No. 19A-_____

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

CRAIG WILSON, ET AL.

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

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PARTIES TO THE PROCEEDING

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

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

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

Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of the federal applicants, respectfully applies for a stay of the orders issued on April 22, 2020 and May 19, 2020, by the United States District Court for the Northern District of Ohio (App., infra, 8a-28a, 42a-52a), pending appeal of those orders to the United States Court of Appeals for the Sixth Circuit and, if the court of appeals affirms the orders, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. Applicants also respectfully request an administrative stay pending disposition of this application.

This Court has repeatedly emphasized that addressing the "complex and intractable" issues facing "prisons in America" requires the "expertise, comprehensive planning, and the commitment of resources" that "are peculiarly within the province of the legislative and executive branches of government." Rhodes v. Chapman,

452 U.S. 337, 351 n.16 (1981) (citation omitted). That holds particularly true for the challenges posed by the COVID-19 pandemic, which presents "'medical and scientific uncertainties'" that "politically accountable officials" must be allowed to confront without inappropriate "second-guessing by an 'unelected federal judiciary.'" South Bay United Pentecostal Church v. Newsom, No. 19A1044 (May 29, 2020), slip op. 2 (Roberts, C.J., concurring in denial of application for injunctive relief) (citations omitted).

Congress has vested the Federal Bureau of Prisons (BOP), under the direction of the Attorney General, with oversight of the Nation's federal correctional system. 18 U.S.C. 4042(a). Since the first cases of COVID-19 were reported in the United States, BOP has brought its statutory authority, its expertise, and its resources to bear to implement a system-wide response to the pandemic. That response has included limiting social interactions within facilities to the extent practicable; distributing necessary cleaning supplies, masks, and protective equipment; and establishing quarantine, testing, and treatment protocols at its correctional facilities. The response has also included restricting "inmate facility transfers" and inmate movements within facilities. App., infra, 94a ¶ 8, 96a ¶ 16.

As authorized by Congress and pursuant to guidance of the Attorney General, BOP's response to the pandemic has also involved increasing use of home confinement for inmates who are "non-violent and pose minimal likelihood of recidivism," where such inmates would be "safer serving" their sentences at home. Memorandum from William P. Barr, Att'y Gen., for Dir. of Bureau of Prisons,

Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic 1 (Mar. 26, 2020) (March 26 Memorandum), https://www.justice.gov/file/1262731/download. In implementing that aspect of its response, BOP has been guided by the Attorney General's direction to honor not only its "solemn obligation to protect" inmates, but its fundamental duty "to protect the public" from the "profound risks" to public safety that could result if BOP does not carefully scrutinize each inmate's suitability for home confinement. Memorandum from William P. Barr, Att'y Gen., for Dir. of Bureau of Prisons, Increasing Use of Home Confinement at Institutions Most Affected by COVID-19 2 (Apr. 3, 2020) (April 3 Memorandum), https://www.justice.gov/file/1266661/download.

Respondents are four inmates who represent a conditionally certified subclass of over 800 older and medically vulnerable inmates at Elkton Federal Correctional Institution (FCI-Elkton), a low-security facility in Ohio in which there has been a significant number of COVID-19 cases. Respondents brought a purported habeas corpus action under 28 U.S.C. 2241, asserting that COVID-19 has created "unconstitutional conditions of confinement" at Elkton that violate the Eighth Amendment. App., infra, 87a (capitalization and emphasis omitted). Respondents demanded their prompt removal from the "physical confines of Elkton" through means such as home confinement or transfers to other facilities. Id. at 54a n.2, 74a, 88a.

On April 22, 2020, the district court held that respondents could pursue their challenge to conditions at Elkton through habeas corpus. App., infra, 16a-18a. It further determined that, despite

BOP's "good efforts" to "limit the virus's spread," id. at 12a, respondents were likely to succeed on their Eighth Amendment claim because inmates could not maintain six-foot social distancing at Elkton, which had low levels of COVID-19 testing. Id. at 9a-10a, 23a. The court also found that, in fashioning its remedy, it was unconstrained by the limits in the Prison Litigation Reform Act of 1996 (PLRA), Pub. L. No. 104-134, § 101[(a)], Tit. VIII, 110 Stat. 1321-66. App., infra, 26a-27a. The court entered a preliminary injunction requiring that the more than 800 subclass members be transferred to other prisons if BOP had not deemed them eligible for home confinement or alternate placements. Id. at 27a-28a.

On May 19, 2020, the district court issued an order enforcing the April 22 injunction. App., infra, 42a-52a. It determined that BOP had failed to comply with the injunction because, inter alia, BOP had not found enough subclass members eligible for home confinement under criteria developed in accordance with the Attorney General's guidance. Id. at 47a-48a. The court ordered BOP to apply home-confinement criteria imposed by the court, including, for example, "disregard[ing]" consideration of a violent offense if it occurred "more than 5 years ago" or if it would be the "only basis [f]or denial." Id. at 48a.

This Court's intervention is urgently needed by June 5 to stay the April 22 and May 19 orders. The Sixth Circuit has denied the government's stay motions; BOP has completed its reevaluation of the class members under the district court's chosen criteria; and, absent a stay, BOP must begin to transfer inmates out of Elkton on June 5. All stay requirements are satisfied here.

First, if the Sixth Circuit were to uphold the orders, there is at least a reasonable probability that this Court would grant certiorari. Judicial orders peremptorily requiring the removal of more than 800 inmates from a federal prison based on an alleged Eighth Amendment violation -- in the midst of a pandemic -- present extraordinarily significant questions and should not be imposed without this Court's review. Moreover, the orders contradict this Court's precedents recognizing that it is politically accountable officials who have the constitutionally committed authority and the expertise to determine the appropriate response to difficult problems like those presented by COVID-19. See, e.g., Bell v. Wolfish, 441 U.S. 520, 548 (1979). And the orders implicate an established conflict regarding the availability of habeas corpus to challenge prison conditions, and a burgeoning disagreement regarding Eighth Amendment claims in the face of a pandemic.

Second, there is more than a fair prospect that the Court would vacate the injunction. Respondents' sole claim for relief is an assertion of "unconstitutional conditions of confinement." App., infra, 87a (capitalization and emphasis omitted). Yet the district court erroneously recharacterized the suit as a challenge to the "fact or duration" of respondents' confinement, id. at 17a-18a, 26a; erroneously exercised habeas jurisdiction under 28 U.S.C. 2241, and eschewed the PLRA's strict limitations on injunctive relief in general and on "prisoner release orders" in particular.

The district court's Eighth Amendment analysis is also contrary to this Court's precedents, which have admonished against invoking the prohibition on cruel and unusual punishments to engage

in judicial second guessing of prison officials' response to difficult and evolving situations. Farmer v. Brennan, 511 U.S. 825, 834, 836-837 (1994). BOP has worked diligently to address the risk at Elkton, and respondents have fallen far short of establishing conditions that violate contemporary standards of decency during the COVID-19 pandemic, or that any such deprivation results from prison officials' "deliberate indifference," as this Court's precedents require. Id. at 834 (citation omitted).

Third, the balance of equities strongly favors a stay. If allowed to stand, the district court's April 22 and May 19 orders will inflict "irreparable harm" by interfering with the "effectuat[ion]" of "statutes enacted by representatives of [the] people." Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted). Here, duly enacted statutes commit to BOP's unreviewable judgment the determination of where inmates are placed, 18 U.S.C. 3621, and BOP has exercised that discretion in response to the COVID-19 pandemic by limiting transfers and providing that home confinement is warranted only in accordance with guidance provided by the Attorney General. But the district court overrode that judgment, requiring transfers of more than 800 Elkton inmates and grants of home confinement under its own standards.

Releasing inmates into home confinement under the court's criteria notwithstanding BOP's determination of their unsuitability for such release would threaten public safety, and the court's transfer order may require moving prisoners into higher-security prisons or farther from their families. More broadly, BOP has

been forced to devote its resources to complying with serial judicial decrees that override BOP's judgment concerning the administration of Elkton and the correctional system, including in response to the COVID-19 pandemic. The court's dramatic imposition is all the more unwarranted in light of evidence showing that BOP has engaged in extensive efforts to combat COVID-19 at Elkton, and that -- since April 8 -- testing has increased, hospitalizations have dramatically dropped, and BOP's efforts to fight the infection at Elkton are bearing fruit. App., infra, 230a, 238a.

A stay pending appeal is plainly warranted. And because the district court has required the removal of more than 800 inmates from Elkton to begin June 5, the government respectfully requests an administrative stay pending disposition of this application.

STATEMENT

1. In January 2020, the first cases of illness caused by COVID-19 were reported in the United States. App., infra, 93a ¶ 6. Recognizing the threat, BOP quickly developed and began implementing an evolving multiphase action plan, which has consistently been informed by changing circumstances and "the guidance and direction of worldwide health authorities." Ibid.

In its first phase, BOP formed a task force to conduct Bureau-wide "strategic planning" in coordination with "subject-matter experts," and began "implementing guidance and directives" from the CDC and other expert bodies. App., infra, 93a ¶ 7. Next, beginning on March 13, 2020, BOP instituted restrictions at all BOP facilities, including suspending facility transfers. Id. at 94a ¶ 8. BOP also suspended visits and contractor access,

instituted enhanced health screening for inmates and staff, and established quarantine procedures for certain newly arriving inmates. Id. at 94a ¶¶ 8-10.

From March 18 to April 13, 2020 -- as Elkton experienced a rapid two-week period of COVID-related hospitalizations, App., infra, 238a -- BOP implemented several further phases of its action plan, requiring, among other things, that all newly admitted inmates (even those who are asymptomatic) be quarantined for 14 days and that inmates displaying symptoms of COVID-19 be placed in isolation until testing negative or meeting CDC criteria. Id. at 96a ¶ 15. BOP also restricted inmate gatherings and secured all inmates in their assigned living quarters to decrease virus transmission. Id. at 96a-97a ¶¶ 16-17; see also id. at 125a-127a ¶ 38. In addition, all BOP staff and inmates have been given appropriate sanitation materials, face coverings, and other personal protective equipment where necessary. Id. at 125a-127a ¶ 38.

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

a. Like all BOP institutions, Elkton has implemented BOP's nationwide COVID-19 response, and taken numerous precautions in light of the facility's particular character. App., infra, 97a-98a ¶ 19. Elkton staff and officials have, since the beginning of the pandemic, educated inmates and staff about measures to avoid transmitting COVID-19. Id. at 98a ¶¶ 20-22. All common areas are

cleaned at least daily with a disinfectant that kills human coronavirus. Id. at 103a ¶ 46. The disinfectant is also available to all inmates to clean their personal areas, and they have access to sinks, water, and soap at all times. Id. at 102a-103a ¶¶ 45-46.

Elkton inmates and staff have been provided protective face masks for daily use and appropriate protective equipment as necessary for particular tasks. App., infra, 103a ¶¶ 48-50. BOP has also taken steps to reduce inmate contact. For example, inmates are required to pick up meals and return to their housing units to eat, and mealtimes are staggered so that only a single housing unit moves within the facility at any time. Id. at 95a ¶ 12; see id. at 104a ¶ 54.

Elkton staff carefully monitor the health of inmates. Elkton is providing 24/7 in-house medical coverage during the pandemic, App., infra, 92a ¶ 3, 184a-185a ¶ 83, and early on, reviewed medical records to identify inmates who are considered high-risk under CDC guidelines, id. at 99a-100a ¶¶ 30-31. Any inmate who reports symptoms consistent with COVID-19 is evaluated by BOP medical providers and, if symptoms are confirmed, moved to an isolation area. Id. at 99a-100a, 103a-104a ¶¶ 29, 34, 51. Asymptomatic inmates who have been in contact with symptomatic inmates during the incubation period (up to 14 days) are quarantined for at least 14 days. Id. at 104a ¶ 52. If an inmate's condition warrants more care, he is sent to a local hospital. Id. at 103a-104a ¶ 51. When testing was limited, medical providers decided whether to test an inmate for COVID-19 based on a number of criteria, including symptoms, potential exposure, and whether

the inmate was high-risk or on a work detail requiring interaction with other inmates or staff. Id. at 102a ¶ 41; see also id. at 101a-102a ¶ 39 (describing CDC's "priority levels" for COVID-19 testing).

b. Elkton has unfortunately experienced significant levels of infection. Elkton hospitalized its first inmate for COVID-19-related health problems on March 26, and during the ensuing two-week period (through April 8), 51 inmates were hospitalized, nine of whom died. App., infra, 230a, 238a-240a.

After that initial surge, however, the number of Elkton inmates requiring hospitalization reduced significantly. App., infra, 238a. Only four inmates were hospitalized in the next ten days, after which hospitalizations dropped to nearly zero, with only two more in the six weeks since April 19. Ibid.; see D. Ct. Doc. 101 (May 29, 2020). Likewise, after the deaths of nine inmates whose illnesses manifested from March 26 to April 6 -- roughly two months ago -- no inmate has since died from COVID-19-related issues. App., infra, 230a.

c. BOP has also evaluated Elkton inmates for placement in home confinement consistent with statutory authorization and guidance from the Attorney General. App., infra, 111a-112a ¶¶ 17-19; 122a-123a ¶¶ 25-26. BOP is generally authorized to use "home confinement" for no more than the final "[six] months" of an inmate's sentence. 18 U.S.C. 3624(c)(2). But under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281, Congress permitted BOP to extend that amount of time if the Attorney General "finds that emergency conditions"

justify such extension, and "as the Director [of BOP] determines appropriate." § 12003(b)(2), 134 Stat. 516. The Attorney General has made the requisite findings, App., infra, 111a-112a ¶¶ 18-19, and directed BOP to prioritize the consideration of inmates at Elkton and two other facilities, providing appropriate eligibility criteria, including that some kinds of offenses are generally disqualifying. Ibid. BOP officials have implemented that guidance at Elkton. Ibid.; see also id. at 120a-121a ¶ 22 (elaborating on evaluation criteria).

BOP has also considered numerous requests from Elkton inmates for "compassionate release," a statutory procedure through which BOP may request an inmate's sentencing court to reduce his term of imprisonment if, as a threshold matter, "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. 3582(c)(1)(A); see also ibid. (requiring sentencing court to also consider "the factors set forth in [18 U.S.C.] 3553(a)"). An inmate may request the sentencing court to grant that relief if BOP denies a request to do so or does not act within 30 days. Ibid. Congress has not, however, adjusted the compassionate release criteria in light of COVID-19, nor has it adjusted the qualifications for other statutory mechanisms to alter inmate placements. For example, it has not made the COVID-19 pandemic an independent basis for furlough under 18 U.S.C. 3622, which authorizes BOP to temporarily release an inmate for specified purposes.

3. On April 13, 2020, respondents filed a habeas corpus petition pursuant to 28 U.S.C. 2241 on behalf of themselves and a

putative class of all current or future Elkton inmates, and a subclass of medically-vulnerable inmates. App., infra, 53a-90a. Their sole claim was that they are being subject to "unconstitutional conditions of confinement in violation of the Eighth Amendment." Id. at 87a (capitalization and emphasis omitted). As relief, they sought -- among other things -- a preliminary injunction requiring BOP to remove all "[m]edically-[v]ulnerable" inmates from Elkton through means such as home confinement, transfer to another facility, or furlough to the community, id. at 54a n.2, 88a.

a. On April 22, 2020, the district court entered a preliminary injunction in favor of a conditionally certified subclass of older and medically vulnerable inmates. App., infra, 27a-28a. The court determined that it had jurisdiction under 28 U.S.C. 2241 only as to that subclass seeking "immediate release" from Elkton, App., infra, 16a-18a, and that the subclass "likely meets the requirements for class certification," id. at 22a.

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

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

The district court's preliminary injunction required that BOP identify "all members of the subclass" within one day; "evaluate each subclass member's eligibility for transfer out of Elkton through any means, including but not limited to compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough within two (2) weeks"; and then "transfer[] to another BOP facility where appropriate measures, such as testing and single-cell placement, or social distancing, may be accom-

plished" every subclass member who is "ineligible for compassionate release, home release, or parole or community supervision." App., infra, 27a-28a.

The government appealed on April 27, 2020; moved the district court for a stay the next day, D. Ct. Doc. 30; and, on April 29, moved the Sixth Circuit for a stay, C.A. Doc. 9-1.

b. On May 4, 2020, the Sixth Circuit denied the stay in a brief per curiam order. App., infra, 1a-5a. It agreed with the district court that invocation of Section 2241 was "proper" and that the PLRA did not apply. Id. at 3a. The court also determined that the district court had not "abused its discretion" in finding that respondents were likely to succeed on their Eighth Amendment claim. Id. at 3a-4a. Finally, the court rejected BOP's argument that the subclass could not satisfy Rule 23, and dismissed BOP's account of the inordinate burden of implementing the order. Id. at 4a-5a.

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

The district court did not rule on the motion to enforce until May 19, 2020. But in the interim, the court acknowledged that

some inmates who are members of the Rule 23(b)(2) subclass may not wish to be transferred from Elkton, particularly if they would be moved to a higher security prison or transferred further from their homes. D. Ct. Doc. 55, at 13-14, 26-27 (May 7, 2020). The court therefore directed respondents to survey all Elkton inmates, through a questionnaire to be distributed by BOP, to ensure that all eligible class members were identified and determine which wished to "optout" and remain at Elkton. Ibid.

On May 19, 2020, the district court granted respondents' motion to enforce the injunction. App., infra, 42a-52a. The court acknowledged that BOP had begun to implement mass testing at Elkton, id. at 43a, and that it had reported evaluating all subclass members for the various forms of relief dictated in the court's order, id. at 45a. But the court noted that testing had yielded positive results for a number of inmates. Id. at 43a. And it found BOP's evaluation efforts insufficient because only five members were "'pending [home confinement] community placement,'" and an additional six reportedly "maybe" qualify. Id. at 45a (emphasis and citation omitted; brackets in original). In the court's view, more inmates should have been eligible for home confinement and compassionate release. Ibid.

After surveying the existing guidance from the Attorney General and BOP, the court ordered five revisions to the criteria for home confinement. App., infra, 47a-48a. The court, for instance, announced that BOP must "disregard" consideration of a violent offense if it occurred "more than 5 years ago" or if it is the "only basis [f]or denial," and BOP must wholly disregard

certain categories of prison disciplinary violations. Id. at 48a. On this basis, the district court, to enforce its injunction, ordered BOP to reevaluate each of the more than 800 subclass members under its revised criteria, and offer a detailed explanation for any denial, within three 48-hour periods. Id. at 48a-49a. The court further ordered BOP to "clarify" the reasons for any denial of compassionate release within 48 hours and adjudicate any new applications within seven days (rather than the 30 prescribed by statute). Id. at 50a.

d. On May 20, 2020, the government sought an immediate stay of the April 22 order in this Court. On May 26, this Court denied a stay "without prejudice to the Government seeking a new stay if circumstances warrant." 19A1041 Order. The Court explained that "[t]he Government ha[d] not sought review of or a stay of the May 19 order in the [court of appeals]" and, "[p]articularly in light of that procedural posture, the Court decline[d] to stay the District Court's April 22 preliminary injunction." Ibid. Justices Thomas, Alito, and Gorsuch would have granted the application. Ibid.

e. BOP previously designated five subclass members for home confinement, App., infra, 235a, and has now re-assessed all subclass members for home confinement. Applying the district court's standards, BOP has informed us that it has now approved 51 additional subclass members for home confinement, none of whom were previously deemed eligible by BOP under the Attorney General's and BOP's criteria. See id. 259a–260a (May 29, 2020 declaration explaining that, as of that day, 17 subclass members had been

approved and 53 more were under consideration). BOP has also recommended one additional subclass member for compassionate release, although an inmate can request the sentencing court grant compassionate release even without BOP's recommendation. See id. at 144a. Under the district court's orders, the remaining subclass members will be transferred to other BOP facilities. BOP began quarantining class members on Friday, May 22, 2020, as required to prepare them for transfer or release. Id. at 233a. Accordingly, as the government informed the Sixth Circuit, absent a stay, transfers from Elkton should begin on June 5, when the first group of 128 subclass members completes a 14-day quarantine. See ibid.

f. On May 27, 2020, the government appealed the May 19 order and, early on May 29, moved the district court to stay that order and renewed its motion to stay the April 22 injunction. D. Ct. Doc. 95, 98. The government then sought that relief in the Sixth Circuit. C.A. Doc. 38. Today, June 1, the Sixth Circuit denied a stay and scheduled oral argument on the appeal of the April 22 injunction for the afternoon of June 5, 2020. App., infra, 272a-274a. Although it had denied the government's request for expedited briefing to be completed by May 20 and a decision issued by May 22, see C.A. Doc. 28, at 2 (May 7, 2020); 5/8/20 C.A. Order 2, the court stated that the "parties" had "suggested" the current slower schedule it had adopted and that it "anticipate[d]" that its decision would "soon follow" oral argument. App., infra, 274a.

ARGUMENT

The government respectfully requests that this Court stay the district court's April 22 and May 19 orders pending completion of

further proceedings in the court of appeals and, if necessary, this Court, and that it enter an immediate administrative stay.

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

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

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

This Court has recognized that, even in normal times, an order requiring the release or transfer of "prisoners in large numbers * * * is a matter of undoubted, grave concern." Brown v. Plata, 563 U.S. 493, 501 (2011). Such orders carry a high risk of jeopardizing public safety and inappropriately interjecting the Judicial Branch into difficult decisions regarding prison security and administration, despite the deference that is owed "to experienced and expert prison administrators faced with the difficult and dangerous task of housing large numbers of convicted criminals." Id. at 511. That is all the more so when prison administrators must address the impact of a pandemic affecting the

Nation at large, and must do so across the prison system. See South Bay United Pentecostal Church v. Newsom, No. 19A1044 (May 29, 2020), slip op. 2 (Roberts, C.J., concurring in denial of application for injunctive relief).

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

The Sixth Circuit itself had previously held that Section 2241 "is not the proper vehicle for a prisoner to challenge conditions of confinement," Luedtke v. Berkebile, 704 F.3d 465, 466 (2013), but it largely nullified that rule in its first stay denial by treating respondents' suit -- which alleges unconstitutional conditions -- as a cognizable habeas challenge to "the fact of the confinement," App., infra, 3a.

In addition, there is burgeoning disagreement in the circuits regarding the standards for issuing an injunction against administrators of detention facilities based on allegedly unconstitutional conditions created by COVID-19. The Sixth Circuit declined to stay such orders in this case, but other circuits have reached a contrary conclusion. In Valentine v. Collier, 956 F.3d 797 (2020) (per curiam), this Court recently declined to lift the Fifth Circuit's stay of an injunction granting relief to a class of "disabled and high-risk" inmates in a state prison that had experienced an outbreak of COVID-19 and several related deaths. Id. at 799; see No. 19A1034 (May 14, 2020). The Fifth Circuit held that the district court's "intrusive order[]" -- which imposed requirements such as increased cleaning and provision of additional sanitizers and paper products -- inflicted irreparable harm on the State and the public by diverting resources from the prison system's implementation of a systemic response to the pandemic. 956 F.3d at 799-800, 803-804. For similar reasons, the Eleventh Circuit stayed a COVID-19 injunction obtained by prisoners purporting to represent "a 'medically vulnerable' subclass of inmates" at a jail where "several inmates * * * ha[d] tested positive for the virus" in Swain v. Junior, No. 20-11622, 2020 WL 2161317, at *1 (11th Cir. May 5, 2020) (per curiam).[1]

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

If the Sixth Circuit affirms the orders in this case, it would place the court on the wrong side of both conflicts. It would also place the circuit in direct conflict with this Court's decisions addressing what constitutes a habeas challenge to the "fact or duration" of confinement, the PLRA's limits on prisoner litigation, and the constitutional standards for claims under the Eighth Amendment, as demonstrated below. In these circumstances, there is more than a "reasonable probability" that the Court will grant certiorari. Conkright, 556 U.S. at 1402 (citation omitted).

II. THERE IS AT LEAST A FAIR PROSPECT THAT THE COURT WOULD VACATE THE ORDERS

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

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

"[W]here an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence," that claim "fall[s] within the 'core' of federal habeas." Nelson v. Campbell, 541 U.S. 637, 643 (2004) (citation omitted). "By contrast, constitutional claims that merely challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside of that core." Ibid. State prisoners may bring such claims under 42 U.S.C. 1983, and federal prisoners may pursue such claims in appropriate circumstances under the Administrative Procedure Act or through an implied cause of action in equity.

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

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

In their habeas petition, respondents' only claim is an assertion of "Unconstitutional Conditions of Confinement." App., infra, 87a (emphasis omitted). Further, while the petition purports to seek "release," it defines "release" only as removal "from the physical confines of Elkton," including through transfers to another facility and mechanisms that would allow for their return to Elkton once the threat of the virus abates. Id. at 54a n.2.

The district court, too, described respondents' suit as focusing on allegedly "dangerous conditions within the prison created by the [COVID-19] virus." App., infra, 17a (emphasis added). And the court did not order the traditional habeas relief of "simple release," Munaf v. Geren, 553 U.S. 674, 693 (2008). Instead, it purported to "enlarge[]" the "conditions of [respondents'] confinement" by requiring their "transfer out of Elkton through any means," including to "another BOP facility." App., infra, 27a-28a (emphasis added).

Nonetheless, the district court characterized the action as a "habeas corpus proceeding[] challenging the fact or duration of confinement," App., infra, 26a, because -- while respondents challenge "conditions within the prison," id. at 17a -- they also "seek immediate release" from "continued imprisonment at Elkton," id. at 18a. But if respondents succeed on the merits, it would not remotely "imply" that their "convictions or sentences" are

invalid, Wilkinson, 544 U.S. at 82 (brackets and citation omitted), or entitle them to release from custody.

In any event, seeking release as a remedy cannot automatically convert a claim into a habeas "fact or duration" challenge, because the PLRA clearly contemplates that actions challenging "prison conditions" may lead to release in rare circumstances and sets out detailed requirements governing when such a "prisoner release order" may be issued. 18 U.S.C. 3626(a). In Brown v. Plata, this Court considered the proper application of those PLRA provisions to cases in which California prisoners alleged that overcrowding and deficiencies in medical care constituted an Eighth Amendment violation that entitled them to orders granting release or transfer of a portion of the state prison population. 563 U.S. at 507-508, 511. The Court never once questioned that the suit was a challenge "to prison conditions" squarely governed by the PLRA. Id. at 530; see also Nussle, 534 U.S. at 532 (recognizing that the PLRA covers "all inmate suits about prison life").

3. a. Because this suit challenges conditions of confinement, respondents should not have been permitted to proceed in habeas at all. In its first denial of a stay, the Sixth Circuit observed that this Court has never "foreclosed" reliance on habeas for conditions-of-confinement challenges. App., infra, 3a. But this Court has held that a prisoner who is not "seeking a judgment at odds with his conviction or with the State's calculation of time to be served" is not raising a claim "on which habeas relief could [be] granted on any recognized theory." Muhammad v. Close, 540 U.S. 749, 754-755 (2004) (per curiam). It has also repeatedly

reiterated that injunctive suits challenging the "conditions of a prisoner's confinement" are not displaced by the specific habeas remedy precisely because they fall outside of habeas' "core." Nelson, 541 U.S. at 643; see Preiser, 411 U.S. at 489.

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

i. Because this suit challenges prison conditions, the district court was required to adhere to the PLRA's restrictions on injunctive relief, under which a court must find that an injunction "extend[s] no further than necessary to correct the harm the court finds requires preliminary relief" and is the "least intrusive means necessary to correct that harm." 18 U.S.C. 3626(a)(2). The district court made no such findings, a failure that alone requires "immediate termination" of the district court's order. 18 U.S.C. 3626(b)(2). And in any event, the court could not have made the requisite findings because the release or transfer of one-third of Elkton's inmates was not "narrowly drawn," minimally "intrusive," or "necessary to correct the harm" the court identified. 18 U.S.C. 3626(a)(2). BOP has shown that its policies have appropriately addressed the risk of COVID-19 at Elkton, and it has further demonstrated that it can conduct mass testing. App., infra, 149a-150a. Further, far from being appropriate to correct harm, the

dramatic remedies the court ordered threaten injury to the public, inmates, and BOP. See pp. 35-39, infra.

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

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

B. In any event, this Court likely would reject respondents' Eighth Amendment claim on the merits. In a conditions-of-

confinement case like this, a prison official violates the prohibition against "cruel and unusual punishments," U.S. Const. Amend. VIII, "only when two requirements" -- one objective, the other subjective -- "are met." Farmer v. Brennan, 511 U.S. 825, 834, 846 (1994). Respondents have established neither.

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

Respondents have not met that standard. The government acknowledges that COVID-19 poses significant health risks. But BOP has mitigated the risk of serious injuries at Elkton by its numerous and increasing responses. See pp. 7-10, supra. Those efforts were well documented before the district court entered its preliminary injunction. App., infra, 92a-105a. And data from Elkton, filed in response to respondents' motion to enforce and to support a renewed stay, confirms that the virus's risks have been significantly mitigated. See id. at 187a-189a, 238a-243a (charts). Even before the court's April 22 injunction, the number of inmates transferred to a local hospital had peaked and dropped to nearly

zero (with only two subsequent hospitalizations), the number of inmates in the hospital had similarly peaked and was in steady decline (with only nine now still there), and the number of staff members with confirmed infections had plateaued. Id. at 238a-239a, 242a; see D. Ct. Doc. 101. And although a total of nine Elkton inmates have died, those deaths reflect infections before April 6, weeks before the injunction. Id. at 230a.

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

The district court concluded that respondents established the Eighth Amendment's objective requirement because respondents have a "very serious medical need to be protected from the virus." App., infra, 22a-23a. But while that need is relevant, it is not sufficient to establish a risk that contemporary standards would condemn, during a pandemic that has confronted institutions and individuals throughout the Nation.

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

Whether an official's conduct can be deemed "'wanton' depends upon the constraints facing the official." Wilson, 501 U.S. at 303 (emphasis omitted); see Whitley v. Albers, 475 U.S. 312, 320 (1986). "[D]eliberate indifference" can constitute "wanton" intent in prison-conditions contexts because -- "as a general matter" -- the responsibility to rectify dangerous conditions "'does not ordinarily clash with other equally important governmental responsibilities'" or implicate unusual "constraints" on its action. Wilson, 501 U.S. at 302-303 (quoting Whitley, 475 U.S. at 320). Like the criminal-law "mens rea requirement" for "subjective recklessness," that standard requires proof that officials "know[] of and disregard[] an excessive risk of inmate health or safety." Farmer, 511 U.S. at 836-837, 839-840; see Wilson, 501 U.S. at 299 (A "lack of due care" or other "error in good faith" is insufficient.) (citation and emphasis omitted). That inquiry

"incorporates due regard for [officials'] 'unenviable task of keeping dangerous men in safe custody under humane conditions,'" Farmer, 511 U.S. at 845 (citation omitted), by "leav[ing] ample room for professional judgment, constraints presented by the institutional setting, and the need to give latitude to administrators who have to make difficult trade-offs as to risks and resources," Battista v. Clarke, 645 F.3d 449, 453 (1st Cir. 2011). This Court has thus emphasized that courts must use "caution" in exercising their equitable power and may not "'enmesh[]'" themselves "'in the minutiae of prison operations.'" Farmer, 511 U.S. at 846-847 (citation omitted).

That judicial caution is even more appropriate in the fast-changing context of the COVID-19 pandemic. As the Chief Justice very recently observed, the proper response to the pandemic is a matter that the Constitution "principally entrusts" to "politically accountable officials," with "'especially broad'" latitude given the need "'to act in areas fraught with medical and scientific uncertainties.'" South Bay United Pentecostal Church, slip op. at 2 (Roberts, C.J., concurring in denial of application for injunctive relief) (citation omitted). When "those broad limits are not exceeded," public-health measures "should not be subject to second-guessing by" the federal judiciary, which "lacks the background, competence, and expertise to assess public health." Ibid. That reasoning applies a fortiori to prison administration, where inmates necessarily have reduced liberty interests in light of their convictions.

BOP officials have not even arguably been "deliberately indifferent" to the evolving COVID-19 pandemic. To the contrary, they have deliberately confronted the risks posed by this public health crisis by, among other things, providing inmates with masks and continuous access to soap, water, and sinks; providing additional protective equipment as necessary; implementing 24/7 medical staffing and screening; limiting inmate movements and group gatherings by modifying meal, recreation, commissary, and other procedures; educating inmates and staff on preventing contraction and transmission of the virus; implementing measures to screen and quarantine incoming inmates; conducting COVID-19 testing in accordance with CDC guidelines; isolating inmates who present with COVID-19-like symptoms; quarantining asymptomatic inmates who may have been in close contact with those infected; implementing enhanced daily cleaning of common areas; and providing inmates with disinfectant cleaners. See pp. 7-10, supra; App., infra, 93a-105a, 165a-186a.

In the preliminary injunction order, the district court recognized that Elkton officials "have sought to reduce [COVID-19] risks" and that their actions reflect "good efforts," but it suggested that such mitigation could "only be so effective" and that "despite their efforts, the Elkton officials fight a losing battle." App., infra, 9a, 12a, 23a. The court also deemed Elkton's level of COVID-19 testing inadequate and criticized Elkton's low-security physical design (which consists of dormitory-style housing), concluding that those factors gave BOP "little chance of obstructing the spread of the virus." Id. at 10a-13a. The court then held --

without further analysis -- that Elkton officials had been "deliberately indifferent." Id. at 23a.

That legal conclusion is fundamentally flawed. Nothing suggests that officials subjectively believed their extensive efforts, which track the CDC's guidance, did not constitute reasonable and appropriate mitigation of the virus's threat. Nor can deliberate indifference be established based on the inherent limitations of maintaining appropriate levels of confinement for those convicted of crimes or the external obstacles that initially limited BOP's ability to acquire large volumes of test kits -- which Congress recognized on March 27 in the CARES Act § 12003(b)(1)(A), 134 Stat. 516. In holding otherwise, the district court entirely failed to account for the practical "constraints facing the official[s]," Wilson, 501 U.S. at 303, and by focusing on what it perceived to be "inadequate measures" that it deemed "dispositive of [officials'] mental state," it erroneously applied a standard with no grounding in Eighth Amendment jurisprudence. Valentine, 956 F.3d at 802. Moreover, prospective relief would have been warranted only if respondents had established not only that BOP officials' "'attitudes and conduct'" were subjectively wanton "at the time suit [wa]s brought," but also that the officials at the time of the challenged orders were "knowingly and unreasonably disregarding an objectively intolerable risk of harm" and would "continue to do so * * * into the future" absent relief. Farmer, 511 U.S. at 845-846 (quoting Helling, 509 U.S. at 36). Respondents have failed to do so.

For its part, the court of appeals, in its first denial of a stay, failed even to address the subjective component of the Eighth Amendment claim, disregarding respondents' burden to establish "deliberate indifference" by those working to combat the risks of COVID-19. See App., infra, 4a. That court's focus on the clear-error standard of review for factual findings, ibid., wholly disregarded the significant legal flaws in the district court's analysis. The court similarly erred in denying the government's renewed stay motion, again relying on "deference owed to the district court" without further substantive analysis. Id. at 273a.

C. Moreover, the district court's order to remove subclass members from Elkton, including especially its order to place certain of them in home confinement, is not a proper Eighth Amendment remedy. The only appropriate relief for the claim that conditions at Elkton are unsafe would be an order to improve those conditions, and if no other means sufficed, by reducing Elkton's population in a manner selected by BOP. See, e.g., Brown, 563 U.S. at 533 (approving order requiring State not to exceed 137.5% of its prisons' capacity that allowed the State to "choose whether to increase the prisons' capacity through construction or reduce the population"; to "choose how to allocate prisoners between institutions"; and to "decide what steps to take to achieve [any] necessary reduction"). Because "[t]he wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government," the district court had no basis to direct home confinement for those meeting criteria of the court's own creation or to

require the transfer of the subclass members regardless of other legitimate penological considerations. Bell v. Wolfish, 441 U.S. 520, 562 (1979); see, e.g., Rhodes v. Chapman, 452 U.S. 337, 351 (1981) ("In assessing claims that conditions of confinement are cruel and unusual, courts must bear in mind that their inquiries 'spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility.'") (citation omitted).

3. Finally, respondents are unlikely to prevail on the merits because their putative class action does not satisfy the commonality and typicality requirements of Federal Rule of Civil Procedure 23(a). See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 n.5 (2011). Even if the four individual respondents could demonstrate an Eighth Amendment violation, each member of the class has not suffered "the same injury," as is required for commonality, Dukes, 564 U.S. at 350 (citation omitted), because each has different medical and other needs, see, e.g., Kress v. CCA of Tennessee, LLC, 694 F.3d 890, 893 (7th Cir. 2012). Respondents also cannot demonstrate typicality because different class members would be entitled to "different injunction[s] or declaratory judgment[s]" depending on their circumstance. Dukes, 564 U.S. at 360. The injunction reflects as much, because it requires BOP to make individualized assessments about the form of relief or transfer necessary for each class member. Indeed, the district court has even acknowledged that some subclass members may not wish to be transferred from Elkton. See p. 15, supra.

III. THE BALANCE OF EQUITIES SUPPORTS A STAY

The third stay requirement is met because "irreparable harm will result from the denial of a stay." Conkright, 556 U.S. at 1402 (brackets and citation omitted). The harms to BOP and to the public interest "merge" when relief is sought against the government, Nken v. Holder, 556 U.S. 418, 435 (2009), and if the April 22 and May 19 orders are not stayed, they will continue to inflict irreparable harm on BOP, other inmates, and the public.

1. a. Congress has vested BOP with the authority to "designate the place of [a federal] prisoner's imprisonment," 18 U.S.C. 3621(b); "place a prisoner in home confinement," 18 U.S.C. 3624(c)(2); and "determine[]" when it is "appropriate" to extend a period of home confinement in light of the COVID-19 crisis, see CARES Act § 12003(b)(2), 134 Stat. 516. BOP's "designation of a place of imprisonment" under Section 3621(b) "is not reviewable by any court." 18 U.S.C. 3621(b). Those statutory provisions reflect the "well settled" principle that "the decision where to house inmates is at the core of prison administrators' expertise," McKune v. Lile, 536 U.S. 24, 39 (2002) (plurality op.), and that "the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management," Thornburgh v. Abbott, 490 U.S. 401, 407-408 (1989) (citation omitted). The district court's contrary orders disregarding those teachings cause "irreparable harm" by enjoining the government "from effectuating [the] statutes enacted by [Congress]," Maryland, 567 U.S. at 1303 (citation omitted), forcing BOP to transfer inmates from the facility that BOP has "designated" (Elkton) and overriding Congress's judgment that BOP,

not the courts, should "determine" when home confinement is "appropriate" in light of COVID-19.

The district court's displacement of such judgments made by expert prison officials also threatens significant additional harm to the public and inmates. The court failed to account for the harms that would result from moving Elkton inmates from the facility BOP has determined to be best suited to their needs. In placing subclass members at Elkton, BOP considered a variety of statutorily-mandated factors, including the mandate to house an inmate within 500 miles of his residence; the inmate's "security designation"; his "programmatic," and "mental and medical health needs"; and BOP's "other security concerns." 18 U.S.C. 3621(b); see App., infra, 270a-271a ¶¶ 42-45. Transferring subclass members to facilities that satisfy the district court's social distancing requirements would likely result in placements that are further from the inmates' residences and at a higher level of security -- in single cells -- than is appropriate based on the inmates' designations in anticipation of their return to society. App., infra, 245a-247a ¶¶ 8-10, 12-13, 270a ¶ 42. Appropriate mental health, drug, and sex offender treatment programs would be interrupted, and the inmates may face additional safety concerns such as "inmate-on-inmate assault" due to their transfers to higher-security institutions. Ibid. Respondents have asserted that, given the presence of COVID-19 at Elkton, inmates would not be "harmed" by their transfer to facilities that are farther away from their homes and less suited to their programmatic needs and security level. C.A. Stay Opp. 22. Many inmates disagree. When all Elkton

inmates were surveyed about their desire to participate in this class-action suit, over 900 inmates responded, and more than 100 specifically indicated that they did not wish to be transferred from Elkton. D. Ct. Doc. 98-1, at 13.[2] But more to the point, expert BOP officials have determined that the potential negative consequences of such transfers are not justified.

Also, when BOP developed its systemic response to COVID-19, BOP determined that it was appropriate to minimize prisoner transfers between facilities. App., infra, 94a ¶ 8, see also id. at 96a ¶ 16.[3] Respondents have asserted that the possibility that the court mandated transfers will lead to the transmission of COVID-19 is mitigated by BOP's ability to quarantine and test inmates. Resp. C.A. Stay Opp. 23. But while testing has diminished that risk, BOP is concerned that some risk remains. Thus, a BOP

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[2] Respondents insist that the harms to these inmates can be "[m]itigat[ed]" by BOP because the court has ordered BOP to "consider" the requests of inmates that wish to remain at Elkton. Resp. C.A. Stay Opp. 22. But under Rule 23(b)(2), a class action is permissible only if challenged "conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Dukes, 564 U.S. at 360 (citation omitted).

[3] CDC's interim guidance recommended that correctional facilities should "[r]estrict [inmate] transfers" to "reduce [the risk of] transmission" unless "necessary" for medical reasons, "extenuating security concerns," or to "prevent overcrowding." CDC Interim Guidance 8-9 (App., infra, 208a-209a) (emphasis omitted). That recommendation simply acknowledges that in some circumstances "a transfer is absolutely necessary" and, in such contexts, additional steps must be taken to minimize the risk of transmission. Id. at 9. Respondents do not contend that Elkton's inmate population exceeds Elkton's design capacity, much less to such a degree that transfers would be "absolutely necessary," where BOP's numerous mitigation measures have already diminished the virus's prospective risk at Elkton.

declaration states that "[g]iven that FCI Elkton has experienced a flattening of the epidemic curve, the transfer of this group of inmates is not necessary to properly protect [them] and may contribute to disease spread to other areas," "even with appropriate testing." App., infra, 248a ¶ 14. And BOP has determined that the threat of COVID-19 is not sufficient to overcome the harm of transferring class members from the facility to which they are otherwise best suited. Id. at 245a-248a.

In short, the wide-scale inmate transfers ordered by the district court as a means to combat the COVID-19 pandemic are highly disruptive of sound prison administration, and would be all the more so if other courts imposed similar orders. See App., infra, 136a ¶ 24. BOP has therefore elected to focus its resources on minimizing the threat of transmission within each institution. Id. at 165a-170a (detailing BOP's multi-phase plan). It is not for the judiciary to second guess that decision, even if "the district court might do things differently," Valentine, 956 F.3d at 803.

b. The court's usurpation of the authority to determine eligibility for home confinement imposes additional harms to public safety. In encouraging BOP to use its authority to grant home confinement as a means of combatting the risks of COVID-19, the Attorney General was careful to emphasize that home confinement might be suitable for "at-risk inmates who are non-violent and pose minimal likelihood of recidivism." March 26 Memorandum 1 (emphasis added). The Attorney General specified a non-exhaustive list of criteria for BOP to consider, including the inmate's PATTERN score (a measure of the risk of recidivism) and the

"inmate's crime of conviction." Id. at 2. The Attorney General later reiterated BOP's "obligation to protect public safety" by carefully scrutinizing each inmate's suitability for home confinement to minimize the risk of inappropriately granting relief to a prisoner who will "engag[e] in additional criminal activity, potentially including violence." April 3 Memorandum 2. Yet, in its May 19 order, the district court ordered BOP to "disregard" certain violent offenses in considering class members' eligibility for home confinement, and to "grant home confinement" where a certain PATTERN score is the only disqualifying factor. App., infra, 48a. In its judicial revision of the Executive Branch criteria, the court has thus created a substantial risk that inmates might be released into home confinement only to offend again. See id. at 236a-237a (explaining that, under that order, BOP will grant home confinement to inmates not otherwise deemed eligible). Such a "mistaken or premature release of even one prisoner" obviously risks "caus[ing] injury and harm." Brown, 563 U.S. at 501.

c. Unless this Court stays the April 22 and May 19 orders, each of these harms is irreparable. Even if BOP ultimately prevails on the merits, inmates will already have been moved from their designated placements; some class members will already have been inappropriately placed in the community through home confinement; BOP's resources will already have been redirected; and risk of COVID-19 transmission through transfer will already have been incurred. Moreover, if other judges follow the lead of this district court, these harms will be multiplied.

2. Finally, the equitable balance tips decisively in favor of a stay in light of evidence demonstrating that, after an initial two-week period (March 26 to April 8) with 51 COVID-related hospitalizations, Elkton has for nearly two months dramatically reduced such events, with only two inmates hospitalized since May 4. App., infra, 238a; pp. 10, 27-28, supra. Elkton's nine deaths similarly resulted from illnesses that manifested from March 26 to April 6, roughly two months ago. Id. at 230a. Given this improving situation, no sound basis exists for imposing the harms flowing from the district court's injunctions in light of the virus's substantially mitigated risks at Elkton.

CONCLUSION

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

Respectfully submitted.

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Solicitor General

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