No. 19A1047

IN THE SUPREME COURT OF THE UNITED STATES

MARK WILLIAMS, WARDEN, ET AL., APPLICANTS

v.

CRAIG WILSON, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR A STAY

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Congress has vested the federal Bureau of Prisons (BOP), under the Attorney General's supervision, with authority to designate where prisoners are incarcerated and to determine when it is appropriate to use home confinement. BOP has used that authority and its expertise to address the "'medical and scientific uncertainties'" presented by the COVID-19 pandemic. 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) (citation omitted). With the aid of internal and external subject-matter experts, BOP has implemented a multi-phase strategic response that prescribes measures for inmates at the prisons where they are housed and places inmates in home confinement when consistent with the Attorney General's guidance. The district court's April 22 and May 19 orders undermine that response, replacing the policy formulated by expert, politically accountable officials with one fashioned by a single judge that lacks any

grounding in the Eighth Amendment's text or this Court's precedent. In doing so, the orders inflict irreparable harm on BOP, the inmates, and the public as a whole.

Respondents minimize that usurpation of Executive prerogatives, asserting that those orders extend the "utmost deference to [BOP's] discretion," Resp. Opp. to Appl. for Stay (Opp.) 2, and that large portions of the orders "would not have been necessary" if BOP had "follow[ed] its own internal directives from the Attorney General," id. at 67. That assertion is fundamentally wrong.

Contrary to respondents' repeated suggestions, neither Congress nor the Attorney General has provided for BOP to place large numbers of Elkton inmates in home confinement in response to COVID-19. In the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281, Congress merely addressed the amount of time inmates may spend in, not which inmates are suitable for, home confinement. § 12003(b)(2), 134 Stat. 516. That Act thus did not disturb BOP's authority, unreviewable by the courts, to determine where an inmate should serve his sentence. See 18 U.S.C. 3621(b); 18 U.S.C. 3624(c)(2) and (4). The Attorney General's guidance implementing the CARES Act similarly does not require BOP to place any inmate in home confinement. It instead directed BOP to "immediately review" all inmates for such relief. 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 Memo), https://www.justice.gov/file/1266661/download. And it specifically instructed that home confinement is generally

appropriate only if an inmate is "non-violent and pose[s] minimal likelihood of recidivism," adding that sex offenses in particular "will render an inmate ineligible." 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 1-2 (Mar. 26, 2020), https://www.justice.gov/file/1262731/download.

BOP promptly evaluated all subclass members for eligibility for home confinement under this guidance. Stay Appl. App. (Stay App.) 235a. But almost half had committed sex offenses, rendering them ineligible. See Opp. App. 62a-73a (listing "sex offender" or "sex offense" as a reason for denial for approximately 400 subclass members). Another large swath had a history of violence that led to their denial. See ibid. In the end, BOP determined that almost none of the subclass members qualified for home confinement under the criteria it was charged with implementing. Stay App. 235a.

Unsatisfied with that result, the district court required BOP to reevaluate every subclass member for home confinement under criteria expressly revised by the court to mandate, for example, that BOP "disregard" certain prior violent offenses. Stay App. 47a-48a. And similarly unsatisfied with BOP's decision to keep inmates at Elkton when they do not qualify for home confinement, the district court required BOP to transfer more than 800 subclass members to alternate BOP facilities. The court thereby overrode BOP's determination -- made pursuant to its unreviewable statutory authority, 18 U.S.C. 3621(b) -- that Elkton is the facility most suited to the subclass members' needs.

Accordingly, there is no sense in which the district court's orders extend deference to BOP's statutory authority or the Attorney General's guidance. Instead, the district court has supplanted the determinations of these expert, politically accountable officials. And in doing so, the court has ignored that this Court's "deliberate indifference" standard for Eighth Amendment claims provides no authority for it to police BOP's adherence to the Attorney General's home confinement criteria or to second guess inmate placement decisions that Congress vested in the Executive's discretion.[1]

Absent a stay, as a result of the district court's unfounded orders, BOP must begin transferring over 800 inmates out of Elkton on June 5. Approximately 50 of those inmates would be transferred to home confinement, even though almost all were deemed unsuitable by BOP under the Attorney General's criteria. Stay Appl. 16. BOP has recommended one inmate for compassionate release. Id. at 17. And the vast majority must be transferred to other BOP facilities that in many instances present increased risks to the inmates and in all instances differ from the one determined by BOP to meet the inmates' needs. Stay App. 245a-247a ¶¶ 8-10, 12-13, 270a ¶ 42.

Respondents nonetheless assert that this case presents nothing more than a fact-bound dispute about whether a stay is appropriate. But the district court's orders are predicated on multiple legal

[1] The district court this morning again denied a stay pending appeal, stating that it was bound by and agreed with the court of appeals' stay denial. 6/4/20 Order 3-4.

errors that have profound implications not only for this case and similar COVID-19 litigation, but for prisoners' Eighth Amendment challenges in general. Respondents' challenge to the conditions of their confinement is not properly cognizable in habeas corpus; the district court did not even attempt to conform its relief to the clear limits established in the Prison Litigation Reform Act (PLRA); BOP's robust efforts to combat COVID-19 at Elkton do not come close to constituting an Eighth Amendment violation; the orders are not appropriate Eighth Amendment relief; and the remedies they require are inconsistent with Rule 23(b). Respondents have no satisfactory response to any of these points.

Respondents also err in asserting that a stay is unwarranted based on the conditions at Elkton. As previously explained (Stay Appl. 10, 27-28), those conditions had begun to improve before the district court's April 22 injunction, with only two hospitalizations since April 19. Respondents urge the Court to ignore those improvements because BOP's mass testing efforts have produced a number of positives. But the sharp and sustained decrease in hospitalizations over a two-month period illustrates that these test results, which reflect an increase in testing capability, do not contradict the improvement of the circumstances at Elkton.

The assertion that the government unduly delayed in seeking a stay lacks merit. Respondents contend that the government should have sought a stay of the April 22 order when the Sixth Circuit declined to stay that order on May 8. But respondents' motion to enforce the injunction was then pending, see D. Ct. Doc. 51, and the district court had ordered respondents to survey all Elkton

inmates to determine whether they wished to participate in the suit, Stay App. 36a-40a. That posture created uncertainty both as to how the district court would enforce its order and the subclass's contours. The government appropriately waited until the district court issued its May 19 order to enforce, which made clear that a stay was necessary. The next day, the government sought a stay of the April 22 order from this Court and -- when the Court indicated that the government should first seek relief from the May 19 order in the lower courts -- the government promptly did so. On the same day the court of appeals denied that relief, the government filed its renewed stay application in this Court.

Nor is there any force to respondents' contention that a stay is unnecessary because the court of appeals has stated that it expects to issue a decision soon after a June 5 oral argument. BOP will begin transferring the first set of 128 inmates on June 5, even before the Sixth Circuit holds oral argument. An immediate stay is therefore necessary and warranted.

I. THERE IS A REASONABLE PROBABILITY THIS COURT WOULD GRANT CERTIORARI AND VACATE THE ORDERS

Respondents assert that this Court would be unlikely to grant certiorari because the district court's orders do not implicate any disagreements in the circuits. Opp. 29. In fact, they implicate two. Stay Appl. 19-21. And the Court would likely grant review in any event because the orders requiring the government to remove more than 800 prisoners from a federal institution, release them on home confinement under standards fashioned by a single judge, or transfer them to facilities unsuitable for them -- all

in the midst of a pandemic and without regard to the PLRA -- raise issues of fundamental importance meriting review. And the Court would be likely to vacate the orders because they disregard this Court's precedents and the PLRA's and Eighth Amendment's requirements.

A. 1. There is a well-established circuit conflict regarding whether prisoners may bring conditions-of-confinement challenges through habeas. Stay Appl. 19. Respondents assert that the split is not implicated because this suit is properly deemed a challenge to the "fact of [their] confinement" cognizable in habeas. Opp. 31 (citation omitted). But that contention is belied by any fair reading of respondents' claims: They allege that they are subject to unconstitutional conditions at Elkton because they cannot maintain social distancing there. See, e.g., Opp. 39, 42.

Respondents protest that their suit must be a "'fact or duration'" challenge because they seek a "form of release" or "enlargement," and accuse the government of "recharacteriz[ing]" their suit as focused on "conditions of confinement." Opp. 35-38 (citation omitted). But it is respondents' own habeas petition that confirms the nature of this suit. Their sole claim for relief is entitled "Unconstitutional Conditions of Confinement in Violation of the Eighth Amendment," and respondents define the "form of relief" they seek as discharge "from the physical confines of Elkton, not necessarily release from custody." Stay App. 54a n.2, 87a (emphasis omitted); see also, e.g., id. at 66a (alleging they are suffering from "current crowded conditions"). And here, that relief entails transfer to other BOP facilities, including higher-

security facilities where inmates enjoy fewer day-to-day freedoms. Neither that form of relief nor transfer to home confinement has any basis in the Great Writ, which involves "terminat[ing] custody, accelerat[ing] the future date of release from custody, [or] reduc[ing] the level of custody." Skinner v. Switzer, 562 U.S. 521, 534 (2011) (quoting Wilkinson v. Dotson, 544 U.S. 74, 86 (2005) (Scalia, J., concurring)).

Respondents also assert that the split regarding whether challenges to conditions of confinement are cognizable in habeas is "not real" because "[e]very court" agrees that "[c]hallenges to the fact or duration of confinement are for habeas; actions that seek to reform the conditions of confinement are for Section 1983." Opp. 30. But that assertion makes it all the more likely the Court would grant certiorari, because the district court allowed a conditions-of-confinement suit to proceed in habeas despite the weight of precedent to the contrary.

2. Respondents contend (Opp. 33-34) that there is no conflict with respect to the viability of Eighth Amendment claims regarding detention facilities in the face of the COVID-19 pandemic because the government has pointed to decisions in the stay posture. But the fact that multiple courts of appeals have already addressed the recent phenomenon of the COVID-19 pandemic in prisons, even through stay opinions, is evidence of the importance of the questions presented. And, as respondents themselves acknowledge, the stay orders in the Fifth and Eleventh Circuits rejected judicial intrusions into prison administration that were far less onerous than the orders in this case. Opp. 34 (citing

Valentine v. Collier, 956 F.3d 797, 799-800 (2020) (per curiam), and Swain v. Junior, No. 20-11622, 2020 WL 2161317, at *2-*3 (11th Cir. May 5, 2020) (per curiam)). The Sixth Circuit's refusal to stay the orders in this case is in sharp contrast to the response by those other circuits. See also Roman v. Wolf, No. 20-55436, 2020 WL 2188048 (9th Cir. May 5, 2020) (staying injunction concerning immigration detention).

B. Respondents further assert that they are likely to succeed on the merits, but that is plainly incorrect.

1. As noted, respondents' suit is properly characterized as a challenge to the conditions of their confinement. Such challenges are not cognizable in habeas, and the suit should have been dismissed for that reason alone. See Muhammad v. Close, 540 U.S. 749, 754-755 (2004) (per curiam) (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."); see also Nelson v. Campbell, 541 U.S. 637, 643 (2004). Indeed, respondents themselves admit that a proper Section 2241 action must challenge "the fact of custody." Opp. 37; see also id. at 40 (habeas applies if relief seeks to "alter the fact or duration of confinement").

Even if the challenge here were permitted in habeas, it would be governed by the PLRA because it fits squarely within that Act's definition of a "civil action with respect to prison conditions." See Stay Appl. 22 (quoting 18 U.S.C. 3626(g)(2)). Respondents' sole contrary argument -- in one short paragraph of their 68-page opposition -- is that the PLRA exempts habeas challenges to "the

fact or duration of confinement in prison." Opp. 41 (quoting 18 U.S.C. 3626(g)(2)). But this suit simply does not match that description, see pp. 7-8, supra, and respondents' allegations are instead materially indistinguishable from those in Brown v. Plata, 563 U.S. 493 (2011). See Stay Appl. 24. Respondents point out that the issue of "release only arose" in Brown because "no further conditions change [in prison] could remedy the constitutional violations," Opp. 38, but that is precisely what respondents allege here concerning Elkton. That respondents requested "a form of release" from the outset of their suit does not exempt their action from the PLRA. Opp. 39-40. To the contrary, the PLRA expressly contemplates that challenges to prison conditions may in rare circumstances result in "prisoner release orders" but imposes stringent procedural requirements on those very orders. 18 U.S.C. 3626(a). Respondents appear to have now abandoned any argument that the district court's orders satisfied those requirements or any others in the PLRA. Compare 19A1041 Stay Opp. 36.

The PLRA was passed to prevent the very sort of judicial intrusion and disruption the district court's orders impose on Elkton, with broader adverse consequences for the prison system as a whole and its inmates. See Woodford v. Ngo, 548 U.S. 81, 93 (2006) ("[t]he PLRA attempts to eliminate unwarranted federal-court interference with the administration of prisons"); Miller v. French, 530 U.S. 327, 339 (2000) ("curbing the equitable discretion of district courts was one of the PLRA's principal objectives"). Recognizing the "intrusive nature and harmful consequences to the public" of prisoner release orders, the PLRA permits those orders

only when issued by a three-judge court and only after lesser measures have failed. H.R. Rep. No. 21, 104th Cong., 1st Sess. 25 (1995); see 18 U.S.C. 3626(a)(3)(A) and (B). The PLRA's constraints serve to ensure that plaintiffs must convincingly demonstrate that any relief sought -- especially release from the prison where they are housed -- is required by the Constitution. The district court disregarded those requirements, and respondents have not made that showing.

2. In any event, there is no substantive legal basis for the district court's sweeping orders. Respondents' Eighth Amendment argument (Opp. 41-52) suffers from fundamental defects. They cannot satisfy the objective requirement for a valid claim, much less the subjective one. See Stay Appl. 26-34.

a. The Eighth Amendment prohibits "cruel and unusual" punishment, U.S. Const. Amend. VIII, and respondents ignore significant portions of the corresponding objective test. See Opp. 43-44. Respondents disregard entirely the requirement that a potential risk of serious harm must be "so grave" that in "today's society" "it violates contemporary standards of decency." Helling v. McKinney, 509 U.S. 25, 36 (1993). That requirement is particularly salient in the context of a pandemic that poses varying risks and implicates evolving challenges and responses throughout society. Respondents have made no attempt to show, as it was their burden to do, that standards in society during the unfolding pandemic would condemn the significantly mitigated risk of COVID-19 that exists at Elkton.

Respondents contend that Elkton's very "design[]" as a "low-security facility" creates an unconstitutional condition of confinement because Elkton's structure cannot accommodate recommended social distancing and the 150-man housing units have thus "deprived [respondents] of any chance to comply with the directives of the CDC." Opp. 6, 44; see Opp. 7, 11. The CDC's guidance for prisons, however, states that while social distancing strategies should "ideally" increase distancing to six feet by, for instance, having inmates sleep "head to foot" in "bunks," "[n]ot all strategies will be feasible" and "will need to be tailored to the individual space in the facility and the needs of the population and staff." Stay App. 211a. Respondents' position, if correct, would impose a constitutionally mandated six-feet-at-all-times rule that would require the removal of inmates from low-security facilities even where prison officials have taken extensive efforts to mitigate the risk of spread that has confronted institutions and individuals in varying ways throughout the Nation. Nothing supports such a rule, which is inconsistent with the decisions of courts of appeals properly analyzing similar Eighth Amendment claims. See Stay Appl. 21-22.

b. Respondents also err in contending (Opp. 41, 44-52) that "the Government is knowingly exposing prisoners at Elkton to a known, heightened risk" and, for that reason, BOP officials are "subjectively" imposing punishment on Elkton's inmates within the meaning of the Eighth Amendment.

Respondents first dispute (Opp. 50) the standard for determining whether officials are "subjectively" imposing such punishment. But it is well settled that punishment not mandated by statute or a court judgment can exist under this Court's Eighth Amendment precedents "only" if an official inflicts "unnecessary and wanton infliction of pain," Farmer, 511 U.S. at 834 (citation omitted), and the official's subjective intent can be judged only in light of "the constraints facing the official," Wilson v. Seiter, 501 U.S. 294, 303 (1991) (emphasis omitted); see Stay Appl. 29-30. Where, as here, officials have taken extensive steps to mitigate a known risk, their actions cannot constitute "punishment" unless the officials can be fairly charged with understanding that they have not taken still further steps that are compelled in light of all the circumstances they confront. Respondents identify nothing that carries their burden of proving such subjective belief, which at the very least requires a showing of "subjective recklessness" by officials who "know[] of and disregard[] an excessive risk to inmate health or safety," Farmer, 511 U.S. at 836-837, 839-840. In light of the prompt and increasing efforts at Elkton, respondents have not shown that officials knowingly disregarded such a risk.

Respondents assert (Opp. 45) that Elkton's mitigation measures "were already proven and known not to work." But that assertion does not reflect the actual mitigation efforts that were still evolving when Elkton experienced its initial two-week spike (March 26 to April 8) in hospitalizations. And significantly, respondents make no effort to square their assertion with the

evidence showing the substantially mitigated heath impacts at Elkton over the subsequent two-month period. The record demonstrates that those impacts at Elkton -- after an initial spike -- have been significantly mitigated in the face of BOP's expanding efforts.[2] After the initial two-week spike that occurred before Elkton had fully implemented its action plan, only four inmates were hospitalized in the next ten days (April 9-18), after which hospitalizations have dropped to nearly zero, with only two additional hospitalizations in the ensuing six-plus weeks. Stay App. 238a; Stay Appl. 10. And not one Elkton inmate infected after April 6 -- nearly two months ago -- has died from COVID-19-related complications. Stay Appl. 28; Stay App. 230a.

Respondents encourage this Court to disregard those improvements, asserting that 461 inmates are "currently" infected and that nearly 25% have been infected "at some point." Opp. 1, 5-6, 24 (emphasis omitted).[3] But the record shows that Elkton places all inmates who test positive into isolation to mitigate further transmissions. Stay App. 99a-100a, 152a, 173a, 178a-179a. Moreover, the two-month decrease in hospitalizations and the absence of deaths resulting from infections contracted after April 6 must reflect either that Elkton's full COVID-19 action plan has

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[2] Respondents assert (Opp. 59) that the government's evidence showing dramatic reductions in hospitalization was just filed May 29. That is incorrect. Only the updated information was filed recently. The initial evidence documenting the improvements was filed well before the district court's May 19 order. See, e.g., Stay App. 179a; id. at 187a-189a (charts).

[3] BOP has more recently reported test results for 1731 of the 1888 viral tests performed at Elkton, of which 315 (18%) were positive. D. Ct. Doc. 108 (June 3, 2020).

mitigated the virus's risks or that "the rate [of] COVID-19" transmission at Elkton (Opp. 28) was so rapid that the virus largely had run its course even before the district court's injunction. Either way, the evidence fails to show that the significantly mitigated risks deny "'the minimal civilized measure of life's necessities,'" still less establish "deliberate indifference." Farmer, 511 U.S. at 834 (citation omitted).

Respondents also argue (Opp. 49) that the initially low levels of testing support their assertion of an Eighth Amendment violation because the government has failed to show that it faced constraints that limited its access to test kits. But it is petitioner's burden to prove that subjective component constituting punishment. And regardless, the evidence showed that Elkton initially lacked enough tests to test all inmates, was receiving 25 rapid-test cassettes per week, and deployed its available tests using the priorities in CDC guidance. Stay App. 101a-102a. In the same Act respondents invoke in seeking home confinement, Congress recognized BOP's initial difficulty in obtaining tests in the marketplace. Stay Appl. 32. Elkton made sustained efforts to obtain additional testing and ultimately contracted to enable mass testing. Stay App. 146a, 149a, 176a. Although the State of Ohio was apparently able to obtain tests for a state prison (Opp. 49), the fact that the State succeeded in the marketplace where facilities were then competing for limited resources does not show that Elkton's officials were recklessly ignoring the virus's known risks.

c. In any event, the district court's orders, and especially its mandated use of home confinement under standards of its own

formulation, do not constitute proper Eighth Amendment relief. Stay Appl. 33-34. Even if respondents could show that the mitigated risk of harm from COVID-19 at Elkton constituted cruel and unusual punishment, at most that would entitle them to an order for BOP to ameliorate the challenged conditions. The Eighth Amendment does not grant inmates the right to home confinement or any particular alternate placement.

II. THE DISTRICT COURT'S ORDERS ARE ALREADY CAUSING SEVERE HARMS

As the government has consistently explained, the district court's orders cause irreparable harm to BOP, inmates, and the public by "inappropriately interjecting the judiciary into sensitive areas of prison administration," 19A1041 Stay Appl. 36-37, and by usurping BOP's statutory authority to determine suitable placements for inmates and to decide when home confinement is appropriate, Stay Appl. 38-39. "[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm" on the government, Abbot v. Perez, 138 S. Ct. 2305, 2324 n.17 (2018), and here that harm is compounded by the adverse effects on inmate well-being and threats to public safety posed by the district court's orders regarding home confinement and transfer.

A. Respondents primarily assert that BOP is not harmed by the district court's usurpation of its statutory authority because "the preliminary injunction did little more than echo the Attorney General's instruction" to "move at-risk prisoners out of Elkton." Opp. 62. But the Attorney General has never suggested that BOP should transfer more than 800 inmates out of Elkton through any

means necessary, as the district court directed. Instead, the Attorney General merely directed BOP to "immediately review" inmates with COVID-19 risk factors to determine whether they are "suitable candidates for home confinement," and to "start[] with the inmates" at Elkton and three other facilities. April 3 Memo 2 (emphasis added). And in doing so, the Attorney General emphasized BOP's "obligation to protect the public" by conducting a "careful" review to prevent the "profound risks" that arise when inmates are inappropriately released to home confinement only to offend again. Id. at 2-3.

Respondents suggest that if BOP was faithfully adhering to that guidance, it would have deemed far more inmates eligible for home confinement. But that overlooks the numerous class members who are ineligible under the plain terms of the Attorney General's memoranda because of their sex offenses or history of violence. See p. 3, supra. Respondents' argument also overlooks that, in order to increase the number of inmates it thought should be deemed eligible for home confinement, the district court explicitly revised the criteria in the Attorney General's guidance by -- for example -- requiring BOP to "disregard" certain violent offenses. Stay App. 48a. And it ignores the unrebutted evidence that applying those judicially crafted standards improperly forced BOP to approve over 50 otherwise-ineligible inmates for home confinement. Stay Appl. 16-17. While respondents contend that the fact of confinement at a low-security prison like Elkton is a sign that an inmate can be safely released, BOP's prison-security designations primarily reflect the "level of security and supervision the inmate

requires" in prison, not his risks to the public -- which can be a salient distinction for, among others, sex offenders. See BOP, Inmate Security Designation and Custody Classification, https://www.bop. gov/policy/progstat/5100_008cn.pdf (Sept. 4, 2019). The threat to public safety is clear.[4]

B. Respondents also ignore entirely the harm to subclass members who, under the district court's orders, will be transferred away from the facility that BOP has determined best-suited to their needs. As the government demonstrated, transferring subclass members to facilities where greater social distancing measures are feasible could place them farther from their homes, interrupt their sex-offender, mental-health, drug, and other rehabilitative programming, and lead to their placement in higher security facilities where they will face heightened levels of intra-inmate violence. Stay Appl. 36. Unsurprisingly, many putative subclass

[4] Respondents barely offer any argument regarding compassionate release, perhaps recognizing that relief must come from a sentencing court. They do erroneously assert that "the Government has taken the position" that the threat of "COVID-19 is entirely irrelevant to the consideration of compassionate release." Opp. 48. The Department of Justice has taken the position in litigation that, under present circumstances, an inmate's diagnosis with a medical condition that the CDC has identified as a risk factor for COVID-19, and from which the inmate is not expected to recover, presents an "extraordinary and compelling reason[]" that may warrant compassionate release if other criteria are also met. 18 U.S.C. 3582(c)(1)(A); see, e.g., United States v. Pabon, No. 17-CR-165, 2020 WL 2112265, at *3 (E.D. Pa. May 4, 2020) (noting and agreeing with Government's position); see also Sentencing Guidelines § 1B1.13(2) (court must also determine that the inmate "is not a danger to the safety of any other person or to the community"); 18 U.S.C. 3582(c)(1)(A) (court must consider the 18 U.S.C. 3553(a) factors, as "applicable," as part of its analysis); United States v. Chambliss, 948 F.3d 691, 694 (5th Cir. 2020).

members do not want that. D. Ct. Doc. 98-1, at 13. Respondents -- themselves only four individuals who as conditional class representatives seek to require BOP to impose those consequences on hundreds of their fellow inmates through an improperly certified class action -- offer no response.

C. Ultimately, the district court's orders have "lock[ed] in place a set of policies for a crisis that defies fixed approaches," Valentine, 956 F.3d at 803 (5th Cir.), and the results are, predictably, unwarranted. Although the evidence indicates that BOP is making gains against the pandemic at Elkton, the prison will now be forced to devote its resources to transferring hundreds of inmates to alternative prisons that are often higher security. The transfer process is resource-intensive and risks spreading infection, at a time when the Nation's law enforcement resources are stretched thin. And the transferred inmates may find themselves in new facilities with heightened levels of violence and diminished freedom and programming, all for the uncertain benefit of leaving Elkton when the virus is relenting there. In contexts like the COVID-19 pandemic, which are "'fraught with medical and scientific uncertainties,'" "politically accountable officials" must be allowed to do their jobs without inappropriate "second-guessing by an 'unelected federal judiciary.'" South Bay United Pentecostal Church, slip op. 2 (Roberts, C.J., concurring in denial of application for injunctive relief) (citations omitted). That

reasoning applies with special force to prison administration in the midst of a pandemic, and it amply warrants a stay here.

CONCLUSION

This Court should stay the district court's orders pending the completion of further proceedings in the court of appeals and, if necessary, this Court.

Respectfully submitted.

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