UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

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

PETITIONERS' OPPOSITION TO RESPONDENTS' EMERGENCY MOTION TO STAY PENDING APPEAL

INTRODUCTION AND BACKGROUND

The crisis at FCI Elkton and FSL Elkton (jointly, "Elkton") continues to worsen, even in the few days since this Court's interim order. A 55-year old man with long-term pre-existing medical conditions—whose name appears on Respondents' preliminary list of the subclass in this action—died on Sunday, April 26.[1] The Federal Bureau of Prisons (BOP) website reports that 49 prisoners and 48 staff at Elkton have now tested positive for COVID-19—although these appear to be current rather than cumulative numbers, as they have fluctuated.[2] As of Friday, April 24, 25 people from Elkton were hospitalized, with 10 on ventilators.[3]

[1] Jo Ann Bobby-Gilbert, *Seventh Elkton Inmate Dies from COVID-19*, BUSINESS DAILY (April 27, 2020), https://businessjournaldaily.com/seventh-elkton-inmate-dies-from-covid-19-2/ (accessed April 28, 2020); *Columbus man is seventh inmate who dies of COVID-19 at Elkton Correctional*, WKBN (April 27, 2020), https://www.nbc4i.com/community/health/coronavirus/columbus-man-is-seventh-inmate-who-dies-of-covid-19-at-elkton-correctional/ (accessed April 28, 2020).

[2] Federal Bureau of Prisons, *COVID-19: Coronavirus*, https://www.bop.gov/coronavirus/ (accessed April 30, 2020).

[3] Neena Satija & Matt Zapotosky, *Amid Coronavirus Pandemic, Federal Inmates Get Mixed Signals About Home Confinement Releases*, WASHINGTON POST (April 24, 2020), *available at*

Those numbers assuredly understate the scope of the problem, given the dearth of testing being conducted at Elkton—a situation that Senator Rob Portman recently decried as "unacceptable," noting that it "threatens the lives of the FCI Elkton inmates as well as Ohioans in the greater northeast Ohio region."[4] By Respondents' own account, only a few dozen prisoners have been tested, and only 25 tests per week are anticipated to be made available. *See* ECF No. 19. At that pace, even if all tests were allocated to prisoners rather than staff and no one was tested more than once, the entire Elkton population would not be tested until early 2022. Even the Medically-Vulnerable Subclass could not be fully tested until roughly November 2020.

Meanwhile, BOP has provided little reassurance, or even clarity, on any plans to move prisoners to home confinement. It has reversed itself repeatedly on its internal criteria for home confinement, particularly the question of whether prisoners must serve at least half of their sentences. "First they needed to have met that mark, then they didn't, then the requirement was apparently reinstated … Then, on Wednesday, a new Bureau of Prisons memo indicated that prisoners who had not hit the halfway point were still eligible."[5] BOP's equivocation "contrasts sharply with some local and state actions that have released thousands of inmates deemed to be the most vulnerable or the least dangerous amid escalating outbreaks of the coronavirus."[6]

Respondents plainly will not take the decisive, life-saving actions necessitated by the emergency at Elkton on their own initiative. By requesting a stay pending appeal, they ask for this Court's permission to continue a pattern of tentative half-measures. Respondents have failed to

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https://www.washingtonpost.com/investigations/amid-coronavirus-pandemic-federal-inmates-get-mixed-signals-about-home-confinement-releases/2020/04/24/0bbc5458-84de-11ea-a3eb-e9fc93160703_story.html (accessed April 28, 2020).

[4] *Portman Urges U.S. Department of Justice and Bureau of Prisons to Increase COVID-19 Testing at FCI Elkton* (April 27, 2020), *available at* https://www.portman.senate.gov/newsroom/press-releases/portman-urges-us-department-justice-and-bureau-prisons-increase-covid-19 (accessed April 29, 2020).

[5] *Id.*

[6] *Id.*

demonstrate a likelihood of success on the merits or irreparable injury in the absence of a stay—but should a stay issue, the impact on Petitioners, subclass members, and the community will be disastrous.

I. Respondents Have Failed To Demonstrate a Strong Likelihood of Success on Appeal

"On a motion to stay pending appeal, district courts balance the following factors: (1) the likelihood that the party seeking the stay will prevail on appeal; (2) whether denial of a stay would irreparably harm the moving party; (3) whether the stay will harm others; and (4) the public interest in granting the stay." *Capital One Bank (USA) N.A. v. Jones*, 710 F. Supp. 2d 634, 636 (N.D. Ohio 2010); *see Nken v. Holder*, 556 U.S. 418, 434 (2009). These "interrelated" factors "must be balanced together," *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991), and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the Court's] discretion." *Nken*, 556 U.S. at 433–34. Because a stay "is an 'intrusion into the ordinary processes of administration and judicial review,'" it is never issued as a matter of right, even if irreparable injury may result. *Id.* at 427 (citations omitted).

A. Petitioners Have Demonstrated Deliberate Indifference

"It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Helling v. McKinney*, 509 U.S. 25, 31 (1993). It is also undisputed that recklessly exposing a prisoner to a serious infection is unconstitutional. *See, e.g., id.*; *Hutto v. Finney*, 437 U.S. 678, 682 (1978) (among the prison conditions for which the Eighth Amendment required a remedy was placement of prisoners in punitive isolation under conditions where infectious diseases could spread easily).

The Court correctly concluded that conditions at Elkton prison satisfy both the objective and subjective standards of deliberate indifference. To satisfy the objective standard, "[a]ll that [a prisoner] needs to show is that [he] was 'incarcerated under conditions posing a substantial risk of

serious harm.'" *Richko v. Wayne Cty., Mich.*, 819 F.3d 907, 916 (6th Cir. 2016) (quotation omitted); *see also Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (objective standard is met if deprivation is "sufficiently serious" or that the prisoner "is incarcerated under conditions posing a substantial risk of serious harm."). As the Court noted, "Petitioners obviously satisfy this component." PI Order, ECF 22 at 16. COVID-19 kills, the uncontested evidence shows a high risk of infection in settings such as Elkton, and a high risk of death, hospitalization, and suffering for everyone—a risk heightened among members of the subclass. Although Respondents suggest the risk is the same in Elkton as it is elsewhere, this is refuted by the uncontested evidence, *see* Novisky Decl., ECF No. 1-3, ¶ 10 (shared sleeping and eating spaces, and shared bathrooms and showers, increase risks to Elkton's population "dramatically"); Goldenson Decl., ECF No. 1-4, ¶ 32 (noting that under these conditions, the spread of COVID-19 will be "magnified" at Elkton, and "[t]he death rate will increase substantially before it starts to diminish"), as well as Elkton's growing death toll. While governments go to extraordinary steps to mandate social distancing and limit large gatherings outside of prison, Respondents have not disputed that prisoners inside Elkton are denied the ability to take that necessary, life-saving step.

Petitioners are also likely to prevail on the subjective prong, showing that prison officials were deliberately indifferent to these substantial risks. Respondents argue that they are taking *some* steps, but these steps are not enough. *See United States v. Rodriguez*, 2020 WL 1627331, Case No. 2:03-cr-0271, ECF No. 135 (E.D. Pa., April 1, 2020) ("The government's assurances that the BOP's 'extraordinary actions' can protect inmates ring hollow given that these measures have already failed to prevent transmission of the disease[.]"). People at Elkton are dying at alarming rates. *See Brown v. Plata*, 563 U.S. 493, 505 n.4 (2011) (upholding an injunction when there was a preventable death among prisoners every five to six days, in a population more than 60 times

larger than that at Elkton). "A prisoner is not required to show that he was literally ignored by the staff to prove an Eighth Amendment violation, only that his serious medical needs were consciously disregarded." *Rouster v. Cty. of Saginaw*, 749 F.3d 437, 448 (6th Cir. 2014) (cleaned up). Custodians are still deliberately indifferent if they took some action, observed that it was failing, but choose not to adjust. *See, e.g*, *Richmond v. Huq*, 885 F.3d 928, 944 (6th Cir. 2018) ("It is insufficient for a doctor caring for inmates to simply provide some treatment for the inmates' medical needs"); *Darrah v. Krisher*, 865 F.3d 361, 369 (6th Cir. 2017) ("continuing to treat him with Methotrexate after Darrah had been on the drug for several months without any noticeable improvement"); *Phillips v. Roane Cty.*, Tenn., 534 F.3d 531, 541 (6th Cir. 2008) (providing observation and limited care, but failing to provide "appropriate" medical care, was deliberate indifference); *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004) (putting prisoner into protective custody but failing to protect her from a risk that persisted even in protective custody was unconstitutional).

Respondents are aware that their methods aren't working, and despite CDC direction, they continue to forcibly expose prisoners to large, congregate settings of more than 100 people that would be illegal on the outside. Even after the Attorney General directed Respondents to begin moving people to home confinement, barely anyone has been moved, and from Respondents' briefing and declarations, it appears that they are willing to delay implementation of the AG's direction for weeks or months, by which time it will be too late. They have not even been able to procure more than a few dozen tests, even as state prisons in Ohio have been able to test everyone.[7]

[7] Bill Chappell & Paige Pfleger, *73% of Inmates at an Ohio Prison Test Positive for Coronavirus*, NPR (Apr. 20, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/04/20/838943211/73-of-inmates-at-an-ohio-prison-test-positive-for-coronavirus.

Respondents also suggest that they should be excused from providing constitutionally adequate protection from a deadly virus because of "constraints" that they are under. But just like a prison cannot stop providing food or medical care just because it is expensive, the Bureau of Prisons cannot simply allow prisoners to suffer needlessly because it does not want to devote additional staff time. Prisons may have some discretion, but they cannot choose a course of action that they know will cost lives and immense suffering. "If government fails to fulfill [their obligation to prisoners], the courts have a responsibility to remedy the resulting Eighth Amendment violation … Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Plata*, 563 U.S. at 511. Petitioners are likely to prevail on their Eighth Amendment claim.

B. Petitioners' Claim Is Properly Brought Under § 2241, Rendering the PLRA Inapplicable

Respondents are also unlikely to persuade the Sixth Circuit that habeas relief is inappropriate in these circumstances, or that the Prison Litigation Reform Act (PLRA) applies.

"Habeas is at its core a remedy for unlawful executive detention." *Munaf v. Geren,* 553 U.S. 674, 693 (2008). It exists to allow prisoners to challenge "the fact or duration of [their] confinement." *Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005). When such a challenge is based on "the manner or execution of" a prisoner's sentence, Sixth Circuit precedent provides that prisoners may bring it under 28 U.S.C. § 2241. *States v. Peterman,* 249 F.3d 458, 461 (6th Cir. 2001).

Petitioners claim that their and others' current detention at Elkton is unlawful; they thus properly challenge the "fact or duration of" their confinement via habeas. *See Dotson*, 544 U.S. at 78. More specifically, they argue that keeping them locked in a crowded prison amid an insufficiently stanched outbreak of a highly contagious and potentially fatal disease is what makes the fact or duration of their confinement unlawful. *See* section I.A, *supra*. They thus properly

brought this case principally under § 2241, because their quarrel is not with the validity of their sentences, but rather "the manner or execution of" those sentences—serving them in the midst of a runaway, inadequately addressed outbreak at Elkton, which poses a substantial risk of serious illness or death. *See Peterman*, 249 F.3d at 461; PI Order, ECF 22 at 11; section I.A, *supra*.

Respondents' highlighting the phrase "conditions of confinement," e.g., ECF 30-1 at 6, does not change the answer. The Sixth Circuit has indeed stated that "§ 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). But while Petitioners have used that phrase colloquially to describe the problems at Elkton, they are not challenging—and thus are not seeking a remedy regarding—the conditions at Elkton. Rather, they are seeking the remedy that habeas corpus has always been defined by and existed to enable: a release from (or reduction in) custody. *See Munaf,* 553 U.S. at 693; *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973). Petitioners claim a right not to more soap or to more prophylactic measures within Elkton's walls, but rather to at least a "quantum change in the level of custody." *See Terrell v. United States*, 564 F.3d 442, 448 (6th Cir. 2009) (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J., concurring)); *accord* PI Order, ECF 22 at 7–8, 10–11.[8] Indeed, that is the only remedy that would be effective to cure their injury.

Martin v. Overton, 391 F.3d 710 (6th Cir. 2004), is not to the contrary. In that case, a state prisoner who had previously been incarcerated at one state prison—and been treated by a particular doctor there—was transferred to a different state prison. *Id.* at 712. He sought to be transferred back to the first state prison for further treatment with his old doctor by filing a *pro se* petition

[8] To be sure, the woefully inadequate "conditions" at Elkton help explain why "the only truly effective remedy" at this point appears to be "the release of a portion of the population." *Cf.* PI Order, ECF 22 at 10. But that merely helps explain, in turn, why Petitioners are challenging their confinement itself, not simply its conditions. *Cf. Bailey v. Wainwright*, 951 F.3d 343, 346–47 (6th Cir. 2020) ("A challenge to a judgment, including one based on the method of implementing the sentence, challenges the extent of an inmate's custody.").

under §2241. *Id.* The Sixth Circuit, unremarkably, observed that the prisoner was wrong to bring his claim under §2241, because "[h]e did not challenge the terms or validity of his state prison term," but rather "sought a transfer to a different prison facility for the purpose of medical treatment and civil damages resulting from the alleged delay and denial of that treatment." *Id.* at 714. That kind of claim against a state prison official, the court rightly observed, would have properly been brought under §1983. *Id.*[9]

Petitioners' claims are nothing like the claim in *Martin*. Martin was seeking medical care from a particular doctor, as well as damages for its absence; he was not challenging the fact or duration of his confinement in any way. *See id.* at 712. Had his old doctor seen him at his new prison, he would have had no claim at all. *See id.* Petitioners, by contrast, cannot escape the risk of serious illness or death posed by Respondents' inaction in the face of the COVID-19 outbreak at Elkton unless at least some subset of them have their confinement changed or reduced, which is why their claim does challenge the fact or duration of their confinement. *See* PI Order, ECF 22 at 10–11.

As noted by the Court, the change in confinement that Petitioners seek is not what many people refer to colloquially as "release," but rather a broader set of potential alterations in custody that would remove them "from the physical confines of Elkton" but not necessarily from Respondents' custody. *See* Pet., ECF 1 at ¶ 4, n. 2; PI Order, ECF 22 at 11. The Court has noted that these kinds of alterations in custody have been better known as "enlargement," PI Order, ECF 22 at 8, which Respondents appear at one point to concede the Sixth Circuit has recognized is a power held by federal district courts, *see* Stay Mem., ECF 30-1 at 10; *Dotson v. Clark*, 900 F.2d

[9] Petitioners have invoked §1331 and the Eighth Amendment an alternative basis for this Court's jurisdiction in this suit seeking only injunctive and declaratory relief against federal officers, *see* Pet., ECF 1 at ¶ 8, 81, 96; Reply, ECF 18 at 11–12, but that basis is unnecessary to address further because this suit is properly brought under §2241.

77, 79 (6th Cir. 1990); *see also, e.g.*, *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001); *Landano v. Rafferty*, 970 F.2d 1230, 1238–39 (3d Cir. 1992); 28 U.S.C. § 2243 (court shall "dispose of the matter as law and justice require").[10]

As for Respondents' separate argument that enlargement is impermissible in this context because 18 U.S.C. § 3621(b) provides that "a designation of a place of imprisonment under this subsection is not reviewable by any court," that argument fails both textually and structurally. First, § 3621(b) requires that prison assignments "meet[] minimum standards of health and habitability," which of course these do not. Second, § 3621(b) clearly cannot divest the federal courts of power to remedy illegal detention, *see* U.S. Const. art. I, § 9, cl. 2; *Boumediene v. Bush*, 553 U.S. 723, 771 (2008), yet on Respondents' broad reading, it would, since habeas often entails reviewing (and altering) a person's "place of imprisonment." Indeed, while Respondents elsewhere suggest that a suit such as Petitioners' "must be brought as a civil rights action," Stay Mem., ECF 30-1 at 9 n. 1, Respondents' theory would seem to bar those too. Even a prisoner claiming that prison itself was not an authorized sentence, *cf. In re Bonner*, 151 U.S. 242, 254–56 (1894); *Wright v. Spaulding*, 939 F.3d 695, 698 (6th Cir. 2019), would be left with no remedy.[11] Respondents' theory, in other words, proves too much.[12]

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[10] Respondents observe that, under circuit precedent, the standard for exercising such power will be met only in extraordinary cases. Stay Mem., ECF 30-1 at 10; *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir. 1990). Petitioners do not disagree, but wonder what circumstances Respondents anticipate being more extraordinary than these.

[11] *See also Washington v. Fed. Bureau of Prisons*, No. CV 5:16-3913-BHH, 2018 WL 6061039, at *3 (D.S.C. Nov. 20, 2018) (concluding that BOP's "discretion" under §3621(b) "is not unbridled" and is still "subject to review for compliance with federal law," including "the Eighth Amendment").

[12] Furthermore, Respondents give no reason why the Court cannot "exercise[] its power to 'enlarge' the custody of [prisoners at Elkton] pending the outcome of [this] habeas action," *cf.* PI Order, ECF 22 at 8, so as to ensure that Elkton prisoners do not fall sick or die before the case can be properly resolved, *see, e.g.*, *Landano v. Rafferty*, 970 F.2d 1230, 1238–39 (3d Cir. 1992); *Puertas v. Overton*, 272 F. Supp. 2d 621, 630 (E.D. Mich. 2003). Nor do Respondents explain why the Court would be unable to grant preliminary relief in support of that authority. *See* 28 U.S.C. §1651 (authorizing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"); PI Order, ECF 22 at 9.

Finally, as the Court has already recognized, PI Order, ECF 22 at 19–20, the PLRA does not apply to this case. That is because, as already discussed, Petitioners challenge the fact or duration of their confinement via habeas, whereas the PLRA provisions on which Respondents rely do not apply to "habeas corpus proceedings challenging the fact or duration of confinement in prison[.]" 18 U.S.C. § 3626(g)(2); *see also Jones v. Bock*, 549 U.S. 199, 200 (2007). And even if Petitioners' claims could have been brought outside of habeas as well, that does not preclude them having been properly brought *in* habeas. *See Adams v. Bradshaw,* 644 F.3d 481, 482–83 (6th Cir. 2011); *Terrell*, 564 F.3d at 448.

Respondents are thus unlikely to succeed on appeal in any argument that this Court lacked authority to issue its preliminary injunction. Moreover, contrary to Respondents' rhetoric, Petitioners are not seeking to involve the Court in "day-to-day prison management," Stay Mem., ECF 30-1 at 9 (quoting *Inmates of Suffolk Cty. Jail v. Rouse*, 129 F.3d 649, 655 (1st Cir. 1997)), but rather seeking reasonable, tailored habeas relief amid extraordinary circumstances to safeguard their and their fellow prisoners' lives, in light of Respondents' unconstitutional failure to do so.

C. Preliminary Class Certification Is Warranted

Respondents' two-paragraph attack on this Court's conditional class ruling does not meet their burden to show that they are likely to succeed on appeal. There, Respondents would need to make a "strong showing" that this ruling "amounted to a clear abuse of discretion." *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013) (stressing that review is "narrow" and "very limited" (internal quotation marks omitted)). The ruling here had two parts: Rule 23(a)'s four requirements and Rule 23(b)(2)'s requirement. *See* PI Order, ECF No.

22 at 12. Of these five requirements, Respondents argue that just *one* is not met here: commonality. *See* Stay Mot., ECF No. 30-1 at 13.[13] That is wrong.

Respondents first seize on this Court's statement that the Proposed Subclass "is *likely* too broad." PI Order, ECF No. 22 at 12. To start, that statement was made on the basis of the record to date. *See, e.g.*, *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018) ("[T]he manner and degree of evidence required at the preliminary class certification stage is not the same as at the successive stages of the litigation." (internal quotation marks omitted)). And there is evidence that the risk to the portion of the Proposed Subclass for which this Court raised a question—those between ages 50 and 65—are seriously at risk from COVID-19. *See* Certification Mot., ECF No. 33-1 at 4 n.4. In any event, the Court granted preliminary relief after exercising its discretion to identify a narrower Subclass—as relevant, those over the age of 65—that it did *not* think was too broad. *Accord Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007).

Respondents' next argue that the commonality requirement is not met because the relief Petitioners seek would require BOP to make individualized determinations when assessing how to transfer those members out of Elkton. *See* Stay Mot., ECF No. 30-1 at 13. But when it comes to commonality, "there need be only one common question to certify a class." *Whirlpool*, 722 F.3d at 853. There are numerous common questions in this litigation that—when answered—will advance this litigation. *See* Certification Mot., ECF No. 33-1 at 3–4 (listing, for example, fact questions regarding BOP's actions to reduce the risk of COVID-19 spread and whether those actions comply with CDC guidelines). Nor, in any event, does the fact *BOP* may have to make

[13] Respondents mention "commonality and typicality," but do not separately discuss typicality. Stay Mot., ECF No. 30-1 at 13. Their choice not to challenge the other four requirements means they have forfeited any argument that those requirements are not met. In any event, Petitioners' have explained why all five requirements are met. *See* Certification Mot., ECF No. 33-1.

individualized determinations *after* this Court renders a judgment mean that this Court will not need to address questions common to the class to reach that judgment.

In one sentence, Respondents suggest that the two-pronged test for deliberate indifference "may" differ among subclass members. Stay Mot., ECF No. 30-1 at 14. But the Subclass definition this Court identified borrows from the categories that the Government itself uses to identify those who are objectively at high risk for COVID-19.[14] And Respondents have not shown that they have treated some members of that Subclass differently (or more indifferently) than others based on this kind of risk calculation.

Respondents thus have not shown they are likely to prevail on appeal on this issue.[15]

II. Respondents Have Not Demonstrated that They Will Suffer Irreparable Injury Absent a Stay

The Government has also failed to demonstrate that it faces irreparable harm without a stay—one of the "most critical factors." *Nken v. Holder*, 556 U.S. 418, 434 (2009). Respondents claim irreparable harm because, they complain, they will have to devote agency staff time to implementing the injunction. Stay Mot., ECF No. 30-1 at 14 ("BOP estimates that it will take in excess of 418 man-hours to preliminarily evaluate all the inmates on the list for transfer."). This is not enough. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Sampson v. Murray*, 415 U.S. 61, 90 (1974); *see also, e.g., Ohio State Conference of N.A.A.C.P. v. Husted*, 769 F.3d 385, 389 (6th Cir. 2014).

[14] *See* Centers for Disease Control and Prevention, People Who Are at Higher Risk for Severe Illness, https://bit.ly/cdcrisks (last visited Apr. 29, 2020).

[15] It is also not clear that a conditional certification ruling is appealable at this stage in the first place. *See, e.g.*, *Taylor v. Pilot Corp.*, 697 F. App'x 854, 858 (6th Cir. 2017) ("A district court's decision to approve notice to a conditionally-certified FLSA class is not a final judgment on the merits. It is also not a collateral order excepted from the final-judgment rule.").

As an afterthought, Respondents mention that "[r]edesignating 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." Other than stating a legal conclusion, Respondent does not explain the scope of the disruption or point to evidence that it would prohibit the agency from completing its mission. As noted in the next section, the equities clearly favor prisoners' lives over inconvenience to agency staff. Respondents point only to agency inconvenience, not irreparable harm. This factor weighs against their motion.[16]

III. Petitioners Would Suffer Substantial Harm From A Stay

As the Court has observed, Elkton is "fight[ing] a losing battle" to contain the spread and impact of COVID-19 within the prison walls. PI Order, ECF No. 22 at 2. Crowding and close contact are inherent to life at Elkton, and render social distancing—the cornerstone of any effort to slow the spread of respiratory disease—impossible. *See* Pet., ECF No. 1 at ¶ 19. People are continuing to die. *See supra* note 1. Absent quick action to carry out the interim relief ordered by this Court, the situation will likely continue to worsen. *See* Novisky Decl. ¶ 6; Goldenson Decl. ¶ 29; *Rodriguez*, 2020 WL 1627331, at *8 (the BOP's actions have "already failed to prevent transmission of the disease" at Elkton). Petitioners, and others in the Medically-Vulnerable Subclass, continue to face this danger daily. Time is of the essence to move them out of Elkton.

The health and lives of the nonmovants weigh strongly against a stay. *See, e.g.*, *Concerned Pastors for Soc. Action v. Khouri*, 844 F.3d 546, 549 (6th Cir. 2016) (rejecting requested stay because injunction reduced the "risk of exposure to lead"). Courts have frequently found far less

[16] Respondents also seek a stay of the portion of the order that requires them to file a list of people who fit the definition of the putative class. That request was untimely when filed, but is now moot, as Respondents have now filed the list following denial of an administrative stay by the Sixth Circuit.

extreme harms to nonmovants to be "substantial" in the context of a stay. *See, e.g.*, *id.*; *Griffiths v. Ohio Farmers Ins. Co.*, No. 1:09-CV-1011, 2010 WL 2774446, at *3 (N.D. Ohio Jul. 12, 2010) (Gwin, J.) ("[d]elaying discovery or the start of a trial" was itself substantial harm); *Glover v. Johnson*, No. 77-CV-71229, 1994 WL 799392, at *1 (E.D. Mich. Jan. 14, 1994) (denying motion for stay or reconsideration in order to preserve the ability to renew a contract for paralegal training); *see also Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1199-1200 (6th Cir. 1983) ("time is of the essence" is a valid reason to deny a stay).

The harm to a nonmoving party need not be irreparable—merely "substantial"—to defeat a motion to stay. *See, e.g.*, *Hosp. Auth. of Metro. Gov't of Nashville & Davidson Cty. v. Momenta Pharm., Inc.*, No. 3:15-CV-01100, 2019 WL 5305506, at *3 (M.D. Tenn. Oct. 21, 2019) (threshold met by delay of a remedy to plaintiffs). The harm to Petitioners and class members from a stay here would be both. The health, and even in some cases the lives, of Medically-Vulnerable Subclass members depend upon swift enforcement of this Court's interim order. Respondents' requested stay, if granted, would leave them exposed to serious illness and death.

IV. A Stay Would Be Contrary to the Public Interest

As noted above, *see supra* section II, requiring Respondents to expend agency staff time and transfer particularly vulnerable prisoners would not pose meaningful harms to the public interest, particularly when balanced against the harm that Petitioners and other prisoners at Elkton are facing. Nor does the fact that Respondents have taken *some* remedial steps, Stay Mem., ECF 30-1 at 16–17, render a stay in the public interest, given that the problem all along has been that Respondents half-measures have been tragically inadequate. *See* section I.A, *supra*.

The public, meanwhile, has an inherent interest in the prompt resolution of this matter. *See Willis v. Big Lots, Inc.*, No. 2:12-CV-604, 2017 WL 1734224, at *3 (S.D. Ohio May 4, 2017) ("there is a strong public interest in the efficient resolution of litigation," cognizable in the context

of a stay), *report and recommendation adopted*, No. 2:12-CV-604, 2017 WL 2493142 (S.D. Ohio June 8, 2017). This is always so where constitutional rights are at stake. *See G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("it is always in the public interest to prevent the violation of a party's constitutional rights").

But even further, the community has a direct health interest that would be endangered by a stay. Leaving Elkton to remain as a COVID-19 breeding ground places both its staff and the general public at risk. Left in its current state, it will continue to act as a concentrated source of the infection that can be carried out to the surrounding community, by allowing it to act as a concentrated source of infection for the surrounding area. Goldenson Decl. ¶ 32 ("What's more, the infection in Elkton would not stay limited to the facility, but would worsen infection rates in the broader community."); Novisky Decl. ¶ 13 ("With institutional staff filtering in and out of Elkton on a daily basis, staff can easily carry the infection from the community to the prison and vice versa."). As Senator Portman observed in an April 27 letter urging BOP to increase testing, "[e]ven as we make strides in Ohio to quell this pandemic, outbreaks in congregate settings like prisons can spill over through the staff and medical professionals who are coming in and out of the prison each day to care for these inmates and could undo the progress that we are making."[17] This Court's interim order is the first step towards halting that potentially lethal dynamic. The public interest is therefore best served by expediting that order, not staying it.

Respondents also misread *Nken v. Holder* in attempting to equate the public's interest with Respondents' own in this context. *Nken* does not provide that a government-movant's claimed hardships are equivalent to the public interest. Rather, the Court in *Nken* stated that the third and

[17] *Portman Urges U.S. Department of Justice and Bureau of Prisons to Increase COVID-19 Testing at FCI Elkton* (April 27, 2020), *available at* https://www.portman.senate.gov/newsroom/press-releases/portman-urges-us-department-justice-and-bureau-prisons-increase-covid-19 (accessed April 29, 2020).

fourth factors merge when the government is "the opposing party", *i.e.*, the nonmovant. 556 U.S. at 435; *see also Slyusar v. Holder*, 740 F.3d 1068, 1074 (6th Cir. 2014). The basis for this merging is the public's interest in "prompt execution" of valid orders, 556 U.S. at 436, and "valid law[s]," *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 571 U.S. 1061, 1062 (2013). That same reasoning weighs not *for* Respondents here, but against them; the public has an interest in seeing this Court's order executed promptly, the Constitution vindicated, and the risk to the health of prisoners, staff, and the community mitigated. Respondents have failed to demonstrate irreparable harm to themselves absent a stay, but even were it otherwise, the public interest is distinct from Respondents' own and weighs against a stay. *See Nken*, 556 U.S. at 436.

CONCLUSION

For the foregoing reasons, this Court should deny Respondents' motion for a stay pending appeal.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2020, the foregoing was filed with the Court's CM/ECF system. Notice of this filing will be sent by operation of that system to all counsel of record.

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