UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CRAIG WILSON, ERIC BELLAMY, KENDAL NELSON, and MAXIMINO NIEVES, on behalf of themselves and those similarly situated, *Petitioners*, v. MARK WILLIAMS, warden of Elkton Federal Correctional Institutions; and MICHAEL CARVAJAL, Federal Bureau of Prisons Director, in their official capacities, *Respondents.*	Case No. 20-cv-0794 Judge James Gwin

PETITIONERS' MEMORANDUM REGARDING THE SIXTH CIRCUIT'S MAY 4, 2020 ORDER DENYING RESPONDENTS' MOTION FOR STAY PENDING APPEAL

INTRODUCTION

Although this Court may exercise discretion as to whether to stay its own orders pending appeal, it is bound by the rulings of the Sixth Circuit on discrete matters within that inquiry. Where the Sixth Circuit's rulings have resolved disputed issues in this case, those resolutions are now the law of the case, and this Court may not revisit them. Further, where the appellate court's holdings establish or reinforce binding precedent on general points of law, this Court may not exercise its discretion in a manner that contradicts that precedent.

The Sixth Circuit's May 4, 2020 Order resolved substantially identical issues to those raised in Respondents' Motion to Stay in this Court: namely, whether Respondents can show a strong likelihood of success on the merits of their appeal (they cannot), or whether their claims of irreparable harm are legally cognizable interests justifying a stay (they are not). This Court cannot grant a stay without revisiting those issues, which would violate the law of the case.

Even aside from the law of the case, the Sixth Circuit's Order also reaffirms several legal principles that operate to preclude any stay for Respondents here. First, it affirms on de novo review this Court's ruling that 28 U.S.C. § 2241 jurisdiction properly applies where, as here, an incarcerated petitioner claims that no set of condition changes would be sufficient to cure a constitutional injury. *See infra* Section I-A. Second, it confirms that claims of this nature properly sound in habeas, rendering the Prison Litigation Reform Act inapplicable. *Id.* Third, it reiterates that the time, money, and energy required to comply with a district court's order cannot constitute irreparable harm as a matter of law. *Infra* Section II.

These discrete legal rulings render it a foregone conclusion that Respondents' Motion to Stay is without merit—indeed, to grant that Motion would require rulings contrary to the Sixth Circuit's. As no pertinent issues remain unresolved in Respondents' Motion, Petitioners respectfully submit that it must be denied.

ARGUMENT

The law of the case doctrine precludes this Court from "reconsideration of identical issues" following resolution by the appellate court, whether those issues were resolved "explicitly or by necessary inference from the disposition[.]" *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306 (6th Cir. 1997) (internal citation omitted). The doctrine is "directed to a court's common sense," *id.*, and is to be applied in the context of this Court's "authority to interpret the scope and meaning" of any appellate order, including orders granting or denying a stay pending appeal. *Reed v. Rhodes*, 472 F. Supp. 603, 605 (N.D. Ohio 1979); *United States v. Michigan*, 508 F. Supp. 480, 485 (W.D. Mich. Nov. 13, 1980). Without law of the case, "an adverse judicial decision would become little more than an invitation to take a mulligan, encouraging lawyers and litigants alike to believe that if at first you don't succeed, just try again." *Entek GRB, LLC v. Stull Ranches, LLC*, 840 F.3d 1239, 1240 (10th Cir. 2016) (Gorsuch, J.).

"Different Rules of Procedure govern the power of district courts and courts of appeals to stay an order pending appeal. Under both Rules, however, the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (citations omitted). The plain meaning of the Sixth Circuit's May 4, 2020, Order resolves each and potentially dispositive issue raised in Respondents' Motion to Stay before this Court—most notably by explicitly rejecting their same arguments on the first two factors, which are "the most critical." Order, App. ECF No. 23-2 ("Order") at 1 (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). Treating those issues as settled—as this Court must—forecloses the possibility of a stay.

I. The Sixth Circuit Resolved the Issue of Likelihood of Success on Appeal in Petitioners' Favor As a Matter of Law

A. 28 U.S.C. § 2241 Jurisdiction Applies, and the PLRA Does Not

As the Sixth Circuit observed in denying Respondents' notice to say, Petitioners "filed a petition under 28 U.S.C. § 2241 to obtain enlargement of their custody to limit their exposure to the COVID-19 virus." Order at 1. The Sixth Circuit reviewed this Court's "legal conclusions de novo." *Id.* at 3. The panel concluded in relevant part:

> Petitioners seek release for the subclass not because the conditions of their confinement fail to prevent irreparable constitutional injury at Elkton, but based on the fact of their confinement. Where a petitioner claims no set of conditions would be constitutionally sufficient, we construe the petitioner's claim as challenging the fact of the confinement. *See Adams v. Bradshaw*, 644 F.3d 481, 483 (6th Cir. 2011); *cf. Terrell v. United States*, 564 F.3d 442, 446−48 (6th Cir. 2009). Petitioners' proper invocation of § 2241 also forecloses any argument that the PLRA applies given its express exclusion of "habeas corpus proceedings challenging the fact or duration of confinement in prison" from its ambit. 18 U.S.C. § 3626(g)(2).

Order at 3. Those unqualified rulings are now the law of this case. *Hanover*, 105 F.3d at 312.

Here, the Sixth Circuit, reviewing de novo, concluded that Petitioners' § 2241 petition for enlargement qualifies as a challenge to the fact of their confinement that is cognizable under § 2241. Order at 1, 3. It also concluded that Petitioners' having properly brought their claim under § 2241 renders the Prison Litigation Reform Act (PLRA) inapplicable in relevant part. Order at 3. These were linchpins of Respondents' legal argument in favor of success on the merits. *See* ECF 30-1, Stay Mem. at 5–10. The Sixth Circuit has now stated its view on those issues. *See Hanover*, 105 F.3d at 312. Even taking these questions alone out of the equation, it is now all but impossible for Respondents to make "a strong showing that [they are] likely to succeed on the merits," *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted), or could have shown a likelihood of establishing on appeal that this Court "abused its discretion when it issued the preliminary injunction," *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 380 (6th Cir. 2008).

B. The Sixth Circuit Held that This Court's Finding of Deliberate Indifference Is Unlikely To Be Disturbed on Appeal

The Sixth Circuit has also conclusively resolved that the Government is not likely to prevail in its appeal from this Court's conclusion on the Eighth Amendment. This Court found that the Petitioners "obviously satisfy" the objective element, and "that, at this preliminary stage of the litigation, the Petitioners have sufficiently met the threshold for showing that Respondents have been deliberately indifferent." Order, ECF No. 22 at 16. The Court rested these conclusions on several findings, including: the severity of COVID19, the low number of tests being administered, and that "Elkton has altogether failed to separate its inmates at least six feet apart, despite clear CDC guidance for some time that such measures are necessary to stop the spread and save lives." *Id.* The Government did not dispute any of these factual findings while the motion for a preliminary injunction was being litigated, nor does it dispute them now. *See* Stay Mem., ECF No. 30-1 at 10-12. The Sixth Circuit ruled that the Court's factual findings will likely survive appellate

review, and agreed that they state a claim for deliberate indifference. Order at 4. The Sixth Circuit has determined that the Government is not likely to prevail on its challenge to this ruling in the current appeal. *See U.S. Student Ass'n Found.*, 546 F.3d at 380.

To be sure, the parties may litigate the factual disputes as this case progresses through discovery, summary judgment, and trial. But the question before the Court today is the same that was before the Sixth Circuit: is the Government likely to prevail on its contention that this Court erred in its Eighth Amendment holding on appeal? The Sixth Circuit answered in the negative.

Nor is it relevant that the Government attached new declarations to its Motion to Stay. Nothing in them offers any basis to depart from the Court's earlier factual findings. The only evidence relevant to the Eighth Amendment in the new declarations is paragraph 38 in the Cole Declaration, which reiterates some of the steps that Elkton has used to try to slow the spread of COVID-19. Yet the declaration does not suggest that social distancing is possible, for example, or otherwise call into doubt this Court's holding that the lack of tests and the refusal to provide social distancing violates the Constitution. *See United States v. Rayborn*, 495 F.3d 328, 337 (6th Cir. 2007) ("[T]he evidence before the district court regarding the church's interstate commerce activities is not materially different from the evidence considered by the previous Sixth Circuit panel."). The Sixth Circuit's ruling on the likely outcome of the appeal on the Eighth Amendment controls.

C. The Sixth Circuit Held that This Court's Conditional Certification of a Class Was Not Properly on Appeal

As the Sixth Circuit observed, Respondents "neither petitioned for nor received permission to appeal" this Court's conditional certification of a class action for the subclass. Order, App. ECF 23-2 at 4. As their appeal itself was defective, *see id.*, Respondents obviously cannot show a strong likelihood of success on the merits of that appeal, in this Court just as in the Sixth Circuit.

Moreover, Respondents' arguments to this Court as to the appropriateness of conditional certification closely mirror those in the Court of Appeals; indeed, the latter appears to have incorporated portions of the former by reference. *Compare* Stay Mem., ECF No. 30-1 at 13 *with* App. Stay Mot., App. ECF No. 9-1 at 18 (citing to declarations from Respondents' motion to this Court) (arguing in both instances only that entitlement to transfer is "inherently individualized"). The Court of Appeals held these arguments to be impermissibly "perfunctory" and so deemed waived. That principle must apply equally in this Court. *See Doe v. The Ohio State Univ.*, 136 F. Supp. 3d 854, 867 (S.D. Ohio 2016) ("It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to … put flesh on its bones.") (quoting *McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997)).

II. The Sixth Circuit Held that, as a Matter of Law, Respondents Have Failed to Show Irreparable Harm, and Further that Respondents' Claimed Harm Is Moot

Both in this Court and in the Sixth Circuit, Respondents offered no evidence of irreparable harm beyond the purportedly "enormous burden [of] compliance" with this Court's April 22 Order. That position was rejected wholesale by the Sixth Circuit as legally insufficient to constitute irreparable harm. *See* Order at 4-5 ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.") (citation omitted)); *see also, e.g.*, *Ohio State Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 389 (6th Cir. 2014). That same principle controls in this Court, and the Sixth Circuit has resolved its application to Respondents' claimed injuries. *Id.* Its ruling leaves no room for a finding of irreparable harm that might justify a stay. Respondents thus fail outright to establish the second of the two "most critical" factors of a stay inquiry. *Nken*, 556 U.S. at 434.

The Sixth Circuit also observed that any harm to Respondents from carrying out this Court's order—in addition to being legally insufficient—has now diminished to the point of

mootness. *See* Order at 5 ("Assuming Respondents have been complying with [this Court's interim order] while the motion to stay is pending, their time to comply is about to expire, rendering any remaining harm slight."). That is even truer today. As of the time of this submission, approximately 13 days and 21 hours have passed of the 14-day period allotted for Respondents' compliance with this Court's Order. Respondents' investment of time and energy has already passed, rendering moot any claims of irreparable harm.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that the Sixth Circuit's May 4, 2020 order fully resolves Respondents' motion for stay before this Court, by applicability of the law of the case. Further, Respondents' motion is moot.

Dated: May 6, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2020, the foregoing was filed with the Court's CM/ECF system. Notice of this filing will be sent by operation of that system to all counsel of record.

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