2021 Supplement: Add a new chapter, starting page 1021:

CHAPTER 20

THE COVID-19 PANDEMIC BEHIND BARS

When the COVID-19 pandemic reached the United States, jails and prisons were especially hard hit. The combination of close confinement, medically vulnerable populations, and lack of personal control for prisoners meant that they faced a high risk of infection and illness, without the opportunity to take many of the ameliorative steps available to non-prisoners. The result was both infection and death rates several times higher in prisons and jails than on the outside. (A study of deaths as of June 2020 found the death rate in prison to be three times the rate outside, after adjusting for age and sex distributions. See Saloner et al, COVID-19 Cases and Deaths in Federal and State Prisons, 324 JAMA 602 (2020). In many states, prisons and jails were slow to offer vaccines to incarcerated people, and staff were slow to agree to vaccination.

In jails, especially, adjustments to pretrial release policies and other pandemic-related policy and situational changes led to a sharp temporary decrease in population. Some prisons released many individuals on various new or augmented compassionate release or parole programs. But for those who stayed incarcerated, in addition to the toll taken by COVID, pandemic-related lockdowns and staff shortages subverted ordinary jail and prison programs and services. Non-COVID medical and mental health care suffered, as did the availability of visits, and programs (including programs required prior to parole consideration). (The image that follows illustrates a letter written by a man incarcerated in Louisiana about the results.

Taslim von Hattum; used with permission of Voice of the Experienced

Litigation challenged institutional decisionmaking related to social distancing (or its absence), masks and sanitation measures, vaccination policies and practices, and more. It proceeded in state and federal court, using many different procedural vehicles and citing a variety of theories. What follows are opinions from three cases—two in federal court, one in state court—and also an executive order relating to COVID.

As will be evident, the litigation involved many of the issues addressed in this casebook: the appropriate standard of liability for conditions of confinement challenges brought by convicted prisoners and pretrial detainees (see Chapter 2); the line between habeas and non-habeas lawsuits (see Chapter 14.A); the operation of the Prison Litigation Reform Act's administrative exhaustion requirement (see Chapter 16.A) and rules limiting the availability of "prisoner release orders" (see Chapter 14.D.4); and more. Some of the cases succeeded in obtaining relief; more did not.

WILSON V. WILLIAMS

961 F.3d 829 (6th Cir. 2020)

JULIA SMITH GIBBONS, CIRCUIT JUDGE, joined by JUDGE DEBORAH L. COOK.

Petitioners, four inmates housed in the low-security Elkton Federal Correctional Institution and its satellite facility FSL Elkton (collectively "Elkton"), on behalf of themselves and others housed or to be housed there, filed a petition under 28 U.S.C. § 2241 to obtain release from custody to limit their exposure to the COVID-19 virus. They sought to represent all current and future inmates, including a subclass of inmates who—through age and/or certain medical conditions—were particularly vulnerable to complications, including death, if they contracted COVID-19. The district court entered a preliminary injunction on April 22, 2020, directing Respondents Mark Williams, Elkton's warden, and Michael Carvajal, the Director of the Federal Bureau of Prisons ("BOP") (together "BOP"), to (1) evaluate each subclass member's eligibility for transfer out of Elkton by any means, including compassionate release, parole or community supervision, transfer furlough, or non-transfer furlough within two weeks; (2) transfer those deemed ineligible for compassionate release to another BOP facility where testing is available and physical distancing is possible; and (3) not allow those transferred to return to Elkton until certain conditions were met.

On appeal, the BOP argues that (1) the district court lacked jurisdiction under 28 U.S.C. § 2241 and that the suit must comply with the Prison Litigation Reform Act ("PLRA"); (2) petitioners have not shown a likelihood of success on the merits of their Eighth Amendment claim; and (3) the district court abused its discretion in granting the injunction.

We hold that jurisdiction was proper under § 2241, although § 2241 does not permit some of the relief petitioners seek. However, because the district court erred in concluding that petitioners have shown a likelihood of success on the merits of their Eighth Amendment claim, we conclude that the district court abused its discretion in granting the preliminary injunction. We thus vacate the injunction.

I.

Petitioners filed a petition under 28 U.S.C. § 2241 seeking release due to the impact of the COVID-19 pandemic at the Elkton facilities. "Our task is ... to review the record that was before the district court at the time the preliminary injunction was entered."

A.

The COVID-19 virus is highly infectious and can be transmitted easily from person to person. COVID-19 fatality rates increase with age and underlying health conditions such as cardiovascular disease, respiratory disease, diabetes, and immune compromise. If contracted, COVID-19 can cause severe complications or death. Because there is no current vaccine, the Centers for Disease Control and Prevention ("CDC") recommends preventative measures to decrease transmission such as physical distancing, mask wearing, and increasing focus on personal hygiene such as additional hand washing.

B.

Elkton is a low-security prison in Lisbon, Ohio, designed to house approximately 2,000 inmates at the main facility and 500 inmates at the satellite facility. The main facility consists of three buildings with six dormitory-style housing units; each unit holds approximately 300 inmates split between two sides. The satellite facility has two housing units, each with approximately 250 inmates. Each side of a housing unit contains approximately 150 bunks resulting in two to three inmates sharing a cube and sleeping a few feet away from each other.

In response to the pandemic, the BOP began a phased approach nationwide. Phase One of its action plan began in January 2020 and involved creating a strategic response plan. On March 13, 2020, the BOP implemented Phase Two, which suspended social and legal visits, inmate facility transfers, staff travel and training, contractor access, and volunteer visits. Elkton began implementing Phase Two health screening of arriving inmates and staff for COVID-19 symptoms and risk factors on March 22. Additionally, the BOP modified operations to maximize physical distancing, including staggering meal and recreation times, instating grab-and-go meals, and establishing quarantine and isolation procedures. Phase Three involved inventorying the BOP's cleaning, sanitation, and medical supplies. In Phase Four, beginning on March 26, the BOP expanded its initial screening procedures to mandate use of a screening tool and temperature check, and require asymptomatic arrivals to be placed in quarantine for fourteen days and symptomatic arrivals to be isolated until they tested negative for COVID-19 or were cleared by medical staff.

On March 31, the BOP implemented Phase Five. Phase Five required all inmates to be secured to their quarters for a fourteen-day period with limited access to the commissary, laundry, showers, telephone, and other services. The BOP also coordinated with the U.S. Marshals Service to decrease incoming arrivals during this period. Phase Six, ordered on April 13, extended Phase Five through May 18.

In addition to complying with nationwide directives, Elkton also provided inmate and staff education through Frequently Asked Questions bulletins, provided staff training on using Personal Protective Equipment, ordered enhanced cleaning, and took other preventative measures. Elkton also began, but quickly ended, daily temperature screening of inmates. For inmates deemed to have "essential" work details requiring movement throughout the building, such as food service and cleaning orderlies, Elkton implemented enhanced screening before and after assigned work details. Inmates are encouraged to self-monitor and report symptoms and are screened for symptoms and exposure to risk factors.

Elkton avers that "[a]ll inmates have access to sinks, water, and soap at all times" and "inmates may receive new soap weekly" or "upon request." And staff have consistent access to soap and hand sanitizer. Elkton provided personal protective equipment to staff to be used in designated locations such as quarantine areas and isolation units. Staff and inmates were provided two surgical face masks for daily use.

Elkton's "[m]edical staff determine if COVID-19 testing is necessary based on applicable guidelines and community standards." Elkton initially received fifty-five testing swabs to test

inmates and staff, and as of April 15 had eighteen swabs remaining. In addition, Elkton received an Abbott rapid-testing machine with twenty-five screening test cassettes and hoped to receive twenty-five additional cassettes each week. As of April 22, fifty-nine inmates and forty-six staff members tested positive for COVID-19, and six inmates had died.

Petitioners contend that the BOP's approach and procedures are limited in effectiveness due to the dormitory-style housing at Elkton making it impossible to maintain physical distance and because there are insufficient supplies. Inmates were issued two disposable masks but have no ability to clean them after repeated use. Inmates are also issued a weekly four-ounce bottle of 3-in-1 soap, so inmates frequently run out of soap. There are few shower and bathroom facilities, so inmates are in close proximity to each other when they use those facilities. Additionally, inmates are unable to physically distance when moving within the facility to pick up meals, use phones and computers, or move within the housing unit itself. Moreover, some inmates circulate through the prison as "essential workers" interacting with others outside their housing unit. Several features of the Elkton facilities "heighten risks for exposure, acquisition, transmission, and clinical complications," including: "overcrowding; population density in close confinement; insufficient ventilation; shared toilet, shower, and eating environments; and limits on hygiene and personal protective equipment such as masks and gloves in some facilities."

C.

Petitioners, on behalf of themselves and current and future inmates at Elkton, allege that their confinement in the midst of the COVID-19 outbreak violates the Eighth Amendment. Specifically, petitioners claim that "there is no set of internal protocols or practices that, in light of the current conditions and population levels, Elkton can use that will prevent further disease and death inside the prison." Therefore, petitioners sought class certification and a preliminary injunction ordering the BOP to identify and release all inmates ages fifty or older and those that are medically vulnerable. Beyond the release of the initial subclass, petitioners seek specific mitigation efforts to prevent spread of COVID-19 within Elkton.

On April 22, the district court granted petitioners' motion in part. The district court recognized the measures Elkton put in place in response to the COVID-19 pandemic but found that "Elkton officials fight a losing battle. A losing battle for staff. A losing battle for inmates." Because of the BOP's limited testing capacity and "the prison's 'dorm-style' design," "inmates remain in close proximity" and "COVID-19 is going to continue to spread." Despite screening measures, "once the virus is inside the prison, as it already is at Elkton, screening measures can only be so effective." The district court found Elkton's "modified operations" to be "[b]etter practices, but not enough."

On the merits of petitioners' motion for a preliminary injunction, the district court held that "the exceptional circumstances at Elkton and petitioners' substantial claims, that are likely to succeed at the merits stage, necessitate the exercise of [the district court's enlargement] authority and that such a relief is proper for members of the [medically-vulnerable subclass]." First, the district court held that it had jurisdiction under § 2241 over petitioners' claims regarding the medically-vulnerable subclass because they sought release and "ultimately [sought] to challenge the fact or duration of confinement as well." * * *

The district court conditionally certified a medically-vulnerable subclass and determined that the subclass was likely to succeed on the merits of the Eighth Amendment claim. The district court limited the subclass to inmates sixty-five and older and those with medical conditions posing additional risk of severe harm from COVID-19.

Balancing the potential harms and public interest, the district court granted the preliminary injunction and required the BOP to (1) identify all members of the subclass within one day; (2) "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 [ ] weeks"; and (3) to not return any subclass member transferred out of the facility to Elkton "until the threat of the virus is abated or until a vaccine is available and Elkton obtains sufficient vaccine supplies to vaccinate its population, whichever occurs first."

[The BOP appealed.] On June 4, the Supreme Court granted the BOP's request for an administrative stay pending disposition of this appeal and further order of the Court. ___ S.Ct. ___, 2020 WL 2988458 (June 4, 2020) * * *

III.

The BOP argues that the district court's decision should be reversed because the district court lacked jurisdiction to consider the petition, incorrectly concluded that petitioners were likely to succeed on the merits, and abused its discretion in granting the preliminary injunction. We disagree with the BOP's assertion that the district court lacked jurisdiction. To the extent petitioners argue the alleged unconstitutional conditions of their confinement can be remedied only by release, 28 U.S.C. § 2241 conferred upon the district court jurisdiction to consider the petition. We agree with the BOP, however, that the district court erred in concluding that petitioners were likely to succeed on the merits of their Eighth Amendment claim. And, because petitioners are unlikely to succeed on the merits, we must also conclude that the district court abused its discretion by granting petitioners a preliminary injunction.

A.

We must initially address whether the district court properly invoked jurisdiction under 28 U.S.C. § 2241 over petitioners' claims. We conclude that petitioners' claims are properly brought under § 2241 because they challenge the fact or extent of their confinement by seeking release from custody. However, because petitioners bring their claims under § 2241, the relief available is circumscribed.

Section 2241 provides jurisdiction to district courts over habeas petitions when a petitioner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3).

Petitioners seek release from Elkton and allege that there are "no mitigation efforts that Elkton could undertake that would prevent the risk of contraction—and possible later spread to the non-prison community—to any acceptable degree, other than immediate release of the Medically-Vulnerable Subclass." Rather than arguing that there are particular procedures or safeguards that the BOP should put in place to prevent the spread of COVID-19 throughout Elkton, petitioners contend that there are no conditions of confinement sufficient to prevent irreparable constitutional injury at Elkton. They therefore seek release. Our precedent supports the conclusion that where a petitioner claims that no set of conditions would be constitutionally sufficient the claim should be construed as challenging the fact or extent, rather than the conditions, of the confinement. The Supreme Court has held that release from confinement—the remedy petitioners seek here—is "the heart of habeas corpus." *Preiser v. Rodriguez*, 411 U.S. 475, 498 (1973).

The BOP's attempts to classify petitioners' claims as "conditions of confinement" claims, subject to the PLRA, are unavailing. The BOP is correct that conditions of confinement claims seeking relief in the form of improvement of prison conditions or transfer to another facility are not properly brought under § 2241. The BOP relies primarily on *Martin v. Overton*, 391 F.3d 710 (6th Cir. 2004), to argue that petitioners' claims are properly characterized as conditions of confinement claims. In Martin, the petitioner sought "transfer to a different prison facility for the

purpose of medical treatment and civil damages resulting from the alleged delay and denial of that treatment."

Because petitioners outside the medically-vulnerable subclass sought improvement in the conditions at Elkton rather than release, the district court correctly concluded that the claims by these inmates were conditions of confinement claims not appropriately considered under § 2241. In contrast, petitioners in the medically-vulnerable subclass bring claims that are readily distinguishable from those in Martin, because "[p]etitioners challenge the extent of their custody and seek release from their confinement at Elkton" rather than transfer to another facility to receive different medical care. Petitioners also point out that the petitioner in Martin could have any constitutional claims remedied without a change in his custody. Petitioners here, however, contend that the constitutional violations occurring at Elkton as a result of the pandemic can be remedied only by release. The BOP's framing of the requested relief as seeking transfer or improvement to the BOP's COVID-19 response procedures overlooks the fact that petitioners in the subclass seek release. Because petitioners seek release from confinement, "the heart of habeas corpus," jurisdiction is proper under § 2241.

However, the decision to bring a habeas claim, rather than one challenging the conditions of confinement, limits the type of relief available to petitioners. A district court reviewing a claim under § 2241 does not have authority to circumvent the established procedures governing the various forms of release enacted by Congress.

The district court's preliminary injunction order primarily grants relief consistent with statutory limitations and procedures. The district court ordered the BOP to "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." The preliminary injunction order requires the BOP to evaluate these forms of release and determine if any of the subclass members are eligible. The district court's order to "prioritize the review [of petitioners] by the medical threat level" is not to the contrary. We decline to set forth a comprehensive list of permissible forms of relief, but we note that the district court's order requiring transfer from Elkton to another BOP facility was not proper under § 2241.

Because petitioners' claims are properly brought under § 2241, the BOP's argument that the claims are foreclosed by the PLRA fails. The PLRA does not apply in habeas proceedings. See 18 U.S.C. § 3626(g)(2).

B.

Turning to the preliminary injunction, we focus our analysis on petitioners' likelihood of success on the merits of their Eighth Amendment claim, as this prong of the preliminary injunction framework is often dispositive.

1.

We turn first to petitioners' likelihood of success on their Eighth Amendment claim.

Here, the objective prong [of the Eighth Amendment claim] is easily satisfied. In assessing the objective prong, we ask whether petitioners have provided evidence that they are "incarcerated under conditions posing a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The COVID-19 virus creates a substantial risk of serious harm leading to pneumonia, respiratory failure, or death. The BOP acknowledges that "[t]he health risks posed by COIVD-19 are significant." The infection and fatality rates at Elkton have borne out the serious risk of COVID-19, despite the BOP's efforts. The transmissibility of the COVID-19 virus in conjunction

with Elkton's dormitory-style housing—which places inmates within feet of each other—and the medically-vulnerable subclass's health risks, presents a substantial risk that petitioners at Elkton will be infected with COVID-19 and have serious health effects as a result, including, and up to, death. Petitioners have put forth sufficient evidence that they are "incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834

Turning to the subjective prong, the question is whether petitioners have demonstrated that the BOP's response to the COVID-19 pandemic has been deliberately indifferent to this serious risk of harm. We conclude that petitioners are unlikely to succeed on the merits of their Eighth Amendment claim because, as of April 22, the BOP responded reasonably to the known, serious risks posed by COVID-19 to petitioners at Elkton.

There is no question that the BOP was aware of and understood the potential risk of serious harm to inmates at Elkton through exposure to the COVID-19 virus. As of April 22, fifty-nine inmates and forty-six staff members tested positive for COVID-19, and six inmates had died. "We may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious." *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). The BOP acknowledged the risk from COVID-19 and implemented a six-phase plan to mitigate the risk of COVID-19 spreading at Elkton.

The key inquiry is whether the BOP "responded reasonably to th[is] risk." *Farmer*, 511 U.S. at 844. The BOP contends that it has acted "assiduously to protect inmates from the risks of COVID-19, to the extent possible." These actions include

> implement[ing] measures to screen inmates for the virus; isolat[ing] and quarantin[ing] inmates who may have contracted the virus; limit[ing] inmates' movement from their residential areas and otherwise limit[ing] group gatherings; conduct[ing] testing in accordance with CDC guidance; limit[ing] staff and visitors and subject[ing] them to enhanced screening; clean[ing] common areas and giv[ing] inmates disinfectant to clean their cells; provid[ing] inmates continuous access to sinks, water, and soap; educat[ing] staff and inmates about ways to avoid contracting and transmitting the virus; and provid[ing] masks to inmates and various other personal protective equipment to staff.

The BOP argues that these actions show it has responded reasonably to the risk posed by COVID-19 and that the conditions at Elkton cannot be found to violate the Eighth Amendment. We agree.

Here, while the harm imposed by COVID-19 on inmates at Elkton "ultimately [is] not averted," the BOP has "responded reasonably to the risk" and therefore has not been deliberately indifferent to the inmates' Eighth Amendment rights. The BOP implemented a six-phase action plan to reduce the risk of COVID-19 spread at Elkton. Before the district court granted the preliminary injunction at issue, the BOP took preventative measures, including screening for symptoms, educating staff and inmates about COVID-19, cancelling visitation, quarantining new inmates, implementing regular cleaning, providing disinfectant supplies, and providing masks. The BOP initially struggled to scale up its testing capacity just before the district court issued the preliminary injuction, but even there the BOP represented that it was on the cusp of expanding testing. The BOP's efforts to expand testing demonstrate the opposite of a disregard of a serious health risk.

Petitioners, and the dissent, urge us to conclude that the BOP was deliberately indifferent to petitioners' health and safety because the BOP's actions have been ineffective at preventing the spread of COVID-19 at Elkton and the BOP "has chosen not to take available action to meaningfully address the risk." Petitioners argue that the BOP "taking measures that it knows will fail is [not] enough to pass constitutional muster." [P]etitioners assert that prison officials "are still deliberately indifferent if they take or persist in a course of action that they know to be ineffective." Additionally, petitioners fault the BOP for failing to make use of the various options

for reducing the population at Elkton to enable physical distancing, such as through home confinement or furlough.

First, petitioners' argument that the BOP's response to the COVID-19 virus has been so ineffective as to constitute deliberate indifference fails. The BOP has not shown the same sense of disregard by prison officials as in our cases finding deliberate indifference. *Richmond v. Huq*, 885 F.3d 928 (6th Cir. 2018), *Darrah v. Krisher*, 865 F.3d 361 (6th Cir. 2017), and *Phillips v. Roane County*, 534 F.3d 531 (6th Cir. 2008), are not to the contrary.

[Unlike in *Richmond*,] even if the BOP's response has been inadequate, it has not disregarded a known risk or failed to take any steps to address the risk, like the doctor in Richmond, such that its response falls below the constitutional minimum set by the Eighth Amendment. Similarly, [t]he BOP * * * has taken many affirmative actions to not only treat and quarantine the inmates at Elkton who have tested positive, but also to prevent widespread transmission of COVID-19. These actions have evolved as new guidance has emerged. The BOP's ongoing and dynamic response to a novel threat can hardly be compared to the doctor's lack of response in the face of no improvement in the inmate's condition in *Darrah* * * *. Additionally, [i]n contrast [to *Phillips*], here the BOP has not turned a blind eye or deaf ear to a known problem that would indicate such a lack of concern for petitioners' welfare. The BOP has in fact put in place and updated its protocols to address the novel risks from COVID-19. The BOP's steps to prevent and mitigate COVID-19 spread at Elkton are likely reasonable responses to this serious risk.

Second, petitioners contend that the BOP's response was not a reasonable response to the virus because the BOP had not made full use of the tools available to remove inmates from Elkton, such as temporary release, furlough, or home confinement. But our precedents do not require that prison officials take every possible step to address a serious risk of harm. For example, although the BOP has the ability to recommend compassionate release, only the sentencing court is authorized to reduce a term of imprisonment. 18 U.S.C. § 3582(c). Similarly, the BOP has authority under 18 U.S.C. § 3622 to temporarily release an inmate for a period up to thirty days, but the bases for granting this release are limited to a delineated list of reasons including obtaining medical treatment, visiting a dying relative, or "engaging in any other significant activity consistent with the public interest." 18 U.S.C. § 3622(a). Finally, as the BOP explains, there are significant risks to inmates and staff when transferring inmates to another facility. The BOP intentionally stopped inmate facility transfers under Phase Two of its response. In light of the BOP's other measures to prevent the spread of COVID-19, and given the limitations on the BOP's authority to release inmates, its failure to make robust use of transfer, home confinement, or furlough to remove inmates in the medically-vulnerable subclass from Elkton does not constitute deliberate indifference.

We conclude that petitioners have not provided sufficient evidence to show that the BOP was deliberately indifferent to the serious risk of harm presented by COVID-19 at Elkton. This conclusion is dispositive * * *. The district court erred in holding that petitioners had demonstrated a likelihood of success on their Eighth Amendment claim.

2.

Although petitioners' failure to demonstrate a likelihood of success on the merits is dispositive, we briefly note that the district court's consideration of the other preliminary injunction factors was incomplete. The district court correctly noted that inmates at Elkton face a risk of irreparable injury if they are infected by COVID-19. However, the district court gave scant attention to the harms the BOP argued would result from the injunction and ignored the Supreme Court's instruction that the harm to the opposing party and the public interest factors "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). For example, the

BOP argued that release of inmates " 'would cause substantial damage to others' because there is no assurance that the inmates can care for themselves upon release." The district court dismissed this argument, noting that "[p]etitioners do not ask this Court to throw open the gates to the prison." That may be true, but the injunction would result in release of some prisoners, and the district court's response does not address the BOP's concerns about how the released inmates would look after themselves. The district court's response to the BOP's concerns about the impact on the public from release of inmates is similarly insufficient. The district court rejected the BOP's argument that prisoners might have no safe place to go upon release and return to their criminal activities upon release by saying that the BOP "might as well be arguing against the release of any inmate[ ] at any time." That response does not address the legitimate concerns about public safety the BOP raised. In granting a preliminary injunction without adequately addressing the remaining preliminary injunction factors, the district court abused its discretion.

IV.

Because petitioners have not shown a likelihood of success on the merits of their Eighth Amendment claim, the district court abused its discretion in granting the preliminary injunction. We accordingly vacate the district court's April 22, 2020 preliminary injunction.

R. GUY COLE, JR., CHIEF JUDGE, concurred in part and dissented in part

COVID-19 is not only highly infectious but also devastating to those unfortunate enough to contract it. It attacks the nose, throat, and lungs of its victims, resulting in effects ranging from flu-like symptoms, to pneumonia, to acute respiratory disease, to death. The likelihood of more severe effects increases dramatically for those who are of an advanced age or who have any number of preexisting conditions, including cardio-vascular disease, respiratory disease, asthma, diabetes, and diseases that compromise the immune system. The inmates whom this preliminary injunction addresses all have characteristics that make them more likely to suffer and die should COVID-19 infect them.

To combat the spread of the virus, the government has recommended that Americans "socially distance" from each other by staying home whenever possible and controlling the nature and extent of their interactions with others to minimize the risk of exposure. But that precaution, which has become routine for so many seeking to guard against infection over the past few months, is unavailable to inmates. Instead, prisoners have been placed in a deadly predicament: prevented by the fact of their confinement from taking recommended precautions, they are left exceptionally exposed to a deadly virus. This reality is particularly concerning for medically vulnerable inmates like those in the subclass.

This predicament has already had deadly consequences at Elkton, which has become an epicenter of the pandemic within the federal prison system. There, groups of roughly 150 inmates continue to be housed together in close quarters. Perhaps predictably, the virus had spread rapidly among inmates and staff alike at the prison by the time the district court issued its preliminary injunction on April 22, 2020. By that time, six inmates at the prison had already died, and more clung to life only with the aid of ventilators, all while the BOP failed to take action to allow the 837 medically vulnerable inmates in its charge at Elkton to follow public health guidelines by maintaining an appropriate distance between themselves and their fellow inmates. This failure left these inmates in a perilous situation, which the district court sought to address through the preliminary injunction before us today. Upon review of the record, I conclude that the district court did not abuse its discretion in granting the preliminary injunction. I therefore respectfully dissent from the majority's opinion finding that it did so.

II.

The majority vacates the preliminary injunction based on its assessment of the petitioners' likelihood of succeeding on the merits of their Eighth Amendment claims. I agree with the majority that the threat of COVID-19 to medically vulnerable inmates in our nation's prisons is an objectively serious one, even more so at a facility like Elkton where prisoners are kept in large groups where they cannot practice social distancing. I disagree, however, with the conclusion that the petitioners are unlikely to succeed in showing that the BOP was deliberately indifferent in responding to that threat.

Our case law is clear: we do not turn a blind eye to prison conditions when the treatment prison officials provide in response to a serious medical need is "so woefully inadequate as to amount to no treatment at all." Relying on this principle, we found officials to be deliberately indifferent when they persisted in treating an inmate's medical condition with medication that was known to be ineffective instead of an alternative that had proven to be much more effective in addressing the condition.

The circumstances here are analogous to those that we considered in *Darrah v. Krisher*, 865 F.3d 361 (6th Cir. 2017). Here, the BOP says that it relied on guidelines from the Centers for Disease Control ("CDC") in crafting its response to the spread of COVID-19 at Elkton. Those guidelines provide that social distancing is "a cornerstone of reducing transmission of respiratory disease." CDC, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities at 4 (Mar. 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html. Yet, the BOP's multiphase response does not include a single phase that allows for meaningful social distancing. Like the officials in *Darrah*, the BOP persisted with ineffective measures when an effective one was readily available. The fact that the ineffective measures here came in the form of multiple actions instead of a single one does not excuse the BOP's choice to ignore methods that address this "cornerstone" of respiratory-disease management. That failure is more jarring when one considers that both Congress and Attorney General Barr went out of their way to urge the BOP to take more aggressive measures to address the virus in its facilities.

First, Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, which allowed the Attorney General to expand the BOP's ability to move prisoners to home confinement. See CARES Act, Pub. L. No. 116-136, § 12003(b)(2) (2020). Next, the Attorney General expanded the availability of transfers to home confinement. Then, on April 3, 2020, the Attorney General turned his attention directly to Elkton and other facilities where the COVID-19 outbreak had become particularly severe. He expressly directed the BOP to "immediately maximize appropriate transfers to home confinement of all appropriate inmates" being held at Elkton and the other facilities where COVID-19 was "materially affecting operations."

Nineteen days passed between the Attorney General's directive to the BOP regarding the use of home confinement for Elkton inmates and the district court's order issuing the preliminary injunction that is at issue in this appeal. During that time, the record does not reflect a substantial effort on the part of the BOP to evaluate for home confinement even the 837 medically vulnerable inmates who make up the subclass. That inexplicable delay had dire consequences. By the time the district court issued its order, six Elkton inmates had already succumbed to COVID-19, with others left hospitalized with severe conditions. That number of cases is even more striking when one considers that the most recent BOP figures show that 78 inmates in federal custody have died from the virus to date, meaning that nearly 8% of all inmate deaths over three months occurred at Elkton—a low-security facility that houses less than 2% of all federal inmates—within the first month of the pandemic. BOP, COVID-19 Cases, https://www.bop.gov/coronavirus/. I am left with the inescapable conclusion that the BOP's failure to make use of its home confinement authority at Elkton, even as it stared down the escalating

spread of the virus and a shortage of testing capacity, constitutes sufficient evidence for the district court to have found that petitioners were likely to succeed on their Eighth Amendment claim.

The BOP casts its overall response to COVID-19 as a "multiphase action plan." That phrase sounds good on paper; it conveys the message that the BOP is doing all that it possibly can to address the outbreak at Elkton. But it means little until we look behind the curtain and examine whether the plan's phases move the BOP closer to keeping the inmates safe. Such an examination here reveals that the BOP's six-phase plan to address COVID-19 is far less impressive than its title suggests. That plan consists of two different phases addressing the screening of inmates, an entire phase consisting of only taking inventory of the BOP's cleaning supplies, a phase where the BOP confined inmates to their quarters where they cannot socially distance, and a final phase that just extended the previous one. It turns out, then, that the "six-phase" plan is, for practical purposes, a four-phase plan where one phase is taking inventory of supplies and another involves the locking of inmates in 150-person clusters where they cannot access the principal method of COVID-19 prevention. Suffice to say, with stakes this high, the specifics matter far more than the headline. As another court observed, "[t]he government's assurances that the BOP's 'extraordinary actions' can protect inmates ring hollow given that these measures have already failed to prevent transmission of the disease." *United States v. Rodriguez*, 451 F.Supp.3d 392, 402 (E.D. Pa. 2020).

Similar scrutiny of the personal protective equipment and cleaning supplies provided to inmates also reveals deep inadequacies. The BOP says that it provided inmates with soap, personal protective equipment, and disinfectant. At first glance, these certainly seem to be positive steps to prevent the spread of the virus. But the record reflects that inmates received four ounces of soap per week and only two disposable masks, and that the disinfectant provided was "watered down."

The flaws inherent in the half-measures employed by the BOP are amplified by the BOP's inability to test inmates for COVID-19. At the time of the preliminary injunction, the BOP had only obtained 75 tests for roughly 2,500 inmates at Elkton. The fact that more than two-thirds of those tests came back positive suggests an extremely high infection rate, but the BOP's testing shortage ensured that the record would not reflect the precise figure. The BOP's failure to test inmates cannot be blamed on a general inability for prison officials to procure tests either. By that same date, Marion Correctional Institution, a comparably sized state facility in Ohio, had tested nearly all of its inmates.

The measures the BOP took to address the virus, along with those it failed to take, lead me to the conclusion that it did not respond reasonably to the outbreak of COVID-19 at Elkton. As such, the petitioners are likely to succeed on the merits of their Eighth Amendment claim.

III.

I also find that the balance of the other preliminary injunction factors decidedly favors the petitioners.

The petitioners will be irreparably harmed without an injunction. In the fight against the spread of COVID-19, time is plainly of the essence. Each day spent in detention at Elkton increases the threat to the inmates' health and life. Such an ongoing medical risk—particularly in light of the medical vulnerabilities of the subclass—cautions against vacating the preliminary injunction. The district court recognized that this virus is spreading through Elkton so quickly that current testing capacity cannot keep up. The court accordingly directed the BOP to identify vulnerable inmates at Elkton and begin the process of evaluating available arrangements to protect them from the spread of the virus. It is quite possible that, absent a preliminary injunction, the ultimate

success of these claims might come too late for vulnerable inmates who could die if forced to remain at Elkton as litigation proceeds.

The BOP argues that it and the public interest are harmed by the preliminary injunction. These arguments fail. The BOP's recitation of the harms that the injunction purportedly causes vaguely refers to unspecified disruptions to its operations required by the devotion of resources to complying with the injunction. But the Supreme Court tells us that "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended ... are not enough" to demonstrate irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). And even if compliance with the order detracts from other functions, there is no higher and better use of BOP resources than to fulfill its legal and moral obligation to care for the lives of those in its custody. See *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976).

The BOP's concerns about the challenges caused by affording inmates access to the alternative arrangements contemplated by the preliminary injunction are unsupported by the record. The BOP does not to point to any evidence that releasing inmates who are eligible for home confinement pursuant to the updated guidance provided in the CARES Act and by the Attorney General will somehow be unable to care for themselves or pose a threat to the public interest. Indeed, Congress's decision to update the requirements for home confinement suggests that, if anything, the public interest is served by more eligible prisoners being released to home confinement. Finally, the BOP's claim that the inability to maintain social distancing during transfer poses a threat lacks support, as the inmates who would be transferred are already being held in a situation where they cannot engage in social distancing. A transfer process with imperfect social distancing in the short term to achieve a better situation until the pandemic abates or an effective vaccine comes to market is not a greater threat to the public interest than the indefinite confinement of the same prisoners in a facility where they cannot practice social distancing at all.

With the balance of the harms favoring the petitioners, I conclude that the district court did not abuse its discretion in issuing the preliminary injunction.

IV.

All observers of good conscience can agree that the spread of COVID-19 in jails and prisons is an urgent problem. To address that problem in federal prisons, we rely on the BOP to take measures to protect its inmates, a task that requires consistent, dedicated effort from prison administrators. To be sure, acting more swiftly and thoroughly may require the BOP to spend additional time and resources to keep its inmates safe. But when the government "takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989). For the sake of the 837 medically vulnerable prisoners who depend on the BOP to maintain their health and safety, it is my hope that as the BOP continues its efforts to manage the COVID-19 outbreak at Elkton, it will increase its efforts to live up to that responsibility.

For these reasons, I respectfully dissent.

In *Wilson v. Williams*, prior to the Sixth Circuit opinion just reprinted, the Supreme Court had granted a stay of the district court injunction pending appeal, without opinion. ___ S.Ct. ___, 2020 WL 2988458 (June 4, 2020). This was not the Court's only such "shadow docket" COVID jail/prison order. In another such case, involving a prison in Texas, the district court granted first preliminary and then final relief, both stayed by the Court of Appeals for the Fifth Circuit. See

Valentine v. Collier, preliminary injunction issued, 2020 WL 1899274 (S.D. Tex., Apr. 16, 2020), opinion issued 455 F.Supp.3d 308 (S.D. Tex., Apr. 20, 2020), stayed, 56 F.3d 797 (2020) (per curiam) (5th Cir., Apr. 22, 2020), application to vacate stay denied, 140 S.Ct. 1598 (May 14, 2020); final injunction issued, 490 F.Supp.3d 1121 (S.D. Tex., Sep. 29, 2020), stayed, 978 F.3d 154 (5th Cir., Oct. 13, 2020). When the second of these stays came before the Court, Justice Sotomayor wrote the opinion that follows:

VALENTINE v. COLLIER

141 S.Ct. 57 (2020)

The application to vacate stay presented to Justice ALITO and by him referred to the Court is denied.

Justice SOTOMAYOR, with whom Justice KAGAN joins, dissenting from the denial of application to vacate stay.

I write again about the Wallace Pack Unit (Pack Unit), a geriatric prison in southeast Texas that has been ravaged by COVID–19. The Pack Unit is a " 'tinderbox' " for COVID–19, not only because it is a dormitory-style facility, "making social distancing in the living quarters impossible," but also because the vast majority of its inmates are at least 65 years old, and many suffer from chronic health conditions and disabilities. These inmates are some of the most vulnerable in the country to the current pandemic.

COVID–19 was first detected in the Pack Unit in April 2020, after one inmate, Leonard Clerkly, contracted the virus and died. Since then, over 500 inmates have tested positive (more than 40% of the inmate population), and 19 more have died. The Pack Unit's 20 deaths account for 12% of all confirmed and presumed deaths from COVID–19 in the entire Texas Department of Criminal Justice (TDCJ) prison system.

In July, the District Court held a weeks-long trial that revealed rampant failures by the prison to protect its inmates from COVID–19. In September, the District Court entered a permanent injunction requiring prison officials to implement basic safety procedures. The Fifth Circuit, however, stayed the injunction pending appeal. Now, two inmates, Laddy Valentine and Richard King, ask this Court to vacate the stay. Because they have met their burden to justify such relief, I would grant the application.

I

Valentine and King are 69 and 73 years old, respectively. Already in a high-risk category due to their ages, both suffer from multiple health conditions that increase the likelihood of serious illness and death from COVID–19, including diabetes, hypertension, and kidney disease. Earlier this year, Valentine and King sued the senior warden of the Pack Unit, the executive director of the TDCJ, and the TDCJ on behalf of a class of fellow inmates, alleging that prison officials were violating the inmates' Eighth Amendment rights by failing to protect them adequately from COVID–19.

Following an 18-day trial, the District Court made detailed findings of fact about the officials' "consistent non-compliance with basic public health protocols" and failure "to take obvious precautionary public health measures upon which all medical professionals would agree." The District Court's findings covered the gamut of essential precautions, including social distancing, mask wearing, proper cleaning and sanitization, testing, quarantining, and contact tracing. Prison staff, for example, regularly failed to wear masks, as documented in the prison's own educational video about COVID–19. The prison's communal showers were not cleaned between

uses by different dorms, and disabled inmates had to sit shoulder to shoulder on benches while waiting for a disability-accessible shower to become available. Inmates were responsible for cleaning the dorms during the outbreak, with no additional staffing, training, or cleaning supplies. This requirement was especially difficult for Harold Dove, who is wheelchair-bound, legally blind, and paralyzed on the right side of his body. He and others repeatedly notified the prison that he was physically unable to clean his assigned dorm, but officials continued to assign him cleaning duties for months, at the height of the outbreak. One of the wardens later testified that he was not concerned about assigning cleaning duties to disabled inmates because a disabled inmate " 'could put a broom against his neck and push it with a wheelchair.' "

Based on the extensive trial record, the District Court entered a permanent injunction requiring the prison to establish and implement minimum safety protocols. These include "regular cleaning of common surfaces," "unrestricted access to hand soap," "wearing of [personal protective equipment (PPE)] among TDCJ staff," weekly testing, contact tracing, and quarantining inmates who are awaiting test results. Some of these procedures are already required by statewide policy.

The Fifth Circuit stayed the injunction pending appeal, concluding that respondents were likely to prevail because the inmates failed, before filing suit, to seek relief through the prison's internal grievance process, as required by the Prison Litigation Reform Act (PLRA). In the Fifth Circuit's view, it was "irrelevant" if that grievance process was "ineffective" or " 'operated too slowly' " in light of the ongoing outbreak. The court also concluded, notwithstanding the District Court's finding of systematic "shortcomings" at the Pack Unit, that the inmates' claims would likely fail on the merits because the prison's "actions were reasonable." Finally, the Fifth Circuit determined that, absent a stay, the injunction would irreparably harm prison officials by interfering with their ability to manage the Pack Unit, and that the public interest favored a stay. This application followed.

II

The bar for vacating a stay is high. Among other things, the decision at issue must be "demonstrably wrong." When this Court ruled on the prior application in this case, challenging the Fifth Circuit's stay of the preliminary injunction, the limited evidentiary record made it difficult to conclude that this stringent standard was met. Now, with the benefit of the District Court's detailed factfinding, no such difficulty remains. The Fifth Circuit demonstrably erred with respect to both the threshold issue of exhaustion under the PLRA and the merits of the inmates' Eighth Amendment claims.

A

Under the PLRA, inmates seeking to bring federal claims concerning prison conditions must first exhaust "available" administrative remedies. 42 U.S.C. § 1997e(a). In *Ross v. Blake*, 578 U.S. 632 (2016), this Court held that remedies are not available, and thus exhaustion is not required, when "an administrative procedure ... operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." In other words, even if an internal process is "officially on the books," it is not " 'available' " if, as a practical matter, it "is not capable of use to obtain relief."

That was the case here, as the District Court found. The prison's grievance process is lengthy, beginning with mandatory informal dispute resolution and followed by up to 160 days of formal review. Remarkably, when this suit was filed, "COVID-related grievances were not treated differently from other types of grievances," despite inmates' attempts to designate them as emergencies. Both Valentine and King filed grievances that remained pending for over two

months during the outbreak. By respondent Collier's own admission, the prison's policy " 'did not give adequate attention to the COVID–19 issue.' ".

Given the speed at which the contagion spread, the 160-day grievance process offered no realistic prospect of relief. In just 116 days, nearly 500 inmates contracted COVID–19, leading to 74 hospitalizations and 19 deaths. At least one inmate, Alvin Norris, died before the prison took any steps in response to his grievance. Both Valentine and another inmate, Gary Butaud, contracted COVID–19 while their grievances remained pending.

The Fifth Circuit erred as a matter of law when it disregarded these findings by the District Court. The Fifth Circuit seized on language in Ross rejecting a judicially created exception to exhaustion for " 'special circumstances,' " and concluded that "special circumstances—even threats posed by global pandemics—do not matter.". But the special-circumstances exception rejected in Ross applied when inmates failed to exhaust available remedies. In rejecting such an exception, this Court nonetheless recognized that the PLRA "contains its own, textual exception to mandatory exhaustion" that applies when remedies are not "available." Contrary to the Fifth Circuit's analysis, consideration of "the real-world workings of prison grievance systems" is central to assessing whether a process makes administrative remedies available. Ross, at 643. When this suit was filed, the Pack Unit's process plainly did not. As the District Court put it, the PLRA "cannot be understood as prohibiting judicial relief while inmates are dying."

B

The Fifth Circuit's evaluation of the merits of the inmates' claims was also demonstrably wrong. To prove an Eighth Amendment claim for unconstitutional prison conditions, an inmate must show that he was exposed to an objective risk of serious harm and that prison officials subjectively acted with deliberate indifference to inmate health or safety. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Deliberate indifference is a "state of mind" equivalent to "recklessly disregarding" a known and substantial risk. Id., at 835–836. Prison officials thus may not "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering." *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

Here, the dangers of COVID–19 to these especially vulnerable inmates were undisputed and, indeed, "indisputable." The District Court first found that respondents were subjectively aware of those risks because they were obvious. Then, weighing the evidence and "competing narratives" presented by the parties at trial, the court concluded that the officials' conduct, communications, and omissions reflected deliberate indifference.

Each of these factual findings must be reviewed deferentially under the clear-error standard. See "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that ... it would have weighed the evidence differently." Id., at 573–574.

Here, the District Court's assessment of the evidence was not only permissible, but fully supported. The District Court cited specific evidence that respondents knew not only of the dangers of COVID–19, but also of the dangers specifically created by their inadequate response to the outbreak. For example, respondent Collier received a text message on April 26, 2020, informing him of the dangers of the prison's policy of removing infected inmates from quarantine after 14 days, without confirming a negative test first: "FYI One of our first positives is still testing positive and shedding virus at 21 days. The state['s] 14 day isolation with no retesting is questionable at best." Yet inmates who had contracted COVID–19 testified that, following the 14-day period, they were "neither medically examined by a doctor [n]or retested for COVID–19 before

returning to negative dorms." One inmate, Roger Beal, informed medical and security staff that he should not be transferred after his 14-day period ended because he was still symptomatic; he even filed a formal grievance warning that he posed a risk to other inmates. Nonetheless, Beal was transferred to a dorm for uninfected inmates after the minimum quarantine period ended, despite his continuing symptoms.

Rather than contending with these facts, the Fifth Circuit sidestepped the clear-error standard by claiming that its review was not "fact-specific." But the Fifth Circuit's analysis makes clear that it substituted its own view of the facts for that of the District Court. For instance, in highlighting the prison's policy requiring masks and social distancing, the Fifth Circuit chose to ignore the District Court's express finding that "staff non-compliance with regard to wearing PPE and social distancing were regular, daily features of life in the Pack Unit." Similarly, the Fifth Circuit gave special weight to the prison's testing efforts, while disregarding the critical flaws identified by the District Court. To start, no mass testing occurred until about a month after the prison's first casualty. Even then, inmates had to wait one to two weeks to get their results, which, according to the prison's own experts, was "simply too long to effectively contain the spread of the virus." Respondents knew of tests with shorter turnaround times but never explored the possibility of using them. Ibid. Perhaps most troublingly, the prison continued to house inmates diagnosed with COVID–19 together with inmates who tested negative—a failure that respondents obscured by "misrepresent[ing] certain facts" to the District Court. In short, far from "dispell[ing]" an inference of deliberate indifference, the prison's actions highlighted by the Fifth Circuit only confirm it.

At bottom, the Fifth Circuit rejected the District Court's careful analysis of subjective deliberate indifference based on the Fifth Circuit's view that respondents took reasonable "affirmative steps" to respond to the virus. But merely taking affirmative steps is not sufficient when officials know that those steps are sorely inadequate and leave inmates exposed to substantial risks. That was the case here: The District Court found that respondents "were well aware of the shortcomings" in their response "and nevertheless chose to stay the course, even after a number of inmates died." Respondent Collier even admitted that prison officials " 'were not doing everything [they] should have been.... Thin[g]s like restricting, isolating, PPE access, cleaning supplies.' " To be sure, the "Eighth Amendment does not mandate perfect implementation," but it also does not set a bar so low that any response by officials will satisfy it. Given the evidence in the record, there is no basis to overturn the District Court's finding of deliberate indifference.

III

The Fifth Circuit's decision creates a risk of serious and irreparable harm to the inmates that far outweighs any risk of harm to respondents. The Fifth Circuit concluded that "a stay will not substantially harm" the inmates because the number of positive cases in the Pack Unit "has been drastically reduced." It is true that, after a months-long outbreak that claimed 20 lives and infected over 40% of the Pack Unit's inmate population, the number of active positive cases has fallen. But the threat of a second outbreak is "ongoing." On the same day that respondents represented to this Court that active cases had reached zero, the prison reported three active cases among prison employees and one among inmates.

As the last outbreak demonstrated, COVID–19 can overtake a prison in a matter of weeks. On May 9, the Pack Unit reported 8 positive cases; in less than three weeks, there were over 200 cases, 5 deaths, and 12 hospitalizations. Oral argument before the Fifth Circuit is weeks away, with a decision on the merits even further. If the injunction's safety measures are not implemented and maintained, this "relentless pandemic" may again engulf the Pack Unit.

On the other hand, respondents make only a generalized claim that the injunction interferes with their ability to manage the Pack Unit. They fail to explain how any particular measure does so. The permanent injunction imposes only basic safety measures using reasonable, flexible terms, such as the "regular cleaning of common surfaces with bleach-based cleaning agents," the "wearing of PPE among TDCJ staff," "weekly testing," and "contact tracing." Respondents have admitted that some of these measures are "medically necessary" and required by statewide policy, and they claim that they have voluntarily implemented nearly all of them. Respondents also presented no evidence of "budgetary or financial concerns" with the measures required by the injunction. They therefore fail to demonstrate that they will suffer any harm from the injunction. If circumstances change and respondents are able to show that a modification of the injunction is warranted, the District Court has offered to hear any such motion on 24 hours' notice.

* * *

The people incarcerated in the Pack Unit are some of our most vulnerable citizens. They face severe risks of serious illness and death from COVID–19, but are unable to take even the most basic precautions against the virus on their own. If the prison fails to enforce social distancing and mask wearing, perform regular testing, and take other essential steps, the inmates can do nothing but wait for the virus to take its toll. Twenty lives have been lost already. I fear the stay will lead to further, needless suffering.

Importantly, nothing in the Court's decision today prevents Valentine and King from returning to this Court if it becomes clear that the risks they face as a result of respondents' conduct are even graver than they already appear. Because I would not force them to wait until it may be too late, I respectfully dissent.

With federal courts proving widely unhospitable, advocates, activists, people inside prisons and jails, and their family members also turned to the state courts and the executive branch in an effort to protect people in custody from the threat of COVID-19. Advocates developed alternative legal strategies in part to bypass the procedural legal hurdles imposed by the Prison Litigation Reform Act and to put political pressure on state governors to act with urgency to address the harm COVID-19 posed to incarcerated and detained people.

Governors in multiple states, including New Jersey, Colorado, Michigan, Pennsylvania, New Mexico, Illinois, and Maryland, issued executive orders that encouraged and/or allowed Department of Corrections to release sentenced people from custody and/or waive procedural barriers to various early release mechanisms. Relevant excerpts of the Illinois executive order are below:

ILLINOIS EXECUTIVE ORDER 2020-21
EXECUTIVE ORDER IN RESPONSE TO COVID-19
(COVID-19 EXECUTIVE ORDER NO. 19)

April 6, 2020

WHEREAS, in a short period of time, COVID-19 has rapidly spread throughout Illinois, necessitating updated and more stringent guidance from federal, state, and local public health officials; and,

WHEREAS, for the preservation of public health and safety throughout Illinois, and to ensure that our healthcare delivery system is capable of serving those who are sick, I find it necessary to take additional significant measures consistent with public health guidance to slow and stop the spread of COVID-19; and,

WHEREAS, social distancing, which consists of maintaining at least a six-foot distance between people, is the paramount strategy for minimizing the spread of COVID-19 in our communities; and,

WHEREAS, certain populations are at a higher risk of experiencing more severe illness as a result of COVID-19, including older adults and people who have serious chronic health conditions such as heart disease, diabetes, lung disease or other conditions; and,

WHEREAS, the Illinois Department of Corrections (IDOC) currently has a population of more than 36,000 male and female inmates in 28 facilities, the vast majority of whom, because of their close proximity and contact with each other in housing units and dining halls, are especially vulnerable to contracting and spreading COVID-19; and,

WHEREAS, the IDOC currently has limited housing capacity to isolate and quarantine inmates who present as symptomatic of, or test positive for, COVID-19; and,

WHEREAS, to ensure that the Director of the IDOC may take all necessary steps, consistent with public health guidance, to prevent the spread of COVID-19 in the IDOC facilities and provide necessary healthcare to those impacted by COVID-19, it is critical to provide the Director with discretion to use medical furloughs to allow medically vulnerable inmates to temporarily leave IDOC facilities, when necessary and appropriate and taking into account the health and safety of the inmate, as well as the health and safety of other inmates and staff in IDOC facilities and the community;

THEREFORE, * * * I hereby order the following, effective immediately and for the remainder of the duration of the Gubernatorial Disaster Proclamations:

> Section 1. * * * furlough periods shall be allowed for up to the duration of the Gubernatorial Disaster Proclamations as determined by the Director of IDOC; * * * and furloughs for medical, psychiatric or psychological purposes shall be allowed at the Director's discretion and consistent with the guidance of the IDOC Acting Medical Director.

In a number of states, advocates petitioned directly to state supreme courts seeking the release of people who were particularly vulnerable to COVID-19. Some courts denied these petitions. See, e.g., Money v. Jeffreys, Case No. 125912 (Ill. 2020) (minute order); Colvin v. Inslee, 467 P.3d 953 (Wash. 2020). Others, however, granted significant relief. Hawaii's Supreme Court appointed a special master who coordinated the release of hundreds of people. See Office of the Public Defender v. Connors, SCPW-20-0000200, and Office of the Public Defender v. Ige, SCPW-20-0000213 (report available at https://s3.documentcloud.org/documents/6834410/Special-Master-Report.pdf). A ruling from the Supreme Court in Massachusetts resulted in many pretrial releases. Excerpts from the Massachusetts decision follow:

COMMITTEE FOR PUBLIC COUNSEL SERVICES v. CHIEF JUSTICE OF THE TRIAL COURT

142 N.E.3d 525 (Mass. 2020)

JUSTICE FRANK M. GAZIANO, joined by CHIEF JUSTICE RALPH GANTS and JUSTICES DAVID A. LOWY, KIMBERLY S. BUDD, ELSPETH B. CYPHER, & SCOTT L. KAFKER.

The 2020 COVID-19 pandemic has created enormous challenges for every aspect of our communities. While scientists are racing to discover whether any existing drugs can help to treat

the virus and improve outcomes for critically ill patients, and others are working at top speed to develop a vaccine, currently there is no cure and no vaccine. Health care workers on the frontlines of the epidemic are coming down with the virus in much higher percentages than others, while surgical masks and other basic protective equipment are in short supply, and hospitals with already close-to-capacity intensive care unit beds confront the possibility of inadequate resources to care for critically ill patients, such as lack of needed ventilators. Everyday life is heavily disrupted; most businesses, schools, and houses of worship are closed, while grocers, pharmacies, and delivery services stretch to provide essential services to meet basic needs, and families without paychecks worry about how to meet those needs. The Centers For Disease Control (CDC) guidelines recommend that, to avoid exposure, individuals limit contact with others, maintain a distance of at least six feet from other individuals if they are together, engage in frequent handwashing, and clean and disinfect frequently touched surfaces daily in order to "flatten the curve," i.e., to reduce the number of cases the beleaguered health care system must treat at any one time. * * *

The petitioners, the Committee for Public Counsel Services (CPCS) and the Massachusetts Association of Criminal Defense Lawyers (MACDL), bring our focus to the situation with respect to COVID-19 confronting individuals who are detained in jails and houses of correction pending trial, and individuals who have been convicted and are serving a sentence of incarceration in the Commonwealth. To allow the physical separation of individuals recommended by the CDC, the petitioners seek the release to the community of as many individuals as possible as expeditiously as possible, indeed, on the day of argument in this case, according to one of them. They offer a number of different legal theories under which a broad-scale release might be accomplished. We conclude that the risks inherent in the COVID-19 pandemic constitute a changed circumstance within the meaning of Mass. Gen. Laws ch. 276, § 58, tenth par., and the provisions of Mass. Gen. Laws ch. 276, § 557.

As the petitioners have argued, and the respondents agree, if the virus becomes widespread within correctional facilities in the Commonwealth, there could be questions of violations of the Eighth and Fourteenth Amendments to the United States Constitution and art. 26 of the Massachusetts Declaration of Rights; nonetheless, at this time, the petitioners themselves clarified in their reply brief and at oral argument that they are not raising such claims.

1. Background. COVID-19 in jails and prisons. All parties agree that, for several reasons, correctional institutions face unique difficulties in keeping their populations safe during this pandemic. First, confined, enclosed environments increase transmissibility. Maintaining adequate physical distance, i.e., maintaining six feet of distance between oneself and others, may be nearly impossible in prisons and jails. Second, proper sanitation is also a challenge; the petitioners have submitted affidavits from Department of Public Health (DPH) officials stating that, during recent routine inspections of Massachusetts correctional institutions (prior to the declaration of emergency), DPH inspectors discovered a concerning number of repeat environmental health violations.

Finally, while many people who contract COVID-19 are able to recover without the need for hospitalization, those who become seriously ill from the virus may require hospitalization, intensive treatment, and ventilator support. Severe cases are most likely to occur among the elderly and those with underlying medical conditions. Those in prisons and jails have an increased prevalence, relative to the general population, of underlying conditions that can make the virus more deadly. The DOC and the petitioners agree that hundreds of those incarcerated in the Commonwealth suffer from chronic diseases, and nearly 1,000 incarcerated individuals are over sixty years of age.

Experts warn that an outbreak in correctional institutions has broader implications for the Commonwealth's collective efforts to fight the pandemic. First, the DOC has limited capacity to

offer the sort of specialized medical interventions necessary in a severe case of COVID-19. Thus, as seriously ill individuals are transferred from correctional institutions to outside hospitals, any outbreak in a correctional institution will further burden the broader health care system that is already at risk of being overwhelmed. Second, correctional, medical, and other staff enter and leave correctional institutions every day. Should there be a high concentration of cases, those workers risk bringing infections home to their families and broader communities. * * *

2. Relief sought. All parties agree that a significant COVID-19 outbreak in Massachusetts correctional institutions would pose considerable risks to those who are incarcerated, correctional staff, and the broader community. They disagree significantly about current conditions in correctional institutions, whether widespread release for some populations would be more harmful than beneficial, and the proper means by which to reduce the number of people held in custody, before jail and after conviction.

a. Petitioners' arguments. The petitioners ask this court to use its extraordinary superintendence power, under Mass. Gen. Laws ch. 211, § 3, to take a number of unprecedented steps to reduce the number of people held in Massachusetts correctional facilities, both pretrial and postsentence. These actions, they contend, are necessary practically, to save lives, and legally, to prevent what could become substantial and widespread violations of constitutional rights.

Specifically, the petitioners' brief describes potential threats to the rights of those held in State custody to be free from cruel and unusual punishment, embodied in the Eighth Amendment to the United States Constitution, and cruel or unusual punishment prohibited by [Massachusetts Declaration of Rights] art. 26. Those provisions require the Commonwealth to furnish conditions of confinement that do not create an unreasonable risk of future harm to inmate health and safety, an obligation the petitioners argue is effectively impossible to meet under conditions of global pandemic.

The petitioners argue as well that inaction could violate rights to due process of law, inscribed in the Fourteenth Amendment, and art. 12 of the Massachusetts Declaration of Rights. For pretrial detainees, the petitioners contend that the risk of infection and death constitutes punishment prior to adjudication, which is not reasonably related to a legitimate government interest, and therefore is inconsistent with due process. For those who have been convicted and sentenced, the petitioners argue that due process protections are violated when the deprivations suffered are "qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Vitek v. Jones*, 445 U.S. 480, 493 (1980). Because the substantial threat of infection, serious illness, and death is not part of the sentence imposed on anyone in the Commonwealth, the petitioners contend that inaction would constitute additional punishment without due process of law.

In their reply brief, and at argument before us, the petitioners state that they are not raising any constitutional claim at this time, and rather are pointing out the possibility of such violations if something is not done to mitigate the situation. The petitioners ask this court to reduce drastically (they suggest by a factor of one-half of the population currently held in custody) the number of individuals entering detention, held pretrial on unaffordable bail, and serving lawful sentences. They propose specific measures with respect to preventing individuals from entering State custody, releasing those who are detained prior to trial, and reducing sentences, staying sentences, or paroling certain groups of individuals who are serving a sentence of imprisonment. To accomplish this latter set of releases, the petitioners suggest that this court amend Mass. R. Crim. P. 29, which allows judges to revise sentences within sixty days of imposition "if it appears that justice might not have been done," to eliminate the sixty-day time limit, so that judges, including the single justice of this court, thereby lawfully could reduce sentences due to COVID-

19. Alternatively, they ask the court simply to order the releases using its purported authority under Mass. Gen. Laws ch. 211, § 3.[a]

b. Respondents' arguments. While acknowledging the serious nature of the COVID-19 pandemic, the respondents take varying positions in response to it and the petitioners' arguments. To begin, they do not agree whether relief under Mass. Gen. Laws ch. 211, § 3, is appropriate. The district attorneys of the northern, northwestern, Suffolk, and Berkshire districts agree with the petitioners that the risk of this pandemic is an unprecedented, deadly threat to incarcerated individuals, correctional officers, and civilian staff, and that extraordinary action is needed to address this rapidly-growing public health emergency expeditiously. The Attorney General states that government officials within and outside the correctional system are committed to taking the steps necessary to protect the health and welfare of everyone within the criminal justice system, while acknowledging that the situation is rapidly evolving and that extraordinary relief under this court's superintendence powers may be appropriate in some circumstances.

The district attorneys for the Bristol, Cape & Islands, eastern, Hampden, middle, Norfolk, and Plymouth districts (seven district attorneys) state that they "are committed to taking appropriate steps consistent with public safety to mitigate the risks of infection in jails and prisons" for inmates and correctional staff, and that "such measures are already underway." They assert that judges have been advised to take into account, and are doing so, COVID-19 risks in making bail determinations and deciding issues involving pretrial detention, court houses are staffed to handle and act upon all emergency motions for release, and correctional officials are acting promptly and allowing "meritorious petitions for release based on medical vulnerability."

The seven district attorneys maintain as well that the petitioners' arguments disregard risks to public safety, particularly the physical and mental safety of victims and their families, especially victims of domestic violence, in addition to abrogating rights granted under the victims' bill of rights set forth in Mass. Gen. Laws ch. 253B.. They contend that immediate release of some medically vulnerable individuals could pose a greater risk to the individual than remaining incarcerated with available medical care and treatment. They point out that seventy-three percent of incarcerated males, and sixty-four percent of incarcerated females are serving a sentence for a violent offense, and that their release into the community, particularly given the reduced levels of supervision currently available, where most supervision is by telephone and not in person, increases risks to the community and could overburden already overworked criminal justice systems. * * *

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[a] [The referenced law provides:

Superintendence of inferior courts; power to issue writs and process

Section 3. The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction * * *; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy. * * *"]

Based on their substantive and factual disagreements, the respondents propose contrasting dispositional requests. The seven district attorneys and the sheriffs ask that the petition be denied in its entirety. They argue that the steps already being taken towards reducing the population of incarcerated individuals are sufficient to address the advancing public health emergency.

The remaining district attorneys and the Attorney General ask that this court grant relief in the form of individualized review, with the goal of quickly reducing the incarcerated population. They do not approve of the blanket release of classes of inmates, noting, as do the seven district attorneys, the public safety concerns regarding the release of those convicted of domestic violence or sexual assault; the dangers to released inmates and detainees who may not have a home, a medical provider, or a means to obtain substance abuse treatment; and the currently decreased availability of shelters and other social services. The district attorneys for the Suffolk, northern, northwestern, and Berkshire districts ask that we create an emergency committee responsible for rapidly and collaboratively creating and implementing a policy to reduce the incarcerated population. The district attorney for the Suffolk district argues that COVID-19 should be considered in various types of judicial decisions, and further requests that new bench warrants not issue for failure to appear or failure of indigent defendants to pay fines or fees. The Attorney General suggests that we establish guidelines for the release of pretrial detainees, and that we explore ways to allow relief for sentenced inmates, such as an amendment to Mass. R. Crim. P. 29. * * *

3. Discussion. We agree that the situation is urgent and unprecedented, and that a reduction in the number of people who are held in custody is necessary. We also agree with the Attorney General and the district attorneys that the process of reduction requires individualized determinations, on an expedited basis, and, in order to achieve the fastest possible reduction, should focus first on those who are detained pretrial who have not been charged with committing violent crimes.

Having carefully examined the petitioners' arguments, we conclude that a modification of Rule 29 in the manner requested by the petitioners, such that judges could revise and revoke indefinitely valid sentences that have been imposed posttrial would result in a violation of [Mass. Declaration of Rights] art. 30[b] by allowing judges essentially to perform the functions of the parole board. Absent a violation of constitutional rights, which the petitioners agree has not been established on this record, we also do not have authority under Mass. Gen. Laws ch. 211, § 3, to exercise supervision over parole, furlough, or clemency decisions by the DOC, the parole board, the sheriffs, and other members of the executive branch.

a. The court's superintendence authority. General Laws c. 211, § 3, provides that the Supreme Judicial Court "shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided." The court's general superintendence authority extends to "the administration of all courts of inferior jurisdiction," and permits the issuance of "writs, summonses and other process and such orders, directions and rules as may be necessary or desirable for the furtherance of justice." In the past, we have exercised our extraordinary superintendence authority to remedy matters of public interest "that may cause further uncertainty within the courts".

A petitioner seeking relief under Mass. Gen. Laws ch. 211, § 3, "must present a substantial claim involving important substantive rights, and demonstrate that any error cannot adequately be remedied in the course of trial or normal appellate review." Here, the petitioners claim that

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[b] [Article 30 provides, in pertinent part "the judicial [department] shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."]

continued confinement in a jail or prison implicates concerns of fundamental fairness, and rights secured by the due process clauses of the Federal and State Constitutions (pretrial detainees) and the Eighth Amendment (inmates serving a sentence and pretrial detainees).

b. Pretrial detainees. We conclude, given the severity of the COVOID-19 pandemic, that the petitioners, as representatives of incarcerated individuals, have established standing to bring their claim, and an entitlement to relief.* * *

To effectuate such relief, pretrial detainees who are not charged with [a violent] offense* * *, and who are not being held without bail subsequent to a determination of dangerousness * * *, as well as individuals who are being held pending a final probation violation hearing, are entitled to expedited hearings on their motions for reconsideration of bail. These categories of pretrial detainees shall be ordered released on personal recognizance unless the Commonwealth establishes, by a preponderance of the evidence, that release would result in an unreasonable danger to the community or that the individual presents a very high risk of flight.

In making a determination whether release would not be appropriate, the judge should consider the totality of the circumstances, including (1) the risk of the individual's exposure to COVID-19 in custody; (2) whether the defendant, * * * would pose a safety risk to the victim and the victim's family members, witnesses, the community, or him- or herself if released; (3) whether the defendant is particularly vulnerable to COVID-19 due to a preexisting medical condition or advanced age; (4) for a defendant who is accused of violating a condition of probation, whether the alleged violation is a new criminal offense or a technical violation; and (5) the defendant's release plan. * * *

c. New arrests. We are persuaded that the limitations that courts in other jurisdictions have placed on new detentions and incarcerations are compelling, and we adopt similar measures to reduce as far as possible the influx of new individuals into correctional institutions. Following any arrest during the COVID-19 state of emergency, and until further order of this court, a judicial officer should consider the risk that an arrestee either may contract COVID-19 while detained, or may infect others in a correctional institution, as a factor in determining whether bail is needed as a means to assure the individual's appearance before the court. Given the high risk posed by COVID-19 for people who are more than sixty years of age or who suffer from a high-risk condition as defined by the CDC, the age and health of an arrestee should be factored into such a bail determination. This is an additional, temporary consideration beyond those imposed by the relevant bail statutes. * * *

d. Incarcerated individuals serving sentences. The petitioners also seek release of multiple groups of individuals who are currently serving sentences of incarceration. They suggest, inter alia, that, in order to do so, we eliminate the requirement in Rule 29 that motions to revise or revoke a sentence be filed within sixty days of the imposition of the sentence or the issuance of the rescript. See Mass. R. Crim. P. 29 (a) (2). * * *

Our broad power of superintendence over the courts does not grant us the authority to authorize courts to revise or revoke defendants' custodial sentences, to stay the execution of sentence, or to order their temporary release. Rule 29 is designed to protect the separation of powers as set forth in art. 30. "The execution of sentences according to standing laws is an attribute of the executive department of government." To attempt to "revise," i.e., cut short, sentences in the current situation would be to perform the function of the parole board, thereby "effectively usurp[ing] the decision-making authority constitutionally allocated to the executive branch." * * *

While we cannot order that relief be granted to sentenced inmates who have been serving a legal sentence, and who have not timely moved to revise or revoke that sentence, mechanisms to allow various forms of relief for sentenced inmates exist within the executive branch. The parole board, for example, has authority to release individuals who have become eligible for parole because they

have reached their "minimum term of sentence." An inmate in a house of correction can receive early parole consideration and be released up to sixty days prior to the minimum term based on "any ... reason that the Parole Board determines is sufficiently compelling." Once an inmate reaches eligibility, the parole board must hold a hearing to decide whether to grant the inmate a parole permit. The parole board "shall only grant a parole permit if they are of the opinion that there is a reasonable probability that ... the offender will live and remain at liberty without violating the law and that release is not incompatible with the welfare of society." If denied parole, inmates generally are entitled to a rehearing after either one or five years, but the board may hold an earlier rehearing at its discretion.

The parole board nonetheless reported at oral argument that it has made no efforts to accelerate the scheduling of parole hearings. The board reports that currently approximately 300 individuals have been deemed appropriate for release and have been awarded parole through the ordinary process, but have yet to be granted parole permits that would result in their actual release from custody because the board has not reduced what the board says is a standard delay in preparing for release. During normal times, the two-week delay the board states is standard might be reasonable. But these are not normal times. We urge the board to expedite release of these previously-approved individuals, as well as to expedite hearings on other inmates who are eligible for parole. * * *

4. Conclusion. Due to the crisis engendered by the COVID-19 pandemic, pretrial detainees who have not been charged with an excluded offense as set forth in Appendix A are entitled to a rebuttable presumption of release on personal recognizance, and a hearing within two business days of filing a motion for reconsideration of bail and release, in accordance with the procedures set forth in this opinion.

The special master shall report weekly to this court * * * in order to facilitate any further response necessary as a result of this rapidly-evolving situation.