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.,	)	**MOTION TO DISMISS**
Respondents.	)	

Now come Respondents Mark Williams, Warden of Elkton Federal Correctional Institution, and Michael Carvajal, Director of Federal Bureau of Prisons ("Respondents"), by and through their undersigned counsel, and, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, respectfully move this Honorable Court to dismiss Petitioners' Emergency Petition for Writ of Habeas Corpus, Injunctive Relief, and Declaratory Relief. The grounds for this Motion are more fully set forth in the Memorandum in Support filed contemporaneously herewith and incorporated herein by this reference.

(Signatures on next page)

Respectfully submitted,

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Petitioners,	)	JUDGE JAMES S. GWIN
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v.	)	
	)	
MARK WILLIAMS, Warden of Elkton Federal Correctional Institution, et al.,	)	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**
	)	
	)	
Respondents.	)	

Pursuant to Fed. R. Civ. P. 12(b)(6), 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 issue an order dismissing Petitioners' Emergency Petition for Writ of Habeas Corpus, Injunctive Relief, and Declaratory Relief (ECF No. 1, PageID # 1-38) (the "Petition") for failure to state a claim upon which relief can be granted.

BACKGROUND

On April 13, 2020, Petitioners Craig Wilson, Eric Bellamy, Kendal Nelson, and Maximino Nieves (collectively, "Petitioners") filed the Petition. Invoking this Court's habeas corpus jurisdiction pursuant to 28 U.S.C. § 2241, Petitioners, on behalf of themselves and a proposed class and subclass of medically-vulnerable inmates, sought "release" from Elkton based upon what they claimed were conditions of confinement that violated the Eighth Amendment. ECF No. 1, PageID # 2, 29, 35. The gravamen of Petitioners' claim was their contention that social distancing is required to adequately mitigate the risk associated with COVID-19, that social distancing was not possible at Elkton, and that conditions at Elkton therefore denied them the minimal civilized measure of life's necessities. Because Petitioners contended that there was "*no* set of internal protocols or practices that, in light of the current conditions and population levels, Elkton can use that will prevent further disease and death inside the prison," *Id.*, para. 4, PageID # 2, Petitioners sought injunctive relief requiring "immediate release of the Medically-Vulnerable Subclass and potentially more." *Id.*, para. 88, PageID # 33.

Petitioners stressed, however, that by "release," they did not mean unfettered discharge into society at large, and "not necessarily release from custody." *Id.*, PageID # 2 n.2. Instead,

Petitioners defined release to include a variety of forms of relief in which inmates would nevertheless remain in BOP custody, but not physically confined at Elkton, including "release to parole or community supervision; transfer furlough (as to another facility, hospital, or halfway house); or non-transfer furlough, which could entail a released person's eventual return to Elkton once the pandemic is over and the viral health threat is abated." *Id.*

On April 22, 2020, after briefing and a hearing, the Court granted in part and denied in part Petitioners' request for preliminary injunctive relief. ECF No. 22, PageID # 352-72. The Court found that inmates outside the medically-vulnerable subclass were asserting "a confinement conditions claim" that was not cognizable under § 2241 because they sought "the oversight of a public health expert to mitigate the risk COVID-19 poses to class members that remain incarcerated at Elkton." *Id.*, PageID # 362. Conversely, the Court found that inmates in the medically-vulnerable subclass were asserting a claim "closer to a challenge to the manner in which the sentence is served," which the Court concluded was "cognizable under 28 U.S.C. § 2241." *Id.* The Court went on to certify the medically vulnerable subclass as a "conditional class," under Fed. R. Civ. P. 23(b)(2), but, finding Petitioners' subclass definition "likely too broad," the Court limited the subclass to "all Elkton inmates 65 years 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). *Id.*, PageID # 363.

Although the Court found Respondents had undertaken "good efforts" to try to limit the spread of COVID-19 and had instituted "better practices" to reduce inmate contact, *id.*, PageID # 356, it nonetheless concluded Petitioners were likely to succeed on the merits of their Eighth

Amendment claim. *Id.*, PageID # 367. The Court entered a preliminary injunction requiring that Respondents (a) "identify within one (1) day all members of the subclass," (b) "evaluate each subclass member's eligibility for transfer out of Elkton through any means, including, but not limited to, compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough within two (2) weeks," and (c) transfer subclass members found to be 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." *Id.*, PageID # 371-72.

On April 27, 2020, Respondents appealed the preliminary injunction to the Sixth Circuit. ECF No. 26, PageID # 394. While the appeal was pending, Respondents complied with the injunction's first and second requirements (by identifying members of the subclass and evaluating each subclass member's eligibility for transfer out of Elkton through any means). ECF No. 35, PageID # 521-22; ECF No. 63, PageID # 928-29. On June 4, 2020, the Supreme Court stayed the preliminary injunction, as well as this Court's May 19 order enforcing the injunction, "pending disposition of the Government's appeal in the United States Court of Appeals for the Sixth Circuit" and further order of Justice Sotomayor or of the Supreme Court. Order, *Wilson v. Williams*, No. 19A1047 (U.S. June 4, 2020). The Supreme Court's stay remains in place.

On June 9, 2020, the Sixth Circuit issued its opinion vacating the preliminary injunction on the ground that Petitioners were unlikely to succeed on the merits. *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020). For the reasons explained below, controlling precedent, including the Sixth Circuit's ruling in this case, forecloses Petitioners' claims and requires dismissal of the Petition.

ARGUMENT

I. Rule 12(b)(6) Standard of Review

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 663-64, 678 (2009); *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 (2007). This standard requires that the factual allegations "raise a right to relief above the speculative level," and "nudge[] the[] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 555. In deciding a motion to dismiss, a court must treat all factual allegations as true and construe the complaint in the light most favorable to the plaintiff. *Lambert v. Hartman*, 517 F.3d 433, 438-39 (6th Cir. 2008). The court "need not, however, accept conclusory allegations or conclusions of law dressed up as facts." *Erie County, Ohio v. Morton Salt, Inc.*, 702 F.3d 860, 867 (6th Cir. 2012).

II. The Petition Fails to State a Claim for Relief

A. Petitioners Cannot Properly Invoke 28 U.S.C. § 2241 Because They Do Not Seek Release from BOP Custody and Would Have No Grounds for Doing So, as Their Claims Could Be Remedied Through Means Other than Release

As an initial matter, the Sixth Circuit determined that "[b]ecause petitioners outside the medically-vulnerable subclass sought improvement in the conditions at Elkton rather than release, the district court correctly concluded that the claims by these inmates were conditions of confinement claims not appropriately considered under § 2241." *Wilson*, 961 F.3d at 838. That finding mandates dismissal of Petitioner Nieves's claim, along with those brought on behalf of any potential class members outside the medically-vulnerable subclass.

Regarding the medically-vulnerable subclass (which allegedly includes Petitioners Wilson, Bellamy, and Nelson), the Sixth Circuit held that the Court had jurisdiction over their claims under § 2241 because – *but only to the extent that* – "they challenge the fact or extent of

confinement by seeking release from custody." *Id.* at 837. The court of appeals found that such a claim could proceed in habeas, but only so long as the petitioner "claims that no set of conditions would be constitutionally sufficient." *Id.* at 838. It concurrently explained, however, that to the extent Petitioners sought "relief in the form of improvement of prison conditions or transfer to another facility," their claims were "not properly brought under § 2241." *Id.*

Thus, as the Sixth Circuit recognized, the decision to proceed under § 2241 "limit[ed] the type of relief available to petitioners." *Id.* As the court of appeals cautioned, "[a] district court reviewing a claim under § 2241 does not have authority to circumvent the established procedures governing the various forms of release enacted by Congress." *Id.*

Applying these carefully circumscribed parameters to Petitioners' claims shows that Petitioners fail to state a claim compatible with the scope of § 2241 as defined by the Sixth Circuit. The Petition itself made clear that Petitioners were not seeking outright release from BOP custody. ECF No. 1, PageID # 2 n.2. The forms of relief mentioned in the Petition (and erroneously defined as "release") included a variety of remedies, none of which actually involved BOP relinquishing custody of the inmate. Petitioners sought to be placed on parole, community supervision, transfer furlough, or non-transfer furlough. *Id.* Under any of those scenarios, however, the inmates—even if successful—would remain in BOP custody, and would not actually be "released." Indeed, this Court concluded as much in its preliminary injunction decision, stating that what Petitioners really sought was "enlargement," which the Court noted "is not release." ECF No. 22, PageID # 359. And since the Sixth Circuit concluded that habeas jurisdiction exists under § 2241 only to the extent the petitioner necessarily seeks release from confinement, Petitioners' claims fail as a matter of law.

To the extent the Petition sought relief that might relate more closely to actual release

from custody – such as through compassionate release – any such claim is likewise foreclosed by the Sixth Circuit's ruling. Regarding compassionate release, the Sixth Circuit explained that "although the BOP has the ability to recommend compassionate release, only the sentencing court is authorized to reduce a term of imprisonment." *Wilson*, 961 F.3d at 844 (citing 18 U.S.C. § 3582(c)). Relief against BOP in this suit obviously would not compel a sentencing court to release Petitioners from custody, and, as noted above, Petitioners cannot use a habeas petition under § 2241 "to circumvent the established procedures governing the various forms of release enacted by Congress." *Id.* at 838.

Even read generously, the factual allegations in the Petition do not support a plausible claim that release is the necessary remedy for Petitioners' claims. Indeed, Petitioners have conceded (and this Court previously found) that the allegedly unconstitutional conditions at Elkton could be remedied by means other than release – such as transfer to another institution, which this Court ordered but the Sixth Circuit definitively held "was not proper under § 2241." *Wilson*, 961 F.3d at 839. Because their claims are predicated on the assertion that the ability to maintain adequate social distancing is constitutionally mandated (a theory which, as explained below, cannot be squared with the Sixth Circuit's decision), Petitioners cannot allege facts that could plausibly demonstrate that release from custody represents the only way to remedy the alleged violation – *i.e.*, that "no set of conditions" of custody "would be constitutionally sufficient." *Id.* at 838. On the contrary, transferring inmates (though not necessarily subclass members) to other BOP facilities, while not an available remedy in this habeas proceeding, would suffice to cure the alleged violation while keeping Petitioners in custody. Indeed, this Court acknowledged the sufficiency of transfer as a remedy in its preliminary injunction ruling, as well as Petitioners' concession that release from custody was not necessary. ECF No. 22,

PageID # 370 ("[I]t bears repeating that Petitioners are not asking the Court to dump inmates out into the streets. No one's interest would be served in doing so. The Court is confident that the transfer of prisoners from Elkton to other means of confinement could accomplish the goal of protecting Elkton's vulnerable population while also protecting public safety."); ECF No. 37, PageID # 548 ("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."). Similarly, reducing the overall inmate population to a level that permitted social distancing (likewise achievable without releasing any subclass member) would also resolve Petitioners' complaints about social distancing without resulting in the release of Petitioners themselves. Because the facts Petitioners allege would not entitle them to outright release from custody, their claims must be dismissed.

B. The Petition Fails to State an Eighth Amendment Violation Because Petitioners' Allegations Cannot Establish Deliberate Indifference

Even if Petitioners were asserting claims for outright release that fit within the contours of § 2241 (which they are not), the Petition must be dismissed because Petitioners do not plausibly allege that Respondents have acted with deliberate indifference in violation of the Eighth Amendment, as the Sixth Circuit's ruling underscores. Under the subjective prong of the Eighth Amendment analysis, to violate the prohibition on "cruel and unusual punishments," an official must "know[] of and disregard[] an excessive risk to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "[T]he Eighth Amendment prohibits mistreatment only if it is tantamount to 'punishment,' and thus courts have imposed liability upon prison officials only where they are so deliberately indifferent to the serious medical needs of prisoners as to unnecessarily and wantonly inflict pain." *Perez v. Oakland County*, 466 F.3d 416, 423 (6th Cir.

2006) (quotation marks omitted). "[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Farmer*, 511 U.S. at 844.

On appeal, the Sixth Circuit did not disturb any of this Court's factual findings, but undertook de novo review of the mixed question of "whether the BOP's conduct could constitute deliberate indifference." *Wilson*, 961 F.3d at 840. The Sixth Circuit determined that "as of April 22, the BOP responded reasonably to the known, serious risks posed by COVID-19 to petitioners at Elkton." *Id.* After noting the steps taken by BOP to combat the virus, the Sixth Circuit "agree[d]" that BOP's "actions show it has responded reasonably to the risk posed by COVID-19 and that the conditions at Elkton *cannot be found to violate the Eighth Amendment*." *Id.* at 841 (emphasis added). It further found that "BOP's efforts to expand testing *demonstrate the opposite of a disregard of a serious health risk*." *Id.* (emphasis added). Nothing in the Petition plausibly suggests that BOP's assiduous efforts to respond to the COVID-19 pandemic reflect "deliberate indifference" to inmates' health and safety, much less "deliberateness tantamount to intent to punish." *Miller v. Calhoun County*, 408 F.3d 803, 813 (6th Cir. 2005).

Likewise, the Sixth Circuit conclusively rejected Petitioners' assertion that Respondents acted unreasonably by not making "full use of the tools available to remove inmates from Elkton." *Wilson*, 961 F.3d at 844. Acknowledging that courts "must take into account the 'constraints facing the official[s]," the court of appeals held that the law does "not require prison officials [to] take every possible step to address a serious risk of harm." *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 303 (1991)). Here, "[i]n light of the BOP's other measures to prevent the spread of COVID-19, and given the limitations on the BOP's authority to release inmates, its failure to make robust use of transfer, home confinement, or furlough to remove inmates in the

medically vulnerable subclass from Elkton *does not constitute deliberate indifference*." *Id.* (emphasis added).

Based on its review of the record, the court of appeals ruled that "petitioners' argument that the BOP's response to the COVID-19 virus has been so ineffective as to constitute deliberate indifference fails." *Id.* at 843. Consequently, the Sixth Circuit vacated the preliminary injunction because Petitioners' Eighth Amendment claim presented no likelihood of success on the merits, explaining: "[O]ur cases warn that a court must not issue a preliminary injunction where the movant presents *no likelihood* of merits success." *Id.* at 844 (quoting *Daunt v. Benson*, 956 F.3d 396, 421-22 (6th Cir. 2020)) (emphasis added). Thus, the court of appeals concluded that this Court "erred in holding that petitioners had demonstrated a likelihood of success on their Eighth Amendment claim." *Id.* The Sixth Circuit labeled this conclusion "dispositive." *Id.* Accordingly, the Sixth Circuit's holding reinforces not only that Petitioners were unlikely to succeed on the merits under controlling precedent, but that they cannot do so.[1]

As the foregoing discussion of the Sixth Circuit's decision makes clear, the Petition does not, and Petitioners cannot, establish a violation of the Eighth Amendment. Consequently, the Petition fails to state a claim for relief and must, therefore, be dismissed.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court enter an order dismissing the Petition.

[1] In an even more recent decision, which applied and followed *Wilson* in vacating a preliminary injunction entered against the Oakland County, Michigan Jail, the Sixth Circuit made explicit its finding that the "Plaintiffs' claims fail on the merits." *Cameron v. Bouchard*, No. 20-1469, 2020 WL 3867393, at *4 n.1 (6th Cir. July 9, 2020). This further illustrates the case-dispositive nature of the *Wilson* majority's Eighth Amendment holding.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(f)

The undersigned certifies that this Memorandum in Support of Motion to Dismiss is within the 20-page limitation set by Local Rule 7.1(f) for unassigned cases.

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