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June 2, 2020

VIA ECF

The Honorable Renee Marie Bumb
United States District Judge
Mitchell H. Cohen Building & U.S. Courthouse
4th & Cooper Streets, Room 1050
Camden, New Jersey 08101

Re: *Wragg, et al. v. Ortiz, et al.*
Civil Action No. 20-cv-5496-RMB

Dear Judge Bumb,

On behalf of Petitioners in the above-referenced action (the "Litigation"), we write in response to the Court's amended supplemental text order (ECF No. 47) directing the parties to address footnote 26 of the Court's May 27, 2020 opinion (the "May 27 Opinion," ECF No. 40). Petitioners respectfully ask that the Court reconsider its decision dismissing Petitioners' complaint and amend its order to require limited, expedited discovery. *See* Fed. R. Civ. P. 60(b)(6) (stating that a motion for reconsideration may be granted for "any . . . reason that justifies relief"); *see also* L. Civ. R. 7.1(i). "A motion to reconsider is proper when it seeks to correct an error of law or to prevent manifest injustice." *Koert v. GE Grp. Life Ins. Co.*, 416 F.Supp.2d 319, 321 (E.D. Pa. 2005).

Respondents mischaracterize the Court's text order as asking whether the May 27 Opinion "requires modification," ECF No. 48 at 1, but that question does not appear in the Court's order. *See* ECF No. 47. Rather, the Court directed the parties to "address footnote 26 in this Court's Opinion." Footnote 26, in turn, invited Petitioners "to supplement the record" regarding "incidents of failure to address medical needs," in which case the Court said it would "reconsider its Opinion and engage in fact-finding provided Petitioners can show that a favorable finding in this regard would alter the Court's conclusion." May 27 Opinion at 59 n.26.

In order to "supplement the record," as footnote 26 contemplates, Petitioners should be allowed to serve limited discovery requests on Respondents. Discovery is essential because many of the facts relevant to the Court's analysis are within Respondents' exclusive control and because counsel for Petitioners' communications with Petitioners, declarants, and putative class members has been restricted since the Litigation began, inhibiting Petitioners' ability to develop a record

outside of formal discovery.[1] Notably, other courts considering similar habeas petitions in the context of COVID-19 have permitted such discovery. *See, e.g.*, *Brown, et al. v. Marler*, No. 20-cv-1914, ECF No. 21 (E.D. Pa. Apr. 24, 2020) (granting petitioners' request for jurisdictional discovery and directing parties to submit a joint proposed discovery plan, and noting concerns about access to counsel); *Chunn, et al. v. Edge*, No. 20-cv-1590, ECF No. 45 (E.D.N.Y. Apr. 15, 2020) (ordering government to produce limited discovery). As one District Court explained in ordering the production of sick-call requests:

> [S]ick-call requests by other inmates are relevant to petitioners' Eighth Amendment claims. As noted above, while respondent has sought to rebut petitioners' arguments by pointing to the limited number of positive tests thus far, very few inmates have been tested. Evidence of the number of inmates submitting sick-call requests based on symptoms consistent with COVID-19 is relevant to assessing the likely prevalence of COVID-19 within a facility where few tests have occurred. In addition, were the evidence to establish that the [prison] has received many sick-call requests reporting COVID-19 symptoms, but that it has performed very few tests in response, that evidence would be relevant to petitioners' argument that the [prison's] medical staff is not prepared to provide appropriate care to them (including diagnostic care) if they contract COVID-19.

Chunn, No. 20-cv-1590, ECF No. 45, at 4. The same logic should permit Petitioners here to take discovery in light of footnote 26 of the May 27 Opinion.

Additionally, discovery has the potential to "alter the Court's conclusion." *See* May 27 Opinion at 59 n.26. Footnote 26 acknowledges that Petitioners have alleged "failure to address medical needs" and that these allegations, if resolved in Petitioners' favor—which they should be, given the procedural posture, *see Phillips v. Cty. Of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008)—could constitute deliberate indifference. *See* May 27 Opinion at 59 n.26. Moreover, to the extent this Court found the question of whether it has habeas jurisdiction to be tied to the severity of conditions at Fort Dix, *see* May 27 Opinion at 54,[2] Petitioners should be allowed to develop

[1] Petitioners' counsel have been restricted in their ability to communicate with their clients and with potential declarants. As brought to the attention of counsel for Respondents, privileged legal calls have been difficult to set up and, even when arranged, are limited in time and frequency. Instead, counsel has had to rely primarily on monitored email and telephone communications, which prisoners may only access during certain hours and—as to telephone calls—have a limited number of minutes per call and call minutes per month.

[2] Petitioners respectfully reserve their rights, in any potential appeal, to challenge the Court's jurisdictional analysis (as well as any other aspect of the May 27 Opinion), including whether Petitioners' challenge is to the fact—rather than the conditions—of their confinement. *See Wilson v. Williams*, No. 20-3447, ECF No. 23-1 (6th Cir. May 4, 2020). Petitioners note that, the day before the Court's May 27 Opinion, the Supreme Court denied the Solicitor General's application to stay the injunction entered by the Northern District of Ohio in *Wilson*. *See Williams v. Wilson*, 19A1041, 590 U.S. — (May 26, 2020). The Solicitor General in *Wilson* (like Respondents here) explicitly questioned jurisdiction under § 2241 in light of "this Court's precedents recognizing that

through discovery their allegations that circumstances at Fort Dix present the "extraordinary case" in which this Court said habeas jurisdiction could be warranted. *See* Pet. ¶¶ 120–33; *see also* Memorandum of Law in Support of Petitioners' Motion for a Preliminary Injunction, ECF No. 9, at 6–7.

Petitioners therefore seek to serve discovery requests relevant to their allegations that Respondents are failing to address prisoners' medical needs, including:

- **Prisoner Testing Practices and Results**. Respondents concede that they have not been testing prisoners at the Low security facility systematically, and indeed represented that only one test has been performed of a prisoner there. *See* Declaration of Nicoletta Turner-Foster, ECF No. 28-6, at ¶ 23 ("Turner-Foster Decl. I"). However, Respondents have failed to answer Petitioners' allegation that at least 25 prisoners at the Low were tested on May 5 or 6. *See* Mem. Supp. Opp. Mot. to Dismiss, ECF No. 30, at 12. Instead, without disclosing the results of those tests, Respondents merely stated that, hypothetically, "*[i]f* any inmate exhibited symptoms of COVID-19 based on interaction with this staff member, they *would* have been identified during temperature checks/symptoms assessments and tested for the virus." *See* Declaration of Nicoletta Turner-Foster, ECF No. 33-1, at ¶ 24. ("Turner-Foster Decl. II") (emphasis added). Respondents further state that they would like to begin testing asymptomatic prisoners at the Low but—as of May 21, 2020—were still seeking approval from "the Regional Health Services Administrator, Regional Medical Director, and Regional Infections Disease Nurse." *See id.* at ¶ 18. Petitioners seek limited discovery as to the practices, results, and plans for testing at the Low, as well as any follow up plans for testing at the Camp since the last set of tests on May 6, 2020 and following the return of "recovered" prisoners from Unit 5851.

- **Prisoner Screening Protocols and Results**. Respondents have indicated that Fort Dix's policy as to prisoner screening for COVID-19 consists of temperature checks for fever and an evaluation by Health Services "if an inmate were to exhibit symptoms of the virus or report symptoms of the virus. . . If COVID-19 is suspected, he would be tested immediately using the Abbott machine." Turner-Foster Decl. I at ¶ 23. However, Respondents have provided no information related to sick-call requests by prisoners that would reveal how many prisoners have reported symptoms and have been evaluated by Health Services for symptoms, or why certain symptoms associated with COVID-19 might nevertheless not

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challenges to the conditions of a prisoner's confinement fall outside the core of federal habeas corpus." Stay Application at 5 (quotations omitted) (attached as Exhibit A). And, like Respondents here, the Solicitor General cited cases, including *Cardona v. Bledsoe*, 681 F.3d 533 (3d Cir. 2012), arguing that the prisoners' § 2241 petitions were simply misstated conditions-of-confinement claims. Six Justices of the Supreme Court nevertheless voted to deny a stay, the standard for which is whether there is "a fair prospect that a majority of the Court will vote to reverse the judgment below" and "likelihood that irreparable harm will result from the denial of a stay." *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). The order denying a stay is attached hereto as Exhibit B. The government has filed a second application with the Supreme Court to stay the Northern District of Ohio injunction and enforcement order.

result in a COVID-19 test. Moreover, the policy Respondents describe resulted in 58 positive tests at the Camp. Respondents have provided no information to suggest the policy would produce a different result at the Low. Accordingly, Petitioners seek limited discovery on prisoner screening protocols and results, including sick-call requests.

- **Staff Screening Protocols and Results**. Respondents have indicated that "Health Services Division - Central Office is exploring options to offer testing for staff; however, there is currently no options for staff testing offered by BOP. Currently, the BOP's Phase 7 Action Plan mentions community testing sites being the option for staff testing. . . . Staff are required to self-report illness, including possible exposure to COVID-19[.]" Turner-Foster Decl. II at ¶ 22. Respondents further indicated that for those staff members who are known to test positive, Fort Dix's protocol is to only test prisoners who came into contact with staff with confirmed cases if those prisoners subsequently exhibited COVID-19 symptoms "during temperature checks/symptoms assessments." *Id.* at ¶ 24. In so doing, Respondents have effectively denied any efforts or plans by Fort Dix to contact trace based on confirmed staff positive cases and have failed to indicate how this protocol is medically sound. Petitioners thus seek limited discovery as to staff screening protocols and the results thereof as they impact the prisoner population.

- **Site Inspection**. To address this Court's questions and outstanding fact disputes, Petitioners request that the Court appoint an expert to inspect the conditions at Fort Dix in person and report back to the parties and the Court. Petitioners submit that such an inspection is particularly critical to assess to the effectiveness of Phase 7 of the BOP Action Plan. For example, upon information and belief, during the week of May 25, Warden Ortiz required over 200 prisoners at the Low to return to work at Unicor,[3] presumably in cohorts not limited to their housing units. Among other things, a site inspection would assess whether these and other actions by Respondents put prisoners at significant public health and medical risk. At the parties' May 8 conference, Judge Schneider raised the possibility of an independent expert inspection. Other courts have ordered such an inspection. *See Chunn*, No. 20-cv-1590, ECF No. 45 at 3 (granting petitioners' request to have an expert and two attorneys inspect conditions at the Metropolitan Detention Center in Brooklyn, New York and prepare a report). Such an inspection report would assist this Court in deciding whether the situation at Fort Dix constitutes an "extraordinary case" such that this Court should exercise its habeas jurisdiction.

Petitioners thus ask that they be permitted to serve limited discovery requests on Respondents. A proposed order is attached for the Court's consideration as Exhibit C.

[3] Unicor operations at Fort Dix appear to consist of clothing and textile products and printing, data entry, contact center, and other services. https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp

Should the Court deny Petitioners' request for limited discovery, Petitioners ask that they be permitted to supplement the record with additional declarations, to the extent they are able to do so given the limitations on counsel's access to unmonitored communications with prisoners.

We appreciate the Court's attention to this matter and are available to discuss these issues at the Court's convenience.

Respectfully submitted,

By: */s/ Tess Borden*

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No. 19A-_____

IN THE SUPREME COURT OF THE UNITED STATES

MARK WILLIAMS, WARDEN OF ELKTON FEDERAL CORRECTIONAL INSTITUTION, AND MICHAEL CARVAJAL, DIRECTOR OF THE FEDERAL BUREAU OF PRISONS, APPLICANTS

v.

CRAIG WILSON, ET AL.

APPLICATION FOR A STAY OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO AND FOR AN ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

Applicants (respondents-appellants below) are Mark Williams, in his official capacity as Warden of Elkton Federal Correctional Institution; and Michael Carvajal, in his official capacity as the Federal Bureau of Prisons Director.

Respondents (petitioners-appellees below) are Craig Wilson, Eric Bellamy, Kendal Nelson, and Maximino Nieves, on behalf of themselves and all others similarly situated.

IN THE SUPREME COURT OF THE UNITED STATES

No. 19A-_____

MARK WILLIAMS, WARDEN OF ELKTON FEDERAL CORRECTIONAL INSTITUTION, AND MICHAEL CARVAJAL, DIRECTOR OF THE FEDERAL BUREAU OF PRISONS, APPLICANTS

v.

CRAIG WILSON, ET AL.

APPLICATION FOR A STAY OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO AND FOR AN ADMINISTRATIVE STAY

Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the federal applicants, respectfully applies for a stay of the preliminary injunction issued on April 22, 2020, by the United States District Court for the Northern District of Ohio (App., infra, 8a-28a), pending appeal of that injunction to the United States Court of Appeals for the Sixth Circuit and, if the court of appeals affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. Applicants also respectfully request an administrative stay pending disposition of this application.

The COVID-19 pandemic has created extraordinary public health risks in this country and around the world. The Federal Bureau of Prisons (BOP) is working assiduously to mitigate those risks within its facilities by implementing a multi-phase plan it developed in January 2020. Prison officials at Elkton Correctional Institution

(FCI-Elkton) have implemented the BOP's system-wide plan. They have minimized social interactions; distributed necessary cleaning supplies, masks, and protective equipment; and established quarantine, testing, and treatment protocols. Furthermore, when Elkton experienced a number of confirmed cases of COVID-19, prison officials worked to both limit transmission of the virus and ensure that those affected receive adequate medical treatment.

Respondents are four individuals who represent a conditionally certified subclass of older and medically vulnerable Elkton inmates. Respondents brought a purported habeas corpus challenge under 28 U.S.C. 2241, seeking a preliminary injunction that would secure their removal from Elkton based on allegations that COVID-19 has created "unconstitutional conditions of confinement" at the facility. App., infra, 87a (capitalization and emphasis omitted).

Despite acknowledging BOP's "good efforts" to "limit the virus's spread" at Elkton, App., infra, 12a, the court determined that respondents were likely to succeed on their Eighth Amendment claim because the court viewed BOP's "testing" and "social distancing" efforts to be inadequate, id. at 9a, 23a. It therefore granted a preliminary injunction requiring BOP to identify subclass members within one day; evaluate all members' eligibility for "transfer out of Elkton through any means, including but not limited to compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough within two (2) weeks," and then use those means, or transfers to other BOP facilities, to remove all subclass members from Elkton "until the threat of the virus is abated or until a vaccine is available." Id. at 27a-28a.

The government unsuccessfully sought a stay of the injunction from the district court and the Sixth Circuit. App., infra, 1a-5a, 29a. Meanwhile, BOP complied with the first two requirements of the injunction, identifying 837 subclass members and evaluating them for different means of transfer out of Elkton. Id. at 142a. Respondents, however, moved to enforce the injunction the same day BOP reported the results of its evaluation. Id. at 42a.

The district court granted that motion on May 19, 2020. App., infra, 42a-52a. It determined that BOP had not found enough subclass members eligible for transfer out of Elkton through "home confinement" and "compassionate release." Id. at 47a. It therefore imposed revisions to BOP's home confinement criteria -- requiring, for example, that BOP "disregard" some inmates' violent offenses -- and ordered BOP to reevaluate all class members under the revised criteria. Id. at 48a. If BOP finds any class member ineligible under the court's standards, it must provide a detailed, individualized explanation. Ibid. BOP must complete this entire process for the first third of the class (approximately 300 people) by May 21, 2020; the next third 48 hours later; and the final third 48 hours thereafter. Id. at 48a-49a. Also within 48 hours of the order, BOP must provide individualized explanations for every instance in which it has denied a class members' compassionate release petition, id. at 50a, and identify and add new inmates to the class, id. at 51a. Within a week, it must "show cause" why any remaining class members are deemed ineligible for transfer to other facilities. Ibid.

This Court's intervention is urgently needed. The district court's injunction is deeply flawed and should be stayed pending appeal and, if necessary, further proceedings in this Court. The flaws are deepened and the need for relief made especially urgent by the district court's extraordinary May 19 order enforcing the injunction. All the relevant factors support a stay.

First, if the Sixth Circuit were to uphold the injunction, there is at least a reasonable probability that this Court would grant certiorari. A judicial order peremptorily requiring the removal of over 800 inmates from a federal prison based on an alleged Eighth Amendment violation -- in the midst of a pandemic -- presents extraordinarily significant questions and should not be imposed without this Court's review. Both the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, § 101[(a)], Tit. VIII, 110 Stat. 1321-66, and the contours of the Eighth Amendment itself dictate that such relief could be available only in the very rarest of circumstances. The importance of review is further underscored by the recommendation of the Centers for Disease Control and Prevention (CDC) that correctional institutions suspend transfers to the maximum extent possible to avoid the risk of spreading COVID-19. See CDC, Dep't of Health and Human Servs., Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities 14 (Mar. 27, 2020)(CDC Interim Guidance), https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf (App., infra, 214a). And certiorari is also likely because the rulings below implicate an established conflict regarding the availability of

habeas corpus to challenge prison conditions, and a burgeoning disagreement regarding Eighth Amendment claims in the face of a pandemic.

Second, there is more than a fair prospect that the Court would vacate the injunction. Respondents' sole claim for relief is an assertion of "unconstitutional conditions of confinement," App., infra, 87a (capitalization and emphasis omitted). Yet the district court recharacterized the suit as a challenge to the "fact or duration" of respondents' confinement. Id. at 17a-18a, 26a. That led the court to permit the suit to proceed under 28 U.S.C. 2241, despite this Court's precedents recognizing that challenges to the "conditions of a prisoner's confinement * * * fall outside" the "core" of federal habeas corpus. Nelson v. Campbell, 541 U.S. 637, 643 (2004). It also led the court to eschew the strict limitations on injunctive relief in general -- and on "prisoner release orders" in particular -- established by the PLRA.

The district court's Eighth Amendment analysis is also contrary to this Court's precedents, which have admonished against invoking that Amendment to engage in judicial second guessing of prison officials' response to difficult and evolving situations. Farmer v. Brennan, 511 U.S. 825, 834, 836-837 (1994). Respondents have fallen far short of establishing both that they have been deprived of "the minimal civilized measure of life's necessities," and that any such deprivation results from prison officials' "deliberate indifference," as the Eighth Amendment requires. Id. at 834 (citations omitted). This extraordinary pandemic poses risks to those inmates, but it also poses risks to the population as a

whole, and BOP has worked diligently to mitigate the risks at Elkton.

Third, the balance of equities strongly favors a stay. If allowed to stand, the district court's injunction -- now augmented by the court's sweeping May 19 order -- would undermine BOP's systemic response to the COVID-19 pandemic; intrude the Judicial Branch on policy decisions that have been assigned to expert prison administrators; and require BOP to defy the CDC's guidance to restrict prisoner movements during the pandemic to avoid unnecessary risk of spreading the virus. While the court found its injunction appropriate based on the presence of COVID-19 at Elkton, its concerns regarding testing and social distancing cannot justify its dramatic imposition on a correctional institution.

Because all three of the stay factors are readily met, this Court should stay the injunction. In addition, because the injunction and May 19 order enforcing it require BOP immediately to evaluate under judicial supervision hundreds of Elkton inmates for home confinement under revised criteria the district court fashioned without authority or expertise and then to remove over 800 inmates from Elkton, the government respectfully requests that this Court enter an administrative stay.

STATEMENT

1. In January 2020, the first cases of illness caused by COVID-19 were reported in the United States. App., infra, 93a ¶ 6. Recognizing the threat, BOP quickly developed and began implementing a multiphase action plan, which has consistently been

informed by changing circumstances and "the guidance and direction of worldwide health authorities." Ibid.

In its first phase, BOP gathered its existing pandemic resources and new information regarding the specific nature of COVID-19 and "best practices to mitigate its transmission." App., infra, 93a ¶ 7. BOP also formed a task force to conduct Bureau-wide "strategic planning" in coordination with "subject-matter experts," and it began "implementing guidance and directives" from the CDC and other expert bodies. Ibid.

BOP implemented the second phase of its action plan on March 13, 2020, instituting restrictions at all BOP facilities. App., infra, 94a ¶ 8. Consistent with CDC guidance regarding the need to severely restrict inmate movements between facilities and within communities, CDC Interim Guidance 14 (App., infra, 214a), BOP suspended facility transfers. App., infra, 94a ¶ 8. It also suspended visits and contractor access. Ibid. And BOP instituted enhanced health screening for inmates and staff, as well as quarantine procedures for certain newly arriving inmates, again consistent with CDC guidance. Id. ¶¶ 9-10.

From March 18 to April 13, 2020, BOP implemented several further phases of its action plan, requiring (among other things) that all newly admitted inmates -- even those who are asymptomatic -- be quarantined for 14 days and that inmates displaying symptoms of COVID-19 be placed in isolation until testing negative or meeting CDC criteria. App., infra, 96a ¶ 15. BOP also restricted inmate gatherings and secured all inmates in their assigned living quarters to decrease virus transmission. Id. at 96a-97a ¶¶ 16-

17; see also id. at 125a-127a ¶ 38. In addition, all BOP staff and inmates have been given appropriate sanitation materials, face coverings, and other personal protective equipment where necessary. Id. at 125a-127a ¶ 38; see p. 8, infra.

2. FCI-Elkton is a low-security facility in Ohio, in which approximately 2500 inmates are incarcerated in dormitory style housing. App., infra, 106a ¶ 3; id. at 104a ¶ 54 (150-man units), 112a-113a ¶ 22 (units have 250-300 inmates, separated in half).

a. Like all BOP institutions, Elkton has implemented BOP's nationwide COVID-19 response, and taken numerous precautions in accordance with the facility's particular needs. App., infra, 97a-98a ¶ 19. For example, Elkton staff and officials have, since the beginning of the pandemic, educated inmates and staff about measures to avoid transmitting COVID-19. Id. at 98a ¶¶ 20-22. All common areas are cleaned at least daily with a disinfectant that kills human coronavirus. Id. at 103a ¶ 46. The disinfectant is also available to all inmates so that they can clean their personal areas, and they have access to sinks, water, and soap at all times. Id. at 102a-103a ¶¶ 45-46.

Elkton inmates and staff have been provided protective face masks for daily use and appropriate protective equipment as necessary for particular tasks. App., infra, 103a ¶¶ 48-50. BOP has also taken steps to reduce inmate contact. For example, inmates are required to pick up meals and return to their housing units to eat, and mealtimes are staggered so that only a single housing unit moves within the facility at any time. Id. at 95a ¶

12; see id. at 104a ¶ 54. Inmates may also receive medications and visit the commissary during these periods. Id. at 95a ¶ 12.

Elkton staff carefully monitor the health of the inmate population. Early on, staff reviewed medical records to identify inmates who are considered high-risk under CDC guidelines. App., infra, 99a-100a ¶¶ 30-31. Any inmate who reports symptoms consistent with COVID-19 is evaluated by BOP medical providers and, if symptoms are confirmed, moved to an isolation area. Id. at 99a-100a, 103a-104a ¶¶ 29, 34, 51. When testing was limited, medical providers decided whether to test an inmate for COVID-19 based on a number of criteria, including symptoms, potential exposure and whether the inmate was high-risk or on a work detail requiring interaction with other inmates or staff. Id. at 102a ¶ 41; see also id. at 101a-102a ¶ 39 (describing CDC's "priority levels" for COVID-19 testing).

b. Despite BOP's extensive efforts, Elkton has unfortunately experienced significant levels of infection, and, as of May 8, 2020, nine inmates have died from the virus. App., infra, 176a ¶ 47. From the outset, Elkton staff have responded with urgency to the presence of COVID-19, engaging in extensive efforts to limit transmission of the virus and to ensure proper care for those infected. Id. at 184a-186a ¶ 83-86.

Staff have continued to screen all inmates who report symptoms and to isolate them as appropriate. App., infra, 101a-104a ¶¶ 39-41, 51-52. Asymptomatic inmates who have been in contact with symptomatic inmates during the incubation period (up to 14 days) are quarantined in a housing unit for at least 14 days. Id. at

104a ¶ 52. After 14 days, inmates may be released from quarantine if no one in the cohort has developed confirmed or suspected COVID-19. Ibid. But if a quarantined inmate presents with symptoms, he is isolated, and the 14-day clock restarts. Ibid.

In order to ensure adequate medical treatment, Elkton staff have been working 12-hour shifts to provide inmates with 24-hour access to on-site medical services. App., infra, 184a-185a ¶ 83. If an inmate's condition requires hospitalization, he is transported to a local hospital. Id. at 103a-104a ¶ 51. Returning inmates are placed in Elkton's infirmary, where they remain until they have been fever-free for 72 hours and ten days have passed since their symptoms appeared. Id. at 178a ¶¶ 53-54.

BOP has evaluated Elkton inmates for alternate placement in home confinement, in keeping with statutory authorization and guidance from the Attorney General. App., infra, 111a-112a ¶¶ 17-19; 122a-123a ¶¶ 25-26. In general, BOP is authorized to place a prisoner in "home confinement" for no more than the final "[six] months" of his sentence. 18 U.S.C. 3624(c)(2). But, under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281, Congress permitted BOP to extend the amount of time an individual may be placed in home confinement, if the Attorney General "finds that emergency conditions" justify that extension, and "as the Director [of BOP] determines appropriate." Div. B, Tit. II, § 12003(b)(2), 134 Stat. 516.

The Attorney General has made the requisite findings. App., infra, 111a-112a ¶¶ 18-19. He has also directed BOP to prioritize the consideration of inmates at Elkton and two other facilities, and provided criteria for determining an inmate's eligibility, including that "primary or prior violent offenses" and "sex offenses" are generally disqualifying. Ibid. BOP officials have implemented that guidance at Elkton. Ibid.; see also id. at 120a-121a ¶ 22 (elaborating on criteria used for evaluation).

BOP has also considered numerous requests from Elkton inmates for "compassionate release," a statutory procedure through which BOP may request an inmate's sentencing court to reduce his term of imprisonment because "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. 3582(c)(1)(A). Congress has not, however, adjusted the compassionate release procedures in light of COVID-19, nor has it adjusted the necessary qualifications or procedures for other statutory mechanisms to alter inmate placements. For example, it has not made the COVID-19 pandemic an independent basis for furlough under 18 U.S.C. 3622, which authorizes BOP to temporarily release an inmate for specified purposes like "obtaining medical treatment not otherwise available," "participating in training," or "work." 18 U.S.C. 3622(a)(3), (b), and (c).

3. On April 13, 2020, respondents filed a habeas corpus petition pursuant to 28 U.S.C. 2241 on behalf of themselves and a putative class of all current or future Elkton inmates, and a subclass of medically-vulnerable inmates. App., infra, 53a-90a.

Their sole claim was that they are being subject to "unconstitutional conditions of confinement in violation of the Eighth Amendment." Id. at 87a (capitalization and emphasis omitted). As relief, they sought -- among other things -- a preliminary injunction requiring BOP to remove all "[m]edically-[v]ulnerable" inmates from Elkton through means such as home confinement, transfer furlough to another facility, or non-transfer furlough to the community, id. at 54a n.2, 88a, and an order requiring BOP to institute a COVID-19 mitigation plan supervised by the court and "a qualified public health expert," id. at 88a-89a.

On April 22, 2020, the district court entered a preliminary injunction granting relief to a conditionally certified subclass of older and medically vulnerable inmates. App., infra, 27a-28a. Invoking what the court viewed as its "inherent authority" over an inmate's confinement, the court ordered BOP to "determine the appropriate means of transferring" all subclass members "out of Elkton." Id. at 15a-16a.

The district court first determined that it had jurisdiction under 28 U.S.C. 2241, but only as to the subclass of medically vulnerable inmates. App., infra, 16a-18a. Although the putative class of all Elkton inmates and the medically vulnerable subclass were pursuing the same Eighth Amendment claim for "unconstitutional conditions of confinement," id. at 87a (capitalization and emphasis omitted), the court held that the subclass could proceed in habeas and the class as a whole could not because the subclass was seeking "immediate release" from Elkton through home confinement and other mechanisms, while the class as a whole was merely

seeking "an alteration to the confinement conditions." Id. at 18a. The court also found that the subclass "likely meets" the requirements for class certification under Federal Rule of Civil Procedure 23, see App., infra, 22a.

The court then determined that respondents were likely to succeed on their Eighth Amendment claim because they identified a "very serious medical need to be protected from the virus" and because the court believed BOP had been deliberately indifferent to that need. Id. at 23a. While acknowledging that BOP had made "certain prison-practice changes" to protect inmates, the court nonetheless concluded that respondents had demonstrated deliberate indifference. Ibid. The court focused on what it viewed as "paltry * * * test[ing]" and the fact that inmates had not been "separat[ed] * * * at least six feet apart." Id. at 10a, 23a.

Turning to the balance of harms, the district court held that respondents had demonstrated irreparable harm because "it is more than mere speculation that the virus will continue to spread and pose a danger to inmates." App., infra, 24a. The court further concluded that the relief it intended to order -- the wide-scale transfer of hundreds of inmates out of Elkton -- would not impose undue harms and would be in the public interest. Id. at 24a-26a. And the court rejected BOP's argument that the court's ability to award that relief was constrained by the PLRA, which mandates that only a three-judge court may issue a release order in a suit challenging prison conditions. Id. at 26a-27a. In the court's view, the PLRA did not apply because respondents were pursuing "habeas corpus proceedings challenging the fact or duration of

confinement in prison," which the statute exempts. Id. at 26a (citation omitted). And it further observed that its preliminary injunction would not qualify as a "release order" in any event because "the inmates will remain in BOP custody, but the conditions of their confinement will be enlarged." Id. at 27a.

The court entered an order requiring that BOP "identify, within one (1) day all members of the subclass"; "evaluate each subclass member's eligibility for transfer out of Elkton through any means, including but not limited to compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough within two (2) weeks"; and then ensure that "[s]ubclass members who are ineligible for compassionate release, home release, or parole or community supervision" are "transferred to another BOP facility [after required quarantine] where appropriate measures, such as testing and single-cell placement, or social distancing, may be accomplished." App., infra, 27a-28a. Subclass members "may not be returned to the facility until the threat of the virus is abated or until a vaccine is available." Id. at 28a.

4. The government filed a notice of appeal on April 27, 2020; moved the district court for a stay pending appeal the following day, D. Ct. Doc. 30; and filed a stay motion with the Sixth Circuit on April 29, 2020, C.A. Doc. 9-1.

On May 4, 2020, the Sixth Circuit denied the stay in a brief per curiam order. App., infra, 1a-5a. The court agreed with the district court that the invocation of Section 2241 was "proper" and that the PLRA did not apply. Id. at 3a. The court of appeals

also determined that the district court had not "abused its discretion" in finding that respondents were likely to succeed on their Eighth Amendment claim. Id. at 3a-4a. Finally, the court rejected BOP's argument that the subclass could not satisfy Rule 23, and dismissed BOP's account of the inordinate burden of implementing the order. Id. at 4a-5a (citation omitted).

On May 8, 2020, the court of appeals granted the government's motion to expedite briefing on the appeal, App., infra, 6a-7a, but rejected the government's proposed schedule, which would have permitted a decision by May 22, 2020, C.A. Doc. 28. Instead, briefing will not conclude until June 1, 2020, and "the merits panel will determine whether it will expedite oral argument or a decision." App., infra, 7a.

5. a. On May 8, 2020, the district court also denied the government's stay motion. App., infra, 29a-33a. By that time, the government had already fulfilled the injunction's first two requirements and, on May 6, had submitted a status report indicating that it had identified and evaluated all subclass members' eligibility for the forms of relief specified in the preliminary injunction. Id. at 142a-147a. The same day, respondents filed an emergency motion to enforce the injunction, alleging that BOP's efforts did not suffice. D. Ct. Doc. 51.

On May 8, 2020, BOP opposed the motion and submitted declarations confirming that it had evaluated all inmates in the subclass for the forms of relief specified by the court, detailing the criteria it had used, and explaining some of the reasons why the vast majority of inmates had been deemed ineligible. App., infra,

153-157a. BOP explained, for example, that many subclass members are sex offenders, and that under established BOP criteria, reinforced by the Attorney General's recent COVID-19 guidance, an inmate generally cannot qualify for home confinement if he has a "primary or prior sex offense.". Id. at 153a-154a. In addition, BOP emphasized that it had evaluated every application for compassionate release that it had received from a class member, but that -- by statute -- only a sentencing judge can make a final determination of eligibility for that form of relief. Id. at 155a-156a.

BOP further explained that it had begun evaluating inmates who were ineligible for other forms of relief for transfer to other BOP facilities, and it documented the numerous impediments it faced in implementing that transfer order. App., infra, 157a-161a. It explained that CDC guidance calls for detention facilities to "suspend all transfers unless absolutely necessary, if there is a suspected or confirmed case of COVID-19 at" a facility. Id. at 161a. It also noted that the facilities that met the court's social distancing requirements were largely higher-security institutions, and that transferring Elkton inmates to them would raise "serious security concerns." Id. at 159a-160a.

Finally, BOP reported that it had entered into a contract for mass COVID-19 testing of all Elkton inmates. App., infra, 150a. It further observed that, as of May 8, 2020, there had been a "substantial[]" decrease in hospitalizations and improvement in a number of other key metrics. Id. at 150a-152a.

b. The district court did not rule on the motion to enforce until May 19, 2020. In the interim, it issued several orders requiring BOP to produce daily status reports on testing as well as additional information regarding its efforts to evaluate inmates for transfer. D. Ct. Doc. 76 (May 14, 2020). But the court acknowledged that some inmates who are members of the Rule 23(b)(2) subclass may not wish to be transferred from Elkton, particularly if they would be moved to a higher security prison or transferred further from their homes. D. Ct. Doc. 55, at 13-14, 26-27 (May 7, 2020). The court therefore directed respondents to survey all Elkton inmates, through a questionnaire distributed by BOP, to both ensure that all eligible class members have been identified and to determine which wished to "optout" and remain at Elkton. Ibid. Respondents provided copies of the responses to BOP at approximately 1:30 p.m. on May 19, 2020. BOP intended to process the results within two days, so that it could use the information to begin quarantining class members on Friday, May 22, 2020, as required to prepare them for transfer.

c. At 3:30 p.m. on May 19, 2020, the district court granted respondents' motion to enforce the injunction. App., infra, 42a-52a. The court acknowledged that BOP had begun to implement mass testing at Elkton, id. at 43a, and that it had reported evaluating all subclass members for the various forms of relief dictated in the court's order, id. at 45a. But the court noted that testing had yielded positive results for a number of inmates. Id. at 43a. And it found BOP's evaluation efforts insufficient because only five members were "pending [home confinement] community

placement," and an additional six reportedly "might" qualify. Ibid.

In the district court's view, more inmates should be eligible for home confinement and compassionate release. App., infra, 45a. Therefore, after surveying the existing guidance from the Attorney General and BOP, the court ordered five revisions to the criteria for home confinement. Id. at 47a-48a. For example, the court announced that BOP must "disregard" consideration of a violent offense if it occurred "more than 5 years ago" or if it is the "only basis [f]or denial," and BOP must wholly disregard certain categories of prison disciplinary violations. Id. at 48a.

On this basis, the district court, to enforce its injunction, ordered BOP to reevaluate every subclass member under the revised criteria, and offer a detailed explanation for any denial. App., infra, 48a. BOP must complete this process for the first third of the subclass by May 21, 2020; the next third 48 hours later; and the final third 48 hours after that. Id. at 48a-49a. In addition, within 48 hours, BOP must "clarify" the reasons for any denial of compassionate release. Id. at 50a. And, even though the statute affords BOP 30 days to evaluate any application for such release, the court gave BOP just seven days to adjudicate any new applications. Id. at 50a. It also gave BOP seven days to "show cause" why any inmate ineligible for home confinement or compassionate release "cannot be transferred to another BOP facility where social distancing is possible." Id. at 51a.

ARGUMENT

The government respectfully requests that this Court stay the district court's preliminary injunction pending completion of further proceedings in the court of appeals and, if necessary, this Court. The government further requests that the Court grant an administrative stay pending its consideration of this application.

A stay pending the disposition of a petition for a writ of certiorari is appropriate if there is (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will conclude that the decision below was erroneous"; and (3) "a likelihood that irreparable harm will result from the denial of a stay." Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers) (brackets, citation, and internal quotation marks omitted). All of the requirements are met here.

I. A REASONABLE PROBABILITY EXISTS THAT THIS COURT WOULD GRANT CERTIORARI IF THE COURT OF APPEALS WERE TO UPHOLD THE INJUNCTION

If the court of appeals ultimately upholds the district court's injunction in this case, there is, at the very least, a reasonable probability that the Court will grant certiorari.

This Court has recognized that, even in normal times, an order requiring the release or transfer of "prisoners in large numbers * * * is a matter of undoubted, grave concern." Brown v. Plata, 563 U.S. 493, 501 (2011). Such orders carry a high risk of jeopardizing public safety and inappropriately interjecting the Judicial Branch into difficult decisions regarding prison security

and administration, despite the deference that is owed "to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals." Id. at 511. That is all the more so when prison administrators must address the impact of a pandemic affecting the Nation at large, and must do so across the prison system.

A decision upholding this injunction would also implicate two conflicts in the courts of appeals. The circuits are divided as to whether a prisoner may pursue a challenge to his conditions of confinement under Section 2241. The Third, Seventh, Eighth, and Tenth Circuits have all held that suits challenging conditions of confinement are not cognizable in habeas. See, e.g., Spencer v. Haynes, 774 F.3d 467, 469-470 (8th Cir. 2014); Cardona v. Bledsoe, 681 F.3d 533, 535-537 (3d Cir.), cert. denied, 568 U.S. 1077 (2012); Palma-Salazar v. Davis, 677 F.3d 1031, 1035-1038 (10th Cir. 2012); Glaus v. Anderson, 408 F.3d 382, 388 (7th Cir. 2005). By contrast, the D.C. and Second Circuits have permitted petitioners to bring conditions of confinement claims under Section 2241. Aamer v. Obama, 742 F.3d 1023, 1038 (D.C. Cir. 2014); Thompson v. Choinski, 525 F.3d 205, 209 (2d Cir. 2008), cert. denied, 555 U.S. 1118 (2009).

As for the court of appeals below, although the Sixth Circuit has previously held that Section 2241 "is not the proper vehicle for a prisoner to challenge conditions of confinement," Luedtke v. Berkebile, 704 F.3d 465, 466 (2013), it largely nullified that rule in its stay denial in this case by treating respondents' suit -- which seeks removal from Elkton because of allegedly

unconstitutional conditions -- as a cognizable habeas challenge to "the fact of the confinement," App., infra, 3a.

In addition, there is burgeoning disagreement in the circuits regarding the appropriate standards for issuing an injunction against the administrators of a detention facility based on allegedly unconstitutional conditions created by COVID-19. The Sixth Circuit declined to stay such an injunction in this case, but several other circuits have reached a contrary conclusion.

For example, in Valentine v. Collier, 956 F.3d 797 (2020) (per curiam), mot. to vacate stay denied, No. 19A1034 (May 14, 2020), this Court recently declined to lift the Fifth Circuit's stay of an injunction granting relief to a class of "disabled and high-risk" inmates in a state "prison for the elderly and infirm" that had experienced an outbreak of COVID-19 and several related deaths, id. at 799. The district court injunction in question did not order release or transfer, but instead imposed a series of requirements such as increased cleaning and the provision of additional sanitizers and paper products. Id. at 799-800. Nonetheless, the Fifth Circuit held that the "intrusive order[]" inflicted irreparable harm on both the State and the public by diverting resources from the prison system's implementation of a systemic response to the pandemic. Id. at 803-804. And it found it apparent that the district court had erred in finding an Eighth Amendment violation. Although it recognized that "the district court might do things differently," the Fifth Circuit made clear that such disagreement with the officials' actions demonstrated no deliberate indifference to inmate welfare. Id. at 803; see also

Marlowe v. LeBlanc, No. 20-30276, 2020 WL 2043425, at *2-*3 (5th Cir. Apr. 27, 2020) (per curiam) (unpublished) (staying a COVID-19 based preliminary injunction involving a "particularly vulnerable" inmate in a facility where "the virus has spread").

The Eleventh Circuit similarly stayed a COVID-19 injunction obtained by prisoners purporting to represent "a 'medically vulnerable' subclass of inmates" at a jail where "several inmates * * * ha[d] tested positive for the virus" in Swain v. Junior, No. 20-11622, 2020 WL 2161317, at *1 (11th Cir. May 5, 2020) (per curiam). Like the Fifth Circuit, the Swain court determined that prison officials were likely to succeed on appeal because the district court's focus on the facility's "increase in COVID-19 infections" to show that officials "deliberately disregarded an intolerable risk" had misunderstood the Eighth Amendment inquiry and the requirements for a preliminary injunction. Id. at *4.[1]

If the Sixth Circuit affirmed the injunction in this case, it would place the court on the wrong side of both conflicts. It would also place the circuit in direct conflict with this Court's decisions addressing what constitutes a habeas challenge to the "fact or duration" of confinement, congressionally established limits on prisoner litigation in the PLRA, and the constitutional

[1] In a somewhat different context, the Ninth Circuit has largely stayed a preliminary injunction directing the release of immigration detainees and imposing numerous other requirements based on a parallel COVID-19 claim of deliberate indifference under the Due Process Clause. Roman v. Wolf, No. 20-55436, 2020 WL 2188048 (May 5, 2020) (unpublished); see Roman v. Wolf, No. 20-cv-768, 2020 WL 1952656, *10-*12 (C.D. Cal. Apr. 23, 2020).

standards for claims under the Eighth Amendment, as we demonstrate below. In these circumstances, there is more than a "reasonable probability" that the Court will grant certiorari. Conkright, 556 U.S. at 1402 (citation omitted).

II. THERE IS AT LEAST A FAIR PROSPECT THAT THE COURT WOULD VACATE THE INJUNCTION IN WHOLE OR IN PART

This Court is also likely to vacate the injunction because it cannot be squared with this Court's precedents regarding habeas corpus, the PLRA, and the Eighth Amendment.

A. As a threshold matter, the district court's order mischaracterized this suit as a habeas challenge to "the fact or duration of confinement," App., infra, 26a, rather than a challenge to prison conditions. This Court has repeatedly drawn a line between "two broad categories of prisoner petitions: (1) those challenging the fact or duration of confinement itself; and (2) those challenging the conditions of confinement." McCarthy v. Bronson, 500 U.S. 136, 140 (1991). Challenges to the fact or duration of confinement are those in which the prisoners' success would "necessarily imply the invalidity of their convictions or sentences." Wilkinson v. Dotson, 544 U.S. 74, 82 (2005) (brackets and citation). By contrast, challenges to the conditions of confinement are those in which petitioners "allege[] unconstitutional treatment of them while in confinement." Preiser v. Rodriguez, 411 U.S. 475, 499 (1973).

1. The categorization of a prisoner's challenge has two important consequences. First, it determines whether the prisoner's avenue for relief is through a petition for habeas corpus or

a civil rights action. "[W]here an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence," that claim "fall[s] within the 'core' of federal habeas." Nelson v. Campbell, 541 U.S. 637, 643 (2004) (citation omitted). "By contrast, constitutional claims that merely challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside of that core." Nelson, 541 U.S. at 643. State prisoners may bring such claims under 42 U.S.C. 1983, and federal prisoners may pursue such claims in appropriate circumstances under the APA or through an implied cause of action in equity, see, e.g., Simmat v. United States Bureau of Prisons, 413 F.3d 1225, 1231-1232 (10th Cir. 2005).

Second, the distinction determines whether certain PLRA restrictions apply. The PLRA creates a carefully reticulated scheme for "the entry and termination of prospective relief in civil actions challenging prison conditions." Miller v. French, 530 U.S. 327, 331 (2000). And it broadly defines a "civil action with respect to prison conditions" as "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison," while excluding "habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. 3626(g)(2). As this Court has explained, the PLRA tracks the basic distinction between habeas suits challenging the "fact or duration of confinement itself," and civil actions "challenging the conditions of confinement." Porter v. Nussle, 534 U.S. 516, 527-528 (2002) (citation omitted).

2. Respondents' suit plainly constitutes a challenge to prison conditions that cannot proceed through habeas and must be governed by the restrictions in the PLRA.

In their habeas petition, respondents' only claim is an assertion of "Unconstitutional Conditions of Confinement." App., infra, 87a (emphasis omitted); see also, e.g., id. at 66a (alleging that they are suffering from "current crowded conditions" at Elkton); id. at 74a (asserting that the "concentration of infected prisoners in unsafe conditions within * * * Elkton is dangerous"). In their briefing, respondents have further disclaimed any "quarrel * * * with the validity of their sentences," asserting only that the conditions at Elkton violate the Eighth Amendment. Resp. C.A. Stay Opp. 11.

The district court, too, has described the suit as focusing on allegedly "dangerous conditions within the prison created by the [COVID-19] virus." App., infra, 17a (emphasis added). The bulk of the analysis in the injunction order also treats the case as a conditions-of-confinement challenge. For example, the court found that respondents have a likelihood of success based on its assessment of conditions related to "testing" and the inability to "separate [Elkton] inmates." Id. at 23a. And the court did not order the traditional habeas relief of "simple release," Munaf v. Geren, 553 U.S. 674, 693 (2008). Instead, it purported to "enlarge[]" the "conditions of [respondents'] confinement," by requiring them to be "transfer[red] out of Elkton through any means," including transfer to "another BOP facility." App., infra, 27a-28a (emphasis added).

Nonetheless, the district court characterized the action as a "habeas corpus proceeding[] challenging the fact or duration of confinement" App., infra, 26a, because -- while respondents challenge the "conditions within the prison," id. at 17a -- they also "seek immediate release" from "continued imprisonment at Elkton," id. at 18a. But if respondents succeed on the merits, it would not remotely "imply" that their "convictions or sentences" are invalid. Wilkinson, 544 U.S. at 82 (brackets and citation omitted). Nor would success entitle them to release, but only to the improvement of the challenged conditions. Indeed, respondents do not even seek release "from custody"; they request release "from the physical confines of Elkton," which could include a "transfer furlough * * * to another facility," App., infra, 54a n.2 (emphasis added).

In any event, seeking release cannot automatically convert a suit to a habeas "fact or duration" challenge because the PLRA clearly contemplates that actions challenging "prison conditions" may lead to release in rare circumstances where the conditions cannot be redressed, because the statute sets out detailed requirements governing how and when such a "prisoner release order" may be issued. 18 U.S.C. 3626(a). In Brown v. Plata, this Court considered the proper application of those PLRA provisions to two cases in which California prisoners alleged that overcrowding and deficiencies in medical care constituted an Eighth Amendment violation that entitled them to orders granting the release or transfer of a portion of the state prison population. 563 U.S. at 507-508, 511. The Court never once questioned that the suit was

a challenge "to prison conditions" that was squarely governed by the PLRA. Id. at 530; see also Nussle, 534 U.S. at 532 (recognizing that the PLRA covers "all inmate suits about prison life").

3. a. Because this suit constitutes a challenge to conditions of confinement, respondents should not have been permitted to proceed in habeas at all. In denying a stay, the Sixth Circuit observed that this Court has never "foreclosed" the availability of habeas for conditions-of-confinement challenges. App., infra, 3a. But this Court has held that a prisoner who is not "seeking a judgment at odds with his conviction or with the State's calculation of time to be served" is not raising a claim "on which habeas relief could [be] granted on any recognized theory." Muhammad v. Close, 540 U.S. 749, 754–755 (2004) (per curiam). It has also repeatedly reiterated that injunctive suits challenging the "conditions of a prisoner's confinement" are not displaced by the specific habeas remedy precisely because they fall outside of habeas' "core." Nelson, 541 U.S. at 643; see Preiser, 411 U.S. at 489.

b. Moreover, even if this Court were to hold that respondents may pursue their conditions-of-confinement challenge through habeas, the district court's order would still be defective because it does not adhere to the requirements of the PLRA. That statute exempts only "habeas corpus proceedings challenging the fact or duration of confinement." 18 U.S.C. 3626(g)(2) (emphasis added).

i. Because this suit challenges prison conditions, the district court should have adhered to the PLRA's restrictions on injunctive relief, which require a court to find that an injunction

"extend[s] no further than necessary to correct the harm the court finds requires preliminary relief," and that the order is the "least intrusive means necessary to correct that harm." 18 U.S.C. 3626(a)(2). The district court made no such findings, a failure that alone entitles the government to "immediate termination" of the district court's order. 18 U.S.C. 3626(b)(2). And even had it recognized those procedural requirements, the court could not have made the requisite findings because the release or transfer of one-third of Elkton's inmates was not "narrowly drawn," minimally "intrusive," or "necessary to correct the harm" the court identified. 18 U.S.C. 3626(a)(2). BOP has shown that its policies have appropriately mitigated the risk of COVID-19 at Elkton, and it has further demonstrated that it is capable of mass testing. App, infra, 149a-150a. Further, far from being appropriate to correct a harm, the dramatic remedy the court ordered is directly contrary to the CDC guidance to avoid transfers to the maximum extent possible. CDC Interim Guidance 13 (App, infra, 213a).

ii. The preliminary injunction is also incompatible with the PLRA because it is a "prisoner release order" that does not comply with any of the statute's mandates regarding such relief. A "prisoner release order" may be "entered only by a three-judge court," and only after "a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation * * * sought to be remedied" and "the defendant has had a reasonable amount of time to comply with" that order. 18 U.S.C. 3626(a)(3)(A) and (B). None of that occurred here.

The district court contended that its injunction would not fall afoul of the PLRA, if it applied, because it is not a "release" order, but only an order "enlarg[ing]" or altering the "place of custody" "pending the outcome of a habeas action." App., infra, 15a. The district court cited no cases in support of its novel claim of authority to "enlarge" respondents' "place of custody" in this way.[2] Under the PLRA, "[t]he term 'prisoner release order' includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population." 18 U.S.C. 3626(g)(4). And Brown recognized that an order that permitted state officials to "comply by * * * transferring prisoners to [other] facilities," was still a "prisoner release order" because it had the "'effect of reducing or limiting the prison population.'" 563 U.S. at 511 (quoting 18 U.S.C. 3626(g)(4)).

B. In any event, this Court likely would reject respondents' Eighth Amendment claim on the merits. In a conditions-of-confinement case like this, a prison official violates the prohibition against "cruel and unusual punishments," U.S. Const. Amend. VIII, "only when two requirements" -- one objective, the other subjective -- "are met." Farmer v. Brennan, 511 U.S. 825, 834, 846 (1994). Respondents have established neither.

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[2] The lack of precedent on "enlargement" via transfer may be due to another federal statute that explicitly mandates that "[n]otwithstanding any other provision of law, a designation of a place of imprisonment * * * is not reviewable by any court." 18 U.S.C. 3621(b).

1. First, challenged prison conditions must be, "objectively, 'sufficiently serious'" that they deny "'the minimal civilized measure of life's necessities.'" Farmer, 511 U.S. at 834 (citations omitted); see Hudson v. McMillian, 503 U.S. 1, 9 (1992). Where the conditions pose health risks, "the seriousness of the potential harm" and probability that it will "actually" occur must at least present "an unreasonable risk of serious damage to [an inmate's] future health." Helling v. McKinney, 509 U.S. 25, 35-36 (1993). In addition, "today's society" must judge that risk "so grave that it [would] violate[] contemporary standards of decency to expose anyone unwillingly to [it]." Id. at 36.

Respondents have not met that standard. The government acknowledges that COVID-19 poses significant health risks. But BOP has mitigated the risk of serious injuries at Elkton by its numerous and increasing responses. See pp. 7-11, 16, supra. Data from Elkton, filed in response to respondent's motion to enforce, reflects that the efforts have significantly mitigated the risk. See App., infra, 187a-189a (charts). Even before the district court entered its April 22 injunction, the number of inmates transferred to a local hospital had peaked and dropped to nearly zero (with only one subsequent hospitalization), the number of inmates in the hospital had similarly peaked and was in steady decline, and the number of staff members with confirmed infections had plateaued and flattened. See id. at 187a, 189a. And although

three inmates died after April 22, their deaths reflect the effects of the virus's spread before April 6.[3]

Respondents have also failed to show that the mitigated health risk at Elkton is "so grave" that it would "violate[] contemporary standards of decency to expose anyone unwillingly to [it]," Helling, 509 U.S. at 36. COVID-19 poses risks confronting not only prisoners but law abiding citizens nationwide, including front-line workers and vulnerable nursing home patients. The CDC has issued guidance for appropriately mitigating the risks in correctional facilities, explaining that inmates may continue to be detained in "housing units" in which bunks "ideally" are separated by at least six feet, but that such separation and other "social distancing strategies" involving recreation, meals, and other activities "need to be tailored to the individual space in the facility." CDC Interim Guidance 11 (App, infra, 211a) (emphasis omitted). That expert guidance is contrary to the view that risks at Elkton are such that contemporary societal standards wholly forbid them.

The district court concluded that respondents established the Eighth Amendment's objective requirement because respondents have a "very serious medical need to be protected from the virus."

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[3] See BOP, Inmate Death at FCI Elkton (May 8, 2020) (announcing death of inmate who had been hospitalized in early April), https://www.bop.gov/resources/news/pdfs/20200509_pres_rel_elk.pdf; BOP, Inmate Death at FCI Elkton (May 6, 2020) (same), https://www.bop.gov/resources/news/pdfs/20200509_press_release_elk.pdf; BOP, Inmate Death at FCI Elkton (Apr. 26, 2020) (same), https://www.bop.gov/resources/news/pdfs/20200426_press_release_elk.pdf.

App., infra, 22a-23a. But while that need is relevant, see ibid., it is not sufficient to establish a risk that contemporary standards of decency would condemn, particularly in the context of a pandemic that led health officials to advise everyone to remain in place to the extent possible and to issue guidance to correctional facilities in particular not to transfer inmates.

2. Respondents have also failed to show that the subjective "intent" of Elkton's officials transforms Elkton's conditions into Eighth Amendment "punishment." Where challenged conditions are "not formally meted out as punishment by the statute or the sentencing judge," officials will impose "punishment" only if they "act with a sufficiently culpable state of mind," Wilson v. Seiter, 501 U.S. 294, 298, 300 (1991), which is demonstrated "only [by] the unnecessary and wanton infliction of pain," Farmer, 511 U.S. at 834 (quoting Wilson, 501 U.S. at 297); see, e.g., Estelle v. Gamble, 429 U.S. 97, 104 (1976). Nothing remotely suggests that Elkton's officials -- who have affirmatively sought to mitigate COVID-19's risks -- are wantonly "punishing" respondents.

Whether an official's conduct can be deemed "'wanton' depends upon the constraints facing the official." Wilson, 501 U.S. at 303 (emphasis omitted); see Whitley v. Albers, 475 U.S. 312, 320 (1986). "[D]eliberate indifference" can constitute "wanton" intent in prison-conditions contexts because -- "as a general matter" -- the government's responsibility to rectify dangerous conditions "'does not ordinarily clash with other equally important governmental responsibilities'" or implicate unusual "constraints" on its action. Wilson, 501 U.S. at 302-303 (quoting

Whitley, 475 U.S. at 320). Like the criminal-law "mens rea requirement" for "subjective recklessness," that standard requires proof that officials "know[] of and disregard[] an excessive risk of inmate health or safety," Farmer, 511 U.S. at 836-837, 839-840, i.e., they must "'consciously disregard'" that risk by subjectively recognizing it while failing to "respond[] reasonably." Id. at 839, 844 (brackets and citation omitted); see Wilson, 501 U.S. at 299 (A "lack of due care" or other "error in good faith" is insufficient.) (citation and emphasis omitted). That subjective inquiry "incorporates due regard for [officials'] 'unenviable task of keeping dangerous men in safe custody under humane conditions,'" Farmer, 511 U.S. at 845 (citation omitted), by "leav[ing] ample room for professional judgment, constraints presented by the institutional setting, and the need to give latitude to administrators who have to make difficult trade-offs as to risks and resources," Battista v. Clarke, 645 F.3d 449, 453 (1st Cir. 2011). This Court has thus emphasized that courts must use "caution" in exercising their equitable power and warned that they may not "'enmesh[]'" themselves "'in the minutiae of prison operations.'" Farmer, 511 U.S. at 846-847 (citation omitted).

BOP officials have not even arguably been "deliberately indifferent" to the evolving COVID-19 pandemic. To the contrary, they have deliberately confronted the risks posed by this public health crisis by, among other things, providing inmates with masks and continuous access to soap, water, and sinks; providing additional protective equipment as necessary; limiting inmate movements and group gatherings by modifying meal, recreation,

commissary, and other procedures; educating inmates and staff on preventing contraction and transmission of the virus; implementing measures to screen and quarantine incoming inmates; conducting COVID-19 testing in accordance with CDC guidelines; isolating inmates who present with COVID-19-like symptoms; quarantining asymptomatic inmates who have contracted the virus; implementing enhanced daily cleaning of common areas; and providing inmates with disinfectant cleaners. See pp. 7-10, supra; App., infra, 93a-105a, 165a-186a.

In the preliminary injunction order, the district court recognized that Elkton's officials "have sought to reduce [COVID-19] risks" and that their actions reflect "good efforts," but it suggested that such mitigation could "only be so effective" and that "despite their efforts, the Elkton officials fight a losing battle." App., infra, 9a, 12a, 23a. The court also deemed Elkton's level of COVID-19 testing inadequate and criticized Elkton's low-security physical design (which consists of dormitory-style housing), concluding that those factors gave BOP "little chance of obstructing the spread of the virus." Id. at 10a-13a. The court then held -- without further analysis -- that Elkton's officials had been "deliberately indifferent." Id. at 23a. That legal conclusion is fundamentally flawed. Nothing suggests that officials subjectively believed their extensive efforts, which track the CDC's guidance, were not a reasonable and appropriate response to the threat posed by COVID-19. In holding otherwise, the district court failed to account for the practical constraints facing officials, and by focusing on what it perceived to be

"inadequate measures" that it deemed "dispositive of [officials'] mental state," it erroneously applied a standard that has no grounding in this Court's Eighth Amendment jurisprudence. Valentine, 956 F.3d at 802. Moreover, prospective relief would have been warranted only if respondents had established not only that BOP officials' "'attitudes and conduct'" were subjectively wanton "at the time suit [wa]s brought," but also that the officials currently are "knowingly and unreasonably disregarding an objectively intolerable risk of harm" and "will continue to do so * * * into the future" absent relief. Farmer, 511 U.S. at 845-846 (quoting Helling, 509 U.S. at 36). Respondents failed to do so.

For its part, the court of appeals, in denying a stay, failed even to address the subjective component of the Eighth Amendment claim, disregarding respondents' burden to establish "deliberate indifference" by those working to combat the risks of COVID-19. See App., infra, 4a. That court's exclusive focus on the clear-error standard for factual findings, ibid., wholly disregards the significant legal flaws in the district court's analysis.

III. THE BALANCE OF EQUITIES SUPPORTS A STAY

1. The third stay requirement is met because "irreparable harm will result from the denial of a stay." Conkright, 556 U.S. at 1402 (brackets and citation omitted). The harms to BOP and to the public interest "merge" when relief is sought against the government, Nken v. Holder, 556 U.S. 418, 435 (2009), and the public interest here plainly favors a stay.

a. In Brown, this Court recognized that the "mistaken or premature release of even one prisoner can cause injury and harm."

Brown, 563 U.S. at 501. The risk of harm from the court's order in this case is greatly magnified for at least two reasons.

First, the CDC has recommended that correctional facilities "[r]estrict transfers of incarcerated/detained persons to and from other jurisdictions and facilities" in all but the most essential circumstances to "reduce the risk of transmission and severe disease from COVID-19." CDC Interim Guidance 2, 9 (App., infra, 202a, 209a) (emphasis omitted). Indeed, it has broadly cautioned against unnecessary travel even by the civilian population. See CDC, *Coronavirus and Travel in the United States* (May 8, 2020), https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html ("[t]ravel increases your chances of getting and spreading COVID-19"). And, as BOP has documented, travel by federal inmates provides particular challenges because -- while the inmate transfer process has been altered to address the pandemic -- inmates are still likely to come into contact with others during transfer, including for lengthy periods while they are being transported in vehicles. App., infra, 140a ¶ 7.

Second, the district court gave insufficient attention to the risk that its orders might improperly place dangerous offenders within the community. In its May 19 order, for example, the court explicitly revised the BOP's and the Attorney General's expert guidance regarding when it is safe to place a prisoner in home confinement, forcing BOP to "disregard" highly relevant information like a prior "violent offense." See p. 18, supra.

b. The district court's order also inflicts harm on BOP and the public by inappropriately interjecting the judiciary into

sensitive areas of prison administration. The preliminary injunction and the court's numerous subsequent orders force BOP to divert its resources from its systemic efforts to combat COVID-19. Instead of working to accomplish the priorities established by "subject-matter experts" in accordance with CDC and WHO guidance, App., infra, 93a ¶ 7, BOP must put its efforts into adhering to the court's dictates.

In staying more moderate preliminary injunctions on prison administrators, the Fifth and Eleventh Circuits have recognized the harm that diverting prison resources can inflict on overall attempts to stem the tide of infection in a pandemic. See Valentine, 956 F.3d at 803 (order improperly "interfere[d] with the rapidly changing and flexible system-wide approach that [the Texas Department of Criminal Justice] has used to respond to the [COVID-19] pandemic"); Swain, 2020 WL 2161317, at *5 (order would impose irreparable harm by precluding state from "allocat[ing] scarce resources among different * * * operations necessary to fight the pandemic"). Here, BOP has documented the extensive output of staff time and resources required to evaluate and transfer over 800 inmates, let alone in the manner and timeframe imposed by the May 19 order. See, e.g., App., infra, 129a ¶ 48, 132a-136a ¶¶ 9-17, 21-22.

c. The district court apparently believed that any harms imposed by its order were outweighed by the harms that would ensue from keeping subclass members incarcerated at Elkton. But the specific circumstances it relied on -- the general threat of COVID-19 coupled with what it viewed as inadequate testing and social

distancing -- could not remotely justify the peremptory order to remove more than 800 inmates from Elkton. In any event, several of the premises of the court's order have proved erroneous. For example, while the district court apparently believed it would be simple to transfer inmates from Elkton to other facilities where "single-cell placement, or social distancing" may occur, App., infra, 28a, Elkton's dormitory style is typical of low-security federal facilities. App, infra, 197a ¶ 29. Accordingly, transferring Elkton inmates to institutions meeting the district court's requirements may necessitate moving them to higher-security facilities, which poses "significant security concerns." Id. at 199a ¶ 37.

IV. AT A MINIMUM, THE COURT SHOULD STAY THE INJUNCTION TO THE EXTENT IT GRANTS CLASSWIDE RELIEF

This Court has reserved the question whether habeas claims may ever be pursued as a class action. See Jennings v. Rodriguez, 138 S. Ct. 830, 858 n.7 (2018) (Thomas, J., concurring in part and concurring in the judgment). But regardless of how that question is answered, the court-defined class in this case does not satisfy the commonality and typicality requirements of Federal Rule of Civil Procedure 23(a). See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 n.5 (2011). Thus, at the very least, the injunction should be stayed to the extent it grants classwide relief.

Even if the four individual respondents themselves could demonstrate an Eighth Amendment violation, each member of the class has not suffered "the same injury," as is required for commonality, Dukes, 564 U.S. at 350 (citation omitted), because each has

different medical needs and presents a distinct risk profile for contracting COVID-19, see, e.g., Kress v. CCA of Tennessee, LLC, 694 F.3d 890, 893 (7th Cir. 2012). Respondents also cannot demonstrate typicality because different class members would be entitled to "different injunction[s] or declaratory judgment[s]" depending on their needs. Dukes, 564 U.S. at 360. The injunction reflects as much, because it requires BOP to make individualized assessments about the form of relief or transfer necessary for each class member. And the court has even directed respondents to survey the entire class to determine whether some members wish to remain at Elkton. See p. 17, supra.

CONCLUSION

For the foregoing reasons, this Court should stay the preliminary injunction pending the completion of further proceedings in the court of appeals and, if necessary, this Court. Alternatively, the Court should stay the injunction to the extent it affords class-wide relief. The Court should also grant an administrative stay pending resolution of this application.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

MAY 2020

(ORDER LIST: 590 U.S.)

TUESDAY, MAY 26, 2020

ORDER IN PENDING CASE

19A1041 WILLIAMS, WARDEN, ET AL. V. WILSON, CRAIG, ET AL.

The application for stay presented to Justice Sotomayor and by her referred to the Court is denied.

The Government is seeking a stay only of the District Court's April 22 preliminary injunction. But on May 19, the District Court issued a new order enforcing the preliminary injunction and imposing additional measures. The Government has not sought review of or a stay of the May 19 order in the U.S. Court of Appeals for the Sixth Circuit. Particularly in light of that procedural posture, the Court declines to stay the District Court's April 22 preliminary injunction without prejudice to the Government seeking a new stay if circumstances warrant.

Justice Thomas, Justice Alito, and Justice Gorsuch would grant the application.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TROY WRAGG, MICHAEL SCRONIC, LEONARD BOGDAN, and ELIEZER SOTO-CONCEPCION, individually and on behalf of all others similarly situated, *Petitioners*, v. DAVID E. ORTIZ, in his capacity as Warden of the Federal Correctional Institution, Fort Dix, and MICHAEL CARVAJAL, in his capacity as Director of the Bureau of Prisons, *Respondents*.	Case No. 20-cv-5496-RMB **[PROPOSED] ORDER**

[PROPOSED] ORDER

This Court, having directed the parties to address footnote 26 of the Court's May 27, 2020 opinion (*see* ECF No. 47), and having reviewed the Respondents' Letter submission and Petitioners' Letter Motion for Reconsideration, and any response thereto, pursuant to Local Civil Rule 7.1(i), the Court HEREBY ORDERS that:

1. Petitioners' Motion for Reconsideration (ECF No. 49) is granted;
2. That portion of the Court's May 27, 2020 opinion dismissing Petitioners' Complaint is vacated, and Respondents' Motion to Dismiss will be held in abeyance pending completion of the limited discovery ordered herein; and
3. Discovery shall proceed as follows: Petitioners shall serve discovery requests on Respondents by June 9, 2020; Respondents shall serve responses and objections by June 15, 2020; and the

parties shall meet and confer to develop a joint discovery plan for submission to the Court by June 19, 2020 (or, if the parties cannot agree, they shall submit competing discovery proposals to the Court by that date).

IT IS SO ORDERED.

Date: _____

_____
Hon. Renee Marie Bumb, U.S.D.J.