

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

CRAIG WILSON, et al.,	)	CASE NO.: 4:20cv794
	)	
Petitioners,	)	JUDGE JAMES S. GWIN
	)	
v.	)	
	)	
MARK WILLIAMS, Warden of Elkton Federal Correctional Institution, et al.,	)	<u>CORRECTED EMERGENCY</u>
	)	<u>MOTION FOR STAY</u>
	)	<u>PENDING APPEAL</u>
Respondents.	)	
	)	

Now come Respondents Mark Williams, Warden of Elkton Federal Correctional Institution and Michael Carvajal, Director of Federal Bureau of Prisons (“Respondents”), and, pursuant to Fed. R. Civ. P. 62(d), hereby respectfully move this Court to stay its Order and suspend the preliminary injunction contained therein issued on April 22, 2020 [ECF No. 22], pending final resolution of the appeal filed by Respondents on April 27, 2020. (Notice of Appeal, ECF No. 26 PageID # 394.) The grounds for this Motion are more fully set forth in the Memorandum in Support filed contemporaneously herewith.

(Signatures on the following page.)

Respectfully submitted,

JUSTIN E. HERDMAN
United States Attorney

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Petitioners,	)	JUDGE JAMES S. GWIN
	)	
v.	)	
	)	
MARK WILLIAMS, Warden of Elkton	)	<u>CORRECTED MEMORANDUM</u>
	)	<u>IN SUPPORT OF</u>
Federal Correctional Institution, et al.,	)	<u>EMERGENCY MOTION TO STAY</u>
	)	
	)	
Respondents.	)	

Pursuant to Fed. R. Civ. P. 62(d), Respondents Mark Williams, Warden of Elkton Federal Correctional Institution and Michael Carvajal, Director of Federal Bureau of Prisons (“Respondents”) hereby respectfully request that this Court stay its Order and suspend the preliminary injunction contained therein issued on April 22, 2020 [ECF No. 22], pending final resolution of the appeal filed by Respondents on April 27, 2020, including any further requirement to publish the names on the list compiled by BOP. (Notice of Appeal, ECF No. 26 PageID # 394.) Respondents further respectfully request that the Court stay the briefing schedule for class certification and any hearing related thereto because it will conserve judicial resources and prevent a ruling in a case in which the court of appeals may determine that this Court lacks jurisdiction. Respondents submit that a stay is appropriate in this matter because they are likely to succeed on the merits on appeal and because the preliminary injunction inflicts significant harms on the public and the government that greatly outweigh any potential harm to Petitioners from a stay. Further, Respondents respectfully request an expedited ruling on this motion by 4:00 p.m. on April 30, 2020, because, if this Court does not grant a stay, Respondents will need to seek such relief in the Court of Appeals at that time to ensure meaningful relief in advance of upcoming deadlines and requirements imposed by the Court.

BACKGROUND

On April 22, 2020, the Court issued a preliminary injunction requiring that Respondents (1) identify within one day all members of a “subclass” that the Court defined to include Elkton inmates who are considered to be at high risk according to guidelines of the Centers for Disease Control and Prevention (CDC), (2) 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 weeks; and (3)

transfer subclass members who are ineligible for compassionate release, home release, or parole or community supervision to another BOP facility where appropriate measures, such as testing and single-cell placement, or social distancing, may be accomplished. (ECF# 22 PageID # 371-72.)

In compliance with the Court's order, BOP compiled a list of 837 inmates who are over the age of 65 and/or have diagnosed medical conditions identified by the CDC as making an individual at higher risk of complications from COVID-19. (See, Second Declaration of Kristy Cole ("Cole-2 Decl."), attached hereto as Exhibit A, at ¶ 46.). Compilation of the list satisfied the first requirement of the Court's preliminary injunction. Because inclusion on the list discloses that an inmate has one or more potential risk factors, Respondents moved to seal the list to protect this highly personal and privileged information of hundreds of third-parties. (Mot. to Seal, ECF No. 24 PageID # 389.) The Court denied the Motion on April 27, 2020. (Minutes of Status Conference, ECF No. 27, PageID # 395.)

Under the terms of the Court's preliminary injunction order, BOP estimates that it will take in excess of 418 man-hours to preliminarily evaluate all the inmates on the list for transfer. (Cole-2 Decl. at ¶ 47.) After the preliminary evaluation, significant work is needed to further evaluate and process each inmate prior to the inmate leaving Elkton. (Id. at ¶ 48.) This includes developing a release plan; conducting multiple checks, victim/witness notifications; and considering inmate health issues. (Id.) Many other offices within the Department of Justice—who are not named respondents here—would be required to be involved in the transport release process, including United States Probation Offices, United States Attorneys' Offices, sentencing courts, and the United States Marshal Service. (Id.) The same BOP staff needed to comply with the Court's Order are currently tasked with considering requests made by inmates across the

country who are not on the newly generated list, their normal operational duties, and additional duties already asked of staff in responding to the COVID-19 pandemic. (Id. at ¶ 47.)

Even before the Petitioners brought this action and before the Court issued a preliminary injunction, the BOP was acting urgently to mitigate the risks of COVID-19 within its facilities and to reduce prison populations, to the extent possible and authorized by Congress. The BOP was, for example, already prioritizing the use of home confinement as a tool for combatting the dangers that COVID-19 poses to vulnerable inmates pursuant to the Attorney General's March 26, 2020 and April 3, 2020 Memoranda. (ECF No. 10-2 PageID # 192 at ¶ 17.) The BOP has also been assessing and, in appropriate instances, recommending that an inmate's sentencing court reduce a term of imprisonment under 18 U.S.C. § 4205.

In addition to reducing prison populations, BOP has taken extensive measures to reduce the spread of COVID-19 among the inmates at Elkton, including providing inmate and staff education; conducting inmate and staff screening; testing, quarantine, and isolation procedures; enhanced cleaning and sanitization protocols; providing soap, cleaning supplies, and personal protective equipment (PPE) to inmates; and restricting inmates to their residential area with only one pod moving at a time. (ECF# 10-1 PageID # 178-185 at ¶¶ 19-54). These efforts have been working as the number of new cases has been reduced.

On April 27, 2020, Respondents filed a Notice of Appeal to the Sixth Circuit from the Court's preliminary injunction, including the Court's determination that it has jurisdiction over this case. (Not. of Appeal, ECF No. 26 PageID # 394.) For the reasons discussed below, Respondents respectfully request this Court to stay its Order and suspend the preliminary injunction contained therein issued on April 22, 2020 [ECF No. 22]. On addition, Respondents further request that the Court stay its instruction to file the names of inmates identified by BOP

on the public docket and also stay briefing on class certification.

ARGUMENT

This Court has discretion to stay execution of its judgment pending resolution of an appeal. Fed. R. Civ. P. 62(d). *A. Philip Randolph Institute v. Husted*, 907 F.3d 913, 917 (6th Cir. 2018). Courts consider four factors when determining if a stay is warranted: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Id.*; *Hilton v. Braunskill*, 481 U.S. 870, 867-77 (1987); *Concerned Pastors for Soc. Action v. Khouri*, 844 F.3d 546, 548 (6th Cir. 2016). “These four factors ‘are not prerequisites that must be met, but are interrelated considerations that must be balanced’ together.” *Khouri*, 844 F.3d at 548 (quoting *In re EPA*, 803 F.3d 804, 806 (6th Cir. 2015)). As demonstrated below, Respondents have met their burden of showing that this Court should exercise its discretion to stay its order pending appellate review, *Nken v. Holder*, 556 U.S. 418, 433–34 (2008), because a balancing of the factors supports the issuance of a stay pending appeal. *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 156 (6th Cir. 1991).

I. RESPONDENTS ARE LIKELY TO SUCCEED ON APPEAL

Respondents are likely to succeed on the merits of the appeal because binding Circuit precedent precludes habeas relief in these circumstances, the Prison Litigation Reform Act (PLRA) prohibits the Court from requiring transfer or release of prisoners, and the Petitioners have failed to establish an Eighth Amendment violation. Success on the merits is supported by other courts who have rejected arguments like those made by Petitioners. *See, e.g. Livas v. Myers*, No. 2:20-cv-00422-TAD-KK, 2020 WL 1939583 (W.D. La. Apr. 22, 2020) (Doughty, J.)

(dismissing complaint with prejudice for lack of subject-matter jurisdiction, explaining that designation and classification decisions “fall[] squarely within BOP’s authority and outside the purview of this Court,” and noting that a contrary reading would make the court a “de facto ‘super’ warden of Oakdale”) *Furando v. Ortiz*, No. 1:20-cv-03739-RMB, 2020 WL 1922357 (D.N.J. Apr. 20, 2020) (Bumb, J.) (dismissing habeas petition for failure to exhaust administrative remedies as set forth in 28 CFR §§ 542.10 to 542.19); *Plata v. Newsom*, No. 01-cv-01351, 2020 WL 1908776 (N.D. Cal. Apr. 17, 2020) (Tigar, J.) (holding that the State of California, which had taken measures similar to BOP, had not exhibited “deliberate indifference” even though it could not provide for social distancing and holding that the court would lack authority to release prisoners in any event because only a three-judge court can release prisoners to cure a systemic violation of the Eighth Amendment) A movant “need not always establish a high probability of success on the merits” and a stay is granted with a showing of “serious questions going to the merits” when the movant demonstrates irreparable harm that decidedly outweighs harm to Petitioners. *Griepentrog*, 945 F.2d at 153-54.

A. Habeas Relief Is Improper

As this Court recognized in its April 22, 2020 order, it is well-settled in the Sixth Circuit that a habeas petition under 28 U.S.C. § 2241 “is not the proper vehicle for a prisoner to challenge conditions of confinement.” *Luedtke v. Berkebile*, 704 F.3d 465, 466 (6th Cir. 2013). It is plain that Petitioners here challenge the conditions of their confinement at Elkton. Indeed, Petitioners’ own characterization of their claim is that “incarceration amid the COVID-19 outbreak at Elkton violates their rights to constitutional *conditions of confinement*.” (Pet., ECF No. 1 PageID # 31 (emphasis added; capitalization omitted). The theory of relief is not that there is a defect in Petitioners’ convictions or sentences or that they are entitled to release from

BOP custody, but rather that they should be allowed to complete their terms of custody in a different setting because they believe the *conditions* at the facility where they are currently being held are unconstitutional. These claims are no different from a suit brought under 42 U.S.C. § 1983 alleging that an inmate's conditions of confinement violate the Eighth Amendment because the inmate is not receiving necessary medical care.

The Sixth Circuit held as much in *Martin v. Overton*, 391 F.3d 710, 714 (6th Cir. 2004), where an inmate “sought a transfer to a different prison facility for the purpose of medical treatment.” The court noted that the inmate had improperly asserted that claim under section 2241 because he “did not challenge the terms or validity of his state prison term,” and held that “the district court should have dismissed the petition without prejudice to allow [the inmate] to raise his potential civil rights claim properly as a § 1983 action.” *Id.*

This Court has acknowledged that “[i]nmates challenging BOP’s COVID-19 response challenge the dangerous *conditions* within the prison created by the virus.” Order, ECF No. 22 PageID # 361 (emphasis added). The Court’s decision to grant habeas relief to allegedly medically-vulnerable inmates and require transfer to a different facility directly conflicts with the reasoning in *Martin* that habeas relief is not available—the claims of the subclass here are indistinguishable from the claim in *Martin*. Respondents are therefore likely to establish on appeal that this Court lacks jurisdiction to grant relief under § 2241.

B. The PLRA Precludes the Relief Ordered

Respondents are also likely to succeed in establishing that the preliminary injunction contravenes the Prison Litigation Reform Act’s (“PLRA”) strict limits on the release of prisoners and litigation designed to reduce prison populations or challenge conditions of confinement. The PLRA applies to “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, but . . . not . . . habeas corpus proceedings challenging the fact or duration of confinement in prison.” 18 U.S.C. § 3626(a)(2). This suit challenging health conditions at Elkton plainly falls within this broad provision.

Because the PLRA applies to this suit, any preliminary injunction must “be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm.” 18 U.S.C. § 3626(a)(2). This Court made no finding that its broad preliminary injunction satisfies those requirements. Nor did the Court comply with the PLRA’s requirements that a “prisoner release order”—that is, “any order . . . that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison”—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 the previous court orders.” *Id.* § 3626(a)(3)(A), (B), (g)(4).

In this case, the Court has required BOP to either release subclass members or transfer them to another BOP facility, (Order, ECF No. 22 PageID # 371-72.)—an order that clearly seeks to “limit[]the prison population” at Elkton without satisfying the PLRA’s requirements. The Court has also directed the “nonadmission of prisoners” to Elkton by ordering that “[a]ny subclass members transferred out of Elkton may not return until the threat of the virus is abated or until a vaccine is available,” making the PLRA’s applicability even clearer.

The Court’s only justification for disregarding the PLRA was its conclusion that “the subclass’s claims are properly before the Court as a habeas action.” Dkt. 22 at 19-20. As

explained, however, petitioners' claims are not cognizable in habeas, and even if they were, they do not "challeng[e] the fact or duration of confinement," as is necessary to avoid the PLRA's requirements. 18 U.S.C. § 3626(g)(2).¹ This is no mere technicality: by failing to abide by the PLRA's restrictions in order to superintend BOP's response at Elkton to COVID-19, the Court's order violated Congress's intent "to oust the federal judiciary from day-to-day prison management." *Inmates of Suffolk Cty. Jail v. Rouse*, 129 F.3d 649, 655 (1st Cir. 1997). As the Supreme Court has emphasized, "[c]ourts must be sensitive to the State's interest in punishment, deterrence, and rehabilitation, as well as the need for deference to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals." *Brown v. Plata*, 563 U.S. 493, 511 (2011).

It should be noted that the Court justifies its order in this case based on its belief that "[d]istrict courts have inherent authority to grant enlargement to a defendant..." (ECF No. 22 PageID # 359.) The Court explained that when "a court exercises its power to 'enlarge' the custody of a defendant pending the outcome of a habeas action, the BOP maintains custody over the defendant, but the place of custody is altered by the court." (*Id.*) However, the Court lacks authority to alter the place of custody because BOP has the sole discretion to determine where to confine inmates. 18 U.S.C. § 3621. In fact, the Court's concept of enlargement whereby it can alter the place of custody is specifically rejected by 18 U.S.C. § 3621(b) which provides "[n]otwithstanding any other provision of law, a designation of a place of imprisonment under this subsection is not reviewable by any court." 18 U.S.C. § 3621(b)(emphasis added). See also *Livas*, 2020 WL 1935583, at *8 ("[D]esignation and/or classification falls squarely within BOP's

¹ As we have demonstrated, this suit concerns prison "conditions" and therefore cannot be brought as a habeas action, but must be brought as a civil rights action. Such civil rights actions require exhaustion of administrative remedies under 42 U.S.C. § 1997e. See *Lavista v. Beeler*, 195 F.3d 254, 256-57 (6th Cir. 1999).

authority and outside the purview of this Court. To rule otherwise would make this Court a de facto “super” warden of Oakdale.”); *McKune v. Lile*, 536 U.S. 24, 39 (2002) (“It is well settled that the decision where to house inmates is at the core of prison administrators’ expertise.”); *Fullenwiley v. Wiley*, No. 98-CV-1698, 1999 WL 33504428, at *1 (N.D.N.Y. Oct. 5, 1999) (“[D]iscretionary decisions by the BOP made pursuant to its authority under § 3621(b) are not subject to judicial review”); *see also* 18 U.S.C. § 3625. Although the Court relied on the concept of “enlargement” of a sentence to construe the relief requested by Petitioners as falling within § 2241, that concept is inapplicable here. “Enlargement” is essentially bail pending the adjudication of a habeas petition, but the Sixth Circuit has made clear that “there will be few occasions where a prisoner will meet th[e] standard” for that relief. *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir. 1990).

C. BOP Has Not Violated the Eighth Amendment

Petitioners are also unlikely to prevail on appeal because the BOP has not violated the Eighth Amendment—the only basis for Petitioners’ claims for relief. To succeed on their Eighth Amendment claims, petitioners must satisfy two requirements. First, they must show that they suffer a deprivation that is, “objectively, sufficiently serious,” “result[ing] in the denial of the minimal civilized measure of life’s necessities.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Second, they must show that BOP is acting with “deliberate indifference to inmate health or safety,” “know[ing] of and disregard[ing] an excessive risk to inmate health or safety.” *Id.* at 834, 837; *see also Whitley v. Albers*, 475 U.S. 312, 319 (1986) (“[O]nly the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.”).

As to the first, objective requirement, Petitioners are not being denied the “minimal civilized measure of life’s necessities.” *Farmer*, 511 U.S. at 834. Respondents are acutely aware of the dangers that COVID-19 creates around the world. But risk of exposure to a communicable disease in prison raises Eighth Amendment concerns only if the threat is so severe that it would be “contrary to current standards of decency for anyone to be so exposed.” *Helling v. McKinney*, 509 U.S. 25, 35 (1993). COVID-19 puts prisoners and all other members of the public at unfortunate risk, and the record reflects the numerous steps that BOP has taken and continues to take to protect inmates from those risks to the extent possible. The record establishes that, among other things, BOP has implemented measures for screening inmates for the virus; isolating and quarantining inmates who may have contracted it; conducting testing in accordance with CDC guidelines; limiting and screening staff and visitors; cleaning common areas and giving inmates disinfectant to clean their cells; giving inmates continuous access to sinks, water, and soap; educating staff and inmates about ways to avoid contracting the virus; providing masks to inmates and various other PPE to staff; and limiting inmates’ movement from their residential areas (Cole Decl. ¶ 38; Dees Decl. ¶¶ 19-54). COVID-19 can have tragic effects both within and outside prisons, and “[u]nless there is something about a prisoner’s conditions of confinement that raises the risk of exposure substantially above the risk experienced by the surrounding communities, it cannot be reasoned that the prisoner is involuntarily exposed to a risk the society would not tolerate.” *Hines v. Youssef*, No. 13-cv-357, 2015 WL 164215, at *4 (E.D. Cal. Jan. 13, 2015). Petitioners are thus unlikely to establish that they have been deprived of “the minimal civilized measure of life’s necessities.” *Farmer*, 511 U.S. at 834.

As to the second, subjective requirement, the Respondents have not acted with deliberate

indifference to inmates' health and safety. BOP has taken numerous steps to protect inmate health. More specifically, Elkton implemented each of the six phases of the BOP's national Action Plan (Dees Decl. ¶ 7-18), provides inmate and staff education; conducts inmate and staff screening; put into place testing, quarantine, and isolation procedures in accordance with BOP policy and CDC guidelines; and obtained enhanced cleaning and medical supplies. (*Id.* at ¶ 19.) Additionally, Elkton implemented the "modified operations" in a number of ways, including: "grab and go" meals for inmates, meaning that inmates are permitted to pick up pre-packaged meals at designated times, but must return to their housing units in order to eat; scheduled staggered mealtimes, so that only a single housing unit (approximately 150 inmates) are moving within the facility at any particular time, controlled medication dispensing and commissary are accomplished during these times as well. (*Id.* at ¶ 12.) In addition to the measures BOP is taking to prevent, identify, and treat COVID-19 at Elkton, the BOP is diligently reviewing Elkton inmates' motions for compassionate release and is undertaking, consistent with the Attorney General's directives, identification of inmates who may be transferred to home confinement. (Cole Decl. ¶ 21-37). The record shows the agency's extensive efforts to protect inmates given the inherent constraints of a prison setting and available resources. (Cole Decl. ¶ 38; Dees Decl. ¶ 19-54).

And, as the Supreme Court explained in *Wilson v. Seiter*, 501 U.S. 294, 302-303 (1991), the Eighth Amendment inquiry "depends upon the constraints facing the official"; as demonstrated here, BOP is faced with unprecedented constraints on its resources in responding to the COVID-19 crisis. In light of those constraints, BOP cannot be said to have acted with anything approaching deliberate indifference.

D. The Court Improperly Conditionally Certified the Subclass

The Court recognized that petitioners' definition of a subclass of medically vulnerable inmates "is likely too broad" and limited the subclass to "those identified by the CDC as being at higher risk." Dkt. 22 at 12 & n.50. But the court erred in ordering class-wide relief even on that narrower subclass definition.

To qualify as a class, the members of petitioners' subclass must have met the requirements of Federal Rule of Civil Procedure 23(a) for commonality and typicality. To satisfy the commonality requirement, petitioners must "demonstrate that the class members have suffered the same injury" and assert claims that "depend upon a common contention . . . of such a nature that it is capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). And to satisfy the typicality requirement, petitioners must demonstrate that "a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007). Whether an inmate is entitled to release or transfer is inherently individualized, requiring consideration of the inmate's history and circumstances. *See* Money, 2020 WL 1820660, at *14-15; (*see also* Cole Decl. ¶¶ 15-19, 30, 35-37). Members of the subclass have been convicted of different offenses, have different disciplinary histories, present different safety risks, have different medical concerns, and have different resources and supports available if they are released from prison. Indeed, the Court acknowledged that "the [p]etitioners seek varied relief that allows the BOP to make individualized determination as to where each subclass member should be" and that "'release' might look different for different inmates." Dkt. 22 at 14. Although the Court attempted to frame the case as raising the common question "whether the BOP's failure to create safe conditions for inmates with especially vulnerable health has violated those inmates' rights," *id.* at

13, the Court ignored that both the objective-risk and subjective-indifference prongs of the Eighth Amendment inquiry may differ among subclass members.

II. THE EQUITIES AND PUBLIC INTEREST WARRANT A STAY PENDING APPEAL

A consideration of the equities also supports a stay of the preliminary injunction. In cases involving the government, the harms to the BOP and to the public interest “merge,” *Nken*, 556 U.S. at 435, as demonstrated by the widespread harms to the public and inmates at other institutions if respondents must comply with the Court’s order.

In this case, Respondents and the public will be greatly harmed without a stay. As explained above, in order to comply with the terms of the preliminary injunction, BOP estimates that it will take in excess of 418 man-hours to preliminarily evaluate all the inmates on the list for transfer. (Cole-2 Decl. at ¶ 47.) This is the equivalent of more than five staff members of Elkton’s Case Management Coordinator office working full time to comply with the Court’s order for two weeks. (*Id.*) After the preliminary evaluation, significant work is needed to further evaluate and process each inmate prior to the inmate leaving the institution. (*Id.* at ¶ 48.) This includes developing a release plan conducting multiple checks, notifying victims and witnesses, and considering inmate health issues. (*Id.*) Many other offices who are not before the Court would necessarily be involved in that transport-release process, including United States Probation Offices, United States Attorneys’ Offices, sentencing courts, and the United States Marshal Service. (*Id.*) The same BOP staff needed to comply with the Court’s Order are also currently tasked with considering requests made by inmates who are not on the list, normal operational duties, and additional duties already asked of staff in responding to the COVID-19 pandemic. (*Id.* at ¶ 47.) BOP lacks the resources to both comply with the order, as well as fulfill its mission-critical functions. BOP further lacks the ability to compel other federal offices to

comply with the Court's mandates.

The preliminary injunction further requires transferring potentially hundreds of inmates who are ineligible for release to other BOP facilities. Transferring (or redesignation) of an inmate is, even under normal circumstances, an extremely burdensome process. The BOP must consider, *inter alia*, level of security the inmate requires, the level of security and staff supervision the institution is able to provide, the inmate's program needs, safe and orderly management of the facilities, and protection of the inmate, victims, prison officials, and the public in general. (Cole-2 Decl. at ¶ 11-19; *see also*, Exhibit B, Declaration of Cory Clark ("Clark Decl.") at ¶¶ 9-17.) As explained in Mr. Cole's declaration, transferring so many inmates to comply with the Court's order is virtually impossible. (Clark Decl. at ¶¶ 19-22.) Redesignating so many inmates at once would create a cascade of concerns and threats at exponentially more BOP facilities across the country that would irreparably harm the BOP's nationwide operations, and disrupt its ongoing response to the COVID-19 pandemic.

Further, the mechanics and costs of complying with the Court's preliminary injunction order creates great harm to the BOP. (Exhibit C, Declaration of Peter Pottios ("Pottios Decl."), at ¶¶ 4-10.) As Mr. Pottios explains, it "would be exceptionally difficult if not impossible" to comply with the order. (*Id.* at ¶ 4.) All of the inmates could not be sent to one facility. (*Id.* at ¶ 5.) Further, there would be a limited number of facilities with space, programming needs, and the ability to separate inmates. (*Id.* at ¶ 6.) Even transporting the inmates creates risk of the spread of COVID-19. (*Id.* at ¶ 7.) Not only does this create enormous practical problems, it also would be cost prohibitive. (*Id.* at ¶ 8-10.)

The preliminary injunction, coupled with the Court's instruction on the record to publish the list of inmates, further causes irreparable harm by requiring the names of medically

vulnerable inmates to be published publicly. The preliminary injunction requires BOP to identify inmates who are at higher risk for serious complications from COVID-19 due to age and/or underlying medical conditions. BOP did so. The Court then ordered public filing of the names on that list. The Court has explained that this “includes all Elkton inmates 65 or older and those with documented, pre-existing medical conditions, including heart, lung, kidney, and liver conditions, diabetes, conditions causing a person to be immunocompromised (including, but not limited to cancer treatment, transplants, HIV or AIDS, or the use of immune weakening medications), and severe obesity (body mass index of 40 or higher).” (Order, ECF No. 22 PageID # 363.) This list is therefore made up of the highly personal and privileged information of hundreds of inmates who are not before the Court. Without a stay of any requirement to publish the list, an inmate’s name on a list of medically-vulnerable inmates will always be public and, even if the appeal is successful, there will be no way to retroactively protect their privacy. A stay is appropriate to prevent great and irreparable harm to their privacy. Moreover, inmates on the list may wish to opt out of the class action and may well object to a transfer from a minimum security facility like Elkton to a “single cell” facility.

Those harms to the public and to third parties outweigh any harms a stay would inflict on Petitioners. Even before Petitioners brought this action and before the Court issued a preliminary injunction, the BOP was acting urgently to mitigate the risks of COVID-19 within its facilities and to reduce prison populations, to the extent possible. The BOP was, for example, already prioritizing the use of home confinement as a tool for combatting the dangers that COVID-19 poses to vulnerable inmates pursuant to the Attorney General’s March 26, 2020 and April 3, 2020 Memoranda. (ECF No. 10-2 PageID # 192 at ¶ 17.) The BOP has also been assessing and, in appropriate instances, recommending to an inmate’s sentencing court to reduce

a term of imprisonment under 18 U.S.C. § 4205.

In addition to reducing prison populations, BOP has been taking extensive measures to reduce the spread of COVID-19 among the inmates at Elkton, including providing inmate and staff education; conducting inmate and staff screening; testing, quarantine, and isolation procedures; enhanced cleaning and sanitization protocols; providing soap, cleaning supplies, and personal protective equipment (PPE) to inmates; and restricting inmates to their residential area with only one pod moving at a time. (ECF# 10-1 PageID # 178-185 at ¶¶ 19-54). These efforts have been working as the number of new cases has been reduced. BOP is committed to inmate safety and, even with a stay, will continue its efforts to reduce the inmate population at Elkton and to take measures to prevent the spread of COVID-19 within Elkton.

Further, Respondents submit that staying the brief schedule for class certification and any hearing or decision related thereto is in the public interest. A stay will conserve judicial resources and prevent a ruling in a case in which the Sixth Circuit may soon determine that this Court lacks jurisdiction. It would also prevent confusion among class members regarding whether they need to file their own requests under appropriate administrative procedures or whether their requests are governed by the orders of this Court.

CONCLUSION

For the foregoing reasons, Respondents respectfully urge this Court to grant the Motion to Stay and suspend the preliminary injunction pending appeal.

(Signatures on the following page.)

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Loc. R. 7.1(f), undersigned counsel certifies that the foregoing memorandum is 16 pages and within the limits of an unassigned matter.

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Assistant United States Attorney

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO**

WILSON, ET AL,

Petitioners

v.

WILLIAMS, ET AL,

Respondents

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CASE NO. 4:20-CV-00794

JUDGE GWIN

DECLARATION OF KRISTY COLE

I, Kristy Cole, do hereby declare, certify and state as follows:

1. I am employed by the United States Department of Justice, Federal Bureau of Prisons (BOP). I currently work as the Case Management Coordinator (CMC) at Federal Correctional Institution (FCI) Elkton in Lisbon, Ohio. I have held this position since September, 2007. I have been employed by BOP since March, 1997.
2. The CMC's Office is dedicated to providing oversight of case management activities within the institution. This office works directly with the unit teams, providing training and disseminating information to insure that the institution is in compliance with Correctional Programs' policies and procedures. The CMC provides coordination and oversight of many programs within the institution, including, but not limited to, Central Inmate Monitoring, Financial Responsibility, Admission and Orientation, Inmate Performance Pay, Victim/Witness Program and Adam Walsh Act compliance. The CMC also oversees the Correctional Systems Department. The CMC Office at FCI Elkton has two staff members: myself and an Assistant Case Management Coordinator.

**GOVERNMENT
EXHIBIT**

A

THE BOP'S DESIGNATION AUTHORITY UNDER 18 U.S.C. §3621(b)

3. Attached to this declaration is a true and correct copy of BOP Program Statement 5100.08, Inmate Security Designation and Custody Classification (the "Program Statement").

4. The BOP issued the Program Statement to provide guidance to staff on how to apply

Title 18 United States Code (U.S.C.) § 3621(b), which states in pertinent part:

The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

- (1) the resources of the facility contemplated;
- (2) the nature and circumstances of the offense;
- (3) the history and characteristics of the prisoner;
- (4) any statement by the court that imposed the sentence —
 - (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
 - (B) recommending a type of penal or correctional facility as appropriate; and
- (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

See 18 U.S.C. § 3621(b) (Emphasis added).

OVERVIEW OF THE BOP'S DESIGNATION PROCESS

5. The BOP created the Designation and Sentence Computation Center (DSCC) to centralize all determinations regarding inmate sentence computations and institution placements.

The DSCC is located in Grand Prairie, Texas.

6. Decisions regarding initial institution placements are referred to as designations.

7. DSCC is divided into 18 teams of staff, each identified by a name. Seventeen of these teams are organized by sentencing district. Those 17 teams are responsible for all sentence computations and classification of defendants from their sentencing districts. The remaining

team is Hotel Team. It is responsible for designating the facility where those defendants will serve their criminal sentences

8. Once a defendant is sentenced to a federal term of imprisonment, staff of the United States Probation Office (USPO) upload documents to an electronic system known as “eDesignate”. For cases involving original sentencing to a term of imprisonment, these documents typically include the Judgement in a Criminal Case and the Presentence Investigation Report (PSR). For cases involving sentencing to a term of imprisonment based upon revocation of a term of supervised release, these documents typically include the order by which the court revoked supervised release and imposed a term of imprisonment, along with the revocation petition, which BOP staff also refer to as the violation report.

9. Once USPO staff have uploaded the relevant documents, the case is transferred on eDesignate to the United States Marshals Service (USMS). Typically, USMS staff then upload a copy of the defendant’s USM-129, *Individual Custody/Detention Report*, to eDesignate and then use eDesignate to transfer the case to the BOP and to request that the DSCC either provide a release date for the defendant (in cases where the defendant received a short sentence and there is not sufficient time to transport him to a facility before his release date) or designate the defendant to a facility to serve the term of imprisonment.

10. Once a case has been transferred from the USMS to the BOP, staff of the DSCC team assigned to the defendant’s sentencing district will open the case and begin the designation process. When the process has been completed, DSCC staff respond to the USMS request through eDesignate, usually by notifying the USMS where the inmate will serve the term of imprisonment. The USMS then transports the inmate to the designated facility or, if the

defendant has been allowed to voluntarily surrender, the USMS will notify the defendant of the facility at which he must appear on the scheduled date.

FACTORS IN THE DESIGNATION PROCESS

11. When making designations about inmate designations, the BOP follows the guidance contained in the Program Statement which provides:

This Program Statement provides policy and procedure regarding the Bureau of Prisons inmate classification system. The classification of inmates is necessary to place each inmate in the most appropriate security level institution that also meets their program needs and is consistent with the Bureau's mission to protect society.

The Bureau's classification, designation and redesignation procedures are consistent with the statutory authority contained in 18 U.S.C. § 3621(b). All classification, designation and redesignation decisions are made without favoritism given to an inmate's social or economic status.

PS 5100.08 at page 1.

12. Consistent with the Program Statement, DSCC staff on the team assigned to the defendant's sentencing district consider the following primary factors when making a designation decision: (1) the level of security and supervision the inmate requires; (2) the level of security and staff supervision the institution is able to provide; and (3) the inmate's program needs. *PS 5100.08 at Chapter 1, page 1.*

13. DSCC staff also consider additional factors including, but not limited to:

- The inmate's release residence;
- The level of overcrowding at an institution;
- Any security, location or program recommendation made by the sentencing court;
- Any Central Inmate Monitoring issues (see Program Statement Central Inmate Monitoring Program);

- Any additional security measures to ensure the protection of victims/witnesses and the public in general; and,
- Any other factor(s) which may involve the inmate's confinement; the protection of society; and/or the safe and orderly management of a BOP facility.

PS 5100.08 at Chapter 1, pages 1-2.

14. The designation process involves two parts. First, DSCC staff on the team responsible for the inmate's sentencing district classify the inmate according to a security level (minimum, low, medium or high) and assign the inmate a custody level (community, out, in, or maximum). Second, DSCC staff on Hotel Team designate the inmate to a particular facility commensurate with their security level and custody level and the factors identified below.

15. An inmate's security level represents the level of security the inmate requires. It is based on the Criminal History Points as noted in the Presentence Investigation Report, and, if these points are contested, as ruled upon by the Court in the Statement of Reasons. The BOP has created Public Safety Factors and Management Variables which may adjust the inmate's security level up or down depending on the BOP's professional judgment. *PS 5100.08 at Chapter 5.*

16. An inmate's custody classification represents the amount of staff supervision the inmate requires. It is tied to an inmate's security level. *PS 5100.08 at Chapter 1, page 2 and Chapter 2, page 2.*

THE REDESIGNATION PROCESS

17. Under some circumstances, the BOP may transfer an inmate to a different institution following initial designation. This is referred to as a redesignation. Reasons for requesting redesignation include, but are not limited to disciplinary or closer supervision reasons, institution

classification reasons, institution adjustment reasons, medical/psychological reasons, programming or training reasons, or because an inmate is nearing release. *PS 5100.08 at Chapter 7, pages 1-12.*

18. If institution staff believe an inmate is no longer appropriate for his current institution based on any of the factors identified in Chapter 7 of the Program Statement, they submit a redesignation request to the DSCC. Ordinarily, the DSCC will decide whether to grant or deny the request. DSCC staff will consider redesignation requests using the same factors outlined in paragraphs 24-26. In deciding whether to grant or deny a redesignation request, DSCC staff also carefully review the inmate's institutional adjustment and program performance. *PS 5100.08 at Chapter 1, page 3 and Chapter 7.*

19. If the request is granted, the DSCC will designate the inmate to another facility. If the request is denied, the inmate will remain at the same facility.

THE BOP'S AUTHORITY TO PLACE INMATES ON HOME CONFINEMENT

20. The BOP's statutory authority to transfer prisoners to home confinement rests in 18 U.S.C. § 3624(c)(2) and 34 U.S.C. § 60541. The BOP's policy and procedures regarding home confinement are outlined in BOP Program Statement 7320.01, *Home Confinement* and BOP Operations Memorandum, *Home Confinement under the First Step Act*, both of which are available on www.bop.gov via the Resources tab. Both statutes set forth certain limitations with respect to the BOP's transfer authority. *See* 18 U.S.C. § 3624(c)(2) and 34 U.S.C. § 60541. However, pursuant to the Attorney General's directives in light of the COVID-19 pandemic, dated March 26, 2020, and April 3, 2020, *infra*, and given the surge in positive cases at select sites, the BOP began immediately reviewing all inmates who have COVID-19 risk factors, as

described by the Centers for Disease Control and Prevention (CDC), to determine which inmates are suitable for home confinement. Since the release of the Attorney General's original memorandum dated March 26, 2020, the BOP is prioritizing transfers to home confinement of all suitable inmates as an appropriate response to the COVID-19 pandemic.

The Attorney General's Memorandum for the Director of the Bureau of Prisons, dated March 26, 2020

21. On March 26, 2020, the Attorney General issued a Memorandum for the Director of the Bureau of Prisons (the March 26, 2020, Memorandum) to ensure that, in light of the COVID-19 pandemic, BOP utilizes home confinement, where appropriate, to protect the health and safety of BOP personnel and people in BOP's custody. Pursuant to the March 26, 2020, Memorandum, BOP is prioritizing the use of its statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic. It was noted in the March 26, 2020, Memorandum that many inmates will be safer in BOP facilities where the population is controlled and there is ready access to doctors and medical care. But for some eligible inmates, home confinement might be more effective in protecting their health.

22. In assessing whether home confinement should be granted pursuant to the March 26, 2020, Memorandum, BOP considers the totality of circumstances for each individual inmate, the statutory requirements for home confinement, and the following non-exhaustive list of discretionary factors:

- a. The age and vulnerability of the inmate to COVID-19, in accordance with the CDC guidelines;

- b. The security level of the facility currently holding the inmate, with priority given to inmates residing in low and minimum security facilities;
- c. The inmate's conduct in prison, with inmates who have engaged in violent or gang-related activity in prison or who have incurred a BOP violation within the last year not receiving priority treatment;
- d. The inmate's score under PATTERN (the Prisoner Assessment Tool Targeting Estimated Risk and Need),¹ with inmates who have anything above a minimum score not receiving priority treatment;
- e. Whether the inmate has a demonstrated and verifiable re-entry plan that will prevent recidivism and maximize public safety, including verification that the conditions under which the inmate would be confined upon release would present a lower risk of contracting COVID-19 than the inmate would face in his or her BOP facility;
- f. The inmate's crime of conviction, and assessment of the danger posed by the inmate to the community. Some offenses, such as sex offenses, will render an inmate ineligible for home confinement. Other serious offenses weigh heavily against consideration for home confinement.

23. In addition to setting forth these factors, the March 26, 2020 Memorandum stated that before granting any inmate discretionary release, the BOP Medical Director, or someone he designates, will, based on CDC guidance, make an assessment of the inmate's risk factors for severe COVID-19 illness, risks of COVID-19 at the inmate's prison facility, as well as the risk of COVID-19 at the location in which the inmate seeks home confinement. The BOP will not grant home confinement to inmates when doing so is likely to increase their risk of contracting

¹ For more information on PATTERN, please visit www.bop.gov via Inmates/ First Step Act tab.

COVID-19. The BOP will grant home confinement only when it has determined -- based on the totality of circumstances for each individual inmate -- that transfer to home confinement is likely not to increase the inmate's risk of contracting COVID-19.

24. Moreover, the March 26, 2020 Memorandum noted that for the protection of the public, any inmate to whom BOP grants home confinement is to be placed in a mandatory 14-day quarantine before that inmate is discharged from a BOP facility to home confinement. Inmates transferred to home confinement under this prioritized process are also subject to location monitoring devices and, where a court order is entered, are subject to supervised release.

The CARES Act and the Attorney General's Memorandum for the Director of the Bureau of Prisons, dated April 3, 2020

25. The Coronavirus Aid, Relief, and Economic Security (CARES) Act, Public Law No. 116-236 (enacted March 27, 2020), authorizes the Attorney General to expand the cohort of inmates who can be considered for home confinement upon his finding of emergency conditions which are materially affecting the function of the BOP. On April 3, 2020, the Attorney General made that finding, and in a Memorandum for the Director of the Bureau of Prisons (April 3, 2020 Memorandum), authorized the Director to immediately maximize appropriate transfers to home confinement of all appropriate inmates held at BOP facilities where the Director determines that COVID-19 is materially affecting operations.

26. The April 3, 2020 Memorandum specifically stated that the BOP must move with dispatch in using home confinement, where appropriate, to move vulnerable inmates out of FCI Oakdale, FCI Danbury, and FCI Elkton, and to give priority to those institutions, and others

similarly affected, as the BOP continues to process the remaining inmates who are eligible for home confinement under pre-CARES Act standards.

27. The April 3, 2020 Memorandum directed that the BOP give priority in implementing the new standards to the most vulnerable inmates at the most affected facilities and was explicit that the BOP should begin implementing this directive immediately at the identified facilities and any other facilities at risk of similar problems. The April 3, 2020 Memorandum stated that the review should include a much broader pool of at-risk inmates—not only those who were eligible for transfer prior to the Attorney General exercising his authority under the CARES Act.

28. For inmates deemed suitable candidates for home confinement, the April 3, 2020 Memorandum directed the BOP to immediately process these inmates for transfer and then immediately transfer them following a 14-day quarantine at an appropriate BOP facility. The April 3, 2020 Memorandum further authorized BOP to, in appropriate cases, require that the inmate being transferred undergo his or her 14-day quarantine in the residence to which the inmate is being transferred rather than in the BOP facility from which the inmate is being transferred. The assessment of all inmates remains guided by the factors in the March 26, 2020 Memorandum.

29. The April 3, 2020 Memorandum also recognized that the BOP has limited resources to monitor inmates on home confinement and that the U.S. Probation Office is unable to monitor large number of inmates in the community, and authorized the BOP to transfer inmates to home confinement even if electronic monitoring is not available, so long as it determines in every instance that doing so is appropriate and consistent with the obligation to protect public safety.

30. Lastly, the April 3, 2020 Memorandum stated that it is essential for the BOP to continue making determinations for home confinement in a careful and individualized way that remains faithful to the duty of protecting the public and law enforcement officers.

The BOP's Implementation of the March 26, 2020 and the April 3, 2020 Memoranda

31. The BOP is devoting all available resources to executing the Attorney General's directives, with such resources tailored and prioritized according to the needs of individual institutions across the country. The BOP is assessing the inmate population to determine which inmates would be appropriate for transfer under this priority program. The BOP is then processing those inmates for transfer as expeditiously as possible.

32. The BOP is also frequently updating its public website to provide information and responses to frequently asked questions regarding its response to the COVID-19 pandemic, including providing information regarding its implementation of the Attorney General's directives.

33. The BOP has increased home confinement by 55.2% since March 2020, and is continuing to screen inmates for home confinement. Since the March 26, 2020 Memorandum instructing the BOP to prioritize home confinement as an appropriate response to the COVID-19 pandemic, the BOP has placed an additional 1,576 inmates on home confinement. *See* www.bop.gov (last viewed on April 27, 2020).

34. Inmates do not need to apply to be considered for home confinement. BOP staff are reviewing all inmates to determine which ones meet the criteria established by the Attorney General. While all inmates are being reviewed for suitability for home confinement, any inmate who believes he or she is eligible may request to be reviewed for home confinement and provide a release plan to his or her Case Manager.

35. It should be noted that for public safety reasons, in accordance with the March 26, 2020 Memorandum, and to ensure BOP is deploying its limited resources in the most effective manner, the BOP is currently assessing a number of factors to ensure that an inmate is suitable for home confinement including, but not limited to, reviewing the inmate's institutional discipline history for the last twelve months; ensuring that the inmate has a verifiable release plan; verifying that the inmate's primary or prior offense is not violent, a sex offense, or terrorism related; and confirming the inmate does not have a current detainer.

36. In addition, and in order to prioritize its limited resources, BOP has generally prioritized for home confinement those inmates who have served a certain portion of their sentences, or who have only a relatively short amount of time remaining in those sentences. While these priority factors are subject to deviation in BOP's discretion in certain circumstances and are subject to revision as the situation progresses, BOP is at this time prioritizing for consideration those inmates who either (1) have served 50% or more of their sentences, or (2) have 18 months or less remaining in their sentences and have served 25% or more of their sentences. As BOP processes the inmates eligible for home confinement under these criteria and learns more about the COVID-19 pandemic and its effect on BOP facilities, it is assessing whether and how to otherwise prioritize consideration.

37. If the incarcerated individual does not qualify for home confinement under BOP criteria, an inmate may be reviewed for placement in a Residential Reentry Center and home confinement at a later stage in accordance with applicable laws and BOP policies.

Measures to Protect Inmate and Staff Safety

38. In response to the pandemic, BOP has taken significant measures to protect the health of the inmates in its charge. These steps include, but are not limited to the following:

- a. Beginning April 13, 2020, BOP implemented Phase VI of the Action Plan, which currently governs operations. The current modified operations plan requires that all inmates in every BOP institution be secured in their assigned cells/quarters for a period of at least 14 days, in order to stop any spread of the disease. Only limited group gathering is afforded, with attention to social distancing to the extent possible, to facilitate commissary, laundry, showers, telephone, and computer access. Further, BOP has severely limited the movement of inmates and detainees among its facilities. Though there will be exceptions for medical treatment and similar exigencies, this step as well will limit transmissions.
- b. All staff and inmates have been and will continue to be issued an appropriate face covering and strongly encouraged to wear the face covering when in public areas when social distancing cannot be achieved.
- c. Every newly admitted inmate is screened for COVID-19 exposure risk factors and symptoms. Asymptomatic inmates with risk of exposure are placed in quarantine. Symptomatic inmates are placed in isolation until they test negative for COVID-19 or are cleared by medical staff as meeting CDC criteria for release from isolation. In addition, in areas with sustained community transmission and at medical centers, all staff are screened for symptoms. Staff registering a temperature of 100.4 degrees Fahrenheit or higher are barred from the facility on that basis alone. A staff member with a stuffy or runny nose can be placed on leave by a medical officer.

- d. Contractor access to BOP facilities is restricted to only those performing essential services (e.g. medical or mental health care, religious, etc.) or those who perform necessary maintenance on essential systems. All volunteer visits are suspended absent authorization by the Deputy Director of BOP. Any contractor or volunteer who requires access will be screened for symptoms and risk factors.
- e. Social and legal visits were stopped as of March 13, 2020, and remain suspended until at least May 18, 2020, to limit the number of people entering the facility and interacting with inmates. In order to ensure that familial relationships are maintained throughout this disruption, BOP has increased detainees' telephone allowance to 500 minutes per month. Tours of facilities are also suspended. Legal visits will be permitted on a case-by-case basis after the attorney has been screened for infection in accordance with the screening protocols in place for prison staff, contractors, and visitors.
- f. Further details and updates of BOP's modified operations are available to the public on the BOP website at a regularly updated resource page:

www.bop.gov/coronavirus/index.jsp

Compassionate Release / Reduction in Sentence Procedures

44. The BOP lacks the authority to provide inmates with a reduction in sentence through compassionate or "early release." Rather, only an Article III judge—specifically, the inmate's sentencing judge—may authorize such a reduction of an inmate's federal sentence. However, on an inmate's request, the Director of the BOP may make a motion to an inmate's sentencing court to reduce a term of imprisonment under 18 U.S.C. § 4205(g) and 18 U.S.C. §

3582(c)(1)(A). The BOP uses these statutory authorities in “extraordinary or compelling circumstances” which could not reasonably have been foreseen by the court at the time of sentencing. This process is outlined in BOP Program Statement 5050.50, *Compassionate Release/Reduction In Sentence Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)*. (This BOP program statement is available at www.bop.gov via the Resources tab).

45. Additionally, the First Step Act specifies that an inmate may file a Motion for Reduction of Sentence directly in the sentencing court after exhaustion of administrative remedies, or 30 days from the date the warden receives such a request from the inmate, whichever is earlier. *See* 18 U.S.C. § 3582(c)(1)(A).

REQUIREMENTS OF THE PRELIMINARY INJUNCTION

46. I understand BOP has been ordered by the Court in *Wilson, et al. v. Williams, et al.*, No. 4:20-cv-00794 (N.D. Ohio Apr. 22, 2020), to create a list of inmates at FCI Elkton identified by the CDC as being at higher risk of complications from COVID-19. I further understand that BOP has been ordered to evaluate each inmate that is identified for transfer out of FCI-Elkton through any means, including but, not limited to, compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough within two weeks. I further understand that BOP has been ordered to transfer any identified inmate who is ineligible for compassionate release, home release, parole, or community supervision to another BOP facility. I further understand that BOP has compiled a list of 837 inmates who are over the age 65 and/or have diagnosed medical conditions that are identified by the CDC as making an individual at higher risk of complications from COVID-19.

47. The CMC Office’s preliminary evaluation of each inmate on the list of 837 inmates for transfer would likely take in excess of 418 man-hours—the equivalent of more than five CMC

staff members working full time on compliance with this aspect of the district court's order for two weeks. This dedication of work does not include consideration of requests made by the other roughly 1,700 inmates not included on the list. This also does not include the normal operations of the CMC Office nor does this include the additional duties asked of each staff member across all BOP institutions during this world-wide pandemic.

48. Significant work is needed in order to further evaluate and process each inmate prior to the inmate leaving the institution. Importantly, this includes developing a release plan, and having an officer with the United States Probation Office investigate that plan. Moreover, BOP conducts multiple checks at a variety of levels, for example, N.C.I.C. checks for warrants, victim/witness notifications, and health issues to ensure the continuing safety of the inmate and of the community, before the inmate's release date. Finally, in the case of a request for Compassionate Release, coordination with the U.S. Attorney's Office in the district where the inmate was sentenced is necessary so that a motion could be filed before the sentencing judge for Compassionate Release. Each of these stages with various entities makes it impossible to predict how many man-hours this would require and/or how long this process would take per inmate.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed on this 27th day of April 2020.

A handwritten signature in black ink, appearing to read "Kristy Cole", is written over a horizontal line.

Kristy Cole
Case Manager Coordinator
Federal Correctional Institution
Elkton, Ohio

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO**

WILSON, ET AL,

Petitioners

v.

WILLIAMS, ET AL,

Respondents

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*
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CASE NO. 4:20-CV-00794

JUDGE GWIN

DECLARATION OF CORY CLARK

I, Cory Clark, do hereby declare, certify and state as follows:

1. I am employed by the United States Department of Justice, Federal Bureau of Prisons (BOP). I currently work as a Senior Designator for the Designations and Sentence Computation Center (DSCC) in Grand Prairie, Texas. I have held this position since January 2006. I have been employed by BOP since January 1996.

THE BOP'S DESIGNATION AUTHORITY UNDER 18 U.S.C. §3621(b)

2. Attached to this declaration is a true and correct copy of BOP Program Statement 5100.08, Inmate Security Designation and Custody Classification (the "Program Statement").

3. The BOP issued the Program Statement to provide guidance to staff on how to apply Title 18 United States Code (U.S.C.) § 3621(b), which states in pertinent part:

The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

- (1) the resources of the facility contemplated;
- (2) the nature and circumstances of the offense;
- (3) the history and characteristics of the prisoner;

**GOVERNMENT
EXHIBIT**

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- (4) any statement by the court that imposed the sentence –
 - (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
 - (B) recommending a type of penal or correctional facility as appropriate; and
- (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

See 18 U.S.C. § 3621(b) (Emphasis added).

OVERVIEW OF THE BOP'S DESIGNATION PROCESS

4. The BOP created the DSCC to centralize all determinations regarding inmate sentence computations and institution placements.
5. Decisions regarding initial institution placements are referred to as designations.
6. Once a defendant is sentenced to a federal term of imprisonment, staff of the United States Probation Office (USPO) upload documents to an electronic system known as “eDesignate”. For cases involving original sentencing to a term of imprisonment, these documents typically include the Judgement in a Criminal Case and the Presentence Investigation Report (PSR). For cases involving sentencing to a term of imprisonment based upon revocation of a term of supervised release, these documents typically include the order by which the court revoked supervised release and imposed a term of imprisonment, along with the revocation petition, which BOP staff also refer to as the violation report.
7. Once USPO staff have uploaded the relevant documents, the case is transferred on eDesignate to the United States Marshals Service (USMS). Typically, USMS staff then upload a copy of the defendant’s USM-129, *Individual Custody/Detention Report*, to eDesignate and then use eDesignate to transfer the case to the BOP and to request that the DSCC either provide a release date for the defendant (in cases where the defendant received a short sentence and there is not sufficient time to transport him to a facility before his release date) or designate the defendant to a facility to serve the term of imprisonment.

8. Once a case has been transferred from the USMS to the BOP, staff of the DSCC team assigned to the defendant's sentencing district will open the case and begin the classification process. Once classified, the case is referred to the Hotel Team who is responsible for completing designations. When the process has been completed, DSCC staff respond to the USMS request through eDesignate, usually by notifying the USMS where the inmate will serve the term of imprisonment. The USMS then transports the inmate to the designated facility or, if the defendant has been allowed to voluntarily surrender, the USMS will notify the defendant of the facility at which he must appear on the scheduled date.

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PS 5100.08 at page 1.

10. Consistent with the Program Statement, DSCC designation staff consider the following primary factors when making a designation decision: (1) the level of security and supervision the inmate requires; (2) the level of security and staff supervision the institution is able to provide; and (3) the inmate's program needs. *PS 5100.08 at Chapter 1, page 1.*

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- The level of overcrowding at an institution;
- Any security, location or program recommendation made by the sentencing court;
- Any Central Inmate Monitoring issues (see Program Statement Central Inmate Monitoring Program);
- Any additional security measures to ensure the protection of victims/witnesses and the public in general; and,
- Any other factor(s) which may involve the inmate's confinement; the protection of society; and/or the safe and orderly management of a BOP facility.

PS 5100.08 at Chapter 1, pages 1-2.

12. The designation process involves two parts. First, DSCC staff on the team responsible for the inmate's sentencing district classify the inmate according to a security level (minimum, low, medium or high). Second, DSCC staff on Hotel Team designate the inmate to a particular facility commensurate with their security level and custody level and the factors identified below.

13. An inmate's security level represents the level of security the inmate requires. Security level is determined by several classification items, to include: an inmate's voluntary status, months to release, severity of current offense, criminal history score, history of violence and escape, detainer/pending charges, age, education level, and drug and alcohol abuse. In addition, the BOP has created Public Safety Factors and Management Variables which may adjust the inmate's security level up or down depending on the BOP's professional judgment. *PS 5100.08 at Chapter 5.*

14. An inmate's custody classification represents the amount of staff supervision the inmate requires. It is tied to an inmate's security level. *PS 5100.08 at Chapter 1, page 2 and Chapter 2, page 2.*

THE REDESIGNATION PROCESS

15. Under some circumstances, the BOP may transfer an inmate to a different institution following initial designation. This is referred to as a redesignation. Reasons for requesting redesignation include, but are not limited to disciplinary or closer supervision reasons, institution classification reasons, institution adjustment reasons, medical/psychological reasons, programming or training reasons, or because an inmate is nearing release. *PS 5100.08 at Chapter 7, pages 1-12.*

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BOP has been ordered to evaluate each inmate that is identified for transfer out of FCI Elkton through any means, including but, not limited to, compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough within two weeks. I further understand that BOP has been ordered to transfer any identified inmate who is ineligible for compassionate release, home release, parole, or community supervision to another BOP facility. I further understand that BOP has compiled a list of 837 inmates who are over the age 65 and/or have diagnosed medical conditions that are identified by the CDC as making an individual at higher risk of complications from COVID-19. Finally, I understand that inmates transferred from FCI Elkton are to be sent to another BOP facility where measures, such as single-cell placement or social distancing, may be accomplished.

19. There are several reasons why compliance with the Judge's Order in this case is impossible.

20. The Judge has ordered that inmates transferred from FCI Elkton be sent to another BOP facility where measures, such as single-cell placement or social distancing, may be accomplished. However, inmates are not designated to particular cells. Rather, when a designation is made, DSCC considers the rated capacity and target populations of the prospective institution to determine whether there is enough space per inmate in the physical confines of the institution. The Warden of each institution determines how that space is to be used (single cell, double cell, etc.) depending on the number of inmates designated there and the available space. Thus, there is no way inmates could be transferred with any assurances that the inmate receive a single cell assignment at the new institution.

21. I believe BOP staff are doing their best during the pandemic to provide those social distancing measures that can be provided for the benefit of inmates and staff. However, there is

no way to determine which institutions are appropriate to transfer inmates based on where social distancing measures could be accomplished. The measures put in place depend on the physical layout of the respective institution. For example, the measures in place at a BOP camp would certainly differ from those taken at one of BOP's maximum security prisons. Thus, there can be no guarantee that a new facility can provide the measures desired by the Judge.

22. Additional factors besides space capacity and availability of social distancing must be considered by DSCC when re-designating inmates. These factors, including but not limited to programing needs such as the Residential Drug Abuse Program (RDAP), location recommendations from the inmate's sentencing judge, care levels, and separatee/gang issues, care must be considered. These factors further limit the number of available options for transfer.

23. Should BOP attempt to comply with the Judge's Order, it is expected that a substantive review of an inmate's situation and needs would take between 30-40 minutes per inmate on average. Of course, simpler cases would require less time. Complicated cases, such as inmates who require special supervision (of which approximately 50 are housed at FCI Elkton), may require more time and levels of review.

24. Finally, even if the DSCC could comply in this instance with the Judge's Order, it would be impossible to replicate this should any other Judges issue the same Order. In short order, BOP/DSCC would be unable to transfer inmates pursuant to one Court's mandate without violating another Court's similar order.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed on this 28th day of April 2020.

CORY CLARK Digitally signed by CORY
CLARK
Date: 2020.04.28 12:18:23
-05'00'

Cory Clark
Senior Designator
Designation and Sentence Computation
Center

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO**

WILSON, ET AL,

Petitioners

v.

WILLIAMS, ET AL,

Respondents

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CASE NO. 4:20-CV-00794

JUDGE GWIN

DECLARATION OF PETER POTTIOS

I, Peter Pottios, do hereby declare, certify and state as follows:

1. I am employed by the United States Department of Justice, Federal Bureau of Prisons (BOP). I currently work as the Prisoner Transportation Coordinator for the Designations and Sentence Computation Center (DSCC). I work in Kansas City, Missouri. I have held this position since July 2016. I have been employed by BOP since May 1991.
2. As the Prisoner Transportation Coordinator, I work as the BOP's liaison to the Justice Prisoner & Alien Transportation System (JPATS). JPATS, managed by the United States Marshals Service, is a system for transporting prisoners and criminal aliens between judicial districts, correctional institutions and foreign countries. JPATS supports the federal judiciary through its scheduling and transportation responsibilities. JPATS transports sentenced prisoners who are in the custody of the BOP to hearings, court appearances and detention facilities.
3. I understand BOP has been ordered by the Court in *Wilson, et al. v. Williams, et al.*, No. 4:20-cv-00794 (N.D. Ohio Apr. 22, 2020), to create a list of inmates at FCI Elkton identified by the CDC as being at higher risk of complications from COVID-19. I further understand that

BOP has been ordered to evaluate each inmate that is identified for transfer out of FCI-Elkton through any means, including but, not limited to, compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough within two weeks. I further understand that BOP has been ordered to transfer any identified inmate who is ineligible for compassionate release, home release, parole, or community supervision to another BOP facility. I further understand that BOP has compiled a list of 837 inmates who are over the age 65 and/or have diagnosed medical conditions that are identified by the CDC as making an individual at higher risk of complications from COVID-19. Finally, I understand that inmates transferred from FCI Elkton are to be sent to another BOP facility where measures, such as single-cell placement or social distancing, may be accomplished.

4. Complying with the Judge's Order would be exceptionally difficult if not impossible for a variety of reasons.

5. In the past, there have been occasions when BOP has had to transfer large numbers of inmates at one time due to natural disasters, such as damage caused to facilities from tornados or hurricanes. The most recent example occurred at FCI Estill in Estill, South Carolina earlier this month. In that situation, BOP was forced to transfer about the same number of inmates (832) that are involved in the list in this case. However, those inmates were transferred together and all brought to the same location, USP Lewisburg, which was able to accommodate the security level needed for those inmates.

6. Should BOP be forced to comply with the Judge's Order, I do not believe there is a low security facility that would be able to house the FCI Elkton inmates as a group. Rather, smaller groups of inmates would be transferred together to a variety of BOP's low security institutions

around the nation. The list of low security facilities is further reduced when other factors, such as space capacity, programing needs, separatee requirements, and other issues are considered.

7. One of the Court's concerns is that medically vulnerable inmates maintain social distancing. The ability to maintain this during transportation is almost impossible. If inmates are transported by bus from one institution to another, up to 40 inmates are transported together making social distancing between inmates and BOP staff impossible. Flights, which normally can carry up to 126 inmates, are now capped at 81 in an effort to reduce contact during the pandemic. Still, inmates/staff are around each other in an enclosed environment. Thus, eliminating the chances of the spread of disease is impossible.

8. Another impact with complying with the Judge's Order is the monetary cost associated. JPATS charges BOP for the cost of transporting inmates. JPATS charges BOP \$15,790 per flight hour to transport inmates on its planes. In Fiscal Year 2018, it cost an average of \$863 per inmate to transport an inmate by air. It cost an average of \$190 per inmate to transport an inmate by bus.

9. The mission to transfer the Estill inmates took BOP staff four days and cost in excess of \$1,000,000. Transporting inmates to various institutions, as described above, would increase these costs tremendously.

10. The costs described above do not include the number of man-hours it would take to move the inmates, which obviously varies depending on the distance and mode of transportation. However, BOP can spend on average between \$600-\$2,000 in additional expenses and per diem costs for each group of 40 inmates transported by bus.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed on this 28th day of April 2020.

PETER POTTIOS

Digitally signed by PETER
POTTIOS
Date: 2020.04.28 13:14:34
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Peter Pottios
Prisoner Transportation Coordinator
Designation and Sentence Computation
Center