

In the Supreme Court of the United States

LADDY CURTIS VALENTINE AND RICHARD ELVIN KING,
INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED,
Applicants,

v.

BRYAN COLLIER, IN HIS OFFICIAL CAPACITY, ROBERT HERRERA, IN HIS
OFFICIAL CAPACITY, AND THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
Respondents.

On Application to Vacate the Stay of the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' OPPOSITION TO APPLICATION TO VACATE FIFTH CIRCUIT STAY OF PERMANENT INJUNCTION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE CASE	4
ARGUMENT.....	11
I. The Applicants Face No Threat of Serious or Irreparable Injury from the Stay Pending Appeal.....	12
II. The Court of Appeals Correctly Applied the Governing Standards.....	14
A. The State is likely to succeed on all claims.	15
1. Plaintiffs’ claims are barred because they failed to exhaust administrative remedies.....	15
2. Defendants are likely to prevail on the merits of Plaintiffs’ Eighth Amendment claims.....	18
3. Defendants are likely to prevail on the merits of Plaintiffs’ ADA claim.	24
B. Defendants will suffer irreparable injury if the status quo is altered.....	27
C. The stay does not create a threat of irreparable injury to the Plaintiffs.....	29
D. Maintaining the stay serves the public interest.	30
III. Plaintiffs Have Not Shown that this Court Is Likely to Review the Decision Below.	30
CONCLUSION.....	31
CERTIFICATE OF SERVICE.....	32

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Abbott v. Perez</i> , 138 S. Ct. 2305 (2018)	27
<i>Barnes v. Ahlman</i> , 140 S. Ct. 2620 (2020)	21
<i>California v. Texas</i> , No. 19-840, 140 S. Ct. 932 (U.S. Jan. 21, 2020).....	29
<i>Cameron v. Bouchard</i> , 815 F. App'x 978 (6th Cir. 2020)	22
<i>Certain Named & Unnamed Non-Citizen Children v. Texas</i> , 448 U.S. 1327 (1980) (Powell, J., in chambers)	30
<i>Coleman v. Paccar, Inc.</i> , 424 U.S. 1301 (1976) (Rehnquist, J., in chambers)	11, 12
<i>Connick v. Thompson</i> , 563 U.S. 51 (2011)	19
<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994)	15, 19, 21
<i>Florence v. Bd. of Chosen Freeholders</i> , 566 U.S. 318 (2012)	26
<i>Foster v. Comm'r of Corr.</i> , 146 N.E.3d 372 (Mass. 2020)	22
<i>Hainze v. Richards</i> , 207 F.3d 795 (5th Cir. 2000)	24
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11 (1905)	24, 25, 26, 27
<i>Jones v. Bock</i> , 549 U.S. 199 (2007).	15
<i>Martin v. Blessing</i> , 571 U.S. 1050 (2013)	4
<i>Maryland v. King</i> , 133 S. Ct. 1 (2012) (Roberts, C.J., in chambers)	27
<i>New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.</i> , 434 U.S. 1345 (1977) (Rehnquist, J., in chambers)	27

Cases—Continued:

<i>Nken v. Holder</i> , 556 U.S. 418 (2009)	14, 30
<i>Pennhurst State School & Hospital v. Halderman</i> , 465 U.S. 89 (1984)	28
<i>People ex rel. Carroll v. Keyser</i> , 184 A.D.3d 189 (N.Y. App. 2020)	22
<i>Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott</i> , 134 S. Ct. 506 (2013).....	11
<i>Porter v. Nussle</i> , 534 U.S. 516 (2002)	15, 17
<i>Preiser v. Rodriguez</i> , 411 U.S. 475 (1973)	28
<i>Ross v. Blake</i> , 136 S. Ct. 1850 (2016)	<i>passim</i>
<i>Swain v. Junior</i> , 961 F.3d 1276 (11th Cir. 2020)	22, 24
<i>Tennessee v. Lane</i> , 541 U.S. 509 (2004)	25, 26
<i>Trump v. Int’l Refugee Assistance Project</i> , 137 S. Ct. 2080 (2017) (per curiam)	29
<i>Valentine v. Collier</i> , 140 S. Ct. 1598 (2020)	<i>passim</i>
<i>Valentine v. Collier</i> , No. 20-20525, 2020 WL 6039993 (5th Cir. Oct. 13, 2020)	<i>passim</i>
<i>Valentine v. Collier</i> , 960 F.3d 707 (5th Cir. 2020) (per curiam).....	1, 6
<i>Valentine v. Collier</i> , 956 F.3d 797 (5th Cir. 2020) (per curiam).....	1, 5, 29
<i>Valentine v. Collier</i> , No. 4:20-CV-1115, 2020 WL 3491999 (S.D. Tex. June 27, 2020)	6
<i>W. Airlines, Inc. v. Teamsters</i> , 480 U.S. 1301 (1987) (O’Connor, J., in chambers).	3, 4
<i>Williams v. Wilson</i> , No. 19A1047, 2020 WL 2988458 (U.S. June 4, 2020).....	21-22

Cases—Continued:

Wilson v. City of Southlake,
936 F.3d 326 (5th Cir. 2019)24

Wilson v. Seiter,
501 U.S. 294 (1991)19

Wilson v. Williams,
961 F.3d 829 (6th Cir. 2020)22

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008)12, 13

Woodford v. Ngo,
548 U.S. 81 (2006).17, 24, 28

Statutes and Rules:

42 U.S.C.
§ 1997e(a).....2, 15
§ 1213225

Sup. Ct. R. 10.....30

Tex. Gov’t Code ch. 50127

Other Authorities:

Dylan Moriarty, et al., *Coronavirus Tracker: Charting the spread of Covid-19*, Wall Street Journal, <https://www.wsj.com/articles/coronavirus-case-count-11594333471>13

Tex. Dep’t of Criminal Justice, COVID-19 Case Counts <https://txdps.maps.arcgis.com/apps/opsdashboard/index.html#/dce4d7da662945178ad5fbf3981fa35c>.....13

INTRODUCTION

In May, the district court entered an unlawful preliminary injunction against the Texas Department of Criminal Justice (TDCJ), Executive Director Bryan Collier, and Warden Robert Herrera. It held that Defendants were deliberately indifferent to the threat posed by the COVID-19 pandemic despite implementing extensive measures that complied with or exceeded the federal Centers for Disease Control guidelines for correctional institutions. The Fifth Circuit stayed the preliminary injunction pending appeal, determining that Plaintiffs failed to exhaust administrative remedies and that the district court failed to apply governing Eighth Amendment precedent. *Valentine v. Collier*, 956 F.3d 797 (5th Cir. 2020) (per curiam). This Court refused to vacate that stay. *Valentine v. Collier*, 140 S. Ct. 1598 (2020). The Fifth Circuit later vacated the preliminary injunction. *Valentine v. Collier*, 960 F.3d 707 (5th Cir. 2020) (per curiam).

Little has changed since then, except that Defendants have taken further measures to combat the COVID-19 pandemic—including repeated mass testing of inmates—and the number of infections at the Pack Unit has fallen dramatically. When the district court entered the permanent injunction, only four inmates had active COVID-19 infections. Today, that number is zero. Nevertheless, the district court again held that Defendants Collier and Herrera violated the Eighth Amendment, held that TDCJ violated the Americans with Disabilities Act and

the Rehabilitation Act, and entered a permanent injunction shifting responsibility for responding to a public-health crisis from state prison officials to a single federal district judge.

The district court's permanent injunction is just as unlawful as its preliminary injunction. As before, the injunction violates the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), because Plaintiffs failed to exhaust available administrative remedies. By their own admission, Plaintiffs filed this lawsuit before they had even filed a formal grievance with TDCJ. Moreover, the district court's Eighth Amendment holding is based on a fundamental legal error. Contrary to this Court's precedent, the district court collapsed the objective and subjective prongs of the deliberate-indifference analysis to hold Defendants liable based solely on the impact of COVID-19 at the Pack Unit and without regard to their subjective mental state. The district court similarly erred by holding that the ADA required TDCJ to provide alcohol-based hand sanitizer to a newly certified subclass of mobility-impaired inmates.

The Fifth Circuit once again stayed the district court's injunction and set an extraordinarily compressed schedule on appeal. Defendants' brief is due November 13; Plaintiffs' response is due November 16; and Defendants' reply is due November 18. Oral argument is scheduled for December 3. Despite this already accelerated timeline, Plaintiffs once again seek this Court's emergency intervention.

This Court should again deny their application. Plaintiffs cannot show a serious, irreparable harm in the absence of a permanent injunction because there is no evidence that TDCJ's response to the threat of COVID-19 is constitutionally inadequate and no evidence that the district court's injunction would substantially remedy any imminent harm to Plaintiffs. Indeed, despite a nationwide resurgence of COVID-19, at the time of this filing, there are currently *zero* active COVID-19 cases among inmates at the Pack Unit.

Nor can Plaintiffs show that the Fifth Circuit was “demonstrably wrong in its application of accepted standards in deciding to issue the stay.” *W. Airlines, Inc. v. Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers). The Fifth Circuit's determination that the PLRA bars relief because Plaintiffs failed to exhaust their administrative remedies is plainly correct under this Court's instructions in *Ross v. Blake*, 136 S. Ct. 1850 (2016). *Cf. Valentine*, 140 S. Ct. at 1598 (Sotomayor, J., respecting denial of application to vacate stay) (“Under the circumstances of this case, where the inmates filed a lawsuit before filing any grievance with the prison itself, it is hard to conclude that the Fifth Circuit was demonstrably wrong on this preliminary procedural holding.”). Likewise, Plaintiffs cannot show an Eighth Amendment violation because TDCJ's ongoing, vigorous efforts to protect staff and inmates show the opposite of deliberate indifference.

Finally, Plaintiffs cannot show that their case will “very likely . . . be reviewed here upon final disposition” from the Fifth Circuit. *Teamsters*, 480 U.S. at 1305. That showing is exceptionally difficult before a court of appeals has rendered judgment, and Plaintiffs’ half-hearted gesture at a theoretical circuit split is unavailing. The merits of Plaintiffs’ core Eighth Amendment claim—that two TDCJ officials have subjectively disregarded an extreme risk of harm to their health from COVID-19—is inherently fact-bound and incapable of recurrence. Plaintiffs’ arguments reveal that they seek no more than simple error correction, a request this Court rarely indulges. Plaintiffs’ App. to Vacate Stay at 20-21; *Martin v. Blessing*, 571 U.S. 1050 (2013) (Alito, J., respecting the denial of certiorari).

No one denies that the COVID-19 pandemic is serious and ongoing, but the record shows that Defendants have continued to act diligently to mitigate the risks that COVID-19 presents. The Fifth Circuit correctly stayed the permanent injunction pending appeal, and it has already accelerated Defendants’ appeal to reach the merits as soon as possible. Plaintiffs’ application should be denied.

STATEMENT OF THE CASE

As this dispute has already been the subject of a previous application to vacate a previous stay, 140 S. Ct. 1598, Defendants offer the following supplemental statement of the case. *See* Exh. 1.

Plaintiffs are prisoners in TDCJ's custody at the Wallace Pack Unit. Without previously filing a formal administrative grievance, they filed a complaint in the Southern District of Texas on behalf of themselves, similarly situated prisoners, and a subclass of purportedly high-risk inmates. Exh. 2 at 1, 3. The complaint alleged that Plaintiffs and putative class members faced a heightened risk from the COVID-19 outbreak due to their age, medical condition, and incarceration; that the individual Defendants had violated their rights under the Eighth Amendment; and that TDCJ had violated both the Americans with Disabilities Act and the Rehabilitation Act. *Id.* at 11-13, 22-23, 28-21.

The district court entered a preliminary injunction ordering Defendants to adopt numerous measures it deemed necessary to respond to the COVID-19 pandemic, Exh. 3 at 2-4, most of which TDCJ had already implemented voluntarily under its own policy, Exh. 1 at 5-9. The Fifth Circuit stayed that preliminary injunction, concluding that Defendants were likely to prevail on appeal for two reasons. First, Plaintiffs failed to show deliberate indifference in violation of the Eighth Amendment because “the evidence show[ed] that TDCJ [had] taken and continues to take measures—informed by guidance from the CDC and medical professionals—to abate and control the virus.” *Valentine*, 956 F.3d at 802. Second, the Court concluded that Plaintiffs failed to exhaust their ad-

ministrative remedies before filing suit, *id.* at 804, even though administrative remedies were available under this Court’s decision in *Ross*, *id.* at 805.

Plaintiffs asked this Court to vacate the Fifth Circuit’s stay. This Court denied that request. 140 S. Ct. 1598.

Defendants succeeded on appeal of the preliminary injunction. The Fifth Circuit vacated the district court’s judgment, concluding that “the Texas Department of Criminal Justice . . . [had] substantially complied with the measures ordered by the district court in its preliminary injunction,” despite the stay. *Valentine*, 960 F.3d at 707.

On remand, the district court certified Plaintiffs’ proposed class and held an 18-day bench trial starting on July 13. *Valentine v. Collier*, No. 4:20-CV-1115, 2020 WL 3491999, at *14 (S.D. Tex. June 27, 2020) (certifying general class and high-risk subclass); Pls’ Exh. 2 at 3. On September 29, the district court entered findings of fact and conclusions of law, *see* Pls’ Exh. 2, certified a new subclass of mobility-impaired inmates, *id.* at 49-55, and entered a permanent injunction against Defendants, to take effect on October 14, *id.* at 82-83.

The district court concluded that the PLRA did not bar Plaintiffs’ claims despite their admitted failure to exhaust administrative remedies. It reasoned that “the existing grievance process, designed for run-of-the-mill requests in ordinary times, was ‘utterly incapable of responding to a rapidly spreading pandemic like Covid-19, . . . much in the way

they would be if prison officials ignored the grievances entirely.” *Id.* at 61 (quoting *Valentine*, 140 S. Ct. at 1600-01 (Sotomayor, J., respecting denial of application to vacate stay)). The district court concluded that the PLRA “cannot be understood as prohibiting judicial relief while inmates are dying.” *Id.* at 81 n.13.

Turning to Plaintiffs’ Eighth Amendment claim, the district court held that Defendants Collier and Herrera acted with deliberate indifference to the threat of COVID-19, though its analysis focused on the conduct of TDCJ and other prison officials. For example, the court “acknowledge[d] that Defendants have taken a number of steps to address the spread of COVID-19,” but it dismissed those efforts as “the most basic steps that *TDCJ could have taken* to prevent mass death within the prison walls on an unimaginable scale.” *Id.* (emphasis added). It concluded “that *TDCJ’s approach* in confronting the pandemic was not systematic and lacked indicia of effecting long-term changes that will be consistently carried out until the pandemic is under control within the state of Texas and the country.” *Id.* at 66 (emphasis added). The district court also criticized the lack of “obvious precautionary public health measures.” *Id.* at 69. For instance: “TDCJ did not commence mass testing . . . until May 12,” *id.*; “TDCJ also used defective tests,” *id.* at 70; “TDCJ ignored the most basic steps to increase social distancing,” *id.* at 72; and “TDCJ had no plan to carry out contact tracing,” *id.* at 73. This

amounted, in the district court’s view, to “a pattern of policy failures coupled with implementation and enforcement failures in response to COVID-19 that constitute deliberate indifference to the medical needs of inmates.” *Id.* at 74.

Finally, the district court held that “TDCJ’s decision not to issue hand sanitizer to members of [the mobility-impaired] subclass constitutes a failure to reasonabl[y] accommodate their disabilities in violation of the ADA and RA.” *Id.* at 76. The court did not find that TDCJ denied those inmates access to hand sanitizer on account of their disabilities—in fact, TDCJ does not provide alcohol-based hand sanitizer to any inmates because of its potential use as an intoxicant and a fire accelerant, *id.* at 75. But the district court found “Defendants’ security rationale unpersuasive.” *Id.* at 76. And it concluded, based on the lack of hand sanitizer, that “[b]y virtue of their disability, individuals who must use wheelchairs or walkers to ambulate are being denied access to the basic service of being able to keep their hands clean.” *Id.*

The district court enjoined “Defendants, their agents, representatives, and all persons or entities acting in concert with them” to:

- Provide unrestricted access to hand soap and clean or disposable hand towels to facilitate frequent handwashing;
- Provide members of the mobility-impaired subclass access to hand sanitizer that contains at least 60% alcohol;

- Provide sufficient cleaning supplies for each housing area, including bleach-based cleaning agents and CDC-recommended disinfectants;
- Provide additional cleaning supplies as requested by inmate janitors;
- Train janitors on additional cleaning practices to be carried out due to COVID-19;
- Provide new (either disposable or washed) gloves and masks each time inmates perform new tasks, such as beginning a janitorial shift or working in the laundry exchange;
- Create a plan to allow for the regular cleaning of common surfaces with bleach-based cleaning agents;
- Create a plan to allow for the regular cleaning of cubicles of inmates who are physically unable to do so themselves;
- Enforce social distancing and the wearing of PPE among TDCJ staff;
- Mark common spaces with red tape to denote safe social distancing practices;
- Create a plan for inmates to sleep head-to-foot with exceptions for legitimate concerns by individual inmates;
- Use common spaces for temporary housing of inmates without disabilities;

- Limit transportation of inmates in and out of the Pack Unit other than for medical appointments or release from custody;
- Create a comprehensive weekly testing program using tests FDA-approved for asymptomatic testing and with a turnaround time for results of 48 hours or less, and document that plan in writing;
- Continue weekly testing until the pandemic is brought under control within the state of Texas, even if multiple weeks pass with zero positive cases;
- Quarantine inmates who are awaiting test results from individuals who are known to have tested negative;
- Create a written plan to implement contact tracing when an inmate or staff member tests positive;
- Document in writing all TDCJ policies in response to COVID-19; and
- Institute a regular audit and compliance program to ensure compliance with the measure[s] in the injunction and other written policies in response to COVID-19.

Id. at 82-83.

The Fifth Circuit stayed the district court's injunction before it went into effect. *Valentine v. Collier*, No. 20-20525, ___ F.3d ___, 2020 WL 6039993 (5th Cir. Oct. 13, 2020). It determined that relief on all claims

was barred because Plaintiffs “failed to comply with the exacting procedural preconditions imposed by the Prison Litigation Reform Act, specifically the PLRA’s mandatory and jurisdictional exhaustion requirement.” *Id.* at *1. It explained that the district court impermissibly excused Plaintiffs’ failure by “appl[ying] a ‘special circumstances’ exception, like the one the Supreme Court rejected in *Ross*, under the guise of an availability analysis.” *Id.* at *4.

Regarding Plaintiffs’ Eighth Amendment claim, the Fifth Circuit explained that “[t]he district court articulated the right legal standard but incorrectly applied it.” *Id.* at 5. Specifically, the district court erred by “framing its analysis in terms of COVID-19’s impact in the Pack Unit” rather than “the Eighth Amendment inquiry,” which concerns a defendant’s “state of mind, not the scope of the injury.” *Id.* at *5.

Briefing in the Fifth Circuit is now set to conclude on November 18. Oral argument is scheduled for December 3. Plaintiffs now ask this Court to vacate the Fifth Circuit’s stay during the accelerated appeal.

ARGUMENT

To vacate the Fifth Circuit’s stay, Plaintiffs must make three showings. First, they must show that their rights “may be seriously and irreparably injured by the stay.” *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers); accord *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring); *id.* at 507 (Breyer, J., dissenting). Second, they

must show that the Fifth Circuit was “demonstrably wrong in its application of accepted standards in deciding to issue the stay.” *Coleman*, 424 U.S. at 1304. Third, they must show that the case “could and very likely would be reviewed here upon final disposition in the court of appeals.” *Id.* Plaintiffs fail to make any of these required showings.

I. The Applicants Face No Threat of Serious or Irreparable Injury from the Stay Pending Appeal.

To vacate the Fifth Circuit’s stay, Plaintiffs must first show that the stay will cause them serious and irreparable injury. *Coleman*, 424 U.S. at 1304. The likelihood of such an injury must be judged given the measures Defendants have already put in place, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22-23 (2008), so Plaintiffs must show a serious and irreparable injury “in the absence of an injunction.” *Id.* Plaintiffs cannot make that showing because they fail to demonstrate that the district court’s injunction will be substantially more successful against the spread of COVID-19 than the measures currently in place.

Plaintiffs once again pin their claim to a serious and irreparable harm on the speculation that “without the permanent injunction to hold the Defendants to their constitutional obligations,” COVID-19 infections “threaten[] to spike again in the Pack Unit.” Plaintiffs’ App. to Vacate Stay at 20-21. Plaintiffs offer no support for this unadorned conclusion.

Plaintiffs concede, as they must, that the Pack Unit has experienced a “decrease in COVID-19 cases” as TDCJ has continued to respond to

the pandemic. *Id.* at 11. Indeed, as Plaintiffs acknowledge, the Pack Unit has experienced a steady decline in COVID-19 cases in recent months even as both the State of Texas and the United States suffer a resurgence of the virus. *Id.* at 6.¹ “Mercifully, positive cases of COVID-19” in the Pack Unit “have plummeted sharply, falling from 172 cases between June 23-25 to just 4 cases as of September 28. TDCJ’s preventive measures are working, belatedly abating what had been a perfect storm.” *Valentine*, 2020 WL 60399993, at *1. The number of positive cases has fallen further since the Fifth Circuit’s observation: there are zero active COVID-19 cases in the Pack Unit as of the time of this filing.²

Against the backdrop of TDCJ’s increasingly effective preventive measures, it would be exceedingly difficult to show that the absence of the district court’s injunction threatens serious and irreparable harm. *Winter*, 555 U.S. at 22-23. But Plaintiffs do not even try. They fail to identify any aspect of the permanent injunction that is necessary to mitigate the risk, let alone cite evidence explaining how it would do so. They

¹ See also Dylan Moriarty, et al., *Coronavirus Tracker: Charting the spread of Covid-19*, Wall Street Journal (last visited Oct. 30, 2020), <https://www.wsj.com/articles/coronavirus-case-count-11594333471>.

² See COVID-19 Case Counts, Tex. Dep’t of Criminal Justice (last visited Nov. 2, 2020), <https://txdps.maps.arcgis.com/apps/opsdashboard/index.html#/dce4d7da662945178ad5fbf3981fa35c> (“TDCJ COVID-19 Count”).

merely assert that the Fifth Circuit’s stay increases their risk of exposure to COVID-19. That is not enough to show a threat of serious and irreparable harm absent the permanent injunction.

II. The Court of Appeals Correctly Applied the Governing Standards.

Plaintiffs have failed to demonstrate that the Fifth Circuit’s stay is demonstrably wrong under the governing standards. Courts consider four factors to decide a motion for stay pending appeal:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009). A stay pending appeal “simply suspends judicial alteration of the status quo.” *Id.* at 429. In this case, the status quo is that Defendants are responding to a rapidly developing pandemic using their best efforts—guided by medical experts and CDC recommendations—to prevent the spread of COVID-19 to inmates and prison staff while maintaining safety and security in prison facilities. Under the status quo, prison officials may exercise discretion to respond to changing circumstances and allocate available resources to combat the COVID-19 pandemic without rigid court-ordered procedures backed by the threat of contempt. Each of the *Nken* factors confirms that this state of affairs should be preserved during the appeal.

A. The State is likely to succeed on all claims.

1. Plaintiffs' claims are barred because they failed to exhaust administrative remedies.

The district court lacked the power to enter an injunction in the first place because Plaintiffs failed to exhaust administrative remedies before filing suit. The PLRA imposes a strict exhaustion requirement: “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). As this Court has recently cautioned, this mandatory exhaustion obligation eliminates discretion either to entertain unexhausted claims or to excuse the exhaustion requirement. *Ross*, 136 S. Ct. at 1857.

The PLRA requires that inmates exhaust all available administrative remedies *before* filing suit. 42 U.S.C. § 1997e(a). This Court has made clear that the exhaustion requirement applies to all suits regarding prison life, *Porter v. Nussle*, 534 U.S. 516, 532 (2002), and that “unexhausted claims cannot be brought in court,” *Jones v. Bock*, 549 U.S. 199, 211 (2007). The exhaustion requirement is statutory, and the statute provides no exception for “special circumstances.” *See Ross*, 136 S. Ct. at 1856-57; *see also Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

Plaintiffs admit that they did not so much as file a formal grievance before filing suit, let alone exhaust the grievance process. Plaintiff Valentine affirmatively testified that administrative remedies *were* available to him through TDCJ's grievance process. Exh. 4 at 1-211:16-212:2. Yet even by Valentine's telling, he did not see that process to its conclusion—or even file a grievance—before filing suit. *Id.*; Pls' Exh. 2 at 47. Neither did Plaintiff King. *Id.* at 48. This suit is therefore barred.

The district court purported to excuse Plaintiffs' failure to exhaust on the ground that administrative remedies were "unavailable." It determined that the record contained "insufficient evidence to find that TDCJ was in fact responsive to grievances filed in the systemic way that would be required to render the process available to provide relief during the pandemic." Pls' Exh. 2 at 59-60. And it found that "[t]he grievance process also operated too slowly, given the risk to human life posed by COVID-19." *Id.* at 60. According to the district court, TDCJ's "administrative process is not available if there is a likelihood the inmate will die or suffer severe illness waiting for a response." *Id.* Given "these extraordinary times," the district court reasoned, "the regular TDCJ grievance process was simply incapable of use by inmates whose lives were threatened by" COVID-19. *Id.* at 61.

The district court's "extraordinary times" exception is a thinly veiled appeal to "special circumstances," which this Court has already rejected. *Ross*, 136 S. Ct. at 1856-57. The district court emphasized that it viewed

TDCJ's grievance process as too slow to respond adequately to COVID-19. But the PLRA does not condition the exhaustion requirement on the existence of a "speedy" administrative process; Congress eliminated any such condition when it enacted the PLRA. *Id.* at 1858. The district court's reference to a likelihood of serious illness or death is likewise unavailing: this Court rejected a similar appeal for excessive-force claims, *Porter*, 534 U.S. at 532, and even for constitutional claims generally, *Woodford v. Ngo*, 548 U.S. 81, 89 (2006).

This case shows why the PLRA's exhaustion requirement is critical. As this Court has explained, exhaustion under the PLRA serves two primary purposes: (1) it gives the agency an opportunity to investigate and correct its own mistakes before being haled into federal court; and (2) it promotes efficiency, as "[c]laims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court." *Woodford*, 548 U.S. at 89. The COVID-19 pandemic has rapidly evolved, and the State's response has evolved with it. As a result, many of Plaintiffs' original allegations do not reflect current conditions at the Pack Unit. *Compare Valentine*, 2020 WL 6039993, at *5 (summarizing the district court's "detailed factual findings about TDCJ's response to COVID-19"), *with* Exh. 2 at 32-34 (Plaintiffs' complaint, requesting that the district court require TDCJ to implement specific measures to protect inmates against COVID-19). But instead of bringing complaints concerning possible violations of those new policies

to the attention of prison officials, Plaintiffs first raised them in the district court after they filed suit. That sequence is antithetical to the PLRA's exhaustion requirement. Worse, the district court used Plaintiffs' failure to exhaust against Defendants when it dismissed their efforts to respond to the COVID-19 pandemic as "ad hoc steps in response to litigation proceedings." Pls' Exh. 2 at 13.

Plaintiffs' criticism of the Fifth Circuit's exhaustion analysis is revealing. They complain that under the Fifth Circuit's interpretation, a grievance process would be "available" for PLRA purposes "unless a defendant was actually incapable of offering even some relief." Plaintiffs' App. to Vacate Stay at 16. But that is precisely what the PLRA provides. *Ross*, 136 S. Ct. at 1856-57. Defendants are likely to prevail on all claims because administrative remedies were available, and Plaintiffs failed to exhaust them before filing suit.

2. Defendants are likely to prevail on the merits of Plaintiffs' Eighth Amendment claims.

Even if Plaintiffs had properly exhausted their administrative remedies, Defendants would prevail on the merits of Plaintiffs' Eighth Amendment claim because the evidence does not support the district court's conclusion that Defendants Collier and Herrera acted with deliberate indifference. To prove that prison conditions violate the Eighth Amendment, a plaintiff must show (1) "that he is incarcerated under con-

ditions posing a substantial risk of serious harm,” and (2) that the defendant prison official has acted with “‘deliberate indifference’ to inmate health or safety.” *Farmer*, 511 U.S. at 834. Deliberate indifference requires a showing of “subjective recklessness” as used in criminal law. *Id.* at 839. This is a subjective standard; it requires proof of a prison official’s “sufficiently culpable state of mind.” *Id.* at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)). “[D]eliberate indifference is a stringent standard of fault,” *Connick v. Thompson*, 563 U.S. 51, 61 (2011), which precludes liability unless a prison official “knows of and disregards an excessive risk to inmate health or safety.” *Farmer*, 511 U.S. at 837.

The district court’s analysis rests on a fundamental legal error: it collapsed the objective and subjective components of the deliberate-indifference test. As the Fifth Circuit recognized, the district court altogether failed to analyze Defendants’ subjective intent. *Valentine*, 2020 WL 6039993, at *5-6. The district court held that Defendants violated the Eighth Amendment not because they deliberately refused to respond to the COVID-19 pandemic but because they did not succeed in keeping COVID-19 out of the Pack Unit. *See* Pls’ Exh. 2 at 75 (finding deliberate indifference based on “a pattern of policy failures coupled with implementation and enforcement failures”). That is not the measure of liability under the Eighth Amendment. *See, e.g., Farmer*, 511 U.S. at 844 (“[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded

reasonably to the risk, even if the harm ultimately was not averted.”). The district court’s failure to apply the governing legal standard is fatal to its injunction.

The district court relied on two factors in concluding that Defendants were deliberately indifferent to the risks of COVID-19: “(1) Defendants’ lack of a systemic and sustainable approach to slow the spread of COVID-19;” and “(2) a failure to abide by basic public health guidance including but not limited to the steps outlined in [TDCJ] Policy B-14.52.” Pls’ Exh. 2 at 66. The district court’s discussion of each factor shows multiple errors of law and clear errors of fact.

a. The district court concluded that Defendants lacked a “systematic and sustainable approach” because “the process of designing Policy B-14.52,” TDCJ’s COVID-19 response policy, “indicates that it was not responsive to the needs of individual units or TDCJ facilities in general,” Pls’ Exh. 2 at 66, and because “the overall guidance was not modified for the Pack Unit whatsoever,” *id.* at 65. That is clearly wrong. Although TDCJ certainly formulated a system-wide COVID-19 response policy, it also implemented measures specific to the Pack Unit. For example, TDCJ provided masks to each inmate in the Pack Unit by April 16, Exh. 5 at 9-208:24-209:3, created a social-distancing plan, Pls’ Exh. 2 at 20, and imposed a precautionary lockdown, *id.* at 21. Likewise, TDCJ conducted “strike team” testing of all inmates at the Pack Unit in May, *id.* at 37, and created a long-term testing plan for the Pack Unit “based on

the CDC’s guidelines for mass testing of COVID-19 in nursing homes,” *id.* at 39-40.

The district court nonetheless criticized Defendants’ response because they did not “document the long-term testing plan in writing” and because “TDCJ’s response to COVID-19 has lacked any kind of consistent audit or compliance regime.” *Id.* at 67. But the Eighth Amendment does not impose a paperwork requirement, nor does it mandate specific procedures to respond to a public-health crisis. *See Valentine*, 2020 WL 60399993, at *5 (quoting *Farmer*, 511 U.S. at 844). And focusing on the lack of a written plan or an audit-and-compliance regime ignores the plan Defendants actually implemented, which included numerous protocols to reduce inmates’ risk of exposure to COVID-19, and which has brought the number of active cases of COVID-19 in the Pack Unit down to four at the time of the permanent injunction, *Valentine*, 2020 WL 60399993, at *1, and to zero as of the time of this filing, *see TDCJ COVID-19 Count*, *supra*.

Defendants’ efforts to combat COVID-19 have not only been successful, they plainly exceed what the Eighth Amendment requires. Indeed, Defendants’ current efforts already exceed what the district court thought necessary when it issued its preliminary injunction. Exh. 3 at 2-4. And they exceed what other courts have found adequate to satisfy the Eighth Amendment. *See, e.g., Barnes v. Ahlman*, 140 S. Ct. 2620 (2020) (staying injunction); *Williams v. Wilson*, No. 19A1047, 2020 WL

2988458 (U.S. June 4, 2020) (same); *Cameron v. Bouchard*, 815 F. App'x 978, 988 (6th Cir. 2020) (reversing injunction); *Wilson v. Williams*, 961 F.3d 829, 840-44 (6th Cir. 2020) (same); *Swain v. Junior*, 961 F.3d 1276, 1286-89 (11th Cir. 2020) (vacating injunction); *Foster v. Comm'r of Corr.*, 146 N.E.3d 372, 392-96 (Mass. 2020) (refusing injunction); *People ex rel. Carroll v. Keyser*, 184 A.D.3d 189, 194-96 (N.Y. App. 2020).

b. The district court's description of TDCJ's supposed failure to follow public-health guidelines further highlights its misapprehension of the deliberate-indifference standard. To begin with, failures by TDCJ or unnamed prison officials cannot be attributed to Defendants Collier and Herrera for purposes of Eighth Amendment liability. At any rate, while the court faulted Defendants for failing to implement certain measures, it cited no evidence that such measures were available or that Defendants deliberately chose not to implement them despite knowing that they were available and necessary to avoid a known risk of harm to Plaintiffs.

The district court's conclusion that the Pack Unit used "defective tests," Pls' Exh. 2 at 70, provides a clear example. The court found that the tests used by TDCJ "were only approved under the FDA's Emergency Use Authorization and had not been approved for testing of asymptomatic individuals," *id.*, and it considered this proof that Defendants were deliberately indifferent. But at the time of trial, *no* COVID-19 test had been approved for use on asymptomatic individuals. *Valentine*,

2020 WL 6039993, at *6. And to the extent the FDA has approved COVID-19 tests, it has only done so through Emergency Use Authorizations. *Id.* The district court thus faulted Defendants for failing to use tests that were not available.

The district court also criticized Defendants for beginning mass testing on May 12, Pls' Exh. 2 at 69, but there was no record evidence that Defendants could have done so any earlier. Defendants began initial, targeted testing in April through the University of Texas Medical Branch, but Defendants were limited to testing 54 inmates in one dorm. *Id.* at 36, 70. The district court likewise faulted Defendants for having “no plans to retest individuals following the first round of mass testing,” *id.* at 70, but it acknowledged that Defendants repeatedly retested inmates in the Pack Unit, *id.* at 10. And the district court criticized Defendants' practice of retesting inmates who previously tested negative. *See id.* But Plaintiffs' own expert and CDC guidance endorsed TDCJ's policy of retesting only “those inmates who had previously tested negative.” *See id.* at 39; Exh. 6 at 6-49:8-11.

The district court similarly concluded that “TDCJ ignored the most basic steps to increase social distancing” because “at no point did TDCJ ever even potentially consider using authorized early release as a means to increase social distancing.” Pls' Exh. 2 at 72. As a general matter, weighing the risks and benefits of releasing convicted criminals in an

effort to reduce the spread of COVID-19 is a sensitive public policy determination that is particularly unfit for a federal district court's resolution. *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905); *see also Woodford*, 548 U.S. at 89. And here, the decision whether to release prisoners was straightforward because Defendants have no authority to simply release inmates. *Valentine*, 2020 WL 6039993, at *6. As the stay panel correctly recognized, “[f]ailing to do the ‘impossible’ doesn’t evince indifference, let alone deliberate indifference.” *Id.* (quoting *Swain*, 961 F.3d at 1287).

3. Defendants are likely to prevail on the merits of Plaintiffs’ ADA claim.

Defendants are likely to prevail on Plaintiffs’ ADA claim for at least three reasons. First, that claim is unexhausted. Second, an ADA claim under Title II is not available under exigent circumstances. Third, TDCJ’s decision not to provide hand sanitizer did not deny any inmate the benefits of any service, program, or activity by reason of a disability, and forcing TDCJ to provide contraband to certain inmates is not a reasonable accommodation in any case.

Claims under Title II of the ADA are not available in exigent circumstances. *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000); *accord Wilson v. City of Southlake*, 936 F.3d 326, 331 (5th Cir. 2019). The COVID-19 pandemic has created exigent circumstances in virtually all corners of American life and government. The ADA does not provide

district courts with the power to micromanage the State's COVID-19 response. *See Jacobson*, 197 U.S. at 131. Nonetheless, the district court enjoined TDCJ to provide alcohol-based hand sanitizer—a potential intoxicant and a flame accelerant—to certain inmates. Pls' Exh. 2 at 74-77.

Assuming that the ADA nevertheless applied, the district court erred as a matter of law in finding a violation. The ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. That language, which appears nowhere in the district court's order, does not cover the present circumstances. Alcohol-based hand-sanitizer is classified as contraband; TDCJ does not provide it to any inmate. It therefore does not qualify as a public service, program, or activity provided by TDCJ. Even if it did, no inmate has been denied that supposed service, program, or activity “by reason of” any disability. The district court's strained effort to find a violation of the ADA does not square with the statutory text.

And even if the district court were correct that “the basic service of being able to keep their hands clean,” Pls' Exh. 2 at 76, qualified as a public service or program under the ADA (and it cited no authority for that proposition), forcing TDCJ to provide it to certain inmates would not be a “reasonable” accommodation. *See Tennessee v. Lane*, 541 U.S.

509, 532 (2004). On the contrary, compelling TDCJ to violate its contra-band policy would “fundamentally alter the nature of the service provided.” *Id.*

In addition to ignoring the statutory text, the district court’s ADA analysis improperly intrudes on TDCJ’s authority to set prison policy. “The difficulties of operating a detention center must not be underestimated by the courts.” *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 326 (2012). The judiciary is particularly ill-suited to making sensitive policy decisions during a public-health crisis. *See Jacobson*, 197 U.S. at 131. Defendants’ latitude in determining what accommodations are “reasonable” under the ADA or the Rehabilitation Act are accordingly at their apex here.

But the district court afforded *no* deference to prison officials’ consideration of the risks and benefits of providing convicted criminals with an alcohol-based hand sanitizer. Instead, it simply concluded that because some prison officials in other States weighed the risks and benefits differently, Defendants should have done the same. Pls’ Exh. 2 at 76. The district court likewise surmised, without any evidence, that “hand sanitizer could surely be provided to members of the Mobility-Impaired Subclass in daily, incremental quantities too small for misuse.” *Id.* at 75. Prison officials—who deal with prisoners every day—concluded otherwise, and the district court’s speculation is insufficient to overcome the deference owed to Defendants.

B. Defendants will suffer irreparable injury if the status quo is altered.

This Court has cautioned that district courts may not superintend State officials exercising their police powers during a public-health crisis unless their conduct has “no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” *Jacobson*, 197 U.S. at 31. The usurpation of this authority is itself an irreparable injury to Defendants. *See, e.g., Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)).

The district court’s injunction irreparably injures Defendants because it thwarts their ability to operate the Pack Unit and constrains their ability to respond to an evolving pandemic in real time. The Texas Legislature has charged TDCJ with the duty to operate the State’s prison system. *See* Tex. Gov’t Code ch. 501. The district court’s injunction interferes with that delegation of authority by substituting the district court’s judgment for the judgment of prison officials. That injury is pronounced here, as “it is ‘difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its

prisons.” *Woodford*, 548 U.S. at 94 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973)).

Defendants have worked diligently to address the harms posed by COVID-19 in exceedingly difficult circumstances, with available information and medical guidance changing on a daily basis. Indeed, Defendants currently employ almost all of the measures described in the permanent injunction. *See supra* Part I. These measures have proven effective, steadily reducing and then reversing the spread of COVID-19 in the Pack Unit. To the extent the injunction orders Defendants to carry out their existing policies, it is both unnecessary and improper. *Pennhurst St. Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). And Plaintiffs cite no particular measure that would be more effective than those already implemented by Defendants.

But the district court’s injunction creates a clear risk: if the district court’s chosen measures turn out to be ineffective, or if more effective measures become available, Defendants cannot change course. They are tied to the district court’s policy choices backed by the threat of contempt. Stripping state officials of discretion to adapt to changing circumstances is an irreparable injury in itself, and it may inflict further injury by making their response to the COVID-19 pandemic less effective. It is no answer to say that the district court might be willing to modify its injunction. An injunction that “prevents TDCJ from responding to the

COVID-19 threat without a permission slip from the district court . . . constitutes irreparable harm.” *Valentine*, 956 F.3d at 804.

C. The stay does not create a threat of irreparable injury to the Plaintiffs.

Maintaining the stay does not create a threat of injury to Plaintiffs. As explained above, Plaintiffs have not shown that existing measures are so deficient that the absence of additional court-ordered measures creates a risk of a serious and irreparable harm. Nor have they shown that the court-ordered measures will be any more effective than existing measures at the Pack Unit.

Plaintiffs’ litigation conduct once again demonstrates the lack of a serious threat of irreparable harm that could justify this Court’s intervention. The Fifth Circuit stayed the district court’s injunction on October 13. Plaintiffs did not file their application to vacate that stay until eight days later, on October 21. When parties face a true emergency, they proceed expeditiously. *See Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2085 (2017) (per curiam) (noting emergency cert petition and requests for stay and expedited relief were filed one day after adverse decision below); *see also California v. Texas*, No. 19-840, 140 S. Ct. 932 (U.S. Jan. 21, 2020) (denying motion for emergency expedited consideration after petitioners waited 16 days after adverse decision to seek Supreme Court relief). Plaintiffs delay confirms that they face no real emergency or risk of irreparable harm.

D. Maintaining the stay serves the public interest.

The additional stay factors “merge when the Government is the opposing party.” *Nken*, 556 U.S. at 435. For the reasons stated in Part II(B), *supra*, the Fifth Circuit’s stay serves the public interest.

III. Plaintiffs Have Not Shown that this Court Is Likely to Review the Decision Below.

Plaintiffs cannot show that this Court is likely to grant a writ of certiorari to review the Fifth Circuit’s judgment. That is always a difficult showing to make. *See Certain Named & Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327, 1331 (1980) (Powell, J., in chambers) (noting that only in “exceptional” cases will a litigant be able to show, before decision by the court of appeals, that this Court is likely to grant certiorari).

Plaintiffs concede that their claims must be resolved based “on the facts and circumstances of each particular case.” Plaintiffs’ App. to Vacate Stay at 17. By definition, cases which require such determinations are fact-bound, and are thus cases for which “a writ of certiorari is rarely granted.” Sup. Ct. R. 10. Though Plaintiffs gesture to an alleged circuit split, Plaintiffs’ App. to Vacate Stay at 10, every component of Plaintiffs’ suit is case-specific. They argue that *TDCJ*’s particular administrative process is unavailable for the PLRA’s requirement; that the district court’s determinations about *TDCJ*’s credibility control; that *TDCJ*

acted with a reckless mindset. *Id.* at 4-6, 18-19. The merits of these questions aside, they are, by definition, not amenable to recurrence, much less in another circuit so as to give rise to a circuit split worthy of this Court's intervention.

In the end, Plaintiffs appeal to this Court to rectify what they view as discrete errors made by the Fifth Circuit in a particular case. This Court does not grant certiorari to correct errors, and Plaintiffs provide no reason, let alone an exceptional one, why this Court might do so for their benefit.

CONCLUSION

The Court should deny the application to vacate the stay.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that this document has been filed with the clerk of the Court and served by electronic mail and Federal Express on November 2, 2020, on counsel of record in this case.

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Exhibit List

1. Respondents' Opposition to Application to Vacate Fifth Circuit Stay of Preliminary Injunction
2. Class Action Complaint and Application for Temporary Restraining Order and Other Injunctive Relief
3. Preliminary Injunction Order
4. Testimony of Laddy Curtis Valentine
5. Testimony of Bryan Collier
6. Testimony of Dr. Jeremy Young

Exhibit 1

In the Supreme Court of the United States

LADDY CURTIS VALENTINE AND RICHARD ELVIN KING,
INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED,
Applicants,

v.

BRYAN COLLIER, IN HIS OFFICIAL CAPACITY, ROBERT HERRERA, IN HIS
OFFICIAL CAPACITY, AND THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
Respondents.

On Application to Vacate the Stay of the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' OPPOSITION TO APPLICATION TO VACATE FIFTH CIRCUIT STAY OF PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	3
ARGUMENT.....	18
I. The Applicants Face No Threat of Serious or Irreparable Injury from the Stay Pending Appeal.....	19
II. The Court of Appeals Correctly Applied the Governing Standards.....	22
A. The State is likely to succeed on all claims.	23
B. The State will suffer irreparable injury if the status quo is altered.....	36
C. The stay does not create a threat of irreparable injury to the plaintiffs.	39
D. Maintaining the stay serves the public interest.	39
III. The Applicants Have Not Shown that this Court Is Likely to Review the Decision Below.	39
CONCLUSION.....	40
CERTIFICATE OF SERVICE.....	41

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Abbott v. Perez</i> , 138 S. Ct. 2305 (2018)	36
<i>Booth v. Churner</i> , 532 U.S. 731 (2001)	26, 27
<i>California v. Texas</i> , No. 19-840 (U.S.) (Jan. 21, 2020).....	21
<i>Certain Named and Unnamed Non-Citizen Children v. Texas</i> , 448 U.S. 1327 (1980) (Powell, J., in chambers)	39
<i>Coleman v. Paccar, Inc.</i> , 424 U.S. 1301 (1976) (Rehnquist, J., in chambers)	18, 19
<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994)	24, 30, 31
<i>Fletcher v. Menard Corr. Ctr.</i> , 623 F.3d 1171 (7th Cir. 2010)	28
<i>In re Abbott</i> , 954 F.3d 772 (5th Cir. 2020) (per curiam).....	4, 37, 38
<i>Jacobson v. Commonwealth of Massachusetts</i> , 197 U.S. 11 (1905)	37, 38
<i>Jones v. Bock</i> , 549 U.S. 199 (2007).	24
<i>Madsen v. Women’s Health Ctr., Inc.</i> , 512 U.S. 753 (1994)	35
<i>Maryland v. King</i> , 133 S. Ct. 1 (2012) (Roberts, C.J., in chambers)	36
<i>Muhammad v. Mayfield</i> , 933 F.3d 993 (8th Cir. 2019)	27
<i>New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.</i> , 434 U.S. 1345 (1977) (Rehnquist, J., in chambers)	36
<i>Nken v. Holder</i> , 556 U.S. 418 (2009)	22, 39

Cases—Continued:

<i>Pennhurst State School & Hospital v. Halderman</i> , 465 U.S. 89 (1984)	31
<i>Planned Parenthood of Greater Tex. Surgical Health Servs. v.</i> <i>Abbott</i> , 134 S. Ct. 506 (2013).....	18
<i>Porter v. Nussle</i> , 534 U.S. 516 (2002)	24
<i>Preiser v. Rodriguez</i> , 411 U.S. 475 (1973)	36
<i>Rinaldi v. United States</i> , 904 F.3d 257 (3d Cir. 2018).....	24
<i>Ross v. Blake</i> , 136 S. Ct. 1850 (2016)	24, 25, 26, 27
<i>Trump v. Int’l Refugee Assistance Project</i> , 137 S. Ct. 2080 (2017) (per curiam)	21
<i>Winter v. Nat. Res. Def. Council, Inc.</i> , 555 U.S. 7 (2008)	19, 20
<i>Woodford v. Ngo</i> , 548 U.S. 81 (2006).....	30, 36

Constitutional Provisions, Statutes, and Rules:

18 U.S.C. § 3626(a)(1)(A).....	35
42 U.S.C. § 1997e(a)	24
Tex. Gov’t Code ch. 501	36

INTRODUCTION

This is a suit by two prison inmates who believe that a prison's adherence to the federal Centers for Disease Control's pandemic-response guidelines violates the Eighth Amendment's prohibition on cruel and unusual punishment.

Since early March—before the President declared a national emergency, and before the Governor of Texas declared a statewide disaster—the Texas Department of Criminal Justice (TDCJ) has worked diligently to protect its prisons from the coronavirus pandemic. TDCJ has developed comprehensive policies to prevent or mitigate the spread of COVID-19. It has continuously updated those policies to respond to changing circumstances and emerging medical information. TDCJ's COVID-19 response has not only complied with federal recommendations set out by the CDC for correctional institutions, but has in many ways exceeded them. At all times, TDCJ has prioritized the safety of TDCJ staff and inmates.

Yet to Plaintiffs and the district court, that is not good enough to satisfy the Eighth Amendment. In granting Plaintiffs' request for a preliminary injunction, the district court issued a laundry list of commands that it viewed as a better approach. It issued its injunction even though Plaintiffs sued without even attempting to invoke grievance procedures, and even though they have not plausibly stated an Eighth Amendment violation. And the injunction itself violates the Prison Litigation Reform

Act in multiple ways: it grants relief as to unexhausted claims; it requires TDCJ to act far beyond what the Constitution requires; and it grants global relief far beyond what is necessary to redress these two Plaintiffs' alleged injuries.

Because of these serious errors, and because the injunction irreparably harms Defendants by preventing them from adapting in real time to an evolving public-health emergency, the Fifth Circuit properly stayed the district court's injunction pending appeal. It ordered Defendants' appeal to be expedited and issued an extraordinarily compressed briefing schedule leading up to oral argument on June 4.

Twelve days elapsed. Then, on May 4, almost two weeks after the Fifth Circuit's stay order, and four days before Defendants' opening Fifth Circuit brief was due, Plaintiffs filed this emergency application, claiming they need emergency relief because they are irreparably harmed every day that the preliminary injunction is not in effect.

The Court should deny their application and leave the Fifth Circuit's stay undisturbed. Plaintiffs have not shown any irreparable harm because there is no evidence that TDCJ's COVID-19 measures are inadequate, nor is there any evidence that the district court's laundry list of commands will protect them any better than what Defendants are already doing. Indeed, if Plaintiffs really faced ongoing irreparable harm, they would not have waited 12 days to seek relief.

Moreover, Plaintiffs cannot defend the preliminary injunction on the merits. Their claims fail before they even begin because they never availed themselves of the grievance process necessary to exhaust their claims. Nor have they stated an Eighth Amendment violation, since Defendants have responded vigorously to protect TDCJ staff and inmates from the pandemic threat. That is the opposite of deliberate indifference. And in any event, the district court clearly erred in granting classwide relief without certifying a class and in ordering measures neither required by the Constitution nor necessary to redress Plaintiffs' alleged injuries.

No one denies that the COVID-19 pandemic creates a threat of serious harm, but the record establishes that Defendants have acted diligently, guided by federal recommendations, to address that threat. The Fifth Circuit correctly stayed the preliminary injunction, and it has taken extraordinary steps to decide the merits of Defendants' appeal as soon as possible. The application should be denied.

STATEMENT OF THE CASE

1. Since the novel coronavirus began to spread across the United States in March, TDCJ has consistently acted swiftly and decisively, in accordance with federal guidelines and medical experts' recommendations, to protect prison staff and inmates from infection.

TDCJ's COVID-19 mitigation strategy began on March 11, 2020, days before the President declared a national state of emergency, and

days before the Governor of Texas issued a statewide disaster declaration. *See In re Abbott*, 954 F.3d 772, 779 (5th Cir. 2020). At the outset, TDCJ instituted a meticulous screening process for all prison visitors to reduce the possibility that an outsider might introduce infection to the prison community. Resp. Exh. 1 at 4, 6. And it immediately ramped up efforts to educate inmates and the public about the growing epidemic. *Id.*

Two days later, on March 13, TDCJ suspended all prison visitation entirely. That same day, TDCJ officials established lines of communication with leading governmental authorities and health experts, including the U.S. Centers for Disease Control and Prevention (CDC), the Texas Department of State Health Services, and TDCJ's university health care providers, to ensure that TDCJ had the latest information and recommendations to protect prison staff and inmates. *Id.* at 4. TDCJ's Health Services Director also held daily conference calls with university health care providers at UTMB and Texas Tech University and regional and unit-level medical staff. *Id.* And since March 16, TDCJ has conducted a daily briefing conference call with agency leadership. *Id.*

Since the COVID-19 virus was detected in March 2020, the directors of the State's Correctional Managed Health Care Committee (CMHCC) have worked to develop a policy to respond to the disease in the State's prison system. Resp. Exh. 2 at 2. The directors of CMHCC are Dr. Lannette Linthicum, Director of TDCJ's Health Services Division; Dr.

Owen J. Murray, Vice President of Offender Care Services, UTMB Correctional Managed Care; and Dr. Denise DeShields, Executive Medical Director at the Texas Tech University Health Sciences Center. *Id.* In consultation with other medical experts, the directors of CMHCC developed a policy designed to follow the CDC's guidance on COVID-19. *Id.*

The directors adopted CMHC Infection Control Policy B-14.52 on March 20, 2020. *Id.* That same day, TDCJ waived all medical copays for prison inmates. Resp. Exh. 1 at 4. After Policy B-14.52 was adopted, the university medical directors—Dr. Murray and Dr. DeShields—held conference calls with TDCJ officials to review the policy and answer questions. Resp. Exh. 2 at 3. Among other measures, the policy directed that all units take the following steps:

- Have medical staff educate offenders and staff on how COVID-19 is transmitted, signs and symptoms of COVID-19, treatment, and prevention of transmission;
- Educate staff and inmates on how to prevent the spread of the disease;
- Encourage handwashing with soap and water for 20 seconds or, if soap and water is unavailable, use hand sanitizer with at least 60% alcohol;
- Encourage cough etiquette (Cover coughs or sneezes with a tissue then throw the tissue in the trash. Otherwise, cough inside of your elbow);
- Avoid touching eyes, nose, and mouth with unwashed hands;
- Avoid close contact (<6 feet) with people who are sick or suspected of being sick;
- Stop handshakes;

- Disinfect common areas and surfaces that are often touched with a 10% bleach solution;
- Post visual alerts (signs and posters) at entrances, in the medical department, and other strategic places providing instruction on hand hygiene, cough etiquette, and symptoms of COVID-19;
- Post a sign at the entrance, so that high risk people can elect not to enter the unit if COVID-19 occurs;
- Evaluate the need to minimize offender movement.
- Triage inmates with COVID-19 symptoms as soon as possible.
- Isolate offenders with suspected or confirmed COVID-19;
- Quarantine those who have come into contact with an inmate suspected of having COVID-19;
- Screen all incoming inmates and other persons for symptoms of COVID-19;
- Curtail offender transportation except when absolutely required.
- Provide personal protective equipment to staff and to offenders required to perform duties for which staff should be provided the same personal protective equipment, except that offenders should not be provided with hand sanitizer;
- Contact the TDCJ Office of Public Health if health care providers feel that testing should be considered;
- Provide daily reports of COVID-19 to the TDCJ Office of Public Health.

Resp. Exh. 3.

Three days later, on March 23, 2020, TDCJ received new guidance from the CDC, *see* Exh. 14, and updated policy B.14-52 accordingly. Policy B.14-52, as amended to reflect CDC guidelines, went into effect on March 27. Resp. Exh. 1 at 3. TDCJ has continued to monitor the latest available information and update policy B.14-52. On April 15, the day

before the preliminary injunction hearing, TDCJ updated policy B.14-52 to account for the CDC's updated guidance on face masks. Resp. Exh. 3 at 4. It also provided detailed guidelines on intake quarantines, *id.*, and added new requirements for inmates in medical isolation due to exposure to COVID-19, *id.* at 5-6. The updates also include guidelines for handling staff who may have been exposed to COVID-19. *Id.* at 10-11. And the updated guidance added further precautions when transporting inmates and additional recommendations regarding personal protective equipment. *Id.* at 11-14.

TDCJ has taken additional steps to ensure the safety of inmates and staff from the spreading pandemic. For example, since April 6, the Pack Unit has made extra soap available to inmates at no cost to facilitate frequent handwashing. Declaration of Robert Herrera at 2 (ECF No. 35) (sealed) [Hereinafter Herrera Dec.]. Inmates have daily access to clean face towels, but they do not receive disposable hand towels because they are cost-prohibitive and can damage the plumbing system if flushed. *Id.*

Moreover, on April 8, 2020, TDCJ ordered the precautionary medical lockdown of any unit in which an offender or employee tested positive for COVID-19. Resp. Exh. 1 at 7. Under precautionary lockdown, the unit is closed to everyone except correctional staff and employees assigned to the unit. *Id.* Precautionary lockdown continues until 14 days after the last inmate or employee tests positive for COVID-19. *Id.* On April 13, 2020, TDCJ halted all offender transfers from county jails. *Id.*

The Pack Unit has also provided cloth masks to offenders. Inmates aged 65 and older were given cloth masks on April 14. On April 15, the Pack Unit issued cloth masks to all offenders. Inmates exchange their masks every day so that masks can be washed. Herrera Dec. 4. Since April 15, the Pack Unit has provided all inmate janitors with clean masks and gloves for each shift. *Id.* at 3.

Unfortunately, no corner of society has been spared from the coronavirus pandemic, including the prison system. But when coronavirus has reached Texas prisons, TDCJ has acted promptly to address infections and prevent outbreaks. On April 11, Leonard Clerkly, an inmate at the Wallace Pack Unit, died after being taken to the hospital after experiencing difficulty breathing. At approximately 5:30 p.m. on April 13, TDCJ learned that Mr. Clerkly tested positive for COVID-19. Resp. Exh. 1 at 8.

TDCJ immediately placed the Pack Unit on precautionary lockdown. During precautionary lockdown, transportation of inmates to or from the Pack Unit has stopped except in cases of medical emergency. *Id.* Offender movement within the Pack Unit has stopped except for medical emergencies and scheduled showers. Herrera Dec. at 3. Inmates no longer eat in the dining hall or line up at the pill window to receive medication; instead, meals and medications are delivered to inmates in their housing areas. Inmates no longer go to the recreation yard, *id.* at 5, or to common areas to watch television, *id.* at 6.

Since April 14, Mr. Clerkly's dorm has been placed under medical restriction to separate and restrict the movement of inmates who may have been exposed to COVID-19. *Id.* at 4. The 53 inmates in the dorm have been given masks, and medical staff check their temperature twice per day. *Id.* And at TDCJ's request, the University of Texas Medical Branch administered COVID-19 tests to all inmates who resided in Mr. Clerkly's dorm. Resp. Exh. 1 at 8.

2. Plaintiffs are two inmates in TDCJ's custody. Plaintiff Laddy Valentine is serving a 25-year sentence for child sexual abuse, indecent child contact, and several counts of aggravated sexual assault. *See* TDCJ Offender Information Details, <https://bit.ly/2WhotVX>. Plaintiff Richard Elvin King is serving a life sentence for multiple murders committed in 1989. TDCJ Offender Information Details, <https://bit.ly/3fyAnT5>. Both are housed at the Wallace Pack Unit, a geriatric prison unit that currently houses 1,248 inmates, 827 of whom are aged 65 and over. Herrera Dec. 2. The prison includes a robust full-time medical staff. *Id.*

Dissatisfied with TDCJ's extensive safety and mitigation measures, on March 30, 2020, Plaintiffs filed this lawsuit on behalf of themselves and a putative class of all current and future inmates in the Pack Unit. Exh. 5 ¶ 62. Plaintiffs sought a declaration that "the current conditions inside the Pack Unit are unconstitutional because those conditions are medically unsafe and dangerous to Plaintiffs and the class members, in violation of their Eighth Amendment rights." Exh. 5 ¶ 97. Plaintiffs also

alleged that TDCJ intentionally discriminated against them on account of their disabilities, in violation of the Americans with Disabilities Act and the Rehabilitation Act, by denying reasonable accommodations, including: “[a]ccess to alcohol-based hand sanitizer”; “cleaning supplies for each housing area, including cleaning supplies containing bleach”; “antibacterial hand soap and hand towels to facilitate handwashing”; “[a] prohibition on new prisoners entering the Pack Unit for the duration of the pandemic (or in the alternative, a requirement to test all new prisoners entering the Pack Unit for COVID-19 or place all new prisoners in quarantine for 14 days if no COVID-19 tests are available”; and “[s]ocial distancing measures in the cafeteria, pill line, and other locations where prisoners are required to congregate.” Exh. 5 ¶ 82.

In their complaint, Plaintiff sought a temporary restraining order and injunctive relief, much of which involved safety measures already in place at the Pack Unit. For example, Plaintiffs sought an order requiring Defendants to:

- Provide Plaintiffs and the class members with unrestricted access to antibacterial hand soap and disposable hand towels to facilitate handwashing;
- Provide Plaintiffs and the class members with access to hand sanitizer that contains at least 60% alcohol;
- Provide cleaning supplies for each housing area, including bleach-based cleaning agents and CDC-recommended disinfectants in sufficient quantities to facilitate frequent cleaning;

- Require common surfaces in housing areas to be cleaned hourly with bleach-based cleaning agents, including table tops, telephones, door handles, and restroom fixtures;
- Increase regular cleaning and disinfecting of all common areas and surfaces, including common-use items such as television remote controls, books, and gym and sports equipment;
- Institute a prohibition on new prisoners entering the Pack Unit for the duration of the pandemic (or in the alternative, test all new prisoners entering the Pack Unit for COVID-19 or place all new prisoners in quarantine for 14 days if no COVID-19 tests are available);
- Limit transportation of Pack Unit inmates out of the prison to transportation involving immediately necessary medical appointments and release from custody;
- For transportation necessary for prisoners to receive medical treatment or be released, social distancing requirements should be strictly enforced in TDCJ buses and vans;
- Implement and enforce strict social-distancing measures requiring at least six feet of distance between all individuals in all locations where inmates are required to congregate, including, but not limited to, the cafeteria line, in the chow hall, in all recreation rooms, during required counting, and in the pill line;
- To the extent possible, use common areas like the gymnasium as temporary housing for inmates without disabilities to increase opportunities for social distancing; and
- Post signage and information in common areas that provides: (i) general updates and information about the COVID-19 pandemic; (ii) the CDC’s recommendations on “How To Protect Yourself” from contracting COVID-19; and (iii) instructions on how to properly wash hands. Among other locations, signage should be posted in every housing area, and above every sink.

Exh. 5 ¶ 96. Much of the relief Plaintiffs sought involved safety measures already in place at the Pack Unit. *See supra* pp. 5-7.

Plaintiffs filed this lawsuit and sought injunctive relief without first availing themselves of TDCJ's grievance process. *See* Resp. Exh. 4; *see also* Exh. 4 at 15. The Prison Litigation Reform Act, however, required Plaintiffs to exhaust their administrative remedies before filing any federal complaint. *See* 42 U.S.C. § 1997e(a). Plaintiffs have never alleged that they were unaware of or unable to understand TDCJ's grievance process. Instead, they chose to bypass the grievance process entirely and proceed straight to federal court. They did not seek any administrative remedy through TDCJ's grievance process until after they had filed their complaint. *See* Resp. Exh. 4. Plaintiff Valentine filed a grievance on April 1, 2020, based on "lack of hand sanitation and cleaning supplies." *Id.* Plaintiff King filed a grievance on April 2, 2020, claiming that "Classification continues to move offenders from other units to the Pack Unit during the coron[a]virus pandemic." *Id.*

3. The district court held a telephonic hearing on Plaintiffs' motion for a preliminary injunction on April 16, 2020. *See* Exh. 4 at 4; Exh. 10. At 9:57 p.m. that evening, Resp. Exh. 7, the district court entered a preliminary injunction, ordering "all Defendants, their agents, representatives, and all persons or entities acting in concert with them" to do the following:

- Provide Plaintiffs and the class members with unrestricted access to hand soap and disposable hand towels to facilitate handwashing.

- Provide Plaintiffs and the class members with access to hand sanitizer that contains at least 60% alcohol in the housing areas, cafeteria, clinic, commissary line, pill line, and laundry exchange.
- Provide Plaintiffs and the class members with access to tissues, or if tissues are not available, additional toilet paper above their normal allotment.
- Provide cleaning supplies for each housing area, including bleach-based cleaning agents and CDC-recommended disinfectants in sufficient quantities to facilitate frequent cleaning, including in quantities sufficient for each inmate to clean and disinfect the floor and all surfaces of his own housing cubicle, and provide new gloves and masks for each inmate during each time they are cleaning or performing janitorial services.
- Provide all inmates and staff members with masks. If TDCJ chooses to provide inmates with cotton masks, such masks must be laundered regularly.
- Require common surfaces in housing areas, bathrooms, and the dining hall to be cleaned every thirty minutes from 7 a.m. to 10 p.m. with bleach-based cleaning agents, including table tops, telephones, door handles, and restroom fixtures.
- Increase regular cleaning and disinfecting of all common areas and surfaces, including common-use items such as television controls, books, and gym and sports equipment.
- Institute a prohibition on new prisoners entering the Pack Unit for the duration of the pandemic. In the alternative, test all new prisoners entering the Pack Unit for COVID-19 or place all new prisoners in quarantine for 14 days if no COVID-19 tests are available.
- Limit transportation of Pack Unit inmates out of the prison to transportation involving immediately necessary medical appointments and release from custody.
- For transportation necessary for prisoners to receive medical treatment or be released, CDC-recommended social distancing requirements should be strictly enforced in TDCJ buses and vans.

- Post signage and information in common areas that provides: (i) general updates and information about the COVID-19 pandemic; (ii) information on how inmates can protect themselves from contracting COVID-19; and (iii) instructions on how to properly wash hands. Among other locations, all signage must be posted in every housing area and above every sink.
- Educate inmates on the COVID-19 pandemic by providing information about the COVID-19 pandemic, COVID-19 symptoms, COVID-19 transmission, and how to protect oneself from COVID-19. A TDCJ staff person must give an oral presentation or show an educational video with the above-listed information to all inmates, and give all inmates an opportunity to ask questions. Inmates should be provided physical handouts containing COVID-19 educational information, such as the CDC's "Share Facts About COVID-19" fact sheet already in TDCJ's possession.
- TDCJ must also orally inform all inmates that co-pays for medical treatment are suspended for the duration of the pandemic, and encourage all inmates to seek treatment if they are feeling ill.
- TDCJ must, within three (3) days, provide the Plaintiffs and the Court with a detailed plan to test all Pack Unit inmates for COVID-19, prioritizing those who are members of Dorm A and of vulnerable populations that are the most at-risk for serious illness or death from exposure to COVID-19. For any inmates who test positive, TDCJ shall provide a plan to quarantine them while minimizing their exposure to inmates who test negative. TDCJ must also provide a plan for testing all staff who will continue to enter the Pack Unit, and for any staff that test positive, provide a plan for minimizing inmates' exposure to staff who have tested positive.

Exh. 2 at 2-4. As set out earlier (at 5-8), and as the district court acknowledged, Exh. 4 at 24, many of the measures ordered in the preliminary injunction were already required by TDCJ policy, including "access to soap, tissues, gloves, masks, regular cleaning, signage and education, quarantine of new prisoners, and social distancing during transport."

The next morning, Defendants moved the district court to stay its injunction pending appeal. The district court denied a stay pending appeal, but it ordered a temporary five-day stay “in order to, among other reasons, allow for issuance of the Court’s accompanying Memorandum and Order laying out the factual and legal basis for the Court’s Preliminary Injunction Order.” Exh. 3. Later that afternoon, Defendants filed a motion to stay pending appeal in the Fifth Circuit. Resp. Exh. 5 at 5.

The district court entered a Memorandum and Order on April 20, explaining its reasons for granting “emergency injunctive relief, in the form of protective health measures that help prevent transmission of the coronavirus.” Exh. 4 at 1. Although it recognized that “the measures ordered in the preliminary injunction largely overlap with TDCJ’s COVID-19 policy requirements and recommendations,” Exh. 4 at 23, the district court nevertheless found that Plaintiffs were substantially likely to prevail on the merits of their Eighth Amendment claim. The district court did not rely only on Defendants’ response to the COVID-19 pandemic; it also looked to “[p]ast actions and conduct” in a separate lawsuit, specifically, “Defendants’ failure to live up to the commitments they voluntarily assumed in the settlement of the related case of *Cole v. Collier*.”

Exh. 4 at 20.¹ The court concluded that Defendants had acted with deliberate indifference because their efforts to respond to the COVID-19 pandemic did not “reasonably abate the risk of COVID-19 transmission.” Exh. 4 at 20. The district court did not address Plaintiffs’ ADA claim. Exh. 4 at 15.

The district court held that Plaintiffs’ claims were not barred for failure to exhaust administrative remedies under the PLRA, despite their admitted failure to seek administrative relief before filing suit. Exh. 4 at 15. The district court reasoned that administrative remedies were not “available” given the pandemic’s “alarming speed.” Exh. 4 at 16.

4.a. On April 22, 2020, the Fifth Circuit granted Defendants’ motion to stay the preliminary injunction pending appeal. It found that Defendants were likely to prevail on appeal for multiple reasons. In particular, it held that Plaintiffs “have not shown a ‘substantial risk of serious harm’ that amounts to ‘cruel and unusual punishment.’” Exh. 1 at 6. In addition, it held that “the district court committed legal error in its application of *Farmer v. Brennan*.” *Id.* These errors made Plaintiffs’ Eighth Amend-

¹ *Cole v. Collier* was a class action lawsuit, filed in 2014, based on allegations of excessive heat in housing areas at the Pack Unit. *See* Exh. 5 at 21-22. That lawsuit was settled in 2018. *Id.* at 22. The district judge who issued the preliminary injunction in this case also presided over *Cole v. Collier*.

ment claims untenable. The Fifth Circuit also noted two obstacles to relief under the PLRA: Plaintiffs failed to exhaust administrative remedies, *id.* at 10-13; and the preliminary injunction was overbroad, going “well beyond the limits of what the PLRA would allow even if the Plaintiffs had properly exhausted their claims,” *id.* at 13.

In its order granting a stay pending appeal, the Fifth Circuit ordered the appeal to be expedited and heard at the next available oral argument setting. Shortly thereafter, the Court ordered Defendants to submit their opening brief on May 8, 2020; Plaintiffs to submit their response brief on May 18, 2020; and Defendants to submit a reply brief on May 22, 2020. The Court then set this appeal for oral argument on June 4, 2020. *See* Resp. Exh. 5 at 6.

b. Twelve days after the Fifth Circuit entered its stay pending appeal, on May 4, Plaintiffs filed this emergency application to vacate the Fifth Circuit’s stay. They filed this application four days before the deadline for Defendants’ opening brief in the Fifth Circuit.² Plaintiffs’ emergency application does not explain why they waited twelve days to seek relief in this Court.

² Because Defendants’ response to this application was due on the same day as the deadline for Defendants’ opening brief on appeal, Defendants were forced to seek an extension in the Fifth Circuit. Defendants’ Fifth Circuit brief is now due on May 11. *See* Resp. Exh. 5 at 7.

c. The next day, on May 5, the Fifth Circuit issued a directive to Defendants to provide the following information on May 11 and every ten days thereafter until the scheduled argument on June 4:

(1) Names of offenders and staff, if any, who have tested positive for or have been diagnosed as infected with the COVID-19 virus; give the dates of such test results or diagnosis and whether such infected persons have been hospitalized or have died.

(2) The date and extent and result of any further testing for COVID-19 virus of offenders and staff in his unit;

(3) What additional steps have been taken since the evidentiary hearing in district court on April 16, 2020 by defendants to protect inmates and staff from COVID-19 infection; also state any steps the defendants plan to take and when such future steps will be taken.

Resp. Exh. 6.

ARGUMENT

To vacate the Fifth Circuit’s stay, Plaintiffs must make three showings. First, they must show that their rights “may be seriously and irreparably injured by the stay.” *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers); accord *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (Scalia, J., concurring); *id.* at 507 (Breyer, J., dissenting). Second, they must show that the Fifth Circuit was “demonstrably wrong in its application of accepted standards in deciding to issue the stay.” *Id.* Third, they must show that the case “could and very likely would be reviewed

here upon final disposition in the court of appeals.” *Id.* The application fails to make any of these required showings.

I. The Applicants Face No Threat of Serious or Irreparable Injury from the Stay Pending Appeal.

To vacate the Fifth Circuit’s stay, Plaintiffs must demonstrate that the stay will cause them serious or irreparable injury. *Coleman*, 424 U.S. at 1304. The likelihood of irreparable harm must be judged “in light of” preventative measures already in place. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22-23 (2008). That is, Plaintiffs must show that they will suffer irreparable harm “in the absence of an injunction.” *Id.* Plaintiffs cannot make that showing for at least two reasons: (1) there is no evidence that the district court’s preliminary injunction will be more successful against the spread of COVID-19 than what Defendants are already doing; and (2) Plaintiffs’ own litigation conduct confirms that there is neither an emergency nor a threat of irreparable harm that justifies this Court’s intervention.

A. Even if Plaintiffs could show that the Fifth Circuit’s application of the governing standard was incorrect, and they cannot, *see infra* Part II(A), their request to vacate the stay would fail because there is no evidence that the district court’s injunction will be any more effective in stopping the spread of COVID-19 than Defendants’ existing and evolving measures. Plaintiffs speculate that if the stay remains in effect, the

Pack Unit may suffer an outbreak of COVID-19. App. 7-8. And they contend that the preliminary injunction includes measures the district court found “necessary to protect the status quo: ‘Plaintiffs and proposed class members remaining alive and free from serious illness stemming from COVID-19.’” App. 8 (quoting Exh. 4 at 29). But Plaintiffs’ argument assumes, without foundation, that the district court’s preferred measures will be sufficient to prevent the spread of COVID-19 in the Pack Unit.

The record does not support that assumption because it does not show that measures in the preliminary injunction would prevent the spread of COVID-19 in the Pack Unit. Their medical experts, for instance, merely opined that more should be done. But they could not guarantee that additional measures would guarantee the safety of inmates any more than Defendants can guarantee that any particular measures will be one hundred percent effective. *See, e.g.*, Exh. 10 at 16 (acknowledging that available tests “all have problems with them” and that “nasal swabs . . . take[] several days to come back and have a 40 percent false-negative rate”).

There is no basis to infer that the lack of a preliminary injunction *creates* an additional risk of harm to Plaintiffs because there is no evidence that the preliminary injunction would *reduce* the existing threat of harm any more than measures implemented by TDCJ. Because there is no evidence that the preliminary injunction would further reduce the baseline risk of harm from COVID-19, Plaintiffs cannot show that they

face a risk of irreparable harm “in the absence of an injunction.” *Winter*, 555 U.S. at 22-23.

Moreover, the Fifth Circuit is actively monitoring this case pending oral argument. It has directed Defendants to report new developments every ten days. Resp. Exh. 6. Given that oversight, this Court’s involvement is especially unwarranted.

B. Plaintiffs’ own litigation conduct effectively concedes that there is neither an emergency nor a threat of irreparable harm that justifies this Court’s involvement. The Fifth Circuit stayed the district court’s injunction on April 22. Exh. 1. Twelve days elapsed before Plaintiffs filed this application. When parties face a true emergency that only this Court can resolve, they proceed expeditiously; they do not wait 12 days to say so. *See Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2085 (2017) (per curiam) (noting emergency cert petition and requests for stay and expedited relief were filed one day after adverse decision below); *see also California v. Texas*, No. 19-840 (U.S.) (Jan. 21, 2020) (denying motion for emergency expedited consideration after petitioners waited 16 days after adverse decision to seek Supreme Court relief).

Defendants’ conduct proves that when a party faces a true emergency, it seeks relief promptly. The district court entered its preliminary injunction at 9:57 p.m. on April 16. Resp. Exh. 7. Within 24 hours, De-

defendants had filed a motion in district court to stay the preliminary injunction pending appeal and, after the district court denied that motion, an emergency stay application in the Fifth Circuit. Resp. Exh. 5 at 5.

By contrast, Plaintiffs waited almost two weeks to seek to vacate the Fifth Circuit's order. And they timed their filing to fall four days before the deadline for Defendants' Fifth Circuit merits brief, all but assuring that Defendants would be required to draft their Fifth Circuit merits brief and this response brief concurrently. By proceeding that way, Plaintiffs have shown that there is neither a true emergency nor any real risk of irreparable harm absent this Court's involvement.

II. The Court of Appeals Correctly Applied the Governing Standards.

Plaintiffs have failed to demonstrate that the Fifth Circuit's stay is demonstrably wrong under the governing standard. Courts consider four factors to decide a motion for stay pending appeal:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009). A stay pending appeal “simply suspends judicial alteration of the status quo.” *Id.* at 429. In this case, the status quo is that Defendants are responding to a rapidly developing pandemic using their best efforts—guided by medical experts and CDC

recommendations—to prevent the spread of COVID-19 to inmates and prison staff while maintaining safety and security in prison facilities. Under the status quo, prison officials may exercise discretion to respond to changing circumstances and allocate available resources to combat the COVID-19 pandemic without rigid court-ordered procedures backed by the threat of contempt. Each of the *Nken* factors confirms that this state of affairs should be preserved during the appeal.

A. The State is likely to succeed on all claims.

1. Plaintiffs’ claims are foreclosed because they failed to exhaust administrative remedies under the PLRA.

Plaintiffs acknowledge that TDCJ provides a grievance process and that they ignored that process until after filing suit. *See* Exh. 1 at 11. Plaintiffs now claim that administrative remedies were not “available” because the grievance process might not provide immediate relief. But dissatisfaction with the process does not mean that remedies are unavailable, particularly when Plaintiffs contributed to the supposed delay. Defendants have searched in vain for any case in which a prisoner was permitted to sue without even attempting to exhaust prison remedies. *See* Exh. 1 at 15 (Higginson, J., concurring) (“I agree that Appellants have demonstrated a substantial likelihood of success on their claim I am not aware of any case, nor do Appellees or the district court cite one, in which a prisoner has been deemed compliant with the Prison Litigation Reform Act (PLRA) when there has been no attempt to file a

grievance prior to suit in federal court.”). Straightforward application of the PLRA requires the district court to reject Plaintiffs’ claims.

The PLRA requires that an inmate exhaust all available administrative remedies *before* filing suit. 42 U.S.C. § 1997e(a). This Court has made clear that the exhaustion requirement applies to all suits regarding prison life, *Porter v. Nussle*, 534 U.S. 516, 532 (2002), and that “unexhausted claims cannot be brought in court,” *Jones v. Bock*, 549 U.S. 199, 211 (2007). The exhaustion requirement is statutory, and the statute provides no exception for “special circumstances.” *See Ross v. Blake*, 136 S. Ct. 1850, 1856-57 (2016); *see also See Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (in a case seeking injunctive relief to address “current” prison conditions, inmates are not “free to bypass adequate internal prison procedures and bring their health and safety concerns directly to court”); Exh. 1 at 12.

This Court has recognized one exception to the exhaustion requirement: Plaintiffs need not exhaust administrative remedies if such remedies are not “available.” *Ross*, 136 S. Ct. at 1858; *see, e.g., Rinaldi v. United States*, 904 F.3d 257, 268 (3d Cir. 2018) (“[T]he onus falls on the inmate to show that such remedies were unavailable to him.”). In *Ross*, this Court outlined just three situations in which a prisoner can show that the administrative remedy process is “unavailable”: (1) “when (despite what regulations or guidance materials may promise) it operates as a simple dead end-with officers unable or consistently unwilling to

provide any relief to aggrieved inmates”; (2) when “some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it”; and (3) “when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.” *Ross*, 136 S. Ct. at 1859-60; Exh. 1 at 11.

The district court flouted *Ross* and created a new exception to the exhaustion requirement. It held that Plaintiffs did not even have to attempt to exhaust administrative remedies because it was possible that the administrative process could take too long to resolve their grievances. Exh. 4 at 16-18. Since Plaintiffs failed to file their grievances until after they filed suit, the district court reasoned, prison officials would “not [be] required to respond . . . until May 11 and May 12, 2020.” Exh. 4 at 17. To the district court, the administrative process resembled what *Ross* referred to as a “dead end.” *See* 136 S. Ct. at 1859.

The district court’s reasoning fails out of the gate because it was *Plaintiffs* that waited to file their grievances until after they sued. The Pack Unit began taking precautions against the spread of COVID-19 on March 11, Resp. Exh. 1 at 4, 6, and the Governor declared a state-wide disaster on March 13, yet Plaintiffs did not file grievances until April 1 and 2, respectively, Resp. Exh. 4. Plaintiffs chose to forgo administrative remedies in favor of gathering experts and preparing for litigation, creating the very timeline relied on by the district court to excuse them

from exhausting.³ It was Plaintiffs, not the process, that created the delay. Allowing their own clear-eyed and counseled choices to excuse their failure to exhaust would eviscerate the PLRA’s exhaustion requirement.⁴

In any event, this Court did *not* hold in *Ross* that the question whether an administrative remedy is “available” depends on the speed at which an inmate can complete the administrative remedy process. Rather, “availability” turns on whether the grievance process is “capable of use” by inmates to obtain “some relief”:

As we explained in *Booth*, the ordinary meaning of the word ‘available’ is ‘capable of use for the accomplishment of a purpose,’ and that which ‘is accessible or may be obtained.’ . . . Accordingly, an inmate is required to exhaust those, but only those, grievance procedures that are ‘capable of use’ to obtain ‘some relief for the action complained of.’

136 S. Ct. at 1858-59 (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001)). The question, therefore, is whether TDCJ and the Pack Units’ grievance system is “capable” of providing “some relief” in response to Plaintiffs’ concerns relating to COVID-19.

³ Plaintiffs filed three expert declarations on April 2, Resp. Exh. 8 at 4, the same day as King’s grievance and one day after Valentine’s, Resp. Exh. 4.

⁴ *See* Exh. 16 ¶ 25 (Valentine averring that he spoke his attorneys before they filed suit).

This Court has made clear that *Ross*'s "dead end" test is limited to circumstances where the administrative process creates no "potential" for the inmate to obtain relief. *See id.* Only "[w]hen the facts on the ground demonstrate that *no such potential* exists" does an inmate have "no obligation to exhaust the remedy." *Id.* (emphasis added). In applying that test in *Ross*, the Court made clear that as long as there was some "potential" for an inmate to obtain some relief through a prison's administrative remedy process, the remedy was available. *Id.* at 1862 (considering whether "Maryland's standard grievance procedures potentially offer relief to Blake or, alternatively, did the IIU investigation into his assault foreclose that possibility?").

An administrative remedy is not "unavailable" merely because it will not provide the inmate's requested relief as soon as he wants it. "[A]s long as 'the administrative process has authority to take *some action* in response to a complaint, [even if] not the remedial action an inmate demands,' administrative remedies are 'available.'" *Muhammad v. Mayfield*, 933 F.3d 993, 1000-01 (8th Cir. 2019) (quoting *Booth*, 532 U.S. at 737-38, 741). Plaintiffs presented no evidence that the timelines governing TDCJ's administrative exhaustion process foreclosed any relief. *See* Exh. 1 at 11-12. Rather, the district court merely assumed that Defendants would (1) take 40 days to respond to Plaintiffs' grievances and (2) deny all relief. The district court relieved Plaintiffs' of their burden of proof, a legal error fatal to its preliminary injunction.

The only substantive precedent the district court relied on was an out-of-circuit case decided before *Ross*, and that case cuts against Plaintiffs. *See* Exh. 4 at 18 (citing *Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171 (7th Cir. 2010)). *Fletcher* did not hold that any prisoner claiming imminent danger is exempt from exhausting administrative remedies. *Fletcher* instead suggested that, where there are *no* administrative remedies that can redress an immediate danger to inmate health or safety, administrative remedies are unavailable. 623 F.3d at 1173. But *Fletcher* found that the plaintiff there had grievance procedures available to him, which the plaintiff did not exhaust. *Id.* at 1175. So the court held that the plaintiff’s claim was barred. *Id.* The counterfactual that *Fletcher* raised in dicta—a law prohibiting the prison from responding in time, *see* 623 F.3d at 1174—may make a process unavailable, *see* Exh. 1 at 11-12. But Plaintiffs did not suggest, and the district court did not find, anything that would prohibit prison officials from offering some relief to address Plaintiffs’ grievances. *See id.*

What is more, the evidence before the district court conclusively showed that Plaintiffs *could* receive some relief. *See id.* at 13 n.2. On April 1, Plaintiff Valentine filed a grievance complaining of “lack of hand sanitation and cleaning supplies.” Resp. Exh. 4. Less than a week later, on April 6, prison officials began providing increased access to hand soap—prisoners may “receive extra soap upon request, at no cost to them, as needed to facilitate frequent handwashing.” Herrera Dec. at 2.

The Pack Unit has also provided prisoners access to “a spray bottle of a disinfectant cleaner . . . to use if they wish to clean their housing area more frequently.” *Id.* at 3. And King confirmed in the preliminary injunction hearing that he is able to clean his housing area any time he wants to. Exh. 10 at 79. On April 2, King complained that prisoners from other units were being moved into the Pack Unit. Resp. Exh. 4. But even before his grievance, TDCJ “minimized transfers between units based upon agency needs on a case by case basis” and implemented procedures to screen for COVID-19. Resp. Exh. 1 at 5. A TDCJ-wide policy implemented March 20 provided that “[i]n general, offender transportation must be curtailed, except for movement that is absolutely required, such as for release, bench warrant, medical emergencies, etc.” Resp. Exh. 3 at 12. And since April 14, the day after Mr. Clerkly tested positive for COVID-19, all transfers in or out of the Pack Unit have ceased. Herrera Dec. at 3. These are just a few of the actions taken by Defendants and other State officials, under the guidance of the CDC and medical professionals to address dangers caused by the COVID-19 pandemic. *See* Resp. Exh. 1; Resp. Exh. 3; *see also supra* pp. 5-8.

This evidence highlights why exhaustion is necessary. As the Supreme Court has explained, exhaustion under the PLRA serves two primary purposes: (1) it gives the agency an opportunity to investigate and correct its own mistakes before being haled into federal court; and (2) it promotes efficiency, as “[c]laims generally can be resolved much more

quickly and economically in proceedings before an agency than in litigation in federal court.” *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). The COVID-19 pandemic has rapidly evolved, and the State’s response has evolved with it. *See* Resp. Exh. 1; Resp. Exh. 2 at 3-5. Many of the allegations in Plaintiffs’ complaint do not reflect the current conditions at the Pack Unit. *Compare* Exh. 5 at 15-17 (complaining that the Pack Unit is not posting signs about warning about COVID-19, reducing prisoner contact, educating prisoners, or reducing inmate movement); *with* Herrera Dec.; Resp. Exh. 3. And instead of bringing complaints concerning possible violations of those new policies to the attention of prison officials, Plaintiffs first raised them shortly before and at the preliminary injunction hearing. That sequence is antithetical to the PLRA’s exhaustion requirement.

2. Defendants are likely to prevail on Plaintiffs’ Eighth Amendment Claims.

Defendants are likely to succeed on Plaintiffs’ Eighth Amendment claims because the record proves that Defendants have been anything but deliberately indifferent to the risk of harm posed by the COVID-19 pandemic. To prove that prison conditions violate the Eighth Amendment, a plaintiff must show (1) “that he is incarcerated under conditions posing a substantial risk of serious harm,” and (2) that the defendant prison official has acted with “‘deliberate indifference’ to inmate health or safety.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The district

court's conclusion that Plaintiffs were likely to prevail on their Eighth Amendment claims was erroneous because it failed to require a showing of deliberate indifference to the harm posed by the COVID-19 pandemic.

The district court found a likelihood of success based only on the existence of a substantial risk of serious harm. It stated that “[t]he government has a constitutional duty to protect those it detains from conditions of confinement that create ‘a substantial risk of serious harm.’” Exh. 4 at 18 (quoting *Farmer v. Brennan*, 511 U.S. at 834). But the quoted passage from *Farmer* pertains only to the first element of an Eighth Amendment claim: “the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm.” 511 U.S. at 834. To establish liability, an inmate must make an additional showing of “‘deliberate indifference’ to inmate health or safety.” *Id.* Plaintiffs’ focus on the Fifth Circuit’s discussion of *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), similarly misses the point; that discussion had nothing to do with the district court’s legal error in departing from the standard of liability articulated in *Farmer v. Brennan*. See Exh. 1 at 7. The district court erred because it elided the second step of the Eighth Amendment analysis. As the Fifth Circuit held, the district court erred because it treated failure to eliminate the risk of harm as proof of deliberate indifference. See Exh. 1 at 7-8. That legal error alone supports the Fifth Circuit’s conclusion that Defendants are likely to prevail on appeal.

The district court did not find that the Defendants' response to the COVID-19 pandemic was not reasonable; it found that Defendants could have taken additional steps that would also be reasonable. For instance, the district court did not find that Defendants failed to provide adequate signage to advise Plaintiffs how to protect themselves against COVID-19. Instead, it explained that its order to "give an oral presentation or show an educational video" provided a reasonable measure to abate the risk that other inmates might not understand the existing signs. Exh. 4 at 24.

The district court faulted Defendants for "[t]heir lack of willingness to take extra measures, including measures as basic as providing hand sanitizer and extra toilet paper," citing this failure to take "extra measures" as evidence of "deliberate indifference toward their vulnerability." Exh. 4 at 26. But the decision not to provide alcohol-based hand sanitizer to prisoners is consistent with the CDC's Interim Guidance, which recommends cleaning hands with alcohol-based hand sanitizer "[i]f soap and water are not available" and "where security concerns permit." Exh. 14 at 8, 17. The Pack Unit has provided inmates with unlimited soap since April 6. Herrera Dec. 2. And the record does not support Plaintiffs' claim—or the district court's finding—that TDCJ materials "instruct inmates to use hand sanitizer." App. 15. The cited materials merely reflect the CDC's guidance to use hand sanitizer if soap and water are not available. *See* Herrera Dec. Exh. 3. Nor does the record show

that Defendants refused to provide extra toilet paper; it showed only that one plaintiff had tried unsuccessfully to get additional toilet paper at an unspecified time. *See* Exh. 10 at 65:23-24. If anything, that is further proof of failure to exhaust, *see supra* Part II(A)(1), as Plaintiffs do not suggest that they have ever pursued administrative remedies to obtain extra toilet paper.

The district court also went out of its way to discount the measures Defendants have taken in response to the COVID-19 pandemic. It dismissed unquestionably effective measures—such as screening employees for COVID-19 symptoms, waiving inmate copays, suspension of visitation, masks for prison staff, and unlimited access to soap—as “so essential that they have become ubiquitous.” Exh. 4 at 21. Worse, it counted Defendants’ efforts to adapt to the rapidly evolving COVID-19 pandemic against them, implying that “many of the measures” adopted by Defendants were somehow suspect because they “were not implemented until after the commencement of this lawsuit, and some were not adopted until the day before this Court’s evidentiary hearing.” Exh. 4 at 21. At the same time, the district court faulted Defendants for their failure to present “plans or intent to create plans” for “expanding testing, triaging available tests, coordinating early release to reduce prison populations, or enacting new measures after precautionary lockdown is lifted.” Exh. 4 at 14. Thus, in the district court’s view, taking additional steps to manage the COVID-19 pandemic after an inmate’s death is

somehow proof of deliberate indifference, as is failure to present plans at a preliminary injunction hearing to take additional steps in the future. That view bears no resemblance to this Court's Eighth Amendment jurisprudence.

The district court's mandate to test every Pack Unit inmate for COVID-19 illustrates the errors in its Eighth Amendment analysis. The district court ordered unit-wide testing because it believed it was "necessary for abating a substantial risk of serious harm to Pack Unit inmates." Exh. 4 at 26. The district court's preference for this extra measure is not shared by the CDC, which has advised that "[n]ot everyone needs to be tested for COVID-19"⁵ and which has left the decision to test individual inmates to the judgment of medical staff. *See* Exh. 14 at 22. And to the extent that Defendants had tested Pack Unit inmates for COVID-19, including all inmates who shared the deceased inmate's dorm, the court dismissed that effort because it had "not been notified of any results of those tests." Exh. 4 at 21.

Ultimately, the district court found a likely violation of the Eighth Amendment not because Plaintiffs proved that Defendants were deliberately indifferent to the risk posed by the COVID-19 pandemic but because Defendants failed to prove that they had eliminated the risk of

⁵ *Testing for COVID-19: How to Decide If You Should Be Tested Or Seek Care* (April 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-test-ing/testing.html>.

COVID-19 infection to Plaintiffs and members of the uncertified class. As the district court put it: “Defendants presented no evidence or testimony to suggest that the steps they have taken are sufficient to meet this conflux of challenges facing Pack Unit.” Exh. 4 at 25. As if to prove the point, the district court found that failure to prevent an inmate’s death provided evidence of deliberate indifference. Exh. 4 at 22 (“Mr. Clerkly’s death also suggests a conscious disregard of substantial risk.”). That suggests strict liability—far beyond even the negligence standard that this Court conclusively rejected in *Farmer*, 511 U.S. at 835. The Fifth Circuit correctly identified this legal error and concluded that Defendants are likely to succeed on the merits of their appeal.

3. The preliminary injunction violates the PLRA.

The district court’s injunction is also plainly overbroad. Basic principles of equity provide that “injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs.*” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (emphasis added). The PLRA provides that injunctive relief “with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs” and that relief must be “narrowly drawn.” 18 U.S.C. § 3626(a)(1)(A). The district court recited those restrictions, Exh. 2 at 1, but its preliminary injunction is not “narrowly drawn” in any sense. There are only two plaintiffs here. Yet the district court effectively

granted classwide—without certifying a class. That was not necessary, let alone “narrowly drawn,” to provide relief to Plaintiffs.

B. The State will suffer irreparable injury if the status quo is altered.

The preliminary injunction irreparably injures Defendants because it thwarts their ability to operate the Pack Unit and constrains their ability to respond to an evolving pandemic in real time. The Texas Legislature has charged TDCJ with the duty to operate the State’s prison system. *See* Tex. Gov’t Code ch. 501. The preliminary injunction interferes with that delegation of authority by substituting the district court’s judgment for the judgment of prison officials. That alone constitutes irreparable injury to the State. *See, e.g., Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). That injury is pronounced here, as “it is ‘difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.’” *Woodford v. Ngo*, 548 U.S. 81, 94 (2006) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491–92 (1973)).

Defendants have worked diligently to address the harms posed by COVID-19 in exceedingly difficult circumstances, with available infor-

mation and medical guidance changing on a daily basis. There is no evidence that the measures required by the preliminary injunction will be any more effective against the COVID-19 pandemic than the measures already put in place by Defendants. But the preliminary injunction creates a clear risk: if the measures turn out to be ineffective, or if more effective measures become available, Defendants cannot change course. They are tied to specific measures backed by the threat of contempt. Stripping state officials of discretion to adapt to changing circumstances is an irreparable injury in itself, and it may inflict further injury by making their response to the COVID-19 pandemic less effective. It is no answer to say that the district court might be willing to modify its injunction. An injunction that “prevents TDCJ from responding to the COVID-19 threat without a permission slip from the district court . . . constitutes irreparable harm.” Exh. 1 at 10.

Especially during a public-health crisis, Defendants must have discretion to use their professional judgment in operating the Pack Unit. The State’s police powers are at their apex during a public-health emergency. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29 (1905); *In re Abbott*, 954 F.3d 772 (5th Cir. 2020). And judicial review is appropriate only if a measure designed “to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” 197 U.S. at 29. Absent such a

clear violation, courts may not second-guess state officials' efforts to combat the emergency. "It is no part of the function of a court" to decide which measures are "likely to be the most effective for the protection of the public against disease." *Id.* at 30. Plaintiffs did not show, and the district court did not find that Defendants' efforts to respond to the pandemic have "no real or substantial relation" to the protection of inmates' health and safety or that they are "beyond all question, a plain, palpable invasion" of Plaintiffs' constitutional rights. *Id.* at 29-30.

The district court flatly refused to heed this Court's instruction in *Jacobson*. Instead, it saw the COVID-19 pandemic as a reason to give even less deference to state officials. It concluded, "Deference to prison policies must not come at the expense of ensuring that inmates are afforded a constitutional minimum standard of care, particularly in the face of a rapidly spreading and potentially deadly virus." Exh. 4 at 31. The district court dismissed *Jacobson* in a footnote, finding that it "does not apply to the instant case," because "Plaintiffs claim not that the State is infringing upon their constitutional rights to combat a public health emergency, but rather that the State is infringing upon their constitutional rights precisely because it is not reasonably combatting a public health emergency within Pack Unit." Exh. 4 at 31 n.3. But in drawing that distinction, the district court did exactly what *Jacobson* forbids: it "usurped the power of state authorities by passing judgment on the wisdom and efficacy of those emergency measures." *In re Abbott*, 954 F.3d

at 795. The district court’s failure to respect the principles of federalism reflected in *Jacobson* irreparably injures Defendants.

C. The stay does not create a threat of irreparable injury to the plaintiffs.

Maintaining the stay does not create a threat of injury to Plaintiffs. As explained above, Plaintiffs have not shown that existing measures are so deficient that the absence of additional court-ordered measures creates additional risk of irreparable harm. Nor have they shown that the court-ordered measures will be any more effective than existing measures at the Pack Unit. That they waited 12 days after the Fifth Circuit’s stay to seek relief in this Court confirms that they face no real emergency or risk of irreparable harm. *See* Part I, *supra*.

D. Maintaining the stay serves the public interest.

The additional stay factors “merge when the Government is the opposing party.” *Nken*, 556 U.S. at 435. For the reasons stated in Part II(B), *supra*, the Fifth Circuit’s stay serves the public interest.

III. The Applicants Have Not Shown that this Court Is Likely to Review the Decision Below.

The Applicants cannot show that this Court is likely to grant a writ of certiorari to review the Fifth Circuit’s judgment. That is always a difficult showing to make. *See Certain Named and Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327, 1331 (1980) (Powell, J., in chambers) (noting that only in “exceptional” cases will a litigant be able to show,

before decision by the court of appeals, that this Court is likely to grant certiorari). Here, the stay of a preliminary injunction order is a poor vehicle to review the question presented. Moreover, Plaintiffs fail to identify any split of authority among the circuit courts, drastically reducing the chances that the Court would grant certiorari. Plaintiffs concede that they seek error correction. *See* App. 7. But this Court does not grant certiorari to correct errors, especially not in highly fact-bound cases like this one.

CONCLUSION

The Court should deny the application to vacate the stay.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that this document has been filed with the clerk of the Court and served by electronic mail and Federal Express on May 8, 2020, on counsel of record in this case.

/s/ Kyle D. Hawkins
KYLE D. HAWKINS
Solicitor General
Counsel for Respondents

Exhibit 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

LADDY CURTIS VALENTINE and)	
RICHARD ELVIN KING, individually and)	
on behalf of those similarly situated,)	
)	Case No. _____
Plaintiffs,)	
)	
v.)	
)	
BRYAN COLLIER, in his official capacity,)	
ROBERT HERRERA, in his official capacity,)	
and TEXAS DEPARTMENT OF CRIMINAL)	
JUSTICE.)	
)	
Defendants.)	
)	

**CLASS ACTION COMPLAINT AND APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND OTHER INJUNCTIVE RELIEF**

Plaintiffs Laddy Curtis Valentine and Richard Elvin King, on behalf of themselves and those similarly situated, bring this action to enjoin the above-named Defendants’ willful and/or deliberately indifferent and discriminatory conduct in failing to protect inmates housed in the Wallace Pack Unit who face a high risk of severe illness from exposure to Coronavirus Disease 2019 or COVID-19.

STATEMENT OF THE CASE

1. This case is about the Texas Department of Criminal Justice’s (“TDCJ”) failure to take proper measures to prevent transmission of COVID-19 to some of its most vulnerable inmates. The named Plaintiffs and the classes they seek to represent are currently incarcerated at TDCJ’s Pack Unit in unincorporated Grimes County, Texas. Prisons are an ideal breeding ground for COVID-19. The Centers for Disease Control and Prevention warns that prisons are particularly susceptible to the spread of COVID-19 due to the high population density of inmates, and the tight, confined environment. While it has always been a matter of when, not if, COVID-19 hits the state’s

prisons, that time is now. In the last week there have been multiple reported cases of COVID-19 in both the TDCJ system and the community surrounding the Pack Unit.

2. Despite the ticking time bomb that COVID-19 represents, TDCJ has failed to implement necessary or even adequate policies and practices at the Pack Unit. Plaintiffs have been denied proper and equal access to vital preventative measures to avoid the transmission of COVID-19, in violation of federal law and the United States Constitution. While TDCJ adopted policies in response to this epidemic, they only encompass some of the guidance from the CDC and thus neglect critical measures for halting the spread of the disease. In practice the situation is even worse, as TDCJ has failed to implement many of its own policies, particularly at the Pack Unit. TDCJ's failure is especially harmful to Plaintiffs and the classes they seek to represent. As a Type-I Geriatric prison, the Pack Unit is home to a large population of inmates that are over 50, have serious pre-existing health conditions, or both. The CDC warns that these are precisely the type of people most at risk for serious illness, or even death, from COVID-19.

3. TDCJ's failures don't just affect the inmates. Prison health is community health. An outbreak at the Pack Unit could easily spread to the surrounding communities, and vice versa. Time is running out for proper protections to be put into place. Plaintiffs seek immediate relief from this Court before it is too late.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), § 1343 (civil rights), and § 2201 (Declaratory Judgment Act).

2. Venue is proper in this Court, pursuant to 28 U.S.C. § 1391(b)(2), because a substantial part of the events or omissions giving rise to the claims occurred in this judicial district.

PARTIES

A. Plaintiffs

3. Laddy Curtis Valentine is 69 years old and currently incarcerated at the Pack Unit. He is not expected to be released from custody until 2036.

4. Richard Elvin King is 73 years old and currently incarcerated at the Pack Unit. He is not expected to be released from custody.

B. Defendants

5. Bryan Collier is the executive director of TDCJ. As such, Mr. Collier is the commanding officer of all TDCJ correctional officers, guards, and TDCJ employees and contractors, and is responsible for their training, supervision, and conduct. By law, he is responsible for protecting the constitutional rights of all persons held in TDCJ custody. At all times described herein, he was acting under color of state law. He is sued in his official capacity for declaratory and injunctive relief.

6. Robert Herrera is the warden of the TDCJ Pack Unit. At all times described herein, he was acting under color of state law. As the warden of the Pack Unit, he is responsible for ensuring the conditions of confinement at the Pack Unit are constitutional. He is sued in his official capacity for declaratory and injunctive relief.

7. The Texas Department of Criminal Justice is the state prison system, an agency of the State of Texas. Tex. Gov't Code § 493.004. TDCJ is a recipient of federal funds. At all relevant times, TDCJ operated the Pack Unit, a public facility with programs and services for which Plaintiffs and other prisoners with disabilities were otherwise qualified.

FACTS

A. COVID-19 Is a Deadly Pandemic and a Public Health Emergency

8. Since the end of 2019,¹ the Novel Coronavirus that causes Coronavirus Disease 2019 (or COVID-19)² has ravaged the world, country to country.³ The extensive body of evidence regarding COVID-19 demonstrates that it is a highly communicable respiratory virus that spreads through close-contact and touching common surfaces containing the virus.

9. On January 30, 2020, the World Health Organization declared the COVID-19 outbreak a “Public Health Emergency of International Concern” as cases had been “reported in five WHO regions in one month.”⁴ The next day, the U.S. Secretary of Health and Human Services declared under Section 319 of the Public Health Service Act (42 U.S.C. § 247d), that COVID-19 “present[ed] a Public Health Emergency in the United States.”⁵ “On March 11, 2020, the World

¹ World Health Organization, Pneumonia of Unknown Cause – China (Jan. 5, 2020), <https://www.who.int/csr/don/05-january-2020-pneumonia-of-unkown-cause-china/en/> (“On 31 December 2019, the WHO China Country Office was informed of cases of pneumonia of unknown etiology (unknown cause) detected in Wuhan City, Hubei Province of China. As of 3 January 2020, a total of 44 patients with pneumonia of unknown etiology have been reported to WHO by the national authorities in China. Of the 44 cases reported, 11 are severely ill, while the remaining 33 patients are in stable condition.”).

² The World Health Organization officially adopted the name COVID-19 for the novel coronavirus disease on February 11, 2020, WHO Twitter Post (Feb. 11, 2020), <https://twitter.com/WHO/status/1227248333871173632?s=20>.

³ The first case of COVID-19 outside of China was reported by officials in Thailand on January 8, 2020. *See* WHO statement on novel coronavirus in Thailand, WHO (Jan. 13, 2020), <https://www.who.int/news-room/detail/13-01-2020-who-statement-on-novel-coronavirus-in-thailand>. Over the next several weeks, the outbreak spread to the Republic of Korea, Japan, and Singapore. *See* Statement on the meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV), WHO (Jan. 23, 2020) [https://www.who.int/news-room/detail/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/23-01-2020-statement-on-the-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)). By January 21, 2020, the first case of COVID-19 in the United States was detected in Washington State. Washington State Department of Health, 2019 Novel Coronavirus Outbreak (COVID-19), <https://www.doh.wa.gov/emergencies/coronavirus>.

⁴ Public Health Emergency of International Concern declared (Jan. 30, 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen> (The WHO’s Emergency Committee “noted that early detection, isolating and treating cases, contact tracing and social distancing measures – in line with the level of risk – can all work to interrupt virus spread”).

⁵ Secretary Azar Delivers Remarks on Declaration of Public Health Emergency for 2019 Novel Coronavirus (Jan. 31, 2020), <https://www.hhs.gov/about/leadership/secretary/speeches/2020-speeches/secretary-azar-delivers-remarks-on-declaration-of-public-health-emergency-2019-novel-coronavirus.html>; Secretary Azar Declares Public Health

Health Organization announced that the COVID-19 outbreak can be characterized as a pandemic, as the rates of infection continue to rise in many locations around the world and across the United States.”⁶

10. On March 13, 2020, Texas Governor Greg Abbott determined that “COVID-19 poses an imminent threat of disaster” and, under Section 418.014 of the Texas Government Code, declared “a state of disaster for all counties in Texas.”⁷ Subsequently, the Texas Department of State Health Services determined on March 19, 2020 that “COVID-19 represents a public health disaster within the meaning of Chapter 81 of the Texas Health and Safety Code.”⁸ The same day, Gov. Abbott issued Executive Order GA08, which provides in part that “every person in Texas shall avoid social gatherings in groups of more than 10 people.”⁹

11. Similarly, on March 16, 2020, Grimes County (where the Pack Unit is located) found that “extraordinary measures must be taken to contain COVID-19 and prevent its spread

Emergency for United States for 2019 Novel Coronavirus (Jan. 31, 2020), <https://www.hhs.gov/about/news/2020/01/31/secretary-azar-declares-public-health-emergency-us-2019-novel-coronavirus.html>.

⁶ Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>; *see also* WHO Director-General’s opening remarks at the media briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (“WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction. We have therefore made the assessment that COVID-19 can be characterized as a pandemic. Pandemic is not a word to use lightly or carelessly. It is a word that, if misused, can cause unreasonable fear, or unjustified acceptance that the fight is over, leading to unnecessary suffering and death.”).

⁷ Governor Abbott Declares State of Disaster In Texas Due To COVID-19 (Mar. 13, 2020), <https://gov.texas.gov/news/post/governor-abbott-declares-state-of-disaster-in-texas-due-to-covid-19>.

⁸ *See* Executive Order GA 08 (Relating to COVID-19 preparedness and mitigation), Mar. 19, 2020, <https://www.grimescountytexas.gov/page/open/2263/0/20200319%20Governor%20Abbott%20Executive%20Order%20GA-08.pdf>.

⁹ *Id.*

throughout Grimes County,” and declared a local state of disaster pursuant to Section 418.108(a) of the Texas Government Code.¹⁰

12. In only a few months, over 600,000 people worldwide have been diagnosed with COVID-19, and almost 30,000 of those people have died.¹¹ As of the date of this complaint, over 100,000 Americans have tested positive for COVID-19, while the number of deaths has risen to at least 1,668.¹² Those numbers are growing rapidly every day. There is no vaccine or cure for COVID-19. No one is immune.

B. COVID-19 Is Easily Transmissible and Will Spread Rapidly in a Prison Environment

13. The number of COVID-19 cases is growing exponentially. Nationally, projections by the CDC indicate that over 200 million people in the United States could be infected with COVID-19 over the course of the pandemic without effective public health intervention, with as many as 1.7 million deaths in the most severe projections.¹³

14. COVID-19 is a particularly contagious disease. A recent study showed that the virus could survive for up to three hours in the air, four hours on copper, twenty-four hours on cardboard, and two to three days on plastic and stainless steel—the same type of surfaces prisoners

¹⁰ Declaration of Local Disaster for Public Health Emergency, Mar. 16, 2020, <https://www.grimescountytexas.gov/page/open/2263/0/MARCH%2016%202020%20GRIMES%20COUNTY%20SIGNED%20DECLARATION%20OF%20LOCAL%20DISASTER%20COVID%2019.pdf>; Extended Declaration of Local Disaster for Public Health Emergency, Mar. 23, 2020, <https://www.grimescountytexas.gov/page/open/2263/0/03232020%20EXTENDED%20MARCH%2016%202020%20GRIMES%20COUNTY%20DECLARATION%20OF%20LOCAL%20DISASTER%20COVID%2019.pdf>.

¹¹ World Health Organization, *Corona Virus disease 2019 (COVID-19) Situation Report – 69*, (Mar. 29, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200329-sitrep-69-covid-19.pdf?sfvrsn=8d6620fa_2.

¹² *Id.*

¹³ Chas Danner, *CDC’s Worst-Case Coronavirus Model: 214 Million Infected, 1.7 Million Dead*, N.Y. Mag. (Mar. 13, 2020), <https://nymag.com/intelligencer/2020/03/cdcs-worst-case-coronavirus-model-210m-infected-1-7m-dead.html>.

come into contact every day at the Pack Unit.¹⁴ Another study of an early cluster of COVID-19 cases in Wuhan, China, revealed the dangers of indirect transmission resulting from infected people contaminating common surfaces—in the study, it was a communal restroom, like the restrooms Pack Unit prisoners use.¹⁵

15. New research also shows that controlling the spread of COVID-19 is made even more difficult because of the prominence of asymptomatic transmission—infection transmission by people who are contagious but exhibit limited or no symptoms, rendering any screening tools dependent on identifying symptomatic behavior ineffective.¹⁶

16. COVID-19 has been especially dangerous in areas of close confinement, such as cruise ships and assisted living facilities. It follows that jails and prisons are particularly vulnerable to an outbreak. In fact, jails and prisons are at an even greater risk because of their close quarters and communal living spaces.¹⁷

17. Experts predict that “[a]ll prisons and jails should anticipate that the coronavirus will enter their facility.”¹⁸

¹⁴ Marilyn Marchione/AP, *Novel Coronavirus Can Live on Some Surfaces for Up to 3 Days, New Tests Show*. TIME, (Mar. 11, 2020), <https://time.com/5801278/coronavirus-stays-on-surfaces-days-tests/>.

¹⁵ Cai J, Sun W, Huang J, Gamber M, Wu J, He G. *Indirect virus transmission in cluster of COVID-19 cases, Wenzhou, China, 2020*. 26 Emerg Infect Dis. 6, (2020) <https://doi.org/10.3201/eid2606.200412>.

¹⁶ Chelsea Ritschel, *Coronavirus: Are People Who Are Asymptomatic Still Capable of Spreading COVID-19?* Independent (Mar. 15, 2020), <https://www.independent.co.uk/life-style/health-and-families/coronavirus-symptoms-asymptomatic-covid-19-spread-virus-a9403311.html>.

¹⁷ Evelyn Cheng and Huileng Tan, *China Says More than 500 Cases of the New Coronavirus Stemmed from Prisons*, CNBC, (Feb. 20, 2020), <https://www.cnbc.com/2020/02/21/coronavirus-china-says-two-prisons-reported-nearly-250-cases.html>.

¹⁸ See Nicole Wetsman, *Prisons and jails are vulnerable to COVID-19 outbreaks*, The Verge (Mar. 7, 2020), <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap> (quoting Tyler Winkelman, co-director of the Health, Homelessness, and Criminal Justice Lab at the Hennepin Healthcare Research Institute in Minneapolis).

18. Many jails throughout Texas, all over the country, and around the world are releasing people with the aim of preventing massive outbreaks of severe illness and death from COVID-19.¹⁹ States, counties, and jails that have announced or planning the release of some inmates in their custody, include, but are not limited to: Harris County,²⁰ Texas; Jefferson County, Texas;²¹ Hillsborough County, Florida;²² Mobile County Metro Jail²³ and three other counties in Alabama;²⁴ Spokane in Washington;²⁵ Mercer County, Ohio;²⁶ Mecklenburg County, North

¹⁹ BBC, *US jails begin releasing prisoners to stem Covid-19 infections*, (Mar. 19, 2020), <https://www.bbc.com/news/world-us-canada-51947802> (discussing that some US cities have released hundreds of people from their jails and that Iran has released over 85,000 people to combat the pandemic).

²⁰ Jonathan Martinez, *Harris County Sheriff suggests releasing inmates to reduce the spread of coronavirus at county jails*, Click2Houston (Mar. 18, 2020), <https://www.click2houston.com/news/local/2020/03/19/harris-county-sheriff-suggests-releasing-inmates-to-reduce-the-spread-of-coronavirus-at-county-jails/>.

²¹ Kierra Sam & Jordan James, *Jefferson County jail cancels visitation, releases some inmates amid coronavirus concerns*, 12 News (Mar. 18, 2020), <https://www.12newsnow.com/article/news/local/jefferson-county-jail-cancels-visitatio-releases-someinmates-amid-coronavirus-concerns/502-f7e9e268-e131-46af-a478-95553f309bf8> (Taking steps to reduce the jail population from 800 to 600 in the next few weeks, having already released some people held on misdemeanors or unpaid traffic citations, some who have health issues, and some not considered a flight risk).

²² Tony Marrero, *Hillsborough sheriff releases 164 county jail inmates to reduce coronavirus risk*, Tampa Bay Times (Mar. 19, 2020), <https://www.tampabay.com/news/hillsborough/2020/03/19/hillsborough-sheriff-releases-164-county-jail-inmates-to-reduce-coronavirus-risk/>.

²³ Chris Best, *Some inmates to be released from Metro Jail due to coronavirus*, WKRG News (Mar. 18, 2020), <https://www.wkrq.com/health/coronavirus/some-inmates-over-65-to-be-released-from-metro-jail-due-to-coronavirus/> (Releasing people over 65 years old who are charged with non-violent misdemeanors).

²⁴ Marty Roney, *Coronavirus: County jail inmates ordered released in Autauga, Elmore, Chilton counties*, Montgomery Advertiser, (Mar. 18, 2020), <https://www.montgomeryadvertiser.com/story/news/crime/2020/03/18/county-jail-inmates-ordered-released-autauga-elmore-chilton-counties/2871087001/> (Sheriff ordered to release inmates based on a person's risk to the public).

²⁵ Chad Sokol, *Dozens released from Spokane County custody following Municipal Court emergency order*, The Spokemsan-Review (Mar. 17, 2020), <https://www.spokesman.com/stories/2020/mar/17/dozens-released-from-spokane-county-custody-follow/>.

²⁶ *Mercer County Jail releases low-level inmates amid coronavirus pandemic*, WFMJ 21 (Mar. 18, 2020), <https://www.wfmj.com/story/41912067/mercero-co-jail-releases-low-level-inmates-to-make-room-for-medicalisolation-cells-amid-coronavirus-pandemic> (Granted early release to around 50 people held on low-level charges).

Carolina;²⁷ Cook County Jail in Illinois;²⁸ Sacramento, California;²⁹ Alameda County, California;³⁰ New York City;³¹ Lexington County, South Carolina;³² Jefferson County Jail in Kentucky;³³ New Jersey; and Washington County, Oregon.³⁴

19. The Texas Department of State Health Services maintains a map and count of all COVID-19 cases, updating daily.³⁵ As of March 29, 2020, Texas had reported 2,552 cases of

²⁷ Michael Gordon & Ames Alexander, *Mecklenburg begins releasing jail inmates to avoid cellblock outbreak of COVID-19*, The Charlotte Observer (Mar. 18, 2020), <https://www.charlotteobserver.com/news/coronavirus/article241279836.html> (Nearly 50 people scheduled for release).

²⁸ David Struett, *Cook County Jail releases several detainees who are 'highly vulnerable' to coronavirus*, Chicago Sun Times, (Mar 17, 2020), available at <https://chicago.suntimes.com/coronavirus/2020/3/17/21183289/cook-county-jail-coronavirus-vulnerable-detaineesreleased-covid-19> (Released several detainees who are highly vulnerable to coronavirus who had been held on low-level, non-violent charges).

²⁹ Kristopher Hooks & Ja'Nel Johnson, *Some non-violent, low-level inmates being released from Sacramento jails amid coronavirus pandemic*, ABC10, (Mar. 18, 2020), <https://www.abc10.com/article/news/health/coronavirus/sacramento-inmates-beingreleased-from-amid-coronavirus-pandemic/103-d10ab80d-81d6-41e1-bc47-e6643e1e0d7e> (some low-level, non-violent inmates are being released following a court order).

³⁰ Clara Rodas, *Alameda County Superior Court releases 247 inmates in light of COVID-19*, The Daily Californian (Mar. 19, 2020), <https://www.dailycal.org/2020/03/19/alameda-county-superior-court-releases-247-inmates-in-light-of-covid-19/> (247 inmates have been approved for sentence modification and early release, and another 67 inmates had already been released).

³¹ Mayor announced plans to release “vulnerable” people from city jails. Julia Marsh & Ben Feuerherd, *NYC to begin releasing inmates amid coronavirus outbreak*, N.Y. Post (Mar. 18, 2020), <https://nypost.com/2020/03/18/nyc-to-begin-releasing-inmates-amid-coronavirus-outbreak/>.

³² Releasing people under a state Supreme Court directive to release anyone facing non-capital charges who is not a danger to the community or an extreme flight risk. Meera Bhonsle, *Jail numbers affected by judicial coronavirus directives*, Cola Daily (Mar. 19, 2020), https://www.coladaily.com/communities/lexington/jail-numbersaffected-by-judicial-coronavirus-directives/article_bb2df04e-6a22-11ea-a187-f3aec5c6ac7d.html.

³³ More than 100 pretrial defendants are being released. Andrew Wolfson, *More than 100 pretrial defendants to be released from jail to avoid coronavirus spread*, Louisville Courier Journal (Mar. 17, 2020), <https://www.courierjournal.com/story/news/2020/03/17/kentucky-releasing-some-pretrial-defendants-duc-coronavirus/5074206002/>.

³⁴ Released 60 inmates to allow for appropriate social distancing. Noelle Crombie, *Oregon courts, jails respond to coronavirus: Washington County jail to release 60 inmates; court hearings see widespread delays*, The Oregonian (March 16, 2020), <https://www.oregonlive.com/coronavirus/2020/03/oregon-courts-jails-respond-to-coronaviruswashington-county-jail-to-release-60-inmates-court-hearings-see-widespread-delays.html>

³⁵ Texas Case Counts, COVID-19, Texas Department of State and Health Services, <https://dshs.texas.gov/coronavirus/cases/> (last visited Mar. 30, 2020).

COVID-19, with 34 deaths. Harris County alone has 240 confirmed cases,³⁶ one of which was an inmate in the Harris County jail.³⁷ However, only 25,483 tests have been conducted in Texas as testing for COVID-19 remains limited, meaning the number of confirmed cases likely vastly understates the problem. The total Texas population is estimated to be around 29 million people.³⁸ The Governor of Texas declared COVID-19 a statewide public health disaster.³⁹

20. The CDC recommends the following for virus transmission prevention:

- Wash your hands often with soap and water for at least 20 seconds especially after you have been in a public place, or after blowing your nose, coughing, or sneezing.
- If soap and water are not readily available, use a hand sanitizer that contains at least 60% alcohol. Cover all surfaces of your hands and rub them together until they feel dry.
- Stay home if you are sick, except to get medical care.
- After coughing or sneezing, immediately wash your hands with soap and water for at least 20 seconds. If soap and water are not readily available, clean your hands with a hand sanitizer that contains at least 60% alcohol.

³⁶ Harris County COVID-19 Confirmed Cases, Harris County Public Health, <http://publichealth.harriscountytexas.gov/Resources/2019-Novel-Coronavirus/Harris-County-COVID-19-Confirmed-Cases> (last visited Mar. 30, 2020).

³⁷ Coronavirus in Greater Houston: Live Updates, Houston Public Media, <https://www.houstonpublicmedia.org/articles/news/health-science/coronavirus/2020/03/23/364988/coronavirus-in-greater-houston-live-updates/> (last visited Mar. 30, 2020) (“The first Harris County inmate has tested positive for COVID-19, according to a release from the Harris County Sheriff’s Office.”).

³⁸ QuickFacts: Texas, U.S. Census Bureau, <https://www.census.gov/quickfacts/TX> (last visited Mar. 27, 2020).

³⁹ Edgar Walters, *Texas governor declares statewide emergency, says state will soon be able to test thousands*, Texas Tribune (Mar. 13, 2020), <https://www.texastribune.org/2020/03/13/texas-coronavirus-cases-state-emergency-greg-abbott/>.

- Clean and disinfect frequently touched surfaces daily.⁴⁰

21. Many of these recommendations—like staying home if sick—are simply not feasible in a prison. That is all the more reason it is important to take the proper precautions that can be taken.

C. COVID-19 Poses a High Risk of Serious Illness and Death to Older Adults and Adults with Underlying Medical Conditions.

22. COVID-19 is more likely to cause serious illness and death for older adults and those with certain underlying medical conditions, including lung disease, heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke developmental delay, and pregnancy. These underlying medical conditions increase the risk of serious COVID-19 disease for people of any age. For people over the age of 50 or with medical conditions that increase the risk of serious COVID-19 infection, symptoms such as fever, coughing, and shortness of breath can be especially severe. Plaintiffs and the majority of putative class members fall into one or both of these categories of heightened vulnerability.⁴¹

23. The COVID-19 virus can cause severe damage to lung tissue, sometimes leading to a permanent loss of respiratory capacity, and can damage tissues in other vital organs, including

⁴⁰ How to Protect Yourself—Coronavirus Disease 2019 (COVID-19), CDC (Mar. 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html> (last visited Mar. 30, 2020).

⁴¹ Medical information in this and the paragraphs that follow are drawn from the expert testimony of two medical professionals filed in a recent filed federal case in Washington State, as well the website of the Harvard Medical School. *See* Expert Declaration of Dr. Marc Stern, *Dawson v. Asher*, No. 20-0409 (W.D. Wa. filed Mar. 16, 2020), ECF No. 6, <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-marc-stern>; Expert Declaration of Dr. Robert Greifinger, *Dawson v. Asher*, No. 20-0409 (W.D. Wa. filed Mar. 16, 2020), ECF No. 4, <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-robert-greifinger>; Expert Declaration of Dr. Jonathan Golob, *Dawson v. Asher*, No. 20-0409 (W.D. Wa. filed Mar. 16, 2020), ECF No. 5, <https://www.aclu.org/legal-document/dawson-v-asher-expert-declaration-dr-jonathan-golob>; Coronavirus Resource Center, Harvard Health Publishing, Harvard Medical School (Mar. 27, 2020), <https://www.health.harvard.edu/diseases-andconditions/coronavirus-resource-center>.

the heart and liver. Patients with serious cases of COVID-19 require advanced medical support, including negative pressure ventilation and extracorporeal mechanical oxygenation in intensive care. Patients not killed by serious cases of COVID-19 may face prolonged recovery periods, including extensive rehabilitation from neurologic damage and loss of respiratory capacity.

24. Emerging evidence suggests that COVID-19 can also trigger an over-response of the immune system, further damaging tissues in a cytokine release syndrome that can result in widespread damage to other organs, including permanent injury to the kidneys and neurologic injury. These complications can manifest at an alarming pace. Patients can show the first symptoms of infection in as little as two days after exposure, and their condition can seriously deteriorate in as little as five days or sooner.

25. Many people infected with the virus, however, are completely asymptomatic carriers. People can be infected with the virus and not display any symptoms, or only have very mild symptoms, but still spread the disease to others who may not be as lucky.

26. Most people in high-risk categories who develop serious symptoms will need advanced supportive care requiring highly specialized equipment that is in limited supply, such as ventilator assistance, and a team of care providers, including 1:1 or 1:2 nurse to patient ratios, respiratory therapists, and intensive care physicians. That level of support can quickly exceed local health care resources.

27. High-risk patients should expect a prolonged recovery, including the need for extensive rehabilitation to accommodate profound reconditioning, loss of digits, neurologic damage, and the loss of respiratory capacity.

28. The need for care—including intensive care—and the likelihood of death is much higher from COVID-19 than from influenza. According to recent estimates, the fatality rate of

people infected with COVID-19 is about ten times higher than that of a severe seasonal influenza, even in advanced countries with highly effective health care systems. According to preliminary data from China, a much greater percentage of people in high-risk categories who contracted COVID-19 died than those who were not in high-risk categories.⁴²

29. The only known, effective measures to reduce the risk for vulnerable people of serious illness or death caused by COVID-19 are aggressive social distancing and heightened attention to hygiene and disinfection—measures that TDCJ is making impossible at the Pack Unit.

D. CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities

30. Because of this looming disaster, the CDC has published guidance for correctional and detention facilities to prepare and protect inmates and personnel from the COVID-19 pandemic.⁴³ The CDC’s guidance includes the following advice for preventing the spread of COVID-19 in a correctional or detention facility:

⁴² World Health Organization, *Report of the WHO-China Joint Mission on Coronavirus Disease 2019 (COVID-19)*, at 12 (Feb. 28, 2020), [https://www.who.int/publications-detail/report-of-the-who-china-joint-mission-on-coronavirus-disease-2019-\(covid-19\)](https://www.who.int/publications-detail/report-of-the-who-china-joint-mission-on-coronavirus-disease-2019-(covid-19)) (finding fatality rates for patients with COVID-19 and co-morbid conditions to be: “13.2% for those with cardiovascular disease, 9.2% for diabetes, 8.4% for hypertension, 8.0% for chronic respiratory disease, and 7.6% for cancer”); Wei-jie Guan et al., *Comorbidity and its impact on 1,590 patients with COVID-19 in China: A Nationwide Analysis*, medRxiv, (Feb. 27, 2020) at 5, <https://www.medrxiv.org/content/10.1101/2020.02.25.20027664v1.full.pdf> (finding that even after adjusting for age and smoking status, patients with COVID-19 and comorbidities of chronic obstructive pulmonary disease, diabetes, hypertension, and malignancy were 1.79 times more likely to be admitted to an ICU, require invasive ventilation, or die, the number for two comorbidities was 2.59); Fei Zhou et al., *Clinical course and risk factors for mortality of adult inpatients with COVID-19 in Wuhan, China: a retrospective cohort study*, *Lancet* (March 11, 2020), tb. 1, [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30566-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext) (finding that among hospital patients, who tended to be older, of those who had COVID-19 and died, 48% had hypertension, 31% had diabetes, and 24% had coronary heart disease).

⁴³ CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional Detention Facilities, CDC (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last visited Mar. 30, 2020).

- Facilities should ensure availability of sufficient stocks of hygiene supplies, cleaning supplies, personal protective equipment (“PPE”), and medical supplies (consistent with the healthcare capabilities of the facility).
 - This includes liquid soap, alcohol-based hand sanitizer containing at least 60% alcohol, recommended PPE including facemasks and gloves, and supplies for testing, such as sterile viral transport media and sterile swabs.
- Facilities should make contingency plans in the event of PPE shortages.
- Facilities should provide a no-cost supply of soap to incarcerated/detained persons, sufficient to allow frequent hand washing.
- Facilities should provide alcohol-based hand sanitizer containing at least 60% alcohol.
- Facilities should adhere to CDC recommendations for cleaning and disinfection during the COVID-19 response, including cleaning and disinfecting frequently touched surfaces several times per day.
- Facilities should encourage all persons in the facility to protect themselves by practicing good cough etiquette and good hand hygiene and avoiding touching of the eyes, nose, or mouth.
- Facilities should encourage these behaviors by posting signage throughout the facility and communicating the information verbally on a regular basis.
- Facilities should implement social distancing strategies to increase the physical space between incarcerated/detained persons (ideally 6 feet between all individuals, regardless of the presence of symptoms).

- This should include enforcing increased space between individuals in holding cells and waiting areas, staggering time in recreation spaces, staggering meals and rearranging seating in the dining hall to increase space between individuals, limiting the size of group activities, and rearranging housing spaces to increase space between individuals.
- Facilities should be providing inmates with information and consistent updates about COVID-19 and its symptoms.

E. TDCJ Has Adopted Grossly Inadequate Policies in Response to the COVID-19 Pandemic

31. While TDCJ has implemented policies in response to the COVID-19 pandemic, these procedures are woefully inadequate and do not comport with many of the CDC's recommendations. Indeed, although the CDC has issued a specific Guidance on Management of COVID-19 in Correctional Facilities, TDCJ's policy does not directly cite this Guidance in its references section, only the CDC Guidance for the healthcare setting and for clinical management of patients with confirmed disease.

32. For example, the CDC recommends considering "relaxing restrictions on allowing alcohol-based sanitizer in the secure setting where security concerns allow."⁴⁴ TDCJ's policy acknowledges that hand sanitizer is a method "used to prevent the spread of any respiratory virus" and that it should be carried by staff "and used whenever there is concern that hands have been contaminated."⁴⁵ However, TDCJ still mandates that inmates—even those performing the same

⁴⁴ CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional Detention Facilities, CDC (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last visited Mar. 30, 2020).

⁴⁵ TDCJ Infection Control Manual, No. 5-14.52, Corona Virus Disease 2019 (COVID-19) (Mar. 27, 2020), https://www.tdcj.texas.gov/divisions/cmhc/docs/cmhc_infection_control_policy_manual/B-14.52.pdf (last visited Mar. 30, 2020).

duties as staff that need PPE and alcohol-based hand rub—“must not have access to the waterless hand rub but must wash hands with soap and water instead.”⁴⁶ But as TDCJ’s own policies acknowledge, this is not always practical, and thus inmates are at an increased risk of contracting and spreading COVID-19.

33. And, ironically, TDCJ inmates have been pressed into manufacturing alcohol-based hand sanitizer at the Roach Unit. Thus, TDCJ is forcing inmates to manufacture a necessary preventative measure they are prohibited from using themselves.

34. Inmates in other states have also been required to manufacture additional hand sanitizer.⁴⁷

35. The CDC also recommends correctional facilities “[r]estrict transfers of incarcerated/detained persons to and from other jurisdictions and facilities unless necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating security concerns, or to prevent overcrowding.”⁴⁸ In contrast to this specific instruction to restrict transfers, except in limited circumstances where it is absolutely necessary, TDCJ’s policy only requires facilities to “[m]inimize transfer of offenders between units.”⁴⁹ This general guideline is insufficient to properly reduce the risk to the inmate population.

⁴⁶ *Id.*

⁴⁷ Christina Carrega, *Nearly 100 prison inmates in NY to produce 100K gallons of hand sanitizer weekly*, ABC News (Mar. 10, 2020), <https://abcnews.go.com/Health/prison-inmates-ny-produce-100k-gallons-hand-sanitizer/story?id=69501815>.

⁴⁸ CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional Detention Facilities, CDC (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last visited Mar. 30, 2020).

⁴⁹ TDCJ Infection Control Manual, No. 5-14.52, Corona Virus Disease 2019 (COVID-19) (Mar. 27, 2020), https://www.tdcj.texas.gov/divisions/cmhc/docs/cmhc_infection_control_policy_manual/B-14.52.pdf (last visited Mar. 30, 2020).

36. While moving TDCJ inmates between prisons is exceptionally risky, however, TDCJ is also still accepting new inmates from county jails, without any mechanism to test these newly introduced inmates for COVID-19.

37. In addition to being inadequate, some of TDCJ's policies are impossibly vague, further preventing proper precautions from taking place. For example, the CDC guidance explains that, while difficult, social distancing "is a cornerstone to reducing transmission of respiratory diseases such as COVID-19."⁵⁰ The CDC then provides examples of steps that can be taken in prisons and jails.⁵¹ TDCJ's policy, in contrast, states only that units should "[p]ractice social distancing and avoid gatherings and meetings."⁵² TDCJ's further reference to "teleconference or video conference" implies this policy is aimed more at reducing risk to prison staff, not prisoners directly.⁵³

38. Correctional facilities across the country are now seeing the ramifications from an inadequate response.

39. As of March 25, 2020, Rikers Island in New York, New York had 52 confirmed cases of COVID-19 in the inmate population, with another 96 people under observation awaiting test results.⁵⁴ The Manhattan Supreme Court found this was a due process problem, and released

⁵⁰ CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional Detention Facilities, CDC (Mar. 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last visited Mar. 30, 2020).

⁵¹ *Id.*

⁵² TDCJ Infection Control Manual, No. 5-14.52, Corona Virus Disease 2019 (COVID-19) (Mar. 27, 2020), https://www.tdcj.texas.gov/divisions/cmhc/docs/cmhc_infection_control_policy_manual/B-14.52.pdf (last visited Mar. 30, 2020).

⁵³ *Id.*

⁵⁴ Julia Crave, *Rikers Island Has 52 Confirmed Covid-19 Cases*, Slate (Mar. 25, 2020), <https://slate.com/news-and-politics/2020/03/coronavirus-is-spreading-on-rikers-island.html>.

16 inmates that were pretrial detainees or incarcerated for parole violations.⁵⁵ The infection rate in Rikers is now 87 times higher than the overall U.S. rate.⁵⁶ Rikers is not an anomaly – it is the canary in the coal mine.

40. As another example, Cook County Jail in Chicago, Illinois now has 89 detainees that have tested positive for COVID-19, which is an increase of 51 cases from the day before.⁵⁷ In addition, 12 Cook County Sheriff’s Office employees at the jail have also tested positive for COVID-19.⁵⁸ The outbreak at the Cook County Jail happened in less than a week—the first reported case at the jail, a correctional officer, was confirmed last Sunday and the first two cases among inmates were announced last Monday.⁵⁹

41. Prisons across the country are bracing for COVID-19, with some already reporting confirmed cases and even deaths.⁶⁰

⁵⁵ David Brand, *Manhattan judge orders release of 16 Rikers inmates, ruling COVID-19 violates due process rights*, Queens Daily Eagle (Mar. 26, 2020), <https://queenseagle.com/all/manhattan-judge-orders-release-16-rikers-inmates-covid19-due-process>.

⁵⁶ Jessica Schulberg & Angelina Chapin, *Prisoners at Rikers Say It’s Like a ‘Death Sentence’ as Coronavirus Spreads*, Huffington Post (Mar. 28, 2020), https://www.huffpost.com/entry/rikers-prisoners-coronavirus_n_5e7e705ec5b6256a7a2a995d.

⁵⁷ Sam Kelly, *Sheriff announces 51 new coronavirus cases at Cook County Jail, raising total to 89*, Chicago Sun Times, Mar. 28, 2020, <https://chicago.suntimes.com/coronavirus/2020/3/28/21198407/cook-county-jail-coronavirus-covid-19-cases-inmates-89> (noting that “92 are still awaiting results of the test”).

⁵⁸ *Id.*

⁵⁹ *Id.*; CBS Chicago, *Coronavirus In Chicago: 89 Inmates, 12 Staff At Cook County Jail Test Positive For COVID-19* (Mar. 28, 2020), <https://chicago.cbslocal.com/2020/03/28/coronavirus-cook-county-jail-inmates-staff-covid-19-saturday-march-28/>.

⁶⁰ Joshua Sharpe & Christian Boone, *Georgia inmate dies from COVID-19 as virus hits more prisons*, *The Atlanta Journal-Constitution* (Mar. 27, 2020), <https://www.ajc.com/news/local/breaking-inmate-dies-from-covid-outbreak-worsens-prison/TzQZL4uXfK4GzH9ebSFNQN/>; Sarah N. Lynch, *Prisoner serving time for drug charge is first U.S. inmate to die from COVID-19*, Reuters (Mar. 28, 2020), <https://www.reuters.com/article/us-heath-coronavirus-prison-death/federal-inmate-serving-time-for-drug-charge-is-first-inmate-to-die-from-covid-19-idUSKBN21G04T> (“[A] 49-year-old prisoner in Louisiana who was serving a 27-year prison term for a drug charge, became the first federal inmate to die from COVID-19, the federal Bureau of Prisons (BOP) announced late on Saturday.”).

42. Unfortunately, a similar outbreak appears to be on the horizon for TDCJ facilities. In the last week, multiple individuals working for TDCJ or within its facilities have tested positive for COVID-19. First, a contract employee at TDCJ's Management and Training Corporation tested positive on March 23, 2020 at the Jester I Unit.⁶¹ The next day, a TDCJ inmate at the Lychner State Jail who had suffered shortness of breath and coughing, tested positive for COVID-19.⁶² And the next day, a TDCJ staff member in Huntsville, Texas notified the agency of a positive COVID-19 test a week after having symptoms and interacting with staff and prisoners.⁶³ If TDCJ's inadequate response continues, there is a risk that COVID-19 will spread unhindered through its facilities, which will inflict particularly serious harm on Plaintiffs.

43. There have already been at least 2 confirmed cases of COVID-19 in Grimes County where the Pack Unit is located.⁶⁴ The two neighboring counties, Brazos and Washington, where many of the Pack Unit's employees likely live, also have confirmed cases of COVID-19. As of March 29, 2020, Brazos County had 44 confirmed cases⁶⁵ and Washington County had 6 confirmed cases.⁶⁶ Harris County, just an hour away, has 240 confirmed cases.⁶⁷ COVID-19 has

⁶¹ *TDCJ COVID-19 Updates*, TDCJ (Mar. 27, 2020), <https://www.tdcj.texas.gov/covid-19/index2.html> (last visited Mar. 30, 2020).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Grimes County's second confirmed COVID-19 case is a close contact of first patient*, KBTX (Mar 21, 2020), <https://www.kbtx.com/content/news/Grimes-Countys-second-COVID-19-case-is-a-close-contact-of-the-first-patient-568993931.html>.

⁶⁵ *Two Brazos County Deaths From Coronavirus And 44 Positive Cases As Of Sunday Afternoon*, WTAW (Mar. 29, 2020), <http://wtaw.com/31-coronavirus-cases-brazos-county-friday/>.

⁶⁶ *UPDATE: Six cases of coronavirus confirmed in Washington County*, KAGS (Mar. 28, 2020), <https://www.kagstv.com/article/news/local/washington-county-in-texas-confirms-first-case-of-coronavirus/499-1599dc46-6e8d-4d4e-9012-5bc82d7bc608>. As of March 29, 2020, there were at least 59 confirmed cases of COVID-19 across the Brazos Valley. See *Brazos Valley Confirmed COVID-19 Cases*, KBTX, <https://www.kbtx.com/covid19>.

⁶⁷ *Harris County COVID-19 Confirmed Cases*, Harris County Public Health, <http://publichealth.harriscountytexas.gov/Resources/2019-Novel-Coronavirus/Harris-County-COVID-19-Confirmed-Cases> (last visited Mar. 30, 2020).

spread to all areas surrounding the Pack Unit. Without swift intervention, it will undoubtedly run rampant through the halls of the prison.

F. The Pack Unit Houses Sick, Elderly Prisoners in Conditions Likely to Spread the Virus

44. As Judge Keith Ellison noted in his 2017 preliminary injunction order, the Pack Unit is a Type-I Geriatric prison in the TDCJ system.⁶⁸ A large number of inmates at the Pack Unit face significant health issues, are over the age of 50, or both. As of September 2014, the Pack Unit contained 728 men with high blood pressure, 212 men with diabetes, 142 men with coronary artery disease, and 188 men over the age of 65.⁶⁹ Defendants agree that these numbers are typical for the Pack Unit.⁷⁰

45. Pack Unit inmates primarily live in cubicles in a dormitory setting. Each inmate has his own bunk, separated from his neighbor only by a waist-high wall. It is impossible for inmates at the Pack Unit, in their existing bunks, to sleep more than six-feet apart (as the CDC recommends for proper social distancing).

46. The Pack Unit has communal restrooms, where a significant number of inmates share toilets, sinks, and other fixtures.

G. Despite the Exceptionally High Risk its Inmates Face, the Pack Unit Is Not Meeting Even the TDCJ's Inadequate Policies

47. In addition to its policies being inadequate to combat the COVID-19 threat, TDCJ is neglecting to even follow many of its own policies. Plaintiffs observe that, despite committing to do so, TDCJ is **not**:

⁶⁸ *Cole v. Collier*, No. 4:14-CV-1698, 2017 WL 3049540, at *4 (S.D. Tex. July 19, 2017).

⁶⁹ *Id.*, at *5.

⁷⁰ *Id.*, at *5 n.5.

- Posting the signs and warnings attached to TDCJ's guidance throughout the prison, including attachments providing guidance and education on COVID-19 symptoms and best methods for preventing transmission;
- Reducing social gatherings or taking other precautions to reduce inmate contact;
- Educating inmates on how COVID-19 is transmitted, signs and symptoms, and prevention of transmission;
- Reducing and restricting inmate movement; and/or
- Reminding inmates of effective measures to prevent transmission, such as washing hands with soap for at least 20 seconds.

48. TDCJ's failure to implement these policies puts Plaintiffs at further risk of extreme harm. Because Plaintiffs are particularly at risk of severe illness or even death should they contract COVID-19, they must be provided the adequate care and safeguards recommended by the CDC and health experts. TDCJ is not meeting those standards.

H. The Pack Unit Has a History of Litigation Stemming from Poor Treatment of Inmates

49. The Pack Unit has a long history of litigation stemming from its poor treatment of inmates.⁷¹ In 2014, inmates at the Pack Unit filed a lawsuit seeking relief in the form of adequate temperature control due to the Pack Unit's lack of air conditioning in living quarters.⁷² Temperatures recorded during the summer of 2016 showed that the heat index at the unit exceeded

⁷¹ Emanuella Grinberg, *Texas judge orders prison to cool down*, CNN (July 7, 2019), <https://www.cnn.com/2017/07/19/us/texas-prison-heat-lawsuit/index.html>.

⁷² *Id.*

100 degrees on 13 days and reached into the 90-99 degree range on 55 days.⁷³ In 2017, Judge Ellison ordered officials overseeing the Pack Unit to move 500 “heat-sensitive” inmates to living quarters exceeding no more than 88 degrees.⁷⁴ In a temporary solution, the “heat-sensitive” inmates were moved to air conditioned units. The Pack Unit continued to be without air conditioning in its living quarters.⁷⁵

50. A year later, in 2018, Judge Ellison approved a settlement agreement in which TDCJ would provide air conditioning for the entirety of the Pack Unit.⁷⁶

I. Plaintiffs Are at a Serious of Risk of Infection

1. Plaintiff Richard King Faces Increased Risk from COVID-19 Due to his Disabilities

51. Plaintiff Richard King suffers from disabilities that, according to the CDC, place him “at higher risk of severe illness from COVID-19.”⁷⁷

52. Mr. King suffers from diabetes (and has diabetic neuropathy).

53. Mr. King’s diabetes substantially limits several of his major life activities, including his ability to eat, and to digest food.

54. Mr. King’s diabetes also substantially impairs the operation of several major bodily systems, including his digestive, neurological, circulatory, and endocrine systems.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Jolie McCullough, *Judge approves settlement mandating air conditioning at hot Texas prison*, The Texas Tribune (May 8, 2018), <https://www.texastribune.org/2018/05/08/settlement-air-condition-hot-texas-prison-gets-final-judicial-approval/>.

⁷⁶ *Id.*

⁷⁷ *People who are at higher risk for severe illness—Coronavirus Disease 2019 (COVID-19)*, CDC (Mar. 26, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html> (last visited Mar. 30, 2020).

55. Mr. King was recently diagnosed with kidney problems, and had a follow-up appointment scheduled to evaluate the function of his kidneys before the pandemic. His doctors told him his kidneys are “not doing well.”

56. Mr. King is 73 years old. While his advanced age is not a qualifying disability, it does independently place him “at higher risk of severe illness from COVID-19,” according to the CDC.⁷⁸

2. *Plaintiff Laddy Valentine Faces Increased Risk from COVID-19 Due to his Disabilities*

57. Mr. Valentine suffers from disabilities that, according to the CDC, place him “at higher risk of severe illness from COVID-19.”

58. Mr. Valentine suffers from hypertension, which has substantially impaired the operation of his circulatory system. Mr. Valentine suffered a stroke in the past due to the impairment of his circulatory system. Mr. Valentine’s hypertension is a “serious heart condition” which places him at increased risk of severe complications from COVID-19.

59. Mr. Valentine has also had a lumbar fusion in his back, and uses a walker for mobility. During the pandemic, his limited mobility impairs his ability to do things necessary to care for himself – such as aggressively wash his hands, and, where possible in the prison context, maintain a safe social distance.

60. Mr. Valentine is 69 years old. While his advanced age is not a qualifying disability, it does independently place him “at higher risk of severe illness from COVID-19,” according to the CDC.⁷⁹

⁷⁸ *Id.*

⁷⁹ *Id.*

CLASS ACTION

61. Pursuant to Federal Rule of Civil Procedure 23(a), (b)(1) and (b)(2), Plaintiffs bring this action on behalf of themselves and all similarly-situated persons.

62. Plaintiffs propose to represent a class composed of all inmates who currently are, or who in the future will be, incarcerated at the Pack Unit, and who are subjected to the TDCJ's policies and practices regarding COVID-19 ("Class").

63. Plaintiffs also seek to represent two subclasses of Pack inmates:

- **High-Risk Subclass:** those who are, according to the CDC, most at risk of severe illness from COVID-19, including death—these high-risk conditions include:
 - People aged 65 or older;
 - People with chronic lung disease or moderate to severe asthma;
 - People who have serious heart conditions;
 - People who are immunocompromised including cancer treatment; and
 - People of any age with severe obesity (body mass index [BMI] >40) or certain underlying medical conditions, particularly if not well controlled, such as those with diabetes, renal failure, or liver disease might also be at risk; or
- **Disability Subclass:** those who suffer from a disability that substantially limits one or more of their major life activities and who are at increased risk of COVID-19 illness, injury, or death due to their disability or any medical treatment necessary to treat their disability.

64. Plaintiffs King and Valentine are typical members of the Class, as well as the High-Risk Subclass and the Disability Subclass.

65. This action has been brought and may properly be maintained as a class action under Federal law and satisfies numerosity, commonality, typicality, and adequacy requirements for maintaining a class action under Fed. R. Civ. P. 23(a).

66. **Numerosity:** The joinder of each class member would be impracticable because each class is so numerous. The approximate number of Class members exceeds 1,400 as the Pack Unit houses over 1,400 inmates and many other inmates could potentially be housed at the Pack Unit over the course of this litigation, or in the future. Joining all members of the Class is impracticable due to the minimum 1,400-person size and the fluctuating population of the Pack Unit. Approximately 200 prisoners over age 65 live at the Pack Unit. Joining all 200 prisoners over age 65 would be impracticable. In addition, the Pack Unit is a “Chronic Care I” facility; more than 700 inmates incarcerated there suffer from at least one medical condition or disability that would make them a class member. Identifying every inmate at the Pack Unit who is a member of the Class would require interviewing hundreds of prisoners and reviewing each of their medical records. Disposition of this matter as a class action will provide substantial benefits and efficiencies to the parties and the Court.

67. **Commonality:** Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class, in that they all have a right to be administered COVID-19 prevention, testing, and treatment measures.

- The common questions of law and fact for the proposed Class include:
 - Whether Defendants Collier and Herrera adequately protect the Class from the immediate threat of COVID-19;

- Whether the Class's Eighth and Fourteenth Amendment rights are being violated by Defendants Collier and Herrera's failure to implement adequate procedures and practices to protect the class from COVID-19;
 - Whether Defendants Collier and Herrera's failure to implement adequate procedures and practices constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments; and
 - What practices Defendants are actually implementing with respect to COVID-19 at the Pack Unit.
- The common questions of law and fact for the proposed High Risk Subclass include:
 - Whether the members of the proposed High Risk subclass are at heightened health risk from COVID-19; and
 - Whether the members of the proposed High Risk subclass require heightened measures to protect them from COVID-19 infection;
 - The common questions of law and fact for the proposed Disability Subclass include:
 - Whether members of the Disability Subclass are qualifying individuals with a disability under the meaning of the ADA and Rehabilitation Act;
 - Whether TDCJ's policies and procedures are adequate to protect the Disability Class from the immediate threat of COVID-19;
 - Whether the Disability Class's rights under the ADA are violated by TDCJ's policies and practices;

- Whether the Disabilities Class’s rights under the Rehabilitation Act are violated by TDCJ’s policies and procedures; and
- Whether TDCJ illegally discriminated against the Disability Class by denying the Disability Class reasonable accommodations recommended by the CDC, both in policy and practice.

68. **Typicality:** Plaintiffs’ claims are typical and representative of each class and subclass member’s claims against Defendants, as identified above. The claims of Plaintiffs and the Class all arise from the same conduct by Defendants and are based not only on identical legal theories, but also seek identical relief. All members of the Class are similarly injured by Defendants’ wrongful conduct and the harms Plaintiffs suffer are typical of the harms suffered by the Class.

69. **Adequacy of Class Counsel:** Plaintiffs and their counsel will fairly and adequately represent the interests of the class. Plaintiffs have no interests contrary to those of class members. Plaintiffs’ class counsel, Winston & Strawn, LLP and Edwards Law, have litigated complex commercial and civil rights cases, including class actions against governmental entities. Edwards Law, in particular, has extensive experience with class action litigation against TDCJ.

70. A class action is superior to other available methods for fairly and efficiently adjudicating this controversy, especially since joinder of all Class members is impracticable.

71. Each class member is irreparably harmed as a result of Defendants’ wrongful conduct. Litigating this case as a class action will reduce the risk of repetitious litigation relating to the Defendants’ conduct.

72. Plaintiffs do not seek monetary damages, except as may be incidental to declaratory or injunctive relief.

CAUSES OF ACTION

FIRST CAUSE OF ACTION VIOLATION OF EIGHTH AND FOURTEENTH AMENDMENTS: UNLAWFUL CONDITIONS OF CONFINEMENT (Against Defendants Collier and Herrera in their Official Capacities)

73. Plaintiffs incorporate the previous paragraphs as if alleged herein.

74. The U.S. Constitution's Eighth Amendment, as incorporated against the States through the Fourteenth Amendment, protects prison inmates from cruel and unusual punishment by State actors and requires State actors to provide adequate healthcare to prison inmates. The State actors violate this right when they subject prison inmates to cruel treatment and conditions of confinement that amount to punishment or that do not ensure those inmates' safety and health.

75. In accordance with 42 U.S.C. § 1983, Defendants Collier and Herrera, in their official capacities, act with deliberate indifference to the serious risk COVID-19 poses to the inmates in their custody and care, including the numerous medically vulnerable individuals currently in confinement, without regard to their safety and health.

76. The Pack Unit presently does not comply with all CDC guidelines to prevent an outbreak of COVID-19 and cannot protect the health or safety of Plaintiffs and the class members, many of whom, because of their medical vulnerabilities, remain particularly susceptible to the most devastating health effects wrought by COVID-19.

77. Collier and Herrera, in their respective positions as executive director of TDCJ and warden of the Pack Unit, are aware of the COVID-19 pandemic, its rising spread throughout the nation (including in other facilities operated by TDCJ), and the deleterious threat to health that COVID-19 poses, particularly to the medically vulnerable—including Plaintiffs and the class members.

78. Collier's and Herrera's actions and inactions result in the confinement of Plaintiffs and the class members in conditions grossly inadequate to prevent COVID-19 outbreaks and the spread of the virus to Plaintiffs and the class members, which is a violation of their constitutional rights.

79. By operating the Pack Unit without the adequate conditions and practices to protect against COVID-19 transmission or a COVID-19 outbreak, Defendants Collier and Herrera, as supervisors, direct participants, and the ultimate policy makers for the Unit, have violated and continue to violate Plaintiffs' and the class member's Eighth Amendment rights.

**SECOND CAUSE OF ACTION
VIOLATION OF THE AMERICANS WITH DISABILITIES ACT
AND THE REHABILITATION ACT OF 1973
(Against Defendant TDCJ)**

80. Plaintiffs and the class members incorporate the previous paragraphs as if alleged herein.

81. Defendants intentionally discriminate against prisoners with disabilities, like Plaintiffs King and Valentine and numerous class members, by intentionally denying them reasonable accommodations recommended by the CDC and necessary to protect themselves from COVID-19.

82. Reasonable accommodations recommended by the CDC and necessary to protect inmates with disabilities include, but are not limited to:

- a. Access to alcohol-based hand sanitizer;
- b. Provision of cleaning supplies for each housing area, including cleaning agents containing bleach;
- c. Access to antibacterial hand soap and hand towels to facilitate handwashing;

- d. A prohibition on new prisoners entering the Pack Unit for the duration of the pandemic (or in the alternative, a requirement to test all new prisoners entering the Pack Unit for COVID-19 or place all new prisoners in quarantine for 14 days if no COVID-19 tests are available); and
- e. Social distancing measures in the cafeteria, pill line, and other locations where prisoners are required to congregate.

83. Failing to provide these reasonable accommodations is illegal discrimination under the Acts, entitling Plaintiffs to injunctive and declaratory relief.

84. Title II of the ADA and Section 504 of the Rehabilitation Act require public entities, like TDCJ, to reasonably accommodate people with disabilities in all programs and services for which people with disabilities are otherwise qualified. Because failing to provide adequate medical care and safe conditions of confinement to inmates also violates the Eighth Amendment, TDCJ's immunity from suit is waived by Congress's power to enforce the Fourteenth Amendment.

85. The Rehabilitation Act also requires federal funds recipients to reasonably accommodate persons with disabilities in their programs and services. As TDCJ is a federal funds recipient, its sovereign immunity from suit is waived by Congress's spending power under the Rehabilitation Act.

86. The Pack Unit is a facility, and its operation comprises a program and service, for ADA and Rehabilitation Act purposes.

87. Medical treatment and safe conditions of confinement are programs or services that TDCJ provides to prisoners for purposes of the ADA and Rehabilitation Act.

88. Plaintiffs King and Valentine, and other members of the Class, are qualified individuals with a disability under the meaning of both the ADA and the Rehabilitation Act.

89. TDCJ knows that Plaintiffs King and Valentine, and hundreds of other prisoners at the Pack Unit, including members of the Class, are qualified individuals with a disability. TDCJ knows that individuals with disabilities are in especially acute need of access to accommodations during the COVID-19 pandemic including hand sanitizer and the other items identified above, but deny these reasonable accommodations to Plaintiffs King and Valentine, and other members of the Class.

**TEMPORARY RESTRAINING ORDER, INJUNCTION, AND
DECLARATORY RELIEF**

90. Plaintiffs and the class members incorporate all previous paragraphs as if alleged herein.

91. Plaintiffs and the class members seek an immediate temporary restraining order under Federal Rule of Civil Procedure 65 to protect their health, safety, and well-being in accordance with their constitutionally guaranteed Eighth Amendment rights. Plaintiffs and the class members further seek preliminary and permanent injunctive relief against Defendants under 42 U.S.C. § 1983, the ADA, and the Rehabilitation Act, for themselves and the class members.

92. Without the temporary restraining order and injunctive relief Plaintiffs and the class members seek, Defendants will continue their same perilous practices and conduct, disregarding federal legal mandates and endangering the lives and the welfare of current and future prisoners at the Pack Unit. Without swift intervention by this Court, Plaintiffs and the class members face immediate and irreparable injury: they risk contracting COVID-19 and, because of their particular medical susceptibility, likely will sustain severe, potentially *life-threatening*, health complications.

93. Plaintiffs and the class members have no plain, adequate, or complete remedy at law to address the wrongs described herein.

94. Plaintiffs and the class members are likely to succeed on the merits of their claims because Defendants are constitutionally required to take measures to avoid jeopardizing the health and safety of Plaintiffs and the class in the face of the COVID-19 pandemic. Alternatively, Plaintiffs and the class members submit they are not required to demonstrate likelihood of success on the merits to secure a temporary restraining order because their feared injury—including contracting a potentially life-threatening illness—is so severe.

95. Granting a temporary restraining order and injunctive relief also serves the public interest, because it will help guard against further community spread of COVID-19 in vulnerable populations and will help protect medically compromised individuals from contracting a potentially life-threatening virus. As an outbreak of COVID-19 at the prison would likely result in prison staff becoming infected and suffering as well, the public interest strongly favors granting immediate injunctive relief.

96. To protect their health and safety, Plaintiffs and the class members are entitled to a temporary restraining order and injunctive relief requiring that Defendants immediately take the following actions:

- Provide Plaintiffs and the class members with unrestricted access to antibacterial hand soap and disposable hand towels to facilitate handwashing;
- Provide Plaintiffs and the class members with access to hand sanitizer that contains at least 60% alcohol;
- Provide cleaning supplies for each housing area, including bleach-based cleaning agents and CDC-recommended disinfectants in sufficient quantities to facilitate frequent cleaning;

- Require common surfaces in housing areas to be cleaned hourly with bleach-based cleaning agents, including table tops, telephones, door handles, and restroom fixtures;
- Increase regular cleaning and disinfecting of all common areas and surfaces, including common-use items such as television remote controls, books, and gym and sports equipment;
- Institute a prohibition on new prisoners entering the Pack Unit for the duration of the pandemic (or in the alternative, test all new prisoners entering the Pack Unit for COVID-19 or place all new prisoners in quarantine for 14 days if no COVID-19 tests are available);
- Limit transportation of Pack Unit inmates out of the prison to transportation involving immediately necessary medical appointments and release from custody;
- For transportation necessary for prisoners to receive medical treatment or be released, social distancing requirements should be strictly enforced in TDCJ buses and vans;
- Implement and enforce strict social-distancing measures requiring at least six feet of distance between all individuals in all locations where inmates are required to congregate, including, but not limited to, the cafeteria line, in the chow hall, in all recreation rooms, during required counting, and in the pill line;

- To the extent possible, use common areas like the gymnasium as temporary housing for inmates without disabilities to increase opportunities for social distancing; and
- Post signage and information in common areas that provides: (i) general updates and information about the COVID-19 pandemic; (ii) the CDC's recommendations on "How To Protect Yourself"⁸⁰ from contracting COVID-19; and (iii) instructions on how to properly wash hands. Among other locations, signage should be posted in every housing area, and above every sink.

97. Plaintiffs and the class members request an order declaring that the current conditions inside the Pack Unit are unconstitutional because those conditions are medically unsafe and dangerous to Plaintiffs and the class members, in violation of their Eighth Amendment rights.

98. Plaintiffs request an order declaring that TDCJ violates the ADA and Rehabilitation Act by failing to reasonably accommodate inmates with disabilities.

99. Plaintiffs and the class members are entitled to injunctive and declaratory relief to end this unlawful discrimination.

100. Plaintiffs do not seek damages.

ATTORNEY'S FEES

101. Pursuant to 42 U.S.C. § 1988, and 42 U.S.C. § 12205 Plaintiffs are entitled to recover attorney's fees, litigation expenses, and court costs, including expert costs.

⁸⁰ See *How to Protect Yourself—Coronavirus Disease 2019 (COVID-19)*, CDC (Mar. 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html> (last visited Mar. 30, 2020).

PRAYER FOR RELIEF

THEREFORE, Plaintiffs respectfully request that the Court award the following relief:

- Certify this action as a class action, as described above;
- Remedy ongoing violations of law and the Constitution by granting declaratory and injunctive relief, as set out in this Complaint, on behalf of the Plaintiffs, and the class;
- Issue a temporary restraining order, and a preliminary and permanent injunction, to abate the risk of serious harm described above by requiring Defendants to take the following health and safety measures:
 - Provide Plaintiffs and the class members with unrestricted access to antibacterial hand soap and disposable hand towels to facilitate handwashing;
 - Provide Plaintiffs and the class members with access to hand sanitizer that contains at least 60% alcohol;
 - Provide cleaning supplies for each housing area, including bleach-based cleaning agents and CDC-recommended disinfectants;
 - Increase regular cleaning and disinfecting of all common areas and surfaces, including common-use items such as television remote controls, books, and gym and sports equipment;
 - Institute a prohibition on new prisoners entering the Pack Unit for the duration of the pandemic (or in the alternative, test all new prisoners entering the Pack Unit for COVID-19 or place all new

prisoners in quarantine for 14 days if no COVID-19 tests are available);

- Implement and enforce strict social-distancing measures requiring at least six feet of distance between all individuals in all locations where inmates are required to congregate, including, but not limited to, the cafeteria line, in the chow hall, in all recreation rooms, during required counting, and in the pill line; and
- Post signage and information in common areas that provides:
 - (i) general updates and information about the COVID-19 pandemic;
 - (ii) the CDC’s recommendations on “How To Protect Yourself”⁸¹ from contracting COVID-19; and
 - (iii) instructions on how to properly wash hands.
- Find that Plaintiffs are the prevailing parties in this case and award them attorney’s fees, court costs, expert costs, and litigation expenses;
- Grant such other and further relief as appears reasonable and just, to which Plaintiffs may be entitled, separately or collectively.

⁸¹ *See id.*

Dated: March 30, 2020

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Counsel for Plaintiffs

Exhibit 3

ENTERED

April 16, 2020

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LADDY CURTIS VALENTINE, <i>et al</i> ,	§	
	§	
Plaintiffs,	§	
VS.	§	CIVIL ACTION NO. 4:20-CV-1115
	§	
BRYAN COLLIER, <i>et al</i> ,	§	
	§	
Defendants.	§	

PRELIMINARY INJUNCTION ORDER

This matter came for hearing before the Court on April 16, 2020, upon the Application of Plaintiffs Laddy Curtis Valentine and Richard Elvin King, individually and on behalf of those similarly situated, for injunctive relief. At the hearing, the Court heard testimony from Plaintiffs’ witnesses and argument from counsel for both parties. The Court notes that the Defendants chose to present no live testimony to controvert Plaintiffs’ evidence. After consideration of the Class Action Complaint, the attached evidence, the testimony and evidence at the April 16, 2020 hearing, and any arguments of counsel, the Court finds that Plaintiffs are substantially likely to succeed on the merits of the underlying litigation; that, in the absence of a preliminary injunction, Plaintiffs will suffer immediate irreparable injury for which there is no adequate remedy at law, in that they will face a high risk of serious illness or death from exposure to COVID-19; that the issuance of a preliminary injunction will not inflict greater or undue injury upon those restrained or third parties; and the issuance of a preliminary injunction order will serve the public interest and maintain the status quo. The Court further finds the relief below is narrowly drawn, is consistent with Center for Disease Control (CDC) guidelines, extends no further than necessary to correct the harm the Court finds requires preliminary relief, and is the least intrusive means necessary to correct the

harm the Court finds requires preliminary relief. The Court has given substantial weight to any adverse impact on public safety and the operation of the criminal justice system caused by the preliminary relief and shall respect the principles of comity in tailoring this preliminary relief. *See* 18 U.S.C. § 3626(a)(2).

Plaintiffs' Application for a Temporary Restraining Order is therefore **GRANTED** as a preliminary injunction, and it is **ORDERED**, pursuant to Federal Rule of Civil Procedure 65, that all Defendants, their agents, representatives, and all persons or entities acting in concert with them are enjoined as follows:

- Provide Plaintiffs and the class members with unrestricted access to hand soap and disposable hand towels to facilitate handwashing.
- Provide Plaintiffs and the class members with access to hand sanitizer that contains at least 60% alcohol in the housing areas, cafeteria, clinic, commissary line, pill line, and laundry exchange.
- Provide Plaintiffs and the class members with access to tissues, or if tissues are not available, additional toilet paper above their normal allotment.
- Provide cleaning supplies for each housing area, including bleach-based cleaning agents and CDC-recommended disinfectants in sufficient quantities to facilitate frequent cleaning, including in quantities sufficient for each inmate to clean and disinfect the floor and all surfaces of his own housing cubicle, and provide new gloves and masks for each inmate during each time they are cleaning or performing janitorial services.
- Provide all inmates and staff members with masks. If TDCJ chooses to provide inmates with cotton masks, such masks must be laundered regularly.

- Require common surfaces in housing areas, bathrooms, and the dining hall to be cleaned every thirty minutes from 7 a.m. to 10 p.m. with bleach-based cleaning agents, including table tops, telephones, door handles, and restroom fixtures.
- Increase regular cleaning and disinfecting of all common areas and surfaces, including common-use items such as television controls, books, and gym and sports equipment.
- Institute a prohibition on new prisoners entering the Pack Unit for the duration of the pandemic. In the alternative, test all new prisoners entering the Pack Unit for COVID-19 or place all new prisoners in quarantine for 14 days if no COVID-19 tests are available.
- Limit transportation of Pack Unit inmates out of the prison to transportation involving immediately necessary medical appointments and release from custody.
- For transportation necessary for prisoners to receive medical treatment or be released, CDC-recommended social distancing requirements should be strictly enforced in TDCJ buses and vans.
- Post signage and information in common areas that provides: (i) general updates and information about the COVID-19 pandemic; (ii) information on how inmates can protect themselves from contracting COVID-19; and (iii) instructions on how to properly wash hands. Among other locations, all signage must be posted in every housing area and above every sink.
- Educate inmates on the COVID-19 pandemic by providing information about the COVID-19 pandemic, COVID-19 symptoms, COVID-19 transmission, and how to protect oneself from COVID-19. A TDCJ staff person must give an oral presentation or show an educational video with the above-listed information to all inmates, and give all inmates an opportunity to ask questions. Inmates should be provided physical handouts containing

COVID-19 educational information, such as the CDC's "Share Facts About COVID-19" fact sheet already in TDCJ's possession.

- TDCJ must also orally inform all inmates that co-pays for medical treatment are suspended for the duration of the pandemic, and encourage all inmates to seek treatment if they are feeling ill.
- TDCJ must, within three (3) days, provide the Plaintiffs and the Court with a detailed plan to test all Pack Unit inmates for COVID-19, prioritizing those who are members of Dorm A and of vulnerable populations that are the most at-risk for serious illness or death from exposure to COVID-19. For any inmates who test positive, TDCJ shall provide a plan to quarantine them while minimizing their exposure to inmates who test negative. TDCJ must also provide a plan for testing all staff who will continue to enter the Pack Unit, and for any staff that test positive, provide a plan for minimizing inmates' exposure to staff who have tested positive.

The Defendants have not sought a bond and the Court finds and holds that no security need be posted. *See* Fed. R. Civ. P. 65(c); *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996) ("In holding that the amount of security required pursuant to Rule 65(c) is a matter for the discretion of the trial court, we have ruled that the court may elect to require no security at all." (internal quotation marks omitted)); *see also A.T.N. Indus., Inc. v. Gross*, 632 F. App'x 185, 192 (5th Cir. 2015) (holding that, under Rule 65(c), a court may elect to require no security at all as the amount it considers to be proper).

The Court will issue a memorandum and order setting forth the grounds for this preliminary injunction.

IT IS SO ORDERED.

SIGNED at Houston, Texas on this the 16th day of April, 2020.

A handwritten signature in black ink, appearing to read "Keith P. Ellison". The signature is written in a cursive style with a horizontal line underneath it.

KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

Exhibit 4

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LADDY CURTIS VALENTINE and
RICHARD ELVIN KING, .
 .
 .
 Plaintiffs, .
 . Civil Action
 VS. . No. H-20-CV-1115
 .
 BRYAN COLLIER, ROBERT HERRERA, and . Houston, Texas
 TEXAS DEPARTMENT OF CRIMINAL JUSTICE, . July 13, 2020
 . P.M
 Defendants. .

TRANSCRIPT OF PROCEEDINGS (HELD REMOTELY)
BEFORE THE HONORABLE KEITH P. ELLISON
BENCH TRIAL - DAY 1 - AFTERNOON SESSION

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PROCEEDINGS RECORDED BY STENOGRAPHIC MEANS REMOTELY,
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EXAMINATION INDEX

PAGE NO.

Laddy Curtis Valentine

Direct Examination by Mr. Medlock.....	144
Cross-Examination by Mr. Cowles.....	192
Redirect Examination by Mr. Medlock.....	257
Recross-Examination by Mr. Cowles.....	260

1
2
3
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P R O C E E D I N G S

A F T E R N O O N S E S S I O N

(July 13, 2020)

THE COURT: Okay. Let's swear the witness.

(The oath was administered.)

THE COURT: All right. Who is going to handle the
interrogation, Mr. Medlock?

MR. MEDLOCK: I will be, Your Honor.

THE COURT: Okay. Please proceed.

LADDY CURTIS VALENTINE,

having been duly sworn, testified as follows, to wit:

DIRECT EXAMINATION

BY MR. MEDLOCK:

Q. Mr. Valentine, it's good to see you this afternoon.

A. Yes.

Q. Would you please start by stating your name for the
record.

A. Laddy Curtis Valentine.

Q. And, Mr. Valentine, is there anyone within, say, 20 feet
of you?

A. No.

Q. Do you think it would be safe to take your mask off?

A. Well, they just told me to have it on. The major did; but
if the Court allows it, I'll take it off. There's nobody
within 20 feet.

1 Q. Why did you file those Step 1 grievances?

2 A. Well, with circumstances being exigent and a lot of
3 elderly and a lot of people that -- consideration or adaptation
4 for the policies and procedures just weren't put into place and
5 it behooved me to act on behalf of not only myself, but others.

6 Q. And you were requesting certain relief in each of those
7 four separate Step 1 grievances that you filed during this
8 COVID-19 pandemic; is that right?

9 A. I believe I did.

10 Q. And one of those Step 1 grievances concerns your request
11 for testing for COVID-19; is that right?

12 A. Yes.

13 Q. Were you wanting testing just for yourself or testing for
14 all the offenders at the Pack Unit?

15 A. For everybody.

16 Q. And your requested relief of testing for all of the
17 offenders at the Pack Unit for COVID-19 was subsequently
18 granted; isn't that right, Mr. Valentine?

19 A. It was amazingly so. And, in fact, it seemed like it
20 was -- initially my attempt at informal resolution was denied
21 based on UTMB protocol. Then once I filed the grievance, I
22 think it was just within days that they tested.

23 Q. Do you agree, Mr. Valentine, that the grievance process
24 made available by TDCJ. Let me start again.

25 You agree that TDCJ's grievance process is available to

1 you as an offender at the Pack Unit?

2 A. Well, it's definitely available.

3 Q. And that's why you've continued to utilize it during the
4 course of this COVID-19 pandemic; is that right, Mr. Valentine?

5 A. Well, I used it because of the situation we're in and
6 because that's my only venue to contact the proper authorities
7 regarding what I consider something that's extremely dangerous.
8 It's something that I consider needs as fast of attention as
9 they can knowing even that the grievance system is slow and
10 knowing that it is cumbersome; that is, I believe the grievance
11 system is our only resolution.

12 Q. And has any of your other requested relief in your
13 grievances been provided to you at this point in time,
14 Mr. Valentine?

15 A. Well, oddly enough, on the showers they did come back on
16 the Step 1 and mention that procedure was being put in place to
17 sanitize the dormitories after each -- sanitize the showers
18 after each dorm; but they just didn't follow through.

19 I mean, to say it is good; but you actually have to
20 execute that.

21 Q. Well, just like you told me at your deposition,
22 Mr. Valentine, we went through that again here today in your
23 Zoom trial testimony, you have no way of knowing whether TDCJ
24 is disinfecting the showers in between uses of offenders from
25 the different dorms; isn't that right?

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REPORTER'S CERTIFICATE

I, Lanie M. Smith, CSR, RMR, CRR, Official Court Reporter, United States District Court, Southern District of Texas, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

/s/ Lanie M. Smith
Official Court Reporter

Exhibit 5

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24
25

EXAMINATION INDEX

PAGE NO.

Chad Jeremy Zawitz, M.D.

Continued Cross-Examination by Mr. Edwards..... 151

Bryan Collier

Direct Examination by Ms. Vasquez..... 184

1 everybody.

2 MR. EDWARDS: Thanks, everybody.

3 THE WITNESS: By the way. I love your glasses. I'm
4 obsessed.

02:01PM 5 MR. EDWARDS: Mine?

6 THE WITNESS: Yours.

7 THE COURT: Do you want to call another witness,
8 Ms. Vasquez?

9 MS. VASQUEZ: Yes, Your Honor. Defendants call
02:01PM 10 Bryan Collier.

11 And, Your Honor, we need a brief moment. We're
12 going to have to rearrange a little bit. Can we have just a
13 couple of minutes.

14 THE COURT: Sure.

02:01PM 15 (Brief pause in the proceedings.)

16 MS. VASQUEZ: Thank you. Defendants are ready,
17 Your Honor.

18 THE COURT: Okay. Let's proceed. Are you prepared to
19 take your oath? You've been sworn once. You know you're still
02:05PM 20 under oath, sir?

21 THE WITNESS: Yes, Your Honor.

22 THE COURT: Okay. Let's proceed.

23 **BRYAN COLLIER,**

24 having been previously duly sworn, testified as follows, to
02:05PM 25 wit:

1 **DIRECT EXAMINATION**

2 **BY MS. VASQUEZ:**

3 Q. Will you please state your name.

4 A. Bryan Collier.

02:05PM 5 Q. What is your position, Mr. Collier?

6 A. I am the executive director for the Texas Department of
7 Criminal Justice.

8 Q. And how long have you been executive director for the
9 Texas Department of Criminal Justice?

02:05PM 10 A. Since August of 2016.

11 Q. And what was your position before you were executive
12 director in 2016?

13 A. I served as the deputy executive director from 2007
14 through 2016.

02:05PM 15 Q. And how long have you been employed with the Texas
16 Department of Criminal Justice?

17 A. 35 years.

18 Q. And in your position as the executive director, what do
19 your job responsibilities include?

02:06PM 20 A. Oversight of the Texas Department of Criminal Justice,
21 which includes the oversight of our prison operations, our
22 prison facilities, but also our parole supervision, also our
23 reentry, our support, our treatment and the other parts of the
24 agency that support the overall mission of the agency.

02:06PM 25 We also have oversight and funding responsibilities within

1 Q. So these units in the body of the e-mail that you
2 mentioned, those are units that already had high numbers of
3 positives, correct?

4 A. Yes, ma'am. I don't know -- some of them stick out in my
02:45PM 5 mind as just a lot of numbers, a lot of days; but Beto,
6 Telford, Jordan, Murray, I think there were positives at
7 Darrington, some of those probably had more positives than
8 others, but at the same -- I mean, percentages than others.
9 But, yes, ma'am, they would have been -- positives were present
02:45PM 10 at that time.

11 Q. Did Pack have any positives at this time?

12 A. Not that we were aware of on the 13th.

13 Q. Okay. And so this was consistent with the offenders -- or
14 the units that had high numbers of positives got masks first;
02:45PM 15 and then this e-mail represents the next level, which is
16 offenders over 65 got masks next, correct?

17 A. Yes, ma'am.

18 Q. And on this e-mail, what region is Pack in?

19 A. Pack is in Region VI.

02:46PM 20 Q. Okay. Do you see Region VI on this e-mail?

21 A. No, ma'am.

22 Q. Does it look like it's cut off?

23 A. I would assume, but I'm not sure. Yes, ma'am.

24 Q. When did inmates at Pack over the age of 65 get masks?

02:47PM 25 A. Should have been around April the 14th.

1 Q. When did the rest of the Pack Unit get masks?

2 A. It should have been very shortly after that, the 15th or
3 16th.

4 Q. What is your understanding as to the purpose of a cloth
5 face covering?

02:47PM

6 A. Somewhat twofold. For one, it protects essentially you
7 from me; but at the same time I also am prevented from touching
8 my mouth and nose. If I'm wearing a mask, I'm not going to
9 make that direct contact.

02:47PM

10 Q. What was TDCJ's thought process with regard to giving
11 masks to offenders or inmates ages 65 and older before the rest
12 of the population?

13 A. We knew -- we knew early on that offenders that were 65
14 and older or older or those with major health conditions that
15 the -- essentially the effects of COVID-19 could be much more
16 severe for that population. We knew that if you have a
17 compromised immune system that you could have more
18 complications. So that's why we targeted that specific group
19 first or one of those other positives, active positives.

02:47PM

20 Q. And do you know when the educational video was
21 disseminated to the Pack Unit for the offenders to watch?
22 That's, I think, the one that's shown every day several times a
23 day.

02:48PM

24 A. Yes, ma'am. We did several videos and I want to say the
25 educational one that I've seen played in the trial was sent out

02:48PM

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Exhibit 6

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INDEX OF WITNESSES

Page

FOR THE PLAINTIFFS:

JEREMY YOUNG, M.D.

CROSS-EXAMINATION (CONTINUED) BY MR. COWLES	6
REDIRECT EXAMINATION BY MS. HOCKMAN	54
RECROSS-EXAMINATION BY MR. COWLES	62

ELDON VAIL

DIRECT EXAMINATION BY MR. EDWARDS	66
-----------------------------------	----

1 paragraph in the pretrial order, really, as we understand it
2 from your own internal operating procedures, really is just for
3 your benefit, not to go through and set out every single claim
4 and defense and minutiae that supports it in the pretrial order.

09:16:48

5 We think that our findings of fact and
6 conclusions of law that we attached as exhibits to the pretrial
7 order are sufficient and are happy to go ahead and -- three days
8 after trial and use our resources then when it makes sense we
9 marshal the evidence together.

09:17:03

10 THE COURT: Okay. Let's -- while Dr. Young is
11 waiting, let's go ahead with the deposition -- with the trial
12 testimony; and we can come back to this at another time. I
13 don't want to keep Dr. Young waiting any longer.

14 MS. SCOFIELD: Sure. Certainly, your Honor.

09:17:19

15 THE COURT: Okay. You may continue your cross.

16 MR. COWLES: Thank you, your Honor.

17 (The witness, **JEREMY YOUNG, M.D.**, called on behalf of the
18 Plaintiffs, was previously sworn.)

19 CROSS-EXAMINATION

09:17:29

20 (continued)

21 BY MR. COWLES:

22 **Q** Dr. Young, are you able to hear me okay again this morning?

23 **A** Yes, I can. Can you hear me all right?

24 **Q** I can just fine. Good morning to you.

09:17:34

25 **A** Good morning.

1 **A** Yes. We do -- we do -- here at Ohio State, we do thousands
2 of swab tests every day; and I haven't heard of anybody refusing
3 unless they can get an oral swab.

10:18:34

4 **Q** Isn't it true in your -- well, let me ask you this: You
5 prepared a supplemental declaration in this case dated
6 June 23rd, 2020; is that right?

7 **A** Correct.

10:18:55

8 **Q** And in your supplemental declaration, isn't it true that
9 you recommended all Pack Unit offenders who tested negative
10 previously or whose test results were invalid should be
11 retested?

12 **A** Yes.

10:19:15

13 **Q** Isn't it true that TDCJ has been conducting tests of
14 offenders at the Pack Unit who previously tested negative or
15 whose test results were invalid?

16 **A** So, I'll state this again. I thought it was clear before.
17 Having six weeks elapse in between times that you are testing
18 people and then in addition to that not having the test results
19 come back for seven to fourteen days, is an inadequate --

10:19:35

20 **MR. COWLES:** I object and move to strike, your Honor.
21 I have a limited time. I just would like the witness --
22 **BY MR. COWLES:**

23 **Q** Maybe let me ask the question again because that wasn't an
24 answer to my question.

10:19:42

25 I understand you disagree about the test and

1 you've said that a number of times during the course of your
2 trial testimony. But if you assume that the tests that TDCJ has
3 provided to the offenders at the Pack Unit are reasonable -- I
4 understand you disagree with that.

10:20:02

5 But if you assume that TDCJ's tests at the Pack
6 Unit were reasonable tests, do you agree that the tests at the
7 Pack Unit in the second round of Strike Team testing and the
8 third round of Strike Team testing had tested those offenders
9 who previously tested negative or whose tests were invalid?

10:20:22

10 **A** Yes. But it also showed a lot of positives in each one. I
11 believe the second round had somewhere between 171 and 185
12 positives which shows how flawed the testing strategy is.

10:20:40

13 **Q** You stated in your supplemental declaration that retesting
14 should, quote, "continue until the Pack Unit is certain that
15 they have controlled the spread of COVID-19," close quote.

16 Do you recall that?

17 **A** Yes.

10:20:53

18 **Q** And isn't that exactly what Lorie Davis from TDCJ testified
19 in her deposition that TDCJ is doing at the Pack Unit with its
20 long-term care testing for COVID-19 of the offenders there?

10:21:10

21 **A** It seems to me what they're doing with their testing
22 strategy is just making sure they get to zero by making sure
23 everyone gets infected. I mean, I -- this testing strategy is
24 so incredibly flawed that I don't know how you're ever going to
25 get to zero unless you infect everybody.

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter, to the best of my ability.

This record was taken through video or telephone conference which may have affected the quality of the record.

By: /s/Gayle L Dye 07-20-2020

Gayle L. Dye, CSR, RDR, CRR Date