 7,835,007 total cases in the United States, and 215,194 total deaths in the United
21 States from the disease. https://covid.cdc.gov/covid-data-tracker/#cases_totalcases.
22 COVID-19 is highly contagious—“spreading very easily and sustainably between
23 people”—and it is thought to spread “between people who are in close contact with one
24 another (within about 6 feet),” “through respiratory droplets produced when an infected
25 person coughs, sneezes, or talks.” [https://www.cdc.gov/coronavirus/2019-ncov/prevent-](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html)
26 [getting-sick/how-covid-spreads.html](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html). The CDC states that it may be spread by people
27 who are not showing symptoms. *Id.* The CDC advises that the best ways of protecting
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1 oneself and others is to know how it spreads; wash hands often; avoid close
2 interpersonal contact; cover the mouth and nose with a mask when around others;
3 cover the mouth when coughing or sneezing; clean and disinfect frequently touched
4 surfaces daily; and monitor health daily. [https://www.cdc.gov/coronavirus/2019-
5 ncov/prevent-getting-sick/prevention.html](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html). The CDC also advises that some people are
6 more likely than others to become severely ill from COVID-19 and that this includes
7 racial and ethnic minority groups, older adults, and people with certain underlying
8 medical conditions. [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-
9 precautions/index.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html). There is currently no vaccine to prevent COVID-19.
10 <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>. On
11 March 12, 2020, Governor Steve Sisolak issued a declaration of emergency in the State
12 of Nevada due to COVID-19. [https://gov.nv.gov/News/Emergency_Orders/2020/2020-
13 03-12_-_COVID-19_Declaration_of_Emergency/](https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-12_-_COVID-19_Declaration_of_Emergency/). On March 13, 2020, President
14 Donald J. Trump declared the COVID-19 outbreak in the United States a national
15 emergency. [https://www.whitehouse.gov/presidential-actions/proclamation-declaring-
16 national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/](https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/).
17 Correctional and detention facilities present unique challenges with respect to control of
18 SARS-CoV-2 transmission among incarcerated and detained persons, staff, and
19 visitors. [https://www.cdc.gov/coronavirus/2019-ncov/community/correction-
20 detention/guidance-correctional-detention.html](https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html).

21 **Plaintiff Jess Elijo Carranza**

22 Carranza is a federal criminal pretrial detainee at NSDC, charged in Case No.
23 2:19-cr-00310-RFB-BNW with 1 count of felon in possession of a firearm (ECF No. 1, p.
24 3).³ The petition/complaint states that his jury trial is currently scheduled for October 19,
25 2020. He alleges that he has been exposed to COVID-19 and has experienced
26 symptoms. He claims he was housed in Unit 4G with co-plaintiff Kim while Kim awaited
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28 ³ Carranza also remains in state custody on charges of assault with a deadly weapon, burglary while in possession of a firearm, and possession of a stolen vehicle and property. Case No. C-19-344450-1.

1 results of his COVID-19 test. He avers that NSDC personnel have not tested him
2 despite numerous requests. Carranza says that he suffers from type 1 diabetes and
3 high blood pressure. He has not challenged his detention in his criminal case since his
4 initial appearance (ECF No. 12, p. 5). Respondents state that medical records reflect
5 that Carranza is 37 years-old with type 2 (non-insulin dependent) diabetes and high
6 blood pressure. *Id.* at 6-7.

7 **Plaintiff Jimmy Carter Kim**

8 Kim is also a federal criminal pretrial detainee, charged in Case No. 2:18-mj-
9 00836-DJA with kidnapping and sexual exploitation of children (ECF No. 1, p. 3).⁴ The
10 petition/complaint states that his preliminary hearing currently is scheduled for October
11 16, 2020. Kim, age 31, tested positive for COVID-19. He avers that he remained in Unit
12 4G for 2 days while his test was pending. After a 14-day medical isolation period,
13 prison personnel returned Kim to his dormitory-style unit but did not retest him.

14 Specifically, Kim alleges:

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16 In early July, Kim collapsed on the floor in the medical wing after
17 finally being removed from his unit after his COVID-19 test returned positive.
18 Kim's symptoms included fever, chest pains, dry mouth, fatigue, head and
19 body aches, difficulty breathing, stiff joints, lock jaw, and his arms and hands
20 were seizing up. NSDC staff picked him up off the floor, placed him in a
wheelchair, handcuffed him, and wheeled him to the hole. Staff did not give
Kim any medicine to treat his symptoms, let alone schedule an appointment
with a doctor before placing him in the hole.

21 The cell in which Kim was placed was filthy; he had no bedding for five hours
22 and no soap until the next day. He was not given medicine to ease his
symptoms before being placed in the hole and was forced to drink water out
of the sink.

23
24 Kim was not permitted access to a phone to call his attorney for five days.
Additionally, he was not permitted to take a shower for seven days.

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26 After 14 days, Kim was moved from the hole back to his unit. He was
never retested.

27 (ECF No. 1, p. 9).

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⁴ Kim also remains in state custody, charged with numerous sex offenses. Case No. C-16-313094-1.

1 Plaintiffs allege that defendant has failed to implement the CDC's guidance for detention
2 facilities at NSDC. *Id.* at 7-15.

3 Plaintiffs invoke this court's subject matter jurisdiction "under 28 U.S.C. § 1331
4 (federal question), and 28 U.S.C. § 2241 (habeas corpus)" (ECF No. 1, p. 4). Plaintiffs
5 claim that the conditions at NSDC, with respect to the threat posed by COVID-19,
6 violate their rights as federal criminal pretrial detainees under the Fifth Amendment to
7 the United States Constitution. *Id.* at 17-18. Plaintiffs seek a declaration that the current
8 conditions at NSDC are unconstitutional and ask the court to direct Defendant to
9 implement detailed sanitation and testing protocols. *Id.* at 18-23. They also ask that "if
10 Constitutional conditions of confinement cannot be established" they be released
11 pending trial. *Id.* at 21.

12 Federal law provides for two primary means for prisoners to seek relief on
13 complaints related to their imprisonment, petitions for writ of habeas corpus and civil
14 rights complaints. *See Muhammad v. Close*, 540 U.S. 749, 750 (2004); *Nettles v.*
15 *Grounds*, 830 F.3d 922, 927 (9th Cir. 2016). "Challenges to the validity of any
16 confinement or to particulars affecting its duration are the province of habeas corpus."
17 *Id.* (citing *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)). Claims involving the
18 circumstances of the plaintiff's confinement may be presented in civil rights actions. *Id.*
19 Under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388
20 (1971), a plaintiff may, in a civil rights action, sue a federal officer in his or her individual
21 capacity for damages for violating the plaintiff's constitutional rights. *See Bivens*, 403
22 U.S. at 389. And—as is the case, in part, here—a plaintiff may sue a federal officer in
23 his or her official capacity, invoking jurisdiction under 28 U.S.C. § 1331, and the court's
24 inherent equitable powers, and seek injunctive relief to remedy alleged constitutional
25 violations.

26 "The Supreme Court has 'long held that federal courts may in some
27 circumstances grant injunctive relief against' federal officials violating federal law."
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1 *Sierra Club v. Trump*, 929 F.3d 670, 694 (9th Cir. 2019) (citing *Armstrong v. Exceptional*
2 *Child Ctr., Inc.*, 575 U.S. 320, 326–27 (2015)); *Armstrong*, 575 U.S. at 327 (“The ability
3 to sue to enjoin unconstitutional actions by state and federal officers is the creation of
4 courts of equity, and reflects a long history of judicial review of illegal executive action,
5 tracing back to England.”); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)
6 (“[I]njunctive relief has long been recognized as the proper means for preventing entities
7 from acting unconstitutionally.”); *Bacon v. Core Civic*, No. 2:20-cv-00914-JAD-VCF,
8 2020 WL 3100827, at *6 (D.Nev. June 10, 2020).

9 This action, as pled by Plaintiffs, is a hybrid habeas and civil rights action;
10 Plaintiffs’ complaint includes both claims for habeas corpus relief, *i.e.* release from
11 NSDC, and claims for civil rights relief, *i.e.* injunctive and/or declaratory relief (see ECF
12 No. 1).

13 The Court concludes, however, in light of the particular factual allegations on
14 which Plaintiffs’ claims rely—allegations regarding failure to test all inmates or even all
15 symptomatic inmates for COVID-19; inadequate cleaning; failure to provide detainees
16 with adequate cleaning supplies, personal protective equipment and other items
17 necessary to protect them from COVID-19; and insufficient medical care—that this
18 action is a conditions-of-confinement case. Plaintiffs seek relief on account of the
19 conditions of their confinement. They do not claim any illegality regarding the reasons
20 for their detention or its duration. As has been noted in this district, while it is true that if
21 Plaintiffs were not detained at NSDC, they would not be subject to the alleged
22 constitutional violations, that can be said in any conditions-of-confinement case. If that
23 were determinative of whether an action is properly a habeas action or a civil rights
24 action, it would render habeas jurisdiction available in every conditions-of-confinement
25 case. See *Cordova Carballo et al. v. Barr, et al*, Case No. 2:20-cv-01315-APG-BNW,
26 ECF No. 46.

1 Plaintiffs stress that the Supreme Court has not explicitly foreclosed habeas
2 corpus jurisdiction over all conditions-of-confinement claims. *See Ziglar v. Abbasi*, 137
3 S. Ct. 1843, 1862 (2017) (leaving open the question whether immigration detainees
4 challenging “large-scale policy decisions concerning the conditions of confinement
5 imposed ... might be able to challenge their confinement conditions via a petition for a
6 writ of habeas corpus”); *Boumediene v. Bush*, 553 U.S. 723, 792 (2008) (declining to
7 determine “the reach of the writ with respect to claims of unlawful conditions of
8 treatment or confinement”); *Bell v. Wolfish*, 441 U.S. 520, 526, n. 6 (1979) (leaving for
9 “another day the question of the propriety of using a writ of habeas corpus to obtain
10 review of the conditions of confinement”); *Preiser*, 411 U.S. at 499 (“When a prisoner is
11 put under additional and unconstitutional restraints during his lawful custody, it is
12 arguable that habeas corpus will lie to remove the restraints making custody illegal.”).

13 In the Ninth Circuit, the Court of Appeals has left open the question of habeas
14 jurisdiction over conditions-of-confinement claims by federal prisoners. In *Nettles v.*
15 *Grounds*, 830 F.3d 922 (9th Cir. 2016), a habeas action, a state prisoner challenged a
16 prison disciplinary action on constitutional grounds, claiming the improper disciplinary
17 action could affect his eligibility for parole. The Court of Appeals held that because the
18 petitioner’s claim did not fall within the “core of habeas corpus,” that is, it did not
19 necessarily implicate the “fact or duration” of his conviction or sentence, it must be
20 brought, if at all, in a civil rights action under 42 U.S.C. § 1983. *Nettles*, 830 F.3d at 925
21 (quoting *Preiser*, 411 U.S. at 487); *see also Nettles*, 830 F.3d at 931, 934. The Court of
22 Appeals noted that the Supreme Court has suggested that civil rights actions under 42
23 U.S.C. § 1983 are the exclusive vehicle for state prisoners’ claims that fall outside the
24 core of habeas. *See id.* at 929–31 (citing *Muhammad*, *Wilkinson*, and *Skinner v.*
25 *Switzer*, 562 U.S. 521 (2011)). The Court stated:

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27 The [Supreme Court] has long held that habeas is the exclusive vehicle for
28 claims brought by state prisoners that fall within the core of habeas, and
such claims may not be brought in a § 1983 action. *See, e.g., Wilkinson v.*
Dotson, 544 U.S. 74, 81–82, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005)

1 (characterizing the Court’s precedents as holding “that a state prisoner’s §
2 1983 action is barred (absent prior invalidation)—no matter the relief sought
3 (damages or equitable relief), no matter the target of the prisoner’s suit
4 (state conduct leading to conviction or internal prison proceedings)—if
5 success in that action would necessarily demonstrate the invalidity of
6 confinement or its duration”). Based on our review of the development of
7 the Court’s case law in this area, we now adopt the correlative rule that a §
8 1983 action is the exclusive vehicle for claims brought by state prisoners
9 that are not within the core of habeas corpus.

10 *Nettles*, 830 F.3d at 927. However, the Court of Appeals declined to address the
11 question of whether a civil rights action is the exclusive vehicle for a claim by a federal
12 prisoner not at the core of habeas. See *id.* at 931 (“Because the case before us involves
13 a state prisoner’s action under 28 U.S.C. § 2254, we need not address how the
14 standard suggested in *Skinner* and adopted here applies to relief sought by prisoners in
15 federal custody.”); see also *Workman v. Mitchell*, 502 F.2d 1201, 1208 n.9 (9th Cir.
16 1974)) (stating, in dicta, that it appeared “fairly well established that ... federal habeas
17 corpus actions are now available to deal with questions concerning both the duration
18 and the conditions of confinement”).

19 Federal district courts that have addressed the question, in the Ninth Circuit and
20 other circuits, have reached different conclusions regarding subject matter jurisdiction
21 under 28 U.S.C. § 2241 over federal prisoners’ conditions-of-confinement claims in the
22 context of the COVID-19 pandemic. For example, district courts in this circuit held that
23 jurisdiction under § 2241 was proper in such cases as *Zhang v. Barr*, No. ED CV 20-
24 00331-AB (RAOx), 2020 WL 1502607, at *3 (C.D.Cal. March 27, 2020); *Ortuno v.*
25 *Jennings*, No. 20-cv-02064-MMC, 2020 WL 1701724, at *2 (N.D.Cal. April 8, 2020);
26 *Bent v. Barr*, 445 F.Supp.3d 408, 413–14 (N.D. Cal. April 9, 2020); *Habibi v. Barr*, 445
27 F.Supp.3d 990, 995 n.2 (S.D. Cal. April 14, 2020); and *Perez v. Wolf*, 445 F.Supp.3d
28 275, 293 (N.D. Cal. April 14, 2020). See also, e.g., *Thakker v. Doll*, 451 F.Supp.3d 358,
(M.D.Pa. March 31, 2020); *Vasquez-Berrera v. Wolf*, 4:20-CV-1241, 2020 WL 1904497,

1 at *3–5 (S.D. Tex. Apr. 17, 2020); *Ruderman v. Kolitwenzew*, No. 20-cv-2082, 2020 WL
2 2449758, at *7–8 (C.D. Ill. May 12, 2020).

3 District courts in this circuit have concluded that there was no habeas jurisdiction
4 in several cases, including *Alvarez v. Larose*, 445 F.Supp.3d 861, 865–68 (S.D. Cal.
5 May 9, 2020) (plaintiffs’ “claims would not exist *but for* their current conditions of
6 confinement”); *Wilson v. Ponce*, No. CV 20-4451-MWF (MRWx), 2020 WL
7 3053375, at *9–10 (C.D. Cal. June 8, 2020); and *Hunter v. Martinez*, No. 2:20-cv-
8 05121-JAK (SHK), 2020 WL 3258398, at *3–5 (C.D. Cal. June 12, 2020); *see also, e.g.*,
9 *Wragg v. Ortiz*, No. 20-5496 (RMB), 2020 WL 2745247, at *12–19 (D.N.J. May 27,
10 2020); *Codner v. Choate*, No. 20-cv-01050-PAB, 2020 WL 2769938, at *4-7 (D.Co. May
11 27, 2020); *Mescall v. Hemingway*, No. 2:20-11110, 2020 WL 4584028, at *3 (E.D. Mich.
12 Aug. 10, 2020).

13 Considering the precedent governing the general scope of habeas corpus
14 jurisdiction, the court agrees with defendant that this does not appear to be a habeas
15 case. If Plaintiffs succeed in showing that the conditions under which they are held
16 violate the Fifth Amendment by putting them in excessive danger from COVID-19, or
17 because they have received inadequate medical care in relation to COVID-19, that will
18 not necessarily mean they must be released from detention. Plaintiffs’ complaint mainly
19 seeks that the court direct defendant to implement many specific safety measures,
20 including social distancing; adequate sanitation and disinfection; PPE use that is
21 consistent with CDC guidelines; heightened testing; and improved, non-punitive
22 conditions for quarantine (ECF No. 1, pp. 18-22). After listing 17 separate specific
23 safety measures Plaintiffs ask the court to require of Defendant, Plaintiffs also ask that
24 they be released “if constitutional conditions of confinement cannot be established.” *Id.*
25 at 21. Thus, the Complaint does mention release, but it does not allege that the only
26 effective remedy would be release. Plaintiffs certainly do not set forth factual allegations
27 explaining why the conditions at NSDC could not be altered to sufficiently protect them
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1 from COVID-19 and provide them with adequate medical care. Even if plaintiffs did
2 argue that conditions could not be altered sufficiently, such a claim would conflict with
3 their requests for detailed injunctive relief regarding the conditions of their confinement.
4 This court concludes that it does not have jurisdiction over Plaintiffs' habeas claims
5 under 28 U.S.C. § 2241 and that Plaintiffs have not stated viable claims for which
6 habeas corpus relief may be granted.

7 The court in *Mescall v. Hemingway*, No. 2:20-11110, 2020 WL 4584028 (E.D.
8 Mich. Aug. 10, 2020), made this point in dismissing a similar habeas action in the
9 Eastern District of Michigan:

10 Petitioner's claims are non-cognizable in habeas; Petitioner does not
11 allege that no set of conditions of confinement would remedy the risk
12 caused by Covid-19. Petitioner alleges that insufficient testing of the
13 inmates and staff is being conducted; Petitioner alleges that some prison
14 staff members are not following protocols for wearing face masks; Petitioner
15 alleges that there is insufficient social distancing; Petitioner claims that there
16 is insufficient sanitary equipment being provided to the inmates. Petitioner
17 argues that the risk of Covid-19 transmission at FCI-Milan could be
18 alleviated if facility wide testing for Covid-19 was ordered, if everyone was
19 ordered to wear a face mask and to socially distance, and if adequate
20 sanitary equipment was provided to all inmates. Petitioner does not allege
21 that "there are no conditions of confinement sufficient to prevent irreparable
22 constitutional injury" at FCI-Milan. Only "where a petitioner claims that no
23 set of conditions would be constitutionally sufficient the claim should be
24 construed as challenging the fact or extent, rather than the conditions, of
25 the confinement." [*Wilson v. Williams*, 961 F.3d 829, 838 (6th Cir. 2020)
26 (citing *Adams v. Bradshaw*, 644 F.3d 481, 483 (6th Cir. 2011))]. Petitioner's
27 claims are non-cognizable in a habeas petition, because he challenges the
28 conditions of confinement, rather than the fact or extent of his confinement.

23 *Mescall v. Hemingway*, 2020 WL 4584028, at *3 (E.D. Mich. Aug. 10, 2020). As in
24 *Mescall*, in this case there is no colorable claim, supported by factual allegations, that
25 release from custody would be the only effective remedy. No habeas jurisdiction lies
26 because Plaintiffs do not allege that the fact or duration of the custody itself is
27 unconstitutional.

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Nevertheless, Plaintiffs' claims for injunctive and declaratory relief survive. In *Roman v. Wolf*, a case where detainees made habeas and injunctive and declaratory relief claims about the unconstitutional risk of contracting COVID-19, the Ninth Circuit acknowledged that district courts have the authority to hear claims for injunctive and declaratory relief independently of the habeas claim. See No. 20-55436 (9th Cir. 2020) (declining to address the habeas claim because "the action for declaratory and injunctive relief independently provided the district court jurisdiction to hear the Plaintiff's challenges and authority to grant the types of relief that Plaintiff sought"). Here, the Plaintiffs are also detainees challenging the constitutionality of the conditions of their confinement in light of COVID-19. As such, the Court will proceed with Plaintiffs' surviving claims for injunctive and declaratory relief.⁵

Accordingly, the motion to dismiss is granted in part, and the Plaintiffs' habeas corpus claims are dismissed.⁶

The motion to dismiss is denied in part without prejudice to the extent it seeks dismissal of Plaintiffs' civil rights claims, that is, Plaintiffs' claims invoking jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. §§ 2201–02, and the court's inherent equitable

⁵ Defendant also argues for dismissal on the grounds that Plaintiffs do not have standing to assert claims on behalf of the entire population of NSDC detainees, that they did not exhaust their administrative remedies, and that other relief is available under the Bail Reform Act. (ECF No. 12, p. 2:9–15, 17:13). However, Plaintiffs have standing to raise their own claims against unconstitutional treatment, regardless of whether other detainees are subject to the same treatment, and the Court need not address any class certification at this stage. See *Ziglar v. Abassi*, 137 S. Ct. 1843 (2017) (allowing six detainees to challenge the conditions at a facility holding hundreds); (ECF No. 15, p. 18:8–14). Additionally, exhaustion of administrative remedies is not required if it would be futile, as it is here, since Plaintiffs, as well as many other detainees, have challenged NSDC's COVID-19 policies to no avail; there is no indication that NSDC's response to additional grievances would be any different based on their policy. See *Fraleigh v. U.S. Bureau of Prisons*, 1 F.3d 924, 925 (9th Cir. 1993) (holding that when a denial of a grievance request is based on official Bureau of Prisons policy, further grievance requests would be futile); (ECF No. 1, p. 13:13–14); (ECF No. 15, p. 16:12–17:15); (ECF No. 12, p. 4:3–4, 32:22–23); (ECF No. 12-1, Exh. A). Finally, the Court agrees with Plaintiffs' argument that the Bail Reform Act does not provide a mechanism to challenge the conditions of their confinement, as Plaintiffs do here. (See ECF No. 12, p. 15:10–19).

⁶ The court also has considered the practical difficulty, and potential unfairness, of proceeding in this case on both habeas and civil rights claims. It appears that, if this case were to proceed in this hybrid form, a recurring question would be whether habeas practice or general civil practice should control; the answer to that question would be unpredictable for the parties, and would inevitably have different ramifications for the plaintiffs and defendant depending on the procedural step under consideration. It appears that proceeding with this case to resolution as a hybrid habeas and civil rights action, as it is pled, would be impracticable and potentially unfair to one party or the other. See *Cordova Carballo et al. v. Barr, et al.*, 2:20-cv-1315-APG-BNW (ECF No. 46, p. 13 n.6) (D. Nev. September 30, 2020).

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powers, seeking injunctive and declaratory relief against the Defendant in his official capacity.

The Court need not address whether the Federal Public Defender can represent Plaintiffs at this stage in the proceedings, because Plaintiffs' Motion for Appointment of Counsel, (ECF No. 17), is not yet fully briefed.

IT IS THEREFORE ORDERED that defendant's motion to dismiss (ECF No. 12) is **GRANTED in part and DENIED in part**. Plaintiffs' habeas corpus claims are **DISMISSED**. In all other respects, the motion to dismiss is denied without prejudice.

IT IS FURTHER ORDERED that Plaintiffs' motion for leave to file surreply (ECF No. 22) is **GRANTED**. The Clerk **SHALL DETACH** and **FILE** the surreply at ECF No. 22-1.

DATED: 16 October 2020.



GLORIA M. NAVARRO
UNITED STATES DISTRICT JUDGE