No. 20-20207

In the United States Court of Appeals for the Fifth Circuit

LADDY CURTIS VALENTINE AND RICHARD ELVIN KING, INDIVIDUALLY AND ON BEHALF OF THOSE SIMILARLY SITUATED,
Plaintiffs-Appellees,

v.

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

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division

DEFENDANTS' OPPOSED EMERGENCY MOTION TO STAY INJUNCTION PENDING APPEAL AND FOR A TEMPORARY ADMINISTRATIVE STAY

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Certificate of Interested Persons

No. 20-20207

Laddy Curtis Valentine and Richard Elvin King, individually and on behalf of those similarly situated,
Plaintiffs-Appellees,

v.

Bryan Collier, in his official capacity, Robert Herrera, in his official capacity, and the Texas Department of Criminal Justice,
Defendants-Appellants.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellee, as a governmental party, need not furnish a certificate of interested persons.

/s/ Kyle D. Hawkins
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Introduction and Nature of Emergency

At a time when the State is devoted fully to a comprehensive strategy to end the COVID-19 public-health emergency, the district court has entered a preliminary injunction that immediately hinders those efforts. The district court, responding to complaints by two inmates at the Wallace Pack Unit, has entered a laundry list of orders micromanaging how prison officials respond to COVID-19 in that facility, without regard to the detriment it imposes on the State's comprehensive strategy to secure public health. This Court should enter an immediate stay pending appeal.

Just days ago, this Court recognized that COVID-19 "has caused a serious, widespread, rapidly-escalating public health crisis in Texas." *In re Abbott*, 20-50264, 2020 WL 1685929, at *15 (5th Cir. Apr. 7, 2020). As such, the State's "interest in protecting public health during such a time is at its zenith." *Id.* That is why, "[i]n the unprecedented circumstances now facing our society, even a minor delay in fully implementing the state's emergency measures could have major ramifications." *Id.* This Court aptly summed up: "It is hard to imagine a more urgent situation." *Id.*

There is little doubt that a stay is warranted. Plaintiffs failed to exhaust their administrative remedies, so the Prison Litigation Reform Act (PLRA) bars their claims. And in any event, the district court had no basis to grant a preliminary injunction because Plaintiffs obviously failed to show a likely violation of the Eighth Amendment or the Americans with Disabilities Act (ADA). Even under Plaintiffs' telling, Defendants have been preparing meticulously for the threat presented by the COVID-19 pandemic. Defendants have implemented comprehensive policies to minimize the risk to Plaintiffs and other inmates, and they have continuously

updated those policies as new information and new resources become available. Even if those policies were inadequate, as Plaintiffs allege, they do not show deliberate indifference. And Plaintiffs have failed to show a likely violation of the ADA because TDCJ has not discriminated against them on account of any disability. On the contrary, Plaintiffs contend that they have been treated the same as other inmates; they merely allege that TDCJ's policies are inadequate across the board.

The resulting preliminary injunction is thus impermissible on the merits and irreparably harmful because it removes Defendants' discretion to allocate scarce resources to respond the rapidly evolving COVID-19 pandemic. In ordering mandatory, blanket testing for COVID-19, the preliminary injunction disregards CDC guidance and hamstrings the State's use of already limited testing capacity. There could not be a clearer example of the "usurp[ation of] the state's authority to craft emergency health measures" this Court recently declared "patently wrong." *In re Abbott*, 2020 WL 1685929, at *1.

This Court should immediately stay the district court's extraordinary injunction pending appeal. In the alternative, Defendants respectfully request a temporary administrative stay to prevent irreparable harm to Defendants during the Court's consideration of this motion.

BACKGROUND

Plaintiffs are prisoners housed in the Wallace Pack Unit, a Texas Department of Criminal Justice (TDCJ) facility in Grimes county, Texas. Plaintiffs filed a complaint in the Southern District of Texas, Houston Division, on behalf of themselves and a

putative class of similarly situated inmates. *See* Exh. 1.[1] The complaint alleges that Plaintiffs and putative class members face a heightened risk from the COVID-19 outbreak because of their age and medical condition. *See id.* ¶¶ 51-63. Plaintiffs allege that the individual Defendants have violated their rights under the Eighth Amendment by failing to ensure "adequate conditions and practices to protect against COVID-19 transmission or a COVID-19 outbreak." *Id.* ¶ 79; *see also id.* ¶ 30. Plaintiffs also allege that TDCJ has violated the Americans with Disabilities Act (ADA) and the Rehabilitation Act by failing to provide reasonable accommodations for their disabilities. *Id.* ¶ 82. Plaintiffs sought an immediate temporary restraining order as well as preliminary and permanent injunctive relief. *Id.* ¶ 91.

Plaintiffs filed their complaint on March 30, 2020. The judge to whom the case was assigned sua sponte transferred the case to the docket of Judge Ellison "[b]y agreement of the judges." Exh. 2. The apparent basis for this transfer by agreement was Plaintiffs' statement that their case was related to other litigation pending before Judge Ellison, specifically *Cole v. Collier*, No. 4:14-cv-1698 (S.D. Tex.), a class action concerning excessively high temperatures in the Pack Unit. Exh. 1. That case was settled in 2018. ECF No. 1 ¶ 50.

Defendants filed a motion to transfer the case back to initially assigned judge or to the district clerk for random reassignment, arguing that the transfer was improper because the claims in *Cole* are no longer pending, and the issues in *Cole* do not overlap

[1] The notation "Exh. ___" refers to the documents attached as exhibits to this motion.

with the issues in this case. Exh. 7. That motion was denied. Exh. 10. The court found that its familiarity with the Pack Unit "will allow the present case to proceed expeditiously and help ensure that relief is both effective and not unnecessarily burdensome for all parties," *id.* at 4, and that "in the midst of a pandemic, when hundreds are dying each day, there is not time for even a short delay, if it can be avoided," *id.* at 6.

Following a hearing on the afternoon of April 16, 2020, the district court entered a preliminary injunction at 9:57 p.m., directing 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."

Exh. 18.

The next morning, Defendants moved in district court for a stay pending appeal and requested a decision by 2:00 p.m. Exh. 20. Defendants also filed a notice of appeal. Exh. 19. Shortly before 1:00 p.m., the district court entered a temporary five-day stay of the preliminary injunction order, "until 5:00 pm on Wednesday, April 22, 2020, 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. 21; *see* Fed. R. App. P. 8(a)(1)(A), 8(a)(2)(A)(ii). Because the district court did not grant the requested relief, Defendants now seek a stay in this Court under Federal Rule of Appellate Procedure 8(a)(2). Defendants respectfully request a ruling by 5:00 p.m. on April 22, 2020, or, in the alternative, a temporary administrative stay pending this Court's consideration of this motion.

Statement of Jurisdiction

This Court has appellate jurisdiction over the district court's preliminary injunction under 28 U.S.C. § 1292(a)(1).

Argument

"An appellate court's power to hold an order in abeyance while it assesses the legality of the order has been described as 'inherent.'" *Nken v. Holder*, 556 U.S. 418, 426 (2009) (citation omitted). All four factors relevant to a stay are met here: (1) Defendants are likely to succeed on the merits; (2) Defendants will suffer irreparable harm in the absence of a stay; (3) Plaintiffs will not be harmed by a stay; and (4) the public interest favors a stay. *See Nken*, 556 U.S. at 426.

I. Defendants Are Likely to Succeed on Appeal.

Defendants are likely to succeed on appeal for two reasons. First, Plaintiffs are not entitled to relief because they failed to exhaust their administrative remedies under the PLRA. Second regardless of Plaintiffs' failure to exhaust, Defendants are likely to prevail on appeal because Plaintiffs did not carry their burden to prove "by a clear showing" that they are entitled to a preliminary injunction. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). The district court's preliminary injunction has no basis in the Eighth Amendment or the ADA.

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

The district court had no basis to grant injunctive relief because Plaintiffs failed to exhaust administrative remedies. 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); *see Jones v. Bock*, 549 U.S. 199, 218 (2007). The PLRA's exhaustion requirement is intended "to eliminate unwarranted federal-court interference with the administration of prisons, and thus seeks to 'affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Woodford v. Ngo*, 548 U.S. 81, 93 (2006) (footnote omitted) (quoting *Porter v. Nussle*, 534 U.S. 516, 525 (2002)). "There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court." *Jones*, 549 U.S. at 211.

Mandatory exhaustion statutes like the PLRA foreclose judicial discretion. *Ross v. Blake*, 136 S. Ct. 1850, 1862 (2016) (citing *McNeil v. United States,* 508 U.S. 106, 111 (1993) ("We are not free to rewrite the statutory text" when Congress has strictly "bar[red] claimants from bringing suit in federal court until they have exhausted their administrative remedies")). This Court therefore requires strict adherence to TDCJ grievance procedures before a claim may be deemed properly exhausted. *See Dillon v. Rogers*, 596 F.3d 260, 268 (5th Cir. 2010) ("Under our *strict approach*, we have found that mere 'substantial compliance' with administrative remedy procedures does not satisfy exhaustion; instead, we have required prisoners to exhaust available remedies properly."). Courts may not engraft a "special circumstances" exception onto the PLRA's exhaustion requirement. *Ross*, 136 S. Ct. at 1862. "The only limit to § 1997e(a)'s mandate is the one baked into its text: [a]n inmate need exhaust only such administrative remedies as are 'available.'" *Id.*

If an inmate fails to properly exhaust, his suit must be dismissed pursuant to section 1997e. *See Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 788 (5th Cir. 2012) ("District courts have no discretion to waive the PLRA's pre-filing exhaustion requirement"); *Johnson v. Johnson*, 385 F.3d 503, 515 (5th Cir. 2004) ("[A] prisoner must pursue a grievance through both steps for it to be considered exhausted."). And failure to exhaust cannot be cured after filing suit. "It is irrelevant whether exhaustion is achieved during the federal proceeding. Pre-filing exhaustion is mandatory, and the case must be dismissed if available administrative remedies were not exhausted." *Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012) (per curiam).

Plaintiffs have not exhausted their administrative remedies, nor have they shown that administrative remedies were unavailable. TDCJ's grievance procedure requires an offender to file both a Step One and Step Two grievance and receive a response from the highest authority—which is the Step Two grievance investigator—before filing suit. Tex. Gov't Code § 501.008(d). Plaintiffs filed their complaint on March 30, 2020. *See* Exh. 1. At that time, neither plaintiff had filed a grievance related to Defendants' efforts to address the COVID-19 pandemic. Plaintiff Valentine did not file a grievance until April 1, 2020, complaining about a "lack of hand sanitation and cleaning supplies." *See* Exh. 15 at 38. Plaintiff King did not file a grievance until April 2, 2020, complaining that TDCJ continued to move offenders to the Pack Unit during the coronavirus epidemic. Exh. 15 at 38.

Because Plaintiffs failed to exhaust their administrative remedies before filing suit, the PLRA bars their claims. The district court erred as a matter of law and abused its discretion by granting injunctive relief. On this basis alone, Defendants are likely to prevail on appeal.

B. Plaintiffs did not plead or prove a likely violation of the Eighth Amendment or the ADA.

1. Plaintiffs did not plausibly allege a violation of the Eighth Amendment.

Plaintiffs allege that Defendants have violated the Eighth Amendment by failing to provide "adequate" safeguards against COVID-19. *See* Exh. 1 at 21 ("[Plaintiffs] must be provided the adequate care and safeguards recommended by the CDC and health experts."). Plaintiffs do not allege a likely violation of the Eighth Amendment.

To prove an Eighth Amendment violation, a prisoner must prove that officials acted with deliberate indifference to a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). 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.* (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.

To prove an Eighth Amendment violation based on access to healthcare, a prisoner must prove deliberate indifference to his serious medical needs. This is "an extremely high standard to meet," *Domino v. TDCJ*, 239 F.3d 752, 756 (5th Cir. 2001), and it "exists wholly independent of an optimal standard of care," *Gobert v. Caldwell*, 463 F.3d 339, 349 (5th Cir. 2006). This Court has consistently held that "the decision whether to provide additional treatment is a classic example of a matter for medical judgment, which fails to give rise to a deliberate-indifference claim." *Dyer v. Houston*, ___ F.3d ____, 2020 WL 1778715, *4 (5th Cir. April 9, 2020) (quoting *Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006) (quotation marks omitted)). "Deliberate indifference encompasses only unnecessary and wanton infliction of pain repugnant to the conscience of mankind." *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997). To establish liability, the prisoner "must show that the officials refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any

serious medical needs." *Brauner v. Coody*, 793 F.3d 493, 498 (5th Cir. 2015) (quoting *Domino*, 239 F.3d at 756).

A prison official's mere failure to avoid harm or eliminate a risk does not violate the Eighth Amendment. Liability attaches "only if [an official] knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer*, 511 U.S. at 847. Actions and decisions that are merely inept, ineffective, or negligent do not constitute deliberate indifference. *Thompson v. Upshur Cty., Tex.*, 245 F.3d 447, 458-59 (5th Cir. 2001) ("[D]eliberate indifference cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm."). And complaints that policies or practices are inadequate to prevent harm—even if true—cannot support liability. *See, e.g.*, *Delaughter v. Woodall*, 909 F.3d 130, 136 (5th Cir. 2018) ("mere disagreement with one's medical treatment is insufficient to show deliberate indifference"). Even if harm is not averted, "prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Farmer*, 511 U.S. at 845.

Here, to the extent that TDCJ officials have inferred a substantial risk to offender safety from COVID-19, they have not been indifferent, let alone deliberately indifferent. Defendants have implemented policies targeted at preventing the introduction and spread of COVID-19 within the prison system, including the Pack Unit. Specifically, TDCJ has implemented detailed policies in response to the threat of COVID-19 , and it has updated those policies to account for new developments. *See* Exh. 15 at 41, 73, 190, 258-65; Exh. 17. These policies are a reasonable response to the threat posed by COVID-19. They prove that Defendants have been anything but

deliberately indifferent. Plaintiffs' complaint that these policies are inadequate or insufficient is exactly the kind of "[d]isagreement with medical treatment" that "does not state a claim for Eighth Amendment indifference to medical needs." *Gibson v. Collier*, 920 F.3d 212, 220 (5th Cir. 2019).

2. Defendants are likely to succeed on Plaintiffs' ADA Claim.

Defendants are likely to prevail on Plaintiffs' ADA claim because the ADA does not apply in exigent circumstances; Defendants are not discriminating against Plaintiffs; and the ADA does not require the modifications Plaintiffs seek.

Plaintiffs' ADA claim fails at the outset because an ADA "claim is not available under Title II under" "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); *Elliott v. Lynn*, 38 F.3d 188, 191 (5th Cir. 1994) (holding that prisoners' Fourth-Amendment rights gave way during prison emergency). The COVID-19 pandemic has created exigent circumstances in every area of life and government. Plaintiffs themselves recognize the immense scale of the risk to everyone posed by COVID-19. Exh. 1 ¶ 13. The COVID-19 pandemic leaves no room for courts, under the guise of the ADA, to micromanage the State's response "in a continuously evolving environment." *Roell v. Hamilton County*, 870 F.3d 471, 489 (6th Cir. 2017) (citing *Hainze*).

Plaintiffs' ADA claim also fails because "[n]o discrimination is alleged"; Plaintiffs were "not treated worse because [they were] disabled." *Bryant v. Madigan*, 84 F.3d 246, 249 (7th Cir. 1996). Plaintiffs do not allege that Defendants have denied them "participation in or . . . the benefits of the services, programs, or activities of a

public entity" because of their disability or discriminated against them in any other way. 42 U.S.C. § 12132; *Providence Behavioral Health v. Grant Rd. Public Util. Dist.*, 902 F.3d 448, 459 (5th Cir. 2018). Plaintiffs allege, rather, that conditions faced by all inmates at the Pack Unit are inadequate. That is not discrimination "by reason of" their disabilities. *See Tuft v. Texas*, 410 F. App'x 770, 775 (5th Cir. 2011) (disabled inmate-plaintiff failed to show discrimination based on overcrowding in the showers where all inmates were subjected to the same conditions).

Even if their claim did not fail for the reasons above, it would fail because Plaintiffs seek unreasonable accommodations. In short, they seek judicial micromanagement of a prison during an emergency, and the modifications they seek will "fundamentally alter" the State's operation of the Pack Unit, undermine the safety of Pack Unit offenders, and "impose an undue financial or administrative burden." *Tennessee v. Lane*, 541 U.S. 509, 532 (2004). "The difficulties of operating a detention center must not be underestimated by the courts." *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318, 326 (2012). Because "[t]he judiciary is ill-equipped to manage decisions about how best to manage any inmate population" and "the concern about institutional competence is especially great where, as here, there is an ongoing, fast-moving public health emergency," *Money v. Pritzker*, No. 20-cv-2093, 2020 WL 1820660, at *16 (N.D. Ill. April 10, 2020), it is not reasonable to tie the hands of prison officials.

3. The preliminary injunction improperly interferes with the State's response to a public-health crisis.

Even if Plaintiffs had shown a likely violation of the Constitution or the ADA, the district court's injunction would be improper because it interferes with Defendants' effort to manage the public-health crisis caused by COVID-19. The State's police powers are at their apex during a public-health emergency: "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29 (1905). And judicial review is available only "if a statute purporting to have been enacted 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*." *In re Abbott*, 2020 WL 1685929, at *1 (quoting *Jacobson*, 197 U.S. at 29). This Court emphasized that absent such a clear violation, courts may not second-guess efforts to combat the emergency: "'[i]t 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.* (quoting *Jacobson*, 197 U.S. at 30).

Plaintiffs could not possibly show that Defendants' efforts to respond to the COVID-19 pandemic have "no real or substantial relation" to the protection of inmates' health and safety or that Defendants' policies are "beyond all question, a plain, palpable invasion" of their constitutional rights. *In re Abbott*, 2020 WL 1685929, at *1. Even if alternative measures might be more effective, that would not

justify the district court's exercise of "judicial power to second-guess the state's policy choices in crafting emergency public health measures." *Id.* at *6. The district court's failure to respect the principles of federalism reflected in *Jacobson* underscores Defendants' likelihood of success on appeal.

II. Defendants Will Be Irreparably Harmed Absent a Stay.

The district court's preliminary injunction threatens irreparable injury because it thwarts Defendants' ability to maximize safety and security in Texas prisons. A State suffers an "institutional injury" from the "inversion of . . . federalism principles." *Texas v. United States Envt'l Protection Agency*, 829 F.3d 405, 434 (5th Cir. 2016); *see Moore v. Tangipahoa Par. Sch. Bd.*, 507 F. App'x 389, 399 (5th Cir. 2013) (per curiam) (finding that a State suffers irreparable harm when an injunction "would frustrate the State's program"). "[I]t 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)). Especially during a public-health crisis, Defendants must have discretion to use their professional judgment in operating the Pack Unit.

Among other reasons, the preliminary injunction inflicts irreparable injury by compelling Defendants to provide prisoners with contraband. The order enjoins Defendants to provide offenders "with access to hand sanitizer that contains at least 60% alcohol." Exh. 18 at 2. But alcohol-based hand sanitizer is classified as contraband. Prisoners "are not permitted to use hand sanitizer because it is flammable and

can be ingested, which can cause intoxication and/or alcohol poisoning." *See* Exh. 15 at 14-15.

The preliminary injunction also inflicts irreparable injury by removing Defendants' discretion to allocate scarce resources to respond to the COVID-19 pandemic. For example, the district court enjoined TDCJ to "provide the Plaintiffs and the Court with a detailed plan to test all Pack Unit inmates for COVID-19" and "provide a plan for testing all staff who will continue to enter the Pack Unit." Exh. 18 at 4. First, mandatory testing is not necessary; the CDC has advised that "[n]ot everyone needs to be tested for COVID-19,"[2] and its Interim Guidance for correctional facilities leaves the decision to test individuals to the judgment of medical staff.[3] Second, even if TDCJ could test all inmates and staff at the Pack Unit despite "crippling" supply shortages,[4] compelling TDCJ to do so diverts finite testing resources away from other facilities, not to mention other state agencies that may need to test employees or members of the public. Deciding how best to allocate those resources is

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[2] *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-testing/testing.html.

[3] *See* CDC, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities at 22 (March 23, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html.

[4] *See, e.g.*, N.Y. Times, *Testing Falls Woefully Short as Trump Seeks an End to Stay-at-Home Orders*, https://www.nytimes.com/2020/04/15/us/coronavirus-testing-trump.html (April 15, 2020) ("Although capacity has improved in recent weeks, supply shortages remain crippling, and many regions are still restricting tests to people who meet specific criteria.").

"no part of the function of a court." *In re Abbott*, 2020 WL 1685929, at *1 (quoting *Jacobson*, 197 U.S. at 30).

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. As another court recently noted, "There is no good, clearly safe, constitutionally, and jurisdictionally right solution to many of the short-term problems and disagreements the pandemic has made so acute." Memorandum and Order, *Russell v. Harris County*, No. H-19-226, 2020 WL 1866835, *2 (S.D. Tex. April 14, 2020). It is far from clear 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 if they turn out to be ineffective, or if more effective measures become available, Defendants cannot change course. They are now tied to specific measures mandated by a preliminary injunction and backed by the threat of contempt. Removing Defendants' discretion to adapt their efforts to changing circumstances is an irreparable injury in itself, and it will inflict further injury by making their response to the COVID-19 pandemic less effective.

III. The Remaining Factors Favor a Stay.

A. A stay merely maintains the status quo and will not harm Plaintiffs.

A stay pending appeal will not threaten Plaintiffs with irreparable harm because it maintains the status quo, and Plaintiffs have alleged only a speculative threat of harm from the absence of a preliminary injunction. A preliminary injunction requires a showing of "irreparable harm" that is *likely*, not merely speculative. *See, e.g.*,

Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 22 (2008) (instructing that the lower court's "'possibility' standard is too lenient," as "[o]ur frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction"); 11A Wright & Miller, Federal Practice & Procedure § 2948.1. And the threatened harm must be "imminent." *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975); *accord, e.g.*, *Allied Home Mortg. Corp. v. Donovan*, 830 F. Supp. 2d 223, 227 (S.D. Tex. 2011) (same). Plaintiffs have not shown that existing measures are so deficient that the absence of additional court-ordered measures threatens them with imminent harm.

B. The public interest strongly favors a stay.

The threat of irreparable harm to the State absent a stay means that the public interest favors a stay. "Because the State is the appealing party, its interest and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam) (citing *Nken*, 556 U.S. at 435). For the reasons set out in Part II, *supra*, the public interest strongly favors a stay.

IV. The Court Should Enter a Temporary Administrative Stay While It Considers this Motion.

For the reasons set out above, Defendants are entitled to a stay pending appeal. Defendants request that the Court enter an order granting a stay by 5:00 p.m. on April 22, 2020. In the alternative to ruling on the stay motion by that time, Defendants request that the Court immediately enter an administrative stay while it considers this motion. Such administrative stays are routine. *E.g.*, *In re Abbott*, No. 20-50296, 2020 WL 1855882, at *1 (5th Cir. Apr. 11, 2020) ("Entering temporary

administrative stays so that a panel may consider expedited briefing in emergency cases is a routine practice in our court."); *M.D. ex rel. Stukenberg v. Abbott*, No. 18-40057, ECF 12 (5th Cir. Jan. 19, 2018). In the absence of a stay pending appeal, a temporary administrative stay will prevent irreparable harm to Defendants while the Court considers their motion for a stay pending appeal.

Conclusion

The Court should stay the district court's injunction pending appeal. The Court should also enter a temporary administrative stay immediately while it considers this motion.

Respectfully submitted.

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Certificate of Service

On April 17, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Kyle D. Hawkins
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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,121 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Kyle D. Hawkins
Kyle D. Hawkins

Exhibit List

1. Complaint and Application for a Temporary Restraining Order
2. Transfer Order
3. Declaration of Jeremy D. Young
4. Declaration of Robert L. Cohen
5. Declaration of Eldon Vail
6. Declaration Joseph C. Gathe
7. Defendants' Motion to Transfer
8. Plaintiffs' Opposition to Defendants' Motion to Transfer
9. Defendant's Reply in Support of Motion to Transfer
10. Order Denying Defendants' Motion to Transfer
11. Memorandum Regarding Authorities for Reduction of Inmate Population
12. Declaration of Laddy Valentine
13. Declaration of Richard King
14. Proposed Temporary Restraining Order
15. Defendants' Response in Opposition to Plaintiff's Application for a Temporary Restraining Order (excluding Herrera Declaration)
16. Defendants' Response to Plaintiffs' Memorandum Regarding Authorities For Reduction of Inmate Population
17. Corrected Exhibit C, Attachment B to [Exhibit 15] Defendants' Response In Opposition to Plaintiffs' Application for a Temporary Restraining Order
18. Preliminary Injunction Order
19. Notice of Appeal
20. Motion to Stay Pending Appeal
21. Order Denying Motion to Stay Pending Appeal
22. Plaintiffs' Reply in Support of Application for a Temporary Restraining Order
23. Herrera Declaration (to be filed under seal)