UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

JOSEPH A. DENBOW and SEAN R. RAGSDALE, *on their own and on behalf of a class of similarly situated persons*, *Petitioners*, v. MAINE DEPARTMENT OF CORRECTIONS, *et al*., *Respondents.*	Case No. 20-cv-00175-JAW **PETITIONERS' MEMORANDUM REGARDING THE APPLICABILITY OF THE RULES GOVERNING SECTION 2254 CASES**

Pursuant to the Court's interim discovery order, Petitioners submit this memorandum to address the unresolved questions identified by the Court, specifically: **(1)** "whether the Court is required to formally convert the § 2241 petition to a § 2254 petition," and **(2) "**regardless of the answer to the conversion issue, whether the Court should apply the Rules Governing Section 2254 Cases to this case." Order at 2-3, ECF No. 34 (June 25, 2020). As discussed below, the Court should not convert the petition to a § 2254 petition because such conversion could foreclose Petitioners from challenging other constitutional violations in their conviction or sentence unrelated to the COVID-19 pandemic—an outcome that implicates the Suspension Clause and is not required by statute or First Circuit precedent. To the extent the Court nonetheless chooses to convert, Petitioners respectfully request notice and the opportunity to amend or dismiss given the restrictions on second or successive § 2254 petitions. Regardless of conversion, moreover, it is appropriate for the Court to apply the Rules Governing Section 2254 Cases in this case. In light of the flexibility baked into the Rules Governing Section 2254 cases, the Court has the discretion to apply those rules in this case "as law and justice require." *See* 28 U.S.C. § 2243; *see also* Joint Status Report at 4-5, ECF No. 30 (June 17, 2020) (discussing discretion in applying the Rules Governing Section 2254 Cases).

I. The Court Should Not Convert the § 2241 Petition to a § 2254 Petition

The question of whether the Court may convert this § 2241 petition into a § 2254 petition hinges on the collateral consequences for petitions filed under § 2254, including the restrictions on second or successive petitions. Converting this petition into a § 2254 petition could bar named petitioners—or even all putative class members—from later asserting any constitutional infirmity in their convictions or sentences, despite having no opportunity to raise such challenges in this case. *See* 28 U.S.C. § 2244(b). It is precisely because of such harsh collateral consequences that, even in run-of-the-mill cases involving a plainly mislabeled petition, it is reversible error for a court to convert a petition without giving a pro se petitioner the chance to decline the conversion or withdraw the motion. *See, e.g. Cook v. N.Y. State Div. of Parole*, 321 F.3d 274, 282 (2d Cir. 2003) (vacating a decision ordering conversion without the opportunity to withdraw); *see also Castro v. United States*, 540 U.S. 375, 124 S. Ct. 786, 792 (2003) (acknowledging the "serious consequences" to a petitioner of recharacterizing a petition to a § 2255 motion and requiring notice and an opportunity to withdraw, amend, or dismiss the filing).

In other words, a key consideration before ordering conversion is the risk that "construing [a filing] as a section 2254 petition might cause [a party] to forfeit unintentionally any otherwise meritorious claims for federal habeas relief he might have." *Cook*, 321 F.3d at 282. Respondents are wrong, therefore, in claiming that concerns about the second or successive petition should be delayed until "any future petition filed by one of the Petitioners." Respondents' Mem. at 5 n.5, ECF No. 35 (July 2, 2020). To the contrary, the "potential adverse consequences of … recharacterization" must be considered *before* (not after) any such conversion may take place. *See Cook*, 321 F.3d at 281-82 (citing *Adams*, 155 F.3d at 583).

Although these concerns with conversion are typically only procedural—requiring notice and the opportunity to cure or to dismiss before converting the petition—in this case they are also substantive and militate against any conversion at all. These substantive concerns derive from the presumption of reviewability of the Maine Department of Corrections' response to the COVID-19 pandemic, as well as canons of interpretation that avoid implicating the Suspension Clause.[1] There is a "strong presumption in favor of judicial review of administrative action" and a "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *I.N.S. v. St. Cyr*, 533 U.S. 289, 298 (2001) (superseded by statute on other grounds as stated in *Nasrallah v. Barr*, 140 S. Ct. 1683 (2020)); *see also DHS v. Thuraissigiam*, 140 S. Ct. 1959, 1980 (2020) (acknowledging the "presumption in favor of judicial review" and "the rule that '[i]mplications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction") (internal citations omitted).

Conversion to a § 2254 petition would implicate serious concerns under the Suspension Clause. The Clause "ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the "delicate balance of governance" that is itself the surest safeguard of liberty." *Boumediene v. Bush*, 553 U.S. 723, 745 (2008) (citation omitted). In conflict with this guarantee, converting to a § 2254 petition could require Petitioners (and potentially putative class members) to choose between pursuing their challenges to unconstitutional prison conditions during a deadly pandemic, and other potentially meritorious constitutional or statutory challenges to their conviction or sentence. The bar on second

[1] The Suspension Clause provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2. During ratification, founders "referred to the Suspension Clause as an 'exception' to the 'power given to Congress to regulate courts.'" *Boumediene v. Bush*, 553 U.S. 723, 743 (2008) (internal citation omitted).

successive petitions, which represents a "modified res judicata rule," typically protects against "abuse" of the habeas remedy, requiring parties to raise all constitutional infirmities to their convictions or sentences in a single proceeding. *See Felker*, 518 U.S. at 664 (1996) (denying a challenge under the Suspension Clause). But in the unique circumstances of the COVID-19 pandemic, it would not be feasible or desirable for Petitioners to raise all potential constitutional or statutory violations with their convictions or sentences in this case. Requiring all potential claims to be challenged in a single proceeding, 28 U.S.C. § 2244(b), would represent a denial of the federal forum for litigants challenging unprecedented dangers arising from the COVID-19 pandemic.

These concerns under the Suspension Clause invoke the "clear statement" rule: "[W]hen a particular interpretation of a statute invokes the outer limit of Congress' power, we expect a clear indication that Congress intended that result." *Id.* at 299. Here, there is no "clear statement" requiring conversion of petitions filed under § 2241 challenging conditions of confinement as unconstitutional. To the contrary, the First Circuit has recognized that § 2241 "may be used to attack the manner in which a sentence is executed, as opposed to the sentence itself," and had to resort to "Congressional intent" to determine that § 2254 procedures should nonetheless apply to prisoners' challenge to the removal of a pre-release program . *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 875 n.9 (1st Cir. 2020).

Indeed, the Supreme Court's procedural rules demonstrate the reasonableness of allowing this petition to proceed under § 2241. The Supreme Court's rule governing original jurisdiction[2] over habeas petitions provides: "If the relief sought [in the habeas petition] is from the judgment

[2] *See Felker v. Turpin,* 518 U.S. 651, 660–62 (1996) (explaining that the Supreme Court retains original jurisdiction over habeas cases); *see also* 28 U.S.C. §§ 2241, 2254(a) allowing petitions to be filed before the Supreme Court).

of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b)." SCOTUS Rule 20.4. In this case, the petitioners do not seek relief "from the judgment of a state court," but rather from the unconstitutional conditions that place them at greater risk of serious illness or death during this pandemic. *See id.* Accordingly, the standards under which the Supreme Court's rules require compliance with § 2254 procedures are not met, making it appropriate to proceed under the default jurisdiction under § 2241.

This understanding is consistent with the numerous § 2241 petitions filed on behalf of post-conviction State prisoners during the COVID-19 pandemic.[3] For example, in one habeas petition on behalf of convicted state prisoners (among other petitioners), the court held that § 2241 is "the proper vehicle for Plaintiffs to challenge the continued confinement of medically-vulnerable Jail inmates during the COVID-19 pandemic." *Cameron v. Bouchard*, No. CV 20-10949, 2020 WL 2569868, at *13 (E.D. Mich. May 21, 2020), *on reconsideration*, No. CV 20-10949, 2020 WL 2615740 (E.D. Mich. May 22, 2020) (stayed pending appeal). In another petition on behalf of pre-trial detainees *and* post-conviction state prisoners, the court held that "Plaintiffs are challenging the current health conditions of their confinement, which, they claim, have become unconstitutional because of the COVID-19 pandemic risk. They are not attacking their underlying sentences. As such, § 2241 is the proper vehicle for their petition" *McPherson v. Lamont*, No. 3:20CV534 (JBA), 2020 WL 2198279, at *5 (D. Conn. May 6, 2020); *but see Griffin v. Cook*, No. 3:20-CV-589 (JAM), 2020 WL 2735886, at *3 (D. Conn. May 26, 2020) (applying § 2254).

[3] These decisions include the *McPherson* decision, which arises in the Second Circuit, another circuit that has adopted the so-called "majority rule."

In sum, ordering conversion to a § 2254 petition carries serious implications under the Suspension Clause—a result that would be avoided by applying the reasonable interpretation that § 2254 procedures apply only to cases seeking "relief . . . from the judgment of a state court," which is not the case here. *See* SCOTUS Rule 20.4. Accordingly, even accepting this Court's determination that § 2254 exhaustion applies, *Denbow v. Maine Dep't of Corr.*, No. 1:20-CV-00175-JAW, 2020 WL 3052220, at *17 (D. Me. June 8, 2020),[4] the Suspension Clause implications of conversion militate against conversion to a § 2254 petition.

None of the cases cited in the Respondents' Memorandum are to the contrary, and indeed, Respondents cite no precedential decision from the First Circuit converting to a § 2254 petition at all. *See generally* Resp. Mem. at 2-5. The only precedential First Circuit decision on point is *Gonzales-Fuentes*, a petition filed under *both* §§ 2241 and 2254, making conversion a nonissue. *Gonzalez-Fuentes*, 607 F.3d at 875 n.9. And in *Brennan v. Wall*, a non-precedential decision, the petitioner had already previously filed a § 2254 petition and the First Circuit had already denied a certificate of appeal for a second petition, making concerns about waiver of future rights a non-issue. 100 F. App'x 4 (1st Cir. 2004) (non-precedential). In short, there is no First Circuit precedent governing the specific issue presented here, and the Court should decline to chart a new path that could deprive Petitioners of a weighty constitutional right.

Finally, to the extent the Court nonetheless elects to convert the petition to a § 2254 petition, Petitioners respectfully request advanced notice and the opportunity to either amend or dismiss their petition before such a conversion takes effect. *Cook*, 321 F.3d at 282; *Castro*, 540 U.S. at 383-84. Although this procedure is typically afforded to pro se petitioners, the same

[4] For purposes of preserving the issue for appeal, Petitioners continue to assert that the petition was properly filed under § 2241, as in *Cameron* and *McPherson* discussed above.

courtesy should extend to Petitioners in this case, given the unusual and exceptional nature of their claims, the strong reasons for believing that § 2241 should apply, and the weighty concerns with converting to a § 2254 petition.

II. Petitioners Do Not Object to the Court Applying the Rules Governing Section 2254 Cases to this Case

Although this petition was filed under 28 U.S.C. § 2241, this Court has the "discretion" to apply the Rules Governing Section 2254 Cases to other situations, including in section 2241 cases. *See* Section 2254 Rule 1, Advisory Committee Notes; *see also* Joint Status Report at 4-5, ECF No. 30. With the exception of Rule 9 on second or successive petitions (which, in any event, appears to be superseded by statute), Petitioners do not object to applying the Rules Governing Section 2254 Cases in this case. Although "the Rules Governing Section 2254 Cases are an awkward fit to the Petitioners' conditions of confinement theory," Order at 2, these rules were promulgated after *Harris v. Nelson*, and are consistent with its generous view of judicial authority to oversee case management with "initiative" and "flexibility." 394 U.S. 286, 290, 291 (1969) (quoting 28 U.S.C. § 2243). With respect to class procedures, moreover, the Court may apply Rule 23 as a Rule of Civil Procedure that is "not inconsistent with any statutory provision or these rules." Section 2254 Rule 12.[5]

CONCLUSION

For these reasons, Petitioners object to converting their § 2241 petition to a § 2254 petition, but do not object to Respondents' proposal to apply the Rules Governing Section 2254 Cases, with the exception of Rule 9.

[5] The Rules Governing Section 2254 Cases do not incorporate the requirement of the Maine rule on post-conviction reviews, which requires that the petition "shall be limited" to challenges to a "single trial" or "single proceeding." M.R. Crim. P. 67(b).

Dated July 10, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that she has electronically filed this date the foregoing PETITIONERS' RESPONSE REGARDING THE APPLICABILITY OF THE RULES GOVERNING SECTION 2254 CASES with the Clerk of the Court using the CM/ECF system. This filing is available for viewing and downloading from the ECF system.

Dated: July 10, 2020

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