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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

LANCE AARON WILSON; MAURICE SMITH; EDGAR VASQUEZ, individually and on behalf of all others similarly situated,

Plaintiff-Petitioners,

vs.

FELICIA L. PONCE, in her capacity as Warden of Terminal Island; and MICHAEL CARVAJAL, in his capacity as Director of the Bureau of Prisons,

Defendant-Respondents.

CASE NO. 2:20-cv-04451-MWF-MRWx

PLAINTIFF-PETITIONERS' REPLY SUPPORTING *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION

[Filed concurrently with Declaration of Shoshana E. Bannett]

Assigned to Hon. Michael W. Fitzgerald
Courtroom 5

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I. INTRODUCTION

On May 24, 2020, in the five days between Petitioners' filing of an *ex parte* application for a temporary restraining order and order to show cause re: preliminary injunction ("TRO Application") and the filing of Defendant-Respondents' ("Respondents") opposition, another person died at Terminal Island. His name was Adrian Solarzano, and he is the ninth victim whose life has been claimed by the uncontrolled COVID-19 outbreak at the prison. Mr. Solarzano was an individual with "long-term, pre-existing medical conditions, which the CDC lists as risk factors for developing more severe COVID-19."[1] On April 16, 2020, he tested positive for the disease, but was eventually deemed "recovered" and returned to the general population on May 10, 2020.[2] Five days later, he began to feel chest pains and anxiety and was admitted to a hospital, where he tested negative for COVID-19. Nine days after that, he was dead.[3]

In their opposition, Respondents fundamentally misunderstand Petitioners' allegations and the remedy requested in the TRO. Petitioners are asking the Court to use its authority to "enlarge," i.e., transfer the place of custody of a subclass of

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[1] Eric Licas, *9th Coronavirus-related Death Reported At Terminal Island Federal Prison*, Orange County Register, May 27, 2020, *available at* https://www.dailynews.com/2020/05/27/9th-coronavirus-related-death-at-terminal-island-federal-prison/

[2] The number of "recoveries" has been described by health professionals as "probably the most ignored of the public metrics that are out there," because "it really doesn't help us make decisions about what precautions communities need to take, or really how prevalent in the community COVID is." *See* https://www.dallasnews.com/news/public-health/2020/05/19/why-arent-coronavirus-recoveries-always-reported/?outputType=amp. The CDC does not re-categorize positive cases as "recovered" on a national level, and there is no standard definition for "recovery" that is being used by public health institutions. *Id*.

[3] https://www.dailynews.com/2020/05/27/9th-coronavirus-related-death-at-terminal-island-federal-prison/

petitioners to home confinement, starting with the medically vulnerable, during the pendency of this habeas action while it considers Petitioners' requests for permanent relief. *See* 28 U.S.C. § 2243; TRO Application at 65-68 (Dkt. 10); Resnick Decl. at 29-32 (Dkt. 10-1, Ex. M). Similar remedies have been granted by district courts around the country in class actions against other federal prisons besieged by COVID-19. *See, e.g.*, *Wilson v. Williams*, 2020 WL 1940882 at *4 (N.D. Ohio Apr. 22, 2020) (describing the authority of the district court to grant enlargement pending a ruling on the merits of a habeas petition); *Martinez-Brooks v. Easter*, 2020 WL 2405350 at *14 (D. Conn., May 12, 2020) (granting TRO for "enlarge[ment] to home confinement" in section 2241 petition). In the proposed order that was filed concurrently with the TRO Application, Petitioners proposed a court-supervised, process-based remedy that asks the Court to order *Respondents* to evaluate and determine whose confinement should be enlarged and who qualifies for compassionate release, but to do so in an accelerated time frame and giving weight to COVID-19 risk factors. (Dkt. 10-3.) The remedy requested does not turn the Court into a "super warden" but rather comports with the "responsibility" of courts to remedy Eighth Amendment violations committed by prison officials. *See Brown v. Plata*, 563 U.S. 493, 511 (2011) (courts "may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.") The requested remedy requires Respondents to use their authority constitutionally—it does not substitute the Court as the ultimate decision-maker.

Petitioners have alleged that Respondents are violating the Eighth Amendment by (1) failing to use their statutory authority, as intended by Congress in passage of the CARES Act, to reduce the population of a severely overcrowded low security prison during a global pandemic, and (2) failing to take sufficient measures to prevent the spread of COVID-19 or to provide adequate medical treatment—something Respondents *cannot do* unless they reduce the population.

Respondents primarily defend the actions they have taken to manage COVID-19 but provide *no* evidence that they have made any meaningful efforts to reduce the total incarcerated population at Terminal Island based on COVID-19 risk factors. Because they are unable to show that they have moved swiftly to reduce prison density, Respondents instead distract the Court with arguments about why the named Petitioners in particular should not be released—but ironically, in making these arguments, they disregard COVID-19 risk factors and treat BOP-created criteria, modeled after the pre-CARES Act guidelines proposed by Attorney General Barr, as *disqualifiers*, the very process which Petitioners submit is unconstitutional. Respondents ignore the fact that, while the named Petitioners certainly believe they should be considered for home confinement or compassionate release, the TRO Application did not ask the Court to decide whether any individual prisoner deserved home confinement or compassionate release. Rather, the relief requested is for the Court to put in place an accelerated process by which *Respondents* are to make that determination in a manner that gives due weight to COVID-19 risk factors.

Apart from confirming that Respondents are giving COVID-19 risk factors little to no weight in making home confinement determinations, Respondents' focus on the convictions of the named Petitioners is also totally irrelevant to the question of whether the conditions inside of Terminal Island are constitutional. While Respondents describe the actions they have taken to prevent the spread of the virus and provide treatment, the results speak for themselves. Nearly every prisoner in Terminal Island is infected. A person who tested positive for COVID-19 who was labeled "recovered" died just a few days later. Testimony from multiple prisoners shows that people are begging for medical attention and not receiving it, and sick people and healthy prisoners are being commingled.[4] If Respondents have indeed

[4] Dkt. 10-1 (Rim Decl.), Ex. J at ¶ 8, Ex. H at ¶ 9, Ex. P at ¶ 3; Dkt. 10-2 (Threatt

gone to such great lengths to manage the virus and still failed to do so, that only further demonstrates that *without taking the preliminary step of reducing the prison population, there is nothing Respondents can do to prevent the spread of COVID-19 or to ensure adequate medical treatment for prisoners.*

Petitioners are aware that the Court will need to consider evidence and evaluate the law before granting permanent relief. But as the recent death of Mr. Solarzano reminds us, time is of the essence. In the days that it took counsel to prepare the Complaint, two people died at Terminal Island. Between the filing of the Complaint and this Reply, another person died. Expedited relief is necessary. Like Petitioners, Mr. Solarzano was convicted of crimes. For those crimes, he was sentenced to repay his debt to society at Terminal Island. That sentence, however, was not the death penalty. Nine people have already died at Terminal Island—and hundreds more have fallen ill. Inevitably, more will die unless the Court orders Respondents to do what they should have done two months ago: begin an expedited process to review prisoners for enlargement of confinement, and ultimately reduce the population at Terminal Island to a level where all who remain can be incarcerated in safe and sanitary conditions that do not violate the Eighth Amendment's prohibition on cruel and unusual punishment.

II. PETITIONERS' CLAIMS AND RELIEF SOUGHT

On May 16, 2020, Petitioners filed their Class Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus (the "Complaint").[5] The Complaint asserts two separate claims based on the inhumane conditions at FCI Terminal Island created by Respondents' mismanagement of the COVID-19 outbreak at that facility: (1) a Petition for Writ of Habeas Corpus under

Decl.) at ¶¶ 4-5; Bannett Decl., Ex. 1 at 1 (describing commingling of health and sick prisoners).

[5] Dkt. 1.

28 U.S.C. § 2241 ("Section 2241"), which challenges the fact or duration of confinement; and (2) a claim for injunctive relief, which challenges conditions, both based on violation of the Eighth Amendment of the United States Constitution.[6]

Under the Section 2241 claim, the Complaint asks that the Court grant Petitioners and all similarly situated individuals Habeas relief under Section 2241 by ordering "a highly expedited process—for completion within no more than 48 hours—for [BOP] to use procedures available under the law to review members of the Class for enlargement of custody . . . in order to reduce the density of the prison population to a number that allows for the implementation of appropriate measures to prevent the spread of COVID-19[,]"[7] and subsequently ordering the release of those granted temporary enlargement.[8]

Separately, the Complaint also requests injunctive relief under the Eighth Amendment to order improved conditions for all prisoners *not* granted enlargement and remaining at Terminal Island, in the form of social distancing, provision of sanitary products and personal protective equipment (PPE), improved sanitary practices, adequate testing, contact tracing, and isolation measures.[9]

Given the speed and unpredictable nature of the coronavirus, on May 22, 2020, Petitioners filed this *ex parte* application asking that the Court immediately implement "an individualized, supervised process-based remedy" to ensure that BOP made timely decisions for enlargement of custody regarding petitioners—and others incarcerated at Terminal Island—pending final adjudication of their claims.[10]

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[6] *Id.* at 47-50.

[7] Dkt. 1 at 51:3-9

[8] *Id.* at 51:13-15.

[9] *Id.* at 51:16-53:26.

[10] Dkt. 10 at 68:12-24

III. ARGUMENT

A. The Court Has the Authority to Grant the Relief Sought by Petitioners.

This is not a motion for the Court to grant home confinement or compassionate release of the named petitioners, or a request that the Court evaluate every individual prisoner at Terminal Island for such relief. Rather, Petitioners are asking the Court to put in place a process that ensures that *Respondents* will act in compliance with the Eighth Amendment—specifically, to order *Respondents* to exercise authority they already have under the CARES Act and the First Step Act, and to supervise a process for *Respondents* to determine each prisoner's suitability for release on an accelerated schedule based primarily on public health and safety factors, as directed by the Attorney General's April 3, 2020 Memorandum (the "April 3 Memo"). While courts must give some deference to prison administrators, the Supreme Court has counseled that where a "government fails to fulfill [its] obligation [to provide adequate health care], the courts have a responsibility to remedy the resulting Eighth Amendment violation." *Brown v. Plata*, 563 U.S. 493, 511 (2011). Thus, while courts should be sensitive to principles of federalism, "[c]ourts nevertheless must not shrink from their obligation to enforce the constitutional rights of all persons, including prisoners," and "may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Id.* (quotations, citations omitted). *See also Coleman v. Brown*, 28 F. Supp. 3d 1068, 1108-09 (E.D. Cal. 2014) (ordering defendants to work under guidance of special master to develop a protocol for administrative segregation decisions, including as appropriate a plan for alternate housing, to correct Eighth Amendment violations relating to housing and treatment of mentally ill inmates in California's prison system), approved by *Coleman v. Brown*, 756 Fed. Appx. 677 (9th Cir. 2018). Respondents' deliberate refusal to do more to reduce the density of an overcrowded prison known to have medically

vulnerable prisoners—when the world knows that population density itself is currently deadly—is tantamount to deliberate indifference. Petitioners are thus asking that the Court comply with its obligation to enforce the Eighth Amendment and impose a process that would require Respondents to use *their own discretion* constitutionally.

The Court's authority to supervise the process requested by Petitioners is found in the Eighth Amendment and 28 U.S.C. § 2243. The Court has jurisdiction to provide mandatory injunctive relief directly under the Eighth Amendment to ensure that cruel and unusual punishment is not inflicted on prisoners. *See e.g. Edmo v. Corizon, Inc.*, 935 F.3d 757, 766 (9th Cir. 2019) (affirming district court order granting mandatory injunction to correct Eighth Amendment violation); *Coleman*, 28 F.Supp.3d at 1108-09 (entering mandatory injunction instituting supervised process to determine appropriate protocol for administrative segregation decisions). When the Eighth Amendment violation is brought by way of habeas petition, section 2243 authorizes courts to "summarily hear and determine the facts and *dispose of the matter as law and justice require.*" 28 U.S.C. § 2243 (emphasis added). Courts use this power to enlarge custody (or grant bail) while the Eighth Amendment violation is being considered where, as here, there are exceptional circumstances and a high probability of success. *See e.g.*, *Hall v. San Francisco Superior Court*, 2010 WL 890044, at *2–3 (N.D. Cal. March 8, 2010) (holding that a district court can grant bail to state prisoners pending a habeas decision if the prisoner shows "exceptional circumstances" and a "high probability of success."); *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) (acknowledging "the authority of the federal courts to grant bail to habeas petitioners"); *Landano v. Rafferty*, 970 F.2d 1230, 1239 (discussing "category of bail cases aris[ing] when the district court has pending but has not yet decided, a petition for habeas corpus").

In response to COVID-19 outbreaks at correctional facilities, other district courts have relied on the enlargement power in section 2243 and the Eighth

Amendment to grant "individualized, supervised process-based" remedies that mirror the relief sought by Petitioners. *See Wilson*, 2020 WL 1940882 at *8-10 (granting in part emergency motion and ordering FCI Elkton to conduct expedited review of all medically vulnerable prisoners for enlargement of custody); *Wilson v. Williams*, 2020 WL 2542131 at *4 (N.D. Ohio May 19, 2020) (expanding upon April 22 decision and ordering FCI Elkton to further expand home confinement criteria and provide detailed written explanations for any decision to deny home confinement); *Martinez-Brooks*, 2020 WL 2405350 at *32 (granting in part temporary restraining order and ordering FCI Danbury to conduct expedited review of all prisoners with COVID-19 risk factors for enlargement of custody, and provide individualized written explanations for any decision to deny enlargement); *Cameron v. Bouchard*, 2020 WL 2569868 at *27 (E.D. Mich. May 21, 2020) (granting preliminary injunction and ordering Oakland County Jail to release medically vulnerable prisoners, subject to accelerated individual review of suitability for release).

Respondents' attempt to distinguish this case from the cases granting similar relief at FCI Elkton and FCI Danbury on the basis that those two institutions were named in the April 3 Barr memo is preposterous. The April 3 Barr memo referred to "FCI Oakdale, FCI Danbury, FCI Elkton, *and similarly situated facilities where you determine that COVID-19 is materially affecting operations*." (Dkt. 10-1 [Rim Decl.] Ex. A at 2 (emphasis added).) At the time that Attorney General Barr identified those facilities, Oakdale was reporting 18 positive cases and 5 deaths, Danbury was reporting 20 positive cases, and Elkton was reporting 2 positive cases and 3 deaths.[11] Terminal Island did not report its first positive case until April 11,

[11] https://www.cnn.com/2020/04/04/politics/barr-early-release-inmates-prisons/index.html

2020 and is now even with Elkton at 9 prisoner deaths.[12] There can be no reasonable dispute that Terminal Island, a Care Level 3 facility, is a prison "similarly situated" to those named in the Barr memo, and the fact that it was not specifically identified in the Barr memo because it was reporting no positive cases at the time does not make *Wilson* or *Martinez-Brooks* distinguishable.

A court-supervised process is necessary in this case because Respondents have demonstrated that no matter how many prisoners succumb to the unbridled spread of the COVID-19 pandemic at Terminal Island, they will not exercise their authority under the CARES Act to reduce the prison's population to a safe level. To date, Respondents have limited the availability of home confinement review by treating the following factors as *requirements*, which deny consideration to large swathes of Terminal Island's population: (1) any prisoner with a disciplinary record in the past 12 months other than 300 or 400 series incidents; (2) any prisoner without a verifiable release plan; (3) any prisoner whose primary offense is violent, a sex offense, or terrorism related, regardless of how long ago the offense was or whether the details actually involved violence; (4) any prisoner with a current detainer; and (5) any prisoner with a PATTERN risk score above "Minimum."[13] As authority for these categorical exclusions, Respondents cite to the factors laid out in the Attorney General's March 26 Memorandum (the "March 26 Memo.").[14] The March 26 Memo, however, was issued ***prior*** to the enactment of the CARES Act, which authorized the Respondents to expand the population of prisoners who can be considered for home confinement. Through his subsequent April 3 Memo,[15] the Attorney General explicitly invokes this authority and directs BOP to expand its

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[12] https://www.bop.gov/coronavirus/

[13] Dkt. 10-1 (Rim Decl.), Ex. F at 1-2.

[14] Dkt. 10-1 (Rim Decl.), Ex. D.

[15] Dkt. 10-1 (Rim Decl.), Ex. A.

scope of home confinement for "all at-risk inmates – not only those who were previously eligible for transfer."[16] The April 3 Barr Memo, moreover, explains that the factors of the March 26 Memo should be considered *guidance*, and not a criteria for eligibility, so that all prisoners "with a suitable confinement plan will generally be appropriate candidates for home confinement rather than continued detention at institutions in which COVID-19 is materially affecting their operations."[17] Not only are Respondents imposing categorical exclusions to home confinement review in direct conflict with the April 3 Barr Memo, they are also further limiting the availability of review for prisoners who have not served more than 50% of their sentence, or have served more than 25% of their sentence and have less than 18 months remaining—additional barriers that were not even mentioned in the pre-CARES Act March 26 Memo.[18]

Here, Respondents have failed to fulfill their constitutional obligations, and judicial intervention is required. Respondents' arbitrarily high bar for home confinement review has resulted in a complete failure to reduce Terminal Island's population to a safe level: only ***46 out of over a thousand prisoners*** were even being considered as of the time of the Complaint's filing.[19] There is no representation anywhere in the opposition brief or attached declarations that Respondents have considered anyone other than these initial 46 individuals in the interim. This is precisely the situation faced by District Courts in *Wilson* and *Martinez-Brooks*, which led them to craft individualized, supervised, and process-

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[16] *Id.* at 2.

[17] *Id.*

[18] Dkt. 10-1 (Rim Decl.), Ex. F at 2.

[19] Em Nguyen, *Rep. Barragan Dissatisfied With Terminal Island Federal Prison Warden's Explanation*, Spectrum News 1 (May 1, 2020), https://barragan.house.gov/spectrum-news-rep-barragan-dissatisfied-with-terminal-island-federal-prison-wardens-explanation/

based relief in order to prevent prison authorities from bottlenecking home confinement review with draconian exclusions incompatible with the April 3 Barr Memo. *See Martinez-Brooks*, 2020 WL 2405350 at *33 (ordering that FCI Danbury "eliminat[e] all requirements that the inmate have served some portion of his or her sentence . . . eliminat[e] the requirement that a 'primary or prior offense' not be a violent offense . . . [and] eliminate[e] the requirement that an inmate be without incident reports in the past 12 months.") (internal quotations omitted); *Wilson*, 2020 WL 2542131 at *4 (ordering that FCI Elkton "eliminate all requirements that the inmate have served some part of his sentence . . . disregard any incident reports at the low or moderate severity levels (300 or 400 levels) . . . disregard the violence offense restriction for any inmate whose underlying conviction involved an offense that occurred more than 5 years ago or for which the only basis for denial is a prior violent offense . . . [and] grant home confinement to inmates who were previously deemed ineligible solely on the basis of a Low PATTERN risk score[.]")

Respondents' opposition itself is powerful evidence of the defects in their home confinement review process. Much of the brief is devoted to a boilerplate recital of facts which Respondents contend categorically disqualify Petitioners from CARES Act relief. For example, according to Respondents, Petitioner Wilson, who was convicted of a non-violent offense involving distribution of hydrocodone, "does not qualify for home detention" for relief because his PATTERN risk score is Low, rather than Minimum;[20] and Petitioners Smith and Vasquez are disqualified because of the nature of their offenses, even though the convictions for these offenses happened in 2011 and 2012, respectively, and are nearly a decade old, without any evaluation of whether they could be deemed non-violent *now*.[21] These perfunctory recitals are themselves proof that Respondents have adopted a "check the box"

[20] Dkt. 24 at 3:2-3 and 18:21-23.

[21] *Id.* at 19:3-4; 19:13-15.

approach for home confinement review, treating factors that were meant to be *guidelines* as justification for categorically disqualifying prisoners from consideration.[22] Worse yet, Respondents now propose yet *another* barrier by arguing that Petitioners should be required to prove that they have access to better medical care in their release plan before being considered—even though the rapid rise in the number of infections and deaths—including deaths of prisoners deemed "recovered"—and prisoner observations that even very sick people are being denied care, make crystal clear that Respondents themselves *cannot provide adequate medical care*. *See e.g. USA v. Fischman*, 2020 WL 2097615 at * 2 (finding that the government could not "explain how FCI Terminal Island is ensuring the safety of health of inmates given the exponential growth of such cases over such a short time").[23] This approach runs contrary to the April 3 instructions from Attorney General Barr, who cautioned BOP to use the March 26 factors as guidance but to also act with the understanding that all prisoners "with a suitable confinement plan will generally be appropriate candidates for home confinement rather than continued detention at institutions in which COVID-19 is materially affecting their

[22] *See United States v. Pippin*, No. CR16-0266-JCC, 2020 WL 2602140, at *3 (W.D. Wash. May 20, 2020) (granting compassionate release to sex offender and finding based on age, lack of disciplinary infractions and other current facts that he was no longer a danger to the safety of any other person or to the community despite conviction for sex offense from 2016 and another sex offense from 2002).

[23] *See also* Dkt. 10-1 (Rim Decl.), Ex. J at ¶ 10 (prison staff waited several hours before taking prisoner with low blood oxygen levels and labored breathing to hospital, despite nurse recommendation); Dkt. 10-2 (Threatt Decl.) at ¶ 6 (sick prisoners are unable to obtain medical attention until they were "literally on the floor dying"), ¶ 4 (prisoners do not receive medical attention until they had a sustained temperature of more than 101 degrees); Bannett Decl., Ex. 2 at 2, 7 (prisoners in housing unit K have used the "emergency medical telephone and it has taken between 4 and 20 hours for them to be seen; commanding Officer told prisoners that staff was so overwhelmed that it had become impossible to answer inmate requests).

operations."[24]

Moreover, despite evidence that Petitioner Wilson suffers from chronic asthma and hypertension,[25] and despite admitting that Petitioner Smith suffers from hypertension, type 2 diabetes, and chronic kidney disease, and that diabetes is a high risk condition for COVID-19,[26] Respondents conclude without explanation that none of the named Petitioners is at high risk of complications from COVID-19, and then admit that neither Petitioner Wilson nor Petitioner Smith has received any treatment for COVID-19.[27] And while Respondents are (or were) doing temperature checks, we know from prisoners that they are being used as a basis to *deny* treatment to anyone whose temperature is under 101 degrees.[28] Not only does this further exemplify Respondents' intentionally rigid approach, it is evidence of a deliberate policy of indifference in and of itself that in order justify their refusal to consider the named Petitioners for home confinement, Respondents would fail to address medical conditions known to cause individuals to be at high risk. Similarly, Respondents duplicitously argue that "Petitioners do not offer any viable housing options for themselves,"[29] while ignoring that each of the Petitioners specifically

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[24] Dkt. 10-1 (Rim Decl.), Ex. A at 2.

[25] Dkt. 10-1 (Rim Decl.), Ex. G at ¶ 3.

[26] Dkt. 27 (Leen Decl.) at 3:13-14. Contrary to Respondents' unsupported assertion that none of these conditions would cause an individual to be deemed "high-risk," asthma, hypertension, diabetes, and chronic kidney disease are each identified as factors which cause individuals to be "at high-risk for severe illness from COVID-19" by the CDC. Center for Disease Control, *People Who Are at Higher Risk for Severe Illness*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last accessed May 29, 2020).

[27] Dkt. 24 at 19:16-20:18.

[28] Dkt. 10-2 (Threatt Decl.) at ¶ 4. *See also* Bannett Decl., Ex. 2 at 6 (correctional officers laughed about false readings (e.g. temperatures of 89) and merely recorded false data).

[29] Dkt. 24 at 42.

discussed a plan to reside with a loved one, where they can quarantine and will receive medical care.[30] Petitioner Wilson submitted a compassionate release request where he also detailed his future employment. In short, Respondents' opposition papers actually confirm that they will continue to invent fictitious barriers to releasing at-risk prisoners who are not a danger to the public and who should be prime candidates for home confinement under Attorney General Barr's April 3 memorandum.

Further, Respondents' lengthy arguments regarding the eligibility of the named petitioners ignores the nature of the relief sought. While Petitioners believe that the situation at Terminal Island is sufficiently grave for the Court to directly order the release of certain prisoners, that is not the focus of the desperately needed relief they seek here. The vital relief sought in this e*x parte* application is an order for Respondents to begin an expedited review process, that will reduce the population sufficiently so that whoever remains at Terminal Island can be incarcerated under constitutional conditions. Petitioners are not demanding that the Court order their release, but rather, they ask that they—and every other person incarcerated at Terminal Island—be timely evaluated based on the standards set out by the Attorney General in the April 3 Memo, not the draconian categorical standards arbitrarily set by Respondents and demonstrated by their perfunctory evaluation of Petitioners' eligibility revealed in the opposition brief.

B. Respondents Do Not Dispute Petitioners' Arguments on the Futility of Exhaustion.

Exhaustion of administrative remedies is not required here—either under 18 USC § 2241 or under the Prison Litigation Reform Act ("PLRA") for three reasons: (1) there is no administrative procedure to be considered for home confinement under the CARES Act; (2) exhaustion would be futile due to the urgency of the

[30] Dkt. 10-1 (Rim Decl.), Ex. G at ¶ 25, Ex. H at ¶ 11, Ex. I at ¶10.

COVID-19 pandemic; and (3) administrative remedies are "effectively unavailable" at this time. Respondents admit the first, because they must. A BOP document circulated to prisoners at Lompoc ***discouraged prisoners from applying for relief under the CARES Act*** and confirmed that there was no process to do so. It stated, "Inmates do NOT need to apply or request to be considered for the CARES ACT."[31] Guidance to family members posted on Respondents' own webpage confirms that Respondents are not accepting submissions from prisoners or their loved ones for consideration for CARES Act relief.[32] It states:

> Can I submit an inmate's name for consideration?
>
> Submitting inmate names is not necessary. BOP staff are able to run and establish lists of inmates who meet the guidance provided by the Attorney General. This process ensures that all eligible inmates who meet the criteria are reviewed and considered for movement to Home Confinement.

Thus, even if a prisoner's family wanted to submit a release plan for consideration, there is no way to do it. The language confirms not only that there is no administrative procedure to exhaust but also that Respondents are using "lists of inmates who meet the guidance provided by the Attorney General" to determine who is "eligible"—proving that they are treating the pre-CARES Act factors as ***criteria for eligibility*** as opposed to discretionary factors to consider for prioritization.

Respondents fail to address the second reason, regarding futility. Respondents do not dispute that the BOP typically takes 30 days to respond to an application for

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[31] Dkt. 10-1 (Rim Decl.), Ex. R.

[32] Federal Bureau of Prisons, *Frequently Asked Questions regarding potential inmate home confinement in response to the COVID-19 pandemic, Providing Assistance,* https://www.bop.gov/coronavirus/faq.jsp#hc_assistance (last accessed May 29, 2020).

compassionate release, nor do they dispute that 30 days is more than enough time for a healthy individual to contract COVID-19 and develop serious complications that may lead to permanent damage or even death. Respondents provide no evidence that would indicate they are taking any action to expedite this process during the COVID-19 pandemic. Thus, their claim that Petitioners must exhaust administrative remedies in the midst of a COVID-19 outbreak is tantamount to a statement that prisoners should be made to wait until the virus has run its course, and many have already fallen seriously ill or even died. This is not a theoretical concern: at least one prisoner—Adrian Solarzano—has already died between the filing of Petitioners' *ex parte* application and this reply. Given this context, the notion that the people incarcerated at Terminal Island should be made to persevere for an additional 30 days—with all their attendant jeopardy—is further evidence of Respondents' deliberate indifference towards the health and safety of its incarcerated population.

Finally, Respondents have not provided evidence to dispute that administrative remedies have been made "effectively unavailable" for Petitioners because Terminal Island staff have stopped accepting medical complaints, claiming, ironically, that they are "too busy with COVID-19."[33] Respondents submit a declaration reciting their standard procedures for complaints, but that declaration is bereft of any representation that the procedure is still functioning as intended and staff are accepting written complaints in the midst of the COVID-19 outbreak.[34] Respondents submit no statistics regarding how many complaints have been received in total during the outbreak, or how many of those complaints are being actively reviewed. If these numbers were favorable to Respondents, they would have doubtless submitted data showing that numerous complaints have been

[33] Dkt. 10-1 (Rim Decl.), Ex. G at ¶ 24. *See also* Bannett Decl., Ex 2 at 4-5 (detailing retaliation at hands of correctional officers for complaining about guards not wearing masks).

[34] *See generally* Dkt. 25 (Bugarin Decl.).

received during the outbreak and are being actively considered. The fact that they have not warrants the opposite inference.

C. The Government Mischaracterizes the Nature of Petitioners' Habeas and Eighth Amendment Claims.

Petitioners have two separate claims: one under section 2241, and another under the Eighth Amendment. The former section 2241 claim challenges only the "fact or duration" of Petitioners' confinement on the basis that no constitutional confinement is possible based on current conditions at Terminal Island. To remedy this unconstitutional confinement, in turn, the habeas claim seeks that the court order an individualized, supervised process-based remedy for expedited review for temporary enlargement of custody. For Petitioners' *ex parte* application, only the first of the two—the process-based remedy for enlargement—is requested. The latter Eighth Amendment claim challenges only the conditions of Petitioners' confinement, and seeks injunctive relief for improvement those conditions—once Terminal Island's population has been reduced to a level where constitutional confinement is possible through the section 2241 claim.

In the weeks and months since the COVID-19 pandemic started, it has become well-established that section 2241 is the proper vehicle for affected prisoners to seek relief. *See e.g.*, *Wilson*, 2020 WL 1940882 at *5 (section 2241 proper vehicle for relief as petitioners "ultimately seek[s] to challenge the fact or duration of confinement."); *Martinez-Brooks*, 2020 WL 2405350 at *16–17 (section 2241 proper vehicle for relief because petitioners were challenging "the fact or duration of confinement" by claiming that "no constitutional conditions of confinement are possible under the circumstances"); *Cameron*, 2020 WL 2569868 at *13 (same); *Calderon v. Barr*, 2020 WL 2394287 at *2 (E.D. Cal. May 12, 2020) ("[t]he vast majority of cases in the lower courts dealing with the COVID-19 pandemic as it affects detention facilities more or less assume jurisdiction is appropriate under [Section 2241])." The Court's specific authority to initiate the

process for enlargement as provisional relief stems from its authority to decide habeas cases "as law and justice requires" pursuant to 28 U.S.C. § 2243, as well as a District Court's inherent authority to enter an order affecting custody pending adjudication of a habeas petition. *See, e.g.*, *Mapp*, 241 F.3d at 226; *In re Wainwright*, 518 F.2d 173, 174 (5th Cir. 1975); *Johnston v. Marsh*, 227 F.2d 528, 531 (3rd Cir. 1955).

Respondents challenge the Court's jurisdiction on the basis that section 2241 is not an appropriate vehicle for challenging conditions of confinement. Petitioners, however, are not challenging the conditions of their confinement through their section 2241 petition, but rather the fact and duration: which is why the sole relief under Section 2241 sought by this *ex parte* application is the process for enlargement.[35] Respondents do not and cannot challenge Petitioners' claim that the prisoners cannot adequately social distance at Terminal Island. Indeed, Respondents do not discuss the spacing in the housing units at all. To the contrary, while Respondents devote a section of their brief to "[i]ncreased sanitation and social distancing measures to combat COVID-19," the only social distancing measure discussed applies to staff. (Dkt. 24 at 12-13.)

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[35] Contrary to Respondents' contention, there is no distinction between the relief sought in this case and in *Williams and Martinez-Brooks*. In both *Williams* and *Martinez-Brooks*, the petitioners (1) sought changes to conditions of confinement and (2) challenged the fact or duration of confinement by seeking a process for consideration of home confinement. *See e.g. Wilson* Complaint, Prayer for Relief (requesting implementation of "[s]pecific mitigation efforts, in line with CDC guidelines, to prevent, to the degree possible, contraction of COVID-19 by every Class Member not immediately released"), *Wilson*, 2020 WL 1940882 at *4; *Martinez-Brooks* Complaint, Prayer for Relief (requesting court enter injunction requiring respondents "to provide medically adequate social distancing and health care and sanitation for members of the Class who remain"); *Martinez-Brooks*, 2020 WL 2405350, at *2. Like in this case, the petitioners argued that the prisons could not provide constitutional conditions of confinement without reducing the prison population, such that the challenge was both to the very fact of confinement and to the conditions of confinement themselves.

If the Court does not act and require Respondents to consider prisoners for home confinement under Attorney General Barr's April 3 memorandum with the goal of placing on home confinement sufficient numbers of prisoners to allow for social distancing, there are no steps that Respondents can take that will adequately protect Terminal Island inmates from COVID-19. Bannett Decl., Ex. 4 (Sixth Circuit's May 4, 2020 Order in *Wilson v. Williams*) at 4 ("Where a petitioner claims no set of conditions would be constitutionally sufficient, we construe the petitioner's claim as challenging the fact of confinement"). While petitioners also seek injunctive relief to improve conditions of confinement, that relief was appropriately sought as a separate claim directly under the Eight Amendment. It is well-established that claims for injunctive relief challenging conditions of confinement in federal prisons may be brought directly under the Eighth Amendment. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) ("[I]t is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment,'" which "imposes duties on these officials, who must provide humane conditions of confinement").

IV. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that Court grant the Temporary Restraining Order and impose a supervised process-based remedy for an expedited, individualized review for enlargement of custody. Petitioners further request that the Court order Respondents to adhere to CDC guidance regarding the prevention and treatment of COVID-19.

DATED: June 1, 2020

Respectfully submitted,

Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, P.C.

By: */s/ Naeun Rim*
Naeun Rim
Attorneys for Plaintiff-Petitioners

DATED: June 1, 2020

Peter J. Eliasberg
Peter Bibring
ACLU Foundation of Southern California

By: */s/ Peter Bibring*
Peter Bibring
Attorneys for Plaintiff-Petitioners

DATED: June 1, 2020

Donald Specter
Sara Norman
Prison Law Office

By: */s/ Donald Specter*
Donald Specter
Attorneys for Plaintiff-Petitioners

CERTIFICATE OF AUTHORIZATION

TO SIGN ELECTRONIC SIGNATURE

Pursuant to Local Rule 5-4.3.4(a)(2)(i) of the Signatures Procedures for the United States District Court for the Central District of California, filer attests that all other signatories listed concur in the filing's content and have authorized this filing.

DATED: June 1, 2020

Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, P.C.

By: */s/ Naeun Rim*
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

LANCE AARON WILSON; MAURICE SMITH; EDGAR VASQUEZ, individually and on behalf of all others similarly situated,

Plaintiff-Petitioners,

vs.

FELICIA L. PONCE, in her capacity as Warden of Terminal Island; and MICHAEL CARVAJAL, in his capacity as Director of the Bureau of Prisons,

Defendant-Respondents.

CASE NO. 2:20-cv-04451-MWF-MRWx

DECLARATION OF SHOSHANA E. BANNETT IN SUPPORT OF PLAINTIFF-PETITIONERS' REPLY SUPPORTING *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION

[Filed concurrently with Reply]

Assigned to Hon. Michael W. Fitzgerald
Courtroom 5A

DECLARATION OF SHOSHANA E. BANNET

I, Shoshana E. Bannett, declare as follows:

1. I am an active member of the Bar of the State of California and Of Counsel with Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, a professional corporation, attorneys of record for Plaintiff-Petitioners Lance Aaron Wilson, Maurice Smith, and Edgar Vasquez in this action. I make this declaration in support of Plaintiff-Petitioners' Reply Supporting *Ex Parte* Application for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction. Except for those matters stated on information and belief, I make this declaration based upon personal knowledge and, if called upon to do so, I could and would so testify.

2. Attached as **Exhibit 1** is a true and correct copy of an April 26, 2020 Declaration my office received from Claud R. Koerber, BOP Register Number #16324-081, who is currently incarcerated at FCI Terminal Island according to https://www.bop.gov/inmateloc/.

3. Attached as **Exhibit 2** is a true and correct copy of an April 29, 2020 Declaration my office received from Claud R. Koerber.

4. Attached as **Exhibit 3** is a true and correct copy of an April 19, 2020 Declaration my office received from Claud R. Koerber.

5. Attached as **Exhibit 4** is a true and correct copy of the May 4, 2020 Order from the United States Court of Appeals for the Sixth Circuit in *Wilson v. Williams*, Case No. 20-3447.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I executed this declaration on June 1, 2020, at Los Angeles, California.

/s/ Shoshana E. Bannett
Shoshana E. Bannett

EXHIBIT 1

Declaration of Chad R. Koerber

Sunday

April 26, 2020
5:12 p.m. (PACIFIC)

1. Today, at approximately 4:30 p.m. the Corrections Officer ("CO") on duty for unit K, which is the housing unit where I am assigned, that COVID-19 continues to spread throughout the Terminal Island facility, despite the current lock-down and quarantine measures.

2. The same CO informed our unit, that as of today there are 107 confirmed COVID-19 cases among the inmate population and 8 confirmed staff COVID-19 cases here at Terminal Island.

3. There have been 3 or 4 inmates removed from Unit K over the last 2 weeks as a precaution, due to fever, but as of today, the CO informed us that our housing unit is the only unit with no confirmed COVID-19 cases, and the 97 inmates in here, the last of approximately 1,000 Terminal Island inmates, to have no confirmed cases among them yet.

(Fri. 4/24 at 7 p.m.)

4. Nevertheless, despite our quarantine, two days ago an inmate (K04-04) was transferred into our unit from the contaminated SHU, and COs doing rounds still regularly disregard posted protocol — wearing masks pushed down below the chin exposing mouth and nose, not wearing eye guards or gowns, and do not dispose of or change contaminated gloves.

5. On Thursday, April 23, Captain Hacker came through the K-unit, and told inmates (of which I am 1) that staff from the B.O.P. regional office were coming to walk through units. He confirmed that as of that day there had been two inmate COVID-19 deaths here at Terminal Island.

6. We are currently prohibited from all access to legal resources, Attorney phone calls, general phone calls and email. This has been the case since April 17, 2020.

I swear under penalty of perjury, and under the laws of the state of California, that the foregoing statements are true and accurated and based on my personal knowledge.

SAN PEDRO, CALIFORNIA

CLAUD R. KOERBER
INMATE # 16324-081
TERMINAL ISLAND

EXHIBIT 2

Declaration of Claud R. Koerber

1. I have been an inmate at FCI Terminal Island since Feb. 26, 2020.

2. Immediately upon arrival, I informed medical staff of my medical history and current health challenges, including my Autoimmune conditions, and current issues with edema in my legs and abdominal pain.

3. During my first week here, my abdominal pain increased, as did my edema, to the point that I had open sores on the bottom of both legs. I submitted a sick-call, which is the process here, and waited outside in the rain (March 3) for two hours. I saw FNP Morrison and she ordered tests, medication and conducted a brief physical.

4. By March 26, sixteen days later, I still had not received medication, I had extensive wounds on my lower legs (exasserbated by prison boots) and was suffering from serious abdominal pain. FNP Morrison saw me, after I again waited for several hours locked outside in a fenced cage, forced to use an outdoor toilet with no toilet paper and no soap. FNP Morrison was visibly frustrated with the prison pharmacy for not having provided the medication she ordered, and re-entered orders for me to see the doctor, to have x-rays and an ultrasound. She appologized and said there are only two FNP staff for over 1,000 inmates, many with health issues.

5. About this same time I saw the dentist here about a broken crown and exposed tooth. He had me sign up on the schedule for treatment, and confirmed I would be seen next in approximately 37 months. When I verified that this meant I would not be treated for more than 3 years, he apologized and informed me that staff is short and that is the current delay.

6. On about April 1, 2020, I spoke to acting Captain Caldwell during A+O with approx. 20 other new inmates present. I told him about the medical and dental delays, and he responded that this is a prison, not a medical facility, and unless I was on the verge of death, it would take weeks to months for any issue to be addressed because medical staff was limited. In that same meeting CO Otero told us, in answer to similar questions, to go ahead and sue the B.O.P. in court, it will not result in faster action, but it will single out to staff who are troublemakers. CO Otero is, based on my understanding, the spouse of FNP Morrison.

7. As of today, April 28, I still have not received the ultrasound ordered, and because of the COVID-19 outbreak here, there are now no sick calls. I haven't even seen medical staff in weeks. Other inmates in my housing unit (Unit K) have used the "emergency" medical telephone, and it has taken between 4 and 20 hours for them to be seen.

8. Since the outbreak of COVID-19, the staff here have regularly been unwilling or unable to comply with CDC and B.O.P. guidelines that have been delivered to us. For example:

APRIL 6: Inmate masks were issued on this date, but on the same day, Warden Ponce, A.W. Prilov, and several COs were not wearing masks.

The same day, at approximately 6:30 p.m., though K-Unit was on protective quarantine, with no symtematic inmates and no confirmed COVID cases, AND Despite published rules posted on our doors, 4 inmates were transferred into our unit from Unit E, where there were already several symtomatic inmates.

APRIL 7: Unit K officers doing hourly rounds did not wear masks or use hand sanitizer.

APRIL 8: At approx. 3 pm, inmates from outside our unit violated our quarantine and were allowed in our unit to work on plumbing, and were not required to wear masks.

APRIL 9: Despite our quarantine inmates from our unit were allowed to come and go to work as medical orderlies and powerhase workers, without any change of clothes, gloves or other process to protect us from contamination. THIS continued daily until About April 15.
Also, inmate Matthew Henderson was transferred from our unit to Unit A despite the quarantine and lockdown.

MARCH 31 - APRIL 10: From approximately March 31 to April 10, despite B.O.P. lockdown, meals were served in the prison cafeteria, by inmates from units with symtomatic inmates, and co-mingling of seating with multiple units at a time, meany 12-18 inches apart, w/ no sanitation, no mask requirements, no cleaning of tables, hand-rails, etc. During this same period Staff and inmates prepared bag / sack lunches without masks, gloves, etc. During this time COs were observed (on 3/31, 4/1, 4/2 & 4/3) mingling in groups, touching each other, patting down inmates, etc., w/o gloves, masks, or social distancing. This was also true with 10-12 COs a day coming through K-unit.

(4)

At 7:35 am on 4/2 an inmate spoke up

about COs not wearing masks and gloves when handing out breakfast meals. (Inmate K01-07L) The CO in charge stepped up to him and shouted within my hearing, "Shut the Fuck up, you piece of shit. My family is at risk because I come here everyday to help you pieces of shit. You don't tell me what the rules out, you don't complain. Do you understand me?" The conflict continued up the unit stairs, with the inmate trying to walk back and the CO continuing his threatening language. The inmate quietly asked to speak to the Lt. on duty, which only enraged the CO more. Following this exchange, several inmates, including myself realized verbal complaint or discussion was too dangerous and started keeping written notes for possible future use.

APRIL 10: We were placed on a hard lockdown, with no access to phones or emails. Newly appointed Captain Hacker came to Unit K and informed us formally of 1 COVID CASE of 1 inmate here at Terminal Island. Nevertheless, that same day inmate Salinas from our unit was allowed to travel in and out without gloves, masks, etc., to do electrical work.

APRIL 13: The 4pm count CO in our unit was not wearing a mask.

APRIL 14: CO Ms. Castro was not wearing a mask while handing out breakfast meals.

APRIL 15: Despite lockdown, without any testing or screening approximately 12 inmates from Unit K were taken for kitchen work detail, and commissary work detail.

COs Pollack and Green were not wearing gloves while handling food, and allowed inmates to handle food w/o gloves.

APRIL 21: CO Avery was wearing his mask below his chin, not covering his mouth or nose, WHILE HANDING Food to K-unit, despite formal quarantine. AST. THIS TIME THE WARDEN HERSELF WAS HANDING out food to K-unit w/o protective gear.

APRIL 24: A new inmate was brought from the contaminated SHU (Special Housing Unit) to Unit K (K04-04L) despite formal quarantine.

During Temperature checks, COs do not clean or disinfect the thermometer used on 97 inmates. Also, the COs laughed about false readings (e.g. temperatures of 89°) and merely recorded false data or declined to re-test for correct data.

April 25: Again, during temperature checks for the unit, COs do not clean or disinfect the themometer after it comes into contact with inmates, and tolerated false data.

APRIL 26: COs (including CO SUNA) were not wearing PPE when walking through the housing unit (Unit K).

At 4:30 pm, CO came in and told us that 107 confirmed COVID-19 infections exist here, and said, "this is war," and that he was telling us this against orders because we "should know" and that the staff was so overwhelmed it had become impossible to answer inmate requests, but that he would try to help, noting he was the only CO in the last week to even accept inmate questions or requests for assistance.

9. As of April 29, 2020, inmates here have no ability to seek non-emergency medical assistance with any defined process. Emergency medical assistance is slow and unpredictable, and we are being deliberately cut-off from phone and email communication. I have twice submitted written requests for assistance regarding my medical risk, medical records and have received no reply, and have twice submitted written requests

to be allowed access to legal resources, including a phone call with my attorney, and have received no response.

10. More than 30 days ago I submitted written requests for assistance with obtaining a medical evaluation of my COVID-19 risk, including written requests to the Warden and to Ms. Neal my case manager. I have received no response. The exception is that last Thursday, April 23, I received a "Release Plan" form from the CO, who told me Ms. Neal had requested I fill it out and return it to her, which I did immediately. I have heard nothing since.

11. Last night and again today, local PBS radio reported that there are now over 400 positive COVID-19 cases here at Terminal Island with inmates, 10 more cases with staff members.

12. In the past, in 2010 and 2011, simple viral infections triggered my Autoimmune conditions and brought me to the brink of death, requiring extensive stays at the Intermountain Medical Center in Midvale, UT, including a prolonged stay in the ICU with sepsis, atrial-fibulation, spleen infarct, liver and renal complications and significant asthma exacerbation and breathing difficulty. The medical care I received then was urgent, available and responsive. That kind of care is not available here, and in the midst of this COVID-19 outbreak I genuinely fear for my life.

13. If I do contract the COVID-19 infection here, based upon current methods employed here, I will have no ability to communicate with the outside - no phones, no email, and no outgoing mail.

I declare under penalty of perjury and under penalty of the laws of the state of California, that the forgoing statements are true and correct.

April 29, 2020, SAN PEDRO, CA.

C. R. Koerber

CLAUD R. KOERBER

EXHIBIT 3

Declaration of Claud R. Koerber

THE UNDERSIGNED ATTESTS TO THE FOLLOWING:

1. On or about April 10, 2020, a fellow inmate in the K unit housing FNU Acosta (aka "Guantos") was violently coughing and appeared flushed and feverish. I asked him if he was okay, and suggested he seek medical evaluation. He declined. I, and other inmates, privately informed the unit CO that Acosta appeared to have COVID-19 symptoms. The CO told us to leave the matter to the inmate.

2. On or about March 27, 2020, I asked Warden Ponce, in writing, to consider me for compassionate release or home confinement based on my unique medical and health risk (documented compromised immune system, twice previously experienced life-threatening complications from viral infections, and a history of moderate asthma), and have since written to my counselor, case manager, and filed with the district court for relief because I am unusually vulnerable to the COVID-19 virus (including medical records verifying my medical circumstances).

3. On or about April 17, 2020, Assistant Warden Soto informed us (inmates in Unit K), in person, that Terminal Island had been "hit" with COVID infections, that "at least 30" cases had been verified and that the situation was expected "to get much worse" here. He also informed us that of all 1,000+ inmates here at Terminal Island, living in 9 different housing units, as of Friday, April 17, only the 200 (approx.) inmates in Units K and J had not yet been exposed to an infection in the units.

4. K unit is a 100-man dormitory, with 50 bunks, spaced 4 feet laterally, situated in 4 rows; I am 1 foot from the next adjacent head of the bunk beside me, and 4 feet from bunks on both sides. We are confined to quarters, meaning we eat, sleep, shower, and use bathroom facilities, all without the ability to maintain social distancing.

5. On April 19, 2020, K-unit inmate Albert Gastan was taken from the unit after his internal defibulator/pacemaker went off twice. He was taken to a local community hospital in San Pedro, CA. Without any quarantine, he was returned to our unit despite our current quarantine for safety. That same evening, the medical transport COs communicated to us that there were now 50+ confirmed cases, and expected the number to rise.

6. On April 19, 2020, we (K unit inmates) saw out our windows that Military officers had arrived. They built several structures outside the Medical unit (4 large tents with generators) and also started moving temporary shower units, apparent coffins, and other items into the facility.

7. On April 19, 2020, through a housing unit window, inmates from other units shouted messages back and forth with us. We currently are prohibited (since 4/17) from phones and email. During these communications we learned the quarantined inmates awaiting home confinement in unit E and the SHU had been contaminated, and several positive COVID cases confirmed there.

8. April 20, 2020, inmate Acosta (from FTL) was removed from K-unit, by medical, and our Unit CO informed us it was a Suspected COVID case. His property has now been removed.

THESE THINGS ARE TRUE, UNDER PENALTY of PERJURY. 4/20/20 2:42 pm PST.
Daniel R Keeler

The following facts may be relevant:

1. On Friday, April 17, 2020, at about 5:00 p.m. (PST), Associate Warden Soto addressed all inmates in housing unit K at Terminal Island, where I am housed, and provided what he termed an "update" on the ongoing COVID-19 emergency here.

2. A.W. Soto informed us that the Federal Bureau of Prisons (BOP) had ordered that all BOP facilities be on emergency lockdown, beginning immediately, for at least 5 days, and that during this time inmates would not be allowed access to phones or computers (email). He also confirmed to me, in direct response to my question - that no exception would be made even for attorney-client calls or urgent pending legal matters; and that outgoing mail would not be sent out until at least Monday, April 20, 2020.

3. A Lt. [illegible] "at least 3" Terminal Island inmates had positive COVID-19 test results, saying "we've been hit" and "it's going to be real hard," and that "the numbers are expected to get much worse over the next week or two." He also confirmed that of the 9 housing units here (A, B, C, D, E, F, G, J and K), only 2 have not yet had a confirmed COVID-19 test result (Units K and J) and therefore approximately 1,000 inmates here have recently been directly exposed to a COVID-19 infection.

4. The same day, I and dozens of Unit K inmates observed military personnelle arrive and setting up four large tents outside the medical unit here with a 20 killowatt

generator for emergency facilities.

5. Since that address be A.W. Soto, one inmate was witnessed by Unit K inmates being taken from Unit A on a stretcher, another ~~in-mate~~ inmate from Unit E being given CPR (heart compressions, and ~~E~~ last night to inmates from our unit were taken to medical with poor breathing and heart problems.

6. Despite all this, yesterday, Saturday, April 18, the Warden, Ms. Pond helped pass out breakfast and was handling every inmate in K Units breakfast without gloves on. When an inmate commented she simply smiled and kept handling the food.

These statements are true and correct under penalty of perjury; made by me this 19th day of April, 2020.

EXHIBIT 4

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

100 EAST FIFTH STREET, ROOM 540
Deborah S. Hunt — POTTER STEWART U.S. COURTHOUSE — Tel. (513) 564-7000
Clerk — CINCINNATI, OHIO 45202-3988 — www.ca6.uscourts.gov

Filed: May 04, 2020

Re: Case No. 20-3447, *Craig Wilson, et al v. Mark Williams, et al*
Originating Case No. : 4:20-cv-00794

Dear Counsel:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Amy E. Gigliotti on behalf of Karen S. Fultz
Case Manager
Direct Dial No. 513-564-7036

cc: Mr. James Raymond Bennett II
Mr. David Joseph Carey
Ms. Sara E. DeCaro
Ms. Jacqueline C. Greene
Ms. Freda Levenson
Mr. Joseph Wilfred Mead
Ms. Sandy Opacich
Ms. Laura A. Osseck
Mr. David Allan Singleton
Mr. Mark A. Vander Laan
Mr. Michael Louis Zuckerman

Enclosure

No. 20-3447

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 04, 2020
DEBORAH S. HUNT, Clerk

CRAIG WILSON, on behalf of themselves and all others similarly situated, et al.,

Petitioners-Appellees,

v.

MARK WILLIAMS, in his official capacity as Warden of Elkton Federal Correctional Institution, et al.,

Respondents-Appellants.

O R D E R

Before: COLE, Chief Judge; GIBBONS and COOK, Circuit Judges.

Petitioners, four inmates housed in the Elkton Federal Correctional Institution and its low-security satellite prison FSL Elkton (collectively "Elkton"), on behalf of themselves and others housed or to be housed there, filed a petition under 28 U.S.C. § 2241 to obtain enlargement of their custody to limit their exposure to the COVID-19 virus. They sought to represent all current and future inmates, including a subclass of inmates who—through age and/or certain medical conditions—were particularly vulnerable to complications, including death, if they contracted COVID-19. Following a hearing, the district court entered a preliminary injunction directing Respondents Mark Williams, Elkton's warden, and Michael Carvajal, the Director of the Federal Bureau of Prisons ("BOP"), to take certain steps for the subclass that included: (1) evaluating each subclass member's eligibility for transfer out of

Elkton by any means within two weeks; (2) transferring those deemed ineligible for compassionate release to other facilities utilizing certain measures to contain transmission of COVID-19; and (3) prohibiting those transferred from returning to Elkton until certain conditions were met. Respondents appeal, and move to stay the injunction pending resolution of their appeal. Petitioners move to strike the motion to stay, and separately oppose a stay. Respondents reply. Disability Rights of Ohio, a not-for-profit organization advocating for people with disabilities in Ohio, files an amicus brief in support of Petitioners.

First, we address the procedural motion. Petitioners move to strike Respondents' motion to stay, and more particularly, the portion of that motion seeking an administrative stay. To the extent Petitioners sought to strike the request for an administrative stay, our prior denial of this request renders that portion of their motion moot. More generally, however, Petitioners contend Respondents have abused the stay process by requesting relief in this court without first obtaining a ruling from the district court. A party must first move the district court for a stay unless it would be impracticable, the district court denied a motion to stay, or it otherwise already failed to afford the relief requested. Fed. R. App. P. 8(a)(1)(A), (a)(2)(A). We find Respondents complied with Rule 8 and protected their interests by simultaneously seeking relief here, given the short time frame in which they sought relief.

We balance four factors to determine whether, in our discretion, a stay is appropriate: (1) whether the movant "has made a strong showing that he is likely to succeed on the merits"; (2) whether the movant "will be irreparably injured absent a stay"; (3) whether issuance of a stay will "substantially injure" other interested parties; and (4) "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). The first two factors are "the most critical." *Id.*

Respondents challenge the preliminary injunction on multiple grounds, alleging that: the district court lacked jurisdiction under § 2241 over the action; if the suit had been properly brought under the Prison Litigation Reform Act ("PLRA"), the injunction would contravene its requirements for the release of prisoners; Petitioners failed to establish a violation of their Eighth Amendment rights; and the case is not suitable for classwide adjudication. We review legal conclusions de novo, factual findings for clear error, and the district court's ultimate decision to issue injunctive relief for abuse of discretion. *Graveline v. Johnson*, 747 F. App'x 408, 412 (6th Cir. 2018).

Section 2241 provides jurisdiction to district courts over habeas petitions when a petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). The Supreme Court has neither foreclosed a prisoner from using, nor authorized a prisoner to use, habeas relief to challenge his conditions of confinement. *See Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973). We need not reach this question here, however. 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).

Given the procedural posture of the case, we review not the merits of Petitioners' Eighth Amendment claim, but whether the district court abused its discretion in entering the preliminary

injunction. We accept the district court's factual findings unless we find them clearly erroneous. Fed. R. Civ. P. 52(a)(6). The district court found that Elkton's dorm-style structure rendered it unable to implement or enforce social distancing. The COVID-19 virus, now a pandemic, is highly contagious, and can be transmitted by asymptomatic but infected individuals. Older individuals or those who have certain underlying medical conditions are more likely to experience complications requiring significant medical intervention, and are more likely to die. At Elkton, COVID-19 infections are rampant among inmates and staff, and numerous inmates have passed away from complications from the virus. Elkton has higher occurrences of infection than most other federal prisons. Respondents lack adequate tests to determine if inmates have COVID-19. While the district court's findings are based on a limited evidentiary record, its "account of the evidence is plausible in light of the record viewed in its entirety." *United States v. Ables*, 167 F.3d 1021, 1035 (6th Cir. 1999). Thus, at this juncture and given our deferential standard of review on motions to stay, "[t]he district court's choice between two permissible views of the evidence cannot . . . be clearly erroneous." *Id.*

Finally, Respondents challenge the conditional certification of a class action for the subclass. Respondents, however, have neither petitioned for nor received permission to appeal that decision. *See* Fed. R. Civ. P. 23(f). Regardless, we will not generally consider "[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation." *United States v. Sandridge*, 385 F.3d 1032, 1035 (6th Cir. 2004) (citation omitted).

Respondents also argue that the enormous burden compliance with the injunction places on the BOP's time and resources constitutes irreparable harm. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are

not enough." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (citation omitted). Further, Respondents received fourteen days in which to evaluate each subclass member's eligibility for transfer out of Elkton. Assuming Respondents have been complying with this directive while the motion to stay is pending, their time to comply is about to expire, rendering any remaining harm slight. Based on this, we cannot find that Respondents have established irreparable harm.

The motion to stay is **DENIED**. The motion to strike is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk