No. 20-3447

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 04, 2020
DEBORAH S. HUNT, Clerk

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

Petitioners-Appellees,

v.

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

Respondents-Appellants.

O R D E R

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

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

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

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

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

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

Section 2241 provides jurisdiction to district courts over habeas petitions when a petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). The Supreme Court has neither foreclosed a prisoner from using, nor authorized a prisoner to use, habeas relief to challenge his conditions of confinement. *See Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973). We need not reach this question here, however. Petitioners seek release for the subclass not because the conditions of their confinement fail to prevent irreparable constitutional injury at Elkton, but based on the fact of their confinement. Where a petitioner claims no set of conditions would be constitutionally sufficient, we construe the petitioner's claim as challenging the fact of the confinement. *See Adams v. Bradshaw*, 644 F.3d 481, 483 (6th Cir. 2011); *cf. Terrell v. United States*, 564 F.3d 442, 446−48 (6th Cir. 2009). Petitioners' proper invocation of § 2241 also forecloses any argument that the PLRA applies given its express exclusion of "habeas corpus proceedings challenging the fact or duration of confinement in prison" from its ambit. 18 U.S.C. § 3626(g)(2).

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

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

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

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

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

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

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk